THE

DIGEST OF JUSTINIAN

London: C. J. CLAY AND SONS,
CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,
AVE MARIA LANE,
AND
STEVENS AND SONS, LIMITED,
119½ AND 120, CHANCERY LANE.

Glasgow: 50, WELLINGTON STREET.
Leipzig: F. A. BROCKHAUS.
New York: THE MACMILLAN COMPANY.
Bombay and Calcutta: MACMILLAN AND Co., LTD.

THE
DIGEST OF JUSTINIA

TRANSLATED

BY

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VOLUME I

Cambridge
At the University Press
1904

Cambridge:

PRINTED BY J. AND C. F. CLAY,

AT THE UNIVERSITY PRESS.

PREFACE.

THIS Volume is an instalment of a Translation of the Digest of Justinian, and, if circumstances are favourable, I hope it may be finished in the course of a few years, either by the present writer or by another. A few words have to be said as to the general design and method of the work. Something is always gained and something lost by the use of a translation. The gain is the obvious saving of time and trouble for those whose knowledge of the original language is imperfect, indeed even for others; the loss is that of the tone and spirit of the original. This at least and at the best; but there is also the possibility of the translation being incorrect, while all clue to the true meaning is effaced. A translator must hope to obviate these dangers as best he may by taking care; but there is one source of embarrassment which requires to be treated with special tact and judgment, I mean the occurrence of technical expressions. How are these to be rendered? There are several ways of dealing with them.

First, they can be left untranslated and simply given in the original; and, if one universal method is to be followed throughout, I believe this to be the best. Secondly, the Latin expression can be translated by the name of the nearest corresponding institution in English law, and this plan, on the same supposition, I believe to be the worst. Thirdly, the Latin term may be

interpreted, i.e. rendered by a kind of explanatory substitute. This is very common in the German translation edited by Otto, Schilling and Sintenis, far the best, I believe, existing; in which, however, to give one example, the Latin word *adoptare* is constantly rendered 'an kindes statt annehmen,' to take on the footing of a child; a kind of version which leaves the reader with a peculiar sense of unsatisfied want. There is yet another method; an English expression may be used, but it is felt at the same time that it is not to be taken as a translation at all, strictly speaking; it is meant to represent the Latin word in a more convenient form, not to interpret it. One very simple example of this occurs where the original is somewhat lengthened or shortened or otherwise modified, in a way which often gives rise to a recognised English word, though not always; take the terms inofficious, agnate, compensation. The last is no doubt an English word, but it does not translate the Latin word from which it is derived. This procedure is a fertile source of inaccuracy and misunderstanding, but we cannot afford to discard it; we must, of course, bear in mind, to take an example, that, where the English word 'heir' stands for *heres*, it is not used in its ordinary sense. No rule, I should say, ought to be followed exclusively; on the whole, however, the plan which I have preferred is to go chiefly by the first, so far as to give the Latin expression, though to a considerable extent following the third also; but it will be desirable to add a Glossary of the Latin technical terms used at the end of the present work.

As hinted, a certain freedom should always be maintained; even the second of the above methods need not be absolutely excluded; as, for instance, where the institution named is one whose precise nature is immaterial to the main subject under discussion, or the correspondence is really exact.

It need perhaps hardly be said that anyone who wishes thoroughly, or as far as he can, to understand the Digest requires a great deal more information than can be supplied by the best

possible translation. Many passages are difficult to comprehend, or indeed are incomprehensible, because the reasoning is involved and abstruse, or the text is corrupt, or there is an interpolation made by an incompetent or ill-advised person. With these matters the translator as such has very little concern. If the reasoning is complicated or hopelessly obscure, his aim should be to make the English version present precisely the same obscurity and to preserve as well as he can such means of removing it as the passage itself in his judgment presents. Where the text is corrupt, he should call attention to the fact, unless the corruption is too insignificant and the sense is plain; and it will often be advisable to offer some more or less conjectural reading by way of emendation. The best Editor of the text, I mean Mommsen, has suggested many such readings, most of which are adopted, i.e. mentioned, in the following pages. It should perhaps be here noted that although emendation proposed by a competent person is commonly of value as an expression of opinion as to the meaning of the true text, which it purports to supply, still an emendation which introduces, say, half-a-dozen words arrived at by conjecture, however worthy of attention, is in many cases, perhaps in most, very unlikely to be the true reading. The subject of interpolations has been treated with ability and to good effect by recent writers, Gradenwitz and others, and is of considerable interest; but an interpolated passage is still an integral part of the Digest, and has to be translated accordingly.

This leads to the question what is the text here translated; to which I have merely to say that it is, as may be supposed, taken from Mommsen, and almost entirely from his later single column edition, with, at the foot of the page, the greater number of the corrections or emendations suggested by him. These are marked in a note with the letter M, where the Editor expresses no doubt, the expression "Cf. M." signifying that he shows some hesitation. I have ventured occasionally to suggest my own emendation, without adding any explanatory mark.

I have translated what may be called Justinian's prefaces, three in number, which describe the scheme and occasion of the Digest and other works, as well as the Emperor's plan of education for legal students; they consist of three 'Constitutiones' or enactments, commonly distinguished by their respective initial Latin words. The third of them, the *Constitutio Tanta*, appears to be a free version of a Greek text, which itself is also preserved. This last I have not thought it necessary to translate; a modern Latin version is given in Mommsen's stereotype or double column edition.

I have to thank Mr Buckland of Caius College for a number of useful hints vouchsafed during the course of the work.

I cannot close this preface without expressing my sense of the immense debt owed by all those who concern themselves with the things of Ancient Rome to the illustrious scholar, legist and historian who has lately been taken from us, Theodor Mommsen.

C. H. MONRO.

CAMBRIDGE.
April, 1904.

CONTENTS.

PAGE

The formation of the Digest.

Constitutio "Deo auctore" xiii

Constitutio "Omnem" xviii

The confirmation of the Digest.

Constitutio "Tanta" xxv

I.

I. On justice and law. (*De justitia et jure.*) 3

II. On the origin of law and of the different magistracies, as well as the succession of those learned in the law. (*De origine juris et omnium magistratuum et successione prudentium.*) 6

III. On statutes, decrees of the Senate and long usage. (*De legibus Senatusque consultis et longa consuetudine.*) . . . 19

IV. On Imperial enactments. (*De constitutionibus principum.*) . 23

V. On status. (*De statu hominum.*) 24

VI. On persons *sui juris* and *alieni juris*. (*De his qui sui vel alieni juris sunt.*) 28

VII. Concerning adoptions and emancipations and other methods by which *potestas* is dissolved. (*De adoptionibus et emancipationibus et aliis modis quibus potestas solvitur.*) . 31

VIII. On the division of things and their respective natures. (*De divisione rerum et qualitate.*) 39

IX. Concerning Senators. (*De Senatoribus.*) 42

X. On the office of Consul. (*De officio Consulis.*) 45

XI. On the office of Præfectus Prætorio. (*De officio Præfecti Prætorio.*) 45

XII. On the office of Præfectus Urbi. (*De officio Præfecti Urbi.*) . 46

XIII. On the office of Quæstor. (*De officio Quæstoris.*) 48

XIV. On the office of the Prætors. (*De officio Prætorum.*) . . . 49

XV. On the office of Præfectus Vigilum. (*De officio Præfecti Vigilum.*) 50

XVI. On the office of Proconsul and Legate. (*De officio Proconsulis et Legati.*) 51

XVII. On the office of Præfectus Augustalis. (*De officio Præfecti Augustalis.*) 56

XVIII. On the office of Præses. (*De officio Præsidis.*) 56

XIX. On the office of Imperial Procurator or Rationalis. (*De officio procuratoris Cæsaris vel Rationalis.*) 62

		PAGE
XX.	On the office of Juridicus. (*De officio Juridici.*)	63
XXI.	On the office of one to whom jurisdiction is delegated. (*De officio ejus cui mandata est Jurisdictio.*)	63
XXII.	On the office of assessors. (*De officio Assessorum.*) . . .	65

II.

I.	On Jurisdictio. (*De Jurisdictione.*)	66
II.	A man to be dealt with after the like rule to that which he maintained against another. (*Quod quisque juris in alterum statuerit ut ipse eodem jure utatur.*) . .	70
III.	Where a man refuses obedience to the magistrate exercising jurisdiction. (*Si quis jus dicenti non obtemperaverit.*) .	72
IV.	On citation. (*De in jus vocando.*)	73
V.	Where one who is cited fails to appear; also where a man cites one whom, according to the Edict, he has no right to cite. (*Si quis in jus vocatus non ierit, nec quis eum vocaverit quem ex Edicto non debuerit.*)	79
VI.	Persons cited bound to appear or else give a guarantee or an undertaking. (*In jus vocati ut eant aut satis vel cautum dent.*)	79
VII.	No one to release by force a man who is cited. (*Ne quis eum qui in jus vocabitur ei eximat.*)	80
VIII.	What persons respectively are compelled to give a guarantee or promise on oath or are remitted to a simple promise. (*Qui satisdare cogantur vel jurato promittant vel suae promissioni committantur.*)	82
IX.	Nature of the undertaking given in the case of a noxal action. (*Si in noxali causa agatur quemadmodum caveatur.*) .	88
X.	On one who contrives that a defendant shall not appear. (*De eo per quem factum erit quominus quis in judicio sistat.*)	90
XI.	Where a man fails to observe an undertaking to appear to an action. (*Si quis cautionibus in judicio sistendi causa factis non obtemperabit.*)	92
XII.	On feast-days, adjournments and different seasons. (*De feriis et dilationibus et diversis temporibus.*)	98
XIII.	On statement of particulars and discovery of documents etc. (*De edendo.*)	101
XIV.	On pacts. (*De pactis.*)	108
XV.	On compromising and compounding. (*De transactionibus.*) .	130

III.

I.	On summons. (*De postulando.*)	139
II.	On those marked with *infamia*. (*De his qui notantur infamia.*)	144
III.	On "procuratores" and "defensors." (*De procuratoribus et defensoribus.*)	153

PAGE

IV. On proceedings taken on behalf of any corporation or against the same. (*Quod cujuscunque universitatis nomine vel contra eam agatur.*) 172
V. On *negotia gesta* (voluntary agency). (*De negotiis gestis.*) . 175
VI. On vexatious actions. (*De calumniatoribus.*) 197

IV.

I. On restitutions *in integrum*. (*De in integrum restitutionibus.*) 201
II. Acts done through fear. (*Quod metus causa gestum erit.*) . 203
III. On *dolus malus*. (*De dolo malo.*) 215
IV. On persons under twenty-five. (*De minoribus viginti quinque annis.*) 226
V. On *capitis minutio*. (*De capite minutis.*) 253
VI. Grounds on which restitution *in integrum* is allowed to persons over twenty-five years of age. (*Ex quibus causis majores viginti quinque annis in integrum restituuntur.*) . . 256
VII. On transfers made for the purpose of varying the conditions of a trial. (*De alienatione judicii mutandi causa facta.*) . 270
VIII. On matters referred; on persons who undertake arbitrations with a view to pronouncing an award. (*De receptis; qui arbitrium receperint ut sententiam dicant.*) . . . 274
IX. Seamen, innkeepers, stablekeepers to restore what they receive. (*Nauta caupones stabularii ut recepta restituant.*) . . 294

V.

I. On trials at law; as to where a man ought to take proceedings or be sued. (*De judiciis, ubi quisque agere vel conveniri debeat.*) 300
II. On inofficious testaments. (*De inofficioso testamento.*) . . 320
III. On the action for recovery of an inheritance. (*De hereditatis petitione.*) 335
IV. On suits for parts of an inheritance. (*Si pars hereditatis petatur.*) 365
V. On the possessory *petitio hereditatis*. (*De possessoria hereditatis petitione.*) 370
VI. On the fidei-commissary *petitio hereditatis*. (*De fidei-commissaria hereditatis petitione.*) 370

VI.

I. On specific vindications. (*De rei vindicatione.*) . . . 371
II. On the Publician action *in rem*. (*De Publiciana in rem actione.*) 393
III. On actions to recover vectigalian—that is emphyteutic—land. (*Si ager vectigalis, id est emphyteuticarius, petatur.*) . 399

ERRATA.

p. 18, l. 17 from bottom of page, for *entitled* read *intitled*.
p. 26, ll. 8, 5, for *seven months* read *in the seventh month*.
p. 45, l. 4, for [ ] read ( ).
p. 67, ll. 9, 21, do.
p. 76, l. 6, do.
p. 88, ll. 8, 10, do.
p. 112, l. 17 from bottom of page, for *Mavius* read *Mevius*.
p. 161, l. 10 from bottom of page, for 6 read *h*.
p. 175, l. 14, for [ ] read ( ).
p. 195, l. 18, for *Javolenus* read *Javolenus*.
p. 219, ll. 6, 7, for *and so my case is* read *so as to have the application*.
p. 219, l. 11, after *collusion* insert (*ni collusum est*).
p. 220, l. 8, for *prescriptis* read *præscriptis*.
p. 222, l. 19, del. *that*.
p. [illegible], l. 11 from bottom of page, insert comma at end of line.
p. 255, l. 8, del. the first two commas.
p. 276, l. 14, for *both sides* read *each side*.
p. 330, ll. 6, 7 from bottom of page, del. commas.
p. 331, l. 15, del. mark of interrogation.
p. 354, l. 7, after *vendor* insert mark of interrogation.
p. 383, l. 6, after *bequeaths*, for *the* read *a*.

ON THE PLAN OF THE DIGEST.

CONSTITUTIO DEO AUCTORE.

The Emperor Cæsar Flavius Justinianus pious happy renowned conqueror and triumpher ever Augustus greets Tribonianus his quæstor.

GOVERNING under the authority of God our empire, which was delivered to us by His Heavenly Majesty, we prosecute wars with success, we adorn peace, we bear up the frame of the State, and we so lift up our minds in contemplation of the aid of the omnipotent Deity that we do not put our trust in our arms, nor in our soldiers, nor in our leaders in war, nor in our own skill, but we rest all our hopes in the providence of the Supreme Trinity alone, from whence proceeded the elements of the whole universe, and their disposition throughout the orb of the world was derived. 1. Whereas then there is in all things nothing found so worthy of respect as the authority of enacted law, which disposes well things both divine and human, and expels all iniquity, and yet we find the whole course of our statutes, such as they come down from the foundation of the city of Rome and from the days of Romulus, to be in a state of such confusion that they reach to an infinite length and surpass the bounds of all human capacity, it was therefore our first desire to make a beginning with the most sacred Emperors of old times, to amend their statutes, and to put them in a clear order, so that they might be collected together in one book, and, being divested of all superfluous repetition and most inequitable disagreement, might afford to all mankind the ready resource of their unalloyed character. 2. This work being accomplished and put together in one volume under our own brilliant name, hastening as we do to lift ourselves above scanty and somewhat unimportant matters and to arrive at the full and supreme amendment of the law, so as to amend and rearrange the entire Roman jurisprudence and to present

in one volume the scattered books of a number of authors, a thing which no one ever dared to hope or to desire, the task appeared to us to be one of great difficulty, indeed to be impossible. However, we lifted our hands to Heaven, and, praying for the Eternal aid, we embraced this enterprise in our minds, trusting to God, who is able in the magnitude of His goodness to grant and complete achievements well-nigh desperate. 3. Hereupon we bethought us of the excellent service of your wholehearted character, and committed to you before others this additional work, having received proofs of your ability from the composition of our Code, and we ordered you to choose as companions in your labour whomsoever you thought right out of the number of the accomplished professors as well as of the most eloquent of the robed men of the forum, men of the most honourable position. The above persons being accordingly got together and having been introduced into our palace and accepted favourably by us on the strength of your testimony, we have entrusted to them the execution of the entire plan, it being however understood that the whole should be carried out under the management of your most watchful mind. 4. You all therefore have our order to read and to work up the books dealing with Roman law left by the learned of old time to whom the most sacred Emperor allowed the privilege of writing and interpreting rules of law, so that the whole substance might be taken from them, all repetition and all discrepancy being as far as possible got rid of, and hereupon a single and sufficient result might be presented in the place of the scattered materials which preceded. Whereas, on the other hand, other authors have written books dealing with law, but their writings have not been received or used by any later authorities, we ourselves are not concerned to let their works affect our resolution. 5. The above matter being composed under the Supreme indulgence of the Deity, it is only right to set it forth in a work of great beauty, consecrating thereby an apt and most holy temple of Justice, and to distribute the whole law into fifty books and distinct titles, in imitation of our Code of Imperial enactments and also of the Perpetual Edict, as far as this may prove in your opinion to be the more convenient course, so that there may be nothing left outside the above-mentioned compilation, but the entire ancient law, in a state of confusion for some fourteen hundred years and now by us made clear, may be, so to speak, enclosed within a wall and have nothing left outside it; all legal authors enjoying the same rank and no superior authority being kept for any one of them, since it cannot be said

that any of them are either better or worse in all respects, but only particular writers in particular respects. 6. You must however, when comparing a number of authors, not pronounce upon the work of one as better and juster, as it is possible for the opinion of one writer, and that one of inferior merit, to be preferable in some points to many and even better authors. For this reason opinions which are[1] cited in the notes to Æmilius Papinianus, taken from Ulpianus and Paulus, not to speak of Marcianus, which once were allowed no weight in consequence of the honour due to the most renowned Papinianus, ought not to be at once rejected, but if you see that anything taken from them is necessary to supplement the labours of Papinianus of supreme genius or to interpret his writings, you must not hesitate to set it down as being as good as law; so that all those most learned authors whose work is embodied in this book may have as much authority as if their lucubrations were derived from Imperial constitutions and had been uttered by our own divine mouth. We are justified in ascribing everything to ourselves, seeing that it is from us that all their authority is derived; and one who amends anything which is done with a want of exactness deserves more credit than the original author. 7. There is another thing of which we wish you to make a special object; if you find anything in old books which is not well placed, anything superfluous or wanting in finish, you should get rid of unnecessary prolixity; fill up what is deficient, and present the whole work in apt form and with engaging appearance. You should at the same time further observe this; if, in the ancient statutes and enactments which old writers cited in their books, you find anything expressed incorrectly, you must rectify it and put it in proper form, so that whatever is chosen and set down by you may be deemed genuine and the best version and be treated as if originally written, and no one is to take upon him by reference to the ancient text to argue that your version is faulty. Considering indeed that by an ancient enactment, the so-called *Lex Regia*, all legal authority and all power vested in the Roman people were transferred to the Imperial Government, and we do not attribute our collective legislatorial sway to this and that source, but desire that it should be all our own, how can antiquity interfere with our legislation? In fact, we desire that all the law referred to, when once set forth, should be so fully in force, that where anything was put in one way by the old writers, but appears to

[1] del. *antea*, M.

bear the opposite sense in our work, no fault should be found with the former, but the whole should be set down to our will and pleasure. 8. By this means, in all parts of our aforesaid Code there is to be no place allowed to any antinomy—such is the name used from old time, taken from the Greek language—but there must be full agreement, full consistency, and no one is to raise any dispute on the question. 9. Repetition too, as already said, we desire to be absent from a compilation such as this; and any provisions that have been made by the most sacred ordinances, which we have inserted in our Code, we do not allow to be again set down as parts of the old law, seeing that the fiat of Imperial enactment is quite enough to give them authority; unless indeed this should be done by way of contrast or of supplement or for more complete exactitude; but even then it must be done very sparingly, lest, if this kind of exception is allowed, a certain amount of thorns may spring in such a meadow. 10. Again, if any rules included in the old books have by this time fallen into disuse, we by no means permit you to set them down, as we wish such rules only to be maintained as have been put in force in the most usual course of judicature, or have been approved by the long usage of this revered City, in accordance with the work of Salvius Julianus, which points out that all cities ought to follow the usage of Rome, the head of the world, and not Romé follow that of other cities. And by Rome we should understand not merely the old city, but our own royal city too, which, with the favour of God, was built with the best auguries. 11. We therefore order that everything should be governed by those two books, one that of Imperial enactments, the other that of the law consolidated and amended (*jus enucleatum*) and put together with a view to a book to be made; adding anything else that may come to be published by us to serve the use of an educational work (*institutiones*), in order that the immature mind of the student, being supplied with simple principles, may be the more easily brought to the comprehension of the higher learning. 12. Our complete work, such as it will be composed by you with God's assistance, we command shall bear the name of Digest or Pandects, and no person learned in the law shall at any time venture to add any commentary thereto and upset by his own language the concise method of the said book, as was done in old time, when, by the contradictory opinions of expositors, the whole law was little short of being thrown into confusion: let it be enough to make some few corrections of it by notes and an ingenious use of titles, avoiding the occasioning of anything to be

complained of that might arise from the habit of interpreting. 13. Lest moreover the writing itself should hereafter give rise to any ambiguity, we command that the text of the book shall not be written with the use of the trickery of ciphers and compendious conundrums, such as directly and by their mischievous character have occasioned many instances of antinomy, even where what is intended to be signified is the number of the book or some similar matter; even such things we do not allow to be shown by special numerical figures, they must be set out in ordinary letters. 14. All these things your Wisdom must, with the favour of God, endeavour to accomplish, together with other most able men, and bring it to a well-conceived and most speedy close, that the complete book, digested into fifty heads, may be put before us in strong and eternal memory of the matter in hand, in proof of the providence of Almighty God, to the glory of our rule and of your service. Given on the eighteenth day before the Calends of January at Constantinople; in the consulship of the most honourable Lampadius and Orestes.

CONSTITUTIO OMNEM.

The Emperor Cæsar Flavius Justinianus Alamannicus Gothicus Francicus Germanicus Anticus Alanicus Vandalicus Africanus pious happy renowned conqueror and triumpher ever Augustus to Theophilus Dorotheus Theodorus Isidorus Anatolius Thalelæus and Cratinus honourable men professors and to Salaminius most eloquent man professor greeting.

THAT the whole law of our State is now reformed and arranged partly in four books of institutes or elements, partly in fifty of digests or pandects, and further in twelve of Imperial enactments—who knows better than you do? and now indeed everything which it was requisite either to order at the beginning or to pronounce upon when all was complete, with willing acknowledgment of the fact, has been fully done by our speeches made both in the Greek tongue and in that of the Romans, which speeches we wish to be eternal. Whereas however you, being appointed professors of legal knowledge, ought to be acquainted with this too, what it is that we hold necessary to be conveyed to students and at what times, to the end that they may thereby be made most worthy and most learned, we therefore opine that the present divine address ought to be directed to you especially, so that your Wisdoms, and also other professors who may choose at any future time to follow the same course, may, by observing our rules, tread the distinguished path of legal erudition. Now it is without doubt necessary that elementary works (*institutiones*) should in all studies claim the first place, supplying as they do the first step in every branch of knowledge in a short form. Then, of the fifty books of our Digest, we hold that six-and-thirty alone are sufficient both for you to expound and for youthful students to use for the purpose of their education. But we ought in our opinion here to set forth the order of arrangement and the method which has to be followed, and to remind you of the things which you used to deliver of old, also,

with regard to our recent compilation, to state the way of applying it and the proper times, so that nothing relating to this duty may be left unknown. 1. Some while ago, as your Wisdoms are aware, out of all the immense multitude of rules, reaching to two thousand books and three million lines, students, under instruction from their teachers, generally made use of no more than simply six books, and those ill composed and containing very little law of any importance, everything else being disused and in fact inaccessible to everybody; these six books included the Institutes of our master Gaius and four separate books, one on the old law of dotal gifts, another on guardianships, and a third, indeed a fourth, on testaments and legacies; and even these they did not use throughout; there were large portions of them which they passed by as being superfluous. To students of the first year this work was not given in accordance with the order observed in the Perpetual Edict, but the subjects were arranged anyhow and all in confusion, matters practical and unpractical being mixed up, in fact the unpractical matters were allowed the larger space. In the second year the order adopted went the wrong way about, they were given the first part of the legal rules, some particular titles being left out, as it was an absurd thing after the Institutes to read anything else than what is placed first in the law and deserves to be called the first subject; but after these titles had been gone through, though even these were not read from the beginning to the end, but a selection was made, and that for the most part of unpractical pieces, there were other titles set before the students, partly from that division of the law which is called *judicia* (actions at law),—these again not being taken from the beginning to the end, but only so as to afford a meagre catalogue of practical points, all the rest of the book being treated as of no consequence,—partly from that division which is called Things, consisting of seven books, in which once more a great many chapters were set on one side out of the way of the students, being regarded as unsatisfactory and not very well fitted for educational purposes. In the third year they had to take up such subjects in both works, I mean the book on Things and the book on Actions, as had not been given them in the second year, the two works being taken alternately; this furnishing an introduction which led to the most excellent Papinianus and his Responsa, which Responsa, taken all together, extend to nineteen books; but of these they only took eight books, and not the whole contents even of these eight books; out of a great number of rules expressed in ample detail, they were confined

to a few short extracts, so that they had to close the task with their thirst unslaked. The above being all which was given them by their teachers, the students used to read the Responsa of Paulus for themselves, not taking the whole of them, but adopting a fragmentary series which a bad custom recommended. Such was, up to the fourth year, all that was done towards acquiring a knowledge of ancient law, [and if][1] any one wishes to consider what were the things which they read, he will find, on reckoning them up, that in that immense multitude of legal rules there were scarcely sixty thousand lines on their subject which they read through, all the rest being left remote and unknown, and being only held worthy of attention to some very small extent when either it was required in the course of an action, or you yourselves, masters in the law, made a point of reading them, so that you might have something better to show in the way of knowledge on the part of your pupils. The above then sets forth the method of education in old days, as is fully shown by your report. 2. We however, observing this meagre provision of rules of law, and deeming it a very miserable state of things, propose to display the treasures of law to such as desire to behold them, so that, when your Wisdoms have in some wise turned them to due account, your pupils may become amply endowed legal pleaders. Accordingly in the first year they must [to begin with] take in our Institutes, derived as these are from almost the whole body of the old institutional works and conducted into one clear reservoir out of all their muddy sources by the agency of Tribonianus, that most distinguished man and magistrate, ex-quaestor of our sacred palace and ex-consul, also by the agency of two of your number, Theophilus and Dorotheus, most able professors. For the rest of the year we order, in accordance with a very good principle of arrangement, that there should be given them the first portion of the law, which is called by the Greek name πρῶτα, there being nothing before it, as, in fact, whatever is *first* cannot have anything else preceding it. Such, we lay down, is to be the beginning and the conclusion of the first year's education; and we think proper that those who take it shall not be called by the silly and ridiculous name of Two-pounders (*dupondii*); they are to be styled New Justinians, which appellation, so we decree, is to be used for all time to come, so that those persons who, while yet untaught, aspire to the knowledge of law and choose to accept the enactments of the earlier year may take our name, seeing that the first book is to be given

[1] Cf. M.

to them at once, which was published by our authority. The name they used to bear was in keeping with the ancient state of confusion in which the law used to be, but now that it is clearly and distinctly presented, so that it can be easily conveyed to their minds, it seems requisite that they should enjoy distinction under another name. 3. In the second year, for which another name has been already given them by a decree, and one of which we approve, we ordain that they should take either the seven books on Actions or the eight on Things, according as the alternation of time allows, which alternation we wish to be maintained untouched. They must take these books, both of Actions and Things, from beginning to end, and in their proper order, none of them being omitted, as everything is invested with an elegance unknown before, and nothing unpractical or obsolete is to be found in them. To each of these books, whichever is taken, the one on Actions or the one on Things, we desire should be added for the second year's course four works in one book each, which we have chosen out of the whole compilation of fourteen books, one being taken from the larger work in three books compiled by us on the subject of *dos*, one from the two books on guardianships and curatorships, one from the work in two parts on testaments, and, from the seven books on legacies and *fideicommissa* (testamentary trusts) and subjects connected therewith, again one only. Thus those four books which we have put at the head of the particular compilations named above are the only ones which we wish you to put before them; the other ten you must keep back for a convenient occasion, as it is impossible, indeed the second year is too short a time, for the study of these books to be instilled into them by a master's instruction. 4. After this the course of the third year is to be as follows. Whether it happens to the pupils, as the turn comes, to read the book on Actions or the book on Things, there must be taken at the same time the threefold arrangement of books on law, each being on one subject; in the first place there is to be one separate work on the hypothecarian formula, which we have put in the best place for it, namely in the part where we deal with hypotheks, so that, competing as it does with actions on pledge, which come in the books on Things, it may not shun their vicinity, both of them really dealing with much the same subject. After this separate work another similar one is to be put before them, compiled by us on the Edict of the Ædiles, on the Redhibitorian action, on actions for recovery of property, and lastly on the stipulation for double the price, seeing that whereas legal provisions

elative to purchase and sale are conspicuous in the books about hings, but all the definitions, as we called them, were placed in the ast part of the former edict, we were obliged to transfer them to ne earlier position, lest they should wander further away from the eighbourhood of Sale to which they are, so to speak, ancillary. o these three books we have joined the study of that most acute awyer, Papinianus, whose works students used to take in their hird year, though they did not go through the whole series, but, ere as well as before, had a few examples given them out of nany, selected here and there. With you however that excellent uthor himself will be open for perusal, not only in respect of his esponsa, compiled in nineteen books, but also in the thirty-seven ooks of questions, the two books of definitions, besides the book n adultery, in fact in pretty well the whole of his dissertations hroughout the entire array of our Digest in which he excels in is own special portions. Then, lest the third-year students, the Papinianists, as they are called, should seem to lose their author's name and grace of expression, he has again been introduced for the third year by a most exquisite method, as the book about hypotheks is one which we had filled throughout with passages from the same excellent Papinianus, so that the pupils may take their name from this fact and be called Papinianists, and may rejoice in memory of him, observing the festal day which they used to celebrate when they first took his rules of law, and even by this means the memory of that most sublime præfectorian may abide for ever, and the course of study for the third year may hereupon close. 5. Next, seeing that it is usual for the students in the fourth year to go by the conventional Greek name λύται, they can, if they like, keep this title; but instead of the Responsa of the most learned Paulus, which at one time they used to take in barely eighteen books instead of twenty-three, reading them in the confused way already mentioned, let them now turn all their attention to the ten separate works which remain out of the fourteen which we have already described, by which they will acquire a store of knowledge much larger and fuller than they ever got from the Responsa of Paulus. By this means the whole compilation of separate books put together by us and divided into seventeen will be taken home in their minds, such as we have set it down in two parts of the Digest, the fifth and sixth, according to the division into seven parts; and what was said at the beginning of my address will be found to be true, the object being to make the youths perfect after studying the thirty-six books as well as equipped for

every legal purpose and not unworthy of our days. Two other parts of our Digest, the sixth and seventh, which are arranged in fourteen books, must be laid on one side, so that they can at a later time both study them and display their knowledge of them in Court. If they studiously imbue themselves with these and take pains both to read and thoroughly to understand the Code of Imperial statutes by the end of the fifth year, in which they are called *prolytæ*, they will want for nothing in legal knowledge, but will embrace the whole of it from the beginning to the end in their minds, and, though this is the case with no other of the branches of learning, the number of which is infinite, however worthless any may be, this study by itself will be carried forward to an admirable conclusion which it now receives at our hands. 6. Accordingly, when all these legal secrets are disclosed, nothing will be hidden from the students, and, after reading through all the works put together by us by the hands of the eminent Tribonianus and the others, they will turn out distinguished pleaders and servants of justice, and, both for contending in cases and for deciding them, they will be the ablest of men and successful in all times and places. 7. These three works which we have composed we desire should be put in their hands in royal cities as well as in the most fair city of Berytus, which may well be styled the nursing mother of law, as indeed previous Emperors have commanded, but in no other places which did not enjoy the same privilege in old times, as we have heard that even in the brilliant city of Alexandria, and in Cæsarea and others, there have been ignorant men who, instead of doing their duty, conveyed spurious lessons to their pupils, and such as these we desire to make desist from that attempt by laying down the above limits, so that, if they should hereafter be guilty of such conduct and carry on their duties outside the royal cities and the metropolis Berytus, they may be punished by a fine of ten pounds of gold and be expelled from the city in which instead of teaching the law they transgress the law. 8. There is another thing which we mentioned, both in the address which we delivered on first appointing commissioners for the compilation of this book and also in another ordinance issued by our Divinity after its completion, and which we may suitably issue now, namely that no one of those who compose these books is to venture to make any private ciphers in them, nor, by way of saving time, to throw difficulty in the way of the interpretation and compilation of the rules, and I wish all clerks who may at any time in future commit such an offence to know that, besides incurring the criminal fine, they will be com-

pellable to pay twice the value of the book to its owner, if they hand it to an innocent person, seeing that the very purchaser of such a book can set no value on it, as no judge will allow anything to be quoted from it, but will order that it should be treated as non-existing. 9. Next there is a very necessary order which we make by way of very strong prohibition, that none, either in this renowned city or in the fair town of Berytus, among those who are prosecuting legal studies, shall perpetrate unworthy, indeed most offensive, or I should rather say slavish, jokes, to carry out which is an illegal act, either against the professors themselves or their companions, and still more against those who attempt the study of law when fresh to the work. How indeed can the word 'joke' be used of what leads to criminal acts? Such conduct we do not by any means allow; and this whole branch of the matter we put under strict rule for our own days and transmit it to all future time, as it is right that our souls should be educated first, and then our tongues. 10. All the foregoing, so far as this most prosperous city is concerned, the eminent man who is prefect of this genial city must take care both to observe and to enforce, according to what is required by the nature of the offence in the case both of students and writers; in the city of Berytus this duty falls both on the illustrious governor of the Punic shore and the most blessed bishop and the legal professors of that city. 11. Begin now therefore to deliver to the students legal learning under the governance of God and to open up the way found by us, so that they may become the best ministers of justice and of the State, and that the greatest possible honour may attend you for all ages to come; the fact being that in your day there has been devised an exchange of law such as we read in Homer, that originator of all virtue, to have been mutually made by Glaucus and Diomedes when they exchanged two unlike things,

> Gold for brass, a hundred kine
> The worth of what was given for nine.

All this we order shall be in force for ever, to be observed by all, both professors and students of the law and clerks, by these and the judges likewise. Given on the seventeenth day before the kalends of January at Constantinople, our master Justinianus ever Augustus being consul the third time.

ON THE CONFIRMATION OF THE DIGEST.

CONSTITUTIO TANTA.

In the name of our Lord God Jesus Christ.

The Emperor Cæsar Flavius Justinianus Alamannicus Gothicus Francicus Germanicus Anticus Alanicus Vandalicus Africanus pious happy renowned conqueror and triumpher ever Augustus to the Senate and to all peoples.

So great in our behalf is the foresight of Divine Humanity that it ever deigns to support us with eternal acts of liberality. After the Parthian wars were hushed in eternal peace, after the nation of the Vandals was destroyed[1], and Carthage, nay rather all Libya, was again taken into the Roman Empire, then I contrived also that the ancient laws, already bowed down with age, should by my care reach new beauty and come within moderate bounds; a thing which before our command none ever expected or deemed to be at all possible for human endeavour. It was indeed a wondrous achievement when Roman jurisprudence from the time of the building of the city to that of our rule, which period well-nigh reaches to one thousand and four hundred years, had been shaken with intestine war and infected the Imperial legislation with the same mischief, to bring it nevertheless into one harmonious system, so that it should present no contradiction, no repetition and no approach to repetition, and that nowhere should two enactments appear dealing with one question. This was indeed proper for Heavenly Providence, but in no way possible to the weakness of man. We therefore have after our wont fixed our eyes on the aid of Immortality, and, calling on the Supreme Deity, we have desired that God should be made the originator and the guardian of the whole work, and we have entrusted the entire task to Tribonianus,

[1] For *ereptam* read *peremptam*, M.

a most distinguished man, Master of the Offices, ex-quaestor of our sacred palace and ex-consul, and we have laid on him the whole service of the enterprise described, so that with other illustrious and most learned colleagues he might fulfil our desire. Besides this, our Majesty, ever investigating and scrutinizing the composition of these men, whensoever anything was found doubtful or uncertain, in reliance on the heavenly Divinity, amended it and reduced it to suitable shape. Thus all has been done by our Lord and God Jesus Christ, who vouchsafed the means of success both to us and to our servants herein. 1. Now the Imperial statutes we have already placed, arranged in twelve books, in the Code which is illuminated with our name. After this, undertaking a very great work, we allowed the same exalted man both to collect together and to submit to certain modifications the very most important works of old times, thoroughly intermixed and broken up as they may almost be called. But in the midst of our careful researches, it was intimated to us by the said exalted person that there were nearly two thousand books written by the old lawyers, and more than three million lines were left us by them, all of which it was requisite to read and carefully consider and out of them to select whatever might be best. This, by the grace of Heaven and the favour of the Supreme Trinity, was accomplished in accordance with our instructions such as we gave at the outset to the exalted man above mentioned, so that everything of great importance was collected into fifty books, and all ambiguities were settled, without any refractory passage being left. We gave these books the name of Digest or Pandects, for the reason that they have within them all matters of question and the legal decision thereof, having taken to their bosom things collected from all sides, so that they conclude the whole task in the space of about one hundred and fifty thousand lines. We have divided the books into seven parts, not incorrectly nor without reason, but in regard of the nature and use of numbers and in order to make a division of parts in keeping therewith. 2. Accordingly, the first part of the whole frame, which part is called *πρῶτα*, after the Greek word, comes by itself in four books. 3. The second link has seven books, which are called *de judiciis* (on trials at law). 4. In the third group we have put all that comes under the title *de rebus* (on things), the same having eight books assigned to it. 5. The fourth place, which amounts to a sort of kernel of the whole compilation, takes eight books. This contains everything that relates to hypothek, so that the subject does not differ very much from the

actio pigneratitia (action to redeem, etc.), and another book is inserted in the same volume which has the Edict of the Edile and the Redhibitorian action and the stipulation for returning double the price received, which is matter of law in case of an *evictio* (recovery of property on the ground of ownership), the fact being that these matters are connected with the subject of purchase and sale, and the aforesaid actions were always closely attendant on those last topics. It is true that, in the scheme of the old Edict, they wandered off into out-of-the-way places widely apart from one another, but by our care they are put in the same group, as it is only right that discussions on almost identical subjects should be put close together. Then another book has been devised by us to follow the two first to deal with interest on money and with *trajectitia pecunia* (bottomry loans), also on documents of title, on witnesses, on proof, and therewith on presumptions, which three separate books are placed close to the portion dealing with things. After these we have assigned a place to the rules laid down anywhere as to betrothals, marriages, and dowries, all which we have set forth within three volumes. On guardianship and curatorship we have composed two books. This framework, consisting of eight books, we have set down in the middle of the whole work, and it contains all the most practical and best expressed rules collected from all quarters. 6. We then come to the fifth article of our Digest, to which the reader will find consigned whatsoever was said of old time on the subject of testaments and codicils, both of ordinary persons and soldiers; this article is called "On Testaments." Next comes the subject of legacies and *fideicommissa* (testamentary trusts), in books five in number. 6*a*. And as there is nothing so closely bound up with anything else as an account of the *lex Falcidia* with legacies, or of the *Senatusconsultum Trebellianum* with *fideicommissa*, we appropriate two books to these respective subjects, and thus complete the whole fifth part in nine books. We have not thought proper to put anything besides the *Senatusconsultum Trebellianum*, because, as to the stumblingblocks and obscurities of the *Senatusconsultum Pegasianum*, which the very ancients themselves were disgusted with, and their nice and superfluous distinctions, we desire to be rid of them, and we have included all the law we lay down on the subject in the *Trebellianum*. 6*b*. In all this we have said nothing about *caduca* (escheats), lest a head of law which, in the midst of unprosperous courses and bad times for Rome, grew in importance with public distress, and drew strength from civil war, should remain in our day when our reign

is strengthened by Divine favour and a flourishing peace and placed above all nations in the matter of the perils of war, and thus a melancholy reminiscence should be allowed to cast a shadow on a joyful age. 7. Next we have before us the sixth part of the Digest, in which are placed all kinds of *bonorum possessio*, whether they relate to freeborn persons or freedmen, and herein the whole law concerned with degrees of relationship and with connexion by marriage, also statutable heritage and succession *ab intestato* in general and the *Senatusconsultum Tertullianum* or *Orfitianum*, which respectively regulate the succession of children to their mother, and mothers to their children. We have assigned two books to all the varieties of *bonorum possessio* and reduced the whole to a clear and compendious scheme. *7a.* After this we take the things laid down by old authors as to *operis novi nuntiatio* (notification of novel structure), as to the *damnum infectum* (apprehended mischief), also for the case of the destruction of buildings or the same being threatened, also as to the keeping off of rainwater; further we take whatever we find provided by statute relating to *publicani* as well as to the making of voluntary gifts both *inter vivos* and *mortis causa*, all which we have put in a single book. *7b.* For manumissions and trials as to liberty, these are the subject of another book, (*7c*) and again on questions as to property and possession there are many discursive passages put in a single volume, (*7d*) while a further book is assigned to the subject of persons who have suffered judgment or have confessed *in jure* (in the pleadings), also of detention of goods and sales thereof (for insolvency), and as to the preventing of frauds on creditors. *7e.* After this, Interdicts are dealt with in the lump, then come *exceptiones* (pleas), and there is again a separate book embracing the subject of lapse of time and obligations and actions; the result being that the above-mentioned sixth part of the whole volume of the Digest is kept within eight books. 8. The seventh and last division of the Digest is made up of six books, and all the law that is met with as to stipulations or verbal obligations, as to sureties and *mandatores* (persons who request an advance to be made to another), also novations, discharges of debt, formal receipts and praetorian stipulations is set down in two volumes, which it was impossible so much as to reckon among the number of ancient books. *8a.* After this we have put two terrifying books on the subject of private and extraordinary offences and also of public crimes, in which are described the whole severe treatment and awful penal measures applied to criminals, mixed with which are

the provisions which have been made as to incorrigible men who endeavour to conceal themselves and who resist authority, also the matter of penalties such as are imposed on condemned persons, or remitted, and the subject of their property. 8*b*. Next we have devised a separate book on appeals from judgments delivered by way of deciding either civil or criminal cases, 8*c*. and whatever else we find devised by the ancients and strictly laid down for municipal authorities or with relation to decurions or to public offices or public works or *nundinæ* (right of market), or promises or different kinds of trials or assessments or the meaning of words,—all these are taken into the fiftieth book, which closes the whole compilation. 9. The whole of the above has been completed by the agency of the eminent man and most learned magistrate Tribonianus, ex-quæstor and ex-consul, a man adorned alike with the arts of eloquence and of legal science, as well as distinguished in practical life, and one who has no greater or dearer object than obedience to our commands: other brilliant and hardworking persons have co-operated, such as Constantinus, that illustrious man, Count of the Sacred Largesses and Master of the Office of Libels and Sacred inquiries, who has long deserved our esteem from his good repute and distinction; also Theophilus, an illustrious man, a magistrate and learned in the law, who wields admirably the best sway in the law over this brilliant city; Dorotheus, an illustrious man, of great eloquence and quæstorian rank, whom, when he was engaged in delivering the law to students in the most brilliant city of Berytus, we, moved by his great reputation and renown, summoned to our presence and made to share in the work in question; again, Anatolius, an illustrious person, a magistrate, who, like the last, was invited to this work when acting as an exponent of law at Berytus, a man who came of an ancient stock, as both his father Leontius and his grandfather Eudoxius left behind them an excellent report in respect of legal learning; also Cratinus, an illustrious person, Count of the Sacred Largesses, who was once a most efficient professor of this revered city. All these were chosen for the above-mentioned work, together with Stephanus, Mena, Prosdocius, Eutolmius, Timotheus, Leonides, Leontius, Plato, Jacobus, Constantinus, Johannes, most learned men, who are of counsel at the supreme seat of the Præfecture, which is at the head of the eastern *prætoria*, but who derive a testimony to their excellence from all quarters and were chosen by us for the completion of so great a work. Thus, all the above having met together under the guidance of the eminent Tribonianus, so as to accomplish this great work in

pursuance of our commission, the whole was by Divine favour completed in fifty books. 10. Herein we had so much respect for ancient authority that we by no means have suffered them to consign to oblivion the names of those learned in the law; everyone of the old lawyers who wrote on law has been mentioned in our Digest; all that we did was to provide that if, in the rules given by them, there appeared to be anything superfluous or imperfect or of small importance, it should be amplified or curtailed to the requisite extent and be reduced to the most correct form; and in many cases of repetition or contradiction what appeared to be better has been set down instead of any other reading and included under one authority thus given to the whole, so that whatever has now been written may appear clearly to be ours and to be composed by our order, none being at liberty to compare the ancient text with what our authority has introduced, as in fact there have been many very important transformations made on the ground of practical utility. It goes as far as this, that where an Imperial enactment is set down in the old books, we have not spared even this, but resolved to correct it and put it in better form; leaving the very names of the old authority, but preserving by our emendations whatever the real sense of the statutes made suitable and necessary. Hence it came to pass that where of old there was any matter of doubt the question has now become quite safe and undisturbed, and no room for hesitation is left. 11. We saw however that the burden of all this mass of knowledge is more than such men are equal to bearing as are insufficiently educated and are standing in the vestibules of law, though on their way towards the secrets thereof, and we therefore were of opinion that a further compendious summary[1] should be prepared, so that, thereby tinctured and so to speak imbued with the first elements of the whole subject, they might proceed to the innermost recesses thereof and take in with eyes undazzled the exquisite beauty of the law. We therefore summoned Tribonianus, that eminent man who had been chosen for the direction of the whole work, also Theophilus and Dorotheus, illustrious persons and most eloquent professors, and commissioned them to collect one by one the books composed by old authors in which the first principles were to be found, and thereupon, whatever they found in them that was useful and most to the purpose and polished in every point of view and in accordance with the practice of the present age, all this they were to endeavour to grasp and to put it into four books, so as to lay the first foundations and

[1] *mediocris emendatio.* Gr. μετρία εἰσαγωγή.

principles of education in general, and thus enable young men, supported thereon, to be ready for weightier and more perfect rules of law. We instructed them at the same time to bear in mind our own Constitutions as well, which we have issued with a view to the amendment of the law, and, in composing the Institutes, not to omit to insert the same improvement, so that it should be clear both where there had been any doubt previously, and what points had been afterwards established. The whole work, as accomplished by these men, was put before us and read through; whereupon we received it willingly and judged it to be not unworthy of our mind, and we ordered that the books should be equivalent to enactments of our own, as is more plainly declared in our own address which we have placed at the beginning of the whole. 12. The whole frame of Roman law being thus set forth and completed in three divisions, viz. one of the Institutes, one of the Digest or Pandects, and lastly one of the Constitutions, all being concluded in three years, whereas when the work was first taken in hand it was not expected to be finished in ten years, we offered this work too with dutiful intent to Almighty God for the preservation of mankind, and rendered full thanks to the Supreme Deity who vouchsafed us successful waging of war and the enjoyment of honourable peace and the giving of the best laws, not only for our own age, but for all time, both present and future. Therefore we saw it to be necessary that we should make manifest the same system of law to all men, to the end that they should recognise the endless confusion in which the law was, and the judicious and lawful exactitude to which it had been brought, and that they might in future have laws which were both direct and compendious within every one's reach, and of such a nature as to make it easy to possess the books which contained them. Our object was that people should not simply be able by spending a whole mass of wealth to procure volumes containing a superfluous quantity of legal rules, but the means of purchasing at a trifling price should be offered both to rich and poor, a great deal of learning being procurable with a very small outlay. 13. Should it chance that here and there, in so great a collection of legal rules, taken as it is from an immense number of books, some cases of repetition should occur, this no one must be severe upon; it should rather be ascribed first of all to human weakness, which is part of our nature, as indeed it belongs rather to the Deity than to mortal man to have a memory for all things and to come short in nothing, as indeed was said of old. It should also be borne in mind that there are some rules of exceeding

brevity in which repetition may be admitted to good purpose, and it has been practised in accordance with our deliberate intent, the fact being that either the rule was so material that it had to be referred to under different heads of inquiry, because the two subjects were connected together, or else, where it was involved in other different inquiries, it was impossible to exclude it from some passages without throwing the whole into confusion. And in these passages, in which there were well-reasoned arguments set forth by the old writers, it would be altogether an unlawyerlike proceeding to cut out and get rid of something that was inserted in one after another, as it would confuse the mind and sound absurd to the ears of anyone to whom it was presented. 14. In like manner, where any provision has been made by Imperial enactment, we have by no means allowed it to be put in the book of the Digest, as the reading of such enactments is all that is wanted; save where this too is done for the same reasons as those for which repetition is admitted. 15. As for any contradiction occurring in this book, none such has any claim to a place in it, nor will any be found, if we consider nicely the grounds of diversity; some special differential feature will be discovered, however obscure, which does away with the imputation of inconsistency, puts a different complexion on the matter and keeps it outside the limits of discrepancy. 16. Again should anything happen to be passed over which, among so many thousand things, was, so to speak, placed in the depth and lying hid, and being fit to be so [placed], [still] was covered with darkness and unavoidably was left out, who could with reason find fault with this, considering in the first place how limited is the mind of mortal man, and secondly the intrinsic difficulty of the case, where the passage, being closely bound up with a number of useless ones, gave the reader no opportunity of detaching it from the rest? It may be added too that it is much better that a few valuable passages should escape notice than that people should be encumbered with a quantity of useless matter. 17. There is one very remarkable fact which comes to light in these books, namely, that the old books, plentiful as they were, are found to be of smaller compass than the more compendious supply now open. The fact is that the men who carried on actions at law in the old days, in spite of the number of rules of law that had been laid down, still only made use of a few of them in the course of the trial, either because of a deficient supply of books, which it was out of their power to procure, or simply owing to their own ignorance; and cases were decided according to the good pleasure of the judge

rather than by the letter of the law. In the present compilation, I mean in our Digest, the law is got together from numerous volumes, the very names of which the men of old could not tell, or rather had never heard; and the whole has been composed with an ample supply of matter in such sort that the ancient plenty appears defective while our own compendious collection is very rich. Of this ancient learning Tribonianus, most excellent man, has furnished us with a very large supply of books, a number of which were unknown even to the most erudite men; these were read through, and all the most valuable passages were extracted and found their way into our own excellent work. But the authors of this composition did not peruse those books only from which they took the rules they have set down; they read a great deal more, in which they found nothing of value or nothing new which they could extract and insert in our Digest, and which accordingly they very reasonably rejected. 18. Now whatever is divine is absolutely perfect, but the character of human law is to be constantly hurrying on, and no part of it is there which can abide for ever, as nature is ever eager to produce new forms, so that we fully anticipate that emergencies may hereafter arise which are not enclosed in the bonds of legal rules. Wherever any such case arises, let the August remedy be sought, as in truth God set the Imperial dispensation at the head of human affairs to this end, that it should be in a position, whenever a novel contingency arrives, to meet the same with amendment and arrangement, and to put it under apt form and regulations. We are not the first to enunciate this, it comes of an ancient stock; Julianus himself, that most acute framer of statutes and of the Perpetual Edict, set down in his own writings that wherever anything should turn out defective, the want should be supplied by Imperial legislation. Indeed not only he but the Divine Hadrianus, in the consolidated Edict and the *Senatusconsultum* which followed it, laid down in the clearest terms that where anything was not found to be set down in the Edict, later authority might meet the defect in accordance with the rules, the aims and the analogy thereof. 19. Now therefore, conscript fathers and all men in the whole world, render fullest thanks to the Supreme Divinity, who has kept so greatly beneficial a work for your times: in truth, that of which those of old time were not in the Divine judgment held to be worthy has been vouchsafed to your age. Worship therefore and keep these laws, and let the ancient ones sleep; and let none of you so much as compare them with the former ones, nor, if

there be any discrepancy between them, ask any question, seeing that, whatsoever is set down here, we desire that it alone should be observed. Moreover in every trial or other contest, where rules of law have to be enforced, let no one seek to quote or maintain any rule of law save as taken from the above-mentioned Institutes or our Digest or Ordinances such as composed and promulgated by us, unless he wish to have to meet a charge of forgery as an adulterator, together with the judge who allows such things to be heard, and to suffer most severe penalties. 20. Lest however it should be unknown to you what those books of old lawyers are from which this composition is taken, we have ordered that this likewise should be set down at the beginning of our Digest, so that it may be quite clear who are the authorities and which are the books written by them, and how many thousands of these there are on which this temple of Roman jurisprudence has been constructed. 20*a*. Of legal authorities or commentators we have chosen those who were worthy of so great a work as this, and whom older most devoted Emperors did not scorn to admit; we have given all of them one pinnacle of rank, and none is allowed to claim any pre-eminence for himself. Indeed, seeing that we have laid down that the present laws themselves should be equivalent to enactments issued by us, how should any greater or less importance be attributed to any amongst them, where one rank and one authority is vouchsafed to all? 21. One thing there is which, as it seemed good to us at the very beginning, when with the Divine sanction we commissioned the execution of this work, so it seems opportune to us to command now also; this, namely, that no man of those who either at this day are learned in the law or hereafter shall be such shall venture to append any commentary to these laws, save so far as this, that he may translate them into the Greek tongue with the same order and sequence as those in which the Roman text is written, or, as the Greeks call it, *κατὰ πόδα*, or, if he likes to make any notes for difficulties in the various titles, he may compose what are commonly called *παράτιτλα*. Any further interpretations, or rather perversions, of these rules of law we will not allow them to exhibit, for fear lest their long dissertations cause such confusion as to bring some discredit on our legislation. This happened in the case of the old commentators on the *Edictum perpetuum*, for, although that work was composed in a compendious form, these men, by extending in this way and that to divers intents, drew it out beyond all bounds so as to bring almost all Roman law into confusion; and, if we do not put up with *them*, how can we ever

allow room for the vain disputes of future generations? If any should venture to do such things, they will themselves be liable to be prosecuted for forgery, but their books will be altogether set at nought. But if, as before said, anything should appear doubtful, this must be by the judges referred to the Imperial Majesty, and the truth be pronounced on the Augustal authority, to which alone it belongs both to make and to interpret laws. 22. We lay down also the same penalty on the ground of forgery for those persons who at any future time should venture to write down our laws by the occult means of ciphers. We desire that everything, the names of authors as well as the titles and numbers of the books, should be plainly given in so many letters and not by means of marks, so that anyone who gets for himself one of these books in which there are marks used in any passage whatever of the book or volume will have to understand that the codex which he owns is useless; if anyone has these objectionable marks in any part of a codex such as described, we decline to allow him to cite any passage therefrom in Court; and a clerk who should venture to write such marks will not only be punished criminally, as already mentioned, but he will also have to give the owner twice the value of the book, if the owner himself either bought such a book or ordered it to be written without notice. This provision has already been issued by us both in a Latin enactment and in Greek and sent to the professors of law. 23. These our laws, which we have set down in these books, I mean the Institutes or Elements and the Digest or Pandects, we desire should be in force from and after our third most happy Consulship, on the third day before the Kalends of January in the present twelfth Indiction, laws which are to hold good for all time to come, and which, while in force together with our own ordinances, may display their own cogency in the Courts in all causes, whether they arise at some future time or are still pending in the Court, because they have not been settled by any judgment or terms of arrangement. Any cases that have been disposed of by judicial decree or set at rest by friendly compromise we do not by any means wish to have stirred up again. We have done well to make a point of bringing out this body of law in our third Consulship, as that Consulship is the happiest one which the favour of Almighty God and of our Lord Jesus Christ has given to our State; in it the Parthian wars were put an end to and consigned to lasting rest, moreover the third division of the world came under our sway, as, after Europe and Asia, all Libya too was added to our dominions, and now a final completion is

made of the great work on our law, [so that] all the gifts of Heaven have been poured on our third Consulship. 24. Now therefore let all our judges in their respective jurisdictions take up this law, and both within their own provinces and in this royal city observe and apply it, more especially that distinguished man the Prefect of this revered city. It will be the duty of the three distinguished Pretorian Prefects, the Oriental, the Illyrian, and the Libyan, to make the same known by the exercise of their authority to all those who are subject to their jurisdiction.

Given on the seventeenth day before the Kalends of January in the third Consulship of our Lord Justinianus.

DIGEST OF JUSTINIAN.

FIRST BOOK.

I.

On Justice and Law.

1 Ulpianus (*Institutes* 1) When a man means to give his attention to law (*jus*), he ought first to know whence the term *jus* is derived. Now *jus* is so called from *justitia*; in fact, according to the nice definition of Celsus, *jus* is the art of what is good and fair. 1. Of this art we may deservedly be called the priests; we cherish justice and profess the knowledge of what is good and fair, we separate what is fair from what is unfair, we discriminate between what is allowed and what is forbidden, we desire to make men good, not only by putting them in fear of penalties, but also by appealing to them through rewards, proceeding, if I am not mistaken, on a real and not a pretended philosophy. 2. Of this subject there are two departments, public law and private law. Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals; as a matter of fact, some things are beneficial from the point of view of the state, and some with reference to private persons. Public law is concerned with[1] sacred rites, with priests, with public officers. Private law has a threefold division, it is deduced partly from the rules of natural law, partly from those of the *jus gentium*, partly from those of the civil law. 3. Natural law is that which all animals have been taught by nature; this law is not peculiar to the human species, it is common to all animals which are produced on land or sea, and to fowls of the air as well. From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children; we find in fact that animals in general, the very wild beasts, are marked by acquaintance with this law. 4. *Jus gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations;

[1] For *constitit* read *consistit*.

2 POMPONIUS (*Enchiridion*) take, for example, religion as observed towards God; or the duty of submission to parents and country;

3 FLORENTINUS (*Institutes* 1) or the right of repelling violence and wrong; it is in fact by virtue of this law that whatever a man does in defence of his own person he is held to do lawfully; and Nature having made us in a certain sense akin to one another, it follows that it is a monstrous thing for one man to lie in wait for another.

4 ULPIANUS (*Institutes* 1) Manumissions also are comprised in the *jus gentium*. Manumission is the same as dismissal from *manus* (hand), in short the giving of liberty; as long as a man is in a state of slavery he is subject to *manus* and *potestas* (control), by manumission he is freed from control. All this had its origin in the *jus gentium*, seeing that by natural law all were born free, and manumission was not known, because slavery itself was unknown; but when slavery came in through the *jus gentium*, there followed the relief given by manumission; and whereas people were once simply called by the one natural name of 'man,' by the *jus gentium* there came to be three divisions, first freemen, then, as contradistinguished from them, slaves, and then, in the third place, freedmen, that is persons who had ceased to be slaves.

5 HERMOGENIANUS (*Epitomes of law* 1) It was by this same *jus gentium* that war was introduced, nations were distinguished, kingdoms were established, rights of ownership were ascertained, boundaries were set to domains, buildings were erected, mutual traffic, purchase and sale, letting and hiring and obligations in general were set on foot, with the exception of a few of these last which were introduced by the civil law.

6 ULPIANUS (*Institutes* 1) The civil law is something which on the one hand is not altogether independent of natural law or *jus gentium*, and on the other is not in every respect subordinate to it; so that when we make addition to or deduction from universal law (*jus commune*), we establish a law of our own, that is, civil law. 1. Now this law of ours is either ascertained by writing or without writing; as the Greeks say, *τῶν νόμων οἱ μὲν ἄγγραφοι οἱ δὲ ἄγραφοι*—(of laws some are in writing and some are not in writing).

7 PAPINIANUS (*Definitions* 2) The civil law is the law which is derived from statutes, plebiscites, decrees of the senate, enactments of the emperors, or the authority of those learned in the law. 1. Prætorian law is that which was introduced by the prætors in

order to aid, supplement, or amend the civil law, with a view to the public advantage. The same is also called 'honorary law,' after the *honor* (public office) of the prætors.

8 MARCIANUS (*Institutes* 1) In fact honorary law itself is the living voice of the civil law.

9 GAIUS (*Institutes* 1) All nations which are governed by statutes and customs make use partly of law which is peculiar to the respective nations, and partly of such as is common to all mankind. Whatever law any nation has established for itself is peculiar to the particular state (*civitas*), and is called civil law, as being the peculiar law of that state, but law which natural reason has laid down for mankind in general is maintained equally by all men, and is called *jus gentium*, as being the law which all nations use.

10 ULPIANUS (*Rules* 1) Justice is a constant, unfailing disposition to give every one his legal due. 1. The principles of law are these: Live uprightly, injure no man, give every man his due. 2. To be learned in the law (*jurisprudentia*) is to be acquainted with divine and human things, to know what is just and what is unjust.

11 PAULUS (*on Sabinus* 14) The word *jus* is used in a number of different senses: in the first place, in that in which the name is applied to that which is under all circumstances fair and right, as in the case of natural law; secondly, where the word signifies that which is available for the benefit of all or most persons in any particular state, as in the case of the expression civil law. With equal correctness the term *jus* is applied in our state to honorary law. We may add that the prætor is said to administer the law even when he gives an unjust judgment, the word referring not to what the prætor did in the particular case, but to what it is his business to do. The term *jus* is applied in another sense to the place in which law is administered, the name being transferred from the thing done to the place where it is done. What place that is may be stated as follows: whatever place the prætor fixes upon in which to dispense justice, so as he maintain unimpaired the dignity of his own authority and the customs of our forefathers, that place is properly termed *jus*.

12 MARCIANUS (*Institutes* 1) We sometimes apply the word *jus* to the tie of a personal connexion, for example a man may say 'I have a *jus cognationis* or *affinitatis*' (I am connected by blood or marriage) with such a one.

II.

On the Origin of Law and of the different Magistracies, as well as the succession of those learned in the Law.

1 1. Gaius (*on the Law of the Twelve Tables* 1) Having undertaken to give an exposition of ancient statutes, I have as a matter of course thought it right to go back for my account of the law of the Roman people[1] to the foundation of the city; not that I have any desire to write unduly verbose commentaries, but because I observe that in all subjects a thing is only perfect when it is complete in all its parts, and undoubtedly the most essential part of anything is its beginning. Besides this, if with men who are arguing cases in the *forum* it is, so to speak, a monstrous thing to set the matter forth to the judge, without first making some introductory statement; how much more unsuitable must it be for one who has undertaken to give an exposition to disregard the beginning and omit reference to historical causes, and so to take up at once with unwashed hands, if I may use the expression, the subject-matter which has to be expounded? The fact is, so it strikes me, that some introduction such as I have mentioned makes people more willing to approach the study of the matter in hand, and, when they have got so far, causes the subject itself to be more easily comprehended.

2 Pomponius (*Enchiridion*) Accordingly it seems requisite to set forth the origin and development of law itself. 1. Now at the time of the origin of our state the citizens at large (*populus*) undertook at first to proceed without fixed statutes or any fixed law at all, and everything was regulated by the direct control of the kings. 2. After that, the state being more or less enlarged, the tradition is that Romulus himself divided the body of the citizens into thirty parts, which parts he called *curiae*, for the reason that he exercised his care (*cura*) of the commonwealth in accordance with the opinions of the parts referred to. Accordingly he himself proposed to the people certain curiate statutes, and the kings that succeeded him did the same thing; all which statutes exist in writing in the book of Sextus Papirius, who was

[1] For *prius* read PRius (*populi Romani ius*). M.

contemporary with Superbus the son of Demaratus of Corinth, and was one of the leading men. That book, as above mentioned (*sic*), is called the Papirian civil law; not that Papirius inserted anything in it of his own composition, but because statutes which had been passed in an unsystematic way were (therein) reduced by him to a single body of law. 3. The kings being subsequently expelled by a tribunician statute, the above statutes all went out of use, and the Roman people came once more to live by loosely ascertained law or by mere custom rather than by any formal statute, to which condition it submitted for about twenty years. 4. Afterwards, in order to put an end to this state of things, it was determined that ten men should be appointed by the authority of the state through whom application should be made for statutes to Greek cities, and the Roman state should be put on a statutable foundation. The laws so obtained they wrote on ivory tablets, and set them up before the *rostra*, to the end that they might be the more clearly perceptible, and supreme authority in the state was given for that year to the officers mentioned, their duty being to amend the statutes, where necessary, and also to expound their meaning, and there was to be no appeal from their decisions as there was from those of magistrates in general. They, however, themselves took note of certain deficiencies in the original statutes just referred to, and, accordingly, in the course of the ensuing year they added two more tables to those already existing; hence the statutes taken all together were called the statutes of the Twelve Tables. It has been stated by some writers that the passing of these laws was suggested to the Tenmen by one Hermodorus, an Ephesian, who was living as an exile in Italy. 5. These statutes being enacted, it thereupon followed that discussion in the *forum* (*disputatio fori*) became a necessity, as in fact it naturally must be the case that correct interpretation requires the guidance of those learned in the law. [The results of] such discussion, and the rules of that particular law which is composed by the learned and established without the use of writing, are not called by any special *name*[1] like the other parts of the law which have their respective designations; they are both comprised under the general appellation of civil law. 6. After this there were at about the same time various forms of actions devised, founded on the above statutes, by which people in general might carry on litigation; and in order to prevent the citizens from bringing their actions in any way they pleased,

[1] *parte* must be a slip of the pen. We are obliged to read *appellatione*. v. M.
[2] *datis propriis nominibus ceteris partibus* del. Hal.

the Tenmen required that they should be in set and solemn form. This branch of the law is called that of statute-actions (*legis actiones*), in other words, statutable actions (*legitimæ actiones*). Accordingly, these three branches of law arose at about the same time, that is to say, the statute of the Twelve Tables was first passed[1], these tables gave rise to the civil law, and in accordance with the same were devised the statute-actions. But, in connexion with all these statutes, the knowledge of the way to interpret them and the conduct of actions founded upon them was left to the College of Pontifices, and it was laid down by order which of these should superintend private causes every year; and the people continued to conform to this usage for about a hundred years. 7. Afterwards, Appius Claudius having propounded and reduced to form the actions above mentioned, Gnæus Flavius, his secretary, the son of a freedman, purloined the book and put it in the hands of the people at large, at which service the people were so much gratified that he was made a tribune of the *plebs* as well as a senator and a curule ædile. The book itself, which contains the forms of action, is called the Flavian civil law, on the same principle as that on which a book already mentioned is called the Papirian civil law, for Gn. Flavius, like Papirius, inserted nothing in the book of his own composition. As the Roman state increased, certain kinds of application not being available, after no long time Sextus Ælius composed additional forms and presented to the people the book which is known as the Ælian civil law. 8. Hereupon, there being in public use the statute of the Twelve Tables and the civil law, and also the statute-actions, it came to pass that discord arose between the *plebs* and the fathers, whereupon the former seceded and established laws for itself, which laws are called plebiscites. Soon after, on the *plebs* being induced to return, a great deal of disagreement arose in connexion with these plebiscites, in consequence of which it was enacted by the *lex Hortensia* that they should be observed as if they were regular statutes. The result of this was that the difference between a plebiscite and a statute consisted thereafter in the formal method of enactment, but the force of the two was the same. 9. Next, seeing that the *plebs* found in course of time that it was difficult for them to meet together, and the general body of the citizens no doubt found it much more difficult still, considering the vast increase of their numbers, the very necessity of the case caused the administration of the commonwealth to be put in the hands of the senate; hence

[1] Insert *latagua* before *lege*. M.

that body came to take a new part in the management of affairs, and whatever it enacted was observed as law, the enactment being called a *senatus-consultum*. 10. At this time, besides the above, there were magistrates who administered justice, and in order that the citizens might be aware what kind of pronouncement the officer would make in any given case and take their measures accordingly, the magistrates published edicts. The edicts of the prætor constituted the honorary law, the name honorary being derived from the public office (*honos*) of the prætor. 11. Lastly, in accordance with the growing uniformity in the methods of creating law which [the state] was found to have already adopted bit by bit, as the occasion required, it came to be a matter of necessity that the business of providing for the public welfare should be in the hands of one man, as it was impossible for the senate to carry on with the same diligence every department of the administration; accordingly a head of the state was established, and he was entrusted with power to the effect that whatever he laid down should be held valid. 12. Hence in our state [the sources of law are as follows:—] a rule may depend on law properly so called, that is, on a statute; or there is the special and particular civil law which is established without writing by mere interpretation on the part of the learned; again, there are the statute-actions, which give the proper formalities to be used in pleading, or there may be a *plebiscitum*, which is enacted without the authority of the fathers; furthermore there are the edicts of the magistrates, from which is derived the honorary law, or there is a *senatus-consultum* which takes its force simply from the fact of being enacted by the senate, though there is no statute strictly so called; or, [lastly,] there is an imperial ordinance, the law being that whatever is enacted by the Emperor himself must be observed as if it were a regular statute.

13. Now that we are acquainted with the origin and progress of the law, the next thing is to note the titles of the various magistrates and the origins of their respective offices, since, as we have already shown, it is through those who preside at the administration of justice that practical results are secured. What advantage is there in the existence of law in the state, if there are no officers to conduct its administration? After that we will treat of the succession of learned authorities, as there can be no consistent body of law at all, unless there are persons acquainted with the law by whom it can from day to day be advanced and improved. 14. With regard to magistrates, there is no doubt

that in the earliest times of the Roman state all power was in the hands of the kings. 15. It is clear that there was also in those days a *tribunus celerum*; he was the officer who was at the head of the horsemen, and he may be said to have occupied the first place next after the king; such an officer was Junius Brutus, who took the lead in the matter of expulsion of the king. 16. After the kings were expelled, two consuls were established, and it was provided by statute that they should exercise supreme authority; their name was derived from the fact that they above all others 'consulted' the interest of the commonwealth. Lest however they should lay claim in all respects to the power that had been wielded by the kings, a statute was passed which provided that there should be an appeal from their decisions, and that they should not be able to inflict capital punishment on a Roman citizen without the order of the people: all that was left them was the power of summary coercion (*ut coercere possent*), and of ordering persons to be imprisoned in the name of the state. 17. After this, as the business of conducting the census required a longer time, and the consuls were not equal to this in addition to their other duties, censors were appointed. 18. Then, as the nation increased in numbers and frequent wars arose, including some of considerable severity waged against Rome by bordering tribes, it was sometimes resolved, when the case required it, that a magistrate should be appointed endowed with exceptional powers; accordingly dictators were instituted, from whom there was no appeal, and who even had conferred upon them the right of inflicting capital punishment. But it was not held right that such a magistrate, wielding as he did supreme power, should be retained in office for more than six months. 19. The dictators were required to have *magistri equitum* (masters of the horsemen) just as the kings were to have *tribuni celerum* (officers of cavalry); the office was very much the same as the present office of *praefectus praetorio*, still the holders were considered statutable magistrates. 20. About the same time the *plebs*, which had seceded from the *patres* some sixteen years after the expulsion of the kings, created tribunes for themselves on the Sacred Mount by way of plebeian magistrates. They were called tribunes because at one time the whole body of the citizens was divided into three parts, and one tribune was created from each part; or because they were created by the votes of the tribes. 21. Moreover, in order that there should be officers to superintend the temples, in which the *plebs* used to deposit all their enactments, two

members of the *plebs* were appointed who were called ædiles. 22. Afterwards, when the national finance had come to be on a larger scale, in order to provide officers to preside over it, quæstors were appointed to superintend money matters, so called because they were created for the purpose of inquiring into [the state of the treasury] and guarding the money. 23. And whereas, as has been mentioned, the consuls were not permitted by law to hold a court for trying a Roman citizen in a capital case without the leave of the people, for this reason quæstors were appointed by the people to preside in capital causes; they were called *quæstores parricidii*; these are in fact mentioned in the statute of the Twelve Tables. 24. It being also resolved that a body of statutes should be passed, it was proposed to the people that all the magistrates should go out of office in order that Tenmen [should be created for the purpose of drawing up statutes. Accordingly the Tenmen[1]] were appointed for one year; but whereas they contrived to prolong their office, and were guilty of oppressive practices, and declined, when the time came, to appoint their successors in office, their object being that they themselves and their faction should keep the government in their own hands without interruption, they brought matters to such a pass by their harsh and tyrannical domination that the army deserted the state. The author of the secession is said to have been a certain Verginius, who found that Appius Claudius, contrary to the rule which he had himself taken from the old law and inserted in the Twelve Tables, had refused to give him the interim custody of his own daughter [pending the trial of the question of her status] and had granted it to a man who had been set on by the judge himself to claim her as his slave; so that, carried away by his desire for the girl, he, the judge, had upset all rules of right and wrong. Verginius, finding this, so it was said, and indignant at such a departure, in the case of his own daughter, from a very long-established rule of law (the fact being that Brutus, the earliest consul at Rome, had allowed interim liberty in the case of Vindex, the slave of the Vitellii, whose information had brought to light a treasonable conspiracy), Verginius, I say, who deemed[2] the honour of his daughter more precious than even her life, snatched a knife from the shop of a butcher and killed her with it, his object being that the girl's death should preserve her from the dishonour of suffering foul outrage, and thereupon, fresh from the deed, before his daughter's blood was dry, he took

[1] The portion in brackets was probably omitted by mistake. *v.* M.

[2] Read *putans* for *putaret*. M.

refuge with the ranks of his fellow-soldiers. The legions were at that time at Algidum, on a military expedition, but the whole army at once abandoned their actual leaders and carried the standards to the Aventine mount, soon after which the *plebs* of the city betook themselves in a body to the same spot, and by the common consent of the citizens [the Tenmen] were [some of them driven into exile and[1]] some put to death in prison; whereupon the commonwealth returned once more to its previous condition. 25. Next, several years having elapsed after the passing of the Twelve Tables, a contest arose between the *plebs*[2] and the *patres*, the former desiring that the consuls should be chosen[3] out of their own body as well as from the *patres*, to which the latter refused to consent; whereupon it was resolved that military tribunes should be created with consular power, being taken partly from the *plebs* and partly from the *patres*. The number of these officers varied from time to time, sometimes there were twenty, sometimes more, occasionally not so many. 26. Afterwards, it having been resolved that the consuls might be taken from the *plebs* itself, they came to be appointed from both bodies; whereupon, by way of allowing the *patres* some kind of precedence[4], it was resolved that two officers should be appointed from their number [to superintend the games[5]], and this was the origin of the curule ædiles. 27. Again, as the consuls were called away by wars on the border, and there was thus no one left to administer justice at home, it came to pass that in addition to them a prætor was created who was called the *prætor urbanus*, because he administered justice in the city. 28. Some years after this, as this prætor was not equal to the discharge of his duties, in consequence of the excessive crowding of actual foreigners into the city, another prætor was created in addition, called the *prætor peregrinus*, because his chief duty was to administer justice to the *peregrini* (foreigners). 29. Again, it was necessary that there should be some magistrate to preside[6] at the court of the *hasta*; accordingly the 'Tenmen for[7] determining causes' were appointed. 30. About the same time were also appointed the 'Fourmen to take charge of highways' and the 'Threemen of the Mint' who melted bronze, silver, and gold; also the 'Threemen for capital cases' who were to have the

[1] Words in brackets probably omitted by mistake. M.
[2] Read *cum post aliquos annos quam duodecim tabulæ latæ sunt plebs.* M.
[3] Read *creari* for *creare.* M.
[4] Read *plus juris* for *pluris.* M.
[5] M.
[6] Read *præesset* for *præessent.* M.
[7] Del. *in.* Hul.

care of the prison, so that, when punishment was to be inflicted, it might be done by their agency. 31. And as it was unsuitable for the magistrates to be engaged in public affairs in the evening, there were appointed the Fivemen for the hither side and the other side of the Tiber who might act in the place of the magistrates. 32. After this, Sardinia being annexed, then Sicily, also Spain, and next the province of Narbo, so many additional prætors were appointed, corresponding to the number of provinces which had come under the Roman sway, some of which prætors had to superintend home, and some provincial affairs. Later on, Cornelius Sylla instituted State inquisitions (*quæstiones publicæ*), for example, for forgery (*de falso*), for parricide, for stabbers; and he also created four additional prætors. Next Gaius Julius Cæsar appointed two prætors and two ædiles to preside over the distribution of corn, who[1] were to be called Cereal, from the goddess Ceres. Thus there were created twelve prætors and six ædiles. After this the Divine Augustus appointed sixteen prætors. Then the Divine Claudius added two more prætors to hold courts on questions of testamentary trusts (*de fideicommisso*), but one of the two was suppressed by the Divine Titus; and the Divine Nerva added a judge who should adjudicate on cases between the fiscus and private persons. This makes the number of persons who administer justice in the state eighteen. 33. All the above holds good as long as the magistrates are at home; but whenever they leave the city, one is left to administer justice who is entitled *præfectus urbi*. He used at one time to be appointed when the others took their departure[2], afterwards he may be said to have been regularly instituted on account of the Latin festivals, and the appointment is made every year. The fact is that the prefect of the corn supply and the prefect of the watch (*præfectus annonæ* and *præfectus vigilum*) are not magistrates, they are extraordinary officers appointed in the interest of the public. At the same time the Cistiberes above referred to (tribunes for the hither side of the Tiber) were by a decree of the senate afterwards made ædiles. 34. On the whole then, as it appears by the above, there were ten tribunes of the *plebs*, two consuls, eighteen prætors and six ædiles exercising jurisdiction in the city.

35. The knowledge of civil law has been professed by a great number of distinguished men; we will at present mention such of them as held the first rank in the estimation of the Roman people, so as to set forth the names and characters of those who originated

[1] Read *et dicerentur*. Cf. M. [2] Read *profectis iis* for *præfectus*. Cf. M.

and handed down our rules of law. Of all those who acquired systematic knowledge, no one, so the tradition is, made a public profession of it before Tiberius Coruncanius; all those who preceded him either desired to keep the civil law in the background, or else[1] were in the habit of bestowing their time on such as consulted them, rather than putting themselves at the disposal of persons who wished for systematic instruction. 36. One lawyer of pre-eminent learning was Publius Papirius, who drew up a consolidated version of the Royal statutes (*leges regiae*). After him came Appius Claudius, one of the Tenmen, who had the chief voice in the composition of the Twelve Tables. After him another Appius Claudius of the same family possessed the greatest knowledge of the law; he was called the hundred-handed, he laid down the Appian road, he made the aqueduct for the Claudian water, he voted that Pyrrhus should not be admitted into the city; and he it was, according to tradition, who first wrote forms of action for cases of interruption to possession, but his book is not extant. The same Appius Claudius devised the letter *R*, a consequence of which seems to have been that Valesii was turned into Valerii and Fusii into Furii[2]. 37. A man of very great learning after these was Sempronius, whom the Roman citizens called *σοφὸν* (the wise), and no one else either before or after him received that surname. [Then there was] Gaius Scipio Nasica, who was called by the senate 'the Best'; in addition to which he was presented by the state with a house in the Via Sacra, so as to make it more easy to consult him. Next came Quintus Mucius; he was once sent as envoy to Carthage, where, two dice being laid before him, one for 'peace' and the other for 'war,' he was given the choice between them and requested to take back to Rome whichever he preferred; whereupon he took up both, saying that the proper course was for the Carthaginians to ask for whichever of the two they would rather receive. 38. The above were succeeded by Tiberius Coruncanius, who, as already mentioned, was the first public professor of law; there is however no written work of his to be met with, though his formal opinions were numerous and noteworthy. After him Sextus Aelius and his brother Publius Aelius and also Publius Atilius displayed very great learning as public teachers, so much so that the two Aelii were in fact made consuls, and Atilius was the first person

[1] Perhaps read *vel solebant* for *solumque*. *v.* M.

[2] Read *idem A. C. R literam invenit ridetarque ab hoc proceusine ut* etc. for *idem A. C. qui ridetur ab hoc proceusine R literam invenit ut* etc., which is absurd. (Muret.)

to whom the people gave the title of Sapiens. Indeed Sextus Ælius is mentioned by Ennius, and there exists a book of his bearing the title *Tripertita*, containing a sort of cradle of the law; it is called *Tripertita* because in it we have first the statute of the Twelve Tables, this is followed by an exposition, and lastly the work concludes with the statute-actions. There are three other books which are said to be by the same author, though some persons maintain that this is not the case; these latter have been to some extent followed by Cato. We next have Marcus Cato, the head of the Porcian family, and some books are extant written by him; but there are a great many by his son, and it is on these last that the subsequent works are founded. 39. After these were Publius Mucius and Brutus and Manilius, who were the founders of the civil law. Of these P. Mucius left as many as ten treatises, Brutus seven, Manilius three; and written rolls of Manilius are preserved[1]. The two former were of consular rank, Brutus had been prætor, P. Mucius had been even Pontifex Maximus. 40. Pupils of these were Publius Rutilius Rufus, who was consul at Rome and proconsul of Asia, Paulus Verginius and Quintus Tubero, the well-known Stoic, who studied under Pansa and was himself consul. Sextus Pompeius, the paternal uncle of Gnæus Pompeius, lived at the same time, and so did Cælius Antipater, an author of historical works, but a man who bestowed more pains on the art of public speaking than on legal learning; there was also Lucius Crassus, brother to Publius Mucius, who was called Munianus, this last is said by Cicero to have been the best speaker of all jurisconsults. 41. After these Quintus Mucius, the Pontifex Maximus, son of Publius, was the first who made a digest of the civil law, which he arranged under heads in eighteen books. 42. Mucius had a great number of pupils, but those of most authority were Aquilius Gallus, Balbus Lucilius, Sextus Papirius, and Gaius Juventius; of these Gallus is reported by Servius to have had most authority with the people at large. They are however all cited by Servius Sulpicius; but no original works of these men are extant of such a character as to be in general demand; indeed their writings are not in frequent and general use at all, though Servius[2] constantly made use of them in compiling his own books, and it is owing to his writings that they themselves are held in remembrance. 43. Servius Sulpicius, at a time when he occupied the chief place as a pleader of causes, or, at any rate, the next after Marcus Tullius [Cicero], is said to have gone to Quintus

[1] Del. *monumenta*. M.

[2] After *Servius* insert *iis*.

Mucius for his advice about an affair in which a friend of his was concerned, and to have very imperfectly understood an answer which Mucius gave him[1] on a point of law. Hereupon, as the story is, he asked the question again, and received an answer from Mucius, which he still failed to comprehend, which drew upon him a severe reproach from Mucius; it was disgraceful, he said, that a patrician, a member of a family of distinction and a pleader of causes, should be unacquainted with the law in which his business lay. Stung with this taunt, so to call it, Servius took pains to learn the civil law, and received a great deal of instruction from teachers above mentioned; he was taught by Balbus Lucilius, and helped on his way a great deal by Gallus Aquilius who lived at Cercina; hence it comes that a great many works of his now extant were composed at that place. Servius died in the course of serving as a legate, whereupon the Roman people erected a statue to him before the *rostra*, which is to be seen at this day in front of the *rostra* of Augustus. A number of rolls of his works are in existence; he left behind him nearly a hundred and eighty books. 44. Many lawyers derived instruction from him, among whom the following were the chief writers: Alfenus Varus [Gaius[2]], Aulus Ofilius, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius Labeo [Antistius], the father of Labeo Antistius, Cinna, Publicius Gellius. Of these ten, eight wrote books, the matter of the whole of whose existing works was arranged by Aufidius Namusa in a hundred and forty books. Among the above-mentioned pupils [of Servius] those of greatest authority were Alfenus Varus and Aulus Ofilius; Varus attained the consulship, Ofilius always kept his equestrian rank. He was on very intimate terms with the Emperor, and he left a large number of books on civil law which were intended to serve as a groundwork in every part of the subject. He was[3] the first author to write about the statutes relating to the five per cent. duty; he was also the first to make a careful arrangement of the matter of the praetor's edict so far as it bore on *jurisdictio*; though before him Servius left two very short books addressed to Brutus bearing the title *On the Edict*. 45. An author of the same day was Trebatius, he was a pupil of Cornelius Maximus; there was also Aulus Cascellius, a pupil of Quintus Mucius Volusius[4], in fact in honour of his instructor,

[1] Read *respondentem* for *respondisse*. *v.* M.

[2] The names in brackets may perhaps be omitted, *v.* M.

[3] Read *conscripsit* for *conscribit*.

[4] I read *Quinti Muci* for *Quintus Mucius*, but the text is hopeless.

he made Mucius's grandson Publius Mucius his heir. He was a man of quæstorian rank, and he did not care to rise higher, though Augustus himself offered him the consulship. Among the three last-named, Trebatius, it is said, had more practical acquaintance with law than Cascellius, but Cascellius surpassed Trebatius in eloquence, while Ofilius excelled both in learning. No works of Cascellius remain, except a single book of "good sayings." There are a good many books of Trebatius, but they are not much used. 46. After these came Q.[1] Tubero, who studied under Ofilius; he was a patrician, and he gave up the business of a pleader for the study of the civil law, his chief reason for this being that he had prosecuted Quintus Ligarius before Gaius Cæsar without success. Quintus Ligarius was the man who, being in command on the African coast, refused to allow Tubero to land when he was ill, or to take water, on which Tubero prosecuted him, and Ligarius was defended by Cicero; Cicero's oration is preserved, and may fairly be called a very fine one; it is entitled *Defence of Quintus Ligarius*. Tubero was accounted most learned in public and private law, and he left a great many books on both subjects, but he affected antique language in his writing, and for that reason his books are not popular. 47. After him very great authority was allowed to Ateius Capito, who followed Ofilius, and Antistius Labeo, who studied under all the above (*sic*); though he was especially instructed by Trebatius. Of these two, one, Ateius, was consul; Labeo, when the same office was offered him by Augustus, the holding of which would have made him *interim* consul (*consul suffectus*), declined to accept it, but he bestowed great pains on legal studies. In the prosecution of these he divided the year into two parts, so as to pass six months at Rome with his pupils, and for the remaining six months to be absent and give himself up to writing books. In the end he left four hundred volumes, many of which are in constant use. These two men may be said to have founded two schools respectively; Ateius Capito adhered to the doctrines which had reached him by tradition; Labeo, who was gifted with original ability and relied on his own learning, having given attention to many other branches of knowledge, undertook to make a good many innovations. 48. In connexion with this distinction, Ateius Capito was succeeded by Massurius Sabinus, and Labeo by Nerva; these two in fact widened the difference between the two schools above mentioned. Nerva was on very intimate terms with the Emperor. Massurius Sabinus was a member of the equestrian order, and was

[1] Read *Q.* for *quoque*. Cf. M

the first to give opinions in the public interest (*publice*); †the fact being that after this privilege had come to be given, it was allowed to him by Tiberius Cæsar†.[1] 49. It may be observed in passing that before the days of Augustus the right of delivering opinions in the public interest was not granted by the head of the state, but any persons who felt confidence in their own learning gave answers to such as consulted them; moreover they did not always give their answers under seal; they very often wrote to the judge themselves, or called upon those who consulted them to testify to the opinions they gave. The Divine Augustus was the first to lay down, in order to ensure greater authority to the law, that the jurisconsult might deliver his answer in pursuance of an authorization given by himself; and from that time such an authorization was asked for as a favour. It was in consequence of this that our excellent Emperor Hadrian, on receiving a request from some lawyers of prætorian rank for leave to give legal opinions, answered the applicants that this privilege was not usually asked for but granted [*or* that there was no leave asked for this practice, it was simply carried out], consequently, if any one were confident of his powers, he (the Emperor) would be much pleased to find that[2] he took steps to qualify himself for delivering opinions to the citizens. 50. Accordingly leave was given to Sabinus by Tiberius Cæsar to deliver opinions to the citizens. Sabinus himself was admitted into the equestrian order at an advanced time of life, in fact at about the age of fifty. He was not a man of ample means, but he was maintained to a great extent by his pupils. 51. Sabinus was succeeded by Gaius Cassius Longinus, the son of a daughter of Tubero's, who herself was grand-daughter to Servius Sulpicius: whence Cassius speaks of Servius Sulpicius as his great-grandfather. Cassius was consul along with Quartinus in the time of Tiberius; he possessed very great influence in the state down to the time when the Emperor expelled him. 52. He was banished to Sardinia, but he lived to be recalled by Vespasian. Nerva was succeeded by Proculus. There lived at the same time another Nerva, the son; there was also another Longinus, who belonged to the equestrian order; he afterwards attained to the office of prætor. Proculus however had the greater authority, in fact he had very great influence. The members of the two schools were called respectively Cassians and Proculians, the distinction between the schools having taken its start from Capito and Labeo. 53. Cassius was succeeded

[1] I have put *nam postaquam* for *posteaquo*: *tandem* for *tamen*. Cf. M.: reading very doubtful.

[2] *si* inser. after *se*. Cf. M.

by Cælius Sabinus, who had very great influence in the days of Vespasian; Proculus by Pegasus, who was at the same period Prefect of the city; Cælius Sabinus by Priscus Javolenus; Pegasus by Celsus; Celsus the father by Celsus the son and Priscus Neratius; both the last mentioned were consuls, Celsus indeed was twice consul; Javolenus Priscus was followed by Aburnius Valens and Tuscianus, also by Salvius Julianus.

III.

On Statutes, Decrees of the Senate, and Long Usage.

1 Papinianus (*Definitions* 1) A statute (*lex*) is a command of general application, a resolution on the part of learned men, a restraint of offences, committed either voluntarily or in ignorance, a general covenant on the part of the state.

2 Marcianus (*Institutes* 1) The orator Demosthenes himself gives this definition: 'A law (*νόμος*) is the following:—something which all men ought to obey for many reasons, and chiefly because every law is devised and given by God, but resolved on by intelligent men, a means of correcting offences both intentional and unintentional, a general agreement on the part of the community by which all those living therein ought to order their lives. We may add that Chrysippus the philosopher, a man who professed the highest wisdom of the Stoics, begins his book called *περὶ νόμου* (on law) as follows:—"Law is the king of all things, both divine and human, it ought to be the controller, ruler and commander of both the good and the bad, and thus to be a standard as to things just and unjust and" [director of] "beings political by nature, enjoining what ought to be done and forbidding what ought not to be done."

3 Pomponius (*on Sabinus* 25) Laws ought to be laid down, as Theophrastus said, in respect of things which happen for the most part, not which happen against reasonable expectation.

4 Celsus (*Digest* 5) Rules of law are not founded on possibilities which may chance to come to pass on some one occasion,

5 The same (*Digest* 17) since law ought to be framed to meet cases which occur frequently and easily, rather than such as very seldom happen.

6 Paulus (*on Plautius* 17) What occurs once or twice, as Theophrastus says, lawgivers pass by.

MODESTINUS (*Rules* 1) The use of a statute is as follows: to command, to prohibit, to permit, to punish.

ULPIANUS (*on Sabinus* 3) Rules of law are not laid down with respect to particular individuals, but for general application.

THE SAME (*on the Edict* 16) Nobody questions that the senate can make law.

JULIANUS (*Digest* 59) Neither statutes nor decrees of the senate can possibly be drawn in such terms as to comprehend every case which will ever arise; it is enough if they embrace such as occur very often.

THE SAME (*ibid.* 90) Consequently, when a rule is laid down in the first instance, a more precise provision has to be made, either by interpretation or else by direct legislation on the part of the most excellent Emperor.

THE SAME (*ibid.* 15) It is impossible for every point to be expressly comprehended in statutes or senatorial decrees; still if, in any case that arises, the meaning of the enactment is clear, the presiding magistrate ought to extend the rule to analogous cases to the one expressed and lay down the law accordingly.

ULPIANUS (*on the Edict of the Curule Ædiles* 1) For, as Pedius says, whenever this or that is provided by statute, there is a fair opening for any further rule which involves the same beneficial principle being supplied, either by interpreting the statute in that sense or, at any rate, by the ruling of the presiding magistrate (*jurisdictio*).

PAULUS (*on the Edict* 54) But where a rule has obtained force which is against legal principle, no analogous extension thereof should be made.

JULIANUS (*Digest* 27) In cases where anything has been laid down which is against legal principle, we cannot follow the rule of law [so laid down].

PAULUS (*Special law*) Special law (*jus singulare*) is law which contradicts the ordinary course of legal principle, but has been introduced for the sake of some particular beneficial operation in virtue of the authority of those who laid it down.

CELSUS (*Digest* 26) To know the statutes does not mean to have got hold of the actual words, but to be acquainted with their sense and application.

18 THE SAME (*ibid.* 29) Statutes ought to be interpreted indulgently, so as to preserve the intention.

19 THE SAME (*ibid.* 33) Where a word in a statute is obscure, the meaning which ought rather to be adopted is the one which involves no absurdity, especially considering that it is possible by applying that principle to arrive at the intention of the statute.

20 JULIANUS (*Digest* 55) It is impossible to assign the principle of every rule of law laid down by our forefathers;

21 NERATIUS (*Parchments* 6) consequently the reasons for the law laid down ought not to be inquired into; or else a great many rules already established will be upset.

22 ULPIANUS (*on the Edict* 35) Where a statute gives an exemption in respect of what is past, it maintains the prohibition for the future.

23 PAULUS (*on Plautius* 4) Where a particular interpretation has always been received, there ought to be no change made.

24 CELSUS (*Digest* 9) It is not like a lawyer to take hold of one particular portion of a statute and found a judgment or opinion upon it without examining the whole statute.

25 MODESTINUS (*Responsa* 8) It is inconsistent with all principles of law and with all rules of indulgent construction founded on justice that where any provision is happily introduced for the benefit of mankind, we should interpret it so harshly as to make it an authority for severe dealing to the prejudice of those for whose sake it was devised.

26 PAULUS (*Questions* 4) There is nothing new in earlier statutes being made use of in interpreting later ones.

27 TERTULLIANUS (*Questions* 1) It being the case that the older statutes are usually made use of for interpreting the newer, it ought always to be understood that it is, so to speak, of the essence of a statute that it should be applicable to any persons or things which may at any time be similar to those specified.

28 PAULUS (*on the lex Julia et Papia* 5) But in like manner the later statutes are relevant for interpreting the earlier, unless they contradict them, as may be shown in a number of cases.

29 THE SAME (*on the lex Cincia*) A man who does what a statute forbids transgresses the statute; a man who contravenes the intention of a statute, without disobeying the actual words, commits a fraud on it.

ULPIANUS (*on the Edict* 4) A fraud is committed on a statute when something is done which the statute desired should not be done, but did not actually forbid; the difference between fraud on the law and transgression of it is the same as that between speech and intention.

THE SAME (*on the lex Julia et Papia* 13) The Emperor is not bound by statutes. The Empress no doubt is bound, at the same time the Emperor generally gives her the same exceptional rights as he enjoys himself.

JULIANUS (*Digest* 84) In any kinds of cases in which there are no written laws the rule which ought to be observed is that which has come to prevail by use and custom; and should there in any case be no such rule assignable, then what comes nearest and answers to one; if even this cannot be found, then we ought to go by the law in use in the city of Rome. 1. Immemorial custom is observed as a statute, not unreasonably; and this is what is called the law established by usage. Indeed, inasmuch as statutes themselves are binding for no other reason than because they are accepted by the judgment of the people, so anything whatever which the people show their approval of, even where there is no written rule, ought properly to be equally binding on all; what difference does it make whether the people declare their will by their votes, or by positive acts and conduct? On this principle it is also admitted law, and very rightly so, that statutes are abrogated not only by the voice of one who moves to repeal them (*suffragio legislatoris*), but also by the fact of their falling out of use by common consent.

ULPIANUS (*on the office of Proconsul* 1) It is the practice for custom of long standing to be observed for law and statute in all such matters as are not regulated by written rules.

THE SAME (*ibid.* 4) Where anyone is found to be confident as to the custom of a city or province, I am of opinion that a question which ought to be asked first of all is this: Has the custom ever been confirmed by a judicial sentence delivered after objections were heard?

HERMOGENIANUS (*Epitomes of law* 1) We may add that rules of law which have the sanction of long-established custom and have been kept up for a great number of years, may be treated as being the subject of a tacit agreement on the part of the citizens in general, and are as fully maintained as those which exist in writing.

36 PAULUS (*on Sabinus* 7) In fact especial weight is allowed to a rule which has met with such approval that it was not necessary to embody it in writing.

37 THE SAME (*Questions* 1) If a question is raised as to the interpretation of a statute, we must first inquire what was the rule of law which the state observed previously in cases of the same kind; custom is the best interpreter of statutes.

38 CALLISTRATUS (*Questions* 1) In fact the reigning Emperor Severus laid down that where doubts occur owing to the wording of a statute, in such a case custom or the authority of constant decisions given to the same kind of effect ought to have the force of a statute.

39 CELSUS (*Digest* 23) When some rule has been introduced which was not arrived at by any legal principle, but was founded on a mistake and subsequently maintained by mere custom, it is not to be applied to similar cases.

40 MODESTINUS (*Rules* 1) Accordingly all rules were either made through agreement or established by necessity or fixed by custom.

41 ULPIANUS (*Institutes* 2) Now all law is concerned with [1]acquisition or preservation or restriction of right, as what is in question is either how a thing becomes a man's property or how a man can preserve some thing or right which he already has, or how he can transfer it to some one else or cease to have it.

IV.

ON IMPERIAL ENACTMENTS.

1 ULPIANUS (*Institutes* 1) What the Emperor has determined has the force of a statute; seeing that, by a *lex regia* which was passed on the subject of his sovereignty, the people transfer to him and confer upon him the whole of their own sovereignty and power. 1. Accordingly whatever the Emperor has laid down by a letter with his signature, or has decreed on judicial investigation, or has pronounced out of court, or enacted by an edict, amounts beyond question to a statute. The above are cases of what are commonly called constitutions. 2. No doubt some of

[1] Read *constatit* for *constitit*.

these are of special application, and are not drawn into a precedent; wherever the Emperor shows indulgence to anyone on the ground of his merits, or imposes a penalty on anyone, or gives him relief in a way not practised theretofore, this applies only to the particular person.

2 ULPIANUS (*Fideicommissa* 4) Where any new ordinance is made, there ought to be a very clear case of beneficial operation to allow of a departure from the law which has been held just for a long time past.

3 JAVOLENUS (*Epistles* 13) An indulgence vouchsafed by the Emperor, which proceeds in fact from his divine clemency, ought to receive the most extensive construction possible.

4 MODESTINUS (*Excuses* 2) Later enactments have more force in law than those which precede them.

V.

ON STATUS.

1 GAIUS (*Institutes* 1) All law in force amongst us deals with either persons, or things, or actions.

2 HERMOGENIANUS (*Epitomes of law* 1). Seeing then that all law has been established for the sake of mankind, we will discuss first personal status, and then the remaining subjects, following the arrangement of the *Edictum perpetuum*, and joining to the above the titles next in order and connected therewith, so far as the nature of the subject allows.

3 GAIUS (*Institutes* 1) Now the main division of the law of persons is this, that all human beings are either free or slaves.

4 FLORENTINUS (*Institutes* 9) Liberty is the natural power of doing what anyone is disposed to do, save so far as a person is prevented by force or by law. 1. Slavery is a creation of the *jus gentium*, by which a man is subjected, contrary to nature, to ownership on the part of another. 2. Slaves are called *servi* because military commanders commonly sell their captives and so *preserve* them instead of killing them; 3. they are called *mancipia*, because they are taken by the hands of their enemies.

5 MARCIANUS (*Institutes* 1) Now all slaves have one and the same legal condition; of free men some are *ingenui*, some are *libertini*. 1. Slaves become subjects of ownership either by the

civil law or by the *jus gentium*; by the civil law, a man over twenty years of age becomes a slave by allowing himself to be sold in order to have a share in the purchase-money; by the *jus gentium*, people own as slaves those who are captured from their enemies or who are born from their female slaves. 2. Persons are *ingenui* who are born of a free mother; it is enough that the mother should be free at the moment when the child is born, though she should have been a slave at the time of conception. Even in the converse case, where she is free at conception, but a slave at the time of the birth, the law is that the child is born free; and it matters not whether the mother conceived in lawful wedlock or in random intercourse; the mother's ill fortune ought not to prejudice the unborn child. 3. Hence arose this question:—if a slavewoman is manumitted, being with child at the time, and after that is reduced to slavery again, or sent into banishment, and then gives birth to a child, is the child free or a slave? However, the view which has found deserved favour is that the child is born free, and that it is sufficient for the unborn child that the mother was free at some time or other during the period of pregnancy.

6 GAIUS (*Institutes* 1) *Libertini* are those who have been manumitted out of lawful slavery.

7 PAULUS (*on the portions allowed to children of condemned persons*). An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth.

8 PAPINIANUS (*Questions* 3) The Emperor Titus Antoninus laid down that the position of children is not prejudiced by the terms of a badly drawn instrument.

9 THE SAME (*ibid.* 31) There are many points in our law in respect of which women are in a worse legal position than men.

10 ULPIANUS (*on Sabinus* 1) The question has been asked:—according to which sex are hermaphrodites to be treated? but I should say on the whole that they ought to be treated as having the sex which predominates in them.

11 PAULUS (*Responsa* 18) Paulus gave the opinion that where a boy was conceived in the lifetime of the father [of his mother], but without such father being aware of the connexion formed by his daughter, then, even though the boy should be born after the death of such grandfather, he is not to be held to be the lawful son of the man who begot him.

THE SAME (*ibid.* 19) It is now generally admitted on the authority of the very learned physician Hippocrates that a completely formed child may be born in seven months (*septimo mense*); it may be therefore held that a boy who is born in lawful marriage in seven months is a lawful son.

HERMOGENIANUS (*Epitomes of law* 1) Where a slave is given up by his owner to the fortune of a trial at law in a capital case, though he should be acquitted, he does not become free.

PAULUS (*Sentences* 4) We cannot apply the word 'children' [*liberi*] to offspring which is born fashioned in some way which is contrary to the normal form of the human species; for instance, where a woman is delivered of something monstrous or portentous. But any offspring which exceeds the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be reckoned among children.

TRYPHONINUS (*Controversies* 10) A testator ordered that Arescusa should be free if she bore three children. On her first delivery she had one child, on her second three children. The question was asked whether any of the children were born free, and, if any, which. [Answer] The condition on which freedom is to turn in this case is one which the woman has to fulfil; but there can be no doubt that the child last born is born free. Nature does not allow that two children should issue from their mother's womb at the same time by one movement, and thus that the order of birth should be uncertain, and it should not be clearly apparent which of two children is born a slave and which free. Accordingly, the condition being fulfilled at the moment when the [last] delivery begins, the result is that the child thereupon born is the child of a free woman; just as if any other condition on which the freedom of the woman was to turn had been fulfilled at the moment when she was delivered; or suppose, for instance, she had been manumitted on condition that she gave ten thousand to the heir of the testator, or to Titius, and at the moment of her delivery she fulfilled the condition by an agent; in that case it would have to be held that she was already a free woman when she gave birth to the child.

ULPIANUS (*Controversies* 6) The same would follow if Arescusa in the case mentioned first bore two, and then brought forth twins: the rule to lay down is that it cannot be said that both the twins are born free, but only that the one born last is free. The truth is it is rather a question of fact than of law.

17 THE SAME (*on the Edict* 22) By an enactment of the Emperor Antoninus all those living in the Roman world were made Roman citizens.

18 THE SAME (*on Sabinus* 27) The Emperor Hadrian laid down in a rescript to Publicius Marcellus that if a free woman were condemned to the extreme penalty, being with child at the time, her child would be born free, and that the custom was to keep the woman until she was delivered of the child. We may add[1] that if a woman, after conceiving in lawful wedlock, is forbidden fire and water, her child is born a Roman citizen and is under the *potestas* of its father.

19 CELSUS (*Digest* 29) When lawful marriage has taken place, the children follow the father; the child of random intercourse follows the mother.

20 ULPIANUS (*on Sabinus* 38) A man who has become a lunatic is held to retain the same status and rank that he had before, as well as any magistracy or authority, just as he retains ownership in his property.

21 MODESTINUS (*Rules* 7) If a free man sells himself for a slave, and is afterwards manumitted, he does not recover his original status which he renounced, but takes the condition of a *libertinus*.

22 THE SAME (*Responsa* 12) Herennius Modestinus laid down that if a slavewoman is delivered of a child at a time when, by the terms of the donation by which she was acquired, she ought to have been manumitted already, then, seeing that the Imperial enactment makes her free at once, her child is freeborn.

23 THE SAME (*Pandects* 1) The expression 'conceived at random' (*vulgo conceptus*) is applied to anyone who cannot point out who is his father, or who can, but his father is one who cannot be his father lawfully. Such a one is called '*spurius*' from σπορά (generation).

24 ULPIANUS (*on Sabinus* 27) This is a rule of nature: whoever is born out of lawful wedlock follows his mother, unless some special statute provides otherwise.

25 THE SAME (*on the lex Julia et Papia* 1) We must take the term 'ingenuus' to include one who is judicially pronounced freeborn, though he should really be a freedman; what is judicially decided is deemed to be the fact.

[1] Read *et* after *sed.* Hal.

3 JULIANUS (*Digest* 69) Unborn children are in almost every branch of the civil law regarded as already existing. They are allowed to take statutable inheritances; and if a woman with child is taken prisoner by the enemy, and a child is born, it comes under the law of *postliminium*, moreover it follows the condition of its father or its mother [as the case may be]; lastly, if a slavewoman who is with child is stolen, then, although she should be delivered when in the hands of a *bona fide* purchaser, the child will be regarded as stolen goods, and consequently ownership in it will not be acquired by *usus*. Again, on the same principle, after the death of a patron, so long as a son of the deceased can possibly be born, a freedman is in the same legal position as one whose patron is living.

7 ULPIANUS (*Opinions* 5). When a man confesses that he is a freedman, his patron cannot give him freeborn status even by adopting him.

VI.

ON PERSONS *sui juris* AND *alieni juris*.

1 GAIUS (*Institutes* 1) We next have another division of the law of persons; some persons are *sui juris*, and some are subject to the legal authority of others. Let us consider the case of persons who are subject to the authority of others; when we see who such persons are, we shall thereby understand who are *sui juris*. Let us then take the case of those who are under the *potestas* of others. 1. Now slaves are under the *potestas* of their owners, and this *potestas* is part of the *jus gentium*, in fact we may observe among all nations alike that slave-owners have the power of life and death over their slaves, and whatever is acquired through the slave is acquired to the owner. 2. At the present day however no persons living under Roman rule are at liberty to deal cruelly with their slaves to an excessive extent or without some ground recognised in the statutes, as, by an enactment of the Divine Antoninus, a man who kills his own slave without due cause is to be just as much punished as one who kills the slave of another. Indeed even excessive harshness on the part of slave-owners is restrained by an enactment of the same Emperor.

2 ULPIANUS (*on the office of Proconsul* 8) If an owner treat his slaves with cruelty or compel them to commit lewdness or submit to indecent outrage, the proper course for the Præses to take may be plainly seen from the rescript of the Divine Pius to Ælius Marcianus, the Proconsul of Bætica. The words of the rescript are as follows: "The power which owners have over their slaves ought not to be interfered with, and no human being ought to be debarred from exercising his legal rights; still it is in the interest of owners themselves that slaves who make just complaint should not be refused aid against violence or starvation or any insufferable wrong. You must therefore listen to the complaint of those slaves of the household of Julius Sabinus who fled for refuge to the statue, and if you find that they have been treated with improper severity or subjected to infamous wrong, order them to be sold on terms which shall secure that they shall not be brought back into the hands of their present owner; and should such owner endeavour to evade my enactment, let him understand that I will visit his behaviour very severely." Moreover the Divine Hadrian relegated one Umbricia, a lady of good social position (*matrona*), for five years, for treating her female slaves with extreme cruelty on very trivial grounds.

3 GAIUS (*Institutes* 1) Again, a man has under his *potestas* any children that he has begotten in lawful wedlock: this rule of law is peculiar to Rŏman citizens.

4 ULPIANUS (*Institutes* 1) A Roman citizen may be a *paterfamilias* or a *filiusfamilias* or a *materfamilias* or a *filiafamilias*. A *paterfamilias* is a man who is in his own *potestas*, whether of mature age or not; a similar definition applies to a *materfamilias*; a *filiusfamilias* or *filiafamilias* is under the *potestas* of some one else. A child who is born from the union of me and my wife is under my *potestas*; and one who is born from the union of my son and his wife, in other words, my grandson or granddaughter, is equally under my *potestas*, so is my great-grandson or great-granddaughter, and so on of more remote descendants.

5 THE SAME (*on Sabinus* 36) Grandsons through a son on the death of the grandfather regularly come under the *potestas* of the son, that is, of their own father: similarly great-grandchildren and remoter descendants either come under the *potestas*[1] of the son, if he is living and has remained in the family, or else under that of

[1] Read *potestatem* for *potestate*. Hal.

some ascendant who preceded *them* in the group subject to *potestas*. This rule applies not only where the children are such by nature but where they are adopted.

THE SAME (*ibid.* 9) The definition of 'son' (*filius*) is 'the male child of a man and his wife.' If however we suppose a case where a husband was absent, let us say, for ten years, and, on coming home, found in his house a child one year old, we agree with the opinion of Julianus that the child is not [to be deemed in law] the son of the husband. Still, according to the same writer, a man is not to be listened to who, after constantly living with his wife, refuses to acknowledge her son, as not being his own. I should say however, and this is the opinion of Scævola, that if it is shown that the husband passed an interval of time without knowledge of his wife, owing to bodily infirmity or any other reason, or a *paterfamilias* was for physical reasons unable to beget children, then a child born in the house, though the fact of birth was known to the neighbours, is not [to be deemed in law] the son of the husband.

THE SAME (*ibid.* 25) There is no doubt that a grandson steps into the place of a son where his [i.e. such grandson's] father is visited with some punishment which causes him to lose his citizenship or become a penal slave.

THE SAME (*ibid.* 26) If the father is a lunatic, his children remain none the less under their father's *potestas*; the same rule applies to any *paterfamilias* who has children under his *potestas*. The right of *potestas* was established by custom, and a man cannot cease to have persons under his *potestas* except by the occurrence of the regular circumstances by which children become free, consequently there can be no admissible doubt that in the above case the children remain subject to *potestas*. Accordingly, he will have in his *potestas* not only those children whom he begot before his lunacy began, but also such, if there be any, as were conceived when he was sane, but were born after he became a lunatic. Indeed if his wife should conceive at a time when he is a lunatic, it is a fair question whether his child will not come under his *potestas* by birth; a lunatic, it is true, cannot contract a marriage, but he can remain a party to a marriage already contracted; and this being the case, [it follows that] his son will be under his *potestas*. Similarly, if the wife is a lunatic, a child which she may have conceived previously will be born in [the husband's] *potestas*; and if it be conceived when she is a lunatic, but the husband is sane, there is no doubt that it will be born

under *potestas*, since the marriage remains good. We may add that if both husband and wife are lunatics, and, that being the case, the wife conceives, the child will be born under the *potestas* of its father, some remnant of intention being assumed to remain in the parties in spite of their lunacy; since the marriage holds good where one party is a lunatic, it will do so equally where both are in that condition. 1. So true is it that a father who is a lunatic retains the right of *potestas*, that in fact the benefit of anything which the son gains is acquired by the father.

9 POMPONIUS (*on Quintus Mucius* 16) A *filiusfamilias* is in matters of public law on the same footing as a *paterfamilias*; so that he is able, for example, to discharge the office of magistrate, or to be appointed a guardian.

10 ULPIANUS (*on the lex Julia et Papia* 4) If the Court should declare that a child is to be reared or maintained, it must be held that inquiry is open on the question of fact whether the child is or is not a lawful son; a decision as to maintenance is not allowed to prejudge the above question of fact.

11 MODESTINUS (*Pandects* 1) Natural or emancipated children cannot be brought under *patria potestas* against their will.

VII.

CONCERNING ADOPTIONS AND EMANCIPATIONS AND OTHER METHODS BY WHICH *potestas* IS DISSOLVED.

1 MODESTINUS (*Rules* 2) The position of *filiusfamilias* is acquired not only by nature but by adoption. 1. The word adoption is a general term, and embraces two kinds of cases, of which one is again called adoption, the other arrogation. Adoption is of a *filiusfamilias*, arrogation of one who is *sui juris*.

2 GAIUS (*Institutes* 1) Now adoption, in the comprehensive sense of the word, is performed in two ways, that is, either by the authority of the Emperor or by the order of a magistrate. By the authority of the Emperor a man adopts such as are *sui juris*; which kind of adoption is called arrogation, because the person adopted is asked, that is, interrogated, whether he desires that the person whom he is intending to adopt should become his lawful son, and the person who is being adopted is asked whether he is willing that this should take place. A man adopts by

order of a magistrate persons who are under the *potestas* of a *paterfamilias*, whether they are issue in the first generation, as sons or daughters, or in a lower generation, as grandsons or granddaughters, great-grandsons or great-granddaughters. 1. One rule applies equally to both kinds of adoption, viz. that men who are incapable of begetting children, such as those who are impotent, are able to adopt. 2. But the following rule applies only to the kind of adoption which requires application to the Emperor, viz. that if a man who has children under his *potestas* allows himself to be arrogated, not only is he brought under the *potestas* of the arrogator himself, but his children too come under the *potestas* of the same person, so as to be, as it were, that person's grandchildren.

3 PAULUS (*on Sabinus* 4) Where a consul or the governor of a province is a *filiusfamilias*, it is recognised law that he can be emancipated or given in adoption in his own court.

4 MODESTINUS (*Rules* 2) It is held by Neratius that any magistrate who can take *legis actiones* can emancipate his children or give them in adoption in his own court.

5 CELSUS (*Digest* 28) In case of adoption it is only persons who are *sui juris* whose consent is asked; but where children are given in adoption by their father, the will of both parties has to be considered, [which may be made known] by express consent or by the fact of no objection being made.

6 PAULUS (*on the Edict* 35) When anyone is adopted for grandson as through a particular son, the son's own consent is required; this is said by Julianus himself.

7 CELSUS (*Digest* 39) There is no need, in case of an adoption, for concurrence on the part of those with whom the person to be adopted will come into agnatic connexion.

8 MODESTINUS (*Rules* 2) The rule once in force that in a case of arrogation the concurrence of a *curator* should not be interposed has been very properly altered by the Divine Claudius.

9 ULPIANUS (*on Sabinus* 1) Even a blind man can adopt or be adopted.

0 PAULUS (*on Sabinus* 2) If a man who has a son in his *potestas* should, with the consent of that son, adopt anyone into the position of grandson through that son, this will not make the party adopted *suus heres* to his [adoptive] grandfather, seeing that if the grandfather dies, he falls into the *potestas* of the person who is, so to speak, his father.

11 THE SAME (*ibid.* 4) If a man who has a son should adopt some one into the position of grandson, as though he were the son of that son, but the son himself has not concurred in the adoption; then, on the death of the [adoptive] grandfather, such grandson will not be under the *potestas* of the son.

12 . ULPIANUS (*on Sabinus* 14) When a man has been set free from *patria potestas*, he cannot afterwards come again under *potestas* in any creditable way, save by adoption.

13 PAPINIANUS (*Questions* 36) In almost every legal aspect of the case, when the *potestas* of an adoptive father is terminated, there is no trace left of the preceding state of things; in short the very dignity of father acquired by adoption is laid aside when the relation is ended.

14 POMPONIUS (*on Sabinus* 5) Even a grandson through a[n adopted] son, though conceived and born in the household of the father of such adopted son[1] loses his whole legal position on emancipation.

15 . ULPIANUS (*on Sabinus* 26) When a *paterfamilias* is adopted, everything which belongs to him and all his rights of acquisition pass tacitly to the person who adopts him; in addition to this, any children who are in his *potestas* go with him, moreover such children as subsequently return under the law of *postliminium*, or were conceived but unborn at the moment of arrogation, will equally come under the *potestas* of the party arrogating. 1. If a man has two sons and a grandson through one of the two, and he wishes to adopt his grandson so as to put him on the footing of son of the other son, he can do so by first emancipating him and then readopting him as son to such other son. In fact he does this last just as if he were any stranger, and not as grandfather, and, on whatever principle he could adopt a person whom he treated as the son of a stranger, on the same principle he can adopt one whom he treats as the son of his own other son. 2. In a case of arrogation one point to inquire into is whether the party arrogating chances to be under sixty years of age, because, if he is, he ought rather to think of begetting children; unless it so happen that there is some disease or infirmity in the case, or there is some other good ground for an arrogation, as, for example, where he wishes to adopt a person with whom he is connected. 3. Moreover a man ought not to arrogate more than one person without lawful cause,

[1] Read *adoptati* for *adoptatum*. Cf. M.

nor some one else's freedman, nor a person who is older than himself;

16 JAVOLENUS (*extracts from Cassius* 6) as the adoptive relation is only allowed between those persons between whom the natural relation might by possibility have existed.

17 ULPIANUS (*on Sabinus* 26) A man is not allowed to arrogate a person to whom he has been an acting guardian or curator, so long as the person whom it is proposed to arrogate is under twenty-five, because otherwise his object in arrogating him might be to avoid submitting his accounts. Moreover there ought to be an inquiry as to whether or not the case is one in which the arrogation is desired on some dishonourable ground. 1. [1]Only those children under the age of puberty are allowed to be arrogated in whose case the reason for the arrogation is either blood-relationship or some perfectly genuine affection, in all other cases leave must be refused, lest it should be in the power of the guardians to put an end to the guardianship, and at the same time to bring to nothing a testamentary substitution which may have been made by the father of the ward. 2. Accordingly an estimate must be made first of the ward's means and also of the means of the person who proposes to adopt him, in order to ascertain by comparison of the two whether the adoption can be considered beneficial to the ward; next an inquiry must be made into the manner of life of the man who wishes to make the ward a member of his family; thirdly, as to his age, so as to ascertain whether it would not be better for him to think about begetting children for himself, rather than bringing some one under his *potestas* who is taken from another man's family. 3. It should further be considered whether, when a man has one or more children of his own, he ought to be allowed to acquire another by adoption; as the result might be that either those children whom he begot in lawful wedlock would have a worse prospect of the kind which all children acquire who are dutiful to their parents, or the ward himself so adopted would gain less by the adoption than he ought under the circumstances to get. 4. Sometimes a poorer person will even be allowed to adopt a richer, if he is clearly a man of frugal habits, and his motives are honourable and well-known to be such. 5. However it is the practice in such cases for security to be given.

[1] The passage seems corrupt: the sense must be as above. Read *his* for *eorum*, *ceteris* for *ceterorum*, and delete *his* where it occurs.

18 MARCELLUS (*Digest* 26) In fact, when a man wishes to arrogate a ward, if he establishes a good case for it in other respects, his application should only be granted on the terms of his giving an undertaking to a government slave that he will make over any property of the ward's that comes to his hands to those persons to whom such property would have gone if the ward so arrogated had remained as he was.

19 ULPIANUS (*on Sabinus* 26) It is beyond doubt that, in the form of the undertaking which the arrogator has to give, where there occur the words "those who have a right thereto," this reference includes the case of any manumissions which are contained in the secondary testament, and most especially that of a slave being made substitutional heir, also the case of legatees. 1. If the arrogator should fail to give the security in question, an *utilis actio* is allowed against him.

20 MARCELLUS (*Digest* 26) This undertaking comes into force where the ward dies under age. It may be observed that the law speaks of a male ward, but the same practice has to be observed in the case of a girl;

21 GAIUS (*Rules*) as females may be arrogated by imperial rescript as well as males.

22 ULPIANUS (*on Sabinus* 26) If an arrogator dies leaving an adopted son who is under age, and soon after that this latter himself dies, will the heirs of the arrogator be liable to the action? The proper answer is that the heirs will be equally bound to hand over the property of the adopted son, and the quarter in addition. 1. Here the question has been asked whether the arrogator can appoint a substitutional heir to the adopted son under age; but I am of opinion that such a substitution is not allowed, unless it be simply in respect of the quarter which he gets of the arrogator's property, and the substitution must turn on an earlier event than that of the adopted son reaching the age of puberty. But if he should leave the property in question to the adopted son upon trust to hand it over at some date chosen at large, such a trust ought not to be admitted, because the quarter does not come to the son by an exercise of the testator's will, but by the Emperor's provision. 2. All the above applies equally whether a man arrogates a boy under age as a son or as a grandson.

23 PAULUS (*on the Edict* 35) When a person is given in adoption, he becomes cognate to every one to whom he becomes agnate, and he does not become cognate to any one to whom he does not become agnate; adoption does not create the tie of blood, but the tie of agnation. Hence, if I adopt a son, my wife is not in the place of mother to him; he does not become agnate to her, consequently she does not become cognate to him; again, my mother is not in the place of grandmother to him, as he does not become agnate to those who are outside my family; but any male whom I adopt [as a son] does become brother to my daughter, as my daughter is in my family: and of course the two are not allowed to marry.

24 ULPIANUS (*Controversies* 1) No one can be arrogated in his absence or without his own consent.

25 THE SAME (*Opinions* 5) On the death of a daughter who has been living as an independent woman as if in consequence of a lawful emancipation, and who before her decease appointed heirs by testament, the father is not allowed to take proceedings calling in question the validity of his own act, on the alleged ground that the emancipation was not made according to law nor in the presence of witnesses. 1. A man cannot adopt or arrogate any one without being present, nor can he execute the required formalities by an agent.

26 JULIANUS (*Digest* 70) A person whom my emancipated son adopts will not thereby become my grandson.

27 THE SAME (*ibid.* 85) According to the civil law the son of an adopted son acquires the same position as if he were himself adopted.

28 GAIUS (*Institutes* 1) Any one who has in his *potestas* a son and a grandson through that son is at full liberty to dismiss the son from his *potestas* and retain the grandson; or, conversely, to retain the son in his *potestas*, and emancipate the grandson; or to make both *sui juris*: similar rules must be held to apply in the case of a great-grandson.

29 CALLISTRATUS (*Institutes* 2) Where a natural father is unable to speak, but is able to make plain by some other method than speech that he desires to give his son in adoption; the adoption is as fully upheld as if it had been effected with proper legal formality.

30 PAULUS (*Rules* 1) Even a man who has no wife can adopt a son.

31 MARCIANUS (*Rules* 5) No son who is in the *potestas* of a father, whether by nature or adoption, can in any way compel his father to let him be free from *potestas*.

32 PAPINIANUS (*Questions* 31) In some cases, however, where a boy under age has been adopted, he has a right to be heard, if, on arriving at full age, he desires to be emancipated, and the judge will have to decide after hearing the case. (1. The Emperor Titus Antoninus laid down that where a man is guardian to his stepson he must be allowed to adopt him.)

33 MARCIANUS (*Rules* 5) And if, on arriving at the age of puberty, the boy can show that it was not to his advantage that he should be brought under the party's *potestas*, the just course is that he should be emancipated by his adoptive father, and so recover his original legal position.

34 PAULUS (*Questions* 11) The following question has been raised. If a son is given you in adoption on the understanding that after, say, three years you will give the same son in adoption to me, is there any right of action against you? As to this, Labeo holds there is no right of action; as it is not in accordance with our customs that a man should have a son for a prescribed time.

35 THE SAME (*Responsa* 1) The operation of an adoption is not to lower a person's station, but to raise it. Consequently, even where a senator is adopted by a plebeian, he remains a senator; in the same way a man will remain the son of a senator.

36 THE SAME (*ibid.* 18) It is recognised that a son can be emancipated by his father in any place whatever, so as thereupon to be freed from *patria potestas*. 1. The law is that the act of manumitting or of giving in adoption can be executed before a proconsul, even in a province which has not been allotted to the proconsul in question.

37 THE SAME (*Sentences* 2) A man can adopt a person as grandson even when he has no son. 1. When a man has once adopted any one, then, if he should emancipate him or give him in adoption, he cannot adopt him again.

38 MARCELLUS (*Digest* 26) An adoption not made in proper legal form can be made good by the Emperor;

39 ULPIANUS (*on the office of Consul* 3) this appears by the following rescript of the Divine Marcus to Eutychianus:—'The

judges will consider whether your application ought to be granted after hearing the parties who have objections to make, that is to say, those who would suffer if the adoption were confirmed.'

40 MODESTINUS (*Differences* 1) On the arrogation of a *paterfamilias* the children who were under his *potestas* become grandchildren to the arrogator, and fall under his *potestas* along with their own father. The same result does not take place in an adoption [in the narrower sense of the word]; the children of one who is [so] adopted remain under the *potestas* of their natural grandfather. 1. Both where a man adopts, and also where he arrogates, he ought to be older than the person whom he makes his son by adoption or arrogation, and that by the period of full puberty; in other words, he ought to be in advance of the age of the other by eighteen years. 2. One who is impotent can by arrogation acquire for himself a *suus heres*; his physical defect is no obstacle.

41 THE SAME (*Rules* 2) If a man who has in his *potestas* a grandson through a son emancipates his son, and after that adopts him again, on his death the grandson does not come under the *potestas* of his father. Similarly the grandson does not come under the *potestas* of his father [on his grandfather's death], where his grandfather keeps him under *potestas* on giving his son in adoption and subsequently readopts the son.

42 THE SAME (*Pandects* 1) Even an infant can be given in adoption.

43 POMPONIUS (*on Quintus Mucius* 20) Persons may be adopted not only for sons but even for grandsons, so as to cause whoever is adopted to be deemed in law a grandson through a son, and not even necessarily any particular son.

44 PROCULUS (*Epistles* 8) If a man who has a grandson through a son adopts some other person into the position of grandson [simply], I should say that on the death of the grandfather there will be no legal tie of consanguinity between the grandsons. But if he adopts him in such form as to make him as much his grandson by law and statute as if he had been born the son, say, of Lucius the adopting party's son and of Lucius's lawful wife, I should hold the contrary[1].

45 PAULUS (*on the lex Julia et Papia* 3) The legal obligations of a person who is given in adoption pass to the adoptive father.

[1] Read, for *ut etiam...quasi, uti tam jure lege nepos suus esset quam si.* Cf. M. and Aul. Gell. 5. 19. 9.

46 ULPIANUS (*on the lex Julia et Papia* 4). A son begotten by me when I was in a condition of slavery may be brought under my *potestas* by the favour of the Emperor: but there is no doubt that such a son will still be of libertine status.

VIII.

ON THE DIVISION OF THINGS AND THEIR RESPECTIVE NATURES.

1 GAIUS (*Institutes* 2) The main division of things ranges them under two heads; some things being subjects of divine law, some of human. Subjects of divine law, for instance, are things sacred and religious. Things under a sanction (*res sanctæ*), moreover, as for example, walls and gates, are to a certain extent subjects of divine law. A thing which is of divine law is no man's property; but a thing which is of human law is for the most part the property of some one or other; still it is possible that it should be no man's property, we know that things comprised in an inheritance, until some one becomes heir, are no man's property. Such things as are subjects of human law are either public or private. Things that are public are held to be no man's property, they are in fact regarded as belonging to the whole community; things are private that are the property of individuals. 1. Again, some things are corporeal, some incorporeal. Corporeal are such as can be handled, for instance, land, slaves, raiment, gold, silver, and innumerable things besides; incorporeal are those that cannot be handled, of which nature are such as consist of a right, for instance, an inheritance, a usufruct, an obligational claim, however acquired. It is beside the purpose to say that there are corporeal things contained in an inheritance; as it is equally true that produce which is taken from land [in exercise of a usufruct] is corporeal, and anything owing to a man in pursuance of an obligation is for the most part corporeal, such as land, or a slave, or money; still the bare right of succession to an inheritance and the right of usufruct and the right involved in an obligational claim are all incorporeal. To the same class also belong rights attached to urban and rustic tenements, or, as they are also called, servitudes.

2 MARCIANUS (*Institutes* 3) Some things are by natural law common to all, some belong to a community (*universitatis*), some to nobody, most things belong to individuals; and that

are acquired by various titles in the respective cases. 1. To begin with, by natural law, the following are common to all: air, flowing water, the sea, and consequently the seashore.

3 FLORENTINUS (*Institutes* 6) Moreover pebbles, gems and generally things which persons find on the seashore at once become theirs by natural law.

4 MARCIANUS (*Institutes* 3) Accordingly no one is debarred from entering on the seashore for the purpose of fishing, so long as there is no meddling with houses buildings or monuments; these not being, like the sea itself, subjects of the *jus gentium*. The above was laid down by the Divine Pius in a rescript addressed to the fishermen at Formiæ and Capena. 1. But rivers are almost all public, and so are harbours.

5 GAIUS (*Everyday matters or Golden things* 2) The use of river banks is public by the *jus gentium*, just as much as that of the river itself. Consequently anybody is at liberty to bring a boat to land on the bank, to fasten ropes to trees growing thereon, to dry nets and [for that purpose] to draw them up from the sea or to place cargo on the banks, just as he is free to navigate the stream itself. Still the ownership of the banks is vested in the persons to whose land they are joined; and consequently the trees that grow on the banks belong to the same persons. 1. Persons who fish in the sea are at liberty to erect huts on the shore in which to take shelter;

6 MARCIANUS (*Institutes* 3) so far does this go that those who build on the shore become in fact owners of the soil, so long, that is, as the building stands; no doubt, if the building falls down, then the site will, by something like the law of *postliminium*, revert to its former legal character, and, if some one else builds on the spot, the land becomes his. 1. Of things which belong to a collective body and not to individuals we may take for examples theatres, racecourses and the like in cities, or any other property which in any case belongs to the city at large. Consequently a slave belonging to the city at large is not regarded as one in whom the individual citizens have their respective shares, but as the property of the whole body (*universitas*); hence the Divine Brothers laid down by rescript that a municipal slave can be examined by torture either for or against a citizen. For this reason again it is that the freedman of a city is not obliged to ask permission under the Edict, if he summonses one of the citizens. 2. Sacred things, religious things and things under a sanction are no man's property. 3. Sacred

things are those which have been consecrated by an act of the state, and not privately; consequently if any one affects to make something sacred on his own behalf privately, the thing does not become sacred but remains profane. If a temple is once made sacred, the site remains sacred even if the building should be pulled down. 4. But any one can make a place religious at his own will and pleasure, by burying a dead body on his own ground: and where several have a right to one burial ground, any one of them can bury there, even against the will of the others. It is also open to any one to bury on another person's ground with the leave of the owner; and even where the owner only ratifies the act after the burial has taken place, the spot becomes religious. 5. Even an empty tomb is held on the whole to be a religious place, as is testified by Virgil.

7 ULPIANUS (*on the Edict* 25) However the Divine Brothers issued a rescript to the opposite effect.

8 MARCIANUS (*Rules* 4) The word 'sanctus' (under a sanction) is used of whatever is defended and guarded against wrong or damage at the hands of men. 1. *Sanctus* is derived from *sagmina*; *sagmina* being certain herbs usually carried by legates of the Roman people to secure them against outrage, just as the legates of the Greeks carry what are called κηρύκια. 2. Again, in a municipal town, the walls are under a sanction, according to what Cassius tells us was the opinion expressed by Sabinus, which he declares to be correct, adding that no one ought to be permitted to cast anything at or upon them.

9 ULPIANUS (*on the Edict* 68) Sacred places are such as are dedicated by the state (*publice*), whether in a city or in the country. 1. It should be understood that a public site can only be made 'sacred' where the Emperor dedicates it or gives permission to dedicate it. 2. A point that should be noted is that a sacred place is not the same thing as a *sacrarium*. A sacred place is a consecrated place, a *sacrarium* is a place in which sacred objects are kept, and it may exist in a private building; moreover, when persons wish to divest such a place of its religious character, they commonly have the sacred objects removed by evocation. 3. The word 'sanctus' is used in a special sense to denote things which are neither sacred nor profane, but are protected by some kind of 'sanction'; thus the term *sanctus* is applied to statutes, because they derive their force from a particular sanction. Whatever is maintained by some particular sanction is 'sanctum,' even though

it be not consecrated to God. and sometimes it is added in the terms of the sanction itself that whosoever offends in respect of the object in question shall be capitally punished. 4. The walls of a municipal town are not even allowed to be repaired without the authority of the Emperor or the Præses, nor may anything be united to them or laid upon them, save on the same condition. 5. A sacred thing cannot have a money value put upon it.

0 POMPONIUS (*Extracts from Plautius* 6) According to Aristo, just as anything built into the sea becomes private property, so anything over which the sea encroaches becomes public.

1 POMPONIUS (*Various passages* 2) If any one trespasses on the walls, he suffers capital punishment; for example, if he climbs over them by the use of ladders, or by any other means: citizens of Rome are only allowed to leave the city by passing through the gates; taking any other way is the act of an enemy, and of evil omen. In fact Remus, the brother of Romulus, was put to death, so tradition says, because he desired to climb over the wall.

IX.

CONCERNING SENATORS.

1 ULPIANUS (*on the Edict* 62) All agree that a man of consular rank always takes precedence of a woman of consular rank. But it is a point to consider whether a man of prefectorian rank takes precedence of a woman of consular rank. I should hold that he does, because the male sex deserves the greater honour. 1. By a woman of consular rank is meant the wife of a man of consular rank; or, as Saturninus adds, even the mother; but for this last there is no express authority and it has never been admitted in practice.

2 MARCELLUS (*Digest* 3) Cassius Longinus holds that when a man has been removed from the senate for disgraceful conduct, and has not been reinstated, he ought not to be allowed to sit as judge, nor to appear as a witness; since this is against the *lex Julia* on extortion.

3 MODESTINUS (*Rules* 6) A senator who is removed from the senate does not thereby suffer *capitis diminutio*, indeed the Divine Severus and Antoninus allowed him to live in Rome.

4 POMPONIUS (*Various passages* 12) When a man is unworthy of the lower rank he is still more unworthy of the higher.

5 ULPIANUS (*on the lex Julia et Papia* 1) By the expression 'son of a senator' we must understand not only one who is son in the course of nature, but an adopted son as well; nor will it make any difference who it is that he was adopted from, nor what was the manner of his adoption. Nor is it material whether the party adopting was already of senatorial rank at the time of the adoption or only attained to that rank afterwards.

6 PAULUS (*on the lex Julia et Papia* 2) The expression 'son of a senator' applies to one whom the senator has adopted, but only so long as he remains in the senator's family; if he should be emancipated, then by the emancipation he loses the name of son. 1. If the son of a senator is given in adoption by his father to a man of inferior rank, he is still regarded as being the son of a senator; the rank of senator is not lost by an adoption proceeding from an inferior rank, any more than a similar adoption would make the party adopted cease to be of consular rank.

7 ULPIANUS (*on the lex Julia et Papia* 1) If a man is emancipated by his father who is a senator, the law is that he should be treated as if he were the son of a senator. 1. Again, Labeo lays down that even one who is born after the death of his father who was a senator is on the footing of son of a senator. But where a man was conceived and born (*sic*) after his father was removed from the senate, then, in the opinion of Proculus and Pegasus, he is not on the footing of son of a senator; and in this they are quite right;—a man cannot properly be called the son of a senator where his father was removed from the senate before his birth. No doubt if he was already conceived, before his father's removal from the senate, but born after his father's loss of rank, the better opinion is that he must be regarded as the son of a senator; as most authorities hold that it is the time of conception that has to be considered. 2. If a man's father and grandfather were both senators, he is regarded as on the footing both of son of a senator and grandson of a senator. But if the father lost his rank before the person in question was conceived, it may be asked whether he ought not to be regarded as on the footing of grandson of a senator in spite of the fact that he is not regarded as son; and the better opinion is that he ought, so that his grandfather's rank

is to his advantage rather than his father's loss of rank to his disadvantage.

THE SAME (*Fideicommissa* 6) Women who are married to men of honourable[1] rank (*clarissimi*) are included under the term honourable. Daughters of senators are not comprised under the expression honourable women [after marriage], except where they have found honourable husbands; husbands give honourable rank to their wives, but parents only do so to their daughters unless and until the latter marry plebeians; accordingly a [married] woman is "honourable" only when she is the wife of a senator, or of any honourable man, or, if she has come to be separated from such a husband, has not married any one else of lower rank.

PAPINIANUS (*Responsa* 4) Where the daughter of a senator affects to marry a freedman, loss of rank on the part of her father does not make her a lawful wife; as [,conversely,] the rank which a man has once communicated to his children will not be taken away by the fact of the father losing his status by removal from the senate.

ULPIANUS (*on the Edict* 34) By the expression children of senators we must understand not merely the sons of senators, but all those persons who are shown to be the children of senators or of their sons, whether the senators' sons whose children they are shown to be were sons by nature or by adoption. But where a man was the child of the daughter of a senator, what we have to look at is the rank of his father.

PAULUS (*on the Edict* 41) Though senators are said to have their domicile in the city, still they are also regarded as having their domicile in the place of their birth; their rank is held rather to give an additional domicile than to give a new one in place of the old.

ULPIANUS (*on registration* 2) Women once married to men of consular rank may procure leave from the Emperor, though it is very sparingly given, enabling them, if they contract subsequent marriages with men of lower rank, to retain their consular rank all the while. I know, for instance, that Antoninus Augustus accorded this privilege to his cousin Julia Mammæa. 1. The term senators we must understand to imply persons descended from patricians and consuls or any illustrious [*illustres*] men; as in fact such alone have the right to speak in the senate.

[1] See Gibbon c. 17.

X.

ON THE OFFICE OF CONSUL.

1 ULPIANUS (*on the office of Consul* 2) It is the duty of the consul to appoint a board [*consilium*] for persons who propose to execute a manumission. 1. Individual consuls can manumit by themselves; but no one who enters the names with one consul can manumit before another; every manumission is confined to the court of one consul. It is true that it has been laid down by the senate that if one of two colleagues is for any reason unable to manumit, because he is hindered by illness or any other sufficient cause, the other can take the manumission. 2. There is no doubt that a consul can manumit his own slaves in his own court. Should it however happen that the consul is under twenty years of age, he cannot manumit in his own court, as he is the very person on whom the decree of the senate casts the duty of examining the ground for requiring a board, but he can manumit in the court of his colleague, if the ground is held to be established.

XI.

ON THE OFFICE OF *Præfectus Prætorio.*

1 AURELIUS ARCADIUS CHARISIUS master of the *libelli* (*on the office of Præfectus Prætorio*) It is requisite to state briefly what was the history of the original creation of the office of Prefect to the Prætorium. We are informed by certain writers that prefects to the Prætorium were anciently established in the place of the *Magister Equitum*; for whereas, in the days of our forefathers, dictators were from time to time entrusted for a definite period with supreme power, and used thereupon to choose *Magistri Equitum* who were joined to them as partners in their duties in connexion with military matters[1], and occupied the next place of authority under them, it came to pass that, when power in the state was transferred to permanent Emperors, prefects to the Prætorium were appointed by the head of the state on the model of the *Magistri Equitum*. These officers were entrusted with ampler powers with a view to the improvement of public discipline.

[1] Read *ad curas* for *curæ ad*. Cf. M.

1. Such being the origin of the authority of the prefects, it subsequently obtained so great an extension that no appeal can be made from them. In fact, though it once was a question whether an appeal from these prefects was admissible, which in strict law it was, and cases were on record of appeals being made, still, by an imperial order which was subsequently rehearsed in public, the right of appeal was taken away, the Emperor being of opinion that men who were called to the exalted station conferred by this office in consequence of their special assiduity and upon proof of their being men of honesty and character, would, considering the wisdom and enlightenment which went with their rank, pronounce similar decisions to those which he would have given himself. 2. The prætorian prefects enjoyed another privilege as well; minors were not allowed to get a *restitutio in integrum* after one of their judgments in the court of any magistrate who was not a prætorian prefect himself.

XII.

ON THE OFFICE OF *Præfectus Urbi*.

ULPIANUS (*on the office of Prefect of the City*) As declared in an epistle of the Divine Severus addressed to Fabius Cilo, prefect of the city, the jurisdiction claimed by that magistrate embraces all criminal offences of every kind, not only such as are committed within the city, but also [some] which are committed[1] in Italy, though without the city. 1. Where slaves flee to statues for refuge, also where they have been bought with their own money with a view to manumission, the prefect will hear their complaints against their owners. 2. He will also entertain applications by impecunious patrons who complain of their freedmen, especially where they allege that they are in ill health and desire that their freedmen should support them. 3. He has the power of relegation and deportation into any island which the Emperor may prescribe. 4. The opening words of the epistle referred to are these:—'as we have entrusted our city to your care': consequently any offence that is committed within the city must be held to be a matter for the prefect. Besides this, any offence committed within the

[1] *Intra Italiam* must be incorrect or a clumsy interpolation; v. subs. 4: to help the sense I have inserted 'some'.

hundredth milestone is a matter for the prefect; if it is beyond the milestone, it lies outside his jurisdiction. 5. If a man's complaint is that his slave has committed adultery with his wife, the case may be brought before the prefect. 6. He may also be applied to for an interdict *quod vi aut clam* or *unde vi*[1]. 7. Moreover guardians and curators are brought before the Prefect of the City where they act corruptly in respect of their guardianships or curatorships, and the case requires such severe treatment that it is not adequately met by the infamy consequent on *de suspecto* proceedings; for instance, where it can be shown that a man got into a guardianship by bribery, or was himself bribed into taking measures to prevent some ward having a proper guardian appointed, or that, when called upon to disclose the amount of the property, he deliberately understated it, or that he disposed of the ward's goods with plainly fraudulent intent. 8. With regard to the above statement, that the prefect will hear complaints by slaves against their owners, we must not understand this to mean that slaves may bring criminal charges against their owners, (this a slave is by no means to be allowed to do, except in certain recognised cases,) what is supposed is that a slave makes a respectful representation; slaves may, for example, bring before the prefect cases of cruelty or harsh treatment or insufficient sustenance which they have had to suffer, or indecent assaults to which they are or have been compelled to submit. The Divine Severus imposed this further duty on the Prefect of the City that he should protect slaves from compulsory prostitution. 9. Furthermore, the prefect will be bound to take measures to secure that moneychangers conduct themselves honestly in all branches of their business, and forbear unlawful practices. 10. If a patron alleges that he is slighted by his freedman, or complains that his freedman is insolent to him, or that he or[2] his children or his wife has had to put up with abusive language from him, or makes any similar charge; the proper course is to apply to the Prefect of the City, who will punish the freedman according to the misbehaviour complained of. The usual way of dealing with the offence is to warn the man or to order him to be beaten, or to take still stronger measures in the way of punishment; as a matter of fact, freedmen are liable to punishment in a great many cases. There is no doubt that if the patron can show that his freedman brought a criminal charge against him, or conspired against him

[1] Read *aut unde vi adiri* for *inde vi audire*. Cf. M.

[2] Read *-ve* for *-que*. Cf. M.

on some other legal ground? My own opinion is that nothing would be set aside, and this is the more indulgent view; the Roman people was quite competent to confer the authority in question, even on a slave; and, if they had known that he was a slave, they would have given him his liberty. Much more must this power be held good in the case of the Emperor.

4 ULPIANUS (*on all the Courts* 1) A prætor cannot appoint himself to be guardian, or to be *judex* in some particular case.

XV.

ON THE OFFICE OF *Præfectus Vigilum*.

1 PAULUS (*on the office of Præfectus Vigilum*) In old days the business of preventing fires was superintended by the Threemen, who, because they kept watch at night, were called *Triumviri nocturni;* sometimes ædiles and tribunes of the plebs took a part in the service. There was a body of government slaves stationed about the gate and the walls, who could be called out if necessary; and besides them there were gangs of slaves belonging to private owners whose duty it was to put out fires, either for pay or gratuitously. Lastly, the Divine Augustus thought proper to have the mischief dealt with by a provision of his own,

2 ULPIANUS (*on the office of Præfectus Vigilum*) a number of fires having, on a particular occasion, occurred in one day.

3 PAULUS (*on the office of Præfectus Vigilum*) As the business of looking after the public safety was, so he held, suited for no one so well as the Emperor himself, nor was any one else equal to the duty, he therefore stationed seven detachments in suitable places, each detachment to protect two districts of the city; they were to be commanded by tribunes, with an officer at the head of them all, of the class of *spectabiles*, called the prefect of the watch. 1. This prefect deals with cases of incendiaries, housebreakers, thieves, robbers, harbourers of thieves, unless in any particular instance the offender is a person of such ruffianly and infamous character that the case is sent on to the prefect of the city. Conflagrations in most cases may be attributed to the negligence of occupiers, accordingly, where persons have paid insufficient attention to their fires, the prefect either orders them to be beaten, or else he remits the beating, but gives the parties a severe warning. 2. House-breaking is for the most part committed in blocks of chambers, or

in warehouses where people store the most valuable part of their property, and the housebreaker breaks open a storechamber or a closet or a chest; in which case punishment is generally inflicted on the caretakers, and this agrees with a rescript of the Divine Antoninus to Erucius Clarus. The Emperor tells him that, if his warehouses were broken into, he can examine by torture the slaves who had to guard them, even though the Emperor himself should be a part-owner of the slaves. 3. It should be mentioned that the prefect of the watch is bound to be up the whole night and to go the rounds with his men, wearing the proper shoes, 4. and provided with hooks and axes, and they are to take care to warn all householders to see that no case of fire arises through want of attention. Moreover he is ordered to remind every one to have a supply of water ready in his upper room. 5. He has also judicial authority over the boxmen (*capsarii*), who engage for hire to take charge of people's clothes at the baths, so that if they should be guilty of any malpractices in connexion with the above duty this magistrate deals with the case.

4 ULPIANUS (*on the office of Præfectus Urbi*) The Emperors Severus and Antoninus sent a rescript to Junius Rufinus the prefect of the watch in the following terms:—"if occupants of blocks of chambers or other persons carelessly omit to attend to their fires, you can order them to be beaten or scourged; as for any who may be proved guilty of wilful arson, you may send them on to my friend Fabius Cilo, the prefect of the city; runaway slaves you must hunt up and send back to their owners."

XVI.

ON THE OFFICES OF PROCONSUL AND LEGATE.

1 ULPIANUS (*Controversies* 1) The proconsul may display anywhere the insignia of his office as soon as he is outside the city, but he only exercises authority within the actual province which has been assigned to him.

2 MARCIANUS (*Institutes* 1) All proconsuls can exercise jurisdiction as soon as they have left the city, not however contentious jurisdiction, but only voluntary; for example free persons [*can be emancipated*] and slaves can be manumitted in their court, and adoptions can be executed there. 1. No one can

manumit in the court of the proconsul's legate, as he has not the requisite jurisdiction;

3 ULPIANUS (*on Sabinus* 26) nor can a man adopt before him: in short, the legate cannot take statute actions at all.

4 THE SAME (*on the office of Proconsul* 1) The proconsul ought to be careful not to be burdensome to the province in the matter of providing quarters, so the present Emperor and his father laid down in a rescript addressed to Aufidius Severianus. 1. No proconsul is at liberty to have his own grooms; instead of these, in the provinces, soldiers discharge the service required. 2. It is better that the proconsul should set out without his wife; still he can have his wife with him, if he likes, only he must understand that the senate held, in the consulship of Cotta and Messala, that if any offence were committed by the wife of a man who went out to occupy an official position, account and satisfaction would have to be demanded from the husband himself. 3. Before crossing the boundary of the province assigned to him, the proconsul ought to issue a proclamation announcing his arrival and containing some kind of recommendation of himself, by reference to any persons living in the province with whom he may be acquainted or connected, and above all the proclamation should excuse[1] the inhabitants from coming to meet him either publicly or privately, on the ground that it is most suitable that any persons who received him should do so in their own country. 4. He will be acting correctly and in accordance with the proper order of proceeding if he sends an announcement to the retiring proconsul to inform him on what day he will make his entry; very often events of this kind, if they are unexpected and uncertain as to time, are distracting to the provincial population, and interfere with business. 5. When he enters he ought to take care of the following point too;—he should make his entry into the province at the particular spot at which it is customary to do so, and whatever city he first arrives at, either by land or sea, he should attend to what the Greeks call the "epidemiae" or the "cataplus" (places of stay and port of arrival); as the provincial people are sure to set great store by the observation of customs and privileges of this kind. Some provinces have this particular distinction, that the proconsul always arrives by sea; one of these is Asia, in fact it has gone so far that the present Emperor Antoninus Augustus, in answer to a request on the part of the Asiatic provincials, announced

[1] Read *excusans* for *excusantis*. Cf. M.

by rescript that the proconsul was absolutely bound to arrive at the province of Asia by sea, and land at Ephesus first of all the metropolitan cities. 6. After this, having made his entry into the province, he ought to delegate his judicial powers to his legate, but he must not do so before he has entered; as it would be highly absurd if before he had acquired the jurisdiction himself,—and as a matter of fact he is not competent to exercise it before his entry,—he were to assign it to some one else, not having got any jurisdiction to assign. However if he should assign it before entry, and then, after entry, continue of the same mind, it would probably be held that the legate had the jurisdiction, not, that is, from the time when it was delegated, but from the time at which the proconsul entered the province.

5 PAPINIANUS (*Questions* 1) Sometimes a proconsul can delegate his judicial powers though he should not have yet come into the province; suppose, for instance, he should be unavoidably delayed on his journey, whereas the legate was in a position to reach the province very early.

6 ULPIANUS (*on the office of Proconsul* 1) It is usual for the proconsul to assign to his legates the office of examining prisoners, the object being that they should first hear what the prisoners have got to say, and then send them on to him, they themselves releasing any innocent prisoner. But a delegation of this kind is irregular; as, when a man has had given him the power of life and death, or of inflicting any inferior punishment, he cannot transfer it to another, and it follows that he cannot transfer the right of discharging accused persons, where that other is not qualified to hear the charge against them. 1. The proconsul being free to assign his judicial powers or not to assign them at his own discretion, so too, after assigning them, he has a right to recall the assignment; still he ought not to do so without consulting the Emperor. 2. A legate ought not to consult the Emperor; he should go to his own proconsul, and this latter is bound to give an answer to any legate who consults him. 3. A proconsul is not obliged to make an absolute point of declining presents, but he must use moderation; in short, he need not be so scrupulous as to decline them altogether, but he must not be so grasping as to accept them to an excessive amount. This matter is put very well in a letter of the Divine Severus and the present Emperor Antoninus, in which they set down the limitations to be observed in this matter; the words are as follows:—"With regard to

presents, what we hold is this,—there is an old saying, 'Not everything, nor every day, nor from everybody'; of course it is very discourteous to accept no presents at all, but it is a very contemptible thing to accept them indiscriminately, and to accept all is absolutely sordid." With regard to the injunction contained in the proconsul's instructions, that neither he nor any other officer is to accept any gift or present or make any purchase except of supplies for everyday subsistence, this does not apply to trifling gifts, but only where the amount is beyond what is required for ordinary consumption. Still, on the other hand, presents must not be taken to such an extent as to make them amount to positive largess.

THE SAME (*ibid.* 2) If the proconsul arrives at some[1] populous city, or at the chief town of the province, he must allow the place to be formally commended to him, and show no impatience at receiving a complimentary address, as the provincial population claim the right of doing these things as an honour to themselves; he ought also to allow holidays in accordance with the customs and usages theretofore in vogue. 1. He ought to go round the temples and public works in order to examine whether they are in proper repair or require to be in any way restored, and, if there are any which are only in course of construction, he ought to see that they are completed, so far as the resources of the municipality admit; he ought also to appoint in the regular form careful superintendents of the works, and, if necessary, provide military attendants to support them. 2. As the proconsul has plenary judicial authority, he unites in himself the attributes of all those who administer justice at Rome either as magistrates or in virtue of extraordinary powers:

8 THE SAME (*on the Edict* 39) so that he has the highest authority in the province after that of the Emperor,

9 THE SAME (*on the office of Proconsul* 1) and no legal matter can arise in the province which he is not competent to dispose of. It is true that if a pecuniary question is raised which concerns the revenue and comes within the province of the imperial *procurator*, he will do well not to meddle with it. 1. Where a [judicial] decree is required, the proconsul cannot dispose of the matter by '*libellus*'; matters which require that a case should be entertained judicially cannot be so disposed of. 2. The proconsul ought to be patient with pleaders, but he must maintain his

[1] Read *aliquam* for *aliam quam*. Cf. M.

character, so as not to appear abject, and he ought not to shrink from saying what he thinks, if he finds that there are people who trump up cases or buy titles, nor should he allow any one to make a motion before him, except those who have a right to do so according to the terms of his own edict. 3. Some kinds of cases the proconsul can dispose of out of court (*de plano*); he can in this way order that members of a family shall show proper deference to their *paterfamilias*, or freedmen to their patrons and patrons' children; he may admonish and put in dread out of court a son who is brought before him by his father on the alleged ground that he is leading an improper life; in the same way he may correct an insolent freedman either by reprimand or by beating. 4. He is bound therefore to take care that applications are made to him in some regular course, so that, in short, every one who has a request to make may get a hearing, lest it come to pass that, if concession is made to the rank of one applicant or the importunity of another, persons in a humble position, who either have not secured the assistance of advocates at all or else have only found such as are inattentive and men of no station, will be unable to state their claims. 5. It will also be his duty in most cases to allow the assistance of counsel to women or persons who are under age or otherwise helpless, or to such as are out of their mind, if any one asks for it on their behalf; or, if no one asks, he ought to allow it of his own accord. Again, if any one should declare that he is unable to get counsel, owing to the power of his opponent, in this case too the proconsul ought to find him one. It is not allowable that any one should be borne down by the power of his opponent; in fact it tends to bring odium on the officer himself who is at the head of the province, if there is some one who behaves with so little self-restraint that nobody will venture to undertake to appear as a pleader in opposition to him. 6. The above observations apply to all governors equally, and they ought to be attended to by others as much as by the proconsul.

10 THE SAME (*ibid.* 10) It must be borne in mind that until the new proconsul arrives, the retiring proconsul is bound to go on discharging all duties; the proconsulship is one continuous office, and the interests of the province require that there should be some one there by whose action the provincial inhabitants can get their business disposed of: accordingly he is bound to administer justice until the new proconsul arrives. 1. Dismissal of his legate before he leaves the province himself is a thing

which he is warned against doing by the *lex Julia* on extortion and also by the rescript of the Divine Hadrian to Calpurnius Rufus, the proconsul of Achaia.

1 VENULEIUS SATURNINUS (*on the office of Proconsul* 2) If any offence is committed which requires specially severe punishment, the legate ought to have the case removed to the court of the proconsul: he has not himself the right to put to death or imprison or inflict a severe flogging.

2 PAULUS (*on the Edict* 2) A legate who exercises jurisdiction in pursuance of a delegation has the power of appointing a *judex*

3 POMPONIUS (*on Quintus Mucius* 10) Legates of the proconsul have no authority of their own, so long as no jurisdiction has been delegated to them by the proconsul.

4 ULPIANUS (*on the lex Julia et Papia* 20). A proconsul does not have more than six *fasces*.

5 LICINNIUS RUFINUS (*Rules* 3) The proconsul's legates can themselves appoint guardians.

6 ULPIANUS (*on the Edict* 2) As soon as the proconsul passes the gate on entering Rome he lays aside his *imperium*.

XVII.

ON THE OFFICE OF *Præfectus Augustalis*.

1 ULPIANUS (*on the Edict* 15) The prefect of Egypt does not divest himself of the prefectship, or the right of *imperium* given him by statute under Augustus on the model of the proconsulship, until his successor has actually entered Alexandria, even though the latter should have arrived at the province; this is set down in the prefect's instructions.

XVIII.

ON THE OFFICE OF *Præses*.

1 MACER (*on the office of præses* 1) The title of *præses* is a term of general signification, consequently proconsuls and imperial legates and governors of provinces in general, though they should be senators, are called *præsides*; the term proconsul is of special application.

2 ULPIANUS (*on Sabinus* 26) A *prœses* can adopt in his own court, just as he can emancipate a son or manumit a slave.

3 PAULUS (*on Sabinus* 13) The *prœses* of the province has a right of *imperium* over the men of his own province only, and he has the right only while he is in the province; if he leaves it he becomes a private person. Sometimes he has *imperium* even over outsiders, if they commit any active offence; it is part of the instructions given by the Emperor that the governor of the province shall take measures for ridding the province of evil-disposed persons, and no distinction is made as to the place from which such persons come.

4 ULPIANUS (*on the Edict* 39) The *prœses* of the province has the highest authority in his province after that of the Emperor.

5 THE SAME (*on all the Courts* 1) The *prœses* of the province cannot appoint himself guardian any more than he can make himself *judex* in a particular case.

6 THE SAME (*Opinions* 1) The *prœses* of the province is bound to put a check on unlawful demands and such as are made with duress, also to the practice of making persons contract sales and execute assurances by putting them in terror, or by promising money which then is not paid. The *prœses* is also to see that no one makes gain or suffers loss unjustly. 1. The actual truth is not affected by a mistake of gossiping reporters[1]; the *prœses* should follow whatever is the proper course considering established facts. 2. The *prœses* of the province should make it matter of conscience to see that persons of influence and resource do not inflict any wrong on those in humbler station, and do not pursue such as take up the cause of these latter with vexatious charges where they are innocent. 3. The *prœses* of the province ought to take care to keep down unauthorized offerers of aid who, on pretence of a desire to support officers in military command, proceed to alarm the public; and, where any such are found, he should repress them; he should also prevent unlawful exactions being made on pretence of levying taxes. 4. The *prœses* should make it a matter of particular concern that no one should be prohibited from carrying on any lawful business, and also that nothing that is prohibited should be practised, and that no penalties should be imposed on innocent persons. 5. The *prœses* of the province will take care that men of small means shall not suffer

[1] Read *gestorum* for *gestarum*. Cf. M.

the wrongful treatment of having their sole light or their scanty furniture taken from them for the use of others on the ground of the arrival of official attendants or soldiers. 6. The *præses* of the province must see that nothing is done on the alleged behalf of soldiers which does not serve their general needs, by some of the number who put forward an unfair claim for some advantage confined to themselves. 7. The event of death ought not to be laid to the account of the physician; but it is equally true that he ought to be held answerable for any mischief which he has occasioned by want of skill; the wrong done by one who gives incorrect advice at a dangerous crisis ought not to be set down to human frailty and so treated as no offence at all. 8. Officers who rule whole provinces have the power of life and death, and they have authority given them to send offenders to the mines. 9. Where the *præses*, after imposing a fine, discovers that it cannot be discharged out of the present means of the persons whom he has ordered to pay it, he must check improper eagerness on the part of the official who has to demand the money, and relieve the party from pressure[1] for payment. When a fine is remitted by the governor of the province on the ground of poverty, it ought not to be exacted.

7 THE SAME (*ibid.* 3) The *præses* of the province ought to inspect buildings, and, on sufficient cause appearing, compel the owners to repair them, and, in case of refusal, he should employ lawful means for remedying the unsightly condition of the premises.

8 JULIANUS (*Digest* 1) I have often heard the present Emperor declare that where a rescript says "You can apply to the officer who is at the head of the province," this does not put the proconsul or his legate or the *præses* of the province under the necessity of undertaking to hear the case, he must consider whether he ought to hear it himself or appoint a *judex*.

9 CALLISTRATUS (*on judicial inquiries* 1) As a general rule, whenever the Emperor issues a rescript by which he refers a matter to the *præses* of a province; for example, where he says "You can apply to the officer who is at the head of the province," perhaps adding "he will consider what steps he ought to take," the proconsul or the legate is not put under the necessity of undertaking to hear the case; but[2] even if the words "he will consider what

[1] Read *necessitati* for *necessitate*. Cf. M.

[2] *sed* inserend. before *quamvis*, delend. before *is cæst. deb.* Cf. M.

steps he ought to take" are not added it is his duty to consider whether he ought to hear it himself or appoint a *judex*.

10 HERMOGENIANUS (*Epitomes of Law* 2) In all cases which are heard at Rome by the præfect of the city, or the prætorian prefect, or, again, by the consul, or the prætor, or any other Roman magistrate, the proper tribunal in the provinces is that of the *corrector* or the *præses*.

11 MARCIANUS (*Institutes* 3) In the provinces all kinds of applications come within the competency of the *præses*, though at Rome they are made to a number of different judges:

12 PROCULUS (*Epistles* 4) But although the officer who is at the head of the province has to occupy the place and discharge the duties of every Roman magistrate, still it is his duty to consider not so much what is done at Rome as what the case requires.

13 ULPIANUS (*on the office of Proconsul* 7) It may be expected from any *præses* of character and conduct that he should take care that the province which he governs shall be settled and orderly. This he will have no difficulty in bringing about, if he studiously aims at securing that the province shall be clear of bad characters, and he accordingly seeks them out; in fact he is bound to seek out persons guilty of sacrilege, highway robbers, manstealers and thieves, and punish them according to their respective offences; he should also restrain those who give them shelter, as without such assistance a highway robber cannot long escape detection. 1. In the case of lunatics whom their friends cannot keep under control, the *præses* ought to apply a remedy, viz. that of confining them in prison. This was laid down by the Divine Pius. It is true that the Divine brothers held that, in the case of a man who was guilty of parricide, an inquiry should be made as to whether he was feigning madness when he committed the deed, or was really and truly out of his mind, so that if he was feigning he might be punished, but, if he was insane, he might be detained in prison.

14 MACER (*on criminal trials* [*judicia publica*] 2) The Divine Marcus and Commodus issued a rescript to Scapula Tertullus in these words: "If you have clearly ascertained that Ælius Priscus is in such a state of insanity that he is permanently out of his mind and so entirely incapable of reasoning, and no suspicion is left that he was simulating insanity when he killed his mother, you need not concern yourself with the question how he should be

punished, as his insanity itself is punishment enough. At the same time he must be closely confined, and, if you think it advisable, even kept in chains; this need not[1] be done by way of punishment so much as for his own protection and the security of his neighbours. If however, as is very often the case[2], he has intervals of sounder mind, you must carefully investigate the question whether he may not have committed the crime on one of these occasions, and so have no claim to mercy on the ground of mental infirmity; and, if you should find that anything of this kind is the fact you must refer the case to us, so that we may consider, supposing he committed the act at a moment when he could be held to know what he was doing, whether he ought not to be visited with punishment corresponding to the enormity of his crime. But when we learn by a letter from you that his position in respect of place and treatment is such that he is in the hands of his friends, even if confined to his own house, your proper course will be, in our opinion, to summon the persons who had the charge of him at the time and ascertain how they came to be so remiss, and then pronounce upon the case of each separately, according as you see anything to excuse or aggravate his negligence. The object of providing keepers for lunatics is to keep them not merely from doing harm to themselves, but from bringing destruction upon others; and if this last-mentioned mischief should come to pass, it may well be set down to the negligence of any who were not sufficiently assiduous in the discharge of their office."

15 MARCIANUS (*on criminal trials* 1) One point requires attending to: the officer who governs a province must not pass the boundary, save for the purpose of discharging a vow, and even then he must not spend the night beyond the border.

16 MACER (*on the office of Præses* 1) It is provided by a decree of the senate that actions must be entertained very sparingly on any questions arising upon contracts made by provincial governors or their suite or their freedmen before they came into the province, it being understood that where any such person forbears to bring an action in consequence of this rule, the right of action will be restored to him after he leaves the province. But if anything happen involving no act of his own,—for example, he is the victim of some *injuria* or theft,—the court will so far entertain his case as to let him proceed to *litis contestatio*, and then an order can be made that any property stolen should be produced and

[1] Read *quod non* for *quoniam*. Cf. M. [2] *sit* inserend. after *saniore*.

deposited, or that a promise should be given with security that the party should appear to the action or that the thing will be produced.

17 CELSUS (*Digest* 3) If the *prœses* of the province should happen to manumit or appoint a guardian before he has had notice that his successor has arrived, these acts will be held valid.

18 MODESTINUS (*Rules* 5) It is provided by plebiscite that no *prœses* shall accept a gift or present, save one of eatables and drinkables for a few days' consumption.

19 CALLISTRATUS (*on judicial inquiries* 1) The magistrate who dispenses justice should take care to be quite ready to entertain applications, but he should not let anyone treat him with disrespect. Accordingly it is inserted in the instructions given to the governors of provinces that they are not to allow the provincials to be on a footing of easy familiarity; as intercourse on equal terms is apt to lead to rank being disrespectfully treated. 1. Again, when the governor is hearing a case judicially, he should not fire up against persons of whom he has a bad opinion, nor ought he to be moved to tears by the entreaties of those in distress; a man is not behaving like a firm and good judge who[1] allows his countenance to betray his feelings. To put it in a few words, the judge should so administer justice as to allow the impression produced by his personal character to enhance the authority of his rank.

20 PAPINIANUS (*Responsa* 1) The imperial legate, that is, the *prœses* or *corrector* of the province, does not by resigning his office lose his right of *imperium*.

21 PAPINIANUS (*on the office of assessors*) Where the *prœses* has before him a case of a slave being corrupted, or a female slave being debauched, or a male slave being unnaturally assaulted, then, if the slave alleged to be corrupted is the overseer of some absent[2] person, or is in such a position that, over and above any loss in respect of property, the mischief amounts to the ruin of the owner's whole establishment,—he ought to inflict very severe punishment on the offender.

[1] *cujus* perhaps slipshod in the author quoted: *si cujus* would be more grammatical.

[2] Read *absentis* for *agentis*. Cf. M.

XIX.

On the office of Imperial Procurator or Rationalis.

1 Ulpianus (*on the Edict* 16) Any acts and deeds of the imperial procurator are acknowledged [? *comprobantur*] by the Emperor as if they were the Emperor's own acts[1]. If the imperial procurator should deliver something belonging to the Emperor as if it were his own, I should say that he does not pass the property in it; he only passes the property when he is acting in the Emperor's behalf and delivers with his consent. In fact if he does any act by way of effecting a sale or a donation or a compromise of matters in dispute, it is void; as it is no part of his duty to dispose of the Emperor's property, but to administer it carefully. 2. The following is a special attribute of the imperial procurator; a slave of the Emperor can enter on an inheritance by his order, and, if the Emperor should be appointed heir, the procurator can himself, by intermeddling with a rich inheritance make the Emperor [complete] heir.

2 Paulus (*Sentences* 5) But if the property in respect of which the Emperor is appointed heir is insufficient for the debts, then, when the fact is ascertained, the course is to consult the Emperor; since when a question arises as to entering on or declining such inheritances, it is the person appointed heir whose wishes should be ascertained.

3 Callistratus (*on judicial inquiries* 6) Imperial procurators[2] have not the power of deporting; this is a punishment which they are not competent to inflict. 1. But if they should forbid any one access to land belonging to the Emperor on the ground that his behaviour tended to a riot or was otherwise a wrong to the imperial tenants, the party is bound to keep away; this is laid down in a rescript of the Divine Pius to Julius. 2. It may be added that the procurator is not able to give a man [who is deported] leave to return, and this is laid down in a rescript of the present Emperors Severus and Antoninus written in answer to an application by one Hermias.

[1] Sentence hopeless.

[2] Read *procuratores* for *curatores*. Cf. M.

XX.

ON THE OFFICE OF *Juridicus*.

1 ULPIANUS (*on Sabinus* 26) A man can execute an adoption in the court of the *juridicus*, as the latter is allowed to take statute actions.

2 THE SAME (*ibid.* 39) The *juridicus* who holds office at Alexandria is allowed by an enactment of the Divine Marcus to appoint guardians.

XXI.

ON THE OFFICE OF ONE TO WHOM JURISDICTION IS DELEGATED.

1 PAPINIANUS (*Questions* 1) Wherever any powers are conferred specially by a statute or a decree of the senate or an imperial enactment, if the officer delegates his jurisdiction, such powers do not pass; but powers which he possesses in right of his magisterial office can be delegated. Hence those magistrates are clearly in the wrong who having the power to hold a criminal trial conferred upon them by a statute or a decree of the senate, such as the *lex Julia de adulteriis*, or any other similar enactment, thereupon proceed to delegate their jurisdiction. A very strong argument in support of the above is the following:—in the *lex Julia de vi* it is expressly provided that the judge on whom there falls the duty of holding the inquiry can delegate it if he goes away; so that he has a right of delegation only in case he should be absent, whereas in general jurisdiction can be delegated equally well by a magistrate who remains on the spot. Should the case to be tried be that of a man being murdered by his own slaves, the prætor will not be at liberty to delegate the power of holding a trial, deriving it as he does from a decree of the senate. 1. When a man has undertaken a jurisdiction which was given him by delegation, he has no original powers of his own, he only exercises the jurisdiction of the officer who delegated. The better opinion is that according to long-established practice "*jurisdictio*" may be transferred, but the right of mere command (*merum imperium*) which is given by a statute will not pass; hence no one holds that the legate of the proconsul has the power of inflicting punishment

when he takes the proconsul's jurisdiction by delegation. (Note by Paulus: the better opinion is that when *jurisdictio* is delegated the right of direct command which is bound up with *jurisdictio* passes too.)

2 ULPIANUS (*on all the Courts* 3) Where the *præses* delegates his jurisdiction, the person to whom it is assigned cannot summon a board (*consilium*). 1. Where guardians and curators wish to sell land [in those respective capacities] the prætor or *præses* can give permission on sufficient cause shown; but if he delegates his jurisdiction, he can by no means thereby transfer the right of holding the requisite inquiry.

3 JULIANUS (*Digest* 5) Even where the person who carries on another man's jurisdiction is himself a prætor, still so long as he is discharging the office of the other, he is not acting in virtue of his own powers, but is administering justice in the place of the officer by whose delegation he sits.

4 MACER (*on the office of Præses* 1). The right of holding inquiry into the case of a guardian who is 'suspected' can be delegated. Indeed it has been laid down by rescript, with a view to the benefit of wards, that, where jurisdiction is delegated in general terms, the above right is included; the words are as follows:—"The Emperors Severus and Antoninus to Braduas, Proconsul of Africa. As you have handed over your own jurisdiction to your legates, it follows that they can hold an inquiry into cases of guardians who are suspected." 1. Delegation can be validly made of the power to grant *possessio bonorum*, the power to make an order granting possession in case an undertaking against *damnum infectum* should not be given to one who applied for it, to admit a woman into possession on behalf of an unborn child, to admit a legatee into possession for the purpose of preserving legacies.

5 PAULUS (*on Plautius* 18) It is quite clear that [a man] to whom jurisdiction is delegated cannot delegate it over to another. 1. When jurisdiction is delegated to a private person, the delegation is held to include *imperium* as well, such as does not amount to *merum imperium*; there is no such thing as jurisdiction not involving authority to inflict some slight punishment.

XXII.

On the office of Assessors.

1 Paulus (*on the office of Assessors*) The whole office of an assessor,—one, it may be said, in which the skill of those learned in the law comes into play,—is exercised in cases which are pretty much such as follow: judicial inquiries, motions, applications by libel, edicts, decrees, epistles.

2 Marcianus (*on criminal trials* 1) A freedman can be an assessor. As for persons under *infamia*, there are no statutes forbidding them to act, but in my opinion they are not qualified to discharge the duty of assessor, and in fact there is said to be an imperial enactment to this effect.

3 Macer (*on the office of Præses* 1) If some one province comes to be divided and the two parts are put under two *præsides* respectively, as we see in the cases of Germania and Mysia, a native of either part can be an assessor in the other, and he is not held to be acting in his own province.

4 Papinianus (*Responsa* 4) On the decease of an Imperial legate his attendants (*comites*) have a right to their pay for the rest of the period for which the legate appointed them to serve, provided always that they do not act as attendants to any one else during the time. A different rule is applied where the legate made way for a successor before the regular termination of his office.

5 Paulus (*Sentences* 1) A member of a board[1], while acting as assessor, is by no means at liberty to adjourn the matter into his own audience chamber, but he is allowed to take it into the chamber of some one else.

6 Papinianus (*Responsa* 1) Where a municipal curator summons a board, a man of the same *municipium* is not debarred from acting as assessor, as he is not in receipt of official pay.

[1] Read *consiliario* for *consiliari*. Cf. M.

SECOND BOOK.

I.

On *Jurisdictio.*

1 Ulpianus (*Rules* 1) The office of one who exercises *jurisdictio* is most comprehensive; he can grant [an order for] *bonorum possessio* and put persons into possession, he can appoint guardians to children under age who have none, he can nominate a judge to parties in litigation.

2 Javolenus (*extracts from Cassius* 6) When an officer is given *jurisdictio*, he is also clearly allowed those powers without which *jurisdictio* cannot take its due course.

3 Ulpianus (*on the office of Quaestor* 2) *Imperium* is either simple (*merum*) or mixed. Simple *imperium* is where an officer is in possession of the power of the sword for the purpose of punishing[1] evildoers; when it is also called *potestas*. Mixed *imperium*, which in fact includes *jurisdictio*, is that which is evinced in granting *bonorum possessio*; *jurisdictio* extends to the power of nominating a judge.

4 The same (*on the Edict* 1) The power of ordering an undertaking to be given by a prætorian stipulation, and of putting persons into possession, belongs more to *imperium* than to *jurisdictio*.

5 Julianus (*Digest* 1) By the custom of our forefathers it has been brought to pass that an officer who can delegate his *jurisdictio* can only be one who possesses it in his own right and not by the gift of another;

6 Paulus (*on the Edict* 2) because [in the latter case] the *jurisdictio* would not be given him directly, and the *jurisdictio*

[1] *in* inserend. after *animadvertendum.*

which he has by delegation is not bestowed by the statute but only confirmed by it. Hence if an officer who delegated his *jurisdictio* dies before the person to whom it was delegated has begun to execute the matter in hand, then, according to Labeo, the delegation is annulled, in accordance with the rule in ordinary cases [of *mandatum*].

7 ULPIANUS (*on the Edict* 3) If any one should maliciously destroy a notice which is made in the [prætor's] *album*, or on paper [*charta*], or any other substance, such notice being relative to the prætor's standing jurisdiction, and not dealing with a special occasion, an action is allowed against the offender for five hundred *aurei*, in which any one may sue (*populare est*).

1. The words of the Edict include slaves and sons under *potestas*, moreover the prætor refers to both sexes alike. 2. Should the damage be done while the notice is being put up, or before it has been put up, no doubt the words of the Edict will not apply, but, according to Pomponius, the principle of the Edict ought to be held to go far enough to include this case. 3. In the case of slaves, where their owners do not undertake their defence, and in that of persons destitute of means, bodily torture is to be used. 4. The words of the Edict include the term "maliciously" [*dolo malo*]; because, if any one should act in the way described through ignorance, or want of education, or by the prætor's own order, or by accident, he is not liable. 5. The Edict extends to the case of one who carries the written matter away, though he should not damage it; and it applies equally whether the party commits the offence with his own hands or instigates another to commit it. If one man did the act without malice, but another induced him with malice, the one who induced will be liable; if both act with malice, both will be liable; certainly, if several join in the act, whether they do damage or instigate to it, they will all be liable;

8 GAIUS (*on the provincial Edict* 1) and it goes as far as this—that it is not enough for one of the parties alone to pay the penalty.

9 PAULUS (*on the Edict* 3) If a household of slaves should damage the album, the Edict does not deal with the case in the way in which it does with theft, by providing that if the owner, assuming that he chose to defend the action, pays on behalf of one of such slaves as much as the man would pay himself if he were free, then no action is to be allowed in respect of the others: the reason for this may be that, in the case we are considering, the

object is to redress a slight offered to the dignity of the prætorian office, and it is regarded as a case of so many distinct acts; just as, when a number of slaves have committed an *injuria* or have done damage to property, [the same rule is observed,] on the ground that there are several distinct acts, and not one only as in the case of theft. Octavenus says that the slave-owner ought equally to be relieved in the case under discussion; but this can only be said where the slaves maliciously contrive that some one else shall destroy the album, as in that case there is one common plot, and not a number of distinct acts. Pomponius makes the same remark (lib. X.).

10 ULPIANUS (*on the Edict* 3) The officer who presides at the administration of justice ought not to administer it for his own case nor for that of his wife or his children, nor for his freedmen or any others whom he has about him.

11 GAIUS (*on the provincial Edict* 1) If the same plaintiff brings a number of actions against the same defendant, and the amount sued for is low enough in every separate case to bring it within the jurisdiction of the judge, but the aggregate amount of all taken together exceeds the limits of his jurisdiction, Sabinus, Cassius and Proculus hold that the action can be carried on before the judge in question, and this opinion is confirmed by a rescript of the Emperor Antoninus. 1. Again, if there are reciprocal rights of action between two parties, in respect of which one asks for a sum below the limit, and the other for one above it, the one who asks for the smaller sum must proceed before the same judge, so that it may not be in the power of my opponent, if he is disposed to act vexatiously, to say whether I shall be allowed to argue my case before the same judge or not. 2. If a single action is brought in which a number of persons are plaintiffs at the same time, as, for instance, an action for dividing an inheritance (*familiæ erciscundæ*), for partition of common property (*communi dividundo*), for settling boundaries (*finium regundorum*)—ought we, in order to determine the jurisdiction of the judge who takes the case, to consider the value of the separate shares, which is what Ofilius and Proculus maintain, on the ground that each person is a party to the suit in virtue of his own particular share, or ought we rather to consider the value of the whole property, because the title to the whole is brought in question at the trial, and the whole may possibly be adjudged to one party? This last view is held by Cassius and Pegasus, and there is no doubt their opinion is reasonable.

12 ULPIANUS (*on the Edict* 18) A municipal magistrate is not allowed to visit a slave with severe punishment, but he cannot be denied the right of inflicting moderate chastisement.

13 THE SAME (*on Sabinus* 51) The officer who orders any one to act as *judex* must be a magistrate. 1. Magistrates, or persons who are invested with any official authority, such as proconsuls, or prætors, or governors of provinces in general, cannot order a man to act as judge on a day by which they will themselves have returned to private life.

14 THE SAME (*on the Edict* 39) It is established law and is in accordance with actual practice that where an officer of higher or equal rank submits to the jurisdiction of another, the jurisdiction may be exercised either for or against him.

15 THE SAME (*on all the Courts* 2) If parties by mistake go before one prætor, intending to go before another, the proceedings so far are void. No one can be allowed to say that the parties agreed upon the particular *præses*, since, as Julianus says, where persons are under a mistake there is no agreement: what indeed can be more inconsistent with agreement than a mistake which is a proof of ignorance?

16 THE SAME (*on all the Courts* 3) It is the practice of the prætor to delegate his jurisdiction, and he either delegates it altogether, or with reference to a particular case; whereupon the person to whom the jurisdiction is delegated acts in the place of the officer delegating, and not in his own character.

17 THE SAME (*Opinions* 1) Just as the prætor is able to delegate his entire jurisdiction to another, so he is able to delegate it with reference to particular persons or a particular case, especially where he has a sufficient reason in the fact that he himself undertook the advocacy of one of the parties before he was a magistrate.

18 AFRICANUS (*Questions* 7) If two parties should agree that some other prætor should exercise jurisdiction than the one to whom it regularly belongs, and, before application were made to the prætor agreed upon, there should be a change of mind,—it is beyond doubt that no one could be compelled to abide by such an agreement.

19 ULPIANUS (*Fideicommisso* 6) An unmarried woman was defendant to an action which was brought before a judge who was competent to hear it, and judgment was given against her; after which she became the wife of a man who was subject to a

different jurisdiction, and the question arose whether the order of the original judge could be carried out. My answer was that it could, as the order was already made; but in fact I should hold the same if the marriage had taken place after the hearing had begun, but before judgment was given; so that the decision would properly be given by the original judge. A similar rule ought to be observed in all cases of this kind. 1. Whenever a question arises as to whether the amount which determines jurisdiction is reached or not, the point to inquire into always is how much is sued for, not what is the amount of the debt.

10 PAULUS (*on the Edict* 1) An officer who exercises jurisdiction outside his local limits may be disobeyed with impunity. The same rule holds where he affects to exercise jurisdiction with reference to an amount beyond his competency.

II.

A MAN TO BE DEALT WITH AFTER THE LIKE RULE TO THAT WHICH HE MAINTAINED AGAINST ANOTHER.

1 ULPIANUS (*on the Edict* 3) This Edict is one of perfect fairness and can give no reasonable occasion of protest to any one: indeed, how can anybody complain of having the same law applied to his own case that he applied or caused to be applied to other people? 1. "If a man who holds any magistracy or authority should establish any new law to the prejudice of another, he must himself at any time thereafter, on the application of an opponent of his own, be dealt with in accordance with the same rule; again, if a man should procure the application of any new law in the court of one holding some magistracy or[1] authority, judgment must at any time thereafter, on the application of his opponent, be given against him in accordance with such new law," so that, in short, whatever a man himself deemed to be just in the case of another, he must suffer the same to be held good in his own case too. 2. The words "whatever the officer who presides at the *jurisdictio* establishes" are understood by reference to the result; we must not confine ourselves to the words; consequently, if the officer should wish to establish something for law, but should be checked, and his judgment should not take effect, the Edict does

[1] Read *ne* for *que*.

not apply. The word "statuit" (establishes) implies that the matter is completed, and the wrong is consummated, not merely begun. It follows that if a man exercises jurisdiction between parties between whom he is not competent to exercise it, then, seeing that the proceeding is treated as null and void, and there is in fact no decision at all, we must hold that the Edict does not apply; how indeed could there be any harm done by the attempt, where the illegality produced no effect?

2 PAULUS (*on the Edict* 3) By this Edict what has to be punished is malice in the person exercising jurisdiction; if the law has been laid down otherwise than it ought, owing to an oversight on the part of the assessor, the ill consequence ought to fall on the assessor himself, and not on the magistrate.

3 ULPIANUS (*on the Edict* 3) If a man has procured for himself the benefit of an unjust rule being applied to an opponent, he will be dealt with according to the same rule himself only where the thing was done on his own application; if it was not on his application, he will suffer no penalty. But if he got the order, then, whether he put the rule in force or only obtained leave to put it in force without doing so, he will be punished under this Edict. 1. If it was my *procurator* who made the application, the question arises who it is that will be dealt with according to the same rule; Pomponius holds that it is myself only, at any rate, if I specially instructed the *procurator*, or subsequently ratified what he did. But if a guardian or the curator of a lunatic or minor made the application, he is punished under the Edict himself. The same course must be followed with a *procurator* too, if he was made '*procurator* on his own behalf.' 2. The penalty is laid down against every one who comes within the terms of the Edict, on the application not only of the party who was injured by him, but of any person whatever who takes proceedings at any distance of time. 3. Suppose a person for whom you are surety obtains an order forbidding some debtor of his to plead [a particular] *exceptio* against him, and, after that, you desire to plead [a similar] *exceptio* in respect of your engagement as surety, neither you nor the principal debtor himself can get leave to do so; even though in the meantime this should entail a wrong on you if your debtor is insolvent. But if you yourself are hit by the Edict, the principal debtor can still plead the *exceptio*, but you cannot; so that the penalty incurred by you [the surety] will not affect the principal debtor; accordingly you

will have no right of action on *mandatum* against him. 4. If my son in the exercise of a magistracy incurs the penalty of the Edict, will the Edict apply in respect of such actions as I bring in his right? My opinion is that it will not, or else my relation to him will put me in a worse legal position. 5. With regard to the prætor's declaration that a person in the case mentioned is to be dealt with "after the same rule," will the liability to this penalty pass to his heir as well? Julianus informs us that not only the person himself loses the right of action, but his heir does too. 6. He adds this, which is not unreasonable, that he is exposed to the penalty in question not only in connexion with such rights of action as he had at the time when he brought himself within the terms of the Edict, but in connexion also with any that he may acquire subsequently. 7. The principle under discussion (so Julianus holds) will not allow money already paid to be recovered, as there was still ground for the payment in natural law, and that fact bars the recovery.

4 GAIUS (*on the provincial Edict* 1) The prætor makes one rather nice reservation, in these words:—"save always where one of the above persons [against whom relief is promised] had acted to the prejudice of some one who had himself done similar prejudice to another." This reservation is perfectly sound, as otherwise a magistrate who seeks to uphold the Edict, or a litigating party who desires to enjoy the benefit conferred by the Edict, might himself incur the penalty which the very Edict imposes.

III.

WHERE A MAN REFUSES OBEDIENCE TO THE MAGISTRATE EXERCISING JURISDICTION.

1 ULPIANUS (*on the Edict* 1) All magistrates, save only duumvirs, are allowed, in accordance with the rights appertaining to their respective authorities, to protect their administration of justice by means of penal sentences. 1. A man is held to refuse obedience to the magistrate exercising jurisdiction when he declines to comply with the final direction given in the course of the magistrate's administration of the law; for example, where he refuses to allow moveable property to be made the subject of a vindication against him, but does allow it to be driven or carried away [, it is

held that he obeys][1]; but, if he resists even these subsequent measures, then it is held that he does not obey. 2. If a *procurator* or guardian or curator refuses obedience to the officer exercising jurisdiction, the offender is himself punished, not the principal or the ward. 3. This Edict, so Labeo says, applies not only to a defendant who disobeys, but to a plaintiff as well. 4. The action is not for an amount representing the plaintiff's interest in the matter, but is confined to the direct loss; and, as it provides a penalty simply, it is not allowed to be brought after a year nor against the heir of the wrongdoer.

IV.

On Citation.

1 Paulus (*on the Edict* 4) To cite a person to appear is to cite him for the purpose of a trial at law.

2 Ulpianus (*on the Edict* 5) No citation can be made of a consul or a prefect or a prætor or a proconsul or any other magistrate who possesses *imperium*, and who consequently can exercise coercive powers and order persons to be put in prison; nor of a *pontifex* while he is performing sacred rites, nor of such as cannot stir from the spot where they are, because of the religious character attached to the place, nor, again, of one who is riding on his way in the service of the government on a horse which is state property. Furthermore a man must not be summoned who is in the act of being married, nor a woman in the like case; nor a judge who is at the moment hearing a case; nor a man who is pleading before the prætor; nor one who is conducting the funeral of a member of his own household, or is performing due rites to the dead;

3 Callistratus (*judicial inquiries* 1) nor persons who are attending a funeral;—and this rule we find is confirmed by a rescript of the Divine Brothers:—

4 Ulpianus (*on the Edict* 5) nor any one who is compelled to appear in court or in some particular place in order to take part in a trial; nor lunatics nor infant children. 1. The prætor says "No one is to cite to appear without my permission a parent, a patron or patroness, or the children or parents of a patron or

[1] *obtemperans* inserend. M.

cite any individual member of the corporate body; as he is no freedman of the individuals. But he is bound to treat the municipality (*res publica*) with deference, and if he desires to go to law with a municipality or a corporation, he must apply for permission under the Edict, though he should intend to cite one who is appointed agent for the body [*actor*]. 5. The terms "children" and "parents" of the patron and patroness we must regard as including both sexes. 6. If the patron is reduced to peregrine condition by a sentence of deportation, then, in the opinion of Pomponius, he loses his privilege. But if he should be reinstated he will recover the full benefit of this Edict as well. 7. The expression "parents of the patron" confers the exemption even on adoptive parents; but only so long as the adoptive relation lasts. 8. If my son is given in adoption, he cannot be cited by my freedman; neither can my grandson, where he was born into the adoptive family. But if my son, after emancipation, adopts a son, such a grandson can be cited [by my freedman], as he is a stranger to me. 9. The word *liberi* (children), according to Cassius, is applied in a way corresponding to the use of the word parent, that is, even beyond a descendant in the fifth degree. 10. If a freedwoman has a child by her patron, she and her son are forbidden to cite each other. 11. But if the children of a patron should have brought a capital accusation against their father's freedman, or have taken proceedings to have him judicially pronounced a slave, no honour need be shown them. 12. The prætor says:—"No one is to cite without my permission," etc. He will give permission if the action brought against a patron or a parent is not one which involves infamy or which wounds his honour. But in every case he ought to act on cause shown; as in some cases, in the opinion of Pedius, he ought to allow a patron to be cited by his freedman, even where the action involves infamy, where, for instance, he has done the freedman some outrageous wrong, say, he scourged him. 13. The honour in question is always to be paid to the patron, even though he is concerned as a guardian, or curator, or voluntary defendant on behalf of another (*defensor*), or as an agent (*actor*). But where a guardian or curator of the patron is concerned, such a person can be cited with impunity, according to Pomponius, and this is the better opinion.

.1 PAULUS (*on the Edict* 4) Although the prætor does not proceed to say that he will allow penal proceedings [only] on sufficient cause shown, still, according to Labeo, his jurisdiction

must be exercised subject to some limitation; suppose, for example, the freedman should think better of his intention and abandon the action, or the patron, although cited, should not appear, or he should have no objection to being cited; although the language of the Edict does not admit the above construction.

12 ULPIANUS (*on the Edict* 57) If a freedman should, in contravention of the prætor's Edict, cite a son of his patron whom that patron has under his *potestas*; the proper view to take is that, in the absence of the father, the son under *potestas* ought to get relief, and he has a good penal action *in factum* against the freedman; viz. one for fifty *aurei*.

13 MODESTINUS (*Pandects* 10) The general rule is that those persons to whom deference ought to be shown cannot be cited without the leave of the prætor.

14 PAPINIANUS (*Responsa* 1) Where a freedman is put on his trial by his patron, and, with a view to his defence, makes a number of applications to the *præses* of the province in his court, he is not held to be thereby citing the patron who accuses him.

15 PAULUS (*Questions* 1) A freedman presented a petition to the Emperor against his patron in which he did not conceal the fact that he was his freedman; assuming that he obtains a rescript such as he prays, is it held to follow that the penalty due under the Edict is remitted? My answer was this:—I do not think that the prætor's Edict applies to such a case; a man who presents a petition to the Emperor or the *præses* is not held to be citing his patron.

16 THE SAME (*Responsa* 2) The question was asked whether a guardian could cite his own patroness without the leave of the prætor, when acting on behalf of his ward. I answered that the person in question, while acting on behalf of his ward, might go so far as to cite his own patroness without the leave of the prætor.

17 THE SAME (*Sentences* 1) Where a man has given an undertaking at the magistrate's office that he will produce any one, he is compellable to do so. Moreover a man who has promised by enrolled assurance that he will produce any one, even though he give no undertaking at the office, is still compelled to produce him[1].

[1] This is clearly the meaning intended; the wording is uncertain.

18 GAIUS (*on the Twelve Tables* 1) Most writers hold that it is not lawful to cite any person from his own house; a man's house, they say, being his most secure shelter and retreat, so that any one who should cite him out of it must be held to be using violence;

19 PAULUS (*on the Edict* 1) and, if such person is undefended and he keeps out of the way, it is clear that he suffers quite sufficient penalty by the fact that the other party is put in possession of his property. But if he makes himself accessible or he can be seen from any public place, then, according to Julianus, he can be properly cited.

20 GAIUS (*on the Twelve Tables* 1) There is no doubt that a man can lawfully be cited from his housedoor, or the baths, or the theatre.

21 PAULUS (*on the Edict* 1) Still, though a man who is in his house can sometimes be cited, no one ought to be dragged out of his own dwellinghouse.

22 GAIUS (*the Twelve Tables* 1) Again, one is not allowed to cite a girl under the age of puberty, who is subject to some one else's *potestas*. 1. Where a man is cited, two cases may occur in which he must be excused from attending; one where some one undertakes his defence in his place, and the other where, before they have come into Court, the parties agree to compromise the matter.

23 MARCIANUS (*Institutions* 3) When a man is freedman to several patrons in common, he is still bound to ask the praetor for leave to cite any one of such patrons in particular, or else he will incur the penalty prescribed by the Edict.

24 ULPIANUS (*on the Edict* 5) If any one contravenes the above regulations, an action is allowed against him for fifty *aurei*; but this will not be given to the heir [of the patron], nor against the heir [of the freedman], nor after the lapse of a year.

25 MODESTINUS (*on penalties* 1) If a freedman should cite a patron without getting permission under the Edict, then, on complaint made by the patron, he either has to pay the above-mentioned penalty, viz. fifty *aurei*, or else he is chastised by order of the prefect of the city as failing in respect, that is, if he is ascertained to be devoid of means.

V.

WHERE ONE WHO IS CITED FAILS TO APPEAR; ALSO WHERE A MAN CITES ONE WHOM, ACCORDING TO THE EDICT, HE HAS NO RIGHT TO CITE.

1 ULPIANUS (*on the Edict* 1) Where any one who is cited offers as a surety for his appearance at the trial a person who is not subject to the jurisdiction of the judge before whom he is himself cited, such a surety is not regarded as offered at all, unless he expressly renounces his privilege.

2 PAULUS (*on the Edict* 1) A man who is cited on whatever ground before the prætor, or any other officer who presides at the administration of justice, is bound to attend for the purpose of having the very point ascertained whether the officer in question really has the jurisdiction or not. 1. Where one who is cited declines to attend, he will be ordered by the proper judge to pay such fine as it comes within the jurisdiction of that judge to impose; but on sufficient cause shown, as allowance must be made for the man's want of education; moreover if the plaintiff has no interest in the other party appearing at that precise time, the prætor remits the penalty; for instance on the ground that the day was a holiday (*dies feriatus*).

3 ULPIANUS (*on Sabinus* 47) Where a man promises to appear at a trial, but does not go on to name a penalty which he will pay in case of non-appearance, the clear rule is that an action can be brought for unliquidated damages to an amount equivalent to the plaintiff's interest; and so says Celsus himself.

VI.

PERSONS CITED BOUND TO APPEAR OR ELSE GIVE A GUARANTEE OR AN UNDERTAKING.

1 PAULUS (*on the Edict* 1) It is provided by the Edict that, when a surety is offered that a person will appear in answer to a summons, the surety so offered must be of sufficient means, regard being had to the station of the defendant, except where the surety is a near connexion of the defendant, in which case any kind of surety must be accepted; suppose, for example, a man is offered as surety for his parent or patron,

2 CALLISTRATUS (*on the monitory Edict* 1) or, again, for his patroness, or his own children, or his wife or his daughter-in-law. In these cases any kind of surety has to be accepted[1], and where the plaintiff refuses to accept a surety, knowing that it is a case of a close connexion such as above mentioned, there is a good right of action for fifty *aurei*,

3 PAULUS (*on the Edict* 4) since in the case of persons closely connected any surety is deemed and taken to be of sufficient means.

4 ULPIANUS (*on the Edict* 58) Where a man has promised that two particular men should appear at the trial, and thereupon he produces one but not the other, he cannot be held to procure them to appear in fulfilment of his promise, seeing that one of the two was not produced.

VII.

NO ONE TO RELEASE BY FORCE A MAN WHO IS CITED.

1 ULPIANUS (*on the Edict* 5) The praetor published this Edict in order that he might keep in check by fear of punishment such as forcibly release persons who are cited. 1. Indeed we read in Pomponius that where the offender is a slave, a noxal action must be given, unless the slave did the act with his owner's knowledge; in that case his owner must submit to the action, without being allowed the alternative of surrender for *noxa*. 2. Ofilius holds that this Edict will not apply where a person has been released who was never legally liable to be cited, for instance, a parent, or a patron, or one of the other persons mentioned; and this seems to me the sounder opinion. Certainly where it was a wrong to cite the party it was no wrong to release him.

2 PAULUS (*on the Edict* 4) Both, no doubt, contravene the Edict, the freedman who cites his patron, and the other party who forcibly releases him; but the freedman is in the worse position, if he acts the part of plaintiff where his own wrong is just as great. The same equitable consideration applies in the case of one who was cited to a place to which he was not liable to be cited; but here the observation may be made more strongly still that a man who has a right to decline to be sued at that place, cannot be alleged to be released with violence.

[1] *quibus* inserend. after *accipitur*. M.

3 ULPIANUS (*on the Edict* 5) Where a man sets free a slave who was cited, Pedius holds that the Edict does not apply, because the slave was not a person who could legally be cited. That being the case, it comes to this; there will have to be an action for production. 1. If a man should set free some one who is cited before a subordinate judge (*judex pedaneus*), the penalty mentioned in the Edict will not be incurred. 2. With regard to the rule laid down by the prætor in the words "release with violence" (*vi*), does it apply where simple force is used, or must there be malice (*dolus malus*) as well? Release by force is enough, though there should be no malice.

4 PAULUS (*on the Edict* 4) The word 'eximere' (release), so Pomponius says, is a comprehensive term. 'Eripere' means to take out of a man's hands by actual seizure; 'eximere' is to set free in any way whatever. Suppose for instance one should not positively seize a man, but contrive some hindrance in order to prevent him from coming to the magistrate's court, so as to cause the regular time for bringing the action to expire, or the property at stake to be lost by lapse of time; the party would be held to have released the person in question, though there should be no physical release. Similarly if any one, without taking a man away, detains him where he is, he is liable under the same words. 1. If a man releases some one who is cited on a vexatious pretence, there is no doubt that he is liable under the Edict. 2. The prætor says "and he is not to contrive maliciously to procure him to be released." Of course it is possible that the thing should be done otherwise than maliciously, for instance, when there is good ground in law for a release.

5 ULPIANUS (*on the Edict* 5) If a man releases some one through the agency of a third person, he comes under these words, whether he is himself present or absent. 1. Where a man effects a forcible release, an action *in factum* is allowed against him, in which the measure of damages is not the actual amount of loss suffered, but the value set by the plaintiff on the subject-matter of the [original] litigation. This rule is expressly added to make it clear that where a plaintiff has brought a vexatious action, still he can recover the damages referred to. 2. He must however show that the result of the release was that the defendant was not brought before the court. If he really was brought after all, there is no penalty, the words only apply where the act made a real difference. 3. The action is *in factum*, and, if there are more

offenders than one, each may be sued separately, moreover the party released remains still as much liable as before. 4. Heirs have a right to bring this action only where they have an interest in doing so; but no action is allowed against an heir, nor after the lapse of a year.

6 THE SAME (*on the Edict* 35) Where a man who has released a defendant debtor by force pays the damages, this does not extinguish the debtor's liability, as the party simply pays damages for his own act.

VIII.

WHAT PERSONS RESPECTIVELY ARE COMPELLED TO GIVE A GUARANTEE OR PROMISE ON OATH OR ARE REMITTED TO A SIMPLE PROMISE.

1 GAIUS (*on the provincial Edict* 5) The term *satisdatio* (giving a guarantee or security) arose in the same way as *satisfactio*. Just as people are said to give satisfaction to one with whose wish they comply, so they are said to make "satisdation" to the opposite party when they give him such security[1] in respect of the subject-matter of his suit that by furnishing sureties they relieve him from all risk involved in it.

2 ULPIANUS (*on the Edict* 5) A surety who is given for the appearance of a defendant is regarded as substantial not merely by reference to his means, but by reference also to the facilities there may be for suing him. 1. If a man should give a surety for his appearance to a suit brought by any one of the class of persons legally incapable of bringing it, this giving of a surety is of no force. 2. The praetor says, "If any one cites his parent, his patron or patroness, the children or parents of his patron or patroness, or his own children, or some one whom he has under his *potestas*, or his wife, or his daughter-in-law, any kind of surety for the appearance of the defendant is to be accepted." 3. Where the praetor says "or his own children," we must understand this to include grandchildren descended through women: and we must allow the privilege in question in the case of parents not only where they are *sui juris*, but equally where they are under any man's *potestas*: this is in fact said by Pomponius. Moreover a son can become a surety for his father, even where he is under some one

[1] Read *cum ..caveatur* for *qui...cavit*. M.

else's *potestas*. Daughter-in-law we must take to include granddaughter-in-law, and so on in remoter generations. 4. Where the prætor says "any kind of surety is to be accepted," this refers to the surety's means, it signifies, in short, even if the surety is not substantial. 5. Where the prætor allows an action against a surety who promised that some one should appear, it is given for such amount as the matter is worth; but as for whether that means the actual loss in fact incurred, or a definite amount [*an vero quantitatem*] settled beforehand, this is a point to consider. The better opinion is that the surety is liable for the actual amount [*in veram quantitatem*], unless he became surety for a specific sum[1].

3 GAIUS (*on the provincial Edict* 1) Whether the action was for double or treble or fourfold damages, it is held that one and the same surety is liable for whatever the amount was, without further discrimination, as that is the amount which the matter is taken to be worth.

4 PAULUS (*on the Edict* 4) If a defendant who has furnished a surety for his appearance should die, the prætor ought not to order him to be produced[2]. Should the prætor order him to be produced, in ignorance of his death, or should the defendant die after the order is made, but before the day on which he was to be produced, no action can be allowed. Should the party on the other hand die or lose his citizenship after the day on which he was to be produced, an action may be brought with good effect.

5 GAIUS (*on the provincial Edict* 1) But if a man is surety for one against whom judgment has already been given, and the latter, being in that position, dies, or loses Roman citizenship, this will not prevent an action being properly brought against the surety. 1. Where a plaintiff declines to accept some surety offered for the appearance of the other party, though he is beyond all doubt a substantial person, having regard to the condition of the defendant, or, if there was any doubt, is shown to be such, an action for *injuria* can be brought against him, as it is certainly no every day *injuria* that a man who offers a thoroughly sufficient surety should be brought up summarily in person. Indeed the surety himself whom the party declined to accept may take proceedings as for an *injuria* done to himself.

6 PAULUS (*on the Edict* 12) If in any case there is some flaw in the undertaking or the guarantee given, it is held that there is no undertaking at all.

[1] The passage must be corrupt. [2] Read *exhiberi* for *exhibere*. Cf. M.

7 ULPIANUS (*on the Edict* 14) If, without the sufficiency of the surety being denied, it should be alleged that he has a right to object to the jurisdiction, and the plaintiff should be apprehensive that he will raise a plea founded on the alleged right,—let us see how the law stands. As to this point,—so we are informed by Pomponius in his book of Epistles, by Marcellus (Dig. 3) and by Papinianus (Questions 3)—the Divine Pius laid down, in a rescript addressed to Cornelius Proculus, that a plaintiff was quite justified in refusing to accept such a surety, but that, if no other surety can be procured, the one who is offered must make a declaration that, if he is sued, he will not avail himself of his privilege. 1. Where the finding of a surety is obligatory, but the defendant has a difficulty in finding one on the spot where he is sued; then, if he offer to find one in some other city of the same province, his proposal may be entertained. But where the defendant offers a surety without being obliged to do so, he is not allowed to change the place; a man has no claim to consideration of this kind where he of his own choice put himself under the necessity of finding a surety. 2. If guarantee for appearance has not yet been furnished, where the trial relates to some moveable, and the person who is required to find a surety is not thought trustworthy, the property should be deposited at the Office [*Officium*], if that is agreeable to the judge, until either a surety is found or else the case is concluded.

8 PAULUS (*on the Edict* 14) Commonly the parties to the action agree as to the mention of a day in the stipulation. In default of such agreement, Pedius holds that the promisee may choose the day, subject to some limitation as to the time; this point is to be decided by the judge. 1. A man who offers a woman as a person to guarantee his appearance, is not held to find a surety at all; indeed, soldiers and persons under twenty-five are not to be approved of, except where such persons are sureties in their own behalf, as, for example, where they are sureties for their own agents. Some indeed hold that where an action is brought to recover dotal land by a husband, the wife may be surety in her own behalf. 2. If a person who before issue was joined was surety that the judgment would be complied with [*judicatum solvi*] is found to be a slave, the plaintiff has a claim to relief, and a fresh undertaking must be made. Relief must also be given to one under twenty-five, and perhaps to a woman, on the ground of inexperience. 3. If one who is surety that the judgment will be

complied with becomes heir to the person to whom the assurance was given, or *vice versâ*, fresh assurance will have to be given. 4. A guardian or curator, when he has to undertake that property shall be preserved for the ward, may have an order that he shall come to the municipal town, because the guarantee is compulsory; the same rule holds as to a guarantee for a man giving up to the bare proprietor property in which a usufruct has been created; and a legatee is in the same position with reference to his giving security that, if the inheritance should be recovered by action [from the present assumed heir], he will give up any legacy paid him, including anything which, having regard to the *lex Falcidia*, was paid in excess; moreover, an heir has a right to be heard on an application to be sent to the municipal town for the purpose of giving security for payment of legacies. It is true that if a legatee has once been put in possession of the property bequeathed him in a case where it was the heir's own fault that he omitted to find a surety, and the heir thereupon requests that the legatee may give up possession, and declares that he is ready to find a surety in the municipal town, he will not be entitled to permission to do so. But it is a different case where the legatee is put in possession through no negligence or wilful misconduct of the heir. 5. A man [who desires to give security in the *municipium*] is ordered to deny on oath any vexatious intention, for fear lest he should really be seeking to annoy his opponent, and should have had that main object in calling upon him to come to the *municipium*, when perhaps he is able to find a surety in Rome; still some persons are excused the oath referred to in disavowal of vexatious intention; for instance, parents and patrons. A man who gets the order authorizing him to go to a *municipium* is bound to swear as follows:—that he is unable to find a surety in Rome, but that he can find one at the place to which he requests to be sent, and that he does not make the application with any vexatious intent. But he is not compellable to swear as follows:—that he cannot find a surety in any other place than the one named:—because if, though unable to give security in Rome, he is able to give it in any one of several other places, this would amount to compelling him to commit perjury. 6. The leave in question will only be obtained where there is shown to be lawful cause. Suppose, for instance, the defendant was in the *municipium* on a previous occasion, and then refused to find any surety; in such a case the permission ought not to be given him, as it was his own fault that he did not find a surety at the place to which he now desires to go.

9 GAIUS *(on the provincial Edict 5)* Where an arbitrator is appointed to try the sufficiency of proposed sureties, if his decision appears unjust, relatively to either party, there is an appeal allowed from him, just as there is from a regular judge.

10 PAULUS *(on the Edict 75)*[1] If sureties are approved of by the arbitrator, they are to be deemed substantial persons; seeing that a complaint may be made before the proper judge, who can, on sufficient cause shown, reject sureties approved by the arbitrator, or, it may be, approve those rejected. 1. Much more may we say that, where a man of his own freewill accepted sureties that were offered him, he is bound to be content with them. If, however, in the meantime some notable calamity should overtake the sureties, or, say, severe loss of means, then, on sufficient cause shown, sureties must be found over again.

11 ULPIAN *(on the Edict 75)* Julianus has the following: having no mandate as yet from me to bring an action to recover land, you still intend to bring the action, and you accordingly take the requisite guarantee, after which I give you the mandate and you institute proceedings in pursuance of it; in this case the sureties are bound.

12 THE SAME *(on the Edict 77)* All writers are agreed that where a man is appointed heir on condition, then, if he is in possession of the inheritance while the condition is pending, he must give an undertaking to the substitutional heir to hand over the inheritance, after which, if the condition fails, the substitute, assuming that he chooses to enter as heir, can bring the *hereditatis petitio*, and, if he succeeds therein, the undertaking can be sued on. Very often indeed the praetor himself, before the condition comes to pass, and before the time has arrived for the *hereditatis petitio*, will, on due cause shown, order the stipulation to be made.

13 PAULUS *(on the Edict 75)* And if there are several substitutes, an undertaking must be given to each separately.

14 THE SAME *(Responsa 2)* A son under *potestas* undertakes the defence of his father, who is absent: I wish to know whether he is bound to give security by sureties that the judgment will be obeyed. Paulus replied that any one who undertakes to defend an action on behalf of an absent person, even if he is a son or a father, is bound, according to the terms of the Edict, to give such security to the person who is bringing it.

[1] On division of sections at this point cf. M.

15 MACER (*on appeals* 1) It must be borne in mind that defendants in possession of immoveable property are not compellable to find sureties. 1. By possessor is to be understood a person who possesses land in the country or a town, whether solely or in respect of a share. We may add that a man is considered possessor just as much when he has an *ager vectigalis*, that is, an emphyteutic estate. Furthermore, a man must be regarded as possessor when he has the bare ownership. But where he has only the usufruct, we have Ulpian's authority that he is not possessor. 2. A creditor who has taken a thing in pledge is not 'possessor,' although he should have got possession, whether the thing has been delivered to him or he has allowed it to be held on *precarium* by the debtor. 3. If land is given by way of *dos*, both husband and wife are, in regard of their actual possession of such land, considered possessors. 4. A man who has a right of action *in personam* for the delivery of land is in a different legal position. 5. Guardians are treated like possessors, whether their wards are in possession or they are so themselves; indeed, the construction is the same even where only one of the guardians is in possession. 6. If you bring an action against me to recover land which I possess, and judgment being given in your favour, I thereupon appeal, am I still possessor of the land? The proper view to hold is that I am possessor, as I have still got possession; and it makes no difference that my possession can be taken away from me by course of law. 7. When the question arises whether a man is possessor, the time to be considered [for the present purpose] is that at which the undertaking is given; for just as a man who sells the possession after giving the undertaking is in no worse position, so one who takes possession after giving it is in no better position.

16 PAULUS (*on the Edict* 6) Where a man promises on oath to appear at the trial, he is not held to commit perjury if he fails to appear on some recognized ground.

IX.

NATURE OF THE UNDERTAKING GIVEN IN THE CASE OF A NOXAL ACTION.

1 ULPIANUS (*on the Edict* 7) If a man has promised that some slave who is the subject of a noxal action shall be produced at the trial, he must, so the praetor says, be ready to produce[1] him in the same legal plight [*causa*] in which he is at the time while joinder of issue is still pending. 1. What is meant by the expression "the same legal plight" is a point to consider; but the true view, I should say, is that a man must be held to present the slave in the same plight where he does not put the plaintiff in a worse legal position with reference to the action which he brings. Should the slave in the meantime cease to be the promisor's property, or the plaintiff's right of action be lost, then, according to Labeo, the slave cannot be held to be presented in the same legal plight; the same may be said where a plaintiff who was in as good a position (as the defendant) for purposes of litigation comes to be in a worse position by some change of place or of party. Thus where the slave is sold to some one who cannot be sued in the same court as the promisor could, or is transferred to a man who is a more formidable antagonist, the same authority considers on the whole that he cannot be said to be produced in court in the same legal plight. Again, if the slave should in the meantime be surrendered for *noxa*, Ofilius holds that he cannot be produced in the same plight, as, in his opinion, surrender for *noxa* does away with all noxal actions on the part of other persons.

2 PAULUS (*on the Edict* 6) However, the present practice is different; when a slave is surrendered for *noxa* he is not discharged from all antecedent legal predicaments; in fact *noxa* still follows the guilty subject just as much as if he had been sold. 1. If some one is in a position to bring a noxal action in respect of a slave, and the slave is absent, then, according to Vindius, if the owner does not deny that the slave is under his control, he can be compelled either to promise that he shall be produced in court, or to join issue, or else, if he does not choose to undertake the defence, he must give an undertaking that he will produce the slave as soon as he is able: but, if he denies falsely that he is

[1] *debere* inserend. after *exhibere*. M.

under his control, he must take up the case without the alternative of surrender for *noxa*. Julianus says the same, even where the owner contrives fraudulently that the slave shall not be under his control. But, if the slave is present and the owner is absent, and nobody defends the slave, the prætor will order that the plaintiff may carry the slave off; at the same time the owner will be allowed, on cause shown, to defend the case afterwards, so Pomponius and Vindius say, so as to prevent him from losing by his absence; consequently the plaintiff himself can get an order giving him back his right of action, which he was deprived of by the fact that when the slave was taken off he became his (the plaintiff's) property.

3 ULPIANUS (*on the Edict* 7) If a noxal action is brought against one who has a usufruct in a slave and he declines to defend him, the prætor will not allow an action at law on his part to recover the usufruct.

4 GAIUS (*on the provincial Edict* 6) If a noxal action is brought against one of two co-owners, is the defendant bound to find a surety in respect of the share of his fellow owner? Sabinus says he is not, because, being obliged to take up the defence for the whole claim, he is in a way defending the entire man as if he were his own property, and he will not be listened to if he offers to defend in respect of a share only.

5 ULPIANUS (*on Sabinus* 47) A man promises to produce a slave in court in the same plight, but the slave gets his liberty and then appears; here, if the question to be tried concerns this particular man in connexion with capital proceedings or on the ground of *injuria* which he is charged with committing, this is not a good appearance; as †one kind of penalty is applied with a freeman by imposition of, it may be, pecuniary damages, and another is used with a slave by inflicting severe punishment, and, in the case of *injuria*, the slave is beaten by way of satisfaction†[1]. But, so far as other grounds of noxal proceedings are concerned, the former slave may in fact be held to have got into a better plight [for the plaintiff].

6 PAULUS (*on Sabinus* 11) However, if a promise was given that a *statu liber* should appear, he is held to appear in the same plight though he should be a free man when he appears, as the chance of liberty was an element in his legal position originally.

[1] Transpose *servo...satisfit* and *libero...pecuniaria*.

X.

ON ONE WHO CONTRIVES THAT A DEFENDANT SHALL NOT APPEAR.

1 ULPIANUS (*on the Edict* 7) The prætor held it to be thoroughly just to put a check on the ill practice (*dolus*) of such as take measures to prevent a man from appearing to a trial. 1. A man is held to have acted with malice [*dolus malus*], not only where he kept the defendant back with his own hands or by the instrumentality of persons in his service, but also where he engaged others to keep him back or get him out of the way so that he should not appear, whether such persons were aware or not of his design. 2. According to the meaning put on the expression '*dolus malus*,' if any one should address words of evil omen to some one who is on his way to the court which should oblige him to give up going to the trial, the party would be liable under this Edict: though indeed some hold that the other would have himself to blame for being so easily imposed on. 3. If the defendant fails to appear, owing to the contrivance (*dolus*) of the plaintiff, such defendant will not have any right of action against the plaintiff in virtue of this Edict, as he may well be content with an *exceptio*, supposing he should, in consequence of not appearing at the trial, be sued for the penalty on his formal undertaking to appear. The case is different if he should be hindered by some third person; then he would have a right to bring the action in question. 4. If several are guilty of contrivance, all are liable; but if one of them pays the penalty, the rest are discharged, as the plaintiff has no further interest. 5. All are agreed that in such a case a noxal action must be brought in respect of a slave. 6. The action is allowed equally to the heir of the party wronged, though only for a year: but against the heir of the wrongdoer I should say an action will only be so far allowed as to prevent such heir from making any gain through the contrivance of the deceased.

2 PAULUS (*on the Edict* 6) If a slave of the plaintiff, with the knowledge of his owner, and without such owner attempting to prevent him, though able to do so, should use contrivance so as to prevent me from appearing to the action, then, according to Ofilius, I shall have a right of *exceptio* to an action by the owner, lest the latter should profit by the ill contrivance of his slave.

But if the slave should do this without the consent of the owner, Sabinus holds that I ought to be allowed a noxal action; the act of the slave, he says, ought not to prejudice the owner except so far as to cause him to lose the slave, seeing that he did no wrong himself.

3 JULIANUS (*Digest* 2) In pursuance of this Edict, where a man has maliciously contrived that some one who was cited should not appear to the action, there is a good right of action *in factum* against him for an amount equivalent to the interest the plaintiff had in the defendant appearing. In this action the inquiry will embrace the question what loss the plaintiff suffered in consequence of the non-appearance; for instance, where the defendant in the meantime acquired ownership in the subject-matter of the suit by effluxion of time or was discharged from liability to an action. 1. No doubt, if the party who contrived that the defendant should not appear is insolvent, it is only just that a fresh action should be allowed against the original defendant himself, lest he should make gain and the plaintiff suffer loss by another man's ill practice. 2. If the promisee and the promisor in the stipulation are both prevented from appearing in the action, one by the contrivance of Titius and the other by that of Mævius, each may bring an action *in factum* against the person by whose contrivance he was hindered. 3. If the promisee is prevented from appearing by the contrivance of the promisor and the promisor by that of the promisee, the prætor ought not to give any relief to either of them; the two cases of *dolus* may be set off one against the other. 4. If I stipulate with the surety for fifty in case the defendant fails to appear to the action, where the amount that I am suing for is a hundred, and the defendant is prevented from appearing by the ill contrivance of Sempronius, I can get a hundred from Sempronius. This is in fact what my interest is held to amount to, because, if the defendant had appeared at the trial, I could have proceeded on a valid right of action which I had against him, —or, say, his heir,—for a hundred, although the amount which the surety engaged to pay were not so much.

XI.

WHERE A MAN FAILS TO OBSERVE AN UNDERTAKING TO APPEAR TO AN ACTION.

1 GAIUS (*on the provincial Edict* 1) [With regard to the time within which appearance is to be made] the prætor lays down that one day should be given for every twenty thousand paces of distance, in addition to the day on which the undertaking is made, and the day on which the party is to appear. Certainly where the time is calculated with reference to the distance on the above scale, there is no hardship inflicted on either of the litigating parties.

2 ULPIANUS (*on the provincial Edict* 74) The law does not require that a defendant should appear to the action where the matter in connexion with which he promised to appear is compromised; but this is only so where the compromise is made before the day on which the party was bound to appear; at the same time, if it is made afterwards, an action on the promise ought to be met by an *exceptio* of *dolus*: indeed, who would ever take any trouble about the promise of a penalty when the matter has been compromised? The fact is any one would suppose that the mere *exceptio* of 'compromise made' would be a good plea, on the ground that the compromise included the liability to penalty itself, unless the parties expressly agreed otherwise. 1. If a man fails to appear to an action in accordance with his promise, without any ill contrivance of his own, owing to some hindrance connected with the discharge of a municipal office, it is quite right that he should be allowed an *exceptio*. 2. On the same principle he ought also to be relieved if he was not able to present himself at the trial because he was required elsewhere as a witness. 3. Where a man promises to appear to an action, and is unable to do so because he is prevented by ill-health or a storm or the strength of the current in a river, he has a good *exceptio*; which is very reasonable, as such a promise requires personal attendance, and how was it possible for a man to appear who was hindered by bad-health (etc.)? For this reason even the Twelve Tables lay down that if the judge or either of the litigating parties should be hindered by a serious illness, the day of the trial is to be put off. 4. If a woman fail to appear, not on the ground of ill-health, but because she is expecting her confinement, according to Labeo, she ought to be allowed an *exceptio*: but if she keeps her bed after the birth of the child, it

ought to be shown that she is prevented by what amounts to ill-health. 5. A similar rule holds where a defendant becomes insane; a man who is hindered by insanity is hindered by ill-health. 6. With regard to the above statement that a man is relieved even where his failure to appear is owing to a tempest or the force of a current, we must understand the word tempest to apply equally whether it is by land or sea; it is, in short, such a tempest as prevents either a land journey or navigation, as the case may be. 7. The force of a current does not imply a tempest; but the expression applies as well where the breadth of a river constitutes the impediment, whether the bridge is broken down or the ferry-boat is not to be found. 8. Suppose, however, a man had had it in his power to avoid encountering a tempest or a strong stream by starting earlier or making the voyage at a suitable time, but he created his own difficulty, are we to say that he will get nothing by an *exceptio*? This point is one to be decided on cause shown. The rule cannot be[1] laid down so strictly on the one hand that he can be asked why he did[2] not set out a long time before the day which was mentioned in the promise; nor on the other hand can he be allowed to excuse himself on the ground of tempest or the force of a stream if his delay was at all his own fault. Suppose, for instance, a man who was at Rome at the very time when he made the promise to appear at the trial should, without any urgent need, have gone off to a provincial town to amuse himself: how will he be the better for such matter of *exceptio*? or how if there was a storm at sea, but the party was able to come by land; or, in the case of the stream, to make a circuit so as to avoid it? Here again we must say that the *exceptio* will not be open to him as a matter of course; unless indeed the want[3] of time was such that he could not accomplish the journey by land or avoid the stream in the respective cases. Of course, if the stream overflowed to such an extent as to flood the whole place where he had to appear, or some unforeseen disaster wrecked the place, or made it dangerous to approach it, then too the *exceptio* must be allowed him on principles of fairness and justice. 9. In the same way an *exceptio* is allowed to a defendant who desired to come to the trial, but was detained by a magistrate, such detention being without any ill contrivance (*dolus*) of his own; if he took steps to this very end, or gave occasion for it, the *exceptio* will not serve his turn, but his

[1] For *sit* read *est*.
[2] For *est* read *sit*.
[3] After *nisi* read *temporis*. M.

own *dolus* will prejudice him, though he will not be prejudiced by *dolus* on the part of any one else, by whose contrivance he was kept back. Still, if he is kept back by a private person he will get nothing at all by an *exceptio* founded on the circumstance;

3 PAULUS (*on the Edict* 69) but he is allowed an action against the person who kept him back for an amount corresponding to the loss it occasions him (*id quod interest*).

4 ULPIANUS (*on the Edict* 74) Again, if a man was not able to appear at a trial because he had already been condemned on a capital charge, in that case he is excused, and with reason. By condemnation on a capital charge we must understand a case where a man is punished by death or exile. It will perhaps be said—what is the use of this *exceptio* to a man who is condemned? But the answer is that it is required by his sureties; it is also of use in case he has gone into exile without losing his citizenship, as then the *exceptio* will be available for any one who takes up his defence. 1. One point must be remembered, that a man who failed to appear because he was arraigned on a capital charge is in that legal predicament that he cannot avail himself of the *exceptio*; the case in which it is allowed is where he is condemned. It is true that if the reason why he failed to appear was that he was prevented by imprisonment or military arrest, in that case his position is one in which he can have the *exceptio*. 2. We may add that if a man fails to come because he is hindered by a funeral in his family, he ought to be allowed the *exceptio*. 3. Again, if a man is in bondage in the hands of enemies, and for that reason fails to appear, he must have the benefit of the *exceptio*. 4. The question has been raised whether an agreement can be made to the effect that no *exceptio* shall be pleaded at all, where a man breaks an engagement which was intended to secure that he would appear to an action; but Atilicinus holds that such an agreement is void. For my own part, I should say that the agreement is valid, provided express mention is made of the particular grounds of *exceptio*, and the promisor undertook voluntarily not to rely on them. 5. Again, this question is asked: suppose a man who was not bound to find sureties for appearing to an action nevertheless promises with sureties, will his sureties be allowed an *exceptio*? I should say that the essential question is whether such a promise with sureties was given owing to a mistake, or in pursuance of an agreement; if it was owing to a mistake, the sureties ought to be allowed the *exceptio*; if in pursuance of an agreement, they certainly ought not.

Julianus himself says:—"if a man by way of assurance that he will appear to an action promises through ignorance a larger sum than is laid down, an *exceptio* ought to be allowed"; but if a promise is made of the same sum in pursuance of an agreement, then, says Julianus, the *exceptio* will be neutralized by a *replicatio* of "terms agreed upon."

5 PAULUS (*on the Edict* 69) There are two co-promisees, and the debtor promises one of them under a penalty that he will appear to an action, but the other hinders him from doing so. In this case no *exceptio* will be allowed in bar of an action by the first, unless the two are partners; but it will then, for fear lest the result of the fact of partnership should be that the one [who does the wrong] profits by his own ill-practice. 1. Again, if there are two co-promisors, and one, on being sued, declines to appear at the trial, in disregard of the promise he made to secure his appearance, whereupon the plaintiff demands from one the thing which is the subject of the litigation, and the penalty for non-appearance from the other; the action for the penalty will be barred by an *exceptio*. 2. On the same principle if a promise is made by a father to the effect that he will appear at the trial, where an action is brought on his son's contract, and, after that, the plaintiff sues the son on the contract, he will be met with an *exceptio* if he then sues the father on his promise: and there is a corresponding rule in the converse case if the son promises to appear and the plaintiff then sues the father in an action *de peculio*.

6 GAIUS (*on the Twelve Tables* 1) Where a man finds a surety and then fails to appear, for the reason that he is absent on public service, it is not just that the surety should be bound on another man's behalf, so as to have to appear to a suit where the other himself is free not to appear.

7 PAULUS (*on the Edict* 69) If a man promises that a slave, or any one who is in the *potestas* of another, shall be produced to meet an action, he has every *exceptio* that he would have had, if he had been surety for some one who was free or *sui juris*, except an *exceptio* alleging that the slave was absent on the public service, as a slave cannot be absent on public service. Setting aside this exception, all the others, being of general application, are available both in the case of a free man and in that of a slave;

8 GAIUS (*on the provincial Edict* 29) and if, in three or five or more days after the defendant was to have appeared, according to his promise, he gives the plaintiff an opportunity of proceeding

against him, and the latter's legal position is none the worse for the defendant's default, it follows that he must be held to have a good defence by way of *exceptio*.

9 ULPIANUS (*on the Edict* 77) If a slave promises to appear to an action, the stipulation cannot be sued on either against the slave or his sureties. 1. If an engagement is made by one stipulation in respect of several slaves to the effect that they shall all be produced to meet an action, the whole penalty is incurred, according to Labeo, though only one should fail to appear, because it is a fact that they were not all produced; still, should a proportionate penalty be offered for the one slave, Labeo holds that if an action is brought on the stipulation, the defendant will have an *exceptio doli*.

10 PAULUS (*on Plautius* 1) If I promised that a particular man should appear to an action who is alleged to be already discharged from liability by lapse of time[1], an action must be allowed against me to call upon me either to produce this man or else to defend the action on his behalf, in order that an inquiry may be made into the facts. 1. A slave for whose production a promise had been made died before the day by the ill-contrivance of the promisor: it is in accordance with ascertained practice that the penalty cannot be demanded before the day arrives; as the whole stipulation is held to be referred to that day. 2. A man who desired to bring an action for *injuria*, stipulated that the other party should appear to the action, but, fulfilment of the promise having become due, the promisee died before joinder of issue[2]. It was held that his heir had no right to an action on the stipulation, because stipulations of that kind were only had as subsidiary to the main action, and an action for *injuria* is not open to the heir of the party wronged. In short, although the benefit of a stipulation such as named, which is made for securing the appearance of some one to an action, does pass to the heir, still in this case the action ought not to be allowed; the deceased himself, if he had chosen to drop the action for *injuria*, and yet to sue on the stipulation, would not have been allowed to do so. A similar rule, it was held, would apply if I proposed to bring an action for *injuria* and the defendant died after the time had arrived for suing on the stipulation, as I have no right of action on stipulation against his heir; and

[1] *quia...tenebatur* delend. M.
[2] Put *ante l. c.* after *commissa stipulatione*. M.

with this Julianus agrees. Accordingly it is equally true that, if sureties were given, no action will be allowed against them after the death of the principal. Pomponius says the same, provided the death does not take place a long time after, because, if the deceased had appeared, the plaintiff might have carried the suit as far as joinder of issue.

11 ULPIANUS (*on Sabinus* 47) If a man promises that anyone shall appear to an action, he ought to procure that he appears in the same legal position (*causa*). To procure him to appear in the same position is to make him so appear that the plaintiff is not in a worse situation for carrying on proceedings, although he may find it more difficult to get the redress which he demands. For even if there should be greater difficulty in this last point, still the rule is that the promisor is held [in such a case] to have procured the party to appear in the same position; even if he should have contracted a fresh debt or have lost his money, he is still held to appear in the same position, from which it follows that, even where a man appears after he has become a judgment debtor to someone else, he is held to appear in the same legal position.

12 PAULUS (*on Sabinus* 11) But where a man is enjoying some fresh special immunity (*novum privilegium*), he cannot be held to appear in the same position. 1. One thing must be borne in mind, that any estimate of the amount of the plaintiff's interest must be made with reference to the day on which the defendant was bound to appear, not to the day when the proceedings commence, although by that day the plaintiff should have ceased to have any interest.

13 JULIANUS (*Digest* 55) If at any time a slave should, as if he were proceeding to litigate on his own account, either stipulate with another for appearance at the trial or make a promise to appear himself, the stipulation confers no right of action, nor are the sureties bound, as a slave cannot be either defendant or plaintiff in an action.

14 NERATIUS (*Parchments* 2) If a man stipulates as *procurator* for another that the promisor shall simply procure the appearance of whoever it is that is the subject of the engagement, but does not go on to stipulate for a penalty in case that person should not appear, such a stipulation can hardly be said to be of any value at all, because the *procurator*, so far as he is himself personally concerned, has no interest in the party's appearing. As however he is acting on someone else's behalf in making the stipulation, it

may very well be argued that the person whose interest ought to be considered in the matter is not the *procurator* but the principal on whose behalf he acts, so that, if the defendant fails to appear, there should be payable to the *procurator*, in pursuance of the stipulation, an amount equivalent to the interest which the principal in the case had in the party appearing. The same rule would apply, indeed it would apply still more strongly, if the *procurator* should have stipulated in such words as these "whatever is adequate compensation (*quanti ea res erit*)," so long as we understand this form of words to relate not to the *procurator's* own concern in the matter, but to that of the principal.

15 PAPINIANUS (*Questions* 2) If a guardian promises to appear to an action and does not observe his promise, and in the meantime the ward becomes of full age, or dies, or even is made to renounce an inheritance [on which the action was founded], no action will be allowed on the stipulation. Indeed, if an action had been brought on the main question, and judgment therein given against the guardian, and then any one of the above events were to happen, it is established law that no action on the judgment would be allowable against the guardian.

XII.

ON FEAST-DAYS, ADJOURNMENTS, AND DIFFERENT SEASONS.

1 ULPIANUS (*on all the Courts* 4) It is set forth in an address of the Divine Marcus that no one is to compel his opponent to attend to stand a trial at the season of harvest or vintage, as men who are engaged in agricultural matters ought not to be compelled to come to the *forum*. 1. If however the prætor, through ignorance or stupidity, should persist in summoning such persons, and they choose to come, then, if he delivers judgment in the case, they being there present and voluntary parties to the action, the judgment will be good in law, although the magistrate who ordered them to attend were wrong in doing so; should they however throughout keep away, and the prætor pronounce judgment in spite of their absence, it follows from the above that we must hold the judgment to be of no validity, as the law cannot be set aside by the act of the prætor; accordingly the decision will, without any appeal, be held of no account. 2. Certain circumstances however there are in which there is an exception to the rule, in

the case of which persons may be compelled to come before the prætor, even at a time when harvest and vintage are going on; for instance, where the subject-matter of the suit would be lost by lapse of time, that is to say where lapse of time would take away the right of action. No doubt whenever the matter is pressing, persons are compellable to come before the prætor, but they can only be compelled to attend so far as to join issue, and this is set forth in the very words of the address: indeed, if either party should after joinder of issue decline to proceed with the action, the address allows him to have the case adjourned.

2 THE SAME (*on the Edict* 5) The Divine Marcus enacted, reciting the above address in the senate, that the prætor might be applied to in some further cases, even on holidays: for instance, for the appointment of guardians or curators; to admonish persons who neglected their duties; to hear excuses; to order alimentary provisions; to ascertain persons' ages; for orders that possession might be taken on behalf of unborn children (*ventris nomine*), or for the sake of preserving property, or by way of security for the payment of legacies or *fidei-commissa*, or in cases of *damnum infectum*; also for orders for discovery of testaments; for the appointment of curators of the property of persons as to whom it is uncertain whether there will be an heir to succeed them or not; for orders for the maintenance of children, parents, or patrons, or for making entry on inheritances suspected to be insolvent, or for ascertaining by ocular proof the extent of an aggravated *injuria*, or [1] executing fide-commissary manumissions.

3 THE SAME (*on the Edict* 2) Again, where property is likely to be lost by lapse of time or by death, the practice is for justice to be administered even in the season of harvest and vintage. The loss to be feared may be by death, as where the action is for theft; mischief (*damnum injuria*), or aggravated *injuria*; or in cases where any one is alleged to have committed robbery at a fire, or the fall of a house, or a shipwreck, or after violent capture of a boat or a ship; and similar cases. The same holds where the object of the proceedings would be lost by lapse of time, or the period within which an action may be brought has nearly expired. 1. Moreover inquiries as to whether a man is free or a slave can be heard to the end at all times of the year. 2. Similarly justice will be administered at all times in a case against a man who accepts

[1] After *vel* ins. *de*, and for *libertas* read *libertate*. Cf. M.

anything as the price of market-day feasts (*nundinarum nomine*) contrary to public policy.

4 PAULUS (*on the Edict* 1) The *praeses* of a province usually lays down what are to be the days[1] of harvest and vintage in accordance with the custom of the particular locality.

5 ULPIANUS (*on the Edict* 62) On the last day of December the magistrates are not accustomed to administer justice, or even to hear any applications at all.

6 THE SAME (*on the Edict* 77) With regard to judgment being given on a holiday, it is laid down by statute that there is to be no trial had on such a day except by consent of the parties, and that if any judgment is given in contravention of this rule, no one is bound to do any act or make any payment in pursuance of such judgment, and no officer in whose court any application is made in the matter is to compel obedience to the judgment.

7 THE SAME (*on the office of consul* 1) It is no doubt set down in the address of the Divine Marcus that an order giving further time for the production of documents is not to be had more than once; at the same time, for the convenience of litigating parties, on cause shown, a second order for further time is commonly granted, whether the documents are in the same or a different province, subject to regulations depending on situation; and this is especially done in the case of some unforeseen occurrence. The following point is a fair matter for consideration; whether, where a deceased person got an order for further time for production of documents, similar leave should be given to his successor also, or are we to say that, leave having been once given, no further extension ought to be allowed? But the better opinion is that on cause shown leave should be given to the successor as well.

8 PAULUS (*on Sabinus* 13) According to the Roman custom the day begins at midnight and ends at the middle of the next night. Consequently, whatever was done during those four-and-twenty hours, that is two half nights and an intervening period of daylight, is treated exactly as if it had been done at any hour of daylight.

9 ULPIANUS (*on the office of proconsul* 7) The Divine Trajan laid down in a rescript to Minicius Natalis that holidays occasion cessation of judicial business only, but matters pertaining to military discipline must be carried on even on holidays; and this last will include inspection of prisoners.

[1] Before *tempus* del. *causa*. M.

10 PAULUS (*Sentences* 5) In all pecuniary causes only one adjournment can be allowed in each separate case; in capital cases three adjournments may be given to the accused and two to the accuser; but, on both sides, only on cause shown.

XIII.

ON STATEMENT OF PARTICULARS AND DISCOVERY OF DOCUMENTS, ETC.

1 ULPIANUS (*on the Edict* 4) Whatever action a man desires to bring he is bound to give a statement of the nature of it; it is perfectly just that a man who is going to bring an action should state the nature of the particular action, so that the defendant may thereupon know whether he ought to give way or to maintain the contest, and, in case he thinks proper to maintain it, may not address himself to the matter without being sufficiently equipped for carrying it on by being acquainted with the kind of action which is being brought against him. 1. The word 'edere' (to state etc.) includes also enabling the defendant to take a copy, or expressing the whole matter in a written statement (*libellus*), and handing it to him; or dictating it. Labeo adds that a man states the nature of his action when he takes his opponent up to the prætor's album and points out the form which he is going to dictate; or he may do it by mentioning the form which he wishes to use. 2. These statements should always be made without day and consul, lest, if these are given, some document should be concocted and drawn with an earlier date. But the prætor meant to bar the day and consul which give the date at which an instrument was executed, not that at which, in accordance with its terms, payment was to be made; as the day of payment is practically the most important thing in a stipulation. But when accounts are produced, the day and consul should be given, as a credit and debit account cannot be set out to any purpose unless day and consul are given. 3. Everything ought to be discovered which the party means to produce before the judge; but the rule does not go so far as to compel a man to produce documents which he is not going to use. 4. A man is not held to make discovery of a stipulation when he does not discover the whole of it. 5. Persons who fail to make proper discovery, owing to some blunder caused

by age, or want of education, or by sex, or any other sufficient cause, will be relieved.

2 PAULUS (*on the Edict* 3) In an action for a legacy, the prætor does not require the precise words of the testament to be given [by the plaintiff], the reason of which perhaps is that the heir commonly has a copy of the testament.

3 MAURICIANUS (*on penalties* 2) The senate decreed that no person against whom an action is brought on behalf of the *fiscus* should be compelled to discover to the informant any other documents than such as relate to the case in connexion with which the applicant declared himself to be informant.

4 ULPIANUS (*on the Edict* 4) The prætor says:—A man who keeps a banker's table is bound to produce [to a customer] the account in which he is concerned, adding day and consul. 1. This Edict is founded on a thoroughly just principle; the banker makes up the accounts of every separate customer, consequently it is only right that books which he kept for me and[1] documents which might almost be said to belong to me should be produced for my inspection. 2. The above words comprehend the case of the banker being one under *patria potestas*, so that even a person in that position is compelled to produce accounts; whether his father is bound too is a question. Labeo says that the father is not bound, unless the banking business is being carried on with his knowledge; but Sabinus very properly laid down that this liability must be admitted where the son accounts to his father for his gains. 3. If, on the other hand, the business is carried on by a slave,—which it may be,—then, says Labeo, if the slave carries it on with his owner's consent, the owner can be compelled to produce accounts, and an action is allowed against him, just as much as if he carried on the business himself. But if the slave acted without his owner's knowledge, it is enough for the owner to swear that he has not got the accounts asked for. If the slave carries on the banking business with his *peculium*, the owner is liable *de peculio* or *de in rem verso*; but if the owner has got the account and declines to produce it, he is liable for the whole. 4. Even a man who has ceased to carry on the business of banker is compellable to produce documents. 5. As to place, a man is compellable to produce at the spot where he carried on the business; this is distinctly laid down. In fact, if he has the books relating to the banking business in one province, and the manage-

[1] For *meum* read *meumque*. Cf. M.

ment was in another, I should say he can be compelled to make discovery at the place where he carried the business on; he was in the wrong to begin with in taking the books away somewhere else; and if he carries on his business in one place and is called upon to disclose in another, he is by no means compellable to do it: unless you desire copies at the spot where you make the application; of course at your own expense:

5 PAULUS (*on the Edict* 3) and in this case he must have time allowed him for bringing the accounts to the place.

6 ULPIANUS (*on the Edict* 4) Should any banker, as often happens, have got his books at his country-house or in a store-house, he must either take you to the place or else give you a copy of the accounts. 1. The successors to the banker's estate are equally compellable to produce the account. If there are several heirs, and one has got the account, he alone is compellable to produce it. If all have accounts, and one produces, all the others can be compelled to produce too; as the one who produced might be some obscure person of no consideration, so that any one might reasonably be in doubt as to the good faith of the production. Accordingly, to enable the different accounts to be compared, the others are bound to produce as well, or, at any rate, sign the account produced by the one. A similar rule applies to the case of there being several different bankers from whom production is required; there is no doubt that, if several guardians managed a guardianship together, they must either all disclose or sign the account disclosed by one of them. 2. The person, however, who applies for the order on the banker is required to swear that he does not ask for production with vexatious intent; otherwise he might ask for accounts which he does not require, or which he has got already, in order to give trouble to the banker. 3. An account, Labeo says, is a statement of mutual transactions of payment and receipt of credit and debt[1] for the purpose of incurring or discharging obligations, and no account can begin simply with the bare payment of a debt. Moreover, where a party takes a pledge or [security by way of] *mandatum*, he is not compellable to make discovery of the fact, as these lie outside the account. But a banker is bound to disclose any payment which he engaged for by *constitutum*; this is included within the scope of the business of a banker. 4. An action lies in pursuance of this Edict for the amount of

[1] After *credendi* ins. *debendi*. M.

the plaintiff's interest; 5. from which it is clear that the Edict only applies where the account is one in which the plaintiff is concerned; and an account may be said to concern me when you keep it at my request. But if my agent made the request in my absence, will it have to be disclosed to me on the ground that it concerns me? The better opinion is that it will. Moreover, I have no doubt that, where a man has an account for me, he must produce it to my agent, as one that concerns him; and the latter must undertake that I will ratify his act, if I gave him no mandate. 6. If where the books begin there is a date, and in such books Titius's account is written, and this is followed by my account without day and consul, I can ask to have day and consul given for me too; as the day and consul put at the beginning apply to the whole of the account. 7. Production of an account is dictating it or delivering a written statement or showing an account-book. 8. The prætor says:—"I will order discovery to be made to a banker, or to one who asks for discovery a second time, only on cause shown." 9. The reason why he objects to discovery being made to a banker is that he himself has the means of being fully informed by his own professional papers, and it would be absurd that the very man whose position is such that he is bound to produce documents should make an application to have documents produced. As to the question whether discovery of documents cannot be demanded even by the heir of a banker, this is a point to consider; but the answer is that where the books of the business have come to the heir's hands, he has no right to discovery, but, if not, the order will be made on cause shown. Indeed, on sufficient cause, the account must be discovered to the banker himself; for instance, if he proves that he has lost his accounts by shipwreck, or by the fall of a house, or by a fire, or some similar accident, or that he has them at a great distance, for instance, beyond seas. 10. Again, the prætor will not order production on a further application, except on cause shown:

7 PAULUS (*on the Edict* 3) for example, where the applicant shows that he has left in foreign parts the account already furnished, or that discovery was insufficiently made, or where the accounts are some which he lost by unavoidable misfortune, but not by his own neglect. 1. If he lost them by some mishap which is excusable so far as he is concerned, fresh discovery will be ordered. The above expression "further" (*iterum*) has two

significations; one in which it refers to the second time, which the Greeks express by δεύτερον, while the other comprehends subsequent times as well, for which the Greeks use the word πάλιν, which is treated as equivalent to 'whenever it is necessary.' It may come to pass that a man loses an account which has been furnished to him twice, and in this case the word *iterum* is taken to mean 'time after time.'

8 ULPIANUS (*on the Edict* 4) Where a banker is called upon to discover his accounts, he is liable to be punished if he maliciously contrives to avoid producing them, but he is not answerable for negligence, unless it comes very near malice. A man declines discovery maliciously both where he produces (*sic*) accounts with a sinister object and where he declines to produce them at all. 1. Where a man offends against this Edict he has to pay by way of damages an amount equivalent to the interest I had in having the account produced at the time when the order was made by the prætor, not the interest I have now; consequently, if my interest has ceased altogether, or has come to be less or greater, the right of action will[1] [still exist, and it will] be for neither more nor less than if my interest had been unchanged.

9 PAULUS (*on the Edict* 3) There are some persons who are bound to discover accounts, but who nevertheless are not compelled to do so by the prætor in virtue of this Edict. For example, where an agent has managed some one's affairs or accounts, he is not compelled by the prætor to produce an account on pain of an action *in factum*; because, in short, the same end can be arrived at by an action on *mandatum*. Similarly, where a partner has managed the partnership affairs dishonestly, the prætor does not interfere in pursuance of the above words; because there is the action *pro socio* open. Again, the prætor does not compel a guardian [under this head] to furnish an account to his ward; but the practice is to compel him to furnish it by the action on *tutela*. 1. It makes no difference whether the successor or the *paterfamilias* or the owner of the banker, [if the banker is a slave,] is of the same profession himself or not; seeing that, as they step into the place of the banker and his legal position, they are bound to discharge his liabilities. But a person to whom the banker may have bequeathed his account-books cannot be held to be included, as the words only point to one who succeeds to his legal position;

[1] After *habebit* read *minus et habebit*. Cf. M.

a legatee is no more included than he would be if the banker had given him the books in his lifetime. In fact, the heir himself will not be bound, supposing he does not possess and has not maliciously contrived to avoid possessing; still if, before he delivers them to the legatee, he should be warned not to deliver them [until the application is heard], he will be liable, [if he does deliver them,] as for malicious contrivance; he is also liable so long as he has not delivered them. If the heir has delivered them without malicious intention, then, on cause shown, the legatee can be compelled to produce them. 2. Money-changers too (*nummularii*), as we read in Pomponius, may reasonably be compelled to furnish accounts, as money-changers keep accounts just like bankers; they receive money and they pay money out, so much at a time; and the evidence of their receipts and payments is chiefly to be found in their written entries and account-books, moreover reliance is constantly put upon their good faith. 3. As a fact, the praetor orders discovery to be made to all persons who apply for it of such accounts as they are concerned in, an oath being taken by the applicants that they do not make the application with vexatious intent. 4. A man is concerned in an account, not only where he is himself party to the contract, or has succeeded to one who was a party, but also where some one subject to his *potestas* is such a party.

10 GAIUS (*on the provincial Edict* 1) A banker is ordered to produce accounts; and it matters not whether the case in which the application is made is one to which the banker is a party or not. 1. The reason why the praetor compels only bankers to produce their accounts, and not other persons engaged in a business of a different kind, is that their duties and services are discharged in the interest of the public, and their most essential function is that of keeping a careful account of their proceedings. 2. An account is regarded as produced if it is produced from the commencement (*a capite*); unless an account is examined from the commencement, it cannot be understood; this of course does not mean that everybody is to be free to inspect and copy the whole of a man's book of accounts and all his parchments, but only that that particular portion is to be inspected and copied which serves to give the applicant the information required. 3. The measure of damages in the action being an amount equivalent to the interest which the plaintiff has in the account being produced, the result is that, whether the applicant suffers

adverse judgment in an action brought against him, or he is unsuccessful in an action which he brings, for want, in either case, of the accounts by which he might have supported his case, he will recover in this action whatever is the extent of his loss. Let us consider, however, whether this is really a practical rule: as a matter of fact, if the plaintiff can prove before the judge who hears the case between him and the banker that [if he had been furnished with the account] he would have been successful in the action which he lost, then he must have been in a position to prove his point in that action itself [without the account]; so that, if he did not prove it, or he proved it, but the judge did not attend to the proof, he has only himself to blame, or else the judge. However, this argument is not sound. It may well happen that by this time [, when he sues the banker,] he has got hold of the accounts, either from the hands of the defendant himself, or in some other way, or he may be able to prove, by means of other documents, or of testimony, which for some reason or other he was not able to bring forward on the former occasion, that he would have been able to succeed in the former action [if he had had the accounts]. It is precisely on this principle that a man has a *condictio* or an action for *damnum injuria* if a written assurance is stolen or destroyed; because, though persons may have been unable to prove some matter or other at first, owing to an assurance being abstracted, and consequently have lost their case, they may be able to prove it now by means of other documents and testimony which they could not make use of on the previous occasion.

11 MODESTINUS (*Rules* 3) It is established law that copies of documents can be properly produced without the signature of the party who produces them.

12 CALLISTRATUS (*on the monitory Edict* 1) Women are held to be excluded from the functions of a banker, as that business is one for men.

13 ULPIANUS (*on the Edict* 4) This action is not allowed after the lapse of a year, nor against the heir [of the banker], except in virtue of some act of his own. It is allowed to an heir.

XIV.

On Pacts.

1 Ulpianus (*on the Edict* 4) The justice of this part of the Edict is founded on Nature: what indeed can be so much in accordance with mutual trust among men as the principle of abiding by what persons have agreed to? 1. *Pactum* is derived from *pactio*- the word *pax* comes from the same origin—2. and *pactio* means the consent and agreement of two or more persons to the same effect. 3. The word '*conventio*' is a comprehensive term applying to all matters about which persons who have dealings with one another agree by way of forming a contract or compromising a dispute; for just as men are said '*convenire*' (to come together) when they are brought together and come from different places to one place, so too, when men, starting from different inclinations of the mind, make some common agreement, in other words, have come to arrive at one resolution [, the same word may be used]. So true is it that the term 'convention' is of general application that Pedius makes the nice observation that there is no contract and no obligation, whether concluded by act or by set words, but it involves a convention; even a stipulation, which is made by a set form of words, is null and void, unless it involves agreement. 4. Most conventions however come to be classed under some special head, such as that of sale, letting, pledge or stipulation.

2 Paulus (*on the Edict* 3) Labeo says a convention[1] may be made by act or by letter or by a messenger; in fact, he says, it can be made with an absent person. Moreover it is understood that a convention may be by agreement, even when made tacitly; 1. accordingly, if I return to my debtor a written undertaking which he gave me, it is held that there is a convention between us that I shall not sue him, and the law is that, if I do, he will have a good *exceptio* founded on the convention.

3 Modestinus (*Rules* 3) When, however, an article pledged for debt is restored to the debtor, then, if the money is not paid, there is no doubt that an action can be brought for the debt, unless it is expressly proved that the contrary was intended.

[1] For *convenire* read *conveniri*.

4 PAULUS (*on the Edict* 3) Again, as valid conventions may be formed tacitly, it is held that where dwelling-houses (*urbanæ habitationes*) are let, the landlord has a hypothek on things "borne in and brought in" (*invecta et illata*) even where no express convention was made. 1. According to this, even a dumb man can make a '*pactum*.' 2. One illustration of the above is the case of a stipulation made for giving *dos*; there is no right of action for the *dos* before the marriage takes place, any more than if this had been expressly provided, and should the marriage not take place at all, the stipulation becomes inoperative without more (*ipso jure*). Julianus holds the same. 3. This lawyer was once consulted on the following case which occurred. An agreement had been made that, so long as interest was paid [on money lent], no action should be brought for the principal, but the stipulation had been drawn in absolute terms. Julianus held that the stipulation was subject to a condition, just as if this had been expressly provided.

5 ULPIANUS (*on the Edict* 4) Of conventions there are three kinds. The occasion of making them is either public or private, and a private convention either is statutable or is founded on the *jus gentium*. A case of a public convention is that of one which is made to conclude peace[1], military commanders having come to such and such terms with that object.

6 PAULUS (*on the Edict* 3) A statutable convention is one which is made binding by some statute. Accordingly, in some cases a right of action is created or taken away by a pact, that is, where this construction is supported by a statute or a decree of the senate.

7 ULPIANUS (*on the Edict* 4) Of conventions founded on the *jus gentium* some give rise to actions and some to exceptions. 1. Those that give rise to actions are not simply referred to under the name 'convention,' they have come to be classed under the special designations appropriate to the particular contracts respectively, such as purchase and sale, letting and hiring, partnership, loan, deposit and similar names. 2. Even if the matter does not come to be assigned to some special class of contract, still if there is a sufficient additional ground (*causa*), then, according to Aristo's well expressed reply to Celsus, there is an obligation formed. For example, I gave you one thing on the understanding that you should give me another, or I gave you a thing on the

[1] Read *pro pace*. Cf. M.

understanding that you should do something; this, says Aristo, amounts to a '*synallagma*,' and a civil obligation will arise upon it. Accordingly I should say that Julianus was rightly taken to task by Mauricianus in reference to the following case:—I gave you Stichus on the understanding that you should manumit Pamphilus, and you manumitted Pamphilus; but Stichus was recovered by some third person in virtue of superior title (*evictus*). Julianus tells us that the prætor must allow you an action *in factum* [against me], but the other says that your case is met by a civil action for an unliquidated amount (*civilis incerti actio*), that is to say, an action in set terms (*præscriptis verbis*), as there is a contract formed, or, as Aristo calls it, '*synallagma*,' and upon that this action arises. 3. If a promise is made with reference to some illegal act as an inducement to abstain from committing it, on such an agreement no obligation can arise. 4. If there is no additional ground (*causa*), in that case it is certain that no obligation can be created, [I mean] on the mere agreement; so that a bare agreement (*nudum pactum*) does not produce an obligation, it only produces an *exceptio*. 5. To be precise, it does sometimes give its shape even to an action, as in *bona fide* cases; it is a common saying that agreements by way of pact (*pacta conventa* are embodied in *bona fide* actions. But this must be understood to mean that if the pact follows as part of one continued transaction, it is included in the agreement so as even to give ground to an action; but, if it follows after an interval, it is not included, nor will it be of any force, so far as relied on by the plaintiff, as otherwise we should have an action founded on a pact. Suppose, for example, after a divorce, an agreement is made that the *dos* shall not be given up [to the woman] at the end of the regular time for which it may be held over, but at once; this agreement will be of no force, or else there would be an action founded on a pact. Marcellus tells us the same thing. Again, suppose an agreement is made with reference to an action on guardianship that interest shall be paid in excess of the established rate, this will produce no effect, else there will be an action founded on a pact; whereas the pacts which are embodied in the agreement are those which make the very terms of the contract, that is, which were made when the contract was originally formed. This was declared to my knowledge by Papinianus, who added that if, subsequently to a purchase, some agreement is made after an interval which goes beyond the natural character of the contract, no action *ex empto* [purchaser's

action) can be brought thereon, owing to the same rule, viz. that no action is to be founded on a pact. The same must be said in respect of all kinds of *bona fide* actions. But on the side of the defendant the pact has force, because, according to the ordinary practice, pacts give ground to exceptions, even where they are interposed subsequently. 6. So true is it that pacts[1] which are made subsequently, and which are connected with the contract in question, are included in it, that it is recognised law that in purchases, and indeed in *bona fide* cases in general, so long as nothing further has been done, the purchase may be abandoned. But if it can be abandoned altogether, why should not a part of it be altered by a pact? This is in fact what Pomponius tells us is the case (on the Edict 6); and, that being so, a pact will produce an effect even on the side of the plaintiff, and will constitute good ground for an action, where nothing further has been done; this on the above principle: why indeed, if the whole contract can be set aside, should it not be recast? The result will be that there is in some sort held to be a fresh contract.

There is something ingenious in this view; consequently I am equally disposed to approve of a view which Pomponius supports in his books of Lectiones, that it is possible by means of a pact for a purchase to be abandoned in part, on the view that the purchase of [the whole is revoked, and then that of] a part is made anew. On the other hand, there was a case where a purchaser died leaving two heirs, and the vendor made a pact with one of them that the purchase should be abandoned; here, Julianus says, the agreement was good, and the purchase was avoided as to a share, seeing that in the case of any other kind of contract one of the heirs might procure an *exceptio* by making an agreement. Accordingly both views are received law and very properly, I mean the opinion of Julianus and that of Pomponius too.

7. The prætor says:—"Pacts agreed on, where they are not made with malicious intent, nor contrary to statutes, plebiscites, decrees of the senate, or imperial edicts, and there is no fraud (*fraus*) on any of these,—I will uphold." 8. Of pacts some are *in rem* some *in personam*. They are *in rem* wherever I agree generally that I will not sue; *in personam* where I agree that I will not sue a particular person, e.g. that I will not sue Lucius Titius. The question whether a pact is made *in rem* or *in per-*

[1] For *exceptiones* read *pactiones*. Cf. M.

somam is to be ascertained not more[1] from the words of the parties who made the agreement than from their intention; very often, as Pedius says, the name of a person is inserted in the pact, not in order to make the pact personal, but in order to make it plain who is a party to it. 9. The prætor says he will not uphold a pact made with malicious intent (*dolo malo*). *Dolus malus* is committed by cunning and deceitfulness, and, as Pedius says, a pact is made with *dolus malus* whenever, in order to entrap the other party, a man aims at one thing and pretends that he aims at something else.

10. As for pacts which appear to be made so as to involve *fraus* (prejudice), the prætor does not proceed to refer to them; in fact, Labeo makes the discriminating remark that, if he did so, this would either be unjust or else superfluous. It would be unjust if, by the aid of it, a creditor who had once [by such a pact] given his debtor a *bona fide* release should after that endeavour to nullify it; but if the creditor were deceived into giving the release, the inclusion of *fraus* would be superfluous, because [such] *fraus* is included under *dolus*. 11. Whether the pact was made with *dolus malus* originally, or, after the pact was concluded, something or other was done with *dolus malus*, there will be a good replication (*exceptio*) in both cases alike; this is secured by the words in the Edict—"and there is no *fraus*." 12. With regard to the clause commonly inserted at the end of a pact,- "Titius asked, Mavius promised,"—these words are not understood as only making a pact, but as making a stipulation equally well, consequently an action *ex stipulatu* arises on them, unless the contrary effect is expressly proved, that is, that the words were used with the intention of making a bare agreement, and not a stipulation. 13. If I make a pact with a man that no action shall be brought on a judgment debt[2], or no action for burning a house, such a pact is valid. 14. If I agree that I will not proceed upon a "notification of novel structure" (*operis novi nuntiatio*), some hold that the agreement is not valid, on the ground that this is a matter in which the prætor's right of command (*imperium*) comes in; but Labeo makes this distinction,—if, he says, the "notification of novel structure" is made in respect of private rights, the agreement can lawfully be made; if it is made in connexion with state affairs, it is not lawful; and this is a sound distinction. Accordingly the law is, as to matters of any kind embraced by the prætor's edict, that where they do not

[1] For *minus* read *magis*. [2] Del. *pro*.

involve any question of injury to the public, but only concern private rights, a pact may be lawfully made; in fact the statute permits a pact to be made by way of compromising an action for theft. 15. Again, a pact not to sue in an action on *depositum* is, according to Pomponius, a valid agreement, and, similarly, where a man [sc. the depositee] agrees in a case of *depositum* to undertake the whole risk, this Pomponius says is a valid agreement, and is not to be set aside as being contrary to the rule of law: 16. in short, to put it in general terms, in any case in which the pact lies outside every-day law it ought not to be observed; † nor can any inhibition be imposed by legacy to a similar effect, and if an engagement not to sue should be made by way of oath, it need not be kept †[1], so Marcellus says (*Dig.* 2); and if recourse is had to a stipulation in a case where a pact is unlawful, the stipulation is not legally binding, but must be absolutely rescinded. 17. If a man [nominated heir] should, before entering on the inheritance, agree with the creditors that they should take less than their debts, the pact will be valid. 18. But if it is a slave who makes the agreement, before acquiring freedom and with it the inheritance, having been appointed heir subject to a condition, then, so Vindius tells us, the pact will be of no avail; but Marcellus holds (*Dig.* 8) that a *suus heres* and a slave who is compulsory heir, both being appointed unconditionally, if they make the pact before intermeddling with the goods, make it with effect, and this is sound. He says the same of an extraneous heir; and, if he should enter at the request of the creditors, Marcellus holds that he has in fact an action on *mandatum*. If however, to take the case mentioned above, a man made the pact while he was a slave, Marcellus holds that it cannot be pleaded, because it is not the practice that a man should, after acquiring liberty, get any advantage from what he did in a state of servitude; which cannot be denied as to the *exceptio* founded on a pact, but whether the law goes so far as to refuse an *exceptio* founded on *dolus* is matter of question. Marcellus in cases of the same kind allowed the *exceptio doli*, though at one time he was in doubt about it; for instance, take this case:— a *filiusfamilias* who was appointed heir made a pact with the creditors [that they should take a percentage], he was then emancipated, and he entered on the inheritance: whereupon Marcellus says he could have an *exceptio doli*. He maintains the same view even where a son makes a similar agreement with his father's

[1] The words within † † are hopelessly corrupt, or some part of them.

creditors in the lifetime of his father; there too, he says, the *exceptio doli* will be allowed; and the real truth is an *exceptio doli* ought not to be held inadmissible even in the case of a slave. 19. At the present day, however, no agreement of this kind bars the creditors, unless they meet together and declare in pursuance of a general agreement what is the percentage of their debts that they are content to accept; subject to this, that if they cannot agree, then the praetor must interpose, who will make a decree in accordance with the will of the majority.

8 PAPINIANUS (*Responses* 10) Majority is held to mean majority in respect of amount of debt, not in number of persons. But if the two sides are equal in respect of the aggregate of debt, then the majority in number is to be preferred. If the number of creditors is equal [too], the praetor will go by the will of that one among them who has precedence in station, but if there is absolute equality between the two sides in every respect, the praetor must choose the terms which are most humane; this being what may be gathered from the rescript of the Divine Marcus.

9 PAULUS (*on the Edict* 62) If there are a number of creditors who have one common right of action, they are treated as one person. For instance, suppose there are several co-creditors by stipulation, or several bankers who all gave credit to the debtor at the same time; the co-creditors in each case count for one, there being only one debt. And if the contract was made with several guardians of a creditor who was under age, they count for one, because they agreed on behalf of one ward. Moreover if one and the same guardian agrees on behalf of several wards who claim in respect of one debt, it is held that he is to be treated as one single creditor, since it is difficult to see how one man can act the part of two. In fact even a man who has several distinct rights of action is not allowed, in competing with a man who has only one, to stand for more than one person. 1. Aggregate amount of debt may be estimated by adding a number of different sums; for instance, one man may have owing to him minute sums amounting altogether to a hundred *aurei*, where another claims one sum of fifty *aurei*; in which case we must look at the amount which is made up of several sums, because these, when added up together into one sum, exceed the other. 2. We must however reckon interest as making part of the sum.

10 ULPIANUS (*on the Edict* 4) According to the terms of the rescript of the Divine Marcus, all the creditors have to attend the

meeting. How then if some are absent? will those who are absent be bound to go by the example of those present? Again, one nice question raised is whether the agreement will be a bar to preferential creditors who are absent; assuming that the agreement is one which is binding on absent persons as well as present. I remember that, before the above regulation was laid down by the Divine Marcus, the Divine Pius declared by rescript that the *fiscus* itself, in cases where it was not secured by hypothec, and preferential creditors in general, would have to be bound by the example of ordinary creditors; as all the above regulations must be held to be in force with respect to unsecured creditors. 1. If to the pact there be added the stipulation of a penalty, it is a question whether the proper course is to plead the pact by way of *exceptio*, or to sue on the stipulation. Sabinus holds that the person who stipulated can take either course at his pleasure; and this is the better opinion; but if he has recourse to an *exceptio* founded on the pact, it will be fair that he should give a formal release of the stipulation. 2. A thing very commonly said is that an *exceptio* founded on *dolus* is subsidiary to an *exceptio* founded on a pact; in short, as Julianus says, and a great many others agree, that in some cases, where an *exceptio pacti* cannot be had, an *exceptio doli* will be allowed; for instance, if my *procurator* makes a pact, I shall have a good *exceptio doli*, so Trebatius thinks; his view being that, just as a pact made by my *procurator* bars an action by me, so too I can plead one to an action against me:

11 PAULUS (*on the Edict* 3) seeing indeed that he can give a good receipt to my debtor.

12 ULPIANUS (*on the Edict* 4) That it does bar my action is certain, whether I instructed him to be a party to the pact or he was my *procurator* for all purposes; as indeed Puteolanus tells us (*Adsessoria* 1), seeing that it is established law that [in the latter case] he can join issue on my behalf.

13 PAULUS (*on the Edict* 3) But if the *procurator* was only made such for the purpose of bringing an action, an agreement made by him does not bar his principal, just as he is not competent to give a receipt. 1. If, on the other hand, he has been made "*procurator* on his own behalf," he is treated like a principal, and for that reason his own concluded pact must be upheld.

14 ULPIANUS (*on the Edict* 4) Similarly it is ascertained law that the pact of the *magister* of a company is good both for and against the company.

15 PAULUS (*on the Edict* 3) Moreover, as Julianus says, the pact of a guardian can be pleaded on behalf of the ward.

16 ULPIANUS (*on the Edict* 4) If a pact is made by the purchaser of an inheritance [with a debtor to the same] and the vendor of the inheritance brings an action, he can be barred by an *exceptio doli*; for, after the rescript of the Divine Pius which laid down that the purchaser must be allowed to bring an *utilis actio*, it is only proper that a debtor to the inheritance should have an *exceptio doli* when sued by the vendor. 1. It may be added that if it was agreed by the owner of a thing sold and a purchaser that the property purchased,—say, a slave,—should be given up, then, if the person who sold as owner sues the purchaser for the price, he can be met by an *exceptio doli*.

17 PAULUS (*on the Edict* 3) If I give you ten, and agree with you that you shall owe me twenty, no obligation arises for more than ten; no obligation can be contracted of the class formed *re* (by act) save to the extent of what actually passed. 1. Some rights of action are taken away by means of a pact in direct law, as a right of action for *injuria* or theft. 2. In the case of a pledge there is a right of action founded on a pact, in virtue of *jus honorarium*, and it is nullified by an *exceptio*, if the party at any time agrees not to sue. 3. If a man makes a pact to the effect that no action shall be brought against himself, but only against his heir, the heir will not have the *exceptio*. 4. If I make a pact that no action shall be brought against either me or Titius, this cannot be pleaded by Titius, even if he should become my heir, as such a pact cannot be made available by a subsequent event. Julianus gives this rule with reference to a case where a father made a pact to the effect that no action should be brought against him or his daughter, and the daughter became heiress to her father. 5. An agreement by pact made with a vendor, if it is made *in rem*, can, so a good many authorities hold, be pleaded by the purchaser too; and such, Pomponius says, is the present law; but, in the opinion of Sabinus, even where such a pact is expressly *in personam*, it can be pleaded against the purchaser as well [as against the vendor]; and Sabinus holds that the rule is the same even where the succession to the property is by donation [instead of sale]. 6. Where the pact is made by a man who has taken possession of an inheritance to which he has no right, then, the opinion held is that, if the real heir should recover the property, the pact cannot be pleaded either by such heir or against him.

7. Where a son or a slave makes a pact that no action shall be brought against the father or the owner, [as the case may be,]

18 GAIUS (*on the provincial Edict* 1) then, whether the pact relates to a previous contract made with such person himself or with his father or owner, he [, such son or slave,]

19 PAULUS (*on the Edict* 3) acquires a good *exceptio*. A similar rule applies to a free man who is held to service as a slave in good faith. 1. Moreover if a *filiusfamilias* makes a pact to the effect that no action shall be brought against him, this will give him an *exceptio*, and so it will to his father, if he should be sued *de peculio*,

20 GAIUS (*on the provincial Edict* 1) or *de in rem verso*, or if he should be sued as one who takes up the defence in behalf of his son, if this is what he prefers to do.

21 PAULUS (*on the Edict* 3) It can also be pleaded by the father's heir as long as the son lives; but in case of the son's death it cannot be pleaded either by the father or his heir, because the pact was *in personam*. 1. If a slave makes a pact that no action shall be brought against him, it will be inoperative [, if pleaded as such]; as for an *exceptio doli*, let us consider the point. As to this, if the pact he made was *in rem*, the *exceptio* founded on a concluded pact will avail both the owner [of the slave in question] and his heir, but if the pact was expressly *in personam*, then the owner still has an *exceptio doli*. 2. Again, a man cannot, by making a pact, enable someone else to plead it who is subject to his *potestas*, but he can plead it himself, according to Proculus, if he should be sued in the name of the person so subject, and this is perfectly sound, provided always that it was so understood when the pact was made. But, if I make a pact that you shall not sue Titius, and then you bring an action against me in his name, I cannot have an *exceptio* of pact concluded; what is not open to Titius himself will equally little avail for one who defends his case. Julianus himself says,—if a father makes a pact that no action shall be brought against himself or his son, the better opinion is that the *filiusfamilias* is not allowed to plead the pact by way of *exceptio*, he can only plead *dolus*. 3. A woman under *potestas* can make a pact that she will not sue for her *dos* when she comes to be *sui juris*; 4. and a man under *potestas* can make a good pact with reference to a legacy which has been left him on a condition. 5. Where a number of persons have a concurrent right to ask for the same entire sum of money as co-creditors, or are co-debtors of

the same sum, the question has been raised as to how far an *exceptio pacti* [founded on an agreement made by one of them] is available against or for the others also. As to this, a pact made *in rem* is available in defence of any co-debtor of whom you can say that the party who made the pact had an interest in such co-debtor being free from liability. Consequently an agreement made by the principal debtor that he shall not be sued will be a defence to his sureties,

22 ULPIANUS (*on the Edict* 4) unless the understanding was merely that the principal should not be sued, but the surety might be; as in that case the surety will not have the *exceptio*.

23 PAULUS (*on the Edict* 3) But an agreement made with the surety will be no defence to the principal debtor, because the surety has no interest in the principal debtor not being sued for the money. Indeed it will not be a defence even to his co-sureties. 1. The defendant to an action cannot as a matter of course plead an agreement made [by the plaintiff] with another[1], irrespective of the kind of interest he has in doing so; he can only do so where, the *exceptio* being allowed him, the real benefit goes through him to the party with whom the agreement was made; as in the case of a principal promisor and those who are bound as sureties on his behalf.

24 THE SAME (*on Plautius* 3) But if the surety guaranteed the debt on his own behalf, in that case the surety must be treated as the principal debtor, and an agreement made with him is held to be made with a principal.

25 THE SAME (*on the Edict* 3) The same rule applies to two co-promisors, or two bankers, if [, in the respective cases,] they are partners. 1. A personal pact, according to Labeo, does not affect a third person, as indeed it does not even the heir of a party. 2. But although a pact made with the surety cannot be pleaded by the principal debtor, still, in most cases, so Julianus tells us, the principal debtor will have an *exceptio doli*;

26 ULPIANUS (*on the Edict* 4) that is to say, where the intention was that even the principal debtor himself should not be sued. The same principle applies to co-sureties.

27 PAULUS (*on the Edict* 3) If [two] bankers are partners and one of them makes a pact with a debtor, will the other be barred by an *exceptio*? Neratius, Atilicinus, and Proculus say that the other will not be barred, even if the first made his pact *in rem*;

[1] Read *alio*.

the only established rule being, so he says, that the other can sue for the whole debt. Labeo says the same; in fact one partner cannot, he says, even novate the obligation, though valid payment can be made to him; and in the same way, where persons under *potestas* lend anything, valid repayment can be made to them, though they cannot novate the obligation. This is quite true, and the corresponding rule applies to two co-creditors by stipulation.

1. If an agreement is made with a debtor not to sue for a given time, this will not protect either the debtor or his surety for any further time. But if the principal debtor, without naming himself, enters into a pact that the creditor shall not sue his surety, some hold that this will not protect the surety, though the principal debtor has an interest in its doing so; for the reason that no *exceptio* ought to be open to a surety which is not open to the principal debtor too. The view I have always maintained is that this *exceptio* does protect the surety; it would not be a case of the surety acquiring a right through a free person, but rather of provision being made for the person himself who makes the pact; and this seem to be in accordance with the present practice[1].

2. A man made a pact that he would not sue, and afterwards agreed that he might sue; here the first pact will be nullified by the second; not indeed in direct law, in the way a stipulation is annulled by a subsequent stipulation, where such is the intention, because the operation of a stipulation is a matter of law, in the case of an informal agreement all turns upon fact; accordingly, in the case referred to, the *exceptio* is rebutted by a *replicatio*. In accordance with this principle it may happen that the first *pactum* will not protect the sureties. But where the pact agreed upon was of such a kind that it took away the right of action itself, take, for instance, the case of an action for *injuriæ*, the party cannot enable[2] himself to bring an action by making a subsequent pact to the effect that he may bring it, because, in this case, the original right of action was taken away, and the subsequent pact is ineffectual, as a means of conferring a right of action; an action for *injuriæ* cannot be founded on a pact, but only on the commission of offensive conduct. The same thing may be said as to *bona fide* contracts, where a pact agreed upon nullifies the whole contract, as in the case of a purchase; the operation of a fresh pact is not to revive the old obligation, it will only serve to form a new contract. Where however an agreement was made subsequently,

[1] For *videmur* etc. read *videmurque eo jure uti*. M.

[2] Read *facere* for *agere*. Cf. M.

not in order to take away the whole contract, but only to reduce its terms, there a second pact may operate so as to reestablish the original contract. This may very well occur in the case of an action for *dos*. Suppose a woman were to make a pact to the effect that her *dos* should be handed over to her at once, and, after that, were to make a second pact that it should only be given at the time laid down for it by statute; in that case the *dos* will thereupon revert to its regular legal condition. We have no right to say in such a case that the position with respect to *dos* is made worse by means of a pact; as wherever the right of action for *dos* reverts to those legal implications which were made part of its nature by statute, [*or*, which nature's own law gave it,] the woman's legal position in respect of *dos* is not made worse, it resumes its regular character. My master Scaevola is of the same opinion on this point. 3. One thing there is which cannot be provided by any pact, namely that a man shall not be answerable for *dolus*; though indeed if a man agrees by pact that he will not bring an action on *depositum*, the direct consequence seems to be that he agrees not to bring an action for *dolus*; no doubt such a pact as this can be pleaded. 4. Pacts which create a position contrary to sound morals ought not to be observed; as, for instance, where I agree not to sue you for theft or *injuria*, if you should commit such offences; because it is desirable that people should go in fear of the penalties attached to theft and *injuria*; but such a pact may very well be made after the offence is committed. Similarly a man cannot make a pact that he will not sue out an Interdict *unde vi*, assuming that it touches some matter of state concern. To sum up the matter, where the agreement made by pact is outside the scope of private rights and obligations, it cannot be upheld; as care must above all things be taken that an agreement made as to one matter or with one person shall not produce an ill-effect in another matter or in the case of another person. [1]5. If you owe me ten, and I agree with you that I will forbear to sue you for twenty, the law is that you have a good *exceptio* of *pactum conventum* or of *dolus* as to ten. Again, if you owe me twenty, and I agree not to sue you for ten, the result of your meeting my demand with an *exceptio* will be that I am only at liberty to require you to pay the odd ten. 6. But if I stipulated for ten or Stichus, and make a pact with you as to ten, after which I sue you for Stichus or ten, you can plead '*pactum conventum*,' which will bar my whole suit; for just as payment or an action or

[1] 5, 6 and 7 are absurd, and much of the Latin is barbarous.

a formal release applying to one thing would discharge the whole obligation, so too, if there is an agreement interposed by pact not to sue for one thing, the whole obligation is got rid of. But if our agreement was understood to be that I should not have ten given me, but Stichus, then I have a good right of action for Stichus, and there is no *exceptio* that can bar me. A similar rule holds as to an agreement not to sue for Stichus. 7. But if you are bound to give me, generally, a slave, and I thereupon agree that I will not sue for Stichus, then, if I sue for Stichus, I may be met with an *exceptio* of pact, but if I sue for some other slave, there is no objection to the action. 8. Again, if I agree not to bring a *hereditatis petitio* against you, and then I sue for specific things as heir, you can have an *exceptio* of *pactum conventum* drawn to suit your case, founded on the intention[1] of the agreement in question, just as if I were to agree not to sue for a piece of land, and I were to sue for the usufruct in it, or not to sue for a ship or a building, and I sued for particular distinct portions of them, after the whole had been broken up; provided always there were no express understanding to a different effect. 9. Where a formal release given is void, it is held to amount to a tacit agreement to the effect that no action shall be brought. 10. A slave who is part of an inheritance cannot make a valid pact on the express behalf of the person who eventually enters as heir, as that person is not yet owner of the slave; but if the pact concluded is made *in rem*, the heir can acquire the benefit of it.

28 GAIUS (*on the provincial Edict* 1) Pacts which are concluded in contravention of the rules of the civil law are not held valid; as, for instance, where a ward agrees without his guardian's concurrence that he will not sue his debtor, or that he will not sue for a given time, say five years: in fact, he can not even give a valid receipt for money due, except with the concurrence of his guardian. On the other hand if a ward agrees that something which he owes should not be sued for, the pact so concluded is upheld, because it is open to him to improve his position even without the concurrence of his guardian. 1. If the *curator* of a lunatic or prodigal makes a pact that no action shall be brough against such lunatic or prodigal, it is more than equitable tha such an agreement of the curator should be supported; but th converse does not hold. 2. If a son under *potestas*, or a slave makes a pact that he will not himself bring an action, the pact i

[1] For *pactum* read *actum*. Cf. M.

inoperative. But if either of the last-named makes a pact *in rem*, that is, that the money in question shall not be sued for, this pact will be held good in bar of an action by the father or the owner, provided the son or the slave had free management of his *peculium*, and the matter about which he made the pact concerns the *peculium*. Even then there is some further qualification; for, seeing that it is quite true, as Julianus holds, that however much a slave may have the management of his *peculium* allowed him, still he has no right to give it away,—the consequence is that if he deliberately makes a gratuitous pact that the money shall not be sued for, the pact so concluded ought not to be upheld; should he however as a consideration for such an agreement receive something which is worth as much as what he gives, or possibly more, then the pact must be upheld.

29 ULPIANUS (*on the Edict* 4) Again, if a slave lends his owner's money, then, according to Celsus, any pact which he made at the time of the loan is valid.

30 GAIUS (*on the provincial Edict* 1) Still, as to a *filiusfamilias*, we may well ask whether it is not sometimes the case that, even where he agrees that he will himself forbear to sue, the agreement is valid; as, in some cases, a *filiusfamilias* has a right of action; for instance, he has one for *injuria*. However, as the fact is that where an *injuria* is committed on a son, the father himself has a right of action, there is no reasonable doubt that, if the father wishes to sue, he will not be barred by the son's agreement. 1. Where a man stipulated with a slave for the payment of a sum of money which Titius owed him, the question has been asked whether, supposing he then sues Titius for the money, his action can be and ought to be barred by an *exceptio* of *pactum conventum*, on the ground that he must be held to have made a pact that he would not sue Titius. Julianus thinks there would be no bar to the stipulator's action, except where he has a good right of action *de peculio* against the owner of the slave, in other words, where the slave had sufficient ground for intervening, for example, because he (the slave) owed Titius the same sum: but if the slave only intervened as surety, in which case no action *de peculio* would be allowed, then the creditor ought not to be prevented from suing Titius; and it is equally true, in the opinion of Julianus, that he ought by no means to be prevented if he took the slave for a free person. 2. If I stipulate with you, subject to some condition, to the effect that you will pay me a sum which Titius owes me uncon-

ditionally, is it the case, supposing the condition fails, that, if I sue Titius, I may and ought to be met by an *exceptio* of *pactum conventum*? The better opinion is that no such *exceptio* can be used.

31 ULPIANUS (*on the Edict of the Curule Ædiles* 1) It is perfectly admissible to make an agreement not to take advantage of the Edict of the Ædiles, whether the agreement should be made in the course of contracting the sale or subsequently.

32 PAULUS (*on Plautius* 3) With regard to the rule above mentioned, that, if a pact not to sue is made with the principal debtor, this gives a good *exceptio* to the surety as well; this rule was adopted for the debtor's own sake, to prevent his being sued by the surety on the *mandatum*, consequently, if no action on *mandatum* was open, if, for example, the surety guaranteed the debt by way of bounty, the proper view to take is that the surety will not have the *exceptio*.

33 CELSUS (*Digest* 1) A man promised a *dos* on behalf of a woman who was his granddaughter through his son, and made a pact that no action should be brought to recover the *dos* against either himself or his son. If after that the action is brought against one who is heir to him along with his son, such coheir cannot protect himself by an *exceptio* founded on the agreement, but the son can very well avail himself of it; since the law allows a man to take thought for his heir, and there is nothing to prevent his providing for one of his [expectant] heirs in particular, on the chance of his becoming heir, and taking no thought for the others.

34 MODESTINUS (*Rules* 5) It is the opinion of Julianus that the legal tie of agnation cannot be renounced by a pact, any more than a man can be allowed to say that he does not wish to be a *suus heres*.

35 THE SAME (*Responsa* 2) Two brothers and a sister, Titius, Mævius and Seia, divided amongst them an inheritance which they shared in common, and executed instruments by which they declared that they had made a partition of their maternal inheritance, moreover they gave mutual assurances that nothing remained undivided. Afterwards, two of them, that is Mævius and Seia, who had been absent at the time of their mother's death, ascertained that a sum of money in gold coins had been abstracted by their brother, of which sum no mention was made in the instrument of partition. I wish to know whether, the

agreement to divide being made, the brother and sister have a good right of action against their brother for division of the money abstracted. Modestinus's answer was:—if, on suing for a portion of the money which is alleged to have been abstracted by Titius, the two plaintiffs should be met with an *exceptio* founded on a pact in general terms, the fact being that they made a composition including the matter as to which Titius committed the fraud, without being aware of the truth, there would be a good replication of *dolus*.

36 PROCULUS (*Epistles* 5) You being in possession of my estate, you and I agreed that you should deliver possession thereof to Attius; in this case, if I sue you to recover the property, my action cannot be barred by an *exceptio* founded on the agreement, unless either you have already delivered possession, or else you and I made the agreement for your benefit and it is not your fault that you have not made the delivery.

37 PAPIRIUS JUSTUS (*on imperial enactments* 2) The Emperors Antoninus and Verus laid down by rescript that a debtor to a municipality could not be excused payment by the curator, and that the release made to certain inhabitants of Philippi must be rescinded.

38 PAPINIANUS (*Questions* 2) The law of the State cannot be varied by the agreements of private persons.

39 THE SAME (*Questions* 5) The old lawyers hold that an agreement obscurely expressed or of doubtful meaning must be interpreted against a vendor or *locator*, such persons having it in their power to set down the terms of the contract more clearly.

40 THE SAME (*Responsa* 1) A pact in these words,—"I declare that you are not bound" need not be intended to be *in personam*, and, being general, it will apply perfectly well between the respective heirs of the original parties, in case of legal proceedings. 1. A man who has lodged an appeal agrees that if a sum of money which he has promised to pay by way of compounding an action is not paid by a given day, he will comply with the original judgment; the judge of appeal will hereupon, without discussing any other point on the main question, proceed upon the above as a lawful agreement, just as if the defendant had confessed his liability. 2. The coheirs of a deceased person having divided the assets and liabilities, the different creditors accepted interest from the respective coheirs on the footing of the arrange-

ment, for the whole of their debts, though no formal readjustment of liability had been made:—this will not interfere with the rights of action which every creditor had previously against all the heirs in proportion to the respective shares of the latter in the inheritance, so long as such heirs do not proceed to offer to the creditors assigned to them respectively the whole of their debts in due execution of the arrangement made. 3. A father who had promised a *dos* made a pact to the effect that, after his own death, if his daughter should die without children, the marriage having lasted up to that time, a certain portion of the *dos* should revert to his brother and heir. If the father (*socer*) should have other children subsequently, and appoint them heirs by his testament, the above agreement will give them a good *exceptio doli*, as the intention of the contracting parties was to provide for the heirs, and it is clear that whereas the father, in expressing [what he considered] his last wishes, referred to his brother, he only did so at a time when he had no other children [than his daughter].

41 THE SAME (*Responsa* 11) "If before such a day you pay me such a portion of your debt, I will give you a formal release for the rest, and discharge you from your liability." The above gives no ground of action; still it is well established that the debtor has a good *exceptio pacti*.

42 THE SAME (*Responsa* 17) An agreement was made between debtor and creditor that the creditor should not take on himself the burden of paying the tax (*tributum*) due on land which he held as security for the debt, but that that duty should fall on the debtor. I gave the opinion that this agreement was not binding so far as the *fiscus* was concerned, as it was not allowable that a regulation of revenue law should be stultified by agreements between private persons.

43 PAULUS (*Questions* 5) We know, in the case of a sale, what the law requires of the vendor on the one hand and the purchaser on the other; but if the parties chose to vary the terms in any respect when they made the contract, this must be maintained.

44 SCÆVOLA (*Responsa* 5) A boy under age being on the point of being made to decline his father's inheritance, his guardian settled with a majority of the creditors that they should accept a percentage on their debts, and the curators made the same arrangement with others. The question is this: if the guardian is himself a creditor of the father, is he only allowed to retain for his own debt an equally small portion? My answer was that

if the guardian brought the other creditors down to a percentage on their debts, he was bound to put up with a similar reduction himself.

45 HERMOGENIANUS (*Epitomes of law* 2) An agreement for partition, unless it takes formal effect by a delivery or a stipulation, will, being a bare pact, afford neither party ground for an action.

46 TRYPHONINUS (*Disputations* 2) An agreement made between heir and legatee to the effect that the former need not give security is recognised to be valid, as there is an enactment of the Divine Marcus enrolled in the Semestria to the effect that the will of the deceased shall be binding on this point as well as any other. Moreover, where the heir has been released by the legatee by means of an agreement to that effect from the duty of giving security, the latter cannot be allowed to change his mind and revoke the release, as it is quite open to a man to alter for the worse his means of enforcing his rights at law or his expectation of realising his claims at some future time.

47 SCAEVOLA (*Digest* 1) A purchaser of land gave an undertaking that he would pay twenty, and promised the same by stipulation; after this the vendor gave an undertaking to the effect that he had agreed that he would be content with thirteen, and that he should receive payment of that sum within a specified time. The debtor, on being sued for the latter amount, agreed that, if it were not paid within a further specified time, he should be liable to be sued on his original undertaking. The question was asked whether, on failure on the part of the debtor to fulfil the later[1] agreement, the whole debt could be demanded in pursuance of the original undertaking. I answered that, taking the facts as stated, it could. 1. Lucius Titius, having a complicated account with Gaius Seius, a moneychanger (*mensularius*), comprising a number of receipts and payments, made Seius his debtor, and the latter handed him a written document in the following terms:— "Whereas you have had a moneychanger's account (*ratio mensae*) with me, I have in my hands at this time, as the balance resulting from a great number of transactions included in the said account, three hundred and eighty-six [*aurei*], and the proper interest thereon. As for the sum of *aurei* which I hold to your credit without express agreement, I engage to repay it. If any instrument issued, that is, written, by you is remaining in my hands for

[1] For *posteriore* read *posteriori*. Cf. M.

whatever reason, whatever the amount may be, it is to be held void and treated as cancelled." The following question arose. Some time before this instrument was made Lucius Titius had requested Seius the moneychanger to pay the former's patron the sum of three hundred; must we say that, considering the terms of the above letter, by which all written engagements connected with whatever contract were to be held void and treated as cancelled, neither Seius nor his sons can be sued in respect of the last-mentioned matter? I answered that if the account mentioned only included the receipts and payments made, all other debts remained as they were.

48 GAIUS (*on the Twelve Tables* 3) It is perfectly clear that any pact that is made on a delivery of property is valid.

49 ULPIANUS (*on Sabinus* 36) If a man lends money and makes a pact that he will only sue the debtor for payment to the extent of what the latter is able to pay, is this a valid agreement? The better opinion is that it is; there is nothing dishonest in a man desiring to be sued for payment to such extent only as his means allow.

50 THE SAME (*on Sabinus* 42) On a contract of deposit, or a loan for use, or a *locatio*, or any other similar contract, I should say that there is nothing inadmissible in an agreement such as the following: "You must not make my slave a thief or a runaway"; in other words, "You must not incite him to become a thief or a runaway, you must not be so negligent in providing for him as to cause him to take to stealing." Just as there may be an action brought for corrupting a slave, so too, on the same principle, there may be such an agreement as the above, which aims at preventing the corruption of slaves.

51 THE SAME (*on the Edict* 26) If you believe [erroneously] that you are bound in pursuance of a legacy to agree with a debtor that you will not sue him, and accordingly he enters into such a pact, the debtor will not be released in strict law, nor can he bar your action by pleading the agreement by way of *exceptio*, so Celsus informs us (lib. XX). 1. The same writer adds the following:—If you believe erroneously that you have to pay a legacy to Titius, and you instruct your debtor to pay it, and the debtor who is already a creditor of Titius, agrees with him that he will not sue him, this will not put an end to your right of action against your debtor, nor to his against his debtor.

52 THE SAME (*Opinions* 1) A letter by which a man pledged himself that such a one was coheir jointly with himself will not give the latter any right of *hereditatis petitio* against persons who are in possession of assets of the deceased. 1. Land being pledged as security for debt, an agreement is made between the debtor and a person who purchased from the pledgee, professing to do so on the debtor's behalf, that the profits already received should be set off against what was owing, and the balance should be paid, and thereupon the land should be restored to the debtor; in this case, [on the death of the purchaser,] his heir is bound to observe the agreement entered into by the deceased. 2. If an agreement is made that any sums already paid by a pledgee of land in discharge of the land tax (*tributum*) due from the estate subject to the pledge should be recoverable from the pledgor (*debitor*), and future sums payable out of the same land should be paid by such pledgor, this is a lawful agreement and must be upheld accordingly. 3. Certain persons threatening to bring the plaint for an inofficious testament made by their father, the heir agreed that they should receive a specified amount as long as he lived. A claim was made to have this pact treated as making a perpetual obligation, but it was laid down by rescript that by no law or principle of justice could such a demand be entertained.

53 THE SAME (*Opinions* 4) There is no harm in advancing to a person engaged in litigation the expense of his action; but an agreement to the effect that instead of the amount expended for the purpose of the action being returned with lawful interest, the half of whatever is gained by the suit shall be handed over is an unlawful bargain.

54 SCÆVOLA (*notes to Julian Digest* 22) If I had a right to ask for Stichus and I agree not to sue for him, it cannot be said that my debtor is in default; and, if Stichus dies, I do not think the defendant is liable, if he was not in default before the pact was made.

55 JULIANUS (*Digest* 35) If a debtor has a usufruct in a slave, and the slave who is the subject thereof enters into a pact to the effect that the debtor shall not be sued, by this pact he improves the debtor's position. Again, if the creditor had the usufruct in a slave, and made a pact that he would not sue, but the slave in whom he had the usufruct thereupon agreed that the creditor

might sue, the creditor might perfectly well claim to be allowed to sue in virtue of the pact interposed by the slave.

56 THE SAME (*on Minicius* 6) If it is agreed that a landlord shall forbear to bring some action against a tenant, and the agreement is made on sufficient grounds, there is nothing in this to prevent the tenant from bringing an action against the landlord.

57 FLORENTINUS (*Institutions* 8) A man who accepts interest from his debtor in advance is held to make a tacit pact that he will not sue for the principal before the time by which the interest would have been payable. 1. If a pact is expressed in such terms that it is *in rem* with respect to one party and is *in personam* with respect to the other, as, for example, where the terms are that I will not sue or [and?] that you shall not be sued, then my heir will have a good right of action against all of you, (i.e. you and your heirs,) and all of us, (i.e. I and my heirs,) will have a good right of action against your heir.

58 NERATIUS (*Parchments* 3) In cases of purchase and sale, letting and hiring, and any similar contracts, it is undisputed that, so long as nothing further is done, the parties who are bound to one another can by mutual agreement withdraw from the contract. Aristo's opinion went further: if, he said, I have done for you all that I was bound to do as vendor, and thereupon, the purchase-money being still owing, you and I agree that you shall restore to me everything connected with the thing sold which you received from me, and that you shall not pay the purchase-money, and you accordingly restore everything, you will thereupon cease to owe me the money, because, according to the received view as to *bona fides*, which affords the guiding principle in all such cases, the agreement in question is a *bona fide* convention. It would make no difference whether, before anything were done in pursuance of our respective obligations, we agreed to abandon the contract or you first restored to its original position everything that I had given you, and then we agreed that you should not give me anything in pursuance of the contract. One thing there is which certainly cannot be effected by any agreement concluded with the object of making void a previous arrangement; you cannot be compelled in that way to give me back what I have once given you; were this the case, our operations would consist not so much in getting rid of our old contract as in creating between us fresh obligations of some kind.

59 PAULUS (*Rules* 3) Wherever a man can acquire any right through a stipulation made by another, the law is that his position can be improved by pacts agreed on by the agency of the same person.

60 PAPIRIUS JUSTUS (*Imperial enactments* 8) The Emperor Antoninus laid down in a rescript to Avidius Cassius that, if the creditors of a deceased person are willing to take a percentage on their debts out of the estate, though it were from an heir who is a stranger, those akin to the deceased should be first considered, if substantial persons.

61 POMPONIUS (*on Sabinus* 9) No man can by means of a pact deprive himself of the right to consecrate (*dedicare*) his own ground, or to bury a dead body on his own land, or to dispose of his estate without his neighbour's consent.

62 FURIUS ANTHIANUS (*on the Edict* 1) A debtor, after first agreeing that he shall not be sued for the debt, the result of which pact is that his surety is protected as well, makes another agreement that he may be sued: the question has been raised whether the surety thereupon loses the benefit of the former agreement. The better opinion is that when the surety has once acquired a right to an *exceptio* founded on a pact, it cannot after that be wrested from him against his will.

XV.

ON COMPROMISING AND COMPOUNDING.

1 ULPIANUS (*on the Edict* 50) When a man compromises a case (*transigit*), the subject of compromise is some question at issue which he treats as doubtful, and the result of the trial as uncertain, the case not being concluded. But one who comes to terms (*paciscitur*) gives up gratuitously and by way of bounty something distinct and undisputed.

2 THE SAME (*on the Edict* 74) For a man to agree to a compromise there need not be any Aquilian stipulation added, it is enough that terms are agreed upon by way of pact.

3 SCÆVOLA (*Digest* 1) The Emperors Antoninus and Verus issued the following rescript: "It is beyond question that private agreements cannot impair the rights of those who are not parties

to them. Consequently whatever compromise has been made between the heir and the mother of the deceased, the testament cannot be held to be rescinded by it, and legatees and manumitted slaves have not lost their rights of action; so that whatever they wish to sue for in pursuance of the testament, they must bring their action against the person who is named therein; who, when he compromised the question of inheritance, either took measures for his own protection in respect of the burdens which fall on the heir, or, if he did not, has no right to allow his own neglect to prejudice other persons." 1. A compromise being made [between the above parties] in respect of a *fidei commissum* [made in favour of the mother], and afterwards the "codicils" themselves being found: I desire to ask, supposing the mother of the deceased has received less in pursuance of the compromise than was properly due to her, whether she has a right to get the difference in virtue of the *fidei commissum*. The answer was Yes. 2. A secured creditor having sold the property pledged [and died], the debtor agreed with one Mævius,—who gave himself out as the statutable heir of the creditor,—to terms of composition very advantageous to the latter; after which, the creditor's testament being produced, it turned out that his real heir was Septicius. Hereupon these questions were asked: if the debtor sues Septicius in an action on the *pignus*, can the latter have an *exceptio* founded on the composition which the plaintiff [debtor] made with Mævius, who was not really heir under the testament?[1] and will Septicius have a *condictio* to recover from Mævius the money which the debtor paid Mævius under the impression that he was heir, on the ground that Mævius received it on the pretence of being heir? The opinion given was that on the above statement of fact the answer was No [to both questions]; as Septicius was not himself a party to the compromise with the debtor, and when Mævius received the money he was not acting on behalf of Septicius.

4 ULPIANUS (*on Sabinus* 46) The Aquilian stipulation absolutely supersedes and annuls all preceding obligations, and it is itself annulled by the *acceptilatio*; this is the present practice. Consequently even bequests which are made on a condition come within the scope of the Aquilian stipulation.

5 PAPINIANUS (*Definitions* 1) When an Aquilian stipulation is employed, given, that is, on agreement, any actions at law which

[1] For *tempore* read *testamento*. Cf. M.

the parties did not have in their minds remain unaffected. Those learned in the law have adopted a method of interpretation which will defeat any release made insidiously.

GAIUS (*on the provincial Edict* 17) Where disputes arise out of a testament there can be no compromise nor any inquiry into the facts made without inspecting and taking note of the words of the testament itself.

ULPIANUS (*Disputations* 7) A compromise is valid even after judgment if an appeal has been made or can still be made. 1. A surety was sued and judgment given against him; after which the principal debtor compromised matters with the successful plaintiff. The question is asked whether the compromise is valid. I should say that it is, and that every previous ground of claim is taken away as against either the principal debtor or the surety. If however the surety made the compromise himself after judgment was pronounced against him, then, although the compromise does not annul the judgment, still the obligation incurred under the judgment ought to be considered as discharged to the extent of anything that was given in pursuance of the compromise. 2. So true is it that whatever was given, though not to be taken in discharge of the compromise, is still so much off the judgment debt, that on the faith of this construction it has been held, and indeed embodied in a rescript, in a case where a compromise was made, without the leave of the prætor, of an obligation to furnish an alimentary provision, that what was given in pursuance of the compromise was a good part performance of the duty to furnish the provision; the whole result being that whatever might still be owing by way of such provision would have to be supplied, but credit must be allowed for what was given already.

THE SAME (*on all the Courts* 5) It being observable that persons for whom an alimentary provision had been made by testament were very ready to compound their claims, and were satisfied to take a small sum in immediate payment, the Divine Marcus provided, in an address which he recited in the Senate, that no composition as to an alimentary provision should be upheld, except where made on the prætor's authority. Accordingly the practice is for the prætor to interpose and decide, as between the parties to the agreement, whether any composition ought to be admitted, and, if so, what shall be the terms of it. 1. Whether the subject of the bequest is a provision for lodging,

or dress, or for maintenance charged on land, in all cases the same prætor holds an inquiry as to the composition to be made. 2. The Emperor's address deals with maintenance left by testament or by codicils, whether the codicils are supplementary to a testament or there was no testament. The same rule holds equally where the provision was made by a *donatio mortis causa*, or is a charge on a person to whom a *donatio mortis causa* was made: and where the provision is made by way of fulfilling a condition, the rule is still the same. No doubt, where the gift of maintenance is unconnected with the death of the giver, the composition may be made without the leave of the prætor. 3. Accordingly, whether the gift provides for monthly, daily or annual payment, the Emperor's address applies; and the same is the case where the provision is not to be perpetual, but for a specified number of years. 4. If a capital sum of money is left a man by testament, for him to live on the interest and restore the whole sum at his death, the address still applies, although it cannot be held that such a bequest is one which provides for annual payments. 5. However, if a sum of money or some specific thing should be left to Titius, on the understanding that he is to provide Seius with maintenance out of it, the better opinion is that Titius can compound for it, as the provision for Seius is not reduced by Titius's composition. The same holds too if the legatee[1] is charged with maintenance by way of *fidei commissum*. 6. The kind of composition which the Emperor's address is directed against is one which is made in order to enable a man to spend the present value of a provision given him. How would it be then if he were to make an arrangement, without the prætor's authority, to the effect that whereas a provision was left him, payable yearly, he should receive it monthly, or, where it was payable monthly, he should receive it daily? or how if he had a right to[2] receive it at the end of the year, and he arranged that he should have it at the beginning? I should say that any such agreement is valid, because, in the case of arrangements such as mentioned, the person to be provided for improves his position; what the Emperor's address aimed at preventing was compositions being made so as to cut short alimentary provisions. 7. It is a matter of indifference whether the beneficiaries in these cases are freedmen or freeborn, also whether they have an independent competency or not. 8. The points which the decree requires to be investigated in the prætor's court are these: first, what is the motive for

[1] Before *legatario* ins. *a*. Cf. M. [2] Del. *ut*. M.

making the composition, secondly, what is the scale of payment, thirdly, what are the personal characters of the parties. 9. As to the motive, the question to inquire into is what reason there is for making a composition at all; the prætor will not listen to one who desires to compound without good ground. The reasons generally given are very much as follows:—that the heir lives in one place and the beneficiary in another; or that one of the two intends to change his place of abode; that there is some urgent reason for having a capital sum of money in hand; or that a provision for maintenance has been charged on several heirs, and it is a troublesome thing to have to apply for a number of small sums of money to different persons; or whatever other reason there may be among the many which constantly occur for inducing the prætor to allow a composition to be made. 10. The amount of money which is the subject of the arrangement has also to be considered, in short, the sum for which the composition is to be made: this very question of amount may help to estimate the good faith of the transaction. The amount should be fixed according to the age of the party who accepts the composition and the state of his health, it is obvious that the terms would vary according as the party were a boy, or a young man, or an old man; as of course a provision for maintenance comes to an end on death. 11. Regard must also be had to the character of the parties, that is to say, it must be considered what are the habits of life of the persons to whom the provision is left, whether, for example, they are persons who are prudent in their habits, and can maintain themselves independently, or are of a lower type, and have to depend on the provision. With regard to the person on whom the provision is charged, the points to look at are these:—what are his means, what is his way of life, what reputation has he? These will make plain whether he has any wish to defraud the person with whom he proposes to make the composition. 12. When a man makes a composition about an alimentary provision, he will not be held to be therein making one about a provision for lodging or for dress, as the Divine Marcus had an eye to compositions being made in respect of these matters too, independently of the case first mentioned. 13. It may be added that where a man enters into a composition on the subject of alimony, he will not be bound to proceed to do the same with reference to a provision for lodgings or anything else against his will; so that he can either make the composition as to all these matters at once or as to one or more in particular. 14. Shoe-

money too can only be compounded for in pursuance of the prætor's judgment. 15. If land is left to one or more persons by way of provision, and they wish to sell it, a decision of the prætor must be had as to the sale and the terms of the composition connected with it. Again, if land is left to several persons by way of alimentary provision, and they make a composition among themselves, the composition cannot be upheld if made without the leave of the prætor. The same holds if landed security is given for a provision, as, even where a mortgage is made with this object, the property cannot be released without application to the prætor. 16. It is more than plain that whether the composition relates to the whole of the provision or to a part of it only, the decision of the prætor is required for it. 17. If, when application is made to the prætor, he allows the composition to be made without any inquiry into the circumstances, the arrangement will be null and void; the affair was put into the prætor's hands for him to inquire into it, not for him to neglect it or give it away. Even if he fails to extend his inquiry to every point which the Emperor's address enjoins, viz. the motive, the amount proposed and the character of the parties, then, although he should inquire into some points, still the rule is that the arrangement is void. 18. Moreover, in this matter, the *præses* of the province, or the prætor, is not at liberty to delegate his authority. 19. A composition on the subject of an alimentary provision can be made before the Imperial procurator; for instance, where the provision is claimed from the Fiscus; consequently a composition can be equally settled before the Præfectus Ærarii. 20. If an action is pending relative to a provision, but the action is compromised, the compromise cannot be held good without application to the prætor, because otherwise the Emperor's address might be evaded; as it would be possible for a feigned action to be brought, in order that a composition might be made without the prætor's leave. 21. Should it happen that an alimentary provision is left to a person, and, in addition to this, a legacy to be paid at once, and then a composition is made without the sanction of the prætor, any money already paid will be first appropriated to the legacy which was to be payable at once, and anything over and above to the provision. 22. If a man compounds in respect of a provision, without the prætor's leave, anything paid [in pursuance of the composition] will go in discharge of arrears of the provision. It matters not whether the amount of such arrears was exactly what was paid or less or more; even if it was less,

still what was paid must be appropriated to the arrears of the provision. It is true that if the party who compounded about a provision which he was to receive is the richer by the payment made, it will be perfectly fair that an action should be allowed against him to recover the amount by which he is the richer, as he has no right to be enriched by another man's loss. 23. If a fixed annual allowance should be left to some one in a superior (*honestior*) position, say, for instance, there is a gift of a yearly pension, or a usufruct, then a composition may be made without application to the prætor; but if a small usufruct is left by way of maintenance, I should hold that in such a case a composition made without the prætor's sanction is null and void. 24. If what is left a man as a provision is not money, but corn or oil or any other necessary of life, he is not at liberty to compound in respect of them, whether the allowance was annual or monthly. If however he makes an arrangement without the prætor's leave to the effect that, instead of some provision such as above mentioned, he should receive a payment in money every year or every month, and, in so doing, he does not alter the day or the amount, but only the nature of the provision; or should he, to take the converse case, agree to take his provision in kind, where it was left him in money, or say he arranges to have wine instead of oil, or oil instead of wine, and so on, or he changes the place, so as to take the provision in a municipal town or a province, when it was left him in Rome, or vice versâ; or he changes the person chargeable, so as to take at the hands of one only what he had a right to at the hands of several, or to accept the liability of one person in the place of that of another;—in all these cases the prætor must exercise his judgment, and the question ought to be considered from the point of view of the interest of the beneficiary. 25. If a fixed annual sum is left for lodging, and an arrangement is made without the prætor's leave to the effect that actual lodging shall be given, this is a valid composition, as the party gets the benefit of a lodging, though it is true that the lodging[1] is liable to be lost by collapse or fire. Again, in the converse case, where the parties agree that, instead of a lodging which was left, a fixed sum shall be given, the arrangement is good, even without the prætor's leave.

9 THE SAME (*Opinions* 1) A man sued his guardians in respect of such liability as they had incurred in the course of

[1] Del. *transactio*. M.

their administration as guardians to himself alone, and compromised the action. If after that he brings a similar action as representative of his brother, whose heir he is, against the same defendants, they cannot bar it by pleading the compromise made (*praescriptione transactionis factae*). 1. Wherever a compromise is made, it is considered to apply to those points only on which the parties really came to an agreement. 2. Where a man who was, through the fraud of a coheir, in ignorance of all the real facts of the case, executed an instrument of compromise without the Aquilian stipulation, you cannot say he has made an agreement; rather he is defrauded. 3. Where a man who has not yet ascertained that he has a right to bring a plaint to set aside his father's testament has made an agreement to compromise other matters with adverse claimants, †the agreement so concluded will only bar his action in respect of those matters which the parties are shown to have had in their minds[1];† though the person who consented to the compromise was over twenty-five; for as for anything for which it only becomes known subsequently that he had a right to bring an action at all, it is not right that he should lose through the agreement what the parties are not shown to have been thinking about.

10 THE SAME (*Responsa* 1) Where a father compromises the rights of sons who were not under his *potestas*, the law by no means allows them to be prejudiced by it.

11 THE SAME (*on the Edict* 4) After judgment has been given, although no appeal has been lodged, still, if the fact of judgment having been given is disputed, or it is possible for a party to be ignorant whether the fact is so or not, then, as there is some possibility of a trial being held, a compromise can be made.

12 CELSUS (*Digest* 3) No indulgence must be shown to a man who, after making a compromise as to bequests in general made to him, proceeds to found some claim on the alleged fact that he was only thinking about what was left him at the beginning of the testament, and not what was left in a subsequent part as well. But if codicils are produced afterwards, then I should say he may very honestly tell me that he was only thinking about what was contained in the text of those testamentary papers which he knew of at the time.

[1] The phrase between † † is repeated in the text with some variation by a blunder; I omit the second version. v. M.

ÆMILIUS MACER (*on the five per cent. statute as to inheritance* 1) None of the Imperial procurators are allowed to compromise an action without first consulting the Emperor.

SCÆVOLA (*Responsa* 2) A dispute arose between the statutable heir and a person named heir in the testament, and, an arrangement having been made with the creditors, the dispute was settled on certain specified terms. I wish to know who it is that the creditors can sue. The answer was, if the creditors were themselves parties to the arrangement, then what has to be followed with reference to the debts is whatever the terms were that they agreed upon; but if the creditors [on whose behalf you ask] were not parties, then, owing to the doubt existing as to who it was that was really heir to the deceased, the two parties mentioned will be liable to *utiles actiones* to the extent of the shares in the inheritance which they both agreed in the arrangement that they should respectively take.

5 PAULUS (*Sentences* 1) A pact agreed upon is commonly followed by an Aquilian stipulation, but the better conceived plan is to add a penal stipulation as well, because, if the pact should chance to be rescinded, the penalty can be sued for in an action on the stipulation.

6 HERMOGENIANUS (*Epitomes of law* 1) Where a man breaks faith in respect of a lawful compromise, he is not only liable to be barred by an *exceptio*, but he may be compelled to pay any penalty which he has promised to pay in proper form on stipulation, in case he should commit a breach of the agreement while the pact was still in force.

7 PAPINIANUS (*Questions* 2) The vendor of an inheritance, after assigning his rights of action to the purchaser, made a compromise with a debtor to the inheritance who was not aware of the sale; if the purchaser of the inheritance should take steps to enforce the debt, the debtor must be allowed in virtue of his ignorance to plead by way of *exceptio* that the matter was compromised. A corresponding rule must be laid down for the case of a man who takes an inheritance in pursuance of a *fidei commissum*, if the heir-at-law compromises matters with a debtor who is unaware of the facts.

THIRD BOOK.

I.

On motions.

1 Ulpianus (*on the Edict* 6) The prætor published this title by way of taking measures for keeping up his dignity, and also for maintaining a becoming order, desiring to prevent motions being made before him at random and without discrimination. 1. With this object he established three classes; some persons he would not allow to move the court at all, others he allowed to make motions on their own behalf, others again he allowed to move for particular kinds of persons only, and also for themselves. 2. To move (*postulare*) is to set forth one's own request or that of one's friend in court to the magistrate who presides, or to oppose a request made by the other party. 3. The prætor begins with those who are forbidden to make any motion at all. Here the grounds of exclusion given are childhood and accidental defects. As for childhood, the Edict forbids any one to move the court under the age of seventeen, that is, if he has not completed that number of years, as the prætor considered that that time of life was too early for any one to come forward in public; though it is said that Nerva the son actually gave opinions on legal questions when he was of that age or a little older, to any who consulted him. As for accidental defects, the prætor forbids motions to be made before him by persons who are deaf, i.e. such as cannot hear at all; it would in fact have been impossible to allow a man to make a motion who was unable to hear the prætor's decree; indeed, it would have been dangerous to the man himself, because, if he did not hear the decree, he would be liable to be punished for contumacy, on the ground that he did not obey the order of the court. 4. The prætor's words are:—"if they have no advocate,

I will give them one." It is not the prætor's practice to show this indulgence to the above mentioned class only, he extends it to all alike who for specific reasons, such as machinations or intimidation on the part of their opponents, fail to find counsel. 5. Under the second head the Edict deals with persons who are forbidden to move on behalf of others: here the prætor excludes on the ground of sex and accidental defect, he also puts a mark on persons who deserve one for bad character. With regard to sex, he forbids women to move on behalf of other persons. The principle of this prohibition is that of preventing women from mixing themselves up with other people's affairs contrary to the modesty which becomes their sex, or discharging offices proper to men; the first case that gave occasion to the prohibition was that of one Carfania, a most pertinacious woman, who so worried the magistrate with shameless applications as to give ground for the rule laid down in the Edict. As to accidental defect, the prætor debars a man who has lost the sight of both eyes; such a man being unable to see the magisterial badges of office and so pay them due respect. Labeo tells us that in a case where one Publilius, a blind man, father of Asprenas Nonus, wanted to make an application to the court, Brutus turned his seat round and refused him a hearing. However although a blind man cannot move on any one else's behalf, still he retains his senatorial rank, and he can discharge the office of *judex*. It may be asked whether he is able to hold magisterial offices: this point must be considered. There is an instance of a blind man bearing such an office; indeed Appius Claudius the Blind took part in public debates, and pronounced a very harsh view in the senate in the matter of the prisoners taken in the war with Pyrrhus. However the best rule to lay down is that such a man is at liberty to keep any magistracy which he has already begun to exercise, but is absolutely forbidden to be candidate for another; and there are plenty of precedents to confirm this view. 6. The prætor also debars from moving on behalf of others any man who has been used like a woman against nature. But a man who has suffered this outrage by force from brigands or enemies ought not to have a stigma put upon him, and this is said by Pomponius. A man who has been condemned on a capital charge is not allowed to move on behalf of others. Moreover there is a decree of the senate by the terms of which a man who has been condemned on a criminal charge for false accusation (*calumnia*) is not allowed to make a motion even before a subordinate judge (*judex pedaneus*).

Again a man is excluded who hires himself out to fight with beasts. In applying the word beasts (*bestiæ*) we must consider the savageness of the particular animal rather than the question of its species; the creature might for example be a lion, but a tame lion, or some other animal with fangs, but still tame. It appears from the above that it is simply a man who makes the engagement that has a mark put on him, whether he actually fights or not, and if he should fight without having hired himself out to do so, he will not be liable; the man who is liable is not one who has fought with beasts but one who has hired himself out to do so. We may add here that we learn from old writers that persons who fight without pay by way of displaying their prowess are not liable, unless indeed they allow themselves to receive a distinction on the ground; whoever does that does not, I should say, escape a mark of censure. If a man engages his services to hunt wild beasts, or to encounter, otherwise than in the arena, a wild beast which is a plague to the neighbourhood, he incurs no mark. In short where persons have fought with beasts without their object being to display their prowess, the prætor allows them to appear on their own behalf, but forbids them to do it on behalf of another. Still it is perfectly right that where any such persons are exercising a guardianship or a curatorship, they should be allowed to make applications on behalf of those who are under their charge. If any one is shown to have behaved in the way mentioned, he is not only debarred from making the motion prohibited on behalf of another person, but, in addition to that, he will be punished by a pecuniary fine in virtue of the extraordinary powers of the court to an amount assessed by the judge. 7. As was mentioned at the beginning of this title, the prætor divides those who have not full right to make motions into three classes, of which we now come to the third, comprising those persons to whom he does not deny the right of moving altogether, but only says that they are not to move for whomsoever they please; thus treating them as less open to objection than those who are subject to a mark under the preceding heads. 8. The prætor's words are:—"whatever persons are forbidden by any statute, plebiscite, senatorial decree, edict, or imperial enactment to move otherwise than on behalf of particular kinds of persons, none such are to move in my court on behalf of any other than such persons as the law allows." These words comprehend all those remaining persons who are set down as of bad fame (*infames*) in the prætor's edict; and all such are forbidden to move except in behalf of themselves and particular

classes of persons. 9. Then the prætor proceeds:—"wherever any one of all those persons mentioned above shall not have been restored to his original position (*in integrum restitutus*), such a one etc." The words "any one of all those persons mentioned" must be taken to apply only to a person who is one of those comprehended in the third clause in the Edict and is only allowed to move for particular classes of persons; in a case within either of the previous clauses, an order for *in integrum restitutio* would hardly be granted. 10. But to what kind of restitution is the prætor referring? does he mean restitution by the Emperor or by the senate? Pomponius asks this question, and he holds that the restitution meant is the one given by the Emperor, or the one given by the senate, without distinction. It has however been asked whether the prætor can make an order of restitution himself, and my opinion is that no such order made by a prætor should be observed, except where the prætor gives relief in virtue of his magisterial authority, as he commonly does on the ground of youth, or where a party has been deceived, and in other cases which we shall have to go through under the head of *restitutio in integrum*. This view is supported by the fact that if a man on whom judgment is passed in a case entailing infamy should get the judgment set aside by *restitutio in integrum*, he thereupon, in the opinion of Pomponius, is cleared of the infamy. 11. The prætor next adds:—"Such persons are not to move the court save on behalf of a parent, a patron or patroness, or the children or parents of a patron or patroness": about which persons we have already spoken more fully under the heading "on citations." He also adds "or their own children or a brother, sister, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, stepdaughter, or ward of either sex, lunatic of either sex,

2 GAIUS (*on the provincial Edict* 1) or imbecile of either sex,"—as such persons have curators appointed, as well as others,—

3 ULPIANUS (*on the Edict* 6) "where the guardianship or curatorship of any such person was given to the party who desires to move the court by a parent of the person under care or by a resolution of a majority of the guardians[1] or by a magistrate who had the requisite authority thereto." 1. When we speak of "affinity" we must not take this to mean such connexions by

[1] *tutorum*: but probably it should be *tribunorum*, cf. Gaius I. 185. M.

marriage as may have existed some time before but only such as are existing now. 2. Pomponius adds that the terms daughter-in-law, son-in-law, father-in-law and mother-in-law are meant to include remoter degrees of connexion such as are usually distinguished [in Latin] by the use of the prefix *pro*; 3. and that in speaking of curators the prætor should have added the curators of dumb persons or of any others to whom curators are commonly given, that is, deaf persons, spendthrifts, and those under twenty-five,

4 PAULUS (*on the Edict* 5) as well as any to whom the prætor is in the practice of giving a curator on the ground of infirmity,

5 ULPIANUS (*on the Edict* 9) and such as are incapacitated by some incurable disease from managing their own affairs.

6 THE SAME (*on the Edict* 6) I should say however that any persons who are not discharging the office of their own free will but of necessity can make a motion without trangressing the Edict, even where they belong to the class of persons who [as it is laid down] can only move on their own behalf. Where a man is prohibited from acting as an advocate, if this means the court of the prohibiting magistrate, for such time as the latter continues magistrate, in accordance with the ordinary practice, I should say the person prohibited can afterwards practise before the magistrate who succeeds to the office.

7 GAIUS (*on the provincial Edict* 3) Any one whom the prætor forbids to move in his court he forbids absolutely, even though the opposite party should be willing to allow him to move.

8 PAPINIANUS (*Questions* 2) The Emperor Titus Antoninus laid down by rescript that where a man was debarred by interdict from practising as an advocate for a period of five years, there was nothing to prevent his making motions after the lapse of the five years for whomsoever he pleased. The Divine Hadrian too laid down that a man was qualified to make applications after his return from exile. No distinction is admitted in connexion with the nature of the offence for which the party was forbidden to speak or exiled, otherwise a penal period which was definite as to duration might be further prolonged, in contradiction to the terms of the judgment.

9 THE SAME (*Responsa* 1) When a man is forbidden to move on behalf of others on some ground which does not entail infamy, and consequently does not deprive him of the right to move on

behalf of others in every case, he is only disabled from moving on behalf of others in the province in which the magistrate who pronounced the prohibition was *præses*; the prohibition does not extend to any other province, though it should bear the same name.

PAULUS (*Rules*) Advocates of the Fiscus are at liberty to appear on their own behalf or on behalf of their sons or parents or of wards in whose guardianships they are acting, and even to appear against the Fiscus. As a matter of fact members of a municipal curia are forbidden to appear in a case against their own municipality, except such persons as are above mentioned.

TRYPHONINUS (*Disputations* 5) A rescript of the present Emperor lays down that a guardian is not forbidden to be of counsel for his ward in a matter in which he has already acted as pleader against the ward's father. Not only so, but the guardian may plead the cause of his ward against the Fiscus, even though he previously acted for the Fiscus in the same matter against the ward's father. 1. As for the question what persons are included under the term *infames*, the answer to that will be set forth in the next title.

II.

ON THOSE WHO ARE MARKED WITH *infamia*.

JULIANUS (*on the Edict* 1) The prætor's words are: A man is marked with infamy who is dismissed from the army by way of disgrace, either by the commander or by the officer who has the power of pronouncing on the matter; or a man who appears on the stage in exercise of the calling of a player, or in order to recite; or carries on the trade of procurer; or is pronounced in a criminal trial to have committed any act by way of false accusation or in collusion with the accused; or has had judgment given against him in an action for theft, robbery, *injuria*, *dolus malus* or fraud, where he was a party to the action on his own behalf, or to have compromised any such action; or has had judgment given against him in an action *pro socio* or an action on guardianship, *mandatum* or *depositum*, to which he was a party on his own account, such action not being an *actio contraria*; or who, having a [married] woman under his *potestas*, did on the death of his son-in-law, and with knowledge of the fact of his death, before the

expiration of the time which it is customary for a widow to take to complete her mourning for her deceased husband, give such woman in marriage before she had completed the mourning; or who should, with knowledge of the facts, take to wife a widow in the case above mentioned, without being ordered to do so by the man in whose *potestas* he was himself; or who, having a man under his *potestas*, should allow him to take to wife a woman situated as above mentioned; or who should, either on his own behalf, but not by order of the person exercising *potestas* over him, or on behalf of a man or a woman over whom he was exercising *potestas*, have two betrothals or two marriages on foot at the same time.

2 ULPIANUS (*on the Edict* 6) Whereas the prætor says "who shall be dismissed from the army," the word dismissed must be taken to refer to a soldier who wears the military boot, or any other soldier who is dismissed, including a centurion, or the prefect of a cohort, or wing, or legion, or the tribune of either a cohort or legion. Pomponius says, in addition to the above, that the officer who is in command of the army, though he may display the badges of the consular office, if dismissed by the Emperor by way of disgrace, is branded with this mark; accordingly, even if a general is dismissed when in command of an army[1],—if the Emperor dismisses him, and adds, as for the most part he does add, that he dismisses him by way of disgrace,—there need be no doubt that the general is also marked with infamy in pursuance of the prætor's Edict; but this is not the case where a successor is appointed without any displeasure on the part of the Emperor. 1. The word army (*exercitus*) does not mean one cohort, or one wing, but a large body of troops; thus we may say that a man is in command of an army, when he is at the head of a legion or several legions, with the corresponding auxiliary troops which have been entrusted to him by the Emperor; but here too, when a man is dismissed from any particular division, this must be treated as equivalent to dismissal from the army. 2. "Dismissed by way of disgrace." The reason why this was added is that there are several different kinds of dismissal. There is honourable dismissal which is accorded by the Emperor when a man has completed his time of service, or sooner, there is dismissal for sickness (*causaria*), which releases a man from the labour of military service on the ground of ill-health; there is dismissal in disgrace. Dismissal in disgrace occurs whenever the person in authority who dismisses adds expressly that he

[1] Del. *notatur et*., M.

does so by way of a disgrace; he is always bound to give the reason for which a soldier is dismissed. Even where a man is cashiered, that is where his badges of service are taken away from him, this makes him *infamis*, though the authority should not go on to say that he is cashiered as a mark of disgrace. There is yet a fourth kind of dismissal, which occurs where a man has subjected himself to military service in order to avoid discharging some office; but dismissal in this case does not affect a man's character, as has been very often laid down by rescript. 3. A soldier who is condemned under the *lex Julia de adulteriis* is so distinctly *infamis* that the very judgment itself releases him from the oath of service as a mark of disgrace. 4. When soldiers are dismissed in disgrace they are not at liberty to stay in the city or in any other place where the Emperor is. 5. The prætor says: "A man is infamous who appears on the stage." The stage (*scœna*), according to Labeo's definition, is something which is set up for the purpose of performances in any place in which a man stands or moves about to exhibit himself to spectators, whether it be in public or in private or in a street, so long as it is some place to which people are admitted as spectators promiscuously. In fact all such as take part in contests for gain and all who appear on the stage for reward are declared by Pegasus and Nerva the son to be of bad repute.

3 GAIUS (*on the provincial Edict* 1) Where a man hires out his services by way of agreement to appear in the calling of a player, but does not actually appear, he is not marked; the profession in question is not disgraceful to such a degree that the very intention should deserve to be punished.

4 ULPIANUS (*on the Edict* 6) Athletes, so Sabinus and Cassius laid down, do not exercise the calling of players at all; they act as athletes only to display their prowess. In fact, as a general rule, everybody holds, and it seems a sound rule, that no members of an orchestra, or porch-athletes, or chariot-drivers, or washers-down of horses, or any other attendants of such persons as make it their business to act in the sacred contests, should be held to incur ignominy. 1. Umpires, whom the Greeks call "brabeutæ," do not practise the calling of players, as Celsus shows; in fact, they do not act as players, they discharge a service; and the post is one which at the present day is given by the Emperor as no small favour. 2. The prætor says "who carries on the trade of procurer." A man practises the trade of procurer who keeps slaves

who bring in a profit in this way; and if a man makes a similar speculation with free women, he is in the same position. Moreover, whether he makes this his main business, or has some other kind of business as well,—for instance, suppose he is an innkeeper or a tavernkeeper, and has slaves of this kind who wait on travellers, and use the opportunity so afforded to make gain in the way described, or he keeps baths, and, as is done in some provinces, he has slaves at the baths whom he hired to take charge of the clothes of customers, and these carry on the above practices at the bathing establishment,—in all these cases he will be liable to the penalties inflicted on procurers. 3. According to Pomponius, even where a man who is himself a slave makes this use of female slaves who are part of his *peculium*, he will be marked with infamy after gaining his freedom. 4. A man who commits *calumnia* (taking proceedings in bad faith) is only marked if judgment is given against him thereupon, it is not enough that he should have been in fact guilty; and a *prevaricator* is in a similar position. A prevaricator is, as it were, a "varicator" (straddler), a man who betrays his own case and helps the other side; the name, according to Labeo, is derived from *varia certatio* (varying contention), as a man who prevaricates has been standing on both sides, in short, he has stood on the opposite side to his own. 5. Again if a man suffers judgment or makes a compromise in an action for theft, robbery, *injuria*, or *dolus malus* to which he was a party on his own account, he incurs infamy in the same way,

5 PAULUS (*on the Edict* 5) as a man who compromises a charge is regarded as confessing it.

6 ULPIANUS (*on the Edict* 6) The word "theft" must be understood to include both *furtum manifestum* and *furtum nec manifestum*. 1. But if a man, after judgment against him in an action for theft, or any other action involving infamy, appeals, then, pending the appeal, he is not regarded as infamous, but if the whole period within which he can bring the appeal should be allowed to lapse, he is held infamous by relation back from the time of the original adverse judgment; though, at the same time, if his appeal is rejected, I should say he is marked as from that day only, not from the original time. 2. If a defendant suffers adverse judgment as representing some one else, he is not branded with infamy; consequently any agent of mine, or person who volunteered to take up my case (*defensor*), or my guardian or curator or heir will not be marked with infamy on adverse

judgment in an action for theft or any similar offence [committed by me], nor shall I myself, if my case was conducted all through by means of an agent. 3. The Edict proceeds—"or makes a compromise." Compromise must be taken to mean compromise for some pecuniary consideration, whatever the amount; otherwise a man will be marked even where he induced the other party by earnest entreaty to abandon the action, and no account will be taken of cases of forbearance; but this is inconsistent with humanity. Where a man compromises an action by the prætor's order on pecuniary terms, he is not marked. 4. Add that if a man, on an oath being tendered him, swears that he did no wrong, he will not be marked; he has in a way established his innocence by oath. 5. As to the reference to adverse judgment on *mandatum*, the language of the Edict puts a mark not only on the party who undertook the mandate, but on any one who fails to keep faith where the other relied on his doing so. For instance: I was surety for you, and had to pay; if I get judgment against you in an action on the *mandatum*, it makes you infamous. 6. There is of course this to be added, that sometimes the heir himself suffers judgment on his own account, and so becomes infamous, viz. where he acted dishonestly in connexion with a deposit or a mandate; in respect of a guardianship or partnership the heir cannot suffer judgment on his own account, because an heir does not succeed to the position of guardian or partner, he only succeeds to the liability for debt contracted by the deceased. 7. Adverse judgment in an *actio contraria* does not entail infamy; and this is as it should be, as in such actions no question of bad faith is at issue, but the point[1] commonly decided by the court is a question of computation.

7 PAULUS (*on the Edict* 5) In actions founded on contract, even where they should involve infamy, and parties who suffer adverse judgment be marked, still one who makes a compromise is not marked. This is quite right, as a compromise is not so dishonourable in these cases as in those above mentioned.

8 ULPIANUS (*on the Edict* 6) The words occur "on the death of his son-in-law." The prætor very rightly adds "he being aware of the fact of the death," so as to prevent his ignorance being punished. As however the period of mourning admits no interval, it is right that it should, as it does, begin to run from the day of the husband's death even where the death is unknown to the

[1] Dele *qui*. M.

widow; so that, if she only becomes aware of it after the expira of the prescribed period, then, according to Labeo, she can put mourning and lay it aside on the same day.

9 PAULUS (*on the Edict* 5) Men are not compelled to mo for their deceased wives. There is no mourning for a betrothed

10 THE SAME (*on the Edict* 8) It is in accordance with present practice that a widow should get leave from the Emp to marry again within the prescribed period. 1. When a wo completes the period of mourning for her deceased husband, incurs no censure for having been engaged in the meantime marry again.

11 ULPIANUS (*on the Edict* 6) Mourning for children parents is no impediment to marriage. 1. Even where deceased husband was some one for whom, by established cust a woman ought not to observe mourning, still the widow cannot given in marriage before the expiration of the statutable ti the prætor looks at the day on which mourning for a decea husband would terminate, and the object of making it a prac to complete the period is to avoid confusion of blood. 2. P ponius holds that a woman who bears a child within the prescri time may at once give herself in marriage, which, I should say sound. 3. It is not the practice, so Neratius says, to obs mourning for enemies, or for persons condemned for *perdue* (treason), or those who hang themselves, or lay violent hands themselves from a bad conscience and not from weariness of l still if a widow[1], where the husband has died under any s circumstances, should give herself in marriage [within the per she will be marked with infamy. 4. A mark is also set on man who takes to wife such a widow, that is, if he knows the f ignorance of law is not excused, but only ignorance of fact. A who should make such a marriage by the order of one who *potestas* over him is excused, and the mark is put on the pe himself who suffers him to make the marriage. Both these r are sound; the party who complied deserves indulgence, and one who allowed him to make the marriage may fitly rece mark of ignominy.

12 PAULUS (*on the Edict* 5) When a man marries by the o of his father [under the circumstances mentioned], if he keep

[1] For *si quis* read or understand *si qua*.

wife after he is set free from his father's *potestas*, he is not on that account marked.

13 ULPIANUS (*on the Edict* 6) How then if the father did not give the son leave to marry, but ratified the marriage after it was made? suppose for instance he was unaware originally that the circumstances of the woman were such as described, but afterwards found it out: in this case he will not be marked, as the prætor looks at the time when the marriage took place. 1. Where a man contracts two betrothals on some one else's behalf, he is not marked, unless he concludes them on behalf of some man or woman whom he has under his *potestas*; of course it must be held that a man who allows his son or daughter to contract a betrothal may be held to have in a way contracted it himself. 2. Where the prætor says "at the same time," we must not take this to mean the actual betrothals being contracted at the same time, but to apply equally where the periods to any extent coincide. 3. Again if a woman is betrothed to one man and married to another she is punished by the rule given in the Edict. 4. And as it is the party's own act which entails the mark of infamy, it follows that, even where the woman with whom a man contracts marriage or betrothal is one whom he cannot marry legally, or cannot marry consistently with religious principle (*fas*), he will still be marked. 5. [The award of] a person made arbitrator by mutual compact does not lay a party under infamy, as such an award is not in every respect the same thing as a judgment. 6. As far as the question of infamy is concerned, it makes a great deal of difference whether in the case before the court the judge made his decision after a regular hearing, or something was uttered independently, in the latter kind of case no infamy is inflicted. 7. Where a penalty of undue severity is imposed beyond the terms of the statute, the character of the party is not affected; this has been enacted, and also laid down by *responsum*. Suppose for instance the præses should relegate a man who ought only to have been mulcted in a part of his property, the proper view to take is that by suffering so severe a sentence the accused person has compounded for the retention of his character, and accordingly he is not infamous. At the same time, if, in a case of *furtum nec manifestum*, the judge makes an order for payment of four times the value, then the extra penalty laid on the defendant is no doubt a grievance, as, where the *furtum* is not *manifestum*, he ought to have been sued for the double value only; still this fact does not

prevent the loss of his character; whereas, if the penalty which the judge inflicted in excess had not been of a pecuniary kind, the party would be held to have compounded. 8. A charge of *stellionatus* imposes infamy on the party on whom judgment is passed, though this is not a subject for a *publicum judicium*.

14 PAULUS (*on the Edict* 5) Where an owner defends a noxal action brought in respect of his slave, and after that emancipates the same slave by testament, and appoints him heir, if the latter should then himself suffer judgment in the action, he does not become infamous, because he does not incur judgment on his own account, as he was not a party to the original joinder of issue.

15 ULPIANUS (*on the Edict* 8) A woman is marked who gets an order for possession on behalf of an alleged unborn child on false pretences (*per calumniam*), that is, by declaring that she is with child,

16 PAULUS (*on the Edict* 8) when in reality she is not, or is with child by a man who was not her husband;

17 ULPIANUS (*on the Edict* 8) as a woman who deceives the prætor ought to be punished. But a woman who acts as above mentioned is only marked where she does so without being at the time subject to *potestas*.

18 GAIUS (*on the provincial Edict* 3) Where a woman was under a delusion in the matter, she cannot be held to have been in possession on false pretences,

19 ULPIANUS (*on the Edict* 8) and no woman is marked save one as to whom it is judicially declared that she got the order for possession by means of false pretences. The law will apply equally to a father who procures by false pretences that a daughter whom he had under his *potestas* should get an order for possession on behalf of an alleged unborn child.

20 PAPINIANUS (*Responsa* 1) A man to whom these words are addressed in the judgment of the præses of a province—"You seem to have used a cunning contrivance to set some one on to bring an accusation" is rather put to shame than, as far as appears, laid under ignominy; the fact is a person who incites another does not positively act in the way of giving him a mandate.

21 PAULUS (*Responsa* 2) Lucius Titius preferred a charge against Gaius Seius alleging that he had suffered wrong at his

hands, and read a written testimony in support of his case before the Præfectus Prætorio. The præfect did not put any faith in the deposition, and declared that Lucius Titius had suffered no wrong at the hands of Gaius Seius. My question is this:—are the witnesses whose testimony was rejected classed with infamous persons on the ground of false testimony? Paulus's answer was that no ground was stated which would make it right that those about whom the question was asked should be classed among infamous persons, seeing that it was not right that where a judgment, whether just or not, is given in favour of one person, another person should be prejudiced by it.

22 MARCELLUS (*publica* 2) The infliction of a beating does not entail infamy, what does is the ground on which the party incurred the punishment, assuming that the ground in question is one which imposes infamy on a man who is condemned to it. A similar rule is laid down as to other kinds of punishment.

23 ULPIANUS (*on the Edict* 8) Mourning ought to be observed for parents and children of both sexes, and other agnates and cognates as well, agreeably to the dictates of family affection and to the extent to which any particular person is ready to assume it; but a person who does not complete the regular period of mourning in such cases is not marked with infamy.

24 THE SAME (*on the Edict* 6) The Emperor Severus laid down by rescript that the character of a woman in respect of *infamia* was none the worse for the fact that her owner made [immoral] gain by her means when she was a slave.

25 PAPINIANUS (*Questions* 2) It has been held right that even a disinherited son should observe mourning in memory of his father, and a similar rule applies in the case of a mother whose inheritance does not pass to her son. 1. When a man is killed in battle he must be mourned for, even though his body should not be found.

III.

ON "PROCURATORS" AND "DEFENSORS."
(AGENTS, WHETHER APPOINTED OR VOLUNTARY.)

1 ULPIANUS (*on the Edict* 9) A *procurator* is a man who manages another person's affairs in pursuance of a mandate from his principal. 1. A *procurator* may be appointed for affairs in general or for one affair in particular, and either at an interview or by a messenger or by letter; though some hold, so Pomponius says (b. 24), that a man is not a *procurator* where he undertakes a mandate with respect to a single affair, just as a man is not called a *procurator* in the strict sense who undertakes to carry a thing or a letter or a message. But the better opinion is that a man is a *procurator* even when he is appointed for a single affair. 2. The employment of procurators is absolutely necessary, in order that persons who are unwilling or unable to look after their affairs themselves may be able to bring or defend actions by the intervention of others. 3. A man may be appointed procurator even in his absence,

2 PAULUS (*on the Edict* 8) provided always that the person who is understood to be appointed is ascertained, and he himself ratifies the appointment. 1. A lunatic must not be deemed in the same position as an absent person, as he is devoid of intelligent will, so that he is unable to ratify.

3 ULPIANUS (*on the Edict* 9) A *procurator* can also be appointed for a future trial, or for a future day, or on a condition, or until a particular day,

4 PAULUS (*on the Edict* 8) or for an indefinite time.

5 ULPIANUS (*on the Edict* 7) A man is said to be present even when he is in the pleasure-grounds,

6 PAULUS (*on the Edict* 6) or in the *forum*, or in the city, or somewhere within the space over which buildings extend from the city without a break:

7 ULPIANUS (*on the Edict* 7) so that his *procurator* is held to be the agent of one who is present.

8 THE SAME (*on the Edict* 8) A *filiusfamilias* can appoint a *procurator* for bringing an action, where the action is one which he could have brought himself; and that not only when he has

castrense peculium; any *filiusfamilias* can do it. For example, if he has suffered an *injuria* he can appoint a *procurator* to bring an *actio injuriarum*, supposing, that is, that his father is not present and no *procurator* for his father chooses to take the proceedings, and such appointment of a *procurator* by the *filiusfamilias* himself will be valid. Julianus goes further; if, he says, a *filiusfamilias* has himself a son who is subject to the same *potestas* as he is, and an *injuria* is done to him in the person of that son, the *paterfamilias* not being present, he, the *filiusfamilias* first mentioned, can appoint a *procurator* to get satisfaction for the *injuria* inflicted on the grandson of the absent man. A *filiusfamilias* can also appoint a *procurator* to defend an action. We may add that a *filiafamilias* can equally appoint a *procurator* to bring an action for *injuria*; for, as for the fact that, in the case of an action to recover *dos*, the daughter joins with her father in appointing a *procurator*, this, according to Valerius Severus, is quite unnecessary, it being enough that the father should appoint at the daughter's request. I should say however that if the father should chance to be absent, or to be a man of doubtful moral character, in both which cases the practice is for the daughter to be allowed to bring the action herself, it is open to her to appoint a *procurator*. 1. It is not the practice that a man should be appointed *procurator* against his will; and we must understand the appointment to be against his will not only where he objects, but even where it is not shown that he consents. 2. Veteran soldiers can be appointed *procurators*; but soldiers on service cannot be appointed, even with the consent of the other party to the action, unless by some accident the matter was overlooked at the time of joinder of issue: and excepting always the case of a soldier being made *procurator* on his own behalf, or undertaking to prosecute or defend an action in which all the men of his detachment (*numerus*) are interested alike, in which case he is allowed to be *procurator*. 3. "Where a man has been appointed *procurator* for defending a case on whose behalf the principal has with his consent furnished an undertaking that the order shall be complied with (*judicatum solvi*), then," such are the praetor's words, "I will compel him to undertake the case." However, on sufficient cause shown, he ought not to be compelled; suppose for instance a deadly quarrel arises in the meantime between the *procurator* himself and the principal; in such a case, so Julianus tells us, the action cannot be allowed against the *procurator*. The same result ensues if some position of rank should be acquired by

the *procurator*, or he should have to be absent on government service,

9 GAIUS (*on the provincial Edict* 3) or he can show ill-health or urgent necessity for going to a distance;

10 ULPIANUS (*on the Edict* 8) or he is busy about an inheritance which has come to him; or there is any other sufficient excuse. Besides all this, the *procurator* ought not to be forced [to take up the case] when his principal is present,

11 PAULUS (*on the Edict* 8) provided, that is, the principal himself can be compelled to do so.

12 GAIUS (*on the provincial Edict* 3) Other grounds too it is said are sometimes sufficient for compelling a *procurator* to take joinder of issue; suppose, for example, the principal is absent, and the plaintiff maintains that lapse of time would cause the matter at stake to be lost.

13 ULPIANUS (*on the Edict* 8) However, such grounds ought neither to be allowed without discrimination nor yet peremptorily set aside, the matter should be ordered by the prætor after he has heard the facts.

14 PAULUS (*on the Edict* 8) If, after the appointment of a *procurator*, deadly enmity arose [between him and his principal], the *procurator* must not be compelled to take issue, and he does not become liable under the stipulation on the ground of default in defending the case, as the circumstances are not the same.

15 ULPIANUS (*on the Edict* 8) If the principal dies before joinder of issue, having already given an assurance on stipulation on behalf of his *procurator* that the judgment shall be obeyed, the *procurator* can be compelled to undertake the case, but only where the principal gave the assurance with the knowledge of the *procurator* and without the latter making any objection. Should the fact be otherwise, it is thoroughly contrary to legal principle that the *procurator* should be liable where he had no knowledge; still an action can be brought on the words of the stipulation on the ground of default in defending the action. 1. Where a man is appointed *procurator* for an action *communi dividundo*, he must be held to be appointed to act both as plaintiff and defendant, and a double assurance must be given.

16 PAULUS (*on the Edict* 8) Up to joinder of issue the principal is free either to appoint another *procurator* in the place of the first, or to take joinder of issue himself.

actio utilis on the stipulation must be allowed to the principal, the direct right of action being taken away altogether.

28 THE SAME (*disputations* 1) If my *procurator* has had security given him that the judgment will be obeyed, I have an *actio utilis* on the stipulation, just as an *actio utilis* on the judgment is conceded to me. Indeed, even where my *procurator* has sued on the stipulation without my consent, still this will not prevent an action on the stipulation being granted me. The consequence of this is that if my *procurator* sues on the stipulation, he can be barred by an *exceptio*, just as he may where he sues on the judgment, assuming that he was not appointed *procurator* on his own behalf, or with a view to his bringing the very action. But, to take the converse case, if my *procurator* [is defendant and] gives an undertaking that the judgment will be complied with, no action on the stipulation will be allowed against me. And if my *defensor* [voluntary agent for the defence] gives the undertaking, the action on stipulation is not allowed against me, because I cannot be sued on the judgment itself.

29 THE SAME (*on the Edict* 9) If the plaintiff would rather sue the principal than the person who is *procurator* on his own behalf, the rule is that he has a right to do so.

30 PAULUS (*Sentences* 1) A *procurator* for a plaintiff, [*i.e.* one] who was not made *procurator* on his own behalf, may claim, in order to meet the expense which he incurred in the trial, that he should be satisfied out of the money recovered in the action, if the principal in the case is not in a position to pay.

31 ULPIANUS (*on the Edict* 9) If a man, after judgment is given against him in a suit which he defended as *procurator*, becomes heir to his principal, he cannot disclaim his liability to an action on the judgment. This is the rule where he is sole heir. If he is co-heir along with others, and he pays the whole judgment debt, then, if it was expressly included in his original mandate of agency that he should pay, he will have a good action on the mandate against his co-heirs; if it was not part of his mandate, he has an action on *negotia gesta*: and this last is equally the case if the *procurator* does not become heir at all, but still pays. 1. There is no law against several *procurators* being appointed for one trial on behalf of several persons respectively. 2. Julianus says that where a man appoints two different *procurators* at

different times, by appointing the second he must be held to have revoked his appointment of the first.

32 PAULUS (*on the Edict* 8) Where a number of different persons are appointed *procurators* at the same time, each for the whole matter, the one who proceeds first will be in the better position, so that one who comes later will not be *procurator* as to anything about which another has got before him and is suing already.

33 ULPIANUS (*on the Edict* 9) It is said that even a slave or a *filiusfamilias* can have a *procurator*. As far as the *filiusfamilias* is concerned, this is true; as to the slave, I should demur. It is allowed that a person should carry on a slave's transactions for him where they depend on his *peculium*, and so far be his *procurator*, and this is Labeo's opinion, but it is not allowed that he should bring an action. 1. There is no doubt, however, that a man who is a party to proceedings about his status can have a *procurator* not only in connexion with the management of his affairs, but for such judicial proceedings as may be taken either on his behalf or against him, whether he is living as a slave or as a free man[1]. Conversely too it is clear that he can be appointed *procurator* for another. 2. It is a matter of public policy that absent persons should be defended by some one or other; even in capital trials defence is allowed on behalf of an accused person. Accordingly, wherever judgment could legally be pronounced against a man in his absence, it is just that any one should have a hearing who chooses to speak for him and argue in favour of his innocence, and it is the regular practice to allow it; indeed this is shown by a rescript of the reigning Emperor. 3. The prætor says:—"Where a man requests that an action should be allowed him on behalf of another, he must defend his principal to the satisfaction of an impartial arbitrator; and he ought, subject to similar arbitration, to give security[2] to the person against whom he brings an action on behalf of another that the person concerned as principal in the matter will ratify what is done." 4. It was thought just by the prætor that where a man takes proceedings as *procurator* on behalf of another, he should also [be ready to] undertake the same person's defence. 5. If a man takes proceedings as a *procurator* on his own behalf, the rule still is that he is bound

[1] Text confused and probably an interpolation: the above appears to be the meaning.

[2] For *quo* read *quocum alterius*. Cf. M.

to defend [the person who appointed him], except where that person had no choice as to appointing him.

34 GAIUS (*on the provincial Edict* 3) Where a man sues in the character of *procurator* on his own behalf, for instance, where he is purchaser of an inheritance, will he be bound conversely to defend his vendor? The rule is that if the transaction was concluded in good faith, and with no intention to prejudice persons who might desire to sue the vendor on their part, he will not be obliged to defend him.

35 ULPIANUS (*on the Edict* 9) However, *procurators* of the following classes will be bound to defend their principals, being persons who are at liberty to sue without a mandate, viz. children, though subject to *potestas*, also parents, brothers, persons connected by marriage and freedmen. 1. A patron can proceed against his freedman for ingratitude by a *procurator* and the freedman can meet the charge by a *procurator*. 2. Not only where what the *procurator* asks for is an action properly so called, but also where it is a *præjudicium* (preliminary inquiry) or an interdict, or where he applies for an order to give an undertaking for payment of legacies or for security against *damnum infectum*, will he be bound to defend his principal in his absence, before any competent court, [that is,] and in the same province. Of course it would be oppressive that he should be called upon, in order to defend him, to leave Rome and go to a province[1], or the converse, or to go from one province to another. 3. To defend implies doing what the principal himself would do in reference to the case, and giving a sufficient guarantee, and the position of the *procurator* ought not to be made more burdensome than that of the principal would be, except in the matter of giving security. Setting aside the giving security, it is clear that the *procurator* is held to defend only where he proceeds to joinder of issue. Hence the question is raised in Julianus's treatise, whether he is compellable to join issue, or it is enough that, the case not being defended, an action can be brought on the stipulation. Julianus says (*Dig.* 3) that he is compellable to join issue, unless, after inquiry, he should decline to proceed at all, or should on sufficient grounds be removed. A *procurator* is regarded as defending a case even where he allows the other party to take possession, where the party has applied for an undertaking against *damnum infectum* or for the payment of legacies,

[1] For *provincia* read *provinciam*. Cf. M.

36 PAULUS (*on the Edict* 8) or in a case of *operis novi nuntiatio*. And even where he allows a slave to be taken off by the plaintiff in a noxal action, he is held to defend the case provided in all these cases he gives an undertaking that the principal will ratify.

37 ULPIANUS (*on the Edict* 9) But he must defend his principal in respect of all actions, even those which are not allowed against the heir. 1. Accordingly the question has arisen whether, supposing the other side brings several actions, and there are different *defensors* forthcoming (voluntary agents for the defence) who are ready to undertake the respective cases, the party is properly defended; Julianus holds that he is; and such, according to Pomponius, is the present practice.

38 THE SAME (*on the Edict* 40) Still we must not go so far as to hold that if an action is brought for ten thousand, and there are two *defensors* forthcoming who are ready to defend for five thousand each, they ought to be allowed to appear.

39 THE SAME (*on the Edict* 9) A *procurator* is not bound to defend merely in actions and interdicts and by entering into stipulations, but in connexion with interrogatories too, so that, when examined in the magistrate's court, he may answer in all cases where the principal would have had to answer himself. He will therefore be bound to answer as to whether an heir is absent, and, whether he answers or holds his tongue, he may be liable. 1. A man who brings an action of any kind whatever on another's behalf is bound to give an undertaking that the party concerned will ratify what is done. Sometimes, indeed, even where a *procurator* takes proceedings on his own behalf, he will still be bound to give an undertaking that his principal will ratify, so Pomponius tells us (6. 24). For example, take this case. The defendant tenders in return an oath to the *procurator*[1], and the latter swears that something or other is due to an absent principal; hereupon the action which he brings is brought as if he were principal, because of his own oath; (as in fact this action could not possibly be open to the real principal;) still the *procurator* must give an undertaking for ratification. Again, suppose an assurance is given to the *procurator* in the form of *constitutum*, and he brings an action in pursuance of it, it is beyond question that this is a proper case for giving an undertaking for ratification, and this we read in

[1] After *rettulit* ins. *adversarius, et is.* M.

Pomponius. 2. In Julianus we find this question:—is the *procurator* bound to guarantee that the principal alone will ratify, or that the other creditors will do so as well? to which what that author says is that the undertaking need only refer to the principal, and that the expression "the person concerned in the matter" does not comprehend the creditors, seeing that the principal himself was not bound to give such an undertaking. 3. If a father sues to recover *dos* [on behalf of his daughter], he is bound to give an undertaking that the daughter will ratify; moreover he is bound to defend an action against her; Marcellus himself has this. 4. If a father brings an action for *injuria* on behalf of his son, then, as there are two actions allowed, one by the father and one by the son, there is no undertaking given for ratification. 5. If a *procurator* contests a question of *status* with anyone, whether it is a case where someone who passes for a slave institutes proceedings against him to establish his liberty, or he himself brings an action to establish the servitude of someone who passes for free, in both cases he is bound to give an undertaking that the principal will ratify the matter. This appears by the words of the Edict, so that the *procurator* is treated as if he were plaintiff, on whichever side he contends. 6. There is one case in which a man has to give an undertaking both for ratification and for the judgment being obeyed, in respect of one and the same action. The case is this. Application is made for a hearing with a view to a *restitutio in integrum* on the alleged ground that undue advantage has been taken of some one under twenty-five in the matter of a sale, and on the other side the party is represented by a *procurator*; here the *procurator* is bound to give an undertaking first, that the principal will ratify the matter,—because otherwise the principal might come forward later and desire to raise some claim,—and, secondly, that the judgment will be obeyed, so that if eventually something has to be given to the minor in consequence of his getting the *restitutio in integrum*, it may be accordingly given. All this may be read in Pomponius (*on the Edict* 25). 7. This writer also says that if an application should be made to remove a guardian, any one who undertakes the case for the guardian ought also to give security for ratification, lest his principal should come forward and claim to set aside what has been done. However, the case could hardly arise of a guardian being complained of through a *procurator*, as it is a question involving infamy; unless it should appear that the guardian gave instructions to the particular *procurator* expressly, or else the

prætor were proceeding to hear the case in the guardian's absence, and so treated it as undefended.

40 THE SAME (*on the Edict* 9) Pomponius tells us that it is not every kind of proceeding that a man can institute by means of a *procurator*; for example, a *procurator* cannot ask for an interdict to enable him to take off with him children whom he alleges to be under the *potestas* of some absent person, except, as Julianus says, upon due cause shown, in other words, unless he has been specially instructed to do it, and the father is prevented by ill-health or some other sufficient reason. 1. If a *procurator* stipulates in respect of *damnum infectum* or legacies, he is bound to give an undertaking for ratification. 2. Moreover, a man who is sued as *defensor* in an action *in rem* is bound to give an undertaking for ratification in addition to the regular guarantee that the order will be obeyed. Else what is to be done, if the result of the trial should be that the property is declared to be mine [the plaintiff's], and then the person for whom the *defensor* acted comes forward and claims to recover the land? will he not be treated as if he had not ratified the decision? Of course if there had been a regular procurator, or the principal had personally conducted his own case and lost it, then, if he sued me to recover the property, he would be barred by an *exceptio* of *res judicata*, and this is said by Julianus (*Dig.* 50); as where the judge declares that the property belongs to me he declares at the same time that it does not belong to the other. 3. A guarantee of ratification is required to be given by a *procurator* before *litis contestatio*: the rule is that when issue is once joined he cannot be compelled to give the undertaking. 4. But in the case of those persons who are not required to have a mandate, the proper rule is that, if it should be clear that they are taking proceedings against the will of those on whose behalf they profess to act, they must be refused a hearing. Accordingly what is required is not that they should have the consent or the instructions [of their alleged principals], but that it shall not be shown that they are acting against such alleged principals' wishes, even though they should offer to give an undertaking for ratification.

PAULUS (*on the Edict* 9) Women are sometimes allowed to sue on behalf of parents, on due cause shown, for instance where the parents are prevented by illness or old age, and have no one to act on their behalf.

THE SAME (*on the Edict* 8) Although a *procurator* cannot

be appointed in a popular action, still it is very reasonably held that, where a man is bringing an action about a public right of way and would suffer some private loss or damage by being precluded from bringing it, he can appoint a *procurator* as though it were a private action. Much more may a *procurator* be appointed to bring an action for violation of a sepulchre where the principal is a person who has the requisite concern in the matter. 1. A *procurator* may be appointed to bring an action for *injuria* under the *lex Cornelia*; it is true this action is employed with a view to the public advantage, still it is a private action. 2. The obligational relation which exists for the most part between a principal and *procurator* is one which gives rise to an action on *mandatum*. However in some cases no obligation founded on *mandatum* is contracted; one such case occurs where people make some one *procurator* on his own behalf [sc. as defendant], and promise thereupon that the decree shall be obeyed; if they pay anything in pursuance of this promise, they cannot sue the *procurator* on a *mandatum*, but as vendor, assuming, say, that it is a case of sale of an inheritance; or on the ground of some original *mandatum*, as is the case where a surety appoints as *procurator* the principal debtor. 3. When an inheritance has been handed over to any one in pursuance of the Senatusconsultum Trebellianum, he can lawfully appoint the heir *procurator*. 4. Similarly a creditor can lawfully appoint *procurator* in the Servian action the [debtor himself who is] owner of the property pledged for the debt. 5. Add to this that if a *constitutum* has been given to one out of several co-creditors, and he appoints another of the number *procurator* to sue on the *constitutum*, it cannot be said that this is not a valid appointment. Again, where there are two co-promisors, one may appoint the other *procurator* to defend an action. 6. If there are several coheirs and an action *familiæ erciscundæ* or *communi dividundo* is brought, it must not be allowed that different principals should appoint the same *procurator*, because, if it were, it would be impossible to arrange the whole scheme connected with vesting orders and decrees for payment; no doubt such an appointment must be allowed where one coheir dies and leaves several coheirs who succeed him. 7. If the defendant to an action skulks, after *litis contestatio*, his sureties can only be held to defend his case where one of the number defends him in respect of the whole case, or else all or several[1] appoint one of the number to take over the case.

[1] For *qui* read *quidam*. Cf. M.

43 THE SAME (*on the Edict* 9) A deaf or dumb person is not precluded from appointing a *procurator* in any way in which it can be done; perhaps such persons might be appointed for a similar office themselves, not, that is, for taking proceedings, but for transacting business. 1. When the question arises whether any particular person is at liberty to employ a *procurator*, the point to consider is whether he is precluded from appointing one, as this is a prohibitive Edict. 2. In popular actions, where a man takes proceedings merely as one of the public, he is not compellable to undertake the defence like a *procurator*. 3. If a man applies for a curator to be appointed to some one who is present, his application will not be entertained, unless the minor consents; but if the minor is absent, the applicant will have to give security[1] that he will ratify. 4. Where a *procurator* declines to act in defence, the penalty is that he is not allowed to sue. 5. If a *procurator* brings an action, and there is present a slave of the absent principal, then, according to Atilicinus, the undertaking ought to be given to the slave and not to the *procurator*. 6. Where a man is not compelled to defend some one who is absent, nevertheless, if he has given security that the decree shall be obeyed, in pursuance of his intention to defend him, he must be compelled[2] to undertake the case, because otherwise he would be deceiving the person to whom he gave the security, as persons who are not compelled [originally] to defend a case are compelled after they have given the above security. Labeo holds that allowance may be made on special grounds, and that the rule is that, if the plaintiff is put to a disadvantage by the lapse of time, the other ought to be compelled to undertake the case; but where some connexion by marriage is broken off in the meantime, or the two men have quarrelled, or the property of the absent man has come to be taken possession of,

ULPIANUS (*Disputations* 7) or he is going to be at a great distance, or any other lawful ground occurs,

PAULUS (*on the Edict* 9) he [the other] ought not to be compelled. Sabinus however holds that it is no business of the praetor to require the party in question to undertake the defence, and that an action *ex stipulatu* can be brought on the ground that the case is not defended, and if, on the other hand, he has grounds for declining to join issue in the action, his sureties [illegible], because no impartial arbitrator would decide that

[illegible] read *satisdare*. Cf. M. [2] Del. *procuratorem*. M.

a man ought to be compelled to defend a case where he had a lawful excuse. Even where the party gave no security, but he was trusted on his simple promise on stipulation, the rule is the same. 1. Any persons who take proceedings in a public matter, under such circumstances that they are protecting some interest of their own as well, are allowed to appoint a *procurator* on cause shown, and any one else who takes proceedings after that can be barred by an *exceptio*. 2. If an *operis novi nuntiatio* (notice of novel structure) has been served on a *procurator* and he resorts to the Interdict which says that "no force is to be used with him in respect of his building," then, according to Julianus, he is in the position of a *defensor*, and is not required to give security that his principal will ratify, and if he should give such security, I cannot see, says Julianus, in what event the undertaking could be sued upon.

46 GAIUS (*on the provincial Edict* 3) Where a man joins issue on his own behalf with a plaintiff, if he should thereafter wish to appoint a *procurator*, so that the plaintiff might accept the latter as defendant in his place, his application ought to be heard, and he ought to furnish security in proper form on[1] the *procurator's* behalf that the judgment will be obeyed. 1. A man who defends some one on whose behalf he does not sue is at liberty to confine his defence to some one particular matter. 2. A man who takes up the defence of another is compelled to give security; as no one is regarded as an adequate *defensor* in another man's case without giving security. 3. It is asked further, where a *defensor* undertakes the case, and the plaintiff gets an order for restitution *in integrum*, whether the *defensor* will be compellable to undertake to defend the renewed case; but on the whole it is held that he will. 4. A *procurator* is bound, as in connexion with the general management of business on behalf of a principal, so in connexion with the bringing or defending of actions as well, to account for everything in good faith; hence whenever he acquires anything by means of an action, whether he does so directly in discharge of the very claim he made in the action, or indirectly as the result of it, he is compellable to hand it over by an action on the *mandatum*, so that, in fact, if, owing to mistake or illegality on the part of the judge, he should get what was not due, still he must give up that too. 5. Again, in the converse case whatever the *procurator* pays in pursuance of a judgment, he ought to

[1] After *pro* ins. *eo*. Cf. M.

recover by means of an action in counter-claim on *mandatum*; should he however have paid any penalty in consequence of some unlawful act of his own, this he has no right to recover. 6. If any costs of litigation have been incurred in good faith by the *procurator* of either plaintiff or defendant, justice requires that they should be made good to him. 7. Where two persons are entrusted by mandate with the management of a man's affairs, and one of them is a debtor of the person who gave the mandate, can the other properly sue such debtor? No doubt he can; he is not to be regarded as any the less a *procurator* because the person whom he sues is a *procurator* himself.

47 JULIANUS (*on Urseius Ferox* 4) Where a man has left two *procurators* of all his affairs, then, unless he expressly laid down that one was to sue the other for money, he cannot be held to have given such a mandate to whichever chooses to assume it.

48 GAIUS (*on the provincial Edict* 3) Accordingly, where he has given such a special mandate, it follows that if one of the two, on being sued by the other, should meet the demand with an *exceptio* such as this: "if no mandate to proceed against debtors was given to me," the plaintiff may have a *replicatio* in the words: "or a mandate was given to me to sue you."

49 PAULUS (*on the Edict* 54) A principal ought not to be put in a worse position by an act of his *procurator* of which he has no knowledge.

50 GAIUS (*on the provincial Edict* 22) If your *procurator* is discharged from my demand, in any way whatever, you ought to have the benefit of it.

51 ULPIANUS (*on the Edict* 60) If a person under the age of twenty-five should be a *defensor*, he is not a good *defensor* in any matter in which he has a right to an order for *restitutio in integrum*, because such an order releases both him and his sureties. 1. [1]As the position of *defensor* carries with it the same liabilities as that of principal defendant, no order ought to be made [at the suit of a wife] on the *defensor* of the husband beyond what the husband can perform. 2. When a man has undertaken to defend an action on another's behalf, then, though he should be of abundant means,

52 PAULUS (*on the Edict* 57) or of consular rank,

53 ULPIANUS (*on the Edict* 60) still he is not held to be defending, unless he is ready to give security.

[1] Del. *tamen*. M.

54 PAULUS (*on the Edict* 50) Women, soldiers, persons who are about to be absent on government service, or are afflicted with incurable illness, or are about to enter upon a magisterial office, or who cannot be made parties to judicial proceedings against their own will, are not held to be good *defensors*. 1. Guardians who have managed the affairs of their wards in any particular place must be defended in the same place.

55 ULPIANUS (*on the Edict* 65) When a man is appointed *procurator* on his own behalf his principal will have no prior claim to prosecute the action or to receive money [paid by the other side]; since where a man has an available right of action in his own name he is the proper person to institute the proceedings.

56 THE SAME (*on the Edict* 66) A man who is appointed *procurator* to sue for recovery of some movable has a good right to bring an action for production.

57 THE SAME (*on the Edict* 74) Where a man appoints a *procurator* to take proceedings at once, he must be regarded as allowing him to prosecute the suit at a later time too. 1. A man who abandons an *exceptio* founded on an objection to the *procurator* cannot afterwards change his mind and raise it.

58 PAULUS (*on the Edict* 71) A *procurator* who has been entrusted generally with the free management of his principal's affairs may call for the payment of debts, novate contracts, or exchange one thing for another;

59 THE SAME (*on Plautius* 10) and he is also treated as having a mandate to pay creditors.

60 THE SAME (*Responsa* 4) A general mandate does not involve the right to compromise a matter by way of final settlement; consequently if after such a mandate the party who gave it declines to ratify the compromise, he is not debarred from exercising his original right of action.

61 THE SAME (*on Plautius* 1) Plautius says this:—"all are agreed that, when judgment is pronounced against a *procurator*, he cannot be sued [in an *actio judicati*], unless either he was appointed on his own behalf, or else he put himself forward [to undertake the defence] knowing that security had not been given." The rule is the same even where he puts himself forward to undertake the case as a *defensor* and gives security.

62 POMPONIUS (*Extracts from Plautius* 2) If a man who is appointed *procurator* to recover a legacy should sue out an Interdict against the heir for production of the testament, he cannot be met with an *exceptio* founded on an objection to the *procurator* on the ground that the application for the interdict was beyond his mandate.

63 MODESTINUS (*Differences* 6) A *procurator* as to property in general (*totorum bonorum*) who has a mandate to manage his principal's affairs cannot dispose of property, either moveable or immoveable, or slaves, without a special mandate from his principal, except fruit or other things such as easily spoil.

64 THE SAME (*Rules* 3) If, before joinder of issue, the person on whose behalf some one appears as *defensor* should himself come forward and apply for leave to conduct the case on his own behalf, his application should be considered, on special ground shown.

65 THE SAME (*heuremática*) Where a *procurator* is absent, and his principal desires to relieve him from the necessity of giving security, this latter should address a letter to the opposing party informing him who it is that he has appointed to act as *procurator* against him, and in what matter, adding that he will himself ratify anything done to which such *procurator* is a party; as, after this, the letter being admitted, it will be held that the person mentioned appears as *procurator* for a present principal. Accordingly, though the principal should afterwards change his mind and desire that the person should not be *procurator*, still the proceedings in which the person acted in that character must be held good.

66 PAPINIANUS (*Questions* 9) A man stipulates to have delivered to him either Stichus or Damas, the choice to be with himself; if[1] thereupon Titius brings an action as *procurator* to recover one of the two, and the principal ratifies his doing so, the result is that the Court is possessed of the question, and the stipulation is superseded.

67 THE SAME (*Responsa* 2) If a *procurator* pledged his own faith so as to warrant the title to land which he sold, and after that he ceases to manage his principal's affairs, he still will not be relieved by the aid of the prætor from the burden of his obligation; where a *procurator* undertook to be bound by an obligation on

[1] Del. *et* before *ratum*. Cf. M.

behalf of his principal, there is no use his declining to bear the burden.

68 THE SAME (*Responsa* 3) Where a *procurator* stipulates for something on his principal's behalf, consistently with the terms of his mandate, the principal cannot[1] sue to recover it without the *procurator's* consent.

69 PAULUS (*Responsa* 3) Paulus laid down that even where a man has appointed a *procurator* to undertake his defence in an action, he is not precluded from appearing in support of his own case.

70 SCÆVOLA (*Responsa* 1) A father appointed one Sempronius, his creditor, a guardian to his son, a boy under age; who, after discharging the duties of guardian, died, leaving his brother his heir; after this, the brother himself died, having bequeathed to Titius by way of *fideicommissum* the debt owed by the father, whereupon the heirs [of the brother] assigned their right of action to Titius by *mandatum*. I wish to ask this:—seeing that the liability to the *actio tutelæ* and the right to sue for the money lent were both derived from Sempronius's inheritance, is it [not] the case that the right of action acquired by assignment is only given on the terms of the assignee (Titius) undertaking the defence of the heirs by whom the assignment was made? My answer was that Titius was bound to undertake the defence mentioned.

71 PAULUS (*Sentences* 1) An absent defendant can state the grounds of his absence through a *procurator*.

72 THE SAME (*Handbooks* 1) The agency of a *procurator* is not merely a method of acquiring a right of action, it sometimes enables a man to keep one alive; for example, where the *procurator* sues a debtor within the statutable time, or where he notifies against a novel structure being made, so as to make available the Interdict *quod vi aut clam*, as this is equally a case in which a *procurator* keeps an ancient claim on foot for his principal.

73 THE SAME (*on the office of assessors*) If the defendant is ready before *litis contestatio* to pay the sum demanded, what is the proper course, where the action is brought by a *procurator*? It would be unfair that the defendant should be compelled to go on with the defence where the result may be that he will pass for a person of doubtful character, because he did not offer the money

[1] Before *potest* ins. *non*. Cf. D. 41. 2. 49. 2.

62 POMPONIUS (*Extracts from Plautius* 2) If a man who is appointed *procurator* to recover a legacy should sue out an Interdict against the heir for production of the testament, he cannot be met with an *exceptio* founded on an objection to the *procurator* on the ground that the application for the interdict was beyond his mandate.

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[1] Del. *et* before *ratum*. Cf. M.

come to on the question. 1. If a *procurator* is appointed to bring an action for two things, and he brings an action for one, no *exceptio* on that ground will be admissible in bar of the action, and the matter will be properly before the court.

IV.

ON PROCEEDINGS TAKEN ON BEHALF OF ANY CORPORATION OR AGAINST THE SAME.

1 GAIUS (*on the provincial Edict* 3) Associations and guilds and similar corporations are not allowed to be formed by all persons without discrimination; this is a thing which is kept within certain limits by statutes and decrees of the senate and imperial enactments. It is only in very few kinds of cases that such corporate bodies are allowed; for example, the power of constituting a corporation is permitted to partners in government *vectigalia*, as well as in gold mines, silver mines and salt mines. Moreover there are at Rome particular guilds whose corporate character has been established by senatorial decrees and imperial enactments, such as the guilds of bakers and of some others, also guilds of shipowners, and these last exist in the provinces as well. 1. Where any persons are permitted to constitute a corporation in the way of a guild or a company or any other body, they have the special right to have, like a municipal body, common property, a common chest, and an *actor* or *syndicus* by whose agency anything that has to be transacted and done on the general behalf can be transacted and done accordingly, as in a municipal body. 2. If nobody defends any action at law against the society, the proconsul declares that he will order such common property as they have to be taken into possession, and if, after due notice given, they do not bestir themselves to defend their case, he will order such property to be sold. It is moreover held that there is no *actor* or *syndicus* even when the *actor* is [only] absent or detained by ill-health or is incapable of acting. 3. If a stranger is disposed to defend the case of the corporation, the proconsul will allow him to do it, in accordance with the rule as to defending private persons, because, where this is done, the position of the corporation is improved.

2 ULPIANUS (*on the Edict* 8) If the members of a municipality or if any corporation appoint an *actor* to take legal proceedings, we must not say that this officer is to be treated as though he were appointed by a number of individuals; he appears on behalf of the civic community or the corporation, not on behalf of the constituent members separately considered.

3 THE SAME (*on the Edict* 9) No one is allowed to take proceedings at law on behalf of the body of citizens or of the *curia*, except one who is allowed by some statute, or, in default of a statute, is authorized by the members of the *curia* themselves, two-thirds at least of their number being present.

4 PAULUS (*on the Edict* 9) No doubt to make up the number of two-thirds of the decurions the person himself whom they appoint may be reckoned in.

5 ULPIANUS (*on the Edict* 8) One thing Pomponius says must be borne in mind, that a father's vote will be allowed on behalf of his son and a son's on behalf of his father,

6 PAULUS (*on the Edict* 9) and so will the votes of persons under the same *potestas*, as everybody gives his vote as a decurion and not in the character of a member of the household. A similar rule ought to be applied in the case of a candidature for a public office, unless it is precluded by some municipal regulation or ancient custom. 1. If the decurions have ordered that legal proceedings should be set on foot by whomsoever the Duumvirs elect, that person is held to be chosen by the body, so that he can take the proceedings; it makes very little difference whether the choice is made by the body of decurions itself or by some one whom the same body authorized to make it. But if they were to make a resolution to this effect, that, whenever any occasion for an action should arise, it should be the business of Titius to sue in connexion with it, such a resolution is at once null and void, because it cannot be held that a resolution can give the right to sue with reference to a matter which is not yet in dispute. However, at the present day the practice is for all matters of this kind to be managed by means of syndics, in accordance with the customs of the respective localities. 2. Suppose a man appointed *actor* should afterwards be set aside by a resolution of the decurions, would an action by him be barred by an *exceptio*? I should say myself that the way to deal with this question is to say that permission to sue can only be held to be valid where such permission once given is continued. 3. If the *actor* of a corpora-

tion brings actions, he is bound to defend actions too, but he is not bound to give a guarantee for ratification. Still sometimes, if there is doubt whether the order appointing him was made, I should say that a guarantee for ratification ought to be given. It follows that the *actor* in question performs the function of a *procurator*, and the Edict does not give him an action on the judgment, unless he is appointed on his own behalf. He can also accept a *constitutum*. The right to change an *actor* exists in the same cases as that to change a *procurator*. Even a *filiusfamilias* can be appointed *actor*.

7 ULPIANUS (*on the Edict* 10) Just as the prætor allowed an action on behalf of a municipality, so too he thought with great reason that the edict should be made to refer to actions against one. I should say too that where a legate has spent money on some concern of the municipality, he ought to be allowed an action against the municipal body. 1. What is owed to the corporation is not owed to the individual members, and what the corporation owes the individual members do not owe. 2. In the case of decurions and corporations in general, it is of no consequence whether the individuals all remain unchanged, or a part only remains or all are changed. If the number of corporate members comes down to one, it is still held on the whole that this one can sue and be sued, as the legal position of the whole number has devolved on one person and the appellation of corporation still remains.

8 JAVOLENUS (*extracts from Cassius* 15) If town communities fail to be defended by those persons who manage their property, and there are no corporeal effects belonging to the corporation of which possession can be taken by creditors, satisfaction ought to be given to the parties suing out of the debts due to the town.

9 POMPONIUS (*on Sabinus* 13) If you are coheir to some one along with a municipality, you and the body will have good mutual rights of action for division of the inheritance (*familiæ erciscundæ*). The same may be said of an action to determine boundaries, or to avert rain-water.

10 PAULUS (*Handbooks* 1) An *actor* may be appointed further for an *operis novi nuntiatio*, and to enter into stipulations, for instance a stipulation for payment of legacies, for making good *damnum infectum*, for one that a decree shall be obeyed, although it is true that the assurance should rather be given to a slave of

the civic community; still, if it is given to the *actor*, the manager of the property of the community will have an *utilis actio*.

V.

ON *negotia gesta* (VOLUNTARY AGENCY).

1 ULPIANUS (*on the Edict* 10) This edict is indispensable, as it deals with a matter of great importance to absent persons, the object being to secure that they shall not, in consequence of actions against them being undefended, have their property taken into possession or sold to pay their creditors, or pledges sold that they have given for debt, or have actions brought against them to enforce payment of penal damages, or lose their property wrongfully.

2 GAIUS (*on the provincial Edict* 3) Where a man volunteers to manage the affairs [*negotia gerere*] of another in his absence, even without the party's knowledge, whatever money he spends to good purpose on the affairs of the other, indeed whatever obligation he incurs towards any one in the interest of the other during his absence, he has a right of action on the strength of it; accordingly, in the case in question, mutual rights of action arise which are called actions on *negotia gesta*. And, certainly, just as it is reasonable that the party himself who managed for the other should give an account of his proceedings, and, wherever he managed the affairs in any respect improperly, or kept back any profit which he made in the course of the proceedings, should be ordered to make compensation in that behalf, so, conversely, it is fair also, where he has managed to good purpose, that there should be made good to him any loss which he incurred or will have to incur in the matter.

3 ULPIANUS (*on the Edict* 10) The prætor says:—"If a man volunteers to manage affairs in which another is concerned, or affairs in which another was concerned at his death, I will grant an action thereon." 1. The words 'if a man' may be taken thus 'if a man or a woman,' as it is settled that women too can bring actions on *negotia gesta* or be sued in such actions. 2. The word 'affairs' is to be read as applying to one affair or to several. 3. There

follows the word 'another,' and this also applies to both sexes. 4. There is no doubt, if a ward "manages affairs," that after the rescript of the Divine Pius he can in fact be sued to the extent of the amount to which he is enriched; of course, if he himself sues, he must allow his liability on the management to be set off. 5. If I manage affairs for a lunatic, an action for *negotia gesta* lies against him in my favour; and, according to Labeo, the curator of a lunatic of either sex will have an action allowed him against the lunatic. 6. The words "or manages affairs in which another was concerned at his death" refer to cases in which the party manages after a man's death; it was necessary that the Edict should refer to such cases, because he cannot be said to have managed affairs for the testator who was already dead, or for an [appointed] heir who had not yet taken up the inheritance. If there has been any accession of property after the death, for instance, there are children of female slaves, or young of cattle, or vegetable or other produce or proceeds, or any acquisitions made by slaves; though none of these cases are embraced in the words, still they ought to be regarded as included. 7. As this action is founded on management executed (*negotium gestum*), the right as well as the liability descends to the heir. 8. If a person who is appointed by the prætor to execute a judgment in connexion with my affairs should deal fraudulently with me, an action will be allowed me against him. 9. Labeo tells us that in the action on *negotia gesta* sometimes the only material point is the question of 'dolus'; if, for instance, you volunteer to act in my affairs, simply on the strength of your goodwill to me, to prevent my property being sold to pay my debts, it will be absolutely just, he says, that you should answer for 'dolus' alone, and this is not an unreasonable view. 10. A man is liable to this action not only where he meddles with somebody else's affairs and acts in them of his own accord, without being driven to it by any pressure, but even where he is driven by some pressure or acts on the notion that there is pressure put upon him. 11. The following question is raised in Marcellus (Dig. 2). Suppose I have already made up my mind to volunteer to manage something for Titius, and, that being the case, you give me a mandate to do the same thing; can I have both actions? To this I should say myself that both actions will lie. This is exactly like what Marcellus himself says in reference to the case of my proposing to manage some one else's affairs and thereupon taking a surety; in this case too, according to him, an action will lie against both.

4 THE SAME (*on Sabinus* 45) However, whether in this case the surety would not have some right of action is a question to consider, but the true rule is that he can bring an action for *negotia gesta*, unless he became surety out of pure bounty.

5 THE SAME (*on the Edict* 10) Add that, if I managed for you under the belief that I had a mandate from you, this again will be perfectly good ground for an action on *negotia gesta*, and the action on *mandatum* will not lie. A similar rule applies where I become surety for a debt owed by you in the belief that I had a mandate from you. 1. And if I managed under the idea that the affair concerned Titius when it really concerned Sempronius, Sempronius alone is liable to an action at my hands on *negotia gesta*.

6 JULIANUS says:—(*Dig.* 2) If I manage affairs of your ward without any mandate from you, but to save you from liability on the *actio tutelæ*, this will make you liable at my hands on *negotia gesta*, and so it will your ward, provided, that is, he is enriched by it. 1. Again, if I lend money to your *procurator* on your account, for him to pay off your creditor with it or to redeem your pledge, I shall have a right of action against you on *negotia gesta*, but I shall have none against the man with whom I made the agreement. Suppose however I take a promise from your *procurator* by stipulation; it may be said that I still have an action against you on *negotia gesta*, because I added the stipulation in question out of extra caution. 2. If a man receives money or anything else to bring it to me, then, as he acted in my business, I have a good right of action on *negotia gesta* against him. 3. We may add that if a man has managed my affair with no thought of me, but for the sake of gain to himself, then, as we are told by Labeo, he managed his own affair rather than mine (and, no doubt, a man who intervenes with a predatory object aims at his own profit and not at my advantage): but none the less, indeed all the more, will such a one too be liable to the action on *negotia gesta*. Should he himself have gone to any expense in connexion with my affairs, he will have a right of action against me, not to the extent to which he is out of pocket, seeing that he meddled in my business without authority, but to the extent to which I am enriched. 4. If a man has gone to work in such an unintelligent way as to act in his own interest in respect of his own property, fancying he was acting in mine, there is no ground for an action on either side, in fact good faith itself is against there being any. If he acts in his

own affair and mine too, thinking it is only mine, he will be liable in respect of mine; as, even if I give him a mandate to act in my interest in a matter in which you and I had a joint concern, the rule is, according to Labeo, that if he acted in your interest too, with his eyes open, he is liable to you on *negotia gesta*. 5. If a man acts in my interest as if he were my slave, when he is really my freedman or is freeborn, he will be allowed an action on *negotia gesta*. 6. But if I act in the interest of your son or your slave, let us see whether I have not an action on *negotia gesta* against you. For my own part I agree with a distinction made by Labeo and approved by Pomponius (b. 26) to the effect that if I acted in some matter connected with [your son's or your slave's] *peculium* on your account, you are liable to me; but if I did it out of friendship for your son or your slave, or on their account, an action ought to be allowed against the father or the owner to the extent of the *peculium* only. The same rule holds even where I thought the person was *sui juris*. For example, if I buy for your son a slave which he does not require, and you ratify, your ratification, so Pomponius says in the same passage, is inoperative[1], to which he adds that, in his opinion, even though there should be nothing in the *peculium*, because it is exceeded by the amount owing to the father or owner, still an action ought to be allowed against the father himself to the extent to which he is made the richer by my management. 7. If, however, I managed affairs on behalf of a free man whom you had in your service *bona fide* as your slave, then, according to Pomponius, if I did it thinking he was your slave, I shall have a good action on *negotia gesta* against you in respect of so much of his *peculium* as has to remain in your hands, but, in respect of so much as he has a right to carry away himself, I have no action against you, but only against him. Indeed, if I knew he was free, I still have a right of action against him in respect of so much of the *peculium* as he can take away, and against you in respect of so much as has to remain with you. 8. According to Pomponius, if I think that a slave belongs to Titius who really belongs to Sempronius, and I give money to prevent his being killed, I have an action on *negotia gesta* against Sempronius. 9. The following question is raised in Pedius (b. 7).—I ask Titius, without bringing any action, to pay me money, fancying he is your debtor, and he pays, though really he is not your debtor, after which you hear of the fact and ratify the payment;—can you sue me on *negotia gesta*? On this point Pedius says there may be some

[1] For *agitur* read *agi tua*. Cf. M.

doubt, because no affair of yours was transacted, Titius not having been your debtor. The ratification however, he says, makes the affair yours; the man from whom the money was received has a right of action to recover it from the one who ratified [that is you], and in the same way the latter will after the ratification have a good right of action against me. Thus ratification will make an affair yours which originally was not yours, but only managed on your account. 10. The same writer has this. Suppose I think that you are heir to Titius, whereas the real heir is Seius, whereupon I sue a debtor of Titius [on your behalf], and I recover the money, after which you ratify; there are then mutual rights of action on *negotia gesta* between you and me. You may say the affair transacted was none of yours but some one else's; but this is made good by your ratification, the result of which is that the affair transacted must be treated as in your interest, and there will be a good *hereditatis petitio* against you. 11. How then, asks Pedius, if I, thinking you are an heir, repair a block of chambers belonging to the inheritance, and you ratify, do I have a right of action against you? To this his answer is No; by such an act of mine another man is enriched, and the thing done is a direct service to some one else, and it is impossible that where the act is a direct advantage to another this should be held to be a case of managing your affair. 12. Let us consider the following case. Suppose a man who is carrying on a course of management for another has taken steps in respect of some affairs and neglected others, but, in consequence of his action, some one else forbore to attend to the affairs last mentioned, whereas, all this while, a really diligent man,—and this is what the party acting may be required to be,—would have managed the other affairs too,—ought we to say that the party is liable in an action on *negotia gesta* even in respect of the matters which he did not manage? This, I should say, is the more correct view. Certainly if there is anything for which he was bound to call himself to account, he will beyond doubt be charged with it. Granting indeed that it cannot be laid to his charge that he omitted to sue other debtors, because it was not in his power to sue them at law, seeing that he could not bring any action at all, still he will be charged with omission in not getting in his own debt; and if that debt should chance to be one that carried no interest, interest at once begins to be due;—so the Divine Pius informed Havius Longinus in a rescript,—unless, as the Emperor proceeds to say, the principal had released the party from the payment of interest,

PAULUS (*on the Edict* 9) As the office of the *judex* has just the same force in *bona fide* cases as question [and answer] have in a stipulation expressly made to the same effect.

ULPIANUS (*on the Edict* 10) But if the person who carried on the affairs was a person of such a kind that he would not be required to show any mandate, he might be called to account for not offering to give the debtor a guarantee of ratification, and so suing him, assuming that there was no difficulty about giving the guarantee. At any rate there is no doubt whatever about debts due from himself; consequently, if he was indebted on some ground which would cease to operate at the end of a fixed period, and he was discharged [as debtor] by lapse of time, he will none the less be liable to an action on *negotia gesta*. A similar rule applies to a case where the heir of a deceased debtor would not be liable, as Marcellus tells us. 1. Again, if I bring an action to recover land belonging to you or to a city, in which I use underhand means, but I am acting in your interest or in that of the city, and I get by the action a larger sum by way of mesne profits than I ought to have got, I shall be bound to make over the whole amount to you,—or to the city authorities, as the case may be,—though I had no right to sue for it. 2. If it comes to pass in any way that the *judex* takes no account of some ground of set-off, an *actio contraria* can be brought; but if the set-off is considered and rejected, the better opinion is that no *actio contraria* can afterwards be brought, for the reason that the case is decided, and the plaintiff would in that case be met by an *exceptio* of *res judicata*. 3. Julianus (b. 3) discusses this case. There are two partners of whom one forbids me to carry on the management, and the other does not forbid me; shall I have a right of action on *negotia gesta* against the one who did not forbid me? His difficulty is this, that if an action is allowed against this latter, it is impossible that the one who forbade should not be implicated too: however, it is equally unjust in his opinion that the one who did not forbid should through the act of his co-partner escape liability, seeing that, supposing I were to lend money to one of two partners where the other partner forbade me to do so, I should at any rate acquire a legal claim on the former. Accordingly I hold that the proper view is that of Julianus, that there will still be a good action on *negotia gesta* against the one who did not forbid, it being always understood that the one who forbade is not to

incur loss to the slightest degree either through his partner or directly.

9 SCÆVOLA (*Questions* 1) Pomponius says,—if you manage some affair of mine, and I approve of what you did, though you managed it badly, still you are not liable to me on *negotia gesta*. A point to consider will accordingly be, [as he thinks,] whether it is not the case that, so long as it is doubtful whether I am going to ratify or not, the right of action on *negotia gesta* is suspended; indeed, how is it possible for a right of action which has once accrued to be put an end to by the bare will [of the party who has it]? However, he thinks that the above rule is only true where you are clear of all *dolus malus*. Here Scævola adds: I should rather say that even where I approve, I still have a right of action on *negotia gesta*, and where it is said that you are not liable to me, this only means that I cannot disapprove of what I have once approved of; and just as anything which has been managed to good purpose must needs be treated as if it were ratified, when it comes into court, so in like matter must anything which the party has himself approved of. Indeed if it is true that where I have approved I have no right of action on *negotia gesta*, how will matters stand if the other receives money from my debtor and I approve? how am I to recover it from him? Or say he sells something of mine; or, again, he lays out money on my behalf, how is he to recoup himself? In any case there is no *mandatum* that he can sue on. It is clear therefore that even after ratification there will be an action on *negotia gesta*.

10 ULPIANUS (*on the Edict* 10) Does the law however go so far as to bestow on me a right of action for the expense I have incurred? I should say I have a good right of action, unless it was expressly agreed that neither party should have an action against the other. 1. But when a man sues on *negotia gesta* he will have the action not only where the management led to some result, but it is enough for him if he acted beneficially, even if it finally led to no result. Accordingly, if he repaired a house that was in danger of falling, or cured a sick slave, he will have a good action on *negotia gesta*, even if the house is now burnt or the slave is dead: this Labeo approves of. However, according to Celsus, Proculus says in a note on the passage in Labeo that the action need not always be allowed [even if the work was effective]. Take the case, for instance, of a man repairing a house which the owner had abandoned because he could not afford the expense of

it, or one which he did not think he required. In such a case, says Proculus, he is laying a burden on the owner, if we adopt Labeo's view, as everybody is at liberty to abandon his property, even though it be to escape liability for *damnum infectum*. However, this opinion of Proculus is rather neatly held up to ridicule by Celsus. A man, he says, to have an action on *negotia gesta* must have managed the affair beneficially, but he does not manage it beneficially, where he undertakes something which is not wanted or which would lay a burden on the householder. Similar to the above rule is a remark we meet with in Julianus, viz. that a man who has repaired a house or cured a sick slave has an action on *negotia gesta*, if he did it beneficially, though no eventual advantage should be realized I should like to ask this: suppose he thought he did it beneficially, but the householder was not really the better for it, how does the matter stand? I should say that in this case he will not have the action on *negotia gesta*; as granting that we do not consider the ultimate result, anyhow the act ought to be beneficial at the outset.

POMPONIUS (*on Quintus Mucius* 21) If you manage the affairs of an absent man without his knowledge, you must answer for negligence as well as deliberate misfeasance. Proculus indeed says that sometimes you must answer even for accidents; for example, where you manage on behalf of an absent man some new kind of affair which the other was not in the habit of doing himself; for instance buying untrained slaves in the market, or entering upon any more or less complicated business; the rule being that if any loss results from the business, it will fall on you, but gain will go to the absent principal; however, if, taking the whole transaction, gain is made in some things and loss incurred in others, the absent principal is bound to set off the gain against the loss.

ULPIANUS (*on the Edict* 10) This action must be allowed to the successor of a man who died in the hands of the enemy, the deceased being the person whose affairs are in question. 1. Moreover if I acted on behalf of some son under *potestas*, a soldier, who died after making a testament, an action must be allowed on the same principle: 2. and just as in respect of the management of the affairs of the living, it is enough that such management was beneficial, so it is also in respect of the property left by persons deceased, even though the ultimate result should be other than was intended.

13 PAULUS (*on the Edict* 9) A debtor of mine who owed me fifty died, I undertook to be curator of his estate and I spent (as curator) ten. After this one hundred were realized by the sale of a portion of the property which he left on his death, and I put that sum by in a chest; but the money was lost without any negligence on my part. The question arose whether, on an heir eventually coming forward, I had a right to sue him, either for the sum of fifty which I had originally lent, or for the ten which I spent. Julianus says that the essential point to consider is whether I had reasonable ground for putting by the hundred, because, assuming that what I ought to have done was to pay off what was owing to myself and the other creditors who had claims against the estate, then I ought to bear the risk of not only the sixty (*sic*) but also of the forty that remained; however, I might still retain the ten which I spent; in other words I need only make good ninety. But if there was reasonable ground for keeping the whole sum of one hundred by me, for example, there was a danger lest land of the deceased should be forfeited for a government debt, or, money having been borrowed on a sea-risk, the penal sum payable on failure of the condition should be increased, or payment should be demandable in pursuance of an arbitration,—then, says Julianus, I can recover from the heir not only the ten which I spent to preserve the estate, but in addition to that my original debt of fifty.

14 ULPIANUS (*on the Edict* 10) Where the case is that a *filiusfamilias* managed affairs, it will be perfectly just that an action should be allowed against the father himself, whether the son has a *peculium*, or he acted so as to improve his father's estate; and if the party was a female slave the principle is the same.

15 PAULUS (*on the Edict* 9) Pomponius says (b. 26) that in *negotia gesta* you must always look at the condition[1] of the party [whose affairs are managed] as it is at the outset. Suppose, for instance, he says, I begin to manage affairs for a boy under age, and before I have finished he becomes of age; or I manage affairs for a slave or a *filiusfamilias*, and in the course of the management he becomes free or *sui juris* as the case may be. I have myself always laid down that this is the sounder view, except in a case where a man undertakes the matter intending to manage a single piece of business, but afterwards undertakes

[1] Del. *temporis*. M.

cond course of management with a distinct intention at a
when the other party is already become of full age or free or
uris: in this case you may say that there are so many different
of management, so that the action will be governed and the
is of the order to be made be adjusted in accordance with the
us of the party.

THE SAME (*on Plautius* 7) Still, where a man manages
rs of mine, there are not a number of different affairs, but one
le contract, unless he undertook one particular affair with the
ntion, when he had finished that, of going no further; in such
se as that, if he should alter his mind and proceed to address
self to another affair as well, there is a fresh contract.

ULPIANUS (*on the Edict* 35) Where a man has carried on a
ticular course of management while a slave, he is not bound to
e an account of it after he is manumitted. It is true that if it
nixed up [with the subsequent matter], so that it is impossible
the account of what was done during slavery to be separated
m that of what the party did in a state of liberty, then as a
tter of course the case on *mandatum* or on *negotia gesta* will
nprise what was done during slavery as well as the rest. For
tance, suppose a man while still a slave buys a site for building
l builds a block upon it, and the block collapses, after which
is manumitted and leases the ground to a tenant, the action on
gotia gesta will embrace nothing more than the lease of the
ound, as no portion of the course of management carried on
ring the preceding time can be brought into the case, unless it
something without which it is impossible to get at a clear
count of the affairs carried on while the party was free.

PAULUS (*on the Edict* 9) Proculus and Pegasus say that a
an who began a course of management while he was a slave is
ound to act in good faith, and that, consequently, whatever sum
e would have been able to realize, if some one else had been
anaging on his behalf, he must now, as he did not make himself
ay it, make the same sum good to his principal, if sued on *negotia*
esta, if he had so much in his *peculium* that by retainer of the
me the amount could have been realized. With this Neratius
grees.

THE SAME (*on Neratius* 2) However, even if he had nothing
n his *peculium*, still he was indebted by way of natural obligation,
nd, if he afterwards had anything, he was bound to pay himself

out of it [as agent], if, [when free] he continued to carry on the same course of management; just as a man who was liable to an action which would be barred by lapse of time is compellable, even after the period of limitation expires, to make the amount good [to the principal], if sued on *negotia gesta*. 1. Our friend Scævola says that in his opinion the remark of Sabinus that the account ought to be given from the beginning must[1] be understood to mean that it ought to appear what the available balance was when the party managing first became free, not that he is to hold himself liable for what is attributable to malice or negligence of which he was guilty while a slave; so that even if it should be discovered that when he was a slave he spent money improperly, still he will not have to account for it. 2. If some free man serves me as a *bona fide* slave, and I commission him to do something, then, according to Labeo, I have no action on *mandatum* against him, as he did not execute the commission of his own free will, but under the impression that he was compellable as being a slave; accordingly there will be an action on *negotia gesta*, because it really was his desire to act in my interest, and, as a matter of fact, he was capable of contracting a legal obligation towards me. 3. Being engaged in managing my affairs in my absence, you bought me unawares something that was my own property, and you became owner by *usus* without knowing it; you are not under any obligation to give it up to me enforceable by an action on *negotia gesta*. But if, before the *usucapio* is complete, you ascertain that the thing belongs to me, you ought to find some one to sue you for it on my behalf, so that he may recover the thing for me, and enable you to enforce against your vendor the stipulation against recovery[2] by the owner (*evictio*); and you are not held to be guilty of any *dolus malus* in finding some one to bring the action, as the reason why you have to do it is that you may avoid liability on the action on *negotia gesta*. 4. In the action on *negotia gesta* the defendant has to make good not only the capital but the interest too which he derived from the other's money, and even the interest which he might have derived. On the other hand by means of this action he can recover interest which he has paid, or which he might have drawn from money of his own which he spent on the other party's affairs. 5. Titius being in the hands of the enemy, I carried on his business, and afterwards he returned. I have a good action on

[1] Transfer *debere* to the place before *quod*. Cf. M.
[2] After *rem* read *recipiat*. M.

negotia gesta, although at the time when the affairs were being managed, there was no principal in respect of them.

20 ULPIANUS (*on the Edict* 10) But if he dies in the hands of the enemy, both the direct action and the counter action on *negotia gesta* will be available respectively for and against his successor.

21 PAULUS (*on the Edict* 9) This is illustrated by an opinion given by Servius, as reported by Alfenus (*Dig.* 89). Three men were taken prisoners by the Lusitani, one of whom was released on the understanding that he should bring back a ransom for all three, and that, if he did not return, the two others should give a ransom for him as well as themselves. On these facts Servius declared that justice required that the Praetor should allow an action against him. 1. When a man manages affairs pertaining to the estate of a deceased person, he may be said to impose on the inheritance an obligation towards himself, and himself to incur one towards the inheritance; accordingly, it makes no difference if the person who eventually takes up the inheritance should even be a boy under age, as the debt in question will devolve on him along with the other burdens on the inheritance. 2. If I have begun to carry on Titius's affairs in his lifetime, I have no right to let them go at his death, but I am not obliged to begin any fresh ones, what I am bound to do is to carry through matters already entered upon, and to keep hold of any advantage gained. A rule of this kind is applied when one of two partners dies; as whenever anything is done for the sake of winding up some previous affair, it is of no consequence how long it takes to conclude it, the question is when it was begun. 3. Lucius Titius managed affairs of mine in pursuance of a mandate from you; so far as he managed any of them badly, I can bring an action against you on *negotia gesta,* to compel you not only to assign your rights of action against him, but also to make good to me whatever harm I may have suffered through his neglect, on the ground that you selected an agent without knowing his character.

22 GAIUS (*on the provincial Edict* 3) Where a man manages affairs in the interest either of an inheritance or an individual, and buys some article because he finds it necessary to do so, then, even if the article should be destroyed, he can recover what he spent by an action on *negotia gesta*; suppose, for example, he gets corn or wine for household slaves, and by some accident it comes to be destroyed, say by fire or the fall of a house. But of course this rule only applies where the fall or the fire itself takes place without any

fault of his; if he is himself liable to an adverse judgment on the ground of the very fall or fire, it would be absurd that he should recover anything in connexion with things lost in the way described.

23 PAULUS (*on the Edict* 20) If a man who is managing affairs for another gets in money which was not due, he is compelled to hand it over; and with regard to any payment which he makes of what was not due, the better opinion is that he must hold himself accountable for it.

24 THE SAME (*on the Edict* 24) If I give money to a *procurator* with the intention of making the actual money thereby the property of my creditor, the property in it does not pass to the creditor by receipt on the part of the *procurator*; still the creditor can, by ratifying the act of the *procurator*, make the money his own, even against my will, because the *procurator* in receiving the money was acting on behalf of the creditor only; accordingly ratification on the part of the creditor discharges me of the debt.

25 THE SAME (*on the Edict* 27) If a man who is managing affairs for another spends more than he ought, what he can recover from his principal is the sum which he was obliged to give.

26 MODESTINUS (*Responsa* 1) A man ordered in his testament by a *fideicommissum* that his inheritance should be handed over to a particular city; whereupon the magistrates appointed Titius Seius and Gaius as trustworthy agents in respect of the property; after which these agents divided the duties of management amongst them; and this they did without the sanction or consent of the magistrates. After some time the testament by which the inheritance was left in trust to be handed over to the city was proved in Court to be void, the consequence being that Sempronius was recognised as the statutable heir *ab intestato* of the deceased; but one of the above-mentioned agents died insolvent and left no heir. My question is this:—if Sempronius brings an action against the agents for this property, on whom is the risk to fall occasioned by the want of means of the deceased agent? Herennius Modestinus replied:—whatever cannot be recovered in an action on *negotia gesta* from any particular one of the agents in respect of the matters which he carried on alone will be so much to the loss of the person who acquired the statutable inheritance.

27 THE SAME (*Responsa* 2) There were two brothers, one of whom was of full age and the other was under twenty-five. They

shared in common land on which there stood no houses, but the elder brother erected extensive buildings on a waste which they [also] held in common, on which waste there were dwelling-houses standing which had belonged to their father; and on making a partition with his brother of the waste in question, he claimed to be compensated for his outlay, on the ground that he had improved the property; his younger brother having by that time arrived at statutable age. Herennius Modestinus laid down that where an outlay was incurred without pressing need but by way of luxury, the brother on whose behalf the question was asked had no right of action. 1. Where Titius maintained his sister's daughter out of natural affection, I gave it as my opinion that this afforded no ground of action against her.

8 JAVOLENUS (*extracts from Cassius* 8) Where any one has managed affairs of Seius in pursuance of a mandate given by Titius, he is liable to an action on *mandatum* at the hands of Titius, and damages must be assessed at an amount representing the interest of Seius and Titius in the matter; moreover Titius's interest is measured by whatever sum he has to pay Seius, towards whom he is himself bound on the ground of *mandatum* or *negotia gesta*. But Titius has a good right of action against the person to whom he gave a mandate to manage another person's affairs, even previously to his making any payment himself to [that other, that is] his own principal, because he may be held to be already the poorer to the extent of[1] the obligation which he has incurred.

29 CALLISTRATUS (*monitory Edict* 3) If a father appoints by testament a guardian to a postumous son, and, pending the birth, the person so appointed manages the property as guardian, but eventually no son is born; in such a case, the proper action against the guardian is not on *tutela*, but on *negotia gesta*; but, should a postumous son be born, there will have to be an action on *tutela*, and this action will embrace both periods of management, viz. the one which ends with the birth of the child, and the one subsequent to it.

30 JULIANUS (*Digest* 3) A question was asked on a statement of fact as follows. A man was appointed *curator*, by a resolution of a municipal body, for the purchase of wheat; and another man, who was appointed to be under him as a subordinate *curator*, spoilt the wheat by mixing something else with it so that the price of the wheat was charged on the *curator*, it being bought for the

[1] For *quo* read *quod*. Cf. M.

municipality. The question was what was the action which the *curator* could bring against the *subcurator* so as to recoup himself for the loss which he suffered through him. The answer given by Valerius Severus was that a guardian has a right to an action on *negotia gesta* against his fellow-guardian ; and he added that one magistrate is given the same action against another, only however where he is not himself privy to the malpractice ; from which it follows that the same rule applies equally in the case of a *subcurator*.

31 PAPINIANUS (*Responsa* 2) A man gave a mandate to a freedman or a friend to borrow some money. The lender, on the faith of the written instructions [which constituted the mandate], entered into the contract, and repayment was guaranteed by a surety. Here, although the money was not spent on behalf of the party first mentioned, nevertheless the lender or the surety will be allowed an action against him on *negotia gesta*, modelled, in fact, on the *actio institoria*. 1. Amongst affairs of Sempronius which a particular person managed was one in which Titius was interested, which the person in question managed without being aware of this fact. He will be liable to Sempronius in respect of that particular matter too, but he has a right to an order, on mere motion, for an undertaking to indemnify him in case he is sued by Titius, as the latter can claim a right of action. A similar rule applies to a guardian. 2. A case being ready for trial, but the defendant failing to appear, a friend of the defaulter volunteered to take it up, stating to the Court some reason for the other's absence. The friend will not be held guilty of negligence for not appealing if the case is decided against the absent man. *Note by Ulpianus:* this is correct, as the judgment was against the defaulter ; at the same time, if the friend, when he defended the absent person, had had judgment given against himself, and then were to sue on *negotia gesta*, he might be called to account for not appealing when he had an opportunity. 3. Where a man manages another person's affairs, he is required to pay interest, that is, on the balance which he has after discharging necessary expenses. 4. A testator desired that certain freedmen should be paid a specified sum with a view to the expense of erecting a monument ; if any outlay is made beyond this amount, it cannot be lawfully claimed from the heir in an action on *negotia gesta*, nor yet on the ground of *fideicommissum*, as a limit to the outlay was laid down by the testator's expressed intention. 5. The heir of the deceased guardian of a girl being his

son and under age, he is not liable in respect of his own guardian's management of any affairs of the female ward of his father, but the boy's guardian can be sued in his own name in an action on *negotia gesta*. 6. If a mother should be led by natural affection to manage the affairs of her son in accordance with the will of his father, still she will not have the power to appoint an agent at her own risk to take legal proceedings, since she has herself no right to sue on behalf of her son, nor can she dispose of any part of his property, nor can she give a discharge to any debtor of the boy by receiving payment of the debt. 7. One of several [alleged] co-owners of a water-course defended a case in which the right to water was in question, and judgment was given in favour of the [owner of the alleged servient] tenement, still the party who defrayed such expense as was necessarily incurred and was reasonable in respect of the common interest has an action on *negotia gesta*.

THE SAME (*Responsa* 3) A surety, owing to a mistake which he made, took over [by assignment from the creditor] certain pledges or hypotheks referring to a different contract in which he was himself not concerned, but he paid both debts to the creditor, thinking that he could provide for being indemnified by consolidating his landed securities [against the debtor]. It would be useless thereupon [for the debtor] to sue him on *mandatum*, and equally so for him to sue the debtor; but each of the parties must have recourse to an action on *negotia gesta* against the other; on the trial of which negligence alone need be taken into account, not accident as well, as the surety cannot be held to be a depredator. The creditor cannot on the ground of the above be held liable to an action founded on pledge [at the hands of the debtor], for restoration of the property pledged, as he appears to have sold his own legal position. 1. A mother took presents made to her daughter by the man who was betrothed to her, and that without the knowledge of the girl: as in this case the daughter has no action on *mandatum* or *depositum*, she can sue on *negotia gesta*.

13 THE SAME (*Responsa* 10) The heir of a deceased husband cannot bring an action against the widow for despoiling an inheritance (*compilatae hereditatis*), where during the marriage she had the husband's property in her possession. Consequently his wisest course will be to bring an action against her for production (*ad exhibendum*) and on *negotia gesta*, supposing she really managed her husband's affairs.

34 PAULUS (*Questions* 1) Nesennius Apollinaris sends greeting to Julius Paulus. A woman managed affairs for her grandson, and the grandmother and grandson being both dead, the heirs of the former were sued by the heirs of the latter in an action on *negotia gesta*, but the heirs of the grandmother claimed to set off maintenance given to the grandson. To this it was replied that the grandmother had furnished the maintenance out of her own property in compliance with the demands of natural affection; as she never applied for an order to settle the amount to be given for maintenance, nor was any such order made. Besides this it was said that there was an express rule that where a mother supported her child she could not sue to recover the cost of maintenance which her natural affection had induced her to provide at her own expense. To this it was answered on the other hand that this rule would fully apply wherever it was shown that the mother afforded the support out of her property; but, in the present case, where the grandmother carried on her grandson's affairs, the chances were that she had supported him out of his own property. The question was entertained whether the expense should be held to have been defrayed out of both properties. I wish to know what you think is the fairest conclusion. My answer was as follows. This whole question turns on matters of fact. Indeed I should say that even the rule laid down for the case of a mother is not one to be observed without exception. Suppose, for instance, she made a formal declaration that she was maintaining her son with the express intention of bringing an action against himself or his guardians. Or take the case of the father dying abroad, and the mother, in expectation of his return home, supporting the son and the household slaves; in which case the Divine Antoninus Pius laid down that an action should be allowed against the boy himself on *negotia gesta*. Accordingly, the question being one of fact, the grandmother or her heirs have, I should say, a good right to be heard on an application for leave to set off the cost of the maintenance, especially if it appears that the grandmother actually entered the items in the account of expenditure. With regard to the view that the expense might be held to have been incurred out of both properties, that, I should say, is altogether inadmissible.

35 SCÆVOLA (*Questions* 1) A divorcé having taken place, the [former] husband managed affairs on behalf of the [former] wife; in this case the woman can recover her *dos* not merely by an action

for *dos*, but by an action on *negotia gesta*: that is, always provided, in the case of the latter action[1], that the husband had enough means to be able to hand over the *dos* during the time of his management; if not, he cannot be made accountable for not charging himself with it. However, even after the loss of his means, there will still exist a full right of action against him on *negotia gesta*, though if the husband should be sued in an action for *dos*, the case must be dismissed. But some limit has to be observed in the action on *negotia gesta*, that is to say, the action which asks for relief "to the extent of the defendant's means, though he afterwards lost them"[2] is only admissible where he was able to pay throughout the time of management; as he was not at once guilty of any shortcoming in respect of his duty because he did not immediately sell his property to realize the sum required; in short, [to make him in default,] some interval must be allowed to elapse during which he appears to have done nothing. If, in the meantime, before the party has completely discharged his duty of management, the dotal property is lost, he is as little liable [for it] on *negotia gesta* as if he never had been able to hand it over at all. Indeed even if the husband's means are sufficient, the action on *negotia gesta* is [liable to be] disallowed, because there may be a danger of their ceasing to be sufficient[3]. 1. But we do not admit the proposition that a man who manages affairs of his debtor is bound to restore property pledged to himself for debt where the money is still owing, and he has not got enough in his hands [in pursuance of the management] to be able to pay himself. 2. Again a case of redhibition is not merged in the right of action on *negotia gesta*; consequently the *actio redhibitoria* is lost at the end of six months, if he [, the vendor who managed the affairs of his purchaser,] did not find the slave sold amongst the property of the other, or, supposing he did find him, did not find, and so did not recover, such additional property as went with the slave by way of accession, or whatever was necessary to make up for any fall in the value of the slave, or any acquisitions through the slave otherwise than out of the property of the purchaser, there not being enough realized out of the actual affairs of the purchaser under management for the vendor to recoup himself at once. 3. At the same time if the person managing the affairs is debtor to the principal on some other ground, and the obligation is not liable to fail by lapse of time, and he has ample means, he cannot be charged with default for not

[1] Transfer *si* to the place after *gestis*. Cf. M.
[2] Inverted commas after M.
[3] After *facere* ins. *posse*. M.

paying this debt, at any rate so long as the claim that he should do so is not founded on any ground connected with the question of interest. The rule is different where a guardian was debtor to his ward, as there the ward has an interest in the earlier debt being paid, so as to put present debt on the right of action on *tutela*.

36 PAULUS (*Questions* 4) If a free man who is serving me in good faith as a slave borrows money and bestows it to my advantage, let us consider what is the action by which I can be compelled to restore the money so spent to my advantage; as the man did not manage the matter on my behalf as if I were his friend, but as if I were his owner. However the proper action to allow is that on *negotia gesta*, and this ceases to be available as soon as the money is paid to the lender.

37 THE SAME (*Sentences* 1) Where affairs of a ward have been managed without the concurrence of his guardian, [and the party managing brings an action,] an inquiry is commonly made at the time of *litis contestatio* as to whether the ward is the richer by the matter in respect of which he is being sued. 1. Where a man manages for another some pecuniary affair, he is compellable amongst other things to pay interest, and to bear the risk of all loss on such demands as he has acquired by any contracts he made himself, save where, owing to accidental circumstances, the debtors have become so destitute of means that at the time of *litis contestatio* in the action against him they are not able to pay. 2. Where a father has managed property of his son which the son acquired by free gift from the father himself, he will still be liable to the son in an action on *negotia gesta*.

38 TRYPHONINUS (*Disputations* 2) A man who owed money without interest managed affairs for his creditor. The question was asked whether in an action against him on *negotia gesta* he could be made to pay interest on the money referred to. My answer was,—if it had been his duty [as representing his creditor] to get payment of the money from himself [as debtor], then he would be bound to pay interest; but if the time for paying the money had not arrived during the period of his management of his creditor's affairs, he would not be bound to pay interest; still, if, the day for paying having past, he did not debit himself in the accounts he gave to the creditor whose affairs he carried on with the sum of money which he owed him, he would in justice have to pay interest, being sued in a *bona fide* action. Let us consider then what the

scale of interest will be. Will it be the rate which the creditor himself could have got by lending the money at interest to someone else, or must he pay on the highest scale? the fact is that where a man appropriates to his own uses money belonging to someone to whom he is guardian or whose affairs he is carrying on, or, say, a municipal magistrate does the same with the funds of the municipality, he has to pay interest on the highest scale, as has been enacted by Divine Emperors. Still it is a different case where the party did not possess himself of money which was derived from the management which he was engaged in, but had borrowed it from his friend before he undertook the management of that friend's affairs. The persons to whom the above enactments refer were bound to exercise good faith without any remuneration, at any rate good faith which was absolute and without any profit to themselves, consequently, where[1] they are found to abuse their opportunities, they are compellable to pay interest on the highest scale by way of inflicting on them some kind of penalty; but the person whose case we are discussing received money by way of loan from the other in a straightforward way, and the reason why he may be ordered to pay interest is simply that he did not pay the principal, but not that he appropriated money which was derived from the business which he was managing. On the other hand it makes a great deal of difference whether money has just begun to be owed or the claim on the debtor is of some standing, the latter circumstance being enough to make a debt bear interest which otherwise would not bear it.

9 GAIUS (*on verbal obligations* 3) Anyone who pays on another's behalf discharges the debt, even where the other refuses to consent or is unaware of the payment: but money which is owing to one man cannot be legally demanded by another without the consent of the first. In fact both common sense and legal principle establish that you may make another man's condition better even without his knowledge or against his will, but you are not at liberty to make it worse.

10 PAULUS (*on Sabinus* 10) If I have a house in common with you, and I give a neighbour security against *damnum infectum* in respect of your share, the proper view is that if I have to pay anything, the action I can bring against you is rather that on *negotia gesta* than *communi dividundo*, because it was in my

[1] For *qua* read *quia*. Cf. M

power to defend my own share without being obliged to defend that of my fellow-owner.

41 THE SAME (*on the Edict* 30) A man who defends my slave in a noxal action without my knowledge or in my absence, can sue me on *negotia gesta* for the whole amount, not merely to the extent of the slave's *peculium*.

42 THE SAME (*on the Edict* 32) You undertake affairs of mine at the request of my slave. If you do this merely at the suggestion of my slave, there will be an action on *negotia gesta* between you and me; but if you do it as on a mandate from my slave, there is authority for saying that you can bring an action *de peculio et de in rem verso* against me.

43 LABEO (*Posteriora abridged by Javolemus* 6) Whereas you paid money on behalf of a man who gave you no *mandatum* to do so, you have a good action on *negotia gesta*, as the result of the payment was that the debtor was released from his creditor;—unless indeed the debtor had some interest in the payment not being made.

44 ULPIANUS (*Disputations* 6) Where a man out of friendship for the father applies to have guardians appointed to the children under age, or takes proceedings for removing guardians of doubtful character, he has no action against the children, according to the enactment of the Divine Severus.

45 THE SAME (*Opinions* 4) Where an outlay is made [by a voluntary agent] on anyone's affairs, with beneficial result, which outlay comprehends expense honourably incurred for the acquisition of public offices such as are taken by successive steps, the money may be recovered by an action on *negotia gesta*. 1. Persons who have received their liberty by will unconditionally are not compelled to render an account of a course of management which they carried on in the lifetime of their previous owners. 2. Titius paid money to the creditors of an inheritance under the impression that his sister had succeeded as testamentary heir to the deceased. Although his notion in doing so was that he was managing the affairs of his sister, whereas, as a matter of fact, he had acted in the interest of the sons of the deceased, who were *sui heredes* to their father, as soon as the testament was out of the way; still, as it is only just that he should not be exposed to loss, it was held that he could sue for the amount in an action on *negotia gesta* [against the latter].

AFRICANUS (*Questions* 7) You commissioned my son to buy and for you; and being made aware of this fact, I bought it for you myself. It is, I should say, an essential question what was my intention in buying it. If the case was that I made the purchase for the sake of supplying you with something which I knew you required, and I also knew your mind to be such that you would be glad to have the land as purchaser, then we have reciprocal rights of action on *negotia gesta*, just as we should have, supposing either there had been no mandate given in the matter, or you had given a mandate to Titius, and I, thinking I could carry the business through more conveniently than he could, had purchased it myself. But if my object in purchasing was to prevent my son being liable to an action on *mandatum*, then I should say on the whole that I could, as representing my son, bring an action on *mandatum* against you, and you in the same way would have an action against me *de peculio;* since, even if Titius had undertaken the commission, and, to save him from liability in respect of it, I had made the purchase myself, I could sue Titius on *negotia gesta*, and you and he could sue one another on *mandatum*. The case would be the same if you were to give my son a mandate to be surety for you, and I were to be surety for you myself. 1. If the case suggested is that you gave Titius a mandate to be surety for you, and that, whereas he was from some cause or other hindered from being surety, I, in order to relieve him of his promise, became surety, then I have a good right of action on *negotia gesta*.

PAULUS (*Sentences* 1) The action on *negotia gesta* is given to whoever has an interest in taking proceedings in that particular form. 1. Whether the action which is brought by or against the party is direct or *utilis* is of no importance, since in the extraordinary procedure, where the drawing up of formulas is not now practised, there is no occasion for such niceties, especially considering that both kinds of action are of the same force and produce the same effect.

8 PAPINIANUS (*Questions* 3) If a brother, even without his sister's knowledge, by way of acting in her interest, stipulates with her husband for *dos*, he can be legally sued by her in an action on *negotia gesta* to compel him to release the husband.

9 AFRICANUS (*Questions* 8) If a slave whom I sell steals something from me, his vendor, thereupon the purchaser sells the thing, and, subsequently, it ceases to exist, an action on *negotia*

gesta must be[1] allowed me for the price, just as it would have to be allowed, supposing you had managed some affair thinking you were acting in your own interest whereas you really acted in mine; or just as, conversely, you would be allowed an action against me, if you fancied that some inheritance belonged to you as heir which really was mine, and you had accordingly handed over to someone else property of your own which the testator had bequeathed; seeing that I should thereby be released from the obligation of some time or other[2] making the transfer thereof.

VI.

ON VEXATIOUS ACTIONS.

1 ULPIANUS (*on the Edict* 10) Where a man is alleged to have received money in order that he should give trouble or forbear to give trouble with a vexatious intent (*calumniæ causa*) there is a good right of action *in factum* against him during one year for fourfold the sum of money which he is alleged to have received; and a similar action after the expiration of the year, for the actual sum. 1. According to Pomponius, this action is not only good in pecuniary cases but applies to criminal (*publica*) charges too, especially considering that a man who takes money for giving or forbearing to give trouble with vexatious intent is liable to proceedings under the *lex repetundarum*. 2. A man who has received money is equally liable whether he received it after joinder of issue or before. 3. Moreover an enactment of the present Emperor, addressed to Cassius Sabinus, forbids the giving of money to the *judex* or to the other party, whether the case is public, private, or fiscal, and, where such an act is done, it lays down that the right to proceed is lost. It is no doubt a fair question, supposing the other party took the money by way of compromising the case and not vexatiously, whether the enactment still applies; and I should say it does not, just as the above action itself is gone; there is no prohibition of compromises, but only of vile acts of extortion. 4. A man will be deemed to have received money even where he received something else instead of money.

[1] For *sit* read *est*. Cf. M.
[2] For *quandoque* read *quando quidem*. Cf. M.

2 PAULUS (*on the Edict* 10) Moreover where a man is released from an obligation, this may be regarded as a case of receiving money, similarly where money is lent him without interest, or property is let or sold under its value. And it is immaterial whether he receives the money himself, or requests that it should be given to some one else, or ratifies the acceptance of it by someone else on his behalf.

3 ULPIANUS (*on the Edict* 10) Speaking generally, this rule applies to all cases where a man gets any benefit at all with a view such as described, whether he receives it from the other party or from someone else. 1. Accordingly, where he took money that he might give trouble, he is liable whether he gave trouble or not, and equally so where he took it that he might not give trouble, though he gave trouble. 2. The Edict applies also to a man who has made a '*depectum*,' which word means a dishonourable *pactum* (agreement). 3. One point to be noted is this. A man who has given money in order that someone should be put to trouble has no action to recover it himself, because his own conduct was dishonourable; the action is allowed to the person with respect to whom the money was given with a view to vexatious consequences to him. Consequently if anyone has money given him by you as an inducement to give me trouble, and by me as an inducement not to do so, he will be liable to two actions at my hands.

4 GAIUS (*on the provincial Edict* 4) This action is not open to the heir, because it ought to be enough for him that he has an action to recover the money which was paid by the deceased:

5 ULPIANUS (*on the Edict* 10) but it is good against an heir to the extent of whatever has come to his hands. It is in fact settled law that heirs can be compelled to give up dishonourable gains as well as the receivers, though criminal charges would be too late; for example, anything given as an inducement to falsification (*ob falsum*), or given to a judge to procure a partial decree the heir can be compelled to give up, as he may anything else acquired in a flagitious manner. 1. Besides the above action there is also a good right of *condictio*, assuming that the only dishonourable behaviour in the case is that of the party who receives; if the party who gives is equally guilty, then the one in possession is in the better case. Supposing then the money is recovered by a *condictio*, is the action above mentioned taken away, or is it to be

allowed for threefold the amount, or is the action for fourfold allowed and the *condictio* too, as in the case of a thief? I should say however that one or other of the two actions by itself is enough. But where the *condictio* is open, there is no occasion to allow the action *in factum* after the expiration of a year.

6 GAIUS (*on the provincial Edict* 4) With regard to the year, in the case of a person who gave money to prevent an action being brought against him, it begins to run from the day on which he gave the money, provided he then had the power of suing to recover it. But in the case of a person in respect of whom another gave money to procure proceedings being taken against him, it may be a matter of question whether the year ought to be reckoned from the day when the money was given, or whether it ought not rather to be from the day when the party in question knew it was given; since a man who does not know of the ground that there is for taking proceedings cannot be held to have the power of taking them; and the better opinion is that the year is reckoned from the day when he first knew.

7 PAULUS (*on the Edict* 10) If a man has money given him by another as an inducement not to give me trouble, then, if it was given in pursuance of a mandate from me, or by my general *procurator*, or by someone who volunteered to act on my behalf and whose act was ratified by me, I am deemed to have given it myself. But if the other did not give it on my mandate, even though he did it out of concern for me to prevent the trouble, and I have not ratified, then it is held that the party who thus paid can recover the money and I have the action for fourfold. 2. Where a *publicanus* retained a man's slaves, and money was paid him which was not lawfully owing, he too is liable to an action *in factum* on the above clause in the Edict.

8 ULPIANUS (*Opinions* 4) If it should be thoroughly proved to the proper judge in the case that money was taken from a person who was innocent, on pretence made of some criminal charge which was not established against him, the judge must order the sum thus illegally extorted to be restored, in accordance with the terms of the Edict dealing with the case of such persons as are alleged to have received money as an inducement to give trouble or to forbear from giving it; and he must inflict a penalty on the guilty party proportionate to his offence.

9 PAPINIANUS (*on adulteries* 2) Where a slave is accused, if application is made, he is examined by torture; and, if he is acquitted, the accuser is ordered to pay the owner double the value of the slave; besides which an inquiry is made as to vexatious proceeding on the part of the accuser, apart from any estimate of the slave's value; as the charge of vexatious conduct is independent of any question of the loss incurred by the owner in respect of the slave in consequence of the torture.

FOURTH BOOK.

I.

On restitutions *in integrum.*

1 Ulpianus (*on the Edict* 11) The practical character of this title need not be dwelt on, it is plain in itself. Under this title the prætor gives relief on a number of different occasions to persons who have made a mistake or have been circumvented, whether they were put to a disadvantage by intimidation, or craft, or their youth, or their absence,

2 Paulus (*Sentences* 1) or a change of status, or excusable error.

3 Modestinus (*Pandects* 8) Wherever restitution *in integrum* is promised by the prætor it is always on cause shown, so that he may examine into the sufficiency of the causes alleged, and see whether the particular case[1] is of a kind in which he gives relief.

4 Callistratus (*monitory Edict* 1) I know it is the practice of some magistrates not to listen to one who asks for restitution *in integrum* in respect of any very trivial matter or amount, if this would prejudge the case of some matter or amount of more importance.

5 Paulus (*on the Edict* 7) In any case in which the prætor promises that he will give anyone restitution *in integrum*, no one is held to be barred †from proceeding in the matter† (*nemo videtur re exclusus*).

6 Ulpianus (*on the Edict* 13) Restitution *in integrum* may be given to the successor on the death not only of a *minor*, but of a man who had been absent on business of the State, indeed of any-

[1] For *verœ* read *vere ex.* Cf. M.

one who could himself have got such restitution: this has very often been laid down. Accordingly whether the applicant is an heir, or is a person to whom an inheritance has been handed over [in pursuance of a *fideicommissum*], or is successor to a *filius-familias* who was a soldier, he can get restitution. On the same principle where minors, male or female, are reduced to slavery, their owners will be granted restitution *in integrum*, subject always to the limitation laid down as to time. Indeed, if it should happen that a minor, under the above circumstances, had been put to a disadvantage in respect of an inheritance upon which he had entered, then, as we learn from Julianus (*Dig.* 17), his owner will be allowed to repudiate, not merely in consideration of his youth but even without there being his youth in his favour; the fact being that patrons of freedmen may have put their statutable rights in practice not with a view to acquiring the inheritance themselves, but in order to punish the freedmen.

7 MARCELLUS (*Digest* 3) The Divine Antoninus, in a rescript addressed to Marcius Avitus the praetor on the question of relieving a man who had lost property through absence, expressed himself as follows: "It is true that no variation should be made lightly from the regular practice; still relief ought to be given where plain justice requires it. If therefore the party failed to appear when called upon, and thereupon judgment was given in the usual form, but he, very shortly afterwards, applied in Court before you had risen, it may be supposed that his previous default was not due to his own negligence, but to the fact that he did not thoroughly hear what the officer said; accordingly he can have the order for restitution." 1. Aid of this kind is in fact not confined to cases such as mentioned; relief ought to be given to any persons who are deceived without fault of their own, especially where there is some fraud in the case on the part of their opponents, as there is always a good right of action for *dolus malus*, and it is the part of a good praetor rather to allow a new trial (*restituere litem*), as both reason and justice require, than to compel the party to bring an action involving *infamia*, a resource to which recourse should be had only where the case is one which admits of no other remedy.

8 MACER (*on appeals* 2) There is this difference between the case of minors under twenty-five and that of persons absent on State business, that minors, even where they were defended by their guardians or curators, may still get restitution *in integrum* against the State (*rem publicam*), of course on due cause shown;

but with regard to persons who were absent on State business, and any others who are put upon the same footing, if they were defended by their *procurators*, the practice is that they are only so far relieved by way of restitution *in integrum* as to be allowed to appeal.

II.

ACTS DONE THROUGH FEAR.

1 ULPIANUS (*on the Edict* 11) The prætor says: "Where an act is done through fear I will not uphold it." The old terms of the Edict were "*force* or fear." The word force (*vis*) was introduced to express compulsion applied in opposition to the party's will; fear (*metus*) was held to mean mental trepidation on the ground of urgent or apprehended danger. But afterwards the mention of force was left out for the reason that anything which is done by unmitigated force may be held to be done through fear too.

2 PAULUS (*Sentences* 1) Force (*vis*) is an attack by some overpowering agency such as cannot be withstood.

3 ULPIANUS (*on the Edict* 11) This clause therefore comprises both force and intimidation, and where a man has done any act under forcible compulsion he can get restitution by this Edict. 1. But by force we understand force which is outrageous and such as it is against good morals to use, not force which is rightfully applied by a magistrate, that is to say, in pursuance of established law, and the right attached to the office which he bears. Nevertheless, if a magistrate of the Roman people or the governor of a province has in any case acted illegally, then, according to Pomponius, this Edict will apply to the case; suppose, he says, a magistrate should extort money from anyone by threatening him with death or stripes.

4 PAULUS (*on the Edict* 11) I should say myself that the fear of enslavement or any similar evil must be included.

5 ULPIANUS (*on the Edict* 11) Fear, according to Labeo, must be understood to mean not simply any apprehension whatever, but fear of some evil of exceptional severity.

6 GAIUS (*on the provincial Edict* 4) The fear which we must hold to be referred to in this Edict is not the fear felt by a weak-

minded man, but such as might reasonably occur even in the case of a man of thorough firmness of character.

ULPIANUS (*on the Edict* 11) Pedius says (b. 7) that this Edict does not comprise apprehension of *infamia*, and that no fear of annoyance affords ground for restitution under the Edict. Similarly where some nervous person is under groundless apprehension of what is really nothing at all, he will not get restitution under this Edict, as no act has been done with force or intimidation. 1. Again, if a man who is detected in the act of theft or adultery, or any other outrageous offence, either gives away property or binds himself in any way, Pomponius says very truly (b. 28) that the case is within the purview of the Edict, as the man was in fear of death or imprisonment. It is true that it is not always lawful to kill an adulterer or a thief, unless he defends himself with a weapon; still there was a possibility that such offenders might be killed, even though it were not lawful, and so their fear might be well grounded. Again, if such a one should part with his property to avoid information being given by someone who detects him, it is held that he may have the benefit of this Edict, because, if information were given, he might be exposed to the penalties above mentioned.

3 PAULUS (*on the Edict* 11) In such a case the party who detects no doubt comes under the *lex Julia*, as he accepted something [as hushmoney] for a detected act of adultery. But the praetor is bound to step in to compel restitution as well; as the act of the party receiving is against good morals, besides which the praetor does not concern himself with the question whether the man who gave is an adulterer or not, he only looks at the fact that the other acquired by putting a person in fear of his life. 1. If a man takes money from me by means of a threat to deprive me of the written evidence of my status if I refuse to pay, there is no doubt that this is an extreme case of intimidation; at any rate, if proceedings are already pending to establish that I am a slave, and there is no possibility of my being pronounced a free man if the documents in question are gone. 2. If a man or a woman makes a gift to avoid *stuprum*, the Edict applies, inasmuch as to persons of character such a fear ought to be worse than that of death. 3. In the above cases which I said came under the Edict it makes no difference whether a man is apprehensive on his own account or on behalf of his children; indeed parental affection makes people feel stronger alarm on their children's behalf than on their own.

9 ULPIANUS (*on the Edict* 11) We must take fear to mean present alarm, not the surmise that intimidation may be exercised; this we find in Pomponius (b. 28); what he says is that we must understand the meaning to be fear excited—in short a case where apprehension has been excited by some person. Following this up, he discusses this case: Suppose I abandon my land on the report that someone is coming to attack me with arms, is this a case where this Edict will apply? To this Labeo, he says, holds that it is not; nor is it a case for the interdict *unde vi*; I cannot be held to be ejected by force, as I did not wait to be ejected, but took to flight. It would be a different case [so, he says, Labeo holds] if I only took my departure after an entry was made by armed men; that would really be a case for the Edict. He [Pomponius] also says that if the case which occurs is that you get together a band of men and build on my land by force, then the interdict *quod vi aut clam* and the Edict under discussion will both apply; because, in short, what makes me allow you to do it is that I am put in fear. Again, if I deliver up possession to you, owing to the use of force, this[1] Edict, according to Pomponius, will apply. 1. It should be observed that in the Edict the prætor speaks in general terms and *in rem*; he does not go on to say by whom the act is supposed to be done: consequently, whether it is a single individual who excites the fear, or a mob, or a municipal body, or a guild, or a corporation, it will be a case for the Edict. At the same time, though the prætor includes the case of any use of force, no matter by whom, still Pomponius says, with some nice discrimination, that if I accept something from you or induce you to bind yourself to something as a consideration for protecting you against the violence of enemies or brigands or a mob or procuring your liberty, I ought to be amenable to the Edict only where I was myself the author of the violence in question; but, if I had nothing to do with the violence, I ought not to be amenable; I ought rather to be held to have simply received a consideration for my services. 2. Pomponius says further that it is well held by some that the act of manumitting a slave or of pulling down a house, where it is done on compulsion, is one which comes within the scope of the restitution provided by this Edict. 3. Where the prætor says that he will not uphold the act, let us consider how this exactly applies. Now a transaction may in the first place be incomplete [in itself], though the party was put in fear; for instance, take a case where a stipulation is made to repay a loan,

[1] Read *huic* for *hoc*. Cf. M.

but no money is thereupon advanced; or, secondly, it may be complete, as where, on the stipulation being made, the money is advanced, or a debtor who puts his creditor in fear gets thereby a formal release of his debt, or there is some similar act which completes the transaction. Hereupon Pomponius tells us that where the transaction is complete, the party sometimes has a good right to use either an *exceptio* or an action, but where it is incomplete he can only have an *exceptio*. However, I know of an actual case in which certain Campanians by putting a man in fear extorted from him a written promise to pay money, and a rescript was made by the present Emperor to the effect that the party could apply to the prætor for a restitution *in integrum*; whereupon the prætor declared, I being present myself, in the character of assessor, that if the applicant chose to bring an action against the Campanians, such an action was regular, or, if he preferred pleading an *exceptio* to an action brought by them, it could be had. We may gather from this pronouncement of the Emperor, that whether the act is complete or incomplete, an action and an *exceptio* are both equally available. 4. Moreover, if the party wishes, he can have an action *in rem* or *in personam*, the formal release, or whatever kind of discharge he gave, being rescinded. 5. Julianus (*Dig.* 3) expresses the opinion that when a man has procured delivery of a thing by putting in fear, he is compellable not only to give it back, but to give a formal undertaking guaranteeing absence of *dolus*. 6. Although however we hold that an action *in rem* must be allowed, because the thing delivered belongs to the party to whom force was applied, still it is not unreasonably held that, if a man sues for fourfold damages, there is an end of the right of action *in rem*; and the converse holds too. 7. The restitution, that is *in integrum*, to be ordered in pursuance of this Edict by the judge's authority is on this wise:—where delivery of anything was made on compulsion (*vi*), the thing must be redelivered, and, as already said, an undertaking by stipulation given against *dolus*, to provide for the case of the thing having been deliberately damaged; and, if there was a discharge given by way of formal release, the original contractual relation will have to be re-established; in fact, it goes as far as this, that, according to Julianus (*Dig.* b. 4), if it was a case of money being owed, and a formal release was procured by force, then, unless either the money is paid or the position of debtor and creditor is re-established and in pursuance thereof issue is joined in an action, the party must be ordered to pay fourfold. Again, if I was compelled by force to promise by way of stipulation, there

will have to be a formal release of the stipulation. Similarly, if any usufruct or [real] servitude is lost, it will have to be re-established. 8. We may add that since the right of action we are discussing is expressed *in rem*, and does not lead to any coercive measure being applied to the person himself who exercised force, but the prætor's intention is that where anything is done by means of intimidation the right should be re-established against all alike, there is much reason in a remark made by Marcellus on a passage in Julianus, where the latter writer says that, if a surety uses force to extort a discharge of the debt by formal release, there will be no restitution granted of the right of action against the principal debtor, but the surety must be ordered to pay fourfold, unless he himself re-establishes the creditor's right of action against such principal debtor. Here Marcellus's remark is the more sound in law; the right of action, he says, will be good even against the principal debtor, as it is expressed *in rem*.

10 GAIUS (*on the provincial Edict* 4) The following point is clear, that if the sureties are formally released through the act of a principal debtor who puts [the creditor] in fear, an action may be brought against the sureties themselves to make them renew their liability. If I give you a formal release of a stipulation, being compelled thereto by your putting me in fear, it is within the discretion of the judge before whom proceedings are taken under the Edict not only to order the obligation to be renewed in your individual person, but to make you furnish sureties, viz. either the same as before or others no less substantial, and besides this renew any pledges which you gave in the same matter.

11 PAULUS (*Digest of Julianus* 4 makes this note:) If a third person, without any sinister collusion on the part of the surety, has used force to procure that a formal release should be given to such surety, the latter will not be liable to renew the obligation of the principal debtor as well.

12 ULPIANUS (*on the Edict* 11) The other side must restore the children of female slaves, the young of cattle, and produce generally, and all accessions (*causa*); this is not confined to produce already taken, as, if I could myself have realised more, and I was prevented by intimidation, he must make this good too. 1. The following question may be raised: suppose the party who used force himself should have [in return] force used towards him; is it the intention of the prætor that restitution should be ordered at his suit under this Edict of those things the property in which

he transferred to another? Pomponius says (b. 28) that the prætor ought not to assist him: force, he remarks, may be lawfully met with force, and thus he suffered the same thing that he inflicted. Accordingly, if a man compels you by threats to make him a promise, and then I compel him by threats to give you a formal release, there is no case for restitution at his suit. 2. Julianus says that a man who uses force to make his debtor pay him a debt is not liable under this Edict, on account of the nature of the action founded on putting in fear, which requires that loss should have been inflicted; although it cannot be denied that the creditor in question comes under the terms of the *lex Julia de vi* and has lost his right as a creditor.

3 CALLISTRATUS (*on judicial inquiries* 5) There is extant a decree of the Divine Marcus in these words: "The best course for you is, if you think you have any legal demand, to bring it to the test of an action." Here, on Marcianus saying, "I used no violence" (*vis*), the Emperor replied, "Do you think there is no violence except where people are wounded? It is just as much a case of violence wherever it happens that a man who thinks he has a right to something demands to have it given up without going to the Court. Accordingly, if anyone is shown to me to be in possession of or to have taken—recklessly and without judicial authority—anything belonging to his debtor, or money which was owing him, where it was not given him voluntarily by the debtor, and so to have laid down the law for himself in the matter,—he shall forfeit the right of a creditor."

14 ULPIANUS (*on the Edict* 11) Again, if I have a perpetual *exceptio* which protects me against your demand, and, that being the case, I compel you to give me a formal release, this Edict does not apply, because you have lost nothing. 1. If the party refuses to make the restitution, the prætor promises to allow an action against him for fourfold: that is to say, four times the whole value which ought to have come by way of restitution. The prætor deals indulgently enough with the party in giving him an opportunity to make restitution, if he wishes to avoid the penalty. After a year he allows an action for the simple value, and that not as a matter of course, but only on cause shown; 2. an essential point being, in the matter of showing cause, that this action is to be allowed only where no other is available, and, certainly, considering that, in a case of *injuria* inflicted by putting in fear, the right of action lapses in a year, that is, a year reckoned with allowances (*utilis*),

there ought to be some substantial ground to justify this action being still available after the expiration of the year. One example of there being some other right of action is the following: suppose the party to whom force was used is dead; then his heir may have the *hereditatis petitio*, seeing that the party who used force is in possession "as possessor," and, that being so, the heir will not have the right of action founded on putting in fear; true as it is that, if the year were still running, then the heir himself could bring proceedings for the fourfold damages. The reason why the action is given to successors is that it includes indemnity (*rei habet persecutionem*). 3. In this action the question is not whether the party who put in fear is the defendant or someone else; it is enough for the plaintiff to show that threats or force were used to him, and that the result was that the present defendant, although, it may be, no charge can be brought against him, still made gain. The truth is that fear prevents a man from realising the facts; so that it is with good reason that he is not compelled to point out who it was that employed threats or force; accordingly all that the plaintiff is compelled to do is this: he must show that intimidation was practised with the object of making him give someone a formal release for a debt, or deliver property, or in short do something or other. And it ought not to strike[1] anyone as unjust that one man should be condemned to pay fourfold in consequence of an act done by another, because the action is not for fourfold at the outset; it is only so where restitution is refused. 4. This being an "arbitrarian" action, it is open to the defendant to make restitution of the thing at any time before the *arbiter* gives his judgment, in accordance with what has already been said, and, if he declines to make it, it is agreeable to law and justice alike that he should pay fourfold. 5. Sometimes however, even if the case is one of intimidation being practised, the arbiter's decision allows the defendant to get off. Suppose Titius used threats without my privity, and property acquired by such means came into my hands, but it is now, through no illpractice of mine, no longer in existence; will not the judge on motion let me go free? Or suppose the property is a slave, and he runs away from me; if the judge makes me give an undertaking that, should the slave get into my power, I will give him up, then equally I ought to be dismissed from the action, on motion to this effect. Accordingly, some hold that a *bona fide* purchaser who acquires from the party who used force is not liable, nor a donee or a legatee of the

[1] For *videtur* read *videatur*. Cf. M.

property. However, Vivianus maintains very correctly that persons in these positions are bound just as much, as otherwise I should be put to a disadvantage in law by the fact that I was put in fear. Pedius too (b. 18) says that the judge's authority in a case of restitution is such that he may make an order for restitution on a party who used force, though the property has come to the hands of another, or on the man to whose hands it has come, though the intimidation proceeded from another; because no man must be allowed to derive a benefit from the fact that another put someone in fear. 6. Labeo says that if a man is compelled by being put in fear to contract an obligation, and he furnishes a surety who undertakes the office freely, then he and the surety can both be discharged; whereas, where the surety alone made the undertaking under threats, and not the principal, the surety alone will be discharged. 7. What is given fourfold is the value of the matter in hand, including produce and all accessions (*omnis causa*). 8. If a man engages under duress to appear to an action, and then finds a surety, the surety will be discharged as well as the party. 9. If, on the other hand, a man constrains another by duress to make him a promise and, on refusing to execute a release, he is ordered by the judge to pay fourfold, then, if he sues on his stipulation, and is met with an *exceptio*, Julianus holds that he has a good *replicatio*, because the fourfold which the defendant got includes the simple value. Labeo, however, laid down that, even after [he had paid the damages on] the action for fourfold, the party who imposed the duress would none the less be barred by the *exceptio*; but as this appears[1] harsh, it must be so far qualified in practice that he is liable to the penalty of being ordered to pay threefold, and is also in any case compelled to give a formal release. 10. With regard to the above statement that the fourfold damages include the simple value, the principle on which the different amounts are assigned is that the order to pay fourfold of course embraces the matter itself, and thus restitution thereof is effected, but the penalty is maintained to the extent of threefold. 11. How will it be if [the property e.g.] a slave is lost or destroyed without any malice or negligence in the party who used the duress and on whom judgment was passed? In such a case, if the slave dies before an action can be brought on the judgment, there will be the less strictness observed as to enforcing the order, for the fact that the defendant is compelled to give satisfaction for his offence by a threefold penalty. But in the case of a slave who

[1] Read *videatur* for *videbatur*. Cf. M.

appears to have taken to flight, the defendant must be forced to give an undertaking that he will pursue the man and give him up without fail; and even then the party who suffered duress will retain to the full his right of action *in rem*, or for production, or whatever right of action he may have for recovering the slave, so that, if [he] such owner should by any means get the slave back, then, if the other party should be sued in pursuance of the undertaking, he has an *exceptio* which is a complete protection. All this applies where adverse judgment is already given; but should the slave die before the decision without any malice or negligence in the defendant, the latter will still be liable[1]; this follows from the words of the Edict, ["If etc.] and such property is not restored in pursuance of the judge's pronouncement." Accordingly, if the slave has taken to flight without any contrivance or negligence in the defendant to the action, he will have to undertake in pursuance of the order of the judge that he will follow up the slave and hand him over. It must be added that even where the property is gone through no negligence of the defendant to the action, still, if it would not have been lost at all, supposing he had not got it from the other by putting him in fear, he will be liable; this agrees with the practice in the case of an Interdict *unde vi* or *quod vi aut clam*. Hence it sometimes happens that a man will recover the price of a slave who is then dead, where, if he had not suffered duress, he would have sold him. 12. A man who uses duress to me, seeing that he gets possession by my act, is not a thief; though a man who takes by force is a thief with circumstances of aggravation; so Julianus holds. 13. Where a man puts in fear, it is clear that he is liable for *dolus* too—Pomponius says the same thing; moreover whichever action is first brought would be a good bar to the other, if pleaded by way of *exceptio in factum*. 14. Julianus says that the unit which is multiplied fourfold is simply the interest which the plaintiff had, so that if a man who owed forty in pursuance of a *fideicommissum* should promise under duress to pay three hundred and should pay it, he will recover four times two hundred and sixty, as this is the sum with reference to which the duress was really operative. 15. It would follow from this that if several put in fear and an action is brought against one only, then, if the latter makes restitution without further compulsion before judgment, they are all discharged; but, in fact, even if he does not do this, but pays

[1] For *tenebitur*—will be liable—some would read *non tenebitur*—will not be liable. Cf. M.

fourfold in pursuance of the judgment, the better opinion is that in this case too the action founded on putting in fear is at an end as against the others;

15 PAULUS (*on the Edict* 11) or an action will be allowed against the others for the amount by which what is recovered from the one falls short of the whole sum due.

16 ULPIANUS (*on the Edict* 11) As for what was above said in reference to the case of several persons putting in fear, a similar rule holds where the property is transferred to one, but it was another that put in fear. 1. Where slaves put in fear, there will be a noxal action in respect of the slaves themselves, but an [ordinary] action can be brought against an owner [of the slaves], into whose hands the property comes; and if, upon being sued in this action, he either gives up the thing, or, in accordance with what has been said, pays fourfold, this will relieve the slaves too. If however, on being sued in a noxal action, he prefers to surrender the slaves for *noxa*, this will be no bar to an action against him in his own person, if the thing has come to his hands. 2. This action is allowed to the heir of the party wronged, and to his successors generally, since it is an action for indemnity. It is allowed against heirs or successors in general to the extent of what has come to their hands; which is reasonable, for though the liability to a penalty does not pass to the heir, still an advantage gained by dishonourable or outrageous means ought not to be a source of profit to the heir; indeed there is a rescript to this effect.

17 PAULUS (*Questions* 1) Let us here consider this point. Where the heir, after something obtained as above has come to his hands, consumes what has so come, will he cease to be liable, or will the fact that the thing once came make him liable once for all? and, if he dies after consuming it, is there a good right of action against his heir, without further distinction, because he succeeded to a heritable indebtedness, or will no action be allowed because nothing came to the hands of the second heir? The better opinion is that in any case the right of action holds against the heir of the heir; it is enough that the thing once came to the hands of the original heir, and the right of action thereupon becomes permanent. On any other principle we shall have to say that the very heir who consumes what has come to him will not be liable to an action.

18 JULIANUS (*Dig.* 64) Where the actual thing which came to the party's hands is lost or destroyed, he is not, in the language

of the law, enriched, but if it is converted into money or some other kind of property, there is then no further inquiry to be made as to what finally ensues, but the man is held to be enriched once for all, though he should after that lose what he got. The Emperor Titus Antoninus himself, in a rescript addressed to Claudius Frontinus on the valuation of things comprised in an inheritance, declared that he might very well be sued in a *hereditatis petitio* on this very ground, that, although the things which were originally included in the estate were not in his hands, still, the mere[1] value received for the things, seeing that the receipt made him the richer, however often a conversion might have taken place in respect of the individual objects, bound him just as much as if the actual things were still there in their original form.

19 GAIUS (*on the provincial Edict* 4) With regard to the fact that the proconsul promises an action against the heir to the extent only of what comes to his hands, we must understand this to refer to the allowance of a perpetual right of action.

20 ULPIANUS (*on the Edict* 11) On the inquiry how much has come to the hands of the heir, we must consider the question with reference to the time of joinder of issue, supposing it to be clear that anything has come at all. It is the same where something so passes into the general bulk of the property of the party who used the unlawful force that it is certain that it will come to the heir; in short, where a debtor is released.

21 PAULUS (*on the Edict* 11) Where a freedwoman after being guilty of ingratitude towards her patron, knows that this is the case, and, being thus in peril in respect of her status, gives or promises something to the patron, to avoid being reduced to slavery again, the Edict does not apply, because such a case of being put in fear is the woman's own act. 1. Where any act is done under intimidation, the prætor will not treat any lapse of time as a ground for upholding it. 2. Where the applicant delivered possession of land which was not his own, the unit of which he will recover fourfold or the simple amount, as the case may be, with the proceeds, is not the value of the land but the value of the possession of it; the subject of valuation is whatever has to be restored, in short, what the applicant is kept out of, and that is, here, the bare possession with the produce. Pomponius agrees with this. 3. If a *dos* is promised under intimidation, I should say that no obligation arises, there can be no doubt that such a promise of *dos*

[1] For *quo* read *quoque*. Cf. M.

is the same as none at all. 4. If I am compelled through fear to give up a purchase or a *locatio*, it is worth considering whether the transaction is null and void, so that the original contract remains, or the case is to be treated like that of a formal release, on the ground that one cannot in such a case rely on any *bona fide*[1] obligation, any such being lost and so ended; but the better opinion is that the case is like that of a formal release, consequently there is ground for a prætorian action. 5. If I am compelled by fear to enter upon an inheritance, I should say that I become heir, because, although I should have declined if I had had liberty of action, still, being compelled, I had the will to do it; however I ought to get an order of restitution from the prætor, and to be given the power to abstain. 6. If I repudiate an inheritance under compulsion, the prætor offers me two kinds of relief; he either allows *utiles actiones* in which I am put on the footing of heir, or else the action founded on putting in fear, so that it is open to me to adopt whichever course I choose.

22 PAULUS (*Sentences* 1) Where a man thrusts someone into prison in order to extort something from him, whatever act in the law is done under the circumstances is of no force.

23 ULPIANUS (*Opinions* 4) It is not likely that a man would pay in the city under compulsion and unjustly a sum which he did not owe, if he showed that he had the rank of illustrious, inasmuch as he could appeal to the law of the land, and apply to someone endowed with authority, who would at all events have prevented him from having to submit to violence. The above presumption is so plain that in order to have it set aside he must show the clearest possible proofs that violence was used. 1. If a man, under well-grounded terror of a judicial inquiry to which a powerful opponent threatens to bring him in chains, sells, on such compulsion, something which he could have lawfully retained, the matter will be restored to its rightful position by the governor of the province. 2. If a money-lender keeps an athlete in unlawful confinement, so as to prevent him from engaging in his professional contests, and thus compels him to undertake to pay a larger sum of money than he owes, the proper judge will, on proof of these facts, order the matter to be restored to its rightful position. 3. When a man is forcibly compelled, by the employment of the officers of the *præses*, without any judicial proceedings first held, to pay a sum of money to one who claims under an assignment from a

[1] For *bonæ fidei* read *bona fide*. Cf. M.

person to whom the man first mentioned never owed the money, the Court will order the sum illegally extorted to be restored by the party by whom the applicant[1] was wronged. But if he discharged his actual debts on a bare requisition being made and not in consequence of judicial proceedings, then, although the other ought to have recovered the money in the way prescribed by law, and not in an irregular manner, still it is not according to legal principle to reverse transactions which led to the party paying amounts which he owed.

III.

On *Dolus malus.*

1 Ulpianus (*on the Edict* 11) In this Edict the prætor gives assistance against shifty and deceitful people who use some kind of craft to the prejudice of other persons, his object being to secure that the former shall not profit by their cunning and the latter shall not be losers by their simplicity. 1. The words of the Edict are as follows:—"where acts are alleged to be done with *dolus malus*, then, if there is no other action available in the case, and there appears to be sufficient cause, I will grant a trial." 2. *Dolus malus* is defined by Servius as follows:—a contrivance for the purpose of deceiving someone else in which one thing is pretended and another thing is aimed at. Labeo however says that it is possible, even without any pretence, for a man to aim at circumventing his neighbour; and it is possible, he thinks, even without *dolus malus*, for one thing to be aimed at and another pretended, as is done by such as seek to promote or protect their own or other people's interests by the use of this sort of concealment. Accordingly his own definition of *dolus malus* is that it is any craft, deceit, or contrivance, employed with a view to circumvent, deceive, or ensnare other persons. Labeo's definition is correct. 3. The prætor was not content merely to say *dolus*, he added the word *malus* (bad), because the old lawyers used to speak of good *dolus* as well as bad, applying this expression as equivalent to that of "ingenious device," especially where anything was contrived against an enemy or a brigand. 4. The prætor's words are:—"if there is no other action available in the case." The prætor does well to offer this action only where no other is open, as also

[1] For *rei* read *ei*. Cf. M.

action involving infamy ought not to be lightly ordered by the prætor if a civil or prætorian one is available by way of which the party might proceed; so true is this that Pedius himself says (b. 8) that even where there is an Interdict given which a man can sue for, or there is some *exceptio* by which he can protect himself, this Edict will not apply. Pomponius says the same thing (b. 28), and he adds this:—even where a man is secured by means of a stipulation, he cannot have the action on *dolus*; suppose, for example, there were a stipulation against *dolus*. 5. The same writer says further that where no action at all can be granted against a man, for example, where he has been induced by *dolus malus* to promise on stipulation under circumstances so dishonouring to the promisee that no magistrate would allow an action in pursuance of the stipulation, the promisor need not trouble himself to ask for an action on *dolus malus*, because no magistrate would allow an action against him. 6. Pomponius also reports that it was the opinion of Labeo that even where a man can get a restitution *in integrum*, the present action ought not to be open to him; again, that if some other right of action is lost by lapse of time, still the present action ought not to be allowed, as a man who omits to take proceedings in time has himself to blame for it; unless indeed the *dolus malus* was committed with the very object of causing the lapse to take place. 7. Where a man who has some civil or prætorian right of action merges it in a stipulation and then puts an end to it by formal release or by any other means, he can take no proceedings on *dolus*, because he had a right of action of a different kind; unless indeed it was by means of *dolus malus* that he lost the right of action. 8. It is not only where there is some other kind of action admissible against the party whose alleged malicious practice is the subject of inquiry,

2 PAULUS (*on the Edict* 11) or where the matter in hand can be secured by some means or other against him,

3 ULPIANUS (*on the Edict* 11) that this Edict fails to apply, this is equally the case where some other party

4 PAULUS (*on the Edict* 11) is liable to an action [which will meet the case], or where the matter in hand can be secured for me by proceedings in which the opposing party is someone else.

5 ULPIANUS (*on the Edict* 11) Consequently, if a ward is cheated by Titius, the fact being that his guardian acted in collusion with Titius, the ward ought not to have any action on *dolus* against

Titius, because he has the action on *tutela* against his guardian, by means of which he can recover an amount equivalent to his interest. No doubt if the guardian is insolvent, the proper view is that the ward can have the action *de dolo*;

6 GAIUS (*on the provincial Edict* 4) as a man cannot be said to have an action open to him at all, when owing to the other party's want of means his action is worthless.

7 ULPIANUS (*on the Edict* 11) Pomponius somewhat acutely interprets the exception signified by the words "if there is no other right of action" as expressing the case of its being impossible for the matter in hand to be preserved for the person whom it concerns in any other way. It cannot be held that there is anything inconsistent with this view in what is laid down by Julianus (b. 4) that where a minor under twenty-five is induced by the fraudulent advice of his slave to sell him with his *peculium*, and the purchaser manumits him, the minor is allowed an action *de dolo* against the man manumitted, as we must understand the case to be that the purchaser is free from *dolus*, so that he cannot be held liable on his contract; or that the sale is null and void, assuming that the minor's consent to the sale itself was procured by fraudulent manœuvres. The fact that in this case the vendor is supposed to be a minor is no ground for a restitution *in integrum*, as no such relief is allowed to be given against a manumitted person. 1. It follows from the above that where a man can take measures to save himself harmless by an action for damages, the rule to lay down is that the action *de dolo* does not apply. 2. Pomponius indeed says that even if there is only an *actio popularis*, the action *de dolo* is not available. 3. Labeo holds that the action *de dolo* ought to be allowed not only where there is no other action, but even where there exists a doubt whether there is another action or not. He mentions the following cases. A man who owes me a slave, in pursuance, say, of a sale, or a stipulation, makes the slave take poison and then delivers him; or he owes me land, and pending delivery, he imposes a servitude on it, or pulls down buildings, or cuts down or roots up trees; in all these cases, according to Labeo, whether he gave me an undertaking against *dolus* or not, an action *de dolo* is admissible, because, even if he did give such an undertaking, it is doubtful whether there is a good right of action on the stipulation. However the true view is, that, if an undertaking was given against *dolus*, there is no action *de dolo*, because there is an action *ex stipulatu*; if

no such undertaking was given, then, in the case of an action *ex empto*, there is no action *de dolo*, because there is an action *ex empto*, but in the case of an action *ex stipulatu* the action *de dolo* is required. 4. If the bare proprietor of a slave in whom someone else has an *usus* kills the slave, then, besides the action on the *lex Aquilia*, there is an action for production as well, supposing the bare proprietor was in possession when he killed the man; consequently the action *de dolo* does not apply. 5. Again, if a slave is bequeathed by testament, and the heir kills him before entering on the inheritance, then, seeing that the slave was destroyed before he became the property of the legatee, there is no action under the *lex Aquilia*; but there is no action *de dolo*, at whatever time he killed him, because there is a good right of action *ex testamento*. 6. If your beast does me a damage owing to the *dolus* of a third person, the question arises whether I have a good right of action *de dolo* against the latter. For my own part I am satisfied with what we read in Labeo, viz. that, if the party who owns the beast is not solvent, the action *de dolo* ought to be allowed, although, if due surrender was made for *noxa*, I do not think the action ought to be allowed, even for the difference. 7. Again, Labeo asks this question:—If my slave is in fetters and you loose him so as to enable him to run off, have I an action *de dolo* against you? To this Quintus says in a note on Labeo,—if you did not do it out of compassion, you are liable for *furtum*, if you did, the proper action is *in factum*. 8. A slave produces to his owner a person who undertakes to be responsible for the performance of the agreement which the slave makes in consideration of acquiring his freedom, on the understanding, that when the slave becomes free, the liability is to be transferred to him; but on being manumitted the [quondam] slave declines to allow the liability to be transferred. Pomponius says this is ground for an action *de dolo*. But if it is the patron's own fault that the obligation is not transferred, then, he says, the proper view is that the guarantor has a good *exceptio* to bar an action by the patron. A difficulty I have is this: how can an action *de dolo* be given, seeing that there is another action open? It will however perhaps be said that inasmuch as, if the patron proceeds against the slave's guarantor (*reus*), the action will be barred by an *exceptio*, the correct view must be that an action *de dolo* ought to be ordered, on the ground that a right of action which can be defeated by an *exceptio* is no right of action at all; at the same time the patron's action is only barred by the *exceptio* because he does not choose

to accept the manumitted man himself in the place of the guarantor. Of course the man who promised in the place of the slave ought to have an action *de dolo* allowed him against the manumitted man, or if the promisor in question should not be solvent, the original owner will be allowed such action. 9. If my procurator maliciously allows my opponent to get the better in an action, and so my case is dismissed, the question may be asked whether I have a good right of action *de dolo* against the party who thus gained the day. I should say that I have not, so long as the latter (*reus*) is willing to take over the defence of the case, reserving this *exceptio*, "unless there was no collusion" [with the procurator]; but otherwise an action *de dolo* must be allowed, assuming, that is, that it is impossible to proceed against the procurator, in consequence of his insolvency. 10. Again, Pomponius reports that the prætor Cæcidianus refused to allow an action *de dolo* against one who had declared that a particular person to whom a sum of money was to be lent was a substantial person; and in fact the prætor was justified in refusing, as no action *de dolo* ought to be allowed save in a case of gross and plain overreaching.

8 GAIUS (*on the provincial Edict* 4) Where however, knowing that the party was in an impecunious condition, you, with a view to your own gain, declared to me that he was a substantial person, an action *de dolo* will very properly be allowed against you, as you gave an untrue recommendation of a person with the intention of deceiving me.

9 ULPIANUS (*on the Edict* 11) Where a man declares that some inheritance is of very small value, and thereupon buys it from the heir, there is no action *de dolo*, as the action *ex vendito* will suffice. 1. But if you persuade me to repudiate an inheritance, on the alleged ground that it will not pay the creditors, or to choose some particular slave [in pursuance of a legacy], on the ground that there is no better slave in the household, then, I should say, an action *de dolo* must be allowed, supposing you do this with intent to deceive. 2. Again, if a testament is kept concealed for a long time, in order to prevent its being set aside as 'inofficious,' but it is produced one day after the death of the [testator's] son, the son's heirs can take proceedings against the parties who concealed it, both under the *lex Cornelia* and by an action *de dolo*. 3. Labeo says (*Posteriora*, b. 37), if Titius should maintain that oil belongs to him which as a matter of fact is yours, whereupon you deposit the oil with Seius for him to sell it and to keep the purchase-

money until the question is decided between you and Titius which of the two the oil belongs to, after which Titius refuses to join issue in the action,—in this case, seeing that you cannot sue Seius either on *mandatum* or as stake-holder, the condition subject to which the goods were put in his hands not having come to pass, there will be a good action *de dolo* against Titius. However Pomponius says (b. 27) that the stake-holder can be sued in an action *prescriptis verbis*, or, if he should not be solvent, Titius can be sued *de dolo*, and this appears to be a sound distinction. 4. If in pursuance of the judge's intimation in a noxal action you surrender to me a slave whom you had hypothecated to someone else, and accordingly you go free; still you are liable to an action *de dolo*, it being made clear that the slave was really pledged. 4 a. This action *de dolo* is noxal, accordingly Labeo says (*Prætor peregrinus*, b. 30) that, where an action *de dolo* is granted in respect of a slave, it is sometimes *de peculio* and sometimes noxal. If the matter in connexion with which the *dolus* was committed is one for which an action would be given *de peculio*, then an action *de peculio* will be given in the present case; if it is one for which the action would be noxal, this action will be noxal too. 5. The prætor was quite right in inserting the mention of cause to be shown; such an action is not one to be allowed without discrimination; for instance, to begin with, if the amount is small,

10 PAULUS (*on the Edict* 11) that is, not more than two *aurei*,

11 ULPIANUS (*on the Edict* 11) the action ought not to be allowed; 1. moreover there are particular classes of persons to whom it will not be allowed, for example, children or freedmen who desire to sue their *paterfamilias* or patron, the reason being that it involves *infamia*. Nor will it be allowed to a person of low estate against one of superior rank, for example, to one of plebeian *status* against a man of consular rank and acknowledged dignity, nor to a person who is dissipated and extravagant, or in any way of small account, against a man who leads an irreproachable life. Such is Labeo's own opinion. In short, it comes to this, in the case of the persons mentioned, the proper view is that an action should be allowed *in factum*, worded carefully, so as to include a reference to *bona fides*,

12 PAULUS (*on the Edict* 11) because otherwise the persons above-mentioned might gain by their own *dolus*.

13 ULPIANUS (*on the Edict* 11) But the action *de dolo* will be granted to the heirs of the persons excluded, as well as against the

heirs [of the wrongdoers]. 1. We may add that, according to Labeo, one thing held essential when the case is inquired into is that no action *de dolo* is to be allowed against a ward, unless he should be sued in the capacity of heir. In my judgment he can be sued even on the ground of his own *dolus*, supposing he is very nearly of the age of puberty, especially if he is enriched by the transaction;

14 PAULUS (*on the Edict* 11) suppose, for instance, he should prevail on the plaintiff's *procurator* to let the action against him be dismissed, or should obtain money from his guardian on lying pretences, or should be guilty of any similar fraud which requires no elaborate contrivance.

15 ULPIANUS (*on the Edict* 11) I should say too that an action ought equally to be allowed against a ward on the ground of *dolus* committed by his guardian, if he (the ward) is enriched by it; just as in the same case an *exceptio* is allowed [to an action by the ward]. 1. Whether an action *de dolo* is allowed against a municipal body is not clear. I should say that no such action can be allowed on the ground of *dolus* on the part of such a body; how indeed can a municipal body be guilty of *dolus*? Still if anything comes to the municipality through the *dolus* of the agents who manage its affairs, then I should say the action ought to be allowed. But proceedings *de dolo* founded on *dolus* in the members of a *curia* are allowed against the individual members themselves. 2. Again, if anything comes to the hands of a principal through the *dolus* of his *procurator*, an action *de dolo* is allowed against the principal to the extent of what comes to him; of course there is no doubt that the *procurator* is himself liable for his own *dolus*. 3. In this action it ought to be specified whose *dolus* it is by which the thing was done which is the subject of the proceedings, though in a case of putting in fear it is not required.

16 PAULUS (*on the Edict* 11) The prætor also requires that the plaintiff should describe what it is that was done with *dolus malus*; the plaintiff is bound to know what is the business in respect of which he was overreached, and not to shift his ground in making such a serious charge.

17 ULPIANUS (*on the Edict* 11) If several persons act with *dolus*, and one alone makes restitution, all alike are discharged; and if one pays an amount equivalent to the damage suffered, I should say so far that the rest are discharged. 1. This action is

allowed against the heir and successors in general only to the extent of what has come to their hands.

18 PAULUS (*on the Edict* 11) Moreover in this action the discretion of the judge comprises a right to order restitution; and if restitution is not made judgment is thereupon given for an amount representing what the matter is worth to the plaintiff. The reason why no definite limits are laid down as to amount either in this action or in the action for putting in fear is that it is desired to make it possible, where the defendant is contumacious, that the damages which he is ordered to pay should be assessed at the sum which the plaintiff declares on oath to represent the amount of his interest in the matter; though, in both cases, the oath may, on motion to the judge, be kept within limits by taxation of the amount. 1. However, it is not always the case in this action that the restitution of the property has to be left to the discretion of the judge; suppose for instance it should be manifest that no restitution can be made,—as in a case where a slave was transferred to the defendant through *dolus malus* on his part, and then died,—and accordingly that the defendant ought to be at once ordered to pay a sum representing the amount of the plaintiff's interest in the matter. 2. Where the *usufruct* in a block of chambers was left to a legatee and the bare proprietor sets fire to the block, there is no action *de dolo*, because such a case would be a ground for actions of other kinds. 3. In the case of a man who knowingly lent false[1] weights for a vendor to weigh out goods with to a purchaser, Trebatius allowed an action *de dolo*. Here, nevertheless, if the weights lent were heavier than they were supposed to be, the vendor has a *condictio* to recover the amount of goods which he handed over in excess; if they were too light, the purchaser can sue on his contract to have given him the amount of goods still due; unless indeed the goods were sold on the express understanding that the amount to be delivered should be determined by those actual weights, the lender having declared with fraudulent intent that his weights were correct. 4. Where a man contrived by *dolus* that a right of action should be lost by lapse of the statutable period, Trebatius said that an action *de dolo* ought to be allowed, not in order that restitution might be made in pursuance of the judge's intimation, but that the plaintiff might get damages to an amount representing the interest he had in the right of action not being lost; because if the practice were different, it would be a fraud on the statute. 5. Where you promise me a particular slave,

[1] After *pondera* read *iniqua*. M.

and a third person kills him, it is generally held, and very rightly, that an action on *dolus malus* is allowed [me[1]] against the third person, because you are discharged from my demand; for which reason no action will be granted you on the *lex Aquilia*.

19 PAPINIANUS (*Questions* 37) If the surety for a promise to deliver some beast kills it before default on the part of the promisor, then, according to opinions given by Neratius Priscus and Julianus, an action *de dolo* ought to be granted against him, because, as the debtor is discharged, it follows that the surety is freed also.

20 PAULUS (*on the Edict* 11) Your slave owed you money, but had not wherewithal to pay it, whereupon on your instruction he borrowed money from me and paid it to you. Here Labeo holds that an action for *dolus malus* will be granted against you, as, on the one hand, the action *de peculio* is inapplicable, because there is nothing in the *peculium*, and it cannot be said that there is anything spent to the owner's profit (*in rem versum*), because the owner received it in discharge of a debt. 1. If you make me believe that you had no partnership with the person to whom I am heir, and I consequently allow an action against you to be dismissed, according to Julianus I shall have a right to an action *de dolo*.

21 ULPIANUS (*on the Edict* 11) If, on my tendering an oath, you swear that you are not liable, and you are let go free, but after that you are proved to have committed perjury, then, says Labeo, an action on *dolus* must be allowed against you; but Pomponius thinks that the view to hold is that the use of the oath amounts to a compromise, which opinion is upheld by Marcellus (*Dig.* 8): if you appeal to a man's conscience, you must abide by it (*stari religioni debet*).

22 PAULUS (*on the Edict* 11) In fact the penalty affixed to perjury is enough.

23 GAIUS (*on the provincial Edict* 4) If a legatee whose legacy is in excess of what the *lex Falcidia* will allow him to retain should, while the *heir* is still uninformed as to the amount of the assets, induce him to believe, either by volunteering to swear or by some other deceitful contrivance, that the testator's estate is amply sufficient for paying the legacies in full, and should by that means get his own legacy paid in full, an action is allowed *de dolo*.

24 ULPIANUS (*on the Edict* 11) If it is contrived by the *dolus* of a man who acts as spokesman in behalf of someone who has

[1] M.

instituted proceedings for having his freedom established in law, that a decision which the Court makes in favour of liberty should not be given in the presence of the other party, I should say that an action *de dolo* can be allowed against him at once, because a decision once pronounced in favour of liberty is not allowed to be reconsidered.

25 PAULUS (*on the Edict* 11) I brought an action against you for payment of money, and issue was joined accordingly, whereupon you induced me to believe, contrary to the fact, that you had paid the money to my slave or my *procurator*, and by that means you procured that the case should be dismissed, with my consent. The question being asked on my side whether there would be an action *de dolo* allowed against you, it was held that such an action could not be allowed, because I can have another remedy; as I can have a fresh trial, and if I am met with the *exceptio* of *res judicata*, I shall have a lawful *replicatio*.

26 GAIUS (*on the provincial Edict* 4) The proconsul promises to allow the action in question against the heir to the extent of what comes to his hands, that is to say, the extent to which the inheritance is the richer by the matter in hand when it comes to him,

27 PAULUS (*on the Edict* 11) or would have been, except for his use of *dolus malus* to prevent it.

28 GAIUS (*on the provincial Edict* 4) Consequently if a formal discharge is given you [by means of your own *dolus*], there will be a good action against your heir without more. But if property was delivered to you, then, if the thing delivered is existing at the time of your death, there will be an action against your heir, if it is not existing, there will not. However the right of action against the heir will be, in any case, without limitation of time, as he must not be allowed to profit by another man's loss. And it is in keeping with this that as against the person himself who acted with *dolus* an action *in factum* must be allowed without limitation of time to the extent to which he is enriched.

29 PAULUS (*on the Edict* 11) Sabinus holds that the heir is sued rather on the principle of making good a deficiency (*calculi ratione*) than on the ground of malfeasance, and, in any case, he does not incur infamy; consequently that his liability ought to be without limitation of time.

30 ULPIANUS (*on the Edict* 11) And where the action is asked for against the heir, no special cause need be shown.

31 PROCULUS (*Epistles* 2) If any one induces my slaves to abandon possession of property, possession is not lost, but the party is liable to an action *de dolo malo*, if I incur any damage.

32 SCÆVOLA (*Digest* 2) A legacy *per præceptionem* of a slave was made to a son of the testator, with a request that he would manumit the slave after a specified interval, if he should have in the meantime handed in his accounts to such son and his brothers who were coheirs with him. Hereupon the legatee (i.e. the son) gave the slave his liberty by manumission, viz. by *vindicta*, before the day mentioned, and before the accounts were rendered. The question was asked whether the legatee was liable on the *fideicommissum* at the suit of his brothers to send them in the accounts which concerned them corresponding to their respective shares in the inheritance. My answer was that as the legatee had actually set the slave free, he was not liable on the ground of *fideicommissum*; but if he had hurried on the manumission with the object of avoiding sending in accounts to his brothers, they could have recourse to an action *de dolo* against him.

33 ULPIANUS (*Opinions* 4) A man being in possession of property which he was offering for sale, his opponent instituted proceedings against him to determine the question of ownership, and, after having thus prevented him from closing with a purchaser to whom the property might have been sold, abandoned the action. It was held that the party in possession had in virtue of these facts a good right of action *in factum* to indemnify himself.

34 THE SAME (*on Sabinus* 42) If you give me leave to quarry stone on your land, or to dig for chalk or sand, and I thereupon go to expense in the matter, but you refuse after that to let me take anything away, the only action that will apply in the case is that on *dolus malus*.

35 THE SAME (*on the Edict* 30) Where a party in whose custody a written testament is deposited mutilates or spoils it in any way after the death of the testator, the person named heir will have a good action *de dolo* against him. Indeed the persons to whom legacies are given will have similar rights of action.

36 MARCIANUS (*Rules* 2) If two parties both practise *dolus* they cannot thereupon bring actions against one another.

37 ULPIANUS (*on Sabinus* 44) A thing said by a vendor by way of puffing his goods is treated as not said, and as constituting no engagement; and if the vendor said it in order to deceive the purchaser, still the proper construction is that no right of action results in regard to anything said or promised, but only an action *de dolo*.

38 THE SAME (*Opinions* 5) A debtor causes a letter to be sent to his creditor purporting to come from Titius, in which the request is made that he (the debtor) may be released, whereupon the creditor, being deceived by the letter, releases the debtor by means of an Aquilian stipulation and a formal discharge. If after this the letter is shown to be forged or beside the purpose, a creditor over twenty-five will have an action *de dolo*, one under that age will get a restitution *in integrum*.

39 GAIUS (*on the provincial Edict* 27) If you offer yourself to Titius [as defendant to an action which he brings] about a thing which in reality you do not possess, your object being that some one else may acquire it by *usus*, and you give security that the decree shall be obeyed, then, even though the action against you should be dismissed, still you will be liable for *dolus malus*; this is held by Sabinus.

40 FURIUS ANTHIANUS (*on the Edict* 1) A man who deceives someone else in order to induce him to enter on an inheritance which will not pay the charges on it will be liable for *dolus*, unless it so chance that he was a creditor himself and the only one; in that case it is enough that there is an *exceptio* of *dolus malus* in bar of any action on his part.

IV.

ON PERSONS UNDER TWENTY-FIVE.

1 ULPIANUS (*on the Edict* 11) This Edict the Prætor propounded in deference to natural justice, undertaking by means of it the protection of persons of immature age. All are agreed that the judgment of persons of that time of life is deficient in soundness and strength, and exposes them to be taken at a disadvantage in many different ways[1]; and for this reason the Prætor promises them his support in the present Edict, and his assistance against

[1] Dele *multorum insidiis expositum*. M.

imposition. 1. The words of the Edict are :—"in the case of any transaction which I hear to be executed with one under twenty-five years of age, I will deal with it according to the circumstances of the particular case." 2. It appears then that the Prætor promises assistance to those under twenty-five ; of course after that age it is well-known that manly vigour has reached maturity. 3. Accordingly, at the present day, up to that age young men are under the guidance of curators, and they will not be allowed to take in hand the management of their own affairs, even though they should be such as conduct them well.

2 THE SAME (*on the lex Julia et Papia* 19) Even the fact of having children will not enable minors to get[1] the control of their affairs out of the hands of their curators at an earlier time. As for what is laid down in sundry statutes that a year is remitted for every child, this, as the Divine Severus declares, refers to capacity for holding a public office, not to the question of a minor acquiring control over his affairs.

3 THE SAME (*on the Edict* 11) Moreover the Divine Severus and the present Emperor have construed decrees of consuls or *præsides* resembling the above statutes as being made with a private object of their own, these Emperors themselves having very rarely used their exceptional powers to indulge minors with permission to manage their own affairs ; and with this the present practice agrees. 1. Where a man makes a contract with a minor, and the contract takes effect at some time subsequent to that of the minor reaching full age, do we look at the beginning of the transaction or the end? The rule is, indeed it has been so enacted, that if a man, after reaching full age, confirms what he did when under age, there is no case for restitution *in integrum*. Accordingly it is with a nice attention to legal principle that Celsus (*Epistles* b. 11 and *Digest* b. 2) lays down the law on a point raised by a statement of fact as to which he was consulted by Flavius Respectus the Prætor. A person under twenty-five years, let us say aged twenty-four, had commenced proceedings in an action on *tutela* against the heir of his guardian ; and what happened thereupon was that the action against the heir, as the case was stated, was dismissed, the plaintiff having, before the trial was finished, already reached the full majority of twenty-five years ; whereupon a restitution *in integrum* was asked for. Upon this Celsus gave his opinion to Respectus to the effect that the *quondam* minor in

[1] Read *recipiant* for *recipiat*. Cf. M.

question ought not, as a matter of course, to get restitution *in integrum*; it ought only to be given if it were shown that the defendant had cunningly contrived to get himself discharged from the action at a time when the plaintiff had already reached full age; "and it was not," he said, "only on the last day of the trial that the minor was deceived in this case, but the whole of the other party's proceedings were a contrivance for securing that he should be discharged from the action only after the plaintiff reached full age." But Celsus goes on to admit that if there are only slight grounds of suspicion that the other party has acted with *dolus* in the matter, the plaintiff ought not to get restitution *in integrum*. 2. I know also that there was such a case as the following. A man under twenty-five had intermeddled with his father's inheritance, and, having reached full age, he had accepted payment from certain debtors to the estate; after which he applied for an order of restitution *in integrum*, in order to be able to renounce the inheritance. It was urged on the other side that after reaching full age he had confirmed the step which he took when he was a minor; however we held that he ought to get restitution *in integrum*, having regard to the commencement; and I should hold the same where a minor entered on the inheritance of a stranger. 3. A point to consider is whether we ought to say that a person is under twenty-five years of age even on his birthday before the very hour at which he was born, so that if he should be imposed on he may get restitution. As to this, since up to that time he has not completed the age in question, the rule is that we must reckon the time from moment to moment. Similarly if he is born on a day which is doubled by intercalation (*bissexto*), Celsus tells us that it makes no difference whether he is born on the earlier or the later day; the two days are treated as one, and it is the latter of the two[1] which is held to be intercalated. 4. We may next consider whether relief ought to be given only to persons *sui juris* or to persons under *potestas* too. What causes some hesitation is that if it should be said that the Court must go so far as to relieve one under *potestas* in respect of a matter which regards his *peculium*, the result will be that through him we shall be relieving a person of full age as well, that is the party's father, a thing which the Prætor by no means intended; the Edict promises aid to persons under age, not to those of full age. However I should say myself that the most correct opinion is that of those who hold that a *filiusfamilias* who is under age may have restitution *in integrum*

[1] Del. *kalendarum*. Cf. M.

in those cases only in which he has an interest of his own, as for example where he is himself bound by some *obligatio*. Accordingly, if he contracted an obligation by his father's order, then his father of course can be sued for the whole amount; and, as for the son, seeing that he can be sued himself, though he should be living under *potestas*,—or, even after he should be emancipated or disinherited, to the extent of his ability to pay,—and, in fact, that when he is living under *potestas*, he can be sued upon a judgment even against the will of his father, [—considering, I say, all this,] he will have a good claim to an order for relief, if he should be sued himself. Still, whether this relief will at all benefit the father himself,—for example in the way in which the practice sometimes is to make it a benefit to a surety for the son,—is a question to consider; my own opinion is that it will not. Accordingly, if the son is sued, he can ask for relief, (though if the creditor sues the father, no relief is given,) except in the case of a loan; if the son received money by his father's order for this object, i.e. by way of loan, he is not relieved. Similarly, if the son made the contract and was put to a disadvantage, then, if the father is sued *de peculio*, the son will not have a right to restitution; but if the son himself is sued, he can get the order. I attach no weight to the fact that the son may be said to have an interest in possessing a *peculium*; the fact is the father has a greater interest in it than the son, although there may be a case in which the son has a direct concern in it; for example, where his father's property is taken possession of by the revenue department for a debt; in which case, by the enactment of Claudius, the *peculium* is to be separated for the son's benefit [from the general property of the father]. 5. In accordance with the above, even if a *filiafamilias* should be taken in in respect of her *dos*, because she consented to her father's stipulating, some time after giving the *dos*, for the return of it or finding someone else to stipulate for it, I think she ought to get restitution, because the *dos* is the peculiar patrimony of the daughter herself. 6. Where a man under twenty-five has procured himself to be arrogated, but he now alleges that he was imposed upon in the matter of the arrogation,—suppose, for instance, that he was a person of means, and was arrogated by someone whose object was plunder,—I should hold that his application for restitution *in integrum* ought to be entertained. 7. Where a legacy is given or a *fideicommissum* left to a *filius-familias* under age, [payable] after his father's death, and he

suffers a disadvantage, in consequence, let us say, of consenting to the act of his father in agreeing [with the heir] that no action shall be brought for the legacy, it may fairly be said that he has a right to institution *in integrum*, seeing that he has an interest of his own on account of his expectation of the legacy, which he has a right to receive after his father's death. We may add that if a legacy is left him which is personal to himself, for instance, a legacy of a military appointment, the rule is that he can get restitution *in integrum*, as he has an interest in not being disappointed in respect of it, seeing that he does not acquire it for his father, but has it for himself. 8. Where a minor is appointed heir on condition that his father emancipates him within a hundred days, whereupon he ought to inform his father, but he omits to do so, though quite able to do it, whereas his father would have emancipated him if he had been aware of the facts,—the proper view is that he can get restitution *in integrum*, if his father is ready to emancipate him. 9. Pomponius adds that in any case in which a *filiusfamilias* would get restitution in respect of a matter which regards his *peculium*, the father himself can on the same grounds, in right of the son, get leave to be heard after the son's death, as if he were heir to his son. 10. But in the case of a *filiusfamilias* who has a *castrense peculium*, there is no doubt at all that, in respect of matters which touch the *castrense peculium*, he has a right to restitution *in integrum*, on the ground that it is his own patrimony in regard to which he has been put to a disadvantage. 11. A slave under twenty-five cannot get restitution under any circumstances, as it is the person of his owner that is taken into consideration, and the latter must reckon it his own folly, if he entrusted the matter to one under age. Hence even if he contracts through a boy under the age of puberty, the same rule applies, as Marcellus himself says (*Dig.* 2). Again, if a slave under age should be allowed the free disposition of his *peculium*, an owner of full age will not on the strength of that fact get restitution.

4 AFRICANUS (*Questions* 7) The reason is that whatever the slave transacts under these circumstances he is to be regarded as transacting with the consent of the owner. This will come out more clearly if the question arises in connexion with an institorian action, or the case is one in which a person over twenty-five years of age commissioned a minor to transact some piece of business and the party so commissioned was deceived in the matter.

5 ULPIANUS (*on the Edict* 11) If however the slave was one who had a claim to immediate manumission in pursuance of a *fideicommissum*, and he is taken in, then, seeing that default is made in the matter to his prejudice, it may very well be said that the prætor is bound to come to his aid.

6 THE SAME (*on the Edict* 10) Persons under twenty-five years of age are relieved by restitution *in integrum*, not only where they suffer some loss of property, but also where they have a personal interest in not being worried with litigation and expense.

7 THE SAME (*on the Edict* 11) The prætor's words are, "any transaction which I hear to be executed." The word "transaction" (*gestum*) is applied irrespective of the precise circumstances, it may be a case of contract, or of something else. 1. Accordingly, where a minor buys, or sells, or enters into a partnership, or borrows money, if he is put to a disadvantage he will get the assistance. 2. Again, if money is paid him by a debtor, either of his father's estate or his own, and he loses it, the proper view is that he will get the relief, on the ground that the transaction was with himself. Accordingly, if a minor sues a debtor, he ought to have curators with him, if he wants to have the money paid him; otherwise the defendant will not be compelled to pay it him. However, the present practice is for the money to be deposited in a temple, as Pomponius mentions (b. 28), (for fear lest either the debtor should be burdened with the payment of excessive interest, or the creditor who is under age should lose his money), or else for payment to be made to the curators, if there are any. There is in fact Imperial legislation on the subject which allows a debtor to compel a person of immature age to apply to have curators appointed. However, what is to be said in case the prætor orders the money to be paid to the minor without curators, and the party pays? will the latter be sure of protection? This point is not quite clear; however, I should say that if he was compelled to pay after alleging that the other was under age, he cannot be made responsible any further; unless indeed it is suggested that the proper course for him is to appeal on the ground that the prætor's order was a legal wrong. But I do not believe that if a minor asked for restitution *in integrum* under these circumstances the prætor would give him a hearing. 3. A minor is not relieved in the above cases only, but also where he intervenes as a third party, for instance, where he binds himself or pledges his property in the character of

surety. On this point Pomponius appears to agree with those who distinguish between the case of the person in question being approved of by an arbiter appointed for the special purpose of judging of proposed sureties and the case of his being simply accepted by the other party. But I should say that a person ought to get relief irrespective of this distinction, if he is really a minor, and shows that he has been overreached. 4. Relief is also given in connexion with trials at law whether the party who suffered a disadvantage was plaintiff or defendant. 5. Again, if a minor has taken up an inheritance that is more unprofitable than he thought, aid is given him so as to enable him to renounce it; as this is a clear case of being put to a disadvantage. The same rule applies to a *bonorum possessio* or any other form of succession. Not merely a son who has intermeddled with his father's estate, but any member of the household whatever who is under age can get an order of restitution; for example, a slave who should be appointed heir and given his liberty; the proper view being that, if he intermeddled, he can be relieved in consideration of his immature age, and so be enabled to keep his own property separate. Of course, when a person gets restitution after he has entered on the inheritance, he is bound to make good any part of the estate which he can follow into his own property and which has not been lost or destroyed through his youth and inexperience. 6. According to the present practice it is well established that minors are relieved even where they are disappointed of profit. 7. Pomponius indeed says (b. 28) that if a man declines a legacy, even without ill-practice on any one's part, or is unlucky in respect of the legacy of an option, because he chooses the worse of two things, or promises someone to give him one or other of two things, and thereupon gives the one which is the more valuable, he has a right to relief; and as a matter of fact relief ought to be given. 8. In consequence of the view being held that minors have a claim to relief even where they are disappointed of profit, the question has been asked whether, supposing something belonging to the minor is sold, and there is a person forthcoming who is ready to make a better offer, the minor will get restitution *in integrum*, in consideration of the gain which he missed. As to this it is quite a common thing for the praetor to grant the order, so as to allow the biddings to be opened; and he does the same thing in the case of property which ought to be kept unsold in the interest of minors. But it should be done with circumspection; otherwise no one would have anything to do with purchasing the property of

wards, even if the sale were in good faith. And it is a rule which deserves thorough approbation that, in respect of things which are exposed to unforeseen mischief, a minor has no claim to relief against a purchaser, unless a case of corrupt behaviour or clear partiality is shown on the part of a guardian or curator. 9. If, after getting the order, he intermeddles with the inheritance, or enters on one which he had declined, he can thereupon get an order once more to enable him to give it up; there are rescripts and responses to this effect. 10. But with regard to the remark of Papinianus (Resp. 2) to the effect that if a slave is substituted to a minor as compulsory heir, then, if the minor declines the inheritance, such slave will be compulsory heir, and, if the minor after that gets an order for restitution, will notwithstanding remain free, but, if the minor enters on the inheritance and then gives it up, the slave who was appointed substitute to him, with liberty, cannot become heir nor be free,—this is not altogether accurate. If the inheritance will not pay the debts, and the heir [appointed in the first place] declines to take it, then the succession goes to the substituted compulsory heir, as both the Divine Pius and the present Emperor laid down by rescript; speaking, as a matter of fact, of the case of a boy under fourteen being appointed heir who was a stranger to the family. When Papinianus goes on to say that the *quondam* slave remains free, this seems to imply that he does not remain heir too,—[I am speaking of the case] where the boy under age gets an order for restitution after once declining the inheritance;—the fact being that, seeing that the boy does not become heir, but only has *utiles actiones*, there is no doubt that the man who once became heir will remain heir. 11. Again, if a minor did not appeal within the proper time, he is aided so far as to be enabled to appeal; it may be assumed that this is what he desires. 12. Similarly he is aided in case of adverse judgment against him for default of appearance. However, it is undoubted law that men of any age can have a new trial after judgment in default, if they show that they were absent with good ground.

8 HERMOGENIANUS (*Epitomes of law* 1) Even where judgment is pronounced against a minor on the ground of contumacy, he can ask for the relief of restitution *in integrum*.

9 ULPIANUS (*on the Edict* 11) If, in pursuance of a judgment, goods of a minor are taken in execution and sold, and after that he gets restitution against the decree of the Præses or Imperial procurator, it is worth considering whether the things which were

sold ought not to be recovered; it is quite certain that where his money was paid in pursuance of the judgment it will have to be restored. In truth, the minor has an interest in recovering the goods themselves rather than their value, and I should say that this must sometimes be allowed, that is if the minor would otherwise suffer serious loss. 1. A married woman too is relieved in respect of the amount of her *dos*, if she has been inveigled into giving more than her means will bear, or perhaps has given her whole property. 2. We may next consider whether minors are relieved only where they are put to a disadvantage in respect of contracts, or it applies equally where they commit delicts; for instance, suppose a minor was guilty of some *dolus* in connexion with a deposit or a loan or any case of contract, will he be relieved if nothing comes to his hands by it? As to this the law is that minors will not get relief in respect of delicts; so that none is given in the cases mentioned. As a matter of fact, if a minor commits a theft or does damage to property, he will not be relieved. Still, if, in a case where after committing damage he could have avoided payment of double damages by confession, he chose to deny his act, restitution will[1] be allowed him so far only as to enable him to be treated as if he had confessed. On the same principle, if it was in his power to settle for the loss he occasioned as thief so as to avoid an action for twofold or fourfold damages, he will be relieved. 3. If a married woman, after being divorced through her own fault, desires this relief, or a husband does the same, I should say no restitution can be had, as the case is one of a serious offence; in fact, the law is that if adultery is committed by a minor, the relief is not given. 4. Papinianus says that if a person over the age of twenty but under twenty-five allows himself to be sold into slavery, that is, if he shares the price, it is not the practice to grant restitution; this is perfectly right, as the case does not admit of restitution, the status of the party being changed. 5. If a minor appears to have incurred a forfeiture for non-payment of duty, there will be an order for restitution *in integrum*. But this must be understood to be on the assumption that there is no wilful misconduct in the case on the part of the minor; otherwise the restitution will not be granted. 6. Add that it is inadmissible that a minor should be relieved by the prætor against the acquisition of liberty by his slave,

10 PAULUS (*on the Edict* 11) except where he obtains this indulgence from the Emperor on very special grounds.

[1] Read *est* for *sit*. Cf. M.

11 ULPIANUS (*on the Edict* 11) But there will be an action *de dolo* or an *utilis actio* for an amount representing the interest which the minor had in the slave not being manumitted; accordingly whatever would have been his if he had not executed the manumission will have to be made good to him. Moreover, in respect of such things as the manumitted slave made away with, but which belonged to his owner, there are good rights of action against him for production, or for theft, by way of *condictio*, for the reason that he 'handled' them after he was free; but where the delict was committed during the time of slavery, the owner has no right of action for it against the thief after the latter has acquired his freedom: this is comprised in a rescript of the Divine Severus. 1. How are we to deal with the case of an owner under the age of twenty-five but over twenty selling a slave on the understanding that he is to be manumitted? I say over twenty, because it is stated by Scævola himself (*Questions* b. 14), and it is the better opinion, that the rule laid down in the rescript of the Divine Marcus addressed to Aufidius Victorinus does not embrace this case, I mean that of a minor[1] over twenty. We have to consider then whether relief is not given to one over twenty years of age; and the answer is that if he asks for restitution before the slave's freedom is acquired, his application will be entertained, but if he only does so afterwards, it cannot. On the other hand it may be asked whether where the party himself who purchases on the above understanding is a minor, he cannot get restitution. Here again, if the slave's freedom is not yet acquired, the proper view is that he may be relieved; but if he only applies after the day agreed upon has arrived, then the intention of the vendor, if he is himself more than twenty years[2] of age, carries the gift of freedom. 2. A question was asked on a statement of fact as follows. Certain young men under twenty-five had received as curator a man named Salvianus; who, after discharging the duties of the curatorship for some time, came to be appointed a city procurator by the gift of the Emperor, and after that obtained an order from the prætor in the absence of the minors releasing him from the curatorship. Hereupon the minors applied to the prætor and asked for restitution *in integrum* against Salvianus, on the ground that he had been released contrary to legislative enactments on the subject. It was not the practice, so they maintained, for persons to be relieved of guardianships which they had once

[1] For *minorem* read *majorem*. Cf. M.
[2] After *majoris* read *viginti annis*. M.

undertaken, except such persons as were beyond seas on business of the state, or were employed in the direct service of the Emperor, an example of relief given on such a principle being the case of Menander Arrius the *consiliarius*; nevertheless Salvianus had been excused his duties, so that they the minors had been put to a disadvantage, and accordingly they claimed to get restitution *in integrum* from the prætor. Ælius Severus was in doubt how to deal with the application, and referred it to the Emperor Severus, who, being thus consulted, sent a rescript to Venidius Quietus, the successor of Ælius, to the effect that there was no case for the prætor's interference, it not being stated that any contract had been made with a person under twenty-five; but the usual course, he said, was for the Emperor himself to interpose, and order the party to resume the duties of curator, where he had been wrongfully excused by the prætor. 3. I must not omit to say that minors are not relieved as a matter of course, but only on cause shown, in a case where it appears that they have been put to a disadvantage. 4. Moreover, if a man, after carrying on his affairs in a judicious manner, asks for restitution in consequence of some loss which took place not through his own heedlessness, but by unavoidable accident, he will not get the order; it is not the mere occurrence of loss that procures a man the indulgence in question, but his want of heed and caution. This is the same as what Pomponius says (b. 28). Accordingly there is a note by Marcellus on Julianus as follows: if a minor buys a slave that he is in need of, and after that he [the slave] dies, the minor has no claim to restitution; he was not put to any disadvantage about the purchase of a piece of property which he could not possibly do without, though no doubt the slave was mortal. 5. Where a man becomes heir to someone of ample means, and the estate of the deceased unexpectedly goes to ruin, for example there are farms which are destroyed by a landslip, houses are burnt down, or slaves run away or die,—Julianus uses language (b. 46), implying that if the heir is a minor, he will get restitution *in integrum*; but Marcellus in his notes to Julianus declares that restitution would not be given; as the party was not taken in in any way owing to the heedlessness of youth when he entered on a rich inheritance, and the accidental mishaps that took place might very well have been experienced by any householder of full age, however careful. But a minor might have a claim to restitution in such a case as this: suppose he entered on an inheritance containing a number of pieces of property liable to be lost by death, or, say, containing

land with buildings on it, but on the other hand subject to a heavy debt; and he did not anticipate any probability of its coming to pass that slaves died or buildings fell in; or he was not sufficiently quick in selling such things as are exposed to different kinds of accidents. 6. A further question is this:—is the application of one minor to be entertained where he asks for restitution against another? In Pomponius the answer given is simply No; however, my own opinion is that the prætor ought to inquire which of the two was put to disadvantage, and if both were, for example, one minor lent money to another and the latter lost it, in that case, according to Pomponius the one who borrowed the money, and then squandered or lost it, has the better claim. 7. No doubt, if a person under age contracts with a *filiusfamilias* of full age, then, according to the opinion expressed by Julianus (*Dig.* b. 4) and Marcellus (*Dig.* b. 2) he can get restitution *in integrum*, so that the rule about age is more attended to than the *Senatusconsultum* [*Macedonianum*].

12 GAIUS (*on the provincial Edict* 4) If a woman intervenes to make herself liable at the suit of a minor in the place of some third person, no action will be allowed the minor against the woman, he will, in fact, like anyone else, be barred by an *exceptio*, for the reason that the ordinary law gives him restitution in respect of his right of action against the original debtor. This is on the assumption that the original debtor is solvent, otherwise the woman cannot avail herself of the benefit of the *Senatusconsultum* [*Velleianum*].

13 ULPIANUS (*on the Edict* 11) An essential point to consider when cause has to be shown is whether relief should be given to the minor alone or it is to be extended to others who are bound along with him, for instance, sureties; the truth is that if I knew the party was a minor, and I did not feel that I could trust him, but you were surety for him, it is not just that the surety should be relieved and I be ruined, rather the surety himself ought to be refused the action on *mandatum*. The short rule is that it will be for the prætor to weigh well the question which of the two he is most bound to relieve, the creditor or the surety; as for the minor who suffers disadvantage, he will be liable to neither. There is less difficulty in saying that relief should not be given to a *mandator*, as you may say that his assertions and encouragement procured the contract to be made with the minor. This may well lead to the question whether a minor ought to ask for restitution

in integrum against the creditor or against the surety too. The safer course would, I should say, be to ask for it against both; the question of ordering restitution *in integrum* should be weighed on cause shown and in the presence of the parties, or in their absence where such absence is wilful. 1. Sometimes the Court goes so far as to give a minor restitution *in rem*, that is, against the man who is in possession of his property, though he was not party to any contract. For instance, you purchased something from a minor and sold it to a third person; here the minor has a right in some cases to ask for restitution against the person in possession, lest he should lose his property or go without his property, the course followed being that either the prætor hears the case, or else the transfer is set aside and an action *in rem* is allowed. Pomponius tells us (b. 28), that in Labeo's opinion, where a person under twenty-five sells and delivers land, and the purchaser transfers it on to a third person, then, if the second purchaser was aware that the facts are as stated, restitution will be ordered against him; but if the second purchaser was not aware, and the first purchaser is solvent, the order will not be made; if the first purchaser is not solvent, the fairer course is to relieve the minor even to the prejudice of a second purchaser who had no notice although he purchased *bona fide*.

14 PAULUS (*on the Edict* 11) No doubt as long as the party who purchased from the minor, or the heir of such party, is a substantial person, no decree should be made to the prejudice of the *bona fide* purchaser of the property, and this is laid down by Pomponius himself.

15 GAIUS (*on the provincial Edict* 4) Of course, where restitution is granted, a subsequent purchaser can come upon his own vendor, and a similar rule holds if there are several successive purchasers.

16 ULPIANUS (*on the Edict* 11) A further point to consider, when the case comes on, is this, whether there may not be some other kind of action open short of one for a restitution *in integrum*; because if the party is sufficiently protected by the ordinary remedies and by direct law, he ought not to be allowed extraordinary relief; take, for instance, the case of a contract being made with a ward without the concurrence of the guardian, where the ward is not the richer by it. 1. Again, it is stated in a book of Labeo's that if a minor is inveigled into contracting a partnership,

or even where he affects to assume the position gratuitously, no real partnership is contracted, nor would there be any even if the parties were of full age, and consequently there is no case for the prætor's intervention. Ofilius too lays down the same rule; because the party is sufficiently protected in direct law. 2. Again Pomponius has the following (b. 28): an heir was required to hand over sundry things to his brother's daughter [a minor], subject to the condition that, if she died without children, she should restore them to the heir, and, the heir dying, she undertook to restore them to *his* heir: on which facts Aristo held that she had a right to restitution *in integrum*. But Pomponius goes on to say this, that the undertaking given could be made the subject of a *condictio incerti* even by a person of full age; in point of fact the person, he says, enjoys security not at once without more, but by means of a *condictio*. 3. In short the general rule must be held to be that where the contract itself is invalid the prætor ought not to interfere in respect of a matter which is clear in law. 4. Pomponius further says that in purchase and sale the contracting parties are free to take advantage of one another about the price, upon principles of natural law.

5. We may next consider the question who can grant orders for restitution *in integrum*. Restitution may be granted by the prefect of the city and by other magistrates so far as this corresponds with their general jurisdiction, relief being thus given against their own decisions as well as in other cases.

17 HERMOGENIANUS (*epitomes of law* 1) The *præfectus prætorio* can also give restitution *in integrum* against his own decision, although there is no appeal from his court. The reason why this distinction is made is that an appeal amounts to a complaint that the decision is unjust, but in an application for restitution *in integrum* the party is really asking to be relieved from the consequence of his own want of judgment, or alleges that he has been overreached by his opponent.

18 ULPIANUS (*on the Edict* 11) But an inferior magistrate cannot give restitution against the decision of a superior: 1. and if the Emperor has pronounced a decision, he very rarely allows restitution, or permits a man to be introduced into his council-chamber to say that he was put to a disadvantage owing to youthful want of judgment, adding, it may be, that grounds which were in his favour were not brought forward[1], or complaining that he was betrayed by

[1] For *dicta non allegat* read *dicat non allegata*, M.

his counsel. For example, the Divine Severus and the Emperor Antoninus refused to listen to Glabrio Acilius, who, without alleging any special grounds, asked for an order of restitution against his brother after the case had been heard to the end in the Imperial chamber. 2. Nevertheless, when Percennius Severus asked for restitution[1] *in integrum* in opposition to two decisions already given, the Divine Severus and the Emperor Antoninus allowed both matters to be made the subject of an inquiry before them. 3. The same Emperor informed Licinnius Fronto by rescript that it was not usual for any one except the Emperor himself to give restitution *in integrum* after a decision pronounced on appeal by a judge who took the Emperor's place. 4 Moreover, if the case has been heard by a judge assigned by the Emperor, restitution can only be given by the Emperor, who himself appointed the judge. 5. Restitution *in integrum* is granted not only to minors but to the successors of minors as well, though they should themselves be of full age.

19 THE SAME (*on the Edict* 13) Sometimes however the successor of the minor will be given a longer time than the year for taking proceedings, as the Edict itself says, if his own age chance to furnish ground for it; as after the age of twenty-five he will have the regular period; he may indeed be said to have been put to a disadvantage in respect of the fact that whereas he had a claim to restitution within the time which was given with reference to the deceased, he did not apply for it. No doubt if the deceased had [only] a short portion remaining of an *annus utilis* [365 available days], his[2] heir, if under age, will be allowed for the purpose of getting restitution, after the completion of his own twenty-fifth year, not the whole of the time laid down [sc. a year], but only so much time as the minor to whom he is heir himself had remaining.

20 THE SAME (*on the Edict* 11) Papinianus says (*Responsa* 2) that when a man comes home from exile he ought not to be allowed any prolongation of the time laid down for restitution *in integrum*; because while he was absent it was in his power to apply to the prætor through a *procurator*, but he said nothing; or he could have applied to the *præses* in the place where he was. Where however this writer goes on to say that the party has forfeited all claim to relief by reason of the punishment inflicted on him, this is incorrect; what connexion is there between criminal

[1] After *restitui* insert *desiderante, cas res.* M.
[2] Read *hujus* for *hujc.* Cf. M.

conduct and an excuse given on the ground of youth? 1. But if a person who is over twenty-five should within the period laid down for restitution carry his suit on as far as *litis contestatio*, and after that discontinue the proceedings, the *litis contestatio* will not be of any use to him towards procuring restitution *in integrum*; this is laid down in a great many rescripts.

21 THE SAME (*on the Edict* 10) However, a man is not held to discontinue a matter when he merely postpones further steps, but only when he abandons the case altogether.

22 THE SAME (*on the Edict* 11) Where restitution is asked for so as to revoke an entry on an inheritance on the part of a minor, the minor will not have to refund any portion of the estate which he has spent in discharge of legacies, or the value of slaves who may have acquired their liberty by means of his entry. Similarly, in the converse case, where a minor gets restitution for the purpose of making an entry, then any transactions executed by the *curator* of the goods appointed by the Prætor's order in due form of law for the purpose of making the proper sales must be upheld, according to the rescript of Severus and Antoninus addressed to Calpurnius Flaccus.

23 PAULUS (*on the Edict* 11) Where a *filiusfamilias* carries on business in pursuance of a mandate from his father, he cannot have the benefit of restitution, in fact, even if the mandate had been given him by a stranger, he would not have this relief, because the result would be that the person whose interest was chiefly promoted would be a person of full age, who would have been the one exposed to loss in the matter. Where however the fact is that the loss will eventually fall on the minor, because he is unable to recoup himself for such expense as he incurs by having recourse to the person whose business he carried on, on the ground of that person's insolvency, then, no doubt, the Prætor will interpose. But should the principal himself be under age and the *procurator* be of full age, the principal will not easily get a hearing, except where the transaction is carried on by his mandate, and he cannot indemnify himself by having recourse to his *procurator*. Hence we may add that if a minor is imposed upon when acting as *procurator*, the principal ought to bear the loss, as it was his own folly that he put his affairs in the hands of such an agent. This is Marcellus's own opinion.

PAULUS (*Sentences* 1) But if a minor meddles of his own accord with the affairs of a person of full age, he can get restitution, so as to prevent loss happening to the latter. But if he declines to do this, then, if he should be sued on *negotia gesta*, he will have no restitution against the action; indeed he may be compelled to assign to the principal any right that he has to relief by way of restitution *in integrum* [against a third party] so as to make the principal "*procurator* on his own behalf," in order to enable him by that means to make good the loss which he incurred through the minor. 1. However, transactions carried on with minors ought not to be as a matter of course rescinded, they ought simply to be put on a footing of fairness and justice; or else persons of that unadvanced time of life would be put to great inconvenience, as no one would conclude any contracts with them, and they would virtually be under an Interdict as to all dealings with property. Consequently, the Prætor cannot interpose unless they have been clearly overreached, or have acted with extreme[1] carelessness in the matter. 2. Our master Scævola used to say this: where a man, owing to the thoughtlessness of youth, neglects or declines an inheritance or a *bonorum possessio*, then, if everything remains as it was, his application for the order ought by all means to be entertained; but if, after the inheritance is sold and the affairs wound up, he comes and asks for the money which has been got in by the exertions of a substitute, he must be refused a hearing; and in such a case the court ought to be much stricter still about giving restitution to the heir of a minor. 3. If a slave or a *filiusfamilias* should impose on a minor, the owner—or the father—ought to be ordered to restore whatever comes to his hands; what does not come to his hands he must make good out of the *peculium*: if neither of these two resources is found sufficient, and there is wilful misconduct in the case on the part of the slave, the latter should either be punished with stripes, or surrendered for *noxa*. We may add that if the *filiusfamilias* is equally guilty, he is liable to have judgment pronounced against him on the ground of his misconduct. 4. Restitution ought to be so carried out that everybody recovers his legal position unimpaired. Accordingly, where a person gets restitution who was imposed upon in respect of a sale of land which he made, the Prætor will order that the purchaser should restore the land with mesne profits, and that the purchase-money should be returned

[1] For *tam* read *admodum*. Cf. M.

him,—unless he paid it knowing that the applicant would get rid of it, as a man does in the case of money which is lent for the borrower to spend; but the relief is less readily given in connexion with a sale, as the purchaser pays the vendor a debt, which he is compellable to pay him, whereas nobody is compellable to lend money; and, even admitting that the circumstances under which the contract was made were such that it is liable to be set aside, still, if payment of the price could be compelled, there is no reason why the purchaser should be exposed to loss as a matter of course. 5. This Edict gives rise to no special action or undertaking, the whole thing depends on the prætor's estimate of the facts.

25 GAIUS (*on the provincial Edict* 4) There is no doubt about this point, that if a minor pays something which he does not owe, under circumstances which give him no[1] claim by civil law to demand to have it returned, he has a right to an *utilis actio* to recover it; seeing indeed that the practice is to give an action for recovery, if sufficient grounds are shown, even to those over twenty-five. 1. In the case of a young man who has a good right to restitution, it ought to be given on his own application, or given to his *procurator*, where the latter has received an express mandate for the purpose; but where the applicant only avers that he has a general mandate for carrying on his principal's affairs of every kind, he ought not to be heard.

26 PAULUS (*on the Edict* 11) But if there is any doubt about the special mandate, when the party applies for restitution, he can put the matter on a satisfactory footing by means of a promise by stipulation that the principal will ratify the proceeding. 1. And in case of the absence of the party who is alleged to have taken advantage of the minor, any one who takes up his defence will have to give security that the judgment will be obeyed.

27 GAIUS (*on the provincial Edict* 4) Restitution ought in any case to be granted to a father on behalf of his son, though the son himself should be unwilling to have it, because the father's interest is at stake through his liability to an action *de peculio*. From this it is clear that relations and relations-in-law in general are in a different position, and that they have no right to be heard, except where they apply for the order with the consent of the minor, or where the manner of life of the minor himself is such that

[1] Some would read *deneganda* for *danda*. Cf. M. This would alter *no claim* into *a claim*.

an interdict may reasonably be issued taking from him the management of his property. 1. If a minor borrows money and then squanders it, the Proconsul is bound to refuse to grant his creditor an action against him. But if the minor lends it to some one who is in circumstances of destitution, nothing further ought to be done than to order the young man to assign to his own creditor such rights of action as he has against the person to whom he lent the money. Again, if he should spend the money in the purchase of land at a higher price than it ought to cost, the way to arrange the matter will be to order that the vendor shall restore the price and take back the land, so that the creditor himself who lent the money to the minor may recover what is due to him without loss to any one else. By this example we learn in fact what the practice ought to be where the minor buys something with his own money at a higher price than it ought to cost; only it must be remembered that both in this and the above case the vendor who gives back the price must pay in addition whatever interest he got or might have got for the money he received, and will have a right to recover mesne profits so far as the minor is the richer by them. And, conversely, if the minor sells for a lower price than the property ought to fetch, the purchaser must be ordered to restore the land with mesne profits, and the minor must give back so much of the price as represents the extent to which he is the richer by having received it. 2. If a person under the age of twenty-five gives his debtor a formal release without any consideration (*sine causa*), he will get restitution of his right of action not only against the debtor himself but against the sureties and in respect of any securities that were given him. If he had two correal debtors, and he gave a formal release to one, his right of action will be restored against both. 3. By this we learn that if he should novate his contract to his own loss, for example, by transferring the liability, by way of novation, from a substantial debtor to a person of no means, he can get restitution so as to recover his right of action against the former debtor. 4. Restitution ought to be granted even against those persons on whose *dolus* no action is allowed to be brought, except so far as some persons are exempted by a special statute.

28 CELSUS (*Digest* 2) Where a person under twenty-five gets restitution against one whom he sued in an action on *tutela*, it does not follow that the guardian himself will have restored to him the right to the counter action on *tutela*.

29 MODESTINUS (*Responsa* 2) Where a ward can be shown to have been put to a disadvantage, even if it was with the concurrence of his father, who is also his guardian, [it is held that] if he afterwards has a curator given him, there is nothing to prevent this latter asking for restitution *in integrum* on the boy's behalf. 1. A female ward, having had judgment given against her in an action founded on curatorship, desired to get restitution with reference to one particular point in the decree, whereupon, seeing that she appeared to have been successful as to the remaining points in the case as tried, the plaintiff, who was a person of full age although he at first acquiesced in the judgment, now maintained that there ought to be a new trial altogether. Hereupon Modestinus's opinion was, that if the particular matter as to which the ward desired restitution *in integrum* was independent of the other matters comprised in the case, there was nothing in the case entitling the plaintiff to a hearing, in respect of his prayer that the whole judgment should be set aside. 2. Where a party gets restitution *in integrum* by reason of his minority and in virtue thereof repudiates his father's inheritance, but none of the father's creditors are present or are summoned by the Præses to take any proceedings, it is a fair question whether the restitution can be held to have been properly granted. Modestinus's opinion was that as it was part of the case that an order of restitution *in integrum* was given without the creditors being made parties, the order was no bar to an action by the latter.

30 PAPINIANUS (*Questions* 3) An emancipated son omits to ask for *possessio contra tabulas*, and, after having commenced the requisite proceedings for restitution, sues for a legacy under his father's testament, being then over twenty-five. Hereupon he is regarded as abandoning the case; since, even supposing the period for procuring *bonorum possessio* were still running, still, after he has elected to go by the will of the deceased, the indulgence held out by the prætor must be regarded as rejected.

31 THE SAME (*Responsa* 9) Where a woman, after becoming heir to a deceased person, got restitution on the ground of her youth in order to enable her to decline the inheritance, I gave it as my opinion that any slaves forming part of the estate whom she had in due form manumitted in pursuance of a *fideicommissum* would retain their freedom; they would not, I added, be compelled to pay twenty *aurei* as the price of retaining it, as they had acquired freedom in a thoroughly legal way. The fact is that even if some

of the creditors had recovered their money from her before she got the order of restitution, no claim on the part of the others against those so receiving payment, with a view to having the money shared amongst them, would be held admissible.

2 PAULUS (*Questions* 1) A person under the age of twenty-five applied to the Præses, and satisfied him by his personal appearance that he was of full age, contrary to the fact; but his curators, knowing that he was a minor, continued to manage his affairs. Some time after the above decision as to his age, but before he had reached the age of twenty-five, money that was owing to the youth was paid him, and he spent it unprofitably. I wish to ask who bears the loss; and supposing the curators themselves had laboured under the same misapprehension, ever since the decision was arrived at, that is, they thought that he was of full age, and they had accordingly relinquished the management, and, in fact, sent in their accounts as curators,—in such a case, would they have to bear the risk of the period which elapsed since the moment when the minor was [falsely] assumed to be of full age? My answer was:—as for the persons who paid their debts, they were released by direct law and cannot be sued over again. There is no doubt that curators who knew the party to be under age, and still continued to execute their office, ought not to have allowed him to receive the debts owing to him, and they are liable to an action in respect of it. If however they gave credence to the decision of the Præses, and ceased to carry on the management, or even went so far as to submit their accounts, they are in the same position as any other debtors, consequently they are not liable to be sued.

3 ABURNIUS VALENS (*Fideicommissa* 6) If a person under twenty-five is requested [in a testament] to manumit a slave of his own, who is, as a matter of fact, worth more money than the amount which is left the minor by way of legacy in the same testament, and the minor accepts the legacy, then, according to a *responsum* of Julianus, he is not compellable to give the slave his liberty, if he is prepared to return the legacy; so that just as a man of full age is free to decline the legacy, if he is unwilling to manumit, so the party in question is excused from the duty of manumitting if he returns the legacy.

4 PAULUS (*Sentences* 1) If a person under twenty-five lends money to a *filiusfamilias* who is also under age, the one who spends the money is in the better position, unless [he] the borrower is found to be the richer for the loan at the time of *litis contestatio*.

1. Where minors have arranged to submit their case to arbitration by a given judge, and have stipulated for performance of the award with the concurrence of their respective guardians, they have a good right to ask for restitution *in integrum* against the obligation so contracted.

35 HERMOGENIANUS (*Epitomes of law* 1) Where property is knocked down to a minor but he is outdone by means of a better offer made by another person, the minor will be heard on an application for restitution *in integrum*, if it is shown that he had an interest in becoming the purchaser, for example because the property in question once belonged to his ancestors; but this is only on condition that he himself gives the vendor the amount of the excess on the fresh offer.

36 PAULUS (*Sentences* 5) A person under twenty-five who has omitted to make some averment can recover the opportunity of making it by the help of a restitution *in integrum*.

37 TRYPHONINUS (*Disputations* 3) The relief consisting in restitution *in integrum* was not provided for the purpose of enforcing penal damages, consequently where a minor has once omitted to bring an action for *injuria*, the opportunity cannot be recovered by this means. 1. Again, in a case where the sixty days are passed within which a man can accuse his wife of adultery, by the right of the husband, without the proceeding being vexatious, restitution *in integrum* will be refused: indeed, if he were now to seek to recover the right of which he had omitted to avail himself, how would this differ from a request to be excused the commission of a delict, namely that of vexatious proceedings? And inasmuch as it is an ascertained rule of law that the prætor ought not to give any relief in respect of delicts or for the benefit of vexatious litigators, the restitution *in integrum* will not be granted. In the case of delicts a person under twenty-five will not get restitution *in integrum*; at any rate in the case of aggravated delicts, except to this extent, that sometimes consideration for youth may induce a judge to inflict a milder penalty. But, to come to the provisions of the *lex Julia* for punishing adultery, a man who confesses that he has committed that offence has no right to ask for a remission of the penalty on the ground that he was under age; nor, as I have added, [will any remission be given] where he commits any of those offences which the statute punishes in the same way as adultery; as, for example, where he marries a woman who was convicted of adultery, he knowing the

fact, or where his own wife was detected in adultery, and he declines to dismiss her, or where he makes a profit of her adultery, or accepts a bribe to conceal illicit intercourse which he detected, or lends his house for the commission of adultery or illicit intercourse therein; youth, as I said, is no excuse in the face of plain enactments in the case of a man who, though he appeals to the law, himself transgresses the law.

38 PAULUS (*Decrees* 1) Æmilius Larianus bought from Ovinius the Rutilian plot, subject to a *lex commissoria* (conditional avoidance, i.e. on non-payment by such a day), and paid part of the price, the understanding being that if within two months from the purchase he should not have paid half the balance of the purchase money, the sale should be rescinded, and again, if, within another two months, he should not have paid over the amount then remaining, the sale should equally be rescinded. Before the expiration of the first two months Larianus died and was succeeded by Rutiliana, a girl under twelve, and her guardians failed to make the required payment within the time. The vendor, after repeated reminders to the guardians, when more than a year had passed, sold the property to [one] Claudius Telemachus; whereupon the ward applied for a restitution *in integrum*, and having been unsuccessful, both in the Prætor's Court and in that of the City Prefect, she appealed. My own opinion was that the judgment she appealed from was right, because it was her father who made the contract, and not she herself; but the Emperor was influenced by the consideration that the day when the sale was to be rescinded arrived in the girl's time [i.e. after the father's death], and it was by her own default that the terms of the sale were not observed. I suggested that a better ground for allowing her restitution was the fact that the vendor by reminding the guardians after the day on which it was agreed that the sale might be rescinded, and asking for his purchase-money, might be said to have abandoned the condition in his favour; but I said I did not attach any weight to the fact that the time had lapsed after the death of the father, any more than I should to the fact of the creditor [of a minor] selling an article pledged where the time for payment had lapsed after the death of the debtor. However, as the Emperor did not like the *lex commissoria*, he decreed restitution *in integrum*. There was another consideration which weighed with the Emperor, namely that the original guardians who had omitted to ask for restitution had been pronounced untrustworthy (*suspecti*). 1. With regard

to the alleged rule that it is not usual for relief to be given to a *filiusfamilias* after he is emancipated, supposing he is still under age, in respect of neglect attributable to him while under *potestas*, this is only the case where the result might otherwise be that he would acquire for the benefit of his father.

39 SCÆVOLA (*Digest* 2) Within the available time for asking for restitution, certain minors applied for the order before the Præses and satisfied the judge as to their age. The question of age being decided in their favour, the opposing parties, in order to prevent further prosecution of the case in the Court of the Præses, appealed to the Emperor; and the Præses, pending the result of this appeal, postponed the further hearing. Thereupon the question arose;—if, when the inquiry on appeal in the Emperor's court is terminated, the appeal is dismissed, and the minors are found to have by that time passed the age of minority, can they proceed to finish the case [in the Court below], it not having been their fault that the matter was not brought to a conclusion? My answer was that, taking the facts as stated, the case would go on just as if the applicants were still under age. 1. A plot of land belonging to a minor being put up for sale by his curators, one Lucius Titius was purchaser, who remained in possession for six years, and made the property far and far away better than it had been; my question is whether the minor has a right to restitution *in integrum* against the purchaser Titius, his curators being substantial persons. I answered that, taking the whole of the facts stated, the minor could hardly have restitution, unless he chose to make good to the purchaser all the expense which the latter could prove that he had incurred in good faith, especially considering that he was provided with a resource ready to hand, as his guardians were persons of substance.

40 ULPIANUS (*Opinions* 5) A person under twenty-five recovered judgment to the effect that a *fidecommissary* legacy should be paid him; whereupon he gave an acknowledgment that he had received it, and the [heir as] debtor gave him an undertaking to pay it, as if he had borrowed the money. In this case the minor can get restitution *in integrum*; he had acquired a right to sue for money in pursuance of a judgment, and now, by means of a fresh contract, he has converted that right into a claim to originate proceedings in a different kind of suit. 1. A person under twenty-five made over without sufficient reflection land of his father's in discharge of debts incurred by the latter which appeared in the accounts

relating to his management of the affairs of third persons to whom he had been guardian. In this case matters must be restored to an equitable footing by a restitution *in integrum*; the transferee being credited with the interest due for the money which appears to be payable in connexion with the guardianship, and the amount being set off against the profits which he derived from the land.

41 JULIANUS (*Digest* 45) Where a minor has been imposed upon in respect of a sale of land, and the judge orders that it shall be restored to him, and that he shall give back the price to the purchaser, but the minor changes his mind and declines to avail himself of the order for restitution *in integrum* pronounced in his favour, then, if the purchaser sues for the purchase-money, as it were on the ground of a judgment, the minor will be allowed a good *exceptio* in bar of the action, since everybody is at liberty to disregard what was introduced for his own benefit. The purchaser[1] will have no cause for complaint if he is put back into the position in which he was placed by his own act, and which he could not have altered if the minor had not prayed the aid of the Prætor.

42 ULPIANUS (*on the office of Proconsul* 2) The Præses of a province can give restitution *in integrum* even against his own decree or that of his predecessor in office; because minors obtain by reason of their youth the same advantage which is given to persons of full age by allowing them to appeal.

43 MARCELLUS (*on the office of Præses* 1) The age of a person who alleges that he is over twenty-five must be ascertained by a formal inquiry, because the investigation may be a bar to an application for restitution *in integrum* by the person in question, as well as to other proceedings.

44 ULPIANUS (*Opinions* 5) It is not every kind of transaction by persons under twenty-five which is liable to be upset, but only those which on inquiry turn out to be such that[2] the applicant was overreached by some one else, or deluded through his own credulity, and so either lost something which he possessed, or missed the opportunity of making some gain which he might have made, or laid himself under the burden of some obligation which it was open to him to decline to undertake.

[1] For *venditor* read *emptor*. Cf. M.
[2] After *deprehensa sunt* insert *ut* (Ruecker).

45 CALLISTRATUS (*Monitory Edict* 1) Even where an unborn child fails to succeed to property owing to some one acquiring it by *usus* before the child's birth, according to Labeo, he can get restitution of his right of action. 1. The Emperor Titus Antoninus laid down by rescript that where a minor alleged that his opponent had been dismissed from a suit owing to the fraud of his (the applicant's) guardian, and he desired to take fresh proceedings against the same defendant, it was open to him to begin by suing his guardian.

46 PAULUS (*Responsa* 2) Where a man volunteers to take up the defence of a minor in a trial, and judgment is pronounced against him, he can be sued on the judgment, and the youth of the person whose defence he took up will not constitute any case for getting restitution, as judgment is a ground of action to which he cannot demur. From this it appears that the minor himself, in whose behalf he suffered the adverse judgment, cannot pray the relief of restitution against the decision.

47 SCÆVOLA (*Responsa* 1) A guardian who was pressed by creditors sold property of his ward in good faith, but the mother of the ward addressed to the purchasers a protest against the sale. I wish to ask, seeing that the property was sold under pressure from the creditors, and no reasonable allegation can be made of corrupt dealing on the part of the guardian, whether the ward can possibly have restitution *in integrum*. My answer was that this must be determined by judicial inquiry into the circumstances, but that if there were [otherwise] sufficient grounds for restitution, such relief ought not to be refused simply because the guardian was guilty of no misconduct. 1. The curator of certain minors sold pieces of ground of which he himself and the youths whose curator he was were owners in common; I wish to know, supposing these youths get an order from the Prætor for restitution *in integrum*, whether the sale will be rescinded only to the extent of their shares in the common property. My answer was, that it would be rescinded only to that extent; unless, indeed, the purchaser desired that the whole contract should be abandoned, on the ground that he would not have bargained for a share only. A further question I wish to ask is this: would the purchaser have to recover his money with interest from the wards, Seius and Sempronius, or from the heir of the curator? I replied that the heirs of the curator were liable, still actions would be allowed against Seius and Sempronius to the extent of the shares which

they had in the land, at any rate if the purchase-money which had been received had come to their hands to a corresponding amount.

48 PAULUS (*Sentences* 1) If a minor gets restitution *in integrum* in respect of some suretyship which he undertook, or a mandate which he gave, this does not release the principal debtor. 1. A minor sells a female slave; if the purchaser manumits her, the minor cannot thereupon get restitution *in integrum*, but he will have an action against the purchaser for the amount of his interest. 2. Where a woman under the age of twenty-five finds her position made the worse by an agreement to give *dos*, and she has in fact entered into an agreement such as no woman of full age would ever enter into, which she therefore wishes to rescind, her application ought to be entertained.

49 ULPIANUS (*on the Edict* 35) If property of a ward or a minor is sold, there being no statute forbidding the sale, the sale is valid; at the same time, if it involves a serious loss to the ward or the minor, even though there was no collusion in the case, the sale may be rescinded by restitution *in integrum*.

50 POMPONIUS (*Letters and various passages* 9) Junius Diophantus greets his friend Pomponius. A person under twenty-five intervened with the intention of novating a contract [by substituting himself as debtor] on behalf of an existing debtor, this latter being liable to an action which would be extinguished by lapse of time, and as to which there were then ten days more to run; after which the minor got restitution *in integrum*;—will the renewed right of action, which is given to the creditor against the original debtor, be for ten days or for a longer time? What I have maintained is that so much time ought to be given, reckoning from the day of the restitution *in integrum*, as had been remaining originally. I wish you would let me know in writing what is your own opinion. The answer was:—I certainly think that what you held with reference to the limited right of action in respect of which a minor intervened, is the better opinion, and consequently the security which the former debtor gave will also remain available.

V.

ON *capitis minutio.*

1 GAIUS (*on the provincial Edict* 4) *Capitis minutio* is a change of *status.*

2 ULPIANUS (*on the Edict* 12) This Edict refers to such cases of *capitis deminutio* as occur without affecting a man's right of citizenship: when a *capitis deminutio* occurs which involves loss of citizenship or loss of liberty, the Edict will not apply, and the person concerned cannot be sued in any kind of action; of course an action will be allowed against persons into whose hands the property of those in question has passed. 1. The Prætor says:— "Whatsoever man or woman, after becoming party to any contract or transaction, shall appear to have suffered *capitis deminutio,* I will allow an action against him or her, just as if such *capitis deminutio* had not taken place." 2. Persons who suffer *capitis deminutio* will still remain subject to a natural obligation in respect of such grounds as occurred before the *capitis deminutio*; but if the grounds occurred afterwards, it is the other party's own folly for entering into a contract with the person in question, so far as the words of this Edict are concerned. There are cases, however, in which an action will be allowed where a contract was made with a person after he suffered *capitis deminutio*; and, in fact, if it is a case of arrogation, no difficulty arises, as the party can contract an obligation just as much as any [other] *filiusfamilias.* 3. No one can get rid of his delicts, in spite of undergoing *capitis minutio.* 4. Where a man arrogates his debtor, the right of action against the debtor will not be renewed on the latter becoming *sui juris.* 5. The right of action above given is not subject to limitation, and the right and the liability pass to the respective heirs.

3 PAULUS (*on the Edict* 11) When children go with their *paterfamilias* on the latter being arrogated, it is held that they suffer *capitis deminutio,* as they come under some one else's *potestas* and they change their family. 1. When a son or any one else [under *potestas*] is emancipated, he clearly incurs *capitis deminutio,* because no one can be emancipated without first being reduced as a matter of form to a servile condition: this is very different from

the case of a slave being manumitted, because a person in bondage has no legal position at all, consequently none can be altered ;

4 MODESTINUS (*Pandects* 1) in fact he only begins to have any status on the occasion itself.

5 PAULUS (*on the Edict* 11) Loss of citizenship amounts to a *capitis minutio*, as in the case of "Interdiction of fire and water." 1. Persons who make "defection" incur *capitis deminutio* : (defection is said to be made by such as withdraw themselves from those under whose command they are, and bring themselves into the category of enemies ; also by those whom the Senate has pronounced to be enemies, or [has made such] by means of a special statute:) at any rate such persons so far suffer *capitis deminutio* that they lose their citizenship. 2. We may now come to the question what it is that is lost by *capitis deminutio* ; and we may first of all take that *capitis deminutio* which occurs without affecting a man's citizenship, and by means of which it is acknowledged that a man's position in matters of public law is not taken away. For instance, it is certain that a man will remain a magistrate or a senator or a judge.

6 ULPIANUS (*on Sabinus* 51) In fact any other office which the party holds under government continues as before; as [this] *capitis deminutio* puts an end to a man's private rights and those connected with his family position, not those connected with citizenship.

7 PAULUS (*on the Edict* 11) Guardianships too are not lost through *capitis deminutio*, except such guardianships as come to persons living under some one else's *potestas*. Accordingly guardians appointed by testament, or in pursuance of a [modern] statute, or a senatorial decree, will remain guardians in spite of the *capitis deminutio* : whereas statutable guardianships founded on the Twelve Tables are annulled on the same principle as statutable heirships resting on the same foundation, both being conferred on agnates, who cease to be agnates when their families are changed. But both heirships and guardianships founded on recent statutes are for the most part given in such terms that the persons to receive them are pointed out by describing their natural position; for instance, there are senatorial decrees which confer the inheritance on mothers and sons as such. 1. Obligations founded on *injuria*, and in fact any which give rise to actions *ex delicto*, are attached to the individual. 2. If a *capitis deminutio* occurs involving

loss of liberty, no renewal [of a right of action] is admissible as against the slave, because, even as a matter of prætorian jurisdiction, a slave cannot be under an obligation so as to be liable to be sued; but, as Julianus tells us, an *utilis actio* will be allowed against his owner, and, if the owner does not choose to defend the case for the whole amount claimed, there must be an order enabling the plaintiff to take possession of such property as the slave had [when he was free]. 3. Similarly where citizenship is lost, there is no acknowledged principle of justice allowing restitution against a man when he loses his property and leaves the city and so goes into exile destitute.

8 GAIUS (*on the provincial Edict* 4) Obligations, the fulfilment of which is regarded as a matter of natural law, it is obvious cannot be avoided by *capitis deminutio*, as no civil principle can entail the destruction of natural rights. Accordingly the right of action for *dos*, which is framed with express reference to principles of right and justice, will still hold good even after a *capitis deminutio*;

9 PAULUS (*on the Edict* 11) so that if a woman comes to be emancipated, she may still one day bring the action.

10 MODESTINUS (*Differences* 8) If a legacy is left[1] of a sum to be paid every year or every month, or there is a legacy of a *habitatio*, it falls through on the death of the legatee, but on the occurrence of a *capitis deminutio* it will continue uninterrupted; for the reason that a legacy such as named depends on fact rather than law.

11 PAULUS (*on Sabinus* 2) There are three kinds of *capitis deminutio*, the greatest, the middle, the least; seeing that there are three positions a man may have, liberty, citizenship, and family status. Accordingly where men lose all these three, that is, liberty, citizenship, and family status, it is always held that this amounts to the greatest *capitis deminutio*; where they lose citizenship but retain liberty, it is the middle, and where liberty and citizenship are both retained, but family position alone is changed, it is understood to be the least *capitis deminutio*.

[1] For *legatum...relictum* read *legato...relicto*. Cf. M.

VI.

GROUNDS ON WHICH RESTITUTION *in integrum* IS ALLOWED TO PERSONS OVER TWENTY-FIVE YEARS OF AGE.

1 ULPIANUS (*on the Edict* 12) No one will refuse to admit that this Edict is founded on very sufficient grounds; where a man's legal position has been affected to his detriment at a time when he was attending to the service of the State, or was involved in some misfortune, there is a remedy given; on the other hand, relief is given against persons so circumstanced, in order that what has come to pass may have no effect to their advantage or to their disadvantage. 1. The words of the Edict are as follows:—"Where any part of any one's property appears to be lost by non-user, when he is absent owing to fear, or, without fraudulent contrivance, in the service of the State, or is in prison, or in slavery, or in the power of the enemy; or subsequently[1] to such circumstances; or it appears that any one's right to bring an action is barred by time; also where a man has acquired ownership of something by *usus*, or has acquired anything which has been lost[2] by want of *usus*, or has been released from liability to an action by reason of the right of action of the other party being barred by time, the fact being that the person in question himself was absent and undefended, or was in prison, or had provided no means by which he could be sued, or there was some legal obstacle to his being cited to appear against his will, and no one took up the case in his place; also where it shall appear that, after an appeal was made to a magistrate or some one with the powers of a magistrate[3], the right of action was lost by delay without any ill contrivance on the appellant's own part;—in all these cases—I will order restitution *in integrum* of the right of action [at any time] within a year after it was first possible to make an application on the subject; and further, if any other just ground shall be shown me, I will give the same relief, so far as the order shall be in accordance with statutes, plebiscites, decrees of the Senate, and edicts and ordinances of the Emperors."

2 CALLISTRATUS (*Monitory Edict* 2) This Edict—so far as[4] it applies to those persons who are mentioned therein—is not now in

[1] After *potestate* read *posteave non utendo deminutum esse.* M.
[2] For *amisit* read *amissum est* or *sit.* Cf. M.
[3] For *sive cui pro* read *prove.* Cf. M.
[4] Read *quoad* for *quod.*

frequent use, as justice is administered in the case of such persons by procedure *extra ordinem* in pursuance of decrees of the senate and imperial constitutions. 1. The section we are considering first relieves those persons who were absent through fear; provided, that is to say, the fear causing their absence was not mere groundless alarm.

3 ULPIANUS (*on the Edict* 12) A man is held to be absent through fear who is absent because he is reasonably in terror of death or bodily torture, and this must be judged by seeing what is his actual state of mind; but it is not enough that the alarm which kept him away should be simply any state of terror,—the matter has to be investigated by the judge.

4 CALLISTRATUS (*Monitory Edict* 2) [The Edict relieves] secondly those who have been absent, without *dolus malus*, on the service of the State. The fact of *dolus malus*, as I understand it, affects the application of the rule in this way, that where a man was able to come back and declined to do so, he is not relieved as to anything that happened to his prejudice during his absence; if, for example, he deliberately took means to be absent in the service of the State for the sake of securing some other particular advantage[1], the privilege in question is withheld;

5 ULPIANUS (*on the Edict* 12) or suppose he contrived to be absent by taking pains for the purpose, even without an eye to gain, or set out earlier than he needed, or managed to be absent on State service in order to improve his position as a litigator. The proviso as to *dolus malus* applies to those who are absent on State service, it does not extend to such as are absent through fear; in fact, if there is any *dolus*, it is not a case of fear. 1. Persons who are acting on State service in Rome itself are not absent on State service;

6 PAULUS (*on the Edict* 12) for instance, magistrates.

7 ULPIANUS (*on the Edict* 12) It is true that soldiers quartered in Rome are treated as being absent on State service.

8 PAULUS (*Short notes* 3) A legate of a municipality is also relieved in pursuance of the ordinance of the Emperors Marcus and Commodus.

9 CALLISTRATUS (*Monitory Edict* 2) Relief is also given to a man who was in chains. This expression does not refer only to a man who is confined in the way of legal imprisonment, but

[1] *et* del. Hal.

includes the case of one who is kept in duress by robbers or brigands or any application of overpowering force. The word chains is to be taken in a wide sense; it is held that even persons who are merely in confinement, e.g. in the stone-quarries, are to be considered "in chains"; it makes no difference whether a man is kept in durance with walls or with fetters. However Labeo holds that the word imprisonment must be taken to mean only imprisonment in due course of law.

10 ULPIANUS (*on the Edict* 12) Those persons are in the same position who are under the surveillance of soldiers or officers of the magistrate's court or attendants of the municipal authorities, if it is shown that they were unable to look after their own affairs. Persons are understood to be in chains who are to that extent bound that they cannot appear in public without discredit.

11 CALLISTRATUS (*Monitory Edict* 2) Relief is also given to one who is in a state of servitude, whether he is a free man who is kept in good faith as a slave, or is simply coerced.

12 ULPIANUS (*on the Edict* 12) When a man is engaged in litigation on the question of his status, his case ceases to be within the purview of the Edict as soon as the proceedings are commenced; accordingly he is regarded as being in a state of slavery so long only as there is no trial begun of the kind mentioned.

13 PAULUS (*on the Edict* 12) Labeo says quite rightly that a man is not comprised in the Edict who has simply been appointed heir with a gift of freedom, before he actually becomes heir, because till then he has not really got any property, moreover the Prætor only speaks of persons who are free. 1. I should say, however, that a *filiusfamilias*, as far as his *castrense peculium* is concerned, is within the terms of the Edict.

14 CALLISTRATUS (*Monitory Edict* 2) Furthermore, relief is given to a man who has been in the enemy's power, that is to say, taken prisoner by the enemy; but deserters cannot be supposed to derive any benefit from the Edict, as they are refused the right of *postliminium*. Persons in the power of the enemy might however be held to be included in that part of the Edict in which it refers to those who have been in slavery.

15 ULPIANUS (*on the Edict* 12) Relief is given in the case of persons taken by the enemy if they return under the conditions of *postliminium*, or die in the enemy's hands, as they cannot have the services of a *procurator*; whereas other persons such as above-

mentioned can perfectly well get help through a *procurator*, except those who are kept in a state of slavery. My own opinion however is that assistance can be had even on behalf of a man who has fallen into the enemy's hands, if there is a curator appointed for his property, as there commonly is. 1. Relief is given just as much[1] to one born in the hands of the enemy, if he has the right of *postliminium*, as to one taken by them. 2. Where a man is put in possession of the house of a soldier on the ground of *damnum infectum*, if the Prætor granted the order for possession in the soldier's presence, he will get no restitution, but if it was in his absence, the rule is that he must be relieved. 3. With regard to the provision in the Edict in making which the Prætor uses the words "or subsequently" without more, it must be understood to amount to this, that if occupation on the part of the *bona fide* possessor began before the absence [of the owner], but the period expired after his return, the relief consisting in restitution is admissible, not, that is, at any distance of time, but only where application is made within a short time after the party's return, viz. not beyond the time he takes to hire a lodging, get his effects together, and look out for an advocate: but a man who puts off applying for restitution, Neratius tells us, ought not to have a hearing;

16 PAULUS (*on the Edict* 12) as relief is not given to persons who are remiss, but only to such as were hindered by stress of circumstances; and the whole matter will be one to be arranged by exercise of the Prætor's discretion, that is, in accordance with the principle of only giving restitution where a party was unable to join issue in the action not through remissness, but because time pressed.

17 ULPIANUS (*on the Edict* 12) Julianus says (b. 4) that a soldier will be relieved not only against the possessor of an inheritance, but even against purchasers from the possessor, so that, if the soldier accepts the inheritance, he can recover what is contained therein by a *vindicatio*; but, if he does not accept it, there may be a construction by way of relation back to the effect that *usucapio* took place. 1. Again if a legacy is left a man in such words as these:—"or so much for every year which he shall pass in Italy," the legatee may get restitution to enable him to receive the annuity as if he had been in Italy, so Labeo says, and Julianus (b. 4) and Pomponius (b. 31) express their approval; [which is a

[1] For *minus* read *magis*.

fresh point,] as it is not a case of the right of action being barred by time in which the aid of the Prætor would be required, but the matter turns on a condition.

18 PAULUS (*on the Edict* 12) It must be borne in mind that the law gives persons of full age the relief of restitution only in cases where they sue in order to recover property or debts, not where the relief which they seek to have given them would enable them to make a profit by means of penalty or loss inflicted on some one else.

19 PAPINIANUS (*Questions* 3) Add that if a purchaser, before acquiring a thing by *usus*, is captured by the enemy, it is held that the interruption of possession is not cured by *postliminium*; acquisition by *usus* is not valid without possession; but possession is almost entirely a state of fact, and matter of fact is without the scope of *postliminium*.

20 THE SAME (*Questions* 13) Nor ought the purchaser to be allowed an *utilis actio*, as it is very unjust to take a thing away from an owner, where there was no *usus* that took it away; a thing cannot be regarded as lost, where it was not taken out of the hands of the party who is said to have lost it.

21 ULPIANUS (*on the Edict* 12) "Also," the Edict says, "where a person has acquired ownership of something[1] by *usus*, or has acquired what had been lost by want of *usus*, or is released from liability to an action by reason of the right of action of the other being barred by time, the fact being that the person in question himself was absent and undefended" (etc.). The Prætor inserted this clause in order that, just as he comes to the aid of persons in the positions above described to protect them from suffering a disadvantage, so he may interpose[2] in opposition to them to prevent them from causing a disadvantage to other people. 1. It should be observed, moreover, that the Prætor's language is more comprehensive where he gives restitution in opposition to these persons than it is where he comes to their aid; thus, in the words before us, he does not specify the different classes of persons whom he relieves against, as in the previous case, but he inserts a general clause which comprises all such persons as are absent and undefended. 2. Restitution in this case is granted, whether those thus absent and undefended acquired by *usus* in their own persons, or by the

[1] After *quis* read *quid*. M.
[2] Read *succurrat* for *succurrit*. Hal.

agency of others who were in their *potestas*, but only where there was no one to defend the case on their behalf; if there was a *procurator*, then, as you [the present applicant] had some one to sue, the other [who has now acquired by *usus*] must be left unmolested. But if there was no one to defend the case on behalf of the other party, it is perfectly fair that you should get the relief under discussion, especially considering that, in the case of people who are undefended, if they are purposely keeping out of the way, the Prætor promises to give possession of their property, to the further intent that, if the case requires it, it may be sold; but if they are not keeping out of the way, though they are undefended, he simply promises to give possession of their property. 3. A man is not regarded as being defended simply where some one puts himself forward to defend him of his own motion, but only where there is some one called upon by the plaintiff himself who is prepared to follow up the defence to the end; and the defence will be held to be complete where such person does not shirk the trial, and security is given that the judgment will be obeyed.

22 PAULUS (*on the Edict* 12) It must be understood then that this Edict only applies where the friends of the party were asked whether they would undertake the defence, or there was no friend who could be asked. In fact the only case in which it can be held that an absent person is undefended is where the complainant comes forward on his own part with an express challenge, and no one offers to undertake the defence; and the complainant ought to make an attestation specifying these facts. 1. On the whole then, the Prætor, while he does not wish the persons we are speaking of to suffer loss, is equally unwilling to allow them to make positive gain. 2. This Edict, according to Labeo, applies to the case of lunatics, infant children, and town corporations.

23 ULPIANUS (*on the Edict* 12) The Prætor says further: "or was in chains, or had provided no means by which he could be sued." He had good reason for proceeding to mention persons in these positions, as it was quite possible for a man to be in chains and yet be present, whether he were put in chains by state authority or by a private person; and there is no doubt that a man who is in chains, as long as he is not in a state of slavery, can acquire property by *usus*. However, even where the party is in chains, still, if there is some one to defend him, no restitution will be ordered. 1. But a man cannot acquire anything by *usus* when he is in the hands of the enemy, and, if the time of possession has

begun to run in his favour, he will not be able to complete it whilst he is in the enemy's hands: moreover, even if he returns under the conditions of *postliminium*, he will not be able to pursue the acquisition of ownership by *usus*. 2. Again, Papinianus says that where a man has lost the possession of land, or the quasi-possession of a usufruct in land, in consequence of being taken prisoner, he ought to be relieved, and the profits too which another person has gathered from the usufruct in the meantime he thinks ought in fairness to be handed over to the returning captive. 3. There is no doubt that those who were in the *potestas* of the [person since made] captive can acquire property by *usus* by means of their possession of it as part of their *peculium*; and it will be fair that the assistance prescribed by this clause should be given to persons who are present, that is, who are not in captivity, if anything of theirs was acquired by *usus* by some one else, where they were undefended. On the other hand, if the time for bringing an action which the party had a right to institute against a captive has expired, relief will be given him against the captive. 4. The Prætor then proceeds to say—"or provided no means by which he could be sued," so that restitution may be granted [against him], if, while he is in course of making such provision, the acquisition by *usus* [on his part] should be completed, or some other event should happen of those mentioned above. This is quite reasonable; an order enabling the applicant to take possession of the property is not always a sufficient remedy, as the circumstances may very well be such that it is impossible to give possession of the property of a person who is keeping out of the way, or that the party is not keeping out of the way; take a case, for instance, in which, while the other is endeavouring to procure legal assistance, or the trial is for some other reason being delayed, the right of action is barred by lapse of time;

24 PAULUS (*on the Edict* 12) but the words will equally apply to the case of persons who, when sued, elude the complainant and contrive by various shifts and subterfuges to evade the action;

25 GAIUS (*on the Provincial Edict* 4) and we may fairly say that they apply in a similar way to the case of a man who keeps out of reach, not with any intention of eluding a suitor, but because he is hindered by the multitude of his engagements.

26 ULPIANUS (*on the Edict* 12) Again, restitution will be vouchsafed where the Prætor was himself in fault. 1. Restitution, according to Pomponius, against a man who is relegated will be

ordered in virtue of the general clause in the Edict; but none will be granted in his favour, because he could have appointed a *procurator*; still I should say that on special cause shown the order would even be made in his favour. 2. The Prætor proceeds:—"or there was some legal obstacle to his being cited against his will, and no one took up the case on his behalf." These words apply to those persons who, in accordance with ancient custom, cannot be cited without offence, such as the Prætor, the Consul, and any magistrate who is invested with some right of command or authority. But the Edict does not comprise under these words persons whom the Prætor does not allow to be cited without his own express permission; because, if he had been applied to, he might have given the permission; take the case of patrons and parents. 3. The Edict then has the words—"and no one took up the case on his behalf"; this applies to all the cases above mentioned, except that of a person who has acquired something by *usus* while absent; the reason for excepting this case being that it has been already fully provided for. 4. The Prætor next says:—"also where it shall appear that a party's right of action was lost by the fault of the magistrates without ill contrivance of his own." What is the object of these words? It is to secure that in case a right of action should come to be lost in consequence of delays on the part of the judge, restitution should be ordered. Moreover where there was no magistrate accessible to whom to apply, in that case also, according to Labeo, restitution should be granted. By "the fault of the magistrate" we must understand such a case as that of a magistrate declining to entertain the matter, but if he simply, after hearing the application, refused to allow the action, there is no case for restitution: with this Servius agrees. Again it is a case of the fault of the magistrate, if he declines to entertain the application out of favour to the defendant or for a corrupt motive; in which case not only the clause in question will apply, but a former one too, viz. "or the party provides no means by which he could be sued," as in fact the party took special measures to prevent his being sued, by corrupting the judge. 5. By a right of action being lost we must understand to be meant the party ceasing to be able to bring an action. 6. The words are added "without any ill contrivance of his own," the object being that, if there should be some ill contrivance on his part in the case, he should receive no assistance; the Prætor gives no relief to such as are themselves delinquents. Accordingly, if a man desires to bring his case before the next

Prætor, and, with that object, deliberately misses the present opportunity, he will not be relieved. Or again, if he refused obedience to the Prætor's directions, and, for that reason the Prætor declined to deal with his case, according to Labeo, he will get no restitution, and the rule is the same if the Prætor refused him a hearing on any other ground. 7. If special holidays should be ordered, on the ground, it may be, of some national success, or in honour of the Emperor, and the magistrate for that reason should decline to sit, Gaius Cassius announced expressly in his edict that he would grant restitution, because this must be held to be a case of the fault of the Prætor; the regular holidays he said ought not to be taken into account, because the complainant was able to see when they were coming, and was bound to do so, so as not to run against them. This is no doubt the better opinion, and Celsus says the same (*Dig.* b. 4). However, when time lapses owing to holidays, restitution ought to be granted only of the actual days lost, not of the whole period from the beginning. This is said by Julianus (*Dig.* b. 4); what he tells us is that where *usucapio* is set aside, the proper order is for restitution of as many days as those on which the complainant was ready and willing to take proceedings, but was hindered by the occurrence of the holidays. 8. [This rule applies] in any case in which a man by his absence hindered another's action for something short of the whole period required to bar the right; suppose, for example, I was in possession of something belonging to you for less by one day than the period laid down for acquiring by *usus*, and then I began to be absent on State service, in that case restitution ought to be ordered against me for one day. 9. "And further," the Prætor continues, "if any other just ground shall be shown me, I will order restitution *in integrum*." It was necessary to insert this clause in the Edict, because cases of a great many kinds might occur which would give a claim to the relief of restitution, but which could not be specifically enumerated, so that whenever restitution is called for by the justice of the case, recourse can be had to the above clause. Suppose, for instance, a man has discharged a legation on behalf of a city, it is perfectly just that he should get restitution, though he was not absent in the service of the State; and it has been often laid down that he ought to get relief, whether he had a *procurator* or not. I should say the same where he has been summoned from some province to come up to the city or to come before the Emperor in order to be a witness; there have been a great many rescripts to the effect

that this is a case for relief. Again, relief has been given to persons who have been abroad in connexion with some judicial enquiry or appeal. In short, as a general rule, whenever persons have been absent unavoidably and not by their own choice, the proper view is that they ought to be relieved;

PAULUS (*on the Edict* 12) and whether a man loses something or is disappointed of some expected gain, an order for restitution should be made, though there should be no loss of any portion of his property.

8 ULPIANUS (*on the Edict* 12) Again, where a man has been absent on defensible grounds, the Prætor should consider whether it is a good case for relief,—suppose, for instance, the party claims on the ground that he was prosecuting studies, and say his *procurator* was dead;—the object in such a case being to secure that he shall not lose his expectations in consequence of absence on some very reasonable ground. 1. Again, if a man is not confined or in chains, but has given security with sureties for his appearance somewhere, and, being in consequence unable to absent himself, has suffered some disadvantage, he will get an order of restitution; and similarly an order may be made against him. 2. "So far" the Prætor continues "as such order shall be in accordance with statutes, plebiscites, decrees of the Senate and edicts and ordinances of the Emperors." This clause does not lay down that the Prætor will give restitution if the statutes permit it, but if they do not forbid it. 3. Where a man has been absent in the service of the State several times, Labeo holds that the period allowed him for applying for an order of restitution should be made to run from the day of his last return. But if all his absences put together amount to a year, and each separately to less than a year, a fair point to consider is whether he has a whole year given him to ask for restitution, or only so much time as that for which his last absence lasted: but I should say a whole year. 4. If, when your place of abode is in the province, you[1] happen to be in the City, will time run against me, on the ground that it is in my power to sue you? Labeo says it will not. I should say however that this is only true where the other side has a right to an order to have the action removed into the provincial Court; but, if he has not, it must be held that it is in my power to bring the action, because I am able to have issue joined in Rome just as well. 5. A man who has been absent on State service has a good *exceptio*, corresponding

[1] Dole *autem*. M.

to his right of action to rescind; suppose, for instance, he should have got possession of the property [which he lost], and a *vindicatio* is brought against him to recover it. 6. In an action to rescind which a man has a right to bring against a soldier, Pomponius says it is perfectly just that the defendant should account for the profits attributable to the period during which he was absent and undefended; consequently such profits must be handed over to a soldier [in the converse case]; there are similar rights of action on both sides.

29 AFRICANUS (*Questions* 7) The object being that the discharge of a duty to the State should be no loss or gain to any one.

30 PAULUS (*on the Edict* 12) Where a soldier who was in course of acquiring something by *usus* dies, and his heir completes the period required for acquisition, it is agreeable to justice that the acquisition ensuing thereupon should be liable to be rescinded, the same legal construction being maintained (*eadem servanda sint*) in the persons of the heirs who succeed to the prospect of acquiring by *usus* [as was observed in the person of the deceased]; the fact is that the possession enjoyed by the deceased descends to the heir as it were united to the inheritance, indeed very often the title is completed before the inheritance has been entered upon. 1. Where a man who was absent on State service has acquired something by *usus*, and after that disposes of it to another, restitution may be granted [to the former owner], and, though the absence and the acquisition by *usus* should be with no ill contrivance (*dolus*), the party must be debarred from making a gain by them. Similarly restitution must be made in all the other cases, as if judgment had been given against the party.

31 THE SAME (*on the Edict* 53) Where a man whose property has been acquired by *usus* by some one else who was absent on State service gets into possession of the property so acquired, then, even if he should subsequently lose it, his right of action to recover it is not subject to be barred by time, but is perpetual.

32 MODESTINUS (*Rules* 9) A man is regarded as absent on State service as soon as he has started from the City, though he has not yet reached[1] the province; and, when he has once departed, he remains absent till he returns to the City. This rule applies to Proconsuls and their legates and to those [legates] who are at the head of a province, also to imperial procurators who are employed

[1] For *excesserit* read *accesserit*. Cf. M.

in the provinces, as well as military officers (*tribuni*) and prefects and assessors of legates whose names are sent in to the *aerarium*, or the particulars relative to whom are entered[1] in the Imperial Gazette (*commentarius principis*).

33 THE SAME (*on cases unravelled*) Among those who are relieved in virtue of the general clause is included the Advocate of the *fiscus*. 1. Those persons who take down the pronouncements of the Præses are certainly not absent on State service. 2. Military doctors, inasmuch as the duty they discharge is in the public interest and ought not to expose them to any kind of disadvantage, have a right to ask to be relieved by restitution.

34 JAVOLENUS (*Extracts from Cassius* 15) A soldier who has come home on furlough is not held to be absent on State service. 1. A man who gives his services in connexion with State dues which are farmed out for revenue purposes is not absent on State service.

35 PAULUS (*on the lex Julia et Papia* 3) Men who are sent to take out soldiers or bring them back or to superintend[2] recruiting are absent on State service. 1. And so are such as are sent to congratulate the Emperor. 2. So is an Imperial *procurator*, and not only one who is entrusted as *procurator* with the affairs of a particular province, but one who has to manage some of such affairs, though not all. Consequently a number of *procurators* of different respective departments in the same province are all regarded as absent on State service. 3. The Prefect of Egypt is also absent on State service, and so is an officer who in any other capacity leaves the City in the discharge of public duty. 4. The Divine Pius laid down the same rule for soldiers who serve in the Urban Cohorts. 5. The question has been raised whether an officer who is sent to put down malefactors is absent on State service; and it was held that he was. 6. We may add the case of a civilian who joins an expedition by the order of an officer of consular rank and is killed in action; in which case the relief under discussion is granted to his heir. 7. A man who has gone to Rome on State service is held to be absent on State service. Again, if he should depart from his own country on State service, even if he is free to go through the City, he is absent on State service. 8. Similarly, in the case of a man who is in some province, from the moment of his leaving his house, or, where he

[1] For *delati* read *relati*. Cf. M.

[2] For *curarent* read *curam agerent*. Cf. M.

has taken up his abode in his own province in order to act as a government official, from the moment of his beginning to transact public business,—he is treated like a person who is absent. 9. A man is absent on State service on his way to the camp and on his way back, as one who is going to discharge the duties of a soldier must go to the camp and return from it. According to Vivianus it was laid down by Proculus that a soldier who is away on furlough is absent on State service as long as he is on his way home or on his way back, but whilst at home he is not absent.

36 ULPIANUS (*on the lex Julia et Papia* 6) We regard people as absent on State service only when they are absent on no affairs of their own, but under compulsion.

37 PAULUS (*on the lex Julia et Papia* 3) Persons who act as assessors in their own province beyond the time allowed by Imperial enactments are not regarded as absent on State service.

38 ULPIANUS (*on the lex Julia et Papia* 6) Where a man is allowed by the Emperor to act as assessor in his own province by way of special indulgence, I should say that he is absent on State service; but, if he acts in the same way without permission, we are bound to say that, as in so doing he commits an offence, he does not enjoy the privileges of those who are absent on State service. 1. A man will be regarded as absent on State service for so long as he is occupying some official post; but as soon as his official duties are discharged, he at once ceases to be absent on State service; however, the law will allow him for his return a certain period of time to be reckoned from the moment when he ceases to be absent on State service, viz. so much time as he required in order to return to the City; and it will be keeping within bounds to allow him the same period as the statute in that behalf allows to a *praeses*[1] who is returning. Consequently, if he goes out of the way for some object of his own, there can be no doubt that the time so spent will not be given him over and above; the time will be reckoned within which it is in his power to return, and as soon as it is ended it will be said that he has ceased to be absent on State service. No doubt if he is prevented from continuing his journey by reason of sickness, something will be allowed to considerations of humanity, just as some account is taken of severe weather, or difficulties of navigation, or any other accidental hindrance.

[1] After *reuertentibus* read *praesidibus*. Cf. M.

39 PAULUS (*Sentences* 1) Where a man who is going to be absent on State service leaves a *procurator* who is able to defend an action on his behalf, no application that he makes for restitution *in integrum* will be entertained.

40 ULPIANUS (*Opinions* 5) If a soldier is in a position to take criminal proceedings at a time when he is acting in the service of the State, he does not lose the power to take them. 1. Where a man has been detained on an island in pursuance of a penal sentence in respect of which he has obtained restitution *in integrum*, and it is shown that during his detention some other person has taken possession of a portion of his property of which he was not deprived by the sentence, what is so taken must be restored so as to put him in his old position with reference to it.

41 JULIANUS (*Digest* 35) A man leaves a legacy to Titius, provided Titius should be in Italy at the testator's death, or he leaves him so much a year, so long as he should be in Italy. If Titius gets the aid of the Prætor on the ground that he was excluded from the legacy owing to his being absent on State service; he is compellable to make good any *fideicommissum* which is left at his charge. *Note by Marcellus.* Can any one doubt, indeed, that where an inheritance is restored to a soldier which he had lost owing to absence on State service, the title to legacies and *fideicommissa* will not be impaired?

42 ALFENUS (*Digest* 5) A man cannot be said with truth to be absent on State service, when he has undertaken a legation with a view to his own private business.

43 AFRICANUS (*Questions* 7) If a man stipulates for so much a year so long as he or the promisor shall be in Italy, and after that it happens to one of the two to be absent in the service of the State, it is the duty of the Prætor to give an *utilis actio*. The rule is the same if the stipulation were in such terms as the following: "if such a one should be at Rome for the next five years," or "if he should not be at Rome, do you promise to pay a hundred?"

44 PAULUS (*on Sabinus* 2) A man who is absent on State service will not get restitution if he suffers hurt in any matter in respect of which he would have incurred loss even if he had not been absent on State service.

45 SCÆVOLA (*Rules* 1) Soldiers in general who cannot leave their standards save at their own peril are held to be absent on State service.

46 MARCIANUS (*Rules* 2) A man who was absent on State service will have a right to restitution even against one who was himself also absent on State service, if he has good reason to complain that he has suffered a loss.

VII.

ON TRANSFERS MADE FOR THE PURPOSE OF VARYING THE CONDITIONS OF A TRIAL.

1 GAIUS (*on the provincial Edict* 4) The proconsul does all he can to secure that no man's legal position shall be prejudiced by the act of another; and, being aware that the course of a trial often gives a man a great deal more trouble where he has to deal with a different opponent from the one he began with, he took measures to prevent this mischief by laying down that, if any one should tranfer the property in dispute to another so as to put some one else in his own place as a party to the suit with the deliberate purpose of prejudicing his opponent, he should be liable to an action *in factum* in which the measure of damages would be the interest the other litigant had in not having a substituted opponent to deal with. 1. Accordingly a party will be liable if he brings in as opponent some one who belongs to a different province or is a person of superior resources;

2 ULPIANUS (*on the Edict* 13) or any one who is likely to give trouble to the other side:

3 GAIUS (*on the provincial Edict* 4) because, if I take proceedings against a man who belongs to another province, I am obliged to do so in his province, and no one can contend on equal terms with a person of superior resources. 1. Again, if the defendant manumits a slave who is the subject of the action, the plaintiff is put in a more disadvantageous position, because the Prætor always favours liberty. 2. Again, if you transfer to another a piece of ground on which you have made some structure exposing you to an Interdict *quod vi aut clam* [at my hands], or to an action to keep off rainwater (*aquæ pluviæ arcendæ*), this is recognised as putting me in a disadvantageous position, because, if my proceedings had been taken against you, you would have had to remove the structure at your own expense; but, as it is, my action has to be brought against a different person from the one who did

the act, and, consequently, I am compelled to remove the structure at my own expense; the law being that whenever a man is in possession of something which was constructed by a third person, he is only liable to the proceedings in question so far as to be compellable to allow the structure to be removed. 3. If I give you a notification of novel structure (*opus novum*), after which you dispose of the spot, and the purchaser completes the work, it is held that you are liable to the action under discussion, on the ground that I cannot take proceedings in pursuance of the notification of novel structure against you, because you have not constructed anything, nor can I against your alienee, because I did not give him the notification. 4. From all this it is clear that, whereas the Proconsul promises to grant restitution *in integrum*, when the action is thereupon brought, it will be the duty of the judge on motion to let the plaintiff have by way of damages an amount[1] representing the interest which he would have had in not having to deal with a substituted opponent; he may, for example, owing to there being such a substitute, have gone to some expense or suffered some other inconvenience. 5. Suppose however the party against whom the action in question can be brought is ready to submit to an *utilis actio*, so as to put the plaintiff on the same footing as if he (such defendant) were still in possession? In that case it is very reasonably held that the action founded on this Edict will not be allowed against him.

4 ULPIANUS (*on the Edict* 13) Again, if the property comes to be acquired by *usus* by the person to whom it was transferred, so that no action can be brought to recover it from him, this Edict applies. 1. Moreover it may happen that a man's possession is terminated without any *dolus malus*, but still the change was effected in order to alter the conditions of the trial; and there are many other cases of the same kind. On the other hand a man may cease to be in possession, and that with *dolus malus*, and yet he may not have made the change with a view to altering the conditions of the trial, so that he incurs no liability under the terms of the Edict: as a man does not transfer property who simply abandons possession. However the Prætor does not find fault with the behaviour of a man who shows this anxiety to be rid of property, where his object is to avoid being exposed to constant litigation about it,—indeed such a very unassuming resolution, proceeding as it does from the party's hatred for actions at law, is

[1] For *tantum judicis* read *judicis tantum*. Cf. M.

not a thing to be censured,—the Prætor only deals with the case of one who, without having any wish to lose the property, transfers the defence to another, so as to give the plaintiff, as opponent instead of himself, some person who will give him trouble. 2. Pedius (b. 9) declares that this Edict deals not only with transfers of ownership, but transfers of possession too; otherwise, he says, if the defendant to an action *in rem* assigns the possession to some one else, he will avoid liability. 3. But where a man's reason for putting another in his place as party to the action is bad health or old age or urgent business, this is not a case in which he is liable under this Edict, as the Edict refers expressly to *dolus malus* (malicious contrivance); indeed otherwise it would amount to prohibiting the very practice of carrying on litigation through procurators, as the property is generally transferred to them, if the occasion requires it. 4. The Edict comprises the case of real servitudes, provided the transfer is made with *dolus malus*. 5. The measure of damages in this action is the extent of the plaintiff's interest; consequently, if he was not really owner, or the slave tranferred died without any fault of the transferor's, the action cannot be brought, unless the plaintiff had some interest on independent grounds. 6. The action is not for vindictive damages, it is an action to recover property or debt in pursuance of the judge's intimation; hence it is allowed to the heir; but against the heir,

5 PAULUS (*on the Edict* 11) or any one similarly placed,

6 ULPIANUS (*on the Edict* 13) or after the lapse of a year, it is not allowed,

7 GAIUS (*on the provincial Edict* 4) because it is meant for the recovery of property, though, at the same time, it may be said to be founded on a delict.

8 PAULUS (*on the Edict* 12) A man is liable under this Edict even where he produces a thing on being called upon, if he does not, on the intimation of the judge, put the case at law on its original footing. 1. The Prætor says: "or any transfer made for altering the conditions of a trial"; this refers to the conditions of a future trial, not of the one already proceeding. 2. A man is regarded as transferring a thing even where he sells what belongs to some one else. 3. But if he makes the transfer by appointing an heir or bequeathing a legacy, the Edict will not apply. 4. If a man transfers something and then takes it back, he will not be liable under the Edict. 5. A man who makes his vendor take

back what he sold, by way of redhibition, is not held to get rid of property in order to alter the conditions of a trial.

9 PAULUS (*on the Edict of the curule Ediles* 1) Because, when the slave is given back by way of redhibition, everything is put on its former footing; so that the party who returns the thing is not held to have disposed of it in order to vary the conditions of a trial,—unless, indeed, the party restores the slave in this manner with the very object in question, and, except for that, would not have restored him at all.

10 ULPIANUS (*on the Edict* 12) Indeed even if, where you desire to sue me for something at law, I deliver it to another in pursuance of an obligation in that behalf, the Edict will not apply. 1. If the guardian of a boy under age, or the agnate [curator] of a lunatic transfers the property, there is an *utilis actio* open, as the parties themselves under guardianship or curatorship are incapable of entertaining the fraudulent intent.

11 THE SAME (*Opinions* 5) Where a soldier applied for leave to bring an action in his own name for landed property which he declared to have been given him gratuitously, he was answered that if the gift was made in order to vary the conditions of a trial, the action ought to be brought by the previous owner, so as to let this latter have the credit of bestowing the actual property on the soldier, and not a mere right to sue some one.

12 MARCIANUS (*Institutions* 14) If a man should dispose of [his share in] a piece of property in order to avoid having to defend an action *communi dividundo*, he is forbidden by the *Lex Licinnia* to bring an action of the same kind himself; his object might, for instance, be to contrive that some purchaser in a commanding position should make a bid for it, and get the property for a low price, so that by that means he might afterwards recover it himself. After this if the party who transferred his share should desire to bring an action *communi dividundo*, he will not get a hearing; and if the purchaser should wish to take proceedings, he is prohibited doing so under that head in the Edict in which it is provided that a man shall not transfer property in order to vary the conditions of the trial.

VIII.

ON MATTERS REFERRED: ON PERSONS WHO UNDERTAKE ARBITRATIONS WITH A VIEW TO PRONOUNCING AN AWARD.

1 PAULUS (*on the Edict* 2) Arbitration is framed on the model of judicial trials, and its object is to put an end to litigation.

2 ULPIANUS (*on the Edict* 4) An arbitration is held not to give ground for an *exceptio*, but for an action for a penalty.

3 THE SAME (*on the Edict* 13) According to Labeo, where a matter is referred to arbitration, and an award is given by means of which a person is to be released by a youth under twenty-five from an action on guardianship, the Prætor ought not to uphold the award, and no action will be allowed to recover the penalty due in pursuance thereof. 1. However true it is that the Prætor does not compel any one to undertake an arbitration, since such an office is optional and at will, and there is no obligation to exercise jurisdiction; nevertheless, where a man has once undertaken the duty of arbitration, the Prætor holds that the matter is a proper subject for his care and close attention; not merely because the Prætor is anxious that disputes should be set at rest, but because it is not right that people should be disappointed who have chosen that particular person to decide between them under the impression that he was an impartial judge. Suppose that after the case had been already once or twice gone into, the private affairs of both parties laid bare, and secret features of the matter disclosed, the arbitrator were, out of partiality for one side, or because he was influenced by corrupt motives, or for any other reason, to decline to give an award: can any one say that in such a case it would not be perfectly just that the Prætor should have to interpose, so as to make the arbitrator discharge the office which he had undertaken? 2. The Prætor says "A man who undertakes arbitration after mutual submission with promises to pay money," etc. 3. Let us consider the personal position of arbitrators. There is no doubt that, whatever an arbitrator's rank may be, the Prætor will compel him to discharge thoroughly the office he has undertaken, even if he is a consular person, unless he should be placed in some magisterial or other authority, such as that of consul or prætor, as the Prætor has no power over those in such positions;[1]

[1] For *hoc* read *hos*. Cf. M.

4 PAULUS (*on the Edict* 13) there being no way in which magistrates can be coerced who are of higher or equal authority [as compared with the officer who seeks to coerce them], nor does it matter whether they undertook the office during their tenure of their present magistracy or before. Inferior officers can be compelled to act.

5 ULPIANUS (*on the Edict* 13) Indeed, even a son under *potestas* can be compelled.

6 GAIUS (*on the provincial Edict* 5) Moreover, it is said that a son under *potestas* can be arbitrator in a concern of his own father's; in fact, the common opinion is that he can even be a judge.

7 ULPIANUS (*on the Edict* 13) Pedius says (b. 9) and so does Pomponius (b. 33) that it is a matter of small account whether an arbitrator is freeborn or a freedman, whether he enjoys an unblemished reputation or is marked with ignominy. Labeo says (b. 11) that a reference for arbitration cannot be made to a slave; and this is true. 1. Hence Julianus says that, if a reference is made to Titius and a slave, then Titius himself cannot be compelled to give an award, because he undertook the arbitration jointly with some one else, although, he adds, there is no such thing as the arbitration of a slave. But how will it be if Titius pronounces an award? In that case the penalty will not become due, because he does not pronounce the award under the conditions he engaged for.

8 PAULUS (*on the Edict* 13) But if the terms of the submission were to the effect that the award of either party singly should be valid, then Titius, he says, can be compelled to act.

9 ULPIANUS (*on the Edict* 13) Again, if the reference is made to a slave, and he pronounces an award after he has obtained his freedom, I should say that if he acts with the consent of the parties when he is a free man, it is valid. 1. But a reference should not be made to a boy under age, or a lunatic, or a deaf man, or a dumb man,—so Pomponius says (b. 33). 2. When a man is a judge, he is forbidden by the *lex Julia* to undertake an arbitration in the same matter that he has before him as judge, or to order a reference to himself; and if he should pronounce an award, no action for the penalty will be allowed. 3. Other cases might be added of persons who are not compellable to make an award, for instance, those in which the arbitrator is clearly corrupt

or acts on some dishonorable motive. 4. Julianus says, if both the contending parties give the proposed arbitrator a bad name, the Prætor ought not to dispense with his services as a matter of course, but only on cause shown. 5. According to the same writer, if the parties treat the arbitrator's authority with contempt and go to the Court

10 PAULUS (*on the Edict* 13) or to some other arbitrator,

11 ULPIANUS (*on the Edict* 13) and after that come back to the first arbitrator, the Prætor ought not to compel him to go into the case, the parties having put such a slight upon him as to reject him and go to some one else. 1. The arbitrator, he says, is not to be compelled to pronounce an award, unless a regular submission was made. 2. Where the Prætor speaks of "mutual engagements to pay," this must not be understood to imply that there is on both sides a promise of a penal sum of money, to be payable if either party should refuse to abide by the arbitrator's award; but to include the case of anything else being promised by way of a penalty; we find this in Pomponius. Suppose then goods are placed in the hands of the arbitrator, on the understanding that he is to give them to the successful party, or that, if either party should refuse to obey his award, he is to give such goods to the other, will he be compelled to pronounce an award? I should say that he will. A similar rule holds where a specific quantity [of things determined in kind] is left in his hands with the same object. On the same principle therefore where, in the stipulations made, one man promises a thing and another money, the submission is complete, and the arbitrator will be compelled to pronounce his award. 3. In some cases, as Pomponius tells us, the mutual promises can be very well made by bare agreement; for example, where the two parties are mutually indebted, and they agree that if either of them should refuse to obey the arbitrator's award, he shall not sue for what is owed him by the other. 4. Again Julianus says that the arbitrator is not to be compelled to give an award, if one party makes the promise and the other does not. 5. He holds the same where the submission involves the promise of a penalty under a condition, for instance, "so many thousands, if such a ship comes back from Asia"; as the arbitrator cannot be compelled to pronounce an award until the condition is fulfilled, for fear lest his award should have no effect, through the failure of the condition. Pomponius has the same thing (*on the Edict* 33).

12 PAULUS (*on the Edict* 13) In this case perhaps the only

thing giving ground for an application to the Prætor will be the desire that, if the time appointed in the reference can be enlarged, an order may be made accordingly.

13 ULPIANUS (*on the Edict* 13) Pomponius says that if one party has a formal release given him of the penal sum agreed upon, the arbitrator ought not to be compelled to give an award. 1. The same writer says also that if the submission is of my claims only, and I stipulated for a penal sum to be paid by you, it is a point worth considering whether this is any submission at all. But I do not see myself what is his difficulty; if his point is that the agreement only refers the claims of one of the parties, there is no reason in his remark, as it is quite open to parties to refer one single question; but if it is that the formal promise is only made on one side, this is to the purpose. At the same time if the promisee in this stipulation is the party who eventually sues, it may be said that there is a good submission, because the party who is sued has a sufficient defence; for example, he can plead the *pactum* by way of *exceptio*; as for the party who sues, if the arbitrator's award is not obeyed, he has got the formal promise to rely upon. However, I do not think this argument is sound; granting that the party has a good *exceptio*, this is not a sufficient reason for the arbitrator being compellable to deliver an award. 2. A man is held to have undertaken an arbitration, so Pedius says (b. 9), when he has assumed the duties of judge and promises to give a decision which shall finally dispose of the matters in dispute. But where, the same writer proceeds, the supposed arbitrator only intervenes so far as to try whether the parties will allow their dispute to be disposed of by his advice and authority, he cannot be held to have undertaken an arbitration. 3. A man who is arbitrator in pursuance of a submission is not compelled to pronounce an award on those days on which a judge is not compelled to deliver judgment, unless the time agreed upon in the submission is on the point of expiring and it cannot be enlarged. 4. Similarly, if he should be pressed by the Prætor to pronounce his decision, it is perfectly just that he should have some time allowed him for doing so, if he declares on oath that he has not yet formed a clear opinion about the matter.

14 POMPONIUS (*on Q. Mucius* 11) If the formal reference is made without a day being assigned, it is absolutely necessary that the arbitrator should appoint a day, I mean subject to the consent of the parties, and that the case should be gone into accordingly

if he omits to do this, he can be compelled to give his decision at any time.

15 ULPIANUS (*on the Edict* 13) Though the Prætor should in his Edict declare absolutely that he will compel the arbitrator to give a decision, still, in some cases, he ought to listen to what he has to say, and allow his excuses, on due cause shown; suppose, for instance, the parties give him a bad name, or there comes to be some deadly enmity between him and the parties or one of them, or he can claim to be excused the duty on the ground of his age, or a fit of illness occurring to him after the reference, or the necessity of attending to his private affairs, or urgent occasion to go to a distance, or the duty of some Government office: all this is in Labeo.

16 PAULUS (*on the Edict* 13) Or the reason may be any other difficulty in which he is put after assuming the arbitration. But, in a case of ill-health or similar grounds of excuse, he may be compelled to postpone the matter, on sufficient cause shown. 1. Where an arbitrator is engaged in a case of his own, whether of a public or private nature, he ought on that ground to be excused from adjudicating on the matters referred to him, at any rate where the time agreed cannot be enlarged; if it can, why should not the Prætor compel him to enlarge it, as he is able to do so? This is a thing which may sometimes be done without any inconvenience[1] to the arbitrator. If again both parties wish him to give the award, must we not say that, although no undertaking was given as to enlarging the time, still the arbitrator can only get an order relieving him of the necessity of proceeding, on the ground of his own case, on the terms of his giving his consent to the matter being referred to him afresh? I assume in all this that the time is on the point of expiring.

17 ULPIANUS (*on the Edict* 13) Again if one of the parties executes a '*cessio bonorum*' (assignment for the benefit of his creditors) Julianus informs us (*Dig.* b. 4) that the arbitrator cannot be compelled to give an award, because the party in question can neither sue nor be sued. 1. If the parties come back to the arbitrator after a long interval of time, then, according to Labeo he is not compellable to give an award. 2. Again, if there are more than one who undertook the arbitration, no single one can be compelled to give an award; it must be either all or none. 3. Hereupon Pomponius asks the following question (b. 33):—

[1] Read *districtione* for *distinctione*. Cf. M.

Suppose a reference to arbitration is made in such terms that whatever commends itself to Titius as examiner, Seius is to pronounce accordingly, which of the two is compellable to act? I should say myself that such an arbitration is invalid, being one in which the arbitrator has not free power of pronouncing his opinion. 4. If the terms of the submission are that the parties shall abide by the award of Titius or Seius, then, as Pomponius says,—and our opinion is the same,—the reference is valid; but the arbitrator who will be compelled to give the award is whichever the parties agree upon. 5. If an agreement is made to refer the question to two persons, on the terms that, if they should disagree, they are to add a third, I should say that such a submission is void; because they may disagree as to whom they shall add. But if the terms are that the third person so added is to be Sempronius, this is a good submission, because they cannot disagree as to whom they shall add. 6. But let us take a more general question, viz. this. If a reference is agreed upon to two arbitrators, must the Prætor compel them to give a decision? The fact is that, considering how prone men are by nature to disagree, the matter referred is hardly likely ever to be settled. Where the number is odd, the reference is upheld, not because it is likely that all the arbitrators will agree, but because, even if they disagree, there is a majority whose decision can be adhered to. However the common practice is to refer the matter to two arbitrators, and then the Prætor is bound to compel them, if they disagree, to choose some third person whose authority can be obeyed. 7. Celsus says (*Dig.* b. 2) if the reference is to three, then it is enough for two to agree, provided the third person is present as well: but, if he is not present, then, even though two agree the decision is void, because the reference was to more than two, and, if the third had been present, he might have brought the two over to his own opinion:

18 POMPONIUS (*Epistles and various passages* 17) just as, where three judges are appointed, a judgment given by two who agree together in the absence of the third is invalid, because the judgment given by the majority of the judges is only upheld where it is clear that every one gave some judgment or other.

19 PAULUS (*on the Edict* 13) What kind of decision it is that the arbitrator gives is a question with which the Prætor is not concerned, so long as his decision is in accordance with his real opinion. Accordingly if the matter was agreed to be referred, on the understanding that the arbitrator should pronounce some

particular decision, this, says the same writer, is no arbitration at all, and according to Julianus (*Dig.* b. 4) the arbitrator cannot be compelled to give any decision. 1. An arbitrator is considered to give a decision when, in making his pronouncement, he intends that there should be an end of the whole dispute in pursuance of it. But where he has undertaken to arbitrate on a number of different points, then, unless he deals conclusively with all the matters in dispute, no award can be said to be given, and he will still have to be compelled by the Prætor to act. 2. This being the case, a fair question to consider is whether he cannot alter his decision; and in fact it has been discussed as an independent question, supposing an arbitrator first orders something to be handed over and then forbids it, whether one ought to abide by his order or by his prohibition. Sabinus was of opinion that he can alter his decision. Cassius makes a good defence of his master's opinion, and says that Sabinus was not thinking of a decision which concludes an arbitration, but of an order made in the course of the case being got ready for trial; suppose, for instance, he ordered the parties to attend on the calends (first day of the month), and afterwards told them to come on the ides (thirteenth or fifteenth); then (Cassius said), he has a right to change the day. But if he had passed judgment on the defendant or dismissed the plaintiff's case, then, as he would cease to be arbitrator, he could not alter his decision,

20 GAIUS (*on the provincial Edict* 5) as the arbitrator cannot correct his decision, even though he should have made a mistake in pronouncing it.

21 ULPIANUS (*on the Edict* 13) Suppose however he was appointed to decide several matters in dispute which were entirely independent of one another, and he has given a decision as to one, but not, so far, as to any other; has he ceased to be arbitrator? Let us consider whether he cannot alter his award as to the first question in dispute on which he has already pronounced. Here it makes a great deal of difference whether it was part of the agreement for reference that he should pronounce as to all the questions taken together, or it was not: if it was, then he can make an alteration, as he has not yet given his award; but if he was equally at liberty to deal with the various questions separately, you may say that there are so many different references, so that, as far as the particular question is concerned, he has ceased to be arbitrator. 1. If an arbitrator should express his award thus: that it appeared

to him that Titius did not owe anything to Seius; then, even though he should not proceed to forbid Seius to sue for the money he claimed, still if Seius did sue, he must be held to act against the arbitrator's award: this was laid down by Ofilius and Trebatius. 2. I should say that an arbitrator can appoint a particular day for payment, and this seems to be Trebatius's opinion too. 3. Pomponius says that where an arbitrator gives an award in terms which are not specific, it has no force; for instance if he were to say:—"you must pay him what you owe him," or "the division you have made must be adhered to," or "you must accept the same proportion of your demand that you have paid your own creditors." 4. Again if the arbitrator declares that no penalty is to be sued for in pursuance of the agreement for reference, I find it is said by Pomponius (b. 33) that this has no force; and this is quite reasonable, as the question of penalty was not the subject of the reference. 5. According to Papinianus (*Questions* b. 3), where the day for hearing the question referred has passed, but the parties arrange for a later day and agree upon a fresh reference to the same arbitrator, but he declines to undertake the arbitration on the second reference, he cannot be compelled to undertake it, provided it was not owing to any default of his own that he did not discharge the duty before: but, if the delay was his own fault, it is perfectly just that he should be compelled by the Prætor to undertake the fresh arbitration. This all holds upon the assumption that no undertaking was given in the first agreement as to enlarging the time; if any such was given, and he himself enlarged the time accordingly, then he remains arbitrator. 6. The expression "full reference" is employed to describe a reference which is expressed to be arranged "in respect of matters and questions in dispute"; this will comprise all disputed points. But if only one matter is really in dispute, though the agreement should have been so made as to bespeak a "full reference," still all rights of action are saved which depend upon other grounds: the only real subject of a reference is whatever it was agreed to refer. However the safer plan is, where a man only desires an arbitration on one point, to specify that particular point in the agreement to refer and no other. 7. The parties are not bound to comply with the award, where the arbitrator orders them to do something dishonorable. 8. If the parties come before the arbitrator within the time agreed upon, and he then orders them to come again after the time, no penalty will be due [from a defaulting party]. 9. If one of the parties should fail to appear because he is hindered by

ill-health or by absence on State service, or by having to act as a magistrate, or for any other good reason, then, according to Proculus and Atilicinus, the penalty becomes payable; still, if he is prepared to make a fresh agreement for reference to the same arbitrator, an action against him will be disallowed, or he can defend himself by an *exceptio*. This however is only true where the arbitrator himself is prepared to undertake the fresh arbitration, since, as Julianus very properly says (*Dig.* b. 4), he is not to be compelled to undertake it against his will; but in any case the party himself is freed from liability to a penalty. 10. If the arbitrator orders the parties to come before him, say, in some province, whereas the submission was made in Rome, it is a question sometimes asked whether he cannot be disobeyed with impunity. The better opinion is that expressed by Julianus (b. 4), that the place implied in the agreement to refer is whatever place the parties intended their engagements to apply to, consequently the arbitrator may be disobeyed with impunity if he orders the parties to attend at some other place. How then if it does not appear what place the parties did intend? The best rule would be that the place implied must be held to be the place where the agreement was made. Suppose however he should require them to attend in some part of the suburbs: Pegasus admits that this is valid. My opinion is that this is only so where the arbitrator is a man whose standing and repute allow of his discharging his office habitually in out-of-the-way places, and the parties can easily get to the place. 11. But if he should call upon them to come to some low place such as a tavern or a brothel, then, as Vivianus says, he can beyond all doubt be disobeyed with impunity; and Celsus confirms this opinion (*Dig.* b. 2). Thereupon the latter writer raises this nice point: suppose the place assigned is one in which one of the parties cannot appear consistently with self-respect, but the other can; whereupon the one who could come without disgracing himself fails to come, and the other, whose self-respect is injured by his coming, does come,—will the penalty agreed upon by the terms of reference be payable on the ground[1] that the act which was promised was not executed? Here Celsus is very properly of opinion that the penalty is not incurred; it would be absurd, he said, that the order should be good as applied to one of the parties and not as applied to the other. 12. We may next consider, supposing a party should decline to hand over what the arbitrator orders, how long must he be in default for an action on the stipu-

[1] Dele *an.* M.

lation to be admissible? As to this, if no day was named, then, as Celsus says (*Dig.* b. 2), some moderate interval of time is implied; and, when this has passed, the penalty can be sued for at once; still, he says, if the party complies with the award before joinder of issue in the action on the stipulation, that action cannot be proceeded with;

22 PAULUS (*on the Edict* 13) unless indeed the plaintiff in the action had some particular interest in the money to be awarded being paid immediately.

23 ULPIANUS (*on the Edict* 13) Celsus tells us that if an arbitrator orders something to be given by the first of September, and it is not given, then, even if it is offered subsequently, still, the penalty contracted for having once become due, the right of action in pursuance of the submission is not lost, since it remains a fact that the thing was not handed over before the first of the month: but, he adds, if the party accepted it when it was tendered, he cannot sue for the penalty, as he can be barred by an *exceptio doli*. It is a different case where the order simply was to give [without mention of time]. 1. The same author says that if the arbitrator orders me to pay something to you, and you are prevented from receiving it by ill-health or on some other sufficient ground, then, in the opinion of Proculus, the penalty cannot be sued for [by you], even if you are ready to receive the money after the first of the month, and I decline to pay it. However, he himself holds very rightly that there are two orders made by the arbitrator, one to pay the money and the other to pay by the first of the month; consequently, that even if you do not incur the penalty by not paying by the first of the month, because it was not your fault, still you do incur a penalty with respect to the other part by not paying at all. 2. The same author says that abiding by an award cannot be anything else than taking measures, so far as it depends on one's self, to procure that the award shall be complied with. 3. Celsus says further that if the arbitrator orders me to pay you a sum of money on a particular day, and you on that day decline to receive it, it may fairly be argued that as a bare matter of civil law the penalty is not incurred;

24 PAULUS (*for the Edict* 13) but nevertheless, he adds, if, subsequently to that, you are ready to receive it, I cannot with impunity decline to pay it, as up to that time I have not paid.

25 ULPIANUS (*on the Edict* 13) Labeo says that where it was

provided in the agreement for reference that the arbitrator should pronounce his award on all points on the same day, and that he should be at liberty to enlarge the time, then, if such arbitrator, after pronouncing an award on some points and not on others, enlarges the time, the enlargement is valid, and the award he has pronounced can be disobeyed with impunity. This view of Labeo is approved of by Pomponius, and I hold the same opinion, as he has not discharged his duty in respect of the award. 1. These words "[he may] enlarge the time for arbitration" give the arbitrator no power beyond that of postponing the day of decision; consequently he cannot reduce or alter the scope of the original reference, so that he will be bound to consider the other points too, and give one award as to the whole. 2. If in the original agreement for reference the promises were made with a surety, then, according to Labeo, the deferred hearing must be on the same terms. However, Pomponius is in doubt whether the sureties must be the same or may be others equally substantial: what is to be done, he asks, if the original sureties decline to act again? However, I should say, if they decline, others must be found who are equally suitable;

26 PAULUS (*on the Edict* 13) so that it shall not be in the power of sureties who decline to renew their engagement to cause the penalty to be incurred. A similar rule must be applied if the sureties die.

27 ULPIANUS (*on the Edict* 13) The arbitrator can enlarge the time either in his own person, or through a messenger, or by letter. 1. If the agreement to refer made no mention of the heir or other successor, it drops on the death of either party. The present practice is not in accordance with Labeo's opinion, who held that if the arbitrator orders a man to pay a sum of money and the latter dies without paying it, the penalty may be demanded, even though his heir is ready to tender the money. 2. The parties are bound to abide by the award which the arbitrator pronounces on the question referred to him, whether it is just or unjust; a person who agreed to refer the matter has only himself to blame [if he is not satisfied]; a rescript of the Divine Pius ends thus:—"the party must make up his mind to content himself with the award, even if it is not quite reasonable." 3. If there are several arbitrators, and they pronounce different awards, the parties are free to decline to abide by their awards; but if a majority agree, their decision must be followed, or else the penalty can be demanded.

Hereupon we find this question raised in Julianus :—suppose there are three arbitrators and one orders 15 to be paid, the second 10, and the third 5 ; which award is to be followed ? to which Julianus says 5 must be given, as all the arbitrators agreed to the extent of that sum. 4. If any one of the parties fails to attend, then, seeing that what he does prevents the arbitration being held, the penalty can be demanded. On the same principle an award pronounced when the parties are not all present will have no force, unless it was specially provided in the submission that an award should be given even if one or both parties should be absent ; and it is the party who failed to attend who incurs the penalty, because it is owing to him that no arbitration is held [as intended]. 5. An arbitrator is held to pronounce his award in the presence of persons when those before whom he pronounces it are persons possessed of intelligence ; but it cannot be said to be pronounced "in the presence of" a lunatic or one who is deranged ; indeed, an award is not held to be pronounced "in the presence of" a boy under age, unless it is done before his guardian ; this is what Julianus says on the above points (*Dig.* b. 4). 6. If either party being present obstructs the arbitrator in pronouncing his award, the penalty can be sued for. 7. If no penalty was included in the terms of the submission, but the party simply promised that the award should be complied with, there will be an action against him for unliquidated damages.

28 PAULUS (*on the Edict* 13) It is of no consequence whether the sum agreed on by way of penalty is specific or unliquidated, for instance, the agreement may be in the terms "whatever the matter may be worth."

29 ULPIANUS (*on the Edict* 13) If an action for money is brought against a person who the arbitrator ordered should not be sued for it, this is a transgression of the arbitrator's award. How then, if the action is brought against a surety of the same person, will the penalty be incurred ? I should say that it will, and so Sabinus says, since the action is virtually against the principal. If on the other hand I agree with the surety to refer the matter as far as he is concerned, but I sue the principal, the penalty is not incurred, unless the surety had an interest in my not suing.

30 PAULUS (*on the Edict* 13) Where, after an agreement to refer some matter to arbitration, one of the parties sues in the ordinary court, some authorities hold that the Prætor will not

interfere to compel the arbitrator to pronounce an award, because now there can be no penalty payable in the matter, any more[1] than if the agreement to refer were annulled. However, if this view should prevail, the result will be that a man who regrets that he made an agreement to submit a matter to arbitration will have it in his power to evade the submission. Accordingly it must be held that the party in question has incurred the penalty, and an action to enforce it can be carried through before the judge in the regular way.

31 ULPIANUS (*on the Edict* 13) When anything is done contrary to a promise made on stipulation, the promise can only be sued upon where the breach was committed without there being any *dolus malus* (malicious contrivance) on the part of the promisee; a promise can only be sued upon at all subject to this proviso, that a man is not to derive a benefit from his own *dolus*. But if an agreement to refer contains a special clause providing for the case of something in the matter being done with *dolus*, then the party who acts with *dolus* can be sued upon the promise; accordingly, where a man uses bribes or solicitation, so as to corrupt the arbitrator or the pleader on the other side, or some one of those to whom he has committed his own case, he can be sued on the clause which refers to *dolus*; also where he circumvents his opponent by craft; in short, if he behaves with any *dolus* in the course of the proceedings, the action *ex stipulatu* will be available; consequently, if such opponent desires to proceed by an action *de dolo*, it will not be allowed, as he has the action *ex stipulatu*. If however such a clause as above mentioned is not inserted in the agreement, there is room for an action or an *exceptio* founded on *dolus*. Such an agreement for reference, that is, one which includes a clause mentioning *dolus*, is a complete submission.

32 PAULUS (*on the Edict* 13) In the case of a submission to arbitration no attention is paid to the question whether the penalty is greater or less than the amount which the matter at issue is worth. 1. When the penalty is once incurred the arbitrator will not be compelled to pronounce an award. 2. If a woman is a party to a submission on behalf of a third person, this is no valid submission of a money claim, because it is a case of intervention on behalf of some one else. 3. On the whole, it comes to this: the Prætor is not to interfere where either, to begin with, there was no submission, or there was one, but it is uncertain as yet whether it is

[1] Read *esset* for *est*.

one in pursuance of which a penalty can be sued for, or the penalty has ceased to be recoverable, because the contract is avoided by lapse of time, or by death, or by a formal release, or by a judicial decree, or by simple agreement. 4. As to the question whether, where some priestly office devolves on an arbitrator, he will be compelled to pronounce an award, this is a point to consider about [but probably he will not]; an excuse on that ground would be allowed not merely out of regard to the office of the person himself, but to give glory to God, to whose worship a priest ought to give himself up. However if he assumed such an office after he was chosen arbitrator, then even a priest is bound absolutely to give an award. 5. Again, the arbitrator is not to be compelled to act if the matter has been compromised, or a slave, who was to be the subject of the arbitration, is dead; unless indeed, in this last case, the parties have some interest in the matter being proceeded with. 6. Julianus lays down the following without further discrimination;—if, owing to a mistake, parties go to an arbitrator on a question about some delict which entails *infamia*, or about something which the law makes a subject for a criminal trial, as for instance a question of adultery or murder or the like, the Prætor ought to forbid the arbitrator to give a decision, and if he gives any, the Prætor ought not to allow it to be put in force. 7. If a reference is agreed upon in respect of a question at issue at law as to a man's freedom, the arbitrator, as is very reasonable, will not be compelled to give an award; because the law favours liberty, so that the matter ought to go to a higher tribunal. The rule is the same where the question is as to whether a person is freeborn or a freedman, also where it is alleged that freedom has to be given in pursuance of a *fidei-commissum*. The same rule applies to an *actio popularis*. 8. If one of the parties to a submission is a slave, in the opinion of Octavenus, the arbitrator cannot be compelled to pronounce an award, and, if he does pronounce one, no proceedings can be allowed for the penalty in the nature of an action *de peculio*. If the other party to the submission is a free man, it is a question worth considering whether proceedings for a penalty can be allowed against him; but, on the whole, I should say not. 9. Again, if a man is party to a submission in Rome, [then goes away,] and afterwards comes to Rome as a legate, in this case the arbitrator is not compellable to give an award, any more than the party himself, if he had before joined issue in an action, would be compelled in the same case to prosecute it; and it makes no difference whether the party was a legate on the first occasion too or not. But if he makes the

submission now, being a legate at the time, then I should say that the arbitrator can be compelled to give an award; because, if the party had under the same circumstances joined issue in an action at law, he would be bound to proceed with it. Some persons however are in doubt on this point, though without sufficient reason; but at any rate they would be in no doubt at all, if the question which the party agreed to refer while he was a legate were one arising upon a contract which he made while a legate; because on such a question he would be equally compellable to sustain a trial at law. With regard to the point first mentioned, one question worth considering is whether, supposing the legate made the submission before [leaving Rome], the arbitrator can be compelled to pronounce an award on the legate's own application, as, on the principle first relied on, it might be held unjust to leave it in the legate's own power [to determine whether the arbitrator shall give an award or not]. However, this case will be treated in the same way as would be that of his desiring to proceed by an action at law, which he is quite free to do. † *But such an arbitration is to be treated like an action brought in the regular way, so that if he wishes the arbitrator to pronounce an award, he will only get a hearing where he is ready to defend his own case* †.[1] 10. If a man who had agreed with some one now deceased to refer a matter to arbitration should raise a claim to the inheritance judicially, then, if the arbitrator gives his award, it will prejudge the question of inheritance, consequently the arbitrator must be prevented from proceeding for the present. 11. The time agreed on for the arbitration may be enlarged, I do not mean, that is, when this has to be in pursuance of an agreement, but when it is necessary to get the arbitrator's order for the purpose, to prevent the penalty being incurred. 12. If an arbitrator attempts to conceal himself, the Prætor ought to have a search made for him, and if he keeps away for a long time, he should be ordered to pay a fine. 13. Where an agreement is made to refer a question to several arbitrators, on the understanding that if[2] any one should pronounce an award, even standing by himself, the parties should abide by it, then, if all but one should be absent, still that one will be bound to give a decision; but if the submission was on the understanding that all were to pronounce, or †that the view of the majority was to prevail,†[3] the Prætor ought not to put compulsion on the individual arbi-

[1] Apparently some confusion.
[2] After *ut* ins. *si*. Cf. M.
[3] Text hopeless; the sense must be as above.

trators separately, as no individual arbitrator's view will determine the penalty. 14. In a case where an arbitrator seemed clearly to be an enemy of one of the parties on independent grounds, where moreover he was called upon, on special evidence produced, not to pronounce an award, but[1] he nevertheless proceeded to pronounce one, though no one pressed him to do so, whereupon a complaint was made to the Emperor Antoninus, the note which the Emperor made on the party's *libel* was that he could have an *exceptio* of *dolus malus*. The same Emperor being consulted by the judge before whom an action was brought for the penalty, his answer was that although no appeal could be brought, nevertheless the action for the penalty could be barred by an *exceptio* of *dolus malus*. Accordingly that plea gives a remedy which amounts to a kind of appeal, as a legal means is furnished of having a rehearing after an arbitrator's award. 15. In discussing the duty of an arbitrator we must understand that the whole discussion must be founded on the particular terms of the submission, as the arbitrator cannot legally do anything but what it was provided by the agreement that he should be able to do; accordingly he cannot decide just as he pleases, nor on whatever question he pleases, but only on the question which it was agreed to refer and in conformity with the agreement. 16. Questions have been raised as to pronouncing the award, and it has been held that it is not simply any award which the arbitrator chooses to pronounce that will be valid, though on some points there has been a difference of opinion. I should say that the award is in fact not binding, if the arbitrator should declare that on such a point the parties must go to the court, or make a fresh submission, either to him or to some other arbitrator. In fact Julianus himself declares that he may be disobeyed with impunity, if he orders the parties to go before another arbitrator, as otherwise the matter will never end,—though if he gives some such award as follows, that land must be delivered or security must be given, subject to the approval of Publius Mævius, the award must be obeyed. The above view is supported by Pedius: [he says that] in order to prevent arbitrations being prolonged or transferred to other arbitrators, who perhaps are hostile to [one of] the parties, the arbitrator ought to frame his award so as to put an end to the dispute; whereas the dispute is not put an end to where the question is either postponed or transferred to some other arbitrator. The award, he adds, is partly on the question in what form security shall be given and who shall be sureties, and the decision on these

[1] After *dicerat* read *et*. M.

points cannot be delegated, unless the agreement was to refer to the arbitrator the very question on whose arbitration security should be given. 17. Again, if the arbitrator should require that someone else should be joined with him, where there is no such provision in the submission, this is no award; an award can only be on the question referred, but the above was not referred. 18. If two principals make mutual stipulations, and then desire the case to be carried on before the arbitrators through their *procurators*, the arbitrator may require the parties themselves to be present as well; 19. indeed, if the submission expressly names the heir, he can call upon their heirs to be present too. 20. It is a regular part of the duty of the arbitrator to say how clear possession is to be given. Does it comprise the ordering[1] an undertaking to be given that the principal will ratify what is done by his procurator? Sextus Pedius holds that it does; however there is no sense in this view, because, if the principal should not ratify, he will become liable on the stipulation. 21. An arbitrator can do nothing outside the terms of the submission, consequently it is necessary to add expressly any provision as to enlarging the time; otherwise his order may be disobeyed with impunity.

33 PAPINIANUS (*Questions* 1) An arbitrator who is chosen in pursuance of a submission on the understanding that he may enlarge the time is at liberty to do so; but he may not advance the hearing if the parties object.

34 PAULUS (*on the Edict* 13) If there are two correal creditors or debtors, and one of them refers a question to arbitration, and thereupon an award is made ordering that he shall not sue or shall not be sued, as the case may be, let us consider whether, if the other sues—or is sued—the penalty is incurred; the same question arises in the case of two bankers who are co-creditors (*quorum nomina simul sunt*). The truth is we might perhaps put them on the footing of sureties, if they are partners; but, if they are not, then there is no action against you [by your co-debtor] though I sue[2] [him], and, though you should be sued [by my co-creditor], the action is not on my behalf. 1. If the penalty is once incurred, then I should say that the true rule is that there is an end of the submission, and the penalty cannot be incurred any more, unless the intention was that it should be incurred from time to time on each separate occasion.

[1] After *satis* read *ut detur*. Cf. M.

[2] Read *licet ego petam* for *nec ego peto*. Hal. cf. M.

35 GAIUS (*on the provincial Edict* 5) If a boy under age agrees to refer a matter without his guardian's concurrence, the arbitrator cannot be compelled to pronounce an award, (because, if the award should be against the boy, he will not be liable to pay the penalty,) unless the boy gave a surety who can be sued for the penalty. This is Julianus's opinion too.

36 ULPIANUS (*on the Edict* 77). If an arbitrator should, under compulsion from the prætor, give an award on a holiday (*feriatis diebus*), and the penalty should be sued for in pursuance of the submission, it is clear that no *exceptio* is admissible, unless, by some[1] statute, the very holiday on which the award was given was barred.

37 CELSUS (*Digest* 2) Where an arbitrator has ordered that neither party shall sue the other, then, if the heir of either sues in spite of the prohibition, he will incur the penalty; the object of going before an arbitrator is not to postpone a dispute but to put an end to it altogether.

38 MODESTINUS (*Rules* 6) When a penalty is sued for in pursuance of a submission, the man who incurs the penalty will have an order made upon him to pay it, and it is of no consequence whether the other party had an interest in the award being complied with or not.

39 JAVOLENUS (*extracts from Cassius* 11) It is not every case of disobedience to the award of an arbitrator which causes the penalty to become recoverable in pursuance of the agreement between the parties, but only those cases in which the question at issue turned on the payment of money or the performance of some service. *The same*:—An arbitrator can punish contumacy in a party to the arbitration by ordering him to pay a sum of money to his opponent; but a man is not to be reckoned contumacious because he did not set out the names of his witnesses to the satisfaction of the arbitrator. 1. Where an arbitrator orders the time agreed upon to be enlarged, in a case in which he was authorized to do so, the default of either party will afford ground for the penalty being demandable by the other.

40 POMPONIUS (*extracts from various passages* 11) An arbitrator ordered the parties to attend on the first day of January, and died before that day; when the day came one of the parties failed to attend. In this case, beyond all doubt, the penalty was not

[1] Read *aliqua* for *alia*. Pothier, cf. M.

incurred ; indeed Aristo tells us he once heard Cassius say that no penalty was incurred in the case of an arbitrator himself failing to come to hold the arbitration. The above is in keeping with what is said by Servius, viz. that if it is the fault of the promisee that he fails to receive the money promised, the penalty is not incurred.

41 CALLISTRATUS (*monitory Edict* 1) As it is provided by the *lex Julia* that no one under twenty is to be compelled to be a judge, it is held that no one can be allowed to choose one under that age as judge in an arbitration , consequently no penalty can be incurred through an award given by such a person. At the same time it has often been said that if a man who is over twenty but under twenty-five should without due reflection undertake to hear an arbitration case, under the circumstances relief would be given.

42 PAPINIANUS (*Responsa* 2) An arbitrator ordered that certain slaves should be handed over by a given day, and, as they were not so handed over, adjudged the party to pay so much to the *fiscus* by way of penalty, in accordance with the terms of the submission. By this award no rights are acquired by the *fiscus*, but nevertheless the penalty promised can be demanded, because the party failed to do what was ordered by the arbitrator.

43 SCAEVOLA (*Responsa* 1) A reference to arbitration was agreed upon of "all matters and disputes," by Lucius Titius and Maevius Sempronius. Thereupon, by mistake, Lucius Titius omitted in his application some particular matters, and nothing was said about them in the arbitrator's award. The question arose whether a fresh application could be made as to the matters so omitted. The answer was that it could, and that no penalty was incurred in pursuance of the submission ; but that if the party made the omission with malicious intent, then, though he could no doubt still apply, he would have to submit to the penalty.

44 THE SAME (*Digest* 2) A dispute arose on a question of boundaries between Castellianus and Seius, and an arbitrator was chosen in order that the question might be set at rest by his decision ; who accordingly gave his award in the presence of the parties and laid down the boundaries. The question was asked whether, on failure to observe the award on the side of Castellianus, the penalty was incurred in pursuance of the submission. I answered that if the arbitrator was not obeyed in respect of an award which he made in the presence of both parties, the penalty was incurred.

45 ULPIANUS (*on Sabinus* 28) In arbitration cases, where part of the agreement is that the decision shall be made by a particular person, the right of decision is confined to that person.

46 PAULUS (*on Sabinus* 12) An arbitrator can decide as to matters, accounts, and disputes which were pending between the parties to the arbitration at the time, not such as occurred after the reference.

47 JULIANUS (*Digest* 4) If an agreement to refer is made in such terms that the arbitrator is to pronounce his award in the presence of both parties or of their respective heirs, and one of the litigating parties dies leaving for heir a boy under age, no award given is held to be valid, unless the guardian has given his concurrence. 1. Similarly, if one of the parties to the agreement becomes insane,

48 MODESTINUS (*Rules* 4) the arbitrator will not be compelled to give an award:

49 JULIANUS (*Digest* 4) indeed, he may be ordered not to give one, as it is held that there is no such thing as an act done in the "presence" of a lunatic. If however the lunatic has a *curator* or comes to have one while the case is still pending, the award can be pronounced in the presence of the *curator*. 1. An arbitrator can summon the parties to attend either by a messenger or by letter. 2. If mention is made of the heir in connexion with one of the parties only, the arbitration will be annulled by the death of either of the parties, just as it would be if there had been no reference to the heir of either.

50 ALFENUS (*Digest* 7) An arbitrator who was had in pursuance of a submission, not being able to give his award by the day which was laid down in the reference, ordered the time to be enlarged; but one of the contending parties refused to observe the order; whereupon an opinion was sought on the question whether he could be sued for the penal sum in pursuance of the submission. I answered that he could not, because the arbitrator had not been authorized to make such an order.

51 MARIANUS (*Rules* 2) If a man is appointed arbitrator in his own affair, he cannot pronounce an award, as he would be ordering himself to do something or forbidding himself to bring some action and nobody can issue a command or a prohibition to himself.

52 THE SAME (*Rules* 4) If a man who is ordered by an arbitrator in pursuance of a submission to pay a sum of money should

make default in doing so, he is bound to pay the penalty in accordance with the agreement, but, if he afterwards pays the money, he is discharged from the penalty.

IX.

SEAMEN, INNKEEPERS, STABLEKEEPERS, TO RESTORE WHAT THEY RECEIVE.

1 ULPIANUS (*on the Edict* 14) The prætor says:—"Where seamen, innkeepers, or stablekeepers have received the property of anyone on the terms of safe custody, then, unless they restore it, I will allow an action against them." 1. This Edict is highly beneficial, as it is very often necessary to rely on the engagements of the persons mentioned and to commit things to their custody. And no one need think that the above Edict bears hardly on them, as it is open to them, if they like, to refuse to receive anyone, and, unless this rule were laid down, they would have it in their power to conspire with thieves against the persons they took in; in fact, even as it is, they are not always innocent of dishonest machinations of this kind. 2. Let us consider then, first of all, who the persons are that are held liable. The prætor uses the word "seamen" (*nautæ*). By seaman we must understand a person who has the management of the ship, though, as a matter of fact, anybody is called a seaman who is on board the ship to aid in the navigation; however, the prætor is only thinking of the *exercitor* (owner or charterer). It is clear, Pomponius says, that the *exercitor* ought not to be bound by the act of some oarsman or man before the mast, but only by his own act or that of the master; though, no doubt, if he himself told anyone to commit something to the care of one of the sailors, he must himself be liable. 3. There are particular officers on board vessels who exercise authority in the ship with a view to the proper custody of goods, such as the *nauphylax* (ship's guard) and the *dicætarius* (steward); so if one of these receives anything, I should say there ought to be an action allowed against the *exercitor*, because a man who gives the above officers the conduct of any such department as described authorizes things being committed to their charge, though it is the owner (*navicularius*) or the master who does what is called the *cheirembolon* (taking charge). Even if he does not do

this, still the owner will be liable for what is received. 4. As for those who ply rafts, or wherrymen, there is no provision in the Edict about them, but, according to Labeo, there ought to be the same rule, and such is the present practice. 5. Under the description of innkeepers and stablekeepers are to be understood not only those who carry on those respective businesses, but their agents as well. But those who discharge the duties of a common drudge are not included; for instance, doorkeepers, kitchenboys and the like. 6. The prætor says, "where they have received any one's property on the terms of safe custody"; this means where they receive any object or ware. Hence it is stated in Vivianus that the Edict deals equally with things which are over and above the actual cargo, such as clothes which passengers wear on board ship, and such things in general as people require for everyday use. 7. Pomponius says (b. 34) that it is a matter of small account whether the goods which people bring in are their own or those of other persons, so long as those who bring them have an interest in their being preserved, as the articles in question will have to be given up to such people rather than to their owners. Accordingly if goods were held by me as security for money lent on a sea-risk (*pecunia nautica*), the "seaman" will be responsible to me and not to the debtor, if he received the goods from me[1]. 8. Does the party receive goods on terms of safe custody only where, besides being put on board, they are expressly entrusted to him; or, if they are not so entrusted, is he still held to receive on the above terms by the bare fact that they are put on board? I hold that he undertakes the custody in all cases where anything is put on board, and that he is bound to answer for the acts not only of seamen but even of passengers;

2 GAIUS (*on the provincial Edict* 5) just as an innkeeper is bound to answer for the acts of travellers;

3 ULPIANUS (*on the Edict* 14) and with regard to the acts of passengers, the same thing is set down by Pomponius too (b. 34). According to this writer, even if the goods have not yet been taken on board, but have been lost on land, still, if they are goods which the *exercitor* has once engaged to carry, the loss falls on him. 1. The prætor says, "Unless they restore it, I will allow an action against them." The action founded on this Edict is *in factum*. However we may fairly ask whether this action is necessary, as the case is one which would afford ground for a civil action; namely,

[1] For *ante* read *a me*. Hal. cf. M.

if there was a pecuniary consideration given, the action *ex locato* or *ex conducto*; that is to say, if the whole ship was hired out, the party who chartered her can bring an action *ex conducto* even for the goods that are missing, but, if the "seaman" engaged to carry the goods, he can be sued *ex locato*; lastly, if the goods were taken on board for nothing. then, says Pomponius, there is a good action on *depositum*. This writer, therefore, is surprised at there being an honorary action introduced, as there are civil actions available; unless indeed, he says, the object was to let it become known that the praetor took express care to check the dishonesty of persons such as those mentioned; and also because in cases of *locatio* and *conductio* a man answers for negligence, in *depositum* for *dolus* only, but under this Edict the party who took in the goods is bound absolutely, even where the goods are lost or mischief happens through no fault of his, unless what ensues is a case of unavoidable mischief. Accordingly Labeo says that if anything is lost through shipwreck or through an attack by pirates, the *exercitor* may reasonably be allowed an *exceptio*. The same must be said where a case of *vis major* happens in a stable or an inn. 2. Innkeepers and stablekeepers are liable, so far as it is in the exercise of their calling that they take the goods in; but if they do so in some way which is not connected with their business they are not liable. 3. If a *filiusfamilias* or a slave takes in the goods, and the consent of the father or[1] owner is given, the latter may be sued on the whole liability. Again, if a slave of the *exercitor* stole the property or did damage, there will be no noxal action, because, the goods having been taken in, the owner [of the slave] can thereupon be sued in a direct action. If however the above-mentioned persons act without the consent [of the father or owner], there will be an action *de peculio*. 4. This action, Pomponius says, is to indemnify the plaintiff (*rei persecutionem continet*), and consequently it will be allowed against the heir and without limitation of time. 5. We may lastly ask whether proceedings by way of an honorary action for goods received and by way of action for theft can be taken in respect of the same thing. As to this, Pomponius is in doubt; but I should say on the whole that the party ought to be confined to one or other of the two, either on motion or by an *exceptio doli*.

4 PAULUS (*on the Edict* 13) On the other hand the seaman himself at whose risk the goods are has a good action for theft, unless either he stole them himself, and after that they were stolen

[1] After *patris* ins. *aut*. M.

from him, or someone else stole them, but the seaman is not in a solvent condition. 1. If a seaman receives [the goods] of a seaman, a stablekeeper those of a stablekeeper, or an innkeeper those of an innkeeper, he will still be liable. 2. Vivianus declared that the Edict applies as much to such things as are brought in after the cargo is placed on board and the contract to carry it is made, though no freight should be payable for them, such as articles of clothing, or food to be consumed on board, as these things are comprised as accessories in the general contract.

5 GAIUS (*on the provincial Edict* 5) Seamen, innkeepers, and stablekeepers receive pay not for taking care of the goods, but, in the case of the seaman, for conveying passengers to their destination, in that of the innkeeper, for letting travellers stay in the inn, and in that of the stablekeeper, for allowing horses to be put in his stables; still they are responsible for custody. Fullers and cobblers do not receive pay for custody, but for their handiwork, nevertheless they are liable to an action *ex locato* for the custody. 1. What has been said about theft must be understood to apply equally to damage; as there can be no doubt that a man who receives property on terms of safe custody must be held to engage to protect it not only from theft but from damage.

6 PAULUS (*on the Edict* 22) Though you should be carried in a ship or make use of an inn without charge, still an action *in factum* on your part will not be disallowed if your property is unlawfully damaged. 1. If you make use of my slave in your ship or inn, and he damages my property or commits a theft thereof, then, although it is true that [generally] actions for theft and *damnum injuria* [on my slave's part] would have to be brought against me, still, in this case, the action, being *in factum*, is available against you, even in respect of my own slave's behaviour. The rule is the same if he belongs to both of us in common; but whatever you pay me on account of the slave's act, whether your liability was established in an action *communi dividundo*, or *pro socio*, or in an action founded on the fact that you hired a share in the slave, or hired the whole man, you will have a good demand on me on the contract of hiring too. 2. But if I am damnified by some injury done to the slave himself by a third person who is on board the same vessel or in the same inn, and whose acts the prætor is in the practice of taking into account, Pomponius is of opinion that this action will not be available on the slave's account. 3. An innkeeper is liable to the action *in factum*

on the ground of the behaviour of persons who are in the inn as lodgers, but this does not apply to one who is admitted by way of casual entertainment, such as a traveller. 4. A man may very well have recourse to an action for theft or unlawful mischief against seamen themselves, if, that is, he can prove the ill-behaviour of any particular person; but he is bound to confine himself to one action; and if he proceeds against the *exercitor*, he ought to assign to him his right of action [against the actual delinquent], though indeed the *exercitor* would have a right to sue such delinquent in an action *ex conducto*. If however the *exercitor* is dismissed from the action, and then the party proceeds against the seaman, the latter will be allowed an *exceptio*, so as to avoid repeated trials being had on the ground of the behaviour of the same man: and, conversely, if proceedings are taken and carried through founded on the behaviour of one particular man, and then the action *in factum* is brought [against the *exercitor*], an *exceptio* is allowed.

7 ULPIANUS (*on the Edict* 18) The *exercitor* is bound to answer for the behaviour of all his seamen, whether they are slaves or free; and it is quite reasonable that he should be answerable for their behaviour, as he himself employed them at his own risk. But he is only answerable where the damage is committed on board the ship; if it happens off the ship, even by the act of the seamen, he is not responsible. Moreover if he gives notice beforehand that all the passengers are to look after their own goods, and that he will not be answerable for damage or loss, and the passengers agree to the terms of this notice, then he cannot be sued. 1. The action *in factum* referred to is for double damages. 2. If the seamen should do any damage to one another's property, this does not concern the *exercitor*. But where a man is both seaman and merchant he will have a good claim; and where the loss falls on one of those called *nautepibatae* (persons who work out their passage), the *exercitor* is liable to him too; but he is also bound to answer for the acts of such persons, since they are seamen as well [as passengers]. 3. If the mischief is done by the slave of a seaman, though such slave is not a seaman himself, it will be perfectly just to allow an *utilis actio* against the *exercitor*. 4. In this action the *exercitor* is liable directly, that is, in respect of his own fault for employing such men; consequently even if the men themselves should die, this will not release him. Where however the action is founded on acts of the *exercitor's* own slaves, it can

only be a noxal action, to bind the *exercitor*; no doubt, where he employs slaves belonging to someone else, he is bound to make full inquiry as to how far they can be trusted, and are men of good character; but in respect of his own slaves he may fairly be excused, whatever kind of slaves it is that he got to equip his vessel. 5. If there are several *exercitors* to the same ship, each may be sued in respect of his own share in the business of *exercitor*. 6. The actions under discussion are prætorian, nevertheless the right to sue is subject to no limitation in respect of time; on the other hand they are not allowed against the heir. We may add that if a slave was *exercitor*, and he is dead, no action *de peculio* will be allowed against his owner, even within the year; but where a slave or a son has the control of a ship or an inn or a stable, with the consent of the owner or father, there, I should say, the latter himself will have to defend the action for the whole damage, on the implied assumption that he undertook the full responsibility for all contingencies.

FIFTH BOOK.

I.

ON TRIALS AT LAW: AS TO WHERE A MAN OUGHT TO TAKE PROCEEDINGS OR BE SUED.

1 ULPIANUS (*on the Edict* 2) If persons submit their case to some particular tribunal, upon agreement so to do, thereupon, as between the parties so agreeing, jurisdiction belongs to any judge who presides in the court, or has other authority therein.

2 THE SAME *on the Edict* 3 Parties are held to agree who know that they are not subject to the jurisdiction of the judge in question, but do in fact agree to resort to his court; but if they merely suppose that the jurisdiction belongs to that judge, it will not on that account belong to him; where the litigating parties make a mistake, as Julianus himself says (*Dig.* 1), there is no agreement. Or, if they took for prætor one who was not prætor, then again the agreement so made in error confers no jurisdiction. Again, if one of the parties refuses to concur, but is compelled thereto by the prætor by the force at his command, no jurisdiction is conferred. 1. In respect of agreements, is an arrangement between private persons enough, or is the consent of the prætor himself required as well? The words of the *lex Julia* on trials-at-law are "so as to prevent private persons agreeing"; so that an agreement between private persons is enough. If then the private persons agree, but the prætor is not aware of their agreement, and thinks the jurisdiction is his own, we may fairly consider whether the conditions required by the statute are not fulfilled; and I should say that it may be very well maintained that the jurisdiction belongs to the person agreed upon. 2. If a man is nominated as judge, and is to hold the office for a given time, and all the litigating parties agree to an enlargement of the time within which he is to

be bound to decide the case, the enlargement may take effect, unless this is expressly barred by Imperial order. 3. Legates are allowed the right of having the case transferred to the court of their domicile, where the question turns upon any contract which they made before they became legates, and a similar right is given to persons who have been required to attend to give evidence or have been sent for or ordered to go to a province to act as judges. The fact[1] that a man has appealed against a judgment does not put him under the necessity of defending proceedings taken by other persons during the time occupied by the prosecution of his appeal at Rome or in any other place at which it is being carried on; Celsus says that under these circumstances a man may in fact ask to have the case transferred to his own domicile[2], because he only came to Rome on other business. This opinion is held by Celsus and it is perfectly sound; the Divine Pius himself laid down, in a rescript addressed to Plotius Celsianus, that a man whom he had cited to appear at Rome to give an account of a guardianship ought not to be compelled to appear in respect of a different guardianship in connexion with which he had not been cited. The same Emperor, in a rescript to Claudius Flavianus, laid down that a youth under twenty-five who had asked for a restitution *in integrum* against one Asinianus, who had come to Rome on some other business, had no right to have his application heard at Rome. 4. All the above-mentioned persons have the cause transferred to their own home on the supposition that they did not enter into the contract in the place where they are sued; but if they did enter into the contract there, they have no right to have the cause transferred; except legates, who are not compelled to defend their case in Rome as long as they remain there in the character of legates, even if it was there that they made the contract, provided they made it before the time of their discharging the office of legate. This we are told by Julianus, and a rescript of the Divine Pius lays down the same rule. No doubt if they continue to reside at Rome after the duties attached to the character of legate are discharged, then, according to a rescript of the Divine Pius, they can be sued there. 5. If they made the contract outside their own province, but not in Italy, it is a matter of question whether they can be sued in Rome. Marcellus says they can only use the privilege of having a matter transferred to their domicile when it depends on a contract made by them in their own city, or at any

[1] For *quoque qui* read *quod quis*. Cf. M.

[2] For *domus* perhaps read *domum*.

rate within their own province, and this is true. However[1], on the other hand, if they bring an action themselves, they must defend any action brought against them; but I do not mean to say that this is so where they simply sue on some *injuria* or theft or damage which they suffered where they are; or else, as Julianus nicely observes, either they will have to bear insults and loss without getting redress, or else it will be in anybody's power, by attacking them, to make them subject to [Roman] jurisdiction the moment they seek redress. 6. If there is any doubt whether a man is or is not in such a position that he can have a matter transferred to his home tribunal, it is for the prætor to determine the question, on inquiry into the case; and if it should be clear that he can under the circumstances have it so transferred, the party will be bound to undertake to appear at the trial, the prætor laying down to what day his engagement shall refer. As to whether he is simply to enter into an undertaking or find security, Marcellus is in doubt; my own opinion is that he need only give a formal promise, and Mela says the same thing; and, were it otherwise, the case would be not so much that he had to find persons to be security for him as that he was compelled to meet the action where he was. 7. But in all cases in which the time for appearance is extended, it ought to be done so as not to allow lapse of time to occasion loss to creditors. 8. The right of inflicting a fine is allowed to such as exercise judicial functions by governmental appointment, and to no others; save in pursuance of express authorization.

3 THE SAME (*on the Edict* 4) A man cannot be held to be keeping out of the way to avoid an action, if, even when present, he is not compellable to meet the action.

4 GAIUS (*on the provincial Edict* 1) A man cannot have any action-at-law against a person whom he has in his own *potestas*, save in respect of *castrense peculium*.

5 ULPIANUS (*on the Edict* 5) Where a man is cited out of the jurisdiction of some other magistrate to appear in the prætor's court, he is bound to attend, so both Pomponius and Vindius inform us; because it is for the prætor to form a judgment as to whether he has jurisdiction in the case, and not for the party cited to treat the authority of the prætor with contempt: as even legates and all those generally who have a right to have a case removed to their domicile are in this position that, if

[1] Dele *et.* M.

they are cited, they must appear, and then they can assert their privilege.

6 THE SAME (*on the Edict* 6) A blind man is competent to discharge the office of judge.

7 THE SAME (*on the Edict* 7) If a man, after he has once been cited, becomes a soldier, or comes to have a different forum, he will not have a right to have the case removed to his forum, as the plaintiff, you may say, is beforehand with him.

8 GAIUS (*on the provincial Edict* 2) If a man in the course of a legation makes a *constitutum* of money which he owed before he was legate, he cannot be compelled to meet an action in the place where he made the *constitutum*.

9 ULPIANUS (*on the Edict* 9) The Italian islands are a part of Italy, and [the islands in the vicinity] of any province [are a part of that province].

10 THE SAME (*on the Edict* 10) A man is held to "desist" not where he postpones a trial at law, but where he abandons it altogether; to desist is to give up with a vexatious object proceedings which a man had set on foot. There is no doubt that if a man, on ascertaining the real facts of the case, relinquishes some proceeding because he is unwilling to persevere in an unjust contest, not having begun it originally with a vexatious object, he is not held to desist.

11 THE SAME (*on the Edict* 12) If I arrogate a man after he has joined issue with me in an action which he brought against me or I brought against him, then, according to what Marcellus tells us (*Dig.* 3), the action is at an end, because there could have been no action between us at the outset [if we had been in our present position].

12 PAULUS (*on the Edict* 17) Where the prætor forbids one out of a number to act as judge, he may be held to authorize the others. 1. Those officers can appoint a judge to whom the power of doing so is given by a statute or an Imperial enactment or a decree of the senate. By a statute, for instance, this power may be given to a proconsul. Moreover one to whom jurisdiction is delegated can appoint a judge; in this position are proconsular legates. We may add those to whom the right has been allowed by custom, because of their general power of command (*imperium*), for instance the *præfectus urbi* and the other magistrates at Rome.

2. Officers who have the power of appointing a judge are not at liberty to give any judge they please; some kinds of persons are incapacitated from being judges by statute, some by nature, some by custom. By nature deaf and dumb persons are incapable, also incurable lunatics and boys under age, as they are devoid of judgment. By statute a man is incapacitated who has been removed from the senate. By custom, women and slaves, not because they are wanting in judgment, but because it is an established rule that they are not to discharge civil offices. 3. As to those who are legally capable of holding the office of judge, it is immaterial whether they are under *potestas* or *sui juris*.

13 GAIUS (*on the provincial Edict* 7) In the three actions called *familiae erciscundae*, *communi dividundo*, and *finium regundorum* it is a question who is to be regarded as plaintiff, seeing that [in each of these cases] all parties appear to be in the like position. However it is held on the whole that the party to be regarded as plaintiff is the one who brought the matter before the court;

14 ULPIANUS (*Disputations* 2) but where both parties bring the matter before the court, the practice is to determine the question by lot.

15 THE SAME (*on the Edict* 21) If a *filiusfamilias*, being a judge, should "make the case his own," he is liable to pay an amount equal to the value of what there was in his *peculium* at the time of his pronouncing judgment. 1. A judge is said to "make the case his own" when he maliciously pronounces judgment in fraud of a statute; and he is held to pronounce maliciously when plain proof is given of favour or spite or, it may be, some corrupt motive on his part. The result is that he is compelled to hand over the true value of the matter at stake.

16 THE SAME (*on the Edict* 5) Julianus holds that where a judge has made the case his own, there will be a good right of action against his heir; but this opinion is not correct, and many have criticised it.

17 THE SAME (*on the Edict* 22) Julianus says that if one of the parties makes the judge heir either to the whole or a part of his estate, some other judge must needs be had, because it is unjust that a man should be made the judge of his own case.

18 THE SAME (*on the Edict* 23) If a considerable interval of time will have to pass before the judge appointed can attend to the

matter, the Prætor orders another appointment; this occurs, for instance, where he is engrossed by something or other which does not allow him to bestow his attention on the trial,—he may have an attack of illness or be obliged to go on a journey, or his private property may be exposed to dangers. 1. If a *filiusfamilias* wishes to take proceedings on the ground of some injury as to which his father has a good right of action, he is only allowed to bring an action where there is no one to bring it on behalf of the father. Julianus himself holds that if a *filiusfamilias* is away from home on a legation or with a view to study, and some act of theft or wrongful damage to property is committed against him, he can proceed by way of *utilis actio*, as, if he waited for his father to sue, the wrongs done might go unpunished, because either the father never meant to come to the place at all, or else, before he arrived, the party who committed the offence took himself off. Accordingly, the rule which I have always approved of is that where the matter does not depend on delict but on contract, then, if the father happens to be somewhere in the provinces and the son himself is staying at Rome, either for the sake of study or for some other good reason, the son ought to proceed by way of *utilis actio*; let us suppose that he seeks to recover a deposit or sues on *mandatum* or for money which he lent;—and the reason for this is that, if he is not allowed the action, the result may be that he will be victimized with impunity and be living at Rome in a state of destitution because he does not get the allowance which his father intended him to have for his expenses. Suppose the *filiusfamilias* is a senator and his father is in the provinces; would not the fact of his rank enhance the equity of the case?

19 THE SAME (*on the Edict* 60) An action against an heir who is away from home ought to be defended at the place at which the deceased was liable, and the heir can be sued there if he can be found on the spot, and is not protected by any special ground of exemption personal to himself. 1. If a man has been carrying on a guardianship or a curatorship or has been engaged in business, or banking, or anything which has made him incur some obligation, in any particular place, he must be ready to defend actions in the same place, though he had no home there, and if he will not defend actions, and has no home there, he must submit to possession being taken of his property. 2. Similarly, if he sold goods in any particular place, or dealt with them in any way, or bought goods, it is held that he must[1] sustain actions at the same

[1] After *defendere* ins. *debere*. Cf. M.

place, unless it was agreed that he should do so somewhere else. Is the rule[1] then this, that a man who has bought from a merchant who is a stranger, or sold to some one whom he knew to be on the point of leaving the place, has no right to an order for possession[2] of the other party's goods on the spot [if the occasion arises], but must go to the party's place of abode, while if a man [buys] from one who has a shop or a place of business which he hired in some particular locality, then the [latter's] position is such that he ought to be sued there[3]? This is on the whole the most reasonable rule; in fact, where a dealer comes to a place with the intention of speedily leaving it, you can only buy[4] from such a person as if he were a mere traveller, some one, that is, who is on his way by land or sea to some other destination, and[5] it would be a very oppressive rule that whatever place a man came to in the course of a voyage or a land-journey he should [be compellable to] defend an action at every spot. But if he stops anywhere,—I do not say as though the place were his legal home, but because he has hired some small shop or stall or warehouse or box or office at the place, and sells goods there or carries on business,—then he will be bound to defend actions at the respective places. 3. Labeo mentions the following point:—Where a provincial trader has a slave stationed at Rome as a factor to sell goods, any contract made with the slave is to be treated as if it were made with his owner; accordingly the trader must defend actions at Rome. 4. One point which we must bear in mind is this: where a man's obligation is such that he is bound to pay in Italy, then, if he has his domicile in a province, he can be sued both here and there alike; this is held by Julianus and by many others.

20 PAULUS (*on the Edict* 58) The correct view is that every kind of obligation is to be treated like [one founded on] contract, so that, wherever a man incurs an obligation, it is to be held that a contract was made there, though it should not be a case of a debt founded on a loan.

21 ULPIANUS (*on the Edict* 70) If I desire to exhibit my demand to my debtor [*edere actionem*] a good rule is that if he admits that he owes the money and declares that he is prepared to

[1] Perhaps read *igitur* for *dicimus*. Cf. M.

[2] Read *possidere* for *possideri*. Cf. M.

[3] Sense clear, exact words lost. I have put the mark of interrogation after *conveniatur* instead of after *sequi ejus*.

[4] For *emptis* read *emis*. Cf. M.

[5] For *emit* read *et*. Cf. M.

pay it, the statement must be accepted, and he must be ordered to pay the money by a given day, giving the proper undertaking in the meantime: there is no great mischief in delay being made for a short while. The expression "a short while" must be understood to apply to so much time as has been allowed defendants for payment after an order is made upon them.

22 PAULUS (*on Plautius* 3) Where a man is not compellable to sustain an action at some particular place, then, if he brings an action there himself, he can be compelled to defend actions too, and to appear before the same judge.

23 THE SAME (*on Plautius* 7) A matter which arises after joinder of issue cannot be held to be before the Court; so that a fresh application will have to be made.

24 THE SAME (*on Plautius* 17) No right of action exists at Rome against persons who are summoned to the city by the Emperor, except where they enter into a contract during their stay. 1. Legates are compellable to submit to actions in Rome in respect of delicts committed during the time of their legation, whether such delicts are committed by themselves or by their slaves. 2. But if an action *in rem* is applied for against a legate, ought it to be allowed, this action being founded on the fact of present possession? Cassius laid down that the proper rule is that if the action might result in the legate being deprived of his whole suite of attendant slaves, it ought not to be allowed, but if it relates to one slave out of a large number, it is not to be refused. Julianus says, without distinction, that no action can be allowed; which is quite right, as the object of disallowing the action is to prevent the legate from being called away from the duties of the post which he has undertaken.

25 JULIANUS (*Digest* 1) If a man while serving on a legation should purchase—or in any way whatever come to possess—a slave or any other piece of property, he is compellable, and that very justly, to submit to an action in respect of such property [on the spot]; otherwise it will be put in the power of a legate, in virtue of his office, to carry off other people's goods to his own place of abode.

26 PAULUS (*on Plautius* 17) In the case of a legate entering on an inheritance, we are told by Cassius that even where he enters on it at Rome, there is no right of action against him; because it might embarrass him in the discharge of the duties of his legation;

and this is quite sound. He cannot even be sued by a legatee; at the same time, a legatee can get an order for possession of the property, unless the legate gives security; and the same rule applies to creditors on the estate.

27 JULIANUS (*Digest* 1) What indeed is there to prevent the legate continuing to discharge his official duties and there being some agent in the meantime in possession of the estate in order to take care of it?

28 PAULUS (*on Plautius* 17) Again, if an inheritance is handed over to him under the Trebellian statute, no action against him will be allowed, whether the heir entered on the inheritance of his own free will or under compulsion; the most convenient course will be, no doubt, that the inheritance should be handed over to the legatee; still matters ought to be put on the same footing as if he had entered on the inheritance himself. 1. Where, to take the converse case, the legatee himself, during his legation, enters on an inheritance and hands it over, an action will be allowed against the *fideicommissary*; and no *exceptio* under the Trebellian statute is admissible founded on the position of the legatee, as what has just been mentioned is a direct relief to the legatee himself. 2. But in those cases in which a legatee is not compellable to sustain an action, he is equally little compellable to swear that he is not liable to pay, as the oath takes the place of joinder of issue. 3. A legatee is bound to give the regular engagement as to *damnum infectum* in respect of a house, or else submit to the neighbour taking possession. 4. If the time for bringing an action against the legatee is on the point of expiring, the Praetor is bound, on due cause shown, to allow the action to be brought, so that issue may be joined, and the case may be removed into the provincial Court. 5. If a *paterfamilias* dies leaving one son, and his widow is pregnant, the son cannot legally demand from the debtors half the money lent [by the deceased, nor will such a demand be legalized] though eventually one son should be born, because where in the nature of things we might count upon one child being born, the number might be greater[1]. However, Sabinus and Cassius hold that what he ought to have asked for is a quarter, because it was not certain that there would not be three born, and we need not consider the nature of things, according to which nothing is undetermined, seeing that whatever is going to take place does come to pass in any case; what has to be considered is our own ignorance.

[1] Wording apparently hopeless: cf. M.

29 THE SAME (*on Plautius* 8) The party who first applies is Plaintiff.

30 MARCELLUS (*Digest* 1) Wherever the trial is once accepted, there too it ought to be carried through to its termination.

31 CELSUS (*Digest* 27) If a plaintiff dies leaving several heirs, and one of them carries on the proceedings, it will not be true to say that the whole matter involved in the trial up to that point is before the Court; as no one can bring before the Court a suit instituted by another, unless he has the consent of his coheirs.

32 ULPIANUS (*on the office of Consul* 1) Where a judge has a certain period of time laid down[1] within which he is to give judgment, but he dies, and another judge is appointed in his place, we must understand that the same period is laid down afresh with reference to the new judge; although the magistrate in appointing him should not state this expressly; provided always that this does not go beyond the statutable period.

33 MODESTINUS (*Rules* 3) A man is not held to have agreed to a particular judge because he calls upon the plaintiff to state the nature of his action in that judge's court.

34 JAVOLENUS (*extracts from Cassius* 15) If a man dies after joining issue as defendant at Rome, his heir, even though his domicile should be beyond the sea, must still defend the case at Rome, because he steps into the place of the person by whom he was appointed heir.

35 THE SAME (*Epistles* 10) It is not the case that whereas the obligation of a surety can be left contingent or even expressly contracted in such terms as to refer to a future day, so too an action can be left contingent, or relate to something as to which an obligation may arise subsequently. I suppose nobody will deny that a surety can be given before the principal debt is contracted, but that there can be no issue joined before there is a debt in existence.

36 CALLISTRATUS (*Inquiries* 1) In some cases, where there is sufficient cause, and particular kinds of parties are concerned, the hearing may be ordered to be postponed; for example, where documents bearing on a case are alleged to be in the hands of persons who will have to be absent in the service of the State. This was laid down by the Divine brothers in the following terms: "Humanity requires that a postponement should be allowed on

[1] For *præstitâ* read *præstituta*. Cf. M.

the ground of accidental misfortunes, for example, where a father who is party to an action has lost his son or daughter, or a wife her husband, or a son his parent, and that in other cases of the same kind the inquiry should be postponed, within certain limits[1]." 1. Where a senator volunteers to manage some other person's affairs in a province, he has no right to decline to sustain an action on *negotia gesta*; Julianus expressed the opinion that he is obliged to defend the action, because he contracted the obligation of his own accord.

37 THE SAME (*Inquiries* 5) If an inquiry is made as to alleged violence and as to the fact of possession; the question of violence should be taken before the question of ownership, according to a rescript of the Divine Hadrian addressed to the Thessalian community in the Greek language.

38 LICINNIUS RUFINUS (*Rules* 4) A thing given by way of legacy, if it is sued for by an action *in personam*, ought to be handed over where it is, unless it was removed with malice on the part of the heir; and in that case it ought to be handed over where it is sued for. It must be added that a legacy defined by weight tale or measure ought to be handed over where it is sued for, unless the bequest contained some such additional words as "a hundred bushels out of such a warehouse" or "so many *amphorae* of wine out of such a vat." But if the legacy is sued for by an action *in rem*, the action, we may add, must be brought where the thing is; and if the thing is moveable, an action *ad exhibendum* may be brought against the heir to make him produce it; because then the legatee can bring a *vindicatio* to recover it.

39 PAPINIANUS (*Questions* 3) If the man appointed judge is a lunatic, there is nothing that need prevent there being a valid trial in the fact that he is unable to act as judge at the time; so that whatever he lays down in a judgment given after he recovers the use of his wits may be upheld: for a judge to be appointed, his own presence or knowledge is not required. 1. When a man comes to Rome on a legation, he can always be surety in any matter, since he cannot make use of his privilege, where his contract was entered into in Italy.

40 THE SAME (*Questions* 4) It is not everything which a judge is empowered to do that is made a matter of legal compulsion. 1. If a judge in giving judgment should maliciously omit some part of his duty, contrary to a statutable rule, he offends against the statute.

[1] M. thinks the text of the rescript is omitted.

41 THE SAME (*Questions* 11) In all *bona fide* actions, so long as the day for paying over money has not arrived, if anyone applies to have an undertaking given for payment, the order will be made on sufficient cause shown.

42 THE SAME (*Questions* 24) If the wife of a legate is divorced from her husband at Rome, the opinion has been given that [if she sues for *dos*] the husband must be ready to defend the action in Rome.

43 THE SAME (*Questions* 27) Where a man stipulates that a block of chambers shall be built for him at Capua within a specified time, it is recognised law that, when the time expires, he can bring an action for damages to the extent of his interest wherever he likes.

44 THE SAME (*Responsa* 2) The discharge of the duty of judge is not obstructed by the fact that, after an action has been commenced against all the guardians, some of the number have become absent in the service of the State, since the management carried on by those who are present can be distinguished from that of those who are not defending the case, and a separate estimate can be made. 1. If a person on whose account an action has been brought through a *procurator* afterwards turns out to be a slave, the defendant ought to be dismissed from the action, but this will be no bar to the principal, if on some future day he should choose to bring the action in his own name.

45 THE SAME (*Responsa* 3) A banker ought to be sued where the contract with him was made, and no adjournment of the case should be allowed save on sufficient grounds, [for example,] to allow of his books being brought from a province. A similar rule holds with reference to an action on guardianship. 1. Where the guardians of a girl have judgment given against them in the province in an action which they defended on behalf of their ward, the curators of the girl are compellable to obey the decree in Rome, the fact being that the girl's mother borrowed the money in Rome, and the girl was her mother's heir.

46 PAULUS (*Questions* 2) A man who is appointed judge continues to hold the office though he should come to be insane, because he was properly appointed judge at the outset; but in case of a serious illness he is excused the necessity of sitting; accordingly someone else must be put in his place.

47 CALLISTRATUS (*Questions* 1) Care must be taken not to

appoint as judge anyone whom one side asks for expressly by name; (such an appointment, according to a rescript of Hadrian, would be a thing of bad example;) unless special permission for this being done should be given by the Emperor out of respect for the person asked for as judge.

48 PAULUS (*Responsa* 2) The following is an extract from a letter of the Divine Hadrian: Magistrates are not in the year of their office to commence any proceedings on their own behalf either as plaintiffs or defendants, nor are they to be judges in a matter which they are concerned in as guardians or curators. But as soon as the term of their office expires, then actions may be brought both by them[1] and against them.

49 THE SAME (*Responsa* 3) A vendor, being called upon by the purchaser to defend him in an action brought by a person who claimed to recover the property as owner, declares that he has a special right to have his own judge; the question is whether he has a right to remove the case from the court of the judge before whom the matter has been begun between the plaintiff and the purchaser to that of his own judge. Paulus answered that the practice is for the vendor to take the purchaser's judge. 1. Judges appointed by the Præses commonly continue to hold their office even in the time of his successors, when they are still bound to deliver judgment, and their judgments are upheld. Scævola too gave his opinion to the same effect.

50 ULPIANUS (*Fideicommissa* 6) If an action is brought for a *fideicommissum*, and the defendant [the heir,] declares that the main part of the estate is somewhere else, he cannot be compelled to execute the trust [in pursuance of the action]; it is in fact provided by a great number of imperial enactments that a *fideicommissum* must be sued for in the place where the bulk of the estate is; unless it be shown that the testator desired the trust to be executed in the place where the action to enforce it is brought. 1. The following point has been considered in connexion with a question of debt: Suppose in the province in which the action on a *fideicommissum* is brought, there were an excess of debt; would a *præscriptio* be admissible on the ground that the bulk of the estate was somewhere else? However, the rule is that even in such a case the plea of debt makes no difference, debt not being a thing which depends on locality, but one affecting

[1] del. *πρὸς τοὺς φεύγοντας* and *τοῖς φεύγουσι*. Cf. M.

the whole of the estate; a debt, it is well known, is a deduction from the whole of the property, not from the resources existing at a particular place. Suppose, however, this particular portion of the property were specially charged with some burden, such as, for example, that of an alimentary provision which the testator directed to be paid in Rome, or with taxes, or any other burdens the payment of which it was impossible to get remitted, would the plea be admissible? In such a case the better opinion, I should say, is that it would. 2. However, there is in fact a rescript to the effect that a *fideicommissum* should be sued for at the place where the heir has his home. But whenever an heir once begins to pay in discharge of a *fideicommissum*, he cannot afterwards have recourse to the above plea,

51 MARCIANUS (*Institutes* 8) even though the inheritance should have come to a man whose home is in a province. We may add that the Emperors Severus and Antoninus laid down by rescript that if the party[1] agrees to pay in discharge of the trust in some other place, he is bound to pay accordingly in the place so agreed upon.

52 ULPIANUS (*Fideicommissa* 6) Moreover if the heir appears to the action on the *fideicommissum* and has recourse to other grounds of defence, but avoids this one, he cannot afterwards fall back upon this ground, even before judgment is given. 1. If a testator orders that corn tickets (*tesserœ frumentariœ*) should be bought for his freedmen, then, although the bulk of the estate should be in a province, nevertheless the correct view is that the *fideicommissum* must be discharged in Rome, as it is clear that that was the testator's intention, considering the nature of the purchase directed. 2. Again, if the case should be that there are left so many pounds of silver or gold to such and such honourable persons, and there are sufficient assets in Rome to discharge this *fideicommissum*; then, although the main bulk of the whole assets should be in a province, we shall have to say that the trust must be executed in Rome; as it is very unlikely that a testator who desired honour to be done to persons to whom he left such small *fideicommissa* should have wished them to be discharged in the province. 3. If the thing left by way of *fideicommissum* is on the spot, the correct view is that the action cannot be met by a *præscriptio* founded on the fact that the bulk of the estate is elsewhere. 4. But if the object of the action is to have given on the spot not the actual

[1] Read *fidei commissum* for *fidei commissarius*. Cf. M.

thing left by *fideicommissum*, but security for the discharge of the trust, it is a fair question whether this plea is not available; but I should say it is not; nay more, even if there is nothing at all on the spot, still the defendant should be ordered to give the security. What is there for him to be afraid of? if he does not give the security, the plaintiff will be put in possession in order to secure the *fideicommissum*.

HERMOGENIANUS (*epitomes of law* 1) There are just a few special cases in which slaves are allowed to appear against their owners; one case is where a slave alleges that a testament is kept back in which, as he declares, he was given his liberty. Slaves are also allowed to inform against owners accused of short deliveries of the *annona* of the Roman people, also of insufficient returns of property, also of coining. Besides this they may proceed against their owners to procure freedom left them by *fideicommissum*; as well as in cases in which they allege that they are bought by their own money, and that, contrary to the faith of the agreement, they have not been manumitted. Moreover, where it is provided [by testament] that a slave shall be free on rendering his accounts, he has a right to ask for an arbitrator between himself and his owner to examine his accounts. Again, if a slave chooses to rely on the good faith of a person who promised that he should be bought with that person's money, and be manumitted on repayment of the sum by himself, after which the person in question declines to take the money when tendered, the slave has a right given by law to inform as to the terms of the credit on the strength of which the contract was made.

PAULUS (*Sentences* 1) An inquiry of greater importance should not be prejudged by a case of less importance; the more important question attracts the less important case.

THE SAME (*on the office of assessor*) A citation made by a preceding judge ought to count as one of the three citations. It is true that if the whole number of citations should have been completed by the preceding judge, the practice still is for the successor to issue one more.

ULPIANUS (*on Sabinus* 30) Although it is perfectly true that [only] a real *procurator* can bring a matter before the Court, still, where a man, without being a *procurator*, proceeds to joinder of issue, and, after that, the principal ratifies his act, it is held, by relation back, that the matter has been properly brought before the Court.

57 THE SAME (*on Sabinus* 41) There is a good right of action against a *filiusfamilias*, both on contracts and delicts; but if the defendant dies after joinder of issue, the action is transferred to his father; only however as an action *de peculio* and *de in rem verso*. It is clear that if a *filiusfamilias* undertakes to defend an action as *procurator* for some one, then, on his death, the action is transferred to the person whose case he defended, or [if judgment has already been pronounced,] an action[1] on the judgment may be given to the same person.

58 PAULUS (*on Sabinus* 13) An action is put an end to if the person who ordered the judge to hear it forbids him to proceed, or indeed any magistrate does so who possesses superior authority to the first in the same kind of jurisdiction, or even the judge himself comes to be vested with authority equal to that of the magistrate who appointed him judge.

59 ULPIANUS (*on Sabinus* 51) If, in the order given to a man to act as judge, no place is mentioned, the magistrate is regarded as ordering him to act in the place where the Court is usually held, provided the litigating parties are not put to inconvenience.

60 PAULUS (*on Sabinus* 14) When a judge dies, whatever it was that he had to adjudicate upon, the person who is put in his place is bound to address himself to the same point.

61 ULPIANUS (*on the Edict* 26) It is commonly said that the point which is the subject of the trial is whatever it was that the litigating parties both intended; Celsus however declares that there is some risk in ascertaining this by reference to the defendant personally, because he will always try to avoid an adverse judgment by saying that that was not the point agreed upon. On the whole then, it comes to this: the best rule to give is not that the subject of the trial is whatever the parties intended that it should be, but that nothing is the subject of the trial which it was expressly intended that it should not be. 1. A judge for cases of robbery is not qualified to hear pecuniary cases.

62 THE SAME (*on the Edict* 39) It is impossible for a contest to proceed between two parties, unless one of them is demandant and the other is in possession; there must be someone who bears the burden of being plaintiff and another who has the advantage of being in possession.

[1] For *transactio vel* read *transit actione*.

63 THE SAME (*on the Edict* 49) A proper defence implies this: the party accepts a trial, either in his own person or by an agent, always giving security; and a man is not held to make a proper defence who does not pay what the judge orders.

64 THE SAME (*Disputations* 1) Damages for *dolus* are not assessed by the judge by reference to the actual interest of the plaintiff, but by reference to the value asserted on oath: indeed, it is admitted that even a thief has for this reason a good right of action on a deposit or on a loan for use. 1. If a man who is prepared to bring one kind of action first accepts security that the judge's order will be obeyed, and then proceeds upon another kind of action, he will not be able to sue on the stipulation, because the undertaking appears to be given in reference to a different matter.

65 THE SAME (*on the Edict* 34) A woman ought to sue for her *dos* where her husband's home was, not where the written assurance of *dos* was made; the contract of *dos* is not of such a kind that regard should be had[1] to the place where the assurance was executed so much as to the place which the woman herself would have naturally made her home in consequence of the marriage.

66 THE SAME (*Disputations* 2) Where a man raises an issue in ambiguous terms or uses obscure language, his expressions must be construed in the way that makes most for his own advantage.

67 THE SAME (*Disputations* 6) When a slave avers that he has been bought with his own money, if he establishes the fact, he will be deemed free by relation back to the time when he was bought, since the Imperial enactment does not order that he shall be pronounced free, but that liberty shall be made good to him. Accordingly the owner will be compellable to manumit a slave who buys himself with his own money; moreover if the owner should keep out of the way, the proper course is[2] to go by the analogy of those senatorial decrees which deal with the question of gifts of liberty made by way of *fideicommissum*.

68 THE SAME (*Disputations* 8) A peremptory summons (*edictum*) is arrived at in the following course: the defendant failing to appear, the plaintiff asks for one summons, next for a second,

69 THE SAME (*on all the Courts* 4) after an interval of not less than ten days;

[1] Dele *et.* M.
[2] Dele *debere*, or, with M., read *de ea re.*

70 THE SAME (*Disputations* 8) then for the third; and all these having issued he may sue out the peremptory summons. It was called peremptory, because it put an end to (*perimit*) the contention, that is to say, it did not allow the other party to shirk the trial any longer.

71 THE SAME (*on all the Courts* 4) In the peremptory summons the judge who issues it gives warning that he will hear the case and give judgment even if the other party fails to attend.

72 THE SAME (*Disputations* 8) This summons is sometimes allowed when the full number of summonses above mentioned has been issued already, sometimes after one only or two, sometimes in the first instance,—in which case it is said to be given once for all. Which course shall be taken is a question for the consideration of the magistrate exercising jurisdiction, whose duty it will be to arrange the series of summonses or to abridge the same according to the nature of the case or the person or the time.

73 THE SAME (*on all the Courts* 4) Even after the peremptory summons is sued out, as soon as the day mentioned arrives, the defendant who was absent is still called upon, and, whether he answers or does not answer, the case will be taken and judgment will be pronounced; though not necessarily in favour of the party who is present; even the one who is absent may sometimes get the better if he has a good case. 1. But should the party who sued out the peremptory summons be himself absent on the day when the cause was to be heard, whereas the party against whom he sued it out is present, then the peremptory summons must be cancelled, and the cause will not be heard, nor will judgment be pronounced in favour of the party who is present. 2. If the summons is cancelled, we may consider the question whether the rule is that the defendant cannot be sued any further, or whether the contention is still open, but simply the particular proceeding in which the summons occurred goes for nothing; and the better view is that the particular proceeding alone goes for nothing, but the parties can proceed to litigate afresh. 3. It must be understood that if judgment is given against an absent person on the strength of a peremptory summons and he appeals, he will not be allowed a hearing, supposing, that is, his absence was contumacious; if it was not, he may be heard.

74 JULIANUS (*Digest* 5) Whatever matter the judge hears he is compellable to pronounce judgment upon it too. 1. Where a judge has been appointed to decide a matter, provided the amount

involved does not exceed a certain sum, he may still adjudicate in respect of a higher amount, if the parties agree. 2. On one occasion, I had undertaken to defend an action brought against an absent person, and I joined issue with the plaintiff at a time when the person in question was dead, after which I lost the case and paid the damages assessed. The question arose whether my payment was a discharge to the heir of the deceased, also what sort of action I could bring against the heir. The answer was that issue joined through a person who defended the case on the debtor's behalf is no joinder at all where the debtor is already dead, and consequently the heir is not discharged, on the other hand that the person in question, if he paid in pursuance of a judgment, cannot sue to recover the money; however, he has a good right of action against the heir on *negotia gesta*, and of course the latter can protect himself by the *exceptio* of *dolus malus*, if he should be sued by the original plaintiff.

75 THE SAME (*Digest* 36) If the Praetor orders a man who is sued for a debt to appear in Court, and, after the series of summonses is gone through, pronounces that the absent defendant must pay the money, then, if an action is brought on the judgment, the judge who hears the case cannot as a matter of course inquire into the grounds of the Praetor's decision; otherwise such summonses and decrees made by the Praetors will be a mockery. *Note by Marcellus*: if the plaintiff craftily and with knowledge of the facts made some false allegation, and it is clearly proved that it was by that means that he got a favourable decision from the Praetor, then my opinion is that the *judex* ought to listen to the defendant's complaint; *Note by Paulus*: but if the reason why the defendant was not able to appear was that he was hindered by illness, or was detained by business of the State, I should say that, in such a case, either action against him on the judgment ought not to be allowed, or else the Praetor ought not to allow execution on the judgment itself so given.

76 ALFENUS (*Digest* 6) A case was stated to the effect that a number of judges having been appointed for the same matter, some of them, after listening to the case, were allowed to retire, and others were put in their places; whereupon the question arose whether a change in respect of some particular judges left the matter the same or made it a different case. My answer was that not only one or two judges might be changed, but even the whole bench, and still it would be the same matter, and the case would remain the same that it was before; indeed this, I said, was not

the only instance in which it happened that, though the parts were changed, nevertheless the thing itself was held to be the same; as it occurred in a great many other cases. A regiment was held to be the same, though numbers of the men were killed and others had been put in their places, and the people at large were looked upon as being the same people at this time as they had been a hundred years ago, though not one of the old number was now living: in the same way, where a ship had been so often repaired that there was not a single plank still in her that was not new, nevertheless she was regarded as the same vessel. If, I said, anybody held that where the parts are changed the thing itself becomes a different individual thing, it would come to this, on his principle, that we ourselves are not the same persons that we were a year ago; the fact being, so philosophers tell us, that the very smallest particles of which our bodies are composed[1] are every day being detached and others from without are coming into their place. Accordingly, where the outward form of a thing remained unchanged, the thing itself, I said, was held to be the same.

77 AFRICANUS (*Questions* 3) In private matters the son may be judge in the father's case, or the father in the son's:

78 PAULUS (*on Plautius* 16) as the business of judging is a public office.

79 ULPIANUS (*on the office of proconsul* 5) When a man is proved to have cited his opponent on insufficient grounds, he is bound to make good his travelling expenses and the cost of the trial. 1. Where judges are in doubt about the law, the practice is for the Præses to lay it down; if they consult the Præses on a question of fact, he is not bound to furnish them with an opinion, he must tell them to pronounce judgment in accordance with their own conscientious conviction; to proceed otherwise sometimes gives rise to scandal, and furnishes occasion for partiality and canvassing.

80 POMPONIUS (*on Sabinus* 2) Where a mistake is made about the name or forename of a judge, then, according to the opinion given by Servius, if he was appointed judge in pursuance of an agreement between the parties, the person to act will be the one whom both parties had in their minds.

81 ULPIANUS (*Opinions* 5) A man who does not preside at any *jurisdictio*, and is not clothed with any authority by the Emperor,

[1] For *constiteremus* read *consisteremus*. Cf. M.

nor appointed by a magistrate who has the right to appoint judges, nor chosen as arbitrator by mutual agreement, nor confirmed in his position under some statute, cannot be judge.

82 THE SAME (*on the office of Consul* 1) Sometimes the magistrates of the Roman people are in the habit of expressly appointing the officer of the Court by way of arbitrator; this should be very seldom done and only in a case of pressing need.

II.

ON INOFFICIOUS TESTAMENTS.

1 ULPIANUS (*on the Edict* 14) It must be understood that plaints of an inofficious testament are frequently made; all kinds of persons alike being allowed to raise the question of inofficiousness, whether parents or children; it is true that those particular kinsfolk who are more remote than brothers would do well not to incur the burden of useless expense, as they would have no chance of succeeding.

2 MARCIANUS (*Institutes* 4) Proceedings are taken on [1]inofficious testaments on the assumption that the testators were not in their right minds when they made their testaments. By this it is not meant that the person who made the testament was actually a lunatic or deranged, rather the testament was duly made, but it was not in accordance with what family affection prescribes; if the testator were really a lunatic or out of his mind, the testament would be void.

3 MARCELLUS (*Digest* 3) The allegation that a testament is inofficious is made by adducing reasons to show that the applicant ought not to have been disinherited or passed over, such a case often occurs where parents are instigated to disinherit or pass over their children by false statements about them.

4 GAIUS (*on the* lex Glitia) A parent ought not to be humoured who commits a wrong against his children in his testament; the reason why he does so often being that he has allowed the cajolery and incitements of the stepmother of his children to pervert his mind to that extent that he conceives a prejudice against those of his own blood.

[1] After *colore* read *de*. Cf. M.

5 MARCELLUS (*Digest* 3) Even those who do not descend from the testator in the male line have a right to take proceedings, as they can be taken on the testament of a mother, and the application is very often successful. The point of the term inofficious, as already said, is this,—the parties applying show that they were passed over, or, it may be, even got rid of by disinherison, without deserving it, and consequently, unduly; and the colour put on the matter, when it is argued in Court, is that the testator appears not to have been in his right mind when he framed such an unjust testament.

6 ULPIANUS (*on the Edict* 14) A posthumous son can allege that a testament is inofficious where the testator was a person to whom he might have become *suus heres* or statutable heir, if he were himself already conceived before the testator's death; and he can equally do so where the testator was his cognate, because in that case too he could get *bonorum possessio* on intestacy. Does it come to this then, that it is made matter of reproach to the testator that he did not die intestate? This, we may be sure, no one could induce the judge to agree to; the testator is not treated as if he had been deprived of *testamenti factio*. What the applicant can charge the testator with is this, that he did not make him heir; as, had he been named heir, he might have had the benefit of an order for possession in pursuance of the clause as to giving the order to the mother of an unborn child; and being once born he would have a right to ask for possession *secundum tabulas*. On the same principle I should say that the plaint may be brought by a person who, after the testament[1] is made, is extracted from his mother's womb by excision. 1. If some person who is not legally capable of succeeding to the deceased on intestacy takes proceedings for inofficiousness,—a thing which nobody prevents him from doing,—and his application happens to be successful, his success will be of no use to himself, but only to those persons who have a right to inherit on intestacy; what he does is to make the deceased intestate. 2. When a man dies after bringing forward a charge of inofficiousness, does he transmit the right of plaint to his heir? Papinianus answered,—and the same thing is pointed out in more than one rescript,—that if the man dies after he has already accepted *bonorum possessio*, the right of proceeding with the plaint is transmitted. Even if the *bonorum possessio* has not been asked for, but the contention has been begun

[1] For *matris factum* read *factum matris*. Cf. M.

or put in train, or the party dies after taking steps to bring the plaint, I should say that the right is transmitted to the heir.

7 PAULUS (*on Septemviral cases*) Let us consider how a man can be held to have put a case in train, so as to be able to transmit the right of action. Let us suppose that he was under the *potestas* [of the deceased], so that he does not require *bonorum possessio*, and entry on the inheritance would be an act without an object; if such a person simply gives warning that he means to make the charge or goes so far as to make a notification (*denuntiatio*), or to serve the libel, he will transmit to his heir the right to proceed with the charge; this is laid down in a rescript of the Divine Pius on serving libels and making notification. How then if he was not under the *potestas* of the deceased? does he still transmit the right of action to his heir? I should say [again] that, if he does as much as is above mentioned, he puts the case in train sufficiently.

8 ULPIANUS (*on the Edict* 14) Papinianus says (*Questions* 5) very correctly that a father cannot institute the plaint for inofficiousness in the name of his son against the wish of the latter, as the wrong is done to the son. Immediately after he says that, if a son dies after he has accepted *bonorum possessio* with a view to presenting the question in due form, there is an end of the plaint for inofficiousness, as it was not allowed to the father [in his own person], but on behalf of his son. 1. If a man abandons the case after taking the preliminary steps required in the matter of a plaint for inofficiousness, he will not get a hearing afterwards. 2. It has very often been laid down by rescript that where the Emperor is appointed heir, the testament can still be pronounced inofficious. 3. Papinianus says (*Responsa* 2) that there can be a good plaint for inofficiousness against the testament of a *paterfamilias* who is an old soldier, although the only property he had should be what he acquired on active service. 4. Where a soldier makes his testament while in military service, and dies within a year's time after his discharge, I doubt whether the plaint for inofficiousness is admissible, because his testament is in force all the while by military law; there is indeed good ground for saying that it is not admissible. 5. Again, where the testament is that of a boy under age, his mother cannot allege that it is inofficious, because it was his father who made it for him,—this opinion was given by Papinianus,—nor can his father's brother, because it is the son's testament; consequently the boy's brother

cannot do it either, if he let the father's own testament pass. If however the application was granted as to the father's testament, then the son's is upset too; unless the rescission was expressly confined to what concerns the father, in which case the pupillary portion remains good. 6. If a man makes his son a donation *mortis causa* of a fourth part of what would have come to him if he—the testator—had died intestate, then I should say his testament is safe. 7. If a man makes secondary provisions in his testament (*secundas tabulas*), and thereby appoints a substitute to his son who is under age, this is not a sufficient ground for allowing the boy himself to have the plaint for inofficiousness. 8. Seeing that one quarter of the portion due [on intestacy] is enough to bar the plaint, a point to consider is whether a disinherited child who does not raise the complaint nevertheless counts (*partem faciat*); take for instance a case where there are two disinherited sons; but no doubt he does count, so Papinianus lays down, and, if the other alleges inofficiousness, he cannot ask for the whole estate of the deceased, but only half. Similarly where there are grandchildren through two deceased sons respectively, e.g. through the one several, say three, and through the other one, the grandson who stands by himself will be debarred the plaint by getting three twenty-fourths of the inheritance and any one of the others by getting one twenty-fourth. 9. The quarter will of course be calculated after debts and funeral expenses are deducted; whether testamentary manumissions count, so as to reduce it further still, is a point to consider. Then how does the matter stand? If, where a man is appointed sole heir, he cannot allege that the testament is inofficious, because he has got the Falcidian quarter, but the *lex Falcidia* does not interfere with testamentary manumissions, it may be reasonably assumed that the quarter in our case is to be taken after deducting the amount lost by manumissions. It being accordingly the law that the quarter is reduced by testamentary manumissions, it will follow that, where a man's whole estate consists of slaves, if he gives them all their liberty, he bars any plaint for inofficiousness; unless, perhaps, in such a case, the son, if he was not under *potestas*, has a good right, when appointed heir by his father, to decline the inheritance, and, having by that means transmitted it to the substitute, thereupon to bring the plaint for inofficiousness, so[1] as to acquire the inheritance [as] on intestacy without incurring the penalty mentioned in the Edict. 10. Where a testator bade his heir perform

[1] Read *ut* for *uel*. Cf. M.

some condition in respect of a son or of some other relation who is qualified to bring this plaint, and the latter accepted the benefit with knowledge of his position, we may well consider whether he is not debarred from making the plaint for inofficiousness, since he acquiesced in the will; and a similar question arises when the person from whom the gift came was a legatee or a *statuliber*. It may fairly be said that the son is in fact debarred, especially where the party whom the testator ordered to make the gift was the heir; however, if it was a legatee, may not the rule be that, where the right to bring the plaint for inofficiousness has once arisen, an offer by the legatee will not take it away? Then why did we lay down the rule for the case of the heir in absolute terms? The reason was that before entry on the inheritance no right to bring the plaint can arise at all. My own opinion is that in this matter we must go by the event, so that if what was left the son was offered him before proceedings were taken by him, then the son has all he can ask for, as the gift is offered in pursuance of the testator's intention. 11. It follows[1] that where a man is appointed heir, say for one half, whereas he would have a claim to one-sixth of the testator's assets in case of intestacy, and he is requested to hand over his inheritance after a specified interval of time, it may reasonably be said that he cannot institute proceedings, because he has the means of taking the portion due to him and the produce thereof; it is well known that [where legacies are deferred] the heir must debit himself with the proceeds of the property bequeathed towards the discharge of his claim to the Falcidian quarter. Hence if a man is appointed heir at the outset to the extent of a half and is requested to hand over the inheritance at the end of ten years, he has no occasion to bring the plaint, because he can easily receive during that time the amount he had a right to and the proceeds thereof. 12. Where a man alleges that a testament is void or nullified as well as inofficious, he should be called upon to choose which contention he would prefer to begin with. 13. If a disinherited son is in possession of the estate of the deceased, the person named heir can sue to recover the inheritance, but the son can bring the plaint in the form of a cross action, just as he would proceed if he were not in possession but were suing to recover. 14. It must be remembered that a person who alleges that a testament is inofficious without grounds, and thereupon loses, will forfeit what the testa-

[1] Reference is to 8 and 9.

ment gave him, and the fiscus can recover it by action as a thing which is taken away from the party for unworthiness. However he is only deprived of what was given him by the testament where he persisted in maintaining a groundless contest till the actual decision of the Court was given; if, before judgment, he gave the case up or died, what was given him is not taken away; on the same principle, if he is absent and, that being the case, a decision is pronounced in favour of the other party, who is present, we may again say that he can keep what was given him. But a man can only lose in pursuance of this rule a thing which he would have had the right to enjoy; if he was requested to hand anything over to another, no wrong ought to be done [to the intended beneficiary]. Hence it is not a bad remark that is made by Papinianus (*Responsa* 2), that if a man is appointed heir and requested to hand over the inheritance, and after that he brings the plaint for inofficiousness and fails, all he loses is whatever he would have got under the *lex Falcidia*. 15. Where a boy under age has been arrogated [by the testator], being one of those relations who, irrespective of any adoption and emancipation, have a right to the plaint for inofficiousness, I should say that he is debarred the plaint, because he has a quarter in pursuance of the enactment of the Divine Pius. If however he brings the plaint but does not succeed, will he lose this quarter? To this I should say that either he ought not to be permitted to move the plaint at all, or, if he is permitted, then, even if he does not succeed, he must be allowed to have the quarter as a debt which is owed him. 16. If the judge goes into the case of inofficiousness and decides against the testament, and there is no appeal made, the testament is rescinded in law, the person in whose favour judgment is given will be *suus heres* or *bonorum possessor*, according to the nature of his claim, testamentary manumissions are absolutely void, legacies are not payable, and, if they should have been paid already, they can be recovered, either by the person who paid them or by the successful applicant, the recovery being by *utilis actio*. As a rule, if they were paid before the proceedings commenced, the person to recover them is the successful applicant, so the Divine Hadrian and the Divine Pius laid down by rescript. 17. No doubt, if the allegation of inofficiousness is made on some very plain grounds allowed in law, as much as five years after the testator's death, then manumissions already made or which there was a good right to demand are not to be revoked, but the successful party will have a right to have twenty *aurei* given him by each freedman.

9 MODESTINUS (*on inofficious testaments*) But if a man proceeds within five years' time, manumissions are rescinded. However Paulus says the judge will allow cases of freedom given by way of *fideicommissum*, each person, that is, having to pay twenty *aurei* as before.

10 MARCELLUS (*Digest* 3) If some of the judges in the case of an inofficious testament decide against the testament and others in favour of it, as is occasionally the case, it is more humane to go by the opinion of those judges whose view was in favour of the testament, save in case of clear proof that their pronouncement in favour of the person named heir was unjust. 1. One thing is perfectly well known: a man who accepts a legacy cannot with propriety maintain that the testament was inofficious, unless he duly disposed of the whole legacy to some one else.

11 MODESTINUS (*Responsa* 3) I gave it as my opinion that even where a man is successful on the plaint for inofficiousness, still it does not follow that donations which the testator appears to have carried out in his lifetime in favour of him [the defendant] are upset, or that an action can be had to recover part of what he [the testator] may have given him by way of *dos*.

12 THE SAME (*on prescriptions*) It makes no difference whether a son who is disinherited accepts a legacy left to himself or gets it through his own son or slave to whom it was left; either way he will be barred by the *praescriptio*. Moreover if a slave of such a son is appointed heir, and the son manumits him without first ordering him to enter on the inheritance, in order that the party manumitted may enter of his own free will, the son doing this with a fraudulent intention, his action will be barred. 1. If a son who is disinherited proceeds to ask a *statuliber* for the money which the latter has to pay, he is held to accept his father's will. 2. If a son institutes proceedings for a legacy which his father revoked, and, being unsuccessful, falls back on the plaint for inofficiousness, he will not be barred by the *praescriptio*; as, granting that by the original action he affirmed the testament, still there is something on the other hand which has to be set down to the testator's own fault, so that the son cannot with propriety be refused a hearing. 3. Where a son of the testator owed [his father] a sum of money as co-debtor with Titius, and the father ordered in his testament that Titius should be released, the son will not, if freed from the debt by a formal

release given to Titius, be deprived of his right of action for inofficiousness.

13 SCÆVOLA (*Responsa* 3) Titia appointed her daughter heir, leaving her son a legacy, and in the same testament made the following provision: "everything that I have hereinbefore ordered to be given or done I desire to be given and done by whatsoever person shall be my heir or *bonorum possessor*, even by intestate succession, and whatever I hereinafter order to be given [or done], I leave it in trust to such person to see that it is given or done." This question was asked,—supposing a sister [that is, another daughter[1]] succeeds in a plaint brought in the Centumviral Court, will the *fideicommissa* have to be executed in pursuance of the above clause? Answer: if the question is whether a man can legally impose a *fideicommissum* on those persons whom he expects to succeed him on intestacy, as heirs or *bonorum possessores*, the answer is:—he can. *Note by Paulus*: he approves however of the view that *fideicommissa* made by a man who dies intestate need not be discharged, the party being deemed to be out of his mind.

14 PAPINIANUS (*Questions* 5) A father emancipated his son, and kept under his *potestas* a grandson through that son; the son so emancipated afterwards had another son, and died, having in his testament disinherited both sons and passed over his father. During the inquiry whether the testament is inofficious as far as the sons are concerned, which takes the first place, the question as to any issue to be raised on the part of the father of the deceased is in suspense; but if the case is decided against the sons, then the father's turn for the plaint comes, and he can proceed with his own case.

15 THE SAME (*Questions* 14) Though succession to the inheritance of their children is no right of the parents, considering what they hope on their children's behalf and their natural affection for them, still, when the regular order of mortality is inverted, the property ought, as a matter of natural feeling, to be left by children to their parents as much as by parents to their children. 1. Where a man, after instituting proceedings for inofficiousness, changes his mind, and then dies, the plaint is not allowed to his heir; it is not enough to commence proceedings, if the party does not choose to follow them up. 2. Where a son brings an action for

[1] Unless above we read *filia* for *filio*, 'another daughter' for 'her son.' Cf. M.

inofficiousness against two heirs, and gets different decisions from the judges as to the respective heirs, that is, he is successful against one, but is beaten by the other,—it is open to him to sue debtors and he is liable to be sued by creditors to the extent of a share in the inheritance, and he can, to the like extent, recover specific property and divide the inheritance; in fact it is quite correct to say that an action *familiæ erciscundæ* is open to him, as it is held that he becomes statutable heir for a share; accordingly part of the inheritance remains subject to the testament, and there does not seem to be any objection to saying that the testator is to be held to die intestate in respect of a portion of his property.

16 THE SAME (*Responsa* 2) Where a son has already taken proceedings in the matter of an alleged inofficious testament of his mother against his brother who was appointed heir for a part[1], and he was successful, a daughter [sister of applicant] who takes no proceedings, or, at any rate, is not successful in any, cannot take a share as statutable heir along with her brother. 1. A father, in pursuance of the right founded on emancipation, got an order for possession *contra tabulas* of his son's property, and actually took possession; after this, a daughter of the deceased son, who had been disinherited by her father, carried through on good grounds an action for inofficiousness: in this case the order for possession which the father got falls to the ground; because in the former proceedings the subject of the inquiry was the legal position of the father, not the legal character of the testament; consequently the whole inheritance must be made good to the daughter with mesne profits.

17 PAULUS (*Questions* 2) Where a man abstains from impeaching an inofficious testament, by way of tacitly renouncing his claim to the succession, his share does not count to the prejudice of any that desire to raise the plaint. Accordingly, where one of two children who are disinherited brings the plaint on the ground of an inofficious testament of their father, and thereupon[2],—looking at the fact that, if the testament is upset, the other son too has a claim to succeed *ab intestato*,—the first son would have no right to bring a *vindicatio* to recover the whole estate, [it will follow that,] if such first son is successful with the plaint, he will take his stand on the authority of a *res judicata*, his assumption being that

[1] For *de parte ante* it is proposed by M. to read *de trienta*: which would make the above "Where a son has taken proceedings etc....heir for one-third."

[2] Insert the next *et* before *quia*. Cf. M.

the Centumviral Court, at the moment when it made the testator intestate, must have believed him to be the only son in existence. 1. When a decree is made against the testament as being inofficious, the deceased is regarded as having had no testamentary capacity. This construction is not to be maintained where the applicant is present and recovers judgment because the heir makes no defence, as in this case it is not held that the judgment of the Court makes law, consequently manumissions are upheld and legacies are payable.

18 THE SAME (*on inofficious testaments*) There is in fact an enactment of the Divine Brothers which recognises the above distinction.

19 THE SAME (*Questions* 2) A mother at her death appointed a stranger heir for three-quarters, and one daughter for a quarter, passing over a second daughter: thereupon the latter brought the plaint for inofficiousness and was successful. I wish to ask what relief can be had by the daughter who was named heir. My answer was this:—The daughter who was passed over ought to sue to recover whatever she would have had if her mother had died intestate. Hereupon it may be said that the daughter so omitted, if she sues for the whole inheritance *ab intestato* and gets judgment in her favour, will in fact have the entire and exclusive succession, just as if the other had declined the statutable inheritance. However it is not admissible that the daughter who was passed over should, if she brings the plaint for inofficiousness, be given a hearing in opposition to her sister; and another thing to be said is that the sister who has made entry in pursuance of a testament is not on the same footing as one who declines to take up the succession: accordingly the sister [who was passed over] must sue to recover half from the stranger, and it may be safely maintained that by such suit she will recover the full half, on the ground that half the whole estate is her proper share. It would follow from this that the testament is not upset altogether, but the testatrix is made intestate to a certain extent, even though the Court set aside her last will on the assumed ground of insanity. The fact is that if any one holds that where the daughter succeeds on the plaint the whole testament is upset, it must be maintained that her sister, who was appointed heir, has as good a right as she to enter on the inheritance, considering that one who entered in pursuance of a testament which she thought was valid cannot be regarded as declining the succession *ab intestato*, which she did not know to be

open to her; we know that even where persons are aware of their legal rights, still they do not lose them because they choose to go upon some other claim which they believe to be good. This is exemplified in the case of a patron who adopts a deceased freedman's will in consequence of a mistaken opinion which he has formed of it, as such a one is not regarded as having declined the *bonorum possessio contra tabulas*. It is clear from this that the daughter who was passed over cannot sue to recover the whole estate, seeing that, even if the testament is upset, the right of the sister who was appointed heir to enter on the inheritance herself is unimpaired.

20 SCÆVOLA (*Questions* 2) Where a person wishes to make out a case of inofficiousness, in spite of its being denied that he is son to the deceased, he is not allowed to have the Carbonian *bonorum possessio*, as that is only granted in cases where, if the applicant were really son, he would be heir or *bonorum possessor*, the object being to enable him for the time being to be in possession and have maintenance without being liable to have any action prejudged that he might be in a position to bring; but where a person raises a case of inofficiousness, he cannot bring any action nor take any other proceeding except the *hereditatis petitio*, and he has no right to maintenance. The reason for the above rule is that otherwise the party might possibly be in a better position than he would be if the other side had admitted [that he was a son of the deceased].

21 PAULUS (*Responsa* 3) Where a man commences the plaint for inofficiousness and afterwards drops the action owing to fraudulent representations of the person named heir, who pretends that he is under a tacit trust to hand over to him a third part of the inheritance, he cannot be held to have abandoned the plaint, and consequently he is not forbidden to recur to the proceedings which he commenced. 1. Again, the question has been raised whether the heir has a right to a hearing, if he asks to have made good the payments which he made before the plaint for inofficiousness was brought. The answer given was that a man, who with his eyes open discharges a *fideicommissum* by which he was not bound, has no right thereupon to an action to recover what he paid. 2. The same authority laid down that where a person who is appointed heir is deprived of the inheritance by means of the plaint for inofficiousness, everything ought to proceed as if no entry had been made on the inheritance; accordingly the person who was

appointed heir will retain his full right of action against the successful applicant for any debt and he can set off any debt.

22 TRYPHONINUS (*Disputations* 17) A son is not debarred from impeaching the testament of his mother for inofficiousness by the fact that his father gets a legacy under the testament, or even has entered on the inheritance, although he should be in the father's *potestas*: indeed I have myself laid down that the father is at liberty to impeach it on his son's behalf, as the indignity affects the son. 1. It was asked further, supposing the son were unsuccessful in his impeachment, whether what was given to the father would escheat to the State; the fact being that[1] if he had succeeded, the benefit won would go to some one else, and that nothing in the case turns on the duty of the father, but the whole question is as to the merits or demerits of the son? As to this, we must incline to the opinion that the father does not lose what was given him, if the decision is in favour of the testament. 2. Much more is it the case that where a testator leaves me a legacy, and then his son takes proceedings to set aside the testament for inofficiousness, and dies, leaving me his heir, whereupon I continue the proceedings relating to the inheritance, but fail of success, I do not lose the legacy left me by the testament:—I am assuming that the deceased son had already commenced proceedings. 3. Again, if I adopt some person *sui juris* after he has already brought proceedings to try the question of the inofficiousness of a testament under which testament a legacy was left me, and I continue the case as representing my adopted son, and fail of success, I ought not to lose my legacy, as there is no demerit on my part, such as to entitle the fiscus to take away what was left me[2], seeing that I did not bring the action on my own personal behalf, but in virtue of a kind of right of succession.

23 PAULUS (*on inofficious testaments*) If your case is that an emancipated son is passed over [in his father's testament] and a grandson through him who remained under the *potestas* of the testator is appointed heir, [my answer is that] the son can sue for *bonorum possessio* against his own son, the testator's grandson, but he cannot bring the plaint for an inofficious testament. But if the emancipated son is disinherited, he can bring the plaint, and

[1] Read the mark of interrogation after *illi optur* instead of after *glitticaretur*.

[2] For *derelictum* read *relictum*. Cf. M.

thereupon he can be joined with his own son, and he will get the inheritance together with him. 1. If disinherited children have purchased the inheritance or any specific things contained in it from the persons appointed heirs, knowing that the vendors are heirs, or have hired land from them, or done anything of that kind, or have paid the heir debts which they owed the testator, they are held to acquiesce in the will of the deceased, and they are excluded from the plaint. 2. If there are two sons disinherited, and both take proceedings for an inofficious testament, after which one of them resolves to discontinue the proceedings, his share goes to the other by accretion. The same follows equally if he is barred by lapse of time.

24 ULPIANUS (*on Sabinus* 48) It very often happens in connexion with the plaint for inofficiousness that different decisions are pronounced in one and the same case. Suppose for instance the applicant is a brother to the persons appointed heirs and the latter have different legal positions. Should this be the case, the deceased must be held to have died partly testate and partly intestate.

25 THE SAME (*Disputations* 2) If some donation is made not *mortis causa* but *inter vivos*, but in any case with the intention that it shall count towards the quarter, it may fairly be said that the plaint for inofficiousness does not lie, if either the party gets the quarter by the donation, or else, if he does not get so much, the amount by which the donation falls short is made up in accordance with the arbitration of an impartial person; or, at any rate, [if he is to have the plaint,] the donation must be brought into hotchpot. 1. Where a man who has no ground on which to present the plaint for inofficiousness, being nevertheless allowed to do so, endeavours to upset the testament in part, and chooses one particular heir against whom to bring the plaint, [and is successful thereon[1],] the proper thing to say is that, inasmuch as the testament is valid as to the remainder, and the persons who had a prior claim to the applicant are shut out, the applicant has instituted the proceedings to good purpose.

26 THE SAME (*Disputations* 8) If a man is appointed heir on condition, say, that he manumits Stichus, and he does manumit him, but after the manumission the testament is pronounced inofficious or unjust; it is still right that he should be relieved, that

[1] Cf. M.

is, that he should recover from the manumitted man the value of the slave, so as to prevent his losing the slave for nothing.

27 THE SAME (*Opinions* 6) Where, after the impeachment of a testament for inofficiousness has been set on foot, the parties have come to an agreement by which they compromise the case, but the heir fails to abide by the terms of the compromise, it is held that the case for the plaint remains as it was before. 1. Where a man avers that he is the son of a testator who in his testament denied that he was so, but nevertheless disinherited him, there is still a good case for the plaint for inofficiousness. 2. The testament of a soldier cannot be alleged to be inofficious even by an applicant who is a soldier himself. 3. A plaint to set aside a testament for inofficiousness in respect of a certain portion had been brought by a grandson of the testator against his own father's brother, or some other person named heir, and he was successful; but the heir under the testament appealed: it was held that in the meantime, considering the want of means of the applicant, who was a boy under age, he might have an order for maintenance on a scale corresponding to the amount of the fortune a share in which was being sued for in his name by the proceedings to impeach the testament as inofficious; and that the other party was bound to keep him supplied accordingly till the case was decided. 4. The plaint for inofficiousness may be brought on the testament of a mother who held the mistaken opinion that her son was dead, and so appointed some one else heir.

28 PAULUS (*on Septemviral cases*) In a case where a mother was informed falsely that her son, who was a soldier, was dead, and she thereupon appointed other persons heirs, the Divine Hadrian decreed that the inheritance should belong to the son, on the understanding that manumissions and legacies were to be maintained. Particular attention should be paid[1] in this case to the additional clause about manumissions and legacies; as where a testament is made out to be inofficious, none of its provisions are valid.

29 ULPIANUS (*Opinions* 5) Where the legatees suspect that the persons nominated heirs and the party who is taking proceedings to set aside the testament as inofficious are in collusion, it is a settled rule that the legatees have a right to appear and argue in support of the will of the deceased; and the same persons have in fact a right to appeal, if judgment is given against the

[1] Read *adnotandum* for *adnotatum*. Cf. M.

testament. 1. Even bastard children are allowed to allege inofficiousness in respect of the testament of their mother. 2. Where the impeachment of a testament for inofficiousness has been set on foot, then, although the matter should be settled by a compromise, nevertheless the testament remains in full force; consequently the testamentary manumissions and the legacies, to the extent sanctioned [as to the latter] by the *lex Falcidia*, retain their validity. 3. As a woman can never adopt a son without the leave of the Emperor, it follows that a man cannot bring proceedings to set aside for inofficiousness the testament of a woman whom he falsely supposed to be his adoptive mother. 4. Proceedings for inofficiousness ought to be brought in the province in which the persons nominated heirs have their home.

30 MARCIANUS (*Institutes* 4) Where a son has been given in adoption, the natural father has a good right to take proceedings to set aside the son's testament for inofficiousness. 1. According to a rescript of the Divine Severus and Antoninus, guardians[1] can take proceedings to set aside a testament as inofficious, or as forged (*falsum*), without risking the loss of anything left them by the testament.

31 PAULUS (*on Septemviral cases*) Where a person who is qualified to impeach a testament is unwilling or unable to do so, it is fair matter of inquiry whether it is not open to the person next in order to take proceedings. In fact the law is that it is, so that it is a case for succession. 1. On the question of the plaint for inofficiousness on the part of children or parents, it makes no difference who the person is that is nominated heir, whether he is taken from among children or strangers, say fellow-townsmen. 2. If I become heir to the person who was appointed heir himself under the testament which I wish to impeach as inofficious, this circumstance will be no bar to me, especially if I do not possess the portion which is in question, or only possess it in my own right (*jure suo*)[2]. 3. The rule is different if a man makes me a legacy of what he received under the testament in question; if I accept that, I am debarred from impeaching the testament. How then if I confirm the testator's will in some other manner? Suppose, for instance, after the death of my father, I endorse on the testament itself that I consent to it; in this case I am debarred from impeaching it.

[1] For *tutoribus* read *tutores*.
[2] Cf. Dig. 41. 10. 1. pr.

32 THE SAME (*on inofficious testaments*) If a disinherited son acts as advocate or undertakes to be *procurator* for one who sues for a legacy under the testament, he is not allowed to impeach the same testament himself; a man who has in any way expressed his approbation of any testamentary disposition whatever of the deceased is regarded as accepting the testament. 1. If a disinherited son becomes heir to a legatee and sues for the legacy, we may fairly consider whether he is not debarred from bringing the impeachment; there is no doubt about the will of the deceased, and on the other hand it is a fact that nothing has been left him by the testament. However his safest course will be to abstain from suing for the legacy.

III.

ON THE ACTION FOR RECOVERY OF AN INHERITANCE

1 GAIUS (*on the provincial Edict* 6) A man may have a right to an inheritance either by the old law or the new. By the old, in virtue of the Twelve Tables or of a testament made in due form of law,

2 ULPIANUS (*on the Edict* 15) whether the party is made heir directly or by his own act or through some one else,

3 GAIUS (*on the provincial Edict* 6) for example, where a man has some person under his *potestas*, and, that person being appointed heir, he orders him to enter on the inheritance; and we may add that if a man is made heir to Titius where the latter has himself become heir to Seius, then, just as he may lay claim in an action at law to the inheritance of Titius, so he may to that of Seius too. A man may also be heir on intestacy, as where, let us say, he is *suus heres* to the deceased, or he is an agnate, or he manumitted the deceased, or his *paterfamilias* manumitted him. Persons become heirs by the new law whenever they are entitled to the inheritance in virtue of a decree of the senate or of an Imperial constitution.

4 PAULUS (*on the Edict* 1) If I bring the action for recovery of an inheritance (*hereditatis petitio*) against a man who is in possession of a single piece of property which is the only subject of the contention, he [the defendant] will have to hand over equally anything which comes into his possession afterwards.

5 ULPIANUS (*on the Edict* 14) The Divine Pius laid down by rescript that the possessor of an inheritance about which a contention arises is not to be allowed to sell any part of it before the proceedings are begun, unless he likes to give security for the whole amount of the inheritance, or for the handing over of everything contained therein. However, the Praetor announced by Edict that on special ground shown, he would allow some portion of the property to be disposed of, though no such security were given, but only the ordinary undertaking, and that, even though the trial had begun; because, if diminution of the property were barred altogether, this might stand in the way of some independent desirable objects. Suppose, for instance, something is required for funeral expenses; this is an object for which the Praetor allows a portion of the property to be spent. Again, suppose there is ground to believe that if a sum of money is not paid by a given day, some article which is pledged for the debt will be sold. A diminution of the property will also be necessary in order to provide food for the household; furthermore, the Praetor allows the sale of things which in a short while would perish. 1. The Divine Hadrian laid down in a rescript to Trebius Sergianus that Ælius Asiaticus should give security for the inheritance which it was sought to recover from him; and then, the rescript continues, he can raise the question of the testament being forged; the point is that proceedings on the *hereditatis petitio* will be stayed while the question of forgery is being tried. 2. A trial which is had for the recovery of an inheritance is of that preeminence that no other proceeding is allowed to prejudge the question which is at issue in it.

6 THE SAME (*on the Edict* 75) Where a testament is alleged to be forged (*falsum*), but a legacy is sued for in pursuance of it, either the legacy must be paid, on an undertaking being given, or the question must be argued as to whether the legacy is due [on the footing of the testament itself], although the testament is alleged to be forged. But no legacy should be paid to the person who raises the question of forgery, if the question is once set down for trial.

7 THE SAME (*on the Edict* 14) Where any one alleges that he has a right to his liberty in pursuance of a testament, the judge ought not to deliver judgment on the question of liberty, lest he should prejudge the question for whoever will have to pronounce on the testament; this was enacted by the senate; but the Divine Trajan himself laid down that the trial on the question of liberty

ought to be stayed until the action for inofficiousness is either struck out or carried through. 1. However, trials of liberty cases are only put off where the question of inofficiousness has reached the stage of joinder of issue; if the matter does not come to that point, the question of liberty is not deferred. This is laid down in a rescript of the Divine Pius. The facts were these. Proceedings had been taken against one Licinnianus to determine his status, who accordingly, in order to prevent a speedy decision as to what his legal status was, avoided appearing at the trial on the question of liberty, declaring that he would take issue on the question of inofficiousness of the testament, and would then bring a *hereditatis petitio*, as his contention was that the testament made him free and heir. Hereupon the Divine Pius lays down that if Licinnianus had been in possession of the inheritance, he would be in a better position for being allowed a hearing, because then he would have defended the action claiming to be heir-at-law, and it was open to the party who professed to be his owner to prosecute[1] the inquiry as to an inofficious testament; but, as it was, his servitude ought not to be suspended for five years on the pretence that there was a trial for inofficiousness to come in which Licinnianus himself had not joined issue. The Emperor did, however, allow the judge to form an opinion in a general way whether the trial on the testament was asked for in good faith, and ordered, in case he found that it was, that a short period should be fixed at the end of which, if issue had not by that time been joined, the judge who had to try the question of liberty should be called upon to do his office. 2. But the Divine Pius [also] laid down that whenever a man has to defend a case in which the issue is as to his own liberty and heirship, in which, however, he does not allege that he is free by virtue of the testament, but that he was manumitted in some other way, say, for instance, by the testator himself in his lifetime, then the trial of the question of liberty ought not to be postponed, even though it were expected that judicial proceedings would be taken as to the testament; it is true, the Emperor added, this was always subject to the proviso that the judge of the question of liberty must be warned that he was not to listen to any argument in favour of liberty that was founded on the testament itself.

8 PAULUS (*on the Edict* 16) A man is not prevented from suing to recover a statutable inheritance on the ground that he acted in pursuance of the will of the deceased at a time when he did not know whether the testament was valid or not.

[1] M. suggests *obligare* for *agere*.

9 ULPIANUS (*on the Edict* 15) It ought to be specified that according to the strict rule the only person liable to a *petitio hereditatis* is one who possesses [i.e. exercises] either as heir or as possessor, some [alleged] right, or possesses a thing forming part of the inheritance,

10 GAIUS (*on the provincial Edict* 6) however small the thing may be. 1. Hence where a man is heir as to the whole estate or as to a share, he frames his issue so as to assert that the inheritance is his in whole or in part, but all that is handed over to him, in virtue of the judge's office, is that which the other party has in his possession, that is, the whole of it, if the plaintiff is sole heir, or [in any case] such share in it as the plaintiff has in the inheritance.

11 ULPIANUS (*on the Edict* 15) A man possesses as heir (*pro herede*) when he believes himself to be heir. Whether a man can equally possess as heir when he knows that he is not heir is a question; but Arrianus holds (*De interdictis* b. 2) that he is liable [to the proceeding under discussion], and Proculus maintains that such is the present practice. Indeed it should be added that a *bonorum possessor* is held to possess as heir. 1. A man possesses "as possessor" when he is simply a plunderer,

12 THE SAME (*on the Edict* 67) who, if he is asked on what ground he is in possession, will only answer "Because I am," and will not maintain that he is heir, even by way of false pretence;

13 THE SAME (*on the Edict* 15) in short, one who is unable to allege any title to possess at all; so thieves and robbers are liable to the *petitio*. 1. Moreover, this title, *pro possessore*, is [one that may be] attached and, so to speak, fastened to any other title. For instance it may be attached [*haeret*] to the title of *pro emptore* (title as purchaser); if I buy from a lunatic whom I know to be such, I possess as possessor. Again, the question is asked in connexion with the title *pro donato* (as donee) whether a person who possesses upon that title does so *pro possessore*, for instance, a husband or wife; and Julianus's opinion is generally adopted that he or she does possess *pro possessore*, consequently he or she will be liable to the *petitio hereditatis*. Similarly the title *pro dote* (by right of dower) may take the form of possession *pro possessore*, as, for example, where I marry a girl under twelve years of age and accept something by way of *dos*, knowing the girl's age. Again, if a legacy is paid me on grounds to my knowledge false, I shall certainly possess *pro possessore*. 2. A man who hands over an inheritance [in pursuance of a *fideicommissum*] cannot be liable

to a *petitio hereditatis*, unless he did it dishonestly, that is, he knew [it was not to be done] and yet he did it; even past dishonesty is material in a *petitio hereditatis*, the view being that the party dishonestly gave up possession. 3. Neratius says (*Parchments* 6) that the *petitio hereditatis* can be brought against an heir, even where he is unaware that the deceased himself was possessing as heir or as possessor. In b. 7 he says that the rule is the same even where the heir believed that the things [demanded] were part of some inheritance which was open to him. 4. How if a person purchases an inheritance? ought an *utilis petitio hereditatis* to be allowed against him, to prevent his being worried by a number of separate actions? Of course the vendor is liable; but suppose no vendor is to be found, or he sold for a small sum of money and was a *bona fide* possessor; can the purchaser be got hold of? Here Gaius Cassius thinks an *utilis actio* must be allowed. 5. The same rule holds where the heir, being told to sell the inheritance for a small sum, sells it to Titius; Papinianus believes the rule to be that the action is allowed against the fideicommissary; as it is better that the heir should not be sued where he only received some very trifling price: 6. and the same rule applies where the heir was requested to hand over the inheritance, retaining a specified quantity. Of course, if he was requested to hand over the inheritance on receiving a specified amount,—such is the opinion of Papinianus,—the *petitio hereditatis* cannot be brought against the heir, because what the heir receives by way of fulfilling a condition is not possessed by him as heir. However Sabinus gives an opposite opinion in the case of a *statuliber*; and this is the truer view, as the money received from a *statuliber* is part of the inheritance. 7. The above rule applies also where the heir merely retains the profits arising from the inheritance, in this case too he is liable to the *petitio hereditatis*. 8. If a man buys an inheritance to which some one else is entitled, with knowledge of the fact, he possesses, so to speak, as possessor, and thereupon some hold that he may be sued in a *petitio hereditatis*; this opinion, however, I do not think is correct, as no one is a plunderer who pays a price; however, being the purchaser of a single collective estate (*universitas*), he is liable to an *utilis actio*. 9. Again, where a man buys an inheritance from the Fiscus on the assumption that there is no owner for it, it is perfectly just that there should be an *utilis actio* allowed against him. 10. The statement is made in Marcellus (*Dig.* 4), that if a woman gives an inheritance as a *dos*, the husband is in possession of the inheritance by right of dower (*pro dote*), but he is liable to an *utilis*

petitio hereditatis for recovery of it; Marcellus however adds that the woman herself is liable to a direct action, especially if a divorce has already taken place. 11. It is further settled that the heir of a deceased possessor is liable to a *petitio hereditatis* in respect even of such things as the deceased possessed as purchaser, on the ground that the heir possesses "as heir," although he is beyond doubt equally liable to the suit in respect of things which the deceased possessed "as heir" or "as possessor." 12. Where a man is in possession of an inheritance on behalf of some one who is absent, it being uncertain whether that person will ratify his action or not, I should say that he can be called upon to defend the *petitio hereditatis* on behalf of such absent person, but that he is certainly not so liable on his own account, because a man cannot be held to possess as heir or as possessor, who possesses as representing another; unless indeed it should be said that, inasmuch as the principal does not ratify, therefore the *procurator* is, so to speak, a plunderer; on that view he can be held liable on his own account. 13. The *petitio hereditatis* is not good simply against a man who possesses something or other which formed part of the inheritance; even if he possesses nothing, it is a fair question whether, by volunteering to defend the suit, though he does not possess, he does not make himself liable. Celsus tells us (*Dig.* 4) that he is liable on the ground of fraud, as a man who volunteers to defend the petition acts fraudulently; and Marcellus expresses his approval of this opinion in general terms, in commenting on Julianus; every one, he says, who volunteers to defend a suit for recovery of the inheritance is liable just as if he were in possession. 14. Again, where a man uses fraud so as to avoid being in possession, he will be liable to a *petitio hereditatis*. But where I lose possession with fraudulent intent, and then another acquires it who is prepared to stand a trial, Marcellus (*Dig.* 4) discusses the question whether thereupon any assessment of damages does not become null and void as against the party so ceasing to possess, and, on the whole, he says that it does, unless the party who sues has an interest in its being held otherwise; but at any rate, he says, there is no doubt that the assessment becomes void if the party acquiring possession is prepared to hand over the property. But if the party who went out of possession with *dolus* is sued first, this will not discharge the one who possesses. 15. [The *petitio hereditatis* may] also [be brought] against a debtor to the estate, on the ground that he possesses (withholds) a right; it is settled that the *petitio* may be brought against 'possessors' of a right;

14 PAULUS (*on the Edict* 20) and whether the defendant was liable on a delict or on a contract is a matter of indifference. The expression "debtor to the estate" is held to include a person who made a promise to a slave who was part of the estate, or one who did some damage before the inheritance was entered upon,

15 GAIUS (*on the provincial Edict* 6) or stole something which was part of the estate.

16 ULPIANUS (*on the Edict* 15) But when the debt owed by the person against whom the *petitio* is brought is deferred or on condition, no judgment can be given against the debtor; it is true that, [in the case of such debts,] according to the opinion of Octavenus, as reported by Pomponius, it is the time when judgment is given that the Court must look at [on the question] whether the day for payment has come; the same rule applies to a stipulation on condition: and, if the day has not come, the defendant may be compelled, on motion to the judge, to give security for the discharge of the debt when the day does come, or the condition happens. 1. The *petitio hereditatis* may equally be brought against a man who is in possession of the price got for things forming part of the inheritance, or who has received payment from a debtor to the estate. 2. Accordingly Julianus says (*Dig.* 6) that where a man brings the *petitio hereditatis*, and has received the damages assessed, he is himself liable to be sued in like manner. 3. The petition can be brought not only against a debtor of the deceased but against a debtor to the estate; indeed both Celsus and Julianus declare that it may be brought against a person who acted for the benefit of the estate as a voluntary agent, but that where the party was voluntary agent for the heir it certainly cannot; there can be no *petitio hereditatis* against a debtor of the heir's. 4. According to Julianus, where a man who was in possession as heir is ejected by force, the petition may be brought against him as being the possessor of a right, because he has the interdict *unde vi*, which he is bound to assign, if judgment is given against him; but the party who ejected him is liable to be sued in the same way too, because he is in possession "as possessor" of things forming part of the inheritance. 5. Julianus says further that if a man sells a portion of the inheritance, whether, when he does so, he is in possession of it or not, he is liable to the petition, and this whether he has been paid the purchase money or is in a position to sue for it, he too [in the latter case] assigning his rights of action. 6. The same writer says that a patron cannot bring a *petitio hereditatis* against a man 81

to whom his freedman transferred property in fraud of him the patron, because the transferee is liable to the Calvisian action on the part of such patron; the transferee is in fact debtor to the patron and not to the [deceased freedman's] estate. On the same principle there can be no *petitio hereditatis* against one to whom the deceased [freedman] made a *donatio mortis causa*. 7. Again, Julianus tells us that where a man [who assumes to be heir] hands over an inheritance or delivers specific objects in pursuance of a *fidei-commissum*, the petition can be brought against him, because he has a right to bring a *condictio* to recover the things transferred in [the assumed] discharge of the trust, so that he is, so to speak, the 'possessor' of a right: 8. and he adds that if the party should by way of discharging the trust pay over the purchase money of things which he sold, the *petitio hereditatis* can be brought against him, because he has a right to recover the money. In these cases however, so Julianus says, the defendant will only have to make over his rights of action; as the things themselves are in existence, and the plaintiff can, if he likes, claim them by an action *in rem*.

17 GAIUS (*on the provincial Edict* 6) If the possessor of the inheritance should, in the belief that he is heir under the testament, pay money out of his own pocket by way of discharging legacies, and some one who claims *ab intestato* should recover the inheritance from him, then, although it may be held to be so much the worse for the defendant if he did not look out for himself by taking a formal promise by stipulation that the legacies should be returned, in case the inheritance were recovered by some one else, still, inasmuch as it may chance that he paid the legacies at a time when no question had been raised, and it was for that reason that he omitted to have any undertaking given him such as above mentioned, the rule is that in such a case, if the inheritance is recovered, he is to be allowed to bring an action for repayment of the money. At the same time, where the action for repayment is allowed in the absence of an undertaking, there is some danger of its being impossible to recover anything by the action, owing to want of means in the person to whom the legacy was paid; accordingly, it is laid down by a *senatus consultum* that the party who paid is to be relieved as follows: he is to recoup himself by retaining things which form part of the inheritance, but he must assign his rights of action to the plaintiff in the *petitio*, for him to take proceedings in pursuance thereof at his own risk.

18 ULPIANUS (*on the Edict* 15) The following is a question

worth considering. A person in possession of an inheritance effects a sale by the agency of a banker, after which the purchase money is lost in the banker's hands; is he liable to a *petitio hereditatis*, having regard to the fact that he has got nothing and he can get nothing? Labeo holds that he is liable, as the ill-advised credit which he gave to the banker must be at his own risk; but, according to Octavenus, he will only have to assign his rights of action, and for such rights of action he is liable to a *petitio hereditatis*. My own view is that, in the case of a person who was in possession in bad faith, Labeo's opinion is the sound one; but in the other case, that of a *bonæ fidei* possessor, I should say that Octavenus's opinion is the one to follow. 1. Where proceedings are being taken by way of *petitio hereditatis* against one who is not in possession of a thing, nor, so to speak, of a right, at the time, but who afterwards gets hold of one of the two, will he be held liable to the petition? Celsus lays down quite correctly (*Dig.* 4) that the order may be very properly made upon him, though at first he did not possess anything. 2. We may now consider what kind of subject-matter is embraced by the *petitio hereditatis*. As to this, the rule is that the action comprises every kind of thing that forms part of an inheritance, whether it consists of a right or of a material object.

19 PAULUS (*on the Edict* 20) In fact, it includes not only objects forming part of the inheritance, but even those which do not form part of it, but which nevertheless are at the risk of the heir, such as things pledged with the deceased, or lent to him or deposited in his custody. As to things given in pledge, there is a right of action to recover them separately, though they are still comprised in the *petitio hereditatis* too, like things in respect of which the Publician action lies. It is true that there can hardly be any [separate] action in respect of objects which have been lent or deposited, still as people are subject to risk in regard of them, it is fair that they should be given up. 1. But if the period necessary for acquiring by *usus* as purchaser should have been completed by the heir himself, a thing so acquired will not be comprised in the *petitio hereditatis*, because the heir, that is, the person who would be plaintiff in the *petitio*, has a good *vindicatio*, and there is no *exceptio* allowed to the defendant in possession. 2. The *petitio hereditatis* further comprises things as to which the [deceased being] possessor had a right of retention, though not a right of action for their recovery; for instance, where the deceased

swore that a thing was not the property of some one who sued him to recover it and, after that, died, this too must be handed over. Indeed even where the possessor of the thing has lost it by his own negligence, he will be liable accordingly. A similar rule applies to a plunderer, although he is not liable on the ground of negligence; simply he has no right to keep the property in his possession. 3. I have always maintained the opinion that where an inheritance has to be given up, servitudes are not included, because there is nothing which can be given up under that head, as there is in the case of material things and the profits derived from them; but if the owner of the servient land refuses to allow free passage he can be sued in the appropriate action.

20 ULPIANUS (*on the Edict* 20) The inheritance [to be sued for] further comprises whatever was procured in order to preserve the estate, as, for example, slaves, cattle, and anything else which was procured as a matter of necessity for the benefit of the estate. Where such things were bought with money which formed part of the inheritance, they are beyond all doubt comprised; if they were not so bought, it is a question for us to consider whether they are comprised; but I should say they are even then, if some great advantage to the inheritance is involved; of course the heir must make good the purchase-money. 1. At the same time it is not everything that is bought with money forming part of the inheritance that is comprised in the *petitio*. Julianus, for instance, tells us (*Dig.* 6) that if the possessor bought a slave with money which was part of the inheritance, and then the *petitio hereditatis* is brought against him, the slave will only be comprised in a case where it was an advantage to the inheritance that he should be purchased; if the possessor bought the slave for his own convenience, then what is comprised is the price which he gave for him. 2. On the same principle, suppose the possessor sold land belonging to the inheritance, if he had no good reason for doing so, then, according to Julianus, the land itself with mesne profits is comprised in the suit; but if he did it for the purpose of paying a debt due from the estate, all that is comprised is the price which he received. 3. The things comprised in the *petitio*, he goes on to say, are not simply such as existed at the moment of the death, but any increase that accrues to the inheritance subsequently; an inheritance does, as a matter of fact, admit of increase and decrease. Anything which accrues after the inheritance has been entered upon, if it is produced out of the inheritance itself, will, I should say, accrue to the

inheritance, but if it comes from some other source, it will not; such things go to the possessor personally. All produce is so much addition to the inheritance, whether it accrued after or before entry on the inheritance; and the children born of female slaves no doubt accrue to the inheritance. 4. Whereas the statement was made above that all actions the right to which is part of the estate are comprised in the *petitio*, the question arises whether they carry with them their regular character or not. For instance, suppose an action in which the measure of damages is increased by the defendant's denial: does the right to this action carry the right to the increase with it, or is it open only for the simple amount? Take the action under the *lex Aquilia*. Julianus tells us (*Dig.* 6) that the defendant will have to pay the simple amount. 5. The same writer says, and very justly, that if the possessor should have had judgment given against him in a noxal action brought by the deceased, he cannot now get off on motion by a surrender for *noxa*, because a man is only allowed to make such a surrender up to the time of an action against him on the judgment, but after he has become defendant in that action, he cannot free himself by a surrender for *noxa*; and in fact he has been made such a defendant by means of the *petitio hereditatis*. 6. Besides the above, we find a great many questions discussed relative to the *petitio hereditatis*, to the sale of the assets of deceased persons, to past fraud and to mesne profits. But as an express rule was laid down on these subjects by a decree of the senate, the best plan is to give the text of the decree and append an explanation. "On the fourteenth of March Quintus Julius Balbus and Publius Juventius Celsus, Titus Aufidius, Œnus Severianus, consuls, expressed themselves on the subject of those matters which the Emperor Cæsar, son of [the Divine] Trajanus the Parthian conqueror and grandson of the Divine Nerva, Hadrianus Augustus, Emperor and mighty Prince on the third of March last preceding propounded and set forth in a bill as to what he desired should be done, whereon they resolved as follows:— 6 *a*. 'Whereas, before such portions of the goods of Rusticus as fell to the State were sued for by the Treasury, those persons who deemed themselves the heirs sold the inheritance, we hold that interest ought not to be demanded on the purchase money received as the price of the things sold, and the same rule must be observed in similar cases. 6 *b*. We hold further that, if judgment were given against those persons who were defendants to the *petitio hereditatis*, they would be bound to pay over the purchase money which came to their hands as the price of any objects included in the inheritance

which were sold, even though such objects were destroyed or damaged before the *petitio* was brought. 6 *c*. Furthermore, that where any persons should have laid hands on the goods of the deceased, knowing that they did not belong to them, even though they contrived before joinder of issue to avoid being in possession of them, judgment ought to be passed upon them just as much as if they were in possession; but, wherever they should have had reasonable ground to believe that the goods belonged to them, the judgment should be only for the amount to which they were enriched by what they had done. 6 *d*. The senate held that the *petitio hereditatis* must be deemed to have been brought for the Treasury so soon only as the party knows that it is being brought against him, that is, so soon as it is notified to him or he is summoned by a letter or citation'." We have now therefore to apply the proper interpretation to the separate terms of this enactment. 7. The Senate says: "Whereas, before such portion of the goods as fell to the State were sued for by the Treasury' etc. What took place was that portions which escheated to the State were sued for by the Treasury, but if the demand had been for the whole inheritance, the decree of the senate would apply equally, and if it were a case of unclaimed property being sued for by the Treasury, or goods which came to it on any other title, 8. still the decree of the senate would apply, and it would be the same thing if the claim were made by a municipality. 9. Moreover no one doubts that where the *petitio* is brought by a private person, the decree of the senate will apply equally, although it was made with reference to a demand of the State. 10. It may be added that the decree is not put in force solely with reference to inheritances, it is applied equally to a *peculium castrense* or any other collective unit of property (*universitas*). 11. As for the words "the *petitio hereditatis* must be deemed to have been brought so soon" etc.: this means so soon only as the party knows that the inheritance is being demanded of him at law, because, the moment he knows this he becomes at once a *mala fide* possessor. "That is, so soon as it is notified to him" etc.: suppose however he knows that the suit is being brought, but still nobody notified it to him, will he from that time be chargeable with interest on money realized by sale of the goods? I should say that he will, because from that time he is a *mala fide* possessor. Let us suppose on the other hand that the notification was made, but the party does not know, because notice was given not to himself but to his *procurator*. Then, as the senate required that notification should be given to the party

himself, it will not affect him, unless indeed the person to whom it was given informed him, but [it will] not [affect him] where, though he was able to inform him, he omitted to do so. As to the question who the person must be by whom the notification is given, the senate lays down no rule on the subject; accordingly the notice will be effectual whoever it is that gives it. 12. The above relates to the case of *bona fide* possessors, as the words of the decree are "those persons who deemed themselves the heirs"; where however a man sells an inheritance which he knows does not belong to him, then, beyond all doubt, what is demandable in the *petitio hereditatis* is not the purchase money of the things sold, but the things themselves and the mesne profits of the same. However the Emperor Severus in a letter to Celer is clearly shown to have applied the rule to *mala fide* possessors as well, though the decree of the Senate only mentions those who deem themselves heirs; (unless indeed we assume the words [of Severus] to refer to such things as it was desirable to sell because they were a burden rather than a profit to the inheritance;) the result being to leave it in the power of the applicant to choose what sort of charge he will make on the *mala fide* possessor, i.e. whether he will charge him with the thing itself and the profits or with the purchase money and interest from the date of the action being brought. 13. The senate speaks of persons who deem themselves to be heirs; if however they deem themselves to be *bonorum possessores* or lawful successors of any other kind, or aver that the inheritance has been handed over to them [in pursuance of a *fideicommissum*], they will be in the same position. 14. Papinianus says however (*Questions* b. 3) that if the possessor of an inheritance leaves untouched money which was found among the heritable effects of the deceased, he can by no means be sued for interest. 15. The decree says interest "on the purchase money received as the price of the things sold." We must understand by purchase money received not merely money got in already, but money which might have been got in though it never was. 16. How if the possessor sell things after the *petitio hereditatis* has been brought? In such a case the things themselves and the mesne profits will be comprised in the *petitio*. Should they however be things of such a kind that they could yield no profits or were liable to perish by lapse of time, but they were sold at their full value, perhaps the plaintiff in the *petitio* may elect to have the purchase money handed over with interest. 17. The decree proceeds:—"We hold that if judgment were given against those persons who were defendants to the

petitio hereditatis, they would be bound to pay over the purchase money which came to their hands as the price of any objects included in the inheritance which were sold, even though such objects were destroyed or damaged before the *petitio hereditatis* was brought." If it is a *bona fide* possessor who sells things belonging to the inheritance, whether he received the purchase money or not, as [at least] he has a right of action for it, he will be bound to make good the amount to the applicant; however, where he has a right of action, it will be enough to assign such right. 18. If the possessor sold something, and the true owner afterwards got judgment to recover it, whereupon the possessor restored the price he received for it, the money cannot be said to have come to his hands; though indeed it might be said that at the outset the purchase money is not comprised in the *petitio*, because the thing sold was not part of the inheritance; however although what is mentioned in the decree of the senate is not the sale of things which form part of the inheritance but the sale of things out of the inheritance, still he need not pay over this money, as nothing is left in his hands. In fact Julianus himself (*Dig.* b. 6) tells us that the possessor will not have to make good to the applicant money received by him which was not really due, nor on the other hand can he credit himself with any money that he paid which was not owing. 19. Again, if some article has been returned [by a purchaser from the possessor] by way of *redhibition*, then, no doubt, it is part of the inheritance, and the purchase money which was refunded will not be comprised in the *petitio hereditatis*. 20. Add that if the possessor of the inheritance is bound to the purchaser in pursuance of the contract of sale, his case must be held to be sufficiently provided for by [the petitioner's] undertaking. 21. But the possessor is bound to hand over the purchase money for things sold, even where the things themselves are destroyed or lost. Here this question arises: is he bound to hand over the money only where he is possessor in good faith, or equally where he was such in bad faith? As to this, if the things are still in existence in the hands of the purchaser, and are not destroyed or lost, then, no doubt, a *mala fide* possessor is bound to hand over the actual things, or, if he cannot possibly recover them from the purchaser, he must pay damages to the amount assessed by the plaintiff on oath at the trial. But, where the things are destroyed or lost, the actual value ought to be given, because if the plaintiff had got the thing itself, he could have sold it, and then he would not have failed to get the actual value.

21 GAIUS (*on the provincial Edict* 6) A thing is regarded as destroyed (*deperditum*) when it has ceased to exist in this world; it is lost (*deminutum*) if is it acquired by some one else by *usus*, and has so been taken out of the inheritance.

22 PAULUS (*on the Edict* 20) If the *bona fide* possessor has [now] got both the thing and the purchase money, for instance, because he bought the thing back, will he be allowed to say that he would rather give up the thing, and not the purchase money? In the case of a depredator the rule laid down is that it is the plaintiff who should be allowed to elect; must we rather say here that the possessor in question has a good right to be heard, if he desires to hand over the thing itself, though deteriorated, but the plaintiff in the *petitio hereditatis*, if *he* desires to have the purchase money, will be refused a hearing, on the ground that this last is an unconscionable demand, or must we say that, as the purchaser is the richer by something contained in the inheritance, he ought to hand over along with the thing so much of the purchase money as is in excess of the present value? This is a point to consider. In an address of the Divine Hadrian we find this passage:—"You must consider, conscript fathers, whether it is not the fairest rule that the possessor should not make a profit, but should give up the price which he received for another man's goods, as it may be held that the purchase money received for the thing sold, where such thing formed part of the estate of the deceased, takes the place of the thing itself, and has in a certain sense become a portion of such estate." Accordingly the possessor will be bound to give up to the plaintiff both the thing itself and the profit he made by the sale of it.

23 ULPIANUS (*on the Edict* 15) It is a fair question whether the *bona fide* possessor will be bound to give up the purchase money in all cases, or only where he is the richer by it; suppose, for instance, after receiving the money, he lost it or spent it or gave it away. As to the expression "came to their hands," it is doubtful whether it only refers to what there was at the outset, or the phrase applies equally to what remains; but I should say [that it must refer to what remains, on account of[1]] the next clause in the decree (though that is ambiguous too), so that no demand can be made except where the party is enriched. 1. Accordingly, if what comes to the possessor's hands is not the purchase money alone, but a penalty too, in consequence of the

[1] Ol. M.

money being in arrears when paid, it may be said that this was comprised as well, as the party is enriched to that full extent; although the decree of the senate only mentioned the purchase money.

24 PAULUS (*on the Edict* 20) Where the possessor is turned out by force, he is not bound to hand over a penalty which became due to him thereon, that being a thing to which the plaintiff has no right. On the same principle he is not bound to hand over a penal sum which some defendant to an action promised to pay him in case he should fail to appear at the trial.

25 ULPIANUS (*on the Edict* 15) Again if he sold part of the inheritance with a *lex commissoria* (an agreement avoiding the sale on non-payment), it must be said, in accordance with the above, that he will have to hand over any gain he made in consequence of such agreement. 1. Moreover, if he sold anything and bought something else with the purchase money, the *petitio hereditatis* will comprise the purchase money, not the thing of which he acquired the ownership. If the thing [which he bought] is worth less than the sum for which it was bought, he will be regarded as enriched to the extent only of the value of the thing; on the principle on which, if he had consumed the thing [to any extent], he would not be regarded as enriched to the extent of its full value. 2. Where the decree says "where any persons should have laid hands on the goods of the deceased, knowing that they did not belong to them, even though they contrived before joinder of issue to avoid being in possession of them, judgment ought to be passed upon them just as much as if they were in possession," these words must be taken to imply that past *dolus* as well as present is to be brought into account in the *petitio hereditatis*, and, in fact, *culpa* (negligence) too. Consequently the proceedings can be brought against a person who failed to get in a debt to the estate from a third person or even from himself, supposing the debt is now extinguished by lapse of time; that is, at any rate, if it was in his power to do so. 3. As for the words "where any persons should have laid hands on the goods," the decree here refers to depredators, that is to say, persons who lay hands on the goods knowing that the inheritance does not belong to them, in short, having no good ground for taking possession. 4. With regard to profits[1], it is held that they will have to make good not merely what they realized but what they ought to have realized.

[1] del. *inquit*. M.

5. The decree is referring to the case of a person who lays hold of goods belonging to the inheritance having at the outset predatory intentions. Where a man however at the outset had some lawful ground for taking possession, but afterwards, having become aware that the inheritance in no sort belonged to him, thereupon conducted himself in predatory fashion, the decree says nothing directly about him; nevertheless I should say that the intention of the decree includes this case too; it makes very little difference whether a man acted with malice in respect of the inheritance from the very first or only began to do so later on. 6. With regard to the party's knowing that the inheritance does not belong to him, is a man held to be in this position simply where he knows the facts of the case, or do the words not exclude one who is mistaken about the law[1]? He may have thought that a testament was made in due form when it was really void, or that the succession *ab intestato* was open to him in preference to some other agnate who really preceded him. I should say that a man is not a depredator who has no wrong intention, though he should be mistaken about the law. 7. The decree proceeds: "though they[2] contrive before joinder of issue" etc. The reason why these words are added is that after joinder of issue, indeed after proceedings are begun, every possessor is at once *mala fide*. It is true that in the decree of the senate joinder of issue alone is referred to, but, in spite of this, as soon as ever proceedings are commenced, all possessors are on the same footing and are liable as depredators; and this is the present practice; as soon as the party is challenged he knows from that moment that he is in possession of something which does not belong to him; and when a man is a depredator, he will be held liable on the ground of *dolus* even before joinder of issue; it would be a case of past *dolus*. 8. "Judgment" it proceeds "ought to be passed upon them just as much as if they were in possession." This is quite right; where a man contrives fraudulently to avoid being in possession, he is liable to adverse judgment just as if he were in possession. This rule holds equally, whether he contrives fraudulently to cease to possess or to avoid taking possession. The above clause will apply whether the thing is in the possession of some one else or has ceased to exist at all; hence if some one else is possessor, the *petitio hereditatis* can be brought against

[1] *Ad sensum*: the text asks whether the words include one who does not know the law as well as one who knows the facts, which is absurd, if *factum* does not include *jus*. [2] Read *fecerint* for *fecerit*. Cf. M.

both persons alike, and if the possession passes from one to another through a number of persons in succession, they will all be held liable. 9. Is it however only the person in possession who will have to pay over mesne profits, or is it equally one who contrived to avoid being in possession? As to this, after the decree of the senate, we are bound to say that both are liable. 10. The above words of the decree allow of an oath being employed in an action even against a man who is not in possession, as a plaintiff may swear to the amount just as much where the defendant contrived to avoid being in possession as where he is in possession. 11. The senate consulted the interests of *bonæ fidei* possessors so far as to secure that they should not have to bear the loss to the full extent, but only be obliged to pay to the extent to which they are enriched. Accordingly, any expenditure which they have made out of the inheritance itself, as by squandering anything or losing anything, thinking all the while that they were making away with their own property, they will not have to make good. Again, if they give anything away, they will not be held to be enriched with reference to such property, though they put some one under a natural obligation to requite them. No doubt if they have received some donation in return, then it must be said that they are enriched to the extent of the gift so received; the case would be much the same thing as a kind of exchange. 12. Where a man spends his own money more lavishly in consideration of his having come in for an inheritance, Marcellus holds (*Dig.* 6) that he will nevertheless have to hand over the estate without any deduction, if he has left the inheritance untouched. 13. The same rule holds if he borrowed money, as though he were well off, [but] deceived himself in the matter. 14. If however he pledged for debt things forming part of the inheritance, we may fairly ask whether the inheritance is touched even then; but it can hardly be said that it is, as he is personally liable for the debt. 15. So true is it that a man is not held liable who is not enriched, that in a case where a man [is made heir to half an inheritance and[1]], thinking himself to be sole heir, wastes with no dishonest intent half the estate, Marcellus discusses the question (*Dig.* 4) whether he is not free from any liability on the ground that what he spent came out of what did not belong to him but to his coheirs; his point being that even where a man who is not heir at all wastes all he had in his hands, whatever it was, there is no doubt that he is not liable, on the ground that he is not the richer. As to the question itself,

[1] Cf. M.

there being three views suggested, one the view first mentioned [viz. that the party in question is not liable at all], then a second, viz. that it may be said that he ought to hand over all that remains in his hands, on the ground that what he spent was his own share, thirdly the view that the amount lost ought to be charged equally on both shares,—Marcellus says that he certainly ought to hand over something or other, but he is in doubt whether to say that he must hand over the whole or a part. However I should say that he is not bound to hand over the whole balance remaining in his hands, but a moiety thereof. 16. When a man has spent part of an inheritance [under the above circumstances], will the whole loss fall on the estate, or will a proportion come out of his private property[1]? Suppose, for instance, the possessor drinks up the whole stock of wine belonging to the estate of the deceased: will the whole amount be charged on the inheritance, or will something be charged to the man's own property? The latter construction would of course imply that he was held to be the richer by whatever amount it was he was in the habit of spending [on wine] before the inheritance came to him; so that if he began to spend on a more liberal scale in consideration of the inheritance, he would not be regarded as the richer to the extent of such excess, but he would be so regarded to the extent of his habitual outlay; since granting that [except for the inheritance] he would not have spent in such a lavish style, still he would anyway have spent something or other on daily meals. The Divine Marcus himself, in the case of one Pythodorus, who had been requested to hand over so much of the inheritance as might remain in his hands, decided that as to things which had been disposed of without any design of diminishing the fideicommissary gift and the price of which had not gone to augment Pythodorus's private estate, the loss must fall both on his private estate and on the inheritance, not on the inheritance alone. Consequently in the above case it will be a point to consider whether the possessor's usual outlay is to come out of the inheritance in accordance with the rescript of the Divine Marcus, or out of his own pocket alone, and the better opinion is that those expenses must come out of his own pocket which he would have incurred even if he had not been heir. 17. Again, if the *bona fide* possessor has made a sale and is not the richer by the purchase money, can the plaintiff in the *petitio hereditatis* recover the separate articles from the purchaser, assuming that they have not been acquired by *usus*? and, if [illegible]

[1] Read *patrimonio* for *patrimonii*. Cf. M. et seq.

attempts to do so, is he not liable to be barred by an *exceptio* such as this:—"so far as the question of heirship would not be prejudged as between the plaintiff and the [defendant's] vendor," on the ground that the *petitio hereditatis* cannot be held to comprise the purchase money of the things in question, although the purchaser, if the case goes against him, has a claim to recoup himself at the expense of the vendor. To this I should say that the thing can be recovered, *unless the purchaser can come down upon the bona fide possessor*[1]. How will it be however if the party who sold is prepared to defend the case on the *petitio* so as to let himself be sued as though he were in possession? In this case an *exceptio* would at once be admissible on the part of the purchaser. There is no doubt that if the things were sold for a small price and the plaintiff in the *petitio* recovers the money, whatever the amount, then much more may it be said that there is a good *exceptio* against him [on the part of the purchaser]; since the law is, so Julianus informs us (*Dig.* b. 4), that where the possessor pays the plaintiff in the *petitio* the money which he has himself got in from debtors to the estate, these latter are discharged, whether the party who got the debts in was a *bona fide* possessor or a depredator, and they are discharged directly (*ipso jure*). 18. A *petitio hereditatis*, though it is an action *in rem*, still is a means of enforcing some personal performances, for instance, the payment of money received from debtors, also the purchase money of things sold. 19. The above decree of the senate, though it was made in aid of the *petitio hereditatis* is held to be applicable to the action *familiae erciscundae*, else we should have this absurdity that there might in respect of the same thing be an action to recover it but not an action to divide it. 20. The young of flocks and cattle go to increase the inheritance;

26 PAULUS (*on the Edict* 20) and if lambs are born, and afterwards others born of the first, the latter also must be handed over as an accretion to the estate.

27 ULPIANUS (*on the Edict* 15) The children of female slaves and the children of their female children are not regarded as profits, because it is not a usual thing for female slaves to be procured with a view to the breeding of children, still such children go to increase the inheritance; and there is no doubt, seeing that they all fall into the estate, that the possessor is bound to hand them over,

[1] Perhaps interpolated. Cf. M.

supposing that he is in possession of them, or that, after the *petitio* was brought, he fraudulently contrived to avoid being in possession. 1. Again, rents which are collected from lessees of buildings will be comprised in the *petitio hereditatis*, even where the tenement leased is a brothel: there are brothels kept on the estates of a great many respectable proprietors:

28 PAULUS (*on the Edict* 20) and after the decree of the senate we are bound to hold that every kind of gain can be taken over both from *bonæ fidei* possessors and depredators.

29 ULPIANUS (*on the Edict* 15) Any consideration paid by agricultural tenants is treated as profits. Money received for the services of slaves is in the same case as rents are, and so are payments taken for the hire of ships or of horses.

30 PAULUS (*on the Edict* 20) Julianus says that the plaintiff ought to elect whether he will claim the principal sum simply or the interest too, taking an assignment of the right of action at his own risk. However according to that we shall be varying the practice from what the senate intended; which was that the *bona fide* possessor should be liable to the extent to which he was enriched; and how if the plaintiff were to elect to have money which the defendant had been unable to keep? The proper rule therefore is, in the case of a *bonæ fidei* possessor, that all that he is bound to hand over is either the principal and interest thereon if he received any interest, or else, [if he prefers it,] his right of action, making an assignment of the same for such amount as is still owing him in virtue of such right; all this at the risk of the plaintiff.

31 ULPIANUS (*on the Edict* 15) If the possessor has paid any debts, he can set them off, although he will not have directly discharged the plaintiff to the *petitio*, as a payment which a man makes on his own account and not on account of the debtor does not discharge the debtor. Accordingly Julianus says (*Dig.* b. 6) that the possessor can only take credit for such payments where he undertakes that he will defend[1] actions brought against the plaintiff to the *petitio*. Whether it goes as far as this, that even a *bonæ fidei* possessor is bound to undertake that the plaintiff shall be defended, is a thing to consider, as he is not enriched in respect of what he paid; unless indeed it so happen that he has a *condictio* to recover it, and so far is the richer, as he can sue to get this

[1] Ins. *a* before *se*. Cf. M.

money back; suppose, for instance, thinking himself to be the heir, he paid on his own account. But Julianus seems to me to have been thinking only about a depredator when he spoke of his giving the above undertaking, and not about a *bona fide* possessor. However the latter will have to assign the [right of] *condictio*. If the plaintiff in the *petitio* is himself sued by the creditors [after the possessor has paid the debts], he will have to plead the payment by way of *exceptio*. 1. If anything was owing [from the inheritance] to the depredator himself, he will not be allowed to deduct it; especially if it was a debt only owing by way of natural obligation. But how if the plaintiff would benefit by the debt being discharged, because it was owing under a penalty, or for any other reason? [In that case] it may be held that he [the depredator] has paid himself or ought to have done so. 2. But a rightful possessor beyond all doubt ought to deduct what is owing to him. 3. Just as a possessor may deduct expense which he incurred, in the same way, if he ought to have incurred expense and did not do so, he must answer for his negligence, unless he is a *bona fide* possessor; in that case, as he neglected the matter because he regarded it as his own affair, there is nothing for which he can be sued up to the time when the *petitio hereditatis* is brought; but from that time he is a depredator himself. 4. One thing no doubt a depredator cannot be called to account for, viz. allowing debtors to be discharged [by lapse of time], or waiting till they were too poor to pay, instead of suing them at once, the fact being that he had no right of action. 5. It is worth considering whether the possessor is bound to hand over what has been paid him; but whether he was a *bona fide* possessor or not, it is held that he ought to hand it over, and that, if he does hand it over, as Cassius tells us and Julianus too (b. 6), this is a direct discharge to the debtors.

32 PAULUS (*on the Edict* 20) Things acquired through a slave must be handed over to the heir; (the same principle is followed both in the case of the inheritance of a freedman and in that of proceedings on an inofficious testament; where, for the time being, the slave belongs to the heir,)

33 ULPIANUS (*on the Edict* 15) unless the slave made [the acquisition through] a stipulation founded on the property of (*ex re*) such heir. 1. Julianus tells us that, if the possessor has sold a slave, then, where the slave was not required for purposes connected with the inheritance, he can be called upon in the *petitio*

hereditatis to hand over the purchase money; as, in fact, he would have been debited with it, if he had not sold him; but, where the slave was so required, the slave himself must be handed over, if he is living, though, if he is dead, perhaps not even the purchase money; however Julianus tells us that the judge who hears the case will not allow the possessor to put the purchase money in his pocket, and this is the better opinion.

34 PAULUS (*on the Edict* 20) I should say that, where the inheritance of a *filiusfamilias* who is a soldier comes to any one by testament, it may be sued for by a *petitio hereditatis*. 1. Where a slave or a *filiusfamilias* has got in his hands things which are part of an inheritance, the *petitio hereditatis* can be brought against the owner or the *paterfamilias* [as the case may be,] if it is in his power to hand the things over. At any rate, if the owner has got the purchase money of things forming part of the inheritance as part of the slave's *peculium*, then, in Julianus's own opinion, the *petitio* can be brought against the owner, this latter being regarded as in possession of a right.

35 GAIUS (*on the provincial Edict* 6) Julianus also says that a *petitio hereditatis* can be brought against the owner, as being in possession of a right, even where the slave has not yet received the purchase money for things sold, on the ground that the owner has a right of action by means of which he can get the money, which right of action a person may very well acquire without knowing it.

36 PAULUS (*on the Edict* 20) Where the *petitio hereditatis* is brought against an owner or a father who is in possession of purchase money, ought the proceedings to be taken within a year after the death of the son or the slave, or the manumission of the slave or the emancipation of the son? again, can the owner or the father deduct what is owing to himself? Julianus says that the better opinion is,—and Proculus lays down the same rule,—that the action is subject to no limitation in point of time, and that the defendant's own debt cannot be deducted, as it is not a case of an action *de peculio*, but of a *petitio hereditatis*. This is perfectly sound where the slave or the son has got the purchase money; but if the reason why the *petitio hereditatis* is brought against the owner is that the debtor was a slave, the matter ought to be treated as though it were a case of an action *de peculio*. According to Mauricianus, the rule is the same, even where the slave or the son wastes the money which he makes by the price, but it can be paid some way or other out of the *peculium*. 1. But there is no doubt

that the *petitio* can equally well be brought directly against a *filiusfamilias*, since he has it in his power to hand the property over, just as he has to produce it if sued *ad exhibendum*. Much more is it held that the *petitio* can be brought against a *filiusfamilias* who, when he was a *paterfamilias* and in possession of the inheritance, gave himself in arrogation. 2. If the possessor kills a slave who is part of the inheritance, the *petitio hereditatis* will comprise a demand on that head: Pomponius however says that the plaintiff is bound to choose whether he would like judgment to be given in his favour against the possessor, he himself giving an undertaking that he will not proceed on the *lex Aquilia*, or he would prefer to reserve full right of action on the *lex Aquilia*, and forbear to have the damage in question ascertained by the judge [on the hearing of the *petitio*]. This right of election exists where the slave was killed before entry was made on the inheritance; if it was done afterwards, then the right of action becomes the heir's personal right, and it is not comprised in the *petitio hereditatis*. 3. If a depredator discontinues possession craftily, and the thing is destroyed in some way in which it would have equally been destroyed if he had continued in possession on the same footing as before, then, looking at the actual words of the decree of the senate, the depredator is in a better legal position than the *bonae fidei* possessor, because where a depredator craftily discontinues possession, the same order is made upon him as if he were still in possession, and the decree does not go on to say [what is to happen[1]] if the thing is destroyed. At the same time there is no doubt that the depredator ought not to be in a better position than a *bonae fidei* possessor. According to this it must be added that, if the thing is sold for more than it is worth, the plaintiff ought to be at liberty to elect to take the purchase money; otherwise the depredator will make a profit. 4. There is some doubt on the question to what moment the enrichment of the *bonae fidei* possessor refers; but, on the whole, the true view is that it is the time when judgment is given. 5. In speaking of profits, the cost is supposed to be deducted which is incurred for the purpose of producing, collecting and preserving the profits themselves: this is absolutely required on principles of natural justice not only in the case of *bonae fidei* possessors, but even of depredators, as Sabinus himself holds.

37 ULPIANUS (*on the Edict* 15) Where the party has made an

[1] v. M.

outlay, but realized no profits, it is perfectly just that even then the outlay should be allowed for in the case of *bona fide* possessors.

38 PAULUS (*on the Edict* 20) It is held, no doubt, with reference to necessary and useful expenditure in general that the two can be estimated separately, so that *bona fide* possessors should be credited with the latter as well, but a depredator has only himself to blame, if he chose with his eyes open to lay out money on another man's property. However it is more liberal, even in the case of this last, that his outlay should be taken into account, (after all, the plaintiff ought not to make a profit out of another man's loss,) and it will be part of the judge's duty to make this allowance as a matter of course; in fact, no *exceptio* on the ground of *dolus malus* is required. There may, no doubt, be this difference between the *bona fide* and the *mala fide* possessor in the matter, that the former can deduct his outlay at all events, though the subject matter on which it was made has ceased to exist, just as a guardian or curator has his expenses allowed, but a depredator can only make the deduction where the subject matter is improved by the outlay.

39 GAIUS (*on the provincial Edict* 6) Expenditure is held both useful and necessary where it is incurred for the repair of buildings, or for plantations of young trees, or in cases in which damages assessed in a [noxal] action are paid in respect of a slave, because it is more worth while to make such payment than to surrender the slave himself; and it is manifest that there must be a great many other occasions of outlay of the same kind. 1. It may however be reasonably considered whether a man has not just as good an *exceptio doli* in respect of an outlay on pictures and sculptures and other *objets de luxe*; that is, so long as he is a *bona fide* possessor; of course, a depredator may very properly be told that he ought not to have gone into unnecessary expense on another man's property; provided it is always open to him to take away whatever can be removed without injury to the property.

40 PAULUS (*on the Edict* 20) It may be added that the provision in the address of the Divine Hadrian to the effect that when the parties are at issue there ought to be made good to the plaintiff whatever he would have had, if the inheritance had been handed over to him at the time of the action being brought, sometimes acts oppressively. Suppose, for instance, after joinder of issue, slaves or horses or cattle die: in such a case, according to the words of the enactment, the possessor will be ordered to make good the deficiency, because, if the inheritance had been handed over, the

plaintiff could have sold them. The order would, according to Proculus, be perfectly right in a case where the *petitio* is brought to recover a specific thing; but Cassius holds otherwise. Where the possessor is a depredator, the opinion of Proculus is sound, but Cassius is right where the possession is *bona fide*; as a possessor is not bound to guarantee the plaintiff against the event of death, or from fear of such a mishap to leave his own claim undefended without more. 1. A depredator does not acquire a right to mesne profits, they go with the estate; consequently he must in fact make good the profits derived from such profits. But, in the case of a *bona fide* possessor, those profits only will be comprised in the order for handing over the inheritance, as an increment thereof, by which the possessor has become the richer. 2. If the possessor has acquired any rights of action, he must assign them, if the inheritance is recovered from him; for instance where he is entitled to an *interdictum unde vi*, or has granted property in *precarium*. Add, to take a converse case, that if the possessor has given an undertaking against *damnum infectum*, the plaintiff must undertake to indemnify him. 3. Noxal actions too come within the scope of the judge's duty, so that, if the possessor is prepared to surrender for *noxa* a slave who has done any damage to something which is part of the inheritance, or has committed a theft in respect of it, he will be discharged, on the principle of the rule applied in the case of the interdict *quod vi aut clam*.

41 GAIUS (*on the provincial Edict 6*) If, at the time when the possessor of the inheritance was sued, the things which he had in his possession were somewhat few in number, but he afterwards took into possession some others besides, he will, if the application is successful, have to hand over these as well, whether he acquired the possession after or before the joinder of issue: and if the sureties he found are not sufficient for the whole matter at stake, the proconsul must call upon him to give suitable security. If, to take the converse case, he comes afterwards to be in possession of fewer things than he possessed originally, provided this happens without any craft of his own, the case against him must fail as far as those things are concerned which he ceases to possess. 1. According to Julianus, the possessor must include in what he brings into account the mesne profits derived from such things as the deceased had in his hands as pledges for debt.

42 ULPIANUS (*on the Edict 67*) If a debtor to the inheritance declines to pay, not because he claims to be heir himself, but

because he denies, or hesitates to admit, that the inheritance belongs to the person who sues to recover it, he is not liable to the *petitio hereditatis*.

43 PAULUS (*on Plautius* 2) I first accepted a legacy from you, and then sued to recover the inheritance. According to Atilicinus, some authorities have been of opinion that I cannot have a *petitio hereditatis* against you without refunding the legacy. It is however worth considering whether the rule is not that the party who sues for the inheritance is only obliged to restore the legacy on the terms of an undertaking being given him that if the suit for the inheritance is decided against him, it shall be paid him again; as it is unjust that the possessor of the inheritance should in such a case keep in his hands a legacy which he once paid, especially where the other party did not sue for the inheritance vexatiously, but owing to a mistake; and this view is supported by Labeo. However the Emperor Antoninus laid down in a rescript that where a man has put in his pocket a legacy under the testament, the suit for the inheritance ought, on cause shown, to be refused him, that is, if it is a plain case of vexatious proceedings.

44 JAVOLENUS (*Extracts from Plautius* 1) Where a man sues for the inheritance after accepting a legacy under the testament, then, if by any means whatever the legacy is not returned, it is part of the duty of the judge as a matter of course to see that, if the suit is successful, the inheritance shall be handed over to the plaintiff, less the amount he received.

45 CELSUS (*Digest* 4) Where a man volunteers to defend a case without having the thing demanded in his possession, judgment will be given against him, unless he can show by the clearest possible proofs that the plaintiff knew from the very commencement of the case that he had nothing in his possession; because then the plaintiff was not deceived, moreover the party who volunteered to defend the suit is liable under the clause referring to *dolus*: of course the measure of damages will be the interest the plaintiff had in not being deceived.

46 MODESTINUS (*Differences* 6) Any man will be considered as practically a depredator who gives a tacit assurance [to a testator] that he will hand over the inheritance to some one who is not entitled to take it.

47 THE SAME (*Responsa* 6) One Lucius Titius having been unsuccessful in an application to have the testament of a kinsman set

aside as forged, I wish to know whether he can have a good right to impeach the testament as not validly made and not sealed. The answer given was that he was not debarred from raising the issue whether the testament was validly made merely because he was unsuccessful in the application to have it set aside as not genuine.

48 JAVOLENUS (*Extracts from Cassius* 3) In estimating the value of an inheritance, the purchase money realized on a sale of it is to be taken into account, with the addition of whatever further sum the inheritance was worth, where it was sold with a view to business; but, if it was sold in pursuance of a *fideicommissum*, nothing more will be comprised than what the possessor received in good faith.

49 PAPINIANUS (*Questions* 3) If a *bona fide* possessor chooses to proceed against debtors to the inheritance or persons in occupation of property forming part of the estate, he has a right to be heard, at any rate where there is a danger lest rights of action should be lost by lapse of time. But a man who is bringing the *petitio* will have no reason to fear being barred by an *exceptio* if he brings an action *in rem*; suppose, for instance, the possessor of the inheritance should be remiss in the matter, or suppose he should know that he has no legal claim.

50 THE SAME (*Questions* 6) An inheritance may have an existence in the eye of the law, though it is not a corporeal thing. 1. If a *bona fide* possessor erects a monument to the deceased in order thereby to fulfil a condition, then, inasmuch as the will of the deceased ought to be observed in this matter as well as in others, it may be said, at any rate where the cost of making the monument does not exceed reasonable limits, or does not go beyond the amount directed by the testator, that the person from whom the inheritance is recovered will either have a right exerciseable by means of an *exceptio*[1] *doli* to retain the amount of his outlay, or else an action of *negotia gesta* to recover it, in short an action for "managing the affair" of the inheritance; for, true as it is that in strict law there is no right of action to compel heirs to erect monuments, nevertheless they may be constrained by imperial or pontifical authority to follow out the testator's last will.

51 THE SAME (*Responsa* 2) The heir of a lunatic will have to make good to the substitute or to a kinsman in the next degree the profits for the time intervening by which the lunatic appears to

[1] Read *exceptionis* for *exceptione*. Cuj. ad M.

have become the richer through his curator; except, of course, such expenditure incurred about the substance of the estate as was either necessary or useful. Moreover if any necessary expense was incurred on the lunatic's own behalf, this will be likewise excepted, unless the lunatic had other sufficient means by which he could be maintained. 1. No interest is due on profits received after the suit to recover the inheritance was brought; a different principle is applied in the case of those which were received before such proceedings were begun and so fell into the inheritance.

2 HERMOGENIANUS (*Epitomes of law* 2) If a possessor has received immoral profits (*inhonestos questus*) from an inheritance, he will have to hand over these as well, otherwise a scrupulous construction will give the possessor the benefit of unscrupulous gain.

3 PAULUS (*on Sabinus* 10) A possessor's disposition of property is necessary not merely where it is to pay debts owed by the inheritance, but also where it is to provide for the case of any necessary outlay which he has made on something which is part of the inheritance, or for the case of something being likely to be lost or injured by lapse of time.

4 JULIANUS (*Digest* 6) Where a man purchases from the fiscus either shares in an inheritance or the whole estate, it is not unjust that he should be allowed an action by which to sue for the whole of the property, just as a *petitio hereditatis* is allowed to one to whom an inheritance is handed over under the Trebellian decree of the senate. 1. There is no question that the heir of a debtor can by means of a *hereditatis petitio* get into his hands objects pledged by the deceased as security for debt. 2. If buildings and lands have been allowed to deteriorate by the negligence of the possessors, for example, vineyards, orchards or gardens have been cultivated in some way which is not in accordance with the habits of the deceased proprietor, the possessors must submit to have damages assessed in the trial corresponding to the deterioration which the property has undergone thereby.

5 THE SAME (*Digest* 60) When an inheritance is recovered by action from a *bona fide* possessor, he will have to hand over what he may have received under the *lex Aquilia* not merely to the extent of the simple amount of the injury, but to that of double damages; as he has no right to make a gain out of what he receives on account of the estate.

56 AFRICANUS (*Questions* 4) In a *hereditatis petitio* any profits received by the possessor will have to be handed over at all events, even where the plaintiff himself would not have received them.

57 NERATIUS (*Parchments* 7) If the same person defends two suits for the same inheritance against two plaintiffs [respectively], and judgment is given in favour of one of the two, the question is sometimes asked whether the inheritance ought to be given up to the successful suitor, exactly as would have been required if the defendant had not had to sustain a suit on the part of the other; so that, in short, supposing judgment should be subsequently given for the other suitor as well, the defendant would be discharged, on the ground that he neither was in possession nor had used any fraudulent contrivance to avoid being in possession of the property, having given it up upon judgment being given against him; or the rule rather is that, since it was always possible that the second suitor too would get judgment in his favour, the defendant is not bound to hand over the estate unless an undertaking is given him; seeing that he has to defend the action for the same inheritance against the other suitor? However the best plan is that it should be the duty of the judge, on motion, to meet the case of the unsuccessful defence by an undertaking or security [such as mentioned]; as by that means the property is still there for the benefit of the party who is tardy about vindicating his rights against the successful suitor who got before him.

58 SCAEVOLA (*Digest* 3) A son who was emancipated by his father in accordance with a condition imposed by the testament of his mother entered upon her inheritance, which the father had in his possession before emancipating his son, and of which he had received the profits[1], but out of which the father made a certain outlay in honour of his son, the latter being a Senator. This question was asked,—whereas the father was ready to hand over the inheritance, crediting himself however with the amount which he had laid out on his son's behalf, would the son, if he should still persevere in his suit for the inheritance, be liable to be barred by an *exceptio* of *dolus malus*? My answer was that, even if the father did not raise the point by way of *exceptio*, the case was sufficiently met by the duty incumbent on the judge, on motion.

[1] Read *percepit* for *possedit*.

IV.

On suits for part of an inheritance.

1 Ulpianus (*on the Edict* 5) After the action which the Praetor offers to a man who maintains that he has a right to the whole inheritance, it naturally follows that he should proceed to offer an action to one who claims a share in the inheritance. 1. When a man sues for an inheritance or part of an inheritance, he does not apportion his demand to the amount which the possessor occupies but to his own assumed right; accordingly if he is sole heir, he claims the whole inheritance, although you—[the defendant]—may be in possession of one single thing only, and if he is heir to a share, he claims a share, although you may be in possession of the whole. 2. Not only so, but supposing two persons are in possession of an inheritance and there are two who claim to be respective owners of shares, the two claimants will not have to content themselves with making their demands against the two respective possessors, for example, the first claimant against the first possessor and the second claimant against the second possessor, but both sue the first and both sue the second, as you cannot say that one defendant has got the first claimant's share and the other has got the second claimant's share, but each defendant is in possession of both shares, and that as heir. Where the possessor and the suitor in the action to recover are both in possession of the inheritance, each of them laying claim to a moiety thereof, they will have to sue reciprocally to get their respective shares in the effects; or, if they raise no contention as to who is heir, their proper course will be to take proceedings to divide the inheritance (*familiae erciscundae*). 3. If I claim to be heir to a share, and my coheir is in possession of the inheritance jointly with an outsider, such coheir being in possession of no more than his proper share, a question which is asked is whether I ought to bring my *petitio hereditatis* against the outsider alone, or against my coheir too. As to this, Pegasus is reported to have been of opinion that I ought to sue the outsider alone, and that he will have to hand over whatever he is in possession of, which perhaps the judge will have to order on motion; however, as a matter of strict principle, I ought to bring the *petitio* against both, that is to say, against my coheir as well as the other, and the coheir himself ought to bring his

action against the outsider who is in possession. Still the view held by Pegasus is the more practical. 4. Again, suppose I claim to be heir to half the inheritance, but I am in possession of a third, [and two others of a third each,] and I wish to get hold of the sixth part which remains [to make up my half], let us consider what is my proper course. Labeo says I must in any case sue each separate possessor for half [his share], the consequence of which will be that I shall get one-sixth [of the whole] from each, and I shall have altogether two-thirds. This, I should say, is true: but I shall myself be bound to give up a sixth out of the third which I originally possessed; accordingly the judge must order on motion that I should for my own part allow a set off of what I possess myself, supposing the persons from whom I demand the inheritance are my coheirs. 5. In some cases the Praetor goes so far as to grant leave to bring the *petitio* for an unascertained share, where sufficient grounds occur. Take the following case. Of several brothers deceased one left a son and others left widows with child: in this case it is uncertain what share in the inheritance can be claimed by the son of the deceased brother [first mentioned], because it is unknown how many children will be born, issue of the brothers of such deceased brother. It is accordingly perfectly just that the son should be allowed to claim an unascertained share; so that it will not be going too far to say that wherever a man is in reasonable doubt as to what share he should sue to recover, he ought to be allowed to claim an unascertained share.

2 GAIUS (*on the provincial Edict* 6) Where the same inheritance comes to a number of persons, of whom some make entry, and some still hesitate, then, such as make entry cannot, if they bring the *petitio hereditatis*, sue for a larger share than they would have had if the others had entered, and they will be in none the better position for the others not entering. But if the others do not enter [at all] they may then sue for the shares of such others, provided they have a right to them.

3 PAULUS (*on Plautius* 17) The old lawyers had so much consideration for an unborn child which would be free on its birth (*libero ventri*) that they kept for it all its possible rights unimpaired against the day of its birth. We see an instance of this in the law of succession, as those persons who are in a more remote degree of relationship to the deceased than the unborn child are not entitled, so long as it is uncertain whether there will be a child born or not. Where, however, the others are related to the deceased in the same

degree as the unborn child, then the question has been raised how much of the inheritance ought to be kept in suspense, on the ground that it was impossible for them to tell how many children might be born. There are[1], in fact, so many various and incredible stories told[2] in connexion with this subject that they are generally set down for fictions. It is related that a married woman had four daughters at a birth, again some authors of repute have left it on record that a Peloponnesian[3] woman five times had four children at a birth, and that many Egyptian women have borne seven children at one time. We have all heard of the three twin-brothers Horatii, all senators, girt for battle; and Lælius tells us that he saw on the Palatine a free woman who was brought from Alexandria to be shown to Hadrian, with five children, four of whom, so he says, she was reported to have brought forth on the same occasion, and the fifth forty days later. What is to be said then? The legal authorities, very well deserving the name of "*prudentes*," have adopted a kind of middle course, viz. that of taking into consideration what may happen with tolerable frequency; in other words, inasmuch as it was possible that three children should be born on one occasion, they gave a fourth part to the existing son; what comes once or twice, as Theophrastus says, lawyers do not heed, consequently, even if, as a matter of fact, the mother is destined to have only one child eventually, the existing son will be heir in the meantime not to the extent of half but of a quarter;

ULPIANUS (*on the Edict* 15) and if less than three are born, a further share will accrue to the son in due proportion out of the vacant part; if more than three, there will be a similar decrease of the share which he took as heir.

5 PAULUS (*on Plautius* 17) One thing more should be understood, that if the woman is not really with child at all, but is thought to be so, the son is already sole heir, although he does not know that he is sole heir. 1. A similar rule applies in the case of an outsider, where he is appointed heir for a definite share, and all postumous children to the rest. But if the appointment of heirs should be as follows, "all children born to me and [with them] Lucius Titius are to be heirs in equal shares," there is ground for doubt whether Lucius Titius is not unable to enter, just as a man would be who did not know what was his share under a

[1] Del. *ideo*. Cf. M.
[2] Read *traduntur* for *creduntur*. Cf. M.
[3] Read *Peloponnesum* for *Peloponnesi*.

testament. However, the most convenient rule is that a man who does not know how much his share is should be able to enter, if he is not unaware of whatever else there is that he ought to know.

6 ULPIANUS (*Opinions* 6) Where it has been decided that a sister is coheir with her four brothers to the property of their mother, a fifth part of each of the portions first held by the respective brothers will come to her, so that they will give her no more than the fifth parts of the respective fourth parts which they were thought entitled to at that time. 1. Where expense is properly incurred on account of liabilities which fall on the entire inheritance, they will be charged in due proportion against one who is successful in an action for a share which he claims by the right of patron.

7 JULIANUS (*Digest* 8) A man cannot get by a *petitio hereditatis* what he gets by an action *familiae erciscundae*, viz. dissolution of the co-ownership, as the competence of the judge only goes as far as this, that he can order that there should be handed over to the applicant an undivided share in the inheritance.

8 THE SAME (*Digest* 48) One who is in possession of an inheritance may be allowed to defend the suit so far as a certain portion is concerned, and to give up a portion, as there is nothing to prevent a man's possessing the whole inheritance in the fact[1] that he knows that half belongs to him, and does not choose to raise any dispute as to the other half.

9 PAULUS (*Epitomes of Alfenus's Digest* 3) A number of persons were appointed heirs, one of them being in Asia; whereupon the procurator of this one made a sale, and took the purchase money for his principal's share. After this it was discovered[2] that the person who was in Asia had previously died after appointing the same procurator heir to half his property and some other person to the other half. The question was asked how the money derived from the [original] inheritance was to be sued for. The answer was that they ought to bring a *petitio* for the whole inheritance against the man who had been procurator of the person who died, because the money which came to the hands of such procurator in pursuance of the sale had been derived from the [original] inheritance; but nevertheless they should sue his coheir[3] for half the inheritance. The result would be that if all the money was still in the hands of the man who had been procurator, they would by the aid of the

[1] Del. *et.* M.
[2] Read *apparuit* for *apparuerit.* Cf. M.
[3] Read *coheredi* for *coheredibus.*

Court recover from him the whole sum, and, if he had handed over half to his coheir, they would get judgment against the man himself for one half and against his coheir[1] for the other half.

0 PAPINIANUS (*Questions* 6) A man having been appointed heir for a particular share, his son, who was not aware that his father died in the testator's lifetime, looked after the share on his father's account, as if his father were simply absent, and received the purchase money of things that were sold. This being the case, there could be no *petitio hereditatis* against the son because he did not possess the various sums of purchase money either as heir or as possessor, but was managing his father's business as son. At the same time an action on *negotia gesta* will be allowed to the remaining persons who were appointed heirs who have a right to the portion left to the deceased. One thing there is certainly no occasion to fear, viz. that the son may be held liable to the heirs of his father (who perhaps disinherited his son), on the ground that he was managing their affairs in connexion with the inheritance,—because the management which he in fact carried on was not of any part of his father's estate. True it is, no doubt, [as a general rule,] that the person on whose account anything is received has a right of action on *negotia gesta*; still, what is received on account of some one else ought in justice to be handed over to the person who has the property in it[2]. In the present case the matter was not the father's affair, as he was not in existence, nor was it the affair of the inheritance derived from him, as it was connected with the estate of another deceased person. Should the son, however, have become heir to his father, and what gives rise to the dispute be the fact that his father died when he was already heir, then we come to this question, whether he must not be held to be changing the nature of his claim to possess. Still, since the general rule is that a man who has been managing the affairs of an inheritance and has become indebted thereby, if he subsequently raises a claim to be heir himself may be sued as the "possessor of a right," we must apply this rule to the son in the present case.

[1] Read *coheredem* for *coheredes*.

[2] Read *ea res est* for *nomine perceptum est* where these last words occur the second time. Cf. M.

V.

ON THE POSSESSORY *petitio hereditatis.*

1 ULPIANUS (*on the Edict* 15) According to the regular scheme, after the civil actions open to the heirs the Praetor would proceed to take into consideration those persons whom he makes virtual heirs, that is to say, to whom there is given *bonorum possessio*;

2 GAIUS (*on the provincial Edict* 6) and, by means of the *petitio hereditatis* allowed thereupon, a *bonorum possessor* gets just as much as an heir can get by the civil actions above discussed.

VI.

ON THE FIDEI-COMMISSARY *petitio hereditatis.*

1 ULPIANUS (*on the Edict* 16) The order of arrangement brings us now to the action offered to persons to whom an inheritance is handed over [in pursuance of a *fideicommissum*]. Any one in fact to whom an inheritance is handed over in pursuance of the decree of the senate in virtue of which rights of action pass can employ the fide-commissarian *petitio hereditatis*,

2 PAULUS (*on the Edict* 20) and this action is subject to the same rules as the civil *petitio hereditatis*;

3 ULPIANUS (*on the Edict* 16) and it makes no difference whether a man was requested to hand over to me or to the person to whom I am heir; moreover, if I am *bonorum possessor* or successor of any kind to the person to whom the fide-commissarian inheritance was left, I can still have recourse to this action. 1. It must be understood that a man has no right to bring this action against the party who hands the inheritance over. 2. The actions allowed to the applicant are such as are available on behalf of an heir and he is liable to such as are good against an heir.

SIXTH BOOK.

I.

On specific vindications.

1 Ulpianus (*on the Edict* 16) After the actions which are offered relating to a collective entirety (*universitas*) there is added the kind of action which consists in a demand for a specific thing. 1. Such an action *in rem* to recover a specific object is in use in the case of all moveable things, whether animals or things inanimate, and also where the thing is so much land. 2. But by this action no demand can be made for free persons over whom some one claims a right, as for example for children who are in a man's *potestas*; accordingly, such demands are made by "prejudicial" actions or by interdicts or by pretorian suits, as is mentioned by Pomponius (b. 37); "unless indeed," as this writer says, "the plaintiff proceeds to give the nature of his title," so that[1], if a man inserts in his demand such words as "my son" or "under my *potestas* by the law of Rome," then Pomponius himself agrees that the proceedings are in proper form; what he says is that a man can, by the law of the Quirites, bring a *vindicatio* where he adds the nature of his title. 3. By this action, as Pomponius tells us (*passages*, b. 25), not only can recovery be prayed of separate objects, but even a flock may be sued for; and, similarly, a herd of oxen or a stud of horses and in general animals which are kept herded together. It should be observed that it is enough that the flock itself should belong to the plaintiff, although particular animals should not be his; the subject of the *vindicatio* is the flock, not individual animals.

2 Paulus (*on the Edict* 21) If the two parties to the suit own equal numbers respectively, neither of them can sue to recover

[1] Read *et* before *si*. Cf. M.

entire flock, nor even a half of the whole. Where however one of the two owns the greater number, so that, even if all that are not his are taken away, he will still be in a position to describe the subject-matter of his suit as the flock, then the animals which do not belong to him will not be comprised in the number to be handed over.

3 ULPIANUS (*on the Edict* 16) Marcellus has the following (Digest 4). A man who owned a flock of three hundred head lost a hundred of them and purchased thereupon that number from some one who owned them or who was *bonæ fidei* possessor of them, though some one else owned them: these animals too, he says, will certainly be comprised in an action brought for the flock. Indeed, even if there are no others remaining except those purchased as above mentioned, he can still include them in his *vindicatio* for the flock. 1. The objects which go to make up the tackle of a ship, must be sued for separately, the ship's boat too must be sued for by itself. 2. Pomponius tells us that if things of the same kind are so fused and mixed up together that they cannot be detached and separated, the *vindicatio* must not be for the whole mass, but for a portion of it. Suppose, for instance, your silver and my silver are reduced to a single mass; we shall own the mass in common, and each of us can have a *vindicatio* for an amount proportionate to the weight of so much of it as belongs to him, though it should not be ascertained what are the weights of our respective shares therein.

4 PAULUS (*on the Edict* 21) In this case there may also be an action *communi dividundo*; moreover, any one who contrived maliciously that the two masses of silver should be mixed would be liable to an action for theft and to an action for production, the rule being that in the action for production we must take into account the question of value, and, in the case of a *vindicatio* or an action *communi dividundo*, the party whose silver was the more valuable will get the greater quantity.

5 ULPIANUS (*on the Edict* 16) Pomponius says further:—if corn belonging to two is mixed up without the owners' consent, they have rights of action *in rem* for such quantities in the heap as appear to belong to them respectively; but, if the mixture was made with their consent, the two quantities must be held to have become common property, and there can be an action *communi dividundo*. 1. Again, he says that if *mulsum* should be made out of your honey and my wine, some hold that here again the

resulting object is owned in common, but I should be more inclined to say, as indeed he himself suggests, that the *mulsum* belongs to the person who made it, as it is not a case of a thing retaining its individual character. If lead should be mixed with silver, then, inasmuch as it can be separated again, there will be no common property created, and no action *communi dividundo* can be brought[1], but there will be a good right of action *in rem*; where, however, our authority proceeds, the material cannot be separated, for example, where bronze and silver are mixed, a *vindicatio* must be brought for such and such a portion of the mixture; and it is impossible to apply what is said in the case of the *mulsum*, because, though the two materials are mixed up, still they are both there. 2. The same author lays down that, if your stallion covers my mare, the foal will not be yours but mine. 3. In the case of a tree which was transplanted into another man's field and there grew and drove its roots into the soil, Varus and Nerva used to admit an *utilis actio in rem*; if it did not grow in the way described, it would not cease to be mine [the original owner's]. 4. In an action *in rem*, if the parties are agreed as to the thing which is the subject of the action, but there is a mistake about the name of it, the proceedings are held to be in sufficiently good form. 5. If there are more slaves than one of the same name, for instance several named Eros, and it does not appear which of them is the subject of the action, Pomponius lays down that no order will be made.

3 PAULUS (*on the Edict* 6) When a man brings an action *in rem*, he is bound to specify the thing, and to say whether he is suing for the whole or a share, and, [if a share,] what share, the very term "thing" (*res*) does not mean a thing described in kind but individually. Octavenus lays down this rule, that a man is bound to give, in the case of unwrought materials, the weight, where the things are stamped or coined, the number, and of wrought articles individual descriptions; and the dimensions ought to be given as well, where the dimensions are an essential part of the description of the subject-matter. If the action is to have it declared that the plaintiff owns particular articles of clothing, or that they must be transferred to him, are we only bound to give the number, or must we state the colour too? On the whole the proper course is to do both things; but it would be a cruel thing to oblige a man to say whether his clothes are worn or new. There is still

[1] Del. *quia separari potest.* Ol. M.

sometimes a difficulty in the case of household vessels, viz. on the question whether we ought simply to say, for example, 'a dish,' or go on to specify in every case whether it is square or round, plain or engraved, as it is not always easy in a statement of claim to add these particulars and the practice need not be so strict: though it is true that, in suing to recover a slave, the name ought to be given, and it ought to be said whether he is a boy or a full-grown man, especially if there are more than one; still, if I do not know what the slave's name is, I must have recourse to some description that will identify him; for instance, I can say that he was part of the assets of such a one, or he was the child of such and such a woman. Similarly, where a man is suing for land, he ought to give the name it bears and say where it is situated.

7 THE SAME (*on the Edict* 11) If a man puts himself forward to defend an action to recover land, and judgment is given against him, still, so Pedius says, there is a good right of action against the actual possessor to recover the property.

8 THE SAME (*on the Edict* 12) Pomponius (b. 36) approves of the following opinion. If you and I own land in common in equal shares, and you and Lucius Titius are in possession of it, I must not sue you both for two quarters respectively, but I must sue Titius, who owns nothing in the land at all, for the entire half. It would be different if you and Titius were respectively in possession of two portions in severalty which made up the whole; in that case, no doubt, I should have to sue you and Titius for your respective shares in the whole; because, if any distinct portion is possessed in severalty, some share in what is so possessed must necessarily belong to me: consequently, indeed, you yourself must sue Titius for a quarter. The above distinctions do not apply to moveable property, nor to a suit to recover an inheritance; in fact in such cases there can never be any possession of the thing for a divided portion (*pro diviso*).

9 ULPIANUS (*on the Edict* 16) In this action the duty of the judge will be this: the judge must ascertain whether the defendant is in possession; but it is immaterial on what assumed title he is in possession; as soon as I have proved that the property is mine, the party in possession is bound to deliver it up to me, unless he pleaded something by way of *exceptio*. Some writers however, one of whom is Pegasus, have expressed the opinion that the only kind of possession dealt with in this action is that which is relevant in asking for the Interdict *uti possidetis* or *utrubi*. For

instance, Pegasus says that where anything is deposited with a man, or is lent him for use, or he hired it, or he is in possession to secure the payment of legacies, or for the sake of *dos*, or in the name of an unborn child, or because he failed to obtain security for *damnum infectum*, then, because in none of these cases does he, properly speaking, possess, a *vindicatio* cannot be brought against him. I hold however that where any person whatever has got a thing in his hands and is able to deliver it over, an action to recover it can be brought.

10 PAULUS (*on the Edict* 21) Where the action is for moveable property, where is it to be handed over, I mean if it is not on the spot? As to this, it is not a bad rule that where the defendant is a *bona fide* possessor, the delivery over should be made either where the thing is, or else where the action is brought, but at the cost of the plaintiff,—the cost being that of the necessary travelling expenses, whether by land or sea, exclusive of the price of provisions,

11 ULPIANUS (*on the Edict* 16) unless the plaintiff prefers that the property should be handed over at the place where judgment is given, but at his own expense and risk; as in that case an undertaking will be given with security for delivery up accordingly.

12 PAULUS (*on the Edict* 21) If the defendant is a *mala fide* possessor, who got hold of the property somewhere else, the same rule will apply; but if he took it away from the place where issue was joined and carried it somewhere else, he must hand it over at the place from which he took it, at his own expense.

13 ULPIANUS (*on the Edict* 16) The judge is bound not only to order the thing to be handed over, but also to take into account any deterioration it may have suffered; suppose, for instance, a slave is handed over who has been enfeebled or severely beaten or wounded; the judge will certainly take into account how far his value is reduced. It is true the possessor might be sued by an action under the *lex Aquilia*; accordingly, the question arises whether it is not the duty of the judge to decline to put an estimate on the damage done unless the right of action under the *lex Aquilia* is released. As to this, Labeo holds that the plaintiff is bound to undertake that he will not sue under the *lex Aquilia*, which is a sound opinion.

14 PAULUS (*on the Edict* 20) Should the plaintiff, however, prefer to have recourse to an action under the *lex Aquilia*, the

case on the *vindicatio* must be dismissed. Accordingly the plaintiff will be allowed to elect, so as to get twofold damages, but not threefold.

15 ULPIANUS (*on the Edict* 16) Moreover, if the defendant beats the slave severely and then hands him over, according to Labeo, the plaintiff has a good right of action for *injuria* too. 1. Where the defendant has sold something out of necessity, then perhaps it will be the duty of the judge to give him relief so far that he will only have to hand over the price. There is no doubt that if he has gathered fruit and sold it to prevent its being spoilt, this too is a case in which he will not have to account for more than the price. 2. Again, suppose the subject of the suit is a field, and this is assigned to soldiers, a small sum being given to the possessor by way of compliment, will he have to give up this? I should say that he will. 3. If the slave, or any animal which is the subject of the action, should have died without malice or negligence on the part of the possessor, it is very commonly said that the value need not be made good; but the better opinion is that where it so happens that the plaintiff would have sold the property if he had received it, then the value ought to be made good where the possessor was in default, because, if the other had handed it over, the plaintiff would have sold and made a clear gain of the purchase money.

16 PAULUS (*on the Edict* 21) It is a matter of course that, even where a slave dies, some judgment must be given in respect of profits and any children of a female slave, and on the ground of the stipulation against disturbance [by one claiming superior title; it does not go further], as the possessor is certainly not bound after joinder of issue to make good what is unavoidable. 1. It is not regarded as a case of negligence if the possessor, where a ship is the subject of the action, sent her on a voyage at a proper season for navigation, even though, as a matter of fact, she was lost; unless he entrusted her to incompetent persons.

17 ULPIANUS (*on the Edict* 16) Julianus (*Digest* b. 6) has the following. If I buy from Titius a slave who is really owned by Mævius, and afterwards, on Mævius suing me to recover him, I sell him, and the purchaser kills him, justice requires that I should hand over the purchase money to Mævius. 1. Julianus also says, in the same book, that if the defendant makes default in giving up a slave, and the slave dies, mesne profits must be included in the account up to the time of judgment being given. The same writer

says that not only profits must be made good, but every incidental gain (*omnem causam*), consequently children of a female slave are comprised in the order to deliver up, and the mesne profits accruing from such children. So thoroughly is it the case that incidental gain is comprised that Julianus tells us (b. 7) that if the defendant should have acquired through the slave a right of action under the *lex Aquilia*, he will be compelled to assign it. Should the defendant on the other hand have fraudulently gone out of possession, and then some stranger have wrongfully killed the slave, the defendant can be compelled either to give the slave's value or else to assign his own right of action, whichever the plaintiff prefers. He is also bound to hand over any profits [derived from the slave] which he may have received from another possessor, as he is not to be allowed to make any gain out of a slave who has become the subject of an action. He is not bound to hand over profits referable to a time at which the slave was in the possession of the party who recovers him by action. What Julianus says with reference to an action under the *lex Aquilia* applies where the possessor has acquired the ownership by *usus* after joinder of issue, because he then comes to have full right over the slave.

GAIUS (*on the provincial Edict* 7) If, after issue is joined, the defendant becomes owner of the slave by *usus*, he is still bound to deliver him over, and to give an undertaking against *dolus* in connexion with him, as there is a danger of his having pledged him for debt or manumitted him.

ULPIANUS (*on the Edict* 16) We are informed by Labeo that the defendant himself has a right to an undertaking that he shall be duly saved harmless in the matter (*his rebus recte præstari*)[1] as, for instance, where he has himself given an undertaking for *damnum infectum*.

GAIUS (*on the provincial Edict* 7) Moreover, the possessor must hand over as well anything which he got through the slave after joinder of issue otherwise than out of his own property: this will comprise inheritances and legacies which may have come to him through the slave. It is in fact not enough that the man himself should be handed over, it is required that the legal implications attached to the property (*causa rei*) should go too, that is to say, that the plaintiff should have whatever he would have had if the slave had been handed over at the time when issue was taken.

[1] Cf. D. 50. 16. 71.

Accordingly, children of a female slave must be handed over, even where the birth may have taken place after the defendant acquired ownership of the mother by *usus*, I mean, if this happened after issue was joined; and, in such a case, the rule applies to the children as well as to the mother that the defendant is bound to deliver them up and also give an undertaking against *dolus*.

21 PAULUS (*on the Edict* 21) If the slave runs away from a *bonae fidei* possessor, a material question will be whether the slave's character was such that he ought to have been kept in safe custody; as, if he appeared to be a slave of thoroughly good repute, so as not to require to be confined, the case against the possessor must be dismissed, subject however to this, that if he has become owner by *usus* pending the proceedings, he must assign his rights of action to the plaintiff, and make good the mesne profits referable to the time during which the slave was in his possession. If on the other hand the defendant had not yet acquired ownership by *usus*, the case must be dismissed without any undertaking being required, so that he need not undertake to the plaintiff that he will follow the property up: what is there to prevent the plaintiff himself following the property up at once, even though the defendant should still become owner while the man is on the run? Pomponius is of opinion that this is perfectly fair (*on the Edict* b. 39). If, however, the slave ought to have been kept securely, the Court will hold the defendant liable in respect of the slave himself; subject always to this, that if the defendant has not become owner by *usus*, the plaintiff must assign to him his rights of action. Julianus, however, holds in the above cases, where owing to the flight of the slave the defendant is declared free from liability, that although he is not compellable to undertake to follow the property up, still he must undertake that in case it [i.e. the man] should come into his hands, he will hand it over. This view is supported by Pomponius (*Various passages*, b. 34), and it is the better opinion.

22 ULPIANUS (*on the Edict* 16) If the slave runs off by the fraudulent contrivance of the possessor, judgment must be given against the latter as if he were in possession.

23 PAULUS (*on the Edict* 21) A man has a good right of action *in rem* when he has become owner either by the *jus gentium* or the civil law. 1. Consecrated places, also religious places, cannot be sued for by an action *in rem* as though they were some one's property. 2. If a man affixes to that which is his own something belonging to another, so that it becomes part of it, for instance,

affixes to a statue of his own an arm or a foot which belongs to some one else, or a handle or a bottom to a bowl, or a figure to a chandelier, or a foot to a table, most authorities hold very properly that he becomes owner of the whole thing, and that he can say with truth that the statue or the bowl is his. 3. Again, whatever is written on my paper or painted on my board at once becomes mine; though it is true that some have held a different opinion about a painting, on the ground of the value of the picture; still, where one thing cannot exist without some other, it must be allowed to go with that other. 4. Accordingly in all these cases, in which what belongs to me draws to it by preponderance what belongs to some one else and makes it mine, [it follows that] if I sue to recover the [whole] thing I can be compelled by means of an *exceptio* of *dolus malus* to offer the defendant the value of the accessory part. 5. We may add that wherever anything at all, by being joined or affixed to something else, goes with it by way of accession, its previous owner cannot have a *vindicatio* for it so long as it coheres to the principal thing, but he can bring an action for production so that it may be detached and then sued for by a *vindicatio*: subject, that is, to the exception mentioned by Cassius in connexion with the welding (*ferruminatio*) of two things together; what he says is that where an arm has been joined by welding to the statue to which it belongs, it is merged in the unity of the principal part, and that which has once become the property of another cannot, he says, even if it should be broken off, revert to its previous owner. The same rule does not apply to what is soldered with lead; as welding, by bringing together two objects consisting of identical material, effaces the distinction between them, but soldering does not produce the same effect. Consequently in all the above cases, I mean where there is no ground for an action to produce nor for an action *in rem*, there must needs be an action *in factum*. But, in the case of things which consist of a number of detached objects, it is clear that the different members all retain their respective individual characters, take the case of so many slaves or so many sheep; so that I may very well lay claim by action to a flock of sheep by that name, though there should be amongst them a ram belonging to you; and you yourself can bring an action to recover the ram. The case would be different where there are things consisting of coherent parts: if you affix to my statue an arm taken from some one else's statue, it cannot be said that after that the arm belongs to you, as the whole statue corresponds to one idea (*uno spiritu continetur*). 6. Where one man's building materials

have been built into another man's house, there cannot be a suit to recover them by the former, because of the statute of the Twelve Tables, nor can an action be brought for production in respect of them, except against one who built them into his house, knowing that they were not his; there is, however, an old action called *de tigno juncto*, which is for double damages and is founded on the Twelve Tables. 7. Again, where a man builds on his own ground with another man's stone, he will have a good action to recover the house as owner, but the previous owner can recover the stone, if it should be taken down, even though the building should only be taken to pieces after the period for acquisition by *usus* has expired, reckoning from the time when the house gets into the hands of a *bona fide* possessor: as where the house itself passes into new ownership by lapse of time, it does not follow that the separate stones are acquired by *usus*.

24 GAIUS (*on the provincial Edict 7*) A man who intends to bring an action for something ought to consider whether he can obtain possession of it by some interdict, as it is far more convenient for him to be in possession himself and compel the other party to undergo the burden of being plaintiff than to be plaintiff himself while the other party is in possession.

25 ULPIANUS (*on the Edict 70*) A man who volunteers to defend a case without ground, the fact being that he is not in possession and has not taken fraudulent means to avoid being in possession, cannot get the action dismissed, so Marcellus tells us, if the plaintiff is unaware of the facts; and this opinion is true. This is always supposing that issue is already joined, but if he has not taken joinder of issue, a man who declares that he is not in possession, when he really is not, does not deceive the plaintiff, and if [during the same period] he takes himself off, he cannot be said to have volunteered to defend the case.

26 PAULUS (*on Plautius 2*) In fact, if the plaintiff knows the truth, he is not deceived by any one, he deceives himself; consequently the defendant will be dismissed from the action.

27 THE SAME (*on the Edict 21*) But if I want to sue Titius, and, that being the case, some one says that he is in possession, and accordingly volunteers to take up the defence, and I establish all this by testimony in the course of the proceedings, judgment may be pronounced adversely to the party in question as a matter of course. 1. The defendant certainly ought to be in possession

both at the time of joinder of issue and when judgment is pronounced. If he was in possession at the time of joinder of issue, but had, without *dolus malus*, lost possession by the time when judgment was given, he ought to be discharged. If on the other hand at the time of joinder of issue he was out of possession, but was in possession when judgment was given, then we must follow the opinion of Proculus, to the effect that judgment must absolutely be given against him; consequently the order made will include mesne profits, reckoned from the time when his possession began. 2. If the slave who is the subject of the suit is maliciously damaged by the possessor, and after that dies, owing to some other cause, and not through any negligence of the defendant's, there will be no account taken of the previous damage, because that makes no difference to the plaintiff. What I say refers to the action *in rem*; the right of action on the *lex Aquilia* still remains. 3. Moreover, a man who before joinder of issue has contrived fraudulently to avoid being in possession of a thing is liable to an action *in rem*; this indeed may be inferred from the Senatusconsultum, by which it was provided, as already said, that past *dolus* should be comprised in the suit to recover an inheritance; for if past *dolus* [as just said] is included in the suit for an inheritance, which in fact is itself an action *in rem*, it is only to be expected that, in keeping therewith, past *dolus* should be included in an action *in rem* for a specific thing. 4. If a father or an owner is in possession by means of a son or a slave, who should thereupon be absent at the time when judgment is pronounced, without negligence on the part of the father or owner; then these latter either must have time allowed them or else must give an undertaking to deliver up possession. 5. Where the possessor expends money on the thing which is the subject-matter of the suit before joinder of issue, he can, by an exception of *dolus malus*, procure that account shall be taken of the expenditure, supposing the plaintiff perseveres with the suit for his property without allowing for the outlay. A similar rule applies where the possessor defends a noxal action brought in respect of a slave, and, the case being decided against him, pays the damages, or, by mistake, builds a block of houses on ground belonging to the plaintiff; unless, that is, in this last case, the plaintiff is willing to allow him to take the building down. The same thing, as some have said, ought to be effected through the judge in a case for the recovery of *dos* with reference to a vacant piece of ground given to the wife. But where you educate a boy belonging to me whom you have in your possession, then, so Proculus holds, the reimbursed

not be followed, because I cannot be expected to do without my slave, and it is impossible for the same remedy to be applied as was mentioned in the case of the vacant ground.

28 GAIUS (*on the provincial Edict* 7) Suppose for instance you have taught him to be a painter or a clerk. [Accordingly] the rule is that no estimate of expenditure can be called for on motion to that effect,

29 POMPONIUS (*Notes to Q. Mucius* 21) unless you are[1] offering the slave for sale, and would get a better price for him in consequence of his accomplishment,

30 GAIUS (*on the provincial Edict* 7) or the defendant has already notified the plaintiff to pay the expense, whereupon he said nothing, and the defendant has now raised an *exceptio* of *dolus malus*.

31 PAULUS (*on the Edict* 21) But if an inquiry is made as to mesne profits on a slave who is the subject of a suit, we must not look merely at the period of the slave's puberty, as some services can be done even by a child under that age. It would, however, be an unconscionable thing for a plaintiff to ask for an estimate of profits which might have been realised by means of the slave's accomplishments, where the slave learnt those accomplishments at the expense of the defendant.

32 MODESTINUS (*Differences* 8) However, if the defendant has taught the slave some craft, then, when the slave who learnt the craft in question has reached the age of twenty-five, the expense [of his education] may be set off.

33 PAULUS (*on the Edict* 21) The estimate of profits must include not only those received, but also such as could without impropriety have been received; accordingly, if the thing sued for is lost through the contrivance or the negligence of the possessor, then, according to Pomponius, the better opinion is that of Trebatius, who holds that the account of the profits is to be carried on to the point to which it would have been carried if the thing had not been lost, that is to say, to the time when judgment is pronounced; and this is held by Julianus too. On this principle, where the action is brought by a bare proprietor and the usufruct comes to an end after the defendant has begun to be in default, then profits

[1] "You" may have meant the plaintiff and the word have been inadvertently left unaltered. Cf. Pellat, *de R. V.* 241.

will be accounted for from the time when the usufruct gave place to the bare proprietorship.

4 JULIANUS (*Digest* 7) (A similar rule holds where so much land accrues to existing land by alluvion,)

5 PAULUS (*on the Edict* 21) and conversely, where a plaintiff after joinder of issue bequeaths the usufruct of the property [and dies, and the suit is continued by his heir], some writers very justly hold that the account of profits must not be carried on beyond the time when the usufruct was separated in enjoyment from the bare property. 1. Where I have sued for land which as a matter of fact belongs to some one else, and the Court pronounces judgment declaring it to belong to me, the order made on the possessor must comprise the profits too; having once for all made the mistake, the judge will of course go on to make this order; as the profits cannot be allowed to go into the pocket of the possessor after the action has gone against him: otherwise, as Mauricianus says, the judge cannot decide that I am to have delivery made me of the thing itself; and why, he asks, is the possessor to have what he would not have had if he had delivered possession at once? 2. The plaintiff who has accepted the value put upon some property in dispute is not bound to guarantee the defendant against a better title in respect of the property itself; the defendant has himself to blame that he did not give up the possession. 3. There is no doubt that even where things cannot be divided without being destroyed, a man can still sue for a share in them.

6 GAIUS (*on the provincial Edict* 7) When a man proceeds by way of petitorian action, he ought to inquire, if he wishes to sue to any purpose, whether the person against whom he brings his action is in possession or has fraudulently gone out of possession. 1. A man who is sued *in rem* is liable to judgment on the head of negligence as well, and the possessor of a slave is guilty of negligence if he sends the slave into dangerous places, and thereupon he is lost; or he allows a slave for whom he is sued to be made to fight in the amphitheatre, and he is killed; equally so, if the slave sued for was a runaway and he did not keep him fast, so that the man made his escape; or where, the subject of the action being a vessel, he sent her to sea in bad weather and she was lost by shipwreck.

7 ULPIANUS (*on the Edict* 17) Julianus has the following (*Dig.* b. 8):—if I build on another man's ground of which I am a *bona fide* purchaser, but I do this at a time at which I already have

notice that the ground is another's, let us consider whether it is not the fact that I have not got a good *exceptio* ;—unless indeed you choose to say that I have a good *exceptio* if I was apprehensive of loss. However, I should say that a person in my case has no such *exceptio* ; as soon as he once knew that the ground was not his, he ought not to have built. At the same time the Court will go so far as to allow him to take down the building which he put up, so long as he causes no loss or damage to the owner of the ground.

38 CELSUS (*Digest* 3) You bought without notice land which did not belong to your vendor and then built or planted, after which the land is recovered by the true owner. In this case the order made by a wise judge will vary according to the circumstances of the parties and the facts. Take the case in which the owner himself would have made the same improvements; then, before he can get his land back, he must reimburse your expenses, but only to the extent to which the property was made more valuable, and where the additional value exceeds the cost, he need only pay what was actually expended. Supposing, however, the owner is a poor man, and, if he is to be compelled to pay the above amount, he will have to relinquish his household gods[1] and the graves of his fathers, then it will be enough that you should be allowed to take away as much as you can of what you erected, provided that the property will not thereby be in a worse condition than it would be if no building had ever been set up. However, we lay down that if the owner is prepared to give you an amount equivalent to whatever you, the possessor, would have in your hands if you took away the things referred to, he shall be allowed to do so ; and you are not to be at liberty to act spitefully; you might, for instance, be disposed to scrape off plaster which you had put on, or efface pictures, though this should serve no object but that of giving annoyance. Lastly, suppose a case where the person who is owner is one who intends to sell the land almost at once after getting it back ; then, unless he hands over the amount which it has been already said that he ought to hand over in the first of the above cases, the damages which you will be ordered to pay must be reduced by that amount.

39 ULPIANUS (*on the Edict* 17) Contractors who build with their own materials at once pass the property in the materials to the persons on whose ground they build. 1. Julianus says well (*Dig.* 12) that a woman who pledges land by way of guaranteeing

[1] After *laribus* ins. *paternis*. M.

another person's debt can recover it by an action *in rem* even after the creditor should have sold it;

40 GAIUS (*on the provincial Edict* 7) because the creditor is held to have sold what was not legally pledged.

41 ULPIANUS (*on the Edict* 17) If a man purchases on these terms, that, if any one should make a better offer, the purchase shall be abandoned, then, as soon as such an offer is made, he is no longer able to have an action *in rem*. Indeed if land is assigned to a man, subject to a conditional avoidance (*in diem*), then, up to the time of a better offer being made, he can have an action *in rem* to recover it, but after such an offer he cannot. 1. If a slave or a *filius-familias*, having free management of his *peculium*, sells and delivers land to me, I can have an action *in rem* to recover it. Add that if a slave delivers his owner's property with his owner's consent, the same rule holds; just as, where a procurator sells or delivers [to me] with the consent of his principal, this will give me a right of action *in rem*.

42 PAULUS (*on the Edict* 26) If there is an action *in rem* brought, then it is true that the case must fail as against the heir of [a deceased] possessor, if he is not[1] in possession himself; at the same time if any liability has been incurred which was personal to the deceased, this may certainly be comprised in the order.

43 THE SAME (*on the Edict* 27) Whatever is affixed to a religious object is itself religious; consequently stones built in [so as to form part of a sepulchral monument], even if they should be once removed, cannot be recovered by an action *in rem*; however the plaintiff will get extraordinary relief by an action *in factum*, the party who removed the stones being compelled to restore them. But if a man should build into a monument stones that were some one else's property, without the consent of their owner, and, before the monument has served as such [i.e. before interment] they should be taken out again in order to be set up somewhere else, they can be recovered by the owner. In fact if they should be taken out in order to be set up again in the same monument, there is no doubt the owner can sue to recover them equally well.

44 GAIUS (*on the provincial Edict* 29) Fruit on a tree is regarded as part of the land.

[1] After *non* read *possideat absolvatur, tamen, si quid ex*, some such words being apparently omitted by a slip of the pen. Cf. M.

45 ULPIANUS (*on the Edict* 68) Where the action is for a slave, and, after action brought, he is restored to the plaintiff, if the restoration is made by a *bona fide* possessor, I should say that he ought to give security against malicious wrong only, but other possessors must do so against negligence too; indeed so must a *bona fide* possessor, if issue has already been joined.

46 PAULUS (*on Sabinus* 10) Where a thing which is sued for by an action *in rem* is valued at the amount which the plaintiff deposes to on oath, the property in it at once passes to the defendant in possession; as, if I am possessor, I am held to have compromised and settled the matter on the footing of the amount which the plaintiff himself fixed.

47 THE SAME (*on Plautius* 17) This is on the assumption that the thing is on the spot; if it is somewhere else, then [the property passes only] when the possessor gets into possession in pursuance of the plaintiff's consent; consequently it is in accordance with principle that the judge's valuation should in such a case be made only on the plaintiff giving an undertaking that nothing will be done by him to prevent possession of the thing being delivered.

48 PAPINIANUS (*Responsa* 2) Where a *bona fide* possessor has gone to expense on a piece of land which is shown to belong to some one else, he cannot sue to recover his outlay from any person who gave him the land for nothing, or from the true owner; still, by means of an *exceptio doli*, he can have such expense made good, on motion to the judge, on principles of justice, that is, where the expenditure exceeds the profits which he received before joinder of issue; the fact being that there is a set-off allowed, and the owner is compelled to hand over the amount expended in excess, if the land has been improved.

49 CELSUS (*Digest* 18) My opinion is that the ground on which a house is built is part of the house and is not simply subjacent to it as the sea is to ships. 1. Whatever there is remaining of property of mine which I have a right to recover by action is itself my property.

50 CALLISTRATUS (*Monitory Edict* 2) Where a man has a right to a field in virtue of a purchase, no action of this kind can be brought until the field has been delivered and possession subsequently lost. 1. But an heir may very well sue for what is coming to the inheritance, even though he should not yet have had possession of it (i.e. of what he sues for).

1 POMPONIUS (*on Sabinus* 16) If an action is brought *in rem*, and judgment is given against the heir of the possessor, the judgment takes into account negligence and fraudulent contrivance on the part of the heir himself.

2 JULIANUS (*Dig.* 55) If the possessor of a piece of land fraudulently contrived to go out of possession of the land before joinder of issue, his heirs certainly are not compellable to take up the defence of the action *in rem*; at the same time an action *in factum* against them must be allowed, by which they can be compelled to hand over the amount by which they have been enriched out of the property.

3 POMPONIUS (*on Sabinus* 31) If the possessor of land should have cultivated or planted it, and after that the land is recovered by action, he is not at liberty to carry away what he planted.

4 ULPIANUS (*Opinions* 6) There is a great deal of difference between discharging the office of an advocate and defending one's own case; and where a man finds out eventually that a piece of property is his own, he will not have lost his ownership in it by the fact that when some one else was suing to recover it he assisted him, not knowing at the time that he was himself owner.

5 JULIANUS (*Dig.* 55) If the possessor of land dies before taking joinder of issue, leaving two heirs, and an action is brought to recover the whole estate against one of the two, who is in possession thereof, there can be no doubt that an order must be made against him for the undivided whole.

THE SAME (*Dig.* 78) The law does not admit an action for recovery of a *peculium* as it does of a flock; the legatee of a *peculium* will have to sue for the separate things of which it consists.

ALFENUS (*Dig.* 6) A man against whom an action was brought for recovery of land was sued by a second plaintiff for the same land. This question was asked,—Supposing the defendant should hand over the land to either of the two plaintiffs in pursuance of the judge's order, and after that the other case should be decided in favour of the plaintiff, how is the defendant to escape suffering loss twice over? My answer was that whichever of the two judges in the respective cases gave judgment first ought to order the land to be handed over to the plaintiff on condition that he undertook or gave security to the defendant that if the other plaintiff got a judgment for recovery too he would give it up.

58 PAULUS (*Epitomes of Alfenus, Digest* 3) A man who was sued in an action to recover a slave and an action for theft committed by the same slave, asked the question what he ought to do if judgment were given against him in both actions. The answer was—if the judgment first given were in the action for recovery of the slave, the judge ought not to compel him to deliver the slave in pursuance thereof, unless security were first given him that in case any damages should be paid by him in consequence of the fact that he had taken joinder of issue [for *furtum*] in respect of the same man, they should be duly made good to him. But if judgment were first given on the theft, and he had accordingly surrendered the man for *noxa*, and thereupon another judgment were given in favour of the plaintiff in the action *in rem* for the man himself, then the judge ought not to assess any damages for non-delivery of the man, because the non-delivery was in no respect attributable to malice or negligence of the defendant himself.

59 JULIANUS (*Extracts from Minicius* 6) A lodger placed windows and doors in another man's buildings, and these the owner of the buildings in a year's time removed: I wish to know whether the person who placed them can have a *vindicatio* for them. Answer Yes: things affixed to another person's building, as long as they remain attached, are part of the building, but as soon as they are removed they at once revert to their original legal condition.

60 POMPONIUS (*on Sabinus* 29) Where a possessor who is a child or a lunatic destroys or spoils anything, this is not punishable.

61 JULIANUS (*Extracts from Minicius* 6) Minicius was asked whether, supposing a man used another man's timber to repair his ship, the ship would nevertheless remain the property of the same owner. His answer was that it would: but if he did the same when originally building it the case must needs be different. Julianus makes this note: the property in the whole ship follows the legal position of the keel.

62 PAPINIANUS (*Questions* 6) If an action is brought for a ship against a *mala fide* possessor, there must be an estimate made of mesne profits too, just as in the case of shops or yards such as are usually let. This is not inconsistent with the rule that the [pretended] heir is not compelled to pay interest on money set aside which he does not himself touch; as, however true it may

be that freight, like interest, does not come by nature but is receivable in virtue of law, still the reason why the freight can be claimed in this case is that the possessor of the ship is not responsible to the plaintiff for risk, whereas the money is lent out at interest at the risk of the lender [as between the lender and the plaintiff]. 1. As a general rule, when a question arises as to bringing profits into the account, it is understood that what has to be considered is not whether the *mala fide* possessor enjoyed the profits himself, but whether the plaintiff would have been able to enjoy them if he had been allowed to be in possession of the property. This opinion has the approval of Julianus.

3 THE SAME (*Questions* 12) Where a man loses possession through negligence, but without fraud, then, as he will have to submit to have the value assessed, and to be charged with it, his application will be entertained if he asks that the other party should assign his right of action; and, as the prætor will give his aid at any time, if any one should be in possession, he will be put to no disadvantage. He has a right to relief even if the very person who received the amount assessed should be in possession; and the latter will not easily get a hearing if he should afterwards want to give back the money after once receiving it in pursuance of the judge's decision at the risk of the defendant on whom the order was made.

4 THE SAME (*Questions* 20) If an action *in rem* is brought, there is no doubt that mesne profits must be handed over in respect even of those things which are not held for profit but only for use.

5 THE SAME (*Responsa* 2) A man who purchased land from one who was not the owner will not be compelled, if he raises an *exceptio doli*, to hand over the land to the true owner, save on the terms of getting back any money which he may have paid to a creditor of the owner who had taken the land in pledge for his debt, as well as the balance of interest for the intermediate period, where, that is, such interest exceeds the amount of the profits which he received before the trial; as these profits can in justice only be set off against later interest, on the same principle as that applying to money spent on improvements. 1. Where a man allowed his daughter a female slave, not by way of *dos*, but as part of her *peculium*, then, if he does not bequeath *peculium* to the daughter by way of legacy, it follows that the woman is one of the slaves comprised in the assets of the deceased. If however

the father disinherited his daughter in consideration of her *dos* and *peculium*, and gave that express reason for leaving her nothing by testament, or for leaving her so much the less, the daughter will have a sufficient defence [to an action by the heir] in her father's intention.

66 PAULUS (*Questions* 2) A man has none the less right to sue for recovery of something as his own because there exists a probability of his losing the ownership in case some condition on which a legacy or a gift of freedom was made to depend should be fulfilled.

67 SCAEVOLA (*Responsa* 1) A man who had purchased a house from the guardian of a boy under age having sent in a carpenter to repair it, the carpenter found some money there; the question is asked to whom the money belongs. My answer was that if the coins were not a hoard, but money which happened to be lost or which the person to whom it belonged had by mistake omitted to take away, then there was no reason why they should not still belong to the same person as before.

68 ULPIANUS (*on the Edict* 51) When a man is ordered to hand over property and refuses to obey the judge, alleging that he is unable to hand it over, then, if he has got it in his hands, possession is, on motion, transferred from him to the other party by armed force, and the only order made upon him refers to the profits and legal accessions in general. But if it is out of his power to hand it over, then, if he fraudulently contrived to put it out of his power, he must be ordered to pay whatever amount the other party swears to as the value, subject to no limitation and without taxation. But if he is unable to hand the thing over, and it is the fact that he did not contrive fraudulently to be so unable, he can be ordered to pay no more than the actual value, that is to say, what the other party's interest amounts to. The above rules are of general application, and are followed on all occasions where something is to be handed over on the intimation of the judge, whether it is a case of an interdict or an action *in rem* or *in personam*.

69 PAULUS (*on Sabinus* 13) Where a man has used fraudulent contrivance to avoid being in possession, he is liable to this special punishment that the plaintiff is not bound to give him an undertaking that he will assign to him the rights of action which he has in connexion with the matter;

70 POMPONIUS (*on Sabinus* 29) and it is held that he must not even be allowed an action in the nature of a Publician action, because otherwise a man would have it in his power to acquire property by violence against the will of the owner by paying its real value.

71 PAULUS (*on Sabinus* 13) If however the possessor used fraudulent contrivance, but the plaintiff declines to swear, and prefers that the other party should be ordered to pay the actual value, his wish must be complied with.

72 ULPIANUS (*on the Edict* 16) If you purchase from Titius the land of Sempronius, and, on your paying the price, it is delivered to you, after which Titius becomes heir to Sempronius, and sells and delivers the same land to someone else, it is fair that you should have the prior claim; as, even if the vendor himself (Titius) should sue you to recover the land, you might bar his action by an *exceptio*. It may be added that, if Titius were in possession, and you were to sue him, then, if he raised an *exceptio* of ownership, you would have a good *replicatio*.

73 THE SAME (*on the Edict* 17) In an action brought in respect of a particular thing the possessor is not compelled to say what is the extent of his share in it; this is the duty of the plaintiff, not of the possessor; the same practice holds in the Publician action. A superficiary,

74 PAULUS (*on the Edict* 21) that is to say a person who has a *superficies* in someone else's ground on the terms of paying a fixed rent for it,

75 ULPIANUS (*on the Edict* 16) is promised by the prætor that he will be allowed an action *in rem* on sufficient cause shown.

76 GAIUS (*on the provincial Edict* 7) The rules laid down as to an action for recovery of an entire thing must be taken to apply equally to the recovery of a share, and it is part of the judge's duty to order that whatever kind of things ought to be handed over along with the share itself shall be handed over to an amount proportionate to the share. 1. An action is allowed for recovery of an unascertained share, if there is sufficient ground. Such sufficient ground may occur where some case on a testament calls for the application of the *lex Falcidia*, on account of the uncertainty as to the amount to be deducted from legacies, this question not having been carefully gone into before the judge; as, in such a case, a legatee to whom a slave is left by testament, may

well be in ignorance what share in the slave he ought to sue for; accordingly an action such as mentioned will be allowed. The same rule must be applied to any other kind of subject-matter as well.

77 ULPIANUS (*on the Edict* 17) A woman made a present by letter to a man who was not her husband of a piece of land, and then hired the same land from him: [I opined] that it might plausibly be held that the man had a right of action *in rem* for the land, on the ground that he had acquired possession of it through the woman herself as his tenant in occupation. Part of the case was that he had in fact been on the land which was given him at the very time when the letter was despatched; and this circumstance alone was enough to constitute transfer of possession, even if there had been no hiring in the question.

78 LABEO (*Probabilities epitomized by Paulus* 4) If you have not collected the produce of the piece of land of which you were in possession, though not owner, you are not bound to hand over anything in respect of the produce of such land. Paulus: Or rather the question to ask is this: Has the produce become the defendant's by collection on his part on his own account? We must understand that there is a gathering of produce not merely where the whole produce is got together, but where the gathering is begun and has gone so far that the ground has ceased to support the fruit; for example where olives or grapes are plucked, though no one has made any wine or oil; in which case the party who has thus gathered is deemed to have thereby received the produce.

79 THE SAME (*Probabilities epitomized by Paulus* 6) If you sue me to recover a slave, and the slave dies after joinder of issue, profits must be brought into account for the time of his life. Paulus: I should say that this is only true where the slave had not already fallen into such a state of health as to render his services of no value; as even if he had continued to live in such a condition as that, it would not be right that profits should be taken into account for that period.

80 FURIUS ANTHIANUS (*on the Edict* 1) Nobody is compelled to stand an action *in rem*; as any one is free to declare that he is not in possession, with the result that if the other party can prove that the property really is in the possession of his opponent, he can take over the possession with the aid of the Court, even though he do not prove that he is himself owner.

II.

On the Publician action *in rem*.

1 Ulpianus (*on the Edict* 16) The prætor says "where a man desires to sue for something which was delivered to him on sufficient ground, the action not being against the owner, and the thing not having become the plaintiff's property by *usus*, I will allow him an action." 1. The prætor says with good reason "not having become the plaintiff's property by *usus*," because, if it has once been acquired by *usus*, he has a good civil action, and has no need for a prætorian one. 2. Why however did he only mention delivery and acquisition by *usus*, when there are plenty of heads of law besides under which a man can acquire ownership? For instance there is bequest,

2 Paulus (*on the Edict* 19) or donation made *mortis causa*, in the case of which last, if the donee loses possession, he has a right to the Publician action, because acquisition by such a gift is treated after the analogy of that by a legacy.

3 Ulpianus (*on the Edict* 16) There are a number of other heads of law besides under which acquisition is made. 1. The prætor says "sue [for something delivered] on sufficient ground"; accordingly it is a man who has sufficient ground for taking the delivery who can bring the Publician action, and it is not only the *bona fide* purchaser who has a right to the action, but others have too, for example, one to whom property was delivered by way of *dos*, such property not having yet become his by *usus*; gift by way of *dos* is in fact a very sufficient ground, whether the property was given with a valuation or without. Again, suppose a thing was delivered in pursuance of a judgment,

4 Paulus (*on the Edict* 19) or in discharge of an obligation,

5 Ulpianus (*on the Edict* 16) or by way of surrender for *noxa*, whether the ground of surrender was furnished by a true view of the facts or an untrue view.

6 Paulus (*on the Edict* 19) Again, if in a case founded on *noxa*, no one having defended the slave, I have the prætor's leave to take him away, and, after taking him, I lose possession of him, I have a right to the Publician action.

7 Ulpianus (*on the Edict* 16) Add that if the property is transferred to me by a vesting order (*adjudicata*), I have a right

to the Publician action. 1. If a judicial valuation is put on the property sued for, this is equivalent to a sale; and Julianus tells us (*Dig.* 22) that if the defendant tenders the amount of the valuation so made, he has a right to the Publician action. 2. Marcellus says (*Dig.* 17) that a man who buys a thing from a lunatic, not being aware of his lunacy, can acquire it by *usus*: consequently he will have the Publician action too. 3. We may add that where a man receives something as a volunteer, he has a right to the action, as it is good even against a donor; the plaintiff is none the less a possessor on sufficient grounds where he accepted a liberality. 4. Where a man purchases from a person under twenty-five in ignorance of his age, he has a right to the action. 5. Again, he has the same right of action, if it is a case of an exchange. 6. The Publician action is formed on the model of a case of ownership, not on the model of a case of possession. 7. If I sue you to recover property and you tender me an oath, whereupon I swear that the thing is mine, I have a right to the action, but only against you: the only person against whom the oath is available is the man who tendered it: and if the oath is tendered to the defendant in possession, and he swears that the thing does not belong to the plaintiff, he will have an *exceptio* against that plaintiff only; it does not go so far as to give him a right of action. 8. All the rules laid down with reference to a *vindicatio* apply to the Publician action too. 9. The right to the action goes to the heir and to prætorian successors also. 10. If the act of purchasing is not mine but that of my slave, I have the action. A similar rule holds where the purchase is made by my procurator, or my guardian, or my curator, or any one who volunteers to act on my behalf. 11. The prætor speaks of a *bona fide* purchaser. Accordingly it is not every purchase which will serve, but only one made *bona fide*; moreover, it is enough that I should be a *bona fide* purchaser, though I do not purchase from the owner; and that even where the vendor sells with a fraudulent intent: I am not prejudiced by the vendor's fraud. 12. In connexion with this action, if I succeeded to the original purchaser, and I myself acted with fraud, this will do me no harm, where the purchaser himself bought in good faith; and if the purchaser to whom I succeeded acted with fraud, I shall gain nothing by being clear of fraud myself. 13. However, if my slave was the actual purchaser, it is fraud on his part that has to be considered and not on mine;—and a similar remark applies to good faith. 14. The action regards the time of purchase; accord-

ingly, in the opinion of Pomponius, nothing that was fraudulently done either before or after the purchase can be brought in question in the action. 15. The good faith involved in the matter is that of the purchaser only. 16. In order therefore that a man should have a good right to the action, the following things must be the case; there must be a *bona fide* purchaser, and the thing which is the subject of the purchase must have been delivered to him in pursuance of the bargain; it must be carefully remembered that a man cannot proceed on the Publician action before delivery, however much he may be a *bona fide* purchaser. 17. According to Julianus (*Dig.* 7) the delivery of the thing purchased ought to be taken in good faith; so that where a man takes possession knowing that the thing belongs to another, he cannot take proceedings by way of a Publician action, because he can never acquire the property by *usus*. But no one must suppose the legal view to be this, that if the purchaser should be ignorant at the time when delivery begins that the thing belongs to someone else, this is enough to enable him to bring the Publician action; it is required that the purchaser should be *bona fide* at the other moment too [viz. when the delivery is completed].

8 GAIUS (*on the provincial Edict* 7) But nothing is expressed as to the price having been paid; on which we may found the opinion that in fact it is not the view of the prætor that the question need be asked whether the price is paid or not.

9 ULPIANUS (*on the Edict* 16) Whether the thing is delivered to the purchaser or to the heir of the purchaser, the Publician right of action exists in both cases equally. 1. Where a man purchases a thing which was deposited with him or lent to him or pledged with him, it must be taken as delivered, if after the purchase it remains in his hands. 2. It may be added that a similar rule holds where the delivery preceded the purchase. 3. Again, if I purchase an inheritance, and some article contained in the inheritance has been delivered to me, for which I wish to bring an action,—according to Neratius, I can have the Publician action. 4. If a man makes separate sales to two persons respectively who both purchase *bona fide*, let us consider which has the best right to bring the Publician action; is it the one to whom delivery was made first, or the one who simply purchased [first]? To this Julianus says (*Dig.* 7) that if the two both purchase from the same assumed owner, preference must be given to the one to whom delivery was made first, but if they purchase from different assumed

owners, the one in possession is in a better position than the one who sues:—and this is a sound view. 5. This action is not in place in the case of things which cannot be acquired by *usus*, for example in the case of things stolen or fugitive slaves. 6. If a slave who forms part of an inheritance should before entry by the heir purchase something, and then lose the possession which was delivered to him, the heir can very well bring the Publician action, as though the possession had been his own. The members of a *municipium* will also be in the same position, supposing something has been delivered to a slave whom they owned as such members,

10 PAULUS (*on the Edict* 19) whether the slave purchased with reference to his own *peculium* or not.

11 ULPIANUS (*on the Edict* 16) If I have purchased something, and the thing is delivered to another at my request, then, according to a rescript of the present Emperor, Severus, the latter party will have a right to ask for the Publician action. 1. If an action is brought for a usufruct duly delivered, the Publician action is allowed; also where servitudes of urban estates are created by delivery or by sufferance (prescription), for example, suppose a man has allowed a water-course to be made through his house; also where rustic servitudes are similarly created, as in their case too there is no doubt that delivery and sufferance must be allowed to produce their respective effects. 2. Where the child of a stolen slave-woman was conceived at a time when the woman was in the possession of a *bonæ fidei* purchaser, it can be recovered by this action, even though such child itself has not been in the possession of the purchaser; but the heir of the party who stole the woman cannot bring the action, because he succeeds to the bad title of the deceased (i.e. the thief). 3. Sometimes however, even where the mother who was stolen was not sold, but was given to me for nothing, without my knowing of the theft, and she conceived and bore a child while in my possession, I have a right to a Publician action to recover the child, so Julianus says, provided that at the time at which I bring the action I am unaware that the mother was stolen. 4. The same author, Julianus, gives the general rule that under whatever circumstances I could acquire the mother by *usus*, if she were not stolen property, I can under the same circumstances acquire the child by *usus*, if I was unaware that the mother was stolen property; so that in all [such] cases I shall have the Publician action. 5. The same rule holds in the case of the child of a female child of a slave-woman, and

also in the case of a child which was not born, but was brought into the world by excision after the death of the mother, so Pomponius says (b. 40). 6. The same writer says that, where a house was purchased, if the house is destroyed, any accessions to it can be recovered by the action under discussion. 7. Any accession made to land by alluvion takes the legal implications of the principal thing to which it accedes; consequently, where the land itself cannot be recovered by a Publician action, neither can the accession in question, but where it can, then [the action embraces[1]] the portion which accrued by alluvion, and this we read in Pomponius. 8. The same writer adds that if it is desired to sue for missing portions of a statue that was purchased, a similar action will serve. 9. He also proceeds to lay down that if I buy a piece of vacant ground and build a block of houses on it, I can very properly use the Publician action. 10. Again, so he says, if I built such a block and the whole becomes a piece of vacant ground, I can similarly use the Publician action.

PAULUS (*on the Edict* 19) In a case where a man made a present of a slave to a woman to whom he was betrothed, and, before ownership in the slave was acquired by *usus*, he received him back again by way of *dos*, it was laid down in a rescript of the Divine Pius that, should the parties be divorced, the slave ought to be handed over to the woman; as the gift was between a betrothed man and woman, and so was valid. Accordingly the woman will be allowed an *exceptio* if she is in possession and the Publician action if she should have lost possession, whether [in the latter case] the person in possession should be a stranger or the donor. 1. When an inheritance is handed over to any one in pursuance of the Trebellian Senatusconsultum, he can have the Publician action, even though he should not yet have acquired possession. 2. In lands held on perpetual lease (*prædia vectigalia*), and in other lands which are not subject to *usucapio*, the Publician action is allowed, if it should happen that such land[2] is delivered to one who takes it *bona fide*. 3. The same rule holds equally where I purchase *bona fide* from one who is not owner a block of chambers which goes with the surface. 4. In the case of a thing of such a kind that some statute or imperial enactment prohibits a transfer of it, the Publician action is not available; in such cases the prætor gives no assistance to any one, lest he should

[1] Some such words probably omitted. M.
[2] Ins. *res* after *tradita*. v. M.

be transgressing a statute. 5. A Publician action may be had even to recover a slave-child under the age of a year. 6. A man can employ the Publician action where the subject-matter of his suit is a share in something. 7. Indeed even a man who has been in possession for a single moment might perfectly well proceed by means of this action.

3 GAIUS (*on the provincial Edict* 7) Whenever people get hold of anything under such circumstances, whatever they are, as constitute a lawful method of acquisition, and then lose possession of it, they will be allowed this action for the purpose of recovering the thing in question. 1. But there are cases where particular classes of persons have no right to the Publician action, even in pursuance of lawful possession: possession in consequence of a pledge or of a gift in *precarium* is lawful, but in neither of these cases is it in accordance with practice that a right of action of this kind should exist: the reason being simply this, that neither the pledge nor the holder on *precarium* takes possession with that intent that he believes himself to be owner. 2. Where a man purchases from a boy under age, he is bound to show that he bought with the concurrence of the boy's guardian, and not in transgression of any statute. Still, if he is deceived into buying with the concurrence of a simulated guardian, he may be held to have purchased in good faith.

4 ULPIANUS (*on the Edict* 16) Papinianus has the following (*Questions* 6):- where a man forbids delivery to be made in pursuance of a sale or notifies to that effect, the thing having been sold by his agent at his request, but the agent thereupon nevertheless delivers, the praetor will protect the purchaser, whether he is in possession of the thing or is suing to recover it. But if the agent should have to pay anything to the purchaser in consequence of an action brought by the latter on the contract, such agent will recover [against the principal] by an *actio contraria* on the *mandatum*; [and this case might very well arise,] as it is possible that the thing should be recovered from the purchaser by the person who gave the mandate to sell, owing to the purchaser, through ignorance, omitting to raise the *exceptio* which he ought to have raised, for example, the following: "unless the man that I dealt with sold at your request."

5 POMPONIUS (*on Sabinus* 3) If a slave of mine in the course of his flight from my house should purchase something from a man who is not the owner, I shall have a good Publician right of action,

even though I should not have acquired through such slave the possession of the thing delivered.

PAPINIANUS (*Questions* 10) Paulus's note: The Publician action may be barred by the *exceptio* of legal ownership.

NERATIUS (*Parchments* 3) The Publician action was not devised with the object of taking property away from the actual owner; this we may conclude in the first place on principles of justice, and in the second place from the existence of the *exceptio* "provided the thing in question is not the property of the defendant"; the object of the action was to secure that where a man has bought a thing in good faith and has acquired the possession of it in pursuance of the purchase, he rather than the other party should keep it.

III.

ON ACTIONS TO RECOVER VECTIGALIAN—THAT IS EMPHYTEUTIC—LAND.

PAULUS (*on the Edict* 21) Of town lands some are called vectigalian and some are not so called. The word vectigalian is applied to land which is let by way of perpetual lease, that is to say, on the terms that so long as [1]*vectigal* is paid it shall not be possible in law to take the land away from the original lessees or from those who succeed to their position: land which is not vectigalian is such as is let for cultivation in the way in which lands commonly are let with that object by private contract. Where persons take a lease of land from municipal bodies to be enjoyed in perpetuity, then, although such lessees do not thereby become owners, nevertheless the law now is that they have a good right of action *in rem* against any one who should have taken possession, in fact even against the members of the municipal body themselves,

ULPIANUS (*on Sabinus* 17) provided always they pay the *vectigal*.

PAULUS (*on the Edict* 21) The case is the same where they contracted a lease for a definite term, but the period for which it was contracted has not yet expired.

[1] Transpose *tamdiu* and *quamdiu*. Cf. M.

CAMBRIDGE: PRINTED BY J. AND C. F. CLAY, AT THE UNIVERSITY PRESS.