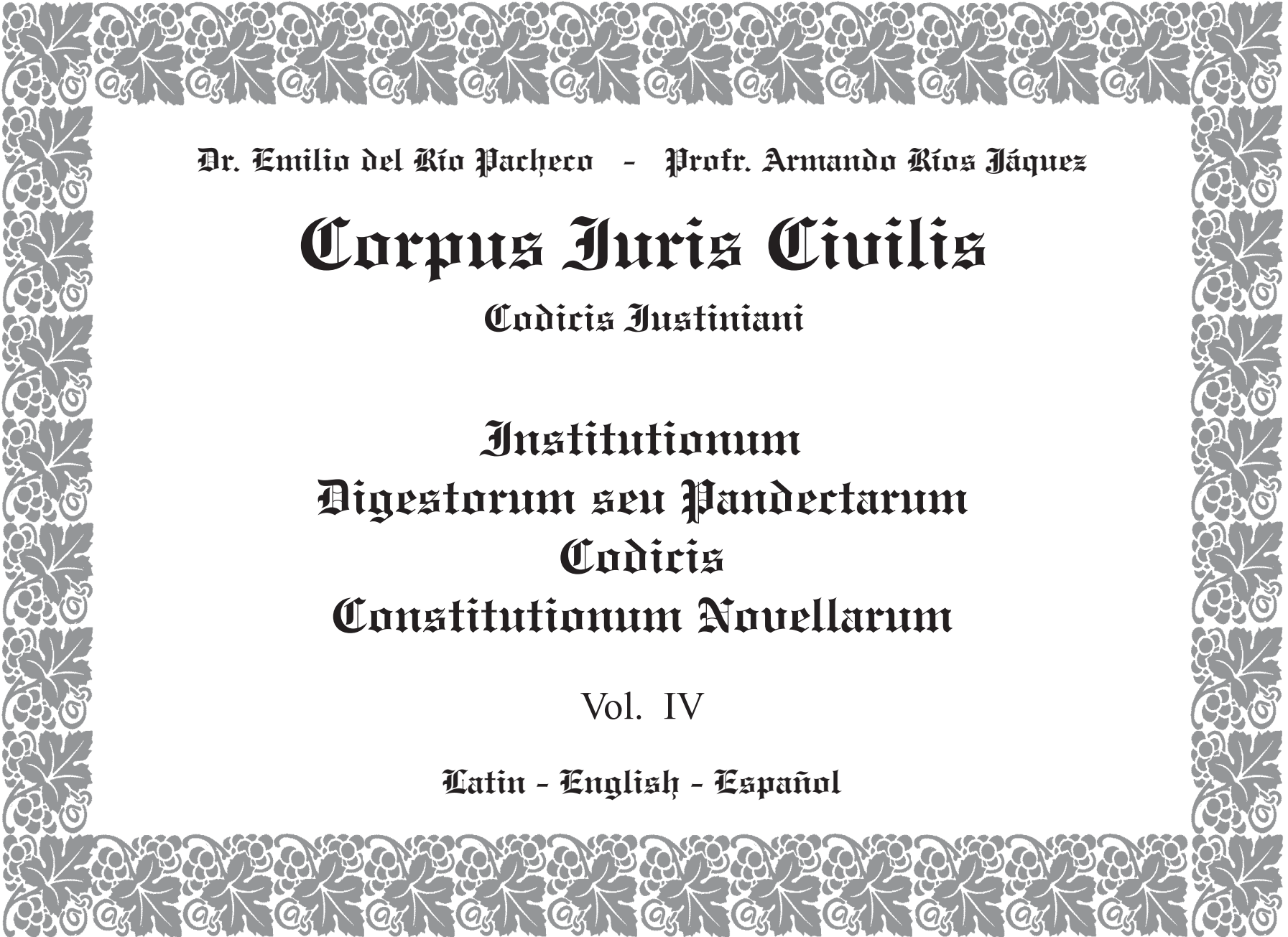




Dr. Emilio del Río Pacheco - Profr. Armando Ríos Jáquez

Corpus Iuris Civilis

Codicis Justiniani

Institutionum

Digestorum seu Pandectarum

Codicis

Constitutionum Nouellarum

Vol. IV

Latin - English - Español

First Edition, 2006

Reserved rights

Copyright© 2006 by Emilio del Río Pacheco
and Armando Ríos Jáquez

REGLA
Reproducciones Gráficas Laguna, S. de R.L.
Praxedis Guerrero No. 500-A
Fracc. Río 2000 Col. Leandro Rovirosa Wade
Torreón, Coahuila, México. C.P. 27120
Phone. 871-144-3113
E-mail: armando.rios.jaquez@gmail.com

Fact has left the deposit that demands the law.

ISBN: 968-9218-00-X (Complete Work)
968-9218-04-2 (Volume IV)

IMPRESO EN MEXICO
PRINTED IN MEXICO

Primera Edición, 2006

Derechos reservados

Copyright© 2006 por Emilio del Río Pacheco
y Armando Ríos Jáquez

REGLA
Reproducciones Gráficas Laguna, S. de R. L.
Praxedis Guerrero No. 500-A
Fracc. Río 2000 Col. Leandro Rovirosa Wade
Torreón, Coahuila, México. C.P. 27120
Tel. 871-144-3113
E-mail: armando.rios.jaquez@gmail.com

Queda hecho el depósito que marca la ley.

ISBN: 968-9218-00-X (Obra completa)
968-9218-04-2 (Tomo IV)

IMPRESO EN MEXICO
PRINTED IN MEXICO

PARS QUINTA

DIGESTORUM SEU PANDECTARUM

IURIS ENUNCIATI EX OMNI
VETERE IURE COLLECTI

DOMINI NOSTRI SACRATISSIMI
PRINCIPIS IUSTINIANI

(DE TESTAMENTIS)

LIBER VECIESIMUS OCTAVUS

TIT. I

QUI TESTAMENTA FACERE POSSUNT ET
QUEMADMODUM TESTAMENTA
FIANT.

1.- MODESTINUS; *libro II pandectarum*.- Testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri velit.

2.- LABEO; *libro I posteriorum a Javoleno epitomatorum*.- In eo qui testatur eius temporis, quo testamentum facit, integritas mentis, non corporis sanitas exigenda est.

3.- PAPINIANUS; *libro XIV quaestionum*.- Testamenti factio non privati, sed publici iuris est.

4.- GAIUS; *libro II institutionum*.- Si quaeramus, an valeat testamentum, in primis animadvertere debemus, an is qui fecerit testamentum habuerit testamenti factionem, deinde, si habuerit, requiramus, an secundum regulas iuris civilis testatus sit.

5.- ULPIANUS; *libro VI ad Sabinum*.- A qua aetate testamentum vel masculi vel feminae facere possunt, videamus. Verius est in masculis quidem quartum decimum annum spectandum, in feminis vero

FIFTH PART OF THE DIGEST

Or

PANDECTS OF THE CORRECTED LAW

AND REMOVED FROM ALL THE OLD ONE LAW

BY ORDER

OF THE MOST SACRED PRINCE
OUR LORD JUSTINIAN

(OF THE WILLS)

BOOK XXVIII

TITLE I

WHO CAN MAKE WILLS AND IN WHAT
MANNER THEY SHOULD
BE EXECUTED

1.- MODESTINUS; *Pandects, Book II*.- A will is the lawful expression of our wishes with respect to what anyone desires to be done after his death.

2.- LABEO; *Abridgments of Last Works by Javolenus, Book I*.- Soundness of mind is required of a testator at the time that he makes a will, but bodily health is not necessary.

3.- PAPINIANUS; *Questions, Book XIV*.- The execution of a will is not a private right, but a matter of public law.

4.- GAIUS; *Institutes, Book II*.- If we make inquiry as to whether a will is valid, we should first ascertain whether he who made it had the right to do so, and then, if he had, we should ascertain whether it was drawn up in accordance with the rules of the Civil Law.

5.- ULPIANUS; *On Sabinus, Book VI*.- Let us consider at what age males or females can make a will. The better opinion is that males must have attained the age of fourteen and females that of

PARTE QUINTA DEL DIGESTO

O

PANDECTAS DEL DERECHO CORREGIDO

Y SACADO DE TODO EL ANTIGUO DERECHO

POR ORDEN

DEL SACRATÍSIMO PRÍNCIPE
NUESTRO SEÑOR JUSTINIANO

(DE LOS TESTAMENTOS)

LIBRO VIGÉSIMO OCTAVO

TITULO I

QUIÉNES PUEDEN HACER TESTAMENTO,
Y CÓMO SE HACEN LOS
TESTAMENTOS

1.- MODESTINO; *Pandectas, libro II*.- El testamento es la justa expresión de nuestra voluntad respecto a lo que cada cual quiere que se haga después de su muerte.

2.- LABEON; *Obras póstumas compendiadas por Javoleno, libro I*.- En el que testa se ha de exigir, al tiempo en que hace testamento, la integridad de su juicio, y no la salud de su cuerpo.

3.- PAPINIANO; *Cuestiones, libro XIV*.- La facultad de hacer testamento no es de derecho privado, sino de público.

4.- GAYO; *Instituta, libro II*.- Si investigamos si es válido un testamento, debemos observar ante todo si tuvo facultad de hacer testamento el que haya hecho el testamento, y después, si la hubiere tenido, investigaremos, si testó según las reglas del derecho civil.

5.- ULPIANO; *Comentarios a Sabino, libro VI*.- Veamos de qué edad pueden hacer testamento los varones, o las hembras. Y es más verdadero, que en los varones se ha de esperar ciertamente al décimo

excessisse debeat quis quartum decimum annum, ut testamentum facere possit, an sufficit complesse? Propone aliquem kalendis ianuariis natum testamentum ipso natali suo fecisse quarto decimo anno: an valeat testamentum? Dico valere. Plus arbitrator, etiamsi pridie kalendarum fecerit post sextam horam noctis, valere testamentum: iam enim complesse videtur annum quartum decimum, ut Marciano videtur.

6.- GAIUS; *libro XVII ad edictum provinciale*.- Qui in potestate parentis est, testamenti faciendi ius non habet, adeo ut, quamvis pater ei permittat, nihilo magis tamen iure testari possit.

§ 1.- Surdus mutus testamentum facere non possunt: sed si quis post testamentum factum valetudine aut quolibet alio casu mutus aut surdus esse coeperit, ratum nihilo minus permanet testamentum.

7.- MACER; *libro I ad legem vicensimam hereditatium*.- Si mutus aut surdus, ut liceret sibi testamentum facere, a principe impetraverit, valet testamentum.

8.- GAIUS; *libro XVII ad edictum provinciale*.- Eius qui apud hostes est testamentum quod ibi fecit non valet, quamvis redierit.

§ 1.- Si cui aqua et igni interdictum sit, eius nec illud testamentum valet quod ante fecit nec id quod postea fecerit: bona quoque, quae tunc habuit cum damnaretur, publicabuntur aut, si non videantur lucrosa, creditoribus concedentur.

§ 2.- In insulam deportati in eadem causa sunt:

§ 3.- Sed relegati in insulam et quibus terra Italica et sua provincia interdicatur testamenti faciendi ius retinent.

make a will, is it sufficient for a party to have reached the age of fourteen, or must he have passed that age? Suppose a person born on the Kalends of January makes his will upon his fourteenth birthday, will such a will be valid? I hold that it will be valid, and I go even farther, and say that if he made his will upon the day preceding the Kalends of January, after the sixth hour of the night, his will will be valid, for, according to Marcianus, he is then considered to have completed his fourteenth year.

6.- GAIUS; *On the Provincial Edict, Book LXX*.- Where an individual is under the control of his father, he has no right to make a will; and to such an extent is this true that even if the father should grant him permission, he, nevertheless, cannot legally execute a will.

§ 1.- Persons who are deaf and dumb cannot make a will, but where anyone becomes dumb or deaf through illness, or any other accident, after the will has been executed, it will still be valid.

7.- ÆMILIUS MACER, *On the Twenty Per Cent Law of Inheritance, Book I*.- Where a person who is dumb or deaf obtains permission from the Emperor to make a will, it will be valid.

8.- GAIUS; *On the Provincial Edict, Book VII*.- A will executed by a person while in the power of the enemy is not valid, even though he should return.

§ 1.- Where fire and water have been forbidden to anyone, no will which he made previously or subsequently will be valid, and whatever property he was possessed of at the time of his condemnation shall be confiscated; or, if it does not seem to be sufficiently valuable for this to be done it shall be abandoned to his creditors.

§ 2.- Persons who have been deported to an island are in the same condition.

§ 3.- Those, however, who have been relegated to an island, and such as have been forbidden to remain in Italy or in their own province, retain the right to make a will.

Pero ¿deberá uno haber pasado del décimo cuarto año, para que pueda hacer testamento, o bastará que lo haya cumplido? Supón, que el que nació en las Calendas de Enero hizo testamento en el mismo día de su natalicio, en el décimo cuarto año, ¿será válido el testamento? Digo, que es válido; creo más, que también si lo hubiere hecho la víspera de las Calendas después de la sexta hora de la noche, es válido el testamento; porque se considera que cumplió el año décimo cuarto, según le parece a Marciano.

6.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- El que está bajo la potestad de un ascendiente no tiene el derecho de hacer testamento, de tal manera que, aunque su padre se lo permita, no puede, sin embargo, testar en derecho.

§ 1.- El sordo, y el mudo, no pueden hacer testamento; pero si después de haber hecho testamento hubiere comenzado uno a ser mudo o sordo por enfermedad o por otro cualquier accidente, permanece, no obstante, válido el testamento.

7.- EMILIO MACER; *Comentarios a la ley vigésima de las herencias, libro I*.- Si el mudo o el sordo hubiere impetrado del Príncipe, que le fuese lícito hacer testamento, es válido el testamento.

8.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- El testamento del que está en poder de los enemigos, y que lo hizo en poder de ellos, no es válido, aún cuando aquel hubiere regresado.

§ 1.- Si a alguno se le hubiera hecho interdicción del agua y del fuego, no es válido ni el testamento que hizo antes, ni el que hubiere hecho después; y también se le confiscarán los bienes que tenía cuando fue condenado, o se les concederán a los acreedores, si no parecieran lucrativos.

§ 2.- En la misma situación están los deportados a una isla.

§ 3.- Pero los relegados a una isla, y aquellos a quienes se les veda la tierra italiana, y la de su provincia, conservan el derecho de hacer testamento.

§ 4.- Hi vero, qui ad ferrum aut ad bestias aut in metallum damnantur, libertatem perdunt bonaque eorum publicantur: unde apparet amittere eos testamenti factionem.

9.- ULPIANUS; *libro XLV ad edictum*.- Si quis post accusationem in custodia fuerit defunctus indemnatus, testamentum eius valebit.

10.- PAULUS; *libro III sententiarum*.- Qui manus amisit testamentum facere potest, quamvis scribere non possit.

11.- ULPIANUS; *libro X ad Sabinum*.- Obsides testari non possunt, nisi eis permittitur.

12.- IULIANUS; *libro XLII digestorum*.- Lege Cornelia testamenta eorum, qui in hostium potestate decesserint, perinde confirmantur, ac si hi qui ea fecissent in hostium potestatem non pervenissent, et hereditas ex his eodem modo ad unumquemque pertinet. Quare servus heres scriptus ab eo, qui in hostium potestate decesserit, liber et heres erit seu velit seu nolit, licet minus proprie necessarius heres dicatur: nam et filius eius, qui in hostium potestate decessit, invitus hereditati obligatur, quamvis suus heres dici non possit, qui in potestate morientis non fuit.

13.- MARCIANUS; *libro IV institutionum*.- Qui a latronibus capti sunt, cum liberi manent, possunt facere testamentum.

§ 1.- Item qui apud externos legatione funguntur, possunt facere testamentum.

§ 2.- Si quis in capitali crimine damnatus appellaverit et medio tempore pendente appellatione fecerit testamentum et ita decesserit, valet eius testamentum.

14.- PAULUS; *libro II regularum*.- Qui in testa-

§ 4.- Moreover, those who have been sentenced to fight in the arena, or to be thrown to wild beasts, or to work in the mines, forfeit their liberty, and their property is confiscated; from whence it is evident that they lose the right to make a will.

9.- ULPIANUS; *On the Edict, Book XLV*.- If anyone accused of crime should die in prison before being convicted, his testament will be valid.

10.- PAULUS; *Opinions, Book III*.- Where a man has lost his hands, he can make a will, even though he is unable to write.

11.- ULPIANUS; *On Sabinus, Book X*.- Hostages cannot execute a will, unless permission is granted them to do so.

12.- JULIANUS; *Digest, Book XLII*.- According to the Lex Cornelia, the wills of those who die while in the power of the enemy are confirmed, just as if those who had executed them had never been in the hands of the enemy, and their estates pass to whomever are entitled to them under the testamentary provisions. Wherefore, in case a slave is appointed heir by a person who dies while in the power of the enemy, he will become free and the heir of the testator, whether he is willing or not; although he is improperly said to be a necessary heir, for the son of a man who dies while in the hands of the enemy must assume the obligation of the estate, even if unwilling to do so, although he cannot be said to be his heir, as he was not under his control at the time of his death.

13.- MARCIANUS; *Institutes, Book IV*.- Those who have been captured by robbers, as they remain free, can make a will.

§ 1.- Moreover, those who perform the duties of envoys in foreign countries can make a will.

§ 2.- Where anyone convicted of a capital crime appeals, and makes a will in the meantime, while the appeal is pending, and then dies, his will is valid.

14.- PAULUS; *Rules, Book II*.- Where a slave

§ 4.- Mas los que son condenados a muerte, o a las fieras, o a las minas, pierden la libertad, y se les confiscan sus bienes; por donde se ve, que pierden la facultad de hacer testamento.

9.- ULPIANO; *Comentarios al Edicto, libro XLV*.- Si después de la acusación hubiere fallecido uno en la cárcel antes de haber sido condenado, será válido su testamento.

10.- PAULO; *Sentencias, libro III*.- El que perdió las manos, puede hacer testamento, aunque no pueda escribir.

11.- ULPIANO; *Comentarios a Sabino, Libro X*.- Los rehenes no pueden testar, si no se les permite..

12.- JULIANO; *Digesto, libro XLII*.- Por la Ley Cornelia los testamentos de los que hubieren fallecido en poder de los enemigos se confirman del mismo modo que si los que los hubiesen hecho no hubiesen caído en poder de los enemigos; y de la misma manera le corresponde a cada cual la herencia procedente de ellos. Por lo cual, el esclavo instituido heredero por el que hubiere fallecido en poder de los enemigos, será libre y heredero, quiera o no quiera, aunque con propiedad no se le llame heredero necesario; porque también el hijo del que falleció en poder de los enemigos se obliga contra su voluntad a la herencia, aunque no pueda decirse que es heredero suyo, el que no estuvo bajo la potestad del que murió.

13.- MARCIANO; *Instituta, libro IV*.- Los que fueron cogidos por los ladrones, como quiera que permanecen siendo libres, pueden hacer testamento.

§ 1.- Asimismo, los que en el extranjero desempeñan una legación, pueden hacer testamento.

§ 2.- Si hubiere apelado el condenado a pena capital, y en el tiempo intermedio, pendiente la apelación, hubiere hecho testamento, y así hubiere fallecido, es válido su testamento.

14. PAULO; *Reglas, libro II*.- El que fue manu-

mento domini manumissus est, si ignorat dominum decessisse aditamque eius esse hereditatem, testamentum facere non potest, licet iam pater familias et sui iuris est: nam qui incertus de statu suo est, certam legem testamento dicere non potest.

15.- ULPIANUS; *libro XII ad edictum*.- De statu suo dubitantes vel errantes testamentum facere non possunt, ut divus Pius rescripsit.

16.- POMPONIUS; *libro singulari regularum*.- Filius familias et servus alienus et postumus et surdus testamenti factionem habere dicuntur: licet enim testamentum facere non possunt, attamen ex testamento vel sibi vel aliis adquirere possunt.

§ 1.- Marcellus notat: furiosus quoque testamenti factionem habet, licet testamentum facere non potest: ideo autem habet testamenti factionem, quia potest sibi adquirere legatum vel fideicommissum: nam etiam compotibus mentis personales actiones etiam ignorantibus adquiruntur.

17.- PAULUS; *libro III sententiarum*.- In adversa corporis valetudine mente captus eo tempore testamentum facere non potest.

18.- ULPIANUS; *libro I ad Sabinum*.- Is cui lege bonis interdictum est testamentum facere non potest et, si fecerit, ipso iure non valet: quod tamen interdictione vetustius habuerit testamentum, hoc valebit. Merito ergo nec testis ad testamentum adhiberi poterit, cum neque testamenti factionem habeat.

§ 1.- Si quis ob crimen famosum damnetur, senatus consulto expressum est, ut intestabilis sit: ergo nec testamentum facere poterit nec ad testamentum adhiberi.

19.- MODESTINUS; *libro V pandectarum*.- Si

manumitted by the will of his master is not aware that the latter is dead, and that the heir has entered upon his estate, he cannot execute a will, even though he may already be the father of a family, and his own master; for he who is uncertain as to his own condition cannot make an absolute testamentary disposition of property.

15.- ULPIANUS; *On the Edict, Book XII*.- Those who entertain any doubt with reference to their condition or are mistaken concerning it cannot execute a will; as the Divine Pius stated in a Rescript.

16.- POMPONIUS; *Rules*.- It is held that a son under paternal control, the slave of another, a posthumous child, and a deaf person, have the right to take under a will; for, although they cannot execute one, still they can acquire property by a will, either for themselves or for others.

§ 1.- Marcellus observes that an insane person also has the right to take under a will although he cannot execute one; hence a party is understood to possess this right, because he can acquire for himself either a legacy or a trust, for the right to bring a personal action is also acquired by parties that are not aware of the fact, but who are of sound mind.

17.- PAULUS; *Sentences, Book III*.- Where a party loses his mind on account of bodily illness, he cannot make a will as long as this condition exists.

18.- ULPIANUS; *On Sabinus, Book I*.- He who is legally prohibited from managing his own property cannot make a will, and if he should make one, it will not be valid in law. Where, however, he executed a will before his interdiction, it will be valid. Hence it is reasonable that he cannot be offered as a witness to a will, since he has not the right to make one himself.

§ 1.- Where anyone has been convicted of public libel, it is stated in the Decree of the Senate that he cannot make a will; hence he can neither execute one, nor be offered as a witness to prove the will of another testator.

19.- MODESTINUS; *Pandects, Book V*.- Where a

mitido en el testamento de su señor, si ignora que falleció su señor, y que fue adida su herencia, no puede hacer testamento, aunque ya es padre de familia y de propio derecho; porque el que está inseguro de su propio estado no puede declarar disposición cierta en su testamento.

15.- ULPIANO; *Comentarios al Edicto, libro XII*.- Los que dudan o yerran sobre su propio estado no pueden hacer testamento, según respondió por rescripto el Divino Pío.

16.- POMPONIO; *Reglas, libro único*.- Se dice que el hijo de familia, y el esclavo ajeno, y el póstumo, y el sordo tienen la testamentifacción; porque aunque no pueden hacer testamento, pueden, sin embargo, adquirir por testamento o para sí, o para otros.

§ 1.- Observa Marcelo: también el furioso tiene la testamentifacción, aunque no puede hacer testamento. Mas tiene la testamentifacción por esto, porque puede adquirir un legado o un fideicomiso; pues también para los que están en su cabal juicio se adquieren acciones personales, aún ignorándolo ellos.

17.- PAULO; *Sentencias, libro III*.- El privado de juicio no puede durante el tiempo de la enfermedad de su cuerpo hacer testamento.

18.- ULPIANO; *Comentarios a Sabino, libro I*.- Aquel a quien por la ley se le puso interdicción en sus bienes, no puede hacer testamento, y si lo hubiere hecho, es nulo de derecho; pero será válido el testamento que hubiere hecho anterior a la interdicción. Luego, con razón tampoco podrá ser presentado como testigo para un testamento, pues no tiene la testamentifacción.

§ 1.- Si alguno fuese condenado por algún libelo infamatorio, se expresó en un Senadoconsulto, que sea intestable; luego tampoco podrá hacer testamento, ni ser testigo de un testamento.

19.- MODESTINO; *Pandectas, libro V*.- Si un

filius familias aut pupillus aut servus tabulas testamenti fecerit signaverit, secundum eas bonorum possessio dari non potest, licet filius familias sui iuris aut pupillus pubes aut servus liber factus decesserit, quia nullae sunt tabulae testamenti, quas is fecit, qui testamenti faciendi facultatem non habuerit.

20.- ULPIANUS; *libro I ad Sabinum*.- Qui testamento heres instituitur, in eodem testamento testis esse non potest. Quod in legatario et in eo qui tutor scriptus est contra habetur: hi enim testes possunt adhiberi, si aliud eos nihil impediatur, ut puta si impubes, si in potestate sit testatoris.

§ 1.- Potestatis autem verbum non solum ad liberos qui sunt in potestate referendum est, verum etiam ad eum quem redemit ab hostibus, quamvis placeat hunc servum non esse, sed vinculo quodam retineri, donec pretium solvat.

§ 2.- Per contrarium quaeri potest, an pater eius, qui de castrensi peculio potest testari, adhiberi ab eo ad testamentum testis possit. Et Marcellus libro decimo digestorum scribit posse: et frater ergo poterit.

§ 3.- Quae autem in testamento diximus super prohibendis testimoniis eorum qui in potestate sunt, in omnibus testimoniis accipias, ubi aliquid negotii geritur, per quod adquiratur.

§ 4.- Ne furiosus quidem testis adhiberi potest, cum compos mentis non sit: sed si habet intermissionem, eo tempore adhiberi potest: testamentum quoque, quod ante furorem consummavit valebit et bonorum possessio ex eo testamento competit.

§ 5.- Eum qui lege repetundarum damnatus est ad testamentum adhiberi posse existimo, quoniam in iudicium testis esse vetatur.

§ 6.- Mulier testimonium dicere in testamento

son under paternal control, a ward, or a slave draws up a will and seals it, possession of the property mentioned therein cannot be granted to the legatees, even though the testator should be a son who is independent, or a ward who has reached the age of puberty, or a slave who should become free, at the time of his death; for the reason that a will drawn up by one who has no right to do so is void.

20.- ULPIANUS; *On Sabinus, Book I*.- Where an heir is appointed by will, he cannot be a witness to it. The contrary rule applies to a legatee, and to one who is appointed guardian, for such persons can act as witnesses, if no other impediment exists; as, for instance, where the party had not arrived at puberty, or was under the control of the testator.

§ 1.- The term "control" not only applies to children who are in the power of their father, but also to one whom the testator has redeemed from the hands of the enemy, although it is established that such a person shall not be a slave, but shall merely be kept under restraint until he has paid the amount of his ransom.

§ 2.- On the other hand, the question may be asked whether a father can be offered as a witness to a will by which his son disposes of his peculium castrense. And Marcellus states in the Tenth Book of the Digest that he can be a witness, and that his brother can also be one.

§ 3.- Moreover, what we have stated with reference to the testimony of those who are under the control of a testator being prevented from witnessing a will is applicable to all cases where any kind of business is transacted by means of which property is acquired.

§ 4.- Nor can an insane person be offered as a witness, as he is not of sound mind. If, however, he has lucid intervals, he can testify during their continuance; a will which he has executed before he became insane will be valid; and he should be entitled to the possession of property in accordance with the terms of the will.

§ 5.- I think that anyone who has been convicted of embezzlement cannot be a witness to a will, since his testimony in court is forbidden.

§ 6.- A woman cannot act as a witness to a will,

hijo de familia, o un pupilo, o un esclavo, hubiere hecho testamento y lo hubiere sellado, no puede darse conforme al mismo la posesión de los bienes, aunque el hijo de familia hubiere fallecido hecho de propio derecho, o púbero el pupilo, o libre el esclavo, porque son nulas las tablas del testamento, que hizo el que no hubiere tenido facultad de hacer testamento.

20.- ULPIANO; *Comentarios a Sabino, libro I*.- El que es instituido heredero en un testamento no puede ser testigo en el mismo testamento. Lo contrario se observa respecto al legatario y al que fue nombrado tutor; porque estos pueden ser presentados como testigos, si ninguna otra cosa se lo impidiera, por ejemplo, si fuera impúbero, o si estuviera bajo la potestad del testador.

§ 1.- Mas la palabra potestad se ha de referir no solamente a los descendientes que están bajo potestad, sino también al que fue rescatado de los enemigos, por más que esté establecido que este no es esclavo, sino que está retenido por cierto vínculo hasta que pague el rescate.

§ 2.- Por el contrario, puede preguntarse, si el padre del que puede testar de su peculio castrense, pueda ser presentado por él como testigo de su testamento; y escribe Marcelo en el libro décimo del Digesto, que puede; luego también podrá el hermano.

§ 3.- Mas lo que hemos dicho respecto a ser presentados como testigos en un testamento los que están bajo potestad, entiéndelo respecto a todos los testigos, cuando se hace algún negocio por el cual se adquiera.

§ 4.- El furioso no puede ciertamente ser presentado como testigo, no estando en su cabal juicio, pero si tiene intervalos, puede ser presentado en este tiempo; y también será válido el testamento que hizo antes, de la locura, y en virtud de este testamento compete la posesión de bienes.

§ 5.- Opino, que el que fue condenado por la ley de peculado no puede ser presentado testigo para un testamento, porque se le prohíbe ser testigo en juicio.

§ 6.- La mujer no podrá ciertamente prestar testi-

quidem non poterit, alias autem posse testem esse mulierem argumento est lex Iulia de adulteriis, quae adulterii damnatam testem produci vel dicere testimonium vetat.

§ 7.- Servus quoque merito ad sollemnia adhiberi non potest, cum iuris civilis communionem non habeat in totum, ne praetoris quidem edicti.

§ 8.- Et veteres putaverunt eos, qui propter sollemnia testamenti adhibentur, durare debere, donec suprema contestatio peragatur.

§ 9.- Non tamen intelligentiam sermonis exigimus: hoc enim divus Marcus Didio Iuliano in teste, qui Latine non noverat, rescripsit: nam si vel sensu percipiat quis, cui rei adhibitus sit, sufficere.

§ 10.- Sed si detenti sint inviti ibi testes, putant non valere testamentum.

21.- ULPIANUS; *libro II ad Sabinum*.- Heredes palam ita, ut exaudiri possunt, nuncupandi sint: licebit ergo testanti vel nuncupare heredes vel scribere: sed si nuncupat, palam debet. Quid est palam? Non utique in publicum, sed ut exaudiri possit: exaudiri autem non ab omnibus, sed a testibus: et si plures fuerint testes adhibiti, sufficit sollemnem numerum exaudire.

§ 1.- Si quid post factum testamentum mutari placuit, omnia ex integro facienda sunt. Quod vero quis obscurius in testamento vel nuncupat vel scribit, an post sollemnia explanare possit, quaeritur: ut puta Stichum legaverat, cum plures haberet, nec declaravit de quo sentiret: Titio legavit, cum multos Titios amicos haberet: erraverat in nomine vel praenomine vel cognomine, cum in corpore non errasset: poteritne postea declarare, de quo senserit? Et puto posse: nihil enim nunc dat, sed datum significat. Sed

although she can be a witness in court; as is established by the Lex Julia de Adulteriis, which prohibits a witness who has been convicted of adultery from testifying or making a deposition.

§ 7.- A slave cannot participate in the formalities attaching to the execution of a will, and very properly, as he has no share whatever in the rights conferred by the Civil Law, or indeed in those granted by the Praetorian Edict.

§ 8.- The ancient authorities thought that those who are summoned to take part in the solemn formalities of a will should remain until the last attestation had been completed.

§ 9.- We do not, however, require that a witness should understand the language of the testator; for the Divine Marcus, in a Rescript addressed to Didius Julianus, stated this with reference to a witness who was ignorant of the Latin language; for it is sufficient if the witness perceives by his senses for what purpose he was summoned.

§ 10.- Where the witnesses are detained against their consent, the authorities hold that the will is not valid.

21.- THE SAME; *On Sabinus, Book II*.- The name of the heir should be plainly spoken, in order that it may be heard. The testator is, therefore, permitted either to mention the heirs by name, or to write down their names, but if he mentions them he must do so distinctly. What does the term "distinctly" mean? It does not mean that this shall be done publicly, but in such a way that the names may be heard, not, indeed, by everyone, but by the witnesses to the will; and where there are several witnesses, it will be sufficient for them to be heard by the number specified by law.

§ 1.- Where the testator wishes to change his will, it is established that everything must be done over again from the beginning. The question, however, arises whether, after the legal formalities have been complied with, he can explain anything which may happen to be obscure in his will, either in words or in writing. As, for instance, where he makes a bequest of Stichus, when he has several slaves of that name, and did not mention which one he had reference to; or where he makes a bequest to Titius, when he has

monio en un testamento, pero la mujer puede ser testigo en otros casos, como lo prueba la ley Julia sobre los adulterios, que veda que la mujer condenada por adulterio sea presentada como testigo o preste testimonio.

§ 7.- Tampoco con razón puede ser presentado el esclavo para los actos solemnes, porque no tiene para todo la comunidad del derecho civil, ni ciertamente la del Edicto del Pretor.

§ 8.- Y opinaron los antiguos, que los que son presentados por causa de las solemnidades de un testamento, deben permanecer hasta que se termine la última manifestación.

§ 9.- Mas no exigimos la inteligencia del lenguaje; porque esto, respondió por rescripto el Divino Marco a Didio Juliano respecto a un testigo, que no conocía el latín, porque basta que por los sentidos perciba, uno para qué cosa haya sido presentado.

§ 10.- Pero si los testigos hubieran sido retenidos aún contra su voluntad, opinan que no es válido el testamento.

21.- EL MISMO; *Comentarios a Sabino, libro II*.- Los herederos han de ser nombrados claramente, de suerte, que puedan ser oídos; luego, le será lícito al testador o nombrar los herederos, o escribirlos, pero si los nombra, debe nombrarlos claramente. ¿Qué significa claramente? No ciertamente en público, sino de modo que se pueda oír, pero que se oiga no por todos, sino por los testigos, y si hubieren sido presentados muchos testigos, basta que oiga el número solemne.

§ 1.- Si después de hecho un testamento plugo cambiar alguna cosa, todo se ha de hacer de nuevo. Se pregunta, si lo que alguno dice o escribe con cierta oscuridad en un testamento podrá aclararlo después de las solemnidades; por ejemplo, había legado a Stico, teniendo muchos, y no declaró a cual se refería; hizo un legado a Ticio, teniendo muchos amigos llamados Ticio; se había equivocado en el nombre, o en el nombre propio, o en el sobrenombre, no habiéndose equivocado respecto a la persona;

et si notam postea adiecerit legato vel sua voce vel litteris vel summam vel nomen legatarii quod non scripserat vel nummorum qualitatem, an recte fecerit?

Et puto etiam qualitatem nummorum posse postea addi: nam etsi adiecta non fuisset, utique placeret coniectionem fieri eius quod reliquit vel ex vicinis scripturis vel ex consuetudine patris familias vel regionis.

§ 2.- In testamentis, in quibus testes rogati adesse debent, ut testamentum fiat, alterius rei causa forte rogatos ad testandum non esse idoneos placet. Quod sic accipiendum est, ut, licet ad aliam rem sint rogati vel collecti, si tamen ante testimonium certiores ad testamentum se adhibitos, posse eos testimonium suum recte perhibere.

§ 3.- Uno contextu actus testari oportet. Est autem uno contextu nullum actum alienum testamento intermiscere: quod si aliquid pertinens ad testamentum faciat, testamentum non vitatur.

22.- ULPIANUS; *libro XXXIX ad edictum*.- Ad testium numerum simul adhiberi possumus ut ego et pater et plures, qui fuimus in eiusdem potestate.

§ 1.- Condicionem testium tunc inspicere debemus, cum signarent, non mortis tempore: si igitur cum signarent, tales fuerint, ut adhiberi possint, nihil nocet, si quid postea eis contingerit.

§ 2.- Si ab ipso testatore anulum accepero et signa-

several friends who are called Titius; or where he has made a mistake either in the name, the title or the surname of a party, but did not make a mistake with reference to the article bequeathed; can he afterwards state what he meant? I think that he can, for he does not give anything by doing so, but merely points out what was given. But if he should subsequently append a note to a legacy, either orally or in writing, or add a certain sum, or insert the name of the legatee which he had not yet filled out, or mention the kind of money with which the legacy is to be paid, will he act in accordance with law?

I think that even the kind of money to be paid can afterwards be designated, for where he has not done so, it will be necessary to determine this with reference to the bequest, either from documents drawn up at the same time, or in accordance with the custom of his family or of the province.

§ 2.- It is held in the case of wills, where witnesses are asked to be present for the purpose of attesting the same, that if they have been summoned for any other purpose, they will not be competent; and it must be understood in this instance that even though they may have been requested to appear, or were collected for some other purpose, and, before they act as witnesses, they are informed that they are to be employed for that purpose, they can legally act as such.

§ 3.- The will must be drawn up with reference to itself alone, and this is done where nothing foreign to the purpose of the instrument is introduced; but where any act connected with the will is performed, the validity of the latter will not be affected.

22.- THE SAME; *On the Edict, Book XXXIX*.- In order to obtain at the same time the legal number of witnesses, the father, the son, and any other persons who are under his control may be called.

§ 1.- In order to establish the condition of the witnesses, we should consider the time when they attached their seals to the will, and not the time when the testator died. Therefore, if at the time they attached their seals they were competent to do so, the validity of the will can not be questioned if anything should afterwards happen to the witnesses.

§ 2.- If I take a ring from the testator himself, and

¿acaso podrá declarar después a quien se haya referido? Yo opino, que puede; porque ahora no da nada, sino que aclara lo que dio. Pero si después hubiere añadido una nota allegado, o de viva voz, o por escrito, o la cantidad, o el nombre del legatario, que no había escrito, o la calidad de las monedas, ¿lo habrá hecho también válidamente?

Y yo creo, que también puede añadirse después la calidad de las monedas; porque aunque no hubiese sido expresada, ciertamente parecería bien que se hiciese conjetura de lo que dejó, o por las escrituras inmediatas, o por la costumbre del padre de familia, o de la región.

§ 2.- Respecto a los testamentos en los cuales deben presentarse testigos rogados, para que se haga el testamento, se establece que los testigos que acaso fueron rogados para otra cosa, no son idóneos para el testamento; lo que se ha de entender de este modo, que aunque hayan sido rogados o reunidos para otra cosa, si no obstante se cerciorasen antes de su testimonio de que eran presentados para un testamento, pueden ellos prestar válidamente su testimonio.

§ 3.- Se debe testar en un solo contexto de acto; pero es en un solo contexto, si no interviene ningún acto extraño en el testamento; porque si hiciera alguna cosa perteneciente al testamento, no se vicia el testamento.

22.- EL MISMO; *Comentarios al Edicto, libro XXXIX*.- Para el número de testigos podemos ser presentados juntamente, por ejemplo, yo y mi padre, y muchos que estuvimos bajo la potestad del mismo.

§ 1.- Debemos examinar la condición de los testigos al tiempo en que sellaron, no al tiempo de la muerte; así, pues, si cuando sellaron hubieren sido tales que pudieran ser presentados, en nada perjudica, si algo les hubiere acontecido después.

§ 2.- Si yo hubiere recibido del mismo testador el

vero, testamentum valet, quasi alieno signaverim.

§ 3.- Si signa turbata sint ab ipso testatore, non videtur signatum.

§ 4.- Si quis ex testibus nomen suum non adscripserit, verumtamen signaverit, pro eo est atque si adhibitus non esset: et si, ut multi faciunt, adscripserit se, non tamen signaverit, adhuc idem dicemus.

§ 5.- Signum autem utrum anulo tantum impressum adhibemus, an vero et si non anulo, verum alio quodam impresso? Varie enim homines signant. Et magis est, ut tantum anulo quis possit signare, dum tamen habeat xaraktyra.

§ 6.- Posse et nocte signari testamentum nulla dubitatio est.

§ 7.- Signatas tabulas accipi oportet et si linteum, quo tabulae involutae sunt, signa impressa fuerint.

23.- ULPIANUS; *libro IV disputationem*.- Si testamentum, quod resignaverit testator, iterum signatum fuerit septem testium signis, non erit imperfectum, sed utroque iure valebit tam civili quam praetorio.

24.- FLORUS; *libro X institutionum*.- Unum testamentum pluribus exemplis consignare quis potest idque interdum necessarium est, forte si navigaturus et secum ferre et relinquere iudiciorum suorum testationem velit.

25.- IAVOLENUS; *libro V ex posterioribus Labeonis*.- Si is, qui testamentum faceret, heredibus primis nuncupatis, priusquam secundos exprimeret heredes, obmutuisset, magis coepisse eum testamentum facere quam fecisse Varus digestorum libro primo Servium respondisse scripsit: itaque primos heredes ex eo testamento non futuros. Labeo tum hoc verum esse existimat, si constaret voluisse plures eum, qui testamentum fecisset, heredes pronuntiare: ego nec Servium puto aliud sensisse.

make use of it to seal his will, the latter will be valid, just as if I had sealed it with another ring.

§ 3.- If the seals should be broken by the testator himself, the will will not be held to have been sealed.

§ 4.- Where one of the witnesses did not sign his name, but, nevertheless, attached his seal, it is the same as if he had not been present; and if he signed it (as many do) without attaching his seal, we hold that the same rule applies.

§ 5.- Can we only attach our seals by means of a ring, or if we do not use a ring can we do so with any other article, as men frequently do? The better opinion is that the seal can only be impressed by means of a ring, for it must have a form and be engraved with a device.

§ 6.- There is no doubt that a will can be sealed at night.

§ 7.- A will must be considered to have been sealed when the seals have been impressed upon the cloth in which it is wrapped.

23.- THE SAME; *Disputations, Book IV*.- If the seals of a will have been broken by the testator, and it has been sealed a second time by himself and seven witnesses, it will not be void, but will be valid by both the Praetorian and the Civil Law.

24.- FLORENTINUS; *Institutes, Book X*.- Anyone can make several copies of the same will, and indeed this is sometimes necessary; for example, where the testator is about to take a sea voyage, and desires to leave the will behind him, and take a copy with him.

25.- JAVOLENUS; *On the Last Works of Labeo, Book V*.- Where anyone who makes a will after having mentioned the first heirs loses the power of speech before he can mention the second ones, the better opinion is that he has begun to make a will rather than that he has made it; which view Verus stated, in the First Book of the Digest, was entertained by Servius; therefore the first heirs appointed cannot take under such a will. Hence Labeo thinks that this is correct, if it should be established that the testator who executed the will intended to appoint several heirs. I do not think that

anillo, y hubiere sellado, es válido el testamento, como si yo lo hubiere sellado con anillo de otro.

§ 3.- Si por el mismo testador se hubieran alterado los sellos, no se considera que se selló.

§ 4.- Si alguno de los testigos no hubiere escrito su nombre, pero hubiere sellado, se considera lo mismo que si no hubiese sido presentado; y aún diremos lo mismo, si como hacen muchos, hubiere puesto su nombre, pero no hubiere sellado.

§ 5.- ¿Pero admitimos acaso como sello solamente el impreso con el anillo o también si no con el anillo, sino otro cualquier modo hubiera sido impreso, - porque los hombres sellan de diversas maneras? Y es más cierto, que solamente con anillo puede sellar uno, con tal, sin embargo, que tenga sello.

§ 6.- No hay duda alguna que también de noche se puede sellar un testamento.

§ 7.- Deben considerarse selladas las tablas, también si los sellos hubieren sido impresos en el lienzo en que fueron envueltas las tablas.

23.- EL MISMO; *Disputas, libro IV*.- Si el testamento, cuyos sellos hubiere levantado el testador, hubiere sido sellado otra vez con los sellos de siete testigos, no será imperfecto, sino que será válido por ambos derechos, tanto por el civil, como por el pretorio.

24.- FLORENTINO; *Instituta, libro X*.- Cualquiera puede sellar un solo testamento en varios ejemplares; y esto es a veces necesario, por ejemplo, si el que ha de navegar quisiera llevarse consigo, y dejar, testimonio de sus voluntades.

25.- JAVOLENO; *Obras póstumas de Labeón, libro V*.- Si el que hiciese testamento se hubiese quedado mudo, habiendo nombrado los primeros herederos, antes que expresase los segundos herederos, escribió Varo en el libro primero del Digesto, que Servio respondió, que aquel más bien comenzó a hacer testamento que no que lo hizo; y así, que no habrán de ser en virtud de este testamento herederos los primeros. Labeón opina, que esto es verdad, si constase que el que hubiese hecho el testamento quiso nombrar más herederos; y yo creo que tampoco Servio entendió otra cosa.

Servius intended anything else.

26.- GAIUS; *libro XXII ad edictum provinciale*.- Cum lege quis intestabilis iubetur esse, eo pertinet, ne eius testimonium recipiatur et eo amplius, ut quidam putant, neve ipsi dicatur testimonium.

26.- GAIUS; *On the Provincial Edict, Book XXII*.- Whenever anyone is declared by law to be incapable of becoming a witness, this means that his testimony cannot be received, and, moreover (as certain authorities hold), that no testimony can be introduced in his behalf.

26.- GAYO; *Comentarios al Edicto provincial, libro XXII*.- Cuando por la ley se manda que uno sea intestable, se refiere a que no admita su testimonio, y además, a que, como opinan algunos, tampoco a él se le preste testimonio.

27.- CELSUS; *libro XV digestorum*.- Domitius Labeo Celso suo salutem. Quaero, an testimonium numero habendus sit is, qui, cum rogatus est ad testamentum scribendum, idem quoque cum tabulas scripsisset, signaverit. Iuventius Celsus Labeoni suo salutem. Non intellego quid sit, de quo me consuleris, aut valide stulta est consultatio tua: plus enim quam ridiculum est dubitare, an aliquis iure testis adhibitus sit, quoniam idem et tabulas testamenti scripserit.

27.- CELSUS; *Digest, Book XV*.- "Domitius Labeo to his friend Celsus, Greeting. I ask whether he is to be included in the number of witnesses who, after having been requested to write a will, attached his seal to the same after he had done so." "Jubentius Celsus, to his friend, Labeo, Greeting. I either do not understand the point with reference to which you desire to consult me, or your request for advice is certainly foolish, for it is ridiculous to doubt whether such a person can act as a witness, since he himself drew up the will."

27.- CELSO; *Digesto, libro XV*.- Domicio Labeón saluda a su amigo Celso. Pregunto, ¿deberá ser contado en el número de los testigos el que habiendo sido rogado para escribir el testamento, también lo hubiere sellado cuando hubiese escrito las tablas? Juvencio Celso saluda a su amigo Labeón. O no entiendo qué es sobre lo que me consultas, o es muy necia tu consulta; porque es más que ridículo dudar si alguno haya sido presentado en derecho como testigo, porque él mismo haya escrito también las tablas del testamento.

28.- MODESTINUS; *libro IX regularum*.- Servus licet alienus iussu testatoris [testoris] testamentum scribere non prohibetur.

28.- MODESTINUS; *Rules, Book IX*.- A slave, even though he belongs to another person, is not prohibited from drawing up a will by order of the testator.

28.- MODESTINO; *Reglas, libro IX*.- Al esclavo, aunque ajeno, no le está prohibido escribir un testamento por mandato del testador.

29.- PAULUS; *libro XIV responsorum*.- Ex ea scriptura, quae ad testamentum faciendum parabatur, si nullo iure testamentum perfectum esset, nec ea, quae fideicommissorum verba habent peti posse.

29.- PAULUS; *Opinions, Book XIV*.- Nothing can be claimed under a written instrument which was drawn up as a will, where it was not legally completed, not even where something has been left by way of trust.

29.- PAULO; *Respuestas, libro XIV*.- En virtud de la escritura, que se preparaba para hacer un testamento, si el testamento no se hubiese perfeccionado con arreglo a ningún derecho, tampoco se pueden pedir las cosas que tienen el nombre de fideicomisos.

§ 1.- Ex his verbis, quae scriptura pater familias addidit: tautyn tyn diavykyn boulomai einai kurian epi pasys ecousias [id est: hanc voluntatem valere volo quocumque modo], videri eum voluisse omnimodo valere ea quae reliquit, etiamsi intestatus decessisset.

§ 1.- By the following words which the head of a household added to a written document, namely: "I desire this will to be valid as far as possible"; he seems to have intended that every bequest that he left by said document should be valid, even though he might die intestate.

§ 1.- En virtud de estas palabras, que un padre de familia añadió en la escritura: quiero que este testamento sea válido por cualquier razón que pudiese, se considera que aquel quiso que de todos modos sea válido lo que dejó aunque hubiese fallecido intestado.

30.- PAULUS; *libro III sententiarum*.- Singulos testes, qui in testamento adhibentur, proprio chirographo adnotare convenit, quis et cuius testamentum signaverit.

30.- THE SAME; *Opinions, Book III*.- It is proper for every witness to a will to sign his name in his own hand, as well as that of the party to whose will he attached his seal.

30.- EL MISMO; *Sentencias, libro III*.- Conviene que cada uno de los testigos, que se presentan para un testamento, anoten de su propio puño quién haya sellado, y de quién sea el testamento.

31.- PAULUS; *libro V sententiarum*.- Eius bona, qui se imperatorem facturum heredem esse iactaverat, a fisco occupari non possunt.

31.- THE SAME; *Opinions, Book V*.- The Treasury cannot seize the property of anyone who publicly announces that he is going to make the Emperor his

31.- EL MISMO; *Sentencias, libro V*.- No se pueden ocupar por el fisco los bienes del que se había jactado de que él había de hacer que el emperador

TIT. II

DE LIBERIS ET POSTUMIS HEREDIBUS
INSTITUENDIS VEL EXHEREDANIS

1.- ULPIANUS; *libro I ad Sabinum*.- Quid sit nominatim exheredari, videamus. Nomen et praenomen et cognomen eius dicendum est an sufficit vel unum ex his? Et constat sufficere.

2.- ULPIANUS; *libro VI regularum*.- Nominatim exheredatus filius et ita videtur "filius meus exheres esto", si nec nomen eius expressum sit, si modo unicus sit: nam si plures sunt filii, benigna interpretatione potius a plerisque respondetur nullum exheredatum esse.

3.- ULPIANUS; *libro I ad Sabinum*.- Et si pepererit filium dicere, ex Seia autem natum dixit, recte exheredat: et si cum convicio dixerit "non nominandus" vel "non filius meus", "latro", "gladiator", magis est, ut recte exheredatus sit, et si ex adultero natum dixerit.

§ 1.- Pure autem filium exheredari Iulianus putat, qua sententia utimur.

§ 2.- Filius inter medias quoque heredum institutiones recte exheredatur et erit a toto gradu summotus, nisi forte ab unius persona eum testator exheredaverit: nam si hoc fecit, vitiosa erit exhereditatio. Quemadmodum si ita eum exheredaverit "quisquis heres mihi erit, filius exheres esto": nam, ut Iulianus scribit, huiusmodi exhereditatio vitiosa est, quoniam post aditam hereditatem voluit eum summotum, quod est impossibile.

TITLE II

CONCERNING THE APPOINTMENT AND
DISINHERITANCE OF CHILDREN AND
POSTHUMOUS HEIRS

heir.

1.- ULPIANUS; *On Sabinus, Book I*.- Let us consider what is meant by the term "specific disinheritance." Must the name, the title, and the surname be mentioned, or will it be sufficient for any of them to be stated? It is established that it is sufficient for one of them to be mentioned.

2.- THE SAME; *Rules, Book VI*.- It is held that a son is specifically disinherited in the following words, "Let my son be disinherited", even if his name is not expressly stated, where the testator has only one son; for where he has several, the opinion is entertained by most authorities, in accordance with the more beneficent interpretation, that none of the sons will be disinherited.

3.- THE SAME; *On Sabinus, Book I*.- Where the testator does not mention his son by name, but merely states that he was born of Seia, he legally disinherits him. And if he should refer to him in terms of probation, as, for example: "He who is not to be mentioned by me"; or "He who is not my son, who is a robber and a gladiator"; the better opinion is that the son is legally disinherited. The same rule applies where he refers to him as born of adulterous intercourse.

§ 1.- Julianus thinks that a son should be unconditionally disinherited, which opinion we have adopted.

§ 2.- The son can be legally disinherited between the separate appointments of two heirs, and, in this instance, he will be removed from every degree of inheritance, unless the testator should have disinherited him as only one of his heirs; for if he does this, the disinheritance will be defective, just as if he had expressed himself in the following terms: "Whoever my son will be, I disinherit him." For (as Julianus says) a disinheritance of this kind is

TÍTULO II

DE QUE LOS DESCENDIENTES Y LOS
PÓSTUMOS HAYAN DE SER INSTITUIDOS
HEREDEROS O DESHEREDADOS

fuese su heredero.

1.- ULPIANO.- *Comentarios a Sabino, libro I*.- Veamos que sea ser desheredado nominalmente; ¿se ha de expresar el nombre, el nombre propio, y el sobrenombre, o basta uno de ellos? Y es sabido que basta.

2.- EL MISMO; *Reglas, libro VI*. - También se considera desheredado nominalmente un hijo de este modo: «Quede desheredado mi hijo», aunque no se haya expresado ni su nombre, si fuera único; porque si son muchos los hijos, preferentemente se responde por los más, por benigna interpretación, que ninguno fue desheredado.

3.- EL MISMO; *Comentarios a Sabino, libro I*.- Y si hubiere omitido decir hijo, pero dijo el nacido de Seia, deshereda en forma; y si con injuria hubiere dicho; «el que no se debe nombrar», o «el que no es mi hijo, el ladrón, el gladiador,» es más cierto, que haya sido desheredado en forma; y también si hubiere dicho que nació de un adúltero.

§ 1.- Pero opina Juliano, que al hijo se le deshereda puramente; cuya opinión practicamos.

§ 2.- También es desheredado en forma el hijo entre las instituciones intermedias de herederos, y quedará separado de todo el grado, a no ser acaso que el testador lo hubiere desheredado respecto a la persona de uno solo. Porque si hizo esto, la desheredación será viciosa, como si lo hubiere desheredado de este modo: «Cualquier hijo que yo tuviere, sea desheredado»; porque, como escribió Juliano, una desheredación de esta naturaleza es

§ 3.- Ante heredis institutionem exheredatus ab omnibus gradibus summotus est.

§ 4.- Inter duos autem gradus exheredatus ab utroque remotus est secundum Scaevolae sententiam, quam puto veram.

§ 5.- In eo, qui miscuit duos gradus, exheredationem valere Mauricianus recte putat, veluti: "Primus heres esto ex semisse. Si primus heres non erit, secundus ex semisse heres esto. Tertius ex alio semisse heres esto. Filius exheres esto. Si tertius heres non erit, quartus heres esto": nam ab utroque gradu summotus est.

§ 6.- Si ita testatus sit pater familias, ut a primo quidem gradu filium praeteriret, a secundo solo exheredaret, Sabinus et Cassius et Iulianus putant perempto primo gradu testamentum ab eo gradu exordium capere, unde filius exheredatus est: quae sententia comprobata est.

4.- ULPIANUS; *libro III ad Sabinum*.- Placet omnem masculum posse postumum heredem scribere, sive iam maritus sit sive nondum uxorem duxerit: nam et maritus repudiare uxorem potest et qui non duxit uxorem, postea maritus effici. Nam et cum maritus postumum heredem scribit, non utique is solus postumus scriptus videtur, qui ex ea quam habet uxorem ei natus est, vel is qui tunc in utero est, verum is quoque, qui ex quacumque uxore nascatur:

5.- IAVOLENUS; *libro I ex Cassio*.- Ideoque qui postumum heredem instituit si post testamentum factum mutavit matrimonium, is institutus videtur, qui ex posteriore matrimonio natus est.

6.- ULPIANUS; *libro III ad Sabinum*.- Sed est quaesitum, an is, qui generare facile non possit,

defective, since the testator desires his son to be excluded after he has entered upon the estate, which is impossible.

§ 3.- A son who is disinherited before the appointment of an heir is excluded from all degrees.

§ 4.- In accordance with the opinion of Scævola, which I think to be correct, where a son is disinherited between two degrees of inheritance, he is excluded from both.

§ 5.- Mauricianus properly holds that where two degrees of succession are mingled, the act of disinheritance will be valid, for example: "I appoint the first heir to half of my estate; if there is no first heir, the second heir shall inherit half of my estate, and the third the other half. I disinherit my son if there is no third heir, and I appoint the fourth in his stead"; for the son is, in this instance, excluded from every degree.

§ 6.-Where a father executes a will in such a way as to pass over his son in the first degree, and disinherits him only in the second, Sabinus, Cassius, and Julianus hold that the first degree having been disposed of, the will begins to be operative from that degree from which the son was disinherited. This opinion should be approved.

4.- THE SAME; *On Sabinus, Book III*.- It is established that every man can appoint a posthumous child his heir, whether he is married or not. For, indeed, a husband can repudiate his wife, and one who has not contracted marriage can subsequently do so; and where a husband appoints a posthumous heir, it is held that this does not only apply to a child who is born of the present wife of the testator, but also to one who is unborn, and indeed may be born of any wife whomsoever.

5.- JAVOLENUS; *On Cassius, Book I*.- Therefore, where a man has appointed a posthumous heir, and, after the execution of the will, marries again, he is held to have been appointed who is the issue of the subsequent marriage.

6.- ULPIANUS; *On Sabinus, Book III*.- The question arose whether a man who has not complete

viciosa, pues quiso que él quedase separado después de adida la herencia, lo que es imposible.

§ 3.- El desheredado antes de la institución de heredero, fue separado de todos los grados.

§ 4.- Mas el desheredado entre dos grados, fue separado de uno y otro según el parecer de Scévola; que juzgo verdadero.

§ 5.- Respecto a aquel que mezcló dos grados, con razón opina Mauriciano, que es válida la desheredación, por ejemplo: «el primero sea heredero de la mitad; si el primero no fuere heredero, sea heredero de la mitad el segundo; el tercero sea heredero de la otra mitad, y sea desheredado mi hijo; si el tercero no fuere heredero, sea heredero el cuarto»; porque fue separado de uno y otro grado.

§ 6.- Si un padre de familia hubiera testado de modo, que en el primer grado preteriese ciertamente a su hijo, y solo en el segundo lo desheredase, opina Sabino, Cassio, y Juliano, que, suprimido el primer grado, el testamento comienza en aquel grado del cual fue desheredado el hijo; cuya opinión fue aprobada.

4.- EL MISMO; *Comentarios a Sabino, libro III*.- Está establecido, que todo varón puede instituir heredero a un póstumo, ya si sea marido, ya si aún no hubiere tomado mujer; porque también el marido puede repudiar a su mujer, y hacerse después marido el que no tomó mujer. Porque también cuando el marido instituyó heredero a un póstumo, no se considera ciertamente instituido solo aquel póstumo, que le nació de la que tiene por mujer, o el que entonces está en el claustro materno, sino también el que nazca de cualquier mujer casada.

5.- JAVOLENO; *Doctrina de Cassio, libro I*.- Y por esto, cuando el que instituyó heredero a un póstumo, cambió de matrimonio después de hecho el testamento, se considera instituido el que nació del matrimonio posterior.

6.- ULPIANO; *Comentarios a Sabino, libro III*.- Pero se preguntó, si el que fácilmente no pueda

postumum heredem facere possit, et scribit Cassius et Iavolenus posse: nam et uxorem ducere et adoptare potest: spadonem quoque posse postumum heredem scribere et Labeo et Cassius scribunt: quoniam nec aetas nec sterilitas ei rei impedimento est.

§ 1.- Sed si castratus sit, Iulianus Proculi opinionem secutus non putat postumum heredem posse instituere, quo iure utimur.

§ 2.- Hermaphroditus plane, si in eo virilia praevallebunt, postumum heredem instituere poterit.

7.- PAULUS; *libro I ad Sabinum*.- Si filius qui in potestate est praeteritus sit et vivo patre decedat, testamentum non valet nec superius rumpitur, et eo iure utimur.

8.- POMPONIUS; *libro I ad Sabinum*.- Si primo herede instituto filium exheredavero, a secundo autem substituto non exheredavero et, dum pendet, an prior aditurus sit, filius decesserit, secundum sententiam qua utimur non erit secundus heres, quasi ab initio inutiliter institutus, cum ab eo filius exheredatus non sit. Quod si in postumo filio idem acciderit, ut natus vivo patre a quo exheredatus sit moriatur, eadem dicenda erunt de substituto, quoniam cum est natus filius, loco eius est, qui superstes est.

9.- PAULUS; *libro I ad Sabinum*.- Si quis postumos, quos per aetatem aut valetudinem habere forte non potest, heredes instituit, superius testamentum rumpitur, quod natura magis in homine generandi et consuetudo spectanda est quam temporale vitium aut valetudo, propter quam abducatur homo a

power of reproduction can appoint a posthumous heir. Cassius and Javolenus say that he can do so, because he can marry and adopt children. Labeo and Cassius state that one who is temporarily impotent can also appoint a posthumous heir, since in this instance neither age nor sterility can be considered as impediments.

§ 1.- Where, however, the individual in question has been castrated, Julianus, following the opinion of Proculus, does not think that he can appoint a posthumous heir. This is the modern practice.

§ 2.- An hermaphrodite can appoint a posthumous heir, if the male organs predominate in his physical conformation.

7.- PAULUS; *On Sabinus, Book I*.- If a son who is under paternal control should be passed over in his father's will, and die during the lifetime of the latter, the will is not valid, and where there is a former one, it will not be broken. This is also the rule at the present time.

8.- POMPONIUS; *On Sabinus, Book I*.- If I disinherit my son by the appointment of an heir in the first degree, but do not disinherit him from the second degree of substitution, and if, while the first heir appointed is hesitating whether he will enter upon the estate or not, the son should die, the second heir, according to the rule which we have adopted, will have no rights under the will on account of having been improperly appointed in the beginning, since the son was not disinherited from the second degree. If this should occur in the case of a posthumous child, so that it is born during the lifetime of the father, by whom it was disinherited, and it should afterwards die, the same rule must be held to apply with reference to the substituted heir, since when this child was born he occupied the place of the one who survived.

9.- PAULUS; *On Sabinus, Book I*.- Where anyone who, on account of age or ill health, cannot have children, appoints posthumous heirs, a former will is broken, because the nature of man and the capacity for procreation must rather be considered than a temporary defect or illness, by reason of which a man

engendrar podrá instituir heredero a un póstumo; y escriben Cassio y Javoleno, que puede; porque puede tomar mujer, y adoptar. Escriben Labeón y Cassio, que también el espadón puede instituir heredero a un póstumo, porque ni la edad, ni la esterilidad sirve de impedimento para esto.

§ 1.- Pero si fuera un castrado, siguiendo Juliano la opinión de Próculo, no cree que pueda instituir heredero a un póstumo; cuyo derecho practicamos.

§ 2.- A la verdad, el hermafrodita, si en él prevalecieran los órganos viriles, podrá instituir heredero a un póstumo.

7.- PAULO; *Comentarios a Sabino, libro I*.- Si el hijo, que está bajo potestad, hubiera sido preterido, y falleciera viviendo su padre, no es válido el testamento, ni se romperá el anterior; y de este derecho usamos.

8.- POMPONIO; *Comentarios a Sabino, libro I*.- Si yo hubiere desheredado a mi hijo habiendo instituido el primer heredero, pero no lo hubiere desheredado respecto del segundo sustituido, y mientras está pendiente si el primero haya de adir la herencia hubiere fallecido mi hijo, conforme a la opinión que practicamos, no será heredero el segundo, como si desde un principio hubiese sido instituido inútilmente, porque respecto de él no fue desheredado el hijo. Pero si lo mismo hubiere sucedido respecto de un hijo póstumo, de suerte que nacido en vida del padre, por quien haya sido desheredado, muriese, se habrá de decir lo mismo respecto al sustituto, porque cuando ha nacido un hijo, está en el lugar del que sobrevive.

9.- PAULO; *Comentarios a Sabino, libro I*.- Si alguno instituyó herederos a póstumos, que por la edad o por enfermedad no puede acaso tener, se rompe el anterior testamento, porque se ha de atender en el hombre a la naturaleza y a la costumbre de engendrar más bien que a un vicio temporal o a una

generandi facultate.

§ 1.- Sed si ex ea, quae alii nupta sit, postumum quis heredem instituerit, ipso iure non valet, quod turpis sit institutio.

§ 2.- Si filium exheredavero nepotemque ex eo praeteriero et alium heredem instituero et supervixerit filius post mortem meam, licet ante aditam hereditatem decesserit, non tamen nepotem rupturum testamentum Iulianus et Pomponius et Marcellus aiunt. Diversumque est, si in hostium potestate filius sit et decesserit in eodem statu: rumpit enim his casibus nepos testamentum, quod moriente avo fili ius pependerit, non abscisum ut superiore casu fuerit. Sed et si heres institutus omiserit hereditatem, erit legitimus heres, quoniam haec verba "si intestato moritur" ad id tempus referuntur, quo testamentum destituitur, non quo moritur.

§ 3.- Sed si ex ea, quam nefas sit ducere, postumum heredem instituero, non putat rumpi testamentum Pomponius.

§ 4.- Sed si per adoptionem sororem factam habeam, potero postumum ex ea heredem instituere, quia adoptione soluta possum eam ducere uxorem.

10.- POMPONII; *libro I ad Sabinum*.- Commotissime is qui nondum natus est ita heres instituitur: "sive vivo me sive mortuo natus fuerit, heres esto", aut etiam pure neutrius temporis habita mentione. Si alteruter casus omissus fuerit, eo casu qui omissus sit natus rumpit testamentum, quia hic filius nec sub conditione quidem scriptus heres intellegitur, qui in hunc casum nascitur, qui non est testamento adprehensus.

11.- PAULUS; *libro II ad Sabinum*.- In suis heredibus evidentius apparet continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse,

is deprived of the power of generation.

§ 1.- Where, however, a man appoints a posthumous child as his heir who is to be born of the wife of another, the appointment will not be valid in law, for the reason that it is dishonorable.

§ 2.- If I disinherit my son, and pass over my grandson born to said son, and appoint another person my heir, and my son survives, even though he should die before my estate is entered upon, my grandson cannot, nevertheless, break my will; so Julianus, Pomponius, and Marcellus hold. The case is different where my son is in the hands of the enemy and dies there, for my grandson in this instance can break my will, since, when his grandfather died, the right of the son was in suspense, and was not extinguished, as in the former instance. Where, however, the appointed heir rejects the estate, the grandson will be the lawful heir, as these words, "If he should die intestate", have reference to the time when the will ceased to be valid, and not to that when the party died.

§ 3.- But where I appoint a posthumous heir to be born of a woman whom it is wrong to marry, Pomponius does not think that the will is broken.

§ 4.- If I have an adopted sister, I can appoint her posthumous child my heir, for the reason that if the adoption is annulled I can marry her.

10.- POMPONII; *On Sabinus, Book I*.- A child that is yet unborn may very conveniently be appointed an heir, in the following terms: "If, during my lifetime or after my death, a child should be born to me, I appoint him my heir"; or this may be done absolutely, without making mention of either time. If either of these contingencies is omitted, and the child is born, so far as the one which is omitted is concerned the will will be broken, because the said child is not understood to have been born subject to the condition under which it was appointed heir by the will.

11.- PAULUS; *On Sabinus, Book II*.- In the case of proper heirs, it is perfectly evident that a continuation of ownership legally remains, so that there appears to

enfermedad, por la cual sea privado un hombre de la facultad de engendrar.

§ 1.- Pero si alguno hubiere instituido heredero a un póstumo de la que estuviera casada con otro, no es válida de derecho la institución, porque es torpe.

§ 2.- Si yo hubiere desheredado a mi hijo preterido a un nieto nacido de él, e instituido heredero a otro, y mi hijo sobreviviere después de mi muerte, aunque falleciere antes de adida la herencia, dicen Juliano, Pomponio y Marcelo, que el nieto no romperá, sin embargo, el testamento. Y lo contrario es, si mi hijo estuviera en poder de los enemigos, y hubiere fallecido en el mismo estado; porque en estos casos el nieto rompe el testamento, porque al morir el abuelo quedaría en suspenso el derecho del hijo, y no habría sido destruido, como en el caso anterior. Pero también si el heredero instituido hubiere dejado de adir la herencia, será heredero legítimo, porque estas palabras: «si muere intestado», se refieren al tiempo en que se invalida el testamento, no a aquel en que muere.

§ 3.- Pero si yo hubiere instituido heredero a un póstumo nacido de aquella a la que sea ilícito tomarla por mujer, no juzga Pomponio que se rompa el testamento.

§ 4.- Pero si yo tuviera quien se hubiera hecho hermana por adopción, podré instituir heredero al póstumo nacido de ella, porque, disuelta la adopción, puedo tomarla por mujer.

10.- POMPONIO; *Comentarios a Sabino, libro I*.- El que aún no ha nacido es instituido perfectísimamente heredero en esta forma: «ya si hubiere nacido viviendo yo, ya si habiendo muerto», o también puramente, sin haberse hecho mención ni de uno ni de otro tiempo; si se hubiere omitido uno u otro caso, el nacido rompe el testamento en el caso que se omitió, porque ciertamente no se entiende instituido heredero bajo condición el hijo que nace en un caso, que no fue comprendido en el testamento.

11.- PAULO; *Comentarios a Sabino, libro II*.- En los herederos suyos aparece con más evidencia, que la continuación del dominio lleva la cosa a que no se

quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur. Unde etiam filius familias appellatur sicut pater familias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit. Itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. Hac ex causa licet non sint heredes instituti, domini sunt: nec obstat, quod licet eos exheredare, quod et occidere licebat.

12.- ULPIANUS; *libro IX ad Sabinum*.- Quod dicitur filium natum rumpere testamentum, natum accipe et si exsecto ventre editus sit: nam et hic rumpit testamentum, scilicet si nascatur in potestate.

§ 1.- Quid tamen, si non integrum animal editum sit, cum spiritu tamen, an adhuc testamentum rumpat? Et tamen rumpit.

13.- IULIANUS; *libro XXIX digestorum*.- Si ita scriptum sit: "Si filius mihi natus fuerit, ex besse heres esto: ex reliqua parte uxor mea heres esto. Si vero filia mihi nata fuerit, ex triente heres esto: ex reliqua parte uxor heres esto", et filius et filia nati essent, dicendum est assem distribuendum esse in septem partes, ut ex his filius quattuor, uxor duas, filia unam partem habeat: ita enim secundum voluntatem testantis filius altero tanto amplius habebit quam uxor, item uxor altero tanto amplius quam filia: licet enim subtili iuris regulae conveniebat ruptum fieri testamentum, attamen cum ex utroque nato testator voluerit uxorem aliquid habere, ideo ad huiusmodi sententiam humanitate suggerente decursum est, quod etiam Iuvenio Celso apertissime placuit.

be no succession; since those should be held to be the owners of the estate who, during the lifetime of their father, were already considered to occupy that position. Wherefore, the son of a family is so called, just as a father is styled the father of a family, so that it is only by the prefix that the parent is distinguished from the child. Hence, after the death of the father, the children are not considered to have obtained the inheritance, but rather to have acquired the free administration of the property. For this reason they are owners, even though they have not been appointed heirs, for there is no reason why he should not possess the right of disinheriting those whom he formerly had the right to put to death.

12.- ULPIANUS; *On Sabinus, Book IX*.- When it is said that the birth of a child breaks a will, the term "birth" must be understood to also apply where it has been taken from its mother's womb by means of a surgical operation. For in this case a child breaks a will, provided it is born under paternal control.

§ 1.- But what if the child should be born deformed, but still of sound mind; would the will be broken in this instance? It must be held that it would be.

13.- JULIANUS; *Digest, Book XXIX*.- The following was set forth in a will: "If a child should be born to me, I appoint him heir to two-thirds of my estate, and I appoint my wife heir to the remaining third; if, however, a daughter should be born to me, I appoint her an heir to one-third of my estate, and my wife to the remaining two-thirds." In case both a son and daughter are born, it must be held that the estate should be divided into seven parts, out of which the son should be entitled to four, the wife to two, and the daughter to one portion. Thus, in compliance with the will of the testator, the son should have twice as much as the wife, and the wife twice as much as the daughter, and although, according to the strict rule of law, it might be held that the will was broken; still, as the testator desired that his wife should have something in case either of the children mentioned should be born, recourse was had to this interpretation through motives of humanity, and it was also clearly accepted by Juventius Celsus.

considere que hubo herencia, como si en otro tiempo fuesen dueños los que también en vida del padre son considerados en cierto modo como dueños; por lo cual se llama también hijo de familia, como padre de familia, habiéndose añadido solo esta diferencia, por la cual se distingue al engendrador del que fue engendrado. Así, pues, no se considera que después de la muerte del padre reciben la herencia, sino mas bien que consiguen la libre administración de los bienes; y por esta causa, aunque no hayan sido instituidos herederos son dueños, y no obsta que sea lícito desheredar, a los que también era lícito matar.

12.- ULPIANO; *Comentarios a Sabino, libro IX*.- Respecto a lo que se dice que el hijo nacido rompe el testamento, entiende que nació, aunque haya sido dado a luz habiendo sido abierto el vientre; porque también este rompe el testamento, por supuesto, si naciera bajo potestad.

§ 1.- ¿Mas, qué se dirá, si como animal no hubiera sido dado a luz íntegramente, pero con espíritu, aún así romperá el testamento? Y esto no obstante lo rompe.

13.- JULIANO; *Digesto, libro XXIX*.- Si se hubiera escrito de este modo: «si me hubiere nacido un hijo, sea heredero de dos terceras partes, y de la restante parte sea heredera mi mujer; pero si me hubiere nacido una hija, sea heredera de una tercera parte, y de la restante parte sea heredera mi muje», y hubiesen nacido un hijo y una hija, se ha de decir, que la herencia se ha de dividir en siete partes, para que de ellas tenga cuatro el hijo, dos la mujer, y una sola parte la hija. Porque así tendrá el hijo, conforme a la voluntad del testador, otro tanto más que la mujer, y también la mujer otro tanto más que la hija; porque aunque a una sutil regla de derecho convenía que se rompiese el testamento, sin embargo, como el testador quiso que habiendo nacido ambos tuviera la mujer alguna cosa, se recurrió por lo mismo a semejante resolución por razón de humanidad; lo que también le pareció muy bien a Juvencio Celso.

§ 1.- Regula est iuris civilis, qua constitutum est hereditatem adimi non posse: propter quam liber et heres esse iussus, quamvis dominus ademerit eodem testamento libertatem, nihilo minus et libertatem et hereditatem habebit.

§ 2.- Testamentum, quod hoc modo scribitur: "Titius post mortem filii mei heres esto: filius exheres esto" nullius momenti est, quia filius post mortem suam exheredatus est: quare et contra tabulas paternorum libertorum huiusmodi filius bonorum possessionem accipere poterit.

14.- AFRICANUS; *libro IV quaestionum*.- Si postumus a primo gradu exheredatus, a secundo praeteritus sit, quamvis eo tempore nascatur, quo ad heredes primo gradu scriptos pertineat hereditas, secundum tamen gradum vitari placet ad hoc, ut praetermittentibus institutis ipse heres existat. Immo et si defuncto eo heredes instituti omiserint hereditatem, non posse substitutos adire. Itaque et si a primo gradu exheredatus, a secundo praeteritus, a tertio exheredatus sit et viventibus primis et deliberantibus decedat, quaeri solet omittentibus primis aditionem utrum ad eos, qui tertio gradu scripti sint, an potius ad legitimos heredes pertineat hereditas. Quo et ipso casu rectius existimari putavit ad legitimos eam pertinere: nam et cum duobus heredibus institutis et in singulorum locum facta substitutione a primis exheredatus postumus, a secundis praeteritus fuerit, si alter ex institutis omiserit, quamvis postumus excludatur, non tamen magis substitutum admitti.

§ 1.- Quod vulgo dicitur eum gradum, a quo filius praeteritus sit, non valere, non usquequaque verum esse ait: nam si primo gradu heres institutus sit filius,

§ 1.- It has been established by a rule of the Civil Law that an estate once granted cannot be taken away; wherefore, in case a slave is directed to become free and an heir, even though his master should deprive him of freedom by the same will, he shall, nevertheless, be entitled to both his freedom and the estate.

§ 2.- When a will is framed in the following terms: "Let Titius be my heir, after the death of my son, and I disinherit my son"; it is of no effect, because the son is disinherited after the death of the testator, and for this reason he can obtain possession of the estate in opposition to the wills of the freedmen of his father.

14.- AFRICANUS; *Questions, Book IV*.- Where a posthumous child has been disinherited in the first degree, and passed over in the second, even though it was born at the time when the estate belonged to heirs appointed in the first degree, it is held that the will is broken with reference to the second degree, so that if the heirs who have been appointed fail to enter upon the estate, it itself will become the heir. Nay more, if the heirs who have been appointed fail to enter upon the estate after its death, the substituted heirs cannot do so. So if the posthumous child who was disinherited in the first degree, passed over in the second, and disinherited in the third, should die while the first heirs are deliberating whether they will accept the estate or not, it may be asked if the first ones should reject the estate, whether it will belong to those who are appointed in the third degree, or to the heirs-at-law. In this instance it is also held to be more equitable that it should belong to the heirs-at-law. For in a case where two heirs have been appointed and substitution has been made for each of them, and the posthumous child has been disinherited in the first degree, and passed over in the second, if either of the appointed heirs should not accept the estate — even though the posthumous child may have been excluded — still the substituted heir cannot be admitted.

§ 1.- While it is commonly asserted that the rule having reference to a degree in which a child is passed over is not valid, this is not true in every

§ 1.- Hay una regla de derecho civil, en la cual se determinó, que no se puede quitar una herencia, por razón de la que aquel que se mandó que fuese libre y heredero, aunque su señor le hubiere quitado en el mismo testamento la libertad, tendrá, sin embargo, la libertad y la herencia.

§ 2.- El testamento que se escribe de este modo: «sea heredero Ticio después de la muerte de mi hijo, y quede desheredado mi hijo», es de ningún valor, porque el hijo fue desheredado después de su muerte; por lo cual, este hijo podrá recibir la posesión de los bienes aún contra el testamento de los libertos paternos.

14.- AFRICANO; *Cuestiones, libro IV*.- Si el póstumo desheredado en el primer grado hubiera sido preterido en el segundo, aunque nazca en el tiempo en que la herencia pertenezca a los herederos instituidos en el primer grado, está establecido, sin embargo, que se vicie el segundo grado, para este objeto, para que, abandonando la herencia los instituidos, quede él mismo de heredero; aún también si habiendo fallecido él hubieren dejado de adir la herencia los herederos instituidos, no pueden adirla los sustituidos. Y así, también si el desheredado en el primer grado, y preterido en el segundo, hubiera sido desheredado en el tercero, y falleciera viviendo los primeros y mientras deliberaban, se suele preguntar, si dejando de hacer los primeros la adición les pertenecerá la herencia a los que hayan sido instituidos en el tercer grado, o preferentemente a los herederos legítimos. Y en este caso opinó que se consideraba más acertadamente que aquella les pertenecía a los legítimos; porque también cuando habiendo sido instituidos dos herederos, y habiéndose hecho sustitución para el lugar de cada uno, el póstumo desheredado por los primeros hubiere sido preterido en los segundos, si uno de los instituidos hubiere dejado de aceptar, aunque el póstumo sea excluido, no es sin embargo admitido con más razón el sustituto.

§ 1.- Lo que vulgarmente se dice, que no es válido aquel grado en el que fue preterido el hijo, dice que no es verdad en todos los casos; porque si en el

non debere eum a substitutis exheredari: ideoque si filio et Titio heredibus institutis Titio Maevius substitutus sit, omittente Titio hereditatem Maevium eam adire posse, quamvis filius secundo gradu exheredatus non sit.

§ 2.- Si quis ita scripserit: "Ille, quem scio ex me natum non esse, exheres esto", hanc exheredationem ita nullius momenti esse ait, si probetur ex eo natus: non enim videri quasi filium exheredatum esse. Cum elogium pater, cum filium exheredaret, proposuisset et adiecisset propter eam causam exheredare, probaturque patrem circa causam exheredationis errasse.

15.- ULPIANUS; *libro I ad Sabinum*.- Idem est et si ita dixerit: "Ille illius filius exheres esto", patrem ei adulterum per errorem adsignans.

16.- AFRICANUS; *libro IV quaestionum*.- Si filius heres institutus sit omisso postumo filioque substitutus nepos ex eo sit, si interim moriatur filius, postumo non nato nepotem tam patri quam avo suum heredem futurum. Quod si nemo filio substitutus sit et solus ipse institutus sit, tunc quia eo tempore, quo is moriatur, certum esse incipit neminem ex eo testamento heredem fore, ipse filius intestato patri heres existet: sicut evenire solet, cum sub ea condicione quae in ipsius potestate erit, filius heres institutus, prius quam ei pareret, moriatur.

17.- FLORUS; *libro X institutionum*.- Filii etiam hoc modo exheredantur "filius exheres sit": "filius exheres erit".

instance; for if a son has been appointed heir in the first degree, he should not be disinherited in the substitution. Therefore, where a son and Titius have been appointed heirs, and Maevius was substituted for Titius, Titius having refused the estate, Maevius can enter upon it, even though the son may not have been disinherited in the second degree.

§ 2.- If anyone should make the following statement in his will: "I disinherit So-and-So, whom I know is not my son"; a clause of this kind will be of no force or effect, where it is proved that the party referred to is the son of the testator; for a son is not held to have been disinherited merely because his father spoke disparagingly of him at the time, and added that he disinherited him for this reason, and it is proved that the father was mistaken with reference to his motive for disinheriting him.

15.- ULPIANUS; *On Sabinus, Book I*.- The same rule applies if the testator should have said: "I disinherit So-and-So, the son of So-and-So," attributing an adulterous father to him through mistake.

16.- AFRICANUS; *Questions, Book IV*.- Where a son is appointed heir by his father, who passes over a posthumous child, and his grandson who is the son of the said heir is afterwards substituted for him, and the son, in the meantime, dies, and the posthumous child should not be born, the said grandson will be the heir of both his father and grandfather. Where, however, no one is substituted for the son, and he alone is appointed heir, then, for the reason that, at the time when the son died, it begins to be certain that there will be no heir under the will, the son himself will become the heir of his father if the latter dies intestate; just as frequently happens where a son who is under the control of his father is appointed heir under some condition, and dies before he has complied with it.

17.- FLORENTINUS; *Institutes, Book X*.- Sons can also be disinherited in the following terms: "Let my son be disinherited"; "My son shall be disinherited."

primer grado hubiera sido instituido heredero el hijo, no debe ser desheredado respecto a los sustitutos; y por esto, si habiendo sido instituidos herederos un hijo y Ticio, hubiera sido Mevio sustituido a Ticio, abandonando Ticio la herencia, puede adirla Mevio, aunque el hijo no haya sido desheredado en el segundo grado.

§ 2.- Si alguno hubiere escrito de este modo: «quede desheredado aquel que sé que no nació de mí», dice, que esta desheredación es de ningún valor, si se probase que nació de él; porque no parece que fue desheredado como hijo, pues el padre al desheredar al hijo expuso la razón, y añadió que por esta causa lo desheredaba, y se prueba que el padre erró respecto a la causa de la desheredación.

15.- ULPIANO; *Comentarios a Sabino, libro I*.- Lo mismo es también si hubiere dicho así: «quede desheredado el que es hijo de aquel», asignándole por error un padre adúltero.

16.- AFRICANO; *Cuestiones, libro IV*.- Si un hijo hubiera sido instituido heredero habiéndose omitido al póstumo, y al hijo se le hubiera sustituido un nieto nacido de él, si mientras muriese el hijo no habiendo nacido el póstumo, el nieto habrá de ser heredero suyo, así del padre, como del abuelo; pero si nadie hubiera sido sustituido al hijo, y solo él hubiera sido instituido, entonces, como al tiempo en que muere éste comienza a ser cierto que nadie habrá de ser heredero en virtud de este testamento, sea heredero del padre intestado el mismo hijo, como suele suceder, cuando instituido heredero el hijo bajo una condición, que estuviere en la potestad del mismo, muriese antes que la cumpliera.

17.- FLORENTINO; *Instituta, libro X*.- También son desheredados los hijos de este modo: «sea desheredado mi hijo, mi hijo será desheredado».

18.- ULPIANUS; *libro LVII ad edictum*.- Multi non notae causa exheredant filios nec ut eis obsint, sed ut eis consulant, ut puta impuberibus, eisque fideicommissam hereditatem dant.

19.- PAULUS; *libro I ad Vitellium*.- Cum quidam filiam ex asse heredem scripsisset filioque, quem in potestate habebat, decem legasset, adiecit "et in cetera parte exheres mihi erit", et quaereretur, an recte exheredatus videretur, Scaevola respondit non videri, et in disputando adiciebat ideo non valere, quoniam nec fundi exheres esse iussus recte exheredaretur, aliamque causam esse institutionis, quae benigne acciperetur: exheredationes autem non essent adiuvandae.

20.- MODESTINUS; *libro II pandectarum*.- Sub condicione filius heres institutus si pendente condicione adrogandum se dedit, necessarius heres non erit.

21.- POMPONIVS; *libro II ad Quintum Mucium*.- Si filium nominatim exheredavero et eum postea heredem instituero, heres erit.

22.- CLEMENTIUS; *libro XVII ad legem Iuliam et Papiam*.- Cum postumus sub condicione instituitur, si prius quam nascatur condicio exstiterit, non rumpitur testamentum postumi agnatione.

23.- PAPINIANUS; *libro XII quaestionum*.- Filio, quem pater post emancipationem a se factam iterum adrogavit, exheredationem antea scriptam nocere dixi: nam in omni fere iure sic observari convenit, ut veri patris adoptivus filius numquam intellegatur, ne imagine naturae veritas adumbretur, videlicet quod

18. ULPIANUS; *On the Edict, Book LVII*.- Many fathers disinherit their children not on account of any disgrace or to do them injury, but with a view to their own welfare (as, for instance, those who have not arrived at puberty), and bequeath their estates to them in trust.

19.- PAULUS; *On Vitellius, Book I*.- A certain man appointed his daughter sole heir to his estate, and bequeathed ten aurei to his son, who was under his control, and added: "My son shall be disinherited so far as the remainder of my estate is concerned." The question arose whether he could be held to be legally disinherited. Scaevola answered that he did not seem to be properly disinherited, and, while discussing the point, added that the disinheritance was void, for a child could not be legally disinherited when this only had reference to a certain tract of land; and that the case was different where anyone is appointed an heir, for the reason that appointments are understood to be subject to the most liberal interpretation, but no encouragement should be given to disinheritances.

20.- MODESTINUS; *Pandects, Book II*.- Where a son is appointed an heir under some condition, and while the condition is pending gives himself to be arrogated, he will cease to be a necessary heir.

21.- POMPONIVS; *On Quintus Mucius, Book II*.- If I should disinherit my son by name and afterwards appoint him my heir, he will be my heir.

22.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book XVII*.- When a posthumous child is appointed an heir under some condition, and the condition is fulfilled before he is born, the will will not be broken by the birth of the said posthumous child.

23.- PAPINIANUS; *Questions, Book XII*.- Where a father, after emancipation granted by him to his son, resumes control over him again by arrogation, I have stated that the disinheritance previously made by his father will prejudice his rights; for it is proper to be observed in almost every law that an adopted son can

18.- ULPIANO; *Comentarios al Edicto, libro LVII*.- Muchos desheredan a los hijos no por causa de tacha, ni para perjudicarles, sino para mirar por ellos, como a los impúberos, y les dan la herencia por fideicomiso.

19.- PAULO; *Comentarios a Vitelio, libro I*.- Habiendo uno instituido heredero de toda la herencia a su hija, y habiendo legado diez a un hijo, que tenía bajo su potestad, añadió: «y en la restante parte quedará para mi desheredado», y preguntándose si se le consideraría bien desheredado, Scévola respondió: no se le considera; y discutiendo añadía, que esto no era válido, porque tampoco el que se mandó que fuese desheredado de un fundo estaría bien desheredado, y que era distinta la causa de la institución, la cual se interpreta favorablemente, pero que las desheredaciones no debían ser favorecidas.

20.- MODESTINO; *Pandectas, libro II*.- El hijo instituido heredero bajo condición, si pendiente la condición se dio en arrogación, no será heredero necesario.

21.- POMPONIO; *Comentarios a Quinto Mucio, libro II*.- Si yo hubiere desheredado nominalmente a un hijo, y después lo hubiere instituido heredero, será heredero.

22.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro XVII*.- Cuando un póstumo es instituido bajo condición, si antes que nazca se hubiere cumplido la condición, no se rompe el testamento por la agnación del póstumo.

23. PAPINIANO; *Cuestiones, libro XII*.- Yo dije, que al hijo que el padre arrogó de nuevo después de la emancipación hecha por él, le perjudica la desheredación que antes se escribió; porque en casi todo el derecho conviene que se observe así, de suerte que nunca el hijo sea considerado adoptivo del verdadero

non translatus, sed redditus videretur: nec multum puto referre, quod ad propositum attinet, quod loco nepotis filium exheredatum pater adrogavit.

§ 1.- Si Titius heres institutus loco nepotis adoptetur, defuncto postea filio qui pater videbatur, nepotis successione non rumpitur testamentum ab eo, qui heres invenitur.

24.- PAULUS; *libro IX quaestionum*.- Postuma sub condicione heres instituta si pendente condicione vivo patre nascatur, rumpit testamentum.

25.- PAULUS; *libro XII responsorum*.- Titius testamento heredem instituit et filium habens sic exheredationemosuit: "Ceteri omnes filii filiaeque meae exheredes sunt". Paulus respondit filium recte exheredatum videri. Postea consultus, an videatur exheredatus, quem pater putavit decessisse, respondit filios et filias nominatim exheredatos proponi: de errore autem patris, qui intercessisse proponitur, apud iudicem agi oportere.

§ 1.- Lucius Titius cum suprema sua ordinaret in civitate et haberet neptem ex filia praegnatem rure agentem, scripsit id quod in utero haberet ex parte heredem: quaero, cum ipsa die, qua Titius ordinaret testamentum in civitate hora diei sexta, eodem die albescente caelo rure sit enixa Maevia masculum, an institutio heredis valeat, cum, quo tempore scriberetur testamentum, iam editus esset partus. Paulus respondit verba quidem testamenti ad eum pronepotem directa videri, qui post testamentum factum nasceretur: sed si, ut proponitur, eadem die qua testamentum factum est neptis testatoris antequam testamentum scriberetur enixa esset, licet

never be understood to hold that relation towards his real father, in order to prevent the truth of nature from being obscured by a mere formality; so that the son is not considered to have been brought under the care of his father, but to have been returned to his control. In the case suggested, I do not think that it makes much difference whether the father arrogated his disinherited son either as his son or his grandson.

§ 1.- Where Titius is appointed an heir and adopted in the place of a grandson, and afterwards the son who was considered the father of said grandson dies, the will is not broken by the succession of the grandson, so far as he who has been appointed heir is concerned.

24.- PAULUS; *Questions, Book IX*.- Where a posthumous child appointed heir under some condition is born while the condition is pending, and during the lifetime of its father, this breaks the will.

25. THE SAME; *Opinions, Book XII*.- Titius appointed an heir by will, and having a son disinherited him, as follows: "Let all my other sons and daughters be disinherited." Paulus was of the opinion that the son seemed to have been legally disinherited. Afterwards, having been asked whether a son whom his father believed to be dead could have been held to have been disinherited, he answered that, in accordance with the case stated, the sons and daughters were specifically disinherited, but, with reference to the case of the father who was mistaken with reference to the death of his son, the point should be determined in court.

§ 1.- Lucius Titius, while drawing up his last will in the City, had a granddaughter by his daughter who was at that time in the country, and pregnant, stated that her unborn child should be heir to a portion of his estate. I ask, if on the very day when Titius drew up his will in town, about the sixth hour, his granddaughter Mævia brought forth a male child in the country; whether such an appointment was valid, since at the time when the will was drawn up the child had already been born? Paulus answered that the terms of the will seemed to have reference to a great-grandchild to be born after the execution of the will; but if, as in the case stated, the granddaughter of the

padre, a fin de que la verdad de la naturaleza no sea oscurecida con una ficción a saber, porque no se le consideraría transferido, sino regresado; y no creo que importe mucho, por lo que atañe a este propósito, que el padre haya arrogado en calidad de nieto al hijo desheredado.

§ 1.- Si habiendo sido instituido heredero Ticio fuese adoptado en calidad de nieto, habiendo fallecido después el hijo, que era considerado padre con la sucesión del nieto no se rompe el testamento por el que se halla heredero.

24.- PAULO; *Cuestiones; libro IX*.- La póstuma instituida heredera bajo condición, si naciera en vida del padre estando pendiente la condición, rompe el testamento. .

25.- EL MISMO; *Respuestas, libro XII*. -Ticio instituyó heredero en su testamento, y teniendo un hijo hizo así su desheredación: «todos mis demás hijos e hijas sean desheredados»; Paulo respondió, que se consideraba que el hijo fue desheredado en debida forma. Consultado después sobre si se consideraba desheredado el que el padre creyó que había fallecido, respondió, que se dice que los hijos y las hijas son nominalmente desheredados, pero que en cuanto al error del padre, respecto del que se dice que había fallecido, se debe reclamar ante el juez.

§ 1.- Lucio Ticio, al disponer en la ciudad su última voluntad, y teniendo de una hija una nieta embarazada que vivía en el campo, escribió que lo que tuviese en su vientre fuese heredero de una parte; pregunto, si en el mismo día en que Ticio hiciera su testamento en la ciudad, a la hora sexta del día, Mevia hubiera parido al apuntar el alba en dicho día un varón en el campo, ¿será válida la institución de heredero, habiéndose ya dado a luz, el parto al tiempo en que se escribiese el testamento? Paulo respondió, que las palabras del testamento se consideraban ciertamente dirigidas a aquel bisnieto, que naciese después de hecho el testamento; pero si, como se

ignorante testatore, tamen institutionem iure factum videri recte responderi.

26.- PAULUS; *libro III sententiarum*.- Filius familias si militet, ut paganus nominatim a patre aut heres scribi aut exheredari debet, iam sublato edicto divi Augusti, quo cautum fuerat, ne pater filium militem exheredet.

27.- PAULUS; *libro III ad Neratium*.- Postumum ex qualibet vidua natum sibi filium heredem instituere potest.

28.- TRYPHONUS; *libro XX disputationem*.- Filius a patre, cuius in potestate est, sub condicione, quae non est in ipsius potestate, heres institutus et in defectum condicionis exheredatus decessit pendente etiam tunc condicione tam institutionis quam exheredationis. Dixi heredem eum ab intestato mortuum esse, quia dum vivit, neque ex testamento heres neque exheredatus fuit. Herede autem scripto ex parte filio coheres post mortem filii institui potest.

§ 1.- Filius familias miles de castrensi peculio fecit testamentum habens filium in eiusdem potestate. Cum militare desisset, patre eodemque avo defuncto quaesitum est, an rumpetur eius testamentum. Non quidem adoptavit nec hodie ei natus est filius nec priore subducto de potestate suo herede ulterior successit in proximum locum: sed tamen in potestate sua habere coepit, quem non habebat simulque pater familias factus est et filius sub eius reccidit potestate: rumpetur ergo testamentum. Sed si heres sit institutus vel exheredatus iste eius filius, non rumpitur, quia nullo circa eum novo facto, sed ordine quodam naturali nactus est potestatem.

testator was born upon the same day on which the will was executed, and before it was drawn up, even though the testator may have been ignorant of the fact, still, the appointment must be held to have been legally made; and this opinion is in accordance with law.

26.- PAULUS; *Decisions, Book III*.- Where a son under paternal control is serving in the army he should, just as any civilian, be appointed an heir, or be disinherited by his father by name; for the Edict of the Divine Augustus, by which it was provided that a father should not disinherit his son while in the army, has been repealed.

27.- THE SAME; *On Neratius, Book III*.- A father can appoint as his heir a posthumous child the issue of him and any widow whomsoever.

28. TRYPHONINUS; *Disputations, Book XX*.- A son who was appointed an heir by his father while under control of the latter, dependent upon a certain condition with which he had nothing to do, and who was disinherited when the condition was not fulfilled, died while the condition of his appointment, as well as of his disinheritance, was still pending. I held that the son, when he died, was the heir of his intestate father, since during his lifetime he was neither the heir under his will, nor was he disinherited. Where a son is appointed heir to a certain share of an estate, his co-heir can be appointed after the death of the son.

§ 1.- A son under paternal control, who was in the military service, made a will disposing of his peculium castrense, having at the same time a son under his control. After he left the service, and his father, who was also a grandfather, died; the question arose whether his will was broken. He did not, in fact, adopt anyone, nor had any son recently been born to him, nor was his nearest heir removed from his control, so that the next in order might take his place; still, he began to have under his control a person not previously in that position, and at the same time he became the head of a family and his own son became subject to his authority. Therefore, his will is broken. If, however, his said son had been either appointed or

dice, la nieta del testador hubiese parido en el mismo día en que se hizo el testamento, antes que se escribiese el testamento, aunque ignorándolo el testador, con razón se responde, que, no obstante, se considera legalmente hecha la institución.

26.- PAULO; *Sentencias, libro III*.- Si el hijo de familia fuese militar, debe ser instituido heredero, o desheredado, por el padre, nominalmente, como si fuese paisano, habiendo sido ya derogado el edicto del Divino Augusto, en que se había dispuesto, que el padre no desheredase a su hijo militar.

27.- EL MISMO; *Comentarios a Neracio; libro III*.- Uno puede instituir heredero el hijo póstumo que le nació de cualquier viuda.

28. TRIFONINO; *Disputas, libro XX*.- Un hijo, instituido heredero por su padre, en cuya potestad está, bajo una condición que no estaba en la potestad del mismo, y desheredado en defecto de la condición, falleció, hallándose aún entonces pendiente la condición, así de la institución, como de la desheredación; yo dije, que este había muerto heredero abintestato, porque mientras vivió, ni fue heredero en virtud del testamento, ni desheredado. Pero habiendo sido instituido el hijo heredero de una parte, puede ser instituido después de la muerte del hijo el coheredero

§ 1.- Un hijo de familia, militar, hizo testamento de su peculio castrense, teniendo un hijo bajo la potestad del mismo ascendiente; habiendo dejado de ser militar, fallecidos su padre y su mismo abuelo, se preguntó, ¿se romperá su testamento? Ciertamente no adoptó, ni hoy le ha nacido un hijo, ni habiendo salido de su potestad su primer heredero le sucedió el segundo en el próximo lugar; pero, esto no obstante, comenzó a tener bajo su potestad al que no tenía, y al mismo tiempo se hizo padre de familia, y su hijo recayó bajo su potestad; luego se romperá el testamento. Mas si este hijo suyo hubiera sido instituido heredero, o desheredado, no se rompe, porque alcanzó la potestad no por algún hecho nuevo

§ 2.- Si quis ex certa uxore natum scribit heredem, in periculum rumpendi testamentum deducit ex alia susceptis liberis.

§ 3.- Si quis eo tempore, quo nondum eius uxor esse posset, testator natum ex ea scripsit heredem, an postea contracto licito matrimonio natus heres ex testamento esse possit, quaeritur: veluti si scribas hodie heredem, qui tibi ex Titia natus erit, quando Titia ancilla vel minor annis viginti quinque ea, cuius pater tuus tutelam administravit aut tutor tu ipse fuisti, postea Titia uxor iusta tibi fuerit vel libertatem adeptam aut tempore annorum viginti quinque et utilis anni et rationum allegatione, an natus heres esse possit? Nemo certo dubitabit ex Titia, quae tunc propter tenorem aetatis uxor duci non potuit, quando testamentum fiebat, natum postea ea uxore ducta heredem esse posse. Et generaliter nato post testamentum heredi scripto aditus est ad hereditatem, in qualicumque statu testamenti faciendi tempore fuit quae postea testatori civiliter nupta est.

§ 4.- Quid autem, si filium post testamentum natum ex besse, filiam autem post testamentum natam ex triente scripsit heredem nec ullum coheredem dedit nec substituit invicem alium? Unus natus solus ex testamento fit heres.

29.- SCAEVOLA; *libro VI quaestionum*.- Gallus sic posse institui postumos nepotes induxit: "Si filius meus vivo me morietur, tunc si quis mihi ex eo nepos sive quae neptis post mortem meam in decem mensibus proximis, quibus filius meus moreretur, natus nata erit, heredes sunt".

disinherited by his will, it would not be broken; for the reason that he obtained power not by any innovation on his part, but in the natural course of affairs.

§ 2.- Where a party appoints an heir to be born of a certain wife of his he runs the risk of breaking his will if children are born to him by some other woman.

§ 3.- If a testator appoints as heir a child to be born from a certain woman who at that time could not be his wife, and he afterwards was legally able to marry her; the question arises whether a child born under such circumstances can be an heir under the will. For example, if to-day you appoint as an heir a child born to yourself and Titia, and Titia at the time is a female slave, or a minor under twenty-five years of age, or because your father administered her guardianship, or you yourself administered it, and Titia afterwards should become your legal wife, either because she obtained her freedom, or reached the age of twenty-five years, her legal majority, or your accounts as guardian had been rendered; would your child born of her be your heir? Certainly, no one will doubt that such a child born after you married her would be your heir, even though on account of her age she could not be legally married at the time that the will was executed. And, generally speaking, whenever an heir appointed by a will is born after it is made, he has a right to enter upon the estate, no matter in what condition the woman who subsequently married the testator may have been in at the time of the execution of the will.

§ 4.- But what if the testator had appointed the son and daughter to be born after his will his heirs, the son for two-thirds, and the daughter for one-third of his estate, without appointing any co-heir, or substituting one for the other? The child that was born would be the sole heir under the will.

29.- SCAEVOLA; *Questions, Book VI*.- Gallus stated that posthumous grandchildren could be appointed heirs in the following terms, namely: "If my son should die during my lifetime, and within ten months after my death any grandchildren, either male or female, should be born to his wife, let them be my heirs."

relativo a él, sino por cierto hecho natural.

§ 2.- Si alguno instituyó heredero al que hubiese nacido de cierta mujer, pone el testamento en peligro de que se rompa habiendo tenido hijos de otra.

§ 3.- Si algún testador instituyó heredero al que naciera de aquella a la cual en aquel tiempo aún no podría ser su mujer, se pregunta si el nacido después de contraído lícito matrimonio no puede ser heredero en virtud de testamento, como por ejemplo, si hoy instituyeras heredero al que te naciere de Ticia, siendo esclava Ticia, o siendo menor de veinticinco años aquella, cuya tutela administró tu padre, o habiendo sido tú mismo su tutor, y después Ticia hubiere sido tu mujer legítima, o hubiere conseguido la libertad, o hubiere cumplido los veinticinco años, y transcurrió el tiempo del año útil, y se hizo la rendición de cuentas, ¿podría ser heredero el que nació? Ciertamente que nadie dudará, que el nacido de Ticia, la cual entonces, cuando se hacía el testamento, no pudo ser tomada por mujer por razón de su edad, puede ser heredero, habiendo nacido después de haber sido tomada ella por mujer. Y en general, habiendo nacido después del testamento el heredero instituido, hay ingreso a la herencia, cualquiera que sea el estado en que estuvo al tiempo de hacerse el testamento la que después se casó civilmente con el testador.

§ 4.- Mas ¿qué se dirá, si instituyó heredero de dos tercios al hijo nacido después del testamento, y del otro tercio a una hija nacida también después del testamento, y no nombró ningún coheredero, ni substituyó recíprocamente el uno al otro? Uno solo que haya nacido será heredero en virtud del testamento.

29. SCÉVOLA; *Cuestiones, libro VI*.- Galo introdujo, que los nietos póstumos pudieran ser instituidos de este modo: «si mi hijo muriese viviendo yo, entonces, si de él me hubiere nacido un nieto, o una nieta, después de mi muerte, en los diez meses inmediatos a cuando muriese mi hijo, sean herederos».

§ 1.- Quidam recte admittendum credunt, etiamsi non exprimat de morte filii, sed simpliciter instituat, ut eo casu valeat, qui ex verbis concipi possit.

§ 2.- Idem credendum est Gallum existimasse et de pronepote, ut dicat testator: "Si me vivo nepos decedat, tunc qui ex eo pronepos" et cetera.

§ 3.- Sed et si vivo filio iam mortuo pronepote cuius uxor praegnas esset, testamentum faceret, potest dicere: "Si me vivo filius decedat, tunc qui pronepos".

§ 4.- Num si et filius et nepos vivat, concipere "Utrisque mortuis vivo se, tunc qui pronepos nasceretur?" Quod similiter admittendum est, ita sane, si prius nepos, deinde filius decederet, ne successione testamentum rumperetur.

§ 5.- Et quid si tantum in mortis filii casum conciperet? Quid enim si aquae et ignis interdictionem pateretur? Quid si nepos, ex quo pronepos institueretur, ut ostendimus, emancipatus esset? Hi enim casus et omnes, ex quibus suus heres post mortem scilicet avi nasceretur, non pertinent ad legem Velleam [Vellaeam]: sed ex sententia legis Velleae [Vellaeae] et haec omnia admittenda sunt, ut ad similitudinem mortis ceteri casus admittendi sint.

§ 6.- Quid si qui filium apud hostes habebat testaretur? Quare non inducere, ut, si antea quam filius ab hostibus rediret quamvis post mortem patris decederet, tunc deinde nepos vel etiam adhuc illis vivis post mortem scilicet avi nasceretur, non rumperet? Nam hic casus ad legem Velleam [Vellaeam] non pertinet. Melius ergo est, ut in eiusmodi utilitate praesertim post legem Velleam [Vellaeam], quae et multos casus rumpendi abstulit, interpretatio admittatur, ut instituens nepotem, qui sibi post mortem suus nasceretur, recte instituisse

§ 1.- Certain authorities hold that the appointment of heirs will be legal, even if the father does not mention the death of the son, but simply appoints his grandchildren his heirs; since it may be inferred from his words that in such an event the appointment will be valid.

§ 2.- It must also be believed that Gallus held the same opinion with reference to grandchildren, when the testator says: "If my grandson should die during my lifetime, then my great-grandchild who is his issue," etc.

§ 3.- If, however, the grandson should die during the lifetime of the son, leaving his wife pregnant, and the testator should make a will; he can say: "If my son should die during my lifetime, then my great-grandson sprung from him shall be my heir."

§ 4.- While the testator's son and grandson are still living, can the testator provide for the succession of his great-grandson, under the assumption that both the former will die during his lifetime? This also must be admitted, in order to prevent the will from being broken by the succession, if in fact the grandson should die, and then the son after him.

§ 5.- What if the testator should only anticipate the event of the death of his son, and what would be the result if the testator should suffer the interdiction of water and fire? What if the grandson, the father of the great-grandson appointed heir, as we have stated, should be emancipated? These instances, as well as any of those in which a lawful heir is born after the death of his grandfather, have no connection with the Lex Velleia. But, in accordance with the spirit of the Lex Velleia, all these matters should be taken into consideration, just as other cases should be admitted, for example, where death occurs.

§ 6.- What course must be pursued where the person who makes the will has a son in the hands of the enemy? Why has it not been held that, if the son should die before returning from captivity, but after the death of his father, then the grandson who was born during their lifetime, or even after the death of his grandfather, could not break the will? This case has no relation to the Lex Velleia. The better opinion therefore is that, for the sake of convenience, and especially after the Lex Velleia, which disposed of many cases where a will could be broken, the

§ 1.- Algunos creen que con razón se ha de admitir, que, aunque no hable de la muerte del hijo, sino que haga simplemente la institución, sea en este caso heredero válido el que se pueda colegir de las palabras.

§ 2.- Lo mismo se ha de creer que opinó Galo también respecto al bisnieto, como si el testador dijese: «si mi nieto falleciese viviendo yo, entonces, el bisnieto nacido de él», etcétera.

§ 3.- Pero si hiciese el testamento viviendo el hijo, habiendo muerto ya el bisnieto, cuya mujer estuviese embarazada, también puede decir: «si viviendo yo falleciese mi hijo, entonces, el que fuese mi bisnieto».

§ 4.- ¿Pero si viviesen el hijo y el nieto, puede decir que muertos ambos, viviendo él, en este caso el bisnieto que naciese? Lo que del mismo modo se ha de admitir; pero de esta suerte, si primeramente falleciese el nieto, y después el hijo, para que el testamento no se rompiese por la sucesión.

§ 5.- ¿Y qué, si solo se expresase respecto al caso de la muerte del hijo? Porque, ¿que, si fuese castigado con la interdicción del agua y del fuego? ¿Qué, si el nieto, cuyo hijo, bisnieto, fuese instituido, como hemos mostrado, hubiese sido emancipado? Porque estos casos, y todos aquellos en que naciese un heredero suyo, por supuesto, después de la muerte del abuelo, no pertenecen a la ley Velleia. Pero según el sentido de la ley Velleia también se ha de admitir todo esto, de suerte que se hayan de admitir los demás casos a semejanza del de la muerte.

§ 6.- ¿Qué se dirá, si testase el que tenía a su hijo en poder de los enemigos? ¿Por qué no dijeron, que, si antes que el hijo volviese de los enemigos, aunque falleciese después de la muerte del padre, y después en este caso naciese el nieto, o aún viviendo todavía aquellos, pero después de la muerte del abuelo, no rompería el testamento porque este caso no pertenece a la ley Velleia? Luego mejor es que por semejante utilidad se admita la interpretación, principalmente después de la ley Velleia, que suprimió muchos casos en que se rompía el testamento, de que el que

videatur, quibuscumque casibus nepos post mortem natus suus esset rumperetque praeteritus: atque etiam si generaliter, "quidquid sibi liberorum natum erit post mortem" aut "quicumque natus fuerit" sit institutus, si suus nasceretur.

§ 7.- Si eius, qui filium habeat et nepotem ex eo instituat, nurus praegnas ab hostibus capta sit ibique vivo pariat, mox ille post mortem patris atque avi redeat, utrum hic casus ad legem Velleam [Vellaeam] respiciat an ad ius antiquum aptandus sit, possitque vel ex iure antiquo vel ex Vellea [Vellaea] institutus non rumpere?

Quod quaerendum est, si iam mortuo filio pronepotem instituat redeatque mortuo. Sed cum testamentum ab eo non rumpitur, nihil refert, utrum ex iure antiquo an ex lege Vellea [Vellaea] excludatur.

§ 8.- Forsitan addubitet quis, an istis casibus si nepos post testamentum nascatur vivo patre suo, deinde ex eo concipiatur, isque vivo patre deinde avo nascatur, an non potuerit heres institui, quia pater ipsius non recte institutus esset. Quod minime est expavescendum: hic enim suus heres nascitur et post mortem nascitur.

§ 9.- Ergo et si pronepos admittetur, qui natus erit ex nepote postea vivo filio, atque si ex eo natus esset, adoptatur.

§ 10.- In omnibus his speciebus illud servandum est, ut filius dumtaxat, qui est in potestate, ex aliqua parte sit heres institutus: nam frustra exheredabitur post mortem suam: quod non esse necessario in eo

interpretation should be adopted that, where a testator appoints his grandson who was born after his death, he shall be held to have appointed him legally. And no matter under what circumstances the grandson born after the testator's death may become his heir, whenever he has been passed over in the will, he can break it. Even if its provisions are stated in general terms, for instance: "Any children born to me after my death, or whoever shall be born after my death, shall be appointed my heir"; provided such a child should be born his heir.

§ 7.- Where anyone has a son, and appoints his grandson born of said son his heir, and his daughter-in-law, being pregnant, is captured by the enemy, and while in their hands, and, during the lifetime of the grandfather and his son, brings forth a child, and the latter, after the death of his father and grandfather returns; is this case included in the Lex Velleia, or must recourse be had to the ancient law, so that the grandson who is appointed may not break the will either under the ancient law or the Lex Velleia?

This question may be raised, if, after the death of the son, the grandfather appoints his grandson his heir, and the latter returns after the death of his grandfather. However, when the will cannot be broken by him who was appointed, it makes no difference whether he is excluded from the succession by the ancient law or by the Lex Velleia.

§ 8.- Someone perhaps may doubt whether, in this instance, if the grandson should be born after the execution of the will, and during the lifetime of his father and grandfather, he can be appointed an heir because his father had not been legally appointed. There should be no apprehension on this ground, for the grandchild is born of a lawful heir after the death of his ancestors.

§ 9.- Hence, if a great-grandson, born of a grandson, can be admitted to the succession, if afterwards his son should be living, a son born to him will also be entitled to the succession.

§ 10.- In all these instances, it must be observed that only a son who is under parental control can be appointed heir to any portion of an estate, for his disinheritance after the death of the testator will be

instituya al nieto, que después de su muerte le naciese como heredero suyo, se considere que lo instituyó debidamente, cualesquiera que fuesen los casos en que el nieto hubiese nacido heredero suyo después de su muerte, y de que rompería el testamento habiendo sido preterido; y también si en general hubiera sido instituido cualquier descendiente que le naciese después de su muerte, o cualquiera que hubiere nacido, si naciese heredero suyo.

§ 7.- Si la nuera del que tenga un hijo, e instituya al nieto nacido de él, hubiera sido cogida por los enemigos estando embarazada, y allí pariese viviendo el abuelo, y luego el nacido volviera después de la muerte de su padre y de su abuelo, ¿corresponderá quizá este caso a la ley Vellea, o se habrá de acomodar al derecho antiguo, y podrá el instituido no romper el testamento o por el derecho antiguo, o por la ley Vellea?

Lo que se ha de investigar, si instituyera al bisnieto habiendo ya muerto el hijo, y volviera habiendo muerto él. Pero no rompiéndose por él el testamento, nada importa que sea excluido por el derecho antiguo, o por la ley Vellea.

§ 8.- Acaso alguno dudará, si en estos casos, cuando el nieto nazca después del testamento viviendo su padre, y después se conciba de éste, y el concebido nazca después viviendo el padre y también el abuelo, no habrá podido ser instituido heredero, porque el padre del mismo no hubiese sido instituido debidamente. Lo que en manera ninguna se ha de temer; porque éste nace heredero suyo, y nace después de la muerte.

§ 9.- Luego también de este modo será admitido el bisnieto, que hubiere nacido del nieto, y después es adoptado, viviendo el hijo, lo mismo que si de él hubiese nacido.

§ 10.- En todos estos casos se ha de observar esto, que haya sido instituido heredero de alguna parte solamente el hijo que esta bajo potestad, porque inútilmente será desheredado después de su muerte;

filio, qui apud hostes est, si ibi decedat et in nepote certe et pronepote, quorum si liberi heredes instituantur, institutionem numquam exigemus, quia possunt praeteriri.

§ 11.- Nunc de lege Vellea [Vellaea] videamus. Voluit vivis nobis natos similiter non rumpere testamentum.

§ 12.- Et videtur primum caput eos spectare, qui, cum nascerentur, sui heredes futuri essentiarum et rogo, si filium habeas et nepotem nondum natum tantum ex eo heredem instituas, filius decedat, mox vivo te nepos nascatur?

Ex verbis dicendum est non rumpi testamentum, ut non solum illud primo capite notaverit, si nepos, qui eo tempore instituitur, quo filius non sit, verum et si vivo patre nascatur: quid enim necesse est tempus testamenti faciendi respici, cum satis sit observari id tempus quo nascitur? Nam etsi ita verba sunt: "Qui testamentum faciet, is omnis virilis sexus, qui ei suus heres futurus erit" et cetera.

§ 13.- Etiam si vovente parente vivo nascantur, sequenti parte succedentes in locum liberorum non vult rumpere testamentum: et ita interpretandum est, ut, si et filium et nepotem et pronepotem habeas, mortuis utrisque pronepos institutus succedens in sui heredis locum non rumpat.

Et bene verba se habent "si quis ex suis heredibus suus heres esse desierit" ad omnes casus pertinentia, quos supplendos in Galli Aquili [Aquili] sententia diximus: nec solum, si nepos vivo patre decedat, nec succedens pronepos avo mortuo rumpat, sed et si supervixit patri ac decedat, dummodo heres insti-

void. It is not necessary, however, for the son to be disinherited if he is in the hands of the enemy and dies there; and certainly with respect to the grandson and great-grandson, we never require their appointment if their children are appointed heirs, because they can be passed over.

§ 11.- Let us now examine the Lex Velleia. It prescribes that children born in our lifetime, in like manner, cannot break our wills.

§ 12.- The first section of the law has reference to those who after they are born, will become proper heirs. I ask, if you should have a son, and appoint as your heir your grandson by said son, who is not yet born, and your son should die, and your grandson should be born during your lifetime, what will be the result?

It must be held from the words of the law that the will is not broken, as it not only states in the first section if the grandson is appointed at the time during which the son was not in existence, but also if he should be born during the lifetime of his father. In this case, why should it be necessary for the time when the will was executed to be considered, since it is sufficient to observe the time when the grandson was born? For, in fact, the following are the words of the law: "He who makes a will can appoint as heirs all those children of the male sex who will be his proper heirs"; and also, "even though they may have been born during the lifetime of their father".

§ 13.- In the next section of the law, it is not provided that those who succeed to the place of the children can break the will; and this must be interpreted in such a way that if you have a son, a grandson, and a great-grandson, and after the death of the first two, your grandson having been appointed and succeeding the lawful heir, will not break the will.

It has been very properly decided that the words: "If any one of his heirs should cease to be his heir"; have reference to all those cases to which we have stated the formula of Gallus Aquilius is applicable; for not only where a grandson dies during the lifetime of his father, the great-grandson succeeding his

lo que no es necesario respecto del hijo, que está en poder de los enemigos, si allí falleciera, y ciertamente respecto del nieto y del bisnieto, de los cuales, si fuesen instituidos herederos los hijos, no exigiremos nunca la institución, porque pueden ser preteridos.

§ 11.- Veamos ahora respecto a la ley Velleia; quiso que los que nacieron viviendo nosotros no rompieran tampoco el testamento.

§ 12.- Y parece que el primer capítulo se refiere a los que, cuando naciesen, hubiesen de ser herederos suyos. Y pregunto, ¿y si tuvieras un hijo, instituyeras heredero solamente al nieto todavía no nacido de él, falleciera el hijo, y después naciera el nieto viviendo tú?

En virtud de las palabras se ha de decir, que no se rompe el testamento, porque en el primer capítulo no consignó aquello solamente, si el nieto, que sea instituido a tiempo en que no exista el hijo, sino también si naciera viviendo su padre; porque ¿qué necesidad. hay de que se mire al tiempo en que se hizo el testamento, siendo suficiente que se atienda al tiempo en que nace, -puesto que así dicen las palabras: «el que hiciere testamento, instituirá a todo el que del sexo viril hubiere de ser para él heredero suyo», etcétera, aunque nazca viviendo su ascendiente-?

§ 13.- En la siguiente parte no quiere la ley que los que suceden en lugar de los descendientes rompan el testamento; y se ha de interpretar así, que si tuvieras un hijo, y un nieto, y un bisnieto, muertos aquellos, el bisnieto instituido, que sucede en lugar de un heredero suyo, no rompe el testamento.

Y están perfectamente estas palabras: «si alguno de los herederos suyos hubiere dejado de ser heredero suyo», las cuales se refieren a todos los casos, que hemos dicho que se han de suplir en la opinión de Galo Aquilio; y no solamente si el nieto falleciese viviendo el padre, no romperá el

tutus sit aut exheredatus.

§ 14.- Videndum, num hac posteriore parte "si quis ex suis heredibus suus heres esse desierit, liberi eius" et cetera "in locum suorum sui heredes succedunt", possit interpretatione induci, ut, si filium apud hostes habens nepotem ex eo heredem instituas, non tantum si vivo te filius decedat, sed etiam post mortem, antequam ab hostibus reversus fuerit, succedendo non rumpet: nihil enim addidit, quo significaret tempus: nisi quod, licet audenter, possis dicere vivo patre hunc suum heredem esse desisse, licet post mortem decedat, quia nec redit nec potest redire.

§ 15.- Ille casus in difficili est, si filium habeas et nepotem nondum natum instituas isque nascatur vivo patre suo ac mox pater decedat: non enim suus heres est tempore quo nascatur nec posteriori alii succedendo prohiberi videtur rumpere quam qui iam natus erit. Denique et superiore capite ut liceat institui nondum natos, qui cum nascentur sui erunt, permitti, posteriore capite non permittit institui, sed vetat rumpi neve ob eam rem minus ratum esset, quod succedit. Porro procedere debet, ut utiliter sit institutus: quod nullo iure potuit qui nondum natus erat. Iuliano tamen videretur duobus quasi capitibus legis commixtis in hoc quoque inducere legem, ne rumpantur testamenta.

§ 16.- Quaeremus tamen, cum recepta est Iuliani sententia, an, si nascatur nepos vivo patre suo, deinde emancipetur, sponte adire possit hereditatem. Quod magis probandum est: nam emancipatione suus heres fieri non potuit.

deceased grandfather does not break the will, but also where he survives his father and then dies, provided he has either been appointed heir, or been disinherited.

§ 14.- It should be considered whether by the words of this last section, namely: "If any of his heirs should cease to be his heir, his children shall become heirs in his stead", are susceptible of the interpretation that if, having a son in the hands of the enemy, you appoint your grandson by said son your heir, not only if your son should die during your lifetime, but even after your death and before he returns from captivity, he does not break the will by the succession, for the testator added nothing by which the time might be indicated, unless you may rather rashly hold that he has ceased to be a lawful heir during the lifetime of his father (although he died after the death of the latter), because he did not and could not return.

§ 15.- The following case is a difficult one. If you have a son and you appoint your grandson, who is not yet born, your heir, and the latter is born during the life of his father, and then his father dies, he is not his heir at the time when he was born, nor afterwards, for by his succession he who has already been born is held to be forbidden to break the will. Hence, by the first section of the law, those children are permitted to be appointed heirs who are as yet unborn, and who, after they are born, will be proper heirs. By the second section, their appointment is not permitted, but the law forbids them to break the will; nor on this account should the second section be considered of inferior importance. However, the child who was not yet born at the time he was appointed should take the place of his father (which in fact he could not do by law), just as if he had been legally appointed. Julianus, however, held that the two confused sections of the law might be reconciled in such a way as to prevent wills from being broken.

§ 16.- After adopting the opinion of Julianus, let us, however, examine whether if a grandson is born during the lifetime of his father, and is subsequently emancipated, he can voluntarily enter upon the estate. This opinion should be approved, for a party cannot become a proper heir by emancipation.

testamento el bisnieto sucediendo al abuelo fallecido, sino tampoco si sobrevivió a su padre, y falleciese, con tal que haya sido instituido heredero, o desheredado.

§ 14.- Se ha de ver, si en esta última. parte: «si alguno de los herederos suyos hubiere dejado de ser heredero suyo, sucedan en lugar de los herederos suyos sus hijos, etcétera, como herederos suyos», se pueda inducir por interpretación, que, si teniendo un hijo en poder de los enemigos instituyeras heredero a un nieto habido de él, no rompa, sucediendo, el testamento, no solamente si el hijo falleciera viviendo tú, sino también después de tu muerte, antes que hubiere vuelto de poder de los enemigos; porque no añadió nada con lo que significase el tiempo, a no ser que, aunque atrevidamente, puedas decir que éste dejó de ser heredero suyo viviendo el padre, aunque fallezca después de la muerte, porque ni vuelve, ni puede volver.

§ 15.- Es difícil este caso, si tuvieras un hijo, e instituyeras a un nieto no nacido todavía, y éste naciera viviendo su padre, y después falleciera su padre; porque no es heredero suyo al tiempo en que nace, ni en el posterior parece que se prohíbe que sucediendo a otro rompa el testamento, más que el que ya hubiere nacido. Finalmente, también en el capítulo primero permite que sea lícito que se instituya a los que aún no han nacido, que, cuando nacerán, serán herederos suyos; y en el segundo capítulo no permite que sean instituidos, sino que veda que se rompa el testamento, o que por esta razón sea menos válido lo que sucede. Debe, pues, ser lo procedente, que sea útilmente instituido, porque no pudo serlo por ningún derecho el que aún no había nacido. Mas a Iuliano le parece, que, combinados los dos casi capítulos de la ley, la ley lleva también a esto, a que no se rompan los testamentos.

§ 16.- Pero preguntaremos, habiendo sido admitida la opinión de Iuliano, si en el caso de que nazca el nieto viviendo su padre, y después sea emancipado, podrá adir espontáneamente la herencia; lo que más bien se ha de admitir, porque no pudo por razón de la emancipación hacerse heredero suyo.

30.- GAIUS; *libro XVII ad edictum provinciale*.- Inter cetera, quae ad ordinanda testamenta necessario desiderantur, principale ius est de liberis heredibus instituendis vel exheredandis, ne praeteritis istis rumpatur testamentum: namque filio qui in potestate est praeterito inutile est testamentum.

31.- PAULUS; *libro II ad Sabinum*.- Dum apud hostes est filius, pater iure fecit testamentum et recte eum praeterit, cum, si in potestate esset filius, nihil valitum esset testamentum.

32.- MARCIANUS; *libro II regularum*.- Si filio emancipato exheredato is qui in potestate est praeteritus sit, ipse quidem emancipatus si contra tabulas petat, nihil agit, ab intestato autem et suus et emancipatus venient.

TIT. III

DE INIUSTO RUPTO IRRITO FACTO
TESTAMENTO

1.- PAPINIANUS; *libro I definitionum*.- Testamentum aut non iure factum dicitur, ubi sollemnia iuris defuerunt: aut nullius esse momenti, cum filius qui fuit in patris potestate praeteritus est: aut rumpitur alio testamento, ex quo heres existere poterit, vel adgnatione sui heredis: aut in irritum constituitur non adita hereditate.

2.- ULPIANUS; *libro II ad Sabinum*.- Tunc autem prius testamentum rumpitur, cum posterius rite perfectum est, nisi forte posterius vel iure militari sit factum vel in eo scriptus est qui ab intestato venire potest: tunc enim et posteriore non perfecto superius rumpitur.

30.- GAIUS; *On the Provincial Edict, Book XVII*.- Among other things which are necessarily provided for in the execution of wills, one of the most important has reference to the appointment or disinheritance of children as heirs; lest, they having been passed over, the will may be broken; for a will is void where a son who is under paternal control is passed over.

31.- PAULUS; *On Sabinus, Book II*.- Where a son is a captive in the hands of the enemy, his father can legally make a will and pass him over; but if the son was under paternal control, the will will be void.

32.- MARCIANUS; *Rules, Book II*.- Where a son has been disinherited after his emancipation, and another, who is under the control of the father, is passed over, and the one who is emancipated contests the will, his act will be void; for both the proper heir and the son who is emancipated will be entitled to the succession ab intestato.

TITLE III

CONCERNING ILLEGAL, INVALID, AND
BROKEN WILLS

1.- PAPINIANUS; *Definitions, Book I*.- A will is said not to have been executed in compliance with the law, where the legal formalities are lacking; or to be of no force and effect, where a son who is under the control of his father is passed over; or broken by another subsequent will, when by the terms of the latter, an heir is created, or the birth of a proper heir takes place; or where it does not become operative because the estate is not entered upon.

2.- ULPIANUS; *On Sabinus, Book II*.- Hence, a first will is broken when a second one is properly executed, unless the latter has been executed in accordance with military law, or where the testator stated therein who would be entitled to succeed ab intestato; for, in this instance, the first will is broken by the second, although it may not be perfect.

30.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- Entre las demás, que necesariamente se requieren para formalizar los testamentos, es la principal formalidad legal la de instituir herederos a los descendientes, o desheredarlos, para que, preteridos éstos, no se rompa el testamento porque preterido el hijo que está bajo potestad, es inútil el testamento.

31.- PAULO; *Comentarios a Sabino, libro II*.- Mientras el hijo está en poder de los enemigos, el padre hizo legalmente testamento, y lo preterió debidamente, porque, si el hijo hubiese estado en su potestad, no habría de ser válido su testamento.

32.- MARCIANO; *Reglas, libro II*.- Si desheredado el hijo emancipado hubiera sido preterido el que está bajo potestad, el mismo emancipado no hace ciertamente cosa alguna, si reclamara contra el testamento, sino que sucederán abintestato el heredero suyo y el emancipado.

TÍTULO III

DEL TESTAMENTO INJUSTO, ROTO,
O QUE SE HIZO ÍRRITO

1.- PAPINIANO; *Definiciones, libro I*.- Se dice que un testamento o no fue hecho con arreglo a derecho, cuando faltaron las solemnidades de derecho, o no es de valor alguno, cuando fue preterido el hijo que estaba bajo la potestad del padre, o se rompe por otro testamento, en virtud del cual podrá haber heredero, o por la agnación de un heredero suyo, o se hace írrito no habiendo sido adida la herencia.

2.- ULPIANO; *Comentarios a Sabino, libro II*.- Mas se rompe el primer testamento, cuando el posterior fue hecho con arreglo a derecho, a no ser acaso o que el posterior haya sido hecho según el derecho militar, o que en él haya sido instituido el que puede suceder abintestato; porque entonces, aún no habiéndose perfeccionado el posterior, se rompe el

3.- ULPIANUS; *libro III ad Sabinum*.- Postumi per virilem sexum descendentes ad similitudinem filiorum nominatim exheredandi sunt, ne testamentum adgnascendo rumpant.

§ 1.- Postumos autem dicimus eos dumtaxat, qui post mortem parentis nascuntur, sed et hi, qui post testamentum factum in vita nascuntur, ita demum per legem Velleam [Vellaeam] rumpere testamentum prohibentur, si nominatim sint exheredati.

§ 2.- Unde etiam ante heredis institutionem vel inter medias heredum institutiones vel inter gradus exheredari possunt: nam divus Marcus decrevit idem in postumo quod in filio servandum, nec ratio diversitatis reddi potest.

§ 3.- Ex his apparet aliam causam esse filiorum superstitum, aliam posteriorum: illi iniustum faciunt, hi rumpunt, illi semper, hi, si nascantur nec inveniant se exheredatos.

§ 4.- Sed et si sit ante hoc aliud testamentum, a quo postumus exheredatus sit, placet, sive post mortem testatoris nascatur sive vivo testatore, utrumque ruptum esse et superius per inferius et inferius per postumum.

§ 5.- Nominatim autem exheredatus postumus videtur, sive ita dixerit: "quicumque mihi nasceretur", sive ita: "ex Seia", sive ita: "venter exheres esto". Sed et si dixerit: "postumus exheres esto", natus vel post mortem vel vivo testatore non rumpet.

§ 6.- Licet autem postumus praeteritus adgnascendo rumpat, tamen interdum evenit, ut pars testamenti rumpatur: ut puta si proponas a primo gradu postumum exheredatum, a secundo praeteritum: nam hic primus gradus valet, secundus ruptus est.

3.- THE SAME; *On Sabinus, Book III*.- Posthumous children who descend through the male sex are disinherited by name, just in the same way as the living children of the testator, unless they break the will by their birth.

§ 1.- We only style those children "posthumous" who are born after the death of their father; those who are born after the execution of the will are, in accordance with the Lex Velleia, forbidden to break the will, where they are disinherited by name.

§ 2.- Wherefore, children can be also disinherited either before the appointment of an heir, or between the appointment of several heirs, or between the different degrees of inheritance; for the Divine Marcus decreed that the same rule should be observed with reference to a posthumous child, as in the case of a living one, since no reason for establishing a difference can be given.

§ 3.- From these matters it is apparent that a difference exists between living children and those subsequently born. The former always render the will illegal, the latter break it, and when they are born do not find themselves disinherited.

§ 4.- Where a former will by which a posthumous child is disinherited exists, it is established that it is broken, whether the child is born after the death of the testator, or during his lifetime; the first one is broken by the second, and the second by the birth of the posthumous child.

§ 5.- A posthumous child is also considered to be expressly disinherited where the testator says: "Let any child whosoever that is born to me be disinherited, whether it has been brought forth by Seia, or whether it is still unborn." If, however, he should say: "Let my posthumous child be disinherited"; and it is born either after the death, or during the life of the testator, it will not break the will.

§ 6.- However, even though a posthumous child who has been passed over breaks a will by its birth, still, it sometimes happens that only a portion of the will is broken; as, for example, where the posthumous child was disinherited in the first degree, and passed over in the second; for in this instance the

anterior.

3.- EL MISMO; *Comentarios a Sabino, libro III*.- Los póstumos que descienden por sexo viril han de ser desheredados nominalmente a semejanza que los hijos, para que al nacer no rompan el testamento.

§ 1.- Pero llamamos póstumos solamente a los que nacen después de la muerte del ascendiente; pero aun los que nacen en vida del testador después de hecho el testamento se prohíbe por la ley Velleia que rompan el testamento, solo en el caso de que hayan sido nominativamente desheredados.

§ 2.- Por lo cual, pueden ser desheredados también antes de la institución de heredero, o entre las instituciones de herederos intermedias, o entre los grados; porque el Divino Marco decretó, que lo mismo se ha de observar respecto a un póstumo, que respecto a un hijo; y ni se puede dar razón de la diversidad.

§ 3.- Resulta de esto, que una es la causa de los hijos sobrevivientes, y otra la de los posteriores; aquellos hacen injusto el testamento, estos lo rompen; aquellos siempre, estos, si nacieron, y no se encontrasen desheredados.

§ 4.- Pero también si antes de este hubiera otro testamento, por el cual hubiera sido desheredado el póstumo, se determina, que ya si naciera después de la muerte del testador, ya si en vida del testador, se rompieron ambos, el anterior por el posterior, y el posterior por el póstumo.

§ 5.- Mas se considera que el póstumo fue desheredado nominalmente, si el testador hubiere dicho así: «cualquiera que me naciese», o así: «de Seia», o así: «el que está en el vientre sea desheredado»; pero también si hubiere dicho: «el póstumo sea desheredado», el que nació o después de la muerte, o viviendo el testador, no romperá el testamento.

§ 6.- Mas aunque el póstumo preterido rompa al nacer el testamento, sin embargo, a veces sucede, que se rompe parte del testamento, por ejemplo, si dijeras que el póstumo fue desheredado en el primer grado, y preterido en el segundo; porque en este caso el primer grado es válido, y el segundo se rompió, (pero ambas

4.- ULPIANUS; *libro IV disputationem*.- Denique et deliberantibus primo gradu scriptis heredibus qui secundo gradu scripti sunt heredes optinere hereditatem non possunt: gradu enim rupto et infirmato amplius hereditas inde optineri non potest.

5.- ULPIANUS; *libro III ad Sabinum*.- Nam et si sub condicione sit heres institutus quis, a quo postumus non est exheredatus, tamen pendente condicione rumpitur gradus, ut et Iulianus scripsit: sed et si sit ei substitutus quis, etiam deficiente condicione primi gradus non admittetur substitutus, a quo scilicet postumus exheredatus non est.

Puto igitur existente quidem condicione primi gradus postumo potius locum fore: post defectum autem condicionis natus postumus gradum non rumpit, quia nullus est. Rumpendo autem testamentum sibi locum facere postumus solet, quamvis filius sequentem gradum, a quo exheredatus est, patiat valere. Sed si a primo gradu praeteritus, a secundo exheredatus sit, si eo tempore nascatur postumus, quo aliquis ex institutis vixit, totum testamentum ruptum est: nam tollendo primum gradum, sibi locum faciet.

6.- ULPIANUS; *libro X ad Sabinum*.- Si quis filio exheredato nuru praegnate relicta decesserit et extraneum sub condicione instituerit et pendente condicione post mortem patris vel deliberante herede instituto de adeunda hereditate exheredatus filius decesserit et nepos fuerit natus, an rumpat testamentum? Et dicemus testamentum non rumpi, cum nec exheredari huiusmodi nepos deberet ab avo,

appointment in the first degree will be valid, if that in the second is void.

4.- THE SAME; *Disputations, Book IV*.- Then, if the heirs appointed in the first degree deliberate as to the acceptance of the estate, those appointed in the second degree cannot obtain it, because the second degree being broken and weakened, the estate can no longer be acquired from that source.

5.- THE SAME: *On Sabinus, Book III*.- Where anyone is appointed an heir under some condition, by which a posthumous child is not disinherited, still, the degree is broken while the condition is pending, as Julianus stated. But when someone is substituted, even where the condition upon which the appointment in the first degree depends is not fulfilled, the substituted heir will not be admitted to the succession from which the posthumous heir has not been disinherited.

I think, therefore, that if the condition of the appointment under the first degree is complied with, the posthumous heir will have the preference. However, the birth of the posthumous child, after failure to comply with the condition, does not destroy the appointment in the first degree, because the latter becomes null and void. By breaking the will, the posthumous child makes a place for himself, even though the son causes the second degree from which he was disinherited to become valid. Where, however, the posthumous child who was passed over in the first degree and disinherited in the second is born at the time when one of the appointed heirs is living, the entire will is broken; for, by destroying the first degree, he makes a place for himself in the succession.

6.- THE SAME; *On Sabinus, Book X*.- Where anyone, after having disinherited his son, dies, leaving his daughter-in-law pregnant, and appoints a stranger his heir under some condition, and while the condition is pending and after the death of the father, or while the heir is deliberating as to whether or not he will enter upon the estate, the disinherited son should die, and a grandson should be born, will this

cosas).

4.- EL MISMO; *Disputas, libro IV*.- Finalmente deliberando los herederos instituidos en el primer grado, los que fueron instituidos herederos en el segundo grado no pueden obtener la herencia; porque roto e invalidado el grado, no se puede obtener ya en virtud de él la herencia.

5.- EL MISMO; *Comentarios a Sabino, libro III*.- Porque también si alguno hubiera sido instituido heredero bajo condición, por quien no fue desheredado el póstumo, se rompe, sin embargo, el grado estando pendiente la condición, como escribió también Juliano. Pero también si a él le hubiera sido sustituido uno, faltando la condición del primer grado tampoco será admitido el sustituto, por quien ciertamente no fue desheredado el póstumo.

Opino, pues, que cumpliéndose ciertamente la condición del primer grado, habrá lugar preferentemente para el póstumo, pero que el póstumo nacido después de haber faltado la condición no rompe el grado, porque no hay ninguno. Mas rompiendo el testamento suele el póstumo hacerse lugar para sí, aunque el hijo permita que sea válido el siguiente grado, del cual fue desheredado. Pero si preterido en el primer grado hubiera sido desheredado en el segundo, si el póstumo naciera a tiempo en que vivió alguno de los instituidos, se rompió todo el testamento; porque se hace para sí lugar suprimiendo el primer grado.

6.- EL MISMO; *Comentarios a Sabino, libro X*.- Si alguno hubiere fallecido habiendo desheredado a su hijo quedando embarazada la nuera, y hubiere instituido a un extraño bajo condición, y pendiente la condición después de la muerte del padre, o deliberando el heredero instituido sobre adir la herencia, hubiere fallecido el hijo desheredado, y hubiere nacido el nieto, ¿romperá acaso el testamento? Y

quem pater praecedebat.

Plane si forte institutus omiserit hereditatem, hunc avo suum futurum heredem ab intestato non dubitatur. Utrumque propriis rationibus: nam adgnascendo quidem is rumpit quem nemo praecedebat mortis tempore: ab intestato vero is succedit cui ante eum alii non est delata hereditas, non fuisse autem filio delatam hereditatem apparet, cum deliberante instituto decesserit. Sed haec ita, si mortis avi tempore in utero nepos fuit. Ceterum si postea conceptus est, Marcellus scribit neque ut suum neque ut nepotem aut cognatum ad hereditatem vel ad bonorum possessionem posse admitti.

§ 1.- Sed si pater eius, qui mortis avi tempore in utero fuit, apud hostes erat, nepos iste patre in eadem causa decedente post mortem avi succedendo testamentum rumpit, quia supra scripta persona ei non obstat: nec enim creditur in rebus humanis fuisse, cum in ea causa decedat, quamquam captivus reversus patris sui iniustum faceret testamentum in eo praeteritis.

§ 2.- Sive autem in civitate nepos fuit conceptus sive apud hostes, quoniam datur et partui postliminium, succedendo testamentum rumpit.

§ 3.- Succedendo itaque sui non rumpunt, sive fuerint instituti vel exheredati ab eo gradu ad quem hereditas defertur, scilicet si gradus ille valeat.

§ 4.- Quocumque autem modo parentes praecedentes in potestate esse desierint, succedentes liberi, si fuerint instituti vel exheredati, non rumpunt testamentum, sive per captivitatem sive per mortem vel poenam.

break the will? We say that the will is not broken, as a grandson ought not to be disinherited in this way by his grandfather, who preceded his father in the succession.

It is clear that if the appointed heir should refuse to accept the estate, there can be no doubt that this heir would inherit from his grandfather ab intestato. Both of these cases are founded upon good and sufficient reasons, for a posthumous child breaks a will by his birth, where no one took precedence of him at the time of the death of the testator, and he succeeds ab intestato where the succession has not been granted to anyone before him. It is evident that, in this instance, the succession has not been granted to the son, since he died while the appointed heir was deliberating as to his acceptance of the estate. This, however, is the rule only where the grandson was still unborn at the time of the death of his grandfather; for Marcellus says that if he had been conceived after that time, he could not be admitted to the succession either as a proper heir, a grandson, or a cognate, or would be entitled to praetorian possession of the estate.

§ 1.- Where the father of a grandson who, at the time of the death of the grandfather, was in the hands of the enemy, and died in captivity, the said grandson, by obtaining the succession after the death of his grandfather, breaks the will, because his aforesaid father was not in his way; for, as he died while a captive, he is not considered to have been alive when his grandfather died, and even if the captive father should return, this would render the will of his father illegal, as he had been passed over therein.

§ 2.- If a grandson was either conceived in his own country or among the enemy, as the right of postliminium is also granted to unborn children, the will will be broken by his birth.

§ 3.- Therefore, those who succeed to proper heirs do not break the will, whether they are appointed heirs or disinherited in the degree in which the succession is granted, provided that this is valid.

§ 4.- However, no matter in what way fathers standing first in the succession may cease to be under paternal control, whether through captivity, death, or the infliction of some penalty, their children who succeed them and who are either appointed heirs or

diremos, que no se rompe el testamento, pues ni debería ser desheredado por el abuelo este nieto, a quien le precedía el padre.

Mas si acaso el instituido hubiere dejado de adir la herencia, no se duda que éste habrá de ser abintestato heredero del abuelo. Una y otra cosa por sus propias razones, porque al nacer rompe ciertamente el testamento aquel a quien nadie le precedía al tiempo de la muerte, pero sucede abintestato aquel a quien antes que a él no le fue deferida a otro la herencia; pero aparece que la herencia no le fue deferida al hijo, cuando hubiere fallecido estando deliberando el instituido. Mas esto es así, si el nieto estaba en el vientre al tiempo de la muerte del abuelo; pero si fue concebido después, escribe Marcelo, que no puede ser admitido a la herencia, o a la posesión de los bienes, ni como heredero suyo, ni como nieto o cognado.

§ 1.- Pero si el padre del que estaba en el vientre al tiempo de la muerte del abuelo, se hallaba en poder de los enemigos, este nieto, falleciendo su padre en la misma situación, romperá el testamento sucediendo después de la muerte del abuelo, porque no le obsta la antes mencionada persona; pues ni se cree que existió, falleciendo en ta situación, aunque el cautivo que hubiere regresado haría injusto el testamento de su propio padre habiendo sido preterido en él.

§ 2.- Mas ya si el nieto fue concebido en la ciudad, ya si en poder de los enemigos, como también al parto se le da el postliminio, al suceder rompe el testamento.

§ 3.- Así, pues, los herederos suyos, al suceder, no rompen el testamento, ya si hubieren sido instituidos, ya si desheredados en aquel grado al cual se le defiere la herencia, por supuesto, si aquel grado fuese válido.

§ 4.- Mas de cualquier modo que los ascendientes que preceden hubieren dejado de estar en potestad, los descendientes que suceden, si hubieren sido instituidos o desheredados, no romperán el testamento, ora sea por cautiverio, ora por muerte, o por

§ 5.- Irritum fit testamentum, quotiens ipsi testatori aliquid contigit, puta si civitatem amittat per subitam servitutem, ab hostibus verbi gratia captus, vel si maior annis viginti venum se dari passus sit ad actum gerendum pretiumve participandum.

§ 6.- Sed et si quis fuerit capite damnatus vel ad bestias vel ad gladium vel alia poena quae vitam adimit, testamentum eius irritum fiet, et non tunc cum consumptus est, sed cum sententiam passus est: nam poenae servus efficitur: nisi forte miles fuit ex militari delicto damnatus, nam huic permitti solet testari, ut divus Hadrianus rescripsit, et credo iure militari testabitur. Qua ratione igitur damnato ei testari permittitur, numquid et, si quod ante habuit factum testamentum, si ei permissum sit testari, valeat? An vero poena irritum factum reficiendum est? Et si militari iure ei testandum sit, dubitari non oportet, quin, si voluit id valere, fecisse id credatur.

§ 7.- Eius qui deportatur non statim irritum fiet testamentum, sed cum princeps factum comprobaverit: tunc enim et capite minuitur. Sed et si de decurione puniendo vel filio nepoteve praescribendum principi interlocutus est, non puto statim servum poenae factum, licet in carcere soleant diligentioris custodiae causa recipi. Nec huius igitur testamentum irritum fiet, priusquam princeps de eo supplicium sumendum rescripserit: proinde si ante decesserit, utique testamentum eius valebit, nisi mortem sibi conscivit. Nam eorum, qui mori magis quam damnari maluerint ob conscientiam criminis, testamenta irrita constitutiones faciunt, licet in civitate decedant:

disinherited by a will cannot break it.

§ 5.- A will becomes invalid whenever anything happens to the testator himself; as, for instance, where he loses his civil rights through being suddenly reduced to slavery, for example, where he is captured by the enemy; or where, being over twenty years of age, he permits himself to be sold for the purpose of transacting the business of his purchaser, or to share in his own price.

§ 6.- Where, however, anyone convicted of a capital crime is condemned to be thrown to wild beasts, or to fight as a gladiator, or some other sentence is imposed which will deprive him of life, his will becomes void, not from the time when he suffered punishment, but from the date of his sentence, for he then at once becomes a penal slave; unless, being a soldier, he is convicted of some military offence, for under such circumstances, it is customary for him to be permitted to make a will, as the Divine Hadrian stated in a Rescript; and I think that he can make one in accordance with military law. On this principle, therefore, as he is allowed, to make a will after his conviction, should one which he had previously executed be held valid, if he was allowed to make it, or should it be considered void on account of the penalty, after it has been made? There can be no doubt that, if he has a right to make a will by military law, and wishes the first will to be valid, he will be considered to have executed it.

§ 7.- The will of a person who has been deported does not immediately become void, but only after the Emperor has confirmed the sentence, for then he who was condemned loses his civil rights. Where, however, the punishment of a Decurion is concerned, or that of his son or grandson, and the Governor refers the case to the Emperor, I do not think that the convicted party becomes at once a penal slave, although it is customary to incarcerate him for safe-keeping. Therefore, his will does not become void before the Emperor issues his decree that he must suffer the punishment. Hence, if he should die before this is done, his will will be valid, unless he takes his own life; for, by the Imperial Constitutions the wills of those who are conscious of their guilt are void, even though they may die while in possession of their civil rights.

pena.

§ 5. - Se hace írrito el testamento siempre que al mismo testador le acontece alguna cosa, como si pierde la ciudadanía por súbita esclavitud, por ejemplo, habiendo sido cogido por los enemigos, o si siendo mayor de veinte años hubiera consentido en ser vendido para llevar una administración o para participar del precio.

§ 6.- Pero también si alguno hubiere sido condeñado a pena capital, o a las fieras, o a los gladiadores, o a otra cualquier pena, que quita la vida, se hará írrito su testamento, y no cuando murió, sino cuando consintió la sentencia; porque se hace esclavo de la pena, a no ser acaso que haya sido militar condeñado por delito militar, porque a éste se le suele permitir que teste, como respondió por rescripto el Divino Adriano; y creo, que testará según el fuero militar. Así, pues, por la razón de que a este condeñado se le permite testar, ¿será acaso válido también el testamento que antes tuvo hecho, si a él se le hubiera permitido testar, o se ha de rehacer habiendo sido hecho írrito por la pena? Y si hubiera de testar según el fuero militar, no se debe dudar que se ha de creer que lo hizo, si quiso que aquel fuera válido.

§ 7.- El testamento del que es deportado no se hará írrito desde luego, sino cuando el Príncipe hubiere aprobado lo hecho; porque entonces también es disminuido de cabeza. Pero si para castigar a un decurión, o a su hijo, o a su nieto, el Presidente determinó escribir al Príncipe, no creo que tampoco se haya hecho desde luego esclavo de la pena, aunque suelen ser llevados a la cárcel por causa de más vigilante custodia; y por lo tanto no se hará írrito su testamento antes que el Príncipe hubiere respondido por rescripto que se ejecute en él el suplicio; por lo cual, si hubiere fallecido antes, será ciertamente válido su testamento, si él no se procuró la muerte. Porque las Constituciones hacen írritos los testamentos de los que por la conciencia de su delito hubieren preferido morir, más bien que ser condeñados, aunque mueran con la ciudadanía.

Quod si quis taedio vitae vel valetudinis adversae impatientia vel iactationis, ut quidam philosophi, in ea causa sunt, ut testamenta eorum valeant. Quam distinctionem in militis quoque testamento divus Hadrianus dedit epistula ad Pomponium Falconem, ut, si quidem ob conscientiam delicti militaris mori maluit, irritum sit eius testamentum: quod si taedio vel dolore, valere testamentum aut, si intestato decessit, cognatis aut, si non sint, legioni ista sint vindicanda.

§ 8.- Hi autem omnes, quorum testamenta irrita damnatione fieri diximus, si provocaverint, capite non minuuntur atque ideo neque testamenta quae antea fecerunt irrita fient et tunc testari poterunt: hoc enim saepissime est constitutum nec videbuntur quasi de statu suo dubitantes non habere testamenti factionem: sunt enim certi status nec ipsi de se interim incerti.

§ 9.- Quid tamen si appellationem eius praeses non recepit, sed imperatori scribendo poenam remoratus est? Puto hunc quoque suum statum interim retinere nec testamentum irritum fieri: nam, ut est oratione divi Marci expressum, tametsi provocantis vel eius pro quo provocatur appellatio non fuerit recepta, poena tamen sustinenda est, quoad princeps rescripserit ad litteras praesidis et libellum rei cum litteris missum, nisi forte latro manifestus vel seditio praerupta factioque cruenta vel alia iusta causa, quam mox praeses litteris excusabit, moram non recipiant, non poenae festinatione, sed praeveniendi periculi causa: tunc enim punire permittitur, deinde scribere.

But where anyone, through weariness of life, or because he is unable to endure the suffering of illness, or through a desire for notoriety commits suicide, as certain philosophers do, this rule does not apply, as the wills of such persons are valid. The Divine Hadrian also made this distinction with reference to the will of a soldier, in a letter addressed to Pomponius Falco, stating that if anyone belonging to the army preferred to kill himself because he was guilty of a military offence, his will shall be void; but if he does so because he is tired of life, or on account of suffering, it will be valid, and if he should die intestate, his property can be claimed by his relatives, or, if he has none, by his legion.

§ 8.- All those persons, whose wills we have stated become void because of their condemnation, do not lose their civil rights if they appeal from the decision of the tribunal; and therefore any wills which they may have previously executed do not become void, and it has very frequently been decided they can still make a will. They are not held to resemble those who are doubtful concerning their condition, and have not testamentary capacity, for they are certain of their condition, and they are only uncertain of themselves while the appeal is pending.

§ 9.- But what if the Governor did not receive the appeal, but delayed the infliction of the penalty until it was confirmed by the Emperor? I think that the party in question would, in the meantime, also preserve his status, and that his will would not become invalid. For (as has been stated in the Address of the Divine Marcus) where an appeal which has been taken by the party directly, or by someone acting for him is not received, the infliction of the penalty must remain in abeyance until the Emperor answers the letter of the Governor and returns his decision together with the letter; unless the accused is a notorious robber, or has been guilty of fomenting sedition, or has perpetrated bloodshed, or where some other good reason exists which can be set forth by the Governor in his letter, and which does not admit of delay, not for the purpose of hastening the punishment, but in order to provide against danger to the community; for, under such circumstances, he is permitted to inflict the penalty and then communicate the facts to the Emperor.

Pero si algunos lo hicieren por tedio de la vida, o por no sufrir una enfermedad, o por jactancia, como algunos filósofos, se hallan en el caso de que sean válidos sus testamentos. Cuya distinción hizo el Divino Adriano también respecto al testamento de un militar en una Epístola dirigida a Pomponio Falcón, para que, si verdaderamente prefirió morir por causa de su conciencia de un delito militar, sea irrito su testamento; pero si por tedio de la vida, o por un dolor, sea válido el testamento, o, si falleció intestado, hayan de ser reivindicados sus bienes por los cognados, o, si no los tuviera, por la legión.

§ 8.- Mas ninguno de estos, cuyos testamentos hemos dicho que se hacen írritos por una condena es disminuido de cabeza, si hubiere apelado; y por lo tanto, ni se harán írritos los testamentos que antes hicieron. Y podrán testar entonces; porque esto se dispuso muchísimas veces, y no se considerará que, como los que dudan de su propio estado no tienen la testamentifacción, porque están ciertos de su estado, y no están ellos interinamente ciertos de sí mismos.

§ 9.- Pero ¿qué diremos, si el Presidente no admitió su apelación, pero retardó la pena escribiendo al Emperador? Opino, que también éste conserva mientras tanto su estado, y que no se hace írrito su testamento; porque, como se expresó en la Oración del Divino Marco, aunque no hubiere sido admitida la apelación del apelante, o de aquel por quien se apela, se ha de suspender sin embargo la pena hasta que el Príncipe haya respondido a la carta del Presidente, y le haya enviado con la carta el escrito del reo, a no ser acaso que tratándose de un ladrón manifiesto, o de una sedición abortada y de una colisión cruenta, o de otra justa causa, que por carta excusó desde luego al Presidente, no admitan dilación, no por apresurar la pena, sino por causa de prevenir un peligro; porque entonces se permite castigar, y escribir después.

§ 10.- Quid si quis fuerit damnatus illicite poena non sumpta, an testamentum eius irritum fiat, videamus: ut puta decurio ad bestias an capite minuatur testamentumque eius irritum fiat? Et non puto cum sententia eum non tenuerit. Ergo et si quis eum, qui non erat iurisdictionis suae, damnaverit, testamentum eius non erit irritum, quemadmodum est constitutum.

§ 11.- Sed ne eorum quidem testamenta rata sunt, sed irrita fient, quorum memoria post mortem damnata est, ut puta ex causa maiestatis, vel ex alia tali causa.

§ 12.- Quatenus tamen diximus ab hostibus capti testamentum irritum fieri, adiciendum est postliminio reversi vires suas recipere iure postliminii aut, si ibi decedat, lege Cornelia confirmari. Ergo et si quis damnatus capite in integrum indulgentia principis sit restitutus, testamentum eius convalescet.

§ 13.- Filii familias veterani sui iuris morte patris facti testamentum irritum non fieri constat: nam quantum ad testandum de castrensi peculio pro patre familias habendus est, et ideo nec emancipatione irritum fieri militis vel veterani testamentum verum est.

7.- ULPIANUS; *libro X ad Sabinum*.- Si miles iure civili testamentum fecerit et primo gradu heredem eum scripserit quem iure militari poterat, secundo eum quem communi iure potest, et post annum missionis decesserit, primus gradus irritus fiet et a secundo incipiet testamentum.

8.- ULPIANUS; *libro XI ad Sabinum*.- Verum est adoptione vel adrogatione filii filiaeque testamentum

§ 10.- Let us see where someone has been illegally condemned and the penalty has not been inflicted, whether his will will be invalid. Suppose, for instance, that a decurion has been sentenced to be thrown to wild beasts, will he lose his civil rights, and will his testament become void? I do not think that this will be the case, as the sentence cannot legally bind him. Therefore, where a magistrate finds someone guilty who is not subject to his jurisdiction, his will will not be void, as has been frequently decided.

§ 11.- The wills of those whose memory is condemned after their death, for example, on account of high treason, or some similar offence, are invalid.

§ 12.- With reference, however, to what we have stated, namely, that the will of anyone captured by the enemy becomes invalid, it must be added that the will regains its validity through the right of postliminium, if the testator should return; or if he dies while in captivity, it is confirmed by the Lex Cornelia. Therefore, where anyone is convicted of a capital crime, and is restored to his civil rights through the indulgence of the Emperor, his will again becomes valid.

§ 13.- It has been settled that the will of a son under paternal control who has served his time in the army, and has become his own master through the death of his father, is not void; for when a son disposes of his castrense peculium by will, he must be considered as the head of a household, and therefore it is certain that the will of a soldier or a veteran does not become void by his emancipation.

7.- ULPIANUS; *On Sabinus, Book X*.- If a soldier should make a will in accordance with the Civil Law, and appoint an heir in the first degree, which he is entitled to do under military law, and in the second degree should substitute someone as heir which he can do by the Common Law, and should die a year after his discharge, the first degree becomes invalid, and the will commences with the second.

8.- THE SAME; *On Sabinus, Book XI*.- It is true that a will is broken by either the adoption or the

§ 10.- Veamos, ¿qué se dirá, si alguno hubiere sido condenado ilícitamente, pero no se hubiera ejecutado la pena, se hará irrito su testamento; por ejemplo, condenado un decurión a las fieras, será disminuido de cabeza, y se hará irrito su testamento? Y no lo creo, no habiéndole obligado la sentencia. Luego también si alguno hubiere condenado al que no era de su jurisdicción, su testamento no será irrito, según se halla establecido.

§ 11.- Pero tampoco ciertamente son válidos, sino que se harán irritos, los testamentos de aquellos cuya memoria fue condenada después de su muerte, por ejemplo, por causa de lesa majestad, o por otra causa semejante.

§ 12.- Mas en cuanto a lo que hemos dicho, que se hace irrito el testamento del que fue cogido por los enemigos, se ha de añadir, que por derecho de postliminio recobra su vigor el del que regresó por el postliminio, o que si allí fallecieran estos, se confirman por la ley Cornelia. Luego también si condenado alguno a pena capital hubiera sido restituido por entero por indulgencia del Príncipe, se convalidará su testamento.

§ 13.- Es sabido que no se hace irrito el testamento del hijo de familia, veterano, que con la muerte de su padre se hizo de propio derecho; porque, en cuanto a testar de su peculio castrense, ha de ser tenido como padre de familia, y por esto es verdad que tampoco por la emancipación se hace irrito el testamento del militar o del veterano.

7.- ULPIANO; *Comentarios a Sabino, libro X*.- Si un militar hubiere hecho testamento por derecho civil, y en primer grado hubiere instituido heredero a quien podía por derecho militar, y en, segundo al que puede por derecho común y hubiere fallecido después de un año de su licenciamiento, se hará irrito el primer grado, y el testamento empezará desde el segundo.

8.- EL MISMO; *Comentarios a Sabino, libro XI*.- Es verdad que por la adopción o la adrogación de un

rumpi, quoniam sui heredis adgnatione solet rumpi.

§ 1.- *Filia cum emancipatur vel nepos, quia una mancipatione exeunt de potestate, testamentum non rumpunt.*

9.- PAULUS; *libro II ad Sabinum*.- Si pater ab hostibus capiatur filio manente in civitate, reverso eo non rumpitur testamentum:

10.- PAULUS; *libro I ad Vitellium*.- Sed nec filius postliminio rediens rumpit patris testamentum, ut Sabinus existimavit.

11.- ULPIANUS; *libro XLVI ad edictum*.- Si binae tabulae proferantur diversis temporibus factae, unae prius, aliae [alia] postea, utraque tamen septem testium signis signatae, et apertae posteriores vacuae inventae sint, id est nihil scriptum habentes omnino, superius testamentum non est ruptum, quia sequens nullum est.

12.- ULPIANUS; *libro IV disputationem*.- Postumus praeteritus vivo testatore natus decessit: licet iuris scrupulositate nimisque subtilitate testamentum ruptum videatur, attamen, si signatum fuerit testamentum, bonorum possessionem secundum tabulas accipere heres scriptus potest remque optinebit, ut et divus Hadrianus et imperator noster rescripserunt, idcircoque legatarii et fideicommissarii habebunt ea, quae sibi relicta sint, securi. Idem et circa iniustum et irritum testamentum erit dicendum, si bonorum possessio data fuerit ei, qui rem ab intestato auferre possit.

§ 1.- Si paganus, qui habebat iam factum testamentum, aliud fecisset et in eo comprehendisset fidei heredis committere, ut priores tabulae valerent, omnimodo prius testamentum ruptum est: quo rupto potest quaeri, an vice codicillorum id valere deberet. Et cum haec verba sint fideicommissi, et sine dubio

arrogation of a son or a daughter, just as it is ordinarily broken by the birth of an heir.

§ 1.- Where a daughter and a grandson are emancipated, this does not break a will, because they are released from paternal control by a single sale.

9.- PAULUS; *On Sabinus, Book II*.- Where a father is taken captive by the enemy, and his son retains his citizenship, the father's will is not broken by his return.

10.- THE SAME; *On Vitellius, Book I*.- Nor does a son returning from captivity break the will of his father through the right of postliminium, which is the opinion held by Sabinus.

11.- ULPIANUS; *On the Edict, Book XLVI*.- Where two wills executed at different times are produced, and each of them is sealed with the seals of seven witnesses, and the last one, having been opened, is found to be blank, that is, without any writing whatsoever, the first will is not broken for the reason that the second one is void.

12.- THE SAME; *Disputations, Book IV*.- A posthumous child, having been passed over, was born and died during the lifetime of the testator. Although by strict construction of the law, and by the employment of excessive subtlety, the will may be held to be broken, still, if it was properly sealed, the heir who was entitled to the possession of the estate in accordance with the terms of the will will acquire it; as the Divine Hadrian and Our Emperor stated in Rescripts. For this reason the legatees, as well as the beneficiaries of the trust, will be secure in the possession of whatever has been left to them. The same must be said with reference to a will improperly executed, or one which is void, where the possession of the estate was granted to him who could have obtained it ab intestato.

§ 1.- Where a civilian who had already made one will makes another, and provides in the latter that the heir shall be entrusted with the execution of the first will, the first is unquestionably broken. Having been broken, it may be asked whether it should not be valid as a codicil. Since the words of the testator in the

hijo o de una hija se rompe el testamento, porque suele romperse por la agnación de un heredero suyo.

§ 1.- La hija, o el nieto, cuando son emancipados, como que con una sola emancipación salen de la potestad, no rompen el testamento.

9.- PAULO; *Comentarios a Sabino, libro II*.- Si el padre fuera cogido por los enemigos, permaneciendo su hijo con la ciudadanía, con el regreso de aquél no se rompe el testamento.

10.- EL MISMO; *Comentarios a Vitelio, libro I*.- Pero el hijo que vuelve por el derecho de postliminio tampoco rompe el testamento del padre, como juzgó Sabino.

11.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Si se presentaran dos testamentos hechos en diversos tiempos, uno antes, y otro después, pero sellados ambos con los sellos de los siete testigos, y abierto el posterior se hallara vacío, esto es, sin tener absolutamente nada escrito, no se rompió el anterior testamento, porque es nulo el segundo.

12.- EL MISMO; *Disputas, libro IV*.- Falleció un póstumo preterido que nació viviendo el testador; aunque por escrupulosidad y demasiada sutileza del derecho se considere roto el testamento, sin embargo, si hubiere sido sellado el testamento, el heredero instituido puede recibir la posesión de los bienes con arreglo al testamento, y obtendrá la herencia, como respondieron por rescripto el Divino Adriano y nuestro Emperador. Y por lo tanto, los legatarios y los fideicomisarios tendrán con seguridad lo que se les haya dejado. Lo mismo se habrá de decir también en cuanto a un testamento injusto e irrito, si se le hubiere dado la posesión de los bienes al que pudiera apoderarse de los bienes abintestato.

§ 1.- Si el paisano, que ya tenía hecho testamento, hubiese hecho otro, y en este hubiese consignado, que encomendaba a la fidelidad del heredero que fuese válido el anterior testamento, quedó roto en absoluto el anterior testamento; roto el cual, puede preguntarse, si debería valer este por vía de codicilo.

universa, quae illic scripta sunt, in causa fideicommissi erunt, non solum legata et fideicommissa, sed et libertates et heredis institutio.

13.- GAIUS; *libro II institutionum*.- Postumorum loco sunt et hi, qui in sui heredis loco succedendo quasi adgnascendo fiunt parentibus sui heredes. Ut ecce si filium et ex eo nepotem neptemve in potestate habeam, quia filius gradu praecedit, is solus iura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sint: sed si filius meus me vivo morietur aut qualibet ratione exeat de potestate mea, incipit nepos neptisve in eius loco succedere et eo modo iura suorum heredum quasi adgnatione nanciscuntur. Ne ergo eo modo rumpat mihi testamentum, sicut ipsum filium vel heredem instituere vel exheredare nominatim debeo, ne non iure faciam testamentum, ita et nepotem neptemve ex eo necesse est mihi vel heredem instituere vel exheredare, ne forte me vivo filio mortuo succedendo in locum eius nepos neptisve quasi adgnatione rumpat testamentum: idque lege Iunia Vellea provisum est.

14.- PAULUS; *libro singulari de adsignatione libertorum*.- Si ita facta sit exheredatio: "si filius natus natave sit, exheres esto", utrisque natis non rumpitur testamentum.

15.- IAVOLENUS; *libro IV epistularum*.- Qui uxorem praegnatam habebat, in hostium potestatem pervenit: quaero, filio nato quo tempore testamentum in civitate factum rumpatur? Et si filius ante morietur quam pater, an scripti heredes hereditatem habituri sint? Respondi: non puto dubium esse, quin per legem Corneliam, quae de confirmandis eorum testamentis, qui in hostium potestate decessissent, lata est, nato filio continuo eius testamentum, qui in

second will refer to a trust, undoubtedly all matters therein contained relate to a trust, not only the legacies and the property left to be administered in a fiduciary capacity but also all manumissions, as well as the appointment of an heir.

13.- GAIUS; *Institutes, Book II*.- Those also are included among posthumous children who, by succeeding to the place of proper heirs, through their birth become the lawful heirs of their parents. For instance, if I have a son, and a grandson or a granddaughter born to him, all under my control, as the son takes precedence by a degree in the succession, he alone has the right of a direct heir, even though the grandson and granddaughter, who are his children, are also under my control. If, however, my son should die during my lifetime, or, for any reason whatsoever, should be released from my control, the said grandson and granddaughter will take his place in the succession, and in that way their rights as direct heirs will be acquired, as it were by birth, but my testament will not be broken in this way, just as if I should appoint or disinherit my son as my heir; nor can I legally make a will in such a way that it will become necessary for me to appoint as heir, or disinherit my grandson or my granddaughter, unless my son having died during my lifetime, and my grandson or granddaughter having taken his place in the succession, should break the will, just as is done by birth; and this the Lex Julia Velleia provided for.

14.- PAULUS; *Concerning the Assignment of Freedmen*. Where disinheritance is expressed as follows: "If a male or female child should be born, let it be disinherited"; and both are born, the will is not broken.

15.- JAVOLENUS; *Epistles, Book IV*.- A man whose wife was pregnant fell into the hands of the enemy. I ask where a son was born, at what time the will executed by the testator, who was there in the enjoyment of his civil rights, was broken, and if the son should die before the father, whether the testamentary heirs will be entitled to the estate. I answered that I did not think that there could be any doubt, in accordance with the Cornelian Law, which

Y como quiera que estas palabras sean de fideicomiso, estará también sin duda en la condición de fideicomiso todo lo que ahí está escrito, no solamente los legados y los fideicomisos, sino también las libertades, y la institución de heredero.

13.- GAYO; *Instituta, libro II*.- Están en el lugar de póstumos también los que, sucediendo en lugar de un heredero suyo, se hacen por agnación herederos suyos de los ascendientes, como por ejemplo, si yo tuviera bajo mi potestad un hijo, y un nieto o una nieta habidos de él, como el hijo precede en grado, este solo tiene los derechos de heredero suyo, aunque también el nieto y la nieta habidos de aquél se hallen bajo la misma potestad; pero si mi hijo muriese viviendo yo, o por cualquiera otra razón saliese de mi potestad, comienza el nieto o la nieta a suceder en su lugar, y de este modo adquieren como por agnación los derechos de herederos suyos. Luego para que de este modo no me rompa el testamento, así como debo o instituir heredero, o desheredar nominalmente, a mi mismo hijo, para no hacer el testamento contra derecho, así también me es necesario o instituir heredero, o desheredar, al nieto o a la nieta habidos de él, no sea que muerto mi hijo, viviendo yo, y sucediendo en su lugar el nieto o la nieta, rompa como por agnación el testamento; y esto se determinó por la ley Junia Vellea.

14.- PAULO; *De la asignación de los libertos, libro único*.- Si la desheredación hubiera sido hecha de este modo: «si hubiera nacido un hijo o una hija sea desheredado», no se rompe el testamento habiendo nacido ambos.

15.- JAVOLENO; *Epístolas, libro IV*.- Uno que tenía embarazada la mujer, cayó en poder de los enemigos; pregunto, habiendo nacido el hijo, ¿en qué tiempo se romperá el testamento hecho en la ciudad; y si el hijo muriese antes que el padre, habrán de tener la herencia los herederos instituidos? Respondí, que no creo que haya duda, de que por la Ley Cornelia, que se dio para confirmar los testamentos de, los que hubiesen fallecido en poder de los enemigos, se

hostium potestate sit, rumpatur: sequitur ergo, ut ex eo testamento hereditas ad neminem perveniat.

16.- POMPONIUS; *libro II ad Quintum Mucium*.- Cum in secundo testamento heredem eum qui vivit instituimus sive pure sive sub condicione (si tamen condicio existere potuit, licet non exstiterit), superius testamentum erit ruptum. Multum autem interest, qualis condicio posita fuerit: nam aut in praeteritum concepta ponitur aut in praesens aut in futurum: in praeteritum concepta ponitur veluti "si Titius consul fuit": quae condicio si vera est, id est si Titius consul fuit, ita est institutus heres, ut superius testamentum rumpatur [rumpatur]: tum enim ex hoc heres esset. Si vero Titius consul non fuit, superius testamentum non est ruptum.

Quod si ad praesens tempus condicio adscripta est herede instituto, veluti "si Titius consul est", eundem exitum habet, ut, si sit, possit heres esse et superius testamentum rumpatur, si non sit, nec possit heres esse nec superius testamentum rumpatur.

In futurum autem collatae condiciones si posibles sunt, existere potuerunt, licet non exstiterint, efficiunt, ut superius testamentum rumpatur, etiamsi non exstiterint: si vero impossibiles sunt, veluti "Titius si digito caelum tetigerit, heres esto", placet perinde esse, quasi condicio adscripta non sit, quae est impossibilis.

17.- PAPINIANUS; *libro V responsorum*.- Filio praeterito qui fuit in patris potestate neque libertates competunt neque legata praestantur, si praeteritus fratribus partem hereditatis avocavit: quod si bonis se patris abstinuit, licet suptilitas iuris refragari videtur, attamen voluntas testatoris ex bono et aequo

was enacted for the confirmation of the wills of those who died while in captivity, that, if a son was born, the will of a testator who was in the hands of the enemy would be broken. It follows, therefore, that the estate will belong to no one by this will.

16.- POMPONIUS; *On Quintus Mucius, Book II*.- When in the second will we appoint an heir who is living, whether this is done either absolutely or conditionally, and the condition can be fulfilled even though this may not take place, the first will is broken. It makes a great deal of difference, however, what the imposed condition was; for everyone that can be conceived has reference either to the past, the present, or the future. One is imposed with reference to the past, for instance: "If Titius has been consul"; and if this condition is true (that is to say if Titius has actually been consul), the heir will be appointed in such a way that the first testament will be broken, for he becomes the heir for this reason. If, however, Titius has not been consul, the former testament will not be broken.

Where the condition imposed with reference to the appointment of an heir relates to the present time, as for instance: "If Titius is consul"; the result will be the same, so that, if he is consul, the party can become the heir, and the former testament will be broken. But if he is not consul, the party cannot become the heir, and the former testament will not be broken.

If conditions are imposed with reference to a future time, and they are possible and can be fulfilled, even though they may not take place, they cause the former will to be broken. Where, however, they are impossible, as, for example, "Let Titius be my heir if he has touched the sky with his finger", it is held that this condition is just as if it had not been prescribed, as it is impossible.

17.- PAPINIANUS; *Opinions, Book V*.- Where a son who was under his father's control has been passed over, no manumissions or legacies granted by the will are valid, if the son who was passed over does not claim his share of the estate from his brothers. If, however, he refuses to accept any of his father's

rompa inmediatamente el testamento del que esté en poder de los enemigos; luego es consiguiente, que en virtud de este testamento no vaya la herencia a poder de nadie.

16.- POMPONIO; *Comentarios a Quinto Mucio, libro II*.- Cuando en un segundo testamento instituimos heredero a uno que vive, ya puramente, ya bajo condición, si, no obstante, se pudo cumplir la condición, aunque no se haya cumplido, se habrá roto el anterior testamento; pero importa mucho qué condición haya sido puesta, porque o se pone refiriéndose a lo pasado, o a lo presente, o a lo futuro. Se pone refiriéndose a lo pasado, por ejemplo: «si Ticio fue cónsul», y si esta condición es verdadera, esto es, si Ticio fue cónsul, el heredero fue instituido de modo que se rompa el anterior testamento, porque entonces sería heredero en virtud de este; pero si Ticio no fue cónsul, no se rompió el anterior testamento.

Mas si habiéndose instituido heredero la condición fue, escrita para el tiempo presente, por ejemplo: «si Ticio es cónsul», produce el mismo resultado, que, si lo fuera, puede ser heredero, y se rompe el anterior testamento, y, si no lo fuera, ni puede ser heredero, ni se rompe el anterior testamento.

Mas las condiciones referidas a lo futuro, si son posibles, se habrán podido cumplir; y aunque no se hayan cumplido hacen que se rompa el anterior testamento, también si no se hubieren cumplido; pero si son imposibles; por ejemplo: «sea heredero Ticio, si tocara el cielo con el dedo», se establece, que es lo mismo que si no hubiera sido escrita la condición que es imposible.

17.- PAPINIANO; *Respuestas, libro V*.- Preterido un hijo, que estaba bajo la potestad de su padre, ni competen las libertades, ni se prestan los legados, si el preterido reclamó su parte de herencia a sus hermanos; pero si se abstuvo de los bienes de su padre aunque parece que a esto se opone el rigor del

tuebitur.

18.- SCAEVOLA; *libro V quaestionum*.- Si qui heres institutus est a testatore adrogetur, potest dici satis ei factum, quia et antequam adoptetur, institutio in extraneo locum habebat.

19.- SCAEVOLA; *libro VI quaestionum*.- Si ego et Titius instituti simus et a nobis postumus exheredatus sit, a substitutis nostris non sit exheredatus, Titio defuncto ne ego quidem adire potero: iam enim propter instituti personam, a quo postumus exheredatus est, in cuius locum substitutus vocatur, a quo postumus exheredatus non est, ruptum est testamentum.

§ 1.- Sed si ego et Titius invicem substituti simus, quamvis in partem substitutionis exheredatus non sit, mortuo vel repudiante Titio me posse adire puto et ex asse heredem esse.

§ 2.- In prima tamen specie et si vivat Titius, neque ego sine illo neque ipse sine me adire poterit, quia incertum est, an adhuc altero omittente rumpatur testamentum: itaque simul adire possumus.

20.- SCAEVOLA; *libro XIII digestorum*.- Lucius Titius integra mente et valetudine testamentum fecit uti oportet, postea cum in valetudinem adversam incidisset, mente captus tabulas easdem incidit: quaero, an heredes his tabulis instituti adire possint hereditatem. Respondit secundum ea quae proponerentur non ideo minus adiri posse.

estate, although, in accordance with the strict interpretation of the law, the will may be considered void, still, the wishes of the testator will be complied with on the principles of justice and equity.

18.- SCAEVOLA; *Questions, Book V*.- Where anyone who has been appointed heir by a testator is arrogated by him, it can be said that he has done enough for him, because before he adopted him, his appointment was merely that of a stranger.

19.- THE SAME; *Questions, Book VI*.- If Titius and myself should be appointed heirs, and by our appointment a posthumous child is disinherited, or one is not disinherited on account of our substitution as heirs, and Titius should die, I cannot enter upon the estate; for the will is broken on account of the appointment of a person by which the posthumous child is disinherited, and who is called to the succession as a substituted heir, by whom the posthumous child is not disinherited.

§ 1.- Where, however, Titius and myself are substituted for one another, even though the posthumous child may not have been disinherited in that part of the will which mentions the substitution, and Titius either dies, or rejects the estate, I think that I can enter upon and become the heir of all of it.

§ 2.- However, in the first case, even though Titius may be living, I cannot enter upon the estate without him, nor can he do so without me, for the reason that it is uncertain whether the will may not be broken by one of us refusing to accept, and therefore we should both enter upon the estate together.

20. THE SAME; *Digest, Book XIII*.- Lucius Titius, while of sound mind and in good health, made a will in the proper manner, and afterwards became ill, and while insane mutilated the instrument. I ask whether the heirs appointed by the said will can enter upon the estate. The answer was, that in accordance with the facts stated, they will be prevented from doing so.

derecho, amparará, sin embargo, por razón de bondad y de equidad la voluntad del testador.

18.- SCÉVOLA; *Cuestiones, libro V*.- Si el que fue instituido heredero fuese arrogado por el testador, se puede decir que se le satisfizo, porque aún antes que sea adoptado tendrá lugar la institución como respecto de un extraño.

19.- EL MISMO; *Cuestiones, libro VI*.- Si yo y Ticio hubiéramos sido instituidos, y un póstumo hubiera sido desheredado respecto a nosotros, y no hubiera sido desheredado en cuanto a nuestros sustitutos, habiendo fallecido Ticio ni yo ciertamente podré adir la herencia; porque ya el testamento fue roto por causa de la persona del instituido, respecto al cual fue desheredado el póstumo, a cuyo lugar es llamado el sustituto, respecto al que el póstumo no fue desheredado.

§ 1.- Pero si yo y Ticio hubiéramos sido sustituidos recíprocamente, aunque no haya sido desheredado en la parte de la sustitución, muerto Ticio o repudiando la herencia, opino que yo puedo adirla, y que soy heredero de la totalidad.

§ 2.- Mas en el primer caso, aunque viva Ticio, ni yo sin él, ni él sin mi, podremos adir la herencia, porque es incierto, si aún dejando de adirla uno se rompa el testamento; y así podemos adirla simultáneamente.

20.- EL MISMO; *Digesto, libro XIII*.- Lucio Ticio hizo testamento estando en su cabal juicio y en salud, como conviene; después, habiendo caído enfermo, estando privado de juicio rompió aquel testamento; pregunto, ¿podrán los herederos instituidos en este testamento adir la herencia? Respondió, que, según lo que se proponía, no por eso podría ser menos fácilmente adida.

TIT. IV

DE HIS QUAE IN TESTAMENTO DELENTUR
INDUCUNTUR VEL INSCRIBUNTUR

1.- ULPIANUS; *libro XV ad Sabinum*.- Quae in testamento legi possunt, ea inconsulta deleta et inducta nihilo minus valent, consulto non valent: id vero quod non iussu domini scriptum inductum deletumve est, pro nihilo est. "Legi" autem sic accipiendum non intellegi, sed oculis perspicere quae sunt scripta: ceterum si extrinsecus intelleguntur, non videbuntur legi posse. Sufficit autem, si legibilia sint inconsulto deleta sive ab ipso sive ab alio, sed nolentibus. "Inducta" accipiendum est et si perducta sint.

§ 1.- Quod igitur incaute factum est, pro non facto est, si legi potuit: et ideo, etsi novissime, ut solet, testamento fuerit adscriptum: "Lituras inductiones superductiones ipse feci", non videbitur referri ad ea quae inconsulto contigerunt. Proinde et si inconsulto superscripsit induxisse se, manebunt et si ademit, non erunt adempta.

§ 2.- Sed si legi non possunt quae inconsulto delata sunt, dicendum est non deberi, sed hoc ita demum, si ante consummationem testamenti factum est.

§ 3.- Sed consulto quidem deleta exceptione petentes repelluntur, inconsulto vero non repelluntur, sive legi possunt sive non possunt, quoniam, si totum testamentum non exstet, constat valere omnia quae in eo scripta sunt. Et si quidem illud concidit testator, denegabuntur actiones, si vero alius invito testatore, non denegabuntur.

TITLE IV

CONCERNING ERASURES,
CANCELLATIONS, OR ADDITIONS
TO A WILL

1.- ULPIANUS; *On Sabinus, Book XV*.- Where any words have undesignedly been erased or blotted in a will, so that they can still be read, they will, nevertheless, be valid; but this is not the case where it has been done purposely. Where anything has been obliterated or erased without the order of the testator, it is of no effect. The term "read" must be understood to mean not that the sense can be ascertained, but that what has been written can be perceived by the eyes. But where the meaning can be gathered from some other source, the words are not held to be legible. It is sufficient, however, for them to be legible where they have been thoughtlessly erased, either by the testator or by someone else, against his will. The word "blotted" must be understood to signify that the words are obscured.

§ 1.- Hence, where anything of this kind has been done unintentionally and the writing can be read, it is just as if it had not been done at all. Therefore, if at the end of the will (as is customary) there was written: "I, myself, have made all the erasures, insertions, and changes herein contained"; it is not held that this has reference to anything which may have been erased accidentally; for if a testator should write that he had made the erasures unintentionally, the words will remain, and if he has rendered them illegible, they will not be considered to be so.

§ 2.- Where words of this kind cannot be read, and have been unintentionally erased, it must be held that nothing is granted by them; provided, however, that this was done before the completion of the will.

§ 3.- Where, however, words have been intentionally erased, parties claiming under them will be barred by an exception, but if this was done undesignedly, they will not be barred, whether the words can, or cannot be read; since if the entire will does not exist, it is established that everything therein contained will be valid. If indeed the testator mutilated the will, actions will be denied to parties mentioned in it; this, however, will not be the case

TÍTULO IV

DE LO QUE SE BORRA, SE TACHA, O SE
SOBREScribe EN UN TESTAMENTO

1.- ULPIANO; *Comentarios a Sabino, libro XV*.- Lo que puede leerse en un testamento, habiendo sido borrado y tachado involuntariamente, es, no obstante, válido; pero voluntariamente no vale. Mas lo que se escribió, tachó, o borró, no por mandato del testador, se tiene por nulo; pero «leerse» se ha de entender de este modo, no que se entienda, sino que se perciba con los ojos lo que está escrito. Pero si se entiende extrínsecamente, no se considerará que se puede leer; mas es suficiente que sea legible lo borrado involuntariamente, o por él mismo, o por otro. Pero se ha de entender "tachado" sin voluntad, también si hubiera sido cancelado.

§ 1.- Así, pues, lo que se hizo sin intención, se tiene por no hecho, si pudo leerse. Y por lo tanto, aún si al final se hubiere escrito, como es costumbre, en el testamento: «yo mismo hice los rayados, los tachados, y los sobrescritos», no se considerará que se refiere a lo que sucedió sin quererlo. Por lo cual, si inadvertidamente sobrescribió que él tachó algo, quedará, y si lo quitó, no estará quitado.

§ 2.- Pero si no se pudiera leer lo que se borró involuntariamente, se ha de decir, que no se debe; pero esto es así solamente, si se hizo antes de la conclusión del testamento.

§ 3.- Mas los que piden lo borrado ciertamente con voluntad, son repelidos con la excepción, pero si lo borrado involuntariamente, no son repelidos, ya si se puede, ya si no se puede leer, porque, si no existiera todo el testamento, es sabido que vale todo lo que en él está escrito. Y si verdaderamente lo borró el testador, se denegarán las acciones pero si otro contra la voluntad del testador, no serán denegadas.

§ 4.- Et hereditatis portio adempta vel tota hereditas, si forte sit substitutus, iure facta videbitur, non quasi adempta, quoniam hereditas semel data adimi facile non potest, sed quasi nec data.

§ 5.- Si quis codicillos in testamento confirmavit et codicillis aliquid adscripsit, mox deleuit ita ut appareat, an debeatur? Et Pomponius scribit codicillos deletos non valere.

2.- ULPIANUS; *libro IV disputationem*.- Cancellaverat quis testamentum vel induxerat et si propter unum heredem facere dixerat: id postea testamentum signatum est. Quaerebatur de viribus testamenti deque portione eius, propter quem se cancellasse dixerat. Dicebam, si quidem unius ex heredibus nomen induxerit, sine dubio ceteram partem testamenti valere et ipsi soli denegari actiones: sed legata ab eo nominatim relictas debebuntur, si voluntas ea fuit testantis, ut tantum heredis institutio improbetur. Sed si instituti nomen induxit et substituti reliquit, institutus emolumentum hereditatis non habebit.

Sed si omnia nomina induxerit, ut proponitur, adscripserit autem idcirco se id fecisse, quia unum heredem offensum habuit, multum interesse arbitror, utrum illum tantum fraudare voluit hereditate an vero causa illius totum testamentum infirmare, ut licet unus inductionis causam praeberit, verum omnibus offuerit. Et si quidem soli ei ademptam voluit portionem, ceteris nihil nocebit inductio, non magis quam si volens unum heredem inducere invitus et alium induxerit. Quod si putavit totum testamentum delendum ob unius malum meritum, omnibus denegantur actiones: sed an legatariis denegari actio debeat, quaestio est. In ambiguo tamen

where the mutilations were made against the consent of the testator.

§ 4.- When the heir has been deprived of a portion of the estate, or of all of it, and a substitute has been appointed, the act will be held to be legally performed; but the estate will not be considered to have been taken away from the heir, but never to have been given to him, as where an estate has once been granted it is not easily taken away.

§ 5.- Where anyone confirmed his codicils by a will, and added something in a codicil which he afterwards erased, but which is still legible; will any obligation be incurred by it? Pomponius says that a codicil which has been erased is void.

2. THE SAME; *Disputations, Book IV*.- A certain individual cancelled his will, or erased it, and stated that he did so on account of a certain heir, and this same will was afterwards sealed by witnesses. The question arose with reference to the validity of the instrument, and of that portion of it which the testator said that he had cancelled on account of the said heir. I held that if the testator had erased the name of one of the heirs, the remainder of the will would undoubtedly be valid, and the right of action would be absolutely refused to the said heir; but where he had been specifically charged with legacies they would be due, if it was the intention of the testator that only his appointment as heir should be annulled. If, however, he erased the name of the appointed heir, and retained that of the substituted heir, he who was appointed would not be entitled to anything out of the estate.

But if (as in the case stated), the testator should erase all the names, and should allege that he had done so on account of his dislike to a single heir, I think that it makes a great deal of difference whether he merely desired to deprive the said heir of his inheritance, or whether, on his account, he intended to invalidate the entire will; so that, although only one heir was the cause of the erasure, all of them would be prejudiced by it. If, however, he only wished to deprive a single heir of his share of the estate, the erasure will not prejudice the others, any more than if the testator, while intending to erase the name of one heir, had also unintentionally erased that

§ 4.- Y quitada una porción de la herencia, o toda la herencia, si acaso hubiera un substituto se considerará que esto se hizo en derecho, no como si hubiera sido quitada, porque la herencia una vez dada no puede ser quitada fácilmente, sino como si ni dada hubiera sido.

§ 5.- Si alguno confirmó los codicilos en un testamento, y añadió alguna cosa en los codicilos, y luego la borró, de modo que aún se vea, ¿acaso se deberá? Y escribe Pomponio, que no son válidos los codicilos borrados.

2.- EL MISMO; *Disputas, libro IV*.- Uno había cancelado un testamento o hecho tachones en él, aunque había dicho que lo hacía por causa de un solo heredero y después fue sellado este testamento; se preguntaba respecto a la validez del testamento, y sobre la porción de aquél por causa de quien había dicho que él hizo la cancelación; yo decía, que si verdaderamente hubiere tachado el nombre de uno solo de los herederos, era sin duda válida la restante parte del testamento, y que solo a aquel se le denegaban las acciones; pero se deberán los legados dejados nominalmente a su cargo, si fue la voluntad del testador que quedase revocada solamente la institución de heredero. Pero si tachó el nombre del instituido, y dejó el del substituido, el instituido no tendrá el beneficio de la herencia.

Mas si hubiere tachado todos los nombres, como se expone, pero hubiere escrito que él hizo esto precisamente porque le había ofendido uno de los herederos, opino que importa mucho saber, si quiso privar de la herencia solamente a aquel, o invalidar todo el testamento por causa de aquel, de modo que, aún cuando uno solo hubiere dado motivo para el tachón, habrá per-judicado, sin embargo, a todos; y si verdaderamente quiso que solo a este se le quitase la porción, lo tachado en nada perjudicará a los demás, no de otra suerte que si queriendo tachar el nombre de uno solo heredero, hubiere tachado contra su voluntad también el de otro. Mas si hubiere creído

interpretandum erit et legata deberi et coheredum institutionem non esse infirmandam.

3.- MARCELLUS; *libro XXIX digestorum*.- Proxime in cognitione principis cum quidam heredum nomina induxisset et bona eius ut caduca a fisco vindicarentur, diu de legatis dubitatum est et maxime de his legatis, quae adscripta erant his, quorum institutio fuerat inducta. Plerique etiam legatarios excludendos existimabant. Quod sane sequendum aiebam, si omnem scripturam testamenti cancellasset: nonnullos opinari id iure ipso peremi quod inductum sit, cetera omnia valitura. Quid ergo? Non et illud interdum credi potest eum, qui heredum nomina induxerat, satis se consecuturum putasse, ut intestati exitum faceret? Sed in re dubia benigniorem interpretationem sequi non minus iustius est quam tutius.

Sententia imperatoris Antonini Augusti Pudente et Pollione consulibus. "Cum Valerius Nepos mutata voluntate et incidit testamentum suum et heredum nomina induxerit, hereditas eius secundum divi patris mei constitutionem ad eos qui scripti fuerint pertinere non videtur". Et advocatis fisci dixit: "Vos habetis iudices vestros". Vibius Zeno dixit: "Rogo, domine imperator, audias me patienter: de legatis quid statues?" Antoninus Caesar dixit: "Videtur tibi voluisse testamentum valere, qui nomina heredum induxit?" Cornelius Priscianus advocatus Leonis dixit: "Nomina heredum tantum induxit". Calpurnius Longinus advocatus fisci dixit: "Non potest ullum testamentum valere, quod heredem non habet". Priscianus dixit: "Manumisit quosdam et legata dedit". Antoninus Caesar remotis omnibus cum

of another. If the testator thought that his entire will should be cancelled because one of the heirs was undeserving, the right of action will be denied to all of them. But it may be asked whether the right of action should also be denied to the legatees. So far as this doubtful question is concerned, it should be held that the legacies are due, and that the appointment of the co-heir is not invalidated.

3.- MARCELLUS; *Digest, Book XXIX*.- A case was recently brought to the attention of the Emperor, where a certain testator erased the names of the heirs, and the estate was claimed as forfeited to the Treasury. There was doubt for a long time as to what disposition should be made of the legacies, and especially of such as had been bequeathed to those whose appointment as heirs had been erased. Several authorities decided that the legatees should be excluded, and I thought that this course should be adopted if the testator had cancelled his entire will; others were of the opinion that what had been erased was abrogated by operation of law, but that all the remainder was valid. What course should then be pursued? Could it not sometimes be held that a testator who had erased the names of his heirs was aware that he would be in the same position as if he had died intestate? Where a point is in doubt, it is not less just than safe to follow the more indulgent interpretation.

The following is the decision by the Emperor Antoninus Augustus, during the Consulship of Pudens and Pollio: "Since Valerius Nepos, having changed his mind, has mutilated his will, and erased the names of his heirs, his estate, in accordance with the Constitution of my Divine Father, does not seem to belong to the heirs mentioned therein". He also stated to the advocates of the Treasury: "You have your own judges". Vibius Zeno said, "I ask, O Lord Emperor, that you hear me patiently, what do you decide with reference to the legacies?" The Emperor Antoninus replied: "Does it seem to you that a testator who erased the names of his heirs intended that his will should stand?" Cornelius Priscianus, the advocate of Leo, said: "The testator only erased the names of his heirs". Calpurnius Longinus, the

que debía borrarse todo el testamento por el mérito contrario de uno solo, a todos se les deniegan las acciones. Pero se duda si la acción deberá dene-gárseles a los legatarios mas en la duda se habrá de interpretar, que se deben los legados, y que no se ha de invalidar la institución de los coherederos.

3.- MARCELO; *Digesto, libro XXIX*.- Hace poco que en un caso de conocimiento del Príncipe, habiendo tachado uno los nombres de los herederos, y siendo reivindicados sus bienes por el fisco como caducos, se dudó mucho tiempo respecto a los legados, y principalmente respecto a los legados que habían sido dejados a aquellos cuya institución había sido tachada; y juzgaban los más, que también los legatarios debían ser excluidos, lo que decía yo que ciertamente se debería hacer, si hubiese cancelado toda la escritura del testamento; algunos opinaban, que de derecho se invalidaba lo que hubiera sido tachado, pero que debía ser válido todo lo demás. Luego, ¿qué se dirá, acaso que se puede creer a veces que el que había tachado los nombres de los herederos había juzgado que él conseguiría lo bastante para hacer que quedase intestado? Pero en caso de duda no es menos justo que seguro seguir la interpretación más benigna.

He aquí la sentencia del Emperador Antonino Augusto, siendo cónsules Pudente y Polión: «Como quiera que Valerio Nepote, habiendo cambiado de voluntad, haya abierto su testamento, y tachado los nombres de los herederos, según la Constitución de mi Divino padre no parece que su herencia les pertenece a los que hubieren sido instituidos». Y a los abogados del fisco les dijo: «vosotros teneis vuestros jueces». Vibio Zenón dijo: «te ruego, señor Emperador, que me oigas con paciencia: ¿qué determinarás respecto a los legados?» Antonio César dijo: «¿te parece que quiso que valiese su testamento el que tachó los nombres de los herederos?» Cornelio Prisciano, abogado de Labeón, dijo: «tachó solamente los nombres de los herederos». Calpurnio Lougino, abogado del fisco, dijo: «no puede ser

deliberasset et admitti rursus eodem iussisset, dixit: "Causa praesens admittere videtur humaniorem interpretationem, ut ea dumtaxat existimemus nepotem irrita esse voluisse, quae induxit". Nomen servi, quem liberum esse iusserat, induxit. Antoninus rescripsit liberum eum nihilo minus fore: quod videlicet favore constituit libertatis.

4.- PAPINIANUS; *libro VI responsorum*.- Pluribus tabulis eodem exemplo scriptis unius testamenti voluntatem eodem tempore dominus sollemniter complevit. Si quasdam tabulas in publico depositas abstulit atque delevit, quae iure gesta sunt, praesertim cum ex ceteris tabulis quas non abstulit res gesta declaratur, non constituentur irrita. Paulus notat: sed si, ut intestatus moreretur, incidit tabulas et hoc adprobaverint hi qui ab intestato venire desiderant, scriptis avocabitur hereditas.

TIT. V

DE HEREDIBUS INSTITUENDIS

1.- ULPIANUS; *libro I ad Sabinum*.- Qui testatur ab heredis institutione plerumque debet initium facere testamenti. Licet etiam ab exheredatione, quam nominatim facit: nam divus Traianus rescripsit posse nominatim etiam ante heredis institutionem filium exheredare.

§ 1.- Institutum autem heredem eum quoque dicimus, qui scriptus non est, sed solummodo nuncupatus.

Advocate of the Treasury, answered, "No will can be valid in which an heir is not appointed". Priscianus added, "He manumitted certain slaves, and bequeathed legacies." The Emperor Antoninus, having caused all the parties to retire while he considered the matter, and having ordered them to be again admitted, said: "The present case seems to admit of an indulgent interpretation, so that we think that the testator Nepos only intended that portion of his will which he erased to be annulled". He had actually erased the name of a slave whom he had ordered to be free. Antoninus stated in a Rescript that the slave would, nevertheless, be liberated. He decided the question in this way on account of the favor conceded to freedom.

4.- PAPINIANUS; *Opinions, Book VI*.- A testator solemnly indicated his wishes in a will, several copies of which were made at the same time; and he afterwards removed and erased some of these which had been deposited in a public place. Whatever provisions were legally made by said will, and which could be established by the other copies of the same which the testator did not remove, were not held to have been annulled. Paulus states that if the testator defaced the will in order that he might die intestate, and if those who desired to inherit ab intestato were able to prove this, the heirs mentioned in the will would be deprived of the property.

TITLE V

CONCERNING THE APPOINTMENT
OF HEIRS

1.- ULPIANUS; *On Sabinus, Book I*.- He who executes a will should generally begin with the appointment of an heir. He can also begin with a disinheritance specifically made; for the Divine Trajan stated in a Rescript that a son may be disinherited by name, even before the appointment of an heir.

§ 1.- We also say that an heir has been appointed where the testator did not write, but only mentioned his name.

válido testamento alguno que no tiene heredero». Prisciano dijo: «manumitió a algunos, y dio legados». Cuando retirados todos hubo deliberado Antonino César, y mandado que de nuevo se recibiera a los mismos, dijo: «el caso presente parece que admite más humana interpretación, para que juzguemos que Nepote quiso que fuese Írrito solamente lo que tachó». Tachó el nombre del esclavo, que había mandado que fuese libre; Antonino respondió por rescripto, que aquel, sin embargo, debía ser libre, lo cual ciertamente lo determinó en favor de la libertad.

4.- PAPINIANO; *Respuestas, libro VI*.- Habiéndose escrito varias tablas con un mismo ejemplar, el testador completó solamente al mismo tiempo la voluntad de un solo testamento; si retiró algunas tablas depositadas en público, y las borró, no se hará Írrito lo que se hizo con arreglo a derecho, principalmente cuando por las demás tablas, que no retiró, se declare lo que se hizo. Paulo observa: pero si rompió las tablas para morir intestado, y esto lo probaren los que pretenden suceder abintestato, se les quitará la herencia a los instituidos.

TÍTULO V

DE LA INSTITUCIÓN DE HEREDEROS

1.- ULPIANO; *Comentarios a Sabino, libro I*.- El que testa debe comenzar ordinariamente el testamento con la institución de heredero, o aún también por la desheredación que hace nominalmente; porque respondió por rescripto el Divino Trajano, que podía desheredar nominalmente a su hijo también antes de la institución de heredero.

§ 1.- Pero decimos que es heredero instituido también el que no fue escrito, sino solamente nombrado.

§ 2.- Mutus et surdus recte heres institui potest.

§ 3.- Qui neque legaturus quid est neque quemquam exheredaturus, quinque verbis potest facere testamentum, ut dicat: "Lucius Titius mihi heres esto": haec autem scriptura pertinet ad eum qui non per scripturam testatur. Qui poterit etiam tribus verbis testari, ut dicat: "Lucius heres esto": nam et "mihi" et "Titius" abundat.

§ 4.- Si ex fundo fuisset aliquis solus institutus, valet institutio detracta fundi mentione.

§ 5.- Si autem sic scribat: "Lucius heres", licet non adiecerit "esto", credimus plus nuncupatum, minus scriptum: et si ita: "Lucius esto", tantundem dicimus: ergo et si ita: "Lucius" solummodo. Marcellus non insupuliter non putat hodie hoc procedere. Divus autem Pius, cum quidam portiones inter heredes distribuisset ita: "Ille ex parte tota, ille ex tota" nec adiecisset "heres esto", rescripsit valere institutionem: quod et Iulianus scripsit.

§ 6.- Item divus Pius rescripsit "illa uxor mea esto" institutionem valere, licet deesset "heres".

§ 7.- Idem Iulianus "illum heredem esse", non putavit valere, quoniam deest aliquid: sed et ipsa valebit subaudito "iubeo".

2.- ULPIANUS; *libro II ad Sabinum*.- Circa eos, qui ita heredes instituti sint: "Ex partibus quas adscripsero", non putat Marcellus eos heredes nullis adscriptis partibus, quemadmodum si ita essent heredes instituti: "Si eis partes adscripsero". Sed magis est, ut sic utraque institutio accipiat, si voluntas defuncti non refragatur: "Ex quibus partibus adscripsero, si minus, ex aequis", quasi duplici facta

§ 2.- A person who is dumb, or one who is deaf, can legally be appointed an heir.

§ 3.- Where a testator is not about to bequeath any legacies or disinherit anyone, he can make a will in five words, by saying: "Let Lucius Titius be my heir". This formula can also be used by a person who does not commit his will to writing, and who can even make a will in three words, as where he says: "Let Lucius be heir"; for the words my and Titius are superfluous.

§ 4.- Where anyone is appointed sole heir to a tract of land, the appointment will be valid, without any mention of the land.

§ 5.- If anyone should write as follows: "Lucius heir", even though he may not add, "Let him be"; we hold that this is a nuncupative, rather than a written will. And if he should write: "Let Lucius be", we hold that it would amount to the same thing. Therefore, if he should only write "Lucius", Marcellus thinks, and not without reason, that this form would not be accepted at the present time. The Divine Pius, however, in the case where a testator, who was distributing certain portions of an estate among his heirs, merely said: "So-and-So to all this share, and So-and-So to all that"; but did not add "Let him be heir", the Emperor stated in a Rescript that the appointment was valid, and this opinion was also adopted by Iulianus.

§ 6.- The Divine Pius also stated in a Rescript that an appointment was valid when made in the following terms: "Let my wife be", even though the word "heir" was lacking.

§ 7.- Iulianus does not think, that an appointment made as follows, "So-and-So to be heir," is valid, since something is lacking. This appointment, however, will be valid, because the words, "I order", are understood.

2.- THE SAME: *On Sabinus, Book II*.- Where a testator makes use of the words: "I appoint So-and-So and So-and-So to be my heirs according to their shares"; with reference to those who are appointed heirs, Marcellus does not think that they become such where no shares have been assigned to them, just as if they had been designated in the following terms: "If I should specify their shares". The better opinion is,

§ 2.- El mudo y el sordo pueden ser instituidos válidamente herederos.

§ 3.- El que ni ha de legar cosa alguna, ni ha de desheredar a alguien, puede hacer testamento con cinco palabras, como diga: «sea Lucio Ticio mi heredero». Mas esta escritura corresponde al que no testó por escrito, el cual también podrá testar con tres palabras, diciendo: «sea heredero Lucio»; porque sobran el «mi» y el «Ticio».

§ 4.- Si uno solo hubiese sido instituido heredero de un fundo, es válida la institución prescindiéndose de la mención del fundo.

§ 5.- Mas si escribiera de este modo: «heredero Lucio», aunque no hubiere añadido «sea», creemos que se habló más, y que se escribió menos; y si así: «sea Lucio», decimos lo mismo; luego también si de esta manera: "Lucio", solamente, opina Marcelo, no sin sutileza, que hoy no es esto procedente. Pero el Divino Pio, habiendo distribuido uno entre los herederos las porciones de este modo: «aquel, de toda la parte, y aquel, de toda», y no habiendo añadido: «sea heredero», respondió por rescripto, que era válida la institución; lo que escribió también Iuliano.

§ 6.- Asimismo respondió por rescripto el Divino Pio: la institución, «sea, aquella mi mujer" es válida, aunque faltase «heredera».

§ 7.- El mismo Iuliano no opinó que fuese válida esta, «sea heredero aquel», porque falta alguna cosa; pero también será válida, sobreentendiéndose «mando».

2. EL MISMO; *Comentarios a Sabino, libro II*.- En cuanto a los que hayan sido instituidos herederos de este modo: «de las partes que yo escribiere», no opina Marcelo que estos sean herederos, no habiendo asignado ningunas partes, de la misma manera que si hubiesen sido instituidos herederos así: «si yo les asignare partes»; pero es más cierto, que una y otra institución, si no se contraria la voluntad del testador,

institutione: quam sententiam Celsus libro sexto decimo digestorum probat. Aliter atque probat in illa institutione: "Ex qua parte me Titius heredem scripsit, Seius heres esto": tunc enim si non est a Titio scriptus, nec Seius ab eo, nec immerito: hic enim creditur inesse condicio. Sed Marcellus haec similia putat.

§ 1.- Potest autem interesse, utrum ita quis scribat: "Ex his partibus quas adscripsi" an "adscripsero", ut superiori modo dicas nullis adscriptis partibus nullam esse institutionem: quomodo in illo Marcellus: "Ex his partibus, ex quibus testamento matris scripti fuissent, heredes sunt", si intestata mater decesserit, hos non esse institutos.

3.- ULPIANUS; *libro III ad Sabinum*.- Servus alienus vel totus vel pro parte sine libertate heres institui potest.

§ 1.- Si servum meum pure heredem scripsero, sub conditione liberum, differtur institutio in id tempus, quo libertas data est.

§ 2.- Si quis ita scripserit: "Si Titius heres erit, Seius heres esto: Titius heres esto", quasi quaevis condicio exspectatur Titii aditio, ut Seius heres fiat: et sane et Iuliano et Tertulliano hoc videtur.

§ 3.- Qui fideicommissam libertatem sub conditione accepit, potest ab herede pure cum libertate heres institui et non exspectata conditione libertatem et hereditatem consequitur et erit interim necessarius: et existente conditione voluntarius heres efficietur, ut non desinat heres esse, sed ut ius in eo

that where the wishes of the deceased are not disregarded, each appointment should be understood, for instance: "I appoint them heirs for the shares of the estate which I shall assign to them, but not to equal shares"; just as if a twofold appointment had been made. This opinion Celsus approves in the Sixteenth Book of the Digest. But he thinks otherwise where an appointment is made as follows: "Let Seius be my heir to the same portion to which Titius has appointed me heir"; for if he was not appointed by Titius, Seius will not be appointed by him. This opinion is not unreasonable, for in this instance a condition is involved. Marcellus, however, thinks that the cases are similar.

§ 1.- It makes a difference where a party writes: "Of those shares which I have assigned to him", or "Which I shall assign to him", for, in the first instance, you can say that where no shares are designated, there is no appointment; just as Marcellus decided in a case where the appointment was made as follows: "Let So-and-So and So-and-So be heirs to those portions to which they have been appointed by the will of their mother", and if their mother should die intestate, they will not be legally appointed.

3.- THE SAME; *On Sabinus, Book III*.- A slave who belongs entirely, or partly, to another, can be appointed the heir of the testator, without the grant of his freedom.

§ 1.- If I appoint my slave to be absolutely my heir, but grant him his freedom under a certain condition, his appointment will be deferred until the time when his freedom is granted him.

§ 2.- Where a party stated in his will: "If Titius shall be my heir, let Seius be my heir and let Titius be my heir"; the acceptance of Titius is awaited as a condition for Seius to become the heir. And, indeed, this is reasonable, and seems so to Julianus and Tertullianus.

§ 3.- Where an heir has accepted a trust by which freedom is conditionally granted to a slave, the said slave can be appointed heir by the former, with an absolute grant of his freedom, without waiting for the fulfillment of the condition, and he will obtain both his freedom and the estate. In the meantime, he will

sean entendidas de este modo, de las partes que yo hubiere asignado, y, si no, de iguales, como si se hubiera hecho una doble institución. Cuya opinión aprueba Celso en el libro décimo sexto del Digesto, al contrario de lo que aprueba en esta institución: «sea heredero Seyo de la parte en que Ticio me instituyó heredero»; porque entonces, si no fue instituido por Ticio, tampoco lo fue Seyo por él; y no sin razón, porque se considera que aquí hay una condición; pero Marcelo considera semejantes estos casos.

§ 1.- Mas puede importar saber, si uno escribe así: «de aquellas porciones que escribí, o «que yo escribiere», para que en el primer caso digas, que no habiéndose asignado ningunas porciones, es nula la institución, así como dice Marcelo en este caso: «sean herederos de las porciones por que hubiesen sido instituidos herederos en el testamento de la madre», que, si la madre hubiere fallecido intestada, estos no fueron instituidos.

3.- EL MISMO; *Comentarios a Sabino, libro III*.- El esclavo ajeno puede ser instituido heredero sin la libertad, o de la totalidad, o de parte.

§ 1.- Si a mi esclavo yo lo hubiere instituido heredero puramente, y libre bajo condición, la institución se difiere a aquel tiempo en que fue dada la libertad.

§ 2.- Si alguno hubiere escrito de este modo: «si Ticio fuere heredero, sea heredero Seyo, y sea heredero Ticio», se espera la adición de Ticio como cierta condición, para que Seyo se haga heredero; y, a la verdad, así le parece a Juliano y a Tertuliano.

§ 3.- El que bajo condición recibió la libertad por fideicomiso puede ser instituido puramente heredero con la libertad por el heredero, y consigue la libertad y la herencia sin haberse esperado a la condición, y será mientras tanto heredero necesario, y se hará heredero voluntario cumpliéndose la condición, de

o mutetur successionis.

§ 4.- Aperturae tabularum dilatio necessarii heredis ius non mutat, ut solemus in substituto impuberis dicere: nam est relatum, si se adrogandum dederit substitutus impuberi defuncti filius, necessarium eum fore.

4.- ULPIANUS; *libro IV ad Sabinum*.- Suus quoque heres sub condicione heres potest institui: sed excipiendus est filius, quia non sub omni condicione institui potest. Et quidem sub ea condicione, quae est in potestate ipsius, potest: de hoc enim inter omnes constat. Sed utrum ita demum institutio effectum habeat, si paruerit condicioni, an et si non paruerit et decessit?

Julianus putat filium sub eiusmodi condicione institutum etiam, si condicioni non paruerit, summotum esse, et ideo si coheredem habeat ita institutus, non debere eum exspectare, donec condicioni pareat filius, cum et si patrem intestatum faceret non parendo condicioni, procul dubio exspectare deberet. Quae sententia probabilis mihi videtur, ut sub ea condicione institutus, quae in arbitrio eius sit, patrem intestatum non faciat.

§ 1.- Puto recte generaliter definiri: utrum in potestate fuerit condicio an non fuerit, facti potestas est: potest enim et haec "si Alexandriam pervenerit" non esse in arbitrio per hiemis condicionem: potest et esse, si ei, qui a primo miliario Alexandriae agit, fuit imposita: potest et haec "si decem Titio dederit" esse in difficili, si Titius peregrinetur longinquo itinere: propter quae ad generalem definitionem recurrendum est.

be a necessary heir, and will become a voluntary heir when the condition is fulfilled, so that he will not cease to be an heir, but the right of succession will be changed so far as he is concerned.

§ 4.- Delay in opening a will does not affect the rights of a necessary heir, as we are accustomed to hold where anyone is substituted for a minor. For it has been established that if the substitute gives himself to be arrogated by the minor, as the son of the deceased, he will become his necessary heir.

4.- THE SAME; *On Sabinus, Book IV*.- A direct heir can also be appointed under a condition. The son of the testator must, however, be excepted, because he cannot be appointed under any condition whatsoever. He can, indeed, be appointed under a condition which it is in his power to carry out, and on this opinion all authorities are agreed; but will the appointment take effect if he fulfills the condition, or will it do so if he should not fulfill it, and dies?

Julianus thinks, where a son has been appointed heir under such a condition, that he cannot be removed from the succession, even if he should not comply with the condition, and therefore when he is appointed in this way and has a co-heir, the latter is not obliged to wait until the son complies with the condition; since, although the latter, by not complying with it, can render his father intestate, there is no doubt that the co-heir should wait. This opinion seems to me to be correct, so that where a son is appointed under a condition, compliance with which depends upon his will, he cannot by avoidance render his father intestate.

§ 1.- I think that, generally speaking, a question of fact is involved in the case where a condition is, or is not, dependent upon the power of the son to carry it out. For a condition like this: "If he should go to Alexandria", does not depend upon the will of the son, if the weather should be severe, but it may depend upon it where the condition was imposed upon a person who only lived a mile from Alexandria. The following condition: "If he should pay ten aurei to Titius", presents a difficulty, if Titius

suerte que no deje de ser heredero, sino que respecto de él se cambie el derecho de sucesión.

§ 4.- La dilación en la apertura del testamento no cambia el derecho del heredero necesario, como solemos decir respecto del sustituto del impúbero; porque se ha dicho, que si el hijo del difunto, sustituido a un impúbero, se hubiere dado en adrogación, él habrá de ser heredero necesario.

4.- EL MISMO; *Comentarios a Sabino, libro IV*.- También el heredero suyo puede ser instituido heredero bajo condición. Pero se ha de exceptuar el hijo, porque no puede ser instituido bajo toda condición; y puede serlo ciertamente bajo aquella condición, que está en la potestad del mismo, porque esto de todos es sabido. Pero ¿tendrá efecto la institución acaso solamente de este modo, si hubiere cumplido la condición, o también si no la hubiere cumplido y falleció?

Opina Juliano, que el hijo instituido bajo esta condición quedó removido, aunque no haya cumplido la condición; y que por lo tanto, si el instituido de este modo tuviera un coheredero, no debe éste esperar hasta que el hijo cumpla la condición, porque, aunque no cumpliendo la condición haría intestado a su padre, sin duda alguna debería esperar; cuya opinión me parece admisible, para que el instituido bajo condición, que esté en su arbitrio, no haga intestado a su padre.

§ 1.- Opino, que se define bien como regla general, que es cuestión de hecho la potestad, tratándose de si la condición haya estado o no haya estado en la potestad; porque también esta, «si hubiere llegado a Alejandría», puede no estar en la potestad por las circunstancias del invierno, y puede también estar, si se le impuso al que vive a una milla de Alejandría; también esta, «si le hubiere dado diez a Ticio», puede ser difícil, si Ticio viajase a larga distancia; por lo que se ha de recurrir a la definición general.

§ 2.- Sed et si filio sub condicione, quae in eius potestate est, herede instituto nepos sit substitutus sive extraneus, puto vivo filio non exstaturum heredem substitutum, post mortem vero exstaturum, nec necessariam a substituto filii exheredationem, cum et, si fuerit facta, frustra est: post mortem enim filii facta est, quam inutilem esse alias ostendimus: opinamur igitur filium, si sit institutus sub ea condicione et sit in eius potestate, non indigere exheredatione a sequentibus gradibus: alioquin et a coherede indigebit.

5.- MARCELLUS NOTUM AD IULIANI; *libro XXIX digestorum*.- Si eiusmodi sit condicio, sub qua filius heres institutus sit, ut ultimo vitae eius tempore certum sit eam existere non posse et pendente ea decedat, intestato patri heres erit, veluti "si Alexandriam pervenerit, heres esto": quod si etiam novissimo tempore impleri potest, veluti "si decem Titio dederit, heres esto", contra puto.

6.- ULPIANUS; *libro IV ad Sabinum*.- Sed si condicioni dies sit adiectus, ut puta: "Si Capitolium intra dies triginta ascenderit", tantundem potest dici: ut, si non paruerit condicioni, substitutus possit admitti filio repulso, consequens est sententiae Iuliani et nostrae.

§ 1.- Nepotes autem et deinceps ceteri, qui ex lege Vellea [Vellaea] instituti non rumpunt testamenta, sub omni condicione institui possunt, etsi redigantur ad filii condicionem.

§ 2.- Solemus dicere media tempora non nocere, ut

should be absent upon a long journey. Hence, recourse must be had to the general definition of a condition which can be complied with by the party in question.

§ 2.- If, however, after the testator appointed his son his heir under a condition which the latter was able to carry out, or where he appointed a stranger, I think that the substitute cannot become an heir during the lifetime of the son, but can after his death; and it is not necessary for the son to be disinherited by the appointment of the substitute. And even if the disinheritance should be made it would be void; for we have shown elsewhere that where this takes place after the death of the son it is invalid. Therefore, we are of the opinion that where a son has been appointed under such a condition, and is under the control of his father, he does not need to be disinherited from the following degrees; otherwise he must also be disinherited by the appointment of a co-heir.

5.- MARCELLUS ON JULIANUS; *In the XXIX Book of the Digest, Observes That*.- If the condition under which the son was appointed an heir is of such a character that it is certain that at the last moment of his life it cannot be fulfilled, and, while it is pending, the son dies, he will be the heir to his father just as if the latter was intestate; for instance: "If he should go to Alexandria, let him be my heir". If, however, the condition can be complied with during the last hours of his life, for example, "If he pays ten aurei to Titius, let him be my heir", I hold that the contrary is true.

6.- ULPIANUS; *On Sabinus, Book IV*.- Where a certain time is mentioned in the condition, for instance: "If he goes up to the Capitol within thirty days"; it can be said that if he does not comply with the condition, the son will be excluded from, and the substitute will be admitted to the succession. This is the result of the opinion of Julianus and myself.

§ 1.- The grandsons and other successors of the testator, who, when appointed, do not break the will under the Lex Velleia, can be appointed under any condition whatsoever, although they occupy the position of a son.

§ 2.- We are accustomed to say that anything which

§ 2.- Pero también si habiendo sido instituido heredero el hijo bajo condición, que está en su potestad, le hubiera sido sustituido un nieto, o un extraño, opino que viviendo el hijo no habrá de ser heredero el sustituido, pero que lo será después de la muerte de aquel, y que no es necesaria la desheredación del hijo respecto al sustituto, porque, aunque hubiere sido hecha, es inútil; pues la que se hizo después de la muerte del hijo hemos demostrado en otra parte que es inútil. Opinamos, pues, que el hijo, si hubiera sido instituido bajo esta condición, y ella estuviera en su potestad, no necesita la desheredación respecto a los siguientes grados, porque de otra suerte la necesitará también respecto al coheredero.

5.- MARCELO; *nota al libro XXIX. del Digesto de Juliano*.- Si la condición, bajo la cual haya sido instituido heredero el hijo, fuera de tal naturaleza, que en el último momento de su vida fuese cierto que no se puede cumplir, y falleciera estando ella pendiente, será heredero de su padre intestado, como por ejemplo: «si hubiere llegado a Alejandría, sea heredero»; pero si puede cumplirse también en el último momento, como «si hubiere dado diez a Ticio, sea heredero», opino lo contrario.

6.- ULPIANO; *Comentarios a Sabino, libro IV*.- Pero si a la condición se le hubiese añadido día como por ejemplo, «si dentro de treinta días hubiere subido al Capitolio», puede decirse otro tanto, que, si no hubiere cumplido la condición, podría ser admitido el sustituido, siendo rechazado el hijo; lo que es conforme a la opinión de Juliano y a la nuestra.

§ 1.- Pero los nietos, y los demás descendientes que instituidos en virtud de la ley Vellea no rompen los testamentos, pueden ser instituidos bajo toda condición, aunque se reduzcan a la condición de hijo.

§ 2.- Solemos decir, que el tiempo intermedio no

puta civis Romanus heres scriptus vivo testatore factus peregrinus mox civitatem Romanam pervenit: media tempora non nocent. Servus alienus sub condicione heres scriptus traditus est servus hereditario, mox usucapto ab extraneo: non est vitata institutio.

§ 3.- Si servum communem cum libertate dominus heredem scripserit et eum redemerit, necessarius efficietur. Sed si substitutus sit impuberi et partem redemerit impubes, necessarius non efficietur, ut Iulianus scribit.

§ 4.- Sed si sit cum libertate institutus, an ei libertatis datio codicillis adimi possit, apud Iulianum quaeritur. Et putat in eum casum, quo necessarius fieret, ademptionem non valere, ne a semet ipso ei adimatur libertas: servus enim heres institutus a semet ipso libertatem accipit. Quae sententia habet rationem: nam sicuti legari sibi non potest, ita nec a se adimi.

7.- IULIANUS; *libro XXX digestorum*.- Si servus communis sub condicione heres institutus vivo testatore libertatem consecutus sit, etiam pendente condicione testamentariae libertatis adire hereditatem potest.

§ 1.- Item sive testator eum alienaverit sive heres post mortem testatoris, iussu domini hereditatem adibit.

8.- IULIANUS; *libro II ad Urseium Ferozem*.- Duo socii quendam servum communem testamento facto heredem et liberum esse iusserant: ruina simul oppressi perierant. Plerique responderunt hoc casu

occurs in the intermediate time does not injuriously affect the heir; for example, where the party appointed is a Roman citizen, and becomes a foreigner during the lifetime of the testator, and afterwards recovers his Roman citizenship, what has happened to him in the meantime does not prejudice his rights. Where a slave belonging to another is appointed an heir, and afterwards is delivered to another slave belonging to the estate, and is then acquired by a stranger through usucaption, his appointment as heir is not annulled.

§ 3.- When a master appoints a slave, owned by him in common with another, his heir with the grant of his freedom, and ransoms him from his joint-owner, he becomes a necessary heir. Where, however, the slave is substituted for a minor, and the latter purchases the share of the other joint-owner, Julianus says that the said slave does not become a necessary heir.

§ 4.- It is asked by Julianus whether this slave, appointed heir with a grant of his freedom, can subsequently be deprived of it by means of a codicil. He holds that in the case where the said slave becomes a necessary heir, any deprivation of his freedom will not be valid, for he would be compelled to deprive himself of it; as where a slave is appointed an heir, he receives his freedom from himself. This opinion is reasonable, for as he cannot bequeath his freedom to himself, so also he cannot deprive himself of it.

7.- JULIANUS; *Digest, Book XXX*.- When a slave held in common is appointed an heir under some condition, and obtains his freedom during the lifetime of the testator, he can enter upon the estate while the condition under which he is to obtain freedom by the will, is still pending.

§ 1.- Again, he will be entitled to the estate by the order of his master, even if the testator had alienated him during his lifetime, or the heir has done so after the death of the testator.

8.- THE SAME; *On Urseius Ferox, Book II*.- Two partners by their will directed a certain slave owned in common by them to be their heir and free, and both of them perished at the same time by the fall of a house.

perjudica, como por ejemplo, un ciudadano romano instituido heredero, habiéndose hecho peregrino viviendo el testador, volvió después a la ciudadanía romana; el tiempo intermedio no le perjudica. Un esclavo ajeno, instituido heredero bajo condición, fue entregado a un esclavo de la herencia, y después fue usucapido por un extraño; no se vició la institución.

§ 3.- Si el señor hubiere instituido heredero con la libertad a un esclavo común, y lo hubiere comprado, se hará necesario. Pero si hubiera sido sustituido a un impúbero, y el impúbero hubiere comprado la parte, no se hará necesario, como escribe Juliano.

§ 4.- Pero si hubiera sido instituido con la libertad, preguntase Juliano, si se le podrá quitar por codicilos la dación de la libertad. Y opina, que en este caso, en que se haría necesario, no es válida la privación, para que por él mismo no se le quite la libertad; porque el esclavo instituido heredero recibe de sí mismo la libertad; cuya opinión tiene fundamento, porque así como no se la puede legar a sí mismo, así tampoco se la puede quitar a sí propio.

7.- JULIANO; *Digesto, libro XXX*.- Si instituido heredero bajo condición un esclavo común hubiera conseguido la libertad viviendo el testador, puede adir la herencia estando todavía pendiente la condición de la libertad testamentaria.

§ 1.- Asimismo, ya si lo hubiere enajenado el testador, ya si el heredero, adirá la herencia por mandato de su señor después de la muerte del testador.

8.- EL MISMO; *Comentarios a Urseyo Ferox, libro II*.- Dos consocios habían mandado en el testamento hecho, que cierto esclavo común fuese heredero y libre, y habían perecido aplastados simultá-

duobus orcinum heredem existere, et id est verius.

§ 1.- Sed et si sub eadem condicione servum communem uterque socius liberum heredemque esse iussisset eaque exstisset, idem iuris erit.

9.- ULPIANUS; *libro V ad Sabinum*.- Quotiens volens alium heredem scribere alium scripserit in corpore hominis errans, veluti "frater meus" "patronus meus", placet neque eum heredem esse qui scriptus est, quoniam voluntate deficitur, neque eum quem voluit, quoniam scriptus non est.

§ 1.- Et si in re quis erraverit, ut puta dum vult lancem relinquere, vestem leget, neutrum debet hoc, sive ipse scripsit sive scribendum dictaverit.

§ 2.- Sed si non in corpore erravit, sed in parte, puta si, cum dictasset ex semisse aliquem scribi, ex quadrante sit scriptus, Celsus libro duodecimo quaestionum, digestorum undecimo posse defendi ait ex semisse heredem fore, quasi plus nuncupatum sit, minus scriptum: quae sententia rescriptis adiuvatur generalibus. Idemque est et si ipse testator minus scribat, cum plus vellet adscribere.

§ 3.- Sed si maiorem adscripserit testamentarius vel (quod difficilius est probatione) ipse testator, ut pro quadrante semissem, Proculus putat ex quadrante fore heredem, quoniam inest quadrans in semisse: quam sententiam et Celsus probat.

§ 4.- Sed et si quis pro centum ducenta per notam scripsisset, idem iuris est: nam et ibi utrumque

Several authorities gave it as their opinion that, in this instance, the slave became the heir of, and obtained his freedom from both of them; and this opinion is correct.

§ 1.- Where two partners direct a slave owned in common by them shall become free and their heir, under the same condition, and the condition is complied with, the same rule of law will apply.

9.- ULPIANUS; *On Sabinus, Book V*.- Whenever a testator who wishes to appoint an heir appoints another person through a mistake in the individual (as for instance, "My brother, my patron"), it is settled that neither of them will be his heir; he who is mentioned, for the reason that it was not the intention of the deceased to appoint him; nor he whom he intended to appoint, because he was not mentioned.

§ 1.- In like manner, if a testator should make a mistake with reference to the property (for instance, if he should leave a garment when he intended to leave a dish), he will owe neither. This rule applies whether the testator wrote his will himself, or dictated it to be written by another.

§ 2.- Where, however, the testator was not mistaken with reference to the article itself, but only as to a part of what was to be bequeathed (for example, if, while dictating, he stated that a certain party should be appointed heir to half his estate, while, in fact, he was appointed only to a fourth), Celsus says, in the Twelfth Book of Questions and the Eleventh Book of the Digest, that it can be maintained that the party is heir to half of the estate, as the larger amount was mentioned, but the smaller one was written; and this opinion is supported by certain general rescripts. The same rule will apply if the testator himself writes down a smaller amount when he intended to write a larger one.

§ 3.- But if the person who drew up the will put down the larger amount or (which is a matter more difficult of proof), the testator himself did so, as, for instance, a half instead of a quarter, Proculus thinks that the heir will only be entitled to the quarter, since the quarter is contained in the half. This opinion is also approved by Celsus.

§ 4.- Where, however, the testator writes two hundred for one hundred in figures, the same rule of

neamente en una ruina; los más respondieron, que en este caso quedaba siendo heredero orcino de los dos; y es lo más cierto.

§ 1.- Pero si ambos consocios hubiesen mandado que bajo la misma condición fuese libre y heredero el esclavo común, y aquella se hubiese cumplido, habrá también el mismo derecho.

9.- ULPIANO; *Comentarios o Sabino, libro V*.- Siempre que el que quería instituir heredero a uno hubiere instituido a otro, errando en la persona, por ejemplo, «mi hermano, mi patrono», se establece, que no es heredero el que fue instituido, porque se carece de voluntad, ni aquel a quien quiso instituir, porque no fue instituido.

§ 1.- Y si alguien hubiere errado en la cosa, como si queriendo dejar un plato, legara un vestido, no deberá ni una ni otra cosa; y esto, ya si él mismo lo escribió, ya si lo hubiere dictado para que se escribiera.

§ 2.- Pero si no erró respecto al objeto, sino en la parte, por ejemplo, si habiendo dictado que alguien fuese instituido por la mitad, hubiera sido instituido por la cuarta parte, dice Celso en el libro duodécimo de las Cuestiones y en el undécimo del Digesto, que se puede defender, que ha de ser heredero de la mitad, cual si se hubiera dicho más, y escrito menos; cuya opinión está apoyada por los Rescriptos generales. Y lo mismo es, también si el mismo testador escribiera menos, queriendo asignar mas.

§ 3.- Pero si el testamentario hubiere escrito una parte mayor, o, lo que es de más difícil prueba, el mismo testador, por ejemplo, la mitad por la cuarta parte, opina Próculo, que ha de ser heredero de la cuarta parte, porque la cuarta parte está comprendida en la mitad; cuya opinión la aprueba también Celso.

§ 4.- Pero si alguno hubiese escrito en cifra doscientos en vez de ciento, hay también el mismo

scriptum est et quod voluit et quod adiectum est: quae sententia non est sine ratione.

§ 5.- Tantundem Marcellus tractat et in eo, qui condicionem destinans inserere non addidit: nam et hunc pro non instituto putat: sed si condicionem addidit dum nollet, detracta ea heredem futurum nec nuncupatum videri quod contra voluntatem scriptum est: quam sententiam et ipse et nos probamus.

§ 6.- Idem tractat et si testamentarius contra voluntatem testatoris condicionem detraxit vel mutavit, heredem non futurum, sed pro non instituto habendum.

§ 7.- Sed si, cum primum heredem ex parte dimidia scribere destinasset, primum et secundum scripsit, solus primus scriptus heres videbitur et solus heres existet quasi ex parte dimidia institutus.

§ 8.- Si quis nomen heredis quidem non dixerit, sed indubitabili signo eum demonstraverit, quod paene nihil a nomine distat, non tamen eo, quod contumeliae causa solet addi, valet institutio.

§ 9.- Heres institui, nisi ut certe demonstraretur, nemo potest.

§ 10.- Si quis ita dixerit: "Uter ex fratribus meis Titio et Maevio Seiam uxorem duxerit, ex dodrante, uter non duxerit, ex quadrante heres esto", hic recte factam institutionem esse certum est: sed quis ex qua parte, incertum.

§ 11.- Plane erit similis, si ita institutio facta fuerit: "Uter ex supra scriptis fratribus meis Seiam uxorem duxerit, heres esto": sed et hanc puto valere institutionem quasi sub condicione factam.

§ 12.- Heredes iuris successores sunt et, si plures

law will apply, because both the sum that he intended and what was added to it were written at the same time. This opinion is not unreasonable.

§ 5.- Marcellus discusses this same point with reference to a party who, intending to insert a condition in his will, did not do it; and he holds that the heir should not be considered as having been properly appointed. If, however, he added a condition without intending to do so, it will be annulled, and the heir will be admitted to the succession; since whatever is written contrary to the intention of the testator is not held to have been mentioned by him. This opinion is adopted by Marcellus, and we approve it.

§ 6.- He also discusses the point that, if the person who draws up the will omitted the condition against the wishes of the testator, or changed it, the heir will not be entitled to the succession, and will be considered as not appointed.

§ 7.- But where the testator who intended to appoint one heir to half his estate, appoints both a first and second heir, the first one will solely be considered his heir, and the only one appointed to half the estate.

§ 8.- Where a testator does not mention the name of his heir, but designates him by some mark which does not admit of doubt, and which differs very little from mentioning him by name, without, however, adding any epithet which may cause him injury, the appointment will be valid.

§ 9.- No one can appoint an heir without designating him with certainty.

§ 10.- When a testator says: "Let whichever of my brothers, Titius and Mævius, who may marry Seia, be my heir to three quarters of my estate, and the one that does not marry her, be my heir to the remaining quarter"; in this instance, it is certain that the appointment is legally made.

§ 11.- It is clear that an appointment made in the following terms, namely: "Let whichever of my above-mentioned brothers who marries Seia be my heir", comes under the same rule. I think that this appointment is valid, as being made subject to a condition.

§ 12.- Heirs are legal successors, and, where

derecho; porque también aquí se escribió una y otra cosa, así lo que quiso, como lo que se añadió; cuya opinión no carece de fundamento.

§ 5.- Lo mismo examina Marcelo también respecto del que proponiéndose insertar una condición no la añadió; porque a éste también lo considera como no instituido. Pero si no queriendo añadió la condición, habrá de ser heredero prescindiéndose de aquella, y no se considera dicho lo que se escribió contra la voluntad; cuya opinión aprobamos él y nosotros.

§ 6.- El mismo dice, que también si contra la voluntad del testador suprimió, o cambió, el testamentario una condición, no ha de ser heredero, sino que ha de ser considerado como no instituido.

§ 7.- Pero si, habiéndose propuesto escribir heredero de la mitad al primero, escribió al primero y al segundo, se considerará instituido heredero solo el primero, y solo él será heredero como instituido por la mitad.

§ 8.- Si alguno no hubiere dicho ciertamente el nombre del heredero, pero lo hubiere designado con una señal indudable, que casi nada dista del nombre, pero no con lo que se suele añadir por causa de afrenta, es válida la institución.

§ 9.- Nadie puede ser instituido heredero, sino si fuese designado de una manera cierta.

§ 10.- Si alguno hubiere dicho así: «cualquiera de mis hermanos, Ticio y Mevio, que hubiere tomado por mujer a Seya, sea heredero de las tres cuartas partes, y el que no la hubiere tomado, de la otra cuarta», en este caso es cierto que la institución fue bien hecha, pero incierto por qué parte fue instituido cada cual.

§ 11.- Evidentemente será igual, si la institución hubiere sido hecha así: «sea heredero cualquiera de mis antes mencionados hermanos, que hubiere tomado por mujer a Seya»; pero creo que también esta institución es válida, cual si hubiera sido hecha bajo condición.

§ 12.- Los herederos son sucesores del derecho y, si

instituantur, dividi inter eos a testatore ius oportet: quod si non fiat, omnes aequaliter heredes sunt.

§ 13.- Si duo sint heredes instituti, unus ex parte tertia fundi Cornelianii, alter ex parte eiusdem fundi, Celsus expeditissimam Sabini sententiam sequitur, ut detracta fundi mentione quasi sine partibus heredes scripti hereditate potirentur, si modo voluntas patris familias manifestissime non refragatur.

§ 14.- Si quis ita scripserit: "Stichus liber esto et, posteaquam liber erit, heres esto", Labeo, Neratius et Aristo opinantur detracto verbo medio "postea" simul ei et libertatem et hereditatem competere: quae sententia mihi quoque vera videtur.

§ 15.- Si quis primum ex triente, secundum ex triente heredem instituerit et, si secundus heres non erit, tertium ex parte heredis scribat, hic secundo repudiante heres habebit non solum iure substitutionis, sed et institutionis, id est trientem iure substitutionis, trientem iure institutionis.

§ 16.- Servus cum libertate institutus si sit alienatus, iuberi adire ab eo potest, cui alienatus est: sed si redemptus sit a testatore, institutio valet et necessarius heres erit.

§ 17.- Si servus ex die libertatem acceperit et hereditatem pure, mox sit alienatus vel manumissus, videamus, an institutio valeat. Et quidem si alienatus non esset, potest defendi institutionem valere, ut die veniente libertatis, quae hereditatem moratur, competente libertate et heres necessarius existat.

§ 18.- Sed si in diem libertas, hereditas autem sub conditione data sit, si condicio post diem adve-

several are appointed, their respective rights must be apportioned among them by the testator; for if he does not do this, all of them will share equally as heirs.

§ 13.- Where two heirs are appointed, one to a third of the Cornelian Estate, and the other to two-thirds of the same estate, Celsus adopts the very appropriate opinion of Sabinus that, leaving the mention of the land out of consideration, the heirs whose names appear in the will are entitled to the estate just as if their respective shares had not been indicated; provided that it is perfectly evident that the will of the testator has not been disregarded.

§ 14.- Where a testator inserts in his will: "Let Stichus be free, and after he becomes free let him be my heir", Labeo, Neratius, and Aristo hold that if the word "after" should be omitted, the slave will obtain his freedom and the estate at the same time.

§ 15.- If anyone should appoint an heir to a third of his estate, and another also to a third, and, in case there should be no second heir, appoints still another heir to the two-thirds; in this instance, if the second should reject the estate, the third heir appointed will be entitled to two-thirds of it, not only by the right of substitution, but also by that of appointment; that is to say, he will have one-third of the estate by the right of substitution, and one-third by the right of appointment.

§ 16.- Where a slave is appointed an heir with the grant of his freedom, and then is alienated, he can enter upon the estate by the order of the party to whom he has been transferred. If, however, he should be ransomed by the testator, his appointment will be valid, and he will become a necessary heir.

§ 17.- If a slave should be granted his freedom to date from a certain time, and is left the estate absolutely, and he is afterwards alienated or manumitted, let us see whether his appointment will be valid. And, indeed, if he should not be alienated, it can be maintained that his appointment will be valid, so that he will become a necessary heir when the day he receives his freedom, and which delays his right to the estate, arrives.

§ 18.- But where his freedom is granted him from a certain time, and the estate is left to him under a

fueran instituidos muchos, conviene que el derecho se divida entre ellos por el testador; y si no se hiciera esto, todos son herederos por igual.

§ 13.- Si hubieran sido instituidos dos herederos, uno, de la tercera parte del fundo Cornelianiano, otro, de las dos terceras partes del mismo fundo, Celso sigue la muy clara opinión de Sabino, que, prescindiéndose de la mención del fundo, sean los herederos dueños de la herencia, como si hubieran sido instituidos sin designación de parte, si evidentísimamente no se opone la voluntad del padre de familia.

§ 14.- Si alguno hubiere escrito así: «sea libre Stico, y después que fuere libre sea heredero», opinan Labeón, Neracio y Aristo, que, prescindiéndose de la palabra «después» interpuesta, le competen al mismo tiempo la libertad y la herencia; cuya opinión también a mí me parece verdadera.

§ 15.- Si alguno hubiere instituido al primer heredero de la tercera parte, y al segundo de otra tercera parte, y, si el segundo no fuere heredero, instituyera heredero a un tercero de las dos terceras partes, tendrá éste, repudiándola el segundo, las dos terceras partes no solo por derecho de la sustitución, sino también por el de la institución, esto es, una tercera parte por derecho de la sustitución, y otra tercera por derecho de la institución.

§ 16.- Instituido un esclavo heredero con la libertad, si hubiera sido enajenado, se le puede mandar adir la herencia por aquel a quien fue enajenado; pero si hubiera sido comprado por el testador, es válida la institución, y será heredero necesario.

§ 17.- Si el esclavo hubiere recibido la libertad desde cierto día, y la herencia puramente, y luego hubiera sido enajenado o manumitido, veamos si será válida la institución; y ciertamente, si no hubiese sido enajenado, se puede defender que es válida la institución, de suerte que llegando el día de la libertad, que retarda la herencia, sea, compitiéndole la libertad, también heredero necesario.

§ 18.- Mas si la libertad hubiere sido dada para término, pero la herencia bajo condición, si la con-

nientem exstiterit, liber et heres erit.

§ 19.- Sed et si pure fuerit heres institutus libertate in diem data, si sit alienatus vel manumissus, dici debet heredem eum posse existere.

§ 20.- Sed et si non ipse servus sit alienatus, sed usus fructus in eo, aequae institutio valet, sed differtur in id tempus quo extinguatur usus fructus.

10.- PAULUS; *libro I ad Sabinum*.- Si alterius atque alterius fundi pro partibus quis heredes instituerit, perinde habebitur, quasi non adiectis partibus heredes scripti essent: nec enim facile ex diversitate pretium portiones inveniuntur: ergo expeditius est quod Sabinus scribit, perinde habendum, ac si nec fundum nec partes nominasset.

11.- IAVOLENUS; *libro VII epistularum*.- "Attius fundi Corneliani heres esto mihi, duo Titii illius insulae heredes sunto". Habebunt duo Titii semissem, Attius semissem idque Proculo placet: quid tibi videtur? Respondit: vera est Proculi opinio.

12.- PAULUS; *libro II ad Sabinum*.- Si inaequalibus partibus datis ita adiciatur: "Quos ex disparibus partibus heredes institui, aequae heredes sunto", existimandum est exaequari eos, scilicet si hoc ante peractum testamentum scriptum sit.

13.- ULPIANUS; *libro VII ad Sabinum*.- Interdum haec adiectio "aequae heredes sunto" testatoris voluntatem exprimit, ut puta "primus et fratris mei filii aequae heredes sunto": nam haec adiectio declarat omnes ex virilibus partibus institutos, ut et Labeo scripsit, qua detracta semissem fratris filii, semissem

certain condition, if the condition should be fulfilled after the day of his freedom arrives, he will become both free and the heir.

§ 19.- When a slave has been appointed an heir unconditionally, and his freedom is to date from a certain time, if he should be either alienated or manumitted, it must be said that he can become the heir.

§ 20.- Where, however, not the slave himself, but only the usufruct in him is alienated, his appointment will be valid, but it will be postponed until the time when the usufruct is extinguished.

10.- PAULUS; *On Sabinus, Book I*.- When anyone appoints heirs to different portions of different tracts of land, it will be the same as if they had not been appointed to certain portions of the same; for it is not easy to ascertain what their shares will be in the different tracts. Therefore, it is more expedient, as Sabinus says, for it to be considered that the testator had neither mentioned the land, nor the shares to which they were entitled.

11.- JAVOLENUS; *Epistles, Book VII*.- "Let Attius be my heir to the Cornelian Estate, and let the two persons named Titius be my heirs to such-and-such a house." The persons named Titius will be entitled to half of the estate, and Attius to the remaining half. This opinion is held by Proculus; what do you think of it? The answer is that the opinion of Proculus is correct.

12.- PAULUS; *On Sabinus, Book II*.- Where unequal shares in an estate were bequeathed by a testator, and he added, "Let those heirs to whom I have allotted unequal portions share equally"; it should be held that they do share equally, provided this clause was inserted before the completion of the will.

13.- ULPIANUS; *On Sabinus, Book VII*.- Sometimes, this addition, "Let my heirs share equally", expresses the intention of the testator; as, for instance: "Let the first, and the sons of my brother share equally"; for this addition indicates that all the heirs are appointed for equal shares, as is stated by

dición se cumpliere después que llegase el día, será libre y heredero.

§ 19.- Pero también si puramente hubiere sido instituido heredero habiéndose dado la libertad para término, si hubiera sido enajenado o manumitido, debe decirse, que este puede ser heredero.

§ 20.- Mas también si no hubiera sido enajenado el mismo esclavo, sino el usufruto sobre él, será igualmente válida la institución, pero se difiere para el tiempo en que se extingue el usufruto.

10.- PAULO; *Comentarios a Sabino, libro I*.- Si alguno hubiere instituido herederos de partes de dos fundos, se considerará lo mismo que si hubiesen sido instituidos herederos no habiéndose expresado las partes, porque no se hallan fácilmente las porciones, sino con diversidad de partes; luego es más expedito lo que escribe Sabino, que este caso ha de ser considerado como si no hubiese nombrado ni el fundo, ni las partes.

11.- JAVOLENO; *Epístolas, libro VII*.- «Sea Atcio mi heredero del fundo Corneliano, y sean los dos Ticios herederos de aquella casa»; los dos Ticios tendrán la mitad, y Atcio la otra mitad; y esto le parece bien a Próculo; ¿qué te parece a tí? Respondió, que es verdadera la opinión de Próculo.

12.- PAULO; *Comentarios a Sabino, libro II*.- Si habiéndose dado partes desiguales se añadiera de este modo: «sean herederos por igual los que instituí herederos de partes desiguales», se ha de juzgar que los iguala, por supuesto, si esto hubiera sido escrito antes de acabado el testamento.

13.- ULPIANO; *Comentarios a Sabino, libro VII*.- A veces esta adición: «sean herederos por igual», expresa la voluntad del testador, por ejemplo: «el primero y los hijos de mi hermano sean igualmente herederos»; porque esta adición declara, que todos fueron instituidos por porciones viriles, como

primus haberet.

§ 1.- Pater familias distribuere hereditatem in tot partes potest quot voluerit: sed sollemnis assis distributio in duodecim uncias fit.

§ 2.- Denique si minus distribuit, potestate iuris in hoc revolvitur: ut puta si duos heredes ex quadrante scripserit: nam hereditas eius residua accedit, ut ex semissibus videantur scripti.

§ 3.- Sed si alter ex quadrante, alter ex semisse heredes scripti sunt, qui accedit quadrans pro partibus hereditariis eis adcrecit.

§ 4.- Sed si excesserit in divisione duodecim uncias, aequae pro rata decrescet: ut puta me ex duodecim unciis heredem, te ex sex scripsit: ego hereditatis habeo bessem, tu trientem.

§ 5.- Sed si duos ex asse heredes scripserit, alios ex duodecim unciis, an aequae distributio fiat, apud Labeonem libro quarto posteriorum quaeritur. Et putat Labeo et illos ex semisse et hos, qui ex duodecim unciis scripti sunt, ex semisse heredes fore, cui sententiae adsentiendum puto.

§ 6.- Sed si duos ex asse heredes instituerit, tertium autem ex dimidia et sexta, eodem libro Labeo ait in viginti uncias assem dividendum, octo laturum ex dimidia et sexta scriptum, illos duos duodecim.

§ 7.- Apud eundem refertur: "Titius ex parte tertia", deinde asse expleto "idem ex parte sexta": in quattuordecim uncias hereditatem dividendam Trebatius ait.

14.- IAVOLENUS; *libro I ex Cassio*.- Si quis

Labeo; and if it is omitted, the first will be entitled to half the estate, and the sons of the testator's brother to the other half.

§ 1.- The father of a family can divide his estate into as many portions as he wishes, but the regular division of an estate is made into twelve shares, called unciae.

§ 2.- Hence, if the testator divides his estate into a smaller number than this, recourse is had to this rule by operation of law; for example, where a testator appoints two heirs each to a fourth of his estate, for in this case the remainder of the estate is apportioned in such a way that each heir is held to have been appointed for six shares.

§ 3.- Where, however, one heir is appointed for one-fourth of the estate, and another for half, the remaining fourth will be added in proportion to the shares which they inherit respectively.

§ 4.- If a testator should divide his estate into more than twelve shares, a diminution will then be made pro rata, as for example, if he appointed me heir to twelve shares, and you heir to six, I will be entitled to eight shares of the estate, and you to four.

§ 5.- When a testator appoints two heirs for the entire estate and two others for twelve parts of the same, the inquiry is made by Labeo, in the Fourth Part of his Last Works, whether an equal distribution shall be made. And he holds that the former are entitled to half the estate, and those who are appointed for twelve shares of it will be heirs to the other half. I think that this opinion should be adopted.

§ 6.- If, however, a testator should appoint two heirs for his entire estate, and then appoint a third for a half and a sixth of the same, Labeo says, in the same book, that the entire estate should be divided into twenty parts, of which the two first heirs shall have twelve, and he who was appointed for the half and the sixth will be entitled to eight.

§ 7.- Labeo also gives as an example: "Let Titius be appointed for a third of my estate"; and then, after the entire estate had been disposed of was added: "Let the same Titius be appointed for a sixth". Trebatius says that this estate should be divided into fourteen parts.

14.- JAVOLENUS; *On Cassius, Book I*.- If anyone

también escribió Labeón, y suprimida ella, los hijos del hermano tendrían la mitad, y el primero la otra mitad.

§ 1.- El padre de familia puede distribuir la herencia en tantas partes cuantas quisiere; pero la distribución solemne del as se hace en doce onzas.

§ 2.- Finalmente, si distribuyó menos, se reduce a esto por la autoridad de la ley, por ejemplo, si a dos los hubiere instituido herederos de la cuarta parte; porque les corresponde por accesión su restante herencia, de suerte que se consideren instituidos cada uno por la mitad.

§ 3.- Pero si uno fue instituido heredero de la cuarta parte, y otro de la mitad, la cuarta parte que va a la accesión les acrece según sus porciones hereditarias.

§ 4.- Mas si en la división se excediere de las doce onzas, cada parte decrecerá igualmente a proporción, por ejemplo, me instituyó heredero de doce onzas, y a tí de seis, yo tengo dos tercios de la herencia, y tú el otro tercio.

§ 5.- Pero si hubiere instituido dos herederos de todo el as, y a otros de otras doce onzas, pregúntase Labeón en el libro cuarto de sus Obras póstumas, si se hace por igual la distribución. Y opina Labeón, que así aquellos han de ser herederos de medio as, como también estos, que fueron instituidos herederos de doce onzas, han de ser herederos del otro medio as; a cuya opinión creo que se ha de asentar.

§ 6.- Mas si a dos los hubiere instituido herederos del as, y a un tercero, de la mitad y de la sexta parte, dice Labeón en el mismo libro, que el as se ha de dividir en veinte onzas, debiendo tomar ocho el instituido por la mitad y por un sexto, y doce aquellos dos.

§ 7.- Refiere el mismo, que si hubiere sido instituido «Ticio, por la tercera parte», y después de distribuido el as, «el mismo, por la sexta parte», dice Trebacio, que se ha de dividir la herencia en catorce onzas.

14.- JAVOLENO; *Doctrina de Cassio, libro I*.- Si

heredes ita instituit: "Titius ex parte prima, seius ex parte secunda, Maevius ex parte tertia, Sulpicius ex parte quarta heredes sunt": aequae partes hereditatis ad institutos pertinebunt, quia testator appellatione numeris scripturae magis ordinem, quam modum partibus imposuisse videtur.

15.- ULPIANUS; *libro VII ad Sabinum*.- Iulianus quoque libro trigesimo refert, si quis ita heredem scripserit: "Titius ex parte dimidia heres esto: Seius ex parte dimidia: ex qua parte Seium institui, ex eadem parte Sempronius heres esto", dubitari posse, utrum in tres semisses dividere voluit hereditatem an vero in unum semissem Seium et Sempronium coniungere: quod est verius, et ideo coniunctim eos videri institutos: sic fiet, ut Titius semissem, hi duo quadrantes ferant.

§ 1.- Idem eodem libro scripsit, si primus ex semisse, secundus ex semisse, si primus heres non erit, tertius ex dodrante substitutus sit, facti quidem quaestionem esse: verum recte dicitur, si quidem primus adierit, aequales partes habituros, si repudiaverit, quindecim partes futuras, ex quibus novem quidem laturum tertium, sex secundum:

16.- IULIANUS; *libro XXX digestorum*.- Nam tertium et instituti et substituti personam sustinere, in tres partes institutum videri, in sex substitutum.

17.- ULPIANUS; *libro VII ad Sabinum*.- Item quod Sabinus ait, si cui pars adposita non est, excutiamus. Duos ex quadrantibus heredes scripsit, tertium sine parte: quod assi deest, feret: hoc et Labeo.

should appoint heirs as follows: "Let Titius be heir to the first share, Seius to the second, Maevius to the third, and Sulpicius to the fourth", equal shares of the estate will belong to the parties appointed; for the reason that the testator is held to have named them rather to show the order of their designation, than to prescribe the method of dividing the estate into shares.

15.- ULPIANUS; *On Sabinus, Book VII*.- Julianus states in the Thirtieth Book that where a testator appointed his heirs as follows: "Let Titius be the heir to half of my estate, and Seius to half, and out of the portion which I have left to Seius, let Sempronius be my heir to an equal amount"; it may be doubted whether the testator intended to divide his estate into three shares, or whether he intended to join Seius and Sempronius as heirs to the same half. The latter is the better opinion, and therefore these two are held to have been appointed heirs to the same portion of the estate; hence the result is that Titius will be entitled to half of the estate, and each of the others to a fourth of the same.

§ 1.- The same authority stated in the same book, that where a testator said, "If the first is heir to one-half, the second will be heir to the other half; but if the first should not be an heir, let the third be substituted as heir for three-quarters of my estate". This is indeed a question of fact, but it may very properly be said that if the first heir enters upon the estate, the others will be entitled to equal shares of the same; but if he rejects it, it must be divided into fifteen parts, of which the third heir will be entitled to nine, and the second to six.

16.- JULIANUS; *Digest, Book XXX*.- For the third heir occupies the position of one who has been both appointed and substituted, as he is held to have been appointed for three parts of the estate, and substituted for six.

17.- ULPIANUS; *On Sabinus, Book VII*.- Sabinus says that where a share has not been allotted to one of the heirs this requires investigation. For instance, where a testator appointed two heirs, each to a fourth of the estate, but did not assign anything to the third,

alguno instituyó los herederos de este modo: «sean herederos, Ticio de la primera parte, Seyo de la segunda parte, Mevio de la tercera parte, Sulpicio de la cuarta parte», les pertenecerán a los instituidos iguales partes de la herencia, porque se considera que el testador impuso con la designación del número de la escritura más bien el orden, que la cuantía de las partes.

15.- ULPIANO; *Comentarios a Sabino, libro VII*.- Refiere también Juliano en el libro trigésimo que si uno hubiere instituido heredero de esta manera: «sea Ticio heredero de la mitad, y Seyo de la mitad; y de la misma parte en que instituí heredero a Seyo «Sea heredero Sempronio», se puede dudar, si quiso dividir la herencia en tres porciones iguales, o unir en una sola mitad a Seyo y a Sempronio. Lo que es más verdadero, y por lo tanto, se considera que estos fueron instituidos conjuntamente; y así sucederá, que Ticio tomará medio as, y estos dos una cuarta parte cada uno.

§ 1.- Escribió el mismo en el expresado libro, que si el primero fue instituido por la mitad del as, y el segundo por la otra mitad, y si el primero no fuere heredero fuera substituido el tercero en las tres cuartas partes, la cuestión es ciertamente de hecho; pero con razón se dice, que si verdaderamente el primero hubiere adido la herencia, habrán de tener partes iguales, y que si la hubiere repudiado, habrán de ser quince las partes, de las que tomará ciertamente nueve el tercero, y seis el segundo;

16.- JULIANO; *Digesto, libro XXX*.- porque el tercero representa la personalidad del instituido, y del sustituido, y se considera que fue instituido en tres partes, y sustituido en seis.

17.- ULPIANO; *Comentarios a Sabino, libro VII*.- Examinemos también lo que dice Sabino, si a alguno no se le hubiera asignado parte: uno instituyó a dos herederos de cuartas partes, y a un tercero sin parte; éste tendrá lo que falta para el as; y esto dice también

§ 1.- Unde idem tractat, si duos ex undecim, duos sine parte scripsit, mox unus ex his, qui sine parte fuerunt, repudiaverit, utrum omnibus semuncia an ad solum sine parte scriptum pertineat: et variat. Sed Servius omnibus adcrecere ait, quam sententiam veriolem puto: nam quantum ad ius adcrecendi non sunt coniuncti, qui sine parte instituuntur: quod et Celsus libro sexto decimo digestorum probat.

§ 2.- Idemque putat et si expleto asse duos sine parte heredes scripserit, neque hos neque illos coniunctos.

§ 3.- Sed si asse expleto alium sine parte heredem scripserit, in alium assem veniet. Aliter atque si ita scripsisset expleto asse: "Ex reliqua parte heres esto", quoniam, cum nihil reliquum est, ex nulla parte heres institutus est.

§ 4.- Sed si expleto asse duo sine partibus scribantur, utrum in singulos asses isti duo an in unum assem coniungantur, quaeritur. Et putat Labeo, et verius est, in unum assem venire: nam et si unus sine parte, duo coniunctim sine parte instituuntur, non tres trientes fieri Celsus libro sexto decimo scripsit, sed duos semisses.

§ 5.- Quod si quis dupundium distribuit et tertium sine parte instituit, hic non in alium assem, sed in trientem venit, ut Labeo quarto posteriorum scripsit, nec Aristo vel Aulus (utpote probabile) notant.

the latter will be entitled to the remainder. Labeo also adopts this opinion.

§ 1.- The same authority discusses the question: "Where a testator appointed two heirs to eleven shares of his estate, and two without any, and afterwards one of those to whom no share was assigned rejected the succession, will the twenty-fourth to which he was entitled belong to all the heirs, or to him alone to whom no share was assigned? He does not determine this point. Servius, however, says that the share will belong to all the heirs, and I think that this opinion is the better one; for, so far as the right of accrual is concerned, those who are appointed without any share are not joint heirs with the others. This opinion is adopted by Celsus in the Sixteenth Book of the Digest.

§ 2.- Sabinus also holds that where the testator has disposed of the entire estate, and appointed two heirs without assigning them any portion thereof, neither of them will be joint-heirs with the others.

§ 3.- But if, after having disposed of the entire estate, he should appoint another without any share, the latter will be entitled to half of double the amount of the original shares of the said estate. It will be otherwise, however, if, after having disposed of his entire estate, the testator should provide: "Let So-and-So be my heir to the remainder"; since, as there is nothing left, an heir cannot be appointed for any share.

§ 4.- But if, after the entire estate was disposed of, two heirs should be mentioned without any shares being assigned to them, the question arises, shall these two be united in the doubling of the estate, or only in a single division of the same? Labeo thinks, and it is the better opinion, that they will be entitled to share in a single division; for, where one has been appointed without the assignment of any share, and afterwards two are appointed together without any share being assigned to them, Celsus says, in the Sixteenth Book, the estate should not be divided into three portions, but only into two.

§ 5.- But if the testator, after doubling the shares of the estate, should divide it between two heirs, and should appoint a third without any share, the number of original shares will not be tripled; but the said third

Labeón.

§ 1.- Por lo cual examina el mismo, si a dos los instituyó en once onzas, y a otros dos sin parte, y después uno de los que fueron instituidos sin parte hubiere repudiado la herencia, si les pertenecerá acaso a todos la media onza, o solamente al instituido sin parte; y es de diferente parecer. Pero Servio dice que acrece a todos; cuya opinión considero más verdadera, porque en cuanto al derecho de acrecer no están conjuntos los que son instituidos sin parte; lo que aprueba también Celso en el libro décimo sexto del Digesto.

§ 2.- Y opina el mismo, que, también si después de haber distribuido el as hubiere instituido dos herederos sin parte, ni estos, ni aquellos son conjuntos.

§ 3.- Pero si distribuido el as hubiere instituido otro heredero sin parte, vendrá éste comprendido en otro as; y de otra suerte sería, si distribuido el as hubiese hecho la institución de este modo: «sea heredero de la parte restante», porque no habiendo ningún sobrante, no fue instituido heredero en parte alguna.

§ 4.- Mas si agotado el as se instituyeran sin partes dos herederos, se pregunta si estos dos están conjuntos para un as cada uno, o en un solo as. Y opina Labeón, y es más verdadero, que son comprendidos en un solo as; porque también si uno fuera instituido sin parte, y dos conjuntamente sin parte, escribió Celso en el libro décimo sexto, que no se hacen tres tercios, sino dos mitades.

§ 5.- Pero si uno distribuyó un doble as, e instituyó sin parte a un tercero, éste no viene como prendido en otro as, sino en una tercera parte, según escribió Labeón en el libro cuarto de sus Obras póstumas; y ni

18.- PAULUS; *libro I ad Vitellium*.- Sabinus: quaesitum est, si plus asse pater familias distribuisset et aliquem sine parte fecisset heredem, utrumne is assem habiturus foret an id dumtaxat, quod ex dupundio deesset. Et hanc esse tolerabilissimam sententiam puto, ut eadem ratio in dupondio omnique re deinceps quae in asse servetur. Paulus: eadem ratio est in secundo asse quae in primo.

19.- ULPIANUS; *libro VII ad Sabinum*.- Ex facto etiam agitatum Pomponius et Arrianus referunt [deferunt], si quis vacua parte relicta ita instituerit: "Si mihi Seius heres non erit", quem non instituerat, "Sempronius heres esto", an hic occupare possit vacantem portionem. Et Pegasus quidem existimat ad eam partem admitti: Aristo contra putat, quia huic pars esset data, quae nulla esset: quam sententiam et Javolenus probat et Pomponius et Arrianus et hoc iure utimur.

20.- PAULUS; *libro II ad Sabinum*.- Quo loco scribatur heres sine parte, utrum primo an medio vel novissimo, nihil interest.

§ 1.- Si iam mortuo quadrans, alii dodrans datus sit et alius sine parte scriptus sit, Labeo eum, qui sine parte heres institutus sit, alterum assem habiturum et hanc mentem esse testantis: quod et Iulianus probat et verum est.

heir will be entitled to a third part of the same, as Labeo stated in the Fourth Book of his Last Works, and this opinion is not referred to by either Aristo or Paulus, perhaps because they deemed it correct.

18.- PAULUS; *On Vitellius, Book I*.- Sabinus says: "The question arises where a testator had distributed among his heirs a larger number of shares than the usual division of an estate requires, and had appointed one heir without any share; will the latter be entitled to half the double division, or only what is lacking of the twenty-four shares?" I think that the latter opinion is the more correct one, so that the same ratio shall be observed where the division is doubled, or any other greater number of shares is made than is done in the ordinary distribution of an estate. Paulus: "The same ratio must be observed in the second division as in the first".

19.- ULPIANUS; *On Sabinus, Book VII*.- Pomponius and Arrianus assert that a discussion arose with reference to the following point, namely, where a man left a portion of his estate undisposed of, and then provided, "If Seius" (whom he had not appointed) "should not be my heir, let Sempronius be my heir", whether the latter could take that portion of the estate which had not been allotted to anyone. Pegasus thinks that he would be entitled to this portion. Aristo holds the contrary opinion, because a share was allotted to him which did not exist. Javolenus, Pomponius, and Arrianus approve this opinion, which prevails at the present time.

20.- PAULUS; *On Sabinus, Book II*.- It makes no difference to what place an heir to whom no portion of the estate has been given is assigned, whether to the first, the intermediate, or the last.

§ 1.- Where the fourth of an estate has been left to a person who is already dead, and the remaining three-fourths to another, and a third part was mentioned without any share of the estate being allotted to him, Labeo says that the one who was appointed heir without any share will be entitled to half of the doubled shares of the estate, and that this was the intention of the testator. Julianus also approves this opinion, and it is correct.

Ariston, ni Aulo, lo notan, como probable.

18.- PAULO; *Comentarios a Vitelio, libro I*.- Dice Sabino: se preguntó, si en el caso de que el padre de familia hubiese distribuido más del as, y a alguien lo hubiese instituido heredero sin parte, habría de tener éste un as, o solamente lo que faltase para el doble as. Y opino que es una opinión muy tolerable, que se observe la misma regla en el doble as y en toda otra cosa posterior, que en el as. Y dice Paulo: la misma regla hay para el segundo as, que para el primero.

19.- ULPIANO; *Comentarios a Sabino, libro VII*.- Pomponio y Arriano refieren, que también se discutió sobre este hecho: si en el caso de que habiendo dejado sin destino alguna parte hubiere uno hecho así la institución, «si Seyo no fuere mi heredero, (al cual no lo había instituido), sea heredero Sempronio», podría éste ocupar la porción vacante. Y, a la verdad, Pegaso opina, que es admitido a esta parte; Aristón juzga lo contrario, porque a éste se le habría dado una parte, que no existía. Cuya opinión aprueban Javoleno, Pomponio y Arriano; y este derecho practicamos.

20.- PAULO; *Comentarios a Sabino, libro II*.- Nada importa en qué lugar se escriba heredero sin parte, si al principio, al medio, o al fin.

§ 1.- Si al que ya había muerto se le hubiera dado una cuarta parte, a otro las otras tres cuartas, y otro hubiera sido instituido sin parte, dice Labeón, que el que haya sido instituido heredero sin parte, habrá de tener otro as, y que esta es la mente del testador; lo que aprueba también Juliano, y es verdad.

§ 2.- Quod si vivus et mortuus ex parte dimidia coniunctim heredes instituti sunt, ex altera alius, aequas partes eos habituros ait, quia mortui pars pro non scripto habetur.

21.- POMPONIUS; *libro I ad Sabinum*.- Trebatius ait sic non recte scribi: "Quisquis mihi heres erit, Stichus liber et heres esto", liberum tamen futurum. Labeo et heredem eum futurum recte putat.

§ 1.- Servo libertatem pure, hereditatem sub conditione dari posse verissimum puto, ut tamen utrumque ex conditione pendeat:

22.- IULIANUS; *libro XXX digestorum*.- Et expleta quidem conditione liber heresque erit, quocumque loco libertas data fuerit: deficiente autem conditione perinde habetur, ac si libertas sine hereditate data fuerit.

23.- POMPONIUS; *libro I ad Sabinum*.- Si quis instituatur heres in diem certum vel incertum, si bonorum possessionem agnoscere potest et tamquam heres distrahere hereditatem.

§ 1.- Sed si bonorum possessionem non admittat, sed condicionem trahat, cui facile parere possit, veluti "si servum quem in potestate habeat manumiserit" nec manumittat, hic praetoris erunt partes, ut imitetur edictum suum illud, quo praefinit tempus, intra quod adeatur hereditas.

§ 2.- Item si conditioni heres parere non poterit, quam in sua potestate non habebit, veluti institutione collata in alterius factum aut quendam casum, "si ille" puta "consul factus fuerit", tunc postulantibus creditoribus constituet praetor, nisi intra certum tempus hereditas optigerit aditque fuerit, se bona defuncti creditoribus possidere iussurum et interim

§ 2.- Where a person who is living and one who is dead are appointed joint-heirs to half of an estate, and a third party to the other half; he says that they will be entitled to equal shares, because the share assigned to the deceased is considered as not having been mentioned.

21.- POMPONIUS; *On Sabinus, Book I*.- Trebatius says that the following is not correctly stated: "Whoever shall be my heir, let Stichus be free and my heir", but that the slave will, nevertheless, become free. Labeo holds, and very properly, that he will also be the heir.

§ 1.- I think it very probable that freedom can be absolutely granted to a slave, and that the estate can, at the same time, be bequeathed under some condition, in such a way, however, that both provisions will depend upon the condition.

22.- JULIANUS; *Digest, Book XXX*.- The condition having been fulfilled, the slave will become free and an heir; no matter in what part of the will freedom has been conferred upon him. Where, however, the condition has not been fulfilled, it is considered that freedom has been bestowed upon him without the estate.

23.- POMPONIUS; *On Sabinus, Book I*.- Where an heir is appointed for a time which is either certain or uncertain, he can claim possession of the estate, and can dispose of it as the heir.

§ 1.- But if he should not claim possession of the estate, but postpones compliance with the condition, which he can very easily carry out (for instance, if the condition was that he should manumit a slave who is under his control, but he does not do so), in this case it is the duty of the Praetor to issue his edict designating the time within which the heir shall enter upon the estate.

§ 2.- Likewise, if the heir cannot comply with the condition because it is not in his power (for instance, when it consists of something to be done by another, or depends upon some uncertain event, for example: "If he should become Consul"); and the Praetor should then decide, upon application of the creditors, that unless the estate was accepted and entered upon

§ 2.- Pero si el vivo y el muerto fueron instituidos conjuntamente herederos de la mitad, y otro de la otra, dice que habrán de tener ellos iguales partes, porque la parte del muerto se considera como de quien no fue instituido.

21. - POMPONIO; *Comentarios a Sabino, libro I*.- Dice Trebacio, que no se escribe conforme a derecho de este modo: «cualquiera que fuere mi heredero, sea Stico libre y heredero», pero que ha de ser libre; con razón opina Labeón, que él también ha de ser heredero.

§ 1.- Juzgo muy verdadero, que al esclavo se le puede dar la libertad puramente, y la herencia bajo condición, pero de suerte que una y otra cosa penda de la condición;

22.- JULIANO; *Digesto, libro XXX*.- y cumplida ciertamente la condición, sera libre y heredero, cualquiera que sea el lugar en que hubiere sido dada la libertad; pero faltando la condición se considera lo mismo que si hubiere sido dada la libertad sin la herencia.

23.- POMPONIO; *Comentarios a Sabino, libro I*.- Si alguno fuera instituido heredero para día cierto o incierto, éste puede aceptar la posesión de bienes, y enajenar la herencia como heredero.

§ 1.- Pero si no admitiera la posesión de bienes sino que difiriese la condición, que fácilmente pudiera cumplir, por ejemplo, si hubiere manumitido un esclavo que tenga en su poder, y no lo manumitiera, en este caso serán atribuciones del Pretor, que se observe aquel edicto suyo en que establece el tiempo dentro del cual se ha de adir la herencia.

§ 2.- Asimismo, si el heredero no pudiese cumplir la condición, que no tuviere en su potestad, por ejemplo, habiéndose referido la institución a hecho de otro, o a algún accidente, como «si aquel fuere hecho cónsul», en este caso, pidiéndolo los acreedores, determinará el Pretor, que si dentro de cierto tiempo no correspondiere a alguien la herencia, y no

quae urgebunt per procuratores distrahi iussurum.

§ 3.- Sed si sub condicione quis heres institutus sit et grave aes alienum sit, quod ex poena crescit, et maxime si publicum debitum imminet: per procuratorem solvendum aes alienum, sicuti cum venter in possessione sit aut pupillus heres tutorem non habeat.

§ 4.- Et ideo ait causae cognitionem adiectam propter eos, qui sine dilatione peregre essent vel aegritudine vel valetudine ita impedirentur, ut in ius produci non possint, nec tamen defenderentur.

24.- CELSUS; *libro XVI digestorum*.- "Titius et Seius uterve eorum vivet heres mihi esto". Existimo, si uterque vivat, ambo heredes esse, altero mortuo eum qui supererit ex asse heredem fore,

25.- ULPIANUS; *libro VI regularum*.- Quia tacita substitutio inesse videtur institutioni:

26.- CELSUS; *libro XVI digestorum*.- Idque et in legato eodem modo relicto senatus censuit.

27.- POMPONIUS; *libro III ad Sabinum*.- Si te solum ex parte dimidia pure, ex altera sub condicione heredem instituero et substituero tibi, non existente condicione substitutum ex ea parte heredem fore Celsus ait:

§ 1.- Sed si te heredem instituero et deinde eundem te sub condicione instituam, nihil valere sequentem institutionem, quia satis plena prior fuisset.

within a certain time, he would direct the said creditors of the estate to take possession of the property of the deceased, and, in the meantime, would order any of the property which it was necessary to dispose of to be sold by agents appointed for that purpose.

§ 3.- Where, however, an heir is appointed under a condition, and the indebtedness of the estate is considerable, and is liable to be increased by the imposition of penalties, and especially where there is a public debt, the indebtedness should be discharged by means of an agent, just as where an unborn child is in possession of the estate, or there is a minor heir who has no guardian.

§ 4.- And therefore he says that an investigation should be made with reference to those heirs who are absent, without wilfully being in default; but who are prevented either by acute or chronic illness from coming into court, and have no one to appear in their defence.

24.- CELSUS; *Digest, Book XVI*.- "Let Titius and Seius, or the survivor of either of them, be my heir." I think that if both of them survive, both will be heirs, but if one of them should die, the survivor will be heir to the entire estate:

25.- ULPIANUS; *Rules, Book VI*.- For the reason that a tacit substitution seems to be included in the appointment.

26.- CELSUS; *Digest, Book XVI*.- The Senate also decided this question where a legacy was bequeathed in the same way.

27.- POMPONIUS; *On Sabinus, Book III*.- If I appoint you absolutely my heir to half of my estate, and appoint another heir to the other half under some condition, and I then appoint a substitute for you, Celsus says that if the condition is not complied with, the substitute will be the heir to that portion of the estate.

§ 1.- But if I appoint you my heir unconditionally, and afterwards appoint you under some condition, the second appointment will not be valid, because the first one takes precedence of the other.

fuere adida, él mandará a los acreedores que posean los bienes del difunto, y mandará entretanto que se enajenen por medio de procuradores los que urgieren.

§ 3. - Pero si uno hubiera sido instituido heredero bajo condición, y hubiera una deuda grande, que crece por vía de pena, y principalmente si apremia una deuda pública, se ha de pagar por medio de procurador la deuda; como cuando el vientre esté en posesión, o el pupilo heredero no tenga tutor.

§ 4.- Y por esto dice, que se añadió el conocimiento de causa de razón de los que no por dilación estuviesen de viaje, o de tal suerte estuviesen impedidos por enfermedad o falta de salud, que no pudiesen presentarse en juicio, y, sin embargo, no fuesen defendidos.

24.- CELSO; *Digesto, libro XVI*.- «Sean mis herederos Ticio y Seyo, o el que viviere de los dos»; opino, que si vivisen ambos, ambos son herederos, y que, muerto uno, habrá de ser heredero de la totalidad el que sobreviviere,

25.- ULPIANO; *Reglas, libro VI*.- porque se considera que hay inherente a la institución una tácita substitución;

26.- CELSO; *Digesto, libro XVI*.- y esto determinó el Senado también respecto de un legado dejado de este modo.

27.- POMPONIO; *Comentarios a Sabino, libro III*.- Si a ti solo te hubiere yo instituido heredero puramente de una mitad, y bajo condición de la otra, y te hubiere dado un sustituto, dice Celso, que, no cumpliéndose la condición, el sustituto ha de ser heredero de esta parte.

§ 1.- Pero que si yo te hubiere instituido heredero, y después te instituyere a ti mismo bajo condición, nada vale la segunda institución, porque la primera habría sido bastante plena.

§ 2.- Sed si plures institutiones ex eadem parte sub diversis condicionibus fuerint factae, ultra prior condicio exstiterit, id faciet quod supra diximus, si pure et sub condicione idem instituat.

28.- ULPIANUS; *libro V ad Sabinum*.- Si ita quis institutus sit: "Titius heres esto, si secundus heres non erit", deinde: "secundus heres esto": placet primo gradu secundum esse institutum.

29.- POMPONIUS; *libro V ad Sabinum*.- Hoc articulo "quisque" omnes significantur: et ideo Labeo scribit, si ita scriptum sit: "Titius et Seius quanta quisque eorum ex parte heredem me habuerit scriptum, heres mihi esto", nisi omnes habeant scriptum heredem testatorem, neutrum heredem esse posse, quoniam ad omnium factum sermo refertur: in quo puto testatoris mentem respiciendam. Sed humanius est eum quidem, qui testatorem suum heredem scripserit, in tantam partem ei heredem fore, qui autem eum non scripserit, nec ad hereditatem eius admitti.

30.- ULPIANUS; *libro XXI ad edictum*.- Pignori obligatum servum necessarium domino posse fieri imperator Severus rescripsit, ita tamen, si paratus sit prius creditori satisfacere.

31.- GAIUS; *libro XVII ad edictum provinciale*.- Non minus servos quam liberos heredes instituere possumus, si modo eorum scilicet servi sint, quos ipsos heredes instituere possumus, cum testamenti factio cum servis ex persona dominorum introducta est.

§ 1.- Hereditarium servum ante aditam hereditatem ideo placuit heredem institui posse, quia creditum est hereditatem dominam esse defuncti locum optinere.

§ 2.- Where, however, several appointments have been made for the same share of an estate under different conditions, and the first condition is fulfilled, the result will be the same that we stated above, where the appointment was made absolutely, and also under a condition.

28.- ULPIANUS; *On Sabinus, Book V*.- If anyone should be appointed an heir as follows: "Let Titius be my heir, if Secundus will not be my heir", and afterwards he says, "Let Secundus be my heir", it is settled that Secundus is appointed in the first degree.

29.- POMPONIUS; *On Sabinus, Book V*.- By the term "either" all the heirs are meant, and therefore Labeo says that if the following was inserted in the will, namely: "Let Titius and Seius be my heirs to the amount that either of them has appointed me his heir". If both of them did not appoint the testator their heir, neither of them will be his heir, since the phrase has reference to the act of all; but in this instance, I think that the intention of the testator should be considered. It is more equitable, therefore, that he whom the testator would have designated to inherit his estate should be his heir to that amount, and that he whom he would not have appointed, should not be admitted to share in his estate.

30.- ULPIANUS; *On the Edict, Book XXI*.- The Emperor Severus stated in a Rescript that where a slave was pledged he could be the necessary heir of his master, provided that he was ready to satisfy the creditor beforehand.

31.- GAIUS; *On the Provincial Edict, Book XVII*.- We can appoint as heirs not only slaves but freemen, provided that the slaves belong to parties whom themselves we can appoint, since the making of a will with reference to slaves is a right derived from the authority of their masters.

§ 1.- The power to appoint a slave who forms part of an estate before the estate has been entered upon is based upon the principle that the estate is considered to be the owner of the slave, and to occupy the place of the deceased.

§ 2.- Mas si se hubieren hecho muchas instituciones de una misma parte bajo diversas condiciones, cualquiera condición que se hubiere cumplido la primera hará lo que arriba hemos dicho, si uno mismo fuese instituido puramente y bajo condición.

28.- ULPIANO; *Comentarios a Sabino, libro V*.- Si alguno hubiera sido instituido en esta forma: «sea heredero Ticio, si el segundo no fuere heredero», y después, «sea heredero el segundo», se establece, que el segundo fue instituido en primer grado.

29.- POMPONIO; *Comentarios a Sabino, libro V*.- Con esta palabra «cualquiera» se significan todos, y por esto escribe Labeón, que si se hubiera escrito así: «sean mis herederos Ticio y Seyo de tanta parte de cuanto cualquiera de ellos me hubiere instituido heredero», si todos no hubieran instituido heredero al testador, ninguno de los dos puede ser heredero, porque la expresión se refiere al hecho de todos; en lo cual creo que se ha de atender a la mente del testador. Pero es más humano, que el que verdaderamente hubiere instituido su heredero al testador, haya de ser heredero de este en otra porción igual, y que el que no lo hubiere instituido no sea admitido a su herencia.

30.- ULPIANO; *Comentarios al Edicto, libro XXI*.- Respondió por rescripto el Emperador Severo, que el esclavo obligado en prenda puede ser hecho heredero necesario de su señor, pero de esta suerte, si estuviera dispuesto a satisfacer antes al acreedor.

31.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- Podemos instituir herederos no menos a los esclavos, que a los libres, si, a la verdad, los esclavos fueran de aquellos a quienes podemos instituir herederos, puesto que se introdujo la testamentifacción con los esclavos atendiendo a la persona de sus señores.

§ 1.- Se Determinó que el esclavo de la herencia antes de ser adida la herencia podía ser instituido heredero, por esto, porque se creyó que la herencia era la dueña, y ocupaba el lugar del difunto.

32.- GAIUS; *libro I de testamentis ad edictum praetoris urbani*.- Illa institutio "quos Titius voluerit" ideo vitiosa est, quod alieno arbitrio permissa est: nam satis constanter veteres decreverunt testamentorum iura ipsa per se firma esse oportere, non ex alieno arbitrio pendere.

§ 1.- Is qui apud hostes est recte heres instituitur, quia iure postliminii omnia iura civitatis in personam eius in suspenso retinentur, non abrumpuntur: itaque si reversus fuerit ab hostibus, adire hereditatem poterit. Servus quoque eius recte heres instituitur et, si reversus sit ab hostibus, potest eum iubere adire hereditatem: si vero ibi decesserit, qui ei heres existet potest per servum heres fieri.

33.- GAIUS; *libro II de testamentis ad edictum praetoris urbani*.- Si quis ita scripserit: "Titius ex parte dimidia heres esto: idem Titius ex altera parte dimidia, si navis ex Asia venerit, heres esto", cum ex pura institutione adierit heres, quamvis condicio alterius institutionis pendeat, ex asse fit heres, scilicet etiam condicione deficiente, cum non prosit ei condicio quicquam existens: quippe cum non dubitetur, quin, si quis ex parte dimidia heres institutus sit nec praeterea quisquam alius, ipse ex asse heres institui videatur.

34.- PAPINIAUS; *libro I definitionum*.- Hereditas ex die vel ad diem non recte datur, sed vitio temporis sublato manet institutio.

35.- ULPIANUS; *libro IV disputationem*.- Ex facto proponebatur: quidam duos heredes scripsisset, unum rerum provincialium, alterum rerum Italicarum, et, cum merces in Italiam devehere soleret, pecuniam misisset in provinciam ad merces comparandas, quae comparatae sunt vel vivo eo vel

32.- THE SAME; *Concerning Wills; On the Edict of the Urban Praetor, Book I*.-The appointment of an heir, as follows, "Those whom Titius may wish", is defective, for the reason that it depends upon the desire of another. For the ancient authorities very frequently decided that the validity of wills must be derived from themselves, and not depend upon the wishes of others.

§ 1.- Anyone who is in the hands of the enemy can legally be appointed an heir, because, by the law of postliminium, all his personal rights of citizenship remain in suspense, and are not annulled. Therefore, if he should return from captivity he can enter upon the estate. His slave can also legally be appointed heir, and if his master returns from captivity, he can be ordered to enter upon the estate. If, however, he should die, his legal successor will become his heir through the act of the slave.

33.- THE SAME; *Concerning Wills; On the Edict of the Urban Praetor, Book II*.- If anyone should write the following into a will, namely: "Let Titius be heir to half of my estate, and let the same Titius be heir to the other half if a ship arrives from Asia", as the heir enters upon the estate by reason of an unconditional appointment, although the condition of the second appointment may still be pending, he becomes the heir to the entire estate, even if the condition should not be fulfilled, as its fulfillment will not, in any way, benefit him; since there is no doubt that if a party is appointed heir to half of an estate, and no other heir should afterwards appear, he is held to have been appointed heir to the whole of it.

34.- PAPINIANUS; *Definitions, Book I*.- An estate cannot legally be bequeathed from a certain time or until a certain time, but the defect with reference to the time having been ignored, the appointment of the heir will stand.

35.- ULPIANUS; *Disputations, Book IV*.- In a case which was stated, a certain testator appointed two heirs, one to his property situated in a province, the other to his property situated in Italy; and as it was his custom to bring merchandise into Italy, he sent money into the province for the purpose of buying

32.- EL MISMO; *Comentarios al Edicto del Pretor urbano; De los testamentos, libro I*.- Esta institución: «los que Ticio quisiere», es viciosa por esto, porque fue dejada a ajeno arbitrio; porque con bastante constancia decidieron los antiguos, que convenía que los derechos de los testamentos fuesen firmes por si mismos, y que no pendiesen de ajeno arbitrio.

§ 1.- Es válidamente instituido heredero el que está en poder de los enemigos, porque por el derecho de postliminio se retienen en suspenso en su persona, y no se separan de ella, todos los derechos de ciudadanía; y así, si hubiere vuelto de los enemigos, podrá adir la herencia. También es instituido válidamente su esclavo, y, si hubiera vuelto de los enemigos, puede mandarle que adiera la herencia; pero si allí hubiere fallecido, el que sea su heredero puede hacerse heredero por medio del esclavo.

33.- EL MISMO; *Comentarios al Edicto del Pretor urbano; De los testamentos, libro II*.- Si alguno hubiere escrito de este modo: «sea Ticio heredero de la mitad; y sea el mismo Ticio heredero de la otra mitad, si la nave hubiere llegado de Asia. habiendo adido el heredero en virtud de la institución pura, aunque esté pendiente la condición de la otra institución, se hace heredero de la totalidad, por supuesto, aún faltando la condición, puesto que para nada le favorece la condición que se cumpla, porque no se duda que si alguno hubiera sido instituido heredero de la mitad, y además no lo hubiera sido otro ninguno, se considera que él mismo es instituido heredero de la totalidad.

34.- PAPINIANO; *Definiciones, libro I*.- No se da válidamente una herencia desde cierto día o hasta un día, pero quitado el vicio del tiempo subsiste la institución.

35.- ULPIANO; *Disputas, libro IV*.- Proponíase en virtud de un hecho, que uno instituyó dos herederos, a uno, de los bienes de provincia, y a otro, de los bienes de Italia, y que, como acostumbrase a llevar mercancías a Italia, envió dinero a la provincia para comprar mercancías; las cuales fueron compradas o

post mortem, nondum tamen in Italiam devectae, quaerebatur, merces utrum ad eum pertineant, qui rerum Italicarum heres scriptus erat an vero ad eum, qui provincialium.

Dicebam receptum esse rerum heredem institui posse nec esse inutilem institutionem, sed ita, ut officio iudicis familiae heriscundae cognoscentis contineatur nihil amplius eum, qui ex re institutus est, quam rem, ex qua heres scriptus est, consequi.

Ita igitur res accipietur. Verbi gratia pone duos esse heredes insititos, unum ex fundo Corneliano, alterum ex fundo Liviano, et fundorum alterum quidem facere dodrantem bonorum, alterum quadrantem: erunt quidem heredes ex aequis paribus, quasi sine partibus instituti, verumtamen officio iudicis tenebuntur, ut unicuique eorum fundus qui relictus est adiudicetur vel adtribuatur.

§ 1.- Unde scio quaesitum, aeris alieni onus pro qua parte agnoscere debeat. Et refert Papinianus, cuius sententiam ipse quoque probavi, pro hereditariis partibus eos agnoscere aes alienum debere, hoc est pro semisse: fundos etenim vice praeceptionis accipiendos. Quare si forte tantum sit aes alienum, ut nihil detracto eo superesse possit, consequenter dicemus institutiones istas ex re factas nullius esse momenti:

Et si forte Falcidia interveniens recisionem esset legatorum factura, sic officio iudicis ecedit praeceptiones istas, ut non plus quisque eorum habeat quam esset habiturus, si legatum accepisset vel aliud vel etiam praeceptiones. Quod si fuerit incertum, an Falcidia interventura sit, rectissime probatur officio iudicis cautiones esse interponendas.

some, and this merchandise was purchased either during his lifetime or after his death, but had not yet been brought into Italy. The question arose whether the said merchandise belonged to the heir to whom the property in Italy had been bequeathed, or whether he was entitled to it to whom that in the province had been left?

I stated that it was settled that heirs could be appointed for different kinds of property, and that the appointment was not void; but that it was the duty of the judge having jurisdiction of the partition of the estate to see that no heir to whom a certain portion of the estate had been left, should receive any more than he was entitled to under the will.

This should be understood as follows: for example, suppose two heirs were appointed, one to the Cornelian Estate, the other to the Livian Estate, and that one of these tracts of land compose three-fourths of the property, and the other the remaining fourth; the said heirs will then inherit equal portions of the estate, just as if they had been appointed without any designation of their shares; but it will be the duty of the court to see that the land which was devised to each of them shall be adjudged or allotted to him.

§ 1.- Hence, I am aware that the question arises for what portion of the debts of the estate shall each of these heirs be liable. Papinianus, whose opinion I myself have approved, holds that each of them should be liable for the debts of the estate, in proportion to his hereditary share, that is to say, for half of it; for these lands are understood to have been received as a preferred legacy. Therefore, if the indebtedness was so great that nothing will remain after it has been discharged; we hold consequently that such appointments made with reference to the disposition of certain specific property are of no force or effect.

If the application of the Falcidian Law should cause the diminution of the legacies, it will then become the duty of the judge to reduce these preferred legacies, so that neither one of the heirs may receive more than he would have been entitled to if he had obtained a bequest, or any other property, or even the said legacies. But if there should be any doubt as to the application of the Falcidian Law, it will be perfectly right for the judge to require the

viviendo él, o después de su muerte, pero no habían sido transportadas todavía a Italia; se preguntaba, si las mercancías pertenecerían a aquel que hacia sido instituido heredero de los bienes de Italia, o al que de los de la provincia.

Yo decía, que se había admitido que se podía instituir heredero de las cosas, y que no era inútil la institución, pero de esta suerte, que esté en las atribuciones del juez que conozca de la partición de la herencia, que el que fue instituido en una cosa no obtenga nada más que la cosa de que fue instituido heredero.

Así, pues, se entenderá el caso de este modo, por ejemplo, supón, que dos fueron instituidos herederos, uno del fundo Corneliano, otro del fundo Liviano, y que uno de los fundos constituía ciertamente los tres cuartos de los bienes, y el otro, el otro cuarto; serán ciertamente herederos por partes iguales, cual si hubieran sido instituidos sin porciones, pero serán obligados por ministerio del juez, a que se le adjudique, o se le atribuya, a cada uno de ellos el fundo que se le dejó.

§ 1.- Por lo cual sé que se preguntó en qué proporción se deberá reconocer la carga de las deudas; y refiere Papiniano, cuya opinión yo también aprobé, que ellos debían reconocer las deudas en proporción a sus porciones de la herencia, esto es, por mitad; porque los fundos se han de recibir por vía de previa adquisición. Por lo cual, si acaso las deudas fueran tantas, que deducidas no pueda quedar nada, diremos consiguientemente, que estas instituciones hechas sobre una cosa son de ningún valor.

Y si mediando quizá la Falcidia se hubiese de hacer la reducción de los legados, en este caso reduce por ministerio del juez estas adquisiciones previas, para que ninguno de ellos tenga más que lo que habría de tener, si hubiese recibido un legado, u otra cosa, o aún las adquisiciones previas. Mas si fuera incierto si habría de intervenir la Falcidia, con muchísima razón se aprueba que por ministerio del juez se hayan de interponer cauciones.

§ 2.- Cum haec ita sint, haec etiam institutio, de qua quaeritur, non est repellenda, si alius rerum provincialium, alius rerum Italicarum heres fuerit scriptus, officioque iudicis adtribuentur singulis res quae adscriptae sint, erunt tamen heredes ex aequis partibus, quia nulla pars adscripta est. Quae res facit, ut, si forte in aliis facultatibus plus sit (in Italicis forte quam in provincialibus), in aliis minus et aeris alieni ratio urguet, debeat dici imminutionem eandem fieri quam supra ostendimus: proinde et si aliis fuerint legata relictas, contributio admittenda erit.

§ 3.- Rerum autem Italicarum vel provincialium significatione quae res accipiendae sint, videndum est. Et facit quidem totum voluntas defuncti: nam quid senserit, spectandum est. Verumtamen hoc intellegendum erit rerum Italicarum significatione eas contineri, quas perpetuo quis ibi habuerit atque ita disposuit, ut perpetuo haberet: ceteroquin si tempore in quo transtulit in alium locum, non ut ibi haberet, sed ut denuo ad pristinum locum revocaret, neque augebit quo transtulit neque minuet unde transtulit: ut puta de Italico patrimonio quosdam servos miserat in provincias, forte Galliam, ad exigendum debitum vel ad merces comparandas, recursuros, si comparassent: dubium non est, quin debeat dici ad Italicum patrimonium eos pertinere debere. Ut est apud Mucium relatam, cum fundus erat legatus vel cum instrumento vel cum his quae ibi sunt:

Agasonem enim missum in villam a patre familias non pertinere ad fundi legatum Mucius ait, quia non idcirco illo erat missus, ut ibi esset. Proinde si servus fuerit missus in villam interim illic futurus, quia dominum offenderat, quasi ad tempus relegatus, responsum est eum ad villae legatum non pertinere.

parties to furnish security to one another.

§ 2.- This being the case, the appointment which we are considering should not be rejected as invalid, where one heir was left property situated in a province, and the other property situated in Italy. It will be the duty of the judge to assign to each of the heirs that part of the estate which was bequeathed to him. Nevertheless, the said heirs will each be entitled to half of the estate, because no share was allotted to them by the testator. The result of this is, that if there should be more of certain assets of the estate in one place than in another (for example, more in Italy than in the province), and payment of the debts is pressing, it must be held that the same diminution must be made which we have mentioned above. Hence, where legacies have been left to others, contribution for their settlement should be made by the heirs.

§ 3.- It should now be ascertained what is meant by property situated in Italy, or in the provinces. The intention of the deceased must determine this point, for consideration must be given to what he had in mind. Nevertheless, it must be understood that by the term "property in Italy" all those things are included which the testator always had there, and made arrangement to keep there. Again, if he transferred property temporarily from one place to another, not for the purpose of keeping it there, but with a view to restoring it to its former location, this will not increase the amount of the property in the place to which he transported it, nor diminish that in the place from whence he took it; as, for instance, if he should send from his Italian estate certain slaves into a province (as in Gaul) either for the purpose of paying a debt, or to buy merchandise, who were to return after they had made their purchases, there is no doubt that it must be said that they continue to belong to the Italian estate; as was stated by Mucius where a tract of land was devised, either with all the means of cultivation or with the property which is situated thereon.

For Mucius says that where a slave named Agaso was sent to a country estate by his master, he did not belong to the land which was devised, because he had not been sent there to remain permanently; hence, where a slave is sent to a country estate to remain there for a certain time, because he had offended his

§ 2.-Siendo esto así, tampoco se ha de repeler esta institución, de que se trata, si uno hubiere sido instituido heredero de los bienes de la provincia, y otro de los bienes de Italia, y por ministerio del juez se adjudicarán a cada uno las cosas que le fueron asignadas; pero serán herederos por partes iguales, porque no fue asignada ninguna parte. Lo cual hace, que si acaso en unos bienes haya más, quizá en los de Italia, que en los de la provincia, y en otros menos, y apremiara la cuenta de las deudas, se diga que se verifica la misma disminución, que arriba hemos indicado; por lo que, también si a otros se les hubieren dejado legados, se habrá de admitir la contribución.

§ 3.- Pero se ha de ver, qué bienes se han de entender con la denominación de bienes italianos, o de provincia; y todo ciertamente lo hace la voluntad del difunto, porque se ha de atender a lo que hubiere sido su intención; más se habrá de entender esto, que en la denominación de bienes de Italia se comprenden los que siempre uno hubiere tenido allí; y así dispuso tenerlos siempre. Pero si al tiempo en que los trasladó a otro lugar, no para tenerlos allí, sino para volverlos otra vez al primitivo lugar, ni aumentará los bienes de allí a donde los llevó, ni disminuirá los de allí de donde los trasladó; por ejemplo, había enviado de su patrimonio de Italia algunos esclavos a una provincia, acaso a la Galia, para cobrar una deuda, o para comprar mercancías, debiendo regresar cuando las hubiesen comprado; no es dudoso que deberá decirse que ellos deben pertenecer al patrimonio de Italia, según se halla expuesto en Mucio, cuando se había legado un fundo, o con los enseres, o con las cosas que en él hay.

Porque dice Mucio, que el arriero enviado a una casa de campo por el padre de familia no pertenece al legado del fundo, porque no había sido enviado allí para que allí se estuviese. Por lo cual, si un esclavo hubiere sido enviado a una casa de campo para que interinamente estuviese allí, porque había ofendido a

Quare ne servi quidem, qui operari in agro consuerunt, qui in alios agros revertebantur, et quasi ab alio commodati in ea sunt condicione, ut ad legatum pertineant, quia non ita in agro fuerant, ut ei agro viderentur destinati. Quae res in proposito quoque suggerit, ut Italicarum rerum esse credantur hae res, quas in Italia esse testator voluit.

§ 4.- Proinde et si pecuniam misit in provinciam ad merces comparandas et necdum comparatae sint, dico pecuniam, quae idcirco missa est, ut per eam merces in Italiam adveherentur, in Italico patrimonio adiungendam: nam et si dedisset in provincia de pecuniis, quas in Italia exercebat, ituras et redituras, dicendum est hanc quoque Italici patrimonii esse.

§ 5.- Rationem igitur efficere dici, ut merces quoque istae, quae comparatae sunt ut Romam veherentur, sive provectae sunt eo vivo sive nondum, et sive scit sive ignoravit, ad eum heredem pertinere, cui Italicae res sunt adscriptae.

36.- ULPIANUS; *libro VIII disputationem*.- Si quis ita scripserit heredem: "Ex qua parte codicillis Titium heredem scripsero, heres esto", etiamsi pars in codicillis non fuerit adscripta, erit tamen heres quasi sine parte institutus.

37.- IULIANUS; *libro XXIX digestorum*.- Cum in testamento ita scribitur: "Si filius meus me vivo morietur, nepos ex eo post mortem meam natus heres esto", duo gradus heredum sunt: nullo enim casu uterque ad hereditatem admittitur. Ex quo apparet, si nepoti Titius substitutus fuerit et filius patri heres exstiterit, non posse Titium una cum filio heredem esse, quia non in primum, sed in secundum gradum substituitur.

master; he is, as it were, temporarily banished, and it is held that he does not constitute a part of the estate devised. Hence, slaves who are accustomed to labor on one farm and who are sent to another, being as it were loaned by one tract of land to the other, do not form part of the estate devised, because they do not seem to be permanently attached to the land. In the present instance it must be held that property situated in Italy is such as the testator intended should remain there permanently.

§ 4.- Hence, where a man sends money into a province for the purpose of buying merchandise, and it has not yet been purchased, I say that the money which was sent there to obtain goods to be brought into Italy must be held to form part of the Italian estate; for if the testator had sent into the province money which he was accustomed to use in Italy, and it was taken and returned from one place to another, it should be considered to belong to the Italian estate.

§ 5.- I therefore stated that the result would be that the said merchandise which had been purchased to be conveyed to Rome, whether it was transported during the lifetime of the testator, or whether this had not yet been done, and whether the testator knew, or did not know this to be the fact, it will belong to that heir to whom the Italian estate was bequeathed.

36.- THE SAME; *Disputations, Book VIII*.- Where anyone appoints an heir as follows: "Let Titius be the heir to that portion of my estate to which I have appointed him by a codicil"; he will still be the heir, as having been appointed without any certain share, even though his share was not mentioned in the codicil.

37.- JULIANUS; *Digest, Book XXIX*.- When a testator makes the following disposition in his will: "If my son should die during my lifetime, and the grandson by him should be born after my death, let him be my heir", there are two degrees of succession, for under no circumstances can both of them be admitted to share in the estate. From this it is evident that, if Titius should be substituted for the grandson, and the son should be the heir of his father, Titius cannot be the heir of his son, for the reason that he is

su señor, como relegado hasta cierto tiempo, se respondió, que él no pertenece al legado de la casa de campo. Por lo que, tampoco los esclavos que acostumbraron a trabajar en el campo, que volvían a otros campos, y estaban como dados en comodato por otro, son de tal condición que pertenezcan al legado, porque no habían estado en el campo de suerte que parecieran destinados a aquel campo. Lo cual sugiere también en el caso propuesto, que se crea que son de los bienes de Italia aquellos bienes que el testador quiso que estuviesen en Italia.

§ 4.- Por lo cual, también si mandó dinero a una provincia para comprar mercancías, y aún no hubieran sido compradas, digo, que el dinero que se envió, para que con él se trajesen mercancías a Italia, se ha de agregar al patrimonio de Italia; porque también si lo hubiese dado en la provincia del dinero que manejaba en Italia, para que fuese y retornase, se ha de decir, que esta también es cuenta del patrimonio de Italia.

§ 5.- Así, pues, dije, que esto hacía que también estas mercancías, que fueron compradas para ser llevadas a Roma, ya si fueron transportadas viviendo él, ya si todavía no, y ya si lo sabe, ya si lo ignoró, pertenezcan a aquel heredero a quien se le asignaron los bienes de Italia.

36.- EL MISMO; *Disputas, libro VIII*.- Si alguno hubiere instituido así heredero: «sea heredero de la parte en que yo hubiere instituido heredero a Ticio en los codicilos», aunque en los codicilos no se le hubiere asignado parte, será, sin embargo, heredero, como si hubiera sido instituido sin parte.

37.- JULIANO; *Digesto, libro XXIX*.- Cuando en el testamento se escribe así: «si muriere mi hijo viviendo yo, sea heredero el nieto que después de mi muerte hubiere nacido de él», hay dos grados de herederos, porque en ningún caso son admitidos ambos a la herencia. De lo cual resulta, que si Ticio hubiere sido substituido al nieto, y el hijo hubiere quedado heredero del padre, no puede Ticio ser heredero juntamente con el hijo, porque no es substituido para el primer grado, sino para el

§ 1.- Haec verba: "Publius Marcus Gaius invicem substituti heredes mihi sunt" sic interpretanda sunt, ut breviter videretur testator tres instituisse heredes et invicem eos substituisse, perinde ac si ita scripsisset: "Ille et ille et ille instituti heredes et substituti sunt".

§ 2.- Qui tres filios habebat et ita scripserit: "Filii mei heredes sunt: Publius filius meus exheres esto", videri potest prima parte duos dumtaxat filios heredes instituisse.

38.- IULIANUS; *libro XXX digestorum*.- Qui filio impuberi exheredato Pamphilum legat, eundem post mortem filii ex parte heredem instituere eodem modo potest, quo is, qui servum Sempronio legatum, eundem post mortem Sempronii ex parte heredem instituit.

§ 1.- Servus testamento heres pure scriptus, liber autem iussus esse, si intra kalendas decembres decem dedisset, si codicillis pure libertatem acceperit, intra kalendas quidem neque liber neque heres erit, nisi decem dederit: si intra kalendas non dederit, liber ex codicillis erit.

§ 2.- Si quis servum suum liberum sub condicione, heredem pure scripsisset eumque vendidisset pendente condicione, iussu emptoris servus adire hereditatem potest, quia et constitit institutio et est qui ius imperandi habet.

§ 3.- Quod si post defectam condicionem alienatus fuisset, non potest iussu emptoris hereditatem adire, quia eo tempore ad eum pervenisset, quo iam extincta institutio inutilis fuerat.

§ 4.- Igitur cum servus sub condicione liber esse iubetur et legatum pure accepit, si pendente condicione manumissus vel alienatus fuerat, legatum

substituted not in the first, but in the second degree.

§ 1.- The following clause: "Let Publius, Marcus, Gaius, substitutes for one another, be my heirs", should be understood to mean that the testator seems to have appointed three heirs in a very few words, and to have substituted them for one another, just as if he had written, "Let So-and-So, So-and-So, and So-and-So be appointed my heirs, and be substituted".

§ 2.- Where a man has three sons and wrote in his will: "Let my sons be my heirs, and let my son Publius be disinherited", he is considered to have only appointed two of his sons his heirs in the first part of his will.

38.- THE SAME; *Digest, Book XXX*.- Where a testator bequeathed a slave named Pamphilus to his disinherited son, a minor, he can appoint the said slave heir to a portion of his estate in the same way, after the death of his son, just as anyone who bequeaths a slave to Sempronius, can appoint the said slave heir to a portion of his estate, after the death of Sempronius.

§ 1.- When a slave is unconditionally appointed heir by a will, but is not directed to be free unless he pays ten aurei before the Kalends of December, and he subsequently obtains his freedom absolutely by a codicil, he will neither be free nor an heir, unless he pays the ten aurei before the Kalends of December; but if he should not do so, he will become free by reason of the codicil.

§ 2.- If a testator should absolutely appoint a slave to be his heir, but should grant him his freedom under a condition and sell him while the condition was pending, the slave can enter upon the estate by order of his purchaser, because the appointment is valid, and the purchaser has a right to give the slave the order.

§ 3.- When the slave has been alienated, after failure to comply with the condition has occurred, he cannot enter upon the estate by order of the purchaser, because at the time when he passed into the hands of the latter the appointment, having become void, was of no effect.

§ 4.- Therefore, where a slave is directed to become free under a certain condition, and receives a legacy absolutely, and, while the condition is pending, he is

segundo.

§ 1.- Estas palabras: «sean mis herederos Publio, Marco, y Cayo, recíprocamente substituidos», se han de interpretar de modo, que parezca que el testador instituyó brevemente tres herederos, y que los substituyó recíprocamente, lo mismo que si hubiese escrito de esta manera: «sean herederos instituidos y substituidos aquel, aquel y aquel».

§ 2.- El que tenía tres hijos, y hubiere escrito así: «sean herederos mis hijos, y mi hijo Publio sea desheredado», puede parecer que en la primera parte instituyó herederos solamente a dos hijos.

38.- EL MISMO; *Digesto, libro XXX*.- El que Lega a Pánfilo a un hijo impúbbero desheredado, puede instituir heredero de parte del mismo después de la muerte del hijo, de igual modo que el que al esclavo legado a Sempronio lo instituye heredero de parte después de la muerte de Sempronio.

§ 1.- El esclavo instituido puramente heredero en el testamento, pero que se mandó que fuera libre, si dentro de las Calendas de Diciembre hubiese dado diez; si por codicilos hubiere recibido puramente la libertad, dentro de las Calendas no será ciertamente ni libre, ni heredero, si no hubiere dado los diez, y si no los hubiere dado dentro de las Calendas, será libre en virtud de los codicilos.

§ 2.- Si alguno a su esclavo lo hubiese instituido libre bajo condición, y heredero puramente, y lo hubiese vendido, estando pendiente la condición puede el esclavo adir la herencia por mandato del comprador, porque subsiste la institución, y hay quien tiene el derecho de mandar.

§ 3.- Pero si hubiese sido enajenado después que hubiese faltado la condición, no puede adir la herencia por mandato del comprador, porque habría ido a poder de él a tiempo en que extinguida ya la institución había sido inútil.

§ 4.- Así, pues, cuando se manda que el esclavo sea libre bajo condición, y recibió puramente un legado, si había sido manumitido o enajenado estando pen-

habebit aut domino acquirat, quamvis mortis tempore condicio libertatis extincta fuerit: si vero post defectum condicionis manumissus aut alienatus fuerit, legatum ad irritum recidit.

§ 5.- Cum venditor servum ante traditionem ab emptore pro parte heredem scriptum adire iubet, restituere coheredi servi necesse habet, quia lucrum facere eius servi iure quem vendidit non debet. Plane non totum quod adquisierit restituet, sed pro ea dumtaxat parte, qua servus coheredem habuerit,

39.- MARCIANUS; *libro II regularum*.- Id est partem dimidiam servi et quartam hereditatis, Libro trigesimo Digestorum Iuliani Marcellus notat: immo et id debet praestari, quod consequi venditor non potuisset, si prius, quam adiret servus partem hereditatis, is traditus esset: quod est verum.

40.- IULIANUS; *libro XXX digestorum*.- Si pater familias Titium, quem ingenuum esse credebat, heredem scripserit eique, si heres non esset, Sempronium substituerit, deinde Titius, quia servus fuerat, iussu domini adierit hereditatem: potest dici Sempronium in partem hereditatis admitti. Nam qui scit aliquem servum esse et eum heredem scribit et ita substituit: "Si Stichus heres non erit, Sempronius heres esto", intellegitur tale quod dicere: "Si Stichus neque ipse heres erit neque alium fecerit".

At qui eum, quem liberum putat esse, heredem scripserit, hoc sermone "si heres non erit" nihil aliud intellegitur significare, quam si hereditatem vel sibi non adquisierit vel mutata condicione alium heredem non fecerit, quae adiectio ad eos pertinet, qui patres familias heredes scripti postea in servitutem deducti fuerint. Igitur in hoc casu semisses fient ita, ut alter

either manumitted or alienated, he will be entitled to the legacy, or will obtain it for his master, even though, at the time of the death of the testator, the condition upon which his condition depended had not been fulfilled. If, however, he had been manumitted or alienated after the failure to comply with the condition had taken place, the legacy will become invalid.

§ 5.- Where a vendor orders a slave, who has been appointed heir to a portion of the estate of the purchaser before his delivery to the latter, to accept the bequest, he will be required to return what he has received to the co-heir of the slave, because he should not profit by the right of the slave whom he sold. It is evident that he is not required to return everything which he received, but only the proportionate share which the slave had in common with his co-heir.

39.- MARCIANUS; *Rules, Book II*.- That is to say, the half of the slave and the fourth of the estate, as Marcellus observes in the Thirtieth Book of the Digest of Julianus, and he holds that he ought to surrender this because the vendor could not recover it if the slave had been delivered before he entered upon his share of the estate, which opinion is correct.

40.- JULIANUS; *Digest, Book XXX*.- The head of a family appointed Titius, whom he supposed to be freeborn, his heir, and substituted Sempronius for him, if he should not be his heir; and when Titius, being a slave, entered upon the estate by order of his master, it can be held that Sempronius should be admitted to a share of the estate; because where a man knowing someone to be a slave, appoints him his heir, giving him a substitute, as follows: "If Stichus should not be my heir, let Sempronius be my heir," it is understood that he means to say that if Stichus should not be the heir he cannot transfer the possession to anyone else.

But where anyone appoints as his heir a person whom he thinks to be free, in these terms, namely, "If he should not be my heir," he is considered to intend nothing more than that if he should acquire the estate for himself, or his condition should be changed, he cannot appoint another his heir. This addition has reference to those who are appointed heirs of the head

diente la condición, tendrá el legado, o lo adquirirá para su señor, aunque al tiempo de la muerte se hubiere extinguido la condición de la libertad; pero si hubiere sido manumitido o enajenado después de la falta de la condición, el legado se hace irrito.

§ 5.- Cuando el vendedor manda que el esclavo instituido por el comprador heredero de parte antes de la entrega, adquiera la herencia, tiene necesidad de restituirla al coheredero del esclavo, porque no debe realizar lucro por derecho de este esclavo, que vendió. Mas no restituirá todo lo que hubiere adquirido, sino solamente en aquella parte en que el esclavo hubiere tenido coheredero,

39.- MARCIANO; *Reglas, libro II*.- esto es, la mitad del esclavo, y la cuarta parte de la herencia. Marcelo nota en el libro trigésimo del Digesto de Juliano: aun debe entregarse también lo que el vendedor no hubiese podido conseguir, si, antes que el esclavo adiese la parte de la herencia, hubiese sido él entregado; lo que es verdad.

40.- JULIANO; *Digesto, libro XXX*.- Si un padre de familia hubiere instituido heredero a Ticio, que él creía que era ingenuo, y le hubiere substituido, si no fuese heredero, a Sempronio. y después Ticio hubiere adido la herencia por mandato de su señor, porque era esclavo, se puede decir, que Sempronio es admitido a parte de la herencia; porque el que sabe que uno es esclavo, y lo instituye heredero, y le substituye así: «si Stico no fuere heredero, sea heredero Sempronio», se entiende que dice algo como esto, si ni el mismo Stico fuere heredero, ni hubiere instituido a otro.

Mas el que con esta frase, «si no fuere heredero», hubiere instituido heredero al que juzga que es libre, se entiende que no significa ninguna otra cosa, sino que si hubiere adquirido para sí la herencia, o cambiada la condición no hubiere hecho heredero a otro; cuya adición corresponde a aquellos que instituidos herederos, siendo padres de familia,

semis inter eum, qui dominus instituti heredis fuerit, et substitutum aequis portionibus dividatur:

41.- POMPONIUS; *libro XII ex variis lectionibus*.- Et hoc Tiberius Caesar constituit in persona Parthenii, qui tamquam ingenuus heres scriptus adierat hereditatem, cum esset Caesaris servus: nam divisa hereditas est inter Tiberium et eum qui Parthenio substitutus erat, ut refert Sextus Pomponius.

42.- IULIANUS; *libro LXIV digestorum*.- Qui solvendo non erat, duos Apollonios liberos heredesque esse iusserat. Altero ante apertas tabulas testamenti mortuo non ineleganter defendi poterit eum qui supererit liberum et solum necessarium heredem fore. Quod si uterque vivit, institutionem nullius esse momenti propter legem Aeliam Sentiam, quae amplius quam unum necessarium heredem fieri vetat:

43.- PAULUS; *libro I ad legem Aeliam Sentiam*.- Invicem enim eos sibi obstare.

44.- ALFENUS; *libro V digestorum*.- Pater familias testamento duos heredes instituerat: eos monumentum facere iusserat in diebus certis: deinde ita scripserat: "Qui eorum non ita fecerit, omnes exheredes sunt": alter heres hereditatem praetermiserat, reliquus heres consulebat, cum ipse monumentum extruxisset, numquid minus heres esset ob eam rem, quod coheres eius hereditatem non adisset. Respondit neminem ex alterius facto hereditati neque alligari neque exheredari posse, sed uti quisque condicionem impleret, quamvis nemo adisset praeterea, tamen eum heredem esse.

of the family, and are afterwards reduced to slavery; therefore, in this instance, the estate will be divided into two parts, of which one-half will go to him who was the master of the slave appointed heir, and the other half to the substitute.

41.- POMPONIUS; *Various Passages, Book XII*.- Tiberius Cæsar rendered this decision with reference to Parthenius, who had been appointed heir, as being freeborn, and who entered upon an estate while he was the slave of the Emperor; for, as Sextus Pomponius relates, the estate was divided between Tiberius and the person who had been substituted for Parthenius.

42.- JULIANUS; *Digest, Book LXIV*.- A man who was not solvent directed by his will that two slaves named Apollonius should be free and his heirs. One of the said slaves having died before the will was opened, it cannot improperly be held that the survivor would become free and the sole and necessary heir of the testator. If, however, both of them were living, the appointment would be void in accordance with the Lex Ælia Sentia, which prohibits the appointment of more than one necessary heir:

43.- PAULUS; *On the Law of Ælia Sentia, Book I*.- For then they stand in one another's way.

44.- ALFENUS; *Digest, Book V*.- The head of a family appointed two heirs by his will, and ordered them to erect a monument for him within a certain time, and he afterwards inserted in his will: "Let him who does not do this be disinherited". One of the heirs refused to enter upon the estate, and the other, inasmuch as he himself had built the monument, asked for an opinion as to whether he would not be entitled to the estate, because his co-heir had refused to accept it. The answer was that no one can be bound for, or deprived of, an estate by the act of another; but wherever anyone has complied with the condition, he will become the heir to the estate, even though none of the other heirs have entered upon the same.

hubieren sido reducidos después a esclavitud. Así, pues, en este caso se harán dos mitades, de suerte que una de las mitades se divida entre el que hubiere sido señor del heredero instituido y el substituido, en porciones iguales.

41.- POMPONIO; *Doctrina de Autores varios, libro XII*.- Y esto determinó Tiberio César respecto a la persona de Partenio, quien instituido heredero como ingenuo había adido la herencia, siendo esclavo del César; porque la herencia había sido dividida entre Tiberio y el que había sido substituido a Partenio, como refiere Sexto Pomponio.

42.- JULIANO; *Digesto, libro LXIV*.- Uno, que no era solvente, había mandado que fuesen libres y herederos dos Apolonios; habiendo fallecido uno antes de abiertas las tablas del testamento, no sin discreción se podrá defender que el que sobreviviere habrá de ser libre y único heredero necesario. Pero si viven ambos, la institución es de ningún valor en virtud de la ley Elia Sencia, que prohíbe que se haga más de un solo heredero necesario;

43.- PAULO; *Comentarios a la ley Elia Sencia, libro I*.- porque recíprocamente son ellos obstáculo para sí.

44.- ALFENO; *Digesto, libro V*.- Un padre de familia había instituido dos herederos en su testamento, y les había mandado que le hicieran un monumento en ciertos días, y después había escrito de este modo: «si alguno de ellos no hubiere hecho esto, sean desheredados todos»; un heredero había dejado de aceptar la herencia, y el otro heredero consultaba, habiendo él levantado el monumento, si dejaría de ser heredero por esto, porque su coheredero no había adido la herencia. Respondió, que por hecho de otro nadie podía ni ser ligado a una herencia, ni ser desheredado, sino que así que cada cual hubiese cumplido la condición, aunque ninguno hubiese adido además la herencia, era, sin embargo, heredero.

45.- ALFENUS; *libro II digestorum a Paulo epitomatum*.- "Si Maevia mater mea et Fulvia filia mea vivent, tum mihi Lucius Titius heres esto". Servius respondit, si testator filiam numquam habuerit, mater autem supervixisset, tamen Titium heredem fore, quia id, quod impossibile in testamento scriptum esset, nullam vim haberet.

46.- AFRICANUS; *libro II quaestionum*.- Quidam cum filium familias heredem instituere vellet, ne ad patrem eius ex ea hereditate quicquam perveniret, voluntatem suam exposuit filio: filius cum patris offensam vereretur, petit a testatore, ne sub condicione "si a patre emancipatus esset" heredem eum institueret et impetravit ab eo, ut amicum suum heredem institueret: atque ita testamento amicus filii ignotus testatori heres institutus est nec quicquam ab eo petitum est.

Quaerebatur, si ille amicus aut adire nollet aut aditam nollet restituere hereditatem, an fideicommissum ab eo peti possit aut aliqua actio adversus eum esset et utrum patri an filio competeret. Respondit, etiamsi manifestum sit scriptum heredem fidem suam interposuisse, non tamen aliter ab eo fideicommissum peti posse quam si et ipsum testatorem fidem eius secutum esse probaretur.

Si tamen, cum a filio familias rogaretur, amicus et aditum se hereditatem recepisset et restitutum patri familias facto, non absurde dici possit mandati actionem futuram: et eam actionem patri inutilem fore, quia non sit ex bona fide id ei restitui, quod testator ad eum pervenire noluerit: sed nec filio vulgarem competituram, verum utilem, sicuti dare placeret ei, qui, cum filius familias esset, pro aliquo fideiussisset ac pater familias factus solvisset.

45.- THE SAME; *On the Epitomes of the Digest, by Paulus, Book II*.- "If my mother, Mævia, and my daughter Fulvia, should be living, then let Lucius Titius be my heir." Servius was of the opinion that if the testator never should have a daughter and his mother should survive, Titius would still be his heir, because where anything that is impossible is inserted into a will it has no force.

46.- AFRICANUS; *Questions, Book II*.- A certain individual desiring to make a son under paternal control his heir, but in such a way that none of the estate would go to his father, stated his wishes to the son. The latter, fearing to offend his father, requested the testator to appoint him his heir under the condition that he should be emancipated by his father, and gained his consent to appoint one of his friends his heir, and in this way, the friend of the son who was unknown to the testator was appointed his testamentary heir, and nothing was required of him.

The question arose, if the said friend was unwilling to enter upon the estate, or if, after having entered upon it he should refuse to surrender it, whether it could be demanded of him as trustee, or whether any action could be brought against him, or whether one would lie against the father, or the son. The answer was that, even though it was evident that the appointed heir was merely a trustee, still, the estate could not be demanded of him unless it could be proved that the testator himself regarded him in that light.

If, however, the friend, having been requested by the son under paternal control, agreed to enter upon the estate, and to surrender it after he became his own master, it cannot improperly be held that an action on mandate could be brought, and that such an action would not lie in favor of the father, because good faith did not require that he should be given what the testator was unwilling should come into his hands. Nor will the common action on mandate be available to the son, but a prætorian action will be; as it has been settled that one should be granted to a party who while a son under paternal control, has become surety for someone, and after becoming his own master is

46.- EL MISMO; *Digesto compendiado por Paulo, libro II*.- «Si vivieren mi madre Mevia y mi hija Fulvia, en este caso sea mi heredero Lucio Ticio»; Servio respondió, que si el testador nunca hubiere tenido hija, pero su madre le hubiese sobrevivido, habrá de ser, no obstante, heredero Ticio, porque no tendría ninguna fuerza lo imposible que se hubiese escrito en el testamento.

46.- AFRICANO; *Cuestiones, libro II*.- Queriendo uno instituir heredero a un hijo de familia, de modo que al padre de éste no fuese cosa alguna de esta herencia, expuso su voluntad al hijo; el hijo, temiendo la ofensa del padre, pidió al testador, que no lo instituyese heredero bajo la condición «si hubiese sido emancipado por su padre»; y obtuvo de él que instituyese heredero a un amigo suyo, y de esta suerte fue instituido heredero en el testamento un amigo del hijo, desconocido para el testador, y no se le pidió, cosa alguna;

Se preguntaba, si en el caso de que aquel amigo o no quisiera adir, o no quisiera restituir la herencia adida, se le podría pedir el fideicomiso, o si habría alguna acción contra él, y si le competería al padre o al hijo. Respondió, que aunque sea evidente que el heredero escrito interpuso su fidelidad, no se le podía, sin embargo, pedir el fideicomiso de otra suerte, que si se probase que también el testador se atuvo a su fidelidad;

Pero que si, cuando el amigo fuese rogado por el hijo de familia, hubiese admitido que él adiría la herencia, y se la restituiría a aquel, hecho padre de familia, se podría decir no absurdamente, que ha de haber la acción de mandato, y que esta acción habrá de serle inútil al padre, porque no sería de buena fe que a él se le restituyese lo que el testador no hubiere querido que fuera a su poder; pero que tampoco al hijo le ha de competir la vulgar, sino la útil, como parecería bien que se le diese al que, siendo hijo de familia, hubiese sido fiador por alguno, y hubiese pagado, hecho padre de familia.

47.- AFRICANUS; *libro IV quaestionum*.- Si ita scriptum fuerit: "Titius, immo Seius heres esto", Seium solum heredem fore respondit. Sed et si ita: "Titius heres esto: immo Seius heres esto", idem erit dicendum.

§ 1.- Quidam testamento ita heredes instituit: "Titia filia mea heres esto: si quid mihi liberorum me vivo mortuove nascetur, tunc qui virilis sexus unus pluresve nascentur, ex parte dimidia et quarta, qui feminini sexus una pluresve natae erunt, ex parte quarta mihi heres sit": postumus ei natus est: consulebatur, quota ex parte postumus heres esset. Respondit eam hereditatem in septem partes distribuendam, ex his filiam quattuor, postumum tres habituros, quia filiae totus as, postumo dodrans datus est, ut quarta portione amplius filia quam postumus ferre debeat. Ideo si postuma quoque nata esset, tantundem sola filia, quantum uterque postumorum habituri essententiarum itaque in proposito cum as filiae, dodrans postumo sit datus, viginti unam partes fieri, ut filia duodecim, novem filius habeat.

§ 2.- In testamento ita scriptum est: "Lucius Titius ex duabus uncis, Gaius Attius ex parte una, Maevius ex parte una, Seius ex partibus duabus heredes mihi sunt": consulebatur quid iuris esset. Respondit hanc scripturam illam interpretationem accipere posse, ut Lucius Titius duas uncias habeat, ceteri autem quasi sine partibus instituti ex reliquo dextante heredes sint: quem dextantem ita dividi oportet, ut Seius quincuncem, Attius et Maevius alterum quincuncem habeant.

48.- MARCIANUS; *libro IV institutionum*.- His

obliged to make payment.

47.- THE SAME; *Questions, Book IV*.- Where it is stated in a will, "Let Titius, not Seius, be my heir", the opinion was that Seius alone will be the heir. Where, however, the following words are used: "Let Titius be my heir, not let Seius be my heir," the same rule will apply.

§ 1.- A certain testator appointed his heirs as follows: "Let Titia, my daughter, be my heir; and if any children are born to me during my lifetime, or after my death, then let one or more of those of the male sex who are born inherit half and a quarter of my estate, and let one or more of those of the female sex who may be born be heirs to the fourth part of my estate"; a posthumous male child was born to the testator, and it was asked what portion of the estate he would inherit. The answer was that the estate should be divided into seven parts, and that the daughter would be entitled to four of them, and the posthumous child to three; for the reason that the entire estate was bequeathed to the daughter, and three-fourths of it to the posthumous child, so that the daughter was entitled to a fourth more than the posthumous child. Therefore, if a posthumous daughter has also been born, the first daughter should be entitled to as much as both the posthumous children together. Hence, in the case stated, as the entire estate was given to the daughter, and three-fourths of it to the posthumous child, it should be divided into twenty-one shares, so that the daughter might have twelve shares and the son nine.

§ 2.- Where the following provision was made in a will: "Let Lucius Titius be the heir to six shares of my estate, Gaius Attius to one share, Maevius to one share, and Seius to two shares", the question arose as to what the law would be in this case. The answer was that the will should be interpreted in such a way that Lucius Titius should have one-sixth, and the others, as they had been appointed without definite shares, should be the heirs to the remainder of the estate, which should be divided so that Seius would receive five shares, and Attius and Maevius the remaining five between them.

48.- MARCIANUS; *Institutes, Book IV*.- The

47.- EL MISMO; *Cuestiones, libro IV*.- Si se hubiere escrito de este modo: «sea heredero Ticio, antes bien, Seyo», respondió, que solo Seyo habrá de ser heredero, pero si de esta suerte: «sea heredero Ticio, antes bien, sea heredero Seyo», se habrá de decir lo mismo.

§ 1.- Uno instituyó así herederos en su testamento: « sea heredera mi hija Ticia; si vivo o muerto yo, me naciere algún descendiente, entonces, el que naciere de sexo viril, uno o más, sea mi heredero de la mitad y de la cuarta parte, y la que hubiere nacido de sexo femenino, una o más, de la cuarta parte»; le nació un póstumo; y se consultaba, de qué parte sería heredero el póstumo. Respondió, que esta herencia se ha de distribuir en siete partes, de las que habrá de tener cuatro la hija, y tres el póstumo, porque a la hija se le dió todo el as, y al póstumo tres cuartos, de modo que la hija deba llevar una cuarta parte mas que el póstumo, por lo cual, si también hubiese nacido una póstuma, la hija sola habría de tener otro tanto de lo que tendrían ambos póstumos; y así, en el caso propuesto, habiéndosele dado a la hija el as, y al póstumo los tres cuartos, se hacen veintiuna partes, para que la hija tenga doce, y nueve el hijo.

§ 2.- En un testamento se escribió de esta manera: «sean mis herederos Lucio Ticio de dos onzas, Cayo Atcio de una parte, Mevio de otra parte, y Seyo de dos partes»; se consultaba, qué derecho habría. Respondió, que esta escritura podía admitir esta interpretación, que Lucio Ticio tuviera dos onzas, y que los demás fueran herederos de las restantes diez onzas, cual si hubieran sido instituidos sin partes; cuyas diez onzas debían dividirse de manera, que Seyo tuviera cinco, y Atcio y Mevio las otras cinco.

48.- MARCIANO; *Instituta, libro IV*.- Con estas

verbis: "Titius hereditatis meae dominus esto", recte institutio fit.

§ 1.- Illa institutio valet: "Filius meus impiissimus male de me meritis heres esto": pure enim heres instituitur cum maledicto et omnes huiusmodi institutiones receptae sunt.

§ 2.- Interdum nec cum libertate utiliter servus a domina heres instituitur, ut constitutione divorum Severi et Antonini significatur, cuius verba haec sunt: "Servum adulterii accusatum non iure testamento manumissum ante sententiam ab ea muliere videri, quae rea fuerit eiusdem criminis postulata, rationis est". Quare sequitur, ut in eundem a domina collata institutio nihil momenti habeat.

§ 3.- Si in patre vel patria vel alia simili adsumptione falsum scriptum est, dum de eo qui demonstratus sit constet, institutio valet.

49.- FLORENTINUS; *libro X institutionum*.- Si alienum servum liberum et heredem esse iussi et si postea meus effectus est, neutrum valet, quia libertas alieno servo inutiliter data est.

§ 1.- In extraneis heredibus illa observantur: ut sit cum eis testamenti factio, sive ipsi heredes instituantur sive hi qui in potestate eorum sunt, et id duobus temporibus inspicitur, testamenti facti, ut constiterit institutio, et mortis testatoris, ut effectum habeat. Hoc amplius et cum adibit hereditatem esse debet cum eo testamenti factio, sive pure sive sub conditione heres institutus sit: nam ius heredis eo vel maxime tempore inspicendum est, quo acquirit hereditatem. Medio autem tempore inter factum testamentum et mortem testatoris vel condicionem institutionis existentem mutatio iuris heredi non nocet, quia, ut dixi, tria tempora inspicimus.

appointment of an heir is legally made when expressed as follows: "Let Titius be the owner of my estate."

§ 1.- The following appointment is valid: "Let my most unnatural son, who has deserved so ill of me, be my heir"; for he is absolutely appointed heir, although in terms of reproach, and all appointments of this kind are accepted.

§ 2.- Sometimes a slave is not legally appointed an heir with the grant of his freedom by his mistress, as is indicated by a Constitution of the Divine Severus and Antoninus, which is in the following words: "It is reasonable that a slave accused of adultery should not, before judgment has been rendered, be legally enfranchised by the same woman with whom he was implicated, where she is accused of the same crime. Hence it follows that his appointment as an heir by his mistress is of no force and effect."

§ 3.- Where the testator makes a false statement with reference to the father, the nationality, or any similar relationship of his heir, the appointment will be valid, provided the identity of the party designated is established.

§ 4.- FLORENTINUS; *Institutes, Book X*.- If I should direct a slave belonging to another to be free and my heir, and the slave should afterwards become mine, neither of these provisions will be valid, for the reason that freedom cannot legally be granted to the slave of another.

§ 1.- So far as foreign heirs are concerned, the rule must be observed that, where all have testamentary capacity, whether they themselves are appointed heirs, or others are appointed who are under their control, the appointment has reference to two different times, that of the execution of the will, in order that the appointment may be made, and that of the death of the testator, in order that it may take effect. Moreover, the execution of the instrument will have reference to the acceptance of the estate, whether the heir was appointed absolutely or under some condition; for, with regard to the right of the heir, special attention must be paid to the time when he acquires the estate. A change in the right of the heir, if it took place in the intermediate time, that is, during the interval between the execution of the will

palabras: «sea Ticio dueño de mi herencia», se hace válidamente la institución.

§ 1.- Es válida esta institución: «sea heredero mi impiísimo hijo, que ha merecido mal de mi», porque es instituido heredero puramente con maldición, y están admitidas todas las instituciones de esta naturaleza.

§ 2.- A veces ni aún con la libertad es instituido útilmente heredero por su dueña el esclavo, como se expresa en la constitución de los Divinos Severo y Antonino, cuyas palabras son estas: «es de razón, que el esclavo acusado de adulterio no sea considerado legalmente manumitido en testamento antes de la sentencia por aquella mujer que hubiera sido acusada como reo del mismo crimen»; de lo cual se sigue, que no tiene ningún valor la institución hecha a favor del mismo por su dueña.

§ 3.- Si se escribió con falsedad en cuanto al padre, o en cuanto a la patria, o en cuanto a otro particular semejante, con tal que haya certeza respecto a aquel que haya sido designado, es válida la institución.

49.- FLORENTINO.- *Instituta, libro X*.- Si mandé que un esclavo ajeno fuese libre y heredero, y este se hizo después mío, no es válida ni una ni otra cosa, porque inútilmente se le dió la libertad a un esclavo ajeno.

§ 1.- Respecto a los herederos extraños se observa esto, que haya con ellos testamentifacción, ora si fueran instituidos herederos ellos mismos, ora si los que están bajo su potestad. Y a esto se atiende en dos tiempos, al en que se hizo el testamento, para que subsista la institución, y al de la muerte del testador, para que tenga efecto. Además de esto, también debe haber testamentifacción con él cuando adiere la herencia, ya si haya sido instituido heredero puramente, ya si bajo condición, porque el derecho del heredero ha de ser considerado principalísimamente al tiempo en que adquiere la herencia; pero la alteración del derecho en el tiempo intermedio, desde que se hizo el testamento hasta la muerte del testador, o hasta que se cumple la condición de la institución, no le perjudica al heredero, porque, como he dicho,

50.- ULPIANUS; *libro VI regularum*.- Servum meum heredem institutum cum libertate si vivus vendidero ei, cum quo testamenti factio non est, posteaque eum redemero, ex testamento mihi heres esse poterit nec medium tempus, quo apud eum fuit, vitiavit institutionem, quia verum est utroque tempore tam testamenti faciendi quam mortis tempore meum fuisse. Unde si apud eum remanserit, vitiauit institutio: vel si cum eo testamenti factio est, iussu eius adeundo adquiret ei hereditatem.

§ 1.- Si in non faciendo impossibilis condicio institutione heredis sit expressa, secundum omnium sententiam heres erit, perinde ac si pure institutus esset.

§ 2.- Hereditas plerumque dividitur in duodecim uncias, quae assis appellatione continentur. Habent autem et haec partes propria nomina ab uncia usque ad assem, puta haec: sextans quadrans triens quincunx semis septunx bes dodrans dextans deunx as.

51.- MARCIANUS; *libro III regularum*.- Talem institutionem quidam valere non putabant: "Stichus liber esto et, si liber erit, heres esto". Sed divus Marcus rescripsit hanc institutionem valere perinde atque si non erat adiectum "si liber erit".

§ 1.- Si quis ita scripserit: "Stichus, si meus erit cum morior, liber et heres esto", alienatus non poterit iussu emptoris adire hereditatem, quamvis, etsi non erat hoc expressum, non alias liber et heres fieri poterat, quam si mansisset eius. Sed si vivus eum

and the death of the testator or the fulfillment of the condition of the appointment, will not prejudice him, because, as I have stated, we must take into consideration these three different dates.

50.- ULPIANUS; *Rules, Book VI*.- If, during my lifetime, I should sell my slave, whom I had appointed my heir with the grant of his freedom, to a party who did not have testamentary capacity, and afterwards I should redeem said slave, he can be my heir under the will; nor will the intermediate time during which he was in the hands of another master annul the appointment, because it is certain that he has been mine at both times, namely that of the execution of the will, and that of death. Wherefore, if he had remained in the hands of his other master, the appointment would become void; or if he had been transferred to someone who had testamentary capacity, he would acquire my estate for the latter through entering upon it by his direction.

§ 1.- If the condition upon which the appointment of an heir was dependent stated that some act was not to be performed, and it was impossible, the person designated will be the heir in accordance with the opinion of all authorities, just as if he had been unconditionally appointed.

§ 2.- An estate is generally divided into twelve parts, which are included in the appellation as. These parts all have their own names from the uncia to the as, for example, the following: "The sixth, the fourth, the third, five-twelfths, half, seven-twelfths, two-thirds, three-fourths, five-sixths, eleven-twelfths, the as."

51.- MARCIANUS; *Rules, Book III*.- Certain authorities held that the following appointment was not valid: "Let Stichus be free, and if he should become free, let him be my heir." The Divine Marcus stated in a Rescript that this appointment is valid, just as if the addition, "If he should become free", had not been made.

§ 1.- Where anyone makes the following provisions in a will, namely: "If Stichus should still belong to me when I die, let him be free, and my heir." If Stichus is alienated, he cannot enter upon the estate by order of the purchaser, although, even if the

como he dicho, atendemos a los tres tiempos.

50.- ULPIANO; *Reglas, libro VI*.- Si en vida hubiere yo vendido a aquel con quien no hay testamentifacción el esclavo mio instituido heredero con la libertad, y después lo hubiere vuelto a comprar, podrá ser mi heredero en virtud del testamento, y no vició la institución el tiempo intermedio, durante el que estuvo en poder de aquel porque es verdad que fue mío tanto al tiempo de hacerse el testamento, como al de la muerte. Por lo cual, si hubiere permanecido en poder de aquel, se vicia la institución, o si hay testamentifacción con él, le adquirirá la herencia adiéndola por su mandato.

§ 1.- Si en la institución de heredero se hubiera expresado una condición imposible, que consistiera en no hacer, conforme al parecer de todos será heredero, lo mismo que si hubiese sido instituido puramente.

§ 2.- La herencia se divide por lo general en doce onzas, que se comprenden en la denominación de as; pero también estas partes tienen nombres propios, desde la onza hasta el as, tales como estos: sexto, cuarto, tercio, cinco onzas, medio as, siete onzas, dos tercios, tres cuartos, cinco sextos, once onzas, as.

51.- MARCIANO; *Reglas, libro III*.- Algunos opinaban que no era válida esta institución: sea libre Stico, y si fuere libre, sea heredero, pero el Divino Marco respondió por rescripto, que esta institución era válida lo mismo que si no se hubiese añadido si fuere libre.

§ 1.- Si alguno hubiere escrito de este modo: «si Stico fuere mío cuando yo muera, sea libre y heredero», habiendo sido enajenado no podrá adir la herencia por mandato del comprador, aunque, no obstante que no se había expresado esto, no podía

manumiserit, Celsus libro quinto decimo digestorum scribit fieri hunc heredem: non enim hunc casum testatorem voluisse excludere palam est neque verba omnino repugnant: nam quamvis servus eius non est, at certe libertus est.

52.- PAULUS; *libro II regularum*.- Servus hereditarius heres institui potest, si modo testamenti factio fuit cum defuncto, licet cum herede instituto non sit.

53.- MARCELLUS; *libro singulari responsorum*.- Lucius Titius Seio et Sempronio ex semissibus heredibus institutis et ceteris exheredatis invicem heredem substituit, deinde legata et libertates dedit, postea ita subiecit: "Cornelius et Sallustius et Varro aequis partibus heredes sunt, quos invicem substituo": quaero, quantum vel priores duo ex semissibus instituti vel posteriores habere debeant. Marcellus respondit in obscuro esse, Cornelium et Sallustium et Varronem primo an secundo vel tertio gradu heredes instituere voluerit: sed secundum scripturam testamenti quae proponeretur, alterum assem datum eis videri.

54.- NERATIUS; *libro I membranarum*.- Pater filio impuberi servum heredem substituit liberumque esse iussit: eum pupillus vendidit Titio: Titius eum iam primo testamento facto in secundo testamento liberum heredemque esse iussit. Superius testamentum Titii ruptum est, quia is servus et heres potest esse et, ut superius testamentum rumpatur, sufficit ita posterius factum esse, ut aliquo casu potuerit ex eo heres existere. Quod ad vim autem eius institutionis pertinet, ita se res habet, ut, quamdiu pupillo ex ea substitutione heres potest esse, ex Titii testamento libertatem hereditatemque consequi non

testator had not declared it to be his intention, the slave cannot become free and the heir, unless he was under his control at the time of his death. If, however, he should manumit him during his lifetime, Celsus says in the Fifteenth Book of the Digest that Stichus will become his heir; for it is evident that the testator did not intend to exclude this case, nor are his words at all contradictory, for even though he is no longer his slave, he certainly is his freedman.

52.- PAULUS; *Rules, Book II*.- A slave belonging to the estate can be appointed an heir, provided that he had testamentary capacity with the deceased, even though this may not have been the case so far as the heir appointed by the testator was concerned.

53.- MARCELLUS; *Opinions*.- Lucius Titius, after having appointed Seius and Sempronius equal heirs to his estate, and his other sons having been disinherited, substituted each of the said heirs for the other, and then bequeathed certain legacies, and manumitted certain slaves, and afterwards added the following: "Let Cornelius, Sallustius, and Varo be heirs to equal portions of my estate, and I substituted them for one another." I ask, what portion of the estate the first heirs, who are appointed for the whole of it, and what portion the last heirs should have? Marcellus answered that it was doubtful whether the testator intended to appoint Cornelius, Sallustius, and Varo his heirs in the first, second, and third degrees; but according to the terms of the will as set forth, it would appear that the estate was given to all of the heirs after the shares had been doubled.

54.- NERATIUS; *Parchments, Book I*.- A father substituted his slave as heir to his minor son, and at the same time granted the latter his freedom, and the minor sold the said slave to Titius. Titius, who had already made one will, in a second ordered the slave to be free and his heir. The first will of Titius was broken because the said slave could be his heir; and as the first will was broken, it is sufficient that the one subsequently executed provided that the heir appointed by it should, in a certain contingency, succeed to the testator. With reference to the effect of this appointment, the result will be that as long as the

hacerse libre y heredero de otro modo, que si hubiese permanecido siendo de él. Pero si en vida lo hubiere manumitido, escribe Celso en el libro décimo quinto del Digesto, que éste se hace heredero; porque es evidente, que el testador no quiso excluir este caso; y ni las palabras lo repugnan en absoluto, pues aunque no es su esclavo, es, no obstante, ciertamente su liberto.

52.- PAULO; *Reglas, libro II*.- Puede ser instituido heredero un esclavo de la herencia, si hubo testamentificación con el difunto, aunque no la haya con el heredero instituido.

53.- MARCELO; *Respuestas, libro único*.- Lucio Ticio, habiendo instituido herederos por mitades de la herencia a Seyo y a Sempronio, Y, habiendo desheredado a los demás, les sustituyó recíprocamente otro heredero, después dió legados y libertades, y luego añadió de este modo: «son herederos por partes iguales, Cornelio, Sallustio, y Varron, a los cuales los substituyo recíprocamente»; pregunto, ¿cuánto deberán tener o los dos primeros instituidos por mitades de la herencia, o los posteriores? Marcelo respondió, que estaba obscuro, si haya querido instituir a Cornelio, Sallustio y Varron herederos en primer, o segundo, o tercer grado; pero que conforme a la escritura de testamento, que se mencionaba, se considera que a estos se les dió otro as.

54.- NERACIO; *Pergaminos, libro I*.- Un padre le sustituyó a su hijo impúbere un esclavo como heredero, y mandó que fuese libre; el pupilo lo vendió a Ticio, y Ticio, habiendo hecho ya un primer testamento, mandó en un segundo testamento que fuera libre y heredero; se rompió el primer testamento de Ticio, porque este esclavo también puede ser heredero, y para que se rompa el anterior testamento basta que el posterior haya sido hecho de modo, que en virtud de él haya podido haber en algún caso heredero. Mas por lo que respecta al valor de esta institución, el caso se entiende de manera, que

possit: si pupillus in suam tutelam pervenerit, perinde ex Titii testamento liber heresque sit ac si pupillo substitutus non fuisset: si pupillo heres exstitit, propius est, ut Titio quoque, si velit, heres esse possit.

55.- PAULUS; *libro I ad legem Aeliam Sentiam*.- Si is qui solvendo non est primo loco Stichum, secundo eum cui ex fideicommissi causa libertatem debet liberum et heredem instituerit, Neratius secundo loco scriptum heredem fore ait, quia non videtur creditorum fraudandorum causa manumissus.

56.- PAULUS; *libro singulari de secundis tabulis*.- Potest quis ita heredem instituere: "Si intra annum septuagesimum decessero, ille mihi heres esto": non enim pro parte testatus intellegi debet, sed sub conditione instituisse.

57.- PAULUS; *libro LVII ad edictum*.- Si is qui solvendo non est servum cum libertate heredem instituerit et liberum substituerit, ante incipiendum erit a substituto: lex enim Aelia Sentia ita demum ei, qui in fraudem creditorum heres institutus est conservat libertatem, si nemo alius ex eo testamento heres esse potest.

58.- PAULUS; *libro IV ad Vitellium*.- Nemo dubitat recte ita heredem nuncupari posse "hic mihi heres esto", cum sit coram, qui ostenditur.

§ 1.- Qui frater non est, si fraterna caritate diligitur, recte cum nomine suo sub appellatione fratris heres instituitur.

59.- CELSUS; *libro XVI digestorum*.- Liber homo

heir can succeed to the minor by reason of this substitution, he can not obtain his freedom and the estate under the will of Titius. If the heir should obtain control of himself, he would then obtain his freedom, and the estate by the terms of the will of Titius, just as if he had not been substituted for the minor; and if he should become the heir of the minor, there is the best reason to conclude that he could also be the heir of Titius, if he was willing.

55.- PAULUS; *On the Lex Aelia Sentia, Book I*.- If a man who is not solvent should, in the first place, appoint Stichus his heir with a grant of his freedom, and in the second, another slave, upon whom he conferred freedom by the terms of a trust, Neratius says that the slave appointed in the second place will be the heir, because he is not considered to have been manumitted for the purpose of defrauding creditors.

56.- THE SAME; *On Second Wills*.- Anyone can appoint an heir as follows: "If I die in my seventieth year, let So-and-So be my heir." In this instance, the person executing the will should not be considered to be partly testate, but to have made the appointment under a condition.

57.- THE SAME; *On the Edict, Book LVII*.- If anyone who is insolvent appoints his slave, with the grant of his freedom, his heir, and substitutes a freeman for him, the substitute will be first entitled to the estate, for the Lex Aelia Sentia confirms the freedom of the slave only where he has not been appointed heir for the purpose of defrauding creditors, if there is no one else who can be an heir under a will.

58.- THE SAME; *On Vitellius, Book IV*.- No one doubts that an heir can legally be appointed as follows: "Let him be my heir," where the party indicated is present.

§ 1.- If a person is not a brother of the testator, but entertains fraternal affection for him, he can legally be appointed his heir, by mentioning his name with the appellation of brother.

59.- CELSUS; *Digest, Book XVI*.- A man who is

hasta que en virtud de esta substitución puede ser heredero del pupilo, no pueda conseguir la libertad y la herencia por el testamento de Ticio; si el pupilo hubiere llegado a su propia tutela, sera libre y heredero en virtud del testamento de Ticio, lo mismo que si no hubiese sido substituido al pupilo; si fué heredero del pupilo, es mas probable que también pueda ser heredero de Ticio, si quisiera.

55.- PAULO; *Comentarios a la ley Elia Sencia, libro I*.- Si el que no es solvente hubiere instituido libre y heredero en primer lugar a Stico, y en segundo a aquel a quien le debe la libertad por causa de fideicomiso, dice Neracio, que habrá de ser heredero el instituido en segundo lugar, porque no se considera manumitido para defraudar a los acreedores.

56.- EL MISMO; *De los segundos testamentos, libro único*.- Cualquiera puede instituir heredero de este modo: «si yo falleciere dentro de los setenta años, sea aquel mi heredero»; porque no se debe entender que testó de parte, sino que instituyó bajo condición.

57.- EL MISMO; *Comentarios al Edicto, libro LVII*.- Si el que no es solvente hubiere instituido con la libertad heredero a un esclavo, y le hubiere substituido un hombre libre, se habrá de comenzar antes por el substituido; porque la ley Elia Sencia le conserva la libertad, al que fue instituido heredero en fraude de los acreedores, solamente de este modo, si otro ninguno puede ser heredero en virtud de este testamento.

58.- EL MISMO; *Comentarios a Vitelio, libro IV*.- Nadie duda, que válidamente se puede nombrar de este modo heredero: «sea éste mi heredero», cuando esté presente el que se designa.

§ 1.- El que no es hermano, si es querido con cariño de hermano, es instituido válidamente heredero con su propio nombre bajo la denominación de hermano.

59.- CELSO; *Digesto, libro XVI*.- Instituido here-

cum tibi serviret, heres institutus iussu tuo adiit. Trebatus esse eum heredem: Labeo tunc non esse heredem, si necessitate id fecerit, non quod alioquin vellet obligari.

§ 1.- Si quis ita heredem instituerit: "Titius qua ex parte mihi socius est in vectigali salinarum, pro ea parte mihi heres esto", quidam putant, si asse descripto id adiectum sit, ut maxime socius fuerit Titius, non esse heredem, sed si qua pars vacua relicta fuerit, ex ea heredem esse. Quod totum et ineptum et vitiosum est: quid enim vetat asse descripto utiliter Titium ex parte fore quarta, ex qua socius erat, heredem institutum esse?

§ 2.- "Titius heres esto: Seius et Maevius heredes sunt". Verum est quod Proculus placet duos semisses esse, quorum alter coniunctim duobus datur.

§ 3.- Cum quis ex institutis, qui non cum aliquo coniunctim institutus sit, heres non est, pars eius omnibus pro portionibus hereditariis accrescit, neque refert, primo loco quis institutus an alicui substitutus heres sit.

§ 4.- Si heres institutus scribendi testamenti tempore civis Romanus fuit, deinde ei aqua et igni interdictum est, heres fit, si intra illud tempus quo testator decessit redierit aut, si sub condicione heres institutus est, quo tempore condicio exsistit. Idem est in legatis et in bonorum possessionibus.

§ 5.- "Titius ex semisse heres esto: Seius ex quadrante heres esto: Titius si in Capitolium ascenderit, ex alio quadrante heres esto". Antequam Capitolium ascendat si pro herede gerat, ex semisse heres erit, si Capitolium ascenderit, et ex quadrante heres erit nec

free, but who is serving you as a slave, having been appointed an heir, enters upon the estate by your order. Trebatius says that he is the heir, but Labeo maintains that he is not, if he acted through necessity, and not, on the contrary, because he intended to bind himself.

§ 1.- If anyone should appoint an heir as follows: "Let Titius be my heir to the portion in which he is a partner with me in the lease of the salt-pits," certain authorities hold that if this statement had been made by the testator after the entire property had been divided, even though Titius was a partner to a very large extent, the appointee would not be the heir; but if there was a certain share which had not been bequeathed, he would be the heir to it. This opinion is absurd and incorrect, for what prevents the testator from legally making Titius his heir for the fourth part, which perhaps was the amount in which he was interested as a partner, after the entire property had been disposed of under the ordinary division?

§ 2.- "Let Titius be my heir, and let Seius and Maevius also be my heirs." It is true, as is held by Proculus, that the estate should be divided into two portions, one of which should be given to the two heirs who were appointed together.

§ 3.- Where one of several heirs who has not been appointed conjointly with anyone else declines to take under the will, his share will accrue to all the others in proportion to their hereditary shares; and it does not make any difference whether any of them was appointed in the first place, or is substituted for someone else.

§ 4.- Where a person appointed heir was a Roman citizen at the time that the will was executed, and was afterwards interdicted from water and fire, he will be the heir if he should return between the time of his sentence and that of the death of the testator, or if he was appointed an heir under a certain condition, and returns at the time that the condition was fulfilled. The same rule also applies to legacies, and the praetorian possession of estates.

§ 5.- "Let Titius be my heir to half of my estate, Seius to a quarter, and Titius to the other quarter if he ascends to the Capitol." If he conducts himself as heir before he ascends to the Capitol, he will be entitled to half of the estate; if he should do so afterwards, he

dero un hombre libre, cuando te prestaba servidumbre, adió por tu mandato la herencia; Trebacio dice, que éste es heredero, y Labeón, que entonces no es heredero, si esto lo hubiere hecho por necesidad, no porque quiera obligarse de otro modo.

§ 1.- Si alguno hubiere instituido heredero de este modo: «sea mi heredero Ticio de la misma parte en que es mi socio en la renta de las salinas», opinan algunos, que si esto se hubiera dicho después de distribuido el as, aunque Ticio hubiere sido su socio, no es heredero, pero que si hubiere quedado vacante alguna parte, es heredero de ella. Todo lo cual es mal aplicado y defectuoso; porque ¿qué impide, que distribuido el as haya sido útilmente instituido heredero Ticio, acaso de la cuarta parte, por la que era socio?

§ 2.- Sea heredero Ticio, y sean herederos Seyo y Mevio, es verdad lo que le parece bien a Próculo, que hay dos mitades, una de las cuales se les da conjuntamente a dos.

§ 3.- Cuando alguno de los instituidos, que no haya sido instituido conjuntamente con otro, no es heredero, su parte les acrece a todos a proporción de su participación en la herencia, y no importa que uno haya sido instituido en primer lugar, o que haya sido substituido heredero a alguno.

§ 4.- Si el heredero instituido fue ciudadano romano al tiempo de escribirse el testamento, y después él le privó del agua y del fuego, se hace heredero, si hubiere regresado dentro del tiempo en que falleció el testador, o si fue instituido heredero bajo condición, al tiempo en que se cumplió la condición. Y lo mismo se dice en cuanto a los legados, y en cuanto a las posesiones de bienes.

§ 5.- «Sea Ticio heredero de la mitad de la herencia; sea heredero Seyo de la cuarta parte; y sea heredero Ticio de la otra cuarta parte, si subiere al Capitolio»; si antes que suba al Capitolio se condujese como heredero, será heredero de la mitad de la

erit ei necesse pro herede gerere quippe iam heredi.

§ 6.- Si ita scriptum fuerit: "Titius ex parte tertia, Mævius ex parte tertia heredes sunt: Titius, si intra tertias kalendas navis ex asia venerit, ex reliqua parte heres esto": videamus, ne Titius statim ex semisse heres sit: nam duo heredes instituti sunt, sed Titius aut ex semisse aut ex besse: ita sextans utique erit in pendent et, si condicio exstiterit, ex besse heres erit, si non exstiterit, ille sextans Mævio adrescet.

Sed si decesserit Titius, antequam condicio exsistat, deinde condicio exstiterit, tamen ille sextans non Titii heredi, sed Mævio adrescet: nam cum adhuc dubium esset, Titio an Mævio is sextans datus esset, Titius decessit nec potest intellegi datus ei qui tempore dandi in rerum natura non fuit.

§ 7.- Si Attius Titium et Mævium et Seium aequis partibus heredes instituit, Titius interim solus adiit hereditatem et Seium heredem instituit, poterit Seius Titii adire hereditatem, Attii vel adire vel omittit: sed Attio, antequam adeat vel omittat eius hereditatem, ex semisse heres erit. Si adierit Seius Attii hereditatem, Titius ex triente dumtaxat heres erit et per hereditatem Titii triens dumtaxat ad Seium perveniet, alterum trientem ex sua institutione habebit. Quid ergo si ab Attio Titius et Seius heredes instituti sunt, Titius adierit hereditatem, Titio Seius heres exstiterit? Potestne Attii hereditatem omittit an necessario ei ex asse heres est? Quippe cum alius nemo heres institutus est, quam is ipse qui ex aliqua parte iam heres est, perinde est, quasi unus heres per Titium institutus sit.

will be heir to a quarter of the same; for it will not be necessary for him to signify his acceptance, since he is already an heir.

§ 6.- Where the following is stated in a will: "Let Titius be my heir to a third part of my estate, and Mævius be my heir to another third, and let Titius be my heir to the remaining third, if a ship should arrive from Asia within three months." Let us see whether Titius will not immediately become the heir to half of my estate, for two heirs have been appointed. Titius will either be an heir to one-half of it, or to two-thirds, so that a sixth of the estate will be in abeyance, and if the condition should be fulfilled, Titius will be the heir to two-thirds of the estate, but if it should not be fulfilled, the sixth will accrue to Mævius.

If, however, Titius should die before the condition is fulfilled, and it should be fulfilled afterwards, the sixth of the estate which remained in abeyance will not accrue to the heir of Titius, but to Mævius; for Titius died when it was still doubtful as to whether he or Mævius would be entitled to the said sixth, since it could not be understood to have been given to him who was no longer in existence at the time it should have been allotted.

§ 7.- If Attius should appoint Titius, Mævius, and Seius heirs to equal portions of his estate, and, in the meantime, Titius was the only one who accepted, and he appointed Seius his heir, Seius would enter upon the estate of Titius, and could either accept or decline that of Attius; but before he accepted or rejected the estate of Attius, he would still be the heir to half of it. If Seius should enter upon the estate of Attius, Titius would only be the heir to one-third of the same, and through inheritance only a third of the estate of Titius would come into the hands of Seius, but he would be entitled to another third by virtue of his appointment. But what if Titius and Seius, having been appointed heirs of Attius, Titius should enter upon the estate, and Seius should become the heir of Titius, could he, or could he not refuse the estate of Attius, or would he necessarily be the heir to the entire estate? As no one else was appointed but the person who was already the heir to a certain portion of the estate, it is just the same as if he had been appointed sole heir by Titius.

herencia; y si hubiere subido al Capitolio, será heredero también de la cuarta parte, y no tendrá necesidad de conducirse como heredero, porque ya es heredero.

§ 6.- Si se hubiere escrito en esta forma: «sean herederos Ticio de la tercera parte, y Mævio de la tercera parte; y si la nave hubiere llegado de Asia dentro de las terceras Calendas, sea Ticio heredero de la parte restante», veamos si Ticio sería desde luego heredero de la mitad de la herencia, porque se restituyeron dos herederos, o si lo será Ticio de dicha mitad, o de los dos tercios; y así estará ciertamente pendiente una sexta parte, y si se hubiere cumplido la condición, será heredero de los dos tercios, y si no se hubiere cumplido, esta sexta parte acrecerá a Mævio.

Pero si hubiere fallecido Ticio antes que se cumpliera la condición, y después se hubiere cumplido la condición, aquella sexta parte no acrecerá sin embargo al heredero de Ticio, sino a Mævio; porque Ticio falleció estando todavía en duda si esta sexta parte se había dado a Ticio, o a Mævio, y no puede entenderse que se le dió al que no existía al tiempo de darse,

§ 7.- Si Atcio instituyó herederos por partes iguales a Ticio, Mævio y Seyo, y solo Ticio adió mientras tanto la herencia, e instituyó heredero a Seyo, podrá Seyo adir la herencia de Ticio, y adir, o dejar de adir, la de Atcio; pero será heredero de Atcio por la mitad de la herencia, antes que ada o deje de adir su herencia. Si Seyo hubiere adido la herencia de Atcio, Ticio será heredero solamente de un tercio y por la herencia de Ticio le corresponderá a Seyo solamente la tercera parte, y tendrá a la tercera en virtud de su institución. ¿Qué se dá, pues, si Ticio y Seyo fueron instituidos herederos por Atcio, y Ticio hubiere adido la herencia, y Seyo hubiere quedado siendo heredero de Ticio, puede dejar de adir la herencia de Atcio, o es por necesidad su heredero en el as, porque no fue instituido ningún otro heredero sino el mismo que ya es heredero de alguna parte? Y el caso es igual que si un solo heredero hubiera sido instituido por Ticio.

60.- CELSUS; *libro XXIX digestorum*.- Qui solvendo non erat, servum primo loco et alterum servum secundo loco heredes scripsit. Solus is qui primo loco scriptus est hereditatem capit: nam lege Aelia Sentia ita cavetur, ut, si duo pluresve ex eadem causa heredes scripti sint, uti quisque primus scriptus sit, heres sit.

61.- MODESTINUS; *libro VIII responsorum*.- Qui volebat filiam exheredare, sic testamento comprehendit: "Te autem, filia, ideo exheredavi, quoniam contentam te esse dote volui": quaero an efficaciter exheredata sit. Modestinus respondit nihil proponi, cur non esset voluntate testatoris exheredata.

62.- MODESTINUS; *libro II pandectarum*.- In tempus capiendae hereditatis institui heredem posse benevolentiae est, veluti "Lucius Titius cum capere potuerit, heres esto": idem et in legato.

§ 1.- Quotiens non apparet, quis heres institutus sit, institutio non valet (quippe evenire potest, si testator complures amicos eodem nomine habeat et ad designationem singulari nomine utatur): nisi ex aliis apertissimis probationibus fuerit revelatum, pro qua persona testator senserit.

63.- IAVOLENUS; *libro I ex Cassio*.- Heredes sine partibus utrum coniunctim an separatim scribantur, hoc interest, quod, si quis ex coniunctis decessit, non ad omnes, sed ad reliquos qui coniuncti erant pertinet, sin autem ex separatim, ad omnes, qui testamento eodem scripti sunt heredes, portio eius pertinet.

64.- IAVOLENUS; *libro VII epistularum*.- Eius servum, qui post mortem meam natus erit, heredem

60.- CELSUS; *Digest, Book XXIX*.- A man who was insolvent appointed one slave in the first place, and another in the second place, his heirs. He alone who was appointed in the first place is entitled to the estate, for by the Lex Aelia Sentia, it is provided that where two or more are designated in the same way, the first one mentioned becomes the heir.

61.- MODESTINUS; *Opinions, Book VIII*.- A testator who wished to disinherit his daughter inserted the following clause into his will: "As for you, my daughter, I have disinherited you because I desired that you should be content with your dowry." I ask whether she was legally disinherited. Modestinus answered that there was nothing in the case stated which would prevent her from being disinherited by the will of the testator.

62.- THE SAME; *Pandects, Book II*.- It is an act of kindness for an heir to be appointed for the time that he can obtain the benefit of the inheritance, as for instance: "Let Lucius Titius be my heir for the time when he can obtain my estate." The same rule applies to legacies.

§ 1.- Whenever it is not apparent who the appointed heir is, the appointment will not be valid; and this may happen where the testator had several friends of the same name, and in designating the one whom he appointed he used only a single name; unless it is disclosed by the clearest evidence whom the testator had in his mind.

63.- JAVOLENUS; *On Cassius, Book I*.- Where heirs are appointed without the designation of their shares, it is important to ascertain whether they are appointed conjointly, or separately; because if any one of those appointed conjointly should die, his share will not belong to all the heirs, but only to the remaining ones who are appointed along with him; but where one of those appointed separately dies, his share will belong to all of the heirs appointed under the will.

64.- THE SAME; *Epistles, Book VII*.- Labeo has frequently stated that the slave of a person born after

60.- CELSO; *Digesto, libro XXIX*.- Uno que no era solvente instituyó herederos en primer lugar a un esclavo, y en segundo lugar a otro esclavo; solo adquiere la herencia el que fue instituido en primer lugar; porque en la ley Elia Sencia se dispone, que si dos o más hubieren sido instituidos herederos por la misma causa, sea heredero el que primero haya sido instituido.

61.- MODESTINO; *Respuestas, libro VIII*.- Uno que quería desheredar a su hija se expreso así en el testamento: «mas a ti, hija, te desheredé, porque quise que te contentases con la dote», pregunto, estará eficazmente desheredada? Modestino respondió, que no se expone nada para que no estuviese desheredada por voluntad del testador.

62.- EL MISMO; *Pandects, libro II*.- Es acto de benevolencia, que se pueda instituir heredero para el tiempo en que se tome la herencia, por ejemplo: «sea heredero Lucio Ticio, cuando pudiere adquirir»; y lo mismo respecto a un legado.

§ 1.- Cuando no aparece quién haya sido instituido heredero, no es válida la institución, porque puede suceder, si el testador tuviera muchos amigos del mismo no hubiere, y empleara para la designación del nombre un nombre en singular, a no ser que con evidéntísimas pruebas se hubiere revelado de qué persona entendió hablar el testador.

63.- JAVOLENO; *Doctrina de Cassio, libro I*.- Importa saber si los herederos en partes hayan sido instituidos conjuntamente, o por separado, porque si falleció alguno de los conjuntos, esto pertenece no a todos, sino a los demás que eran conjuntos; pero si de los separados, su porción les pertenece a todos los que fueron instituidos herederos en el mismo testamento.

64.- EL MISMO; *Epístolas, libro VII*.- A menudo escribió Labeón, que se puede instituir heredero al

institui posse Labeo frequenter scribit idque verum esse manifesto argumento comprobatur: quia servus hereditarius, priusquam adeatur hereditas, institui heres potest, quamvis is testamenti facti tempore nullius sit.

65.- IAVOLENUS; *libro XII epistularum*.- Hereditas ad statum primum nullo iure pertinet, cum institutus heres non sit: nec quicquam ei prodest, quod ab eo aliquid legatum est aut libertus ei defuncti testamento commendatus est. Ex quo si manumissus non est, servus est.

66.- POMPONIUS; *libro I ad Quintum Mucium*.- Si ita quis heredes instituerit: "Titius heres esto: Gaius et Maevius aequis ex partibus heredes sunt", quamvis et syllaba coniunctionem faciat, si quis tamen ex his decedat, non alteri soli pars accrescit, sed et omnibus coheredibus pro hereditariis portionibus, quia non tam coniunxisse quam celerius dixisse videatur.

67.- POMPONIUS; *libro II ad Quintum Mucium*.- Si ita scriptum fuerit: "Tithasus si in Capitolium ascenderit, heres esto: Tithasus heres esto", secunda scriptura potior erit: plenior est enim quam prior.

68.- POMPONIUS; *libro VII ad Quintum Mucium*.- Si quis Sempronius heredem instituerit sub hac condicione "si Titius in Capitolium ascenderit", quamvis non alias heres esse possit Sempronius, nisi Titius ascendisset in Capitolium, et hoc ipsum in potestate sit repositum Titii: quia tamen scriptura non est expressa voluntas Titii, erit utilis ea institutio. Atquin si quis ita scripserit: "Si Titius voluerit, Sempronius heres esto", non valet institutio: quaedam enim in testamentis si exprimantur, effectum nullum habent, quando, si verbis tegantur, eandem significationem habeant quam haberent

my death can be appointed my heir. The truth of this is readily established, for the reason that a slave forming part of an estate can be appointed an heir before the estate is entered upon, even though at the time of the execution of the will he did not belong to anyone.

65.- THE SAME; *Epistles, Book XII*.- An estate cannot, under any circumstances, belong to Statius Primus, since he has not been appointed heir, and it would be of no benefit to him whatever if he were charged with the payment of a legacy, or if the freedman of the deceased was entrusted to his care by testamentary disposition; for he will remain a slave for all time, if he should not be manumitted.

66.- POMPONIO; *On Quintus Mucius, Book I*.- If anyone should appoint heirs as follows: "Let Titius be my heir, and let Gaius and Maevius be heirs to equal portions of my estate"; although the word "and" is a conjunction; still, if either of the parties should die, his share will not accrue to the other alone, but to all his co-heirs in proportion to their interest in the estate; because it is held that the testator did not mean to unite the two heirs, but intended to mention them more particularly.

67.- THE SAME; *On Quintus Mucius, Book II*.- Where the following was inserted in a will: "Let Tithasus be my heir if he ascends to the Capitol; let Tithasus be my heir"; the second clause will have the greater effect, for it is more complete than the first one.

68.- THE SAME; *On Quintus Mucius, Book VII*.- A certain man appointed Sempronius his heir under the following condition: "If Titius should ascend to the Capitol." Even though Sempronius could not become the heir unless Titius should ascend to the Capitol, and this absolutely depends upon the inclination of Titius, for the reason that the desire of Titius is not expressly referred to in the will the appointment will be valid. But if the testator had said, "If Titius is willing, let Sempronius be my heir"; the appointment would be void. For certain things which are mentioned in wills have no force or effect, if, when

esclavo del que naciere después de mi muerte. Y prueba que esto es verdad con un argumento concluyente; porque un esclavo de la herencia puede ser instituido heredero antes que sea adida la herencia, aunque éste no sea de nadie al tiempo en que se hizo el testamento.

65.- EL MISMO; *Epístolas, libro XII*.- La herencia no le pertenece por ningún derecho a Stado Primo, no habiendo sido instituido heredero, tampoco le aprovecha cosa alguna, que a su cargo se haya legado algo, o que se le haya encomendado en el testamento del difunto un liberto, que, en virtud de esto, si no fue manumitido, es esclavo.

66.- POMPONIO; *Comentarios a Quinto Mucio, libro I*.- Si uno hubiere instituido herederos en esta forma: «sea heredero Ticio, y sean herederos por partes iguales Cayo y Mevio»; aunque la sílaba "y" constituya conjunción, no obstante, si falleciera alguno de estos, su parte no acrece al otro solo, sino también a todos los coherederos conforme a sus porciones de la herencia, porque se considera no tanto que los designó conjuntamente, como que los indicó con más brevedad.

67.- EL MISMO; *Comentarios a Quinto Mucio, libro II*.- Si Seyó hubiere escrito así: «sea heredero Titaso, si hubiere subido al Capitolio; sea heredero Titaso», será preferente la segunda institución, porque es más plena que la primera.

68.- EL MISMO; *Comentarios a Quinto Mucio, libro VII*.- Si uno hubiere instituido heredero a Sempronio bajo esta condición: «si Ticio hubiere subido al Capitolio», aunque Sempronio no pueda ser heredero de otra suerte, si Ticio no hubiese subido al Capitolio, y esto se haya dejado al arbitrio de Ticio, no obstante, como en la escritura no está expresada la voluntad de Ticio, será útil esta institución. Pero si uno hubiere escrito en este modo: «si Ticio quisiere, sea heredero Sempronio», no es adida la institución. Porque algunas cosas si se expresan en los testamentos, no tienen ningún efecto, cuando, si se encu-

expressa, et momentum aliquod habebunt. Sic enim filii exheredatio cum eo valet, si quis heres existat: et tamen nemo dubitat, quin, si ita aliquis filium exheredaverit: "Titius heres esto: cum heres erit Titius, filius exheres esto", nullius momenti esse exheredationem.

69.- PROCULUS; *libro secundo epistularum*.- "Cornelius et Maevius, uter eorum volet, heres esto": uterque vult: Trebatius neutrum fore heredem, Cartilius utrumque: tu cui adsentiaris? Proculus: Cartilio adsentio et illam adiectionem "uter eorum volet" supervacuam puto: id enim etiam ea non adiecta futurum fuit, ut, uter vellet, heres esset, uter nollet, heres non esset. Quod si hi ex numero necessariorum heredum essent, tum id non frustra adiectum esse et non solum figuram, sed vim quoque condicionis continere: dicerem tamen, si uterque heres esse vellet, utrumque heredem esse.

70.- PAPINIANUS; *libro VI responsorum*.- Captatorias institutiones non eas senatus improbavit, quae mutuis affectionibus iudicia provocaverunt, sed quarum condicio confertur ad secretum alienae voluntatis.

71.- PAULUS; *libro V ad legem Iuliam et Papiam*.- Illae autem institutiones captatoriae non sunt, veluti si ita heredem quis instituat: "Qua ex parte Titius me heredem instituit, ex ea parte Maevius heres esto", quia in praeteritum, non in futurum institutio collata est.

§ 1.- Sed illud quaeri potest, an idem servandum sit quod senatus censuit, etiamsi in aliam personam

when they are obscured by words, they have the same signification as if they had been expressed, and have a certain amount of weight; for instance, the disinheritance of a son will be valid where there is an heir, and still no one doubts that if a testator should disinherit his son as follows: "Let Titius be my heir, and when he is my heir, let my son be disinherited"; that a disinheritance of this kind if of no force whatever.

69.- PROCULUS; *Epistles, Book II*.- "Let Cornelius or Maevius, whichever one of them may desire to have my estate, be my heir." Trebatius holds that neither of them is the heir, but Cartilius maintains that both of them are heirs. Whose opinion do you adopt? Proculus, I agree with Cartilius, and think that the addition, "Whichever one of them may desire to have my estate", is superfluous; for if this addition had not been made, the result would be that whichever of them wished to take under the will would be the heir, and that the one who was not willing would not be. If, however, these parties were included in the number of necessary heirs, then this clause would not have been added in vain; and it would not only prevent the appearance, but would also have the effect of a condition; still, I would say that both of them would be heirs, if they desired to be.

70.- PAPINIANUS; *Opinions, Book VI*.- When the Senate disapproved of testamentary appointments of heirs which were obtained by intrigue, it did not include such as were dictated by mutual affection, but those in which a condition was imposed for the purpose of secretly obtaining an advantage through the will of another.

71.- PAULUS; *On the Lex Julia et Papia, Book V*.- The following appointment does not come under the head of such as are corruptly sought after; for instance, where a testator appoints an heir as follows: "Let Maevius be my heir, to the same portion to which Titius has appointed me to his heir"; for the reason that the appointment has reference to the past and not to the future.

§ 1.- It may be asked, however, whether the same rule established by the Senate should be observed

bren con las palabras, tienen la misma significación que tendrían expresadas; y tendrán algún valor. Porque la desheredación de un hijo es válida, si alguien fuese heredero, y sin embargo nadie duda, que, si uno hubiere desheredado a su hijo de este modo: «sea heredero Ticio, y cuando Ticio fuere heredero, sea desheredado mi hijo», la desheredación es de ningún valor.

69.- PRÓCULO; *Epístolas, libro II*.- «De Cornelio y Mevio, el que de ellos quisiere sea heredero»; quieren ambos; Trebacio dice, que ninguno ha de ser heredero; Cartilio, que ambos; ¿tú, con quien convienes? Y dice Próculo: convengo con Carilio, y considero superflua aquella adición «el que de ellos quisiera»; porque, aunque no se hubiera añadido, había de establecer que fuese heredero el que quisiera de los dos, y que no fuese heredero el que no quisiera. Pero si estos fuesen de número de los herederos necesarios. Entonces no se habría añadido inútilmente aquello, y tendría no solamente la apariencia, sino también la fuerza de la condición; pero yo diría, que si ambos quisieran ser herederos, los dos serían herederos.

70.- PAPINIANO; *Respuestas, libro VI*.- El Senado no desaprobó como captatorias aquellas instituciones que provocaron disposiciones por mutuos afectos, sino aquellas cuya condición se refiere al secreto de la voluntad ajena.

71.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Mas no son captatorias estas instituciones, por ejemplo, si alguno instituyera heredero en esta forma: «sea heredero Mevio de la misma parte en que Ticio me instituyó heredero», porque la institución se halla referida al tiempo pasado, no al futuro.

§ 1.- Pero se puede preguntar, si se haya de observar lo mismo, que dispuso el Senado, aún

captionem direxerit, veluti si ita scripserit: "Titius, si Maevium tabulis testamenti sui heredem a se scriptum ostenderit probaveritque, heres esto", quod in sententiam senatus consulti incidere non est dubium.

72.- CLEMENTIUS; *libro IV ad legem Iuliam et Papiam*.- Si quis solidum a lege capere non possit et ex asse sit institutus ab eo qui solvendo non est, Iulianus ex asse eum heredem esse respondit: legi enim locum non esse in ea hereditate quae solvendo non est.

73.- GAIUS; *libro XIII ad legem Iuliam et Papiam*.- Sub condicione herede instituto si substituamus, nisi eandem condicionem repetemus, pure eum heredem substituere intellegimur.

74.- LICINIUS; *libro II regularum*.- Si ita quis heres institutus fuerit: "Excepto fundo, excepto usu fructu heres esto", perinde erit iure civili atque si sine ea re heres institutus esset, idque auctoritate Galli Aquilii factum est.

75.- PAPINIANUS; *libro XII quaestionum*.- Si filius substituatur ei, a quo praeteritus est, non ut intestati patris, sed ex testamento habebit hereditatem, quoniam et quolibet alio substituto, si fuisset ab eo exheredatus, inde testamentum inciperet, ubi filius esset exheredatus.

76.- PAPINIANUS; *libro XV quaestionum*.- Servus uxori a marito mortis causa donatus mariti manet, ut et Iuliano quoque videtur. Idem si accipiat libertatem simul et hereditatem, viro necessarius heres erit: nec sine libertate aliquid ei legari potest.

where the testator attempts to secure an estate for some other person; for instance, if he should say, "Let Titius be my heir, if he can show and prove that Maevius had been appointed his heir by his will". There is no doubt that this comes within the terms of the Decree of the Senate.

72.- TERENCEIUS CLEMENS; *On the Lex Julia et Papia, Book IV*.- Where anyone who has been designated an heir to the entire estate is for some legal reason incapable of acquiring it, and was appointed by a party who died insolvent, Julianus is of the opinion that he can inherit the whole estate, for the law is not applicable to the estate of one who was insolvent.

73.- GAIUS; *On the Lex Julia et Papia, Book XIII*.- Where an heir is appointed under a condition, and we substitute another for him, unless, when doing so, we repeat the same condition, the substitution of the heir will be understood to be absolute.

74.- LICINIUS RUFINUS; *Rules, Book II*.- If anyone should appoint an heir as follows: "Let him be my heir, with the exception of the land and the usufruct", according to the Civil Law, this will be just as if the heir was appointed without the property; and this rule was established by the authority of Gaius Aquilius.

75.- PAPINIANUS; *Questions, Book XII*.- Where a son is substituted for an heir who has been passed over, he will be entitled to the estate by virtue of the will, and not on account of his father dying intestate; for if anyone else had been substituted, and the son had been disinherited, the will would begin to be operative from the degree in which the son was disinherited.

76.- THE SAME; *Questions, Book XV*.- Where a slave is given by a husband to his wife, mortis causa, he remains the property of the husband, as was held by Julianus. Moreover, if he receives his freedom and the estate at the same time, he will be the necessary heir of the husband, as nothing can be left to him without granting him his freedom.

cuando hubiere dirigido la institución capciosa a otra persona, como si hubiere escrito de este modo: «sea heredero Ticio, si mostrare, o probare que Mevio fue instituido por el heredero en las tablas de su testamento; lo que no es dudoso que cae en el sentido del Senadoconsulto.

72.- TERENCEIO CLEMENTE; *Comentarios a la ley Julia y Papia, libro IV*.- Si alguno no pudiera por ley tomar la totalidad, y hubiera sido instituido en el as por quien no es solvente, respondió Juliano, que éste es heredero del as; porque no ha lugar a la ley en aquella herencia, que no es solvente.

73.- GAYO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si habiendo instituido heredero bajo condición, lo substituyéramos, se entiende que substituímos puramente al heredero, si no repitiéramos la misma condición.

74.- LUCINIO RUFINO; *Reglas, libro II*.- Si alguien hubiere sido instituido heredero de este modo: «sea heredero, exceptuado el fundo y exceptuado el usufructo», será lo mismo por derecho civil, que si hubiese sido instituido heredero sin esta excepción; y esto se determinó con la autoridad de Galo Aquilio.

75.- PAPINIANO; *Cuestiones, libro XII*. Si el hijo fuese substituido a aquel respecto del cual fue preterido, tendrá la herencia de su padre, no como intestado, sino en virtud del testamento, porque también habiendo sido substituido otro cualquiera, si respecto de él hubiese sido desheredado, el testamento comenzaría desde donde hubiese sido desheredado el hijo.

76.- EL MISMO; *Cuestiones, libro XV*.- El esclavo donado por el marido a la mujer por causa de muerte, permanece del marido, como también le parece a Juliano. Si el mismo recibiera la libertad y al mismo tiempo la herencia, será heredero necesario del marido, y sin la libertad no se le puede legar cosa alguna.

77.- PAPINIANUS; *libro XVII quaestionum*.- Asse toto non distributo ita scriptum est: "Quem heredem codicillis fecero, heres esto": Titium codicillis heredem instituit. Eius quidem institutio valet ideo, quod, licet codicillis dari hereditas non possit, tamen haec ex testamento data videtur: sed hoc tantum ex hereditate habebit, quantum ex asse residuum mansit.

78.- PAPINIANUS; *libro VI responsorum*.- Qui non militabat, bonorum maternorum, quae in pannonia possidebat, libertum heredem instituit, paternorum, quae habebat in Syria, Titium. iure semisses ambos habere constitit, sed arbitrum dividendae hereditatis supremam voluntatem factis adiudicationibus et interpositis propter actiones cautionibus sequi salva Falcidia, scilicet ut, quod vice mutua praestarent, doli ratione quadranti retinendo compensetur.

§ 1.- Lucio Titio ex duabus partibus, Publio Maevio ex quadrante scriptis heredibus assem in dodrantem esse divisum respondi: modum enim duarum partium ex quadrante declarari: quod veteres nummis Titio legatis nummorum specie non demonstrata ceterorum legatorum contemplatione receperunt.

§ 2.- Filiis heredibus aequis partibus institutis ac postea fratris filio pro duabus unciiis unum assem inter omnes videri factum placuit et ex eo decem uncias filios accepisse: tunc enim ex altero asse portionem intellegi relictam, cum asse nominatim dato vel duodecim unciiis distributis residua portio non invenitur: nihil autem interest, quo loco sine

77.- THE SAME; *Questions, Book XVII*.- His entire estate not having been distributed, a testator inserted in his will: "Let him be the heir whom I shall appoint by my codicil." He appointed Titius his heir by his codicil. This appointment is valid, for although an estate cannot be bequeathed by a codicil; still, in this instance, it is held to have been left by the will. The heir, however, will only be entitled to that portion of the estate which has not yet been disposed of.

78.- THE SAME; *Opinions, Book VI*.- A man who was not in the army appointed his freedman heir to certain property derived from his mother which he possessed in Pannonia, and appointed Titius heir to his paternal estate, which he held in Syria. It is established by law that each of the heirs would be entitled to half of his estate; but the court having jurisdiction of the distribution of the same followed the last will of the testator, and adjudged to each of the heirs what he had left them, after having required them to furnish security against any proceedings which might be instituted under the Falcidian Law; that is to say, that they should reserve the right to retain a fourth of the bequest, so that whatever each of them might have to pay could be set off by means of an exception on the ground of bad faith.

§ 1.- Lucius Titius and Publius Mævius, having been appointed heirs, the first to two shares of an estate, and the second to three shares of the same, I gave it as my opinion that the intention was that the estate should be divided into nine parts, for the reason that the value of the two shares had been deducted by the testator from the value of the other three. In this same manner, the ancient authorities decided that where a sum of money was bequeathed to Titius, and the kind of coin was not specified, this could be ascertained by an examination of the other legacies bequeathed by the testator.

§ 2.- Where children were appointed heirs to equal portions of an estate, and afterwards the son of a brother was appointed for two shares, it was decided that the intention was that the ordinary division of the estate should prevail; and accordingly that the children should receive ten shares of the same. A bequest is understood to have been made with a view

77.- EL MISMO; *Cuestiones, libro XVII*.- No habiéndose distribuido todo el as, se escribió de este modo: «sea heredero aquel a quien yo nombrase heredero en los codicilos»; instituyó a Ticio heredero en los codicilos; la institución de éste es ciertamente válida por esto, porque aunque no pueda darse la herencia por codicilos, esta, sin embargo, se considera dada por testamento; pero éste tendrá de la herencia tanto cuanto quedó sobrante del as.

78.- EL MISMO; *Respuestas, libro VI*.- Uno que no era militar instituyó a un liberto heredero de los bienes maternos, que poseía en la Pannonia, y a Ticio, de los paternos que tenía en Siria; se determinó en derecho, que ambos tenían cada uno la mitad de la herencia; pero que el arbitro de la partición de herencia se atuviera, quedando salva la Falcidia, a la última voluntad, hechas las adjudicaciones e interpuestas las cauciones por razón de las acciones, a saber, para que aquello a que se obligasen mutuamente se compensase por razón de dolo reteniéndose la cuarta parte del as.

§ 1.- Habiendo sido instituidos herederos Lucio Ticio de dos partes, y Publio Maevio del cuarto, respondí, que el as había sido dividido en tres cuartos porque la cuantía de las dos partes se declaraba por el cuarto, lo que admitieron los antiguos en la contemplación de los demás legados, cuando a Ticio se le legaron monedas sin haberse designado la clase de las monedas.

§ 2.- Habiendo sido instituidos herederos por iguales partes los hijos, y después en dos onzas el hijo del hermano, se determinó que se considerase constituido entre todos un solo as, y que de él recibieron diez onzas los hijos; porque se entiende que se dejó la porción a cuenta de otro as, cuando dado nominalmente el as, o distribuidas las doce

portione quis heres instituat, quo magis assis residuum accepisse videatur.

§ 3.- Seius Maeuium ex parte, quam per leges capere possit, heredem instituit, ex reliqua Titium. Si Maeuius solidum capere poterit, Titius adiectus aut substitutus heres non erit.

79.- PAPINIANUS; *libro I definitionum*.- Quod si non sit reliqui facta mentio, tantundem in altero asse habebit Maeuius quantum Titius in primo.

80.- PAPINIANUS; *libro VI responsorum*.- Quod si Maeuius nullius capax sit, in totum substitutus admittitur.

81.- PAULUS; *libro IX quaestionum*.- Clemens patronus testamento caverat, ut, si sibi filius natus fuisset, heres esset, si duo filii, ex aequis partibus heredes [heres] essent, si duae filiae, similiter: si filius et filia, filio duas partes, filiae tertiam dederat. Duobus filiis et filia natis quaerebatur, quemadmodum in proposita specie partes faciemus, cum filii debeant pares esse vel etiam singuli duplo plus quam soror accipere? Quinque igitur partes fieri oportet, ut ex his binas masculi, unam femina accipiat.

§ 1.- Si ita scripserit testator: "Quanta ex parte me a Titio heredem institutum recitasset, ex ea parte Sempronius mihi heres esto", non est captatoria institutio: plane nullo recitato testamento ab ipso testatore inanis videbitur institutio remota suspicione captatoriae institutionis.

to doubling the number of shares where the estate having been specifically bequeathed, or the twelve shares distributed, the remaining share cannot be found. It makes no difference, however, in what place an heir has been appointed without a share, provided he appears to have received the remainder of the estate.

§ 3.- Seius appointed Mævius heir to a portion of his estate, which he could take according to law, and appointed Titius heir to the remainder. If Mævius could take the entire estate, Titius, who was added to, or substituted for him, would not be an heir.

79.- THE SAME; *Definitions, Book I*.- If no mention was made of the remainder, and the number of the shares was doubled, Mævius would only be entitled to as much as Titius would have been entitled to in the first place.

80.- THE SAME; *Opinions, Book VI*.- But if Mævius was not capable of taking under the will the substitute would be entitled to the entire estate.

81.- PAULUS; *Questions, Book IX*.- Clemens Patronus provided by his will, "that if a son should be born to him, he should be his heir; if two sons should be born to him they should be his heirs to equal portions of his estate; if two daughters were born to him, the same division should be made; if a son and daughter should be born, two-thirds of the estate should be given to the son, and one-third to the daughter". Two sons and a daughter having been born, the question arose how we should make the division of the estate in the case stated? Since the sons inherit equally, each of them should have twice as much as their sister; therefore the estate should be divided into five parts, out of which four should be given to the male heirs, and one to the female heir.

§ 1.- A testator inserted the following into his will: "Let Sempronius be my heir to the share to which I was appointed heir by Titius, and which I shall apply for in person." This appointment does not come under the head of seeking after an estate; for it is evident that the appointment will be void if the will of Titius is not offered by the testator himself, all suspicion of the appointment for interested purposes

onzas, no se halla porción sobrante; mas no importa en que lugar sea instituido sin porción algún heredero, para que se considere que recibió lo restante del as.

§ 3.- Seyo instituyó heredero a Mevio de la parte que por las leyes pudiera adquirir, y de la restante a Ticio; si Mevio pudiere adquirir la totalidad, Ticio no será heredero adjunto o substituido,

79.- EL MISMO; *Definiciones, libro I*.- pero si no se hubiera hecho mención del sobrante, Mevio tendrá en otro as tanto cuanto Ticio en el primero,

80.- EL MISMO; *Respuestas, libro VI*.- pero si Mevio no tuviera capacidad para recibir cosa alguna, el substituido es admitido a la totalidad.

81.- PAULO; *Cuestiones, libro IX*.- Clemente, patrono, había dispuesto en su testamento, que si le hubiese nacido un hijo, fuese heredero; si dos hijos, fuesen herederos por partes iguales, y si dos hijas, igualmente; y si un hijo y una hija, le había dado dos partes al hijo, y la tercera a la hija. Habiendo nacido dos hijos y una hija, se preguntaba, cómo haremos en el caso propuesto las partes, debiendo ser iguales los hijos, y recibir también cada uno el duplo que la hermana; conviene, pues, que se hagan cinco partes, para que de ellas reciban dos cada uno de los varones, y una la hembra.

§ 1.- Si el testador hubiere escrito de este modo: «de la parte en que yo expresase que fui instituido heredero por Ticio, de la misma parte sea mi heredero Sempronio», esta no es institución captatoria; porque no habiéndose expresado ningún testamento por el mismo testador, se considerará baldía la institución, habiendo quedado alejada la sospecha de institución captatoria.

having been removed.

82.- SCAEVOLA; *libro XV quaestionum*.- Si quis ita heres instituitur: "Si legitimus heres vindicare nolit hereditatem meam", puto deficere condicionem testamenti illo vindicante.

83.- SCAEVOLA *libro XVIII quaestionum*.- Si non lex Aelia Sentia, sed alia lex vel senatus consultum aut etiam constitutio servi libertatem impediat, is necessarius fieri non potest, etiamsi non sit solvendo testator.

§ 1.- Temporibus divi Hadriani senatus censuit, si testator, qui cum moritur solvendo non fuit, duobus pluribusve libertatem dederit eisque hereditatem restitui iusserit et institutus heres suspectam sibi hereditatem dixerit, ut adire eam cogatur et ad libertatem perveniat qui priore loco scriptus fuerit, eique hereditas restituatur. Idem servandum in his, quibus per fideicommissum libertas data fuerit. Igitur si primo loco scriptus desideraret adire hereditatem, nulla difficultas erit. Nam si posteriores quoque liberos se esse dicent et restitui hereditatem desiderent, an solvendo sit hereditas et omnibus liberis factis restitui deberet, apud praetorem quaereretur. Absente autem primo sequens desiderans adiri hereditatem non est audiendus, quia, si primus velit sibi restitui hereditatem, praefendus est et hic servus futurus est.

84.- PAULUS; *libro XXIII quaestionum*.- Si servo fideicommissa data sit libertas, heres hunc eundem servum cum libertate heredem reliquisset, quaesitum est, an necessarius fiat heres. Et humanius est et magis aequitatis ratione subnixum non fieri necessarium: qui enim etiam invito defuncto poterat libertatem extorquere, is liber esse iussus non magnum videtur beneficium a defuncto consequi,

82.- SCAEVOLA; *Questions, Book XV*.- Where a testator appoints an heir as follows: "If my lawful heir refuses to accept my estate", I think the condition of the will is not fulfilled, if the heir should claim the estate.

83.- THE SAME; *Questions, Book XVIII*.- If another law than that of Aelia Sentia, or a decree of the Senate, or even an Imperial Constitution prevents the grant of freedom to a slave, the latter cannot become a necessary heir, even though the testator may be insolvent.

§ 1.- In the time of the Divine Hadrian, the Senate decreed that if a testator was not solvent when he died, and granted freedom to two or more slaves, and directed his estate to be given to them, if the appointed heir should say that he suspects that the estate would impose burdens upon him, he will be forced to accept it, in order that the slave first mentioned in the will may receive his freedom, and the estate be surrendered to him. The same rule must be observed in the case of those to whom freedom has been granted by virtue of a trust. Therefore, if the heir appointed in the first place wishes to enter upon the estate, no difficulty will arise; but if those slaves mentioned afterwards allege that they also should be free, and demand the surrender of the estate to them, an investigation must be made by the Praetor as to the solvency of the estate, and he must cause it to be delivered to all of said slaves who will become free. Where, however, the first slave is absent, and the one afterwards mentioned wishes to enter upon the estate, he shall not be heard, because if the first desires the estate to be given to him, he must be preferred, and the second must remain a slave.

84.- PAULUS; *Questions, Book XXIII*.- Where freedom was granted to a slave by virtue of a trust, and the heir appointed the same slave his own heir with the grant of his freedom, the question arose whether the said slave became a necessary heir. It is more just, and more consonant with the principles of equity, that he should not become a necessary heir, for he who could compel his freedom to be granted

82.- SCÉVOLA; *Cuestiones, Libro XV*.- Si alguno fuera instituido heredero de este modo: «si mi legítimo heredero no quisiera reivindicar mi herencia», opino que falta la condición reivindicándola él.

83.- EL MISMO; *Cuestiones, libro XVIII*.- Si no la ley Elia Sencia, sino otra ley, o un Senadoconsulto, o aún una Constitución impidiera la libertad del esclavo, éste no se puede hacer heredero necesario, aunque el testador no sea solvente.

§ 1.- Decretó el Senado en tiempos del Divino Adriano, que si el testador, que, al morir no fue solvente, hubiere dado la libertad a dos o más, y mandado que se le restituyese la herencia, y el heredero instituido dijere que para él era sospechosa la herencia, sea obligada a adirla, y llegue a la libertad, el que hubiere sido instituido en primer lugar, y se le restituya la herencia. Lo mismo se ha de observar respecto a aquellos a quienes se les hubiere dado la libertad por fideicomiso. Así, pues, si el instituido en primer lugar deseara adir la herencia, no habrá ninguna dificultad; porque si también los posteriores dijeren que son libres, y desearan que se les restituya la herencia, se investigaría ante el Pretor si la herencia es solvente, y si deba ser restituida a todos, hechos libres; pero si, estando ausente el primero, deseara el siguiente adir la herencia, no ha de ser oído, porque, si el primero quisiera que a él se le restituya la herencia, ha de ser preferido, y éste ha de ser esclavo.

84.- PAULO; *Cuestiones, libro XXIII*.- Si al esclavo se le hubiera dado por fideicomiso la libertad, y el heredero hubiese dejado heredero con la libertad o este mismo esclavo, se preguntó, si se hará heredero necesario; y es más humano, y está más apoyado en razón de equidad, que no se haga necesario; porque el que aún contra la voluntad del difunto podía exigir la libertad, si se mandó que éste

immo nihil commodi sensisse, sed magis debitam sibi accepisse libertatem.

§ 1.- Idem probandum erit et in illo servo, quem testator ea lege emerat, ut manumitteret, si heres fuerit institutus: nam et hic seposito beneficio testatoris proprio iure poterit ad libertatem pervenire ex constitutione divi Marci.

§ 2.- Idem et in eo, qui propria sua data pecunia emptus est ab aliquo: nam et hic poterit ab ipso testatore libertatem extorquere.

85.- SCAEVOLA; *libro II responsorum*.- Lucius Titius, qui fratrem habebat, testamento ita cavuit: "Titius frater meus ex asse mihi heres esto: si mihi Titius heres esse noluerit aut (quod abominor) prius morietur quam meam hereditatem adierit aut filium filiamve ex se natum natamve non habebit, tunc Stichus et Pamphilus servi mei liberi et heredes mihi aequis partibus sunto". Quaero, cum Titius hereditatem adierit et liberos aditae hereditatis tempore non habuerit, an Stichus et Pamphilus ex substitutione liberi et heredes esse possint. Item quaero, si ex substitutione neque liberi neque heredes esse possint, an in partem hereditatis videantur adiecti. Respondit: apparet quidem non eam mentem testatoris fuisse, ut quemquam heredem adhiberet fratri, quem aperte ex asse heredem instituisset: igitur si frater adiit, Stichus et Pamphilus heredes non erunt: quos eo amplius noluit heredes esse, si frater prius quam hereditatem adiret decessisset liberis relictis. Nam prudens consilium testantis animadvertitur: non enim fratrem solum heredem praetulit substitutis, sed et eius liberos.

86.- MAECENATUS; *libro VII fideicommissorum*.- Iam dubitari non potest suos quoque heredes

him even if the deceased had been unwilling when he ordered him to be free does not seem to have obtained great favor from the deceased, and, indeed, he is regarded rather to have received the freedom to which he was entitled, rather than to have had a favor conferred upon him.

§ 1.- The same principle is applicable to the case of a slave whom a testator purchased under the condition that he would manumit him, if he should be appointed heir; for leaving the favor of the testator out of consideration, he can obtain his freedom in accordance with the Constitution of the Divine Marcus.

§ 2.- The same rule applies to a slave who was purchased by another with his own money, for he also can compel the same testator to grant him his freedom.

85.- SCAEVOLA; *Opinions, Book II*.- Lucius Titius, who had a brother, made the following provision in his will: "Let my brother Titius be the heir to my entire estate. If Titius is unwilling to be my heir, or (which is something that I do not wish to happen) if he should die before entering upon my estate, or should not have a son or daughter born to him, then let Stichus and Pamphilus, my slaves, be free, and heirs to equal portions of my estate." I ask, if Titius should accept the estate, and should have no children at that time, whether Stichus and Pamphilus can become free and heirs, by virtue of the substitution. I ask also, if they can be neither free nor heirs under the said substitution, whether they can be held to be co-heirs to a portion of the estate. The answer was that it is clear that it was not the intention of the testator to appoint any co-heir with his brother, whom he had evidently designated as heir to his entire estate. Hence if the brother enters upon the estate, Stichus and Pamphilus will not be heirs, for the reason that the testator did not wish them to be, if his brother should die and leave children before accepting it. The wise disposition of the testator must be noted, as he not only gave preference to his brother over the substitutes, but also to his brother's children.

86.- MARCIANUS; *Trusts, Book VII*.- There is no longer any room for doubt that heirs can be appointed

fuese libre, parece que no consigue del difunto un gran beneficio, aún que no experimentó ninguna ventaja, sino más bien que recibió la libertad que se le debía.

§ 1.- Lo mismo se habrá de aprobar también respecto a aquel esclavo, que el testador había comprado con la condición de manumitirlo, si hubiere sido instituido heredero; porque también éste podrá, habiendo prescindido del beneficio del testador, llegar por derecho propio a la libertad en virtud de la Constitución del Divino Marco.

§ 2.- Lo mismo también respecto de aquel que con su propio dinero que dió fue comprado por alguno; porque también éste podrá arrancar del mismo testador la libertad.

85.- SCÉVOLA; *Respuestas, libro II*.- Lucio Ticio que tenía un hermano, dispuso así en su testamento: «sea mi heredero de toda la herencia mi hermano Ticio; si Ticio no quisiere ser mi hermano, o, lo que me horroriza, muriere antes que hubiere adido mi herencia, o no tuviere hijo o hija nacido o nacida de él, entonces sean libres y herederos míos por partes iguales mis esclavos Stico y Pánfilo», pregunto, si habiendo adido Ticio la herencia, y no teniendo hijos al tiempo de haberse adido la herencia, podrán Stico y Pánfilo ser libres y herederos en virtud de la substitución; y asimismo pregunto, si en el caso de que no puedan ser ni libres, ni herederos en virtud de la substitución, se considerará que fueron agregados para parte de la herencia. Respondió: aparece ciertamente, que no fue la mente del testador agregar un heredero cualquiera al hermano, a quien claramente había instituido heredero del as; así, pues, si el hermano adió la herencia, no serán herederos Stico y Pánfilo, los cuales no quiso que fuesen herederos ni aún si el hermano hubiese fallecido, antes que adiese la herencia, habiendo dejado hijos; pues se hecha de ver la prudente resolución del testador, porque antepuso como heredero a los substituidos no solamente a su hermano, sino también a los hijos de éste.

86.- MECIANO; *Fideicomisos, libro VII*.- Ya no se puede dudar, que se pueden instituir también los

sub hac condicione institui posse, ut, si voluissent, heredes essent, si heredes non essent, alium quem visum erit eis substituere: negatumque hoc casu necesse esse sub contraria condicione filium exheredare, primum quia tunc tantum id exigeretur, cum in potestate eius non esset, an heres patri existeret, expectantis extrinsecus positae condicionis eventum, deinde quod, etsi quacumque posita condicione deberet filius sub contraria condicione exheredari, in proposito ne possibilis quidem repperiri posset, certe, si verbis exprimeretur, inepta fieret: huic enim condicioni "si volet, heres esto" quae alia verba contraria concipi possunt quam haec "si nolet heres esse, exheres esto?" quod quam sit ridiculum, nulli non patet.

§ 1.- Non ab re autem hoc loco velut excessus hic subiungetur suis ita heredibus institutis "si voluerint heredes esse" non permittendum amplius abstinere se hereditate, cum ea condicione instituti iam non ut necessarij, sed sua sponte heredes exstiterunt. Sed et ceteris condicionibus, quae in ipsorum sunt potestate, si sui pareant, ius abstinendi adsequi non debent.

87.- HERMOGENIANUS; *libro III iuris epitomarum*.- Ex unciis sex primo herede instituto, secundo ex octo, si tertius ex residua parte vel nulla portionis facta mentione heres instituatur, quinque uncias hereditatis tertius habebit: in viginti quattuor etenim partes hereditate distributa tertio ratio calculi veluti ex decem partibus instituto quinque uncias adsignabit.

88.- GAIUS; *libro singulari de casibus*.- Ei qui solvendo non est aliquo casu evenit, ut et servus cum libertate heres exsistat et praeterea alius heres adiciatur: veluti si servo cum libertate herede instituto ita adiectum sit: "Si mihi Stichus heres erit, tunc Titius quoque heres esto": nam Titius, antequam

under the following condition, namely: "If they wish to be heirs, and if they do not wish to be, another, who seems to be acceptable, shall be substituted for them." In this instance, it has been denied that it is necessary to disinherit a son under the contrary condition; in the first place, because this is only required when the condition is in his power, or he is the heir of his father, and its fulfillment is dependent upon some outside influence and must be awaited; second, because no matter what kind of a condition has been imposed, the son should be disinherited under the contrary condition, and in the case stated disinheritance cannot possibly take place; and certainly if it were expressed in words it would be absurd, for what other terms can be conceived which would be contrary to this condition: "If he is willing, let him be my heir", than these: "If he is unwilling to be my heir, let him be disinherited"? It is evident to every one that such a provision is ridiculous.

§ 1.- It does not seem to be foreign to the subject to add here, by way of supplement, that when heirs are appointed under the condition, "If they wish to be heirs", they should not be permitted to reject the estate for the reason that where they are appointed under this condition they are not necessary heirs, but become such voluntarily. Nor are they entitled to the right to reject the estate under other conditions which they are able to comply with, and have fulfilled.

87.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Where an heir has been appointed first in order to half of an estate, and a second to two-thirds, and a third to the remaining portion, or if he has been appointed without mentioning what he shall receive, the said third heir will be entitled to five-twelfths of the estate; for if it is divided into twenty-four parts, the rules of calculation will give him ten twenty-fourths of the same, which is equivalent to five shares.

88.- GAIUS; *On Cases*.- Where a testator, who is insolvent, happens to have an heir in addition to a slave who has been appointed his heir with the grant of his freedom, for instance, where the testator in appointing the slave his heir with the grant of his freedom added: "If Stichus should be my heir, then let

herederos suyos bajo esta condición, que sean herederos si quisiesen, y si no fuesen herederos, substituirles otro que bien hubiere parecido; y se ha negado que en este caso sea necesario desheredar al hijo bajo condición contraria, primeramente, porque esto se exigiría solamente cuando no estuviese en la potestad del que espera el resultado extrínseco de la condición puesta ser heredero de su padre, y en segundo lugar, porque aunque habiéndose puesto cualquier condición debiese ser desheredado el hijo bajo una condición contraria, en el caso propuesto no se podría encontrar ciertamente una posible; porque si se expresase con palabras, se haría inaplicable, pues para esta condición: «sea heredero si quisiera», ¿qué otras palabras contrarias pueden concebirse más que estas: «si no quisiera ser heredero, sea desheredado»? Lo que a nadie se le oculta cuán ridículo sea.

§ 1.- Mas por esto no se añadirá en este lugar como superfluo, que habiendo sido instituidos los herederos suyos de este modo, si quisieren ser herederos, no se les ha de permitir ya abstenerse de la herencia, porque instituidos con esta condición ya no fueron herederos como necesarios, sino por su voluntad; pero si los herederos suyos cumplieran las demás condiciones, que están en la potestad de los mismos, no deben alcanzar el derecho de abstenerse.

87.- HERMOGENIANO; *Epítome del derecho, libro III*.- Instituido en seis onzas el primer heredero, y en ocho el segundo, si el tercer heredero fuera instituido en la restante parte, o sin haberse hecho mención alguna de su porción, tendrá este tercero cinco onzas de la herencia, porque distribuida la herencia en veinticuatro partes, la razón del cálculo asignó cinco onzas al tercero, cual si hubiera sido instituido por diez partes.

88.- GAYO; *Casos, libro único*.- En algún caso sucede, que el esclavo sea con la libertad heredero del que no es solvente, y que además se agregue otro heredero, como si habiéndose instituido heredero un esclavo con la libertad se hubiera añadido de este modo: «si Stico fuere mi heredero, entonces sea tam-

Stichus ex testamento heres exstiterit, heres esse non potest, cum autem semel heres exstiterit servus, non potest adiectus efficere, ut qui semel heres exstitit desinat heres esse.

89.- PAULUS; *libro II manualium*.- Si socius heres institutus sit ex asse et servo communi legetur pure sine libertate, hoc legatum non constitit. Plane sub condicione ei utiliter et sine libertate legabitur, quoniam et proprio servo ab herede recte sub condicione legatur. Quare etiam heres institui sine libertate ut alienus socio herede scripto poterit, quia et proprius cum domino heres institui poterit.

90.- TRYPHONUS; *libro XXI disputationem*.- Testamento domini servus sub condicione cum libertate heres institutus pendente adhuc condicione necem domini detexit eumque praetor mereri libertatem decrevit. Etsi postea condicio testamenti exstiterit, aliunde liber est, id est ex praemio, non ex testamento: igitur non est necessarius domino heres: licet autem ei volenti adire.

91.- PAULUS; *libro V sententiarum*.- Imperatorem litis causa heredem institui invidiosum est nec calumnia facultatem ex principali maiestate capi oportet.

92.- PAULUS; *Imperialium sententiarum in cognitionibus prolatarum ex libris sex primo seu decretorum libro secundo*.- Pactumeius Androstenes Pactumeiam Magnam filiam Pactumeii Magni ex asse heredem instituerat, eique patrem eius substituerat. Pactumeio Magno occiso et rumore

Titius also be my heir"; for Titius cannot be the heir before Stichus becomes such under the will, and as the slave has at once become the heir, he who was added cannot share in the estate; so that where the slave becomes the heir, the other ceases to be one.

89.- PAULUS; *Manuals, Book II*.- Where a partner is appointed sole heir to an estate, and the legacy is bequeathed to a slave held in common by both partners, without the grant of his freedom, this legacy is void. It is evident that a legacy can legally be bequeathed under a condition, and without the grant of freedom, since a bequest can be made legally to one's own slave, and the heir be charged with the execution of it under a condition. Wherefore, where a partner is appointed an heir, a slave can be also appointed his co-heir, without the grant of his freedom, as, for instance, where he belongs to another; because a slave can be appointed an heir after his master has already been appointed.

90.- TRYPHONINUS; *Disputations, Book XXI*.- Where a slave is appointed an heir with the grant of his freedom, but conditionally, by the will of his master; and while the condition is still pending, he discovers the murderers of his master, and the Praetor decides that he deserves his freedom, even though the condition of the will should afterwards be complied with, the said slave will become free, for another reason, that is to say, he will be liberated by way of reward, and not on account of the will. Hence, he is not the necessary heir of his master, although he can enter upon the estate if he desires to do so.

91.- PAULUS; *Decisions, Book V*.- It is odious for anyone to appoint the Emperor his heir in order to carry on a lawsuit, for it is not proper to make use of the Imperial authority for the purpose of encouraging vexatious litigation.

92.- THE SAME; *On the First of the Six Books Relating to the Imperial Decisions; or the Second Book of the Decrees*.- Pactumeius Androstenes appointed Pactumeia Magna, the daughter of Pactumeius Magnus, heir to his entire estate, and substituted her father for her. Pactumeius Magnus,

bién heredero Ticio», porque Ticio no puede ser heredero antes que Stico haya sido heredero en virtud del testamento; mas una vez que el esclavo haya sido heredero, no puede hacer el adjunto que el que una vez fue heredero deje de ser heredero.

89.- Si el consocio hubiera sido instituido heredero en el as, y se hiciese puramente un legado sin la libertad al esclavo común, no subsiste este legado; pero bajo condición se le hará útilmente un legado aún sin la libertad, porque también al esclavo propio se le lega válidamente bajo condición a cargo del heredero. Por lo cual también podrá ser instituido heredero sin la libertad, como si fuera de otro, habiendo sido instituido heredero el consocio, porque también el propio podrá ser instituido heredero juntamente con su señor.

90.- TRIFONINO; *Disputas, libro XXI*.- Instituido heredero un esclavo con la libertad bajo condición en el testamento de su señor, descubrió, estando todavía pendiente la condición, la muerte de su señor, y el Pretor decretó que él merecía la libertad; aunque después se hubiere cumplido la condición del testamento, es libre por otra circunstancia, esto es, por premio, no por el testamento; así, pues, no es heredero necesario de su señor, pero le es lícito adir la herencia si quiere.

91.- PAULO; *Sentencias, libro V*.- Es cosa odiosa que el Emperador sea instituido heredero por causa de litigio; y no conviene que mediante la majestad del Príncipe se adquiriera facultad para calumniar.

92.- EL MISMO; *libro I. De los seis de sentencias imperiales dadas en juicio extraordinario, o libro II de los Decretos*.- Pactumeyo Androstenes había instituido heredera por el as a Pactumeya Magna, hija de Pactumeyo Magno, y a ella le había substituido el padre de la misma. Habiendo sido muerto

perlato, quasi filia quoque eius mortua, mutavit testamentum Noviumque Rufum heredem instituit hac praefatione: "Quia heredes, quos volui habere mihi contingere non potui, Novius Rufus heres esto". Pactumeia Magna supplicavit imperatores nostros et cognitione suscepta, licet modus institutioni contineretur, quia falsus non solet obesse, tamen ex voluntate testantis putavit imperator ei subveniendum. Igitur pronuntiavit hereditatem ad Magnam pertinere, sed legata ex posteriore testamento eam praestare debere, proinde atque si in posterioribus tabulis ipsa fuisset heres scripta.

TIT. VI

DE VULGARI ET PUPILLARI
SUBSTITUTIONE

1.- MODESTINUS; *libro II pandectarum*.- Heredes aut instituti dicuntur aut substituti: instituti primo gradu, substituti secundo vel tertio.

§ 1.- Heredis substitutio duplex est aut simplex, veluti: "Lucius Titius heres esto: si mihi Lucius Titius heres non erit, tunc Seius heres mihi esto": "Si heres non erit, sive erit et intra pubertatem decesserit, tunc Gaius Seius heres mihi esto".

§ 2.- Substituere liberis tam heredibus institutis quam exheredatis possumus et tam eum, quem heredem nobis instituimus, quam alterum.

§ 3.- Substituere liberis pater non potest nisi si heredem sibi instituerit: nam sine heredis institutione nihil in testamento scriptum valet.

2.- ULPIANUS; *libro VI ad Sabinum*.- Moribus introductum est, ut quis liberis impuberibus testamentum facere possit, donec masculi ad quatuordecim annos perveniant, feminae ad duodecim.

having been killed, and the rumor having been spread that his daughter was also dead, the testator changed his will, and appointed Novius Rufus his heir, with this preamble: "Let Novius Rufus be my heir, for the reason that I have not been able to retain those heirs whom I desired to have." Pactumeia Magna applied to our Emperors, and the case having been heard, it was decided that she was entitled to relief, as this was in compliance with the wishes of the testator; and while there was a certain reason for the appointment of the other heir, still, as it was ill founded, it could not legally be interposed. Therefore, the decision was that the estate belonged to Magna, but that she would be compelled to pay the legacies bequeathed by the second will, just as if she herself had been appointed heir by the said will.

TITLE VI

CONCERNING ORDINARY AND
PUPILLARY SUBSTITUTIONS

1.- MODESTINUS; *Pandects, Book II*.- Heirs are said to be either appointed or substituted. Those who are appointed belong to the first degree, those who are substituted to the second, or the third degree.

§ 1.- There are two kinds of substitutions, the simple, as, for example: "Let Lucius Titius be my heir, and if Lucius Titius should not be my heir, then let Seius be my heir; if he should not be my heir, or should be and die before arriving at puberty, then let Gaius Seius be my heir."

§ 2.- We can substitute an heir for others who have been appointed, as well as for those who have disinherited; and we can substitute an heir who has already been appointed, or anyone else.

§ 3.- A father cannot substitute an heir for his children, unless he appoints one for himself; for without the appointment of an heir no provision of a will is valid.

2.- ULPIANUS; *On Sabinus, Book VI*.- It was introduced by custom, that if anyone made a will for his children under puberty, it would only be valid until his sons attained the age of fourteen years, and

Pactumeyo Magno, y habiéndose esparcido el rumor, como si también hubiese muerto su hija, cambió el testamento, e instituyó heredero a Novio Rufo con esta declaración: «como no he podido conservar para mí los herederos que quise tener, sea heredero Novio Rufo». Pactumeya Magna suplicó a nuestros Emperadores, y habiéndose conocido del asunto, aunque en la institución se contenía un modo, como el falso no suele perjudicar, creyó no obstante el Emperador que se le debía auxiliar en virtud de la voluntad del testador; en su consecuencia declaró, que la herencia pertenecía a Magna, pero que ésta debía pagar los legados del testamento posterior, lo mismo que si ella hubiese sido instituida heredera en el testamento posterior.

TITULO VI

DE LA SUBSTITUCIÓN VULGAR
Y DE LA PUPILAR

1.- MODESTINO; *Pandectas, libro II*.- Los herederos se dicen o instituidos o substituidos; instituidos, en el primer grado, substituidos, en el segundo o en el tercero.

§ 1.- La, substitución de un heredero es doble, o simple, por ejemplo; «sea heredero Lucio Ticio si Lucio Ticio no fuere mi heredero, sea entonces Seyo mi heredero; si no fuere heredero, o si lo fuere, y falleciere dentro de la pubertad, entonces sea Cayo Seyo mi heredero».

§ 2.- Podemos substituir a los descendientes tanto habiéndolos instituido herederos, como habiéndolos desheredado, y tanto al que instituimos heredero nuestro, como a otro.

§ 3.- El padre no puede substituir a sus descendientes, sino si hubiere instituido heredero para sí; porque sin la institución de heredero nada vale lo escrito en el testamento.

2.- ULPIANO; *Comentarios a Sabino, libro VI*.- Se introdujo por las costumbres, que cualquiera pueda hacer testamento por los descendientes impúberos hasta que los varones lleguen a los catorce

Quod sic erit accipiendum, si sint in potestate: ceterum emancipatis non possumus. Postumis plane possumus. Nepotibus etiam possumus et deinceps, si qui non recasuri sunt in patris potestate. Sed si eos patres praecedant, ita demum substitui eis potest, si heredes instituti sint vel exheredati: ita enim post legem Velleam [Vellaeam] succedendo non rumpunt testamentum: nam si principale ruptum sit testamentum, et pupillare evanuit. Sed si extraneum quis impuberem heredem scripserit, poterit ei substituere, si modo eum in locum nepotis adoptaverit vel adrogaverit filio praecedente.

§ 1.- Quisquis autem impuberi testamentum facit, sibi quoque debet facere: ceterum soli filio non poterit, nisi forte miles sit. Adeo autem, nisi sibi quoque fecerit, non valet, ut, nisi adita quoque patris hereditas sit, pupillare testamentum evanescat. Plane si omissa causa principalis testamenti ab intestato possideatur hereditas, dicendum est et pupillo substitutum servandum:

§ 2.- Interdum etiam pupillaris testamenti causa compellendum heredem institutum adire hereditatem, ut ex secundis tabulis fideicommissum convalescat: ut puta si iam pupillus decessit: ceterum si adhuc vivat, improbum esse Iulianus existimat eum, qui sollicitus est de vivi hereditate.

§ 3.- Ego etiam, si minor viginti quinque annis adeundae hereditatis causa fuerit restitutus, puto proficere secundis tabulis, ut praetor utiles actiones decernat substituto.

§ 4.- Prius autem sibi quis debet heredem scribere, deinde filio substituere et non convertere ordinem scripturae: et hoc Iulianus putat prius sibi debere, deinde filio heredem scribere: ceterum si ante filio, deinde sibi testamentum faciat, non valere. Quae sententia rescripto imperatoris nostri ad virium

his daughters that of twelve. This must, however, be understood to apply where the children are under his control. We cannot substitute other heirs for emancipated children, but it is clear that we can do so for posthumous children, as we also can grandchildren and their successors, if they are not liable to again come under the authority of their father. If, however, they precede their parents, they can only be substituted for them where they have been appointed heirs or disinherited; for, according to the Lex Velleia they do not break the will of their grandfather by the succession, since if the principal will is broken, the pupillary one cannot stand. But if anyone appoints as his heir a child who has not yet reached puberty, he can appoint a substitute for him, provided he adopted him instead of his grandson, or arrogated him, and his son precedes him.

§ 1.- Where anyone makes a will for the benefit of a child who has not reached puberty, he must also make one for himself. He cannot, however, make a will for his son alone, unless he happens to be a soldier; therefore, unless he also executes one for himself, it will not be valid, and unless the estate of the father is entered upon, the pupillary will will be of no effect. It is evident that if the estate is not affected under the principal will, it will come into possession of the heir ab intestato, and it must be held that the pupillary substitution will be preserved.

§ 2.- Sometimes, in order to establish the validity of a pupillary substitution, the appointed heir can be compelled to enter upon the estate, or this can be done to uphold a trust in the second will; for instance, where the minor has already died. But if he is still living, Julianus thinks that he is despicable who solicits an estate during the lifetime of the owner.

§ 3.- I think that where a minor under the age of twenty-five years is granted restitution because of having entered upon an estate, that this will confirm the second will, and enable the Praetor to grant an equitable action to the substitute.

§ 4.- The testator should first mention his own heir, and then he can appoint a substitute for his son, and he must not reverse this order of appointment. Julianus also thinks that he should first appoint an heir for himself, and afterwards one for his son. If, however, he should first make a will for his son, and

años, y las hembras a los doce; lo cual se habrá de entender de este modo, si estuvieran bajo potestad. Pero no podemos por los emancipados, mas podemos por los póstumos, y también podemos por los nietos, y los demás descendientes, si no han de recaer en la potestad del padre. Pero si a ellos les precedieran los padres, solamente se les puede substituir, si hubieran sido instituidos herederos, o desheredados; porque sucediendo así, después de la ley Veleia no rompen el testamento; pues si se hubiera roto el testamento principal, se invalida también el pupilar. Pero si alguno hubiere instituido heredero a un extraño impúbbero, le podrá nombrar substituto, si lo hubiere adoptado en calidad de nieto, o lo hubiere arrogado precediendo un hijo.

§ 1.- Mas el que hace testamento para un impúbbero debe hacerlo también para sí; pero no podrá, para su hijo solo, a no ser acaso que sea militar; mas de tal modo no es válido, si no lo hubiere hecho también para sí, que si no hubiera sido adida también la herencia del padre, se invalida el testamento pupilar. Mas si habiéndose prescindido de la causa del testamento principal se poseyera la herencia abintestato, se puede decir, que se le ha de conservar también al pupilo el substituto.

§ 2.- A veces también por causa del testamento pupilar ha de ser compelido a adir la herencia el heredero instituido, para que se convalide el fideicomiso del segundo testamento, por ejemplo, si ya ha fallecido el pupilo; pero si viviera todavía, considera Juliano que no es probo el que se mostró solícito por la herencia del que está vivo.

§ 3.- Yo opino, que, aunque el menor de veinticinco años hubiere sido restituido para adir la herencia, aprovecha al segundo testamento, para que el Pretor conceda al substituto las acciones útiles.

§ 4.- Mas antes debe uno instituir para sí heredero y después nombrarle substituto al hijo y no invertir el orden de la escritura y esto opina Juliano, que debe instituir heredero primeramente para sí, y después para su hijo; pero que si antes hubiera testamento para el hijo, y luego para sí, no es válido. Cuya

lupum Britanniae praesidem comprobata est, et merito: constat enim unum esse testamentum, licet duae sint hereditates, usque adeo, ut quos quis sibi facit necessarios, eosdem etiam filio faciat et postumum suum filio impuberi possit quis substituere.

§ 5.- Sed si quis ita fuerit testatus: "Si filius meus intra quartum decimum annum decesserit, Seius heres esto", deinde: "Filius heres esto", valet substitutio, licet conversa scriptura filii testamentum fecerit.

§ 6.- Sed et si ita scripserit: "Si filius mihi heres non erit, Seius heres esto: filius heres esto", secundo quidem gradu Seius scriptus est heres et, si filius heres non exstiterit, procul dubio Seius ei heres erit: sed et si exstiterit filius heres et intra pubertatem defunctus est, Seius admittendus recte videtur, ut non ordo scripturae, sed ordo successionis spectetur.

§ 7.- Quod igitur dictum est singulis liberorum substituere licere, ideo adiectum est, ut declaretur non esse a filii testamento incipiendum impuberis.

3.- MODESTINUS; *libro I differentiarum*.- Cum filio impuberi pater ita substituerit: "Quisquis mihi heres erit, idem filio impuberi heres esto", placuit ad hanc substitutionem scriptos tantummodo ad hereditatem admitti: itaque dominus, cui per servum hereditatis portio quaesita sit, ex substitutione impuberi heres effici non poterit, si servus ab eius exierit potestate.

4.- MODESTINUS; *libro singulari de heurmatibus*.- Iam hoc iure utimur ex divi Marci et Veri constitutione, ut, cum pater impuberi filio in alterum

afterwards one for himself, his acts will not be valid. This opinion is adopted in a Rescript of our Emperor addressed to Virius Luppus, Governor of Britain, for it is clear that there is but one will, although there are two estates, so that, where anyone appoints necessary heirs for himself, he also appoints them for his son, and a man can substitute his posthumous child for his son who has not yet reached the age of puberty.

§ 5.- Where a testator stated in his will: "If my son should die before reaching the age of fourteen years, let Seius be my heir", and then added, "Let my son be my heir"; the substitution will be valid, although he inserted the provision in a reversed order.

§ 6.- But where he said: "If my son should not be my heir, let Seius be my heir, let my son be my heir"; Seius is appointed heir in the second degree; and if his son should be his heir, there is no doubt that Seius will be the heir of the son; but if the son becomes the heir and dies before attaining the age of puberty; Seius is held to have been properly admitted to the succession, as not the order observed in the will, but the order of the succession must be considered.

§ 7.- Therefore, when it was said that a substitution could be made for each one of the children, this was added in order to show that the father should not begin with the will of a son, who has not yet reached the age of puberty.

3.- MODESTINUS; *Differences, Book I*.- Where a father made a substitution for his son who had not yet arrived at puberty, as follows: "Whoever becomes my heir, let him also be the heir of my son who has not yet arrived at the age of puberty"; it was decided that only such heirs as had been mentioned with reference to this substitution in the will should be admitted to share in the estate. Hence a master who, by means of his slave, had acquired a portion of the estate, could not become the heir by virtue of his substitution for a child who had not attained the age of puberty, if the slave was no longer under his control.

4.- THE SAME; *Concerning Inventions*.- At the present time, we are governed by the Constitution of the Divine Marcus and Verus, which provides that

opinión se halla comprobada en un Rescripto de nuestro Emperador dirigido a Virio Lupo, Presidente de la Bretaña; y con razón, porque es sabido que hay un solo testamento, aunque sean dos las herencias de tal manera que a los que uno hace herederos necesarios para sí los haga también para el hijo, y pueda uno substituir su propio póstumo al hijo impúbbero.

§ 5.- Pero si alguno hubiere testado de este modo: «si mi hijo falleciere dentro de los catorce años, sea heredero Seyo», y después: «sea heredero mi hijo» es válida la substitución, aunque haya hecho el testamento del hijo invirtiendo la escritura.

§ 6.- Mas también si hubiere escrito así: «si mi hijo no fuere mi heredero, sea heredero Seyo, sea heredero mi hijo», Seyo está instituido heredero ciertamente en el segundo grado, y si el hijo no hubiere sido heredero, sin duda alguna será su heredero Seyo. Pero aunque el hijo hubiere sido heredero sin duda alguna será su heredero Seyo. Pero aunque el hijo hubiere sido heredero, y haya fallecido en la pubertad, parece que con razón debe ser admitido Seyo, de suerte que no se atienda al orden de la escritura, sino al orden de la sucesión.

§ 7.- Así, pues, lo que se ha dicho, que es lícito substituir a cada uno de los descendientes, se añadió para esto, para declarar que no se ha de comentar por el testamento del hijo impúbbero.

3.- MODESTINO; *Diferencias; libro único*.- Cuando al hijo impúbbero le hubiere substituido el padre de este modo: «cualquiera que fuere mi heredero, el mismo sea heredero de mi hijo impúbbero», se determinó, que sean admitidos a la herencia solamente los escritos para esta substitución; y así el señor, para quien por medio del esclavo se hubiera adquirido una porción de la herencia, no podrá hacerse en virtud de la substitución heredero del impúbbero, si el esclavo hubiere salido de su potestad,

4.- EL MISMO; *Cuestiones nuevas, libro único*.- En virtud de una constitución del Divino Marco y de Vero usamos ya de este derecho, que cuando el padre

casum substituisset, in utrumque casum substituisse intellegatur, sive filius heres non exstiterit sive exstiterit et impubes decesserit.

§ 1.- Quod ius ad tertium quoque genus substitutionis tractum esse videtur: nam si pater duos filios impuberes heredes instituat eosque invicem substituat, in utrumque casum reciprocam substitutionem factam videri divus Pius constituit.

§ 2.- Sed si alter pubes, alter impubes hoc communi verbo "eosque invicem substituo" sibi fuerint substituti, in vulgarem tantummodo casum factam videri substitutionem Severus et Antoninus constituit: incongruens enim videbatur, ut in altero duplex esset substitutio, in altero sola vulgaris. Hoc itaque casu singulis separatim pater substituere debebit, ut, si pubes heres non exstiterit, impubes ei substituat, si autem impubes heres exstiterit et intra pubertatem decesserit, pubes frater in portionem coheredis substituat: quo casu in utrumque eventum substitutus videbitur, ne, si vulgari modo impuberi quoque substituat, voluntatis quaestionem relinquat, utrum de una vulgari tantummodo substitutione in utriusque persona sensisse intellegatur: ita enim in altero utraque substitutio intellegitur, si voluntas parentis non refragetur. Vel certe evitandae quaestionis gratia specialiter in utrumque casum impuberi substituat fratrem: "Sive heres non erit sive erit et intra pubertatis annos "decesserit".

whenever a father makes a substitution for his child under the age of puberty instead of another, where there are two, he will be understood to have made the substitution in both instances; that is, where his son was not his heir, or was his heir but died before attaining the age of puberty.

§ 1.- It is held that this privilege should also be extended to the third kind of substitution. For if a father should appoint, as his heirs, his two sons who are under the age of puberty, he substitutes them for one another, and the Divine Pius decreed that it should be held that the substitution was reciprocal in both cases.

§ 2.- Where, however, two children, one of whom has reached the age of puberty, and the other has not, are reciprocally substituted by the ordinary formula: "I substitute them each for the other"; the Emperors Severus and Antoninus decided that in this instance only the ordinary substitution should be held to have been made; for it seemed to have been inconsistent that the double substitution should take place with reference to one of the heirs, but that, so far as the other was concerned, only the ordinary substitution should be provided; therefore, in this case, the father ought to have made a substitution for each one separately, so that if the child who had arrived at puberty should not be his heir, the one who had not reached puberty should be substituted for him; but if the one who had not reached puberty should be his heir, and die before attaining that age, his brother might be substituted for the share of his co-heir. Under these circumstances, the brother will be held to have been substituted in both ways; as, if he were not substituted in the ordinary way for the heir who had not arrived at puberty, the question would arise as to the intention of the father, and whether he was understood to have had in mind but one substitution for both his children, since one substitution is only understood to be included in the other, where the wishes of the parent are not opposed; or if, for the particular purpose of avoiding a dispute, he should, in any event, substitute the brother for the child who had not arrived at puberty, as follows: "Whether he does not become my heir, or whether he does, but dies under the age of puberty."

hubiese substituido al hijo impúbbero para un caso, se entienda que lo substituyó para uno y otro caso, ya si el hijo no hubiere sido heredero, ya si lo hubiere sido, y hubiere fallecido impúbbero.

§ 1.- Cuyo derecho parece que se extendió también al tercer género de substitución; porque si el padre instituyera herederos a los hijos impúbberos, y los substituyera recíprocamente, estableció el Divino Pío, que se considere hecha para uno y otro caso la substitución recíproca.

§ 2.- Pero si un púbbero y un impúbbero hubieren sido substituidos entre sí con esta cláusula común: «y los substituyo recíprocamente», establecieron Severo y Antonino, que se considere hecha la substitución solamente para el caso vulgar; porque parecía incongruente, que en uno hubiese doble substitución, y en otro solo la vulgar. Y así, en este caso, el padre deberá substituir a cada uno por separado, para que si el púbbero no fuere heredero le sea substituido el impúbbero, y para que si el impúbbero fuere heredero, y falleciere dentro de la pubertad, le sea substituido el hermano púbbero en la porción del coheredero; en cuyo caso se considerará substituido para una y otra eventualidad, a fin de que, si en el modo vulgar le substituyera también al impúbbero, no deje cuestión sobre su voluntad, en cuanto a si se entenderá que se refirió solamente a la substitución vulgar respecto a la persona de ambos; porque de este modo se entiende que respecto del otro hay una substitución, si no se opusiera la voluntad del ascendiente; o ciertamente para evitar la cuestión substitúyale al impúbbero el hermano especialmente para uno y otro caso, «ya si no fuere heredero, ya si lo fuere, y hubiere fallecido en los años de la pubertad».

5.- GAIUS; *libro III ad legem Iuliam et Papiam*.- Si in testamento heredes scripti ita alicui substituti fuerint, ut, si is heres non esset, quisquis sibi heres esset is in parte quoque deficientis esset heres: pro qua parte quisque heres exstisset, pro ea parte eum in portione quoque deficientis vocari placet neque interesse, iure institutionis quisque ex maiore parte heres factus esset an quod per legem alteram partem alicuius vindicasset.

6.- CLEMENTINUS; *libro IV ad legem Iuliam et Papiam*.- Si is, qui ex bonis testatoris solidum capere non possit, substitutus sit ab eo impuberi filio eius, solidum ex ea causa capiet, quasi a pupillo capiat. Sed hoc ita interpretari Iulianus noster videtur, ut ex bonis, quae testatoris fuerant, amplius capere non possit: quod si pupillo aliquid praeterea adquisitum esset aut si exheredato esset substitutus, non impeditur eum capere, quasi a pupillo capiat.

7.- PAPINIANUS; *libro VI responsorum*.- Verbis civilibus substitutionem post quartum decimum annum aetatis frustra fieri convenit: sed qui non admittitur ut substitutus, ut adiectus heres quandoque non erit, ne fiat contra voluntatem, si filius non habeat totum interim, quod ei testamento pater dedit.

8.- ULPIANUS; *libro IV ad Sabinum*.- Qui liberis impuberibus substituit, aut pure aut sub condicione solet substituere. Pure sic: "Si filius meus intra pubertatem decesserit, Seius heres esto": sive Seius iste heres institutus sit et impuberi substitutus, nullam habet condicionem, sive solum substitutus. Sub condicione autem institutum si substituatur, id est "si mihi heres erit", non alias existet heres ex substitutione, nisi et ex institutione heres fuerit. Cui similis est et haec substitutio: "quisquis mihi ex supra

5.- GAIUS; *On the Lex Julia et Papia, Book III*.- Where several heirs mentioned in a will were substituted for someone, as follows: "If he should not be my heir, let whoever will be inherit his share of my estate", it is settled that each heir will be called to the share of the heir of him who is lacking; and it does not make any difference whether he who becomes heir to the larger portion of the estate does so by virtue of his appointment, or whether he has obtained it through some law by which he was granted the share of another.

6.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book IV*.- Where anyone who is not capable of acquiring the entire estate of the testator is substituted for the son of the latter who has not yet reached the age of puberty, he can acquire the entire estate for the reason that he obtains it through the minor. Our Julianus holds that this opinion should be interpreted in such a way that the party in question will not be entitled to all the property of the testator. If, however, anything should subsequently be acquired by the minor from another source, or if he should be disinherited, the substitute will not be prevented from acquiring the estate, since he obtains it from the minor.

7.- PAPINIANUS; *Opinions, Book VI*.- In accordance with the terms of the Civil Law, it is not permitted to make a substitution after the fourteenth year. A party who cannot be admitted as a substitute cannot be admitted as an heir, lest, against the will of the testator, the son may in the meantime fail to obtain what his father gave him by his will.

8.- ULPIANUS; *On Sabinus, Book IV*.- Where a father appoints a substitute for his children who have not reached the age of puberty, he usually does so absolutely, or under some condition. He does so absolutely when he says: "If my son should die before reaching the age of puberty, let Seius be my heir." Either Seius is here appointed an heir, and is appointed a substitute for a minor without any condition, or he is merely substituted. But if the testator substitutes an heir who has been appointed,

5.- GAYO; *Comentarios a ley Julia y Papia, libro III*.- Si los herederos instituidos en el testamento hubieren sido substituidos a alguno de este modo, que, si este no fuese heredero, cualquiera que fuera su heredero fuese heredero también en la parte del que falte, se establece, que con arreglo a la parte en que cada cual hubiese sido heredero sea llamado este también a la porción del que falte; y no importa, que por derecho de institución uno haya sido hecho heredero de una parte mayor, o que por otra ley hubiese reivindicado la parte de otro cualquiera.

6.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro IV*.- Si el que no pudiera recibir la totalidad de los bienes del testador hubiera sido substituido por éste a su hijo impúbbero, recibirá por esta causa la totalidad, cual si la recibiera del pupilo; pero a nuestro Juliano le parece, que esto se interpreta de este modo, que de los bienes, que habían sido del testador, no pueda recibir más; pero que si para el pupilo se hubiese adquirido además alguna cosa, o si hubiese sido substituido al que fue desheredado, no se impide que él reciba esto, cual si lo recibiera del pupilo.

7.- PAPINIANO; *Respuestas, libro VI*.- Está convenido que con palabras civiles se hace inútilmente la substitución para después del décimo cuarto año de edad; pero el que no es admitido como substituto, tampoco será en alguna ocasión heredero como adjunto, para que no se obre contra la voluntad, si el hijo no tuviera entretanto todo lo que el padre le dio en el testamento.

8.- ULPIANO; *Comentarios a Sabino, libro IV*.- El que nombra substituto a sus descendientes impúbberos, suele nombrar el substituto o puramente, o bajo condición. Puramente, de este modo: «si mi hijo hubiere fallecido dentro de la pubertad, sea heredero Seyo»; cuya substitución no contiene ninguna condición, ya si este Seyo hubiera sido instituido heredero, y substituido. Pero si substituyera bajo condición al instituido, esto es; «si fuere mi heredero», no será heredero en virtud de la substi-

scriptis heres erit": habet enim in se eandem condicionem similem superiori.

§ 1.- Haec verba: "Quisquis mihi heres erit, idem impuberi filio heres esto" hunc habent sensum, ut non omnis qui patri heres exstitit, sed is qui ex testamento heres exstitit substitutus videatur: et ideo neque pater, qui per filium, neque dominus, qui per servum exstitit, ad substitutionem admittetur, neque heredis heres, quia non ex iudicio veniunt. Partes quoque eadem ad substitutos pertinent, quas in ipsius patris familias habuerunt hereditate.

9.- LABEO; *libro I posteriorum a Iavoleno epitomatorum*.- Si pater filio impuberi eosdem quos sibi et te unum praeterea heredem instituit, bonorum filii te dimidium, ceteros patris heredes communiter dimidium ita habere, ut unus semis apud te maneat, alterius semissis pro his partibus inter heredes paternos divisio fiat, quibus ex partibus hereditatem paternam haberent.

10.- ULPIANUS; *libro IV ad Sabinum*.- Sed si plures sint ita substituti: "Quisquis mihi ex supra scriptis heres erit", deinde quidam ex illis, posteaquam heredes exstiterint patri, obierunt, soli superstites ex substitutione heredes existent pro rata partium, ex quibus instituti sint, nec quicquam valebit ex persona defunctorum.

§ 1.- Quos possum heredes mihi facere necessarios, possum et filio, ut servum meum et fratrem suum, quamvis in rebus humanis nondum sit:

that is to say as follows, "If he should be my heir"; he does not become the heir by reason of a substitution, unless he was the heir by appointment. Such a substitution resembles the following one, namely, "Whoever will have been my heir in accordance with what has been previously stated"; for this substitution contains a condition similar to the former one.

§ 1.- These words: "Let him be heir to my son under the age of puberty who would have been my own heir," have the following meaning, that not every one who might be the heir of the father can be held to be substituted, but only the testamentary appointee. Therefore, neither a father who becomes an heir through his son, nor a master who becomes one through his slave, is admitted to the substitution; nor can the heir of the heir be admitted, because these parties are not entitled to the estate through the wish of the testator. Substitutes have a right to the same shares to which they would be entitled out of the estate of the head of the family himself.

9.- LABEO; *Abridgments of the Last Works of Javoleno, Book I*.- Where a father substituted for his son under the age of puberty the same persons whom he appointed his own heirs, and you in addition, you will be entitled to half of the estate of the son, and the other heirs of the father will be entitled to the other half, so that the undivided half will belong to you, and a division of the remaining half will be made in proportion to the shares of the estate of their father to which the others would have been entitled by inheritance.

10.- ULPIANUS; *On Sabinus, Book IV*.- Where, however, several parties have been substituted as follows: "Whoever shall be my heir in accordance with what has been previously stated", and then some of them die after having become the heirs of their father, the surviving heirs, in accordance with the substitution, can only take that portion of the estate to which they are entitled pro rata by their appointment, and no one will be entitled to it as a representative of the deceased heirs.

§ 1.- Those whom I can appoint my own necessary heirs, I can also substitute as the heirs of my son, my slave, or my brother, even though they are not yet

tución de otro modo, sino si también fuere heredero en virtud de la institución; a la cual es semejante también esta substitución: «cualquiera que de los arriba escritos fuere mi heredero», porque tiene en sí la misma condición análoga a la anterior.

§ 1.- Estas palabras: «cualquiera que fuere mi heredero, él mismo sea heredero de mi hijo impúbbero», tienen este sentido, que se considere substituido no todo el que fue heredero del padre, sino el que fue heredero en virtud del testamento; y por esto, ni el padre, que lo fue por medio del hijo, ni el señor, que lo fue por medio del esclavo, será admitido a la substitución, ni tampoco el heredero del heredero, porque no provienen del testamento; y a los substitutos les pertenecen también las mismas partes que tuvieron en la herencia del mismo padre de familia.

9.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro I*.- Si el padre instituyó herederos de su hijo impúbbero a los mismos que para sí, y además a ti solo, tú tienes la mitad de los bienes del hijo, y los demás herederos del padre la otra mitad en común, de suerte que, quede en tu poder una mitad de la herencia y se divida la otra mitad entre los herederos del padre en la misma proporción en que tendrían la herencia paterna.

10.- ULPIANO; *Comentarios a Sabino, libro IV*.- Pero si muchos hubieran sido substituidos de este modo: «cualquiera que de los arriba escritos fuere mi heredero», y luego hubieren fallecido algunos de ellos después que hubieren sido herederos del padre, solos los sobrevivientes serán herederos en virtud de la substitución a prorrata de las partes en que fueron instituidos, sin que sea válida cosa alguna con la representación de los fallecidos.

§ 1.- A aquellos a quienes puedo hacer herederos necesarios míos, puedo hacerlos también de mi hijo, por ejemplo, a mi esclavo y al hermano de aquel,

postumus igitur erit fratri heres necessarius.

§ 2.- Filio impuberi heredi ex asse instituto substitutus quis est: exstitit patri filius heres: an possit substitutus separare hereditates, ut filii habeat, patris non habeat? Non potest, sed aut utriusque debet hereditatem habere aut neutrius: iuncta enim hereditas coepit esse.

§ 3.- Idemque est, si pater me heredem scripserit ex parte et filium ex parte et ego patris hereditatem repudiavero: nam neque filii hereditatem habere possum.

§ 4.- Si ex asse heres institutus, filio exheredato substitutus repudiaverit patris hereditatem, cum non haberet substitutum, non poterit filii adire nec enim valet filii testamentum, nisi patris fuerit adita hereditas: nec enim sufficit ad secundarum tabularum vim sic esse factum testamentum, ut ex eo adiri hereditas possit.

§ 5.- Ad substitutos pupillares pertinent et si quae postea pupillis obvenerint: neque enim suis bonis testator substituit, sed impuberis, cum et exheredato substituere quis possit: nisi mihi proponas militem esse, qui substituit heredem hac mente, ut ea sola velit ad substitutum pertinere, quae a se ad institutum pervenerunt.

§ 6.- In adrogato quoque impubere dicimus ad substitutum eius ab adrogatore datum non debere pertinere ea, quae haberet, si adrogatus non esset, sed ea sola, quae ipse ei dedit adrogator: nisi forte distinguimus, ut quartam quidem, quam omnimodo ex rescripto divi Pii debuit ei relinquere, substitutus habere non possit, superfluum habeat. Scaevola tamen libro decimo quaestionum putat vel hoc adrogatori permittendum, quae sententia habet rationem. Ego etiam amplius puto et si quid beneficio adrogatoris adquisiit, et haec substitutum posse habere, ut puta adrogatoris amicus vel cognatus ei aliquid reliquit.

born. Therefore, a posthumous child can be the necessary heir of his brother.

§ 2.- A certain man was substituted by the testator for a child not yet arrived at puberty, and who had been appointed heir to an entire estate. If the son becomes the heir of his father, can the substitute separate the two estates, so that he may take that of the son, but not that of the father? He cannot do so; for he must either accept or reject the estate of both, because they are undivided.

§ 3.- The same rule applies if a father should appoint me heir to one portion of his estate, and his son to another portion, and I should reject the bequest of the father, for I cannot have that of the son.

§ 4.- Where anyone is appointed sole heir to an estate, and, having been substituted for a disinherited son, rejects the estate of the father, as he was not substituted, he cannot acquire the estate of the son; for the will of the son will not be valid, unless he accepted the estate of his father, since, in order to establish the validity of the substitution, the will must have been so drawn that the estate could be entered upon by the heir.

§ 5.- Whatever comes into the hands of the pupillary substitute after the death of the testator belongs to him, for the testator did not substitute him for his own estate, but for that of the minor; as anyone can make a substitution for a disinherited son, unless you give as an example the case of a soldier who substitutes an heir for his son, with the intention that only such property as would have come into the hands of the son will belong to the substitute.

§ 6.- We also hold that, in the case of a minor who has been arrogated, the property to which he would have been entitled if this had not taken place will not belong to his substitute, but that alone which the arrogator himself gave him; unless we make the distinction that the fourth part which, in accordance with the terms of the Rescript of the Divine Pius, he is obliged to leave him, cannot be acquired by the substitute. Scaevola, however, holds in the Tenth Book of Questions that the arrogator should be permitted to do this, which opinion is reasonable. I, however, go still further, and think that the substitute will be entitled to any property which has been acquired by reason of the adoption, as for instance,

aunque todavía no exista; así, pues, el póstumo será heredero necesario de su hermano.

§ 2.- Uno fue substituido a un hijo impúbere instituido heredero del as, y el hijo fue heredero del padre; ¿podrá el substituto separar las herencias, de modo que tenga la del hijo, y no tenga la del padre? No puede, sino que debe tener o la herencia de ambos, o la de ninguno de los dos; porque la herencia comenzó a estar junta.

§ 3.- Y lo mismo es, si el padre me hubiere instituido heredero de una parte, y al hijo de otra parte, y yo hubiere repudiado la herencia del padre; porque no puedo tener ni la herencia del hijo.

§ 4.- Si el heredero instituido por el as, y substituido al hijo desheredado, hubiere repudiado la herencia del padre, no teniendo substituto, no podrá adir la del hijo; porque ni vale el testamento del hijo, si no hubiere sido adida la herencia del padre, ni basta para la validez del segundo testamento que se haya hecho el testamento de modo que en virtud de él se pueda adir la herencia:

§ 5.- Si algunos bienes les hubieren correspondido después a los pupilos, les pertenecen también a los substitutos pupilares; porque el testador no substituyó para sus propios bienes, sino para los del impúbere, puesto que puede uno nombrar substituto también para el desheredado, si no me dijeras que era militar el que substituyó un heredero con esta intención, que quería que le pertenecieran al substituto solamente lo que de él fue a poder del substituto.

§ 6.- También respecto al impúbere arrogado decimos, que a su substituto nombrado por el arrogador no debe pertenecerle lo que aquel tendría, si no lo hubiese sido arrogado, sino solo aquello que le dió el mismo arrogador, a no ser acaso que distingamos, que el substituto no puede tener ciertamente la cuarta, que de todos modos debió dejarle según el Rescripto del Divino Pío, pero que tenga el sobrante. Pero opina Scévola en el libro décimo de las Cuestiones, que también esto se le ha de permitir al arrogador; cuya opinión tiene fundamento. Yo creo que todavía más que aún si adquirió alguna cosa por beneficio del arrogador, también puede tenerla el substituto, por ejemplo, si un amigo del arrogador, o

§ 7.- Nemo institutus et sibi substitutus sine causae mutatione quicquam proficit, sed hoc in uno gradu: ceterum si duo sint gradus, potest dici valere substitutionem, ut Iulianus libro trigesimo digestorum putat: si quidem sic sit substitutus sibi, cum haberet coheredem Titium: "Si Stichus heres non erit, liber et heres esto", non valere substitutionem: quod si ita: "Si Titius heres non erit, tunc Stichus liber et heres et in eius partem esto", duos gradus esse atque ideo repudiante Titio Stichum liberum et heredem fore.

11.- PAULUS; *libro I ad Sabinum*.- Si is qui heres institutus est filio substitutus sit, nihil oberit ei in substitutione, si tunc capere possit, cum filius decessit. Contra quoque potest poenas in testamento pupilli pati, licet in patris passus non sit.

12.- PAPINIANUS; *libro III quaestionum*.- Si filius, qui patri ac postea fratri ex secundis tabulis heres exstitit, hereditatem patris recuset, fraternam autem retinere malit, audiri debet: iustius enim praetorem facturum existimo, si fratri separationem bonorum patris concesserit. Etenim ius dicenti propositum est liberos oneribus hereditariis non sponte susceptis liberare, non invitos ab hereditate removere, praesertim quod remotis tabulis secundis legitimam haberet fratris hereditatem. Itaque legata dumtaxat ex secundis tabulis praestari debent habita ratione facultatum in Falcidia non patris, ut alias solet, sed impuberis.

where a friend or relative of the arrogator left anything to the heir.

§ 7.- No one who is appointed, and at the same time substituted for himself, will gain anything without a change of parties; but this occurs when there is only one degree. Where, however, there are two degrees, it can be said that the substitution will be valid, as Julianus holds in the Thirtieth Book of the Digest. Should the testator make the appointment of an heir, when Titius is his co-heir, in the following terms: "If Stichus should not be my heir, let him be free and be my heir", the substitution will not be valid. But if he should say, "If Titius should not be my heir, then let Stichus be free, and be heir to his share", there are two degrees of substitution, and therefore if Titius should reject his portion of the estate, Stichus will become free and the heir of the testator.

11.- PAULUS; *On Sabinus, Book I*.- Where the party who is appointed heir is substituted for a son, he will not be prevented from taking under the substitution, if he can do so after the death of the son. Again, on the other hand, he can be held liable to certain penalties under the will of the minor, although he may not be subject to any under that of the father.

12.- PAPINIANUS; *Questions, Book III*.- If a son who has been appointed the heir of his father, and afterwards becomes the heir of his brother through substitution, rejects the estate of his father, but prefers to retain that of his brother, he should be heard. For I think it is more equitable that the Praetor should permit the separation of the estates of the brother and the father; for he has the right to decide that children shall be freed from the burdens of an estate which they have not voluntarily assumed, but no right excludes them from an estate against their will; and especially when, leaving the substitution out of consideration, the substituted brother would be entitled to the estate. Hence, only the legacies should be paid in accordance with the substitution, and the rule of division established by the Falcidian Law should be followed, not with reference to the estate of the father, as is customary, but with respect to that of the child who had not yet arrived at puberty.

un cognado, le dejó alguna cosa.

§ 7.- Nadie que haya sido instituido y substituido a sí mismo se aprovecha de cosa alguna sin mutación de causa; pero esto, tratándose de un solo grado; mas si hubiera dos grados, se puede decir, que es válida la substitución, como opina Juliano en el libro trigésimo del Digesto. Si, pues, teniendo por coheredero a Ticio, hubiera sido substituido a sí mismo de este modo: «si Stico no fuere heredero, sea libre y heredero», no es válida la substitución; pero si de esta suerte; «si Ticio no fuere heredero, entonces sea libre y heredero Stico, y también en su parte», hay dos grados, y por esto, repudiando Ticio la herencia, Stico habrá de ser libre y heredero.

11.- PAULO; *Comentarios a Sabino, libro I*.- Si el que fue instituido heredero hubiera sido substituido al hijo, nada le obstará en la substitución, si pudiera adquirir cuando falleció el hijo; y también por el contrario puede sufrir penas en el testamento del pupilo, aunque no las haya sufrido en el del padre.

12.- PAPINIANO; *Cuestiones, libro III*.- Si el hijo, que fue heredero del padre, y después del hermano en virtud de segundo testamento, rehusará la herencia del padre, pero prefiriese retener la del hermano, debe ser oído. Porque creo que el Pretor obrará con más justicia, si le concediere al hermano la separación de los bienes del padre; porque le corresponde al juzgador librar a los hijos de las cargas de la herencia no aceptadas voluntariamente, no removerlos contra su voluntad de la herencia, principalmente, cuando, prescindiéndose del segundo testamento, tendría la herencia del hermano. Y así, deben pagarse solamente los legados del segundo testamento, habida cuenta para la Falcidia, no de los bienes del padre, como se suele en otros casos, sino del impúbero.

13.- POMPONIUS; *libro I ad Sabinum*.- Quo gradu heres liberis substituatur, nihil interest.

14.- POMPONIUS; *libro II ad Sabinum*.- In pupillari substitutione licet longius tempus comprehensum fuerit, tamen finietur substitutio pubertate.

15.- PAPINIANUS; *libro VI responsorum*.- Centurio filiis, si intra quintum et vicesimum annum aetatis sine liberis vita decesserint, directo substituit. Intra quattuordecim annos etiam propria bona filio substitutus iure communi capiet, post eam autem aetatem ex privilegio militum patris dumtaxat cum fructibus inventis in hereditate.

16.- POMPONIUS; *libro III ad Sabinum*.- Si quis eum, quem testamento suo legavit, rursus a substituto filii liberum esse iusserit, liber erit quasi legato adempto: nam et in legato in his testamentis novissima scriptura erit spectanda, sicut in eodem testamento (vel testamento et codicillis confirmatis) observaretur.

§ 1.- Si suo testamento perfecto alia rursus hora pater filio testamentum fecerit adhibitis legitimis testibus, nihilo minus id valebit et tamen patris testamentum ratum manebit. Nam et si sibi et filio pater testamentum fecisset, deinde sibi tantum, utrumque superius rumpetur. Sed si secundum testamentum ita fecerit pater, ut sibi heredem instituat, si vivo se filius decedat, potest dici non rumpi superius testamentum, quia secundum non valet, in quo filius praeteritus sit.

17.- POMPONIUS; *libro IV ad Sabinum*.- Substitui liberis is etiam potest, qui post mortem eius natus fuerit, cui substitutus heres fuerit.

13.- POMPONIUS; *On Sabinus, Book XIII*.- It makes no difference in what degree an heir may be substituted for children.

14.- THE SAME; *On Sabinus, Book II*.- In a pupillary substitution, even though a longer time may have been fixed, the substitution will, nevertheless, terminate at the age of puberty.

15.- PAPINIANUS; *Opinions, Book VI*.- A centurion directly substituted an heir for his son: "If he should die without issue before reaching the age of twenty-five years." The substitution for the son would acquire his estate by Common Law if the latter should die before his fourteenth year; after that age, however, he could not, under military privilege, acquire anything more than the estate of the father and the profits derived from the same found among the effects of the son.

16.- POMPONIUS; *On Sabinus, Book III*.- If anyone should bequeath a slave by his will, and afterwards order a substitute, whom he had appointed for his son, to liberate said slave, the latter will become free, just as if the bequest of the legacy was annulled; for so far as the legacy is concerned, what was last mentioned in these wills must be considered, as is done in the case of the same will, or where codicils have been confirmed by a will.

§ 1.- Where, after a testator has executed his will, he afterwards makes one for his son in the presence of competent witnesses, this act will, nevertheless, be valid, and the will of the father will stand; but if the father should make a will for both himself and his son, and afterwards one only for himself, both the will and the substitution first made will be broken. Where, however, the father made the second will and appointed his heir, as follows: "If his son should die in his lifetime", it can then be said that the first will is not broken, for the reason that the second, in which the son was passed over, is void.

17.- THE SAME; *On Sabinus, Book IV*.- Anyone can be substituted for a child, even though he should be born after the death of the child for whom he was substituted as heir.

13.- POMPONIO; *Comentarios a Sabino, libro I*.- Nada importa en qué grado se les substituya heredero a los descendientes.

14.- EL MISMO; *Comentarios a Sabino, libro III*.- Aunque en la substitución pupilar se hubiere comprendido un tiempo más largo, la substitución acabará, no obstante con la pubertad.

15.- PAPINIANO; *Respuestas, libro VI*.- Un Centurión substituyó directamente a sus hijos, si fallacieren sin descendientes dentro del vigésimo quinto año de edad; el substituido al hijo recibirá por derecho común dentro de los catorce años también los bienes propios, más después de esta edad, por privilegio militar solamente los del padre, con los frutos hallados en la herencia.

16.- POMPONIO; *Comentarios a Sabino, libro III*.- Si luego hubiere uno mandado que el que él legó en su testamento fuese hecho libre por el substituto de su hijo, será libre, como si hubiera sido revocado el legado; porque también respecto a un legado se habrá de atender en estos testamentos a la última disposición, así como se observaría respecto al mismo testamento, o a los codicilos confirmados en el testamento.

§ 1.- Si terminado su propio testamento el padre hiciere luego a otra hora el testamento del hijo habiendo presentado los testigos legales, éste será válido, y sin embargo permanecerá válido el testamento del padre. Porque si el padre hubiese hecho testamento para sí y para su hijo, y después solamente para sí, se romperán los dos anteriores. Pero si el padre hubiere hecho el segundo testamento de modo que instituya heredero para sí, si viviendo él falleciera su hijo, se puede decir que no se rompe el anterior testamento, porque no es válido el segundo, en el cual fue preterido del hijo.

§17.- EL MISMO; *Comentarios a Sabino, libro IV*.- También se les puede substituir a los hijos uno que hubiere nacido después de la muerte de aquel a quien hubiere sido substituido heredero.

18.- ULPIANUS; *libro XVI ad Sabinum*.- Si servus communis substitutus sit impuberi cum libertate, si quidem a patre familias fuisset redemptus, erit impuberi necessarius: si vero ab impubere redemptus, non necessarius, sed voluntarius fit heres, ut Iulianus libro trigesimo digestorum scribit: quod si neque a patre neque a pupillo fuerit redemptus, aequitatis ratio suggerit, ut ipse pretium partis suae domino offerens possit et libertatem et hereditatem consequi.

§ 1.- Si Titio fuerit legatus servus, posse eum impuberi substitui cum libertate, quemadmodum institui potuit, et evanescit legatum existente conditione substitutionis.

19.- IULIANUS; *libro XXX digestorum*.- Idem est et si post mortem legatarii servus substitutus sit.

20.- ULPIANUS; *libro XVI ad Sabinum*.- Patris et filii testamentum pro uno habetur etiam in iure praetorio: nam, ut Marcellus libro digestorum nono scribit, sufficit tabulas esse patris signatas, etsi resignatae sint filii, et septem signa patris sufficiunt.

§ 1.- Si pater sibi per scripturam, filio per nuncupationem vel contra fecerit testamentum, valebit.

21.- ULPIANUS; *libro XLI ad edictum*.- Si ita quis substituerit: "Si filius meus intra decimum annum decesserit, Seius heres esto", deinde hic ante quartum decimum post decimum decesserit, magis est, ut non possit bonorum possessionem substitutus petere: non enim videtur in hunc casum substitutus.

22.- GAIUS; *libro XV ad edictum provinciale*.- Is

18.- ULPIANUS; *On Sabinus, Book XVI*.- If a slave, owned in common with another, is substituted for a son not yet arrived at puberty, together with the grant of his freedom, and he should be purchased by the testator, he will become a necessary heir of the minor; but if he should be purchased by the latter, he will not be his necessary, but his voluntary heir; as Julianus states in the Thirtieth Book of the Digest. But whether he was purchased by the father or the minor, equity suggests that he himself, if he tenders the price of his master's share, can obtain both his freedom and the estate.

§ 1.- Where a slave is bequeathed to Titius, he can be substituted for the minor son of the testator with the grant of his freedom; just as where he is bequeathed and appointed heir, and the legacy will vanish when the condition on which the substitution depends is complied with.

19.- JULIANUS; *Digest, Book XXX*.- The same rule applies where a slave is substituted after the death of a legatee.

20.- ULPIANUS; *On Sabinus, Book XVI*.- The will of the father and that of the son are considered as one, in accordance with the Praetorian law; for (as Marcellus states in the Ninth Book of the Digest), it will suffice for the will of the father to be sealed, if that of the son is also sealed; and the seven seals of the witnesses attached to the father's testament will be sufficient.

§ 1.- Where a father makes a written will for himself and an oral will for his son, or vice versa, both will be valid.

21.- THE SAME; *On the Edict, Book XLI*.- If a testator should make a substitution as follows: "If my son dies before reaching his tenth year, let Seius be my heir"; and the son should die after his tenth year, but before reaching his fourteenth, the better opinion is that the substitute cannot demand possession of the estate, for he is not held to have been appointed a substitute in this case.

22.- GAIUS; *On the Provincial Edict, Book XV*.-

18.- ULPIANO; *Comentarios a Sabino, libro XVI*.- Si un esclavo común hubiera sido substituido a un impúbere con la libertad, si verdaderamente hubiese sido comprado por el padre de familia, será heredero necesario del impúbere; pero si hubiese sido comprado por el impúbere, no se hace heredero necesario, sino voluntario, según escribe Juliano en el libro trigésimo del Digesto. Mas si ni por el padre, ni por el pupilo hubiere sido comprado, la razón de equidad sugiere, que ofreciéndole él al señor el precio de su parte pueda conseguir la libertad y la herencia.

§ 1.- Si un esclavo hubiere sido legado a Ticio, puede ser él substituido con la libertad a un impúbere, así como pudo ser instituido el que fue legado; y se extingue el legado cumpliéndose la condición de la substitución.

19.- JULIANO; *Digesto, libro XXX*.- Lo mismo es también si después de la muerte del legatario fuera substituido el esclavo.

20.- ULPIANO; *Comentarios a Sabino, libro XVI*.- El testamento del padre y del hijo son considerados como uno solo aún en el derecho pretorio; porque, como escribe Marcelo en el libro noveno del Digesto, basta que hayan sido selladas las tablas del del padre, y si hubieran sido levantados los sellos del del hijo, bastan también los siete sellos del del padre.

§ 1.- Si el padre hubiere hecho testamento para sí en escritura, y nuncupativo para su hijo, o al contrario, será válido.

21.- EL MISMO; *Comentarios al Edicto, libro XLI*.- Si uno hubiere hecho así la substitución: «si falleciere mi hijo dentro del décimo año, sea heredero Seyo», y él hubiere fallecido luego antes del décimo cuarto, pero después del décimo, es más cierto que no puede pedir el substituto la posesión de los bienes; porque no se considera substituto para este caso.

22.- GAYO; *Comentarios al Edicto provincial*,

qui contra tabulas testamenti patris bonorum possessionem petierit, si fratri impuberi substitutus sit, repellitur a substitutione.

23.- PAPINIANUS; *libro VI responsorum*.- Qui plures heredes instituit, ita scripsit: "Eosque omnes invicem substituo". Post aditam a quibusdam ex his hereditatem uno eorum defuncto, si condicio substitutionis exstitit alio herede partem suam repudiante, ad superstites tota portio pertinebit, quoniam invicem in omnem causam singuli substitui videbuntur: ubi enim quis heredes instituit et ita scribit: "Eosque invicem substituo", hi substitui videbuntur, qui heredes exstiterunt.

24.- ULPIANUS; *libro IV disputationem*.- Si plures sint instituti ex diversis partibus et omnes invicem substituti, plerumque credendum et ex isdem partibus substitutos, ex quibus instituti sint, ut, si forte unus ex uncia, secundus ex octo, tertius ex quadrante sit institutus, repudiante tertio in novem partes dividatur quadrans feratque octo partes qui ex besse institutus fuerat, unam partem qui ex uncia scriptus est: nisi forte alia mens fuerit testatoris: quod vix credendum est, nisi evidenter fuerit expressum.

25.- IULIANUS; *libro XXIV digestorum*.- Si pater impuberes [impuberes] filios invicem substituerit et ei, qui novissimus mortuus fuerit, Titium, respondendum est solos fratres bonorum possessionem accepturos et quodammodo duos gradus huius institutionis factos, ut primo fratres invicem substituerentur, si illi non essent, tunc Titius vocaretur.

26.- IULIANUS; *libro XXIX digestorum*.- Si pater

Where a son demands possession of the estate of his father in opposition to the terms of the will of the latter, and he has been substituted by the said will for his brother under the age of puberty, he will be excluded from the substitution.

23.- PAPINIANUS; *Opinions, Book VI*.- Where a testator appointed several heirs, and said: "I substitute them all reciprocally", and, after his death, the estate was entered upon by some of them, one of the heirs being dead, if the condition upon which the substitution depended is fulfilled, and another heir rejects his share, all of it will belong to the survivors, because they are held to have been substituted for one another with reference to the entire estate. If, however, the testator should appoint heirs and say: "I substitute them reciprocally", those will be held to have been substituted who accept the estate.

24.- ULPIANUS; *Disputations, Book IV*.- Where several heirs are appointed for different shares of an estate, and all of them are substituted for one another, they should generally be considered as substituted for the same shares to which they were appointed heirs; for example, if one was appointed heir to one-twelfth, another to one-eighth, and a third to a quarter of the estate, and the latter should reject his share, the quarter shall be divided into nine parts, to eight of which he will be entitled who was appointed heir to two-thirds, unless it was the intention of the testator that he who was appointed heir to one-twelfth should receive one share, and this is hardly to be believed unless it was explicitly stated.

25.- JULIANUS; *Digest, Book XXIV*.- Where a father substituted his two sons under the age of puberty reciprocally, and Titius for the one who would die last; the opinion was that the brothers alone were entitled to the possession of the estate, and that there were in this instance two degrees of appointment, as it were; so that, in the first place, the brothers should be substituted for one another, and if they should not be heirs, then Titius was to be called to the succession.

26.- THE SAME; *Digest, Book XXIX*.- If a father

libro XV.- El que hubiere pedido la posesión de los bienes contra las tablas del testamento de su padre, si hubiera sido substituido a su hermano impúbere, es repelido de la substitución.

23.- PAPINIANO; *Respuestas, libro VI*.- Uno que instituyó varios herederos escribió así: «y a todos estos los substituyo recíprocamente»; habiendo fallecido uno de ellos después de adida por algunos de los mismos la herencia, si se cumplió la condición de la substitución, repudiando el otro heredero su parte, toda la porción les pertenecerá a los sobrevivientes, porque se considerará que todos fueron substituidos recíprocamente para toda causa; porque cuando uno instituyó herederos, y escribió de este modo: «y a estos los substituyo recíprocamente», se considerarán substituidos los que fueron herederos.

24.- ULPIANO; *Disputas, libro IV*.- Si por diversas partes hubieran sido instituidos muchos, y todos hubieran sido substituidos recíprocamente, se ha de creer las más de las veces, que fueron substituidos por las mismas partes en que fueron instituidos, de suerte que, si uno hubiera sido instituido en una onza, el segundo en ocho, y el tercero en el cuarto del as, repudiándolo el tercero, divídase el cuarto en nueve partes, y llévase ocho partes el que había sido instituido en los dos tercios y una parte el que fue instituido por una onza, si acaso no hubiere sido otra la intención del testador, lo que apenas se ha de creer, a no ser que evidentemente se hubiere expresado.

25.- JULIANO; *Digesto, libro XXIV*.- Si el padre hubiere substituido recíprocamente a sus hijos impúberos, y a Ticio al último que hubiere muerto, se ha de responder, que solo los hermanos han de recibir la posesión de bienes, y que en cierto modo hay hechos dos grados de esta institución, para que en el primero se substituyeran recíprocamente los hermanos, y si estos no existiesen. Entonces fuese llamado Ticio.

26.- EL MISMO; *Digesto, libro XXIX*.- Si el padre

filium impuberem heredem scripserit et ei substituerit, si quis sibi post mortem natus erit, deinde vivo fratre postumus natus fuerit, testamentum rumpetur: post mortem autem fratris vivo patre natus solus heres patri suo existet.

27.- IULIANUS; *libro XXX digestorum*.- Si Titius coheredi suo substitutus fuerit, deinde ei Sempronius, verius puto in utramque partem Sempronium substitutum esse.

28.- IULIANUS; *libro LXII digestorum*.- Lex Cornelia, quae testamenta eorum qui in hostium potestate decesserunt confirmat, non solum ad hereditatem ipsorum qui testamenta fecerunt pertinet, sed ad omnes hereditates, quae ad quemque ex eorum testamento pertinere potuissent, si in hostium potestatem non pervenissentiarum quapropter cum pater in hostium potestate decessit filio impubere relicto in civitate et intra tempus pubertatis decesserit, hereditas ad substitutum pertinet, perinde ac si pater in hostium potestatem non pervenisset. Sed si pater in civitate decessit, filius impubes apud hostes, si quidem mortuo patre filius in hostium potestatem pervenerit, non incommode dicitur hereditatem eius ex ea lege ad substitutos pertinere: si vero vivo patre filius in hostium potestatem pervenerit, non existimo legi Corneliae locum esse, quia non efficitur per eam, ut is, qui nulla bona in civitate reliquit, heredes habeat. Quare etiam si pubes filius vivo patre captus fuerit, deinde mortuo in civitate patre in hostium potestate decesserit, patris hereditas ex lege duodecim tabularum, non filii ex lege Cornelia ad adgnatum proximum pertinet.

29.- SCAEVOLA; *libro XV quaestionum*.- Si pater captus sit ab hostibus, mox filius et ibi ambo

should appoint as his heir his son who is under the age of puberty, and appoint as his substitute a posthumous child, and a child should be born during the lifetime of its father, the will will be broken if the other child is living. If, however, the said child should be born during the lifetime of its father, but after the death of its brother, it will be the sole heir of its father.

27.- THE SAME; *Digest, Book XXX*.- If Titius should be substituted for his co-heir, and Sempronius should afterwards be substituted for him, I think that the better opinion is that Sempronius was substituted for both shares of the estate.

28.- THE SAME; *Digest, Book LVII*.- The Lex Cornelia, which confirms the wills of those who die in the hands of the enemy, not only has reference to the estates of persons who made their wills, but to all estates which can belong to anyone by testamentary disposition, even if they had not fallen into the hands of the enemy. Hence, where a father died in captivity, leaving in his own country a son under the age of puberty, and the latter died before reaching that age, the estate belonged to the substitute; just as if the father had not been captured by the enemy. Where, however, the father died at home, and his minor child died in the hands of the enemy, having been captured after his father's death; will it not be proper to hold that his estate belongs to the substitute, under the terms of the said law? But if the son falls into the hands of the enemy during the lifetime of his father, I do not think that the Lex Cornelia will apply, because it does not provide that he who left no property in his own country shall have any heirs. Wherefore, even if the son, having arrived at puberty, should be captured during the lifetime of the father, and should afterwards die while in the hands of the enemy, after the death of his father at home, the estate of his father will belong to his next of kin, by virtue of the Law of the Twelve Tables, but the estate of the son will not belong to the latter by the terms of the Cornelian Law.

29.- SCAEVOLA; *Questions, Book XV*.- Where a father as well as his son have been captured by the

hubiere instituido heredero a su hijo impúbbero, y le hubiere nombrado substituto, si después de la muerte le hubiere nacido alguno, y después hubiere nacido el póstumo en vida del hermano, el testamento se romperá por el vivo, mas el que nació de la muerte del hermano viviendo el padre será solo heredero de su padre.

27.- EL MISMO; *Digesto, libro XXX*.- Si Ticio hubiere sido substituido a un coheredero suyo, y después Sempronio a este, creo verdadero, que Sempronio fue substituido para ambas partes.

28.- EL MISMO; *Digesto, libro LXII*.- La ley Cornelia, que confirma los testamentos de los que murieron en poder de los enemigos, se refiere no solamente a la herencia de los mismos que hicieron testamento, sino a todas las herencias, que habrían podido pertenecer a cualquiera en virtud del testamento de ellos, si no hubiesen caído en poder de los enemigos. Por lo cual, cuando el padre falleció en poder de los enemigos, habiendo dejado en la ciudadanía a su hijo impúbbero, y éste hubiere fallecido dentro del tiempo de la pubertad, la herencia pertenece al substituto, lo mismo que si el padre no hubiese caído en poder de los enemigos. Pero si el padre falleció en la ciudad, y el hijo impúbbero en poder de los enemigos, si verdaderamente después de muerto el padre, hubiere caído el hijo en poder de los enemigos, no inconvenientemente se dice, que su herencia pertenece en virtud de esta ley a los substitutos; mas si en vida del padre hubiere caído el hijo en poder de los enemigos, no creo que tiene lugar la ley Cornelia, porque no se hace por ella que tenga herederos el que no dejó ningunos bienes en la ciudad. Por lo cual, aunque púbbero hubiere sido hecho prisionero el hijo viviendo el padre, y después de haber fallecido el padre en la ciudad hubiere muerto él en poder de los enemigos, le pertenece al próximo agnado la herencia del padre en virtud de la ley de las Doce Tablas, no la del hijo en virtud de la ley Cornelia.

29.- SCÉVOLA; *Cuestiones, libro XV*.- Si el padre hubiera sido cogido por los enemigos, y después el

decedant, quamvis prior pater decedat, lex Cornelia ad pupilli substitutionem non pertinebit, nisi reversus in civitate impubes decedat, quoniam et si ambo in civitate decessissent, veniret substitutus.

30.- IULIANUS; *libro LXXVIII digestorum*.- Quidam testamento proculum ex parte quarta et quietum ex parte dimidia et quarta heredem instituit, deinde quieto florum, Proculo Sosiam heredes substituit, deinde, si neque Florus neque Sosia heredes essent, tertio gradu ex parte dimidia et quarta coloniam Leptitanorum et ex quarta complures heredes substituit in plures quam tres uncias: quietus hereditatem adiit, Proculus et Sosia vivo testatore decesserunt: quaeritur, quadrans Proculo datus ad quietum an ad substitutos tertio gradu pertineat. Respondi eam videri voluntatem patris familias fuisse, ut tertio gradu scriptos heredes ita demum substituerit, si tota hereditas vacasset, idque apparere evidenter ex eo, quod plures quam duodecim uncias inter eos distribuisset, et idcirco partem quartam hereditatis de qua quaeritur ad quietum pertinere:

31.- IULIANUS; *libro singulari de ambiguitibus*.- In substitutione filio ita facta: "Quisquis mihi ex supra scriptis heres erit, idem filio heres esto", quaeritur, quisquis heres quandoque fuerit intellegatur an quisquis heres tum erit, cum filius moriatur. Placuit prudentibus, si quandoque heres fuisset: quamvis enim vivo pupillo heres esse desisset, forte ex causa de inofficioso, quae pro parte mota est, futurum tamen eum heredem ex substitutione creditum est.

§ 1.- Non simili modo in hac specie dicendum est, si quis, cum filios duos haberet, gaium puberem,

enemy, and both die in captivity; even though the father may die first, the Cornelian Law does not confirm the substitution, unless the minor should die after returning home; although if both should die at home, the substitute will be entitled to the estate.

30.- JULIANUS; *Digest, Book LXXVIII*.- A certain man, by his will, appointed Proculus heir to a fourth part of his estate, and Quietus to the remaining three-fourths of the same; and afterwards substituted, as heirs, Florus for Quietus, and Sosias for Proculus; then, if neither Florus nor Sosias should become the heirs, he substituted the colony of the Leptitians heirs to three-quarters, and several heirs to an amount exceeding the remaining quarter. Proculus and Sosias died during the lifetime of the testator and Quietus entered upon the estate. The question arose whether the fourth left to Proculus should belong to Quietus, or to those who had been substituted in the third degree. I answered that the intention of the testator seemed to have been that those heirs whom he substituted in the third degree should only have a right to the succession where the entire estate had been abandoned; and that this intention was apparent from the fact that he had distributed more than twelve shares among the substitutes; and therefore that the fourth part of the estate, which was in question, would belong to Quietus.

31.- THE SAME; *On Ambiguities*.- A substitution was made as follows: "Let the same person be my heir who will be my heir, as above stated." The question arises what heir is to be understood by this, whether it would be anyone whosoever, or only the party who would be the heir at the time when the son died? It was decided by men learned in the law that he would be the heir who might succeed the testator at any time whatsoever; for even though the appointed heir had died during the lifetime of the minor, and the will had been attacked as being inofficious with reference to a certain part, it should be held that the other is still the heir under the substitution.

§ 1.- The rule cannot be said to be the same in the following case: for instance, where a testator has two

hijo, y ambos fallecieran en su poder, aunque fallezca primero el padre, la ley Cornelia no se aplicará a la substitución del pupilo, a no ser que habiendo regresado a la ciudad falleciera impúbero, porque también si ambos hubiesen fallecido en la ciudad, entraría el substituto.

30.- JULIANO; *Digesto, libro LXXVIII*.- Uno instituyó en su testamento heredero de la cuarta parte a Próculo, y de la mitad y de la otra cuarta parte a Quieto; después les substituyó como herederos Flora a Quieto, y Sosia a Próculo; y luego, si ni Flora, ni Sosia fuesen herederos, substituyó en tercer grado por la mitad y la cuarta parte a la colonia de los Leptitanos, y por la otra cuarta parte a muchos herederos, por más de las tres onzas; Quieto adió la herencia, y Próculo y Sosia fallecieron viviendo el testador; se pregunta, ¿la cuarta parte dada a Próculo le pertenecerá a Quieto, o a los substituidos en tercer grado? Respondí, que parece que esta fue la voluntad del padre de familia, substituir en tercer grado los herederos instituidos solamente si hubiese quedado vacante toda la herencia, y que esto aparecía evidentemente por el hecho de haber distribuido entre ellos mas de las doce onzas; y que por lo tanto, la cuarta parte de la herencia de que se trata, pertenece a Quieto.

31.- EL MISMO; *De las Ambigüedades, libro único*.- En la substitución hecha al hijo de este modo: «cualquiera que de los de arriba escritos fuere mi heredero, sea también heredero de mi hijo», se pregunta, si se entenderá como heredero cualquiera cuando quiera que lo hubiere sido, o si sera heredero cualquiera entonces cuando muera el hijo; y les pareció bien a los jurisconsultos, que cuando quiera que hubiese sido heredero; porque aunque hubiese dejado de ser heredero viviendo el pupilo, acaso por razón de querella de inoficioso testamento, que se promovió respecto a una parte, se creyó, sin embargo, que ha de ser heredero en virtud de la substitución.

§ 1.- No se ha de decir del mismo modo en este caso, si uno, teniendo dos hijos, Cayo, púbero, y

lucium impuberem, ita filio substituisset: "Si Lucius filius meus impubes decesserit neque mihi Gaius filius heres erit, tunc Seius heres esto": nam ita prudentes hoc interpretati sunt, ut ad impuberis mortem condicio substitutionis esset referenda.

32.- IULIANUS; *libro I ad Urseium Ferozem*.- Qui complures heredes ex disparibus partibus instituerat et in his Attium, si Attius non adierit, ceteros ex isdem partibus quibus instituerat heredes ei substituerat: deinde, si Attius non adisset, Titium coheredem eis qui substituti sunt adiecit. Quaesitum est, quam partem is et quam ceteri habituri essentiarum respondi Titium virilem, ceteros hereditarias: veluti si tres fuissent, Titium partem quartam Attianae partis habiturum, reliquarum partium hereditarias partes, ex quibus instituti erant, reliquos habituros esse. Quod si non solum Titium, sed etiam alios adiecisset heredes, hos quidem viriles partes habituros: veluti si tres puta coheredes fuissent substituti, extranei duo adiecti, hos quintas partes Attianae partis, reliquos autem coheredes hereditarias partes habituros esse dixit.

33.- AFRICANUS; *libro II quaestionum*.- Si mater ita testetur, ut filium impuberem, cum erit annorum quattuordecim, heredem instituat eique pupillaribus tabulis, si sibi heres non erit, alium substituat, valet substitutio.

§ 1.- Si filius et ex eo nepos postumus ita heredes instituantur, ut Gallo Aquilio placuit, et nepoti, si is heres non erit, Titius substituat, filio herede existente Titium omnimodo, id est etiam si nepos natus non fuerit, excludi respondit.

sons, Gaius, who has arrived at puberty, and Lucius, who has not, and he makes the substitution as follows: "If my son Lucius should die without reaching the age of puberty, and Gaius should not be my heir, then let Seius be my heir"; for legal authorities have interpreted this to mean that the condition of the substitution should be referred to the death of the son who has not arrived at puberty.

32.- THE SAME; *On Urseius Ferox, Book I*.- Where a testator appointed several heirs, among whom was Attius, to unequal shares of his estate, and if Attius should not accept, he substituted the others as heirs in proportion to their interest, and then added that Titius should be the co-heir of those who were substituted. The question arose to what share Titius would be entitled, and what the others would have. I answered that Titius would be entitled to one share and the others to shares in proportion to their rights in the estate; for instance, if there were three of them, Titius would have the fourth part of the share of Attius, and the other heirs would have the three-fourths remaining, in proportion to the shares to which they were entitled by appointment. If, however, the testator should add not only Titius, but other heirs, the latter would be entitled to a portion equal to that of the share of the substitute; for example, suppose that three co-heirs were substituted and two foreign heirs added, the latter would be entitled to five parts of the share of Attius, and the remaining co-heirs would receive the balance in proportion to their respective shares.

33.- AFRICANUS; *Questions, Book II*.- If a mother should make a will and appoint her son her heir, as soon as he arrives at the age of fourteen years, and in case he should not be her heir, appoints another for him by pupillary substitution, this will be valid.

§ 1.- Where a son is appointed an heir, and his own posthumous son another, in compliance with the rule of Gallus Aquilius, and Titius is substituted for the grandson if he should not be the heir, if the son becomes his father's heir, the opinion was given that Titius should be absolutely excluded; that is to say, even if a grandson should not be born.

Lucio, impúbero, le hubiese dado substituto a este hijo de esta suerte: «si mi hijo Lucio hubiere fallecido impúbero, y mi hijo Cayo no fuere mi heredero, en este caso sea heredero Seyo»; porque los jurisconsultos lo interpretaron esto de este modo, que la condición de la substitución se había de referir a la muerte del impúbero.

32.- EL MISMO; *Comentarios a Urseyo Ferox, libro I*.- Uno que había instituido muchos herederos por partes desiguales, y entre ellos a Atcio, le había substituido los demás herederos por las mismas partes en que los había instituido, si Atcio no hubiere adido la herencia, y agregó luego a Ticio como coheredero de los que fueron substituidos, si Atcio no hubiese adido la herencia; se preguntó, ¿qué parte habría de tener aquel, y cual los demás? Respondí, que Ticio habría de tener una porción viril, y los demás las que se les dejaron en la herencia, esto es, que si hubiesen sido tres, Ticio habría de tener la cuarta parte de la porción de Atcio, y los demás, de las otras partes sus porciones hereditarias, en que habían sido instituidos. Pero si no solamente hubiese agregado a Ticio, sino también a otros como herederos, dijo, que estos ciertamente habían de tener porciones viriles, como, por ejemplo, si hubiesen sido substituidos tres coherederos, y agregados dos extraños, estos habrían de tener quintas partes de la porción de Atcio, y los demás coherederos sus porciones de la herencia.

33.- AFRICANO; *Cuestiones, libro II*.- Si la madre testara de modo que instituyese heredero a su hijo impúbero, cuando fuere de catorce años, y a él le substituyera otro en el testamento pupilar si no fuere su heredero, es válida la substitución.

§ 1.- Si el hijo y el nieto póstumo nacido de él fueran instituidos herederos de modo, que, como le pareció bien a Galo Aquilio, Ticio fuera substituido también al nieto, si éste no fuere heredero. respondió que, siendo heredero el hijo, es excluido Ticio de todos modos, esto es, aunque el nieto no hubiere nacido.

34.- AFRICANUS; *libro IV quaestionum*.- Ex duobus impuberibus ei, qui supremus moreretur, heredem substituit. Si simul morerentur, utrique heredem esse respondit, quia supremus non is demum qui post aliquem, sed etiam post quem nemo sit, intellegatur, sicut et e contrario proximus non solum is qui ante aliquem, sed etiam is ante quem nemo sit intellegitur.

§ 1.- Filium impuberem et Titium heredes instituit: Titio Maevium substituit, filio, quisquis sibi heres esset ex supra scriptis, substituit: Titius omisit hereditatem, Maevius adiit. Mortuo deinde filio putat magis ei soli ex substitutione deferri pupilli hereditatem, qui patris quoque hereditatem adierit.

§ 2.- Etiam si contra patris tabulas bonorum possessio petita sit, substitutio tamen pupillaris valet, et legata omnibus praestanda sunt, quae a substitutione data sunt.

35.- AFRICANUS; *libro V quaestionum*.- Etsi contra tabulas patris petita sit a pupillo bonorum possessio, in substitutum tamen eius actionem legati dandam esse ita, ut augeantur praeter ea quod filius extraneis non debuerit. Sic et crescere a substituto data legata, si per bonorum possessionem plus ad filium pervenisset, quemadmodum et ipse filius plus exceptis deberet. His consequens esse existimo, ut, si impubes ex asse scriptus sit et per bonorum possessionem semis ei ablatus sit, substitutus in partem legati nomine exoneretur, ut, quemadmodum portio, quae per bonorum possessionem accesserit, augeat legata, ita et hic quae abscesserit minuat.

34.- THE SAME; *Questions, Book IV*.- A testator who had two sons not yet arrived at puberty, substituted a certain person as heir of the survivor. If both should die at the same time, it was held that the substitute would be the heir of both, because the survivor is understood to mean not only one who comes after another, but also he whom no one succeeds; just as, on the other hand, the first is understood to mean not only one who comes before another, but also him who has no one before him.

§ 1.- A testator appointed a son, who had not reached puberty, and Titius, his heirs. He substituted Mævius for Titius, and for his son he substituted any of his heirs who had previously been mentioned by him. Titius rejected the estate; Mævius entered upon it. The son having afterwards died, it was decided that the estate of the minor, which was derived from the substitution, would go to Mævius, as the sole heir who had entered upon the estate of the father.

§ 2.- Even though application may be made for the possession of the estate contrary to the will of the father, the pupillary substitution will still be valid, and all the legacies bequeathed under said substitution should be paid.

35.- THE SAME; *Questions, Book V*.- Where praetorian possession of an estate is applied for by a minor in opposition to the will of his father, an action to compel the payment of legacies should still be granted against the substitute; and, for the reason that the son does not owe any legacies bequeathed to strangers, those granted under the substitution shall be increased; just as where legacies are bequeathed under the substitution, if more comes into the hands of the son through praetorian possession of the estate than he would otherwise receive, so, also will he owe more to persons who are privileged. I think that the result of this will be that where a son who has not arrived at puberty is appointed heir to the entire estate, and he is deprived of half of it through praetorian possession, the substitute will be free from liability to pay half of the legacies, just as the portion which is added through obtaining possession of an estate increases the legacies, so also, in this instance, the amount which is lost diminishes them.

34.- EL MISMO; *Cuestiones, libro IV*.- Uno substituyó un heredero al último que muriese de dos impúberos; si falleciesen al mismo tiempo, respondió que era heredero de ambos, porque se entiende que es último, no solamente el que va después de otro, sino también aquel después del cual no hay nadie, como también por el contrario se entiende que es próximo, no solamente el que esta antes que otro, sino también aquel antes del cual no hay nadie.

§ 1.- Uno instituyó herederos a su hijo impúbero y a Ticio, a Ticio le dio por substituto a Mevio, al hijo le substituyó cualquiera que de los antes escritos fuese heredero de él, Ticio dejó de adir la herencia, y Mevio la adió; habiendo muerto después el hijo, opina que en virtud de la substitución se le defiere la herencia del pupilo preferentemente solo a aquel que hubiere adido también la herencia del padre.

§ 2.- Aunque contra el testamento del padre se haya pedido la posesión de los bienes, es sin embargo válida la substitución pupilar, y a todos se les han de pagar los legados, que; se les dieron a cargo de la substitución.

35.- EL MISMO; *Cuestiones, libro V*.- Aunque por el pupilo haya sido pedida la posesión de bienes contra el testamento del padre, se ha de dar, no obstante, contra su substituto la acción de legado, de suerte que aumenten además, porque el hijo no los habrá debido a extraños, y de este modo crecen los legados dados a cargo del substituto, si por la posesión de los bienes hubiese ido mas a poder del hijo, así como también el mismo hijo debería más a los exceptuados. Juzgo que a esto es consiguiente, que si un impúbero hubiera sido instituido heredero del as, y por la posesión de bienes se le hubiese quitado la mitad, el substituto seria exonerado en parte por razón del legado, para que, así como la porción que acreciere por la posesión de bienes aumenta los legados, así también las disminuya en este caso la que se quitare.

36.- MARCIANUS; *libro IV institutionum*.- Potest quis in testamento plures gradus heredum facere, puta: "Si ille heres non erit, ille heres esto", et deinceps plures, ut novissimo loco in subsidium vel servum necessarium heredem instituat.

§ 1.- Et vel plures in unius locum possunt substitui vel unus in plurium vel singulis singuli vel invicem ipsi qui heredes instituti sunt.

37.- FLORUS; *libro X institutionum*.- Vel singulis liberis vel qui eorum novissimus morietur heres substitui potest, singulis, si neminem eorum intestato decedere velit, novissimo, si ius legitimarum hereditatum integrum inter eos custodiri velit.

38.- PAULUS; *libro singulari de secundis tabulis*.- Qui plures liberos habet, potest quibusdam substituere neque utique necesse habet omnibus, sicuti potest nulli substituere.

§ 1.- Ergo et ad breve tempus aetatis substituere potest, ut puta "si filius meus intra annum decimum decesserit, Titius ei heres esto".

§ 2.- Itaque et si diversos substituat post finem aetatis, admittendum erit, veluti "si intra decimum annum decesserit, Titius heres esto: si post decimum intra quartum decimum, Maevius heres esto".

§ 3.- Si a patre institutus rogatusque hereditatem restituere coactus ex fideicommissario adierit, quamvis cetera, quae in eodem testamento relictas sunt, per eam aditionem confirmentur, ut legata et libertates, secundas tamen tabulas non oportere resuscitari destituto iam iure civili testamento Quintus Cervidius Scaevola noster dicebat. Sed plerique in diversa sunt opinione, quia et pupillares tabulae pars sunt prioris testamenti, quo iure utimur.

36.- MARCIANUS; *Institutes, Book IV*.- Anyone can establish several degrees of heirs in a will, for example: "If So-and-So does not become my heir, let So-and-So not be my heir", and I appoint several others in succession, so that in the last place, by way of reserve, a slave is appointed a necessary heir.

§ 1.- Several heirs can be substituted instead of one, or one instead of several, or particular heirs instead of each one, or those who have been appointed heirs can be substituted for one another.

37.- FLORENTINUS; *Institutes, Book X*.- An heir can be substituted for each of the children of a testator, or for one of them who may survive; for each one, where he does not wish that any of them should die intestate, for the survivor, if he desires the right of legitimate succession to remain unimpaired.

38.- PAULUS; *On Pupillary Substitutions*.- Where a man has several children, he can substitute an heir for any of them, and it is not necessary for him to do so for all; just as he can make a substitution for one of them.

§ 1.- Therefore, he can make a substitution for a short period during the lifetime of his heir; for instance, "If my son should die before reaching the age of ten years, let Titius be his heir".

§ 2.- Moreover, the substitution will be admitted if he appoints several heirs for different terms of the age of the son, as, for example: "If he should die before reaching the age of ten years, let Titius be his heir; if he should die after his tenth year, but before reaching his fourteenth, let Maevius be his heir."

§ 3.- Where an heir appointed by a father, who has been charged with delivery of the estate, enters upon it, after having been compelled to do so by the beneficiary of the trust, although the other bequests mentioned in the will may be confirmed by this acceptance, as for example, legacies, and grants of freedom; still, where the will has become inoperative under the Civil Law, the pupillary substitution included therein is not revived; as Quintus Cervidius Scaevola held. Many authorities, however, are of a different opinion, for the reason that the pupillary substitution is a part of the former will; and this is the practice at present.

36.- MARCIANO; *Instituta, libro IV*.- Puede uno hacer muchos grados de herederos en el testamento, por ejemplo: «si aquel no fuere heredero, sea heredero aquel otro», y sucesivamente muchos, de modo que en último lugar instituya subsidiariamente heredero necesario hasta a un esclavo.

§ 1.- Y también pueden ser substituidos muchos en el lugar de uno solo, o uno en el de muchos, o cada uno a cada uno, o recíprocamente los mismos que fueron instituidos herederos.

37.- FLORENTINO; *Instituta, libro X*.- Se puede substituir heredero, o a cada hijo, o al último que de ellos muriese; a cada uno, si quisiera que ninguno de ellos muera intestado, al último, si quisiera que el derecho de las herencias legítimas se conserve íntegro entre ellos.

38.- PAULO; *De los segundos testamentos, libro único*.- El que tiene muchos hijos puede darles substitutos a algunos; y no tiene ciertamente necesidad de dárselos a todos, así como puede no darle substituto a ninguno.

§ 1.- Luego también puede substituir hasta breve tiempo de la edad, por ejemplo: «si mi hijo falleciere dentro de su décimo año, sea su heredero Ticio».

§ 2.- Y así, también se habrá de admitir, si substituyera a varios para después del término de la edad, por ejemplo: «si falleciere dentro de su décimo año, sea heredero Ticio; si después del décimo, dentro del décimo cuarto, sea heredero Mevio».

§ 3.- Si habiendo sido uno instituido heredero por el padre, y habiéndosele rogado que restituyera la herencia, hubiere adido la herencia precisado a ello por causa del fideicomisario, aunque por esta adición se confirme lo demás que se dejó en el mismo testamento, como los legados y las libertades, decía nuestro Quinto Cervidio Scévola, que, sin embargo, no debía revalidarse el segundo testamento habiendo sido ya destituido por el derecho civil el testamento; pero los más son de diversa opinión, porque también el testamento pupilar es parte del primer testamento; de cuyo derecho usamos.

39.- IAVOLENUS; *libro I ex posterioribus Labeonis*.- Cum ex filio quis duos nepotes impuberes habebat, sed alterum eorum in potestate, alterum non, et vellet utrumque ex aequis partibus heredem habere et, si quis ex his impubes decessisset, ad alterum partem eius transferre: ex consilio Labeonis Ofilii Cascellii Trebatii eum quem in potestate habebat solum heredem fecit et ab eo alteri dimidiam partem hereditatis, cum in suam tutelam venisset, legavit: quod si is, qui in potestate sua esset, impubes decessisset, alterum heredem ei substituit.

§ 1.- Filio impuberi in singulas causas alium et alium heredem substituere possumus, veluti ut alius, si sibi nullus filius fuerit, et alius, si filius fuerit et impubes mortuus fuerit, heres sit.

§ 2.- Quidam quattuor heredes fecerat et omnibus heredibus praeter unum substituerat: unus ille, cui non erat quisquam substitutus, et ex ceteris alter vivo patre familias decesserant. Patrem, cui nemo erat substitutus, ad substitutum quoque pertinere Ofilius Cascellius responderunt, quorum sententia vera est.

40.- PAPINIANUS; *libro XXIX quaestionum*.- Causa cognita impubes adrogatus decesserat. Quemadmodum legitimis heredibus auctoritate principali prospicitur vinculo cautionis, ita, si forte substituit naturalis pater impuberi, succurrendum erit substituto: nam et legitimis heredibus futuris non aliae quam utiles actiones praestari possunt.

41.- PAPINIANUS; *libro VI responsorum*.- Coheredi substitutus priusquam hereditatem adiret aut condicio substitutionis existeret, vita decessit. Ad substitutum eius, sive ante substitutionem sive postea substitutus sit, utraque portio pertinebit nec intererit, prior substitutus post institutum an ante decedat.

39.- JAVOLENUS; *On the Last Works of Labeo, Book I*.- A man had, by his son, two grandsons who were under puberty, one of whom was under his control, and the other was not. He wished them to inherit equal portions of his estate, and provided that, if either of them died before reaching the age of puberty, his share should be transferred to the other; and in compliance with the advice of Labeo, Ofilius, Cascellius, and Trebatius, he appointed as his sole heir the grandson who was under his control, and charged him with the delivery of half of his estate to his other grandson when he arrived at puberty, and substituted the other heir for the one who was under his control, if the latter should die before reaching that age.

§ 1.- We can substitute two heirs under different conditions for a son under the age of puberty; for instance, one of them can be substituted if the son should have no children, and another child should be born and die before reaching the age of puberty.

§ 2.- A certain testator appointed four heirs, and substituted others for all of them except one, and the one for whom no substitute had been appointed, as well as one of the others, died during the lifetime of the father. Ofilius and Cascellius held that the share of the one for whom no one had been substituted also belonged to the substitute of the deceased heir; which opinion is correct.

40.- PAPINIANUS, *Questions, Book XXIX*.- An heir who had not reached the age of puberty, and who had been arrogated after proper investigation, died. Just as in the case of heirs-at-law, by Imperial authority, a bond must be furnished, so, if a natural father has substituted an heir for his son under the age of puberty, recourse must be had to the substitute; for only praetorian actions can be granted to heirs-at-law.

41.- THE SAME; *Opinions, Book VI*.- An heir was substituted for his co-heir, but died before he entered upon the estate, or the condition upon which the substitution depended was fulfilled. Both shares of the estate will belong to him who was substituted, either before the substitution of the heir, or afterwards; nor will it make any difference whether

39.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro I*.- Teniendo uno dos nietos impúberos nacidos de un hijo, pero a uno de ellos bajo su potestad, y al otro no, y queriendo tenerlos a ambos como herederos por partes iguales, y, si alguno de ellos hubiese fallecido impúbero, transferirle al otro su parte, por consejo de Labeón, Ofilio, Cascelio, y Trebacio hizo heredero solo al que tenía bajo su potestad, y a su cargo le legó al otro la mitad de la herencia, cuando hubiese llegado a su propia tutela; pero si el que estaba bajo su potestad hubiese fallecido impúbero, le substituyó a él el otro heredero.

§ 1.- Podemos substituirle al hijo impúbero varios herederos para cada causa, por ejemplo, para que uno sea heredero, si él no tuviere ningún hijo, y lo sea otro, si hubiere tenido un hijo, y hubiere muerto impúbero.

§ 2.- Uno había instituido cuatro herederos, y a todos, excepto a uno, les había nombrado substituto; aquel solo, a quien no le había sido substituido nadie, y uno de los otros, habían fallecido viviendo el padre de familia; Ofilio y Cascelio respondieron, que también le pertenece al substituto la parte para la que nadie había sido substituido; cuya opinión es verdadera.

40.- PAPINIANO; *Cuestiones libro XXIX*.- Había fallecido un impúbero arrogado con cono-cimiento de causa. Así como por la autoridad del Príncipe se atiende con el vinculo de la caución a los herederos legítimos, así se habrá de auxiliar al substituto, si acaso el padre natural le dio substituto al impúbero, porque tampoco a los que han de ser herederos legítimos se les prestan otras acciones, sino las útiles.

41.- EL MISMO; *Respuestas, libro VI*.- El substituido al coheredero murió antes que adiese la herencia, o que se cumpliese la condición de la substitución; una y otra porción le pertenecerán a su substituto, ya si hubiera sido substituido antes ya si después, de la substitución, y no importará que el primer substituto muera después, o antes que el instituido.

§ 1.- Ex verbis "eosque invicem substituo" non adeuntis portio scriptis heredibus pro modo sibi vel alii quaesitae portionis defertur.

§ 2.- Cum filiae vel nepoti, qui locum filii tenuit aut post testamentum coepit tenere, parens substituit, si quis ex his mortis quoque tempore non fuit in familia, substitutio pupillaris fit irrita.

§ 3.- Quod si heredem filium pater rogaverit, si impubes diem suum obierit, Titio hereditatem suam restituere, legitimum heredem filii salva Falcidia cogendum patris hereditatem ut ab impubere fideicommisso post mortem eius dato restituere placuit, nec aliud servandum, cum substitutionis condicio puberem aetatem verbis precariis egreditur. Quae ita locum habebunt, si patris testamentum iure valuit: alioquin si non valuit, ea scriptura, quam testamentum esse voluit, codicillos non faciet, nisi hoc expressum est. Nec fideicommisso propriae facultates filii tenebuntur, et ideo, si pater filium exheredaverit et ei nihil reliquerit, nullum fideicommissum erit: alioquin, si legata vel fideicommissa filius acceperit, intra modum eorum fideicommissum hereditatis a filio datum citra Falcidia rationem debebitur.

§ 4.- Qui discretas portiones coniunctis pluribus separatim dedit ac post omnem institutionis ordinem ita scripsit: "Quos heredes meos invicem substituo", coniunctos primo loco vice mutua substituere videtur: quibus institutionum partes non agnoscentibus ceteros omnes coheredes admitti.

the substitute dies after or before the appointed heir.

§ 1.- By the following words: "I substitute them for one another", the share refused by one of the heirs will go to those mentioned in the will, in proportion to what they themselves obtain by their appointment, or what has been acquired by the person to whose control they are subject.

§ 2.- Where a father makes a substitution for his daughter, or for a grandson who occupies the place of his son, or who has held it after the execution of the will, the pupillary substitution becomes void if any of these should not belong to the family of the testator at the time of his death.

§ 3.- If a father should appoint his son his heir and request him, if he should die before reaching the age of puberty, to give his estate to Titius, it has been established that the lawful heir of the son shall be forced to surrender the estate of his father, with the exception of the right granted by the Lex Falcidia, just as if the estate had been granted in trust to the heir of the said minor after his death. The same rule should be observed when a condition upon which the substitution depends is expressed in ambiguous terms, and extends beyond the age of puberty. This, however, will only apply where the will of the father is valid in law; for if the instrument which he drew up as his will is not valid, it will not be admitted as a codicil unless this is expressly stated, nor will the property belonging to the son be bound by the trust. Therefore, if the father has disinherited the son, and left him nothing, the trust will be void. Otherwise, if the son has received either a legacy or a trust from his father, the trust of the estate with which he is charged will be due in proportion to the property which he has received, without reference to the proportion allowed by the Falcidian Law.

§ 4.- Where a testator bequeathed different shares separately to several heirs, and after doing so said: "I substitute my heirs for one another", he is held to have substituted those joined in the first place reciprocally, and if they do not accept their shares, all the other coheirs should be admitted.

instituido.

§ 1.- Y en virtud de estas palabras: "Y los substituyo recíprocamente", la porción del que no ade la herencia se defiende a los herederos instituidos conforme a la cuantía de la porción adquirida para sí o para otro.

§ 2.- Cuando el ascendiente le nombró substituto a la hija, o al nieto, que ocupó el lugar de un hijo, o que comenzó a ocuparlo después del testamento, si alguno de ellos no estuvo en la familia también al tiempo de la muerte, se hace írrita la substitución pupilar.

§ 3.- Pero si el padre le hubiere rogado a su hijo, heredero, que, si falleciere impúbere, restituyese su herencia a Ticio, se determinó, que el heredero legítimo del hijo había de ser obligado a restituir, salva la Falcidia, la herencia del padre, como si por el impúbere o se le hubiese dado después de su muerte el fideicomiso. Y no se debe observar otra cosa, cuando la condición de la substitución excede con palabras deprecativas de la edad de la pubertad. Lo que tendrá lugar de esta suerte, si fue válido en derecho el testamento del padre; en otro caso, si no fue válido, la escritura que quiso que fuera testamento no constituirá codicilos, si no se expresó esto. Y no estarán obligados al fideicomiso los bienes propios del hijo, y por lo tanto, si el padre hubiere desheredado al hijo, y no le hubiere dejado nada, será nulo el fideicomiso. En otro caso, si el hijo hubiere recibido los legados o los fideicomisos, se deberá, dentro de la cuantía de aquellos, el fideicomiso de la herencia dado por el hijo, sin la cuenta de la Falcidia.

§ 4.- Uno que dio separadamente distintas porciones a muchos herederos conjuntos, y que después de todo el orden de la institución escribió así: «a los cuales herederos míos los substituyo recíprocamente», parece que en primer lugar substituye recíprocamente los conjuntos, y que, no admitiendo estos las partes de las instituciones, son admitidos todos los demás coherederos.

§ 5.- Qui patrem et filium pro parte heredes instituerat et invicem substituerat, reliquis coheredibus datis post completum assem ita scripsit: "Hos omnes invicem substituo". Voluntas fit quaestio, commemoratione omnium patrem et filium substitutioni coheredum miscuisset an eam scripturam ad ceteros omnes transtulisset: quod magis verisimile videtur propter specialem inter patrem et filium substitutionem.

§ 6.- Coheres impuberi filio datus eidemque substitutus legata e secundis tabulis relicta perinde praestabit, ac si pure partem et sub condicione partem alteram accepisset. Non idem servabitur alio substituto: nam ille Falcidia rationem induceret quasi plane sub condicione primis tabulis heres institutus, tametsi maxime coheres filio datus quadrantem integrum optineret. Nam et cum legatum primis tabulis Titio datur, secundis autem tabulis eadem res Sempronio, Sempronius quandoque Titio concurrat.

§ 7.- Cum pater impuberi filiae, quae novissima diem suum obisset, tabulas secundas fecisset et impubes filia superstite sorore pubere vita decessisset, irritam esse factam substitutionem placuit, in persona quidem prioris, quia non novissima decessit, in alterius vero, quia puberem aetatem complevit.

§ 8.- Non videri cum vitio factam substitutionem his verbis placuit: "Ille filius meus si (quod abominor) intra pubertatis annos decesserit, tunc in locum partemve eius Titius heres esto", non magis quam si post demonstratam condicionem sibi heredem esse substitutum iussisset: nam et qui certae rei heres instituitur coherede non dato, bonorum omnium hereditatem optinet.

§ 5.- Where a testator appointed a father and his son heirs to a share of his estate, and substituted them one for the other, and then bequeathed the rest of his property to their co-heirs, and afterwards disposed of the entire estate as follows: "I substitute all of these heirs reciprocally", the question arose as to his intention, and whether by mentioning all of them he included the father and son in the substitution of the co-heir, or whether he only intended the will to apply to all the others. The latter opinion appears to be the more probable, on account of the special substitution which he made with reference to the father and son.

§ 6.- Where a co-heir is given to a son under the age of puberty, who has also been substituted for him, he will be obliged to pay any legacies bequeathed under the substitution, just as if he had received a part of the estate absolutely, and another part of it conditionally. The same rule will not apply in case of the substitution of another, for he will bring about the application of the Lex Falcidia, just as if the heir had clearly been appointed under a condition in the first place; although the co-heir given to the son would certainly be entitled to the entire fourth of his share, for where a legacy was granted to Titius by the will, and the same property was given to Sempronius by the substitution, Sempronius will share the property with Titius.

§ 7.- Where a father having two daughters, both under the age of puberty, made a pupillary substitution for the one who should survive, and the daughter who had not reached puberty died, being survived by her sister who had attained that age, it was held that the substitution was void, both with reference to the first daughter above mentioned, because she did not die last, as well as with reference to the second one, because she had reached the age of puberty.

§ 8.- It was held that a substitution expressed in the following terms is not defective: "If my son should die before reaching the age of puberty, which I trust will not be the case, then let Titius be my heir in his stead and to his portion"; any more than if he had directed him to be substituted as his heir, after prescribing a certain condition; for where anyone is appointed an heir to certain property, and a co-heir has not been appointed, he will be entitled to the

§ 5.- Uno que había instituido herederos de parte al padre y al hijo, y los había substituido recíprocamente habiendo nombrado otros coherederos, escribió así después de haber distribuido todo el as: «a todos estos los substituyo recíprocamente»; se promueve esta cuestión respecto a la voluntad, ¿con la expresión de todos mezcló al padre y al hijo en la substitución de los coherederos, o refirió esta cláusula escrita a todos los demás? Lo que parece más verosímil por causa de la especial substitución entre el padre y el hijo.

§ 6.- El coheredero dado al hijo impúbbero y substituido al mismo pagará los legados dejados en el segundo testamento, lo mismo que si hubiese recibido puramente una parte, y otra parte bajo condición. No se observará lo mismo respecto a otro substituto, porque éste añadiría la cuenta de la Falcidia, como instituido claramente heredero bajo condición en el primer testamento, aunque principalmente el coheredero dado al hijo obtuviese íntegra la cuarta parte; porque también cuando en el primer testamento se le da a Ticio un legado, pero en el segundo testamento se le da a Sempronio la misma cosa, Sempronio concurre alguna vez con Ticio.

§ 7.- Cuando el padre hubiese hecho segundo testamento por su hija impúbera, que hubiese fallecido la última, y muriese la hija, impúbera sobreviviéndole una hermana púbera, se determinó que se hizo írrita la substitución; a la verdad, respecto a la persona de la primera, porque no falleció la última, y en cuanto a la de la otra, porque cumplió la edad de la pubertad.

§ 8.- Se determinó; que no se considera hecha viciosamente la substitución con estas palabras: «si aquel hijo mío, lo que no suceda, hubiere fallecido en los años de la pubertad, en este caso sea heredero Ticio en su lugar o parte», no de otra suerte, que si después de haber expresado la condición hubiese mandado que el substituto fuese su heredero porque también el que es instituido heredero de cierta cosa sin habérsele dado coheredero, obtiene la herencia de

42.- PAPINIANUS; *libro I definitionum*.- Qui duos impuberes filios heredes reliquerat, ita substituit, si ambo mortui essent: deinde pueri post mortem patris simul perierunt: duae hereditates substituo deferuntur. Sed si diversis temporibus vita decedant, in hereditate novissimi pueri eius fratris, qui ante mortuus est, hereditatem substitutus inveniet: sed in ratione Falcidiae pueri prioris hereditas non veniet nec substitutus amplius quam Sescunciam iure testamenti desiderabit: legata quoque, quae a substituto eius filii data sunt, qui prior intestato decessit, ad irritum reccidunt.

43.- PAULUS; *libro IX quaestionum*.- Ex facto quaeritur: "Qui filium habebat mutum puberem, impetravit a principe, ut muto substituere ei liceret, et substituit Titium: mutus duxit uxorem post mortem patris et nascitur ei filius: quaero, an rumpatur testamentum. respondi: beneficia quidem principalia ipsi principes solent interpretari: verum voluntatem principis inspicientibus potest dici eatenus id eum tribuere voluisse, quatenus filius eius in eadem valedudine perseverasset, ut, quemadmodum iure civili pubertate finitur pupillare testamentum, ita princeps imitatus sit ius in eo, qui propter infirmitatem non potest testari. Nam et si furioso filio substituisset, diceremus desinere valere testamentum, cum resipuisset, quia iam posset sibi testamentum facere: etenim iniquum incipit fieri beneficium principis, si adhuc id valere dicamus: auferret enim testamenti factionem homini sanae mentis. Igitur etiam adgnatione sui heredis dicendum est rumpi substitutionem, quia nihil interest, alium heredem institueret ipse filius postea an iure habere coepit suum heredem: nec enim aut patrem aut principem de hoc casu cogitasse verisimile est, ut eum, qui postea nasceretur, exheredaret. Nec interest, quemadmodum beneficium principale intercedat circa testamenti factionem, utrum in personam unius an complurium.

entire estate.

42.- THE SAME; *Definitions, Book I*.- Where a man left two children his heirs who had not yet reached the age of puberty, and made a substitution for them as follows: "If both of them should die", and both died at the same time, after the death of their father, the two estates will belong to the substitute; but if they died at different times, the substitute will find in the estate of the boy who died last that of his brother who died previously, but, according to the terms of the Falcidian Law, the estate of the first boy will not be included; the substitute cannot claim more than an eighth of the estate under the will; and the legacies, with whose distribution the substitute of the son who first died intestate was charged, become of no effect.

43.- PAULUS; *Questions, Book IX*.- A question arises in the following case. A certain man who had a son past the age of puberty that was deaf, obtained permission from the Emperor to appoint a substitute for him, and substituted Titius. The said deaf son married a wife after the death of his father and a son was born to him. I ask whether the will was broken. I answered that princes themselves are accustomed to explain rights which they have granted, but where the intention of the prince is examined in this case, it can be said that he only intended the right to be conceded to the father so long as his son remained in the same condition; and that, just as, according to the Civil Law, pupillary substitution is terminated by puberty, so the Emperor imitated this rule in the case of the son, who was incapable of making a will on account of his infirmity. For if he had made the substitution for a son who was insane, we would say that the will would cease to be valid when the son became of sound mind, because then he himself could make a will; and indeed the privilege bestowed by the Emperor would become unjust if we should hold that the will was valid after this, for it would deprive a man who was sane of the right to make his own will. Therefore it must be held that substitution is also annulled by the birth of a legal heir, because it makes no difference whether the son himself subsequently appointed another heir, or whether he received one by

todos los bienes.

42.- EL MISMO; *Definiciones, libro I*.- Uno que había dejado herederos a dos hijos impúberos, los substituyó de esta manera, si ambos hubiesen muerto, y luego fallecieron al mismo tiempo los hijos después de la muerte del padre; las dos herencias se le defieren al substituto. Pero si fallecieran en diversos tiempos, en la herencia del último menor encontrará el substituto la herencia del hermano de aquel, que murió antes; pero en la cuenta de la Falcidia no se comprenderá la herencia del primer menor, ni el substituto pretenderá por derecho del testamento más que onza y media; y también se hacen írritos los legados que se dejaron a cargo del substituto de aquel hijo, que murió primero intestado.

43.- PAULO; *Cuestiones, libro IX*.- Se pregunta en virtud de este hecho; uno que tenía un hijo púbero mudo, impetró del Príncipe, que le fuese lícito nombrarle substituto al mudo, y le nombró a Ticio por substituto; el mudo se casó después de la muerte de su padre, y le nace un hijo; preguntó, ¿se romperá el testamento? Respondí, que, a la verdad los beneficios de los Príncipes suelen interpretarlos los mismos Príncipes, pero que atendiendo a la voluntad del Príncipe se puede decir que él quiso conceder aquel solamente en cuanto el hijo permanece en la misma enfermedad; y que así como por derecho civil el testamento pupilar se invalida con la pubertad, así el Príncipe se había atendido al derecho respecto a este, que no puede testar por causa de enfermedad. Porque también si se le hubiese dado substituto a un hijo loco, diríamos que dejaba de ser válido el testamento, cuando hubiese sanado, porque ya podría hacer testamento para sí; porque comienza a ser injusto el beneficio del Príncipe, si dijéramos que todavía era válido pues le quitaría la facultad de hacer testamento a un hombre de sano juicio. Así, pues, también se ha de decir, que por la agnación de un heredero suyo se rompe la substitución, porque nada importa que el mismo hijo instituyese después otro heredero, o que por la ley comenzare a tener un heredero suyo; porque no es verosímil que el padre, o el Príncipe, haya pensado en este caso, de suerte que

§ 1.- Item quaero, si ita facta proponatur substitutio: "Filius meus si intra decem annos decesserit, Titius heres esto, si intra quattuordecim, Maevius" filiusque octo annorum decesserit, utrum Titius solus ex substitutione ei heres erit an et Maevius, quia certum est et intra decem et intra quattuordecim annos filium decessisse. Respondi omne quidem spatium, quod est intra pubertatem, liberum esse patri ad substituendum filio, sed finis huius pubertas est: magis autem est in utroque eorum tempus suum separatim servari, nisi contraria voluntas testatoris aperte ostendatur.

§ 2.- Lucius Titius cum haberet filios in potestate, uxorem heredem scripsit et ei substituit filios: quaesitum est, an institutio uxoris nullius momenti sit eo, quod ab eo gradu filii non essent exheredati. Respondi eum gradum, a quo filii praeteriti sint, nullius esse momenti et ideo, cum idem substituti proponantur, ex testamento eos heredes existisse videri, scilicet quia non totum testamentum infirmant filii, sed tantum eum gradum, qui ab initio non valuit, sicut responsum est, si a primo sit filius praeteritus, a secundo exheredatus: nihil autem interest, qua ratione secundi heredis institutio valeat, utrum quia ab eo filius exheredatus est an quia ipse filius substitutus est.

§ 3.- Iulius Longinus pater eos, quos sibi heredes instituerat, filio ita substituit "quisquis sibi heres esset": unus ex heredibus institutis, qui tacitam fidem accommodaverat, ut non capienti partem ex eo quod acceperat daret, ad substitutionem impuberis admissus utrum pro ea parte, pro qua scriptus fuit,

law; for it is not probable that either the father or the Emperor, in this instance, had in view the disinheritance of the son who was afterwards born. Nor does it make any difference in what way the privilege granted by the Emperor may interfere with the execution of the will, or whether it has reference to one, or to several persons.

§ 1.- I also ask where a substitution is made as follows: "If my son should die under the age of ten years, let Titius be my heir; if he should die under the age of fourteen years, let Mævius be my heir", and the son died at the age of eight years, will Titius be his sole heir by virtue of the substitution, or will Mævius also be one, because it is certain that the son died under the age of ten years, as well as under the age of fourteen. I answered that the father had a right to make a substitution for his son during the entire time before he attained the age of puberty, but puberty put an end to this right. The better opinion is that the time prescribed separately for each party should be observed, unless it is clearly evident that the will of the testator was opposed to this.

§ 2.- Lucius Titius, while having children under his control, appointed his wife his heir, and substituted the children for her. The question arose whether the appointment of the wife was of no force or effect, for the reason that the children were not disinherited in this degree. I answered that the degree in which the children were passed over was of no importance, since the same parties were appointed as substitutes who were heirs under the will, that is to say, because the children do not annul the entire will, but only the degree mentioned which was not valid from the beginning; just as it has been determined that if a child is passed over in the first degree, he is disinherited in the second. But it makes no difference for what reason the institution of the second heir is valid, whether because the son was disinherited by his appointment, or because the son himself was appointed a substitute.

§ 3.- Julius Longinus, a father, substituted for his children the heirs that he had appointed for himself as follows: "Whoever shall be my heir." One of the heirs appointed had tacitly agreed to give a share of what he received to a person who was not capable of taking it, having been admitted to the substitution of the son

desheredase al que naciese después. Y no importa de qué modo intervenga el beneficio del Príncipe respecto a la facultad de hacer testamento, si respecto a la persona de uno solo, o a la de muchos.

§ 1.- Asimismo pregunto, si se dijese que la substitución fue hecha de este modo: «si mi hijo falleciere dentro de sus diez años, sea heredero Ticio; si dentro de los catorce, Mevio», y el hijo hubiere fallecido de ocho años, ¿será acaso su heredero en virtud de la substitución solo Ticio, o también Mevio, porque es cierto que el hijo falleció así dentro de los diez, como dentro de los catorce años? Respondí, que ciertamente todo el espacio de tiempo, que hay dentro de la pubertad, lo tiene libre el padre para nombrarle substituto al hijo, pero que la pubertad es el término del mismo; pero que es preferible que respecto de cada uno de ellos se observe por separado su propio tiempo, si no se demostrara claramente la contraria voluntad del padre.

§ 2.- Lucio Ticio, teniendo hijos bajo su potestad, instituyó heredera a su mujer, y a ella le substituyó los hijos; se preguntó, ¿sería de ningún valor la institución de la mujer, porque respecto de este grado no hubiesen sido desheredados los hijos? Respondí, que este grado, en el que fueron preteridos los hijos, no era de valor alguno, y que por esto, como se exponía que los mismos eran substitutos, se consideraba que ellos quedaron siendo herederos en virtud del testamento, a saber, porque los hijos no invalidan todo el testamento, sino solamente aquel grado que desde un principio no fue válido, según se respondió, si el hijo hubiera sido preterido en el primero, y desheredado en el segundo; y nada importa, por qué razón sea válida la institución del segundo heredero, si porque el hijo fue desheredado respecto de él, o porque el mismo hijo fue substituido.

§ 3.- Julio Longino, padre, nombró de este modo substitutos de su hijo a los que había instituido sus herederos: cualquiera que fuese su heredero; uno de los herederos instituidos, que había prestado su tácito consentimiento, para dar parte de aquello que había recibido a otro que no la adquiría, habiendo sido

veniat, an vero pro ea quam cepit, ita ut augeatur eius pars in substitutione? Respondi: qui in fraudem legum fidem accommodat, adeundo heres efficitur nec desinet heres esse, licet res quae relictæ sunt auferuntur. Unde et ex secundis tabulis in tantum heres esse potest, in quantum scriptus esset: satis enim punitus est in eo, in quo fecit contra leges. Quin immo etsi desineret heres esse, idem dicerem: quemadmodum intellegendum est in eo qui, cum scriptus esset heres, postquam adisset hereditatem in servitutem redactus est et postea libertate donatus. Cui permissum est ad substitutionem venire, quæ ei in testamento fuerat relicta: licet enim hereditatem ex institutione amisit, tamen ex substitutione istam portionem, quantum amisit, percepturum.

44.- PAULUS; *libro X quaestionum*.- Ex pupillari testamento superius principali neque ex parte neque in totum confirmari posse Maecianus scripsit.

45.- PAULUS; *libro XII responsorum*.- Lucius Titius legitimus filium et alterum naturalem heredes instituit eosque invicem substituit: Titianus legitimus filius, quem pater anniculum reliquit, post patris mortem impubes decessit superstitibus matre et fratre naturali, quem etiam coheredem habebat: quaero an hereditas eius ad Titium naturalem fratrem ex causa substitutionis pertineat an vero ad matrem. Respondi ad primum casum non existentium heredes substitutionem de qua quaeritur pertinere, non ad sequentem, si quis eorum postea decessisset intra pubertatem, cum in naturalis filii persona duplex substitutio locum habere non poterit: et ideo ad matrem legitimi filii hereditas ab intestato pertinet.

§ 1.- Paulus respondit, si omnes instituti heredes

under the age of puberty; what share should he be permitted to have, the one for which he was appointed, or the one which he took, in order that his share might be increased in the substitution. I answered that he who consents to a fraud against the law, by entering upon an estate, becomes the heir, nor does he cease to be such even though he be deprived of the property left to him under such circumstances. Hence, he can be the heir under the pupillary substitution only to the share to which he was appointed, for he is sufficiently punished for what he did contrary to law; and, indeed, I would say the same even though he ceased to be the heir. The same rule should be understood to apply to anyone who, after he had been appointed heir and entered upon the estate, is reduced to slavery, and is subsequently presented with his freedom, who is permitted to be admitted to the substitution left to him by the will; for although he has lost the inheritance to which he was entitled by his appointment as heir, still, by virtue of the substitution, he can receive the same share which he lost.

44.- THE SAME; *Questions, Book X*.- Marcianus states that the principal will can neither be wholly or partly confirmed by pupillary substitution.

45.- THE SAME; *Opinions, Book XII*.- Lucius Titius appointed as his heirs his legitimate son and a natural son, and substituted them for one another. The legitimate son, Titius, whom his father left only a year old, died after the death of his father without reaching the age of puberty, being survived by his mother, and his natural brother who was also his co-heir. I ask whether his estate will belong to his natural brother, by virtue of the substitution, or will it go to his mother. I answered that the substitution in question relates to the first case where the parties appointed are not heirs, and not to the second where one of the heirs died subsequently under the age of puberty; because double substitution cannot exist in the person of the natural son, and therefore the estate will belong to the mother of the legitimate son ab intestato.

§ 1.- Paulus gave it as his opinion that, "If all the

admitido a la substitución del impúbero, ¿irá a ella acaso por la parte en que fue instituido, o por aquella que recibió, de tal manera que se aumente su parte en la substitución? Respondí, que el que presta su consentimiento en fraude de las leyes, se hace heredero adiendo la herencia, y no deja de ser heredero, aunque se le quitan las cosas que de este modo se le dejaron. Por lo cual también puede ser heredero, en virtud del segundo testamento, por tanto en cuanto, hubiese sido instituido; porque fue bastante castigado en aquello en que obró contra las leyes. Aun más, lo mismo diría yo, también si dejase de ser heredero a la manera que se ha de entender respecto del que, habiendo sido instituido heredero, fue reducido a esclavitud, después que hubiese adido la herencia, y luego se le hubiese hecho donación de la libertad, al cual le es permitido ir a la substitución, que se le había dejado en el testamento; porque aunque perdió la herencia en virtud de la institución, habrá de percibir, sin embargo, en virtud de la substitución la misma porción que perdió.

44.- EL MISMO; *Cuestiones, libro X*.- Escribió Meciano, que por el testamento pupilar no se puede confirmar ni en parte, ni en su totalidad, el anterior testamento principal.

45.- EL MISMO; *Respuestas, libro XII*.- Lucio Ticio instituyó herederos a un hijo legítimo, y a otro natural, y los substituyó recíprocamente; Ticiano, el hijo legítimo, a quien el padre dejó de un año, falleció impúbero después de la muerte del padre, sobreviviéndole su madre y su hermano natural, al que también tenía como coheredero; pregunto, ¿su herencia le pertenecerá por causa de la substitución a Ticio, hermano natural, o a la madre? Respondí, que la substitución, de que se trata, pertenece al primer caso, en que no existan herederos, no al segundo, si alguno de ellos hubiese fallecido después dentro de la pubertad, porque respecto a la persona del hijo natural no podrá tener lugar la doble substitución; y por lo tanto, la herencia pertenece abintestato a la madre del hijo legítimo.

§ 1.- Paulo respondió, que si todos los herederos

omnibus invicem substituti essent, eius portionem, qui quibusdam defunctis postea portionem suam repudiavit, ad eum solum, qui eo tempore supervixit, ex substitutione pertinere.

46.- PAULUS; *libro XIII responsorum*.- Pater familias primis tabulis postumo herede instituto secundis sibi vel filio, si intra pubertatem decessisset, Gaium Seium fratrem suum substituit, deinde Titium Gaio Seio, et postea sic dixit: "Quod si Gaius Seius frater meus primo loco substitutus heres mihi esset, tunc Titio fideicommissum relinquo". Quaero, cum filius patri heres exstiterit eoque intra pubertatem mortuo frater testatoris ex substitutione heres sit, an fideicommissum debeat, cum ita relictum sit, si Gaius Seius frater suus sibi heres extitisset. Respondi fratrem defuncti, qui in utrumque casum institutus vel substitutus est, filio impubere defuncto ea quae testator reliquit praestare debere: nec adversari haec verba "quod si Gaius Seius mihi heres erit, tunc dari volo", cum verum sit eum et testatori heredem exstisise.

47.- SCAEVOLA; *libro II responsorum*.- Qui habebat filium et filiam impuberes, instituto filio herede filiam exheredavit et, si filius intra pubertatem decessisset, filiam eidem substituit: sed filiae, si antequam nuberet decessisset, uxorem suam, item sororem suam substituit. Quaero, cum filia impubes prior decesserit, deinde frater eius impubes, an filii hereditas ad uxorem et sororem testatoris iure substitutionis pertineat. Respondi secundum ea quae proponerentur non pertinere.

48.- SCAEVOLA; *libro singulari quaestionum publice tractatarum*.- Servum communem habemus:

appointed heirs were substituted for one another, the portion of one of them who, after some of his co-heirs have died, rejected his share, will, by virtue of the substitution, belong to the heir alone who was living at the time".

46.- THE SAME; *Opinions, Book XIII*.- The father of a family having appointed his posthumous child his heir by his will, substituted his brother, Gaius Seius, for himself, or his son if he should die before reaching the age of puberty, and then substituted Titius for Gaius Seius, and afterwards said: "If my brother, Gaius Seius, whom I substituted in the first place, should be my heir, then I appoint Titius trustee." I ask, if the son should be the heir of his father, and having died before the age of puberty, his brother should become the heir of the testator by virtue of the substitution, whether the trust must be discharged when it was created as follows: "If Gaius Seius, my brother, should be my heir"? I answered that the brother of the deceased, who was appointed or substituted in both cases, must deliver the property which the testator bequeathed, if the son should die before reaching the age of puberty, and that the meaning of the following words cannot be disputed: "If Gaius Seius should be my heir, then I desire the property to be given", since it is a fact that he was the heir of the testator.

47.- SCAEVOLA; *Opinions, Book II*.- A certain person had a son and a daughter, both under the age of puberty, and having appointed his son his heir, he disinherited his daughter, and substituted her for his son, "If the latter should die under the age of puberty"; and then he appointed his wife and his sister as substitutes for his daughter, if she should die before being married. I ask, if the daughter should die first, after having reached the age of puberty, and her brother afterwards, before reaching that age, whether the estate of the son would by the right of substitution belong to the wife and sister of the testator. I answered that, in accordance with the facts stated, it would not belong to them.

48.- THE SAME; *Questions Publicly Treated*.- We own a slave in common; he is appointed an heir; and

instituidos hubiesen sido recíprocamente substituidos a todos, la porción de aquel, que después de haber fallecido algunos rechazó su porción, pertenece en virtud de la substitución solo al que sobrevivió en aquel tiempo.

46.- EL MISMO; *Respuestas, libro XIII*.- Un padre de familia, habiendo instituido en su primer testamento heredero a un póstumo, nombró substituto en el segundo para si o para su hijo, si hubiese fallecido dentro de la pubertad, a Cayo Seyo, su hermano, y después para Cayo Seyo a Ticio, y luego dijo de este modo: «pero si Cayo Seyo, mi hermano, substituido en primer lugar, fuese mi heredero en este caso dejo a Ticio un fideicomiso»; pregunto habiendo quedado heredero del padre el hijo, y siendo muerto éste dentro de la pubertad, heredero en virtud de la substitución el hermano del testador, ¿se deberá el fideicomiso, puesto que se dejó en esta forma, si Cayo Seyo, su hermano, hubiese sido su heredero? Respondí, que el hermano del difunto, que para ambos casos fue, habiendo fallecido impúbere el hijo, instituido o substituido, debe dar lo que dejó el testador, .Y que no se oponen a ello estas palabras: «pero si Cayo Seyo fuere mi heredero, en este caso quiero que se dé», porque es verdad que él quedó siendo heredero también del testador.

47.- SCÉVOLA; *Respuestas, libro II*.- Uno, que tenía un hijo y una hija impúberos, desheredó a la hija habiendo instituido heredero al hijo, y, si el hijo hubiese fallecido dentro de la pubertad, al mismo le substituyó la hija, pero a la hija, si hubiese fallecido antes de casarse, le substituyó su mujer, y también su hermana; pregunto, habiendo fallecido primero la hija, impúbera, y después su hermano, impúbere, ¿les pertenecerá por derecho de la substitución la herencia del hijo a la mujer y a la hermana del testador? Respondí, que, según lo que se exponía, no les pertenece.

48.- EL MISMO; *Cuestiones tratadas en público, libro único*.-Tenemos en común un esclavo el cual

hic heres scriptus est et, si heres non sit, Maevius illi substitutus est: alterius iussu dominorum adiit hereditatem, alterius non: quaeritur, an substituto locus sit an non. Et verius est substituto locum esse.

§ 1.- "Titius heres esto. Stichum Maevio do lego: Stichus heres esto. Si Stichus heres non erit, Stichus liber heresque esto". In hac quaestione in primis quaerendum est, utrum unus gradus sit an duo, et an causa mutata sit substitutionis an eadem permaneat. Et quidem in plerisque quaeritur, an ipse sibi substitui possit, et respondetur causa institutionis mutata substitui posse. Igitur si Titius heres scriptus sit et, si heres non sit, idem heres iussus sit, substitutio nullius momenti erit. Sed si sub condicione quis heres scriptus sit, pure autem substitutus est, causa immutatur, quoniam potest ex institutione defici condicio et substitutio aliquid adferre: sed si exstiterit condicio, duae purae sunt et ideo nullius momenti erit substitutio.

Contra si pure quis instituatur, deinde sub condicione sibi substituat, nihil facit substitutio condicionalis nec mutata intellegatur, quippe cum et si exstiterit condicio, duae purae sunt institutiones. Secundum haec proposita quaestio manifestetur: "Titius heres esto. Stichum Maevio do lego: Stichus heres esto. Si Stichus heres non erit, Stichus liber heresque esto". Nos didicimus, quoniam eodem testamento et legatus sit Stichus et libertatem accepit, praevalere libertatem et, si praevalet libertas, non deberi legatum et ideo iussu legatarii non posse adire hereditatem, ac per hoc verum esse Stichum heredem non esse et ex sequentibus verbis libertatem illi competere: cum unus gradus videtur. Quid ergo, si non adierit Titius? Incipiet substitutione Stichus liber et heres esse. Porro quamdiu non adit iussu legatarii, nec ex causa legati intellegitur legatarii esse effectus, et ideo certum est illum heredem non esse, ac per hoc ex his verbis: "Si heres non erit, Stichus liber

Mævius is substituted for him in case he should not be the heir. The slave accepts the estate by the direction of only one of his masters, and the question arises whether there is ground for the admission of the substitute, or not. The better opinion is that there is ground for his admission.

§ 1.- "Let Titius be my heir. I give and bequeath Stichus to Mævius. Let Stichus be my heir, if Stichus should not become my heir, let Stichus be free and my heir." In this instance, inquiry must first be made whether there is one degree or two, and whether the condition of the substitution is changed, or remains the same. And, indeed, the question frequently arises whether a party can be substituted for himself, and the answer is that where the condition of the appointment is changed he can be substituted. Therefore, if Titius is appointed heir, and if he should not accept he is ordered to become the heir, the substitution is of no force or effect. Where, however, a party is appointed an heir under a condition, but is substituted absolutely, the case is changed, since the condition upon which the appointment depends may not be fulfilled, and the substitution may be productive of some advantage to the heir. But if the condition should be fulfilled, there are two absolute appointments, and the substitution will have no force or effect.

On the other hand, if anyone appoints an heir absolutely, and then substitutes him for himself under some condition, this conditional substitution is inoperative, nor is anything understood to be changed, since, if the condition had been fulfilled, there would be two absolute appointments of the same individual. According to this, the question stated is as follows: "Let Titius be my heir, I give and bequeath Stichus to Mævius; let Stichus be my heir, if Stichus should not be my heir, let him be free and be my heir". We know that since Stichus was bequeathed and received his freedom by virtue of the same will, his freedom will take precedence, and if it does, the legacy will not be due, and he cannot enter upon the estate by order of the legatee, and therefore Stichus is not an heir and by virtue of the words which follow he is entitled to freedom; as it is held that there is but one degree of appointment. But what if Titius should not accept the estate? Stichus would

fue instituido heredero, y, si él no fuera heredero, le fue substituido Mevio; adió la herencia por mandato de uno de los dueños, no por el del otro; se pregunta, ¿habrá lugar para el substituto, o no? Y es más cierto, que hay lugar para el substituto.

§ 1.- «Sea heredero Ticio; doy y lego Stico a Mevio; sea heredero Stico; si Stico no fuere heredero, sea libre y heredero Stico». En este caso se ha de inquirir en primer lugar, si hay un solo grado, o dos, y si se ha mudado la causa de la substitución, o si permanece la misma. Y, a la verdad, en muchos casos se pregunta, si uno puede substituirse a sí mismo; y se responde, que mudada la causa de la institución se puede uno substituir. Así, pues si Ticio hubiera sido instituido heredero, y, si no fuese heredero, se le mandase que sea heredero, la substitución no será de ningún valor. Pero si uno hubiera sido instituido heredero bajo condición, pero substituido puramente, se altera la causa, porque puede faltar la condición de la institución, y producir algún resultado la substitución; pero si se hubiere cumplido la condición, las dos serán puras, por lo tanto no será de valor alguno la substitución.

Al contrario, si uno fuera instituido puramente, y luego fuera substituido a sí mismo bajo condición, nada hace la substitución condicional y no se entienda mudada la causa, porque aunque se hubiere cumplido la condición, hay dos instituciones puras. Según esto quede evidenciada la cuestión propuesta: «sea heredero Ticio; doy y lego Stico a Mevio; sea heredero Stico; si Stico no fuere heredero, sea libre y heredero Stico»; nosotros hemos aprendido, que como en el mismo testamento fue legado Stico y recibió la libertad, prevalece la libertad, y que si prevalece la libertad, no se debe el legado, y no puede por lo tanto adir la herencia por mandato del legatario, y que por esto es verdad que Stico no es heredero, y que en virtud de las palabras que siguen le compete la libertad, porque se considera que hay un solo grado. Luego ¿qué se dirá, si Ticio no hubiere adido la herencia? Que en virtud de la substitución Stico comenzará a ser libre y heredero; ciertamente,

heresque esto", liber et heres existet. Hoc autem, quod sentimus, Iulianus quoque in libris suis probat.

§ 2.- Si pupillus substitutum sibi servum alienaverit eumque emptor liberum heredemque instituerit, numquid iste in substitutione habeat substitutum universum? Ut, si quidem pupillus ad pubertatem pervenerit, necessarius ex testamento emptoris heres exstitit, sin vero intra pubertatem decesserit, ex substitutione quidem liber et heres sit et necessarius patri pupilli, emptori autem voluntarius heres exstitit.

TIT. VII

DE CONDICIONIBUS INSTITUTIONUM

1.- ULPIANUS; *libro V ad Sabinum*.- Sub impossibili condicione vel alio mendo factam institutionem placet non vitari.

2.- ULPIANUS; *libro VI ad Sabinum*.- Si testamento comprehensum sit: "Ille servus, si meus erit" (aut "qui meus erit") "cum moriar, heres esto", quatenus accipiatur "meus", quaeritur. Et si quidem alienavit in eo usum fructum, nihilo minus ipsius est: si vero partem in eo alienavit, an deficiat condicio institutionis, quaeritur. Et verius est non defecisse condicionem, nisi evidentissimis probationibus testatorem voluisse apparuerit pro hac condicione haec verba inseruisse "si totus servus in dominio eius remanserit": tunc enim parte alienata condicio deficit.

begin to be free and an heir by virtue of the substitution. Hence, as long as he does not enter upon the estate by order of the legatee, it is understood that he does not become the property of the legatee on account of the legacy, and therefore it is certain that he is not an heir; but he becomes free and an heir by virtue of the following words: "If he should not be my heir, let Stichus be free and be my heir." Julianus also approves of our opinion in his works.

§ 2.- If a minor alienates a slave who has been substituted for himself, and the purchaser of said slave appoints him his heir with the grant of his freedom, will the substituted slave be entitled to the entire estate of the minor by reason of the substitution? If the minor should reach the age of puberty, the slave will become the necessary heir of the purchaser by virtue of his will, but if the minor should die before attaining that age, the slave will become free and his heir on account of the substitution, and also will become the necessary heir of the father of the minor, but he will be the voluntary heir of the purchaser.

TITLE VII

CONCERNING THE CONDITIONS OF APPOINTMENTS

1.- ULPIANUS; *On Sabinus, Book V*.- It is established that an appointment made under a condition which is impossible, or through mistake, is not void.

2.- THE SAME; *On Sabinus, Book VI*.- Where it was stated in a will: "Let a certain slave, if he should be mine"; or, "If he should be mine at the time I die, be my heir", the question arises how should the term "mine" be understood. If the testator should alienate the usufruct in the slave, the latter will, nevertheless, belong to him; but the question is whether the condition of the appointment would fail if he alienated a portion of his ownership in said slave. The better opinion is, that the condition would not fail, unless it appeared by the clearest evidence that the intention of the testator, when he inserted the words

mientras no ade la herencia por mandato del legatario, no se entiende que por causa del legado se hizo del legatario; y por lo tanto es cierto, que él no es heredero, y por esto en virtud de estas palabras; «si no fuere heredero, sea libre y heredero Stico», será libre y heredero. Mas esto que opinamos, lo aprueba también Juliano en sus libros.

§ 2.- Si el pupilo hubiere enajenado el esclavo que a él le había sido substituido, y el comprador lo hubiere instituido libre y heredero, ¿tendrá acaso este substituto la totalidad en la substitución? Y si verdaderamente el pupilo hubiere llegado a la pubertad, quedó siendo heredero necesario en virtud del testamento del comprador; mas si hubiere fallecido dentro de la pubertad, se hace ciertamente libre y heredero en virtud de la substitución, y es heredero necesario del padre del pupilo, pero voluntario del comprador.

TITULO VII

DE LAS CONDICIONES DE LAS INSTITUCIONES

1.- ULPIANO; *Comentarios a Sabino, libro V*.- Está determinado, que no se vicia la institución hecha bajo una condición imposible, o con otro engaño.

2.- EL MISMO; *Comentarios a Sabino, libro VI*.- Si en el testamento se hubiera expresado: «sea heredero aquel esclavo, si fuere mío, o «que será mío, cuando yo muera», se pregunta, cómo se entenderá la palabra «mío». Y si verdaderamente enajenó el usufruto sobre él, es, sin embargo, de él mismo; pero si enajenó parte de él, se pregunta si falta la condición de la institución. Y es más verdadero, que no faltó la condición, si con evidéntísimas pruebas no hubiere aparecido que el testador quiso consignar estas palabras en lugar de esta condición, si todo el esclavo hubiere permanecido en su dominio; porque enton-

§ 1.- Sed si duo servi ita sint heredes instituti: "Primus et secundus, si mei erunt cum moriar, liberi et heredes sunto" et alter ex his sit alienatus, Celsus recte putat sic accipiendum, atque si singulos separatim sub eadem condicione heredes instituisset.

3.- PAULUS; *libro I ad Sabinum*.- Si ita heres institutus sim, si decem dederó, et accipere nolit cui dare iussus sum, pro impleta condicione habetur.

4.- ULPIANUS; *libro VIII ad Sabinum*.- Si qui ita sint instituti: "Si socii una bonorum meorum permanserint usque ad annos sedecim, heredes sunto", inutilem esse institutionem secundum verborum significationem Marcellus ait: Iulianus autem, quoniam et ante aditam hereditatem iniri societas potest quasi rei futurae, valere institutionem, quod est verum.

§ 1.- Idem Iulianus scribit eum, qui ita heres institutus est, si servum hereditarium non alienaverit, caventem coheredi implere condicionem: ceterum si solus heres scriptus sit, sub impossibili condicione heredem institutum videri: quae sententia vera est.

5.- PAULUS; *libro II ad Sabinum*.- Si heredi plures condiciones coniunctim datae sint, omnibus parendum est, quia unius loco habentur, si disiunctim sint, cuilibet.

6.- ULPIANUS; *libro IX ad Sabinum*.- Si quis ita institutus sit, si monumentum post mortem testatoris

relative to the condition, was that the entire ownership of the slave should remain in him, for then, if any part in him was alienated, the condition would not be fulfilled.

§ 1.- Where, however, there are two slaves who are appointed heirs in the following words: "If the first and second slaves mentioned should belong to me at the time of my death, let them be free and my heirs", and one of them should be alienated, Celsus very properly holds that the language should be understood to mean the same as if the testator had appointed the slaves his heirs separately, and under the same condition.

3.- PAULUS; *On Sabinus, Book I*.- If I am appointed an heir under the condition: "If I pay ten aurei", and the party to whom I am ordered to pay the money refuses to accept it, the condition is held to have been complied with.

4.- ULPIANUS; *On Sabinus, Book VIII*.- If certain heirs should be appointed as follows: "If they remain partners in my property until they reach the age of sixteen years, let them be my heirs", Marcellus says that an appointment made in language of this kind is void. Julianus, however, holds that such an appointment is valid, since the partnership can be formed for some future purpose, before the estate is entered upon. This is correct.

§ 1.- Julianus also says, where anyone appoints an heir under the condition: "If he does not alienate a certain slave belonging to the estate", that the condition is fulfilled when the heir furnishes his coheir with security. However, where only one heir is mentioned, he is held to have been appointed under an impossible condition, which opinion is correct.

5.- PAULUS; *On Sabinus, Book II*.- Where several conditions together are imposed upon an heir, all of them must be complied with, for the reason that they are considered as one; where, however, they are imposed separately, each must be complied with by itself.

6.- ULPIANUS; *On Sabinus, Book IX*.- Where an heir has been appointed under the condition: "If he

ces, enajenada una parte, falta la condición.

§ 1.- Pero si dos esclavos hubieran sido instituidos herederos de este modo: «Primo y Segundo, si fueren míos cuando yo muera, sean libres y herederos», y uno de ellos hubiera sido enajenado, con razón opina Celso, que esto se ha de entender lo mismo que si a cada uno lo hubiese instituido por separado heredero bajo la misma condición.

3.- PAULO; *Comentarios a Sabino, libro I*.- Si yo hubiera sido instituido heredero de este modo, si diere diez, y no quisiera recibirlos aquel a quien se me mandó que los diera, se tiene por cumplida la condición.

4.- ULPIANO; *Comentarios a Sabino, libro VIII*.- Si algunos hubieran sido instituidos de este modo: «sean herederos, si juntos hubieren permanecido siendo socios de mis bienes hasta los dieciséis años», dice Marcelo, que es inútil la institución conforme a la significación de las palabras; pero opina Juliano, que como se puede constituir sociedad también antes de haber sido adida la herencia, como si fuera sobre cosa futura, es válida la institución; lo que es verdad.

§ 1.- Escribe el mismo Juliano, que el que fue instituido heredero de este modo, si no hubiere enajenado un esclavo de la herencia, cumple la condición dando caución al coheredero; pero que, si hubiera sido instituido único heredero, se le considera instituido heredero bajo una condición imposible; cuya opinión es verdadera.

5.- PAULO; *Comentarios a Sabino, libro II*.- Si al heredero se le hubieran impuesto conjuntamente muchas condiciones, se ha de obedecer a todas, porque se consideran como una sola; si lo hubieran sido disyuntivamente, a la que se quisiere.

6.- ULPIANO; *Comentarios a Sabino, libro IX*.- Si uno hubiera sido instituido de este modo, si después

in triduo proximo mortis eius fecisset: cum monumentum in triduo perfici non possit, dicendum erit condicionem evanescere quasi impossibilem.

7.- POMPONIUS; *libro V ad Sabinum*.- Si quis sub condicione heredes instituisset, si invicem cavissent se legata eo testamento relicta reddituros, placet remitti eis condicionem, quia ad fraudem legum respiceret, quae vetarent quosdam legata capere: quamquam et si cautum esset, in ipsa actione exceptione tuendus esset promissor.

8.- ULPIANUS; *libro L ad edictum*.- Quae sub condicione iurisiurandi relinquuntur, a praetore reprobantur: providit enim, ne is, qui sub iurisiurandi condicione quid accepit, aut omittendo condicionem perderet hereditatem legatumve aut cogere turpiter accipiendi condicionem iurare. Voluit ergo eum, cui sub iurisiurandi condicione quid relictum est, ita capere, ut capiunt hi, quibus nulla talis iurisiurandi condicio inseritur, et recte: cum enim faciles sint nonnulli hominum ad iurandum contemptu religionis, alii perquam timidi metu divini numinis usque ad superstitionem, ne vel hi vel illi aut consequerentur aut perderent quod relictum est, praetor consultissime intervenit. Etenim potuit is, qui voluit factum, quod religionis condicione adstringit sub condicione faciendi relinquere: ita enim homines aut facientes admitterentur aut non facientes deficerentur condicione.

§ 1.- Hoc edictum etiam ad legata pertinet, non tantum ad heredum institutionem.

should erect a monument to the testator within three days after his death", and the monument cannot be completed in three days, it must be said that the condition vanished, as being impossible.

7.- POMPONIUS; *On Sabinus, Book V*.- If anyone should appoint heirs under the condition: "If they give security to one another to pay the legacies left by the will", it is established that they are released from complying with the condition, because it was made in violation of the laws which forbid certain persons to receive legacies; although, even if security should be furnished, the heirs would be protected by an exception in an action at law.

8.- ULPIANUS; *On the Edict, Book L*.- Whatever is left by a testator under the condition of taking an oath is disapproved by the Praetor. For he takes care that no one who accepts any property under the condition of taking an oath, or by omitting to comply with the condition, shall lose the estate, or a legacy, or that he shall be compelled shamefully to take an oath on condition of receiving what was bequeathed to him. The Praetor, therefore, sees that anyone to whom property was left under the condition of taking an oath, can acquire it just as those do upon whom no condition of being sworn is imposed, and in this case he acts very properly, as there are some men who, through their contempt for religion, are always ready to take an oath, and there are others who are timid, even to superstition, on account of their fear of Divinity; hence the Praetor most wisely interposes his authority, in order that neither the latter nor the former may either acquire or lose what was left to them in this manner. For he who wishes, by the influence of religion, to restrain those to whom he left property under the condition of taking an oath, would not be able to accomplish his purpose unless they did so; for the parties complying with the condition would be admitted to the succession, or if they failed to comply with it, they would be excluded on account of non-fulfillment of the condition.

§ 1.- This Edict also relates to legacies, and not merely to the appointment of heirs.

de la muerte del testador hubiese hecho un monumento en los tres días próximos a su muerte no pudiéndose acabar el monumento en los tres días, se habrá de decir que se invalida la condición, como imposible.

7.- POMPONIO; *Comentarios a Sabino, libro V*.- Si alguno hubiese instituido herederos bajo esta condición, si recíprocamente se hubiesen dado caución de que ellos devolverán los legados dejados en aquel testamento, se determina, que se les remita la condición, porque tendería al fraude de las leyes, que vedasen que algunos recibiesen legados, aunque también si se hubiese dado caución, habría de ser amparado con excepción en la misma acción el que prometió.

8.- ULPIANO; *Comentarios al Edicto, libro L*.- Se reprueba por el Pretor lo que se deja bajo condición de juramento; porque provee, a fin de que el que recibió una cosa bajo condición de juramento no pierda la herencia o el legado no cumpliendo la condición, o no sea obligado torpemente a jurar la condición para adquirir. Quiso; pues, que aquel a quien se le dejó alguna cosa bajo condición de juramento, la reciba así como la reciben aquellos a quienes no se les impone ninguna tal condición de juramento; y con razón. Porque como algunos hombres sean fáciles para jurar con menosprecio de la religión, y otros demasiado tímidos por temor al divino numen hasta la superstición, prudentísimamente interviene el Pretor, para que ni unos consigan, ni otros pierdan lo que se les dejó. Porque pudo el que quiso que se hiciera lo que sujeta a la condición del juramento, dejarlo bajo la condición de que se haga; pues de este modo serían admitidos los hombres que lo hicieran, o serían excluidos por la condición los que no lo hicieran.

§ 1.- Este Edicto es aplicable también a los legados, no solamente a la institución de herederos.

§ 2.- In fideicommissis quoque oportebit eos, qui de fideicommisso cognoscunt, subsequi praetoris edictum eapropter, quia vice legatorum funguntur.

§ 3.- Et in mortis causa donationibus dicendum est edicto locum esse, si forte quis caverit, nisi iurasset se aliquid facturum, restitutum quod accepit: oportebit itaque remitti cautionem.

§ 4.- Si quis sub iurisiurandi condicione et praeterea sub alia sit institutus, huic videndum est an remittatur condicio: et magis est, ut remitti iurisiurandi condicio debeat, licet alii condicioni parendum habeat.

§ 5.- Sed si sub iurisiurandi condicione sit institutus aut si decem milia dederit, hoc est alternata condicione, ut aut pareat condicioni aut iuret aliud quid, videndum, numquid remitti ei condicio non debet, quia potest alteri condicioni parendo esse securus. Sed est verius remittendam condicionem, ne alia ratione condicio alia eum urgeat ad iusiurandum.

§ 6.- Quotiens heres iurare iubetur daturum se aliquid vel facturum: quod non improbum est, actiones hereditarias non alias habebit, quam si dederit vel fecerit id, quod erat iussus iurare.

§ 7.- Mortuo autem vel manumisso Sticho vivo testatore qui ita heres institutus est, si iurasset se Stichum manumissurum, non videbitur defectus condicione heres, quamvis verum sit compellendum eum manumittere, si viveret. Idem est et si ita heres institutus esset quis: "Titius heres esto ita, ut Stichum manumittat" aut "Titio centum ita lego, ut Stichum manumittat". Nam mortuo Sticho nemo dicit summovendum eum: non videtur enim defectus condicione, si parere condicioni non possit: implenda est enim voluntas, si potest.

§ 2.- With reference to trusts, it is also necessary for those who have jurisdiction over a trust to obey the Edict of the Praetor; for the reason that trusts are discharged in the same manner as legacies.

§ 3.- In the case of donations mortis causa, it must be said that there is ground for the application of the Edict; if, for instance, anyone should provide that the party must surrender whatever he received, unless he swears that he will perform some act. Therefore, it will be necessary for the bond to be given up.

§ 4.- Where anyone has been appointed under the condition of taking an oath, as well as under some other condition, it must be considered whether he can be released from the performance of the condition. The better opinion is, that he should be released from the condition of the oath, although he may be obliged to comply with the other condition.

§ 5.- But where an heir has been appointed under the condition of taking an oath, or of the payment of ten thousand aurei, that is to say, that he is required either to pay the money or be sworn, it must be considered whether he should not be released from one condition because he can be secure by complying with the other. The better opinion is, that he should be released from the first condition, lest, by some means, he may be compelled to take the oath.

§ 6.- Whenever an heir is ordered by the testator, "To give something, or to perform some act", which is not dishonorable, he will not be entitled to an action unless he gives or does what he was ordered to swear to do.

§ 7.- When an heir was appointed on the condition that he would swear to manumit Stichus, and Stichus died, or was manumitted during the lifetime of the testator, the condition will not be held to have been violated; although it is true that the heir would have been compelled to manumit the slave if he had lived. The same rule applies where an heir was appointed as follows: "Let Titius be my heir, in order that he may manumit Stichus"; or, "I bequeath a hundred aurei to Titius, in order that he may manumit Stichus". For if Stichus should die, no one can say that the heir will be barred from receiving the legacy, for he is not considered to have failed to comply with the condition, when he was unable to do so, and the will of the testator must be executed if this can be done.

§ 2.- También convendrá que en los fideicomisos se atengan al Edicto del Pretor los que conocen del fideicomiso, por esto, porque hacen veces de legados.

§ 3.- Y en las donaciones por causa de muerte se ha de decir que tiene lugar el Edicto, si acaso alguno hubiere dado caución de que restituirá lo que recibió, si no hubiese jurado que él haría alguna cosa; y así, convendrá que se le remita la caución.

§ 4.- Si alguno hubiera sido instituido bajo la condición de juramento, y además bajo otra, se ha de ver, si a éste se le remitirá la condición; y es más cierto, que se le deba remitir la condición del juramento, aunque tenga que prestar cumplimiento a la otra condición. .

§ 5.- Mas si hubiera sido instituido bajo condición de juramento, o si hubiere dado diez mil, esto es, bajo la condición alternativa, de que o cumpla la condición, o jure; se ha de ver otra cosa, si no se le deberá remitir la condición, porque puede estar seguro cumpliendo la otra condición; pero es más verdadero, que se le ha de remitir la condición, para que por otro motivo no le apremie la otra condición al juramento.

§ 6.- Cuando se manda que jure el heredero, que él dará o hará alguna cosa, que no es ilícita, no tendrá las acciones de la herencia de otra suerte, que si hubiere dado o hecho lo que se le había mandado jurar.

§ 7.- Mas habiendo muerto o sido manumitido Stico viviendo el testador, el que fue instituido heredero en esta forma, si hubiese jurado que él manumitirá a Stico, no se considerará que como heredero faltó a la condición, aunque sea verdad que habría de ser compelido a manumitirlo, si viviese. Lo mismo es, también si de esta suerte uno hubiese sido instituido heredero: «sea heredero Ticio, con tal que manumita a Stico», o «lego ciento a Ticio, con tal que manumita a Stico»; porque muerto Stico, nadie dirá que él deba ser repelido; porque no se considera que faltó a la condición, si no pudiera cumplir la condición, pues se ha de cumplir la voluntad, si se puede.

§ 8.- De hoc iureiurando remittendo non est necesse adire praetorem: semel enim in perpetuum a praetore remissum est nec per singulos remittendum. Et idcirco ex quo dies legati cesserit, remissum videtur etiam ignorante scripto herede. Ideoque in herede legatarii recte probatur, ut post diem legati cedentem si decesserit legatarius, debeat heres eius actione de legato uti, quasi pure legato relicto ei cui heres exstiterat.

9.- PAULUS; *libro XLV ad edictum*.- Condiciones, quae contra bonos mores inseruntur, remittendae sunt, veluti "si ab hostibus patrem suum non redemerit", "si parentibus suis patronove alimenta non praestiterit".

10.- ULPIANUS; *libro VIII disputationem*.- Institutio talis: "Si codicillis Seium heredem scripsero, heres esto" non est inutilis in quovis herede instituto praeter filium: est enim condicionalis institutio. Nec videtur hereditas codicillis data, quod interdictum est, verum condicionalis est haec institutio, quae testamento data esset. Proinde et si ita scripserit: "Cuius nomen codicillis scripsero, ille mihi heres esto", pari ratione dicendum erit institutionem valere nullo iure impediante.

§ 1.- Si quem ita institutum ponamus: "Ille, si eum codicillis heredem scripsi, heres esto", valet institutio etiam in filio qui in potestate est, cum nulla sit condicio, quae in praeteritum confertur vel quae in praesens, veluti "si rex parthorum vivit", "si navis in portu stat".

11.- IULIANUS; *libro XXIX digestorum*.- Si quis testamento hoc modo scripserit: "Filius meus si Titium adoptaverit, heres esto: si non adoptaverit, exheres esto" et filio parato adoptare Titius nolit se

§ 8.- It is not necessary to appear before the Praetor for the purpose of being released from this oath, for where a release is once given by the Praetor it is good for all time; and a release is not obligatory in each individual instance. Therefore, it is held that a release is granted from the day on which the legacy was payable, even though the appointed heir was ignorant of the fact. Hence, it is very properly held in the case of the heir of a legatee, that if the legatee should die after the day appointed for the payment of the legacy, his heir must make use of the action de legato, just as if the legacy had been left unconditionally to the party whom he succeeded as heir.

9.- PAULUS; *On the Edict, Book XLV*.- A release is also given from conditions which are opposed to good morals, for instance, "If he should not ransom his father from the enemy"; or "If he should not furnish support to his parents or his patron".

10.- ULPIANUS; *Disputations, Book VIII*.- An appointment like the following: "If I appoint Seius my heir by a codicil, let him be my heir", is not void, so far as the appointed heir is concerned, except where that heir is a son; for this is a conditional appointment, and the estate is not held to be bequeathed by a codicil, which is forbidden by law, but it is a conditional appointment made by will. Hence, if the testator should say: "Let him be my heir whose name I shall insert in a codicil", it must be held, for the same reason, that the appointment will be valid, there being no law preventing it.

§ 1.- If we make an appointment as follows: "Let So-and-So be my heir, if I have appointed him heir by a codicil", the appointment will be valid, even with reference to a son who is under paternal control, because a condition is not imposed every time that the past or present is referred to; for example: "If the King of the Parthians should be living"; "If a ship should be in port."

11.- JULIANUS; *Digest, Book XXIX*.- Where a party makes an appointment by will, as follows: "Let my son be my heir, if he adopts Titius, and if he does not adopt him, let him be disinherited"; and if the son

§ 8.- No es necesario recurrir al Pretor para que se remita este juramento; porque fue remitido por el Pretor una vez para siempre, y no se le ha de remitir a cada uno. Y por lo tanto, se considera remitido, aún ignorándolo el heredero instituido, desde que correiere el día del legado. Y por esto, con razón se aprueba respecto al heredero del legatario, que si el legatario hubiere fallecido después que corriese el día del legado, deberá utilizar su heredero la acción de legado, cual si puramente se le hubiera dejado el legado a aquel de quien había quedado heredero.

9.- PAULO; *Comentarios al Edicto; libro XLV*.- Se han de remitir las condiciones que se insertan contra las buenas costumbres, por ejemplo, si no hubiere rescatado de los enemigos a su padre, si no prestare alimentos a sus ascendientes, o a su patrono.

10.- ULPIANO; *Disputas, libro VIII*.- Esta institución: «si en los codicilos yo hubiere instituido heredero a Seyo, sea heredero», no es inútil respecto a cualquier heredero instituido, excepto el hijo; porque es una institución condicional, y no se considera que la herencia fue dada en codicilos, cosa que está prohibida, sino que es condicional esta institución, que se hubiese puesto en el testamento. Por lo cual, también si uno hubiere escrito de este modo: «sea mi heredero aquel cuyo nombre yo hubiere escrito en los codicilos», por la misma razón se habrá de decir, que la institución es válida sin que lo impida ningún derecho.

§ 1.- Si suponemos que uno fue instituido de esta manera: «sea heredero aquel, si lo escribí como heredero en los codicilos», es válida la institución aún respecto del hijo que está bajo la potestad, porque es nula la condición, que se refiere al tiempo pasado, o la que el presente, por ejemplo: «si vive el rey de los Partos, si la nave está en el puerto».

11.- JULIANO; *Digesto, libro XXIX*.- Si alguno hubiere escrito de este modo en su testamento: «sea heredero mi hijo, si hubiere adoptado a Ticio; si no lo hubiere adoptado, sea desheredado», y dispuesto el

adrogandum dare, erit filius heres quasi expleta condicione.

12.- HERMOGENIANUS; *libro III iuris epitomatum*.- Verba haec: "Publius Maevius, si volet, heres esto", in necessario condicionem faciunt, ut, si nolit, heres non existat: nam in voluntaria heredis persona frustra adduntur, cum, etsi non fuerint addita, invitus non efficitur heres.

13.- IULIANUS; *libro XXX digestorum*.- Ei qui ita hereditatem vel legatum accepit "si decem dederit" neque hereditas neque legatum aliter acquiri potest, quam si post impletam condicionem id egerit scriptus heres vel legatarius, per quod hereditas aut legatum acquiri solet.

14.- MARCIANUS; *libro IV institutionum*.- Condiciones contra edicta imperatorum aut contra leges aut quae legis vicem optinent scriptae vel quae contra bonos [bones] mores vel derisoriae sunt aut huiusmodi quas praetores improbaverunt pro non scriptis habentur et perinde, ac si condicio hereditati sive legato adiecta non esset, capitur hereditas legatumve.

15.- PAPINIANUS; *libro XVI quaestionum*.- Filius, qui fuit in potestate, sub condicione scriptus heres, quam senatus aut princeps improbant, testamentum infirmat patris, ac si condicio non esset in eius potestate: nam quae facta laedunt pietatem existimationem verecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est.

16.- MARCIANUS; *libro IV institutionum*.- "Si Titius heres erit, Seius heres esto: si Seius heres erit, Titius heres esto". Iulianus inutilem esse institutionem scribit, cum condicio existere non possit.

is ready to adopt him, but Titius is unwilling to be arrogated, the son will become the heir, just as if the condition had been fulfilled.

12.- HERMOGENIANUS; *Epitomes of Law, Book III*.- The following words: "Let Publius Maevius be my heir if he is willing", establish a condition with reference to the necessary heir, so that he will not become the heir if he is unwilling; for these words are fruitlessly added with reference to a voluntary heir, for even if they had not been added, the appointee would not become the heir against his will.

13.- JULIANUS; *Digest, Book XXX*.- Where anyone receives an estate or a legacy under the condition, "If he should pay ten aurei", neither the estate nor the legacy can be acquired by him, unless, after having fulfilled the condition, he, either as heir or legatee, complies with the legal formalities by means of which an estate or a legacy is ordinarily obtained.

14.- MARCIANUS; *Institutes, Book IV*.- When conditions are prescribed in violation of the Edicts of the Emperors, or against the laws, or contrary to whatever obtains the force of law, or which are opposed to good morals, or imply derision, or are such as the Praetors would not approve of, they are held not to have been written, and the estate or the legacy will pass to the heir or legatee, just as if the condition had not been prescribed.

15.- PAPINIANUS; *Questions, Book XVI*.- Where a son under paternal control is appointed an heir, under a condition which is one that the Senate or the Emperor does not tolerate, it invalidates the will of the father, just as if the condition could not be complied with by the son; for where any acts injuriously affect our piety, reputation, or self-respect, and, generally speaking, are contrary to good morals, it is held that we are unable to perform them.

16.- MARCIANUS; *Institutes, Book IV*.- Julianus states that the following appointment is void, namely: "If Titius should be my heir, let Seius be my heir; if Seius should be my heir, let Titius be my heir",

hijo a adoptarlo Ticio no quisiera darse en arrogación, el hijo será heredero como si se hubiera cumplido la condición.

12.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Estas palabras: «sea heredero Publio Mevio, si quisiera», constituyen condición para el necesario, de modo que, si no quisiera, no será heredero; porque inútilmente se añaden respecto a la persona del heredero voluntario, porque aunque no se hubieren añadido, no se hace heredero contra su voluntad.

13.- JULIANO; *Digesto, libro XXX*.- Para aquel que recibió una herencia o un legado de este modo, si hubiere dado diez, no se puede adquirir ni la herencia ni el legado de otra suerte, que, si después de cumplida la condición, el heredero instituido o el legatario hubiere hecho aquello por lo cual se suele adquirir la herencia o el legado.

14.- MARCIANO; *Instituta, libro IV*.- Las condiciones escritas contra los Edictos de los Emperadores, o contra las leyes, o contra las disposiciones que tienen fuerza de ley, o las que son contra las buenas costumbres, o irrisorias, o de la naturaleza de las que desaprobaron los Pretores, se tienen por no escritas; y se adquiere la herencia o el legado, lo mismo que si no se hubiese puesto condición para la herencia o el legado.

15.- PAPINIANO; *Cuestiones, libro XVI*.- El hijo, que estaba bajo potestad, habiendo sido instituido heredero bajo condición, que reprueba el Senado o el Príncipe, invalida el testamento del padre, lo mismo que si la condición no hubiese estado en su poder; porque los hechos que ofenden la piedad, la estimación, nuestro pudor, y, para decirlo de una vez, que se hacen contra las buenas costumbres, se ha de creer que ni podemos hacerlos.

16.- MARCIANO; *Instituta, libro IV*.- Escribe Juliano, que es inútil esta institución: «si Ticio fuere heredero, sea heredero Seyo; si Seyo fuere heredero, sea heredero Ticio»; porque no se puede cumplir la

17.- FLORUS; *libro X institutionum*.- Si plures institutiones ex eadem parte sub diversis condicionibus fuerint, condicio, quae prior exstiterit, occupabit institutionem.

18.- MARCIANUS; *libro VII institutionum*.- Cum servus pure liber et heres scriptus sub condicione sit et, si heres non exstiterit, legatum acceperit, in legato repetitam videri condicionem divus pius rescipit.

§ 1.- Hac ratione et Papinianus scribit, cum avia nepotem sub condicione emancipationis pro parte heredem instituit et postea codicillis scriptis hoc amplius ei legavit quam quod heredem eum instituit, repetitam videri condicionem emancipationis etiam in legato, quamvis in legato nullam, ut in hereditate, substitutionem fecisset.

19.- MARCIANUS; *libro VIII institutionum*.- Si ita scriptum fuerit "Titius heres esto: si Titius heres erit, Maevius heres esto": si Titius suspectam adierit hereditatem, potest Maevius suo arbitrio adire et quartam retinere.

20.- LABEO; *libro II posteriorum a Iavoleno epitomatum*.- Mulier, quae viro suo ex dote promissam pecuniam debebat, virum heredem ita instituerat, si eam pecuniam, quam doti promississet, neque petisset neque exegisset. Puto, si vir denuntiasset ceteris heredibus per se non stare, quo minus acceptum faceret id quod ex dote sibi deberetur, statim eum heredem futurum. Quod si solus heres institutus esset in tali condicione, nihilo minus puto statim eum heredem futurum, quia adunatos condicio pro non scripta accipienda est.

as the condition cannot take place.

17.- FLORENTINUS; *Institutes, Book X*.- Where several appointments of heirs to the same share of an estate have been made under different conditions, the condition which is first performed will confer priority on the appointment.

18.- MARCIANUS; *Institutes, Book VII*.- Where a slave was granted his freedom absolutely, and an heir was appointed under a condition, and it was provided that if the latter should not be the heir he would be entitled to a legacy, the Divine Pius stated in a Rescript that the conditions seemed to have been repeated in the legacy.

§ 1.- With a view to this, Papinianus stated that where a grandmother appointed her grandson heir to a portion of her estate, under the condition that he should be emancipated, and afterwards, by a codicil, bequeathed to him whatever she had not left him as an heir, the condition of the emancipation was also held to have been repeated in the legacy; although in bequeathing the legacy, she made no substitution, any more than she did in leaving him a share of her estate.

19.- THE SAME; *Institutes, Book VIII*.- Where it was set forth in a will: "Let Titius be my heir, and if Titius should be my heir let Maevius be my heir", if Titius should accept the estate, which was suspected of being insolvent, Maevius can voluntarily accept it, and retain a fourth of the same.

20.- LABEO; *Epitomes of the Last Works of Javolenus, Book II*.- A woman who was indebted to her husband for money promised to him by way of dowry, appointed him her heir, "Under the condition that he would not claim or exact the money which she had promised as dowry". I think that if the husband should notify the other heirs that he is not unwilling to give a release for what was due to him by way of dowry, he will immediately become the heir. If, however, he should be appointed heir under such a condition, I hold that he will, nevertheless, forthwith become the heir, because performance of the condition is impossible, and any such condition must

condición.

17.- FLORENTINO; *Instituta, libro X*.- Si hubiere muchas instituciones de una misma parte, bajo diversas condiciones, la condición que primero se hubiere cumplido prevendrá la institución..

18.- MARCIANO; *Instituta, libro VII*.- Cuando un esclavo haya sido dejado libre puramente, e instituido heredero bajo condición, y, si no fuere heredero, hubiere recibido un legado, respondió por rescripto el Divino Pío, que se considera repetida la condición en el legado.

§ 1.- Por esta razón escribe también Papiniano, que cuando la abuela instituyó heredero de una parte a su nieto, bajo la condición de que fuese emancipado, y después le legó en los codicilos escritos esto además de haberlo instituido heredero, se considera repetida la condición de la emancipación también en el legado, aunque no hubiese hecho ninguna sustitución en el legado, como en la herencia.

19.- EL MISMO; *Instituta, libro VIII*.- Si se hubiere escrito de este modo: «sea heredero Ticio; si Ticio fuere heredero, sea heredero Mevio», si Ticio hubiere adido la herencia sospechosa, puede adirla Mevio a su arbitrio, y retener la cuarta.

20.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro II*.- Una mujer, que debía a su marido la cantidad prometida por razón de dote, había instituido heredero a su marido: si ni hubiese pedido, ni exigido, la cantidad que hubiese prometido en dote, opino, que si el marido hubiese hecho saber a los demás herederos que en él no consistiría que no diese por recibido lo que se le debiera por la dote, se hará inmediatamente heredero. Pero si con esta misma condición hubiese sido instituido único heredero, opino, sin embargo, que él se hará desde luego heredero, porque una condición imposible ha de ser considerada como no escrita.

§ 1.- Si quis hereditarium servum iussus est manumittere et heres esse, quamvis, si manumiserit, nihil agat, tamen heres erit: verum est enim eum manumisisse: sed post aditionem libertas servo data secundum voluntatem testatoris convalescit.

§ 2.- Si quis te heredem ita instituit, si se heredem instituisses aut quid sibi legasses, nihil interest, quo gradu is a te heres institutus vel quid ei legatum sit, dummodo aliquo gradu id te fecisse probes.

21.- CELSUS *libro XVI digestorum*.- Servus alienus ita heres institui potest "cum liber erit": proprius autem ita institui non potest,

22.- GAIUS *libro XVIII ad edictum provinciale*.- Quia ratio suadet eum qui libertatem dare potest, ipsum debere aut praesenti die aut in diem aut sub condicione dare libertatem nec habere facultatem in casum a quolibet obvenientis libertatis heredem instituere.

23.- MARCELLUS; *libro XII digestorum*.- "Uter ex fratribus meis consobrinam nostram duxerit uxorem, ex dodrante, qui non duxit, ex quadrante heres esto". Aut nubit alteri aut non vult nubere. Consobrinam qui ex his duxit uxorem, habebit dodrantem, erit alterius quadrans. Si neuter eam duxerit uxorem, non quia ipsi ducere noluerunt, sed quia illa nubere noluerit, ambo in partes aequales admittuntur: plerumque enim haec condicio: "si uxorem duxerit", "si dederit", "si fecerit" ita accipi oportet, quod per eum non stet, quo minus ducat aut det aut faciat.

be considered as not having been imposed.

§ 1.- If anyone should be ordered to manumit a slave belonging to an estate, and to become the heir, even though he should manumit him, and perform an act which is void, he will, nevertheless, become the heir; for while it is true that he manumitted the slave, the freedom granted to the latter after the estate was entered upon will become valid in accordance with the wish of the testator.

§ 2.- If anyone should appoint you an heir under the condition that you appoint him one, or bequeath something to him, it makes no difference in what degree he has been appointed an heir by you, or what has been left to him, provided you can prove that you have done this in any degree whatsoever.

21.- CELSUS; *Digest, Book XVI*.- A slave belonging to another can be appointed an heir, "When he shall become free"; but a slave belonging to the testator cannot be appointed in this manner.

22.- GAIUS; *On the Provincial Edict, Book XVIII*.- Because reason suggests that he who can bestow freedom should himself grant it, either at the present time, or after a certain period, or under some condition, and he has not the power to appoint a slave his heir in case he should obtain his liberty in any other way whatsoever.

23.- MARCELLUS; *Digest, Book XII*.- "Let whichever of my brothers, who shall marry our cousin, be my heir to three-fourths of my estate, and let the one who does not marry her be my heir to one-fourth of the same." The said cousin either marries another, or does not wish to marry anyone. The brother who marries the cousin will be entitled to three-fourths of the estate, and the remaining fourth will belong to the other. If, however, neither of them marries the girl, not because they were unwilling to do so, but because she refused to be married, both of them will be admitted to equal shares of the estate; for generally, the condition: "If he should marry a wife; if he should pay a sum of money; if he should perform some act"; must be understood to mean that it is not his fault if he does not marry the woman, pay the money, or perform the act.

§ 1.- Si a alguno se le mandó que manumitiese un esclavo de la herencia, y que fuese heredero, aunque nada haga si lo manumitiere, será, sin embargo, heredero, porque es verdad que lo manumitió; pero después de la adición se convalida conforme a la voluntad del testador la libertad dada al esclavo.

§ 2.- Si alguien te instituyó heredero de este modo, si a él lo hubieses instituido heredero, o si le hubieses legado alguna cosa, nada importa en qué grado haya sido él instituido heredero por ti, o se le haya legado alguna cosa, con tal que pruebes que tú hiciste esto en algún grado.

21.- CELSO; *Digesto, libro XVI*.- Un esclavo ajeno puede ser instituido heredero de este modo: «cuando fuere libre; pero el propio no puede ser instituido en esta forma,

22.- GAYO; *Comentarios al Edicto provincial, libro XVIII*.- porque la razón persuade, de que el mismo que puede dar la libertad debe dar la libertad o en el día presente, o para cierto día, o bajo condición, y de que no tiene facultad para instituir heredero a uno para el caso de que de alguien le venga la libertad.

23.- MARCELO; *Digesto, libro XII*.- «Cualquiera de mis dos hermanos que hubiere, tomado por mujer a nuestra prima, sea heredero de los tres cuartos, y el que no la hubiere tomado, de la otra cuarta parte»; o ella se casa con uno u otro, o no quiere casarse; el que de ellos tomó por mujer a la prima, tendrá los tres cuartos, y la otra cuarta parte será del otro; si ninguno de los dos la hubiere tomado por mujer, no porque ellos no la hubieren querido tomar, sino porque ella no hubiere querido casarse, ambos son admitidos a partes iguales; porque de ordinario esta condición; «si se casare, si diere, si hiciere», debe entenderse de este modo, que en él no consista que no se case, dé, o haga.

money, or perform the act.

24.- PAPINIANUS; *libro VI responsorum*.- "Qui ex fratribus meis Titiam consobrinam uxorem duxerit, ex besse heres esto: qui non duxerit, ex triente heres esto". Vivo testatore consobrina defuncta ambo ad hereditatem venientes semisses habebunt, quia verum est eos heredes institutos, sed emolumento portionum eventu nuptiarum discretos.

25.- MODESTINUS; *libro IX regularum*.- Sub condicione heres institutus servus sine iussu domini condicioni parere non potest.

26.- POMPONIUS; *libro II ad Quintum Mucium*.- Si pupillus sub condicione heres institutus fuerit, condicioni etiam sine tutoris auctoritate parere potest. Idemque est et si legatum ei sub condicione relictum fuerit, quia condicione expleta pro eo est, quasi pure ei hereditas vel legatum relictum sit.

27.- MODESTINUS; *libro VIII responsorum*.- Quidam in suo testamento heredem scripsit sub tali condicione "si reliquias eius in mare abiciat": quaerebatur, cum heres institutus condicioni non paruisset, an expellendus est ab hereditate. Modestinus respondit: laudandus est magis quam accusandus heres, qui reliquias testatoris non in mare secundum ipsius voluntatem abiecit, sed memoria humanae condicionis sepulturae tradidit. Sed hoc prius inspiciendum est, ne homo, qui talem condicionem posuit, neque compos mentis esset. Igitur si perspicuis rationibus haec suspicio amoveri potest, nullo modo legitimus heres de hereditate controversiam facit scripto heredi.

§ 1.- Heredi, quem testamento pure instituit, codicillis adscripsit condicionem: quaero, an ei parere necesse habeat. Modestinus respondit:

24.- PAPINIANUS; *Opinions, Book VI*.- "Let the one of my brothers who marries his cousin Titia be the heir to two-thirds of my estate, and the one who does not marry her be the heir to the remaining third of the same." If the cousin should die during the lifetime of the testator, both of the brothers will be entitled to equal shares of his estate, because it is true that they were appointed heirs, but were entitled to different shares in case the marriage took place.

25.- MODESTINUS; *Rules, Book IX*.- Where a slave is appointed an heir under a certain condition, he cannot comply with the condition without the order of his master.

26.- POMPONIUS; *On Quintus Mucius, Book II*.- If a minor should be appointed an heir under some condition, he can comply with the condition, even without the authority of his guardian. The same rule applies where a legacy has been bequeathed to him under some condition, because when the condition has been fulfilled, he is in the same position as if the estate or the legacy had been left to him unconditionally.

27.- MODESTINUS; *Opinions, Book VIII*.- A certain man appointed an heir by his will under the condition: "If he throws my remains into the sea". As the heir did not comply with the condition, the question arose whether he should be excluded from the succession to the estate. Modestinus answered: "The heir should rather be praised than censured, who did not throw the remains of the testator into the sea, in accordance with the will of the latter, but gave them up to burial in memory of the duty due to humanity". It must first be considered whether a man who imposes a condition of this kind is of sound mind, and, therefore, if this suspicion is not removed by convincing evidence, the heir-at-law cannot in any way dispute the right to the estate with the heir who was appointed.

§ 1.- A testator, by a codicil, imposed a condition upon his heir whom he had appointed absolutely by his will, I ask whether it is necessary for him to

24.- PAPINIANO; *Respuestas, libro VI*.- «El que de mis hermanos hubiere tomado por mujer a nuestra prima Ticia, sea heredero de dos tercios; el que no la hubiere tomado sea heredero del otro tercio»; habiendo fallecido la prima viviendo el testador, cada uno tendrá, al ir a la herencia, la mitad de esta, porque es verdad que ellos fueron instituidos herederos, pero diferenciados con el emolumento de sus porciones en la eventualidad de las nupcias.

25.- MODESTINO; *Reglas, libro IX*.- El esclavo instituido heredero bajo condición no puede cumplir la condición sin mandato de su señor.

26.- POMPONIO; *Comentarios a Quinto Mucio, libro II*.- Si un pupilo hubiere sido instituido heredero bajo condición, puede cumplir la condición aún sin la autoridad del tutor. Y lo mismo es, también si se le hubiere dejado bajo condición un legado, porque cumplida la condición, es lo mismo que si se le hubiera dejado puramente la herencia o el legado.

27.- MODESTINO; *Respuestas, libro VIII*.- Uno instituyó heredero en su testamento bajo esta condición: si echara al mar sus restos mortales; se preguntaba, ¿no habiendo cumplido la condición el heredero instituido, ha de ser rechazado de la herencia? Modestino respondió: mas bien ha de ser loado, que acusado, el heredero, que no echó al mar los restos del testador conforme a la voluntad del mismo, sino que, teniendo presente su condición humana, los guardó en la sepultura. Pero antes se ha de examinar esto, si el hombre que puso tal condición no estuviese en su cabal juicio; si, pues, con evidentes razones se puede suscitar esta sospecha, de ningún modo le promueve cuestión al heredero instituido el heredero legítimo.

§ 1.- Al heredero, a quien instituyó puramente en el testamento, le impuso una condición en los codicilos; pregunto, ¿tendrá necesidad de cumplirla?

hereditas codicillis neque adimi potest: porro in defectu condicionis de ademptione hereditatis cogitasse intellegitur.

28.- PAPINIANUS; *libro XIII quaestionum*.- Si filius sub condicione heres erit et nepotes ex eo substituantur, cum non sufficit sub qualibet condicione filium heredem institui, sed ita demum testamentum ratum est, si condicio fuit in filii potestate, consideremus, numquid intersit, quae condicio fuerit adscripta, utrum quae moriente filio impleri non potuit, veluti "si Alexandriam ierit, filius heres esto" isque Romae decessit, an vero quae potuit etiam extremo vitae momento impleri, veluti "si Titio decem dederit, filius heres esto", quae condicio nomine filii per alium impleri potest.

Nam superior quidem species condicionis admittit vivo filio nepotes ad hereditatem, qui si neminem substitutum haberet, dum moritur, legitimus patri heres exstiterit, argumentoque est, quod apud servium quoque relatum est: quendam enim refert ita heredem institutum, si in Capitolium ascenderit, quod si non ascendisset, legatum ei datum, eumque antequam ascenderet mortem obisse: de quo respondit servius condicionem morte defecisse ideoque moriente eo legati diem cessisse.

Altera vero species condicionis vivo filio non admittit nepotes ad hereditatem, qui substituti si non essent, intestato avo heredes existerent: neque enim filius videretur obstitisse, post cuius mortem patris testamentum destituitur, quemadmodum si exheredato eodem filio nepotes, cum filius moreretur, heredes fuissent instituti.

comply with it. Modestinus answers: "An estate can neither be granted, nor taken away by a codicil". The testator, however, is understood, in this instance, to have had in his mind the exclusion of the heir from the succession in case of his failure to comply with the condition.

28.- PAPINIANUS; *Questions, Book XIII*.- If a son should be appointed an heir under a condition, and grandchildren by him are substituted; as it is not sufficient for a son to be appointed an heir under any kind of a condition whatsoever, the will is only held to be valid where the fulfillment of the condition is in the power of the son. Let us therefore consider whether it makes any difference what condition was imposed, whether it was one that could not be carried out if the son should die, as, for instance, "If my son should go to Alexandria, let him be my heir", and he dies at Rome; or if it is one which can be fulfilled at the last moment of his life, for example, "If he should pay ten aurei to Titius, let my son be my heir", for this condition can be performed by another party in the name of the son.

The first kind of a condition above mentioned admits the grandsons to the succession during the lifetime of the father, who, if he should have no substitute, becomes the lawful heir of his father when he dies. This is established by what is stated by Servius, for he relates that a certain person had been appointed an heir under the condition, "If he should ascend to the Capitol, and even if he should not do so, a legacy shall be given to him", and the heir died before he ascended to the Capitol. With reference to this, Servius gave the opinion that the condition failed through the death of the heir, and therefore at the time of his death he began to be entitled to the legacy.

The other kind of a condition, however, does not admit grandsons to the succession during the lifetime of the son, who, if they should not be substituted, would be the heirs of their intestate grandfather; for the son would not be held to have stood in their way, as after the death of the father, his will becomes of no effect; just as if the son having been disinherited, the grandsons had been appointed heirs at the time that the son died.

Modestino respondió: la herencia no puede ser quitada en los codicilos; y, a la verdad, faltando la condición, se entiende que se refirió a la privación de la herencia.

28.- PAPINIANO; *Cuestiones, libro XIII*.- Si un hijo fuere heredero bajo condición, y se le substituyeran los nietos habidos de él, como no basta que el hijo sea instituido heredero bajo cualquier condición, sino que el testamento es válido solamente de este modo, si la condición estuvo en la potestad del hijo, consideremos si es que importa saber qué condición haya sido puesta, si la que muriendo el hijo no se pudo cumplir, por ejemplo, «si mi hijo fuere a Alejandría, sea mi heredero», y él falleció en Roma, o la que se pudo cumplir hasta en el último momento de la vida, por ejemplo, «si a Ticio le diere diez, sea heredero mi hijo», cuya condición se puede cumplir por otro en nombre del hijo.

Porque, a la verdad, la primera especie de condición se puede cumplir por otro en nombre del hijo. Porque a la verdad, la primera especie de condición admite los nietos a la herencia viviendo el hijo, el cual, si no tuviese ningún substituto, al morir, será heredero legítimo de su padre; y sirve de prueba lo que también se ha referido por Servio, porque dice que uno fue instituido heredero de este modo: «si hubiere subido al Capitolio»; pero que, si no hubiese subido, se le dio un legado, y él falleció antes de subir; respecto al cual respondió Servio, que con la muerte faltó la condición, y que, por lo tanto, al morir él comenzó a correr el día del legado.

Pero la otra especie de condición no admite, viviendo el hijo, los nietos a la herencia, los cuales, si no hubiesen sido substituidos, serían herederos del abuelo abintestato; y no se consideraría que sirvió de obstáculo el hijo, después de cuya muerte se invalida el testamento del padre, a la manera que, si habiendo sido desheredado el mismo hijo, hubiesen sido instituidos herederos los nietos, cuando muriese el hijo.

TIT. VIII

DE IURE DELIBERANDI

1.- ULPIANUS; *libro LX ad edictum*.- Si servus fuerit heres institutus, utique non ipsi praestituimus tempus ad deliberandum, sed ei cuius servus est, quia pro nullo isti habentur apud praetorem. Itemque si plurium servus sit, utique omnibus dominis praestituemus.

§ 1.- Ait praetor: "Si tempus ad deliberandum petet, dabo".

§ 2.- Cum dicit tempus nec adicit diem, sine dubio ostendit esse in ius dicentis potestate, quem diem praestituat:

2.- PAULUS; *libro LVII ad edictum*.- Itaque pauciores centum dierum non sunt dandi.

3.- ULPIANUS; *libro LX ad edictum*.- Nec non illud sciendum nonnumquam semel, nonnumquam saepius diem ad deliberandum datum esse, dum praetori suadet tempus, quod primum aditus praestituerat, non suffecisse:

4.- ULPIANUS; *libro LXI ad edictum*.- Sed hoc impetrari non debet nisi ex magna causa.

5.- ULPIANUS; *libro LXX ad edictum*.- Aristo scribit non solum creditoribus, sed et heredi instituto praetorem subvenire debere hisque copiam instrumentorum inspiciendorum facere, ut perinde instruere se possint, expediet nec ne agnoscere hereditatem.

§ 1.- Si maior sit hereditas et deliberat heres et res sunt in hereditate, quae ex tractu temporis deteriores fiunt, adito praetore potest is qui deliberat sine praeiudicio eas iustis pretiis vendere: qui possit etiam ea, quae nimium sumptuosa sint, veluti iumenta aut venalicia, item ea quae mora deteriora

TITLE VIII

CONCERNING THE RIGHT OF DELIBERATING

1.- ULPIANUS; *On the Edict, Book LX*.- If a slave should be appointed an heir, we cannot grant him time for deliberation, but it is granted to him to whom the slave belongs; for the reason that slaves are considered by the Praetor as of no importance. Moreover, if the slave belongs to several masters, we grant time for deliberation to all of them.

§ 1.- The Praetor says, "If anyone asks time for deliberation I will grant it".

§ 2.- When the Praetor says that he will grant time, but does not say how much, he undoubtedly means that it is in the power of the court having jurisdiction to fix the term to be allowed.

2.- PAULUS; *On the Edict, Book LVII*.- And no less than a hundred days should be granted.

3.- ULPIANUS; *On the Edict, Book LX*.- It must be noted that sometimes one term, and sometimes several, are granted for deliberation, when the Praetor is convinced that the time that he allowed when first applied to was not sufficient.

4.- THE SAME; *On the Edict, Book LXI*.- This indulgence should not be granted, unless where a very good reason exists.

5.- THE SAME; *On the Edict, Book LXX*.- Aristo says that the Praetor should come to the relief not only of creditors, but also of the heir who has been appointed, and that they should furnish the latter with a copy of their claims, in order that he may ascertain whether it is to his interest to accept the estate or not.

§ 1.- If the estate is quite valuable, and while the heir is deliberating there is property forming part of it which will be spoiled by lapse of time, upon application to the Praetor, the person who is deliberating can sell the said property for a fair price, without being prejudiced thereby; and he can also

TÍTULO VIII

DEL DERECHO DE DELIBERAR

1.- ULPIANO; *Comentarios al Edicto, libro LX*.- Si un esclavo hubiere sido instituido heredero, ciertamente que no le concederemos al mismo, sino a aquel de quien es el esclavo, tiempo para deliberar, porque estos no son considerados como persona alguna por el Pretor. Y asimismo, si el esclavo fuera de muchos, se lo concederemos ciertamente a todos sus dueños.

§ 1.- Dice el Pretor: «Si pidiere tiempo para deliberar, se lo daré».

§ 2.- Como dice «tiempo», y no añade día, sin duda indica que está en la facultad del juzgador qué día haya de fijar.

2.- PAULO; *Comentarios al Edicto, libro LVII*.- Y así, no se han de dar menos de cien días.

3.- ULPIANO; *Comentarios al Edicto, libro LX*.- Y también se ha de saber esto, que en ocasiones se da una sola vez día para deliberar, y en otras, muchas veces, cuando se persuade al Pretor de que no ha sido suficiente el tiempo que había concedido la primera vez que a el se recurrió;

4.- EL MISMO; *Comentarios al Edicto, libro LXI*.- Pero esto no se debe impetrar sino por causa poderosa.

5.- EL MISMO; *Comentarios al Edicto, libro LXX*.- Escribe Ariston, que el Pretor debe auxiliar no solamente a los acreedores, sino también al heredero instituido, y darles facilidad de inspeccionar los documentos, para que por ellos puedan instruirse si les conviene, o no, aceptar la herencia.

§ 1.- Si la herencia fuese cuantiosa, y el heredero delibera, y en la herencia hay cosas que con el transcurso del tiempo se deterioran, puede el que delibera, habiendo recurrido al Pretor, venderlas, sin perjuicio, por su justo precio; el cual puede vender también aquellas cosas que sean demasiado costosas,

fiant, vendere, quique praeterea curaturus sit, ut aes alienum quod sub poena vel sub pretiosis pignoribus debeatur, solvatur.

6.- GAIUS; *libro XXIII ad edictum provinciale*.- Igitur si quidem in hereditate sit vinum oleum frumentum numerata pecunia, inde fieri debebunt impendia: si minus, a debitoribus hereditariis exigenda pecunia. Quod si nulli sunt debitores aut iudicem provocent, venire debent res supervacuae.

7.- ULPIANUS; *libro LX ad edictum*.- Ait praetor: "Si pupilli pupillae nomine postulabitur tempus ad deliberandum, an expediat eum hereditatem retinere, et hoc datum sit: si iusta causa esse videbitur, bona interea deminui nisi si causa cognita boni viri arbitratu vetabo".

§ 1.- Merito praetor impedit interim diminutionem, quamdiu nomine pupilli petitur tempus ad deliberandum.

§ 2.- Quid sit autem "deminui vetabo" videamus. His verbis praetor non tantum alienationem impedit, verum etiam actiones exerceri non patitur: est enim absurdum ei, cui alienatio interdictur, permitti actiones exercere, et ita Labeo scribit.

§ 3.- In causae autem cognitione hoc vertetur, an iusta causa sit, ut deminuere praetor permittat. Ergo et funeris causa deminui permittet, item eorum quae sine piaculo non possunt praeteriri. Vescendi gratia aequae deminui permittet. Sed et ubi arguet, ex aliis quoque causis permittit eum oportet, ut aedificia sarciantur, ne agri inculti sint, si qua pecunia sub poena debetur ut restituatur, ne pignora distrahantur. Ex aliis quoque iustis causis praetor aditus diminutionem permittet: neque enim sine permissu eius debet diminutio fieri.

sell any property which is too expensive to keep, as, for instance, beasts of burden, or slaves which were for sale; as well as such articles as become deteriorated by delay. He also should take care that any debt which is due, or which is subject to a penalty, or which is secured by valuable pledges, is paid.

6.- GAIUS; *On the Provincial Edict, Book XXIII*.- Hence, where wine, oil, wheat, or money constitutes part of the estate, it should be used to pay the debts. If there are none of these articles, money must be collected from the debtors of the estate, and if there are no debtors, or they contest the claims against them, any superfluous property should be sold.

7.- ULPIANUS; *On the Edict, Book LX*.- The Praetor says: "If time is requested in the name of a male or female minor, for the purpose of deliberation as to whether it will profit him or her to retain the estate, and this is granted, if there seems to be good reason to diminish the assets of the estate in the meantime, I shall forbid this to be done, unless the report of a reputable citizen recommends it after thorough investigation."

§ 1.- With reason the diminution prevents meanwhile the Pretor, when to name of a male time is requested to deliberate.

§ 2.- But we see what means "I will prohibit that they are diminished". With these words the distraction not only prevents the Pretor, but that does not allow either that the actions are exercised; because he is absurd, that to who prohibits itself him the distraction is allowed him to exercise the actions; and thus Labeo writes.

§ 3.- But in the cause knowledge this will be ventilated, if there is just causes so that the Pretor allows that the goods are diminished; soon also it will allow that they are diminished because of the funeral; and also by the one of things that cannot be neglected without incurring themselves pain; also it will allow that they are diminished to eat. But when it is urgent, also it must allow it by other causes, so that buildings are repaired, so that they are not left without culture the fields, and, if under pain it must some money, so that it is paid, in order that the articles are not

por ejemplo, caballerías o esclavos que estaban para ser vendidos, así como las que se deterioran con el tiempo, y ha de cuidar además de que se paguen las deudas, que se deben bajo pena o mediante prendas valiosas.

6.- GAYO; *Comentarios al Edicto provisional, libro XXIII*.- Así, pues, si en la herencia hubiera vino, aceite, trigo, o dinero contante, de esto se deberán hacer los gastos; si no, se habrá de exigir el dinero a los deudores de la herencia. Pero si no hay ningunos deudores, o recurrieran al juez, se deben vender las cosas superfluas.

7.- ULPIANO; *Comentarios al Edicto, libro LX*.- Dice el Pretor: «Si en nombre de un pupilo o de una pupila se pidiera tiempo para deliberar si le conviene retener la herencia, y se hubiera dado; si pareciere que hay justa causa, prohibiré que mientras tanto se disminuyan los bienes, a no ser con conocimiento de causa a arbitrio de hombre bueno»,

§ 1.- Con razón impide mientras tanto el Pretor la disminución, cuando a nombre del pupilo se pide tiempo para deliberar.

§ 2.- Pero veamos qué significa «prohibiré que se disminuyan». Con estas palabras no solamente impide el Pretor la enajenación, sino que tampoco consiente que se ejerciten las acciones; porque es absurdo, que a quien se le prohíbe la enajenación se le permita ejercitar las acciones; y así lo escribe Labeón.

§ 3.- Mas en el conocimiento de causa se ventilará esto, si hay justa causa para que el Pretor permita que se disminuyan los bienes; luego también permitirá que se disminuyan por causa del funeral; y asimismo por la de cosas que no se pueden desatender sin incurrirse en pena; igualmente permitirá que se disminuyan para comer. Pero cuando urge, también debe permitirlo por otras causas, para que se reparen edificios, para que no queden sin cultivo los campos, y, si bajo pena se debe algún dinero, para que se pague, a fin de que no se enajenen las prendas.

8.- ULPIANUS; *libro LXI ad edictum*.- Si quis suus heres, posteaquam se abstinuerit, tunc petat tempus ad deliberandum, videamus, an impetrare debeat: magisque est, ut ex causa debeat impetrare, cum nondum bona venierint.

9.- PAULUS; *libro LVIII ad edictum*.- Filius dum deliberat, alimenta habere debet ex hereditate.

10.- MARCELLUS; *libro XXVIII digestorum*.- Si plures gradus sint heredum institutorum, per singulos observaturum se ait praetor id quod praefiniendo tempore deliberationis edicit, videlicet ut a primo quoque ad sequentem translata hereditate quam primum inveniatur successorem, qui possit defuncti creditoribus respondere.

11.- IAVOLENUS; *libro IV ex posterioribus Labeonis*.- Qui filium libertinum habebat, heredem eum instituerat, deinde ita scripserat: "Si mihi filius nullus erit, qui in suam tutelam veniat, tum dama servus liber esto": is filius pupillus libertinus erat: quaerebatur, si dama liber esset. Trebatius negat, quia filii appellatione libertinus quoque contineretur: Labeo contra, quia eo loco verum filium accipi oportet. Trebatii sententiam probo, si tamen testatorem de hoc filio locutum esse appareat.

alienated. Also by other right causes the Pretor will allow the diminution to that it has resorted, because the diminution without its permission is not due to do.

8.- THE SAME; *On the Edict, Book LXI*.- Where a proper heir, after having rejected the estate, requests time for deliberation, let us see whether he ought to obtain it. The better opinion is that he should obtain it, where proper cause is shown, and the property of the estate has not yet been sold.

9.- PAULUS; *On the Edict, Book LVIII*.- While the son is deliberating, he should be supported at the expense of the estate.

10.- MARCELLUS; *Digest, Book XXVIII*.- When there are several degrees of appointed heirs, the Praetor says that he will examine them one by one in regular succession, in accordance with the time granted each for deliberation; in order that, while the estate is passing from the first to the following degrees, he may as soon as possible find the heir who can satisfy the creditors of the deceased.

11.- JAVOLENUS; *On the Last Works of Labeo, Book IV*.- A former slave had a son who was a freedman, and whom he appointed his heir, and he then inserted into his will: "If I should have no son who will become his own master, then let Damas the slave be free". The minor son of the testator had been emancipated. The question arose whether Damas should be free. Trebatius declares that he should not, because the term freedman is also included in the appellation of son. Labeo holds the contrary opinion, because in this instance a true son must be understood. I adopt the view of Trebatius, in case it should become evident that the testator had reference to the said son.

También por otras justas causas permitirá la disminución el Pretor a que se haya recurrido, porque no se debe hacer la disminución sin su permiso.

8.- EL MISMO; *Comentarios al Edicto, libro LXI*.- Si algún heredero suyo pidiera tiempo para deliberar después que se hubiere abstenido, veamos si deberá impetrarlo; y es más cierto que debe impetrarlo en virtud de causa, cuando todavía no se hubieren vendido los bienes.

9.- PAULO; *Comentarios al Edicto, libro LVIII*.- El hijo debe tener, mientras delibera, alimentos de la herencia.

10.- MARCELO; *Digesto, libro XXVIII*.- Si hubiera muchos grados de herederos instituidos, dice el Pretor, que él observará respecto de cada uno lo que consignó en el Edicto, al prefijar el tiempo de la deliberación; a saber, para que transferida la herencia también del primero al siguiente, encuentre cuanto antes sucesor, que pueda responder a los acreedores del difunto.

11.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro IV*.- Uno que tenía un hijo libertino, lo había instituido heredero, y después había escrito de este modo: «sí yo no tuviere ningún hijo, que llegue a su propia tutela, entonces sea libre el esclavo Damas»; este hijo pupilo era libertino; y se preguntaba, si Damas sería libre. Trebacio dice que no, porque con la denominación de hijo se comprendería también el libertino; Labeón dice lo contrario, porque en esta calidad debe admitirse al hijo verdadero. Apruebo la opinión de Trebacio, si, no obstante, aparece que el testador habló de este hijo.

LIBER VICESIMUS NONUS

TIT. I

DE TESTAMENTO MILITIS

1.- ULPIANUS; *libro XLV ad edictum*.- Militibus liberam testamenti factionem primus quidem divus Iulius Caesar concessit: sed ea concessio temporalis erat. Postea vero primus divus Titus dedit: post hoc Domitianus: postea divus Nerva plenissimam indulgentiam in milites contulit: eamque Traianus secutus est et exinde mandatis inseri coepit caput tale. Caput ex mandatis: "Cum in notitiam meam prolatum sit subinde testamenta a commilitonibus relicta proferri, quae possint in controversiam deduci, si ad diligentiam legum revocentur et observantiam: secutus animi mei integritudinem erga optimos fidelissimosque commilitones simplicitati eorum consulendum existimavi, ut quoquomodo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta quo modo volent, faciant quo modo poterint sufficiatque ad bonorum suorum divisionem faciendam nuda voluntas testatoris".

§ 1.- Miles autem appellatur vel a militia, id est duritia, quam pro nobis sustinent, aut a multitudine, aut a malo, quod arcere milites solent, aut a numero mille hominum, ductum a Graeco verbo, tractum a tagmate: nam Graeci mille hominum multitudinem tagma appellant, quasi millensimum quemque dictum: unde ipsum ducem xiliarxon appellant. Exercitus autem nomen ab exercitatione traxit.

2.- GAIUS; *libro XV ad edictum provinciale*.- De militis testamento ideo separatim proconsul edicit, quod optime novit ex constitutionibus principalibus propria atque singularia iura in testamenta eorum

BOOK XXIX

TITLE I

CONCERNING THE WILL OF A SOLDIER

1.- ULPIANUS; *On the Edict, Book XLV*.- The Divine Julius Caesar was the first who granted to soldiers free power to make a will, but this concession was only temporary. The first after him to confer this power was the Divine Titus, and then Domitianus. The Divine Nerva subsequently conceded the greatest indulgence to soldiers in this respect, and Trajanus followed his example. From that time forward there was inserted in the Imperial Edicts the following provision: "It has come to my notice that wills executed by our fellow-soldiers have been frequently presented which would be the subject of dispute if the laws were strictly applied and enforced; so, in accordance with the benevolent promptings of my mind with reference to my excellent and most faithful fellow-soldiers, I have thought that. Indulgence should be extended to their inexperience, so that no matter in what way they may draw up their wills, they shall be confirmed. Let them, therefore, draw them up in whatever form they desire, in the best way that they can, and the mere wish of the testators will be sufficient for the distribution of their estates."

§ 1.- The term "soldier" is understood to have been derived from militia, that is to say duritia, the hardships which soldiers endure for us, or from the word "multitude," or from the term "evil," from which soldiers are accustomed to protect us; or from the one thousand men from the Greek *tanma*, for the Greeks designate a thousand men assembled together by that term, each one being called the thousandth of the entire number, whence the leader himself is styled *ciliarco*V. The word *exercitus* (army) derives its name from exercise.

2.- GAIUS; *On the Provincial Edict, Book XV*.- The Praetor issued a separate Edict with reference to the wills of soldiers, for the reason that he was well aware that, according to the Constitutions of the

LIBRO VIGÉSIMO NOVENO

TÍTULO I

DEL TESTAMENTO DEL MILITAR

1.- ULPIANO; *Comentarios al Edicto, libro XLV*.- El Divino Julio César fue ciertamente el primero que les concedió a los militares la libre facultad de hacer testamento, pero esta concesión era temporal; más después fue el Divino Tito el primero que la dio; luego Domiciano, y posteriormente el Divino Nerva concedió a los militares plenísima facultad, y Trajano la mantuvo, y desde entonces comenzó a insertarse este capítulo en los mandatos. Capítulo de los mandatos: «habiéndose puesto en mi conocimiento, que de vez en cuando se presentaban testamentos dejados por los militares, que podían ser llevados a controversia, si fueran sujetos a la escrupulosidad y a la observancia de las leyes, habiendo seguido la integridad de mi ánimo hacia mis buenos y fidelísimos colegas militares, he creído que se debía atender a la sencillez de los mismos, a fin de que, de cualquier modo que hubiesen testado, sea válida su voluntad. Hagan, pues, sus testamentos del modo que quieran, o de la manera que pudieren y baste para hacer la división de sus bienes la nuda voluntad del testador».

§ 1.- Mas dicese militar, o por la milicia, esto es, duro servicio, que por nosotros soportan, o por la multitud, o por el mal que los militares suelen evitar, o por el número de mil hombres, significación sacada de una palabra griega, derivada de «τάγμα» porque los Griegos llaman «τάγμα» la muchedumbre de mil hombres, como si cada uno se llamara un milésimo, por lo cual llaman (comandante de mil) al mismo jefe. Pero la palabra ejército provino de ejercicio.

2. GAYO; *Comentarios al Edicto provincial, libro XV*.- El Procónsul publicó por separado un Edicto sobre el testamento del militar, por esto, porque sabía muy bien, que en virtud de las Constituciones de los

3.- ULPIANUS; *libro II ad Sabinum*.- Si miles, qui destinaverat communi iure testari, ante defecerit quam testaretur? Pomponius dubitat. Sed cur non in milite diversum probet? Neque enim qui voluit iure communi testari, statim beneficio militari renuntiavit, nec credendus est quisquam genus testandi eligere ad impugnanda sua iudicia, sed magis utroque genere voluisse propter fortuitos casus: quemadmodum plerique pagani solent, cum testamenti faciunt perscripturam, adicere velle hoc etiam vice codicillorum valere. Quicquam dixerit, si imperfectum sit testamentum, codicillos non esse, nam secundum nostram sententiam etiam divus Marcus rescripsit.

4.- ULPIANUS; *libro I ad Sabinum*.- Iure militari surdum et mutum testamentum facere posse ante causariam missionem in numeris manentem placet.

5.- ULPIANUS; *libro IV ad Sabinum*.- Milites etiam his, qui heredes exstiterunt, possunt substituere in his dumtaxat, quae sunt ex testamento eorum consecuti.

6.- ULPIANUS; *libro V ad Sabinum*.- Si miles unum ex fundo heredem scripserit, creditum quantum ad residuum patrimonium intestatus decessisset: miles enim pro parte testatus potest decedere, pro parte intestatus.

7.- ULPIANUS; *libro IX ad Sabinum*.- Qui iure militari testatur etsi ignoraverit praegnatem uxorem vel non fuit praegnans, hoc tamen animo fuit, ut vellet quisquis sibi nascetur exheredem esse, testamentum non rumpitur.

been established with reference to their wills.

3.- ULPIANUS; *On Sabinus, Book II*.- If a soldier who intended to make his will in compliance with the ordinary law should die before having it witnessed: Pomponius is in doubt as to its validity. But why should he not approve of a will thus made by a soldier without observing the ordinary formalities? Is it because he thinks that a soldier who intended to execute his will, in accordance with the ordinary law, by doing so renounced his military privilege? Can it be believed that anyone would select a certain way to make his will for the purpose of rendering it void; and is it not more probable that he would prefer to make use of both ways in the execution of his will, on account of the accidents to which he was exposed; just as civilians, when they draw up their wills, are accustomed to add that they desire that they shall be valid at least as codicils; and in this instance would anyone say that if the will is imperfect it should stand as a codicil? The Divine Marcus stated in a Rescript an opinion which coincides with our own.

4.- THE SAME; *On Sabinus, Book I*.- It is established that a person who is deaf or dumb can make a military will while in the army, and before having been discharged on account of his affliction.

5.- THE SAME; *On Sabinus, Book IV*.- Soldiers can make a substitution for their heirs, but only with reference to such property as they have acquired by their wills.

6.- THE SAME; *On Sabinus, Book V*.- Where a soldier appoints a sole heir to a certain tract of land, he is held to have died intestate so far as the remainder of his patrimony is concerned. For a soldier can die partly testate and partly intestate.

7.- THE SAME; *On Sabinus, Book IX*.- Where a will is executed in accordance with military law, even though the testator may be ignorant that his wife was pregnant, or, being aware of the fact, he does this with the intention that if a child should be born to him, it shall be disinherited, the will is not broken.

los testamentos de los mismos.

3.- ULPIANO; *Comentarios a Sabino, libro II*.- Si el militar, que había determinado testar según el derecho común, hubiere fallecido antes que testase, duda Pomponio. Pero ¿por qué no aprueba lo contrario tratándose del militar? Porque el que quiso testar según el derecho común, no renunció desde luego al beneficio militar, y no se ha de creer que uno elige una manera de testar para que se hayan de impugnar sus disposiciones. Antes bien, que quiso testar de ambos modos atendiendo a los casos fortuitos, a la manera que suelen añadir muchos paisanos, cuando hacen testamento por escrito, que quieren que él también valga como codicilo; y no diga nadie, que, si no se hubiera perfeccionado el testamento, no hay codicilos; porque también el Divino Marco respondió por rescripto conforme a nuestra opinión.

4.- EL MISMO; *Comentarios a Sabino, libro I*.- Se halla establecido, que por derecho militar, el sordo y el mudo, que están en el ejército, pueden hacer testamento antes de su licencia como inútiles.

5.- EL MISMO; *Comentarios a Sabino, libro IV*.- Los militares pueden nombrarles substitutos también a los que quedaron sus herederos, pero solamente respecto a aquellos bienes que adquirieron por el testamento de los mismos.

6.- EL MISMO; *Comentarios a Sabino, libro V*.- Si un militar hubiere instituido a uno solo heredero de un fundo, se cree que en cuanto al restante patrimonio falleció intestado; porque el militar puede fallecer en parte testado, y en parte intestado.

7.- EL MISMO; *Comentarios a Sabino, libro IX*.- Si uno testa por derecho militar, aunque haya ignorado que su mujer estaba embarazada, o aunque ella no estuviese embarazada, si no obstante tuvo esta intención, la de querer que fuese desheredado cualquiera que le naciese, no se rompe el testamento.

8.- MARCELLUS; *libro X digestorum*.- Idem est et si adrogaverit filium neposve successerit in locum filii.

9.- ULPIANUS; *libro IX ad Sabinum*.- Idemque erit dicendum et si nato filio vivo se maluit eodem testamento durante decedere: nam videtur iure militari refecisse testamentum:

§ 1.- Ut est rescriptum a divo Pio in eo qui cum esset paganus, fecit testamentum, mox militare coepit: nam hoc quoque iure militari incipiet valere, si hoc maluit miles.

10.- ULPIANUS; *libro XI ad Sabinum*.- Facere testamentum hostium potitus nec iure militari potest.

11.- ULPIANUS; *libro XLV ad edictum*.- Ex militari delicto capite damnatis testamentum facere licet super bonis dumtaxat castrensibus: sed utrum iure militari an iure communi, quaeritur. Magis autem est, ut iure militari eis testandum sit: nam cum ei quasi militi tribuatur ius testandi, consequens erit dicere iure militari ei testandum. Quod ita intellegi oportet, si non sacramenti fides rupta sit.

§ 1.- Si miles incertus, an sui iuris sit, testamentum fecerit, in ea condicione est testamentum eius, ut valeat: nam et si incertus, an pater suus vivat, testamentum fecerit, testamentum eius valebit.

§ 2.- Si filius familias ignorans patrem suum decessisse de castrensi peculio in militia testatus sit, non pertinebunt ad heredem eius patris bona, sed sola castrensia:

12.- PAPINIANUS; *libro VI responsorum*.-

8.- MARCELLUS, *Digest, Book X*.- The same rule applies where a soldier arrogates a son, or his grandson obtains the succession in the place of his son.

9.- ULPIANUS; *On Sabinus, Book IX*.- The same rule must be said to apply where a soldier who had a son born to him in his lifetime preferred to die without making any alteration to his will; for, in accordance with military law, he is held to have renewed his will.

§ 1.- This was stated in a Rescript by the Divine Pius with reference to a man who executed a will while he was a civilian, and afterwards became a soldier; for this will was valid by military law, if such was the desire of the soldier.

10.- THE SAME; *On Sabinus, Book IV*.- Anyone who is in the power of the enemy cannot make a will, even in compliance with military law.

11.- THE SAME; *On the Edict, Book XLV*.- Those who are condemned to death for some military crime can only make a will disposing of property obtained during their service; but the question arises, can they do so by military, or by civil law? The better opinion is, that they can make a will in accordance with military law; for, as the right of testation is conferred upon a man because of his being a soldier, it must be held that it follows that he can exercise it by reason of his military privilege. This should, however, be understood to apply to cases where he has not violated his oath.

§ 1.- Where a soldier is in doubt whether or not he is his own master, and makes a will, he is in such a position that it will be valid in any event. For if he should execute a will, being uncertain as to whether or not his father is living, it will be valid.

§ 2.- Where a son under paternal control, not knowing that his father is dead, makes a will disposing of his castrense peculium while in the service, the estate of his father will not belong to the heir, but only such property as the son has acquired during the time when he was a soldier.

12.- PAPINIANUS; *Opinions, Book VI*.- Soldiers

8.- MARCELO; *Digesto, libro X*.- Lo mismo es también si hubiere arrogado un hijo, o si en el lugar de un hijo hubiere sucedido un nieto.

9.- ULPIANO; *Comentarios a Sabino, libro IX*.- Y lo mismo se habrá de decir, también si habiendo nacido un hijo en vida de él, prefirió fallecer subsistiendo el mismo testamento; porque se considera por derecho militar que hizo de nuevo el testamento.

§ 1.- Como se respondió en rescripto por el Divino Pio, respecto a uno que, siendo paisano, hizo testamento, y luego comenzó a ser militar; porque también éste testamento comenzar a ser válido por derecho militar, si así lo prefirió el militar.

10.- EL MISMO; *Comentarios a Sabino, libro XI*.- El que está en poder de los enemigos no puede hacer testamento ni aún por derecho militar.

11.- EL MISMO; *Comentarios al Edicto, libro XLV*.- A los condenados a muerte por delito militar les es lícito hacer testamento solamente de sus bienes castrenses; pero se pregunta si por derecho militar, o por derecho común. Pero es más cierto, que ellos han de testar por derecho militar; porque como a éste se le concede el derecho de testar como militar, será consiguiente decir, que por él se ha de testar por derecho militar; lo que se debe entender de este modo, si no hubiera sido quebrantada la fe del juramento.

§ 1.- Si el militar, que está incierto de si es de propio derecho, hubiere hecho testamento, su testamento está en el caso de que sea válido; porque también si hubiere hecho testamento, estando incierto de si vive su padre, será válido su testamento.

§ 2.- Si un hijo de familia, ignorando que había fallecido su padre, hubiera testado de su peculio castrense estando en el ejército, no le pertenecerán a su heredero los bienes del padre, sino solo los castrenses.

12.- PAPINIANO.- *Respuestas, libro VI*.- Porque

tes enim ea dumtaxat, quae haberent scriptis, relinquunt.

13.- ULPIANUS; *libro XLV ad edictum*.-Idem est, etsi de testamento mutando cogitavit, non quia adimere volebat castrensia bona heredi scripto, sed quia de paternis testari volebat et alium heredem scribere.

§ 1.- Sed si iam veteranus decessit, universa bona etiam paterna ad heredem pertinere castrensiū Marcellus libro decimo digestorum scribit: neque enim iam potuit de parte bonorum testari.

§ 2.- Et deportati et fere omnes, qui testamenti factionem non habent, a milite heredes institui possunt. Sed si servum poenae heredem scribat, institutio non valebit: sed si mortis tempore in civitate inveniatur, institutio incipit convalescere quasi nunc data hereditate. Et generaliter in omnibus id poterit dici quos miles scribit heredes, ut institutio incipiat vires habere, si mortis tempore talis inveniatur, ut a milite institui potuerit.

§ 3.- Si servum proprium, quem liberum esse credidisset, miles heredem sine libertate instituit, in ea condicione est, ut institutio non valeat.

§ 4.- Cum miles in testamento suo servo libertatem dederit eidemque et a primo et a secundo herede per fideicommissum hereditatem reliquerit, quamvis et primus heres et substitutus, priusquam adierint hereditatem, mortem obierunt, non debere intestati exitum facere imperator noster cum divo Severo rescripsit: sed perinde habendum est, ac si eidem servo libertas simul et hereditas directo data esset, quae utraque ad eum pervenire testatorem voluisse negari non potest.

only leave by will such property as they own.

13.- ULPIANUS; *On the Edict, Book XLV*.- The same rule applies where a soldier has determined to change his will, not because he desired to deprive the heir he appointed of his property acquired in the service, but in order to make a will disposing of his father's estate, and to appoint another heir.

§ 1.- If, however, the soldier should die after having been discharged, his entire estate, including that derived from his father, will belong to the heir of the peculium castrense; as Marcellus says in the Eleventh Book of the Digest. For one who is no longer in the army can not dispose of only a portion of his property by will.

§ 2.- Persons who have been deported, and almost all those who have not testamentary capacity, can be appointed heirs by a soldier. If, however, he should appoint as his heir someone who had become a penal slave, the appointment will not be valid. But if, at the time of the death of the testator, the heir should be in the possession of his citizenship, the appointment will begin to take effect, just as if the estate had just been bequeathed. And, in general, it may be said, in every instance in which a soldier appoints his heir, that the appointment will begin to acquire validity, if at the time of the death of the testator, the party was in such a condition that he could be appointed the heir of a soldier.

§ 3.- Where a soldier appoints as his heir his own slave, whom he believed to be free, without granting him his freedom, the appointment will not be valid.

§ 4.- Where a soldier by his will granted freedom to his slave, and left him his estate in trust, charging the first heir and the substitute with its delivery, even though the first heir and the substitute should die before entering upon the estate, the deceased will not die intestate, as our Emperor and the Divine Severus stated in a Rescript; but it should be held that the case resembled one where his freedom and the estate had been directly given to the said slave; and it cannot be denied that it was the intention of the testator that he should obtain both.

los militares les dejan a los herederos instituidos solamente los bienes que tuviesen.

13.- ULPIANO; *Comentarios al Edicto, libro XLV*.- Lo mismo es, también si trató de cambiar el testamento, no porque quisiera quitarle los bienes castrenses al heredero instituido, sino porque quisiera testar de los paternos, e instituir otro heredero.

§ 1.- Pero si falleció siendo ya veterano, todos los bienes, aún los paternos, le pertenecen al heredero de los castrenses, según escribió Marcelo en el libro undécimo del Digesto; porque ya no pudo testar de parte de los bienes.

§ 2.- Y pueden ser instituidos herederos por un militar, así los deportados, como casi todos los que no tienen la testamentifacción. Pero si instituyera heredero a un esclavo de la pena, no será válida la institución. Mas si al tiempo de la muerte se hallara en la ciudad, comienza a convalidarse la institución, como si entonces hubiera sido dada la herencia. Y en general, respecto a todos los que un militar instituye herederos se podrá decir esto, que la institución comienza a tener vigor, si se hallara que al tiempo de la muerte era tal que pudiese ser instituido por un militar.

§ 3.- Si el militar instituyó heredero sin la libertad a un esclavo propio, que él hubiese creído que era libre, se está en el caso de que no sea válida la institución.

§ 4.- Cuando un militar le hubiere dado en el testamento la libertad a un esclavo suyo, y a este mismo le hubiere dejado por fideicomiso a cargo del primero y del segundo heredero la herencia, respondió por rescripto nuestro Emperador, en unión del Divino Severo, que, aunque así el primer heredero, como el substituto, hubieren fallecido antes que hubieren adido la herencia, no debía tener el resultado de haber muerto intestado. Por el contrario, se ha de considerar lo mismo, que si a dicho esclavo le hubiese sido dada directamente la libertad al mismo tiempo que la herencia, cuyas dos cosas no se puede negar que el testador quiso que le correspondieran.

14.- MAECENATUS; *libro IV fideicommissorum*.- Tractabatur, an tale aliquid et in paganorum testamentis indulgendum esset: et placet non sine distinctione hoc fieri, sed, si quidem vivo testatore et sciente decessissent, nihil novi statuendum, si autem ignorante aut post mortem eius, omnimodo subveniendum.

15.- ULPIANUS, *libro XLV ad edictum*.- In fraudem plane creditorum nec miles amplius quam unum necessarium facere poterit.

§ 1.- Sicut autem hereditatem miles nuda voluntate dare potest, ita et adimere potest. Denique si cancellaverit testamentum suum vel inciderit, nullius erit momenti: si tamen testamentum cancellaverit et mox valere voluerit, valebit ex suprema voluntate. Et ideo cum miles induxisset testamentum suum, mox anulo suo signasset, qui super ea re cogniturus erit considerabit, quo proposito id fecerit: nam si mutatae voluntatis eum paenituisse probabitur, renovatum testamentum intellegitur: quod si ideo, ne ea quae scripta fuerant legi possint, causa irriti facti iudicii potior existimabitur.

§ 2.- Testamentum ante militiam factum a milite, si in militia decesserit, iure militari valere, si militis voluntas contraria non sit, divus Pius rescripsit.

§ 3.- Si quis se scribat heredem in testamento militis, non remittitur ei senatus consulti poena.

§ 4.- Miles ad tempus heredem facere potest et alium post tempus vel ex condicione vel in condicionem.

§ 5.- Item tam sibi quam filio iure militari testamentum facere potest: et soli filio, tametsi sibi non fecerit: quod testamentum valebit, si forte pater vel in militia vel intra annum militiae decessit.

14.- MARCIANUS; *Trusts, Book IV*.- A discussion arose as to whether the same indulgence should be granted with reference to the wills of civilians. It was established that in this instance there was a distinction, for if the parties should die during the lifetime of the testator, and he be aware of the fact, there was no necessity for anything new, but where he was not aware of it, relief must, by all means, be granted after his death.

15. - ULPIANUS; *On the Edict, Book XLV*.- A soldier cannot appoint more than one necessary heir, where it is evident that this is done in order to defraud his creditors.

§ 1.- Just as a soldier can dispose of his estate by merely stating his wish, so he can take it away. Hence, if he cancels or tears his will, the latter will be of no force or effect. If, however, he should cancel his will, and afterwards wish it to be valid, it will be valid through this last expression of his desire. Therefore, where a soldier, having erased his will, afterwards sealed it with his ring, the court having jurisdiction of the case must take into consideration the intention of the testator in doing this; for if it should be proved that he repented of changing his mind, the will will be understood to have been renewed. If, however, he has done this with the intention that what was written in the will should not be read, he will be held to have done so for the purpose of cancelling his will.

§ 2.- The Divine Pius stated in a Rescript that a will executed by a soldier before entering the army is valid by military law, provided the testator died in the service, and did not change his mind afterwards.

§ 3.- Where anyone who draws up the will of a soldier inserts his own name as heir therein, he will not be released from the penalty prescribed by the Decree of the Senate.

§ 4.- A soldier can appoint an heir for a certain time, and another after that time, or he can appoint one on the fulfillment of a certain condition, or another after the condition has been complied with.

§ 5.- He can also, by military law, execute a will not only for himself but also for his son, and he can do this for his son alone, even though he does not execute one for himself, and such a will is valid if the father should die in the service, or within a year after

14.- MECIANO; *Fideicomisos, libro IV*.- Discutiase si una cosa igual se había de conceder también en cuanto a los testamentos de los paisanos; y está determinado, que no se hace esto sin alguna distinción; sino que, si verdaderamente hubiesen fallecido viviendo el testador y sabiéndolo, no se ha de establecer ninguna novedad, pero que, si ignorándolo, o después de su muerte, se ha de prestar de todos modos auxilio.

15.- ULPIANO; *Comentarios al Edicto, libro XLV*.- A la verdad, en fraude de los acreedores, ni aún el militar podrá nombrar más que un solo heredero necesario.

§ 1.- Mas así como el militar puede dar la herencia por su nuda voluntad, así también puede quitarla, Finalmente, si hubiere cancelado o rasgado su testamento, no será este de ningún valor. Pero si hubiere cancelado el testamento, y después hubiere querido que valiese, valdrá en virtud de su última voluntad. Y por lo tanto, cuando un militar hubiese tachado su testamento, y luego lo hubiese sellado con su sello, considerará el que de esto conociere con qué propósito lo haya hecho; porque si se probare que él se arrepintió, de haber cambiado de voluntad, se entenderá renovado el testamento, pero si para que no se pudiera leer lo que se hubiere escrito, se considerará más atendible la causa de haber sido invalidado el testamento.

§ 2.- El Divino Pío dijo por rescripto, que vale por derecho militar el testamento hecho por un militar antes de estar en la milicia, si falleciere en la milicia, cuando no haya contraria voluntad del militar.

§ 3.- Si alguien se escribiera a sí mismo como heredero en un testamento militar, no se le remite la pena del Senadoconsulto.

§ 4.- El militar puede nombrar heredero también hasta cierto tiempo, y otro para después de este tiempo, o en virtud de condición o hasta cierta condición.

§ 5.- Asimismo, puede hacer testamento por derecho militar, tanto para sí, como para su hijo, y para su hijo solo, aunque no lo hubiere hecho para sí; cuyo testamento será válido, si acaso el padre falleció estando en la milicia, o dentro del año de haber sido

§ 6.- Bonorum possessionem ultra tempora edicto determinata nec militis posse adgnosci Papinianus libro quarto decimo quaestionum scribit, quia generalis est ista determinatio.

16.- PAULUS; *libro XLIII ad edictum*.- Dotalem fundum si legaverit miles, non erit ratum legatum propter legem Iuliam.

17.- GAIUS; *libro XV ad edictum provinciale*.- Si certarum rerum heredes instituerit miles, veluti alium urbanorum praediorum, alium rusticorum, alium ceterarum rerum, valebit institutio perindeque habebitur, atque si sine partibus heredes eos instituisset resque omnes suas per praeceptionem cuique legando distribuisset.

§ 1.- Iulianus etiam ait, si quis alium castrensium rerum, alium ceterarum scripsisset, quasi duorum hominum duas hereditates intellegi, ut etiam in aes alienum, quod in castris contractum esset, solus is teneatur, qui castrensium rerum heres institutus esset, extra castra contracto aere alieno is solus obligetur, qui ceterarum rerum heres scriptus esset. Cui scilicet conveniens videtur respondisse, ut ex quaqua causa debeatur militi, vel huic heredi vel illi ipso iure debeatur. Quod si alterutra pars bonorum aeri alieno, quod ex ea causa penderet, non sufficiat et propter hoc is qui ex parte heres institutus est non adierit, alterum qui adisset compellendum esse aut defendere totam hereditatem aut totam creditoribus solvere.

§ 2.- Si eodem testamento miles eundem heredem, deinde exheredem scripserit, adempta videtur hereditas, cum in paganorum testamento sola hereditas exheredatione adimi non possit.

his discharge.

§ 6.- Papinianus, in the Fourteenth Book of Questions, states that application for the possession of the property of an estate cannot be made after the time prescribed by the Edict, because this provision is a general one.

16.- PAULUS; *On the Edict, Book XLIII*.- If a soldier should bequeath a dotal estate to anyone, the legacy will not be valid, according to the Lex Julia.

17.- GAIUS; *On the Provincial Edict, Book XV*.- Where a soldier appoints heirs to certain property, as for instance, one to certain property in a city, another to certain lands in the country, and still another to other property, the appointments will be valid, for it will be considered just as if he had appointed the said heirs without assigning them their shares in the estate, and that he had distributed all his property through making his bequest to each one by preference.

§ 1.- Julian also says that where a testator appoints one heir to his property obtained while a soldier, and another the heir to the remainder of the estate, this is to be understood to be the disposal of two distinct estates belonging, as it were, to two different men, so that that heir alone who was appointed for the property obtained while in the service shall be liable for debts incurred by the soldier while in the army, and he alone who was appointed heir to the remainder of the estate shall be bound to pay any debts contracted outside of the service. In this instance it seems to be proper to hold that where anything is due to the soldier from any source, it will be due by operation of law to either the former or the latter heir. If, however, either of the shares of the property should not be sufficient to pay the debts for which it is liable, and for this reason the party appointed heir to this share does not accept it, the other who did accept must be compelled either to take up the defence of the entire estate, or to pay the creditors in full.

§ 2.- Where, in the same will, a soldier appoints a certain person his heir, and afterwards disinherits him, he will be held to have been deprived of the estate, while by the will of a civilian, an estate cannot be taken away by a mere disinheritance of this kind.

militar.

§ 6.- Escribe Papiniano en el libro décimo cuarto de sus Cuestiones, que después del tiempo determinado en el Edicto no se puede recibir la posesión ni aun de los bienes de un militar, porque esta es una determinación general.

16.- PAULO; *Comentarios al Edicto, libro XLIII*.- Si un militar hubiere legado un fundo dotal, no será válido el legado en virtud de la ley Julia.

17.- GAYO; *Comentarios al Edicto provincial, libro XV*.- Si un militar hubiere instituido herederos de ciertos bienes, por ejemplo, a uno, de los predios urbanos, a otro, de los rústicos, a otro, de las demás cosas, será válida la institución, y se considera lo mismo que si los hubiese instituido herederos sin porciones, y hubiese distribuido todos sus bienes legándoselos a cada uno por previa adquisición.

§ 1.- También dice Juliano, que si alguno hubiese instituido heredero de los bienes castrenses a uno, y de los demás a otro, se entiende que hay dos herencias, como de dos personas, de suerte también que respecto a las deudas, que se hubiesen contraído en los campamentos, esté obligado solo el que hubiese sido instituido heredero de los bienes castrenses, y que en cuanto a las deudas contraídas fuera de los campamentos se obligue solo el que hubiese sido instituido heredero de los demás bienes. A lo cual, por supuesto, parece conveniente haber respondido, para que cualquiera que sea la causa por la que se deba algo a un militar, por el mismo derecho se le deba a éste, o a aquel heredero. Pero si una u otra parte de los bienes no fuera suficiente para las deudas, que por aquella causa estuvieran pendientes, y por esto no hubiere adido la herencia el que fue instituido de aquella parte, ha de ser compelido el que la hubiese adido, o a defender toda la herencia, o a entregársela toda en pago a los acreedores.

§ 2.- Si en el mismo testamento hubiere un militar instituido heredero, y luego desheredado, a una misma persona, se considera quitada la herencia, aunque en el testamento de los paisanos no se pueda quitar la herencia sola con la desheredación.

§ 3.- Si pater a filio familias milite ex castrensi peculio heres institutus ommissa causa testamenti aliquid ex peculio possidebit dolo malo fecerit, quo minus possideret, datur in eum legatorum actio.

§ 4.- Si miles testamentum in militia fecerit, codicillos post militiam et intra annum missionis moriatur, plerisque placet in codicillis iuris civilis regulam spectari debere, quia non sunt a milite facti, nec ad rem pertinere, quod testamento confirmati sunt. Ideoque in his legatis, quae testamento data sunt, legi Falcidiae locum non esse, at in his, quae codicillis scripta sunt, locum esse.

18.- TRYPHONINUS; *libro XVIII disputationem*.- Si vero composita utraque legata, tam quae testamento quam quae codicillis data sunt, ultra dodrantem sint, quaeritur, quatenus minuantur ea, in quibus Falcidia locum habet. Commodissime autem id statuatur, ut ex universitate bonorum in solidum solutis legatis quae testamento miles dederat id quod supererit pro dodrante et quadrante dividatur inter heredes et eos, quibus codicillis legata data sunt.

§ 1.- Quid ergo si consumant universorum bonorum quantitatem legata quae testamento data sunt, utrum nihil ferent hi, quibus codicillis legatum est, an aliquid? Et quoniam, si adhuc miles haec quoque legasset, contribuebantur omnia et pro rata ex omnibus decedebat ea portio, quam amplius legaverat quam in bonis habuerat, nunc quoque idem fiet: deinde constituta quantitate legatorum quae codicillis data sunt ex summa, quae efficiebatur debita, si aequo iure omnia deberentur, quartam deducet his solis, quibus codicillis legata sunt.

§ 3.- If a father should be appointed heir to the castrense peculium by his son under paternal control, who is serving in the army, and he fails to take advantage of the will, and has some of the property in possession, or fraudulently relinquished it to avoid having possession, an action will be granted to the legatee against him.

§ 4.- If a soldier should make a will while he is in the army, and a codicil after his term of service has expired, and he dies within a year of his discharge, it is held by many authorities that the codicil should be considered to have been made in accordance with the rule of the Civil Law; because it was not executed by a soldier, and it should not be held that it is confirmed by the will. Therefore there is no room for the application of the Falcidian Law in the case of any legacies bequeathed by the will, but this law is applicable to such legacies as are included in the codicil.

18.- TRYPHONINUS; *Disputations, Book XVIII*.- Where, however, the legacies granted by the will, as well as those granted by the codicil, taken together, amount to more than three-fourths of the estate, the question arises as to what extent should those to which the Falcidian Law applies be diminished. It would be most convenient, however, for it to be decided that the legacies which the soldier bequeathed by his will, having been fully paid out of the assets of the entire estate, the remainder should be divided between the heirs and those to whom legacies were given by the codicil, in the proportion of three-fourths to the former, and one-fourth to the latter.

§ 1.- But what if the legacies bequeathed by the will should absorb the entire amount of the estate, would those to whom property was left by the codicil be entitled to anything, or would they not? Since, if the soldier had made these bequests while still in the service, all would be liable to contribution, and that portion which he bequeathed in excess of his estate must be deducted pro rata from all the legacies, the same must also be done in this instance. Then, the amount of the legacies bequeathed by the codicil having been ascertained from the sum which is found to be due (where the legacies belong to the same

§ 3.- Si el padre, instituido heredero del peculio castrense por el hijo de familia, militar, poseyere alguna cosa del peculio habiendo prescindido de la causa del testamento, o con dolo malo hubiere hecho que no la poseyera, se da contra él la acción de los legados.

§ 4.- Si un militar hubiere hecho testamento estando en la milicia, y codicilos después de haber estando en la milicia, y muriese dentro del año de su licenciamiento, les parece bien a los más, que en cuanto a los codicilos se deba atender a la regla del derecho civil, porque no fueron hechos por un militar, y que no hace al caso que hayan sido confirmados por el testamento; y que por esto no tiene lugar la ley Falcidia en estos legados, que se dejaron en el testamento, pero que tiene lugar en aquellos que se escribieron en los codicilos.

18.- TRIFONINO; *Disputas, libro XVIII*.- Pero si computados unos y otros legados, tanto los que se dieron en el testamento, como los que en los codicilos, excedieran de los tres cuartos, se pregunta, en cuánto se disminuirán a aquellos respecto de los que tiene lugar la Falcidia; mas esto se determinará facilísimamente, de modo que pagados por completo de la totalidad de los bienes los legados, que el militar había dado en el testamento, se divida lo que sobrase, a razón de tres cuartos y de una cuarta parte, entre los herederos y aquellos a quienes se les dieron los legados en los codicilos.

§ 1.- ¿Qué se dirá, pues, si los legados, que se dieron en el testamento, consumieran la cuantía de la totalidad de los bienes, aquellos a quienes se les legó en los codicilos no llevarán acaso nada, o alguna cosa? Y como, si también los hubiese legado siendo todavía militar, contribuirían todos, y a prorrata se deduciría de todos la porción que había legado de más sobre lo que había tenido en sus bienes, también ahora se hará lo mismo; y fijada después la cuantía de los legados, que se dieron en los codicilos, deduzca, de la suma que resultase debida, si todos se debiesen por igual derecho, la cuarta parte a aquellos solos a

§ 2.- Quod si post utraque legata solida computata deprehenderetur, quod remaneat apud heredem, non tamen sufficiens quartae eorundem legatorum: quod ei deest, detrahatur his solis, quibus codicillis legata data sunt.

19.- ULPIANUS; *libro IV disputationem*.- Quae-rebatur, si miles, qui habebat iam factum testamentum, aliud fecisset et in eo comprehendisset se fidei heredis committere, ut priores tabulae valerent, quid iuris esset. Dicebam: militi licet plura testamenta facere, sed sive simul fecerit sive separatim, utique valebunt, si hoc specialiter expresserit, nec superius per inferius rumpetur, cum et ex parte heredem instituere possit, hoc est ex parte testato, ex parte intestato decedere. Quin immo et si codicillos ante fecerat, poterit eos per testamentum sequens cavendo in potestatem institutionis redigere et efficere directam institutionem, quae erat precaria. Secundum haec in proposito referebam, si hoc animo fuerit miles, ut valeret prius factum testamentum, id quod cavuit valere oportere ac per hoc effici, ut duo testamenta sint. Sed in proposito cum fidei heredis committatur, ut valeat prius testamentum, apparet eum non ipso iure valere voluisse, sed magis per fideicommissum, id est in causam fideicommissi et codicillorum vim prioris testamenti convertisse.

§ 1.- Utrum autem totum testamentum in eam causam conversum sit, hoc est et heredis institutio, an vero legata tantum et fideicommissa et libertates, quaeritur. Sed mihi videtur non solum cetera praeter institutionem heredis, sed et [es] ipsam institutionem in causam fideicommissi vertisse, nisi aliud testatorem scripsisse probetur.

§ 2.- Si quis a milite heres ad tempus scriptus esset et alius ex tempore, quaeritur, an posterior heres a

class) the heir can then deduct his fourth from those legacies alone which were bequeathed by the codicil.

§ 2.- If, however, all the legacies had been included in the computation, and what remains in the hands of the heir should not be sufficient to make up the fourth of his share of said legacies, whatever is lacking must be taken from those legacies alone which were bequeathed by the codicil.

19.- ULPIANUS; *Disputations, Book IV*.- The question arose, where a soldier having already made one will makes a second, and in the latter charges his heir as trustee to carry out the provisions of the first, what would be the rule of law in this case? I said, "A soldier is permitted to make several wills, but whether he makes them all at once or separately, they will be valid only where the testator expressly stated that he desired this to be the case; nor will the first will be annulled by the last, as he can appoint an heir to a portion of his estate, that is to say, he can die partly testate and partly intestate. Again, if he had, in the first place, made a codicil, he can arrange it by providing in the will which follows that the codicil can have the effect of an appointment, and can render a direct appointment effective which was formerly precarious; hence, I will say that, in the case stated, if the soldier had intended that the will first executed should be valid, what he provided must stand, and the consequence is that there will be two wills. However, where the execution of the first will is committed to the heir as trustee, it is evident that he did not intend that it should be valid by operation of law, but rather through the acts of the trustee, that is to say, that he has converted the effect of the first will into that of a trust and a codicil.

§ 1.- The question, however, arises, whether the entire will is converted into a codicil, that is to say, whether the appointment of the heir is included, or in fact only the legacies, the trusts, and the grants of freedom. It seems to me that not only the other matters, with the exception of the appointment of the heir, but also the appointment itself is included in the trust, unless it is proved that the intention of the testator was otherwise.

§ 2.- Where anyone has been appointed by a soldier heir for a certain time, and another person an heir for

quienes en los codicilos se les dieron los legados.

§ 2.- Pero si después de computados íntegros unos y otros legados se viere que lo que le queda al heredero no es, sin embargo, suficiente para la cuarta de los mismos legados, dedúzcase lo que le falta, a aquellos solos a quienes se dieron los legados en los codicilos.

19.- ULIPIANO; *Disputas, libro IV*.- Si un militar, que ya tenía hecho testamento, hubiese hecho otro, y en éste hubiese consignado que encomendaba a la fidelidad del heredero, que fuese válido el primer testamento, se preguntaba, qué derecho habría; yo decía: al militar le es lícito hacer muchos testamentos, pero ya si los hubiere hecho simultáneamente, ya si por separado, serán ciertamente válidos, si especialmente hubiere expresado esto; y no se romperá el anterior por el posterior, porque también podría instituir heredero de una parte, esto es, fallecer en parte testado, y en parte intestado. Aún más, también si antes había hecho codicilos, disponiendo por el siguiente testamento podrá elevarlos a la categoría de institución, y hacer directa la institución, que era precaria. Según esto, decía yo en el caso propuesto que si el militar hubiere tenido intención de que fuese válido el primer testamento hecho, debe valer lo que dispuso, y que de aquí resulta que haya dos testamentos; pero en el caso propuesto, encomendándose a la fidelidad del heredero que valga el primer testamento, aparece que él no quiso que fuese válido por el mismo derecho, sino más bien por el fideicomiso, esto es, que redujo a la condición del fideicomiso y de los codicilos la fuerza del primer testamento.

§ 1.- Pero se pregunta, si acaso se habrá reducido a esta condición todo el testamento, esto es también la institución de heredero, o solamente los legados, los fideicomisos, y las libertades; pero a mi me parece que redujo a la condición de fideicomiso no solamente lo demás, excepto la institución de heredero, sino también la misma institución, si no se probare que el testador escribió otra cosa.

§ 2.- Si por un militar uno hubiese sido instituido heredero hasta cierto tiempo, y otro desde cierto

priore relicta legata debet. Et arbitror hunc non debere, nisi alia voluntas militis probetur.

20.- IULIANUS; *libro XXVII digestorum*.- Tribunus militum si intra dies certos, quam successor eius in castra venerat, manens in castris codicillos fecerit et ibi decesserit, quoniam desinit militis loco haberi, postquam successor eius in castra venit, ideo communi iure civium Romanorum codicilli eius aestimandi sunt.

§ 1.- Cum aliquis facto testamento militare coeperit, id quoque testamentum, quod ante quam militare coeperit fecerat, aliquo casu intellegitur militiae tempore factum, veluti si tabulas inciderit et legerit testamentum ac rursus suo signo signaverit, amplius si et aliquid interleverit perduxerit adiecerit emendaverit: quod si nihil bonorum inciderit, testamentum eius ad privilegia militum non pertinebit.

21.- AFRICANUS; *libro IV quaestionum*.- Quod constitutum est, ut testamentum militiae tempore factum etiam intra annum post missionem valeret, quantum ad verba eius ad eos dumtaxat qui mitti solent id beneficium pertinere existimavit: secundum quod neque praefectos neque tribunos aut ceteros, qui successoribus acceptis militare desinunt, hoc privilegium habituros.

22.- MARCIANUS; *libro IV institutionum*.- Miles filius familias si capite minutus fuerit vel emancipatus vel in adoptionem datus a patre suo, testamentum eius valet quasi ex nova voluntate.

23.- TERTULLIANUS; *libro singulari de castrense peculio*.- Idem et si pater familias miles de castrensibus rebus dumtaxat testatus adrogandum se

the ensuing time, the question arises whether the last heir should be responsible for the distribution of the legacies not distributed by the first one. I think that this obligation does not rest upon him, unless it is established that the soldier's intention was different.

20.- JULIANUS; *Digest, Book XXVII*.- A military tribune made a codicil while in camp, after his successor arrived, and then died. As he ceased to occupy the position of a soldier after his successor had arrived in the camp, his codicil must be considered as having been executed under the common law governing Roman citizens.

§ 1.- Where anyone, after executing a will, enters the military service, this will is also considered that of a soldier, under certain circumstances; as, for instance, if he opened the will and read it, and sealed it a second time with his seal; and still more so, if he erased part of it, defaced it, or made any additions to, or corrections in it. If, however, none of these things took place, his will will not enjoy any of the privileges attaching to the testament of a soldier.

21.- AFRICANUS; *Questions, Book IV*.- The decision that a will executed during military service is also valid for a year after the discharge of the testator from the army seems by its terms to show that this privilege can only be enjoyed by those who are regularly discharged. Hence, neither prefects, tribunes, or other officers who cease to serve when their successors arrive will be entitled to it.

22.- MARCIANUS; *Institutes, Book IV*.- Where a son under paternal control, who is serving as a soldier, loses his civil rights, or is emancipated, or is given in adoption by his father, his will will be valid, just as if a new one had been executed.

23.- TERTULLIANUS; *On the Castrense Peculium*.- The same rule applies where the head of a household, while a soldier, only disposes of his

tiempo, se, pregunta, ¿debe acaso el heredero posterior los legados dejados a cargo del primero? Y opino que éste no los debe, si no se probase otra voluntad del militar.

20.- JULIANO; *Digesto libro XXVII*.- Si el tribuno militar, permaneciendo en los campamentos, hubiere hecho codicilos dentro de ciertos días después que su sucesor había llegado a los campamentos, y hubiere fallecido allí, como quiera que deja de ser considerado en la condición de militar, después que su sucesor llegó a los campamentos, sus codicilos han de ser por esto estimados conforme al derecho común de los ciudadanos romanos.

§ 1.- Cuando, habiendo hecho testamento, hubiere comenzado alguien a ser militar, en algún caso se entiende hecho durante el tiempo de su servicio militar también este testamento, que había hecho antes que hubiere comenzado a ser militar, por ejemplo, si hubiere abierto y leído el testamento, y luego lo hubiere sellado de nuevo con su sello; y también, si hubiere borrado, suprimido, añadido, o enmendado alguna cosa; pero si no hubiere sucedido nada de esto, su testamento no estará comprendido en los privilegios de los militares.

21.- AFRICANO; *Cuestiones, libro IV*.- El beneficio que se estableció, de que el testamento hecho en el tiempo del servicio militar valiese también durante un año después del licenciamiento, opinó que, en cuanto a las palabras del mismo, corresponde solamente a los que suelen ser licenciados, según lo que, ni los prefectos, ni los tribunos, ni los demás que dejan de servir en la milicia habiendo recibido sucesores, habrán de tener este privilegio.

22.- MARCIANO; *Instituta, libro IV*.- Si un militar, hijo de familia, hubiere sido disminuido de cabeza, o emancipado, o dado en adopción por su padre, es válido su testamento, como por nueva voluntad.

23.- TERTULIANO; *Del peculio castrense, libro único*.- Lo mismo, también si habiendo testado un padre de familia, militar, solamente de sus bienes

dederit: si vero missus iam hoc fecerat, non valet testamentum.

24.- FLORUS; *libro X institutionum*.- Divus Traianus Statilio Severo ita rescripsit: "Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intellegi debet, ut utique prius constare debeat testamentum factum esse, quod et sine scriptura et a non militantibus fieri potest. Si ergo miles, de cuius bonis apud te quaeritur, convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet, quem vellet sibi esse heredem et cui libertatem tribuere: potest videri sine scripto hoc modo esse testatus et voluntas eius rata habenda est. Ceterum si, ut plerumque sermonibus fieri solet, dixit alicui: "Ego te heredem facio", aut "tibi bona mea relinquo", non oportet hoc pro testamento observari. Nec ullorum magis interest, quam ipsorum, quibus id privilegium datum est, eiusmodi exemplum non admitti: alioquin non difficulter post mortem alicuius militis testes existerent, qui adfirmarent se audisse dicentem aliquem relinquere se bona cui visum sit, et per hoc iudicia vera subvertuntur".

25.- MARCELLUS; *libro singulari responsorum*.- Titius priusquam tribunus legionis factus esset, testamentum fecit et postea cinctus manente eodem defunctus est: quaero, an militis testamentum videatur esse. Marcellus respondit: testamentum quod ante tribunatum fecisset, nisi postea ab eo factum dictum esse probaretur quod valere vellet, ad commune ius pertinet: constitutionibus enim principum non militum testamenta, sed quae a militibus facta sunt confirmantur: sed plane fecisse testamentum eum interpretandum est, qui se velle testamentum quod ante fecerat valere aliquo modo declaravit.

peculium castrense by will, and subsequently gives himself to be arrogated. If, however, he should do this after having been already discharged, his testament will not be valid.

24.- FLORENTINUS; *Institutes, Book X*.- The Divine Trajanus stated in a Rescript addressed to Statilius Severus that: "The privilege accorded to persons serving in the army which imparts validity to their wills, no matter how they have been executed, must be understood as follows, namely, in the first place, it must be established that the will was executed, which can be done without committing it to writing, which also applies to others who are not soldiers. Therefore, where a soldier, with reference to whose estate application has been made to you, has called together persons to witness his will, and declared in their presence whom he desired to be his heir, and to what slave he wished to grant freedom, it may be held that he, in this way, made a will without reducing it to writing, and his wishes must be carried into effect. If, however (as frequently happens), he should say to someone: "I constitute you my heir, or I leave you my property"; this must not be regarded as a will. Nor does it make any more difference to others than those to whom this privilege is granted, that such a disposition of property should not be allowed; for otherwise, it would not be difficult for witnesses to be found after the death of a soldier, who would assert that they had heard the latter say that he left his property to those whom they desired to benefit, and in this way the wills of soldiers would be overthrown."

25.- MARCELLUS; *Opinions*.- Titius, before he became a legionary tribune, made a will, and after obtaining the office died, without having altered it. I ask whether such a will should be considered a military one. Marcellus answers, The will which he made before becoming tribune would be subject to the rules of the Common Law, unless after it had been executed, it is proved that the testator declared that he wished it to be valid. For, by the Imperial Constitutions, not the wills of soldiers, but wills made by soldiers while in the army, are confirmed. It is evident, however, that a soldier should be

castrenses, se hubiere dado en arrogación; pero si esto lo había hecho estando ya licenciado, no es válido el testamento.

24.- FLORENTINO; *Instituta, libro X*.- El Divino Trajano respondió así por rescripto a Statilio Severo: «Este privilegio, que se les dió a los militares, para que sean válidos los testamentos de cualquier modo hechos por ellos, se debe entender de suerte que ciertamente deba constar primero que se hizo testamento, el cual se puede hacer también sin escritura, y por los que no son militares. Así, pues, si el militar, sobre cuyos bienes se cuestiona ante tí, habiendo convocado hombres para esto, para que se atestiguase su voluntad, habló de modo que declarase a quién quería él tener por heredero, y a quién concederle la libertad, se puede considerar que de este modo testó sin escritura, y ha de ser tenida como válida su voluntad. Pero si como se suele hacer muchas veces en las conversaciones, dijo a alguno: yo te hago heredero, o, te dejo mis bienes, no conviene que esto se observe como testamento. Y a nadie le interesa más que a los mismos a quienes se les dio este privilegio, que no se admita semejante forma; porque de otra suerte, no sería difícil que después de la muerte de cualquier militar hubiese testigos que afirmasen, que ellos oyeron que uno decía que dejaba sus bienes a quien le hubiera parecido; y de este modo se suvierten las verdaderas últimas voluntades».

25.- MARCELO; *Respuestas, libro único*.- Ticio hizo testamento antes que hubiese sido hecho tribuno de una legión, y permaneciendo después el mismo con el cingulo falleció; pregunto, si se considerará que es de militar su testamento; Marcelo respondió: el testamento, que hubiese hecho antes de ser tribuno, si no se probase que después se hizo, o se dijo, por él alguna cosa, que quisiera que valiese, pertenece al derecho común; porque en las Constituciones de los Príncipes se confirman no los testamentos de los militares, sino los hechos por los militares. Pero, a la verdad, se ha de interpretar que hizo testamento el

26.- MACER *libro II militarium*.- Testamenta eorum, qui ignominiae causa missi sunt, statim desinunt militari iure valere, quod anni spatium testamentis eorum, qui honestam vel causariam missionem meruerunt, tribuitur.

§ 1.- Ius testandi de castrensi, quod filiis familias militibus concessum est, ad eos, qui ignominiae causa missi sunt, non pertinet, quod hoc praemii loco merentibus tributum est.

27.- PAPINIANUS; *libro VI responsorum*.- Centurio secundo testamento postumus heredes instituit neque substitutos dedit: quibus non editis ad superius testamentum se redire testatus est. Cetera, quae secundo testamento scripsit, esse irrita placuit, nisi nominatim ea confirmasset ad priorem voluntatem reversus.

28.- ULPIANUS; *libro XXXVI ad Sabinum*.- Cum filius familias miles decessisset filio impubere herede instituto eique substituisset in avi potestate manenti tutoresque dedisset, divi fratres rescripserunt substitutionem quidem valere, tutoris autem dationem non valere, quia hereditati quidem suae miles qualem vellet substitutionem facere potest, verum tamen alienum ius minuere non potest.

29.- MARCELLUS; *libro X digestorum*.- Si a milite scriptus heres sua sponte adierit hereditatem et rogatus totam hereditatem restituerit, ex Trebelliano transeunt actiones.

understood to have made a will, who declares in any way whatsoever that he desires that a previous will which he had executed should be valid.

26.- MACER; *Military wills, Book II*.- The wills of soldiers who have been dishonorably discharged immediately cease to be valid by military law; but the privilege is extended for the term of a year to the wills of those who have obtained an honorable discharge, or one for some good reason.

§ 1.- The right to dispose of castrense peculium by will, which is granted to sons under paternal control, serving in the army, is not conceded to such as are dishonorably discharged, because this privilege is only bestowed by way of recompense upon others who deserve it.

27.- PAPINIANUS; *Opinions, Book VI*.- A centurion, by a second will, appointed his posthumous children his heirs, but did not appoint any substitutes for them; and, as none were mentioned, stated that reference should be had to his first will. It was held that everything included in the second will was void, except the appointment of the posthumous heirs; unless, after having referred to his first will, he expressly confirmed all that was contained in the second.

28.- ULPIANUS; *On Sabinus, Book XXXVI*.- Where a son under paternal control died while in the army, after having appointed as his heir his son, who had not yet reached the age of puberty, and also appointed a substitute as well as guardians for him while under the control of his grandfather, the Divine Brothers stated in a Rescript that the substitution was valid, but that the appointment of the guardians was not, for the reason that a soldier in disposing of his estate can make any substitution that he desires, but he cannot do anything injuriously affecting the rights of another.

29.- MARCELLUS; *Digest, Book X*.- If an heir appointed by a soldier should voluntarily accept an estate, and, having been requested to do so, surrenders the whole of it, the rights of action arising out of the Trebellian Decree of the Senate are

que de algún modo declaró que él quería que valiese el testamento, que antes había hecho.

26.- MACER; *De los testamentos militares, libro II*.- Los testamentos de los que fueron licenciados por causa de ignominia, al punto dejan de ser válidos por derecho militar, porque el espacio de un año se concede a los testamentos de los que merecieron licenciamiento honroso, o por causa de invalidación.

§ 1.- El derecho de testar del peculio castrense, que se les concedió a los hijos de familia, militares, no les pertenece a los que fueron licenciados por causa de ignominia, porque esto se les concedió en calidad de premio a los beneméritos.

27.- PAPINIANO; *Respuestas, libro VI*.- Un centurión instituyó herederos en el segundo testamento a unos póstumos, y no les dio substitutos, y testó diciendo que, no naciendo estos, él volvía a su anterior testamento; se determinó, que fuese nulo lo demás que escribió en el segundo testamento, si expresamente no lo hubiese confirmado al volver a su primera voluntad.

28.- ULPIANO; *Comentarios a Sabino, libro XXXVI*.- Si hubiese fallecido un hijo de familia, militar, habiendo instituido heredero a un hijo impúbero, y a éste, que estaba bajo la potestad del abuelo, le hubiese nombrado substituto y dado tutores, respondieron por rescripto los Divinos Hermanos, que era ciertamente válida la substitución, pero que no era válida la dación de tutor, porque el militar puede, a la verdad, hacer para su propia herencia la substitución que quiera, pero no puede menoscabar el derecho ajeno.

29.- MARCELO; *Digesto, libro X*.- Si el heredero instituido por un militar hubiere adido espontáneamente la herencia, y habiéndosele rogado hubiere restituido toda la herencia, se transmiten las acciones en virtud del Senadoconsulto Trebeliano.

§ 1.- Miles testamento suo manumittendo nihil efficit in eo, cuius libertas lege Aelia Sentia vel alia qua impeditur.

§ 2.- Edictum praetoris, quo iusiurandum heredibus institutis legatariisque remittitur, locum habet etiam in militum testamentis, sicut etiam in fideicommissis: idemque si turpis esset condicio.

§ 3.- Patri eius, qui in emancipatione ipse manumissor exstitisset, contra tabulas testamenti dandam bonorum possessionem partis debitae placet exceptis his rebus, quas in castris adquisisset, quarum liberam testamenti factionem habet:

30.- PAULUS; *libro VII quaestionum*.- Nam in bona castrensia non esse dandam contra tabulas filii militis bonorum possessionem divus Pius Antoninus rescripsit.

31.- MARCELLUS; *libro XIII digestorum*.- Si miles Titio et Seio servum legaverit et eum Titius manumisisset deliberante Seio moxque is legatum omisisset, liberandum fore dico, quia et si heres servum alicui legatum interim manumisisset, deinde legatarius repudiasset, liber esset.

32.- MODESTINUS; *libro IX regularum*.- Si secundum probabilem voluntatem militis hereditas eius non adeatur, nec res castrenses heredibus competunt.

33.- TERTULLIANUS; *libro singulari de castrense peculio*.- Si filius familias miles fecisset testamentum more militiae, deinde post mortem patris postumus ei nasceretur, utique rumpitur eius testamentum. Verum si perseverasset in ea voluntate,

transferred.

§ 1.- Where a soldier by his will manumits a slave whose freedom is not allowed to be granted by the Lex Aelia Sentia, or any other law, his act is void.

§ 2.- The Edict of the Praetor, by which appointed heirs as well as legatees are excused from taking an oath, is also applicable to the wills of soldiers, just as in the case of trusts. The same rule applies where a condition is dishonorable.

§ 3.- It is established that praetorian possession of the share of the estate to which he was entitled should be granted to a father who had personally emancipated his son, this being done in opposition to the provisions of the latter's will, except with reference to such property as the son had acquired while in the service, and which he was free to dispose of testamentarily.

30.- PAULUS; *Questions, Book VII*.- For the Divine Pius Antoninus stated in a Rescript that praetorian possession of the estate of a son serving as a soldier should not be granted in violation of the will of the latter, so far as property obtained while in the army was concerned.

31.- MARCELLUS; *Digest, Book XIII*.- Where a soldier bequeathed a slave to Titius and Seius, and while Seius was deliberating as to whether he would accept the bequest or not, Titius manumitted the slave, and Seius afterwards declined the legacy, I say that the slave should be free, for the reason that if an heir manumits a slave bequeathed to anyone, and the legatee afterwards rejects the bequest, the slave will become free.

32.- MODESTINUS; *Rules, Book IX*.- Where the estate of a soldier is not entered upon in accordance with the evident desire of the testator, the heirs will not be entitled to his property acquired while in the service.

33.- TERTULLIANUS; *On the Castrense Peculium*.- Where a son under paternal control, while in the army, makes a will according to military custom, and subsequently, after the death of his father, a posthumous child is born to him, his will is

§ 1.- El militar, manumitiendo en su testamento, nada hace respecto a aquel cuya libertad está impedida por la Ley Elia Sencia, o por otra.

§ 2.- El Edicto del Pretor, por el cual se les remite el juramento a los herederos instituidos y a los legatarios, tiene aplicación también en los testamentos de los militares, así como en los fideicomisos; y lo mismo, si hubiese una condición torpe.

§ 3.- Está determinado, que al padre de aquel, que él mismo hubiese sido manumisor en la emancipación, se le ha de dar contra las tablas del testamento la posesión de los bienes de la parte debida, excepto de aquellas cosas que hubiese adquirido en los campamentos, de las cuales tiene la libre facultad de testar.

30.- PAULO; *Cuestiones, libro VII*.- Porque respondió por rescripto el Divino Pío Antonino, que en los bienes castrenses no se ha de dar la posesión de los bienes contra el testamento del hijo, militar.

31.- MARCELO; *Digesto; libro XIII*.- Si un militar hubiere legado un esclavo a Ticio y a Servio, y Ticio lo hubiese manumitido estando deliberando Seyo, y luego éste no hubiese admitido el legado, digo que se le habrá de dar la libertad, porque sería libre, también si el heredero hubiese manumitido entretanto el esclavo legado a alguien, y luego lo hubiese repudiado el legatario.

32.- MODESTINO; *Reglas, libro IX*.- Si conforme a la probable voluntad de un militar no fuese adida su herencia, ni los bienes castrenses les competen a los herederos.

33.- TERTULIANO; *Del peculio castrense, libro único*.- Si un hijo de familia, militar, hubiese hecho testamento a la usanza militar, y luego le naciese un póstumo después de la muerte de su padre, se rompe ciertamente su testamento. Pero si hubiese perse-

ut vellet adhuc illud testamentum valere, valiturum illud, quasi rursum aliud factum, si modo militaret adhuc eo tempore quo nasceretur illi postumus.

§ 1.- Sed si filius familias miles fecisset testamentum, deinde postea vivo eo et adhuc avo quoque superstite nasceretur ei postumus, non rumpitur eius testamentum, quia cum id quod nasceretur in potestate eius non perveniret, non videtur suus heres adgnasci: ac ne avo quidem suo hunc nepotem postumum, cum vivo filio nasceretur, suum heredem protinus adgnasci et ideo nec avi testamentum rumpi, quoniam, licet in potestate avi protinus esse inciperet, tamen antecederet eum filius.

§ 2.- Secundum quae si filius familias miles testamentum fecerit et omiserit postumum per errorem, non quod volebat exheredatum, deinde postumus post mortem avi vivo adhuc filio, id est patre suo natus fuerit, omnimodo rumpet illius testamentum. Sed si quidem pagano iam illo facto natus sit, nec convalescet ruptum: si vero militante adhuc natus fuerit, rumpetur, deinde, si voluerit ratum illud esse pater, convalescet sic quasi denuo factum.

§ 3.- Sed et si vivo avo nascatur postumus, hic non rumpet continuo patris testamentum: si supervixerit post mortem avi vivo adhuc patre, rumpet, quod novus illi nunc primum heres adgnascitur: ita tamen, ut numquam possit duorum simul testamenta rumpere et avi et patris.

34.- PAPINIANUS; *libro XIV quaestionum*.- Eius militis, qui doloris impatientia vel taedio vitae mori maluit, testamentum valere vel intestati bona ab his qui lege vocantur vindicari divus Hadrianus rescipit.

broken. If, however, he is still of the same mind, and wishes the said will to continue to be valid, he can render it so, just as if he had made another; provided he was serving as a soldier up to the time when the posthumous child was born.

§ 1.- Where, however, a son under paternal control, who is serving as a soldier, makes a will, and then afterwards, during his lifetime, and during that of his grandfather, a posthumous child is born to him, his will will not be broken, because the said child will not come under his control, and is not held to be born a proper heir. Nor indeed, can this posthumous grandchild, since it was born during the lifetime of the son, become at once a proper heir to its grandfather, and therefore the will of the grandfather is not broken; as, although it at once comes under the control of its grandfather, the son will, nevertheless, be entitled to priority.

§ 2.- It follows that if a son under paternal control makes a will while serving as a soldier, and through mistake, and not because he wished to disinherit him, omits to mention a posthumous child; and if the said posthumous child should be born after the death of his grandfather, but during the lifetime of the son, that is to say his own father, his testament will certainly be broken. If, however, it should be born after its father has become a civilian, the validity of the testament which has been broken will not be restored. But if it should be born while its father is still in the army, then, if the latter should desire the will to be valid, it will become so, just as if it had been executed a second time.

§ 3.- If, however, a posthumous child should be born during the lifetime of its grandfather, this will not at once break the will of the father, but only where it survives its grandfather, while its father is still living, as it now for the first time becomes the heir of the latter. For this is the case because it never can break two wills at once, that is to say, those of its father and its grandfather.

34.- PAULUS; *Questions, Book XIV*.- The Divine Hadrian stated in a Rescript that the will of a soldier who preferred to die rather than to suffer pain, or the annoyances of life, was valid, and that his estate could be claimed by those entitled to it by law if he

verado en esta voluntad, de suerte que quisiera todavía que valiese aquel testamento; habrá de valer, cual si de nuevo hubiese hecho otro, si es que fuese todavía militar al tiempo en que le naciese un póstumo.

§ 1.- Pero si el hijo de familia, militar, hubiese hecho testamento, y luego después, viviendo él y sobreviviendo todavía también el abuelo, le naciese un póstumo, no se rompe su testamento, porque como lo que naciese no llegaría a estar bajo su potestad, no se considera que nace heredero suyo, y ni aún para su abuelo nace este nieto póstumo siendo desde luego heredero suyo, porque nacería viviendo el padre; por esto tampoco se rompe el testamento del abuelo, porque, aunque comenzase a estar desde luego bajo la potestad del abuelo, le precedería, sin embargo, el hijo.

§ 2.- Según esto, si el hijo de familia, militar, hubiere hecho testamento, y hubiere preterido a un póstumo por error, no porque quería desheredarlo, y luego hubiere nacido el póstumo después de la muerte del abuelo, viviendo todavía el hijo, esto es, su propio padre, romperá de todos modos el testamento de éste. Pero si verdaderamente hubiera nacido, habiéndose ya hecho paisano aquel, tampoco se convalidará el testamento roto; mas si hubiere nacido siendo todavía militar, se romperá; y si después hubiere querido el padre que fuese válido, se convalidará como si de nuevo hubiese sido hecho.

§ 3.- Pero si viviendo aún el abuelo naciera el póstumo, éste no romperá desde luego el testamento del padre; si sobreviviere después de la muerte del abuelo, lo romperá viviendo todavía el padre, porque le nace ahora por primera vez un nuevo heredero, pero de suerte que nunca pueda romper simultáneamente los testamentos de los dos, el del abuelo y el del padre.

34.- PAPINIANO; *Cuestiones, libro XIV*.- El Divino Adriano respondió por rescripto, que es válido el testamento de aquel militar que por no sufrir un dolor, o por tedio de la vida, prefirió morir, o que los bienes de él, intestado, son reivindicados por

§ 1.- Militia missus intra annum testamentum facere coepit neque perficere potuit: potest dici solum ita esse testamentum quod in militia fecit, si iure militiae fuit scriptum: alioquin si valuit iure communi, non esse iure rescissum.

§ 2.- Nec tamen circa militem eadem adhibebitur distinctio: nam quocumque modo testamentum fecerit, novissima voluntate rescindetur, quoniam voluntas quoque militis testamentum est.

35.- PAPINIANUS; *libro XIX quaestionum*.- Miles si testamentum imperfectum relinquit, scriptura quae profertur perfecti testamenti potestatem optinet: nam militis testamentum sola perficitur voluntate: quique plura per dies varios scribit, saepe facere testamentum videtur.

36.- PAPINIANUS; *libro VI responsorum*.- Militis codicillis ad testamentum factis etiam hereditas iure videtur dari. Quare si partem dimidiam hereditatis codicillis dederit, testamento scriptus ex asse heres partem dimidiam habebit, legata autem testamento data communiter debentur.

§ 1.- Miles castrensiu bonorum et non castrensiu diversis heredibus institutis postea castrensiu bonorum alios heredes instituit. Prioribus tabulis tantum abstulisse videtur, quantum in posteriores contulerit: nec videtur mutare, etsi prioribus tabulis unus heres scriptus fuisset.

§ 2.- Miles in supremis ordinandis ignarus uxorem esse praegnatam ventris non habuit mentionem. Post mortem patris filia nata ruptum esse testamentum apparuit neque legata deberi. Si qua vero medio tempore scriptus heres legata solvisset, utilibus actionibus filiae datis ob improvisum casum esse revocanda nec institutum, cum bonae fidei possessor fuerit, quod inde servari non potuisset, praestare.

died intestate.

§ 1.- A soldier who had been discharged began a will within the year but was unable to finish it. It can be said that, by this act, the will which he executed while in the army was rendered void, if it was drawn up in accordance with military law; otherwise it would not be legally rescinded if it was valid at Common Law.

§ 2.- This distinction does not apply to the will of a soldier executed while in the service, for in whatever way he may make a will, it is rendered inoperative by a following one, as the wish of a soldier, however expressed, is a testament.

35.- THE SAME; *Questions, Book XIX*.- Where a soldier leaves an imperfect will, the instrument when offered has the effect of a perfect one, for the testament of a soldier is perfected by the mere statement of his wishes. Where anyone makes several wills on different days, he is considered to make his will frequently.

36.- THE SAME; *Opinions, Book VI*.- An estate is also held to be legally bequeathed where a codicil to a will is executed; hence, if the testator bequeaths half his estate by a codicil, the heir, appointed to all of it by the will, will be entitled to half, and any legacies left by the will must be divided in common, when they are paid.

§ 1.- A soldier, after having appointed different heirs, some to what he obtained in the service and others to property otherwise acquired, subsequently designated still other heirs for his property obtained in the service. He is held to have taken from the first will whatever he bestowed by the second, but he is not considered to have changed his first will, even though but one heir was appointed thereby.

§ 2.- A soldier, when drawing up his last will, not being aware that his wife was pregnant, made no mention of the unborn child. A daughter having been born after his death, the will appeared to have been broken, and the legacies not to be due. If, however, in the meantime, the appointed heir should have paid the legacies, praetorian actions would be granted the daughter to recover the property, on account of this unexpected event, and the appointed heir, since he

aquellos que son llamados por la ley.

§ 1.- Un licenciado de la milicia comenzó a hacer testamento dentro del año, y no pudo acabarlo; se puede decir, que de este modo quedó invalidado el testamento, que hizo estando en la milicia, si fue escrito con arreglo al derecho militar, pero que si fue válido por derecho común, no fue rescindido en derecho.

§ 2.- Pero respecto al militar no se hará la misma distinción; porque de cualquier modo que hubiere hecho testamento, se rescindirá por última voluntad, porque también la voluntad del militar es una especie de testamento.

35.- EL MISMO; *Cuestiones, libro XIX*.- Si un militar dejase un testamento imperfecto, la escritura que se produce, alcanza fuerza de testamento perfecto, porque el testamento de un militar se perfecciona con su sola voluntad. Y el que en varios días escribe muchos, se considera que hace muchas veces testamento.

36.- EL MISMO; *Respuestas, libro VI*.- Con los codicilos de un militar hechos a un testamento se considera que un derecho se da también la herencia. Por lo cual, si en los codicilos hubiere dado la mitad de la herencia, el heredero instituido en el testamento por todo el as tendrá la mitad; pero se deben en común los legados dados en el testamento.

§ 1.- Un militar, habiendo instituido diversos herederos de los bienes castrenses y de los no castrenses, instituyó después otros herederos de los bienes castrenses; se considera que del primer testamento quitó tanto cuanto hubiere llevado a los posteriores, y no parece que hay alteración, aunque en el primer testamento se hubiese instituido un solo heredero.

§ 2.- Un militar, ignorando al hacer su testamento que su mujer estaba embarazada, no hizo mención del que estaba en el vientre; habiendo nacido una hija después de la muerte del padre, se vio que se había roto el testamento, y que no se debían los legados; pero si en el tiempo intermedio hubiese pagado algunos legados el heredero instituido, han de ser revocados por razón de este caso imprevisto mediante las acciones útiles que se hayan dado a la

§ 3.- Veteranus moriens testamentum iure communi tempore militiae factum irritum esse voluit et intestatus esse maluit. Heredum institutiones ac substitutiones in eodem statu mansisse placuit, legata vero petens exceptione doli mali secundum ius commune summo veri, cuius exceptionis vires ex persona petentis aestimantur: et alioquin potior est in re pari causa possessoris.

§ 4.- Miles iure communi testatus postea testamento iure militiae super bonis omnibus facto post annum militiae vita decesserat: prioris testamenti, quod ruptum esse constabat, non reintegrari vires constituit.

37.- PAULUS; *libro VII quaestionum*.- Si duobus a milite liberto scriptis heredibus alter omiserit hereditatem, pro ea parte intestatus videbitur defunctus decessisse, quia miles et pro parte testari potest, et competit patrono ab intestato bonorum possessio, nisi si haec voluntas defuncti probata fuerit, ut omittente altero ab alterum vellet totam redire hereditatem.

38.- PAULUS; *libro VIII quaestionum*.- Quod dicitur, si miles intra annum quam missus est decesserit, valere eius testamentum quod iure militari fecerat, verum est, etiamsi post annum condicio institutionis exstiterit, mortuo eo intra annum. Et ideo si heredi filio substituerit, nihil interest, quando filius moriatur: sufficit enim patrem intra annum obisse.

§ 1.- Miles testamentum fecerat, deinde non ignominiae causa missus rursum cinctus est in alia

was a bona fide possessor, will not be obliged to make good anything which he can not recover from the estate.

§ 3.- A discharged soldier, at the time of his death, wished that a will which he had executed in accordance with the Common Law during his term of service should be void, and preferred to die intestate. It was decided that the appointments of heirs and the substitutions for them would remain unaltered, but that those who claimed legacies under the will would be barred by an exception on the ground of bad faith, in accordance with the Common Law, and that the force of this exception would be regulated according to the standing of the persons who made the demand; otherwise, all other things being equal, the condition of the possessor is preferable.

§ 4.- A soldier having made a will according to the Common Law, subsequently made one in accordance with military law disposing of all his property a year after his discharge from the service. It was held that the force of the first will was destroyed and could not be restored.

37.- PAULUS; *Questions, Book VII*.- A soldier, who was a freedman, appointed two heirs by his will, and one of them having refused to accept, the testator was held to have died intestate with reference to that particular share, for the reason that a soldier can die partly testate, and praetorian possession can be acquired by a patron ab intestato; for unless the intention of the deceased was proved to have been that if one of the heirs should reject his portion, the entire estate should go to the other heir.

38.- THE SAME; *Questions, Book VIII*.- When it is said that if a soldier should die within the year after his discharge, his will, which he executed in accordance with military law, is valid; this is true even if the condition of his appointment is to be fulfilled after the lapse of the year, provided that he dies within twelve months. Therefore, if he should appoint a substitute for his son who was his heir, it will make no difference when the son dies, for it is sufficient if his father should die within the year.

§ 1.- A soldier executed a will, and afterwards, having been discharged for no dishonorable reason,

hija, y el heredero instituido, habiendo sido poseedor de buena fe, no responde de lo que no se hubiese podido recuperar de aquellos.

§ 3- Quiso un veterano, al morir, que fuese irrito el testamento hecho con arreglo al derecho común durante el tiempo de su servicio militar, y prefirió quedar intestado; se determinó que subsistieron en el mismo estado las instituciones de herederos y las substitutiones, pero que los que pidiesen los legados fuesen repelidos conforme a derecho con la excepción de dolo malo; la fuerza de cuya excepción es estimada según la persona del que pide, y en otro caso, en igualdad de circunstancias, es preferente la causa del poseedor.

§ 4.- Un militar que había testado conforme al derecho común, habiendo hecho después con arreglo al derecho militar testamento de todos sus bienes, había fallecido después de un año de su servicio militar; se reconoció, que no se reintegraba en su fuerza el anterior testamento, que constaba que se rompió.

37.- PAULO; *Cuestiones, libro VII*.- Si habiendo sido instituidos dos herederos por un militar, liberto, uno no hubiere admitido la herencia, se considerará que en aquella parte falleció intestado el difunto, porque el militar puede testar también de una parte, y le compete al patrono abintestato la posesión de los bienes, a no ser que se hubiere probado esta voluntad del difunto, que quisiera que, no admitiéndola uno, fuese al otro toda la herencia.

38.- EL MISMO; *Cuestiones, libro VIII*.- Lo que se dice, que, si un militar hubiere fallecido dentro de un año después que fue licenciado, es válido su testamento, que había hecho con arreglo al derecho militar, es verdad aunque la condición de la institución se hubiere cumplido después del año, habiendo muerto él dentro del año. Y por lo tanto, si le hubiere dado sustituto a su hijo, heredero, nada importa cuando muera el hijo, porque basta que el padre haya fallecido dentro del año.

§ 1.- Un militar había hecho testamento, y, licenciado después no por causa ignominiosa, fue incor-

militia: quaerebatur, an testamentum eius, quod in militia fecerat, valeret. Quaesivi, utrum iure militari an communi iure testatus est. Et si quidem communi iure testatus est, nulla dubitatio est, quin valeat. Sed si ut miles fecisset testamentum, agitare coepi, quando adsumptus fuisset, postquam desiit in numeris esse, utrum intra annum an post annum: cognovi intra annum eum adsumptum. Ergo si, cum adhuc iure militari valeret, rursus eodem iure posset testari, numquid etiam post annum eo mortuo valeat testamentum? Me movebat, quod alia militia est posterior: sed humanius est dicere valere testamentum, quasi coniuncto munere militiae. Non loquor de eo, qui voluit valere testamentum etiam adsumptus: hic enim quasi in militia sequenti fecit testamentum exemplo eius, qui paganus fecit, deinde militare coepit.

39.- PAULUS; *libro IX quaestionum*.- Si filius familias miles captus apud hostes decesserit, dicemus legem Corneliam etiam ad eius testamentum pertinere. Sed quaeramus, si pater eius prius in civitate decesserit relicto nepote ex filio, an similiter testamentum patris rumpatur. Et dicendum est non rumpi testamentum, quia ex eo tempore, quo captus est, videtur decessisse.

40.- PAULUS; *libro XI responsorum*.- Lucius Titius miles notario suo testamentum scribendum notis dictavit et antequam litteris praescriberetur, vita defunctus est: quaero, an haec dictatio valere possit. Respondi militibus, quoquo modo velint et quo modo possunt, testamentum facere concessum esse, ita tamen, ut hoc ita subsecutum esse legitimis probationibus ostendatur.

§ 1.- Idem respondit ex testamento eius, qui iure militari testatus esset, servum, qui licet sub con-

he again enlisted in another corps of soldiers; the question arose whether the will which he had executed while in the service, would be valid. I ask whether he executed it in accordance with military law, or the Common Law. If he executed it according to the Common Law, there is no doubt that it would be valid; but if he made it as a soldier, I thought it proper to inquire when he enlisted the second time, after he was discharged, whether within the year, or afterwards. I ascertained that he enlisted within the year, and, therefore, as his will was still valid in accordance with military law, and he could make another under the same law, would his will be valid after the year had elapsed, if he should die? I have some doubt on this point, for the reason that his other term of service was more recent. It is, however, better to hold that the will is valid, the two terms of service being, so to speak, united. I do not allude to him who, having enlisted a second time, stated that he wished his will to be valid; for in this instance, he made it, as it were, during his second term of service, in the same way as where a civilian makes one and afterwards becomes a soldier.

39.- THE SAME; *Questions, Book IX*.- Where a son under paternal control, while serving in the army, was captured and died in the hands of the enemy, we say that the Cornelian Law is also applicable to his will. We may ask, however, whether his father died before him at home, and if a grandson was born to him by the said son, whether the will of the father would be broken, in like manner. It must be held that the will will not be broken, for the reason that he is considered to have died at the very time that he was taken prisoner.

40.- THE SAME; *Opinions, Book XI*.- Lucius Titius, a soldier, dictated his will to his secretary to be made from notes, and before it was fully written out he died. I ask whether this dictation can be valid. I answered, that it is conceded to soldiers to make their wills in whatever way they desire, and in whatever way they can, provided this is done so that it can be established by lawful evidence.

§ 1.- It was also held that where a slave was entitled to a legacy (although under a condition), by a will

porado luego en otra milicia; se preguntaba, si sería válido el testamento que había hecho estando en la milicia, Yo pregunto, ¿testó acaso por derecho militar, o por derecho común? Y si verdaderamente testó por derecho común, no hay duda alguna, que será válido; pero si hubiese hecho testamento como militar, comencé a investigar cuándo fue reincorporado, después que dejó de estar en las filas, si dentro del año, o después del año. Supe que fue reincorporado dentro del año; luego sí, siendo todavía válido por derecho militar, podía testar de nuevo con el mismo derecho, ¿porqué no será válido el testamento aún habiendo muerto él después del año? Me hacía vacilar, que la otra milicia es posterior; pero es más humano decir que es válido el testamento, como si hubiese sido continuado el servicio en la milicia. No hablo de aquel que quiso que fuese válido su testamento aún después de reincorporado; porque éste hizo testamento como estando en la segunda milicia, a la manera del que lo hizo siendo paisano, y después comenzó a ser militar.

39.- EL MISMO; *Cuestiones, libro IX*.- Si un hijo de familia, militar, hubiere fallecido prisionero en poder de los enemigos, diremos que también es aplicable a su testamento la ley Cornelia. Pero veamos, si en el caso de que su padre hubiere fallecido antes en la ciudad, habiendo dejado un nieto procedente del hijo, se romperá igualmente el testamento del padre. Y se ha de decir, que no se rompe el testamento, porque se considera que falleció desde el tiempo en que fue hecho prisionero.

40.- EL MISMO; *Respuestas, libro XI*.- Lucio Ticio, militar, dictó a su escribiente su testamento para que lo escribiera en cifras, y falleció antes que fuese transcrito en letras; pregunto, ¿podrá ser válido este dictado? Respondí, que a los militares les está concedido hacer testamento de la manera que quieran y del modo que pueden, pero de suerte, que con legítimas pruebas se demuestre que así se hizo.

§ 1.- El mismo respondió, que en virtud del testamento del que hubiese testado por derecho militar

dicione legatum meruit, etiam libertatem posse sibi vindicare.

§ 2.- Idem respondit: Lucius Titius miles testamentum ita fecit: "Pamphila serva mea ex asse mihi heres esto": alio deinde capite Sempronio commilitoni suo eandem Pamphilam reliquit, cuius fidei commisit, ut eam manumitteret: quaero, an heres esset Pamphila atque si directo accepisset libertatem. Respondi intellegendum militem, qui ancillam suam heredem instituerat, ignorasse posse ex ea institutione etiam libertatem ei competere et ideo sine causa postea a commilitone petisse, ut eandem manumitteret: cum ex priore scriptura libera et heres effecta est, postea nullo praecudio voluntati facto frustra legata est.

41.- TRYPHONUS; *libro XVIII disputationem*.- Miles ita heredem scribere potest: "Quoad vivit, Titius heres esto, post mortem eius septicius". Sed si ita scripserit: "Titius usque ad annos decem heres esto" nemine substituto, intestati causa post decem annos locum habebit. Et quia diximus ex certo tempore et usque ad certum tempus milites posse instituere heredem, his consequens est, ut, antequam dies veniat, quo admittatur institutus, intestati hereditas deferatur et quod in bonorum portione ei licet, hoc etiam in temporis spatio, licet non modicum sit, ex eodem privilegio competat.

§ 1.- Mulier, in qua turpis suspicio cadere potest, nec ex testamento militis aliquid capere potest, ut divus Hadrianus rescripsit.

§ 2.- Nec tutorem ei, qui in aliena est potestate, miles dare potest.

§ 3.- Si miles exheredaverit filium vel sciens eum filium suum esse silentio praeterierit, an legatum a substituto eius dare possit, quaesitum est. Dixi non posse, licet ampla legata reliquerit exheredato.

drawn up in accordance with military law, he could also demand his freedom.

§ 2.- An opinion was likewise given in the following case. Lucius Titius, a soldier, stated in his will: "Let Pamphila be the heir to my entire estate", and then by another clause, left the same bequest to Sepronius, one of his comrades, and charged him to manumit the said slave. I ask whether Pamphila would be his heir, just as if she had received her freedom directly at the hands of the testator? The answer was, that it should be understood that the soldier did not know, at the time when he appointed his female slave his heir, that she would obtain her freedom by virtue of her appointment; and therefore he afterwards had no reason to request his comrade to manumit her, since she had become free and his heir under the first clause, and as the bequest was of no force or effect, the intention of the testator was not interfered with.

41.- TRYPHONINUS; *Disputations, Book XVIII*.- A soldier can appoint an heir as follows: "As long as Titius lives let him be my heir, and after his death, let Septicius be my heir". If, however, he should say: "Let Titius be my heir for ten years", without appointing any substitute, he will be intestate after the lapse of ten years; and, for the reason we have already stated, as a soldier can appoint an heir from a certain time, and up to a certain time, the result is that before the time arrives when the heir appointed can be admitted to the succession it will become intestate; and since a soldier is permitted to bequeath a portion of his property, so also, by the same privilege, he can remain intestate for a period of considerable extent.

§ 1.- A woman who is suspected of being dissolute cannot take anything under the will of a soldier, as the Divine Hadrian stated in a Rescript.

§ 2.- A soldier cannot appoint a guardian for a minor who is under the control of another.

§ 3.- If a soldier should disinherit his son, or, knowing him to be his son, should pass him over in silence, the question arises whether he can charge a substitute with the payment of a legacy. I held that he

podía reivindicar para sí también la libertad el esclavo, que, aunque bajo condición, mereció un legado.

§ 2.- El mismo respondió: Lucio Ticio, militar, hizo testamento de este modo: «sea mi heredera de todo el as mi esclava Pánfila», y después en otro capítulo le dejó la misma Pánfila a Sempronio compañero suyo, a cuya fidelidad encomendó que la manumitiese; pregunto, ¿sería heredera Pánfila, como si directamente hubiese recibido la libertad? Respondí, que se ha de entender que el militar, que había instituido heredera a su esclava, ignoró que en virtud de esta institución le competía a ella también la libertad; y que por esto le pidió después sin causa a su compañero que la manumitiese, puesto que en virtud de la primera escritura fue hecha libre y heredera, y después fue inútilmente legada no habiéndose causado perjuicio alguno a aquella voluntad.

41.- TRIFONINO; *Disputas; libro XVIII*.- El militar puede instituir heredero en esta forma; «sea heredero Ticio, mientras viva; después de su muerte, Septicio». Pero si hubiere escrito así; « sea heredero Ticio hasta la edad de diez años», sin haberle substituido ninguno, después de los diez años tendrá lugar la sucesión intestada. Y como hemos dicho, que el militar puede instituir heredero desde cierto tiempo y hasta cierto tiempo, es a esto consiguiendo, que, antes que llegue el día en que sea admitido el instituido, se difiera la herencia del intestado. Y lo que le es lícito respecto a una porción de los bienes, compétale también por el mismo privilegio en cuanto al espacio de tiempo, aunque no sea corto.

§ 1.- La mujer, sobre la cual puede recaer sospecha de torpeza, no puede adquirir cosa alguna ni por testamento de un militar, según respondió por rescripto el Divino Adriano.

§ 2.- Tampoco puede darle tutor el militar al que está bajo ajena potestad.

§ 3.- Si un militar hubiere desheredado a su hijo o sabiendo que era su hijo lo hubiere preterido en silencio, se preguntó, si podría dar un legado a cargo de su substituido. Dije, que no podía, aunque hubiere

§ 4.- Miles et emancipato filio substituere potest: verum hoc ius in his exercebitur, quae ab ipso ad eum cui substituit pervenerint, non etiam in his, si quae habuerit vel postea adquisierit. Nam et si filio suo vivo adhuc substituit, post adquisitam ei avi hereditatem nemo diceret ad substitutum pertinere.

§ 5.- Si militis adita non fuerit hereditas, an substitutio quam pupillo fecit valeat, quaeritur. Et consequens erit hoc dicere, quia permittitur militem filio facere testamentum, quamvis sibi non fecerit.

42.- ULPIANUS; *libro XLV ad edictum*.- Ex eo tempore quis iure militari incipit posse testari, ex quo in numeros relatus est, ante non: proinde qui nondum in numeris sunt, licet etiam lecti tirones sint et publicis expensis iter faciunt, nondum milites sunt: debent enim in numeros referri.

43.- PAPINIANUS; *libro VI responsorum*.- Filius familias equestri militia exornatus et in comitatu principum retentus cingi confestim iussus testamentum de castrensi facere potest.

44.- ULPIANUS; *libro XLV ad edictum*.- Rescripta principum ostendunt omnes omnino, qui eius sunt gradus, ut iure militari testari non possint, si in hostico deprehendantur et illic decedant, quomodo velint et quomodo possint, testari, sive praeses sit provinciae sive quis alius, qui iure militari testari non potest.

could not do so, even though he left an ample legacy to the disinherited son.

§ 4.- A soldier can substitute anyone for an emancipated son; the former, however, can only exercise his right with reference to property which came from the father to the son, and so far as any which he already possessed, or subsequently acquired, is concerned. For if, during the lifetime of his son, or while the grandfather was still living, he made the substitution, no one can say that the estate obtained from the grandfather will belong to the substitute.

§ 5.- Where the estate of a soldier was not entered upon, the question arises whether the substitution which he made for a minor will be valid. The result is, that it must be considered valid, because a soldier is allowed to make a will for his son, even though he may not make one for himself.

42.- ULPIANUS; *On the Edict, Book XLV*.- Anyone can make a will by military law, from the very day he entered the service, but he cannot do this before; hence those who are not yet actually enrolled in the army, even although they may have been drafted and travel with it at the public expense, are not yet considered soldiers, as to be such they must be included in the ranks.

43.- PAPINIANUS; *Opinions, Book VI*.- A son under paternal control, who belongs to the Equestrian Order and is enrolled in the retinue of the Emperor, as soon as he is ordered to join the army, can make a will disposing of his castrense peculium.

44.- ULPIANUS; *On the Edict, Book XLV*.- The Rescripts of the Emperors disclose that if anyone belonging to the class whose members are not allowed to make a will in accordance with military law happens to be in the enemy's country, and dies there, he can make a will in any way that he wishes, and in any way that he can, whether he is the Governor of the province, or some one else who has no right of testation under military law.

dejado cuantiosos legados.

§ 4.- El militar puede nombrar sustituto al hijo desheredado y al emancipado. Mas este derecho se ejercitará sobre aquellos bienes que de él mismo hubieren ido a poder de aquel a quien le nombró sustituto, no también sobre aquellos que hubiere tenido, o que después hubiere adquirido; porque también si a su hijo le nombró sustituto, viviendo todavía el abuelo, nadie diría que la herencia del abuelo adquirida después para él le pertenece al sustituto.

§ 5.- Si no hubiere sido adida la herencia de un militar, se pregunta si será válida la substitución que hizo para un pupilo; y será consiguiente decir esto, puesto que se permite que el militar haga testamento para su hijo, aunque no lo hubiere hecho para sí.

42.- ULPIANO; *Comentarios al Edicto, libro XLV*.- Uno comienza a poder testar con arreglo al derecho militar desde el momento en que fue incorporado en las filas, y no antes; por lo cual, los que todavía no están en las filas, aunque hayan sido elegidos para soldados, y estén en marcha a expensas públicas, no son todavía militares, porque deben ser incorporado a las filas.

43.- PAPINIANO; *Respuestas, libro VI*.- El hijo de familia exornado con la milicia ecuestre, y retenido en la comitiva de los Príncipes, puede hacer testamento de su peculio castrense tan pronto como se le mandó ceñir el cingulo.

44.- ULPIANO; *Comentarios al Edicto, libro XLV*.- Manifiestan los rescriptos de los Príncipes, que absolutamente todos los que son de tal condición, que no puedan testar según el derecho militar, testen como quieran, y como puedan, si se hallaran en lugar enemigo, y allí fallecieran, ora sea un Presidente de provincia, ora otro cualquiera que no puede testar conforme al derecho militar.

TIT. II

DE ADQUIRENDA VEL OMITTENDA
HEREDITATE

1.- PAULUS; *libro II ad Sabinum*.- Qui totam hereditatem acquirere potest, is pro parte eam scindendo adire non potest:

2.- ULPIANUS; *libro IV ad Sabinum*.- Sed et si quis ex pluribus partibus in eiusdem hereditate institutus sit, non potest quasdam partes repudiare, quasdam adgnosceret.

3.- ULPIANUS; *libro VI ad Sabinum*.- Quamdiu prior heres institutus hereditatem adire potest, substitutus non potest.

4.- ULPIANUS; *libro III ad Sabinum*.- Nolle adire hereditatem non videtur, qui non potest adire.

5.- ULPIANUS; *libro I ad Sabinum*.- Mutum nec non surdum, etiam ita natos pro herede gerere et obligari hereditati posse constat.

§ 1.- Eum, cui lege bonis interdicatur, institutum posse adire hereditatem constat.

6.- ULPIANUS; *libro VI ad Sabinum*.- Qui in aliena est potestate, non potest invitum hereditati obligare eum in cuius est potestate, ne aeri alieno pater obligaretur.

§ 1.- Sed in bonorum possessione placuit ratam haberi posse eam, quam citra voluntatem adgnovit is qui potestati subiectus est.

§ 2.- Sed et si legitima hereditas filio delata sit ex senatus consulto Orfitiano matris, idem erit probandum.

§ 3.- Sed et si non adierit filius, diu tamen possedit pater hereditatem, credendus est admisisse here-

TITLE II

CONCERNING THE ACQUISITION OR
REJECTION OF ESTATES

1.- PAULUS; *On Sabinus, Book II*.- Anyone who has the right to acquire an entire estate cannot, by dividing it, accept only a portion of the same.

2.- ULPIANUS; *On Sabinus, Book IV*.- If anyone should be appointed an heir to several portions of the same estate, he cannot accept some of them and reject the others.

3.- THE SAME; *On Sabinus, Book VI*.- As long as the first heir who was appointed can enter upon an estate, the substitute cannot do so.

4.- THE SAME; *On Sabinus, Book III*.- An heir who has no right to enter upon an estate is not considered to have refused to do so.

5.- THE SAME; *On Sabinus, Book I*.- It is established that a person who is dumb or deaf, even if he was born so, can act as an heir and obligate himself for an estate.

§ 1.- It is also settled that anyone who is interdicted by law from disposing of his property, if he should be appointed an heir, can enter upon an estate.

6.- THE SAME; *On Sabinus, Book VI*.- Anyone who is subject to the authority of another cannot bind him under whose control he is for the debts of the estate, without his consent, unless the father is liable for the debts.

§ 1.- It is established with reference to the possession of property, that that shall be considered to have been ratified which a son has acknowledged contrary to the will of his father, while under the control of the latter.

§ 2.- Where, however, the estate of a mother is transferred to her son as heir-at-law, in accordance with the Orphitian Decree of the Senate, the same rule should be adopted.

§ 3.- If the son did not accept the estate, but, nevertheless, remained in possession of the same for

TÍTULO II

DE LA ADQUISICIÓN O DE LA NO
ACEPTACIÓN DE LA HERENCIA

1.- PAULO; *Comentarios a Sabino, libro I*.- El que puede adquirir toda la herencia, no puede adirla en parte, dividiéndola.

2.- ULPIANO; *Comentarios a Sabino, libro IV*.- Pero aunque alguien haya sido instituido heredero de muchas partes en la herencia de uno mismo, no puede repudiar algunas partes, y aceptar otras.

3.- EL MISMO; *Comentarios a Sabino, libro VI*.- Mientras el primer heredero instituido puede adir la herencia, no puede adirla el substituto.

4.- EL MISMO; *Comentarios a Sabino, libro III*.- No se considera que no quiere adir la herencia el que no puede adirla.

5.- EL MISMO; *Comentarios a Sabino, libro I*.- Consta, que el mudo, y también el sordo, aún así nacidos, pueden hacer actos de heredero y obligarse a la herencia.

§ 1.- Consta, que aquel a quien por la ley se le pone interdicción en sus bienes, puede adir la herencia habiendo sido instituido heredero.

6.- EL MISMO; *Comentarios a Sabino, libro VI*.- El que está bajo ajena potestad no puede obligar a favor de la herencia, contra la voluntad del mismo, a aquel bajo cuya potestad está, a fin de que el padre no se obligue a las deudas.

§ 1.- Pero en cuanto a la posesión de los bienes se determinó, que se pueda ratificar la que sin consentimiento tomó el que está sujeto a potestad.

§ 2.- Pero lo mismo se habrá de aprobar, también si al hijo le hubiera sido deferida en virtud del Senado-consulto Orficiano la herencia legítima de la madre.

§ 3.- Pero también si el hijo no hubiere adido la herencia, mas el padre la poseyó por largo tiempo, se

ditatem, ut divus Pius et imperator noster rescripserunt.

§ 4.- Si is, qui putabat se filium familias, patris iussu adierit, eum neque sibi neque ei qui iussit quaesisse hereditatem constat: quamquam is, quem pater iussit adire et decessit, si adierit iam mortuo patre, obliget se hereditati, ut Iulianus libro trigesimo primo digestorum scripsit: nam eum, qui dubitat, utrum filius familias an pater familias morte patris factus sit, posse adire hereditatem magis admittit.

§ 5.- Interdum filii familias et sine aditione adquirent hereditatem his in quorum sunt potestate, ut puta si nepos ex filio exheredato heres sit institutus: patrem enim suum sine aditione faciet heredem et quidem necessarium.

§ 6.- Sed si quis heres institutus adoptetur a filio exheredato, necessarium eum non facit, sed iuberi debet, ut adeat, quoniam mortis tempore in potestate non fuerit: nam per eum quis existere necessarius non potest qui ipse non esset exstaturus.

§ 7.- Celsus libro quinto decimo digestorum scripsit eum, qui metu verborum vel aliquo timore coactus fallens adierit hereditatem, sive liber sit, heredem non fieri placet, sive servus sit, dominum heredem non facere.

7.- PAULUS; *libro I ad Sabinum*.- Si quis filium familias heredem instituerit et ita scripserit: "Si mihi Titius iste filius familias heres non erit, Sempronius heres esto" filio adeunte iussu patris substitutus excluditur.

§ 1.- Si filius prius quam sciret se necessarium exstitisse patri heredem decesserit relicto filio necessario, permittendum est nepoti abstinere se avi hereditate, quia et patri eius idem tribueretur.

a considerable time, he must be held to have accepted it; as the Divine Pius and Our Emperor stated in a Rescript.

§ 4.- Where he who thought he was a son under paternal control enters upon an estate by the order of his father; it is held that the said estate was neither acquired by him, nor by his father who ordered him to accept it, even though the father may have died after doing so, if he enters upon the estate after his father's death, and thereby bound himself for its debts; as Julianus states in the Thirty-first Book of the Digest. For when anyone is in doubt as to whether or not he is a son under paternal control, and by the death of his father becomes his own master, the better opinion is that he can enter upon the estate.

§ 5.- Sometimes a son under paternal control acquires an estate without acceptance from him under whose control he is; for instance, where a grandson is appointed the heir instead of a disinherited son, and his father constitutes him his heir, and even his necessary heir, without his formal acceptance of the estate.

§ 6.- Where anyone is appointed an heir by a disinherited son, he does not make him his necessary heir, but he should order him to enter upon the estate, since he was not under his control at the time of his death; for no one can become a necessary heir by the act of a party who himself cannot acquire the estate.

§ 7.- Celsus stated in the Fifteenth Book of the Digest that where anyone, through fear of corporeal punishment, or impelled through any other kind of duress, pretends to accept an estate; if he is a freeman, he is not considered an heir, and if he is a slave, he does not make his master an heir.

7.- PAULUS; *On Sabinus, Book I*.- If anyone should appoint a son under paternal control his heir, and afterwards says: "If the said Titius, a son under paternal control, shall not be my heir, let Sempronius be my heir"; and the son enters upon the estate by the order of his father, the substitute will be excluded.

§ 1.- If the son, before he knew that he was the necessary heir of his father, should die leaving a son as his necessary heir, the grandson should be permitted to reject the estate of his grandfather for the

ha de creer que admitió la herencia, según respondieron por rescripto el Divino Pío y nuestro Emperador.

§ 4.- Si el que se creía hijo de familia hubiere adido la herencia por mandato de su padre, consta que él no adquirió la herencia ni para sí, ni para el que se lo mandó, aún cuando aquel, a quien el padre le mandó adirla, y falleció, se obligue a la herencia, si la hubiere adido habiendo muerto ya el padre, según escribió Juliano en el libro trigésimo primero del Digesto; porque más bien admite, que el que duda si con la muerte de su padre se haya hecho hijo o padre de familia pueda adir la herencia.

§ 5.- A veces, aún sin la adición, adquieren los hijos de familia la herencia para aquellos bajo cuya potestad están, por ejemplo, si hubiera sido instituido heredero un nieto habido de un hijo desheredado; porque sin la adición hará heredero a su padre, y por cierto necesario.

§ 6.- Pero si instituido alguien heredero fuese adoptado por un hijo desheredado, no lo hace heredero necesario, pero se le debe mandar que ada la herencia, porque al tiempo de la muerte no habrá estado bajo su potestad; pues nadie puede ser heredero necesario por medio de quien él mismo no lo habría de ser.

§ 7.- Escribió Celso en el libro décimo quinto del Digesto, que está determinado, que el que constreñido por el miedo de palabras o por algún temor hubiere adido la herencia engañando, no se hace heredero, si fuera libre, y no hace heredero a su señor, si fuera esclavo.

7.- PAULO; *Comentarios a Sabino, libro I*.- Si alguien hubiere instituido heredero a un hijo de familia, y hubiere escrito así: «si este Ticio, hijo de familia, no fuere mi heredero, sea heredero Sempronio», adiando el hijo la herencia por mandato de su padre, es excluido el substituto.

§ 1.- Si antes que supiese que él quedó heredero de su padre, hubiere fallecido el hijo habiendo dejado otro hijo heredero necesario, se le ha de, permitir al nieto abstenerse. de la herencia del abuelo, porque

§ 2.- In omni successione qui ei heres exstitit, qui Titio heres fuit, Titio quoque heres videtur esse nec potest Titii omittere hereditatem.

8.- ULPIANUS; *libro VII ad Sabinum*.- More nostrae civitatis neque pupillus neque pupilla sine tutoris auctoritate obligari possunt: hereditas autem quin obliget nos aeri alieno, etiam si non sit solvendo, plus quam manifestum est. De ea autem hereditate loquimur, in qua non succedunt huiusmodi personae quasi necessariae.

§ 1.- Impubes qui in alterius potestate est si iussu eius adierit hereditatem, licet consilii capax non fuerit, ei acquirit hereditatem.

9.- PAULUS; *libro II ad Sabinum*.- Pupillus si fari possit, licet huius aetatis sit, ut causam adquirendae hereditatis non intellegat, quamvis non videatur scire huiusmodi aetatis puer (neque enim scire neque decernere talis aetas potest, non magis quam furiosus), tamen cum tutoris auctoritate hereditatem acquirere potest: hoc enim favorabiliter eis praestatur.

10.- ULPIANUS; *libro VII ad Sabinum*.- Si ex asse heres destinaverit partem habere hereditatis, videtur in assem pro herede gessisse.

11.- POMPONIUS; *libro III ad Sabinum*.- Impuberibus liberis omnimodo abstinendi potestas fit, puberibus autem ita, si se non immiscuerint.

12.- ULPIANUS; *libro XI libro 11 ad edictum*.- Ei, qui se non miscuit hereditati paternae, sive maior sit sive minor, non esse necesse praetorem adire, sed sufficit se non miscuisse hereditati. Et est in semenstribus Vibii Soteri et Victorino rescriptum,

reason that this privilege would also have been granted to his father.

§ 2.- In every succession, anyone who is the heir to a party who is the heir of Titius, is also held to be himself the heir of Titius, nor can he reject the estate of the latter.

8.- ULPIANUS; *On Sabinus, Book VII*.- In accordance with the custom of our country, neither a male nor a female ward can bind themselves without the authority of their guardian. It is, however, perfectly evident that the acceptance of an estate, even if it is not solvent, renders us liable for its debts. In this instance, we refer to an estate to which parties do not succeed as necessary heirs.

§ 1.- A child not arrived at the age of puberty, who is under the control of another and enters upon an estate by order of the latter, acquires it, even though he is not legally capable of deliberation.

9.- PAULUS; *On Sabinus, Book II*.- Where a ward is competent to act for himself, even though he may be of such an age as to be unable to understand the meaning of the acceptance of an estate (although a boy of this age is not supposed to know, or to be able to decide anything, any more than an insane person) he can, nevertheless, acquire an estate by the authority of his guardian; for this privilege is granted to wards by way of favoring them.

10.- ULPIANUS; *On Sabinus, Book VII*.- Where an heir to an entire estate intends only to accept a portion of the same, he is held to have acted as heir to the entire estate.

11.- POMPONIUS; *On Sabinus, Book III*.- Power is granted to children under the age of puberty to absolutely reject the estates of their fathers, but those who have arrived at puberty can only do so where they have not meddled with the affairs of the estate.

12.- ULPIANUS; *On the Edict, Book XI*.- When a child has not interfered with the affairs of his father's estate, whether he is of age or a minor, it is not necessary for him to make application to the Praetor, but it is sufficient if he has not concerned himself

también a su padre se le permitiría lo mismo.

§ 2.- En todas las sucesiones, el que fue heredero de quien fue heredero de Ticio, se considera que es heredero también de Ticio, y no puede dejar de aceptar la herencia de Ticio.

8.- ULPIANO; *Comentarios a Sabino, Libro VII*.- Según la costumbre de nuestra ciudad, ni el pupilo ni la pupila pueden obligarse sin la autoridad del tutor; pero es más que evidente, que la herencia nos obliga a favor de las deudas, aunque no sea solvente. Mas hablamos de aquella herencia en la que no suceden personas tales como necesarias.

§ 1.- Si el impúbero, que está bajo la potestad de otro, hubiere adido la herencia por mandato de éste, aunque no hubiere sido capaz de consejo, adquiere para él la herencia.

9.- PAULO; *Comentarios a Sabino, libro II*.- El pupilo, si pudiera hablar, aunque sea de tal edad que no entienda la causa de adquirir una herencia, no obstante que no se considere que sepa un niño de esta edad, - pues esta edad ni puede saber, ni discernir, no más que un loco-, puede, sin embargo, con la autoridad del tutor adquirir la herencia; porque esto se les concede por favor.

10.- ULPIANO; *Comentarios a Sabino, libro VII*.- Si el heredero de todo el as hubiere determinado tener parte de la herencia, se considera que obró como heredero del as.

11.- POMPONIO; *Comentarios a Sabino, libro III*.- A los descendientes impúberos se les concede en absoluto la facultad de abstenerse, pero a los púberos en este caso, si no se hubieren inmiscuido.

12.- ULPIANO; *Comentarios a Sabino XI*.- El que no se inmiscuyó en la herencia paterna, ora sea mayor, ora menor de edad, no tiene necesidad de recurrir al Pretor, sino que basta que él no se haya inmiscuido en la herencia. Y en los Semestres se

non esse necesse pupillis in integrum restitui ex avito contractu, quorum pater constituerat non agnoscere hereditatem neque quicquam amoverat vel pro herede gesserat.

13.- ULPIANUS; *libro VII ad Sabinum*.- Is qui heres institutus est vel is cui legitima hereditas delata est repudiatione hereditatem amittit. Hoc ita verum est, si in ea causa erat hereditas, ut et adiri posset: ceterum heres institutus sub condicione si ante condicionem existentem repudiavit, nihil egit, qualisqualis fuit condicio, etsi in arbitrium collata est.

§ 1.- Si quis dubitet, vivat testator nec ne, repudiando nihil agit.

§ 2.- Substitutus quoque similiter si ante repudiat, quam heres institutus decernat de hereditate, nihil valebit repudiatio.

§ 3.- Neque filius familias repudiando sine patre neque pater sine filio alteri nocet: utrique autem possunt repudiare.

14.- PAULUS; *libro II ad Sabinum*.- Idem est etiam si legitima hereditas filiis obvenit.

15.- ULPIANUS; *libro VII ad Sabinum*.- Is qui putat se necessarium, cum sit voluntarius, non poterit repudiare: nam plus est in opinione, quam in veritate.

16.- ULPIANUS; *libro XXIV ad edictum*.- Et e contrario qui se putat necessarium, voluntarius existere non potest.

17.- ULPIANUS; *libro VII ad Sabinum*.- Nec is, qui non valere testamentum aut falsum esse putat, repudiare potest. Sed si certum sit falsum non esse,

with the business of the estate. It was stated in a rescript in the *Semestria* to Vivius Soter and Victorinus: "It is not necessary to make complete restitution to wards, on account of a contract made by their grandfather, if their father intended that they should not accept his estate, where nothing has been done, nor any business transacted in behalf of the heir."

13.- THE SAME; *On Sabinus, Book VII*.- A party who has been appointed an heir, or one to whom the estate has descended by law, loses it by rejecting it. This is true only where the estate is in such a condition that it can be entered upon, but where the heir is appointed under a condition, and rejects the estate before the condition has been fulfilled, his act will be void, no matter what the condition may be, and even if it is dependent upon his will.

§ 1.- Where an heir is in doubt as to whether the testator is living or not, and rejects the estate, his act is void.

§ 2.- In like manner, if a substitute rejects an estate before the appointed heir makes up his mind with reference to it, his rejection will not be valid.

§ 3.- If a son under paternal control, or a father, rejects an estate neither will prejudice the rights of the other, but both of them can reject it together.

14.- PAULUS; *On Sabinus, Book II*.- The same rule also applies where an estate descends by law to children.

15.- ULPIANUS; *On Sabinus, Book VII*.- He who thinks that he is the necessary heir, when he is a voluntary heir, cannot reject an estate; for, in this instance, more weight is attached to opinion than to the truth.

16.- THE SAME; *On the Edict, Book XXIV*.- And, on the other hand, anyone who thinks that he is a necessary heir cannot become a voluntary heir.

17.- THE SAME; *On Sabinus, Book VII*.- Nor can anyone who thinks that a will is void, or forged, reject it. But if it is certain that a will which is said to be

halla respondido por rescripto a los Vibios Sotero y Victorino, que no tienen necesidad de ser restituidos por entero en virtud de contrato del abuelo los pupilos, cuyo padre había determinado no aceptar la herencia, y no había quitado cosa alguna de la misma, u obrado como heredero.

13.- EL MISMO; *Comentarios a Sabino, libro VII*.- El que fue instituido heredero, o aquel a quien le fue deferida la herencia legítima, pierde la herencia con la repudiación. Esto es verdad de esta suerte, si la herencia se hallaba en estado de que también pudiera ser adida; pero el heredero instituido bajo condición nada hizo, si repudió la herencia antes de cumplirse la condición, cualquiera que haya sido la condición, aunque haya sido dejada a su arbitrio.

§ 1.- Si alguno dudara si vive o no el testador, no hace nada repudiando la herencia.

§ 2.- Y del mismo modo también, si el substituto la repudiara antes que el heredero instituido determinara respecto de la herencia, no valdrá nada la repudiación.

§ 3.- Ni el hijo de familia repudiando la herencia sin el padre, ni el padre sin el hijo, perjudica al otro, pero ambos pueden repudiarla.

14.- PAULO; *Comentarios a Sabino, libro II*.- Lo mismo es también, si a los hijos les va una herencia legítima.

15.- ULPIANO; *Comentarios a Sabino, libro VII*.- El que se cree heredero necesario, siéndolo voluntario, no podrá repudiar la herencia; porque hay más en su opinión, que en la realidad.

16.- EL MISMO; *Comentarios al Edicto, libro XXIV*.- Y por el contrario, el que se cree heredero necesario, no puede ser voluntario.

17.- EL MISMO; *Comentarios a Sabino, libro VII*.- Tampoco puede repudiar la herencia el que cree que no es válido, o que es falso, el testamento. Pero si

quod falsum dicitur, sicut adeundo acquirit, ita et repudiando amittit hereditatem.

§ 1.- Heres institutus idemque legitimus si quasi institutus repudiaverit, quasi legitimus non amittit hereditatem: sed si quasi legitimus repudiavit, si quidem scit se heredem institutum, credendus est utrumque repudiasse: si ignorat, ad neutrum ei repudiatio nocebit neque ad testamentariam, quoniam hanc non repudiavit, neque ad legitimam, quoniam nondum ei fuerat delata.

18.- PAULUS; *libro II ad Sabinum*.- Is potest repudiare, qui et adquirere potest.

19.- PAULUS; *libro LIX ad edictum*.- Qui hereditatem adire vel bonorum possessionem petere volet, certus esse debet defunctum esse testatorem.

20.- ULPIANUS; *libro LXI ad edictum*.- Pro herede gerere videtur is, qui aliquid facit quasi heres. Et generaliter Iulianus scribit eum demum pro herede gerere, qui aliquid quasi heres gerit: pro herede autem gerere non esse facti quam animi: nam hoc animo esse debet, ut velit esse heres. Ceterum si quid pietatis causa fecit, si quid custodiae causa fecit, si quid quasi non heres egit, sed quasi alio iure dominus, apparet non videri pro herede gessisse.

§ 1.- Et ideo solent testari liberi, qui necessarii existunt, non animo heredis se gerere quae gerunt, sed aut pietatis aut custodiae causa aut pro suo. Ut puta patrem sepelivit vel iusta ei fecit: si animo heredis, pro herede gessit: enimvero si pietatis causa hoc fecit, non videtur pro herede gessisse. Servos hereditarios pavit iumentum aut pavit aut distraxit: si hoc ut heres, gessit pro herede: aut si non ut heres, sed ut custodiat, aut putavit sua, aut dum deliberat, quid fecit consulens ut salvae sint res hereditariae, si forte ei non placuerit pro herede gerere, apparet non videri

forged is not so; since by entering upon the estate, he can acquire it, so also by rejecting it he will lose it.

§ 1.- Where an appointed heir, who is at the same time heir-at-law, rejects the estate by reason of his appointment, he cannot be admitted to the succession on account of his being the heir-at-law; if, however, as the heir-at-law he should reject the estate, knowing at the same time that he has been appointed heir to the same, it should be held that he has rejected it in both capacities. If he was not aware of his appointment, his rejection will not prejudice him in either respect, not with reference to the testamentary succession, as he did not reject this, nor with reference to the legal succession, as it was not yet granted him.

18.- PAULUS; *On Sabinus, Book II*.- Anyone who can acquire an estate can also reject it.

19.- THE SAME; *On the Edict, Book LIX*.- Where anyone desires to enter upon an estate, or to claim praetorian possession of the same, he must be certain that the testator is dead.

20.- ULPIANUS; *On the Edict, Book LXI*.- He is held to act as an heir who does anything in the capacity of one. And, in general, Julianus stated that he only acted in the capacity of heir who transacted any business as such; but to act as heir is not so much a matter of fact as of intention, for he must intend to perform the act as an heir. Where, however, he does anything on account of filial affection, or to protect the property of the estate, or where he acts, not as the heir or the owner, but by some other right, it is evident that he should not be held to have acted as heir.

§ 1.- And therefore children who are necessary heirs are accustomed to allege that, where they transact any business for the estate, they do so only on account of natural affection or for the sake of protecting the property, or because it is theirs; as, for instance, where a child buries his father, or does only what is just and is required of him. If, however, he proceeds with the intention of becoming an heir, he acts in the capacity of one, for if, induced by filial reverence, he does anything, he will not be held to

fuera cierto que no es falso el que se dice que es falso, así como adiéndola la adquiere, así también pierde la herencia repudiándola.

§ 1.- El heredero instituido, y también legítimo, si como instituido la hubiere repudiado, no pierde la herencia como legítimo; pero si la repudió como legítimo, se ha de creer que la repudió de ambos modos, si verdaderamente sabe que él es heredero instituido; pero si lo ignora, la repudiación no le perjudicará ni para una, ni para otra cosa, no para la herencia testamentaria, porque esta no la repudió, y no para la legítima, porque todavía no le había sido deferida.

18.- PAULO; *Comentarios a Sabino, libro II*.- Puede repudiar la herencia el que también puede adquirirla.

19.- EL MISMO; *Comentarios al Edicto, libro LIX*.- El que quiera adir la herencia, o pedir la posesión de los bienes, debe estar cierto de que falleció el testador.

20.- ULPIANO; *Comentarios al Edicto, libro LXI*.- Se considera que obra como heredero, el que hace alguna cosa como heredero. Y en general, escribe Juliano, que solamente obra como heredero el que hace alguna cosa como heredero, pero que obrar como heredero no es cosa tanto de hecho, como de intención; porque debe ser con esta intención, de que quiera ser heredero. Pero si hizo alguna cosa por piedad, si la hizo por causa de custodia, si la hizo no como heredero, sino como dueño por otro derecho, se ve, que no parece que obró como heredero.

§ 1.- Y por esto suelen declarar los descendientes, que son herederos necesarios, que ellos no hacen lo que hacen la intención de heredero, sino o por piedad, o por causa de custodia, o como por cosa propia; por ejemplo, si enterró al padre o le hizo las exequias, con el ánimo de heredero, obró como heredero, pero si esto lo hizo por piedad, no se considera que obró como heredero. Alimentó a los esclavos de la herencia, dió de comer a las caballerías, o las enajenó; si esto lo hizo como heredero, se considera

ei non placuerit pro herede gerere, apparet non videri pro herede gessisse. Proinde et si fundos aut aedes locavit vel fulsit vel si quid aliud fecit non hoc animo, quasi pro herede gereret, sed dum ei, qui substitutus est vel ab intestato heres exstaturus, prospicit, aut res tempore perituras distraxit: in ea causa est, ut pro herede non gesserit, quia non hoc animo fuerit.

§ 2.- Si quid tamen quasi heres petit, sed ex his, quae ad heredem extraneum non transeunt, videamus, an oneribus se immerserit hereditariis. Ut puta a liberto parentis operas petit: has heres extraneus petere non potuit, hic tamen petendo consequi potest. Et constat pro herede eum non gessisse, cum petitio earum etiam creditoribus competat et maxime futurarum.

§ 3.- Sed et qui in sepulchrum hereditarium mortuum intulit, obligari paternis creditoribus non est existimandus, ut Papinianus ait: quae sententia humanior est, licet Iulianus contra scripserit.

§ 4.- Papinianus scribit filium heredem institutum qui se bonis paternis abstinuit volgo putare quosdam, si a statulibero pecuniam accepit, a creditoribus conveniendum, sive nummi peculiares fuerint sive non fuerint, quia ex defuncti voluntate accipitur, quod condicionis implendae causa datur. Iulianus autem et si non abstinuit, idem existimavit. Ita demum autem pro herede gessisse ait Papinianus, si solus heres sit: ceterum si coheredem habeat et coheres adiit, non est cogendus, inquit, is qui accepit a statulibero actiones creditorum suscipere: nam cum se filius abstinet, idem debebit consequi iure praetorio, quod emancipatus consequitur qui hereditatem repudiavit, quo facto statuliber filio

have acted as an heir. In instances of this kind, he provides food for slaves belonging to the estate, or for beasts of burden, or sells them. If he does this in the capacity of heir, he acts as heir, and if he does not do so, but merely attempts to preserve the property because he believes it to be his; or, while he is deliberating what course he shall pursue, he merely takes measures that the property of the estate may be preserved; and if he should conclude not to conduct himself as heir, it is evident that he cannot be held to have acted in that capacity. Hence, if he has either leased or repaired any lands or houses belonging to the estate, or has done anything else of this kind, not with the intention of acting as heir, but merely for the benefit of the substitution, or of the heir ab intestato, or sells property which is perishable; he is not in the position of a person who acts in the capacity of an heir, because he had not the intention of doing so.

§ 2.- If, however, he should claim any property as heir which does not pass to the foreign heir, let us see whether he becomes liable for the debts of the estate; for instance, where he claims the services of a freedman of his father, which a foreign heir cannot claim, but he can obtain by demanding them; it is established that he does not act as an heir; for such a demand can be made by the creditors, and especially for future services to be rendered.

§ 3.- A son who buries a corpse in the family tomb of his father, should not, by this act, be held to have rendered himself liable to the creditors of the latter; which opinion is held by Papinianus, and is the more equitable one, although Julianus states the contrary.

§ 4.- Papinianus says that certain authorities hold that where a son has been appointed the heir of his father, and declines to accept the estate, if he receives money from a slave who was to be free on condition of payment, he can be sued by the creditors of the estate, whether the money paid was, or was not, a part of the peculium of the slave; because it was received, as it were, by the wish of the deceased, for the purpose of complying with the condition. Julianus thinks that the same rule will apply even where the son did not accept the estate. Finally, Papinianus says that he acts in the capacity of heir only where he is the sole heir, but if he should have a co-heir, and the latter enters upon the estate, the son who received the

que obró como heredero; pero si no como heredero, sino para custodiarlos, o porque los creyó suyos, o si hizo alguna cosa mientras deliberaba, procurando que estuviesen a salvo los bienes de la herencia si acaso no le hubiere agregado obrar como heredero, se ve que no parece que obró como heredero. Por lo tanto, también si dio en arrendamiento fundos o casas, o las reparó, o si hizo alguna otra cosa, no con esta intención, de hacerla casi como heredero, sino mirando por aquel que fue substituido, o por el que haya de ser heredero abintestato, o si enajenó cosas que perecerían con el tiempo, está en el caso de no haber obrado como heredero, porque no tuvo esta intención.

§ 2.- Mas si como heredero pidió alguna cosa, pero de aquellas que no pasan al heredero extraño, veamos si se habrá inmiscuido en las cargas de la herencia, por ejemplo, si al liberto de un ascendiente le pidió servicios, que un heredero extraño no pudo pedirle; mas éste pudo conseguirlos pidiéndolos, y consta que él no obró como heredero, porque la petición de aquellos, y mayormente de los futuros, les compete también a los acreedores.

§ 3.- Pero tampoco se ha de estimar que el que enterró un muerto en un sepulcro de la herencia se obliga a los acreedores de su padre, como dice Papiniano, cuya opinión es más humana, aunque Juliano haya escrito lo contrario.

§ 4.- Escribe Papiniano, que por lo común opinaban algunos, que el hijo instituido heredero, que se abstuvo de los bienes paternos, si recibió dinero de un manumitido bajo condición en el testamento, ha de ser demandado por los acreedores, ya si el dinero hubiere sido del peculio, ya si no lo hubiere sido, porque se recibe por voluntad del difunto lo que se da por causa de cumplir una condición; pero Juliano opinó lo mismo, aún si no se abstuvo. Mas dice Papiniano que obró como heredero únicamente en este caso, si él solo fuera heredero. Pero si tuviese coheredero, y el coheredero adió la herencia, dice que no ha de ser obligado el que recibió del manumitido bajo condición en el testa-

nominatim pecuniam dare iussus potuisset non heredi dando ad libertatem pervenire. Itaque tunc pro herede geri dicendum esse ait, quotiens accipit quod citra nomen et ius heredis accipere non poterat.

§ 5.- Si sepulchri violati filius aget quamvis hereditarii, quia nihil ex bonis patris capit, non videtur bonis immiscere: haec enim actio poenam et vindictam quam rei persecutionem continet.

21.- ULPIANUS; *libro VII ad Sabinum*.- Si quis extraneus rem hereditariam quasi subripiens vel expilans tenet, non pro herede gerit: nam admissum contrariam voluntatem declarat.

§ 1.- Interdum autem animus solus eum obstringet hereditati, ut puta si re non hereditaria quasi heres usus sit.

§ 2.- Sed ita demum pro herede gerendo acquirit hereditatem, si iam sit ei delata: ceterum ex quibus causis repudiantem nihil agere diximus, ex isdem causis nec pro herede gerendo quicquam agere sciendum est.

§ 3.- Si quis partem ex qua institutus est ignoravit, Iulianus scribit nihil ei nocere, quominus pro herede gereret. Quod et Cassius probat, si condicionem, sub qua heres institutus est, non ignorat, si tamen exstitit condicio, sub qua substitutus est. Quid tamen si ignorat condicionem exstitisse? Puto posse adire hereditatem, quemadmodum si ignoret, an coheredis, cui substitutus est, repudiatione portio ei delata sit.

money from the slave should not be compelled to defend actions brought by the creditors; for, as he rejected the estate as a son, he should also be entitled under Prætorian Law to the rights enjoyed by an emancipated child who rejects an inheritance.

Hence, if the slave had been expressly ordered by the testator to pay the money to his son, he could obtain his freedom even if he did not pay him. He is therefore said to have acted in the capacity of heir, since he received what he could not obtain without assuming the name and rights of an heir.

§ 5.- Where a son brings an action against a person who has violated a tomb, even though it belongs to the estate, he is not considered to have interfered with the affairs of the same, as he takes nothing from the estate of his father; for the object of this action is a penalty and punishment rather than the recovery of property.

21.- THE SAME; *On Sabinus, Book VII*.- Where a stranger has in his possession property belonging to an estate which he has purloined or stolen, he does not act in the capacity of heir, for his act shows a contrary intention.

§ 1.- Sometimes the mere intention of the heir makes him responsible for the estate; as, for instance, when, in the capacity of heir, he makes use of some property which does not belong to it.

§ 2.- Still, no one can acquire an estate by acting in the capacity of heir, where it has already descended to him. But we say that in those cases where we have held that the rejection of an estate is void, it must be noted that where the party acts as heir, his acceptance will also be void.

§ 3.- Where anyone does not know to what portion of the estate he has been appointed heir, Julianus says that this does not prevent him from acting in that capacity. This opinion is also approved by Cassius, if the party was aware of the condition under which he was appointed; provided that the condition has been complied with. But what if he did not know that the condition had been complied with? I think that he can enter upon the estate in the same way that he could if he was not aware that the portion of his co-heir, for whom he was substituted, had been increased by the rejection of the latter.

mento a hacerse cargo de las acciones de los acreedores; porque cuando el hijo se abstiene, deberá conseguir por el derecho Pretorio lo mismo que consigue el emancipado, que repudió la herencia; hecho lo cual, el manumitido bajo condición en el testamento, a quien se mandó que diera el dinero determinadamente al hijo, habría podido llegar a la libertad aún no dándoselo al heredero. Y así, opina que se ha de decir, que se obra como heredero, en este caso, cuando uno recibe lo que no podía recibir sin el nombre y el derecho de heredero.

§ 5.- Si un hijo ejercitara la acción de sepulcro violado, aunque éste sea de la herencia, como no adquiere nada de los bienes del padre, no se considera que se inmiscuye en los bienes; porque esta acción comprende la pena y la vindicta más bien que la persecución de la cosa.

21.- EL MISMO; *Comentarios a Sabino, libro VII*.- Si un extraño tiene una cosa de la herencia, como sustrayéndola o robándola, no obra como heredero, porque lo hecho declara su voluntad contraria.

§ 1.- Pero a veces la sola intención obligará a uno a favor de la herencia, por ejemplo, si como heredero hubiera usado de cosa que no era de la herencia.

§ 2.- Pero obrando como heredero adquirirá la herencia solamente de esta suerte, si ya le hubiera sido deferida; mas se ha de saber, que por las causas que hemos dicho que nada hace el que la repudia, por las mismas no hace cosa alguna ni aún obrando como heredero.

§ 3.- Si uno ignoró la parte en que fue instituido, escribe Juliano, que nada le perjudicaba para que no obrase como heredero; lo que aprueba también Cassio, si no ignora la condición bajo la cual fue instituido heredero, si, no obstante, se cumplió la condición bajo la que fue substituido. Pero, ¿qué, si ignora que se cumplió la condición? Opino, que puede adir la herencia, así como si ignorase, que por la repudiación del coheredero, a quien fue substituido, le haya sido deferida una porción.

22.- PAULUS; *libro II ad Sabinum*.- Si is, ad quem legitima hereditas pertinet, putaverit defunctum servum suum esse et quasi peculium eius nactus sit, placet non obligari eum hereditati. Idem ergo dicemus, ut ait Pomponius, si quasi libertini sui, cum ingenuus esset, bona eius occupavit. Nam ut quis pro herede gerendo obstringat se hereditati, scire debet, qua ex causa hereditas ad eum pertinet: veluti adgnatus proximus iusto testamento scriptus heres, antequam tabulae proferantur, cum existimaret intestato patrem familias mortuum, quamvis omnia pro domino fecerit, heres tamen non erit. Et idem iuris erit, si non iusto testamento scriptus heres prolatis tabulis, cum putaret iustum esse, quamvis omnia pro domino administraverit, hereditatem tamen non adquiret.

23.- POMPONIUS; *libro III ad Sabinum*.- In repudianda hereditate vel legato certus esse debet de suo iure is qui repudiat.

24.- ULPIANUS; *libro VII ad Sabinum*.- Fuit quaestionis, an pro herede gerere videatur, qui pretium hereditatis omittendae causa capit, et optinuit hunc pro herede quidem non gerere, qui ideo accepit, ne heres sit, in edictum tamen praetoris incidere. Sive igitur a substituto non heres accepit sive a legitimo, mortis causa accepisse videtur. Idemque erit et si non accepit, sed promissa sit ei pecunia: nam et stipulando mortis causa capit.

25.- ULPIANUS; *libro VII ad Sabinum*.- Si quis mihi bona fide serviat servus alienus, iussu meo hereditatem adeundo nihil promovebit nec adquiret mihi, nec fructuarius quidem servus.

22.- PAULUS; *On Sabinus, Book II*.- If anyone entitled to the legitimate succession, believing that the deceased was his slave should, in consequence obtain his peculium, it is held that he will not be liable to the estate. We therefore say (as Pomponius holds), that the same rule applies if he should take possession of the estate of one whom he thought to be his freedman, when, in fact, the latter was freeborn. For, as anyone by acting in the capacity of heir, renders himself liable to the estate, he should ascertain under what title the said estate belongs to him; for example, if the next of kin is appointed heir by a valid will, and before the latter is produced, and while he thinks that the testator died intestate, even though he should act in every respect as the owner, he, nevertheless, will not be the heir. The same rule of law will apply where he is appointed heir by a will not properly executed, and the latter having been produced, he thinks that it is legal, still, he will not acquire the estate; even though he should administer all the property belonging to it as the owner thereof.

23.- POMPONIUS; *On Sabinus, Book III*.- Where anyone rejects an estate or a legacy, he must be certain of his rights.

24.- ULPIANUS; *On Sabinus, Book VII*.- The question arose whether a person is held to have acted in the capacity of heir who receives a sum of money as compensation for rejecting an estate. It was decided that he who received the money in consideration of relinquishing the estate did not act as heir; but that he would still be liable to the penalty imposed by the Edict of the Praetor. Therefore whether he received the money from the substitute, or from the heir-at-law, he is held to have received it mortis causa. The same rule will apply if he did not receive the money, but it was merely promised to him, for he obtains it by virtue of the stipulation, mortis causa.

25.- THE SAME; *On Sabinus, Book VIII*.- When a slave belonging to another, who is serving me in good faith, enters upon an estate by my order, he will commit an act which is void, and he will not acquire the said estate for me, nor will such an act be valid if

22.- PAULO; *Comentarios a Sabino, libro II*.- Si aquel a quien le pertenece la herencia legítima, hubiere creído que el difunto era esclavo suyo, y la hubiera adquirido como peculio del mismo, se determina que no esté obligado a la herencia. Luego lo mismo diremos, como expresa Pomponio, si ocupó los bienes de aquel, como de un libertino suyo, siendo ingenuo; porque para que obrando como heredero se obligue uno a favor de la herencia, debe saber por qué causa le pertenece a él la herencia, por ejemplo, el próximo agnado instituido heredero en legítimo testamento, aunque todo lo hubiere hecho como dueño, antes que se produzca el testamento, creyendo que el padre de familia murió intestado, no será, sin embargo, heredero, y el mismo derecho habrá, si el heredero instituido en testamento no legítimo, aunque, producido el testamento, creyendo que era legítimo, todo lo hubiere administrado como dueño, no adquirirá, sin embargo, la herencia.

23.- POMPONIO; *Comentarios a Sabino, libro III*.- Para repudiar la herencia o un legado debe estar cierto de su derecho el que los repudia.

24.- ULPIANO; *Comentarios a Sabino, libro VII*.- Hubo cuestión sobre si se considera que obra como heredero el que recibe precio para no aceptar la herencia; y prevaleció, que no obra ciertamente como heredero el que lo recibió precisamente para no ser heredero, pero que incurre en el Edicto del Pretor; así, pues, ya si el que no es heredero lo recibe del substituto, ya si del heredero legítimo, se considera que lo recibió por causa de muerte. Y lo mismo será, también si no lo recibió, pero se le prometió dinero, porque también estipulando adquiere por causa de muerte.

25.- EL MISMO; *Comentarios a Sabino, libro VIII*.- Si algún esclavo ajeno me prestase de buena fe servidumbre, no hará nada, ni adquirirá para mí, añadiendo por mi mandato la herencia, y tampoco ciertamente el esclavo usufructuario.

§ 1.- Servus municipum vel collegii vel decuriae heres institutus manumissus vel alienatus adibit hereditatem.

§ 2.- Si fisci servus sit, iussu procuratoris Caesaris adibit hereditatem, ut est saepe rescriptum.

§ 3.- Si quis plane servus poenae fuerit effectus ad gladium vel ad bestias vel in metallum damnatus, si fuerit heres institutus, pro non scripto hoc habebitur: idque divus Pius rescripsit.

§ 4.- Iussum eius qui in potestate habet non est simile tutoris auctoritati, quae interponitur perfecto negotio, sed praecedere debet, ut Gaius Cassius libro secundo iuris civilis scribit: et putat vel per internum fieri posse vel per epistulam.

§ 5.- Sed utrum generaliter "quaecumque tibi hereditas fuerit delata", an specialiter? Et magis placet, ut Gaius Cassius scribit, specialiter debere mandare.

§ 6.- An nominatim de vivi hereditate mandari possit, quaeritur: sed ego non puto recipiendum, ut de vivi hereditate mandetur. Plane si rumor fuit Lucium Titium decessisse, poterit ei mandare, ut, si scripsit eum, adeat: aut si clusae adhuc tabulae sunt et sit incertum, an filius scriptus sit heres.

§ 7.- Sed quid si mandavit, ut hereditatem colligat, an videtur mandasse, ut adeat? Quid si ut petat bonorum possessionem? Aut ut rem hereditariam distrahat? Aut quid si petitam bonorum possessionem ratam habuit, mox filius adeat hereditatem? Vel quid si pro herede gerere mandavit, filius adiit hereditatem? An iussu videatur adisse, dubitari potest. Immo verius est ex his omnibus aditionem esse introducendam.

performed by a slave of whom I am the usufructuary.

§ 1.- A slave belonging to a municipality, corporation, or a decuria, who is appointed an heir, can enter upon the estate after having been manumitted or alienated.

§ 2.- If the said slave belongs to the Treasury, he can enter upon the estate by order of the Imperial Steward, as has been frequently stated in rescripts.

§ 3.- Where it is evident that someone has become a penal slave, by having been condemned to fight with gladiators, or wild beasts, or to work in the mines, and he is appointed an heir, his appointment will be considered as not having been made, as the Divine Pius stated in a Rescript.

§ 4.- The order of a man who has another under his control does not resemble the authority of a guardian which can be interposed after the transaction has been completed, but should precede the acceptance; as Gaius Cassius says in the Second Book of the Civil Law. He also thinks that this order can be communicated by means of a messenger, or by a letter.

§ 5.- Should the order, however, be given generally, as follows: "Whatever estates may pass to you", or specifically? The better opinion is (as Gaius Cassius holds) that it should be given specifically.

§ 6.- The question also arises whether the order can be given expressly with reference to the estate of a man still living. I think that where it is given with reference to the estate of a person who is still living, it should not be obeyed. It is evident that if the report was current that Lucius Titius was dead, or if the will was not yet opened, and it was still uncertain whether the son was designated the heir, the party appointed heir could be ordered to enter upon the estate.

§ 7.- But what if the order should be given to "acquire the estate"? Would it be held that the party had been directed to enter upon it? What if he should be ordered to "apply for praetorian possession of the estate", or "to sell the property belonging to it"? Or what if the son should enter upon the estate, after the father had ratified his demand for praetorian possession of the same? Or what if the son should enter upon the estate, after having been ordered to act in the capacity of heir? Can it be doubted that he would be held to have entered upon it by order of his

§ 1.- Instituido heredero el esclavo de un municipio, o de un colegio, o de una decuria, adirá la herencia manumitido o enajenado.

§ 2.- Si fuera esclavo del fisco, adirá la herencia por mandato del procurador del César, según se respondió muchas veces por rescripto.

§ 3.- Si alguno se hubiere hecho ciertamente esclavo de la pena, o hubiere sido condenado a luchar con los gladiadores, o con las fieras, o a trabajar en las minas, si hubiere sido instituido heredero, se tendrá por no instituido; y esto respondió por rescripto el Divino Pío.

§ 4.- El mandato del que tiene a otro en su potestad, no es semejante; a la autoridad del tutor, que se interpone concluido el negocio, sino que debe preceder, como escribe Cayo Cassio en el libro segundo del derecho civil, y opina, que puede hacerse o por mensajero o por carta.

§ 5.- Pero ¿acaso en general, como «cualquier herencia que te hubiere sido deferida», o especialmente? Y parece preferible, como escribe Cayo Cassio, que deba dar especialmente el mandato.

§ 6.- Se pregunta si se podrá dar especialmente mandato respecto a la herencia del que está vivo. Pero yo creo que no se ha de admitir que se dé mandato respecto de la herencia del que vive; pero si corrió el rumor de que había fallecido Lucio Ticio, podrá mandarle, que ada la herencia, si lo instituyó, o si aún estuviera cerrado el testamento, y por ello fuera incierto si el hijo fue instituido heredero.

§ 7.- Pero ¿qué se dirá, si le mandó que recogiese la herencia; se considera acaso que le mandó que la adiera? ¿Qué se dirá, si que pidiera la posesión de los bienes, o que enajenase alguna cosa de la herencia? ¿O qué, si ratificó la posesión de los bienes pedida, y luego el hijo adiese la herencia? ¿O qué, si le mandó que obrase como heredero, y el hijo adiese la herencia? Se puede dudar si se considera que la adió por mandato, pero es más verdadero que en todos estos casos se ha de admitir la adición.

§ 8.- Pater filio ita scripsit: "Scio, fili, quod pro tua prudentia invigilabis hereditati delatae tibi Lucii Titii". Puto iussu patris adisse.

§ 9.- Quid si mandavit: "Si expedit adire, adito?" "Si putas expedire adire, adito?" Erit iussu aditum.

§ 10.- Si "coram Titio" iussit adire, si "arbitrio Lucii Titii", recte puto iussisse.

§ 11.- Sed si mandavit quasi ex asse instituto et inveniatur ex parte, non puto ex iussu adisse. Quod si ex parte iussit, potest ex asse adire. Aliter atque si mandavit quasi ab intestato et ex testamento adiit: nam non puto quicquam egisse. At si ex testamento mandavit, poterit et ab intestato, quoniam non fecit deteriorem condicionem patris. Idemque et si quasi instituto praecepit et inveniatur substitutus, vel contra.

§ 12.- Sed si mandavit, ut patris adiret, sit autem et impuberi substitutus, non sufficit iussum.

§ 13.- Plane si sic mandavit "si qua ex testamento Lucii Titii deferatur hereditas", potest defendi iussu adisse.

§ 14.- Sed si posteaquam iussit, paenitentiam egit prius quam adiret, nihil agit adeundo.

§ 15.- Item si se adrogandum dederit prius quam filius adiret, non est adquisita hereditas.

father? Indeed, the better opinion is, that in all these cases, attention should be called to the entry upon the estate.

§ 8.- A father wrote to his son as follows: "I know, my son, that you will watch with prudence over the estate of Lucius Titius, which has been conferred upon you." I think that the son enters upon the estate by order of his father.

§ 9.- What if he ordered, as follows: "Enter upon the estate, if it is expedient for you to do so"; "If you think it is expedient to enter upon the estate, do so"? The entry upon the estate will be by order of the father.

§ 10.- If a father should order his son to enter upon the estate, "In the presence of Titius", or with the consent of Lucius Titius, I think that the order is given in accordance with law.

§ 11.- Where, however, the order is given to a son as heir to the entire estate, and it should be ascertained that he is heir only to a portion of the same; I do not think that he can enter upon it under such an order. But, if his father orders him to accept only a portion of the estate, he can accept the whole of it. The case is different where he orders him to enter upon it as ab intestato, and he does so by virtue of a will, for I think that then his act is not valid; but if the order was to enter upon the estate by virtue of a will, the son can likewise do so ab intestato; since he does not make the condition of his father any worse. The same rule applies where the father directs the son to enter upon the estate as an appointed heir, and it is ascertained that he is a substitute, or vice versa.

§ 12.- Where, however, a father directs his son to enter upon an estate, he being a substitute of a child under the age of puberty, the order will not be sufficient.

§ 13.- It is clear that if the order was as follows: "If any estate passes to you by the will of Lucius Titius", it can be maintained that he can enter upon it under an order of this kind.

§ 14.- But if after he has given the order, he should change his mind before the son has entered upon the estate, and he does so, his act will be void.

§ 15.- Likewise, if he should give his son to be arrogated before the latter enters upon the estate, the estate will not be acquired by him.

§ 8.- Un padre escribió así de su hijo: «sé, hijo, que con tu prudencia cuidarás de la herencia de Lucio Ticio a ti deferida;» opino, que adió por mandato del padre.

§ 9.- ¿Qué se dirá si mandó así: «ádelá, si conviene adirla; si juzgas que conviene adirla, ádelá»? Se habrá adido por mandato.

§ 10.- Si mandó adirla ante Ticio, o si a arbitrio de Lucio Ticio, opino que mandó bien.

§ 11.- Pero si le mandó como a instituido por el as, y se hallara que lo fue de parte, no opino que adió en virtud de mandato; pero si le mandó como a instituido de parte, puede adir como instituido por el as. Lo contrario, si le mandó como a heredero abintestato, y adió en virtud de testamento, porque no creo que hizo cosa alguna. Mas si le mandó que en virtud de testamento, podrá también abintestato, porque no hizo peor la condición del padre. Y lo mismo, también si le mandó como a instituido, y se hallara que es substituto, o al contrario.

§ 12.- Pero si le mandó que adiese la herencia del padre, pero hubiera sido substituido también a un impúbero, no es suficiente el mandato.

§ 13.- Pero si le mandó de este modo, si se le defiriese alguna herencia en virtud del testamento de Lucio Ticio, se puede defender que la adió por mandato.

§ 14.- Mas si después que se lo mandó, se arrepintió, antes que la adiese, nada hizo adiéndola

§ 15.- Asimismo, si se hubiere dado en arrogación, antes que el hijo la adiese, no se adquirió la herencia.

26.- PAULUS; *libro II ad Sabinum*.- Si ego et servus meus vel filius heres institutus sit, si iussero filio vel servo adire, statim et ex mea institutione me heredem esse Pomponius scribit: idem et Marcellus probat et Iulianus.

27.- POMPONIUS; *libro III ad Sabinum*.- Neminem pro herede gerere posse vivo eo, cuius in bonis gerendum sit, Labeo ait.

28.- ULPIANUS; *libro VIII ad Sabinum*.- Aristo existimat praetorem aditum facultatem facere debere heredi rationes defuncti ab eo petere, penes quem depositae sunt, deliberanti de adeunda hereditate.

29.- POMPONIUS; *libro III ad Sabinum*.- Qui heres institutus prohibeatur ab eo, qui una institutus iam hereditatem adiit, tabulas litteras rationes inspicere mortui, unde scire posset an sibi adeunda esset hereditas, non videtur pro herede gerere.

30.- ULPIANUS; *libro VIII ad Sabinum*.- Cum quidam legationis causa absens filium heredem institutum non potuisset iubere adire in provincia agentem, Divus Pius rescripsit consulibus subvenire ei oportere mortuo filio, eo quod rei publicae causa aberat.

§ 1.- Quod dicitur: "Proximus a filio postumo heres, dum mulier praegnas est aut putatur esse, adire hereditatem non potest: sed si scit non esse praegnatam, potest" accipe proximus a ventre, qui suum heredem pariturus est. Et non solum ad testatos haec verba, verum ad intestatos quoque pertinent. Et in eo ventre idem accipias, qui legitimum vel consanguineum pariturus est, quoniam mortis tempore qui in utero est, quantum ad moram faciendam inferioribus et sibi locum faciendum si

26.- PAULUS; *On Sabinus, Book II*.- If I am appointed an heir together with my slave or my son, and I order my son or my slave to enter upon the estate, Pomponius says that I will immediately become the heir through my own appointment. Marcellus and Julianus both concur in his opinion.

27.- POMPONIUS; *On Sabinus, Book III*.- Labeo says that no one can act as heir during the lifetime of the person, the administration of whose estate is in question.

28.- ULPIANUS; *On Sabinus, Book VIII*.- Aristo thinks that the Praetor should give the heir who is deliberating with reference to his acceptance of the estate the right to enter upon the same, in order to demand the papers of the deceased from the party with whom they have been deposited.

29.- POMPONIUS; *On Sabinus, Book III*.- Where anyone who has been appointed an heir is prevented by another heir, who was appointed along with him and has already entered upon the estate, from examining the papers of the deceased, from which he may ascertain whether he ought to accept it or not, he is not held to have acted in the capacity of heir.

30.- ULPIANUS; *On Sabinus, Book VIII*.- Where a man absent on an embassy is not able to order his son who was appointed an heir, and is in a province, to enter upon the estate; the Divine Pius stated in a Rescript addressed to the Consuls that relief should be granted him when his son died, for the reason that he was absent on business for the State.

§ 1.- Where it is said that: "The next of kin to a posthumous child cannot enter upon the estate so long as the woman is pregnant, or is thought to be so, but if he knows that she is not pregnant, he can enter upon it"; it is understood that this is applicable to the next of kin to the unborn child, who, when born, will be the proper heir of the deceased. These words not only have reference to persons dying testate, but also to intestates. And the same must be understood to apply to an unborn child who will be either the proper

26.- PAULO; *Comentarios a Sabino, libro II*.- Si yo y mi esclavo, o mi hijo, fuéramos instituidos herederos, escribe Pomponio, que, si yo le hubiere mandado a mi hijo o a mi esclavo, que adiese la herencia, me hago inmediatamente heredero también en virtud de mi institución; y lo mismo aprueban Marcelo y Juliano.

27.- POMPONIO; *Comentarios a Sabino, libro III*.- Dice Labeón, que nadie puede obrar como heredero viviendo aquél en cuyos bienes se haya de hacer gestión.

28.- ULPIANO; *Comentarios a Sabino, libro VIII*.- Opina Aristón, que el Pretor a quien se haya recurrido debe darle facultad al heredero, que delibera sobre adir la herencia, para pedir las cuentas del difunto a aquel en cuyo poder fueron depositadas.

29.- POMPONIO; *Comentarios a Sabino libro III*.- El heredero instituido a quien por el que instituido coheredero adió ya la herencia, se le prohibiese inspeccionar el testamento, las cartas y las cuentas del difunto, por cuyo medio podría saber si se habría de adir por él la herencia, no se considera que obra como heredero.

30.- ULPIANO; *Comentarios a Sabino, libro VIII*.- Cuando hallándose uno ausente por causa de una legación no hubiese podido mandarle a su hijo instituido heredero, que vivía en una provincia, que adiese la herencia, respondió por rescripto a los Cónsules el Divino Pio, que debía auxiliarle, muerto el hijo, porque había estado ausente por causa de la República.

§ 1.- Lo que se dice: «el heredero próximo al hijo póstumo no puede adir la herencia mientras la mujer está embarazada, o se considera que lo está, pero si sabe que no está embarazada, puede adirla», entendiéndolo así: el próximo al vientre, que ha de dar a luz a un heredero suyo. Y estas palabras se refieren no solo a los herederos por testamento, sino también a los de abintestato y entiende lo mismo respecto al vientre, que ha de dar a luz a un heredero legítimo o consanguíneo, porque el que está en el vientre al

fuerit editus, pro iam nato habetur. Idemque et per bonorum possessionem edictalem denique praetor ventrem mittit in possessionem.

§ 2.- Sive igitur putem praegnatem sive sit re vera praegnas, quae eum paritura est qui suus futurus est, adire hereditatem non possum, quoniam in eo est, ut rumpatur testamentum, nisi si proponas ventrem institutum vel exheredatum.

§ 3.- Quod dicitur "si putetur esse praegnas", sic accipiendum est, si dicat se praegnatem. Quid ergo, si ipsa non dicat, sed neget, alii dicant praegnatem esse? Adhuc adiri hereditas non potest: finge obstetrices dicere. Quid si ipse putat solus? Si iusta ratione ductus, non potest adire: si secundum multorum opinionem potest.

§ 4.- Quid ergo si praegnas fuit, cum putaret heres non esse praegnatem et adiit, mox abortum factum est? Procul dubio nihil egerit. Totiens igitur ei sua praesumptio proficit, quotiens concurrit cum veritate.

§ 5.- Sed et si ipsa mulier heres instituta sit, quae se praegnatem fingit, adeundo adquiret hereditatem: per contrarium non adquiret, si se putet praegnatem, cum non sit.

§ 6.- Suum heredem certum est ex asse heredem esse, etsi putat esse praegnatem mulierem, quae non est praegnas. Quid si unum in utero habeat, an ex parte dimidia sit heres, sive institutum postumum proponas sive intestatum patrem decessisse? Quod et Sextum Pomponium Opinatum Tertullianus libro quarto quaestionum refert: putasse enim, sicuti cum vacuo utero suus ex asse heres est, ita et cum unum gerit nec per naturam humanae condicionis alium

heir, or a blood relative; since the former at the time of the death is considered as already born, so far as deferring the succession of more remote heirs and making a place for itself therein if it should be brought forth, is concerned. The same rule applies to the possession of property granted by the Praetorian Edict. Finally, the Praetor places the unborn child in possession of the estate.

§ 2.- Therefore, if I think that the woman is pregnant, or if she actually is pregnant, and the child which she is to bring forth will be the proper heir of the deceased, I cannot enter upon the estate, as the will is liable to be broken by the birth of the heir, unless you suppose the case that the unborn child is either appointed an heir, or disinherited.

§ 3.- The statement, "If he thinks that she is pregnant", must be understood to mean if she asserts she is in that condition. But what if she should not say that she is pregnant, but denies it, and others say that she is in that condition? The estate cannot then be entered upon, even though you may suppose midwives to confirm the existence of her pregnancy. What if the heir alone thinks that the woman is pregnant? If he has good reason for thinking so, he cannot enter upon the estate; but if his opinion agrees with that of many others he can do so.

§ 4.- But what if the woman was pregnant, and the heir thought that she was not, and entered upon the estate, and afterwards an abortion was produced? There is no doubt whatever that his act will be void. Hence this opinion will benefit the heir as often as it agrees with the truth.

§ 5.- Where, however, the woman herself is appointed heir, and pretends to be pregnant, she will acquire the estate by entering upon it. On the other hand, she will not acquire it, if she thinks she is pregnant and this is not the case.

§ 6.- It is certain that a proper heir is entitled to the entire estate, even though he thinks that the woman is pregnant, when this is not true. What course must be pursued if she is pregnant of one child? Will it be heir to half of the estate, whether you suppose the case of the appointment of a posthumous child, or that the father died intestate? This opinion which Tertullianus states in the Fourth Book of Questions, was held by Sextus Pomponius; for he thought that when the

tiempo de la muerte, es considerado como ya nacido en cuanto a causar mora a los herederos posteriores, y en cuanto a hacerse para sí lugar, si hubiere sido dado a luz. Y lo mismo también respecto a la posesión de los bienes del Edicto. Finalmente, el Pretor pone al vientre en posesión.

§ 2.- Así, pues, ya si creo que está embarazada, ya si en realidad estuviera embarazada la que ha de dar a luz al que ha de ser heredero suyo, no puedo adir la herencia, porque en él está que se rompa el testamento, a no ser que digas que el vientre fue instituido heredero o desheredado.

§ 3.- Lo que se dice: «si se creyera que está embarazada», se ha de entender así, si ella dijera que está embarazada. Luego ¿qué será, si ella misma no dijera, sino que negara, pero otros dijeran, que estaba embarazada? Supón que lo dicen las comadronas; tampoco se puede adir en este caso la herencia. ¿qué, si él solo lo cree? Si inducido por justa razón, no puede adirla, si conforme a la opinión de muchos, puede.

§ 4.- ¿Más qué se dirá, si estuvo embarazada, creyendo el heredero que no estaba embarazada y adió la herencia, y luego sobrevino el aborto? Sin duda alguna que no habrá hecho nada. Así, pues, su presunción le favorece siempre y cuando concurre con la verdad.

§ 5.- Pero si hubiera sido instituida heredera la misma mujer, que se fingió embarazada, adiéndola, adquirirá, la herencia; por el contrario, no la adquirirá, si se creyera embarazada no estándolo.

§ 6.- Es cierto, que el heredero suyo es heredero de toda la herencia, aunque crea que está embarazada la mujer, que no está embarazada. ¿Qué se dirá, si tuviese uno solo en el vientre, será acaso heredero de la mitad, -ora si dijeras que fue instituido el póstumo, ora que el padre falleció intestado-? Lo que dice Tertuliano en el libro cuarto de las Cuestiones, que opinó también Sexto Pomponio; porque opinó, que así como estando vacío el vientre el heredero lo es de

partum formare potest (quod quidem post certum tempus conceptionis eveniet), ex parte dimidia et ignorantem fore heredem, non ex quarta, ut Iulianus putat.

§ 7.- Scientia autem vel opinio, si filius familias vel servus instituti sunt, utrum ipsorum an domini vel patris accipienda sit? Finge patrem putasse praegnatem, filium certum esse fingere et sic adire, an adquirat hereditatem? Puto adquirere: sed contra non adquirere.

§ 8.- Si certus sum non esse falsum testamentum vel irritum vel ruptum, licet dicatur esse, possum adire hereditatem.

31.- PAULUS; *libro II ad Sabinum*.- Heredi cum postumo instituto reliquae partes ad crescant, quae postumo datae sunt, si certum sit non esse praegnatem, licet heres ignoret.

32.- ULPIANUS; *libro VII ad Sabinum*.- Heres institutus si putet testatorem vivere, quamvis iam defunctus sit, adire hereditatem non potest.

§ 1.- Sed et si scit se heredem institutum, sed utrum pure an sub conditione ignoret, non poterit adire hereditatem, licet pure heres institutus sit, et sub conditione licet paruerit condicioni.

§ 2.- Sed et si de conditione testatoris incertus sit, pater familias an filius familias sit, non poterit adire hereditatem, etsi eius condicionis sit in veritate, ut testari poterit.

33.- PAULUS; *libro XII ad Plautium*.- Quod si

when the woman was not pregnant the proper heir was entitled to the whole estate; as when she is only pregnant of one child, a second cannot be formed in accordance with the nature of the human race, for this only happens a certain time after conception, and the heir already born, even though he was not aware of the fact, will be entitled to half, and not to a fourth of the estate, as is held by Julianus.

§ 7.- When a son under paternal control or a slave is appointed an heir, shall the knowledge or opinion of the master or the father as to the pregnancy be adopted? Suppose the father thinks that the woman is pregnant, and the son is certain that she is not, and, in accordance with his belief, he enters upon the estate, will he obtain it? I think that he will, but in the opposite case I hold that he will not do so.

§ 8.- If I am certain that a will is not forged, void, or broken, even though it is said to be, I can enter upon the estate.

31.- PAULUS; *On Sabinus, Book II*.- Where an heir is appointed along with a posthumous child, the remainder of the estate bequeathed to the latter will accrue to the other heir, if it is certain that the woman is not pregnant, even though the heir may be ignorant of the fact.

32.- ULPIANUS; *On Sabinus, Book VIII*.- An appointed heir cannot enter upon the estate if he thinks that the testator is living, even though he may already be dead.

§ 1.- But even if he knows that he has been appointed an heir, but is ignorant as to whether his appointment was absolute or conditional, he cannot enter upon the estate, even though he may have been appointed heir absolutely, or if he was appointed under a condition, even though he may have complied with it.

§ 2.- Where, however, the heir is uncertain as to the condition of the testator, namely, as to whether he was the head of a household or a son under paternal control, he cannot enter upon the estate, even though his condition was in fact such as to enable him to make a will.

33.- PAULUS; *On Plautius, Book XII*.- When the

toda la herencia, así también cuando lleva uno solo, y conforme a la naturaleza de la condición humana no puede formar otro parto, lo que sucederá ciertamente después de cierto tiempo de la concepción, habrá de ser heredero de la mitad, aún ignorándolo, no de la cuarta parte, como opina Juliano.

§ 7.- Mas si un hijo de familia o un esclavo fue instituido heredero, ¿se ha de atender acaso a su certeza o a su opinión, o a las de su señor o padre, -supón que el padre creyó que estaba embarazada, y supón que el hijo está cierto, y que así a la herencia-, y adquirirá la herencia? Opino que la adquiere, pero que al contrario no la adquiere.

§ 8.- Si estoy cierto de que no es falso el testamento, o írrito, o de que no se ha roto, aunque se diga que lo es, puedo adir la herencia.

31.- PAULO; *Comentarios a Sabino, libro II*.- Al heredero instituido, junto con un póstumo, le acrecen las demás partes, que se le dieron al póstumo, si fuera cierto que no estaba embarazada, aunque lo ignore el heredero.

32.- ULPIANO; *Comentarios a Sabino, libro VIII*.- El heredero instituido, si creyese que vive el testador, aunque ya haya fallecido, no puede adir la herencia.

§ 1.- Pero si sabe que él fue instituido heredero pero ignora si puramente, o bajo condición, tampoco podrá adir la herencia, aunque haya sido instituido heredero puramente, y bajo condición, aunque haya cumplido la condición.

§ 2.- Más si estuviera incierto de la condición del testador, de si es padre o hijo de familia, tampoco podrá adir la herencia, aunque en realidad sea de tal condición que pudiese testar.

33.- PAULO; *Comentarios a Plautio, libro XII*.-

dubitet, apud hostes decessit an civis Romanus, quoniam utroque casu est ius adeundi et in re est, ut possit adire, dicendum est posse adire.

34.- ULPIANUS; *libro VIII ad Sabinum*.- Sed et si de sua condicione quis dubitet, an filius familias sit, posse eum adquirere hereditatem iam dictum est. Cur autem, si suam ignoret condicionem, adire potest, si testatoris, non potest? Illa ratio est, quod qui condicionem testatoris ignorat, an valeat testamentum dubitat, qui de sua, de testamento certus est.

§ 1.- Sed et si cum esset pure institutus, putavit sub condicione et impleta condicione, quam iniectam putavit, adiit, an possit adquirere hereditatem? Consequens est dicere posse eum adire, maxime cum haec suspicio nihil ei offuerit nec periculum attulerit. Facilius quis admittet, si quis pure institutus putavit se sub condicione institutum condicionemque impletam quam in eventum putabat: nam in nullo haec suspicio offuit.

35.- ULPIANUS; *libro IX ad Sabinum*.- Si quis heres institutus ex parte, mox titio substitutus, antequam ex causa substitutionis ei deferatur hereditas, pro herede gesserit, erit heres ex causa quoque substitutionis, quoniam invito quoque ei adcrevit portio. Idem dico et si filius familias vel servus iussu domini vel patris adierint hereditatem, mox emancipatus vel manumissus ex causa substitutionis adeant: erunt namque heredes: sunt enim appendices praecedentis institutionis.

§ 1.- Si exclusus per condicionem sibi datam pater filium iussit adire, dicendum erit eum non quaesisse suam portionem.

heir is in doubt as to whether the deceased died in the hands of the enemy, or as a Roman citizen at home, since in both cases he has the right to enter upon the estate, and is in a condition to do so, it must be said that he can enter upon it.

34.- ULPIANUS; *On Sabinus, Book VIII*.- Where anyone is in doubt as to his own condition and whether he is a son under paternal control, it has already been stated that he can acquire an estate. But why can he enter upon an estate if he is ignorant of his own condition, but if he is ignorant of that of the testator he cannot do so? The reason is that he who is ignorant of the condition of the testator does not know whether his will is valid or not; but he who is aware of his own is certain of the validity of the will.

§ 1.- If an heir was appointed absolutely, but thinks that he was appointed under a condition, and, after complying with it, enters upon the estate, can he acquire it? It follows that he can legally enter upon it, especially when the opinion which he entertains places no obstacle in his way, nor causes him any risk. This would be more readily admitted, where someone who was absolutely appointed thought that he was appointed under a condition, and that the condition which depended upon some event had been fulfilled; for this opinion presented no obstacle to his acceptance of the estate.

35.- THE SAME; *On Sabinus, Book IX*.- Where anyone has been appointed an heir to a portion of an estate, and was afterwards substituted for Titius, his co-heir, and acted in the capacity of heir before the estate vested in him by virtue of the substitution; he will also be heir on account of the substitution; since the share of his co-heir accrued to him without his consent. I hold that the same rule will apply where a son under paternal control or a slave, by order of his father or master, enters upon an estate, and, after having been emancipated or manumitted, acquires it by reason of the substitution, for they become heirs through the effect of the preceding appointment.

§ 1.- Where a father, who was excluded on account of the condition imposed upon him not having been fulfilled, orders his son to enter upon the estate, it must be held that he cannot, by this means, obtain his

Pero si dudara si falleció en poder de los enemigos, o siendo ciudadano romano, como quiera que en uno y otro caso hay el derecho de adir la herencia, y en realidad puede adirla, se ha de decir que puede adirla.

34.- ULPIANO; *Comentarios a Sabino, libro VIII*.- Pero aunque uno dude de su propia condición, de si sea hijo de familia, ya se ha dicho que puede adquirir la herencia. Mas ¿por qué puede adirla, si ignorase su propia condición, y no puede, si ignorase la del testador? La razón es, que el que ignora la condición del testador duda si será válido el testamento, y el que duda de la suya está cierto del testamento.

§ 1.- Pero si habiendo sido instituido puramente creyó que bajo condición, y adió la herencia habiendo cumplido la condición, que creyó que se le había impuesto, ¿podrá adquirir la herencia. Es consiguiente decir, que él puede adirla, mayormente no habiéndole obstado para nada esta duda, ni habiéndole causado perjuicio. Más fácilmente lo admitirá cualquiera, si instituido uno puramente creyó él que había sido instituido bajo condición, y que se cumplió la condición que creía sujeta a eventualidad; porque para nada le obstó esta sospecha.

35.- EL MISMO; *Comentarios a Sabino, libro IX*.- Si instituido alguien heredero de una parte, y substituido después a Ticio, hubiere obrado como heredero antes que se le defiriese la herencia por causa de la substitución, será heredero también por causa de la substitución, porque aún contra su voluntad le acrece la porción. Lo mismo digo, también si un hijo de familia o un esclavo hubiere adido la herencia por mandato de su señor o de su padre, y después de emancipado o manumitido la adieran por causa de la substitución, porque serán herederos, pues son dependientes de la anterior institución.

§ 1.- Si excluido el padre por una condición a él impuesta le mandó al hijo adir la herencia, se habrá de decir, que no adquirió su porción.

§ 2.- Sed si ex duobus filiis unum iusserit, debebit et alium filium iubere adire.

36.- POMPONIUS; *libro III ad Sabinum*.- Si ex sua parte dominus vel pater adierit, necessarium est iussum, ut filius vel servus coheredes adeant.

37.- POMPONIUS; *libro V ad Sabinum*.- Heres in omne ius mortui, non tantum singularum rerum dominium succedit, cum et ea, quae in nominibus sint, ad heredem transeant.

38.- ULPIANUS; *libro XLIII ad edictum*.- Si duo sint necessarii heredes, quorum alter se abstinuit, alter posteaquam prior abstinuit immiscuit se, dicendum est hunc non posse recusare, quo minus tota onera hereditaria subeat: qui enim scit aut scire potuit illo abstinente se oneribus fore implicitum, ea condicione adire videtur.

39.- ULPIANUS; *libro XLVI ad edictum*.- Quam diu potest ex testamento adiri hereditas, ab intestato non defertur.

40.- ULPIANUS; *libro IV disputationem*.- Quaesitum est, an, licet quis paternae hereditatis nihil attingat, aliquid tamen propter patris voluntatem habeat vel faciat, an creditoribus paternis cogatur respondere: ut puta si impuberi fuerit substitutus. In qua specie Iulianus libro vicesimo sexto digestorum scripsit incidere eum in edictum, si se immiscuerit impuberis hereditati: nam qui iudicium parentis oppugnaverit, non debet ex eadem hereditate quicquam consequi. Sed Marcellus eleganter distinguit multum interesse, utrum ex asse fuerit institutus in patris testamento an ex parte, ut, si ex parte, potuerit sine metu remota patris successione impuberis hereditatem amplecti.

share.

§ 2.- But when he orders one of two sons to enter upon the estate, he must also order the other to do so.

36.- POMPONIUS; *On Sabinus, Book III*.- If a father or a master should enter upon his share of an estate, he must order his son or his slave, who is his co-heir, to enter upon it also.

37.- THE SAME; *On Sabinus, Book V*.- An heir succeeds to every right of the deceased, and not merely to the ownership of certain property, for any liabilities which were contracted also pass to him.

38.- ULPIANUS; *On the Edict, Book XLIII*.- Where there are two necessary heirs, one of whom refuses to accept his share of the estate, and the other, after the refusal of the first, busies himself with its affairs; it must be held that he cannot decline to assume all the liabilities of the estate; for he either knew, or could have ascertained, that when the other refused he would be liable for the indebtedness, and he is held to have entered upon the estate under this condition.

39.- THE SAME; *On the Edict, Book XLVI*.- As long as an estate can be entered upon by virtue of a will, it does not descend as intestate.

40.- THE SAME; *Disputations, Book IV*.- The question arose, where a son had not obtained any portion of his father's estate, but had still received something, or performed some act in accordance with his father's will, whether he could be compelled to be liable to his father's creditors, just as if he had been substituted for a son under the age of puberty? In a case of this kind, Julianus slated in the Twenty-sixth Book of the Digest that he would come within the scope of the Edict, if he had meddled with the affairs of the minor's estate, for where anyone opposes the will of a parent, he ought not to obtain anything from his estate. Marcellus, however, makes a very nice distinction in this instance, since it makes a great deal of difference whether the son was appointed heir to the entire estate of his father, by the

§ 2.- Pero si de dos hijos se lo hubiere mandado a uno, también deberá mandarle al otro hijo que la ada.

36.- POMPONIO; *Comentarios a Sabino, libro III*.- Si el señor o el padre hubiere hecho la adición en cuanto a su parte, es necesario su mandato para que adan el hijo o el esclavo coherederos.

37.- EL MISMO; *Comentarios a Sabino, libro V*.- El heredero sucede en todo el derecho del difunto, no solamente en el dominio de cada cosa, como quiera que también pasen al heredero las que consistan en créditos.

38.- ULIPANO.- *Comentarios al Edicto, libro XLIII*.- Si fueran dos los herederos necesarios, de los cuales uno se abstuvo, y el otro se inmiscuyó en la herencia después que el primero se abstuvo, se ha de decir, que este no puede negarse a soportar todas las cargas de la herencia; porque el que sabe, o pudo saber, que absteniéndose aquel había de obligarse él a las cargas, parece que ade la herencia con esta condición.

39.- EL MISMO; *Comentarios al Edicto, libro XLVI*.- Mientras se puede adir la herencia en virtud de testamento, no se defiere abintestato.

40.- EL MISMO; *Disputas, libro IV*.- Se preguntó, si, aunque uno no tomara nada de la herencia paterna, tuviera, sin embargo, alguna cosa por voluntad de su padre, o la hiciera, si estará obligado a responder a los acreedores paternos, por ejemplo, si hubiere sido substituido a un impúbbero. En cuyo caso escribió Juliano en el libro vigésimo sexto del Digesto, que incurre él en el Edicto, si se hubiere inmiscuido en la herencia del impúbbero; porque el que hubiere impugnado la voluntad de su ascendiente, no debe conseguir cosa alguna de la misma herencia. Pero discretamente distingue Marcelo, que hay mucha diferencia, si fue instituido en el testamento de su padre heredero de todo el as, o de una parte, porque si de una parte, habrá podido aceptar sin miedo la herencia del impúbbero habiendo rechazado la sucesión del

will of the latter, or only to a portion of the same; as if he was only an heir to a portion, he could obtain the estate of the minor after it had been separated from that of the father.

41.- IULIANUS; *libro XXVI digestorum*.- Filius, qui se paterna hereditate abstinuit, si exheredati fratris hereditati se immiscuerit et pro herede gesserit, poterit ex substitutione hereditatem optinere.

42.- ULPIANUS; *libro IV disputationem*.- Iulianus libro vicesimo sexto digestorum scripsit, si pupillus paterna hereditate se abstinuisset, deinde ei aliquis heres exstisset, non esse eum compellendum creditoribus paternis respondere, nisi substitutus ei fuit: inclinatur enim in hoc, ut putet substitutum etiam patris onera subiturum. Quae sententia a Marcello recte notata est: impugnat enim utilitatem pupilli, qui ipse saltem potest habere successorem: metu enim onerum patris timidius quis etiam impuberis hereditatem adibit. Alioquin, inquit, et si frater fuit, ommissa causa testamenti ab intestato possidebit hereditatem et quidem impune: nec enim videtur voluisse fraudare edictum, qui sibi prospicit, ne oneribus patris pupilli hereditas implicaretur. Sed quod in fratre scripsit, credo ita intellegendum, si non impuberis frater fuit, sed testatoris: ceterum utique si frater a patre fratri substitutus impuberi sit, sine dubio necessarius heres existet.

§ 1.- Si in societate, quam vivo patre inchoaverat, filius post mortem patris perseveraverit, Iulianus recte distinguit interesse, utrum rem coeptam sub patre perficit an novam inchoavit: nam si quid novum in societate inchoavit, non videri miscuisse hereditati patris scripsit.

41.- JULIANUS; *Digest, Book XXVI*.- If a son should reject the estate of his father, and, acting in the capacity of heir, meddles with that of his disinherited brother, he can obtain the said estate by virtue of the substitution.

42.- ULPIANUS; *Disputations, Book IV*.- Julianus says in the Twenty-first Book of the Digest that if a minor rejects the estate of his father, and someone appears as his heir, the latter cannot be compelled to be liable to the father's creditors, unless he was substituted for the said minor; for he is inclined to believe that in this case the substitution must be responsible for the father's debts. This opinion is very properly rejected, by Marcellus, as being opposed to the interest of the minor, who himself, at all events, can have a successor; for anyone would enter upon the estate with great reluctance if he was apprehensive of being liable for the debts of the father. Otherwise, he says, if he had a brother who rejected the will in order to obtain the estate as heir-at-law, he could do so with impunity; for he would not be held to have intended to evade the Edict, which provides for this, in order to prevent the estate of the minor from being burdened with the debts of the father. What, however, was stated with reference to the brother, I think should be understood to apply to the brother of the testator, and not to that of the minor. But if another brother was substituted for the minor, he would undoubtedly be his necessary heir.

§ 1.- If a son, after the death of his father, should continue to belong in the same firm of which he was a member during the lifetime of his father, Julianus very properly says, by way of distinction, that it makes a difference whether he merely finishes some business which had been begun by his father, or he himself does something which is entirely new; for where he commences something entirely new which is connected with the partnership to which he belongs, he will not be considered to have interfered with the estate of his father.

padre.

41.- JULIANO; *Digesto, libro XXVI*.- El hijo, que se abstuvo de la herencia paterna, si se hubiere inmiscuido en la herencia del hermano desheredado, y hubiere obrado como heredero, podrá obtener la herencia en virtud de la substitución.

42.- ULPIANO; *Disputas, libro IV*.- Escribió Juliano en el libro vigésimo sexto del Digesto, que si el pupilo se hubiese abstenido de la herencia paterna, y después alguien hubiese quedado siendo su heredero, no ha de ser obligado este a responder a los acreedores del padre, si no le fue substituido; porque se inclina a esto, a pensar que también el substituto ha de soportar las cargas del padre. Cuya opinión es censurada con razón por Marcelo, porque se opone a la utilidad del pupilo, el cual a lo menos por sí puede tener un sucesor, porque por temor a las cargas del padre adirá alguien con más recelo también la herencia del impúbero; de otra suerte, dice, también si fue hermano, poseerá abintestato la herencia, habiendo prescindido de la causa del testamento; y a la verdad, impunemente, porque no se considera que quiso faltar al Edicto el que miró por sí, para que la herencia del pupilo no se inmiscuyese en las cargas del padre. Pero lo que escribió respecto al hermano, creo que se ha de entender de esta manera, si no fue hermano del impúbero, sino del testador; pero ciertamente que si el hermano hubiera sido substituido por el padre a otro hermano impúbero, será sin duda heredero necesario.

§ 1.- Si después de la muerte de su padre hubiere perseverado el hijo en la sociedad que había constituido viviendo su padre, con razón distingue Juliano, que hay diferencia si llevó a cabo cosa comenzada viviendo su padre, o si empezó otra nueva; porque si comenzó alguna cosa nueva en la sociedad, escribió que no se considera que se inmiscuyó en la herencia del padre.

§ 2.- Si servum patrum filius manumiserit, sine dubio miscuisse se paternae hereditati videbitur.

§ 3.- Proponebatur filius a patre de castrensi peculio servos comparasse eosque a patre manumittere rogatus, cum heres esset ab eo institutus: quaerebatur, si se abstinisset paterna hereditate eosque manumisisset, an miscuisse se paternae hereditati videatur. Dicebamus, nisi evidenter quasi heres manumiserit, non debere eum calumniam pati, quasi se miscuerit hereditati.

43.- IULIANUS; *libro XXX digestorum*.- Heres per servum hereditarium eiusdem hereditatis partem vel id, quod eiusdem hereditatis sit, adquirere non potest.

44.- IULIANUS; *libro XLVII digestorum*.- Quotiens pupillus patri heres exstitit et abstinet se hereditate, quamvis patris bona sub creditoribus fiant, tamen rata haberi debent, quaecumque pupillus bona fide gesserit: et ideo ei, qui fundum tutore auctore a pupillo emerit, succurrendum erit: nec interest, pupillus solvendo sit nec ne.

45.- IULIANUS; *libro I ad Urseium Ferozem*.- Aditio hereditatis non est in opera servili.

§ 1.- Idcirco si servus dotalis adierit, actione de dote eam hereditatem mulier recipiabit, quamvis ea, quae ex operis dotalium adquiruntur, ad virum pertineant.

§ 2.- Et cum quaestus et compendii societas initur, quidquid ex operis suis socius adquisierit, in medium conferet: sibi autem quisque hereditatem acquirit.

§ 3.- Praeterea nec fructuarius quidem servus iussu eius, qui usum fructum in eo habet, adire hereditatem poterit.

§ 4.- Et quod a quibusdam respondetur, si liber

§ 2.- If a son should manumit a slave that belongs to his father, he will undoubtedly be held to have interfered with his father's estate.

§ 3.- The following case has been suggested, namely: A son purchased slaves from his father with his castrense peculium, and was appointed heir by his father and charged to manumit said slaves. The question arose, if he should reject his father's estate, and manumit the slaves, would he be considered to have interfered with the estate of his father? He says that unless it was evident that he had manumitted them while acting as heir, he should not be apprehensive of being held responsible for having interfered with the estate.

43.- JULIANUS; *Digest, Book XXX*.- An heir cannot, by means of a slave belonging to an estate, acquire a share of said estate, or any property forming part of the same.

44.- THE SAME; *Digest, Book XLVII*.- Whenever a minor is the heir of his father, and refuses to accept his estate, although the property of the deceased passes into the hands of his creditors, still, whatever the minor has done in good faith should be confirmed. Therefore, if anyone should purchase a tract of land from a ward, with the consent of his guardian, relief should be granted him; and it makes no difference whether the ward is solvent or not.

45.- THE SAME; *On Urseius Ferox, Book I*.- The acceptance of an estate is not included in the service of a slave.

§ 1.- Therefore, if a dotal slave should enter upon an estate, the wife can recover it in an action on dowry, even though the property acquired by the labor of dotal slaves belongs to her husband.

§ 2.- Where a partnership for profit and gain is entered into, each partner must pay into the common fund whatever he earns by his labor, but each one can acquire an estate for himself.

§ 3.- Moreover, a slave in whom someone has an usufruct cannot enter upon an estate by order of him who enjoys said usufruct.

§ 4.- The opinion has been stated by certain

§ 2. - Si el hijo hubiere manumitido un esclavo de su padre, se considerará sin duda que se inmiscuyó en la herencia paterna.

§ 3.- Se proponía, que un hijo le compró a su padre unos esclavos con su peculio castrense y que se le rogó por su padre que los manumitiera, habiendo sido por él instituido heredero; se preguntaba, si se hubiese abstenido de la herencia paterna y los hubiese manumitido, si se considerará que se inmiscuyó en la herencia paterna. Decíamos, que si no los hubiere manumitido evidentemente como heredero, no debía soportar él la calumnia, cual si se hubiere inmiscuido en la herencia.

43.- JULIANO; *Digesto, libro XXX*.- El heredero no puede adquirir por medio de un esclavo de la herencia parte de dicha herencia, o cosa que sea de la misma herencia..

44.- EL MISMO; *Digesto, libro XLVII*.- Siempre que un pupilo quedó siendo heredero de su padre, y se abstiene de la herencia, aunque los bienes del padre se hagan de los acreedores, sin embargo, se debe, tener por válida cualquiera cosa que el pupilo hubiere hecho de buena fe; y por lo tanto se le habrá de auxiliar al que, con intervención del tutor le hubiere comprado al pupilo un fundo, y no importa que el pupilo sea, o no, solvente.

45. EL MISMO; *Comentarios a Urseyo Ferox, libro I*.- La adición de la herencia no se cuenta entre los servicios de un esclavo.

§ 1.- Por lo tanto; si un esclavo dotal hubiere adido la herencia, la mujer recuperará esta herencia con la acción de dote, aunque le pertenezcan al marido las cosas que se adquieren con el trabajo de los esclavos de la dote.

§ 2.- Y cuando se hace sociedad de ganancia y de ahorro, todo lo que un socio hubiere adquirido con su trabajo lo aportará en común, pero cada cual adquiere, para sí la herencia.

§ 3.- Además de esto, ciertamente que tampoco el esclavo usufructuario podrá adir la herencia. por mandato de quien sobre él tiene el usufruto.

§ 4.- Y lo que por algunos se responde, que si el

homo, qui bona fide mihi serviebat, propter me heres institutus erit, posse eum iussu meo adire hereditatem, potest verum esse, ut intellegatur non opera sua mihi adquirere, sed ex re mea, sicut in stipulando et per traditionem accipiendo ex re mea mihi adquirat.

46.- AFRICANUS; *libro I quaestionum*.- Cum falsum testamentum diceretur, si quidem ipse heres accusaretur, quoniam certus esse debeat se falsum non fecisse, recte adibit hereditatem: sin autem alius argueretur citra conscientiam eius, non potest adire, quasi dubitet verum esse testamentum.

47.- AFRICANUS; *libro IV quaestionum*.- Qui servum suum heredem institutum adire iusserat, priusquam ille adiret, furiosus est factus. Negavit recte servum aditurum, quoniam non nisi voluntate domini adquiri hereditas potest, furiosi autem voluntas nulla est.

48.- PAULUS; *libro I manualium*.- Si quis alicui mandaverit, ut, si aestimaverit, peteret sibi bonorum possessionem, et postquam ille petit, furere coeperit, nihilo minus acquisita est ei bonorum possessio. Quod si antequam ille petat, is qui mandavit petendum furere coeperit, dicendum est non statim ei acquisitam bonorum possessionem: igitur bonorum possessionis petitio rati habitione debet confirmari.

49.- AFRICANUS; *libro IV quaestionum*.- Pupillum etiam eo tutore auctore, qui tutelam non gerat, hereditatem adeundo obligari ait.

50.- MODESTINUS; *libro singulari de heurmatibus*. - Si per epistulam servo pupilli tutor hereditatem

authorities that if a freeman who is serving me as a slave in good faith should be appointed an heir on my account, he can enter upon the estate by my order. This is true where it is understood that he does not acquire the estate as the result of his own labor, but on account of his having charge of my property; just as in making a stipulation and by accepting delivery he acquires property for me by virtue of his transacting my business.

46.- AFRICANUS; *Questions, Book I*.- A will is said to be forged even if the heir himself is accused of having fabricated it, since he must be sure that he did not commit the forgery in order to be able to legally enter upon the estate; but where another is accused of having done this without the knowledge of the heir, he cannot enter upon the estate if there is any doubt of the will being genuine.

47.- THE SAME; *Questions, Book VI*.- A certain man ordered his slave, who had been appointed an heir to accept the estate, and before he did so, the master became insane. It is said that the slave cannot legally enter upon the estate, as an estate cannot be acquired without the consent of his master, and an insane person cannot give his consent.

48.- PAULUS; *Manuals, Book I*.- Where one person directs another to demand praetorian possession of an estate for him if he should deem it advisable, and, after the demand is made, he becomes insane, he will, nevertheless, acquire possession of the property. If, however, before the demand is made, he whom he ordered to make it should become insane, it must be said that he will not immediately acquire possession of the estate. Therefore, the demand for praetorian possession should be confirmed by ratification.

49.- AFRICANUS; *Questions, Book IV*.- It is held that a ward, who enters upon an estate even with the consent of his guardian who does not transact his business, is rendered liable.

50.- MODESTINUS; *On Inventions*.- Where a guardian by a letter orders the slave of his ward to

hombre libre, que de buena fe me prestaba servidumbre, hubiere sido instituido heredero por mi causa, podía adir la herencia por mandato mío, puede ser verdad, de suerte que se entienda que no se adquiere para mí su trabajo, sino en virtud de cosa mía, así como adquiriría para mí en virtud de cosa mía estipulando o recibiendo por tradición.

46.- AFRICANO; *Cuestiones, libro I*.- Cuando se dijese que es falso un testamento, si verdaderamente fuese acusado el mismo heredero, como quiera que deba estar cierto de no haberlo hecho falso, adirá válidamente la herencia; pero si otro fuese acusado sin conocimiento de él no puede adirla, cual si dudara que se sea verdadero el testamento.

47.- EL MISMO; *Cuestiones, libro IV*.- Uno que había mandado que un esclavo suyo instituido heredero adiese la herencia, se volvió loco antes que aquel la adiese; dijo, que el esclavo no la adiría válidamente, porque no puede adquirir la herencia sino con la voluntad de su señor, y es nula la voluntad del loco.

48.- PAULO; *Manual, libro I*.- Si uno le hubiere mandado a otro, que si le pareciere, pidiese para sí la posesión de los bienes, y después que él la pidió hubiese comenzado a enloquecer, se adquirió sin embargo, para él la posesión de los bienes. Pero si antes que él la pida hubiere comenzado a enloquecer el que le mandó que la pidiera, se ha de decir, que no se adquirió inmediatamente para él la posesión de los bienes; así, pues, la petición de la posesión de los bienes debe ser confirmada con ratificación.

49.- AFRICANO; *Cuestiones, libro IV*.- Dice, que el pupilo se obliga adiendo la herencia también con la autoridad de un tutor, que no administra la tutela.

50.- MODESTINO; *Cuestiones nuevas, libro único*.- Si por carta le hubiere mandado el tutor a un

adire iusserit, si post subscriptam epistulam tutor moriatur, antequam ex epistula servus adiret, nemo dicturus est obligari postea pupillum hereditati.

51.- AFRICANUS; *libro IV quaestionum*.- Eum, qui duobus testamentis eiusdem testatoris heres scribitur, cum dubitet, num posterius falsum sit, ex neutro eorum posse adire hereditatem placet.

§ 1.- Filius familias heres scriptus patrem suum certiore fecerat videri sibi solvendo esse hereditatem: pater rescripserat sibi parum idoneam renuntiari itaque debere eum diligentius explorare et ita adire, si idoneam comperisset: filius acceptis litteris patris adiit hereditatem: dubitatum est, an recte adisset. Probabilius diceretur, quamdiu persuasum ei non sit solvendo esse hereditatem, patrem non obligasse.

§ 2.- Sed et si quis ita dixerit: "Si solvendo hereditas est, adeo hereditatem", nulla aditio est.

52.- MARCIANUS; *libro IV institutionum*.- Cum heres institutus erat filius et habebat patrem furiosum, in cuius erat potestate, interponere se suam benivolentiam divus Pius rescripsit, ut, si filius familias adierit, perinde habeatur atque si pater familias adisset, permisitque ei et servos hereditatis manumittere.

§ 1.- Qui ex parte heres institutus est pure, ex parte sub condicionem solus, etiam pendente condicionem, si adierit hereditatem, ex asse heres erit, quia solus heres futurus est omnimodo, nisi habeat in condicionalem partem substitutum.

53.- GAIUS; *libro XIV ad legem Iuliam et Papiam*.- Qui ex duabus partibus heres institutus fuerit, ex alia pure, ex alia sub condicionem, et ex pura

enter upon an estate, and dies after having signed it, before the slave has entered upon the estate in obedience to the letter, no one can say that the ward will subsequently be liable for the debts of the estate.

51.- AFRICANUS; *Questions, Book IV*.- Where an heir is appointed by two wills executed by the same testator, and is in doubt as to whether the last one may not be forged, it is held that he cannot enter upon the estate by virtue of either.

§ 1.- A son under paternal control, having been appointed an heir, notified his father that the estate appeared to him to be solvent. His father replied that he had been informed that there was a question as to its solvency, and therefore that he should examine it more carefully, and accept it if he found that it was solvent. The son having received the letter of his father, entered upon the estate. It was doubted whether he did so according to law. It may be said to be more probable that if he was not thoroughly convinced that the estate was solvent, his father would not be liable.

§ 2.- If anyone should say, "If the estate is solvent, I will accept it", such an acceptance is void.

52.- MARCIANUS; *Institutes, Book IV*.- A son that was under the control of his father who was insane was appointed an heir; the Divine Pius stated in a Rescript that he would be indulgent, and that if the said son should enter upon the estate, it would be considered just as if his father had done so, and that he would allow him to manumit the slaves belonging to said estate.

§ 1.- When anyone is appointed an heir to one portion of an estate absolutely, and to the remaining portion under a condition, if he enters upon the estate while the condition is still pending, he will become the heir to the whole of it; for the reason that he will be the heir under all circumstances, unless he has a substitute for that part of the estate which depends upon the fulfillment of the condition.

53.- GAIUS; *On the Lex Julia et Papia, Book XIV*.- Where an heir has been appointed to two shares of an estate, to one absolutely, and to the other

esclavo del pupilo que adiese la herencia, si el tutor muriese después de firmada la carta, antes que en virtud de la carta la adiese el esclavo, nadie ha de decir que el pupilo se obliga después a la herencia.

51.- AFRICANO; *Cuestiones, libro IV*.- Está establecido, que el que es instituido heredero en dos testamentos de un mismo testador, dudando si es falso el posterior, no puede adir la herencia en virtud de ninguno de ellos.

§ 1.- Instituido heredero un hijo de familia, le había asegurado a su padre que le parecía que la herencia era solvente, el padre le había contestado por escrito, que se le manifestaba que era poco conveniente, y que así, debía él averiguarlo con más diligencia; y adirla solo si la hubiese hallado conveniente; el hijo, recibida la carta del padre adió la herencia: se dudó si la habria adido válidamente. Con más probabilidad se diría que no se obligó al padre, mientras este no se le haya persuadido de que la herencia era solvente.

§ 2.- Pero también si alguno hubiere dicho de este modo: «ado la herencia, si la herencia es solvente» es nula la adición.

52.- MARCIANO *Instituta, libro IV*.- Habiendo sido instituido heredero un hijo. y teniendo loco a su padre, bajo cuya potestad estaba, respondió por rescripto el Divino Pío, que él interponía su benevolencia, para que, si el hijo de familia hubiere adido la herencia, se considere lo mismo que si la hubiese adido un padre de familia, y le permitió también que manumitiese esclavos de la herencia.

§ 1.- El que fue instituido único heredero, puramente de una parte, y bajo condición de la otra, aún si pendiente la condición hubiere adido la herencia, será heredero de toda ella, porque de todos modos ha de ser único heredero a no ser que tenga substituto para la parte dejada bajo condición.

53.- GAYO; *Comentarios a la ley Julia y Papia, libro XIV*.- Si uno hubiere sido instituido heredero de dos partes, de una puramente, y de otra bajo condi-

institutione adierit et decesserit posteaque condicio exstiterit, ea quoque pars ad heredem eius pertinet.

§ 1.- Qui semel aliqua ex parte heres exstitit, deficientium partes etiam invitatus excipit, id est tacite ei deficientium partes etiam invito accrescunt.

54.- FLORUS; *libro VIII institutionum*.- Heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur.

55.- MARCIANUS; *libro II regularum*.- Cum hereditate patris necessarius heres se absteat, condicio coheredi sive suo sive extraneo defertur, ut aut totam agnoscat aut a toto recedat, et ita se abstinere potest propter alium, qui per suam personam non poterat. Si tamen creditores dicant se contentos esse eius portione, quia non potest exonerari, nisi deferatur condicio, et alterius parte abstinere se creditores debent, ut eius actiones ei qui convenitur dentur.

56.- ULPIANUS; *libro LVII ad edictum*.- Si is qui immiscuit se hereditati decessisset, deinde alter se abstinet, eadem condicio deferenda est heredi eius quae et ipsi, quod Marcellus ait.

57.- GAIUS; *libro XXIII ad edictum provinciale*.- Necessariis heredibus non solum impuberibus, sed etiam puberibus abstinendi se ab hereditate proconsul potestatem facit, ut, quamvis creditoribus hereditariis iure civili teneantur, tamen in eos actio non detur, si velint derelinquere hereditatem. Sed impuberibus quidem, etiamsi se immiscuerint hereditati, praestat abstinendi facultatem, puberibus autem ita, si se non immiscuerint.

conditionally, and accepts the share left to him absolutely, and then dies, and the condition is subsequently fulfilled, that share of the estate dependent upon it will also belong to his heir.

§ 1.- Where anyone becomes the heir to one share of an estate, he will also even without his consent, acquire the shares of his co-heirs who refuse to accept them; that is to say, their shares will tacitly accrue to him, even contrary to his will.

54.- FLORENTINUS; *Institutes, Book VIII*.- Where an heir enters upon an estate, he is understood to have succeeded the deceased from the date of his death.

55.- MARCIANUS; *Rules, Book II*.- When a necessary heir rejects the estate of his father, his co-heir whether he be a proper heir, or a stranger, can either accept the entire estate or reject it; and where he cannot reject it himself, he can do so on account of its refusal by his co-heir. If, however, the creditors should say that they will be content with his share because he cannot be discharged from liability unless he be allowed to make his choice, they should relinquish the other's share in order that the rights of action growing out of it may be assigned to the co-heir who is sued.

56.- ULPIANUS; *On the Edict, Book LVII*.- Where one of two heirs meddles with an estate and dies, and afterwards the other rejects it, his heir will be entitled to the same choice that the deceased himself would have had; which is the opinion of Marcellus.

57.- GAIUS; *On the Provincial Edict, Book XXIII*.- The Proconsul gives necessary heirs — not only those who are under the age of puberty but also all over that age — the power to reject an estate; so that although they are liable to the creditors of the same under the Civil Law, still, an action is not granted against them if they wish to relinquish the estate. And, indeed, he grants this privilege to those under the age of puberty, even if they have busied themselves with the affairs of the estate, but he also grants it to those over that age, where they have not done so.

ción, y hubiere hecho la adición en virtud de la institución pura, y hubiere fallecido, y después se hubiere cumplido la condición, también esta parte le pertenece a su heredero.

§ 1.- El que una vez hubiere quedado siendo heredero de alguna parte, adquiere aún contra su voluntad las partes de los que faltan, esto es, que tácitamente le acrecen aún contra su voluntad las partes de los que faltan.

54.- FLORENTINO; *Instituta, libro VIII*.- Cualquiera que sea el tiempo en que el heredero ada la herencia, se entiende que entonces ya le sucedió al difunto desde su muerte.

55.- MARCIANO; *Reglas, libro II*.- Cuando el heredero necesario se abstenga de la herencia del padre, se le concede al coheredero, ya suyo, ya extraño, la elección, para que o la acepte toda, o se aparte de toda ella, y de este modo se puede abstener por causa de otro el que no podía por su propia persona; mas si los acreedores dijieran, que estaban contentos con la porción de aquel, como no se puede descargar si no se le defiriese la elección, los acreedores deben abstenerse también de la parte del otro, de suerte que sus acciones se le den al que es demandado.

56.- ULPIANO; *Comentarios al Edicto, libro LVII*.- Si hubiere fallecido el que se inmiscuyó en la herencia, y después se abstiene el otro, se le ha de deferir a su heredero la misma elección que a él mismo; que es lo que dice Marcelo.

57.- GAYO; *Comentarios al Edicto provincial, libro XXIII*.- El Procónsul les concede facultad a los herederos necesarios, no solamente a los impúberos, sino también a los púberos, para abstenerse de la herencia, de suerte que, aunque por derecho civil estén obligados a los acreedores de la herencia, no se dé, sin embargo, contra ellos acción, si quisieran abandonar la herencia. Pero, a la verdad, a los impúberos les concede la facultad de abstenerse, aunque se hubieren inmiscuido en la herencia, más a los púberos solamente si no se hubieren inmiscuido.

§ 1.- Sed tamen et puberibus minoribus viginti quinque annis, si temere damnosam hereditatem parentis appetierint, ex generali edicto quod est de minoribus viginti quinque annis succurrit, cum et si extranei damnosam hereditatem adierint, ex ea parte edicti in integrum eos restituit.

§ 2.- Servis autem necessariis heredibus, sive puberes sive impuberes sint, hoc non permittitur.

58.- PAULUS; *libro II regularum*.- Ex parte heres institutus servus et nondum adita hereditate a coherede eius liber et heres fit necessarius, quia non a coherede, sed a semet ipso accipit libertatem: nisi ita institutus fuerit: "Cum mihi quis heres erit, Stichus liber et heres esto".

59.- NERVA; *libro II membranarum*.- Qui patri heres exstitit si idem filio impuberi substitutus est, non potest hereditatem eius praetermittere: quod sic recipiendum est etiam si vivo pupillo mortuus erit, deinde pupillus impubes decesserit. Nam is qui heres exstitit pupillo quoque heres necessario erit: nam si ipsum invitum obligat, coniungi eam paternae hereditati et ad crescendi iure adquiri cuicumque patris heredi existimandum est.

60.- IAVOLENUS; *libro I ex posterioribus Labeonis*.- Filium emancipatum pater solum heredem instituit et, si is heres non esset, servum liberum et heredem esse iusserat: filius, tamquam pater demens fuisset, bonorum possessionem ab intestato petit et ita hereditatem possedit. Labeo ait, si probaretur sana mente pater testamentum fecisse, filium ex testamento patri heredem esse. Hoc falsum puto: nam filius emancipatus cum hereditatem testamento datam ad se pertinere noluit, continuo ea ad substitutum heredem transit nec potest videri pro herede gessisse, qui, ut hereditatem omitteret, ex alia parte edicti possessionem bonorum petat. Paulus: et

§ 1.- Nevertheless, where minors under the age of twenty-five years have rashly interfered with the affairs of the insolvent estate of their father, relief can be granted them by the general terms of the Edict, with reference to minors who are under that age; for if, being strangers, they should enter upon an insolvent estate, complete restitution can be granted them in compliance with the Edict.

§ 2.- This privilege, however, is not conferred upon slaves who are necessary heirs, whether they are over, or under, the age of puberty.

58.- PAULUS; *Rules, Book II*.- Where a slave is appointed heir to a portion of an estate, and his co-heir has not yet entered upon the estate, he becomes free and a necessary heir, because he does not receive his freedom from his co-heir, but from himself; unless his appointment was made as follows: "When anyone becomes my heir, let Stichus be free and be my heir."

59.- NERATIUS; *Parchments, Book II*.- Where anyone becomes the heir of his father, and is also appointed the substitute of a child under the age of puberty, he cannot reject the estate of the latter. This must be understood to apply, even if the heir should die during the lifetime of the minor, and then the minor himself should die; for whoever becomes the heir will necessarily also be the heir of the minor. For if the second heir binds himself against his will, it must be held that the estate of the minor is united with that of the father, and, by the right of accrual, it is acquired by whoever becomes the heir of the father.

60.- JAVOLENUS; *On the Last Works of Labeo, Book I*.- A father appointed his emancipated son his sole heir, and ordered that, if he should not become his heir, his slave should be free and be his heir. The son demanded praetorian possession of his father's estate on the ground of intestacy, alleging that he was insane, and in this way obtained possession of it. Labeo says that if his father should be proved to have been of sound mind when he made his will, the son will be his heir by virtue of the will. I think that this opinion is incorrect, for where an emancipated son declines to accept an estate given to him by will, it immediately passes to the substituted heir; nor can he

§ 1.- Pero, no obstante, también a los púberos menores de veinticinco años los auxilia en virtud del Edicto general, que trata de los menores de veinticinco años, si inconsideradamente hubieren adido la herencia perjudicial de un ascendiente, porque también si hubieren adido la herencia gravosa de un extraño, les restituye por entero en virtud de aquella parte del Edicto.

§ 2.- Mas esto no se les permite a los esclavos herederos necesarios, ya sean púberos, ya impúberos.

58.- PAULO; *Reglas, libro II*.- El esclavo instituido heredero de una parte se hace libre y heredero necesario, aunque todavía no se haya adido la herencia por su coheredero, porque no adquiere la libertad por el coheredero, sino por si mismo, a no ser que hubiere sido instituido de este modo: «cuando alguno fuere mi heredero, sea Stico libre y heredero».

59.- NERACIO; *Pergaminos, libro II*.- El que fue heredero del padre, si él mismo fue substituido al hijo impúbero, no puede dejar de aceptar la herencia de este. Lo que se ha de admitir de este modo, aunque hubiere muerto viviendo el pupilo y después hubiere fallecido impúbero el pupilo, porque el que hubiere quedado siendo heredero será también necesariamente heredero del pupilo; porque si le obliga al mismo contra su voluntad, se ha de juzgar que se une esta a la herencia del padre, y que por derecho de acrecer es adquirida para cualquier heredero del padre.

60.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro I*.- Un padre instituyó único heredero a su hijo emancipado, y si este no fuese heredero, había mandado que fuese libre y heredero un esclavo; el hijo, como si el padre hubiese estado loco, pidió abintestato la posesión de los bienes de este, y así poseyó la herencia; dice Labeón, que si se probase que el padre hizo el testamento estando en sano juicio, el hijo es heredero del padre en virtud del testamento. Yo creo que esto no es exacto, porque si el hijo emancipado no quiso que le perteneciera la herencia que se le dio en el testamento, esta pasa inmediatamente al heredero

Proculus Labeonis sententiam improbat et in Iavoleni sententia est.

61.- MACER; *libro I de officio praesidiis*.- Si minor annis, posteaquam ex parte heres exstitit, in integrum restitutus est, divus Severus constituit, ut eius partis onus coheres suscipere non cogatur, sed bonorum possessio creditoribus detur.

62.- IAVOLENUS; *libro I ex posterioribus Labeonis*.- Antistius Labeo ait, si ita institutus sit "si iuraverit, heres esto", quamvis iuraverit, non tamen eum statim heredem futurum, antequam pro herede aliquid gesserit, quia iurando voluntatem magis suam declarasse videatur. Ego puto satis eum pro herede gessisse, si ut heres iuraverit: Proculus idem, eoque iure utimur.

§ 1.- Si servus heres institutus post iussum domini, antequam adiret, alienatus esset, novum iussum posterioris domini, non iussum prioris exigitur.

63.- MARCELLUS; *Notad ad Pomponius, libro singulari regularum*.- Furiosus acquirere sibi commodum hereditatis ex testamento non potest, nisi si necessarius patri aut domino heres existat: per alium autem acquiri ei potest, veluti per servum vel eum quem in potestate habet.

64.- IAVOLENUS; *libro secundo ex posterioribus Labeonis*.- Servus duorum heres institutus et adire iussus si alterius domini iussu adierit, deinde manumissus fuerit, poterit ipse adeundo ex parte dimidia heres esse,

be held to have acted in the capacity of heir who demands praetorian possession under another section of the Edict, in order to avoid taking advantage of his rights under the will. Paulus: "Proculus disapproves of the opinion of Labeo, and adopts that of Javolenus."

61.- MACER; *On the Duties of Governor, Book I*.- Where a minor, after having accepted an estate, obtains complete restitution, the Divine Severus decreed that his co-heir is not bound to assume liability for the debts of his share of the estate, but that praetorian possession of the same should be granted to the creditors.

62.- JAVOLENUS; *On the Last Works of Labeo, Book I*.- Antistius Labeo says that if an heir is appointed as follows: "Let him be my heir, if he will make oath", he will, nevertheless, not become the heir at once, even though he should be sworn before he performs some act in that capacity; because by taking the oath he is held merely to have disclosed his intention. I think, however, that he has acted in the capacity of heir if he has taken the oath as such. Proculus entertains the same opinion, and this is our practice.

§ 1.- Where a slave is appointed an heir, and is alienated after having been ordered by his master to accept the estate, before he does so, a new order by his second master, and not that of his old one, is required.

63.- NOTES OF MARCELLUS; *On the Rules of Pomponius*.- An insane person cannot, under a will, acquire for himself the benefit of an estate, unless he is the necessary heir of his father, or the heir of his master; but he can acquire the estate through the agency of another, as for instance, by a slave or someone whom he has under his control.

64.- JAVOLENUS, *On the Last Works of Labeo, Book II*.- The slave of two masters was appointed an heir and ordered to enter upon the estate; if he did so, by the order of one of them, and then was manumitted, he could himself become the heir of half the said estate by entering upon the same.

substituto, y no se puede considerar que obró como heredero el que para no aceptar la herencia pide la posesión de los bienes en virtud de la otra parte del Edicto. Paulo y Próculo desaprueban la opinión de Labeón, y son de la opinión de Javoleno.

61.- MACER; *Del Cargo de Presidente, libro I*.- Si el menor de edad fue restituido por entero después que fue heredero de una parte, determinó el Divino Severo, que no sea obligado el coheredero a asumir la carga de la parte de él, sino que se les dé a los acreedores la posesión de los bienes.

62.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro I*.- Dice Antistio Labeón, que si uno hubiera sido instituido en esta forma: «si hubiere jurado, sea heredero», aunque hubiere jurado, no habrá de ser, sin embargo, heredero desde luego, antes que hubiere hecho alguna cosa como heredero, porque se considera que jurando más bien que otra cosa declaró su voluntad. Yo opino, que suficientemente obró como heredero, si hubiere jurado como heredero; lo mismo Próculo, y de este derecho usamos.

§ 1.- Si el esclavo instituido heredero hubiese sido enajenado después del mandato de su señor, antes que adiese la herencia, se exige nuevo mandato del último señor, y no el mandato del primero.

63.- MARCELO; *nota al libro único de las Reglas de Pomponio*.- El loco no puede adquirir para sí por testamento el beneficio de la herencia a no ser que sea heredero necesario de su padre o de su señor; mas por medio de otro se puede adquirir para él, por ejemplo, por medio de un esclavo, o de aquel a quien tiene en su potestad.

64.- JAVOLENO; *Doctrinas de las Obras póstumas de Labeón, libro II*.- Instituido heredero el esclavo de dos, y habiéndosele mandado adir la herencia, si la hubiere adido por mandato de uno de los señores, y después hubiere sido manumitido, podrá él, adiéndola, ser heredero de la mitad;

65.- PAULUS; *libro II ad Sabinum*.- Et si substitutum haberet idem servus ita "si heres non erit, ille heres esto", substitutus locum non habet.

66.- ULPIANUS; *libro LXI ad edictum*.- Si servus communis vel uni ex dominis vel pluribus vel omnibus heres exstiterit necessarius, nullius eorum hereditate se poterit abstinere.

67.- ULPIANUS; *libro I regularum*.- Servus communis ab extero heres institutus si iussu unius adierit hereditatem, non pro maiore parte interim heredem eum facit, quam pro dominica, deinde ceteris sociis non iubentibus tacito iure partes ei ad crescant.

68.- PAULUS; *libro V ad legem Iuliam et Papiam*.- Cum solus servus heres institutus sit, sicut licet uno tempore omnium dominorum iussu adire hereditatem, ita et separatim temporibus singulorum iussu recte adit: nam quia saepius adit, non ex testamento, sed ex iure dominorum venire utilitatis causa videtur, ne alterius festinatione alterius ius laedatur.

69.- ULPIANUS; *libro LX ad edictum*.- Quamdiu institutus admitti potest, substituto locus non est nec ante succedere potest quam excluso herede instituto. Eveniet igitur, ut necessarium sit remedium praetoris et circa denegandas primo actiones et circa praestituendum tempus substituto, quia intra diem primo praestitutum neque adire hereditatem potest neque pro herede gerere. Is autem, qui tertio gradu scriptus est, si primo deliberante secundus decedat, ipse potest succedere. Ergo exspectamus in singulis, ut prius eis deferatur hereditas: tunc deinde, posteaquam delata est, exspectamus diem praestitutum, intra quem diem nisi aut adeat aut pro

65.- PAULUS; *On Sabinus, Book II*.- Hence, if the same slave was given a substitute in the following terms: "If he should not be my heir, let So-and-So be my heir", the substitute will be excluded from the succession.

66.- ULPIANUS; *On the Edict, Book LXI*.- Where a slave owned in common becomes the necessary heir of one, or several, or all of his masters, he cannot refuse to accept the estate of any of them.

67.- THE SAME; *he Same, Rules, Book I*.- Where a slave owned in common is appointed an heir by a stranger, and enters upon the estate by the order of one of his masters; this does not, in the meantime, constitute him the heir of a larger amount than his master is entitled to. If, however, his other masters do not order him to accept the estate, their shares will accrue to him tacitly by operation of law.

68.- PAULUS; *On the Lex Julia et Papia, Book V*.- Where a slave is appointed sole heir, just as he is permitted, at the same time, to enter upon the estate by the order of all his masters, so also he can legally enter upon it by the order of each one of them, at different times; for, because he enters upon it frequently, he is considered to do so for the sake of convenience, and on account of the right of his masters, and not by virtue of the will, in order to prevent the right of one from being prejudiced by the undue haste of another.

69.- ULPIANUS; *On the Edict, Book LX*.- So long as the appointed heir is entitled to be admitted to the succession there is no place for the substitute, for he cannot succeed until the appointed heir has been excluded; the result therefore will be that the remedy of the Praetor becomes necessary, as well with reference to the refusal of actions to the heir, as to the granting of time to the substitute, because the latter cannot accept the estate, or perform any act as heir within the term granted by law to the one who was appointed. But a substitute appointed in the third degree, if the second heir dies while the first is deliberating, can himself succeed. Hence we wait for

65.- PAULO; *Comentarios a Sabino, libro II*.- y si el mismo esclavo tuviese substituto en esta forma: «si no fuere heredero, sea heredero aquél» no tiene lugar el substituto.

66.- ULPIANO; *Comentarios al Edicto, libro LXI*.- Si el esclavo común hubiere quedado siendo heredero necesario o de uno de sus señores, o de varios, o de todos, no se podrá abstener de la herencia de ninguno de ellos.

67.- EL MISMO; *Reglas, libro I*.- El esclavo común instituido heredero por un extraño, si hubiere adido la herencia por mandato de uno solo, no lo hace interinamente heredero de parte mayor que la correspondiente a su dominio; y después, no dando mandato los demás condueños, le acrecen las partes por tácito derecho.

68.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Cuando un esclavo haya sido instituido único heredero así como le es lícito adir la herencia a un mismo tiempo por mandato de todos sus señores, así también la ade válidamente en distintos tiempos por mandato de cada uno de ellos; porque como ade muchas veces, se considera que procede por causa de utilidad, no en virtud del testamento, sino del derecho de los señores, a fin de que con el apresuramiento de uno no se lesione el derecho de otro.

69.- ULPIANO; *Comentarios al Edicto, libro LX*.- Mientras puede ser admitido el instituido, no tiene lugar el substituto, ni puede suceder antes que haya sido excluido el heredero instituido. Sucederá, pues, que será necesario el auxilio del Pretor, así para denegarle al primero las acciones, como para prefiarle tiempo al substituto, porque dentro del término prefijado al primero ni puede adir la herencia, ni obrar como heredero. Mas el que fue instituido en tercer grado puede suceder, si deliberando el primero falleciera el segundo. Esperamos, pues, respecto de cada uno, que primeramente se les difiera la herencia, y entonces, después que les fue

herede gerat, denegamus ei actiones.

70.- PAULUS; *libro LVII ad edictum*.- In plurium heredum gradibus hoc servandum est, ut, si testamentum proferatur, prius a scriptis incipiatur, deinde transitus fiat ad eos ad quos legitima hereditas pertinet, etiamsi idem sit, ad quem utroque modo pertineat: nam hoc gradatim consequitur, ut prius ex testamento delatam, deinde legitimam repudiet. Idem iuris est in bonorum possessione, ut prius scriptus repellat bonorum possessionem, deinde is qui ab intestato petere potest.

§ 1.- Si vero ei, ad quem legitima hereditas potest pertinere, condicio data sit, nihil constituere potest de legitima, antequam dies condicionis transeat, et ideo dicendum est et in eo casu. Si respondit neutram hereditatem ad se velle pertinere, bona defuncti a creditoribus possidenda sunt.

71.- ULPIANUS; *libro LXI ad edictum*.- Si servum quis alienum ab hostibus redemerit et heredem eum cum libertate instituerit, magis puto fore eum liberum et necessarium heredem: nam cum scribit ei libertatem, vinculo suo resolvit. Et in hoc solum reddit iure postliminii, ut non iterum servus eius fiat, cuius erat antequam caperetur (hoc enim satis impium est), sed ut pristino domino suam aestimationem omnimodo offerat vel maneat ei obligatus, donec pretium solvat: quod libertatis favore introductum est.

§ 1.- Si quis hac lege emptus sit, ut intra certum diem manumittatur, et cum libertate heres institutus

each one in order that the estate may pass to them, then, after this has taken place, we wait during the prescribed time, and if within this time the parties do not enter upon the estate, or perform any acts as heirs, we refuse them rights of action.

70.- PAULUS; *On the Edict, Book LVII*.- The following rule must be observed with reference to the different degrees of heirs, namely, where a will is produced, the appointed heir shall be given the preference; then we pass to those to whom the estate belongs by law, even if there should be but one heir who is entitled to it under both heads; for this order must be followed so that the heir may first reject the estate left him by will, and afterwards that given him by law. The same rule applies to praetorian possession to enable the testamentary heir to reject the estate, and the one who was entitled to it by law on the ground of intestacy.

§ 1.- If, however, a condition is prescribed for the party to whom the estate will belong by law, he cannot come to any conclusion before the time appointed for the fulfillment of the condition has passed. Therefore it must be said, in this instance, if he answers that he does not desire that the estate shall belong to him by either title, praetorian possession of the estate of the deceased shall be granted his creditors.

71.- ULPIANUS; *On the Edict, Book LXI*.- If anyone should ransom a slave belonging to another from the enemy, and appoint him his heir with the gift of freedom, I am inclined to think that he will be free, and the necessary heir of the testator. For the latter, when he granted him his freedom, released him from his bond, and gave him power to enjoy the right of postliminium, so that he would not again become the slave of the party to whom he belonged before he was captured (for this would be extremely wicked), but to enable him to tender to his former master the price of his ransom, or remain obligated to him until he could pay it; which provision was introduced in favor of freedom.

§ 1.- If a slave should be purchased under this law in order to be manumitted within a certain time, and

deferida, esperamos el término prefijado, dentro de cuyo término, si no la adiera, u obrara como heredero, le denegamos las acciones.

70.- PAULO; *Comentarios al Edicto, libro LVII*.- En los grados de muchos herederos se ha de observar esto, que, si se produjera el testamento, se comience primeramente con los instituidos, y después se pase a aquellos a quienes les pertenece la herencia legítima, aunque sea uno mismo a quien de uno u otro modo le pertenezca; porque gradualmente se consigue esto, que primeramente repudie la diferida en virtud de testamento, y después la legítima. El mismo derecho hay respecto a la posesión de bienes, para que primeramente rechace la posesión de los bienes el instituido, y después el que puede pedirla abintestato.

§ 1.- Pero si a aquel a quien puede pertenecerle la herencia legítima se le hubiera impuesto una condición, nada puede determinar en cuanto a la legítima antes que pase el día de la condición; y por esto se ha de decir, que también en este caso si respondió que no quería que le perteneciera ninguna herencia, se han de poseer por los acreedores los bienes del difunto.

71.- ULPIANO; *Comentarios al Edicto, libro LXI*.- Si alguien hubiere rescatado de los enemigos un esclavo ajeno, y lo hubiere instituido heredero con la libertad, más bien creo que ha de ser libre y heredero necesario; porque cuando le da la libertad disuelve su propio vínculo, y por derecho de postliminio vuelve para esto solo, para que no se haga otra vez esclavo de aquel de quien no era antes, que fuese hecho prisionero, -porque esto es bastante inhumano-, pero para que en todo caso le ofrezca a su primitivo señor su propia estimación, o le quede obligado hasta que le pague el precio; lo que se introdujo en favor de la libertad.

§ 1.- Si alguno hubiera sido comprado con la condición de que sea manumitido dentro de cierto

sit, an ei succurrendum sit, ut se abstineat, videamus. Magisque est, ut, donec dies non exstiterit, possit ei necessarius heres effici et non possit sese abstinere: sin autem dies praeteritus fuerit, tunc non necessarius, sed voluntarius heres efficitur et potest se abstinere secundum exemplum eius, cui fideicommissaria libertas sub condicione debebatur.

§ 2.- Si quis dederit nummos domino, ut manumittatur, puto huic omnimodo esse succurrendum.

§ 3.- Praetor ait: "Si per eum eamve factum erit, quo quid ex ea hereditate amoveretur".

§ 4.- Si quis suus se dicit retinere hereditatem nolle, aliquid autem ex hereditate amoverit, abstinendi beneficium non habebit.

§ 5.- Non dixit praetor "si quid amoverit", sed "si per eum eamve factum erit, quo quid ex ea amoveretur": sive ergo ipse amoverit sive amovendum curaverit, edictum locum habebit.

§ 6.- Amovisse eum accipimus, qui quid celaverit aut interverterit aut consumpserit.

§ 7.- Ait praetor quo quid ex ea amoveretur: sive autem una res sive plures fuerint amotae, edicto locus est, sive ex ea hereditate sint sive ad eam hereditatem pertineant.

§ 8.- Amovere non videtur, qui non callido animo nec maligno rem reposuit: ne is quidem, qui in re erravit, dum putat non esse hereditariam. Si igitur non animo amovendi, nec ut hereditati damnum det, rem abstulit, sed dum putat non esse hereditariam, dicendum est eum amovisse non videri.

§ 9.- Haec verba edicti ad eum pertinent, qui ante quid amovit, deinde se abstinere: ceterum si ante se abstinuit, deinde tunc amovit, hic videamus an edicto

he is appointed heir with the grant of his freedom, let us see if he will be entitled to relief if he declines to accept the estate. The better opinion is, that until the prescribed time has elapsed, he can become the necessary heir of the testator, and cannot reject the estate; but where the time has expired, he then becomes not the necessary, but the voluntary heir, and can reject it in the same way that he, to whom freedom is due under the terms of a trust can do.

§ 2.- If a slave should give money to his master in order that he may be manumitted, I think that, by all means, relief should be granted him.

§ 3.- The Praetor says: "If either a male or a female heir should have committed an act by which any property has been taken from the estate."

§ 4.- If a proper heir should state that he is unwilling to retain the estate, and has removed any property belonging to it, he shall not have the privilege of refusal.

§ 5.- The Praetor did not say: "If the heir should take anything"; but, "If either a male or a female heir should have committed an act by which any property has been taken from the estate." Therefore, if the heir should himself remove any of the property, or cause this to be done, the Edict will apply.

§ 6.- We understand anyone to have taken the property belonging to an estate, to mean that he has concealed, embezzled, or squandered said property.

§ 7.- The Praetor says: "By which any property has been taken from the estate", and the Edict applies whether one article or several have been taken, or whether the property in question forms a portion of the estate, or is connected with the same.

§ 8.- A person is not held to have taken property, where he did not act with fraudulent or malicious intent. Nor will he be held to have done so who was mistaken with reference to the property, and was not aware that it belonged to the estate. Hence, if he took it without the intention of misappropriating it, or causing damage to the estate, but under the impression that it did not belong to it, it must be held that he should not be considered to have appropriated it to his own use.

§ 9.- These words of the Edict apply to him who, in the first place, took some of the property and afterwards rejected the estate; but if he rejected it in

tiempo, y hubiera sido instituido heredero con la libertad, veamos si se le habrá de auxiliar para que se abstenga; y es más cierto, que mientras no se hubiere cumplido el término, se le puede hacer heredero necesario, sino voluntario, y puede abstenerse de la herencia, a la manera de aquel a quien se le debía bajo condición la libertad fideicomisaria.

§ 2.- Si alguno hubiere dado dinero a su señor para ser manumitido, opino que a este se le ha de auxiliar de todos modos.

§ 3.- Dice el Pretor: «si por él o por ella se hubiere hecho que se amoviese alguna cosa de la herencia»

§ 4.- Si algún heredero suyo dice que él no quiere retener la herencia, pero hubiere amovido de la herencia alguna cosa, no tendrá el beneficio de abstenerse.

§ 5.- No dijo el Pretor: «si hubiere amovido alguna cosa» sino, «si por él o por ella hubiere hecho que se amoviese alguna cosa», luego ya si él mismo la hubiere amovido, ya si él hubiere procurado que la amovieran, tendrá lugar el Edicto.

§ 6.- Entendemos que «amovió» el que hubiere ocultado alguna cosa, o la hubiere quitado, o consumido.

§ 7.- Dice el Pretor: «que si amoviese de ella alguna cosa»; pero ya si se hubiere amovido una sola cosa, ya si muchas, tiene lugar el Edicto, ora sean de aquella herencia, ora pertenezcan a la misma herencia.

§ 8.- No se considera que amueve el que repuso la cosa no con intención astuta, ni maligna; ni ciertamente el que erró respecto a la cosa, creyendo que no era de la herencia. Así, pues, si quitó la cosa no con ánimo de amoverla, no para causar perjuicio a la herencia, sino creyendo que no era de la herencia, se ha de decir, que no se considera que él la amovió.

§ 9.- Estas palabras del Edicto se refieren a aquel que amovió antes alguna cosa, y después se abstiene; pero si se abstuvo antes, y después la amovió,

locus sit. Magisque est, ut putem istic Sabini sententiam admittendam, scilicet ut furti potius actione creditoribus teneatur: etenim qui semel se abstinuit, quemadmodum ex post delicto obligatur?

72.- PAULUS; *libro I ad Plautium*.- Si quis heres ita scriptus fuerit, ut intra certum tempus adeat hereditatem et, si non ita adierit, alius ei substituatur, prior autem heres antequam adiret decesserit: nemo dubitat, quin substitutus ultimum diem aditionis exspectare non solet.

73.- PAULUS; *libro VII ad Plautium*.- Si quis non quasi heres, sed quasi patroni filius egens a liberto paterno ali velit, procul dubio hoc extra causam est immiscendi se bonis paternis, et ita recte Labeo scribit.

74.- PAULUS; *libro XII ad Plautium*.- Qui putat se decem dare iussum, cum quinque iussus sit, si decem dederit, fiet heres adeundo.

§ 1.- At si quinque putet se iussum dare, cum decem dare iussus est, et dat quinque, non implet condicionem, sed ad aliquid proficit, ut, si adimpleverit reliquum, aliorum quinque datione videatur condicio esse impleta.

§ 2.- Qui bona fide servit si quasi iussu domini adierit, non obligabitur.

§ 3.- Similis est huic statuliber, qui iussus ab herede adire hereditatem post condicionem libertatis existentem, cum hoc ignoraret, adiit.

§ 4.- De eo, qui heres institutus ab aliquo dubitat, an libertas ei ex testamento domini optigerit, cum nesciat condicionem libertatis exstitisse vel here-

the first place, and then misappropriated the property, let us see whether the Edict will apply. I think that it is better in this instance to adopt the opinion of Sabinus, namely, that the heir will be liable to the creditors of the estate in an action of theft; for where the heir has refused the estate, he afterwards becomes liable on account of the crime.

72.- PAULUS; *On Plautius, Book I*.- If an heir should be appointed as follows: "Let him enter upon the estate within a certain time, and if he should not do so, let another be substituted for him", and the first heir dies before entering upon the estate, no one can doubt that the substitute will not be obliged to wait until the last day fixed for acceptance.

73.- THE SAME; *On Plautius, Book VII*.- Where anyone, not acting as heir, but as the son of his patron, being in want, asks for support from the freedman of his patron, there is no doubt that he does not, by so doing, interfere with the management of his father's estate. Labeo also very properly holds this opinion.

74.- THE SAME; *On Plautius, Book XII*.- If an heir thinks that he was ordered to pay ten aurei, when in fact he was ordered to pay five, and he pays ten, he will become the heir by entering upon the estate.

§ 1.- But if he thinks that he was ordered to pay five, when he was ordered to pay ten, and he pays five, he does not comply with the condition. This, however, will be of some advantage to him, for if he should pay the remainder, the condition will be held to have been complied with by the payment of the other five aurei.

§ 2.- Where a freeman serves as a slave in good faith, and enters upon an estate by the order of his supposed master, he will not become liable.

§ 3.- The position of a slave who is to be liberated upon a certain condition is similar to the one where he is ordered by the heir to enter upon an estate, and does so after the condition upon which his freedom depends has been fulfilled, even if he is not aware of it.

§ 4.- Where a slave has been appointed heir by someone, there is some doubt whether he is entitled to his freedom by virtue of the will of his master,

veamos en este caso si habrá lugar al Edicto; y es más cierto, según creo, que en este caso se ha de admitir la opinión de Sabino, a saber, que se obligue a favor de los acreedores más bien con la acción de hurto; porque el que una vez se abstuvo, ¿cómo se obliga por un delito posterior?

72.- PAULO; *Comentarios a Plaucio, libro I*.- Si alguien hubiere sido instituido heredero con la condición de que adiese la herencia dentro de cierto tiempo, y si así no la hubiere adido, le fuera substituido otro, pero el primer heredero hubiere fallecido antes que la adiese, nadie duda que el substituto no suele esperar el último día de la adición.

73.- EL MISMO; *Comentarios a Plaucio, libro VII*.- Si alguno quisiera ser alimentado por un liberto del padre, no como heredero, sino como hijo necesitado del patrono, está lejos de duda, que esto es ajeno a inmiscuirse en los bienes del padre; y así lo escribe acertadamente Labeón.

74.- EL MISMO; *Comentarios a Plaucio, libro XII*.- El que cree que se le mandó dar diez, habiéndosele mandado dar cinco, si hubiere dado los diez, se hará heredero adiando la herencia.

§ 1.- Mas si creyera que se le mandó dar cinco, habiéndosele mandado dar diez, y da los cinco, no cumple la condición, pero esto le aprovecha para algo, para que, si completare el resto, se considere que con la entrega de los otros cinco quedó cumplida la condición.

§ 2.- El que de buena fe presta servidumbre, si hubiere adido la herencia como por mandato de su señor, no se obligará.

§ 3.- Semejante a este es el instituido libre bajo condición en el testamento, al cual se le mandó por el heredero adir la herencia, y la adió después de cumplida la condición de la libertad, ignorando esto.

§ 4.- Respecto a aquel que, instituido heredero por alguno, duda si le habrá correspondido la libertad en virtud del testamento de su señor, no sabiendo que se

ditatem aditam, an adeundo heres fiat, videndum. Iulianus hunc diceret fieri heredem.

75.- MARCELLUS; *libro IX digestorum*.- Ex semisse Titius heres scriptus est: quadrantis bonorum possessionem per errorem petit. Quaero, an nihil actum sit an vero perinde omnia servanda sint, ac si quadrans nominatus non sit. Respondit magis nihil actum esse, quemadmodum cum ex semisse scriptus heres ex quadrante per errorem adiit hereditatem.

76.- IAVOLENUS; *libro IV epistularum*.- Si tu ex parte sexta sub condicione institutus fuisses heres et omittente partem suam Titio, cui substitutus eras, ex substitutione adisses, deinde condicio iure sextantis exstisset, quaero, an adire necesse habueris, ne sextans tuus intreat. Respondit: nihil interest, utrum ex substitutione prius adierim an ex prima institutione, cum ab utraque causa una aditio sufficiat: sextans itaque, qui sub condicione datus mihi est, ad me solum pertinet.

§ 1.- Item si tu sextantis, ex quo institutus esses heres, omiseris actionem, numquid dubitas, quin ex substitutione adeundo Titianae partis habiturus partem esses? Respondit: non dubito, quin, si prima institutione adeundo heres esse possim, in potestate mea sit, quam partem hereditatis aut amittere velim aut vindicare.

77.- POMPONIUS; *libro VIII ad Quintum Mucium*.- Illud dubitari potest, an, si, cum testamento heres institutus essem ab eo, qui etiamsi intestatus decessisset, legitima hereditas eius ad me pertineret, an simul utramque hereditatem repudiare possim, quoniam antequam ex testamento here-

when he does not know whether the condition upon which his freedom depends has been fulfilled or not; or where the estate has been accepted, whether he can become the heir by entering upon the same. Julianus says that he will become the heir.

75.- MARCELLUS; *Digest, Book IX*.- Titius was appointed heir to half of an estate, and, through mistake, demanded possession of only one-fourth of it. I ask whether such a demand is not void, or whether all his rights are saved just as if the fourth of the estate had not been mentioned by him. The answer was, that the better opinion is that the demand is of no force or effect, just as if in the case where a party has been appointed heir to half of an estate, he erroneously only accepts a quarter of the same.

76.- JAVOLENUS; *Epistles, Book IV*.- If you have been appointed heir to one-sixth of an estate, under a certain condition, and Titius, to whom you were substituted, refuses to take his share, and you accept the estate by virtue of the substitution, and the condition under which you were entitled to a sixth is fulfilled, I ask whether it will be necessary for you to enter upon the estate in order to avoid losing your sixth. The answer was, that it makes no difference whether the estate is entered upon by reason of the substitution, or on account of the first appointment; since in either instance a single acceptance will be sufficient. Hence the sixth part which was granted to me under a condition belongs to me alone.

§ 1.- Moreover, if you fail to accept the sixth of the estate to which you were appointed the heir, do you think that by accepting under the substitution you will be entitled to a part of the share of Titius? I do not doubt that if I can become the heir by accepting under the first appointment, it will be in my power either to reject, or claim any part of the estate which may be desired.

77.- POMPONIUS; *On Quintus Mucius, Book VIII*.- A doubt may arise whether, after I have been appointed heir by the will of a person whose estate, even if he should die intestate, would belong to me as heir-at-law, I can reject both titles to the estate at the same time, for the reason that the estate did not

cumplió la condición de la libertad, o que la herencia fue adida, se ha de ver si adiéndola se hará heredero; y Juliano diría que éste se hace heredero.
;

75.- MARCELO; *Digesto, libro IX*.- Ticio fue instituido heredero de la mitad de la herencia, y pidió por error la posesión de los bienes de la cuarta parte; pregunto, ¿no se habrá hecho nada, o todo se habrá de observar lo mismo que si no se hubiese nombrado la cuarta parte? Respondió, que es más cierto que nada se hizo, así como si el instituido heredero de la mitad adió por error la herencia en cuanto a la cuarta parte.

76.- JAVOLENO; *Epístolas, libro IV*.- Si tú hubieses sido instituido bajo condición heredero de la sexta parte, y dejando de aceptar su parte Ticio, a quien habías sido substituido, hubieses hecho la adición en virtud de la substitución, y después se hubiese cumplido la condición respecto al derecho de la sexta parte, pregunto, ¿tendrás necesidad de hacer la adición para que no perezca tu sexta parte? Respondió: nada importe, que primeramente haya adido en virtud de la substitución, o en virtud de la primera institución, puesto que por ambas causas basta una sola adición; y así, la sexta parte que se me dio bajo condición, me pertenece a mí solo.

§ 1.- Asimismo, si tu hubieses dejado de hacer la adición de la sexta parte en que hubieses sido instituido heredero, dudarás acaso que adiando en virtud de la substitución habrás de tener la parte de la porción de Ticio? Respondió: no dudo, que si adiando por la primera institución puedo ser heredero, está en mi facultad designar qué parte de la herencia quiero perder o reivindicar.

77.- POMPONIO; *Comentarios a Quinto Mucio, libro VIII*.- Se puede dudar, si, habiendo sido yo instituido heredero con testamento por aquel cuya herencia legitima me pertenecería, aunque él hubiese fallecido intestado, podré repudiar simultáneamente una y otra herencia, toda vez que antes que yo haya

ditatem repudiarim, legitima nondum ad me pertinet. Verum eodem momento intellegor et ex testamento et legitimam repudiare, sicuti, si legitimam velim ad me pertinere, cum sciam testamento mihi relictam, videbor ante repudiare testamentum et ita legitimam adquisisse.

78.- POMPONIUS; *libro XXXV ad Quintum Mucium*.- Duo fratres fuerant, bona communia habuerant: eorum alter intestato mortuus suum heredem non reliquerat: frater qui supererat nolebat ei heres esse: consulebat, num ob eam rem, quod communibus, cum sciret eum mortuum esse, usus esset, hereditati se alligasset. Respondit, nisi eo consilio usus esset, quod vellet se heredem esse, non adstringi. Itaque cavere debet, ne qua in re plus sua parte dominationem interponeret.

79.- ULPIANUS; *libro II ad legem Iuliam et Papiam*.- Placet, quotiens acquiritur per aliquem hereditas vel quid aliud ei cuius quis in potestate est, confestim acquiri ei cuius est in potestate, neque momento aliquo subsistere in persona eius per quem acquiritur et sic acquiri ei cui acquiritur.

80.- PAULUS; *libro V ad legem Iuliam et Papiam*.- Si solus heres ex pluribus partibus fuero institutus, unam partem omittere non possum nec interest, in quibusdam habeam substitutum nec ne.

§ 1.- Idem puto etiam, si aliis mixtus heredibus ex pluribus partibus heres institutus sim, quod et hic adeundo unam portionem omnes adquiero, si tamen delatae sint.

§ 2.- Item si servus meus ex parte heres institutus sit pure, ex parte sub condicione, dato scilicet coherede, et iussu meo adierit, deinde eo manumisso condicio alterius portionis exstiterit, verius est non mihi esse adquisitam illam portionem, sed ipsum

belong to me by law, before I rejected it as bequeathed by will. It is true that I am understood to have rejected at the same time the estate bequeathed by the will and the one conferred by law, just as if I wished the latter to belong to me, when I knew that it also had been left to me by will; hence I shall be held to have first rejected the testamentary estate, and in this way to have acquired the one conferred by law.

78.- THE SAME; *On Quintus Mucius, Book XXXV*.-Two brothers held their property in common, one of them who died intestate did not leave any direct heir, and his brother, who survived him, refused to be his heir. The question was asked whether the latter rendered himself liable for the debts of the estate, because he had made use of the common property after he knew that his brother was dead. The answer was, that if he had not used said property because he wished to be the heir, he would not be liable. Therefore he should be careful not to exercise ownership upon any more of the property than he was entitled to as his share.

79.- ULPIANUS; *On the Lex Julia et Papia, Book II*.- It is established that whenever an estate, or anything else, is acquired through some person who is under the control of another, it is immediately acquired by the latter, and does not remain for a moment vested in him by whom it is acquired, and hence it is directly obtained by the party entitled to it.

80.- PAULUS; *On the Lex Julia et Papia, Book V*.- If I should be appointed sole heir to several shares in an estate, I cannot reject one share, nor does it make any difference whether or not I have a substitute for said share.

§ 1.- Think that the same rule will apply, even where I have been appointed together with other heirs, or have been appointed heir to several shares, because by the acceptance of one of the shares, I will acquire all of them, if they should be rejected.

§ 2.- Moreover, if one of my slaves has been absolutely appointed an heir to a portion of an estate, and conditionally appointed to another portion, having, for example, a co-heir, and he enters upon the estate by my direction, and after he has been

repudiado la herencia testamentaria, aun no me pertenece la legítima; pero se entiende que en el mismo momento repudio así la testamentaria, como la legítima, a la manera que si yo quisiera que me perteneciera la legítima, sabiendo que me había sido dejada en testamento, se considerará que antes repudio el testamento, y que así adquirí la legítima.

78.- EL MISMO; *Comentarios a Quinto Mucio, libro XXXV*.- Había dos hermanos, que tenían los bienes comunes, y habiendo muerto intestado uno de ellos no había dejado heredero suyo, y el hermano que sobrevivía no quería ser su heredero; consultaba, si porque hubiese usado las cosas comunes, sabiendo que él había muerto, se había obligado a favor de la herencia; respondió, que si no hubiese usado de ellas con la intención de querer ser heredero, no se obligaba; y así debe dar caución de que no interpondrá su dominio en cosa alguna más que en su parte.

79.- ULPIANO; *Comentarios a la ley Julia y Papia, libro V*.- Está determinado, que siempre que se adquiere por medio de alguien una herencia, o alguna otra cosa para aquel en cuya potestad está, ni por un momento subsiste en la persona de aquel por quien se adquiere, y que así se adquiere para aquel para quien se adquiere.

80.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Si yo hubiere sido instituido único heredero de muchas partes no puedo dejar de aceptar una sola parte, y no importa que en algunas tenga, o no, substituto.

§ 1.- Lo mismo pienso, también si yo hubiera sido instituido heredero de varias partes en unión de otros herederos, porque también en este caso adiendo una sola porción las adquiero todas, si no obstante me hubieran sido deferidas.

§ 2.- Asimismo, si mi esclavo hubiera sido instituido heredero de una parte puramente, y de otra bajo condición, habiéndosele dado, por supuesto, un coheredero, y hubiere adido por mi mandato la herencia, y después, habiendo sido él manumitido, se

comitari: omnia enim paria permanere debent in id tempus, quo alterius portionis condicio exstet, ut adquiratur ei, cui prior portio adquisita est.

§ 3.- Ego quidem puto et si adhuc in potestate sit, iterum adeundum esse, si condicio exstiterit, et illud quod dicimus semel adeundum, in eiusdem persona locum habet, non cum per alium acquirenda est hereditas.

81.- ULPIANUS; *libro XIII ad legem Iuliam et Papiam*.- Totiens videtur heres institutus etiam in causa substitutionis adisse, quotiens adquirere sibi possit: nam si mortuus esset, ad heredem non transferret substitutionem.

82.- CLEMENTIUS; *libro XVI ad legem Iuliam et Papiam*.- Si servus eius qui capere non potest heres instituitur et antequam iussu domini adeat hereditatem, manumissus alienatusve sit et nihil in fraudem legis factum esset, ipse admittitur ad hereditatem. Sed et si partem capere possit dominus eius, eandem dicenda sunt de parte, quam ille capere non potest: nihil enim interest, de universo quaeratur quod capere non possit an de portione.

83.- ULPIANUS; *libro XVIII ad legem Iuliam et Papiam*.- Si totam an partem, ex qua quis heres institutus est, tacite rogatus sit restituere, apparet nihil ei debere adcrecere, quia rem non videtur habere.

84.- PAPINIANUS; *libro XVI quaestionum*.-

manumitted, the condition upon which the other portion of the estate depends is fulfilled; the better opinion is that the first portion is not acquired by me but follows the slave himself. For everything should remain in the same state at the time when the condition of the second share was fulfilled, in order that it may be acquired by him who was entitled to the first portion.

§ 3.- Therefore, I think that if the slave remains under the control of his original master, he must enter upon the estate a second time, if the condition should be fulfilled; and when we stated that the heir should only enter upon the estate but once, this has reference to the heir himself personally, and does not apply where the estate is acquired through the intervention of another.

81.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- An appointed heir is held to have signified his acceptance even in case of substitution, whenever he can acquire the property for himself; for if he should die, he will not transfer the substitution to his heir.

82.- TERENCE CLEMENS, *On the Lex Julia et Papia, Book XVI*.- If the slave of a person who is incapable of taking under a will should be appointed an heir, and is manumitted or alienated before entering upon the estate by order of his master, and commits no act for the purpose of evading the law, he himself will be admitted to the succession. If, however, his master can take but a certain share of the estate, the same rule will apply to that portion which he cannot take under the will. For, generally speaking, it makes no difference where the question is raised whether someone cannot take anything under a will, or can only take a part of the estate.

83.- ULPIANUS; *On the Lex Julia et Papia, Book XVIII*.- If anyone should be tacitly requested to surrender to another the entire share of an estate to which he has been appointed heir, it is evident that he can receive nothing by accretion, because he is not considered to be entitled to the property.

84.- PAPINIANUS; *Questions, Book XVI*.- Where

hubiere cumplido la condición de la otra porción, es más cierto que no se adquiere para mí aquella porción, sino que le sigue a él; porque todas las cosas deben permanecer en el mismo estado hasta el tiempo en que se cumpla la condición de la otra porción, a fin de que se adquiriera para aquel para quien la primer porción fue adquirida.

§ 3.- Yo, a la verdad, creo, que si aún estuviese en su potestad, se ha de adir otra vez, si se hubiere cumplido la condición; y lo que decimos que se ha de adir una sola vez, tiene lugar respecto a la persona de uno mismo, no cuando se ha de adquirir la herencia por medio de otro.

81.- ULPIANO; *Comentarios. a la ley Julia y Papia, libro XIII*.- Se considera que el heredero instituido adió también por causa de la substitución tantas veces cuantas pueda adquirir para sí; porque si hubiese muerto, no le transferirá al heredero la substitución.

82.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro XVI*.- Si el esclavo de quien no puede adquirir fuese instituido heredero, y hubiere sido manumitido o enajenado, antes que por mandato de su señor adiese la herencia, y nada se hubiese hecho en fraude de la ley, él mismo es admitido a la herencia. Pero si su señor pudiera adquirir también una parte, se ha de decir lo mismo respecto a la parte que él no puede adquirir; porque nada importa que se trate de la totalidad que no pueda adquirir, o de una porción.

83.- ULPIANO; *Comentarios de la ley Julia y Papia, libro XVIII*.- Si a uno se le hubiera rogado tácitamente que restituyera la totalidad, o la parte, en que fue instituido heredero, es evidente que nada debe acrecerle, porque se considera que no tiene la cosa.

84.- PAPINIANO; *Cuestiones, libro XVI*.- Si

Ventre praeterito si filius qui fuit emancipatus aut ex heres institutus sit, quamdiu rumpi testamentum potest, non defertur ex testamento hereditas. Sed si vacuo ventre mulier fuit et incerto eo filius in familia retentus vita decessit, heres fuisse intellegitur: emancipatus aut ex heres non aliter possunt hereditatem quaerere, quam si non esse praegnatem sciant. Ergo si ventre pleno sit mulier, nonne iniquum erit interea defunctum filium heredi suo relinquere nihil? Et ideo decreto filio succurrendum est, quia, sive frater ei nascatur sive non nascatur, patri heres futurus est. Eademque ratio facit, ut emancipato quoque subveniri debeat, qui alterutro casu rem omnimodo habiturus est.

85.- PAPINIANUS; *libro XXX quaestionum*.- Si metus causa adeat aliquis hereditatem, fiet ut, quia invitus heres existat, detur abstinendi facultas.

86.- PAPINIANUS; *libro VI responsorum*.- Pannonius avitus cum in Cilicia procuraret heres institutus ante vita decesserat, quam heredem se institutum cognosceret. Quia bonorum possessionem, quam procurator eius petierat, heredes aviti ratam habere non potuerant, ex persona defuncti restitutionem in integrum implorabant, quae stricto iure non competit, quia intra diem aditionis avitus obisset. Divum tamen Pium contra constituisse Maecianus libro quaestionum refert in eo, qui legationis causa Romae erat et filium, qui matris delatam possessionem absens amiserat, sine respectu eius distinctionis restitutionem locum habere. Quod et hic humanitatis gratia optinendum est.

an unborn child is passed over, and an emancipated son or a stranger is appointed heir, as long as the will can be broken by the birth of the child, the estate cannot be transferred in accordance with the terms of the will. If, however, the woman should not prove to be pregnant, and, while this is uncertain, the son remaining in the family should die, he is understood to have been the heir; and whether he be either an emancipated son or a stranger, he cannot acquire the inheritance unless he knows that the woman was not pregnant. Therefore, if the woman should actually be pregnant, would it not be unjust if, in the meantime, the son who died could leave nothing to his heir? Hence relief should be granted to the son, under the decree, because, whether a brother should be born to him or not, he will still be the heir of his father. The same course of reasoning makes it plain that relief should also be granted to an emancipated son who, in either instance, will certainly be entitled to possession of the estate.

85.- THE SAME; *Questions, Book XXX*.- If anyone, induced by fear, should enter upon an estate, the result will be that, because he becomes the heir against his will, the power to reject the estate may be granted him.

86.- THE SAME; *Opinions, Book VI*.- Pannonius Avitus, while acting as the Imperial Steward in Cilicia, was appointed an heir, but died before he learned of his appointment. His heirs, as representatives of the deceased, petitioned for complete restitution, because in that capacity, they could not take possession of the estate now claimed by his deputy, and which, according to the strict construction of the law, he was not entitled to; because Avitus had died within the time appointed for its acceptance. Marcellus, in the Book of Questions, states that the Divine Pius rendered a contrary decision with reference to a party who was at Rome as the member of an embassy, where his son, being absent, had failed to obtain the possession of property which descended from his mother, and that, without respect to this distinction, there was ground for restitution. This rule should also in the interest of justice be applicable in this case.

habiendo sido preterido un póstumo, hubiera sido instituido heredero el hijo que fue emancipado, o un extraño, mientras puede ser roto el testamento no se defiende la herencia en virtud del testamento; pero si la mujer no estuvo embarazada y estando esto en duda falleció el hijo retenido en la familia, se entiende que fue heredero; pero el emancipado o el extraño no pueden adquirir la herencia de otro modo, sino sabiendo que la mujer no estaba embarazada. Luego si la mujer estuviera embarazada, ¿no será injusto que el hijo fallecido mientras tanto no le deje nada a su heredero? Y por esto se le ha de auxiliar al hijo por el decreto, porque ya le nazca un hermano, ya no le nazca, ha de ser heredero de su padre. Y la misma razón hace que se deba auxiliar también al emancipado, el cual en uno y en otro caso ha de tener de todos modos la cosa.

85.- EL MISMO; *Cuestiones, libro XXX*.- Si por causa de miedo adiese alguno la herencia, sucederá, que, como es heredero contra su voluntad, se le dé la facultad de abstenerse.

86.- EL MISMO.- *Respuestas, libro VI*.- Habiendo sido instituido heredero Pannonio Avito, siendo procurador en Cilicia, falleció antes que supiera que había sido instituido heredero; como los herederos de Avito no habían podido ratificar la posesión de los bienes, que había pedido el procurador de aquel, imploraban por razón de la persona del difunto la restitución por entero, la cual no les competió en estricto derecho, porque Avito había fallecido dentro del término de la adición. Pero refiere Medano en el libro de sus Cuestiones, que el Divino Pío determinó por el contrario, respecto de uno que estaba en Roma por causa de una legación, y respecto de un hijo que estando ausente había perdido la posesión de los bienes de su madre que le había sido deferida, que tiene lugar la restitución, sin atenderse a esta distinción; lo que se ha de observar también en este caso por razón de humanidad.

§ 1.- Rei perduellionis hereditatem suspensa cognitione filius emancipatus, cui de patris innocentia liquet, potest quaerere.

§ 2.- Pro herede gessisse filium placuit, qui moriens comperto matrem suam intestato vita decessisse codicillis petit ab herede suo, ut maternorum bonorum servum manumitteret ac sibi parentibusque suis in possessione matris monumentum exstrueret.

87.- PAPINIANUS; *libro X responsorum*.- Eum bonis patris se miscere convenit, qui remoto familiae vinculo pro herede gerere videtur. Et ideo filius, qui tamquam ex bonis matris, cuius hereditatem suscepit, agrum ad hereditatem patris pertinentem ut maternum ignorans possedit, abstinendi consilium, quod in bonis patris tenuit, amisisse non videtur.

§ 1.- Pupillis, quos placuit oneribus hereditariis esse liberandos, confusas actiones restitui oportet.

88.- PAULUS; *libro I quaestionum*.- Gerit pro herede, qui animo agnoscit successionem, licet nihil attingat hereditarium. Unde et si domum pignori datam sicut hereditariam retinuit, cuius possessio qualisqualis fuit in hereditate, pro herede gerere videtur: idemque est et si alienam rem ut hereditariam possedisset.

89.- SCAEVOLA; *libro XIII quaestionum*.- Si pupillus se hereditate abstineat, succurrendum est et fideiussoribus ab eo datis, si ex hereditario contractu convenirentur.

90.- PAULUS; *libro XII responsorum*.- Respondit per curatorem hereditatem adquiri non posse.

§ 1.- Idem respondit, si iussu avi nepos patris, qui

§ 1.- The emancipated son of a person accused of treason, who is certain of the innocence of his father, can obtain his estate while the examination of the case is pending.

§ 2.- It is established that a son has acted in the capacity of heir, when, at the time of his death, he knew that his mother had died intestate, and asks his heir in a codicil to manumit a slave belonging to his mother's estate, and to erect a monument for himself and his parents on land forming part of her estate.

87.- THE SAME; *Opinions, Book X*.- It is held that a son meddles with the estate of his father, if he appears to act in the capacity of heir, where the family ties have been broken. Therefore, a son who accepts the estate of his mother, and obtains land belonging to the estate of his father, of which he takes possession, not being aware that it is part of his mother's estate, is not held to have lost the right to reject the estate.

§ 1.- It has been decided that mixed actions should be granted to minors, who, it has been held, must be released from liability for the debts of an estate.

88.- PAULUS; *Questions, Book I*.- A person acts in the capacity of heir, who signifies his intention of accepting an estate, even though he does not touch any of the property forming part of the same. Hence, if he should keep a house as belonging to the estate but which had been given by way of pledge, the possession of which was, in any way, held by the estate, he will be considered to have acted as the heir. The same rule will apply if he should retain possession of any other property as a part of the estate.

89.- SCAEVOLA; *Questions, Book XIII*.- If a minor rejects an estate, relief must be granted to the sureties given by him, if suit should be brought against them on account of some contract relating to the estate.

90.- PAULUS; *Opinions, Book XII*.- Paulus holds that an estate cannot be acquired through the intervention of a curator.

§ 1.- He also gives it as his opinion that if a

§ 1.- El hijo emancipado, al cual le consta la inocencia de su padre, reo de lesa majestad, puede adquirir la herencia estando en suspenso el conocimiento de la causa.

§ 2.- Está determinado, que obró como heredero el hijo que al morir, habiendo sabido que su madre falleció intestada, le pidió en los codicilos a su propio heredero, que manumitiese un esclavo de los bienes maternos, y que a él y a sus padres se les levantase un monumento en una posesión de su madre.

87.- EL MISMO; *Respuestas, libro X*.- Es común opinión, que se inmiscuye en los bienes del padre el que prescindiéndose del vínculo de la familia pareciera que obra como heredero; y por lo tanto, el hijo que como de bienes de la madre, cuya herencia aceptó, posee como materno, ignorándolo, un campo perteneciente a la herencia del padre, no parece que abandonó el propósito de abstenerse, que tuvo respecto a los bienes de su padre.

§ 1.- A los pupilos, que se determinó que habían de estar libres de las cargas de la herencia, se les deben restituir las acciones confundidas.

88.- PAULO; *Cuestiones, libro I*.- Obra como heredero el que acepta la sucesión con intención, aunque no toque a nada de la herencia; por lo cual, también si retuvo como de la herencia una casa dada en prenda, cuya posesión estuvo de cualquier modo en la herencia, se considera que obró como heredero; y lo mismo es, también si hubiese poseído como de la herencia una cosa ajena.

§ 89.- SCEVOLA; *Cuestiones, libro XIII*.- Si el pupilo se abstuviese de la herencia, se ha de auxiliar también a los fiadores dados por él, si fuesen demandados por un contrato de la herencia.

§ 90.- PAULO; *respondió en el libro XII. de las Respuestas*.- Que no se puede adquirir la herencia por medio de curador.

§ 1.- El mismo respondió, que si por mandato del

de castrensi peculio testamentum fecit, hereditatem adisset, adquisisse ei ea de quibus pater testari potest, quia castrensia esse mutatione personae desierint.

91.- PAULUS; *libro XV responsorum*.- Respondit, si is qui bonis paternis se abstinent per suppositam personam emptoris bona patris mercatus probatur, perinde eum conveniri oportere a creditoribus atque si bonis paternis se immiscuisset.

92.- PAULUS; *libro XVII responsorum*.- Filius familias duxit uxorem: ea filiis sublatis intestata decessit: filii iussu patris, non avi adierunt hereditatem: quaero, an avo adquisita sit hereditas. Paulus respondit secundum ea quae proponuntur nihil actum esse.

93.- PAULUS; *libro III sententiarum*.- Pater quotiens filio mandat adire, certus esse debet, an pro parte an ex asse, et an ex institutione an ex substitutione, et an testamento an ab intestato filius suus heres existat.

§ 1.- Mutus pater vel dominus filio vel servo heredibus institutis magis est, ut, si intellectu non careat, nutu iubere possit adire hereditatem, ut ei iure eius commodum quaeri possit: quod facile explicari possit scientia litterarum.

§ 2.- Mutus servus iussu domini pro herede gerendo obligat dominum hereditati.

94.- HERMOGENIANUS; *libro III iuris epitomae*.- Qui superstitis bona repudiat, post mortem eius adire hereditatem, item bonorum possessionem petere non prohibetur.

grandson should enter upon the estate of his father who made a will disposing of his castrense peculium by the order of his grandfather, he will acquire for the benefit of his grandfather all that his father was able to dispose of by will; because castrensial property ceases to be such by the change of persons.

91.- THE SAME; *Opinions, Book XV*.- Paulus holds that where a son who declines to accept the estate of his father is proved to have purchased the said estate by the intervention of anyone, he can be sued by the creditors of the estate, just as if he had taken upon himself the management of it.

92.- THE SAME; *Opinions, Book XVII*.- A son under paternal control married; and his wife died leaving children; and the latter entered upon the estate of their mother, by order of their father, and not by that of their grandfather. I ask whether the estate is acquired by the grandfather? Paulus answers that, in accordance with the case stated, the act is void.

93.- THE SAME; *Decisions, Book III*.- Every time that a father directs his son to enter upon an estate, he must be certain whether his son is an heir to a portion, or to the whole of it; and also whether his right is derived from an appointment as heir, or from substitution, or by virtue of a will, or through intestacy.

§ 1.- Where the father or the master is dumb, the better opinion is, that if a son or a slave has been appointed heir, he can, by a nod, direct him to enter upon the estate; provided he has sufficient intelligence to enable him to legally acquire the estate, which can be the more readily ascertained if he knows how to write.

§ 2.- A slave who is dumb, and acts in the capacity of heir by the direction of his master, renders the latter liable for the debts of the estate.

94.- HERMOGENIANUS; *Epitomes of Law, Book III*.- He who refuses to accept the property of a person who is living is not forbidden to enter upon his estate, or demand praetorian possession of it after his death.

abuelo hubiese adido el nieto la herencia del padre, que hizo testamento de su peculio castrense, adquirió para él aquellas cosas de que puede testar el padre, porque dejaron de ser castrenses con el cambio de persona.

§ 91.- EL MISMO; *respondió en el libro XV. de las Respuestas*.- Que si se prueba que aquel que se abstuvo de los bienes de su padre compro por medio de la supuesta persona de un comprador los bienes de su padre, debe ser demandado por los acreedores lo mismo que si se hubiese inmiscuido en los bienes de su padre.

§ 92.- EL MISMO; *Respuestas, libro XV*.- Un hijo de familia tomó por mujer, esta falleció intestada habiendo dejado hijos, y los hijos adieron la herencia por mandato del padre, no del abuelo; pregunto, ¿se habrá adquirido para el abuelo la herencia? Paulo respondió, que, según lo que se exponía, no se hizo nada.

93.- EL MISMO; *Sentencias, libro III*.- Siempre que el padre le manda al hijo adir la herencia, debe estar cierto de si su hijo es heredero de parte, o de todo el as en virtud de institución, o de substitución, por testamento o abintestato.

§ 1.- Si el padre o el señor fuese mudo, es mas cierto, que, instituidos herederos el hijo o el esclavo, si no carece de entendimiento, puede mandar por señas que adan la herencia. para que en derecho se adquiera para él su beneficio, lo que fácilmente se puede explicar si sabe escribir.

§ 2.- El esclavo mudo, obrando como heredero por mandato de su señor, obliga al señor a la herencia.

94.- HERMOGENIANO; *Epítome del derecho, libro III*.- Al que repudia los bienes del que sobrevive, no se le prohíbe adir después de la muerte de este la herencia, así como tampoco pedir la posesión de los bienes.

95.- PAULUS; *libro IV sententiarum*.- Recusari hereditas non tantum verbis, sed etiam re potest et alio quovis indicio voluntatis.

96.- HERMOGENIANUS; *libro III iuris epitomatum*.- Qui se pupillum falso existimans, cum esset pubes, pro herede gessit, quo minus heres existat, nihil error talis ei nocebit.

97.- PAULUS; *libro III decretorum*.- Clodius Clodianus facto prius testamento postea eundem heredem in alio testamento inutiliter facto instituerat: scriptus heres cum posterius putaret valere, ex eo hereditatem adire voluit, sed postea hoc inutile repertum est. Papinianus putabat repudiasset eum ex priore hereditatem, ex posteriore autem non posse adire. Dicebam non repudiare eum, qui putaret posterius valere. Pronuntiavit Clodianum intestatum decessisse.

98.- SCAEVOLA; *libro XXVI digestorum*.- Quae neptis suae nomine, quam ex Seia habebat, Sempronio tot dotis nomine sponderat et pro usuris in exhibitionem certam summam praestabat, decessit relicta Seia filia et aliis heredibus: cum quibus Sempronius iudicio egit condemnatique pro portionibus hereditariis singuli heredes, inter quos et Seia, Sempronio caverunt summam, qua quisque condemnatus erat usuris isdem, quae ad exhibitionem a testatrice praestabantur: postea excepta Seia filia ceteri heredes abstinerunt hereditate beneficio principis et tota hereditas ad Seiam pertinere coepit. Quaero, an in Seiam, quae sola heres remansit et omnia ut sola heres erat, pro eorum quoque portionibus, qui beneficio principali hereditate abstinerint, utilis actio dari debeat. Respondit pro parte eorum, qui se abstinuissent, actiones solere decerni in eam, quae adisset et maluisset integra hereditaria onera subire.

95.- PAULUS; *Decisions, Book IV*.- An estate can be rejected not only by words, but also by any act or other indication of the will.

96.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Where anyone, erroneously supposing himself to be a minor, when, in fact, he has arrived at puberty, acts as an heir, his rights will not be prejudiced by a mistake of this kind.

97.- PAULUS; *Decrees, Book III*.- Clodius Clodianus, having made a will, afterwards appointed the same heir by another will, which was drawn up in such a way as to be of no force or effect. The appointed heir, thinking that the second will was valid, desired to enter upon the estate by virtue of it, but it was afterwards ascertained to be void. Papinianus held that he had rejected the estate granted by the former will, and could not accept it under the second. I held that he did not reject the first will, as he thought that the second was valid. It was finally decided that Clodianus died intestate.

98.- SCAEVOLA; *Digest, Book XXVI*.- A certain woman promised Sempronius in the name of her granddaughter, whom she had by Seia, her daughter, a sum of money by way of dowry, and paid him a certain amount as interest for household expenses. She then died, Seia being her heir, together with others, against whom Sempronius brought an action, and the different heirs were held liable for their shares of the estate, among whom was Seia, who, with the rest gave security to Sempronius that they would pay the sum for which each one of them had had judgment rendered against him or her, with the same interest which had been paid by the testatrix for the support of the family. Afterwards, the other heirs, with the exception of Seia, rejected the estate through the indulgence of the Emperor, and it was entirely vested in Seia. I ask whether a praetorian action should be granted against Seia, who was now the sole heir, and as such administered all the affairs of the estate, to recover the amount of the shares of those who, through the indulgence of the Emperor, had been able to reject the estate. The answer is that

95.- PAULO; *Sentencia, libro IV*.- Se puede rehusar la herencia no solamente con palabras, sino también con un acto, y con otro cualquier indicio de la voluntad.

96.- HERMOGENIANO; *Epítome del derecho, libro III*.- Al que creyéndose falsamente pupilo, siendo púbero, obró como heredero, en nada le perjudicará tal error para que no sea heredero.

97.- PAULO; *Decretos, libro III*.- Clodio Clodiano, habiendo hecho primeramente testamento, había instituido después el mismo heredero en otro testamento hecho inútilmente; el heredero instituido, juzgando que el posterior era válido, quiso adir en virtud de él la herencia, pero después se vio que no era válido; Papiniano opinaba, que este había repudiado la herencia en virtud del primero, y que no podía adirla por el posterior; yo decía, que no la repudiaba el que creía que era válido el posterior; se decidió, que Clodio falleció intestado.

98.- SCEVOLA; *Digesto, libro XXVI*.- Una que a nombre de su nieta, que tenía de Seia, había prometido a Sempronio cierta cantidad a título de dote, y que pagaba determinada suma por intereses para alimentos, falleció habiendo dejado herederos a su hija Seia, y a otros, contra los cuales ejercitó su acción Sempronio; y habiendo sido condenados a proporción de sus partes en la herencia cada uno de los herederos, entre los cuales se hallaban también Seia, le dieron caución a Sempronio por la suma en que cada uno había sido condenado, con los mismos intereses que para alimentos se pagaban por la testadora; después, excepto la hija Seia, los demás herederos se abstuvieron de la herencia por beneficio del Príncipe, y toda la herencia comenzó a pertenecerle a Seia; pregunto, ¿se debía dar la acción útil contra Seia, que quedó siendo única heredera, y lo había hecho todo como única heredera, también respecto a las porciones de los que se habían abstenido de la herencia por beneficio del Príncipe? Respondió, que respecto a la parte de los que se hubieren abstenido, se solían dar las acciones contra

99.- POMPONIUS; *libro I senatus consultorum*.- Aristo in decretis Frontianis ita refert: cum duae filiae patri necessariae heredes exstitissent, altera se paterna abstinerat hereditate, altera bona paterna vindicare totumque onus suscipere parata erat. Sanctum cassium praetorem causa cognita actiones hereditarias utiles daturum recte pollicitum ei, quae ad hereditatem patris accesserat denegaturumque ei quae se abstinerat.

actions involving the shares of those who decline to accept an estate are usually granted against the party who accepts the same, and prefers to discharge the liabilities of the entire estate.

99.- POMPONIUS; *Decrees of the Senate, Book I*.- Aristo stated, with reference to the Decrees of Fronto: Two daughters were the necessary heirs of their father; one of them declined to accept his estate, and the other took possession of her father's property and was ready to discharge all its liabilities. The venerable Praetor Cassius, after hearing the case, very properly decided that praetorian actions should be granted to her who had accepted the estate of her father, but should be denied to the other daughter who had refused it.

la que hubiese adido la herencia, y hubiese preferido soportar íntegras las cargas de la herencia.

99.- POMPONIO; *Senadoconsultos, libro I*.- Refiere Aristón en los Decretos Frontonianos que habiendo quedado dos hijas herederas necesarias de su padre, y habiéndose una abstenido de la herencia paterna, y hallándose dispuesta la otra a reivindicar los bienes paternos y a aceptar todas las cargas, con razón le prometió el Pretor Santo Cassio a la que había aceptado la herencia de su padre, que le daría con conocimiento de causa las acciones útiles relativas a la herencia, y que se las denegaría a la que se había abstenido.

TIT. III

TESTAMENTA QUEMADMODUM
APERIUNTUR INSPICIANTUR
ET DESCRIBANTUR

1.- GAIUS; *libro XVII ad edictum provinciale*.- Omnibus, quicumque desiderant tabulas testamenti inspicere vel etiam describere, inspiciendi describendique potestatem facturum se praetor pollicetur: quod vel suo vel alieno nomine desideranti tribuere eum manifestum est.

§ 1.- Ratio autem huius edicti manifesta est: neque enim sine iudice transigi neque apud iudicem exquiri veritas de his controversiis, quae ex testamento proficiscerentur, aliter potest quam inspectis cognitisque verbis testamenti.

§ 2.- Si quis neget sigillum suum agnoscere, non ideo quidem minus aperiuntur tabulae, sed alias suspectae fiunt.

2.- ULPIANUS; *libro L ad edictum*.- Tabularum testamenti instrumentum non est unius hominis, hoc est heredis, sed universorum, quibus quid illic adscriptum est: quin potius publicum est instrumentum.

TITLE III

IN WHAT WAY WILLS SHOULD BE
OPENED, EXAMINED, AND
COPIED

1.- GAIUS; *On the Provincial Edict, Book XVII*.- The Praetor promises that he will grant the privilege of examining and copying a will to all who desire to inspect one or copy it. It is plain that he will grant this permission to anyone who desires it either in his own name or in that of another.

§ 1.- The reason for the adoption of this Edict is plain; for one cannot, without judicial authority, carry out the provisions of a will, nor can the truth be ascertained by the court in those controversies which arise out of the interpretations of wills, except by the examination and investigation of the language contained therein.

§ 2.- Where anyone refuses to acknowledge his seal, this does not prevent the opening of a will, but it becomes suspicious for this reason.

2.- ULPIANUS; *On the Edict, Book L*.- The instrument containing the provisions of the will does not belong to one person, that is to say, to the heir, but it is the property of all those to whom anything has

TÍTULO III

DE CÓMO SE HAN DE ABRIR,
INSPECCIONAR Y TRANSCRIBIR LOS
TESTAMENTOS

1.- GAYO; *Comentarios al Edicto provincial libro XVII*.- El Pretor promete a todos los que desean inspeccionar, o también transcribir, las tablas de un testamento, que les dará la facultad de inspeccionarlas y transcribirlas. Lo que es evidente que él lo concede al que lo desea, o en el suyo, o en nombre de otro.

§ 1.- Mas la razón de este Edicto es evidente; porque no se puede transigir sin juez, ni investigar ante el juez la verdad en estas controversias, que dimanasen de un testamento, de otro modo que habiéndose inspeccionado y conocido las palabras del testamento.

§ 2.- Si alguno dijera que no reconoce su propio sello, ciertamente que no por eso dejan de abrirse las tablas, pero en este caso se hacen sospechosas.

2.- ULPIANO; *Comentarios al Edicto, libro L*.- El instrumento de las tablas de un testamento no es de un solo hombre, esto es, del heredero, sino de todos aquellos a quienes en él se les ha asignado alguna

§ 1.- Testamentum autem proprie illud dicitur, quod iure perfectum est: sed abusive testamenta ea quoque appellamus, quae falsa sunt vel iniusta vel irrita vel rupta: itemque imperfecta solemus testamenta dicere.

§ 2.- Ad causam autem testamenti pertinere videtur id quodcumque quasi ad testamentum factum sit, in quacumque materia fuerit scriptum, quod contineat supremam voluntatem: et tam principales quam secundae tabulae edicto continentur.

§ 3.- Si plura sint testamenta, quae quis exhiberi desideret, universorum ei facultas facienda est.

§ 4.- Si dubitetur, utrum vivat an decesserit is, cuius quis quod ad causam testamenti pertinet inspicere describique postulat, dicendum est praetorem causa cognita statuere id debere, ut, si liquerit eum vivere, non permittat. Inspicere tabulas est, ut ipsam scripturam quis inspiciat et sigilla et quid aliud ex tabulis velit spectare.

§ 5.- Inspectio tabularum etiam lectionem earum indicat.

§ 6.- Diem autem et consulem tabularum non patitur praetor describi vel inspicere idcirco, ne quid falsi fiat: namque etiam inspectio materiam falso fabricando instruere potest.

§ 7.- Utrum autem in continenti potestatem inspiciendi vel describendi iubet an desideranti tempus dabit ad exhibitionem? Et magis est, ut dari debeat secundum locorum angustias seu prolixitates.

§ 8.- Si quis non negans apud se tabulas esse non patiaturspici et describi, omnimodo ad hoc compelletur: si tamen neget penes se tabulas esse, dicendum est ad interdictum rem mitti quod est de tabulis exhibendis.

been bequeathed; and, indeed, it is rather a public document.

§ 1.- That is properly said to be a will which is legally perfect; however, we also improperly call certain papers wills which are forged, illegal, void, or broken, and we are also accustomed to designate as wills such as are defective.

§ 2.- It is held that whatever has been done with reference to a will is subject to the same rules as the will itself, no matter upon what material it has been written; provided that it contains the last wishes of the deceased, and the will itself, as well as the substitution, is embraced in the Edict.

§ 3.- Where anyone desires to produce several wills, authority to produce them all should be granted.

§ 4.- If any doubt should exist whether the person whose will someone desires to have examined or copied is living or dead, it must be held that the Praetor shall decide this after proper investigation, so that if it is proved that the testator is living, he shall not permit the will to be examined; otherwise, he can allow the applicant to examine the writing, the seals, and anything else belonging to the instrument which he may desire to inspect.

§ 5.- The examination of a will also includes the perusal of the same.

§ 6.- The Praetor does not permit the date of the will or the name of the Consul under whose administration it was drawn up to be copied or examined, in order to avoid opportunity for fraud; for even the examination of these may furnish material for the perpetration of forgery.

§ 7.- Can the Praetor order that power to examine or copy a will be accorded without delay, or shall he grant time for its production to the person having possession of the same if he wishes it? The better opinion is that he should grant a certain time, dependent upon the difficulty of communication, and the distance of the place.

§ 8.- If anyone does not deny that he has possession of a will, but will not allow it to be examined and copied, he should, by all means, be compelled to do so. If, however, he denies that the will is in his possession, it must be said that recourse should be had to the interdict which provides for the production

cosa; o más bien, es un instrumento público.

§ 1.- Pero se llama propiamente testamento el que está perfeccionado en derecho; pero abusivamente llamamos también testamentos los que son falsos, o injustos, o írritos, o han sido rotos, y asimismo solemos llamar testamentos a los imperfectos.

§ 2.- Mas se considera que pertenece a la condición de testamento todo lo que se haya hecho como para testamento, cualquiera que sea la materia sobre que se hubiere escrito, que contenga una última voluntad; y compréndanse en el Edicto así las principales, como las segundas tablas.

§ 3.- Si fueran muchos los testamentos, que alguien deseara que se exhibieran, se le ha de dar vista de todos.

§ 4.- Si se dudara si vive o ha fallecido aquel cuya disposición, perteneciente a la condición de testamento, pide alguien que se inspeccione, se ha de decir, que el Pretor debe decidir esto con conocimiento de causa, para que, si se averiguare que vive, no permita que se inspeccionen las tablas, y para que cualquiera inspeccione la misma escritura, y los sellos, y otra cualquier cosa que de las tablas quiera ver.

§ 5.- La inspección de las tablas indica también su lectura.

§ 6.- Mas el Pretor no consiente que se copie ni se vea el día y el nombre del cónsul del testamento, con este objeto, para que no se haga alguna falsificación; porque también la inspección puede dar pie para que se haga alguna falsedad.

§ 7.- Pero ¿concede acaso facultad para inspeccionar o copiar desde luego, o le dará, al que lo solicite, tiempo para la exhibición? Y es más cierto, que deberá dársele según la proximidad o la mayor distancia de los lugares.

§ 8.- Si no negando alguno que tiene en su poder las tablas, no consintiera que se inspeccionaran y copiaran, será de todos modos compelido a ello; pero si negara que en su poder están las tablas, se ha de decir, que se remite al interdicto, que hay sobre la exhibición de las tablas.

of wills.

3.- GAIUS; *libro XVII ad edictum provinciale*.- Ipsi tamen heredi vindicatio tabularum sicut ceterarum hereditariarum rerum competit et ob id ad exhibendum quoque agere potest.

4.- ULPIANUS; *libro L ad edictum*.- Cum ab initio aperiendae sint tabulae, praetoris id officium est, ut cogat signatores convenire et sigilla sua recognoscere.

5.- PAULUS; *libro VIII ad Plautium*.- Vel negare se signasse: publice enim expedit suprema hominum iudicia exitum habere.

6.- ULPIANUS; *libro L ad edictum*.- Sed si maior pars signatorum fuerit inventa, poterit ipsis intervenientibus resignari testamentum et recitari.

7.- GAIUS; *libro VII ad edictum provinciale*.- Sed si quis ex signatoribus aberit, mitti debent tabulae testamenti ubi ipse sit, uti agnoscat: nam revocari eum adgnoscenti causa onerosum est. Quippe saepe cum magna captione a rebus nostris revocamur et sit iniquum damnosum cuique esse officium suum. Nec ad rem pertinet, unus absit an omnes. Et si forte omnibus absentibus causa aliqua aperire tabulas urgeat, debet proconsul curare, ut intervenientibus optima opinionis viris aperiantur et post descriptum et cognitum factum ab isdem, quibus intervenientibus apertae sunt, obsignentur, tunc deinde eo mittantur, ubi ipsi signatores sint, ad inspicienda sigilla sua.

8.- ULPIANUS; *libro L ad edictum*.- Pupillares tabulas, etiamsi non fuerit superscriptum ne aperirentur, attamen, si seorsum eas signatas testator

3.- GAIUS; *On the Provincial Edict, Book XVII*.- The heir is, nevertheless, entitled to an action for the recovery of the will, just as for property belonging to the estate, and on this account he can bring an action to compel the production of the will.

4.- ULPIANUS; *On the Edict, Book L*.- When the will is about to be opened, it is the duty of the Praetor to require the witnesses to appear and acknowledge their seals,

5.- PAULUS; *On Plautius, Book VIII*.- Or deny that they have sealed the will; for it is expedient that the last will of men should be carried into effect.

6.- ULPIANUS; *On the Edict, Book L*.- If the majority of the witnesses are found, the will can be opened and read in their presence.

7.- GAIUS; *On the Provincial Edict, Book VII*.- If one of the witnesses should be absent, the will must be sent to him wherever he may be, in order that he may acknowledge his seal. For it would be a hardship to compel him to return for this purpose, as frequently it causes great inconvenience for us to be taken from our business under such circumstances; and it would be unjust for anyone to suffer injury for having performed his duty. Nor does it make any difference whether one or all of the witnesses are absent. If all of them should happen to be absent, and, for some cause or other, there is an urgent necessity for opening the will, the Proconsul should take care that it is opened in the presence of men of excellent reputation; and after it has been copied and examined in their presence, it must be sealed by the same parties before whom it was opened, and then sent to the place where the witnesses are, in order that they may acknowledge their seals.

8.- ULPIANUS; *On the Edict, Book L*.- The Praetor does not permit the opening of a pupillary will, even if there is no endorsement on it forbidding this to be

3.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- Más al mismo heredero le compete la reivindicación de las tablas, así como de las demás cosas de la herencia, y por esto puede ejercitar también la acción de exhibición.

4.- ULPIANO; *Comentarios al Edicto, libro L*.- Cuando desde un principio se haya de abrir el testamento, es de cargo del Pretor obligar a los que lo sellaron a comparecer y a reconocer sus sellos,

5.- PAULO; *Comentarios a Plaucio, libro VIII*.- o a negar que lo sellaron; porque importa a la utilidad pública, que tengan efecto las últimas voluntades de los hombres.

6.- ULPIANO; *Comentarios al Edicto, libro L*.- Pero si se hubiere hallado a la mayor parte de los que lo sellaron, se podrá con su intervención abrir y leer el testamento.

7.- GAYO; *Comentarios al Edicto provincial, libro VII*.- Pero si alguno de los que lo sellaron estuviere ausente, se debe enviar el testamento a donde él esté, para que lo reconozca; porque es gravoso que sea llamado para reconocerlo, porque muchas veces somos distraídos de nuestros negocios con grande quebranto, y es injusto que sea gravoso para cada cual su propio cargo. Y no importa al caso, que esté ausente uno solo, o todos; y si acaso estando todos ausentes urgiera alguna causa para que se abra el testamento, debe cuidar el procónsul de que se abra interviniendo varones de la mejor fama, y que después de haberse copiado y reconocido sea sellado por los mismos, con cuya intervención fue abierto, y que luego después sea enviado a donde estén los mismos que lo sellaron, para que inspeccionen sus sellos.

8.- ULPIANO; *Comentarios al Edicto, libro L*.- Aunque no se hubiere sobrescrito que no se abra, sin embargo, el Pretor no consentirá, sino con cono-

reliquerit, praetor eas aperiri nisi causa cognita non patietur.

9.- PAULUS; *libro XLV ad edictum*.- Si mulier ventris nomine in possessione sit, aperiendae sunt secundae tabulae, ut sciatur, cui demandata sit curatio.

10.- ULPIANUS; *libro XIII ad legem Iuliam et Papiam*.- Si in duobus exemplariis scriptum sit testamentum, alterutro patefacto apertae tabulae sunt.

§ 1.- Si sui natura tabulae patefactae sunt, apertum videri testamentum non dubitatur: non enim quaeremus, a quo aperiantur.

§ 2.- Si tabulae non compareant vel exustae sint, futurum est, ut subvenire legatariis debeat. Idem est, si subpressae vel occultae sint.

11.- GAIUS; *libro XI ad legem Iuliam et Papiam*.- Sicut codicilli pars intelleguntur testamenti, ita secundae tabulae principalium tabularum partem optinere videntur.

12.- ULPIANUS; *libro XIII ad legem Iuliam et Papiam*.- Si quis fecerit testamentum et exemplum eius, exemplo quidem aperto nondum apertum est testamentum: quod si authenticum patefactum est totum, apertum.

TIT. IV

SI QUIS OMISSA CAUSA TESTAMENTI
AB INTESTATO VEL ALIO MODO
POSSEDEAT HEREDITATEM

1.- ULPIANUS; *libro L ad edictum*.- Praetor

done; still, if the testator left his will partially sealed, the Praetor can allow it to be opened, if proper cause be shown.

9.- PAULUS; *On the Edict, Book XLV*.- Where a woman is placed in praetorian possession of an estate in the name of her unborn child, the pupillary will should be opened, in order that it may be ascertained to whom the curatorship of the child was entrusted.

10.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- Where there are two copies of a will, and one of them remains unsealed, the will is held to be opened.

§ 1.- Where the will itself is unsealed, there is no doubt that it should be considered as opened; for we do not inquire by whom it is to be opened.

§ 2.- If a will should not be produced, or has been burned, it follows that relief should be granted to the legatees; and the same rule applies where the will has been suppressed, or concealed.

11.- GAIUS; *On the Lex Julia et Papia, Book XL*.- Just as a codicil is considered to be part of a will, so a pupillary substitution is also held to constitute a part of the same.

12.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- Where anyone makes a will and also a copy of it, and the copy is open, the will is not considered to be open; but when the original will is open, everything else is likewise.

TITLE IV

WHERE ANYONE, THROUGH THE
REJECTION OF HIS APPOINTMENT AS
TESTAMENTARY HEIR, OBTAINS
POSSESSION OF THE ESTATE THROUGH
INTESTACY OR IN ANY OTHER WAY

1.- ULPIANUS; *On the Edict, Book L*.- The Praetor

cimiento de causa, que se abra el testamento del pupilo, si por separado lo hubiere dejado sellado el testador.

9.- PAULO; *Comentarios al Edicto, libro XLV*.- Si la mujer estuviera en posesión a nombre del vientre, se ha de abrir el segundo testamento, para que se sepa a quién haya sido pedida la curatela.

10.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si el testamento estuviese escrito en dos ejemplares, manifestándose uno u otro está abierto el testamento.

§ 1.- Si por su naturaleza está de manifiesto el testamento, no se duda que se considera abierto el testamento; porque no buscaremos por quién sea abierto.

§ 2.- Si no pareciera el testamento, o se hubiera quemado, sucederá que se les deberá amparar a los legatarios; y lo mismo es, si hubiere sido suprimido u ocultado.

11.- GAYO; *Comentarios a la ley Julia y Papia, libro XI*.- Así como se entiende que los codicilos, son parte del testamento, así también; se considera que el segundo testamento es parte del testamento principal.

12.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si alguno hubiere hecho testamento y copia del mismo, a la verdad, habiéndose abierto la copia, aun no está abierto el testamento, pero habiéndose abierto el auténtico está abierto todo.

TÍTULO IV

DE SI ALGUNO POSEYERE LA HERENCIA
ABINTESTATO O DE OTRO MODO,
HABIENDO PRESCINDIDO DEL
TÍTULO DEL TESTAMENTO.

1.- ULPIANO; *Comentarios al Edicto, libro L*.- El

voluntates defunctorum tuetur et eorum calliditati occurrit, qui omissa causa testamenti ab intestato hereditatem partemve eius possident ad hoc, ut eos circumveniant, quibus quid ex iudicio defuncti deberi potuit, si non ab intestato possideretur hereditas, et in eos actionem pollicetur.

§ 1.- Et parvi refert, utrum quis per semet ipsum an per alium adquirere potuit hereditatem: nam quomodocumque potuit, si non adquisiit hereditatem, in ea causa est, ut incidat in edictum praetoris:

§ 2.- Praetermittere autem causam testamenti videtur, qui, cum posset iubere, noluit id facere.

§ 3.- Quid ergo si servus eius cum iuberetur adire hereditatem, dicto audiens non fuit? Sed compellendus est servus hoc facere ideoque dominus ab intestato veniens incidit in edictum.

§ 4.- Sin autem nec certioratus est dominus a servo et postea ipse ab intestato possedit hereditatem, non debet incidere in edictum, nisi si fingit ignorantiam.

§ 5.- Si proponatur idem et institutus et substitutus et praetermiserit institutionem, an incidat in edictum, quaeritur. Et non puto incidere, quasi testator hanc ei dederit facultatem, qui eum substituit.

§ 6.- Praetermittere est causam testamenti, si quis repudiaverit hereditatem.

§ 7.- Qui sunt in potestate statim heredes sunt ex testamento nec quod se abstinere possunt, quicquam facit. Quod si postea miscuerunt, ex testamento videntur heredes: nisi si abstinerint quidem se testamento, verum ab intestato petierint bonorum possessionem: hic enim incident in edictum.

§ 8.- Qui sub condicione institutus heres potuit

attempts to carry out the wishes of deceased persons, and opposes the cunning of those who, by refusing to take under the will, obtain possession of the estate, or a portion of the same, on the ground of intestacy; in order to defraud legatees to whom something may be due under the will of the decedent, if the estate should not be obtained ab intestato; and he promises to grant an action against them.

§ 1.- It makes little difference whether the party in question acquires the estate himself, or through someone else; for in whatever way he may be able to do so, if he does not acquire it under the will, he is in a position to be affected by the Edict of the Praetor.

§ 2.- An heir is held to have omitted to take advantage of the benefits granted him by will, who, when he can order someone to enter upon the estate, declines to do so.

§ 3.- But what if his slave, when ordered to enter upon the estate, after receiving the order should not obey it? The slave, however, can be compelled to do this, and therefore his master comes within the scope of the Edict.

§ 4.- If, however, the master has not been informed by his slave of his appointment as heir, and he himself afterwards obtains possession of the estate on the ground of intestacy; he will not be liable under the Edict, unless he pretends ignorance of the facts.

§ 5.- Where the proposed case is, that the same party was, at the same time, appointed heir and substituted, and neglected to take advantage of his appointment; the question arises whether he comes within the scope of the Edict. I do not think that he does, as the testator who appointed him as substitute for himself granted him the privilege of rejection.

§ 6.- Where anyone rejects an estate, he forfeits any rights to which he may be entitled under the will.

§ 7.- Where children subject to the authority of their father immediately become heirs by his will, there is no reason why they cannot reject his estate. If, however, they subsequently interfere with it, they are considered to be heirs by virtue of the will, unless they refrain from taking under it, and claim possession of the property on the ground of intestacy; for, in this instance, they come within the terms of the Edict.

§ 8.- Where an heir is appointed under a condition,

Pretor protege las voluntades de los fallecidos, y se opone a la astucia de los que habiendo prescindido del título del testamento poseen abintestato la herencia o parte de la misma, con el objeto de defraudar a aquellos a quienes se les pudo deber alguna cosa en virtud de la última voluntad del difunto, si no se poseyese abintestato la herencia, y promete acción contra ellos.

§ 1.- Y poco importa que uno haya podido adquirir la herencia por sí mismo, o por medio de otro; porque de cualquier modo que haya podido, si no adquirió la herencia, se considera que incurre en el Edicto del Pretor.

§ 2.- Pero se considera que prescinde del título del testamento, el que pudiendo mandar, no quiso hacerlo.

§ 3.- ¿Qué se dirá, pues, si su esclavo, mandándosele adir la herencia, no obedeció al mandato? Que el esclavo ha de ser compelido a hacer esto; y que por lo tanto su señor, sucediendo abintestato, incurre en el Edicto.

§ 4.- Mas si el señor no fue hecho sabedor por el esclavo, y después él poseyó abintestato la herencia, no debe incurrir en el Edicto, sino si finge ignorancia.

§ 5.- Si se propusiera que uno mismo fue instituido y substituido, y hubiere prescindido de la institución, se pregunta si incurre en el Edicto; y no creo que incurra, cual si el testador, que lo substituyó, le hubiere dado esta facultad.

§ 6.- Es prescindir del título del testamento, que uno haya repudiado la herencia.

§ 7.- Los que están bajo potestad son inmediatamente herederos en virtud del testamento, y nada importa, que se puedan abstener; pero si se inmiscuyeron después, se consideran herederos en virtud del testamento, a no ser que se hubieren abstenido ciertamente del testamento, pero hubieren pedido la posesión de los bienes abintestato, porque en este caso incurrirán en el Edicto.

§ 8.- El que instituido heredero bajo condición

parere condicioni nec paruit, cum condicio talis sit, ut in arbitrio sit heredis instituti, deinde ab intestato possideat hereditatem, debet edicto teneri, quia eiusmodi condicio pro pura debet haberi.

§ 9.- Non quaerimus, qui praetermissa causa testamenti ab intestato hereditatem possideant, utrum iure legitimo possideant an non: nam quoquo iure possideant hereditatem vel partem eius, conveniri ex edicto poterunt, utique si non ex alia causa possideant: ut puta si quis omisit quidem hereditatem, sed ex causa fideicommissi possidet missus in possessionem fideicommissorum servandorum causa: vel si proponas eum crediti servandi causa venisse in possessionem: nam nec ex hac causa legatariis respondere cogetur. Totiens igitur edictum praetoris locum habebit, quotiens aut quasi heres legitimus possidet aut quia bonorum possessionem accipit ab intestato aut si forte quasi praedo possideat hereditatem fingens sibi aliquem titulum ab intestato possessionis: quocumque enim modo hereditatem lucrifactor quis sit, legata praestabit, sane interveniente cautione "evicta hereditate legata reddi".

§ 10.- Et si non possideat quis hereditatem, dolo autem malo fecerit quo minus possideat, eveniet, ut perinde teneatur atque si hereditatem adisset.

§ 11.- Dolo autem malo fecisse videtur quo minus possideat, qui ad alium transtulit possessionem per fraudem, ut legatarii ceterique qui quid in testamento acceperunt careant his quae sibi relicta sunt.

§ 12.- Sane quaestionis fuit, utrum is demum dolo

and being able to comply with it, does not do so, when the condition is such that it depends upon the consent of the said heir, and he afterwards obtains possession of the estate on the ground of intestacy, he should be held liable under the Edict; for the reason that a conditional appointment of this kind should be considered as an absolute one.

§ 9.- When parties who have refused to take under the will obtain an estate on the ground of intestacy, we do not inquire whether they have acquired possession of the same as heirs-at-law or not, for by whatever title they may acquire possession of the estate, or a portion of it, they can be sued under the Edict, provided they do not acquire it on some other ground; for instance, where anyone rejects an estate and acquires it by means of a trust, and is placed in possession for the purpose of discharging the trust; or if you should state that he obtained possession in order to preserve a claim; as, in this instance, he cannot be compelled to answer in a suit brought by the legatees. Therefore, the Edict of the Praetor will apply whenever any one holds possession as an heir-at-law, or acquires the estate on the ground of intestacy, or holds it as a depredator, pretending that he has some title to possession on the ground of intestacy; for no matter in what way he may be pecuniarily benefited by obtaining the estate, he must pay the legacies.

§ 10.- Security, however, must be furnished by the legatees, that in case the heir should be deprived of the estate by a better title the legacies shall be repaid to him; and even if the party may not have the estate in his possession, but has acted in bad faith to avoid being in possession, the result is that he will be held liable, just as if he had entered upon the estate.

§ 11.- A person is considered to have acted in bad faith to avoid being in possession, who fraudulently transfers possession to someone else, in order that the legatees and others who have received anything under the will may be deprived of whatever was bequeathed to them.

§ 12.- The question was asked whether anyone

pudo cumplir la condición, y no la cumplió, siendo tal la condición que estuviera al arbitrio del heredero instituido, y después poseyera la herencia abintestato, deberá estar sujeto al Edicto, porque semejante condición debe ser considerada como pura.

§ 9.- No investigamos, si los que poseen la herencia abintestato habiendo prescindido del título del testamento la posean, o no, con legítimo derecho; porque cualquiera que sea el título con que posean la herencia, o parte de la misma, podrán ser demandados en virtud del Edicto, con tal que no la posean en virtud de otra causa, por ejemplo, si alguno dejó ciertamente de aceptar la herencia, pero la posee por causa de fideicomiso, habiendo sido puesto en posesión para conservar los fideicomisos, o si dijeras, que él había entrado en posesión para conservar un crédito, porque en virtud de esta causa no estará obligado a responder a los legatarios. Así, pues, el Edicto del Pretor tendrá lugar siempre y cuando uno posee o como heredero legítimo, o porque recibe abintestato la posesión de los bienes, o si acaso poseyera la herencia como poseedor de mala fe, fingiendo tener algún título para la posesión abintestato; porque de cualquier modo que uno se haya de lucrar con la herencia, pagará los legados.

§ 10.- A la verdad, interviniendo la caución de que «habiéndose hecho evicción de la herencia se devuelvan los legados» aunque uno no posea la herencia, pero hubiere hecho con dolo malo que no la posea, sucederá, que será considerado lo mismo que si hubiese adido la herencia.

§ 11.- Mas se considera que hizo con dolo malo que no la poseyera, el que con fraude transfirió a otro la posesión, para que los legatarios, y los demás que recibieron alguna cosa en el testamento, carezcan de lo que se les dejó.

§ 12.- Pero hubo cuestión sobre si se considerará

malo facere videatur quo minus possideat, qui per dolum eam possessionem dimittat, quam aliquando habuit, an vero is quoque, qui hoc ipsum malitiose fecit, ne ab initio possidere inciperet. Labeo sibi videri ait non minus delinquere eum, qui non incipiat possidere, quam eum qui desinat: quae sententia optinet.

§ 13.- Si quis per fraudem omiserit hereditatem, ut ad legitimum perveniat, legatorum petitione tenebitur.

2.- ULPIANUS; *libro VII ad Sabinum*.- Licet pro herede gerere non videatur, qui pretio accepto praetermisit hereditatem, tamen dandam in eum actionem exemplo eius, qui omissa causa testamenti ab intestato possidet hereditatem, divus Hadrianus rescripsit: proinde legatariis et fideicommissariis tenebitur.

§ 1.- Sed utrum ab eo erit incipiendum et sic ad heredem veniendum an convertemus ordinem? Mihi videtur humanior esse haec sententia, ut possessor hereditatis prior excutiatur, maxime si lucrativam habet possessionem.

3.- POMPONIUS *libro III ad Sabinum*.- Si pecuniam a substituto acceperis, ut praetermitteres, isque adierit, an danda sit legatariis actio, dubitari potest. Et puto, si ipse quoque praetermiserit et, quod lege ad se rediret, possidebit hereditatem, in utrum-que vestrum dandam, ut ei tamen, cui ab utroque legatum sit, in alterutrum detur actio.

4.- ULPIANUS; *libro L ad edictum*.- Si quis pecuniam non accepit, simpliciter autem omisit causam testamenti, dum vult praestitum ei qui substitutus est

should not be held to have acted in bad faith who, in order to avoid being in possession, fraudulently relinquished it after having held it for some time; or whether he is also liable who did this maliciously to avoid obtaining possession in the first place. Labeo says that it seems to him that he who avoided obtaining possession in the first place is not less guilty than he who fraudulently relinquishes it, after having obtained it. This is one prevalent opinion.

§ 13.- Where anyone fraudulently rejects an estate in order that it may descend to the heir-at-law, he will be liable to an action brought by the legatees.

2.- THE SAME; *On Sabinus, Book VII*.- Although he who relinquishes an estate in consideration of the payment of a sum of money may not be considered to have assumed the part of an heir, an action should, nevertheless, be granted against him, as in the case of a party who, having declined to take an estate under a will, obtains possession of it on the ground of intestacy, as the Divine Hadrian stated in a Rescript. For this reason he will be liable to be sued by the legatees and other beneficiaries of the estate.

§ 1.- But should the action be brought against him in the beginning, and recourse then be had to the heir; or shall we change the order? The more equitable opinion seems to me to be that proceedings should first be instituted against the possessor of the estate, especially if the possession of the same is profitable to him.

3.- POMPONIUS; *On Sabinus, Book III*.- If you receive money from a substitute in consideration of your relinquishing your claim to an estate, and he enters upon the same, it may be doubted whether an action should be granted to the legatees. I think that if the substitute should also relinquish his claim for the reason that the estate vests in him by law, and he obtains possession of it, both of you will be liable; and an action will be granted in favor of him to whom a legacy has been bequeathed, against whichever one of you he may elect to sue.

4.- ULPIANUS; *On the Edict, Book L*.- In case the heir should not receive any money, but refuses to take under the will, because he desires to confer a favor

que obra con dolo malo para no poseer el que con dolo dimitiera la posesión, que en algún caso tuvo, o también el que maliciosamente hizo esto mismo para no comenzar a poseer desde un principio. Labeón dice, que le parece, que no menos falta el que no empieza a poseer, que el que deja de poseer; cuya opinión está aceptada.

§ 13.- Si por fraude hubiere dejado alguno de aceptar la herencia, para que vaya al heredero legítimo, estará obligado por la petición de los legados.

2.- EL MISMO; *Comentarios a Sabino, libro VII*.- Aunque no parezca que obra como heredero el que por precio recibido prescindió de la herencia, sin embargo, respondió por rescripto el Divino Adriano, que se ha de dar contra él acción, a la manera que contra aquel que habiendo prescindido del títulos del testamento posee abintestato la herencia; por lo cual estará obligado a los legatarios y a los fideicomisarios.

§ 1.- ¿Pero se habrá de comenzar acaso por este, y llegar de este modo al heredero, o invertiremos el orden? A mi me parece que es más humana esta opinión, que primeramente se haga excusión contra el poseedor de la herencia, mayormente si tiene la posesión a título lucrativo.

3.- POMPONIO; *Comentarios a Labeón, libro III*.- Si hubieres recibido dinero del substituto para que no aceptes la herencia, y él la hubiere adido, se puede dudar si se les ha de dar acción a los legatarios. Y opino, que si tampoco este la hubiere aceptado y poseyere la herencia porque recayese en él por la ley, se ha de dar contra vosotros dos, pero de suerte, que a aquel a quien a cargo de ambos se le haya legado alguna cosa se le dé acción contra uno de otro.

4.- ULPIANO; *Comentarios al Edicto, libro L*.- Si alguno no recibió dinero, sino que simplemente prescindió del título del testamento, queriendo que

vel legitimo, numquid locus non sit edicto? Plane indignandum est circumventam voluntatem defuncti: et ideo si liquido constiterit in necem legatariorum hoc factum, quamvis non pecunia accepta, sed nimia gratia collata, dicendum erit locum esse utili actioni adversus eum qui possidet hereditatem.

§ 1.- Et recte dicetur, ubicumque quis, dum vult praestitum ei, qui se repudiante venturus est, non repudiaturus, nisi praestitum vellet, et maxime si ob evertenda iudicia id fecit, ibi dicendum est adversus possessorem competere actionem, sic tamen, ut, ubi quidem pecunia accepta repudiavit, ibi dicamus eum qui omisit conveniendum, ubi vero gratis, in fraudem tamen eorum quibus quid relictum est, possessorem debere conveniri utili actione.

§ 2.- Quamquam de heredibus institutis videatur praetor loqui, attamen etiam ad alios haec res serpit: ut, si sit legatarius, a quo fideicommissum relictum est, et hic id egisset, ut omittatur hereditas, doloque id fecit, conveniri debet.

§ 3.- Si quis vendiderit hereditatem, utique possidere videtur, non dolo fecisse, quo minus possideat.

5.- MARCELLUS; *libro XII digestorum*.- Excusatus videtur patronus, qui institutionem praetermisit, cum aliter esset a liberto scriptus heres quam eum institui oportet: nam et si servus eius ex asse institutus fuerit et per quemcumque casum non potuerit iussu domini adire hereditatem, impune praetermittet ex testamento hereditatem.

either on the substitute, or the heir-at-law, will there be ground for the application of the Edict? It would be intolerable for him to be able to prevent the execution of the will of the deceased; and therefore if it is clearly established that this was done for the purpose of injuring the legatees — even though no money was received but the act was prompted by excessive partiality — it must be said that there will be ground for an equitable action against the party who is in possession of the estate.

§ 1.- It is very properly held that whenever anyone wishes to confer a favor upon another who will become the heir by his rejection of the estate, and he would not have rejected it unless he had intended to confer the favor, and especially if he did so for the purpose of preventing the execution of the will, it must, in this instance, be said that an action will lie against the possessor of the estate, with this distinction, however, that where money having been accepted, the heir rejected the estate, we can, under these circumstances, say that suit should be brought against him; but where he acted through partiality and for the purpose of defrauding those to whom something was bequeathed, the possessor of the estate should be sued in a praetorian action.

§ 2.- Although the Praetor seems to refer to appointed heirs, still, this provision also extends to others; for instance, where there is a legatee who has been charged with a trust, and he causes the estate to be rejected through his fraudulent act, suit should be brought against him.

§ 3.- Where anyone sells his right to an estate, he is held to remain in possession of the same, and not to have acted fraudulently in order to avoid being in possession.

5.- MARCELLUS; *Digest, Book XII*.- A patron is held to be excused who rejects an appointment as heir, when he has been appointed heir by his freedman in a different way than he ought to have been. For if his slave should have been appointed sole heir to an estate, and on account of some accident was not able to enter upon it by order of his master, he can, with impunity, decline to accept the estate given him by the will.

todo pasara al que fue substituido, o al heredero legitimo, ¿tendrá acaso lugar el Edicto? Ciertamente que ha de indignar que haya sido defraudada la voluntad del difunto; y por lo tanto, si constare claramente que esto se hizo en perjuicio de los legatarios, aunque sin haberse recibido dinero, pero por demasiado favor concedido, se habrá de decir, que tiene lugar la acción útil contra el que posee la herencia.

§ 1.- Y con razón se dirá, que siempre que, queriendo uno que todo se le dé a aquel que, repudiando él, ha de suceder, no repudiaría si no quisiera que a aquel se le diese, y principalmente si hizo esto para anular la última voluntad, se ha de decir que compete la acción contra el poseedor; pero de esta suerte, que, cuando ciertamente repudió el testamento habiendo recibido dinero, digamos que ha de ser demandado el que prescindió de él, pero que cuando gratuitamente, mas en fraude de aquellos a quienes se les dejó alguna cosa, debe ser demandado con la acción útil el poseedor.

§ 2.- Aunque; parezca que el Pretor habla de los herederos instituidos, sin embargo, esto se extiende también a otros, de modo que: si hubiera un legatario a cuyo cargo se dejó un fideicomiso, y este hubiese hecho de modo que no se aceptase la herencia, y esto lo hizo con dolo, deberá ser demandado.

§ 3.- Si uno hubiere vendido la herencia, se considera ciertamente que la posee, no que hizo con dolo que no la poseyera.

5.- MARCELO; *Digesto, libro XII*.- Se considera excusado el patrono que hubiere prescindido de la institución, cuando por su liberto hubiese sido instituido heredero de otro modo que como conviene que él sea instituido; porque, aunque su esclavo hubiere sido instituido en el as, y por alguna circunstancia no hubiere podido adir la herencia por mandato de su señor, impunemente prescindiré éste de la herencia dejada por testamento.

6.- ULPIANUS; *libro L ad edictum*.- Quia autem is qui ab intestato possidet hereditatem conveniri potest, si omittit causam testamenti, quaesitum est, si quasi ex voluntate testatoris videatur omisisse, an cogatur praestare. Ut puta fratrem suum scripsit heredem et codicillos fecit ab intestato petitque a fratre, ut, si legitima hereditas ad eum pertinuerit, fideicommissa praestaret quibusdam: si igitur omissa causa testamenti ab intestato possideat hereditatem, videndum est, an legatariis cogatur respondere.

Et Iulianus libro trigesimo primo digestorum scribit cogendum primum legata praestare, mox dimissis legatis si quid superfuerit ex dodrante, tunc fideicommissa cogi praestare: ceterum si legata absumant dodrantem, tunc nihil fideicommissariis praestandum: habere enim integrum quadrantem legitimum heredem oportet. Ordo igitur a Iuliano adhibetur, ut prius legata praestentur, deinde ex superfluo fideicommissa, dummodo quadrans non tangatur. Ego puto Iuliani sententiam ita accipendam, ut, si omissa causa testamenti ab intestato possideat hereditatem, cogatur omnimodo legata praestare: nec enim utique omittit ei hereditatem permisit, qui fideicommissa ab eo relinquit ab intestato.

§ 1.- Plane si nominatim id ei permisit, dicemus non eum incidere in edictum, quia usus est facultate ea, quam ei testator concessit: quod si non ei concessit specialiter testator omittit, is ordo erit sequendus, quem Iulianus ostendit.

§ 2.- Quid deinde dicemus, is isdem et ex testamento legata et fideicommissa ab intestato fuerint relicta et praeterea aliis fideicommissa? An ordinem

6.- ULPIANUS; *On the Edict, Book L*.- For the reason that a party who is in possession of an estate on the ground of intestacy can be sued if he relinquishes his rights under the will, the question arose whether he can be compelled to make payment if he seems to have relinquished them in compliance with the wishes of the testator. For example, a man appointed a brother his heir, and then executed a codicil requesting his brother, if the estate should come to him by law, to discharge a trust in favor of certain individuals; and therefore it should be considered, he having renounced his rights under the will and obtained possession of the estate on the ground of intestacy, whether he will be liable to the legatees.

Julianus states, in the Thirty-first Book of the Digest, that he can be compelled in the first place to pay the legacies, and afterwards, they having been settled, should anything be remaining from the three-fourths of the estate, he can be required to discharge the trust. If, however, the legacies exhaust three-fourths of the estate, then nothing shall be paid under the trust, for the heir-at-law must have the fourth undiminished. Hence the order was established by Julianus that the legacies should first be discharged, and the trusts paid out of the remainder, with the understanding that the fourth should remain intact.

I think that the opinion of Julianus should be adopted, so that if the estate was rejected under the will, in order that it might be obtained ab intestato, the party ought by all means to be compelled to pay the legacies, for the reason that the testator who left him the trust to be discharged in case the succession was intestate did not authorize him to reject the estate under such circumstances.

§ 1.- If, however, it is evident that the testator expressly authorized him to do this, he will not become liable under the Edict, because he availed himself of the privilege which the testator granted him. But if the testator did not under the will specifically grant him the privilege of rejecting the estate, the order prescribed by Julianus should be followed.

§ 2.- But what shall we say where legacies are left by will, and trusts in case of intestacy, to the same person, and, in addition to this, trusts are left to other

6.- ULPIANO; *Comentarios al Edicto, libro L*.- Mas como el que posee la herencia abintestato puede ser demandado, si prescinde del título del testamento, se preguntó si estará obligado a pagar, si pareciera que prescindió de él como por voluntad del testador; por ejemplo, instituyó heredero a su hermano, hizo codicilos abintestato, y le pidió a su hermano, que, si a él le perteneciere la herencia legítima, pagase fideicomisos a ciertas personas; así, pues, si habiendo prescindido del título del testamento poseyera abintestato la herencia, se ha de ver si estará obligado a responderles a los legatarios.

Y escribe Juliano en el libro trigésimo primero del Digesto, que primeramente ha de ser obligado a pagar los legados, y que después, pagados los legados, si sobrare algo de los tres cuartos, es obligado en este caso a pagar los fideicomisos; pero que si los legados consumiesen los tres cuartos, nada se les ha de pagar entonces a los fideicomisarios, porque conviene que el heredero legítimo tenga íntegra la cuarta parte. Establécese, pues, por Juliano un orden, para que primeramente se paguen los legados, y después, del sobrante, los fideicomisos, con tal que no se le toque a la cuarta parte. Yo juzgo, que la opinión de Juliano se ha de entender de este modo, que si, habiendo prescindió del título del testamento, poseyera la herencia abintestato, sea de todos modos obligado a pagar los legados; porque ciertamente no le permitió que prescindiera de la herencia el que a su cargo le dejó abintestato fideicomisos.

§ 1.- Pero si expresamente le permitió esto, diremos que no incurre él en el Edicto, porque usó de la facultad que le concedió el testador; pero si el testador no le permitió especialmente que prescindiera de la herencia, se habrá de seguir el orden que señala Juliano.

§ 2.- Finalmente ¿qué diremos si a los mismos les hubieren sido dejados legados en el testamento, fideicomisos abintestato, y además fideicomisos a

illum debeamus facere, quem Iulianus monstrat, an vero contribuemus omnes fideicommissarios quasi aequales? Et magis est, ut ita distinguamus multum interesse, utrum incidit in edictum heres an non. Nam si incidit, praeferendi erunt hi quibus testamento relicta fuerunt quaedam: sin vero non incidit, quia haec fuit testatoris voluntas, ut daret ei facultatem et ab intestato succedendi, vel quia alia causa intercessit, quae secundum ea quae supra scripta sunt non offendit edictum, dicendum est contribui fideicommissa debere quasi exaequata.

§ 3.- Non simpliciter autem praetor pollicitus est se daturum actionem, sed causa cognita: nam sive invenit testatorem huius rei auctorem esse ipsumque permisisse ab intestato succedere aut si qua alia iusta causa omittendi intervenerit, utique non dabit actionem in eum legatorum.

§ 4.- Item si invenerit bona ad alium pertinere, non dabit actionem, si vero nulla suspicio collusionis religionem praetoris instruxerit.

§ 5.- Si autem is, cui auferri hereditas potest, aliquid possideat de hereditate et possidere desierit sine dolo malo, magis est, ut desinat conveniri.

§ 6.- Quod ergo tempus spectabimus, possideat nec ne? Litis contestatae tempus spectari debet.

§ 7.- Certe si vacantia bona quis possederit et quadriennium praeterierit, indubitate conveniri poterit ex hac parte edicti, quia et omisit causam testamenti et quia ab intestato possedit et quidem sic, ut praescriptione quadriennii tutus sit.

§ 8.- Si patronus ex debita sibi portione heres scriptus dato sibi coherede ex alia parte omiserit

parties? Shall we follow the same order established by Julianus, or shall we subject all the trustees to contribution as if they were equal? The better opinion is to ascertain whether it makes much difference if the heir becomes liable under the Edict, or not; for if he does become liable, those are to be preferred to whom something was left by the will; but if he does not, as it was the wish of the testator to grant him the privilege of succeeding ab intestato, or because he was admitted for some other reason, which, in accordance with what we have above stated, is not in violation of the Edict, it must be said that all the trusts ought to contribute as if they had all been placed on the same footing.

§ 3.- The Praetor does not promise to grant the action indiscriminately, but only where proper cause is shown; for if he should ascertain that the testator was the author of this arrangement, and himself had permitted the heir to succeed ab intestato, or if he should find that there was any other good reason for the rejection of the estate, he will not grant the legatees an action against him.

§ 4.- Also if the Praetor should ascertain that the property belongs to another, he will not grant an action, provided no suspicion of collusion influences the decision of the Praetor.

§ 5.- here, however, the person who can be deprived of the estate has in his possession any portion of the same, and relinquishes possession of it without being guilty of fraud, the better opinion is that he ceases to be liable to be sued.

§ 6.- What time then shall we consider, when investigating as to whether he is in possession or not? The time when issue was joined should be considered.

§ 7.- It is evident that where anyone is in possession of the property of an unclaimed estate, and that the term of four years has elapsed, suit can undoubtedly be brought against him, under this Section of the Edict, both for the reason that he refused to take under the will and because he is in possession on the ground of intestacy, and, indeed, as he is rendered safe by prescription on account of the expiration of four years.

§ 8.- Where a patron is appointed heir to the share of an estate to which he is entitled, and a co-heir is

otros, deberemos acaso seguir el orden, que indica Juliano, o contribuiremos a todos los fideicomisarios, como iguales? Y es preferible que distingamos de este modo, que importa mucho saber, si el heredero incurrió, o no, en el Edicto. Porque si incurrió, habrán de ser preferidos aquellos a quienes se les dejaron algunas cosas en el testamento; pero si no incurrió, porque fue voluntad del testador darle facultad para suceder también abintestato, o porque medió otra causa, que según lo que arriba se ha dicho no infringe el Edicto, se ha de decir, que se debe contribuir a los fideicomisos, como si fuesen iguales.

§ 3.- Mas el Pretor no prometió simplemente que él daría acción, sino con conocimiento de causa; porque si hallare que el testador fue autor de esto, y que él mismo permitió suceder abintestato, o si hubiere mediado alguna otra justa causa para dejar de aceptar la herencia, ciertamente que no dará contra éste la acción de los legados.

§ 4.- Asimismo, si hallare que los bienes pertenecen a otro, no dará acción, pero esto sin ninguna sospecha de colusión penetrare en la conciencia del Pretor.

§ 5.- Mas si aquel a quien se le puede quitar la herencia poseyera alguna cosa de la herencia, y hubiere dejado de poseer sin dolo malo, es más cierto que deja de ser demandado.

§ 6.- Luego ¿a qué tiempo miraremos si posee o no? Se debe mirar al tiempo en que fue contestada la demanda.

§ 7.- A la verdad, si uno hubiere poseído bienes vacantes, y hubieren transcurrido cuatro años, indudablemente podrá ser demandado en virtud de esta parte del Edicto, tanto porque prescindió del título del testamento, como porque poseyó abintestato, y ciertamente de modo, que esté seguro con la prescripción de cuatro años.

§ 8.- Si instituido el patrono heredero de la porción que se le debía, y habiéndosele nombrado un co-

institutionem, quia debita pars eius erat exhausta, omiserit et coheres, deinde possideat patronus ab intestato legitimam hereditatem totam, dandam in eum legatorum actionem Celsus libro sexto decimo digestorum ait, quae in Titium competeret, sufficeretque patrono, quod integram debitam sibi portionem habeat. Haec autem ita sunt, si coheres collisit cum patrono: aliter enim non esse patronum cogendum legata praestare: neque enim interdictum est, ut quis omittat hereditatem, si sine fraude id fiat.

§ 9.- Hoc edictum etiam ad contra tabulas bonorum possessionem pertinere magis dicendum est, scilicet ut qui accipiendo contra tabulas bonorum possessionem liberis parentibusque legata praestaret si omiserit eam bonorum possessionem et ab intestato possideat hereditatem, cogatur ea praestare, quae praestaret, si contra tabulas possessionem accepit.

§ 10.- Si libertas sub condicione fuerit data "si decem dederit" et omissa causa testamenti fuerit, non aliter libertas competet, quam si condicioni paritum sit.

7.- MARCELLUS; *libro XII digestorum*.- Quidam Titium et Maevium instituit heredes et centum Titio legavit: uterque omissa testamento legitimam adiit hereditatem. Non probe legatorum actionem Titius postulabit. Idem, si utrique legasset.

8.- ULPIANUS; *libro L ad edictum*.- Si quis sub condicione dandorum decem vel qua alia, quae in dando vel in faciendo fuit, heres institutus omissa causa testamenti ab intestato possideat hereditatem, videndum est, an huic, in cuius personam condicio collata est, subveniri debeat. Et magis est, ne

appointed with him, and he rejects the appointment for his share, because what is due to him has been already exhausted, and the co-heir also rejects his portion; and then the patron obtains possession of the entire estate ab intestato, by operation of law; Celsus says in the Sixteenth Book of the Digest that the same action should be granted against him which could have been brought against his co-heir Titius, and that it will be sufficient for the patron to have for himself the entire share to which he was legally entitled. This, however, is correct only where the co-heir is in collusion with the patron, for otherwise, the latter cannot be compelled to pay the legacies, as it is not forbidden for anyone to refuse an estate, if he does so without being guilty of fraud.

§ 9.- The better opinion is, that this Edict also applies to the praetorian possession of an estate contrary to the provisions of the will, so that, where a party, by taking possession of the estate in opposition to the will, must pay the legacies to the children, and the parents, and if he should fail to obtain possession of the estate, and should acquire possession of it on the ground of intestacy, he can be compelled to pay whatever he would have paid if he had obtained possession of the estate in opposition to the will.

§ 10.- Where freedom has been given to a slave on the condition of his paying ten aurei, and his rights under the will are relinquished by the heir, the slave will not be liberated unless the condition is complied with.

7.- MARCELLUS; *Digest, Book XII*.- A certain man appointed Titius and Maevius his heirs, and bequeathed a hundred aurei to Titius, and both of them relinquished their rights under the will, and entered upon the estate as heirs-at-law. Titius cannot properly bring an action to recover his legacy. The same rule will apply where the testator bequeathed legacies to both the heirs.

8.- ULPIANUS; *On the Edict, Book L*.- Where a person becomes an heir under the condition of paying ten aurei, or under any other condition which consists of either giving or doing something, and the heir, having relinquished his rights under the will, obtains possession of the estate on the ground of intestacy, it

heredero de la otra parte, hubiere prescindido de la institución, porque estaba exhausta la parte que se le debía, y también hubiere dejado de aceptarla el coheredero, y después el patrono poseyera abintestato toda la herencia legítima, dice Celso en el libro décimo sexto del Digesto, que se ha de dar contra él la acción de los legados, que competiría contra Ticio, y que al patrono le bastaría tener íntegra la porción a él debida. Mas esto es así, si hubo colusión entre el heredero y el patrono; porque de otra suerte, no ha de ser obligado el patrono a pagar los legados, porque no está prohibido que cualquiera deje de aceptar la herencia, si esto lo hiciera. sin fraude.

§ 9.- Preferentemente se ha de decir, que este Edicto pertenece también a la posesión de los bienes contra el testamento, esto es, que el que recibiendo contra el testamento la posesión de los bienes pagaría a los descendientes y a los ascendientes los legados, si hubiere dejado de aceptar la posesión de los bienes y poseyera la herencia abintestato, sea obligado a pagar los que pagaría, si contra el testamento hubiere recibido la posesión de los bienes.

§ 10.- Si se hubiere dado la libertad bajo esta condición: «si hubiere dado diez», y se hubiere prescindido del título del testamento, no competirá la libertad de otra suerte, que si se hubiera cumplido la condición.

7.- MARCELO; *Digesto, libro XII*.- Uno instituyó herederos a Ticio y a Mevio, y le legó cien a Ticio, y ambos adieron la herencia habiendo prescindido del testamento; Ticio no pedirá honradamente la acción de los legados; y lo mismo, si a ambos les hubiese dejado legados.

8.- ULPIANO; *Comentarios al Edicto, libro L*.- Si instituido uno heredero bajo la condición de dar diez, o bajo otra cualquiera, que consistió en dar o en hacer, poseyera abintestato la herencia habiendo prescindido del título del testamento, se ha de ver, si se deberá auxiliar a este a cuya persona fue referida la

subveniatur: neque enim legatarius est.

9.- PAULUS; *libro XLV ad edictum*.- Sed et si adhuc parendi condicioni tempus habeat, hac parte edicti non tenetur.

10.- ULPIANUS; *libro L ad edictum*.- Si non solus, sed cum alio possidet hereditatem is qui omisit causam testamenti, rectissime Iulianus ait, quod et Marcellus probat, dandam in ipsum quoque legatorum actionem utilem: nec enim aspernari debet obesse sibi factum heredis scripti, cui etiam profuerit. Hoc autem ita est, nisi si pecuniam accepit is qui omisit causam testamenti: tunc enim in solidum tenebitur.

§ 1.- Cum substitutis ab institutis legata fuissent relicta et tam instituti quam substituti omitta causa testamenti possideant ab intestato hereditatem, divus Pius rescripsit neque improbe neque imprudenter institutos legata recusare substitutis data: recte enim recusant in se dari legatorum fideicommissorum petitionem substitutio, cui liberum fuit adeunti hereditatem non fideicommissum petere, sed universa bona optinere.

§ 2.- Si duo sint heredes institutus et substitutus et ambo omitta causa testamenti ab intestato possideant hereditatem, quaestionis est, an ambo cogantur legata praestare et utrum unusquisque ea legata quae a se relicta sunt an vero ambo utraque legata cogantur praestare. Ego puto in solidum adversus singulos legatorum petitionem dandam: sed utrum eorum quae a se legata sunt an vero etiam eorum quae ab altero herede, videamus. Et alias proponamus institutum solum possidere hereditatem: eorum legatorum, quae sunt a se relicta, an etiam eorum, quae sunt a substituto relicta, actionem patietur?

should be considered whether or not relief should be granted to him for whose benefit the condition was imposed. The better opinion is that he is not entitled to relief, for he is not a legatee.

9.- PAULUS; *On the Edict, Book XLV*.- But if the parties still have time to comply with the condition, he will not be liable under this section of the Edict.

10.- ULPIANUS; *On the Edict, Book L*.- Where he who has relinquished his rights under the will is not alone, but together with another party has possession of the estate, Julianus very properly says, and his opinion is approved by Marcellus, that an equitable action should also be granted against him in favor of the legatees, for he ought not to object because the act of the appointed heir prejudices him, since he also profited by it. This, however, is correct where the person who relinquishes his rights under the will did not receive any money for doing so, for he will then be liable for the entire amount.

§ 1.- Where legacies have been left to be discharged by appointed heirs in favor of substitutes, and the said appointed heirs as well as the substitutes have obtained possession of the estate on the ground of intestacy, after their rights under the will have been relinquished by them, the Divine Pius stated in a Rescript that the appointed heirs can honorably refuse to pay the legacies bequeathed to the substitutes; for they may very properly refuse to pay any legacy or trust to a substitute who claims it, if he was free to enter upon the estate, and to obtain all the property belonging to it without demanding the discharge of the trust.

§ 2.- Where there are two heirs, one of whom was appointed and the other substituted, and both of them having relinquished their rights under the will obtain possession of the estate ab intestato; the question arises whether both of them can be compelled to pay the legacies, and whether each one of them is obliged to pay those legacies, with which he was charged, or whether both of them should pay the legacies together. I think an action should be granted in favor of the legatees against each one of them, for the payment of all the legacies; but let us consider whether each one is obliged to pay the legacies with

condición; y es más cierto que no se le auxilia, porque no es legatario;

9.- PAULO; *Comentarios al Edicto, libro XLV*.- pero aun si tuviese todavía tiempo de cumplir la condición, no está obligado por esta parte del Edicto.

10.- ULPIANO; *Comentarios al Edicto, libro L*.- Si no solo, sino con otro, poseyera la herencia, el que prescindió del título del testamento, con muchísima razón dice Juliano, y lo aprueba también Marcelo, que se ha de dar aun contra este la acción útil de legados; porque no debe desestimar que le perjudique el hecho del heredero instituido aquel a quien también le habría aprovechado. Mas esto es así, si no recibió dinero el que prescindió del título del testamento; porque en este caso estará obligado a la totalidad.

§ 1.- Cuando a cargo de los instituidos se hubiesen dejado legados a los substitutos, y tanto los instituidos, como los substitutos poseyera abintestato la herencia habiendo prescindido del título del testamento, respondió por rescripto el Divino Pío, que los instituidos deniegan no improba, ni imprudentemente, los legados dados a los substitutos; porque con razón rehúsan que la petición de los legados o de los fideicomisos se le dé contra ellos al substituto, el cual, añadiendo la herencia, tuvo en su arbitrio no pedir el fideicomiso, sino obtener todos los bienes.

§ 2.- Si fueran dos los herederos, uno instituido y otro substituido, y ambos poseyera la herencia abintestato habiendo prescindido del título del testamento, hay la duda de si estarán obligados ambos a pagar los legados, y de si cada uno estará obligado a pagar los legados que se dejaron a su cargo, o ambos a pagar unos y otros legados; yo creo, que se ha de dar contra cada uno por la totalidad la petición de legados. Pero veamos, si de los que se legaron a su cargo o si también de los que a cargo de otro heredero; y supongamos de otra suerte, que solo el instituido posee la herencia, ¿soportará él la acción

Dicendum est ita demum etiam eorum, si dolo substituti perveniat ad institutos hereditas sine pecunia: nam si pecuniam accepit substitutus, ipse erit conveniendus.

Item si solus substitutus possideret, si quidem pecunia accepta institutus omisisset, dicemus institutum suis legatariis respondere debere, substitutum suis: si autem sine pecunia, adversus substitutum dabimus actionem. Nunc cum ambo possideant, melius dicetur singulos suis legatariis respondere debere.

11.- IAVOLENUS; *libro VII epistularum*.- Si ab instituto et substituto eadem res mihi legata sit et omissa causa testamenti hereditatem possideant lege, etiamsi ab utroque solidum mihi debetur, tamen ab uno legatum consecutus ab altero petere non potero: eligere itaque reum potero.

12.- ULPIANUS; *libro L ad edictum*.- De libertatibus quoque in hoc casu quaesitum est, an competant tam hae quae ab instituto quam hae quae a substituto datae sunt. Et magis est, ut competant, tam directae quam fideicommissariae.

§ 1.- Heredem eius, qui omissa causa testamenti ab intestato possidet hereditatem, in solidum legatorum actione teneri constat: magis est enim rei persecutionem quam poenam continere et ideo et per-

which he himself was charged, or also those with which the other heir was charged. Let us also suppose that the appointed heir alone was in possession of the estate: will he be liable to an action for the payment of the legacies with which he was charged, or will he be also responsible for those with which the substitute was charged? It must be held that he will only be liable for the legacies with which the substitute was charged in case the estate should come into the hands of the heirs appointed under the will, on account of the bad faith of the substitute, where no money was paid; for if the substitute received any money, he himself should be sued.

Moreover, if the substitute alone is in possession of the estate, and the appointed heir should reject it in consideration of having received a sum of money, we say that he will be liable to his legatees, and the substitute to his own; but where no money has been paid, we will grant an action against the substitute. If, however, both parties are in possession, the better opinion is that each one will be liable to his respective legatees.

11.- JAVOLENUS; *Epistles, Book VII*.- Where the same property has been bequeathed to me to be delivered by both the appointed and the substituted heirs, and they, having relinquished their rights under the will, have possession of the estate by operation of law, the entire legacy is due to me from both of them; still, if I have obtained it from one, I cannot collect it from the other, hence I can proceed against whichever one of them I choose.

12.- ULPIANUS; *On the Edict, Book L*.- The question also arose in this case with respect to grants of freedom, whether it was proper that they should be conferred by both of the heirs, when the one appointed as well as the substitute were charged with their execution. The better opinion is that both those which were direct and those which were granted in trust become operative.

§ 1.- It is established that the heir of anyone who relinquished his rights under a will in order to obtain possession of the estate on the ground of intestacy is liable in an action brought by the legatees to recover

de los legados, que se dejaron a su cargo o también de los que se dejaron a cargo del substituto? Se ha de decir, que también de éstos, solamente si por dolo del substituto fuera la herencia a los instituidos sin haber mediado dinero; porque si el substituto recibió dinero, el mismo deberá ser demandado.

Asimismo, si solo el substituto poseyera la herencia, si verdaderamente hubiese dejado de aceptarla el instituido habiendo recibido dinero, diremos que el instituido debe responder a sus propios legatarios, y el substituto a los suyos; mas si sin haber mediado dinero, daremos la acción contra el substituto. En el caso presente, poseyéndola ambos, más bien se dirá, que cada uno debe responder a sus propios legatarios.

11.- JAVOLENO; *Epístolas, libro VII*.- Si una misma cosa me hubiera sido legada a cargo del instituido y del substituto, y habiendo prescindido del título del testamento poseyeran la herencia por la ley, aunque por ambos herederos se me debe la totalidad, sin embargo, habiendo conseguido de uno el legado, no podré pedírselo al otro, y podré por lo tanto elegir el deudor.

12.- ULPIANO; *Comentarios al Edicto, libro L*.- En este caso se cuestionó también respecto a las libertades, sobre si competen tanto las que se dieron a cargo del instituido, como las que a cargo del substituto; y es más cierto que competen así las directas, como las fideicomisarias.

§ 1.- Consta, que el heredero de quien posee abintestato la herencia habiendo prescindido del título del testamento, está obligado solidariamente por la acción de los legados; porque es más cierto que

petuam esse. Hoc autem ita est, nisi propter dolum defuncti conveniatur heres: tunc enim in id quod ad eum pervenit conveniretur.

13.- GAIUS; *libro XVII ad edictum provinciale*.- Etsi non totam aliquis hereditatem partemve eius, ex qua heres institutus est, ab intestato possideat, sed vel minimam portiunculam vel etiam unam aliquam rem, tenetur hoc edicto,

14.- GAIUS; *libro II de testamentis ad edictum praetoris urbani*.- Quamvis non proprie pars hereditatis in una re intellegatur.

15.- GAIUS; *libro XVII ad edictum provinciale*.- Nec id iniquum est, cum ex suo quisque vitio hoc incommodo adficiatur.

16.- GAIUS; *libro II de testamentis ad edictum praetoris urbani*.- Cum enim hereditas ab eo quoque peti possit, qui unam aliquam rem hereditario nomine possideat, dubitari non oportet, quin verum sit quod diximus.

17.- GAIUS; *libro XVII ad edictum provinciale*.- Si quis omissa causa testamenti omnino eam hereditatem non possideat, excluduntur legatarii: nam liberum cuique esse debet etiam lucrosam hereditatem omittere, licet eo modo legata libertatesque intercidunt. Sed in fideicommissariis hereditatibus id provisum est, ut, si scriptus heres nollet adire hereditatem, iussu praetoris adeat et restituat: quod beneficium his, quibus singulae res per fideicommissum relictas sint, non magis tributum est quam legatariis.

the entire amount; for the proceeding rather has reference to the recovery of the property than the penalty, and therefore the action is a perpetual one. This, however, will not be the case if the heir is sued on account of the bad faith of the deceased, for then an action can be brought against him for the property which came into his hands.

13.- GAIUS; *On the Provincial Edict, Book XVII*.- Even if the heir should not come into possession of the entire estate, or a large portion of the same on the ground of intestacy, but only of a very small part of that for which he was appointed, and also where he only holds a single article belonging to it, he will be liable under this Edict.

14.- THE SAME; *Concerning Testaments; On the Edict of the Urban Praetor, Book II*.- Even though, properly speaking, a single article is not understood to be part of an estate.

15.- THE SAME; *On the Provincial Edict, Book XVII*.- For this is not unjust, since the person suffers this inconvenience through his own fault,

16.- THE SAME; *Concerning Testaments; On the Edict of the Urban Praetor, Book II*.- For since an estate can be claimed on the ground of hereditary right by a party, who is in possession of a single article belonging to it, it cannot be doubted that what we have stated is true.

17.- THE SAME; *On the Provincial Edict, Book XVII*.- If anyone, having relinquished his rights under the will, should not be in possession of the entire estate, the legatees are excluded; for everyone should be free to reject even a profitable inheritance, even though in this way legacies and grants of freedom may be annulled. It has been provided, however, with reference to estates bequeathed in trust, that if the appointed heir should decline to accept the estate, he can be compelled to do so by order of the Praetor, and to surrender it to the beneficiaries of the trust; but this advantage is not enjoyed by those to whom separate articles have been bequeathed by way of trust, any more than it is by legatees.

esta contiene la persecución de la cosa más bien que una pena, y que por esto también es perpetua. Mas esto es así, si no fuera demandado el heredero por causa de dolo del difunto; porque entonces, sería demandado por aquello que fue a su poder.

13.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- Y si uno no poseyera abintestato toda la herencia o la parte de la misma, en que fue instituido heredero, sino o una mínima porción, o aún alguna sola cosa, está obligado a este Edicto,

14.- EL MISMO; *Comentarios al Edicto del Pretor urbano, libro II; De los testamentos*.- Aunque con propiedad no se entienda que hay parte de una herencia en una sola cosa.

15.- EL MISMO; *Comentarios al Edicto provincial, libro XVII*.- Y esto no es injusto, porque cada cual sufre este perjuicio por su propia culpa.

16.- EL MISMO; *Comentarios al Edicto del Pretor urbano, libro II; De los testamentos*.- Pues como la herencia se le puede pedir también al que posee una sola cosa a título de herencia, no se debe dudar de que sea verdad lo que hemos dicho.

17.- EL MISMO; *Comentarios al Edicto provincial, libro XVII*.- Si alguno, habiendo prescindido del título del testamento, no poseyera en manera alguna la herencia, son excluidos los legatarios; porque cada cual debe tener libertad aun para dejar de aceptar una herencia lucrativa, aunque de este modo se extinguen los legados y las libertades. Pero respecto a las herencias fideicomisarias se determinó, que si el heredero instituido no quisiera adir la herencia, la ada por mandato del Pretor, y la restituya; cuyo beneficio se les concedió a estos a quienes se les dejaron cosas particulares por fideicomiso, no de otra suerte que a los legatarios.

18.- GAIUS; *libro II de testamentis ad edictum praetoris urbani*.- Si duo heredes instituti ambo omisa causa testamenti ab intestato possideant hereditatem, tunc, quia uterque praetorio iure perinde habetur atque si ex testamento hereditatem adisset, pro partibus in singulos competit actio.

§ 1.- Admonendi sumus huic, in quem ex hac parte edicti legatorum actio datur, beneficium legis Falcidia concedendum.

19.- GAIUS; *libro XVII ad edictum provinciale*.- Praeterea patrono quoque qui ex asse heres institutus est si ab intestato possederit hereditatem, commodum partis debitae, quod habiturus foret, si ex testamento adisset hereditatem, saluum ei debet esse.

20.- ULPIANUS; *libro IV disputationem*.- Si eadem res diversis personis ab instituto et substituto fuerit relicta, non uterque, sed qui ab instituto accepit solus vindicabit.

21.- IULIANUS; *libro XXVII digestorum*.- Si filius meus a matre sua heres scriptus fuerit et ego testamenti causa omisa bonorum possessionem eiusdem filii nomine petiero, actio legatorum in me dari debet non secus ac si ipse heres scriptus omisa causa testamenti bonorum possessionem ab intestato accepissem.

22.- IULIANUS; *libro XXXI digestorum*.- Si in testamento ita scriptum fuerit: "Titius heres esto: si Titius heres erit, Maevius heres esto" et Titius omisa causa testamenti hereditatem legitimam possederit, Maevio adversus eum petitio hereditatis dari non debet pro parte, quam habiturus esset, si testamenti causa omisa non fuisset. Cum enim omisso

18.- THE SAME; *Concerning Testaments; On the Edict of the Urban Praetor, Book II*.- Where two appointed heirs, both having relinquished their rights under the will, obtain possession of an estate on the ground of intestacy, then, in accordance with the Praetorian Law, both will be considered as having entered upon the estate under the will, and an action will lie against each of them for his respective share.

§ 1.- We should note that the benefit of the Lex Falcidia must be accorded to the heir against whom an action is granted in favor of the legatees by this section of the Edict.

19.- THE SAME; *On the Provincial Edict, Book XVII*.- Moreover, where a patron has been appointed heir to the whole estate, and by renouncing his rights under the will obtains possession ab intestato, he should always be entitled to the benefit of the share which is due to him, and which he would have obtained if he had entered upon the estate by virtue of the will.

20.- ULPIANUS; *Disputations, Book IV*.- Where the same property was left to different persons, and both the appointed heir and the substitute were charged with its delivery, both of said legatees are not entitled to recovery, but only the one who received it from the appointed heir.

21.- JULIANUS; *Digest, Book XXVII*.- If my son should be appointed heir by his mother, and I, having relinquished my testamentary rights, demand possession of the estate in the name of my said son, an action in favor of the legatees should be granted against me, just as if I myself had been appointed the heir, and, having relinquished my rights under the will, had obtained possession of the property of the estate on the ground of intestacy.

22.- THE SAME; *Digest, Book XXXI*.- Where the following provision was inserted into a will: "Let Titius be my heir, and if Titius becomes my heir, let Maevius become my heir"; and Titius, having relinquished his testamentary rights, obtains possession of the estate as heir-at-law, the petition to recover the estate should not be granted against him

18.- EL MISMO; *Comentarios al Edicto del Pretor urbano, libro II, De los testamentos*.- Si instituidos dos herederos, ambos poseyeran la herencia abintestato habiendo prescindido del título del testamento, en este caso, como por derecho Pretorio ambos son considerados lo mismo que si hubiesen adido la herencia en virtud del testamento, compete contra cada uno la acción respecto a su parte.

§ 1.- Debemos tener entendido, que a este, contra el cual se da en virtud de esta parte del Edicto la acción de los legados, se le ha de conceder el beneficio de la ley Falcidia.

19.- EL MISMO; *Comentarios al Edicto provincial, libro XVII*.- Además de esto, también al patrono que fue instituido heredero del as, si poseyere la herencia abintestato, le debe quedar a salvo el beneficio de la parte debida, que habría de haber tenido, si hubiere adido la herencia en virtud del testamento.

20.- ULPIANO; *Disputas, libro IV*.- Si a diversas personas se les hubiere dejado la misma cosa a cargo del instituido y del substituto, no la reivindicarán ambos, sino solo el que la recibió del instituido.

21.- JULIANO; *Digesto, libro XXVII*.- Si mi hijo hubiere sido instituido por su madre, y yo hubiere pedido en nombre del mismo hijo la posesión de los bienes habiendo prescindido del título del testamento, se debería dar contra mí la acción de los legados, no de otro modo, que si instituido yo mismo heredero hubiese recibido abintestato la posesión de los bienes habiendo prescindido del título del testamento.

22.- EL MISMO; *Digesto, libro XXXI*.- Si en el testamento se hubiere escrito de este modo: «sea heredero Ticio; si Ticio fuere heredero, sea heredero Mevio», y habiendo prescindido del título del testamento poseyere Ticio la herencia legítima, no se le debe dar contra él a Mevio la petición de la herencia respecto a la parte que habría de tener, si no

testamento hereditas possidetur, legatorum quidem et libertatum ratio habenda est, quia aliter quam ab herede dari non potuerunt: hereditatis vero quae ita data est rationem habere praetor non debet: sua enim culpa testator sub hac condicione hereditatis partem dedit, quam potuit pure dare.

§ 1.- Quare et si ita scriptum fuisset: "Titius heres esto: quisquis mihi ex supra scriptis heres erit, Stichus liber heresque esto" et Titius omisso testamento hereditatem possideat, libertatem praetor Stichus tueri non debet nec hereditatis petitionem ei dare.

§ 2.- Si quis hoc modo testamentum scripserit: "Titius heres esto: si Titius heres non erit, Maevius heres esto: quisquis mihi ex supra scriptis heres erit, Maevio, si mihi heres non erit, centum dato", deinde Titius omisso testamento legitimam hereditatem possideat, an Maevio, cuius in potestate fuit, ut ex substitutione adeundo totam hereditatem haberet, legatorum actio dari debeat, quaeritur. Et placet dari, quia nihil prohibet Maevium iustam causam habuisse, propter quam nollet negotiis hereditariis implicari.

23.- ULPIANUS; *libro XLVI ad edictum*.- Si filius qui mansit in patris potestate, item filia heredes instituti praeterito fratre emancipato, qui contra tabulas accipere possessionem potuit, ut intestati patris possessionem acceperint, legata omnibus praestabunt nec filia dotem suam fratri conferet, cum ut scripta videatur hereditatem habere.

in favor of Mævius for the share of the estate to which he would have been entitled, if Titius had not relinquished his hereditary rights. For, as the heir obtains possession of the estate when testamentary rights are relinquished, the legacies and grants of freedom must be taken into account, since otherwise they cannot be granted except by the heir. The Praetor, however, cannot intervene where an estate is disposed of in this way, for the testator is to blame for having bequeathed a part of it under such a condition, when he could have bequeathed it absolutely.

§ 1.- Wherefore, if the following provision was inserted into a will: "Let Titius be my heir, and if any of the above-mentioned persons whom I have appointed becomes my heir, let Stichus be free and my heir", and Titius having relinquished his rights under the will obtains possession of the estate, the Praetor cannot assure Stichus of his freedom, nor can he grant him an action for the recovery of the estate.

§ 2.- Where anyone draws up a will as follows: "Let Titius be my heir, and if Titius should not become my heir, let Mævius be my heir, and if any of the heirs whom I have previously appointed becomes my heir, I bequeath a hundred aurei to Mævius, if he should not become my heir". Titius relinquished his rights under the will and obtained possession of the estate by operation of law, and the question arises whether an action for the recovery of the estate should be granted to Mævius, in whose power it was to acquire it all by entering upon the same by virtue of the substitution. It was decided that Mævius would be entitled to the action, because nothing prevented him from having a good reason for not involving himself in the affairs of the estate.

23.- ULPIANUS; *On the Edict, Book XLVI*.- Where a son, who is under the control of his father, and also a daughter were appointed heir, an emancipated brother, having been passed over, obtained possession of the estate in opposition to the will. By this means the heirs acquired the estate of their father on the ground of intestacy, and paid all the legacies. The daughter, however, did not divide her dowry with her brother, as she was held to be entitled

se hubiese prescindido del título del testamento. Porque cuando habiéndose prescindido del testamento se posee la herencia, se ha de tener ciertamente cuenta de los legados y de las libertades, porque no se podrán dar de otro modo que por el heredero; Pero el Pretor no debe tener cuenta de la herencia, que fue dada de esta manera, porque por su culpa dió el testador bajo esta condición parte de la herencia, que pudo dar puramente.

§ 1.- Por lo cual, también si se hubiese escrito de este modo: «sea heredero Ticio; cualquiera que de los arriba escritos fuere mi heredero, sea libre heredero Stico», y habiendo prescindido del testamento Ticio poseyera la herencia, el Pretor no debe amparar la libertad de Stico, ni darle la petición de la herencia.

§ 2.- Si alguno hubiere escrito de este modo su testamento: «sea heredero Ticio; si Ticio no fuera heredero, sea heredero Mevio; cualquiera que de los arriba escritos fuere mi heredero, déle ciento a Mevio, si no fuere mi heredero», y después, habiendo prescindido del testamento, poseyera Ticio la herencia legítima, se pregunta, si se deberá dar la acción de los legados a Mevio, en cuya facultad estuvo tener toda la herencia adiéndola en virtud de la substitución; y si se determina, que se le dé, porque nada impide que Mevio haya tenido justa culpa por la que no quiera mezclarse en los negocios de la herencia.

23.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Si instituidos herederos el hijo que permaneció bajo la potestad de su padre, y también una hija habiendo sido preferido el hermano emancipado, que pudo recibir la posesión contra él testamento, hubieren recibido la posesión como si hubiera fallecido intestado su padre, les pagarán a todos los legados, y la hija no le llevará a colación a su hermano su propia dote, porque se considera que

24.- PAULUS; *libro LX ad edictum*.- Si dolo tutoris omiserit pupillus causam testamenti et legitimam hereditatem possideat, danda est legatorum actio in pupillum, sed eatenus, quatenus hereditas ei adquisita est. Quid enim, si cum alio possideat hereditatem?

§ 1.- Sed hoc et in eo qui pubes est plerique putant observandum, ut pro qua parte possideat, teneatur, quamvis praetor perinde in eum det actionem, atque si adisset hereditatem.

25.- CELSUS; *libro XVI digestorum*.- Cui servus ipsius substitutus est, servum suum adire iussit. Si idcirco fecit, ne legata praestaret, utraque praestabit, et qua heres est et qua omissa causa testamenti possidet ex substitutione hereditatem, salva Falcidia ei servata.

26.- PAPINIANUS; *libro XVI quaestionum*.- Iulianus scribit patrem, qui filiam sibi substitutam iussit adire hereditatem, legata quae ab ipso data sunt ex sententia edicti praestaturum, quoniam filia patri substituitur in casu, non ut arbitrium eligendi relinquatur: sed si varia legata supra dodrantem data sint, eorum prius rationem habendam, quae a filia relictas sunt. Non enim caret dolo pater, qui honore proprio omisso propter compendium alienam institutionem maluit.

§ 1.- Denique si filiae pater substitutus adiit hereditatem, nihil eum dolo facere Iulianus existimat, quia nemo filiae patrem contra votum parentum

to her share of the estate as an appointed heir.

24.- PAULUS; *On the Edict, Book LX*.- Where a ward relinquishes his testamentary rights through the fraudulent representations of his guardian, and obtains the estate as heir-at-law, actions to recover the legacies should be granted against the ward, but only to the extent that the estate had been acquired by him. But what if he had obtained possession of the estate along with another?

§ 1.- Many authorities think that this rule should be observed only with reference to a youth who has arrived at puberty, and that he should only be liable for the share of the estate in his possession; even though the Praetor grants an action against him just as if he had entered upon the estate.

25.- CELSUS; *Digest, Book XVI*.- A man for whom his own slave was substituted ordered him to enter upon the estate. If he did this for the purpose of avoiding payment of the legacies, he shall pay them all, both for the reason that he is the heir, and because having relinquished his rights under the will he has possession of the estate by virtue of the substitution, with the exception of the portion reserved by the Falcidian Law.

26.- PAPINIANUS; *Questions, Book XVI*.- Iulianus says that where a father ordered his daughter, who had been appointed a substitute for himself, to accept an estate; he will, by the terms of the Edict, be compelled to pay the legacies with which he was charged, since his daughter was substituted instead of her father, and the latter was not given the right of choice. Where, however, the different legacies amount to more than three-quarters of the estate, an account must be taken, in the first place, of those with which the daughter was charged, for fraud will be imputed to the father, if, having rejected the honor conferred upon him, he prefers the appointment of another as heir, on account of the benefit which may accrue to him therefrom.

§ 1.- Iulianus thinks that if a father who is substituted for his daughter enters upon an estate, he will not be guilty of bad faith, for no one is considered

tiene la herencia como instituida.

24.- PAULO; *Comentarios al Edicto, libro LX*.- Si por dolo del tutor hubiere prescindido el pupilo del título del testamento, y poseyera la herencia legítima, se ha de dar contra el pupilo la acción de los legados, pero solamente en cuanto para él se adquirió la herencia. ¿Pero qué será, si con otro poseyera la herencia?

§ 1.- Pero los más creen que esto se ha de observar también respecto al que es púbero, de suerte que esté obligado respecto a la parte que posea, aunque el Pretor dé contra él la acción, lo mismo que si hubiese, adido la herencia.

25.- CELSO; *Digesto, libro XVI*.- Uno a quien le fue substituido el esclavo del mismo, mandó que su esclavo adiese la herencia; si lo hizo para no pagar los legados, pagará unos a otros, tanto porque es heredero, como porque habiendo prescindido del título del testamento posee la herencia en virtud de la substitución, reservándosele salva la Falcidia.

26.- PAPIANO; *Cuestiones, libro XVI*.- Escribe Juliano, que el padre que mandó que adiese la herencia la hija a él substituida, deberá pagar según el sentido del Edicto los legados, que se dieron a cargo del mismo, porque la hija es substituida al padre en su caso, no para que se deje el arbitrio de elegir. Pero si se hubieran dado varios legados que excedieran de los tres cuartos, se ha de tener cuenta primeramente de los que se dejaron a cargo de la hija; porque no conoce de dolo el padre, que habiendolo prescindido de su propio honor prefirió por razón de ganancia una institución ajena.

§ 1.- Finalmente, si el padre substituido a la hija adió la herencia, opina Juliano, que él no hace nada con dolo, porque se considera que nadie substituye el

substituere videtur, sed ut arbitrium eligendi relinquat.

27.- PAPINIANUS; *libro VI responsorum*.- Mater secundis tabulis impuberi filio substituta locum edicto facit, si omisso testamento legitimam hereditatem filii possideat. Idem iuris erit et si filio heres data sit et substituta.

§ 1.- In sententiam edicti propter legatorum causam frater incidisse non videbatur, qui filium suum substitutum impuberi testamento fratris non emancipavit, sed ab intestato per eum possidere coepit.

§ 2.- In eum, qui testamento scriptus heres non fuit, si fraudis consilio cum heredibus scriptis participato legitimam hereditatem solus possideat, actio legatorum ex sententia praetoris dabitur.

28.- MAECENATUS; *libro IV fideicommissorum*.- Si servum heredem institutum dominus, qui ipse rogatus fuerat fideicommissum praestare, priusquam adire iuberet, vendiderit, praestare id debet, cum per pretium servi hereditatis quoque aestimationem consequatur.

§ 1.- Institutus heres et rogatus restituere hereditatem si omissa causa testamenti legitimam hereditatem possideat, non dubie ut legata ceteraque fideicommissa, ita hereditatem quoque restituere compellendus est, libertates quoque tam directas quam fideicommissarias. Sed si alienos servos rogatus sit manumittere, utique redimere eos debet. Eam autem decessionem patietur is cui restituta fuerit hereditas, quam is qui ei restituit passurus fuit.

to have substituted a father for his daughter against the will of the parent, but in order that he might have the power of making his choice.

27.- THE SAME; *Opinions, Book VI*.- Where a mother is substituted for her son under the age of puberty, there is ground for the application of the Edict, if, having relinquished her testamentary rights, she obtains possession of the estate of her son by operation of law. The same rule applies if she should be appointed the heir and also the substitute of her son.

§ 1.- A brother is not considered to come within the terms of the Edict, so far as the legacies are concerned, who did not emancipate his son who had been substituted for a boy under the age of puberty by the will of his brother; but he will obtain possession of the property of the estate through him on the ground of intestacy.

§ 2.- An action in favor of the legatees will be granted by the decree of the Praetor against a party who was not appointed testamentary heir, if he participated in a fraudulent agreement with the appointed heirs in order to obtain sole possession of the estate by operation of law.

28.- MARCIANUS *Trusts, Book IV*.- Where a master sells a slave whom he had appointed his heir, and who himself had been charged with a trust, and he does this before he orders him to enter upon the estate, he should discharge the trust, because by obtaining the price of the slave he also obtained the value of the estate.

§ 1.- Where a party is appointed heir and is requested to deliver the estate, and having relinquished his testamentary rights, obtains possession of the estate by operation of law, there is no doubt that he can be compelled to surrender the estate, and also the legacies and other property left in trust, as well as execute any grants of freedom direct, as well as indirect. Where, however, he is charged to manumit slaves belonging to others, he should redeem them, and he to whom the estate was surrendered, as well as he who surrenders it, must both share the loss.

padre a la hija contra el deseo de los ascendientes, sino para dejarle el arbitrio de elegir.

27.- EL MISMO; *Respuestas; libro VI*.- La madre substituida a su hijo impúbere en el segundo testamento da lugar, al Edicto, si habiendo prescindido del testamento poseyera la herencia legítima del hijo; el mismo derecho habrá, si fue nombrada heredera con el hijo, y a él substituida.

§ 1.- Uno no se consideraba que por causa de los legados incurrió en la disposición del Edicto el hermano que no emancipó a su hijo substituido a un impúbere en el testamento de su hermano, sino que por medio de él comenzó a poseer abintestato los bienes,

§ 2.- Contra el que no fue instituido heredero en el testamento se dará por sentencia del Pretor la acción de los legados, si, habiendo participado con los herederos instituidos de propósito defraude poseyese solo la herencia legítima.

28.- MECIANO; *Fideicomisos, libro IV*.- Si el señor, a quien se le había rogado que pagase un fideicomiso, hubiere vendido un esclavo instituido heredero, antes que le mandase adir la herencia, debe pagarlo, porque con el precio del esclavo se consigue también la estimación de la herencia.

§ 1.- El heredero instituido a quien también se le rogó que restituyera la herencia, si poseyera la herencia legítima habiendo prescindido del título del testamento, a de ser compelido sin duda a restituir como los legados y los demás fideicomisos, también la herencia, y las libertades, tanto directas como fideicomisarias. Pero si se le hubiera rogado que manumitiese esclavos ajenos, deberá ciertamente redimirlos; pero aquel a quien se le hubiere restituido la herencia sufrirá la disminución que haya de haber sufrido el que a él se la hubiera restituido.

29.- ULPIANUS; *libro V fideicommissorum*.- Qui omissa causa testamenti ab intestato possidet hereditatem, servos ad libertatem perducere debet, ne eis factum noceat eius qui ex testamento adire noluit: sic tamen, ut habeat liberos.

30.- HERMOGENIANUS; *libro III iuris epitomatum*.- Qui omissa causa testamenti pro emptore vel pro dote vel pro donato sive alio quolibet titulo, exceptis pro herede et pro possessore, possideat hereditatem, a legatariis et fideicommissariis non convenitur.

TIT. V

DE SENATUS CONSULTO SILANIANO ET
CLAUDIANO QUORUM TESTAMENTA
NE APERIANTUR

1.- ULPIANUS; *libro L ad edictum*.- Cum aliter nulla domus tuta esse possit, nisi periculo capitis sui custodiam dominis tam ab domesticis quam ab extraneis praestare servi cogantur, ideo senatus consulta introducta sunt de publica quaestione a familia necatorum habenda.

§ 1.- Domini appellatione continentur qui habet proprietatem, etsi usus fructus alienus sit.

§ 2.- Qui servum bona fide possedit, domini appellatione non continebitur, nec qui usum fructum solum habuit.

§ 3.- Servus pignori datus, quod attinet ad debitoris necem, per omnia perinde habetur atque si pignori datus non esset.

§ 4.- Servi appellatione etiam hi continentur, qui sub condicione legati sunt: nam medio tempore heredis sunt, nec quod condicio existens efficit, ut desi-

29.- ULPIANUS; *Trusts, Book V*.- Where anyone, having relinquished his rights under the will, obtains possession of an estate on the ground of intestacy, he must bestow freedom on the slaves, nor can this act of him who declines to take under the will injure them, as they become his freedmen.

30.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Where an heir, having relinquished his rights under the will, obtains possession of the estate as a purchaser, or on account of a dowry, or by way of donation, or by any other title except that of heir or possessor, he will not be liable to an action brought by the legatees.

TITLE V

CONCERNING THE SILANIAN AND
CLAUDIAN DECREES OF THE SENATE BY
THE PROVISIONS OF WHICH WILLS
CANNOT BE OPENED

1.- ULPIANUS; *On the Edict, Book L*.- As no household can be safe unless slaves are compelled, under peril of their lives, to protect their masters, not only from persons belonging to his family, but also from strangers, certain decrees of the Senate were enacted with reference to putting to public torture all the slaves belonging to a household in case of the violent death of their master.

§ 1.- A person is included in the appellation of master who possesses the ownership of the slaves, even though the usufruct of the same may belong to another.

§ 2.- Where anyone is in possession of a slave in good faith, but who is, in fact, free, he is not included in the appellation of master; nor is he, either, who has only the usufruct of a slave.

§ 3.- A slave given by way of pledge is, so far as the death of the debtor is concerned, in every respect considered as if he had not been pledged.

§ 4.- Those also are included in the appellation of slaves, who are bequeathed under a certain condition; for in the meantime they belong to the heir, and as,

29.- ULPIANO; *Fideicomisos, libro V*.- El que habiendo prescindido del título del testamento posee abintestato la herencia, debe poner en libertad a los esclavos, para que no les perjudique el hecho de quien no quiso adir la herencia en virtud del testamento, pero esto de suerte, que los tenga como liberos.

30.- HERMOGENIANO; *Epítome del derecho, libro III*.- El que habiendo prescindido del título del testamento poseyera la herencia como comprador, o en dote, o por donación, o con otro cualquier título, excepto como heredero, y como poseedor, no es demandado por los legatarios ni por los fideicomisarios.

TÍTULO V

DE LOS SENADOCONSULTOS SILANIANO
Y CLAUDIANO, QUE TRATA DE QUE
NO SE ABRAN LOS TESTAMENTOS
DE ALGUNOS

1.- ULPIANO; *Comentarios al Edicto, libro L*.- Como ninguna casa pueda estar segura de otro modo, sino si los esclavos estuvieran obligados bajo pena capital a custodiar a sus señores, tanto respecto a los domésticos, como respecto a los extraños, por esta razón se establecieron Senadoconsultos sobre el tormento público que debe darse a los esclavos de los matados.

§ 1.- Compréndese bajo la denominación de señor, el que tiene la propiedad, aunque sea de otro el usufruto.

§ 2.- El que de buena fe poseyó un esclavo, no estará comprendido en la denominación de señor, así como tampoco el que tuvo solo el usufruto.

§ 3.- El esclavo dado en prenda es considerado, en lo que atañe a la muerte del deudor, en todo lo mismo que si no hubiese sido dado en prenda.

§ 4.- Bajo la denominación de esclavo se comprenden también los que fueron legados bajo condición; porque son del heredero durante el tiempo

nant esse heredis, facit ne videantur interim eius. Idemque erit dicendum in statulibero.

§ 5.- Sed in eo, cui fideicommissa libertas pure debetur, exstat rescriptum divi Pii ad Iuventium Sabinum, quo ostenditur non esse festinandum ad tormenta eius, cui fideicommissa libertas debetur: et magis est, ne puniatur ob hoc quod sub eodem tecto fuit, nisi particeps sceleris fuerit.

§ 6.- Domini appellatione etiam pro parte domini contineri dicendum est.

§ 7.- Domini appellatione et filius familias ceterique liberi, qui in potestate sunt, continentur: senatus consultum enim Silanianum non solum ad patres familias, verum ad liberos quoque pertinet.

§ 8.- Quid deinde dicemus, si liberi non sint in potestate? Marcellus libro duodecimo digestorum dubitat: ego puto plenius accipiendum, ut etiam ad eos liberos pertineat, qui in potestate non sunt.

§ 9.- In eo, qui est in adoptionem datus, non putamus locum habere senatus consultum, quamvis in adoptato locum habet.

§ 10.- Sed nec in alumno occiso locus est senatus consulto.

§ 11.- De matris servis filio filiave occisis quaestio non habebitur.

§ 12.- Si pater ab hostibus captus sit, quaestionem de servis habendam et supplicium filio occiso eleganter Scaevola ait: quod etiam post mortem patris probat, si ante, quam suus ei heres existat, occisus fuerit.

§ 13.- Idem Scaevola ait constantius defendendum herede instituto filio de his quaestionem habendam et

when the condition is fulfilled they cease to belong to him, it follows that meanwhile they should not be held to constitute part of his property. The same rule must be said to apply to the case of a slave who is to be free under a certain condition.

§ 5.- A Rescript of the Divine Pius to Jumentius Sabinus is extant which has reference to a slave whose unconditional freedom was due under the terms of a trust; from which it is evident that too much haste should not be employed in the torture of a slave who is entitled to his freedom under a trust, and the better opinion is that he should not be punished, for the reason that he lives under the same roof with the testator, unless he participated in the crime.

§ 6.- It must be said that he who has only a share in the ownership of a slave is also included in the appellation of master.

§ 7.- Sons under paternal control, and other children who are in the power of their father, are also included in the appellation of master; for the Silanian Decree of the Senate not only refers to the heads of families, but also to the children.

§ 8.- But what shall we say if the children are not subject to the authority of their father? Marcellus, in the Twelfth Book of the Digest, expresses uncertainty on this point. I think that the most liberal construction should be given to the Decree of the Senate, so that it may also include children who are not under paternal control.

§ 9.- We do not think that the Decree of the Senate is applicable to the case of a son who has been given in adoption, even though it may apply to an adoptive father.

§ 10.- The Decree of the Senate does not apply where a youth who is being reared is killed.

§ 11.- Torture shall not be inflicted upon the slaves of a mother, where a son or a daughter have been killed.

§ 12.- Scaevola very properly says that where a father has been captured by the enemy, and his son is killed, the slaves of the father should be put to the torture and punished. He approves of this also being done, even after the death of the father, if the son was killed before he became the proper heir.

§ 13.- Scaevola also says that it may uniformly be maintained, where a son has been appointed heir and

intermedio, y no importa que cumpliéndose la condición haga que dejen de ser del heredero, para que no se considere que mientras tanto son de él y lo mismo se habrá de decir respecto al que se le dejó la libertad bajo condición.

§ 5.- Pero respecto de aquel a quien se le debe puramente la libertad dejada por fideicomiso, hay un Rescripto del Divino Pío dirigido a Juvencio Sabino, en el que se indica que no se ha de proceder apresuradamente para el tormento de aquel a quien se le debe la libertad dejada por fideicomiso; y es mas cierto, que no se le ha de castigar por esto, porque vivió bajo el mismo techo, sino si hubiere sido partícipe del crimen,

§ 6.- Se ha de decir, que bajo la denominación de señor se comprende también el señor de parte.

§ 7.- En la denominación de señor se comprenden también los hijos de familia y los demás descendientes, que están bajo potestad; Porque el Senadoconsulto Siliano pertenece no solamente a los padres de familia, sino también a los hijos.

§ 8.- Mas ¿qué diremos, si los hijos no estuvieran bajo potestad? Duda Marcelo en el libro duodécimo del Digesto, pero yo creo que se ha de entender con mas amplitud, de suerte que sea aplicable también a los hijos, que no están bajo potestad.

§ 9.- Respecto el que fue dado en adopción, no creemos que tenga lugar el Senadoconsulto, aunque tiene lugar en cuanto al adoptado,

§ 10.- Pero tampoco respecto al alumno que fue muerto tiene lugar el Senadoconsulto,

§ 11.- Habiendo sido matados un hijo o una hija, no se someterá a tormento a los esclavos de la madre.

§ 12.- Si el padre hubiera sido cogido por los enemigos, discretamente dice Scévola, que habiendo sido matado el hijo, se ha de someter al tormento y al suplicio a los esclavos; lo que aprueba también después de la muerte del padre, si hubiere sido matado antes que fuese respecto de él heredero suyo.

§ 13.- Dice el mismo Scévola, que más constantemente se ha de defender, que instituido heredero

supplicium, qui pure legati vel manumissi sunt, ante aditam hereditatem filio occiso: quamvis enim, si viveret, herede eo existente ipsius non essent futuri, attamen ubi decessit, qua extinctum legatum et libertas est, senatus consulto fore locum dicit.

§ 14.- Si pater necatus sit, an de servis filii quaestio habeatur, si forte castrensi peculio servos habuit? Et magis est quaestionem de servis filii habendam suppliciumque sumendum, licet non sit in potestate filius.

§ 15.- Si vir aut uxor occisi esse proponantur, de servis eorum quaestio habetur, quamquam neque viri servi proprie uxoris dicantur neque uxoris proprie viri: sed quia commixta familia est et una domus est, ita vindicandum atque in propriis servis senatus censuit.

§ 16.- Sed neque uxore occisa neque marito de servis soceri quaestionem habendam senatus censuit: Marcellus autem libro duodecimo digestorum etiam in soceri servis idem quod in mariti recte dixit.

§ 17.- Occisorum appellatione eos contineri Labeo scribit, qui per vim aut caedem sunt interfecti, ut puta iugulatum strangulatum praecipitatum vel saxo vel fuste vel lapide percussum vel quo alio telo necatum.

§ 18.- Quod si quis puta veneno vel etiam quo alio quod clam necare soleat interemptus sit, ad hoc senatus consultum vindicta mortis eius non pertinebit: hoc idcirco, quia totiens puniendi sunt servi, quia auxilium domino non tulerunt, quotiens potuerunt ei adversus vim opem ferre et non tulerunt: ceterum quid potuerunt facere adversus eos, qui veneno vel quo alio more insidiantur?

is killed before entering upon the estate, that the slaves can be put to the torture and punished, even if they have been unconditionally bequeathed or manumitted. For although even if he had lived and had become the heir, the slaves would not belong to him, therefore when he died, as both the legacies and the grants of freedom will be extinguished, he holds there is ground for the application of the Decree of the Senate.

§ 14.- If the father is killed, should torture be inflicted upon the slaves of the son, if they form part of the castrense peculium? The better opinion is that the slaves of the son should be put to the torture, and subjected to punishment, even though the son is not under the control of his father.

§ 15.- In the case of murder of a man and his wife, torture should be inflicted upon their slaves, although, properly speaking, the slaves of the husband do not belong to the wife, nor her slaves to him, but, for the reason that the two sets of slaves are commingled, and there is but one household, the Senate decreed that punishment should be inflicted, just as if the slaves belonged equally to both of them.

§ 16.- But where the wife or the husband was killed, the Senate did not decree that the slaves of the father-in-law should be put to the torture. Marcellus, however, very properly says, in the Twelfth Book of the Digest, that what has been determined with reference to the slaves of the husband also applies to those of a father-in-law.

§ 17.- Labeo states that those are understood to be included in the term "killed" who have been put to death by violence, or murdered; for instance, by having their throats cut, by being strangled, or thrown down from some height, or struck with a stone or a club, or deprived of life by the use of any other kind of weapon.

§ 18.- Where a man is killed, for instance, by poison, or by some other agency which it is customary to employ secretly, this Decree of the Senate will not apply to the avenging of his death; for the reason that slaves are punished whenever they do not assist their master against anyone who is guilty of violence towards him, when they are able to do so. But what could they effect against those who insidiously make use of poison or any other method

un hijo han de ser sometidos al tormento y al suplicio los que fueron legados o manumitidos puramente, cuando el hijo hubiere sido muerto antes de adir la herencia; porque aunque si viviese, quedando el heredero, no deberían de ser del mismo, sin embargo, luego que murió, como se extinguió el legado y la libertad, dice que ha de tener lugar el Senado-consulto.

§ 14.- Si hubiera sido muerto el padre, ¿se sujetará al tormento a los esclavos del hijo, si acaso tuvo esclavos en su peculio castrense? Y es más cierto que se ha de sujetar al tormento a los esclavos del hijo, y que se les ha de imponer suplicio, aunque el hijo no esté bajo potestad.

§ 15.- Si se dijera que fueron muertos el marido y la mujer, se somete al tormento a sus esclavos, aunque propiamente no se diga que los esclavos del marido son de la mujer, ni propiamente que los de la mujer son del marido; pero como está mezclada la familia, y hay una sola casa, determinó el Senado que se les ha de castigar lo mismo que a los esclavos propios.

§ 16.- El Senado determinó, que ni habiendo sido muerta la mujer, habiendo sido muerto el marido, se ha de someter al tormento a los esclavos del suegro; pero con razón dice Marcelo en el libro duodécimo del Digesto, también respecto a los esclavos del suegro, lo mismo que respecto de los del marido.

§ 17.- Escribe Labeón, que bajo la denominación de matados se comprende a los que fueron muertos por fuerza o por herida, como por ejemplo, el degollado, el estrangulado, el despellejado o el herido con peñasco, con palo, o con piedra, o el muerto con otra cualquier arma.

§ 18.- Pero si alguno hubiere sido muerto, por ejemplo, con veneno o también con otra cualquier cosa, que suela matar clandestinamente, no corresponderá a este Senadoconsulto el castigo de su muerte, precisamente por esto, porque los esclavos deben ser castigados, por no haber prestado auxilio a su señor, siempre y cuando pudieron prestarle auxilio contra la fuerza, y no se lo prestaron, pero ¿que pudieron hacer contra los que tienden acechanzas

§ 19.- Plane si venenum per vim infusum sit, senatus consultum locum habet.

§ 20.- Ubi cumque igitur vis adhibita est quae interemere solet, ibi dicendum est locum senatus consulto fore.

§ 21.- Quid ergo, si dominus veneno non per vim necatus esse proponatur? Impunitum erit factum? Nullo modo: licet enim cessat senatus consultum Silanianum nec quaestio suppliciumque de his qui sub eodem tecto fuerunt habeatur, tamen si qui conscii vel factores sceleris fuerunt, hi demum supplicio adficiuntur: et adiri hereditas apeririue tabulae etiam ante quaestionem habitam possunt.

§ 22.- Si sibi manus quis intulit, senatus consulto quidem Silanianum locus non est, sed mors eius vindicatur, scilicet ut, si in conspectu servorum hoc fecit potueruntque eum in se saevientem prohibere, poena adficiantur, si vero non potuerunt, liberentur.

§ 23.- Si quis non metu criminis imminens, sed taedio vitae vel impatientia doloris sibi manus intulit, eius testamentum aperiri et recitari mortis casus non impedit.

§ 24.- Item illud sciendum est, nisi constet aliquem esse occisum, non haberi de familia quaestionem: liquere igitur debet scelere interemptum, ut senatus consulto locus sit.

§ 25.- Quaestionem autem sic accipimus non tormenta tantum, sed omnem inquisitionem et defensionem mortis.

§ 26.- Hoc autem senatus consultum eos quidem, qui sub eodem tecto fuerunt, omnimodo punit, eos vero, qui non sub eodem tecto, sed in eadem regione, non aliter, nisi conscii fuissententiarum

§ 27.- "Eodem" autem "tecto" qualiter accipiat, videamus, utrum intra eosdem parietes an et ultra intra eandem diaetam vel cubiculum vel eandem

of this kind?

§ 19.- It is evident that the Decree of the Senate will be applicable where poison is forcibly administered.

§ 20.- Therefore, whenever such force is employed as usually causes death, it must be held that there is ground for the application of the Decree of the Senate.

§ 21.- But what if the master was killed by poison, and not by violence, will the deed go unpunished? By no means. For although the Silinian Decree of the Senate may not apply, nor torture and punishment be inflicted upon those who are under the same roof, still, any who knew of the crime or were participants in it must be subjected to punishment, and the estate can be entered upon, and the will opened, even before torture is inflicted.

§ 22.- Where a person lays violent hands upon himself, there is indeed no ground for the application of the Decree of the Senate; still, his death should be avenged. For example, if he committed the act in the presence of his slaves, and they could have prevented it, they should be punished, but if they were unable to prevent it, they will be free from liability.

§ 23.- Where anyone lays violent hands upon himself, not through remorse for some crime which he has committed, but through being weary of life, or unable to suffer pain, the manner of his death does not prevent his will from being opened and read.

§ 24.- It should also be noted that, unless it is established that a man has been killed, his slaves ought not to be tortured. Hence, it must positively be ascertained that the party owed his death to crime, for the Decree of the Senate to be applicable.

§ 25.- We, however, understand the term torture to mean not merely being put to the question, but every inquiry and defence that may be made in the investigation of the death of the master.

§ 26.- Again, this Decree of the Senate punishes, without exception, all those slaves, "Who live under the same roof"; but such as are not under the same roof, but in the same neighborhood, shall not be punished, unless they have knowledge of the crime.

§ 27.- Let us consider what must be understood by the term "under the same roof"; whether it means within the same walls, or outside, within the same

con veneno, o con algún otro recurso.

§ 19.- Pero si el veneno hubiera sido dado por fuerza, tiene lugar el Senadoconsulto.

§ 20.- Así, pues, siempre que se ha empleado fuerza, que suele matar, se ha de decir, que tendrá lugar el Senadoconsulto.

§ 21.- ¿Luego qué se dirá, si se expusiese que el señor fue muerto con un veneno y no por fuerza, quedará impune el hecho? De ningún modo, porque aunque deja de ser aplicable el Senadoconsulto Silaniano, y no se sujete al tormento y al suplicio a los que habitaron bajo el mismo techo, sin embargo, si hubo algunos sabedores o autores del delito, solamente estos son sujetos al suplicio; y se puede adir la herencia, y abrir el testamento antes de haberse aplicado el tormento.

§ 22.- Si alguno puso mano en sí mismo, no tiene ciertamente lugar el Senadoconsulto Silaniano, pero se castiga su muerte, esto es, que si esto lo hizo en presencia de los esclavos, y pudieron impedirle que se ensañara consigo mismo, serán castigados, pero si no pudieron, quedarán exentos.

§ 23.- Sí alguno puso mano en sí mismo, no por miedo de inminente acusación criminal, sino por tedio a la vida, o por no sufrir un dolor, el accidente de su muerte no impide que se abra y se lea el testamento.

§ 24.- Asimismo se ha de saber, que si no constara que alguien fue muerto, no se sujeta al tormento a su familia; debe, pues, constar, que fue muerto por crimen, para que haya lugar al Senadoconsulto.

§ 25.- Mas entendemos por cuestión de tortura, no solamente los tormentos, sino toda inquisición y castigo de la muerte.

§ 26.- Mas este Senadoconsulto castiga en absoluto a los que ciertamente habitaron bajo el mismo techo; pero a los que no habitaron bajo el mismo techo, sino en la misma región, no de otra suerte, sino si hubiesen sido sabedores.

§ 27.- Pero veamos de qué manera entenderemos bajo el mismo techo, ¿acaso dentro de las mismas paredes, o también fuera, dentro de la misma

domum vel eosdem hortos vel totam villam. Et ait Sextus sic esse saepe iudicatum, ut quicumque eo loci fuerunt, unde vocem exaudire potuerunt, hi puniantur, quasi sub eodem tecto fuerunt, licet alii validioris vocis, alii exiguioris sunt nec omnes undique exaudiri possunt.

§ 28.- Iuxta hoc tamen videtur et divus Hadrianus rescripsisse in haec verba: "Servi quotiens dominis suis auxilium ferre possunt, non debent saluti eorum suam antepone: potuisse autem ancillam, quae in eodem conclavi cum domina sua fuerat, auxilium rei ferre, si non corpore suo, at certe voce plorantem, ut hi, qui in domo fuerant aut vicini audirent, hoc ipso manifestum est, quod dixit percussorem sibi mortem minatum, si proclamasset. ultimum itaque supplicium pati debet vel hoc, ne ceteri servi credant in periculo dominorum sibi quemque consulere debere".

§ 29.- Hoc rescriptum multa continet: nam ei non parcat, qui eodem conclavi fuit: et ei, qui timuit mori, non ignoscit: et quod vel voce oporteat servos dominis auxilium ferre, ostendit.

§ 30.- Si quis in villa agens occisus sit, plus quam iniquum est, si forte diffusa late praedia habeat, de omnibus qui in ea regione fuerint servis et quaestionem haberi et supplicium sumi: sufficit ergo eos, qui cum ipso qui occisus dicitur fuerunt et qui suspicione caedis aut conscientia attingi videbuntur, de his quaestionem haberi.

§ 31.- Cum dominus in itinere esset occisus, de his, qui una cum eo fuerunt cum occiditur vel, cum una fuissent, profugerunt, supplicium sumendum est. Quod si cum domino nemo fuit cum occideretur, cessant ista senatus consulta.

§ 32.- Impubes servus vel ancilla nondum viripotens non in eadem causa erunt: aetas enim excusationem meretur.

§ 33.- Impuberi autem utrum in supplicio tantum

enclosure, within the same apartment, or the same house, or the same garden, or the entire residence. Sextus says that it has often been decided that wherever slaves were if they could have heard the voice of their master, they shall be punished just as if they have been under the same roof; although some persons have louder voices than others, and all cannot be heard from the same place.

§ 28.- With reference to this, it appears that the Divine Hadrian also stated the following in a Rescript: "Whenever slaves can afford assistance to their master, they should not prefer their own safety to his. Moreover, a female slave who is in the same room with her mistress can give her assistance, if not with her body, certainly by crying out, so that those who are in the house or the neighbors can hear her; and this is evident even if she should allege that the murderer threatened her with death if she cried out. She ought, therefore, to undergo capital punishment, to prevent other slaves from thinking that they should consult their own safety when their master is in danger."

§ 29.- This Rescript contains many provisions, for it does not spare anyone who is in the same room, and does not excuse a slave who fears death, and requires slaves to summon aid to their masters by crying out.

§ 30.- Where a master is killed while on one of his estates in the country, it would be extremely unjust if all the slaves who are in that neighborhood should be subjected to torture and punishment, if the said estate is very large. It will then be sufficient for those to be put to the torture who were with him when he was said to have been killed, and who appeared to be liable to suspicion of having committed the murder, or of having knowledge of it.

§ 31.- Where a master was murdered while on a journey, the slaves who were with him at the time he lost his life, or those who had been with him and took to flight, should be subjected to punishment. If, however, no one was with him at the time he was killed, these Decrees of the Senate do not apply.

§ 32.- A male or a female slave who has not yet reached the age of puberty is not included in this category, for their age is deserving of excuse.

§ 33.- Shall we grant a slave, who has not yet

habitación, o alcoba, o dentro de la misma casa, o de los mismos huertos, o de toda la granja? Y dice Sexto, que muchas veces se juzgó de modo que fueran castigados cualesquiera que estuvieron en lugar donde pudieron oír la voz, cual si hubieran estado bajo el mismo techo, aunque unos son de voz más fuerte, y otros de voz más débil, y no todos pueden ser oídos de todas partes.

§ 28.- No conforme a esto parece que también el Divino Adriano respondió por rescripto en estos términos; «Cuando los esclavos pueden prestar auxilio a sus señores, no deben anteponer a la salvación de estos la suya propia; mas pudo la esclava, que estaba en la misma cámara, con su señora, prestarle auxilio a esta; si no con su cuerpo, ciertamente con su voz, llorando para que la oyeran los que estaban en la casa; o los vecinos; lo cual es evidente, porque: dijo que el agresor la amenazó de muerte si gritaba, y ciertamente debe sufrir el último suplicio aun por esto, para que no crean los demás esclavos que debe uno mirar por si estando en peligro sus señores».

§ 29.- Este Rescripto contiene muchos extremos; porque no perdona al que estuvo en la misma habitación, y no perdona al que temió morir, y porque muestra que aun con la voz deben los esclavos prestar auxilio a sus señores.

§ 30.- Si habitando uno en una granja hubiera sido muerto, es sumamente injusto, si acaso tuviere predios muy extensos, que se someta al tormento y se sujete al suplicio a todos los esclavos que hubieren estado en aquella región; basta, pues, que se someta al tormento a aquellos que estuvieron con el mismo que se dice que fue muerto, y a quienes pareciere que les alcanza la sospecha o el conocimiento de la muerte.

§ 31.- Cuando el señor hubiese sido muerto en un camino, se les ha de imponer el suplicio a aquellos que iban junto con él cuando fue muerto, o que, estando con él, huyeron; pero si nadie estaba con el señor, cuando este fuese muerto, dejan de ser aplicables estos Senadoconsultos.

§ 32.- No estaría en el mismo caso el esclavo impúbero, o la esclava que no es todavía viripotente; porque su edad merece excusa.

§ 33.- ¿Pero al impúbero le perdonamos acaso

parcimus an vero etiam in quaestione? Et magis est, ut de impubere nec quaestio habeatur: et alias solet hoc in usu observari, ut impuberes non torqueantur: terreri tantum solent et habena et ferula vel caedi.

§ 34.- Excusantur autem servi, qui auxilium tulerunt sine dolo malo: nam si finxit se quis auxilium ferre vel dicis gratia tulit, nihil hoc commentum ei proderit.

§ 35.- Tulisse autem auxilium non tantum si videtur qui servavit dominum, hoc est qui potuit ita opem ferre, ut salvus esset dominus, verum si quoque, qui quidquid potuit fecit, tametsi dominus interfectus est: veluti si quis clamavit, ut ad auxilium conveniretur, aut terruit adgressores atque si quis turbam convocavit aut si corpus suum obiecit vel alias corpore suo auxilium tulit.

§ 36.- Non tamen semper qui clamore usus est, auxilium tulisse videtur: quid enim, si, cum posset manu depellere a domino periculum, ille clamorem inanem elegit? Plectendus utique erit.

§ 37.- Quid si vulnerati sint servi, cum protegerent dominum? Dicendum est parci eis debere, nisi si aut ipsi sibi vulnera ista fecerunt data opera, ne punirentur, aut talia vulnera isti acceperunt, ut possent nihilo minus opem ferre, si voluissentiarum

§ 38.- Si dominus mortifere vulneratus supervixerit nec de quoquam servorum suorum conquestus sit, etiamsi sub eodem tecto fuerunt, tamen parcendum illis erit.

2.- CALLISTRATUS; *libro V de cognitionibus*.- Divus Marcus Commodus Pisoni rescripsit in haec verba: "Cum constiterit apud te, Piso carissime, Iulium donatum, posteaquam conterritus adventu latronum profugerat villam suam, vulneratum esse, mox testamento facto purgasse officium servorum

attained puberty, indulgence merely with reference to punishment, or does this also relate to torture? The better opinion is that torture should not be inflicted upon a slave under the age of puberty; and, besides, it is the custom ordinarily observed that minors shall not be put to the torture, but only be frightened, or be whipped with a rod, or a leather thong.

§ 34.- Slaves are excused who have obtained aid without fraudulent intent; for if one should pretend to be of assistance, or should bring it merely for the sake of appearance, this will be of no advantage to him.

§ 35.- A slave is considered to have rendered assistance to his master not only when he has preserved him from harm, that is to say, when he could have exerted his power to the extent of saving him, but also when, although he did all that he could, he was unable to prevent his master from being killed; for example, where he cried out for the purpose of obtaining aid, or frightened the persons who were attacking his master, or if he assembled a crowd of people, or interposed his body between them and his master, or afforded him protection in any other way by means of his body.

§ 36.- A slave who cries out is not, however, always considered to have aided his master; for what, if when he could have averted the danger from him, he chose to cry out in vain? He should undoubtedly be punished.

§ 37.- But what if the slaves should be wounded while they are protecting their master? It must be said that they should be excused unless they inflicted wounds upon themselves purposely in order to avoid being punished; or if they did not receive wounds sufficiently serious to prevent them from still assisting their master, if they had desired to do so.

§ 38.- Where the master, being mortally wounded, survives for a certain time, without complaining of any of his slaves, even if they should be under the same roof with him, they must be spared.

2.- CALLISTRATUS; *Concerning Judicial Inquiries, Book V*.- The Divine Marcus Commodus stated in a Rescript to Piso the following: "Since it has been proved before you, my dear Piso, that Julius Donatus, after having been alarmed by the approach of robbers, took refuge in his country-house, and was

solamente el suplicio, o también el tormento? y es mas, cierto, que al impúbere tampoco se le sujete al tormento; y en otros casos suele observarse en la practica que no se dé tormento a los impúberos; solamente suelen ser atemorizados, y castigados con las disciplinas o con la caña.

§ 34.- Mas son excusados los esclavos que sin dolo malo prestaron auxilio; porque si alguno fingió prestar auxilio, o lo prestó en apariencia, de nada le aprovechará esta ficción.

§ 35.- Pero se considera que prestó auxilio no solamente el que resguardó a su señor, esto es, el que pudo prestarle auxilio de modo que el señor quedase salvo, sino también el que hizo todo lo que pudo, aunque su señor haya sido muerto, como si uno gritó para que se acudiese en auxilio, o amedrentó a los agresores, y si alguno convocó gente, o si interpuso su propio cuerpo, o de otro modo prestó auxilio con su propio cuerpo.

§ 36.- Mas no siempre se considera que prestó auxilio el que dió voces; porque ¿qué se dirá, si pudiendo apartar de su señor el peligro con la mano, prefirió dar inútiles voces? Deberá ser ciertamente castigado.

§ 37.- ¿Que, si hubieran sido heridos los esclavos al proteger a su señor? Se ha de decir, que se les debe perdonar, si ellos mismos no se causaron de intento estas heridas para no ser castigados, y, si recibieron heridas tales, que, no obstante, pudieran prestar auxilio, o hubiesen querido.

§ 38.- Si sobreviviere el señor herido de muerte; y no se hubiera querellado de ninguno de sus esclavos, aunque estuvieron bajo el mismo techo, sin embargo, se les habría de perdonar.

2.- CALISTRATO; *De las jurisdicciones, libro V*.- El Divino Marco y Cómodo respondieron por rescripto en estos términos: «Constándote, carísimo Pisón, que Julio Donato fue herido después que aterrado con la llegada de los ladrones; había huido a su granja, que, luego, habiendo hecho testamento.

suorum, nec pietas pro servis nec sollicitudo heredis optinere debet, ut ad poenam vocentur, quos absolvit dominus ipse".

3.- ULPIANUS; *libro L ad edictum*.- Si quis in gravi valetudine adfectus opem domino ferre non potuerit, subveniendum est ei.

§ 1.- Si quis moriens dixisset a servo vim mortis allatam esse sibi, dicendum est non esse credendum domino, si moriens hoc dixit, nisi potuerit et probari.

§ 2.- Si maritus uxorem noctu intra cubiculum secum cubantem necaverit vel uxor maritum, servi poena senatus consulti liberabuntur. Sed si exaudissent et opem non tulissent, plectendi erunt, non tantum si proprii essent mulieris, sed etiam si mariti.

§ 3.- Si tamen maritus in adulterio deprehensam occidat, quia ignoscitur ei, dicendum est non tantum mariti, sed etiam uxoris servos liberandos, si iustum dolorem exsequenti domino non restiterunt.

§ 4.- Si cum omnes domini adgressuram paterentur, uni servus opem tulit, an sit excusandus, an vero quia omnibus non tulit plectendus? Et magis est, ut, si quidem omnibus ferre potuit, quamvis quibusdam tulit, supplicio adficiendum: si vero simul omnibus non potuit, excusandum, quia quibusdam opem tulerit. Nam illud durum est dicere, si, cum duobus auxilium ferre non possit, elegit alteri esse auxilio, electione crimen eum contraxisse.

§ 5.- Quare et si servus mulieris marito dominae magis auxilio fuit quam dominae vel contra, dicendum est ignosci ei debere.

§ 6.- Subvenitur eis, qui eo tempore quo dominus dominave occisa est clausi ita fuerunt sine dolo malo,

wounded, and afterwards, having executed a will, manifested his affection for his slaves, neither his regard for them, nor the solicitude of the heir should allow punishment to be inflicted upon those whom the master himself has absolved".

3.- ULPIANUS; *On the Edict, Book L*.- Where a slave who was suffering from serious illness could not render his master assistance, he must be granted relief.

§ 1.- If anyone while dying says that he was killed by his slave, it must be held that the master should not be believed, if he made this statement at the point of death, unless it can otherwise be proved.

§ 2.- If a husband should kill his wife, or a wife should kill her husband at night, while they were together in their bedroom, the slaves will not be liable to punishment under the Decree of the Senate; but if they heard cries, and did not render assistance, they shall be punished, not only if they belong to the wife, but also if they belong to the husband.

§ 3.- Where, however, a husband kills his wife caught in the act of adultery; for the reason that he himself is excused, it must be held that his slaves, as well as those of his wife, are free from liability, if they did not resist their master while seeking just reparation for a grievance.

§ 4.- Where several masters, owning a slave in common, are attacked, and the slave only assists one of them, shall he be excused, or, indeed, shall he be punished for not assisting all of them? The better opinion is, that he should be subjected to punishment, if he could have assisted all of them, but only assisted one. If, however, he could not assist all at the same time, he must be excused, because he only afforded aid to one, for it would be harsh to claim that where a slave could not protect two of his masters, that he was guilty of crime for having chosen to protect but one of them.

§ 5.- Wherefore, if a slave belonging to the wife should assist her husband rather than his mistress, or vice versa, it must be said that he ought to be excused.

§ 6.- Those slaves must be excused who, at the time their master or mistress was killed, were shut up

justificó la conducta de sus esclavos, ni la compasión a los esclavos, ni la solicitud del heredero debe bastar para que sean llamados a la pena aquellos a quienes el mismo señor absolvió».

3.- ULPIANO; *Comentarios al Edicto, libro L*.- Si afectado alguno de grave enfermedad no hubiere podido prestarle auxilio a su señor, se le ha de amparar.

§ 1.- Si alguno al morir hubiese dicho, que a un esclavo se le había hecho violencia de muerte, se ha de decir, que no se le ha de dar crédito al señor, si esto lo dijo al morir, sino si también se hubiere podido probar.

§ 2.- Si el marido hubiere matado de noche a su mujer que estaba acostada con él dentro de la alcoba o la mujer al marido, los esclavos estarán exentos de la pena del Senadoconsulto. Pero si lo hubiesen oído, y no hubiesen prestado auxilio, habrán de ser castigados, no solo si fuesen propios de la mujer, sino también si del marido.

§ 3.- Pero si el marido la matase habiéndola sorprendido en adulterio, como quiera que se le perdona, se ha de decir, que no solamente han de quedar exentos los esclavos del marido, sino también los de la mujer, si no hicieron resistencia a su señor que vengaba su justo dolor.

§ 4.- Si cuando todos los señores sufriesen una agresión, el esclavo le prestó auxilio a uno solo, ¿habrá de ser excusado, o por el contrario castigado, porque no se lo prestó a todos? Y es más cierto, que si verdaderamente pudo prestárselo a todos, ha de ser castigado con el suplicio, aunque se lo haya prestado a algunos; pero si no pudo a todos al mismo tiempo, ha de ser excusado, porque les habría prestado auxilio a algunos. Porque es duro decir, si no pudiendo prestar auxilio a dos, elige, auxiliar a uno, que cometió crimen con la elección.

§ 5.- Por lo cual, también si un esclavo de la mujer prestó auxilio al marido de su señora, más bien que a su señora, o al contrario, se ha de decir, que se le debe perdonar.

§ 6.- Se ampara a los que al tiempo en que fue muerto el señor o la señora estuvieron encerrados sin

ut erumpere succurrendi causa aut comprehendendi eos, qui caedem fecerint, non potuerint: nec interest, a quo clausi continebuntur: sic tamen, si non data opera voluerint se ita includi, ne opem ferre possint. Clusos accipere debemus et si sunt vincti, si tamen ita vincti, ut omnino rumpere vincula et auxilio esse non potuerint.

§ 7.- Ignoscitur etiam his qui aetate defecti sunt.

§ 8.- Surdus quoque inter inbecillos numerandus est aut inter eos qui sub eodem tecto non sunt, quia ut illi per spatium, ita hic per morbum nihil audit.

§ 9.- Caecus quoque veniam mereri debet.

§ 10.- Mutum simili modo excipimus, sed ibi, ubi vocis tantum auxilium superfuit.

§ 11.- Furiosos excipi nequaquam dubium est.

§ 12.- Si quis quem eorum servum servamve ex ea familia, qui eius facinoris noxius erit, receperit vel celaverit sciens dolo malo, in ea causa est, ac si lege quae de sicariis lata est facinoris noxius fuerit.

§ 13.- Si ex stipulatu servus debeat et caedem domini arguerit et pro hoc praemio liber esse iussus sit, ex stipulato actio stipulatori non datur: nam et si supplicio adfectus fuisset, non daretur. Quod si sub eodem tecto non fuit, ex stipulatu actio in aestimatione servi utilis erit creditori.

§ 14.- Utrum autem is solus videatur indicasse vel arguisse, qui ad hoc prosilit ultro, an etiam is, qui, cum accusaretur ipse, detorsit in alium crimen? Et magis est, ut ille hoc praemio dignus sit, qui ultro ad accusationem prosilit.

without bad faith on their part, so that they could not break out for the purpose of rendering assistance, or of seizing those who committed the murder. Nor does it make any difference by whom they were shut up, provided this was not done on purpose to prevent them from bringing aid. We understood the term "shut up" also to mean where they are bound, provided they have been bound in such a way that they cannot release themselves, and render assistance.

§ 7.- Those also are excused who are incapacitated on account of age.

§ 8.- A deaf slave also should be included among those who are infirm, or who do not live under the same roof; because as the latter cannot hear anything on account of the distance, so the former can hear nothing on account of his affliction.

§ 9.- A blind slave also deserves to be excused.

§ 10.- We must likewise except a dumb slave, but only where he could render aid by means of his voice.

§ 11.- There is no doubt whatever that slaves who are insane should be excepted.

§ 12.- Where anyone knowingly receives, or conceals through fraud a male or a female slave who belonged to the deceased, and who is liable to punishment on account of not having assisted him when the crime was committed, he is in the same position as if he had been guilty of the crime as prescribed by the law enacted with reference to assassins.

§ 13.- Where a slave is due by reason of a stipulation, and discloses who committed the murder of his master, and on this account is directed to be free by way of reward, an action based on the stipulation shall not be granted to the stipulator, for it would not be granted if the slave had been subjected to punishment. Where, however, the slave did not live under the same roof with his master, an equitable action based on the stipulation will be granted to the creditor to recover the estimated value of the slave.

§ 14.- But does this only apply to a slave who seems to have indicated or proved who committed the crime, if he did this voluntarily; or shall he also be included who, when he was accused, threw the responsibility of the crime upon another? The better opinion is, that he is entitled to the reward who

dolo malo de tal suerte, que no hubieren podido salir para socorrerlo, o para coger a los que hubieren hecho la muerte. Y no importa por quién estuvieren encerrados, con tal, sin embargo, que de intento no hubieren querido estar de aquella manera encerrados, para no poder prestar socorro. Debemos entender que están encerrados, también si están atados, pero si están atados de modo, que absolutamente no hayan podido romper las ligaduras y prestar auxilio.

§ 7.- Se perdona también a los que están agobiados por la edad.

§ 8.- También el sordo ha de ser contado entre los impedidos, o entre los que no están bajo el mismo techo, porque así como estos por la distancia, así aquel que nada oye por su enfermedad.

§ 9.- También el ciego debe merecer perdón.

§ 10.- De igual modo exceptuamos al mudo, pero en los casos en que quedó el solo auxilio de la voz.

§ 11.- No es dudoso en modo alguno que se exceptúan a los locos.

§ 12.- Si alguno hubiere albergado o ocultado a sabiendas con dolo malo a un esclavo o esclava de la familia de estos, que fuere culpable de tal delito, está en la misma condición que si fuere culpable del delito por la ley que se dió contra los sicarios.

§ 13.- Si en virtud de estipulación fuera debido el esclavo, y hubiere denunciado la muerte de su señor, y por esto se hubiera mandado que en premio fuese libre, no se le da la acción de lo estipulado al estipulador; porque tampoco se le daría, si hubiese sido condenado al suplicio. Pero si no estuvo bajo el mismo techo, tendrá el acreedor en virtud de la estipulación la acción útil por la estimación del esclavo.

§ 14.- ¿Pero acaso se considerará que indicó o denunció solo el que se lanzó a esto voluntariamente, o también el que siendo acusado echó el crimen sobre otro? Y es más cierto, que es digno de este premio el que voluntariamente se lanzó a la acusación.

§ 15.- Hi quoque, qui non potuerunt alias ad libertatem pervenire, ut puta si hac lege distractus erat quis, ne manumitteretur, poterunt propter hoc, quod in commune utile est, ad libertatem pervenire.

§ 16.- De his quoque servis, qui testamento manumissi sunt, perinde atque servis supplicium sumendum est.

§ 17.- De his, qui antequam testamentum occisi occisaeve aperiretur profugissent posteaque aperto testamento liberi scripti invenirentur, perinde ac si de servis quaestio habenda suppliciumque sumendum est: nam est aequissimum ultioni dominorum non obstande indulgentiam ipsorum, quam quisque plenior esset expertus, eo graviores scelere suo poenam merebuntur.

§ 18.- Quod ad causam testamenti pertinens relictum erit ab eo qui occisus esse dicetur, id ne quis sciens dolo malo aperiendum recitandum describendumque curet, edicto cavetur, priusquam de ea familia quaestio ex senatus consulto habita suppliciumque de noxiis sumptum fuerit.

§ 19.- Aperire autem hic ille videtur qui naturaliter aperit, sive sint signatae sive non sint legatae, sed tantum naturaliter clausae.

§ 20.- Aperire accipere debemus prohibitos nos vel palam publice vel secreto: omnis enim apertura prohibita est.

§ 21.- Si quis ignorans occisum aperuerit, non debet hoc edicto teneri.

§ 22.- Et si sciens, non tamen dolo aperuit, aequum non tenebitur, si forte per imperitiam vel per rusticitatem ignarus edicti praetoris vel senatus consulti aperuit.

§ 23.- Si quis tabulas quidem non aperuit naturaliter, linum autem incidit, excusatus erit, quia dolo caret, qui ipsas tabulas non aperuit.

voluntarily came forward with the accusation.

§ 15.- Those slaves also, who otherwise would be unable to obtain their freedom, for instance, where they have been sold on condition that they will never be manumitted, can become free by an act of this kind, because it is conducive to the public welfare.

§ 16.- Punishment must also be inflicted upon slaves who have been manumitted by will, just as upon other slaves.

§ 17.- Torture and punishment must also be inflicted upon any slaves who, before the will of their murdered master or mistress has been opened, take to flight, and who afterwards, when the will is opened are found to have been left their freedom, just as upon other slaves. For it is perfectly just that the kindness of their masters should not stand in the way of their being avenged, and the more the slave has enjoyed their favor, the more serious punishment he deserves for his crime.

§ 18.- It is provided by the Edict that where anything has been bequeathed by will by the person who is said to have been killed, no one who is aware of this shall open, read, or copy the will, before the slaves have been tortured and punishment is inflicted upon the guilty, in compliance with the Decree of the Senate; otherwise he will be guilty of bad faith.

§ 19.- He is considered to have opened a will who opens it in the ordinary way, whether it is sealed, or not fastened with a cord, but merely closed.

§ 20.- We must understand the term "to open", to mean that we are forbidden to open the will in the presence of anyone, or publicly, or secretly; for every kind of opening is prohibited.

§ 21.- Where anyone who did not know of the murder opens a will he should not be held liable under this Edict.

§ 22.- And if he should be aware of the death of the testator, but does not open the will in bad faith, he will also not be liable, or if he does this through inexperience, or through rusticity is not aware of the existence of the Edict of the Praetor, or the Decree of the Senate.

§ 23.- Where anyone does not open a will in the ordinary way, but cuts the cord with which it is tied, he will be excused, because he is not guilty of bad

§ 15.- También los que de otro modo no pudieron llegar a la libertad, por ejemplo, si uno había sido vendido con la condición de que no fuese manumitido, podrán llegar a la libertad por causa de esto, que es útil al común.

§ 16.- Se les ha de imponer pena, lo mismo que a los esclavos, también a aquellos esclavos que fueron manumitidos en el testamento.

§ 17.- A aquellos que hubiesen huido antes que se abriese el testamento del asesinado o de la asesinada, y que después de abierto el testamento fuesen hallados instituidos libres, se les ha de someter al tormento y sujetar a la pena, lo mismo que si fueran esclavos; porque es muy justo, que para la venganza de los señores no obste la indulgencia de los mismos; que, cuanto mayor la hubiese obtenido uno, tanto mas grave pena merecerá por su delito.

§ 18.- En cuanto a lo que perteneciente a la causa del testamento se hubiere dejado por el que se dijere que fue matado, se dispone en el Edicto, que nadie procure a sabiendas con dolo malo abrirlo, leerlo, y copiarlo, antes que aquella familia haya sido sometida en virtud del Senadoconsulto al tormento, y que se haya dado suplicio a los culpables.

§ 19.- Pero se considera en este caso que lo abre, el que naturalmente lo abre, ora estén selladas las tablas, ora no estén ligadas, sino solo cerradas naturalmente.

§ 20.- Debemos entender que nos está prohibido abrirlo o manifiestamente, o en público, o en secreto; porque está prohibida toda apertura.

§ 21.- Si alguno lo hubiere abierto ignorando que el testador había sido muerto, no debe quedar sujeto a este Edicto.

§ 22.- Y si sabiéndolo lo abrió, pero no con dolo, tampoco igualmente quedará obligado, si acaso lo abrió no conociendo por ignorancia o por rusticidad el Edicto del Pretor o el Senadoconsulto.

§ 23.- Si alguno, a la verdad, no abrió naturalmente el testamento, pero hubiere cortado la cuerda, será excusado, porque carece de dolo el que no abrió las

§ 24.- Si autem non totum testamentum, sed pars eius aperta sit, dicendum est in edictum incidisse eum qui aperuit: parvi enim refert, utrum totum an pars aperiatur.

§ 25.- Si quis codicillos aperuerit, testamentum non aperuerit, in edictum incidit: nam et codicilli ad causam testamenti pertinent.

§ 26.- Item sive iure valeat id quod apertum est sive non valeat, attamen edicto locus est.

§ 27.- Eadem servantur et de his, quae ad causam substitutionis pertinent, si pupillus pupillave occisus occisave esse dicitur.

§ 28.- Si alius aperuit, alius recitavit, alius descripserit, omnes in edictum incident, qui singula eorum fecerunt.

§ 29.- Non tantum ex testamento, sed etiam ab intestato hereditas ad hoc edictum pertinet, ut ne quis adeat bonorumve possessionem petat, antequam quaestio de familia habeatur, ne heres propter compendium suum familiae facinus occultaret.

§ 30.- Eleganter Scaevola ait, ut quis ad heredem suum utiles actiones transmittat, si forte ante aditionem decessit, exploratum esse debere idcirco eum non adire, quod senatus consulto edicto que terreatur.

§ 31.- Si condicioni intra diem ex die mortis praestitutum parere iussi ignorantia non paruerunt, si idcirco ignoratum est, quia metu senatus consulti aperiri tabulae non potuerunt, succurritur eis ad implendam condicionem.

§ 32.- Si et aliud impedimentum sit de non adeunda hereditate vel aperiendarum tabularum, sit et senatus consulti, nihil prodesse impedimentum senatus consulti, si et aliud fuit: veluti si praegnas uxor occisi fuit vel etiam putabatur et propterea adire

faith who does not open the will itself.

§ 24.- Where, not the entire will, but only a portion of the same, is opened, it must be said that the person who opens it comes within the terms of the Edict, for it makes but little difference whether the entire will, or only a part of it, is opened.

§ 25.- Where anyone opens a codicil, but does not open the will, he becomes liable under the Edict, because the codicil forms a part of the will.

§ 26.- There is ground for the enforcement of the Edict whether the will that is opened is valid, or not.

§ 27.- The same rule applies to those matters which relate to the substitution, where a male or a female minor is alleged to have been killed.

§ 28.- When one person opens a will, and another reads it publicly, and a third copies it, all of those who did these things separately will be liable under the Edict.

§ 29.- This Edict has reference not only to testamentary estates but also to intestate successions, in order to prevent anyone from entering upon the estate, or demanding praetorian possession of property belonging to the same, before torture has been inflicted upon the slaves, lest an heir might conceal the crime of his slaves for his own advantage.

§ 30.- Scaevola very properly says that anyone will transmit to his heir the right to bring praetorian actions if he should happen to die before entering upon the estate, and it should be ascertained that he did not do so because he feared to become liable under the Decree of the Senate and the Edict.

§ 31.- If I should order a condition to be complied with between a certain day and the time of my death, and the heirs do not comply with it through ignorance, and, for the reason that such ignorance existed, the will could not be opened without incurring the penalty of the Decree of the Senate; relief should be granted to the heirs to enable them to fulfill the condition.

§ 32.- Where any other impediment than fear of violating the Decree of the Senate exists to prevent entrance upon the estate or opening of the will, that arising from the Decree of the Senate, if there is any other, will be of no advantage to the heir; as, for

mismas tablas.

§ 24.- Mas si no se hubiese abierto todo el testamento, sino parte del mismo, se ha de decir, que incurrió en el Edicto el que la abrió; porque poco importa si se abre todo o parte.

§ 25.- Si alguno hubiere abierto los codicilos, pero no hubiere abierto el testamento, incurre en el Edicto; porque también los codicilos pertenecen a la causa del testamento.

§ 26.- Así mismo, ya sea válido en derecho lo que se abrió, ya no sea válido, tiene, sin embargo, lugar el Edicto.

§ 27.- Lo mismo se obtiene ya también respecto a lo que pertenece a la causa de la substitución, si se dijere que fue muerto o muerta el pupilo o la pupila.

§ 28.- Si uno abrió el testamento, otro lo leyó, y otro lo copió, incurrirán en el Edicto todos los que hicieron algunas de estas cosas;

§ 29.- Pertenece a este Edicto no solamente la herencia proveniente de testamento, sino también la de abintestato, para que nadie la ada, o pida la posesión de los bienes, antes que se aplique el tormento a la familia, a fin de que el heredero no oculte por razón de propia ganancia el delito de la familia.

§ 30.- Discretamente dice Scévola, que para que uno transmita a su heredero las acciones útiles, si acaso falleció antes de la adición, debe haberse explorado, si él no la adió precisamente porque temiese al Senadoconsulto y al Edicto.

§ 31.- Si aquellos a quienes se les mandó cumplir una condición, dentro del término fijado a partir del día de la muerte, no la cumplieron por ignorancia, si se ignoró por esto, porque no se pudieron abrir las tablas por miedo al Senadoconsulto, se les ampara para que cumplan la condición.

§ 32.- Si además del Senadoconsulto hubiera otro impedimento para no adir la herencia, o para no abrir las tablas, de nada aprovecha el impedimento del Senadoconsulto, si también hubo otro, por ejemplo, si la mujer del asesinado quedó embarazada, o aun si

hereditatem institutus non potuerit.

4.- PAPINIANUS; *libro VI responsorum*.- Qui postumos heredes instituerat, non natis postumis uxorem secundo loco scripsit heredem: cum a familia necatus diceretur, uxor diem suum obierat: heredes mulieris actiones ex constitutione sibi dari postulabant. Eos ita demum audiendos esse respondi, si mulier, quam in utero nihil gestare constabat, propter senatus consultum hereditatem adire noluit: alioquin praegnate ea defuncta nullam iniuriae querellam intervenisse.

5.- ULPIANUS; *libro L ad edictum*.- Necessarios heredes puto edicto comprehendere, si se misceant hereditati.

§ 1.- Nec bonorum possessionem peti praetor permittit: et ego puto ad omnes bonorum possessiones hoc edictum pertinere.

§ 2.- Non alias bona publicantur, quam si constabit esse occisum patrem familias et heredem ante quaestionem de familia habitam suppliciumque sumptum adisse hereditatem.

§ 3.- Ubi quis incuria necatus est vel medici insidiis, adiri quidem hereditas potest, sed heredi defensio mortis incumbit.

6.- PAULUS; *libro XLV ad edictum*.- Etsi percussor certus sit, tamen habenda quaestio est, ut caedis mandator inveniatur: utique autem ipse maxime quaestioni dabitur, quamvis et ceteri puniantur.

§ 1.- Quamvis alias in caput domini servi non torqueantur, recte tamen fiet quaestio, etiamsi heredem accusent, sive extraneus heres sive ex suis sit.

instance, if the wife of the murdered man was pregnant, or was even supposed to be in that condition, and for this reason the appointed heir could not enter upon the estate.

4.- PAPINIANUS; *Opinions, Book VI*.- A man appointed his posthumous children his heirs, and, in case none should be born, substituted his wife, and he was said to have been killed by his slaves, and his wife died; the woman's heirs petitioned that the estate should be given to them by virtue of the substitution. I gave it as my opinion that they should only be heard if the wife was proved not to have been pregnant, and declined to enter upon the estate on account of the Decree of the Senate. If, however, she should die while pregnant, no complaint could be made that any injury had been done to them.

5.- ULPIANUS; *On the Edict, Book L*.- I think that necessary heirs are included in the Edict, if they interfere in the business of the estate.

§ 1.- The Praetor does not permit the possession of the estate to be demanded under these circumstances; and I think that the Edict applies to all praetorian possession.

§ 2.- Property belonging to an estate shall not be confiscated, unless it is established that the head of the household was killed, and that the heir entered upon the estate before the slaves were put to the question, and punished.

§ 3.- Where anyone dies through neglect, or through the treachery of a physician, his estate can be entered upon; but the duty of avenging his death devolves upon the heir.

6.- PAULUS; *On the Edict, Book XLVI*.- Even if the murderer should be well known, torture must still be inflicted, in order that the instigator of the crime may be detected. Moreover, the murderer himself shall, by all means, be put to the question, and the other slaves also punished.

§ 1.- Although slaves shall not be tortured except where their master is accused of a capital crime; still, torture can be properly inflicted even if the heir is accused, whether he be a foreign, or the proper heir.

se lo creía, y por esto el instituido no hubiere podido adir la herencia.

4.- PAPINIANO; *Respuestas, libro VI*.- Uno que había instituido herederos a unos póstumos, instituyó en segundo lugar heredera a su mujer, no habiendo nacido los póstumos; cuando se decía que había sido matado por la familia, la mujer había muerto; los herederos de la mujer pedían que en virtud de la constitución se les diesen las acciones; respondí, que ellos debían ser oídos solamente si la mujer, que constaba que nada llevaba en el vientre, no quiso adir la herencia por causa del Senadoconsulto, pero que de otra suerte, habiendo fallecido embarazada, no hubo lugar a ninguna querella de injuria.

5.- ULPIANO; *Comentarios al Edicto, libro L*.- Opino, que los herederos necesarios son comprendidos en el Edicto, si se inmiscuyeran en la herencia.

§ 1.- Tampoco permite el Pretor que se pida la posesión de bienes, y yo creo que este Edicto pertenece a todas las posesiones de bienes.

§ 2.- No se confiscarán los bienes de otra suerte, sino si constare que fue muerto el padre de familia, y que el heredero adió la herencia antes de haberse dado tormento a la familia, y de habérsele aplicado el suplicio.

§ 3.- Cuando alguno fue muerto por incuria, o por acechanzas del médico, se puede ciertamente adir la herencia, pero le incumbe al heredero el castigo de la muerte.

6.- PAULO; *Comentarios al Edicto, libro XLVI*.- Aunque sea conocido el agresor, se ha de aplicar, sin embargo, el tormento, para descubrir al que mandó dar la muerte; y, a la verdad, él será sometido especialmente al tormento, aunque también los otros sean castigados.

§ 1.- Aunque en otros casos no se dé tormento a los esclavos por causa de su señor, sin embargo, con razón se aplicará el tormento, aunque acuse al heredero, ya sea heredero un extraño, ya uno de los suyos.

§ 2.- Si unus ex dominis non compareat, querendum est de casu eius per servos, quos communes habuerunt: magis enim de salute aut ultione domini non comparentis quam in caput praesentis torquebuntur.

§ 3.- Si appetitus sit nec occisus dominus, nihil senatus consulto cavetur: ipse enim in familiam suam potest animadvertere.

7.- PAULUS; *libro singulari ad senatus consultum Silanianum*.- Et in libertos extraordinarium auxilium habebit.

8.- PAULUS; *libro XLVI ad edictum*.- Senatus consulto Pisoniano cavetur, ut, si poenae obnoxius servus venisset, quandoque animadversum in eum esset, ut venditor pretium praestaret, ne emptori iniuriam fecisse videatur senatus.

§ 1.- Si filius familias, qui in castrensi peculio testatus est, occisus sit, omnimodo id defendendum est, ut, ex quibus casibus ad fiscum patris familias bona pertinent, his casibus et huius peculium, potius quam ad heredes, qui deliquerunt in adeundo et similibus ultive non sunt.

9.- GAIUS; *libro XVII ad edictum provinciale*.- Cum fisco caduca bona defuncti addicantur propter inultam mortem, in eum legatorum actio datur: et libertates ratae sunt eorum scilicet, qui senatus consulto excipiuntur.

10.- PAULUS; *libro singulari ad senatus consultum Silanianum*.- Si exheredatus filius, antequam adiretur patris hereditas, occisus sit, ex eventu inspicietur, ut, si adita fuerit hereditas, quasi alieni fuisse videantur: si vero irritum testamentum factum sit, quia ipsius essent si viveret, omnia perinde

§ 2.- Where one of two masters does not appear, the slaves held in common shall be put to the question to ascertain what has happened to him; for they are tortured to ascertain something with reference to the fate of the master who does not appear, rather than to avenge his death, or to obtain information which may implicate the master who is present in a capital crime.

§ 3.- Where a master has been attacked, but not killed, nothing is provided by the Decree of the Senate, for he himself can punish his own slave.

7.- THE SAME; *On the Silanian Decree of the Senate*.- And in this instance, he will enjoy an extraordinary privilege with reference to his freedman.

8.- THE SAME; *On the Edict, Book XLIX*.- It is provided by the Pisonian Decree of the Senate that: "Where a slave is liable to some penalty and is about to be punished, the vendor shall refund the price paid for him to the purchaser;" which was enacted by the Senate to avoid any injury being done to the purchaser.

§ 1.- Where a son under paternal control, who has made a testamentary disposition of his castrense peculium, is killed, it should undoubtedly be maintained that under these circumstances the estate of the deceased will belong to the Treasury, if his heirs have entered upon his estate, and did not avenge his death; just as in a similar instance, the estate of the head of a household will also be forfeited.

9.- GAIUS; *On the Provincial Edict, Book XVII*.- When the property of a deceased person is confiscated by the Treasury because his death was unavenged, an action is granted against it in favor of the legatees, and all grants of freedom to slaves shall be perfected; that is to say, of such as are excepted from the provisions of the Decree of the Senate.

10.- PAULUS; *On the Silanian Decree of the Senate*.- Where a disinherited son is killed before the estate of his father has been entered upon, consideration must be paid to what takes place, so that, if the estate is accepted, the slaves will not be held to belong to another; but if the will should

§ 2.- Si no pareciera alguno de los dueños, se han de hacer investigaciones sobre lo sucedido al mismo, por medio de los esclavos que tuvieron en común; porque serán sometidos al tormento más bien para salvación o venganza del señor, que no parece, que por razón del que está presente.

§ 3.- Si el señor hubiera sido agredido, pero no muerto, nada se dispone en el Senadoconsulto; porque él mismo puede imponer castigo a su familia,

7.- EL MISMO; *Comentarios al Senadoconsulto Silaniano, libro Único*.- y tendrá contra los libertos recurso extraordinario.

8.- EL MISMO; *Comentarios al Edicto, libro XLVI*.- Dispónese en el Senadoconsulto Pisoniano, que, si hubiese sido vendido un esclavo sujeto a pena, en cualquier tiempo en que se le hubiese impuesto la pena entregue al vendedor el precio, para que no parezca que el Senado le causó injusticia al comprador.

§ 1.- Si hubiera sido muerto el hijo de familia, que había testado de su peculio castrense, se ha de defender de todos modos esto, que en los casos en que pertenecen al fisco los bienes del hijo de familia debe pertenecerle también su peculio mas bien que a los herederos, que delinquieron al adir la herencia, y en otras cosas semejantes, o que no vengaron la muerte.

9.- GAYO; *Comentarios al Edicto Provincial, libro XVII*.- Cuando se adjudican al fisco como caducos los bienes del difunto por no haberse vengado la muerte, se da contra él la acción de los legados, y son válidas las libertades, por supuesto, de aquellos, que están exceptuados en el Senadoconsulto.

10.- PAULO; *Comentarios al Senadoconsulto Silaniano, libro Único*.- Si el hijo desheredado hubiera sido muerto antes que fuese adida la herencia del padre, se verá por el resultado, que, si la herencia hubiere sido adida, se consideren como si hubiesen sido ajenos, pero que si se hiciere irrito el testamento,

aguntur ac si dominus esset.

§ 1.- Sub Divo Traiano constitutum est de his libertis, quos vivus manumiserat, quaestionem haberi.

11.- TRYPHONINUS; *libro II disputationem*.- Idemque erit et de his, qui ius anulorum petierant.

12.- PAULUS; *libro singulari ad senatusconsulto Silaniano*.- Si servus a testatore occiso legatus sit et praetor pro praemio statuerit liberum eum esse, dicendum est non impediri libertatem.

13.- VENULIUS SATURNINUS; *libro II de publicis iudiciis*.- In cognitione aperti adversus senatus consultum testamenti eius, qui a familia sua occisus dicatur, quinquennii tempus constitutum est senatus consulto Tauro et Lepido consulibus: quod tamen ad extraneos pertinet. Namque eos, qui parricidii poena teneri possunt, semper accusare permittitur eodem senatus consulto.

14.- MAECIANUS; *libro XI de publicis iudiciis*.- Excipiuntur senatus consulto Silaniano impuberes servi. Trebius autem Germanus legatus etiam de impubere sumi iussit supplicium et tamen non sine ratione: nam is puer nec multum a puberi aetate aberat et ad pedes domini cubuerat cum occideretur nec postea caedem eius prodiderat. Ut enim opem ferre eum non potuisse constabat, ita silentium praestitisse etiam postea certum erat, et his dumtaxat impuberibus senatus consulto parci credebat, qui tantum sub eodem tecto fuissent: qui vero ministri vel participes caedis fuissent et eius aetatis, quamquam nondum puberis, ut rei intellectum capere possent, his non magis in caede domini quam in ulla alia causa parci oportere.

become void, measures must be taken just as if the son had been their master, because they would have belonged to him if he had lived.

§ 1.- It was established by a Constitution of the Divine Trajanus that freedmen whom the deceased had manumitted could be put to the question.

11.- TRYPHONINUS; *Disputations, Book II*.- The same rule will apply to those who have obtained the right to wear rings.

12.- PAULUS; *On the Silanian Decree of the Senate*.- Where a slave has been bequeathed by a testator who was murdered, and the Praetor decides that he was entitled to his freedom by way of reward, it must be said that his freedom cannot be prevented.

13.- VENULEIUS, SATURNINUS; *On Public Prosecutions, Book II*.- During the Consulate of Taurus and Lepidus, the term of five years was established by a Decree of the Senate for the institution of criminal proceedings, where the will of a man who was said to have been killed by his slaves had been opened contrary to the Decree of the Senate, which provision, however, only applies to strangers; for, by the same Decree of the Senate, those who are liable to punishment for parricide can always be accused without reference to lapse of time.

14.- MAECIANUS; *On Public Prosecutions, Book XI*.- Slaves who have not reached the age of puberty are excepted from the operation of the Silanian Decree of the Senate. The deputy, Trebius Germanus, however, ordered punishment to be inflicted upon a slave under the age of puberty; and this was not without reason, because the boy was very little under that age, and was sleeping at the feet of his master at the time when he was killed, and did not afterwards disclose that he had been murdered. As it was proved that he was unable to have assisted him, it was also certain that he afterwards kept silent; and it was held that boys under the age of puberty could only be excused from liability under the Decree of the Senate, where they had merely been under the same roof with their master, but where such slaves had been the principals or accomplices in the crime, and

como serían de él si viviese, se hace todo lo mismo que si él fuese dueño.

§ 1.- Se estableció en tiempos del Divino Trajano, que se sujetará al tormento a aquellos libertos que uno había manumitido en vida.

11.- TRIFONINO; *Disputas; libro II*.- Y lo mismo será también respecto de los que habían solicitado el derecho de anillos.

12.- PAULO; *Comentarios al Senadoconsulto Silaniano, libro Único*.- Si el esclavo hubiera sido legado por el testador que fue muerto, y el Pretor hubiere determinado que por premio fuese libre, se ha de decir, que no se impide la libertad.

13.- VENULEYO SATURNINO; *De los juicios públicos, libro II*.- Para el conocimiento de la apertura, hecha contra el Senadoconsulto, del testamento de quién se dijese que fue muerto por su familia, se estableció el término de un quinquenio por un Senadoconsulto, hecho bajo el consulado de Tauro y de Lépidio; pero en cuanto se refiere a los extraños, porque en cuanto a los que pueden quedar sujetos a la pena de parricidio, se permite por el mismo Senadoconsulto acusarlos siempre.

14.- MECIANO; *De los juicios públicos, libro XI*.- Se exceptuará en el Senadoconsulto Silaniano los esclavos impúberos. Pero el Legado Trebio Germano mandó que se diera suplicio también a un impúbero, y, sin embargo, no sin razón; porque este joven no estaba muy lejano de la edad púber, y había dormido a los pies de su señor cuando este fue muerto, y después no había denunciado su muerte; porque así como constaba que no pudo prestar auxilio, así era cierto que también después guardó silencio; y creía que en el Senadoconsulto se perdonaba solamente a los impúberos, que únicamente hubiesen estado bajo el mismo techo, pero que a los que hubiesen sido auxiliares o partícipes de la muerte, y de edad que, aun cuando no púberos todavía, pudiesen comprender el hecho, no se les debía perdonar en el caso de muerte de su señor, no de otra suerte que

15.- MARCIANUS; *libro singulari de delatoribus*.- Si sequens gradus ultus fuerit necem testatoris, an priore hereditas ad illum transferatur? Et ait Papinianus non esse hoc: nam poena illius huius praemium esse non debet.

§ 1.- Cum ex parte heredi instituto legatum quoque erat et in ulciscenda morte cessaverat, divi Severus et Antoninus rescripserunt tam hereditatis portionem quam legatum ei auferendum.

§ 2.- Heredibus autem, qui in ulciscenda morte defuncti cessaverant, tam testamento quam ab intestato auferuntur bona: forte et si quasi patronus venit, quamvis hi suo iure admittantur.

16.- MARCELLUS; *libro XII digestorum*.- Domino a familia occiso servus communis necem eius detexit: favore libertatis liber quidem fieri debet, pretii autem partem sibi contingentem socium consequi oportet.

17.- MODESTINUS; *libro VIII regularum*.- Prius de se familia torquenda est et, si confiteatur, tunc interrogetur, quo mandante flagitium admissum sit.

18.- MODESTINUS; *libro IX regularum*.- Et inofficioso testamento queri idem et mortem vindicare defuncti non prohibetur, idque Paulus respondit.

19.- MODESTINUS; *libro VIII pandectarum*.- Cum dominus occiditur, auxilium ei familia ferre debet et armis et manu et clamoribus et obiectu

were of such an age as to understand what they were doing (even though they may not have reached the age of puberty), they should not be excused from responsibility for the murder of their master any more than for anything else.

15.- MARCIANUS; *On Informers*.- Where substitutes avenge the death of the testator, shall the estate be transferred to them? Papinianus says that it should not, for the penalty of the first degree ought not to be the reward of the second.

§ 1.- Where a legacy was bequeathed to an heir appointed to a portion of the estate, and he failed to avenge the death of the deceased, the Divine Severus and Antoninus stated in a Rescript that he should be deprived of the share of the estate which had been bequeathed to him.

§ 2.- Estates bequeathed by will, as well as those derived from intestate succession, must be taken away from heirs who have been derelict in avenging the death of the deceased (even if they appear as patrons), although they may be entitled to the succession as direct heirs.

16.- MARCELLUS; *Digest, Book XII*.- Where a master was killed by one of his slaves, and a slave who was owned in common by the deceased and another party detected the criminal, he should be liberated on account of the favor due to freedom, but the partner should be paid his share of the value of the slave.

17.- MODESTINUS; *Rules, Book VIII*.- The slaves should first be put to the torture, and if they confess should then be interrogated, in order that it may be ascertained at whose instigation they committed the crime.

18.- THE SAME; *Rules, Book IX*.- It is not forbidden to complain of an inofficious testament, and to avenge the death of the defunct at the same time. Paulus rendered this opinion.

19.- THE SAME; *Pandects, Book VIII*.- When a master is attacked, his slaves should attempt to assist him with arms, and with their hands, with cries, and

tratándose de otra cualquier causa.

15.- MARCIANO; *De los Delatores, libro único*.- Si el siguiente grado hubiere vengado la muerte del testador, ¿se le transferirá del primero la herencia? Y dice Papiniano, que esto no es así, porque la pena de uno no debe ser premio del otro.

§ 1.- Cuando al instituido heredero de parte se le había hecho también un legado, y había dejado de vengar la muerte, respondieron por rescripto los Divinos Severo y Antonino, que se le ha de quitar tanto la porción de la herencia, como el legado.

§ 2.- Pero a los herederos, que habían dejado de vengar la muerte del difunto, se les quitan los bienes adquiridos así por testamento, como abintestato, y quizá también si uno sucedió como patrono, aunque estos sean admitidos a la herencia por derecho propio.

16.- MARCELO; *Digesto, libro XII*.- Habiendo sido muerto el señor por la familia, un esclavo común descubrió su muerte; en favor de la libertad debe hacerse ciertamente libre, pero su condeño debe obtener la parte del precio que le corresponde.

17.- MODESTINO; *Reglas, libro VIII*.- Primeramente se ha de dar tormento a la familia por lo que a ella respecta, y, si confesara, entonces se le interrogará por mandato de quien se cometió el delito.

18.- EL MISMO; *Reglas libro IX*.- No se prohíbe que uno mismo se querelle por testamento inoficioso, y venga la muerte del difunto; y esto respondió Paulo.

19.- EL MISMO; *Pandectas; libro VIII*.- Cuando se mata al señor, la familia le debe prestar auxilio con armas, con la mano, con voces, y con la interposición

corporis: quod si, cum posset, non tulerit, merito de ea supplicium sumitur.

20.- PAPINIANUS; *libro II responsorum*.- Heres, qui veneni causam persequitur, res hereditarias urgentes ordinare salvis probationum indicii non prohibetur.

21.- PAPINIANUS; *libro VI responsorum*.- Propter veneni quaestionem tempus petendae possessionis non profertur, cum eo quoque suspenso crimine recte petatur. Aliud senatui placuit, cum a familia dominus necatus dicitur, servorum videlicet causa, quorum libertatem quaestionis habendae gratia neglegi necesse est.

§ 1.- Neptis, quae possessionem aviae petierat, mortem eius interfectam sciens non defenderat. Fideicommissum, quod avia ex alio testamento nepti debuit, in restituendis fisco bonis non esse deducendum placuit: dolus enim heredis punitus est. Si autem neglegentia mulier emolumentum bonorum amiserit, fideicommissum esse retinendum integrato iure debiti rationis est.

§ 2.- Praesidis iniquitate reis illatae caedis absolutis heredibus, qui non defunctorie debitum officium impleverant, quamvis non provocassent, hereditatem auferri non oportere visum est.

22.- PAULUS; *libro XVI responsorum*.- Gaius Seius cum languesceret, questus est se veneno occidi a servo suo et sic exspiravit: cui heres exstitit Lucia Titia soror et mortem eius exsequi neglexit et ipsa post annum decimum decessit: exstitit qui bona nuntiaret Gaii Seii: quaero, an morte Titiae extinctum

with the interposition of their bodies. If anyone should not offer assistance when he is able to do so, he shall deservedly be subjected to punishment for this reason.

20.- PAPINIANUS; *Opinions, Book II*.- An heir, who is instituting a prosecution for poisoning, is not forbidden to transact urgent business relating to the estate, if he preserves all evidence and proofs of the crime.

21.- THE SAME; *Opinions, Book VI*.- The time for demanding the possession of the property of an estate shall not be delayed on account of any question arising out of the poisoning; and the claim may properly be made while the proof of the crime is still in abeyance. The Senate determined otherwise where a master was said to have been killed by his slaves, because as it was necessary that the freedom of said slaves should not be granted them at once, in order that they might be put to the torture.

§ 1.- A granddaughter, who had demanded possession of the estate of her grandmother, being aware that she had been killed, did not avenge her death. It was held that a trust which the grandmother owed to her granddaughter, by virtue of the will of another, should not be deducted from the estate of the grandmother, when it was confiscated by the Treasury, for the bad faith of the heir must be punished. If, however, the woman had lost the benefit of the bequest through mere negligence, it is just that the trust should be deducted, the right of the obligation remaining unimpaired.

§ 2.- Where persons guilty of murder have been discharged through the injustice of the Governor, it is held that the heirs should not be deprived of the estate if they have properly discharged their duty, even though they may not have appealed from the decision.

22.- PAULUS; *Opinions, Book XVI*.- Gaius Seius, while in a feeble condition, complained that he had been poisoned by his slaves, and then died. His sister, Lucia Titia, became his heir, and after his death neglected to prosecute his murderer. She herself died ten years afterwards, and someone gave notice that

del cuerpo; pero si, pudiendo, no lo hubiere prestado, con razón se le impone el suplicio.

20.- PAPINIANO; *Respuestas, libro II*.- Al heredero, que sigue la causa de envenenamiento, no se le prohíbe disponer las cosas urgentes de la herencia, quedando a salvo los indicios de las pruebas.

21.- EL MISMO; *Respuestas, libro VI*.- Por razón de la tortura por causa de envenenamiento no se prolonga el término para pedir la posesión, porque perfectamente se pide también estando en suspenso la acusación criminal. Otra cosa le plugo al Senado, cuando se dice que el señor fue muerto por la familia, por supuesto, por causa de esclavos cuya libertad hay necesidad de diferir para someterlos al tormento.

§ 1.- Una nieta, que había pedido la posesión de los bienes de su abuela, sabiendo que había sido muerta, no había vengado su muerte; se determinó, que al restituirse los bienes al fisco no se debía deducir el fideicomiso, que en virtud de otro testamento debía la abuela a la nieta, porque se castigó el dolo del heredero; mas si por negligencia hubiere perdido la mujer el emolumento de los bienes, es de razón que se ha de retener el fideicomiso, habiéndose integrado el derecho de la deuda.

§ 2.- Habiendo sido absueltos por injusticia del Presidente los reos de la muerte causada, pareció que a los herederos, que no negligentemente habían cumplido su cargo debido, aunque no hubiesen apelado, no se les debía quitar la herencia.

22.- PAULO; *Respuestas, libro XVI*.- Cayo Seyo, sintiéndose enfermo, se quejó de que había sido envenenado por su esclavo, y así espiró; quedó siendo su heredera su hermana Lucia Ticia, descuidó perseguir la muerte de aquel, y ella misma falleció después de diez años; hubo quien denunció los

sit crimen. Paulus respondit causam, de qua quaeritur, cum sit pecuniaria, morte ingratae heredis extinctam non videri.

23.- MAECIANUS; *libro XIII fideicommissorum*.- Si antequam patefieret testatorem occisum, tabulae testamenti apertae essent, deinde innotuisset id admissum esse, causa cognita puto compellendum institutum adire hereditatem, quam suspectam diceret, et ex Trebelliano senatus consulto restituere.

24.- ULPIANUS; *libro L ad edictum*.- Si quis quasi suspectam hereditatem coactus adit, non tenetur edicto.

25.- GAIUS; *libro XVII ad edictum provinciale*.- Lege Cornelia cavetur de praemio accusatoris, qui requisivit et renuntiavit eos servos, qui ex ea familia ante quaestionem fugerint, ut in singulos servos quos convicerit quinque aureos ex bonis occisi aut, si inde redigi ea quantitas non possit, ex publico accipiat. Quod praemium non in omnes servos, qui sub eodem tecto locove fuerint, sed in eos solos, qui eadem admisissent, accusatori tribuitur.

§ 1.- Praeterea cavetur, ut de his, qui ante quaestionem habitam fugerint, si aperto testamento liberi scripti inveniantur, lege de sicariis iudicium fiat ita, ut ex vinculis causam dicant et convicti perinde ac servi puniantur et ei qui convicerit deni aurei praemii nomine darentur ex bonis damnati.

the estate of Gaius Titius was liable to forfeiture. I ask whether the criminal prosecution was extinguished by the death of Titia. Paulus answered that, in the case stated, it did not appear to be extinguished by the death of the ungrateful heir, as a pecuniary penalty was involved.

23.- MAECIANUS; *Concerning Trusts, Book XIII*.- If a will should be opened before it was known that the testator had been killed, and then the crime should be ascertained to have been committed, I think that, where proper cause is shown, the appointed heir should be compelled to enter upon the estate which he declared was insolvent, and make restitution in accordance with the Trebellian Decree of the Senate.

24.- ULPIANUS; *On the Edict, Book L*.- Where anyone is compelled to enter upon an estate which he has reason to suspect of being insolvent, he will not be liable under the Edict.

25.- GAIUS; *On the Provincial Edict, Book XVII*.- It is provided by the Cornelian Law with reference to the reward to which an accuser is entitled who seeks out and gives information of the whereabouts of slaves who have fled before torture was applied, that he shall receive five aurei out of the estate of the deceased for each slave that he convicts, or if this sum can not be obtained from that source, it shall be paid out of the Public Treasury. This reward shall not be given for the apprehension and conviction of every slave who was under the same roof and in the same place with the deceased, but only for those who are found guilty of the murder.

§ 1.- It is also provided with reference to those slaves who fled before torture was applied, that if, after the will has been opened, it should be found that they were granted their freedom thereby, judgment shall be rendered in accordance with the law relating to assassins: so that they cannot defend themselves after having been imprisoned, and that if they are convicted, they shall be punished just like slaves, and ten aurei shall be taken out of the estate, by way of reward, and given to the party who convicted them.

bienes de Cayo Seyo; pregunto, ¿se habrá extinguido el crimen con la muerte de Ticia? Paulo respondió, que siendo pecuniaria la causa, de que se trata, no se considera que se extinguió con la muerte de la heredera ingrata.

23.- MECIANO; *Fideicomisos, libro XIII*.- Si antes que se supiera que el testador fue muerto se hubiesen abierto las tablas del testamento, y después se hubiese averiguado que se había cometido este delito, opino que con conocimiento de causa ha de ser compelido el instituido a adir la herencia, que dijese que era sospechosa, y a restituirla en virtud del Senadoconsulto Trebeliano.

24.- ULPIANO; *Comentarios al Edicto, libro L*.- Si compelido adió alguien una herencia como si fuera sospechosa, no queda sujeto al Edicto.

25.- GAYO; *Comentarios al Edicto provincial, libro XVII*.- Se dispone en la ley Cornelia por premio del acusador, que buscó y denunció a los esclavos que de aquella familia hubieren huido antes del tormento, que por cada esclavo que hubiere convicto reciba cinco áureos de los bienes del que fue muerto, o de los fondos públicos. si de aquellos no se pudiera reunir esta cantidad; cuyo premio se le concede al acusador no por todos los esclavos que hubieren estado bajo el mismo techo, o en el mismo lugar, sino por aquellos solos que hubiesen hecho la muerte.

§ 1.- Además de esto se dispone, que respecto de aquellos que hubieren huido antes de haberse aplicado el tormento, si abierto el testamento se hallaran declarados libres, se haga juicio conforme a la ley sobre los sicarios, de suerte que sostengan la causa estando aprisionados, y, convictos, sean castigados lo mismo que esclavos, y al que los hubiere hecho convictos se le den a título e premio diez áureos de los bienes del condenado.

§ 2.- Ex hoc edicto actio proficiscitur contra eum, qui adversus edictum praetoris tabulas testamenti aperuisse dicitur vel si quid aliud fecisse dicitur: nam ut ex supra dictis apparet, plura sunt, propter quae poena edicti constituta est. Palam est autem popularem actionem esse, cuius poena in centum aureos ex bonis damnati extenditur: et inde partem dimidiam ei, cuius opera convictus erit, praemii nomine se daturum praetor pollicetur, partem in publicum redacturum.

26.- SCAEVOLA; *libro XXXIV digestorum*.- Fideicommissum, quod ex testamento fratris patruelis Gaius Seius Titio debebat, ab heredibus Seii Titius accepit: quaesitum est, cum necem Gaii Seii heredes eius non vindicaverint, an Titius nihilo minus eos heredes ut indignos accusare possit ob id, quod necem eius non vindicaverint, nec obsit ei, quod ab isdem fideicommissum ex testamento fratris patruelis consecutus sit. Respondit nihil proponi, cur obstaret.

27.- CALLISTRATUS; *libro I de iure fisci*.- Si de pluribus heredibus quibusdam invitis aut ignorantibus apertum erit testamentum, non amittunt portiones suas qui culpa carent.

TIT. VI

SI QUIS ALIQUEM TESTARI PROHIBUERIT
VEL COEGERIT

1.- ULPIANUS; *libro XLVIII ad edictum*.- Qui dum captat hereditatem legitimam vel ex testamento, prohibuit testamentarium introire volente eo facere testamentum vel mutare, divus Hadrianus constituit

§ 2.- Proceedings are instituted under this Edict against a person who, contrary to the provisions of the Edict of the Praetor, is said to have opened the will, or to have committed some other act, in violation of them; for (as in evident from what has been previously stated) there are many things on account of which the penalty prescribed by the Edict can be imposed. It is clear that this action is a popular one, and its penalty is a hundred aurei to be taken from the property of the person who is convicted; and the Praetor promises that half of said sum shall be given by way of reward to him by whose efforts the criminal was found guilty, and the other half shall be turned into the Public Treasury.

26.- SCAEVOLA; *Digest, Book XXXIV*.- Gaius Seius owed Titius property under a trust established by the will of his cousin, and Titius received it from the heirs of Seius. The question arose, as the heirs of Gaius Seius did not avenge his death, whether Titius could, nevertheless, accuse these heirs as being unworthy to obtain the estate, because they had not avenged his death; and whether the fact that he had received from them the trust to which he was entitled under the will of his cousin, the deceased, would not stand in his way. The answer was that, in accordance with the facts stated, there was no reason that it should be considered an obstacle.

27.- CALLISTRATUS; *On the Rights of the Treasury, Book I*.- Where there are several heirs, and the will is opened against the consent of some of them, or without their knowledge, those who are free from blame will not lose their shares of the estate.

TITLE VI

WHERE ANYONE PREVENTS ANOTHER
FROM MAKING A WILL, OR COMPELS
HIM TO MAKE ONE

1.- ULPIANUS; *On the Edict, Book XLVIII*.- The Divine Hadrian decreed that if anyone, while endeavoring to obtain possession of an estate to which he was entitled either by descent or by will,

§ 2.- De este Edicto dimana acción contra el que se dijere que abrió las tablas del testamento en contravención al Edicto del Pretor, o si se dijere que se hizo alguna otra cosa; porque, como resulta de lo antes dicho, hay muchas cosas; por las cuales se estableció la pena del Edicto. Mas es sabido que es popular la acción, cuya pena se extiende a cien áureos de los bienes del condenado; y por esto promete el Pretor que dará a título de premio la mitad a aquel por cuyos servicios uno hubiere sido convicto, y que aplicará la otra mitad a los fondos públicos.

26.- SCÉVOLA; *Digesto, libro XXXIV*.- Ticio recibió de los herederos de Seyo el fideicomiso que Cayo Seyo le debía al mismo Ticio en virtud del testamento de su primo hermano; se preguntó, si no habiendo vengado la muerte, de Cayo Seyo los herederos de éste, podrá, no obstante, Ticio acusar como indignos a estos herederos, porque no hubieren vengado la muerte de aquel, y no le obstará que haya recibido de los mismos el fideicomiso en virtud del testamento de su primo hermano; respondió, que nada se proponía para que le obstase.

27.- CALISTRATO; *Del derecho del fisco, libro I*.- Si repugnándolo o ignorándolo algunos de muchos herederos se hubiere abierto el testamento, no pierden sus porciones los que carecen de culpa.

TÍTULO VI

DE SI ALGUNO HUBIERE IMPEDIDO QUE
OTRO TESTE, O A ELLO LE HUBIERE
OBLIGADO

1.- ULPIANO; *Comentarios al Edicto, libro XLVIII*.- Al que por captarse una herencia legítima o por testamento impidió que entrase el testamentario, queriendo uno hacer testamento, o cambiado, deter-

denegari ei debere actiones denegatisque ei actionibus fisco locum fore.

§ 1.- Si dominus dolo fecerit, ne testamentum mutaretur, in quo servus eius scriptus erat, quamvis manumissus adierit hereditatem, actiones ei denegantur, cum et liberis eius si quid fuerit datum, denegari debeat, etsi non fuerint in potestate. Sed si legatum ei relictum sit idque restituere sit rogatus, consequens erit dicere admitti eum ad legatum, quod non ipse habuisset, sed ad alium sit translaturus.

§ 2.- Si plures heredes instituti sint et omnes dolo fecerint, quo minus testamentum mutaretur, dicendum est actiones omnibus denegari, quia omnes dolo fecerunt.

2.- PAULUS; *libro XLIV ad edictum*.- Si quis dolo malo fecerit, ut testes non veniant, et per hoc deficiatur facultas testamenti faciendi, denegandae sunt actiones ei qui dolo fecerit, sive legitimus heres sit sive priore testamento scriptus.

§ 1.- Fratris autem factum fratri non nocet.

§ 2.- Si fidei eius qui dolum admisit commissum est, ut hereditatem restitueret: ea hereditas caduca cum suis oneribus fiet, ut commodum legis Falcidia fiscus sentiat, dodrantis autem fideicommissarius.

3.- PAPINIANUS; *libro XV responsorum*.- Virum, qui non per vim nec dolum, quo minus uxor, contra eum mutata voluntate, codicillos faceret, intercesserat, sed ut fieri adsolet, offensam aegrae mulieris maritali sermone placaverat, in crimen non incidisse respondi, nec ei quod testamento fuerat datum auferendum.

should prevent a person from entering, who had been sent for, either to draw up a will which the testator desired to execute, or to change one already made, he shall be denied the right to bring any action, and when this is done, the Treasury will be entitled to the estate.

§ 1.- Where a master acting in bad faith prevents a will from being changed by which his slave had been appointed heir, even though, having been manumitted, the latter should enter upon the estate, he shall be denied all rights of action, and his children, if anything has been left to them, shall also lose their rights, even though they are not under his control. Where, however, a legacy has been left to the master in trust, and he is requested to pay it, it must be said that he can receive the legacy, since he himself is not entitled to it, but it must be transferred to another.

§ 2.- Where several heirs have been appointed, and all of them are guilty of bad faith in preventing a will from being changed, it must be said that rights of action shall be refused all of them, because all have acted fraudulently.

2.- PAULUS; *On the Edict, Book XLIV*.- Where anyone acts in bad faith in order to prevent the appearance of witnesses to a will, and by this means the power of making the will is lost, all rights of action shall be refused to the party responsible for the fraud, whether he is the heir-at-law, or was appointed under a former will.

§ 1.- The act of a brother, however, under these circumstances, does not injure his brother.

§ 2.- Where he who committed the fraudulent act was charged with the transfer of the estate, it will be forfeited with all liabilities, so that the Treasury will obtain the benefit of the Falcidian Law, and the beneficiary of the trust will receive three-fourths of the estate.

3.- PAPINIANUS; *Opinions, Book XV*.- Where a husband does not, by employing either force or fraud, interfere to prevent his wife from changing, by means of a codicil, a will which she had made in his favor but (as often happens), merely attempts to appease the anger of his wife by marital remonstrances; I gave as my opinion that he was not guilty of any offence, and should not be deprived of what had been given

minó el Divino Adriano, que se le deben denegar las acciones, y que habiéndosele denegado las acciones ha de haber lugar para el fisco.

§ 1.- Si el señor hubiere hecho con dolo que no se cambiase el testamento en que su esclavo había sido instituido, aunque manumitido hubiere adido la herencia, se le deniegan las acciones, porque también a sus hijos se le debe denegar la cosa que se le hubiere dado, aunque no hubieren estado bajo potestad. Pero si se le hubiera dejado un legado, y se le hubiera rogado que lo restituyese, será consiguiente decir, que se le admite al legado, que él mismo no habría de tener, sino que habría de transferir a otro.

§ 2.- Si hubieran sido instituidos muchos herederos, y todos hubieren hecho con dolo que no se alterase el testamento, se ha de decir, que a todos se les deniegan las acciones, porque todos obraron con dolo.

2.- PAULO; *Comentarios al Edicto, libro XLIV*.- Si alguno hubiere hecho con dolo malo, que no acudan los testigos, y por esto se invalidará la facultad de hacer testamento, se le han de denegar las acciones al que con dolo lo hubiere hecho, ya sea heredero legítimo, ya instituido en el primer testamento.

§ 1.- Mas el hecho de un hermano no le perjudica a otro hermano.

§ 2.- Si a la fidelidad del que cometió el dolo se encomendó que restituyese la herencia, esta herencia se hará caduca con sus cargas, de modo que el fisco experimente el beneficio de la ley Falcidia, y el fideicomisario el de las tres cuartas partes.

§ 3.- PAPINIANO; *Respuestas, libro XV*.- Respondí, que el marido que ni por fuerza, ni por dolo, había mediado para que su mujer no hiciera contra él codicilos por haber cambiado de voluntad, sino que, como se suele hacer, había aplacado con razonamientos de marido la ofensa de su mujer enferma, no incurrió en delito, y que no se le ha de quitar lo que se le había dado en el testamento.

him by the will.

TIT. VII

DE IURE CODICILLORUM

1.- ULPIANUS; *libro IV disputationem*.- Saepissime rescriptum et constitutum est eum, qui testamentum facere opinatus est nec voluit quasi codicillos id valere, videri nec codicillos fecisse: ideoque quod in illo testamento scriptum est, licet quasi in codicillis poterit valere, tamen non debetur.

2.- IULIANUS; *libro XXXVII digestorum*.- Si ei, qui post testamentum factum et ante codicillos scriptos natus esset, codicillis per fideicommissum aliquid daretur, utile est.

§ 1.- Quod si ei, qui post testamentum factum et antequam codicilli scriberentur mortuus esset, datum esset, pro non scripto habetur.

§ 2.- Codicillorum ius singulare est, ut quaecumque in his scribentur perinde haberentur, ac si in testamento scripta essentiarum ideoque servo, qui testamenti facti tempore testatoris fuisset, codicillorum tempore alienus, non recte libertas directa datur. Et contra si, cum testamentum fiebat, alienus esset, codicillorum tempore testatoris, intellegitur alieno servo libertas data. Et ideo licet directae libertates deficiunt, attamen ad fideicommissarias eundum est.

§ 3.- Furiosus non intellegitur codicillos facere, quia nec aliud quicquam agere intellegitur, cum per omnia et in omnibus absentis vel quiescentis loco habetur.

TITLE VII

CONCERNING THE LAW OF CODICILS.

1.- ULPIANUS; *Disputations, Book IV*.- It has very frequently been set forth in Rescripts and Imperial Constitutions, that where a testator was under the impression that he had made a will (but which was void as such), and did not intend it to be valid as a codicil, he is held not to have executed a codicil. Therefore, whatever is included in a will of this kind will not be due, although it would have been if included in a codicil.

2.- JULIANUS; *Digest, Book XXXVII*.- Where a child is born after a will has been executed, and before a codicil is written, and anything is left to it in trust by the codicil, it will be valid.

§ 1.- If, however, he to whom anything was given should die after the execution of the will, and before the codicil in which the bequest is made is executed, it will be considered as not having been written.

§ 2.- A rule peculiar to a codicil is that whatever is included in it shall be considered to have the same effect as if it had been included in the will. Hence freedom is not legally granted to a slave who, at the time of the execution of the will, was the property of the testator, but, when the codicil was executed, belonged to another. And, on the other hand, if the slave belonged to another at the time that the will was made, and at the time of the execution of the codicil had become the property of the testator, freedom is then understood to have been granted to a slave belonging to another; and therefore, although it cannot be directly bestowed, still recourse can be had to a trust.

§ 3.- An insane person is not understood to have the power to make a codicil, for the reason that he is not considered to be competent to perform any other act; since, in the transaction of every kind of business, he is held to be in the position of one who is absent, or who takes no part in the transaction.

TITULO VII

DEL DERECHO DE LOS CODICILOS

1.- ULPIANO; *Disputas, libro IV*.- Muchísimas veces se determinó por rescriptos y constituciones, que el que creyó hacer testamento, y no quiso que este valiera como codicilos, se consideraba que tampoco hizo codicilos; y por lo tanto, lo que se escribió en aquel testamento, aunque pudiese valer como codicilo, sin embargo no se debe.

2.- JULIANO; *Digesto, libro XXXVII*.- Si al que hubiese nacido después de hecho el testamento y antes de haberse escrito los codicilos, se le diese alguna cosa en los codicilos por fideicomiso, es válida.

§ 1.- Pero si al que hubiese muerto después de hecho el testamento y antes que se escribiesen los codicilos se le hubiese dado alguna cosa, se tendrá por no escrita.

§ 2.- Es singular el derecho de los codicilos, de suerte que cualquier cosa que en ellos se escriba es considerada lo mismo que si hubiese sido escrita en el testamento. Y por lo tanto, al esclavo que hubiese sido del testador al tiempo de haber sido hecho el testamento, y de otro al tiempo de los codicilos no se le da debidamente la libertad directa. Y por el contrario, si cuando se hacia el testamento fuese de otro, y del testador al tiempo de los codicilos, se entiende dada la libertad al esclavo de otro. Y por lo tanto, aunque faltan las libertades directas, se ha de recurrir, sin embargo, a las fideicomisarias.

§ 3.- No se considera que el loco hace codicilos, porque tampoco se considera que haga otra cualquier cosa, puesto que por todo y en todo es tenido en el lugar de un ausente o de uno que está dormido.

§ 4.- Hereditas testamento inutiliter data non potest codicillis quasi hereditas confirmari, sed ex fideicommisso petitur salva ratione legis Falcidia.

3.- IULIANUS; *libro XXXIX digestorum*.- Si quis cum testamentum nullum habebat, codicillis fideicommissa hoc modo dedit: "Quisquis mihi heres erit bonorumve possessor, eius fidei committo", fideicommissa praestari debent, quia pater familias, qui testamenti factionem habet et codicillos faceret, perinde haberi debet, ac si omnes heredes eius essent, ad quos legitima eius hereditas vel bonorum possessio perventura esset.

§ 1.- Sed et si post codicillos factos natus quis esset proximus adgnatus vel suus heres, fideicommissum praestari debebit: intellegitur enim is quoque heres scriptus et ideo non perinde habendus est ac si rupisset hos codicillos.

§ 2.- Testamento facto etiamsi codicilli in eo confirmati non essent, vires tamen ex eo capient. Denique si ex testamento hereditas adita non fuisset, fideicommissum ex huiusmodi codicillis nullius momenti erit.

4.- IULIANUS; *libro LXIII digestorum*.- Eum, qui codicillorum tempore solvendo sit, recte libertatem dare placuit, quamvis testamenti facti tempore solvendo non fuerit.

5.- PAPINIANUS; *libro VII responsorum*.- Ante tabulas testamenti codicilli facti non aliter valent, quam si testamento quod postea factum est vel codicillis confirmentur aut voluntas eorum quocumque indicio retineatur: sed non servabuntur ea, de quibus aliter defunctus novissime iudicavit.

6.- MARCIANUS; *libro VII institutionum*.- Divi Severus et Antoninus rescripserunt nihil egisse matrem, quae, cum pure liberos suos heredes

§ 4.- Where an estate is fruitlessly bequeathed by a will, it cannot be confirmed by a codicil, but it can be claimed under a trust, with a reservation of the amount granted by the Lex Falcidia.

3.- THE SAME; *Digest, Book XXXIX*.- Where anyone who has not made a will establishes a trust, by means of a codicil, as follows: "Whoever shall be my heir, or the praetorian possessor of my estate, I leave to him as trustee," the sums left under the trust must be paid, because the head of the household who had the power to make a will, and made a codicil, is in the same position as if all those were his heirs into whose hands the estate will come either through descent or through possession under praetorian law.

§ 1.- Where a child is born after the execution of a codicil, and it is the next of kin, or the direct heir, it will not be obliged to pay any sums left in trust, for it is also understood to be the appointed heir, and therefore it should not be considered as having broken the codicil.

§ 2.- Where a will has been made, even if a codicil should not be confirmed by it, the codicil will, nevertheless, obtain all its force and effect from the will. Again, if the estate is not entered upon by virtue of the will, a trust created by a codicil of this kind will be of no validity whatever.

4.- THE SAME; *Digest, Book LXIII*.- It has been decided that a testator who was solvent at the time of making a codicil can legally grant freedom to his slaves, although he may not have been solvent at the time when the will was executed.

5.- PAPINIANUS; *Opinions, Book VII*.- A codicil which precedes a will is not valid unless confirmed by the will or by a second codicil subsequently executed, or where its provisions are established by some other expression of the intention of the testator; but any different dispositions that the deceased may subsequently make shall not stand.

6.- MARCIANUS; *Institutes, Book VII*.- The Divine Severus and Antoninus stated in a Rescript, where a mother appointed her children her heirs

§ 4.- La herencia dada inútilmente en un testamento no puede ser confirmada como herencia en los codicilos, sino que se pide en virtud de fideicomiso, quedando salva la cuenta de la ley Falcidia.

3.- EL MISMO; *Digesto, libro XXXIX*.- Si alguien, no teniendo ningún testamento, dio en codicilos fideicomisos de este modo «a la fidelidad de cualquiera que fuere mi heredero o poseedor de mis bienes, lo encomiendo», se deben entregar los fideicomisos, porque el padre de familia, que tiene la testamentifacción, y hace codicilos, debe ser considerado lo mismo que si fuesen sus herederos todos aquellos a quienes hubiese de ir su herencia legítima o la posesión de sus bienes.

§ 1.- Pero también si después de hechos los codicilos hubiese nacido un próximo agnado, o un heredero suyo, deberá entregar el fideicomiso; porque se entiende que también este fue instituido heredero, y por lo tanto no ha de ser considerado como si hubiese roto estos codicilos.

§ 2.- Hecho el testamento, aunque en él no hubiesen sido confirmados los codicilos, sin embargo, de él recibirán fuerza. Finalmente, si la herencia no hubiese sido adida en virtud del testamento, no será de valor alguno el fideicomiso proveniente de semejantes codicilos.

4.- EL MISMO; *Digesto, libro LXIII*.- Plugo, que el que sea solvente al tiempo de los codicilos, dé perfectamente la libertad, aunque no hubiere sido solvente al tiempo de hacerse el testamento.

5.- PAPINIANO; *Respuestas, libro VII*.- Los codicilos hechos antes que las tablas del testamento no son válidos de otro modo, sino si fuesen confirmados en el testamento, que se hizo después, o en codicilos, o si la voluntad de los mismos resulta de otro cualquier indicio; pero no se observarán aquellas disposiciones sobre las que el difunto resolvió últimamente de otro modo.

6.- MARCIANO; *Instituta, libro VII*.- Respondieron por rescripto los Divinos Severo y Antonino, que nada hizo la madre, que, habiendo instituido

institut, condicionem emancipationis codicillis adiecit, quia neque condicionem heredi instituto codicillis adicere neque substituere directo potest.

§ 1.- Codicillos et plures quis facere potest et ipsius manu neque scribi neque signari necesse est.

§ 2.- Licet in confirmatione codicillorum pater familias adiecerit, ut non alias valere velit quam sua manu signatos et subscriptos, tamen valent facti ab eo codicilli, licet neque ab eo signati neque manu eius scripti fuerint: nam ea quae postea geruntur prioribus derogant.

§ 3.- Codicillos is demum facere potest, qui et testamentum facere potest.

§ 4.- Si post testamentum factum mortuo codicillis quis legaverit licet testamento confirmatis, pro non scripto legatum fit.

7.- MARCIANUS; *libro II regularum*.- Quaedam non referuntur ad confirmationem codicillorum, veluti si ante captivitatem quis codicillos confirmaverit et in captivitate codicillos scribat: nam non valent. Idem est, si aliquo modo ius testamenti faciendi desierit habere.

§ 1.- Praeterea in illis, quae non iuris, sed facti sunt, non est perinde habendum quod codicillis scribitur, atque si ubi confirmatio scriptum fuisset: veluti si ita in codicillis scriptum erit: "Vestem quae mea est", codicillorum tempus spectandum, non quo confirmantur: item "si Titius Vivus est" vel "si tot annis est", codicillis legavit seio, tempus codicillorum, non quo tempore fit testamentum, spectandum.

8.- PAULUS; *libro singulari de iure codicillorum*.- Conficiuntur codicilli quattuor modis: aut enim in

absolutely, but, in a codicil, added a condition of emancipation, that her act was void; because she could not impose a condition upon an heir who had been appointed, or directly make a substitution under a codicil.

§ 1.- Anyone can make several codicils, and it is not necessary for him to write or seal them with his own hand.

§ 2.- Although, in the confirmation of a codicil, the head of a household may have added that it was not his intention that it should be valid, unless it was sealed and signed with his own hand; still, the codicil made by him will be valid, even if it had neither been signed nor sealed with his own hand, for subsequent dispositions annul those which precede them.

§ 3.- He only can make a codicil who is competent to make a will.

§ 4.- If anyone, by a codicil, should bequeath a legacy to a person who died after he had made his will, the bequest will be considered as not having been made, even though the codicil may have been confirmed by the will.

7.- THE SAME; *Rules, Book II*.- There are certain dispositions which do not relate to the confirmation of codicils; as, for instance, where anyone confirms a codicil before being taken prisoner, and writes a codicil while in captivity, for such a codicil will not be valid. The same rule applies where a person in some way or other ceases to possess testamentary capacity.

§ 1.- Moreover, in questions which are rather those of fact than of law, what is included in a codicil is not to be considered as if it had been written at the time when the codicil was confirmed; for example, if it should be stated in the codicil, "That such-and-such a garment which belongs to me is bequeathed", the time that the codicil was written, and not that when it was confirmed, should be considered. Again, if a bequest is made to Seius by a codicil as follows, "If Titius is living", or "If he is so many years old", the date of the codicil, and not that of the will, should be considered.

8.- PAULUS; *Paulus, On the Law of Codicils*.- Codicils are drawn up in four ways: for they are either

puramente herederos a sus hijos, añadió en codicilos la condición de la emancipación, porque ni puede agregar en los codicilos condición para el hijo instituido, ni substituirlo directamente.

§ 1.- También puede hacer uno muchos codicilos, y no es necesario que se escriban de su propia mano, ni que los selle.

§ 2.- Aunque al confirmar los codicilos hubiere añadido el padre de familia, que no quería que fuesen válidos de otro modo, sino si hubieran sido sellados. Y subscritos por su mano, son válidos, sin embargo, los codicilos hechos por él, aunque ni hubieren sido sellados por él, ni escritos por su mano; porque lo que se hace después deroga lo anterior.

§ 3.- Solamente puede hacer codicilos el que también puede hacer testamento.

§ 4.- Si después de hecho testamento alguien hubiere hecho legado en codicilos al que ya había muerto, aunque hayan sido confirmados por testamento, el legado se considera como no escrito.

7.- EL MISMO; *Regla libro II*.- Algunas cosas no se refieren a la confirmación de los codicilos, por ejemplo, si alguien hubiere confirmado los codicilos antes de su cautividad, y en el cautiverio escribiese codicilos, porque no son válidos; lo mismo es, si de algún modo hubiere dejado de tener el derecho de hacer testamento.

§ 1.- Además de esto, respecto a aquellas cosas que no son de derecho, sino de hecho, no se ha de considerar lo que se escribe en codicilos lo mismo, que si se hubiese escrito al tiempo de la confirmación, por ejemplo, si en los codicilos se hubiere escrito así: «el vestido, que es mío», se ha de atender al tiempo de los codicilos, no a aquel en que se confirman. Asimismo: «si vive Ticio», o «si tiene tantos años», y así hizo el legado a Seyo en los codicilos, se ha de atender al tiempo de los codicilos, no al tiempo en que se hace el testamento.

8.- PAULO; *Del derecho de los codicilos, libro único*.- De cuatro modos se hacen los codicilos,

futurum confirmantur aut in praeteritum aut per fideicommissum testamento facto aut sine testamento.

§ 1.- Sed ideo fideicommissa dari possunt ab intestato succedentibus, quoniam creditur pater familias sponte sua his relinquere legitimam hereditatem.

§ 2.- Codicilli totiens valent, quotiens quis testamentum quoque facere possit. Non tamen hoc ita intellegemus, ut exigamus potuisse eum eo tempore, quo scribit eos codicillos, testamentum facere: quid enim, si sufficientium testium facultatem non habuit? Sed si iure testamenti factionem habuit.

§ 3.- Si post factum testamentum codicillos quis confirmaverit, deinde adrogandum se praebuerit et ibi codicillos fecerit atque ita emancipatus decesserit, quaeritur, an ex codicillis legata debeantur: nam et testamentum valet, sed eo tempore eos fecit, quo testamenti factionem non habuit. Nec similis est muto, qui recte codicillos confirmaverit: licet enim is testamentum facere non possit, tamen testamentum quod ante fecerat in eodem statu est, huius autem testamentum sublatum est et de alienis quodammodo rebus testatur. Sed dicemus codicillos valere: nam et si postumus natus ruperit testamentum et decesserit, nihilo minus codicilli valent.

§ 4.- Si miles testamentum quidem ante militiam, sed codicillos in militia fecerit, an iure militari valeant codicilli, quaeritur, quoniam testamentum iure communi valet, nisi si militiae tempore signavit vel quaedam adiecerit. Certe codicilli militiae tempore facti non debent referri ad testamentum, sed iure militari valent.

§ 5.- Si ei servo, qui testamento legatum acceperit, libertas codicillis detur, utile legatum esse dicemus,

to be confirmed in the future; or have been confirmed in the past; or they are made by means of a trust, where a will has been executed; or where there is no will.

§ 1.- Those who succeed to an estate ab intestato can be charged with a trust, as it is considered that the deceased has voluntarily left them the estate to which they were entitled by law.

§ 2.- A codicil is valid whenever the party who executed it was competent to make a will. But it must not be understood that we require him to have been competent to make a will at the time when he wrote the codicil. (For what if he was unable to obtain a sufficient number of witnesses?) It is indispensable, however, for him to have had the legal right to make a will.

§ 3.- If anyone, by his will, should confirm a codicil to be made hereafter, and then offer himself to be arrogated, and afterwards make a will, and die emancipated; the question arises whether the legacies bequeathed by the codicil should be paid, as the will is valid? He, however, executed the codicil at a time when he did not have testamentary capacity; and this case is not similar to that of a dumb person, who can legally confirm a codicil; for, although he is not competent to make a will, still one which he made before he became dumb remains in the same condition; but the will of this party is void, and, he is in a certain way disposing of the property of others by means of it. We hold, however, that the codicil is valid, for even if the birth of a posthumous child should break the will, and it should afterwards die, the codicil will still be valid.

§ 4.- Where a soldier executes a will before entering the army, and executes a codicil after his enlistment, the question arises whether the codicil will be valid under military law, since a will made under such circumstances is valid by the Common Law only where the soldier did not seal it, or make some addition to it during the term of his military service. It is certain that the codicil made during military service should not be referred back to the will in order to establish its validity, but is valid by military law.

§ 5.- Where freedom is granted by a codicil to a slave who had also received a legacy by will, we say

porque o se confirman para lo futuro, o para lo pasado, o por fideicomiso habiéndose hecho testamento, o sin testamento.

§ 1.- Pero se pueden encomendar fideicomisos a los que suceden abintestato, por esto, porque se cree que el padre de familia les deja espontáneamente la herencia legítima.

§ 2.- Son válidos los codicilos siempre y cuando uno también pueda hacer testamento. Pero esto no lo entenderemos de modo, que exijamos que uno haya podido hacer testamento al tiempo en que escribe aquellos codicilos, -porque ¿qué sería, si no tuvo posibilidad de hallar suficientes testigos?-, sino si tuvo en derecho la testamentifacción.

§ 3.- Si después de hecho el testamento hubiere uno confirmado los codicilos, luego se hubiere dado en arrogación, y estando en ella hubiere hecho codicilos, y así emancipado hubiere fallecido, se pregunta, si se deberán los legados dejados en los codicilos, porque también es válido el testamento, pero aquellos los hizo a tiempo en que no tuvo la testamentifacción, y no es semejante al mudo el que convenientemente hubiere confirmado los codicilos; porque aunque este no pueda hacer testamento, sin embargo, el testamento que antes había hecho se halla en el mismo estado, pero el testamento de aquel se invalidó, y él testa de cosas en cierto modo ajenas. Pero diremos, que son válidos los codicilos, porque aun cuando el póstumo nacido hubiere roto el testamento, y fallecido, son sin embargo, válidos los codicilos.

§ 4.- Si un militar hubiere hecho testamento ciertamente antes de estar en la milicia, pero codicilos estando en la milicia, se pregunta si valdrán por derecho militar los codicilos, puesto que el testamento es válido por derecho común, a no ser que lo haya sellado estando en la milicia, o que le haya añadido alguna cosa. A la verdad, los codicilos hechos estando en la milicia no se deben referir al testamento, sino que son válidos por derecho militar.

§ 5.- Si al esclavo, que por testamento hubiere recibido un legado, se le diese la libertad en

quasi ab initio constiterit legatum.

§ 6.- Si quis certi generis codicillos confirmaverit, puta "quos novissimos fecero", non utique statim quae codicillis dantur consistere videbuntur, quamdiu alii quoque fieri possint, et ideo si alii postea fiant, legata in prioribus data non valebunt.

9.- MARCELLUS; *libro IX digestorum*.- Aristo negavit valere codicillos ab eo factos, qui pater familias nec ne esset, ignorasset. Ulpianus notat: nisi veteranus fuit: tunc enim et testamentum valebit.

10.- PAPINIANUS; *libro XV quaestionum*.-Quod per manus traditum est codicillis hereditatem dari non posse rationem illam habet, ne per codicillos, qui ex testamento valerent, ipsum testamentum, quod vires per institutionem heredum accipit, confirmari videretur.

11.- PAPINIANUS; *libro XIX quaestionum*.- Qui gravi utero uxorem esse ignorabat, codicillis ad filium scriptis libertates dedit. Nata post mortem patris filia, cum de ea nihil patrem sensisse constitisset, placuit libertates a solo filio praestari: posse.

12.- PAPINIANUS; *libro XXII quaestionum*.- Redemptis a sorore partibus.

13.- PAPINIANUS; *libro XIX quaestionum*.- Illud enim sine dubio dici non potest etiam filiam manumittere cogendam, cum ab ea nihil pater petierit et iure suo heres exstiterit.

§ 1.- Tractari solet de eo, qui, cum tabulas testamenti non fecisset, codicillis ita scripsit: "Titium heredem esse volo". Sed multum interest, utrum

that the legacy is valid, just as if it had been so from the beginning.

§ 6.- Where anyone confirms a codicil of a certain kind, for instance, "the one which I shall execute last", the provisions contained in any codicil will not be considered to be valid immediately, so long as others can be made; and therefore if others should be made subsequently, all grants of legacies by former ones will be void.

9.- MARCELLUS; *Digest, Book IX*.- Aristo denies that a codicil is valid where it is made by a person who was ignorant as to whether or not he was the head of the family. Ulpianus states in a note, "Unless he had served in the army, for then his will will be valid".

10.- PAPINIANUS; *Questions, Book XV*.- The opinion that an estate cannot be bequeathed by a codicil has been handed down from former times, and the reason for this is to prevent the will, which obtains all its force from the appointment of the heirs, from appearing to be confirmed by means of a codicil, which itself is dependent upon the will for its validity.

11.- THE SAME; *Questions, Book XIX*.- A certain man who was not aware that his wife was pregnant, in a codicil directed to his son, liberated some of his slaves. After the death of the father, a daughter was born to him, and as it was established that her father had not had her in his mind at any time, it was held that the grant of freedom should be made by the son alone:

12.- THE SAME; *Questions, Book XXII*.- After the sister had been reimbursed for her share of the slaves.

13.- THE SAME; *Questions, Book XIX*.- For it can undoubtedly be maintained that the daughter could not be compelled to manumit the slaves, since her father requested nothing of her, and she becomes an heir in her own right.

§ 1.- The point is often discussed as to what conclusion should be reached, where a man did not make a will, but stated in a codicil: "I wish Titius to be

codicilos, diremos que es útil el legado. como si el legado hubiere sido válido desde el principio.

§ 6.- Si alguno hubiere confirmado codicilos de cierto género, por ejemplo: «los últimos que yo hubiere hecho», no se considerará ciertamente que sean válidas desde luego las cosas que se dan en los codicilos, mientras todavía se pueden hacer otros, y por lo tanto, si se hicieron otros después, no serán válidos los legados que se dieron en los primeros.

9.- MARCELO; *Digesto, libro IX*.- Negó Aristón que fuesen válidos los codicilos hechos por el que hubiese ignorado si era o no padre de familia observó Ulpiano: si no fue veterano, porque entonces será también válido el testamento.

10.- PAPINIANO; *Cuestiones, libro XV*.- Lo que vulgarmente se dice, que no se puede dar la herencia por codicilos, tiene esta razón, que no parezca que por los codicilos. que serían válidos por virtud del testamento, se confirma el mismo testamento, que recibe su fuerza de la institución de herederos.

11.- EL MISMO; *Cuestiones, libro XIX*.-Uno, que ignoraba. que su mujer estuviese embarazada, dio libertades en codicilos escritos para el hijo; habiendo nacido después de la muerte del padre una hija, y constando que nada previno el padre respecto de ella, se determinó, que las libertades se podían dar por el hijo solo,

12.- EL MISMO; *Cuestiones, libro XXII*.- habiendo comprado sus porciones a su hermana.

13.- EL MISMO; *Cuestiones, libro XIX*.- Porque sin duda no se puede decir, que también la hija haya de ser obligada a manumitir, porque el padre nada le exigió a ella, y fue heredera por derecho propio.

§ 1.- Se suele discutir respecto del que, no habiendo hecho testamento, escribió así en los codicilos: «quiero que Ticio sea heredero»; pero importa

fideicommissariam hereditatem a legitimo per hanc scripturam, quam codicillorum instar habere voluit, reliquerit an vero testamentum facere se existimaverit: nam hoc casu nihil a legitimo peti poterit. Voluntatis autem quaestio ex eo scripto plerumque declarabitur: nam si forte a Titio legata reliquit, substitutum adscripsit, heres si non exstisset, sine dubio non codicillos, sed testamentum facere voluisse intellegitur.

14.- SCAEVOLA; *libro VIII quaestionum*.- Quidam referunt, quantum repeto apud Vivianum, Sabini et Cassii et Proculi expositam esse in quaestione huiusmodi controversiam: an legata, quae posteaquam instituti mortem obierunt codicillis adscripta vel adempta sunt, a substitutis debeantur, id est an perinde datio et ademptio etiam hoc tempore codicillis facta valeat ac si testamento facta esset. Quod Sabinum et Cassium respondisse aiunt Proculo dissentiente. Nimirum autem Sabini et Cassii collectio, quam et ipsi reddunt illa est, quod codicilli pro parte testamenti habentur observationemque et legem iuris inde traditam servant. Ego autem ausim sententiam Proculi verissimam dicere.

Nullius enim momenti est legatum, quod datum est ei, qui tempore codicillorum in rebus humanis non est, licet testamenti fuerit: esse enim debet cui detur, deinde sic quaeri, an datum consistat, ut non ante iuris ratio quam persona quaerenda sit. Et in proposito igitur quod post obitum heredis codicillis legatum vel ademptum est, nullius momenti est, quia heres, ad quem sermonem conferat, in rebus humanis non est eaque ademptio et datio nunc vana efficietur. Haec in eo herede, qui ex asse institutus erit dato

my heir". It makes a great deal of difference whether he left the estate in trust in charge of his lawful heir, by means of this instrument, which he intended for a codicil, or whether he thought that he was making a will, for, in this case, Titius could claim nothing from the lawful heir. The intention of the party in question is generally ascertained by the examination of the instrument itself. For if he left a legacy to be discharged by Titius, and appointed a substitute for him, if he should not be the heir, there is no doubt that he should be understood to have intended to make a will, and not a codicil.

14.- SCAEVOLA; *Questions, Book VIII*.- Certain authorities hold (as I recollect) that in Vivianus a controversy is explained which arose between Sabinus, Cassius, and Proculus with reference to the question whether legacies given, or taken away by a codicil from persons who died after they were appointed heirs, were due to the substitutes; that is to say, whether the giving or the taking away of the legacies was as valid where they were provided for by a codicil, as they were when provided for by a will. It is said that Sabinus and Cassius answered that this was the case, and that Proculus dissented. The conclusion of Sabinus and Cassius, (as they themselves assert) is that the codicil is considered as part of the will, and that it sustains the observance of the law with reference to the delivery of the property. Still, I venture to say that the opinion of Proculus is the more correct; for a legacy is of no force or effect which is bequeathed to one who, at the time the codicil was made, was not in existence, even though he was living at the time when the will was drawn up; as it should belong to him to whom it is given.

Then the question should be asked whether the legacy was properly bequeathed, so that the rule of law shall not be inquired into before the existence of the person is ascertained. In the case stated, therefore, the bequest is of no force or effect, if it was made or taken away by a codicil, after the death of the heir; for the reason that the heir referred to was not in existence, and the deprivation or the grant of the legacy becomes void in consequence. This would not apply where a substitute is given for an heir

mucho ver, si por medio de esta escritura, que quiso tuviera apariencia de codicilo, haya dejado una herencia fideicomisaria a cargo del heredero legítimo, o si haya creído hacer testamento; porque en este caso nada se le podrá pedir al heredero legítimo. Mas esta cuestión sobre la voluntad se aclarará la más de las veces por el mismo escrito; porque si acaso dejó legados a cargo de Ticio, y nombró substituto, si no hubiese sido heredero, se entenderá sin duda, que no quiso hacer codicilos, sino testamento.

14.- SCÉVOLA; *Cuestiones, libro VIII*.- Refieren algunos, según recuerdo, que en Viviano se expuso la controversia de Sabino, Cassio y Próculo sobre esta cuestión, si los legados, que después que fallecieron los instituidos fueron consignados o quitados en los codicilos, se deberán por los substitutos, esto es, si la dación y la revocación hechas también en este tiempo en codicilos serán válidas lo mismo que si hubieran sido hechas en testamento. Lo que dicen que respondieron Sabino y Cassio, disintiendo de ellos Próculo; pero, a la verdad, la razón de Sabino y de Cassio, que también ellos mismos exponen, es esta, que los codicilos son considerados como parte del testamento, y guardan las prescripciones y las reglas de derecho de él derivadas. Mas yo me atrevería a decir, que la opinión de Próculo es la más verdadera; porque no es de ningún valor el legado que se le dio al que no existe al tiempo de hacerse los codicilos, aunque haya existido al de hacerse el testamento; porque debe existir aquel a quien se le dé.

Y además así se investiga, si sea válido lo que se dio a fin de que no se haya de buscar la razón del derecho antes que la persona; y por lo tanto, en el caso propuesto lo que se legó o se quitó en los codicilos después de la muerte del heredero no tiene valor alguno, porque no existe el heredero a quien se dirige el encargo, y estas revocación y dación se hacen ahora vanas. Esto respecto al heredero, que hubiere sido instituido por el as habiéndose nombrado substituto, de suerte que los codicilos se con-

substituto, ita ut ab instituto codicilli confirmarentur.

§ 1.- Quod si duo instituti sint substitutis datis unusque eorum decesserit, utilia videntur legata: sed circa coheredem erit tractatus, numquid totum legatum debeat, si "quisquis mihi heres erit" legatum erit, an vero non, quia sit substitutus heres, qui partem faciat, licet ipse non debeat. Idem etiam potest circa nomina expressa tractari. Multoque magis solum coheredem totum debere puto, quia si adiunctus sit, qui etiam tunc cum adiungebatur in rebus humanis non erat.

15.- AFRICANUS; *libro II quaestionum*.- Sed cum ea testatoris voluntas fuerit, ut ex universa hereditate legata erogarentur, dicendum scriptis heredibus profuturam doli exceptionem, si amplius quam hereditaria portio petatur.

16.- PAULUS; *libro XXI quaestionum*.- Ab intestato factis codicillis relicta etiam postea natus intestati successor debet: quicumque enim ab intestato successerit, locum habent codicilli: nam unus casus est nec interest qui succedit dum intestato succedat. Ad testamentum autem quod quoquo tempore fecisset, pertinent codicilli. Et ut manifestius dicam, intestato patre familias mortuo nihil desiderant codicilli, sed vicem testamenti exhibent: testamento autem facto ius sequuntur eius.

17.- PAULUS; *libro III sententiarum*.- Litterae, quibus hereditas promittitur vel animi affectus exprimitur, vim codicillorum non optinent.

appointed to the entire estate, as the codicil would be confirmed by the appointment.

§ 1.- Where two heirs have been appointed, and substitutes assigned, and one of them should die, the legacies will still be considered valid; but some discussion arose with reference to the co-heir, and whether he owed the entire legacy, where the bequest was as follows: "Whoever shall be my heir." Or must it be held that all is not due, for the reason that the heir who was substituted should pay a portion of the same, even though he himself does not owe it? The same discussion may arise with reference to specified obligations; but I think that there is much more ground for the co-heir being liable for the entire legacy, because the party who was joined with him is no longer in existence.

15.- AFRICANUS; *Questions, Book II*.- But as it was the will of the testator that the legacy should be paid out of the entire estate, it must be said that an exception on the ground of bad faith will lie for the benefit of the heirs appointed by the will, where a sum greater than they are entitled to is claimed.

16.- PAULUS; *Questions, Book XXI*.- Where a codicil is made without a will having been drawn up, the successor of the deceased, even though he was born after the codicil was executed, will owe whatever legacies were bequeathed by the same; for the codicil is valid, no matter who the heir may be who is entitled to the intestate succession; for only one case was taken into consideration, and it does not make any difference who obtains the estate, provided he succeeds ab intestato. The codicil depends upon the will, if one was made, no matter at what time this was done. And (in order that I may express myself more clearly) where the head of a household dies intestate, the codicil requires no confirmation, but takes the place of a will. Where, however, a will has been made, the codicil is governed by the same law.

17.- THE SAME; *Sentences, Book III*.- Letters by which an estate is promised, or affection is expressed, have not the force of a codicil.

firmasen por el instituido.

§ 1.- Pero si fueran dos los instituidos habiéndose nombrado substitutos, y uno de ellos hubiere fallecido, se consideran útiles los legados, pero respecto al heredero habrá la cuestión de si deberá acaso todo el legado, si así se hubiere hecho el legado. «cualquiera que fuere mi heredero», o si no lo deberá, porque hay un heredero substituto, que forma parte, aunque el no deba el legado; y lo mismo también se puede disentir respecto a los nombres expresados, y con mucha más razón creo que solo el coheredero debe todo el legado, porque el otro era adjunto, y tampoco existía al tiempo en que era nombrado adjunto.

15.- AFRICANO; *Cuestiones, libro II*.- Pero cuando la voluntad del testador hubiere sido esta, que los legados se pagasen de toda la herencia, se ha de decir, que a los herederos instituidos les ha de aprovechar la excepción de dolo, si se les pidiera más que su porción de herencia.

16.- PAULO; *Cuestiones, libro XXI*.- Hechos los codicilos abintestato, el sucesor del intestato, aunque nazca después, deberá lo que se dejó. Porque cualquiera que sea el que hubiere sucedido abintestato, tienen lugar los codicilos, porque el caso es uno solo, y no importa quien sucede, con tal que suceda abintestato; pero los codicilos pertenecen al testamento, que hubiese hecho en cualquier tiempo. Y, para decirlo más claramente, habiendo fallecido intestado el padre de familia, nada requieren los codicilos, sino que hacen veces de testamento; pero habiéndose hecho testamento, siguen el derecho de este.

17.- EL MISMO; *Sentencias, libro III*.- Las cartas en que se promete una herencia, o en que se expresa el afecto del ánimo, no alcanzan la fuerza de codicilos.

18.- CELSUS; *libro XX digestorum*.- Plotiana Celso suo salutem. Lucius Titius his verbis ita cavuit: "Si quid tabulis aliove quo genere ad hoc testamentum pertinens reliquero, ita valere volo". Quaero, an codicilli, qui ante hoc testamentum scripti sunt, debeant rati esse. Iuventius Celsus Plotianae salutem. Haec verba: "Si quid ad hoc testamentum pertinens reliquero, valere volo", etiam ea, quae ante testamentum scripta sunt, comprehendere.

19.- MARCELLUS; *libro XIV digestorum*.- Is qui unum filium habebat, cum codicillos ad eum scripsisset, decessit intestatus herede eo et quem postea procreavit. Adgnatione sui heredis nemo dixerit codicillos evanuisse: igitur si nihil tum de postumis speravit, et codicilli non evanescent et quae relicta sunt, pro parte dimidia filius, ad quem codicillus factus est, solvere compellitur, non etiam postumus. Sed et si codicillos reliquisset duobus superstitibus filiis decedens, cum putaret alterum ex his prius decessisse, simili modo dici potest omnia perinde debere filium, ad quem scripti sunt codicilli, atque si solus heres exstisset patri. immo dumtaxat partem debet: eorum tamen, quae pro parte praestari non possunt, nihil eorum praestandum, quoniam illi non fuerit filio ablaturus, nisi solum putaret successorem sibi futurum.

20.- PAULUS; *libro V ad legem Iuliam et Papiam*.- Si palam heres nuncupatus sit, legata autem in tabulis collata fuerint, Iulianus ait tabulas testamenti non intellegi, quibus heres scriptus non est, et magis codicilli quam testamentum existimandae sint: et hoc puto rectius dici.

18.- CELSUS; *Digest, Book XX*.- Plotiana to her friend, Celsus, Greeting. Lucius Titius made the following provision in his will: "If I leave anything by will in any document, which in any way relates to this will, I desire it to be valid." I ask whether a codicil made before this will should be confirmed. Iuventius Celsus to Plotiana, Greeting. These words: "If I leave anything which relates to this will, I desire it to be valid," also include everything which was bequeathed before the will was made.

19.- MARCELLUS; *Digest, Book XIV*.- A father, who had an only son, made a codicil directed to him, and died intestate, leaving as his heir a son whom he had begotten after he had made the codicil. No one can say that the codicil was annulled, and therefore if the deceased did not expect to have a posthumous heir, the codicil will not become void through his death; and the son to whom it was directed will be compelled to pay the legacy in proportion to his share of the estate, but the posthumous son will not be compelled to pay anything. But if he, at the time of his death, should have left two surviving sons, but thought that one of them was dead, in like manner, it can be held that the son to whom the codicil was directed may be compelled to pay the entire legacy, just as if he had been the sole heir of his father; but he will only owe a sum in proportion to his share of the estate. Still, no part of a legacy which cannot be divided shall be paid, as the father would not have deprived his son of his share, unless he had thought that he would be his sole heir.

20.- PAULUS; *On the Lex Julia et Papia, Book V*.- Where an heir has been orally appointed, and the bequests of the legacies have been reduced to writing; Julianus says that this instrument should not be understood to be a will in which the heir is not mentioned, but it should rather be considered a codicil, and I think this to be the more correct opinion.

18.- CELSO; *Digesto, libro XX*.- Plociana saluda a su amigo Celso. Lucio Ticio dispuso así en estos términos: «si yo hubiere dejado o en tablas o de otro cualquier modo algo que pertenezca a este testamento, quiero que así sea válido»; pregunto, ¿deberán ser válidos los codicilos, que se escribieron antes de este testamento? Juvencio Celso a Plociana, salud. Estas palabras: «si yo hubiere dejado algo que pertenezca a este testamento, quiero que sea válido», comprenden también las disposiciones que se escribieron antes del testamento.

19.- MARCELO; *Digesto, libro XIV*.- Uno, que tenía un solo hijo, habiéndole escrito codicilos, falleció intestado siendo heredero aquel, y otro que procreó después; nadie dirá que con el nacimiento de un heredero suyo se invalidaron los codicilos; así, pues, si entonces no espero nada en cuanto a póstumos, los codicilos no se invalidan, y el hijo, para quien se hizo el codicilo, es compelido a pagar con arreglo a su mitad los legados que se dejaron, pero no también el póstumo. Pero si al fallecer también hubiese dejado codicilos sobreviviéndole dos hijos, creyendo que uno de ellos había fallecido antes, se puede decir del mismo modo que el hijo para quien se escribieron los codicilos debe todos los legados, lo mismo que si solo él hubiese quedado heredero de su padre. Por mejor decir, debe solamente su parte; pero de aquellos, que no se pueden pagar en parte, no se ha de satisfacer nada absolutamente, porque el testador no se los habría de haber quitado al hijo, si no hubiese creído que él solo habría de suceder.

20.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Si el heredero hubiera sido claramente nombrado de palabra, pero los legados hubieren sido consignados en el testamento, dice Juliano, que no se entiende que son tablas del testamento aquellas en las que no hay heredero escrito; y más bien se han de considerar como codicilos, que como testamento, y esto creo que es lo que se dice con más acierto.

LIBER TRICESIMUS

TIT. UNUS

DE LEGATIS ET FIDEICOMMISSIS

1.- ULPIANUS; *libro LXVII ad edictum*.- Per omnia exaequata sunt legata fideicommissis.

2.- ULPIANUS; *libro Ifideicommissorum*.- Scien- dum est eos demum fideicommissum posse relin- quere, qui testandi ius habent.

3.- ULPIANUS; *libro IV ad Sabinum*.- Haec verba testatoris: "Quisquis mihi ex supra scriptis heres erit" aut "si heres erit Seius" vel "si hereditatem adierit" subiectum legatum vel fideicommissum non faciunt condicionale.

4.- ULPIANUS; *libro V ad Sabinum*.- Si quis in fundi vocabulo erravit et Cornelianum pro Semproniano nominavit, debebitur Sempronianus: sed si in corpore erravit, non debebitur. Quod si quis, cum vellet vestem legare, suppellectilem adscripsit, dum putat suppellectilis appellatione vestem contineri, Pomponius scripsit vestem non deberi, quemadmodum si quis putet auri appellatione electrum vel aurichalcum contineri vel, quod est stultius, vestis appellatione etiam argentum contineri. Rerum enim vocabula immutabilia sunt, hominum mutabilia.

§ 1.- Si quis heredes instituerit et ita legaverit: "Quisquis mihi Gallicanarum rerum heres erit, damnas esto dare", ab omnibus heredibus videri legatum, quoniam ad omnes eos res Gallicanae pertinent.

5.- PAULUS; *libro I ad Sabinum*.- Servi electione legata semel dumtaxat optare possumus.

BOOK XXX

SINGLE TITLE

CONCERNING LEGACIES AND TRUSTS

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

2.- THE SAME; *Trusts, Book I*.- It must be remembered that only those can bequeath property in trust who have testamentary capacity.

3.- THE SAME; *On Sabinus, Book IV*.- The following words of a testator: "Whoever of the parties above mentioned shall be my heir," or, "If Seius should be my heir," or, "If he should enter upon my estate," any trust subsequently bequeathed will not, for this reason, be conditional.

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

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

5.- PAULUS; *On Sabinus, Book I*.- Where a slave is left to be selected by the legatee, we can make a

LIBRO TRIGÉSIMO

TÍTULO ÚNICO

DE LOS LEGADOS Y DE LOS FIDEICOMISOS

1.- ULPIANO; *Comentarios al Edicto, libro LXVII*.- En todo fueron igualados los legados con los fideicomisos.

2.- EL MISMO; *Fideicomisos, libro I*.- Se ha de saber, que solamente los que tienen el derecho de testar pueden dejar fideicomiso.

3.- EL MISMO; *Comentarios a Sabino, libro IV*.- Estas palabras del testador: «cualquiera que de los arriba escritos fuere mi heredero», o «si Seyo fuere mi heredero», o «si adiere la herencia», no hacen condicional el legado o el fideicomiso expresado.

4.- EL MISMO; *Comentarios a Sabino, libro V*.- Si alguno erró en el nombre del fundo, y nombró el Corneliano por el Semproniano, se deberá el Semproniano; pero si erró en la cosa, no se deberá. Mas si alguien, queriendo legar un vestido, escribió un ajuar, creyendo que con la denominación de ajuar se comprendía el vestido, escribió Pomponio, que no se debe el vestido, del mismo modo que si uno creyera que con la denominación de oro se comprendía el ámbar o el auricalco, o, lo que es más necio, que con la denominación de vestido se comprende también la plata. Porque los nombres de las cosas son inmutables, y variables los de los hombres.

§ 1.- Si alguno hubiere instituido herederos y hecho legados de este modo: «cualquiera que fuere mi heredero de los bienes de las Galias, esté condenado a dar», se considera que se legó a cargo de todos los herederos, porque a todos ellos pertenecen los bienes de la Galia.

5.- PAULO; *Comentarios a Sabino, libro I*.- Legada la elección de un esclavo, solo una vez

§ 1.- Labeo ait, cum certa res aut persona legatur ita: "Qui meus erit cum moriar, heres dato" et communis sit, totum deberi. Trebatium vero respondisse partem deberi Cassius scripsit, quod et verius est.

§ 2.- Cum fundus communis legatus sit non adiecta portione, sed "meum" nominaverit, portionem deberi constat.

6.- IULIANUS; *libro XXXIII digestorum*.- "Stichum, qui meus erit cum moriar, heres meus dato": magis condicionem legato iniecissem quam demonstrare voluisse patrem familias apparere eo quod, si demonstrandi causa haec oratio poneretur, ita concepta esset "Stichus qui meus est", non "qui meus erit". Sed condicio talis accipi debet "quatenus meus erit", ut, si totum alienaverit, legatum extinguatur, si partem, pro ea parte debeatur, quae testatoris mortis tempore fuerit.

7.- PAULUS; *libro II ad Sabinum*.- Legatum servo delatum dominus potest repudiare.

8.- POMPONIUS; *libro II ad Sabinum*.- Si ex toto fundo legato testator partem alienasset, reliquam dumtaxat partem deberi placet, quia etiam si adiecisset aliquid ei fundo, augmentum legatario cederet.

§ 1.- Si ita scriptum sit: "Lucius Titius heres meus aut Maevius heres meus decem Seio dato", cum utro velit, Seius aget, ut, si cum uno actum sit et solitum, alter liberetur, quasi si duo rei promittendi in solidum obligati fuissent, quid ergo si ab altero partem petierit? Liberum cui erit ab alterutro reliquum petere. Idem erit et si alter partem solvisset.

§ 1.- Labeo says that when a certain article or slave is bequeathed as follows: "Who will be mine when I die shall be given by my heir," and the article or slave is held in common, the whole of it will be due. Cassius states that Trebatius gave it as his opinion that only the share owned by the testator is due; which is correct.

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

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

7.- PAULUS; *On Sabinus, Book II*.- A master can reject a legacy bequeathed to his slave.

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

§ 1.- If the following provision should be inserted in a will: "Let Lucius Titius, my heir, or Maevius, my heir, pay ten aurei to Seius," Seius can bring suit against whichever of the heirs he may select, and if he brings an action against one of them, and payment is made by him, the other will be released; just as where two debtors have promised to pay, both will be liable for the entire amount. But what if the legatee should only demand half of the amount from one of the

§ 1.- Dice Labeón, que cuando se lega cierta cosa o persona en esta forma: «déla el que fuere mi heredero, cuando yo muera», y se tuviera en común, se debe la totalidad; pero Cassio escribió, que Trebacio respondió, que se debe la parte; lo que también es más cierto.

§ 2.- Cuando no habiéndose expresado la porción se haya legado un fundo común, pero que el testador lo hubiere nombrado «mío», consta que se debe su porción.

6.- JULIANO; *Digesto, libro XXXIII*.- «Dé mi heredero el esclavo Stico, que fuere mío, cuando yo muera»; parece que el padre de familia más bien impuso una condición para el legado, que no que quiso hacer una demostración, por esto, porque si esta oración se pusiera para hacer la demostración, habría sido expresada de este modo. «Stico, que es mío», no «que fuere mío». Pero esta condición se debe entender en cuanto fuere mío de suerte que, si lo hubiere enajenado todo él, se extinga el legado, y si parte, se deba en aquella porción que fuere del testador al tiempo de su muerte.

7.- PAULO; *Comentarios a Sabino, libro II*.- El señor puede repudiar el legado dejado al esclavo.

8.- POMPONIO; *Comentarios a Sabino, libro II*.- Si de todo el fundo legado hubiese enajenado el testador una parte, está establecido que se deba solo la parte restante, porque aunque hubiese agregado alguna cosa a este fundo, el aumento cedería a favor del legatario.

§ 1.- Si se hubiera escrito así: "Déle ciento a Seyo o mi heredero Lucio Ticio, o mi heredero Mevio", Seyo ejercerá su acción contra el que quiera de los dos, de suerte que, si la hubiera ejercitado contra uno, y se hubiera hecho el pago, el otro quede libre, como si dos prometedores se hubiesen obligado solidariamente. Luego, ¿qué se dirá, si a uno le hubiere pedido parte? Que él tendrá libertad para pedirle al otro lo restante; y lo mismo será, también si uno

§ 2.- Si ita legatum sit: "Lecticarios octo aut pro his in homines singulos certam pecuniam, utrum legatarius volet", non potest legatarius partem servorum vindicare, pro parte nummos petere, quia unum in alterutra causa legatum sit, quemadmodum si olei pondo quinquaginta aut in singulas libras certum aes legatum sit: ne aliter observantibus etiam uno homine legato divisio concedatur. Nec interest, divisa ea summa an iuncta ponatur: et certe octo servis aut pro omnibus certa pecunia legata non posse invitum heredem partem pecuniae, partem mancipiorum debere.

9.- POMPONIUS; *libro III ad Sabinum*.- Id quod apud hostes est legari posse Octavienus scripsit et postliminii iure consistere.

10.- PAULUS; *libro II ad Sabinum*.- Iulianus nec a filio familias sine iussu patris optari posse nec ante aditam hereditatem putat, quod est verum.

11.- PAPINIANUS; *libro IX quaestionum*.- Cum filio familias vel servo alieno legatum vel hereditas datur, fidei committi patris vel domini potest ac tunc demum ex persona ipsorum fideicommissum vires capit, cum ipsis, per quos commodum hereditatis vel legati patri dominove quaeritur, fideicommissum relinquitur. Denique Iulianus non insuptili ratione motus patrem, cuius filius heres institutus est, extero quidem habita ratione legis Falcidiae restituere hereditatem respondit, quoniam ex persona filii teneretur, ipsi vero filio non admissa Falcidia, quoniam ex persona sua sibi filius obligare non posset ac pater non ut heres, sed ut pater rogari videtur. Et ideo si filio rogatus sit pater post mortem suam, quod ad se pervenit ex legato vel hereditate filio relictis, restituere isque vivo patre decedat,

heirs? He would be free to demand the remainder from the other. The same rule will apply where one of the parties has paid his share.

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

9.- THE SAME; *On Sabinus, Book III*.- Octavianus states that property in the hands of the enemy can be bequeathed, and the bequest will stand, under the law of postliminium.

10.- PAULUS; *On Sabinus, Book II*.- Julianus holds that a choice cannot be made by a son under paternal control, without the consent of his father; nor before he has accepted the estate.

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

hubiese pagado parte.

§ 2.- Si así se hubiera hecho un legado: «ocho mozos de litera, o en lugar de estos cierta cantidad por cada hombre, según quiera el legatario», no puede el legatario reivindicar parte de los esclavos y pedir dinero por la otra parte, porque en uno u otro caso se legó una sola cosa, así como si se hubieran legado cincuenta libras de aceite, o cierta cantidad por cada libra, a fin de que a los que hicieran de otro modo, no se les conceda también la división habiéndose legado un centavo; y no importa que esta cantidad se exprese dividida o junta y a la verdad, los legados ocho esclavos, o por todos ellos cierta cantidad, no puede, contra su voluntad deber el heredero parte del dinero y parte de los esclavos.

9.- EL MISMO; *Comentarios a Sabino, libro III*.- Escribió Octaviano, que se puede legar lo que está en poder de los enemigos, y que es válido el legado por derecho de postliminio.

10.- PAULO; *Comentarios a Sabino, libro II*.- Opina Juliano, que no se puede elegir por el hijo de familia sin orden del padre, ni antes de haber sido adida la herencia; lo que no es verdad.

11.- PAPINIANO; *Cuestiones libro IX*.- Cuando a un hijo de familia o a un esclavo ajeno se le da un legado o la herencia, se le puede hacer fideicomiso al padre o al señor; y entonces el fideicomiso adquiere fuerza por razón de la persona de los mismos, solamente cuando se les deja el fideicomiso a los mismos por los cuales se adquiere para el padre o para el señor la utilidad de la herencia o del legado. Por último, movido Juliano por sutil razón respondió, que el padre, cuyo hijo fue instituido heredero, le restituya la herencia a un extraño, habida ciertamente cuenta de la ley Falcidia, porque se obligaría por la persona de su hijo; pero al mismo hijo, sin admitirse la Falcidia, porque por su propia persona no se le podría obligar el hijo, y el padre parecería que no era rogado como heredero, sino como padre. Y por esto,

omnimodo patrem id retenturum, quoniam fideicommissum ex persona patris vires acceperit.

12.- POMPONIUS; *libro III ad Sabinum*.- Si mihi et tibi eadem res legata fuerit, deinde die legati cedente heres tibi exstitero, liberum mihi esse Labeo ait, ex meo legato an ex eo, quod tibi heres sim, adquiram legatum: si voluero, eam rem ex meo legato ad me pertinere, ut tota mea sit, ex hereditario legato petere eam posse.

§ 1.- Proculus ait, si quis servos quos Gadibus haberet eo testamento, quod Romae moriens fecerit, triduo quo mortuus fuerit heredem dare mihi damnaverit, ratum esse legatum et angustias temporis nihil legato nocere.

2. Regula iuris civilis est, quae efficit, ut quibus ipsis legare possumus, eorum quoque servis legare possumus.

3. In legatis novissimae scripturae valent, quia mutari causa praecedentis legati vel die vel condicione vel in totum ademptione potest. Sed si sub alia et alia condicione legatum ademptum est, novissima ademptio spectanda est. Interdum tamen in legatis non posterior, sed praecedens scriptura valet: nam si ita scripsero: "Quod Titio infra legavero, id neque do neque lego", quod infra legatum erit, non valebit. Nam et eum sermonem, quo praesentia legata data in diem proferuntur, ad postea quoque scripta legata pertinere placuit. Voluntas ergo facit, quod in testamento scriptum valeat.

13.- POMPONIUS; *libro IV ad Sabinum*.- Cum incertus homo legatus tibi esset, heres Stichum servo

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

12.- POMPONIUS; *On Sabinus, Book III*.- If the same property should be bequeathed to me and to yourself, and on the day when the legacy was due, I should become your heir, Labeo says that I can acquire the property either for the reason that it was left to me, or because I am your heir. Proculus says, that if I should wish the whole of it to belong to me on account of the legacy which was bequeathed to me, I must demand it on the ground of being heir to the legacy.

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

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

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

13.- THE SAME; *On Sabinus, Book IV*.- Where a slave, insufficiently described, was left to you, and

si se le hubiere rogado al padre que después de su muerte le restituyera al hijo lo que fue a su poder de él en virtud del legado o de la herencia dejados al hijo, y éste falleciera viviendo el padre, esto lo habrá de retener de todos modos el padre, porque el fideicomiso habrá recibido fuerza por la persona del padre.

12.- POMPONIO; *Comentarios a Sabino, libro III*.- Si a mi y a tí nos hubiere sido legada la misma cosa, y después al correr el término del legado yo hubiere quedado siendo tu heredero, dice Labeón, que tengo libertad para adquirir el legado o porque se me legó, o porque soy tu heredero; y si yo quisiere que la cosa me pertenezca por razón de mi legado, para que toda sea mía, dice Próculo, que puedo pedirla en virtud del legado hereditario.

§ 1.- Si alguno hubiere condenado a su heredero, en testamento que al morir hubiere hecho en Roma, a darme dentro de tres días después que hubiere muerto, esclavos que tuviese en Cádiz, el legado es válido, y la premura del tiempo en nada le perjudica al legado.

§ 2.- Hay una regla de Derecho Civil, que hace, que también podamos hacer legados a los esclavos de aquellos mismos a quienes les podemos legar.

§ 3.- En los legados son válidas las últimas escrituras, porque se puede mudar la causa del legado anterior o por el término, o con la condición, o en su totalidad con la revocación; pero si se revocó un legado bajo una y otra condición, se ha de atender a la última revocación. Pero a veces no es válida en los legados la escritura posterior, sino la precedente; porque si yo hubiere escrito así: «lo que abajo yo legar e a Ticio, esto, ni lo doy, ni lo lego», no será válido lo que abajo se hubiere legado; pues se determinó que también aquella cláusula con la que se difieren a término los legados dados de presente, pertenezca asimismo a los legados escritos después. Luego la voluntad hace que sea válido lo escrito en el testamento.

13.- EL MISMO; *Comentarios a Sabino, libro IV*.- Habiéndosete legado un esclavo incierto, el heredero

tuo tradidit. Neratius respondit, si voluntate domini tradidit vel ratum hoc dominus habuerit, perinde eum liberatum, atque si Stichus legatus esset.

14.- ULPIANUS, *libro XV ad Sabinum*.- Si ita sit adscriptum: "Si cui legavero bis, semel heres ei dato" vel "ut semel debeatur", et eidem duas quantitates adscripserit vel duos fundos, an utrumque debeatur? Et ait Aristo unum videri legatum: nam quod ademptum est, nec datum videri secundum Celsi et Marcelli sententiam, quae vera est.

§ 1.- Sed Papinianus libro nono decimo quaestionum ait etsi post legata saepius adscripta idem hoc subiecit semel praestari velle et hoc ante impletum testamentum fecerit, ipso iure videri cetera legata adempta. Sed quo magis erit ademptum? Non enim apparet. Et ait posse dici exiguius esse praestandum.

15.- PAULUS; *libro III ad Sabinum*.- Qui quartam partem bonorum legare voluit, dimidiam scripsit. Proculus recte ait posse defendi quartam legatam, quia inesset dimidia. Idem erit et si quinquaginta voluit legare et centum scripta sint: quinquaginta enim debebuntur. Sed et si plus legare voluit et minus scripsit, valebit legatum.

§ 1.- Si quis unam summam filiabus legaverit, ut etiam de postuma sentiret, si ea non est nata, superstiti solidum debebitur.

16.- POMPONIUS; *Pomponius libro V ad Sabinum*.- Si duobus res coniunctim legata sit, quamvis alter in rerum natura non fuerit, alteri solam partem deberi puto verum esse.

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

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

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

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

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

16.- POMPONIUS; *On Sabinus, Book V*.- Where the same property is bequeathed to two persons conjointly, and one of them is not in existence, I think that it is true that only a half is due to the survivor.

entregó Stico a tu esclavo; Neracio respondió, que si lo entregó con voluntad del señor, o si el señor hubiere ratificado esto, queda él libre de la obligación lo mismo que si hubiese sido legado Stico.

14.- ULPIANO; *Comentarios a Sabino, libro XV*.- Si se hubiera escrito así: «si a alguno le hubiere yo legado dos veces, déle el heredero una vez», o como si se debiera una sola vez, y para uno mismo hubiere asignado dos cantidades, o dos fundos, ¿se deberá una y otra cosa? Y dice Aristón, que se considera que se legó una sola cosa; porque lo que se quitó, ni aun parece que se dió, según la opinión de Celso y de Marcelo, la cual es verdadera.

§ 1.- Pero dice Papiniano en el libro décimo noveno de las Cuestiones, que si después de haber asignado muchas veces legados hubiere añadido esto mismo, que quería que se hiciese una sola entrega, y esto lo hubiere hecho antes de haber concluido el testamento, se considera que de derecho quedaron revocados los demás legados; pero ¿cual habrá sido revocado preferentemente, puesto que no aparece? Y dice, que se puede decir, que se debe entregar el más exiguo.

15.- PAULO; *Comentarios a Sabino, libro III*.- Uno que quiso legar la cuarta parte de sus bienes, escribió la mitad; y con razón dice Próculo, que se puede defender que fue legada la cuarta parte, por estar comprendida en la mitad. Lo mismo será, también si quiso legar cincuenta, y se hubiese escrito ciento, porque se deberán los cincuenta. Pero también será válido el legado, si quiso legar mas, y escribió menos.

§ 1.- Si uno hubiere legado una sola cantidad a sus hijas, como refiriéndose también a una póstuma, si esta no nació, se deberá la totalidad a la sobreviviente.

16.- POMPONIO; *Comentarios a Sabino, libro V*.- Si una cosa hubiera sido legada conjuntamente a dos, aunque uno no hubiere existido, creo que es verdad que al otro se le debe su sola parte.

§ 1.- Heres adiecto ei nomine cuiusdam, qui heres non sit, dare damnatus totum legatum debet: nam et si duos ex heredibus suis nominatim quis damnasset et alter hereditatem non adisset, qui adisset totum deberet, si pars eius qui non adisset ad eum qui adisset pervenerit.

§ 2.- Si Titio et postumis legatum sit, non nato postumo totum Titius vindicabit. Sed et si testator Titio et postumis viriles partes dari voluisset vel etiam id expressisset, totum legatum Titio debetur non nato postumo.

17.- ULPIANUS; *libro XV ad Sabinum*.- Qui filiabus legavit, si mentionem aliqua parte testamenti postumae fecit, videtur in filiarum legato et de postuma sensisse.

§ 1.- Si quis ita legaverit: "Si qua filia mihi genitur, ei heres meus centum dato", pluribus natis videtur singulis tantundem legasse: quod ita accipiendum est, nisi evidens sit contraria sententia testatoris.

§ 2.- Si uni ex heredibus fuerit legatum, hoc deberi ei officio iudicis familiae heriscundae manifestum est: sed et si abstinerit se hereditate, consequi eum hoc legatum posse constat.

18.- IULIANUS; *libro XXXI digestorum*.- Et quidem totum legatum petere potest, quamvis a semet ipso inutiliter ei legatum fuisset.

19.- ULPIANUS; *libro XV ad Sabinum*.- Legata inutiliter data Papinianus putat libro quaestionum confirmari per repetitionem, id est per hanc scripturam postea forte in codicillis factam: "Hoc amplius ei heres meus dato", et diversum esse in illa

§ 1.- Where an heir is charged with the payment of a legacy together with another who is not his co-heir, he who was appointed owes the entire legacy; for if the testator expressly charged two heirs with the payment, and one of them does not enter upon the estate, the other who did would owe the whole amount, if the share of him who refused the estate should come into the hands of the heir who accepted it.

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

17.- ULPIANUS; *On Sabinus, Book XV*.- Where a person made a bequest to his daughters and mentioned a posthumous daughter in some part of his will, he is held to have had the posthumous daughter in his mind at the time he made the bequest.

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

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

18.- JULIANUS; *Digest, Book XXXI*.- He can, indeed, claim the entire legacy, even though he would have been himself improperly charged if he had not refused the estate.

19.- ULPIANUS; *On Sabinus, Book XV*.- Papinianus holds in the Book of Questions that where legacies have been left in such a way as to be of no effect, they can be confirmed by repetition; that is to say, by the following clause subsequently inserted in

§ 1.- El heredero condenado a dar, habiéndose añadido el nombre de cualquiera, que no sea heredero, debe todo el legado; porque también si uno hubiese condenado expresamente a dos herederos suyos, y uno de ellos no hubiese adido la herencia, el que la hubiese adido lo debería todo, si la parte del que no la hubiese adido hubiere ido a poder del que la hubiese adido.

§ 2.- Si se les hubiera hecho un legado a Ticio y a los póstumos, Ticio lo reivindicaría todo no habiendo nacido el póstumo. Pero asimismo, si el testador hubiese querido que se le diesen porciones viriles a Ticio y a los póstumos, o también hubiese expresado esto, se le debe todo el legado a Ticio, no habiendo nacido el póstumo.

17.- ULPIANO; *Comentarios a Sabino, libro XV*.- El que dejó un legado a las hijas, si en alguna parte del testamento hizo mención de la póstuma, se considera que en el legado de las hijas también se refirió a la póstuma.

§ 1.- Si alguien hubiere hecho un legado de este modo: «si me nace alguna hija, dele ciento al heredero», habiendo nacido muchas, se considera que legó otro tanto a cada una; lo que se ha de entender de este modo, si no fuere evidente la voluntad contraria del testador.

§ 2.- Si se hubiere hecho un legado a uno solo de los herederos, es evidente, que se le debe este por el ministerio del juez de la partición de herencia; pero consta, que aunque él se hubiere abstenido de la herencia puede conseguir este legado;

18.- JULIANO; *Digesto, libro XXXI*.- Y ciertamente puede pedir todo el legado, aunque inútilmente a él se le hubiese dejado el legado a cargo de sí mismo.

19.- ULPIANO; *Comentarios a Sabino, libro XV*.- Opina Papiniano en el libro de las Cuestiones, que los legados dados inútilmente se confirman con la repetición, esto es, por esta cláusula acaso puesta después en los codicilos: «déle además esto mi

scriptura: "Quas pecunias legavi, quibus dies adpositus non est, annua bima trima die heres meus dare damnas esto": non enim hoc egisse testatorem, ut confirmaret quae inutilia sunt, sed ut diem utilibus prorogaret.

§ 1.- Idem eodem loco et in substituto impuberis scripsit, ut, si fuerit ab impubere inutiliter legatum, substitutus hoc debeat, si "hoc amplius" legatum ab eo sit relictum aliquid nec ille patri heres exstiterit et decesserit.

§ 2.- In legato pluribus relicto si partes adiectae non sunt, aequae servantur.

20.- POMPONIUS; *libro V ad Sabinum*.- Qui duos servos haberet, unum ex his legasset, ut non intellegeretur quem legasset, legatarii est electio.

21.- ULPIANUS; *libro XV ad Sabinum*.- Grege legato et quae postea accedunt ad legatarium pertinent.

22.- POMPONIUS; *libro V ad Sabinum*.- Si grege legato aliqua pecora vivo testatore mortua essent in eorumque locum aliqua essent substituta, eundem gregem videri: et si deminutum ex eo grege pecus esset et vel unus bos superesset, eum vindicari posse, quamvis grex desisset esse: quemadmodum insula legata, si combusta esset, area possit vindicari.

23.- PAULUS; *libro III ad Sabinum*.- Si quis bonorum partem legaverit, ut hodie fit, sine fructibus restituitur, nisi mora intercesserit heredis.

24.- POMPONIUS; *libro V ad Sabinum*.- Quod in

a codicil: "Let my heir pay him this, in addition;" and where something different is afterwards stated: "Let my heir be charged with the payment of the money which I have bequeathed, on the days which I have fixed, and not at the end of one, two, and three years;" for the testator did not do this for the purpose of confirming the bequests which were void, but merely to prolong the time of payment for those which were valid.

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

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

20.- POMPONIUS; *On Sabinus, Book V*.- Where a testator has two slaves, and bequeaths one of them in such a way that it cannot be ascertained which one he bequeathed, the legatee can make his choice.

21.- ULPIANUS; *On Sabinus, Book XV*.- If a flock of sheep was left, any increase which subsequently takes place will belong to the legatee.

22.- POMPONIUS; *On Sabinus, Book V*.- Where a drove of cattle was bequeathed, and some of them die during the life of the testator, and others are substituted in their stead, the drove is held to be the same. If the drove should be diminished to such an extent that only a single ox survives, it can be claimed, even though the drove, as such, has ceased to exist; just as in the case where a house which has been devised is burned, the land on which it stood can be claimed.

23.- PAULUS; *On Sabinus, Book III*.- Where a person bequeaths a part of his property, as is the custom at present, it can be surrendered without the crops, unless the heir is in default.

24.- POMPONIUS; *On Sabinus, Book V*.- It is

heredero», y que cosa diversa sucede con esta otra cláusula: «las cantidades que legué, para las que no se señaló día, esté condenado mi heredero a darlas dentro del término de uno, dos, tres años»; porque esto no lo hizo el testador para confirmar los legados inútiles, sino para prorrogar el término de los útiles.

§ 1.- Escribió él mismo en el mismo lugar y respecto al substituto de un impúbere, que si inútilmente se hubiere hecho un legado a cargo de un impúbere, lo deba el substituto, si además de esto se hubiera legado a su cargo alguna cosa, y aquel no hubiere sido heredero de su padre, y hubiere fallecido.

§ 2.- Si en el legado dejado a muchos no se hubiesen asignado las partes, estas se hacen iguales.

20.- POMPONIO; *Comentarios a Sabino, libro V*.- Si el que tuviese dos esclavos hubiese legado uno de ellos, de modo que no se entendiese cuál había legado, la elección es del legatario.

21.- ULPIANO; *Comentarios a Sabino, libro XV*.- Legado un rebaño, también le pertenecen al legatario las cabezas que después se le agregan.

22. POMPONIO; *Comentarios a Sabino, libro V*.- Si habiéndose legado un rebaño hubiesen muerto algunas reses; viviendo el testador, y en lugar de ellas hubiesen sido substituidas otras, se considera que este es el mismo rebaño; y si se hubiese disminuido el ganado de este rebaño, y quedase un solo buey, este puede ser reivindicado, aunque haya dejado de haber rebaño, a la manera que, legada una casa, si se hubiese quemado, se puede reivindicar el solar.

23.- PAULO; *Comentarios a Sabino, libro III*.- Si alguno hubiere legado parte de los bienes, como se hace hoy, se restituye sin los frutos, a no ser que hubiere mediado mora del heredero.

24.- POMPONIO; *Comentarios a Sabino, libro V*.-

rerum natura adhuc non sit, legari posse, veluti "quidquid illa ancilla peperisset", constitit: vel ita "ex vino quod in fundo meo natum est" vel "fetus tantum dato".

§ 1.- Si usum fructum habeam eumque legaverim, nisi postea proprietatem eius nactus sim, inutile legatum est.

§ 2.- Si quis post testamentum factum fundo Titiano legato partem aliquam adiecerit, quam fundi Titiani destinaret, id quod adiectum est exigi a legatario potest (et similis est causa alluvionis) et maxime si ex alio agro, qui fuit eius cum testamentum faceret, eam partem adiecit.

§ 3.- Quod si post testamentum factum ex fundo Titiano aliquid detraxit et alii fundo adiecit, videndum est, utrumne eam quoque partem legatarius petiturus sit an hoc minus, quasi fundi Titiani esse desierit, cum nostra destinatione fundorum nomina et domus, non natura constituerentur.

§ 4.- Et magis est, ut quod alii destinatum est ademptum esse videatur. Si navem legavero et specialiter meam adscripsero eamque per partes totam refecero, carina eadem manente nihilo minus recte a legatario vindicaretur.

25.- PAULUS; *libro III ad Sabinum*.- A filio herede etiam pure patri legari potest nec interest, an diecedente legati in patris potestate sit: igitur et si iussu patris adita sit hereditas, imputabitur ei in Falcidiam.

26.- POMPONIUS; *libro V ad Sabinum*.- Non amplius legatorum nomine ad quemquam pertinere videtur quam quod deducto eo, quod explendae conditionis causa datum esset, superesset.

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

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

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

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

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

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

26.- POMPONIUS; *On Sabinus, Book V*.- No more of a legacy is considered to belong to anyone than what remains after a deduction has been made of

Fue constante, que se pueda legar lo que no exista todavía, por ejemplo: «lo que hubiese parido aquella esclava», o así: «del vino que se haya producido en mi fundo», o «de tantos fetos».

§ 1.- Si yo tuviera el usufruto, y lo legare, es inútil el legado, si después no hubiera adquirido su propiedad.

§ 2.- Si alguien hubiere agregado después de hecho el testamento alguna parte al fundo Ticiano, que había legado, cuya parte destinase para el fundo Ticiano, se puede exigir por el legatario lo que se agregó; y semejante es la causa de aluvión, y principalmente si añadió aquella parte de otro campo, que fue suyo, cuando hacía el testamento.

§ 3.- Pero si después de hecho el testamento separó algo del fundo Ticiano, y lo agregó a otro fundo, se ha de ver, si el legatario haya de pedir también esta parte, o ella menos, como si hubiere dejado de ser del fundo Ticiano, puesto que los nombres y las casas de los fundos se constituyen por determinación nuestra, no por la naturaleza; y es más cierto, que se considere quitado lo que se destinó para otro.

§ 4.- Si yo hubiere legado una nave, y especialmente hubiere escrito que era mía, y por partes la hubiere rehecho toda ella subsistiendo la misma quilla, con razón será, no obstante, reivindicada por el legatario.

25. PAULO; *Comentarios a Sabino, libro III*.- Al padre se le puede legar también puramente a cargo del hijo heredero, y no importa si al correr el término del legado está bajo la potestad del padre. Así, pues, también si hubiere sido adida la herencia por orden del padre, se le contará para la Falcidia.

26.- POMPONIO; *Comentarios a Sabino, libro V*.- No se considera que por razón de legados le pertenece a alguien algo más que lo que quedase después

condicionis causa datum esset, superesset.

§ 1.- Si certum corpus heres dare damnatus sit nec fecerit, quo minus ibi ubi id esset traderet, si id postea sine dolo et culpa heredis perierit, deterior fit legatarii condicio.

§ 2.- Cum bonorum parte legata dubium sit, utrum rerum partes an aestimatio debeatur, Sabinus quidem et Cassius aestimationem, Proculus et Nerva rerum partes esse legatas existimaverunt. Sed oportet heredi succurri, ut ipse eligat, sive rerum partes sive aestimationem dare maluerit. In his tamen rebus partem dare heres conceditur, quae sine damno dividi possunt: sin autem vel naturaliter indivisae sint vel sine damno divisio earum fieri non potest, aestimatio ab herede omnimodo praestanda est.

27.- PAULUS; *libro IX ad Plautium*.- Potest autem heres vel paucioribus vel in una re relictam partem legatario dare, in quam vel legatarius consenserit vel iudex aestimaverit, ne necesse haberet legatarius in omnibus rebus vindicare portionem.

28.- ULPIANUS; *libro XIX ad Sabinum*.- Si creditori meo, tutus adversus eum exceptione, id quod ei debeo legem, utile legatum est, quia remissa exceptio videtur, sicut Aristo ait id quod honoraria actione mihi debetur si legetur mihi, legatum valere, quia civilis mihi datur actio pro honoraria.

§ 1.- 1. Marcellus libro vicesimo octavo putat rem quam ex stipulatu mihi debes si legaveris, utile esse legatum, ut neque Falcidia hoc minuat:

property given in order to comply with a condition.

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

§ 2.- Where, however, a part of his estate is bequeathed, it is doubtful whether a portion of the property itself, or the estimated value of the same should be given. Sabinus and Cassius think that the value should be paid; Proculus and Nerva hold that a part of the property bequeathed should be delivered. It is necessary, however, to come to the relief of the heir, so that he himself may determine whether he prefers to give a portion of the property itself, or to pay its estimated value. But in matters of this kind, the heir will be obliged to give a portion of the property which can be divided without any loss, but if it is naturally incapable of division, or if the division cannot be effected without loss, the estimated value of the property must, by all means, be paid by the heir.

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

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

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

de deducido lo que se hubiese dado para cumplir la condición.

§ 1.- Si el heredero hubiera sido condenado a dar una cosa cierta, y no hubiere hecho por no entregarla allí donde ella estuviese, si después hubiere perecido sin dolo ni culpa del heredero, se hace peor la condición del legatario.

§ 2.- Siendo dudoso, si, legada parte de los bienes, se deben partes de las cosas, o su estimación, Sabino y Cassio opinaron ciertamente, que se había legado la estimación, y Próculo y Nerva, que partes de las cosas. Pero se le debe amparar al heredero, para que él mismo elija si prefiere dar parte de las cosas, o si su estimación. Mas se concede que el heredero dé la parte en aquellas cosas, que se pueden dividir sin daño; pero si naturalmente estuvieran indivisas, o no se puede hacer sin daño su división, se debe pagar en todo caso por el heredero la estimación.

27.- PAULO; *Comentarios a Plautio, libro IX*.- Mas puede el heredero darle al legatario la parte que se le dejó, o en menos cosas, o en una sola, sobre la que o el legatario hubiere consentido, o el juez hubiere determinado, para que no tenga necesidad el legatario de reivindicar su porción en todas las cosas.

28.- ULPIANO; *Comentarios a Sabino, libro XIX*.- Si, estando yo seguro contra él con una excepción, le legara a mi acreedor lo que le debo, el legado es útil, porque a de considera remitida a aquel la excepción, pues según dice Aristón, si se me legara lo que se me debe por acción honoraria, es válido el legado, porque se me da la acción civil en lugar de la honoraria.

§ 1.- Opina Marcelo en el libro vigésimo octava, que si me hubieres legado la cosa que me debes por estipulación, es útil el legado, de suerte que ni lo disminuya la Falcidia.

Falcidian Law.

29.- PAULUS; *libro VI ad legem Iuliam et Papiam*.- Sin autem neque modo neque tempore neque condicione neque loco debitum differatur, inutile est legatum.

30.- ULPIANUS; *libro XIX ad Sabinum*.- Talis scriptura: "Quas pecunias legavi, quibus dies adpositus non est, eas heres meus annua bima trima die dato", ad corpora legata non pertinet, sed ad ea quae pondere numero mensura continentur.

§ 1.- Et ad ea tantum legata pertinet, quibus dies non est adpositus: proinde si forte pure legatum est, ex hac adiectione prorogabitur.

§ 2.- Quid si forte centum mihi legata sunt praesentia, utrum annua die dabuntur an vero praesentia? Et ait Servius et Labeo praesens deberi. Quamvis igitur supervacua sit haec adiectio, quantum ad vim et effectum legati pertinet, tamen ad hoc proficiet, ut praesenti die legatum debeat.

§ 3.- Sed si in annos singulos aut singulos menses sit legatum relictum, cessabit ea scriptura, quia hoc legatum et initium et finem habet.

§ 4.- Sed et si sub condicione sit legatum relictum, potest dici cessare annuam adiectionem, quia dies incertus appellatur condicio.

§ 5.- Cui congruit quod Trebatius existimat, si cui legetur, quando annorum viginti erit, vulgarem hanc clausulam cessare.

§ 6.- Item si legetur pecunia quae in arca est vel vinum quod in apothecis est, dicendum est cessare clausulam, quoniam quotiens species legetur, cessare diximus.

§ 7.- Hanc autem scripturam non solum ad praecedentia sola legata, sed ad universa quae testamento adscripta sunt, extendi Gallus Aquilius, Ofilius, Trebatius responderunt idque verum est.

29.- ULPIANUS; *On the Lex Julia et Papia, Book VI*.- If, however, the claim is not rendered more advantageous to the creditor, either by modification, time, condition, or place, the bequest is void.

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

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

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

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

§ 4.- Where, however, a legacy is bequeathed under a condition, it can be said that the payment of the same at intervals will not be applicable, because the condition is considered uncertain.

§ 5.- In accordance with this, Trebatius thinks that if a bequest is made to a person to be paid when he is twenty years of age, the provision above-mentioned, as commonly interpreted, does not apply.

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

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

29.- PAULO; *Comentarios a la ley Julia y Papia, libro VI*.- Mas si ni por el modo, ni por el tiempo, ni por la condición, ni por el lugar se diferenciase lo debido, es inútil el legado.

30.- ULPIANO; *Comentarios a Sabino, libro XIX*.- Esta cláusula: «las cantidades que legué, para las que no se ha fijado día, délas mi heredero en el término de uno, dos, tres años», no se refiere a las cosas corpóreas legadas, sino a las que se contienen en peso, número y medida.

§ 1.- Y se refiere solamente a aquellos legados para los que no se fijó día; por lo cual, si acaso se hizo puramente el legado, se prorrogara por esta adición.

§ 2.- ¿Qué se dirá, si acaso se me legaron ciento de presente, se me darán dentro del término de un año, o de presente? Y dicen Servio y Labeón, que se deben de presente. Así, pues, aunque sea superflua esta adición, en cuanto se refiere a la fuerza y al efecto del legado, aprovechará, sin embargo, para esto, para que se deba el legado en el presente día.

§ 3.- Pero si el legado hubiera sido dejado para cada año o cada mes, dejará de serle aplicable esta cláusula, porque este legado tiene principio y fin.

§ 4.- Pero también si el legado hubiera sido dejado bajo condición, se puede decir, que deja de ser aplicable la adición relativa al año, porque el día incierto se llama condición.

§ 5.- A lo cual es consiguiente lo que opina Trebacio, que si a alguno se le legase para cuando fuere de veinte años, deja de ser aplicable esta cláusula vulgar.

§ 6.- Asimismo, si se legara el dinero, que hay en la caja, o el vino, que hay en las despensas, se ha de decir, que no tiene aplicación la cláusula, porque hemos dicho que no tiene aplicación cuando se legue una especie.

§ 7.- Pero respondieron Galo Aquilio, Ofilio, y Trebacio, que esta cláusula no se extiende únicamente a los solos legados precedentes, sino también a todos los que se escribieron en el testamento; y esto

31.- PAULUS; *libro III ad Sabinum*.- Sed etiam ad ea, quae codicillis confirmatis postea legata fuerint, haec clausula pertinet.

32.- ULPIANUS; *libro XX ad Sabinum*.- Si quis a filio pupillo herede instituto, cum is in tutelam suam venisset, pecuniam legaverit et a substituto herede legata repetierat, impubere filio mortuo secundus heres legatum non debebit. Quod ita verum esse tam Sextus quam Pomponius putant, si repetitio legatorum ad eum modum concepta sit veluti: "Quae a filio meo legavi quaeque eum dare iussi, si mihi heres esset, id heres meus isdem diebus dato": sed si ita repetita fuerint: "Quae a filio meo legavi, heres meus dato", pure repetita videbuntur legata et dumtaxat demonstratio eorum facta: igitur et hoc ipsum legatum de quo quaeritur praesens debebitur.

§ 1.- Si quis plures Stichos habens Stichum legaverit, si non appareat, de quo Sticho sensit, quem elegerit debet praestare.

§ 2.- Si parti civitatis aliquid sit relictum, quod ad ornatum vel compendium rei publicae spectat, sine dubio debebitur.

33.- PAULUS; *libro III regularum*.- Si pluribus eadem res legata fuerit, si quidem coniunctim, etiamsi alter vindicet, alter ex testamento agat, non plus quam partem habebit is qui ex testamento agit: quod si separatim, si quidem evidentissime apparuerit ademptione a priore legatario facta ad secundum legatum testatorem convolasse, solum posteriorem ad legatum pervenire placet: sin autem hoc minime apparere potest, pro virili portione ad legatum omnes venire: scilicet nisi ipse testator ex scriptura manifestissimus est utrumque eorum solidum accipere voluisse: tunc enim uni pretium,

31.- PAULUS; *On Sabinus, Book III*.- This provision has reference also to all legacies which are afterwards confirmed by codicils.

32.- ULPIANUS; *On Sabinus, Book XX*.- Where anyone bequeaths money to be paid by his minor son, who is appointed his heir, "When he arrives at puberty," and he also charges the heir whom he substitutes with the payment of the same, and the son dies before reaching puberty, the substituted heir will not owe the legacy. Sextus and Pomponius, however, do not think that this is correct, where the repetition of the legacy has been stated as follows, for instance: "Let my heir pay upon the same day the legacy with which I have charged my son, and which I have ordered him to pay if he shall become my heir." If, however, the repetition was made as follows, "Let my heir pay the legacies, with the payment of which I have charged my son;" the legacies appear to have been repeated unconditionally, and the designation of them has only been made by the testator. Therefore, this very legacy with reference to which inquiry is made will be due me.

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

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

33.- PAULUS; *Rules, Book III*.- Where the same property is left to several persons, or it is left to all conjointly; and one brings suit to recover it, and another brings an action for the same purpose under the will, he who founds his action on the will cannot recover any more than his share of the legacy. If it should be left to each person separately, and it is perfectly evident that the testator intended, by depriving the first legatee of the bequest, to confer it upon the second; it is established that the last legatee will be entitled to all of it. If, however, this does not plainly appear, all the legatees will be entitled to

es verdad.

31.- PAULO; *Comentarios a Sabino, libro III*.- Pero esta cláusula es aplicable también a las cosas que hubieren sido legadas después en codicilos confirmados.

32.- ULPIANO; *Comentarios a Sabino, libro XX*.- Si uno hubiere legado una cantidad, a cargo del pupilo instituido heredero, cuando este hubiese llegado a su propia tutela, y hubiere repetido los legados a cargo de heredero substituido, habiendo fallecido impúbere el hijo, el segundo heredero no deberá el legado; lo cual opinan tanto Sexto como Pomponio que es así verdad, si la repetición de los legados hubiera sido concebida de este modo, por ejemplo: «lo que legué a cargo de mi hijo, y lo que le mandé que diera, si fuese mi heredero, délo en los mismos días mi heredero». Pero si hubieren sido repetidos así: «lo que legué a cargo de mi hijo, délo mi heredero», se considerarán repetidos puramente los legados, y hecha solamente la demostración de los mismos; así, pues, también se deberá de presente este legado de que se trata.

§ 1.- Si teniendo alguien muchos Sticos hubiere legado un Stico, si no aparece de qué Stico habló, debe entregar el que hubiere elegido,

§ 2.- Si a parte de la ciudad se le hubiera dejado alguna cosa, que respecta al ornato o a provecho de la República, sin duda se deberá.

33.- PAULO; *Reglas, libro III*.- Si a muchos hubiere sido legada la misma cosa, si conjuntamente, aunque uno la reivindique, y otro ejercite la acción del testamento, el que ejercitare la acción del testamento no tendrá más que su parte. Pero si separadamente, y apareciere evidentísimamente, que con la revocación hecha respecto al primer legatario el testador se dirigió al segundo legado, se determina que solamente el segundo llegue a obtener el legado; mas si de ningún modo puede verse esto, todos entran en el legado por una porción viril, por supuesto, si el mismo testador no manifestó por escrito que quiso

alii ipsa res adsignatur electione rei vel pretii servanda ei, qui prior de legato sive fideicommisso litem contestatus est, ita tamen, ut non habeat licentiam altero electo ad alterum transire.

34.- ULPIANUS; *libro XXI ad Sabinum*.- Plane ubi transferre voluit legatum in novissimum, priori non debebitur, tametsi novissimus talis sit, in cuius persona legatum non constituit. At si coniuncti disiunctive commixti sint, coniuncti unius personae potestate funguntur.

§ 1.- Si eadem res saepius legetur in eodem testamento, amplius quam semel peti non potest sufficere vel rem consequi vel rei aestimationem.

§ 2.- Sed si duorum testamentis mihi eadem res legata sit, bis petere potero, ut ex altero testamento rem consequar, ex altero aestimationem.

§ 3.- Sed si non corpus sit legatum, sed quantitas eadem in eodem testamento saepius, divus Pius rescripsit tunc saepius praestandam summam, si evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse: idemque et in fideicommisso constituit. Eiusque rei ratio evidens est, quod eadem res saepius praestari non potest, eadem summa volente testatore multiplicari potest.

§ 4.- Sed hoc ita erit accipiendum, si non certum corpus nummorum saepius sit relictum, ut puta centum, quae in arca habet, saepius legavit: tunc enim fundo legato esse comparandum credo.

§ 5.- Sed si pondus auri vel argenti saepius sit

equal shares of the bequest; unless, indeed, the testator himself manifestly indicated by his language that he intended one of them to receive the entire property, for then the value of the article should be given to one of them, and the article itself to the other. And he who first joined issue with reference to the legacy, or the trust, shall have the right to choose which he will prefer, the property itself, or the value of the same; still, after having chosen one he will not be permitted to abandon it, and select the other.

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

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

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

§ 3.- Where no certain article is bequeathed, but a specified sum is mentioned several times in the same will, the Divine Pius stated in a Rescript that the heir must pay the said sum several times, if it is established by perfectly conclusive evidence that the testator intended to multiply the legacy. The same rule has also been laid down by him with reference to a trust. The reason of this is evident, for as the identical thing cannot be delivered more than once, the same sum can be multiplied, if this should be the intention of the testator.

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

§ 5.- Where, however, a certain weight of gold or of

que cada uno de ellos recibiese la totalidad; porque entonces se le asigna a uno el precio, y a otro la cosa misma, debiéndosele reservar la elección de la cosa, o del precio, al primero que contestó la demanda sobre el legado o sobre el fideicomiso, pero de suerte, que no tenga facultad, habiendo elegido una cosa, para inclinarse a la otra.

34.- ULPIANO; *Comentarios a Sabino, libro XXI*.- A la verdad, cuando quiso transferir el legado al último, no se le deberá al primero, aunque el último sea tal, que en cuanto a su persona no sea válido el legado; mas si estuvieran mezclados conjuntos o separados los legatarios, los conjuntos tienen la representación de una sola persona.

§ 1.- Si la misma cosa se legara muchas veces en el mismo testamento, no se puede pedir más que una vez, y basta que se consiga o la cosa, o la estimación de la cosa.

§ 2.- Pero si en los testamentos de dos me hubiera sido legada la misma cosa, podré pedirla dos veces, de modo que por un testamento consiga la cosa, y por el otro su estimación.

§ 3.- Mas si no se hubiera legado una cosa corpórea, sino muchas veces la misma cantidad en el mismo testamento, respondió por rescripto el Divino Pío, que entonces si ha de pagar muchas veces la suma, si con evidentes pruebas se demuestra, que el testador quiso multiplicar el legado. Y lo mismo estableció también en cuanto a los fideicomisos; y la razón de esto es evidente, porque no se puede entregar muchas veces la misma cosa, pero queriéndolo el testador se puede multiplicar la misma suma.

§ 4.- Pero esto se habrá de entender así, si no se hubiera dejado muchas veces una cierta cantidad de monedas, por ejemplo, si legó muchas veces cien, que tiene en la caja, porque entonces creo que este se ha de comparar con el legado de un fundo.

§ 5.- Mas si se hubiera dejado muchas veces cierto

relictum, Papinianus respondit magis summae legato comparandum, merito, quoniam non species certa relicta videatur.

§ 6.- Proinde et si quid aliud est quod pondere numero mensura continetur saepius relictum, idem erit dicendum, id est saepius deberi, si hoc testator voluerit.

§ 7.- Quod si rem emissem mihi legatam, usque ad pretium quod mihi abest competet mihi ex testamento actio.

§ 8.- Et multo magis hoc dicendum est, si duobus testamentis mihi eadem res legata sit, sed alter me restituere rogaverit vel ipsam rem vel aliud pro ea, aut si sub condicione legasset dandi quid pro ea: nam hactenus mihi abesse res videtur, quatenus sum praestaturus.

§ 9.- Si coniunctim res legetur, constat partes ab initio fieri. Nec solum hi partem faciunt, in quorum persona constitit legatum, verum hi quoque, in quorum persona non constitit legatum, ut puta si Titio et servo proprio sine libertate.

§ 10.- Sed si in pupillari testamento alii eandem legaverit, quam mihi in suo testamento legavit, Iulianus scribit concursu partes nos habere: interim igitur partem habebit is, cui in suo testamento legavit.

§ 11.- Si duobus sit legata, quorum alter heres institutus sit, a semet ipso ei legatum inutiliter videtur, ideoque quod ei a se legatum est ad collegatarium pertinebit.

§ 12.- Inde dicitur, si duo sint heredes, unus ex uncia, alter ex undecim uncis, et eis fundus legatus

silver has been left, Papinianus is of the opinion that it should rather be compared to the bequest of a sum of money, as no certain kind of property appears to have been bequeathed.

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

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

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

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

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

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

§ 12.- Hence, it must be said that where there are two heirs, one of whom is appointed for one-twelfth,

peso de oro o de plata, respondió Papiniano, que más bien se ha de comparar este con el legado de una suma; y con razón, porque no parece que se dejó una especie cierta.

§ 6.- Por lo tanto, también si se deja muchas veces alguna otra cosa, que se contiene en peso, número, o medida, se habrá de decir lo mismo, esto es, que se debe muchas veces, si esto hubiere querido el testador.

§ 7.- Pero si yo hubiese comprado la cosa que se me legó, me competirá la acción del testamento por el precio que me costó.

§ 8.- Y con mucha más razón se ha de decir esto, si en dos testamentos me hubiera sido legada la misma cosa, pero uno me hubiere rogado que restituyese o la misma cosa, u otra en su lugar, o si la hubiese legado con la condición de que diera algo por ella; porque se considera que en tanto me falta la cosa, en cuanto yo he de entregar.

§ 9.- Si la cosa fuese legada conjuntamente, es sabido, que se hacen partes desde el principio; y no solamente constituyen parte aquellos respecto de cuya persona es válido el legado, sino también aquellos en cuanto a cuya persona no es válido el legado, por ejemplo, si se hubiera hecho a Ticio, y a un esclavo propio sin la libertad.

§ 10.- Pero si en el testamento pupilar hubiere legado a otro la misma cosa, que me legó en su propio testamento, escribe Juliano, que tenemos partes en concurso; así, pues, interinamente tendrá su parte aquel a quien se la legó en su propio testamento.

§ 11.- Si hubiera sido legada a dos, uno de los que hubiera sido instituido heredero, se considera que a este se le legó inútilmente a cargo de sí mismo, y por lo tanto, lo que a este se le legó a su propio cargo pertenecerá al colegatario.

§ 12.- Por esto se dice, que si fueran dos los herederos, uno por una onza, y el otro por once onzas,

sit, unciarium heredem undecim partes in fundo habiturum, coheredem unciam.

§ 13.- Plane si alter ex legatariis heres extiterit heredi, a quo legatum erat relictum, non ideo minus partem collegatario faciet: retinet enim pro parte legatum.

§ 14.- Si ita Titio legetur: "Fundum Seianum vel usum fructum eius sibi habeto", duo esse legata et arbitrio eius esse, an velit usum fructum vindicare.

§ 15.- Sed et si quis ita leget Titio: "Fundum do lego, ut eum pro parte habeat", mihi videtur posse dici partem habiturum: videri enim fundi appellatione non totum fundum, sed partem appellasse: nam et pars fundi fundus recte appellatur.

35.- PAULUS; *libro III ad Sabinum*.- Si heres alienum hominem dare damnatus sit et hic a domino manumissus sit, nihil ex hoc legato debetur.

36.- POMPONIUS; *libro VI ad Sabinum*.- "Titiae textores meos omnes, praeterquam quos hoc testamento alii legavi, lego. Plotiae vernas meos omnes, praeterquam quos alii legavi, lego". Cum essent quidam et vernae idem et textores, Labeo ait, quoniam nec quos Titiae textores non legaverit, aliter apparere possit, quam si cognitum fuerit, quos eorum Plotiae legaverit, nec quos Plotiae vernas non legaverit, possit, neutrius legato exceptos esse eos de quibus quaeritur et ideo communes ambobus esse: hoc enim iuris est et si neutrius legati nomine quicquam esset exceptum.

§ 1.- Quod si hoc modo esset legatum "textores omnes praeter vernas" et rursus "vernas omnes praeter textores", qui et verna et textor esset, neutri fuisse legatum.

and the other for eleven-twelfths of the estate, and a tract of land is bequeathed to them; one of the heirs will be entitled to eleven-twelfths of the land, and his co-heir to one-twelfth of the same.

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

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

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

35.- PAULUS; *On Sabinus, Book III*.- Where an heir is charged with the delivery of a slave belonging to another, and the slave is manumitted by his master, nothing is due on account of the legacy.

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

§ 1.- Where, however, a legacy was bequeathed in the following terms: "All my slaves, who are weavers, except those born under my roof," and again, "All the slaves born under my roof except the

y se les hubiera legado un fundo, el heredero de una onza habrá de tener once partes en el fundo, y su coheredero una onza.

§ 13.- Pero si uno de los legatarios hubiere quedado heredero del heredero a cuyo cargo se había dejado el legado, no por eso dejará de hacer parte con el colegatario, porque retiene en cuanto a su parte el legado.

§ 14.- Si así se le legara a Ticio: «tenga para sí el fundo Seyano, o su usufruto», hay dos legados, y está al arbitrio de él, si quisiera reivindicar el usufruto.

§ 15.- Pero también si alguien le legara de este modo a Ticio: «le doy y lego un fundo, de suerte que lo tenga en parte», me parece que se puede decir, que habrá de tener una parte; porque parece que con la denominación de fundo llamó no todo el fundo, sino una parte, porque perfectamente se llama fundo también una parte.

35.- PAULO; *Comentarios a Sabino, libro III*.- Si el heredero hubiera sido condenado a dar un esclavo ajeno, y este hubiera sido manumitido por su señor, no se debe nada en virtud de este legado.

36.- POMPONIO; *Comentarios a Sabino, libro VI*.-«Lego a Ticio todos mis tejedores, excepto los que en este testamento legué a otro. Lego a Plocia todos mis esclavos nacidos en mi casa, excepto los que legué a otro»; habiendo algunos esclavos nacidos en su casa, que también eran tejedores, dice Labeón, que, como ni pueda aparecer qué tejedores no haya legado a Ticia, de otro modo que si se hubiere conocido cuáles de ellos haya legado a Plocia, ni se pueda saber cuáles haya legado a Plocia, estos, de que se trata, no están exceptuados para el legado de ninguno de los dos, y por lo tanto son comunes para ambos; porque esto es de derecho, aunque ninguna cosa hubiese sido exceptuada por razón del legado de ninguno de los dos.

§ 1.- Pero si se hubiese hecho el legado de este modo: «todos los tejedores, excepto los nacidos en mi casa, y luego, «todos los nacidos en mi casa excepto los tejedores», el que hubiese nacido en su

§ 2.- Nihil distat, utrum ita legetur "Titio et Maevio" an ita "Titio cum Maevio": utrobique enim coniunctim legatum videtur.

§ 3.- Si alteri Stichum heres dederit, quem duobus dare damnatus fuerat, et antequam interPELLARETUR ab altero Stichus mortuus est, heres non tenetur, quia nihil per eum factum intellegitur.

37.- ULPIANUS; *libro XXI ad Sabinum*.- Legato generaliter relicto, veluti hominis, Gaius Cassius scribit id esse observandum, ne optimus vel pessimus accipiat: quae sententia rescripto imperatoris nostri et divi Severi iuvatur, qui rescripserunt homine legato actorem non posse eligi.

§ 1.- Si de certo fundo sensit testator nec appareat de quo cogitavit, electio heredis erit, quem velit dare: aut si appareat, ipse fundus vindicabitur. Sed et si lancem legaverit nec appareat quam, aequae electio est heredis, quam velit dare.

38.- POMPONIIUS; *libro VI ad Sabinum*.- Legatarius pro parte acquirere, pro parte repudiare legatum non potest: heredes eius possunt, ut alter eorum partem suam adquirat, alter repudiet.

§ 1.- Si legatum nobis relictum constituerimus nolle ad nos pertinere, pro eo erit, quasi nec legatum quidem sit: et ideo dicimus nec confusas servitutes, si forte praedium mihi legatum praedio meo debuerit servitutes, et integra furti actio manebit, si servus legatus sit ei, cuius nomine furti agere poterit legatarius.

weavers," those who were both born under his roof and were weavers, will not be included in either legacy.

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

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

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

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

38.- POMPONIIUS; *On Sabinus, Book VI*.- A legatee cannot accept a part of his legacy and reject the remainder; his heirs, however, can do so, so that one of them can accept his share, and another reject his own.

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

casa, y fuese tejedor, no fue legado a ninguno de los dos.

§ 2.- No hay diferencia entre que se legue así: «a Ticio y a Mevio», o así: «a Ticio con Mevio» porque de ambos modos se considera que se legó conjuntamente.

§ 3.- Si el heredero hubiere dado a Stico a uno de los dos a quien había sido condenado que lo diera, y antes que fuese demandado por el otro murió Stico, el heredero no está obligado, porque se entiende que nada se hizo por él.

37.- ULPIANO; *Comentarios a Sabino, libro XXI*.- Habiéndose dejado en general un legado, por ejemplo, de un esclavo, escribe Cayo Cassio, que se ha de observar esto, que no se reciba ni el mejor, ni el peor; cuya opinión está apoyada por un rescripto de nuestro Emperador y del Divino Severo, quienes respondieron por rescripto, que, legado un esclavo, no puede ser elegido el que es administrador.

§ 1.- Si el testador habló de cierto fundo, y no apareciera sobre cual pensó, será del heredero la elección del que quiera dar, o si apareciera, será reivindicado el mismo fundo. Pero también si hubiere legado un plato, y no apareciera cual, es igualmente del heredero la elección del que quiera dar.

38.- POMPONIO; *Comentarios a Sabino, libro VI*.- El legatario no puede adquirir en parte, y en parte repudiar el legado, pero pueden sus herederos, de modo que uno de ellos adquiera su parte, y el otro la repudie.

§ 1.- Si hubiéremos determinado no querer que nos pertenezca el legado que se nos legó, será lo mismo que si verdaderamente no hubiera sido legado; y por esto decimos, que ni aun se confunden las servidumbres, si acaso el predio que se me legó debiere servidumbres a un predio mío; y permanecerá íntegra la acción de hurto, si se le hubiera legado un esclavo a

account of whom the legatee can institute proceedings for theft, the right of action will remain unimpaired.

39.- ULPIANUS; *libro XXI ad Sabinum*.- Cum servus legatus in fuga esset vel longinquo absens exigatur, operam praestare heres debet, ut eam rem requirat et praestet, et ita Iulianus scribit. nam et sumptum an in hanc rem facere heres deberet, Africanus libro vicesimo epistularum apud Iulianum quaerit putatque sumptum praestandum, quod et ego arbitror sequendum.

§ 1.- Fructus autem hi deducuntur in petitionem, non quos heres percepit, sed quos legatarius percipere potuit: et id in operis servorum vel vecturis iumentorum vel naulis navium dicendum. Quod in fructibus dicitur, hoc et in pensionibus urbanorum aedificiorum intellegendum erit. In usurarum autem quantitate mos regionis erit sequendus: iudex igitur usurarum modum aestimabit et statuet. Ipsius quoque rei interitum post moram debet, sicut in stipulatione, si post moram res interieret, aestimatio eius praestatur. Item partus ancillarum et, si servus fuerit legatus, et hereditas vel legatum vel quid per eum adquisitum sit heres praestare debet.

§ 2.- Si Titius a me rem emisset et eandem mihi legasset antequam ei traderem, mox ei tradidero et pretium recepero, videtur quidem is prima facie rem mihi meam legasse et ideo legatum non consistere. Sed ex empto actione liberatus utique per legatum rem vindicare potero quam tradidi. sed si nondum erat solutum mihi pretium, Iulianus scribit ex vendito quidem me acturum, ut pretium exsequar, ex testamento vero, ut rem quam vendidi et tradidi recipiam. Idem subiungit, si pretium quidem mihi erat solutum, rem autem nondum tradideram, ex testamento me agentem liberationem consequi.

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

§ 1.- The profits of the property should also be deducted in making the claim for the legacy, not only those, however, which the heir may have collected, but also such as the legatee could have collected; and this rule also applies not only to the labor of slaves, but also to the work of animals, as well as transportation by vessels. What has been stated with reference to profits must also be understood to apply to the rents of houses in cities. With respect to the rate of interest on money, the custom of the country must be followed, and therefore the court must make an estimate and fix the rate of interest. Moreover, if the heir is in default, he will also be liable for the destruction of the property, and its value must be paid; just as this is done in a stipulation where the property is lost after the party is in default. This rule also applies to the offspring of female slaves. Where a slave is bequeathed, the heir will be bound to surrender everything which he has acquired by means of said slave, whether it be an estate, a legacy, or anything else.

§ 2.- If Titius should purchase property from me, and bequeath it to me before I deliver it to him, and then I deliver it and receive the price for the same; he is considered at first sight to have bequeathed it to me, and hence the legacy is void.¹ But, as I am released from liability to an action on purchase, I can bring an action to recover the property which I delivered on the ground of its being a legacy. Still, if the price has not yet been paid to me, Julianus says that I am entitled to an action on sale to recover the price, and that, in addition, a suit under the will to recover the property which I sold and delivered will

aquel en cuyo nombre pudiese el legatario ejercitar la acción de hurto.

39.- ULPIANO; *Comentarios a Sabino, libro XXI*.- Cuando estuviese fugitivo el esclavo legado, o se exigiese lo que está ausente aún lejos, debe procurar el heredero buscar aquella cosa, y entregarla; y así lo escribe Juliano, porque aun si deberá el heredero hacer gastos para ello, lo discute Africano en Juliano en el libro vigésimo de las Epístolas, y opina, que se han de sufragar los gastos; lo que también yo creo que se ha de seguir.

§ 1.- Mas se comprenden en la petición no los frutos que percibió el heredero, sino los que pudo percibir el legatario; y esto se ha de decir respecto a los servicios de los esclavos, o al transporte de las caballerías, o a los fletes de las naves. Lo que se dice de los frutos se habrá de entender también en cuanto a las pensiones de los edificios o baños; pero en cuanto a la cuantía de los intereses se habrá de seguir la costumbre de la región. Así, pues, el juez estimará y fijará la cuantía de los intereses. También debe después de la mora la pérdida la misma cosa, así como en la estipulación, si después de la mora pereciere la cosa, se paga su estimación, y lo mismo los partos de las esclavas. Y si se hubiere legado un esclavo, y por medio de él se hubiera adquirido una herencia, o un legado, o alguna cosa, esto debe entregarlo el heredero.

§ 2.- Si Ticio me hubiese comprado una cosa, y me la hubiese legado, antes que yo se la entregase, y luego se la hubiere yo entregado, y hubiere recibido el precio, ciertamente que a primera vista parece que éste me legó mi propia cosa, y que por esto no es válido el legado, pero habiendo quedado libre de la acción de compra, ciertamente que podré reivindicar por medio del legado la cosa, que entregué. Pero si aun no se me había pagado el precio, escribe Juliano, que yo, a la verdad, ejercitaré la acción de venta, para conseguir el precio, y la de testamento para recobrar la cosa, que vendí y entregué. Añade el mismo, que si

§ 3.- Idem Iulianus scribit, si fundum testator, quem ab alio emerat, mihi legavit, heredem cogen- dum mihi actionem ex empto praestare, scilicet si nondum res tradita fuerit vel defuncto vel heredi.

§ 4.- Si quis alicui legaverit licere lapidem caedere, quaesitum est, an etiam ad heredem hoc legatum transeat. Et Marcellus negat ad heredem transmitti, nisi nomen heredis adiectum legato fuerit.

§ 5.- Heres cogitur legati praedii solvere vectigal praeteritum vel tributum vel solarium vel cloacarium vel pro aquae forma.

§ 6.- Scio ex facto tractatum, cum quidam duos fundos eiusdem nominis habens legasset fundum Cornelianum et esset alter pretii maioris, alter minoris et heres diceret minorem legatum, legatarius maiorem: volgo fatebitur utique minorem eum legasse, si maiorem non potuerit docere legatarius.

§ 7.- Constat etiam res alienas legari posse, utique si parari possint, etiamsi difficilis earum paratio sit.

§ 8.- Si vero Sallustianos hortos, qui sunt Augusti, vel fundum Albanum, qui principalibus usibus deseruit, legaverit quis, furiosi est talia legata testamento adscribere,

§ 9.- Item Campum Martium aut Forum Romanum vel aedem sacram legari non posse constat.

§ 10.- Sed et ea praedia Caesaris, quae in formam patrimonii redacta sub procuratore patrimonii sunt, si legentur, nec aestimatio eorum debet praestari, quoniam commercium eorum nisi iussu principis

lie. He also adds that if the price had been paid to me, but I had not yet delivered the property, I would be free from liability on account of the right of action to which I would be entitled by virtue of the will.

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

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

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

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

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

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

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

§ 10.- If, however, lands belonging to the Emperor, and forming part of the Imperial domain or under the superintendence of the Imperial Steward, are devised, their appraised value will not have to be paid

verdaderamente se me había pagado el precio, pero yo no había entregado todavía la cosa, ejercitando la acción de testamento consiguió la exención de la obligación.

§ 3.- Escribe el mismo Juliano, que si el testador me legó el fundo que había comprado a otro, el heredero ha de ser obligado a cedermela acción de compra, por supuesto, si la cosa aun no hubiere sido entregada o al difunto, o al heredero.

§ 4.- Si uno le hubiere legado a otro que le sea lícito arrancar piedra, se preguntó, si este legado pasa también al heredero; y Marcelo dice, que no se transmite al heredero, si no se hubiere añadido en el legado el nombre del heredero.

§ 5.- El heredero está obligado a pagar el impuesto caído del predio legado, o el tributo, o el gravamen de solar, o el impuesto de cloaca, o el de conservación de acueducto.

§ 6.- Sé que se discutió sobre el hecho de que habiendo uno, que tenía dos fundos del mismo nombre, legado el fundo Cornelianiano, y siendo uno de mayor precio, y otro de menor, y el heredero dijese que se había legado el menor, y el legatario que el mayor, ordinariamente se reconocerá que ciertamente aquel legó el menor, si el legatario no hubiere podido probar que el mayor;

§ 7.- Es sabido, que se pueden legar también las cosas ajenas, por supuesto, si se pudieran comprar, aunque sea difícil su compra.

§ 8.- Pero si uno hubiere legado los huertos Salustianos, que son de Augusto, o el fundo Albano, que sirve para los usos del Príncipe, es de loco escribir tales legados en el testamento.

§ 9.- Asimismo es sabido, que no se puede legar el campo de Marte, o el foro Romano, o un edificio sagrado.

§ 10.- Pero, asimismo, si se legáranlos predios del César, que constituidos en su patrimonio se hallan al cuidado del procurador del patrimonio, tampoco se debe entregar la estimación de los mismos, porque no

non sit, cum distrahi non soleant.

40.- ULPIANUS; *libro II fideicommissorum*.- Sed si res aliena, cuius commercium legatarius non habet, ei cui ius possidendi non est per fideicommissum relinquatur, puto aestimationem deberi.

41.- ULPIANUS; *libro XXI ad Sabinum*.- Cetera igitur praeter haec videamus. Et quidem corpora legari omnia et iura et servitutes possunt.

§ 1.- Sed ea quae aedibus iuncta sunt legari non possunt, quia haec legari non posse senatus censuit Aviola et Pansa consulibus.

§ 2.- Tractari tamen poterit, si quando marmora vel columnae fuerint separatae ab aedibus, an legatum convalescat. Et si quidem ab initio non constitit legatum, ex post facto non convalescet, quemadmodum nec res mea legata mihi, si post testamentum factum fuerit alienata, quia vires ab initio legatum non habuit. Sed si sub condicione legetur, poterit legatum valere, si exsistentis condicionis tempore mea non sit vel aedibus iuncta non sit, secundum eos, qui et emi rem meam sub condicione et promitti mihi stipulanti et legari aiunt. Purum igitur legatum Catoniana regula impedit, condicional non, quia ad condicionalia Catoniana non pertinet.

§ 3.- Item quaeri potest, si quis binas aedes habens alteras legaverit et ex alteris aliquid iunctum ei cui aedes legavit, an legatum valebit? Movet quaestionem, quod ex senatus consulto et constitutionibus licet nobis ab aedibus nostris in alias aedes transferre possessoribus earum futuris, id est non distracturis: et ita imperator noster et divus Severus rescripserunt. Numquid ergo et legari possit ei, cui aliam domum legem? Sed negandum erit, quia

by the heir, as any commercial disposal of them cannot take place, except by order of the Emperor, as they are not to be sold.

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

41.- THE SAME; *On Sabinus, Book XXI*.- Now let us examine some other things in addition to what has been mentioned, and in fact all corporeal property, as well as rights and servitudes can be bequeathed.

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

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

§ 3.- It may also be asked whether the legacy will be valid where a party has two houses and devises one of them, and also leaves him to whom he devised the house something which was joined to the other. This question arises from the fact that we are permitted by the Decree Of the Senate and the Imperial Constitutions to transfer to one house property from another of which we are to remain in possession, that is to say, which is not to be sold. This

hay el comercio de ellos, sino con orden del Príncipe, pues no se suelen vender.

40.- EL MISMO; *Fideicomisos, libro II*.- Pero si a aquel, que no tiene el derecho de poseerla, se le dejara por fideicomiso una cosa ajena, cuyo comercio no tiene legatario, opino que se debe su estimación.

41.- EL MISMO; *Comentarios a Sabino, libro XXI*.- Veamos, pues, otras cosas además de estas; y ciertamente que se pueden legar todas las corpóreas, y los derechos, y las servidumbres.

§ 1.- Pero las que están unidas a los edificios no se pueden legar, porque el Senado determinó, siendo cónsules Aviola y Pansa, que estas no se pudieran legar.

§ 2.- Pero se podrá discutir, si se convalidará el legado cuando los mármoles, o las columnas, estuvieren separados de los edificios. Y si verdaderamente no fue válido el legado desde el principio no se convalida por hecho posterior, así como tampoco la cosa mía que me fue legada, si después de hecho el testamento hubiere sido enajenada, porque el legado no tuvo eficacia desde un principio. Pero si se legare bajo condición, podrá ser válido el legado, si al tiempo de cumplirse la condición no fuese mía la cosa, o no estuviese unida al edificio según los que dicen que se puede comprar una cosa mía bajo condición, y prometérsese estipulando, y legáseme. Así, pues, la regla Catoniana impedirá el legado puro, pero no el condicional, porque la regla Catoniana no se refiere a los legados condicionales.

§ 3.- Asimismo se puede preguntar, si el que teniendo dos casas le hubiere legado una, y de la otra alguna cosa unida, a aquel a quien le legó la casa, ¿será válido el legado?. Motiva la cuestión, que en virtud del Senadoconsulto y de las Constituciones nos es lícito transferir cosas de nuestras casas a otras casas para los que hayan de ser poseedores de ellas, esto es, para los que no las hayan de enajenar; y así lo respondieron por rescripto nuestro Emperador y el

cui legatum est non est possessor futurus.

§ 4.- Si duobus domum legaverit Sempronianam et ex ea alteri eorum marmora ad exstructionem domus Seianae quam ei legaverat, non male agitabitur, an valeat, quia dominus est utriusque legatarius. Et quid si quis domum deductis marmoribus legaverit, quae voluit heredem habere ad exstruendam domum, quam retinebat in hereditate? Sed melius dicitur in utroque detractio non valere: legatum tamen valebit, ut aestimatio eorum praestetur.

§ 5.- Sed si quis ad opus rei publicae faciendum legavit, puto valere legatum: nam et Papinianus libro undecimo responsorum refert imperatorem nostrum et divum Severum constituisse eos, qui rei publicae ad opus promiserint, posse detrahere ex aedibus suis urbanis atque rusticis et id ad opus uti, quia hi quoque non promercii causa id haberent. Sed videamus, utrum ei soli civitati legari possit, in cuius territorio est, an et de alia civitate in aliam transferre possit. Et puto non esse permittendum, quamquam constitutum sit, ut de domu, quam aliquis habet, ei permittatur in domum alterius civitatis transferre.

§ 6.- Hoc senatus consultum non tantum ad urbem, sed et ad alias civitates pertinet.

§ 7.- Sed et divorum fratrum est rescriptum ad libellum Procliani et Epitynchani ob debitum publicum desiderantium ut sibi distrahere permittatur, quod eis ius distrahendi denegaverunt.

§ 8.- Hoc senatus consultum non tantum ad aedes,

Our Emperor and the Divine Severus stated in a Rescript. Therefore cannot I devise property attached to one house to the person to whom I have devised the other? This will be denied, for the reason that the party to whom the property is bequeathed will not be the future possessor of the same.

§ 4.- Where a testator leaves the Sempronian House to two persons, and bequeaths to one of them the marble which is in it, for the erection of the Seian House, which he devised to him, it may not unreasonably be asked whether such a bequest will be valid, for the reason that the legatee is the owner of both houses. What would be the case if a person should devise a house, after excepting the marble which he wished the heir to have for the purpose of building another house which still remained a part of the estate. The better opinion may be said to be that the exception will be void in either instance, but the legacy will be valid, and the appraised value of the property must be paid.

§ 5.- If, however, anyone bequeaths a legacy of this kind for the purpose of constructing some public work, I think that it will be valid; and Papinianus, in the Eleventh Book of Opinions, relates that our Emperor and the Divine Severus decided that those who promised to erect some public work can remove materials from their city and country houses, and use them with that design, because they do not remove them for commercial purposes. Let us, however, consider whether property can only be left to a city situated in the same territory, or whether it can be transferred elsewhere, to be used in some other city. I think that this should not be allowed, although it has been settled that materials can be taken from a house which a man owns and transported to another belonging to him in a different town.

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

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

§ 8.- This Decree of the Senate applies to

Divino Severo. Luego ¿se le podrá legar también a aquel a quien yo legara la otra casa? Pero se habrá de decir que no, porque aquel, a quien se le legó, no es poseedor futuro.

§ 4.- Si a dos les hubiere legado la casa Semproniana, y de ella, a uno de los mismos mármoles, para la construcción de la casa Seyana, que le había legado, no sin razón se discutirá si será válido, porque el legatario es dueño de ambas. ¿Y que se dirá, si alguien hubiere legado una casa, deducidos los mármoles, que quiso los tuviera el heredero para construir la casa, que retenía en la herencia? Pero mejor se dirá, que en uno y otro caso no es válida la separación; pero será válido el legado, para que se pague la estimación de estas cosas.

§ 5.- Pero si alguien hizo un legado para que se hiciera una obra de la República, opino que es válido el legado; porque también refiere Papiano en el libro undécimo de las Respuestas, que nuestro Emperador y el Divino Severo establecieron, que los que hubieren prometido alguna cosa para una obra de la República, podían separarla de sus casas urbanas y rústicas, y emplearlas en aquella obra, porque tampoco estos la tendrían por causa de comercio. Pero veamos, si se podrá legar a aquella sola ciudad, en cuyo territorio está, o si también se podrá transferir de una ciudad a otra; Y opino, que no se ha de permitir aunque se halle establecido, que de la casa que uno tiene se le consienta trasladar esas cosas a casa de otra ciudad.

§ 6.- Este Senadoconsulto se refiere, no solamente a Roma, sino también a las demás ciudades.

§ 7.- Pero hay además un Rescripto de los Divinos Hermanos, recaído sobre súplica de Procliano y de Epitincano, que deseaba por causa de una deuda pública, que se le permitiese enajenar, por el cual les denegaron el derecho de enajenar.

§ 8.- Este Senadoconsulto se extiende no sola-

sed et ad balinea vel aliud quod aedificium vel porticus sine aedibus vel tabernas vel popinas extenditur.

§ 9.- Item hoc prohibetur haec legari, quod non alias praestari potest, quam ut aedibus detrahatur subducatur, id est marmora, vel columnae. Idem et in tegulis et in tignis et ostiis senatus censuit: sed et in bibliothecis parietibus inhaerentibus.

§ 10.- Sed si cancelli sint vel vela, legari poterunt, non tamen fistulae vel castelli.

§ 11.- Sed automataria aut si quis canthari, per quos aquae saliunt, poterunt legari, maxime si impositicii sint.

§ 12.- Quid ergo in statutis dicendum? Si quidem inhaerent parietibus, non licebit, si vero alias existant, dubitari potest: verum mens senatus plenius accipienda est, ut si qua ibi fuerunt perpetua, quasi portio aedium distrahi non possint.

§ 13.- Proinde dicendum est nec tabulas adfixas et parietibus adiunctas vel singula sigilla adaequata legari posse.

§ 14.- Sed si paravit quaedam testator quasi translaturus in aliam domum et haec legavit, dubitari poterit, an valeat: et puto valere.

§ 15.- Sed si ea quae legavit aedibus iunxit, extinctum erit legatum.

§ 16.- Sed si heres ea iunxit, puto non exstingui,

42.- ULPIANUS; *libro II fideicommissorum.* - sive scit, sive ignoravit.

43.- ULPIANUS; *libro XXI ad Sabinum.* - Senatus enim ea, quae non sunt aedium, legari permisit, haec autem mortis tempore aedium non fuerunt: heres

dwellings, as well as to baths and every other kind of buildings, such as porticoes, drinking houses, and restaurants.

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

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

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

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

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

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

§ 15.- But when the testator fastens to his house the objects which he bequeathed, the legacy will be extinguished.

§ 16.- But if it united the heir, I think that it is not extinguished,

42.- THE SAME; *Trusts, Book II.* - Whether the legatee was aware of this fact or not.

43.- THE SAME; *On Sabinus, Book XXI.* - The Senate, therefore, does not permit anything which is attached to a house to be separately bequeathed. But

mente a las casas, sino también a los baños, o a otro cualquier edificio, o a pórticos sin casas, o a tiendas, o a hosterías.

§ 9.- Asimismo se prohíbe que se legue lo que no se puede entregar de otro modo sino quitándolo, o separándolo, de las casas, esto es, los mármoles o las columnas; lo mismo dispuso el Senado también respecto a las tejas, a las vigas, y a las puertas; e igualmente en cuanto a las bibliotecas adheridas a las paredes.

§ 10.- Pero si fueran celosías, o cortinas, se podrán legar, pero no las cañerías, o los depósitos para agua.

§ 11.- Pero también se podrán legar las máquinas automáticas, o las tazas de los surtidores por las que salta el agua, especialmente si están sobrepuestas.

§ 12.- ¿Qué se dirá, pues, en cuanto a las estatuas? Que si verdaderamente están adheridas a las paredes, no será lícito; pero si estuvieran de otro modo, se puede dudar. Pero se ha de entender con más amplitud la intención del Senado, de modo que, si algunas hubo allí que fueran perpetuas, como formando parte de la casa, no se puedan enajenar.

§ 13.- Por lo cual se ha de decir, que tampoco se pueden legar los cuadros fijados y adheridos a las paredes, o las estatuas adosadas a las mismas.

§ 14.- Pero si el testador compro algunas cosas como para trasladarlas a otra casa, y las lego, se podrá dudar si será válido el legado; y opino que es válido.

§ 15.- Mas si unió a las casas las cosas que legó, se habrá extinguido el legado.

§ 16.- Pero si las unió el heredero, opino que no se extingue,

42.- EL MISMO; *Fideicomisos, libro II.* - ya si lo supo, ya si lo ignora;

43.- EL MISMO; *Comentarios a Sabino, libro XXI.* - porque el Senado no permitió que se legasen las cosas que son de las casas; pero como estas no fueron

ergo aestimationem praestabit. Sed si detraxerit ut praestiterit, poenis erit locus, quamvis ut non vendat, detraxit, sed ut exsolvat.

§ 1.- Marcellus etiam scribit, si maritus diaetam in uxoris hortis, quos in dotem acceperat, fecerit, posse eum haec detrudere, quae usui eius futura sint, sine mulieris tamen damno, nec ad hoc senatus consultum futurum impedimento. Ergo si non est ei obfuturum, quo minus detrahat, dici oportebit posse eum haec legare, quae detrudere potest.

§ 2.- Legatum in aliena voluntate poni potest, in heredis non potest.

§ 3.- Qui ab hostibus redemptus est legari sibi poterit et proficiet legatum ad liberationem vinculi pignoris, quod in eo habuit qui redemit.

44.- ULPIANUS; *libro XXII ad Sabinum*.- Servum filii sui castrensis peculii legare pater potest et, si vivo patre mortuus sit filius et apud patrem peculium remansit, constitit legatum: cum enim filius iure suo non utitur, retro creditur pater dominium in servo peculiari habuisse.

§ 1.- Si quis rem, sibi legatam ignorans adhuc, legaverit, postea cognoverit et voluerit ad se pertinere, legatum valebit, quia, ubi legatarius non repudiavit, retro ipsius fuisse videtur, ex quo hereditas adita est: si vero repudiaverit, retro videtur res repudiata fuisse heredis.

§ 2.- Si Pocula quis legavit et Massa facta est vel contra, item si Lana legetur et vestimentum ex ea fiat,

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

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

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

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

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

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

§ 2.- Where anyone bequeaths drinking cups, and they have been melted down, or vice versa; and also

de las casas al tiempo de la muerte, el heredero pagará su estimación. Pero si las hubiere separado, y entregado, habrá lugar a las penas, aunque las haya separado, no para venderlas, sino para pagar.

§ 1.- Escribe también Marcelo, que si el marido hubiere hecho un cenador en los huertos de su mujer, que había recibido en dote, puede él separar las cosas que hayan de servir para su uso, pero sin perjuicio de la mujer; y que el Senadoconsulto no le habrá de servir de impedimento para esto. Luego si no le ha de servir de obstáculo, convendrá decir que él puede legar las cosas, que puede separar.

§ 2.- Se puede encomendar un legado a la voluntad ajena, pero no a la del heredero.

§ 3.- El que fue rescatado de los enemigos podrá ser legado a él mismo, y el legado aprovechará para la liberación del vínculo de prenda, que sobre él tuvo el que lo rescató.

44.- EL MISMO; *Comentarios a Sabino, libro XXII*.- El padre puede legar un esclavo del peculio castrense de su hijo, y si el hijo hubiera muerto viviendo el padre, y el peculio quedó en poder del padre, es válido el legado; porque cuando el hijo no usa de su derecho, se cree por retroacción que el padre tuvo el dominio sobre el esclavo del peculio.

§ 1.- Si alguien hubiere legado una cosa ignorando todavía que le había sido legada, después lo supiere, y quisiera que le perteneciese a él, será válido el legado, porque cuando el legatario no la repudió, se considera que antes fue de él mismo, desde que fue adida la herencia; pero si la hubiere repudiado, se considera que la cosa repudiada fue antes del heredero.

§ 2.- Si uno legó vasos, y se hizo una masa, o al contrario, y, así mismo, si se legara lana, y con ella se

Iulianus libro trigesimo secundo scripsit legatum in omnibus supra scriptis consistere et deberi quod exstat: quam sententiam puto veram, si modo non mutaverit testator voluntatem.

§ 3.- Sed et si Lancem legavit et Massam fecit, mox Poculum, debebitur Poculum, durante scilicet voluntate.

§ 4.- Si areae legatae domus imposita sit, debebitur legatario, nisi testator mutavit voluntatem.

§ 5.- Eum, qui chirographum legat, debitum legare, non solum tabulas argumento est venditio: nam cum chirographa veneunt, nomen venisse videtur.

§ 6.- Sed et si nomen legetur, benigne id quod debetur accipiendum est, ut actiones adversus debitorem cedantur.

§ 7.- Si idem servus et legatus et liber esse iussus sit, interdum procedere solum legatum poterit, ut puta si in fraudem creditoris data erit libertas: vel si is sit servus, qui in perpetuam servitutem venerit, idem erit: vel si servus sit forte pignori datus.

§ 8.- Si statuliberum heres legaverit, expedit heredi ipsum statuliberum praestare magis quam aestimationem. Etenim aestimationem veram praestabit: ipsum vero si dederit, existente condicione nullum sentiet damnum: iam enim aestimatio postea non petitur ab eo hominis liberi.

§ 9.- Si duos fundos habens testator alterius mihi usum fructum, alterum Titio leget, aditum mihi legatarius non debebit: sed heres cogitur redimere aditum et praestare.

45.- POMPONIUS; *libro VI ad Sabinum*.- Si a substituto pupilli ancillas tibi legassem easque tu a

where wool is bequeathed and clothing has been made out of it; Julianus says, in the Thirty-second Book of the Digest, that the legacy of all the above-mentioned articles is valid, and that whatever remains of them is due. I think that this opinion is correct, provided the testator did not change his mind.

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

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

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

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

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

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

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

45.- POMPONIUS; *On Sabinus, Book VI*.- If I should bequeath to you certain female slaves to be

hace un vestido, escribió Juliano en el libro trigésimo segundo del Digesto, que es válido el legado de todas las cosas mencionadas, y que se debe lo que existe; cuya opinión considero verdadera, si es que el testador no hubiere cambiado de voluntad.

§ 3.- Pero también si legó un plato, e hizo una masa, y después un vaso, se deberá el vaso, por supuesto, subsistiendo la voluntad.

§ 4.- Si sobre el solar legado se hubiera levantado una casa, se le deberá al legatario, si el testador no cambió de voluntad.

§ 5.- La venta sirve de prueba de que el que lega un quirógrafo lega la deuda, no solamente las tablas; porque cuando se venden los quirógrafos, se considera que se vendió el crédito.

§ 6.- Pero aunque se legue un crédito, se ha de entender benignamente legado lo que se debe, de modo que se cedan las acciones contra el deudor.

§ 7.- Si se hubiera mandado que el mismo esclavo fuera legado, y libre, a veces podrá ser válido solo el legado, por ejemplo, si la libertad hubiera sido dada en fraude de un acreedor, o si éste fuera esclavo, que hubiere caído en esclavitud perpetua, será lo mismo, o si acaso el esclavo estuviera dado en prenda.

§ 8.- Si el heredero hubiere legado un esclavo instituido libre bajo condición, le convendrá más entregar este mismo esclavo, que su estimación; porque pagará la verdadera estimación, pero si diere el mismo esclavo, cumpliéndose la condición no experimentará ningún perjuicio, porque después ya no se le pide la estimación de un hombre libre.

§ 9.- Si teniendo el testador dos fundos me legara el usufruto de uno, y el otro a Ticio, el legatario no me deberá el paso para él, sino que estará obligado el heredero a comprar el paso, y a cedérmelo.

45.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si yo te hubiese legado esclavas a cargo del

pupillo emissas et antequam scires tibi legatas esse alienaveris, utile legatum esse Neratius et Aristo et Ofilius probant.

§ 1.- Heres generaliter dare damnatus sanum eum esse promittere non debet, sed furtis et noxiis solum esse promittere debebit, quia ita dare debet, ut eum habere liceat: sanitas autem servi ad proprietatem eius nihil pertinet: sed ob id, quod furtum fecit servus aut noxam nocuit, evenit, quo minus eum habere domino liceat, sicuti ob id, quod obligatus est fundus, accidere possit, ut eum habere domino non liceat.

§ 2.- Si vero certus homo legatus est, talis dari debet, qualis est.

46.- POMPONIIUS; *libro IX epistularum*.- Quae de legato dicta sunt, eadem transferre licebit ad eum, qui vel Stichum vel hominem dari promiserit.

47.- ULPIANUS; *libro XXII ad Sabinum*.- Cum res legata est, si quidem propria fuit testatoris et copiam eius habet, heres moram facere non debet, sed eam praestare. Sed si res alibi sit quam ubi petitur, primum quidem constat ibi esse praestandam, ubi relicta est, nisi alibi testator voluit: nam si alibi voluit, ibi praestanda est, ubi testator voluit vel ubi verisimile est eum voluisse: et ita Iulianus scripsit tam in propriis quam in alienis legatis. Sed si alibi relicta est, alibi autem ab herede translata est dolo malo eius: nisi ibi praestetur ubi petitur, heres condemnabitur doli sui nomine: ceterum si sine dolo, ibi praestabitur, quo transtulit.

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

§ 1.- Where an heir is charged in general terms with the delivery of a slave, he is not obliged to warrant that he is sound, but he should warrant him not to be liable for theft or damages; because he should provide a slave such as the legatee may be permitted to retain. The health of a slave, however, has nothing to do with the title to him, but the rule is applicable where a slave has committed a theft or some damage for which he is responsible, in order to prevent his master from retaining him; just as a tract of land may happen to be liable for debts so that its owner cannot hold it.

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

46.- THE SAME; *Epistles, Book IX*.- What has been stated with reference to a legacy also applies to a person who has promised to furnish either Stichus, or some other slave.

47.- ULPIANUS; *On Sabinus, Book XXII*.- Where property is bequeathed which belonged to the testator, and the heir has possession of it, he ought not to delay, but should deliver it at once. If, however, the property is elsewhere than where it is demanded, in the first place it must be held that it shall be delivered where it was bequeathed, unless the testator wished otherwise; for if this was the case, it should be delivered in the place where the testator intended this should be done, or in that which it is probable he had in mind. Julianus gave this opinion not only with reference to property owned by the testator, but where bequests are made of articles belonging to others. If, however, the property has been left in one place and fraudulently transferred by the heir to another, unless it is delivered where the demand is made, the heir will be condemned on account of his bad faith; but where there was no bad faith, the property shall be delivered in the place to which it was transferred.

substituto del pupilo, y tú las hubieses comprado del pupilo, y antes que supieses que te habían sido legadas las hubieses enajenado, prueban Neracio, y Aristón y Ofilio que el legado es útil.

§ 1.- El heredero condenado en general a dar un esclavo no debe prometer que está sano, pero deberá. prometer que está exento de hurtos y de daños, porque debe darlo de modo que sea lícito tenerlo, pero la salud del esclavo nada tiene que ver con la propiedad del mismo. Pero acontece que por el hurto que hizo el esclavo, o por el daño que causó, no le es lícito al señor tenerlo, así como puede suceder que porque el fundo esté obligado no le sea lícito al señor tenerlo.

§ 2.- Mas si se legó un esclavo determinado, se debe dar tal cual es.

46.- EL MISMO; *Epístolas, libro IX*.- Lo que se ha dicho respecto al legado será lícito aplicarlo también al que hubiere prometido que se dé o Stico, o un esclavo.

47.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Cuando se legó una cosa, si verdaderamente fue propia del testador, y la tiene a su disposición el heredero, no debe causar mora, sino entregarla. Pero si la cosa estuviera en otra parte que allí donde se pide, es ciertamente sabido en primer lugar, que debe ser entregada allí donde fue dejada, si el testador no quiso que en otra parte; porque si quiso que en otra parte, ha de ser entregada allí donde quiso el testador, o donde es verosímil que él quiso; y así lo escribió Juliano, tanto respecto a los legados propios, como a los ajenos. Pero si fue dejada en un punto, y fue trasladada a otro por el heredero con dolo malo suyo, si no fuese entregada donde se pide, el heredero será condenado por razón de su dolo; mas si sin dolo, será entregada allí donde la trasladó.

§ 1.- Sed si id petatur quod pondere numero mensura continetur, si quidem certum corpus legatum est, veluti frumentum ex illo horreo vel vinum ex apotheca illa, ibi praestabitur ubi relictum est, nisi alia mens fuit testantis: sin vero non fuit certa species, ibi erit praestandum ubi petitur.

§ 2.- Itaque si Stichus sit legatus et culpa heredis non pareat, debet aestimationem eius praestare: sed si culpa nulla intervenit, cavere heres debet de restitutione servi, non aestimationem praestare. Sed et si alienus servus in fuga sit sine culpa heredis, idem dici potest: nam et in alieno culpa admitti potest: cavebit autem sic, ut, si fuerit adprehensus, aut ipse aut aestimatio praestetur: quod et in servo ab hostibus capto constat.

§ 3.- Sed si Stichus aut Pamphilus legetur et alter ex his vel in fuga sit vel apud hostes, dicendum erit praesentem praestari aut absentis aestimationem: totiens enim electio est heredi committenda, quotiens moram non est facturus legatario. Qua ratione placuit et, si alter decesserit, alterum omnimodo praestandum, fortassis vel mortui pretium. Sed si ambo sint in fuga, non ita cavendum, ut, "si in potestate ambo redirent", sed "si vel alter", et "vel ipsum vel absentis aestimationem praestandam".

§ 4.- Item si res aliena vel hereditaria sine culpa heredis perierit vel non compareat, nihil amplius quam cavere eum oportebit: sed si culpa heredis res perit, statim damnandus est.

§ 5.- Culpa autem qualiter sit aestimanda, vide-

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

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

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

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

§ 5.- But let us consider in what way the neglect of

§ 1.- Pero si se pidiera cosa que se contiene en peso, número o medida, si verdaderamente se legó una cosa cierta, por ejemplo, el trigo de aquel granero, o el vino de aquella despensa, será entregada allí donde se dejó, si no fue otra la intención del testador; pero si no fue una especie cierta, se habrá de entregar allí donde se pide.

§ 2.- Así, pues, si hubiera sido legado Stico, y no pareciese por culpa del heredero, deberá entregar su estimación; pero si no medió culpa ninguna, debe dar caución el heredero para la restitución del esclavo, pero no entregar su estimación. Mas si el esclavo ajeno estuviera fugitivo sin culpa del heredero, se puede decir lo mismo, porque también se puede contraer culpa respecto al ajeno; pero se dará caución de este modo, que si hubiere sido cogido, será entregado o él mismo, o su estimación; lo que también es constante respecto al esclavo cogido por los enemigos.

§ 3.- Pero si fuese legado Stico o Pánfilo, y uno de ellos estuviera o fugitivo, o en poder de los enemigos, se habrá de decir, que se entrega el presente, o la estimación del ausente; porque se le ha de dejar al heredero la elección, siempre y cuando no ha de causarle mora al legatario. Por cuya razón, se determinó, que también si uno de los dos hubiere fallecido, se haya de entregar de todos modos el otro, o acaso el precio del que murió. Pero si ambos estuviesen fugitivos, no se ha de dar caución de este modo, si ambos volviesen bajo la potestad, sino si uno de los dos, y se habrá de entregar o este mismo, o la estimación del ausente.

§ 4.- Asimismo, si la cosa ajena o de la herencia hubiere perecido sin culpa del heredero, o no pareciese, este no deberá hacer más que dar caución; pero si la cosa pereció por culpa del heredero, debe ser condenado desde luego.

§ 5.- Pero veamos cómo se haya de estimar la

amus, an non solum ea quae dolo proxima sit, verum etiam quae levis est? An numquid et diligentia quoque exigenda est ab herede? Quod verius est.

§ 6.- Item si fundus chasmate perierit, Labeo ait utique aestimationem non deberi: quod ita verum est, si non post moram factam id evenerit: potuit enim eum acceptum legatarius vendere.

48.- POMPONIUS; *libro VI ad Sabinum*.- Si heredis servus rem legatam ignorante domino subtraxisset et vendidisset, Atilicinus in factum dandam actionem, ut vel noxae servum dederet dominus vel ex peculio praestaret, quod ex venditione eius rei haberet.

§ 1.- Si unus ex heredibus servum legatum occidisset, omnino mihi non placet coheredem teneri, cuius culpa factum non sit, ne res in rerum natura sit.

49.- ULPIANUS, *libro XXIII ad Sabinum*.- Si cui legetur, cum quattuordecim annorum erit, certo iure utimur, ut tunc sit quattuordecim annorum, cum impleverit: et ita imperatorem decrevisse Marcellus scripsit.

§ 1.- Ergo cum esset sic relictum: "Cum ad quartum decimum annum pervenisset, annua bima trima die", et decem et septem annorum mortis tempore inveniatur, praesens legatum erit. Proinde si quindecim annorum, consequetur dicemus post biennium deberi: si sedecim, post annum debetur: si menses desint ad septimum decimum annum, residuis mensibus debetur. Haec ita, si putans minorem esse quattuordecim annorum, cum iam excessisset, sic legavit: si vero scit, triennium ad legati praestationem ex die testamenti facti numerabimus.

the heir may be established; must that which resembles fraud be merely taken into account, or that also which is but slight negligence, or must exact diligence be required from the heir? The latter I think to be the most correct opinion.

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

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

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

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

§ 1.- Therefore, where property is left to a legatee when he arrives at his fourteenth year, payable in three different instalments in one, two, and three years, and he has reached his seventeenth year at the time of the testator's death, the legacy should all be paid at once. Hence, if the legatee has attained his fifteenth year, we hold that the legacy will be due after the lapse of two years; if he has reached his sixteenth year, it will be due a year afterwards; if some months are lacking before he reaches his seventeenth year, the legacy will be due after those months have elapsed. This, however, will be the case if the testator thought that the minor was fourteen years of age when he made the bequest, when in fact

culpa, ¿acaso no solamente la que esté próxima al dolo, o también la que es leve, o quizá se ha de exigir también del heredero la diligencia? Y esto es más cierto.

§ 6.- Asimismo, si un fundo hubiere perecido por hundimiento, dice Labeón, que ciertamente no se debe su estimación; lo que es así verdad, si esto no hubiere sucedido después de causada la mora, porque pudo el legatario venderlo habiéndolo recibido.

48.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si un esclavo del heredero hubiese sustraído y vendido la cosa legada ignorándolo su señor, dice Atilicino, que se ha de dar la acción por el hecho, para que o el señor dé el esclavo por el daño, o pague del peculio lo que tuviese por la venta de aquella cosa.

§ 1.- Si uno de los herederos hubiese matado el esclavo legado, en manera ninguna me parece bien que quede obligado el coheredero, por culpa de quien no se haya hecho que la cosa no exista.

49.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Si a alguno se le legara: «cuando fuere de catorce años», usamos de este derecho cierto, que entonces sea de catorce años, cuando los hubiere cumplido; y así escribió Marcelo que lo decretó el Emperador.

§ 1.- Luego cuando así se hubiese dejado una cosa: «en el término de uno, de dos, de tres años, cuando hubiese llegado al décimo cuarto año»; se hallara que es de diez y siete años al tiempo de la muerte, el legado será de presente; por lo cual, si de quince años, diremos consiguientemente que se debe después de dos, y si de diez y seis, se deberá después de un año; si faltaran meses para los diez y siete años, se deberá transcurridos los meses. Esto es así, si juzgando que es menor de catorce años cuando ya los hubiese cumplido, le legó de esta manera; pero si lo sabe, contaremos; los tres años para la prestación del legado desde el día en que se hizo el testamento.

§ 2.- Hoc autem legatum et condicionale est et in diem, condicionale tamdiu, quamdiu quartus decimus annus sit completus, postea in diem.

§ 3.- Et ideo si quidem ante quartum decimum annum decesserit, ad heredem nihil transit: certe postea ad heredem transfert. Quod si testamenti facti tempore minor quattuordecim annis filius inveniatur, puto tempus annua bima trima die praestationis ex die completi quarti decimi anni statim cedere, nisi evidens alia mens probaretur testatoris aliud sentientis.

§ 4.- Si Titio decem quae ego debeo legavero et rogavero eadem creditori praestare, fideicommissum quidem in creditoris persona non valet, quia nihil eius interest, heres vero potest cum legatario agere, quia ipsius interest creditori solvi, ne eum conveniat: ergo propter hoc valebit legatum.

§ 5.- Sed si testator decem mihi sub fideiussore debuit, fideicommissi petitio non solum heredi, sed et fideiussori competit: interest enim eius solvi mihi, quam ipsum conventum mandati actionem intendere: nec interest, solvendo sit nec ne.

§ 6.- Iulianus libro trigesimo nono digestorum scribit, si fideiussor creditori legasset quod ei deberet, an legatum valeret. Et ait creditoris quidem nihil interesse, verum debitorem habere ex testamento actionem: interest enim ipsius liberari, quippe conveniri a fideiussoris herede non poterit.

§ 7.- Quod si idem fideiussor Titio leget et fidei eius commiserit, ut creditori solvat, et debitor et fideiussoris heres agere cum Titio ex causa fideicommissi poterunt, quia utriusque interest legatarium solvere.

he was more than that, and if he was aware of it, we must calculate that the payment of the legacy must be made three years after the date of the will.

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

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

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

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

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

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

§ 2.- Mas este legado es condicional, y a término; condicional, hasta tanto que se haya cumplido el décimo cuarto año, y después, a término.

§ 3.- Y por esto, si verdaderamente hubiere fallecido antes del décimo cuarto año, nada pasa al heredero, y si después, lo transfiere ciertamente al heredero. Pero si se hallara que el hijo es menor de catorce años al tiempo de haberse hecho el testamento, yo creo que el tiempo, «dentro del término de uno, de dos, de tres años», para la prestación corre inmediatamente desde el día en que se cumplieron los catorce años, si no se probase que fue evidentemente otra la intención del testador, que quiso otra cosa.

§ 4.- Si yo le hubiere legado a Ticio los diez que yo debo, y le hubiere rogado que se los entregue al acreedor, no es válido el fideicomiso, ciertamente en cuanto a la persona del acreedor, porque nada le interesa, pero puede el heredero ejercitar la acción contra el legatario, porque a él mismo le interesa que se pague al acreedor, para que a él no le demande; luego por esto será válido el legado.

§ 5.- Pero si el testador me debió diez con fiador, la petición del fideicomiso le compete no solo al heredero, sino también al fiador, porque le interesa a éste más bien que se me pague, que no intentar, siendo él demandado, la acción de mandato, y no importa que sea o no solvente.

§ 6.- Pregunta Juliano en el libro trigésimo noveno del Digesto, si cuando el fiador le hubiese legado al acreedor lo que le debiese, sería válido el legado; y dice, que ciertamente nada le interesa al acreedor, pero que el deudor tiene la acción derivada del testamento; porque le interesa a él mismo quedar libre, porque no podrá ser demandado por el heredero del fiador.

§ 7.- Pero si el mismo fiador hiciese el legado a Ticio, y encomendare a su fe que pague al acreedor, podrán ejercitar contra Ticio la acción por causa del fideicomiso, así el deudor, como el heredero del fiador, porque a ambos les importa que pague el legatario.

§ 8.- Meminisse autem oportet eum, qui damnatur hoc solum "fundum vendere", non gratis damnari hoc facere, sed hoc solum, ut vendat vero pretio.

§ 9.- Quod si certo pretio sit damnatus facere, necesse habebit tanti vendere, quanti damnatus est.

50.- ULPIANUS; *libro XXIV ad Sabinum*.- Si servus plurium sit, pro domini portione legatum ei relictum adquiret.

§ 1.- Si hereditatis iudex contra heredem pronuntiaverit non agentem causam vel lusorie agentem, nihil hoc nocebit legatariis. Quid ergo, si per iniuriam fuerit pronuntiatum, non tamen provocavit? Iniuria ei facta non nocebit legatariis, ut et Sabinus significat. Si tamen secundum substitutum pronuntiet, an ille legatariis teneatur, videamus: et cum ius facit haec pronuntiatio quod attinet ad ipsius personam, numquid legatariis teneatur? Nec enim tam improbe causari potest secundum se iudicatum per gratiam. Respondebit igitur et legatariis, ut creditoribus.

§ 2.- Si quis ante quaestionem de familia habitam adierit hereditatem vel necem testatoris non defenderit, legatorum persecutio adversus fiscum locum habet. Quid tamen, si fiscus bona non agnoscat? Ex necessitate redundabit onus legatorum ad heredem. Sed si subiecit delatorem sibi, ut ei hereditas abiudicaretur et oneribus careret, vel minus plene defendit causam, non se exonerat exemplo eius, qui collusorie de hereditate litigavit.

§ 3.- Si numerus nummorum legatus sit neque apparet quales sunt legati, ante omnia ipsius patris familias consuetudo, deinde regionis, in qua versatus est, exquirenda est: sed et mens patris familiae et

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

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

50.- THE SAME; *On Sabinus, Book XXIV*.- Where a slave belongs to several masters, and a legacy is left to him, he will acquire for each master a share of the legacy in proportion to his ownership of him.

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

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

§ 3.- Where a certain number of coins is bequeathed, and it is not apparent what their denomination is, before anything else is done, the custom of the testator himself, and afterwards that of

§ 8.- Pero conviene tener presente, que el que es condenado a vender un fundo, no es condenado a hacer esto gratuitamente, sino a esto solo, a que lo venda por su verdadero precio.

§ 9.- Pero si hubiera sido condenado a hacerlo por cierto precio, tendrá necesidad de venderlo por tanto en cuanto fue condenado.

50.- EL MISMO; *Comentarios a Sabino, libro XXIV*.- Si el esclavo lo fuera de muchos, adquirirá a proporción del dominio el legado que se le dejó.

§ 1.- Si el juez de la herencia hubiere fallado contra el heredero que no defendía su causa, o que la defendía ficticiamente, esto en nada les perjudicará a los legatarios, ¿Qué se dirá, pues, si se hubiere fallado con injusticia, pero no apeló? La injusticia a él hecha no les perjudicará a los legatarios, como también indica Sabino. Mas si fallara a favor del substituto, veamos si estará obligado a los legatarios; y como este fallo causa derecho en cuanto atañe a la persona del mismo, ¿no estará acaso obligado a los legatarios, -porque no puede excusarse con tanta falta de probidad diciendo que por gracia se falló a su favor?- Responderá, pues, también a los legatarios como a los acreedores.

§ 2.- Si uno hubiere adido la herencia antes de haberse aplicado el tormento a la familia, o no hubiere vengado la muerte del testador, tiene lugar contra el fisco la persecución de los legados. ¿pero qué se dirá, si el fisco no admitiese los bienes? Que por necesidad recaerá sobre el heredero la carga de los legados. Pero si se procuró un delator, para que se le adjudicase la herencia, y él estuviese exento de las cargas, o si no defendió plenamente la causa, no se descarga a sí propio, a la manera que el que mediante colusión litigó sobre la herencia.

§ 3.- Si se hubiere legado un número de monedas, y no aparece cuáles son legadas, se ha de averiguar ante todo la costumbre del mismo padre de familia, y después la de la región en que vivió; pero también se

legatarii dignitas vel caritas et necessitudo, item earum quae praecedunt vel quae sequuntur summarum scripta sunt spectanda.

51.- PAPINIANUS; *libro IV quaestionum*.- Sed si certos nummos (veluti quos in arca habet) aut certam lancem legavit, non numerata pecunia, sed ipsa corpora nummorum vel rei legatae continentur neque permutationem recipiunt et exemplo cuiuslibet corporis aestimanda sunt.

52.- PAULUS; *libro IV ad Sabinum*.- Si cui servi omnes cum peculio legati sint, etiam hi servi debentur, qui nullum peculium habent.

§ 1.- Si a filio impubere sub condicione legatum sit et filius heres exstitit, deinde mortuus est, potest dici patrem familias, qui a filio sub condicione legavit, a substituto pure repetit, statim voluisse a substituto dari, si filius pendente condicione decessisset.

53.- ULPIANUS; *libro XXV ad Sabinum*.- Quid ergo, si maiorem quantitatem a substituto reliquit? Quod excedit, hoc erit, quod a substituto relictum est: quod vero concurrat cum summa superioribus tabulis inscripta, inde debebitur.

§ 1.- Sed si repetierit legatum cum alio, forte fundum mihi legaverat ab impubere, repetiit hunc ab impuberis herede mihi et Seio, repetitio haec efficiet, ut pars mihi debeatur.

§ 2.- Si quis duos heredes scripserit et damnaverit

the neighborhood must be ascertained, in order to learn what he intended. And not only the intention of the testator, but also the rank of the legatee, or the affection with which he was regarded, and his wants must be considered; and the disposition of other sums by the same will, which either precede or follow the above-mentioned bequest, should also be taken into account.

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

52.- PAULUS; *On Sabinus, Book IV*.- Where all the slaves of the testator, together with their peculium are bequeathed to anyone, those slaves also are due who have no peculium.

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

53.- ULPIANUS; *On Sabinus, Book XXV*.- But what if he left a larger amount to be paid by the substitute? The amount in excess would be what had been left to be paid by the substitute. This, in fact, would be included with the sum mentioned in the former will, and therefore would be due.

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

§ 2.- If anyone should appoint two heirs, and

ha de atender a la mente del padre de familia, y a la dignidad del legatario, o al cariño, y al parentesco, y también a lo escrito respecto a las sumas que preceden o que siguen.

51.- PAPINIANO; *Cuestiones, libro IV*.- Pero si legó ciertas monedas, por ejemplo, las que tiene en la caja, o legó cierto plato, se comprende, no dinero contante, sino las mismas monedas, o la misma cosa legada, y estas no admiten permuta, y han de ser estimadas a la manera que otra cosa cualquiera.

52.- PAULO; *Comentarios a Sabino, libro IV*.- Si a uno se le hubieran legado todos los esclavos con su peculio, se deberán también los esclavos que no tienen ningún peculio.

§ 1.- Si bajo condición, se hubiera hecho un legado a cargo de un hijo impúbere, y el hijo quedó heredero, y murió después, se puede decir, que el padre de familia, que bajo condición hizo el legado a cargo del hijo, y lo repitió puramente a cargo del substituto, quiso que desde luego fuese dado por el substituto, si el hijo hubiese fallecido estando pendiente la condición.

53.- ULPIANO; *Comentarios a Sabino, libro XXV*.- Luego ¿qué se dirá, si dejó mayor cantidad a cargo del substituto? Que lo que excede será lo que se dejó a cargo del substituto; porque lo que concurre con la suma inscrita en las anteriores tablas, se deberá en virtud de estas.

§ 1.- Pero si hubiere repetido el legado con otro, por ejemplo, si me había legado un fundo a cargo de un impúbere, y lo repitió para mi y para Seyo a cargo del heredero del impúbere, esta repetición hará que se me deba una parte.

§ 2.- Si alguien hubiere instituido dos herederos, y

unumquemque solidam rem legatario praestare, idem est atque si duobus testamentis legatum esset: nam et si mihi et filio vel servo meo esset eodem testamento legatum, sine dubio valeret legatum utriusque, ut et Marcellus apud Iulianum adicit.

§ 3.- Si heres hominem legatum occidit ob facinus, hoc est merentem, sine dubio dicendum erit eum ex testamento non teneri.

§ 4.- Sed si noxae dedit, an teneatur, quia potest redimere? Et puto teneri.

§ 5.- Sed si animal legatum occiderit, puto teneri, non ut carnem praestet vel cetera leiqana, sed ut praestet pretium, quanti esset, si viveret.

§ 6.- Item si aedes legatas ob damnum infectum possideri passus est, puto eum teneri: debuit enim repromittere.

§ 7.- Sed si mortuum intulit fecitque religiosum locum legatum, si quidem patrem familias intulit, cum alio inferre non posset vel tam oportune non haberet, ex testamento non tenebitur: an vero teneatur, ut pretium loci praestet? Et si quidem ipse pater familias illo inferri voluit, ex testamento non tenebitur: quod si heres intulit suo arbitrio, debebit praestare, si sit in hereditate, unde pretium praestetur: testator enim qui legavit vel alio inferri voluit vel pretium loci legatario offerri.

§ 8.- Item si servum non ipse occidit, sed compulsi ad maleficium, ut ab alio occideretur vel supplicio adficeretur, aequissimum erit pretium eum praestare: quod si sua mala mente ad hoc processit, cessabit aestimatio.

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

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

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

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

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

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

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

a cada uno lo hubiere condenado a entregarle toda la cosa al legatario, es lo mismo que si el legado hubiese sido hecho en dos testamentos; porque también si a mí y a mi hijo, o a mi esclavo, se nos hubiese hecho el legado en el mismo testamento, sin duda sería válido el legado de uno y de otro, como añade también Marcelo en Juliano.

§ 3.- Si el heredero mató el esclavo legado por causa de un crimen, esto es, mereciéndolo, se habrá de decir, sin duda, que él no está obligado en virtud del testamento.

§ 4.- Pero si lo dio por noxa, ¿estará obligado, porque puede rescatarlo? Y opino que está obligado.

§ 5.- Mas si hubiere matado el animal legado, opino que queda, obligado no a entregar la carne, o los demás despojos, sino a entregar el precio que tendría, si viviese.

§ 6.- Asimismo, si consintió que por causa de daño inminente fueran poseídas las casas legadas, opino; que queda obligado; porque debió prometer.

§ 7.- Pero si enterró un muerto, e hizo religioso el lugar legado, si verdaderamente enterró un padre de familia, no pudiendo enterrarlo en otra parte, o no teniendo dónde tan oportunamente, no quedará obligado en virtud del testamento. Mas ¿quedará obligado a entregar el precio del lugar? Y si verdaderamente quiso el mismo padre de familia ser enterrado en él, no quedará obligado en virtud del testamento; pero si el heredero lo enterró por su propio arbitrio, deberá entregar, si la hubiera en la herencia, cosa con qué se pague el precio; porque el testador, que lo legó, o quiso ser enterrado en otra parte, o que se ofreciera al legatario el precio del lugar.

§ 8.- Igualmente, si él mismo no mató al esclavo, pero lo compelió a un delito para que por otro fuese muerto, o para que se le sujetase al suplicio, será muy justo, que él entregue el precio; pero si llegó a esto por su propia mala intención, no tendrá lugar la estimación.

§ 9.- Servus legatus si ab hostibus captus sit sine dolo heredis, non praestabitur, si dolo, praestabitur.

54.- POMPONIUS, *libro VIII ad Sabinum*.- Turpia legata, quae denotandi magis legatarii gratia scribuntur, odio scribentis pro non scriptis habentur.

§ 1.- Si Titiae legatum relictum est, si arbitratu Seii nupsisset, et vivo testatore Seius decessisset et ea nupsisset, legatum ei deberi.

§ 2.- Sed et si servi mors impedisset manumissionem, cum tibi legatum esset, si eum manumisisses, nihilo minus debetur tibi legatum, quia per te non stetit, quo minus perveniat ad libertatem.

§ 3.- Si pars heredum nominata sit in legando, viriles partes heredes debent, si vero omnes, hereditarias.

55.- POMPONIUS; *libro IX ad Sabinum*.- Nemo potest in testamento suo cavere, ne leges in suo testamento locum habeant, quia nec tempore aut loco aut condicione finiri obligatio heredis legatorum nomine potest.

56.- POMPONIUS; *libro XIV ad Sabinum*.- Si legati servi nomine stipuletur legatarius fugitivum eum non esse praestari, nihil veniet in eam stipulationem, quia qualis sit, talis ex testamento praestari debet nec ullum in legato damnum facere intellegetur.

57.- ULPIANUS; *libro XXXIII ad Sabinum*.- Si res obligata per fideicommissum fuerit relicta, si quidem

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

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

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

§ 2.- If a legacy has been bequeathed to you on condition that you manumit a slave, and the death of the slave prevents his manumission, you will, nevertheless, be entitled to the legacy, because it was not your fault that he did not obtain his freedom.

§ 3.- Where, in the bequest of a legacy, only a part of the heirs are mentioned, the heirs will be charged with it equally, and if all of them are charged, each will be liable in proportion to his share of the estate.

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

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

57.- ULPIANUS; *On Sabinus, Book XXXIII*.- Where property which was encumbered was

§ 9.- El esclavo legado, si hubiera sido cogido por los enemigos sin dolo del heredero, no sera pagado; pero si con dolo, será pagado.

54.- POMPONIO; *Comentarios a Sabino, libro VIII*.- Los legados torpes, que se escriben mas bien para difamar al legatario, se tienen por no escritos a causa del odio del que los escribe.

§ 1.- Si a Ticia se le dejó un legado, si se hubiese casado conforme a la voluntad de Seyo, y Seyo hubiese fallecido viviendo el testador, y ella se hubiese casado, se le debe el legado.

§ 2.- Pero aun si la muerte del esclavo hubiese impedido la manumisión, cuando te hubiese sido legado, si lo hubieses manumitido, se te debe, sin embargo, el legado, porque en ti no consistió, que no llegase a la libertad.

§ 3.- Si al hacerse el legado hubiera sido nombrada parte de los herederos, deben los herederos porciones viriles, pero si todos, con arreglo a las de la herencia.

55.- EL MISMO; *Comentarios a Sabino, libro IX*.- Nadie puede disponer en su testamento que las leyes no tengan aplicación en su testamento, porque la obligación del heredero respecto a los legados no se puede extinguir por el tiempo, o por el lugar, o por la condición.

56.- EL MISMO; *Comentarios a Sabino, libro XIV*.- Si el legatario estipulase en nombre del esclavo legado, que se respondiese de que él no era fugitivo, nada se comprenderá en esta estipulación, porque se debe entregar en virtud del testamento tal cual sea; y no se entendería que hace daño alguno en el legado.

57.- ULPIANO; *Comentarios a Sabino, libro XXXIII*.- Si por fideicomiso hubiere sido dejada una

scit eam testator obligatam, ab herede luenda est, nisi si animo alio fuerit: si nesciat, a fideicommissario (nisi si vel hanc vel aliam rem relicturus fuisset, si scisset obligatam), vel potest aliquid esse superfluum exsoluta aere alieno. Quod si testator eo animo fuit, ut, quamquam liberandorum praediorum onus ad heredes suos pertinere noluerit, non tamen aperte utique de his liberandis senserit, poterit fideicommissarius per doli exceptionem a creditoribus, qui hypothecaria secum agerent, consequi, ut actiones sibi exhiberentur: quod quamquam suo tempore non fecerit, tamen per iurisdictionem praesidis provinciae id ei praestabitur.

58.- PAPINIANUS; *libro IX responsorum*.- Domus hereditarias exustas et heredis nummis exstructas ex causa fideicommissi post mortem heredis restituendas viri boni arbitrato sumptuum rationibus deductis et aedificiorum aetatibus examinatis respondi,

59.- ULPIANUS; *libro XXXIII ad edictum*.- Si modo nulla culpa eius incendium contigisset.

60.- IULIANUS; *libro XXXIX digestorum*.- Quod si nulla retentione facta domum tradidisset, incerti conductio ei competet, quasi plus debito solverit.

61.- PAPINIANUS; *libro IX responsorum*.- Sumptus autem in reficienda domu necesarios a legatario factos petenti ei legatum, cuius postea condicio exstitit, non esse reputandos existimavi.

bequeathed by a trust, if the testator knew that it was encumbered, it must be released by the heir, unless the testator intended otherwise. If he did not know this, the debt must be assumed by the beneficiary, unless he can prove that if the testator knew that the property was encumbered he would have left something else, or if it is probable that something will remain after payment of the debt. If, however, while it was not the intention of the testator that the burden of releasing the lien on the land should be borne by his heirs, he evidently did not think of relieving them of their responsibility; the beneficiary of the trust can, by means of an exception on the ground of bad faith, compel the creditors, if they bring an Hypothecary Action against him, to assign their rights to him; and even though he may not have done this during the time prescribed by law, still, this privilege will be accorded him by means of the jurisdiction of the Governor of the province.

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

59.- ULPIANUS; *On the Edict, Book XXXIII*.- Provided the fire did not take place through the negligence of the heir.

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

61.- PAPINIANUS; *Opinions, Book IX*.- It was my opinion that the necessary expenses incurred by the legatee for the repair of a house, where he claims the legacy and the condition upon which it is dependent was afterwards fulfilled, should not be included in the calculation.

cosa obligada, si verdaderamente sabe el testador que estaba obligada, ha de ser desempeñada por el heredero, a no ser que lo hubiere hecho con otra intención; si no lo supiera, por el fideicomisario, a no ser que hubiese de haber dejado esta u otra cosa, si hubiese sabido que estaba obligada, o puede quedar algún remanente pagada la deuda. Pero si el testador tuvo esta intención, que, aunque no haya querido que pertenezca a sus propios herederos la carga de desempeñar los predios, no hubiere, sin embargo, expresado claramente que fueran ellos desempeñados, podrá el fideicomisario mediante la excepción de dolo conseguir de los acreedores, que ejercitasen contra él la acción hipotecaria, que se le cedan las acciones; lo que aun cuando no lo hubiere hecho en su tiempo, le será, sin embargo, concedido por la jurisdicción del Presidente de la provincia.

58.- PAPINIANO; *Respuestas, libro IX*.- Respondí, que las casas de la herencia que se quemaron, y que se reedificaron con dinero del heredero, deben ser restituidas por causa de fideicomiso después de la muerte del heredero, deducidas las cuentas de los gastos a arbitrio de buen varón, y examinada la edad de los edificios,

59.- ULPIANO; *Comentarios al Edicto, libro XXXIII*.- si es que el incendio hubiese acontecido sin culpa alguna de él.

60.- JULIANO; *Digesto, libro XXXIX*.- Pero si hubiese entregado la casa no habiendo hecho ninguna retención, le competará. la condición de cosa incierta, como si hubiere pagado más de lo debido.

61.- PAPINIANO; *Respuestas, libro IX*.- Pero juzgué, que los gastos necesarios hechos por el legatario para restaurar la casa, no le han de ser puestos en cuenta al que pide el legado, cuya condición se cumplió después.

62.- PAULUS; *libro XLI ad edictum*.- Si ancilla cum liberis legata sit, et ancilla sola, si non sint liberi, et liberi soli, si non sit ancilla, debentur.

63.- CELSUS; *libro XVII digestorum*.- Si ancillas omnes et quod ex his natum erit testator legaverit, una mortua servius partum eius negat deberi, quia accessionis loco legatus sit: quod falsum puto et nec verbis nec voluntati defuncti accommodata haec sententia est.

64.- GAIUS; *libro XV ad edictum provinciale*.- Captatoriae scripturae simili modo neque in hereditatibus neque in legatis valent.

65.- GAIUS; *libro I de legatis ad edictum praetoris*.- Si ita legatum sit: "Seio servos decem do praeter eos decem, quos Titio legavi", si quidem decem tantum inveniantur in hereditate, inutile est legatum, si vero ampliores, post eos, quos Titius elegit, in ceteris valet legatum, sed non in ampliores quam decem qui legati sunt: quod si minus sunt, in tantos, quanti inveniantur.

§ 1.- "Illi, si volet, Stichum do": condicionale est legatum et non aliter ad heredem transit, quam si legatarius voluerit, quamvis alias quod sine adiectione "si volet" legatum sit, ad heredem legatarii transmittitur: aliud est enim iuris, si quid tacite contineatur, aliud, si verbis exprimatur.

§ 2.- Si domus fuerit legata, licet particulatim ita reffecta sit, ut nihil ex pristina materia supersit, tamen dicemus utile manere legatum: at si ea domus destructa aliam eodem loco testator aedificaverit, dicemus interire legatum, nisi aliud testatorem sensisse fuerit adprobatum.

62.- PAULUS; *On the Edict, Book XLI*.- Where a female slave is bequeathed, together with her children, the slave alone will be due if there are no children; and the children alone, if the slave is dead.

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

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

65.- THE SAME; *On the Edict of the Praetor, Concerning Legacies, Book I*.- Where a bequest is made as follows: "I give to Seius ten slaves, to addition to the ten which I have directly bequeathed to Titius." Then if only ten are ascertained to belong to the estate, the legacy is void; but if more than that number remain after Titius has selected his ten, the legacy will be valid with respect to the others; but for no greater number than the ten which were bequeathed. If less than ten should remain, the bequest will be valid with reference to as many as are found.

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

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

62.- PAULUS; *Comentarios; al Edicto, libro XLI*.- Si hubiera sido legada una esclava con sus hijos, se debe sola la esclava, si no tuviera hijos, y solos los hijos, si no existiera la esclava.

63.- CELSO; *Digesto, libro XVII*.- Si el testador hubiere legado todas las esclavas, y lo que de ellas hubiere nacido, dice Servio, que muerta una, no se debe su parto, porque fue legado en calidad de accesión; lo que creo que es falso, y que esta opinión no está ajustada ni a las palabras, ni a la voluntad del difunto.

64.- GAYO; *Comentarios al Edicto provincial, libro XV*.- Las escrituras en que se capta, no son válidas de igual modo ni en las herencias, ni en los legados.

65.- EL MISMO; *Comentarios al Edicto del Pretor urbano, libro I de los legados*.- Si se hubiera legado así: «doy a Seyo diez esclavos además de los diez, que le legué a Ticio», si verdaderamente en la herencia se encontrasen solo diez, es inútil el legado, pero si más después de los que eligió Ticio, es válido el legado en cuanto a los demás, pero no por más que los diez, que se legaron; pero si hay menos, por tantos cuantos se hallen.

§ 1.- «Le doy Stico a aquel, si lo quisiese», es un legado condicional, y no pasa al heredero de otro modo, que si hubiere querido el legatario aunque si el legado se hubiera hecho de otra suerte, sin la adición, «si quisiese», se transmite al heredero del legatario; porque diferente derecho es, si algo se contiene tácitamente, y otra cosa se expresa con las palabras.

§ 2.- Si se hubiera legado una casa, aunque por partes haya sido restaurada, de modo, que nada quede de sus primitivos materiales, diremos, sin embargo, que el legado subsiste válido; mas si, destruida aquella casa, el testador hubiere edificado otra en el mismo lugar, diremos, que fenece el

unless it should be proved that the intention of the testator was otherwise.

66.- GAIUS; *libro XVIII ad edictum provinciale*.- Etsi aequo pretio emere vel vendere iusserit heredem suum testator, adhuc utile legatum est. Quid enim si legatarius, a quo emere fundum heres iussus est, cum ex necessitate eum fundum venderet, nullum inveniret emptorem? Vel ex diverso quid si legatarii magni interesset eum fundum emere nec aliter heres venditurus esset, quam si testator iussisset?

67.- GAIUS; *libro I de legatis ad edictum praetoris*.- Servus uni ex heredibus legatus si quid in hereditate malitiose fecisse dicatur (forte rationes interlevisse), non aliter adiudicandus est, quam ex eo volentibus coheredibus quaestio habeatur. Idem est et si extraneo fuerit legatus.

§ 1.- Si ex pluribus heredibus ex disparibus partibus institutis duobus eadem res legata sit, heredes non pro hereditaria portione, sed pro virili id legatum habere debent.

68.- GAIUS; *libro XVIII ad edictum provinciale*.- Si post mortem patris filio legetur, dubium non est, quin mortuo patre ad filium pertineat legatum nec intersit, an patri heres exstiterit nec ne,

§ 1.- sed si servo post mortem domini relictum legatum est, si quidem in ea causa durabit, ad heredem domini pertineat: usque adeo, ut idem iuris est et si testamento domini liber esse iussus fuerit: ante enim cedit dies legati, quam aliquis heres domino exsistat, quo fit, ut hereditati acquisitum legatum postea herede aliquo existente ad eum pertineat: praeterquam si suus heres aliquis aut necessarius domino ex eo testamento factus erit: tunc enim quia in unum concurrit, ut et heres exsistat et dies legati cedat, probabilius dicitur ad ipsum potius

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

67.- THE SAME; *On the Edict of the Praetor, Concerning Legacies, Book I*.- Where a slave is bequeathed to one of several heirs, and is said to have maliciously committed some act against the estate, as, for instance, to have removed the accounts; he shall not be adjudged to the heir before being put to the torture, if the other heirs desire it. The same rule applies if he is bequeathed to a stranger.

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

68.- THE SAME; *On the Provincial Edict, Book XVIII*.- Where a bequest is made to a son after the death of his father, there is no doubt that when his father dies the legacy will belong to the son; and it makes no difference whether the legatee becomes the heir of his father or not.

§ 1.- Where a legacy is bequeathed to a slave after the death of his master, if he remains in the condition of servitude, the legacy will belong to the heir of his master; and the same rule will apply if the slave should be ordered to become free by the will of his master, for the time of the bequest dates from the moment of the appearance of the heir; the result of which is that the legacy will be acquired by the estate, and afterwards will vest in him who is the heir; and, moreover, where someone is created either the proper or the necessary heir of the master by his will,

legado, si no se hubiere probado que el testador quiso otra cosa.

66.- EL MISMO; *Comentarios al Edicto provincial, libro XVIII*.- Y si el testador hubiere mandado que su heredero comprase o vendiese una cosa por su justo precio, también es útil el legado. Porque ¿qué diremos, si el legatario de quien se mandó que el heredero comprase un fundo, no encontrase ningún comprador, cuando por necesidad vendiese este fundo? O por el contrario, ¿qué diremos, si al legatario le interesase mucho comprar este fundo, y el heredero no hubiere de venderlo, sino si el testador lo hubiese mandado?

67.- EL MISMO; *Comentarios al Edicto del Pretor, libro I de los legados*.- Si se dijera que el esclavo legado a uno solo de los herederos hizo maliciosamente alguna cosa en la herencia, acaso que borró las cuentas, no ha de ser adjudicado de otra suerte, sino si, queriéndolo los coherederos, fuese sometido al tormento; y lo mismo es también si hubiere sido legado a un extraño.

§ 1.- Si una misma cosa hubiera sido legada a dos de varios herederos instituidos en diversas partes, los herederos deben tener este legado, no a proporción de su parte en la herencia, sino por partes viriles.

68.- EL MISMO; *Comentarios al Edicto provincial libro XVIII*.- Si al hijo se le legara para después de la muerte del padre, no hay duda, de que muerto el padre le pertenezca al hijo el legado, y no importa que haya sido o no heredero del padre.

§ 1.- Pero si a un esclavo se le dejó un legado para después de la muerte de su señor, si verdaderamente permaneciere en esta misma condición, pertenézcale al heredero del señor, de tal manera, que haya el mismo derecho también si en el testamento del señor se hubiere mandado que fuese libre; porque corre el término del legado antes que alguien sea heredero del señor; de lo cual resulta, que el legado adquirido para la herencia, siendo alguien heredero, le pertenece después a este, salvo si alguien se hubiere hecho en virtud de este testamento heredero suyo o necesario

cui relictum est pertinere legatum quam ad heredem eius, a quo libertatem consequitur.

§ 2.- Si pure legatus servus sub condicione liber esse iussus fuerit, sub contraria condicione valet legatum: et ideo existente condicione legatum peremittitur, deficiente ad legatarium pertinebit. Et ideo si pendente condicione libertatis legatarius decesserit posteaque defecerit condicio libertatis, ad heredem legatarii non pertinet legatum.

§ 3.- Quod si idem pure legatus sit et ex die liber esse iussus erit, omnimodo inutile legatum est, quia diem venturam certum est.

§ 4.- Ita Iulianus quoque sensit, unde ait: si servus Titio legatus sit et idem post mortem Titii liber esse iussus fuerit, inutile legatum est, quia moriturum Titium certum est.

69.- GAIUS; *libro II de legatis ad edictum praetoris*.- Servo legato legari posse receptum est, quod adita hereditate statim servus acquiritur legatario, deinde sequitur legatum.

§ 1.- Si servum sub condicione legatum heres alienaverit, deinde condicio extiterit, potest nihilominus a legatario vindicari nec extinguitur legatum.

§ 2.- Si testator quosdam ex heredibus iusserit aes alienum solvere, non creditores habebunt adversus eos actionem, sed coheredes, quorum interest hoc fieri. Nec solum hoc casu alius habet actionem, quam cui testator dari iussit, sed alio quoque, veluti si filiae nomine genero aut sponso dotem dari iusserit: non enim gener aut sponsus, sed filia habet actionem, cuius maxime interest indotatam non esse.

then, because the time of the appearance of the heir and that appointed for the vesting of the legacy coincide, it is held to be more probable that the legacy should belong to the party to whom it was left than to the heir of him from whom the slave obtains his freedom.

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

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

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

69.- THE SAME; *On the Edict of the Praetor Concerning Legacies*.- It is accepted that a legacy can be bequeathed to a slave who has himself been disposed of by will; because at the moment the estate is entered upon the slave is acquired by the legatee, and then the legacy follows him.

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

§ 2.- If a testator should direct some of his heirs to pay a debt, his creditors will not be entitled to an action against them, but they can proceed against the remaining co-heirs, as it is to their interest that this should be done. In this instance, not only another party than the one to whom the testator ordered property to be given will be entitled to an action, but others besides; as, for example, if he should direct a dowry to be given to his son-in-law, or to the man

del señor; porque entonces, como concurre al mismo tiempo que haya heredero, y que corra el término del legado, se dice más ciertamente que el legado pertenece más bien al mismo a quien se le dejó, que al heredero de aquel de quien se consigue la libertad.

§ 2.- Si se hubiere mandado que el esclavo legado puramente fuese libre bajo condición, es válido el legado bajo la condición contraria; y por lo tanto, cumpliéndose la condición se extingue el legado, y faltando, le pertenecerá al legatario; y por esto, si pendiente la condición de la libertad hubiere fallecido el legatario, y después faltare la condición de la libertad, el legado no le pertenece al heredero del legatario.

§ 3.- Pero si el mismo hubiera sido legado puramente, y se hubiere mandado que fuese libre desde cierto día, es de todos modos inútil el legado, porque es cierto que había de llegar el día; y así opinó también Juliano.

§ 4.- Por lo cual dice: si a Ticio se le hubiera legado un esclavo, y se hubiere mandado que él mismo fuese libre después de la muerte de Ticio, el legado es inútil, porque es cierto que Ticio ha de morir.

69.- EL MISMO; *Comentarios al Edicto del Pretor, libro II, de los legados*.- Está admitido que se le pueda legar a un esclavo legado, porque, adida la herencia, inmediatamente se adquiere el esclavo para el legatario, y después seguirá el legado.

§ 1.- Si el heredero hubiere enajenado el esclavo legado bajo condición, y después se cumpliera la condición, puede, ello no obstante, ser reivindicado por el legatario, y no se extingue el legado.

§ 2.- Si el testador hubiere mandado que algunos de los herederos pagasen las deudas, no tendrían contra ellos acción los acreedores, sino los coherederos, a quienes interesa que se haga esto, y no solamente en este caso tiene la acción otro distinto de aquel a quien mandó el testador que se le diera la cosa, sino también en otro, por ejemplo si hubiere mandado que en nombre de la hija se diese la dote al yerno o al esposo; porque no tiene la acción el yerno o el

§ 3.- Si fundus qui legatus est servitutem debeat impositam, qualis est, dari debet: quod si ita legatus sit "uti optimus maximusque", liber praestandus est.

§ 4.- Servus, qui in negotio fuerit, legatus non ante tradi debet quam rationes explicet, et si ad iudicium itum sit, iudicis eadem partes esse debent.

§ 5.- Si res quae legata est an in rerum natura sit dubitetur, forte si dubium sit, an homo legatus vivat, placuit agi quidem ex testamento posse, sed officio iudicis contineri, ut cautio interponeretur, qua heres caveret eam rem persecuturum et, si nactus sit, legatario restitutum [restitutum].

70.- GAIUS; *libro XVIII ad edictum provinciale*.- Si servus Titii furtum mihi fecerit, deinde Titius herede me instituto servum tibi legaverit, non est iniquum talem servum tibi tradi, qualis apud Titium fuit, id est ut me indemnem praestes furti nomine, quod is fecerit apud Titium.

§ 1.- Nam et si fundus, qui meo fundo serviebat, tibi legatus fuerit, non aliter a me tibi praestari debeat, quam ut pristinam servitutem recipiam.

§ 2.- Nec dissimile est ei qui mandato alicuius servum emit vel ei qui servum redhibet, qui omnes non aliter restituere servum coguntur, quam ut ratio habeatur furti, quod ab eo servo factum fuerit vel antequam negotium contraheretur vel postea.

§ 3.- Quare et si post aditam hereditatem servus

betrothed to his daughter, in her name. For neither the son-in-law nor the betrothed will be entitled to an action, but the girl will be, as she has the greatest interest in the matter.

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

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

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

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

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

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

§ 3.- Therefore, if a slave who was bequeathed

esposo, sino la hija, a quien principalmente interesa.

§ 3.- Si el fundo que se legó debiera una servidumbre impuesta, debe ser dado tal cual es. Pero si hubiera sido legado así: «como mejor y más grande», ha de ser entregado libre.

§ 4.- Legado un esclavo, que hubiere estado empleado en un negocio, no debe ser entregado antes de que rinda cuentas, y si se hubiera recurrido a juicio, esta misma debe ser la función del juez.

§ 5.- Si se dudara si existe la cosa que se legó por ejemplo, si fuera dudoso si vive el esclavo legado, se determinó, que ciertamente se podía ejercitar la acción de testamento, pero que estaba en las atribuciones del juez, que se interpusiese caución, por la cual el heredero asegurase que perseguiría la cosa, y que si la consiguiera la entregará al legatario.

70.- EL MISMO; *Comentarios al Edicto Provincial, libro XVIII*.- Si un esclavo de Ticio me hubiere hecho un hurto, y después Ticio, habiéndome instituido heredero, te hubiere legado el esclavo, no es injusto que se te entregue el esclavo tal cual estuvo en poder de Ticio, esto es, que me prestes indemnización por razón del hurto, que él hubiere hecho en poder de Ticio.

§ 1.- Porque también si te hubiere sido legado un fundo, que prestaba certidumbre a un fundo mío, no debe entregársete por mí de otro modo, que si yo recobrara la antigua servidumbre.

§ 2.- Y no es desemejante el caso de aquel que por mandato de otro compró un esclavo, o al de aquel que devuelve un esclavo; todos los que no de otra suerte son obligados a restituir el esclavo, sino si se tuviera cuenta del hurto, que por el esclavo se hubiere hecho, o antes que se celebrase el negocio, o después.

§ 3.- Por lo cual, también si después de adida la

legatus heredi furtum fecerit, ita praestari debebit, ut ob hoc delictum quasi litis aestimatio a legatario sufferatur heredi.

71.- ULPIANUS; *libro LI ad edictum*.- Si domus alicui simpliciter sit legata neque adiectum quae domus, cogentur heredes quam vellent domum ex his, quas testator habebat, legatario dare: quod si nullas aedes reliquerit, magis derisorium est quam utile legatum.

§ 1.- De evictione an cavere debeat is, qui servum praestat ex causa legati, videamus. Et regulariter dicendum est, quotiens sine iudicio praestita res legata evincitur, posse eam ex testamento peti: ceterum si iudicio petita est, officio iudicis cautio necessaria est, ut sit ex stipulatu actio.

§ 2.- In pecunia legata confitenti heredi modicum tempus ad solutionem dandum est nec urgendum ad suscipiendum iudicium: quod quidem tempus ex bono et aequo praetorem observare oportebit.

§ 3.- Qui confitetur se quidem debere, iustam autem causam adfert, cur utique praestare non possit, audiendus est: ut puta si aliena res legata sit negetque dominum eam vendere vel immensum pretium eius rei petere adfirmet, aut si servum hereditarium neget se debere praestare, forte patrem suum vel matrem vel fratres naturales: aequissimum est enim concedi ei ex hac causa aestimationem officio iudicis praestare.

§ 4.- Cum alicui poculum legatum esset velletque heres aestimationem praestare, quia iniquum esse aiebat id separari a se, non impetravit id a praetore: alia enim condicio est hominum, alia ceterarum

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

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

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

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

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

§ 4.- Where a cup has been bequeathed to anyone, and the heir desires to pay the appraised value of the same, because he says it would be a hardship for him to be deprived of it, he cannot obtain this favor from

herencia le hubiere hecho un hurto al heredero el esclavo legado, deberá ser entregado de tal suerte, que por causa de este delito se le pague por el legatario al heredero como la estimación del litigio.

71.- ULPIANO; *Comentarios al Edicto, libro LI*.- Si a alguien le hubiera sido legada simplemente una casa, y no se hubiese añadido qué casa, serán obligados los herederos a darle al legatario la casa que quiera de las que tenía el testador; pero si no hubiere dejado ningunas casas, el legado es más bien irrisorio que útil.

§ 1.- Veamos si deberá prestar caución de evicción el que entrega un esclavo por causa de legado; y por lo regular se ha de decir, que siempre que de la cosa legada se hace evicción, habiendo sido entregada sin forma de juicio, puede ser pedida en virtud del testamento; pero si fue pedida en juicio, es necesaria caución por ministerio del juez, para que haya la acción de lo estipulado.

§ 2.- Cuando se haya legado dinero, se le ha de dar al heredero que lo confiesa un corto tiempo para el pago, y no se le ha de apremiar a que acepte el juicio; cuyo tiempo, a la verdad, deberá determinarlo el Pretor según lo bueno y equitativo.

§ 3.- El que confiesa que él ciertamente debe, pero alega justa causa por la que verdaderamente no pueda pagar, ha de ser oído, por ejemplo, si hubiera sido legada una cosa ajena, y dijera que su dueño no la vende, o afirmase que pide un precio excesivo por aquella cosa, o si dijera que él no debe entregar aquel esclavo de la herencia, que es acaso su padre, o su madre, o su hermano natural; porque es muy justo, que por esta causa se le conceda por ministerio del juez pagar la estimación.

§ 4.- Habiéndosele legado a uno un vaso, y queriendo el heredero pagar su estimación, porque dado que era injusto que aquel se separase de él, no impetró esto del Pretor; porque una es la condición de

rerum: in hominibus enim benigna ratione receptum est, quod supra probavimus.

§ 5.- Si fundus municipum vectigalis ipsis municipibus sit legatus, an legatum consistat petique possit, videamus. Et Iulianus libro trigensimo octavo digestorum scribit, quamvis fundus vectigalis municipum sit, attamen quia aliquod ius in eo is qui legavit habet, valere legatum.

§ 6.- Sed et si non municipibus, sed alii fundum vectigalem legaverit, non videri proprietatem rei legatam, sed id ius in vectigalibus fundis habemus.

72.- PAULUS; *libro XLVIII ad edictum*.- Si quis legaverit fundum Cornelianum exceptis vineis, quae mortis eius tempore erunt, si nullae vineae erunt, legato nihil decedit.

73.- GAIUS; *libro III de legatis ad edictum praetoris*.- Si heres iussus sit facere, ut Lucius centum habeat, cogendus est heres centum dare, quia nemo facere potest, ut ego habeam centum, nisi mihi dederit.

§ 1.- Vicis legata perinde licere capere atque civitatibus rescripto imperatoris nostri significatur.

74.- ULPIANUS; *libro IV disputationem*.- Licet imperator noster cum patre rescripserit videri voluntate testatoris repetita a substituto, quae ab instituto fuerant relictas, tamen hoc ita erit accipiendum, si non fuit evidens diversa voluntas: quae ex multis colligetur, an quis ab herede legatum vel fideicommissum relictum noluerit a substituto deberi. Quid enim si aliam rem reliquit a substituto ei fideicommissario vel legatario, quam ab instituto non reliquerat? Vel quid si certa causa fuit, cur ab instituto relinqueret, quae in substituto cessaret? Vel quid si substituit ex parte fideicommissarium, cui ab

the Praetor, because the condition of a slave is one thing, and that of other property is another, and the more indulgent course is adopted with reference to slaves, as we have previously stated.

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

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

72.- PAULUS; *On the Edict, Book XLVIII*.- If anyone should bequeath the Cornelian Estate, with the exception of the vineyards which were there at the time of his death, and there are no vineyards there, nothing will be deducted from the legacy.

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

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

74.- ULPIANUS; *Disputations, Book IV*.- Although Our Emperor and his father stated in a Rescript that, where property was ordered to be delivered by the appointed heir, this, according to the intention of the testator, also applied to the substitute; still, it must be understood in this way, only where it is clear that the intention of the testator was not otherwise. It can be ascertained in several ways whether; where his heir was charged with the payment of a legacy or trust, he was unwilling for the substitute to be charged with it. But what if he had charged the substitute with the delivery of other

los hombres, Y otra la de las demás cosas, pues respecto a los hombres se admitió por benigna razón lo que arriba hemos aprobado.

§ 5.- Si un fundo tributario de un municipio hubiera sido legado a los mismos habitantes del municipio, veamos si subsiste el legado, y si puede ser pedido. Y escribe Juliano en el libro trigésimo octavo del Digesto, que aunque el fundo tributario sea de los habitantes del municipio, es, sin embargo, válido el legado, porque algún derecho tiene en él el que lo negó.

§ 6.- Pero si hubiere legado el fundo tributario no a los habitantes del Municipio, sino a otro, no se considera legada la propiedad de la cosa, sino de derecho que tenemos en los fundos tributarios.

72.- PAULO; *Comentarios al Edicto, libro XLVIII*.- Si alguno hubiere legado el fundo Cornelianiano, exceptuadas las viñas que en él hubiere al tiempo de su muerte, si no hubiere ningunas viñas, nada se deduce del legado.

73.- GAYO; *Comentarios al Edicto del Pretor, libro III. de los legados*.- Si se le hubiera mandado al heredero, que haga que Lucio tenga ciento, el heredero ha de ser obligado a dar los ciento, porque nadie puede hacer que yo tenga ciento, si no me los diere.

§ 1.- Se indica en un rescripto de nuestro Emperador, que a las aldeas les es lícito recibir legados lo mismo que a las ciudades.

74.- ULPIANO; *Disputas, libro IV*. - Aunque nuestro Emperador haya resuelto por rescripto juntamente con su padre, que se considera que por voluntad del testador se repitieron a cargo del substituto los legados, que se habían dejado a cargo del instituido, sin embargo, esto se habrá de entender así, si no fue evidente diversa voluntad, la cual se colegiará de muchas circunstancias, si alguno no hubiere querido que el legado o el fideicomiso dejado a cargo del heredero se deba por el substituto. Porque; ¿qué se dirá, si a cargo del substituto? ¿O que, si hubo una causa cierta, por la que había dejado

instituto reliquerat fideicommissum? In obscura igitur voluntate locum habere rescriptum dicendum est.

75.- ULPIANUS; *libro V disputationem*.- Si sic legatum vel fidei commissum [fideicommissum] sit relictum "si aestimaverit heres" "si comprobaverit" "si iustum putaverit", et legatum et fideicommissum debebitur, quoniam quasi viro potius bono ei commissum est, non in meram voluntatem heredis collatum.

§ 1.- Si mihi quod Titius debet fuerit legatum neque Titius debeat, sciendum est nullum esse legatum. Et quidem si quantitas non sit adiecta, evidenti ratione nihil debebitur, quia non apparet, quantum fuerit legatum: nam et si quid [quod] ego Titio debeo ei legavero quantitate non adiecta, constat nullum esse legatum, cum, si decem quae Titio debeo legavero nec quicquam Titio debeam, falsa demonstratio non peremit legatum, ut in legato dotis Iulianus respondit.

§ 2.- Quod si addiderit: "Decem quae mihi Titius debet lego", sine dubio nihil erit in legato: nam inter falsam demonstrationem et falsam condicionem sive causam multum interest. Proinde et si Titio decem, quae mihi Seius debet, legavero, nullum erit legatum: esse enim debitor debet: nam et si vivus exegissem, exstingueretur legatum et, si debitor maneret, actiones adversus eum heres meus dumtaxat praestare cogeretur.

§ 3.- Si quis ita stipulatus: "Stichum aut decem, utrum ego velim" legaverit quod ei debebatur, tenebitur heres eius, ut praestet legatario actionem

property to the beneficiary of the trust, or to the legatee, with which he had not charged the appointed heir? Or what course should be pursued if a good reason existed why the appointed heir should be charged with the legacy, and the substitute should not? Or what should be done if he had substituted the beneficiary, to whom he had left property in trust, to be delivered by his appointed heirs? It must therefore be said that the above-mentioned Rescript does not apply, except where the intention of the testator is obscure.

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

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

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

§ 3.- If anyone should stipulate "To give Stichus, or ten aurei, whichever I may choose," and bequeaths what was due to the legatee, his heir will be required

la cosa a cargo del instituido, la cual dejase de existir respecto al substituto? ¿O qué, si en parte substituyó al fideicomisario, para quien a cargo del instituido había dejado un fideicomiso? Así, pues, se ha de decir, que tiene lugar el rescripto siendo obscura la voluntad.

75.- EL MISMO; *Disputas, libro V*.- Si de este modo se hubiera dejado un legado a un fideicomiso: «si el heredero lo estimare, si lo aprobare, si lo juzgare justo», se debería tanto el legado como el fideicomiso, porque más bien le fue encomendado como a hombre bueno, que no atribuido a la mera voluntad del heredero.

§ 1.- Si se me hubiere legado lo que debe Ticio, y Ticio no debiera, se ha de saber que es nulo el legado, y, a la verdad, si no se hubiera añadido una cantidad, por evidente razón no se deberá nada, porque no aparece cuánto se haya legado; porque también si lo que debo a Ticio se lo hubiere legado sin haber expresado la cantidad, es sabido que es nulo el legado, porque si yo le hubiere legado los diez que le debo a Ticio, y yo no le debiera cosa alguna a Ticio, esta falsa demostración no extingue el legado, como respondió Juliano respecto al legado de la dote.

§ 2.- Pero si hubiera añadido: «lego los diez que me debe Ticio», sin duda no había nada en el legado; porque hay mucha diferencia entre la falsa demostración y la falsa condición, o causa; por lo cual, también si a Ticio le hubiere legado los diez que me debe Seyo, será nulo el legado, porque debe ser deudor; porque también si viviendo yo los hubiese exigido, se extinguirá el legado, y, si el deudor permaneciese siendolo, mi heredero sería obligado solamente a ceder contra él las acciones.

§ 3.- Si habiendo alguien estipulado así: «Stico, o diez, según yo quiera», hubiere legado lo que se debía, su heredero estará obligado a ceder la acción al

electionem habituro, utrum Stichum an decem persequi malit.

§ 4.- Proinde si Stichum legaverit, cum ille ei Stichum aut decem deberet, incerti actio legatario adversus heredem competit, ut scripsit Iulianus libro trigesimo tertio digestorum, per quam actionem compellat heredem experiri: et, si Stichum consecutus fuerit, praestabit ei, si decem, nihil consequetur. Secundum quod erit in arbitrio debitoris, an sit legatarius is cui Stichus legatus est.

76.- IULIANUS; *libro XXXIV digestorum*.- Quod si quis Stichum aut Pamphilum stipulatus Sempronio Stichum legasset, Maevio Pamphilum, oneratus heres intellegitur, ut necesse habeat alteri actionem suam, alteri aestimationem Stichi aut Pamphili dare.

77.- ULPIANUS; *libro V disputationem*.- Si pecunia fuit deposita apud aliquem eiusque fidei commissum, ut eam pecuniam praestet, fideicommissum ex rescripto divi Pii debetur, quasi videatur heres rogatus remittere id debitori: nam si conveniatur debitor ab herede, doli exceptione uti potest: quae res utile fideicommissum facit. Quod cum ita se habet, ab omni debitore fideicommissum relinqui potest.

78.- ULPIANUS *libro VIII disputationem*.- Fideicommissum, quod a legatario relinquitur, ita demum ab eo debetur, si ad legatarium legatum pervenerit.

79.- IULIANUS; *libro V digestorum*.- Si quis testamento suo Titio et Seio decem dari iusserit, nullam haec verba recipiunt ambiguitatem, ut dena dixisse videatur, qui decem dixit.

to assign his right of action to the legatee, and the latter will have the right to choose Stichus or the ten aurei, whichever he may prefer.

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

76.- JULIANUS; *Digest, Book XXXIV*.- If anyone should stipulate to deliver Stichus or Pamphilus, and then should bequeath Stichus to Sempronius, and Pamphilus to Maevius; the heir is understood to be required to pay the value of Stichus or Pamphilus to one of the legatees, and to assign his right of action to the other.

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

78.- THE SAME; *Disputations, Book VIII*.- Where a legatee is charged with a trust, he is only bound to carry it out if the property bequeathed comes into his hands.

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

legatario, que tendrá la elección, según quiera reclamar a Stico o los diez.

§ 4.- Por lo cual, si hubiere, legado a Stico, debiéndole aquel a Stico, o los diez, le compete al legatario contra el heredero la acción de cosa incierta, según escribió, Juliano en el libro trigésimo tercero del Digesto, por cuya acción compelerá al heredero a reclamar; y si hubiere conseguido a Stico, se lo entregará, y si los diez, no conseguirá nada; según lo que estará al arbitrio del deudor, si será legatario aquel a quien le fue entregado Stico.

76.- JULIANO; *Digesto, libro XXXIV*.- Pero si alguno estipuló a Stico o a Panfilo, y a Stico lo hubiese legado a Sempronio, y a Mevio a Pánfilo, se entiende gravado el heredero a tener necesidad de darle al uno su acción, y al otro la estimación de Stico o la de Pánfilo.

77.- ULPIANO; *Disputas, libro V*.- Sí en poder de alguien se deposita, una cantidad, y el fideicomiso de la misma, para que entregase aquella cantidad, se deberá el fideicomiso en virtud del Rescripto del Divino Pío, cual si pareciera que se le rogó al heredero que esto se lo remitiera al deudor; porque si el deudor fuera demandado por el heredero, puede usar de la excepción de dolo, lo cual hace útil el fideicomiso. Y siendo esto así, se puede dejar un fideicomiso a cargo de todo deudor.

78.- EL MISMO; *Disputas, libro VIII*.- El fideicomiso, que se deja a cargo del legatario, sola-mente se debe por este, si el fideicomiso hubiere llegado a poder del legatario.

79.- JULIANO; *Digesto, libro V*.- Si alguno hubiere mandado en su testamento que se les diesen diez a Ticio y a Seyo, no admiten duda alguna estas palabras, de modo que parezca que dijo diez para cada uno el que dijo diez.

80.- MARCELLUS; *notum ad Iuliani, libro XXXII digestorum.*- Is, qui sola triginta reliquerat, Titio triginta legavit, Seio viginti, Maevio decem. Massurius Sabinus probat Titium quindecim, Seium decem, Maevium quinque consecuturos, ita tamen, ut ex his pro rata portionis Falcidia satisfiat.

81.- IULIANUS; *libro XXXII digestorum.*- Si fundum sub condicione legatum heres pendente condicione sub alia condicione alii legasset et post existentem condicionem, quae priore testamento praeposita fuisset, tunc ea condicio, sub qua heres legaverat, exstisset, dominium a priore legatario non discedit.

§ 1.- Si servo communi res legata fuisset, potest alter dominus agnoscere legatum, alter repellere: nam in hanc causam servus communis quasi duo servi sunt.

§ 2.- "Stichum Sempronio do lego: si Sempronius Stichum intra annum non manumiserit, eundem Stichum Titio do lego". Quaesitum est, quid iuris esset. Respondi Sempronium interim totum habiturum et, si quidem intra annum manumisisset, liberum eum effecturum: sin autem hoc non fecisset, totum ad Titium pertinere.

§ 3.- Qui fundum excepto aedificio legat, appellatione aedificii aut superficiem significat aut solum quoque, cui aedificium superpositum est. Si de sola superficie exceperit, nihilo minus iure legati totus fundus vindicabitur, sed exceptione doli mali posita consequetur heres id, ut sibi habitare in villa liceat: in quo inerit, ut iter quoque et actum in ea habeat. Si vero solum quoque exceptum fuerit, fundus excepta villa vindicari debet et servitus ipso iure villae debetur, non secus ac si duorum fundorum dominus alterum legaverit ita, ut alteri serviret. Sed inclinandum est testatorem etiam de solo cogitasse, sine quo aedificium stare non potest.

80.- MARCELLUS; *Notes On the Digest of Julianus, Book XXXII.*- A man who left an estate of only thirty aurei bequeathed thirty to Titius, twenty to Seius, and ten to Maevius. Massurius Sabinus holds that Titius is entitled to fifteen, Seius to ten, and Maevius to five aurei; provided, however, that each legatee contributes his share of the Falcidian fourth in proportion to what was bequeathed to him.

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

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

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

§ 3.- Where a testator devises a tract of land, with the exception of the building, by the term "building" is understood either the edifice or the soil upon which it was erected in addition. If he excepts only the building itself, the entire tract of land can, nevertheless, be claimed by the terms of the legacy; but if the heir files an exception on the ground of bad faith, he can obtain permission to live in the house as well as acquire a right of way through the land to obtain access to it. Where, however, the ground was excepted, the land with the exception of the house can be claimed, and a servitude will, by operation of law, attach to it for the benefit of the house; just as where an owner bequeaths one of two tracts of land

80.- MARCELO; *nota en el libro XXXII, del Digesto de JULIANO.*- Uno, que solamente había dejado treinta, legó treinta a Ticio, veinte a Seyo, y diez a Mevio; Masurio Sabino prueba, que Ticio habrá de obtener quince, Seyo diez, y Mevio cinco, pero de modo que de estos se satisfaga a prorrata de cada porción la Falcidia.

81.- JULIANO; *Digesto, libro XXXII.*- Si estando pendiente la condición el heredero hubiere legado a otro bajo otra condición el fundo legado bajo condición, y después de cumplirse la condición, que se hubiese puesto en el primer testamento, entonces se hubiese cumplido la condición bajo la que el heredero lo había legado, el dominio no se separa del primer legatario.

§ 1.- Si una cosa hubiese sido legada a un esclavo común, puede uno de los dueños aceptar el legado, y rechazado el otro; porque para este caso el esclavo común es como si fuera dos esclavos.

§ 2.- «Doy y lego Stico a Sempronio. Si Sempronio no hubiere manumitido a Stico dentro de un año, doy y lego el mismo Stico a Ticio»; se preguntó, ¿que derecho habría? Respondí, que interinamente todo lo tendría Sempronio, y que, si verdaderamente lo hubiese manumitido dentro de un año, se haría libre, pero que si no hubiese hecho esto, todo le pertenece a Ticio.

§ 3.- El que lega un fundo, exceptuado el edificio, con la denominación de edificio significa o la superficie, o, también el suelo sobre el que está levantado el edificio; si hubiere hecho la excepción solamente respecto a la superficie, se reivindicará, sin embargo por derecho de legado todo el fundo, pero por la excepción de dolo malo que se haya puesto conseguirá el heredero que le sea lícito habitar en la casa de campo; en lo que estará comprendido, que tenga también paso y conducción para ella. Mas si también se hubiera exceptuado el suelo, deberá ser reivindicado el fundo quedando exceptuada la casa de campo, y de derecho se le deberá servidumbre a la casa de campo, no de otra suerte que si el dueño de

§ 4.- Si libertus patronum ex septunce heredem scripserit, alios ex ceteris et ita legaverit: "Quisquis mihi alius ex supra scriptis cum patrono meo heres erit, servos illum et illum Titio lego, quos aestimo singulos vicens aureis", intellegendum erit a coherede patroni dumtaxat legatum datum et ideo Titium non amplius quincuncem in servis vindicare posse. Adiectio autem illa "quos aestimo singulos vicens aureis" non mutat legati condicionem, si legis Falcidiae rationem habere oporteat: nihilo minus enim verum pretium servorum in aestimationem deducetur.

§ 5.- "Titio fundum do lego, si heredi meo decem dederit". Si decem heres Titio debuisset et ea Titius accepta ei fecisset, fundum vindicare potest.

§ 6.- Si Titius, cui Stichus legatus fuerat, antequam sciret ad se legatum pertinere, decesserit et eundem Seio legaverit et heres Titii legatum non repudiaverit, Stichum Seius vindicabit.

§ 7.- Si pater familias ab impubere filio Titio fundum legaverit et a substituto eundem eidem Titio et pupillus patri heres exstiterit: sive vindicaverit Titius legatum sive repudiaverit, quamvis filius impubes decesserit, a substituto vindicare non poterit. Hoc enim, quod rursus a substituto legatur, perinde habendum est ac si repetita legata essententiarum quare et si pure a filio, sub condicione a substituto legatum fuerit, perinde omnia servabuntur ac si tantum a filio legatum fuisset: contra autem si a filio sub condicione, a substituto pure legatum fuerit et pupillus pendente condicione decesserit, ex substitutione sola legatum valebit.

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

§ 4.- If a freedman should appoint his patron heir to seven-twelfths of his estate, and other persons heirs to the remainder, and make his bequest as follows: "I charge whoever of the above-mentioned persons will be my heirs, along with my patron, to deliver such-and-such slaves to Titius, which slaves I think to be worth twenty aurei apiece;" it must be understood that the co-heir of the patron is the only one charged with the legacy, and therefore that Titius can only claim five-twelfths of the slaves. But the following addition: "Whom I think to be worth twenty aurei apiece," does not change the condition of the bequest, if allowance be made for the proportion due under the Falcidian Law, for in order that this may be done, the true value of the slaves must, nevertheless, be deducted, when they are appraised.

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

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

§ 7.- If the head of a household should charge his minor son with the delivery of a tract of land, which he left to Titius, and should charge a substitute in the same manner for the same person, and the minor should become the heir of his father, whether Titius claims the legacy or rejects it, he cannot demand anything from the substitute, even though the son should die before reaching puberty; for when a legacy is bequeathed a second time, and the substitute is charged therewith, it should be considered that the legacy is only repeated. Wherefore, if the son was absolutely, and the substitute conditionally, charged with the legacy, the case will be the same as if the son alone was charged with it. And, on the other hand, if the son was charged with it conditionally, and the substitute absolutely, and the minor should die before the condition was

dos fundos hubiere legado uno, de modo que le prestase servidumbre al otro; pero nos hemos de inclinar a que el testador pensó también, respecto al suelo, sin el que no puede subsistir el edificio.

§ 4.- Si un liberto hubiere instituido heredero de siete onzas a su patrono, y a otros de los demás, y hubiere legado así: «si otro cualquiera de los antes dichos fuere mi heredero con mi patrono, le lego a Ticio aquel y aquel esclavos, que estimo en veinte áureos cada uno», se habrá de entender que el legado se dió solamente a cargo del coheredero del patrono, y que por lo tanto Ticio no puede reivindicar más de cinco onzas sobre los esclavos; mas aquella adición: «que estimo en veinte áureos cada uno», no altera la condición del legado, si debiera tenerse cuenta de la ley Falcidia. Porque, esto no obstante, se comprendería en la estimación el verdadero valor de los esclavos.

§ 5.- «Doy y lego a Ticio un fundo, si él le diere diez a mi heredero»; si el heredero le hubiese debido los diez a Ticio, y Ticio se los hubiese dado por recibidos, puede reivindicar el fundo.

§ 6.- Si Ticio, a quien le había sido legado Stico, hubiere fallecido antes que supiese que le pertenecía el legado, y hubiere legado el mismo Stico a Seyo, y el heredero de Ticio no hubiere repudiado el legado, Seyo reivindicaría a Stico.

§ 7.- Si un padre de familia le hubiere legado un fundo a Ticio a cargo de un hijo impúbere, y el mismo fundo al mismo Ticio a cargo del substituto, y el pupilo hubiere quedado heredero del padre, ora haya reivindicado Ticio el legado, ora lo haya repudiado, no podrá reivindicarlo del substituto, aunque haya fallecido el hijo impúbere; porque lo que se lega de nuevo a cargo del substituto, ha de ser considerado lo mismo que si se hubiesen repetido los legados. Por lo cual, también si se hubiere hecho el legado puramente a cargo del hijo, y bajo condición a cargo del substituto, todo se observará lo mismo que si el legado hubiese sido hecho solamente a cargo del hijo; mas, por el contrario, si el legado se hubiere hecho bajo condición a cargo del hijo, y puramente a cargo del substituto, y el pupilo hubiere fallecido estando pendiente la condición, será valido el legado

§ 8.- His verbis "Lucio et Titio eorumve cui fundum do lego" utiliter legatur et, si utrique vixerint, utrique, si alter, alteri debetur.

§ 9.- Cum statuliber sub condicione legatus est et pendente condicione legati condicio statutae libertatis deficit, legatum utile fit: nam sicut statuta libertas tunc peremit legatum, cum vires accipit, ita legatum quoque non ante peremi potest, quam dies cesserit eius.

§ 10.- A filio impubere legatus et a substituto liber esse iussus, si quidem pupillus ad pubertatem pervenerit, ab eo cui legatus fuerat vindicabitur: mortuo vero pupillo libertas competit. Longe magis hoc servari conveniet, si idem servus sub condicione ab impubere legatus fuerit et pendente condicione filius intra pubertatem decesserit.

82.- IULIANUS; *libro XXXIII digestorum*.- Non quocumque modo si legatarii res facta fuerit die cedente, obligatio legati exstinguitur, sed ita, si eo modo fuerit eius, quo avelli non possit. Ponamus rem, quae mihi pure legata sit, accipere me per traditionem die legati cedente ab eo herede, a quo eadem sub condicione alii legata fuerit: nempe agam ex testamento, quia is status est eius, ut existente condicione discessurum sit a me dominium. Nam et si ex stipulatione mihi Stichus debeatur et is, cum sub condicione alii legatus esset, factus fuerit meus ex causa lucrativa, nihilo minus existente condicione ex stipulatu agere potero.

§ 1.- Si ex bonis eius, qui rei publicae causa aberat,

fulfilled, the legacy will be valid solely by virtue of the substitution.

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

§ 9.- Where a slave who is to be free under a condition is bequeathed under another condition, and while the condition of the bequest is pending, the other condition upon which his liberty is dependent fails to be carried out, the legacy is valid; for, as a conditional grant of freedom annuls the legacy if the condition is fulfilled; so also the legacy cannot be annulled before the time when it is to take effect shall have arrived.

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

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

§ 1.- If I have acquired, by prescription, some

en virtud de la sola substitución.

§ 8.- Con estas palabras: «doy y lego el fundo a Lucio y a Ticio, o a cualquiera de ellos», Se lega útilmente; y si ambos hubieren vivido, se les deberá a ambos, y si uno, a este todo.

§ 9.- Cuando el instituido libre bajo condición en el testamento fue legado bajo condición, y pendiente, la condición de legado falta la condición de la libertad concedida, el legado se hace útil; porque así como la libertad concedida extingue el legado, entonces cuando adquiere validez, así tampoco se puede extinguir el legado antes que haya corrido el término de la misma.

§ 10.- El esclavo que fue legado a cargo de un hijo impúbere, y que a cargo del substituto se mandó que fuese libre, si verdaderamente hubiere llegado el pupilo a la pubertad, será reivindicado por aquel a quien había sido legado, pero, muerto el pupilo, compite la libertad, con mucha mas razón convendrá que se observe esto, si el mismo esclavo hubiere sido legado bajo condición a cargo del impúbere, y pendiente la condición hubiere fallecido el hijo dentro de la pubertad.

82.- EL MISMO; *Digesto, libro XXXIII*.- No si de cualquier modo se hubiere hecho del legatario la cosa, se extingue, corriendo a término, la obligación del legado, sino de esta suerte, si se hubiere hecho de él de modo, que no se le pueda quitar. Supongamos que la cosa, que se me haya legado puramente, la recibo yo por entrega, corriendo el término del legado, del heredero a cuyo cargo hubiere sido legada la misma cosa bajo condición a otro; yo, a la verdad, ejercitaré la acción del testamento, porque su estado es tal, que, cumpliéndose la condición, se habría de separar de mí el dominio; porque también si en virtud de estipulación me fuese debido Stico, y éste, habiendo sido legado a otro bajo condición, hubiere sido hecho mío por causa lucrativa, podré, sin embargo, cumpliéndose la condición, ejercitar la acción de lo estipulado.

§ 1.- Si por el uso hubiere yo adquirido una cosa de

rem usu adquisierim et ea antequam evinceretur mihi legata sit, deinde postea evincatur, recte ex testamento petam eam mihi dari oportere.

§ 2.- Fundus mihi legatus est: proprietatem eius fundi redemi detracto usu fructu: postea venditor capite minutus est et usus fructus ad me pertinere coepit. Si ex testamento egero, iudex tanti litem aestimare debet, quantum mihi aberit.

§ 3.- Marcellus. Idem erit et si partem redemero, pars mihi legata est aut donata: partem enim dumtaxat petere debebo.

§ 4.- Iulianus. Quod si legatum mihi est quod ex Pamphila natum erit, ego Pamphilam mercatus sum et ea apud me peperit, non possum videri partum ex causa lucrativa habere, quia matrem eius mercatus sum: argumentum rei est, quod evicto eo actio ex empto competit.

§ 5.- Qui Gaium et Lucium eiusdem pecuniae reos habebat si ita legaverit: "Quod mihi Gaius debet, id heres meus Sempronio damnas esto dare: quod mihi Lucius debet, id heres meus Maevio damnas esto dare", eam condicionem heredis sui constituit, ut is necesse habeat alteri actiones suas, alteri litis aestimationem praestare. Si tamen vivus testator Gaius acceptum fecit, necesse est, ut Sempronii et Maevii legatum inutile sit.

§ 6.- Cum mihi Stichus aut Pamphilus legati fuissent duorum testamentis et Stichum ex altero testamento consecutus fuisssem, ex altero Pamphilum petere possum, quia et si uno testamento Stichus aut Pamphilus legati fuissent et Stichus ex causa lucrativa meus factus fuisset, nihilo minus Pamphilum petere possem.

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

§ 2.- Where a tract of land has been bequeathed to me, and I have acquired the mere ownership of the same without the usufruct, and the vendor afterwards forfeits his civil rights, the usufruct will belong to me. If I bring an action under the will, the court will render a judgment of the amount that I have lost through litigation.

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

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

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

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

los bienes del que estaba ausente por causa de la República, y me hubiera sido legada antes que de ella se hiciese la evicción, y después se hiciera su evicción, con razón pediré en virtud del testamento que se me haya de dar.

§ 2.- Se me legó un fundo, compré la propiedad de este fundo deducido el usufruto, y después el vendedor fue disminuido de cabeza, y comenzó a pertenecerme el usufruto; si yo ejercitare la acción del testamento, el juez, deberá estimar el litigio en tanto cuanto me faltare.

§ 3.- Dice Marcelo: «lo mismo será, también si yo hubiere comprado una parte, y se me legó o donó la otra parte» porque deberé pedir solamente una parte.

§ 4.- Y dice Juliano: pero si se me legó «lo que hubiere nacido de Pánfila», y yo compré a Pánfila, y esta parió en mi poder, no se puede considerar que yo tenga el parto por causa lucrativa, porque compré a su madre; y es prueba de esto, que, habiéndose hecho evicción del mismo, compete la acción de compra.

§ 5.- Si el que tenía obligados por la misma cantidad a Cayo y a Lucio hubiere hecho un legado en esta forma: «esté condenado mí heredero a darle a Sempronio lo que Cayo me debe; y esté condenado mi heredero a darle a Mevio lo que Lucio me debe», estableció para su heredero esta condición, que tenga la necesidad de cederle al uno sus acciones, y al otro la estimación del litigio. Pero si viviendo el testador dió por pagado a Cayo, es necesario que sea inútil el legado de Sempronio y de Mevio.

§ 6.- Cuando en los testamentos de dos me hubiesen sido legados Stico o Pánfilo, y yo hubiese obtenido a Stico en virtud de un testamento, puedo pedir por el otro a Pánfilo, porque también si en un solo testamento hubiesen sido legados Stico o Pánfilo, y Stico hubiese sido hecho mío en virtud de causa lucrativa, esto no obstante podría yo pedir a Pánfilo.

83.- MARCELLUS; *libro XII digestorum*.- Titius Stichus partem tibi legavit: eiusdem Stichi partem Seius tibi legavit: ex utriusque testamento consequeris.

84.- IULIANUS; *libro XXXIII digestorum*.- Huiusmodi legatum: "Si Titius heredi meo caverit centum Maevio se daturum, et heres meus Titio centum dato", utile legatum est, quemadmodum quod alicui legatum ex causa fideicommissi restituatur.

§ 1.- Eadem ratione hoc quoque legatum utile sit: "Si Titius heredi meo caverit se in municipio ex centum aureis opus facturum, tum ei centum aureos heres meus dare damnas esto".

§ 2.- Si Sempronius Titium heredem instituerit et ab eo post biennium fundum dari iusserit Maevio, Titius deinde ab herede suo eundem fundum Maevio praesenti die legaverit et Maevius pretium fundi ab herede Titii acceperit: si ex testamento Sempronii fundum petere velit, exceptione repelli poterit si pretio fundi contentus non erit.

§ 3.- Si cui homo legatus fuisset et per legatarium stetisset, quo minus Stichum, cum heres tradere volebat, acciperet, mortuo Sticho exceptio doli mali heredi proderit.

§ 4.- Aedes, quibus heredis aedes serviebant, legatae sunt traditae legatario non imposita servitute. Dixi posse legatarium ex testamento agere, quia non plenum legatum accepisset: nam et eum, qui debilitatum ab herede servum acceperit, recte ex testamento agere.

§ 5.- Qui servum testamento sibi legatum, ignorans eum sibi legatum, ab herede emit, si cognito legato ex testamento egerit et servum acceperit, actione ex vendito absolvi debet, quia hoc iudicium fidei bonae est et continet in se doli mali exceptionem. Quod si pretio soluto ex testamento agere instituerit, hominem consequi debet, actione ex empto

83.- MARCELLUS; *Digest, Book XIII*.- Titius bequeathed to you a share in Stichus, and Seius bequeathed to you the remaining share in Stichus, you can then claim him by virtue of both wills.

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

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

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

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

§ 4.- Where a house, in whose favor another house belonging to the heir was charged with a servitude was delivered to the legatee without the servitude, I held that the latter can bring an action under the will, because he did not receive the entire legacy. And, indeed, if the legatee should receive from the heir a slave, who had become disabled, he can very properly bring an action under the will.

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

83.- MARCELO; *Digesto, libro XIII*.- Ticio te legó una parte de Stico, y Seyo te legó la otra parte del mismo Stico, adquirirás en virtud del testamento de ambos.

84.- JULIANO; *Digesto, libro XXXIII*.- Un legado de esta naturaleza: «si Ticio le hubiere dado caución a mi heredero, de que él le dará ciento a Mevio, déle también mi heredero ciento a Ticio», es útil el legado; a la manera que lo que se le legó a uno, para que sea restituido por causa de fideicomiso.

§ 1.- Por la misma razón también es útil este legado: «si Ticio le hubiere dado caución a mi heredero, de que él hará en el municipio una obra de cien áureos, en este caso esté condenado mi heredero a darle cien áureos».

§ 2.- Si Sempronio hubiere instituido heredero a Ticio, y mandado que por éste se le dé un fundo a Mevio después de dos años, y luego Ticio le hubiere legado de presente a Mevio el mismo fundo a cargo de su heredero, y Mevio hubiere recibido del heredero de Ticio el precio de fundo, si quisiera pedir el fundo en virtud del testamento de Sempronio, podría ser repelido con excepción, si no se hubiere contentado con el precio del fundo.

§ 3.- Si a alguien se le hubiese legado un esclavo, y en el legatario hubiese consistido que no recibiese a Stico cuando el heredero quería entregarlo, muerto Stico, le aprovechará al heredero la excepción de dolo malo.

§ 4.- Unas casas legadas, a las cuales prestaban servidumbre las casas del heredero, le fueron entregadas al legatario no habiéndoseles impuesto servidumbre; dije, que podía el legatario ejercitar la acción del testamento, porque no había recibido íntegro el legado; porque también el que hubiere recibido un esclavo debilitado por el heredero, con razón ejercitará la acción del testamento,

§ 5.- El que compró del heredero un esclavo que le había sido legado en testamento, ignorando que le hubiera sido legado, si, habiendo tenido conocimiento del legado, ejercitare la acción del testamento, y recibiere el esclavo, debe ser absuelto de la acción de venta, porque este juicio es de buena fe, y contiene en sí la excepción de dolo malo, Pero si

pretium reciperabit, quemadmodum reciperet, si homo evictus fuisset. Quod si iudicio ex empto actum fuerit et tunc actor compererit legatum sibi hominem esse et agat ex testamento, non aliter absolvi heredem oportebit, quam si pretium restituerit et hominem actoris fecerit.

§ 6.- Cum pater pro filia sua dotis nomine centum promississet, deinde eidem centum eadem legasset, doli mali exceptione heres tutus erit, si et gener ex promissione et puella ex testamento agere instituerit: convenire enim inter eos oportet, ut alterutra actione contenti sint.

§ 7.- Si ita cui legatum esset: "Si tabulas chirographi mei heredi meo reddiderit, heres meus ei decem dato", huiusmodi condicio hanc vim habet "si heredem meum debito liberaverit". Quare et, si tabulae exstarent, non intellegitur condicio satisfecisse creditor, nisi acceptum heredi fecerit, et, si tabulae in rerum natura non fuerint, existimabitur implese condicionem, si heredem liberaverit, nec ad rem pertinebit, iam tunc cum testamentum fiebat tabulae interciderint an postea vel mortuo testatore.

§ 8.- Si Titio et Maevio legatus fuerit Stichus, qui Titii erat, debetur pars Stichi Maevio: nam Titius, quamvis ad legatum non admittatur, partem faciet.

§ 9.- "Stichum aut Pamphilum, utrum heres meus volet, Titio dato". Si dixerit heres Stichum se velle dare, Stichus mortuo liberabitur. Cum autem semel dixerit heres, utrum dare velit, mutare sententiam non poterit.

§ 10.- Legatum est ita: "Fundum Cornelianum et mancipia, quae in eo fundo cum moriar mea erunt, heres meus Titio dato". Ancilla, quae in eo fundo esse consueverat, mortis tempore cum in fuga esset, enixa est: quaero, an vel ipsa vel partus eius legato cedat.

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

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

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

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

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

§ 10.- A legacy was bequeathed as follows: "Let my heir transfer to Titius the Cornelian Estate and the slaves who are on said estate, and who will be mine at the time of my death." A female slave who ordinarily remained on said estate, at the time of the testator's

pagado el precio hubiere determinado ejercitar la acción del testamento, deberá obtener el esclavo, y por la acción de compra recuperará el precio, así como lo recuperaría si se hubiere hecho evicción del esclavo. Pero si se hubiere ejercitado la acción de compra, y entonces hubiere sabido el actor que se le había legado el esclavo, y ejercitara la acción del testamento, no deberá ser absuelto el heredero de otra suerte, sino si hubiere restituido el precio, y hubiere hecho del actor el esclavo.

§ 6.- Cuando el padre hubiese prometido por su hija ciento por razón de dote y después le hubiese legado los mismos ciento, el heredero estará seguro con la excepción de dolo malo, si el yerno hubiere determinado ejercitar la acción nacida de la promesa, y la joven la del testamento; porque se debe convenir entre ellos, que se contenten con una u otra acción.

§ 7.- Si a alguno se le hubiese legado de este modo: «si le hubiere devuelto a mi heredero las tablas de mi quirógrafo, dele diez mi heredero», esta condición tiene esta eficacia, si hubiere librado de la deuda a mi heredero. Por lo cual, también si existieren las tablas, no se entenderá que el acreedor cumplió la condición, si no hubiere dado por quitado al heredero; y si no existieren las tablas, se estimará que cumplió la condición, si liberó al heredero. Y no importará al caso que hayan perecido las tablas entonces cuando se hacía el testamento, o después, o muerto el testador,

§ 8.- Si a Ticio y a Mevio hubiere sido legado Stico que era de Ticio, se le deberá a Mevio una parte de Stico, porque Ticio, aunque no sea admitido al legado, formará parte.

§ 9.- «Déle a Ticio o a Stico o a Pánfilo, al que de los dos quiera mi heredero; si el heredero hubiere dicho, que él quería dar a Stico, muerto Stico, se librará de la obligación; mas cuando una vez hubiere dicho el heredero, a cuál de los dos quería dar, no podrá cambiar de parecer.

§ 10.- Se legó así: «déle mi heredero a Ticio el fundo Cornelianiano, y los esclavos que en este fundo hubiere míos cuando yo muera»; una esclava, que había acostumbrado a estar en este fundo, dió a luz al tiempo de la muerte, hallándose fugitiva; pregunto, si

Respondi: ancilla quamvis in fuga sit, legata videtur et, licet fugitiva erat, perinde habetur ac si in eo fundo fuisset moriente patre familias: huic consequens est, ut partus quoque matrem sequatur et perinde legato cedat, ac si in fundo editus fuisset.

§ 11.- Si Titio Stichus aut Pamphilus, utrum eorum malet, legatus est, deinde Pamphilum testator Titio donavit, Stichus in obligatione remanet.

§ 12.- Quibus ita legatum fuerit: "Titio et Maevio singulos servos do lego", constat eos non concursuros in eundem servum, sicuti non concurrunt, cum ita legatur: "Titio servum do lego: Maevio alterum servum do lego".

§ 13.- Si is cui legatum fuerat antequam constitueret, qua actione uti vellet, decessit duobus heredibus relictis, legatum accipere simul venientes, nisi consenserint, non possunt: quare quamdiu alter rem vindicare vult, alter in personam agere non potest. Sed si consenserint, rem communiter habebunt: consentire autem vel sua sponte debent vel iudice imminente.

85.- PAULUS; *libro XI ad Plautium*.- Duobus coniunctim fundus erat legatus: alter ex his partis aestimationem per actionem personalem abstulit. Alter si fundum totum vindicare velit, exceptione doli pro parte dimidia repellitur, quia defunctus semel ad eos legatum pervenire voluit.

86.- IULIANUS; *libro XXXIV digestorum*.- Si tibi homo, quem pignori dederas, legatus ab alio fuerit, actionem ex testamento habebis adversus heredem, ut pignus luatur.

death had fled, and brought forth a child. I asked whether she herself and her child are included in the legacy. I answered that the slave seems to have been bequeathed, even though she has taken to flight, and even if she was a fugitive, she is considered to have been on said estate at the time of the testator's death. Consequently, as the child follows the condition of the mother, it is included in the legacy, just as if it had been born on the estate.

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

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

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

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

86.- JULIANUS; *Digest, Book XXXIV*.- If a slave whom you had given in pledge is bequeathed to you by some other party, you will be entitled to an action under the will against the heir if the pledge is released.

cederá al legado ella misma, o el parto de ella. Respondí: aunque esté fugitiva, se considera legada la esclava, y aun cuando estaba fugitiva, es considerada lo mismo que si hubiese estado en el fundo al morir el padre de familia; a esto es consiguiente, que también el parto siga a la madre, y que ceda al legado lo mismo que si hubiese sido dado a luz en el fundo.

§ 11.- Si a Ticio se le legó Stico o Pánfilo, el que de los dos prefiriese, y después el testador le hizo a Ticio donación de Pánfilo, Stico queda sujeto a la obligación.

§ 12.- Es sabido, que aquellos a quienes se les hubiere legado así: «doy y lego a Ticio y a Mevio un esclavo a cada uno», no han de concurrir respecto al mismo esclavo, como no concurren, cuando se lega así: «doy y lego un esclavo a Ticio; doy y lego otro esclavo a Mevio».

§ 13.- Si aquel a quien se le había hecho un legado falleció, habiendo dejado dos herederos, antes que determinase de qué acción quería usar, los sucesores no pueden recibir simultáneamente el legado, si no lo consintieren. Por lo cual, mientras uno quiere reivindicar la cosa, el otro no puede ejercitar la acción personal, pero, si se hubieren convenido, tendrán en común la cosa; mas deben convenirse o por su espontánea voluntad, o apremiándolos el juez.

85.- PAULO; *Comentarios a Plaucio, libro XI*.- Un fundo había sido legado conjuntamente a dos, y uno de ellos tomó por la acción personal la estimación de su parte, y el otro, si quisiera reivindicar todo el fundo, es repelido en cuanto a la mitad con la excepción de dolo, porque el difunto quiso que el legado fuese a poder de ellos una vez.

86.- JULIANO; *Digesto, libro XXXIV*.- Si por otro se te hubiere legado el esclavo que habías dado en prenda, tendrás contra el heredero la acción del testamento, para que se desempeñe la prenda.

§ 1.- Si testamento Stichus ab uno herede legatus fuerit Maevius et eidem codicillis idem Stichus ab omnibus heredibus et antequam codicilli aperirentur Maevius litis aestimationem consecutus fuerit, ipso iure vindicari ex codicillis non potest, quia testator semel legatum ad eum pervenire voluit.

§ 2.- Cum servus legatur, et ipsius servi status et omnium, quae personam eius attingunt, in suspensio est. Nam si legatarius repulerit a se legatum, numquam eius fuisse videbitur: si non repulerit, ex die aditae hereditatis eius intellegitur. Secundum hanc regulam et de iure eorum, quae per traditionem servus acceperit aut stipulatus fuerit, deque his, quae legata ei vel donata fuerunt, statuatur, ut vel heredis vel legatarii servus singula gessisse existimetur.

§ 3.- Si fundus ab omnibus heredibus legatus sit, qui unius heredis esset, is quidem cuius fundus esset non amplius quam partem suam praestabit, ceteri in reliquis partes tenebuntur.

§ 4.- Valet legatum, si superficies legata sit ei, cuius in solo fuerit, licet is dominus soli sit: nam consequetur, ut hac servitute liberetur et superficiem lucrificiat.

87.- PAPINIANUS; *libro XVIII quaestionum*.- Filio pater, quem in potestate retinuit, heredi pro parte instituto legatum quoque relinquit. Durissima sententia est existimantium denegandam ei legati petitionem, si patris abstinerit hereditate: non enim impugnatur iudicium ab eo, qui iustis rationibus noluit negotiis hereditariis implicari.

88.- MARCIANUS; *libro VI institutionum*.- Sed si non alias voluit pater habere eum legatum, nisi hereditatem retineat, tunc neque adversus

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

§ 2.- Where a slave is bequeathed, and the condition of said slave and of everything relating to him personally are in suspense, and the legatee should refuse the legacy, the slave is considered never to have belonged to him; and if he should not reject him, he is understood to be his from the day of the acceptance of the estate. In accordance with this rule, and the rights of those interested in property which the slave either received by delivery or stipulated for, as well as with reference to whatever was bequeathed or given to him, his condition will be determined; and also whether the business he transacted was for the benefit of the heir, or the legatee.

§ 3.- Where all the heirs of a testator are charged with the delivery of a tract of land, which belonged to one of them, he to whom it belonged is not required to furnish more than his share, and the others will be liable for the remaining shares.

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

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

88.- MARCIANUS; *Institutes, Book VI*.- If, however, the father intended that the son should not have the legacy unless he accepted the estate, then an

§ 1.- Si en el testamento hubiere sido legado Stico a Mevio, a cargo de un solo heredero, y al mismo le hubiere sido legado en codicilos el mismo Stico a cargo de todos los herederos, y antes que se abriesen los codicilos hubiere obtenido Mevio la estimación del litigio, no puede de derecho ser reivindicado en virtud de los codicilos, porque el testador quiso que una vez fuera el legado a poder de aquel.

§ 2.- Cuando se lega un esclavo, queda en suspensio el estado así del mismo esclavo, como de todo lo que atañe a su persona; porque si el legatario hubiere repelido de sí el legado, se considerará que nunca fue de él, y si no lo hubiere repelido, se entenderá que fue de él desde el día en que fue adida la herencia. Según esta regla, se determinará así sobre el derecho de las cosas que el esclavo hubiere recibido por entrega, o hubiere estipulado, como sobre las que se le legaron o donaron, de suerte, que se considere que el esclavo administró cada una de estas cosas, o del heredero, o del legatario.

§ 3.- Si a cargo de todos los herederos hubiera sido legado un fundo, que fuese de un solo heredero, a la verdad, este de quien fuese el fundo no entregará más que su parte, y los demás estarán obligados por las restantes partes.

§ 4.- Es válido el legado, si se hubiera legado la superficie a aquel en cuyo suelo estuviere, aunque este sea el dueño del suelo; porque conseguirá que quede libre de esta servidumbre, y gane la superficie.

87.- PAPINIANO; *Cuestiones, libro XVIII*.- Un padre le dejó también un legado al hijo instituido heredero de parte, que retuvo en su potestad; es muy duro el parecer de los que juegan que se le ha de denegar la petición del legado; si se hubiere abstenido de la herencia de su padre; porque no se impugnará última voluntad por quien por justas razones no quiso inmiscuirse en los negocios de la herencia.

88.- MARCIANO; *Institutas, libro VI*.- Pero si el padre no quiso que el tuviera el legado de otro modo, sino si retuviera la herencia, es sabido, que en este

coheredem dandam ei legati petitionem secundum Aristonis sententiam constat, cum ipsi filio non videretur esse solvendo hereditas: et hoc ita est, licet non condicionaliter expressisset, intellexisse tamen manifestissime adprobetur.

89.- IULIANUS; *libro XXXVI digestorum*.- Nam nec emancipatus hereditate omitta legatum ab herede petere prohibetur. Praetor enim permittendo his, qui in potestate fuerint, abstinere se hereditate paterna manifestum facit ius se in persona eorum tribuere, quod futurum esset, si liberum arbitrium adeundae hereditatis habuissententiarum

90.- PAPINIANUS; *libro XVIII quaestionum*.- Quid ergo si ita legaverit "Hoc amplius filio meo?" non dubie voluntatis quidem quaestio erit, sed non absimilis est prioris casus circa filii providentiam, nisi evidens voluntas contraria patris probetur.

§ 1.- Plane si pluribus filiis institutis inter eos verbis legatorum bona dividerit, voluntatis ratione legatorum actio denegabitur ei, qui non agnovit hereditatem.

91.- IULIANUS; *libro XXXVI digestorum*.- Quaesitum est, si filius familias, qui filium habebat, heres institutus fuisset, cum esset uterque in potestate aliena, an ab eo filio eius legari possit. Respondi, cum possit a filio patri legari, consequens est, ut vel fratri ipsius vel filio vel etiam servo patris sui legetur.

§ 1.- Praesenti quidem die data libertate servo legari vel pure vel sub conditione poterit: cum vero libertas sub conditione data fuerit, alias utiliter, alias inutiliter pure legabitur. Nam si ea condicio libertatis fuerit, ut patre familias statim mortuo possit ante aditam hereditatem exsistere condicio, veluti: "Stichus si decem Titio dederit" (vel "Capitolium ascenderit"), "liber esto", utile legatum est:

action should not be granted him against his co-heir for the recovery of the legacy, as is held by Aristo; since the estate did not appear to be solvent to the son himself. This is the case, even if the testator did not make the acceptance of the estate conditional, as it is clearly established what his intention was.

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

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

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

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

§ 1.- Where freedom is granted to a slave at once, a legacy can be bequeathed to him either absolutely or conditionally. But where freedom has been bestowed upon him under some condition, it can at certain times be valid, and at others, even if bequeathed absolutely, it may be void; for if the condition of freedom was such that it could be fulfilled immediately on the death of the testator, before the

caso no se le ha de dar ni aún contra el coheredero la petición del legado conforme al parecer de Aristón, puesto que al mismo hijo no le parecería que era solvente la herencia; y esto es así, aunque no lo hubiese expresado condicionalmente, pero si se probara clarísimamente que así lo entendió;

89.- JULIANO; *Digesto, libro XXXVI*.- porque ni aun al emancipado se le prohíbe pedirle al heredero el legado, habiendo prescindido de la herencia; porque el Pretor, permitiéndoles abstenerse de la herencia paterna a los que hubieren estado bajo potestad, hace evidente, que él concedo a la persona de los mismos el derecho que habría habido, si hubiesen tenido el libre arbitrio de adir la herencia.

90.-PAPINIANO; *Cuestiones, libro XVIII*.- ¿Luego, que se diría, si hubiere legado de este modo: «esto además a mi hijo?» Indudablemente habrá cuestión sobre la voluntad; pero no es este caso desemejante del anterior en cuanto a la resolución del hijo, a no ser que se pruebe la contraria voluntad del padre.

§ 1.- Pero si esto sucediere habiendo instituido a muchos hijos, se le denegaría la acción por razón de legados al que no hubiere aceptado la herencia.

91.- JULIANO; *Digesto, libro XXXVI*.- Se preguntó, si habiendo sido instituido heredero un hijo de familia, que tenía un hijo, estando ambos bajo ajena potestad, se le podría hacer a cargo de él un legado a su hijo. Respondí: puesto que se le puede hacer al padre un legado a cargo de su hijo, es consiguiente, que se legue o al hermano del mismo, o al hijo, o aun también a un esclavo de su padre.

§ 1.- Habiéndose dado ciertamente de presente la libertad a un esclavo, se le podrá legar o puramente, o bajo condición, pero cuando la libertad hubiere sido dada bajo condición, unas veces, se legará puramente con utilidad, y otras inútilmente. Porque si la condición de la libertad hubiere sido esta, que inmediatamente después de muerto el padre de familia se pueda cumplir la condición antes de adida

huiusmodi autem condiciones: "Si heredi decem dederit", "si post aditam hereditatem Capitolium ascenderit", inutile legatum efficient. Necessario autem ex asse herede scripto etiam hae condiciones, quae ante aditam hereditatem impleri possunt, inutile legatum efficient.

§ 2.- Duobus heredibus institutis alteri Stichum legaverat et eidem Sticho decem. Cum Stichus vivo testatore ad libertatem pervenisset, totum legatum ei debebitur: nam in solidum constituisse causam legati in eius persona hoc quoque argumento est, quod, si heres, cui legatus fuerat, hereditatem non adisset, solidum ab altero herede consequi possit.

§ 3.- Servo legato legatum datum est: si alienatus a testatore fuisset, legatum ad emptorem pertinebit.

§ 4.- Cum servus Titio et eidem servo aliquid legatur, fideicommiti potest, ut aut servum alicui restituat vel ea quae servo legata sunt: hoc amplius etiam ipsi servo, cum liber erit, fideicommissum a Titio dari potest.

§ 5.- Si quis Stichum legaverit et eundem alienaverit vel manumiserit, deinde codicillis eidem legatum dederit, legatum vel manumisso vel emptori debebitur.

§ 6.- Si mihi servus a te herede legatus fuerit et eidem servo aliquis legaverit et vivo eo qui mihi servum legaverat dies legati servo dati cesserit, confestim id legatum hereditati acquiritur: et ideo, quamvis postea moritur is qui servum mihi legaverat, ad me id quod servo legatum est non pertinebit.

§ 7.- Cum homo ex testamento petitus est, causa eius temporis, quo lis contestabatur, repraesentari debet actori et, sicut partus ancillarum, sicut fructus fundorum interim percepti in hoc iudicium

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

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

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

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

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

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

§ 7.- Where a slave is claimed by virtue of a will, he should be delivered to the plaintiff in the same condition in which he was at the time issue was joined in the case. And, as the offspring of a female

la herencia, por ejemplo: «sea libre Stico, si le hubiere dado diez a Ticio», o «si hubiere subido al capitolio», es útil el legado; mas las condiciones de esta naturaleza: «si le hubiere dado diez al heredero; si después de adida la herencia subiere al capitolio», harán inútil el legado. Mas, instituido un heredero necesario de toda la herencia, también estas condiciones, que se pueden cumplir antes de adida la herencia, harán inútil el legado.

§ 2.- Instituidos dos herederos, a uno le había legado a Stico, y diez al mismo Stico; habiendo llegado Stico a la libertad en vida del testador, se le deberá todo el legado; porque la causa del legado se consolidó por completo en su persona, y de ello es prueba también, que si el heredero, a quien le había sido legado, no hubiese adido la herencia, podría conseguir del otro heredero la totalidad.

§ 3.- Se le dió un legado a un esclavo legado; si hubiese sido enajenado por el testador, el legado pertenecerá al comprador.

§ 4.- Cuando a Ticio se le lega un esclavo, y al mismo esclavo alguna cosa, se le puede encomendar en fideicomiso, que restituya a alguien o el esclavo, o las cosas, que se le legaron al esclavo; además de esto, se puede dar a cargo de Ticio un fideicomiso también para el mismo esclavo, cuando fuere libre.

§ 5.- Si alguno hubiere legado a Stico, y al mismo lo hubiere enajenado o manumitido, y después le hubiere dado al mismo un legado en codicilos, se debería el legado o al manumitido, o al comprador.

§ 6.- Si a tu cargo, siendo tú heredero, me hubiere sido legado un esclavo, y alguien le hiciera un legado al mismo esclavo, y, viviendo el que me había legado el esclavo, corriera el término del legado dado al esclavo, inmediatamente se adquiere este legado para la herencia; y por lo tanto, aunque muera después el que me había legado el esclavo, no me pertenecerá lo que se legó al esclavo.

§ 7.- Cuando se ha pedido un esclavo en virtud de un testamento, se le debe dar por anticipado al actor la causa de aquel tiempo en que se contestaba la demanda, y así como se comprenden en este juicio

deducuntur, ita quod servo legatorum vel hereditatis nomine interim obvenierit praestandum est petitori.

92.- IULIANUS; *libro XXXIX digestorum*.- Si fundum per fideicommissum relictum unus ex heredibus, excusso pretio secundum redditum eius fundi, mercatus sit propter aes alienum hereditarium praesente et adsignante eo, cui fideicommissum debebatur, placet non fundum, sed pretium eius restitui deberi. Marcellus notat: si fundum restituere malit heres, audiendum existimo.

§ 1.- Iulianus. Si Titio pecunia legata fuerit et eius fidei commissum, ut alienum servum manumitteret, nec dominus eum vendere velit, nihilo minus legatum capiet, quia per eum non stat, quominus fideicommissum praestet: nam et si mortuus fuisset servus, a legato non summo veretur.

§ 2.- Sicuti conceditur unicuique ab eo, ad quem legitima eius hereditas vel bonorum possessio perventura est, fideicommissum dare, ita et ab eo, ad quem impuberis filii legitima hereditas vel bonorum possessio perventura est, fideicommissa recte dabuntur.

93.- ULPIANUS; *libro I fideicommissorum*.- Quod fideicommissum hactenus, quatenus impubes decedat, valebit: ceterum si pubes factus decesserit, evanescit fideicommissum.

94.- IULIANUS; *libro XXXIX digestorum*.- Plane si filium impuberem exheredaverit, fideicommissum legitimus heres praestare cogendus non erit, nisi idem et patri heres fuerit.

§ 1.- Qui rogatus erat hereditatem, ex qua servus eius heres institutus erat, restituere, cum alii servum vendidisset, quaesitum est, an hereditatem restituere cogendus est is, ad quem hereditas ex emptione servi heredis scripti pervenerit. Dixi compellendum esse

slave, as well as the crops of the land which have been obtained, in the meantime, are included in this action; therefore any property which meanwhile has been acquired by the slave either by bequest or inheritance must be delivered to the plaintiff.

92.- JULIANUS; *Digest, Book XXXIX*.- Where one of several heirs purchases a tract of land which has been left in trust, the price having been determined by the income from said land on account of the debts due from the estate; the party entitled to the land under the terms of the trust, being present, and consenting, it is settled that not the land itself, but the value of the same should be delivered. Marcellus states in a note, "If the heir should prefer to deliver the land, I think that he should be heard."

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

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

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

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

§ 1.- Where a master was asked to deliver to another person an estate to which his own slave had been appointed heir, and he sold the slave; the question arose whether he into whose hands the estate came through the purchase of the slave, that

los partos de las esclavas, y los frutos de los fundos percibidos entretanto, así se le ha de dar al demandante lo que entretanto le correspondiere al esclavo a título de legados o de herencia.

92.- JULIANO; *Digesto, libro XXXIX*.- Si uno de los herederos compró por causa de deudas de la herencia un fundo dejado por fideicomiso, habiendo pagado el precio conforme a la renta de este fundo, estando presente y asintiendo aquel a quien se debía el fideicomiso, se determina, que no se debe restituir el fundo, sino su precio. Marcelo observa: si el heredero prefiriese restituir el fundo, opino que ha de ser oído.

§ 1.- Dice Juliano: si a Ticio le hubiere sido legada una cantidad, y se hubiera encomendado a su fidelidad, que manumitiese un esclavo ajeno, y un dueño no quisiera venderlo, adquirirá, no obstante, el legado, porque en el no consiste que no cumpla el fideicomiso; porque aun si el esclavo hubiese muerto, no seria excluido del legado.

§ 2.- Así como se le concede a cada cual dar un fideicomiso a cargo de aquel a quien ha de ir su herencia legítima, o la posesión de los bienes, así también se darán perfectamente fideicomisos a cargo de aquel a quien ha de ir la herencia legítima de un hijo impúbere, o la posesión de los bienes;

93.- ULPIANO; *Fideicomisos libro I*.- cuyo fideicomiso será válido en tanto cuanto fallezca impúbere, pero, si hubiere fallecido hecho púbere, se extingue, el fideicomiso.

94.- JULIANO; *Digesto, libro XXXIX*.- Pero si hubiere desheredado a un hijo impúbere, el heredero legítimo no habrá de ser obligado a entregar el fideicomiso, a no ser que el mismo fuere heredero también del padre.

§ 1.- Como quiera que uno a quien se le había rogado que restituyese la herencia, de que había sido instituido heredero un esclavo del mismo, hubiese vendido a otro el esclavo, se preguntó, ¿ha de ser obligado a restituir la herencia aquel a quien hubiere

ad fideicommissum restituendum eum, qui servum suum heredem scriptum vendidit, cum pretium hereditatis, quam restituere rogatus est, habeat. Is autem, ad quem hereditas ex emptione servi heredis scripti pervenerit, ex causa cogendus erit fideicommissum praestare, id est si dominus servi heredis scripti solvendo non erit.

§ 2.- Si cui Stichus aut Dama legatus esset electione legatario data et fidei eius commissum esset, ut Stichum alteri praestaret: si Damam vindicare maluerit, nihilo minus Stichum ex causa fideicommissi praestare debebit. Sive enim pluris est Dama, compellendus est Stichum redimere, sive minoris, aequè Stichum iuste dare cogetur, cum per eum steterit, quo minus ex testamento haberet quod fideicommissum fuerit.

§ 3.- Qui testamento manumittitur et neque legatum neque hereditatem capit, fideicommissum praestare cogendus non est, ac ne is quidem, qui servum legatum rogatus fuerit manumittere: is enim demum pecuniam ex causa fideicommissi praestare cogendus est, qui aliquid eiusdem generis vel similis ex testamento consequitur.

95.- ULPIANUS; *libro I fideicommissorum*.- Videndum tamen est, numquid, si vice operarum rogaverit eum aliquid, debeat hoc fideicommissum valere: quod nequaquam dicendum est, quia nec operae imponi huiusmodi liberto possunt nec impositae exiguntur, quamvis testator ita caverit.

96.- IULIANUS; *libro XXXIX digestorum*.- Quidam testamento vel codicillis ita legavit: "Aureos quadringentos Pamphilae dari volo ita ut infra scriptum est: ab Iulio actore aureos tot et in castris quos habeo tot et in numerato quos habeo tot": post multos annos eadem voluntate manente decessit,

was appointed heir, can be compelled to surrender it. I said that a person who sold his own slave that had been appointed heir could be compelled to discharge the trust, as he had received the price of the estate which he was asked to surrender. He, however, into whose hands the estate came through the purchase of the slave that had been appointed heir, can, after investigation, be forced to discharge the trust; that is to say, in case the original master of the slave was not solvent.

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

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

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

96.- JULIANUS; *Digest, Book XXXIX*.- A certain individual made the following bequest in his will, or codicil: "I desire forty aurei to be paid to Pamphila, as is hereinafter stated; so many of which are due to me from Julius; and so many which I have invested in camp equipage; and so many which I have in cash."

ido la herencia por virtud de la compra del esclavo instituido heredero? Dije, que ha de ser compelido a restituir el fideicomiso el que vendió su esclavo instituido heredero, puesto que tiene el precio de la herencia, que se le rogó que restituyera. Mas aquel a, quien hubiere ido la herencia en virtud de la compra del esclavo instituido heredero, habrá de ser obligado en virtud de causa a entregar el fideicomiso, esto es, si no fuere solvente, el dueño del esclavo instituido heredero.

§ 2.- Si a alguien le hubiere sido legado Stico, o Dama, habiéndosele dado la elección al legatario, y se hubiese encomendado a su fidelidad, que a Stico lo entregase a otro, si hubiere preferido reivindicar a Dama, deberá, no obstante, entregar a Stico por causa del fideicomiso. Porque si Dama vale más, debe ser compelido a rescatar a Stico, y si menos, con razón será obligado a dar a Stico, puesto que en él consistió que no tuviese en virtud del testamento lo que se hubiere dejado por el fideicomiso.

§ 3.- El que es manumitido en un testamento, y no recibe ni un legado, ni la herencia, no ha de ser obligado a entregar un fideicomiso. Y tampoco ciertamente aquél a quien se le hubiere rogado que manumita un esclavo legado; porque ha de ser obligado a dar dinero por causa de fideicomiso solamente el que en virtud del testamento obtiene alguna cosa del mismo género, o de otro semejante.

95.- ULPIANO; *Fideicomisos, libro I*.- Pero se ha de ver, si, en el caso de que le hubiere rogado alguna cosa en vez de servicios, deberá ser válido este fideicomiso; lo que de ningún modo se ha de decir, porque ni se le pueden imponer servicios a un libertino de esta clase, ni se exigen los que se hayan impuesto, aunque así lo hubiere dispuesto el testador.

96.- JULIANO; *Digesto, libro XXXIX*.- Uno legó así en testamento o en codicilos: «quiero que se le den a Pánfila cuatrocientos áureos, así como a seguida está escrito; por el administrador Julio tantos áureos, y tanto que tengo en el campamento, y tantos que tengo en moneda contante»; falleció después de

cum omnes summae in alios usus translatae essent: quaero, an debeatur fideicommissum. Respondi: vero similis est patrem familias demonstrare potius heredibus voluisse, unde aureos quadringentos sine incommodo rei familiaris contrahere possint, quam condicionem fideicommissi inieciisse, quod initio pure datum esset, et ideo quadringenti Pamphilae debebuntur.

§ 1.- Quotiens lege Iulia bona vacantia ad fiscum pertinent, et legata et fideicommissa praestantur, quae praestare cogere heres a quo relicta erant.

§ 2.- Si tibi servus legatus fuerit et petitum a te, ut Titio aliquid praestares usque ad pretium servi, deinde servus decesserit, nihil fideicommissi nomine praestare cogendus eris.

§ 3.- Si scriptus ex parte heres rogatus sit praecipere pecuniam et eis quibus testamento legatum erat distribuere, id quod sub condicione legatum est tunc praecipere debebit, cum condicio exstiterit: interim aut ei aut his quibus legatum est satisfieri oportet.

§ 4.- Cui statuliber pecuniam dare iussus est, is rogari potest, ut eandem pecuniam alicui restituat: nam cum possit testator codicillis pure libertatem dare et hoc modo condicionem extinguere, cur non etiam per fideicommissum eandem pecuniam adimendi potestatem habeat?

97.- IULIANUS; *libro XLII digestorum*.- Si mihi Stichus legatus esset fideique meae commissum, ut aut Stichum aut Pamphilum meum servum redderem, et in Stichum aliquid ex legato propter legem Falcidiam perdissem, necesse habeo aut Pamphilum servum meum totum Titio dare aut eam partem Stichi, quam legatorum nomine accepero.

The testator died several years afterwards being still of the same mind, but all the sums which he mentioned had been employed for other purposes. I ask whether the trust must be discharged. I answered that it was very probable that the testator had intended rather to point out to his heirs where they could readily obtain forty aurei, without interfering with the remainder of his estate, than to have inserted a condition in a trust which in the beginning had been absolute; and therefore that Pamphila was entitled to the forty aurei.

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

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

§ 3.- Where an heir appointed for a certain share of an estate is charged, as follows: "Take a certain sum as a preferred legacy, and distribute it among those who have received legacies by the will," he must take in this manner what was conditionally bequeathed, after the condition has been complied with, and, in the meantime, he will be required to give security either to the heir, or to the parties to whom the conditional legacies have been left.

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

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

muchos años subsistiendo la misma voluntad, cuando todas las sumas habían sido aplicadas a otros usos; pregunto, si se deberá el fideicomiso. Respondí es más verosímil que el padre de familia quiso demostrar a los herederos de donde podrían reunir los cuatrocientos áureos sin quebranto de los bienes familiares, más bien que haber impuesto una condición al fideicomiso, que en un principio fue dado puramente; y por lo tanto se le deberán los cuatrocientos a Pánfila.

§ 1.- Siempre que por la ley Julia pertenecen al fisco los bienes vacantes, se pagan los legados y los fideicomisos, que sería obligado a pagar el heredero, a cuyo cargo habían sido dejados.

§ 2.- Si te hubiere sido legado un esclavo, y se te hubiere pedido que entregases a Ticio alguna cosa hasta el precio del esclavo, y después hubiere fallecido el esclavo, no habrás de ser obligado a entregar nada por razón del fideicomiso.

§ 3.- Si al instituido heredero de una parte se le hubiera rogado que tomase antes una cantidad, y se la distribuyese a aquellos a quienes se les había legado en el testamento, lo que se legó bajo condición deberá tomarlo cuando se hubiere cumplido la condición; mientras tanto, deberá darse fianza a aquel, o a aquellos a quienes se hizo el legado.

§ 4.- A aquel a quien se mandó que un instituido libre bajo condición le diese una cantidad, se le puede rogar que restituya a otro la misma cantidad. Porque pudiendo el testador dar puramente la libertad en codicilos, y extinguir de este modo la condición, ¿porqué no tendría también la facultad de revocar por fideicomiso la misma cantidad?

97.- EL MISMO; *Digesto, libro XLII*.- Si se me hubiese legado Stico, y se hubiera encomendado a mí fidelidad, que yo entregase o a Stico, o a mi esclavo Pánfilo, y en Stico hubiese yo perdido algo por virtud del legado a causa de la ley Falcidia, tendré necesidad o de darle a Ticio todo mi esclavo Pánfilo, o aquella parte de Stico que yo hubiere recibido a

98.- IULIANUS; *libro LII digestorum*.- Servus ab hostibus captus recte legatur: hoc enim iure postliminii fit, ut, quemadmodum heredem instituere possumus servum qui in hostium potestate est, ita legare quoque eum possemus [possumus].

99.- IULIANUS; *libro LXX digestorum*.- Si domino Stichus legatus esset et servo eius optio data, partem dimidiam Stichi dico ad dominum pertinere, quod possit servus manumissus eundem Stichum optare.

100.- ULPIANUS; *libro LXXVII digestorum*.- Si mihi Sempronius a Titio herede legaverit Titiusque mihi sub eadem condicione eandem rem legaverit, existente condicione capiam legatum ex testamento Sempronii.

101.- IULIANUS; *libro LXXVIII digestorum*.- Si servo meo Stichus legatus fuerit testamento idque legatum repudiavero, deinde prolatis codicillis apparuerit mihi quoque eundem Stichum legatum esse, nihilo minus eundem vindicare possum.

§ 1.- Si ei qui in hostium potestate est legatum fuerit et is apud hostes decesserit, nullius momenti legatum erit, quamvis postliminio confirmari potuit.

102.- IULIANUS; *libro LXXXI digestorum*.- Si minor quam viginti annis dominus servum causa non probata manumiserit et postea legatum ei dederit isque alienatus ad libertatem perductus fuisset, legatum non capit: nam perinde nullius est momenti legatum, ac si sine libertate datum fuisset.

103.- IULIANUS; *libro LXXXIII digestorum*.- In tacitis fideicommissis fraus legi fieri videtur, quotiens quis neque testamento neque codicillis

legacy.

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

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

100.- THE SAME; *Digest, Book LXXVII*.- If Sempronius should charge his heir Titius with a legacy in my favor, and Titius should bequeath the same property to me subject to the same condition, and the condition should be complied with, I can still claim the legacy under the will of Sempronius.

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

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

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

103.- THE SAME; *Digest, Book LXXXIII*.- Fraud is held to have been committed in the case of an implied trust, whenever the trustee is not requested to

título de legado.

98.- EL MISMO; *Digesto, libro LII*.- Se lega válidamente el esclavo cogido por los enemigos; porque por derecho de postliminio resulta, que, así como podemos instituir heredero a un esclavo, que está en poder de los enemigos, así también podemos legarlo.

99.- EL MISMO; *Digesto, libro LXX*.- Si Stico hubiese sido legado al señor, y al esclavo de este le hubiese sido dada la elección, digo que al señor le pertenece la mitad de Stico, porque puede el esclavo manumitido elegir al mismo Stico.

100.- EL MISMO; *Digesto, libro LXXVII*.- Si Sempronio me hubiere hecho un legado a cargo de su heredero Ticio, y Ticio me hubiere legado la misma cosa bajo la misma condición, cumpliéndose la condición adquiriré el legado en virtud del testamento de Sempronio.

101.- EL MISMO; *Digesto, libro LXXVIII*.- Si Stico hubiere sido legado por testamento a un esclavo mío, y yo hubiere repudiado este legado, y después abiertos los codicilos hubiere aparecido que también me fue legado el mismo Stico, puedo, ello no obstante, reivindicarlo.

§ 1.- Si al que está en poder de los enemigos se le hubiere hecho un legado, y falleciere en poder de los enemigos, el legado no será de valor alguno aunque pudo ser confirmado por el postliminio.

102.- EL MISMO; *Digesto, libro LXXXI*.- Si un señor menor de veinte años hubiere manumitido un esclavo sin causa justificada, y después le hubiere dado un legado, y habiendo sido enajenado hubiese sido puesto en libertad, no adquiere el legado; porque es de ningún valor el legado, lo mismo que si hubiese sido dado sin la libertad.

103.- EL MISMO; *Digesto, libro LXXXIII*.- Se considera que en los fideicomisos tácitos se defrauda a la ley, siempre que uno no fuese rogado ni en el

rogaretur, sed domestica cautione vel chirographo obligaret se ad praestandum fideicommissum ei qui capere non potest.

104.- IULIANUS; *libro I ad Urseium Ferozem*.- Ab omnibus heredibus legatum ita erat: "Quisquis mihi heres erit, damnas esto Titio dare centum": deinde infra comprehensum erat, ne unus ex heredibus ei daret: quaeritur, reliqui heredes utrum tota centum dare deberent an deducta unius illius hereditaria portione. Respondit verius esse reliquos heredes tota centum debere, cum et significatio verborum non repugnet huic sententiae et voluntas testatoris congruat.

§ 1.- In testamento sic erat scriptum: "Lucio Titio, si is heredi meo tabellas, quibus ei pecuniam expromiseram, dederit, centum dato": Titius deinde antequam tabellas heredi redderet, decesserat: quaesitum est, an heredi eius legatum deberetur. Cassius respondit, si tabulae fuissent, non deberi, quia non redditus his dies legati non cessit. Iulianus notat: si testamenti faciendi tempore tabulae nullae fuerunt, una ratione dici potest legatum Titio deberi, quod adunatos condicio pro non scripta habetur.

§ 2.- Etiam rem hostium posse legari Sabinus ait, si aliquo casu emi possit.

§ 3.- Si Attio ita legatum fuerit: "Quisquis mihi heres erit, damnas esto Attio heredi decem dare", deducta sua parte Attius decem petet.

§ 4.- Item si iussus fuisset heres decem dare et fundum sibi habere, deducta sua parte decem dabit.

§ 5.- Denique constitit, cum ita legatum fuisset:

perform any act either by a will, or by a codicil, but merely binds himself by a private agreement, or by a memorandum, that he will discharge the trust in favor of a party who is not entitled to profit by it.

104.- THE SAME; *On Urseius Ferox, Book I*.- Where all the heirs of a testator were charged with a legacy as follows: "Let whoever becomes my heir be charged with the payment of a hundred aurei to Titius." It was afterwards inserted in the will that only one of his heirs should pay Titius the money. The question arose, must the remaining heirs pay the entire hundred aurei, or what is left after deducting the share of the estate belonging to the one above mentioned? The answer was that it was more advisable for the remaining heirs to pay the hundred aurei, since the meaning of the words is not opposed to this opinion, and the intention of the testator agrees with it.

§ 1.- Where the following was inserted in a will: "Let my heir pay a hundred aurei to Lucius Titius, if he surrenders to him a note by which I have promised to pay him a certain sum of money." Titius died before delivering the note to the heir; and the question arose whether his heir would be entitled to the legacy? Cassius gave it as his opinion that if there was, in reality, a note, the heir of the legatee would not be entitled to the legacy, because, as the note was not returned, the time for the legacy to vest had not arrived. Julianus remarks that, if there was no note in existence at the time when the will was executed, there was one reason why the legacy would be due to Titius, and that is because an impossible condition is not considered to have been imposed.

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

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

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

§ 5.- Finally, it is established that where a legacy

testamento, ni en los codicilos, pero en caución doméstica, o en quirógrafo se obligase a entregar el fideicomiso al que no puede adquirirlo.

104.- EL MISMO; *Comentarios a Urseio Ferox, libro I*.- Se había hecho así un legado a cargo de todos los herederos; «cualquiera que fuere mi heredero esté condenado a darle ciento a Ticio», y después se había expresado a continuación, que no se los diese uno de los herederos; se pregunta, si los demás herederos deberían dar todos los ciento, o deducida la porción hereditaria de aquel solo. Respondió, que era más verdadero, que los demás herederos debían íntegros los ciento, porque ni la significación de las palabras se opone a este parecer, y es congruente la voluntad del testador.

§ 1.- En un testamento se había escrito de este modo: «dele ciento a Lucio Ticio, si éste diere a mi heredero las tablas en que yo le había prometido dinero»; después falleció Ticio antes que le devolviese las tablas al heredero; se preguntó, si se le debería el legado a su heredero; Cassio respondió que si existiesen las tablas, no se le debía, porque no habiendo sido devueltas aquellas, no corrió el término del legado. Juliano observa: si no existieron ningunas tablas al tiempo de hacerse el testamento, se puede decir por una sola razón, que se le debe a Ticio el legado, porque la condición imposible se tiene por no escrita.

§ 2.- Dice Sabino, que también se puede legar una cosa de los enemigos, si en algún caso se pudiera comprar.

§ 3.- Si a Atcio se le hubiere legado así: «cualquiera que fuere mi heredero, esté condenado a darle diez al heredero Atcio», Atcio pedirá los diez, deducida su propia parte.

§ 4.- Asimismo, si se le hubiese mandado al heredero que diez, y que tuviese para sí un fundo, dará los diez deducida su propia parte.

§ 5.- Por último, es sabido, que si se hubiese hecho

"Quisquis mihi heres erit, damnas esto heredi meo decem dare", exaequari omnium heredum partes eo, quod unusquisque et sibi et coheredi suo dari damnatus videtur.

§ 6.- Cum quidam heredem instituit, quandoque mater eius decessisset, deinde secundus heres scriptus fuisset et ab eo legata ei, qui sub condicione heres institutus fuisset, relicta essent isque viva matre decessisset, postquam dies legati cesserit, quaesitum est, an heredi eius legata deberentur. Verius est legatum heredi deberi, sive pure a substituto legatum datum est primo heredi sive sub hac condicione "si heres non fuerit", quia moriente eo condicio impletur.

§ 7.- Si socero a genero suo herede instituto pars hereditatis alii legata fuisset, deducta dote eum debitum esse partem hereditatis legatam Sabinus respondit, quemadmodum, si pecunia ex crediti causa socero debita fuisset, ea deducta partem hereditatis daturus fuisset.

105.- IULIANUS; *libro I ex Minicio*.- Legatum ita erat: "Quae Lucius Titius mihi debet, ea heres meus Cornelio dare damnas esto". Nihil amplius ex hoc legato quam actiones suas heres praestare debet.

106.- ALFENUS; *libro II a Paulo epitomatorum*.- Si in testamento scriptum esset: "Heres meus aureos centum Licinio damnas esto" neque adscripsisset "dare", deberi legatum constat.

107.- AFRICANUS; *libro II quaestionum*.- Si a pluribus heredibus legata sint eaque unus ex his praecipere iubeatur et praestare, in potestate eorum, quibus sit legatum, debere esse ait, utrumne a singulis heredibus petere velint an ab eo, qui praecipere sit iussus: itaque eum qui praecipere

has been bequeathed as follows, "Let whoever becomes my heir be charged to pay my heir ten aurei," the shares of all the heirs will be equal, for the reason that each of them is held to be charged for his own benefit, as well as for that of his co-heirs.

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

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

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

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

107.- AFRICANUS; *Questions, Book II*.- Where several heirs are charged with the payment of a bequest, which one of them is directed to pay as a preferred legacy? It is said that it is in the power of those to whom the legacy was bequeathed to choose whether they will bring suit against the heirs singly,

así un legado: «cualquiera que fuere mi heredero, esté condenado a darle diez a mi heredero», se igualan las partes de todos los herederos, por esto, porque se considera que cada uno está condenado a darse a sí mismo y a darle a su coheredero.

§ 6.- Habiendo uno instituido un heredero para cuando hubiese fallecido su madre, y habiendo sido instituido después un segundo heredero, y habiéndose dejado a cargo de este legados al que bajo condición había sido instituido heredero, y habiendo fallecido éste viviendo la madre, después que había corrido el término del legado, se preguntó, si se le deberían los legados a su heredero; y es más cierto, que se le debe el legado al heredero, ya si a cargo del substituto se le dio al primer heredero el legado puramente, ya si bajo esta condición: «si no fuere heredero», porque muriendo él se cumple la condición.

§ 7.- Si instituido el suegro heredero por su yerno le hubiese sido legada a otro parte de la herencia, respondió Sabino, que deducida la dote habrá de deber él la parte legada de la herencia, a la manera que, si por causa de un crédito se le hubiese debido una cantidad al suegro, habría de dar, deducida esta, parte de la herencia.

105.- EL MISMO; *Doctrina de Minicio, libro I*.- Se había hecho así un legado: «esté condenado mi heredero a darle a Cornelio lo que Lucio Ticio me debe»; en virtud de este legado no debe prestar el heredero nada más que sus propias acciones.

106.- ALFENO VARO.- *Digesto compendiado por Paulo, libro II*.- Si en un testamento se hubiese escrito: «esté condenado mi heredero a cien áureos a favor de Licinio», y no hubiese escrito «dar», es sabido que se debe el legado.

107.- AFRICANO; *Cuestiones, libro II*.- Si se hubieran hecho legados a cargo de muchos herederos, y se mandara que uno de ellos los percibiera antes y los entregase, dice que debe estar en la facultad de aquellos, a quienes se les haya legado, si quisieran reclamados de cada uno de los herederos, o

iussus est cavere debere coheredibus indemnes eos praestari.

§ 1.- Si quis servum, cui aliquid sine libertate legaverit, cum morietur ipse servus, leget, minime dubitandum, quin utile legatum futurum sit, propterea scilicet, quod moriente servo id quod ipsi legatum erit ad eum cui ipse legatus fuerit perventurum sit.

108.- AFRICANUS; *libro V quaestionum*.- Si servus legatus vivo testatore fugisse dicatur, et impensa et periculo eius cui legatus sit reddi debet, quoniam rem legatam eo loco praestare heres debeat, in quo a testatore sit relicta.

§ 1.- Si id quod ex testamento mihi debes quilibet alius servo meo donaverit, manebit adhuc mihi ex testamento actio et maxime, si ignorem meam factam esse: alioquin consequens erit, ut etiam, si tu ipse servo meo eam donaveris, invito me libereris: quod nullo modo recipiendum est, quando ne solutione quidem invito me facta libereris.

§ 2.- Cum homo Titio legatus esset, quaesitum est, utrum arbitrium heredis est quem velit dandi an potius legatarii. Respondi verius dici electionem eius esse, cui potestas sit qua actione uti velit, id est legatarii.

§ 3.- Huiusmodi legatum "Illi aut illi, uter eorum prior Capitolium ascenderit" utile esse evidenti argumento probari ait, quod constet usum fructum libertis legatum et qui eorum supervixerit proprietatem utiliter legari. Idque et de herede instituendo dicendum existimavit.

or only against the one who was directed to pay the preferred legacy; hence the latter must give security to his co-heirs for the purpose of indemnifying them.

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

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

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

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

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

de aquel a quien se le haya mandado percibirlos antes; y así, aquel a quien se le mandó que los percibiera antes, debe dar caución a los coherederos de que a ellos los mantendrá indemnes.

§ 1.- Si alguien legara el esclavo, al cual le hubiere legado alguna cosa sin la libertad, para cuando muriese el mismo esclavo, de ningún modo se ha de dudar que no haya de ser útil el legado; a saber, por esto, porque muriendo el esclavo, lo que a este mismo se le hubiere legado habrá de ir a aquel a quien él mismo haya sido legado.

108.- EL MISMO; *Cuestiones, libro V*.- Si se dijera que el esclavo legado huyó viviendo el testador, debe ser entregado a costa y a riesgo de aquel a quien haya sido legado, porque el heredero debe entregar la cosa legada en aquel lugar en que haya sido dejada por el testador.

§ 1.- Si otro cualquiera hubiere donado a mi esclavo lo que me debes en virtud del testamento, me quedará todavía la acción del testamento, y principalmente si yo ignorase que la cosa se hubiera hecho mía; de otra suerte, será consiguiente que, aun cuando tú mismo la hubieres donado a mi esclavo, quedarás exento contra mi voluntad lo que de ningún modo se ha de admitir, puesto que ni aun ciertamente por el pago hecho contra mi voluntad quedarías libre.

§ 2.- Habiéndosele legado a Ticio un esclavo se preguntó, ¿es acaso arbitrio del heredero dar el que quiera, o más bien del legatario? Respondí que con más verdad se dice, que la elección es de aquel que tenga facultad de usar de la acción que quiera, esto es, del legatario.

§ 3.- Dice que se prueba con evidente argumento que es útil un legado de esta naturaleza: «a aquel, o a aquel, al que de los dos subiere primero al Capitolio», porque es sabido que a los libertos se les lega útilmente el usufruto legado, y la propiedad al que de ellos sobreviviere; y creyó que esto mismo se ha de decir también respecto al heredero que se instituye.

§ 4.- Stichum, quem de te stipulatus eram, Titius a te herede mihi legavit: si quidem non ex lucrativa causa stipulatio intercessit, utile legatum esse placebat, sin e duabus, tunc magis placet inutile esse legatum, quia nec absit quicquam nec bis eadem res praestari possit.

§ 5.- Sed si, cum mihi ex testamento Titii Stichum deberes, eundem a te herede Sempronius mihi legaverit fideique meae commiserit, ut eum alicui restituam, legatum utile erit, quia non sum habiturus: idem iuris erit et si pecuniam a me legaverit: multo magis, si in priore testamento fideicommissum sit. Item si in priore testamento Falcidia locus sit, quod inde abscedit ratione Falcidia, ex sequenti testamento consequar.

§ 6.- Item si domino heres exstitero, qui non esset solvendo, cuius fundum tu mihi dare iussus esses, manebit tua obligatio, sicut maneret, si eum fundum emissem.

§ 7.- Si ita scriptum erit: "Amplius quam Titio legavi heres meus Seio decem dato", dubitandum non erit, quin et Titio suum legatum maneat et Seio nihil ultra decem debeatur: nam et usitatum fere est sic legare: "Lucio Titio tot et hoc amplius uxori et liberis eius tot".

§ 8.- Si ei cui nihil legatum est cum hac adiectione "hoc amplius" aliquid legetur, minime dubitandum est, quin id quod ita legaverit debeatur: multoque minus dubitandum, si ab eo qui nihil mihi debet ita stipulatus fuero: "Amplius quam mihi debes decem dare spondes?" quin decem debeantur.

§ 9.- Si servus alienus liber esse iussus et legatus

the appointment of an heir.

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

§ 5.- Where, however, you already owe me Stichus under the terms of the will of Titius, and Sempronius has charged you, his heir, with the delivery of the same slave to me as a legacy, and has requested me to deliver the said slave to a third party, the legacy will be valid, because I am not to retain the slave. The same rule will apply where he bequeathed me a sum of money; and it will be still more applicable if a trust was established by a former will. Likewise, if there was ground for the application of the Falcidian Law under the terms of the first will, what has been deducted on account of it I can acquire by virtue of the second.

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

§ 7.- Where it is provided by a will, "Let my heir pay to Seius ten aurei more than I have bequeathed to Titius," there can be no doubt that Titius will be entitled to his legacy, and that there will be no more than ten aurei due to Seius. For it is customary to make a bequest in the following terms: "I bequeath so much to Lucius Titius, and as much more to his wife and children."

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

§ 9.- Where a slave belonging to another is

§ 4.- Ticio me legó a tu cargo, siendo tú heredero, a Stico, que yo había estipulado de ti; si verdaderamente no medió estipulación por causa lucrativa, se determinaba que era útil el legado; pero si por las dos, en este caso parece mejor que sea inútil el legado, porque ni falta cosa alguna, ni una misma cosa puede ser entregada dos veces.

§ 5.- Pero si debiéndome tú a Stico en virtud del testamento de Ticio, Sempronio me lo hubiere legado a tu cargo siendo tú su heredero, y hubiere encomendado a mi fidelidad, que yo lo restituya a otro, el legado será útil, porque yo no lo he de tener. El mismo derecho habrá, también si a mi cargo hubiere legado dinero; con mucha mas razón, si el fideicomiso se hubiere hecho en el primer testamento. Asimismo, si en el primer testamento hubiera lugar a la Falcidia, conseguiré por el siguiente testamento lo que del primero faltó por razón de la Falcidia.

§ 6.- Igualmente, si yo hubiere quedado heredero de un dueño, que no fuese solvente, cuyo fundo se te hubiese mandado que me lo dieras, subsistirá tu obligación, como subsistirá, si yo hubiese comprado aquel fundo.

§ 7.- Si se hubiere escrito así: «además de lo que legue a Ticio, déle mi heredero diez a Seyo», no se habrá de dudar que subsistirá para Ticio su legado, y que a Seyo no se le deberá nada más que los diez; porque también es bastante usual legar de este modo: «tanto a Lucio Ticio, y además de esto, tanto a su mujer y a sus hijos».

§ 8.- Si al que nada se le legó se le legara alguna cosa con esta adición: «esto además», de ningún modo se ha de dudar que se deba lo que así hubiere legado, y mucho menos se ha de dudar que se deban los diez, si yo hubiere estipulado de este modo de quien nada me debe: «¿prometes dar diez, además de lo que me debes?»

§ 9.- Si se mandó que fuese libre un esclavo ajeno,

sit, peti eum ex legato posse ait: nam cum libertas nullius momenti sit, absurdum esse per eam legatum infirmari, quod alioquin valeret, et si solum datum fuisset.

§ 10.- Qui quinque in arca habebat ita legavit vel stipulanti promisit "decem quae in arca habeo": et legatum et stipulatio valebit, ita tamen, ut sola quinque vel ex stipulatione vel ex testamento debeantur. Ut vero quinque quae deerunt ex testamento peti possint, vix ratio patietur: nam quodammodo certum corpus, quod in rerum natura non sit, legatum videtur. Quod si mortis tempore plena summa fuerat et postea aliquod ex ea deperierit, sine dubio soli heredi deperit.

§ 11.- Si servus legatus sit et moram heres fecerit, periculo eius et vivit et deterior fit, ut, si debilem forte tradat, nihilo minus teneatur.

§ 12.- Cum quid tibi legatum fidei tuae commissum sit, ut mihi restituas, si quidem nihil praeterea ex testamento capias, dolum malum dumtaxat in exigendo eo legato, alioquin etiam culpam te mihi praestare debere existimavit: sicut in contractibus fidei bonae servatur, ut, si quidem utriusque contrahentis commodum versetur, etiam culpa, sin unius solius, dolus malus tantummodo praestetur.

§ 13.- Qui Margarita Titio pignori dederat, filium heredem instituit et filiam exheredavit, deinde ita cavit: "Te, Titi, rogo fideique tuae committo, uti Margarita, quae tibi pignori dedi, vendas et deducto omni debito tuo quod amplius erit id omne filiae meae restituas". Ex ea scriptura filiam a fratre fidei commissum petere posse, ut is actiones suas adversus debitorem ei praestaret: hoc enim casu eum, qui creditor fuisset, debitorem intellegendum eius scilicet, quod pretium pignoris summam debiti excedat.

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

§ 10.- Where an individual had five aurei in his chest, and bequeathed them, or promised in a stipulation, "The ten aurei which I have in my chest," the legacy or the stipulation will be valid; but only five aurei will be due under either. Moreover, it seems hardly reasonable that the five aurei which are lacking should be claimed under the will; for in this instance certain property which is not in existence is considered to have been bequeathed. If, however, at the time of the testator's death, the entire amount should be in his chest, and it should subsequently be somewhat diminished, the heir alone must undoubtedly bear the loss.

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

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

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

y hubiera sido legado, dice que puede ser pedido en virtud del legado, porque siendo de ningún valor la libertad, es absurdo que por ella se invalide el legado, que de otra manera valdría, aunque hubiese sido dado solo.

§ 10.- Uno que tenía cinco en su cajón, legó de este modo, o le prometió al estipulante: «los diez que tengo en el cajón»; y serán válidos el legado y la estipulación, pero de suerte, que se deban solo los cinco, en virtud de la estipulación, o en, virtud del testamento. Mas difícilmente consentirá la razón, que se puedan pedir por el testamento los cinco que faltaren; porque en cierto modo se considera legada una cierta cosa que no existe. Pero si al tiempo de la muerte hubiere estado completa la suma, y después hubiere faltado algo de ella, sin duda falta a cargo del heredero solo.

§ 11.- Si hubiera sido legado un esclavo, y el heredero hubiere incurrido en mora, vive y se deteriora a riesgo de éste, de modo que, si acaso lo entregara débil, esté no obstante obligado.

§ 12.- Cuando se te hubiere legado alguna cosa, o hubiera sido encomendada a tu fidelidad, para que me la restituyas, si verdaderamente no recibieras nada más en virtud del testamento, opinó que solamente debes prestarme el dolo malo al exigirse este legado, y en otro caso, también la culpa, como se observa en los contratos de buena fe, de modo, que, si verdaderamente se tratara de la conveniencia de ambos contratantes, se preste también la culpa, y si de la de uno solo, solamente el dolo malo.

§ 13.- Uno que a Ticio le había dado en prenda mas margaritas instituyó heredero a su hijo, desheredó a su hija, y después dispuso de este modo: «te ruego, Ticio, y encomiendo a tu fidelidad, que vendas las margaritas que te di en prenda, y que deducida toda tu deuda le restituyas a mi hija todo lo demás que hubiere»; en virtud de esta cláusula la hija puede pedirle a su hermano el fideicomiso, a fin de que él le ceda sus acciones contra el deudor; porque en este caso se ha de entender que es deudor el que hubiese sido acreedor, a saber, de lo que el precio de la prenda exceda del importe de la deuda.

§ 14.- Non autem mirandum, si, cum alius rogatus sit, alius fidei commissio obstringatur: nam et cum in testamento ita scribatur: "Te, Titi, rogo, ut acceptis centum illum servum manumittas" vel "Sempronio quid praestes", parum quidem apte scribi, verum aequae intellegendum heredis fidei commissum, ut pecuniam Titio praestet: ideoque et ipsum Titium cum herede acturum et libertatem servo vel Sempronio quod rogatus sit praestare cogendum.

§ 15.- Avidius filii sui fidei commisit, ut certam pecuniam quattuor libertis suis mutuam daret et usuras leviores taxaverat: placuit hoc fideicommissum utile totum esse.

109.- AFRICANUS; *libro VI quaestionum*.- Si quando quis uxori suae ea, quae vivus donaverat vulgari modo, leget, non de aliis donationibus videri eum sentire ait, quam de his quae iure valiturae non sunt: alioquin et frustra legaturus sit atque si ita exprimat: "quae uxori iure donavero" vel ita: "quae uxori manumissionis causa donavero, ea ei lego": nam inutile legatum futurum est.

§ 1.- Heres, cuius fidei commissum erat, ut mihi fundum aut centum daret, fundum Titio vendidit: cum electio ei relinquatur utrum malit dandi, ut tamen alterum solidum praestet, praetoris officio convenire existimo, ut, si pecuniam Titius offerat, inhibeat fundi persecutionem. Ita enim eadem causa constitueretur, quae futura esset si alienatus fundus non fuisset, quando etiam adversus ipsum heredem officium praetoris sive arbitri tale esse deberet, ut, si fundus non praestaretur, neque pluris neque minoris quam centum aestimaretur.

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

§ 15.- Avidius entrusted to the fidelity of its son who gave in mutuum to four freed or emancipated slaves his certain amount them, and had indicated more reduced interests; one determined, that all this trust is useful.

109.- THE SAME; *Questions, book VI*. - When some bequeaths to its woman in the vulgar form what in life it had donated to him, says, that it is considered that it did not talk about other donations, but to which they do not have to be valid in right. Of another luck, also it would have to have bequeathed uselessly; as if it was expressed thus: "what in right there will be I donated my woman", or this way: "what I will have donated to him to my woman because of manumission, I bequeath it"; because the legacy has to be useless.

§ 1.- A heir, to whom had entrusted itself to him by trust that he gave me land, or one hundred, sold to him land to Titius; as to him the election is left him of which of the two things prefers to give me, with so, nevertheless, that it gives one or another complete one, I think that it corresponds to the attributions of the Praetor to prohibit the persecution of land, if Titius offered the money; because therefore cause would constitute same, that would have to exist, if land not had be alienated, since also against the inheriting misino it would have to be so the function of the Praetor, or of the referee, whom, if it were not

§ 14.- Mas no se ha de extrañar, que habiendo sido rogado uno, sea otro el obligado al fideicomiso; porque también cuando en el testamento se escriba así: «te ruego, Ticio, que, recibidos ciento, manumitas a aquel esclavo, o le des alguna cosa a Sempronio», se escribe ciertamente con poca propiedad, pero se ha de entender igualmente que se encomendó a la fidelidad del heredero, que le entregue a Ticio el dinero; y por esto, el mismo Ticio ejercitará la acción contra el heredero, y será obligado a darle al esclavo la libertad, o a Sempronio lo que se le haya rogado.

§ 15.- Avidio encomendó a la fidelidad de su hijo que les diese en mutuo a cuatro libertos suyos cierta cantidad, y había señalado más reducidos intereses; se determinó, que todo este fideicomiso es útil.

109.- EL MISMO; *Cuestiones, libro VI*.- Cuando alguno legue a su mujer en la forma vulgar lo que en vida le había donado, dice, que se considera que él no se refirió a otras donaciones, sino a aquellas que no han de ser válidas en derecho. De otra suerte, también habría de haber legado inútilmente; como si se expresase así: «lo que en derecho hubiere yo donado a mi mujer», o de este modo: «lo que yo le hubiere donado a mi mujer por causa de manumisión, se lo lego»; porque el legado ha de ser inútil.

§ 1.- Un heredero, a quien se le había encomendado por fideicomiso que me diese un fundo, o ciento, le vendió el fundo a Ticio; como a él se le deja la elección de cuál de las dos cosas prefiera darme, con tal, sin embargo, que entregue una u otra íntegra, opino que corresponde a las atribuciones del Pretor prohibir la persecución del fundo, si Ticio ofreciese el dinero; porque así se constituiría la misma causa, que habría de existir, si el fundo no hubiese sido enajenado, puesto que también contra el mismo heredero debería ser tal la función del Pretor, o del árbitro, que, si no se entregase el fundo, no estimase

110.- AFRICANUS; *libro VIII quaestionum*.- Si heres generaliter servum quem ipse voluerit dare iussus sciens furem dederit isque furtum legatario fecerit, de dolo malo agi posse ait. Sed quoniam illud verum est heredem in hoc teneri, ut non pessimum det, ad hoc tenetur, ut et alium hominem praestet et hunc pro noxae dedito relinquat.

111.- MARCIANUS; *libro II institutionum*.- Etiam si partis bonorum se excusaverit tutor, puta Italicarum vel provincialium rerum, totum quod testamento datum est ei auferetur, et ita divi Severus et Antoninus rescripserunt.

112.- MARCIANUS; *libro VI institutionum*.- Si quis inquilinos sine praediis quibus adhaerent legaverit, inutile est legatum: sed an aestimatio debeat, ex voluntate defuncti statuendum esse divi Marcus et Commodus rescripserunt.

§ 1.- Cum servum suum heres damnatus dare eum manumiserit, tenetur in eius aestimationem, nec interest, scierit an ignoraverit legatum. Sed et si donaverit servum heres et eum is cui donatus est manumiserit, tenetur heres, quamvis ignoraverit a se eum legatum esse.

§ 2.- Si ita legatum fuerit "Titio cum Seio do lego", utrisque legatum est, sicut utrumque legatum est, cum fundus cum domo formiana legatus est.

§ 3.- Si quis scripserit testamento fieri, quod contra ius est vel bonos mores, non valet, veluti si quis scripserit contra legem aliquid vel contra edictum praetoris vel etiam turpe aliquid.

§ 4.- Divi Severus et Antoninus rescripserunt

given land, it considered neither the more, nor the less, that the one hundred.

110.- THE SAME; *Questions, book VIII*. - If the heir, to whom in general was sent to him that he gave the slave who he himself will want, he will have given knowingly one thief, and this one will have made him a theft to the legatee, it says, that the action for fraud can be exercised. But like it is truth that the heir is forced this, not to give the worse one, it is forced to give in addition another slave, and to leave this one like dice by the damage.

111.- MARCIANUS; *Institutes, book II*.- Although the tutor from the goods has excused itself, for example, of the goods of Italy, or the provinces, everything will take off to him what it occurred him in the testament; and thus Severus and Antoninus decided by rescript Divine.

112.- THE SAME; *Institutes, book VI*.- If some will have bequeathed the renters without the estates to that they are adhered, the legacy is useless; but the Divine Marcus and Commodus were responsible for rescript, that are had to determine in accordance with the will of the deceased, if it will have the estimation.

§ 1.- When the condemned heir to give his own slave will have manumit it, he is forced to the estimation of the same one; and it does not matter that it has known, or ignored, that was bequeathed. But also if the heir will have donated the slave, and it this a will have manumit who was donated, is forced the heir, although it has ignored who that was bequeathed to its position.

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

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

§ 4.- The Divine Severus and Antoninus stated in a

ni más, ni menos, que los ciento.

110.- EL MISMO; *Cuestiones, libro VIII*.- Si el heredero, a quien en general se le mandó que diese el esclavo que él mismo quisiera, hubiere dado a sabiendas uno ladrón, y éste le hubiere hecho un hurto al legatario, dice, que se puede ejercitar la acción de dolo malo. Pero como es verdad que el heredero está obligado a esto, a no dar el peor, es obligado a entregar además otro esclavo, y a dejar éste como dado por el daño.

111.- MARCIANO; *Instituta, libro II*.- Aunque se haya excusado el tutor de parte de los bienes, por ejemplo, de los bienes de Italia, o de las provincias, se le quitará todo lo que se le dio en el testamento; y así lo decidieron por rescripto los Divinos Severo y Antonino.

112.- EL MISMO; *Instituta, libro VI*.- Si alguno hubiere legado los inquilinos sin los predios a que están adheridos, es inútil el legado; pero respondieron por rescripto los Divinos Marco y Cómodo, que se ha de determinar con arreglo a la voluntad del difunto, si se deberá la estimación.

§ 1.- Cuando el heredero condenado a dar su propio esclavo lo hubiere manumitido, está obligado a la estimación del mismo; y no importa que haya sabido, o ignorado, que fue legado. Pero también si el heredero hubiere donado el esclavo, y lo hubiere manumitido este a quien fue donado, está obligado el heredero, aunque haya ignorado que aquel fue legado a su cargo.

§ 2.- Si se hubiere legado así: «a Ticio con Seyo le doy y le lego», se les legó a ambos, así como se legó una y otra cosa, cuando se legó un fundo con la casa Formiana.

§ 3.- Si alguno hubiere escrito en su testamento, que se haga lo que es contra derecho, o contra las buenas costumbres, no es válido, como si alguno hubiere escrito alguna cosa contra la ley, o contra el Edicto del Pretor, o aun alguna cosa torpe.

§ 4.- Los Divinos Severo y Antonino respondieron

iusiurandum contra vim legum et auctoritatem iuris in testamento scriptum nullius esse.

113.- MARCIANUS; *libro VII institutionum*.- Servo alieno ita legari potest "quoad serviat" vel "si servus" forte "Titii erit", ut et Marcellus ait.

§ 1.- Si quis post tempus libertatem servo suo dederit et interea rogaverit heredem, donec ad libertatem perveniat, cibaria ei dare, testatoris voluntati obtemperandum esse divi Severus et Antoninus rescripserunt.

§ 2.- Si quis a primo herede centum legaverit alicui et eidem a secundo ducenta posteaque generaliter repetierit legata, trecenta videtur repetisse.

§ 3.- Sed si pater impuberi filio substituerit et a substituto legata repetierit: si pupillus heres exstiterit et intra pubertatem decesserit, repetitio non valet, quia voluntas defuncti haec est, ut semel debeantur.

§ 4.- Si ab impubere legatum fuerit sub condicione "si ad pubertatem pervenerit" et a substituto repetitum fuerit, legatum debetur et a substituto nec videtur repetita condicio, quae inutile legatum facit.

§ 5.- Ineptas voluntates defunctorum circa sepulturam (veluti vestes aut si qua alia supervacua ut in funus impendantur) non valere Papinianus libro tertio responsorum scribit.

114.- MARCIANUS; *libro VIII institutionum*.- Filius familias miles vel veteranus licet sine testamento decedat, potest fideicommittere a patre, quia etiam testamentum facere potest.

Rescript that an oath inserted in a will which was opposed to the general tenor of the laws, or the authority of some special enactment, is of no force or effect.

113.- THE SAME; *Institutes, Book VII*.- A bequest can be made to the slave of another as follows, "As long as he remains a slave," or, "If he should become the slave of Titius," which was also held by Marcellus.

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

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

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

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

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

114.- THE SAME; *Institutes, Book VIII*.- A son under paternal control, who is a soldier or who has been discharged from the service, even though he may die intestate, can charge his father with a trust, for the reason that he can make a will.

por rescripto, que no es de ningún valor el juramento escrito en un testamento contra la fuerza de las leyes y la autoridad del derecho.

113.- EL MISMO; *Instituta, libro VII*.- Al esclavo ajeno se le puede legar de este modo, mientras sea esclavo, o si acaso fuere esclavo de Ticio, como también dice Marcelo.

§ 1.- Si alguno hubiere dado libertad a su esclavo para después de cierto tiempo, y hubiere rogado a su heredero que mientras tanto, hasta que llegue a la libertad, le dé alimentos, respondieron por rescripto los Divinos Severo y Antonino, que se ha de estar a la voluntad del testador.

§ 2.- Si uno le hubiere legado a otro ciento a cargo de su primer heredero, y doscientos al mismo a cargo del segundo, y después hubiere repetido en general los legados, se considera que repitió los trescientos.

§ 3.- Mas si el padre le hubiere dado substituto a un hijo impúbere, y hubiere repetido los legados a cargo del substituto, si el pupilo hubiere quedado heredero y hubiere fallecido dentro de la pubertad, no es válida la repetición, porque la voluntad del difunto es esta, que se deban una vez.

§ 4.- Si a cargo de un impúbere se hubiere hecho un legado bajo esta condición, «si llegare a la pubertad», y se hubiere repetido a cargo del substituto, se debe el legado también por el substituto; y no se considera repetida la condición, que hace inútil el legado.

§ 5.- Escribe Papiniano en el libro tercero de las Respuestas, que no son válidas las voluntades necias de los difuntos respecto a la sepultura, por ejemplo, que se gasten en los funerales vestidos, o algunas otras cosas superfluas.

114.- EL MISMO; *Instituta, libro VIII*.- El hijo de familia, militar o veterano, aunque fallezca sin testamento, puede dejar un fideicomiso a cargo de su padre, porque también puede hacer testamento.

§ 1.- Si libertus ab intestato decesserit, a patrono potest usque ad partem debitam fideicommissum relinquere, quia, si testamentum faceret, licebat ei partem debitam solam relinquere.

§ 2.- Qui intestato decedit et scit bona sua ad fiscum perventura vacantia, fidei fisci committere potest.

§ 3.- Apud Marcellum libro duodecimo digestorum talis quaestio agitur. Quidam ab eo cui fundum legaverat fideicommisserat, ut eum fundum post mortem suam restitueret Sempronio: eiusdem legatarii fidei commiserat, ut Titio daret centum: quaeritur quid iuris sit. Et ait Marcellus, si Titio testator centum ex fructibus, quos vivus legatarius perceperit, reliquerit et legatarius post tantum temporis decessisset, ut ex fructibus centum fierent, Titium centum accepturum: si post acceptum legatum confestim decessisset legatarius, Titii fideicommissum extinguere, quia placet non plus posse rogari quem restituere quam quantum ei relictum est.

§ 4.- Sed si Titii fideicommissum non est in tempus mortis legatarii collatum, ait Marcellus confestim fideicommissum Titio dandum, sed cautione exacta quanto amplius ceperit reddi: quam cautionem ita committi, si prius legatarius decesserit, quam ex fructibus centum perciperet. Sed vix est, ut legatarius ex redditibus voluit ante dare, quam fructus legatarius percepisset: certe erit legatarius audiendus, si velit totum fundum praestare, si de restituendo cavetur: absurdum enim est de suo eum praestare centum, maxime si fundus centum vel non multo pluris est: quo iure utimur.

§ 5.- Si quid alicui licite fuerit relictum vel ius aliud, quod ipse quidem propter corporis sui vitium vel propter qualitatem relictum vel aliam quamcumque

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

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

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

§ 4.- If, however, the trust for the benefit of Titius was to be discharged before the death of the legatee, Marcellus says that the sum provided by the trust must immediately be paid to Titius, but that he will be required to give security to refund any surplus which there might be, and this security will be operative if the legatee should die before a hundred aurei are obtained from the profits. It can, however, hardly be maintained that the testator intended that the bequest should be paid out of the profits before the legatee had been able to collect them. The legatee should certainly be heard if he desires to deliver the entire tract of land, provided the beneficiary furnishes security for its return, for it would be absurd to compel the legatee to pay a hundred aurei, especially if the land is only worth that much, or very little more. This is the practice at the present time.

§ 5.- Where anything is bequeathed to someone in accordance with law, or some interest or right is left which cannot be enjoyed or held on account of some

§ 1.- Si un liberto hubiere fallecido intestado, puede dejar a cargo de su patrono un fideicomiso hasta la porción debida, porque si hiciera testamento, le será lícito dejar la sola porción debida.

§ 2.- El que fallece intestado, y sabe que sus bienes vacantes habrán de ir al fisco, puede encomendarle al fisco un fideicomiso.

§ 3.- En el libro duodécimo del Digesto se discute por Marcelo esta cuestión: uno había dejado un fideicomiso a cargo de aquel a quien le había legado un fundo, para que después de su muerte restituyese este fundo a Sempronio; había encomendado a la fidelidad del mismo legatario, que le diese ciento a Ticio; se pregunta, qué derecho habrá. Y dice Marcelo, que si el testador hubiere dejado a Ticio los ciento de los frutos que el legatario hubiere percibido en vida, y el legatario hubiese fallecido después de tanto tiempo, que se reuniesen los ciento de los frutos, Ticio deberá recibir los ciento; pero que si el legatario hubiese fallecido inmediatamente después de recibido el legado, se extingue el fideicomiso de Ticio, porque está establecido, que no se le pueda rogar a nadie que restituya más de cuanto se le dejó.

§ 4.- Mas si el fideicomiso de Ticio no fue referido al tiempo del legatario, dice Marcelo, que inmediatamente se le ha de dar a Ticio el fideicomiso, pero habiéndose exigido caución de que se devolverá lo que de más hubiere recibido; cuya caución se hace efectiva, si el legatario hubiere fallecido antes que de los frutos percibiese los ciento; pero rara vez sucederá que haya querido que el legatario los dé de las rentas antes que el legatario hubiese percibido los frutos. Y a la verdad, se habrá de oír al legatario, si quisiera entregar todo el fundo, si se diera caución de restituirlo; porque es absurdo, que él entregue ciento de lo suyo, especialmente si el fundo vale ciento, o no mucho más; de cuyo derecho usamos.

§ 5.- Si a alguien le hubiere sido dejada lícitamente alguna cosa, o algún derecho, que él ciertamente no pudo tener por causa de vicio de su cuerpo, o por la

probabilem causam habere non potuit, alius tamen hoc habere potuit: quanti solet comparari, tantam aestimationem accipiet.

§ 6.- Ut quis heredem instituat aliquem, rogari non potest: plane senatus censuit perinde habendum, atque si rogasset hereditatem restitui.

§ 7.- Quid ergo, si heres post mortem suam rogatus fuerit hereditatis suae partem quartam restituere? Verius esse existimo, quod et Scaevola notat et Papirius fronto scribit, valere fideicommissum, atque si de hereditate sua restituenda rogatus esset: et eatenus restituenda est, quatenus hereditas testatoris patitur, secundum volgarem formam iuris.

§ 8.- Sed si liberos suos emancipare rogatus fuerit, non cogitur hoc facere: potestas enim patria inaestimabilis est.

§ 9.- Aedes destruendae neque legari neque per fideicommissum relinqui possunt: et ita senatus censuit.

§ 10.- Si fideicommissum relictum fuerit servo alieno sine libertate et ad libertatem pervenerit, dicendum est posse eum admitti ad capiendum.

§ 11.- Divi Severus et Antoninus rescripserunt eum, qui rogatus est sub condicione fratris sui filiis restituere, ante diem fideicommissi cedentem ne quidem ex voluntate eorum posse restituere his in potestate patris agentibus, cum possit die fideicommissi cedente sui iuris constitutis ipsis debere restitui vel, si aliquis ex his ante decesserit, non omnibus.

§ 12.- Idem principes rescripserunt filiis ante diem fideicommissi venientem restitui hereditatem maternam necesse non esse, sed praestare heredem posse volgarem cautionem aut, si praestare eam non poterit, mitti liberos in possessionem fideicommissi

defect or qualification attaching to the thing bequeathed, or for any other good reason, and another party can hold said property, the legatee will be entitled to receive from the heir the appraised value of what it would ordinarily sell for.

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

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

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

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

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

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

§ 12.- The same Emperors stated in a Rescript that it is not necessary for the estate of a mother to be delivered to her children before the time prescribed for the discharge of the trust arrives. But the heir can furnish them with the ordinary bond, or if he cannot

calidad de la cosa dejada, o por otra cualquier causa admisible, pero que otro pudo tener, recibirá tanta estimación como en cuanto se suele comprar.

§ 6.- No se puede rogar que uno instituya heredero a alguien; pero el Senado decretó que esto ha de ser considerado lo mismo que si hubiese rogado que se restituyese la herencia.

§ 7.- Luego ¿qué se dirá, si se le hubiere rogado al heredero que después de su muerte restituya la cuarta parte de su propia herencia? Juzgo que es más verdadero, lo que observa Scévola y escribe Papirio Fronto, que es válido el fideicomiso, lo mismo que si se le hubiese rogado que restituyese su herencia; y ha de ser restituida hasta el límite que consiente la herencia del testador según la disposición vulgar del derecho.

§ 8.- Mas si se le hubiere rogado que emancipe a sus propios hijos, no es obligado a hacer esto, porque la patria potestad es inestimable.

§ 9.- No se pueden legar ni dejar por fideicomiso casas para que sean demolidas; y así lo decretó el Senado.

§ 10.- Si a un esclavo ajeno se le hubiere dejado un fideicomiso sin la libertad, y él hubiere llegado a la libertad, se ha de decir, que puede ser admitido a adquirirlo.

§ 11.- Respondieron por rescripto los Divinos Severo y Antonino, que aquel a quien se le rogó que bajo condición restituyera una cosa a los hijos de su hermano no puede, ni aun ciertamente con la voluntad de estos, restituírsela antes de correr el término del fideicomiso, viviendo ellos bajo la potestad de su padre, porque podría suceder que al correr el término del fideicomiso se les deba restituir a ellos mismos, constituidos de propio derecho, o no a todos, si alguno de ellos hubiere fallecido antes.

§ 12.- Los mismos Príncipes respondieron por rescripto, que no era necesario que se les restituyera a los hijos la herencia antes de vencer el término del fideicomiso, pero que él heredero podía prestar la caución vulgar, o que, si no pudiese prestarla, se pone

servandi causa, ut pro pignore, non ut pro dominis possideant vel alienandi ius, sed ut pignus habeant, ut filius per patrem fructus consequatur et servus per dominum.

§ 13.- Cum erit rogatus, si sine liberis decesserit, per fideicommissum restituere, condicio defecisse videbitur, si patri supervixerint liberi, nec quaeritur, an heredes exstiterint.

§ 14.- Divi Severus et Antoninus rescripserunt eos, qui testamento vetant quid alienari nec causam exprimunt, propter quam id fieri velint, nisi invenitur persona, cuius respectu hoc a testatore dispositum est, nullius esse momenti scripturam, quasi nudum praeceptum reliquerint, quia talem legem testamento non possunt dicere: quod si liberis aut posteris aut libertis aut heredibus aut aliis quibusdam personis consulentes eiusmodi voluntatem significarent, eam servandam esse, sed haec neque creditoribus neque fisco fraudi esse: nam si heredis propter testatoris creditores bona venierunt, fortunam communem fideicommissarii quoque sequuntur.

§ 15.- Cum pater filio herede instituto, ex quo tres habuerat nepotes, fideicommisit, ne fundum alienaret et ut in familia relinqueret, et filius decedens duos heredes instituit, tertium exheredavit, eum fundum extraneo legavit, divi Severus et Antoninus rescripserunt verum esse non paruisse voluntati defuncti filium.

§ 16.- Sed et si, cum duos exheredavit, unum heredem instituit, fundum extraneo legavit, ut putat Marcellus posse exheredatos petere fideicommissum. Quod evenit et si vivus filios emancipasset et postea fundum alienasset.

do so, the children can be placed in possession of the estate for the purpose of preserving the trust, so that they hold possession of it by way of pledge, and not as owners, without the right to dispose of it, but retaining it merely in the capacity of pledgees, just as a father acquires the profits of property through his son, and a master through his slave.

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

§ 14.- The Divine Severus and Antoninus stated in a Rescript that where a testator forbids by will any of his estate to be sold, but gives no reason for making this provision, and no one is found with reference to whom this disposition was inserted in the will, the provision is held to be of no force or effect; just as if the testator had left a mere direction, because such a precept cannot be inserted in a will. But where testators make a similar provision with a view to the benefit of their children, their descendants, their freedmen, their heirs, or any other persons whomsoever, it must be carried out; still this cannot be done in such a way as to defraud creditors or the Public Treasury. For if the property of the heir should be sold in order to pay the creditors of the testator, the trust beneficiaries must also be subject to the same rule.

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

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

a los hijos en posesión para conservar el fideicomiso, para que posean en prenda, no como dueños o con el derecho de enajenar, sino para que la tengan como prenda, de suerte, que el hijo adquiriera los frutos por medio de su padre, y el esclavo por medio de su señor.

§ 13.- Cuando a uno se le hubiere rogado, que, si hubiere fallecido sin hijos, restituya por fideicomiso una cosa, se considerará que faltó la condición, si los hijos hubieren sobrevivido al padre; y no se pregunta, si hayan quedado herederos

§ 14.- Respondieron los divinos Severo y Antonino, que la disposición de los que en su testamento vedan que se enajene alguna cosa, y no expresan la causa, por la que quieren que se haga esto, es de ningún valor, si no se halla persona por cuya consideración se dispuso esto por el testador, cual si hubieren dejado un nudo precepto, porque no pueden imponer tal condición en el testamento. Pero si expresasen esta voluntad mirando por sus hijos, o por sus descendientes, o por sus libertos, o por sus herederos, o por otras cualesquiera personas, se habrá de guardar; pero esto, sin que sea en fraude ni de los acreedores, ni del fisco, porque si por causa de los acreedores del testador se vendieron los bienes del heredero, también los del fideicomisario siguen la suerte común.

§ 15.- Como un padre, habiendo instituido heredero a un hijo, del cual había tenido tres hijos, le encargó por fideicomiso que no enajenase un fundo, y que lo dejase en la familia, y el hijo al morir instituyó herederos a dos, desheredó al tercero, y legó aquel fundo a un extraño, respondieron por rescripto los Divinos Severo y Antonino, que era verdad que el hijo no obedeció a la voluntad del difunto.

§ 16.- Pero aun si habiendo desheredado a dos instituyó heredero a uno solo, y legó el fundo a un extraño, opina Marcelo, que los desheredados pueden pedir el fideicomiso; lo que tiene lugar también si en vida hubiese emancipado a los hijos, y después hubiese enajenado el fundo.

§ 17.- Sed si omnes filii heredes instituti sint ex disparibus partibus, non possunt petere fideicommissum ex minore parte scripti, ut viriles, non hereditarias partes in eo habeant: verum est enim in familia reliquisse, licet uni reliquisset.

§ 18.- Item si unum heredem instituisset nec quicquam legasset, exheredati nihil interim, quamdiu in familia res est, petere possunt.

§ 19.- Interdum etiam cum lucro heredis moritur servus legatus vel per fideicommissum relictus, veluti si alienus vel licet proprius, pluribus tamen separatim ita relictus, ut unusquisque in solidum capiat, scilicet si sine culpa heredis mortuus sit.

115.- ULPIANUS; *libro II institutionum*.- Etiam hoc modo: "cupio des" "opto des" "credo te daturum" fideicommissum est.

116.- FLORUS; *libro XI institutionum*.- Legatum est delibatio hereditatis, qua testator ex eo, quod universum heredis foret, alicui quid collatum velit.

§ 1.- Heredi a semet ipso legatum dari non potest, a coherede potest. Itaque si fundus legatus sit ei qui ex parte dimidia heres institutus est et duobus extraneis, ad heredem cui legatus est sexta pars fundi pertinet, quia a se vindicare non potest, a coherede vero semissario duobus extraneis concurrentibus non amplius tertia parte: extranei autem et ab ipso herede cui legatum est semissem et ab alio herede trientem vindicabunt.

§ 2.- Alienus servus heres institutus legari ipse a se nec totus nec pro parte potest.

§ 3.- Servo hereditario recte legatur, licet ea adita non sit, quia hereditas personae defuncti, qui eam

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

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

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

115.- ULPIANUS; *Institutes, Book II*.- Moreover, where a bequest is made as follows: "I wish you to give; I require you to give; I think that you should give," a trust is created.

116.- FLORENTINUS; *Institutes, Book XI*.- A legacy is a deduction from an estate whereby a testator desires that something should be given to a person which otherwise would have entirely belonged to the heir.

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

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

§ 3.- A legacy can lawfully be bequeathed to a slave who forms part of an estate, even though it has not

§ 17.- Mas si todos los hijos hubieran sido instituidos herederos por partes desiguales, no pueden los instituidos en menor parte pedir el fideicomiso, para tener en él porciones viriles, y no las de la herencia; porque es verdad que lo dejó en la familia, aunque lo haya dejado a uno solo.

§ 18.- Asimismo, si hubiese instituido heredero a uno solo, y no hubiese legado cosa alguna, los desheredados no pueden pedir nada mientras la cosa está en la familia.

§ 19.- A veces también muere con lucro del heredero el esclavo legado, o el dejado por fideicomiso, por ejemplo, si el ajeno, o aun el propio, pero dejado separadamente a muchos de manera que cada uno lo adquiera por completo, hubiera muerto, por supuesto, sin culpa del heredero.

115.- ULPIANO; *Instituta libro XI*.- También se hace un fideicomiso de este modo: «deseo que des, prefiero que des, creo que darás».

116.- FLORENTINO; *Instituta libro XI*.- Legado es una disgregación de la herencia, con la cual quiere el testador que sea dado a otro algo de lo que en su totalidad habría de ser del heredero.

§ 1.- No se le puede dar al heredero un legado a cargo de sí mismo, pero se le puede dar a tu cargo siendo tu coheredero. Y así, si se le hubiera legado un fundo a uno que fue instituido heredero de la mitad, y a dos extraños, pertenécele la sexta parte del fundo al heredero a quien fue legado, porque no puede reivindicar de sí mismo, y del coheredero de la mitad de la herencia nada más que la tercera parte, concurriendo los dos extraños; pero los extraños reivindicarán la mitad del mismo heredero, a quien se le hizo el legado, y del otro heredero la tercera parte.

§ 2.- El esclavo ajeno instituido heredero no puede él mismo ser legado a cargo de sí mismo ni en totalidad, ni en parte.

§ 3.- Válidamente se hace un legado a un esclavo de la herencia, aunque esta no haya sido adida,

reliquit, vice fungitur.

§ 4.- Fundus legatus talis dari debet, qualis relictus est. Itaque sive ipse fundo heredis servitutem debuit sive ei fundus heredis, licet confusione dominii servitus exstincta sit, pristinum ius restituendum est. Et nisi legatarius imponi servitutem patiatur, petenti ei legatum exceptio doli mali opponetur: si vero fundo legato servitus non restituatur, actio ex testamento superest.

117.- MARCIANUS; *libro XIII institutionum*.- Si quid relictum sit civitatibus, omne valet, sive in distributionem relinquatur sive in opus sive in alimenta vel in eruditionem puerorum sive quid aliud.

118.- NERVA; *libro X regularum*.- Et eo modo relictum: "exigo" "desidero, uti des", fideicommissum valet: sed et ita: "volo hereditatem meam Titii esse" "scio hereditatem meam restitutum te Titio".

119.- MARCIANUS; *libro I regularum*.- Si servus vetitus est a testatore rationes reddere, non hoc consequitur, ut ne quod apud eum sit reddat et lucri faciat, sed ne scrupulosa inquisitio fiat, hoc est ut neglegentiae ratio non habeatur, sed tantum fraudium. Ideo et manumisso non videtur peculium legari per hoc, quod vetitus est rationes reddere.

120.- ULPPIUS; *libro II responsorum*.- Nihil proponi, cur prohibeatur heres aedificia distrahere, quorum redditus sportulae sunt relictas, salva tamen causa legati.

§ 1.- Omnibus quibus fideicommissum relictum est ad distractionem consentientibus nullam

not been entered upon, because the estate represents the person of the deceased who left it.

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

117.- MARCIANUS; *Institutes, Book XIII*.- Where any property is left to a city the bequest will all be valid, whether it is left for distribution, or to be expended in labor, in provisions, in the instruction of children, or for any other purpose.

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

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

120.- ULPPIANUS; *Opinions, Book II*.- Nothing is stated by which an heir is prevented from selling houses belonging to an estate, although annuities may have been left to be derived from their rent, provided the right to the legacy remains unimpaired.

§ 1.- Where all the parties to whom a trust has been bequeathed consent to the sale of the property, no

porque la herencia representa las veces de la persona del difunto que la dejó.

§ 4.- El fundo legado debe ser dado tal cual se dejó, y así, ya si el mismo fundo debió servidumbre al fundo del heredero, ya si a él el fundo del heredero, aunque con la confusión del dominio se haya extinguido la servidumbre, se ha de restituir el primitivo derecho; y si el legatario no consiente que se imponga la servidumbre, se le opondrá al pedir él el legado la excepción de dolo malo, y si no se le restituyese al fundo legado la servidumbre queda la acción del testamento.

117.- MARCIANO; *Instituta, libro XIII*.- Si se hubiera dejado alguna cosa a ciudades, es válida toda ella, ya se deje para distribuirla, ya para una obra, ya para alimentos, ya para la enseñanza de niños, ya para otra cualquier cosa.

118.- NERACIO; *Reglas, libro X*.- También vale el fideicomiso dejado de este modo: «exigo, deseo, que des»; y también así: «quiero que mi herencia sea de Ticio; sé que tú le restituirás a Ticio mi herencia».

119.- MARCIANO; *Reglas, libro I*.- Si por el testador se le prohibió al esclavo que rindiera cuentas, no se consigue con esto que no devuelva lo que tenga en su poder, y que se lucre con ello, sino que no se haga una escrupulosa investigación, esto es, que no se tenga cuenta de la negligencia, sino solamente de los fraudes. Por esto tampoco se considera que se le lega al manumitido el peculio, porque se le haya prohibido que rinda cuentas.

120.- ULPPIANO; *Respuestas, libro II*.- Nada se expone para que al heredero se le prohíba enajenar edificios de cuyas rentas se dejaron espórtulas, quedando, sin embargo, salva la causa del legado.

§ 1.- A ninguno de aquellos a quienes se les dejó un fideicomiso les habrá de quedar, consintiendo ellos

fideicommissi petitionem superfuturam.

§ 2.- Fructus ex fundo pure legato post aditam hereditatem a legatario perceptos ad ipsum pertinere, colonum autem cum herede ex conducto habere actionem.

121.- MARCIANUS; *libro III regularum*.- Si quis legaverit Titio cum Maevio, et sine altero alter ad legatum admittitur. Nam et cum dicit praetor: "ventrem cum liberis in possessionem esse iubeo", etsi non sint liberi, venter in possessionem mittetur.

122.- PAULUS; *libro III regularum*.- Civitatibus legari potest etiam quod ad honorem ornatumque civitatis pertinet: ad ornatum puta quod ad instruendum forum theatrum stadium legatum fuerit: ad honorem puta quod ad munus edendum venationemve ludos scenicos ludos circenses relictum fuerit aut quod ad divisionem singulorum civium vel epulum relictum fuerit. Hoc amplius quod in alimenta infirmæ aetatis, puta senioribus vel pueris puellisque, relictum fuerit ad honorem civitatis pertinere respondetur.

§ 1.- "Lucius Titius et Gaius Seius Publio Maevio decem dare damnas sunt": Gaius Seius heres non exstitit. Sabinus ait Titium solum legatum debitum: nam Seium pro non scripto habendum esse. Haec sententia vera est, hoc est Titius tota decem debebit.

§ 2.- Eum cui sub hac condicione fundus legatus est, si centum heredi dedisset, si tantum sit in pretio fundi, quantum heredi dare iussus est, non est legatarius cogendus fideicommissum a se relictum praestare, quoniam nihil ex testamento videtur capere, qui tantum erogat, quantum accipit.

further demand can be made under the terms of the trust.

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

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

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

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

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

en la enajenación, ninguna acción para pedir el fideicomiso.

§ 2.- Los frutos percibidos por el legatario, después de adida la herencia, de un fundo legado puramente, le pertenecen a él mismo, pero el colono tiene contra el heredero la acción de conducción,

121.- MARCIANO; *Reglas, libro III*.- Si alguno le hubiere hecho un legado a Ticio juntamente con Mevio, aun sin el uno es admitido el otro al legado; porque también cuando dice el Pretor: «mando que esté en posesión el vientre junto con los hijos», el vientre será puesto en posesión aunque no haya hijos.

122.- PAULO; *Reglas, libro III*.- Se les puede legar a las ciudades también lo que corresponde a honor y a ornato de la ciudad; para ornato, por ejemplo, lo que se hubiere legado para construir un foro, un teatro, un estadio; para honor, por ejemplo, lo que se hubiere dejado para hacer una fiesta, o una cacería, o para juego escénicos, o juegos circenses, o lo que se hubiere dejado para repartirlo entre los ciudadanos, o para banquetes. Además de esto, se responde que pertenece a honor de la ciudad, lo que se hubiere dejado para alimentos de los débiles por su edad, por ejemplo, a los más ancianos, o a los niños y a las niñas.

§ 1.- «Estén condenados Lucio Ticio y Cayo Seyo, a darle diez a Publio Mevio»; Cayo Seyo no fue heredero; dice Sabino, que solo Ticio deberá el legado, porque Seyo ha de ser considerado como no instituido; esta opinión es verdadera, esto es, que Ticio deberá íntegros los diez.

§ 2.- Aquel a quien se le hubiere legado un fundo bajo esta condición, si hubiese dado ciento al heredero, no ha de ser obligado como legatario a pagar el fideicomiso dejarlo a su cargo, si el precio del fundo importase tanto como lo que se mandó que le diera al heredero, porque se considera que no adquiere nada por el testamento el que paga tanto

123.- MARCELLUS; *libro singulari responsorum*.- Lucius Titius cum duos filios heredes relinqueret, testamento ita cavit: "Quisquis mihi liberorum meorum heres erit, eius fidei committo, ut si quis ex is sine liberis decedat, hereditatis meae bessem cum morietur fratribus suis restituat": frater decedens fratrem suum ex dodrante fecit heredem: quaero, an fideicommisso satisfecerit. Marcellus respondit id, quod ex testamento Lucii Titii fratri testator debuisset, pro ea parte, qua alius heres exstisset, peti posse, nisi diversum sensisse eum probaretur: nam parvum inter hanc speciem interest et cum alias creditor debitori suo exstitit heres. Sed plane audiendus erit coheres, si probare possit ea mente testatorem heredem instituisse fratrem suum, ut contentus institutione fideicommisso abstinere deberet.

§ 1.- In testamento ita scriptum est: "Gaio Seio illud et illud heres meus dato. Et te rogo, Sei, fideique tuae mando, uti ea omnia quae supra scripta sunt reddas sine ulla mora ei redderes ipse". Quaero, an tacitum fideicommissum sit, cum personam testator, cui restitui vellet, testamento non significaverit. Marcellus respondit: si in fraudem legum tacitam fidem Seius accommodasset, nihil ei prodesse potest, si his verbis pater familias cum eo locutus esset: non enim ideo circumvenisse minus leges existimandus est, cum perinde incertum sit cui prospectum voluerit.

124.- NERVA; *libro V membranarum*.- Si heredes nominatim enumerati dare quid damnati sunt, propius est, ut viriles partes debeant, quia personarum enumeratio hunc effectum habet, ut exaequantur in legato praestando, qui, si nominati non essent, hereditarias partes debitori essententiarum

where he must pay out as much as he received.

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

§ 1.- The following provision was inserted into a will: "Let my heir deliver such-and-such property to Gaius Seius, and I charge Seius, and I trust to his good faith for the delivery of all the property abovementioned, without delay." I ask whether this creates an implied trust, as the testator did not indicate in his will the person to whom he wished the property to be delivered. Marcellus answered that if Seius had tacitly given his promise for the purpose of defrauding the law, he could in no way derive any benefit from the words written by the testator. For the law must not be thought to have been any the less evaded, because it is uncertain whose advantage the testator had in view.

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

como lo que recibe.

123.- MARCELO; *Respuestas, libro único*.- Lucio Ticio, al instituir herederos a dos hijos, dispuso así en el testamento: «cualquiera que de mis hijos fuere mi heredero, encomiendo a su fidelidad, que, si alguno de ellos falleciese sin hijos, restituya a sus hermanos los dos tercios de mi herencia; cuando muriere»; al fallecer el hermano hizo a su hermano heredero de tres cuartos; pregunto, si habrá cumplido con el fideicomiso. Marcelo respondió, que lo que en virtud del testamento de Lucio Ticio le hubiese debido el testador a su hermano, puede ser pedido en cuanto a la parte en que otro hubiese quedado heredero, si no se probase que aquel pensó diversa cosa; porque hay poca diferencia entre este caso. Y aquel en que de otra suerte el acreedor quedó heredero de su deudor Pero, a la verdad, habrá de ser oído el coheredero, si pudiera probar que el testador instituyó heredero a su hermano con la intención de que contentándose con la institución debiese abstenerse del fideicomiso.

§ 1.- Se escribió así en un testamento: «dé mi heredero esto; aquello a Cayo Seyo; y te ruego, Seyo, y encomiendo a tu fidelidad, que sin demora alguna entregues todo lo que arriba queda escrito; y entregues tú mismo las cosas a aquel»; pregunto, si será este un fideicomiso tácito, no habiendo indicado el testador en su testamento la persona a la cual quisiera que se hiciese la restitución. Marcelo respondió: si Seyo hubiese acomodado su tácita fidelidad en fraude de las leyes, de nada puede aprovecharle, si en estos términos hubiese hablado con él el padre de familia; porque no se ha de creer que dejó de burlar las leyes, por lo mismo que sea cosa incierta a quien haya querido él que se atienda.

124.- NERACIO; *Pergaminos, libro V*.- Si los herederos enumerados por su nombre fueron condenados a dar alguna cosa, es más cierto que deben porciones viriles, porque la enumeración de las personas produce este efecto, que estén igualadas para pagar el legado, los cuales, si no hubiesen sido nombrados, habrían de haber recibido según sus porciones de la herencia.

125.- RUTILIUS MAXIMUS; *libro singulari ad legem Falcidiam*.- Si heres centum praecipere iussus sit et restituere hereditatem et patronus bonorum possessionem contra tabulas petierit, sicut legata ita et praeceptio pro parte, quam patronus abstulit, minuatur.

126.- PAULUS; *libro singulari de secundis tabulis*.- Ab exheredati substituto inutiliter legatum datur. Ergo nec a legitimo exheredati fideicommissum dari poterit, quod et legitimi eo iure praestare coguntur, quo si scripti fuissententiarum sed si committente aliquo ex liberis edictum praetoris, quo contra tabulas bonorum possessionem pollicetur, scriptus quoque filius contra tabulas bonorum possessionem petierit, substitutus eius legata pro modo patrimonii, quod ad filium pervenit, praestabit, perinde ac si id, quod per bonorum possessionem filius habuit, a patre accepisset.

§ 1.- Cum a postumo ita legetur "si heres erit" et non nato postumo substituti adeant, legata eos debere existimandum est, quae ille, si viveret, debiturus erat.

127.- PAULUS; *libro singulari de iure codicillorum*.- A fratris postumo fideicommissum dari potest: sola enim voluntas servatur in fideicommissis, et optinuit Galli sententia alienos quoque postumos legitimos nobis heredes fieri.

128.- MARCIANUS; *libro II institutionum*.- Si tutor pupillam suam contra senatus consultum uxorem duxit, illa quidem ex testamento eius capere potest, ipse autem non potest, et merito: delinquent enim hi, qui prohibitas nuptias contrahunt et merito puniendi sunt: quod imputari non potest mulieri, quae a tutore decepta estado

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

126.- PAULUS; *On Pupillary Substitutions*.- The substitute of a disinherited son cannot legally be charged with a legacy. Therefore, the heir-at-law of a disinherited son cannot be charged with a trust, because heirs-at-law are only compelled to discharge the duties of a trust where they have also been appointed heirs. If, however, one of the children should take advantage of the Edict of the Praetor, by which possession is promised in opposition to the provisions of the will, and the appointed heir should also demand possession contrary to its provisions, the substitute of the first of the children must pay the legacies, just as if a patrimonial estate had come into the hands of the son for whom he was substituted, and as if the son had received from his father that to which he was entitled and had acquired through possession of the estate under the Praetorian Law.

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

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

128.- MARCIANUS; *Institutes, Book II*.- If a guardian marries his female ward in violation of the Decree of the Senate, she can take under his will, but he cannot take anything under hers; and this is reasonable, for parties who contract forbidden marriages are guilty of an offence, and deserve to be punished. The woman, however, should not be

125.- RUTILIO MÁXIMO; *Comentarios a la ley Falcidia, libro Único*.- Si se le hubiera mandado al heredero, que previamente tomase ciento, y que restituyese la herencia, y el patrono hubiere pedido la posesión de los bienes contra el testamento, como los legados, así también se disminuirá la percepción previa a proporción de la parte que tomó el patrono.

126.- PAULO; *De los segundos testamentos, libro único*.- Inútilmente se dá un legado a cargo del substituto de un desheredado; luego ni a cargo del heredero legitimo del desheredado se podrá dar un fideicomiso; porque también los legítimos son obligados a hacer prestaciones por el mismo derecho que si hubiesen sido instituidos. Pero si hallándose alguno de los hijos dentro del Edicto del Pretor, por el que este promete la posesión de los bienes contra el testamento, y también el hijo instituido hubiere pedido la posesión de los bienes contra el testamento, su substituto pagará los legados con arreglo a la cuantía del patrimonio, que fue a poder del hijo, lo mismo que si lo que el hijo obtuvo por la posesión de los bienes lo hubiese recibido del padre.

§ 1.- Cuando a cargo del póstumo se legara así: «si fuere heredero», y no habiendo nacido el póstumo adiesen la herencia los substitutos, se ha de juzgar que ellos deben los legados que aquel habría de haber debido, si viviera.

127.- EL MISMO; *Del derecho de los Codicilos, libro único*.- Se puede dar un fideicomiso a cargo de un póstumo del hermano; porque en los fideicomisos se observa la sola voluntad; y prevaleció la opinión de Galo, de que también los póstumos ajenos se hacen herederos legítimos nuestros.

128.- MARCIANO; *Instituciones, libro II*.- Si un tutor hubiere tomado por mujer a su pupila contra el tenor del Senadoconsulto, ciertamente que ella puede adquirir en virtud del testamento del mismo, pero él no puede; y con razón, porque delinquen los que contraen nupcias prohibidas, y con justicia han de ser castigados, cosa que no se puede imputar a la

considered to be to blame who has been deceived by her guardian.

mujer, que fue engañada por su tutor.

LIBER TRICESIMUS UNUS

TIT. UNUS

DE LEGATIS ET FIDEICOMMISSIS

1.- ULPIANUS; *libro IX, ad Sabinum*.- In arbitrium alterius conferri legatum veluti condicio potest: quid enim interest, "si Titius in Capitolium ascenderit" mihi legetur an "si voluerit?"

§ 1.- Sed cum ita legatum sit pupillo sive pupillae "arbitrio tutorum", neque condicio inest legato neque mora, cum placeat in testamentis legatum in alterius arbitrium collatum pro viri boni arbitrio accipi. Quae enim mora est in boni viri arbitrio, quod iniectum legato velut certam quantitatem exprimit, pro viribus videlicet patrimonii?

2.- PAULUS; *libro LXXV, ad edictum*.- Quotiens nominatim plures res in legato exprimuntur, plura legata sunt: si autem supellex aut argentum aut peculium aut instrumentum legatum sit, unum legatum est.

3.- PAULUS; *libro IV, ad Plautium*.- Si ita legetur: "Heres dare damnas esto, si in Capitolium non ascenderit", utile legatum est, quamvis in potestate eius sit ascendere vel non ascendere.

4.- PAULUS; *libro VIII, ad Plautium*.- Neminem eiusdem rei legatae sibi partem velle, partem nolle

BOOK XXXI

TITLE I

CONCERNING LEGACIES AND TRUSTS

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

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

2.- PAULUS; *On the Edict, Book LXXV*.- Whenever several articles are specifically mentioned in a legacy, there are several legacies. Where, however, only one kind of property, as furniture, silver plate peculium, or certain utensils are bequeathed, there is but one legacy.

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

4.- THE SAME; *On Plautius, Book VIII*.- The better opinion is that no one can accept a portion of a

LIBRO TRIGÉSIMO PRIMERO

TÍTULO ÚNICO

DE LOS LEGADOS Y DE LOS FIDEICOMISOS

1.- ULPIANO; *Comentarios a Sabino, libro IX*.- El legado, como la condición, se puede dejar al arbitrio de otro; porque ¿qué importa que se me legue, «si Ticio hubiere subido al Capitolio», o «si él quisiere?»

§ 1.- Pero cuando así se hubiera hecho un legado a un pupilo o a una pupila: «al arbitrio de los tutores», no hay en el legado ni condición, ni mora, puesto que está determinado que el legado dejado en los testamentos al arbitrio de otro se entienda conforme al arbitrio de buen varón; porque, ¿qué morosidad hay en el arbitrio de buen varón, el cual agregado al legado expresa como cierta cantidad, a saber, con arreglo a las fuerzas del patrimonio?

2.- PAULO; *Comentarios al Edicto, libro LXXV*.- Siempre que nominalmente se expresan muchas cosas en un legado, hay muchos legados, mas si se hubiera legado un ajuar, o plata, o un peculio, o un instrumento, hay un solo legado.

3.- EL MISMO; *Comentarios a Plaucio, libro IV*.- Si así se hiciera un legado: «esté el heredero condenado a dar, si no subiere al Capitolio, el legado es útil, aunque esté en su potestad subir, o no, al Capitolio.

4.- EL MISMO; *Comentarios a Plaucio, libro VIII*.- Es más verdadero, que nadie puede querer una

5.- PAULUS; *libro VII quaestionum*.- Sed duobus legatis relictis unum quidem repudiare, alterum vero amplecti posse respondetur.

§ 1.- Sed si unum ex legatis onus habet, et hoc repellatur, non idem dicendum est: pone eum, cui decem et Stichus legatus est, rogatum servum manumittere: si Falcidia locum habet, ex decem utriusque legati quarta deducetur. Igitur repudiato servo non evitabitur onus deductionis, sed legatarius ex pecunia duas quartas relinquet.

6.- PAULUS; *libro singulari, ad legem Falcidiam*.- Grege autem legato non potest quaedam sperni, quaedam vindicari, quia non plura, sed unum legatum est. Idemque dicemus peculio legato aut veste aut argento et similibus.

7.- PAULUS; *libro VIII, ad Plautium*.- Si Titio et ei qui capere non potest decem legata sint, quia duobus heres dare damnatur et unus capere non potest, quinque sola Titio dantur.

8.- PAULUS; *libro IX ad Plautium*.- Si quis servum heredis vel alienum legaverit et is fugisset, cautiones interponendae sunt de reducendo eo: sed si quidem vivo testatore fugerit, expensis legatarii reducitur, si post mortem, sumptibus heredis.

§ 1.- Si ita legetur: "Sempronio decem aut, si noluerit, hominem Stichum lego", hoc casu duo legata sunt, sed uni contentus esse debet.

§ 2.- Si quis legaverit ex illo dolio amphoras

5.- THE SAME; *Questions, Book VII*.- Where two legacies are bequeathed, it is established that one can be rejected, and the other accepted.

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

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

7. THE SAME; *On Plautius, Book VIII*.- If ten aurei are bequeathed to Titius and another party who cannot legally receive them, as the heir is obliged to pay both the legatees, where one cannot receive the legacy, only five aurei shall be paid to Titius.

8.- THE SAME; *On Plautius, Book IX*.- Where anyone bequeaths a slave belonging to his heir or to someone else, and the slave takes to flight, the heir must furnish security that he will be restored; but if he should take to flight during the lifetime of the testator, he must be brought back at the expense of the legatee; and if he should escape after the death of the testator, he must be brought back at the expense of the heir.

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

§ 2.- Where anyone makes a bequest as follows: "I

le legó.

5.- EL MISMO; *Cuestiones, libro VII*.- Pero se respondería, que habiéndose dejado dos legados, se puede ciertamente repudiar uno, y aceptar el otro.

§ 1.- Mas no se ha de decir lo mismo si uno de los legados tuviese gravamen, y este fuese repelido; supón, que al que se le legaron diez y Stico, se le rogó que manumitiera al esclavo; si tiene lugar la Falcidia, se deducirá de los diez la cuarta de uno y otro legado; así, pues, repudiado el esclavo, no se evitará el gravamen de la deducción, sino que el legatario dejará dos cuartas partes del dinero.

6.- EL MISMO; *Comentarios a la ley Falcidia, libro único*.- Mas habiéndose legado un rebaño, no se puede rechazar unas cabezas, y reivindicar otras, porque no hay muchos, sino un solo legado, y lo mismo diremos, habiéndose legado un peculio, o un vestido, o plata, y otras cosas semejantes.

7.- EL MISMO; *Comentarios a Plautio, libro VIII*.- Si hubieren sido legados diez a Ticio, y a otro, que no puede adquirir, como el heredero está condenado a dar a dos, y uno no puede adquirir, a Ticio se le dan solamente cinco.

8.- EL MISMO; *Comentarios a Plautio, libro IX*.- Si alguno hubiere legado un esclavo del heredero, o de otro, y él hubiese huido, se han de interponer cauciones de recobrarlo; pero si verdaderamente hubiere huido viviendo el testador, es recobrado a expensas del legatario, y, si después de la muerte, a costas del heredero.

§ 1.- Si así se hiciera un legado: «le lego diez a Sempronio, o, si no los quisiere, el esclavo Stico», en este caso son dos los legados, pero debe contentarse con uno solo.

§ 2.- Si alguno hubiere legado diez ánforas de

decem, etsi non decem, sed pauciores inveniri possint, non exstinguitur legatum, sed hoc tantummodo accipit, quod invenitur.

§ 3.- Si inter duos dubitetur de eodem legato, cui potius dari oportet, ut puta si Titio relictum est et duo eiusdem nominis amici testatoris veniant et legatum petant et heres solvere paratus sit, deinde ambo defendere heredem parati sint, eligere debere heredem, cui solvat, ut ab eo defendatur.

§ 4.- Certam pecuniam legatam si et legatarius et substituti legatarii peterent et heres solvere paratus sit, si ambo defendere heredem parati sint, eligere debet heres cui solvat, ut ab eo defendatur: et, si neutrius manifesta calumnia videatur, ei potius solvendum, cui primum legatum est.

§ 5.- Si cui certam partem hereditatis legavero, divus Hadrianus rescripsit, ut neque pretia manumissorum neque funeris impensa deduceretur.

9.- MODESTINUS; *libro IX regularum*.- Cum autem pars bonorum ita legatur: "bonorum meorum, quae sunt cum moriar", dos et manumissorum pretia e medio deducenda sunt.

10.- IAVOLENUS; *libro I, ex Plautio*.- Cum fundus nominatim legatus sit, si quid ei post testamentum factum adiectum est, id quoque legato cedit, etiamsi illa verba adiecta non sint "qui meus erit", si modo testator eam partem non separatim possedit, sed universitati prioris fundi adiunxit.

11.- POMPONIUS; *libro VII, ex Plautio*.- Statu liberum ab herede ne tunc quidem, cum dubia sit eius ex testamento libertas, legatum sine libertate

bequeath ten measures of wine from such-and-such a cask," even though less than ten may be found therein, the legacy is not extinguished, but the legatee will only receive what is contained in the cask.

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

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

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

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

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

11.- POMPONIUS; *On Plautius, Book VII*.- Labeo says that a slave who is to be liberated by the heir under a certain condition cannot receive a legacy

aquella tinaja, no se extingue el legado, aunque no se puedan hallar diez, sino menos, sino que recibe solamente lo que se halla.

§ 3.- Si respecto a un mismo legado se dudara entre dos a quién se le debe dar preferentemente, por ejemplo, si se le dejó a Ticio, y se presentarán dos amigos del testador del mismo nombre, y pidieran el legado, y el heredero estuviera dispuesto a pagarlo, y después ambos estuvieran prontos a defender al heredero, el heredero debe elegir a quién pagará, para que por él sea defendido.

§ 4.- Si así el legatario como los substitutos del legatario pidiesen cierta cantidad legada, y el heredero estuviera dispuesto a pagarla, si ambos estuvieran prontos a defender al heredero, el heredero debe elegir a quién pagará, para que por él sea defendido; y si no pareciera manifiesta la calumnia de ninguno de los dos, se le ha de pagar preferentemente al que primeramente se le hizo el legado.

§ 5.- Si a alguien le hubiere yo legado cierta parte de la herencia, respondió por rescripto el Divino Adriano, que no se dedujesen ni el precio de los manumitidos, ni los gastos del funeral.

9.- MODESTINO; *Reglas, libro IX*.- Mas Cuando se lega de este modo parte de los bienes: «de mis bienes, que haya cuando yo muera», se han de deducir de ellos la dote y el precio de los manumitidos.

10.- JAVOLENO; *Doctrina de Plaucio, libro I*.- Cuando haya sido legado nominalmente un fundo, si se le agregó alguna cosa después de hecho el testamento, también esta cede al legado, aunque no se hayan añadido aquellas palabras: «que fuere mío», si es que el testador no poseyó separadamente aquella parte, sino que la agregó a la totalidad del primer fundo.

11.- POMPONIO; *Doctrina de Plaucio, libro VII*.- Dice Labeón, que el instituido libre bajo condición no puede recibir un legado, sin la libertad, a cargo del

accipere posse Labeo ait, quia servus eius esset: sed si heres eandem condicionem legato inserat, quae libertati a testatore datae praeposita fuerit, valet legatum: nam et si, cum moreretur heres, servus liber esse iussus esset, recte sine libertate ei ab herede legari posse constitit, quia supervacuum sit ei libertatem dare, quam ex testamento heredis capturus non sit, sed ex testatoris habet.

§ 1.- "Stichum aut Pamphilum, utrum heres meus volet, Titio dato, dum, utrum velit dare, eo die, quo testamentum meum recitatum erit, dicat". Si non dixerit heres, Pamphilum an Stichum dare malit, perinde obligatum eum esse puto, ac si Stichum aut Pamphilum dare damnatus esset, utrum legatarius elegerit. Si dixerit se Stichum dare velle, Stichum mortuo liberari eum: si ante diem legati cedentem alter mortuus fuerit, alter qui supererit in obligatione manebit. Cum autem semel dixerit heres, utrum dare velit, mutare sententiam non poterit. Et ita et Iuliano placuit.

12.- PAULUS; *libro II, ad Vitellium*.- Si pecunia legata in bonis legantis non sit, solvendo tamen hereditas sit, heres pecuniam legatam dare compellitur sive de suo sive ex venditione rerum hereditariarum sive unde voluerit.

§ 1.- Quod ita legatum est: "Heres cum morietur Lucio Titio dato decem", cum incerta die legatum est, ad heredes legatarii non pertinet, si vivo herede decesserit.

13.- POMPONIUS; *libro VII, ex Plautio*.- Qui duos reos eiusdem pecuniae habet Titium atque Maevium, ita legavit: "Quod mihi Titius debet, Maevio heres meus dato. Quod Maevius debet, Seio dato". His verbis onerat heredem: nam cum actiones

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

§ 1.- "Let Stichus, or Pamphilus, whichever one my heir may choose, be given to Titius, provided he makes his choice upon the day on which my will shall be published." If the heir does not say whether he prefers to give Pamphilus or Stichus, I think that he will be bound to give Stichus or Pamphilus, whichever one the legatee may select. If he says that he prefers to give Stichus, and Stichus should die, he will be released. If one of the two slaves should die before the time when the legacy vests, the survivor will remain subject to the obligation. Moreover, when the heir has once stated which one he prefers to give, he cannot change his mind, and this opinion was also held by Julianus.

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

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

13.- POMPONIUS; *On Plautius, Book VII*.- Where a man has two debtors who jointly owe him the same sum of money, that is to say, Titius and Maevius, and he makes a bequest as follows, "Let my heir pay to Maevius what Titius owes me, and let him

heredero, ni ciertamente cuando sea dudosa su libertad en virtud del testamento; pero si el heredero le pusiese al legado la misma condición, que hubiere sido puesta en libertad dada por el testador, es válido el legado; porque también si se hubiese mandado que el esclavo fuese libre cuando muriese el heredero, es sabido que perfectamente se le puede hacer un legado sin la libertad a cargo del heredero, porque es superfluo que se le dé la libertad, que él no habría de obtener en virtud del testamento del heredero, sino que tiene por el del testador.

§ 1.- «Déle a Ticio o a Stico o a Pánfilo, al que de los dos quiera, mi heredero, mientras declare a cual de los dos quiera dar en el día en que se leyere mi testamento»; si el heredero no dijere que prefería dar a Pánfilo, o a Stico, opino que está obligado lo mismo que si hubiese sido condenado a dar a Stico o a Pánfilo, al que de los dos hubiere elegido el legatario. Si hubiere dicho que quería dar a Stico, muerto Stico, se libra de la obligación. Si uno de los dos hubiere muerto antes de correr el término del legado, quedará sujeto a la obligación el otro que sobreviviere. Mas cuando una vez hubiere dicho el heredero a cual de los dos quería dar, no podrá cambiar de parecer; y así le pareció también a Juliano.

12.- PAULO; *Comentarios a Vitelio, libro II*.- Si en los bienes del que legó no hubiera el dinero legado, pero la herencia fuera solvente, el heredero es compelido a dar el dinero legado, ora de lo suyo, ora de la venta de los bienes de la herencia, ora de donde quisiere.

§ 1.- Lo que se legó de este modo: «dé el heredero, cuando muere, diez a Lucio Ticio», como se legó a día incierto, no pertenece a los herederos del legatario, si hubiere fallecido viviendo el heredero.

13.- POMPONIO; *Doctrina de Plaucio, libro VII*.- Uno que tiene dos deudores de una misma cantidad, Ticio y Mevio, legó así: «dé mi heredero a Mevio lo que Ticio me debe; dé a Seyo lo que debe Mevio»; con estas palabras grava al heredero; porque

suas heres Maevio praestiterit adversus Titium, videtur Maevius factio eius liberatus esse et idcirco Seio heres tenebitur.

§ 1.- Si is qui unum reum habebat quod is sibi deberet duobus in solidum separatim legasset, oneratur heres duobus satisfacere uni actione cedendo, alteri pecuniam solvendo.

14.- PAULUS; *libro IV, ad Vitellium*.- Si idem servus et legatus et liber esse iussus sit, favor libertatis praevalet: sin autem et in posteriore scriptura legatus est et evidens ademptio libertatis ostenditur, legatum propter defuncti voluntatem praevalebit.

§ 1.- Servo alieno herede instituto post mortem domini eius cui adquisita hereditas et libertatem fideicommissariam dari posse constat.

15.- CELSUS; *libro VI, digestorum*.- Si quis duobus heredibus institutis ita legaverit: "Stichum aut decem heredes danto", non potest alter heredum quinque, alter partem Stichi dare, sed necesse est utrumque aut Stichum totum aut decem solvere.

16.- CELSUS; *libro XVI, digestorum*.- Si Titio aut Seio, utri heres vellet, legatum relictum est, heres alteri dando ab utroque liberatur: si neutri dat, utrumque perinde petere potest atque si ipsi soli legatum foret: nam ut stipulando duo rei constitui possunt, ita et testamento potest id fieri.

17.- MARCELLUS; *libro X, digestorum*.- Si quis Titio decem legaverit et rogaverit, ut ea restituat Maevio, Maeviusque fuerit mortuus, Titii comodo cedit, non heredis, nisi dumtaxat ut ministrum Titium

pay to Seius what Maevius owes me," he binds his heir by these words; for when the latter assigns to Maevius his right of action against Titius, Maevius is held to have been released by his act, and therefore the heir will be liable to Seius.

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

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

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

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

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

17.- MARCELLUS; *Digest, Book X*.- Where anyone bequeaths ten aurei to Titius, and charges him to pay the same to Maevius, and Maevius should die, the legacy will benefit Titius, and not the heir, unless

habiendo cedido el heredero a Maevio sus acciones contra Ticio, se considera que Maevio fué liberado por hecho de él, y por lo tanto el heredero estará obligado a Seyo.

§ 1.- Si el que tenia un solo deudor hubiese legado separadamente a dos por completo lo que aquel le debiese, se grava al heredero a pagar a los dos, cediendo a uno la acción, y pagando a otro el dinero.

14.- PAULO; *Comentarios a Vitelio, libro IV*.- Si se hubiera mandado que el mismo esclavo legado fuera también libre, prevalece el favor de la libertad; mas si fué legado también en una escritura posterior, y se demuestra la evidente revocación de la libertad, prevalecerá el legado por causa de la voluntad del difunto.

§ 1.- Instituido heredero un esclavo ajeno, es sabido que se le puede dar también la libertad fideicomisaria después de la muerte de su señor, para el cual fue adquirida la herencia.

15.- CELSO; *Digesto, libro VI*.- Si alguien, habiendo instituido dos herederos, hubiere hecho así un legado: «dén los herederos a Stico, o ciento», no puede uno de los herederos dar cinco, y el otro una parte de Stico, sino que es necesario que ambos entreguen o a todo Stico, o los diez.

16.- EL MISMO; *Digesto, libro XVI*.- Si se hubiera dejado un legado para Ticio o para Seyo, para el que de los dos quiera el heredero, dándoselo el heredero a uno queda libre respecto a ambos; pero si no se lo dá a ninguno de los dos, ambos pueden pedirlo lo mismo que si a cada uno solo hubiera sido legado; porque así como estipulando se pueden constituir dos acreedores, así también se puede hacer esto por testamento.

17.- MARCELO; *Digesto, libro X*.- Si alguno le hubiere legado diez a Ticio, y le hubiere rogado que se los restituya a Maevio, y Maevio hubiere fallecido, el legado cede en beneficio de Ticio, no del heredero, si

elegit. Idem est et si ponas usum fructum legatum.

§ 1.- Si heres damnatus esset decem uni ex libertis dare et non constituerit cui daret, heres omnibus eadem decem praestare cogendus est.

18.- CELSUS; *libro XVII, digestorum*.- Heredem meum ita tibi obligare possum, ut si, quandoque ego moriar, tuus servus Stichus non erit, dare eum tibi damnas sit.

19.- CELSUS; *libro XVIII, digestorum*.- Si is, cui legatus sit Stichus aut Pamphilus, cum Stichum sibi legatum putaret, vindicaverit, amplius mutandae vindicationis ius non habet: tamquam si damnatus heres alterutrum dare Stichum dederit, cum ignoret sibi permissum vel Pamphilum dare, nihil repetere possit.

20.- CELSUS; *libro XIX, digestorum*.- Et Proculo placebat et a patre sic accepi, quod servo communi legatum sit, si alter dominorum omitteret, alteri non adcrecere: non enim coniunctim, sed partes legatas: nam ambo si vindicarent, eam quemque legati partem habiturum, quam in servo haberet.

21.- CELSUS; *libro XX, digestorum*.- Cum quidam uxori suae dotem reddidisset, quadraginta ei legare voluisset et quamquam sciret dotem redditam, hoc tamen praetextu usus esset, quasi dotis reddendae nomine eam summam legaret, existimo deberi quadraginta: etenim reddendi verbum quamquam significationem habet retro dandi, recipit tamen et per se dandi significationem.

22.- CELSUS; *libro XXI, digestorum*.- Lucius Titius in testamento suo Publio Maevio militiam

the testator merely selected Titius as his agent. The same rule applies if you suppose a case of the bequest of an usufruct.

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

18.- CELSUS; *Digest, Book XVII*.- I can bind my heir to pay you a legacy in such a way that if, when I die, Stichus should not be your slave, he will be compelled to deliver him to you.

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

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

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

22.- THE SAME; *Digest, Book XXI*.- Lucius Titius bequeathed to Publius Mævius, by his will, an office

no eligió a Ticio solamente como a ejecutor; lo mismo es, también si supusieras que se legó el usufruto.

§ 1.- Si el heredero hubiese sido condenado a darle diez a uno de los libertos, y el testador no hubiere determinado a quien se los dará, el heredero debe ser obligado a darles a todos los mismos diez.

18.- CELSO; *Digesto, libro XVII*.- Yo puedo obligar a mi heredero a tu favor de manera que, si cuando yo muera Stico no fuere esclavo tuyo, esté condenado a dártelo.

19.- EL MISMO; *Digesto, libro XVIII*.- Si aquel a quien le hubiera sido legado Stico o Pánfilo, hubiere reivindicado a Stico creyendo que le había sido legado, no tiene ya el derecho de cambiar la reivindicación, así como si el heredero condenado a dar uno u otro hubiere dado a Stico, ignorando que le estaba permitido dar a Pánfilo, no podría repetir nada.

20.- EL MISMO; *Digesto, libro XIX*.- A Próculo le parecía bien, y así lo oí yo de mi padre, que oí que se le hubiera legado a un esclavo común, si uno de los dueños no lo aceptase, no le acrecía al otro; porque no fue legado conjuntamente, sino que se legaron las partes; pues si ambos lo reivindicasen, cada cual habría de tener aquella parte del legado que tuviese en el esclavo.

21.- EL MISMO; *Digesto, libro XX*.- Cuando uno le hubiese devuelto la dote a su mujer, y hubiese querido legarle cuarenta, y, aunque supiese que había sido devuelta la dote, se hubiese valido, sin embargo, de este pretexto, cual si legara esta suma por razón de devolver la dote, opino, que se deben los cuarenta; porque la palabra devolver, aunque tenga la significación de volver a dar, admite, sin embargo, también en si la significación de dar.

22.- EL MISMO; *Digesto, libro XXI*.- Lucio Ticio le dejó en su testamento a Publio Mevio su propio

suam reliquit sive pecuniam eius quaecumque redigi ex venditione eius potuerit, cum suis commodis: sed cum supervixit testamento Lucius Titius, militiam vendidit et pretium exegit et dedit ei, cui illam militiam vel pretium eius testamento dari voluerit: post mortem Lucii Titii iterum Publius Maevius vel militiam vel pretium eius ab heredibus Lucii Titii exigebat. Celsus: existimo pretium militiae praestari non oportere, nisi legatarius ostenderit testatorem et post factam solutionem iterum eum pretium militiae accipere voluisse. Quod si non totum pretium militiae, sed partem vivus testator legatario dedit, reliqui superesse exactionem, nisi heres et ab hoc decessisse testatorem ostenderit. Onus enim probandi mutata esse defuncti voluntatem ad eum pertinet, qui fideicommissum recusat.

23.- MARCELLUS; *libro XIII, digestorum.*- "Lucio Titio fundum Seianum vel usum fructum fundi Seiani lego". Potest legatarius vel fundum vindicare vel fructum, quod facere non potest is cui tantum fundus legatus est.

24.- ULPIANUS; *libro II, fideicommissorum.*- Cum quidam ita fideicommissum reliquisset: "Rogo restituas libertis meis, quibus voles", Marcellus putavit posse heredem et indignum praefere.

At si ita: "his quos dignos putaveris", petere posse ait eos qui non offenderint. Idem ait, si neminem eligat, omnes ad petitionem fideicommissi admitti videri quasi iam praesenti die datum, cum sic relinquatur "quibus voles" nec ulli offerat. Plane si ceteri defuncti sunt, superstiti dandum vel heredi eius, si prius quam peteret decessit. Scaevola autem notat: si omnes petere potuerunt, cum nulli offeratur, cur non et qui decesserunt, ad heredem transmiserunt, utique si uno petente iam eligere non potest, cui det? Videtur enim Marcellus, cum fideicommissum ita relinquatur "ex libertis cui volueris", arbitrari, nisi offerat cui heres velit et statim offerat sine aliquo scilicet intervallo, statim

which he held in the army, or the money which could be derived from the sale of the same, together with all the privileges attaching thereto. Lucius Titius, however, having survived his will, sold the office and collected the price, and gave it to him to whom he had intended to leave by his will the said office, or the price received for the same. After the death of Lucius Titius, Publius Maevius brought suit against the heirs of Lucius Titius to recover either the office or the money. Celsus: I think that the price received for the office should not be paid unless the legatee can show that the testator, after having paid it once, intended that he should receive it a second time. But if the testator, while living, gave to the legatee, not the entire price of the office but only that of a portion of the same, the remainder can be collected, unless the heir can show that the testator intended, by doing this, to annul the legacy; for the burden of proving that the deceased changed his mind rests upon him who refuses to discharge the trust.

23.- MARCELLUS; *Digest, Book XIII.*- "I bequeath to Lucius Titius the Seian Estate, or the usufruct of the same." The legatee can claim either the land or the usufruct, which he to whom only the land is devised cannot do.

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

If, however, he had said, "Those whom you may consider worthy;" he holds such as have not committed any offence will be eligible. He also holds that if the heir does not select anyone, all the freedmen will be permitted to claim the legacy, just as if it had been given upon that very day when it was left "To those whom you may select," and the heir does not tender it to any of them. It is clear that if the other freedmen are dead, it must be delivered to the survivor, or to his heir, if he should die before presenting his claim. Scaevola, however, says in a note that if all could demand a legacy when it is not tendered to any of them, why will not those who have died transmit their rights to their heirs, especially

cargo en la milicia, o el dinero que por la venta del mismo se hubiere podido obtener, con sus beneficios; pero habiendo sobrevivido Lucio Ticio a su testamento, vendió su cargo en la milicia, y cobró el precio, y se lo dió a aquel a quien había querido en su testamento que se le diera aquel cargo a su precio; después de la muerte de Lucio Ticio les exigía otra vez Publio Mevio a los herederos de Lucio Ticio o el cargo en la milicia, o su precio; y dice Celso: yo creo, que no se debe pagar el precio de cargo en la milicia, si el legatario no probare, que el testador quiso, aun después de hecho el pago, que él recibiese otra vez el precio del cargo en la milicia. Pero si en vida no le dió el testador al legatario todo el precio del cargo en la milicia, sino una parte, queda la exacción de la restante, a no ser que el heredero hubiere probado que también desistió de esto el testador; porque la carga de probar que cambió la voluntad del difunto, le incumbe al que deniega el fideicomiso.

23.- MARCELO; *Digesto, libro XIII.*- «Lego a Lucio Ticio el fundo Seyano, o el usufruto del fundo Seyano»; el legatario puede reivindicar el fundo, o el usufruto; lo que no puede hacer aquel a quien solamente se le legó el fundo.

24.- ULPIANO; *Fideicomisos, libro II.*- Como uno hubiese dejado así un fideicomiso: «te ruego que lo restituyas a aquellos de mis libertos a quienes quieras», opinó Marcelo, que el heredero podía preferir aun al indigno.

Mas si de este modo: «a los que hubieres juzgado dignos», dice que pueden reclamar los que no hubieren ofendido. Dice el mismo, que si no eligiera a ninguno, se considera que todos son admitidos a la petición del fideicomiso, cual si ya de presente se hubiere dado, cuando se deja así: «a quienes quieras», y no se lo ofreciera a ninguno, pero si los demás fallecieron, se le ha de dar al sobreviviente, o a su heredero, si falleció antes que lo pidiese. Pero observa Scévola: sí todos pudieron pedirlo, cuando a ninguno se le ofrece, ¿por qué no lo transmitieron a su heredero también los que fallecieron. A la verdad, si pidiéndolo uno ya no puede elegir, ¿a quién lo dará? Porque parece que Marcelo estima, que,

competere omnibus petitionem: cum igitur omnibus competat, merito notatus est, cur superstiti soli putet dandum, nisi forte antequam iustum tempus praetereat, quo potuit eligere cui potius offerat, ceteri decesserint.

25.- MARCELLUS; *libro XV, digestorum*.- Si tamen quibusdam absentibus praesentes petent, cum praesenti die relictum sit fideicommissum, causa cognita statuendum est explorandumque, an et alii sint petitori.

26.- MARCELLUS; *libro XVI, digestorum*.- Is, cuius in servo proprietas erat, fructuario herede instituto alicui eum servum legavit. Non potest heres doli mali exceptione uti, si legatarius vindicare servum vellet non relicto heredi usu fructu.

27.- CELSUS; *libro XXXIV, digestorum*.- Si illud aut illud legatum sit, unum legatum est. Si sub contrariis condicionibus aliud atque aliud legatum est, unum legatum esse arbitramur. Neque refert et heredum et eorum quibus legatum est diversas personas esse, veluti si ita legatum est: "Si Nerva consul factus erit, Titius heres Attio fundum, si non erit Nerva consul factus, Seius heres Maevio centum dato".

28.- MARCELLUS; *libro XXIX, digestorum*.-

where there is only one claiming it, and the heir cannot select the one to whom he may give the legacy? For it appears that Marcellus held that where a trust was bequeathed as follows, "To such of my freedmen as you may select," unless he tenders the legacy to the party whom he wishes to have it, and does so without any delay, all the heirs will be entitled to claim it. Therefore, since all of them can do this, he very properly thinks that it should be given to the survivor alone, unless the other heirs have died before sufficient time had elapsed during which the heir could select one to whom he could give the legacy.

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

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

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

28.- MARCELLUS; *Digest, Book XXIX*.- Where a patron is appointed by his freedman heir to the share

cuando se deja así el fideicomiso: «á quien quisieres de los libertos», si no lo ofreciera el heredero a quien quisiera, y no lo ofreciera inmediatamente, esto es, sin ningún intervalo, les compete desde luego a todos la petición; así, pues, compitiéndole a todos, con razón se le observó, por qué opina que se ha de dar solo al sobreviviente, si acaso no hubieren muerto los demás antes que transcurra el tiempo legítimo en que pudo elegir a quien ofrecérselo preferentemente?

25.- MARCELO; *Digesto, libro XV*.- Pero si hallándose ausentes algunos lo pidieron los presentes, cuando el fideicomiso haya sido dejado de presente, se ha de determinar con conocimiento de causa y se ha de investigar, si también otros lo hayan de pedir.

26.- EL MISMO; *Digesto, libro XVI*.- Uno, de quien era la propiedad sobre un esclavo, habiendo sido instituido heredero el usufructuario, legó a otro el mismo esclavo; no puede el heredero utilizar la excepción de dolo malo, si el legatario quisiera reivindicar su esclavo no habiéndosele dejado el usufruto al heredero.

27.- CELSO; *Digesto, libro XXXIV*.- Si se hubiera legado esto o aquello, hay un solo legado; si bajo condiciones contrarias se legó esto y aquello, creemos que hay un solo legado; y no importa que sean diversas personas las de los herederos y las de aquellos a quienes se hizo el legado, como si así se hizo el legado: «si Nerva hubiere sido hecho Cónsul, déle el heredero Ticio un fundo a Atcio; y si Nerva lo hubiere sido hecho Cónsul, déle ciento a Mevio el heredero Seyo».

28.- MARCELO; *Digesto, libro XXIX*.- No siendo

Cum patronus ex debita parte institutus fideicommissum relictum ab eo praestare non cogitur: si omiserit institutionem, qui eam partem vindicant utrum eodem modo retinere an vero praestare debeant fideicommissum? Et magis est deberi fideicommissum, quoniam quod illius personae praestaretur, hoc nequaquam ad alium pertinere deberet.

29.- CELSUS; *libro XXXVI, digestorum*.- Pater meus referebat, cum esset in consilio duceni veri consulis, itum in sententiam suam, ut, cum Otacilius Catulus filia ex asse herede instituta liberto ducenta legasset petissetque ab eo, ut ea concubinae ipsius daret, et libertus vivo testatore decessisset et quod ei relictum erat apud filiam remansisset, cogeretur filia id fideicommissum concubinae reddere.

§ 1.- Quod alicuius heredis nominatim fidei committitur, potest videri ita demum dari voluisse, si ille exstisset heres.

§ 2.- Si filio heredi pars eius, a quo nominatim legatum est, adcrecit, non praestabit legatum, quod iure antiquo capit.

30.- CELSUS; *libro XXXVII, digestorum*.- Quidam in testamento ita scripsit: "Rei publicae Graviscaeorum lego in tutelam viae reficiendae, quae est in colonia eorum usque ad viam Aureliam": quaesitum est, an hoc legatum valeat. Iuventius Celsus respondit: propemodum quidem imperfecta est haec scriptura in tutelam Aureliae viae, quia summa adscripta non est: potest tamen videri tanta summa legata, quanta ei rei sufficeret: si modo non apparet aliam fuisse defuncti voluntatem aut ex magnitudine eius pecuniae aut ex mediocritate facultatum, quam testatrix reliquit: tunc enim officio iudicis secundum aestimationem patrimonii et legati quantitas definiri potest.

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

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

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

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

30.- THE SAME; *Digest, Book XXXVII*.- A certain person inserted the following provision in a will: "I bequeath to the Republic of the Graviscae, for the purpose of repairing a road which extends from their colony to the Aurelian Way." The question arose whether this legacy was valid. Iuventius Celsus answered: "This document is to a certain extent defective, so far as it relates to the maintenance of the Aurelian Way, for the reason that the amount is not stated. Still, it can sometimes be held that a sum sufficient for the purpose was bequeathed, provided that it does not appear that the intention of the deceased was otherwise; either because of the large amount required, or on account of the moderate

obligado el patrono, instituido heredero en la parte debida, a entregar el fideicomiso dejado a su cargo, si hubiere prescindido de la institución, ¿deberán los que reivindicán esta parte retenerlo del mismo modo, o entregar el fideicomiso? Y es más cierto, que se debe el fideicomiso, porque lo que se le entregase a la persona de él, esto, de ninguna manera debería pertenecerle a otro.

29.- CELSO; *Digesto, libro XXXVI*.- Refería mi padre, que siendo del consejo del Cónsul Duceno Vero, se siguió su dictamen, para que, habiendo Otacilio Catulo legado, siendo su hija instituida heredera de as, doscientos a un liberto, y habiéndole pedido a este que se los diese a la concubina del mismo, y habiendo fallecido el liberto en vida del testador, y habiendo quedado en poder de la hija lo que a aquel se le había dejado, fuese obligada la hija a entregar este fideicomiso a la concubina.

§ 1.- Lo que se encomienda expresamente a la fidelidad de algún heredero, se puede considerar que se quiso que se diera solamente si aquel hubiese quedado heredero.

§ 2.- Si la parte de aquel a cuyo cargo se dejó expresamente un legado acrece al hijo heredero, no pagará el legado, que adquiere por el antiguo derecho.

30.- EL MISMO; *Digesto, libro XXXVII*.- Uno escribió así en su testamento: «hago un legado a la República de los Graviscaeos para el cuidado de la reparación de la vía que hay en su colonia hasta la vía Aurelia» y se preguntó, si será válido este legado. Juvencio Celso respondió: ciertamente que es algo imperfecta esta cláusula: «para el cuidado de la vía Aurelia», porque no hay señalada cantidad. Sin embargo, se puede considerar legada tanta suma cuanta fuese suficiente para este objeto si es que no aparece que fue otra la voluntad del difunto, o por la grande importancia de tal cantidad, o por la mediocre cuantía de bienes, que dejó la testadora; porque entonces puede ser determinada la cantidad por

31.- MODESTINUS; *libro I, regularum*.- Si quis quos non poterit manumittere legavit, ut manumitterentur, nec legatum nec libertas valet.

32.- MODESTINUS; *libro IX, regularum*.- Omnia, quae testamentis sine die vel condicione adscribuntur, ex die aditae hereditatis praestentur.

§ 1.- Fundum ante condicionem completam ab herede non traditum, sed a legatario detentum heres vindicare cum fructibus poterit.

§ 2.- Cum ita legatur: "Illi hoc amplius fundum illum cum omnibus rebus, quae in eodem fundo erunt", mancipia quoque continentur.

§ 3.- Cum ita legatur: "Quidquid in horreo meo erit" et is cui legatum est ex rebus non legatis ignorante eo ampliandi legati sui gratia in horreum intulerit, quod illatum est non videtur esse legatum.

§ 4.- Quod a legatario petatum erat, ut alii restitueret, si legatarius decedat, heres quoque eius id quod legatum est praestare debet.

§ 5.- Species nominatim legatae si non repperiantur nec dolo heredis deesse probentur, peti ex eodem testamento non possunt.

§ 6.- In fideicommisso quod familiae relinquitur hi ad petitionem eius admitti possunt, qui nominati sunt, aut post omnes eos extinctos qui ex nomine defuncti fuerint eo tempore, quo testator moreretur, et qui ex his primo gradu procreati sint, nisi specialiter defunctus ad ultiores voluntatem suam extenderit.

33.- MODESTINUS; *libro IX, responsorum*.- Res-

circumstances of the testatrix. It will, then, be the duty of the judge to fix the amount of the legacy, in accordance with the appraised value of the estate."

31.- MODESTINUS; *Rules, Book I*.- Where anyone makes a bequest for the manumission of slaves, who himself has not the power to manumit them, neither the legacy nor the grant of freedom will be valid.

32.- THE SAME; *Rules, Book IX*.- Everything which is left by will without fixing a time or prescribing a condition must be delivered upon the day when the estate is entered upon.

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

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

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

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

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

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

33.- THE SAME; *Opinions, Book IX*.- Legatees

ministerio del juez conforme a la estimación del patrimonio y del legado.

31.- MODESTINO; *Reglas, libro I*.- Si uno lego los esclavos que no podía manumitir, para que fuesen manumitidos, no son válidos ni el legado, ni la libertad.

32.- EL MISMO; *Reglas, libro IX*.- Todo lo que se consigna en los testamentos sin día o condición, se ha de pagar desde el día en que fue adida la herencia.

§ 1.- El heredero podrá reivindicar con los frutos, antes de haberse cumplido la condición, el fundo no entregado por el heredero, pero detentado por el legatario.

§ 2.- Cuando se lega así: «además de esto, a aquel tal fundo con todas las cosas que en el mismo fundo hubiere», se comprenden también los esclavos.

§ 3.- Cuando se deja así un legado: «todo lo que hubiere en mi granero», y aquel a quien se le hizo el legado hubiere introducido en el granero, ignorándolo el testador, cosas de las no legadas, para aumentar su legado, no se considera legado lo que se introdujo.

§ 4.- Lo que se le había pedido al legatario que lo restituyese a otro, si falleciera el legatario, también su heredero deberá entregarlo como legado.

§ 5.- Las especies legadas determinadamente, si no se hallaran, ni se probase que faltan por dolo del heredero, no pueden ser pedidas en virtud del mismo testamento.

§ 6.- Tratándose de un fideicomiso, que se deja a la familia, pueden ser admitidos a la petición del mismo los que fueron nombrados, o, después de haber muerto todos estos, los que hubiere del nombre del testador al tiempo en que el testador muriese, y los que de ellos hayan sido procreados en el primer grado, a no ser que el difunto hubieren extendido especialmente su voluntad a otros más lejanos.

33.- EL MISMO; *Respondió en el libro IX de las*

pondit: legatorum petitio adversus heredes pro partibus hereditariis competit nec pro his qui solvendo non sunt onerari coheredes oportet.

§ 1.- Qui plures heredes instituit, testamento a quibusdam nominatim reliquit legata, postea codicillos ad omnes heredes scripsit: quaero, quae legata debeant. Modestinus respondit: cum manifeste testator testamento expresserit, a quibus heredibus legata praestari vellet, licet codicillos ad omnes scripserit, apparet tamen ea quae codicillis dedit ab his praestanda esse, quos munere fungi debere testamento suo ostendit testator.

34.- MODESTINUS; *libro X, responsorum*.- Titia cum testamento facto decederet heredibus institutis Maevia et Sempronio filiis suis ex aequis partibus, petit a Maevia, ut Stichum servum suum manumitteret, in haec verba: "A te autem, Maevia filia carissima, peto, ut Stichum servum tuum manumittas, cum in ministerio tuo tot capita servorum tibi his codicillis legavero", nec legavit. Quaero, quid his verbis relictum videatur, cum, ut supra cautum est, duobus heredibus institutis defunctam testatricem et mancipia hereditaria duarum personarum fuisse, et codicillis nihil relictum sit de praestandis mancipiis nec possit utile fideicommissum putari, quod datum non sit, cum legasse se dixerit nec adiecerit legati speciem nec ab herede uti praestarentur mancipia petierit. Modestinus respondit ex verbis consultationi insertis Maeviam neque legati neque fideicommissi petitionem habere neque libertatem servo suo dare compelli.

§ 1.- Lucius Titius in testamento suo ita cavit: "Octaviae Stratonice filiae meae dulcissimae salutem. Volo a se ipsa accipiat praedium Gazam cum instrumento eius universo. Octaviano Alexandro filio meo dulcissimo. Volo praecipiat a se ipso massam salicti Comiani cum instrumento quod ibi est universo". Quaero, an huiusmodi scriptura

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

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

34.- THE SAME; *Opinions, Book X*.- Titia, after making a will and appointing her children Maevia and Sempronius heirs to equal shares of her estate, died, and charged Maevia to manumit her slave Stichus, in the following terms: "I ask you, my dear daughter Maevia, to manumit your slave Stichus, since I have bequeathed to you by my codicil so many slaves for your service," but she did not actually make such a bequest. I ask, what seems to have been left by these words? For, as has been above stated the deceased testatrix, having appointed two heirs, the hereditary slaves of the estate belonged to two distinct persons, and since nothing was provided by the codicil with reference to the delivery of the slaves, the trust could not be held to be legal, where it was not really created; as where the testatrix said she made a bequest, but did not add what it consisted of, nor did she charge the heir with the delivery of the slave. Modestinus answered, as a result of the consultation, that Maevia had no right to claim either the legacy or the trust, and could not be compelled to grant freedom to her slave.

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

Respuestas.- La petición de los legados compete contra los herederos con arreglo a las porciones de la herencia, y por los que no son solventes no deben ser gravados los coherederos.

§ 1.- Uno, que instituyó varios herederos en su testamento, dejó legados expresamente a cargo de algunos, y después escribió codicilos para todos los herederos; pregunto, ¿qué legados deberán? Modestino respondió: habiendo expresado claramente el testador en su testamento por qué herederos quería que se pagasen los legados, aunque haya escrito codicilos para todos, aparece, sin embargo, que los que dió en los codicilos deben ser pagados por aquellos que el testador señala en su testamento que deben desempeñar este cargo.

34.- EL MISMO; *Respuestas, libro X*.- Ticia, falleciendo después de haber hecho testamento, habiendo instituido herederos por partes iguales a sus hijos Mevia y Sempronio, le pidió a Mevia que manumitiese a su esclavo Stico, en estos términos: «pero te pido, muy querida hija Mevia, que manumitas a tu esclavo Stico, pues para tu servicio te legaré tantos esclavos en estos codicilos», y no se los legó; pregunto, ¿qué se considerará dejado con estas palabras, puesto que, como antes se ha dicho, la testadora falleció habiendo instituido dos herederos, y los esclavos de la herencia fueron de dos personas, en los codicilos no se dijo nada sobre la entrega de los esclavos, ni se puede considerar útil el fideicomiso, que no se haya dado, habiendo dicho ella que legaba, no habiendo añadido la especie del legado, y no habiéndole pedido al heredero que se entregasen los esclavos? Modestino respondió, que por las palabras insertas en la consulta no tenía Mevia ni la petición del legado, ni la del fideicomiso, ni era compelida a dar la libertad a su esclavo.

§ 1.- Lucio Ticio dispuso así en su testamento: «Salud a Octaviana Stratónica, mi carísimísima hija; quiero que ella reciba de sí misma la casa de campo Gaza con todas sus pertenencias. A Octaviano Alejandro, mi carísimísimo hijo, salud. Quiero que particularmente él reciba de sí mismo el conjunto de las casas de campo estériles con todas sus depen-

integrum praedium singulis datum esse videatur an vero partem hereditariam dumtaxat contineat, cum inutiliter a semet ipso quemque eorum quam habebat partem accipere voluit. Modestinus respondit non sic interpretandam scripturam de qua quaeritur, ut fideicommissum inutile fiat. Item quaero, si integrum praedium relictum esse videatur, an pretium portionis fratri et coheredi solvendum sit, ut hoc ipso, quod a semet ipso accipere praecepit, pretio illato integrum habere eum voluerit. Item respondit ad solutionem pretii fideicommissarium minime compellendum.

§ 2.- Lucia Titia intestata moriens a filiis suis per fideicommissum alieno servo domum reliquit: post mortem filii eius idem qui heredes cum diviserunt hereditatem matris, diviserunt etiam domum, in qua divisione dominus servi fideicommissarii quasi testis adfuit: quaero, an fideicommissi persecutionem adquisitam sibi per servum eo, quod interfuit divisioni, amisisse videatur. Modestinus respondit fideicommissum ipso iure amissum non esse, quod ne repudiari quidem potest: sed nec per doli exceptionem summovetur, nisi evidenter apparuerit omittendi fideicommissi causa hoc eum fecisse.

§ 3.- Gaius Seius cum domum suam haberet et in praetorio uxoris suae transtulisset, quasdam res de domo sua in eodem praetorio transtulit ibique post multos dies decedens testamento uxorem suam heredem et alios complures reliquit. Quo testamento significavit verba, quae infra scripta sunt: "In primis sciant heredes mei nullam pecuniam esse penes uxorem meam, sed nec aliud quicquam: ideoque hoc

whether, by an instrument of this description, the testator should be considered to have given to each of his heirs an entire tract of land, or whether he merely included in the devise the shares of his estate to which they were legally entitled, as he could not properly charge each one of them with a legacy a portion of which he or she already had. Modestinus answered that the document in question should not be interpreted in such a way as to render the trust of no effect. I also ask, in case it should be decided that the land entirely belonged to one of the heirs, whether the value of the share of the brother and co-heir should be paid, because as the testator wished him to have the entire property in the land, he seemed to have prescribed the condition that the co-heir should be paid the value of his share. He answered that the beneficiary of the trust could, by no means, be compelled to pay the co-heir the value of his or her share.

§ 2.- Lucia Titia, having died intestate, charged her children, by a trust, to deliver a certain house to a slave belonging to another. After her death, her children, who were also her heirs, when dividing their mother's estate, also divided the above-mentioned house, at which division the master of the slave who was the beneficiary of the trust was present as a witness. I ask, if, for the reason that he was present at the division of the property, he should be considered to have lost the right to demand the execution of the trust, acquired by him through his slave. Modestinus answered that the trust was not annulled by operation of law, and it could not even be repudiated, nor would the master be barred by an exception on the ground of bad faith, unless it was perfectly evident that he had been present at the division of the property for the purpose of renouncing his rights under the trust.

§ 3.- Gaius Seius, who had a house of his own, went to live in a villa belonging to his wife, and removed certain property to it from his own residence, and having died there a long time afterwards, left his wife and several other persons his heirs by his will, into which he inserted the following clause: "In the first place, let my heirs know that I have no money nor any other property in the hands of my wife, and therefore

dencias»; pregunto, ¿se consideran, que por esta cláusula se le dió a cada uno todo el predio, o contendrá solamente la parte hereditaria, porque inútilmente quiso que cada uno de ellos recibiera de sí mismo la parte que tenía? Modestino respondió, que la cláusula de que se trata, no se ha de interpretar de modo que se haga inútil el fideicomiso. También pregunto, si se considera dejado íntegro el predio, ¿se le ha de pagar al hermano coheredero el precio de la porción, como si, por lo mismo que dispuso que recibiera el predio de sí mismo, hubiere querido que habiéndose pagado el precio lo tenga íntegro? También respondió, que de ningún modo ha de ser compelido al pago el fideicomisario.

§ 2.- Lucia Ticia, al morir intestada, le dejó por fideicomiso a cargo de sus hijos una casa a un esclavo ajeno, y después de su muerte, los mismos hijos de ella, que eran herederos, cuando dividieron la herencia de su madre dividieron también la casa; a cuya división estuvo presente como testigo el dueño del esclavo fideicomisario; pregunto, ¿se considerará que perdió la acción que para perseguir el fideicomiso se adquirió para él por medio del esclavo, por esto, porque asistió a la división? Modestino respondió, que no se perdió de derecho el fideicomiso, que ciertamente no puede ser repudiado; pero tampoco es repelido por la excepción de dolo, a no ser que se viere evidentemente que él hizo esto para renunciar el fideicomiso.

§ 3.- Teniendo Cayo Seyo una casa suya, y habiéndose trasladado a una quinta de su mujer, transportó de su propia casa a la misma quinta algunas cosas, y, falleciendo en ella después de muchos días, dejó en su testamento heredera a su mujer y a otros muchos; en cuyo testamento consignó las palabras, que van escritas a continuación: «en primer lugar, sepan mis herederos, que en poder de mi mujer

nomine eam inquietari nolo". Quaero, an ea, quae vivo eo in praetorio uxoris eius translata sunt, communi hereditati vindicari possint et an secundum verba testamenti praescribi coheredibus possit a parte uxoris defuncti.

Modestinus respondit, si ea, quae in domum seu praetorium uxoris defunctus transtulit, praecipua ad eam pertinere voluit, nihil proponi, cur voluntate ipsius standum non sit. Necesse igitur habet mulier talem voluntatem fuisse testatoris ostendere. Quod nisi fecerit, in hereditate mariti et haec remanere oportet.

§ 4.- Si ea condicione liberto fideicommissum relictum est, ne a filiis eius recederet, et per tutores factum est, quo minus condicionem impleret, iniquum est eum, cum sit inculpatus, emolumento fideicommissi carere.

§ 5.- Qui invita filia de dote egerat, decessit eadem illa exheredata, filio herede instituto et ab eo fideicommissum filiae dotis nomine reliquit: quaero, quantum a fratre mulier consequi debeat.

Modestinus respondit: quod in primis est non esse consumptam de dote actionem mulieri, cum patri suo non consenserit, utique non ignoras. Sic enim res explicatur, ut, si quidem maior quantitas in dote fuit, illius petitione sit tantummodo mulier contenta: quod si in summa dotis nomine legata amplius sit quam in dote principali, compensatio fiat usque ad eandem summam quae concurrat et id tantummodo, quod excedit in sequenti summa, ex testamento consequatur: non est enim verisimile patrem duplici praestatione dotis filium eundemque heredem onerare voluisse, praeterea cum putaverit se efficaciter licet non consentiente filia instituisse adversus generum de dote actionem.

I do not wish her to be annoyed on this account." I ask whether the property which, during the lifetime of the testator, was transferred to the residence of his wife, can be claimed by his estate; or, in accordance with the terms of the will, the co-heir can be prevented from sharing it with the widow of the deceased.

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

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

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

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

no hay ningún dinero, pero tampoco ninguna otra cosa; y por lo tanto, no quiero que con este motivo sea molestada»; pregunto, ¿las cosas que viviendo él fueron trasladadas a la quinta de su mujer, podrán ser reivindicadas para la herencia común, y podrán ser prescritas contra los coherederos, conforme a las palabras del testamento, por la parte de la mujer del difunto? Modestino respondió, que si lo que el difunto trasladó a la casa o a la quinta de la mujer quiso que le perteneciera especialmente a ella, nada se expone para que no se haya de estar a la voluntad del mismo. Así, pues, la mujer tiene necesidad de probar que tal fue la voluntad del testador; y si no hiciera esto, también deben quedar estas cosas en la herencia del marido.

§ 4.- Si a un liberto se le dejó un fideicomiso con esta condición, que no se separase de sus hijos, y por los tutores se hizo de modo que no cumpliera la condición, es injusto, que, no siendo culpable, carezca del emolumento del fideicomiso.

§ 5.- Un padre, que contra la voluntad de la hija había ejercitado la acción de dote, falleció habiéndola desheredado, y habiendo instituido heredero a un hijo, y a cargo de este dejó un fideicomiso para la hija por razón de la dote; pregunto, ¿cuanto debe obtener del hermano la mujer?

Modestino respondió, que, en primer lugar, no se extinguió para la mujer la acción de dote, no habiéndole prestado su consentimiento a su padre, ciertamente no ignorándolo. Porque el caso se explica de modo, que, si verdaderamente fue mayor la cantidad de la primera dote, se contente la mujer solamente con la petición de esta; pero si la suma legada por razón de la dote fuera mayor que la de la dote principal, se haga la compensación hasta la misma suma a que alcanza, y consiga en virtud del testamento solamente lo que hay de exceso en la siguiente suma; porque no es verosímil que el padre haya querido gravar a su hijo y heredero con la doble prestación de la dote, principalmente habiendo creído que él intentó eficazmente contra el yerno la acción de dote, aun no consintiéndolo la hija.

§ 6.- Lucius Titius relictis duobus filiis suis heredibus diversi sexus institutis addidit caput generale, uti legata et libertates ab his heredibus suis praestarentur: quadam tamen parte testamenti a filio petit, ut omne onus legatorum in se sustineret, in hunc modum: "Ea quaecumque in legatis reliqui vel dari praecepi, ab Attiano filio meo et herede dari praestarique iubebo", deinde subiecit in praeceptione relinquenda filiae suae haec verba: "Paulinae filiae meae dulcissimae si quid me vivo dedi comparavi, sibi habere iubeo: cuius rei quaestionem fieri veto. Et peto a te, filia carissima, ne velis irasci, quod amplio rem substantiam fratri tuo reliquerim, quem scis magna onera sustentaturum et legata quae supra feci praestaturum".

Quaero, an ex his extremis verbis, quibus cum filia sua in testamento pater locutus est, effectum videatur, ut hereditariis actionibus id est omnibus filium suum oneraverit, an vero iam solum propter onus legatorum locutus esse videatur, petitiones autem hereditariae in utrumque heredem creditoribus dari debeant. Modestinus respondit, ut actiones creditorum filius solus excipiat, iussisse testatorem non proponi.

§ 7.- Titia cum nuberet Gaius Seio, dedit in dote praedia et quasdam alias res, postea decedens codicillis ita cavuit: Gaium Seium virum meum commendo tibi, filia, cui volo dari in usum per vitam eius et fructum partem vici Nacolenorum, quam antea ei in dote dedi, una cum hominibus in dote illatis, neque ullo modo eum de dote inquietari: nam post eius obitum ea erunt tua liberorumque tuorum]: praeterea alia multa huic eidem marito legavit, ut quamdiu viveret haberet.

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

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

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

§ 6.- Lucio Ticio, habiendo dejado instituidos herederos a dos hijos suyos de diverso sexo, añadió una cláusula general, para que por estos herederos suyos se diesen los legados y las libertades; pero en cierta parte del testamento le pidió a su hijo que soportase toda la carga de los legados, en esta forma: «mandaré que todo lo que dejé en legados, o que mandé que se diese, se dé y se entregue por Attiano, mi hijo y heredero»; después, al dejar un prelegado a su hija, añadió estas palabras: «si viviendo yo le di o le compré alguna cosa a Paulina, mi carísimísima hija, mando que la tenga para ella, sobre lo que prohíbo que se promueva cuestión; y te pido, queridísima hija, que no quieras llevar a mal que yo haya dejado más bienes a tu hermano, que sabes ha de soportar grandes cargas, y ha de pagar los legados que antes he hecho».

Pregunto, en virtud de estas últimas palabras, con que el padre habló con su hija en el testamento, ¿se considerará haberse efectuado que haya gravado a su hijo con las acciones de la herencia, esto es, con todas ellas, o se considerará que habló ya solamente respecto al gravamen de los legados, pero que las peticiones de la herencia deban darse contra ambos herederos a los acreedores? Modestino respondió, que nada se exponía por lo que el testador hubiese mandado que solo su hijo con-testase las acciones de los acreedores.

§ 7.- Ticia, al casarse con Cayo Seio, dio en dote predios y algunas otras cosas; al fallecer después dispuso así en los codicilos: «te recomiendo, hija, a Cayo Seio mi marido, a quien quiero que se le dé para usufruto durante su vida la participación de la aldea de Nacleos, que antes dije le di en dote con las cosas que se agregan a la dote; y que por nada se le moleste respecto a la dote, porque después de su muerte estas cosas serán tuyas y de tus hijos;» además le legó otras muchas cosas a este mismo marido, para que las tuviera mientras viviese;

Quaero, an propter haec, quae codicillis ei extra dotem relicta sunt, possit post mortem Gaii Seii ex causa fideicommissi petitio filiae et heredi Titiae competere et earum rerum nomine, quas in dotem Gaius Seius accepit. Modestinus respondit: licet non ea verba proponuntur, ex quibus filia testatricis fideicommissum a Gaio Seio, postquam praestiterit quae testamento legata sunt, petere possit, tamen nihil prohibet propter voluntatem testatricis post mortem Gaii Seii fideicommissum peti.

35.- MODESTINUS; *libro XVI, responsorum.*- Respondit legatis uxori quae usus eius causa parata sunt, eos servos ad eam non pertinere, qui non proprii ipsius, sed communis usus causa parati sunt.

36.- MODESTINUS; *libro III, pandectarum.*- Legatum est donatio testamento relicta.

37.- IAVOLENUS; *libro I, ex Cassio.*- Qui testamento inutiliter manumissus est legari eodem testamento potest, quia totiens efficacior est libertas legato, quotiens utiliter data est.

38.- IAVOLENUS; *libro II, ex Cassio.*- Quod servus legatus ante aditam hereditatem adquisiit, hereditati acquirit.

39.- IAVOLENUS; *libro III, ex Cassio.*- Si areae legatae post testamentum factum aedificium impositum est, utrumque debetur et solum et superficium.

40.- IAVOLENUS; *libro I, epistularum.*- Si duobus servis meis eadem res legata est et alterius servi nomine ad me eam pertinere nolo, totum ad me pertinebit, quia partem alterius servi per alterum servum adqui, perinde ac si meo et alterius servo esset legatum.

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

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

36.- THE SAME; *Pandects, Book III.*- A legacy is a donation left by a will.

37.- JAVOLENUS; *On Cassius, Book I.*- Where a slave has been illegally manumitted by a will, he can be bequeathed by the same will, because freedom only takes precedence over a legacy where it was granted in accordance with law.

38.- THE SAME; *On Cassius, Book II.*- Whatever a slave, who was bequeathed, acquired before the estate was entered upon, he acquires for the estate.

39.- THE SAME; *On Cassius, Book III.*- When land which is not built upon is devised, and, after the will was executed, a building is erected thereon, both the ground and the building must be delivered by the heir.

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

Pregunto, ¿por razón de lo que además de la dote se le dejó en los codicilos, podrá competeler a la hija y al heredero de Ticia acción para pedir después de la muerte de Cayo Seyo por causa del fideicomiso, y por razón de las cosas que Cayo Seyo recibió en dote? Modestino respondió: aunque no se alegan palabras por las cuales pueda pedir la hija de la testadora el fideicomiso a Cayo Seyo después que hubiere pagado lo que se legó en el testamento, sin embargo, nada impide que conforme a la voluntad de la testadora se pida el fideicomiso después de la muerte de Cayo Seyo.

35.- EL MISMO; *respondió en el libro XVI. de las Respuestas.*- Habiéndose legado a la mujer las cosas que se destinaron para su uso, no le pertenecen los esclavos que no se adquirieron por causa de uso de ella misma, sino de uso común.

36.- EL MISMO; *Pandectas, libro III.*- El legado es una donación dejada por testamento.

37.- JAVOLENO; *Doctrina de Cassio, libro I.*- El que inútilmente fue manumitido en un testamento, puede ser legado en el mismo testamento, porque siempre y cuando ha sido dada útilmente, es más eficaz la libertad que el legado.

38.- EL MISMO; *Doctrina de Cassio, libro II.*- Lo que un esclavo legado adquirió antes de adida la herencia, lo adquiere para la herencia.

39.- EL MISMO; *Doctrina de Cassio, libro III.*- Si en un solar legado se levantó un edificio después de hecho el testamento, se deberá una y otra cosa, así el solar, como lo edificado.

40.- EL MISMO; *Epístolas, libro I.*- Si la misma cosa fue legada a dos esclavos míos, y no quiero que ella me pertenezca a nombre de uno de los esclavos, me pertenecerá la totalidad, porque adquiero por medio de un esclavo la parte del otro esclavo, lo mismo que si el legado se hubiese hecho a un esclavo mío y al de otro.

41.- IAVOLENUS; *libro VII, epistularum*.- "Maevio fundi partem dimidiam, Seio partem dimidiam lego: eundem fundum Titio lego". Si Seius decesserit, pars eius utrique adcrebit, quia cum separatim et partes fundi et totus legatus sit, necesse est, ut ea pars quae cessat pro portione legati cuique eorum, quibus fundus separatim legatus est, adcrebit.

§ 1.- A me herede uxori meae ita legatum est: "Quidquid propter Titiam ad Seium dotis nomine pervenit, tantam pecuniam Seius heres meus Titiae det":

Quaero, an deductiones impensarum fieri pos-sint, quae fierent, si de dote ageretur. Respondit: non dubito, quin uxori suae quod ita legatum est: "A te heres peto, quidquid ad te pervenisset, ut tantum ei dares", tota dos sine ratione deductionis impensarum mulieri debeatur.

Non autem idem ius servari debet ex testamento extranei, quod servatur in testamento viri, qui dotem uxori relegavit. Haec enim taxationis loco habenda est "quidquid ad te pervenit": illic autem, ubi vir uxori relegat, id videtur legare, quod in iudicio dotis mulier consecutura fuerit.

42.- IAVOLENUS; *libro XI, epistularum*.- Cum ei, qui partem capiebat, legatum esset, ut alii restitueret, placuit solidum capere posse.

43.- POMPONIUS; *libro III, ad Quintum Mucium*.- Si ita relictum fuerit: "Quantum heres meus habebit, tantum Tithaso dari volo", pro eo est, quasi ita sit scriptum: "Quantum omnes heredes habebunt".

§ 1.- Quod si ita fuerit: "Quantum unus heres habebit, tantum Tithaso heredes meos dare volo", minor pars erit accipienda, quae venit in legato.

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

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

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

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

42.- THE SAME; *Epistles, Book XI*.- Where a legacy is bequeathed to a person who can only receive a portion of the same, with the understanding that it is to be delivered to a third party, it has been decided that he can take the whole legacy.

43.- POMPONIUS; *On Quintus Mucius, Book III*.- Where a legacy was bequeathed as follows, "I wish that as much be given to Tithasus as my heir will have," it is the same as if it had been said: "As much as all my heirs will have."

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

41.- EL MISMO; *Epístolas, libro VII*.- «Lego a Mevio la mitad de un fundo, a Seyo la otra mitad, y lego el mismo fundo a Ticio;» si hubiere fallecido Seyo, su parte le acrece a ambos, porque, habiéndose legado por separado así las partes del fundo, como todo el legado, es necesario que aquella parte, que queda vacante, le acrezca, a proporción del legado, a cada uno de aquellos a quienes por separado les fue legado el fundo.

§ 1.- Siendo yo heredero, a mi cargo se le legó así a mi mujer: «déle a Ticia mi heredero Seyo tanta cantidad cuanta por razón de Ticia, fue a poder de Seyo a título de dote;»

Pregunto, ¿acaso se podrán hacer las deducciones de los gastos, que se harían, si se ejercitase la acción de dote? Respondió: no dudo, que, habiéndose hecho así el legado a su mujer: «te pido, heredero, que le des tanto cuanto hubiese ido a tu poder,» se le deba a la mujer toda la dote sin la cuenta de la deducción de los gastos.

Mas no se debe observar en virtud del testamento de un extraño el mismo derecho, que se observa en el testamento de un marido, que le legó a su mujer la dote; porque esta cláusula, «todo lo que fue a tu poder,» ha de ser considerada en calidad de tasación, pero en aquel caso, cuando el marido le lega a su mujer, se considera que le lega lo que la mujer hubiere de conseguir con la acción de dote.

42.- EL MISMO; *Epístolas, libro XI*.- Se determinó, que, cuando al que adquiría una parte se le hubiese hecho un legado, para que lo restituyese a otro, puede adquirirlo todo.

43.- POMPONIO; *Comentarios a Quinto Mucio, libro III*.- Si se hubiere legado así: «quiero que se dé a Titaso tanto cuanto tendrá mi heredero,» es lo mismo que si se hubiera escrito de este modo: «cuanto tendrán todos mis herederos.»

§ 1.- Pero si se hubiere legado así: «quiero que mis herederos den a Titaso tanto cuanto tendrá uno de los herederos,» se habrá de entender que es la parte menor la que viene comprendida en el legado.

§ 2.- Pegasus solitus fuerat distinguere, si in diem fideicommissum relictum sit, veluti post annos decem, interesse, cuius causa tempus dilatum sit, utrumne heredis, quo casu heredem fructum retinere debere, an legatarii, veluti si in tempus pubertatis ei qui impubes sit fideicommissum relictum sit, tunc enim fructus praestandos et antecedentis temporis. Et haec ita intellegenda sunt, si non nominatim adiectum est, ut cum incremento heres fideicommissum praestet.

§ 3.- Si ita scriptum sit: "Decem aut quindecim heres dato", pro eo est ac si decem sola legata sint: aut si ita sit: "Post annum aut post biennium, quam ego decessero, heres dato", post biennium videtur legatum, quia heredis esset potestas in eligendo.

44.- POMPONIUS; *libro IV, ad Quintum Mucium*.- Si pluribus heredibus institutis ita scriptum sit: "Heres meus damnas esto dare aureos quinque", non quilibet heres, sed omnes videbuntur damnati, ut una quinq̄ue dent.

§ 1.- Si ita legatum fuerit: "Lucius Titius heres meus Tithaso quinque aureos dare damnas esto", deinde alio loco ita: "Publius Maevius heres meus Tithaso quinque aureos damnas esto dare", nisi Titius ostenderit adimendi causa a Publio legatum esse relictum, quinos aureos ab utroque accipiet.

45.- POMPONIUS; *libro VIII, ad Quintum Mucium*.- Si ita sit scriptum: "Filiabus meis centum aureos do", an et masculini generis et feminini liberis legatum videatur? Nam si ita scriptum esset: "Filiis

intended.

§ 2.- Pegasus was accustomed to make a distinction where a trust was bequeathed for a certain time, for instance, after ten years; and he held that it made a difference for whose benefit this time had been fixed, whether in favor of the heir, in which case he was entitled to retain the profits of the property, or in favor of the legatee, for example, where the trust was left to take effect at the time of puberty, when the beneficiary was under that age; for in this case the profits of the preceding period must be delivered. These principles are understood to apply where it was specifically added by the testator that the heir must deliver the property subject to the trust, together with all its increase.

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

44.- THE SAME; *On Quintus Mucius, Book IV*.- Where several heirs were appointed, and the legacy was bequeathed as follows, "Let my heir be charged with the payment of five aurei," not any one heir, but all of them together, are considered to be charged with the payment of five aurei.

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

45.- THE SAME; *On Quintus Mucius, Book VIII*.- Where the following was inserted into a will, "I give a hundred aurei to my daughters," will the legacy be considered to have been equally bequeathed to the

§ 2.- Pegaso había solido hacer esta distinción, que si se hubiera dejado un fideicomiso para cierto día, por ejemplo, para después de diez años, importaba saber por causa de quién se haya diferido el tiempo, si por la del heredero, en cuyo caso debe el heredero retener los frutos, o por la del legatario, como si el fideicomiso hubiera sido dejado para el tiempo de la pubertad a uno que fuese impúbero; porque entonces se han de entregar los frutos también del tiempo anterior; y esto se ha de entender así, si expresamente no se añadió que el heredero entregue el fideicomiso con sus aumentos.

§ 3.- Si se hubiera escrito así: «dé el heredero diez o quince,» es lo mismo que si se hubieran legado solo diez; o si de este modo: «dé el heredero después de un año, o después de un bienio, que yo hubiere fallecido,» se considera hecho el legado para después del bienio, porque sería del heredero la facultad de elegir.

44.- EL MISMO; *Comentarios a Quinto Mucio, libro IV*.- Si habiendo sido instituidos muchos herederos se hubiera escrito así: «esté condenado mi heredero a dar cinco áureos,» no se considerará que están condenados cada uno de los herederos, sino todos, de suerte que juntos den los cinco.

§ 1.- Si se hubiere legado así: «esté condenado mi heredero Lucio Ticio a darle cinco áureos a Titaso,» y después, en otro lugar, de este modo: «esté condenado mi heredero Publio Mevio a dar cinco áureos a Titaso,» si Ticio no probare que se dejó el legado a cargo de Publio por causa de revocación, aquel recibirá de ambos cinco áureos.

45.- EL MISMO; *Comentarios a Quinto Mucio, libro VIII*.- Si se hubiera escrito así: «les doy a mis hijas cien áureos,» ¿se considerará hecho el legado tanto a los hijos del género masculino, como a los del

meis hosce tutores do", responsum est etiam filiabus tutores datos esse. Quod non est ex contrario accipiendum, ut filiarum nomine etiam masculi contineantur: exemplo enim pessimum est feminino vocabulo etiam masculos contineri.

§ 1.- Si sub condicione vel ex die certa nobis legatum sit, ante condicionem vel diem certum repudiare non possumus: nam nec pertinet ad nos, antequam dies veniet vel condicio exsistat [exstat].

§ 2.- Si pater filiae suae testamento aureos tot heredem dare iusserit, ubi ea nupsisset, si filia nupta sit, cum testamentum fit, sed absente patre et ignorante, nihilo minus legatum debetur: si enim hoc pater non ignorabat, videtur de aliis nuptiis sensisse.

46.- PROCULUS; *libro V, epistularum*.- Si scripsisset qui legabat: "Quidquid mihi Lucium Titium dare facere oportet, Sempronio lego" nec adiecit "praesens in diemve", non dubitarem, quantum ad verborum significationem attineret, quin ea pecunia comprehensa non esset, cuius dies moriente eo, qui testamentum fecisset, nondum venisset. Adiciendo autem haec verba "praesens in diemve" aperte mihi videtur ostendisse eam quoque pecuniam legare voluisse.

47.- PROCULUS; *libro VI, epistularum*.- Sempronius Proculus nepoti suo salutem. Binae tabulae testamenti eodem tempore exemplarii causa scriptae (ut volgo fieri solet) eiusdem patris familias proferuntur: in alteris centum, in alteris quinquaginta aurei legati sunt Titio: quaeris, utrum [centum] et quinquaginta aureos an centum dumtaxat habiturus sit. Proculus respondit: in hoc casu magis heredi parcendum est ideoque utrumque legatum nullo modo debetur, sed tantummodo quinquaginta aurei.

male and female children ? For if it had been left as follows, "I appoint So-and-So guardians of my sons," it has been held that guardians were also appointed for the daughters. On the other hand, it should be understood that males are not included under the term "daughters," for it would establish a very bad precedent for males to be included in a word which designates females.

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

§ 2.- If a father by will directs his heir to pay a certain sum of money to his daughter when she marries, or if she should be already married when the will is made but her father was absent at the time and not aware of the fact, the legacy, nevertheless, will be due. For if her father was aware of it, he is held to have intended to have left the legacy with a view to some other marriage.

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

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

femenino? Porque si se hubiese escrito de este modo: «les doy a mis hijos estos tutores,» se respondió, que los tutores fueron dados también para las hijas; lo que no se ha de admitir en el caso contrario, de modo que con el nombre de hijas se comprendan también los varones, porque es de pésimo ejemplo, que con un vocablo femenino se comprenda también a los masculinos.

§ 1.- Si se nos hubiese hecho un legado bajo condición o desde cierto día, no podemos repudiarlo antes de la condición o del cierto día, porque no nos pertenece antes que llegue el día, o que se cumpla la condición.

§ 2.- Si el padre hubiere mandado en el testamento, que el heredero le dé tantos áureos a su hija, luego que esta se hubiese casado, si la hija estuviera casada cuando se hace el testamento, pero el padre se hallara ausente y lo ignorase, se debe, sin embargo, el legado; porque el padre, si no ignoraba esto, parece que se refirió a otras nupcias.

46.- PRÓCULO; *Epístolas, libro V*.- Si el que legaba hubiese escrito: «lego a Sempronio todo lo que Lucio Ticio debe darme o hacerme,» y no añadió, «actualmente o para tal día,» yo no dudaría, en cuanto atañe a la significación de las palabras, que no habría sido comprendido el dinero, cuyo vencimiento no hubiera llegado todavía al morir el que hubiese hecho el testamento; pero añadiendo estas palabras: «actualmente o para tal día,» me parece que claramente indicó que quiso legar también este dinero.

47.- EL MISMO; *Epístolas, libro VI*.- Sempronio Próculo a su nieto, salud. Se presentan dos tablas del testamento del mismo padre de familia, escritas al mismo tiempo para tener copia, como se suele hacer, y en una se le legaron a Ticio cien áureos, y en otra cincuenta; preguntas si habrá de tener también los cincuenta áureos, o solamente los ciento. Próculo respondió: en este caso, más bien se ha de favorecer al heredero, y por lo tanto, de ningún modo se deben ambos legados, sino solamente los cincuenta áureos.

48.- PROCULUS; *libro VIII, epistularum*.- Licinnius Lucusta Proculo suo salutem. Cum faciat condicionem in releganda dote, ut, si mallet uxor mancipia quae in dotem dederit quam pecuniam numeratam, recipere, si ea mancipia uxor malit, numquid etiam ea mancipia, quae postea ex his mancipiis nata sunt, uxori debeantur, quaero. Proculus Lucusta suo salutem. Si uxor mallet mancipia quam dotem accipere, ipsa mancipia, quae aestimata in dotem dedit, non etiam partus mancipiorum ei debebuntur.

§ 1.- Bonorum possessione dementis curatori data legata a curatore, qui furiosum defendit, peti poterunt: sed qui petent, cavere debebunt, si hereditas evicta fuerit, quod legatorum nomine datum sit redditu iri.

49.- PAULUS; *libro V, ad legem Iuliam et Papiam*.- Mortuo bove qui legatus est neque corium neque caro debetur.

§ 1.- Si Titio frumentaria tessera legata sit et is decesserit, quidam putant extinguere legatum: sed hoc non est verum, nam cui tessera vel militia legatur, aestimatio videtur legata.

§ 2.- Labeo refert agrum, cuius commercium non habes, legari tibi posse Trebatium respondisse, quod merito Priscus Fulcinus falsum esse aiebat.

§ 3.- Sed Proculus ait, si quis heredem suum eum fundum, cuius commercium is heres non habeat, dare iusserat ei, qui eius commercium habeat, putat heredem obligatum esse, quod verius est, vel in ipsam rem, si haec in bonis testatoris fuerit, vel si non est, in eius aestimationem.

§ 4.- Si testator dari quid iussisset aut opus fieri aut munus dari, pro portione sua eos praestare, quibus pars hereditatis adcreveret, aequae atque cetera

48.- THE SAME; *Epistles, Book VIII*.- Licinius Lucusta, to his friend Proculus, Greeting. I ask where a husband bequeaths a dowry to his wife, and gives her the choice of receiving slaves which she had given to him by way of dowry rather than money, if she should prefer to have them, and the wife selects the slaves, can she also claim any offspring of said slaves which may have subsequently been born to them? Proculus to his friend Lucusta, Greeting. If the wife should prefer to receive the slaves rather than the money, the slaves themselves that, after having them appraised, she gave as dowry, and not their offspring, will be due to her.

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

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

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

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

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

§ 4.- Where a testator directs something to be paid, or some work to be done, or some service to be performed, it is held that those to whom a part of the

48.- EL MISMO; *Epístolas, libro VIII*.- Licinio Locusta a su amigo Próculo, salud. Poniendo uno al legar la dote la condición, de que si la mujer prefiriese los esclavos que hubiere dado en dote a recibir dinero contado, pregunto, si la mujer prefiriese aquellos esclavos, ¿se le deberán acaso a la mujer también los esclavos que de aquellos esclavos nacieron después? Próculo a su amigo Locusta, salud. Si la mujer prefiriese los esclavos a recibir la dote, se le deberán los mismos esclavos que dio estimados en dote, no también los partos de las esclavas.

§ 1.- Habiendose dado al curador la posesión de los bienes del demente, se podrán pedir los legados al curador que defiende al loco; pero los que los pidiesen deberán dar caución, de que, si se hubiere hecho evicción de la herencia, se habrá de devolver lo que se haya dado a título de legados.

49.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Muerto el buey, que fue legado, no se debe ni el cuero, ni la carne.

§ 1.- Si a Ticio se le hubiera legado un bono de trigo, y él hubiere fallecido, opinan algunos que se extingue el legado, pero esto no es verdad, porque al que se le lega un bono, o un cargo en la milicia, se le considera legado su estimación.

§ 2.- Refiere Labeón, que respondió Trebacio, que se te puede legar un campo cuyo comercio no tienes; lo que con razón decía Prisco Fulcinio que era falso.

§ 3.- Pero opina Próculo, que si uno había mandado que su heredero diese el fundo, cuyo comercio no tenga este heredero, a otro que tuviese su comercio, está obligado el heredero, -lo que es más cierto-, o a la misma cosa, si ésta se hallare en los bienes del testador, o a su estimación, si no se halla.

§ 4.- Si el testador hubiese mandado que se dé, alguna cosa, o que se haga alguna obra, o que se dé, un regalo, se halla establecido que deben cumplirlo

legata, placet.

50.- MARCELLUS; *libro XXVIII, digestorum.*- Ut heredibus substitui potest, ita etiam legatariis. Videamus, an idem fieri possit et cum mortis causa donabitur, ut id promittat ille alteri, si ipse capere non poterit: quod magis est, quia in posterioris quoque persona donatio confertur.

§ 1.- Si Titius mihi Stichum aut decem debeat et legavero tibi Stichum quem mihi debet, placet extinguere legatum decem solutis: et si diversis alii decem, alii Stichus legatus fuerit, ex eventu solutionis legatum valet.

§ 2.- Cum ita legatum est: "Quantam pecuniam heres meus a Titio exegerit, tantam Maevio dato", si sub condicione legatum est, antequam exacta pecunia sit, legatarius agere non potest: quod si statim dies legati cedit, ut Publicius recte putat, legatarius agere potest, ut actiones praestentur.

51.- ULPIANUS; *libro VIII, ad legem Iuliam et Papiam.*- Si ita quis testamento suo cavisset: "Illi quantum plurimum per legem accipere potest dari volo", utique tunc, cum quando capere potuerit, videtur ei relictum. Sed et si dixerit: "Quam maximam partem dare possum, damnas esto heres meus ei dare", idem erit dicendum.

§ 1.- Is cui in tempus liberorum tertia pars relicta est, utique non poterit adoptando tertiam partem consequi.

52.- CLEMENTIUS; *libro III, ad legem Iuliam et*

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

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

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

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

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

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

52.- TERENCEIUS CLEMENS; *On the Lex Julia et*

con arreglo a su porción aquellos a quienes acrecería la parte de la herencia, igualmente que los demás legados.

50.- MARCELO; *Digesto, libro XXVIII.*- Veamos si como se puede substituir a los herederos, así también a los legatarios, y si se podrá hacer lo mismo también cuando se donare por causa de muerte, de modo que él le prometa la cosa a otro, si el mismo no pudiese adquirirla; lo que es más cierto, porque también se hace una donación para la persona de otro posterior.

§ 1.- Si Ticio me debiera a Stico, o diez, y yo te hubiere legado a Stico, que él me debe, está determinado que se extingue el legado, pagados los diez y si se les hubiere legado a varios, a uno los diez, y a otro Stico, es válido el legado por el resultado del pago

§ 2.- Cuando se legó así: «déle mi heredero a Mevio tanto dinero cuanto hubiere cobrado de Ticio,» si se legó bajo condición, no puede reclamar el legatario antes que se haya cobrado el dinero; pero si desde luego comienza a correr el término del legado; puede reclamar el legatario, como acertadamente opina Publicio, que se le cedan las acciones.

51.- ULPIANO; *Comentarios a la ley Julia y Papia, libro VIII.*- Si uno hubiese dispuesto así en su testamento: «quiero que se le dé a aquel todo lo mas que puede adquirir por la ley;» se considera ciertamente que se le dejó para entonces cuando lo hubiere podido adquirir. Pero también se habrá de decir lo mismo, si se hubiere dicho: «esté condenado mi heredero a darle la parte mayor que yo puedo dar.»

§ 1.- Aquel a quien se le dejó la tercera parte para cuando tenga hijos, no podrá ciertamente adquirir la tercera parte adoptándolos.

52.- TERENCEIO CLEMENTE; *Comentarios a la*

Papian.- Non oportet prius de condicione cuiusquam quaeri, quam hereditas legatumve ad eum pertineat.

53.- CLEMENTIUS; *libro IV, ad legem Iuliam et Papian.*- Cum ab uno herede mulieri pro dote compensandi animo legatum esset eaque dotem suam ferre quam legatum maluit, utrum in omnes heredes, an in eum solum, a quo legatum est, actio ei de dote dari debeat, quaeritur. Iulianus in eum primum, a quo legatum sit, actionem dandam putat: nam cum aut suo iure aut iudicio mariti contenta esse debeat, aequum esse eum, a quo ei maritus aliquid pro dote legaverat, usque ad quantitatem legati onus huius aeris alieni sustinere reliqua parte dotis ab heredibus ei praestanda.

§ 1.- Eadem erunt dicenda, si heres instituta pro dote omiserit hereditatem, ut in substitutum actio detur: et hoc verum est.

§ 2.- Sed de legatis et legis Falcidiae ratione belle dubitatur, utrum is, in quem solum dotis actio detur, legata integra ex persona sua debeat, perinde ac si omnes heredes dotem praestarent, an dotem totam in aere alieno computare, quia in eum solum actio eius detur: quod sane magis rationem habere videtur.

54.- CLEMENTIUS; *libro XIII, ad legem Iuliam et Papian.*- Si cui fundus centum dignus legatus fuerit, si centum heredi vel cuilibet alii dederit, uberrimum videtur esse legatum: nam alias interest legatarii fundum potius habere quam centum: saepe enim confines fundos etiam supra iustam aestimationem interest nostra adquirere.

55.- GAIUS; *libro XII, ad legem Iuliam et*

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

53.- THE SAME; *On the Lex Julia et Papia, Book IV.*- Where an heir is charged with a legacy to be paid to the wife of the testator instead of her dowry, with the intention of compensating her therefor, and she prefers to have her dowry rather than the legacy, the question arises whether an action to recover the dowry should be granted her against all the heirs, or only against the one charged with the payment of the legacy. Julianus thinks that the action should first be granted against the one who was charged with the payment of the legacy; for as she ought either to be content with her rights, or with the bequest of her husband, it is only just that he whom her husband charged with the payment of the legacy, instead of her dowry, should sustain the burden of the debt to the amount of the legacy, and that the remaining part of the dowry should be paid by the heirs.

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

§ 2.- It may, however, seriously be doubted, where the legacy and the Falcidian Law are involved, whether he against whom alone an action to recover the dowry is granted will personally be obliged to pay the entire legacy, just as if all the heirs had paid the dowry, or whether the entire dowry should be included in the debts of the estate, because the action for its recovery is granted against him alone. This, indeed, seems to be the most reasonable conclusion.

54.- THE SAME; *On the Lex Julia et Papia, Book XIII.*- Where a tract of land worth a hundred aurei is devised as follows, "If he should pay a hundred aurei to my heir or to anyone else," the legacy is held to be very valuable, for it may be more to the benefit of the legatee to have the land than a hundred aurei, since it is often to our interest to acquire land adjoining our own, for a sum even above its just appraisalment.

55.- GAIUS; *On the Lex Julia et Papia, Book XII.*-

ley Julia y Papia, libro III.- No deben hacerse investigaciones sobre la condición de cualquiera antes que a él le pertenezca la herencia o el legado.

53.- EL MISMO; *Comentarios a la ley Julia y Papia, libro IV.*- Cuando a cargo de uno de los herederos se le hubiese hecho un legado a una mujer con ánimo de compensarle por la dote, y ella hubiere preferido obtener su dote más bien que el legado, se pregunta si se deberá dar la acción de dote contra todos los herederos, o solo contra aquel a cuyo cargo se hizo el legado. Juliano opina, que se ha de dar la acción primeramente contra aquel a cuyo cargo se haya hecho el legado; pues debiendo contentarse ella o con su propio derecho, o con la disposición del marido, es justo que aquel, a cuyo cargo le había legado el marido alguna cosa por la dote, soporte la carga de esta deuda hasta la cantidad del legado, debiéndosele pagar por los herederos la restante parte de la dote.

§ 1.- Lo mismo se habrá de decir, si la instituida heredera en lugar de la dote hubiere dejado de aceptar la herencia, de suerte que se le dé la acción contra el sustituto; y esto es verdad.

§ 2.- Pero con razón se duda respecto a los legados y a la cuenta de la ley Falcidia, si aquel, contra el que solamente se da la acción de dote, deberá integros los legados por virtud de su propia persona, lo mismo que si todos los herederos pagasen la dote, o si deberá computar toda la dote como deuda, porque solamente contra él se dé su acción; lo que verdaderamente parece que más bien tiene razón.

54.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XIII.*- Si a alguien se le hubiere legado un fundo que valga ciento, si le hubiere dado ciento al heredero o a otro cualquiera, se considera que el legado es muy útil; porque a veces le interesa al legatario tener el fundo más bien que los ciento, porque frecuentemente nos interesa adquirir los fundos colindantes aun por más de su justo precio.

55.- GAYO; *Comentarios a la ley Julia y Papia,*

Papian.- Si Titio et mihi eadem res legata fuerit et is die cedente legatari decesserit me herede relicto et vel ex mea propria causa vel ex hereditaria legatum repudiaverim, magis placere video partem defecisse.

§ 1.- Si eo herede instituto, qui vel nihil vel non totum capere potest, servo hereditario legatum fuerit, tractantibus nobis de capacitate videndum est, utrum heredis an defuncti persona an neutrius spectari debeat. Et post multas varietates placet, ut, quia nullus est dominus, in cuius persona de capacitate quaeri possit, sine ullo impedimento adquiratur legatum hereditati atque ob id omnimodo ad eum pertineat, quicumque postea heres exstiterit, secundum quod accipere potest: reliqua autem pars ad eos, qui iure vocantur, venit.

56.- GAIUS; *libro XIV, ad legem Iuliam et Papian.*- Quod principi relictum est, qui ante, quam dies legati cedat, ab hominibus ereptus est, ex constitutione divi Antonini successoris eius debetur.

57.- MAURICIUS; *libro II, ad legem Iuliam et Papian.*- Si Augustae legaveris et ea inter homines esse desieris, deficit quod ei relictum est, sicuti divus Hadrianus in Plotinae et proxime imperator Antoninus in Faustinae Augustae persona constituit, cum ea ante inter homines esse desiit, quam testator decederet.

58.- GAIUS; *libro XIV, ad legem Iuliam et Papian.*- Si cui res legata fuerit et omnino aliqua ex parte voluerit suam esse, totam acquirit.

59.- CLEMENTIUS; *libro XV, ad legem Iuliam et Papian.*- Si mihi pure, servo meo vel pure vel sub

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

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

56.- THE SAME; *On the Lex Julia et Papia, Book XIV.*- Where a legacy is bequeathed to the Emperor, and he dies before the day when it becomes due, it will belong to his successor, according to a Constitution of the Divine Antoninus.

57.- JUNIUS MAURICIANUS; *On the Lex Julia et Papia, Book II.*- If you should bequeath a legacy to the Empress, and she should die, the legacy will be void, as the Divine Hadrian decided in the case of Plotina, and the Emperor Antoninus recently in the case of the Empress Faustina, as both of them died before the testator.

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

59.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book V.*- Where property has been bequeathed

libro XII.- Si a Ticio y a mí nos hubiere sido legada la misma cosa, y él hubiere fallecido corriendo el término del legado habiéndome dejado heredero, y yo hubiere repudiado el legado o por mi propia causa, o por la de la herencia, me parece que más bien se determina que se extinguió una parte.

§ 1.- Si habiendo sido instituido heredero el que no puede adquirir nada o la totalidad, se le hubiere hecho un legado a un esclavo de la herencia, al tratar nosotros de la capacidad, se ha de ver si se deberá atender a la persona del heredero, o a la del difunto, o a la de ninguno de los dos; y después de muchas divergencias está determinado que como no hay dueño alguno respecto a cuyas persona se pueda hacer investigación sobre la capacidad, se adquiere sin ningún impedimento el legado para la herencia, y le pertenezca por esto de todos modos a cualquiera que después quedare heredero, conforme a lo que puede adquirir; pero que la otra parte les corresponda a los que son llamados por derecho.

56.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XIV.*- Lo que se le dejó al Príncipe, que falleció antes que corriese el término del legado, se le debe a su sucesor, conforme a la Constitución del Divino Antonino.

57.- JUNIO MAURICIANO; *Comentarios a la ley Julia y Papia, libro II.*- Si le hubieres hecho un legado a la Augusta, y ella hubiere fallecido, se extingue lo que se le dejó, según estableció el Divino Adriano respecto a Plotina, y últimamente el Emperador Antonino respecto a la persona de Faustina, Augusta, porque dejó ella de contarse entre los vivos, antes que falleciera el testador.

58.- GAYO; *Comentarios a la ley Julia y Papia, libro XIV.*- Si a uno se le hubiere legado una cosa, y hubiere querido que de todos modos fuese suya en alguna parte, la adquiere toda.

59.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro XV.*- Si la misma cosa me fue

condicione eadem res legata est egoque legatum quod mihi datum est repudiem, deinde condicione existente id, quod servo meo legatum est, vellem ad me pertinere, partem legati deficere responsum est: nisi si quis dubitet, an existente condicione, si servus vivat, omnimodo legatum meum fiat, quod semel ad me pertinere voluerim: quod aequius esse videtur. Idem est et si duobus servis meis eadem res legetur.

60.- ULPIANUS; *libro XVI, ad legem Iuliam et Papiam*.- Iulianus ait, si a filio herede legatum sit seio fideique eius commissum fuerit sub condicione ut Titio daret, et Titius pendente condicione decesserit, fideicommissum deficiens apud seium manet, non ad filium heredem pertinet, quia in fideicommissis potiore causam habere eum, cuius fides electa sit, senatus voluit.

61.- ULPIANUS; *libro XVIII, ad legem Iuliam et Papiam*.- Si Titio et Maevio heredibus institutis qui quadringenta relinquebat a Titio ducenta legaverit et, quisquis heres esset, centum, neque Maevius hereditatem adierit, trecenta Titius debebit.

§ 1.- Iulianus quidem ait, si alter ex legitimis heredibus repudiasset portionem, cum essent ab eo fideicommissa relictas, coheredem eius non esse cogendum fideicommissa praestare: portionem enim ad coheredem sine onere pertinere. Sed post rescriptum severi, quo fideicommissa ab instituto relictas a substitutis debentur, et hic quasi substitutus cum suo onere consequetur ad crescentem portionem.

62.- LICINIUS; *libro IV, regularum*.- Si alienus servus heres institutus fuerit, a domino eius fideicommissum relinqui potest. Sed ita hoc fideicommissum dominus praestare debet, si per servum

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

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

61.- ULPIANUS; *On the Lex Julia et Papia, Book XVIII*.- If Titius and Maevius should be appointed heirs by a testator who left four hundred aurei, and he charged Titius with a legacy of two hundred, and whomever might become his heir with a hundred, and Maevius, his heir, should not enter upon the estate; Titius will be responsible for the payment of three hundred aurei.

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

62.- LICINIUS RUFINUS *Rules, Book IV*.- Where a slave belonging to another is appointed an heir, his master can be charged with the execution of a trust. The latter, however, will not be obliged to execute it,

legada puramente, y, o puramente, o bajo condición, a mi esclavo, y yo repudiara el legado que se me dió, y después, cumpliéndose la condición, quisiera yo que me perteneciera lo que se legó a mi esclavo, se respondió que se extingue parte del legado, a no ser que alguno dude que, cumpliéndose la condición, si viviera el esclavo, se haga mío de todos modos el legado, que una vez hubiere yo querido que me perteneciera; lo que parece más justo. Lo mismo es, también si a dos esclavos míos se les legara la misma cosa.

60.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XVI*.- Dice Juliano: si a cargo del hijo heredero se le hubiera hecho un legado a Seyo, y a su fidelidad se hubiere encomendado bajo condición, que se lo diese a Ticio, y pendiente la condición hubiere fallecido Ticio, el fideicomiso que se extingue queda en poder de Seyo, y no le pertenece al hijo heredero, porque el Senado quiso que en los fideicomisos tuviera preferente causa aquel cuya fidelidad fue elegida.

61.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XVIII*.- Si habiendo instituido herederos a Ticio y a Mevio, uno que dejaba cuatrocientos hubiere legado doscientos a cargo de Ticio, y ciento a cargo de cualquiera que fuese heredero, y Mevio no hubiere adido la herencia, Ticio deberá los trescientos.

§ 1.- A la verdad, dice Juliano, que si uno de los herederos legítimos hubiese repudiado su porción, habiéndose dejado fideicomisos a su cargo, no ha de ser obligado su coheredero a pagar los fideicomisos, porque la porción le pertenece sin carga al coheredero; pero después del Rescripto de Severo, por el cual se deben por los substitutos los fideicomisos dejados a cargo del instituido, también éste adquirirá, como substituto, con su propia carga la porción que le acrece.

62.- LICINIO RUFINO; *Reglas, libro IV*.- Si hubiere sido instituido heredero un esclavo ajeno, se puede dejar un fideicomiso a cargo de su señor; pero el señor debe pagar este fideicomiso en este caso, si

factus sit heres: quod si ante, quam iussu eius adiretur hereditas, servus manumissus fuerit et suo arbitrio adierit hereditatem, dominus id debiturus non est, quia heres factus non est, nec servus, quia rogatus non est. Itaque utilis actio hoc casu competit, ut is, ad quem emolumentum hereditatis pervenerit, et fideicommissum praestare compellatur.

63.- CALLISTRATUS; *libro IV, edicti monitorii*.- Si heres rem, legatam ignorans, in funus consumpsit, ad exhibendum actione non tenebitur, quia nec possidet nec dolo malo fecit quo minus possideret. Sed per in factum actionem legatario consulitur, ut indemnitas ei ab herede praestetur.

64.- PAPINIANUS; *libro XV, quaestionum*.- Cum proponeretur in scriptura fideicommissi, quod pluribus sub condicione fuerat relictum, per errorem omissam mutuum substitutionem, quam testator in secundis tabulis, cum eosdem substitueret, expressit: divi Marcus et Commodus imperatores rescripserunt voluntatem manifestam videri mutuae factae substitutionis. Etenim in causa fideicommissi utcumque precaria voluntas quaereretur, coniectura potuit admitti.

65.- PAPINIANUS; *libro XVI, quaestionum*.- Peculium legatum augeri et minui potest, si res peculii postea esse incipiant aut desinant. Idem in familia erit, sive universam familiam suam sive certam (veluti urbanam aut rusticam) legaverit ac postea servorum officia vel ministeria mutaverit. Eadem sunt lexicariis aut pedisequis legatis.

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

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

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

65.- THE SAME; *Questions, Book XVI*.- Where peculium is bequeathed, it can be increased and diminished; if the property composing it is augmented by new acquisitions, or the original amount is decreased. The same rule will apply to the slaves of a testator, whether he bequeaths the entire body of them, or only a certain portion; for instance, those belonging to his city-house or his country-house, and he should subsequently change the duties or the employments of said slaves. This rule is also applicable to slaves who are litter-bearers, or footmen.

se hubiera hecho heredero por medio del esclavo. Pero si, antes que por su mandato se adiese la herencia, hubiere sido manumitido el esclavo, y por su propio arbitrio hubiere adido la herencia, el señor no ha de deberlo, porque no se hizo heredero, ni tampoco el esclavo, porque se le rogó a aquél; y así compete en este caso la acción útil, para que aquel a quien hubiere ido el beneficio de la herencia sea compelido también a pagar el fideicomiso.

63.- CALISTRATO; *- Del Edicto monitorio, libro IV*.- Si el heredero consumió en los funerales una cosa, ignorando que hubiese sido legada, no estará obligado por la acción de exhibición, porque no la posee, ni con dolo malo hizo que no la poseyera, pero se atiende al legatario con la acción por el hecho, para que por el heredero se le pague la indemnización.

64.- PAPINIANO; *Cuestiones, libro XV*.- Exponiéndose que en la escritura del fideicomiso, que a varios se les había dejado bajo condición, se omitió por error la mutua substitución, que el testador expresó en las segundas tablas al nombrar substitutos a los mismos, respondieron por rescripto los Divinos Emperadores Marco y Cómodo, que se considera evidente la voluntad de haberse hecho la mutua substitución; porque tratándose de un fideicomiso, siempre que se investigase la voluntad precaria, se pudo admitir la conjetura.

65.- EL MISMO; *Cuestiones, libro XVI*.- El peculio legado se puede aumentar y disminuir, si después comenzaran a existir, o dejarán de ser, las cosas del peculio. Lo mismo será respecto a una familia, ya si uno hubiere legado toda su familia, ya si una determinada, por ejemplo, la urbana, o la rústica, y después hubiere cambiado los oficios o los empleos de los esclavos; lo mismo es, habiéndose legado los esclavos de litera o los acompañantes a pie.

§ 1.- Quadrigae legatum equo postea mortuo perire quidam ita credunt, si equus ille decessit qui demonstrabat quadrigam: sed si medio tempore deminuta suppleatur, ad legatarium pertinebit.

§ 2.- Titio Stichus legatus post mortem Titii libertatem accepit: et legatum adita hereditate et libertas post mortem Titii competit. Idemque est et si moriente Titio liber esse iussus est.

§ 3.- Si tamen Titio ex parte herede instituto servus legatus sit et post mortem eius liber esse iussus sit, sive adierit hereditatem Titius sive non adierit post cuius mortem libertas ei data est, defuncto eo libertas competit.

66.- PAPINIANUS; *libro XVII, quaestionum*.- Maevius fundum mihi ac Titio sub condicione legavit, heres autem eius eundem sub eadem condicione mihi legavit. Verendum esse Iulianus ait, ne existente condicione pars eadem ex utroque testamento mihi debeatur. Voluntatis tamen quaestio erit: nam incredibile videtur id egisse heredem, ut eadem portio bis eidem debeatur, sed verisimile est de altera parte eum cogitasse. Sane constitutio principis, qua placuit eidem saepe legatum corpus non onerare heredem, ad unum testamentum pertinet. Debitor autem non semper quod debet iure legat, sed ita, si plus sit in specie legati: si enim idem sub eadem condicione relinquitur, quod emolumentum legati futurum est?

§ 1.- Duorum testamentis pars fundi, quae Maevius est, Titio legata est: non ineleganter probatum est ab uno herede soluta parte fundi, quae Maevius fuit, ex alio testamento liberationem optingere, neque postea parte alienata revocari actionem semel extinctam.

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

§ 2.- Stichus was bequeathed to Titius and was to receive his freedom together with a legacy after the death of Titius. As soon as the estate is entered upon after the death of Titius, he will be entitled to his freedom. The same rule will apply if he was directed to be free at the death of Titius.

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

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

§ 1.- Part of a tract of land which belonged to Maevius was left to Titius by the wills of two persons. It was not unreasonably decided, where the share which belonged to Maevius was delivered by one heir, that a release was obtained for the same share under the other will, and that, where the share had been alienated, the heir could not afterwards recover

§ 1.- Algunos creen que se extingue el legado de una cuadriga, habiendo muerto después un caballo, si murió aquel caballo que constituía la cuadriga; pero si en el tiempo intermedio se completase la descabalada, le pertenecerá al legatario.

§ 2.- Stico, que había sido legado a Ticio, recibió la libertad después de la muerte de Ticio; adida la herencia, compete el legado, y después de la muerte de Ticio, la libertad. Y lo mismo es, también si se mandó que fuese libre al morir Ticio.

§ 3.- Pero si a Ticio, instituido heredero de parte, se le hubiera legado un esclavo, y se hubiera mandado que después de la muerte de aquél fuese libre, ya hubiere adido la herencia Ticio, ya no la hubiere adido, para después de cuya muerte le fue dada a aquel la libertad, fallecido él, compete la libertad.

66.- EL MISMO; *Cuestiones, libro XVII*.- Mevio nos legó a mí y a Ticio un fundo bajo condición, pero su heredero me lo legó a mí bajo la misma condición; dice Juliano, que se ha de temer, que, cumpliéndose la condición, se me deba la misma parte en virtud de ambos testamentos. Pero la cuestión será sobre la voluntad; porque parece increíble que el heredero haya hecho esto para que a uno mismo se le deba dos veces la misma porción; pero es verosímil que él se haya referido a la otra parte. A la verdad, la Constitución del Príncipe, en que se dispuso que la cosa legada muchas veces a uno mismo no gravaba al heredero, es aplicable a un solo testamento. Mas no siempre el deudor lega válidamente lo que debe, sino en este caso, si importara más la especie del legado; porque si se deja lo mismo bajo la misma condición, ¿qué emolumento ha de resultar del legado?

§ 1.- En los testamentos de dos le fue legada a Ticio la parte de un fundo, que es de Mevio; no sin discreción se aprobó, que entregada por uno de los herederos la parte del fundo, que fue de Mevio, se verifica la liberación respecto al otro testamento, y que, enajenada después la parte, no se renueva la acción una vez extinguida.

§ 2.- Sed si pars fundi simpliciter, non quae Maevii fuit, legetur, solutio prior non peremit alteram actionem, atque etiam hanc eandem partem aliquo modo suam factam poterit alter heres solvere: neque plures in uno fundo dominium iuris intellectu, non divisione corporis optinent.

§ 3.- Non idem respondetur, cum duobus testamentis generatim homo legatur: nam qui solvitur altero legatarii factus est quamvis postea sit alienatus, ab altero herede idem solvi non poterit: eademque ratio stipulationis est. Hominis enim legatum orationis compendio singulos homines continet utque ab initio non consistit in his qui legatarii fuerunt, ita frustra solvitur cuius dominium postea legatarius adeptus est, tametsi dominus esse desinit.

§ 4.- In fundo legato si heres sepelierit, aestimatio referenda erit ad totum pretium fundi, quo potuit ante sepulturam aestimari: quare si fuerit solutus, actionem adhuc ex testamento propter locum alienatum durare rationis est.

§ 5.- Eum, qui ab uno ex heredibus, qui solus oneratus fuerat, litis aestimationem legatae rei abstulit, postea codicillis apertis ab omnibus heredibus eiusdem rei relictas dixi dominium non quaerere: eum enim, qui pluribus speciebus iuris uteretur, non saepius eandem rem eidem legare, sed loqui saepius.

§ 6.- Fundo legato si usus fructus alienus sit, nihilo minus petendus est ab herede: usus fructus enim etsi in iure, non in parte consistit, emolumentum tamen

it by a right of action which had once been extinguished.

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

§ 3.- The same opinion is not held where a slave is bequeathed in general terms by two wills, for where a slave is delivered under one of them, and once becomes the property of the legatee, even though he may afterwards be alienated, he cannot be delivered by the other heir. The same rule applies to a stipulation. For where a slave is bequeathed in general terms, a separate slave should be understood, so that, as a legacy is not valid from the beginning if it includes property which belongs to the legatee, so also the delivery of property whose ownership was subsequently acquired by the legatee is without effect, even though he has ceased to be the owner of the same.

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

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

§ 6.- Where a tract of land is devised, and the usufruct belongs to someone else, it can, nevertheless, be demanded from the heir, for the

§ 2.- Pero si se legara simplemente una parte del fundo, no la que fue de Mevio, la entrega primera no extingue la otra acción, y también podrá el otro heredero entregar esta misma parte que en algún modo se hizo suya, porque muchos obtienen el dominio en un solo fundo por inteligencia del derecho, no por división de la cosa.

§ 3.- No se responderá lo mismo cuando en dos testamentos se legue en general un esclavo; porque si alguno, entregándolo uno, se hizo del legatario, aunque después haya sido enajenado, no podrá él mismo ser entregado por el otro heredero, y la misma razón hay respecto de la estipulación porque el legado de un esclavo comprende en cláusula abreviada a cada uno de los esclavos, y así como no subsiste desde el principio respecto a los que fueron del legatario, así es entregado inútilmente aquel cuyo dominio adquirió después el legatario, aunque dejó de ser dueño.

§ 4.- Si el heredero hubiere dado sepultura a alguien en el fundo legado, la estimación se habrá de referir al total precio del fundo, en que pudo ser estimado antes del enterramiento; por lo cual, si hubiere sido entregado, es de razón que subsista todavía la acción nacida del testamento por causa del lugar enajenado.

§ 5.- Yo dije, que el que recibió de uno de los herederos, que solo había sido gravado, la estimación del litigio de la cosa legada, no adquiriría, abiertos después los codicilos, el dominio de la misma cosa dejada a cargo de todos los herederos; porque el que usase de muchas formas de derecho, no le legaba muchas veces a uno mismo la misma cosa, sino que hablaba repitiéndose.

§ 6.- Si, legado un fundo, fuera de otro el usufruto, ha de pedirsele, sin embargo, al heredero; porque el usufruto, aunque consiste en un derecho, y no en una

rei continet: enimvero fundo relicto ob reliquas praestationes, quae legatum sequuntur, agetur, verbi gratia si fundus pignori datus vel aliena possessio sit. Non idem placuit de ceteris servitutibus. Sin autem res mea legetur mihi, legatum propter istas causas non valebit.

§ 7.- A municipibus heredibus scriptis detracto usu fructu legari proprietatis potest, quia non utendo possunt usum fructum amittere.

67.- PAPINIANUS; *libro XIX, quaestionum*.- Unum ex familia propter fideicommissum a se cum moreretur relictum heres eligere debet: ei quem elegit frustra testamento suo legat quod, posteaquam electus est, ex alio testamento petere potest. Utrum ergo non constitit quod datur, quasi creditori relictum, an, quamdiu potest mutari voluntas, non recte creditori comparabitur? Sive tamen durat electio, fuisse videtur creditor, sive mutetur, ex neutro testamento petitio competit.

§ 1.- Si de Falcidia quaeratur, perinde omnia servabuntur ac si nominatim ei, qui postea electus est, primo testamento fideicommissum relictum fuisset: non enim facultas necessariae electionis propriae liberalitatis beneficium est: quid est enim, quod de suo videatur reliquisse, qui quod relinquit omnimodo reddere debuit?

§ 2.- Itaque si, cum forte tres ex familia essent eius, qui fideicommissum reliquit, eodem vel dispari gradu, satis erit uni reliquisse: nam postquam paritum est voluntati, ceteri conditione deficiunt.

§ 3.- Sed si uno ex familia herede instituto ille fundus extraneo relictus est, perinde fideicommissum ex

usufruct, although it may not legally be a part of the land, still includes its profit. And, indeed, where a tract of land is left, an action can be brought to compel the heir to deliver everything which should be transferred, and follow the legacy; for example, where a tract of land is hypothecated, or is in the possession of someone else. The same rule, however, does not apply to other servitudes. If my own property is bequeathed to me, the legacy will not be valid, for the reasons above stated.

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

67.- THE SAME; *Questions, Book XIX*.- Where an heir is obliged to select one person out of the family of the testator to whom to deliver property under a trust, which was to be executed at the time of his death, he cannot, after he has made his selection, legally bequeath the same property by will to anyone else, because he can claim the property under another will. Therefore, will it not be the case that the bequest is invalid, as where a legacy is left to a creditor; for so long as he can change his mind should he not properly be compared to a creditor? Still, while his choice stands, he will appear to resemble a creditor, but when he changes his mind, he will have no right to claim the property under either will.

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

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

§ 3.- If, however, one of the family of the testator should be appointed heir, and the tract of land be left

parte, comprende, sin embargo, el aprovechamiento de la cosa. Porque, a la verdad, dejado un fundo por causa de las demás prestaciones, que siguen al legado, se ejercitará la acción, por ejemplo, si el fundo hubiera sido dado en prenda, o si fuera de otro la posesión. No se determinó lo mismo respecto a las demás servidumbres. Pero si se me legase una cosa mía, no será válido el legado por estas causas.

§ 7.- Se puede legar la propiedad, deducido el usufruto, a cargo de los individuos de un municipio instituidos herederos, porque por el no uso pueden perder el usufruto.

67.- EL MISMO; *Cuestiones, libro XIX*.- El heredero debe elegir a uno de la familia por causa del fideicomiso dejado a su cargo para cuando muera; y a este que eligió, inútilmente le lega en su testamento lo que después que fue elegido puede pedir por el otro testamento. Luego ¿no es válido lo que se da, cual si se hubiere dejado a un acreedor, o no se le comparará bien con un acreedor, mientras puede cambiarse la voluntad? Sin embargo, si subsistiese la elección, se considera que fue acreedor, y si se cambiase, no compete acción para pedir por ninguno de los dos testamentos.

§ 1.- Si se tratase de la Falcidia, todo se observará lo mismo que si nominalmente se le hubiese dejado en el primer testamento el fideicomiso al que después fue elegido; porque la facultad de una elección necesaria no es beneficio de propia liberalidad; porque ¿qué hay que parezca que dejó de lo suyo el que de todos modos debió restituir lo que dejó?

§ 2.- Y así, si acaso hubiese tres en la familia del que dejó el fideicomiso, en el mismo, o en diferente grado, bastará haberlo dejado a uno solo; porque después que se dio cumplimiento a la voluntad, los demás están excluidos de la condición.

§ 3.- Pero si, instituido heredero uno de la familia, aquel fundo fue dejado a un extraño, se pedirá en

illo testamento petetur, ac si nemo de familia heredi heres exstisset. verum is, qui heres scriptus est, ratione doli exceptionis ceteris fideicommissum petentibus facere partem intellegitur: nam quae ratio ceteros admittit, eadem tacitam inducit pensionem.

§ 4.- Si duos de familia non aequis portionibus heredes scripserit et partem forte quartam extero eiusdem fundi legaverit, pro his quidem portionibus, quas iure hereditario retinent, fideicommissum non petetur, non magis quam si alteri fundum praelegasset: pro altera vero parte, quae in exterum collata est, virilem qui sunt de familia petent admissa propter heredes virilium portionum pensionem.

§ 5.- Sed et si fundum heres uni ex familia reliquerit eiusque fidei commiserit, ut eum extero restituat, quaesitum est, an hoc fideicommissum peti possit. Dixi ita demum peti posse, si fundi pretium efficiat. Sed si quidem ille prior testator ita fideicommissum reliquisset: "Rogo fundum cui voles aut quibus voles ex familia relinquant", rem in expedito fore: quod si talia verba fuissent: "Peto non fundus de familia exeat", heredis heredem propter sequens fideicommissum, quod in exterum collatum est, oneratum intellegi, petituris deinceps ceteris ex primo testamento fideicommissum post mortem videlicet eius qui primo electus est.

§ 6.- Et ideo si electo uno fideicommissum in exterum non conferatur, non alias ei qui electus est fideicommissum praestandum erit, quam interpositis cautionibus: "Fundum, cum morietur, si non in familia cum effectu relinquatur, restitui".

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

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

§ 5.- If, however, the heir should leave the land to one member of the family and charge him to deliver it to a stranger, the question arises whether the execution of this trust can be demanded. I said that this could only be done where an amount was also left to the heir which was equal to the value of the land. If, however, the first testator had left the trust as follows, "I charge you leave this tract of land to whom you may wish, or to those members of my family to whom you may desire to leave it," the matter will be free from difficulty. But if the trust was established in the following words, "I do not wish the land to go out of my family," the successors of the heir are understood to be bound on account of the trust, which was created for the benefit of the stranger; and the members of the family of the first testator will afterwards have a right to demand the execution of the trust, of course after the death of him who was selected in the first place.

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

virtud de aquel testamento el fideicomiso, lo mismo que si nadie de la familia hubiese quedado heredero del heredero, pero se entiende que el que fue instituido heredero hace parte con los demás que piden el fideicomiso por razón de la excepción de dolo; porque la misma razón que admite a los demás, induce a una tácita compensación.

§ 4.- Si hubiere instituido herederos en partes desiguales a dos de la familia, y hubiere legado a un extraño una parte, acaso la cuarta, del mismo fundo, no se pedirá el fideicomiso, ciertamente respecto a las porciones que retienen por derecho de herencia, no de otra suerte, que si a otro le hubiese prelegado el fundo; pero en cuanto a la otra parte, que fue conferida a un extraño, pedirán una porción viril los que sean de la familia, habiéndose admitido la compensación de las personas viriles por causa de los herederos.

§ 5.- Pero también si el heredero hubiere dejado el fundo a uno solo de la familia, y hubiere encomendado a su fe que lo restituya a un extraño, se preguntó si se podrá pedir este fideicomiso. Dije, que solamente se puede pedir de este modo, si importase el precio del fundo. Pero si verdaderamente el primer testador hubiese dejado así el fideicomiso: «te ruego que dejes el fundo a quien quieras, o a quienes quieras de la familia,» la cosa no ofrecerá duda; pero si las palabras hubiesen sido estas: «pido que el fundo no salga de la familia,» se entiende que el heredero del heredero quedó gravado por causa del siguiente fideicomiso, que se dejó para un extraño, debiendo de pedir después los demás el fideicomiso en virtud del primer testamento, por supuesto, después de la muerte del que fue elegido en primer lugar.

§ 6.- Y por lo tanto, si elegido uno no se le confiere el fideicomiso a un extraño, no se le habrá de dar el fideicomiso al que fue elegido, sino habiendo interpuesto cauciones de que cuando muera restituirá el fundo, si no se dejase efectivamente en la familia.

§ 7.- "Rogo, fundum cum morieris restituas ex libertis cui voles". Quod ad verba attinet, ipsius erit electio nec petere quisquam poterit, quamdiu praeferrí alius potest: defuncto eo prius quam eligat petent omnes. Itaque eveniet, ut quod uní datum est vivis pluribus unus petere non possit, sed omnes petant quod non omnibus datum est, et ita demum petere possit unus, si solus moriente eo superfuit.

§ 8.- Si rem tuam, quam existimabam meam, te herede instituto Titio legem, non est Neratii Prisci sententiae nec constitutioni locus, qua cavetur non cogendum praestare legatum heredem: nam succursum est heredibus, ne cogentur redimere, quod testator suum existimans reliquit: sunt enim magis in legandis suis rebus quam in alienis comparandis et onerandis heredibus faciliores voluntates: quod in hac specie non evenit, cum dominium rei sit apud heredem.

§ 9.- Si omissa fideicommissi verba sint et cetera quae leguntur cum his, quae scribi debuerunt, congruant, recte datum et minus scriptum exemplo institutionis legatorumque intellegitur: quam sententiam optimus quoque imperator noster Severus secutus est.

§ 10.- Item Marcus imperator rescripsit verba, quibus testator ita caverat "Non dubitare se, quodcumque uxor eius cepisset, liberis suis reddituram", pro fideicommisso accipienda. Quod rescriptum summam habet utilitatem, ne scilicet honor bene transacti matrimonii, fides etiam communium liberorum decipiat patrem, qui melius de matre praesumpserat: et ideo princeps providentissimus et iuris religiosissimus cum fideicommissi verba cessare animadverteret, eum ser-

the family at that time.

§ 7.- "I ask that when you die you will transfer such-and-such a tract of land to any one of my freedmen whom you may select." These words seem to mean that the choice will belong to the heir himself, and that none of the freedmen can claim the property so long as another can be preferred to him; but if the heir should die before making a selection, all the freedmen can claim the land. Hence, the result is that where the property is given to one, one of them cannot claim it while several are living, but all can claim it although it is not left to all; and one can only claim it if he should be the sole survivor at the time of the death of the heir.

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

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

§ 10.- Moreover, the Emperor Marcus stated in a Rescript that where a testator provided as follows, "I do not doubt that my wife will return to her children everything that she has received from me," it should be considered to be a trust. This Rescript is of the greatest importance, for it presumes the existence of an honorable and well-conducted matrimonial life, and that the father was not deceived with reference to a trust created for the benefit of the children of both the parties. Therefore, when this most wise Prince,

§ 7.- «Te ruego, que cuando mueras restituyas el fundo al que quieras de los libertos;» por lo que atañe a las palabras, la elección será de él mismo, y nadie podrá pedir mientras otro puede ser preferido; y fallecido este antes que elija, pedirán todos. Y así sucederá, que lo que se le dio a uno solo no podrá pedirlo otro viviendo muchos, sino que todos pedirán lo que no se les dio a todos, y así solamente podrá pedir uno, si solo él sobrevivió al morir aquel.

§ 8.- Si yo legara a Ticio, habiéndote instituido heredero, una cosa tuya, que yo creía que era mía, no ha lugar ni al dictamen de Neracio Prisco, ni a la Constitución en que se dispone que no se ha de obligar al heredero a entregar el legado; porque se auxilió a los herederos, para que no fuesen obligados a comprar lo que el testador dejó, creyendo que era suyo; porque son más fáciles las voluntades para legar cosas propias, que para comprar las ajenas y gravar a los herederos, lo que no sucede en este caso, cuando el dominio de la cosa esté en el heredero.

§ 9.- Si se hubieran omitido las palabras del fideicomiso, y las demás que se leen fueran congruentes con las que se habían debido escribir, se entenderá, que se dio regularmente, y que se escribió menos, a la manera que en la institución y en los legados; cuyo dictamen siguió también nuestro óptimo Emperador Severo.

§ 10.- Asimismo respondió por rescripto el Emperador Marco, que las palabras con que el testador había declarado, que él no dudaba que su mujer restituirá a sus hijos todo lo que ella hubiese adquirido, han de ser consideradas como fideicomiso. Cuyo Rescripto tiene suma utilidad, a saber para que el honor del matrimonio que se llevó bien, y la confianza de los hijos comunes, no defrauden al padre, que había presumido mejor de la madre; y por lo tanto, el Príncipe, muy previsor y muy observador

monem pro fideicommisso rescripsit accipiendum.

68.- PAULUS; *libro XI, quaestionum*.- Sequens quaestio est, an etiam quae vivus per donationem in uxorem contulit in fideicommissi petitionem veniant. Respondi ea extra causam bonorum defuncti computari debere et propterea fideicommisso non contineri, quia ea habitura esset etiam alio herede existente. Plane nominatim maritus uxoris fidei committere potest, ut et ea restituat.

69.- PAPINIANUS; *libro XIX, quaestionum*.- "Peto, Luci Titi, contentus sis centum aureis". Fideicommissum valere placuit idque rescriptum est. Quid ergo si, cum heredem ex parte instituisset, ita locutus est: "Peto pro parte tua contentus sis, Luci Titi, centum aureis?" Petere poterunt coheredes partem hereditatis, retinente sive praecipiente quo contentum esse voluit defunctus. Sine dubio facilius est hoc probare, quam probari potuit illud, cum ibi fideicommissum petatur ab his, cum quibus non est testator locutus. Idem dicemus, si, cum ex asse scripsisset heredem, eius gratia, qui legitimus heres futurus esset, ita loquatur: "Peto pro hereditate, quam tibi reliqui, quae ad fratrem meum iure legitimo rediret, contentus sis centum aureis".

§ 1.- Praedium, quod nomine familiae relinquitur, si non voluntaria facta sit alienatio, sed bona heredis veneant, tamdiu emptor retinere debet, quamdiu debitor haberet bonis non venditis, post mortem eius non habiturus quod ex herede praestare cogeretur.

§ 2.- Mater filio impubere herede instituto tutorem

who scrupulously observed the laws, perceived that the ordinary terms employed in creating a trust had been omitted, he decided that the language used should be understood as having established one.

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

69.- PAPINIANUS; *Questions, Book XIX*.- "I ask Lucius Titius to be content with a hundred aurei." It is settled that where a clause of this kind is inserted into a will it creates a valid trust. But what if, after the testator had appointed an heir to a portion of his estate, he should speak as follows: "I ask that Lucius Titius be content with his share of a hundred aurei"? The co-heirs will have a right to demand his share of the estate, whether he either retains or holds as a preferred legacy, the sum which the deceased desired he should be content with. It is no doubt better to adopt this opinion than the one that the trust can be claimed to those whom the testator did not mention.

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

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

§ 2.- A mother having appointed her son, who was

del derecho, advirtiendo que faltaban las palabras del fideicomiso, resolvió por rescripto que aquellas expresiones debían ser consideradas como fideicomiso.

68.- PAULO; *Cuestiones, libro XI*.- Hay la siguiente cuestión, si también se comprenderán en la petición del fideicomiso las cosas que en vida le dio el marido a la mujer por donación. Respondí, que estas debían computarse fuera de la categoría de bienes del difunto, y que por lo tanto no se comprendían en el fideicomiso, porque ella las habría de tener aun siendo otro el heredero. Pero el marido puede encomendar especialmente a la fe de la mujer, que también las restituya.

69.- PAPINIANO; *Cuestiones, libro XIX*.- «Te pido, Lucio Ticio, que te contentes con cien áureos»; se determinó, que esto valiese como fideicomiso, y así se respondió por rescripto. ¿Qué se dirá, pues, si, habiéndolo instituido heredero de una parte, se expresó así: «te pido, Lucio Ticio, que por tu parte te contentes con cien áureos? Que los coherederos podrán pedir la parte de la herencia, reteniendo o tomando antes aquello con que quiso el difunto que se contentase. Sin duda es más fácil aprobar esto, que no que pudo aprobarse aquello, porque en aquel caso se pide el fideicomiso a aquellos con quienes no habló el testador. Lo mismo diremos, si, habiendo instituido heredero del as, hablara así respecto del que hubiese de haber sido heredero legítimo: «te pido, que por la herencia que te dejé, la cual iría por legítimo derecho a mi hermano, te contentes con cien áureos.»

§ 1.- Si no se hubiera hecho una enajenación voluntaria, sino que fuesen vendidos los bienes del heredero, el comprador debe retener el predio, que se deja en nombre de la familia, tanto tiempo cuanto el deudor lo tendría no habiendo sido vendidos los bienes, no habiendo de tener después de la muerte de este lo que el heredero extraño sería obligado a entregar.

§ 2.- Una madre, habiendo instituido heredero a un

eidem adscripsit eiusque fidei commisit, ut, si filius suus intra quattuordecim annos decessisset, restitueret hereditatem Sempronio. Non ideo minus fideicommissum recte datum intellegi debet, quia tutorem dare mater non potuit.

Nam et si pater non iure facto testamento tutoris fidei commiserit, aequè praestabitur, quemadmodum si iure testamentum factum fuisset: sufficit enim, ut ab impubere datum fideicommissum videatur, ab eo dari, quem is qui dabat tutorem dederat vel etiam tutorem fore arbitrabatur.

Idem in curatore impuberis vel minoris annis debet probari. Nec interest, tutor recte datus vivo patre moriatur vel aliquo privilegio excusetur vel tutor esse non possit propter aetatem, cui tutor fuerat datus: quibus certe casibus fideicommissum non intercidit, quod a pupillo datum videtur. Hac denique ratione placuit a tutore, qui nihil accepit, fideicommissum pupillo relinqui non posse, quoniam quod ab eo relinquitur extero, non ipsius proprio, sed pupilli iure debeatur.

§ 3.- Fratre herede instituto petit, ne domus alienaretur, sed ut in familia relinqueretur. Si non paruerit heres voluntati, sed domum alienaverit vel extero herede instituto decesserit, omnes fideicommissum petent qui in familia fuerunt. Quid ergo si non sint eiusdem gradus? Ita res temperari debet, ut proximus quisque primo loco videatur invitatus. Nec tamen ideo sequentium causa propter superiores in posterum laedi debet, sed ita proximus quisque admittendus est, si paratus sit cavere se familiae domum restitutum. Quod si cautio non fuerit ab eo, qui primo loco admissus est, desiderata, nulla

under the age of puberty, her heir, also appointed a guardian for him, and charged the latter: "To deliver the estate to Sempronius, if her son should die without reaching the age of fourteen years." Although the mother could not legally appoint a guardian, the trust should still be understood to have been properly created.

For if a father should appoint a guardian, and charge him with the trust by a will which was not drawn up in compliance with the legal requirements, the trust must, nevertheless, be executed, just as if the will had been made in accordance with law. In order that a minor under the age of puberty may be charged with a trust it will be sufficient for the testator to charge his guardian, whom he appointed, with it, or one whom he supposed to be his guardian.

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

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

hijo impúbbero, le nombró tutor al mismo, y encomendó a su fidelidad, que, si su hijo hubiese fallecido dentro de sus catorce años, le restituyese la herencia a Sempronio; no porque la madre no pudo nombrar el tutor se debe entender que no se dió válidamente el fideicomiso.

Porque aunque el padre hubiere dejado un fideicomiso no habiendo hecho legalmente el testamento, se entregará igualmente, como si en derecho hubiese sido hecho el testamento; porque basta, para que se considere que el fideicomiso fue dado a cargo del impúbbero, que se dé por aquel a quien el que lo daba lo había nombrado tutor, o aun que creía que había de ser tutor.

Lo mismo se debe aprobar respecto al curador de un impúbbero, o de un menor de edad; y no importa, que, el tutor regularmente nombrado muera viviendo el padre, o se excuse por algún privilegio, o que por razón de edad no pueda ser tutor de aquel para quien había sido nombrado tutor; en cuyos casos ciertamente no se extingue el fideicomiso, que se considera dado a cargo del pupilo. Finalmente, por, esta razón se determinó, que no se le puede dejar al pupilo un fideicomiso a cargo del tutor, que nada recibió, porque lo que a su cargo se le deja a un extraño no se debe por derecho propio de él mismo, sino del pupilo.

§ 3.- Habiendo uno instituido heredero a su hermano, le pidió que no enajenase una casa, sino que la dejase en la familia; si el heredero no hubiere obedecido a lo mandado, sino que hubiere enajenado la casa, o hubiere fallecido habiendo instituido heredero a un extraño, pedirán el fideicomiso todos los que hubiere en la familia. ¿Qué se dirá, pues, si no fueran del mismo grado? El caso se debe acomodar de modo, que se considere invitado en primer lugar cada uno de los que estén próximos; pero no por esto se debe lesionar para lo futuro por causa de los que estén más próximos el derecho de los que siguen,

quidem eo nomine nascetur conductio, sed si domus ad exterum quandoque pervenerit, fideicommissi petitio familiae competit. Cautionem autem ratione doli mali exceptionis puto iuste desiderari, quamvis nemo alius ulterior ex familia supersit.

§ 4.- Si quidam sint postea emancipati, tractari potest, an hi quoque recte fideicommissum petant. Et puto recte petituros, quoniam familiae appellatione personae quoque hae demonstratae intelleguntur.

70.- PAPINIANUS; *libro XX, quaestionum*.- Imperator Antoninus rescripsit legatarium, si nihil ex legato accepit, ei cui debet fideicommissum actionibus suis posse cedere nec id cogendum solvere. Quid ergo si non totum, sed partem legati relictum restituere rogatus absteat eo? Utrum actionibus suis in totum cogatur cedere, an vero non nisi ad eam quantitatem, quae fideicommisso continetur? Quod ratio suadet. Sed et si legatum perceperit, non amplius ex causa fideicommissi cogendus erit solvere, quam recepit.

§ 1.- Si centum legatis duplum restituere rogatus sit, ad summam legati videbitur constituisse: si autem post tempus fideicommissum relictum sit, usurarum dumtaxat additamentum admittetur. Nec mutanda sententia erit, quod forte legato percepto magnum emolumentum ex aliquo negotio consecutus est aut poenam stipulationis imminuentem evasit. Haec ita, si quantitas cum quantitate conferatur. Enimvero si pecunia accepta rogatus sit rem propriam, quamquam maioris pretii est, restituere, non est audiendus legatarius, legato percepto si velit

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

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

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

§ 1.- If a legatee, to whom a hundred aurei had been bequeathed, is asked to pay double the amount, the trust will be reduced to the amount of the legacy; and if the trust is to become operative after a certain time, only the interest on what was bequeathed can be collected. Nor can this rule be changed for the reason that the legatee, after receiving the bequest, may have profited greatly by some other transaction, or has escaped liability for a penalty growing out of some stipulation with the enforcement of which he was threatened. This principle, however, will only apply

sino que cada uno de los que estén próximos ha de ser admitido de este modo, si estuviera dispuesto a dar caución de que él restituirá la casa a la familia. Pero si no se le hubiere pedido caución al que fue admitido en primer lugar, no nacerá ciertamente por este motivo ninguna acción de condición, sino que si la casa fuere, en algún caso a poder de un extraño, le compete a la familia la petición del fideicomiso; pero opino que con justicia se reclama la caución por razón de la excepción de dolo malo, aunque de la familia no quede otro ninguno más lejano.

§ 4.- Si algunos hubieran sido después emancipados, se puede discutir si también estos pedirán con derecho el fideicomiso; y opino que lo pedirán con derecho, porque con la denominación de familia se entienden designadas también estas personas.

70.- EL MISMO; *Cuestiones, libro XX*.- El Emperador Antonino respondió por rescripto, que el legatario, si no recibió nada por razón del legado, puede cederle sus acciones a aquel a quien le debe el fideicomiso, y que no ha de ser obligado a pagarlo. ¿Qué se dirá, pues, si habiéndosele rogado que restituya, no la totalidad, sino parte del legado dejado, se abstuvo de él, será acaso obligado a cederle en su totalidad sus acciones, o solamente hasta la cantidad que se contuviese en el fideicomiso? Esto aconseja la razón. Pero aun si hubiere percibido el legado, no habrá de ser obligado a pagar por causa del fideicomiso mas de lo que recibió.

§ 1.- Si habiéndosele legado ciento a uno se le hubiera rogado que restituyese el duplo, se considerará que dispuso hasta la suma del legado. Mas si el fideicomiso hubiera sido dejado para después de cierto tiempo, se admitirá solamente el aumento de los intereses, y no se habrá de cambiar de opinión, porque acaso haya conseguido, percibido el legado, una grande ganancia por algún negocio, si se haya librado de la inminente pena de la estipulación. Esto así, si una cantidad se compensa con la otra cantidad, porque si a uno se le hubiera rogado, que, habiendo

computare: non enim aequitas hoc probare patitur, si quod legatorum nomine perceperit legatarius offerat.

§ 2.- Cum quidam filio suo ex parte herede instituto patrum eius coheredem ei dedisset et ab eo petisset, ut filium suum pro virili portione filiis suis coheredem faceret: si quidem minus esset in virili portione, quam fratris hereditas habuit, nihil amplius peti posse, quod si plus, etiam fructuum, quos patruus percepit vel, cum percipere potuerit, dolo non cepit, habendam esse rationem responsum est, non secus quam si centum milibus legatis rogetur post tempus maiorem quantitatem restituere.

§ 3.- Cum autem rogatus, quidquid ex hereditate supererit, post mortem suam restituere de pretio rerum venditarum alias comparat, deminuisse quae vendidit non videtur,

71.- PAPINIANUS; *libro VIII, responsorum.*- sed quod inde comparatum est, vice permutati dominii restitueretur.

72.- PAPINIANUS; *libro XX, quaestionum.*- Idem servandum erit et si proprios creditores ex ea pecunia dimiserit: non enim absumitur, quod in corpore patrimonii retinetur.

73.- PAPINIANUS; *libro XXIII, quaestionum.*- Si quod ex Pamphila nascetur legatum mihi fuerit et ego Pamphilam emam eaque apud me sit enixa, ratione summa responsum est non ex causa lucrativa partum intellegi meum factum ideoque petendum ex testamento, tamquam istum emissem, ut scilicet pretii contributione facta consequar tantum, quanti

where the sum bequeathed is equal to the amount of the trust. For where money has been received, and the party is asked to deliver to another something of his own, although it may be of greater value, the legatee should not be heard, if, having received the legacy, he demands contribution; for equity does not permit a legatee to tender to the beneficiary of the trust what he has received as a bequest.

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

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

71.- THE SAME; *Opinions, Book VIII.*- But whatever is purchased under such circumstances must be delivered, just as if there had been an exchange of ownership.

72.- THE SAME; *Questions, Book XX.*- The same rule must be observed where the heir paid his own creditors with the money of the estate, for he is not considered to have squandered what remains as part of the estate.

73.- THE SAME; *Questions, Book XXIII.*- Where a slave to be born of Pamphila is bequeathed to me, and I purchase Pamphila, and she brings forth a child in my house, there is good reason for saying that the said child should not be understood to have been acquired by me for a valuable consideration, and therefore a demand can be made under the will for the child, just

recibido el dinero, restituyese una cosa propia, aunque es de mayor precio, no ha de ser oído el legatario, si, percibido el legado, quisiera compensarlo; porque la equidad no consiente que se apruebe esto, si el legatario ofreciese lo que hubiere percibido a título de legados.

§ 2.- Habiendo uno, instituido heredero de parte su hijo, dado a éste como coheredero a su tío paterno, y habiéndole pedido a éste que hiciese coheredero de sus propios hijos a su hijo por una porción viril, si verdaderamente hubiese en la porción viril menos de lo que importó la herencia del hermano, no se puede pedir nada más; pero si más, se respondió, que se ha de tener cuenta también de los frutos que percibió el tío paterno, o que, habiéndolos podido percibir, no percibió por dolo; no de otra suerte, que si habiéndose legado cien mil, se rogara que después de cierto tiempo restituyese mayor cantidad.

§ 3.- Mas cuando aquel a quien se rogó que después de su muerte restituyese lo que quedare de la herencia, compra otras con el precio de las cosas vendidas, no se considera que disminuyó las que vendió;

71.- EL MISMO; *Respuestas, libro VIII.*- sino que se restituirá por vía de dominio permutado lo que se compró con aquel.

72.- EL MISMO; *Cuestiones, libro XX.*- Lo mismo se habrá de observar, también si con este dinero hubiere pagado a sus propios acreedores; porque no se consume lo que se retiene en el cuerpo del patrimonio.

73.- EL MISMO; *Cuestiones, libro XXIII.*- Si se me hubiere legado lo que naciere de Pánfila, y yo comprase a Pánfila, y esta hubiera dado a luz en mi poder, se respondió con muchísima razón, que no se entiende que el parto se hizo mío por causa lucrativa; y que por lo tanto, se ha de pedir en virtud del testamento, como si yo lo hubiese comprado, a saber,

puerum deducta matris aestimatione constituisse mihi iudex in causa legati datus aestimaverit.

74.- PAPINIANUS; *libro XXVII, quaestionum*.- "Titio centum aureos heres praesens dato": deinde protulit diem legatorum. Non est verum, quod Alfenus rettulit, centum praesenti deberi, quia diem proprium habuerunt.

75.- PAPINIANUS; *libro VI, responsorum*.- Miles ad sororem epistulam, quam post mortem suam aperiri mandavit, talem scripsit: "Scire te volo donare me tibi aureos octingentos". Fideicommissum deberi sorori constitit nec aliud probandum in cuiuslibet suprema voluntate: placet enim consistere fideicommissum et si defunctus cum eo loquatur, quem precario remuneratur.

§ 1.- Pro parte heres institutus, cui praeceptiones erant relictas, post diem legatorum cedentem ante aditam hereditatem vita decessit. Partem hereditatis ad coheredes substitutos pertinere placuit, praeceptionum autem portiones, quae pro parte coheredum constiterunt, ad heredes eius transmitti.

76.- PAPINIANUS; *libro VII, responsorum*.- Cum filius divisus tribunalibus actionem inofficiosi testamenti matris pertulisset atque ita variae sententiae iudicum exstissent, heredem, qui filium vicerat, pro partibus, quas aliis coheredibus abstulit filius, non habiturum praeceptiones sibi datas, non magis quam ceteros legatarios actiones, constituit. Sed libertates ex testamento competere placuit, cum pro parte filius de testamento matris litigasset. Quod non erit trahendum ad servitutes, quae pro parte minui non possunt: plane petetur integra servitus ab eo qui filium vicit, partis autem aestimatio

child, just as if I had actually purchased it; so that, if a contribution of the price is made, I can obtain as much as the child would have cost me after having deducted the appraised value of the mother, and the judge appointed to hear the case must make an estimate of the amount of the same.

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

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

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

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

para que, hecho cómputo del precio, yo consiga tanto cuanto el juez nombrado para la causa del legado hubiere estimado que me costó el niño nacido, deducida la estimación de su madre.

74.- EL MISMO; *Cuestiones, libro XXVII*.- «Dele de presente mi heredero cien áureos a Ticio», y después prorrogó el término de los legados; no es verdad, lo que dijo Alfeno, que se deban de presente los ciento, porque tuvieron término propio.

75.- EL MISMO; *Respuestas, libro VI*.- Un militar prescribió a su hermana esta carta, que mandó se abriese después de su muerte: «quiero que sepas que te dono ochocientos áureos»; es cierto que se le debe el fideicomiso a la hermana, y que no se ha de admitir otra cosa, tratándose de su última voluntad de cualquier persona; porque está determinado que le sea válido el fideicomiso, también si el difunto no hablase con aquel a quien remunera con un precario.

§ 1.- El heredero instituido de una parte, a quien se le habían dejado legados previos, falleció antes de haber sido adida la herencia, después de correr el término de los legados; se determinó que les pertenecía a los coherederos substitutos la parte de la herencia, pero que se transmitían a los herederos del mismo las porciones de los legados previos, que subsistieron con arreglo a la porción de los coherederos.

76.- EL MISMO; *Respuestas, libro VII*.- Habiendo intentado un hijo la acción de testamento inoficioso de su madre ante distintos tribunales, y habiendo de este modo diversas sentencias de los Jueces, se resolvió que el heredero, que había vencido al hijo, no habrá de tener los legados previos que se le dieron, con arreglo a las partes que el hijo les quitó a los otros coherederos, así como tampoco los demás legatarios las acciones; pero se determinó, que competían en virtud del testamento las libertades, porque el hijo había litigado respecto a una parte sobre el testamento de su madre. Lo que no se habrá de extender a

praestabitur: aut si paratus erit filius pretio accepto servitutem praebere, doli summovebitur exceptione legatarius, si non offerat partis aestimationem, exemplo scilicet legis Falcidiae.

§ 1.- "Lucio Sempronio lego omnem hereditatem Publii Maevii". Sempronius ea demum onera suscipiet, quae Maevianae hereditatis fuerunt et in diem mortis eius, qui heres Maevii exstitit, perseveraverunt, sicut vice mutua praestabuntur actiones, quae praestari potuerunt.

§ 2.- Dominus herede fructuario scripto fundum sub condicione legavit. Voluntatis ratio non patitur, ut heres ex causa fructus emolumentum retineat: diversum in ceteris praediorum servitutibus, quas heres habuit, responsum est: quoniam fructus portionis instar optinet.

§ 3.- "Heres meus Titio dato, quod ex testamento Sempronii debetur mihi". Cum iure novationis, quam legatarius idemque testator ante fecerat, legatum ex testamento non debeatur, placuit falsam demonstrationem legatario non obesse, nec in totum falsum videri, quod veritatis primordio adiuvaretur.

§ 4.- Servus pure manumissus, cui libertas propter impedimentum iuris post aditam hereditatem non competit, quod status eius extrinsecus suspenditur (forte propter adulterii quaestionem), ex eodem testamento neque legata neque fideicommissa pure data sperare potest, quia dies inutiliter cedit.

§ 5.- Pater cum filia pro semisse herede instituta sic testamento locutus fuerat: "Peto, cum morieris, licet alios quoque filios susceperis, Sempronio nepoti meo plus tribuas in honorem nominis mei". Necessitas quidem restituendi nepotibus viriles

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

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

§ 2.- The owner of land, the usufruct of which had been left to an heir, bequeathed it under a certain condition. The terms of the will did not permit the heir to retain the profits, on account of the usufruct. A different opinion is held with reference to certain servitudes attaching to land to which servitudes the heir was entitled, since he obtains the profits as a portion of the land.

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

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

§ 5.- A father, having appointed his daughter heir to half of his estate, made the following provision in his will: "I ask that when you die, even though you should have other children, you will leave a larger share of your estate to Sempronius, my grandson, in

las servidumbres, las cuales no se pueden disminuir en parte; pero se le pedirá íntegra la servidumbre al que venció al hijo, mas se pagará la estimación de la parte, o, si el hijo estuviera dispuesto a prestar la servidumbre habiendo recibido el predio, será repelido el legatario con la excepción de dolo, si no ofreciera la estimación de la parte, por supuesto, a la manera de la ley Falcidia.

§ 1.- «Lego a Lucio Sempronio toda la herencia de Publio Mevio»; Sempronio asumirá solamente aquellas cargas que fueron de la herencia de Mevio, y que subsistieron hasta el día de la muerte del que quedó heredero de Mevio, así como recíprocamente se prestarán las acciones, que pudieron prestarse.

§ 2.- Un dueño, habiendo instituido heredero al usufructuario, legó un fundo bajo condición; la razón de su voluntad no consiente que el heredero retenga aprovechamiento por causa del usufruto; lo contrario se respondió respecto a las demás servidumbres de los predios, que tuvo el heredero, porque el usufruto hace veces de porción.

§ 3.- «Déle a Ticio mi heredero lo que se me debe por el testamento de Sempronio»; como por derecho de la novación, que el legatario y el mismo testador habían hecho antes, no se debe el legado en virtud del testamento, se determinó que la falsa demostración no le perjudicaba al legatario, y que no se consideraba falso en su totalidad lo que estuviese favorecido por un principio de verdad.

§ 4.- Manumitido puramente un esclavo, a quien por impedimento del derecho no le compete la libertad después de adida la herencia, porque por causa extrínseca está en suspenso su estado, acaso por cuestión de adulterio, no puede separar ni los legados, ni los fideicomisos dados puramente en virtud del mismo testamento, porque corre inútilmente el término.

§ 5.- Un padre, habiendo instituido a su hija heredera de la mitad, se expresó así en el testamento: «te pido, que cuando muera, aunque además hayas tenido otros hijos, le des más a mi nieto Sempronio en honor de mi nombre»; se consideraba que pre-

partes praecedere videbatur, sed moderandae portionis, quam maiorem in unius nepotis personam conferri voluit, arbitrium filiae datum.

§ 6.- Non iure tutori dato mater legavit: si consentiat, ut decreto praetoris confirmetur, et praetor non idoneum existimet, actio legati non denegabitur.

§ 7.- Qui Mucianam cautionem alicuius non faciendi causa interposuit, si postea fecerit, fructus quoque legatorum (quos principio promitti necesse est) restituere debet.

§ 8.- Variis actionibus legatorum simul legatarius uti non potest, quia legatum datum in partes dividi non potest: non enim ea mente datum est legatariis pluribus actionibus uti, sed ut laxior eis agendi facultas sit, ex una, interim quae fuerat electa, legatum petere.

§ 9.- Repetendorum legatorum facultas ex eo testamento solutorum danda est, quod irritum esse post defuncti memoriam damnatam apparuit, modo si iam legatis solutis crimen perduellionis illatum est.

77.- PAPINIANUS; *libro VIII, responsorum.*- Cum pater filios eorumque matrem heredes instituisset, ita scripsit: "Peto a te, filia, ut acceptis ex hereditate mea in portionem tuam centum aureis et praedio Tusculano partem hereditatis restituas matri tuae". Respondi praedium quidem hereditarium iudicio divisionis de communi filiam habituram, pecuniam autem de parte sua retenturam.

§ 1.- Eorum, quibus mortis causa donatum est, fidei committi quoquo tempore potest: quod fideicommissum heredes salva Falcidia ratione,

honor of my name which he bears." The daughter seems to be necessarily compelled to give, in the first place, equal portions to all the grandchildren, but she has the choice of fixing the larger amount which her father desired to be bestowed upon one of his grandsons.

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

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

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

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

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

§ 1.- Those persons to whom a donation mortis causa has been given can be charged with a trust for any length of time; and this trust the heirs must

cedía ciertamente la necesidad de entregarle a los nietos sus porciones viriles, pero que se le dió a la hija la facultad de determinar la porción mayor que quiso se concediese a la persona de una de los nietos.

§ 6.- La madre hizo un legado al tutor no nombrado legalmente; si consintiera que fuese confirmado por decreto del Pretor, y el Pretor no lo estimase idóneo, no se denegará la acción de legado.

§ 7.- El que interpuso la caución Muciana por causa de no hacer alguna cosa, si después la hubiere hecho, debe restituir también los frutos de los legados, que es necesario se prometan al principio.

§ 8.- El legatario no puede utilizar simultáneamente varias acciones de legados, porque no se puede dividir en partes el legado dado; pues no se le concedió con esta intención a los legatarios que utilizarán varias acciones, sino que, para que tuvieran más amplia facultad para reclamar, pidieran el legado mientras tanto en virtud de aquella que había sido elegida.

§ 9.- Se ha de dar la facultad de repetir los legados pagados en virtud de un testamento, que después de condenada la memoria del difunto apareció que era irrito, pero esto, si la acusación de lesa majestad se ha formulado habiendo sido ya pagados los legados.

77.- EL MISMO; *Respuestas, libro VIII.*- Un padre, habiendo instituido herederos a sus hijos y a la madre de estos, escribió así: «te pido, hija, que recibiendo de mi herencia para tu porción cien áureos y el predio Tusculano, le restituyas a tu madre la parte de la herencia»; respondí, que en el juicio de división habrá de obtener ciertamente la hija el predio de la herencia de la masa común, pero que el dinero lo retendrá de su porción.

§ 1.- A aquellos a quienes se les hizo una donación por causa de muerte se les puede encomendar un fideicomiso en cualquier tiempo; cuyo fideicomiso

quam in his quoque donationibus exemplo legatorum locum habere placuit, praestabunt. Si pars donationis fideicommisso teneatur, fideicommissum quoque munere Falcidiaae fungetur. Si tamen alimenta praestari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de maiore pecunia praestari non dubie voluit integra.

§ 2.- Mater filiis suis vulgo conceptis dotem suam mortis causa donando stipulari permisit: cum aliis heredibus institutis petisset a filiis viro dotem restitui, totum viro fideicommissum dotis deberi, si Falcidiaae ratio non intervenerit: ideo retentionem dotis virum habere placuit: alioquin Falcidiaae partem heredibus a filiis ex stipulatu cum viro agentibus ex dote esse per in factum actionem reddendam.

§ 3.- Surdo et muto, qui legatum accipit, ut cum morietur restituat, recte mandatur: nam et ignorantes adstringuntur fideicommisso, quibus ignorantibus emolumentum ex testamento quaeritur.

§ 4.- Hereditatem filius cum moreretur filiis suis vel cui ex his voluisset restituere fuerat rogatus: quo interea in insulam deportato eligendi facultatem non esse poena peremptam placuit nec fideicommissi condicionem ante mortem filii heredis exsistere: viriles autem inter eos fieri, qui eo tempore vixerint, cum de aliis eligendi potestas non fuerit.

§ 5.- Qui dotale praedium contra legem Iuliam vendidit, uxori legatum dedit et emptoris fidei commisit, ut amplius ei pretium restituat. Emptorem fideicommissi non teneri constabat: si tamen accepto legato mulier venditionem irritam faceret, eam

execute after deducting the Falcidian portion which, in donations of this kind, follows the example of legacies. Where only a part of the donation is included in the trust, the latter will also be subject to the privileges of the Falcidian Law. Where, however, the testator desired support to be furnished, it should be held that, according to his will, the whole burden of the Falcidian Law must be sustained by the remainder of the donation, as there is no doubt that the deceased intended that the entire maintenance should be furnished when his bequest of a larger sum is taken into consideration.

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

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

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

§ 5.- Where a husband who, in violation of the Lex Julia, sold land which formed part of his wife's dowry, bequeathed a legacy to her, and charged the purchaser of the land to pay her a larger sum than the price received, it was held that the purchaser was not

entregarán los herederos quedando salva la cuenta de la Falcidia, que se determinó que a la manera que en los legados tuviera lugar también en estas donaciones. Si en el fideicomiso se comprendiera una parte de la donación, también el fideicomiso soportará la carga de la Falcidia; pero si quiso que se prestasen alimentos, se habrá de responder, que toda la carga de la colación queda en el residuo de la donación en virtud de la voluntad del difunto, que sin duda quiso que se prestasen íntegras de la cantidad mayor.

§ 2.- Una madre les permitió a sus hijos concebidos del vulgo que estipularan su dote donándosela por causa de muerte; como habiendo instituido otros herederos les hubiese pedido a los hijos que restituyeran la dote a su marido, se determinó que se le debe al marido todo el fideicomiso de la dote, si no mediar la cuenta de la Falcidia, y que por esto el marido tenía el derecho de retención de la dote; en otro caso, se les ha de restituir a los herederos mediante la acción por el hecho respecto a la dote la parte de la Falcidia por los hijos que ejerciten contra el marido la acción de lo estipulado.

§ 3.- Perfectamente se le encomienda al sordo y al mudo, que recibió un legado, que lo restituya cuando muera; porque aun los que lo ignoran quedan obligados a un fideicomiso, si para aquellos que lo ignoran se adquiere utilidad en virtud del testamento.

§ 4.- Se le había rogado a un hijo, que cuando muriera restituyera la herencia a sus hijos, o al que de ellos hubiese querido; se determinó, que, habiendo sido deportado aquel a una isla en el tiempo intermedio, no se extinguió por la pena la facultad de elegir, y que no se cumplía la condición del fideicomiso antes de la muerte del hijo heredero, pero que se hacen porciones viriles entre los que vivieren en este tiempo, cuando ya no hubiere facultad de elegir entre otros.

§ 5.- Uno que vendió un predio dotal contra viniendo a la ley Julia, dió un legado a su mujer, y encomendó a la fidelidad del comprador, que se restituyese el exceso del precio; era sabido que el comprador del fideicomiso no quedaba obligado;

oblato pretio doli placuit exceptione summo veri.

§ 6.- Maevio debitori suo reus stipulandi mandavit, ut Titio, cui mortis causa donabat, pecuniam debitam solveret. Cum sciens dominum vita decessisse Maevius pecuniam dedisset, non esse liberationem secutam constitit nec, si Maevius solvendo non esset, in Titium actionem solidi vel iure Falcidiae dandam esse, quia mortis causa cepisse non videretur. Diversum probandum foret, si Maevius ignorans dominum vita decessisse pecuniam errore lapsus [lapsus] dedisset: tunc enim portio iure Falcidiae revocaretur.

§ 7.- Cum pater fideicommissum praediorum ex testamento matris filiae deberet, eandem pro parte ita heredem instituit, ut hereditatem fideicommisso compensaret, eademque praedia filio exheredato dari voluit. Quamquam filia patris hereditatem suscipere noluisse, fideicommissum tamen ab heredibus esse filio praestandum, ad quos hereditatis portio quam accepit filia redierat, placuit: quod si alium filiae substituisset, eum oportere filio fideicommissum reddere.

§ 8.- Evictis praediis, quae pater, qui se dominum esse crediderit, verbis fideicommissi filio reliquit, nulla cum fratribus et coheredibus actio erit: si tamen inter filios divisionem fecit, arbiter coniectura voluntatis non patietur eum partes coheredibus praelegatas restituere, nisi parati fuerint et ipsi patris iudicium fratri conservari.

§ 9.- Pater certam pecuniam exheredatae filiae verbis fideicommissi reliquit eamque nupturae dotis

liable under the terms of the trust. If, however, the woman, after having accepted the legacy, should wish to have the sale declared void, she can be barred by an exception on the ground of bad faith, after the price has been tendered her by the purchaser.

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

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

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

§ 9.- Where a father left a certain sum of money by a trust to his daughter whom he had disinherited, and

pero si, habiendo aceptado el legado, la mujer hiciera írrita la venta, se determinó, que, habiéndose ofrecido el precio, fuese ella repelida con la excepción de dolo.

§ 6.- Un estipulante le mandó a su deudor Mevio que le pagase a Ticio, a quien hacia donación por causa de muerte, la cantidad debida. Si sabiendo que el señor había muerto, Mevio hubiese dado el dinero, fue constante que no se siguiera la liberación; y si Mevio no fuese solvente, no se ha de dar contra Ticio la acción por la totalidad, o por derecho de la Falcidia, porque no se consideraría que adquirió por causa de muerte. Lo contrario se habría de admitir, si ignorando Mevio que el señor había fallecido, hubiese dado engañado por error el dinero; porque entonces se revocaría la porción por derecho de la Falcidia.

§ 7.- Debiéndole un padre a su hija por el testamento de la madre el fideicomiso de unos predios la instituyó a ella misma heredera de una parte, de manera que compensase la herencia con el fideicomiso, y quiso que se le diesen los mismos predios a un hijo desheredado; se determinó, que aunque la hija no hubiese querido aceptar la herencia de su padre, se le había de entregar, sin embargo, al hijo el fideicomiso por los herederos, a quienes había vuelto la porción de la herencia, que recibió la hija; pero que si hubiese substituido otro a la hija, convenía que éste le entregase al hijo el fideicomiso.

§ 8.- Habiéndose hecho evicción de los predios que el padre, que hubiere creído que él era dueño, dejó a su hijo con palabras de fideicomiso, no tendrá acción alguna contra sus hermanos y coherederos; pero si hizo división entre los hijos, no consentirá el árbitro, por conjetura de la voluntad, que él restituya a los coherederos las partes legadas previamente, a no ser que ellos mismos estuvieren dispuestos a mantener a favor del hermano la disposición del padre.

§ 9.- Un padre le dejó a una hija desheredada cierta cantidad con palabras de fideicomiso, y quiso que se

nomine dari voluit filio dotem stipulante. Cum filius minorem dotem dedisset, superfluum esse filiae reddendum constabat. Divortio quoque secuto fideicommissum filiam recte petituram, ut actio stipulationis sibi praestaretur, quoniam verisimile non erat patrem interponi stipulationem voluisse, quo filia post primas nuptias indotata constitueretur: ceterum si postea nuberet, ad secundas nuptias cautionem extendi non oportere.

§ 10.- A filia pater petierat, ut cui vellet ex liberis suis praedia cum moreretur restitueret: uni ex liberis praedia fideicommissi viva donavit. Non esse electionem propter incertum diem fideicommissi certae donationis videbatur: nam in eum destinatio dirigi potest, qui fideicommissum inter ceteros habiturus est remota matris electione.

§ 11.- "Fidei heredum meorum committo, ne fundum Tusculanum alienent et ne de familia nominis mei exeat". Secundum voluntatem eos quoque invitatos intellegendum est, quibus heredes extranei fideicommissam libertatem reddiderunt.

§ 12.- "Fidei tuae committo, uxor, ut restituas filiae meae, cum morieris, quidquid ad te quoque nomine de bonis meis pervenerit". Etiam ea, quae postea codicillis uxori dedit, fideicommisso continebuntur, nam ordo scripturae non impedit causam iuris ac voluntatis: sed dos praelegata retinebitur, quoniam reddi potius videtur quam dari.

§ 13.- "Volo praedia dari libertis meis: quod si quorum sine liberis vita decesserit, partes eorum ad reliquos pertinere volo". Collibertum patris

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

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

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

§ 12.- "I charge you, my wife, to give and restore to my daughter at the time of your death, any of my property which may have come into your hands in any way whatsoever." Whatever the testator afterwards gave to his wife by a codicil will be included in the trust, for the order in which the two instruments were executed -does not interfere with the law, and his intention; but if the wife's dowry had been previously left to her, she will have the right to retain it, since this disposition of the property is understood to be restored rather than donated.

§ 13.- "I desire such-and-such land to be given to my freedmen, and if any of them should die without issue, I desire that their shares shall belong to the

le diese a ella a título de dote, para que se casase, estipulando el hijo la dote; habiendo dado el hijo una dote menor, era evidente que se le había de entregar a la hija lo restante. Habiéndose seguido también el divorcio, con razón pedirá la hija el fideicomiso, para que se le ceda la acción de la estipulación, porque no era verosímil que el padre hubiese querido que se interpusiera estipulación para que su hija quedase indotada después de las primeras nupcias; pero si se casara después, no debe extenderse la caución a las segundas nupcias.

§ 10.- Un padre le había pedido a su hija, que cuando muriese restituyese unos predios al que quisiera de sus hijos, y ella en vida le donó los predios del fideicomiso a uno de los hijos; parecía que no había la elección de una donación cierta, por ser incierto el día del fideicomiso; porque la destinación se puede dirigir a aquel, que entre los demás ha de tener el fideicomiso, desestimada la elección de la madre.

§ 11.- «Encomiendo a la fidelidad de mis herederos, que no enajenen el fundo Tusculano, y que no salga de la familia de mi nombre»; conforme a la voluntad, se ha de entender que fueron invitados también aquellos a quienes los herederos extraños les dieron la libertad dejada por fideicomiso.

§ 12.- «Encomiendo, mujer, a tu fidelidad, que le des y le restituyas a mi hija, cuando mueras, todo lo que de mis bienes hubiere ido a tu poder por cualquier título;» se comprenderán en el fideicomiso también las cosas que después le dió a la mujer en codicilos; porque el orden de la escritura no impide la causa del derecho, y de la voluntad, sino que se retendrá la dote prelegada, porque más bien se considera que se devuelve, que no que se da.

§ 13.- «Quiero que se den los predios a mis libertos; pero si alguno de ellos hubiere fallecido sin hijos, quiero que sus porciones les pertenezcan a los

eundemque filium ex voluntate substitutionem excludere placuit.

§ 14.- Curatoris sui frustra fidei commisisse videbatur, ut heredi fratri negotiorum gestorum rationem redderet: quamquam igitur testamento cautum esset, ut, cum ad statum suum frater pervenisset, ei demum solveretur, tamen sub curatore alio fratrem agentem recte placuit actionem inferre, cum illis verbis fratri potius consultum videretur quam solutio quae iuste fieri potuit dilata.

§ 15.- Ab instituto extraneo praedia libertis cum moreretur verbis fideicommissi reliquerat et petierat, ne ex nomine familiae alienarentur. Substitutum ea praedia debere ex defuncti voluntate respondi, sed utrum confestim an sub eadem condicione, voluntatis esse quaestionem: sed coniectura ex voluntate testatoris capienda mors instituti exspectanda est.

§ 16.- Mensae negotium ex causa fideicommissi cum indemnitate heredum per cautionem susceptum emptioni simile videtur et ideo non erit quaerendum, an plus in aere alieno sit quam in quaestu.

§ 17.- Pater filiae mancipia, quae nubenti dedit, verbis fideicommissi praestari voluit: partus susceptos, etsi matres ante testamentum mortuae fuissent, ex causa fideicommissi praestandos respondi. Nec aliud in uxore confirmatis donationibus pridem observatum est.

§ 18.- Hereditatem post mortem suam rogati restituere nominum periculo, quae per divisionem optigerunt inter coheredes interpositis delegationibus, non adstringuntur, non magis quam praediorum, cum permutatio rerum discernens com-

survivors." A testator having enfranchised a father and a son, it was held that the substitution was excluded under the will.

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

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

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

§ 17.- A father, by the terms of a trust, provided that certain slaves of his daughter, whom he had given to her at the time of her marriage, should belong to her. I gave it as my opinion that the offspring of said slaves, even though their mother had died before the will was executed, should be delivered under the trust, and that the same thing should be done where any donations had previously been made to his daughter after her marriage.

§ 18.- Where heirs are charged to surrender the estate at the time of their death, they are not liable to the risk of loss of any claims which they have obtained by division, and which have been assigned to the different co-heirs, any more than to the

demás»; se determina que el coliberto del padre, y al mismo tiempo hijo, excluía la substitución en virtud de la voluntad de aquel.

§ 14.- Se consideraba que inútilmente encomendó a la fidelidad de su curador, que al hermano heredero le rindiese cuenta de los negocios administrados; así pues, aunque en el testamento se hubiese dispuesto que solamente se le pagase cuando su hermano hubiese llegado a su mayor edad, sin embargo, con razón se determinó, que el hermano que estaba bajo otro curador promoviera la acción, porque se consideraba que con aquellas palabras más bien se miró por el hermano, que no que se difirió el pago, que pudo hacerse justamente.

§ 15.- A cargo de un extraño instituido heredero había dejado uno con palabras de fideicomiso unos predios a los libertos, cuando aquel muriese, y le había pedido que no fuesen enajenados de la familia; respondí, que el substituto debía aquellos predios por la voluntad del testador, pero que respecto a la voluntad había la duda si desde luego, o bajo la misma condición; pero por conjetura, que se ha de deducir de la voluntad del testador, se ha de esperar a la muerte del instituido.

§ 16.- La negociación de una mesa de cambio, aceptada por causa de fideicomiso mediante caución con indemnización a los herederos, es considerada semejante a una compra, y por lo tanto, no se habrá de investigar si hay más deudas que ganancias.

§ 17.- Un padre quiso con palabras de fideicomiso, que se entregasen a su hija los esclavos que le dió al casarse ella; respondí, que por causa del fideicomiso se debían entregar los partos dados a luz, aunque las madres hubiesen muerto antes del testamento; y no se observó hace tiempo otra cosa respecto a la mujer, habiendo sido confirmadas las donaciones.

§ 18.- Aquellos a quienes se les rogó que después de su muerte restituyeran la herencia no están sujetos, habiéndose interpuesto delegaciones entre los coherederos, al riesgo de los créditos que les tocaron por la división, no de otra suerte, que al de los

munionem intervenit.

§ 19.- "Filia mea praecipiat sibique habeat volo rem matris suae". Fructus, quos medio tempore pater percipiet nec in separato habuit, sed absumpsit vel in suum patrimonium convertit, non videntur filiae relictæ.

§ 20.- "Dulcissimis fratribus meis, avunculis autem tuis quaecumque mihi supersunt in Pamphylia Lycia vel ubicumque de maternis bonis concedi volo, ne quam cum his controversiam habeas". Omnia corpora maternae hereditatis, quae in eadem causa dominii manserunt, ad voluntatem fideicommissi pertinent: ex isdem igitur facultatibus percepta pecunia et in corpus proprii patrimonii versa, item iure divisionis res propriae factae non praestabuntur, cum discordiis propinquorum sedandis prospexerit, quas materia communionis solet excitare.

§ 21.- Pater pluribus filiis heredibus institutis moriens claves et anulum custodiae causa maiori natu filiae tradidit et libertum eidem filiae, qui praesens erat, res quas sub cura sua habuit adsignare iussit. Commune filiorum negotium gestum intellegatur nec ob eam rem apud arbitrum divisionis praecipuam causam filiae fore.

§ 22.- Cum imperfecta scriptura invenitur, ita demum verbum legati vel fideicommissi, quod praecedat vel sequitur, ad communionem adsumitur, si dicto scriptum congruat.

§ 23.- Filius matrem heredem scripserat et fideicommissa tabulis data cum iurisiurandi religione praestari rogaverat. Cum testamentum nullo iure factum esset, nihilo minus matrem legitimam heredem cogendam praestare fideicommissa respondi: nam enixae voluntatis preces ad omnem successionis speciem porrectae videbantur.

diminution in value of lands belonging to the estate, for where a distribution is made, the change of property disturbs the community of interest.

§ 19.- "I desire that my daughter may have for herself, as a preferred legacy, the property of her mother." Any profits which the father may have received, in the meantime, and did not keep separate, but either consumed or made a portion of his own estate, are not held to have been left to the daughter.

§ 20.- "I desire that any property belonging to me and situated in Pamphilia, Lycia, or anywhere else, which belonged to my mother's estate, shall be given to my dear brothers, who are your maternal uncles, in order that you may have no controversy with them." All the property forming part of his mother's estate, which remained in the same condition of ownership, belonged to the trust. Therefore, any money derived from said property, included in the estate of the testator, and made his own property, will also not be due under the terms of the trust; as the testator intended to prevent that disagreement of his relatives which community of property is accustomed to provoke.

§ 21.- A father, having appointed several of his children his heirs at the time of his death, gave to his oldest daughter his keys and ring for safe-keeping, and ordered a freedman who was present to deliver to his said daughter all the property which was in his charge. It was understood that the "business of the estate was to be transacted by all his children in common, and that his daughter could not, on this account, demand in court any preference in the division of the property.

§ 22.- When a will is found to be imperfect, any words bequeathing a legacy or a trust, and which precede or follow the defect, can only be considered as remedying it, where what is written agrees with the intention of the testator.

§ 23.- A son appointed his mother his heir, and requested her, under the obligation of an oath, to execute certain trusts created by the will. The will having been declared void, I answered that the mother was, nevertheless, compelled to execute the trust, as the lawful heir, for the requests contained in the will are held to extend to every kind of succession.

predios, cuando medió la permuta de cosas que deshace la comunidad.

§ 19.- «Quiero que mi hija tome previamente y tenga para sí los bienes de su madre»; no se consideran dejados a la hija los frutos que el padre percibió en el tiempo intermedio, y que no tuvo con separación, sino que consumió, o aplicó a su patrimonio.

§ 20.- «Quiero que se conceda; a mis cariñosísimos hermanos, pero tíos maternos tuyos, todo lo que me resta en Panfilia y en Licia, o en otra cualquier parte, de los bienes de mi madre, para que no tengas controversia alguna con ellos»; todos los bienes de la herencia materna, que permanecieron en el mismo estado de dominio, están comprendidos en la voluntad del fideicomiso. Así, pues, no se pagarán de estos mismos bienes las cantidades percibidas, e invertidas en cosas del propio patrimonio, así como tampoco las cosas hechas propias por derecho de división, porque el testador atendió a calmar las discordias de los parientes, que suelen excitar los bienes en común.

§ 21.- Un padre, habiendo instituido herederos a varios hijos, entregó al morir a su hija mayor las llaves y el anillo, para que los guardase, y mandó a un liberto, que estaba presente, que le entregase a la misma hija las cosas que tuvo a su cuidado; se entendía, que se administró el negocio común de los hijos, y que por esto no había de ser preferente ante el árbitro de la división la causa de la hija.

§ 22.- Cuando se halla imperfecta la escritura, la palabra de legado o de fideicomiso, que precede, o sigue, es aplicable a todo lo común, solamente si lo escrito fuese congruente con lo dicho.

§ 23.- Un hijo había instituido heredera a su madre, y le había rogado que bajo el sagrado de juramento entregase los fideicomisos dados en el testamento, no habiendo sido hecho el testamento con arreglo a derecho; respondí, que, no obstante, la madre heredera legítima debía de ser obligada a entregar los fideicomisos, porque las suplicas de una voluntad resuelta se consideraban extendidas a toda clase de

§ 24.- "Mando filiae meae pro salute sollicitus ipsius, ut, quoad liberos tollat, testamentum non faciat: ita enim poterit sine periculo vivere". Fideicommissariam hereditatem sorori coheredi non videri relictam apparuit, quod non de pecunia sua testari, sed optentu consilii derogare iuri testamentum fieri prohibendo voluit.

§ 25.- "Rogo, filia, bona tua quandoque distribuas liberis tuis, ut quisque de te meruerit". Videtur omnibus liberis, etsi non aequaliter promeruerint, fideicommissum relictum, quibus matris electione cessante sufficiet, si non offenderint: eos autem, quos mater elegerit, fore potiores, si soli promeruissent, existimavi: quod si neminem elegerit, eos solos non admitti, qui offenderunt.

§ 26.- Donationis praediorum epistulam ignorante filio mater in aede sacra verbis fideicommissi non subnixam deposuit et litteras tales ad aedituum misit: "Instrumentum voluntatis meae post mortem meam filio meo tradi volo". Cum pluribus heredibus intestato diem suum obisset, intellegi fideicommissum filio relictum respondi: non enim quaeri oportet, cum quo de supremis quis loquatur, sed in quem voluntatis intentio dirigatur.

§ 27.- Libertis praedium reliquit ac petit, ne id alienarent utque in familia libertorum retinerent. Si excepto uno ceteri partes suas vendiderint, qui non vendidit ceterorum partes, quibus non dedit alienandi voluntatem, integras petet: eos enim ad fideicom-

§ 24.- "Being solicitous for the welfare of my daughter, I direct her not to make a will until she has children, so that she will be able to live without any apprehension." It would appear that the estate was not left in trust for the sister and co-heir of the said daughter, for the reason that the testator did not intend that his daughter should not dispose of her estate by will, but as he had, by thus forbidding her to make a will, merely offered his advice, she should not make use of her legal right.

§ 25.- "I ask you, my daughter, to distribute all your property of every kind among your children, according as each one may be deserving of your bounty." In this case, it seems that a trust has been created for the benefit of all the children, even though they may not have been equally deserving, and if the mother should not make any choice among them, it will be sufficient for the execution of the trust if they have not been guilty of any offense towards her. I, however, was of the opinion that those should be preferred whom the mother might select, if they were more deserving. But if she should not select any, those alone who have offended her should not be admitted to share in the estate.

§ 26.- A mother made a deposit, in a sacred place, of a letter donating certain lands to her son, he not being aware of the fact. She did not confirm her acts by words creating a trust, but only sent to the guardian of the temple a letter containing the following: "I wish the document containing my will to be delivered to my son, after my death." The mother died intestate, leaving several heirs, and I gave it as my opinion that she should be understood to have left the trust for the benefit of her son; for it is not necessary to inquire to whom anyone may speak with reference to their last will, but toward whom the intention of the will is directed.

§ 27.- A testator left a tract of land to his freedmen, and requested them not to alienate it, so that it might be retained in the family of the said freedmen. If all of them, with the exception of one, should sell their shares, the one who did not do so can claim the shares

sucesión.

§ 24.- «Le mando a mi hija, solícito por la salud de la misma, que no haga testamento hasta que tenga hijos; porque así podrá vivir sin peligro»; se vió que no parecía que se le había dejado a la hermana coheredera la herencia fideicomisaria, porque, prohibiendo que se hiciera testamento, quiso no testar de su propio caudal, sino contravenir al derecho, so pretexto de un consejo.

§ 25.- «Te ruego, hija mía, que en algún tiempo les distribuyas tus bienes a tus hijos, según cada uno de ellos hubiere merecido de tí»; se considera, que a todos los hijos se les dejó el fideicomiso, aunque no lo hayan merecido igualmente; a los cuales les bastará, no habiendo elección de la madre, que no la hayan ofendido, pero estimé, que los que la madre hubiere elegido habrán de ser preferidos, si solo ellos hubiesen sido merecedores; pero si no hubiere elegido a ninguno, solamente no son admitidos los que la ofendieron.

§ 26.- Una madre depositó en un edificio sagrado, ignorándolo el hijo, una carta de donación de predios, no robustecida con palabras de fideicomiso, y envió al guardián del templo esta carta: «quiero que se le entregue a mi hijo el instrumento de mi voluntad después de mi muerte»; habiendo fallecido intestada con muchos herederos, respondí, que se entiende que se le dejó al hijo un fideicomiso; porque no debe investigarse con quién habla uno de sus últimas voluntades, sino a quien se dirige la intención de la voluntad.

§ 27.- Dejó un predio a los libertos, y pidió que no lo enajenasen, y que lo retuviesen en la familia de los libertos. Si excepto uno los demás hubieren vendido sus partes, el que no la vendió pedirá íntegras las partes de los demás, a quienes no les dió consen-

missum videtur invitasse, qui iudicio paruerunt: alioquin perabsurdum erit vice mutua petitionem induci, scilicet ut ab altero partem alienatam quis petat, cum partem suam alienando perdiderit. Sed hoc ita procedere potest, si pariter alienaverint: ceterum prout quisque prior alienaverit, partem posterioribus non faciet: qui vero tardius vendidit, ei qui non vendidit in superiorum partibus fecisse partem intellegitur. At si nemo vendiderit et novissimus sine liberis vita decesserit, fideicommissi petitio non supererit.

§ 28.- Cum inter libertos ad praedii legatum liberta quoque fuisset admissa, quod patronus petit, ut de nomine familiae non exiret, heredem libertae filium partem praedii, quam mater accepit, retinere visum est.

§ 29.- Cum existimaret ad solam consobrinam suam bona perventura, codicillis ab ea factis pluribus fideicommissa reliquerat. Iure successionis ad duos eiusdem gradus possessione devoluta rationibus aequitatis et perpetui edicti exemplo pro parte dimidia mulierem relevandam respondi: sed libertates ab ea praestandas, quas intercidere damni causa durum videbatur.

§ 30.- Pater, qui filio semissem dederat et sororibus eius impuberibus quadrantes, quibus fratrem tutorem dedit, ita fuerat locutus: "Fili, contentus eris pro tuo semisse aureis ducentis et vos, filiae, pro vestris quadrantibus centenis aureis". Vice mutua liberis fideicommissum hereditatis reliquisse non videbatur, sed aestimationem (ut a parentibus frugi fieri solet) patrimonii sui fecisse, nec ideo fratrem iudicio tutelae bonae fidei rationes quandoque praescriptione demonstratae quantitatis exclusurum.

of all the others who by the terms of the trust were not granted the power of alienating the same; for the testator will be held to have only invited those who complied with his will to share in the benefits of the trust. Otherwise, it would be the height of absurdity if each could make a claim against the others, in such a way that anyone could demand the share which he alienated from another who, by alienating his own, had lost it. This proceeding, however, can be instituted if all of them alienated their shares in the same manner. Moreover, it is understood that it is not the act of the first freedman who alienated his share, but that of the one immediately preceding him who did not dispose of his, which causes the accrual of the shares of the others to the advantage of the former. But if no one should sell his share, and the last one should die without issue, the right to demand the execution of the trust will not survive.

§ 28.- Where land is left to freedmen under such circumstances, and there is a freedwoman among them, and the patron requests that the property shall not go out of the family, it was held that the heir of the freedwoman is entitled to retain the share of the land which his mother received.

§ 29.- A person who thought that his entire estate would belong to his female cousin made a will by which he charged her with several trusts. The possession of the estate having devolved upon two heirs of the same degree, by the right of succession, in accordance with the principles of equity, and agreeably to the terms of the Perpetual Edict, I gave it as my opinion that the woman should be relieved from the execution of half the trust, but that it would be a hardship that the grants of freedom which she was required to bestow, should not be made on account of the loss she had sustained.

§ 30.- A father who had appointed his son heir to half of his estate, and the sisters of the latter, who had not yet reached the age of puberty, each heir to a quarter of the same, appointed their brother their guardian, and expressed himself as follows: "My son, you must be content with two hundred aurei, instead of your share of half of the estate, and you, my daughter, must be content with a hundred aurei instead of your shares of a quarter each." It was not held that the father intended to charge his children

timiento para enajenarlas; porque se considera que invitó al fideicomiso a los que obedecieron a su disposición, pues de otra suerte será muy absurdo, que recíprocamente se deduzca petición, esto es, que uno le pida al otro la parte enajenada, cuando enajenándola hubiere perdido su parte. Pero esto puede ser así procedente, si juntamente las hubieren enajenado; pero según cada cual la hubiera enajenado primero, no formará parte con los posteriores, y el que la vendió más tarde, se entiende que formó parte en las porciones de los anteriores con el que no la vendió; mas si ninguno la hubiere vendido, y el último hubiere fallecido sin hijos, no subsistirá la petición del fideicomiso.

§ 28.- Cuando entre los libertos hubiese sido admitida al legado de un predio también una liberta, porque el patrono pidió que no saliese del nombre de la familia, se consideró que el hijo heredero de la liberta retenía la parte del predio, que su madre recibió.

§ 29.- Juzgando que los bienes habían de ir solamente a su prima, habiendo hecho para ella codicilos, les había dejado fideicomisos a muchos; respondí, que habiéndose dado la posesión por derecho de sucesión a dos del mismo grado, se había de relevar a la mujer en cuanto a la mitad por razones de equidad y a la manera del Edicto perpetuo, pero que debían ser dadas por ella las libertades, las cuales parecía duro que se invalidaran por causa del daño.

§ 30.- Un padre, que le había dado a su hijo la mitad de la herencia, y los dos cuartos a las hermanas impúberas de este, a las cuales les dió el hermano como tutor, se había expresado así: «hijo, te contentarás con doscientos áureos por tu mitad de la herencia, y nosotras, hijas, con cien áureos por vuestras cuartas partes»; no se consideraba que les había dejado recíprocamente a sus hijos el fideicomiso de la herencia, sino que, como suele hacerse por padres prudentes, hizo la estimación de su

§ 31.- Titio fratri suo Maevius hereditatem Seii, a quo heres institutus erat, post mortem suam restituere rogatus eodem Titio herede scripto petit, ut moriens Titius tam suam quam Seii hereditatem Sempronio restitueret. Cum ex fructibus medio tempore perceptis fideicommissi debitam quantitatem Titius percepisset, aeris alieni loco non esse deducendum fideicommissum respondi, quoniam ratione compensationis percepisse debitum videbatur. Plane si ea lege Maevius Titium heredem instituatur, ne fideicommissum ex testamento Seii retineat, Falcidiam compensationi sufficere, sed iniquitate occurrere. Prudentius autem fecerit, si ex testamento fratris hereditatem repudiaverit et intestati possessionem acceperit: nec videbitur dolo fecisse, cum fraudem excluserit.

§ 32.- "A te peto, marite, si quid liberorum habueris, illis praedia relinquo vel, si non habueris, tuis sive meis propinquis aut etiam libertis nostris". Non esse datam electionem, sed ordinem scripturae factam substitutioni respondi.

§ 33.- Vicos civitati relictos, qui proprios fines habebant, ex causa fideicommissi non ideo minus deberi placuit, quod testator fines eorum significaturum et certaminis formam, quam celebrari singulis annis voluit, alia scriptura se declaraturum promisit ac postea morte praeventus non fecit.

with a trust in favor of one another, but that he had merely made an estimate of his estate, as is ordinarily done by prudent parents; and, on that account, the brother could not, in a bona fide action on guardianship, avoid giving an account of his administration of the estate, on the ground that the amount which his sisters were to receive had been indicated.

§ 31.- Maevius, having been appointed heir of Seius, and asked by him at his death to transfer the estate to his brother Titius, died, leaving the said Titius his heir, and charged him, at the time of his decease, to leave not only his own estate but that of Seius, also, to Sempronius. Titius having, in the meantime, obtained the profits of the property, I rendered the opinion that it could not be held that a trust had not been created if Titius should claim that he did not hold the estate as a donation but rather in payment of a debt, since by reason of the compensation for the profits which he had received he had done all that was required of him. It is clear that if Maevius had appointed Titius his heir, under the condition that he would not retain the trust under the will of Seius, the Falcidian portion would be sufficient by way of compensation; but some injustice would be done. He, however, would act more prudently if he rejected the estate left to him by his brother, and then obtained possession of the same on the ground of intestacy, for it would not be held that he had acted in bad faith, as he would thus avoid being defrauded.

§ 32.- "I ask you, my husband, to leave such-and-such land to your children, if you should have any; and if you should not have any, to either your, or my relatives, or even to our freedmen." In this instance, I gave it as my opinion that no right of choice was granted, but only a certain order was arranged, by the terms of the will, for the substitution of heirs.

§ 33.- It has been established that where certain tracts of land, which have their own boundaries, are left to a city, they will, none the less, be due under the terms of the trust, because the testator, having been prevented by death, did not by means of another instrument, as he promised he would do, establish the boundaries of said property, as well as those of a race-course where he wished races to be held every year.

patrimonio, ni que por esto el hermano se eximirá en algún caso, por la prescripción de la cantidad designada, de las cuentas en el juicio de buena fe de la tutela.

§ 31.- Mevio, a quien se le rogó que después de su muerte le restituyera a su hermano Ticio la herencia de Seyo, por quien había sido instituido heredero, habiendo instituido heredero al mismo Ticio, pidió que Ticio al morir le restituyese a Sempronio tanto su propia herencia, como la de Seyo; habiendo cobrado Ticio con los frutos percibidos en el tiempo intermedio la cantidad debida por el fideicomiso, respondí, que el fideicomiso no se ha de deducir en calidad de deuda, porque se consideraba que percibió lo debido por razón de compensación. Pero si Mevio instituyese heredero a Ticio, con la condición de que no retenga el fideicomiso en virtud del testamento de Seyo, bastaría la Falcidia para la compensación, pero se cometería una injusticia; pero obrará con más prudencia, si repudiara la herencia del hermano proveniente del testamento, y recibiere la posesión del intestado; y no se considerará que obró con dolo, habiendo evitado el fraude.

§ 32.- «Te pido, marido, que si tuvieses hijos, les dejes los predios, o que si no los tuvieses, se los dejes a tus parientes o a los míos, o aún a nuestros libertos»; respondí, que no se ha de dar la elección, sino que el orden de la escritura se hizo para la substitución.

§ 33.- Se determinó, que las villas dejadas a una ciudad, que tenían límites propios, no dejaban de deberse por causa de fideicomiso, porque el testador prometió que designaría sus límites, y que en otra escritura declarararía la forma del certamen que quiso se celebrase cada año, y después no lo hizo sorprendido por la muerte.

78.- PAPINIANUS; *libro IX, responsorum*.- Qui solidum fideicommissum frustra petebat herede falcidiam obiciente, si partem interim solvi sibi desideraverit neque acceperit, in eam moram passus intellegitur.

§ 1.- Cum post mortem emptoris venditionem rei publicae praediorum optimus maximusque princeps noster Severus Augustus rescindi heredibus pretio restituto iussisset, de pecunia legatario, cui praedium emptor ex ea possessione legaverat, coniectura voluntatis pro modo aestimationis partem solvendam esse respondi.

§ 2.- Etiam res publica fideicommissi post moram usuras praestare cogitur, sed damnum, si quod ex ea re fuerit secutum, ab his sarcendum erit, qui post dictam sententiam iudicatum solvere supersederunt. Nec aliud servabitur in litis sumptibus, si ratio litigandi non fuit: ignaviam etenim praetendentes audiri non oportere. Quod in tutoribus quoque probatur.

§ 3.- Praedium pater de familia liberorum alienari verbis fideicommissi prohibuit. Supremus ex liberis, qui fideicommissum petere potuit, non idcirco minus actionem in bonis suis reliquisse visus est, quod heredem extrarium sine liberis decedens habuit.

§ 4.- Si creditor ab eo qui testamentum fecit domum acceptam iure pignoris vendidit, contra emptorem fideicommissi causa, tametsi voluntatem defuncti non ignoravit, nihil decernetur.

79.- PAPINIANUS; *libro XI, responsorum*.- Quae fideicommissa moriens libertis viri debuit, eorundem praediorum suis quoque libertis fructum reliquit: iuris ignorance lapsi qui petere praedia ex mariti testamento debuerunt, secundum fideicommissum inter ceteros longo tempore perceperunt.

78.- THE SAME; *Opinions, Book IX*.- The beneficiary of a trust will in vain demand its entire execution, where the heir opposes it on the ground that the Falcidian Law applies. If the said beneficiary, in the meantime, demands that his share be paid to him, and he does not receive it, the heir is understood to be in default.

§ 1.- Our Illustrious Emperor, Severus Augustus, decreed that the sale of land belonging to the State should be rescinded after the death of the purchaser, and the price repaid to his heirs out of money belonging to the legatee to whom the purchaser had bequeathed some land which formed part of that above mentioned. I gave it as my opinion that the presumption was that the intention of the testator required that a part of the purchase-money should be paid to the legatee in proportion to the amount of the appraisal of said land.

§ 2.- Moreover, a state is required to pay interest where it is in default in the execution of a trust, but if any damage has resulted on this account, it must be made good by those officials who have neglected to perform this duty after judgment has been rendered. Nor will anything be allowed for the expenses of litigation, if there was no reason for it, as those who allege ignorance should not be heard.

§ 3.- A father, by the terms of a trust, forbade a certain tract of land to be alienated by his family of children. The last of the said children who could demand the execution of the trust is none the less understood to have left this right of action as a part of his estate, even if, dying without children, he left a stranger his heir.

§ 4.- Where a creditor by the right of pledge sells a house received from his debtor who made a will creating a trust, judgment cannot be rendered against the purchaser on account of the trust, even though he was aware of the intention of the deceased.

79.- THE SAME; *Opinions, Book XI*.- A woman charged with a trust in favor of the freedmen of her husband, at the time of her death left the enjoyment of the said land, not only to the freedmen of her husband, but also to her own. The latter, through ignorance of the law, having failed to claim the land

78.- EL MISMO; *Respuestas, libro IX*.- Se entiende que el que pedía todo el fideicomiso inútilmente por oponerle el heredero la Falcidia, si hubiere pretendido que mientras tanto se le entregue una parte, y no la hubiere recibido, sufrió moras respecto a ella.

§ 1.- Habiendo mandado nuestro óptimo y máximo Príncipe Severo Augusto, que después de la muerte del comprador se rescindiese la venta de los predios de la República habiéndose restituido el precio a los herederos, respondí, que del dinero se le ha de pagar al legatario, a quien el comprador le había legado un predio en virtud de esta posesión, una parte con arreglo de la estimación, por conjetura de la voluntad.

§ 2.- También la República es obligada a pagar después de la mora los intereses del fideicomiso, pero el daño, si alguno se hubiere seguido de esto, deberá ser resarcido por los que después de pronunciada la sentencia retardaron pagar lo juzgado. Y no se observará otra cosa respecto a los gastos de litigio, si no hubo razón para litigar; porque no conviene que se oiga a los que alegan su negligencia; lo que se aprueba también respecto a los tutores.

§ 3.- Un padre prohibió con palabras de fideicomiso que un predio saliese de la familia de sus hijos; no se consideró que el último de los hijos, que pudo pedir el fideicomiso, no dejó la acción en sus propios bienes por esto, porque falleciendo sin hijos tuvo por heredero a un extraño.

§ 4.- Si el acreedor vendió por derecho de prenda la casa que recibió del que hizo el testamento, nada se decreta por causa del fideicomiso contra el comprador, aunque no haya ignorado la voluntad del difunto.

79.- EL MISMO; *Respuestas, libro XI*.- Una que al morir debió fideicomisos a los libertos de su marido, dejó también a sus propios libertos el fruto de los mismos predios, y engañados por su ignorancia del derecho, los que debieron pedir los predios en virtud del testamento del marido, percibieron entre los

Non ideo peremptam videri petitionem prioris fideicommissi constituit.

80.- PAPINIANUS; *libro primo definitionum*.- Legatum ita dominium rei legatarii facit, ut hereditas heredis res singulas. Quod eo pertinet, ut, si pure res relicta sit et legatarius non repudiavit defuncti voluntatem, recta via dominium, quod hereditatis fuit, ad legatarium transeat numquam factum heredis.

81.- PAULUS; *libro IX, quaestionum*.- Si quis testamento facto a filiis suis, quos heredes instituisset, fideicommissa reliquisset non ut a legitimis heredibus, sed ut a scriptis, et testamentum aliquo casu irritum factum sit, filii ab intestato venientes fideicommissa ex testamento praestare compelli non possunt.

82.- PAULUS; *libro X, quaestionum*.- Debitor decem legavit creditori, quae ei post annum sub pignore debebat. Non, ut quidam putant, medii temporis tantum commodum ex testamento debetur, sed tota decem peti possunt: nec tollitur petitio, si interim annus supervenerit: nam sufficit, quod utiliter dies cessit.

Quod si vivo testatore annus superveniat, dicendum erit inutile effici legatum, quamquam constiterit ab initio.

Sic et in dote praelegata responsum est totam eam ex testamento peti posse. Alioquin secundum illam sententiam si interusurium tantum est in legato, quid dicemus, si fundus legatus sit ex die debitus? Nam nec pecunia peti potest, quae non est legata, nec pars

to which they were entitled by the will of the husband, obtained the profits of the same with the others for a long time, in accordance with the terms of the trust. It was established that they should not, on this account, be held to have been deprived of the benefit of the first trust.

80.- THE SAME; *Definitions, Book I*.- A legacy transfers the ownership of the property bequeathed, just as inheritance vests in the heir the ownership of each individual article included in it, the result of which is, that if the property is bequeathed absolutely, and the legatee does not reject the will of the deceased, the ownership of the property belonging to the estate passes directly to the legatee, without having become the property of the heir.

81.- PAULUS; *Questions, Book IX*.- Where anyone, having made a will by which he appointed his children his heirs, charged them with a trust, not as his lawful heirs, but as those whom he had appointed, and the will, for some reason, becomes void, his children cannot be compelled to execute the trusts under the same, if they should obtain the estate as heirs at law.

82.- THE SAME; *Questions, Book X*.- A debtor bequeathed ten aurei to his creditor, which he owed him after the expiration of a year, and which were secured by pledge. The amount is not due (as some authorities hold) under the will, when payment is made before maturity merely as a convenience, but suit can be brought for the entire ten aurei; nor will the right of action be barred if, in the meantime, the year has elapsed, for it will be sufficient for the day when the legacy is due to arrive.

Where, however, the year has passed during the lifetime of the testator, it must be said that the legacy will become void, although it was valid in the beginning.

Hence, in the case where a dowry is left as a preferred legacy, it was decided that the entire dowry could be recovered under the will; otherwise, in accordance with the above opinion, if only an intermediate benefit attaches to the bequest, what

demás por largo tiempo el segundo fideicomiso; fue constante, que no por esto se consideraba extinguida la petición del primer fideicomiso.

80.- EL MISMO; *Definiciones, libro I*.- El legado hace del legatario el dominio de la cosa, así como la herencia hace del heredero cada una de las cosas; de lo cual resulta, que si la cosa hubiera sido dejada puramente, y el legatario no repudio la voluntad del difunto, el dominio, que fue de la herencia, pasa directamente al legatario, sin haberse hecho nunca del heredero.

81.- PAULO; *Cuestiones, libro IX*.- Si alguno, habiendo hecho testamento, hubiese dejado fideicomisos a cargo de sus hijos, a los cuales los hubiese instituido herederos, no como a cargo de herederos legítimos, sino de herederos instituidos, y el testamento se hubiera hecho irrito por alguna circunstancia, los hijos que suceden abintestato no pueden ser compelidos a entregar los fideicomisos en fuerza del testamento.

82.- EL MISMO; *Cuestiones, libro X*.- Un deudor le legó a su acreedor los diez que le debía pagar bajo prenda después de un año; en virtud del testamento no se debe, como opinan algunos, solamente el beneficio del tiempo intermedio, sino que se pueden pedir íntegros los diez. Y no se pierde la acción para pedirlos, si mientras tanto transcurriere el año, porque basta que el término haya corrido útilmente.

Pero si el año transcurriere viviendo el testador, se habrá de decir, que se hace inútil el legado, aunque haya sido válido al principio.

Así se respondió también respecto a la dote prelegada, que toda ella podía ser pedida en virtud del testamento. De otra suerte, conforme a aquella opinión, si en el legado se comprenden solamente los intereses del tiempo intermedio, ¿qué diremos, si

fundi facile inveniretur, quae possit pro commodo peti.

§ 1.- Si primo et secundo et tertio heredibus institutis sic legata dentur: "Si mihi primus heres non erit, secundus Titio decem dato: si secundus mihi heres non erit, primus seio fundum tusculanum dato", utrisque omittentibus hereditatem primo et secundo quaerebatur, substituti, quos eis dederat, an et cui legata praestare debent? Ab utroque substituto legata debentur.

§ 2.- Servo alieno posse rem domini legari valens scribit: item id quod domino eius pure debetur. Cum enim servo alieno aliquid in testamento damus, domini persona ad hoc tantum inspicitur, ut sit cum eo testamenti factio, ceterum ex persona servi constituitur legatum. Et ideo rectissime Iulianus definit id demum servo alieno legari posse, quod ipse liber factus capere posset. Calumniosa est enim illa adnotatio posse legari servo et quamdiu serviat: nam et hoc legatum ex persona servi vires accipit: alioquin et illud adnotaremus esse quosdam servos, qui, licet libertatem consequi non possunt, attamen legatum et hereditatem possunt acquirere domino.

Ex illo igitur praecepto, quod dicimus servi inspicere personam in testamentis, dictum est servo hereditario legari posse. Ita non mirum, si res domini et quod ei debetur servo eius pure legari possit, quamvis domino eius non possent haec utiliter legari.

83.- PAULUS; *libro XI, quaestionum*.- Latinus Largus. Proxime ex facto incidit species talis. Libertinus patronum ex semisse heredem instituit et

shall we say where a certain tract of land, due at a certain time, was bequeathed? In this instance the money cannot be claimed, nor can a part of the land be easily found which can be claimed as a benefit.

§ 1.- Where a first, second, and third heir are appointed, and legacies are bequeathed as follows: "If my first heir should not obtain my estate, let my second heir pay ten aurei to Titius; if my second heir should not obtain it, let my first heir deliver the Tusculan Estate to Seius," and both the first and second heirs should decline to accept the estate, the question arises to whom the substitutes appointed for them by the testator should be required to pay the legacies. The legacies will be due from both substitutes.

§ 2.- Valens says that the property of a master can be legally bequeathed to a slave of another, just as a debt can be which he owed unconditionally to his master. For when we give anything by will to a slave belonging to another, the person of his master is only considered with reference to his testamentary capacity, but the legacy is valid so far as the person of the slave is concerned. Therefore, Julianus most properly lays down the rule that a legacy can only be bequeathed to the slave of another which he himself could hold if he became free. The observation that a bequest could be left to the slave as long as he remained in servitude would be improperly made, as a legacy of this kind derives its force and effect from the person of the slave; otherwise, we all might remark that there are certain slaves who, although they cannot obtain their freedom, can, nevertheless, acquire legacies and estates from their masters.

In accordance with the principle, which we have mentioned, namely, that in the case of wills the person of the slave must be considered, it has been decided that a legacy can be bequeathed to a slave forming part of the estate. It is not extraordinary that the property of a master, and what is owing to him, can be absolutely bequeathed to a slave, although such property cannot be legally bequeathed to his master.

83.- THE SAME; *Questions, Book XI*.- Latinus Largus: The following case recently occurred. A freedman appointed his patron heir to half of his

hubiera sido legado un fundo debido desde cierto día -porque ni se puede pedir el dinero, que no se legó, ni fácilmente se hallaría una parte del fundo, que se pudiera pedir por las utilidades -?

§ 1.- Si instituidos primero, segundo, y tercer herederos, se dieran así legados: «si el primero no fuere mi heredero, dele el segundo diez a Ticio; si el segundo no fuere mi heredero, dele el primero el fundo Tusculano a Seyo,» dejando de aceptar ambos la herencia, el primero y el segundo, se preguntaba, ¿los substitutos, que a ellos les había nombrado, deberán pagar los legados, y a quién? Los legados se deberán por ambos substitutos.

§ 2.- Escribe Valente, que a un esclavo ajeno se le puede legar una casa de su señor; y también lo que puramente se le debe a su señor, porque cuando a un esclavo ajeno le damos alguna cosa en el testamento, se atiende a la persona del señor solamente para esto, para si hay con él testamentifacción; por lo demás, el legado fue válido por razón de la persona del esclavo. Y por esto definió perfectísimamente Juliano, que al esclavo ajeno se le puede legar solamente lo que él mismo, hecho libre, podría adquirir; porque es viciosa aquella observación, que se le puede legar a un esclavo también mientras sea esclavo, pues también este legado recibe su fuerza de la persona del esclavo. De otra suerte también anotaríamos, que hay algunos esclavos, que, aunque no puedan conseguir la libertad, pueden, sin embargo, adquirir para su señor un legado y una herencia.

Así, pues, en virtud de aquel precepto, que decimos, de que en los testamentos se mira a la persona del esclavo, se dijo que se le pueden hacer legados a un esclavo de la herencia. Así no es de extrañar, si una cosa del señor, y lo que a este se le debe, se le puede legar a un esclavo de él, aunque estas cosas no se le puedan legar útilmente a su señor.

83.- EL MISMO; *Cuestiones, libro XI*.-Dice Latino Largo: Hace poco que de un hecho se originó el siguiente caso: un libertino instituyó a su patrono

filiam suam ex alio semisse: fidei commisit filiae, ut quibusdam ancillis patroni restitueret, cum hae manumissae essent, et, si eadem filia heres non esset, substituit ei easdem ancillas. Quoniam filia non voluit heres existere, ancillae iussu domini, id est patroni adierunt defuncti hereditatem. Post aliquantum temporis ab eo manumissae quaerebant, an fideicommissum petere ab eodem patrono possint. Rogo ergo, quid de hoc existimes rescribas.

Respondi nec repetitum videri in hunc casum fideicommissum, sed alterutrum datum vel fideicommissum vel ipsam hereditatem. Melius autem dici in eundem casum substitutas videri, in quem casum fideicommissum meruerunt, et ideo ad substitutionem eas vocari. Cum enim servo alieno fideicommissum ab uno ex heredibus sub condicione libertatis fuerit datum idemque servus ei heredi substituatur, licet pure substitutio facta sit, tamen sub eadem condicione substitui videtur, sub qua fideicommissum meruit.

84.- PAULUS; *libro XXI, quaestionum*.- Si quis servo suo fideicommissam libertatem reliquit et aliud quid adscripsit: quidam dicunt, quia placebat ab herede eum manumitti debere, futurum esse, ut non admittatur ad fideicommissum: sed hoc iniquum est. In huiusmodi enim persona utriusque quodammodo dies cessit et libertatis et pecuniae petendae, adeo ut putem, si mora fiat praestandae libertati, etiam fideicommisso moram videri factam et usurarum onus accedere: nam et cetera quae medio tempore adquisiit domino, dum moratur praestare libertatem, eidem restitui oportere rectissime responsum est.

estate, and his daughter to the other half. He charged his daughter to transfer her share to certain female slaves belonging to his patron, as soon as they should be manumitted; and if the said daughter should not become his heir, he substituted for her the same female slaves. As the daughter declined to become her father's heir, the said female slaves, by order of their master, that is to say of the patron, entered upon the estate of the deceased. The slaves, having been manumitted by their master after a certain time, inquired whether they could demand the execution of the trust by their patron. Hence, I ask you to write to me what your opinion is on this point.

I answered that, in this case, the trust did not seem to be repeated, but that one thing or the other, that is to say, either the trust or the estate itself had been granted by the testator. It is, however, under these circumstances better to hold that, the slaves being substituted, and entitled to the trust, were therefore called to the substitution. For when a trust is created to be executed by one of the heirs of a testator, in favor of the slave of another, subject to the condition of his obtaining his freedom, and the same slave is substituted for the said heir; although the substitution may be absolute, this is still considered to have been done subject to the same condition under which he was entitled to the trust.

84.- THE SAME; *Questions, Book XXI*.- Where anyone leaves freedom to his slave by the terms of a trust, and bequeaths him something else, as well, certain authorities say that, because it has been decided that the slave should be manumitted by the heir, the result will be that he cannot be permitted to profit by the trust. This, however, is unjust, for, with reference to a person of this kind, the delivery of both the grant of freedom and the money can be demanded at the same time, and therefore, I think that if the heir should be in default in granting freedom to the slave, he should also be considered in default, so far as the execution of the trust is concerned, and hence he will be subjected to the payment of interest; for it has been most justly held that everything which a slave may have acquired for his master, while the latter was in default in granting him freedom, should be restored to him.

heredero de la mitad de la herencia, y a su hija de la otra mitad; encomendó a la fidelidad de la hija, que la restituyese a algunas esclavas del patrono, cuando estas hubiesen sido manumitidas; y si la misma hija no fuese heredera, le substituyó las mismas esclavas; porque la hija no quiso ser heredera, las esclavas adieron la herencia del difunto por mandato de su señor, esto es, del patrono; manumitidas por él después de algún tiempo preguntaban, si podrían pedirle el fideicomiso al mismo patrono. Te ruego, pues, que me escribas qué piensas sobre esto.

Respondí, que no se considera repetido para este caso el fideicomiso, sino que se dio una u otra cosa, o el fideicomiso, o la misma herencia; pero que mejor es decir, que se les considera substituidas para el mismo caso para el que merecieron el fideicomiso, y que por esto son llamadas ellas a la substitución. Porque cuando a un esclavo ajeno se le hubiere dado un fideicomiso a cargo de uno de los herederos bajo condición de manumisión, y el mismo esclavo fuera substituido a este heredero, aunque la substitución haya sido hecha puramente, se considera, sin embargo, que se hace la substitución bajo la misma condición con que mereció el fideicomiso.

84.- EL MISMO; *Cuestiones, libro XXI*.- Si alguno le dejó a su esclavo la libertad por fideicomiso, y añadió alguna otra cosa, dicen algunos, que como estaba establecido que él debía ser manumitido por el heredero, habrá de suceder que no se le admita al fideicomiso. Pero esto es injusto, porque respecto de tal persona corrió en cierto modo el término de ambas cosas, de la libertad y del dinero que se ha de pedir, de tal suerte, que yo opinaría, que si se causase mora para dar la libertad, también se considerará causada la mora para el fideicomiso, y se añadiría el gravamen de los intereses; porque con muchísima razón se respondió, que se le deben entregar al mismo también las demás cosas, que adquirió para su señor en el tiempo intermedio, mientras se demora darle la libertad.

85.- PAULUS; *libro IV, responsorum*.- Creditor, cui res pignoris iure obligata a debitore legata esset, non prohiberi pecuniam creditam petere, si voluntas testatoris compensare volentis evidenter non ostenderetur.

86.- PAULUS; *libro XIII, responsorum*.- "Gaius Seius pronepos meus heres mihi esto ex semisse bonorum meorum excepta domu mea et paterna, in quibus habito, cum omnibus quae ibi sunt: quae omnia scias ad portionem hereditatis, quam tibi dedi, non pertinere". Quaero, cum sit in his domibus argentum nomina debitorum supellex mancipia, an haec omnia, quae illic inveniuntur, ad alios heredes institutos debeant pertinere. Paulus respondi nomina debitorum non contineri, sed omnium esse communia, in ceteris vero nullum pronepoti locum esse.

§ 1.- Titius cum fratris filio fundos et urbana praedia legaret, in his et fundum Seianum legavit, quem ipse pater familias quoad viveret uno quidem nomine universum habuit, sed quo facilius conductorem inveniret, per duas partes locabat, ita ut ex qualitate loci superiorem partem Seianum superiorem, inferiorem autem partem Seianum inferiorem appellaret. Quaero, an is fundus totus ad fratris filium pertineat. Paulus respondit, si testator fundum Seianum uno nomine universum possedit, quamvis eundem divisus partibus locaverat, universum eum ex causa fideicommissi praestari oportere, nisi si heres, de qua parte testator senserit, evidenter probaverit.

87.- PAULUS; *libro XIV, responsorum*.- Titia Seio tesseram frumentariam comparari voluit post diem trigesimum a morte ipsius. Quaero, cum Seius viva testatrice tesseram frumentariam ex causa lucrativa habere coepit nec possit id quod habet petere, an ei actio competat. Paulus respondit ei, de quo quaeritur, pretium tesserae praestandum, quoniam tale fideicommissum magis in quantitate quam in corpore

85.- THE SAME; *Opinions, Book IV*.- A creditor, to whom property given in pledge by a debtor is bequeathed, is not prevented from demanding the money loaned, if the intention of the testator is clearly shown not to have been to compensate him for the debt by means of the legacy.

86.- THE SAME; *Opinions, Book XIII*.- "Let my great-grandson, Gaius Seius, be heir to half of my property, with the exception of my house, and that of my father, in which I live, with everything contained therein. Let it be known that all these things do not constitute part of the estate which I give to him." I ask, if there should be in said houses any silver plate, notes of debtors, furniture, or slaves, whether all this property found there shall belong to the other heirs who have been appointed. Paulus answered that the notes of debtors are not included, and that they will belong to all the heirs in common; but, so far as the other property is concerned, the grandson will have no claim to the same.

§ 1.- Titius, at the time that he left certain lands and other property in a city to his nephew, devised among others the Seian Estate, which he, as head of the household, reserved entirely for himself, as long as he might live; but, in order the more easily to find a tenant, he divided said Estate into two parts, and designated one the Upper Seian Estate, and the other the Lower Seian Estate, which names were derived from the respective situations of the same.

I ask whether this entire Estate will belong to his nephew. Paulus answered that if the testator possessed the whole Estate under one name, then, even though he rented it after having divided it, all must be delivered under the terms of the trust; unless the heir can clearly prove that the testator had in mind only a portion of said Estate.

87.- THE SAME; *Opinions, Book XIV*.- Titia desired that a ticket calling for grain should be bought of Seius within thirty days after her death. I ask if Seius should obtain possession of the said ticket for a valuable consideration, during the lifetime of the testatrix, as he could not demand what he already had, whether he would still retain his right of action. Paulus answered that the price of the ticket should be

85.- EL MISMO; *Respuestas, libro IV*.- Al acreedor a quien por el deudor le hubiere sido legada una cosa obligada por derecho de prenda, no se le prohíbe pedir el dinero prestado, si evidentemente no se probase la voluntad del testador que quería compensarla.

86.- EL MISMO; *Respuestas, libro XIII*.- «Sea mi bisnieto Cayo Seyo heredero de la mitad de mis bienes, exceptuando mi casa, y la de mi padre, en las que habito, con todas las cosas que haya en ellas. Todas cuyas cosas has de saber que no pertenecen a la porción de la herencia, que te di»; pregunto, si habiendo en estas casas plata, créditos de deudores, ajuar, esclavos, deberán pertenecer todas estas cosas, que allí se hallan, a los otros herederos instituidos, Y dice Paulo; respondí, que no se comprenden los créditos de los deudores, sino que son comunes para todos, pero que sobre las demás cosas no tiene derecho alguno el bisnieto.

§ 1.- Ticio, al legarle al hijo de su hermano fundos y predios urbanos, les legó entre ellos también el fundo Seyano, que el mismo padre de familia tuvo íntegro mientras vivía, ciertamente con un mismo nombre, pero para hallar más fácilmente arrendatario, lo daba en arrendamiento dividido en dos partes, de manera que por las circunstancias del terreno se llamaba Seyano superior a la parte superior, y Seyano inferior a la parte inferior; pregunto, si todo este fundo le pertenecerá al hijo del hermano. Paulo respondió, que si el testador poseyó todo el fundo Seyano con un solo nombre, aunque lo había dado en arriendo en porciones divididas, todo él debía ser entregado por causa del fideicomiso, a no ser que el heredero hubiere probado evidentemente a qué parte se haya referido el testador.

87.- EL MISMO; *Respuestas, libro XIV*.- Quiso Ticio que se comprase para Seyo un bono de trigo después del trigésimo día de la muerte de la misma; pregunto, si, habiendo comenzado a tener Seyo por causa lucrativa en vida de la testadora el bono de trigo, y no pudiera pedir lo que tiene, le competará la acción. Paulo respondió, que a éste, de quien se trata, se le ha de pagar el precio del bono, porque tal

constitit.

§ 1.- Usuras fideicommissi post impletos annos viginti quinque puellae, ex quo mora facta est, deberi respondi. Quamvis enim constitutum sit, ut minoribus viginti quinque annis usurae omnimodo praestentur, tamen non pro mora hoc habendum est, quam sufficit semel intervenisse, ut perpetuo debeantur.

§ 2.- Seia libertis suis fundum legavit fideique eorum ita commisit: "Fidei autem vestrae, vere et sapide, committo, ne eum fundum vendatis eumque qui ex vobis ultimus decesserit, cum morietur, restituat Symphoro liberto meo et successori et Beryllo et Sapido, quos infra manumisi, quive ex his tunc supervivent".

Quaero, cum nec in prima parte testamenti, qua fundum praelegavit, eos substituit, in secunda tamen adiecerit verbum "qui ultimus decesserit", an pars unius defuncti ad alterum pertineret. Paulus respondit testatricem videri in eo fideicommisso, de quo quaeritur, duos gradus substitutionis fecisse, unum ut is, qui ex duobus prior morietur, alteri restitueret, alterum ut novissimus his restitueret, quos nominatim postea enumeravit.

§ 3.- Imperator Alexander Augustus Claudiano Iuliano praefecto urbi. "Si liquet tibi, Iuliane carissime, aviam intervertendae inofficiosi querellae patrimonium suum donationibus in nepotem factis exinanisse, ratio deposcit id, quod donatum est, pro dimidia parte revocari".

§ 4.- Lucius Titius cum haberet quinque liberos, universos emancipavit et in unum filium Gaium Seium amplissimas facultates donationibus contulit et modicum sibi residuum servavit et universos liberos cum uxore scripsit heredes: in eodem testa-

paid to the party concerning whom the inquiry is made, since a trust of this kind has reference to a certain quantity, rather than to the article itself.

§ 1.- I gave it as my opinion that the interest due under a trust should be paid to the girl who was the beneficiary of the same, after she has attained her twenty-fifth year, where the heir is in default in executing said trust. For, although it has been decided that interest in every instance must be paid to minors under the age of twenty-five years, still, this does not apply to cases where the debtor is in default, for it is sufficient for him to have been in default only once, in order to render the interest payable for the entire time.

§ 2.- Seia devised a tract of land to her freedmen, and charged them as follows: "I direct Verus and Sapidus not to sell this land, and whichever of them may die last, at the time of his death, to deliver it to Symphorus, my freedman, and successor, and to Beryllus and Sapidus, whom I have manumitted by this my will, or to whichever of them may be living at the time."

I ask, as she did not substitute the two freedmen in the first part of the will by which she left the property, and as, in the second part of the will she added the clause, "Whichever of them may die last," whether the share of one of the parties who may die will belong to the other. Paulus answered that the testatrix seems to have created two degrees of substitution under the trust in question; first where the party who dies first must deliver his share to the other; and second, where the survivor must deliver it to those whom the testatrix expressly mentioned afterwards.

§ 3.- The Emperor Alexander Augustus to Claudius Julianus, Prefect of the City. "If it should be evident to you, my dear friend Julianus, that the grandmother referred to intended, by making donations to her grandson out of her estate, to prevent her will from being broken on the ground of inofficiousness, reason demands that half of said donations should be annulled."

§ 4.- Lucius Titius, who had five children, emancipated all of them, and gave his only son Gaius Seius a large amount of property in donations, reserving very little for himself, and appointed all his children, together with his wife, his heirs. By the

fideicomiso consiste más bien en una cantidad, que en una cosa determinada.

§ 1.- Respondí, que después de haber cumplido los veinticinco años se le deben a una menor los intereses del fideicomiso, desde que se causó la mora; porque aunque se haya establecido, que de todos modos se paguen los intereses a los menores de veinticinco años, sin embargo, esto no se ha de considerar como mora, la cual basta que una vez se haya causado, para que se deban perpetuamente.

§ 2.- Seya legó un fundo a sus libertos, y encomendó un encargo a su fidelidad en estos términos: «pero encomiendo a vuestra fidelidad, Vero y Sápido, que no vendáis este fundo, y que el último, que de vosotros falleciere, lo restituya cuando muera a Sinforo, mi liberto, y sucesor, y a Berilo, y a Sápido, a quienes a continuación he manumitido, o a los que de ellos sobrevivieren entonces»;

Pregunto, si, no habiéndolos substituido en la primera parte del testamento, en que prelegó el fundo, y habiendo añadido en la segunda esta expresión: «el último que falleciere», le pertenecería al otro la parte de uno que hubiere fallecido. Paulo respondió, que parecía que la testadora hizo en este fideicomiso, de que se trata, dos grados de substitución, uno, para que el que de los dos muriese primero, hiciese la restitución al otro, otro, para que el último hiciese la restitución a aquellos a quienes después enumeró nominalmente.

§ 3.- El Emperador Alejandro Augusto a Claudio Juliano, Prefecto de la ciudad. «Si te constare, carísimo Juliano, que para impedir la querella de testamento inoficioso la abuela consumió su patrimonio en las donaciones hechas a su nieto, exige la razón que se revoque respecto a la mitad lo que donó».

§ 4.- Lucio Ticio, que tenía cinco hijos, los emancipó a todos, y a su solo hijo Cayo Seyo le confirió cuantosísimos bienes por donaciones, se reservó para sí un módico remanente, e instituyó herederos a todos sus hijos juntos con su mujer; en el mismo

mento duas possessiones, quas retinuerat, eidem Gaio Seio praelegavit et ab eo petit, ut ex redivisibus praediorum, quae vivus ei donaverat, Maeviae filiae tot aureos daret, item alteri fratri alios tot: conventus a Maevia sorore sua legem Falcidiam implorat.

Quaero, cum sanctissimus imperator, ut supra scriptum est, contra voluntatem donantis ea quae donata sunt revocari praeceperit, an Gaius Seius compellendus sit secundum voluntatem patris ex donationibus fideicommissum praestare heredi sororis. Paulus respondit post litteras imperatoris nostri dubitari non oportere, quin in hac quoque specie, de qua quaeritur, subveniendum sit liberis, quorum portio in unum filium donationibus collatis imminuta est, praesertim cum imperator noster contra voluntatem patris subvenerit, in proposita autem causa etiam voluntas patris pro his qui fideicommissum petunt intercedit. Sed si Falcidia lex intercedat, fideicommissa in solidum esse praestanda propter immodicarum donationum rationem.

88.- SCAEVOLA; *libro III, responsorum*.- Lucius Titius testamento ita cavuit: "Si quid cuique liberorum meorum dedi aut donavi aut in usum concessi aut sibi adquisiit aut ei ab aliquo datum aut relictum est, id sibi praecipiat sumat habeat". Filii nomine kalendarium fecerat. Postea sententia dicta est et placuit id, quod sub nomine ipsius filii in kalendario remanserat, ei deberi, non etiam id, quod exactum in rationes suas pater convertisset. Quaero, si id, quod exegisset pater ex nominibus filii ante testamentum factum, iterum post testamentum factum in nomen filii convertisset, an ad filium secundum sententiam pertineret. Respondi id, quod ex eadem causa exactum in eandem causam redisset, deberi.

same will he left to the said Gaius Seius, as a preferred legacy, two pieces of property which he had reserved, and charged him to give to his daughter Maevia a certain number of aurei, and also a certain amount to a brother of hers, to be taken out of the income of the land which he had transferred to her during his lifetime. Gaius Seius, having been sued by his sister Maevia, invoked the aid of the Falcidian Law.

I ask, since the Most Holy Emperor (as above stated) decided that where property had been donated against the will of the donor the gift should be annulled, whether Gaius Seius can, in compliance with the will of his father, be compelled to pay to his sister, his heir, the amount of the trust out of the donations which had been made to him? Paulus answered that, according to the Rescript of the Emperor, there can be no doubt that, in a case of the kind concerning which inquiry is made, relief should be granted to the children whose shares have been diminished on account of the donations made to the son; especially since the Emperor came to their assistance against the will of their father. In the case stated, however, the will of the father intervenes in favor of those who claim the benefit of the trust. But where the Falcidian Law applies, the trust must be executed to its full extent, on account of the excessive amount of the donation.

88.- SCAEVOLA; *Opinions, Book III*.- Lucius Titius provided by his will as follows: "Where I have given anything to any one of my children, whether I made him a present of it, or merely permitted him to use it, or where he has acquired any property for himself, whether it has been given to him or bequeathed to him, I desire that he may take and hold the same as a preferred legacy." The father had kept, in the name of one of his sons, an account book of debts, and it was afterwards decided and held that what remained in said book in the name of his son was due to the latter; but not what had been already collected and placed by his father among the assets of his estate. I ask whether the claims of the son which his father had collected before his will was made, and which, after it had been made, he still loaned in the name of his son, would belong to the latter, according

testamento le prelegó al mismo Cayo Seyo dos posesiones, que había retenido, y le pidió, que de las rentas de los predios, que en vida le había donado, le diese tantos áureos a su hija Mevia, y otros tantos a su otro hermano; demandado por Mevia, su hermana, invoca la ley Falcidia;

Pregunto, si, habiendo mandado nuestro santísimo Emperador, como arriba se ha escrito, que se revocuen contra la voluntad del donante las cosas que se donaron, habrá de ser compelido Cayo Seyo a entregarle al heredero de la hermana, conforme a la voluntad del padre, el fideicomiso en virtud de las donaciones. Paulo respondió, que después de la carta de nuestro Emperador, no se debe dudar, que también en este caso, de que se trata, se haya de auxiliar a los descendientes, cuya porción fue disminuida con las donaciones conferidas a un solo hijo, principalmente, habiendo prestado auxilio nuestro Emperador contra la voluntad del padre; pero en el caso presente, también la voluntad del padre intercede a favor de los que piden el fideicomiso; mas si interviene la ley Falcidia, se han de pagar por completo los fideicomisos por razón de lo excesivo de las donaciones.

88.- SCÉVOLA; *Respuestas, libro III*.- Lucio Ticio, dispuso así en su testamento: «si alguna cosa le di a cualquiera de mis hijos, o se la doné o se la concedí para su uso, o él la adquirió para sí, o por alguno le fue dada o dejada, adquiérala previamente, tómelas, y téngalas»; a nombre del hijo había abierto el libro de caja; después se pronunció sentencia, y se determinó, que lo que a nombre del mismo hijo había quedado como remanente en el libro de caja se le debía a éste, pero no también lo que, habiéndolo cobrado, hubiese aplicado el padre a sus propias cuentas; pregunto, si en el caso de que esto lo hubiese cobrado el padre de los créditos del hijo antes de haber él hecho testamento, y después de hecho el testamento lo hubiese aplicado de nuevo a crédito del hijo, le pertenecería al hijo según la sentencia. Respondí, que se debía lo que cobrado en virtud de

§ 1.- "A te peto, Titi, fideique tuae committo, uti curam condendi corporis mei suscipias, et pro hoc tot aureos e medio praecipito". Quaero, an, si Lucius Titius minus quam decem aureos erogaverit, reliqua summa heredibus proficiat. Respondi secundum ea quae proponerentur heredum commodo proficere.

§ 2.- Quae marito heres exstiterat, ita testamento cavuit: "Maevi et Semproni filii dulcissimi, praecipitote omne, quidquid ex hereditate bonisve Titii domini mei, patris vestri ad me pervenit mortis eius tempore, ita tamen, ut omne onus eiusdem hereditatis tam in praeteritum quam in futurum, nec non etiam si quid post mortem Titii domini mei, agnoscatis". Quaero, an si quid solvisset post mortem mariti, cum ipsa fructus cepisset dedisset, ad onus eorum pertineret. Respondi secundum ea quae proponerentur ea dumtaxat onera legatariis imposuisse, quae superessentiarum.

§ 3.- "Quisquis mihi heres heredesve erunt, hoc amplius Lucius Eutychus, quam quod eum heredem institui, e media hereditate sumito sibi que habeto una cum Pamphilo, quem liberum esse iubeo, instrumentum tabernae ferrariae, ita ut negotium exerceatis".

Lucius Eutychus viva testatrice decessit, pars hereditatis eius ad coheredem pertinuit: quaero, an Pamphilus eodem testamento manumissus ad petitionem partis instrumenti admitti possit, licet taberna, ut voluit testatrix, exerceri non possit. Respondi admitti.

§ 4.- Sempronia substituta heredi instituto legata accepit, si heres non esset: movit contra institutum actionem, quod dolo eius factum esse dicebat, quo

to this decision. I answered that any sum which the father had collected in the name of his son, and had afterwards invested in the same way, would belong to him.

§ 1.- "I request you, Titius, and I charge you to attend to my funeral, and to this end I take so many aurei from the funds of my estate." I ask, if Lucius Titius should use less than ten aurei for the purpose aforesaid, whether the balance of the sum will belong to the heirs. I answered that, according to the case stated, the heirs would profit by the remainder.

§ 2.- Where a woman became the heir of her husband, and made the following provision in her will: "My dearest children, Mævius and Sempronius, take as a preferred legacy everything which came into my hands from the estate and property of my lord, your father, Titius, at the time of his death; provided, however, that you assume all the burdens of said estate, for the past as for the future, as well as those for which it may have become liable after the death of my lord, Titius." I ask if she paid anything after the death of her husband, and made a donation to anyone while she was enjoying the profits of the estate, whether the children will be liable for such obligations. I answered that, in accordance with the case stated, only those obligations which remained unsatisfied could be imposed upon the legatees.

§ 3.- "I direct whomever shall be my heir, or heirs, to see that Lucius Eutychus receives, in addition to the share which I have given him as heir out of the assets of my estate, in common with Pamphilus, whom I order to be free, all the implements for the manufacture of iron, in order that they may carry on the business."

Lucius Eutychus died during the lifetime of the testatrix, and his share of the estate passed to his co-heir. I ask whether Pamphilus, who was manumitted by the same will, can be permitted to demand half of the said implements for the manufacture of iron, although it cannot be carried on according to the will of the testatrix. I answered that he should be allowed to do so.

§ 4.- Sempronia was substituted for an appointed heir, and, in case she should not be the heir, was to receive a legacy. She instituted proceedings against

una causa lo hubiese restituido a la misma causa.

§ 1.-«Te pido, Ticio, y encomiendo a tu fidelidad, que asumas el cuidado de darle sepultura a mi cuerpo, y que por esto retires previamente tantos áureos»; pregunto, si, en el caso de que Lucio Ticio hubiere gastado menos de diez áureos, beneficiará la restante cantidad a los herederos. Respondí, que, según lo que se exponía, aprovechaba en beneficio de los herederos.

§ 2.- Una, que había quedado heredera de su marido, dispuso así en su testamento: «Mevio y Sempronio, cariñosísimos hijos, tomad previamente todo lo que de la herencia o de los bienes de Ticio, mi señor, y padre vuestro, vino a mi poder al tiempo de su muerte, pero de modo, que asumaís todas las cargas de la misma herencia, tanto respecto a lo pasado como a lo futuro, así como también si alguna hubiere después de la muerte de Ticio, mi señor»; pregunto, si, en el caso de que hubiese pagado alguna cosa después de la muerte del marido, y habiendo ella percibido los frutos la hubiese dado, pertenecería a cargo de ellos. Respondí, que, según lo que se exponía, les impuso a los legatarios solamente las cargas que subsistiesen.

§ 3.-«Cualesquiera que fueren mi heredero o herederos, tome Lucio Eutico de la masa de la herencia, además de aquello en que lo instituí heredero, y téngala para sí junto con Pánfilo, quien mando que sea libre, la escritura del establecimiento de herrería, a fin de que ejerzais este negocio»;

Lucio Eutico falleció viviendo la testadora, y la parte de su herencia le perteneció al coheredero; pregunto, si Pánfilo, manumitido en el mismo testamento, podrá ser admitido a la petición de parte del instrumento, aunque no se pueda llevar el establecimiento como quiso la testadora. Respondí, que se le admitía.

§ 4.- Sempronia, substituida al heredero instituido, recibió unos legados, si no fuese heredera; promovió acción contra el instituido, porque decía que por dolo

minus testatrix volens primo loco scribere eam heredem testamentum mutaret, nec optinuit: quaero, an legati persecutionem salvam haberet. Respondi secundum ea quae proponerentur salvam habere.

§ 5.- Testator legata ante quinquennium vetuit peti praestarique, sed heres quaedam sua sponte ante quinquennium solvit: quaesitum est, an eius, quod ante diem existentem solutum est, representationem in reliqua solutione legati reputare possit. Respondi non propterea minus relictum deberi, quod aliquid ante diem sit solutum.

§ 6.- Lucius Titius testamento ita cavuit: "Praediolum meum dari volo libertis libertabusque meis et quos hoc testamento manumisi et Seiae alumnae meae, ita ne de nomine familiae meae exeat, donec ad unum proprietas perveniat". Quaero, an Seia in communione cum libertis habeat portionem an vero sibi partem dimidiam eius praedioli vindicare possit. Respondi perspicuam esse testantis voluntatem omnes ad viriles partes vocantis.

§ 7.- Impuberem filium heredem instituit: uxori dotem praelegavit, item ornamenta et servos et aureos decem: et si impubes decessisset, substituit, a quibus ita legavit: "Quaecumque primis tabulis dedi, eadem omnia ab heredibus quoque heredis mei in duplum dari volo". Quaeritur, an ex substitutione, impubere mortuo, dos quoque iterum debeatur. Respondi non videri de dotis legato duplicando testatorem sensisse. Item quaero, cum corpora legata etiam nunc ex lucrativa causa possideantur, an a substitutis peti possint. Respondi non posse.

the heir, alleging that through his fraudulent conduct, the testatrix who, in the first place, had intended to make her heir, had been prevented from changing her will, and lost her case. I ask whether she could still bring an action to recover her legacy. The answer was that, in accordance with the facts stated, she had a right to do so.

§ 5.- A testator forbade the legacies which he bequeathed to be either claimed or paid before the expiration of five years; the heir, however, voluntarily paid a certain part of a legacy before the five years had elapsed. The question arose whether the heir, having paid the remainder of the legacy, could claim the benefit resulting from the payment of a portion of said legacy before the time prescribed. I answered that, because a portion of the legacy was paid before the designated time, a smaller sum could not be held to have been bequeathed.

§ 6.- Lucius Titius made the following provision in his will: "I desire my small tract of land to be given to my male and female enfranchised slaves, both to those whom I have manumitted by this will, and to Seia, my foster-daughter, in order that it may not pass out of the hands of my family, until the ownership of the same shall vest in one person." I ask whether Seia will be entitled to a share in common with the freedmen, or whether she will have a right to claim for herself alone half of said tract of land. I answered that it was evidently the intention of the testator that all the persons mentioned should be entitled to equal shares of the estate.

§ 7.- A testator appointed as his heir his son, who had not yet attained the age of puberty, and he bequeathed his wife her dowry as a privileged legacy, together with a number of jewels and slaves, and ten aurei; and, in case the minor child should die without reaching the age of puberty, he appointed certain substitutes for him, to whom he made the following bequest: "I desire that all of what I have disposed of by my first will, and as much more, shall be given to the heirs of my heir." The question arose whether the amount of the dowry would be payable a second time, under such a substitution, if the child should die before attaining puberty. I answered that it does not appear that the testator intended to double the legacy of the dowry. I also ask, in case the property

del mismo se había hecho, que, queriendo la testadora instituir la heredera en primer lugar, no cambiase el testamento, y no ganó el pleito; pregunto, si tendría a salvo la persecución del legado. Respondí, que, según lo que se exponía, la tenía a salvo.

§ 5.- Un testador prohibió que se pidieran y se entregasen los legados antes de un quinquenio, pero el heredero pagó por su voluntad algunos antes del quinquenio; se preguntó, si en el restante pago del legado se podrá hacer la compensación de lo que se pagó antes de llegar el término. Respondí, que no porque se haya pagado alguna cosa antes del término se considera que no se dejó.

§ 6.- Lucio Ticio dispuso así en su testamento: «quiero que se dé mi pequeño predio a mis libertos y libertas, y a los que manumité en este testamento, y a mi alumna Seya, de suerte, que no salga de la familia de mi nombre, hasta que a uno solo vaya la propiedad»; pregunto, si tendrá Seya su porción en comunión con los libertos, o si podrá reivindicar para sí la mitad de este pequeño predio, Respondí, que era evidente la voluntad del testador, que a todos los llama a porciones viriles.

§ 7.- Uno instituyó heredero a su hijo impúbere, y le prelegó a su mujer la dote, y también los adornos, y los esclavos, y diez áureos, y para: si hubiese fallecido el impúbere, nombró substitutos; a cargo de los que legó de este modo: «quiero que todo lo que dí en el primer testamento, se dé doblado también por los herederos de mi heredero»; se pregunta, si en virtud de la substitución, muerto el impúbere, se deberá también segunda vez la dote. Respondí, que no parece que al duplicar el legado se refirió el testador al de la dote. También pregunto, si estando poseídos también ahora por causa lucrativa los objetos legados, podrían ser pedidos a los substitutos. Respondí, que no podían.

§ 8.- "Civibus meis do lego chirographum Gaii Seii": postea codicillis vetuit a Seio exigi et ab herede petit, ut ex alterius debitoris debito, quem codicillis nominavit, eandem summam rei publicae daret. Quaesitum est, si posterior idoneus non esset, an integram quantitatem heredes praestare debeant. Respondi heredes rei publicae adversus eum dumtaxat debitorem, qui novissimus codicillis, ut proponitur, designatus est, actionem praestare debere.

§ 9.- Filiam ex asse instituit heredem eique substituit nepotem suum et ita cavuit: "Si, quod abominor, neque filia mea neque nepos meus heredes mei erunt, tunc portionem meam partis dimidia fundi illius ad libertos meos pertinere volo". Quaeritur, cum ante testatorem et filia et nepos decesserunt et intestati bona pertinuerunt ad pronepotem eius, an fideicommissum ad libertos pertineret. Respondi secundum ea quae proponerentur, si nullus alius heres institutus substitutusque esset quam filia et nepos, videri legitimorum fidei commissum esse, ut praestaretur.

§ 10.- "Quisquis mihi heres erit, sciat debere me Demetrio patruo meo denaria tria et deposita apud me a Seleuco patruo meo denaria tria, quae etiam protinus reddi et solvi eis iubeo": quaesitum est, an, si non deberentur, actio esset. Respondi, si non deberentur, nullam quasi ex debito actionem esse, sed ex fideicommisso.

§ 11.- Lucius Titius damam et Pamphilum libertos suos ante biennium mortis suae de domu dimisit et cibaria quae dabat praestare desiit: mox facto testamento ita legavit: "Quisquis mihi heres erit,

composing the legacy should already have come into the hands of the woman for a valuable consideration, whether she could demand it from the substitutes. I answered that she could not do so.

§ 8.- "I do give and bequeath to my fellow-citizens the note executed in my favor by Gaius Seius." The testator subsequently made a codicil in which he forbade the note to be collected from Seius, and charged his heir to pay the same sum to the City out of the debt due from another party, whom he mentioned in the codicil. The question arose, if the latter should not prove to be solvent, whether the heirs would be required to pay the entire amount themselves. I answered that the heirs would only be compelled to transfer to the City their rights of action against the debtor who, in accordance with the facts stated, had been mentioned in the codicil.

§ 9.- A testator appointed an heir to his entire estate, substituted his grandson for him, and then provided as follows: "If, as I hope may not happen, neither my daughter, nor my grandson should become my heirs, I then desire that my share, that is half of such-and-such a tract of land, shall belong to my freedmen." The question arises, if the daughter and the grandson should die before the testator, and his estate should pass to his great grandson on the ground of intestacy, whether the freedmen would be entitled to the benefit of the trust. I answered that, in accordance with the facts stated, if no other heir than the daughter and grandson should be appointed, or substituted, it appeared that the heirs-at-law would be required to execute the trust.

§ 10.- "Let my heir, whoever he may be, know that three denarii are due from me to my paternal uncle Denetrius, and that three denarii have been deposited with me by Seleucus, another uncle, which I direct shall be immediately delivered and paid to them." The question arose whether the uncles would be entitled to an action, if the money should not be due. I answered that it should not be due, that no action would lie on account of the debt, but that one could be brought on account of the trust.

§ 11.- Lucius Titius, two years before his death, sent away from his house his freedmen, Damas and Pamphilus, and ceased to furnish them with food as he had formerly done, and, afterwards, having made

§ 8.- «Les doy y lego a mis conciudadanos el quirógrafo de Cayo Seyo»; después prohibió en codicilos que se le cobrase a Seyo, y le pidió al heredero que de la deuda del otro deudor, que nombró en los codicilos, le diese la misma cantidad a la República; se preguntó, si en el caso de que el segundo no fuese solvente, deberán pagar los herederos íntegra la cantidad. Respondí, que los herederos deben cederle la acción a la República solamente contra aquel deudor, que, según se expone, fue designado en los últimos codicilos.

§ 9.- Uno instituyó heredera de la totalidad a su hija, a esta le substituyó un nieto suyo, y dispuso así: «si, lo que no suceda, ni mi hija, ni mi nieto fueren mis herederos, en este caso, quiero que mi porción de la mitad de aquel fundo les pertenezca a mis libertos»; se pregunta, si habiendo muerto antes que el testador así la hija como el nieto, y habiéndole pertenecido a su bisnieto los bienes del intestado, les correspondería el fideicomiso a los libertos. Respondí, que, según lo que se exponía, si no hubiese sido instituido y substituido ningún otro heredero, mas que la hija y el nieto, se considera que se les encomendó a los legítimos que se pagase el fideicomiso.

§ 10.- «Sepa cualquiera, que fuere mi heredero, que yo le debo a Demetrio, mi tío paterno, tres denarios, y que en mi poder fueron depositados por Seleuco, mi tío paterno, tres denarios, los que mando que también inmediatamente les sean devueltos y pagados»; se preguntó, si, en el caso de que no se debiesen, habría acción. Respondí, que, si no se debiesen, no hay ninguna acción como por deuda, sino en virtud del fideicomiso.

§ 11.- Lucio Ticio echó de su casa dos años antes de su muerte a sus libertos Dama y Pánfilo, y dejó de prestarles los alimentos que les daba; después, habiendo hecho testamento, legó en esta forma:

omnibus libertis meis, quos hoc testamento manumisi et quos ante habui quosque ut manumittantur petii, alimentorum nomine in menses singulos certam pecuniam dato". Quaesitum est, an Damae et Pamphilo fideicommissum debeatur. Respondi secundum ea quae proponerentur ita deberi, si hi qui petent manifeste docerent eo animo circa se patronum, cum testamentum faceret, esse coepisse, ut his quoque legatum dari vellet: alioquin nihil ipsis praestetur.

§ 12.- Damae et Pamphilo, quos testamento manumiserat, fundum dedit ita, ut post mortem suam filiis suis restituerent: eodem testamento petiit ab heredibus suis, ut Pamphilam manumitterent, quae Pamphila filia naturalis erat Pamphili: idem Pamphilus post diem legati sui cedentem testamento heredem instituit Maevium eiusque fidei commisit, ut hereditatem suam, id est fundi supra scripti partem dimidiam, quam solam in bonis ex testamento patronae suae habebat, Pamphilae filiae suae, cum primum libera fuisset, restitueret. Quaero Pamphila manumissa, utrum ex testamento superiore patris sui patronae eam partem petere possit, an vero ex testamento patris naturalis ex causa fideicommissi habita ratione legis Falcidiae. Respondi ex his quae proponerentur probari Pamphilam dumtaxat ex testamento superiore fideicommissum petere posse. Claudius. Quia creditur appellatione filiorum et naturales liberos, id est in servitute susceptos contineri.

§ 13.- Scaevola. Codicillis Gaio Seio centum legavit eiusque fidei commisit, ut ancillae testatoris ea daret: quaero, an utile fideicommissum sit, quod legatarius ancillae testatoris dare iussus est. Respondi non esse. Item, si utile non est, an legatarius heredi, cuius ancilla est, restituere compellatur. Respondi non compelli: sed nec ipsum legatarium legatum petere posse.

his will, he inserted into it the following legacy: "Let my heir, whoever he may be, give to my freedman whom I have manumitted by this will, as well as to those whom I formerly had, and to such as I have bestowed freedom upon under a trust, a certain sum of money for their support every month." The question arose whether Damas and Pamphilus were entitled to the benefit of the trust. I answered that, in accordance with the facts stated, they were entitled to it, if those who made the claim should clearly prove that it was the intention of the patron, at the time when he made his will, that the legacy should also be given to them; otherwise, nothing would be due to them.

§ 12.- A testatrix gave to Damas and Pamphilus, whom she manumitted by her will, a certain tract of land, and charged them to transfer the same to their children, when they died. She charged her heirs by the same will to manumit Pamphila who was the natural daughter of Pamphilus. This same Pamphilus, after the time that the legacy vested in him, appointed Mævius his heir by will, and charged him to give his property to Pamphila, his daughter, as soon as she became free, that is to say, half of the land above mentioned, acquired by the will of her patroness, and which constituted his entire estate. I ask whether Pamphila, having been manumitted, could claim this share of the estate by virtue of the will of the patroness of her father, or, indeed, by that of her natural father, and whether on account of the trust, the provision of the Falcidian Law will apply. I answered that, in accordance with the facts stated, it should be held that Pamphila could only claim the execution of the trust by virtue of the first will. Claudius: For the reason that it is believed that under the appellation of "children," natural children are also included, that is to say, such as are born in slavery.

§ 13.- Scævola: A certain person bequeathed a hundred aurei to Gaius Seius by a codicil, and charged him to give that sum to a certain female slave belonging to him, the testator. I ask whether the trust, by which the legatee is ordered to make payment to a female slave of the testator, is valid. I answered that it was not. Again, if it is not valid, will the legatee be obliged to pay the heir to whom the said female slave

«cualquiera que fuere mi heredero deles a todos mis libertos, que manumití en este testamento y que tuve antes, y a aquellos que he pedido que sean manumitidos, cierta cantidad cada mes a título de alimentos»; se preguntó, si a Dama y a Pánfilo se les deberá el fideicomiso. Respondí, que según lo que se exponía, se les debía de este modo, si los que lo pidieren probasen claramente, que al hacer el testamento comenzó el patrono a tener respecto de ellos tal intención, que quisiera que también a ellos se les diese el legado; pero que de otra suerte nada se les diese a ellos.

§ 12.- Uno les dió un fundo a Dama y a Pánfilo, a quienes había manumitido en el testamento, con la condición de que después de su muerte lo restituyesen a sus propios hijos; en el mismo testamento les pidió a sus herederos, que manumitiesen a Pánfila, la cual Pánfila era hija natural de Pánfilo; el mismo Pánfilo, después de correr el término de su legado, instituyó heredero a Mevio, y encomendó a la fidelidad de este, que le restituyese su propia herencia, esto es, la mitad del antes mencionado fundo, única que tenía como bienes en virtud del testamento de su patrona, a su hija Pánfila, tan pronto como hubiese sido libre; pregunto, si manumitada Pánfila podrá pedir esta parte en virtud del anterior testamento de la patrona de su padre, o por el testamento de su padre natural por causa del fideicomiso, habida cuenta de la ley Falcidia. Respondí, que, en virtud de lo que se exponía, se admitía, que Pánfila podía pedir el fideicomiso solamente por el primer testamento. Claudio dice: porque se cree, que en la denominación de hijos se comprenden también los hijos naturales, esto es, los nacidos en la esclavitud.

§ 13.- Dice Scévola: uno legó ciento a Cayo Seyo en codicilos, y encomendó a su fidelidad que se los diese a una esclava del testador; pregunto, si será útil el fideicomiso que al legatario se le mandó dar a la esclava del testador. Respondí, que no lo era. Asimismo, si no es útil, si será compelido el legatario a restituirlo al heredero de quien es la esclava. Respondí, que no se le compele, pero que tampoco el

§ 14.- Insulam libertis utriusque sexus legavit ita, ut ex reditu eius masculi duplum, feminae simplum percipiant, eamque alienari vetuit: ex consensu omnium ab herede venundata est: quaero, an et ex pretio insulae duplum mares, simplum feminae caperent. Respondi ob pretium nullam fideicommissi persecutionem esse, nisi ea mente venditioni consenserunt, ut similiter ex pretio mares quidem duplum, feminae autem simplum consequantur.

§ 15.- Instituto filio herede et ex eo nepotibus emancipatis testator ita cavuit: Volo autem domus meas nec venundari ab heredibus meis neque hypothecae dari sed integras manere ipsis et filiis et nepotibus in sempiternum. Quod si quis eorum partem suam vendere volet vel hypothecae dare, liceat ei vendere eam vel hypothecae dare coherendi suo. Si quis contra fecerit, quod actum est inutile esto et irritum.

Quaeritur, cum filius defuncti mutuam pecuniam a Flavia Dionysia acceperit et locatis aedibus pro parte sua pensiones sibi debitas creditrici delegaverit, an condicio testamenti exstittisse videatur, ut filiis suis fideicommissi nomine teneatur. Respondi secundum ea quae proponerentur non exstittisse.

§ 16.- Matre et uxore heredibus institutis ita cavuit: "A te, uxor carissima, peto, ne quid post mortem tuam fratribus tuis relinquo: habes filios sororum tuarum, quibus relinquo. Scis unum fratrem tuum filium nostrum occidisse, dum ei rapinam facit: sed et alius mihi deteriora fecit". Quaero, cum uxor intestata decessit et legitima eius hereditas ad fratrem pertineat, an sororis filii fideicommissum ab eo

belongs? I answered that he would not be obliged to do so, as he himself would have no right to bring suit to collect the legacy bequeathed to him.

§ 14.- A certain man left a house to his freedmen of both sexes, in such a way that the males receive two-thirds and the females one-third of the rent of the same; and he forbade them to alienate the property. The house, however, was sold by the heir with the consent of all the parties interested. I ask whether the males will be entitled to two-thirds of the purchase-money of the said house, and the females to one-third, or not. I answered that no demand, under the trust, could be made for any part of the price of the house, unless the parties had consented at the time of the sale that the male freedmen should have two-thirds of the purchase-money, and the females one-third of the same.

§ 15.- Having appointed his son his heir, along with his grandson, who had been born to said son, a testator made the following provisions in his will: "I do not wish my house to be sold by my heirs, nor any money to be borrowed on it, but that it shall remain permanently and absolutely, for all time, in the possession of my sons and grandsons. If, however, any one of them should desire to alienate his share, or to borrow money on it, he shall have the power to sell to his co-heir, and to borrow the money from him. But if any one of them should do otherwise, any obligation which he may incur shall be null and void."

A son of the deceased afterwards borrowed money from Flavia Dionysia, and having rented the house to her, assigned to his creditor the rent due to him; and the question arose whether the condition of the will was held to have been fulfilled, so that the son would be liable to his brothers under the terms of the trust. I answered that, in accordance with the facts stated, the condition was not fulfilled.

§ 16.- A testator, having appointed his mother and his wife his heirs, inserted the following provision into his will: "I request you, my dear wife, not to bequeath anything at your death to your brothers; you have your sister's children to whom you can leave your property, for you know that one of your brothers killed our son, while he was robbing him, and your other brother caused me great injury." I ask, as the

mismo legatario puede pedir el legado.

§ 14.- Uno legó una casa a libertos de uno y otro sexo, de modo que de las rentas de la misma percibieran los varones el duplo de la cantidad que las hembras, y prohibió que fuese enajenada, y fue vendida por el heredero con el consentimiento de todos; pregunto, si también del precio de la casa recibirán los varones el duplo de la cantidad que las hembras. Respondí, que por razón del precio no hay acción alguna para reclamar el fideicomiso, salvo que hubieren consentido en la venta con la idea de que también del precio recibieran los varones el duplo de la cantidad que las hembras.

§ 15.- Habiendo instituido heredero a su hijo, y a los nietos emancipados nacidos de él, el testador dispuso así: «quiero que mis casas no sean vendidas por mis herederos, y que sobre ellas no se tomen préstamos a interés, sino que en todo tiempo permanezcan estables para mis hijos y nietos; pero si alguno de ellos quisiere vender su parte, o tomar préstamo a interés sobre ella, tenga facultad para vendérsela a su coheredero, y para recibir de él el préstamo; mas si alguno hubiere obrado de otro modo, será inútil e irrita la obligación que se contraiga»;

Se pregunta, si, habiendo el hijo del difunto tomado dinero en mutuo de Flavia Dionisia, y habiendo delegado, arrendadas las casas, a favor de la acreedora los alquileres que a él se le debían por su parte, se considerará que se cumplió la condición del testamento, de modo que por razón del fideicomiso esté obligado a sus hijos. Respondí, que, según lo que se exponía, no se cumplió.

§ 16.- Habiendo uno instituido herederas a su madre y a su mujer, dispuso así: «te pido, carísima mujer, que después de tu muerte no les dejes nada a tus hermanos, pues tienes hijos de tus hermanas, a quienes dejarlo; sabes que un hermano tuyo mató a un hijo nuestro mientras le robaba, y que otro me hizo mayores daños»; pregunto, habiendo fallecido intestada la mujer, y perteneciendo su herencia

petere possunt. Respondi posse defendi fideicommissum deberi.

§ 17.- "Lucius Titius hoc meum testamentum scripsi sine ullo iuris perito, rationem animi mei potius secutus quam nimiam et miseram diligentiam: et si minus aliquid legitime minusve perite fecero, pro iure legitimo haberi debet hominis sani voluntas": deinde heredes instituit. Quaesitum est intestati eius bonorum possessione petita, an portiones adscriptae ex causa fideicommissi peti possunt. Respondi secundum ea quae proponerentur posse.

89.- SCAEVOLA; *libro IV, responsorum*.- Testamento filium et uxorem suam heredes instituit: postea epistulam scripsisse dicitur, qua et quidquid in peculio habuit filius, ei donavit et adiecit praecipua haec eum suique iuris et post mortem suam habere velle. Quaero, cum testamento significaverit, si quid obsignatum recepisset, id vice codicillorum valeret, epistula autem non sit obsignata, an quae epistula continentur ad filium pertineant. Respondi, si fides epistulae relictarum constaret, deberi, quae in ea dare se velle significavit.

§ 1.- Qui indivisam cum fratre suo rem habebat, filias suas heredes instituit et ita cavuit: "Propter res universas quae mihi cum illo fratre meo patruo vestro communes sunt, quas aestimationis constiterit esse universas duo milium aureorum, fidei vestrae committo, uti pro portione vestra mille aureos a Lucretio Pacato patruo vestro accipiat": huic testamento quinquennio supervixit et abunde patrimonium reliquit: quaesitum est, an heredes Lucretii Pacati secundum verba supra scripta offerentes mille aureos fideicommissum consequantur. Respondi secundum ea quae proponerentur

wife died intestate, and her estate passed to her brother as her heir-at-law, whether the sister's sons could demand the execution of the trust. I answered that they could do so, and that the trust was due.

§ 17.- "I, Lucius Titius, have drawn up this, my last will and testament, without the aid of anyone learned in the law, rather having chosen to follow the inclinations of my mind, than to conform to an over-particular and excessive exactitude. Therefore, if I have included herein anything which does not conform to the prescribed legal requirements, or is indicative of a want of knowledge, the will of a man of sound mind should still be considered valid in law." He then appointed his heirs. The question arose when possession of his estate was claimed on the ground of intestacy, whether the dispositions made under the trust could be enforced. I answered that, in accordance with the facts stated, they could be.

89.- THE SAME; *Opinions, Book IV*.- A certain man appointed his son and his wife his heirs by his will, and afterwards is said to have written a letter, by which he gave to his son all the property the latter had in his peculium; and added that he desired that the latter should have this property as a preferred legacy, to be disposed of at his pleasure, at his death. The testator set forth in his will that any paper found sealed after his death would be valid as a codicil; the above-mentioned letter, however, was not sealed, and I ask whether its contents would benefit the son. I answered that if the genuineness of the letter was clearly established, any property which the testator stated therein he intended should be given to his son, the latter would be entitled to.

§ 1.- A testator who owned property jointly with his brother appointed his daughters his heirs, and made the following provision in his will: "With reference to all my property which is owned in common with you, my brother, and your uncle, and of which the value may altogether amount to two thousand aurei, I ask that you receive therefrom the sum of a thousand aurei from your uncle Lucretius Pacatus, in lieu of your share." The testator survived this will five years, and left a greatly increased estate. The question arose whether the heirs of Lucretius Pacatus could, in compliance with the terms above quoted, by

legítima a su hermano, ¿pueden pedirle el fideicomiso los hijos de la hermana? Respondí, que se puede defender que se debe el fideicomiso.

§ 17.- «Yo, Lucio Ticio, escribí este mi testamento sin intervención de jurisperito alguno, atendiendo más bien al dictado de mi conciencia, que a excesiva y escrupulosa diligencia; y si alguna cosa la hubiere hecho no del todo conforme a la ley o no ajustada a la forma debida, la voluntad de un hombre sano debe ser considerada como legítimo derecho»; después instituyó herederos; se preguntó, ¿petida la posesión de los bienes de éste, se pueden pedir las porciones asignadas por causa de fideicomiso? Respondí, que, según lo que se proponía, se podían.

89.- EL MISMO; *Respuestas, libro IV*.- Uno instituyó en su testamento herederos a su hijo y a su mujer; se dice, que después escribió una carta, en la que también le donó al hijo todo lo que este tuvo en su peculio, y añadió, que quería que tuviera estas cosas privativamente, siendo de propio derecho, y después de su muerte; pregunto, si, habiendo expresado en el testamento, que si recibiese alguna disposición sellada, fuese válida por vía de codicilos, pero la carta no hubiera sido sellada, le pertenecerán al hijo las cosas que en la carta se contienen. Respondí, que si constare la autenticidad de la carta dejada, se debían las cosas que en ella indicó que él quería dar.

§ 1.- Uno que tenía junto con su hermano bienes indivisos, instituyó herederas a sus hijas, y dispuso así: «en cuanto a todas las cosas que tengo en común con aquel hermano mío, vuestro tío paterno, todas las que consta que son de valor de dos mil áureos, encomiendo a vuestra fidelidad, que por vuestra porción recibais mil áureos de Lucrecio Pacato, vuestro tío paterno»; sobrevivió cinco años a este testamento, y dejó un patrimonio cuantioso; se preguntó, si, conforme a las antedichas palabras conseguirían los herederos de Lucrecio Pacato el fideicomiso ofreciendo los mil áureos. Respondí,

non facere voluntatem, ut universa datis millenis aureis restituerentur, sed aestimationis, quae mortis tempore in rebus fuerat, oblationem debere fieri.

§ 2.- Seio, quem heredi substituerat, ita legavit: "Seio, si mihi heres non erit, et uxori eius Marcellae argenti libras quindecim dari volo". Quaero, cum Seius heres exstiterit, an Marcellae legati dimidia portio debeatur. Respondi secundum ea quae proponerentur deberi.

§ 3.- Lucius Titius intestato moriturus, cum haberet uxorem et ex ea filiam emancipatam, codicillis haec verba inseruit: "Pertinent autem hi codicilli ad uxorem et filiam. Primum autem rogo, sic inter vos agatis, ut me vivo egistis itaque rogo, ut quidquid aut ego reliquero aut quod vos ipsae habetis, commune vobis sit". Filia intestati patris bonorum possessionem accepit: quaeritur, an aliqua pars hereditatis Lucii Titii ex causa fideicommissi a filia matri deberetur et quota. Respondi secundum ea quae proponerentur dimidiam partem deberi, si modo uxor parata sit in commune bona sua conferre.

§ 4.- Quattuor filios aequis partibus instituit et fundum per praeceptionem singulis legavit: filii, cum universa bona patris obligata essent, mutua accepta pecunia hereditario creditori solverunt et posteriori obligaverunt, qui, cum ei debitum non solveretur, praedia universa lege pignoris uni ex heredibus vendidit: quaeritur, an, cum iste filius ex causa emptionis ea possideat, fratribus et coheredibus fideicommissi petitio esset an vero ea perempta esset, cum communiter universa sequenti creditori obligaverint. Respondi actionem quidem fideicommissi in personam competentem omnibus invicem manere: non autem fideicommissum restituendum est, nisi prius debitum ab eis emptori eidemque coheredi persolveretur.

quoted, by tendering the sum of a thousand aurei, obtain the execution of the trust. I answered that, according to the facts stated, it was not the intention of the testator that his entire estate should be given up on the payment of a thousand aurei, but that the tender should be made in accordance with its appraised value at the time of the testator's death.

§ 2.- A testator made a bequest to Seius, whom he had substituted for his heir, as follows: "I wish fifteen pounds of silver to be given to Seius, and his wife Marcella, if he should not be my heir." I ask whether if Seius should be his heir, Marcella would be entitled to half of this bequest. I answered that, according to the facts stated, she would be entitled to it.

§ 3.- Lucius Titius, having died intestate, left a wife and a daughter by her, who had been emancipated, and inserted the following provision into his codicil: "This codicil had reference to my wife and daughter. In the first place, I request them to live together, as they did during my lifetime. I also request them to hold in common any property which I may leave to them, or whatever they may have otherwise obtained." The daughter acquired possession of the estate of her father, on the ground of intestacy; and the question arises whether any portion of the estate of Lucius Titius is due to her mother from the daughter by the terms of the trust, and if so, how much. I answered that, in accordance with the facts stated, half of the estate is due to her, provided the mother was ready to place all her own property in the common fund.

§ 4.- A testator appointed his four children his heirs to equal shares of his estate, and left a tract of land to each of them as a preferred legacy. The entire estate of the father being encumbered, the children borrowed money with which to pay the first creditor, and encumbered the same property to the second one; then the latter, as the debt was not paid, sold all the land to one of the heirs under his right of hypothecation. The question arises, as the son had possession of this property by the title of purchase, whether his brothers and co-heirs were entitled to demand the execution of the trust; or whether the trust was annulled, as the entire property held in common had been hypothecated by them to the second creditor. I answered that the personal action to

que, según lo que se exponía, no era la voluntad que se restituyesen todas las cosas habiéndose dado los mil áureos, sino que se debía hacer el ofrecimiento de la estimación, que habían tenido las cosas al tiempo de la muerte.

§ 2.- Uno legó así a Seyo, a quien lo había substituido al heredero: «quiero, que, si yo no tuviere heredero, se den a Seyo y a Marcela, su mujer, quince libras de plata»; pregunto, si, habiendo quedado Seyo heredero, se le deberá a Marcela la mitad del legado. Respondí, que, según lo que se exponía se le debía.

§ 3.- Lucio Ticio, estando para morir intestado teniendo mujer y una hija emancipada habida de ella, insertó estas palabras en los codicilos: «mas les pertenecen estos codicilos a mi mujer y a mi hija; pero ruego primeramente, que os trateis como os tratasteis viviendo yo; y así os ruego, que tengais en común o todo lo que yo os dejare, o lo que vosotras mismas teneis»; la hija recibió la posesión de bienes de su padre, intestado; se pregunta, si por la hija se le debería a la madre por causa de fideicomiso alguna parte de la herencia de Lucio Ticio, y cual. Respondí, que, según lo que se exponía, se le debía la mitad, si la mujer estuviera dispuesta a aportar en común sus bienes.

§ 4.- Uno instituyó herederos por partes iguales a cuatro hijos, y a cada uno le prelegó un fundo; los hijos, hallándose obligados todos los bienes del padre, le pagaron al acreedor de la herencia con dinero recibido en mutuo, y los obligaron a favor del acreedor posterior; el cual, como no se le pagase la deuda, vendió por ley de prenda todos los predios a uno de los herederos; se pregunta, si poseyéndolos este hijo por causa de compra, tendrían sus hermanos y coherederos acción para pedir el fideicomiso, o si se habría extinguido ésta, porque en común se hayan obligado al segundo acreedor. Respondí, que verdaderamente la acción del fideicomiso, que compete contra la persona, subsiste mutuamente para todos; pero no se ha de restituir el fideicomiso, si

§ 5.- Filiae fidei commisit in haec verba: "Peto a te, filia mea, ut dotalem cautionem post mortem meam mutes et ita renoves, ut fratres tui dotem stipularentur hoc casu, ut, si sine liberis uno pluribusve in matrimonio morieris, dos ad eos perveniat". Post mortem patris decessit maritus, antequam renovaretur cautio dotalis, et postea alii nupta decessit nullo liberorum relicto, vivo adhuc Titio uno ex fratribus. Quaesitum est, an Titius petitionem haberet rerum, quae in dotem fuerant. Respondi posse fideicommissum ab heredibus sororis peti, si per eam stetit, quo minus dotem frater stipularetur.

§ 6.- Filium et filiam heredes instituit et libertis legata dedit eorumque fidei commisit in haec verba: "A vobis peto, ut quidquid vobis legavi, contenti sitis viventes, ut post vos filiis meis restituatis". Defuncta testatricis filia Maevia libertus decessit herede instituto patronae filio ex parte debita, ex altera extraneo: quaesitum est, an adita hereditate patronae filius a coherede suo partem eorum, quae ex testamento matris ad Maevium libertum pervenerant, petere potest. Respondi eius, quod ei deberetur, si hereditatem non adisset, partem a coherede petere posse.

§ 7.- Maritus uxorem ex asse heredem instituit, cuius post mortem codicillos aperiri testator praecepit: praedium hereditarium uxor infructuosum rationi suae existimans vendidit: emptor quaerit, an retractari haec venditio possit post mortem mulieris ab his, quibus codicillis per fideicommissum hereditas data deprehenderetur an vero solum quantitas pretii ab herede uxoris fideicommissariis debeatur.

which the heirs were entitled could still be brought by all of them, but that the trust could not be restored unless the heir who purchased the property should first be paid the debt by his co-heirs.

§ 5.- A father charged his daughter with a trust as follows: "I ask you, my daughter, after my death to change the dotal security, and renew it in such a way that your brothers may agree that your dowry may be returned to you on condition that, if you should die without having one or more children during your marriage, your dowry shall go to them." The husband died after the death of the father, and before the dotal bond had been renewed, and the girl, having married a second time, died, leaving no children, and was survived by Titius, one of her brothers. The question arose whether Titius had a right to claim the property which was included in the dowry. I answered that the execution of the trust could be demanded by the heirs of the sister, if it was her fault that her brother did not make the agreement with reference to the dowry.

§ 6.- A testatrix who had appointed her son and daughter her heirs, bequeathed legacies to her freedmen, and charged them with a trust as follows: "As I have bequeathed you certain property I ask you to be content with it, during your lives, and when you die, to deliver it to my children." Maevia, the daughter of the testatrix, having died, a freedman also died, after having appointed a son of his patroness his heir to that portion of his estate to which he was entitled by law, and the remaining portion he left to a stranger. The question arose whether, after the estate had been entered upon, the son of the patroness could demand from his co-heir the share of the property which, according to the will of the mother, had come into the hands of the said freedman. I answered that he could demand from his co-heir the same share to which he would have been entitled if the estate had not been entered upon.

§ 7.- A husband appointed his wife heir to his entire estate, and directed that a codicil, which he had executed, should not be opened until after her death. She, considering a certain tract of land which formed part of the estate unproductive, sold it. The purchaser asks whether, after the death of the woman, the legality of the sale can be called in question by parties to whom it was ascertained that the estate of the

antes no se le pagase por ellos la deuda al comprador y también coheredero.

§ 5.- Uno encomendó a su hija un fideicomiso en estos términos: «te pido, hija mía, que después de mi muerte cambies la caución dotal, y la renueves de modo que tus hermanos estipulen la dote para este caso, para que, si murieses en el matrimonio, sin uno o más hijos, vaya la dote a poder de ellos»; falleció el marido después de la muerte del padre, antes que se renovase la caución dotal, y habiéndose casado ella después con otro falleció no habiendo dejado ningún hijo, viviendo todavía Ticio, uno de los hermanos; se preguntó, si tendría Ticio acción para pedir los bienes, que habían sido de la dote. Respondí, que se les podía pedir el fideicomiso a los herederos de la hermana, si en ella consistió que el hermano no estipulase la dote.

§ 6.- Una instituyó herederos a su hijo y a su hija, dio legados a los libertos, y les encomendó a éstos un fideicomiso en estos términos: «os pido que mientras vivais esteis contentos con lo que os he legado, y que después lo restituyais a mis hijos»; habiendo fallecido Mevia, hija de la testadora, murió el liberto, habiendo instituido al hijo de su patrona heredero de la parte debida, y de la otra a un extraño; se preguntó, ¿adida la herencia podrá el hijo de la patrona pedirle a su coheredero la parte de los bienes que por el testamento de la madre habían ido al liberto Mevio? Respondí, que puede pedirle al coheredero la parte de lo que a él se le debía, si no hubiese adido la herencia.

§ 7.- Un marido instituyó a su mujer heredera de la totalidad, y mandó el testador que después de la muerte de aquella se cubriesen los codicilos; la mujer vendió un predio de la herencia, que creyó que era improductivo para sus cuentas; el comprador pregunta, si se podrá revocar esta venta, después de la muerte de la mujer, por aquellos a quienes se viese que en los codicilos se les dio la herencia, o si a los

Respondi propter iustam ignorantiam tam mulieris quam emptoris heredem mulieris, ut fundus apud emptorem remaneat, fideicommissario pretium dare debere.

LIBER TRICESIMUS DUO

TIT. UNUS

DE LEGATIS ET FIDEICOMMISSIS

1.- ULPIANUS; *libro I, fideicommissorum*.- Si incertus quis sit, captivus sit an a latrunculis obsessus, testamentum facere non potest. Sed et si sui iuris sit ignarus putetque se per errorem, quia a latronibus captus est, servum esse velut hostium, vel legatus qui nihil se a captivo differre putat, non posse fideicommittere certum est, quia nec testari potest, qui, an liceat sibi testari, dubitat.

§ 1.- Sed si filius familias vel servus fideicommissum reliquerit, non valet: si tamen manumissi decessisse proponantur, constanter dicemus fideicommissum relictum videri, quasi nunc datum, cum mors contingit, videlicet si duraverit voluntas post manumissionem. Haec utique nemo credet in testamentis nos esse probaturos, quia nihil in testamento valet, quotiens ipsum testamentum non valet, sed si alias fideicommissum quis reliquerit.

§ 2.- Hi, quibus aqua et igni interdictum est, item deportati fideicommissum relinquere non possunt, quia nec testamenti faciendi ius habent, cum sint

testator had been left in trust by the terms of the codicil; or whether the beneficiaries of the trust would only be entitled to the amount of the price received for the land. I answered that on account of the justifiable ignorance of the woman, as well as of that displayed by the purchaser, the land should remain in possession of the latter, and the heir of the woman should be required to pay the price obtained for it to the beneficiary of the trust.

BOOK XXXII

TITLE I

CONCERNING LEGACIES AND TRUSTS

1.- ULPIANUS; *Trusts, Book I*.- Where anyone is not certain of his condition, for instance, whether he is a captive in the hands of the enemy, or merely detained by robbers, he cannot execute a will. If, however, he should be ignorant of his legal rights, and thinks, through mistake, that because he has been captured by robbers, he is a slave of the enemy; or if, having been sent on an embassy, he believes that he does not differ from a captive, it is certain that he cannot create a trust, for the reason that he is unable to make a will who is in doubt as to whether he can do so or not.

§ 1.- Where a son under paternal control, or a slave creates a trust by will, it will not be valid. If, however, the case is proposed that either of them should die after being manumitted, we constantly decide that the trust should be held to have been left, just as if it had been created at the time of the party's death; that is if his intention had continued to exist after the manumission. Let no one suppose that we adopt this same rule with reference to wills, because whenever a will is not valid, none of its contents are valid either, but it is otherwise where anyone leaves a trust.

§ 2.- Those who have been interdicted from the use of water and fire, as well as persons who have been deported, cannot create a trust by will, because they

fideicomisarios se les deberá por el heredero de la mujer solamente la cantidad del precio. Respondí, que por razón de la justa ignorancia así de la mujer, como del comprador, el heredero de la mujer debe darle al fideicomisario el precio, para que el fundo permanezca en poder del comprador.

LIBRO TRIGÉSIMO SEGUNDO

TÍTULO ÚNICO

DE LOS LEGADOS Y DE LOS FIDEICOMISOS

1.- ULPIANO;- *Fideicomisos, libro I*.- Si alguno estuviera incierto de si está cautivo, o sitiado por ladrones, no puede hacer testamento. Pero también si estuviera ignorante de su derecho, y juzgara por error, porque fue cogido por ladrones, que es esclavo, por ejemplo, de los enemigos, o que está relegado, y cree que en nada se diferencia de un cautivo, es cierto que no puede hacer fideicomisos, porque no puede testar el que duda si le es lícito testar.

§ 1.- Pero si el hijo de familia o el esclavo hubiere dejado un fideicomiso, no es válido; pero si se dijera que fallecieron manumitidos, diremos constantemente, que se considera dejado el fideicomiso, cual si hubiera sido dado ahora cuando le sobreviene la muerte, por supuesto, si hubiere subsistido la voluntad después de la manumisión. Pero ciertamente nadie creará que hayamos de aprobar esto respecto a los testamentos, porque nada es válido en un testamento, cuando no es válido el mismo testamento, sino si de otra manera hubiere dejado a alguien el fideicomiso.

§ 2.- Aquellos a quienes se les puso interdicción en el agua y el fuego, y también los deportados, no pueden dejar un fideicomiso, porque no tienen

§ 3.- Deportatos autem eos accipere debemus, quibus princeps insulas adnotavit vel de quibus deportandis scripsit: ceterum prius quam factum praesidis comprobet, nondum amisisse quis civitatem videtur. Proinde si ante decessisset, civis decessisse videtur et fideicommissum, quod ante reliquerat, quam sententiam pateretur, valebit: sed et si post sententiam, antequam imperator comprobet, valebit quod factum est, quia certum statum usque adhuc habuit.

§ 4.- A praefectis vero praetorio vel eo, qui vice praefectis ex mandatis principis cognoscet, item a praefecto urbis deportatos (quia ei quoque epistula divi Severi et imperatoris nostri ius deportandi datum est) statim amittere civitatem et ideo nec testamenti faciendi ius nec fideicommittendi constat habere.

§ 5.- Si quis plane in insulam deportatus codicillos ibi fecerit et indulgentia imperatoris restitutus isdem codicillis durantibus decesserit, potest defendi fideicommissum valere, si modo in eadem voluntate duravit.

§ 6.- Sciendum est autem eorum fidei committi quem posse, ad quos aliquid perventurum est morte eius, vel dum eis datur vel dum eis non adimitur.

§ 7.- Nec tantum proximi bonorum possessoris, verum inferioris quoque fidei committere possumus.

§ 8.- Sed et eius, qui nondum natus est, fidei committi posse, si modo natus nobis successurus sit.

§ 9.- Illud certe indubitate dicitur, si quis intestatus decedens ab eo, qui primo gradu ei succedere potuit, fideicommissum reliquerit, si illo repudiante ad sequentem gradum devoluta sit successio, eum

exiled.

§ 3.- We must understand those to be deported to whom the Emperor has assigned some island as a residence; or such as he has banished by a written order. But before the Emperor has confirmed the sentence of the Governor, no one is considered to have lost his civil rights. Hence, if he should die before this is done, he is held to have died a citizen, and any trust which he left before he was sentenced will be valid, or one which he created after sentence was imposed upon him, and before the Emperor confirmed it, will also be valid; because up to this time he was still in the possession of his privileges as a citizen.

§ 4.- So far as those are concerned who have been deported by the Praetorian Prefect, or his deputy who has cognizance of cases under the direction of the Emperor, or also the Urban Prefect (because the right of deportation was likewise granted to him by a Rescript¹ of the Divine Severus and our Sovereign) they immediately forfeit their civil rights, and therefore it is evident that they have neither testamentary capacity nor legal power to create a trust.

§ 5.- Where anyone who has been deported to an island makes a codicil while there, and having been restored to the enjoyment of his civil rights by the favor of the Emperor, dies, leaving the same codicil unchanged, it can be maintained that the trust will be valid, provided the party always had the same intention.

§ 6.- Moreover, it should be noted that those can be charged with a trust into whose hands any of a person's estate is to pass when he dies, whether it is given to them, or whether they are not deprived of it.

§ 7.- Not only the next of kin who have obtained possession of an estate by the judgment of the Praetor, but also those entitled to it on the ground of intestacy, can be charged with a trust.

§ 8.- A child who is not yet born can be charged with a trust, if, after it is born, it will become our successor.

§ 9.- It may undoubtedly be said that if anyone should die intestate, and leave a trust to be executed by the heir entitled to succeed him in the first degree, and the latter should reject the estate, and the

ciudadanía.

§ 3.- Pero debemos entender por deportados aquellos a quienes el Príncipe destinó a las islas o respecto de los que escribió que debían ser deportados. Por lo demás, antes que apruebe el hecho del Presidente, no se considera que uno perdió la ciudadanía; por lo cual, si hubiese fallecido antes, se considera que falleció siendo ciudadano, y será válido el fideicomiso que había dejado antes que consintiese la sentencia; pero también será válido el que se hizo después de la sentencia, antes que el Emperador la apruebe, porque tuvo hasta entonces un estado cierto.

§ 4.- Mas los deportados por los Prefectos del Pretorio, o por el que en lugar del Prefecto conociere en virtud de mandatos del Príncipe, y también por el Prefecto de la ciudad, porque también a éste se le dio por una carta del Divino Severo y de nuestro Emperador el derecho de deportar, pierden inmediatamente la ciudadanía; y es sabido que por esto no tienen ni el derecho de hacer testamento, ni el de dejar fideicomiso.

§ 5.- Mas si deportado alguien a alguna isla hubiere hecho en ella codicilos, y reintegrado por indulgencia del Emperador hubiere fallecido subsistiendo los mismos codicilos, se puede defender, que es válido el fideicomiso, si es que persistió en la misma voluntad.

§ 6.- Pero se ha de saber, que se puede hacer un fideicomiso a aquellos a quienes les ha de corresponder alguna cosa a la muerte del testador, o dándosela, o no quitándosela.

§ 7.- Y podemos encomendar un fideicomiso, no solamente a la fidelidad del próximo poseedor de los bienes, sino también a la de otro más lejano.

§ 8.- Pero también se puede encomendar a la fidelidad del que aun no ha nacido, si es que nacido hubiera de sucedernos.

§ 9.- Se dice ciertamente fuera de toda duda, que si al fallecer alguien intestado hubiere dejado un fideicomiso a cargo de quien pudo sucederle eu primer grado, él no debe el fideicomiso, si

fideicommissum non debere: et ita imperator noster rescripsit.

§ 10.- Sed et si a patrono sit relictum et aliquis ex liberis eius mortuo eo admissus sit ad bonorum possessionem, idem erit dicendum.

2.- GAIUS; *libro I, fideicommissorum*.- Ex filio praeterito, licet suus heres erit, fideicommissum relinqui non potest.

3.- ULPIANUS; *libro I, fideicommissorum*.- Si mulier dotem stipulata fuerit et accepto tulit marito in hoc dotem, ut fideicommissum det, dicendum est fideicommissum deberi: percepisse enim aliquid a muliere videtur. Haec ita, si mortis causa donatura mulier marito fecit acceptum. Sed et si mortis causa auxerit marito dotem vel in matrimonium eius mortis causa redierit, potest dici fideicommissum ab eo deberi.

§ 1.- Iulianus scribit, si servus mihi legatus sit eumque manumittere rogatus sim, fideicommissum a me relinqui non posse, scilicet si pure roget: nam si sub condicione vel in diem, propter fructum medii temporis posse me obligari nec Iulianus dubitaret.

§ 2.- Si rem quis debeat ex stipulatu ei cui rem legaverit, fidei committere eius non poterit, licet ex legato commodum sentire videatur, quod dominium nanciscitur statim nec exspectat ex stipulatu actionem: fortassis quis dicat et sumptum [sumptus] litis, quem sustineret, si ex stipulatione litigaret, eum lucrari. Sed nequaquam dicendum est huius fidei committi posse.

§ 3.- Sed si habenti tibi proprietatem usum fructum mortis causa cessero, potest dici fideicommittere me posse. Nec quemquam moveat, quod usus fructus

succession pass to the next degree, the heir will not be required to execute the trust. This rule Our Emperor stated in a Rescript.

§ 10.- If a trust should be left by a freedman to be executed by his patron, and he should die, and one of his children should be permitted to take possession of his property, the same rule will apply.

2.- GAIUS; *Trusts, Book I*.- A trust cannot be left to be executed by a son who has been passed over in a will, even though he should be the heir-at-law.

3.- ULPIANUS; *Trusts, Book I*.- Where a woman made a stipulation with reference to her dowry, and her husband, having taken a receipt from her therefor in order that she might charge him with a trust, it must be said that the trust should be executed, for he is considered to have received something from his wife. This is the case where the woman gives a receipt to her husband, being about to make him a donation mortis causa. But where she increases her dowry in favor of her husband, mortis causa, or marries him again after separation, it may be held that the trust can be executed by him.

§ 1.- Julianus said that if a slave should be bequeathed to me, and I am asked to manumit him, I cannot be charged with a trust, that is to say, if I am requested to do so absolutely; for if I am asked under a condition, or within a certain period, I will be liable on account of the profit which I will derive from the labors of the slave in the meantime, and upon this point Julianus entertained no doubt.

§ 2.- Where anyone owes some property to a certain person, as the result of a stipulation, and bequeaths him the property, he cannot charge him with a trust, although the creditor may be held to have benefited by the legacy, because ownership vests at once, and does not wait for an action based on the stipulation. Perhaps someone might say that he would profit by the expenses of the stipulation, which he would have to pay if the matter should come into court; but it can, by no means, be held that he can be charged with a trust.

§ 3.- If I should transfer to you, mortis causa, the usufruct of certain property of which you have the ownership, it may be held that I can charge you with a

repudiándola él hubiera pasado la sucesión al segundo grado; y así lo respondió por rescripto nuestro Emperador.

§ 10.- Pero también se habrá de decir lo mismo, si hubiera sido dejado a cargo del patrono, y muerto él hubiera sido admitido alguno de sus hijos a la posesión de los bienes.

2.- GAYO; *Fideicomisos, libro I*.- No se puede dejar un fideicomiso a cargo del hijo preterido, aunque fuere heredero suyo.

3.- ULPIANO; *Fideicomisos, libro I*.- Si la mujer hubiere estipulado la dote, y le dio al marido por recibida la dote con este objeto, para que dé un fideicomiso, se ha de decir, que se debe el fideicomiso; porque se considera que recibió de la mujer alguna cosa. Esto así, si la mujer se la dio por recibida al marido, para hacer ella donación por causa de muerte; pero también se puede decir, que si por causa de muerte le hubiere aumentado al marido la dote, o hubiere vuelto al matrimonio de este por causa de muerte, se debe por él el fideicomiso.

§ 1.- Escribe Juliano, que si se me hubiera legado un esclavo, y se me hubiera rogado que lo manumitiese, no se puede dejar el fideicomiso a mi cargo, a saber, si se me rogara puramente; porque si bajo condición, o a término, no dudaría Juliano que puedo ser obligado a causa de los frutos del tiempo intermedio.

§ 2.- Si alguien debiera en virtud de estipulación alguna cosa a aquel a quien le hubiere legado la cosa, no podrá encomendársela por fideicomiso, aunque parezca que en virtud del legado obtiene algún beneficio, porque adquiere inmediatamente el dominio, y no espera a la acción de la estipulación; y quizá diga alguno, que él gana también los gastos del litigio, que soportaría, si litigase en virtud de la estipulación; pero de ningún modo se ha de decir, que se le puede encomendar el fideicomiso.

§ 3.- Pero si a tí, que tienes la propiedad, te hubiere yo cedido por causa de muerte el usufruto, también se puede decir, que te puedo encomendar un fidei-

solet morte exstingui: nam medii potius temporis, quo vivat qui donavit, commodum cogitemus.

§ 4.- Si autem pignus debitoris liberavero mortis causa et eius fidei commisero, non potest valere fideicommissum.

4.- PAULUS; *libro IV, sententiarum*.- A patre vel domino relictum fideicommissum, si hereditas ei non quaeratur, ab emancipato filio vel servo manumisso utilibus actionibus postulatur: penes eos enim quaesitae hereditatis emolumentum remanet.

5.- ULPIANUS; *libro I, fideicommissorum*.- Si fuerit municipio legatum relictum, ab his qui rem publicam gerunt fideicommissum dari potest.

§ 1.- Si quis non ab herede vel legatario, sed ab heredis vel legatarii herede fideicommissum reliquerit, hoc valere benignum est.

6.- PAULUS; *libro I, fideicommissorum*.- Sed et si sic fideicommissum dederó ab herede meo: "te rogo, Luci Titi, ut ab herede tuo petas dari Maevio decem aureos", utile erit fideicommissum, scilicet ut mortuo Titio ab herede eius peti possit: idque et Iulianus respondit.

§ 1.- Sic autem fideicommissum dari non poterit: "si Stichus Seii factus iussu eius hereditatem adierit, rogo det", quoniam qui fortuito, non iudicio testatoris consequitur hereditatem vel legatum, non debet onerari, nec recipiendum est, ut, cui nihil dederis, eum rogando obliges.

7.- ULPIANUS; *libro I, fideicommissorum*.- Si

trust, nor will the point that the usufruct is ordinarily extinguished by death have any weight, since we must consider the benefits which the owner will obtain during the intermediate time that the party who made the donation survives.

§ 4.- If, however, I should release the pledge of my debtor, mortis causa, and charge him with a trust, the trust will not be valid.

4.- PAULUS; *Sentences, Book IV*.- Where a trust is left to be executed by a father or a master, and the estate is not obtained by him who has emancipated his son, or manumitted his slave, the beneficiary of the trust can bring a praetorian action against the said son or slave, because the profits of the estate which he has acquired remain in his hands.

5.- ULPIANUS; *Trusts, Book I*.- Where a legacy is left to a municipality, those who are transacting its business can be charged with a trust.

§ 1.- Where anyone leaves a trust to be executed, not by the heir or legatee himself, but by the heir of said heir or legatee, it is but proper that this should be valid.

6.- PAULUS; *Trusts, Book I*.- Even if I should charge my heir with a trust as follows, "I ask you, Lucius Titius, to charge your heir to pay ten aurei to Mævius," the trust will be valid; provided that, after the death of Titius, its execution can be demanded from his heir. This opinion was also held by Julianus.

§ 1.- A trust cannot, however, be created as follows, "If Stichus should become the property of Seius, and should enter upon my estate by his order, I ask Seius to pay such-and-such a sum," since anyone who obtains an estate through chance, and not by the will of the testator, or acquires a legacy under such circumstances, ought not to be burdened with the obligation of a trust; and the principle should not be adopted that you can bind anyone by a request of this kind when you give him nothing.

7.- ULPIANUS; *Trusts, Book I*.- Where the slave

comiso; y no haga vacilar a nadie, que el usufruto se suele extinguir con la muerte, porque mas bien atenderemos al beneficio del tiempo intermedio en que vive el que hizo la donación.

§ 4.- Mas si por causa de muerte hubiere yo liberado la prenda del deudor, y se la hubiere encomendado en fideicomiso, no puede ser válido este fideicomiso.

4.- PAULO; *Sentencias, libro IV*.- El fideicomiso dejado a cargo del padre o del señor, si no se adquiriese para él la herencia, y se le reclama por las acciones útiles al hijo emancipado o al esclavo manumitido; porque en poder de ellos queda el beneficio de la herencia adquirida.

5.- ULPIANO; *Fideicomisos, libro I*.- Si a un municipio se le hubiere dejado un legado a cargo de los que administran la cosa pública, se les puede dar un fideicomiso.

§ 1.- Si alguno hubiere dejado un fideicomiso, no a cargo del heredero, o del legatario, sino a cargo del heredero del heredero o del legatario, es equitativo que sea válido.

6.- PAULO; *Fideicomisos, libro I*.- Pero también si de este modo hubiere yo dado un fideicomiso a cargo de mi heredero: «te ruego, Lucio Ticio, que le pidas a tu heredero que se le den a Maevio diez áureos»; será útil el fideicomiso, a saber, para que muerto Ticio, se le pueda pedir a su heredero; y esto respondió también Juliano.

§ 1.- Pero no se podrá dar un fideicomiso de este modo: «si Stico, habiendo sido hecho esclavo de Seyo, hubiere adido por su mandato la herencia, ruego que dé», porque el que fortuitamente, y no por voluntad del testador, consigue la herencia o el legado, no debe ser gravado; y no se ha de admitir que al que nada le hayas dado lo obligues rogándole.

7.- ULPIANO; *Fideicomisos, libro I*.- Si se le

deportati servo fideicommissum fuerit adscriptum, ad fiscum pertinere dicendum est, nisi si eum deportatus vivo testatore alienaverit vel fuerit restitutus: tunc enim ad ipsum debet pertinere.

§ 1.- Si miles deportato fideicommissum reliquerit, verius est, quod et Marcellus probat, capere eum posse.

§ 2.- Si quis creditori suo legaverit id quod debet, fidei committi eius non poterit, nisi commodum aliquod ex legato consequatur, forte exceptionis timore vel si quod in diem debitum fuit vel sub condicione.

8.- PAULUS; *libro I, fideicommissorum*.- Si legatarius, a quo fideicommissum datum est, petierit legatum, id tantum, quod per iudicem exegerit, praestare fideicommissario cogetur vel, si non exegerit, actione cedere: ad eum enim litis periculum spectare iniquum est, si non culpa legatarii lis perierit.

§ 1.- Servo heredis fideicommissum utiliter non relinquitur, nisi fidei eius commiserit, ut servum manumittat.

§ 2.- Cum ita petisset testator, ut, quidquid ex bonis eius ad patrem pervenisset, filiae suae ita restitueret, ut eo amplius haberet, quam ex bonis patris habitura esset, divus Pius rescripsit manifestum esse de eo tempore sensisse testatorem, quod post mortem patris futurum esset.

9.- MAECENATUS; *libro I, fideicommissorum*.- Si ita fuerit fideicommissum relictum: "ad quemcumque ex testamento meo vel ab intestato" vel ita: "ad quemcumque quoquo iure bona mea perveniant": hac oratione et eius, qui postea natus erit inve familiam venerit et eius, qui postea cognatus esse coeperit, fidei commissum videtur: eius quoque, quae nondum nupta erit, sed postea eo casu, quo ex edicto ad uxorem bona mariti intestati solent pertinere.

of a man who has been deported is charged with a trust, it will belong to the Treasury, unless the party who was deported disposed of the slave, or was restored to the enjoyment of his civil rights during the lifetime of the testator, for then it will belong to him.

§ 1.- Where a soldier charges a man who has been deported with a trust, the better opinion is (and this is also approved by Marcellus), that he cannot receive the trust.

§ 2.- If anyone should bequeath to his creditor what he owes him, he cannot charge him with a trust, unless the creditor obtains some benefit from the legacy; for example, where he is apprehensive of the filing of an exception, or where the debt was to be paid within a certain time, or under some condition.

8.- PAULUS; *Trusts, Book I*.- If a legatee, who has been charged with a trust, claims the legacy, he can only be compelled to pay to the beneficiary of the trust as much as will be required by the judge; or, if the judge does not compel him to pay anything, he must assign him his right of action; for it is unjust that he should sustain the risk attending a lawsuit, if the case should be lost through no fault of the legatee.

§ 1.- A slave of the heir cannot be charged with a trust, unless the latter is requested to manumit the slave.

§ 2.- Where a testator provided that any of his estate which might come into his father's hands should be given to his daughter, so that, in this way, she would have more than she would otherwise obtain from her father's estate, the Divine Pius stated in a Rescript that it was evident that the testator intended that the delivery of the property should be made after the death of the father.

9.- MARCIANUS; *Trusts, Book I*.- Where a trust was left as follows, "To anyone who may obtain my estate under the terms of my will, or through intestacy," or, "To anyone in whom my estate may vest by any title whatsoever," by these terms a child who may subsequently be born or come into the family, or anyone who may afterwards become a near relative of the testator, is held to be charged with the trust, as well as any woman who is not yet married, and afterwards is ascertained to be in the position in

hubiere asignado un fideicomiso al esclavo de un deportado, se ha de decir, que le pertenece al fisco, salvo si el deportado hubiere enajenado el esclavo viviendo el testador, o él hubiere sido restituido; porque entonces le deberá pertenecer a él mismo.

§ 1.- Si el militar le hubiere dejado un fideicomiso a un deportado, es más cierto, lo que también aprueba Marcelo, que él puede adquirirlo.

§ 2.- Si alguien le hubiere legado a su acreedor lo que le debe, no se le podrá encomendar a éste un fideicomiso, si no obtuviera del legado algún provecho, acaso por temor de la excepción, o si se debió alguna cosa a término, o bajo condición.

8.- PAULO; *Fideicomisos, libro I*.- Si el legatario, a cuyo cargo se dió un fideicomiso, hubiere pedido el legado, sera obligado a entregarle al fideicomisario solamente lo que por medio del juez hubiere exigido, o a ceder la acción, si no lo hubiere exigido; porque es injusto que le afecte la pérdida del litigio, si el litigio no se hubiere perdido por culpa del legatario.

§ 1.- No se le deja útilmente un fideicomiso al esclavo del heredero, si no se hubiere encomendado a la fidelidad de éste que manumita al esclavo.

§ 2.- Habiendo pedido el testador, que todo lo que de sus bienes hubiese ido a poder de su padre, lo restituyera a su hija, para que con ello tuviese más de lo que de los bienes de su padre habría de tener ella, respondió por rescripto el Divino Pio, que es evidente que el testador se refirió a aquel tiempo, que hubiese de venir después de la muerte del padre.

9.- MECIANO; *Fideicomisos, libro I*.- Si así se hubiere dejado un fideicomiso: «a cualquiera que por mi testamento,» o «abintestato,» o de este modo: «a cualquiera que por cualquier derecho vayan mis bienes», y con esta cláusula, se considera que se encomendó el fideicomiso así a la fe del que después hubiere nacido, o ingresado en la familia, como a la del que después hubiere comenzado a ser cognado; y también a la de aquella que aun no se hubiere casado, sino que se casare después, en este caso, en el que por

10.- VALENS; *libro II, fideicommissorum*.- Si tibi et ei, qui ex tribus liberis meis in funus meum venerit, centum aureos legavero, non minuitur in tua persona legatum, si nemo venit.

11.- ULPIANUS; *libro II, fideicommissorum*.- Fideicommissa quocumque sermone relinqui possunt, non solum Latina vel Graeca, sed etiam Punica vel Gallicana vel alterius cuiuscumque gentis.

§ 1.- Quotiens quis exemplum testamenti praeparat et prius decedat quam testetur, non valent quasi ex codicillis quae in exemplo scripta sunt, licet verba fideicommissi scriptura habeat: et ita divum Pium decrevisse Maecianus scribit.

§ 2.- Si ita quis scripserit: "Illum tibi commendo", divus Pius rescripsit fideicommissum non deberi: aliud est enim personam commendare, aliud voluntatem suam fideicommittentis heredibus insinuare.

§ 3.- Cum esset quis rogatus restituere portionem accepta certa quantitate, responsum est ultro petere ipsum fideicommissum ab herede posse. Sed utrum, si volet, praecipiet restituetque portionem, an vero et si noluerit, cogatur accepta quantitate portionem restituere, propriae est deliberationis.

Et sane cum quis rogatur accepta certa quantitate portionem restituere, duplex est fideicommissum, unum, ut possit petere quantitatem paratus portione cedere, aliud, ut et si non petet, tamen cogatur fideicommissario restituere parato praestare quantitatem.

§ 4.- Si quis ita scripserit: "sufficiunt tibi vineae vel fundus", fideicommissum est, quoniam et illud fideicommissum esse arbitramur: "contentus esto illa re".

which, according to the Edict, the property of an intestate husband usually passes to his wife.

10.- VALENS; *Trusts, Book II*.- If I bequeath a hundred aurei to you, and to the one of my three children who may come to my funeral, the legacy will not be diminished, so far as you are concerned, if none of the children should come.

11.- ULPIANUS; *Trusts, Book II*.- Trusts can also be left in any language, not only in Latin or Greek, but also in Carthaginian, Gallic, or the idiom of any nation whatsoever.

§ 1.- Whenever anyone makes a rough draft of his will, and dies before he completes it, what is contained in the draft is not valid as a codicil, although the document may contain words creating a trust. Maecianus states that this was decreed by the Divine Pius.

§ 2.- Where anyone writes, "I recommend So-and-So to you," the Divine Pius stated in a Rescript that a trust was not created; for it is one thing to recommend a person to his heirs, and another to intimate that it is his intention that they should be charged with a trust for his benefit.

§ 3.- Where a man was asked to relinquish his share of an estate upon receiving a certain sum of money, it was held that he himself could demand the execution of the trust by the heir. If, however, he desires to do so, can he retain in his hands the sum bequeathed to him, and relinquish his share of the estate; or, indeed, can he, having been tendered the sum bequeathed, be compelled against his will to relinquish his share? He has a right to decide this matter himself.

And, indeed, where anyone is asked to relinquish his share of an estate upon receiving a certain sum of money, a double trust is created; first, where the party is ready to give up his share, he can demand a sum of money; and second, even though he does not demand it, still, he can be forced to surrender his share if the trustee is ready to pay him the said sum.

§ 4.- Where anyone inserts the following in his will, "Such-and-such vineyards, or lands are sufficient for you," a trust is created, since we consider as a trust the clause, "Let him be content with such-and-such property."

virtud del Edicto le suelen pertenecer a la mujer los bienes del marido intestado.

10.- VALENTE; *Fideicomisos, libro II*.- Si a tí, y al que de mis tres hijos hubiere ido a mis funerales, os hubiere legado yo cien áureos, no se disminuye en tu persona el legado, si ninguno fue.

11.- ULPIANO; *Fideicomisos, libro II*.- Los fideicomisos pueden ser dejados con cualquier lenguaje; no solamente en lengua latina o griega, sino también en la púnica o gala, o en la de otra cualquier nación.

§ 1.- Cuando alguien prepara la minuta de un testamento, y fallece antes que teste, no vale como por codicilo lo que se escribió en la minuta, aunque la escritura tenga las palabras de fideicomiso; y escribe Meciano, que así lo decretó el Divino Pío.

§ 2.- Si alguno hubiere escrito así: «te recomiendo a aquel,» respondió por rescripto el Divino Pío, que no se debe un fideicomiso; porque una cosa es recomendar a una persona, y otra insinuarles a los herederos del fideicomitente la propia voluntad.

§ 3.- Cuando a alguno se le hubiese rogado que restituya una porción habiendo recibido cierta cantidad, se respondió, que a voluntad puede pedirle al heredero el mismo fideicomiso. Pero es objeto de propia deliberación, si tomará previamente y restituirá la porción, si quisiera, o si será obligado a restituir la porción, aun si no hubiere querido, habiendo recibido la cantidad.

Y a la verdad, cuando a alguien se le ruega que restituya una porción habiendo recibido cierta cantidad, hay dos fideicomisos, uno, para que pueda pedir la cantidad estando dispuesto a ceder la porción, otro, para que, aunque no la pidiere, sea, sin embargo, obligado a hacerle la restitución al fideicomisario que esté dispuesto a entregar la cantidad.

§ 4.- Si alguno hubiere escrito de este modo: «bástente las viñas, o el fundo», hay fideicomiso, porque consideramos que también esto es fideicomiso: «conténtate con tal cosa».

§ 5.- Sic fideicommissum relictum: "nisi heres meus noluerit, illi decem dari volo" quasi condicional fideicommissum est et primam voluntatem exigit: ideoque post primam voluntatem non erit arbitrium heredis dicendi noluisse.

§ 6.- Hoc autem "cum voluerit" tractum habet, quamdiu vivat is, a quo fideicommissum relictum est: verum si antequam dederit, decesserit, heres eius praestat. Sed et si fideicommissarius, antequam heres constituat, decesserit, ad heredem suum nihil transtulisse videtur: condicional enim esse legatum nemini dubium est et pendente condicione legati videri decessisse fideicommissarium.

§ 7.- Quamquam autem fideicommissum ita relictum non debeat "si volueris", tamen si ita adscriptum fuerit: "si fueris arbitratus" "si putaveris" "si aestimaveris" "si utile tibi fuerit visum" vel "videbitur", debetur: non enim plenum arbitrium voluntatis heredi dedit, sed quasi viro bono commissum relictum.

§ 8.- Proinde si ita sit fideicommissum relictum: "illi, si te meruerit", omnimodo fideicommissum debetur, si modo meritum quasi apud virum bonum collocare fideicommissarius potuit: et si ita sit "si te non offenderit", aequè debetur: nec poterit heres causari non esse meritum, si alius vir bonus et non infestus meritum potuit admittere.

§ 9.- Haec verba: "te, fili, rogo, ut praedia, quae ad te pervenerint, pro tua diligentia diligas et curam eorum agas, ut possint ad filios tuos pervenire", licet non satis expriment fideicommissum, sed magis consilium quam necessitatem relinquendi, tamen ea praedia in nepotibus post mortem patris eorum vim fideicommissi videntur continere.

§ 10.- Si filio a patre herede instituto fideicommissum relictum fuerit, etsi verbis non sit ita relictum

§ 5.- Where a trust is left as follows, "I wish my heir to pay ten aurei to So-and-So, unless my heir should be unwilling to do so," the trust is, to some extent, conditional, and first requires the consent of the heir; hence, after he has consented, he cannot change his mind and allege that he is unwilling to pay.

§ 6.- When a bequest is made as follows, "If he should be willing," it involves the question as to how long the party who is charged with the trust may live. If, however, the beneficiary should die before the trustee pays the legacy, the heir of the latter must pay it. But if the trustee should die before he is appointed heir, the trust will not be transmitted to his heir, for no one can doubt that the legacy is conditional, and the trustee is held to have died before the condition was fulfilled.

§ 7.- Although a trust which is left in the following manner is not valid, namely, "If he should be willing," it is, nevertheless, valid if expressed as follows: "If you should judge it advisable; if you think it ought to be done, if you should deem it expedient; if it seems, or should seem to you to be advantageous;" for the will does not confer full discretion upon the heir, but the trust is left, as it were, to the judgment of a good citizen.

§ 8.- Hence, where a trust is left as follows, "If he should render some service to him," it will undoubtedly be valid, if the beneficiary has been able to render the heir any service of which a good citizen would approve. It will likewise be valid if left as follows, "Provided that he does not offend you," and the heir cannot allege that the beneficiary does not deserve it, if some other good citizen who is not prejudiced, will admit that the party is deserving of the benefit.

§ 9.- These words, "I ask you, my son, to take the greatest care of the real property which is to come into your hands, in order that it may pass to your children," although they do not exactly express the creation of a trust, as they rather imply advice than the obligation of leaving the property to the children; still, the devise of said land is considered to have the effect of a trust for the benefit of the grandchildren, after the death of their father.

§ 10.- Where a trust is left to a son who has been appointed the heir of his father, while it was not

§ 5.- El fideicomiso dejado de este modo: «a no ser que no quisiere mi heredero, quiero que se den diez a aquel», es un fideicomiso casi condicional, y exige la primera voluntad; y por lo tanto, después de la primera voluntad no estará al arbitrio del heredero decir que no quiso.

§ 6.- Mas este legado: «cuando quisiere» tiene duración mientras viva aquel a cuyo cargo se dejó el fideicomiso; pero si antes que lo hubiere dado hubiere fallecido, lo paga su heredero. Pero si el fideicomisario hubiere fallecido antes que el heredero determine, se considera que no transfirió nada a su heredero; porque para nadie es dudoso, que es un legado condicional, y que parece que el fideicomisario falleció estando pendiente la condición del legado.

§ 7.- Mas aunque no sea debido un fideicomiso así dejado: «si quisieres», sin embargo, si hubiere sido escrito de este modo: «si lo hubieres determinado, si lo juzgares, si lo estimares, si te hubiere parecido útil, o si te pareciere», se deberá; porque no le dió al heredero el pleno arbitrio de la voluntad, sino que fue dejado como encomendado a un hombre bueno.

§ 8.- Por consiguiente, si el fideicomiso hubiere sido dejado así: «a aquel, si lo hubiere merecido», se deberá de todos modos el fideicomiso, si es que el fideicomisario pudo atribuir mérito como a juicio de hombre bueno. Y si de esta manera: «si no te hubiere ofendido», se deberá igualmente; y no podrá el heredero alegar que no fue merecido, si otro hombre bueno y no enemigo pudo admitir que fue merecido.

§ 9.- Por estas palabras: «te ruego, hijo mío, que estimes con tu diligencia los predios que fueren a tu poder, y que tengas cuidado de ellos, para que puedan pasar a tus hijos», aunque no expresan suficientemente un fideicomiso, sino más bien un consejo, que la necesidad de dejarlos, se considera, sin embargo, que estos predios tienen fuerza de fideicomiso a favor de los nietos después de la muerte del padre de éstos.

§ 10.- Si a un hijo se le hubiere dejado un fideicomiso a cargo de su padre instituido heredero,

"cum pater moreretur", sed intellegi hoc possit, puta quia sic relictum est "ut relinquat filio" vel "volo eum habere" vel "volo ad eum pertinere", defendetur in id tempus fideicommissum relictum, quo sui iuris filius efficitur.

§ 11.- Si cui ita fuerit fideicommissum relictum: "si morte patris sui iuris fuerit "effectus" et emancipatione sui iuris factus sit, non videri defecisse condicionem: sed et cum mors patri contingat quasi exstante condicione ad fideicommissum admittetur.

§ 12.- Si rem suam testator legaverit eamque necessitate urgente alienaverit, fideicommissum peti posse, nisi probetur adimere ei testatorem voluisse: probationem autem mutatae voluntatis ab heredibus exigendam.

§ 13.- Ergo et si nomen quis debitoris exegerit, quod per fideicommissum reliquit, non tamen hoc animo, quasi vellet extinguere fideicommissum, poterit dici deberi: nisi forte inter haec interest: hic enim extinguitur ipsa constantia debiti, ibi res durat, tametsi alienata sit. Cum tamen quidam nomen debitoris exegisset et pro deposito pecuniam habuisset, putavi fideicommissi petitionem superesse, maxime quia non ipse exegerat, sed debitor ultro pecuniam optulerat, quam offerente ipso non potuit non accipere.

Paulatim igitur admittemus, etsi ex hac parte pecuniae rem comparaverit, quam non hoc animo exegit, ut fideicommissarium privaret fideicommisso, posse adhuc fideicommissi petitionem superesse.

§ 14.- Si quis illicite aedificasset, id est hoc quod dirui constitutiones iubent, an fideicommissum

expressly stated that it would take effect at the death of the latter, this may be inferred; for instance, because the following words are used, "In order that he may leave the property to his son," or, "I wish him to have the property," or, "I wish it to belong to him," it can be maintained that the execution of the trust is to be postponed until the son becomes his own master.

§ 11.- Where a trust has been left to anyone in the following terms: "If he should become his own master at the death of his father," and he becomes independent by emancipation, the condition will not be held to have failed, but he will obtain the benefit of the trust at the time of his father's death, just as if the condition had been fulfilled.

§ 12.- Where a testator bequeathed certain property belonging to him, and afterwards alienated it through urgent necessity, the execution of the trust can be demanded, unless it can be proved that the testator intended to deprive him of the benefit of it, the fact, of his having changed his mind must, however, be proved by the heirs.

§ 13.- Therefore, if anyone should collect the note of a debtor which he had in trust but did not, by enforcing payment, intend to annul the trust, it can be said that it must be executed. There is, however, a certain difference between these two cases; for, in one, the substance of the debt itself is extinguished, but in the other, the property still remains, although it may have been alienated. But I held that the claim for the execution of the trust still existed, even though a certain party had exacted the payment of a note of the debtor and retained possession of the money as a deposit, especially because the creditor did not himself demand the money, but the debtor tendered it of his own accord, and he, having done so, the former could not refuse to accept it.

Therefore, by degrees we admit that, even if the testator had purchased property with this money which he did not collect with the intention of depriving the beneficiary of the bequest to which he was entitled, the demand for the execution of the trust can still be made.

§ 14.- Where anyone builds a house in an unlawful manner (that is to say one which the Imperial

aunque con las palabras no se le haya dejado de este modo, cuando muera el padre, sino que se pueda entender esto, por ejemplo, porque fue dejado así, para que lo deje al hijo, o, «quiero que él lo tenga», o, «quiero que a él le pertenezca», se defiende que el fideicomiso fue dejado para el tiempo en que el hijo se hace de propio derecho.

§ 11.- Si a alguno le hubiere sido dejado de este modo un fideicomiso: «si por muerte de su padre se hubiere hecho de propio derecho», y por la emancipación se hubiera hecho de propio derecho, no se considera que faltó la condición; sino que también cuando llegue la muerte del padre será admitido al fideicomiso, como si se hubiese cumplido la condición.

§ 12.- Si el testador hubiere legado una cosa suya, y la hubiere enajenado por urgente necesidad, se puede pedir el fideicomiso, a no ser que se pruebe que el testador quiso quitárselo, pero habiéndosele de exigir a los herederos la prueba de haberse cambiado de voluntad.

§ 13.- Luego también si alguno hubiere cobrado el crédito de un deudor, que dejó por fideicomiso, pero no con esta intención, como si quisiera extinguir el fideicomiso, se podrá decir que se debe, a no ser acaso que entre estos casos haya diferencia; porque en este se extingue la misma constancia de la deuda, y en el otro subsiste la cosa, aunque haya sido enajenada. Mas cuando uno hubiese cobrado el crédito de un deudor, y hubiese tenido el dinero en depósito, opiné que subsistía la petición del fideicomiso, mayormente si él mismo no lo había exigido, sino que el deudor había ofrecido voluntariamente el dinero, que, ofreciéndolo él, no pudo dejar de recibir.

Así, pues, paulatinamente admitiremos, que aunque hubiere comprado una cosa con esta parte de dinero, que no cobró con la intención de privar del fideicomiso al fideicomisario, puede subsistir todavía la petición del fideicomiso.

§ 14.- Si alguno hubiese edificado ilícitamente, esto es, lo que las Constituciones mandan que se

relinquere ex eo quid possit, videamus. Et puto posse: cum enim dirui necesse sit, nulla dubitatio est, quin senatus consultum impedimento non sit.

§ 15.- Si heres rogatus sit certam summam usuris certis faenori dare, utile est fideicommissum: sed Maecianus putat non alias cogendum credere, quam idonee ei caveatur: sed ego proclivior sum, ut putem cautionem non exigendam.

§ 16.- Si servo alieno militia relinquatur, an domino quaeratur legatum, quaeritur. Et aut scit servum esse, et dico aestimationem deberi: aut ignoravit, et denegari fideicommissi persecutio debet, quia, si scisset servum, non reliquisset.

§ 17.- Ex his apparet, cum per fideicommissum aliquid relinquitur, ipsum praestandum quod relictum est: cum vero ipsum praestari non potest, aestimationem esse praestandam.

§ 18.- Si quis decem alicui per fideicommissum reliquerit et, si perdidisset id quod testamento relictum est, rursus ei reliquerit, quaerebatur, an sequens fideicommissum valeat vel an exigere heres debeat cautionem salva fore decem, ne cogatur ad praestationem, et an, si saepius perdidisset, saepius ei sarciretur fideicommissum.

Divus Pius rescripsit neque cautionem exigendam et non amplius quam semel, postquam perdidisset, praestandum: non enim onerandus est heres, ut in infinitum, quotiens perdiderit, restituere ei tantundem debeat, sed ut per fideicommissum posterius duplicata eius legata videantur nec amplius ad periculum heredis pertineat, si quid postea si consumpserit exsoluto et posteriore fideicommisso.

§ 19.- Item si quis certam quantitatem cui reliquerit

Constitutions say should be demolished), let us see whether a person can leave anything of which it is composed, by way of trust. I think that he can do so; for although it is necessary for the house to be torn down, still, there is no doubt that the terms of the Decree of the Senate offer no obstacle to such a disposition of the property.

§ 15.- Where an heir is requested to lend a sum of money at a specified rate of interest, the trust is valid. Maecianus, however, thinks that he cannot be compelled to lend it, unless he is furnished with proper security. I am more inclined to the opinion that security should not be required.

§ 16.- Where a commission in the army is left in trust to the slave of another, the question arises whether the legacy is acquired by his master. I hold that the estimated value of the legacy must be paid if the testator knew that the party was a slave; but if he was ignorant of the fact, the master should not be permitted to demand the execution of the trust, because if the testator had known that the legatee was a slave, he would not have left him the bequest.

§ 17.- It is evident from these cases, that when anything is left by way of trust, the article itself must be delivered, and when this cannot be done, the appraised value of the same must be paid.

§ 18.- If anyone should leave ten aurei to someone by a trust, and agree to leave the same amount to him a second time, if he should lose what was left to him by the will, the question arose whether the second trust would be valid, or whether the heir should require security to protect himself, lest he might be compelled to pay the ten aurei again; and also if the sum should be lost several times, whether the trustee ought to be called upon to make it good.

The Divine Pius stated in a Rescript that no security should be required, and that where the property had been lost, it should not be replaced more than once by the trustee, for the heir ought not to be indefinitely burdened, and compelled to repay the said sum of money every time it was lost, but, as the legacy seems to be doubled by the second trust, no further liability attaches to the heir, if the beneficiary should afterwards waste what he has received under it.

§ 19.- Likewise, if anyone should bequeath a

derribe, veamos si podrá alguien dejar de ello un fideicomiso; y opino, que puede, porque como es necesario que se derribe, no hay duda alguna que no sirve de impedimento el Senadoconsulto.

§ 15.- Si al heredero se le hubiera rogado, que diese cierta suma en préstamo a determinado interés, es útil el fideicomiso; pero opina Meciano, que no ha de ser obligado a prestarla de otro modo, sino si se le diera suficiente caución; pero yo estoy más inclinado a pensar que no se ha de exigir caución.

§ 16.- Si a un esclavo ajeno se le dejara un cargo en una milicia, se pregunta si se adquirirá para su señor el legado. Y o sabe que es esclavo, y digo que se debe la estimación, o lo ignoró, y se debe denegar la reclamación del fideicomiso, porque si hubiese sabido que era esclavo, no lo habría dejado.

§ 17.- Resulta de esto, que cuando se deja alguna cosa por fideicomiso, se ha de entregar lo mismo que se dejó, pero que cuando no se puede entregar lo mismo, se ha de dar su estimación.

§ 18.- Si uno le hubiere dejado a otro diez por fideicomiso, y, si hubiese perdido lo que se dejó en el testamento, se lo hubiere dejado de nuevo, se preguntaba, si será válido el segundo fideicomiso, o si el heredero deberá exigir caución de que habrán de quedar a salvo los diez, para que no sea obligado a la prestación, y si en el caso de que los hubiese perdido más veces, se le resarcirá más veces el fideicomiso.

El Divino Pío respondió por rescripto, que no se ha de exigir caución, y que no se han de entregar más de una vez después que los hubiese perdido; porque no ha de ser gravado el heredero, para que indefinidamente, mientras los perdiere, deba entregarle otros tantos, sino para que por el fideicomiso posterior se considere duplicado su legado, y nada más vaya a riesgo del heredero, si aquel hubiere consumido después alguna cosa, habiendo sido pagado también el segundo fideicomiso.

§ 19.- Igualmente, si uno le hubiere dejado a otro

et addiderit facilius hanc summam posse compensari, cum debitor sit fideicommissarius ex causa hereditatis Gaii Seii, nec velit ille hereditatem adire Gaii Seii, sed petat fideicommissum: imperator noster contra voluntatem eum testantis petere fideicommissum rescripsit, cum in fideicommissis praecipue spectanda servandaque sit testatoris voluntas.

§ 20.- Plerumque evenit multorum interesse id quod relinquitur, verum testatorem uni voluisse honorem habitum, et est haec sententia Marcelli verissima.

§ 21.- Sic evenit, ut interdum si pluribus testator honorem habere voluit et de pluribus sensit, quamvis unum legatum sit, tamen ad persecutionem eius plures admittantur. Ut puta si decem fuerunt eiusdem rei stipulandi et heres vel fideicommissarius rogatus est, ut eis solveret: hic enim si omnium interest et de omnibus sensit testator, fideicommissum relictum omnes petere potuerunt.

Sed utrum in partem agent an in solidum, videamus: et credo, prout cuiusque interest, consequentur: unus igitur qui occupat agendo totum consequitur ita, ut caveat defensu iri adversus ceteros fideicommissarios eum qui solvit, sive socii sunt sive non.

§ 22.- Interdum alterius nomen scribitur in testamento, alteri vero fideicommissi petitio vel legati competit, ut puta si fidei heredis committatur, ut ipse publicum pro Titio praestet, fideicommissum hoc vel legatum non publicanus petit, licet ei sit adscriptum, sed ipse petere poterit, pro quo legatum relictum est.

Multum autem interesse arbitror, cui voluit prospectum cuiusque contemplatione testator fecerit. Plerumque autem intellegendum est privati causa hoc fecisse, licet emolumentum publicano quaeratur.

certain sum of money to anyone, and add that the said sum can easily be set off, as the beneficiary is himself a debtor to the estate of the testator, Gaius Seius, and he refuses to accept the estate of the said Gaius Seius, but demands the execution of the trust, Our Emperor stated in a Rescript that such a demand was contrary to the intention of the testator, as with reference to trusts the intention of the testator must by all means be considered and observed.

§ 20.- It frequently happens that what was left is intended for the benefit of several persons; but the testator desired to honor only one of them by mentioning him. This opinion of Marcellus is perfectly correct.

§ 21.- Hence, it happens that, sometimes, where a testator wished to do honor to several persons, and had them all in his mind, although there was but one legacy, still, several are permitted to claim it, as for instance, where ten persons stipulated for the same property, and the heir or trustee was requested to pay them, for in this case, if it was to the interest of all of them, and the testator had them in his mind, they all could demand the execution of the trust.

But let us see whether each can bring an action for his share, or for the entire amount. I think that they can bring suit according to the interest of each one, and therefore the one who first proceeds will obtain the entire amount, provided he gives security that he will defend the party who paid him against all the other beneficiaries of the trust, whether they are partners or not.

§ 22.- Sometimes, however, the right to make a demand for the execution of a trust, or for a legacy, will belong to another party than the one whose name is mentioned in the will; as, for example, where the heir is charged to pay a public tax for Titius, the farmer of the revenue must make the demand for the execution of the trust, or for the payment of the legacy; although he may be the person mentioned, and Titius himself can demand the legacy which was left to him.

I think that it makes a great deal of difference whom the testator had in his mind, and whom he intended to benefit. Generally, however, it should be understood that he acted for the advantage of a private individual, although the profit may have

cierta cantidad, y hubiere añadido que esta suma se podía compensar más fácilmente siendo el fideicomisario deudor por causa de la herencia de Cayo Seyo, y no quisiere él adir la herencia de Cayo Seyo, pero pidiere el fideicomiso, respondió por rescripto nuestro Emperador, que él pide el fideicomiso contra la voluntad del testador, porque principalmente en los fideicomisos se ha de ver y cumplir la voluntad del testador.

§ 20.- Sucede muchas veces, que interesa a muchos la cosa que se deja, pero que el testador quiso que se favoreciese a uno solo; y es muy verdadera esta opinión de Marcelo.

§ 21.- Y así acontece, que a veces, si el testador quiso que se beneficiase a muchos, y se refirió a muchos, aunque haya sido legada una sola cosa, sean, no obstante, admitidos muchos a su reclamación, como por ejemplo, si fueron diez los que estipularon la misma cosa, y se le rogó al heredero o al fideicomisario que la entregase a ellos; porque en este caso, si les interesa a todos, y el testador se refirió a todos, todos podrán pedir el fideicomiso dejado. Pero veamos, si ejercitarán la acción por una parte o por la totalidad; y creo, que conseguirán conforme a cada cual le interesa. Así, pues, el único, que lo ocupa, ejercitando la acción lo consigue todo, con tal que dé caución de que el que pagó será defendido contra los demás fideicomisarios, sean, o no, consocios.

§ 22.- A veces se escribe en el testamento el nombre de uno, pero le compete a otro la reclamación del fideicomiso o del legado, como, por ejemplo, si se encomendase a la fidelidad del heredero que él mismo pague por Ticio el tributo público; este fideicomiso o legado no lo pide el publicano, aunque a él se le haya dejado, pero podrá pedirlo el mismo por cuyo interés fue dejado el legado.

Pero juzgo que importa mucho saber, por quién quiso mirar, y por contemplación de quien lo haya hecho el testador; pero las más de las veces se ha de entender, que esto lo hizo por causa de un particular, aunque se adquiriera emolumento para el publicano.

§ 23.- Si in opere civitatis faciendo aliquid relictum sit, unumquemque heredem in solidum teneri divus Marcus et Lucius Verus Proculae rescripserunt: tempus tamen coheredi praestituerunt, intra quod mittat ad opus faciendum, post quod solam proculam voluerunt facere imputaturam coheredi sumptum pro parte eius.

§ 24.- Ergo et in statua et in servitute ceterisque, quae divisionem non recipiunt, idem divus Marcus rescripsit.

§ 25.- Si quis opus facere iussus paratus sit pecuniam dare rei publicae, ut ipsa faciat, cum testator per ipsum id fieri voluerit, non audietur: et ita divus Marcus rescripsit.

12.- VALENS; *libro I, fideicommissorum*.- "Stichus liber esto: et ut eum heres artificium doceat, unde se tueri possit, peto". Pegasus inutile fideicommissum esse ait, quia genus artificii adiectum non esset: sed praetor aut arbiter ex voluntate defuncti et aetate et condicione et natura ingenioque eius, cui relictum erit, statuere, quod potissimum artificium heres docere eum sumptibus suis debeat.

13.- MAECENATUS; *libro II, fideicommissorum*.- Si sic locutus erit testator: "heres meus illi fundum dato: Seio hoc amplius decem", non erit dubitandum, quin Seius et fundi partem et decem ex testamento percipere debeat.

14.- GAIUS; *libro I, fideicommissorum*.- Non dubium est, quin, si uxori legatum sit "si non nupserit" idque alii restituere rogata sit, cogenda est, si nupserit, restituere.

actually enured to the farmer of the revenue.

§ 23.- Where something is left for the erection of a public work in a city, the Divine Marcus and Lucius Verus stated in a Rescript directed to Procula that each heir was liable for the entire amount. They, however, in this instance, granted time to a co-heir during which he might send persons to do the work, and after this time they decided that Procula alone would be liable, and that she could collect from her co-heir his share of the expense which she had incurred.

§ 24.- The Divine Marcus also stated in a Rescript that the same rule was applicable to a statue, a servitude, and other things which are incapable of division.

§ 25.- Where anyone is ordered to construct a public work, and offers to furnish the money to the city in order that it may construct it, when the testator intended that the trustee himself should do so, he shall not be heard; and this the Divine Marcus stated in a Rescript.

12.- VALENS; *Trusts, Book I*.- "Let Stichus be free, and I request my heir to teach him a trade, in order that he may be able to support himself." Pegasus says that the trust is void, because the kind of trade was not stated. But the Praetor or the Judge must determine, in accordance with the intention of the deceased, and the age, position, character, and talents of the slave to whom the bequest was made, what trade it would be best for the heir to teach him at his own expense.

13.- MAECIANUS; *Trusts, Book II*.- Where a testator expressed himself as follows, "Let my heir give So-and-So such-and-such a tract of land, and pay ten aurei to Seius in addition," there is no doubt that Seius can claim half of the land and ten aurei under the provision of the will.

14.- GAIUS; *Trusts, Book I*.- There is no question, where a legacy is bequeathed to a wife under the condition that she will not marry again, and she is requested to return the legacy if she does; that she can be compelled to do so, if she should marry a second time.

§ 23.- Si se hubiera dejado alguna cosa para hacer una obra para la ciudad, le respondieron por rescripto el Divino Marco y Lucio Vera a Prócula, que cada heredero está obligado por la totalidad; pero le concedieron al coheredero tiempo dentro del que envíe a hacer la obra, después del cual quisieron que la hiciera solamente Prócula, la cual había de imputarle al coheredero el gasto con arreglo a su parte.

§ 24.- En su consecuencia, lo mismo respondió por rescripto el Divino Marco respecto a una estatua, y a una servidumbre, y a las demás cosas, que no admiten división.

§ 25.- Si aquel a quien se le mandó hacer una obra estuviera dispuesto a darle el dinero a la República, para que ella misma la haga, habiendo querido el testador que por él mismo se hiciera no será oído; y así lo respondió por rescripto el Divino Marco.

12.- VALENTE; *Fideicomisos, libro I*.- «Sea libre Stico, y pido que mi heredero le enseñe un oficio con el cual pueda mantenerse»; Pegaso dice que es inútil este fideicomiso, porque no se agregó la clase de oficio; pero el Pretor, o el árbitro determinará por la voluntad del difunto, y por la edad, condición, naturaleza e ingenio de aquel a quien se hubiere dejado, el oficio, que mejor deberá enseñarle a su costa el heredero.

13.- MECIANO; *Fideicomisos, libro II*.- Si el testador hubiere hablado así: «déle mi heredero un fundo a aquel, y además de esto diez a Seyo», no se habrá de dudar que Seyo deberá percibir en virtud del testamento parte del fundo y los diez.

14.- GAYO; *Fideicomisos, libro I*.- No es dudoso, que si a una mujer se le hubiera legado así: «si no se hubiere casado», y se le hubiese rogado que restituya a otro la cosa, ha de ser obligada a restituirla, si se hubiere casado.

§ 1.- Heres quoque, cui iurisiurandi condicio remittitur, legatum et fideicommissum debet.

§ 2.- Sed si cui legatum relictum est, ut alienam rem redimat vel praestet, si redimere non possit, quod dominus non vendat vel immodico pretio vendat, iustam aestimationem inferat.

15.- MAECENATUS; *libro II, fideicommissorum*.- Hae res testatoris legatae quae in profundo esse dicuntur, quandoque apparuerint, praestantur.

16.- POMPONIUS; *libro I, fideicommissorum*.- Saepe legatum plenius restituetur fideicommissario quam esset relictum, veluti si alluvione ager auctus esset vel etiam insulae natae.

17.- MAECENATUS; *libro II, fideicommissorum*.- Etiam ea quae futura sunt legari possunt, ut insula vel in mare vel in fluminibus enata:

§ 1.- Servitus quoque servo praedium habenti recte legatur.

18.- POMPONIUS; *libro I, fideicommissorum*.- Si iure testamento facto fideicommissum tibi reliquero, deinde postea aliud fecero non iure, in quo fideicommissum relictum tibi vel aliud quam quod priore testamento vel omnino non sit relictum, videndum est, mens mea haec fuerit facientis postea testamentum, ut nolim ratum tibi sit priore testamento relictum, quia nuda voluntate fideicommissa infirmarentur. Sed vix id optinere potest, fortassis ideo, quod ita demum a priore testamento velim recedi, si posterius valitum sit et nunc ex posteriore testamento fideicommissum ei non debetur, etiamsi idem heredes utroque testamento instituti ex priore exstiterunt.

§ 1.- An heir who has been released from the requirement of taking an oath, will still be obliged to pay legacies and execute trusts under a will.

§ 2.- Where, however, a legacy has been left to someone for the purpose of purchasing property belonging to another, in order to deliver the same to a third party; and he is unable to purchase said property for the reason that the owner will not sell it, or wishes to sell it at an exorbitant price, he must pay the just value of the same to the beneficiary of the trust.

15.- MAECIANUS; *Trusts, Book II*.- Where the property of a testator, which is said to be in the sea is bequeathed, it must be delivered after it has been recovered.

16.- POMPONIUS; *Trusts, Book I*.- The property left under a trust is very frequently delivered to the beneficiary in a better condition than it was when bequeathed; as for instance, where a field has been increased by alluvial deposit, or where an island has arisen.

17.- MAECIANUS; *Trusts, Book II*.- Property which will be in existence at some future time, as an island which may be formed in the sea or in a river, can also be bequeathed.

§ 1.- A servitude can also legally be bequeathed to a slave who owns an adjoining tract of land.

18.- POMPONIUS; *Trusts, Book I*.- If, having executed a will according to law, I leave you a trust, and then afterwards I make another will without observing the required formalities, by which I do not leave you a trust, or if I do, I leave you one entirely different from that included in the first will; it must be considered whether it was my intention, when I made my second will, to deprive you of what was bequeathed by the first, because trusts are annulled by the mere intention. This, however, is difficult to establish as perhaps I may not have intended to revoke the first will, unless the second should be valid, and now the trust in the second will will not be valid, even though the same heirs were appointed by both wills, and entered upon the estate under the first one.

§ 1.- También el heredero, a quien se le remite la condición del juramento, debe el legado y el fideicomiso.

§ 2.- Pero si a alguien se le dejó un legado, para que compre una cosa ajena, o la entregue, si no pudiera comprarla, porque no la vendiera su dueño, o la vendiese por precio immoderado, pague su justa estimación.

15.- MECIANO; *Fideicomisos, libro II*.- Legadas las cosas del testador, que se dice que están en lo profundo del mar, se entregarán siempre que aparecieren.

16.- POMPONIO; *Fideicomisos, libro I*.- Muchas veces se le entrega al fideicomisario el legado más pleno de lo que fue dejado, por ejemplo, si por aluvión se hubiese aumentado el campo, o también si hubiesen surgido islas.

17.- MECIANO; *Fideicomisos, libro II*.- También se pueden legar las cosas que son futuras, como la isla que surja en el mar, o en los ríos.

§ 1.- También se lega válidamente una servidumbre al esclavo que tiene un predio.

18.- POMPONIO; *Fideicomisos, libro I*.- Si en testamento hecho legalmente te hubiere yo dejado un fideicomiso, «y después yo hubiere hecho otro no con arreglo a derecho, en el que se te haya dejado un fideicomiso, u otra cosa distinta de la que en el primer testamento, o no se te haya dejado absolutamente ninguna, se ha de ver, si al hacerlo después testamento haya sido esta mi intención, la de no querer que sea ratificado lo que se te dejó en el primer testamento, porque los fideicomisos se invalidan por la nula voluntad. Pero apenas puede prevalecer esto, acaso porque solamente quería yo que se desistiera del primer testamento, si hubiera de ser válido el segundo; y en el caso presente no se le debe el fideicomiso en virtud del testamento posterior, aunque en ambos testamentos fueron instituidos

19.- VALENS; *libro V, fideicommissorum*.- Si tibi legatum est vel fideicommissum relictum, uti quid facias, etiamsi non interest heredis id fieri, negandam tibi actionem, si non caveas heredi futurum, quod defunctus voluit, nerva et Atilicinus recte putaverunt.

20.- ULPIANUS; *libro VI, fideicommissorum*.- Si res mihi per fideicommissum relictas eadem tibi legata vel per fideicommissum relictas sit non comunicandi animo, sed utrique in solidum, ambigendum non est, si alteri sit soluta, alterum nullum quidem ius in ipsam rem habere, sed actionem de pretio integram eum habere.

21.- PAULUS; *libro IV, sententiarum*.- Nutu etiam relinquitur fideicommissum, dummodo is nutu relinquat, qui et loqui potest, nisi superveniens morbus ei impedimento sit.

§ 1.- Fideicommissum relictum et apud eum, cui relictum est, ex causa lucrativa inventum extinguere placuit, nisi defunctus aestimationem quoque eius praestari voluit.

§ 2.- Columnis aedium vel tignis per fideicommissum relictis ea tantummodo amplissimus ordo praestari voluit nulla aestimationis facta mentione, quae sine domus iniuria auferri possunt.

22.- HERMOGENIANUS; *libro IV, iuris epitomarum*.- Si quis in principio testamenti adscripserit: "cui bis legavero, semel debere volo", postea eodem testamento vel codicillis sciens saepe eidem legaverit, suprema voluntas potior habetur: nemo enim eam sibi potest legem dicere, ut a priore ei recedere non liceat. Sed hoc ita locum habebit, si specialiter

one.

19.- VALENS; *Trusts, Book V*.- Nerva and Atilicinus very properly held that where a legacy was bequeathed to you, or a trust was left requiring you to perform some act, even if it was not to the interest of the heir for this to be done, the right to bring an action should be denied to you, if you did not furnish security to the heir to comply with the will of the deceased.

20.- ULPIANUS; *Trusts, Book VI*.- If property should be left to me in trust, and the same property should be bequeathed to you either as a legacy, or in trust, not with the intention of dividing it, but entirely to each one of us, there is no doubt that if it should be given to one alone, the other will have no right whatever in the property, but he will be entitled to an action to recover the entire price of the same.

21.- PAULUS; *Sentences, Book IV*.- A trust can also be left by a mere motion of the head, provided he who does so is also able to speak, unless some disease with which he is suddenly attacked prevents him from using his voice.

§ 1.- It has been established that where a trust is left, and the property to which it relates is ascertained to belong to the party to whom it was left by reason of a valuable consideration, the trust will be extinguished, unless the deceased intended that the appraised value of the property should also be paid to the owner of the same.

§ 2.- Where the columns or timbers of a house are left under a trust, the highest authority has decided that only such parts of the building can be delivered which may be removed without injuring it, and that no statement of the appraised value of the same shall be made.

22.- HERMOGENIANUS; *Epitomes of Law, Book IV*.- Where anyone in the beginning of his will expresses himself as follows, "I wish he to whom I have twice made the same bequest shall only be paid once," and afterwards, by the same will or by a codicil, he knowingly bequeaths the same property several times to the same person, his last will should

herederos los mismos que en el primero.

19. - VALENTE; *Fideicomisos, libro V*.- Si se te hizo un legado o se te dejó un fideicomiso para que hagas alguna cosa, aunque nada le importa al heredero que se haga ésta, con razón juzgaron Nerva y Atilicino que se te ha de denegar la acción, si no le dieras caución al heredero de que se hará lo que quiso el difunto.

20.- ULPIANO: *Fideicomisos, libro VI*.- Si habiéndoseme dejado alguna cosa por fideicomiso, se te hubiera legado o dejado la misma por fideicomiso, no con intención de hacerla común, sino por entero a ambos, no se ha de dudar, que si hubiese sido dada a uno, no tiene ciertamente el otro ningún derecho sobre la misma cosa, pero que tiene íntegra la acción por el precio.

21.- PAULO; *Sentencias, libro IV*.- También por señas se deja un fideicomiso, con tal que lo deje por señas el que también puede hablar, a no ser que le sirva de impedimento enfermedad que le haya sobrevenido.

§ 1.- Se determinó que se extinguiese el fideicomiso dejado, también si se halló por causa lucrativa en poder de aquel a quien se le dejó, a no ser que el difunto haya querido que se pague también su estimación.

§ 2.- Habiéndose dejado por fideicomiso las columnas o las vigas de una casa, quiso la muy alta corporación que sin haberse hecho ninguna mención de la estimación se entregasen solamente las que se pueden retirar sin detrimento de la casa.

22.- HERMOGENIANO; *Epítome del Derecho, libro IV*.- Si alguien hubiere escrito al principio de su testamento: «quiero que al que yo hubiere legado dos veces se le deba una sola», y después le hubiere legado a sabiendas muchas veces al mismo en el mismo testamento o por codicilos, se considera preferente la última voluntad; porque nadie puede establecer para

dixerit prioris voluntatis sibi paenituisse et voluisse, ut legatarius plura legata accipiat.

§ 1.- Miles in eum ex militari delicto capitali dicta sententia, permittente eo in ipsa sententia qui damnavit, sicut testamenti faciendi ita fideicommissi relinquendi potestatem consequitur.

§ 2.- Mortis damnum per fideicommissum servi relictum, antequam mora fiat, fideicommissarius solus patitur, licet alienus relinquatur.

23.- PAULUS; *libro V, sententiarum*.- Ex imperfecto testamento legata vel fideicommissa imperatorem vindicare inverecundum est: decet enim tantae maiestati eas servare leges, quibus ipse solutus esse videtur.

24.- NERATIUS; *libro II, responsorum*.- Creditori ita potest legari, ne indebitum ab eo repeteretur.

25.- PAULUS; *libro I, ad Neratium*.- "Ille aut ille heres Seio centum dato": potest Seius ab utro velit petere.

§ 1.- Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio.

26.- PAULUS; *libro II, ad Neratium*.- Is qui fideicommissum debet post moram non tantum fructus, sed etiam omne damnum, quo adfectus est fideicommissarius, praestare cogitur.

27.- PAULUS; *libro II, decretorum*.- Paula Callinico ex parte herede instituto filiae eiusdem iuventianae, cum in familia nupsisset, decem testamento legavit: deinde post tempus codicillis factis centum eidem Callinico reliquerat non adiecto "hoc

be held to prevail, for no one can say that a man is not permitted to revoke his first will. This, however, will only apply where he expressly states that he had changed his original intention, and desired that the legatee should receive several bequests.

§ 1.- Where a soldier who has been sentenced to death for a capital crime is, by the terms of the sentence which condemned him, permitted to make a will, he is also authorized to leave property in trust.

§ 2.- The beneficiary of a trust must alone sustain the loss caused by the death of a slave left to him under the same, before the heir is in default, even though a slave belonging to another is the subject of the legacy.

23.- PAULUS; *Sentences, Book V*.- It is dishonorable for the Emperor to claim a legacy, or the benefit of a trust under an imperfect will; for it is becoming to the majesty of so great a ruler to show obedience to the laws from whose operation he himself seems to be exempt.

24.- NERATIUS; *Opinions, Book II*.- A bequest can be made to a creditor in order to prevent his heir from recovering money which is not due.

25.- PAULUS; *On Neratius, Book I*.- "Let So-and-So, my heirs, pay a hundred aurei to Seius." Seius can demand payment from whichever of said heirs he wishes.

§ 1.- Where there is no ambiguity in the words made use of, no question as to the intention of the testator should be raised.

26.- THE SAME; *On Neratius, Book II*.- He who owes a trust is compelled not only to deliver the property from the day when he is in default, but also to make good any loss which the beneficiary of the trust may suffer on this account.

27.- THE SAME; *Decrees, Book II*.- Paula, having appointed Callinicus heir to a part of her estate, bequeathed by her will ten aurei to her daughter Jubentiana, and then, after some time, having executed a codicil, she left the hundred aurei to the

si mismo la ley de que no le sea lícito separarse del primero. Pero esto tendrá lugar de este modo, si especialmente hubiere declarado que se arrepintió de su primera voluntad, y que quiso que el legatario recibiera muchos legados.

§ 1.- El militar, habiéndose pronunciado contra él sentencia capital por delito militar, permitiéndolo en la misma sentencia el que lo condenó, adquiere, así como la facultad de hacer testamento, también la de dejar un fideicomiso.

§ 2.- El perjuicio de la muerte del esclavo dejado por fideicomiso, antes que se cause mora, lo sufre sólo el fideicomisario, aunque se deje uno ajeno.

23.- PAULO; *Sentencias, libro V*.- Es indecoroso que el Emperador reivindique en virtud de un testamento imperfecto legados o fideicomisos; porque cuadra a tanta majestad observar las leyes de que él considera que está exento.

24.- NERACIO; *Respuestas, libro II*.- A un acreedor se le puede legar, que no se repita de él lo no debido.

25.- PAULO; *Comentarios a Neracio libro I*.- «Déle a Seyo ciento éste o aquel heredero»; Seyo puede pedirlos al que de los dos quiera.

§ 1.- Cuando en las palabras no hay ninguna ambigüedad, no se debe admitir cuestión sobre la voluntad.

26.- EL MISMO; *Comentarios a Neracio, libro II*.- El que debe un fideicomiso es obligado, después de la mora, a pagar no solamente los frutos, sino también todo el daño en que fue afectado el fideicomisario.

27.- EL MISMO; *Decretos, libro II*.- Paulo, habiendo instituido heredero de parte a Calínico, le legó en el testamento diez a Juvenciana, hija del mismo, cuando se hubiese casado en la familia, y luego, habiendo hecho codicilos después de algún

amplius". Pronuntiavit utramque summam deberi, maxime cum in codicillis filiae Callinici nihil legatum fuisset.

§ 1.- Pompeius Hermippus filium Hermippum ex dodrante, filiam Titianam ex quadrante heredes instituerat et praedia certa singulis praelegaverat: praeterea, si sine liberis hermippus moreretur, aliam possessionem filiae dari iusserat: post testamentum factis codicillis filiae certa praedia dederat eamque his contentam esse voluit pro omni hereditate et his, quae in testamento reliquerat: Hermippi bona ad fiscum pervenerant: Titiana soror fideicommissum petebat. Quaerebatur, utrum pro hereditate tantum an et pro his, quae post mortem frater rogatus erat restituere, pater eam voluisset accipere ea quae codicillis reliquerat. Mihi ab omni voluntate recessum videbatur. Placuit humanius interpretari ea sola, quae vivente fratre acceptura erat, adempta videri, non etiam quae post mortem eius reliquerat, si sine liberis decederet, et ita pronuntiavit.

§ 2.- Iulianus Severus decedens institutis quibusdam heredibus alumno suo quinquaginta legaverat eaque a Iulio Mauro colono suo ex pensionibus fundi debitis ab eo praestari voluerat eidemque Mauro quaedam legaverat: cum de hereditate fiscus quaestionem movisset, iussu procuratoris Maurus pecuniam fisco solverat: postea heres scriptus optinuerat fiscum: alumno autem mortuo heres eius fideicommissum ab herede Mauri petebat. Placuit imperatori non videri eius fidei commissum, sed demonstratum, unde accipere posset: et ideo heres Severi haec praestare debet.

28.- PAULUS; *libro singulari ad senatus consultum Tertullianum*.- Si fidei meae committatur,

same Callinicus, but did not add: "In addition to his share." It was decided that both sums should be paid to him, especially as nothing had been left to the daughter of Callinicus by the codicil.

§ 1.- Pompeius Hermippus appointed his son Hermippus heir to three-fourths of his estate, and his daughter Titiana heir to the remaining fourth, and left to each of them certain lands as preferred legacies; and he also directed that if Hermippus should die without issue, another tract of land should be given to his daughter. After having made his will, he made a codicil by which he left his daughter certain lands, and desired her to be content with them, together with what he had left her by his will. The property of Hermippus was forfeited to the Treasury, and his sister Titiana demanded the execution of the trust. The question arose, as her brother was requested to pay her so much instead of her share of the estate, whether her father intended that she should only receive what he had left her by the codicil. It seems to me that he had absolutely revoked his first will. The more equitable interpretation seemed to be that her father did not intend to deprive her of her share of the estate to which she would have been entitled during the lifetime of her brother, nor of that which the latter was to leave her at his death, if he should die without issue; and it was so decided.

§ 2.- Julianus Severus, having appointed several heirs at the time of his death, left to his foster brother fifty aurei which he desired to be paid to him by Julius Maurus, his tenant, out of the rent of land that he owed him; and he also bequeathed certain property to the said Maurus. The Treasury raised a question as to the disposal of the estate, and Maurus paid the money to the Treasury, by order of the Imperial Steward, and the appointed heir afterwards gained the case against the Treasury. The foster-brother having died, his heir demanded the execution of the trust by the heir of Maurus; but the Emperor decided that he was not charged with the trust, but that he had only been mentioned to point out the source from which the trust could be obtained, and therefore that the heir of Severus should execute it.

28.- THE SAME; *On the Tertullian Decree of the Senate*.- If I should be charged with a trust to deliver

tiempo, le había dejado ciento al mismo Calínico sin haber añadido: «además esto»; falló que se debían ambas sumas, mayormente no habiéndose legado nada en los codicilos a la hija de Calínico.

§ 1.- Pompeyo Hermippo había instituido herederos de tres cuartos a su hijo Hermippo, y del otro cuarto a su hija Ticiano, y les había prelegado a cada uno ciertos predios, y además había mandado que si Hermippo muriese sin hijos se le diese otra posesión a la hija; habiendo hecho codicilos después del testamento, le había dado ciertos predios a la hija, y quiso que esta se contentase con ellos por toda su herencia y por lo que le había dejado en el testamento; los bienes de Hermippo habían ido a parar al fisco, y su hermana Ticiano pedía el fideicomiso; se preguntaba, si el padre había querido que ella recibiese lo que le había dejado en los codicilos solamente por la herencia, o si también por lo que se le había rogado al hermano que restituyera después de su muerte. A mí me parecía que se había separado de toda su voluntad; pero se determinó que se interpretase con más humanidad, que se consideraba quitado sólo lo que había de haber recibido ella viviendo el hermano, no también lo que le había dejado para después de la muerte de este, si falleciese sin hijos; y así falló.

§ 2.- Al fallecer Severo Juliano, habiendo instituido algunos herederos, le había legado a un alumno suyo cincuenta, y había querido que fuesen pagados, de las pensiones de un fundo debidas por este, por Julio Mauro, su colono, y le había legado al mismo Mauro algunas cosas; habiendo promovido el fisco cuestión sobre la herencia, Mauro le había pagado el dinero al fisco por mandato del procurador, y después el heredero instituido había ganado contra el fisco, pero, habiendo muerto el alumno, su heredero le pedía el fideicomiso al heredero de Mauro; le plugo al Emperador, que no se considerase que se le encomendó un fideicomiso, sino que se indicó de donde podría cobrarlos; y que por lo tanto debe pagarlos el heredero de Severo.

28.- EL MISMO; *Comentarios al Senadoconsulto Tertuliano, libro único*.- Si se encomendara a mi

ut, quod mihi relictum fuerit supra quod capere possum, alii restituam, posse me id capere constat.

29.- LABEO; *libro II, posteriorum a Javoleno epitomatorum*.- Qui concubinam habebat, ei vestem prioris concubinae utendam dederat, deinde ita legavit: "Vestem, quae eius causa emptā parata esset". Cascellius Trebatius negant ei deberi prioris concubinae causa parata, quia alia condicio esset in uxore.

Labeo id non probat, quia in eiusmodi legato non ius uxorium sequendum, sed verborum inter-pretatio esset facienda idemque vel in filia vel in qualibet alia persona iuris esset. Labeonis sententia vera est.

§ 1.- Cum ita legatum esset, ut Titia uxor mea tantandem partem habeat quantulam unus heres, si non aequales partes essent heredum, Quintus Mucius et Gallus putabant maximam partem legatam esse, quia in maiore minor quoque inesset, Servius Ofilius minimam, quia cum heres dare damnatus esset, in potestate eius esset, quam partem daret. Labeo hoc probat idque verum est.

§ 2.- Cum ita legatum esset: "Quanta pecunia ex hereditate Titii ad me pervenit, tantam pecuniam heres meus Seiae dato", id legatum putat Labeo, quod acceptum in tabulis suis ex ea hereditate testator rettulisset: ceterum negat cavendum heredi a legatario, si quid forte postea eius hereditatis nomine heres damnatus esset.

Ego contra puto, quia non potest videri pervenisse ad heredem, quod eius hereditatis nomine praestaturus esset: idem Alfenus Varus Servio placuisse scribit, quod et verum est.

§ 3.- Si heres tibi servo generaliter legato Stichum

to another person all over and above the share that I can legally take, it is established that I can also receive the said amount.

29.- LABEO; *On the Last Epitomes of Javolenus*.- Where a man had a concubine, and gave her the privilege of using the clothes of a former concubine, and then made a bequest as follows, "I leave her such-and-such clothing which I have purchased, and intended for her," Cascellius and Trebatius deny that she is entitled to the clothing which was obtained for the first concubine, because a different rule prevails in the case of a wife.

Labeo does not adopt this opinion, because, while it is true that in the case of a legacy of this kind the law governing a wife does not apply, the interpretation of the words used by the testator must be considered. The same rule applies to the case of a daughter, or to any other person whatsoever. The opinion of Labeo is correct.

§ 1.- Where a legacy was bequeathed as follows, "I desire my wife, Titia, to have a share of my estate equal to the smallest one which any one of my heirs may have," and the shares of the heirs were unequal, Quintus Mucius and Gallus held that the largest share was bequeathed, for the reason that the smaller share is included in the larger. Servius and Ofilius contended that the smallest share was meant, because when the heir was charged with the payment of the legacy, he had the power to give whatever share he chose. Labeo approves this opinion, and it is correct.

§ 2.- Where a legacy was bequeathed as follows, "Let my heir pay to Seia a sum of money equal to that which I obtained from the estate of Titius," Labeo thinks that the legacy includes what the testator had entered in his accounts as having been derived from the said estate; but he denies that security should be furnished to the heir by the legatee to protect him, in case the heir should afterwards be required to pay anything on account of the said estate.

I, however, hold the contrary opinion, because it cannot be maintained that what the heir will have to pay on account of said estate has actually come into his hands. Alfenus Varus states that this was the opinion of Servius, and it is correct.

§ 3.- Where a slave has been left to you in general

fidelidad, que yo restituya a otro lo que sobre o que puedo adquirir se me hubiere dejado, consta que yo puedo adquirirlo.

29.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro II*.- Uno, que tenía concubina, le había dado a ésta para que lo usara el vestido de otra concubina anterior, y después legó de esta manera: «el vestido, que hubiese sido comprado, y preparado por causa de la misma», Cascelio y Trebacio dicen, que no se le deben los preparados por causa de la primera concubina, porque otra sería la condición tratándose de la mujer.

Labeón no aprueba esto, porque en semejante legado no se ha de seguir el derecho de las mujeres, sino que había que hacer la interpretación de las palabras, y que el mismo derecho había respecto a la hija, o respecto a otra cualquier persona, y es verdadera la opinión de Labeón.

§ 1.- Cuando se hubiese hecho un legado de modo que Ticia, mi mujer, tenga tanta parte como un solo heredero, si no fuesen iguales las partes de los herederos, opinaban Quinto Mucio y Galo, que se legó la parte mayor, porque en la mayor está también la menor; y Servio y Ofilio que la más pequeña, porque habiendo sido condenado a dar el heredero, está en su facultad qué parte haya de dar; Labeón aprueba esto, y esto es lo verdadero.

§ 2.- Cuando se hubiese legado así: «déle mi heredero a Seia tanta cantidad de dinero como de la herencia de Ticio vino a mi poder», opina Labeón, que se legó lo que el testador hubiese consignado en sus libros que recibió de aquella herencia; pero dice que no se le ha de dar caución por el legatario al heredero, si a algo hubiese sido acaso condenado después el heredero por razón de esta herencia.

Yo opino lo contrario, porque no se puede considerar que fue a poder del heredero lo que hubiese tenido que pagar por razón de la misma herencia. Lo mismo escribe Alfenus Varo que le pareció bien a Servio; lo que también es verdad.

§ 3.- Si habiéndose legado en general un esclavo, el

tradiderit isque a te evictus fuisset, posse te ex testamento agere Labeo scribit, quia non videtur heres dedisse, quod ita dederat, ut habere non possis: et hoc verum puto. Sed hoc amplius ait debere te, priusquam iudicium accipiat, denuntiare heredi: nam si aliter feceris, agenti ex testamento opponetur tibi doli mali exceptio.

§ 4.- "Si Stichus et dama servi mei in potestate mea erunt cum moriar, tum Stichus et dama liberi sunt et fundum illum sibi habento". Si alterum ex his post testamentum factum dominus alienasset vel manumisisset, neutrum liberum futurum Labeo putat: sed Tubero eum, qui remansisset in potestate, liberum futurum et legatum habiturum putat. Tuberonis sententiam voluntati defuncti magis puto convenire.

30.- LABEO; *libro II, posteriorum a Javoleno epitomatorum*.- Qui quattuor pocula oleaginea habebat, ita legavit: pocula oleaginea paria duo. Respondi unum par legatum esse, quia non ita esset: bina paria neque ita: poculorum paria duo: idem et Trebatius.

§ 1.- Qui hortos publicos a re publica conductos habebat, eorum hortorum fructus usque ad lustrum, quo conducti essent, Aufidio legaverat et heredem eam conductionem eorum hortorum ei dare damnaverat sinereque uti eum et frui. Respondi heredem teneri sinere frui: hoc amplius heredem mercedem quoque hortorum rei publicae praestaturum.

§ 2.- Cum testamento scriptum esset: "Sticho servo meo heres quinque dato et, si Stichus heredi meo biennium servierit, liber esto", post biennium legatum deberi existimo, quia in id tempus et libertas et legatum referri deberet: quod et Trebatius respondit.

§ 3.- Si fundum mihi vendere certo pretio dam-

terms, and the heir delivers Stichus to you, and he is evicted, Labeo says that you can proceed against him under the will, because the heir is not considered to have given you any slave, since you were unable to retain the one he gave you. I think that this is correct. But he also says that you should notify the heir of the eviction before instituting proceedings, for, if you did otherwise, an exception on the ground of bad faith could be filed against you in case you brought an action under the will.

§ 4.- "If my slaves Stichus and Damas are in my possession at the time of my death, let them be free, and let them have for themselves such-and-such a tract of land." Labeo thinks that if either of said slaves should be alienated or manumitted by their owner, after the will was executed, neither of them would become free. Tubero, however, thinks that the one who remained in the hands of the testator would be free, and be entitled to the legacy. I think that the opinion of Tubero is the one more in conformity with the intention of the deceased.

30.- THE SAME; *On the Last Epitomes of Javolenus, Book II*.- A testator who had four oil jars made the following bequest: "I bequeath two oil jars which are similar." I gave it as my opinion that only a pair of jars was bequeathed, as the expression, "Two pairs of jars," is not the same as "Two similar jars." Trebatius is of the same opinion.

§ 1.- Where a testator rented certain public gardens from the State, and bequeathed to Aufidius the produce of said gardens until the expiration of the lease under which they were rented, and charged his heir to pay the rent of said gardens and permit him to enjoy the same, I held that the heir was obliged to permit him to enjoy them, and moreover, that he would also be obliged to pay the rent of said gardens to the State.

§ 2.- Where it was inserted into a will, "Let my heir pay five aurei to Stichus, my slave, and if Stichus should serve my heir as a slave for the term of two years, let him be free," I think that the legacy will be due after the lapse of two years, for both it and the grant of freedom should be referred to that time. This was also the opinion of Trebatius.

§ 3.- If you are charged to sell me a tract of land for

heredero te hubiese entregado a Stico, y de este se te hubiese hecho evicción, escribe Labeón, que puedes ejercitar la acción de testamento, porque no se considera que el heredero dió lo que había dado de modo que no pudieras tenerlo; y opino que esto es verdad. Pero además dice esto, que debes notificárselo al heredero antes que se acepte el juicio; porque si obrares de otro modo, se te opondrá al ejercitar la acción de testamento la excepción de dolo malo.

§ 4.- Si Stico y Dama, esclavos míos, estuvieren en mi poder cuando yo muera, sean entonces libres Stico y Dama, y tengan para sí aquel fundo, si el señor hubiese enajenado o manumitido a uno de éstos después de haber hecho testamento, opina Labeón, que ninguno de los dos habrá de ser libre; pero Tuberón opina, que el que hubiese permanecido en su poder habrá de ser libre y tendrá el legado. Creo que la opinión de Tuberón es más conforme a la voluntad del difunto.

30.- EL MISMO; *Obras póstumas compendiadas por Javoleno, libro II*.- Uno que tenía cuatro vasos de olivo legó de esta manera: «dos vasos de olivo iguales»; respondí, que se legó un solo par, porque no se legó así: «los dos pares», ni así: «los dos pares de vasos»; y lo mismo dice Trebacio.

§ 1.- Uno, que tenía arrendados a la República huertos públicos, le había legado a Aufidio los frutos de estos huertos por los cinco años que habían sido arrendados, y había condenado a su heredero a pagarle a aquél el arrendamiento de los huertos y a que le dejase usarlos y disfrutarlos; respondí que el heredero estaba obligado a dejar que los usufructúe, y además esto, que el heredero debía pagar también el arrendamiento de los huertos de la República.

§ 2.- Cuando en el testamento se hubiese escrito: «déle cinco mi heredero a mi esclavo Stico, y si Stico le hubiere prestado servidumbre dos años a mi heredero, sea libre», juzgo que después de los dos años, se debe el legado, porque a este tiempo se deberán referir así la libertad, como el legado lo que respondió también Trebacio.

§ 3.- Si fuiste condenado a venderme por cierto

natus es, nullum fructum eius rei ea venditione excipere tibi liberum erit, quia id pretium ad totam causam fundi pertinet.

§ 4.- Qui fundum mandatu meo in societate mihi et sibi emerat, deinde eum finibus diviserat et priusquam mihi traderet, ita eum tibi legaverat "fundum meum illi do". Negavi amplius partem deberi, quia verisimile non esset ita testatum esse patrem familias, ut mandati heres eius damnaretur.

§ 5.- "Uxori meae, dum cum filio meo Capuae erit, heres meus ducenta dato": filius a matre migravit. Si ambo Capuae habitassent, legatum matri debitu iri putavi, quamvis una non habitassent: sin autem in aliud municipium transissent, unius anni tantummodo debitu iri, quo una habitassent quantolibet tempore: Trebatius ait. Videamus, an his verbis "dum cum filio Capuae erit" non condicio significetur, sed ea scriptura pro supervacuo debet haberi: quod non probo. Sin autem per mulierem mora non est, quo minus cum filio habitet, legata ei deberi.

§ 6.- Si aedes alienas ut dares damnatus sis neque eas ulla condicione emere possis, aestimare iudicem oportere Ateius scribit, quanti aedes sint, ut pretio soluto heres liberetur. Idemque iuris est et si potuisses emere, non emeris.

31.- LABEO; *libro I, pithanon a Paulo epitomatum*.- Si cui aedes legatae sint, is omne habebit id aedificium, quod solum earum aedium erit. Paulus: hoc tunc demum falsum est, cum dominus aedium binarum aliquid conclave, quod supra concamarationem alterarum aedium esset, in usum alterarum convertit atque ita his usus fuerit: namque eo modo alteris aedibus id accedet, alteris decedet.

a specified price, you will not be at liberty under the terms of said sale to reserve any of the crops of said land, because the price refers to the entire premises.

§ 4.- Where I directed a party to purchase a tract of land for himself and me, to be held in partnership, and he then divided said land into two portions by boundaries, and, before delivering it to me, he devised it as follows, "I give to So-and-So my tract of land," I denied that more than half the land was due, because it would not be probable that the testator, when he made the devise, intended that his heir should be charged with the mandate.

§ 5.- "Let my heir pay two hundred aurei to my wife, while she remains with my son at Capua." The son left his mother. I was of the opinion that as long as both parties resided at Capua, the legacy would be due to the mother, even though they did not live together. If, however, they should move to some other town, Trebatius says that the legacy would only be due for one year according to the time during which they lived together. Let us see whether a condition was not implied by the words, "While she remains with my son at Capua," but that they shall be considered as superfluous. I do not adopt this opinion. Still, the legacy should be paid to her, provided it is not her fault if she did not reside with her son.

§ 6.- If you are charged to deliver a house belonging to another, and you cannot purchase said house on any terms whatsoever, Attius says that the court must make an appraisal of its value, so that the heir may be discharged after the amount has been paid. The same rule applies if you could have bought the house and did not do so.

31.- THE SAME; *Epitomes of Probabilities, by Paulus, Book I*.- Where a house is bequeathed to anyone, he will be entitled to all the buildings situated on the land belonging to said house. Paulus: This rule, however, does not apply where the owner possessed two adjoining houses, and a room of one of them was destined for the use of the other, and employed for this purpose; for, under these circumstances, the said room will cease to be accessory to the building to which it is attached, and will become accessory to the other.

precio un fundo, no tendrás libertad para exceptuar en esta venta ningún fruto de esta cosa, porque este precio pertenece a toda la causa del fundo.

§ 4.- Uno que por mandato mío había comprado un fundo en sociedad para mí y para él, después lo había dividido con linderos, y antes que me lo entregase te lo había legado de este modo: «le doy a aquel mi fundo»; dije, que no se debía más que la parte, porque no sería verosímil que el padre de familia hubiese testado así para que su heredero fuese perjudicado con la acción de mandato.

§ 5.- «Déle mi heredero doscientos a mi mujer, mientras estuviere en Cápua con mi hijo»; el hijo se separó de la madre; yo opiné, que, si ambos hubiesen habitado en Cápua, se le había de deber a la madre el legado, aunque no hubiesen habitado juntos; pero si hubiesen pasado a otro municipio, dice Trebacio, que se habrá de deber solamente el del año en que hubiesen habitado juntos, cualquier tiempo que fuese. Veamos, si con estas palabras: «mientras estuviere en Cápua con mi hijo», no se significa una condición, sino que esta expresión se deba tener por superflua. Y yo no lo apruebo; sino que si no consiste en la mujer la mora para no habitar con el hijo, se le deben los legados.

§ 6.- Si hubieras sido condenado a dar una casa ajena, y no pudieras comprarla con ninguna condición: escribe Ateyo, que debe estimar el juez cuánto valga la casa, para que, pagado el precio, se libre el heredero. Y el mismo derecho hay, también si la hubieses podido comprar, y no la hubieses comprado.

31.- EL MISMO: *Dichos recopilados por Paulo, libro I*.- Si a alguien se le hubiera legado una casa, aquél tendrá todo el edificio que estuviere sobre el suelo de la misma casa. Y dice Paulo: esto es falso solamente cuando el dueño de dos casas destinó al uso de la una alguna habitación que estuviese sobre bóveda de la otra casa, y así hubiere usado de ella; porque de este modo se le agregará aquélla a una de las casas, y se le quedara a la otra,

32.- SCAEVOLA; *libro XIV digestorum*.- Sextiam filiam ex quadrante, ex reliquis Seium et Marcium sororis filios scripsit heredes: Sextiam substituit Marcio et Marcium Sextiae, dedit autem per praeceptionem Marcio certas species: Marcium partem hereditatis, ex qua scriptus erat, omisit et eo intestato defuncto bona eius ad fratrem legitimum Seium devoluta sunt. Quaesitum est, an Sextia ex substitutione etiam haec, quae praelegata Marcio erant, iure substitutionis a legitimo herede defuncti sibi vindicare possit. Respondit secundum ea quae proponerentur Sextiam in legatis, quae Marcio data sunt, substitutam non esse.

33.- SCAEVOLA; *libro XV digestorum*.- Uxori suae inter cetera ita legavit: "Et domus eam partem, in qua morari consuevimus". Quaesitum est, cum tam testamenti faciendi tempore quam mortis totam domum in usu habuerit nec quicquam ex ea locatum, an ea tantummodo videtur legasse cubacula, in quibus dormire consueverat. Respondit eam omnem partem, in qua morari cum familia sua consuevisset.

§ 1.- Uxori suae inter cetera ita legavit: "Uxori meae quidquid vivus dedi donavi usibusve eius comparavi, concedi volo": quaero, an quod post testamentum factum ei donatum est, id quoque concessum videatur. Respondit verba quae proponerentur nihil pro futuro tempore significare.

§ 2.- Cum Seius pro uxore centum aureos creditori solverit et ornamentum pignori positum luerit, postea autem testamento facto uxori suae legavit, quidquid ad eum inve stipulatum eius concessit et hoc amplius vicenos aureos annuos: quaesitum est, an hos centum aureos heredes viri ab uxore vel ab heredibus eius repetant. Respondit, si donationis causa creditori solvisset, teneri heredes ex causa fideicommissi, si repetant, atque etiam petentes exceptione summo veri: quod praesumptum esse debet, nisi

32.- SCAEVOLA; *Digest, Book XIV*.- A testator appointed Sextia heir to a fourth of his estate, and Seius and Marcium, his sister's sons, heirs to the remaining three-fourths. He then substituted Sextia for Marcium, and Marcium for Sextia, and left Marcium certain property as a preferred legacy. Marcium rejected the share of the estate to which he was appointed heir, and, having died intestate, his property passed to his legitimate brother Seius. The question arose whether Sextia could, under the substitution, also claim for herself from the heir-at-law what had been left to Marcium as a preferred legacy, on the ground of the substitution. The answer was that, according to the facts stated, Sextia was not substituted, so far as the legacies which had been bequeathed to Marcium were concerned.

33.- THE SAME; *Digest, Book XV*.- A certain man bequeathed to his wife, with other property, that portion of his house in which they had been accustomed to live. The question arose, since, at the time that the will was made as well as when the testator died, he made use of the entire house, and did not rent any portion of it, whether he only intended to bequeath the bedroom in which he was accustomed to sleep. The answer was that all that part of the house in which he habitually resided with his family was included.

§ 1.- A testator, among other bequests, left the following legacy to his wife: "I desire that whatever I have presented to my wife, or have purchased for her use during my lifetime shall be given to her." I ask whether it should be held that she was also entitled to what he had given to her after the will was made. The answer was that the words mentioned had no reference to future time.

§ 2.- Where Seius paid a hundred aurei to a creditor of his wife, and redeemed a piece of jewelry which had been deposited by way of pledge, and, having afterwards executed a will, made the following bequest, "I give to my wife whatever I have paid on account of a stipulation into which she entered, and, in addition to this, two hundred aurei every year;" the question arose whether the said two hundred aurei could be recovered by the husband's heirs from his wife or from her heirs. The answer was if he had paid

32.- SCÉVOLA; *Digesto, libro XIV*.- Uno instituyó herederos de una cuarta parte a su hija Sextia, y de las demás a Seyo y a Marcio, hijos de su hermana; Sextia la substituyó a Marcio, y Marcio a Sextia, pero le dió por prelegado algunas cosas a Marcio; Marcio dejó de adir la parte de herencia en que había sido instituido, y habiendo fallecido intestado se le dieron sus bienes a Seyo, su hermano legítimo; se preguntó, si en virtud de la substitución podía Sextia reivindicar para sí del legítimo heredero del difunto por derecho de substitución también las cosas que le habían sido prelegadas a Marcio. Respondió, que, según lo que se exponía, Sextia no había sido substituida en los legados que se le dieron a Marcio.

33.- EL MISMO; *Digesto, libro XV*.- Uno, entre otras cosas, hizo de este modo un legado a su mujer: «y aquella parte de la casa en que acostumbramos a morar»; se preguntó, habiendo tenido en uso toda la casa tanto al tiempo de hacer el testamento, como al de la muerte, y no habiéndose dado en arriendo cosa alguna de ella, ¿se considera que legó solamente aquellas habitaciones en que había solido dormir? Respondió, que toda aquella parte en que hubiese acostumbrado a morar con su familia.

§ 1.-Entre otras cosas le legó uno así a su mujer: «quiero que se le conceda a mi mujer todo lo que yo en vida le di, le doné, o compré para sus usos»; pregunto, si se considerará concedido también lo que se le hubiese donado después de hecho el testamento. Respondió, que las palabras que se exponían no expresaban nada respecto al tiempo futuro.

§ 2.- Habiendo pagado Seyo por su mujer cien áureos a un acreedor, y habiendo desempeñado los adornos que tenía dados en prenda, pero habiéndole legado a su mujer, hecho después testamento, todo lo que le dió para aquél, o para su estipulación, y además de esto veinte áureos anuales; se preguntó, si los herederos del marido repetirán de la mujer, o de los herederos de ella, estos cien áureos. Respondió, que si por causa de donación le hubiese pagado al acreedor, quedan obligados los herederos por causa

contrarium ab herede approbetur.

34.- SCAEVOLA; *libro XVI, digestorum*.- Nomen debitoris in haec verba legavit: "Titio hoc amplius dari volo decem aureos, quos mihi heredes Gaii Seii debent, adversus quos ei actionem mandari volo eique eorundem pignora tradi". Quaero, utrum heredes tantum decem dare debeant an in omne debitum, hoc est in usuras debeant mandare. Respondit videri universam eius nominis obligationem legatam. Item quaero, cum ignorante matre familias actores in provincia adiectis sorti usuris decem stipulati sint, an ex causa fideicommissi supra scripti etiam incrementum huius debiti ad Titium pertineat. Respondit pertinere.

§ 1.- Filio ex parte heredi scripto praeceptionem dedit inter cetera his verbis: "Titio filio meo nomina ex calendario, quae elegerit filius meus sibi, viginti dare damnas sunt sine dolo malo": eidem filio vivus omnium rerum suarum administrationem permisit: qui post testamentum factum ante mortem patris annis decem, quibus procurabat patri, contra veterem consuetudinem patris, qua calendarium exercebatur, novos debitores ampliarum pecuniarum fecit et in priores, quos pater exiguarum fortunarum habebat, maius creditum contulit ad hoc, ut viginti nominibus prope omnis substantia calendarii esset. Quaesitum est, an huic filio eorum nomen, quae ipse fecit, praeceptio permittenda est. Respondit ex his electionem habere, quae testamenti tempore testator in calendario habuit.

§ 2.- Uni ex heredibus per praeceptionem reliquit

the creditor as a donation, his heirs would be liable under the trust if they tried to collect the debt, and that they could even be barred by an exception. The presumption would be that a donation was intended, unless the contrary could be proved by the heir.

34.- THE SAME; *Digest, Book XVI*.- A certain woman bequeathed a claim of her debtor as follows: "I wish the ten aurei, which the heirs of Gaius Seius owe me, to be paid to Titius, in addition; and I desire my heir to assign to him his right of action against them, and to deliver to the said Titius the pledges which they have given." I ask whether the heirs should only pay the ten aurei, or whether the right of action should be assigned for the entire debt; that is to say, for the interest as well as the principal. The answer was that it appears that the entire obligation of the debt was bequeathed. I also ask, if a testatrix should not be aware that her agents in the province entered into a stipulation for the ten aurei, and the interest should be added to the principal on account of the above-mentioned trust, whether the increase of this debt would belong to Titius. I answered that it would.

§ 1.- A testator, having appointed his son his heir to a portion of his estate, with other things left him a preferred legacy in these words: "I request that twenty claims, taken from my account-book, shall be given without fraudulent intent to my son Titius, after he has selected the same." The said testator, during his lifetime, entrusted his son with the transaction of all his business, and the son, after the will was made, and for ten years before his father's death, during which time he acted as his agent, contrary to the usual practice of his father as shown by his account-book, lent new debtors large sums of money, and permitted the old debtors who owed his father small amounts to increase their obligations, in order that the aforesaid twenty claims might almost fill the entire account-book of his father. The question arose whether the son was entitled, as a preferred legacy, to the loans which he himself had made. The answer was that he could only make a choice of those which were in the account-book of the testator at the time he executed his will.

§ 2.- A woman left, as a preferred legacy, to one of

de fideicomiso, si los repitieran, y pidiéndolos son también repelidos con excepción; lo que debe ser presumido, a no ser que por el heredero se probase lo contrario.

34.- EL MISMO; *Digesto, libro XVI*.- Uno legó el crédito de un deudor en estos términos: «quiero que además de esto se le den a Ticio los diez áureos que me deben los herederos de Cayo Seyo, contra los que quiero que se les ceda acción, y que a él se le entreguen las prendas de los mismos»; pregunto, si los herederos deberán dar solamente los diez, o si deberán ceder la acción por toda la deuda, esto es, también por los intereses. Respondió que se considera legada toda la obligación de este crédito. Igualmente pregunto, si, cuando ignorándolo la madre de familia los administradores hubieran estipulado en la provincia diez por intereses agregados al capital, le pertenecerá a Ticio por causa del antes mencionado fideicomiso también el aumento de esta deuda. Respondió, que le pertenecía.

§ 1.- Habiendo uno instituido a su hijo heredero de una parte, le dió entre otras cosas un prelegado en estos términos: «estén condenados mis herederos a darle sin dolo malo a mi hijo Ticio los veinte créditos que del libro de cuentas hubiere elegido mi hijo»; en vida le permitió la administración de todos sus propios bienes al mismo hijo; el cual; después de haberse hecho el testamento, en los diez años antes de la muerte del padre durante los que administraba por el padre creó, contra la antigua costumbre del padre según la que se llevaba el libro de cuentas, nuevos deudores por grandes cantidades, y a los primeros a los cuales tenía el padre como de exiguas fortunas les concedió mayor crédito con este objeto, que en veinte créditos estuviese casi todo el capital del libro de cuentas; se preguntó, ¿se le ha de permitir a este hijo la elección de los mismos créditos que él creó? Respondió, que tiene la elección entre aquéllos que el testador tuvo en el libro de cuentas al tiempo del testamento.

§ 2.- Una le dejó por prelegado a uno de sus

ea, quae ex patrimonio viri sui Arethonis ei supererant, eiusque fidei commisit haec eadem restituere pronepoti, cum erit annis sedecim, in quibus haec verba adiecit: "Item rogo, uti reliquum aes alienum, quod ex bonis Arethonis debetur, omnibus creditoribus ex redditibus eorum bonorum solvas reddas satisque facias". Quaesitum est, an, si probaverit heres non sufficere redditum bonorum ad totius debiti exsolutionem, nihilo minus tamen ipse debet adgnoscerere onus aeris alieni. Respondit manifeste proponi ex redditibus bonorum eorum iussum aes alienum exsolvere, non de proprio.

§ 3.- Pater filio et filia heredibus institutis cum singulis certa praedia et kalendaria praelegasset, ita cavuit: "A te autem, fili carissime, peto, quaecumque legavi, praestari volo, et si quid evenerit aeris alieni, si quod in tempus pro mutuo acceperam et debuero, a te solvi volo, ut quod sorori tuae reliqui, integrum ad eam pertineat". Quaesitum est, an quod ex quacumque causa debuit pater, a filio sit praestandum. Respondit posse filiam ex fideicommisso consequi ut levaretur, quo magis integrum, quod testator dedisset, ad eam pervenisset.

35.- SCAEVOLA; *libro XVII, digestorum*.- Patronus liberto statim tribum emi petierat: libertus diu moram ab herede patroni passus est et decedens heredem reliquit clarissimum virum: quaesitum est, an tribus aestimatio heredi eius debeatur. Respondit deberi.

Idem quaesivit, an et commoda et principales liberalitates, quas libertus ex eadem tribu usque in diem mortis suae consecutus fuisset, si ei ea tribus secundum voluntatem patroni sui tunc comparata esset, an vero usurae aestimationis heredi eius debeantur. Respondi, quidquid ipse consecutus esset, id ad heredem suum transmittere.

her heirs all that remained of the estate of her husband Areto, and charged him to deliver said property to her great-grandson when he reached the age of sixteen years; and she then added the following: "I also ask that you pay, satisfy, and discharge any remaining debt due from the estate of Areto, out of the income of the same to the creditors of said estate." The question arose, if the heir should prove that there was not sufficient income from the estate to pay all the claims, whether he himself would be required to assume the burden of the indebtedness. The answer was that it was evidently the intention of the testatrix that the debts should be paid out of the income of the property, and not out of the private estate of the heir.

§ 3.- A father, having appointed his son and his daughter his heirs, and left to each one of them certain lands and book-accounts by way of preferred legacies, inserted the following provision into his will: "I charge you, my dear son, and I wish you to pay all the legacies which I have bequeathed, and if I should contract any indebtedness by a temporary loan, and owe this when I die, I desire that you pay it, so that what I have left to your sister may remain intact." The question arose whether the son was required to pay all the debts of his father, no matter how they were contracted. The answer was that the daughter could, under the terms of the trust, demand to be released from liability, in order that what the testator had left her might come into her hands unencumbered.

35.- THE SAME; *Digest, Book XVII*.- A patron asked his heir to immediately purchase a place in a tribe for his freedman. The latter suffered from the default of the heir of the patron for a long time, and, at his death, appointed a man of the most illustrious rank his heir. The question arose whether the appraised value of the place in the tribe was due to the heir of the freedman? The reply was that it was due.

It was also asked whether, in this instance, the ordinary benefits and advantages to which the freedman would have been entitled by his membership in the said tribe until the day of his death could be recovered, if the place in the tribe had been purchased in the beginning, in accordance with the will of the patron; or whether his heir would only be

herederos los bienes que le habían quedado del patrimonio de su marido Aretón; y encomendó a su fidelidad, que restituyese estos mismos bienes a su biznieto, cuando fuere de diez y seis años, a lo que añadió estas palabras: «también ruego que pagues, entregues y satisfagas con las rentas de estos bienes a todos los acreedores la restante deuda, que se debe de los bienes de Aretón»; se preguntó, en el caso de que hubiere probado el heredero que no basta la renta de los bienes para el pago de toda la deuda, ¿debe, sin embargo, reconocer él mismo la carga de la deuda? Respondió, que claramente se expone, que se mandó pagar la deuda con las rentas de aquellos bienes, no, con los propios.

§ 3.- Un padre, habiendo instituido herederos a su hijo y a su hija, y habiéndoles prelegado a cada uno ciertos predios y créditos, dispuso así: «pero te pido, carísimo hijo, y quiero que se dé todo lo que he legado, y quiero que si apareciere alguna deuda, si por cierto tiempo yo hubiere tomado en mutuo alguna cantidad, y la debiere, sea pagada por tí, a fin de que le pertenezca íntegro a tu hermana lo que a ella le he dejado»; se preguntó, si se deberá pagar por el hijo lo que por cualquier causa debió el padre. Respondió, que en virtud del fideicomiso podía conseguir la hija que se le aliviase, a fin de que más bien fuese íntegro a poder de ella lo que hubiese dado el testador.

35.- EL MISMO; *Digesto, libro XVII*.- Un patrono había pedido que inmediatamente se comprara para su liberto el derecho de tribu; el liberto soportó mucho tiempo la mora por parte del heredero del patrono, y al fallecer dejó por heredero a un individuo muy esclarecido; se preguntó, si se le deberá a su heredero la estimación del derecho de tribu. Respondió, que se le debe.

El mismo preguntó, si se le deberán a su heredero también las utilidades y las liberalidades del Príncipe, que el liberto hubiese de haber obtenido por la misma tribu hasta el día de su muerte, si entonces se hubiese comprado para él el derecho de aquella tribu conforme a la voluntad de su patrono, o los intereses de la estimación. Respondí, que transmite a

§ 1.- Sempronio ita legavit: "Sempronius sumito praedia mea omnia, quae sunt usque ad praedium, quod vocatur gaas, finibus Galatiae, sub cura vilici primi, ita ut haec omnia instructa sunt". Quaesitum est, cum in eodem confinio praediorum unum sit praedium non Galatiae, sed Cappadociae finibus, sub cura tamen eiusdem vilici, an etiam id praedium cum ceteris ad Sempronium pertineat. Respondit et hoc debere.

§ 2.- Libertis, quos nominaverat, ita legavit: "Fundum Trebatianum, qui est in regione Atellata, item fundum Satrianum, qui est in regione Niphana, cum taberna dari volo". Quaesitum est, cum inter fundos, quos supra legavit, sit quidem fundus vocabulo Satrianus, in regione tamen Niphana non sit, an ex causa fideicommissi libertis debeatur. Respondit, si nullus esset Satrianus in regione Niphana et de eo sensisse testatorem certum sit, qui alibi esset, non idcirco minus debere, quia in regione designanda lapsus esset.

§ 3.- Codicillis confirmatis ita cavit: "Tiburtibus municipibus meis amantissimisque scitis balneum Iulianum iunctum domui meae, ita ut publice sumptu heredum meorum et diligentia decem mensibus totius anni praebeatur gratis". Quaesitum est, an et sumptus refectationibus necessarios heredes praestare debeant. Respondit secundum ea quae proponerentur videri testatorem super calefactionis et praebitionis onus de his quoque sensisse, qui ad cottidianam tutelam pertineant, quibus balineae aut instruuntur aut denique inter solitas cessationum vices parari purgarique, ut habiles ad lavandum fierent, sint solitae.

entitled to the interest on the appraised value of the place. I answered that whatever the freedman could himself have recovered was transmitted to his heir.

§ 1.- A testator made a devise to Sempronius as follows: "Let Sempronius take all the lands which I have within the boundaries of Galatia, as far as the tract which is called Gaas, and which are in charge of Primus, the steward, together with all the appurtenances of the same." The question arose, as there was but one tract of land in charge of the said steward, and it was not within the boundaries of Galatia, but within those of Cappadocia, whether this tract would belong to Sempronius, along with the others. The answer was that it would belong to him.

§ 2.- A testator made the following devise to his freedman, whom he mentioned by name, "I desire the Trebatian Estate, which is in the Atellatan district, and also the Satrian Estate, which is in the district of Niphana, together with a shop, to be given." The question arose, as among the lands above devised there was a tract designated as Satrian, but which was not in the district of Niphana, whether it should be delivered to the freedman under the terms of the trust? The answer was if there was no estate called Satrian in the district of Niphana, but if it was certain that the testator had in his mind the one which was situated elsewhere, it would, none the less, be due, because he had made a mistake in indicating the district in which it was situated.

§ 3.- A person made the following provision in a codicil, which he confirmed: "Let the Julian bath, which is joined to my house, be granted for the gratuitous use of the citizens of Tibur and Scitis, to whom I am much attached, in such a way that they can bathe there publicly, at the expense, and under the supervision of my heirs, for six months of every year." The question arose whether the heirs would be required to pay the expense of necessary repairs. The answer was that, in accordance with the facts stated, the testator, in addition to the obligation to heat the bath, and provide for service, also included whatever was connected to its daily maintenance, so that the bath might be provided with everything necessary;

su heredero todo lo que él mismo hubiese de haber obtenido.

§ 1.-Uno le legó a Sempronio de este modo: «Tome Sempronio todos aquellos predios que hay hasta el predio que se llama Gaas, en los confines de Galacia, al cuidado del primer administrador, de la manera cómo todos ellos están provistos»; se preguntó, si, habiendo en el mismo confin de los predios un predio en los confines, no de Galacia, sino de Capadocia, pero al cuidado del mismo administrador, le pertenecerá a Sempronio también este predio junto con los demás. Respondió, que también se le debe éste.

§ 2.- Uno les legó así a los libertos que había nombrado: «quiero que se dé el fundo Trebaciano, que está en la región Atelata, y también el fundo Satriano, que se halla en la región Nifana, juntamente con la cabaña»; se preguntó, si hallándose ciertamente entre los fundos, que arriba legó, el fundo denominado Satriano, pero no estando en la región Nifana, se les deberá a los libertos por causa del fideicomiso. Respondió, que si no hubiese ninguno denominado Satriano en la región Nifana, y fuera cierto que el testador se refirió a él, que se hallaba en otra parte, no se dejaba de deber porque se hubiese equivocado en cuanto a la región que se debía designar. .

§ 3.- Uno dispuso así en codicilos confirmados: «A los Tiburtinos, mis conciudadanos de municipio, y muy amados. Sabed, que os dejo el baño Juliano, adosado a mi casa; y esto, para que públicamente se os facilite gratis a costa y por diligencia de mis herederos durante diez meses de todo el año»; se preguntó, si deberán pagar también los herederos los gastos necesarios para las reparaciones. Respondió, que, según lo que se exponía, se consideraba que el testador se refirió, además que a la carga de la calefacción y del suministro, también a los gastos que correspondan al cuidado diario, con los que o se proveen los baños, o finalmente se suelen preparar y limpiar durante los acostumbrados períodos de vaca-

36.- *Apud SCAEVOLAM; libro XVIII, digestorum Claudius notat.*- Nec fideicommissa ab intestato data debentur ab eo, cuius de inofficioso testamento constitisset, quia crederetur quasi furiosus testamentum facere non potuisse, ideoque nec aliud quid pertinens ad suprema eius iudicia valet.

37.- *SCAEVOLA; libro XVIII, digestorum.*- Cum quis decedens Seiae matri fundum, qui proprius matris erat, legaverat, ab ea petierat, ut eundem cum moretur Flaviae Albinae coniugi suae restitueret. Post mortem testatoris mater apud magistratum professa est nihil se adversus voluntatem filii sui facturam paratamque se fundum Flaviae Albinae tradere, si sibi annua bina praestarentur reddituum nomine: sed neque possessionem tradidit neque annua bina accepit. Quaesitum est, an iure fundum alii vendere possit. Respondit, si de legati iure fideique commissi quaereretur, secundum ea quae proponerentur nec valuisse, quod matri suum legabatur, neque onus fideicommissi processisse, si modo nihil praeterea mater cepisset.

§ 1.- Qui testamento heredem scripserat, Maevio ducenta legavit et fidei eius commisit, ut centum daret glauce, tyche elpidi autem quinquaginta: postea Maevius volente testatore litteras emisit ad eas secundum voluntatem testatoris restitutum: postea testator fecit codicillos, quibus et hoc praecepit, ut praeter hos codicillos si quid aliud prolatum esset, non valeat. Quaesitum est, an Maevius, qui ducenta accepit, quia mutavit voluntatem de ea epistula testator, a mulieribus conveniri ex causa fideicommissi possit. Respondit secundum ea quae proponuntur frustra Maevium conveniri, sive ducenta sive praedium pro his accepit.

and that, during the ordinary periods of intermission, it should be prepared and cleaned, so that it might be proper for occupancy, as is usual under some circumstances.

36.- *Notes of Claudius on SCAEVOLA; Digest, Book XVIII.*- Where a will has been decided to be inofficious, the trusts therein contained are not due ab intestato because, as an insane person cannot make a will, it is held that nothing included in his last will is valid.

37.- *SCAEVOLA; Digest, Book XVIII.*- A certain person, at the time of his death, devised to his mother, Seia, a certain tract of land which already belonged to her, and requested her when she died to transfer the same to his wife Flavia Albina. After the death of the testator, the mother stated in the presence of a magistrate that she did not wish to do anything against the wish of her son, and that she was willing to transfer the land to Flavia Albina, if she would pay her two aurei a year, as income. She, however, neither delivered possession of the property, nor received the sum of two aurei a year. The question arose whether she could legally sell the land to a third party. The answer was that, if the inquiry was made with reference to the legacy and the trust, in accordance with the facts stated, what the testator left to his mother was not valid, and there was no obligation to comply with the trust, provided the mother had not received anything else by the will.

§ 1.- A certain person appointed an heir, and left two hundred aurei to Maevius, charging him to pay a hundred to Glaucetyches and fifty to Elpidus. Afterwards Maevius, with the consent of the testator, sent letters to the two legatees, and paid them their legacies in accordance with the will of the testator. The testator afterwards made a codicil, and provided that if any instrument was produced which was contrary to the said codicil, it should not be valid. The question arose whether Maevius, who had received two hundred aurei, could be sued by the legatees under the trust, because the testator had changed his mind with reference to the letters above mentioned. The answer was that, according to the facts stated, an

ciones, para que sean a propósito para lavarse.

36.- *Claudio nota en SCÉVOLA al libro XVIII. del Digesto.*- Tampoco se deben abinestato los fideicomisos dados por aquel respecto de cuyo testamento se hubiese hecho prueba de inoficioso, porque se creería que como furioso no pudo hacer testamento; y por lo tanto, tampoco es válida ninguna otra cosa relativa a su última voluntad.

37.- *SCÉVOLA; Digesto, libro XVIII.*- Habiendo legado uno al morir a su madre Seya un fundo, que era propio de su madre, le había pedido que cuando muriese se lo restituyera a Flavia Albina, su cónyuge; después de la muerte del testador declaró la madre ante el magistrado, que ella no haría nada contra la voluntad de su hijo, y que estaba dispuesta a entregar el fundo a Flavia Albina, si a ella se le pagasen dos anualidades a título de réditos; pero ni entregó la posesión, ni recibió las dos anualidades; se preguntó, si con derecho podría venderle a otro el fundo. Respondió, que, si se preguntaba respecto al derecho del legado y del fideicomiso, no fue válido conforme a lo que se exponía, porque se le legaba a la madre lo suyo, y que no tuvo lugar la carga del fideicomiso, si la madre no hubiese recibido además alguna cosa.

§ 1.- Uno que había instituido heredero en su testamento, legó doscientos a Mevio, y encomendó a su fidelidad, que le diese ciento a Glauca Tica, y cincuenta a Elpidos; después, queriéndolo el testador, Mevio les dirigió cartas a las mismas, diciéndoles que conforme a la voluntad del testador él les restituiría; posteriormente el testador hizo codicilos, en los que dispuso también esto, que si además de estos codicilos se hubiese exhibido alguna otra cosa, no fuera válida; se preguntó, si Mevio, que recibió los doscientos, podía ser demandado por las mujeres a causa del fideicomiso, puesto que el testador' cambió de voluntad respecto a aquella carta. Respondió, que, según lo que se expone, en vano es

§ 2.- Seiam et Maevium libertos suos aequis partibus heredes scripsit: Maevio substituit Sempronium pupillum suum: deinde codicillos per fideicommissum confirmavit, quibus ita cavit: "Lucius Titius Seiae heredi suae, quam pro parte dimidia institui, salutem. Maevium libertum meum, quem in testamento pro parte dimidia heredem institui, eam partem hereditatis veto accipere, cuius in locum partemve eius publium Sempronium dominum meum heredem esse volo", et Maevio, ad quem hereditatis portionem noluit pervenire, cum hoc elogio fideicommissum reliquit: "Maevio liberto meo de me nihil merito dari volo lagynos vini vetusti centum quinquaginta".

Quaesitum est, cum voluntas testatoris haec fuerit, ut omnimodo perveniat portio hereditatis ad Sempronium pupillum, an fideicommissum ex verbis supra scriptis valere intellegatur et a quo Sempronius petere possit, cum ad certam personam codicillos scripserit. Respondit posse fideicommissum a Maevio peti.

§ 3.- Pater emancipato filio bona sua universa exceptis duobus servis non mortis causa donavit et stipulatus est a filio in haec verba: "Quae tibi mancipia quaeque praedia donationis causa tradidi cessi, per te non fieri dolo malo neque per eum ad quem ea res pertinebit, quo minus ea mancipia quaeque ex his adgnata erunt eaque praedia cum instrumento, cum ego volam vel cum morieris, quaeque eorum exstabant neque dolo malo aut fraude factove tuo eiusque ad quem ea res pertinebit in rerum natura aut in potestate esse desissent, si vivam mihi aut cui ego volam reddantur restituantur, stipulatus est Lucius Titius pater, sponpondit Lucius Titius filius". Idem pater decedens epistulam fideicommissariam ad filium suum scripsit in haec verba: "Lucio Titio filio suo salutem. Certus de tua pietate fidei tuae committo, uti des praestes illi et illi certam pecuniam: et lucionem servum meum liberum esse volo". Quaesitum est, cum filius patris nec bonorum

action could not be brought against Mævius, whether he had received the two hundred aurei, or the land instead of them.

§ 2.- A testator appointed Seia and Mævius, his freedmen, heirs to equal portions of his estate, and substituted his ward Sempronius for Mævius. He then confirmed a codicil by which he provided as follows: "Lucius Titius to Seia, his heir, whom he appointed to inherit half of his estate, Greeting. I forbid Mævius, my freedman, whom I have appointed by my will heir to half of my estate, to receive the same; and, in his place, I desire Publius Sempronius, my ward, to be my heir to his share of my estate." He also left to Mævius, whom he did not wish to obtain a share of his estate, a trust with the following censure: "I wish a hundred and fifty bottles of old wine to be given to Mævius, my freedman, who deserves nothing from me."

As it was the intention of the testator, in the first place, that half of his estate should, under all circumstances, belong to Sempronius, the question arose whether the trust expressed in the above-mentioned words should be considered valid, and of whom Sempronius could make the demand, as the codicil was addressed to a certain person. The answer was that the execution of the trust could be demanded of Mævius.

§ 3.- A father gave to his emancipated son all his property with the exception of two slaves, but did not make a donation mortis causa, and stipulated with his son as follows: "Do you promise that the slaves which I have given you and the lands which I have transferred to you as a gift, together with such offspring as may be born to said slaves, and also the implements used for cultivating the soil, or whatever of said property may remain or be under your control, and which has not been fraudulently disposed of by you, shall at your death be returned to me, if I should be living, or delivered to anyone whom I may designate? I, Lucius Titius, the father, have stipulated this and, I, Lucius Titius, the son, have promised it." The father, when dying, wrote to his son creating a trust as follows: "Lucius Titius, to his son Lucius Titius, Greeting. Confident of your filial affection, I charge you to pay to So-and-So and So-and-So, a certain sum of money, and I desire my slave Lucio to

demandado Mevio, ya si recibió los doscientos, ya si en lugar de ellos un predio.

§ 2.- Uno instituyó herederos por iguales partes a Seya y a Mevio, libertos suyos, y a Mevio le substituyó su pupilo Sempronio, y después confirmó por fideicomiso codicilos, en los cuales dispuso de este modo: «Lucio Ticio saluda a Seya, su heredera, a la que la instituí en la mitad. Prohíbo que Mevio, mi libertino, a quien en mi testamento instituí heredero de la mitad, reciba esta parte de la herencia, y en lugar de él y en su parte quiero que sea heredero Publio Sempronio, mi señor»; y a Mevio, a quien no quiso que fuera la porción de la herencia, le dejó un fideicomiso con esta disposición: «a Mevio, mi libertino, que nada mereció de mí, quiero que se le den ciento cincuenta cántaros de vino añejo»; se preguntó, si, habiendo sido esta la voluntad del testador, que de todos modos fuera al pupilo Sempronio la porción de la herencia, se entenderá que en virtud de las sobredichas palabras es válido el fideicomiso, y a quién podría pedirlo Sempronio, habiendo dirigido los codicilos a cierta persona. Respondió, que se podía pedir el fideicomiso a Mevio.

§ 3.- Un padre le donó a su hijo emancipado, no por causa de muerte, todos sus bienes, excepto dos esclavos, y estipuló del hijo en estos términos: «respecto a los esclavos y a los predios que por causa de donación te entregué y cedí, no se haga con dolo malo por tí, o por aquel a quien estas cosas le pertenecieren, de modo que estos esclavos, y los que de ellos hubieren nacido, y los predios con sus enseres, cuando yo quiera, o cuando murieres, y los que de ellos quedaren, y no hubiesen dejado de existir, o de estar bajo potestad, por dolo malo o por fraude o por hecho tuyo o de aquel a quien estas cosas le pertenecieren, si yo viviera, no sean devueltos y restituidos a mí, o a quien yo quisiere; estipuló Lucio Ticio, padre, y prometió Lucio Ticio, hijo». El mismo padre, al morir, le escribió a su hijo una carta fideicomisaria en estos términos: «A Lucio Ticio, su hijo, salud. Seguro de tu piedad, encomiendo a tu fidelidad que le des, y le entregues a aquél y a aquél

possessionem acceperit nec ei heres exstiterit, an ex epistula fideicommissa et libertatem praestare debeat. Respondit, etsi neque hereditatem adisset neque bonorum possessionem petisset et nihil ex hereditate possideret, tamen nihilo minus et ex stipulatu ab heredibus patris et fideicommisso ab his quorum interest quasi debitorem conveniri posse, maxime post constitutionem divi pii, quae hoc induxit.

§ 4.- Nuptura duobus filiis suis, quos ex priore marito habebat, mandavit, ut viginti, quae doti dabat, stipularentur in omnem casum, quo solvi posset matrimonium, ut etiam alterutri ex his tota dos solvatur: constante matrimonio uno ex filiis mortuo uxor per epistulam petit a superstite filio, uti quandoque partem dimidiam dumtaxat dotis exigeret et ea contentus erit, alteram autem partem apud maritum eius remanere concedat. Quaesitum est postea in matrimonio muliere defuncta, an maritus, si de tota dote conveniatur a filio, doli mali exceptione se tueri possit et an ultro ex causa fideicommissi actio ei competit, ut de parte obligationis accepto ei feratur. Respondit et exceptionem utilem fore et ultro ex fideicommisso peti posse.

Idem quaerit, an de reliqua dimidia parte mandati actio utilis sit heredibus mulieris adversus filium eius. Respondit secundum ea quae proponerentur, maxime post litteras ad filium scriptas non fore utilem. Claudius: quoniam in his expressit, ut contentus esset partis dimidiae dotis. Quibus verbis satis fideicommissum filio relinqui placuit.

§ 5.- Codicillis ita scripsit: Quaecumque infra scripta sunt rata esse volo. Maximo domino meo denariorum quindecim milia, quae a patruo eius Iulio

be free." The question arose whether the son, who could neither obtain praetorian possession of his father's estate nor was appointed his heir, was bound to execute the trust, and grant freedom to the slave by the terms of the letter. The answer was that while the son could not enter upon the estate of his father, nor demand praetorian possession of the same, and although he did not hold anything belonging to his estate, an action could, nevertheless, be brought against him as a debtor by the heirs of his father, on the ground of the stipulation; and also one on account of the trust by those who were interested in its execution; especially after the Constitution of the Divine Pius, which provided for a case of this kind.

§ 4.- A widow, about to be married, directed her two children, whom she had by her first husband, to stipulate for twenty aurei, the value of the dowry which he was about to give, if for any reason her marriage could be dissolved, so that her entire dowry could be paid to one or the other of them. One of the children having died during the marriage, the wife, by a letter, directed the survivor to be content with half of the dowry, without demanding any more of it, and to let the remaining half remain in possession of her husband. The woman having afterwards died, the question arose whether her husband could be sued for the entire dowry by her son, and whether the former could be protected by an exception on the ground of bad faith; and moreover whether an action would lie in his favor, under the terms of the trust, in order that the son might be compelled to release him from his share of the obligation. The answer was that the exception could legally be interposed, and that he could also bring suit under the terms of the trust.

It was also asked whether a praetorian action, having reference to the remaining half of the property, would lie in favor of the heirs of the woman against her son. The answer was that, according to the facts stated, and especially after the letter written to the son, the action could not be brought. Claudius: Since she stated in her letter that her son should be content with half the dowry, it was held that by these words a trust for the benefit of the son was created.

§ 5.- A testator made the following provision in a codicil: "I wish everything included herein to be carried out. I give to my lord, Maximus, five

cierta cantidad; y quiero que sea libre Lucrion, mi esclavo»; se preguntó, si, no habiendo recibido el hijo la posesión de los bienes del padre, ni sido su heredero, deberá dar en virtud de la carta los fideicomisos y la libertad. Respondió, que aunque no hubiese adido la herencia, ni pedido la posesión de los bienes, y no poseyese nada de la herencia, no obstante podía ser demandado como deudor así con la acción de lo estipulado por los herederos del padre, como por el fideicomiso por aquellos a quienes interesa, mayormente después de la constitución del Divino Pío, que introdujo esto.

§ 4.- Una que se iba a casar les encomendó a los dos hijos suyos, que tenía de su primer marido, que estipulasen para todo caso, en que se pudiese disolver el matrimonio, los veinte que daba en dote, a fin de que también a cualquiera de ellos se le pagase toda la dote; muerto uno de los hijos durante el matrimonio, la mujer le pidió por carta al hijo sobreviviente, que a su tiempo reclamase solamente la mitad de la dote, y con ella se contentase, pero que consintiese que la otra parte quedase en poder de su marido, se preguntó, si habiendo fallecido después la mujer en el matrimonio, podría el marido, si por toda la dote fuera demandado por el hijo, ampararse con la excepción de dolo malo, y si además le compete acción por causa de fideicomiso, para que se le dé por quito respecto a parte de la obligación. Respondió, que sería útil la excepción, y que además se podría pedir en virtud de fideicomiso.

El mismo preguntó, si por la restante mitad tendrían los herederos de la mujer contra su hijo la acción útil de mandato. Respondió que, según lo que se exponía, no habría, la útil, singularmente después de la carta dirigida al hijo. Y dico Claudio: porque en ellas expresó, que se contentase con la mitad de la dote; con cuyas palabras se determinó que eficazmente se le deja al hijo un fideicomiso.

§ 5.- Uno escribió así en los codicilos: «Quiero que sea válido todo lo que a continuación ha sido dispuesto. Quiero que a Máximo, mi señor, se le den

Maximo deposita sunt apud me, ut ei restituerem puberi facto, quae fiunt cum usuris denariorum triginta milia, restitui volo: nam ea re patruo eius iusiurandi dedi. Quaesitum est, an ad depositam pecuniam petendam sufficient verba codicillorum, cum hanc solam nec aliam ullam probationem habeat. respondi: ex his quae proponerentur, scilicet cum iusiurandum dedisse super hoc testator adfirmavit, credenda est scriptura.

§ 6.- Titia honestissima femina cum negotiis suis opera Callimachi semper uteretur, qui ex testamento capere non poterat, testamento facto manu sua ita cavit: quaero, an haec pecunia ex causa mercedis ab heredibus Titiae exigi possit. Respondi non idcirco quod scriptum est exigi posse in fraudem legis relictum.

§ 7.- Ex his verbis testamenti: "Omnibus, quos quasve manumisi manumiserove sive his tabulis sive quibuscumque aliis, filios filiasve suos omnes concedi volo" quaesitum est, an his, quos vivos manumisisset, debeantur filii. Respondit his quoque, quos quasve ante testamentum factum manumisisset, filios filiasve ex causa fideicommissi praestari oportere.

38.- SCAEVOLA; *libro XIX, digestorum*.- Pater filium heredem praedia alienare seu pignori ponere prohibuerat, sed conservari liberis ex iustis nuptiis et ceteris cognatis fideicommisserat: filius praedia, quae pater obligata reliquerat, dimisso hereditario creditore nummis novi creditoris, a priore in sequentem creditorem pignoris hypothecaeve nomine transtulit: quaesitum est, an pignus recte contractum esset. Respondit secundum ea quae proponerentur recte contractum. Idem quaesiit, cum filius praedia hereditaria, ut dimitteret hereditarios creditores, distraxisset, an emptores, qui

thousand denarii which I received by way of deposit from his uncle Julius Maximus, to be paid to him with interest when he becomes a man, which will amount to thirty thousand denarii, for I have promised his uncle under oath to do this." The question arose whether the terms of the codicil were sufficient to authorize a suit to recover the money deposited, as their truth could not be established by any other evidence. I answered that, in accordance with the facts stated, what the testator wrote should be believed, as he alleged that he had bound himself by an oath to do this.

§ 6.- Titia, a woman of high rank, who had always employed Callimachus to transact her business (the latter being incapable of taking under a will), having drawn up a will in her own hand, provided as follows: "I, Titia, have made this my will, and I desire that the sum of ten thousand denarii be given to Callimachus, by way of reward." I ask whether this money can be claimed by the heirs of Titia, on the ground of its being a recompense. I answered that what is bequeathed in violation of law can not be collected.

§ 7.- With reference to the following words of a will: "I wish payment to be made to all male and female slaves whom I have manumitted, or may manumit, either by this will, or by any other, together with their sons and daughters," the question arose whether the heir was liable to those whom the testator had manumitted during his lifetime. The answer was that the provisions of the trust must also be executed so far that those who had been manumitted before the will was made, and their children of both sexes, were concerned.

38.- THE SAME; *Digest, Book XIX*.- A father forbade his son, who was also his heir, to alienate the lands belonging to the estate, or to subject them to pledge; but charged him to hold them for the benefit of such children as he might have by legal marriage, and of his other relatives. The son, having paid one creditor of the estate, released certain tracts of land which his father had encumbered, and, in order to obtain the money to pay him, transferred the said lands to a second creditor, by way of pledge or hypothecation. The question arose whether the pledge was legally contracted. The answer was that,

los quince mil denarios, que en depósito recibí de su tío paterno, Julio Máximo, para que hecho hombre se los entregara con los intereses, que importan treinta mil; porque así se lo juré a su tío paterno; se preguntó, si para pedir el dinero depositado bastarán las palabras de los codicilos, no teniendo más que esta sola prueba, y no otra alguna. Respondí: en virtud de lo que se exponía, por supuesto, habiendo afirmado el testador que sobre esto prestó juramento, ha de ser creída la escritura.

6.- Ticia, mujer honestísima, habiendo utilizado siempre para sus negocios los servicios de Calimaco, quien no podía adquirir por testamento, dispuso así el testamento hecho de su propia mano: «Yo, Ticia, hice testamento, y quiero que se le den a Calimaco por vía de merced diez mil denarios»; pregunto, si se podrá exigir de los herederos de Ticia por vía de merced este dinero. Respondí, que no porque se escribió se podía exigir lo dejado en fraude de ley.

§ 7.- En virtud de estas palabras del testamento: «a todos los que o las que he, o había, manumitido, o en este testamento, o en otro cualquiera quiero que se les concedan todos sus hijos o hijas»; se preguntó, si se les deberán los hijos a los que en vida hubiese manumitido. Respondió, que también a aquéllos o a aquéllas que hubiese manumitido antes de haber hecho testamento, se les debían dar por causa del fideicomiso los hijos o las hijas.

38.- EL MISMO; *Digesto, libro XIX*.- El padre había prohibido que su hijo heredero enajenase unos predios, o los constituyese en prenda, pero había encomendado por fideicomiso que fuesen conservados para los hijos habidos de legítimas nupcias, y para los demás cognados; el hijo, habiendo pagado al acreedor de la herencia con dinero de un nuevo acreedor, transfirió del primero al segundo acreedor a título de prenda o de hipoteca los predios que el padre había dejado obligados, se preguntó, si se habrá constituido debidamente la prenda. Respondió, que, según lo que se exponía, se había consti-

fideicommissum ignoraverunt, bene emerint. Respondi secundum ea quae proponerentur recte contractum, si non erat aliud in hereditate, unde debitum exsolvisset.

§ 1.- Duobus libertis Sticho et Erote heredibus institutis ita cavit: "Fundum Cornelianum de nomine meorum exire veto": unus ex heredibus Stichus ancillam Arescusa testamentum liberam esse iussit eique partem suam fundi legavit: quaero, an eros et ceteri colliberti Stichi ex causa fideicommissi eius fundi partem ab herede Stichi petere possint. Respondit non contineri.

§ 2.- Filiam suam heredem scripserat et ita caverat: "Veto autem aedificium de nomine meo exire, sed ad vernas meos, quos hoc testamento nominavi, pertinere volo": quaesitum est, defuncta herede et legatariis vernis an ad unum libertum qui remansit totum fideicommissum pertineret. Respondit ad eum, qui ex vernis superesset, secundum ea quae proponerentur virilem partem pertinere.

§ 3.- Fundum a filio, quoad vixerit, vetuit vendi dari donari pignerari et haec verba adiecit: "Quod si adversus voluntatem meam facere voluerit, fundum Titianum ad fisci pertinere: ita enim fiet, ut fundus Titianus de nomine vestro numquam exeat". Quaesitum est, cum vivus filius eum fundum secundum voluntatem patris retinuerit, an defuncto eo non ad heredes scriptos a filio, sed ad eos, qui de familia sunt, pertineat. Respondit hoc ex voluntate defuncti colligi posse filium quoad viveret alienare vel pignus non posse, testamenti autem factionem et in eo fundo in extraneos etiam heredes habiturum.

according to the facts stated, it was legally contracted. The question was also raised, if the son should sell land forming part of the estate in order to satisfy its creditors, whether the purchasers, who were ignorant of the existence of a trust, could legally buy the land. I answered that, according to the facts stated, the sale would be valid if there was no other property belonging to the estate out of which the debt could be paid.

§ 1.- A certain man having appointed his two freedmen, Stichus and Eros, his heirs, provided as follows in his will, "I do not consent that the Cornelian Estate shall leave the hands of freedmen." Stichus directed his female slave Arescusa to be free by his will, and bequeathed to her his share of said estate. I ask whether Eros, and the other fellow-freedmen of Stichus, can demand from the heir of the latter his share of the said estate, under the terms of the trust. The answer was that Arescusa was not included in the trust.

§ 2.- A man appointed his daughter his heir, and inserted into his will, "I do not desire my house to pass out of the hands of my freedmen, but I wish it to belong to the slaves born in my family, whom I have mentioned in this will." The question arose, after the death of the heir and the slaves born in the household of the testator, whether a single freedman who remained was entitled to the entire benefit of the trust. The answer was that, in accordance with the facts stated, only the proportionate share of the surviving freedman would belong to him.

§ 3.- A testator, having left a tract of land to his son, forbade him to sell, give, or pledge the same, as long as he lived, and added the following clause: "If he should do this contrary to my will, I desire that the Titian Estate shall belong to the Treasury, and this is provided in order that the said Titian Estate may always be held in his name." As the son retained the property in compliance with the will of his father during his entire lifetime, the question arose whether, after his death, the land would belong to the members of the family, and not to the heirs appointed by the son. The answer was that it may be inferred from the will of the deceased that the son, as long as he lived, could neither alienate nor pledge the land, but that he would have a right to make a will, and leave it even to

tuido debidamente. El mismo preguntó, si, habiendo vendido el hijo predios de la herencia para pagar a acreedores de la herencia, los habrían comprado bien los compradores que ignoraron el fideicomiso. Respondí, que, según lo que se exponía, se contrató válidamente, si no había en la herencia otra cosa con la que hubiese pagado la deuda.

§ 1.- Habiendo uno instituido herederos a dos libertos, Stico y Eras, dispuso de este modo: «prohibo que el fundo Cornelianum salga del nombre de los míos»; uno de los herederos, Stico, dispuso en su testamento que fuese libre la esclava Arescusa, y a ella le legó su propia parte del fundo; pregunto, si Eros y los demás colibertos de Stico podrían pedirle al heredero de Stico por causa de fideicomiso la parte de fundo de éste. Respondió, que no estaba comprendida.

§ 2.- Uno había instituido heredera a su hija, y había dispuesto así: «pero prohibo que el edificio salga de los de mi nombre, y quiero que pertenezca a mis esclavos nacidos en mi casa, que he nombrado en este testamento»; se preguntó, si habiendo fallecido la heredera, y los esclavos nacidos en la casa, legatarios, le pertenecería todo el fideicomiso al único liberto que quedó. Respondió, que, según lo que se proponía, al que de los esclavos nacidos en la casa sobreviviese le pertenecería una porción viril.

§ 3.- Uno prohibió que se vendiese, donase, o empeñase un fundo por su hijo, mientras viviere y añadió estas palabras: «pero si hubiere querido obrar contra mi voluntad, pertenezca al fisco el fundo Titiano; porque así se conseguirá que el fundo Titiano no salga nunca de los de vuestro nombre»; se preguntó, si, habiendo el hijo retenido en vida aquel fundo según la voluntad de su padre, le pertenecerá, fallecido él, no a los herederos instituidos por el hijo, sino a los que son de la familia. Respondió, que de la voluntad del difunto se podía colegir esto, que el hijo mientras viviese, no podía enajenarlo o pignorar, pero que había de tener aún respecto de este fundo testamentificación también a favor de herederos extraños.

§ 4.- Iulius Agrippa primipilaris testamento suo cavet, ne ullo modo reliquias eius et praedium suburbanum aut domum maiorem heres eius pigneraret aut ullo modo alienaret: filia eius heres scripta heredem reliquit filiam suam neptem primipilaris, quae easdem res diu possedit et decedens extraneos instituit heredes. Quaesitum est, an ea praedia extraneus heres haberet an vero ad Iuliam Domnam, quae habuit patrum maiorem Iulium Agrippam, pertinerent. Respondi, cum hoc nudum praeceptum est, nihil proponi contra voluntatem defuncti factum, quo minus ad heredes pertinerent.

§ 5.- Quindecim libertis, quos nominaverat, praedium cum taberna legaverat et adiecerat haec verba: "Sibique eos habere possidere volo ea lege et condicione, ne quis eorum partem suam vendere donareve aliudve quid facere alii velit: quod si adversus ea quid factum erit, tunc eas portiones praediumve cum taberna ad rem publicam Tusculanorum pertinere volo". Quidam ex his libertis vendiderunt partes suas duobus colibertis suis ex eodem corpore, emptores autem defuncti Gaium Seium extraneum heredem reliquerunt: quaesitum est, partes quae venierunt utrum ad Gaium Seium an ad superstites colibertos suos, qui partes suas non venderunt, pertinerent. Respondit secundum ea quae proponerentur ad Gaium Seium pertinere.

Idem quaesivit, an partes venditae ad rem publicam Tusculanorum pertinerent. Respondi non pertinere. Claudius: quia non possidentis persona, qui nunc extraneus est, respicienda est, sed emptorum, qui secundum voluntatem defunctae ex illis fuerunt, quibus permiserat testatrix venundari, nec condicio exstitit dati fideicommissi Tusculanis.

§ 6.- Fidei commisit eius, cui duo milia legavit, in haec verba: "A te, Petroni, peto, uti ea duo milia

foreign heirs.

§ 4.- Julianus Agrippa, a member of the First Company of the Triarii, inserted the following into his will: "I do not wish my heir to pledge or alienate, in any way whatsoever, the remainder of such-and-such lands, or my suburban estate, or my house in the city." His daughter, whom he had appointed his heir, left a daughter the grandchild of the testator, who, having held the property for a long time, died after appointing foreign heirs. The question arose whether the foreign heirs would be entitled to the said land, or whether it would belong to Julia, who was a grand-niece of Julius Agrippa. I answered that, as the above provision was only a mere precept, nothing had been done against the will of the deceased, which would prevent the title to the land from vesting in the heirs.

§ 5.- A certain testatrix left a small tract of land, together with a shop, to fifteen of her freedmen, whom she mentioned by name, and added the following: "I wish my freedmen to hold this land under the condition that none of them will sell or give away his share, or do anything else which will cause it to become the property of a stranger. If anything is done, contrary to this provision, I desire their shares, together with the land with the shop, to belong to the people of Tusculum." Some of her freedmen sold their shares to two of their fellow-freedmen, who were included in their number, and the purchasers having died, appointed as their heir Gaius Seius, a stranger. The question arose whether the shares which were sold would belong to Gaius Seius, or to their surviving fellow-freedmen who had not disposed of theirs. The answer was that, according to the facts stated, they belonged to Gaius Seius.

It was also asked whether the shares which were sold would belong to the people of Tusculum. I answered that they would not. Claudius: Because the person of the actual possessor, who is a stranger, is not to be considered but those of the purchasers, who, in accordance with the will of the deceased, were of the number of those to whom she had permitted the property to be sold, the condition under which the land was granted to the people of Tusculum by the terms of the trust has not been fulfilled.

§ 6.- A testator charged a legatee to whom he had bequeathed two thousand solidi under a trust, as

§ 4.- Julio Agrippa, capitán de una primera centuria, dispuso en su testamento, que de ningún modo pignorase su heredero, o en manera alguna enajenase, sus reliquias, y el predio suburbano, o la casa mayor; su hija instituida heredera dejó como heredera a su hija, nieta del capitán de la primera centuria, la cual poseyó largo tiempo aquellos bienes, y al morir instituyó herederos extraños; se preguntó, si el heredero extraño tendría estos predios o si le pertenecerían a Julia Domna, que tuvo como hermano de su bisabuelo a Julio Agrippa. Respondí, que, siendo este un nudo precepto, no se exponía que se hubiera hecho nada contra la voluntad del difunto, para que no les pertenezcan a los herederos.

§ 5.- Uno les había legado a quince libertos, que había nombrado, un pequeño predio con una cabaña, y había añadido estas palabras: «y quiero que ellos los tengan para sí y los posean con esta ley y condición, que ninguno de ellos quiera vender su parte, o donarla, o hacer de ella otra cualquier cosa a favor de otro. Pero si contra esto se hubiere hecho alguna cosa, quiero que en este caso le pertenezcan a la República de los Tusculanos estas porciones o el predio con la cabaña»; algunos de estos libertos vendieron sus partes a dos colibertos suyos del mismo grupo, pero los compradores fallecidos dejaron como heredero al extraño Cayo Seyo; se preguntó, si las partes que se vendieron pertenecerían a Cayo Seyo, o a sus colibertos sobrevivientes, que no vendieron sus partes. Respondió, que, según lo que se exponía, le pertenecían a Cayo Seyo.

El mismo preguntó, si las partes vendidas le pertenecerían a la República de los Tusculanos. Respondí, que no le pertenecían. y dice Claudio: porque no se ha de mirar a la persona del poseedor, que es ahora un extraño, sino a las de los compradores, que, conforme a la voluntad de la difunta, fueron de aquellos a quienes había permitido la testadora que se les vendiese, y no se cumplió la condición del fideicomiso dado a los Tusculanos.

§ 6.- A aquel a quien le legó dos mil le encomendó uno un fideicomiso en estos términos: «te pido,

solidorum reddas collegio cuiusdam templi". Quaesitum est, cum id collegium postea dissolutum sit, utrum legatum ad Petronium pertineat an vero apud heredem remanere debeat. Respondit Petronium iure petere, utique si per eum non stetit parere defuncti voluntati.

§ 7.- Mater filios heredes scripserat et adiecit: "Praedia, quae ad eos ex bonis meis perventura sunt, nulla ex causa abalienent, sed conservent successioni suae deque ea re invicem sibi caverent": ex his verbis quaesitum est, an praedia per fideicommissum relicta videantur. Respondit nihil de fideicommisso proponi.

§ 8.- Ex parte dimidia heredi instituto per praeceptionem fundum legavit et ab eo ita petit: "Peto, uti velis coheredem tibi recipere in fundo Iuliano meo, quem hoc amplius te praecipere iussi, Clodium verum nepotem meum, cognatum tuum": quaesitum est, an pars fundi ex causa fideicommissi nepoti debeatur. Respondit deberi.

39.- SCAEVOLA; *libro XX, digestorum.*- "Pamphilo liberto hoc amplius, quam codicillis reliqui, dari volo centum. Scio omnia, quae tibi, Pamphile, relinquo, ad filios meos perventura, cum affectionem tuam circa eos bene perspectam habeo". Quaero, an verbis supra scriptis Pamphili fideicommissit, ut post mortem filiis defuncti centum restituat. Respondit secundum ea quae proponerentur non videri quidem, quantum ad verba testatoris pertinet, fidei commissum Pamphili, ut centum restitueret: sed cum sententiam defuncti a liberto decipi satis inhumanum est, centum ei relictos filiis testatoris debere restitui, quia in simili specie et imperator noster divus Marcus hoc constituit.

follows: "I ask you, Petronius, to pay the said sum of two thousand solidi to the society of a certain temple." The society having been subsequently dissolved, the question arose whether the legacy should belong to Petronius, or should remain in possession of the heir. The answer was that Petronius could legally demand it, especially if it did not devolve upon him to execute the will of the deceased.

§ 7.- A mother appointed her sons her heirs, and added: "They must, under no circumstances whatever, dispose of the lands which will come into their possession as part of my estate, but they must reserve them for their successors, and furnish security to one another with reference to this." The question arose whether the lands should be considered to have been left in trust by these words. The answer was that, in accordance with what was stated, they did not create a trust.

§ 8.- A man having appointed an heir to half his estate, left him a certain tract of land as a preferred legacy, and added the following: "I ask you to consent to receive Clodius Verus, my grandson, and your relative as your co-heir to the Julian Estate which I have ordered to be given to you as a preferred legacy." The question arose whether the grandson was entitled to half of the land under the terms of the trust. I answered that he was.

39.- THE SAME; *Digest, Book XX.*- "I wish a hundred aurei to be given to my freedman, Pamphilus, in addition to what I have left him by my codicil. Pamphilus, I know that all that I leave you will eventually come into the hands of my children, for I bear in mind the affection which you entertain towards them." I ask whether the testator, by the use of the above-mentioned words, charged Pamphilus with the trust to pay to the children of the deceased a hundred aurei after his death? The answer was that, according to the facts stated, it could not be held, so far as the language of the testator was concerned, that Pamphilus was charged with a trust to pay the hundred aurei; but as it would be extremely dishonorable for the good opinion of the deceased to be contradicted by his freedman, the hundred aurei which had been bequeathed to him must be paid to the children of the testator. The Divine Marcus, Our

Petronio, que entregues estos dos mil sueldos al colegio de tal templo»; se preguntó, si habiéndose disuelto después este colegio, le pertenecerá el legado a Petronio, o deberá quedar en poder del heredero. Respondió, que con derecho lo pedía Petronio, solamente si en él no consistió el atender la voluntad del difunto.

§ 7.- Una madre había instituido herederos a sus hijos, y añadió: «no enajenen por ninguna causa los predios que de mis bienes han de pasar a ellos, sino consérvenlos para su sucesión, y dénse recíprocamente caución sobre este particular»; en virtud de estas palabras se preguntó, si se considerarán dejados por fideicomiso los predios. Respondió, que nada se expone respecto a fideicomiso.

§ 8.- Al instituido heredero de la mitad le prelegó uno un fundo, y le pidió de este modo: «Te pido que quieras admitir como coheredero en mi fundo Iuliano, que además de esto mandé que tomaras previamente, a Clodio Vera, mi nieto, tu cognado»; se preguntó, si por causa de fideicomiso se le deberá al nieto parte del fundo. Respondió, que se le debía.

39.- EL MISMO; *Digesto, libro XX.*- «Quiero que se le den ciento al liberto Pánfilo, además de lo que le dejé en los codicilos; sé Pánfilo, que todo lo que te dejo habrá de ir a mis hijos, porque bien conocido tengo tu afecto hacia ellos»; pregunto, si con las sobredichas palabras se le encomendó a Pánfilo un fideicomiso, para que después de la muerte les restituya los ciento a los hijos del difunto. Respondió, que, según lo que se exponía, no parecía ciertamente, en cuanto se refiere a las palabras del testador, que se le encomendó a Pánfilo un fideicomiso para que restituyese los ciento, pero que, siendo bastante inhumano que la intención del difunto fuese defraudada por el liberto, se debían restituir a los hijos del testador los ciento que a él se le dejaron, porque en un caso semejante también determinó esto el Divino Marco, nuestro Emperador.

§ 1.- *Propositum est non habentem liberos nec cognatos in discrimine vitae constitutum per infirmitatem arcessitis amicis Gaius Seio contubernali dixisse, quod vellet ei relinquere praedia quae nominasset, eaque dicta in testationem Gaium Seium redegissem etiam ipso testatore interrogato, an ea dixisset, et responso eius tali malista inserto: quaesitum est, an praedia, quae destinata essent, ex causa fideicommissi ad Gaium Seium pertinerent. Respondit super hoc nec dubitandum esse, quin fideicommissum valet.*

§ 2.- *Duas filias aequis ex partibus heredes fecerat: alteri fundum praelegaverat et ab ea petierat, ut sorori suae viginti daret: ab eadem filia petit, ut partem dimidiam fundi eidem sorori restitueret: quaesitum est, an viginti praestari non deberent. Respondi non esse praestanda.*

40.- *SCAEVOLA; libro XXI, digestorum.-* Post emancipationem patris suscepta a patruo ut legitimo herede petierat, ut partem hereditatis avunculo suo daret et agros duos: ad utrumque autem ut proximum cognatum successio eius pertinuit per bonorum possessionem. Quaesitum est, cum in parte hereditatis fideicommissum non constiterit, quam suo iure per bonorum possessionem avunculus habiturus est, an nihilo minus in partem agrorum consistat, ut Titius partes agrorum duas, id est unam, quam suo iure per bonorum possessionem habeat, alteram vero partem ex causa fideicommissi petere debeat. Respondit posse petere.

Idem quaesivit, si ab eodem patruo fideicommissum aliis quoque dederit, utrum in solidum, an vero pro parte ab eo praestanda sint. Respondit in solidum

Emperor, rendered the same decision in a similar case.

§ 1.- The following question was proposed for determination. A certain individual who had no children or relatives, and was reduced to extremity by disease, having called his friends together, told them in the presence of Gaius Seius, who occupied the same house with him, that he desired to leave him certain lands which he mentioned; and Gaius Seius drew up this statement, which was witnessed, and the testator himself, having been interrogated, as to whether he had made it, answered "most assuredly," which was inserted into the instrument. The question arose whether the lands which were designated would belong to Gaius Seius under the terms of the trust. The answer was that there could be no doubt whatever on this point, as the trust was valid.

§ 2.- A father appointed his two daughters heirs to equal shares of his estate, and left a tract of land to one of them as a preferred legacy, and requested the other to pay her sister twenty aurei, and he also requested this same daughter to transfer to her said sister her half of the land. The question arose whether she was obliged to pay the twenty aurei, or not. I answered that she was not obliged to do so.

40.- THE SAME; *Digest, Book XXI.-* A daughter, born after the emancipation of her father, requested her paternal uncle, as her heir-at-law, to give her share of the estate, and two tracts of land, in addition, to her maternal uncle. The succession of the said daughter passed equally to both of her uncles, as next of kin, through praetorian possession. As the trust was not valid with reference to that part of the estate to which her maternal uncle would be entitled as heir-at-law through praetorian possession, the question arose, whether it, nevertheless, would not be valid, as far as half of the said tract was concerned; so that the said Titius, her uncle, might have two shares of said tracts, that is to say, one of them through his right under Praetorian Law, and the other which he could claim by virtue of the trust. The answer was that he was entitled to make the claim.

The question was also asked, if the deceased daughter had also charged her paternal uncle with trusts for the benefit of others, whether he would be

§ 1.- Se propuso el caso de uno que no teniendo hijos ni cognados, hallándose por enfermedad en peligro de su vida, habiendo reunido a sus amigos, le dijo a su compañero Cayo Seyo, que quería dejarle los predios que hubiese nombrado, y que Cayo Seyo consignó por atestado estos dichos, habiendo sido también interrogado el mismo testador, sobre si dijo esto, y habiéndose insertado esta respuesta suya: perfectísimamente; se preguntó, si los predios que hubiesen sido designados le pertenecerían a Cayo Seyo por causa de fideicomiso. Respondió, que sobre esto no se ha de dudar que no sea válido el fideicomiso.

§ 2.- Uno había hecho herederas por partes iguales a dos hijas, y a una le había prelegado un fundo, y le había pedido que diese veinte a su hermana; le pidió a la misma hija que restituyese la mitad del fundo a la misma hermana; se preguntó, si no se deberían entregar los veinte. Respondí, que no se deben dar.

40.- EL MISMO; *Digesto, libro XXI.-* Una hija tenida después de la emancipación de su padre había pedido a su tío paterno, como a heredero legítimo, que le diese a su tío materno parte de la herencia y dos campos; pero a uno y a otro, como a próximos cognados, les correspondió por medio de la posesión de bienes la secesión de aquella; se preguntó, si, no habiendo subsistido el fideicomiso en cuanto a la parte de herencia, que por su propio derecho ha de tener el tío materno por medio de la posesión de los bienes, subsistirá, no obstante, en cuanto a la parte de los campos, de modo que Ticio tenga dos partes de los campos, esto es, una que por derecho propio tendrá por medio de la posesión de los bienes, y otra parte que debería pedir por causa de fideicomiso. Respondió, que podía pedir las.

El mismo preguntó, si, habiendo dado a cargo del mismo tío paterno un fideicomiso también para otros, se habían de entregar por él en su totalidad, o

praestari.

§ 1.- Seiam ex dodrante, Maevium ex quadrante instituit heredes, fidei Seiae commisit in haec verba: "A te peto tuaeque fidei committo, quidquid ex hereditate mea ad te pervenerit, restituas filio tuo retentis tibi hortis meis". Quaesitum est, cum generali capite fideicommississet "quisquis heres esset" de omnibus, ut praestarent quod cuique legasset praestari fieri iussisset, an, cum dodrantem hereditatis restituerit, hortos in assem vindicare Seia debet. Respondit etiam coheredis fidei commissum videri, ut quadrantem, quem in his hortis haberet, Seiae redderet.

41.- SCAEVOLA; *libro XXII, digestorum*.- Uxorem et filium communem heredes instituit et uxoris fidei commisit in haec verba: "Peto a te, domina uxor, ne ex fundo Titiano partem tibi vindices, cum scias me universam emptionem eius fundi fecisse, sed beneficio affectionis et pietatis, quam tibi debui, eandem emptionem, cum nummis meis comparassem, tecum communicasse": quaesitum est, an eum fundum in solidum filii esse voluerit. Respondit eum, de quo quaeretur, perinde rationem in fundo haberi voluisse ac si universus hereditarius esset, ut pro dimidia parte et uxor et filius agrum ut hereditarium habeant.

§ 1.- In testamento ita scriptum fuit: "Domum meam cum horto applicito libertis meis concedi volo" et alio capite: "Fortunio liberti meo ex domo mea, quam libertis dedi, diaetam, in qua habitabam, item cellarium iunctum eidem diaetae ab herede meo concedi volo". Quaesitum est, an heres testatoris oneratus videatur in praestando legato fortunio, quamvis domus universa libertis sit praelegata. Respondit non esse oneratum.

obliged to execute them altogether, or only in proportion to his share of the estate. The answer was that he would be obliged to execute them in their entirety.

§ 1.- A testator appointed Seia his heir to three-fourths of his estate, and Maevius his heir to one-fourth, and he charged Seia with a trust as follows: "I ask, and I charge you to deliver to your son everything that you obtained from my estate after reserving my gardens for yourself." Since he had charged her with a trust in general terms, the question arose whether anyone who would become his heir would be compelled to pay whatever legacies he had bequeathed, and execute whatever trusts he had created; or whether, if Seia should surrender three-fourths of the estate, she could claim all the gardens. The answer was that it appeared that the co-heir was charged by the trust to deliver to Seia the fourth interest which he had in said gardens.

41.- THE SAME; *Digest, Book XXII*.- A husband appointed his wife and a son whom he had by her, his heirs, and charged his wife with a trust as follows: "I ask you, my wife, not to claim any share in the Titian Estate, as you know that I myself bought all of said property, but on account of the affection and respect which I owe you, I have let it be understood that we had equal shares in this purchase which I made with my own money." The question arose whether he intended the said land to belong entirely to his son. The answer, with reference to the clause in question, was that the testator intended the said land to be included in his estate, as constituting a portion of all of it, so that his wife and son should each be entitled to half of the land as constituting part of the same.

§ 1.- Where the following provision was inserted in a will, "I wish my house, with the garden adjoining it, to be given to my freedmen," and under another head was written, "I wish my heir to transfer to my freedman Fortunius, in the house which I have given to my freedmen, the room in which I was accustomed to live, and the storeroom connected with the same," the question arose whether the heir of the testator was obliged to pay the legacy to Fortunius, although the entire house had been previously devised to all the freedmen. The answer was that he was not required to

en cuanto a su parte. Respondió, que se entregarían en su totalidad.

§ 1.- Uno instituyó herederos a Seia de tres cuartas partes, y a Mevio de la otra cuarta, y le encomendó a Seia un fideicomiso en estos términos: «te pido, y encomiendo a tu fidelidad, que todo lo que de mi herencia fuere a tu poder lo restituyas a tu hijo, habiendo retenido para tí mis huertos»; se preguntó, ¿habiendo hecho el fideicomiso en términos generales, para que, cualquiera que fuese heredero, de todo entregue lo que a cada uno hubiese legado, o hubiese mandado que se entregue o haga, debe Seia reivindicar por completo los huertos cuando hubiere restituido los tres cuartos de la herencia? Respondió, que también se considera encomendado a la fidelidad del coheredero, que restituya la cuarta parte que Seia tuviera en aquellos huertos.

41.- EL MISMO; *Digesto, libro XXII*.- Uno instituyó herederos a su mujer y al hijo común, y encomendó a su mujer un fideicomiso en estos términos: «te pido, señora mujer, que no reivindiques para tí una parte del fundo Ticiano, porque sabes que yo hice la total compra de este fundo, pero que por beneficio del afecto y de la piedad que te he debido, hice común contigo esta misma compra, habiendo yo comprado con mi dinero»; se preguntó, si habrá querido que este fundo sea íntegramente del hijo. Respondió, que este, respecto al cual se preguntaba, quiso que en cuanto al fundo se tuviese cuenta lo mismo que si todo él fuese hereditario, de suerte que así la mujer como el hijo tengan como hereditario el campo por mitad.

§ 1.- En un testamento se escribió así: «quiero que se les conceda a mis libertos mi casa con el huerto anejo», y en otro capítulo: «quiero que por mi heredero se le conceda a Fortunio, mi liberti, de aquella casa mía, que he dado a los libertos, la sala en que yo habitaba, y también la despensa unida a la misma sala»; se preguntó, si se considerará gravado el heredero del testador con haber de dar el legado a Fortunio, aunque toda la casa haya sido prelegada a los libertos. Respondió, que no estaba gravado.

§ 2.- Codicillis confirmatis ita cavit: "Omnibus autem libertis meis et quos vivus et quos his codicillis manumissi vel postea manumisero, contubernales suas, item filios filias lego, nisi si quos quasve ad uxorem meam testamento pertinere volui vel ei nominatim legavi legavero". Idem postea petiit ab heredibus suis, ut regionem Umbriae Tusciae Piceno coheredes uxori suae restituerent cum omnibus, quae ibi erunt, et mancipiis rusticis vel urbanis et actoribus exceptis manumissis. Quaesitum est, cum Eros et Stichus servi in diem vitae testatoris in Umbria in Piceno actum administraverint, sint autem damae, quem testator vivus manumiserat, filii naturales, utrum eidem damae ex verbis codicilli ab heredibus praestandi sint, an vero ad Seiam uxorem ex verbis epistulae pertineant. Respondit ex codicillis ad patrem eos naturalem pietatis intuitu pertinere.

§ 3.- Felicissimo et felicissimae, quibus libertatem dederat, fundum Gargilianum legavit cum casa, et alio capite Titio filio, quem ex parte quarta heredem scripserat, praelegaverat in haec verba: "Titi fili, hoc amplius de medio sumito legata mea, quae mihi tam pater tuus praesens quam coelius iustus frater patris reliquerunt". Quaesitum est, cum fundus Gargilianus testatrici a marito eius, id est a patre Titii filii legatus sit, cui fundus ex causa fideicommissi debeatur, utrum Titio filio tantum an felicissimo et felicissimae an tribus. Respondit non esse verisimile eam, quae nihil aliud felicissimo et felicissimae nisi haec quae specialiter legavit, ad filium, cui et hereditatis suae partem reliquit, legatum generali sermone transferre voluisse.

§ 4.- Testamento pueros ita legaverat: "Publio

do so.

§ 2.- A testator made the following provision in a codicil, which he confirmed by his will: "I bequeath to all my freedmen, including those whom I have manumitted during my lifetime, who are manumitted by this codicil, or whom I may hereafter manumit, and their wives, sons and daughters, except such as I have specifically bequeathed, to my wife by the terms of my will." He afterwards charged his heirs as follows: "I desire my heirs to give to my wife, their co-heir, my lands in Umbria, Etruria, and Picenum, together with all their appurtenances, including the country or city slaves, and those who transact my business, with the exception of such as have been manumitted." The question arose whether Eros and Stichus, his slaves who had transacted the business of the testator in Umbria and Picenum until the death of the latter, and who were the natural sons of Damas whom the testator had manumitted during his lifetime, should be delivered by the heirs to Damas, in compliance with the terms of the codicil, or whether they belonged to Seia, his wife, according to the terms of his letter. The answer was that, under the codicil, they belonged to their natural father, in conformity with the dictates of natural affection.

§ 3.- A testatrix left to Felicissimus and Felicissima, to whom she had granted freedom, the Gargilian Estate, including the house, and, in another part of her will, she bequeathed to her son Titius, whom she appointed heir to a fourth of her estate, a legacy, as follows: "My son, Titius, in addition to your share of my estate, take the legacies which your father, Praesens, and Caelius Justus, your father's brother, left me." The question arose, as the Gargilian Estate had been devised to the testatrix by her husband, that is to say, by the father of her son Titius to whom the land was due under the terms of the trust, whether the said land should belong only to Titius, the son, or to Felicissima, or to all three of them. The answer was that it was not probable that the testatrix, who left nothing to Felicissimus and Felicissima except what was contained in a special bequest, intended that the legacy should, by a general statement, be transferred to her son to whom she had also left a portion of her estate.

§ 4.- A man left certain slaves, who were children,

§ 2.- Uno dispuso así en codicilos confirmados «pero les lego a todos mis libertos, así a los que yo en vida, como a los que en estos codicilos, manumití, o a los que después manumitiere, sus compañeras, y también sus hijos e hijas, salvo si en mi testamento he querido que algunos o algunas le pertenezcan a mi mujer, o si determinadamente se los he legado, o se los legare». El mismo le pidió después a sus herederos, que los coherederos le restituyesen a su mujer la región de Umbria, de Tuscia, y de Piceno, con todo lo que allí hubiere, y con los esclavos rústicos o urbanos, y con los administradores, excepto los manumitidos; se preguntó, si, habiendo administrado los esclavos Eros y Stico en Umbria, y en Piceno, hasta el término de la vida del testador, pero siendo hijos naturales de Dama, a quien el testador había manumitido en vida, se le habrán de entregar por los herederos al mismo Dama en virtud de las palabras del codicilo, o si le pertenecerán a Seia, la mujer, en virtud de las palabras de la carta. Respondió, que ellos pertenecían en virtud del codicilo a su padre natural por consideración de piedad.

§ 3.- A Felicísimo y a Felicísima, a quienes les había dado la libertad, les legó una el fundo Gargiliano con su cabaña, y en otro capítulo le había hecho a su hijo Ticio, a quien había instituido heredero de la cuarta parte, un prelegado en estos términos: «hijo Ticio, además de esto retira de la masa mis legados, que me dejaron tanto tu padre presente, como Celio Justo, hermano de tu padre»; se preguntó, habiéndosele legado a la testadora el fundo Gargiliano por su marido, esto es, por el padre del hijo Ticio, ¿a quién se le deberá el fundo por causa del fideicomiso, al hijo Ticio solamente, a Felicísimo y a Felicísima, o a los tres? Respondió, que no era verosímil que ella, que ninguna otra cosa legó a Felicísimo y a Felicísima, sino ésta que especialmente les legó, hubiese querido transferir con esta cláusula general el legado al hijo, a quien le dejó también parte de su propia herencia.

§ 4.- Uno había legado en su testamento unos niños

Maevio dominulo meo ab heredibus meis dari volo pueros quinque ex meis dumtaxat intra annos septem": post annos complures, quam fecit testamentum, moritur. Quaesitum est, cuius aetatis Maevio mancipia debeantur, utrumne quae testamenti facti tempore intra septem annos fuerunt an quae mortis tempore intra eam aetatem inveniuntur. Respondit eam videri aetatem designatam, quae esset, cum a testatore relinquerentur.

§ 5.- Concubinae inter cetera his verbis legaverat: "Fundum in Appia cum vilico suo et contubernali eius et filiis dari volo": quaesitum est, an nepotes quoque vilici et contubernalis eius testator ad concubinam pertinere voluit. Respondit nihil proponi, cur non deberentur.

§ 6.- Legaverat per fideicommissum Maevis ita: "Et quidquid in patria gadibus possideo": quaesitum est, an, si quam suburbanam adiacentem possessionem haberet, haec quoque ex causa fideicommissi Maevis debeatur. Respondit posse ad hanc quoque verborum significationem extendi. Item quaesitum est, an, si calendarii, quod in patria sua vel intra fines eius defunctus exercuit, instrumenta in domo, quam in patria sua habebat, reliquit, an id quoque kalendarium propter verba supra scripta Maevis ex causa fideicommissi deberetur. Respondit non deberi.

Item quaesitum est, an pecunia, quae in arca domi gadibus inventa esset, vel ex diversis nominibus exacta et ibi deposita, ex fideicommisso debeatur. Respondit supra responsum.

§ 7.- Testamento, quo filium et uxorem heredes

by will as follows: "I wish five of my young slaves to be given by my heirs to my little lord Publius Mævius, the said slaves to be under the age of seven years." The testator died many years after he executed the will. The question arose of what age the slaves that were due to Mævius should be, whether they were those who, at the time when the will was made, were under seven, or whether those should be given who were ascertained to be under that age at the time of the death of the testator. The answer was that those seemed to be designated who were of that age when they were bequeathed by the testator.

§ 5.- A testator made a bequest to his concubine of the following legacy, among other things: "I wish the tract of land which I have on the Appian Way to be given to her, with the steward in charge of the same, and his wife and his children." The question arose whether the testator intended that the grandchildren of the steward and his wife should belong to the concubine. The answer was that there was nothing in the case stated which would prevent them being given to her.

§ 6.- A certain man left a legacy in trust to Mævius as follows: "I bequeath whatever I possess in the city of Gades." The question arose whether, if he had any property in the suburb adjoining the city, this also would be due to Mævius under the terms of the trust. The answer was that the meaning of the words will also permit this extension. It was also asked, in the same case, certain notes having been found in the account-book of the testator, he being in the habit of loaning money in his native city of Gades, or in the environs thereof, and having left the property which he had in said city, whether Mævius would be entitled to the said notes on account of a trust having been created by the words above mentioned. I answered that he would not be entitled to them.

The question also arose whether money found in a chest in his house at Gades, or which had been obtained by the collection of different notes and deposited there, would be due under the terms of the trust. The reply was that this question had already been answered.

§ 7.- A testator, by his will, in which he appointed

de este modo: «quiero que por mis herederos se den a Publio Mevio, mi señorito, cinco niños de los míos, solamente de los que estén dentro de los siete años», y muere después de muchos años de haber hecho el testamento; se preguntó, de qué edad se le deberán a Mevio los esclavos, si los que al tiempo de haberse hecho el testamento se hallaron dentro de los siete años, o los que dentro de esta edad se encuentren al tiempo de la muerte. Respondió, que se considera designada la edad que tuviesen cuando por el testador fueran dejados.

§ 5.- Entre otras cosas, uno le había hecho a su concubina un legado en estos términos: «quiero que se le dé el fundo de la vía Appia con su granjero, con su compañera y con los hijos»; se preguntó, si quiso el testador que le pertenecieran a su concubina también los nietos del granjero y de su compañera. Respondió, que nada se exponía, para que no se le debiesen.

§ 6.-Uno le había hecho por fideicomiso un legado a los Mevios en estos términos: «y todo lo que poseo en Cádiz, mi patria»; se preguntó, si, teniendo una posesión suburbana adyacente, también ésta se les debería a los Mevios por causa del fideicomiso. Respondió, que también a ésta se podía extender la significación de las palabras. Igualmente se preguntó, si, habiendo dejado en la casa que tenía en su patria los documentos del libro de cuentas que el difunto llevó en su patria, o dentro de sus confines, se le debería también a los Mevios este libro de cuentas por causa del fideicomiso en virtud de las sobredichas palabras. Respondió, que no se debía.

Asimismo se preguntó, si el dinero que se hubiere encontrado en caja en la casa de Cádiz, o que de varios créditos se hubiese cobrado y allí depositado, sería debido en virtud del fideicomiso. Respondió lo que antes se respondió.

§ 7.- En el testamento en que había instituido

instituerat, filiae per fideicommissum centum, cum in familia nuberet, legavit et adiecit ita: "Fidei tuae, filia, committo, ut, cum in familia nubas et quotienscumque nubes, patiaris ex dote tua, quam dabis, partem dimidiam stipulari fratrem tuum et Seiam matrem tuam pro partibus dimidiis dari sibi, si in matrimonio eius cui nubes sive divortio facto, priusquam dos tua reddatur eove nomine satisfactum erit, morieris nullo filio filiave ex eo relicto".

Pater virginem filiam nuptum collocavit eiusque nomine dotem dedit et post divortium eandem recepit et alii in matrimonium cum dote dedit et stipulatus est eam dotem sibi aut filiae suae reddi: manente filia in matrimonio secundo mortuus est eodem testamento relicto eique heredes exstiterunt filius et uxor: postea marito defuncto puella dote recepta nupsit alii praesentibus et consentientibus fratre et matre, quae etiam dotem eius auxit, et neuter eorum stipulati sunt dotem: mox matri filius et filia heredes exstiterunt: deinde in matrimonio filia decessit marito herede relicto. Quaesitum est, cum puella non ex causa legati pecuniam in dotem ab heredibus patris acceperat, sed mortuo secundo marito mater familias facta dotem recipaverat, an heres eius ex causa fideicommissi fratri defunctae teneatur in eam pecuniam, quam percipere posset, si dotem stipulatus esset. Respondit secundum ea quae proponerentur non teneri.

§ 8.- Eius heres vel legatarius rogatus est, ut quemdam adoptet, his verbis adiectis: "Si alias fecerit, exheres esto" vel "perdat legatum". Quaesitum est, si non adoptaverit, an ei qui adoptatus non est actio quaedam ex fideicommisso competit. Respondit fideicommissum, quo quis rogatur ut adoptet, ratum non esse.

his wife and his son his heirs, left a hundred aurei to his daughter in trust, to be paid when she married in the family, and he added the following provision: "I charge you, my daughter, when you marry in the family, and as often as you may marry, to permit your brother, and your mother Seia, each to stipulate for the return of half of the dowry which will be bestowed, if you should die during your marriage without leaving either a son or a daughter, or a divorce should take place before your dowry is returned, or satisfaction is otherwise given you with reference to it."

The father gave his daughter, who was a virgin, in marriage, and presented her with a dowry. A divorce having taken place, he received the dowry, and gave her with it in marriage to another man, stipulating that the said dowry should be returned either to himself or to his daughter. The testator died during her second marriage, leaving the same will, and his son and wife became his heirs. The husband of the girl having subsequently died, she obtained her dowry, and married a third time in the presence, and with the consent of her brother and mother, who even increased her dowry, and neither of them made any stipulation with reference to it. The son and the daughter afterwards became the heirs of their mother, and then the daughter died, leaving her husband her heir. The question arose, as the girl had not received the money composing her dowry as a legacy from the heirs of her father, but, being the mother of a family, had recovered it after the death of her second husband, whether her heir could be held liable to the brother of the deceased, under the terms of the trust, for the money which he could have received if he had made a stipulation with reference to the dowry. The answer was that, according to the case stated, he would not be liable.

§ 8.- Where the heir or legatee of a testator is requested to adopt someone, and the following words are added, "If he should do otherwise, let him be disinherited," or, "Let him lose his legacy," the question arose, if he should not adopt the person mentioned, whether an action would lie by virtue of the trust in favor of the person who was not adopted. The answer was that a trust by which a party is requested to adopt anyone is not valid.

herederos a su hijo y a su mujer, le legó uno por fideicomiso ciento a su hija, cuando se casase en la familia, y añadió de este modo: «encomiendo, hija, a tu fidelidad, que cuando te cases en la familia y cuantas veces te cases, consientas que de tu dote, que darás, estipulen tu hermano y tu madre Seya que se les dé la mitad por medias partes, si murieres en el matrimonio de aquel con quien te casares, o habiéndose hecho el divorcio, antes que se devuelva tu dote, o si se hubiere pagado por este título, no habiendo dejado de él ningún hijo o hija.

El padre colocó en matrimonio a su hija doncella, y en nombre de ella dió la dote, y después del divorcio la recobró, y a aquella se la dió en matrimonio a otro con la dote, y estipuló que esta dote se le devolviese a él, o a su hija; permaneciendo la hija en su segundo matrimonio falleció él habiendo dejado el mismo testamento, y quedaron herederos de él el hijo y la mujer; después, habiendo fallecido el marido, la joven, recibida la dote, se casó con otro, hallándose presentes y consintiéndolo el hermano y la madre, la cual le aumentó también su dote, y ninguno de los dos estipuló la dote; a poco quedaron herederos de la madre el hijo y la hija, y después murió la hija en el matrimonio habiendo dejado heredero a su marido; se preguntó, si, no habiendo recibido la joven de los herederos del padre por causa del legado el dinero dado en dote, pero habiendo recuperado la dote muerto su segundo marido hecha madre de familia, estará obligado por causa del fideicomiso su heredero a favor del hermano de la difunta por aquel dinero que había podido percibir si hubiese estipulado la dote. Respondió, que, según lo que se exponía, no estaba obligado.

§ 8.- Se le rogó al heredero o al legatario de uno que adoptase a alguien, habiéndose añadido estas palabras: «si de otra manera obrare, quede desheredado» o, «pierda el legado»; y se preguntó, si no lo hubiere adoptado, ¿le competirá al que no fue adoptado alguna acción en virtud del fideicomiso? Respondió, que no era válido el fideicomiso en que se le ruega a uno que adopte a otro.

§ 9.- "Agri plagam, quae est in regione illa, Maevius Publio et Gaio transcribi volo, pretio facto viri boni arbitrato et hereditati illato, duplae evictione expromissa reliquis heredibus, ita ut sub poena centum promittant eam agri plagam partemve eius ad Seium posterosve eius non perventuram quaquam ratione". Quaesitum est, an legatum valeat, cum Publius emere velit, Gaius nolit. Respondit eum, qui fideicommissum praestari sibi velit, posse partem dimidiam eius agri qui legatus est petere, quamvis alter persequi nolit.

Item quaesitum est, cautio, quae interponi debeat, secundum voluntatem, pro quota parte cuique heredum praestanda sit. Respondit pro ea portione, quae ex fideicommisso praestatur.

§ 10.- Sorori legavit homines quos nominavit testamento eiusque fidei commisit, ut eadem mancipia filiis suis cum obiret restitueret. Quaesitum est, adgnata ex his an defuncti filii heredibus restituenda sint post mortem legatariae an remaneant apud heredes eius. Respondit ea, quae postea adgnata essent, verbis fideicommissi non contineri.

§ 11.- Pater naturalis filiae suae ex testamento mariti eius fideicommissi debitor, cum ea mulier alii nuberet, non mandatu mulieris dotem marito eius dedit et sibi reddi eam stipulatus est, si sine liberis filia moreretur: mulier filiam suscepit: quaesitum est, an fideicommissum a patre exigere possit. Respondit, si nec ratam habuisset dotem datam, superesse fideicommissi petitionem.

Idem quaesivit, an si pater accepto facere stipulationem velit, mulieri persecutio fideicommissorum deneganda sit. Respondit supra

§ 9.- "I wish the tract of land which is situated in such-and-such a district to be transferred to Mævius, Publius, and Gaius for a price fixed by an arbiter, and, the purchase-money having been added to my estate, that my remaining heirs shall promise, under the penalty of a hundred aurei, to be liable for double the amount in case of eviction, in order that the said land may not either wholly, or in part, ever pass into the hands of Seia, or her descendants, in any way whatsoever." The question arose whether the legacy was valid, because Publius wished to purchase it, and Gaius refused to consent. The answer was that he who wished to profit by the trust could claim half of the land which was devised, even though the other declined to avail himself of his right.

Inquiry was also made as to what security ought to be furnished, in accordance with the will of the testator, for the amount to be paid to each of the heirs. The answer was that security should be given in proportion to the share to which they were entitled under the terms of the trust.

§ 10.- A testator bequeathed to his sister certain slaves whom he designated in his will, and charged her to deliver the same slaves to his children when she died. The question arose whether the children born of said slaves should be delivered to the children who were the heirs of the deceased, after the death of the legatee, or whether they would belong to her heirs. The answer was that those which were born afterwards were not included in the terms of the trust.

§ 11.- A father owed his daughter a certain sum of money under a trust created by the will of her husband, and, when the girl married again, her father gave a dowry to her husband without having been directed to do so by her, and stipulated for the return of the dowry to himself, if his daughter should die without issue. The woman had a daughter, and the question arose whether the father could be required to execute the trust. The answer was that if the daughter had not ratified the dowry which was given her, the right to demand the execution of the trust would survive.

Inquiry was also made, if the father should be willing to release the obligation arising out of the stipulation, whether the right to demand the

§ 9.- «Quiero que se les transfiera a los Mevios, Publio y Cayo, la extensión de campo que se halla en aquella región, habiéndose fijado el precio a arbitrio de hombre bueno, y habiéndose ingresado en la herencia, prometiéndose por los demás herederos la evicción del duplo, de suerte que prometan bajo la pena de ciento que aquella extensión de campo o parte de la misma no habrá de ir por razón alguna a Seia o a sus sucesores» y se preguntó, si será válido el legado cuando Publio quiera comprar, y Cayo no quiera. Respondió, que el que quiera que a él se le entregue el fideicomiso puede pedir la mitad de aquel campo, que fue legado, aunque el otro no quiera reclamarla.

Asimismo se preguntó, por qué parte se le había de prestar a cada uno de los herederos la caución, que se deberá interponer conforme a la disposición. Respondió, que con arreglo a la porción que se entrega en virtud del fideicomiso.

§ 10.- Uno le legó a su hermana los esclavos, que nombró en el testamento, y encomendó a su fidelidad, que cuando muriese restituyera los mismos esclavos a sus propios hijos; se preguntó, si después de la muerte de la legataria se le habrán de restituir a los hijos herederos del difunto los nacidos de aquellos, o si quedarán en poder de los herederos del mismo. Respondió, que los que después hubiesen nacido no estaban comprendidos en las palabras del fideicomiso.

§ 11.- Un padre natural, deudor a su hija de un fideicomiso en virtud del testamento del marido de aquella, al casarse esta mujer con otro le dió a su marido la dote sin mandato de la mujer, y estipuló que a él le fuese devuelta, si su hija muriese sin hijos; la mujer tuvo una hija; se preguntó, si podría exigirle al padre el fideicomiso. Respondió, que si no hubiese ratificado la dote dada, subsistía la petición del fideicomiso.

El mismo preguntó, si queriendo el padre dar por recibida la estipulación se le habrá de denegar a la mujer la reclamación de los fideicomisos. Respondió

responsum, eumque patrem, de quo quaereretur, si ita dedisset, ut mulier ratum haberet, posse condicere.

§ 12.- Seium maritum scripsit heredem eique substituit Appiam alumnam fideique heredis commisit, ut post mortem suam hereditatem eidem alumnae restitueret aut, si quid ante contigisset alumnae, tunc Valeriano fratris filio restitueret eandem hereditatem. Quaesitum est, si Seius vivus, quidquid ad eum ex hereditate pervenisset, alumnae restituisset, an secundum voluntatem defunctae id fecisse videretur: praesertim cum haec idem substituta esset. Respondit, si vivo Seio Appia decessisset, non esse liberatum a fideicommisso Valeriano relicto.

§ 13.- Scaevola respondit: cum heres scriptus rogatus esset, cum volet, alii restituere hereditatem, interim non est compellendus ad fideicommissum. Claudius: post mortem enim utique creditur datum.

§ 14.- Heredis scripti fidei commiserat, ut Seiae uxori universam restitueret hereditatem et uxoris fidei commisit in haec verba: "A te, Seia, peto, ut quidquid ad te ex hereditate mea pervenerit, exceptis his, si qua tibi supra legavi, reliquum omne reddas restituas Maeviae infanti dulcissimae. A qua Seia satis exigi veto, cum sciam eam potius rem aucturam quam detrimento futuram". Quaesitum est, an statim Maevia fideicommissum a Seia petere possit. Respondit nihil proponi, cur non possit.

42.- SCAEVOLA; *libro XXXIII, digestorum.*- Titius heredes instituit Seiam uxorem ex parte duodecima, Maeviam ex reliquis partibus et de monumento quod sibi exstrui volebat, ita cavuit: "Corpus meum uxori meae volo tradi sepeliendum in fundo illo et monumentum exstrui usque ad quadringentos aureos". Quaero, cum in duodecima

execution of the trust would be denied to the woman. I replied that this had already been answered, and if the father had given the dowry in order that the woman might sanction it, and she did not do so, he could bring suit to recover the dowry in question.

§ 12.- A woman appointed her husband Seius, her heir, and substituted her foster-child, Apia, for him; and charged her heir to transfer her estate to her said foster-child after his death, and if anything should happen to her foster-child before that time, she directed him to deliver her said estate to Valerian, her nephew. The question arose, if Seius, during his lifetime, should deliver to the foster-child whatever he had obtained from the estate, whether he would be held to have done this in accordance with the will of the deceased; especially when the said foster-child had been substituted for him. The answer was that, if Apia should die during the lifetime of Seius, the latter would not be released from the execution of the trust which had been left for the benefit of Valerian.

§ 13.- Scævola held that when an appointed heir is asked to deliver an estate to another person, when he wishes to do so, he will not be compelled, in the meantime, to execute the trust. Claudius: For a trust of this kind is considered to have been created after his death.

§ 14.- A testator requested his appointed heir to deliver his entire estate to his wife, Seia, and charged her as follows: "I ask you, Seia, to deliver to Mævia, our dear child, everything which may come into your hands from my estate, except what I have bequeathed to you as above mentioned; and I forbid any security to be taken from Seia, as I know that she will rather increase, than diminish my estate." The question arose whether Mævia could immediately demand the execution of the trust by Seia. The answer was that there was nothing in the case stated which would prevent her from doing so.

42.- THE SAME; *Digest, Book XXXIII.*- Titius appointed his wife, Seia, his heir to a twelfth part of his estate, and Mævius his heir to the remainder, and made the following provision with reference to a monument which he wished to be erected for himself: "I desire my body to be delivered to my wife to be buried in such-and-such a place, and a

lo que antes se respondió, y que este padre, respecto del que se pregunta, podía reclamar por la condición, si hubiese dado de modo que la hija lo ratificase.

§ 12.- Una instituyó heredero a Seyo, su marido, y le substituyó a éste su alumna Appia, y encomendó a la fidelidad del heredero, que después de su muerte le restituyese la herencia a la misma alumna, o que si antes hubiese fallecido la alumna, en este caso le restituyese la misma herencia a Valeriano, hijo de su hermano; se preguntó, si habiendo restituido en vida Seyo a la alumna todo lo que de la herencia hubiese ido a él, se consideraría que esto lo hizo conforme a la voluntad de la difunta, mayormente habiendo sido ésta substituida al mismo. Respondió, que si Appia hubiese fallecido viviendo Seyo, no quedó libre del fideicomiso dejado a Valeriano.

§ 13.- Scévola respondió: cuando al heredero instituido se le hubiese rogado que cuando quiera restituya a otro la herencia, no ha de ser compelido mientras tanto al fideicomiso. Y dice Claudio: porque se cree que solamente fue dado para después de su muerte.

§ 14.- Uno había encomendado a la fidelidad del heredero instituido, que le restituyese toda la herencia a Seya, su mujer, y le encargó a su mujer un fideicomiso en estos términos: «te pido, Seya, que de cuanto de mi herencia hubiere llegado a tí, excepto si algo te he legado arriba, todo lo restante lo restituyas a Mevia, cariñosísima niña. A la cual, Seya, prohibió que se le exija fianza, porque sé que ella más bien aumentará los bienes, que no les causará quebranto»; se preguntó, si desde luego podría Mevia pedirle el fideicomiso a Seya. Respondió, que nada se exponía para que no pudiera.

42.- EL MISMO; *Digesto, libro XXXIII.*- Ticio instituyó herederas de una duodécima parte a Seya, su mujer, y de las restantes partes a Mevia, y respecto al monumento, que quería que a él se le levantara, dispuso de este modo: «quiero que a mi mujer se le entregue mi cuerpo para que sea enterrado en tal fundo, y que se erija un monumento invirtiéndose

parte non amplius quam centum quinquaginta aurei ex bonis mariti ad uxorem perveniant, an hac scriptura ab ea sola monumentum sibi testator exstrui voluerit. Respondi ab utraque herede monumentum pro hereditariis portionibus instruendum.

43.- CELSUS; *libro XV, digestorum*.- Si filiae pater dotem arbitratu tutorum dari iussisset, Tubero perinde hoc habendum ait ac si viri boni arbitratu legatum sit. Labeo quaerit, quemadmodum apparet, quantam dotem cuiusque filiae boni viri arbitratu constitui oportet: ait id non esse difficile ex dignitate, ex facultatibus, ex numero liberorum testamentum facientis aestimare.

44.- POMPONIUS; *libro II, ad Sabinum*.- Si fundus legatus sit cum his quae ibi erunt, quae ad tempus ibi sunt non videntur legata: et ideo pecuniae, quae faenerandi causa ibi fuerunt, non sunt legatae.

45.- ULPIANUS; *libro XXII, ad Sabinum*.- Hoc legatum "uxoris causa parata" generale est et continet tam vestem quam argentum aurum ornamenta ceteraque, quae uxoris gratia parantur. Sed quae videantur uxoris causa parari? Sabinus libris ad Vitellium ita scripsit: quod in usu frequentissime versatur, ut in legatis uxoris adiciatur "quod eius causa parata sint", hanc interpretationem optinuit, quod magis uxoris causa quam communis promiscuique usus causa paratum foret. Neque interesse visum est, ante ductam uxorem id pater familias paravisset an postea an etiam ex his rebus quibus ipse uti soleret uxori aliquid adsignavisset, dum id mulieris usibus proprie adtributum esset.

monument of the value of four hundred aurei to be erected." The wife obtained as the twelfth part of the estate not more than a hundred and fifty aurei, and I ask whether the testator, by this provision, intended that his monument should be erected by her alone. I answered that the monument should be erected by both the heirs, in proportion to their respective shares of the estate.

43.- CELSUS; *Digest, Book XV*.- Where a father ordered a dowry to be given to his daughter, to be fixed by the judgment of her guardian, Tubero says that this should be considered just as if the dowry had been bequeathed to her to the amount which would be approved of by a reputable citizen. Labeo asks in what way a dowry can be fixed for a girl in accordance with the judgment of a good citizen. He says that this is not difficult when the rank, the means, and the number of children of the party who made the will are taken into account.

44.- POMPONIUS; *On Sabinus, Book II*.- Where a tract of land with everything upon it is devised, any property that is there only temporarily is not held to have been left, and therefore money which is there for the purpose of being loaned is not included in the legacy.

45.- ULPIANUS; *On Sabinus, Book XXII*.- A legacy expressed in the following words, "Which I have procured for the use of my wife," is a general one, and includes clothing as well as silver and gold plate, ornaments, and all the other things which are obtained for the benefit of the wife. But what articles should be considered to have been obtained for this purpose? Sabinus, in his work on Vitellius, says upon this point, that whatever terms are most frequently employed in making bequests to wives should be understood as designating whatever is intended for her individual use, and is, more frequently acquired for this purpose than for the common and promiscuous use of both parties. Nor does it appear to make any difference whether the head of the household obtained such articles before his marriage, or afterwards; or even if he should give anything to his wife which he himself had been accustomed to

hasta cuatrocientos áureos»; pregunto, si, no pasando a la mujer de los bienes del marido en cuanto a la duodécima parte más de ciento cincuenta áureos, habrá querido el testador con esta cláusula que por ella sola se le erija el monumento. Respondí, que el monumento ha de ser erigido por ambas herederas con arreglo a sus porciones de la herencia.

43.- CELSO; *Digesto, libro V*.- Si el padre hubiese mandado que a la hija se le diera la dote a arbitrio de los tutores, dice Tuberón, que esto se ha de considerar lo mismo que si se hubiera hecho un legado a arbitrio de hombre bueno. Labeón pregunta, ¿de qué manera aparece cuánta dote se le debe constituir por arbitrio de hombre bueno a la hija de cualquiera? Y dice, que no es difícil estimar esto atendiendo a la dignidad, a las facultades y al número de hijos del que hace el testamento.

44.- POMPONIO; *Comentarios a Sabino, libro II*.- Si se hubiera legado un fundo con lo que en él hubiere, no se consideran legadas las cosas que en él están temporalmente; y por lo tanto, no fueron legados los dineros que en él se hallaron para ser dados a interés.

45.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Este legado: «las cosas preparadas para mi mujer», es general, y comprende tanto el vestido, como la plata, el oro, y los demás adornos que se preparan por causa de la mujer. Pero ¿qué se considera que se prepara por causa de la mujer? Sabino escribió así en sus libros de Comentarios a Vitelo: lo que es de uso muy frecuente, que se agregue a los legados de la mujer lo que por causa de ésta se preparó, obtuvo esta interpretación, que se haya preparado más bien por causa de la mujer, que no por causa de uso común y promiscuo; y no pareció que había diferencia, si el padre de familia lo hubiese preparado antes de haber tomado mujer, o después, o aun si le hubiese asignado a la mujer alguna cosa de las que él mismo soliese usar, con tal que propiamente hubiese sido atribuido para los usos de la mujer;

46.- PAULUS; *libro II, ad Vitellium*.- Ea tamen adiectio legatum alias exiguius, alias plenius efficit. Augetur, cum sic scriptum est: "quaeque eius causa parata sunt": id enim significat et si quid praeter ea quae dicta sunt eius causa paratum est: minuitur detracta coniunctione, quia ex omnibus supra comprehensis ea sola definiuntur, quae eius causa parata sunt.

47.- ULPIANUS; *libro XXII, ad Sabinum*.- Si quid earum rerum ante comparavit quam uxorem duxit, si id ei ut uteretur tradidit, perinde est, quasi postea paravisset. Ex eo autem legato ea pertinent ad uxorem, quae eius causa empta comparata quaeque retenta sunt: in quibus etiam quae prioris uxoris quaeque filiae neptis vel nurus fuerunt continentur.

§ 1.- Inter emptum et paratum quid interest, quaeritur: et responsum est in empto paratum inesse, in parato non continuo emptum contineri: veluti si quis quae prioris uxoris causa emisset, posteriori uxori tradidisset, eas res eum posterioris uxoris causa paravisset, non emisse constat. Ideoque quamvis maritus posterioris uxoris causa nihil emerit, tamen tradendo quae prior habuerit, eius causa parata sunt. Etsi ei adsignata non sunt, legato cedunt: at quae prioris uxoris causa parata sunt, ita posteriori debentur, si ei adsignata sint, quia non est ita de posteriore uxore cogitatum, cum compararentur.

48.- PAULUS; *libro IV, ad Sabinum*.- Nam ne id quidem quod traditum est, si postea ademptum sit, legato cedet.

use, and then devoted it to her special use.

46.- PAULUS; *On Vitellius, Book II*.- The addition of the clause above mentioned sometimes diminishes, and sometimes increases the legacy; it increases it when it is written as follows, "And whatever has been acquired on her account," for this signifies that something else has been acquired for her benefit in addition to what has already been mentioned. It is diminished when the conjunction "and" is omitted, because, then it signifies that those things alone of all the articles previously designated have been procured for her benefit.

47.- ULPIANUS; *On Sabinus, Book XXII*.- If the husband purchased some of these articles before he married his wife, and gave them to her for her use, it is the same as if he had obtained them with this intention afterwards. In a legacy of this kind, those articles belong to the wife which have been purchased, repaired, and retained for that purpose, and among them are included whatever belonged to a former wife, or the daughter, or granddaughter of the testator.

§ 1.- The question arises as to what difference exists between the terms "purchased" and "prepared." The answer is that the term "prepared" is included in the term "purchased," but this is not the case with the term "prepared," just as if anyone had purchased an article for the use of his first wife, and gave it to his second, for while the said article was prepared for his second wife, it was not purchased for her. Hence, even though a husband might not have purchased anything for his second wife, still, by giving her the articles which the first one had they are prepared for her use, and if they had not been transferred to her, they would be included in the legacy; but whatever was prepared for the use of the first wife will only belong to the second where they have been designated for her use, because where the husband obtained them for his first wife, he is not held to have done so with a second wife in view.

48.- PAULUS; *On Sabinus, Book IV*.- For no article is included in the legacy if, when it has been given to the wife, she is afterwards deprived of it by

46.- PAULO; *Comentarios a Vitelio, libro II*.- pero esta adición unas veces hará más pequeño el legado, y otras mayor; se aumentará, cuando se escribió de este modo: «y lo que se preparó por causa de ella»; porque significa esto: y, si además de lo que se ha dicho, se preparó algo por causa de ella; se disminuye, suprimida la condición, porque de todas las cosas antes comprendidas se definen aquellas solas que por causa de ella fueron preparadas.

47.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Si uno preparó alguna de estas cosas antes de tomar mujer, si se la entregó a ella para que la usase, es lo mismo que si la hubiese preparado después. Mas en virtud de este legado le pertenecen a la mujer aquellas cosas que por causa de ello se compraron y se adquirieron, y los que se retuvieron; entre las que se comprenden también las que fueron de la primera mujer, y las que de la hija, de la nieta, o de la nuera.

§ 1.- Se pregunta, qué diferencia hay entre comprado y preparado. Y se respondió, que en lo comprado está lo preparado, pero que en lo preparado no siempre se contiene lo comprado; por ejemplo, si alguno hubiese entregado a su segunda mujer lo que hubiese comprado por causa de la primera mujer, es claro que él preparó estas cosas por causa de la segunda mujer, no que las compró. Y por lo tanto, aunque el marido no hubiere comprado nada por causa de la segunda mujer, no obstante, entregando las que la primera hubiere tenido, se considera que las preparó por causa de aquélla; porque las que se prepararon por causa de la segunda mujer, ceden el legado, aunque no se le hayan asignado a ella; mas las que fueron preparadas por causa de la primera mujer, se le deben a la segunda en este caso, si a ella se le hubieran asignado, porque en este caso no se pensó en la segunda mujer cuando se prepararon;

48.- PAULO; *Comentarios a Sabino, libro IV*.- porque tampoco ciertamente cederá al legado lo que se entregó, si se hubiera quitado después.

her husband.

49.- ULPIANUS; *libro XXII, ad Sabinum*.- Item legato continentur mancipia, puta lecticarii, qui solam matrem familias portabant. Item iumenta vel lectica vel sella vel burdones. Item mancipia alia, puellae fortassis, quas sibi comatas mulieres exornant.

§ 1.- Sed et si forte virilia ei quaedam donaverit, quodammodo eius causa parata videbuntur.

§ 2.- Proinde et si quaedam promiscui usus sint, solitus tamen fuerit ab ea quasi usum mutuari, dicendum erit ipsius causa videri parata.

§ 3.- Item interest, ipsius causa parata sint ei legata an ipsius causa empta: paratis enim omnia continentur, quae ipsius usibus fuerunt destinata, empta vero ea sola, quae propter eam empta fecit maritus. Unde non continebuntur emptis solis legatis, quae alia ratione pater familias adquisita ei destinavit: utroque autem legato continebuntur et quae maritus emi mandaverat vel quae emerat, necdum autem ei adsignaverat, adsignaturus si vixisset.

§ 4.- Parvi autem refert, uxori an concubinae quis leget, quae eius causa empta parata sunt: sane enim nisi dignitate nihil interest.

§ 5.- Si uxori aurum, quod eius causa paratum est, legatum sit et postea sit conflatum, materia tamen maneat, ea ei debetur.

§ 6.- Sed ut legatum valeat, mortis tempore uxorem esse debere Proculus scripsit et verum est: separatio enim dissolvit legatum.

§ 7.- Hoc legatum et filio et filiae relinqui potest:

49.- ULPIANUS; *On Sabinus, Book XXII*.- Slaves are also included in a legacy of this kind, for instance litter-bearers, who usually carried the mother of the family alone, and also beasts of burden, sedan chairs, and mules, as well as other slaves, such as girls and women employed as hair dressers.

§ 1.- If the husband should have given his wife any ornaments worn by men, they will be considered as having been acquired for her use.

§ 2.- Hence, if there were any articles used by both husband and wife, and he was accustomed to borrow them from her, as it were, it must be said they also should be considered as acquired for her use.

§ 3.- There is likewise a difference between articles which have been prepared for her use and such as were purchased for her, when such articles are bequeathed; for where they are prepared for her use, all that have been intended for her are included, but where they have been purchased, those alone are included which the husband bought for that special purpose; therefore where only the articles which have been purchased are bequeathed, those which were obtained in any other way by the husband, and which he destined for her, are not included. Still, whatever the husband directed to be purchased or which he himself actually bought and did not yet give to his wife, but intended to give to her if she had lived, will be embraced in the legacy under both these terms.

§ 4.- Where anyone bequeaths a legacy to his wife or his concubine, composed of articles which had been purchased and prepared for her use, no distinction is made; for, in fact, no difference exists between the two women except that of social rank.

§ 5.- Where gold obtained for her use is bequeathed by a husband to his wife, and it afterwards is melted, but the material still remains, she will be entitled to it.

§ 6.- But, in order for the legacy to be valid, Proculus says that the woman must be the wife of the testator at the time of his death. This is true, for a separation will extinguish the legacy.

§ 7.- The bequest of articles acquired for his or her

49.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Asimismo se comprenden en el legado los esclavos, por ejemplo, los mozos de litera, que sólo llevaban a la madre de familia, también las cabañerías, o las literas, o las sillas, o los mulos; e igualmente otros esclavos, acaso las jóvenes, a las que distinguen las mujeres como camareras suyas.

§ 1.- Pero también si acaso le hubiere donado a ella algunas cosas propias de hombres, se considerarán en cierto modo preparadas por causa de ella.

§ 2.- Por consiguiente, también si algunas cosas fueran de uso promiscuo, pero él hubiere solido tomarlas de ella en mutuo como para usarlas, se habrá de decir que se consideran preparadas por causa de la misma.

§ 3.- También interesa saber, si las cosas a ella legadas hayan sido preparadas por causa de la misma, o compradas por causa de ella; porque en las preparadas se comprenden todas las que fueron destinadas a los usos de ella misma, pero compradas son aquellas solas de que el marido hizo compra por causa de ella. Por lo cual, legadas solas las compradas, no se comprenderán las que adquiridas por otra razón destinó para ella el padre de familia; pero en uno y en otro legado se contendrán también las que el marido había mandado que se comprasen, o las que había comprado, aunque todavía no se las había asignado a ella, pero que se las habría asignado, si hubiese vivido.

§ 4.- Pero poco importa, que uno le legue a su mujer, o a su concubina, las cosas que por causa de ella se compraron o se prepararon; porque, a la verdad, a no ser en la dignidad, no hay ninguna diferencia.

§ 5.- Si a la mujer se le hubiera legado el oro que por causa de ella se preparó, y después hubiera sido fundido, pero quedara la materia, se le debe ésta.

§ 6.- Pero Próculo escribió, que para que valga el legado debe ser mujer casada al tiempo de la muerte; y es verdad, porque la separación extingue el legado.

§ 7.- Así al hijo, como a la hija se le puede dejar este

"quae eius gratia parata sunt", et servo servaeque: et continebuntur quae ipsi sunt adtributa vel destinata.

50.- ULPIANUS; *libro XXIII, ad Sabinum*.- Cum filio familias ita legatur: "cum is in tutelam suam pervenerit", pubertatis tempus significatur. Et sane si impuberi filio familias legatum sit, plerumque sentiendum est, quod sabinus ait, ut non et pater familias fiat, sed ut pubes. Ceterum si mater, quae suspectam habuit mariti a quo divorterat vitam, filio suo quamvis impuberi leget, non videtur sensisse de eo tempore, quo pubes est, sed eo, quo et pubes et pater familias est (nam et si pubes fuit, multo magis dicemus de patre familias eam sensisse), ac si dixisset "in suam tutelam et in suam potestatem".

§ 1.- Quod si quis patri familias impuberi leget, cum suae tutelae sit, de pubertate sensit, interdum et de viginti quinque annis, si mens testantis appareat. Nam si iam puberi, minori tamen viginti quinque annis legavit, procul dubio anni viginti quinque erunt praestituti.

§ 2.- Item si furioso vel prodigo vel ei, cui praetor ex causa curatorem dedit, ita sit legatum, puto et de eo sensum casu, quo curae et tutelae liberetur.

§ 3.- Ex his et huiusmodi apparet voluntatis quaestionem sabinum interpretatum: et utique non dubitaret, si puberi et multo magis maiori viginti

use can also be left to a son or a daughter, as well as to a male or female slave; and there will be included therein any property which may have been given to them, or intended for them.

50.- THE SAME; *On Sabinus, Book XXIII*.- Where a son under paternal control bequeaths a legacy, "When he will be his own guardian," the age of puberty is meant. And, in fact, if a legacy is bequeathed to a son under paternal control who has not reached the age of puberty, the opinion of Sabinus and the one generally adopted is that this means not when he becomes the head of a household, but when he arrives at the age of puberty. However, if a mother, who is suspicious of the life which her husband is leading, and from whom she has been divorced, should bequeath a legacy to her son, even though he may not have reached the age of puberty; she is understood to have had in view not the time when he shall have reached that age, but the time when he shall both have reached that age, and have become the head of a household. For if he should arrive at puberty afterwards, we can say much more decisively that she had in mind the time when he should become the head of a household, than if she had said: "When he will be his own guardian, and has control over himself."

§ 1.- If anyone should bequeath a legacy to the head of a household, who has not yet reached the age of puberty, "When he shall be his own guardian," he is considered to have had in mind the age of puberty. Sometimes this has reference to the age of twenty-five years, where the intention of the testator is apparent. If, however, he should make a bequest to a person who is over the age of puberty, but under twenty-five, there is no doubt that he had in mind the age of twenty-five.

§ 2.- Likewise, if a bequest is made to a lunatic, a spendthrift, or a person for whom the Praetor has appointed a guardian, for some reason or other, I think that the testator should be considered to have had in view the time when the party in question would be released from curatorship or guardianship.

§ 3.- From these instances and others of the same kind, it becomes evident that Sabinus was of the opinion that the intention of the testator was the

este legado: «las cosas que fueron preparadas por su causa», y también al esclavo y a la esclava, y se comprenderán las cosas que a los mismos les fueron atribuidas o destinadas.

50.- EL MISMO; *Comentarios a Sabino, libro XXIII*.- Cuando a un hijo de familia se le lega así: «cuando él hubiere llegado a su propia tutela», se significa el tiempo de la pubertad. y a la verdad, si a un hijo de familia impúber o se le hubiera hecho un legado, las más de las veces se ha de entender, como dice Sabino, no que llegue a ser también padre de familia, sino púbero. Pero si la madre, que tuvo como sospechosa la vida de su marido, del cual se había divorciado, le hiciera un legado a su hijo, aunque impúbero, no se considera que se refirió al tiempo en que es púbero, sino a aquel en que es púbero, y padre de familia; porque también si fue púbero, diremos con mucha mas razón que ella se refirió a, padre de familia, como si hubiese dicho: «cuando llegue a su tutela, y a su propia potestad».

§ 1.- Pero si alguno le legase a un padre de familia impúbero para cuando fuera de propia tutela, se refirió a la pubertad, y a veces también a los veinticinco años, si es patente la voluntad del testador; porque si le hizo el legado a uno que ya era púbero, pero menor de veinticinco años, sin duda alguna que se habrán indicado los veinticinco años.

§ 2.- Asimismo, si así se le hubiera legado a un furioso, o a un pródigo, o aquel a quien el Pretor le dió curador en virtud de causa, opino que también se refirió al caso en que se librase de la curatela y de la tutela.

§ 3.- De estos y de otros casos semejantes aparece, que Sabino interpretó la cuestión de la voluntad; y ciertamente que no dudaría, si así se le hubiera hecho

quinque annis ita sit legatum, de sua potestate testatorem sensisse.

§ 4.- Sic autem haec scriptura varia est et voluntatis habet quaestionem, ut illa quoque, si quis ita scripserit "cum sui iuris fuerit factus" nam aliter alias accipitur: et plerumque potestatis liberationem continet, plerumque pubertatem vel vicesimum quintum annum.

§ 5.- Ego quidem et si quis iam puberi, minori tamen viginti quinque annis sic legaverit "cum ad pubertatem pervenerit", puto de aetate eum sensisse, quae caret in integrum restitutione.

§ 6.- Idem et si quis "cum suae aetatis fuerit factus", utrum de pubertate an de viginti quinque annis sensum sit, disputari de voluntate potest, non minus quam si ita adscripserit "cum iustae aetatis sit factus" vel "cum maturae aetatis" vel "cum adoleverit".

51.- PAULUS; *libro IV, ad Sabinum*.- Si filiae familias ita legatum sit "cum in tutelam suam pervenerit", tunc debebitur, cum viripotens facta fuerit.

52.- ULPIANUS; *libro XXIV ad Sabinum*.- Librorum appellatione continentur omnia volumina, sive in charta sive in membrana sint sive in quavis alia materia: sed et si in philyra aut in tilia (ut nonnulli conficiunt) aut in quo alio corio, idem erit dicendum. Quod si in codicibus sint membranis vel chartaceis vel etiam eboreis vel alterius materiae vel in ceratis codicillis, an debeantur, videamus. Et Gaius Cassius scribit deberi et membranas libris legatis: consequenter igitur cetera quoque debebuntur, si non adversetur voluntas testatoris.

principal point involved. And, in order that there may be no doubt where a legacy has been left to a child under the age of puberty, and especially where one has been left to a person over twenty-five years of age, the testator must be understood to have meant when the legatee should have control of himself.

§ 4.- Moreover, this clause is susceptible of various interpretations, and depends upon the intention of the testator, just as the following one, where he says, "When he becomes his own master." For sometimes it is understood in one way and sometimes another, as frequently it means the freedom of the legatee from control, and then again it has reference to the age of puberty, or his twenty-fifth year.

§ 5.- For my part, however, I think that, if anyone should make a bequest to an individual who has attained the age of puberty but is still under the age of twenty-five years, as follows, "When he shall reach the age of puberty," the testator had in his mind the age when he would not be entitled to complete restitution.

§ 6.- Likewise, where anyone makes a bequest to a person, "When he shall become of age," or, "Of lawful age," the intention of the testator must be ascertained as to whether he meant the age of puberty or that of twenty-five years; just as if he had written, "When he arrives at lawful age," or "At mature age" or "When he grows up."

51.- PAULUS; *On Sabinus, Book IV*.- Where a bequest is made to a daughter under paternal control, "When she becomes her own guardian," it will be due when she is marriageable.

52.- ULPIANUS; *On Sabinus, Book XXIV*.- Under the designation of "books" all volumes are included, whether they are made of papyrus, parchment, or any other material whatsoever; even if they are written on bark (as is sometimes done), or upon any kind of prepared skins, they come under the same appellation. If, however, the books are bound in leather, or papyrus, or ivory, or any other substance, or are composed of wax tablets, will they be considered to be due? Gaius Cassius says that where books are bequeathed, the bindings are also included.

el legado a un púbero, y mucho más, a un mayor de veinticinco años, que el testador se refirió a la propia potestad de éste.

§ 4.- Mas de este modo es vario el sentido de esta cláusula, y contiene una cuestión respecto a la voluntad, como también ésta, si uno hubiere escrito de este modo: «cuando hubiere llegado a ser de propio derecho»; porque en ocasiones se entiende de diverso modo, y unas veces contiene la liberación de la potestad, y otras la pubertad, o los veinticinco años.

§ 5.- Yo ciertamente, también si alguien le hubiere legado así a uno que ya era púbero, pero menor de veinticinco años: «cuando hubiere llegado a la pubertad», opino que él se refirió a la edad que no tiene restitución por entero.

§ 6.- Asimismo también si uno hubiere legado así: «cuando hubiere llegado a su propia edad», o, «a la edad legal», se puede disputar respecto a la voluntad, sobre si ha entendido referirse a la pubertad, o a los veinticinco años, no menos que si hubiere escrito de este modo: «cuando se haya hecho de edad justa» o, «cuando de edad madura», o, «cuando fuere adolescente».

51.- PAULO; *Comentarios a Sabino, libro IV*.- Si a una hija de familia se le hubiera hecho así un legado: «cuando hubiere llegado a su propia tutela», entonces sera debido cuando se hubiere hecho casadera.

52.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- En la denominación de libros se comprenden todos los volúmenes, ya estén en papel, ya en pergamino, ya en otra cualquier materia; pero también se habrá de decir lo mismo, si en membranas de papiro, o de tilo, como algunos los hacen, o en otra cualquier corteza. Pero veamos si se deberán, si estuvieran en códices en pergamino, o en papel, o aun en marfil, o en otra materia, o en codicilos encerados. Y escribe Cayo Cassio, que, legados los libros, se deben también los pergaminos; así, pues, consiguientemente se

§ 1.- Si cui centum libri sint legati, centum volumina ei dabimus, non centum, quae quis ingenio suo metitus est, qui ad libri scripturam sufficerent: ut puta cum haberet Homerum totum in uno volumine, non quadraginta octo libros computamus, sed unum homeri volumen pro libro accipiendum est.

§ 2.- Si Homeri corpus sit legatum et non sit plenum, quantaecumque rhapsodiae inveniantur, debentur.

§ 3.- Libris autem legatis bibliothecas non contineri Sabinus scribit: idem et Cassius: ait enim membranas quae scriptae sint contineri, deinde adiecit neque armaria neque scrinia neque cetera, in quibus libri conduntur, deberi.

§ 4.- Quod tamen Cassius de membranis puris scripsit, verum est: nam nec chartae purae debentur libris legatis nec chartis legatis libri debebuntur, nisi forte et hic nos urserit voluntas: ut puta si quis forte chartas sic reliquerit "chartas meas universas", qui nihil aliud quam libros habebat, studiosus studioso: nemo enim dubitabit libros deberi: nam et in usu plerique libros chartas appellant. Quid ergo, si quis chartas legaverit puras? Membranae non continebuntur neque ceterae ad scribendum materiae, sed nec coepti scribi libri.

§ 5.- Unde non male quaeritur, si libri legati sint, an contineantur nondum perscripti. Et non puto contineri, non magis quam vestis appellatione nondum detexta continetur. Sed perscripti libri nondum malleati vel ornati continebuntur: proinde et nondum conglutinati vel emendati continebuntur: sed et membranae nondum consutae continebuntur.

Hence, it follows that everything relating to them will be due if the intention of the testator was not otherwise.

§ 1.- Where a hundred books are bequeathed, we must deliver to the legatee a hundred volumes, and not the hundred parts of volumes which anyone may select as he wishes, and each of which will be sufficient to include the contents of a book; hence, when the works of Homer are all contained in one volume, we do not count them as forty-eight books, but the entire volume of Homer should be understood to mean one book.

§ 2.- Where the works of Homer are left, and they are not complete, as many parts of the same as can be obtained at present will be due.

§ 3.- Sabinus says that libraries are not included in legacies of books. Cassius adopts the same opinion, but he holds that parchment covers that are written upon are included. He adds, afterwards, that neither book-cases, writing desks, nor other furniture in which books are kept constitute part of the legacy.

§ 4.- What Cassius stated with reference to blank parchments is true, for blank sheets of papyrus are not included in the term, "Books bequeathed," and books are not due under the term, "Sheets of papyrus bequeathed," unless, perhaps, in this case the intention of the testator may influence us; as for example, if one literary man should leave to another sheets of paper as follows, "I bequeath all my sheets of paper," and he had nothing else but books, no one will doubt that his books were due; for ordinarily many persons designate books as papers. But what if anyone should bequeath sheets of papyrus. In this case neither parchments, nor any other materials used for writing, nor books which have been commenced will be included.

§ 5.- Wherefore, when books are bequeathed, the question is not inappropriately asked whether those are included which are not yet completed. I do not think they are included, any more than cloth which is not yet entirely woven is included under the head of clothing. Books, however, which have been written, but have not yet been beaten or ornamented, are included in such a legacy, as well as such as are not glued together, or corrected, and leaves of parchment which are not sewed, are also included.

deberán también los demás, si no se opone la voluntad del testador.

§ 1.- Si a uno se le hubieren legado cien libros, le daremos cien volúmenes, no los ciento que alguien midió con su ingenio para que le bastasen para la escritura de un libro, como, por ejemplo teniendo todo Homero en un solo volumen, no computaremos cuarenta y ocho libros, sino que el sólo volumen de Homero se ha de admitir por un libro.

§ 2.- Si se hubieran legado todas las obras de Homero, y no estuvieran completas, se deberán cuantos cantos se hallen.

§ 3.- Pero escribe Sabino, que en los libros legados no se comprenden los estantes; lo mismo manifiesta también Cassio, porque dice, que se comprenden los pergaminos, que están escritos, y después añadió, que no se deben ni los armarios, ni las papeleras, ni las demás cosas en que se guardan los libros.

§ 4.- Mas es cierto lo que escribió Cassio respecto a los pergaminos no escritos; porque legados los libros no se deben los papeles en blanco, ni legados los papeles se deberán los libros, a no ser acaso que también en esto nos apremiare la voluntad, por ejemplo, si por ventura algún hombre estudioso, que no tenía ninguna otra cosa más que libros, le hubiere dejado a otro estudioso los papeles de este modo: «todos mis papeles»; pues nadie dudará que se deben los libros, porque también en el uso muchos llaman libros a los papeles. Luego, ¿qué se dirá, si alguno hubiere legado los papeles en blanco? Que no se comprenderían los pergaminos, ni las demás materias para escribir, y ni aun los libros que se comenzaron a escribir.

§ 5.- Por lo cual no sin razón se pregunta, si, habiéndose legado los libros, se contendrán los que todavía no estaban acabados de escribir. Y no opino que se contengan, no de otra suerte que en la denominación de vestidos no se comprende el que aun no está tejido. Pero se comprenderán los libros acabados de escribir todavía no prensados o adornados, y por lo tanto, se comprenderán también los que aun no están encuadernados, o enmendados; pero asimismo se comprenderán también los pergaminos todavía no

§ 6.- Chartis legatis neque papyrum ad chartas paratum neque chartae nondum perfectae continebuntur.

§ 7.- Sed si bibliothecam legaverit, utrum armarium solum vel armaria continebuntur an vero libri quoque contineantur, quaeritur. Et eleganter Nerva ait interesse id quod testator senserit: nam et locum significari bibliothecam eo: alias armarium, sicuti dicimus "eboream bibliothecam emit": alias libros, sicuti dicimus "bibliothecam emisse". Quod igitur scribit Sabinus libros bibliothecam non sequi, non per omnia verum est: nam interdum armaria quoque debentur, quae plerique bibliothecas appellant. Plane si mihi proponas adhaerentia esse membro armaria vel adfixa, sine dubio non debentur, cum aedificii portio sint.

§ 8.- Quod in bibliotheca tractavimus, idem Pomponius libro sexto ex Sabino in dactylitheca legata tractat: et ait anulos quoque contineri, non solum thecam, quae anulorum causa parata sit: hoc autem ex eo coniectat, quod ita proponitur quis legasse: "Dactylithecam meam et si quos praeterea [praeterea] anulos habeo" et ita Labeonem quoque existimasse ait.

§ 9.- Sunt tamen quaedam, quae omnimodo legatum sequuntur: ut lectum legatum contineat et fulcra et armariis et loculis claustra et claves cedunt.

53.- PAULUS; *libro IV, ad Sabinum*.- Argento legato constat arculas ad legatarium non pertinere.

§ 1.- Item anulis legatis dactylithecae non cedunt.

54.- POMPONIUS; *libro VII, ad Sabinum*.- Si pure tibi legavero, deinde postea scripsero ita: "Hoc amplius si navis ex asia venerit, heres meus ei fundum

§ 6.- The legacy of papyri does not include the material for making the leaves, nor such leaves as are not yet finished.

§ 7.- If, however, a testator should leave a library, the question arises whether the book-case or book-cases, or whether only the books themselves, are included. Nerva very properly says that it is important to ascertain what the testator intended; for the word "library" sometimes means the place where books are kept, and at others the bookcase which contains them (as when we say, So-and-So bought an ivory library), and sometimes this means the books themselves as when we say, "He bought a library;" therefore, when Sabinus stated that a library does not follow the books, this is not absolutely true, for sometimes the book-cases, which many persons call a library, are also included. It is clear if you should mention book-cases which are attached or connected with the walls of the house, they undoubtedly will not be included, as they constitute part of the building.

§ 8.- What we have stated with reference to a library, Pomponius discusses in the Sixth Book on Sabinus, and he says that rings are included in a legacy together with the jewel-case which was made to contain them. He bases his opinion upon the following bequest of a testator, "I bequeath my jewel-case, and any rings which I may have in addition." He says that Labeo also was of the same opinion.

§ 9.- There are some things, however, which, under all circumstances, follow the article bequeathed, such as the bequest of a bed which also includes everything appertaining to it, and the locks and keys are always included in legacies of chests of drawers, or presses.

53.- PAULUS; *On Sabinus, Book IV*.- It has been established that where silver plate is bequeathed, small money boxes of that metal do not pass to the legatee.

§ 1.- Where rings are bequeathed, jewel-cases are not included.

54.- POMPONIUS; *On Sabinus, Book VII*.- If I should bequeath a legacy to you absolutely, and then afterwards should say, "Let my heir give him such-

cosidos.

§ 6.- En los papeles legados no se contendrán ni el papiro preparado para papel, ni los papeles aun no acabados de hacer.

§ 7.- Pero si uno hubiere legado una biblioteca, se pregunta, si se comprenderá sólo el armario, o los anuarios, o si se comprenderán también los libros. Y discretamente dice Nerva, que importa saber lo que el testador haya entendido; porque unas veces biblioteca significa el lugar, y otras la estantería, como cuando decimos: compró una biblioteca de marfil, y otras veces los libros, como cuando decimos: compró una biblioteca. Así, pues, no es absolutamente verdadero lo que escribe Sabino, que los libros no siguen a la biblioteca: porque a veces se deben también los armarios, que muchos llaman bibliotecas. Pero a la verdad, si me dijeras que los armarios están adheridos, o fijos en la habitación, sin duda que no se deberán, porque formarán parte del edificio.

§ 8.- Lo mismo que hemos dicho respecto a la biblioteca expone Pomponio en el libro sexto de Sabino respecto a los joyeros legados, y dice, que se comprenden también los anillos, y no sólo el estuche, qué se preparó para los anillos; mas esto lo conjetura, por que se dice que uno legó de esta manera: «mi joyero, y los anillos que yo además tengo»; y así dice que opinó también Labeón.

§ 9.- Pero hay ciertas cosas que de todos modos siguen al legado, de suerte que el lecho legado comprende también las barandillas, y las cerraduras y las llaves ceden a los armarios y estantes.

53.- PAULO; *Comentarios a Sabino, libro V*.- Legada la plata, es cierto que no le pertenecen al legatario las arquillas.

§ 1.- Asimismo, legados los anillos, no ceden a los joyeros.

54.- POMPONIO; *Comentarios a Sabino, libro VII*.- Si yo te hubiere hecho un legado puramente, y después hubiere escrito así: «además de esto, si la

dato", verius est eo verbo "amplius" superiora repeti, sicuti dicimus "Lucius Titius plebi quina milia dedit, hoc amplius Seius viscerationem", quina quoque milia Seium dedisse intellegimus et "Titius accepit quinque, Seius hoc amplius fundum", Seium quinque quoque accepisse intellegimus.

55.- ULPIANUS; *libro XXV, ad Sabinum*.- Ligni appellatio nomen generale est, sed sic separatur, ut sit aliquid materia, aliquid lignum. Materia est, quae ad aedificandum fulciendum necessaria est, lignum, quidquid conburendi causa paratum est. Sed utrum ita demum, si concisum sit an et si non sit? Et quintus Mucius libro secundo refert, si cui ligna legata essent, quae in fundo erant, arbores quidem materiae causa succisas non deberi: nec adiecit, si non comburendi gratia succisae sunt, ad eum pertinere, sed sic intellegi consequens est.

§ 1.- Ofilius quoque libro quinto iuris partiti ita scripsit, cui ligna legata sunt, ad eum omnia ligna pertinere, quae alio nomine non appellantur, veluti virgae carbonēs nuclei olivarum, quibus ad nullam aliam rem nisi ad comburendum possit uti: sed et balani vel si qui alii nuclei.

§ 2.- Idem libro secundo negat arbores nondum concisas, nisi quae minutatim conciduntur, videri ei legatas, cui ligna legata sunt. Ego autem arbitror hoc quoque ligni appellatione contineri, quod nondum minutatim fuit concisum, si iam concidendo fuit destinatum. Proinde si silvam huic rei habebat destinatam, silva quidem non cedet, deiectae autem arbores lignorum appellatione continebuntur, nisi aliud testator sensit.

§ 3.- Lignis autem legatis quod comburendi causa

and-such a tract of land, in addition, if a ship should arrive from Asia," the better opinion is that, by the words, "In addition," what is first mentioned is repeated. Just as when we say, "Lucius Titius gave five thousand aurei to the people, and Seius has given, in addition, a distribution of meat," we understand Seius to have also given five thousand aurei. And where it is said, "Titius received five aurei and Seius a tract of land in addition," we understand that Seius has likewise received five aurei.

55.- ULPIANUS; *On Sabinus, Book XXV*.- The term "wood" is a general one, and is divided into building material and ordinary wood. Building material consists of what is necessary in the construction and support of houses; ordinary wood is anything which is intended for fuel. But should this term apply only to such as has been cut down, or also to such as has not been cut? Quintus Mucius states, in the Second Book, that where wood which is on the land is bequeathed to anyone, any trees which have been felled for building material are not included, but he does not add that what has been felled for firewood will belong to the legatee, still, this is understood to be the case.

§ 1.- Ofilius also states, in the Fifth Book on the Law of Partition, that where wood is bequeathed to anyone, all will belong to him which is not called by some other name; for example, small branches, charcoal, and olive stones, of which no other use can be made than to burn them. The same rule applies to acorns, and all other seeds.

§ 2.- The same authority denies in the Second Book that where wood is bequeathed, trees which have not yet been cut, but only such as have been split into small pieces, are held to have been bequeathed. I think, however, that any wood which has not yet been cut up into small pieces should also be included under the said term, if this was intended to be done. Hence, if a testator owned a grove which he had destined for this purpose, the grove itself would not belong to the legatee, but any trees which had fallen down would be included, under the term "wood," unless the intention of the testator was otherwise.

§ 3.- In a legacy of wood intended for fuel is

nave llegare de Asia, déle mi heredero un fundo», es mas cierto, que con esta palabra «ademas» se repite lo anterior; como cuando decimos: «Lucio Ticio le dió cinco mil a la plebe, y además de esto una comida Seyo», entendemos que Seyo dió también otros cinco mil; y «Ticio recibió cinco, y Seyo además de esto un fundo», entendemos que Seyo recibió también cinco.

55.- ULPIANO; *Comentarios a Sabino, libro XXV*.- La denominación de leña es genérica, pero se la divide de modo, que una cosa es la madera, y otra la leña; madera es la que es necesaria para edificar y para reparar, y leña toda la que está preparada para ser quemada. Pero ¿así solamente? Y dice Quinto Mucio en el libro segundo, que si a alguno se le hubiese legado la leña, que había en un fundo, no se deben ciertamente los arboles cortados para madera, y añadió, que no le pertenecen, si no fueron cortados para ser quemados; Pero así es consiguiente que se entienda.

§ 1.- También Ofilio escribió de este modo en el libro quinto del Derecho dividido, que si a alguno se le legó la leña, le pertenece toda la leña, que no se designa con otro nombre, como las varas, los carbonēs, y los huesos de las aceitunas, de los que no se puede hacer uso para ninguna otra cosa, sino para hacer fuego; pero que también las bellotas, u otros huesos.

§ 2.- El mismo dice en el libro segundo, que al que se le legó la leña no parece que se le legaron los árboles todavía no partidos, sino los que están partidos en trozos pequeños. Pero yo opino, que también se comprende en la denominación de leña lo que todavía no fue partido en trozos pequeños, si ya fue destinado a ser así partido; por consiguiente, si tenía un bosque destinado a este objeto, no cederá ciertamente el bosque, sino que se comprenderán en la denominación de leña los árboles cortados, a no ser que otra cosa haya entendido el testador.

§ 3.- Pero legadas las leñas, se comprende lo que

paratum est continetur, sive ad balnei calefactionem sive diaetarum hypocaustarum sive ad calcem vel ad aliam rem coquendam solebat uti.

§ 4.- Ofilius libro quinto iuris partiti scripsit nec sarmenta ligni appellatione contineri: sed si voluntas non refragatur, et virgulae et gremia et sarmenta et superamenta materiarum et vitium stirpes atque radices continebuntur.

§ 5.- Lignorum appellatione in quibusdam regionibus, ut in Aegypto, ubi harundine pro ligno utuntur, et harundines et papyrus comburitur et herbulae quaedam vel spinae vel vepres continebuntur. Quid mirum? Cum culon hoc et naves culygas appellant, quae haec apotheca helwn deducunt.

§ 6.- In quibusdam provinciis et editu bubum ad hanc rem utuntur.

§ 7.- Si lignum sit paratum ad carbones coquendas atque conficiendas, ait ofilius libro quinto iuris partiti carbonum appellatione huiusmodi materiam non contineri: sed an lignorum? Et fortassis quis dicet nec lignorum: non enim lignorum gratia haec testator habuit. Sed et Titiones et alia ligna cocta ne fumum faciant utrum ligno an carboni an suo generi adnumerabimus? Et magis est, ut proprium genus habeatur.

§ 8.- Sulpurata quoque de ligno aequae eandem habebunt definitionem.

§ 9.- Ad faces quoque parata non erunt lignorum appellatione comprehensa, nisi haec fuit voluntas.

§ 10.- De pinu autem integri strobili ligni appellatione continebuntur.

56.- PAULUS; *libro IV, ad Sabinum*.- Pali et perticae in numero materiae redigendi sunt, et ideo lignorum appellatione non continentur.

57.- POMPONIUS; *libro XXX, ad Sabinum*.- Servius respondit, cui omnis materia legata sit, ei nec

included such as is used for heating baths, or for the furnaces of apartments, or for burning lime, or for any other purpose where heat is employed.

§ 4.- Ofilius states in the Fifth Book of the Law of Partition, that twigs are not embraced in the term wood. But (where it is not contrary to the intention of the testator) small branches, boughs, sprouts, and the remains of materials used in building, as well as the stalks and roots of vines, are included.

§ 5.- In some countries (as, for instance, in Egypt, where reeds are used for wood, and both reeds and papyrus for fuel), certain kinds of grass, thorns, and brambles are included in the term "wood." Is there anything extraordinary about this? The Greek word signifying "wood" and the one indicating ships which transport wood, are derived from another Greek term which means marshes.

§ 6.- In some provinces they use the dung of cattle for this purpose.

§ 7.- Where wood has been prepared to be burned and made into charcoal, Ofilius says, in the Fifth Book on the Law of Partition, that material of this kind is not included in the term charcoal. But would it be included in the term fuel? Someone perhaps might say that it would not, for the testator did not have it in his possession to be used as fuel. Shall we enumerate, as belonging to a class of their own, firebrands and other wood which has been partially burned to avoid their making smoke, or shall we designate them as fire-wood, or charcoal? The better opinion is that they belong to a class of their own.

§ 8.- The same designation will also apply to sulphurated wood.

§ 9.- Wood to be used for torches is not included under the term fuel, unless this was the intention of the testator.

§ 10.- Pine cones are also included in the term firewood.

56.- PAULUS; *On Sabinus, Book IV*.- Beams and poles should be classed as building material, and therefore are not included in the term firewood.

57.- POMPONIUS; *On Sabinus, Book XXX*.- Servius gave it as his opinion that where all material

fue destinado a ser quemado, ora si se solía usar para la calefacción del baño, o para la de las estufas de las habitaciones, ora para cocer cal u otra cosa.

§ 4.- Escribió Ofilio en el libro quinto del Derecho dividido, que los sarmientos no se comprenden en la denominación de leña; pero si a ello no se opone la voluntad, se comprenderán las varas, las virutas, los sarmientos, los restos de maderas, los troncos de las vides, y las raíces.

§ 5.- En algunas regiones, como en Egipto, en donde por leña usan la caña, y se quema la caña y el papiro, se comprenderán en la denominación de leña algunas yerbas, o los espinos, o los abrojos: y que es de extrañar, cuando a esto lo llaman «leña» y «conductoras de leña» a las naves que sacan estas cosas «de las lagunas».

§ 6.- En algunas provincias usan para este objeto también el estiércol de los bueyes.

§ 7.- Si la leña estuviera preparada para cocer y hacer carbón, dice; Ofilio en el libro quinto del Derecho dividido, que esta madera no es comprendida en la denominación de carbón. Pero ¿y en la de leña? Y acaso dirá alguno que tampoco en la de leña; porque el testador no la tuvo para leña. Pero ¿y a los tizones y a otras leñas cocidas para que no hagan humo, los comprenderemos en la leña, o en el carbón, o en su propio género. Y es más cierto que se considera un género propio.

§ 8.- También las leñas azufradas tendrán igualmente la misma definición.

§ 9.- Tampoco las preparadas para teas serán comprendidas en la denominación de leñas, a no ser que esta haya sido la voluntad.

§ 10.- Pero las piñas enteras del pino serán comprendidas en la denominación de leña.

56.- PAULO; *Comentarios a Sabino, libro IV*.- Los palos y las pértigas han de ser comprendidos en la clase de maderas, y por lo tanto no estarán contenidos en la denominación de leña.

57.- POMPONIO; *Comentarios a Sabino, libro XXX*.- Servio respondió, que a aquel a quien se le

arcam nec armarium legatum esse.

58.- ULPIANUS; *libro IV, disputationem.*- Cum uxori suae quis ea, quae eius causa parata sunt, legasset, dehinc vivus purpuras comparasset in provincia necdum tamen advexisset, rescriptum est ad mulierem purpuras pertinere.

59.- IULIANUS; *libro XXXIV, digestorum.*- Qui chirographum legat, non tantum de tabulis cogitat, sed etiam de actionibus, quarum probatio tabulis continetur: appellatio enim chirographi uti nos pro ipsis actionibus palam est, cum venditis chirographis intellegimus nomen venisse. Quin etiam si nomen quis legaverit, id quod in actionibus est legatum intellegitur.

60.- ALFENUS; *libro II, a Paulo epitomatorum.*- Cum quaereretur, agni legati quatenus viderentur, quidam aiebant agnum dumtaxat sex mensum esse: sed verius est eos legatos esse, qui minores anniculis essentiarum

§ 1.- Servis et ancillis urbanis legatis agasonem mulionem legato non contineri respondi: eos enim solos in eo numero haberi, quos pater familias circum se ipse sui cultus causa haberet.

§ 2.- Lana lino purpura uxori legatis, quae eius causa parata essent, cum multam lanam et omnis generis reliquisset, quaerebatur, an omnis deberetur. Respondit, si nihil ex ea destinasset ad usum uxoris, sed omnis commixta esset, non dissimilem esse deliberationem, cum penus legata esset et multas res quae penus essent reliquisset, ex quibus pater familias vendere solitus esset. Nam si vina diffudisset habiturus usioni ipse et heres eius, tamen omne in penu existimare. Sed cum probaretur eum qui testamentum fecisset partem penus vendere solitum esse, constitutum esse, ut ex eo, quod ad

destined for any purpose has been bequeathed, no boxes or chests are embraced in the legacy.

58.- ULPIANUS; *Disputations, Book IV.*- Where anyone leaves to his wife articles intended for her use, and then, during his lifetime, while absent in a province, purchases purple cloth for her, but does not give it to her before he dies, it was stated in a Rescript that the purple cloth would belong to the woman.

59.- JULIANUS; *Digest, Book XXXIV.*- Where anyone bequeaths a promissory note, it is understood that he had in mind not only the tablets upon which it is written, but also the rights of action, the proof of which is contained in the tablets. For it is clear that we use the same "note" instead of the said rights of action; so when the note is sold, we understand that the claim was also disposed of. Moreover, where anyone bequeaths a claim, he is understood to have bequeathed what can be recovered by an action at law.

60.- ALFENUS; *On the Digest of the Epitomes by Paulus, Book II.*- As the question has been raised what should be considered a bequest of lambs, certain authorities hold that only lambs six months old are meant. The better opinion, however, is that those are bequeathed which are less than a year old.

§ 1.- Where urban male and female slaves are bequeathed, I gave it as my opinion that muleteers are not included in the legacy; for only such slaves should be included in this designation whom the head of the household is accustomed to have about him, for his personal service.

§ 2.- Where wool, flax and purple destined for her use were bequeathed to a wife, as the testator had left her a great deal of wool of different kinds, the question arose whether she was entitled to all of it. The answer was that, if none of this wool had been intended for the use of his wife, but all of it was mixed together, the decision must be the same as where provisions were bequeathed, and the testator left many things which were used as provisions, and which he was accustomed to sell, for if he had drawn different kinds of wine to be Used by himself and his heir, it all should be held to be included in the term

haya legado toda clase de madera, no se le legaron ni las arcas, ni los armarios.

58.- ULPIANO; *Disputas, libro IV.*- Habiendo uno legado a su mujer las cosas que por causa de ella fueron preparadas, y habiendo comprado después en vida algunas púrpuras en una provincia, pero no habiéndolas traído todavía, se respondió por rescripto que las púrpuras le pertenecían a la mujer.

59.- JULIANO; *Digesto, libro XXXIV.*- El que lega un quirógrafo no solamente piensa en las tablas, sino también en las acciones, cuya prueba se contiene en las tablas; porque es evidente que usamos de la palabra quirógrafo por las mismas acciones, pues vendidos los quirógrafos entendemos que se vendía el crédito; porque también si uno hubiere legado un crédito, se entiende que se legó lo que se comprende en las acciones.

60.- ALFENO; *Digesto compendiado por Paulo, libro II.*- Como se preguntase hasta de qué tiempo se considerarían legados los corderos, decían algunos, que el cordero era solamente de seis meses; pero es mas verdadero, que fueron legados los que fuesen menores de un año,

§ 1.- Legados los esclavos y las esclavas urbanos, yo respondí que no se comprendía en él legado el arriero, ni el mulero; porque se consideran en aquel número solo los que el mismo padre de familia tuviera cerca de sí para su propio servicio,

§ 2.- Habiéndose legado a la mujer la lana, el lino, y la púrpura, que por causa de ella se hubiesen preparado, habiendo dejado una mucha lana, y de toda clase, se preguntaba, si se debería toda. Respondió, que si de ella no hubiese destinado nada para uso de la mujer, sino que toda estuviese mezclada, la resolución no era distinta de cuando hubiesen sido legadas las provisiones, y hubiese dejado muchas cosas, que fuesen provisiones, de las que hubiese solido vender el padre de familia; porque si hubiese trasegado los vinos, para tener él y su heredero para su uso, todo, sin embargo, se considera comprendido

annum opus esset, heredes legatario darent. Sic mihi placet et in lana fieri, ut ex ea quod ad usum annum mulieri satis esset, ea sumeret: non enim deducto eo, quod ad viri usum opus esset, reliquum uxori legatum esse, sed quod uxoris causa paratum esset.

§ 3.- Praediis legatis et quae eorum praediorum colendorum causa empti parataque essent, neque topiarium neque saltuarium legatum videri ait: topiarium enim ornandi, saltuarium autem tuendi et custodiendi fundi magis quam colendi paratum esse: asinum machinarium legatum videri: item oves, quae stercorandi fundi causa pararentur: item opilionem, si eius generis oves curaret.

61.- ALFENUS; *libro VIII, a Paulo epitomatum*.- Textoribus omnibus, qui sui essent cum moreretur, legatis quaesitum est, an et is, quem postea ex his ostiarium fecisset, legato contineretur. Respondit contineri: non enim ad aliud artificium, sed ad alium usum transductum esse.

62.- IULIANUS; *libro singulari de ambiguitatibus*.- Qui duos mulos habebat ita legavit: "Mulos duos, qui mei erunt cum moriar, heres dato": idem nullos mulos, sed duas mulas reliquerat. Respondit Servius deberi legatum, quia mulorum appellatione etiam mulae continentur, quemadmodum appellatione servorum etiam servae plerumque continentur. Id autem eo veniet, quod semper sexus masculinus etiam femininum sexum continet.

63.- IULIANUS; *libro I, ad Urseium Ferozem*.- In

"provisions." But when it was proved that the party who made the will was accustomed to sell a portion of his provisions, it was decided that the heir should furnish the legatee with the amount of supplies which would be sufficient for his requirements during the year. It seems to me that the same rule should apply to the wool, and that the woman should receive what would be enough for her use for the term of a year; since after what had ordinarily been required by her husband had been deducted, the remainder should not be bequeathed to the wife, but only what was especially intended for her use.

§ 3.- Where land, and everything purchased or intended for the cultivation of the same was left, it was held that neither the slave who was the gardener, nor the forester was bequeathed, as the gardener was intended to adorn the land, and the forester was employed for the purpose of watching and protecting it, rather than for its cultivation. A donkey, used for working a machine, is considered to have been bequeathed, as well as sheep intended to manure the land, together with the shepherd, if one had charge of sheep of this kind.

61.- THE SAME; *Epitomes of the Digest by Paulus, Book VIII*.- Where certain weavers who belonged to the testator at the time of his death were bequeathed, the question arose whether one of them whom he had subsequently appointed porter should be included in the legacy. The answer was that he was included, for he was not transferred to another trade but was only temporarily assigned to a different task.

62.- JULIANUS; *On Ambiguities*.- A certain man who had two mules bequeathed them as follows, "Let my heir give to Seius my two male mules, when I die." The testator had no male mules, but left two female mules. Servius rendered the opinion that the legacy should be paid, because female mules are included in the term "mules," just as female slaves are generally included in the term "slaves." Hence it comes that the male sex always includes the female.

63.- THE SAME; *On Urseius Ferox, Book I*.- In

en las provisiones; pero cuando se probase que el que hubiese hecho el testamento solió vender parte de las provisiones, se determinó que de ellas diesen los herederos al legatario lo que fuese necesario para un año. Así me parece bien a mí que se hace también respecto a la lana, de suerte que de ella tome la mujer lo que le fuese suficiente para el uso de un año; porque no se le legó a la mujer lo restante, deducido lo que fuese necesario para el uso del marido, sino lo que hubiese sido preparado por causa de la mujer.

§ 3.- Legados unos predios, y las cosas que se hubiesen comprado y preparado para cultivar estos predios, dice que no se considera legado ni el jardinero, ni el guardabosques; porque el jardinero fue destinado a adornar, y el guardabosque para defender y guardar el fundo, mas bien que para cultivarlo. Pero se considera legado el asno de la maquina, así como las ovejas, que estuviesen destinadas a estercolar el fundo, y también el pastor, si cuidase de ovejas de esta clase.

61.- EL MISMO; *Digesto compendiado por Paulo, libro VIII*.- Legados todos los tejedores, que fuesen suyos cuando muriese, se preguntó, si se comprendería en el legado también al que de ellos hubiese hecho después portero. Respondió, que se comprendía, porque no fue trasladado a otro oficio, sino a otro uso.

62.- JULIANO; *De las ambigüedades, libro Único*.- Uno que tenia dos mulos, legó de esta manera: «dé mi heredero a Seyo los dos mulos, que fueren míos cuando yo muera»; el mismo no había dejado ningunos mulos, sino dos mulas; Seyo respondió, que se debía el legado, porque en la denominación de mulos se comprenden también las mulas, así como en la denominación de esclavos se comprenden de ordinario también las esclavas. Mas esto provendrá de que siempre el sexo masculino comprende también el sexo femenino,

63.- EL MISMO; *Comentarios a Urseius Ferox*,

repetendis legatis haec verba quae adici solent "item dare damnas esto" et ad condiciones et ad dies legatorum easdem repetendas referri Sabinus respondit.

64.- AFRICANUS; *libro VI, quaestionum*.- Qui filium et nepotem heredem instituerat, certa praedia quaeque in his mortis tempore sua essent nepoti per fideicommissum dederat excepto kalendario: mortis tempore in ea arca, in qua instrumenta et cautiones debitorum erant, pecunia numerata inventa est. Plerisque videbatur vix verosimile esse, ut testator de pecunia numerata sensisset. Ego autem illud dignum animadversione existimabam, cum quis kalendarium praestari alicui voluerit, utrumne nomina dumtaxat debitorum praestari voluisse intellegendus est an vero etiam pecuniam, si qua ab his exacta, eidem tamen kalendario destinata fuerit. Et magis puto, quemadmodum, si exactae pecuniae et rursus collocatae essent, permutatio nominum non peremeret vel minueret fideicommissum, ita ipsae quoque pecuniae, si adhuc kalendario, id est nominibus faciendis destinatae essent, eidem fideicommisso cedere debeant.

Quin etiam illud quoque putem defendi posse, ut non modo a debitoribus exactae pecuniae, sed quaecumque de causa redactae, eidem tamen rationi fuerint destinatae fideicommisso cedant.

65.- MARCIANUS; *libro VII, institutionum*.- Legatis servis exceptis negotiatoribus Labeo scripsit eos legato exceptos videri, qui praepositi essent negotii exercendi causa, veluti qui ad emendum locandum conducendum praepositi essent: cubicularios autem vel obsonatores vel eos, qui piscatoribus praepositi sunt, non videri negotiationis appellatione contineri: et puto veram esse Labeonis

repeating legacies which have already been granted, the following words are usually added, "Moreover, let my heir be charged to give," and Sabinus says they are equivalent to the repetition of the conditions upon which the legacies are dependent, and the dates on which they are to be paid.

64.- AFRICANUS; *Questions, Book VI*.- Where a testator appointed his son and his grandson his heirs, and gave to his grandson under a trust certain lands, and whatever might be on them at the time of his death "with the exception of his account book," and, when he died, a sum of money was found in his chest in which the notes and bonds of his debtors were kept, it was held by several authorities to be hardly probable that the testator had the said money in his mind when he created the trust.

I, however, think that, when anyone wishes his account-book to be delivered to another, it should be taken into consideration, whether it ought to be understood that he expected only the notes of his debtors to be delivered, or whether he also included the money which might be found, if it was derived from the collection of claims, and was intended to be loaned again. I go still further, and hold that if the money had been collected and again invested in a similar manner, the change of obligations would neither annul or diminish the effect of the trust, so that if the same money was intended to be placed in the account book, that is to say for the purpose of making new loans, it would still be payable to the beneficiary under the terms of the trust.

Again, I think that it can be maintained that not only the money collected from the debtors, but also such as was obtained from any other source with the intention of being invested in the same way, would belong to the beneficiary.

65.- MARCIANUS; *Institutes, Book VII*.- Where slaves are bequeathed with the exception of those who transact business, Labeo says that those are considered to be excepted from the legacy who have been appointed for the purpose of attending to some business; for instance, where they have been given authority to purchase, rent, or lease property, but those who take care of the rooms of a house, and

libro I.- estas palabras, que se suelen añadir al repetirse los legados: «asimismo está condenado a dar», respondió Sabino que se han de considerar repetidas así para las condiciones; como para los términos de los legados.

64.- AFRICANO; *Cuestiones, libro VI*.- Uno que había instituido herederos a su hijo y a su nieto, le había dado por fideicomiso a su nieto ciertos predios, y las cosas que en ellos hubiese suyas al tiempo de la muerte, excepto el libro de caja; al tiempo de la muerte se halló dinero contante en la caja en que estaban los instrumentos y las cauciones de los deudores; a los mas les parecía, que es poco verosímil que el testador se hubiese referido al dinero contante.

Pero yo consideraba digno de observación esto: cuando alguno hubiere querido que se le diese a otro el libro de caja, ¿se ha de entender que quiso que se le diesen solamente los débitos de los deudores, o acaso también el dinero, si alguno hubiere sido cobrado de ellos, pero destinado al mismo libro de caja? y creo mas bien, que así como si se hubiesen cobrado las cantidades, y de nuevo hubiesen sido colocadas, el cambio de los créditos lo extinguiría o disminuiría el fideicomiso, así también las mismas cantidades, si todavía estuviesen destinadas al libro de caja, esto es, para hacer préstamos, deberían ceder al mismo fideicomiso.

Aun creo que también se puede defender, que cederá al fideicomiso no sólo las cantidades cobradas de los deudores, sino las recaudadas por cualquier causa, pero que hubieren sido destinadas a la misma negociación.

65.- MARCIANO; *Institutas, libro VII*.- Legados los esclavos excepto los negociantes, escribió Labeón, que se consideran exceptuados en el legado los que hubiesen sido destinados para ejercer algún negocio, por ejemplo, los que hubiesen sido destinados a comprar, a arrendar, o a tomar en arrendamiento; pero que los camareros, o los abastecedores, o los que están al frente de los pescadores, no son

sententiam.

§ 1.- Si ex officio quis ad artificium transierit, quidam recte putant legatum exstingui, quia officium artificio mutatur: non idem e contrario cum lecticarius cocus postea factus est.

§ 2.- Si unus servus plura artificia sciat et alii coci legati fuerunt, alii textores, alii lecticarii, ei cedere servum dicendum est, cui legati sunt in quo artificio plerumque versabatur.

§ 3.- Ornatricibus legatis Celsus scripsit eas, quae duos tantum menses apud magistrum fuerunt, legatum non cedere, alii et has cedere, ne necesse sit nullam cedere, cum omnes adhuc discere possint et omne artificium incrementum recipit: quod magis optinere debet, quia humanae naturae congruum est.

§ 4.- Pecoribus legatis Cassius scripsit quadrupedes contineri, quae gregatim pascuntur. Et sues autem pecorum appellatione continentur, quia et hi gregatim pascuntur: sic denique et Homerus in Odyssea ait, dyeis ton ge suessi parymenon:

I invenies cum adsidentem suibus,
quae pascuntur ad Coracis
rupem prope fontem Arethusam.

§ 5.- Iumentis legatis boves non continentur nec contra.

§ 6.- Equis autem legatis et equae continentur.

§ 7.- Ovibus legatis agni non continentur: quamdiu autem agnorum loco sunt, ex usu cuiusque loci sumendum est: nam in quibusdam locis ovium numero esse videntur, cum ad tonsuram venerint.

walls, and fishermen, are not held as included under the head of slaves who transact business. I think that this opinion of Labeo is correct.

§ 1.- Where a slave passes from some employment to a trade, certain authorities very properly think that the legacy is extinguished, for the reason that the employment was exchanged for a trade. On the other hand, the same rule does not apply where a litter-bearer afterwards becomes a cook.

§ 2.- Where a slave understands several trades, and cooks are bequeathed to one legatee, weavers to another, and litter-bearers to a third, the slave above mentioned will be considered to belong to the person to whom other slaves of the trade in which the said slave was most frequently employed, are bequeathed.

§ 3.- Where female slaves, assigned to dress their mistress' hair, are bequeathed, Celsus says that those who have only been employed in this service for two months are not included in the legacy; others, however, think that they are, as the result might be that none of such slaves would be included, for all can still learn something, and every occupation is capable of improvement. This opinion should rather prevail because it is conformable to human nature.

§ 4.- Where flocks are bequeathed, Cassius says that all quadrupeds which are accustomed to feed together are included. Hogs are also included in this appellation, because they feed together. Hence, Homer says in the Odyssey:

"You will find him seated by his swine,
which feed Near the rock of Corax,
and the Spring of Arethusa."

§ 5.- Where beasts of burden are bequeathed, oxen are not included, and vice versa.

§ 6.- Where horses are bequeathed, mares are included.

§ 7.- Where sheep are bequeathed, lambs are not included, but it must be ascertained from the custom of the neighborhood for how long lambs are to be designated by this term, as in certain localities they are considered to be sheep when they are ready to be sheared.

considerados contenidos en la denominación de negociación; y juzgo que es verdadera la opinión de Labeón.

§ 1.- Si alguno hubiere pasado de un empleo a un oficio, con razón opinan unos que se extingue el legado, porque el empleo se cambia en oficio; no es lo mismo por el contrario, cuando el mozo de litera se hizo después cocinero.

§ 2.- Si un esclavo supiera muchos oficios, y a una persona se le legaron los cocineros, y a otra los tejedores, y a otra los mozos de litera, se ha de decir que este esclavo pertenece a aquel a quien se le legaron los del oficio en que mas se ejercitaba.

§ 3.- Legadas las dedicadas a adornos, escribió Celso, que no se comprenden en el legado las que estuvieron solamente dos meses con maestro, y otros dicen, que también éstas son comprendidas, a fin de que no sea necesario que ninguna sea comprendida, porque todas podrían aprender todavía, y todo oficio admite adelanto, lo cual debe más bien prevalecer, porque es conforme a la naturaleza humana.

§ 4.- Legados los ganados, escribió Cassio, que se comprenden los cuadrúpedos, que paseen pjaras; pero también los cerdos son comprendidos en la denominación de ganados, porque también ellos pacen en pjaras. Así, por último, lo dice también Homero en la Odisea:

Hallarle has ocupado apacentando
los puercos allí cerca de la peña
de Corace, que está junto a Aretusa.

§ 5.- En las caballerías legadas no se comprenden los bueyes, ni al contrario.

§ 6.- Pero en los caballos legados se comprenden también las yeguas.

§ 7.- Legadas las ovejas, no se comprenden los corderos; mas se ha de tomar del uso de cada localidad hasta cuándo están en el número de corderos, porque en algunas localidades se considera que están en el número de ovejas cuando hubieren llegado al esquilado.

66.- PAULUS; *libro III, sententiarum*.- Avibus legatis anseres phasianii et gallinae et aviaria debebuntur: phasianarii autem et pastores anserum non continentur, nisi id testator expressit.

67.- MARCIANUS; *libro VII, institutionum*.- Qui saltum aestivum legavit et hoc amplius etiam eas res legaverit, quae ibi esse solent, non videtur de illis pecoribus sensisse, quae hieme in hibernis aut aestate in aestivis esse solent, sed de illis sensit, quae perpetuo ibi sunt.

68.- ULPIANUS; *libro I, responsorum*.- Iuniano respondit testatorem adiciendo "praedium Seianum omne" eam quoque partem fundi supra scripti quasi ad se pertinentem videri per fideicommissum reliquisse, quam ex causa pignoris nactus est, salvo scilicet iure debitoris.

§ 1.- Ex his verbis: "Curate agros attendere, et ita fiet, ut filius meus filios vestros vobis condonet", fideicommissum peti non posse.

§ 2.- Servos communes a Seia ita relictos "si mei erunt cum moriar" non deberi, si modo hoc sensit testatrix, ut ita deberentur, si in solidum eius fuissent sententiarum

§ 3.- Praediis cum his enthecis, quae in ea possessione sunt, relictis mancipia quoque praediorum, cum illic testamenti facti tempore fuerunt, cedent: sed et quae postea accesserunt, si modo hoc testator manifeste expressit.

69.- MARCELLUS; *libro singulari responsorum*.- Non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testatorem.

§ 1.- Titius codicillis suis ita cavit: "Publio Maevio omnes iuvenes, quos in ministerio habeo, dari volo": quaero, a qua aetate iuvenes et in quam intellegi debeant. Marcellus respondit, quos verbis quae pro-

66.- PAULUS; *Opinions, Book III*.- Where birds are bequeathed, geese, pheasants, and chickens, as well as aviaries will be due; but the slaves having charge of the pheasants and geese are not included; unless the testator expressly says so.

67.- MARCIANUS; *Institutes, Book VII*.- Where a testator devises his woodland pasture and in addition bequeaths everything which is ordinarily there, he is not understood to have intended to bequeath the flocks which during the winter are kept in winter quarters, and during the summer are left in the pastures, but only to have meant those which are always there.

68.- ULPIANUS; *Opinions, Book I*.- Ulpianus stated to Julianus that the testator, by adding, "The entire Seian Estate," was understood to have left also that portion of the above-mentioned land which seemed to be appurtenant to it by the terms of the trust, and which he had obtained by way of pledge; the right of the debtor to the same being reserved.

§ 1.- The execution of a trust cannot be demanded under the following words: "Be sure to take good care of my fields, and the result will be that my son will give you your children."

§ 2.- Where slaves held in common with another are bequeathed by Seia, under the condition, "If they should be mine when I die," they will not be due; provided the testatrix intended that they should be due if they were entirely hers at that time.

§ 3.- Where certain tracts of land are left, together with the stores situated thereon, the slaves who belonged to said lands when the will was made will be included in the legacy, as well as those who were subsequently attached to it; provided the testator plainly showed that this was his intention.

69.- MARCELLUS; *Opinions*.- The ordinary signification of words in a will must never be departed from, unless it is evident that the intention of the testator was otherwise.

§ 1.- Titius provided as follows by a codicil: "I wish all the young slaves whom I have in my service to be given to Publius Mævius." I ask at what age slaves should be understood to be young? Marcellus was of

66.- PAULO; *Sentencias, libro III*.- Legadas las aves, se deberán los ánses, los faisanes, las gallinas, y sus estancias; pero no se comprenderán los guardas de los faisanes, ni los pastores de los ánses, si esto no lo expresó el testador.

67.- MARCIANO; *Instituta, libro VII*.- El que legó los pastos de verano, y además de ellos hubiere legado también las cosas que allí suele haber, no parece que se refirió a los ganados que en invierno suele haber en los de invierno, o en verano en los de verano.

68.- ULPIANO respondió a Juliano; *Respuestas, libro I*.- Añadiendo el testador: «todo el predio Seyano», se considera que dejó por fideicomiso, como si a él le perteneciera, también aquella parte del antes mencionado fundo, que obtuvo por causa de prenda, quedando, por supuesto, a salvo el derecho del deudor.

§ 1.- En virtud de estas palabras: «cuidad de atender a los campos, y así sucederá que mi hijo os condone vuestros hijos», no se puede pedir el fideicomiso.

§ 2.- Los esclavos comunes dejados por Seia de este modo: «si fueren míos, cuando yo muera», no se deben, si es que la testadora entendió decir esto, que se debiesen, si fuesen íntegramente de ella.

§ 3.- Habiéndose dejado unos predios con los enseres que hay en la posesión, se comprenderán también los esclavos de los predios, cuando hubieren estado allí al tiempo de haberse hecho testamento; pero asimismo los que después se agregaron, si esto lo expresó claramente el testador.

69.- MARCELO; *Respuestas, libro único*.- No es conveniente separarse de la significación de las palabras, sino cuando es manifiesto que el testador entendió decir otra cosa.

§ 1.- Ticio dispuso así en sus codicilos: «quiero que se le den a Publio Mevio todos los jóvenes, que tengo a mi servicio»; pregunto, ¿desde qué edad, y hasta cual, se deberá entender que son jóvenes? Marcelo

ponerentur demonstrare voluerit testator, ad notionem eius, qui de ea re cogniturus esset, pertinere: non enim in causa testamentorum ad definitionem utique descendendum est, cum plerumque abusive loquantur nec propriis nominibus ac vocabulis semper utantur. Ceterum existimari posset iuvenis is [], qui adulescentis excessit aetatem, quoad incipiat inter seniores numerari.

70.- ULPIANUS; *libro XXII, ad Sabinum*.- Si cui lana legetur, id legatum videtur quod tinctum non est, sed autofues:

§ 1.- Sive autem facta est sive infecta, lanae appellatione continetur.

§ 2.- Quaesitum est, utrum lanae appellatione ea sola contineatur quae neta non est an et ea quae neta est, ut puta stamen [stamen] et subtemen: et Sabinus et Netam contineri putat, cuius sententia utimur.

§ 3.- Lanae appellationem eatenus extendi placet, quoad ad telam pervenisset.

§ 4.- Et sciendum sucidam quoque contineri et lotam, si modo tincta non sit.

§ 5.- Lanae appellatione tomentum non continebitur.

§ 6.- Sed nec ea lana, ex qua quis quasi vestimentum fecerit valetudinis vel deliciarum gratia, continebitur.

§ 7.- Ne ea quidem, quae fomentationis gratia parata sunt vel medicinae, lanarum appellatione continentur.

§ 8.- Sed et pelles lanatae contineantur? Et hoc lanae cedere manifestum est.

§ 9.- Lana legata etiam leporinam lanam et anserinam et caprinam credo contineri et de ligno, quam eriocylon appellant.

§ 10.- Linum autem lana legata utique non continebitur.

the opinion that this must be referred to the judge who had jurisdiction of the matter, in order to determine what the testator meant by the words which he made use of. For, in the case of wills, attention should not always be paid to the exact definition of terms, as very frequently persons speak incorrectly, and do not always employ appropriate names and appellations. However, a slave may be considered young who has passed the age of youth, until he begins to be included among old men.

70.- ULPIANUS; *On Sabinus, Book XXII*.- Where wool is left to anyone, that which is not dyed is considered to be bequeathed, that is to say, wool in its natural condition.

§ 1.- This also applies to such as has been worked up, or is embraced in the term unfinished wool.

§ 2.- The question arose whether under the term of "wool" only such is included as has not been spun, or whether that which is spun is also meant; as, for instance, the warp and woof. Sabinus thinks that wool which has been spun is included, and we adopt his opinion.

§ 3.- It is held that the word wool should be employed until it is made into cloth.

§ 4.- It must be understood that both washed and unwashed wool are included under this designation, provided it is not dyed.

§ 5.- Cow-hair used for stuffing cushions is not included in the term wool.

§ 6.- Moreover, wool out of which anyone can make a garment either for health or for convenience is not included.

§ 7.- Nor will such as is prepared for application to the body or for medical treatment be embraced in the term wool.

§ 8.- But should skins to which the wool is attached be included? It is evident that these are accessories to the wool.

§ 9.- Where wool is bequeathed, it may in my opinion include the fur of hares and goats, and the down of geese, as well as the substance obtained from a certain plant which is called vegetable wool.

§ 10.- Where, however, wool is bequeathed, flax is not included.

respondió, que corresponde al conocimiento del que hubiese de conocer de este asunto determinar quiénes haya querido indicar el testador con esta palabras; porque en las cuestiones de los testamentos no se ha de descender ciertamente a la definición de las palabras, pues de ordinario hablan abusivamente, y no siempre usan nombre y vocablos propios; pero que podría ser considerado joven el que pasó de la edad de adolescente, hasta que comience a ser contado entre los ancianos.

70.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Si a alguno se le lega la lana, se considera legada la que no fue teñida, sino nacida espontáneamente.

§ 1.- Mas ora esté labrada, ora sin labrar, se comprende en la denominación de lana.

§ 2.- Se preguntó, si en la denominación de lana se comprenderá aquella sola, que no está hilada, o si también la que está hilada, por ejemplo, el estambre y la trama. Y Sabino opina que se comprende también la hilada; cuyo parecer seguimos.

§ 3.- Está determinado, que la denominación de lana se extienda hasta tanto que hubiese llegado a ser tela.

§ 4.- Y se ha de saber, que se comprende también la sucia y la lavada, si aun no hubiera sido teñida.

§ 5.- En la denominación de lana no se comprenderá la borra.

§ 6.- Pero tampoco se comprenderá aquella lana de la que alguno hubiere hecho una especie de vestido por causa de salud o de comodidad.

§ 7.- Tampoco ciertamente se comprenderán en la denominación de lanas las que fueron preparadas para fomento o para medicina.

§ 8.- Pero ¿se comprenderán también las pieles con lana? Y es evidente que ellas ceden a la lana.

§ 9.- Creo que en la lana legada se comprende también el pelo de liebre, el de ansar, y el de cabra, y la lana de madera, que llaman «lana vegetal».

§ 10.- Mas en la lana legada no se comprenderá ciertamente el lino.

§ 11.- Lino autem legato tam factum quam infectum continetur quodque netum quodque in tela est, quod est nondum detextum. Ergo aliud in lino quam in lana est. Et quidem si tinctum linum sit, credo lino continebitur.

§ 12.- Versicoloribus videndum est. Et constabat apud veteres lanae appellatione versicoloria non contineri, sed ea omnia videri legata, quae tincta sunt, et neta, quae neque detexta neque contexta sunt. Proinde quaeritur, an purpura appellatione versicolorum contineatur. Et ego arbitror ea, quae tincta non sunt, versicoloribus non adnumerari et ideo neque album neque naturaliter nigrum contineri nec alterius coloris naturalis: purpuram autem et coccum, quoniam nihil nativi coloris sunt, contineri arbitror, nisi aliud sensit testator.

§ 13.- Purpurae autem appellatione omnis generis purpuram contineri puto: sed coccum non continebitur, fucinum et ianthinum continebitur. Purpurae appellatione etiam subtemen factum contineri nemo dubitat: lana tinguendae purpurae causa destinata non continebitur.

71.- ULPIANUS; *libro XX, ad Sabinum*.- Cum suae ancillae sive servi in testamento scribuntur, hi designari videntur, quos pater familias suorum numero habuit.

72.- PAULUS; *libro IV, ad Sabinum*.- Eadem in omnibus rebus, quas suas quis legaverit, dicenda sunt.

73.- ULPIANUS; *libro XX, ad Sabinum*.- Suos autem servos vel ancillas eos accipimus, qui sunt pleno iure testantis: inter quos fructuarii non continebuntur.

§ 1.- Sed qui bona fide testatori serviunt, suorum

§ 11.- Where flax is bequeathed, that which has been worked up, as well as the unfinished article, is included, as well as what has been spun, and what is in the web and has not yet been woven. Therefore, a difference exists in a bequest of flax and wool. I think that where flax has been dyed it would be included in a bequest.

§ 12.- Where wool has changed its color, this should be taken into consideration. It was decided by the ancient authorities that wool which has changed its color should not be included under the term wool, but all which had been spun and not woven should be included. Hence the question arises whether the term "changed in color" is applicable to purple. I think that what has not been dyed is not included under this term, and therefore that neither wool which is naturally white or black, or of any other natural hue, is meant. I hold, however, that purple and scarlet, as they are not natural colors, should be included under the term dyed wools, unless the testator intended otherwise.

§ 13.- It is my opinion that purple of every description should be included under this name. Scarlet should not be included, nor bluish red, or violet. No one doubts that thread already placed in the loom should be included under the term purple. Wool intended to be dyed purple is not included.

71.- THE SAME; *On Sabinus, Book XX*.- Where the words, "my female slave, or slaves," are inserted in a will, those are held to be indicated whom the testator included in the number of such slaves as belonged to him.

72.- PAULUS; *On Sabinus, Book IV*.- The same must be said with reference to all other property which anyone can bequeath as his own.

73.- ULPIANUS; *On Sabinus, Book XX*.- By the expression "his slaves or female slaves," we understand those to be meant who belonged to the testator by a perfect title, and that those in whom he enjoyed only the usufruct are not included.

§ 1.- Where freemen serve the testator in good faith

§ 11.- Pero en el lino legado se comprende tanto el labrado, como el no labrado, el que está hilado y el que está en la hilaza, que no ha sido tejido todavía. Luego en el lino sucede cosa distinta que en la lana; y, a la verdad, si el lino hubiera sido teñido, creo que será comprendido en el legado del lino.

§ 12.- Se ha de ver respecto a las materias de varios de los colores; y era constante entre los antiguos, que en la denominación de lana no se comprendían las materias de varios colores, sino que se consideran legadas todas las que están teñidas e hiladas, que no fueron tejidas, ni entretejidas. Por lo cual se pregunta, si en la denominación de materias de varios colores se comprenderá la púrpura. Y yo opino, que las materias que no fueron teñidas no se cuentan entre la de varios colores; y por lo tanto, que no se comprende ni lo blanco, ni lo naturalmente negro, ni lo de otro color natural; pero creo que se comprenden la púrpura y la grana, porque en nada son de color nativo, a no ser que otra cosa haya entendido decir el testador.

§ 13.- Pero opino, que en la denominación de púrpura se comprende la púrpura de toda clase, pero que no se comprenderá la grana, y se comprenderán el color del fucino y el violado. Nadie duda, que en la denominación de púrpura se comprende también la trama hecha; pero no se comprenderá la lana destinada a ser teñida de púrpura.

71.- EL MISMO; *Comentarios a Sabino, libro XX*.- Cuando en un testamento se inscriben sus esclavas o esclavos, se considera que son designados los que el padre de familia tuvo por suyos.

72.- PAULO; *Comentarios a Sabino, libro IV*.- Lo mismo se ha de decir respecto a todas las cosas que uno hubiere legado como suyos.

73.- ULPIANO; *Comentarios a Sabino, libro XX*.- Pero entendemos por esclavos o esclavas suyos, los que de pleno derecho son del testador, entre los cuales no se comprenderán los que tiene en usufructo.

§ 1.- Pero los que de buena fe le prestan servi-

appellatione magis est ut contineantur, si modo suorum appellatione eos quos suorum numero habuit voluit contineri.

§ 2.- Eos vero, quos quis pignori hypothecaeve dedit, sine dubio inter suos legasse videbitur debitor: creditor nequaquam.

§ 3.- Proinde si quis servos habuit proprios, sed quorum operas locabat vel pistorias vel histrionicas vel alias similes, an servorum appellatione etiam hos legasse videatur? Quod et praesumi oportet, nisi contraria voluntas testatoris appareat.

§ 4.- Eum, qui venaliciariam vitam exercebat, puti suorum numero non facile contineri velle eiusmodi mancipia, nisi evidens voluntas fuit etiam de his sentientis: nam quos quis ideo comparavit, ut ilico distraheret, mercis magis loco quam suorum habuisse credendus est.

§ 5.- Vicarios autem servorum suorum numero non contineri Pomponius libro quinto scribit.

74.- POMPONIUS; *libro VI, ad Sabinum*.- Si quis suos servos legavit, communes quoque continentur et in quibus usus fructus alienus fuit.

75.- ULPIANUS; *libro XX, ad Sabinum*.- Nummis indistincte legatis hoc receptum est, ut exiguiore legati videantur, si neque ex consuetudine patris familiae neque ex regionis, unde fuit, neque ex contextu testamenti possit apparere.

76.- ULPIANUS; *libro II, ad edictum*.- Chartis legatis nemo dicet scriptas et libros iam factos legato cedere. Hoc idem et in tabulis est.

77.- IAVOLENUS; *libro I, ex Plautio*.- Cum in

as slaves, the better opinion is that they are included under the term "his own;" provided he intended that those who belonged to him, as well as those whom he regarded as being his property, should be included in this appellation.

§ 2.- There is no doubt that those slaves whom a debtor has given in pledge should be held to have been bequeathed as his own; but this, under no circumstances, applies to the creditor.

§ 3.- Therefore, if anyone has slaves of his own whose services he has leased to others, either as bakers or players, or for any other employment; should he be held to have also bequeathed them under the name of slaves? This must be presumed, unless the intention of the testator appears to be otherwise.

§ 4.- I think that where a party pursues the calling of a slave trader, his slaves cannot properly be included among those which belong to his household, unless it was clear that this was his intention with reference to them; for where anyone purchases slaves in order immediately to sell them, he should be considered to hold them rather as merchandise, than as his slaves.

§ 5.- Pomponius states in the Fifth Book that slaves belonging to other slaves are not included in this category.

74.- POMPONIUS; *On Sabinus, Book VI*.- Where anyone bequeaths "his slaves," those also held in common with others, as well as those in whom another enjoys the usufruct, are also included.

75.- ULPIANUS; *On Sabinus, Book XX*.- Where coins, in general, are bequeathed, it is understood that those of the smallest denominations are included; unless it appears from the terms of the will that the intention was to depart from the custom of the testator, or of the neighborhood.

76.- THE SAME; *On the Edict, Book II*.- Where papers are bequeathed, no one can say that this refers to such as have been written upon, and that books already made up are included in the legacy. This also applies to tablets.

77.- JAVOLENUS; *On Plautius, Book I*.- Where

dumbre al testador es más cierto que se comprenden en la denominación de los suyos, si es que quiso que se comprendieran en la denominación de suyos los que el tuvo por suyos.

§ 2.- Mas los que alguno dió en prenda o en hipoteca se considerará sin duda que los legó entre los suyos el deudor, y de ninguna manera el acreedor.

§ 3.- Por consiguiente, si alguno tuvo esclavos propios, pero cuyos servicios daba en arrendamiento, o panaderos, o histriones, y otros semejantes, ¿se considerará que los legó también con la denominación de esclavos? Y esto debe presumirse, si no apareciera contraria voluntad del testador.

§ 4.- Opino que el que se dedicaba al comercio de esclavos no quiere que fácilmente se comprendan en el número de los suyos los esclavos de este comercio, a no ser que haya sido evidente la voluntad del que se refiera también a éstos; porque se ha de creer, que los que alguno compró para venderlos desde luego, los tuvo más bien en calidad de mercancías que en la de suyos.

§ 5.- Pero escribió Pomponio en el libro quinto, que los vicarios no son comprendidos en el número de los esclavos suyos.

74.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si alguno legó los esclavos suyos, se comprenden también los comunes, y aquellos en que tenía otro el usufructo.

75.- ULPIANO; *Comentarios a Sabino, libro XX*.- Habiéndose legado indistintamente monedas, se admitió esto, que se consideren legadas las de menos valor, si otra cosa no pudiera demostrarse por la costumbre del padre de familia, ni de la región en que estuvo, ni por el contexto del testamento.

76.- EL MISMO; *Comentarios al Edicto, libro II*.- Nadie dirá que, legados los papeles, ceden al legado los escritos y los libros ya hechos; esto mismo sucede también respecto a las tablas.

77.- JAVOLENO; *Doctrina de Plautio, libro I*.-

substitutione legata repetuntur, libertates etiam continentur.

78.- PAULUS; *libro II, ad Vitellium*.- Quaesitum est Stichum servum ex eo fundo ante annum mortis testatoris abductum et disciplinae traditum, postea in eum fundum non reversum an deberetur. Responsum est, si studendi causa misisset, non quo de fundo eum aliorum transferret, deberi.

§ 1.- "Maevi fili, quod iam tibi maximam partem facultatum dederim, contentus esse debes fundo Semproniano cum suis inhabitantibus, id est familia, et quae ibi erunt". Quaesitum est de nominibus debitorum et nummis.

Eadem epistulam talem emisit: "Argentum omne et supellectilem, quodcumque habeo, tibi dono et quidquid in praedio Semproniano habeo". An supellex, quae in aliis praediis vel domi-bus esset, ad Maevium pertineret? Et an servi, quos ex eo fundo aliis legavit? Responsum est nomina et nummos non videri deberi, nisi manifeste de his quoque legandis voluntas defunctae adprobaretur. Servos ex isdem fundis aliis datos deminuisse filii legatum. De argento et supellectili quae alibi esset eum cuius notio est aestimaturum, ut id optineat, quod testatori placuisse a legatario adprobabitur.

§ 2.- Praedia quidam reliquit adiectis [his] verbis: "Uti a me possessa sunt et quaecumque ibi erunt cum moriar": quaesitum est de mancipiis, quae in his praediis morata fuerunt vel operis rustici causa vel alterius officii, ceterisque rebus, quae ibi fuerunt in diem mortis, an ad legatarium pertinerent. Respondit ea omnia, de quibus quaereretur, legata videri.

legacies are repeated in making a substitution, grants of freedom are also included in the repetition.

78.- PAULUS; *On Vitellius, Book II*.- The question arose, where the slave Stichus had been removed from the land to which he had been attached, and given instruction, but had not afterwards been returned, whether he should be delivered to the legatee with said land. The answer was that if he had been sent for the purpose of studying, and not to be transferred to some other land, he must be delivered to the legatee.

§ 1.- "My son, Mævius, as I have already given you the greater part of my property, you should be content with the Sempronian Estate, and all who live thereon; that is to say, with the slaves who are there." The question arose as to the disposition of certain notes of debtors, and sums of money which were found on said land.

The same testatrix wrote the following letter: "I give you all the silver plate and furniture which I have, and whatever I possess on the Sempronian Estate." Will the furniture which is on other estates or in other houses belong to Mævius, and will he be entitled to the slaves which the testator bequeathed to others, and which formed part of the Sempronian Estate? The answer was that the notes and the money should not be considered as included, unless the intention of the deceased to bequeath them was positively proved, and that the legacy of the son should be diminished through the bequest to others of slaves attached to the said Estate. With reference to the silver plate and furniture which were elsewhere, their disposition must be left to the judge, who will determine to whom they should belong, in order that the intention of the testator may be carried out by the legatee.

§ 2.- A testator left certain lands as follows, "Just as they were held by me, together with whatever property may be there at the time of my death." The question arose with reference to the slaves who dwelt on said lands either for the purpose of cultivating them, or for other purposes, as well as with reference to other property which was there at the time of the testator's death, whether they belonged to the legatee. The answer was that all the property in question

Cuando en la substitución se repiten los legados, se comprenden también las libertades.

78.- PAULO; *Comentarios a Vitelio, libro II*.- Se preguntó, si sería debido el esclavo Stico separado de un fundo un año antes de la muerte del testador y mandado a estudios, sin que después haya vuelto a aquel fundo, Se respondió, que era debido, si lo hubiese enviado a estudiar, no porque lo trasladase de aquel fundo a otra parte.

§ 1.- «Hijo Mevio, como ya te he dado la mayor parte de los bienes, debes contentarte con el fundo Semproniano con sus habitantes, esto es, con los esclavos y con las cosas que en él hubiere»; se preguntó, respecto a los créditos de los deudores, y al dinero.

La misma testadora envió esta carta: «te dono toda la plata, y el ajuar, cuanto tengo, y lo que tengo en el predio Semproniano»; se preguntó, si le pertenecería a Mevio el ajuar que hubiere en otros predios o casas, y los esclavos que de aquel fundo haya legado a otros. Se respondió, que no se considera que se deben los créditos y el dinero, a no ser que se probase claramente la voluntad de la difunta también para legarlos, que los esclavos que de los mismos fundos fueron dados a otros disminuyeron el legado del hijo, y que respecto a la plata y al ajuar, que hubiese en otra parte, juzgará aquel a quien le compete el conocimiento de este asunto, para que reciba lo que por el legatario se probare, que le plugo al testador.

§ 2.- Uno dejó unos predios habiendo añadido estas palabras: «como han sido poseídos por mí, y todas las cosas que en ellos hubiere, cuando yo muera»; se preguntó, respecto a los esclavos que moraren en estos predios, o por causa de faenas rústicas, o de otro oficio, y respecto a las demás cosas que en ellos hubo el día de la muerte, si le pertenecerían al legatario. Respondió, que se consideran legadas todas las cosas por que se pregunta.

§ 3.- "Peto, ut fundum meum Campanianum genesiae alumnae meae adscribatis ducentorum aureorum ita uti est". Quaeritur, an fundo et reliqua colonorum et mancipia, si qua mortis tempore in eo fuerint, debeantur. Respondit reliqua quidem colonorum non legata: cetera vero videri illis verbis "ita uti est" data.

§ 4.- Illud fortasse quaesiturus sit aliquis, cur argenti appellatione etiam factum argentum comprehendetur, cum, si marmor legatum esset, nihil praeter rudem materiam demonstratum videri posset. Cuius haec ratio traditur, quippe ea, quae talis naturae sint, ut saepius in sua redigi possint initia, ea materiae potentia victa numquam vires eius effugiant.

§ 5.- Coccum quod proprio nomine appellatur quin versicoloribus cederet, nemo dubitavit. Quin minus porro coracinum aut hysginum aut melinum suo nomine quam coccum purpurave designatur?

§ 6.- Cum vir ita legasset: "Quae uxoris causa parata sunt, ei do lego", ego apud praetorem fideicommissarium petebam etiam res aestimatas, quarum pretium in dotem erat, nec optinui, quasi testator non sensisset de his rebus.

Atqui si in usum eius datae sint, nihil interest, ab ipsa an ab alio comparatae sunt. Postea apud aburnium valentem inveni ita relatum: mulier res aestimatas in dotem dederat ac deinde maritus ei legaverat his verbis: "Quae eius causa comparata emptaque essent". Dixit emptorum paratorumque appellatione non contineri ea, quae in dotem data essent, nisi si maritus eas res, posteaquam ipsius factae essent, in uxoris usum convertisset.

should be held to have been bequeathed.

§ 3.- "I desire that my Campanian Estate be given to Genesis, my foster-child, the said Estate being of the value of two hundred aurei, and that it be enjoyed by her as is customary." The question arose whether the remaining rents of the tenants, and the slaves which were on the ground at the time of the death of the testator, were also due to the legatee. The answer was that whatever was due from the tenants was not bequeathed, but that everything else should be held to have been given by the words, "As is customary."

§ 4.- It might, perhaps, be asked by someone why, under the term "silver plate" manufactured silver should be included; when, where marble is bequeathed, nothing except the rough material can be considered to have been indicated. The reason for this is that articles of such a nature that they can be readily reduced to their former condition are subject to the power of the material of which they are composed without ever losing their force.

§ 5.- There is no doubt that scarlet, which is designated by its peculiar name, is not included in wool whose color has been changed, any more than dye made from the blood of crows, or those known as hysginus and melinus are called scarlet or purple.

§ 6.- Where a man made a bequest as follows: "I give and bequeath to my wife those articles which have been acquired for her use," I asked the Praetor, who had jurisdiction of the trust, that the property which the wife had given to her husband, and which had been appraised, might be surrendered, so that its value might be included in the dowry, but I failed to obtain his consent, as he held the testator did not have this property in his mind at the time when he made his will.

If, however, the said property had been given to her for her use, it would make no difference whether it had been obtained by herself, or by another. I afterwards found the following case mentioned in Aburnius Valens. A woman gave certain property, which had been appraised, by way of dowry to her husband, and the latter afterwards left it to her, described as follows, "The articles which have been acquired and purchased for her." This authority held that what is given by way of dowry is not included in the category of property purchased and acquired,

§ 3.- «Pido que le adscribáis a Genesis, mi alumna, mi fundo Capaniano, de doscientos áureos, así como está»; se pregunta, si de deberán al fundo los atrasos de los colonos, y los esclavos, si algunos hubo en él al tiempo de la muerte. Respondió, que con estas palabras: «así como está», no se consideran ciertamente legados los atrasos de los colonos, pero que se dieron las demás cosas.

§ 4.- Acaso haya de preguntar alguno, por que en la denominación de plata se comprende también la plata labrada, cuando si se hubiese legado mármol, no se podría considerar indicada nada más que la materia sin labrar. La razón que de esto se da es, que las cosas que son de tal naturaleza, que muchas veces se pueden reducir a su primitivo estado, no se substraen nunca, vencidas por el poder de la materia, a las fuerzas de ésta.

§ 5.- Nadie dudará que lo teñido de grana, que se llama con su nombre propio, no se comprenda entre lo de varios colores; y ciertamente, lo de negro, o lo de violáceo, o lo de amarillo, ¿no se designa también con nombre propio como la grana y la púrpura?

§ 6.- Habiendo un marido legado en esta forma: «las cosas que fueron preparadas por causa de mi mujer, se las doy y lego a ésta», yo pedía ante el Pretor de los fideicomisos también las cosas estimadas, cuyo precio estaba comprendido en la dote, y no las obtuve, como si el testador no se hubiese referido a estas cosas.

Pero si hubieran sido dadas para uso de ella, nada importa que hayan sido preparadas por ella misma, o por otro. Después hallé en Aburnio Valente este relato: una mujer había dado en dote cosas estimadas, y después su marido le había hecho un legado en estos términos: «las cosas que hubiesen sido preparadas y compradas por causa de ella»; dijo, que en la denominación de cosas compradas y preparadas no se comprenden las que hubiesen sido dadas en dote, sino si el marido, después que se hubiesen hecho de él, hubiese aplicado estas cosas a uso de la

§ 7.- Rebus quae in fundo sunt legatis accedunt etiam ea, quae tunc non sunt, si esse solent: nec quae casu ibi fuerunt, legata existimantur.

79.- CELSUS; *libro IX, digestorum*.- Si chorus aut familia legetur, perinde est quasi singuli homines legati sint.

§ 1.- His verbis: "Quae ibi mobilia mea erunt, do lego" nummos ibi repositos, ut mutui darentur, non esse legatos Proculus ait: at eos quos praesidii causa repositos habet, ut quidam bellis civilibus factitassent, eos legato contineri. Et audisse se rusticos senes ita dicentes pecuniam sine peculio fragilem esse, peculium appellantes, quod praesidii causa seponeretur.

§ 2.- Area legata si inaedificata medio tempore fuerit ac rursus area sit, quamquam tunc peti non poterat, nunc tamen debetur.

§ 3.- Servus quoque legatus si interim manumittatur et postea servus factus sit, peti potest.

80.- CELSUS; *libro XXXV, digestorum*.- Coniunctim heredes institui aut coniunctim legari hoc est: totam hereditatem et tota legata singulis data esse, partes autem concursu fieri.

81.- MODESTINUS; *libro IX, differentiarum*.- Servis legatis etiam ancillas quidam deberi recte putant, quasi commune nomen utrumque sexum contineat: ancillis vero legatis masculos non deberi nemo dubitat. Sed pueris legatis etiam puellae debentur: id non aequè in puellis pueros contineri dicen-

unless the husband, having afterwards become the owner of said property, devotes it to the use of his wife.

§ 7.- Where property, which is on land, is bequeathed, the legacy also includes things which, if not on it at the time, are usually there, and any articles that are there by chance are not considered to have been bequeathed.

79.- CELSUS; *Digest, Book IX*.- Where a chorus, or a body of slaves were bequeathed, it is just the same as if the individuals composing them had been separately bequeathed.

§ 1.- Proculus says that, by the words: "I give and bequeath all movable property which is found there," money which is deposited in that place for the purpose of being loaned is not bequeathed, but that such as has been left there to render it secure (as certain persons were accustomed to do during the Civil Wars), will be included in the legacy; and he relates that he has heard old men in the country say that money without peculium is very easily lost, meaning by the term peculium what is put aside for safe-keeping.

§ 2.- Where a plot of land not built upon is devised, and, in the meantime, a house is erected upon it, and the house having been demolished, the land again becomes vacant, the legatee will be entitled to it, although he could not have claimed it while the house stood there.

§ 3.- Where a slave is bequeathed, and then, after having been manumitted, is again reduced to slavery, he can be claimed by the legatee.

80.- THE SAME; *Digest, Book XXXV*.- Heirs can be appointed conjointly or made joint legatees; that is to say, an entire estate, or an entire legacy can be given to them individually, so that their shares will be indivisible, unless by universal consent.

81.- MODESTINUS; *Differences, Book IX*.- Certain authorities very properly hold that where slaves are bequeathed, female slaves are included, as the common name of "slaves" includes both sexes. No one, however, has any doubt that where female slaves are bequeathed, male slaves are not included. Where children, who are slaves, are bequeathed, girl

mujer.

§ 7.- A las cosas legadas que hay en un fundo se les agregan también las que no se hallan entonces, si suelen estar; y no se consideran legadas las que por casualidad se hallaron en él.

79.- CELSO; *Digesto, libro IX*.- Si se legara un coro o la servidumbre, es lo mismo que si hubieran sido legados cada uno de los esclavos.

§ 1.- Próculo dice, que con estas palabras: «doy y lego mis cosas muebles que allí hubiere», no se legaron los dineros allí depositados para que fuesen dados en mutuo; pero que los que uno tiene depositados para defensa, como hicieron algunos en las guerras civiles, se comprenden en el legado, y que el oyó a campesinos ancianos que decían, que el dinero sin peculio era frágil cosa, llamando peculio a lo que se separase para defensa.

§ 2.- Legando un solar, si en el tiempo intermedio hubiere sido edificado, y otra vez volviera a ser solar, aunque entonces no podía ser pedido, se debe, sin embargo, ahora.

§ 3.- También el esclavo legado puede ser pedido después, si en el tiempo intermedio hubiera sido manumitido, y después hubiera sido hecho esclavo.

80.- EL MISMO; *Digesto, libro XXXV*.- Ser instituidos herederos conjuntamente o ser legatarios conjuntamente es esto: que a cada cual se le dió toda la herencia, y todos los legados, pero que se hacen partes por el concurso.

81.- MODESTINO; *Diferencias, libro IX*.- Con razón piensan algunos, que legados los esclavos se deben también las esclavas, como si el nombre común comprendiera a uno y otro sexo; pero nadie duda, que legadas las esclavas no deben ser los varones. Pero legados los niños se deben también las

dum est.

§ 1.- Mulieribus vero legatis etiam virgines debentur, sicuti viris legatis etiam pueros deberi respondetur.

§ 2.- Pecudibus autem legatis et boves et cetera iumenta continentur.

§ 3.- Armento autem legato etiam boves contineri convenit, non etiam greges ovium et caprarum.

§ 4.- Ovibus legatis neque agnos neque arietes contineri quidam recte existimant.

§ 5.- Ovium vero grege legato et arietes et agnos deberi nemo dubitat.

82.- MODESTINUS; *libro IX, regularum*.- Servus, qui in fundo morari solitus erat, si fugerit, licet post mortem testatoris adprehendatur, fundo legato, ut instructus est, etiam ipse legato cedit.

83.- MODESTINUS; *libro X, responsorum*.- Quod his verbis relictum est: "Quidquid ex hereditate bonisve meis ad te pervenerit, cum morieris, restituas", fructus, quos heres vivus percepit, item quae fructuum vice sunt non venire placuisse: nec enim quicquam proponi, ex quo de his quoque restituendis testatricem rogasse probari potest.

§ 1.- Idem. Testator, qui libertis fideicommissum relinquebat, substitutione inter eos facta expressit, ut post mortem extremi ad posteros eorum pertineret: quaero, cum nemo alius sit nisi libertus eius qui extremo mortuus est, an is ad fideicommissum admitti debeat. Respondit: posterorum appellatione liberos tantummodo, non etiam libertos eorum, quibus fideicommissum relictum est, fideicommisso contineri nequaquam incertum est.

Where children, who are slaves, are bequeathed, girl slaves are included. It must be said that it is not the case, where girl slaves are bequeathed, for boy slaves to be included.

§ 1.- Where female slaves are bequeathed, virgins are also included, just as where male slaves are bequeathed boys are also included.

§ 2.- When droves of cattle are bequeathed, oxen and other beasts of burden are included.

§ 3.- When a herd is bequeathed, it is held that oxen are included, but not flocks of sheep and goats.

§ 4.- When sheep are bequeathed, certain authorities very properly hold that neither lambs nor rams are included.

§ 5.- There is no doubt, however, that rams and lambs are included in the bequest of a flock of sheep.

82.- THE SAME; *Rules, Book IX*.- When a slave, who ordinarily dwelt on a tract of land, takes to flight and the land is devised in the condition in which it is, the slave will form part of the legacy, even though he should be caught after the death of the testator.

83.- THE SAME; *Opinions, Book VI*.- Where a legacy was left as follows, "I ask you to give to So-and-So, at the time of your death, everything belonging to my estate and my property which may come into your hands," the crops which the heir, during the lifetime, as well as whatever took the place of the crops, were not considered to have formed a part of the legacy, for it could not be proved that the testatrix intended that her heir should be charged with the delivery of the crops.

§ 1.- Where a testator left a trust for the benefit of his children, and, after substituting them for one another, desired that, after the death of the last survivor, the trust would pass to their descendants, I ask, if no one remained after the death of the last child, except his freedman, whether he ought to be admitted to the benefit of the trust. The answer was that it was perfectly evident that by the appellation his "descendants," only his children, and not their freedmen, were included in the number of those to whom the trust was bequeathed.

niñas; mas no se ha de decir igualmente que en las niñas se comprenden los niños.

§ 1.- Pero legadas las mujeres, se deben también las doncellas, así como legados los varones se responde que se deben también los niños.

§ 2.- Mas legados los ganados se comprenden también los bueyes, y las demás caballerías.

§ 3.- Pero legado el ganado mayor conviene que se comprendan también los bueyes, pero no también los rebaños de ovejas y de cabras.

§ 4.- Legadas las ovejas, con razón juzgan algunos que no se comprenden ni los corderos ni los carneros.

§ 5.- Pero legado un rebaño de ovejas, nadie duda que se deben así los carneros como los corderos.

82.- EL MISMO; *Reglas, libro IX*.- Si el esclavo que había solido morar en un fundo hubiere huido, aunque fuese cogido después de la muerte del testador, cede también al legado, habiendo sido legado el fundo como está provisto.

83.- EL MISMO; *Respuestas, libro X*.- Respecto a lo que se dejó en estos términos: «restituirás cuando mueras todo lo que de mi herencia o de mis bienes hubiere ido a tí», se determinó que no se comprenden los frutos, que el heredero percibió en vida, ni tampoco las cosas que hacen veces de frutos; porque no se propone cosa alguna por la que se pueda probar que la testadora rogó que se restituyeran también aquellos.

§ 1.- El mismo testador, que les dejaba un fideicomiso a los libertos, dijo, habiendo establecido entre ellos substitución, que después de la muerte del último perteneciese a la posteridad de ellos, pregunto, si, no habiendo otro alguno, más que un libertito del que murió últimamente, deberá ser admitido éste al fideicomiso. Respondió: de ningún modo es incierto que con la denominación de posteridad se comprenden en el fideicomiso solamente los descendientes, pero no también los libertos de aquellos a quienes se dejó el fideicomiso.

84.- IAVOLENUS; *libro II, ex Cassio*.- Cui quae Romae essent legata sunt, ei etiam quae custodiae causa in horreis extra urbem reposita sunt, debentur.

85.- POMPONIUS; *libro II, ad Quintum Mucium*.- Nuper constitutum est a principe, ut et non adiecto hoc "meum" si quis corpus alicui leget et ita sentiat, ut ita demum praestetur, si suum sit, ita valere legatum, ut appareat magis sententiam legantis, non hoc verbum "meum" respiciendum esse. Et ideo elegans est illa distinctio, ut, quotiens certum corpus legatur, ad praesens tempus adiectum hoc verbum "meum" non faciat condicionem, si vero incertum corpus legetur, veluti ita "vina mea" "vestem meam", videatur pro condicionem hoc verbum esse "mea", ut ea demum, quae illius sint, videantur legata. Quod non puto fortiter posse defendi, sed potius et hic vestem vel vinum, quod suorum numero habuerit, hoc legatum esse: sic enim responsum est etiam quod coacuerit vinum legato cedere, si id vini numero testator habuisset.

Plane in mortis tempore collatum hunc sermonem "vestem, quae mea erit" sine dubio pro condicionem accipiendum puto: sed et "Stichum qui meus erit" puto pro condicionem accipiendum nec interesse, utrum ita "qui meus erit" an ita "si meus erit": utrobique condicionem eam esse. Labeo tamen scribit etiam in futurum tempus collatum hunc sermonem "qui meus erit" pro demonstrationem accipiendum, sed alio iure utimur.

86.- PROCULUS; *libro V, epistularum*.- Si ita legatum est "domum quaeque mea ibi erunt, cum moriar", nummos ad diem exactos a debitoribus, ut aliis nominibus collocarentur, non puto legatos esse et Labeonis distinctionem valde probo, qui scripsit

84.- JAVOLENUS; *On Cassius, Book II*.- Where a testator bequeathed his property, which was at Rome, to a certain person, he would also be entitled to whatever was stored for safe keeping in warehouses outside the City.

85.- POMPONIUS; *On Quintus Mucius, Book II*.- It has recently been decided by the Emperor, that where a testator left property to anyone, but did not add the term "my," and did not intend to leave the said property unless it was his, the legacy would be valid only where it was necessary to pay more attention to the wishes of the testator than to the word "my." Wherefore this nice distinction arises, that whenever a certain article is bequeathed to be delivered immediately, the term "my" does not create the condition. If, however, property which is not expressly designated, as, for example, "My wines, my clothing," the term "my" is held to be conditional, so that only that is left which belonged to the testator. Still, I do not think the above-mentioned opinion can be strongly maintained, but rather that, in this instance, any clothing or wine which the testator considered to be his, is bequeathed; and hence it was held that even wine which had become sour was included in the legacy, if the testator had always considered it to be wine.

It is clear that where the testator used language relating to the time of his death, for instance, "the clothing which shall be mine," I think that this undoubtedly should be understood as implying a condition. I also think that, where the testator says, "Stichus, who will be mine," the sentence ought likewise to be considered as conditional; nor does it make any difference if he should say, "Who will be mine," or "If he should be mine," in both cases the bequest will be contingent. Labeo is of the opinion that the following clause, "Who shall be mine," should only be considered by way of designation. We, however, make use of another rule.

86.- PROCULUS; *Epistles, Book V*.- Where a legacy was bequeathed as follows, "I leave my house and its contents at the time of my death," I do not think that money collected from certain debtors of the testator, in order to again be invested in other

84.- JAVOLENO; *Doctrina de Cassio, libro II*.- Al que se legaron las cosas que hubiese en Roma, se le deben también las que por razón de custodia fueron depositadas en almacenes fuera de la ciudad.

85.- POMPONIO; *Comentarios a Quinto Mucio, libro II*.- Se estableció hace poco por el Príncipe, que si uno le legara a otro alguna cosa, aun sin haber añadido «esto que es mío», y entendiera que se entregue solamente si fuera suya, sea válido de este modo el legado, de suerte que aparezca que se ha de atender más bien a la voluntad del que lega, que no a esta palabra «mío». Y por esto es discreta esta distinción, que siempre que se lega una cosa cierta, esta palabra «mía» aplicada al tiempo presente no constituya condición; pero si se legara una cosa incierta, por ejemplo, así: «mi vino, mis vestidos», se considere que esta palabra, «mi», está en lugar de una condición, de suerte que se consideren legados solamente los que sean de él. Lo que no creo que se pueda defender con fuerza, sino que más bien también en este caso fue legado el vestido, o el vino que él hubiere tenido en el número de sus cosas; porque se respondió de este modo, que también el vino que se hubiere agriado cede al legado, si el testador lo hubiese tenido en clase de vino.

Pero, a la verdad, esta frase: «el vestido, que fuere mío», referida al tiempo de la muerte, opino que sin duda ha de ser admitida como condición; mas creo que también esta: «Stico, que fuere mío», ha de ser tomada como condición, y que no importa si se hubiere expresado así: «que fuere mío», o así: «si fuere mío», y que en ambos casos hay esta condición. Pero escribe Labeón, que aun referida a tiempo futuro esta frase: «que fuere mío», ha de ser admitida como demostración; pero usamos el derecho contrario.

86.- PRÓCULO; *Epístolas, libro V*.- Si se legó en esta forma: «la casa, y las cosas que allí hubiere mías, cuando yo muera», no creo que fue legado el dinero cobrado de los deudores a término, para ser colocado en otros créditos. Y apruebo resueltamente la distin-

nec quod casu abesset, minus esse legatum nec quod casu ibi sit, magis esse legatum.

87.- PAULUS; *libro IV, ad legem Iuliam et Papiam*.- Et fideicommissum et mortis causa donatio appellacione legati continetur.

88.- PAULUS; *libro V, ad legem Iuliam et Papiam*.- Lana legata vestem, quae ex ea facta sit, deberi non placet.

§ 1.- Sed et materia legata navis armariumve ex ea factum non vindicetur.

§ 2.- Nave autem legata dissoluta neque materia neque navis debetur.

§ 3.- Massa autem legata Scyphi ex ea facti exigi possunt.

89.- PAULUS; *libro VI, ad legem Iuliam et Papiam*.- Re coniuncti videntur, non etiam verbis, cum duobus separatim eadem res legatur. Item verbis, non etiam re: "Titio et Seio fundum aequis partibus do lego", quoniam semper partes habent legatarii.

Praefertur igitur omnimodo ceteris, qui et re et verbis coniunctus est. Quod si re tantum coniunctus sit, constat non esse potiorum. Si vero verbis quidem coniunctus sit, re autem non, quaestionis est, an coniunctus potior sit: et magis est, ut et ipse praefertur.

similar claims, forms a part of the legacy. I thoroughly approve of the distinction made by Labeo, that the legacy will not be diminished because something may happen to be out of the house, any more than it may be increased because some other article happens to be there.

87.- PAULUS; *On the Lex Julia et Papia, Book IV*.- A trust, and a donation mortis causa, are included in the term legacy.

88.- THE SAME; *On the Lex Julia, et Papia, Book V*.- It has been decided that where wool is bequeathed, a garment made out of it is not included in the legacy.

§ 1.- Likewise, where material such as wood is bequeathed, a ship or a chest of drawers made out of it cannot be claimed as part of the legacy.

§ 2.- Where a ship, which has been bequeathed, is broken up, neither the ship itself, nor the materials of which it is composed, will be due.

§ 3.- Where, however, a mass of metal is bequeathed, any cup made out of it can be demanded.

89.- THE SAME; *On the Lex Julia et Papia, Book VI*.- Parties are considered joint legatees where the same article is bequeathed to them separately, by reason of the property itself, and not on account of the words employed by the testator. They are considered joint legatees on account of the words used, and not by reason of the property bequeathed, where the testator says, "I give and devise such-and-such a tract of land to Titius and Seius, share and share alike," as both legatees have their shares from the beginning.

Therefore a legatee is certainly preferred to others, where he is joined with his co-legatee both by the property left and by the terms of the bequest. If he should only be joined with him by the legacy of the property, it is established that he is not entitled to any preference. But where he is joined with him by words and not by his interest in the property, the question arises whether the other will be entitled to the preference. The better opinion is that he will be preferred.

ción de Labeón, que escribió, que ni lo que por casualidad faltase fue legado de menos, ni lo que por casualidad estuviera allí fue legado de más.

87.- PAULO; *Comentarios a la ley Julia y Papia, libro IV*.- Con la denominación de legado se comprende así el fideicomiso, como la donación por causa de muerte.

88.- EL MISMO; *Comentarios a la ley Julia y Papia, libro V*.- Habiendo legado lana, no parece bien que se deba el vestido, que de ella se haya hecho.

§ 1.- Pero habiéndose legado madera, tampoco se reivindicará la nave o el armario, que de ella se hizo..

§ 2.- Pero deshecha la nave legada, no se deben ni los materiales, ni la nave.

§ 3.- Pero legada una masa, se pueden reclamar las tazas que de ella se hicieron.

89.- EL MISMO; *Comentarios, a la ley Julia y Papia, libro VI*.- Se consideran conjuntos respecto a la cosa, no también respecto a las palabras, cuando una misma cosa es legada a dos separadamente; asimismo en cuanto a las palabras, no también en cuanto a la cosa: «doy y lego a Ticio y a Seyo un fundo por pares iguales», porque siempre tienen parte los legatarios.

Así, pues, es preferido de todos modos a los demás, el que es conjunto tanto respecto a la cosa, como respecto a las palabras; pero si fuera conjunto solamente respecto a la cosa, consta que no es preferido; pero si verdaderamente fuera conjunto respecto a las palabras, pero no en cuanto a la cosa, hay la cuestión de si será preferido el conjunto. Y es más cierto que también él sea preferido.

90.- PAULUS; *libro VII, ad legem Iuliam et Papiam*.- Nominatim legatum accipiendum est, quod a quo legatum sit intellegitur, licet nomen pronuntiatum non sit.

91.- PAPINIANUS; *libro VII, responsorum*.- Praediis per praeceptionem filiae datis cum reliquis actorum et colonorum ea reliqua videntur legata, quae de reditu praediorum in eadem causa manserunt: alioquin pecuniam a colonis exactam et in kalendarium in eadem regione versam reliquis non contineri neque colonorum neque actorum facile constabit, tametsi nominatim actores ad filiam pertinere voluit.

§ 1.- Ex his verbis: "Lucio Titio praedia mea illa cum praetorio, sicut a me in diem mortis meae possessa sunt, do" instrumentum rusticum et omnia, quae ibi fuerunt, quo dominus fuisset instructor, deberi convenit: colonorum reliqua non debentur.

§ 2.- Pater filio tabernam purpurariam cum servis institoribus et purpuris, quae in diem mortis eius ibi fuerunt, legavit. Neque pretia purpurae condita neque debita neque reliqua legato contineri placuit.

§ 3.- "Titio Seiana praedia, sicuti comparata sunt, do lego". Cum essent Gabiniana quoque simul uno pretio comparata, non sufficere solum argumentum emptionis respondi, sed inspiciendum, an litteris et rationibus appellatione Seianorum Gabiniana quoque continentur et utriusque possessionis confusi redditus Titulo Seianorum accepto latii essentiarum.

§ 4.- Balneas legatae domus esse portionem constabat: quod si eas publice praebuit, ita domus esse portionem balneas, si per domum quoque

90.- THE SAME; *On the Lex Julia et Papia, Book VII*.- A legacy is understood to have been specifically bequeathed where the party who is charged with it is known, even though his name may not be stated.

91.- PAPINIANUS; *Opinions, Book VII*.- Where a tract of land was devised to a daughter as a preferred legacy, "Together with what is due from the stewards and tenants," the legacy of the residue includes what remains of the rents of the lands under the same lease. Otherwise, it could readily be established that rent collected from the tenants and money deposited in the account-book of the testator in the same place, would not form part of what was left, as being due from either the tenant or the stewards, even though the testator may have expressly stated that he desired the stewards to belong to his daughter.

§ 1.- It was decided that where the following words are employed, "I give to Lucius Titius such-and-such lands, with the house, in the same condition as they may be found at the time of my death," the farming implements, and all articles for the use of the house must be delivered under the terms of the legacy; but anything which is due from the tenants will not be included.

§ 2.- A father bequeathed to his son a factory used for dyeing purple, together with the slaves appointed to conduct the business, and the purple cloth which was there at the time of his death. It was decided that neither the money obtained from the sale of the cloth, nor what was due from purchasers, nor any debts of the slaves were included in the legacy.

§ 3.- "I give and bequeath to Titius the Seian Estate in the same condition as when I purchased it." As the Gabinian Estate had also been purchased with the other for a single price, I gave it as my opinion that the mere proof of the purchase was not sufficient, but that it must be ascertained from the letters and accounts of the testator whether the Gabinian Estate was included in the name of the Seian Estate, and whether the income of both of them had been united and carried on the books as that of the Seian Estate.

§ 4.- It has been established that where a house is bequeathed, the baths constitute a part of the same. If, however, the testator permitted public access to

90.- EL MISMO; *Comentarios a la ley Julia y Papia, libro VII*.- Se ha de admitir que se legó nominativamente lo que se entiende a cargo de quién haya sido legado, aunque no se haya pronunciado el nombre.

91.- PAPINIANO; *Respuestas, libro VII*.- Habiéndosele dado por prelegado a la hija unos predios con los atrasos de los administradores y de los colonos, se consideran legados los atrasos, que por rentas de los predios permanecieron en el mismo estado; pero el dinero cobrado de los colonos, y aplicado al libro de cuentas en la misma región, fácilmente se verá que no se comprende en los atrasos, ni de los colonos, ni de los administradores, aunque haya querido expresamente que los administradores le pertenezcan a la hija.

§ 1.- En virtud de estas palabras: «doy a Lucio Ticio aquellos predios míos, con su casa, como estén poseídos por mí el día de mi muerte», conviene que se deban los instrumentos rústicos, y todo lo que allí hubiere, para que el dueño estuviere mas provisto, pero no se deben los atrasos de los colonos.

§ 2.- Un padre le legó a su hijo una tienda de púrpuras, con los esclavos encargados de ella y con las púrpuras que en ella hubiere el día de su muerte; se determinó, que no se comprendían en el legado ni el importe de la púrpura recogida, ni los débitos, ni los atrasos.

§ 3.- «Doy y lego a Ticio los predios Seyanos, como fueron comprados»; habiendo sidos comprados al mismo tiempo por un solo precio también los Gabinianos, yo respondí, que no bastaba el solo argumento de la compra, sino que se ha de ver, si en las cartas y en las cuentas estaban comprendidos con la denominación de Seyanos también los Gabinianos, y si se han dado por recibidas bajo el título de los Seyanos confundidas las rentas de una y otra posesión.

§ 4.- Era costumbre que los baños formaban parte de la casa legada; pero si los destinó al público, son parte de la casa los baños en este caso, si también por

intrinsicus adirentur et in usu patris familiae vel uxoris nonnumquam fuerunt et mercedes eius inter ceteras meritoriorum domus rationibus accepto ferebantur et uno pretio comparatae vel instructae communi coniunctu fuissentiarum.

§ 5.- Qui domum possidebat, hortum vicinum aedibus comparavit ac postea domum legavit. Si hortum domus causa comparavit, ut amoeniorem domum ac salubriorem possideret, aditumque in eum per domum habuit et aedium hortus additamentum fuit, domus legato continebatur.

§ 6.- Appellatione domus insulam quoque iniunctam domui videri, si uno pretio cum domu fuisset comparata et utriusque pensiones similiter accepto latas rationibus ostenderetur.

92.- PAULUS; *libro XIII, responsorum*.- "Si mihi Maevia et Negidia filiae meae heredes erunt, tunc Maevia e medio sumito praecipito sibi habeto fundos meos illum et illum cum casulis et custodibus omnium horum fundorum et cum his omnibus agris, qui ad coniunctionem cuiusque eorum fundorum emptione vel quolibet alio casu optigerint, item cum omnibus mancipiis pecoribus iumentis ceterisque universis speciebus, quae in isdem fundis quoque eorum cum moriar erunt, uti optimi maximique sunt utique eos in diem mortis meae possedi et, ut plenius dicam, ita uti cluduntur". In fundo autem uno ex his, qui praelegati sunt, tabularium est, in quo sunt et complurium mancipiorum emptiones, sed et fundorum et variorum contractuum instrumenta, praeterea et nomina debitorum: quaero, an instrumenta communia sint.

Respondi secundum ea quae proponuntur instrumenta emptionum, item debitorum, quae in

them, the baths will form a part of it only when they can be entered through the building itself, and where they have sometimes been used by the head of the household, or his wife; and the rent of the baths has been carried on the books of the testator along with that of other rooms in the house; or where both have been purchased or furnished with money paid out at the same time.

§ 5.- A certain person who owned a house bought an adjoining garden, and afterwards devised the house. If he purchased the garden on account of the house, in order to render the latter more pleasant and healthy, and there was an entrance to it through the house, and the garden was an addition to the latter, it will be included in the legacy of the house.

§ 6.- Under the term "house" is also understood a building joined to the same, if both were purchased for one price, and it is established that the rents of both were carried together on the books.

92.- PAULUS; *Opinions, Book XVI*.- "If my daughters, Mævia and Nigidia, should become my heirs, then let Mævia take from my estate, and have as a preferred legacy, such-and-such of my lands, with the cottages thereon, and the slaves who have charge of the same; and, in addition, all the fields adjoining them, which I have obtained by purchase or in any other way whatsoever, for the purpose of uniting them to said lands; together with all the slaves, flocks, beasts of burden, and other personal property to be found on said land, or any part of the same, at the time of my death, in the best and most perfect condition that I then possessed them, or (to speak more plainly) everything that may be thereon." On one of the tracts of land which had been left as a preferred legacy, there was a building used for keeping records, in which were found instruments relating to the purchases of many slaves, and others having reference to real property, various contracts and the promissory notes of debtors. I ask whether these instruments were to be considered the common property of the heirs.

I answered that, according to the facts stated, neither the documents above mentioned relating to

el interior de la casa se entrase en ellos, y alguna vez fueron usados por el padre de familia o por la mujer, y sus alquileres se daban por recibidos en las cuentas de la casa entre los demás de las habitaciones alquiladas, y hubiesen sido comprados por un solo precio, o provistos conjuntamente.

§ 5.- Uno, que poseía una casa, compró un huerto contiguo a la casa, y después legó la casa, si compró el huerto por causa de la casa, para poseer más salubre y amena la casa, y tuvo entrada al mismo por la casa, y el huerto fue aditamento de la casa, la casa será comprendida en el legado.

§ 6.- Con la denominación de casa se considera comprendida también la casa pequeña unida a la principal, si por un solo precio hubiese sido comprada con esta casa, y se demostrase que del mismo modo se dieron por recibidas en las cuentas los alquileres de ambas.

92.- PAULO; *Respuestas, libro XIII*.- «Si mis hijas Mevia y Negidia fueren mis herederas, en este caso retire Mevia de la masa, tome previamente, y tenga para sí mis fundos tal y tal, con las chozas y con los guardas de todos estos fundos, y con todos los campos que hubieren llegado a unirse a cualquiera de estos fundos por compra, o por otra cualquier circunstancia, asimismo, con todos los esclavos, ganados, caballerías, y con todas las demás cosas, que en los mismos fundos, o en cualquiera de ellos, hubiere cuando yo muera, tan buenos y grandes como son, y tales como yo los haya poseído hasta el día de mi muerte, y, para decirlo de una vez, así como están cercados»; pero en uno de estos fundos, que fueron prelegados, está el archivo en el que se hallan las escrituras de compras de muchos esclavos y también, de fundos, y los instrumentos de varios contratos, y además créditos de deudores; pregunto, si serán comunes los instrumentos.

Respondí, que, según lo que se expone, no se considera que se comprenden en el legado los

fundo praelegato remanserunt, non videri legato contineri.

§ 1.- His verbis domibus legatis: "Fidei heredum meorum committo, uti sinant eum habere domus meas, in quibus habito, nullo omnino excepto cum omni instrumento et repositis omnibus" non videri testatorem de pecunia numerata aut instrumentis debitorum sensisse.

93.- SCAEVOLA; *libro III, responsorum*.- Lucius Titius testamento suo cavit, ne ullo modo praedium suburbanum aut domum heres alienaret: filia eius heres scripta heredem reliquit filiam suam, quae easdem res diu possedit et decedens extraneos heredes instituit: quaesitum est, an praedia pertinerent ad Iuliam, quae Lucium Titium testatorem patruum maiorem habuit. Respondit nihil proponi contra voluntatem defuncti factum, quo minus ad heredem pertinerent, cum hoc nudum praeceptum est.

§ 1.- "Semproniae mulieri meae reddi iubeo ab heredibus meis centum aureos, quos mutuos acceperam". Quaesitum est, si hanc pecuniam ut debitam Sempronia petens victa sit, an fideicommissum peti possit. Respondit secundum ea quae proponerentur posse ex causa fideicommissi peti, quod apparuisset non fuisse ex alia causa debitum.

§ 2.- Quidam praedia legavit libertis adiunctis his verbis: "Uti a me possessa sunt et quaecumque ibi erunt, cum moriar": quaesitum est, an mancipia, quae in his praediis morata in diem mortis patris familias fuerunt operis rustici causa vel alterius officii, ceteraeque res, quae ibi fuerunt, ad legatarios pertineant. Respondit pertinere.

§ 3.- Quaesitum est, an, quod heredes fratribus rogati essent restituere, etiam ad sorores pertineret. Respondit pertinere, nisi aliud sensisse testatorem probetur.

purchases or debts, which were found on the land left as a preferred legacy, appeared to be included in the bequest.

§ 1.- Where a house is devised as follows: "I charge my heirs to permit So-and-So to have the house in which I reside, and everything included therein, without excepting any utensils whatever," the testator is not held to have had in his mind any money or obligations of debtors.

93.- SCAEVOLA; *Opinions, Book III*.- Lucius Titius made the following provision in his will: "My heir shall not, under any circumstances, alienate my suburban estate, or my city residence." His daughter, who was appointed his heir, left a daughter who retained possession of the said property for a long time, and, at her death appointed foreign heirs. The question arose whether the land belonged to Julia, who was the grandniece of Titius the testator. The answer was that, in the case stated, nothing had been done against the will of the deceased to prevent the property from belonging to the heir, as the testamentary provision was a mere precept.

§ 1.- "I direct my heirs to pay to my wife, Sempronia, a hundred aurei, which I have borrowed from her." The question arose whether Sempronia could demand the execution of the trust, if, having brought suit for the said sum of money as being due to her, she should lose her case. The answer was that, according to the facts stated, the money could be claimed under the terms of the trust, since it appeared that it was not due for any other reason.

§ 2.- A man devised certain lands to his freedman, and added the following words: "As they have been possessed by me, and with whatever may be there at the time of my death." The question arose whether the slaves who remained on the land for the purpose of cultivating it, or for any other reason, at the time of the death of the testator, as well as the other personal property found there, would belong to the legatee. The answer was that they would.

§ 3.- The question arose whether property which heirs were charged to deliver to their brothers would also belong to their sisters. The answer was that it would, unless it was proved that the intention of the

instrumentos de las compras, ni de los débitos, que quedaron en el fundo prelegado.

§ 1.- Legadas unas casas con estas palabras: «encomiendo a la fidelidad de mis herederos, que dejen que fulano tenga mis casas, en que habito, sin exceptuar absolutamente cosa alguna, con todos sus enseres y con todas las cosas en ellas puestas», no se considera que el testador se refirió al dinero contante, o a los instrumentos de los débitos.

93.- SCÉVOLA; *Respuestas, libro III*.- Lucio dispuso en su testamento, que de ningún modo enajenase su heredero un predio suburbano o una casa; su hija instituida heredera dejó por heredera a su hija, la cual poseyó mucho tiempo los mismos bienes, y al fallecer instituyó herederos a personas extrañas; se preguntó, si los predios le pertenecerían a Julia, que tuvo como hermano de su bisabuelo al testador Lucio Ticio. Respondió, que no se exponía que se hubiese hecho cosa alguna contra la voluntad del difunto, para que no le perteneciesen al heredero, porque este es un nudo precepto.

§ 1.- «Mando que por mis herederos se le devuelvan a Sempronia, mi mujer, los cien áureos que recibí en mutuo»; se preguntó, si, habiendo sido vencida Sempronia al pedir como debida esta cantidad, se podría pedir el fideicomiso. Respondió, que, según lo que se exponía, se podía pedir por causa de fideicomiso lo que hubiese aparecido que no fue debido por otra causa.

§ 2.- Uno legó predios a los libertos, habiendo añadido estas palabras: «como son poseídos por mí, y todo lo que en ellos hubiere cuando yo muera»; se preguntó, si pertenecerán a los legatarios los esclavos que moraron en estos predios hasta el día de la muerte del padre de familia por causa de faenas rústicas o de otro servicio, y las demás cosas que en ellos hubiere. Respondió, que les pertenecían.

§ 3.- Se preguntó, si lo que se hubiese rogado que los herederos restituyan a los hermanos les pertenecería también a las hermanas. Respondió que les pertenecía, si no se probare que otra cosa entendió el tes-

§ 4.- Collegio fabrorum fundum cum silvis, quae ei cedere solent, uti optimus maximusque esset, legavit. Quaero, an ea quoque, quae in diem mortis ibi fuissent, id est faenum pabulum palea, item machina, vasa vinaria, id est cuppae et dolia, quae in cella defixa sunt, item granaria legata essentiarum respondit non recte peti, quod legatum non esset.

§ 5.- Ex parte dimidia heredi instituto per praeceptionem fundum legavit et ab eo ita petit: "Peto, uti velis coheredem tibi recipere in fundo Iuliano meo, quem amplius te recipere iussi, Clodium verum nepotem meum, cognatum tuum". Quaero, an pars fundi ex causa fideicommissi nepoti deberetur. Respondit deberi.

94.- VALENS; *libro II, fideicommissorum*.- Is, qui complures liberos relinquebat, tribus ex his fundum legaverat et petierat, ut curarent, ne de nomine suo exiret. Quaerebatur, ex tribus qui primus moriebatur utrum utrique vel alteri ex his, qui sibi in legato coniuncti essent, relinquere partem suam deberet, an possit vel alii coliberto suo eam relinquere. Placuit, etsi voluntatis quaestio esset, satis illum facturum etsi alii reliquisset.

Quod si nulli dedisset, occupantis an omnium colibertorum et num eorum tantum, quibus pariter legatum esset, petitio fideicommissi esset, dubitabatur. Et Iulianus recte omnibus debere putavit.

95.- MAECIANUS; *libro II, fideicommissorum*.-

testator was otherwise.

§ 4.- A testator left to the guild of blacksmiths a legacy, as follows: I devise such-and-such a tract of land, together with the forest belonging to it, in the best and most excellent condition in which it may be." I ask whether the personal property which was on the premises at the time of the death of the testator, for example, the hay, the fodder, the straw, the machines, the vessels for holding wine (that is to say the vats and casks attached to the warehouses), and the granaries, were also bequeathed. The answer was that anything which was not bequeathed is improperly claimed.

§ 5.- A testator having left a certain tract of land as a preferred legacy to an heir to whom he had bequeathed half of his estate made the following request of him: "I request you to consent to accept Clodius Verus, my grandson, and your relative, as your co-heir to half of the Julian Estate, which I have directed to be given to you over and above your share." I ask whether the grandson would be entitled to half of the estate under the terms of the trust. The answer was that he would.

94.- VALENS; *Trusts, Book II*.- A man who left several freedmen devised a tract of land to three of them, and requested them to see that its name was not changed. The question arose if, when the first one of the three died, he would be obliged to leave his share to both of his co-legates who were joined with him in the legacy, or only to one of them; or whether he could leave it to another who was his fellow-freedman. It was decided that although this was a question of intention, still, the wishes of the testator would be sufficiently complied with if the legatee should leave the land to another of his fellow-freedmen.

Where, however, he did not give it to any, could it not be doubted whether the claim for the execution of the trust would belong to the more diligent of the fellow-freedmen, or to all of them; or whether it would only belong to those to whom the legacy was jointly bequeathed? Julianus very properly held that the claim belonged to all the freedmen.

95.- MAECIANUS; *Trusts, Book II*.- "Let whoever

tador.

§ 4.- Uno legó a un gremio de artesanos un fundo con los bosques que le suelen corresponder, como mejor y más grande fuese; pregunto, si se habrían legado también todas las cosas que allí hubiese el día de la muerte, esto es, el heno, el pasto, la paja, y las máquinas, los envases para el vino, esto es, las cubas y las tinajas, que en la bodega están empotradas, así como los graneros. Respondió, que no se pide con derecho lo que no hubiese sido legado.

§ 5.- Habiendo uno instituido heredero a otro en la mitad, le prelegó un fundo, y le pidió de esta manera: «te pido que quieras admitir como coheredero en mi fundo Iuliano, que mandé que además recibieras, a Clodio Vero, ni nieto, tu cognado; pregunto, si se le deberá al nieto parte del fundo por causa de fideicomiso. Respondió, que se le debe,

94.- VALENTE; *Fideicomisos, libro II*.- Uno, que dejaba muchos liberos, les había legado a tres de ellos un fundo, y les había pedido que cuidasen de que no saliera de los de su nombre; se preguntaba, si el que de los tres muriese primero debería dejar su parte a ambos, o a uno de éstos, que fuesen conjuntos con él en el legado, o si podría dejarsela a otro coliberto suyo. Se determinó, que aunque hubiese cuestión sobre la voluntad, él obraría cumplidamente también si se la hubiese dejado a otro.

Pero si no se la hubiese dado a ninguno, se dudaba si la petición del fideicomiso competía al ocupante, o a todos los colibertos, o acaso solamente a aquéllos a quienes conjuntamente se les hubiese legado; y con razón opinó Julianus que se les debe a todos.

95.- MECIANO; *Fideicomisos, libro II*.- «Cual-

"Quisquis mihi heres erit, damnas esto dare fideique eius committo, uti det, quantas summas dictavero dederò". Aristo res quoque corporales contineri ait, ut praedia mancipia vestem argentum, quia et hoc verbum "quantas" non ad numeratam dumtaxat pecuniam referri ex dotis relegatione et stipulationibus emptae hereditatis apparet et "summae" appellatio similiter accipi deberet, ut in his argumentis quae relata essent ostenditur. Voluntatem praeterea defuncti, quae maxime in fideicommissis valeret, ei sententiae suffragari: neque enim post eam praefationem adiecturum testatorem fuisse res corporales, si dumtaxat pecuniam numeratam praestari voluisset.

96.- GAIUS; *libro II, fideicommissorum*.- Si Titius ex parte heres rogatus sit Maevio hereditatem restituere et rursus Titio coheres eius rogatus sit partem suam aut partis partem restituere, an hanc quoque partem, quam a coherede ex fideicommisso recipit, Titius restituere Maevio debeat, divus Antoninus consultus rescripsit non debere restituere, quia hereditatis appellatione neque legata neque fideicommissa continentur.

97.- PAULUS; *libro II, decretorum*.- Hosidius quidam instituta filia Valeriana herede actori suo Antiocho data libertate praedia certa et peculium et reliqua relegaverat tam sua quam colonorum: legatarius proferebat manu patris familiae reliquatum et tam suo quam colonorum nomine: item in eadem scriptura adiectum in hunc modum: "Item quorum rationem reddere debeat", scilicet quae in condito habuerat pater familias frumenti vini et ceterarum rerum: quae et ipsa libertus petebat et ex reliquis esse dicebat: et apud praesidem optinuerat.

Ex diverso cum diceretur reliqua colonorum ab eo

shall be my heir be required to pay, and I charge him to pay, whatever sums I mention." Aristo says that corporeal property is also included in this provision, as, for example, lands, slaves, clothing, and silver plate; because the term "whatever" does not merely refer to money, as is evident where the legacy of a dowry and stipulations relating to a purchased estate are involved, and that the word "sums" should be understood in the same sense as in the instances above mentioned. Moreover, the intention of the deceased, which must be especially considered in the case of trusts, also depends upon this opinion; for the testator would hardly have intended his heir to only pay money when, after this preliminary statement, he added corporeal property.

96.- GAIUS; *Trusts, Book II*.- Where Titius was appointed heir to half an estate, and charged to deliver the entire estate to Maevius, and then his co-heir was asked to transfer to him his share, or a portion of the same, will Titius also be obliged to transfer to Maevius the share which he received from his co-heir under the terms of the trust? The Divine Antoninus, having been consulted on this point, stated in a Rescript that he was not obliged to transfer it, because neither legacies nor trusts are included in the term "estate."

97.- PAULUS; *Decrees, Book II*.- A certain Osidius, having appointed his daughter Valeriana his heir, and granted freedom to his steward, Antiochus, and having devised to the latter certain tracts of land together with his peculium and whatever was due, not only from him but from the tenants, the legatee produced a statement written by the hand of the testator, showing what was owing from him and the tenants. The following was also inserted in this instrument: "Moreover, my steward must render an account of other property, that is to say, such as I have set aside for my use, namely grain, wine, and other articles." The freedmen demanded these things from the heir, alleging that they were included in what remained due, and obtained a judgment in his favor from the Governor.

When, on the other hand, it was stated by other

quiera que fuere mi heredero, esté condenado a dar, y a su fidelidad encomiendo que dé, cuantas sumas yo hubiere señalado y dado»; Aristón dice, que se comprenden también las cosas corpóreas, como los predios, los esclavos, el vestido, la plata, porque esta palabra «cuantas» no se refiere únicamente al dinero contante, según aparece de la relegación de la dote y de las estipulaciones de la herencia comprada; y se ve que la denominación de «suma» se debe interpretar del mismo modo que en los ejemplos que se ha citado; que además de esto, la voluntad del difunto, que es la que principalmente vale en los fideicomisos, favorece a esta opinión; porque después de esta manifestación no habría añadido el testador las cosas corpóreas, si solamente hubiese querido que se diese el dinero contante.

96.- GAYO; *Fideicomisos, libro II*.- Si a Ticio, heredero de parte, se le hubiera rogado que restituya a Mevio la herencia, y a su vez se le hubiera rogado a su coheredero que restituya a Ticio su parte, o una parte de su parte, consultado el Divino Antonino sobre si Ticio le deberá restituir a Mevio también esta parte que recibió de su coheredero por fideicomiso, respondió por rescripto que no se le debe restituir, porque en la denominación de herencia no se contienen ni los legados, ni los fideicomisos.

97.- PAULO; *Decretos, libro II*.- Habiendo instituido un cierto Osidio heredera a su hija Valeriana, le había legado a su administrador Antiocho, con la libertad dada, ciertos predios, el peculio, y los atrasos, tanto suyos, como de los colonos; el legatario manifestaba que se quedó a deber por mano del padre de familia, y tanto en su propio nombre, como en el de los colonos; además, que en la misma escritura se añadió de este modo: «también las cosas de que deba dar cuenta, a saber, las que el padre de familia tenía en su almacén, el trigo, el vino y las demás cosas», cuyas mismas cosas también pedía el liberto, y decía que eran de los atrasos, y había ganado la cuestión ante el Presidente.

Como por la parte contraria se dijese que no se le

non peti nec propria, diversam autem causam esse eorum, quae in condito essent, imperator interrogavit partem legatarii: "Quaerendi causa pone", inquit, "in condito centiens aureorum esse, quae in usum sumi solerent: diceres totum, quod esset relictum in arca, deberi?" Et placuit recte appellasse.

A parte legatarii suggestum est quaedam a colonis post mortem patris familias exacta. Respondit hoc, quod post mortem exactum fuisset, reddendum esse legatario.

98.- PAULUS; *libro singulari de forma testamenti*.- Si plures gradus sint heredum et scriptum sit "heres meus dato", ad omnes gradus hic sermo pertinet, sicuti haec verba "quisquis mihi heres erit". Itaque si quis velit non omnes heredes legatorum praestatione onerare, sed aliquos ex his, nominatim damnare debet.

99.- PAULUS; *libro singulari de instrumenti significatione*.- Servis urbanis legatis quidam urbana mancipia non loco, sed opere separant, ut, licet in praediis rusticis sint, tamen si opus rusticum non faciant, urbani videntur. Dicendum autem est, quod urbani intellegendi sunt, quos pater familias inter urbanos adnumerare solitus sit: quod maxime ex libellis familiae, item cibariis deprehendi poterit.

§ 1.- Venatores et aucupes utrum in urbanis an in rusticis contineantur, potest dubitari: sed dicendum est, ubi pater familias moraretur et hos alebat, ibi eos numerari.

§ 2.- Muliones de urbano ministerio sunt, nisi propter opus rurestre testator eos destinatos habebat.

interested parties that what remained due from the tenants, or even what was due from himself had not been demanded of him, and they claimed that the articles which had been set aside for the use of the deceased should not be included in the balance which was due, the Emperor interrogated the representative of the legatee, and, by way of example, asked: "Suppose there had been set aside a hundred thousand aurei, which were to be employed for the use of the testator, would you say that all that was left in the chest would be due to you?" He held that the appeal had been properly taken.

It was alleged by the representative of the legatee, that certain sums of money had been collected from the tenants, after the death of the testator. The decision was that whatever was collected after his death should be delivered to the legatee.

98.- THE SAME; *On the Form of a Will*.- Where there are several degrees of heirs, and the following clause appears in the will, "Let my heir give," this applies to all the degrees, just as the following words, "Whoever shall be my heir," do. Therefore, if anyone does not wish to burden all his heirs with the payment of legacies, but only some of them, he must charge them specifically by name.

99.- THE SAME; *Concerning the Meaning of the Term Equipment*.- When urban slaves are bequeathed, certain authorities divide those living in a city, not by their place of residence but by their occupations, so that although they may be in country places, still, if they do not perform rural labor, they are held to be urban slaves. It must, however, be said that they should be considered urban slaves whom the head of the family is accustomed to include among those belonging to the city, and this can readily be ascertained from the register of the slaves, as well as from the food which is furnished them.

§ 1.- It may be doubted whether slaves employed as hunters and bird-catchers should be included among urban or rustic slaves. It must, however, be said that they should belong to the place where the head of the household lives, and furnishes them support.

§ 2.- Muleteers belong to the class of urban slaves, unless the testator employed them in rural labors.

pedían a él los atrasos de los colonos, ni los propios, pero que era diversa la condición de las cosas que estuviesen en el almacén, el Emperador interrogó a la parte del legatario por vía de investigación; supón, dijo, que hubiese guardados cien mil áureos, que se soliesen tomar para los usos, ¿diras que se debe todo lo que se hubiese dejado en la caja? y se determinó, que apeló bien.

Por la parte del legatario se añadió, que después de la muerte del padre de familia se cobró algo de los colonos, y respondió, que esto que se hubiese cobrado después de la muerte se le ha de restituir al legatario.

98.- EL MISMO; *De la forma del testamento, libro único*.- Si hubiera muchos grados de herederos, y se hubiera escrito: «dé mi heredero», esta expresión se refiere a todos los grados, lo mismo que estas palabras: «cualquiera que fuere mi heredero. Y así, si alguien quisiera gravar con la prestación de legados no a todos los herederos, sino a algunos de éstos, debe condenarlo nominativamente.

99.- EL MISMO; *De la significación de la palabra instrumento, libro único*.- Legados los esclavos urbanos, algunos separan los esclavos urbanos no por el lugar, sino por su trabajo, de modo que aunque estén en predios rústicos, sean, no obstante, considerados urbanos, si no hicieran faenas rústicas. Pero se ha de decir, que se han de entender urbanos los que el padre de familia haya solido contar entre los urbanos; lo que principalmente se podrá averiguar por los libros de la servidumbre, y también por los alimentos.

§ 1.- Se puede dudar si los cazadores y los pajareros serán comprendidos entre los urbanos o entre los rústicos; pero se ha de decir, que se los cuenta allí donde morase el padre de familia, y los alimentaba.

§ 2.- Los muleteros son de servicio urbano, si el testador no los tenía destinados a faenas rústicas.

§ 3.- Eum, qui natus est ex ancilla urbana et missus in villam nutriendus, interim in neutris esse quidam putant: videamus, ne in urbanis esse intellegatur, quod magis placet.

§ 4.- Servis lecticariis legatis si idem lecticarius sit et cocus, accedet legato.

§ 5.- Si alii verna, alii cursores legati sunt, si quidam et verna et cursores sint, cursoribus cedent: semper enim species generi derogat. Si in specie aut in genere utrique sint, plerumque communicabuntur.

100.- IAVOLENUS; *libro II, ex posterioribus Labeonis*.- "Heres meus damnus esto Lucio Titio Stichum servum meum reddere" vel ita: "Illum servum meum illi reddito". Cascellius ait deberi neque id Labeo improbat, quia qui reddere iubetur, simul et dare iubetur.

§ 1.- Duae statuariae marmoreae cuidam nominatim, item omne marmor erat legatum: nullam statuam marmoream praeter duas cascellius putat deberi: Ofilius Trebatius contra. Labeo cascellii sententiam probat, quod verum puto, quia duas statuas legando potest videri non putasse in marmore se statuas legare.

§ 2.- "Uxori meae vestem, mundum muliebrem, ornamenta omnia, aurum argentum quod eius causa factum paratumque esset omne do lego". Trebatius haec verba "quod eius causa factum paratumque est", ad aurum et argentum dumtaxat referri putat, Proculus ad omnia, quod et verum est.

§ 3.- Cui corinthia vasa legata essent, in baseis quoque eorum vasorum collocandorum causa paratas deberi Trebatius respondit. Labeo autem id

§ 3.- Some authorities hold where a child is born to a female slave belonging to the city, and it is sent into the country to be brought up, that it belongs to neither class. Let us see whether it should not be understood to be included along the urban slaves. This appears to be the better opinion.

§ 4.- Where slaves who are litter-bearers are bequeathed, and one of them is both a litter-bearer and a cook, he will be included in the legacy.

§ 5.- Where slaves born in the house are bequeathed to one person, and others who are couriers are bequeathed to another, and some of the number belong to both these classes, they will be included among the couriers, for the reason that the species is subordinate to the genus. Where two slaves belong to the same genus or species, they are generally held in common.

100.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- "I charge my heir to deliver my slave, Stichus, to Lucius Titius," or "Let him deliver my slave to him." Cascellius says that, under a clause of this kind, the slave must be delivered; and Labeo approves his opinion, because where anyone is ordered to deliver anything, he is at the same time ordered to give it.

§ 1.- A legacy of two marble statues, as well as all the marble in the possession of the testator was specifically bequeathed to a certain individual. Cascellius thinks that no other marble statue, except the two mentioned, is due. Ofilius and Trebatius are of the contrary opinion. Labeo adopts the conclusion of Cascellius, which I believe to be correct, because by leaving two statues, it can be held that the testator did not intend to leave any more when he bequeathed the marble.

§ 2.- "I give and bequeath to my wife her clothing, jewels, and all gold and silver plate, which I have had made for her, or intended for her use." Trebatius thinks that the words, "Which I have had made for her or intended for her use," only refer to the gold and silver plate. Proculus holds that they refer to everything mentioned, and this opinion is correct.

§ 3.- In a case where Corinthian vases were bequeathed to a certain person, Trebatius was of the opinion that the pedestals made to support them were

§ 3.- Veamos si el que nació de una esclava urbana y fue mandado para que se sirviese en una casa de campo, opinando algunos que mientras tanto no está ni entre unos ni entre otros, es considerado que esta entre los urbanos; y esto es lo que parece mejor.

§ 4.- Legados los esclavos mozos de litera, si uno mismo fuese mozo de litera y cocinero, formará parte del legado.

§ 5.- Si a uno se le legaron los esclavos nacidos en la casa, y a otro los mozos de a pié, si algunos fueran nacidos en la casa y mozos de a pie, formaran parte de los mozos de a pie; porque siempre la especie deroga al genero, si unos y otros estuvieran en una especie o en un genero, de ordinario se harán comunes.

100.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro II*.- «Esté condenado mi heredero a restituir a Lucio Ticio mi esclavo Stico», o así: «restitúyale a él aquel esclavo mío»; Cascelio dice, que se debe; y no lo desapueba Labeón, porque a aquel a quien se le manda que restituya, también se le manda que se dé simultáneamente.

§ 1.- A uno se le habían legado determinadamente dos estatuas de mármol, y además todo el mármol; Cascelio opina, que no se debe ninguna estatua de mármol además de las dos; Ofilio y Trebacio al contrario; Labeón aprueba la opinión de Cascelio; lo que juzgo verdadero, porque se puede considerar que al legar las dos estatuas no creyó que en el mármol legaba a las estatuas.

§ 2.- «Doy y lego a mi mujer el vestido, los objetos de tocador propios de mujer, todos los adornos, todo el oro y la plata, que por causa de ella se labró y preparó»; Trebacio opina que estas palabras: «que por causa de ella se labró y preparó», se refieren únicamente al oro y a la plata; Próculo que a todo, lo que también es verdad.

§ 3.- Trebacio respondió, que al que se le hubiesen legado vasos Corintios se le deben también los pedestales dispuestos para colocar estos vasos, Pero

non probat, si eas baseis testator numero vasorum habuit. Proculus vero recte ait, si aeneae quidem sint, non autem corinthiae, non deberi.

§ 4.- Cui testudinea legata essent, ei lectos testudineos pedibus inargentatos deberi Labeo Trebatius responderunt, quod verum est.

101.- SCAEVOLA; *libro XVI, digestorum*.- Qui habebat in provincia, ex qua oriundus erat, propria praedia et alia pignori sibi data ob debita, codicillis ita scripsit: Patriae meae mihi carissimae volo pro eius parte dari eique destino quaecumque possideo in Syria cum omnibus quae in iis sunt gregibus servis fructibus apothecis instrumentis]. Quaesitum est, an etiam praedia, quae pignori habuit testator, patriae suae reliquisse videatur. Respondit secundum ea quae proponerentur non videri relicta, si modo in proprium patrimonium (quod fere cessante debitore fit) non sint redacta.

§ 1.- "Peto fundum meum ita, uti est, alumnae meae dari". Quaesitum est, an fundo et reliqua colonorum et mancipia, si qua mortis tempore in eo fundo fuerint, debeantur. Respondit reliqua quidem colonorum non esse legata, cetera vero videri illis verbis "ita uti est" data.

102.- SCAEVOLA; *libro XVII, digestorum*.- His verbis legavit: "Uxori meae lateralibus meis viatoribus et quicquid in his conditum erit, quae membranis meis manu scriptis continebuntur nec ea sint exacta cum moriar, licet in rationes meas translata sint et cautiones ad actorem meum transtulerim". Hic chirographa debitorum et pecuniam, cum esset profecturus in urbem, in lateralibus condidit et chirographis exactis quam pecunia erogata reversus in patriam post biennium alia chirographa

due, as part of the legacy. Labeo, however, does not adopt this opinion, if the testator considered the said pedestals as vases. But Proculus very properly says that if the vases were not of Corinthian brass, they could be claimed by the legatee.

§ 4.- Where articles made of tortoise-shell are bequeathed, Labeo and Trebatius are of the opinion that beds inlaid with tortoise-shell, whose feet are covered with silver, are due, which is correct.

101.- SCAEVOLA; *Digest, Book XVI*.- A man who, in his native province, had certain lands of his own, as well as others which had been pledged to him as security for debts, executed a codicil as follows: "I wish to be given to my beloved country, as its share, and I give to it separately, all the lands which I possess in Syria, together with the personal property that is, the flocks, the slaves, the crops, the provisions, and all the implements which are there." The question arose whether the testator should be held also to have left to his country the lands which are held in pledge. The answer was that, according to the facts stated, these should not be considered to have been left, provided they were not included in his own estate, which might be the case if the debtor should fail to make payment.

§ 1.- "I ask that my tract of land, in its present condition, be given to my foster-child." The question arose whether the balance due from the tenants as well as the slaves, if there were any there at the time of the death of the testator, should be included with the land. The answer was, that what was due from the tenants was not bequeathed, but that everything else appeared to have been included in the words, "In its present condition."

102.- THE SAME; *Digest, Book XVII*.- A testator made a bequest as follows: "I bequeath to my wife my travelling bags, and everything contained therein, as well as the claims in the small register written by my own hand, which have not been collected at the time of my death, although they may have been entered on my accounts as paid, and I have transferred the securities to my steward." The said testator, when about to make a journey to Rome, placed the notes to his debtors and his money in the said travelling bags,

Labeón no lo aprueba, si el testador tuvo estos pedestales en el número de vasos; pero con razón dice Próculo, que si verdaderamente fueran de bronce, pero no de corinto, no se deben.

§ 4.- Labeón y Trebacio respondieron, que al que se le hubiesen legado los muebles incrustados de concha de tortuga se le deben también las camas incrustadas de concha de tortuga guarnecidas de plata en los pies; lo que es verdad.

101.- SCÉVOLA; *Digesto, libro XVI*.- Uno que tenía en la provincia, de la que era oriundo, predios propios, y otros dados a él en prenda por deudas, escribió así en los codicilos: «quiero que se le den por su parte a mi dulcísima pareja, y separadamente le adjudico a la misma, todos los predios que poseo en Siria, con todas las cosas existentes en ellos, y con los ganados, y con los esclavos, y con los frutos, guardados, y con todos los enseres»; se preguntó, si se considerará que le dejó a su patria los predios que el testador tuvo en prenda. Respondió, que, según lo que se exponía, no se consideran dejados, si no hubieran sido comprendidos en el propio patrimonio, lo que de ordinario sucede dejando de pagar el deudor.

§ 1.- «Pido que se le dé a mi alumna mi fundo así como está»; se preguntó, si se le deberán al fundo también los atrasos de los colonos, y los esclavos, si hubiere algunos en aquel fundo al tiempo de la muerte. Respondió, que ciertamente no se dejaron los atrasos de los colonos, pero que se considera dado lo demás con estas palabras: «así como está».

102.- EL MISMO; *Digesto, libro XVII*.- Uno legó con estas palabras: «lego a mi mujer mis alforjas de viaje y todo lo que en ellas estuviere guardado, los créditos que en papeles escritos de mi propia mano se contuvieren, y aunque no hayan sido cobrados, cuando yo muera, hayan sido transferidos a mis cuentas, y yo hubiere traspasado las cauciones a mi agente»; éste, habiendo de marchar a la ciudad, guardó en las alforjas los quirógrafos de sus deudores y el dinero; y tanto habiendo cobrado los quirógrafos,

praediorum, quae postea comparaverat, et pecuniam in lateralibus condidit. Quaesitum est, an ea tantum videatur nomina ei legasse, quae postea reversus in hisdem [isdem] lateralibus condidit. Respondit secundum ea quae proponerentur non deberi quae mortis tempore in his lateralibus essent et membranis manu eius scriptis continerentur. Idem quaesiit, an, cum emptiones praediorum in hisdem [isdem] lateralibus condiderat, praedia quoque legato cedant. Respondit non quidem manifeste apparere, quid de praediis sensisset, verum si ea mente emptiones ibi haberet, ut his legatariae datis proprietates praediorum praestaretur, posse defendi praedia quoque deberi.

§ 1.- Pater familias ita legavit: "Lances numero duas leves, quas de sigillaribus emi, dari volo": is de sigillaribus leves quidem non emerat, lances autem emptas habebat, et dictaverat testamentum ante tri-duum quam moreretur: quaesitum est, an haec lances, quas emptas de sigillaribus habuit, legato cederent, cum nullas alias de sigillaribus emerit nec legaverit. Respondit secundum ea quae proponerentur deberi eas, quas de sigillaribus emisset.

§ 2.- Alumno praecepit militiam his verbis: "Sempronio alumno meo illud et illud: et, cum per aetatem licebit, militiam illam cum introitu comparari volo: huic quoque omnia integra". Quaesitum est, si Sempronius eam militiam sibi comparaverit, an pretium eius, sed et id, quod pro introitu erogari solet, ex causa fideicommissi ab heredibus consequi possit. Respondit secundum ea quae proponerentur posse.

and, having collected the notes, as well as expended the money, he returned home after the lapse of two years, and deposited in the said travelling bags deeds for some real estate which he had subsequently purchased, and a certain sum of money. The question arose whether he should be considered to have only bequeathed to the legatee the notes which, after his return, he placed in his bags. The answer was that, according to the facts stated, the notes which were in the bags when he died and which were not recorded by his own hand in his register were not due under the terms of the legacy. It was also asked, when he placed in his bags the evidences of the purchase of the said real estate, whether these also were included in the legacy? The answer was that it did not clearly appear what he intended to do with reference to the lands, but if he had placed the deeds for them in the bags with the intention that, when they were given to his legatee the ownership of the same would pass to her, it could be maintained that the lands also constituted part of the legacy.

§ 1.- The father of a family made the following bequest, "I desire the two unchased dishes, which I bought in the square where images are sold, to be given." The testator had, in fact, purchased certain dishes in that place, but they were not destitute of ornament, and he made his will only three days before his death. The question arose whether the said dishes, which he had purchased, formed part of the legacy, as he did not bequeath any others which he bought in the same place. The answer was that, according to the facts stated, those which he had purchased in the square of the images should be delivered to the legatee.

§ 2.- A testator directed that a commission in the army should be purchased for a young man whom he had brought up, as follows: "I bequeath to Sempronius, whom I have brought up, such-and-such articles, and, when he has arrived at the proper age, I desire that a commission in the army shall be purchased for him, and that all expenses and charges arising therefrom be paid." The question arose, if Sempronius himself purchased this commission, whether he could recover the price of the same, or whatever is customary to pay under such circumstances, from the heirs by the terms of the

como habiendo gastado el dinero, vuelto a su patria después de dos años, guardó en las alforjas otros quirógrafos de predios, que había comprado después, y dinero; se preguntó, si se considerará que le legó solamente los créditos, que después de haber vuelto guardó en las mismas alforjas. Respondió, que, según lo que se exponía, no se debían los que al tiempo de la muerte estuviesen en estas alforjas, y se contuviesen en los pergaminos escritos de su mano, él mismo preguntó, si, habiendo guardado en las mismas alforjas las escrituras de compras de predios, cederán también los predios al legado. Respondió, que, ciertamente no aparecía con claridad cual hubiese sido su intención respecto a los predios, pero que si tuviera allí las escrituras de copras con la intención de, que dadas estas cosas a la legataria se le diese la propiedad de los predios, se podía defender que se deben también los predios.

§ 1.- Un padre de familia legó de esta manera: «quiero que se den los platos lisos, en número de dos, que compré de los que venden pequeñas estatuas»; Este no había comprado ciertamente los lisos a los vendedores de pequeñas estatuas, pero tenía platos comprados, y había dictado su testamento tres días antes de morir; se preguntó, si cederían al legado estos platos que tuvo comprados a los vendedores de pequeñas estatuas, no habiendo comprado a los vendedores de pequeñas estatuas, no habiendo legado, ningunos otros, Respondió, que, según lo que se exponía, se debían los que hubiese comprado a los vendedores de pequeñas estatuas.

§ 2.- Uno mandó que se comprase para su alumno un cargo en la milicia en estos términos: «A Sempronio, mi alumno, esto y aquello; y quiero que cuando por su edad fuere lícito se le compre tal cargo en la milicia con su entrada; y también para todas estas cosas íntegras»; se preguntó, si, habiendo comprado Sempronio para sí aquel cargo en la milicia, podía conseguir por causa de fideicomiso de los herederos el precio de aquel, o también lo que se suele gastar por entrada. Respondió, que, según lo que se exponía, podía.

§ 3.- Idem testator liberto militiam his verbis legavit: "Seio liberto meo militiam do lego illam", quam militiam et testator habuit: quaesitum est, an onera omnia et introitus militiae ab herede sint danda. Respondit danda.

103.- SCAEVOLA; *libro singulari quaestionum publice tractatarum*.- Si pater exheredato filio substituit heredem extraneum, deinde ille extraneus hunc filium heredem instituit et heres factus intra pubertatem decedat, puto a substituto ei filio omnino legata praestari non deberi, quia non directo, sed per successionem ad filium hereditas patris pervenit.

§ 1.- Plus ego in fratre, qui, cum heres exstisset patri, exheredatum fratrem heredem instituit, accepi substitutum eius legatum non debere ac ne quidem si intestato fratri successerit, quia non principaliter, sed per successionem bona fratris ad eum pervenerunt.

§ 2.- Si filius ex uncia heres institutus sit et ab eo legata data sint, habeat et substitutum, deinde commissio edicto per alium filium acceperit partis dimidia bonorum possessionem: substitutus eius utrum ex uncia legata praestat an vero ex semisse? Et verius est ex semisse sed ex uncia omnibus ex reliquis liberis et parentibus.

§ 3.- Contra quoque si ex dodrante institutus commissio edicto semissem acceperit bonorum possessionem, ex semisse tantum legata substitutus debet: quo modo enim augentur ubi amplius est in bonorum possessione, sic et ubi minus est, deducitur.

trust. The answer was that, according to the facts stated, he could do so.

§ 3.- The same testator bequeathed a commission to his freedman, as follows, "I give and bequeath to Seius, my freedman, such-and-such a commission," which commission the testator himself possessed. The question arose whether all the fees and expenses for admission to the army should be paid by the heir. The answer was that they should be paid by him.

103.- THE SAME; *Questions Publicly Discussed*.- Where a father substituted a foreign heir for his disinherited son, and the said foreign heir afterwards appointed the son his heir, and the latter died under the age of puberty, I think that the legacies with which the substitute for the sum was charged will not be due, for the reason that the estate of the father did not come into the hands of the son directly, but through indirect succession.

§ 1.- I have ascertained, besides, that in the case of a brother who was the heir of his father and appointed his own disinherited brother his heir, that his substitute will not be obliged to pay the legacy, even if he should succeed his brother, where the latter died intestate; because the property did not come into his hands directly, but through succession to his brother.

§ 2.- Where a son was appointed heir to a twelfth of his father's estate, and was charged with a legacy, and a substitute was appointed for him, and, afterwards, his other brother came within the scope of the Edict, and he obtained praetorian possession of half of the estate; the question arose whether his substitute would be required to pay the legacies in proportion to a twelfth, or in proportion to half of the estate. The better opinion is that he would be obliged to pay in proportion to half, but if he paid in proportion to a twelfth, it must be paid to all, and payment should be made to the children and other relatives in proportion to the balance.

§ 3.- On the other hand, if the son was appointed heir to three-fourths of the estate, and having come within the scope of the Edict, he should obtain praetorian possession of half of the property, the substitute would only owe the legacies proportionally; for just as they are increased where praetorian possession of the estate is greater, so also

3.- El mismo testador legó a su liberto un cargo en la milicia en estos términos: «doy y lego a Seyo, mi liberto, aquel cargo en la milicia», cuyo cargo en la milicia tuvo también, el testador; se preguntó, si se habrían de dar por el heredero todas las cargas, y los gastos de ingreso en la milicia, Respondió que se habían de dar.

103.- EL MISMO; *Cuestiones tratadas en público, libro único*.- Si un padre, habiendo desheredado a su hijo, substituyó heredero a un extraño, y después este extraño instituyó heredero a aquel hijo, y hecho heredero falleciera dentro de la pubertad, opino que por el substituido a este hijo no se deben pagar de ningún modo los legados, porque la herencia del padre no fue directamente al hijo, sino por sucesión.

§ 1.- Yo creo más, respecto al hermano que habiendo quedado siendo heredero de su padre instituyó heredero a su hermano desheredado, que el sustituto de este, no debe lo legado, ciertamente ni si abintestato le hubiere sucedido a su hermano, porque los bienes del hermano no pasaron a él directamente, sino mediante sucesión.

§ 2.- Si un hijo hubiera sido instituido heredero de una onza, y a su cargo se hubieran dado legados, y tuviera también un substituto, y después habiéndose incurrido en el Edicto por causa de otro hijo recibió la posesión de la mitad de los bienes ¿pagará acaso su substituto los legados con arreglo a la onza, o con arreglo a la mitad de toda la herencia? Y es más verdadero, que con arreglo a la mitad de toda la herencia; pero de la onza a todos de lo demás a los descendientes y a los ascendientes.

§ 3.- También por el contrario; si el instituido en tres cuartos hubiere recibido, habiéndose incurrido en el Edicto, la posesión de la mitad de todos los bienes, el substituto deberá solamente los legados con arreglo a la mitad de todos los bienes; porque a la manera como se aumentan cuando hay mas en la posesión de bienes, así también se disminuye cuando

they are reduced, where it is less.

hay menos.

LIBER TERTIUS-TRICESIMUS

TIT. I

DE ANNUIS LEGATIS ET FIDEICOMMISSIS

1.- POMPONIUS; *libro V, ad Sabinum*.- Cum in annos singulos quid legatum sit neque adscriptum, quo loco detur: quocumque loco petetur dari debet, sicuti ex stipulatu aut nomine facto petatur.

2.- IDEM; *libro VI, ad Sabinum*.- In annos singulos heres damnatus sinere me frui fundo si initio anni, quo colere deberem, moram fecerit, licet postea patiatur, quia cultura sim exclusus, tamen totius anni nomine mihi tenebitur: quemadmodum si diurnas operas stichi dare damnatus non a mane sed a sexta diei hora det, totius diei nomine tenetur.

3.- ULIPIANUS; *libro XXIV, ad Sabinum*.- Si legatum sit relictum annua bima trima die, triginta forte, dena per singulos debentur annos, licet non fuerit adiectum «aequis pensionibus».

§ 1.- Proinde et si adiectum fuerit «pensionibus» licet non sit insertum «aequis», item si scriptum fuerit «aequis», licet non sit adiectum «pensionibus», dicendum erit aequas fieri.

§ 2.- Sed si adiectum «pensionibus inaequis», inaequales debebuntur: quae ergo debeantur, videamus. et puto eas deberi nisi specialiter testator electionem heredi dedit), quas vir bonus fuerit arbitratus, ut pro facultatibus defuncti et depositione

BOOK XXXIII

TITLE I

CONCERNING ANNUAL LEGACIES AND TRUSTS

1.- POMPONIUS; *On Sabinus, Book V*.- When something payable every year is bequeathed without adding the place where this is to be done the heir should pay it wherever it may be demanded, just as a demand can be made in the case of a stipulation, or a note.

2.- THE SAME; *On Sabinus, Book VI*.- Where an heir is charged to permit me to enjoy the use of certain land by the year, and he is guilty of default at the beginning of the year, when I ought to cultivate the land, he will be liable to me for the entire year, even though he should afterwards permit me to cultivate it, because I have been excluded from putting in the crops; just as where he is charged with furnishing me the daily labor of Stichus, and he sends him to me, not in the morning but at the sixth hour of the day, he will be liable to me for the value of the entire day's work of the slave.

3.- ULIPIANUS; *On Sabinus, Book XXIV*.- Where a legacy, for instance of thirty aurei, is left to me payable in one, two, and three years, ten aurei will be due each year, even though the words "in equal payments" were not added.

§ 1.- Hence, if the words "in payments" were employed, even though "equal" was not added, it must be said that equal payments must be made, just as if the word "equal" was written, and the word "payments" had not been added.

§ 2.- But if the words, "In unequal payments," are added, unequal payments must be made. But let us consider in what way they ought to be made. I think that they ought to be made in accordance with the judgment of a good citizen (unless the testator

LIBRO TRIGÉSIMO TERCERO

TÍTULO I

DE LOS LEGADOS Y FIDEICOMISOS ANUALES

1.- POMPONIO; *Comentarios a Sabino, libro I*.- Cuando se legó alguna cosa para cada año, y no se expresó en qué lugar se haya de dar, se debe dar en cualquier lugar en que se pida, así como si se pidiera en virtud de estipulación, o de crédito contraído.

2.- EL MISMO; *Comentarios a Sabino, libro VI*.- El heredero condenado a dejarme usufructuar un fundo cada año, si hubiere causado mora al principio del año, época en la que yo debería cultivarlo, aunque después lo consienta, como quiera que fuí impedido de cultivarlo, me estará, no obstante, obligado por razón de todo el año; a la manera que si el condenado a darme el trabajo diario de Stico no me lo diera desde por la mañana sino desde la hora sexta del día, me está obligado por razón de todo el día.

3.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si se hubieran legado, por ejemplo, treinta, en uno, dos, tres años, se deberían diez cada año, aunque no se hubiere añadido: «en pensiones iguales».

§ 1.- Por consiguiente, también si se hubiere añadido: «por pensiones», aunque no se haya añadido: «iguales», y asimismo si se hubiere escrito: «por iguales», aunque no se haya añadido: «pensiones», se habrá de decir que se hacen iguales.

§ 2.- Pero si se hubiera añadido: «por pensiones desiguales», se deberán desiguales, luego veamos cuales se deberán; y opino que se deben, salvo si el testador le dio especialmente al heredero la elección, las que hubiere determinado un hombre bueno, de suerte que se deban con arreglo a las facultades del

§ 3.- Sed et si fuerit adiectum «viri boni arbitratu», hoc sequemur, ut pro positione patrimonii sine vexatione et incommodo heredis fiat.

§ 4.- Quid si ita «pensionibus, quas putaverit legatarius», an totum petere possit, videamus. et puto totum non petendum simul, sicut et in heredis electione. fieri enim pensiones debere testator voluit, quantitates dumtaxat pensionum in arbitrio heredis aut legatarii contulit.

§ 5.- Sed si ita sit legatum: «heres meus Titio decem trima die dato», utrum pensionibus an vero post triennium debeatur? Et puto sic accipiendum, quasi pater familias de annua bima trima die sensisse proponatur.

§ 6.- Si cui certa quantitas legetur et, quoad praestetur, in singulos annos certum aliquid velut usuras iusserit testator praestari, legatum valet: sed in usuris hactenus debet valere, quatenus modum probabilem usurarum non excedit.

4.- PAULUS; *libro LXII, ad Edictum*.- Si in singulos annos alicui legatum sit, sabinus, cuius sententia vera est, plura legata esse ait et primi anni purum, sequentium condicionale: videri enim hanc inesse condicionem "si vivat" et ideo mortuo eo ad heredem legatum non transire.

5.- MODESTINUS; *libro X, Responsorum*.- «Avobis quoque, ceteri heredes, peto, ut uxori meae praestetis, quoad viveret, annuos decem aureos». uxor supervixit marito quinquennio et quattuor mensibus: quaero, an heredibus eius sexti anni legatum integrum debeatur. modestinus respondit

upon the means of the deceased, and the place where his estate is situated.

§ 3.- If, however, it was stated that payment should be made in accordance with the judgment of a good citizen, we infer from this that it must be made with reference to the situation of the estate, and without any trouble or annoyance to the heir.

§ 4.- But if the testator directed that payment should be made in the way that the legatee might select; let us see whether the entire amount can be demanded at once. I think that this cannot be done, just as in the case of the choice of the heir; for the testator intended that several payments should be made, and that the amounts of the same should depend upon the judgment of the heir, or of the legatee.

§ 5.- Where, however, a legacy has been bequeathed as follows, "Let my heir pay Titius ten aurei in three years," will the amount be payable in three annual instalments, or at the expiration of three years? I think that this should be understood as if the testator had intended the payments to be made in one, two, and three years.

§ 6.- Where a certain sum of money is bequeathed to anyone, and it is stated that, until it is paid, something shall be given to the legatee every year, as, for example, interest, the legacy will be valid; but in order to make the payment of the interest valid, the sum to be paid annually must not exceed the ordinary rate of interest.

4.- PAULUS; *On the Edict, Book LXII*.- Where anything is bequeathed to a person to be paid annually, Sabinus says (and his opinion is correct), there are several legacies, and that the one for the first year is absolute, and the other conditional; for the condition, "If he should live," seems to be implied, and therefore, if the legatee dies, the legacy will not pass to his heir.

5.- MODESTINUS; *Opinions, Book X*.- "I also charge my other heirs to pay to my wife ten aurei every year, as long as she lives." The wife survived her husband five years and four months. I ask whether her heirs will be entitled to the entire legacy for the sixth year. Modestinus answers that they will

§ 3.- Pero también si se hubiere añadido: «a arbitrio de hombre bueno», nos atendremos a esto, de modo que se haga con arreglo a la situación del patrimonio sin vejación y sin incomodidad del heredero.

§ 4.- Si se hubiere escrito así: «en las pensiones que el legatario juzgare», veamos si podrá pedirlo todo. Y opino, que no se ha de pedir todo al mismo tiempo, como tampoco teniendo la elección el heredero; porque el testador quiso que debían hacerse pensiones, y solo dejó al arbitrio del heredero o del legatario las cantidades de las pensiones.

§ 5.- Pero si se hubiera legado así: «déle mi heredero diez a Ticio en tres años», y se deberán en pensiones, o después del trienio? Y opino que se ha de entender así, como si se expusiera que el padre de familia se refirió al primero, al segundo, y al tercer mío.

§ 6.- Si a alguien se le legara cierta cantidad, y el testador hubiere mandado que hasta que se pague se entregue cada año cierta cosa, por ejemplo, intereses, es válido el legado; pero respecto a los intereses debe ser válido en tanto cuanto no excede de la cuantía admisible para los intereses.

4.- PAULO; *Comentarios al Edicto, libro LXII*.- Si a alguien se le hubiera legado para cada año, dice Sabino, cuya opinión es verdadera, que hay muchos legados, y que es puro el del primer año, y condicional los de los siguientes; porque se considera que hay inherente esta condición, «si viviera», y que por lo tanto, muerto aquel, no pasa el legado al heredero.

5.- MODESTINO; *Respuestas, libro X*.- «También os pido a vosotros, los demás herederos, que le deis a mi mujer, mientras viviere, diez; áureos anuales»; la mujer sobrevivió a su marido cinco años y cuatro meses; pregunto, si se le deberá a los herederos de ella íntegro el legado del sexto año. Modestino

integri sexti anni legatum deberi.

6.- MODESTINUS; *libro X.- Responsorum.*- Annuam pecuniam ad ludos civitati reliquit, quibus praesidere heredes voluit: successores heredum negant se debere, quasi testator tamdiu praestari voluisset, quamdiu praesiderent heredes: quaero igitur, an, cum praesidendi mentionem fecerit, ad tempus fideicommissum an perpetuo praestari voluerit. modestinus respondit fideicommissum quotannis in perpetuum rei publicae praestandum esse.

7.- POMPONIUS; *libro VIII, ad Quintum Mucium.*- Quintus mucius ait: si quis in testamento ita scripsit: "filii filiaeque meae ibi sunt, ubi eos mater sua esse volet, eisque heres meus in annos singulos inque pueros puellasque singulas damnas esto dare cibarii nomine aureos decem": si tutores eam pecuniam dare nolunt ei, apud quem pueri atque puellae sunt, nihil est, quod ex testamento agere possit: nam ea res eo pertinet, uti tutores sciant, quae voluntas testatoris fuit, uti possint eam pecuniam sine periculo dare.

Pomponius, in testamentis quaedam scribuntur, quae ad auctoritatem dumtaxat scribentis referuntur nec obligationem pariunt. haec autem talia sunt. si te heredem solum instituam et scribam, uti monumentum mihi certa pecunia facias: nullam enim obligationem ea scriptura recipit, sed ad auctoritatem meam conservandam poteris, si velis, facere. aliter atque si coherede tibi dato dem scripsero: nam sive te solum damnavero, uti monumentum facias, coheres tuus agere tecum poterit familiae heriscundae, uti facias, quoniam interest illius: quin etiam si utrique iussi estis hoc facere, invicem actionem habebitis.

Ad auctoritatem scribentis hoc quoque pertinet, cum quis iussit in municipio imagines poni: nam si non honoris municipii gratia id fecisset, sed sua, actio

be entitled to it.

6.- THE SAME; *Opinions, Book XI.*- A testator left a certain sum of money to be paid annually for the maintenance of the public games of the city, over which he expressed a wish that his heirs should preside. The successors of his heirs denied that they were liable for the legacy, alleging that the testator only intended it should be paid as long as his heirs could preside over the games. Therefore, when he mentioned their presiding, I ask whether he intended payment to be made during the duration of the trust, or perpetually. Modestinus answers that the legacy should be paid to the city annually in perpetuity.

7.- POMPONIUS; *On Quintus Mucius, Book VIII.*- Quintus Mucius says that if anyone makes the following provision in his will, "Let my sons and daughters live wherever their mother may desire, and let my heir pay, every year, to each boy and girl among them ten aurei, for his or her support." If the guardians who had charge of the children were unwilling to pay the said sum of money, no action can be brought by anyone under the terms of the will; for the provision of the testator was only intended to inform the guardians what he desired, so that they could pay the money without any risk.

Pomponius says that where anything is included in the will which merely has reference to the wishes of the testator, it does not create any obligation. The following is an instance of this. If I should appoint you my sole heir, and direct you to erect a monument to me with a certain sum of money, this statement does not place you under any obligation, but you can erect a monument in order to comply with my wishes, if you desire to do so. It would, however, be otherwise, when I made the same provision after I had given you a co-heir, for if I charged you alone to erect the monument, your co-heir could bring an action in partition against you to compel you to do so, as it is to his interest. If, however, both of you should be ordered to do this, you will be entitled to actions against one another.

The following also has reference to the wishes of the testator, for instance, where anyone directs statues to be placed in a town, for if he did not do this

respondió, que se debe el legado de todo el sexto año.

6.- EL MISMO; *Respuestas, libro XI.*- Uno le dejó a la ciudad una cantidad anual para juegos, en los que quiso que presidieran sus herederos; los sucesores de los herederos dicen que ellos no la deben, como si el testador hubiere querido que se pagase en tanto cuanto presidiesen los herederos; pregunto, pues, si habiendo hecho mención de la presidencia, habría querido que el fideicomiso se pague temporal, o perpetuamente. Modestino respondió, que el fideicomiso se le debe pagar a la República perpétuamente cada año.

7.- POMPONIO; *Comentarios, a Quinto Mucio, libro VIII.*- Dice Quinto Mucio, que si alguno escribió así en el testamento: «residan mis hijos e hijas allí donde su madre quiera que estén, y este condenado al heredero a darles cada año, y a cada varón y a cada hembra, diez áureos a título de alimentos»; si los tutores no quieren darle este dinero a aquel en cuyo poder están los hijos y las hijas, nada hay que pueda reclamar en virtud del testamento; porque esto tiene por objeto que los tutores sepan cual haya sido la voluntad del testador, para que sin riesgo puedan dar este dinero.

Dice Pomponio: en los testamentos se escriben algunas cosas que se refieren solamente a la autoridad del que los escribe, y no producen obligación. Tales son estas; si yo te instituyera único heredero, y yo escribiera que me hagas un monumento con cierta cantidad; por ello esta cláusula no produce ninguna obligación, pero podrás hacerla, si quisieras para conservar la autoridad; otra cosa sería si habiéndote dado un coheredero yo hubiere escrito lo mismo; porque si a ti solo te hubiera yo condenado a que hagas el monumento, podrá tu coheredero ejercitar contra tí la acción de partición de herencia para que lo hagas, porque le interesa. Aún más si a ambos se os hubiere mandado hacerlo, tendrá recíprocamente la acción.

A la autoridad del testador corresponde también esto, cuando uno mandó que en el municipio se pusieran estatuas; porque si esto no lo hubiese hecho

eo nomine nulli competit. itaque haec Quinti Mucii scriptura: «liberi mei ibi sunt, ubi eos mater sua esse vult» nullam obligationem parit, sed ad auctoritatem defuncti conservandam id pertinebit, ut ubi iusserit ibi sint.

Nec tamen semper voluntas eius aut iussum conservari debet, veluti si praetor doctus sit non expedire pupillum eo morari, ubi pater iusserit, propter vitium, quod pater forte ignoravit in eis personis esse, apud quas morari iussit. si autem pro cibariis eorum in annos singulos aurei decem relictum sint, sive hoc sermone significantur, apud quos morari mater pupillos voluerit, sive ita acceperimus hunc sermonem, ut ipsis filiis id legatum debeat, utile erit: et magis enim est, ut providentia filiorum suorum hoc fecisse videatur.

Et in omnibus, ubi auctoritas sola testatoris est, neque omnimodo spernenda neque omnimodo observanda est. sed interventu iudicis haec omnia debent, si non ad turpem causam feruntur, ad effectum perducunt.

8.- GAIUS; *libro V, ad legem Iuliam et Papiam*.- In singulos annos relictum legatum simile est usui fructui, cum morte finiatur. sane capitis deminutione non finitur, cum usus fructus finiatur: et usus fructus ita legari potest: "titio usum fructum fundi lego et quotiensque capite minutus erit, eundem usum fructum ei do". illud certe amplius est in hoc legato, quod in ingressu cuiuslibet anni si decesserit legatarius, eius anni legatum heredi suo relinquit: quod in usu fructu non ita est, cum fructuarius, etiamsi maturis fructibus, nondum tamen perceptis decesserit, heredi suo eos fructus non relinquit.

for the purpose of honoring the town, but to perpetuate his own memory, no one will be entitled to bring an action on this ground. Therefore the testamentary disposition mentioned by Quintus Mucius, "Let my children reside where their mother may desire," creates no obligation, but merely has reference to compliance with the wishes of the deceased; so that the children may live where their mother may direct.

Nor must the will or the order of the testator always be observed; for example, if the Praetor should decide that it was not expedient for a minor to reside where his father ordered him to, on account of the bad character of persons with whom he directed them to associate, of which fact the father was ignorant. Where, however, ten aurei, payable annually, are left for their support, the legacy will be valid, whether this clause had reference to the parties with whom a mother might wish the children to reside, or whether we should understand by it that the children themselves were entitled to the legacy. The better opinion is, that the testator should be considered to have made this bequest in order to provide for his children.

And, in all cases where only the wishes of the testator are concerned, they must neither be always rejected nor always observed, but such matters must be determined by the judge, and carried into effect if they do not relate to anything dishonorable.

8.- GAIUS; *On the Lex Julia et Papia, Book V*.- Where a legacy payable annually is bequeathed, it resembles an usufruct, as it is terminated by the death of the legatee. It is not, however, terminated by the loss of civil rights, as is the case of an usufruct, which can be bequeathed as follows: "I bequeath to Titius the usufruct of such-and-such a tract of land, and every time that he loses his civil rights, I bequeath to him the same usufruct." The legacy is, in this respect, certainly more beneficial, because if the legatee should die at the beginning of any year, he leaves the legacy for that year to his heir. This does not apply to an usufruct, for if the usufructuary should die at the time that the crops are ripe, but before they have been gathered, he will not leave them to his heir.

en honor del municipio, sino en el suyo, a nadie le compele acción por este motivo. Y así esta cláusula de Quinto Mucio: «residan mis hijos allí donde su madre quisiere que ellos estén», no produce ninguna obligación, sino que servirá para conservar la autoridad de el difunto. A fin de que estén allí, donde hubiere mandado.

Pero no siempre debe conservar su voluntad o mandato, por ejemplo, si el Pretor hubiera sido informado de que no le conviene al pupilo decidir allí donde el padre le hubiere mandado, a causa de vicio que el padre quizá ignoró que había en las personas en cuyo poder mando que morasen. Mas si para alimentos de ellos hubieran sido dejados diez áureos para cada año, ya si con esta cláusula se indican aquéllos en cuyo poder haya querido la madre que residan los pupilos, ya si entendiéramos esta cláusula de modo que este legado se les deba a los mismos hijos, será útil; porque también es preferible que se considere que esto lo hizo por atención a sus propios hijos.

Y en general, donde sólo hay la autoridad del testador, ni se ha de despreciar en absoluto, ni se ha de observar siempre, sino que con la intención del juez deben llevarse a efecto todas estas cosas, si no se dirigen a causa torpe.

8.- GAYO; *Comentarios a la ley Julia Y Papia, libro V*.- El legado dejado para cada año es semejante al usufructo, porque se extingue con la muerte; pero no se extingue con la disminución de cabeza, como se extingue el usufructo; y el usufructo puede ser legado de este modo: «lego a Ticio el usufructo del fundo, y le doy el mismo usufructo en cuantas veces fuere disminuido de cabeza». En este legado hay ciertamente además esto, que al comienzo de cualquier año, si falleciere el legatario, le deja a su propio heredero el legado de este año, lo que no es así en el usufructo, porque el usufructuario, aunque hubiere fallecido estando maduros los frutos, pero no habiéndolos percibido todavía, no dejará estos frutos a su heredero.

9.- PAPINIANUS; *libro VII, Responsorum*.- Fundus, quem pater familias libertis legatorum nomine, quae in annos singulos relinquit, pignus esse voluit, ex causa fideicommissi rei servandae gratia recte petetur. paulus notat: hoc admittendum est et in aliis rebus hereditariis, ut et in eas legatarius mittatur.

10.- IDEM; *libro VIII, Responsorum*.- «Seio amico fidelissimo, si voluerit, sicut meis negotiis intervenirebat, eodem modo filiorum meorum intervenire, annuos senos aureos et habitationem qua utitur praestari volo». non ideo minus annua seio pro parte hereditaria viventis filiae deberi placuit, quod ex tribus filiis titiae duo aliis heredibus institutis vita decesserunt, cum tam labor quam pecunia divisionem reciperent.

§ 1.- «Medico sempronio quae viva praestabam, dari volo»: ea videntur relictas, quae certam formam erogationis annuae, non incertam liberalitatis voluntatem habuerunt.

§ 2.- «Uxori praeter id, quod a me vivo annui nomine accipiebat, aureos centum dari volo»: annum videtur et semel centum aureos reliquisse.

3.- «Libertis dari volo quae viva praestabam»: et habitatio praestabitur: sumptus iumentorum non debebitur, quem actori domina praestare solita fuit utilitatis suae causa: ideo nec sumptum medicamentorum medicus libertus recte petet, quem ut patronam eiusque familiam curaret, acceptabat.

11.- PAULUS; *libro XXI, Quaestionum*.- Cum in annos singulos legatur, plura legata esse placet et per singula legata ius capiendi inspicietur. idem in servo inspiciendum est ex persona dominorum.

9.- PAPINIANUS; *Opinions, Book VII*.- A tract of land, which a testator desired to be hypothecated to secure legacies payable annually to his freedman, can be lawfully claimed by them on the ground of a trust, for the purpose of preserving the land. Paulus states that this rule also applies to other property belonging to an estate, to enable the legatee to be placed in possession of the same.

10.- THE SAME; *Opinions, Book VIII*.- "I wish my faithful friend, Seius, to receive six aurei every year, and the house in which he lives, if he should be willing to take charge of the business affairs of my children, just as he has taken charge of mine." It was held that the surviving daughter of the testator was, none the less, obliged to pay the annual legacy to Seius, in proportion to her share of the estate, because two of the three children of the testator had died, and other heirs had been appointed, as the labor as well as the money was susceptible of division.

§ 1.- "I wish my physician, Sempronius, to receive the same that I have paid him during my lifetime." The sums held to have "been left by this bequest were certain annual payments made by the testatrix, so that, as far as her liberality was concerned, no doubt of her intention could arise.

§ 2.- "I desire a hundred aurei to be paid to my wife in addition to what she received from me as an annual allowance during my lifetime." It is understood that the amount should be payable annually, and that the testator also left her a hundred aurei.

§ 3.- "I wish to be given to my freedmen whatever I furnished them during my lifetime." Their lodging must be provided, but the heir will not be required to allow the steward the expense of beasts of burden, which his mistress was accustomed to grant him for his own convenience. Again, where the freedman is a physician, he cannot legally demand money which he was accustomed to receive from his mistress for the purchase of medicines to be administered to his patroness and her family.

11.- PAULUS; *Questions, Book XXI*.- It is established that where legacies are payable annually, they are multiple, and the right of the legatee to each bequest should be regularly investigated. Where the

9.- PAPINIANO; *Respuestas, libro VII*.- El fundo que el padre de familia quiso que tuvieran en prenda los herederos por razón de los legados, que para cada año les dejó, será; válidamente pedido por causa del fideicomiso para conservar la cosa. Paulo observa: esto se ha de admitido también respecto de las demás cosas de la herencia, de suerte que también en ellas sea puesto en posesión el legatario.

10.- EL MISMO; *Respuestas, libro VIII*.- «Quiero que se le den a Seyo, mi fidelísimo amigo, seis áureos anuales; y la habitación de que se sirve, si, como intervenía en mis negocios, del mismo modo quisiere intervenir en los de mis hijos»; se determinó que no porque de los tres hijos de Ticia fallecieron dos habiendo instituido otros herederos, no se le deben a Seyo las anualidades con arreglo a la porción hereditaria de la hija que vive. Pues tanto el trabajo, como el dinero, admiten división.

§ 1.- «Quiero que al médico Sempronio se le dé lo que yo en vida le daba»; se considera dejado lo que tuvo cierta forma de gasto anual, no voluntad incierta de liberalidad.

§ 2.- «Quiero que a mi mujer se le den cien áureos además de lo que de mí, en vida, recibió a título de anualidad»; se considera que dejó una pensión anual, y cien áureos por una sola vez.

§ 3.- «Quiero que se dé a los libertos lo que yo en vida les daba», se les dará también la habitación; no se deberá el gasto de caballerías, que la señora acostumbró a pagar por su propia utilidad al administrador. Y por consiguiente, el liberto médico no pedirá con derecho el importe de medicamentos, que percibía para que curase a la patrona y a la familia de ésta.

11.- PAULO; *Cuestiones, libro XXI*.- Está determinado que, cuando se lega para cada año hay muchos legados, y para cada legado se examinará el derecho a percibirlo. Lo mismo se ha de ver en

12.- IDEM; *libro XIII, Responsorum*.- Gaius seius praedia diversis pagis maeviae et seiae legavit et ita cavit: "praestari autem volo ex praediis potitianis praediis lutatianis annua harundinis milia trecena et salicis munda annua librarum singula milia": quaero, an id legatum defuncta legataria extinctum sit. paulus respondit servitutem iure constitutam non videri neque in personam neque in rem: sed fideicommissi petitionem competisse ei, cui praedia lutatiana legata sunt, et ideo, cum annua legata fuerint, mortua legataria finitum legatum videri.

13.- SCAEVOLA; *libro IV, Responsorum*.- Maevia nepotem ex maevio puberem heredem instituit et lucio titio ita legavit: "lucio titio viro bono, cuius obsequio gratias ago, dari volo annuos quamdiu vivat aureos decem, si rebus nepotis mei interveniat omnemque administrationem rerum nepotis mei ad sollicitudinem suam revocaverit". quaero, cum lucius titius aliquo tempore maevii negotia gesserit et per eum non stet, quo minus gerat, publius autem maevius nollet eum administrare, an fideicommissum praestari debeat. respondi, si non propter fraudem aliamve quam iustam causam improbandae operae causa remotus esset a negotiis, quae administrare secundum defuncti voluntatem vellet, percepturum legatum.

§ 1.- Uxore herede scripta ita cavit: "libertis meis omnibus alimentorum nomine singulis annuos denarios duodecim ab herede dari volo", si ab uxore mea non recesserint". quaero, cum pater familias sua voluntate de civitate difficile profectus sit, ea autem adsidue proficiscatur, an liberti cum ea proficisci debeant. respondi non posse absolute responderi, cum multa oriri possint, quae pro bono sint aestimanda: ideoque huiusmodi varietas viri boni

legacy is left to a slave, the capacity of his master to take it, should also be inquired into.

12.- THE SAME; *Opinions, Book XIII*.- Gaius Seius devised to Mævius and Seia certain tracts of land in different localities, and provided as follows, "I wish three hundred thousand reeds to be furnished annually by the Potician to the Lutatien Estate, together with a thousand pounds of well-cleaned osier, also, every year." I ask whether this legacy will be extinguished by the death of the legatee. Paulus answered that a servitude, either personal or real, does not seem to have been created in accordance with law; but that an action on the ground of a trust will lie in favor of the party to whom the Lutatian Estate was devised. Therefore, as the legacy was to be paid annually, it is considered to terminate with the death of the legatee.

13.- SCAEVOLA; *Opinions, Book IV*.- Mævnia appointed her grandson, who was born to Mævius and had reached the age of puberty, her heir, and made a bequest to Lucius Titius, as follows: "I desire ten aurei to be paid to Lucius Titius, a good man, to whom I am indebted for favors which he has done me, as long as he lives; if he should take charge of the business of my grandson, and conduct the administration of all his affairs." I ask, if Lucius Titius had, at some time or other, transacted the business of Mævius, and the latter had objected to his doing so any longer, whether he would be obliged to execute the trust. I answered that, if Lucius Titius had been deprived of the right to transact the business of Mævius, not on account of any fraudulent act, and no other just reason had existed for rejecting his services, and he was willing to continue to conduct his affairs, he would be entitled to the legacy.

§ 1.- A man, having appointed his wife his heir, provided as follows, in his will: "I wish twelve denarii to be paid every year by my heir to each of my freedmen for his support, if they do not abandon my wife." As the testator very seldom left the town, and his wife frequently did so, I ask whether the freedmen should accompany her on her journey. I answer that a positive opinion cannot be given on this point, as many things might arise which it would be well to

cuanto al esclavo respecto a la persona de los dueños.

12.- EL MISMO; *Respuestas, libro XIII*.- Cayo Seyo legó a Mevia y a Seya predios en diversas regiones, y dispuso así: «pero quiero que de los predios Poticianos se presten a los predios Lutacianos mil trescientas cajas al año y mil libras de sauces limpios cada año»; pregunto, si falleciera la legataria se habrá extinguido este legado, Paulo respondió, que no parecía que se había constituido con arreglo a derecho una servidumbre, ni personal, ni real; pero que la petición del fideicomiso le competió a aquel a quien se le legaron los predios Lutacianos; y que por lo tanto, siendo anuales los legados, se considera que, fallecida la legataria, se extinguió el legado,

13.- SCEVOLA: *Respuestas, libro IV*.- Mevia Instituyó heredero a su nieto púbero nacido de Mevio; y a Lucio Ticio le hizo así un legado: «a Lucio Ticio, hombre bueno, por cuyas atenciones le doy gracias, quiero que se le den diez áureos anuales, mientras viva, si interviniera en los bienes de mi nieto y tomare a su cuidado toda la administración de los bienes de mi nieto»; pregunto, si habiendo administrado Lucio Ticio por algún tiempo los negocios de Mevio, y no consistiendo en él que los administre, porque no quisiera Publio Mevio que él los administrase, se deberá entregar el fideicomiso. Respondí, que si no hubiese sido removido de los negocios, que conforme a la voluntad del difunto quisiera administrar, por fraude o por alguna otra justa causa para desaprobare su trabajo, habrá de percibir el legado.

§ 1.- Uno, habiendo instituido heredero a su mujer, dispuso así: «quiero que a todos mis libertos se les den a título de alimentos por mi heredera doce denarios al año a cada uno, si no se separasen de mi mujer»; pregunto, si, habiéndose ausentado raras veces de la ciudad voluntariamente el padre de familia, pero saliendo ella con frecuencia, deberían salir con ella los libertos, Respondí, que no se podía responder en absoluto, porque se podían originar

arbitrio dirimenda est. Item quaeritur, cum proficiscens eis nihil amplius optulerit ac per hoc eam secuti non sint, an legatum debeatur. respondit et hoc ex longinquis brevibusque excursionibus et modo legati aestimandum esse.

14.- ULPIANUS; *libro II, Fideicommissorum*.- Si cui annum fuerit relictum sine adiectione summae, nihil videri huic adscriptum mela ait: sed est verior nervae sententia, quod testator praestare solitus fuerat, id videri relictum: si minus, ex dignitate personae statui oportebit.

15.- VALENS; *libro VII, Fideicommissorum*.- Javolenus eum, qui rogatus post decem annos restituere pecuniam ante diem restituerat, respondit, si propter capientis personam, quod rem familiarem tueri non posset, in diem fideicommissum relictum probetur et perdituro ei id heres ante diem restituisset, nullo modo liberatum esse: quod si tempus heredis causa prorogatum esset, ut commodum medii temporis ipse sentiret, liberatum eum intellegi: nam et plus eum praestitisse quam debuisset.

16.- PAULUS; *libro III, ad Neratium*.- Servus post decem annos liber esse iussus est legatumque ei ex die mortis domini in annos singulos relictum est. eorum quidem annorum, quibus iam liber erit, legatum debebitur: interim autem heres ei alimenta praestare compellitur.

17.- LABEO; *libro II, Posteriorum a Javoleno epitomatorum*.- Legatum ita est: "attiae, donec

take into consideration; and therefore a case of this kind should be submitted to the judgment of a good citizen. It was also asked, as when the woman went on her journeys she never offered to pay anything additional to her freedmen, and for this reason they did not accompany her, whether they would be entitled to their legacies. The answer was that this should be determined by taking into account the length, or the shortness of the journeys, and the amount of the legacies.

14.- ULPIANUS; *Trusts, Book II*.- Mela says that if a legacy payable annually would be left to anyone without mentioning the amount, the bequest is void. The opinion of Nerva, however, is better, namely, that the testator is considered to have bequeathed what he was accustomed to give during his lifetime; but that, in every instance, the rank of the parties must be taken into consideration.

15.- VALENS; *Trusts, Book VII*.- Javolenus gave it as his opinion, with reference to an heir who having been charged to pay a certain sum of money after the lapse of ten years paid it before the expiration of the time, that, if it could be proved that the trust had been left for the said period to benefit the party entitled to it, because he could not take care of the property, and the heir paid him the money before the time, knowing that he would squander it, he will, under no circumstances, be released from liability. If, however, the time had been fixed on account of the heir, in order that he might profit by the delay, it is understood that he will be released; and, indeed, it may be said that he paid more than he should have done.

16.- PAULUS; *On Neratius, Book III*.- A slave was ordered to be free after the expiration of ten years, and a legacy was bequeathed to him payable annually from the day of his master's death. The legacy will be due for the years when he shall have begun to be free, and, in the meantime, the heir will be compelled to furnish him with subsistence.

17.- LABEO; *On the Last Epitomes of Javolenus, Book II*.- A legacy was bequeathed as follows, "Let

muchas circunstancias, que se hayan de estimar en bien; y que por lo mismo esta diversidad ha de ser dirimida al arbitrio de hombre bueno. Asimismo se pregunta, si, no habiéndoles ofrecido ella nada mas al partir, y no habiéndola seguido por esto, se deberá el legado. Respondió, que también esto se ha de estimar según lo largo o lo breve de las excursiones, y según la cuantía del legado.

14.- ULPIANO; *Fideicomisos, libro II*.- Si a alguien se le hubiere dejado una pensión anual sin expresión de la suma, dice Mela que no parece que se le dejó cosa alguna; pero es más verdadera la opinión de Nerva, de que se considera dejado lo que el testador había solido dar; y si no, convendrá que se determine según la dignidad de la persona.

15.- VALENTE; *Fideicomisos, libro VII*.- Javoleno respondió, que aquel que habiéndosele rogado que restituyese una cantidad después de diez años, la habría restituido antes del término, si se probase que el fideicomiso fue dejado a término por razón de la persona del que lo adquiría, porque no podría cuidar de sus bienes de familia, y el heredero se lo hubiese restituido antes del plazo al que lo había de perder, no quedó de ningún modo libre; pero que si el término hubiese sido prorrogado por causa del heredero, para que él experimentase la utilidad del tiempo intermedio, se entiende que él quedó libre, porque aún dió él más de lo que había debido.

16.- PAULO; *Comentarios a Neracio, libro III*.- Se mandó que un esclavo fuese libre después de diez años, y se le dejó un legado para cada año desde el día de la muerte de su señor; se deberá, ciertamente el legado de los años en que ya fuere libre, pero entretanto es compelido el heredero a prestarle alimentos.

17.- LABEÓN; *Obras póstumas; compendiadas por Javoleno, libro II*.- Se legó así: «esté condenado

nubat, quinquaginta damnas esto heres meus dare" neque adscriptum est "in annos singulos". Labeo trebatius praesens legatum deberi putat, sed rectius dicitur id legatum in annos singulos deberi.

§ 1.- «Vini Falerni, quod domi nasceretur, quotannis in annos singulos binos culeos heres meus attio dato». Etiam pro eo anno, quo nihil vini natum est, deberi duos culeos, si modo ex vindemia ceterorum annorum dari possit.

18.- SCAEVOLA; *libro XIV, Digestorum*.- Codicillis testamento confirmatis fundum libertis legavit eumque alienari vetuit, sed pertinere voluit et ad filios libertorum vel ex his natos: deinde haec verba adiecit: "a quibus praestari volo heredi ex reditu eius fundi decem per annos singulos usque ad annos triginta quinque a die mortis meae". Quaesitum est, cum heres a titio institutus intra trigesimum quintum annum aetatis decesserit, an residui temporis fideicommissum ex verbis supra scriptis heredis quoque heredi debeatur. respondit deberi, nisi ostendatur a libertis testatorem ad heredis trigesimum quintum annum respexisse.

§ 1.- Stichus alumno suo centum et menstruos decem et annuos centum dari voluit et semproniam, quam heredem ex triente instituerat, rogavit in haec verba: "fidei tuae committo, sempronia soror, uti legata, quae alumnis meis reliqui, ex medio recipias et apud te habeas, quoad usque commendatos habeas". Quaesitum est, cum sempronia, cuius fidei commissum sit, abstinuerat se hereditate antequam secundum voluntatem defuncti perciperet pecuniam alumnis relictam, an sticho de legatis actio etiam ante vicesimum quintum annum competat. respondit competere.

19.- IDEM; *libro XVII, Digestorum*.- Titia herede

my heir give to Attia fifty aurei until she marries." It was not stated that the money was to be paid annually. Labeo and Trebatius think that the entire sum is immediately due. It is, however, more equitable to hold that the legacy is payable annually.

§ 1.- "Let my heir give to Attius, every year, two measures of Falernian wine which are to be taken from my estate." It was held that the two measures of wine should be furnished even for a year when no wine was made, provided they could be obtained from the vintage of former years.

18.- SCAEVOLA; *Digest, Book XIV*.- A testator, having confirmed his codicil by his will, devised a tract of land to his freedmen, and forbade it to be alienated, but desired it to belong to the children and grandchildren of his freedmen. He afterwards added the following words: "I wish to be paid by them to my heir, out of the profits of said land, ten aurei every year, for the term of thirty-five years after my death." As the heir appointed by Titius died before the expiration of the term of thirty-five years, the question arose whether the heir of the heir would, by the words above quoted, be entitled to the benefit of the trust for the remainder of the time. I answered that he would, unless it could be proved by the freedmen that the testator had in view the thirty-fifth year of the heir as the time for the extinction of the legacy.

§ 1.- A testator left to Stichus, whom he had brought up, a hundred aurei, and ten aurei payable every month in addition, and then, after appointing Sempronia heir to a third of his estate, charged her as follows: "I request you, Sempronia, my sister, to take from the bulk of my estate the legacies which I have left to my foster-children, and keep them until they are entitled to the same." The question was asked if Sempronia, who was charged with the trust, should refuse to accept the estate before having taken possession of the money left to the foster-children, in accordance with the will of the deceased, whether she would be liable to an action on account of the legacy brought by Stichus before he reached the age of twenty-five years? The answer was that such an action would lie.

19.- THE SAME; *Digest, Book XVII*.- Titia, having

mi heredero a darle a Atcia, hasta que se case, cincuenta», y no se añadió: «cada año»; Labeón y Trebacio opinan que se debe de presente el legado; pero mejor se dirá, que este legado se debe cada año.

§ 1.- «Déle mi heredero a Atcia todos los años para cada año dos pellejos del vino Falerno que se críe en casa»; se deben los dos pellejos también en aquel año en que no se crió ningún vino, si pudieran darse de la vendimia de los demás años.

18.- SCEVOLA; *Digesto, libro XIV*.- En codicilos confirmados por testamento legó uno un fundo a sus libertos, y prohibió que fuese enajenado; pero quiso que perteneciera también a los hijos de los libertos, o a los nacidos de ellos; después añadió estas palabras: «por quienes quiero que de la renta de este fundo se le den diez a mi heredero cada año, hasta treinta y cinco años después del día de mi muerte»; se preguntó, si, habiendo fallecido el heredero instituido por Ticio dentro de los treinta y cinco años de su edad, se le deberá también al heredero en virtud de las antes transcritas palabras el fideicomiso del tiempo restante. Respondió, que se le debe, a no ser que se pruebe por los libertos que el testador se refirió al trigésimo quinto año del heredero.

§ 1.- Uno quiso que se dieran ciento a su alumno Stico, y diez cada mes y otros ciento cada año, y a Sempronia, a quien había instituido heredera del tercio, le rogó en estos términos: «encomiendo a tu fidelidad, hermana Sempronia, que retires de la masa los legados, que dejé a mis alumnos, y que los tengas en tu poder mientras los tengas encomendados»; se preguntó, si, habiéndose abstenido de la herencia Sempronia, a quien se encomendó el fideicomiso, antes que conforme a la voluntad del difunto percibiere el dinero dejado a los alumnos, le competirá a Stico la acción de legados aun antes de los veinticinco años. Respondió, que le compete.

19.- EL MISMO; *Digesto, libro XVII*.- Ticia,

seia scripta usum fructum fundi maevio legavit eiusque fidei commisit in haec verba: "a te, maevi, ex redditu fundi speratiani praestari volo arrio pamphilo et arrio sticho ex die mortis meae annuos sescentos quotannis, quoad vivent". Quaesitum est, cum maevius annua alimenta praestiterit, post mortem autem eius fundus ad heredem titiae pleno iure redierit, an alimenta ex fideicommisso pamphilo et sticho debeantur. respondi nihil proponi, cur debeant praestari ab heredibus titiae, cum ab usufructuario alimenta relicta sunt.

Idem quaesit, an ab heredibus Maevii legatarii praestanda sint. respondi nihil ab herede legatarii, nisi testamentum manifeste probetur voluisse etiam finito usu fructu praestari, si modo id, quod ex usu fructu receptum esset, ei rei parandae sufficeret.

§ 1.- Qui marco homini docto certa annua praestabat, testamento cavit: «domina sanctissima, scio te de amicis meis curaturam, ne quid his desit: verum tamen et marco dari octingenta»: quaesitum est, an marcus praestitis sibi ex causa legati octingentis annua quoque consequi debeat. respondi nihil proponi, cur non secundum ea, quae in consultatione collata essent, debeantur.

§ 2.- «Lucio Titio auri pondo tria, quae viva praestabam». quaero, cum testatrix quadraginta titio, quoad viveret, salarii nomine certam summam et amplius festorum dierum nomine certum pondus argenti aut pro eo pretium praestiterit, an eadem ex causa legati vel fideicommissi ab heredibus eius titio praestari debeant. respondi nihil proponi, cur praestanda non sint.

20.- IDEM; *libro XVIII, Digestorum*.- Annua his verbis legavit: "si morarentur cum matre mea, quam

appointed Seia her heir, bequeathed the usufruct of a certain tract of land to Mævius, and charged him with a trust as follows: "I request you, Mævius, to pay to Arrius Pamphilus and Arrius Stichus, out of the income of the Speratian Estate, six hundred aurei every year from the day of my death, as long as they live." The question arose if Mævius should pay the annual sum for their support, and, after his death, the land should revert to the heir of Titia by operation of law, whether the provision for support under the terms of the trust would be due to Pamphilus and Stichus. I answered that there was nothing in the case stated to compel payment by the heirs of Titia, as the usufructuary was only charged with it.

The question was also asked, whether payment of the legacy should be made by the heirs of the legatee, Mævius. The answer was that nothing was due from the heirs of the legatee, unless it should be clearly proved that the testator intended payment to be made after the extinction of the usufruct, provided the receipts from the usufruct were sufficient to continue it.

§ 1.- A certain individual who had paid an annual sum to a learned man, named Marcus, inserted the following provision into his will: "My dear wife, I know that you will take care of my friends, and allow them to want for nothing, still, I wish eighty aurei to be given to Marcus." The question arose whether Marcus, having received the legacy of eighty aurei, could also claim the aforesaid annual payments? The answer was that there was nothing in the case stated why the annual payments concerning which advice was asked should not be made.

§ 2.- "I bequeath to Lucius Titius three pounds of gold, which I was accustomed to give him during my lifetime." Inasmuch as the testatrix gave Titius every year forty aurei by way of annual salary, and a certain quantity of silver in addition, as a gift for festivals, or the value of the same, I ask whether the trust for the benefit of Titius must be executed by the heirs, or the money be paid as a legacy. The answer was that there was nothing in the case stated to prevent the money from being paid.

20.- THE SAME; *Digest, Book XVIII*.- A testator bequeathed an annual pension under the following

habiendo instituido heredera a Seya, le legó a Mevio el usufruto de un fundo, y le encomendó un fideicomiso en estos términos: «quiero, Mevio, que de la renta del fundo Speraciano se les den por tí a Arrio Pánfilo y a Arrio Stico seiscientos al año cada año desde el día de mi muerte, mientras vivan»; se preguntó, si, habiendo prestado Mevio los alimentos cada año, pero habiendo vuelto de pleno derecho después de su muerte el fundo al heredero de Ticia, se les deberán a Pánfilo y a Stico los alimentos en virtud del fideicomiso. Respondí, que nada se expone para que deban prestarse por los herederos de Ticia, puesto que los alimentos fueron dejados a cargo del usufructuario.

El mismo preguntó, si deberán prestarse por los herederos del legatario Mevio. Respondí, que nada debe prestarse por el heredero del legatario, a no ser que se pruebe evidentemente que el testador quiso que se prestasen aun finido el usufruto, si es que lo que se hubiese percibido por el usufruto bastase para pagarlos.

§ 1.- Uno que a Marco, hombre docto, le pagaba cierta pensión anual, dispuso en su testamento: «virtuosísima señora, sé que te cuidarás de mis amigos, para que no les falte cosa alguna; sin embargo, quiero que también a Marco se le den ochocientos»: se preguntó, si Marco, habiéndosele dado los ochocientos por causa del legado, deberá obtener también la pensión anual. Respondí, que nada se expone para que, según lo que se ha comprendido en la consulta, no se deba.

§ 2.- «A Lucio Ticio las tres libras de oro que yo en vida le entregaba»; pregunto, si, habiendo entregado la testadora, mientras vivía, cuarenta a Ticio, cierta cantidad a título de salario, y ademas cierta cantidad de plata con motivo de los días de fiesta, o en lugar de ella su precio, se le deberán entregar por sus herederos a Ticio estas mismas cosas por causa del legado o del fideicomiso. Respondí, que nada se expone para que no se le hayan de dar.

20.- EL MISMO; *Digesto, libro XVIII*.- Uno legó una pensión anual en estos términos: «si morasen con

heredem ex parte institui": quaesitum est, an mortua matre condicio adposita defecisse videatur ac per hoc neque cibaria neque vestiaria his debeantur. respondit secundum ea quae proponerentur deberi.

§ 1.- Attia fideicommissum his verbis reliquit: "quisquis mihi heres erit, fidei eius committo, uti det ex redditu cenaculi mei et horrei post obitum sacerdoti et hierophylaco et libertis, qui in illo templo erunt, denaria decem die nundinarum, quas ibi posui". quaero, utrum his dumtaxat, qui eo tempore quo legabatur in rebus humanis et in eo officio fuerint, debitum sit, an etiam his qui in loco eorum successerunt. respondit secundum ea quae proponerentur ministerium nominatorum designatum, ceterum datum templo. item quaero, utrum uno dumtaxat anno decem fideicommissi nomine debeantur an etiam in perpetuum decem annua praestanda sint. respondit in perpetuum.

21.- IDEM; *libro XXII, Digestorum*.- Liberto suo ita legavit: "praestari volo philoni, usque dum vivet, quinquagesima omnis redditus, quae praediis a colonis vel emptoribus fructus ex consuetudine domus meae praestantur". Heredes praedia vendiderunt, ex quorum redditu quinquagesima relicta est: quaesitum est, an pretii usurae, quae ex consuetudine in provincia praestarentur, quinquagesima debeatur. respondit redditus dumtaxat quinquagesimas legatas, licet praedia vendita sunt.

§ 1.- A liberto, cui fundum legaverat ferentem annua sexaginta, per fideicommissum dederat Pamphilae annua dena: quaesitum est, si lex falcidia liberto legatum minuerit, an Pamphilae quoque annum fideicommissum minutum videatur, cum ex redditu legata sint, qui largitur, etiamsi falcidia partem dimidiam fundi abstulerit, annum Pamphilae praestationem. Respondit secundum ea quae

condition: "If they should reside with my mother, whom I have appointed heir to a portion of my estate." The question arose whether, after the death of the mother, the condition which was imposed would be considered to have failed, and for this reason neither food nor clothing should be given to the legatees. The answer was that, according to the facts stated, they should be given.

§ 1.- Attius left a trust in the following terms, "I charge whoever shall be my heir to pay, after my death, out of the income of my apartment and my warehouse the sum of ten denarii to the priest, the sacristan, and the freedmen attached to the temple, on the festival day which I have established." I ask whether this legacy was only due to those who were living and in office at the time that it was bequeathed, or whether it should also be paid to those who succeed them. The answer was that, in accordance with the facts stated, although the officers had been mentioned, the legacy was bequeathed to the temple. I also ask whether the ten aurei were only due for one year under the terms of the trust, or whether they should be paid in perpetuity. The answer was that they should be paid in perpetuity.

21.- THE SAME; *Digest, Book XXII*.- A certain person left the following bequest to his freedman: "I desire the fiftieth of my entire income derived from the tenants of my lands and the purchasers of the crops, according to the custom of my household, to be paid to Philo, as long as he lives." The heirs sold the land from which the said fiftieth of the income was derived. The question arose whether the fiftieth of the interest on the price, which, according to the custom of the province, was ordinarily collected, was due? The answer was that, although the land had been sold, only the fiftieth of the income thereof was bequeathed.

§ 1.- A testator charged his freedman, to whom he had left a tract of land that returned an income of sixty aurei a year, with the payment of ten denarii to Pamphila annually, under the terms of a trust. The question arose, if the Falcidian Law should diminish the legacy of the freedman, whether the annual allowance bequeathed to Pamphila under the trust would also be considered to be diminished; as the

mi madre, a la que instituí heredera de una parte»; se preguntó: si muerta la madre se considerará que falta la condición puesta, y si por ello no se deberán ni los alimentos ni el vestido. Respondí, que según lo que se exponía, se deben.

§ 1.- Atcia dejó un fideicomiso en estos términos: «cualquiera que fuere mi heredero, encomiendo a su fidelidad que de las rentas de mi comedor y de mi granero dé después de mi muerte al sacerdote, al sacristán, y a los libertos, que en aquel tempo hubiere, diez denarios el día de las ferias que allí establecí»; Pregunto, si se les deberá solamente a los que al tiempo en que se hacía el legado vivieren y se hallaron en aquel cargo, o si también a los que los sucedieron en su lugar. Respondió, que, según lo que se exponía, se designó el ministerio de los nombrados, pero que se dió al templo. Asimismo pregunto, si a título de fideicomiso se deberán los diez solamente un año, o si también se deberá pagar perpetuamente la anualidad de diez. Respondió, que perpetuamente.

21.- EL MISMO; *Digesto, libro XXII*.- Uno le legó así a su liberto: «quiero que se dé a Filón, mientras viva, la quincuagésima parte de toda la renta, que según la costumbre de mi casa se paga a los herederos por los colonos o por los compradores de frutos»; los herederos vendieron los predios de cuya renta se dejó la quincuagésima parte; se preguntó, si se deberá la quincuagésima de los intereses del precio, que por costumbre se pagasen en la provincia. Respondió, que solamente fueron legadas las quincuagésimas de la renta, aunque se hayan vendido los predios.

§ 1.- A cargo del liberto, a quien le había legado un fundo que al año producía sesenta, había dado uno a Pánfila por fideicomiso diez al año; se preguntó, si, habiendo disminuido la ley Falcidia lo legado al liberto, se considerará disminuido también el fideicomiso anual de Pánfila, puesto que se legó de la renta, que basta para la prestación anual a Pánfila, aunque la Falcidia haya quitado la mitad del fundo.

proponerentur non videri minutum, nisi si alia mens testatoris probaretur.

§ 2.- Filium ex dodrante, uxorem ex quadrante instituit heredes et filii fidei commisit, ut novercae restitueret hereditatem: ab ea autem petit, ut infirmitatem filii commendatam haberet eique menstruos aureos denos praestaret, donec ad vicesimum quintum annum aetatis pervenerit, cum autem impleisset eam aetatem, partem dimidiam hereditatis ei restitueret. Filius deducta dodrantis parte quarta, ex qua institutus erat, novercae hereditatem restituit et postea implevit vicesimum quintum annum aetatis. quaesitum est, cum noverca universae hereditatis haberet dodrantem semunciam et sicilicum, an eius partem dimidiam privigno suo restitueret. Respondit secundum ea quae proponerentur tantum restituendum, quantum cum eo, quod falcidiae nomine filius deduxisset, semissem faceret. idem quaesivit, an, quod infirmitati filii pater consulere voluerit, fructus quoque medii temporis noverca ei restituere deberet. Respondit secundum ea quae proponerentur debere.

§3.- Lucius Titius testamento patriae suae civitati sebastenorum centum legavit, uti alternis annis ex usuris eiusdem certamina sub nomine ipsius celebrarentur, et adiecit haec verba: "quod si condicione supra scripta recipere legatam sibi pecuniam civitas sebastenorum noluerit, nullo modo heredes meos obligatos ei esse volo, sed habere sibi pecuniam". Postea praeses provinciae ex nominibus debitorum hereditariorum elegit idonea nomina et in causam legati rei publicae adiudicavit, post cuius sententiam res publica a plerisque adiudicatis sibi pecunias percepit. Quaesitum est, an, si res publica condicionibus testamento adscriptis postea non paruerit, legatum ad filios heredes pertineat. Respondit rem publicam voluntati testatoris parere compellendam ac, nisi faciat, in his quidem summis,

bequest to Pamphila was derived from income which would have to be paid, even if the Falcidian Law reduced the tract of land by half. The answer was that, in accordance with the facts stated, the bequest to Pamphila would not be diminished, unless the intention of the testator was proved to be otherwise.

§ 2.- A certain testator having appointed his son heir to three-fourths of his estate, and his wife to one-fourth, charged his son to deliver his estate to his stepmother, and requested her "to take good care of his young son, and pay him ten aurei until he reached his twenty-fifth year, and, after he had attained that age, to transfer to him half of the estate." The son having deducted the fourth part of the estate to which he had been appointed heir, delivered her share to his stepmother, and afterwards reached the age of twenty-five years. As the stepmother was entitled to the three-fourths, and one twenty-fourth, and one forty-eighth of the entire estate, the question arose whether she should surrender half of this share to her stepson? I answered that, according to the facts stated, she would have to deliver to him enough to make up half the estate; in addition to what the son had deducted by reason of the Falcidian Law. Since the father seemed to have had in view the tender age of his son, inquiry was also made whether the stepmother would be required to deliver to him the profits for the intermediate time. The answer was that, in accordance with the facts stated, she would be required to do so.

§ 3.- Lucius Titius, by his will, bequeathed a hundred aurei to the city of Sebasta, his birthplace, in order that athletic contests might be celebrated there every other year in his name, with the interest of said sum, and added the following words: "If the city of Sebasta is unwilling to accept the money which I have bequeathed under the above-mentioned condition, I desire that my heirs shall, under no circumstances, be liable for the same, but that they keep it for themselves." The Governor of the province afterwards selected certain good notes from the assets of the estate, and delivered them to the city as its legacy, and, after his decision, the city collected the money due on most of the claims. The question arose, if the city should not subsequently comply with the conditions of the will, whether the legacy

Respondió, que, según lo que se exponía, no se considera disminuido, si no se probase que fue otra la intención del testador.

§ 2.- Uno instituyó herederos de nueve dozavos a su hijo, y de tres a su mujer, y encomendó a la fidelidad del hijo, que restituyese la herencia a su madrastra; pero le pidió a esta que tuviese encomendada la debilidad del hijo, y que le entregase diez áureos mensuales hasta que llegare a los veinticinco años de edad; pero que cuando hubiere cumplido esta edad, le restituyese a él la mitad de la herencia. El hijo, habiendo deducido la cuarta parte de los nueve dozavos en que había sido instituido, le restituyó la herencia a la madrastra, y cumplió después los veinticinco años; se preguntó, sí, teniendo la madrastra nueve onzas de toda la herencia, media onza, y un cuarto de onza, le restituirá a su hijastro la mitad de esto. Respondió, que, según lo que se exponía, se ha de restituir solamente cuanto junto con lo que por razón de la Falcidia hubiere deducido el hijo constituyese la mitad de la herencia. El mismo pregunto, sí, habiendo querido el padre proveer a la debilidad del hijo, debería restituirle la madrastra también los frutos del tiempo intermedio. Respondió, que, según lo que se exponía, debía.

§ 3.- Lucio Ticio legó ciento en su testamento a la ciudad de los Sebastinos, su patria, para que en años alternados se celebrasen con sus intereses certámenes en nombre del mismo, y añadió estas palabras: «pero si la ciudad de los Sebastinos no hubiere querido recibir el dinero a ella legado con la expresada condición, quiero que de ningún modo le estén obligados mis herederos, sino que tengan para sí el dinero»; después el presidente de la provincia eligió entre los créditos de los deudores de la herencia créditos cobrables, y los adjudicó a la República para la causa del legado, y después de su sentencia la República percibió para sí el dinero de la mayor parte de los créditos adjudicados; se preguntó, si, no habiéndose atendido después la República a las condiciones puestas en el testamento, les pertenecerá el

quae per numerationem vel novationem solutae sunt, utili repetitione heredes adiuvandos: ab his vero nominibus, quae neque solverunt rei publicae neque novatione abscesserunt a pristina obligatione, non prohibendos, quo minus debitum petant.

§ 4.- Largius Eurippianus consuluit alumno certam pecuniam patronum testamento legasse deque ea re testamento ita cavisse: "pecuniam, quam titio liberto et alumno meo legavi, esse volo penes publium maevium usque ad annum vicesimum quintum aetatis eius proque ea computari cum eo usuras quadrantes: quantum autem in sumptum ei statuendum sit, tu, publi maevi, cum patris affectum ei praestare debeas, aestimabis". Quaesitum est, an heredes a publico maevio satis accipere debuerint solventes eam pecuniam. respondit, cum testamento nulla exigendae satisfactionis commemoratio fiat, satis habuisse heredes secundum voluntatem defuncti publico maevio pecuniam numerare: et ideo nec titius alumnus vel heredes eius audiri debeant adversus heredes patroni agentes, quod satis non exegerunt: ex ea enim numeratione etiam a titio ac proinde etiam ab heredibus eius liberatos esse supra scriptos heredes, nisi vivente testatore publicus maevius solvendo esse desierit: tunc enim cautio ab eo exigenda est.

§ 5.- Pater duos filios aequis ex partibus instituit heredes, maiorem et minorem, qui etiam impubes erat, et in partem eius certa praedia reliquit et, cum quattuordecim annos impleverit, certam pecuniam ei legavit idque fratris eius fidei commisit, a quo petit in haec verba: "a te peto, sei, ut ab annis duodecim aetatis ad studia liberalia fratris tui inferas matri eius annua tot usque ad annos quattuordecim: eo amplius

would belong to the sons who were the heirs of the deceased. I answered that the city could be compelled to obey the wishes of the testator, and if it did not do so, the heirs could demand the amounts which had been settled by the debtors either in cash or by renewal, and so far as those claims which were not paid to the city, and of which the former obligation was not released by renewal were concerned, the heirs were not prevented from demanding from the debtors what they owed.

§ 4.- Largius Eurippianus rendered an opinion, after his advice had been requested in a case where a patron had left a certain sum of money to his foster-child, and afterwards made the following provision with reference to it in his will: "I wish the money which I have bequeathed to my freedman and foster-child, Titius, to remain in the hands of Publius Mævius, until he reaches the age of twenty-five years, and that, for the use of the same, interest shall be collected at the rate of three per cent. As for the amount of the expenses to be paid to him, Publius Mævius will estimate them, for he should entertain for him the affection of a father." The question arose whether the heirs, when they paid Publius Mævius the money, should require him to give security. The answer was since no mention of security being required was made in the will, the heirs would be sufficiently safe if they paid the money to Publius Mævius, in accordance with the wishes of the deceased. Therefore neither Titius, the foster-child, nor his heirs should be heard, if they brought an action against the heirs of the patron on the ground that they did not exact security for, by the payment of the money; and the above-mentioned heirs will be released from liability to Titius, as well as to his heirs, unless Publius Mævius should cease to be solvent during the lifetime of the testator, for, in this case, security must be required of him.

§ 5.- A father appointed his two sons his heirs to equal portions of his estate, an older one, and a younger who was still under the age of puberty, and he left to the latter certain lands as his share, and also bequeathed him a certain sum of money payable when he reached the age of fourteen years, which he placed in the hands of his brother, as trustee, in the following words: "I charge you, Seius, to give to your

legado a los hijos herederos. Respondió, que la República ha de ser compelida a atenerse a la voluntad del testador, y que si no lo hiciera, han de ser ciertamente auxiliados los herederos con la repetición útil respecto a aquellas sumas que fueron satisfechas por entrega o por novación; y que respecto a los créditos que ni pagaron a la República, ni separaron de la primitiva obligación por la novación, no se les ha de prohibir que pidan lo debido.

§ 4.- Largio Eurippiano consultó sobre el caso de que un patrono legó en su testamento cierta cantidad a su alumno, y dispuso así sobre el particular en el testamento «quiero que el dinero que legué a Ticio, liberto y alumno mío, quede en poder de Publio Mevio hasta los veinticinco años de la edad de aquél, y que por el mismo se le acumulen intereses de tres por ciento; mas tú, Publio Mevio, estimarás cuanto se le haya de fijar para gastos, puesto que debes tributarle afecto de padre»; se preguntó, si pagando los herederos esta suma deberán exigirle fianza a Publio Mevio. Respondió, que no haciéndose en el testamento mención alguna de fianza que deba exigirse, los herederos hicieron bastante con pagarle el dinero a Publio Mevio conforme a la voluntad del difunto; y por lo tanto, ni el alumno Ticio, ni sus herederos, deberán ser oídos al reclamar contra los herederos del patrono porque no exigieron fianza; pues en virtud de este pago quedaron libres así de Ticio, como también de sus herederos, los antes mencionados herederos, a no ser que viviendo el testador hubiere dejado de ser solvente Publio Mevio; porque entonces se le ha de exigir fianza.

§ 5.- Un padre instituyó herederos por partes iguales a dos hijos, uno mayor y otro menor, el cual era también impúbere; y para la parte de éste dejó ciertos predios, y le legó cierta cantidad para cuando hubiere cumplido los catorce años, y esto lo encomendó a la fidelidad del hermano, al cual le pidió en estos términos: «te pido Seyo, que desde los doce años de edad des para los estudios liberales de tu

tributa fratris tui pro censu eius dependas, donec bona restituas: et ad te reditus praediorum illorum pertineant, quoad perveniat frater tuus ad annos quattuordecim".

Quaesitum est, defuncto maiore fratre herede alio relicto utrum omnis condicio percipiendi reditus fundorum, anniversaria praestetur alia, quae praestaturus esset, si viveret, seius, ad heredem eius transierint, an vero id omne protinus ad pupillum et tutores transferri debeat. respondit: secundum ea quae proponerentur intellegitur testator quasi cum tutore locutus, ut tempore, quo tutela restituenda est, haec, quae pro annuis praestari iussisset percipiendisque fructibus, finiantur: sed cum maior frater morte praeventus est, omnia, quae relicta sunt, ad pupillum et tutores eius confestim post mortem fratris transisse.

22.- ALFENUS VARUS; *libro II, Digestorum a Paulo epitomatorum*.- «Filiae meae, quotienscumque vidua erit, in annos singulos centum heres meus dato»: quaeritur, si filia minus annui temporis vidua fuisset, numquid minus ei centum deberentur. respondit sibi videri, tametsi totus annus nondum fuisset, tamen deberi.

23.- MARCIANUS; *libro VI, Institutionum*.- Quum quidam decurionibus divisiones dari voluisset die natalis sui, divi severus et antoninus rescripserunt non esse verisimile testatorem de uno anno sensisse, sed de perpetuo legato.

24.- IDEM; *libro VIII, Institutionum*.- Quum erat certa pecunia, id est centum, rei publicae sardianorum relicta per quadriennium certaminis chrysanthiani, divi severus et antoninus rescrip-

mother a certain sum of money annually, to enable your brother to pursue his studies from his twelfth to his fourteenth year, and, in addition to this, to pay the taxes assessed against him until you deliver him the property; and I desire that the income of said lands shall belong to you, until your brother reaches the age of fourteen years."

The elder brother having died and left a foreign heir, the question arises whether the condition of receiving the income every year, as well as the charge of paying the annual allowance which, if Seius had lived, he would have been compelled to pay, will be transmitted to his heir; or whether the entire amount of the legacy must be immediately delivered to the minor and his guardians. The answer was that, according to the facts stated, the testator is understood to have, as it were, addressed the guardian, so that, at the expiration of the guardianship, the allowance which he had ordered to be paid, and the income which was to be collected, should terminate; but as the elder brother was overtaken by death, everything that had been left by the testator would, at the time when his brother died, immediately pass to the minor and his guardians.

22.- ALFENUS VARUS; *Epitomes of the Digest by Paulus, Book II*.- "Let my heir pay a hundred aurei annually to my daughter every time that she becomes a widow." The question arose, if the daughter should become a widow in less than a year, whether she would be entitled to less than a hundred aurei. The answer was that, although the entire year had not yet elapsed, the whole amount would be due to her.

23.- MARCIANUS; *Institutes, Book VI*.- When a certain man desired a distribution of his estate to be made to the Decurions on his birthday, the Divine Severus and Antoninus stated in a Rescript, that it was not probable that the testator had in his mind payment during only one year, but intended to leave a legacy in perpetuity.

24.- THE SAME; *Institutes, Book VIII*.- Where a certain sum of money, for instance, a hundred aurei, was left to the city of Sardis for the purpose of celebrating games in honor of Apollo in four years,

hermano a su madre tanto al año hasta los catorce años; y que además de esto pagues los tributos de tu hermano conforme al censo del mismo, hasta que restituyas los bienes; y pertenézcate las rentas de aquellos predios hasta que tu hermano llegue a los catorce años»;

Se preguntó, si, fallecido el hermano mayor habiendo dejado otro heredero, se cumplirá toda la condición de percibir las anualidades de la renta de los fundos, y si lo demás que había de hacer, si viviera Seyo, pasaría al heredero de éste, o si todo esto deberá transferirse desde luego al pupilo y a los tutores. Respondió: según lo que se expone, se entiende que el testador habló como con un tutor, de suerte de que al tiempo en que se ha de restituir la tutela termine lo que hubiere mandado que se entregue por anualidades; y respecto a la percepción de los frutos; pero habiendo sido sorprendido por la muerte el hermano mayor, todas las cosas que se dejaron pasaron inmediatamente después de la muerte del hermano al pupilo y a los tutores de éste.

22.- ALFENO VARO; *Digesto compendiado por Paulo, libro II*.- «Déle mi heredero a mi hija, mientras fuere viuda, ciento cada año» se pregunta, si, habiendo estado viuda la hija menos tiempo de un año, no se le deberían acaso los ciento. Respondió, que a él le parece que aunque no hubiese transcurrido todavía todo un año, se le debían, sin embargo.

23.- MARCIANO; *Instituta, libro VI*.- Habiendo querido uno que en el día de su natalicio se hiciesen regalos a los Decuriones, respondieron por rescripto los Divinos Severo y Antonino, que no era verosímil que el testador se hubiera referido a un solo año, sino a un legado perpetuo.

24.- EL MISMO; *Instituta, libro VIII*.- Habiéndose dejado cierta cantidad, esto es, ciento, a la República de Sardis para el quadrienio del certamen Crisantino, respondieron por rescripto los Divinos Severo y

serunt videri perpetuam pensitationem reliquisse testatorem per quadriennium, non in primum quadriennium.

25.- VALENS; *libro II, Fideicommissorum*.- Filiofamilias, quoad in potestate patris sit, in annos singulos dena dari possunt.

TIT. II

DE USU, ET USUFRUCTU, ET REDITU ET HABITATIONE, ET OPERIS PER LEGATUM VEL FIDEICOMMISSUM DATIS

1.- PAULUS; *libro III, ad Sabinum*.-Nec usus nec usus fructus itineris actus viae aquaeductus legari potest, quia servitus servitutis esse non potest: nec erit utile ex senatus consulto, quo cavetur, ut omnium quae in bonis sint usus fructus legari possit, quia id neque ex bonis neque extra bona sit. sed incerti actio erit cum herede, ut legatario, quamdiu vixerit, eundi agendi ducendi facultatem praestet aut ea servitus constituatur sub hac cautione, ut, si decesserit legatarius vel capite deminutus ex magna causa fuerit, restituitur.

2.- PAPINIANUS; *libro XVII, Quaestionum*.- Hominis operae legatae capitis deminutione vel non utendo non amittuntur. et quoniam ex operis mercedem percipere legatarius potest, etiam operas eius ipse locare poterit, quas si prohibeat heres capi, tenebitur. idem est et si servus se locaverit. et quia legatarius fructuarius non est, ad heredem suum operarum legatum transmittit: sed servo usu capto legatum perit.

the Divine Severus and Antoninus stated in a Rescript that the testator appeared to have left a perpetual income, due every four years, and not merely a gross sum for payment at the end of the first term of four years.

25.- VALENS; *Trusts, Book II*.- Ten aurei can be left to be paid annually to a son under paternal control, as long as he is in the power of his father.

TITLE II

CONCERNING USE, USUFRUCT, INCOME, LODGING, AND SERVICES LEFT BY LEGACIES OR TRUSTS

1.- PAULUS; *On Sabinus, Book III*.- Neither the use nor the usufruct of the right to traverse a path, a drive-way or a road, or to convey water by means of an aqueduct, can be left by will, because the servitude of a servitude cannot exist. Nor can such a bequest be rendered legal under the Decree of the Senate by which it is provided that the usufruct of everything included in property may be bequeathed, for the reason that this is neither included in property or excluded from it, but an action for an indeterminate amount will lie against the heir, and in favor of the legatee, as long as he lives, in order to compel the former to permit him to walk, ride, or drive through the property or the servitude may be granted, if security is furnished to return it in case the legatee should die, or forfeit his civil rights for some serious offence.

2.- PAPINIANUS; *Questions, Book XVII*.- Where the services of a slave are bequeathed, they are not lost by forfeiture of civil rights, or by non-user; and, as the legatee can profit by the labors of the slave, he can also lease them. If the heir should prevent him from making use of his services, he will be liable. The same rule applies where the slave leases himself. And, for the reason that the legatee is not considered an usufructuary, he will transmit the legacy of the slave's services to his heir, but where the title to the slave is obtained by usucaption the legacy will be

Antonino, que se considera que el testador dejó una pensión perpetua para cada cuatro años, no para el primer cuadrienio.

25.- VALENTE; *Fideicomisos, libro II*.- Se le pueden dar diez para cada hijo al hijo de familia, mientras esté bajo la potestad de su padre.

TÍTULO II

DEL USO, DEL USUFRUCTO, DE LA RENTA, DE LA HABITACIÓN, Y DE LOS SERVICIOS DADOS POR LEGADO O FIDEICOMISO

1.- PAULO; *Comentarios a Sabino, libro III*.- No se puede legar ni el uso, ni el usufructo de la servidumbre de paso, de conducción, de vía, o de acueducto, porque no puede haber servidumbre de servidumbre; y no será esto útil en virtud del Senadoconsulto en que se dispone que se pueda legar el usufructo de todas las cosas que hay en los bienes, porque esto ni es de los bienes, ni está fuera de los bienes; pero habrá contra el heredero la acción de cosa incierta, para que le conceda al legatario, mientras viviere, la facultad de pasar, de conducir, o de hacer acueducto; o para que se constituya esta servidumbre con la caución de que sea restituida si falleciere el legatario, o hubiere sido disminuido de cabeza por causa mayor.

2.- PAPINIANO; *Cuestiones, libro XVII*.- Los servicios legados de un esclavo no se pierden con la disminución de cabeza, o no utilizándolos; y como el legatario puede percibir retribución de los servicios, también podrá él dar en arriendo los servicios de aquel; y si el heredero prohibiese que se tomen, se obligará. Lo mismo es también si el esclavo se hubiere dado en arriendo; y como el legatario no es usufructuario, transmite a su heredero el legado de servicios; pero usucapido el esclavo se extingue el legado.

3.- PAULUS; *libro III, ad Sabinum*.- Hominis quoque liberi operae legari possunt, sicut locari et in stipulationem deduci.

4.- ULPIANUS; *libro XVIII, ad Sabinum*.- Si pure proprietates legatae erint, ea ad legatarium perveniet, quamvis fructuarius heres sit institutus.

5.- PAULUS; *libro III, ad Sabinum*.- Ususfructum quum moriar, inutiliter stipulor; idem est in legato, quia et constitutus usus fructus morte intercideret solet.

6.- POMPONIUS; *libro XV, ad Sabinum*.- Si usus fructus mihi in biennium continuum a morte testatoris legatus sit et per heredem steterit, quominus eum mihi daret, praeterito biennio nihilo minus tenetur (quemadmodum teneretur, si res legata in rerum natura esse desisset, quam quis deberet, moratusque esset in ea danda), ut peti quidem iam usus fructus qui legatus sit non possit, quia alius futurus sit quam qui legatus fuerit, sed aestimatio eius bima dumtaxat facienda sit.

7.- ULPIANUS; *libro XXVI, ad Edictum*.- Operae testamento relictas quando cedere debeant, utrum ex quo petit eas legatarius an ex quo adita hereditas est? et cui pereant dies, quibus aeger servus fuit? et puto ex die petitionis eas cedere: quare si post petitis aeger esse servus coeperit, legatario peribunt.

8.- GAIUS; *libro III, de legatis ad Edictum Praetoris*.- Si usus fructus municipibus legatus erit, quaeritur, quousque in eo usu fructu tuendi sint: nam si quis eos perpetuo tuetur, nulla utilitas erit nuda

extinguished.

3.- PAULUS; *On Sabinus, Book III*.- The services of a freeman can also be bequeathed, just as he can be hired under a contract, or be made the subject of a stipulation.

4.- ULPIANUS; *On Sabinus, Book XVIII*.- Where the ownership of land is left absolutely, it will pass to the legatee, even though the usufructuary may be appointed heir.

5.- PAULUS; *On Sabinus, Book III*.- If I promise the enjoyment of an usufruct "at the time of my death," the disposition will be void; and the same rule applies to a legacy, for when an usufruct is created, it is usual for it to be extinguished by death.

6.- POMPONIUS; *On Sabinus, Book XV*.- If an usufruct should be bequeathed to me to be enjoyed for two years after the death of the testator, and, I am prevented from enjoying it through the fault of the heir, he will still be liable after the two years have elapsed; just as anyone will be liable where property due under a legacy is destroyed, and he was in default in delivering the same. Hence this usufruct cannot be claimed, because it is different from the one which was bequeathed, but its value for two years should be computed, and paid to the usufructuary.

7.- ULPIANUS; *On the Edict, Book XXVI*.- Where services were left by will, when should they begin to be available, from the day when the legatee demands them, or from the time when the estate is entered upon? And who must bear the loss while the slave is ill? I think that the services are due from the time when they are demanded, and therefore if the slave should begin to be sick after that date, the loss must be borne by the legatee.

8.- GAIUS; *On the Edict of the Praetor Concerning Legacies, Book III*.- Where an usufruct is bequeathed to a municipality, the question arises how long it shall be entitled to the same, for if anyone should say that it

3.- PAULO; *Comentarios a Sabino, libro III*.- También se pueden legar los servicios de un hombre libre, así como pueden ser dados en arrendamiento y comprendidos en estipulación.

4.- ULPIANO; *Comentarios a Sabino, libro XVIII*.- Si hubiere sido legada puramente la propiedad, pasará al legatario, aunque el usufructuario haya sido instituido heredero.

5.- PAULO; *Comentarios a Sabino, libro III*.- Inútilmente estipulo un usufructo para cuando yo muera; lo mismo es en el legado, porque también el usufructo constituido suele acabar con la muerte.

6.- POMPONIO; *Comentarios a Sabino, libro XV*.- Si se me hubiera legado un usufructo por dos años continuos desde la muerte del testador, y en el heredero hubiere consistido que no me lo dé, transcurridos los dos años, está, sin embargo, obligado, así como lo estaba si hubiese dejado de existir la cosa legada que alguien debiese, y hubiese incurrido en mora para darla, de suerte que ya ciertamente no se pueda pedir el usufructo, que haya sido legado, porque habría de ser otro distinto del que haya sido legado, pero se habrá de hacer la estimación del mismo solamente por los dos años.

7.- ULPIANO; *Comentarios al Edicto, libro XXVI*.- ¿Desde cuándo deberán corresponder los servicios dejados en un testamento, acaso desde que los pide el legatario, o desde que fue adida la herencia? ¿Y para quién se pierden los días que el esclavo estuvo enfermo? Y opino, que aquéllos corresponden desde el día en que se piden; por lo cual, si después de pedidos hubiere comenzado a estar enfermo el esclavo, se perderán para el legatario.

8.- GAYO; *Comentarios al Edicto del Pretor, libro III de los legados*.- Si se hubiere legado el usufructo a los habitantes de un municipio, se pregunta, hasta cuando hayan de ser amparados en este usufructo;

proprietatis semper abscedente usu fructu. unde centum annos observandos esse constat, qui finis vitae longissimus esset.

9.- ULPIANUS; *libro VIII, Disputationum*.- Si ab eo, cui legatus esset usus fructus, fideicommissum fuerit relictum, licet usus fructus ad legatarium non pervenerit, heres tamen, penes quem usus fructus remanet, fideicommissum praestat. quod et in militis testamento erit dicendum, si legatarius, a quo fideicommissum relictum est, repudiaverit legatum vel vivo testatore decesserit.

10.- IULIANUS, *libro LXXVIII, Digestorum*.- Si titio fundus et eiusdem fundi usus fructus legatus fuerit, erit in potestate eius, fundum an usum fructum vindicare malit. et si fundum elegerit, necessario plenam proprietatem habebit, licet usum fructum a se repulerit: si vero usum fructum habere maluerit et proprietatem fundi repulerit, solum usum fructum habebit.

11.- IDEM; *libro I, ex Minicio*.- Habitationis legatum in singulos annos ab initio anni deberi constat.

12.- ALFENUS VARUS, *libro II, Digestorum a Paulo epitomatorum*.- Heres in fundo, cuius usus fructus legatus est, villam posuit: eam invito fructuario demolire non potest, nihilo magis quam si, quam arborem posuisset, ex fundo is evellere vellet: sed si antequam usufructuarius prohibuerit, demolierit, impune facturum.

13.- PAULUS; *libro XIII, ad Plautium*.- Cum usus fructus alternis annis legatur, non unum, sed plura legata sunt. aliud est in servitute aquae et viae: viae enim servitus una est, quia natura sui habet intermissionem.

was entitled to it in perpetuity, the mere ownership, if the usufruct should be perpetually separated from it, would be worthless; hence it is established that the municipality can hold it for a hundred years, which is the longest term of life.

9.- ULPIANUS; *Disputations, Book VIII*.- If anyone to whom an usufruct has been bequeathed is charged with a trust, and the usufruct should not come into the hands of the legatee, the heir in whom the said usufruct remains, must execute the trust. This rule also applies to a military will, if the legatee charged with the trust should reject the legacy, or should die during the lifetime of the testator.

10.- JULIANUS; *Digest, Book LXXVIII*.- If a tract of land and the usufruct of the same should be left to Titius, he will have the right to claim either the land or the usufruct; and if he selects the land, he will necessarily be entitled to the full ownership of the same, even though he has rejected the usufruct. Where, however, he prefers to have the usufruct, and rejects the ownership of the land, he will only be entitled to the usufruct.

11.- THE SAME; *On Minicius, Book I*.- It is established that the legacy of an annual lodging is due from the beginning of each year.

12.- ALFENUS VARUS; *Epitomes of the Digest by Paulus, Book II*.- An heir built a country-house on land, the usufruct of which had been bequeathed. He cannot demolish the building without the consent of the usufructuary, any more than he can remove a tree from the land which he had planted there; but if he should demolish the house before the usufructuary forbids him, he can do so with impunity.

13.- PAULUS; *On Plautius, Book XIII*.- Where an usufruct is left to be enjoyed for alternate years, not only one, but several legacies are bequeathed. The case is different however, where a servitude to conduct water and use a right of way is left; for the servitude of a right of way is distinct, since by its nature it is subject to interruption.

porque si alguien los mantiene perpetuamente, ninguna será la utilidad de la nuda propiedad estando separado siempre el usufructo; por lo cual se halla establecido, que se han de observar cien años, que sería el mas largo término de la vida.

9.- ULPIANO; *Disputas. libro VIII*.- Si se hubiere dejado un fideicomiso a cargo de aquel a quien se le hubiese legado el usufructo, aunque el usufructo no hubiere ido al legatario, sin embargo, el heredero en quien queda el usufructo entrega el fideicomiso; lo que se habrá de decir también respecto al testamento de un militar, si el legatario, a cuyo cargo se dejó el fideicomiso, hubiere repudiado el legado, o fallecido viviendo el testador.

10.- JULIANO; *Digesto, libro LXXVIII*.- Si a Ticio se le hubiere legado un fundo y el usufructo del mismo fundo, estará en su facultad reivindicar el fundo, o el usufructo si lo prefiriera; y si hubiere elegido el fundo, tendrá, por necesidad, la plena propiedad, aunque de sí hubiere repelido el usufructo; pero si hubiere preferido tener el usufructo y repelido la propiedad del fundo, tendrá sólo el usufructo.

11.- EL MISMO; *Doctrina de Minicio, libro I*.- Es constante que el legado de la habitación para cada año se debe desde el principio del año.

12.- ALFENO VARO; *Digesto compendiado por Paulo, libro II*.- Un heredero edificó una casa en el fundo, cuyo usufructo fue legado; no puede demolerla contra la voluntad del usufructuario, no de otra suerte que si él quisiera arrancar del fundo el árbol que hubiese plantado; pero si la hubiere demolido antes que el usufructuario lo hubiere prohibido, lo hará impunemente.

13.- PAULO; *Comentarios a Plaucio, libro XIII*.- Cuando se lega el usufructo para años alternados no hay uno solo, sino muchos legados; otra cosa es tratándose de la servidumbre de agua y de vía, porque la servidumbre de vía es una sola, porque por su naturaleza tiene interrupción.

14.- CELSUS; *libro XVIII, Digestorum*.- Duos separatim uti frui sinere damnatus heres communiter uti frui passus est: quaerebatur, an utrique ex testamento teneretur. dixi teneri, si testator utrumque solidum habere voluit: nam ipsius onus est, ut solidum singulis legatum praestaret: qua parte igitur alterum uti frui sineret heres, ea parte eum non sinere alterum uti frui, ideoque per aestimationem unicuique quod deest replere debet.

15.- MARCELLUS; *libro XIII, Digestorum*.- «Damnas esto heres titium sinere in illa domo habitare, quoad vivet»: unum videtur esse legatum.

§ 1.- Qui duos fundos habebat, unum legavit et alterius fundi usum fructum alii legavit: quaero, si fructuarius ad fundum aliunde viam non habeat quam per illum fundum qui legatus est, an fructuario servitus debeatur. respondit, quemadmodum, si in hereditate esset fundus, per quem fructuario potest praestari via, secundum voluntatem defuncti videtur id exigere ab herede, ita et in hac specie non aliter concedendum esse legatario fundum vindicare, nisi prius ius transeundi usufructuario praestet, ut haec forma in agris servetur, quae vivo testatore optinuerit, sive donec usus fructus permanet sive dum ad suam proprietatem redierit.

16.- MODESTINUS; *libro IX, Responsorum*.- Legatum civitati relictum est, ut ex redditibus quotannis in ea civitate memoriae conservandae defuncti gratia spectaculum celebretur, quod illic celebrari non licet: quaero, quid de legato existimes. respondit, cum testator spectaculum edi voluerit in civitate, sed tale, quod ibi celebrari non licet, iniquum esse hanc quantitatem, quam in spectaculum defunctus desti-

14.- CELSUS; *Digest, Book XVIII*.- Where an heir was charged to permit two persons to separately enjoy the usufruct of a tract of land, and he suffered them to enjoy it in common, the question arose whether, under the terms of the will, he would be liable to both. I held that he would be liable, if the testator had intended that each should enjoy the entire usufruct individually; for, in this instance, he would be required to deliver the entire legacy to each one of them. Therefore, if the heir should permit one of the legatees to use part of the usufruct, he could not permit the other to use the same part. Hence, he would be compelled to give to each of them the appraised value of that of which he was deprived.

15.- MARCELLUS; *Digest, Book XIII*.- "Let my heir be charged to permit Titius to reside in such-and-such a house, as long as he lives." This is held to be a single legacy.

§ 1.- Where a testator had two tracts of land, and devised one of them, and then conveyed it to one person and the usufruct of it to another, I ask, if the usufructuary did not have access to the said land by any other way than through the tract which had been devised, whether the servitude would be due to him. The answer that the rule was the same as if the land had belonged to an estate through which a right of way could be granted to the usufructuary, and, according to the will of the deceased, it appeared that this was required from the heir; for in this instance, the legatee would not be permitted to claim the land, unless he had first granted the right of way through it to the usufructuary, in order that the same condition which was obtained during the lifetime of the testator might be preserved either as long as the usufruct continued to exist, or until it was reunited with the land.

16.- MODESTINUS; *Opinions, Book IX*.- A legacy was bequeathed to a town, so that from its income an exhibition might be given there every year for the purpose of preserving the memory of the deceased. It was not lawful for the exhibition to take place there, and I ask what opinion should be given with reference to the legacy. Modestinus answered that, as the testator intended the spectacle to be

14.- CELSO; *Digesto libro XVIII*.- Un heredero, condenado a dejar que dos usufructúen separadamente, toleró que usufructuasen en común; se preguntaba, si estaría obligado a ambos en virtud del testamento. Dije, que estaba obligado, si el testador quiso que uno y otro tuviera la totalidad; porque la carga del mismo es, que entregue todo el legado a cada uno. Así, pues, en la misma parte en que el heredero dejase que uno usufructúe, no dejaba él que usufructuase el otro, y por lo tanto debe suplirle a cada uno mediante estimación lo que le falta.

15.- MARCELO; *Digesto, libro XIII*.- «Esté condenado mi heredero a dejar que Ticio habite en aquella casa, mientras viva»; se considera que hay un solo legado.

§ 1.- Uno que tenía dos fundos, legó uno, y el usufructo del otro fundo se lo legó a otro; pregunto, si, no teniendo el usufructuario camino para ir al fundo por otra parte más que por el fundo que fue legado, se le deberá la servidumbre al usufructuario. Respondió: así como si en la herencia hubiese un fundo por el cual se le pudiera dar camino al usufructuario, se considera que esto se le exige al heredero conforme a la voluntad del difunto, así también en este caso no se le ha de conceder al legatario que reivindique el fundo de otra suerte, sino si antes le diese al usufructuario el derecho de pasar, para que en los campos se conserve la forma, que hubiere subsistido viviendo el testador, ora mientras dura el usufructo, ora mientras revertiere a su propiedad.

16.- MODESTINO; *Respuestas, libro IX*.- Se le dejó un legado a una ciudad para que con las rentas se celebrase todos los años en aquella ciudad para conservar memoria del difunto un espectáculo, que no es lícito que allí se celebre; pregunto, qué opinas respecto al legado. Modestino respondió, que habiendo querido el testador que en la ciudad se diera un espectáculo, pero tal, que no es lícito que en ella se

naverit, lucro heredum cedere: igitur adhibitis heredibus et primoribus civitatis dispiciendum est, in quam rem converti debeat fideicommissum, ut memoria testatoris alio et licito genere celebretur.

17.- SCAEVOLA; *libro III, Responsorum*.- Quidam praedia rei publicae legavit, de quorum redditu quotannis ludos edi voluit, et adiecit: "quae legata peto, decuriones, et rogo, ne in aliam speciem aut alios usus convertere velitis". Res publica per quadriennium continuum ludos non edidit: quaero, an reditus, quos quadriennio res publica percepit, heredibus restituere debeat vel compensare in aliam speciem legati ex eodem testamento. respondit et invitis heredibus possessione adprehensa perceptos fructus restituendos esse et non erogatum secundum defuncti voluntatem in alia quae deberentur compensari.

18.- MODESTINUS; *libro IX, Responsorum*.- Qui plures habebat libertos, testamento suo dixit se habitationem relinquere iis quos codicillis designasset: cum nullos postea designaverit, quaero, an omnes admitti debeant. respondit, si patronus, qui se designaturum personas libertorum pollicitus est, nullum postea designavit, legatum habitationis perfectum esse non videtur, non existente cui datum intellegi possit.

19.- IDEM; *libro singulari de Heurematicis*.- Si alii fundum, alii usum fructum eiusdem fundi testator legaverit: si eo proposito fecit, ut alter nudam proprietatem haberet, errore labitur. nam detracto usu fructu proprietatem eum legare oportet eo modo:

exhibited in the town, but it was of such a character that this could not be done, it would be unjust for the heir to profit by such a large sum of money as the deceased had destined for this purpose. Therefore, the heirs as well as the first citizens of the place should be called together in order to determine how the trust could be changed so that the memory of the testator might be celebrated in another and a lawful manner.

17.- SCAEVOLA; *Opinions, Book III*.- A man left certain lands to a town, and desired the income of the same to be devoted to the celebration of public games every year, and added the following: "I request the Decurions, and I desire that they shall not change the character of the legacy, or employ it for any other use." The town did not celebrate the games for the period of four continuous years. I ask whether the income which it obtained during the said four years should be refunded to the heir, or whether it should be set off against a legacy of another kind bequeathed by the same will. The answer was that if possession of the land had been taken contrary to the will of the heirs, any profits which had been acquired must be given up, and compensation should be made for what was not expended in accordance with the will of the deceased by the surrender of any other property which was due.

18.- MODESTINUS; *Opinions, Book IX*.- A testator, who had several freedmen, said in his will that he left lodging to those whom he designated in a codicil. As he did not afterwards designate anyone, I ask whether all of them would be admitted to share in the legacy. The answer was that, since the patron promised to designate certain of his freedmen, and did not afterwards designate any, the legacy with reference to the lodging was held to be imperfect, as there was no one in existence to whom it could be understood that it was given.

19.- THE SAME; *Concerning Inventions*.- If a testator should leave a tract of land to one person, and the usufruct of the same to another; and he did this on purpose in order that the former should only have the mere ownership, he committed an error, for he ought

celebre, era injusto que esta cantidad, que el difunto hubiere destinado al espectáculo, cediese el lucro de los herederos. Así, pues, reunidos los herederos y los principales de la ciudad se ha de ver en qué cosa deba invertirse el fideicomiso, para que se celebre la memoria del testador de modo distinto y lícito.

17.- SCÉVOLA; *Respuestas, libro III*.- Uno legó predios a la República, con cuyas rentas quiso que se celebrasen juegos todos los años, y añadió: «cuyos legados os pido y ruego, decuriones, que no queráis aplicarlos a otra cosa, o a otros usos»; la República no celebró juegos durante cuatro años seguidos; pregunto, si la República deberá restituir a los herederos las rentas que percibió durante los cuatro años, o compensados para otra clase de legado en virtud del mismo testamento. Respondió, que habiéndose tomado posesión contra la voluntad de los herederos se deben restituir los frutos percibidos, y que lo no gastado según la voluntad del difunto se compensaría con otras cosas que se debieran.

18.- MODESTINO; *Respuestas, libro IX*.- Uno que tenía muchos libertos, dijo en su testamento que él dejaba la habitación a los que hubiese designado en los codicilos. No habiendo designado después ningunos, pregunto, si todos deberán ser admitidos. Respondió; si el patrono que prometió que designaría las personas de los libertos no designó después ninguna, no se considera que se perfeccionó el legado de habitación, no existiendo persona a la que pueda entenderse que se le dió.

19.- EL MISMO; *Cuestiones nuevas, libro único*.- Si el testador hubiere legado a uno un fundo, y a otro el usufructo del mismo fundo, yerra si esto lo hizo con el propósito de que uno tuviera la nuda propiedad. Porque con deducción del usufructo debe él

"titio fundum detracto usu fructu lego: vel seio eiusdem fundi usum fructum heres dato". Quod nisi fecerit, usus fructus inter eos communicabitur, quod interdum plus valet scriptura quam peractum sit.

20.- POMPONIUS; *libro VIII, ad Quintum Mucium*.- Si servum sub condicione liberum esse iubeam et usum fructum eius tibi legavero, valet legatum.

21.- PAULUS; *libro VII ad legem Iulian et Papiam*.- Titio usus fructus Stichi aut, si navis ex asia venerit, decem legata sunt. Non petet usum fructum, antequam condicio decem existat vel deficiat, ne potestas heredi utrum velit dandi auferatur.

22.- ULPIANUS; *libro XV, ad legem Iuliam et Papiam*.- «Patrimonii mei redditum omnibus annis uxori meae dari volo». aristo respondit ad heredem uxoris non transire, quia aut usui fructui simile esset aut huic legato "in annos singulos".

23.- IUNIUS MAURICIUS; *libro II, ad legem Iuliam et Papiam*.- Licet testatori repetere legatum usus fructus, ut etiam post capitis deminutionem deberetur et hoc nuper imperator antoninus ad libellum rescripsit. tunc tantum esse huic constitutioni locum, cum in annos singulos relegaretur.

24.- PAPINIANUS; *libro VII, Responsorum*.- Uxori fructu bonorum legato faenus quoque sortium, quas defunctus collocavit, post impletam ex senatus consulto cautionem praestabitur. Igitur usuras nominum in hereditate relictorum ante cautionem interpositam debitas velut sortes in cautionem deduci necesse est. Non idem servabitur nominibus ab

to have left the ownership of the property, with the reservation of the usufruct, as follows, "I devise such-and-such a tract of land to Titius, with the reservation of the usufruct;" or "Let my heir give the usufruct of said land to Seius;" as unless he expressed himself in this way the usufruct will be shared between them, for the reason that sometimes what is written is of more effect than what is intended.

20.- POMPONIUS; *On Quintus Mucius, Book VIII*.- If I order a slave to be free under a certain condition, and bequeath to you the usufruct in said slave, the legacy will be valid.

21.- PAULUS; *On the Lex Julia et Papia, Book VII*.- "I bequeath to Titius the usufruct of Stichus," or, "if a ship should come from Asia, I bequeath the sum of ten aurei." The legatee cannot demand the usufruct before the condition relating to the ten aurei is fulfilled, or has failed, in order that the heir may not be deprived of the power of giving whichever he chooses.

22.- ULPIANUS; *On the Lex Julia et Papia, Book XV*.- "I desire the income of my estate to be paid every year to my wife." Aristo gives as his opinion that this legacy will not pass to the heir of the wife, because it resembles either an usufruct, or a legacy to be paid annually.

23.- JULIUS MAURICIANUS; *On the Lex Julia et Papia, Book II*.- A testator is allowed to repeat the legacy of an usufruct, so that it may be payable after the forfeiture of civil rights. This the Emperor Antoninus recently stated in a Rescript, for under such circumstances there is only ground for the application of this decision where a legacy is left to be paid annually.

24.- PAPINIANUS; *Opinions, Book VII*.- Where a legacy of the usufruct of property is bequeathed to a wife, the principal, as well as the interest which the deceased loaned, must be paid after security has been furnished in accordance with the terms of the Decree of the Senate. Therefore, it will be necessary for the interest of the notes which formed part of the assets of

legar la propiedad de este modo: «lego a Ticio el fundo deducido el usufructo»; o, «déle a Seyo mi heredero el usufructo del mismo fundo». Y si no lo hubiere hecho, el usufructo se hará común entre ellos, porque a veces vale más lo escrito que lo que se hizo.

20.- POMPONIO; *Comentarios a Quinto Mucio, libro VIII*.- Si yo mandara que bajo condición sea libre un esclavo, y te hubiere legado el usufructo, es válido el legado.

21.-PAULO; *Comentarios a la ley Julia y Papia, libro VII*.- Se legó a Ticio el usufructo de Stico, o diez, si la nave viniere de Asia; no pedirá el usufructo, antes de que se cumpla, o falte, la condición relativa a los diez, para que no se le prive al heredero de la facultad de dar lo que quiera.

22.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XV*.- «quiero que todos los años se le dé a mi mujer la renta de mi patrimonio»; Aristón respondió, que no pasaba al heredero de la mujer, porque sería semejante o al usufructo, o a este legado: «para cada año».

23.- JUNIO MAURICIANO; *Comentarios a la ley Julia y Papia, libro II*.- Le es lícito al testador repetir un legado de usufructo, de suerte que se deba aun después de la disminución de cabeza; y hace poco que el Emperador Antonino respondió por rescripto, que ha lugar a esta Constitución solamente cuando se repitiese el legado para cada año.

24.- PAPINIANO; *Respuestas, libro VII*.- Legado a la mujer el fruto de los bienes, se pagará también el interés de los capitales que colocó el difunto, después de prestada caución con arreglo al Senadoconsulto. Así, pues, es necesario que se comprendan en la caución los intereses de los créditos dejados en la herencia, debidos antes de haberse interpuesto la

herede factis: tunc enim sortes dumtaxat legatario dabuntur aut, quod propter moram usuras quoque reddi placuit, super his non cavebitur.

§ 1.- «Scorpus servum meum semproniae concubinae meae servire volo». non videtur proprietas servi relictā, sed usus fructus.

25.- IDEM *libro VIII, Responsorum*.- Qui fructus praediorum uxori reliquit, post mortem eius praedia cum redditibus ad heredes suos redire voluit, imperitia lapsus. nullum fideicommissum dominus neque proprietatis neque fructus ad eos reverti dedit: etenim redditus futuri, non praeteriti temporis demonstrati videbantur.

26.- PAULUS; *libro X, Quaestionum*.- Sempronius attalus ab herede suo fundum in italiam gaio post decennium deducto usu fructu dari iussit: quaero, cum medio hoc decennii spatio heres vita functus sit, an post tempus decennii plenus fundus ad legatarium pertineat. movet enim me, quod dies legati huius sive fideicommissi cesserit ac per hoc et ad heredem legatarii pertinere potuerit, et ideo quasi circa debitum iam legatum mortuo herede usus fructus extinctus sit nec ad heredem heredis pertinere possit. Respondi: dies quidem fideicommissi vel legati cedit statim, cum post tempus certum heres dare rogatur sive iubetur: sed usus fructus nondum est heredis, nisi cum dominium deducto usu fructu praestitit, et ideo capitis deminutione vel morte perire non potest quod nondum habuit.

Idem evenit, si proprietas deducto usu fructu sub condicione legata sit et pendente condicione heres

the estate, and were due before security was given, to be deducted from the bond. The same rule, however, will not be observed where the money was loaned on the notes by the heir himself; for in this case, only the principal must be paid to the legatee, or whatever interest is found to be due on account of default of payment, and with reference to which no security will be required.

§ 1.- "I wish my slave, Scopus, to serve my concubine Sempronia." In this instance, not the ownership, but the usufruct of the slave is held to have been bequeathed.

25.- THE SAME; *Opinions, Book VIII*.- A testator left his wife the usufruct of certain lands, and desired that after his death the said lands with their revenues should revert to his heirs; and by doing so he committed an error. The owner did not create a trust in favor of the heirs, either with reference to the ownership or the usufruct of the property, for the future revenues, and not those of time which had passed, seemed to have been referred to.

26.- PAULUS; *Questions, Book X*.- Sempronius Attilus charged his heir after the expiration of ten years to give to Gaius his tract of land in Italy, with the reservation of the usufruct. I ask, if the heir should die before the ten years have elapsed whether, after that time, the entire tract of land will belong to the legatee. I am convinced that the time of this legacy, or that of the execution of the trust has arrived, and for this reason that it should belong to the heir of the legatee. Therefore, since the legacy was already due at the time of the death of the heir, the usufruct is extinguished and cannot belong to the successor of the latter. I gave it as my opinion that if the heir should be requested or ordered to deliver certain property, the time for the execution of the trust or for the delivery of the legacy will be when the testator dies, but the usufruct will not belong to the heir until he delivers the ownership after reserving the usufruct. Hence the usufruct cannot be lost by the forfeiture of civil rights, or the death of the heir, for the reason that he does not yet possess it.

The same thing takes place where the ownership of property is bequeathed under a certain condition,

caución. No se observará lo mismo respecto a los créditos creados por el heredero; porque en este caso se le darán al legatario solamente los capitales, o porque se determinó que se pagasen también intereses por causas de la mora, no se dará caución respecto a ellos.

§ 1.- «Quiero que mi esclavo Scorpo sirva a mi concubina Sempronia»; no se considera dejada la propiedad del esclavo, sino el usufructo.

25.- EL MISMO; *Respuestas, Libro VIII*.-Uno que le dejó a su mujer el usufructo de unos predios, quiso que después de su muerte volviesen los predios con las rentas a sus herederos, engañado por su impericia; el dueño no dio para que revertisese a ellos ningún fideicomiso, ni de la propiedad, ni del usufructo; porque se consideraban indicadas las rentas del tiempo futuro, no del pasado.

26.- PAULO; *Cuestiones, libro X*.- Sempronio Atalo mandó que por su heredero se le diese a Cayo, después de diez años, un fundo en Italia deducido el usufructo; pregunto, si, habiendo fallecido el heredero en este espacio intermedio de los diez años, le pertenecerá al legatario después del tiempo de los diez años la plena propiedad del fundo, porque me apoyo en que el término de este legado o fideicomiso habrá comenzado a correr, y en que por esto habrá podido pertenecerle también al heredero del legatario, y por consiguiente, en que, como una deuda ya legada, se haya extinguido el usufructo, muerto el heredero, y no podrá pertenecerle al heredero del heredero. Respondí: ciertamente que el término del fideicomiso o del legado comenzó a correr desde luego, cuando al heredero se le ruega, o se le manda, que lo dé después de cierto tiempo, pero el usufructo aun no es del heredero, sino cuando entregó el dominio deducido el usufructo; y por lo tanto, no puede extinguirse con la disminución de cabeza o con la muerte lo que todavía no tuvo.

Lo mismo acontece, si bajo condición hubiera sido legada la propiedad deducido el usufructo, y

decesserit: tunc enim ab heredis herede incipit usus fructus, qui ex persona eius finietur.

Sed his casibus de sententia testatoris quaerendum est, qui utique de eo usu fructu detrahendo sensit, qui coniunctus esset heredis personae: quo extincto solidam proprietatem ad legatarium voluit pertinere nec plus transmitti ad successorem suum, qui nondum habere coepit usum fructum, quam si iam habere coepisset.

§ 1.- Si fundus duobus, alii usus fructus legatus sit, non trientes in usu fructu, sed semisses constituuntur: idemque est ex contrario, si duo sint fructuarii et alii proprietates legata est. et inter eos tantum adcrendi ius est.

27.- SCAEVOLA; *libro I, Responsorum*.- Uxor maritus per fideicommissum usum fructum et alia et dotem praelegavit: heredes usum fructum ei concesserunt: Post biennium illicitum matrimonium fuisse pronuntiatum est: quaesitum est, an id, quod praeterito tempore possedit, ab ea repeti possit. respondit id, quod fructus nomine percepisset, repeti posse.

28.- PAULUS; *libro XIII, Responsorum*.- Quaero, si usus fructus fundi legatus est et eidem fundo indictiones temporariae indictae sint, quid iuris sit. Paulus respondit idem iuris esse et in his speciebus quae postea indicuntur, quod in vectigalibus dependendis responsum est: ideoque hoc onus ad fructuarium pertinet.

29.- GAIUS; *libro I, Fideicommissorum*.- Si quis usum fructum legatum sibi alii restituere rogatus sit eumque in fundum induxerit fruendi causa: licet iure civili morte et capitis deminutione ex persona

after the reservation of the usufruct, and the heir dies before the condition has been fulfilled; for then the usufruct, which terminates with his life, begins to vest in the heir of the heir.

In these instances, however, the intention of the testator must be ascertained, that is if he, at the time of reserving the usufruct, had someone in his mind who was to be joined with his heir, so that, at the death of the former, he intended the entire ownership to belong to the legatee; because no more could be transmitted to his successor, who had not yet acquired the usufruct, than if he had already begun to enjoy it.

§ 1.- Where a tract of land is devised to two persons, and the usufruct is left to another, they all three of them do not enjoy the usufruct in common, if it is divided into two parts. On the other hand, the same rule will apply where there are two usufructuaries, and the ownership of the property is left to a third party. The right of accrual only exists between them.

27.- SCAEVOLA; *Opinions, Book I*.- A husband left to his wife the usufruct of certain lands and other property and her dowry under a trust. The heirs delivered to her the usufruct in the land. Two years afterwards the marriage was declared to be null and void. The question arose whether what she had collected during that time could be recovered from her. I answered that what she had collected by way of profit could be recovered.

28.- PAULUS; *Opinions, Book XIII*.- I ask, where the usufruct of land is left and the said land becomes subject to temporary taxes, what will be the law in this case? Paulus answered that it would be the same in this instance as where ordinary taxes are imposed; and therefore that this burden must be sustained by the usufructuary.

29.- GAIUS; *Trusts, Book I*.- When anyone is requested to transfer to another an usufruct which was left to himself, and he has united it to the land for the purpose of enjoying the same; although the

pendiente la condición hubiere fallecido el heredero; porque en este caso comienza en el heredero del heredero el usufructo, que se extinguirá con la persona de éste.

Pero en estos casos se ha de investigar respecto a la intención del testador, quien ciertamente se refirió a la separación del usufructo que fuese conjunto a la persona del heredero; el cual extinguido, quiso que toda la propiedad le perteneciera al legatario, y que no se transmitiera a su sucesor, el cual aun no comenzó a tener el usufructo, no de otra suerte que si ya hubiese comenzado a tenerlo.

§ 1.- Si a dos se les hubiera legado un fundo, y a otro el usufructo, no se hacen en el usufructo terceras partes, sino mitades. Y lo mismo es por el contrario, si fueran dos los usufructuarios, y a otro se lo hubiera legado la propiedad; y entre ellos solamente hay el derecho de acrecer.

27.- SCAEVOLA; *Respuestas, libro I*.- Un marido prelegó a su mujer un usufructo, otras cosas, y la dote; los herederos le concedieron el usufructo; después de dos años se falló que el matrimonio había sido ilícito; se preguntó, si se podrá repetir de ella lo que poseyó en el tiempo pasado. Respondió, que se podía repetir lo que hubiese percibido por razón del usufructo.

28.- PAULO; *Respuestas, libro XIII*.- Pregunto qué derecho habrá si se legó el usufructo de un fundo, y al mismo fundo se le hubieran impuesto contribuciones temporales. Paulo respondió, que hay el mismo derecho también respecto a estas contribuciones que después se imponen, que el que se respondió que hay respecto al pago de los tributos; y que por lo tanto esta carga le pertenece al usufructuario.

29.- GAYO; *Fideicomisos, libro I*.- Si a alguien se le hubiera rogado que restituya a otro el usufructo que a él se le legó, y lo hubiere puesto en posesión del fundo para que lo usufructúe, aunque por derecho

legatarii pereat usus fructus, quod huic ipso iure adquisitus est, tamen praetor iurisdictione sua id agere debet, ut idem servetur, quod futurum esset, si ei, cui ex fideicommisso restitutus esset, legati iure adquisitus fuisset.

30.- IAVOLENUS; *libro II, ex Posterioribus Labeonis*.- Cui usus fructus legatus esset, donec ei totius dotis satisfieret, cum ei heres pro sua parte satis dedisset, quamvis reliqui satis non darent, tamen pro ea parte usum fructum desinere habere mulierem ait labeo: idem fieri et si per mulierem mora fieret, quo minus satis acciperet.

§ 1.- Colono suo dominus usum fructum fundi, quem is colebat, legaverat: agat colonus cum herede ita, ut iudex cogat heredem ex locationis actione eum liberare.

31.- LABEO; *libro II, Posteriorum a Iavoleno epitomatorum*.- Is qui fundum tecum communem habebat usum fructum fundi uxori legaverat: post mortem eius tecum heres arbitrum communi dividundo petierat. Blaesus ait trebatium respondisse, si arbiter certis regionibus fundum divisisset, eius partis, quae tibi optigerit, usum fructum mulieri nulla ex parte deberi, sed eius, quod heredi optigisset, totius usum fructum eam habituram. Ego hoc falsum puto: nam cum ante arbitrum communi dividundo coniunctus pro indiviso ex parte dimidia totius fundi usus fructus mulieris fuisset, non potuisset arbitrum inter alios iudicando alterius ius mutare: quod et receptum est.

32.- SCAEVOLA; *libro XV, Digestorum*.- Generali capite praeposito quidam in testamento suo ita adiecit: "felici, quem liberum esse iussi, usum fructum fundi vestigiani lego: cuius proprietatem

usufruct may be extinguished by operation of law, at the death, or by the forfeiture of civil rights by the legatee who acquired it under this title, the Praetor, nevertheless, should exert his authority in order that the right may be preserved if it was left to him under a trust, just as if it had been bequeathed as a legacy.

30.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- Where an usufruct is bequeathed to a woman until her dowry has been entirely paid, and one of the heirs gives her security for his share of the estate but the others do not; Labeo says that the woman will cease to enjoy the usufruct to the extent of said share. The same will take place where the woman is in default in accepting the security.

§ 1.- An owner left to his tenant the usufruct of certain land which he cultivated. The tenant will have a right of action against the heir, in order that the judge may compel the latter to release him from liability under his contract.

31.- LABEO; *On the Last Epitomes of Javolenas, Book II*.- Where anyone has a tract of land in common with you, and leaves the usufruct of said land to his wife, and, after his death, his heir applies to the court for partition of the land; Blaesus says that it was held by Trebatius that, if the judge should divide the land into different portions, the usufruct of the part allotted to you would not, under any circumstances, be due to the woman, but she would be entitled to the usufruct of the entire share assigned to the heir. I think this opinion is incorrect, for if, before the judgment was rendered, the woman was entitled to the usufruct of the undivided half of the entire tract of land, the judge could not, in deciding between the parties, prejudice the rights of the third. This last decision is the one adopted.

32.- SCAEVOLA; *Digest, Book XV*.- A certain man having stated his intentions in general terms, added the following in his will: "I bequeath to Felix, whom I have directed to be free, the usufruct of the Vestigian

civil se extinga por razón de la persona del legatario con la muerte y con la disminución de cabeza el usufructo, porque de derecho fue adquirido para él, sin embargo, debe el Pretor hacer en virtud de su jurisdicción, que se observe lo mismo que se habría de observar si hubiese sido adquirido por derecho de legado para aquel a quien le hubiese sido restituido en virtud del fideicomiso.

30.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro II*.- Si a una se le hubiese legado el usufructo hasta que se le diese caución de toda la dote, habiéndole dado caución en cuanto a su parte un heredero, aunque los demás no le diesen caución, dice Labeón, que, sin embargo, deja la mujer de tener el usufructo en cuanto a aquella parte; y que lo mismo se hace también si por la mujer se causase mora para no recibir la fianza.

§ 1.- El señor había legado a su colono el usufructo de un fundo que éste cultivaba; ejercite el colono contra el heredero su acción de modo que el juez obligue al heredero a librarlo de la acción de locación.

31.- LABEON; *Obras póstumas compendiadas por Javoleno, libro II*.- Uno que tenía un fundo en común contigo, le había legado a su mujer el usufructo del fundo, y después de su muerte el heredero había pedido árbitro para dividir contigo la cosa común; dice Bleso, que Trebacio respondió, que si el árbitro hubiese dividido el fundo en ciertas porciones, de ningún modo se le debe a la mujer el usufructo de la parte que te hubiere correspondido, pero que ella habrá de tener el usufructo de todo lo que le hubiese tocado al heredero. Yo opino que esto es falso, porque habiendo sido de la mujer antes de la sentencia arbitral de la división de cosa común, conjunto sin dividir el usufructo de la mitad de todo el fundo, no pudo el árbitro, juzgando entre otros, cambiar el derecho de tercero; lo que también se admitió.

32.- SCÉVOLA; *Digesto, libro XV*.- Uno habiendo antepuesto el capítulo general, añadió así en su testamento: «lego, a Félix, que he mandado que sea libre, el usufructo del fundo Vestigiano; cuya propiedad

puto te consecuturum, si non contenderis cum herede meo, sed potius concordaveris: sed et tu, heres, omnia fac, ut amici sitis: hoc enim vobis expedit": quaesitum est, an vivente herede exigere possit felix fundi proprietatem. respondit nihil proponi, cur felici proprietatis fundi legata videretur.

§ 1.- Filios ex seio et filiam ex alio marito heredes instituit aequis portionibus et matri ita legaverat: "aeliae dorcadi matri meae dari volo, quoad vivat, usum fructum bonorum meorum, ita ut post obitum eius ad liberos meos aut ad eum, qui ex his vivet, pertineat". Filii post aditam hereditatem decesserant: quaesitum est mortua matre superstite filia testatricis usus fructus utrum ad solam filiam an vero pro portione hereditatis pertineret. respondit ad eos redire, apud quos proprietatis esset. claudius: non credidit ipsum usum fructum in vicem portionum hereditarium post mortem aviae inter ipsos datum, eo magis, quod aequis partibus heredes erant scripti.

§ 2.- Uxori usum fructum domuum et omnium rerum, quae in his domibus erant, excepto argento legaverat, item usum fructum fundorum et salinarum: quaesitum est, an lanae cuiusque coloris mercis causa paratae, item purpurae, quae in domibus erat, usus fructus ei deberetur. Respondit excepto argento et his, quae mercis causa comparata sunt, ceterorum omnium usum fructum legatariam habere.

§ 3.- Idem quaesivit, cum in salinis, quarum usus fructus legatus esset, salis inventus sit non minimus modus, an ad uxorem ex causa fideicommissi usus fructus pertineat. respondit de his legandis, quae venalia ibi essent, non sensisse testatorem.

Vestigian Estate, as I think that he will be entitled to the property if he does not enter into a contest with my heir, but remains on good terms with him. I ask my heir to act in such a way that he and Felix may continue to be friends, for this will be of advantage to both of them." The question arose whether Felix could during the lifetime of the heir exact the ownership of the land. The answer was that there was nothing in the facts stated which showed that the ownership of the land was left to Felix.

§ 1.- A testatrix appointed her children by Seius, and her daughter by another husband, her heirs to equal shares of her estate, and made the following bequest to her mother: "I desire that the usufruct of my property be given to Ælia Dorcas, my mother, as long as she lives, and that, at her death, it shall go to my children, or to the survivor of them." The children of Seius died after entering upon the estate, and after the death of the mother, who was survived by the daughter of the testatrix, the question arose whether the usufruct would belong entirely to the daughter, or only in proportion to her share of the estate. The answer was that it would revert to those in whom the ownership of the land was vested. Claudius: Scaevola believed that after the death of their grandmother, the usufruct itself would revert to the children in proportion to their shares of the estate, especially because they were appointed heirs to equal portions of the same.

§ 2.- Where a husband left to his wife the usufruct of his houses and everything contained therein, except the silver plate, and, in addition, that of his lands and salt-pits; the question arose whether the usufruct of wools of different colors which were intended for commerce, as well as of the purple which was in the houses, were also due to the wife. The answer was that, with the exception of the silver plate and the articles which would be classed as merchandise, the legatee would be entitled to the usufruct of all the other property.

§ 3.- It was also asked, as a considerable amount of salt had been found in the salt-pits, the usufruct of which was bequeathed, whether it also would belong to the wife, under the terms of the trust. The answer was that the testator had not intended to bequeath any property which was for the purpose of sale.

creo que conseguirás, si no contendieres con mi heredero, sino que antes bien vivieres en concordia con él, pero tu, heredero, hazlo también todo para que seáis amigos, porque esto os conviene"; se preguntó, si, viviendo el heredero, podrá exigir Félix la propiedad del fundo? Respondió, que nada se exponía para que se considerase legada a Félix la propiedad del fundo.

§ 1.- Una instituyó herederos en partes iguales a los hijos habidos de Seyo, y a una hija habida de otro marido, y le había hecho así un legado a su madre: «quiero que a Elia Dorcades, mi madre, se le dé, para mientras viva, el usufructo de mis bienes, de suerte que después de su muerte les pertenezca a mis hijos, o al que de ellos viviere»; los hijos habían fallecido después de adida la herencia; se preguntó, si, muerta la madre, sobreviviendo la hija de la testadora, le pertenecería el usufructo solamente a la hija, o con arreglo a su porción de herencia. Respondió, que volvía a aquellos en quienes estuviese la propiedad. Claudio no creyó que el mismo usufructo haya sido dado entre ellos después de la muerte de la abuela en lugar de sus porciones de herencia, con tanta más razón cuanto que habían sido instituidos herederos en partes iguales.

§ 2.- Uno le había legado a su mujer el usufructo de unas casas y de todas las cosas que en estas casas había, excepto la plata, y además el usufructo de fundos y de salinas; se preguntó, si se le debería el usufructo de la lana de cualquier color preparada para mercancía, y también de la púrpura, que había en las casas. Respondió, que, excepto la plata y las cosas compradas para mercancía, tiene la legataria el usufructo de todas las demás cosas.

§ 3.- El mismo preguntó, si, habiéndose encontrado en las salinas, cuyo usufructo se había legado, no pequeña cantidad de sal, le pertenecerá su usufructo a la mujer por causa del fideicomiso. Respondió, que el testador no entendió legar las cosas que en ellas hubiese para vender.

§ 4.- Idem quaesiit, cum eodem testamento ita caverit: "a te peto, uxor, uti ex usu fructu, quem tibi praestari volo in annum quintum decimum, contenta sis annuis quadringentis, quod amplius fuerit, rationibus heredis heredumve meorum inferatur", an recessum videatur a superiore capite ideoque uxor non amplius habeat ex usu fructu, quam annuos quadringentos. Respondit satis id, quod quaereretur, aperte verba quae proponerentur declarare.

§ 5.- Lucius Titius testamento suo Publio Maevio fundum tusculanum reliquit eiusque fidei commisit, uti eiusdem fundi partem dimidiam usus fructus titiae praestaret: publius maevius villam vetustate corruptam cogendis et conservandis fructibus necessariam aedificavit: quaero, an sumptus partem pro portione usus fructus titia agnoscere debeat. Respondit, si prius, quam usum fructum praestaret, necessario aedificavit, non alias cogendum restituere, quam eius sumptus ratio habeatur.

§ 6.- Duae filias et filium mente captum heredes scripsit, filii portionis mente capti datae usum fructum legavit in haec verba: "hoc amplius Publia Clementiana praecipiet sibi quartae partis hereditatis meae, ex qua Iulium Iustum filium meum heredem institui: petoque a te, Publia Clementiana, uti fratrem tuum Iulium Iustum alas tuearis dependas pro eo: pro quo tibi usum fructum portionis eius reliqui, donec mentis compos fiat et convalescat". Quaesitum est, cum filius in eodem furore in diem mortis suae perseverans decesserit, an usus fructus interciderit. respondit verbis quae proponerentur perseverare legatum, nisi manifestissime probetur aliud testatorem sensisse.

§ 7.- Heredis instituti fidei commisit filio suo annua decem praestare aut ea praedia emere et assignare, ut usum fructum haberet, redditum

§ 4.- The question was also asked, if the testator should have made the following provision in the same will, namely, "I ask you, my wife, to be content with the sum of four hundred aurei a year, which I desire you to receive for the term of fifteen years, out of the usufruct, and that you pay to my heirs anything in excess of said sum which may be derived from the said usufruct," whether it should not be held that the testator had changed his mind with reference to the former bequest, and therefore that the wife would not be entitled to more than four hundred aurei a year out of the usufruct. The answer was that the inquiry was clearly explained by the words which were quoted.

§ 5.- Lucius Titius, by his will, left the Tusculan Estate to Publius Mævius, and charged him to give half of the usufruct of the same to Titia. Publius Mævius rebuilt an old country-house which had fallen into decay through age, and which was required for the collection and preservation of the crops. I ask whether Titia should contribute to the payment of the expense of this, in proportion to her share of the usufruct. The answer was that if the legatee had rebuilt the house before he delivered the legacy of the usufruct to Titia, he could not be compelled to deliver it until she had paid her share of the expense.

§ 6.- A man appointed his two daughters and his son, who was not of sound mind, his heirs, and bequeathed the usufruct of the share of his imbecile son to one of his daughters, in the following terms: "In addition to this, let Publia Clementiana take, by way of preferred legacy, the usufruct of the fourth part of my estate, to which I have appointed my son, Julius Justus, my heir; and I ask you, Publia Clementiana, in consideration of the usufruct of his share which I have bequeathed to you, to support and take care of him until he becomes of sound mind and recovers." As the son continued in the same condition until the time of his death, the question arose whether the usufruct would be extinguished. The answer was that, according to the case stated, the legacy would continue to exist, unless it was clearly proved that the testator intended otherwise.

§ 7.- A testatrix charged her appointed heir to pay ten aurei to her son every year, or to purchase land which would return a revenue of ten aurei annually,

§ 4.- El mismo preguntó, si, habiendo dispuesto así en el mismo testamento: «te pido, mujer que por razón del usufructo, que quiero se te dé durante quince años, te contentes con una pensión anual de cuatrocientos; lo que además hubiere, aplíquese a las cuentas del heredero o de mis herederos», se considerará que se separó del capítulo anterior, y que por lo tanto la mujer no tendrá por razón del usufructo más que la pensión anual de cuatrocientos. Respondí, que lo que se pregunta lo declaran con bastante claridad las palabras que se exponen.

§ 5.- Lucio Ticio dejó en su testamento a Publio Mevio el fundo Tusculano, y encomendó a su fidelidad que diese a Ticia la mitad del usufructo del mismo fundo; Publio Mevio reedificó la casa ruinosa por su antigüedad, que era necesaria para recoger y conservar los frutos; pregunto, si deberá pagar Ticia parte del gasto en proporción del usufructo. Respondió, que, si la edificó por necesidad antes de dar el usufructo, no ha de ser obligado a restituir de otra suerte que teniéndose cuenta de este gasto.

§ 6.- Uno instituyó herederos a dos hijas y a un hijo privado de juicio, y a una de las hijas le legó en estos términos el usufructo de la porción dada al privado de juicio: «además de esto Publia Clemenciana tomará para sí el usufructo de la cuarta parte de mi herencia, en que instituí heredero a Julio Justo, mi hijo, y te pido, Publia Clemenciana, que alimentes y cuides a tu hermano Julio Justo, y que pagues por él para lo cual te he dejado el usufructo de su porción, hasta que recobre el juicio y se cure»; se preguntó, si habiendo fallecido el hijo continuando en la misma locura hasta el día de su muerte, se habrá extinguido el usufructo. Respondió, que en virtud de las palabras que se exponían subsistía el legado, a no ser que clarísimamente se pruebe que el testador entendió otra cosa.

§ 7.- Una encomendó a la fidelidad del heredero instituido, que le diese a su hijo diez cada año, o que comprase y le asignase, para que tuviera su usu-

efficientia annua decem: filius fundos sibi ab herede secundum matris voluntatem traditos locavit: et quaesitum est, defuncto eo reliqua colonorum utrumne ad heredem filii fructuarii an vero ad heredem Seiae testatricis pertineant. Respondit nihil proponi, cur ad heredem Seiae pertineant.

§ 8.- Usum fructum tertiae partis bonorum suorum uni ex heredibus legaverat: quaesitum est, an pecuniae, quae ex rebus divisas secundum aestimationem effecta est, tertia praestanda sit. Respondit heredis esse electionem, utrum rerum an aestimationis usum fructum praestare vellet.

§ 9.- Item quaesitum est, tributa praeterea, quae vel pro praediis aut moventibus deberi et reddi necesse est, an eximenda sint ex quantitate, ut reliquae dumtaxat pecuniae, si hoc heres elegerit, reddi debeat. Respondit reliquae pecuniae tertiam praestandam.

33.- IDEM; *libro XVII, Digestorum*.- «Sempronio ea, quae vivus praestabam, dari volo»: is etiam habitabat in testatoris domo, quae uni ex heredibus praelegata erat: quaesitum est, an habitatio quoque debeat. respondit nihil proponi, cur non debeat.

§ 1.- Ex his verbis testamenti: "libertis meis, quibus nominatim nihil reliqui, quae vivus praestabam dari volo" quaesitum est, an libertis, qui cum patrono suo in diem mortis habitabant, etiam habitatio relicta videatur. Respondit videri.

§ 2.- Codicillis ita scripsit: "Negidium Titium Dionem libertos meos senes et infirmos peto in locis, in quibus nunc agunt, senescere patiamini": quaero,

and assign the usufruct of the same to him; and the son, having received the land from the heir, rented it in compliance with the will of his mother. After his death the question arose, whether the amount remaining due from the tenants would belong to the heir of the son, who was the usufructuary, or to the heir of Seia, the testatrix? The answer was that there was nothing in the case stated which would prevent the balance of the rent from belonging to the heir of Seia.

§ 8.- A certain man left the usufruct of a third part of his estate to one of his heirs, and the question arose whether the third of the money to which the property, after having been divided, amounted to according to the appraisal, should be paid to the usufructuary. The answer was that the heir had the choice of delivering either the usufruct of the property itself, or that of the appraised valuation of the same.

§ 9.- It was also asked whether the taxes, in addition to what was due and required to be paid on the land or personal property might be deducted from the amount, so that payment would only be made of the remainder, if the heir should prefer to do this? The answer was that the third of the remaining sum could be paid.

33.- THE SAME; *Digest, Book XVII*.- "I desire that there should be given to Sempronius what I was accustomed to give him during my lifetime." Sempronius lived in the testator's house, which was bequeathed to one of the heirs as a preferred legacy. The question arose whether he was also entitled to his lodging therein. The answer was that there was nothing in the case stated to prevent him from being entitled to it.

§ 1.- The question arose with reference to the following words of a will: "I desire to be given to those of my freedmen, to whom I have left nothing, what I was accustomed to give them during my lifetime." The question arose whether lodging was intended to be left to those freedmen who lived with their patron until the time of his death? The answer was that it appeared to have been left to them.

§ 2.- A testatrix inserted in a codicil: "I ask you to permit Nigidius, Titius, and Dion, my old and infirm freedmen, to pass their lives where they now are." I

fructo, predios que produjeran los diez de renta al año; el hijo dio en arrendamiento los fundos que según la voluntad de su madre se le entregaron al heredero; y se preguntó, si fallecido él le pertenecerán los atrasos de los colonos al heredero del hijo usufructuario, o al heredero de Seia la testadora. Respondió, que nada se expone para que le pertenezcan al heredero de Seia.

§ 8.- Uno había legado a uno de sus herederos el usufructo de la tercera parte de sus bienes; se preguntó, si se deberá dar la tercera parte del dinero que con arreglo a estimación se hizo de los bienes divididos. Respondió, que es del heredero la elección, si quisiera dar el usufructo de los bienes o el de su estimación.

§ 9.- También se preguntó, si además se han de deducir de la cantidad los tributos que se deben y es necesario pagar por los predios o por los bienes semovientes, de suerte que se deba entregar solamente del restante dinero, si esto hubiere elegido el heredero. Respondió, que se ha de dar la tercera parte del dinero restante.

33.- EL MISMO; *Digesto, libro XVII*.- «quiero que se le dé a Sempronio lo que yo en vida le daba»; aquél habitaba también en una casa del testador, que había sido relegada a uno de los herederos; se preguntó, si se deberá también la habitación. Respondió, que nada se expone para que no se deba.

§ 1.- En virtud de estas palabras de un testamento: «quiero que se dé a mis libertos, a quienes determinadamente no he dejado nada, lo que en vida les daba», se preguntó, si se consideraba que a los libertos, que habitaban con su patrono hasta el día de la muerte, se les dejó también la habitación. Respondió, que se considerada.

§ 2.- Una escribió así en los codicilos: «pido que consintáis que Negidio, Ticio y Dión, libertos míos, ancianos y enfermos, pasen la vejez en los lugares en

an ex hoc capite liberti supra scripti ex fideicommisso fructus locorum, quibus morantur, recipere debeant, cum alia, quae eis specialiter legata sunt, sine controversia consecuti sunt. respondit verbis quae proponerentur id petitum, ut ad eum modum paterentur heredes ibi eos esse, ad quem modum ipsa patiebatur.

34.- IDEM; *libro XVIII, Digestorum*.- Codicillis fideicommissa in haec verba dedit: "libertis libertabusque meis et quos in codicillis manumisi fundum, ubi me humari volui, dari volo, ut qui ab his decesserit, portio eius reliquis adcreseat, ita ut ad novissimum pertineat: post cuius novissimi decessum ad rem publicam Arelatensium pertinere volo. Hoc amplius libertis libertabusque meis habitationes in domo, quamdiu vivant: Pactiae et Trophimae diaetas omnes, quibus uti consuevit: habitet quam domum post mortem eorum ad rem publicam pertinere volo". quaesitum est, rei publicae fideicommissum utrum ab herede an a libertis datum sit. Respondit secundum ea quae proponerentur posse ita verba accipi, ut eius legatarii, qui novissimus decederet, fidei commissum videatur. idem quaesivit defunctis quibusdam ex libertis, quibus habitatio relicta erat, an portiones domus, in quibus hi habitaverant, iam ad rem publicam pertineant. respondit, quoad aliquis eorum vivat, fideicommissum rei publicae non deberi.

§ 1.- Qui Semproniam ex parte decima et Maeviam ex parte decima, alumnum ex reliquis partibus instituerat heredes, curatorem alumno dedit, cum iure facere putaret: et curatoris fidei commisit, ne pateretur fundum venire, sed cum Semproniam et Maeviam nutricibus suis frueretur redditu eius: et in parte testamenti ita adiecit: "omnem voluntatem meam fidei heredum meorum committo". Quaesitum est, an tertias partes usus fructus fundi nutrices ex fideicommisso petere possint, quamvis curator ei

ask whether the above-mentioned freedmen will, under the terms of the trust, be entitled to receive the profits of the land on which they reside; inasmuch as they have obtained, without controversy, other legacies which were bequeathed to them. The answer was that, according to the case stated, the charge was that the heirs should permit them to remain where they were, in the same way as she herself had allowed them to do.

34.- THE SAME; *Digest, Book XVIII*.- A man inserted a trust in his codicil in the following terms: "I desire that there shall be given to the men and women whom I have enfranchised by my codicil the tract of land where I have expressed my wish to be buried; and that, when one of them dies, his share may accrue to the remainder; so that, at last, it will all belong to the survivor, and I desire that, after the death of the survivor, the property shall go to the City of Aries. Moreover, I leave lodgings in my house to my freedmen and freedwomen as long as they may live. Pactia and Trophina shall occupy all the rooms which I was accustomed to use, and when they die I wish the house to belong to the said city." The question arose whether the heirs of the freedmen were charged with the trust for the benefit of the city? The answer was that, according to the facts stated, the words might be held to mean that the last survivor of the legatees appeared to be charged with the trust. It was also asked, after certain of the freedmen to whom a lodging was left had died whether those parts of the house in which they dwelt would immediately belong to the city. The answer was that, as long as any of the freedmen lived, the trust would not be due to the city.

§ 1.- A certain party who had appointed Sempronia heir to a tenth of his estate, Maevia to another tenth, and a foster-child to the remainder of the same, appointed a curator for the latter, thinking that he had a right to do so by law, and charged the curator not to suffer the land to be sold, and to permit his foster-child to enjoy the income of the property with Sempronia and Maevia, his nurses; and, at the end of his will, he added, "I charge all my heirs with the execution of this, my testament." The question arose

que ahora viven»; pregunto, si en virtud de esta cláusula deberán recibir por fideicomiso los mencionados libertos el usufructo de los lugares en que moran, habiendo conseguido sin controversia lo demás que especialmente se les legó. Respondió que con las palabras que se exponían se pidió que los herederos consintieran que aquellos estuviesen allí de la misma manera que ella lo consentía.

34.- EL MISMO; *Digesto, libro XVIII*.- Uno dió en codicilos fideicomisos en estos términos: «quiero que a mis libertos y libertas, y a los que manumití en los codicilos, se les dé el fundo en que quise ser enterrado, de suerte que la porción del que de ellos hubiere fallecido acrezca a los demás, a fin de que le pertenezca al último, y después del fallecimiento de éste último quiero que pertenezca a la República de Arles; además de esto quiero que a mis libertos y libertas se les dé en mi casa habitación mientras vivieren; y a Paccia y a Trofima todas las habitaciones interiores en las que cada cual habite según acostumbró; cuya casa quiero que después de la muerte de ellos pertenezca a la República»; se preguntó, si a la República se le dio el fideicomiso a cargo del heredero, o al de los libertos. Respondió, que, según lo que se exponía, las palabras podían entenderse de manera que se considere encomendado a la fidelidad del legatario, que falleciese el último. El mismo preguntó, si habiendo fallecido algunos de los libertos, a quienes se les había dejado la habitación, le pertenecerán ya a la República las porciones de la casa en que aquellos habían habitado. Respondió, que mientras viva alguno de ellos no se le debe a la República el fideicomiso.

§ 1.- Uno que había instituido herederos a Sempronia de una décima parte, a Mevia de otra décima parte, y a su alumno de las demás partes, nombró curador para el alumno, creyendo hacerlo con derecho; y encomendó a la fidelidad del curador, que no consintiese que se vendiera el fundo, sino que disfrutase de su renta con Sempronia y Mevia, sus nodrizas; y en la última parte del testamento añadió así: «encomiendo a la fidelidad de mis herederos toda mi voluntad»; se preguntó, si podrán pedir las

receptus sit, quem iure dare non poterit alumno. respondit secundum ea quae proponerentur utiliter fideicommisso voluntatem suam confirmasse: id igitur cuique dedisse, ut et nutrices una cum alumno redditu fundi uterentur.

35.- IDEM; *libro XXII, Digestorum*.- Uxori usum fructum villae legavit in quinquennium a die mortis suae, deinde haec verba adiecit: "et peracto quinquennio, cum eius usus fructus esse desierit, tunc eum fundum illi et illi libertis dari volo". Quaesitum est, cum uxor intra quinquennium decesserit, an libertis proprietatis petitio iam an vero impleto quinquennio competat, quia "peracto quinquennio" testator proprietatem legaverat. respondit post completum quinquennium fundum ad libertos pertinere.

36.- IDEM; *libro XXV, Digestorum*.- Sticho testamento manumisso fundi usus fructus erat legatus et, cum is uti fruique desisset, fidei heredum testator commisit, uti eum fundum darent Lucio Titio: sed Stichus testamento suo eiusdem fundi proprietatem nepotibus suis legavit et heredes Stichi ex testamento eius legatariis nepotibus eum fundum tradiderunt. quaesitum est, cum nepotes legatarii ignoraverint condicionem fundi supra scripti priore testamento datam et plus quam tempore statuto possederint, an eum fundum sibi adquisierint. respondit secundum ea quae proponerentur legatarios sibi adquisisse.

§ 1.- Idem quaesiit, si aliquo casu legatariis auferri possit, an repetitionem ab heredibus Stichi eius nepotes habere possint. Respondit supra quidem de acquisitione responsum: verum si ex alia causa

whether the nurses could claim the third part of the usufruct of the land under the terms of the trust, even though the curator, whom the testator could not legally appoint for his foster-child, had been charged with the execution of the same. The answer was that, in accordance with the facts stated, the testator had properly legally intimated his wishes by the creation of the trust, and therefore the nurses could enjoy the income of the land, along with his foster-child, in accordance to what he had given to each one of them.

35.- THE SAME; *Digest, Book XXII*.- A man left to his wife the usufruct of his country-house for the term of five years after his death, then he added the following words, "After the said term of five years has elapsed, and the usufruct is extinguished, I wish the said land to belong to So-and-So and So-and-So, my freedmen." The wife having died within the five years, the question arose whether the said freedmen were entitled to claim the ownership of the property immediately, or after the expiration of the five years, because the testator had left it at the expiration of that time. The answer was that the land would belong to the freedmen after the expiration of the five years.

36.- THE SAME; *Digest, Book XXV*.- The usufruct of a tract of land was left to Stichus, who was manumitted by the will, and after he had ceased to enjoy it, the testator left it to his heirs in trust, to be delivered to Lucius Titius. Stichus, however, by his will, left the ownership of said land to his grandchildren, and the heirs of Stichus, in accordance with the terms of his will, transferred the said land to his grandchildren, who were his legatees. The said grandchildren, not being aware of the condition under which the land was devised by the former will, and having possessed it for a longer time than that provided by law to give title by prescription, the question arose whether they acquired the ownership of the land for themselves. The answer was that, in accordance with the facts stated, the legatees had acquired it.

§ 1.- It was also asked, if, in any event, the legatees should be deprived of the land, whether an action in favor of the grandsons would lie for the recovery of the same against the heirs of Stichus. The answer was

nodrizas en virtud del fideicomiso las terceras partes del usufructo del fundo, aunque haya sido admitido el curador a quien en derecho no pudiera nombrarlo para el alumno. Respondió que, según lo que se exponía, confirmó válidamente su voluntad con el fideicomiso y que en su consecuencia les había dado derecho para que también las nodrizas disfrutasen juntamente con el alumno de las rentas del fundo.

35.- EL MISMO; *Digesto, libro XXII*.- Uno legó a su mujer el usufructo de una granja por cinco años, contados desde el día de su muerte, y después añadió estas palabras: «y transcurrido el quinquenio, cuando haya dejado de existir su usufructo, quiero que este fundo sea entonces dado a éste y a aquél libertos»; se preguntó, si, habiendo fallecido la mujer dentro del quinquenio, les competirá a los libertos la petición de la propiedad desde luego, o cumplido el quinquenio, porque el testador había legado la propiedad, transcurridos los cinco años. Respondió que el fundo pertenece a los libertos después de cumplido el quinquenio.

36.- EL MISMO; *Digesto, libro XXV*.- A Stico, manumitado por testamento, le había sido legado el usufructo de un fundo, y el testador había encomendado a la fidelidad de los herederos que cuando aquel hubiese dejado de usufructuarlo diesen el fundo a Lucio Ticio; pero Stico legó en su testamento la propiedad del mismo fundo a sus nietos, y los herederos de Stico entregaron el fundo en virtud de su testamento a los nietos legatarios; se preguntó, si, habiendo ignorado los nietos legatarios la condición impuesta respecto del mencionado fundo en el anterior testamento, y habiéndolo poseído más tiempo del establecido, habrán adquirido para sí este fundo. Respondió, que, según lo que se exponía, los legatarios lo adquirieron para sí.

§ 1.- El mismo preguntó, si, pudiéndoselo quitar en algún caso a los legatarios, podrían tener sus nietos acción para repetirlo de los herederos de Stico. Respondió, que, antes ciertamente se respondió

adquisitio cessasset, videri Stichum, si post mortem eorum, quibus proprietates legata esset, testamentum fecisset, potius quod habere se crederet, quam quod onerare heredes vellet, legasse.

37.- IDEM; *libro XXXIII, Digestorum*.- «Uxori meae usum fructum lego bonorum meorum, usque dum filia mea annos impleat octodecim»: quaesitum est, an praediorum tam rusticorum quam urbanorum et mancipiorum et supellectilis itemque calendarii usus fructus ad uxorem pertineat. Respondit secundum ea quae proponerentur omnium pertinere.

38.- IDEM; *libro III. Responsorum*.- «Fundus Aebutianus redditus uxori meae quoad vivat dari volo»: quaero, an possit tutor heredis fundum vendere et legatario offerre quantitatem annuam, quam vivo patre familias ex locatione fundi redigere consueverat. Respondit posse. item quaero, an habitare impune prohiberi possit. Respondit non esse obstrictum heredem ad habitationem praestandam. item quaero, an compellendus sit heres reficere praedium. Respondit, si heredis factio minores redditus facti essent, legatarium recte desiderare, quod ob eam rem diminutum sit. item quaero, quo distat hoc legatum ab usu fructu. Respondit ex his, quae supra responsa essent, intellegi differentiam.

39.- IDEM; *libro VI, Responsorum*.- Filios heredes instituit, uxori vestem mundum muliebrem lanam linum et alias res legavit et adiecit: "proprietatem autem eorum, quae supra scripta sunt, reverti volo ad filias meas quaeve ex his tunc vivent": quaesitum est, utrum usus fructus an proprietates earum rerum data sit. Respondit proprietatem legatam videri.

that, according to the opinion previously rendered where the property for some reason had not been acquired, if Stichus had made a will after the death of those to whom it was left, he would have been held to have intended to bequeath something which he thought belonged to him, rather than to have burdened his heirs.

37.- THE SAME; *Digest, Book XXXIII*.- "I give to my wife the usufruct of my estate until my daughter arrives at the age of eighteen years." The question arose whether the wife should be entitled to the usufruct of both the land in the country and in the city, as well as to that of the slaves, the furniture, and the funds belonging to the estate. The answer was that, in accordance with the facts stated, she would be entitled to the usufruct of everything.

38.- THE SAME; *Opinions, Book III*.- "I wish the income of the Aebutian Estate to be paid to my wife as long as she lives." I ask whether the guardian of the heir can sell the land and tender to the legatee, annually a sum equal to that which the testator was, during his lifetime, accustomed to obtain from the lease of the property in question? The answer was that he can do so. I also ask whether the legatee can with impunity be prevented from living on the said land. The answer was that the heir is not required to furnish him lodging. I also ask whether the heir can be compelled to make repairs on the land. The answer was that if, through the acts of the heir, the income has been reduced, the legatee can lawfully claim the amount of the diminution. I also ask in what way a legacy of this kind differs from an usufruct. The answer was that the difference can be ascertained from the opinions previously given.

39.- THE SAME; *Opinions, Book VI*.- A certain man appointed his sons his heirs, and bequeathed to his wife her clothing, her jewels, wool, flax and other articles, and added: "I wish the ownership of the articles above mentioned to pass to my daughters, or to any of them who may survive." The question arose whether the usufruct, or the ownership of said property was bequeathed. The answer was that the ownership seemed to have been bequeathed.

respecto a la adquisición, pero que si la adquisición hubiese cesado por otra causa, se considera que Stico, si hubiese hecho testamento después de la muerte de aquéllos a quienes les hubiese sido legada la propiedad, más bien lo legó porque creía que él lo tenía, que no porque quisiera gravar a los herederos.

37.- EL MISMO; *Digesto, libro XXXIII*.- «Lego a mi mujer el usufructo de mis bienes hasta que mi hija cumpla diez y ocho años»; se preguntó, si le pertenecerá a la mujer el usufructo de los predios, así rústicos como urbanos, y el de los esclavos y del ajuar, y también el de libro de cuentas. Respondió, que, según lo que se exponía, le pertenece el de todas las cosas.

38.- EL MISMO; *Respuestas, libro III*.- «Quiero que se dé a mi mujer, mientras viva, la renta del fundo Ebutiano»; pregunto, si podrá el tutor del heredero vender el fundo y ofrecerle al legatario la cantidad anual, que en vida había acostumbrado el padre de familia a obtener por el arrendamiento del fundo. Respondió, que podía. También pregunto, si impunemente se le podrá prohibir que lo habite. Respondió, que no estaba obligado el heredero a darle habitación. Igualmente pregunto, si habrá de ser compelido el heredero a reparar el predio. Respondió, que si por hecho del heredero se hubiesen hecho menores las rentas, con razón pretende el legatario lo que por esta causa se haya disminuido. Asimismo pregunto: ¿en qué se diferencia este legado del usufructo? Respondió, que por lo que antes se ha respondido se conoce la diferencia.

39.- EL MISMO; *Respuestas, libro VI*.- Uno instituyó herederos a sus hijos, legó a su mujer el vestido, los objetos de tocador de mujer, lana, lino, y otras cosas, y añadió: «pero quiero que la propiedad de estas cosas, que se han mencionado, revierta a mis hijas, o a las que de ellas vivieren entonces»; se preguntó, si se habrá dado el usufructo, o la propiedad de estas cosas. Respondió, que se considera legada la propiedad.

40.- ALFENUS VARUS; *libro VIII, Digestorum a Paulo epitomatorum*.- «Illi cum illo habitationem lego»: perinde est, ac si ita «illi et illi» legasset.

41.- IAVOLENUS; *libro II, ex Posterioribus Labeonis*.- Cum ita legatum esset: "fructus annuos fundi Corneliani Publio Maevio do lego", perinde putat accipiendum esse Labeo, ac si usus fructus fundi similiter esset legatus, quia haec mens fuisse testatoris videatur.

42.- IDEM; *libro V, ex Posterioribus Labeonis*.- In fructu id esse intellegitur, quod ad usum hominis inductum est: neque enim maturitas naturalis hic spectanda est, sed id tempus, quo magis colono dominove eum fructum tollere expedit. Itaque cum olea immatura plus habeat redditus, quam si matura legatur, non potest videri, si immatura lecta est, in fructu non esse.

43.- VENULEIUS; *libro X, Actionum*.- Nihil interest, utrum bonorum quis an rerum tertiae partis usum fructum legaverit: nam si bonorum usus fructus legabitur, etiam aes alienum ex bonis deducetur, et quod in actionibus erit, computabitur. At si certarum rerum usus fructus legatus erit, non idem observabitur.

TIT. III

DE SERVITUTE LEGATA

1.- IULIANUS; *libro I, ex Minicio*.- Qui duas tabernas coniunctas habebat, eas singulas duobus legavit: quaesitum est, si quid ex superiore taberna in inferiorem inaedificatum esset, num inferior oneri ferundo in superioris tabernae loco contineretur. respondit servitutem impositam videri. iulianus notat: videamus, ne hoc ita verum sit, si aut

40.- ALFENUS VARUS; *Epitomes of the Digest of Paulus, Book VIII*.- "I bequeath lodging for So-and-So along with So-and-So." This is just the same as if the testator had left it "To So-and-So and So-and-So."

41.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- When a bequest is made as follows, "I give and bequeath to Publius Mævius all the annual crops of the Cornelian Estate," Labeo thinks this should be understood to be the same as if the usufruct of the land had been left, because this seems to have been the intention of the testator.

42.- THE SAME; *On the Last Works of Labeo, Book V*.- Among the crops of land is understood to be included everything which can be used by a man. For it is not necessary in this place to consider the time when they naturally mature, but the time when it is most advantageous for the tenant or the owner to gather them. Therefore, as olives which are not ripe are more valuable than they are after maturity, it cannot be held that they did not form part of the crops, where they are gathered before they are ripe.

43.- VENULEIUS; *Actions, Book X*.- It makes no difference whether the testator bequeaths the usufruct of the third part of property, or the usufruct of the third part of certain property, for where the usufruct of property in general is left, the debts are deducted from it, and any accounts which may be due are credited. Where the usufruct of certain property is bequeathed, the same rule is not observed.

TITLE III

CONCERNING THE LEGACY OF
SERVITUDES

1.- JULIANUS; *On Minicius, Book I*.- A testator who had two adjoining shops left them to different persons. If either one of the buildings projected over the other, the question might arise whether the one underneath would be obliged to pay the expense of keeping up the other. I was of the opinion that the servitude appeared to be imposed, and Julianus says

40.- ALFENO VARO; *Digesto compendiado por Paulo, libro VIII*.- «Lego a aquel con aquel la habitación», es lo mismo que si uno hubiese legado así: «aquel y a aquel».

41.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro II*.- Cuando se hubiese legado así: «doy y lego a Publio Mevio los frutos anuales del fundo Corneliano», opina Labeón que se ha de entender lo mismo que si igualmente hubiese sido legado el usufructo del fundo, porque se considera que esta fue la intención del testador.

42.- EL MISMO; *Doctrina de las obras póstumas de Labeón, libro V*.- Se entiende que está comprendido en los frutos lo que fue destinado para uso del hombre; porque no se ha de considerar aquí la madurez natural, sino el tiempo en que más bien le conviene al colono o al dueño coger este fruto; y así, teniendo más rendimiento la aceituna sin madurar, que si se cogiera madura, no se puede considerar, si se cogió sin madurar, que no esté comprendida en los frutos.

43.- VENULENO; *Acciones, libro X*.- Nada importa que uno haya legado el usufructo de los bienes, o de la tercera parte de los bienes; porque si se legare el usufructo de los bienes, también se deducirán de los bienes las deudas, y se computará lo que estuviere comprendido en acciones. Mas no se observará lo mismo, si se hubiere legado el usufructo de cosas ciertas.

TÍTULO III

DE LA SERVIDUMBRE LEGADA

JULIANO; *Doctrina de Minicio, libro I*.- Uno que tenía dos cabañas contiguas las legó a dos, una a cada uno; se preguntó, si, habiéndose edificado algo de la cabaña superior sobre la inferior, se comprendería la inferior para soportar la carga en el lugar de la cabaña superior. Respondió, que se considera impuesta la servidumbre. Juliano observa: veamos que no sea

nominatim haec servitus imposita est aut ita legatum datum est: "tabernam meam uti nunc est do lego".

2.- MARCELLUS, *libro XIII Digestorum*.- Fundum communem habentibus legari potest via, cum et communis servus recte viam stipulatur et, cum duo ei qui ipse viam stipulatus fuerit heredes exstiterint, non corrumpitur stipulatio.

3.- IDEM; *libro XXIX, Digestorum*.- Si fundum Maevio et ad eum viam per alium fundum et eundem fundum sine via Titio legasset, si uterque fundum vindicasset, sine via legato fundum cessurum, quia neque adquiri per partem servitus possit. et si prius Maevius fundum vindicaret altero deliberante, posse dubitari, an, si postea Titius omisisset, viae legatum salvum esset, et hoc magis videbatur: quamquam si sub condicione quis fundum legasset, viam pure, aut pro parte fundum pure, pro parte sub condicione et viam sine condicione, si pendente ea legati dies cessisset, interitum fore viae legatum: ut responsum est, cum alteri ex vicinis, qui fundum communem habebant, viam sub condicione, alteri pure legasset et pendente condicione decessisset, quia alterius legatarii persona impedimento esset, quo minus solidus fundus cum via vindicaretur.

4.- IAVOLENUS; *libro IX, Epistolarum*.- Si is qui duas aedes habebat unas mihi, alteras tibi legavit et medius paries, qui utrasque aedes distinguat, intervenit, eo iure eum communem nobis esse

with reference to this: "Let us see whether this is only true where the servitude has been expressly imposed, or where the legacy was granted as follows: "I give and bequeath my shop in the condition in which it is at present."

2.- MARCELLUS; *Digest, Book XIII*.- A right of way can be bequeathed to persons holding a tract of land in common, just as a slave held in joint ownership can legally stipulate for a right of way, and the stipulation will not be annulled where two heirs are left by him who stipulated for the right of way.

3.- THE SAME; *Digest, Book XXIX*.- If anyone should devise a tract of land to Mævius, and a right of way to give access to the same through other land, and then should leave the same tract of land to Titius without the right of way, and both of them should claim the land; the latter should be delivered without the right of way, because a servitude cannot be partially acquired. If, however, Mævius should be the first to claim the land, while the other is deliberating as to whether or not he will accept it, if Titius should afterwards reject the estate, it may be doubted whether the right of way which was bequeathed will continue to exist. This has been held to be the better opinion. But if anyone should devise a tract of land under some condition, and the right of way absolutely; or a part of the land absolutely, and a part of the same under a condition, and the right of way absolutely; and the devise should become due before the condition was fulfilled, the bequest of the right of way will be annulled. The rule is the same where two neighbors of the testator owned a tract of land in common, and he left a right of way to one of them conditionally, and to the other absolutely, and before the condition was fulfilled he died; and this is the case because one of the legatees prevents the other from claiming the entire premises together with a right of way.

4.- JAVOLENUS; *Epistles, Book IX*.- Where a man who had two houses left one of them to me and the other to you, and there was a party-wall which separated the buildings, I think that the said wall will

esto así verdadero, si esta servidumbre fue impuesta expresamente, o si el legado fue dado de este modo: «doy y lego mi cabaña, como está ahora».

2.- MARCELO; *Digesto, libro XIII*.- Se puede legar la servidumbre de vía a los que tienen en común un fundo, porque también un esclavo común estipula válidamente la servidumbre de vía; y cuando dos quedaron herederos del mismo que hubiere estipulado la servidumbre de vía, no se vicia la estipulación.

3.- EL MISMO; *Digesto, libro XXIX*.- Si uno le hubiese legado a Mevio un fundo y el camino para ir a él por otro fundo, y a Ticio el mismo fundo sin el camino, si ambos hubiesen reivindicado el fundo, el fundo habrá de ceder al legado sin el camino, porque una servidumbre no se puede adquirir en parte. Y si primeramente reivindicase Mevio el fundo estando deliberando el otro, se puede dudar, si, dejándolo de aceptar después Ticio, quedaría a salvo el legado del camino. Y esto parecía preferible. Aunque si uno hubiese legado un fundo bajo condición, y el camino puramente, o en parte el fundo puramente, y en parte bajo condición, y el camino sin condición, si pendiente ésta hubiese comenzado a correr el término del legado; se habría de extinguir el legado del camino, como se respondió, cuando a uno de los vecinos, que tenían un fundo en común, le hubiese legado el camino bajo condición, y a otro puramente, y hubiese fallecido estando pendiente la condición, porque la persona del otro legatario serviría de impedimento para que no se reivindicase todo el fundo con el camino.

4.- JAVOLENO; *Epístolas, libro IX*.- Si el que tenía dos casas me legó una, y otra a ti, y hay una pared medianera que separe ambas casas, opino que aquella nos es común con el mismo derecho que lo

existimo, quo, si paries tantum duobus nobis communiter esset legatus, ideoque neque me neque te agere posse ius non esse alteri ita immissas habere: nam quod communiter socius habet, et in iure eum habere constitit: itaque de ea re arbiter communi dividundo sumendus est.

5.- PAPINIANUS; *libro XVI, Quaestionum*.- Etsi maxime testamenti factio cum servis alienis ex persona dominorum est, ea tamen quae servis relinquuntur ita valent, si liberis relicta possent valere: sic ad fundum domini via servo frustra legatur.

6.- IDEM; *libro VII, Responsorum*.- Pater filiae domum legavit eique per domus hereditarias ius transeundi praestari voluit. si filia domum suam habitet, viro quoque ius transeundi praestabitur: alioquin filiae praestari non videbitur. Quod si quis non usum transeundi personae datum, sed legatum servitutis esse plenum intellegat, tantundem iuris ad heredem quoque transmittetur: quod hic nequaquam admittendum est, ne, quod affectu filiae datum est, hoc et ad externos eius heredes transire videatur.

7.- PAULUS; *libro XXI, Quaestionum*.- Quum a pluribus heredibus institutis via legata est, quia partem non recipit, singuli heredes in solidum conveniuntur, quia et uno ex heredibus adeunte vindicari potest.

TIT. IV

DE DOTE PRAELEGATA

1.- ULPIANUS; *libro XIX, ad Sabinum*.- Quum

belong to us in common, just as if it had been left to us both jointly, and therefore neither you nor I will have any right to prevent the other from inserting a beam into said wall; for it has been established that whenever a joint-owner holds any property he is entitled to all the rights appurtenant to the same. Therefore, in a case of this kind an arbiter must be appointed for the purpose of dividing the common property, if this should become necessary.

5.- PAPINIANUS; *Questions, Book XVI*.- Although the execution of a will for the benefit of the slaves of others especially depends for its validity upon the testamentary capacity of their masters, still, any bequests made to slaves are just as valid as when left to persons who are free. Hence a right of way to obtain access to the land of his master, cannot legally be bequeathed to a slave.

6.- THE SAME; *Opinions, Book VII*.- A father left a house to his daughter, and gave her access to it through other buildings belonging to the estate. If the daughter resides in the house, the right of access will also be granted to her husband; otherwise, it will not be considered as granted to her. If, however, anyone should assert that this right is not merely a personal privilege, but a complete bequest of a servitude, then the right can only be transmitted to the heir. But, in this instance, such a conclusion can, under no circumstances, be admitted, lest what was granted through affection for his daughter might seem to be transmitted to foreign heirs.

7.- PAULUS; *Questions, Book XXI*.- Where several appointed heirs are charged with a right of way, each of them can be sued for the entire right, because the servitude cannot be divided, for each can claim his legacy, even where only one of the heirs enters upon the estate.

TITLE IV

CONCERNING THE PREFERRED
LEGACY OF A DOWRY

1.- ULPIANUS; *On Sabinus, Book XIX*.- Where a

sería si a nosotros dos se nos hubiese legado en común solamente la pared, y que por lo tanto ni yo ni tú podemos sostener que el otro no tiene derecho para tener así apoyadas las vigas; porque lo que un socio tiene en común fue constante que lo tenga también conforme a derecho; y así, se ha de nombrar en este asunto árbitro para dividir la cosa común.

5.- PAPINIANO; *Cuestiones, libro XVI*.- Aunque hay testamentifacción con los esclavos ajenos principalmente por razón de la persona de sus dueños, sin embargo, las cosas que se dejan a esclavos son válidas de este modo, si pudieran ser válidas dejadas a hombres libres; y así, en vano se lega a un esclavo el camino para ir a un fundo de su señor.

6.- EL MISMO; *Respuestas, libro VII*.- Un padre legó a su hija una casa, y quiso que se le concediera el derecho de pasar por casas de la herencia; si la hija habitara su propia casa, se le prestará también a su marido el derecho de paso, y de otra suerte no se considerará que se le presta a la hija. Pero si alguno entendiera que no se dió a la persona el uso del paso, sino que hay un pleno legado de servidumbre, se transmitirá el mismo derecho también al heredero; lo que de ningún modo se ha de admitir aquí, para que no parezca que lo que por afecto se le dió a la hija pasa también a los herederos extraños a la misma.

7.- PAULO; *Cuestiones, libro XXI*.- Cuando a cargo de muchos herederos instituidos fue legado el camino, como este no admite división, cada uno de los herederos es demandado por la totalidad, porque también puede ser reivindicado adiendo la herencia uno solo de los herederos.

TÍTULO IV

DE LA DOTE PRELEGADA

1.- ULPIANO; *Comentarios a Sabino, libro XIX*.-

dos relegatur, verum est id dotis legato inesse, quod actione de dote inerat.

§ 1.- Et ideo si inter virum et uxorem convenerat, ut morte viri soluto matrimonio filio communi interveniente dos apud mariti heredem remaneret, et maritus decedens dotem relegaverit, stari pacto non debet ob hoc quod dos relegata est. Verum et citra relegationem hoc probari debet: nam quod est admissum posse deteriore condicionem dotis fieri intervenientibus liberis, totiens locum habet, quotiens ipsa in matrimonio decedit vel divortium intervenit.

§ 2.- Et verum est commodum in dote relegata esse repraesentationis, quamvis annua die dos praestaretur:

§ 3.- Est et illud, quod ob res donatas hodie post senatus consultum nulla fit exactio, si modo voluntatem non mutavit testator.

§ 4.- Impensae autem ipso iure dotem minuunt. Sed quod diximus ipso iure dotem impensis minui, non ad singula corpora, sed ad universitatem erit referendum.

§ 5.- Adeo autem dotis actionem continet dotis reformatio, ut, si vivus eam uxori (scilicet quibus licet casibus) solverit, cesset legatum.

§ 6.- Sed et si mancipia fuerint in dote non aestimata et haec demortua sint, legatum dotis in his evanescent.

§ 7.- Sed et si dotem promiserit mulier neque dederit et decedens maritus uxori dotem praelegaverit, mulier nihil amplius quam liberationem habebit: nam et si quis ita legaverit "centum quae in arca habeo" aut "quae ille apud me deposuit", si nulla sint, nihil deberi constat, quia nulla corpora sint.

dowry is bequeathed, it is certain that everything is included in it which is embraced in the dotal action.

§ 1.- Therefore, where an agreement has been made between husband and wife, that, if the marriage should be dissolved by the death of the husband, and a son should be born, the dowry shall remain in the hands of the heir of the husband, and the latter, at his death, shall bequeath the dowry, the agreement will not stand, because the dowry was bequeathed. It should, however, be executed if the dowry was not bequeathed; for the established rule that the condition of the dowry cannot become worse through the intervention of children becomes applicable whenever the woman dies during marriage, or a divorce takes place.

§ 2.- It is true that there is the advantage of payment where a dowry is bequeathed, as otherwise it would only be payable annually.

§ 3.- There is also the advantage that, according to the Decree of the Senate, no demand can be made for property donated, provided the testator did not change his mind.

§ 4.- Moreover, expenses which have been incurred diminish the dowry to that extent by operation of law, and what we have said concerning this does not refer to separate articles, but to the entire dowry.

§ 5.- The bequest of a dowry includes also the dotal action, so that if the husband, while living, restored it to his wife, as is permitted in certain cases, the legacy will be annulled.

§ 6.- But if slaves, whose value had not been appraised, should be included in the dowry, and they should be dead, the legacy of the dowry, so far as they are concerned, will be void.

§ 7.- If the wife promised a dowry, but did not give it, and the husband, at his death, should leave it as a preferred legacy to his wife; she will be entitled to nothing more than a release from liability. For if anyone should make a bequest as follows: "I bequeath a hundred aurei, which I have in my chest," or "Which So-and-So has deposited with me;" and there should be no such sum, it is established that nothing will be due, because the property in question was not in existence.

Cuando se deja por legado la dote, es mas cierto que en el legado de la dote se comprende lo que era inherente a la acción de dote.

§ 1.- Y por lo tanto, si entre el marido y la mujer se había convenido que disuelto el matrimonio por muerte del marido quedase la dote, habiendo hijo común, en poder del heredero del marido, y el marido al morir hubiere dejado por legado la dote, no se debe estar por esto a lo pactado, porque la dote fue dejada por legado, lo cual se debe aprobar aún sin haberse dejado por legado; porque lo que se admitió, que se puede hacer peor la condición de la dote habiendo hijos, tiene lugar siempre y cuando la mujer fallece en el matrimonio, o media divorcio.

§ 2.- Y es verdad que en el legado de la dote hay el beneficio de la representación, aunque la dote se hubiese de entregar al cabo de un año.

§ 3.- También hay esto, que hoy después del Senadoconsulto no hay exacción alguna por causa de las cosas donadas, si es que el testador no cambió de voluntad.

§ 4.- Pero los gastos disminuyen de derecho la dote; pero lo que decimos, que la dote se disminuye de derecho con los gastos, no se habrá de referir a cada uno de los bienes, sino a la totalidad.

§ 5.- Pero de tal modo el legado de la dote contiene la acción de dote, que si en vida se la hubiere pagado el marido a su mujer, por supuesto, en los casos en que es lícito, cesará el legado.

§ 6.- Pero también si en la dote inestimada hubiere esclavos, y estos hubieren fallecido, se extingue en cuanto a ellos el legado de la dote.

§ 7.- Pero si la mujer hubiere prometido la dote y no la hubiere dado, y el marido al fallecer le hubiere prelegado la dote a la mujer, la mujer no tendrá nada más que la liberación. Porque también si uno hubiere legado de este modo: «los cien que tengo en la caja», o «que aquel depositó en mi poder», es constante que, si no hubiere ningunos, nada se debe, porque no hay ninguna cosa.

§ 8.- Si quis uxori fundum titianum his verbis legasset: "is enim fundus propter illam ad me pervenit", omnimodo debetur fundus: nam quidquid demonstratae rei additur satis demonstratae, frustra est.

§ 9.- Celsus libro vicesimo digestorum scribit, si socer nurui dotem relegavit, si quidem ius actionis de dote voluit relegare, nullius momenti esse legatum, quippe nupta est: sed si voluit eam recipere dotalem pecuniam, inquit, utile erit legatum. Si tamen haec dotem receperit, nihilo minus maritus dotis persecutionem habebit, sive heres institutus esset, familiae heriscundae iudicio, sive non, utili actione. Ego puto, quoniam non hoc voluit socer, ut bis dotem heres praestet, mulierem agentem ex testamento cavere debere defensu iri heredem adversus maritum. Ergo et maritus idem debet cavere adversus mulierem defensu iri, si prior agat.

§ 10.- Per contrarium apud iulianum libro trigésimo septimo quaeritur, si socer filio suo exheredato dotem nurus legasset: et ait agi quidem cum marito exheredato de dote non posse, verumtamen ipsum dotem persecuturum ex causa legati: sed non alias eum legatum consecuturum, quam si caverit heredes adversus mulierem defensu iri. Et differentiam facit inter eum, cui dos relegata est, et orcinum libertum, cui peculium legatum est: namque eum de peculio posse conveniri ait, heredem non posse, quia peculium desiit penes se habere: at dotis actio nihilo minus competit, etsi dotem desierit habere.

§ 11.- Idem Iulianus quaerit, si dotem marito relegaverit socer, an dote soluta mulieri legatum mariti extinguatur. Et dicit extinguere, quia nihil esset iam, quod marito posset praestari.

§ 8.- If anyone should bequeath the Titian Estate to his wife, as follows, "Since the said land has come into my hands through her;" the land will undoubtedly be due; for where anything is added for the purpose of pointing out something which has already been designated, it is superfluous.

§ 9.- Celsus in the Twentieth Book of the Digest says that if a father-in-law bequeaths her dowry to his daughter-in-law, and he intends to leave a right of action with reference to the dowry, the legacy will be of no force or effect, as she is already married; but if he wished her to receive the money which she brought as dowry, he says that the legacy will be valid. When, however, she has received her dowry, the husband will, nevertheless, have the right to claim it by means of a praetorian action, whether an heir has been appointed in a suit for partition, or not. I think that, as the father-in-law did not intend his heir to pay the dowry twice, if the woman should bring an action under the will, she should furnish him security to defend the heir against the husband. Therefore, the husband also should furnish security to defend him against his wife, if he should be the first to institute proceedings.

§ 10.- On the other hand, it is stated by Julianus in the Thirty-seventh Book, that if a father-in-law should bequeath the dowry of his daughter-in-law to his disinherited son, while she cannot bring the dotal action against her disinherited husband, he himself can claim the dowry, on the ground of a legacy; but he cannot obtain it unless he furnishes security to defend the heir against the woman. He makes this difference between the person to whom the dowry is bequeathed, and a freedman liberated by the will, and to whom his peculium was bequeathed; for he says that the heir cannot be sued on account of the peculium for the reason that it is no longer in his possession, but the dotal action can, nevertheless, be brought against him, even though he has ceased to have control of the dowry.

§ 11.- Julianus also asks, where the father-in-law bequeathed the dowry to the husband, and it has been paid to the wife, whether the legacy of the husband will be extinguished. He says that it will be extinguished, because there is nothing more which the heir can pay to the husband.

§ 8.- Si alguno hubiese legado a su mujer el fundo Ticiano con estas palabras «porque este fundo vino a mi poder por causa de ella», se debe de todos modos el fundo; porque es superfluo lo que se añade a una cosa suficientemente demostrada.

§ 9.- Escribe Celso en el libro vigésimo del Digesto, que si el suegro legó la dote a la nuera, es de ningún valor el legado, si verdaderamente le quiso legar el derecho de la acción de dote, porque está casada; pero si quiso que ella recibiese el dinero de la dote, dice que será útil el legado. Mas si ella hubiere recibido la dote, el marido tendrá sin embargo, la persecución de la dote en el juicio de partición de herencia, si hubiese sido instituido heredero, y si no, con la acción útil. Yo opino, que, como el suegro no quiso que el heredero pagase dos veces la dote, al ejercitar la mujer la acción de testamento debe dar caución de que el heredero habrá de ser defendido contra el marido. Luego también el mismo marido deberá dar caución de que habrá de ser defendido contra la mujer, si él ejercitase primero la acción.

§ 10.- Por el contrario, en el libro trigésimo séptimo de Juliano se pregunta, si el suegro hubiese legado la dote de la nuera a su hijo desheredado. Y dice, que ciertamente no se puede ejercitar la acción de dote contra el marido desheredado, pero que éste mismo habrá de perseguir la dote por causa del legado, si bien no habrá él de conseguir el legado de otro modo, sino si hubiere dado caución de que habrán de ser defendidos los herederos contra la mujer; y establece diferencia entre aquel a quien fue dejada por legado la dote, y el liberto orcino, a quien se legó el peculio, porque dice que éste puede ser demandado con la acción de peculio, y no puede serlo el heredero, porque dejó de tener en su poder el peculio; pero compete, sin embargo, la acción de dote, aunque hubiere dejado de tener la dote.

§ 11.- El mismo Juliano pregunta, si, habiendo legado el suegro al marido la dote, se extinguirá el legado del marido habiéndosele pagado la dote a la mujer. Y dice que se extingue, porque ya no habría nada que se pudiera dar al marido.

§ 12.- Idem quaerit, si dos alii legata esset eamque rogatus sit mulieri restituere, an lex Falcidia in legato locum haberet. et dicit habere: sed quod minus est in fideicommisso, mulierem dotis actione consecuturam. Ego quaero, an commodata repraesentationis in hoc legato sic observentur atque si dos ipsi mulieri fuisset relegata. et puto habere.

§ 13.- Idem Iulianus quaerit, si mulieri dos sit relegata eaque rogata dotem restituere, an Falcidia locum habeat. et negat habere, quoniam fideicommissum quoque negat valere. quod si praeterea quid uxori legatum sit, putat ex residuo fideicommissum praestari: quod utique habita ratione falcidia mulieri praestabitur. Sed et marito ex parte heredi instituto a socero dote praelegata legatum dotis Falcidiam passurum, videlicet quia adhuc constante matrimonio indebita dos videtur relegata, verum quod Falcidia reccidit, in familiae heriscundae iudicio maritum praecepturum, quemadmodum totam dotem praeciperet, si non esset relegata.

§ 14.- Mela scripsit, si fundus in dote sit et specialiter sit legatus, mox generaliter dos relegata, non bis, sed semel deberi fundum.

§ 15.- Ibidem Mela coniungit, si fundus in dote fuit locatus a marito ad certum tempus, uxorem non alias fundum ex relegatione consequi, quam si caverit se passuram colonum frui, dummodo ipsa pensiones percipiat.

2.- ULPIANUS; *libro V, Disputationum*.- Quum quis uxori suae dotem relegat fideique commissum ab ea relinquit, hoc fideicommissum ex commodo, quod ex relegatione mulier sentit, aestimabitur, et ita Celsus quoque libro vicesimo Digestorum scripsit. quod si necessariae fuerunt impensae, quae ipso iure

§ 12.- He also asks, in case the dowry should be bequeathed to someone else who is charged to return it to the woman, whether the Falcidian Law will apply to the legacy. He says that it will apply, but that she can by the dotal action recover any deficiency which the trust may have suffered on this account. I ask whether the benefit of payment should be taken into consideration in this legacy, as if the dowry had been paid directly to the wife herself. I think that this ought to be done.

§ 13.- Julianus also asks, if a dowry is bequeathed to a wife, and she is asked to pay it to another, whether the Falcidian Law will apply, and he says that it will not, as the trust is invalid. He thinks, however, that where anything, in addition, is bequeathed to the wife, the residue of the trust should be discharged and therefore what is paid her will be subject to the operation of the Falcidian Law. Where, however, the husband is appointed heir to a portion of the father-in-law's estate, and the dowry is bequeathed by the latter as a preferred legacy, the bequest of the dowry will be subject to the Falcidian Law, for the reason that, as the marriage still exists, the dowry is considered not to be due to the woman. But whatever has been deducted through the operation of the Falcidian Law can be recovered by the husband in an action for partition, just as he could recover the entire dowry if it had not been bequeathed to his wife.

§ 14.- Mela says that if a tract of land forming part of the dowry has been especially bequeathed, and after the dowry has been bequeathed in general terms, the land will be due not twice, but only once.

§ 15.- Mela adds, in the same place, that where land forming a part of a dowry has been leased by the husband for a certain time, the wife cannot obtain it under the bequest, unless she furnishes security to permit the tenant to enjoy it, provided she herself receives the rent.

2.- ULPIANUS; *Disputations, Book V*.- Where a husband bequeaths a dowry to his wife, and charges her with a trust, the trust shall be estimated in proportion to the benefit which the woman will receive from immediate payment of her dowry. Celsus also says the same in the Twentieth Book of

§ 12.- El mismo pregunta, si, habiéndose legado a otro la dote, y habiéndosele rogado que se la restituya a la mujer, tendría lugar respecto al legado la ley Falcidia. Y dice que lo tiene, pero que la mujer conseguirá con la acción de dote lo que hay de menos en el fideicomiso. Yo pregunto, si se observaran en este legado los beneficios de la representación lo mismo que si la dote hubiese sido legada a la misma mujer. Y opino que si.

§ 13.- Pregunta el mismo Juliano, si habiéndose legado la dote a la mujer, y habiéndosele rogado que restituya la dote, tendrá lugar la Falcidia. Y dice que no lo tiene, porque también dice que no es válido el fideicomiso. Pero si además se le hubiera legado alguna cosa a la mujer, opina que con lo restante se paga el fideicomiso, el cual se le pagará a la mujer habida ciertamente cuenta de la Falcidia. Pero también habiéndose prelegado por el suegro la dote al marido instituido heredero de una parte, el legado de la dote habrá de soportar la Falcidia, a saber, porque se considera legada la dote indebida subsistiendo todavía el matrimonio; pero lo que la Falcidia quita lo tomará previamente el marido en el juicio de partición de herencia, así como retiraría toda la dote, si no hubiese sido legada.

§ 14.- Escribió Mela, que si hubiera en la dote un fundo, y hubiera sido legado especialmente, y luego hubiera sido legada en general la dote, no se debe el fundo dos veces, sino una.

§ 15.- En el mismo lugar añade Mela, que si un fundo de la dote fue dado por el marido en arrendamiento por cierto tiempo, la mujer no consigue en virtud del legado fundo de otro modo, sino si hubiere dado caución de que ella consentirá que el colono lo disfrute, con tal que la misma perciba las pensiones.

2.- ULPIANO; *Respuestas, libro V*.- Cuando uno lega a su mujer la dote, y a cargo de ella deja un fideicomiso, se estimará este fideicomiso por el beneficio que la mujer experimenta con el legado; y así lo escribió también Celso en el libro vigésimo del Digesto. Pero si hubo gastos necesarios, los cuales

dotem minuunt, amplius dici potest, si tanta quantitas dotis, quam maritus accepit, ei relegata est, oportere dici etiam eam quantitatem posse fideicommissum erogare, quae ipso iure dotem minuit: esse enim mulierem legatariam nemo est qui dubitet. Sed et si non dos, sed pro dote aliquid uxori fuerit legatum, adhuc quasi dos relegata accipitur.

Hoc amplius Iulianus scripsit, etsi non fuerit adiectum pro dote esse legatum, hoc tamen animo relictum, adhuc eius esse condicionis. Uxor igitur si rogetur vel dotem vel quod pro dote legatum est vel quod in vicem dotis ei adscriptum est restituere, non cogetur nisi eatenus, quatenus diximus, restituere:

Et ideo heres instituta rogataque quantitatem hereditatis restituere id demum restituet, quod quantitatem dotis excedit idque quod ex repraesentationis commodo sentit. Nam et si quis, cum a nuru dotem accepisset, filium suum heredem instituerit eumque rogaverit, quidquid ad eum ex hereditate pervenisset, restituere, mox morte uxoris dotem fuerit lucratus, id non restituet quod ex dote percepit, quia matrimonii causa id lucratus est, non ex patris iudicio.

§ 1.- Mulier dotem promisit quadringentorum et dedit fundos duos in ducenta, praeterea nomina debitorum in residua ducenta: mox maritus eius decedens pro dote fundos ei duos non eos, quos in dotem acceperat, reliquit et praeterea duos illos dotales, quos aestimatos acceperat, reliquit fideique eius commisit, ut, quidquid ad se ex hereditate eius pervenisset, id restitueret. Seio cum moreretur: quaerebatur, quantum esset in fideicommisso muliere defuncta. dicebam uxorem hanc, quae rogata est, quidquid ad se pervenerit ex testamento, restituere, in ea esse condicione, ut id demum restituere rogetur, quod deducta dotis quantitate ad eam

the Digest. But if certain necessary expenses were incurred, which, by operation of law, diminished the dowry, and all of it which the husband received is bequeathed to her, it should be held that the entire amount of the expense which diminished the dowry by law must be deducted from the trust, for no one can doubt that the woman is the legatee. If, however, not the dowry, but something in lieu thereof was bequeathed to the wife, this will be understood to be the same as if the dowry was the subject of the bequest.

Julianus goes still farther, for he says that even if it should not be stated that the property was bequeathed in lieu of the dowry, it still will be considered to have been left with that intention. Therefore, if the wife was requested to give up either the dowry or something which was left to her in lieu of it, she will not be compelled to do so, except to the extent which we have stated.

Hence if she was appointed heir, and charged with the transfer of a certain portion of the estate, she would only be compelled to deliver what was in excess of her dowry, and the value of the benefit which he received from immediate payment. For if anyone who has received a dowry from his daughter-in-law should appoint his son his heir, and ask him to deliver to someone else all of the estate which might come into his hands, and he should afterwards obtain the benefit of the dowry through the death of his wife, he will not be compelled to give up the dowry which he had received, for the reason that he profited by it on account of his marriage, and not through the will of his father.

§ 1.- A woman promised a dowry of four hundred aurei, and gave two tracts of land for two hundred of it, and afterwards gave the other two hundred in notes of debtors. Her husband, dying afterwards, left to her, instead of her dowry, two tracts of land which were not the same ones which he had received as part of her dowry; and, in addition to them, the two dotal tracts of land whose value had been appraised; and he charged her by a trust that she would, at the time of her death, deliver to Seius all of his estate which might come into her hands. The question arose, what would be the amount of the trust after the death of the woman? I said that the wife, who was charged to

disminuyen de derecho la dote, se puede decir además, si a ella se le legó tanta cantidad de la dote como la que el marido recibió, que es conveniente se diga que el fideicomiso puede gastar también esta cantidad, que de derecho disminuye la dote; porque no hay nadie que dude que la mujer es legataria. Pero también si no se le hubiere legado a la mujer la dote, sino alguna cosa en lugar de la dote, se entiende igualmente que si hubiera sido legada la dote.

Además de esto escribió Juliano, que aunque no se hubiere añadido que se hizo el legado en lugar de la dote, habiéndose dejado, sin embargo, con esta intención, era también de esta condición. Así, pues, la mujer, si se le rogara que restituya la dote, o lo que por la dote se le legó, o lo que en lugar de la dote se asignó, no será obligada a restituir sino tanto cuanto hemos dicho.

Y por consiguiente, instituida heredera y habiéndosele rogado que restituya la cuantía de la herencia, restituirá solamente lo que excede en la cuantía de la dote y la utilidad que experimenta por el beneficio de la representación. Porque también si uno, habiendo recibido de la nuera la dote, hubiere instituido heredero a su hijo, y le hubiere rogado que restituya todo lo que de la herencia hubiese ido a su poder, y luego por la muerte de la mujer hubiere ganado la dote, no restituirá lo que percibió por razón de la dote, porque esto lo ganó por causa del matrimonio, no por última voluntad del padre.

§ 1.- Una mujer prometió una dote de cuatrocientos, y dió dos fundos por doscientos, y además créditos de deudores por los doscientos restantes; después su marido al fallecer le dejó por la dote dos fundos, no los que había recibido en dote, y además le dejó aquellos dos fundos dotales, que había recibido estimados, y encomendó a su fidelidad, que, cuando muriese, restituyese a Seio todo lo que de su herencia hubiese ido a poder de ella; se le preguntaba, de cuánto sería el fideicomiso habiendo fallecido la mujer. Yo decía, que esta mujer, a quien se le rogó que restituyera todo lo que por el testamento hubiera ido a su poder, se hallaba en el caso de que se le

pervenit: dotem enim recepissee eam magis quam accepisse, salvo eo, quod ex commodo representationis ab ea fideicommittere potuit. Proinde id quidem, quod pro dote maritus ei reliquit, non cogetur restituere, nisi plus fuit in eo quam in quantitate dotis: residuum vero, quod praeterea illi relictum est, cum fructibus cogetur restituere. Habebit igitur praecipuam dotem cum suis fructibus: id vero, quod extrinsecus ei relictum est, cum fructibus, qui ad eam pervenerint, restituet.

3.- IULIANUS; *libro XXXIV, Digestorum*.- Qui ita legat uxori suae: "Titiae amplius quam dotem aureos tot heres meus damnas esto dare", manifestus est dotem quoque relegasse.

4.- AFRICANUS; *libro V, Quaestionum*.- Quum vulgari modo dies legatorum profertur, nihil eam rem ad dotis relegationem pertinere ait, quia suum diem habeat.

5.- MARCIANUS; *libro III, Regularum*.- Dote relegata non est heres audiendus, si velit ob donationes in mulierem factas solutionem differre vel ob impensas alias, quam quae ipso iure dotem minuunt: aliud est enim minorem esse factam dotem, quod per necessarias impensas accidit, aliud pignoris nomine retineri dotem ob ea, quae mulierem invicem prestare aequum est.

6.- LABEO; *libro II, Posteriorum a Iavoleno epitomatorum*.- Quum scriptum esset: «quae pecunia propter uxorem meam ad me venit quinquaginta,

deliver everything which came into her hands under the will, was in a position to be asked to transfer only what she had received after the deduction of the amount of her dowry; for she was entitled to the dowry rather because it was due to her, than as having received it as a legacy, with the exception of what could be claimed under the trust as constituting the benefit resulting from immediate payment. Hence, she will not be compelled to deliver the land which her husband left to her in lieu of her dowry, unless it was of greater value or extent than that which she had brought as such. She, however, will be obliged to give up any excess, together with the profits over and above what had been left to her. Therefore he will be entitled to the dowry with its profits, and anything which was left to her outside of this she must surrender, along with the profits which she obtained from the same.

3.- JULIANUS; *Digest, Book XXXIV*.- Where anyone bequeaths a legacy to his wife, as follows: "Let my heir give so many aurei to Titia in addition to her dowry," it is clear that he also intended to leave her the dowry.

4.- AFRICANUS; *Questions, Book V*.- Where certain dates are fixed for the payment of legacies, as is customary, Africanus says that this does not refer to the legacy of a dowry, because it has its own time of payment.

5.- MARCIANUS; *Rules, Book III*.- Where a dowry has been bequeathed, the heir should not be heard, if he wishes to defer payment of it to the woman on account of donations which have been made to her by her husband, or because of other expenses than those which, by operation of law, diminish a dowry, for it is one thing for a dowry to be diminished by necessary expenses, and another where it is retained because of a pledge; since it is but just that the woman should contribute her share of the indebtedness for which it was given as security.

6.- LABEO; *On the Last Epitomes by Javolenus, Book II*.- Where the following was inserted into a will, "Let my heir give to my wife the sum of fifty

rogara que restituyera solamente lo que, deducido el importe de la dote, fue a su poder; porque ella más bien recuperó la dote que no la recibió, salvo lo que por razón del beneficio de la representación se pudo dejar a cargo de ella por fideicomiso. Por lo tanto, no estará ciertamente obligada a restituir lo que por la dote le dejó el marido, si en ello no hubo más que en el importe de la dote; pero estará obligada a restituir con los frutos el residuo que además se le dejó. Tendrá, pues, ante todo la dote con sus frutos; pero restituirá con los frutos, que hubieren ido a su poder, lo que además se le dejó.

3.- JULIANO; *Digesto, libro XXXIV*.- Es evidente, que quien así hace un legado a su mujer; «esté condenado mi heredero a darle a Ticia, además de la dote, tantos áureos», legó también la dote.

4.- AFRICANO; *Cuestiones, libro V*.- Cuando el día de los legados está prorrogado en el modo vulgar, dice que esto en nada se refiere al legado de la dote, porque tiene su día propio.

5.- MARCIANO; *Reglas, libro III*.- Habiéndose legado la dote no ha de ser oído el heredero, si quisiera diferir el pago por causa de donaciones hechas a la mujer, o por razón de otros gastos que los que de derecho disminuyen la dote; porque una cosa es que se haya hecho menor la dote, lo que acontece por causa de los gastos necesarios, y otra, que a título de prenda se retenga la dote por razón de cosas que es justo que a su vez pague la mujer.

6.- LABÓN; *Obras póstumas compendiadas por Javoleno, libro II*.- Habiéndose escrito: «en lugar de la dote de cincuenta, que por causa de mi mujer vino a

tantundem pro ea dote heres meus dato», quamvis quadraginta dotis fuissent, tamen quinquaginta debere Alfenus Varus Servium respondisse scribit, quia proposita summa quinquaginta adiecta sit.

§ 1.- Item ei, quae dotem nullam habebat, vir sic legaverat: "quanta pecunia dotis nomine et reliqua, pro ea quinquaginta heres dato". Deberi ei legatum Ofilius Cascellius, item et Servii auditores rettulerunt: perinde habendum esse ac si servus alicui mortuus aut pro eo centum legata essent. Quod verum est, quia his verbis non dos ipsa, sed pro dote pecunia legata videtur.

7.- PAPINIANUS; *libro XVIII, Quaestionum*.- Pater dotem a nuru acceptam filio exheredato legavit: heres patris opposita doli exceptione non ante solvere legatum cogendus est, quam ei cautum fuerit de indemnitate soluto matrimonio.

§ 1.- Sed si, priusquam legatum filio solveretur, mulier dotem suam recipiavit, frustra filius de legato aget.

§ 2.- Sed si Lex Falcidia locum in legato dotis adversus filium exheredatum habuerit et mulier solutionem ratam fecerit, propter eam quantitatem, quam heres retinuerit, utilis actio dotis ei dabitur. quod si ratum non habeat, defendi quidem debebit heres a viro, qui se defensurum promisit: sed si totam litem vir solus subierit, actio iudicati, si cautum non erit, pro ea quantitate, quae iure Falcidia petenda est, adversus heredem dabitur.

§ 3.- Sed si, priusquam legatum filio solveretur, mulier divertit, quamquam ipsa nondum praecipere dotem possit, non ideo tamen actio filii differtur: quia tunc isdem diebus filio solvi dotem responsum est, cum patri pro parte heres exstitit et ad praeceptionem

aurei, which came into my hands through her and as much more in lieu of her dowry," Alfenus Verus says that Servius was of the opinion that, although the dowry was only composed of forty aurei, fifty were, nevertheless, due, because an additional sum of fifty was added.

§ 1.- Likewise, where a husband made a bequest to his wife, who had not brought him any dowry, in the following terms, "Let my heir give the sum of fifty aurei, instead of the money which I received from my wife by way of dowry," Ofilius, Cascellius, and the pupils of Servius assert that the legacy is due to her; and hence it must be considered similar to the case where a slave, who is dead, has been bequeathed to someone, or a hundred aurei has been left in his stead. This is correct, because by these words not the dowry itself, but money in lieu of it is held to have been bequeathed.

7.- PAPINIANUS; *Questions, Book XVIII*.- A father bequeathed to his disinherited son the dowry which he had received from his daughter-in-law. If the heir of the father should file an exception on the ground of bad faith, he will not be compelled to pay the legacy, unless security is given him that he will be indemnified in case the marriage is dissolved.

§ 1.- But if, before the legacy has been paid to the son, the woman should recover her dowry, the son will in vain bring an action to recover the legacy.

§ 2.- If, however, the Falcidian Law is applicable to the legacy of the dowry against the disinherited son, and the woman should have ratified the payment, she will be granted a dotal equitable action, based on the amount of the legacy which the heir retained. But if she should not ratify it, the heir must be defended against her by the husband, who promised that he would do so, but if the latter should alone be compelled to undertake the defence, an action on the judgment for the amount claimed under the Falcidian Law will be granted against the heir, if security is not furnished.

§ 3.- But if the wife should obtain a divorce from the son before the legacy is paid, although she cannot yet secure her dowry, the action of the son will, nevertheless, not be deferred for that reason; because when it was decided that the dowry should be paid to

mi poder en dinero, dé mi heredero otro tanto» escribe Alfeno Varo que respondió Servio, que aunque hubiesen sido cuarenta los de la dote, se deben sin embargo los cincuenta, porque se añadió la expresada suma de cincuenta.

§ 1.- Asimismo, a una, que no tenía dote, le había hecho así un legado su marido: «por todo el dinero recibido a título de dote, y por lo demás, de mi heredero cincuenta»; Ofilio, Cascelio y también los discípulos de Servio, dijeron que se le debe el legado; que se ha de considerar lo mismo que si para alguien hubiese muerto un esclavo, o en lugar de él se hubiese legado la suma de ciento; lo que es verdad, porque con estas palabras se considera que se legó, no la misma dote, sino dinero en lugar de la dote.

7.- PAPINIANO; *Cuestiones, libro XVIII*.- Un padre le legó a su hijo desheredado la dote recibida de la nuera; el heredero del padre, opuesta la excepción de dolo, no ha de ser obligado a pagar el legado antes que se le haya dado caución de indemnidad habiéndose disuelto el matrimonio.

§ 1.- Pero si, antes que se le pagase al hijo el legado, la mujer recuperó su dote, inútilmente ejercitará el hijo la acción por el legado.

§ 2.- Pero si hubiere tenido lugar la ley Falcidia contra el hijo desheredado en el legado de la dote, y la mujer hubiere ratificado el pago, se le dará la acción útil de dote por la cantidad que el heredero hubiere retenido; mas si no lo ratificara, deberá ciertamente ser defendido el heredero por el marido, que prometió defenderlo, pero si solo el marido hubiere soportado todo el litigio, se dará contra el heredero, si no se hubiere dado caución, la acción de cosa juzgada por la cantidad que se ha de pedir por derecho de la Falcidia.

§ 3.- Pero si antes que se le pagase al hijo el legado se divorció la mujer, aunque ella no pueda retirar todavía la dote, sin embargo, no por esto se difiere la acción del hijo porque se respondió que en este caso se le paga al hijo en los mismos días la dote. Cuando

dotis soluto matrimonio, postquam heres exstitit, admissus est.

§ 4.- Si forte per errorem cautio defensionis omissa sit ex causa fideicommissi filius dotem acceperit, ut indebitum fideicommissum non repeteretur: cautiones enim praestandae necessitas solutionem moratur, non indebitum facit quod fuit debitum: sed non erit iniquum heredi subveniri.

§ 5.- Quid ergo si patris heres solvendo non sit? nonne iuste mulieri dabitur adversus virum utilis actio dotis? cui dos perire non debet, quia non interposuit per errorem heres cautionem.

8.- IDEM; *libro VII, Responsorum*.- Vir uxori, quae dotem in mancipiis habebat, pecuniam pro dote legaverat: vivo viro mancipiis mortuis uxor post virum vita decessit. ad heredem eius actio legati recte transmittitur, quoniam mariti voluntas servanda est.

9.- IDEM; *libro VIII, Responsorum*.- «Uxori meae Fundum Cornelianum et quae nuptura optulit aestimata in speciebus restitui volo». respondi non aestimatum praedium in dotem datum exceptum non videri, sed universa dote praelegata rerum aestimatarum pretium non relictum, verum ipsas res, quales invenirentur.

10.- SCAEVOLA; *libro VIII, Quaestionum*.- Si seiae pro dote centum fundus legatus sit idemque Maevio: quod Maevio Falcidia aufert, pro eo quasi concursus non fuerit, mulier plus vindicet, quia amplius sit in dote mulieris.

him at that time, it was also held that this should not be done unless he became the heir to a portion of his father's estate, and that, after the marriage was dissolved, and he had accepted the estate, would have been admitted to receive the dowry before distribution.

§ 4.- If security for the defence of the heir should have been neglected through mistake, and the son should receive the dowry under a trust, the trust cannot be claimed again as not having been due; for the necessity of furnishing security causes delay, and does not render that not due, which actually was due. Hence it will not be inequitable to grant relief to the heir.

§ 5.- But what if the heir of the father was not solvent? Could not a praetorian dotal action legally be granted to the woman against her husband; for her dowry should not be lost merely because the heir failed to give security through mistake?

8.- THE SAME; *Opinions, Book VII*.- A man bequeathed a sum of money, in lieu of her dowry, to his wife, who had brought him her dowry in slaves. The slaves having died during the lifetime of the husband, his wife died after he did. The right of action to recover the legacy will pass by law to her heir, as the will of the husband must be executed.

9.- THE SAME; *Opinions, Book VIII*.- "I desire that the Cornelian Estate, and whatever property my wife brought me at the time of her marriage, and which was appraised, be returned to her in kind." I held that the said tract of land which had formed part of the dowry, but had not been appraised, did not appear to have been excepted, but that the entire dowry had been bequeathed, and that not the value of the appraised property, but the property itself had been left in the condition in which it might be found.

10.- SCAEVOLA; *Questions, Book VIII*.- If a tract of land of the value of a hundred aurei should be left to Seia, in lieu of her dowry, and the same should be devised to Mævius, the woman can recover, in addition, the amount which the Falcidian Law will take from Mævius, because they are not, so to speak, joint legatees of the same, as there is more included in

fue heredero del padre en una parte, y fue admitido al cobro de la dote, disuelto el matrimonio, después que quedó heredero.

§ 4.- Si acaso por error fue omitida la caución de la defensa, y el hijo hubiere recibido la dote por causa del fideicomiso, no se repetirá el fideicomiso como indebido. Porque la necesidad de prestar la caución demora el pago, y no hace indebido lo que fue debido, pero no será injusto que se auxilie al heredero.

§ 5.- Luego ¿qué se dirá, si el heredero del padre no fuere solvente, acaso no se le dará con justicia a la mujer contra el marido la acción útil de dote? Para ella no debe perecer la dote, porque el heredero no haya interpuesto por error la caución.

8.- EL MISMO; *Respuestas; libro VII*.- Un marido había legado por la dote una cantidad a su mujer, que tenía la dote en esclavos y, habiendo muerto los esclavos en vida del marido, falleció la mujer después del marido; la acción del legado se transmite debidamente a su heredero, porque se ha de observar la voluntad del marido.

9.- EL MISMO; *Respuestas, libro VIII*.- «Quiero que a mi mujer se le restituyan en especie el fundo Corneliano y los bienes estimados que al casarse me ofreció» respondí, que no se considera exceptuado el predio no estimado dado en dote, sino que habiéndose prelegado toda la dote no se dejó el precio de los bienes estimados, sino los mismos bienes, tales como se encontrasen.

10.- SCÉVOLA; *Cuestiones, libro VIII*.- Si a Seia se le hubiera legado por su dote de ciento un fundo, y lo mismo a Mevio, lo que a Mevio le quita la Falcidia lo reivindicará de más la mujer, como si no hubiere habido concurso, porque importa más la dote de la mujer.

11.- PAULUS; *libro VII, Responsorum*.- Seia cum nuberet Lucio Titio, dedit dotis nomine centum aureos et adhibuit Quintum Mucium, qui nihil numeravit, sed dotem stipulatus est, si morte mulieris solutum fuerit matrimonium. Seia moriens testamento suo ita cavit: "Lucio Titio marito meo, cui maximas gratias ago, dari volo super dotem, quam ei dedi, tot aureos". Quaero, cum instituit Lucium Titium convenire Quintus Mucius ex stipulatu actione, an repellere eum maritus possit ex verbis testamenti. respondit, si Quintus Mucius mandante Seia non donationis causa stipulatus est, heredibus mulieris eum teneri et ideo Quintum Mucium exceptione repellendum esse. Quod si donationis causa Seia stipulari permisisset, videri eum in eum casum, qui morte mulieris exstitit mortis causa stipulatum: et ideo fidei eius committi potuisse in eum casum dicendum fore.

12.- SCAEVOLA; *libro III, Responsorum*.- Qui dotem in pecunia numerata et aestimatis rebus acceperat, uxori ita legavit: "Seiae uxori meae, si omnes res, quae tabulis dotalibus contineantur, heredi meo exhibuerit et tradiderit, summam dotis, quam mihi pro ea pater eius intulit, dari volo: hoc amplius denarios decem". Quaesitum est, cum res in dotem datae plures ipso usu finitae essent nec moriente marito fuerant, an quasi sub impossibili condicione legatum datum debeatur. respondi videri condicioni paritum, si quod ex rebus in dotem datis supererat, in potestatem heredis pervenit.

13.- LABEO; *libro I, Pithanorum a Paulo epitomatorum*.- Paulus: si filius familias, uxorem cum

the dowry of the woman than in the remainder of the land.

11.- PAULUS; *Opinions, Book VII*.- Seia, when she married Lucius Titius, gave him a hundred aurei by way of dowry, and called in Quintus Mucius, who did not pay anything, but stipulated for the return of the dowry, if the marriage should be dissolved by the death of the wife. Seia, at the time of her death, provided as follows by her will: "I wish the sum of so many aurei to be given to my husband, Lucius Titius, to whom I am under many obligations, in addition to what I have given him as my dowry." I ask, if when Quintus Mucius instituted proceedings against Lucius Titius by an action founded on the stipulation, could the husband defeat him by setting out the terms of the will? The answer was that, if Quintus Mucius made the stipulation under the direction of Seia, and not for the purpose of making a donation, he will be liable to the heirs of the woman, and therefore Quintus Mucius will be barred by an exception. If, however, Seia permitted him to make the stipulation as a donation, he will be in the same position as one who had stipulated mortis causa, and therefore it must be said that in this instance he could have been charged with the execution of the trust.

12.- SCAEVOLA; *Opinions, Book III*.- Where a husband who had received a dowry from his wife in money, and other property which had been appraised, made a bequest to her as follows: "If my wife, Seia, should be able to show to my heir all the property contained in her dotal contract, and pay to him the amount which her father gave me for her, by way of dowry, I wish ten denarii over and above this sum to be paid to her." As there was considerable property belonging to the dowry which was worn out by use and which did not exist at the time of the death of the husband, the question arose whether the legacy should be paid under an apparently impossible condition. I answered that the condition would seem to have been complied with, if what remained of the property given as dowry had come into the hands of the heir.

13.- LABEO; *Abridgment of Probabilities by Paulus, Book I*.- Paulus: If a son under paternal

11.- PAULO; *Respuestas, libro VIII*.- Seya, al casarse con Lucio Ticio, le dio cien áureos a título de dote, y presentó a Quinto Mucio, que no entregó nada, pero que estipuló la dote, si el matrimonio se disolviera por muerte de la mujer; Seya al morir dispuso así en su testamento: «quiero que a Lucio Ticio, mi marido, a quien le doy muchas gracias, se le den, además de la dote que le dí, tantos áureos»; pregunto, si, habiendo querido Quinto Mucio demandar a Lucio Ticio con la acción de lo estipulado, podrá el marido repelerlo en virtud de las palabras del testamento. Respondió que si Quinto Mucio estipuló por mandato de Seya, no por causa de donación, estaba obligado a los herederos de la mujer, y que por lo tanto debía ser repelido Quinto Mucio con la excepción; pero que si Seya hubiese permitido que estipulara por causa de donación, se considera que él estipuló por causa de muerte para el caso que sobrevino con la muerte de la mujer, y que por lo tanto se habrá de decir que se le pudo encomendar el fideicomiso para este caso.

12.- SCÉVOLA; *Respuestas, libro III*.- Uno, que había recibido la dote en dinero contante y en bienes estimados, le hizo así un legado a su mujer: «a Seya, mi mujer, si exhibiere a mi heredero todas las cosas que se contienen en las escrituras dotales, y le entregare el importe de la dote que por ella me dio su padre, quiero que además de esto se le den diez denarios», se preguntó, si habiendo perecido por su propio uso muchas de las cosas dadas en dote y no existiendo al fallecer el marido, se deberá el legado como dado bajo condición imposible. Respondió, que se considera que se atendió a la condición, si pasó a poder del heredero lo que quedaba de las cosas dadas en dote.

13.- LABEÓN; *Dichos recopilados por Paulo, libro I*.- Dice Paulo; si un hijo de familia, teniendo

haberet, dotem ab ea acceperat, deinde pater familias factus dotem ei ut solet legavit: quamvis patri heres non erit, tamen id legatum debebitur.

14.- SCAEVOLA; *libro XV, Digestorum*.- Theopompus testamento facto duas filias et filium aequis partibus instituit heredes et codicillis ita cavuit: Filiam meam Crispinam, cuam vellem tradi nuptui, cuicumque amici mei et cognati approbarent, providebit tradi Pollianus sciens mentem meam, in aequalibus portionibus, in quibus et sororem eius tradidi; Pollianus a marito puellae iuratus scripsit voluisse patrem eandem quantitatem in dotem accipere etiam minorem filiam, quam maior accepisset. Quaero, an eandem summam dotis nomine coheredes extra partem hereditatis minori filiae praestare debeant. respondit eum cuius notio est aestimaturum, ut eadem quantitas ex communi praecipua minori filiae dotis nomine detur.

15.- GAIUS; *libro II, de legatis ad Edictum Praetoris*.- Licet placeat pigneratas res vel in publicum obligatas heredem, qui dare iussus est, liberare debere, tamen si is qui tales res in dotem accepit dotem praelegaverit, non cogetur heres liberare eas, nisi aliud specialiter testator dixerit.

16.- PAULUS; *libro II, ad Vitellium*.- Qui dotem a matre uxoris acceperat et stipulanti ei promiserat, testamento uxori dotem legavit. cum quaesitum esset, an uxor dotis summam consequi posset, respondit Scaevola non videri dari uxori, quod necesse sit matri reddi. Alias sic respondit non videri, nisi manifeste uxor docuisset eam testantis voluntatem fuisse, ut onerare heredes duplici praestatione dotis vellet.

control, who had a wife from whom he had received a dowry, should afterwards become the head of a household, and, as is customary, bequeath the dowry to her, the legacy will still be due, even though he did not become the heir of his father.

14.- SCAEVOLA; *Digest, Book XV*.- Theopompus, having made a will, appointed his two daughters and his son equal heirs to his estate, and inserted the following provision in a codicil: "I wish my daughter, Crispina, to be married to someone of whom my friends and relatives will approve; and Pollianus, who knows my intentions, will provide for her dowry, in proportion to the equal shares of my estate which I have left to her and her sister." Pollianus, having been sworn at the instance of the husband of the girl, stated that her father had intended the young daughter to receive as much, by way of dowry, as the elder one. I ask whether the co-heirs will be required to give the same sum to the younger daughter, over and above her share of the estate. The answer was that the magistrate, who had jurisdiction of the case, should decide that the same amount, after having been taken from the bulk of the estate, shall be given to the younger daughter, by way of dowry.

15.- GAIUS; *Concerning Legacies under the Praetorian Edict, Book II*.- Although it is established that property which the heir is ordered to deliver, and which has been pledged or publicly hypothecated, must be released, still, where a husband has received property of this kind by way of dowry, and bequeaths it, his heir will not be compelled to release it, unless the testator specially desired this to be done.

16.- PAULUS; *On Vitellius, Book II*.- A certain man received a dowry from the mother of his wife, and, after having entered into a stipulation with her, left the dowry to his wife by his will. The question having arisen whether the wife could recover the amount of the dowry, Scaevola was of the opinion that it did not seem to be necessary to return to the mother what had been given to the wife; or in other words, he held that unless the wife could clearly prove that this was the wish of the testator, it did not appear that he intended to burden the heirs with a double payment of

mujer, habiendo recibido de ella la dote, y después, hecho padre de familia, le legó la dote, como se acostumbra, aunque no fuere heredero de su padre, se deberá, sin embargo, este legado.

14.- SCÉVOLA; *Digesto, libro XV*.- Teopompo, habiendo hecho testamento, instituyó herederos por partes iguales a dos hijas y un hijo, y dispuso así en los codicilos; «Poliano, que conoce mi intención, cuidará de que mi hija Crispina, que yo quería que fuese dada en matrimonio a quien mis amigos y cognados aprobaran, sea dada con iguales partes con que yo también di a su hermana»; habiendo jurado Poliano a instancia del marido de la joven, declaró por escrito, que el padre quiso que también la hija menor recibiese en dote la misma cantidad que hubiese recibido la mayor; pregunto, si los coherederos deberán entregar a la hija menor a título de dote, la misma cantidad fuera de su porción de la herencia. Respondió que aquel a quien corresponde el conocimiento estimará que a título de dote se le dé a la hija menor la misma cantidad retirada previamente de la masa común.

15.- GAYO; *Comentarios al Edicto del Pretor, libro II, de los legados*.- Aunque esté establecido, que el heredero, a quien se le mandó que las diera, debe liberar las cosas empeñadas, u obligadas al público, sin embargo, si el que recibió tales cosas en dote hubiere prelegado la dote, no será obligado el heredero a liberarlas, a no ser que el testador hubiere dicho especialmente otra cosa.

16.- PAULO; *Comentario, a Vitelio, libro II*.- Uno, que de la madre de la mujer había recibido la dote, y se la había prometido a ella al estipularla, legó en el testamento la dote a su mujer; habiéndose preguntado si podría conseguir la mujer el importe de la dote, respondió Scévola, que no parece que se le da a la mujer lo que es necesario que se le restituya a la madre; y en otra parte respondió así, que no parecía, a no ser que evidentemente hubiese probado la mujer que la voluntad del testador fue esta, que quería gravar a los herederos con el doble pago de la dote.

17.- SCAEVOLA, *libro III, Responsorum*.- Uxori ita legavit: "uxor mea quidquid ei comparavi et quod mihi dedit e medio sibi sumat": quaero, an dos praelegata videatur. Respondit verbis quae proponerentur videri et de dote legata loqui, nisi aliud testatorem voluisse probaretur.

§ 1.- «Titiae uxori meae, quanta pecunia ad me inve stipulationem dotis eius nomine pervenit, quae dos est dotibus duobus consignatis instrumentis centum aureorum». Quaesitum est, an utramque summam consequi possit. Respondit nihil proponi, cur non possit.

TIT. V

DE OPTIONE VEL ELECTIONE LEGATA

1.- ULPIANUS; *libro II, ad Sabinum*.- Divus pius Caecilio Proculo rescripsit eum, cui servorum legata sit electio, tres posse eligere.

2.- IDEM; *libro XX, ad Sabinum*.- Quotiens servi electio vel optio datur, legatarius optabit quem velit:

§ 1.- Sed et homine generaliter legato arbitrium eligendi quem acciperet ad legatarium pertinet.

§ 2.- Data igitur optione si quis optaverit alienum servum vel hominem liberum, videndum est, an consumpsit optionem: et puto non consumi.

§ 3.- Eum, cui centum amphorarum electio data sit, acetum eligentem non consumere optionem, si id acetum elegerit, quod vini numero pater familias non habuit:

the dowry.

17.- SCAEVOLA; *Opinions, Book III*.- A man made a bequest to his wife as follows: "Let my wife take from the bulk of my estate whatever I have obtained for her use, and what she has given to me." I ask whether it should be held that a preferred legacy of her dowry had been bequeathed. The answer was that, in accordance with the facts stated, the legacy of the dowry should also be understood to be meant, unless it was proved that the intention of the testator was otherwise.

§ 1.- "I give to my wife Titia, the money which came into my hands as her dowry, or has been stipulated for as such, which is evidenced by two dotal instruments, duly sealed, and amounts to the sum of a hundred aurei." The question arose whether the woman can recover both sums. The answer was that there seems to be no reason why she cannot do so.

TITLE V

CONCERNING THE OPTION OR CHOICE OF ARTICLES BEQUEATHED AS A LEGACY

1.- ULPIANUS; *On Sabinus, Book II*.- The Divine Pius stated in a Rescript addressed to Cæcilius Proculus, that, where a choice of slaves was bequeathed, the legatee could select three.

2.- THE SAME; *On Sabinus, Book XX*.- Whenever the choice of selection of a slave is bequeathed, the legatee can choose anyone that he wishes.

§ 1.- When a slave is bequeathed in general terms, the right of selection also belongs to the legatee.

§ 2.- Therefore, where an option is given, and the legatee chooses a slave belonging to another, or a freeman, it should be considered whether he has lost his right of selection. I think that he has not done so.

§ 3.- Where a legatee, to whom has been left the choice of a hundred measures of wine, selects vinegar, he is not, by doing so, considered to have lost his right of selection, if the testator did not include

17.- SCÉVOLA; *Respuestas, libro III*.- Uno le legó así a su mujer: «tome para sí mi mujer de la masa todo lo que para ella compré, y lo que me dio» pregunto, si se considerará prelegada la dote. Respondió, que en las palabras que se exponían se consideraba que se habla también del legado de la dote, a no ser que se probase que otra cosa quiso el testador.

§ 1.- «A Ticia, mi mujer, tanta cantidad cuanta a título de dote vino a mi poder, o se comprendió en la estipulación, cuya dote que se halla en dos instrumentos dotalés sellados es de cien áureos»; se preguntó, si podría obtener una y otra suma. Respondió, que nada se proponía para que no pudiera.

TÍTULO V

DEL LEGADO DE OPCIÓN O DE ELECCIÓN

1.- ULPIANO; *Comentarios a Sabino, libro II*.- El Divino Pío respondió por rescripto a Cecilio Próculo, que aquel, a quien haya sido legada la elección de esclavos, puede elegir tres.

2.- EL MISMO; *Comentarios a Sabino, libro XX*.- Siempre que se da la elección o la opción de un esclavo, el legatario optará por el que quiera.

§ 1.- Pero aun habiéndose legado en general un esclavo le pertenece al legatario la facultad de elegir el que haya de recibir.

§ 2.- Así, pues, si habiéndose dado la opción alguien hubiere optado por un esclavo ajeno, o por un hombre libre, se ha de ver si consumó la opción; y opino que no la consuma.

§ 3.- Aquel, a quien se le dio la elección de cien ánforas, no consuma la opción eligiendo vinagre, si hubiere elegido vinagre que el padre de familia no tuvo en calidad de vino.

vinegar under the head of wine.

3.- IDEM; *libro XXIII, ad Sabinum*.- Scilicet si ante exhibitionem, hoc est ante degustationem acetum elegerit.

4.- PAULUS; *libro III, ad Sabinum*.- Scyphi electione data si non omnibus scyphis exhibitis legatarius elegerit, integram ei optionem manere placet (nisi ex his dumtaxat eligere voluisset, cum sciret et alios esse):

5.- AFRICANUS; *libro V.- Quaestionum*.- Nec solum si fraude heredis, sed etiam si alia qualibet causa id eveniret.

6.- POMPONIUS; *libro VI, ad Sabinum*.- Mancipiorum electio legata est. Ne venditio, quandoque eligente legatario, interpelletur, decernere debet praetor, nisi intra tempus ab ipso praefinitum elegerit, actionem legatorum ei non competere. quid ergo si die praeterito, sed antequam venderet heres, vindicare legatarius velit? quia non est damnum subiturus heres, propter quod decernere praetor id solet. et quid si die praeterito, quem finierit praetor, heres aliquos ex servis vel omnes manumiserit? nonne praetor eorum tuebatur libertatem? ergo totiens actio deneganda non est, si omnia in integro sint. Idem est et si pignori aliquos ex his servis heres dederit post diem vel vendiderit.

7.- PAULUS; *libro X, Quaestionum*.- Immo et si quosdam servos distraxit, quosdam retinuit, non est audiendus legatarius, si velit optare ex retentis ab herede, cum iam disposuerit familiam heres.

3.- THE SAME; *On Sabinus, Book XXIII*.- This, of course, will be the case, if he should select the vinegar before the wine was shown to him, and before it was tasted.

4.- PAULUS; *On Sabinus, Book III*.- Where the choice of a cup is left as a legacy, if the legatee makes a selection before all the cups have been shown to him, it is held that he still retains his right; unless he intended to choose one of those which he has seen when he knew that there were others.

5.- AFRICANUS; *Questions, Book V*.- The above-mentioned rule applies not only when this takes place through the fraud of the heir, but also when it happens for any other reason whatsoever.

6.- POMPONIUS; *On Sabinus, Book VI*.- The choice of several slaves is bequeathed. In order that the sale of the slaves belonging to the estate may not be hindered while the legatee is making his choice, it is the duty of the Praetor to decree that unless he avails himself of his right within a certain time fixed by the latter, he will not be entitled to an action to recover the legacy. But what if, after the time had elapsed, and before the heir had sold the slaves, the legatee should desire to make a selection? The Praetor is accustomed to appoint a time, in order that the heir may not sustain any loss. What course should be pursued, if the time prescribed by the Praetor having expired, the heir should manumit some or all of the slaves? Would not the Praetor be obliged to maintain their freedom? The action must not be refused where everything remains intact. The same rule will apply where the heir has given away some of the slaves, or sold them, after the prescribed time has elapsed.

7.- PAULUS; *Questions, Book X*.- Moreover, if the heir has sold some of the slaves and kept others, the legatee should not be heard if he wishes to make his selection out of those retained by the heir, as the latter has already disposed of the slaves belonging to the estate.

3.- EL MISMO; *Comentarios a Sabino, libro XXIII*.- Por supuesto, si hubiere elegido el vinagre antes de la exhibición, esto es, antes de la prueba.

4.- PAULO; *Comentarios a Sabino, libro III*.- Si habiéndose dado la elección de un vaso el legatario hubiese elegido sin haber sido exhibidos todos los vasos, está decidido que le queda íntegra la opción, a no ser que hubiese querido elegir solamente de aquello, sabiendo que también había otros.

5.- AFRICANO; *Cuestiones, libro VI*.- Y no solamente si esto hubiere sucedido por fraude del heredero, sino también si por otra cualquier causa.

6.- POMPONIO; *Comentarios a Sabino, libro VI*.- Se legó la elección de esclavos; a fin de que no se impida la venta, eligiendo el legatario cuando quiera, debe determinar el Pretor, que si no hubiese elegido dentro del tiempo fijado por él, no le compete la acción de legados. ¿qué se dirá, pues, si transcurrido el término, pero antes que el heredero vendiese, quisiera reivindicarlos el legatario, -porque no ha de sufrir el heredero el perjuicio, por razón del cual suele el Pretor decretar esto-? ¿Y qué, si, transcurrido el término, que hubiere fijado el Pretor, el heredero hubiere manumitido a algunos o a todos los esclavos? ¿acaso no amparará el Pretor la libertad de los mismos? Luego no se ha de denegar la acción siempre y cuando todo se halle íntegro. Lo mismo es, también si después del término el heredero hubiere dado en prenda o vendido algunos de estos esclavos.

7.- PAULO; *Cuestiones, libro X*.- Aún si el heredero enajenó algunos esclavos, y retuvo otros, no ha de ser oído el legatario, si quisiera optar entre los retenidos por el heredero, habiendo dispuesto ya de la servidumbre el heredero.

8.- POMPONIUS; *libro VI, ad Sabinum*.- Si tibi electio servi et mihi reliqui legati sunt, decernendum est a praetore, nisi intra certum tempus optaveris, petitionem tibi non datu iri.

§ 1.- Si ex quattuor viriolis duae, quas elegerissem, mihi legatae sint, sive duae solae relictas sint sive ab initio duae solae fuerint, valet legatum.

§ 2.- Unius hominis mihi et tibi optio data est: cum ego optassem, si non mutassem voluntatem, deinde tu eundem optaveris, utriusque nostrum servum futurum: quod si ante decessissem vel furiosus factus essem, non futurum communem, quia non videor consentire, qui sentire non possum: humanius autem erit, ut et in hoc casu quasi semel electione facta fiat communis.

§ 3.- Si rerum depositarum electio mihi relicta sit, et ad exhibendum cum eo, apud quem depositae sint, agere potero et cum herede agere, ut is depositi agendo facultatem mihi eligendi praestet.

9.- IULIANUS; *libro XXXII, Digestorum*.- Quum ita legatur: «Titio Stichum do lego, si Pamphilum non elegerit: eidem Titio Pamphilum, si Stichum non elegerit», simile est, atque si ita legatum fuisset: "Titio Stichum aut Pamphilum, utrum eorum volet, do lego".

§ 1.- Quaesitum est, si Stichus sub conditione liber esse iussus sit et mihi optio servi data esset vel servus generaliter legatus esset, quid iuris esset.

Dixi commodius constitui eum, qui sub conditione libertatem Stichus det et optionem servorum, non cogitare de Stichus, sicuti constat non cogitare eum de eo, cui praesentem libertatem dederit: secundum quod si Stichum optavero vel elegero, nihil agam et ex ceteris nihilo minus optabo.

8.- POMPONIUS; *On Sabinus, Book VI*.- Where the choice of a slave is left to you, and the rest of them are bequeathed to me, it must be held by the Praetor that, unless you make a selection within a certain time, the right of action will be lost.

§ 1.- Where, out of four bracelets, the two which I may choose are bequeathed to me, or only two are left; or where, in the first place, there were only two; the legacy is valid.

§ 2.- Where the choice of a single slave is bequeathed to you and myself, and I make my selection, and do not change my mind, and you select the same slave, he will belong to both of us in common. If, however, I should die, or become insane, before you make your choice, the slave will not belong to us in common, because, as I have lost my mind, I am not considered to have given my consent. The more equitable rule, in this instance, will be that, as I have once made my choice, the slaves will belong to us as joint owners.

§ 3.- If the choice of articles deposited with someone else is bequeathed to me, I can bring suit for the production of the same against the person with whom it was deposited; or I can proceed against the heir to compel him to bring an action on deposit against the party having the property, to compel him to give me an opportunity to make my selection.

9.- JULIANUS; *Digest, Book XXXII*.- Where a bequest is made as follows, "I give and bequeath Stichus to Titius, if he does not select Pamphilus," it is the same as if the bequest had been, "I do give and bequeath to Titius, either Stichus or Pamphilus, whichever one of them he may select."

§ 1.- If Stichus was ordered to be free under a condition, and I was left the choice of a slave, or one was bequeathed to me in general terms, the question arose, what would be the law?

I said that it would be more convenient to decide that he who grants freedom to Stichus under some condition, and then bequeaths the choice of slaves, did not have Stichus in his mind at the time; just as it is established that he did not have him in view on whom he bestowed freedom without delay. In accordance with this, if I should choose or select Stichus, my act will be void, and I will still be entitled

8.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si a ti se te hubiere legado la elección de un esclavo y a mí los demás, se ha de decretar por el Pretor, que, si no hubieses optado dentro de cierto tiempo, no se te habrá de dar la petición.

§ 1.- Si de cuatro brazaletes me hubieran sido legados los dos que yo hubiese elegido, es válido el legado, ora hayan sido dejado dos solos, ora hubiere habido dos solos desde el principio.

§ 2.- Se nos dio a mí y a ti la opción de un solo esclavo; si yo hubiese optado, y no hubiese cambiado de voluntad, y después hubieres optado por el mismo, el esclavo habrá de ser de nosotros dos; pero si yo hubiese fallecido antes, o me hubiese vuelto loco, no habrá de ser común, porque no parece que consiento yo, que no podría consentir; pero será más humano que también en este caso se haga común, como habiéndose hecho ya una vez la elección.

§ 3.- Si se me hubiera dejado la elección de cosas depositadas, podré ejercitar la acción de exhibición contra aquel en cuyo poder estén depositadas, y demandar al heredero, para que éste, ejercitando la acción de depósito, me dé la facultad de elegir.

9.- JULIANO; *Digesto, libro XXXII*.- Cuando se lega así: «doy y lego Stico a Ticio, si no hubiere elegido a Pánfilo», es igual que si se hubiese legado así: «doy y lego Stico o Pánfilo a Ticio, el que de ellos quiera».

§ 1.- Se preguntó, qué derecho habría si se hubiese mandado que Stico fuese libre bajo condición, y a mí se me hubiese dado la elección de un esclavo, o se me hubiese legado en general un esclavo.

Dije, que mas bien se determina que el que bajo condición da la libertad a Stico, y la opción de los esclavos, no piensa en Stico, como es evidente que él no piensa en aquel a quien de presente hubiere dado la libertad; según lo cual, si yo hubiere optado por Stico o lo hubiere elegido, no haré nada, y optaré, no obstante, entre los demás.

§ 2.- In eodem casu quaesitum est, si optione servorum data, antequam optarem, condicio statutae libertatis defecisset, an Stichum optare possim. Puto Mucianae sententiae adsentendum, qua placet ipsa libertate legatum peremi, non datione statutae libertatis: quare sive vivo testatore sive post mortem eius et ante aditam hereditatem condicio statutae libertatis defecerit, legatum erit utile: nam sicut pura libertas, ita statuta libertas aditae hereditatis tempore vires accipit. Ideoque Stichum optare possum.

10.- IDEM; *libro XXXIV.- Digestorum.-* Si Pamphilo servo Lucii Titii servus generaliter legatus sit, deinde dominus Pamphili, postquam dies legati cesserit, eum manumisisset: si quidem Titius servum vindicaverit, extinguatur Pamphili legatum, quia non esset in hereditate qui possit optari. si vero Titius legatum a se repudiasset, Pamphilum optare posse legatum constat: licet enim manumissione Pamphili duae personae constituerentur Titii et Pamphili, unius tamen rei legatum inter eas vertitur et Titio vindicante optio extinguatur, repudiante Pamphilus optare potest.

11.- IDEM; *libro XXXVI.- Digestorum.-* Si Eros Seio legatus sit et Eroti fundus, deinde optio servi Maevio data fuerit isque erotem optaverit, fundus ad solum seium pertinebit, quoniam aditae hereditatis tempore is solus erit, ad quem posset legatum pertinere. Nam et cum servo communi alter ex sociis legat, idcirco ad solum socium totum legatum pertinet, quoniam die legati cedente solus est, qui per eum servum possit adquirere.

to make my selection from the others.

§ 2.- In the same case, when I have been left the choice of slaves, and before I have made my selection the condition on which the freedom of a slave depended fails, the question arises, can I select Stichus? I think that the opinion of Mucianus should be adopted, by which it is held that freedom itself, and not the mere grant of it which has been resolved upon, annuls a legacy. Hence, if the condition upon which the grant of freedom depended should fail either during the lifetime of the testator, or after his death, and before the estate was entered upon, the legacy will be valid; for freedom which is granted absolutely, as well as where it is left under a condition, takes effect at the time when the estate is entered upon, and therefore I can select Stichus.

§ 10.- THE SAME; *Digest, Book XXXIV.-* Where a slave is bequeathed in general terms to Pamphilus, the slave of Lucius Titius, and then the master of Pamphilus manumits him after the time that the legacy becomes due, and Titius claims the slave, the legacy of Pamphilus is extinguished, because there is no slave belonging to the estate who can be selected. If, however, Titius should reject the legacy, it is established that Pamphilus can make his choice of a slave bequeathed to him; for although by the manumission of Pamphilus two persons, Titius and Pamphilus, are constituted legatees, still, the bequest of one and the same thing is left to them, and if Titius claims it, the option of Pamphilus is extinguished, and if he rejects it, Pamphilus can make his selection.

11.- THE SAME; *Digest, Book XXXVI.-* If Eros is bequeathed to Seius, and a tract of land to Eros, and then the option of a slave is left to Maevius, and he chooses Eros, the land alone will belong to Seius, since at the time when the estate was entered upon he was the only one to whom the legacy could belong. For, where one of two joint-owners of a slave leaves him a bequest, the entire legacy will belong to the other joint-owner, as he is the only one who can acquire the legacy through the slave at the time when it becomes due.

§ 2.- En el mismo caso se preguntó, si, habiéndose dado la opción de esclavos, y habiendo faltado, antes de que yo hubiese optado, la condición, de la libertad concedida, podría yo optar por Stico. Creo que se ha de asentir a la opinión de Mucio, según la que parece bien que el legado se extinga con la misma libertad, no con la dación de la libertad concedida. Por lo cual, ora si viviendo el testador, ora si después de su muerte, y antes de adida la herencia hubiere faltado la condición de la libertad, el legado será útil; porque así como la pura libertad, así también la libertad establecida recibe su fuerza al tiempo de haberse adido la herencia, y por lo tanto puedo optar por Stico.

10.- EL MISMO; *Digesto, libro XXXIV.-* Si a Pánfilo, esclavo de Lucio Ticio, se le hubiera legado en general a un esclavo y luego el dueño de Pánfilo lo hubiese manumitido después que hubiere comenzado a correr el término del legado, si Ticio hubiere reivindicado el esclavo, se extingue el legado de Pánfilo, porque no hay en la herencia nadie por quien se pueda optar; mas si Ticio hubiese repudiado de sí el legado, es sabido que Pánfilo puede optar por el legado; pues aunque con la manumisión de Pánfilo se constituirían dos personas, la de Ticio y la de Pánfilo, se trata, sin embargo, entre ellas del legado de una sola cosa, y reivindicándola Ticio se extingue la opción, y repudiándola puede optar Pánfilo.

11.- EL MISMO; *Digesto, libro XXXVI.-* Si a Seyo le hubiera sido legado Eros y a Eros un fundo, y después le hubiere sido dada a Mevio la opción de un esclavo, y él hubiere optado por Eros, el fundo le pertenecerá solamente a Seyo, porque al tiempo de ser adida la herencia solamente había este a quien pudiera pertenecer el legado; porque también cuando a un esclavo común le hace un legado uno de los condueños, le pertenece todo el legado solamente al condueño, por esto, porque al comenzar a correr el término del legado es el único que podría adquirir por medio de este esclavo.

12.- IDEM; *libro I, ex Minicio*.- Servo generaliter legato verius est omnes heredes, si eis electio data est, eundem dare debere: si non consentiant heredes, ex testamento eos teneri.

13.- PAULUS; *libro VIII, ad Plautium*.- Si optio servi data mihi fuerit et Stichus aliquid testator sine libertate legasset, tunc sequens legatum consistit, cum tota familia ad unum, id est Stichum recciderit, ut quasi pure legato utiliter sit legatum. Nec adversatur Catoniana, si voluntarius heres institutus sit, quia potest ante aditam hereditatem, etiamsi statim decesserit, familia minui: quod si necessarius heres institutus sit, sequens legatum propter Catonianam inutile est.

§ 1.- Pomponius scribit emptore hereditatis postulante, ut is, cui servi optio legata sit, optet, videndum esse, an Praetor ut id faciat cogere debeat legatarium, quemadmodum si heres institutus id postulare, quia potest per heredem id emptor consequi: et quare non possit, non video.

14.- IAVOLENUS; *libro II, ex Cassio*.- Si, cum optio servi ex universa familia legata esset, heres aliquem priusquam optaretur manumisit, ad libertatem eum interim non perducit, servum tamen quem ita manumisit amittit, quia is aut electus legato cedit aut relictus tunc liber ostenditur.

15.- IDEM; *libro II, Epistolarum*.- Servo sine libertate legavi, deinde optionem servorum Maevio dedi: is eundem servum optavit: quaero, an id quoque quod legatum est ei deberetur. Respondit: non puto legatum huius servi nomine ad dominum pertinere.

12.- THE SAME; *On Minicius, Book I*.- Where a slave is bequeathed in general terms, the better opinion is that all the heirs, if the choice is left to them, should give the same slave, and if they do not agree, they will be liable under the terms of the will.

13.- PAULUS; *On Plautius, Book VIII*.- Where the selection of a slave is left to me, and the testator bequeaths something to Stichus without granting him his freedom, the second legacy will only stand where the entire body of slaves is reduced to one individual, that is to say, Stichus; and the legacy will be valid, just as if it was bequeathed unconditionally. The opinion of Cato cannot be quoted in opposition to this, if a voluntary heir has been appointed, for the reason that the body of slaves may be diminished before the estate is entered upon, even if the testator should die immediately. Where, however, a necessary heir is appointed, the second legacy will be void in accordance with the rule of Cato.

§ 1.- Pomponius says that where the purchaser of an estate asks that the party to whom the choice of slaves has been bequeathed shall make his selection, it should be considered whether the Praetor must compel the legatee to do so, just as if the appointed heir should make such a demand, for the reason that the purchaser can accomplish this by applying to the heir. I do not see why it cannot be done.

14.- JAVOLENUS; *On Cassius, Book II*.- Where the right to select a slave from the entire body of those forming part of an estate is bequeathed, and the heir manumits one of them before the choice is made, he cannot, in the meantime, confer his freedom upon him, but he will lose the slave whom he manumitted, because if he is chosen by the legatee, he will belong to him, but if he is rejected, he will then become free.

15.- THE SAME; *Epistles, Book II*.- I made a bequest to a slave without granting him his freedom, and I then bequeathed to Maevius his choice of my slaves. He selected the same slave, and I ask whether what was bequeathed to the latter is also due to him. The answer was, I do not think that the legacy left to the said slave will belong to his master.

12.- EL MISMO; *Doctrina de Minicio, libro I*.- Legado en general un esclavo, es más cierto que todos los herederos deben dar el mismo, si a ellos se les dió la elección; y que si no estuvieran de acuerdo los herederos, estaban obligados en virtud del testamento.

13.- PAULO; *Comentarios a Plaucio, libro VIII*.- Si se me hubiere dado la opción de un esclavo, y el testador le hubiese legado alguna cosa a Stichus sin la libertad, en este caso el segundo legado es válido cuando toda la servidumbre se hubiere reducido a uno solo, esto es, a Stichus, como si, habiendo sido legado puramente, hubiera sido hecho válidamente el legado. Y no se opone la regla Catoniana, si hubiera sido instituido un heredero voluntario, porque antes de ser adida, aunque inmediatamente hubiere fallecido, puede disminuirse la servidumbre. Pero si hubiera sido instituido un heredero necesario, es inútil el segundo legado en virtud de la regla Catoniana.

§ 1.- Escribe Pomponio, que pidiendo el comprador de la herencia que opte aquél a quien haya sido legada la elección de un esclavo, se ha de ver, si el Pretor deberá obligar al legatario a que haga esto, lo mismo que si el heredero instituido lo pidiera, porque esto lo puede conseguir el comprador por medio del heredero; y no veo por qué no pueda.

14.- JAVOLENO; *Doctrina de Cassio, libro II*.- Si habiéndose legado la opción de un esclavo entre toda la servidumbre, el heredero manumitió a alguno antes que se optase, no lo pone mientras tanto en libertad, pero pierde el esclavo que así hubiere manumitido, porque éste, o elegido cede al legado, o habiendo sido dejado, se manifiesta entonces libre.

15.- EL MISMO; *Epístolas, libro II*.- Hice a un esclavo un legado sin la libertad, y después le di a Mevio la opción de esclavos, éste optó por el mismo esclavo; pregunto si se le deberá también lo que se legó. Respondió: no creo que lo legado a nombre de este esclavo pertenezca al señor.

16.- TERENCE CLEMENS; *libro XV, ad legem Iuliam et Papiam*.- Optione legata placet non posse ante aditam hereditatem optari et nihil agi, si optaretur.

17.- IDEM; *libro XVII, ad legem Iuliam et Papiam*.- Quum optio duorum servorum Titio data sit, reliqui Maevio legati sint, cessante primo in electione "reliquorum" appellatione omnes ad maevium pertinent.

18.- SCAEVOLA; *libro XIII, Quaestionum*.- Homine legato Neratius ait nihil agi repudiato Pamphilo itaque eum ipsum eligi posse.

19.- PAULUS; *libro III, Sententiarum*.- «Illud aut illud, utrum elegerit legatarius»; nullo a legatario electo decedente eo post diem legati cedentem ad heredem transmitti placuit.

20.- LABEO; *libro II, Posteriorum a Iavoleno epitomatorum*.- Apud Aufidium libro primo rescriptum est, cum ita legatum est: "vestimenta quae volet triclinaria sumito sibi quae habeto", si is dixisset quae vellet, deinde, antequam ea sumeret, alia se velle dixisset, mutare voluntatem eum non posse, ut alia sumeret, quia omne ius legati prima testatione, qua sumere se dixisset, consumpsit, quoniam res continuo eius fit, simul ac si dixerit eam sumere.

21.- SCAEVOLA; *libro XXII, Digestorum*.- Filium et uxorem heredes scripsit, filiam exheredavit et ei legatum dedit, cum in familia nuberet, centum et, cum in familia nupserit, his verbis: "insuper arbitratu Semproniae matris eius mancipia decem, quae confestim post aditam hereditatem meam a Sempronia uxore mea eligi volo: quae mancipia, cum in familiam nupserit, dari volo. Et si antequam

16.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book XV*.- It is established that where the choice of certain articles is bequeathed, it cannot be made before the estate is entered upon, and if it should be made, it will be void.

17.- THE SAME; *On the Lex Julia et Papia, Book XVII*.- Where the choice of two slaves is bequeathed to Titius, and the remaining ones are left to Maevius; if the first legatee should fail to make his selection, all of the slaves will belong to Maevius, under the term "the remaining one."

18.- SCAEVOLA; *Questions, Book XIII*.- Where a slave is bequeathed, Neratius says that if Pamphilus is rejected the act will be void, and therefore the legatee will still have the right of selection.

19.- PAULUS; *Opinions, Book III*.- "The legatee may select such-and-such an article, or such-and-such an article." Where no choice was made by the legatee, and he died after the time when the bequest was due, it was decided that the right of selection was transmitted to his heir.

20.- LABEO; *Epitomes of the Last Works of Javolenus, Book II*.- It is stated in the First Book of Aufidius, that when a bequest was made as follows, "Let him take and have for himself any coverings for table-couches which he may wish," if he mentioned those he wanted, and then, before he took them, should say that he wanted others, he cannot change his mind and take the others; because he had disposed of his entire right of selection under the legacy by his first statement, in which he indicated those which he would take, as the articles become his immediately, just as if he had said that he would take them.

21.- SCAEVOLA; *Digest, Book XXII*.- A testator appointed his son and his wife his heirs, and disinherited his daughter, but left her a legacy of a hundred aurei, payable when she married in his family, and made the following provision in his will: "In addition to this, I bequeath to her ten slaves, to be selected by her mother, Sempronia, whom I wish to be selected by the said Sempronia, my wife,

16.- TERENCE CLEMENTE; *Comentarios a la ley Juliay Papia, libro XV*.- Está establecido, que, legada la opción, no se puede optar antes de haberse adido la herencia y que nada se hace si se optara.

17.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XVII*.- Cuando a Ticio se le haya dado la opción de dos esclavos y los demás hayan sido legados a Mevio, dejando de hacer el primero la elección, con la denominación de los demás todos le pertenecen a Mevio.

18.- SCÉVOLA; *Cuestiones, libro XIII*.- Legado un esclavo, dice Neracio que nada se hace siendo repudiado Pánfilo; y que por lo tanto, puede ser elegido este mismo.

19.- PAULO; *Sentencias, libro III*.- «Este o aquel, el que hubiere elegido el legatario» no habiéndose elegido ninguno por el legatario, se determinó, que, falleciendo él después de haber comenzado a correr el término del legado, se transmite al heredero.

20.- LABEÓN; *Obras póstumas compendidas por Javoleno, libro II*.- Se halla escrito en el libro primero de Aufidio, que cuando se legó así: «tome y tenga para sí los trajes de triclinio que quiera», si él hubiese dicho cuáles quería, y después, antes que los tomase, hubiese dicho que quería otros, no podía él cambiar de voluntad para tomar otros, porque con la primera manifestación, con que hubiese dicho que él los tomaba, extinguió todo su derecho al legado, pues la cosa se hace inmediatamente de él, tan pronto como hubiere dicho que la tomaba.

21.- SCÉVOLA; *Digesto, libro XXII*.- Uno instituyó herederos a su hijo y a su mujer, desheredó a su hija y le dió un legado de ciento, cuando se casase en la familia, en estos términos: «además de esto diez esclavos, a arbitrio de Sempronia, su madre, los cuales quiero que sean elegidos inmediatamente después de adida mi herencia por Sempronia, mi mujer; cuyos esclavos quiero que se den cuando se

nupserit, aliquod ex Mancipiiis decesserit, tunc in locum eius arbitrato Semproniae matris eius dari volo, dum ad eam plenus numerus perveniat. Quod si Sempronia mater eius non elegerit, tunc ipsa sibi quae volet eligat". quaesitum est, cum mater elegerit, an ea, quae ex his Mancipiiis ante nuptias adgnata sunt, ad puellam supra numerum decem Mancipiorum pertineant. Respondit, cum Mancipiorum legatum in tempus nuptiarum testator transtulit, id quod medio tempore ancillae enixae sunt ad filiam non pertinere. idem quaesiit, ante nuptias eorundem Mancipiorum fructus et usus an ad Semproniam matrem pertineant. respondit nihil proponi, cur ad matrem pro solido pertineant.

22.- IDEM; *libro XVII, Digestorum*.- Maritus uxori suae codicillis per fideicommissum dedit praedia, item lances quas elegerit quattuor: quaesitum est, an ex his lancibus, quae mortis tempore sint, eligere possit. respondit posse.

TIT. VI

DE TRITICO, VINO, VEL
OLEO LEGATO

1.- ULPIANUS; *libro XX, ad Sabinum*.- Vino legato acetum quoque continetur, quod pater familias vini numero habuit.

2.- POMPONIUS; *libro VI, ad Sabinum*.- Quum alii penum, alii vinum legatum esset, excepto vino omne penum ad alium legatarium pertinebit.

§ 1.- Si centum amphorae quas velles tibi legatae sint, ex testamento agendo consequi potes, ut degus-

immediately after my estate is entered upon. I desire the said slaves to be given to my daughter when she marries in the family, and if any of the slaves should die before she marries, then I wish others, also to be selected by her mother, Sempronia, to be given in their stead, until the full number of said slaves come into her hands, but if her mother, Sempronia, should not select them, then she herself can choose those whom she may desire." The mother having made the selection, the question arose whether the offspring of the slaves born before her marriage would belong to the girl, in addition to the original ten. The answer was that, as the testator had deferred the legacy of the slaves until the time of the marriage, any of the offspring of the female slaves born in the meantime would not belong to the daughter. It was also asked whether her mother, Sempronia, would be entitled to the use and enjoyment of the said slaves before the marriage of the daughter. The answer was that there was nothing in the case stated why they should not entirely belong to the mother.

22.- THE SAME; *Digest, Book XVII*.- A husband by a codicil left to his wife certain lands in trust, and also four silver dishes which she might select. The question arose whether she could make her selection from all the dishes which were found at the time of the death of the testator. The answer was that she could do so.

TITLE VI

CONCERNING BEQUESTS OF WHEAT,
WINE, AND OIL

1.- ULPIANUS; *On Sabinus, Book XX*.- Where wine is bequeathed, any vinegar which the head of the household kept with his wine is also included.

2.- POMPONIUS; *On Sabinus, Book VI*.- Where provisions are left to one person, and wine to another, all the provisions will belong to the first legatee, with the exception of the wine.

§ 1.- Where a hundred jars of wine are left to you to be selected as you may desire, you can institute

hubiere casado en la familia, y si antes que se casare hubiere fallecido alguno de los esclavos, entonces quiero que en su lugar se dé otro a arbitrio de Sempronia, su madre, a fin de que a poder de ella vaya el número completo; pero si Sempronia, su madre, no lo eligiere, elija entonces ella para sí los que quiera»; se preguntó, si, habiendo elegido la madre, le pertenecerán a la hija además del número de diez esclavos los que de estos esclavos nacieron antes de las nupcias. Respondió, que habiendo referido el testador el legado de los esclavos al tiempo de las nupcias, no le pertenecía a la hija lo que en el tiempo intermedio dieron a luz las esclavas. El mismo preguntó, si le pertenecerán a la madre Sempronia el usufructo y el uso de estos mismos esclavos. Respondió, que nada se exponía para que por completo le pertenezcan a la madre.

22.- EL MISMO; *Digesto, libro XVII*.- Un marido le dio en codicilos a su mujer unos predios por fideicomiso, y además los cuatro platos que eligiere; se preguntó, si podría elegir entre los platos que hubiera al tiempo de la muerte. Respondió, que podía.

TÍTULO VI

DEL LEGADO DE TRIGO,
VINO O ACEITE

1.- ULPIANO; *Comentarios a Sabino, libro XX*.- En el vino legado se comprende también el vinagre, que el padre de familia tuvo en calidad de vino.

2.- POMPONIO; *Comentarios a Sabino, libro VI*.- Cuando a uno se le hubiese legado la despensa, y a otro el vino, toda la despensa, excepto el vino, le pertenecerá al otro legatario.

§ 1.- Si se te hubieren legado las cien ánforas que quisieras, ejercitando la acción de testamento puedes

tare tibi liceat: aut, quanti interfuerit licere tibi degustare, ad exhibendum agere potes.

3.- ULPIANUS; *libro XXIII, ad Sabinum*.- Si cui vinum sit legatum centum amphorarum, cum nullum vinum reliquisset, vinum heredem empturum et praestaturum, non acetum, quod vini numero fuit.

§ 1.- Si vinum legatum sit, videamus, an cum vasis debeat. Et Celsus inquit vino legato, etiamsi non sit legatum cum vasis, vasa quoque legata videri, non quia pars sunt vini vasa, quemadmodum emblemata argenti (scyphorum forte vel speculi), sed quia credibile est mentem testantis eam esse, ut voluerit accessioni esse vino amphoras: et sic, inquit, loquimur habere non amphoras mille, ad mensuram vini referentes. in doliis non puto verum, ut vino legato et dolia debeantur, maxime si depressa in cella vinaria fuerint aut ea sunt, quae per magnitudinem difficile moventur. In cuppis autem sive cuppulis puto admittendum et ea deberi, nisi pari modo immobiles in agro velut instrumentum agri erant. vino legato utres non debebuntur: nec culleos quidem deberi dico.

4.- PAULUS; *libro IV, ad Sabinum*.- Quum certum pondus olei non adiecta qualitate legatur, non solet quaeri, cuius generis oleo uti solitus fuerit testator aut cuius generis oleum istius regionis homines in usu habeant: et ideo liberum est heredi, cuius vellet generis oleum legatario solvere.

5.- IULIANUS; *libro XV, Digestorum*.- Quum certus numerus amphorarum vini legatus esset ex eo, quod in fundo Semproniano natum esset, et minus

proceedings under the will in order to obtain the opportunity to taste the wine; or you can bring suit to compel the wine to be produced, or to recover any damages you may have sustained because you were not permitted to taste it.

3.- ULPIANUS; *On Sabinus, Book XXIII*.- If a hundred measures of wine should be bequeathed to anyone, leaving none for the estate, the heir can purchase and deliver wine, but he cannot deliver vinegar which was found among the wine of the testator.

§ 1.- Where wine is bequeathed, let us see whether the legatee is also entitled to the vessels in which it is contained. Celsus says that where wine is bequeathed, even though the vessels may not be included in the legacy, they are held to be bequeathed; not because they are a part of the wine, to the same extent as the chasing constitutes a part of a cup or a mirror, but because it is probable that the intention of the testator was that he wished the vessels to be accessory to the wine; and hence he says it is usual for us to say that we have a thousand jars, referring to the quantity of the wine. I do not think that this opinion is correct with reference to casks, so that where wine is bequeathed, the casks will also be due; especially if they are fastened in the wine cellar, or it is difficult to move them on account of their size. With reference to vats, however, or small receptacles, I think that they are included, and will be due, unless they are likewise fixed immovably in the ground, and are there as utensils belonging to the same. Where wine is bequeathed, I hold that neither leathern bags nor bottles are included.

4.- PAULUS; *On Sabinus, Book IV*.- Where a certain quantity of oil, without mentioning the quality, is bequeathed, it is not the practice to ask what kind of oil the testator was accustomed to make use of, or what kind of oil men ordinarily use in that neighborhood. Therefore the heir is at liberty to give to the legatee oil of any kind that he may wish.

5.- JULIANUS; *Digest, Book XV*.- Where a certain number of measures of wine out of that obtained from the Sempronian Estate were bequeathed, and a

conseguir que te sea permitido probarlas, o puedes intentar la de exhibición por cuanto te hubiere importado que te fuese lícito probarlas.

3.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Si a alguien se le hubieran legado cien ánforas de vino, no habiendo dejado ningún vino el testador, el heredero habrá de comprar y entregar vino, no vinagre que se tuvo en calidad de vino.

§ 1.- Si se hubiera legado vino, veamos si se deberá con los envases. Y dijo Celso, que, legado el vino, aunque no haya sido legado con los envases, se consideran legados también los envases, no porque los envases forman parte del vino, como los adornos de plata la forman, por ejemplo, de las tazas o de un espejo, sino porque es de creer que la intención del testador fue que quiso que las ánforas fuesen accesión del vino; y así, dice, hablamos de que tenemos mil ánforas, refiriéndonos a la medida del vino. Respecto a las tinajas no considero verdad, que, legado el vino, se deban también las tinajas, mayormente si estuvieren empotradas en la bodega, o son tales que por su magnitud se muevan difícilmente. Mas en cuanto a las cubas o a los barriles opino que se ha de admitir que también se deben éstos, a no ser que de igual modo estuvieran inmóviles en el campo, o como enseres del campo. Legado el vino no se deberán los odres; y digo que tampoco se deberán ciertamente las medidas.

4.- PAULO; *Comentarios a Sabino, libro IV*.- Cuando se lega cierta cantidad de aceite sin haberse añadido la calidad, no se suele investigar de qué clase de aceite haya solido usar el testador, o de qué clase usen el aceite los hombres de aquella región, y por lo tanto el heredero tiene libertad para darle al legatario el aceite de la clase que quiera.

5.- JULIANO; *Digesto, libro XV*.- Cuando se hubiere legado cierto número de ánforas de vino, del que hubiese nacido en el fundo Semproniano, y

natum esset, non amplius deberi placuit et quasi taxationis vicem optinere haec verba "quod natum erit".

6.- PROCULUS; *libro V, Epistolarum*.- Cui vinum heres dare damnatus est, quod in amphoris et cadis diffusum est dari debet, etiamsi vasorum mentio facta non est. item quamvis cum vasis cadis legatum est, tamen id quoque, quod in doliis, legatum esse videtur, sicuti, si servos omnes cum peculio cuiusque eorum legasset, etiam eos, quibus peculii nihil esset, legasse videretur.

7.- IAVOLENUS; *libro II, ex Posterioribus Labeonis*.- Quidam heredem damnaverat dare uxori suae vinum oleum frumentum acetum mella salsamenta. Trebatius aiebat ex singulis rebus non amplius deberi, quam quantum heres mulieri dare voluisset, quoniam non adiectum esset, quantum ex quaque re daretur. Ofilius Cascellius Tubero omne, quantum pater familias reliquisset, legatum putant: Labeo id probat idque verum est.

§ 1.- «Lucio Titio tritici modios centum, qui singuli pondo centum pendeant, heres dato». Ofilius nihil legatum esse, quod et labeo probat, quoniam eiusmodi triticum in rerum natura non esset: quod verum puto.

8.- POMPONIUS; *libro VI, Epistolarum*.- Si heres damnatus sit dare vinum, quod in doliis esset, et per legatarium stetit, quo minus accipiat, periculose heredem facturum, si id vinum effundet: sed legatarium petentem vinum ab herede doli mali exceptione placuit summoveri, si non praestet id, quod propter moram eius damnum passus sit heres.

9.- ULPIANUS; *libro XXIII, ad Sabinum*.- Si quis vinum legaverit, omne continetur, quod ex vinea

smaller quantity was obtained, it was decided that more was not due, and that the following words, "That obtained," operated as a kind of limitation of the legacy.

6.- PROCULUS; *Epistles, Book V*.- Where an heir is charged with the delivery of wine, he will be obliged to deliver whatever is contained in vases or jars, even though no mention was made of vessels. Moreover, although the wine may have been left with the vases and jars, still, that which is contained in casks is held to have also been left; just as where a testator bequeaths all his slaves with their peculium of each of them, those who have no peculium are considered to have likewise been bequeathed.

7.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- A certain individual charged his heir to give to his wife wine, oil, grain, vinegar, honey, and salt-fish. Trebatius said that the heir was not obliged to deliver any more of each article to the woman than he desired, since it was not stated how much of each article was to be given. Ofilius, Cascellius, and Tubero think that the entire amount of the said articles which the testator left was included in the legacy. Labeo approves of this, and it is correct.

§ 1.- "Let my heir deliver to Lucius Titius a hundred measures of wheat, each of which shall weigh a hundred pounds." Ofilius holds that nothing is bequeathed, and Labeo agrees with him, as wheat of this kind does not exist; which opinion I think to be true.

8.- POMPONIUS; *Epistles, Book VI*.- When an heir is charged with the delivery of wine which is contained in casks, and it is the fault of the legatee that he did not receive it, the heir will assume the responsibility if he pours out the wine; and if the legatee should bring suit to recover the wine from the heir, it was held that he would be barred by an exception on the ground of bad faith, if he does not pay the amount of damage sustained by the heir on account of his delay.

9.- ULPIANUS; *On Sabinus, Book XXIII*.- Where anyone bequeaths wine, everything is included

hubiese nacido menos, se determinó que no se debía más, y que estas palabras «que hubiese nacido» hacen veces de tasa.

6.- PROCULO; *Epístolas, libro V*.- A aquel a quien el heredero fue condenado a dar el vino, se le debe dar el que se echó en ánforas y en barriles, aunque no se haya hecho mención de los envases. Asimismo, aunque se haya legado con las vasijas y los barriles, se considera, sin embargo, que se legó también el que está en tinajas; así como si uno hubiese legado todos los esclavos con el peculio de cada uno de ellos, se consideraría que también legó los que no tuviesen ningún peculio.

7.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro II*.- Uno había condenado a su heredero a dar a su mujer vino, aceite, trigo, vinagre y pesca salada; Trebacio decía, que de cada cosa no se debe más que cuanto el heredero hubiese querido dar a la mujer, porque no se añadió cuánto se daría de cada cosa. Ofilio, Cascelio y Tuberón, opinan que se legó todo cuanto hubiese dejado el padre de familia; Labeón lo aprueba, y es verdad.

§ 1.- «Dé mi heredero a Lucio Ticio cien modios de trigo, cada uno de los que pese cien libras»; dice Ofilio, que no se legó nada; lo que también aprueba Labeón, porque no hay en la naturaleza trigo de esta clase; lo que considero verdad.

8.- POMPONIO; *Epístolas, libro VI*.- Si el heredero hubiera sido condenado a dar el vino que hubiese en las tinajas, y consistió en el legatario no recibirlo, el heredero obrará con riesgo si vaciara este vino; pero se determinó que al pedirle el legatario el vino al heredero fuese repelido con la excepción de dolo malo, si no pagase el daño que por su tardanza sufrió el heredero.

9.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Si alguno hubiere legado el vino, se com-

natum vinum permansit. Sed si mulsum sit factum, vini appellatione non continebitur proprie, nisi forte pater familias etiam de hoc sensit. Certe zythum, quod in quibusdam provinciis ex tritico vel ex hordeo vel ex pane conficitur, non continebitur: simili modo nec camum nec cervesia continebitur nec hydromeli. quid conditum? nec hoc puto, nisi alia mens testantis fuit. Oenomeli plane id est dulcissimum vinum continebitur: et passum, nisi contraria sit mens, continebitur: defrutum non continebitur, quod potius conditurae loco fuit. acinaticium plane vino continebitur. Cydoneum et si qua alia sunt, quae non ex vinea fiunt, vini appellatione non continebuntur. Item acetum vini appellatione non continebitur. Haec omnia ita demum vini nomine non continentur, si modo vini numero a testatore non sunt habita: alioquin sabinus scribit omnia vini appellatione contineri, quae vini numero pater familias habuit: igitur et acetum, quod vini numero pater familias habuit, et zythum et camum et cetera, quae pro hominum affectione atque usu vini numero habebuntur. Quod si totum vinum, quod pater familias habuit, coacuit, non exstinguitur legatum.

§ 1.- Si acetum quis legaverit, non continebitur legato acetum quod vini numero testator habuit: embamma autem continebitur, quia aceti numero fuit.

§ 2.- Item si quis vinum quod habuit legavit, deinde hoc coacuit, licet postea in aceti locum translatum sit a patre familias, vino legato continebitur, quia id, quod testamenti facti tempore vinum fuit, demonstratum est: et est hoc verum, nisi voluntas adversetur.

§ 3.- Vino autem paterno legato id demum legatum

which, having originated from the vine, retains the nature of wine. If, however, mead is made, it will not properly be included in the term wine, unless the head of the household had this intention. And, in fact, as the beverage called zythum, which is made in some provinces from wheat, barley, or bread, will not be included, so neither beer nor hydromeli is included. But what would be the case with wine mixed with other substances? I do not think that it will be included, unless the intention of the testator was that it should be. It is clear that wine mingled with honey, that is to say, very sweet wine, will be included; and the drink made of raisins will also be, unless the intention was otherwise. New wine, boiled down and spiced, is not included, because it rather resembles a compound. Wine made of water and grapes is evidently included. The beverage of quinces, and any other drinks not derived from the vine, are not embraced in the term wine, likewise vinegar does not come under that category. None of these things will be included in the term wine, if they were not classed as such by the testator. Sabinus, however, stated that everything will be included under the appellation of wine which the testator considered to be such. Therefore, vinegar which the testator considered as wine, as well as zythum, beer, and all other beverages which, according to the taste and use of man, are classed as wine, will be included. If all the wine which the testator possessed had become sour, the legacy will not be extinguished.

§ 1.- If anyone should bequeath vinegar, that vinegar which the testator kept as wine will not be included. Fruits preserved in vinegar will be included, because they come under the head of vinegar.

§ 2.- Likewise, where anyone bequeaths wine which he had in his possession, and it should afterwards become sour, even though it may have subsequently been placed with the vinegar by the testator, it will be included with the wine which was bequeathed, because that was designated which was wine at the time when the will was executed. This also is true unless opposed to the intention of the testator.

§ 3.- Where wine which came from the estate of the

prende todo lo que nacido de la viña quedó siendo vino. Pero si se hubiera hecho mulso, no se comprenderá propiamente en la denominación de vino, a no ser acaso que el padre de familia se refiriese también a esto; porque a la verdad no se comprenderá el zito, que en algunas provincias se hace del trigo, o de la cebada, o del pan. De igual modo tampoco se comprenderá ni la sidra, ni la cerveza, ni la hidromiel. ¿qué se dirá del compuesto? Opino que tampoco éste, si no fue otra la intención del testador. Pero el vino añejo con miel, esto es, el vino muy dulce, se comprenderá; y se comprenderá el de pasa, si otra no hubiere sido la intención; el vino cocido no será comprendido, porque más bien estuvo en calidad de compuesto; pero el acinaticio será comprendido en el vino; el cidoneo, y otras bebidas que hay, que no se hacen de la uva, no se comprenderán en la denominación de vino; tampoco se comprenderá en la denominación del vino el vinagre. Nada de esto se comprenderá con el nombre de vino solamente si no fue tenido en clase de vino por el testador; porque en otro caso escribe Sabino, que con la denominación de vino se comprende todo lo que el padre de familia tuvo en clase de vino; así, pues, también el vinagre, que el padre de familia tuvo en clase de vino, el zito y la sidra, y lo demás que según el gusto y el uso de los hombres se tuviese en clase de vino. Pero si se agrió todo el vino, que tuvo el padre de familia, no se extingue el legado.

§ 1.- Si alguno hubiere legado el vinagre, no se comprenderá en el legado el vinagre, que el testador tuvo en clase de vino; pero se comprenderá el embamma, que estuvo en clase de vinagre.

§ 2.- Asimismo, si alguno legó el vino que tuvo, y después éste se agrió, aunque luego haya sido trasladado por el padre de familia al lugar del vinagre, se comprenderá en el vino legado, porque se designó lo que fue vino al tiempo de hacerse el testamento; y esto es verdad, si no se opusiera la voluntad del testador.

§ 3.- Pero legado el vino del padre se considera

videtur, quod testator vini numero habuit, non quod pater. Item si peculiare vinum legatum sit, id continebitur, quod servi habuerunt. cur tam diverse? quod paternum vinum iam coepit usus ipsius testatoris esse, at peculiare in usu servorum remansit.

§ 4.- Item si vinum vetus sit legatum.

10.- HERMOGENIANUS; *libro II, Iuris Epitomarum*.- Ex usu testatoris legatum aestimabitur, id est quot annorum vino pro vetere utebatur. quod si non appareat,

11.- ULPIANUS; *libro XXIII, ad Sabinum*.- Vetus accipietur, quod non est novum: id est et anni prioris vinum appellatione veteris continebitur:

12.- PAULUS; *libro IV, ad Sabinum*.- Nam aliter observantibus quis finis aut quod initium veteris vini sumeretur?

13.- ULPIANUS; *libro XXIII, ad Sabinum*.- «Ex eo vino quod in illo fundo nascetur, heres meus amphoras decem quotannis in annos singulos dato». quo anno natum non fuisset, ex superiore anno eius fundi eum numerum amphorarum heredem daturum Sabinus existimat. quae sententia, si voluntas non adversetur, mihi quoque placet.

14.- POMPONIUS; *libro VI, ad Sabinum*.- Vino legato ea demum vasa sequuntur, quae ita diffusa sunt, ut non ad perpetuum usum vasa reservarentur, veluti amphorae et cadi.

15.- PROCULUS; *libro II, Epistolarum*.- Vinum cum vasis legavit. negat Trebatius quod in doliis sit deberi et sensum testatoris alium putat esse, verborum alium: ceterum dolia in vasis vinariis non

testator's father is bequeathed, that only is held to have been left which the former kept as wine, and not what his father considered to be such. Moreover, where wine belonging to a peculium is bequeathed, that only is included which the slaves regarded as wine. What is the reason for this distinction? It is because the wine of the testator's father has already begun to belong to him, but that forming part of the peculium remained for the use of the slaves.

§ 4.- The same rule applies where old wine is bequeathed.

10.- HERMOGENIANUS; *Epitomes of Law, Book II*.- The age of wine when bequeathed is established according to the custom of the testator, that is to say, how many years he considered necessary to render wine old, that is, if this was not known.

11.- ULPIANUS; *On Sabinus, Book XXIII*.- "Old wine" is understood to be such as is not new, that is to say, wine of the preceding year will be included under the term "old."

12.- PAULUS; *On Sabinus, Book IV*.- For where persons do not concur in this opinion, any end, or any beginning, can be taken to designate the age of wine.

13.- ULPIANUS; *On Sabinus, Book XXIII*.- "Let my heir give to So-and-So, every year, ten measures of wine out of that obtained from such-and-such an estate." Sabinus thinks that where no wine was made during one year, the heir must furnish the amount to the legatee from the yield of the preceding year. This opinion I also adopt, if it is not contrary to the intention of the testator.

14.- POMPONIUS; *On Sabinus, Book VI*.- Where wine is bequeathed, it also includes the vessels, where they are not such as are reserved for constant use, for instance, jars and measures.

15.- PROCULUS; *Epistles, Book II*.- A man bequeathed his wine and the vessels containing it. Trebatius denies that any wine, which is in casks, is included; and he holds that the intention of the

legado solamente el que el testador, no el que el padre tuvo en clase de vino. Asimismo, si se hubiera legado el vino de los peculios, se comprenderá el que tuvieron los esclavos. ¿porqué con tanta diversidad? Porque el vino del padre comenzó ya a ser del uso del mismo testador, pero el de los peculios continuó siendo de uso de los esclavos.

§ 4.- Igualmente, si se hubiera legado el vino añejo.

10.- HERMOGENIANO; *Epítome del Derecho, libro II*.- Por el uso del testador se apreciará el legado, esto es, de cuantos años tenía el vino por añejo. Pero si no apareciera.

11.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Se entenderá por añejo el que no es nuevo, esto es, que con la denominación de añejo se comprenderá también el vino del año anterior.

12.- PAULO; *Comentarios a Sabino, libro IV*.- Porque observándolo de otro modo, qué término o qué principio se tomaría para el vino añejo.

13.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- «Dé mi heredero para cada año todos los años diez ánforas del vino que se produjere en aquel fundo»; Sabino opina, que en el año en que no se hubiese producido deberá dar el heredero el mismo número de ánforas con el del año anterior de este fundo; cuya opinión, si a ella no se opusiera la voluntad, también a mi me parece bien.

14.- POMPONIO; *Comentarios a Sabino, libro VI*.- Legado el vino se comprenden solamente los envases que están en uso de modo que los envases no se reserven para uso perpetuo, como las ánforas y los barriles.

15.- PROCULO; *Epístolas, libro II*.- Uno legó el vino con los envases; dice Trebacio, que no se debe el que esté en tinajas, y opina que una fue la intención del testador, y otro el sentido de las palabras; pero

essent. Ego et si dolia in vasis vinariis non sunt, tamen non concederem trebatio vinum quod in doliis esset, id est quod in vasis non esset, non esse legatum.

Illud verum esse puto, cui vinum cum vasis legatum erit, ei amphoras cados, in quibus vina diffusa servamus, legatos esse: vinum enim in amphoras et cados hac mente diffundimus, ut in his sit, donec usus causa probetur, et scilicet id vendimus cum his amphoris et cadis: in dolia autem alia mente coicimus, scilicet ut ex his postea vel in amphoras et cados diffundamus vel sine ipsis doliis veneat.

16.- IDEM; *libro III, ex Posterioribus Labeonis*.- Qui vinum Surrentinum in urnalibus habebat diffusum, is tibi vinum legaverat in amphoris omne. Illud quoque vinum, quod in urnalibus fuisset, legatum esse Labeo et Trebatius responderunt.

§ 1.- Cui dulcia legata essent, si nihil aliud testamento significetur, omnia haec esse legata: mulsum passum defrutum et similes potiones, item uvas ficos palmas caricas.

§ 2.- Quod si ita esset legatum: "vinum amphorarium Aminaeum Graecum et dulcia omnia", nihil inter dulcia, nisi quod potionis fuisset, legatum putat Labeo ex collatione vini amphorarii: quod non improbo.

TIT. VII

DE INSTRUCTO VEL INSTRUMENTO
LEGATO

1.- PAULUS; *libro IV, ad Sabinum*.- Sive cum instrumento fundus legatus est sive instructus, duo legata intelleguntur.

testator was different from what is expressed in his words, and, moreover, casks are not classed as wine vessels. Although casks are not included in the term "wine vessels," still, I do not agree with Trebatius in his opinion that the wine included in the casks, that is to say, which is not in vessels, is not bequeathed.

I think, however, that it is true where wine is bequeathed to anyone with the vessels, that the measures and jars into which it is drawn are also bequeathed to the legatee; for we pour out wine into jars and measures, in order that it may remain in them, until we require it for use; and, again, we sell it together with said jars and measures. We place it in casks, however, with a different intention, that is to say, in order to draw it out of them into jars and measures, or to sell it without the casks.

16.- THE SAME; *On the Last Works of Labeo, Book III*.- A certain testator kept wine of Surrentum in earthen urns, and he bequeathed it to you in jars. Labeo and Trebatius gave it as their opinion that all the wine contained in the urns was bequeathed.

§ 1.- Where sweetened wines are bequeathed, and no other designation is contained in the will, all the following are included in the legacy, namely: wine mixed with honey, wine made of raisins, new wine boiled and spiced, and similar beverages, including all those made of grapes, figs, dates, and dried fruits.

§ 2.- Where a legacy is bequeathed as follows, "I give and bequeath the wine in my jars, my Aminisean and Greek wine, and all my sweet beverages," Labeo thinks that nothing will be included under the latter term, except the beverages which have been made by mixing other substances with the wine contained in the jars of the testator. This opinion I do not reject.

TITLE VII

CONCERNING LEGACIES OF EQUIPMENT
OR IMPLEMENTS

1.- PAULUS; *On Sabinus, Book IV*.- Where a tract of land furnished with everything is devised, or where it is devised with its equipment, two separate

que las tinajas no están comprendidas en los envases de vino, Yo, aunque las tinajas no están comprendidas en los envases de vino, no le concedería, sin embargo, a Trebacio que no se haya legado el vino que estuviese en tinajas, esto es, que no estuviese en envases.

Opino que es verdad, que a aquel a quien se le hubiese legado el vino con los envases se le legaron las ánforas y los barriles en que vaciado conservamos el vino; porque echamos el vino en ánforas y en barriles con la intención de que esté en ellos hasta que se pruebe para usarlo; y por esto lo vendemos con estas ánforas y barriles; pero lo echamos en tinajas con otra intención, a saber, para de ellas echarlo en ánforas y barriles, o para venderlo sin las mismas tinajas.

16.- EL MISMO; *Doctrina de las Obras póstumas de Labeón, libro III*.- Uno que tenía vino sorrentino echado en urnas, te había legado el vino en ánforas; Labeón y Trebacio respondieron, que se legó también todo aquel vino que hubiese habido en las urnas.

§ 1.- A aquel a quien se le hubiesen legado las cosas dulces, si ninguna otra cosa se significara en el testamento, se le legaron también estas otras cosas; el mulso, el vino de pasa, el vino cocido y otras bebidas semejantes, y también las uvas, los higos, los dátiles y los higos secos.

§ 2.- Pero si se hubiese legado de este modo: «el vino de ánforas, el amineo, el griego, y todas las cosas dulces», opina Labeón, atendiendo a la adición de vino de ánforas, que no se legó entre las cosas dulces nada que no fuese cosa de bebida; lo que no desapruébo.

TÍTULO VII

DEL LEGADO DE COSA PROVISTA O
DEL DE LOS UTENSILIOS

1.- PAULO; *Comentarios a Sabino, libro IV*.- Ya si se legó un fundo con los aperos, ya si provisto, se entiende que hay dos legados.

§ 1.- Fundo cum instrumento legato et alienato instrumentum non vindicabitur ex sententia defuncti.

2.- PAPINIANUS; *libro VII, Responsarum*.- Quum pater pluribus filiis heredibus scriptis duobus praeceptionem bonorum aviae praeter partes hereditarias dedisset, pro partibus coheredum viriles habituros legatarios placuit.

§ 1.- Dotes praediorum, quae Graeco vocabulo «envykai» appellantur, cum non instructa legantur, legatario non praestantur.

3.- IDEM; *libro VIII, Responsorum*.- Fundum instructum libertis patronus testamento legavit: postea codicillis petit, ut morientes partes suas fundi superstitibus restituerent, nec instructi mentionem habuit. Talem in causam fideicommissi deductum videri placuit, qualis fuerat legatus, sed medii temporis augmenta fetuum et partuum, item detrimenta fatalium fideicommisso contineri.

§ 1.- Minor viginti annis instructa praedia consobrinae suae dari voluit et quosdam servos praediorum vivus manumisit. non idcirco servi manumissi praestabuntur, quod ad libertatem pervenire non possunt. Idem iuris est, cum ex quavis alia causa libertas non competit.

4.- IAVOLENUS; *libro II, ex Posterioribus Labeonis*.- Quum quidam duos fundos iunctos haberet et ex altero boves, cum opus fecissent, in alterum reverterentur, utrumque fundum cum instrumento legaverat. Labeo Trebatius boves ei fundo cessuros putant, ubi opus fecissent, non ubi manere consuevissent: Cascellius contra. Labeonis sententiam probo.

and distinct legacies are understood to have been left.

§ 1.- Where land is devised with its equipment, and it has been alienated, the equipment cannot be recovered in accordance with the will of the deceased.

2.- PAPINIANUS; *Opinions, Book VII*.- Where a father, after having appointed several of his children his heirs, bequeathed to two of them, as a preferred legacy, the property of their grandmother, in addition to their shares of his own estate; it was held that the legatees would be entitled to equal shares in proportion to those of the co-heirs.

§ 1.- Gifts of land, when the implements for its cultivation, called «envykai» in the Greek language, are not left with it, are not delivered to the devisee.

3.- THE SAME; *Opinions, Book VIII*.- A patron left a tract of land, with its equipment, to his freedmen by his will, and he afterwards requested in a codicil that the legatees, at their death, should give their shares of the land to the survivors; but he did not make any mention of the equipment. It was held that the land which was devised should be considered just as if it had been left under a trust; but that the increase of animals and slaves which took place in the meantime, as well as the losses caused by death, should be included in the trust.

§ 1.- A minor of twenty years of age desired a tract of land with all its equipment to be given to his female cousin, and, during his lifetime, manumitted certain slaves who were attached to said land. The manumitted slaves should not be delivered to the legatee, although they cannot obtain their freedom under such circumstances. The same rule of law applies where freedom is not obtained for any other reason whatsoever.

4.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- A certain testator had two adjoining tracts of land, and the oxen used on one tract, after the work there was completed, were then removed to the other. He bequeathed both tracts, with all the equipment. Labeo and Trebatius think that the oxen ought to belong to the land where they worked, and not where they were accustomed to remain. Cascellius holds the

§ 1.- Legado y enajenado un fundo con los aperos, no se reivindicarán los aperos en virtud de la voluntad del difunto.

2.- PAPINIANO; *Respuestas, libro VII*.- Cuando un padre, habiendo instituido herederos a muchos hijos, hubiese dado a dos de ellos además de sus porciones hereditarias el prelegado de los bienes de la abuela, se determinó que los legatarios habrán de tener porciones viriles con arreglo a las porciones de los coherederos.

§ 1.- Las dotes de predios, que con vocablo griego se llaman «envykai» cuando no se legan provistos, no se le dan al legatario.

3.- EL MISMO; *Respuestas, libro VIII*.- Un patrono legó por testamento a sus libertos un fundo provisto; después pidió en los codicilos que los que muriesen dejaran sus partes del fundo a los sobrevivientes, y no se hizo mención del fundo provisto; se determinó, que se consideraba comprendido en la causa del fideicomiso tal como había sido legado; pero que también se comprendían en el fideicomiso los aumentos de los fetos y de los partos del tiempo intermedio, y asimismo los quebrantos de los que se perdían fatalmente.

§ 1.- Uno menor de veinte años quiso que a su prima se le dieran unos predios provistos y manumitió en vida algunos esclavos de los predios; no precisamente porque no pueden llegar a la libertad se darán los esclavos manumitidos. El mismo derecho hay cuando por otra cualquier causa no compete la libertad.

4.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro II*.- Teniendo uno dos fundos contiguos, y empleándose, cuando hacían falta, los bueyes del uno en el otro, había legado ambos fundos con sus aperos; Labeón y Trebacio opinan, que los bueyes habrán de agregarse al fundo en que trabajaban, no a aquel en que hubiesen acostumbrado a estar; Cascelio por el contrario, aprueba la opinión

5.- LABEO; *libro I, a Paulo epitomatorum.*- Si cui fundum et instrumentum eius legare vis, nihil interest, quomodo leges "fundum cum instrumento" an "fundum et instrumentum" an "fundum instructum". Paulus: immo contra: nam inter ea legata hoc interest, quod, si fundo alienato mortuus fuerit qui ita legavit, ex hac scriptura "fundum cum instrumento" nihil erit legatum, ex ceteris poterit instrumentum esse legatum.

6.- SCAEVOLA; *libro XVI, Digestorum.*- Nepoti legaverat quae certa regione praedia habuerat ut instructa sunt, cum vino grano calendario, et adiecerat haec verba: "quidquid erit cum moriar in illa regione, et quidquid in quacumque specie erit in illa regione, vel quod meum erit". Viva testatrice unus ex debitoribus condemnatus vivente testatrice satis non fecit: quaesitum est, an quod ex sententia iudicis deberetur ad nepotem pertineret. Respondit nihil proponi, cur non deberetur.

7.- IDEM; *libro XXII, Digestorum.*- Tabernam cum caenaculo Pardulae manumisso testamento legaverat cum mercibus et instrumentis et suppellectili quae ibi esset, item horreum vinarium cum vino et vasis et instrumento et institoribus, quos secum habere consueverat. Quaesitum est, cum vivo testatore insula, in qua caenaculum fuit quod ei legatum erat, exusta sit, et post biennium eodem loco constituta nova, et horreum, quod eidem legatum erat, a testatore venierit, vini autem venditio dilata sit, ut ex eo commodum venirent, an universa legata Pardula consequi possit. Respondit ea, in quibus voluntas mutata esset, non deberi.

contrary opinion. I adopt the view of Labeo.

5.- LABEO; *Abridgment of Probabilities by Paulus, Book I.*- If you wish to devise to anyone a tract of land with its equipment it makes no difference what form you use, whether you devise the land with its equipment or the land and its equipment, or the land furnished with its equipment. Paulus: I indeed am of the contrary opinion, for there is this difference between legacies, namely, if the testator who made the devise should employ the following form, "I leave the land with its equipment," and the land should be alienated, the devise will be of no force or effect; but if he used either of the other forms it will be valid.

6.- SCAEVOLA; *Digest, Book XVI.*- A testatrix left to her grandson the lands which she possessed in a certain district, as they were equipped, together with the wine, grain, and a book of accounts; and added the following words: "Everything to be found in that district, when I die, and all property of every description which is there, or which may belong to me." Judgment having been taken against one of her debtors, during the lifetime of the testatrix, he did not satisfy it. The question arose whether what was due under the decision of the court would belong to the grandson. The answer was that there was nothing in the case stated to prevent his being entitled to it.

7.- THE SAME; *Digest, Book XXII.*- A certain person left to Pardula, whom he had manumitted by his will, a shop and an apartment, together with the merchandise utensils and furniture contained therein, and also a warehouse for wine, along with the wine, vessels, utensils, and slaves in charge of the same, which he had been accustomed to have with him. The question arose whether Pardula could claim the entire legacy, as the house which contained the apartment that had been devised was burned during the lifetime of the testator, and had been rebuilt in the same place, after the lapse of two years, and the warehouse which had been left to the same party had been disposed of by the testator, but the sale of the wine had been deferred in order to obtain a higher price. The answer was that that portion of it with

de Labeón.

5.- LABEÓN; *Dichos recopilados por Paulo, libro I.*- Si quieres legar a alguno un fundo y sus aperos, no importa de qué modo se lo legues, si «el fundo con los aperos» o «el fundo y los aperos», o «el fundo provisto». Paulo dice; antes por el contrario, porque entre estos legados hay esta diferencia, que si enajenado el fundo hubiere muerto el que así lo legó, nada se habrá legado en virtud de esta cláusula; «el fundo con sus aperos», y en virtud de las otras se podrán haber legado los aperos.

6.- SCÉVOLA; *Digesto, libro XVI.*- Una había legado a su nieta los predios que había tenido en cierta región, como estaban provistos, con el vino, con los granos, y con el libro de cuentas, y había añadido estas palabras: «todo lo que hubiere, cuando yo muera, en aquella región, y todo lo que en cualquier especie hubiere en aquella región o fuere mío»; condenado en vida de la testadora uno de los deudores, no pagó viviendo la testadora; se preguntó, si le pertenecía al nieto lo que se debiese en virtud de la sentencia del Juez. Respondió, que nada se exponía para que no se le debiese.

7.- EL MISMO; *Digesto; libro XXII.*- Uno había legado a Párdula, manumitido en el testamento una tienda con cenáculo, con las mercaderías, los enseres, y el ajuar que allí hubiese; y también la bodega con el vino, y con los vasos, y con los enseres, y con los encargados del comercio, que había acostumbrado a tener consigo; se preguntó, si, habiéndose quemado en vida del testador la casa en que estuvo el cenáculo, que se le había legado, y habiéndose edificado otra nueva después de dos años en el mismo lugar, y habiéndose vendido por el testador la bodega que al mismo le había sido legada, pero habiéndose diferido la venta del vino para venderlo de este modo convenientemente, podría conseguir Párdula todas las cosas legadas, Respondió, que no se deben aquellas respecto a las que

8.- ULPIANUS; *libro XX, ad Sabinum*.- In instrumento fundi ea esse, quae fructus quaerendi cogendi conservandi gratia parata sunt, Sabinus libris ad vitellium evidenter enumerat. Quaerendi, veluti homines qui agrum colunt, et qui eos exercent praepositive sunt is, quorum in numero sunt vilici et monitores: praeterea boves domiti, et pecora stercorandi causa parata, vasaque utilia culturae, quae sunt aratra ligones sarculi falces putatoriae bidentes et si qua similia dici possunt. Cogendi, quemadmodum torcularia corbes falcesque mesoriae falces fenariae quali vindemiatorii exceptoriaeque, in quibus uvae comportantur. conservandi, quasi dolia, licet defossa non sint, et cuppae.

§ 1.- Quibusdam in regionibus accedunt instrumento, si villa cultior est, veluti atrienses scoparii, si etiam viridiaria sint, topiarii, si fundus saltus pastio-nesque habet, greges pecorum pastores saltuarii.

9.- PAULUS; *libro IV, ad Sabinum*.- De grege ovium ita distinguendum est, ut, si ideo comparatus sit, ut ex eo fructus caperetur, non debeatur: si vero ideo, quia non aliter ex saltu fructus percipi poterit, contra erit, quia per greges fructus ex saltu percipiuntur.

10.- ULPIANUS; *libro XX, ad Sabinum*.- Si re-ditus etiam ex melle constat, alvei apesque con-tinentur.

11.- IAVOLENUS; *libro II, ex Cassio*.- Eadem ratio est in avibus, quae in insulis maritimis aluntur.

reference to which the testator had changed his mind was not due.

8.- ULPIANUS; *On Sabinus, Book XX*.- Sabinus says clearly in his works on Vitellius that everything is included in the equipment of land which is used for procuring, gathering, and preserving the crops. For instance, in order to procure the latter some slaves are employed to cultivate the soil, and others are placed in charge of them to compel them to labor, and among the latter are the stewards and overseers, and, in addition, are oxen, broken to work, and flocks provided for manuring the ground, and implements and utensils for cultivation, such as plows, hoes, weeding hooks, pruning knives, forks, and other tools of this kind. For the purpose of gathering the crops, implements such as presses, baskets, sickles for cutting grain, scythes for mowing hay, baskets in which grapes are picked and carried, are included. For preserving the crops, casks, for example, even though they may not be buried in the ground, and vats, are used.

§ 1.- In some districts, for instance, if a farmhouse is of the better class, there are added, as accessories, slaves who are porters, and floor-cleaners; and if there are pleasure-gardens, gardeners. If the land has woods and pastures, droves of cattle and their shepherds and foresters are included.

9.- PAULUS; *On Sabinus, Book IV*.- With reference to flocks of sheep, the following distinction must be observed, namely, that if they were kept in order to obtain the profits from them, they will not be due under the legacy; but this will not be the case if the profits of the woodland cannot otherwise be acquired, as these profits are obtained therefrom by means of flocks of sheep.

10.- ULPIANUS; *On Sabinus, Book XX*.- If the income of the land also consists of honey, the bees and their hives will be included.

11.- JAVOLENUS; *On Cassius, Book II*.- The same rule applies to birds which are kept in houses near the sea.

hubiese sido cambiada la voluntad.

8.- ULPIANO; *Comentarios a Sabino, libro XX*.- Sabino expone con evidencia en sus libros de comentarios a Vitelio, que en los aperos de un fundo están comprendidas las cosas que fueron preparadas para obtener, recoger y conservar los frutos; para obtenerlos, como los esclavos que cultivan el campo, y los que los dirigen, o están al frente de ellos, en cuyo número están los encargados de las granjas, y los capataces, y además los bueyes domados, los ganados destinados a estercolar, y los instrumentos útiles para el cultivo, como son los arados, los azadones, los escardillos, las hoces de podar, los bidentes y otros análogos que se pueden decir; para recogerlos, como las prensas de lagares, las cestas, las hoces de segar, las guadañas, los cestos de vendimiar y de recoger, en que se acarrean las uvas; para conservarlos como las tinajas, aunque no estén empotradas, y las cubas.

§ 1.- En algunas regiones se agregan a los aperos, si la casa de campo está más cuidada, por ejemplo, los porteros, y los barrenderos; si también hubiera jardines, los jardineros, y si el fundo tiene bosque y pastos, los rebaños de ganados, los pastores, y los guardabosques.

9.- PAULO; *Comentarios a Sabino, libro IV*.- Respecto al rebaño de ovejas se ha de distinguir de este modo, que no se deberá, si hubiera sido comprado para obtenerse de él frutos; pero si lo hubiera sido porque de otro modo no se pudieren percibir frutos del bosque, será lo contrario, porque los frutos se perciben del bosque por medio de los rebaños.

10.- ULPIANO; *Comentarios a Sabino, libro XX*.- Si consta que de la miel se obtiene también renta, se comprenden las colmenas y las abejas.

11.- JAVOLENO; *Doctrina de Cassio, libro II*.- La misma razón hay en cuanto a las aves, que se alimentan en las islas del mar.

12.- ULPIANUS; *libro XX, ad Sabinum*.- Quaesitum est, an frumentum, quod cibariis cultorum paratum foret, instrumento cederet. Et plurimis non placet, quia consumeretur: quippe instrumentum est apparatus rerum diutius mansurarum, sine quibus exerceri nequiret possessio: accedit eo, quod cibaria victus magis quam colendi causa pararentur.

Sed ego puto et frumentum et vinum ad cibaria paratum instrumento contineri: et ita servium respondisse auditores eius referunt. Item nonnullis visum est frumentum, quod serendi causa sepositum est, instrumento contineri, puto quia et instar culturae esset et ita consumitur, ut semper reponeretur: Sed causa seminis nihil a cibariis differt.

§ 1.- Conservandi fructus causa, veluti granaria, quia in his fructus custodiuntur, urceos capsellas, in quibus fructus componuntur: sed et ea, quae exportandorum fructuum causa parantur, instrumenti esse constat, veluti iumenta et vehicula et naves et cuppae et culei.

§ 2.- Alfenus autem, si quosdam ex hominibus aliis legaverit, ceteros, qui in fundo fuerunt, non contineri instrumento ait, quia nihil animalis instrumenti esse opinabatur: quod non est verum: constat enim eos, qui agri gratia ibi sunt, instrumento contineri.

§ 3.- Quaeritur, an servus, qui quasi colonus in agro erat, instrumento legato contineatur. Et Labeo et Pegasus recte negaverunt, quia non pro instrumento in fundo fuerat, etiamsi solitus fuerat et familiae imperare.

12.- ULPIANUS; *On Sabinus, Book XX*.- The question arose whether grain which was intended for the support of slaves who cultivated the land would form part of the equipment of the latter. The greater number of authorities do not think that it would, because it is to be consumed; as the equipment in general includes everything which is intended to remain on the land for a considerable time, and without which the possession of it cannot be maintained. Food prepared for the support of the slaves is considered as accessory, rather than as something destined to promote cultivation.

I think, however, that grain and wine intended for food should be included in the equipment, and the pupils of Servius state that this was also his opinion. Likewise, it is held by some authorities that grain reserved for seed is included in the equipment, and I believe this to be correct, because it has reference to the cultivation of the soil, and is consumed in such a way that it is always replaced. Grain reserved for seed differs in no respect from that intended for the food of slaves.

§ 1.- We have mentioned granaries, for the reason that the crops are kept therein, and earthen vessels, and bins in which they are arranged, as belonging to the class of things used for the preservation of crops. Whatever is intended for the transportation of the crops is also included in the equipment of the land, for example, beasts of burden, vehicles, ships, barrels, and sacks.

§ 2.- Alfenus, however, says that if the testator should make a bequest of certain slaves who were not attached to the land, those who were attached to it will not be included in the equipment of the same, because he is of the opinion that no animal is an implement. This is not correct, for it is well established that the slaves who are on the land for the purpose of cultivating it are included in its equipment.

§ 3.- The question arose whether a slave who was a tenant on land is included in a devise as an implement. Labeo and Pegasus very properly hold that he is not, because he is not on the premises as an appurtenance to the same, even if he were accustomed to exercise supervision over others employed thereon.

12.- ULPIANO; *Comentarios a Sabino, libro XX*.- Se preguntó si se agregaría a los aperos el trigo que estuviese destinado a la manutención de los cultivadores. Y a muchos no les parece bien, porque se consume, pues es apero el aparato de cosas que han de subsistir largo tiempo, sin las que no se podría explotar la posesión; a esto se añade, que las provisiones estarían destinadas más bien para la manutención, que para el cultivo. Pero yo opino que en el apero se contienen así el trigo, como el vino destinado para la manutención; y sus discípulos dicen que así respondió Servio. También les pareció a algunos, que el trigo, que se separó para sembrar, se comprende en el apero; yo creo, que porque sería como para el cultivo, y se consume de modo que siempre se repone; pero por razón de estar para simiente en nada se diferencia del que sirve para la manutención.

§ 1.- Consta que es del apero lo que sirve para conservar los frutos, como los graneros, porque en ellos se guardan los frutos, las orzas y las cajas en que se preparan los frutos, y también lo que se destina para exportar los frutos, como las caballerías, los vehículos, las naves, las cubas y los odres.

§ 2.- Pero Alfenos dice, que si hubiere legado a unos algunos esclavos, no se comprenden en el apero los demás que hubiere en el fundo, porque opinaba que nada animal se comprendía en el apero; lo que no es verdad, porque consta que los que por exigencias del campo están en él, se comprenden en el apero.

§ 3.- Se pregunta, si el esclavo, que como colono estaba en el campo, se comprenderá en el apero legado. Y con razón dijeron que no Labeón y Pegaso, porque no había estado en el campo como siendo del apero, aunque también había solido mandar a la servidumbre.

§ 4.- Saltuarium autem Labeo quidem putat eum demum contineri, qui fructuum servandorum gratia paratus sit, eum non, qui finium custodiendorum causa: sed neratius etiam hunc, et hoc iure utimur, ut omnes saltuarii contineantur.

§ 5.- Trebatius amplius etiam pistorem et tonsorem, qui familiae rusticae causa parati sunt, putat contineri, item fabrum, qui villae reficiendae causa paratus sit, et mulieres quae panem coquant quaeque villam servent: item molitores, si ad usum rusticum parati sunt: item focariam et vilicam, si modo aliquo officio virum adiuvet: item lanificas quae familiam rusticam vestiunt, et quae pulmentaria rusticis coquant.

§ 6.- Sed an instrumenti instrumentum legato instrumento continetur, quaeritur: haec enim, quae rusticorum causa parantur, lanificae et lanae et tonsores et fullones et focariae non agri sunt instrumentum, sed instrumenti. puto igitur etiam focariam contineri: sed et lanificas et ceteros, qui supra enumerati sunt: et ita servium respondisse auditores eius referunt.

§ 7.- Uxores quoque et infantes eorum, qui supra enumerati sunt, credendum est in eadem villa agentes voluisse testatorem legato contineri: neque enim duram separationem iniunxisse credendus est.

§ 8.- Si aliqua parte anni in fundo pascantur pecora, aliqua parte his pabulum conducitur, vel servi, si aliqua parte anni per eos ager colitur, aliqua parte in mercedem mittuntur, nihilo minus instrumento continentur.

§ 9.- Cellarium quoque, id est ideo praepositum, ut rationes salvae sint, item ostiarium mulionemque instrumenti esse constat.

§ 10.- Et molas et machinas, fenum stipulas, asinum machinarium, machinam frumentariam, vas

§ 4.- Labeo thinks that a forester who has been appointed to see to the preservation of the crops is included in the legacy, but that one who is charged with the maintenance of boundaries is not. Neratius, however, holds that he is. The latter opinion, at present, prevails, so that all foresters are included.

§ 5.- Trebatius goes still farther, and thinks that the baker and the barber who are employed for the benefit of the slaves of rustic estates are included, as well as the mason whose duty it is to repair the buildings, and the female slaves who bake the bread, and take care of the house, and likewise the millers employed on the estate and the cook and stewardess, provided they assist any male slave by their service; and also women who are spinners and weavers, and make clothing for the slaves and prepare their food.

§ 6.- The question, however, arises whether any accessories to the equipment are included in a legacy of the latter; for slaves employed for the benefit of the farmers, such as spinners, weavers, barbers, fullers, and cooks do not, properly speaking, form part of the equipment of the land, but are they accessory to the same? I think that cooks are included as well as spinners and weavers, together with the others above enumerated, and the pupils of Servius assert that this was also his opinion.

§ 7.- It must be held that the testator intended that the wives and children of those above mentioned, and who were members of the same household, should be included in the legacy; for it is incredible that he would have directed such a cruel separation to take place.

§ 8.- Where flocks are pastured for a part of the year upon the land, and food is purchased for them during the remainder; or where the land is cultivated for a portion of the year by the slaves, and they are hired out for pay during the remaining portion, they will, nevertheless, be included in the equipment.

§ 9.- It is well established that the steward also (that is to say the slave who is charged with seeing that the accounts are properly rendered), as well as the porter and the muleteer, are also included in the equipment.

§ 10.- The millstones, machinery, hay, straw, the ass used to turn the wheel and all the apparatus of the

§ 4.- Mas a la verdad, Labeón opina que se comprende solo aquel guardabosque, que haya sido destinado a guardar los frutos, no el que a guardar las lindes; pero Neracio cree, que también éste; y de este derecho usamos, de modo que se comprenden todos los guardabosques.

§ 5.- Además opina Trebacio, que también se comprenden el panadero, y el barbero, que están destinados para el servicio de los esclavos campesinos; así mismo el operario, que esté destinado para reparar la casa de campo; y las mujeres que cuezan el pan, y las que presten servicio en la casa de campo; también los molineros, si están destinados al servicio del campo; igualmente la que cuida del fuego, y la mujer del granjero, si en algún servicio le ayuda al marido; y también las trabajadoras en lana, que visten a los esclavos campesinos y las que cuecen la comida para los campesinos.

§ 6.- Pero se pregunta, si en el legado del apero se comprenden los instrumentos de las cosas del apero; porque las que se destinan por causa de los campesinos, las trabajadoras en lana, los barberos, los lavaderos, y las que cuidan de la lumbre, no son instrumentos del campo, sino del apero; opino, pues, que también se comprende la que cuida de la lumbre, e igualmente las trabajadoras en lana, y los demás que antes se han enumerado; y dicen sus discípulos que así respondió Servio.

§ 7.- Se ha de creer, que el testador quiso que se comprendieran en el legado también las mujeres y los hijos de los que arriba se han enumerado, que vivan en la misma granja; porque no es creíble que les haya impuesto una dura separación.

§ 8.- Si en alguna parte del año pastan en el fundo los ganados, y durante otra partes se les lleva el pasto, o tratándose de esclavos, si alguna parte del año se cultiva por ellos el campo, y durante otra parte son enviados a trabajar a jornal, son, no obstante, comprendidos en el apero.

§ 9.- También consta que el despensero, esto es, el encargado de que estén guardadas las raciones, y asimismo el portero y el mulero, son del apero.

§ 10.- Son del apero las muelas, las máquinas, el heno, la paja, el burro de la máquina, la atahona, la

aeneum, in quo sapa coqueretur et defrutum fiat et aqua ad bibendum lavandamque familiam paratur, instrumenti esse, et cribra, et plaustra quibus sterces evehatur.

§ 11.- Ea vero, quae solo continentur, instrumenti fundi non esse cassius scribit, veluti harundineta et salicta, antequam caesa sint, quia fundus fundi instrumentum esse non potest: sed si caesa sint, puto contineri, quia quaerendo fructui deserviunt. idem et in palis erit dicendum.

§ 12.- Si in agro venationes sint, puto venatores quoque et vestigatores et canes et cetera quae ad venationem sunt necessaria instrumentum contineri, maxime si ager et ex hoc redditum habuit.

§ 13.- Et si ab aucupio redditus fuit, aucupes et plagae et huius rei instrumentum agri instrumento continebitur: nec mirum, cum et aves instrumento exemplo apium contineri sabinus et cassius putaverunt.

§ 14.- Si quis eodem instrumento in plurimis agris utatur, cuius agri sit instrumentum, quaeritur. Et ego arbitror, si quidem apparet voluntas patris familiae, cui potius agro destinaverat, eius esse instrumentum: ceteri enim agri ab hoc agro veluti mutantur: si non appareat, nullius instrumento cedet: neque enim pro parte dividemus instrumentum.

§ 15.- Supellex ceteraque, si qua in agro fuerunt, quo instructor esset pater familias, instrumento fundi non continentur.

§ 16.- Si domus sit instrumentum legatum, videntur quid contineatur. Et pegasus ait instrumentum domus id esse, quod tempestatis arcendae aut incendii causa paratur, non quod voluptatis gratia: itaque neque specularia neque vela quae frigoris

mill are included; the brazen cauldron in which the juice of the grape is boiled and spiced, and those which contain water intended for drinking and washing by the slaves are also part of the equipment, as well as the hand-barrows and carts used for the transportation of manure.

§ 11.- Cassius says that anything attached to the soil does not constitute any part of the equipment of the land, as reeds and osiers before they are cut, because the land cannot be an equipment of itself. If, however, they should be cut, I think that they will be included, because they serve for the production of crops. The same rule applies to stakes.

§ 12.- If there is game on the land, I think that the slaves who are hunters and trackers, as well as the dogs, and everything else necessary for hunting, are included in the equipment, especially if the land derives an income from this source.

§ 13.- Likewise, if an income is derived from bird-catching, the slaves who are fowlers and their nets, and any other apparatus used for this purpose, are included in the equipment. This is not extraordinary, as Sabinus and Cassius think that birds themselves are included in the equipment of the land, for instance, such as have been domesticated.

§ 14.- Where a man uses the same implements on different tracts of land, the question arises, to which one will they belong as equipment? I think that if the intention of the testator is plain as to which tract of land he intended them to belong, they will be accessory thereto, for the other tracts have, as it were, borrowed the said implements from this one. If his intention is not clear, they will be accessory to none of them, for we cannot divide implements proportionally.

§ 15.- Any furniture, or other articles found on the land, which the owner intended to be placed in better order, will not be included in the equipment of the same.

§ 16.- It should be considered what comes under the head of household equipment, where the latter is bequeathed. Pegasus says that the equipment of a house includes everything used for protection against the weather, or for the prevention of fire; but not what

caldera de cobre en que se cuece el arrope, y se hace el vino cocido, y en que se echa el agua para que beba y se lave la servidumbre y las cribas, y los carros en que se saque el estiércol.

§ 11.- Mas escribe Cassio, que las cosas que se contienen en el suelo no son del apero del fundo como los cañaverales y los sauzaes, antes que hayan sido cortados, porque el fundo no puede ser instrumento del fundo; pero si hubieran sido cortados, opino que se comprenden, porque sirven para procurar frutos. Lo mismo habrá de decir también respecto a los palos.

§ 12.- Si en el campo hubiera cazadores, opino que se comprenden en el apero también los cazadores, los ojeadores, los perros, y las demás cosas que son necesarias para la caza, mayormente si también de esto obtuvo renta el campo.

§ 13.- Y si hubo renta procedente de la caza de aves, los cazadores, y las redes, y los aparatos para esta cosa se comprenderán en el apero del campo; y no es de extrañar, porque Sabino y Casio opinaron, que también las aves se comprenden en el apero a semejanza de las abejas.

§ 14.- Si alguno usara del mismo apero en muchos campos, se pregunta de qué campo será el apero. Y yo opino, que, si verdaderamente aparece a qué campo lo había destinado preferentemente la voluntad del testador, es apero de aquel, porque los demás campos son como proveídos a préstamo por este; y si no apareciera, no se agregará al apero de ninguno, porque tampoco dividiremos en partes el apero.

§ 15.- El ajuar, y las demás cosas, si algunas hubiere en el campo, para que el padre de familia estuviese más provisto, no se comprenderán en el apero del fundo.

§ 16.- Si se hubieran legado los menesteres de una casa, se ha de ver qué se contenga. Y dice Pegaso, que es menester de una casa lo que se destina para defenderse de la tempestad, o por causa de incendio, no lo que con objeto de recreo; y así, no se deben ni

causa vel umbrae in domo sunt deberi. Quae sententia cassii fuit, qui dicebat inter instrumentum et ornamentum multum interesse: instrumenti enim ea esse, quae ad tutelam domus pertinent, ornamentum, quae ad voluntatem, sicuti tabulas pictas.

§ 17.- Vela autem cilicia instrumenti esse cassius, quae ideo parantur, ne aedificia vento vel pluvia laborent.

§ 18.- Acetum quoque, quod exstinguendi incendii causa paratur, item centones sifones, perticae quoque et scalae, et formiones et spongiae et amas et scopas contineri plerique et pegasus aiunt.

§ 19.- Tegulam autem et tignum eius rei causa paratum instrumento contineri, si ad huiusmodi causam habeat tigna parata ad alios usus non deservientia. Proinde et fulcimenta si qua habebat huic rei necessaria, etiam ea instrumento domus continebuntur.

§ 20.- De velis, quae in hypaethris extenduntur, item de his, quae sunt circa columnas, celsus scribit magis suppellectili adnumeranda et ita sabinum et cassium putare.

§ 21.- Canales autem et harpagones et amas instrumento contineri constat.

§ 22.- Item perticae, quibus araneae detergantur, item spongiae, quibus columnae pavimenta podia extergantur, scalae, quae ad lacunaria admoveantur, instrumenti sunt, quia mundiorem domum reddunt.

§ 23.- Papinianus quoque libro septimo responsorum ait: sigilla et statuariae adfixae instrumento domus non continentur, sed domus portio sunt: quae vero non sunt adfixae, instrumento non continentur, inquit: suppellectili enim adnumerantur, excepto horologio aereo, quod non est adfixum: nam et hoc instrumento domus putat contineri, sicut prothyrum domus, si velamen est, inquit, instrumento domus continetur.

§ 24.- Fistulae autem et canales et crateres et si qua

is employed for purposes of pleasure; and therefore neither the glass screens nor awnings which are kept in the house to provide against cold or to furnish shade are due. This was the opinion of Cassius, who was accustomed to say that a great difference existed between utensils and ornaments, as utensils are articles which are employed for the protection of the house, and ornaments are things which contribute to the pleasure of the owner, as for instance, paintings.

§ 17.- Cassius thinks that the hair-cloth curtains used to prevent buildings from being affected by wind or rain belong to the equipment of a house.

§ 18.- Pegasus and many other authorities say that vinegar kept for the purpose of extinguishing fire, mops made of rags, siphons, poles, ladders, mats, sponges, buckets and brooms are included.

§ 19.- If the owner should have obtained any tiles or beams for his house, they will be included in the equipment of the same, if they were intended for this use, and were not employed in any other. Hence, if he had a scaffold required for this purpose, it would also be included in the equipment of the building.

§ 20.- Celsus says with reference to curtains extending over the thresholds and window sills, and also concerning such as are suspended from columns, that they should rather be classed as furniture; and Sabinus and Cassius are of the same opinion.

§ 21.- Pipes and grappling hooks are also included in the term equipment.

§ 22.- Likewise, long rods used for removing spider webs, sponges with which columns, floors, and the feet of furniture are cleansed, and ladders employed for the purpose of washing ceilings, are utensils, because they render the house cleaner.

§ 23.- Papinianus says, in the Seventh Book of Opinions, that ornamental plaster work, and statues fastened to the walls, are not included in the equipment of a house, but are part of the house itself; and, indeed, where they are not attached to it, they are not included, for they come under the head of furniture; with the exception of brass clocks which are not fastened to the walls; for he thinks that these, like the cloth curtains suspended before a house, form part of its equipment.

§ 24.- Pipes, gutters and basins, as well as other

las vidrieras, ni las cortinas, que hay en la casa por causa del frío o de la sombra. Cuya opinión fue de Cassio, que decía, que hay mucha diferencia entre los menesteres y el ornato; porque eran menesteres las cosas que se refieren a la conservación de la casa, y cosas de ornato las que al recreo, como los cuadros pintados.

§ 17.- Pero Cassio dice, que las cortinas de pelo de cabra son menesteres; porque se destinan a que no sufran los edificios por el viento o por la lluvia.

§ 18.- Muchos y Pegaso dicen, que se comprende también el vinagre que está destinado para apagar los incendios, y también los centones, los sifones, las pértigas, y las escalas; y las esteras, esponjas, cubos y escobas.

§ 19.- Mas las tejas y las vigas preparadas con este objeto se comprenden en los menesteres, si tuviera preparadas las vigas para este objeto sin servir para otros usos. Por consiguiente, también se comprenderán en los menesteres de la casa los puntales, si tenía algunos necesarios para este objeto.

§ 20.- Respecto a los toldos que se extienden en los patios, y a los que están cerca de las columnas, escribe Celso que más bien se han de contar en el menaje; y que así opinan Sabina y Cassio.

§ 21.- Pero consta que se comprenden en los menesteres de canales, los arpones y los cubos.

§ 22.- También las varas con que se quitan las telarañas; asimismo las esponjas, con las que se limpian las columnas, los pavimentos, y los balcones; las escalas, que se ponen para los artesonados, son menesteres, porque hacen más limpia la casa.

§ 23.- También dice Papiniano en el libro séptimo de las Respuestas: Las figurillas y estatuas fijas no se comprenden en los menesteres de la casa, sino que son parte de la casa; pero las que no están fijas dice que no se comprenden en los menesteres, porque se cuentan en el menaje, excepto el reloj de metal, que no está fijo, -porque opina también éste se comprende en los menesteres de la casa-, así como la techumbre del zaguán de la casa, si es de lienzo, dice que se comprende en los menesteres de la casa.

§ 24.- Mas las cañerías, las canales y las pilas de la

sunt alia ad aquas salientes necessaria, item serae et claves magis domus portio quam domus instrumentum sunt.

§ 25.- Specularia quoque adfixa magis puto domus esse partem: nam et in emptione domus et specularia et pegmata cedere, sive in aedificio sunt posita sive ad tempus detracta. sed si non sint, reposita ad hoc tamen sint, ut suppleantur, si qua desint: instrumento potius continebuntur.

§ 26.- Cancelli quoque instrumento contineri puto.

§ 27.- Sed si fundus non sit cum instrumento legatus, sed ita ut instructus sit, quaesitum est, an plus contineatur, quam si cum instrumento legatus esset. Et Sabinus libris ad Vitellium scribit fatendum esse plus esse, cum instructus fundus legetur, quam si cum instrumento: quam sententiam cottidie incrementum et invalescere videmus.

Quanto igitur hoc legatum uberius est, videndum est. Et Sabinus definit et Cassius apud Vitellium notat: omnia quae eo collocata sunt, ut instructor esset pater familias, instructo, inquit, continebuntur, id est quae ibi habuit, ut instructor esset. Hoc ergo legato non agri instrumentum, sed proprium suum instrumentum reliquisse videtur.

§ 28.- Proinde si fundus sit instructus legatus, et suppellex continebitur, quae illic fuit usus ipsius gratia, et vestis non solum stragula, sed et qua ibi uti solebat: mensae quoque eboreae vel si quae aliae, item vitreae et aurum et argentum: vina quoque, si qua ibi fuerint usus ipsius causa, continentur, et si quid aliud utensilium.

§ 29.- Sed si qua eo congesserat non usus ipsius

things required for fountains, together with locks and keys, rather constitute a part of the house itself than accessories thereof.

§ 25.- Panes of glass, attached to a house, I incline to believe belong to it, for when a house is bought, the panes and the shelves are included in the purchase; whether they are in the building at the time, or have been temporarily removed. If, however, they have not been replaced, but are, nevertheless, kept to be restored to their original position, they will be embraced in the equipment.

§ 26.- I think that lattices should be included under the head of equipment.

§ 27.- Where a tract of land is not devised with its equipment, but in order that it may be furnished with it, the question arose whether more is included than if the land had been merely left together with its equipment. Sabinus stated in his works on Vitellius, that it must be confessed that more is left where land is devised to be provided with the means of cultivation than where it is devised furnished with them, which opinion we see is increasing in importance and validity every day.

Therefore let us consider in what respect this legacy is more advantageous than the other. Sabinus lays down the rule, and Cassius, in a note on Vitellius, says that everything that has been brought upon the land in order that the owner of the same may be better prepared for cultivating it is included; that is to say, whatever he has there in order that he may be more abundantly supplied. Thus, by such a legacy he is held to have left not the implements which belong to the land, but those that constitute his own private property.

§ 28.- Hence, if land already provided with the necessary implements is devised, and the furniture which was there for the use of the testator himself is included, together with clothing, not only outer garments, but also those which the testator was accustomed to wear while there, and tables of ivory or of any other material, vessels of glass, gold, and silver, as well as wines, if there were any intended for his own use, and any other utensils; they will also be included.

§ 29.- Where, however, the testator had collected

fuentes, y si algunas otras cosas son necesarias para los surtidores de aguas, y también las cerraduras y las llaves, son más bien parte de la casa, que menesteres de la casa.

§ 25.- También opino que las vidrieras fijas son más bien parte de la casa; porque también en la compra de una casa se agregan las vidrieras y los aparatos para retratos, ya estén puestos en el edificio, ya separados cierto tiempo; pero si no hubieran sido puestos, y estuvieren para suplir los que falten, más bien se comprenderán en los menesteres.

§ 26.- Opino que también las celosías se comprenden en los menesteres.

§ 27.- Pero si el fundo no hubiera sido legado con el apero, sino así como está provisto, se preguntó, si se comprenderá más que si hubiese sido legado con el apero. Y escribe Sabino en los libros de Comentarios a Vitelio, que se ha de confesar, que haya más cuando se lega el fundo provisto, que si con el apero; cuya opinión vemos que diariamente se extiende y robustece.

Así, pues, se ha de ver en cuánto es más lucrativo este legado; y dice Sabino, y anota Cassio en Vitelio; todo lo que fue colocado para que el padre de familia estuviese más provisto, dice que se comprenderá en el fundo provisto, esto es, lo que tuvo en él para que estuviese más provisto. Luego parece que en este legado no legó el apero del campo, sino sus propios utensilios.

§ 28.- Por consiguiente, si hubiera sido legado el fundo provisto, se comprenderá el menaje que hubo en él para uso del mismo, y los vestidos, no solamente los bordados, sino también los que solía usar allí; también las mesas de marfil, y otras cualesquiera; también los vasos de vidrio, y el oro, y la plata; igualmente se comprenderán los vinos, si allí hubiere algunos para uso del mismo, y cualquier otro utensilio.

§ 29.- Pero si en él había reunido algunas cosas no

causa, sed custodiae gratia, non continebuntur: vina etiam, quae in apothecis sunt, non cedent: et hoc iure utimur, ut quae ibi pater familias quasi in horreo habuit, haec non contineantur.

§ 30.- Celsus quoque libro nono decimo Digestorum scribit fructus ibi repositos, ut venirent vel in alium usum quam fundi converterentur, instructo fundo non contineri.

§ 31.- Idem Celsus eodem libro ait etiam suppellectilarios et ceteros hoc genus servos contineri, id est ministeria, quibus instructus erat in eo fundo (extra ea quae libertatem acceperunt), et qui rure morari solebant.

32.- Si instructum fundum legasset, ea paedagogia, quae ibi habebat, ut, cum ibi venisset, praesto essent in triclinio, legato continentur.

§ 33.- Contubernales quoque servorum, id est uxores, et natos, instructo fundo contineri verum est.

§ 34.- Instructo autem fundo et bibliothecam et libros, qui illic erant, ut quotiens venisset uteretur, contineri constat. sed si quasi apotheca librorum utebatur, contra erit dicendum.

§ 35.- Neratius quoque libro quarto Epistularum Rufino respondit instructo fundo et suppellectilem et vina et mancipia non solum ad cultum custodiamve villae, sed etiam quae ut ipsi patri familias in ministerio ibi essent, legato cedere.

§ 36.- Imagines quoque hae solae legatae videntur, quae in aliquo ornatu villae fuerunt.

§ 37.- Papinianus quoque praediis instructis legatis mancipia non contineri, quae temporis causa illic fuerunt ac non eo animo transtulit pater familias, ut aut fundi aut suum instrumentum faceret.

certain articles, not for his own use but for safe-keeping, they will not be included. Wines contained in warehouses are also not included. We have adopted this rule so that whatever the head of the household has collected there, as, for instance, in a granary, may not be embraced in the legacy.

§ 30.- Celsus also states, in the Nineteenth Book of the Digest, that where fruits are collected on the premises in order to be sold, or for any other purpose than for the use or benefit of the land itself, they will not be included among the equipment of the same.

§ 31.- Celsus also says, in the same Book, that slaves who have care of the furniture and other slaves of this kind are included; that is to say, household slaves, who are employed on the land, with the exception of those who have received their freedom, and who are accustomed to reside in the country.

§ 32.- If a testator should devise land already provided with the means of cultivation, young slaves who are being instructed in the service of the table, and whom the testator was accustomed to have there, whenever he came, are embraced in the legacy.

§ 33.- The members of the slaves' families, that is, their wives and children, are undoubtedly included in the devise of land with its equipment.

§ 34.- Where land with its equipment is devised, it is well established that the library, and any books upon the premises, which the head of the household made use of whenever he came, are included. If, however, a warehouse should be used for the storage of the books, the contrary opinion must be held.

§ 35.- Neratius, also, in replying to Rufinus, stated, in the Fourth Book of the Epistles, that the devise of a tract of land with its equipment includes the furniture, the wines, and the slaves, not only those employed in the cultivation of the soil, and the care of the same, but also those attached to the personal service of the head of the household.

§ 36.- Only such pictures are considered to have been bequeathed as were used for the adornment of the country-house.

§ 37.- Papinianus holds that where land is devised with its equipment those slaves are not included who were there only temporarily, and who had not been brought by the testator either for the purpose of being employed on the land, or for his own service.

para su propio uso, sino para custodiarlas, no serán comprendidas, tampoco se agregarán los vinos que están en las bodegas; y usamos de este derecho, que no se comprenderán las cosas que allí tuvo el padre de familia como en un almacén.

§ 30.- También escribe Celso en el libro decimonono del digesto, que los frutos allí depositados para ser vendidos, o para ser aplicados a otro uso que al del fundo, no se comprenden en el fundo provisto.

§ 31.- Dice el mismo Celso en el mismo libro; que también se comprenden los camareros y los demás esclavos de este género, esto es, los de los cargos en que estaba servido en aquel fundo, excepto los que recibieron la libertad, y los que solían morar en el campo.

§ 32.- Si hubiese legado un fundo provisto, se comprenden en el legado los pajes que tenía allí para que cuando allí fuese le prestasen servicio en la mesa.

§ 33.- Es verdad que en el fundo provisto se comprenden también los compañeros de los esclavos, esto es, sus mujeres e hijos.

§ 34.- Pero consta que en el fundo provisto se comprenden la biblioteca y los libros que allí había para usarlos cuando él fuese; pero se habrá de decidir lo contrario, si usaba de ella como de un almacén de libros.

§ 35.- También respondió Neracio a Rufino en el libro cuarto de las Epístolas, que al legado del fundo provisto se agregan el menaje, los vinos y los esclavos, no solamente los que estuviesen allí para el cultivo o la guarda de la casa de campo, sino también los que al servicio del mismo padre de familia.

§ 36.- También se consideran legadas aquellas solas imágenes, que sirvieron de algún ornato en la casa de campo.

§ 37.- También dice Papiniano que en los predios provistos legados no se contienen los esclavos que estuvieron allí por causa temporal, y que el padre de familia no trasladó con la intención de hacerlos o del apanaje del fundo, o de su propio servicio.

§ 38.- Idem respondit praediis instructis legatis actorem ex his in provinciam missum, ut ordinatis negotiis ad primum actum rediret, legato praediorum cedere, quamvis nondum redierit.

39.- Idem respondit instructis hortis legatis etiam vina, quae ibi fuerunt, quo dominus esset instructor, contineri: aliud esse, si horrea ibi habuit, unde instruebatur vel in urbe vel in aliis praediis.

§ 40.- Idem respondit domo per fideicommissum relicta cum suppellectili Claudio Hieronymiano clarissimo viro ab Umbrio Primo et mensas et ceteram suppellectilem, quam in hortis pater familias in Proconsulatum profecturus contulerat, ut tutiore loco essent, contineri.

§ 41.- Idem respondit theriacam quoque et cetera medicamenta, quae secessus causa dominus ibi habuit, et vestem propter secessum ibi depositam instructo fundo legato inesse.

§ 42.- Idem respondit domo ita, ut instructa est, cum omni iure suo legata urbanam familiam, item artifices, quorum operae ceteris quoque praediis exhibebantur, legato non contineri: ostiarii autem, inquit, vel topiarii diaetarii aquarii domui tantum deservientes continebuntur. Sed quod de artificibus ait, falsum est, si eius domus causa parati sunt, licet aliis quoque praediis commodabantur.

§ 43.- Idem respondit domo instructa legata mensas eboreas et libros non contineri: sed et hoc falsum est: nam omne, quicquid in domo fuit, quo instructor ibi esset pater familias, continebitur, suppellectilem autem patris familiae instrumentum esse nemo dubitat. Denique Neratius libro quarto

§ 38.- The same authority was of the opinion that where land was devised with its equipment, and the steward who had charge of the same was sent back into the province to resume his former duties, after having transacted the business for which he came, he will be included in the devise of the land, even though he may not yet have returned.

§ 39.- He also says, where a testator devised his gardens with their equipment, that even the wines which were there for the purpose of having the table of the owner better supplied, are included. It is otherwise, however, if he kept the wines in warehouses, from whence he transported them either to the city, or to other estates.

§ 40.- He also holds that where a house was devised by Umbrius Primus, under a trust, together with its furniture, to Claudius Hieronianus, a most illustrious man, that the tables and the other furniture which the head of the household, being about to start on a journey to assume the proconsulate of a province, had stored in warehouses in order that they might be in a safer place, were included.

§ 41.- He also gave it as his opinion that a certain antidote against poison, and other drugs, together with any clothing which he had deposited there on account of his departure, were included in the devise of the land with its equipment.

§ 42.- He also held, where a house was devised with its equipment and all the legal rights attaching thereto, that the city slaves, as well as those who were skilled workmen, and whose services were also employed on other tracts of land, were not included in the bequest; but he says that the doorkeeper, the gardeners, those having charge of the rooms, the water-carriers, and slaves who only worked in the house will be included. However, what he states with reference to the skilled workmen is not true, if they were destined for the service of the house, even though they were lent to other estates to be employed thereon.

§ 43.- He also gives it as his opinion that where a house is devised with its equipment, ivory tables and books are not included. This, however, is false, for everything in the house by means of which the owner may be better provided and rendered more comfortable will be included. No one doubts that the

§ 38.- El mismo respondió, que habiéndose legado provistos unos predios, el administrador enviado de ellos a una provincia, para que puestos en orden unos negocios volviese a su antigua administración, se agrega al legado de los predios, aun cuando todavía no hubiere vuelto.

§ 39.- Respondió el mismo, que en los huertos provistos legados se comprenden también los vinos, que en ellos hubo para que el señor estuviese más provisto; que otra cosa era si allí tuvo almacenes de donde se proveía o en la ciudad o en otros predios.

§ 40.- El mismo respondió, que en la casa dejada por fideicomiso con su menaje a Claudio Heroniano, varón muy esclarecido, por Umbrio Primo, se comprendían también las mesas y el demás ajuar que al marchar el padre de familia al Proconsulado había llevado a los huertos, para que estuviesen en lugar más seguro.

§ 41.- El mismo respondió, que en el legado del fundo provisto se comprenden también la triaca y los demás medicamentos que tuvo allí para sus temporadas de retiro, y los vestidos allí depositados para esta temporada.

§ 42.- El mismo respondió, que, habiéndose legado una casa, «así como está provista, con todos sus derechos», no se comprenden en el legado esclavos urbanos, ni tampoco los artífices, cuyas obras se llevaban también a los demás predios, pero se comprenderán, dice, los porteros, los jardineros, los camareros, los aguadores, que sirvan solamente a la casa. Pero es falso lo que se ha dicho respecto a los artífices, si fueron destinados a esta casa, aunque se prestaban también a otros predios.

§ 43.- El mismo respondió, que habiéndose legado la casa provista, no se comprenden las mesas de marfil, ni los libros. Pero también esto es falso, porque se comprenderá todo cuanto hubo en la casa para que el padre de familia estuviese en ella más provisto; y nadie duda que el menaje es menester del

Epistularum Marcello fratri suo respondit et vestem domus instructae legato contineri: maxime, inquit, in proposita specie: proponebatur enim, qui legaverat, argentum et rationes excepisse: nam qui haec, inquit, excepit, non potest non videri de ceteris rebus, quae in ea essent, sensisse.

Sed et ipse Papinianus eodem libro Responsorum ait patrem mercatorem ac faeneratorem, qui duos filios totidemque filias heredes instituerat, ita legasse: "filiis maribus domum meam instructam do lego darique iubeo", merces et pignora an contineantur, quaeri posse: sed facilem iudici voluntatis coniecturam fore ceteris patris facultatibus examinatis.

§ 44.- Celsus scribit servis qui in fundo morarentur legatis, vicarios eorum non contineri, nisi appareat et de vicariis eum sensisse.

§ 45.- Papinianus quoque libro septimo Responsorum uxori, cui vir omnia, quae in domo erant, ab herede filia praestari voluit, cautiones debitorum emptionesque servorum non videri legatas respondit, nisi, inquit, ex alia parte et de servis eum cogitasse apparuerit, scilicet ut eorum servorum ei legasse videatur emptiones, quos et ipsos voluit ad eam pertinere.

§ 46.- Si quis fundum ita ut instructus est legaverit et adiecerit cum suppellectili vel mancipiis vel una aliqua re, quae nominatim expressa non erat, utrum minuit legatum adiciendo speciem an vero non, quaeritur. Et Papinianus respondit non videri minutum, sed potius ex abundanti adiectum.

§ 47.- Idem Papinianus libro septimo Respon-

furniture is something which contributes to the convenience of the head of a household. Finally, Neratius, in the Fourth Book of Epistles, informs his brother Marcellus that clothing is included in the devise of a house with its equipment; and he says that this is especially true in the case stated, for it was alleged that the testator who devised the property excepted the silver plate and the accounts, for anyone who excepted these things cannot have had in his mind any other articles which were there.

Papinianus himself, however, says in the same Book of Opinions, that where a father who was a merchant and a money-broker, and had two sons and as many daughters, appointed them his heirs as follows, "I do give and bequeath to my sons my house, furnished as it is, and I order it to be delivered to them," the question may be asked whether the merchandise and pledges are contained in this bequest. It would be easy for the judge to ascertain the intention of the testator by examining his other property.

§ 44.- Celsus says that where anyone bequeaths the slaves residing on the land, their under-slaves are not included, unless it should be evident that the testator had them also in his mind.

§ 45.- Papinianus also held, in the Seventh Book of Opinions, that a wife, to whom her husband had left everything that was in his house, could not require his daughter, who was his heir, to surrender the obligations of debtors and the bills of sale of slaves that did not appear to have been bequeathed, unless (he says), it is clear that the testator had had the slaves in his mind, so that he would seem to have bequeathed to his wife the evidences of the transfer of said slaves whom themselves, he intended should belong to her.

§ 46.- If anyone should devise a tract of land "With its equipment, just as it is," and should afterwards add, "Together with its furniture, and its slaves, and everything else which was not expressly mentioned," the question arises whether, by adding this clause, he will diminish the bequest, or not. Papinianus answers that it will not be considered to have been diminished, but rather to have been unnecessarily increased by this superfluous addition.

§ 47.- Papinianus likewise, in the Seventh Book of

padre de familia. Por último, Neracio respondió a Marcelo, su hermano, en el libro cuarto de las Epístolas, que también los vestidos se comprendían en el legado de la casa provista, especialmente, dijo, en este caso propuesto. Porque se proponía el caso de que uno que la había legado, y que exceptuó la plata y las cuentas; porque, dijo, que el que exceptuó estas cosas no puede no ser considerado como habiéndose referido a las demás cosas que hubiese de ella.

Pero también el mismo Papiniano dice en el mismo libro de las Respuestas, que un padre comerciante y prestamista, que había instituido herederos a dos hijos y a otras tantas hijas, había hecho así un legado: «doy y lego, y mando que se dé, a mis hijos varones mi casa provista;» se puede preguntar si se comprenderán las mercancías y las prendas; pero fácil le habrá de ser al juez la conjetura de la voluntad, habiendo examinado las demás facultades del padre.

§ 44.- Escribe Celso, que, habiéndose legado los esclavos que morasen en el fundo, no se comprenden los vicarios de los mismos, si no se viera que él se refirió también a los vicarios.

§ 45.- También Papiniano respondió en el libro séptimo de las Respuestas, que a la mujer a quien el marido quiso que por su hija, heredera, se le diesen todas las cosas que habían en la casa, no se considera que se le legaron los resguardos de los deudores y las escrituras de compra de los esclavos, a no ser, dice, que por otra parte se hubiere visto que él pensó también en las esclavas por supuesto, para que se considere que le legó las escrituras de compras de los esclavos, que quiso que también le pertenecieran a ella.

§ 46.- Si alguno hubiere legado un fundo «asi como está provisto», y hubiere añadido: con el menaje, o con los esclavos, o con una sola cosa, que determinadamente no había sido expresada, se pregunta si añadiendo la especie disminuye, o no, el legado. Y respondió Papiniano, que no se considera disminuido, sino más bien aumentado por redundancia.

§ 47.- El mismo Papiniano dice en el libro séptimo

sorum ait: instructis hortis filio legatis mater argentum muliebre filiae legaverat: respondit etiam id argentum muliebre, quod in hortis habuit, ut ibi esset instructor, ad filiam pertinere.

13.- PAULUS; *libro IV, ad Sabinum*.- Tabernae cauponae instrumento legato etiam institores contineri Neratius existimat: sed videndum, ne inter instrumentum tabernae cauponae et instrumentum cauponae sit discrimen, ut tabernae non nisi loci instrumenta sint, ut dolia vasa ancones calices trullae, quae circa cenam solent traici, item urnae aerae et congiaria sextaria et similia: cauponae autem, cum negotiationis nomen sit, etiam institores.

§ 1.- Instrumento balneario legato etiam balneatorem contineri Neratius respondit:

14.- IDEM; *libro II, ad Vitellum*.- Continetur autem et fornicator.

15.- POMPONIUS; *libro VI, ad Sabinum*.- Si ita testamento scriptum sit: "quae tabernarum exercendarum instruendarum pistrini cauponae causa facta paratae sunt, do lego", his verbis Servius respondit et caballos, qui in pistrinis essent, et pistores, et in cauponio institores et focariam, mercesque, quae in his tabernis essent, legatas videri.

§ 1.- Domo instructa responsum est, suppellectilem legatam, non etiam vina, quia domus vinis instructa intellegi non potest.

§ 2.- Mulier villae custos perpetua fundo qui cum

Opinions, says, if certain gardens with all their equipment are devised by a mother to a son, and she also bequeaths to her daughter her silverware intended for the use of women, that his opinion is if the said silverware, which she kept in her gardens, was there for her own personal convenience, it will belong to her daughter.

13.- PAULUS; *On Sabinus, Book IV*.- Neratius thinks that where a tavern with its equipment is devised, even the slaves who conduct it are included. It must, however, be considered whether a difference does not exist between the utensils of a house used for drinking purposes, and those of a warehouse for the storage of wine, as only the following are utensils of the latter, namely, casks, vats, large jars, cauldrons, pitchers for pouring out wine, and which are ordinarily passed at supper; brazen urns, large and small measures for liquids, and other things of this kind; but in the word "tavern," as it is a commercial term, slaves who transact the business are also included.

§ 1.- Neratius gives it as his opinion that where a bath is devised as equipped, it also includes the slave in charge of the same.

14.- THE SAME; *On Vitellius, Book II*.- The slave employed in the vaults to keep up the fire is also included.

15.- POMPONIUS; *On Sabinus, Book VI*.- Where the following clause was inserted into a will, "I do give and bequeath all the utensils which are intended for the purpose of carrying on the business of my shops, and for furnishing the same, and for that of my mill and warehouse," Servius held that the horses which were in the mills, and the slaves who were millers, as well as those employed in the shops, the woman who cooked, and the merchandise contained in the shop, were all considered to have been bequeathed.

§ 1.- Where a house, fully equipped, is devised it was decided that the furniture is included, but not the wine; because where a house is devised ready furnished, wines cannot be understood to be there for that purpose.

§ 2.- A female slave who was left constantly in

de las Respuestas: habiendo legado al hijo unos huertos provistos, una madre había legado a su hija los objetos de plata, propios de mujer; respondió, que le pertenecían a la hija también los objetos de plata, propios de mujer, que tuvo en los huertos, para estar en ellos más provista.

13.- PAULO; *Comentarios a Sabino, libro IV*.- Opina Neracio, que en el legado de los enseres de una hostería se comprenden también los encargados de ella, pero se ha de ver, si hay diferencia entre los enseres de una taberna hostería y los enseres de una hostería, de suerte que de la taberna no sean sino los enseres del lugar, como las tinajas, los vasos, las botellas, las copas, las garrafas, que se suelen hacer pasar en la cena, y también las urnas de cobre, y los congios, sextarios, y otras cosas semejantes; pero de la hostería, puesto que tiene nombre de un comercio, también los encargados de la misma.

§ 1.- Respondió Neracio, que en el legado de los instrumentos de un balneario se comprende también el bañero.

14.- EL MISMO; *Comentarios a Vitelio, libro II*.- Pero también se comprenderá el hornero.

15.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si se hubiera escrito así en el testamento: «doy y lego las cosas que se hicieron y prepararon para la explotación y provisión de las tiendas de tahona y de hostería»; respondió Servio, que con estas palabras se considera que se legaron también las caballerías, que hubiese en las tahonas, y los tahoneros, y en la hostería sus encargados, la que cuida de la lumbre, y las mercancías que hubiese en estas tiendas.

§ 1.- Se respondió, que en la casa provista fue legado el menaje, pero no también el vino, porque no se puede entender que la casa esté provista con vino.

§ 2.- En el fundo que fue legado con su apero, o

instrumento legatus esset aut instructo continebitur, sicuti saltuarius: par enim ratio est: nam desiderant tam villae quam agri custodiam, illic, ne quid vicini aut agri aut fructuum occupent, hic, ne quid ceterarum rerum quae in villa continentur: villa autem sine ulla dubitatione pars fundi habetur.

16.- ALFENUS; *libro II, Digestorum a Paulo epitomatorum.*- Villae instrumento legato supellectilem non contineri verius est.

§ 1.- Vineae et instrumento eius legato instrumentum vineae nihil esse servius respondit: qui eum consulebat, Cornelium respondisse aiebat palos periticas rastros ligones instrumenti vineae esse: quod verius est.

§ 2.- Quidam uxori fundum, uti instructus esset, in quo ipse habitabat, legavit. Consultus de mulieribus lanificis an instrumento containerentur, respondit non quidem esse instrumenti fundi, sed quoniam ipse pater familias, qui legasset, in eo fundo habitasset, dubitari non oportere, quin et ancillae et ceterae res, quibus pater familias in eo fundo esset instructus, omnes legatae viderentur.

17.- MARCIANUS; *libro VII.- Institutionum.*- Item pictoris instrumento legato cerae colores similiaque horum legato cedunt, item peniculi et cauteria et conchae.

§ 1.- Instrumento piscatorio contineri Aristo ait naucellas, quae piscium capiendorum causa comparatae sunt: sed et piscatores contineri verius est.

§ 2.- Instrumento balneatorio legato dictum est balneatorem sic instrumento contineri balneario,

charge of a country-house, and bequeathed as belonging to the same, is included in the devise just as a forester is, and for the same reason; since houses require guardians as well as land, on the one hand, to prevent the neighbors from trespassing, or appropriating the fruit, and on the other, to prevent anyone from removing any of the property contained in the house. The building, however, is undoubtedly considered a part of the land.

16.- ALFENUS; *Epitomes of the Digest by Paulus, Book II.*- Where the utensils of a country-house are bequeathed, the better opinion is that the furniture is not included.

§ 1.- Servius gave it as his opinion, where a vineyard and everything appertaining to it was left, that there were no such things as implements used for the cultivation of a vineyard. Cornelius, when his opinion was asked upon this point, replied that stakes, poles, and hoes are implements which belong to a vineyard; which is correct.

§ 2.- A certain man left to his wife a tract of land where he himself resided, equipped for cultivation just as it was. When advice was taken whether the female slaves, who were spinners and weavers, were included in the devise, the answer was that they did not, properly speaking, constitute part of the equipment of the land; but, as the testator who devised the property lived upon it, there could be no doubt that the female slaves and other property which were on the premises for the use of the head of the household should be held to be embraced in the bequest.

17.- MARCIANUS; *Institutes, Book VII.*- When the studio of a painter is bequeathed with its equipment, the wax, the colors, and everything of this kind is included in the legacy, as well as the brushes, the implements for finishing encaustic tiles, and the flasks for oil.

§ 1.- When the equipment of a fisherman is bequeathed, Aristo says that it includes the boats used for catching fish. The better opinion is that it also includes the fishermen themselves.

§ 2.- Where the utensils of a bath are bequeathed, it has been established that the slave in charge of the

provisto, se comprenderá la mujer guardesa perpetua de la casa, así como el guardabosque; pues hay la misma razón, porque requieren guarda tanto las casas de campo, como los campos; aquéllas, para que los vecinos no se apoderen de alguna cosa del campo, o de los frutos; éstos, para que no se apoderen de alguna de las cosas, que en la casa de campo se contienen; pero sin duda alguna es considerada parte del fundo la casa de campo.

16.- ALFENO; *Digesto compendiado por Paulo, libro II.*- Es más verdadero, que, legado el apero de una casa de campo, no se comprende el menaje.

§ 1.- Respondió Servio, que, habiéndose legado una viña y sus instrumentos, no hay cosas que sean instrumentos de la viña; el que le consultaba decía que Cornelio respondió, que los palos, las pértigas, los rastrillos y los azadones, son instrumentos de la viña; lo que es más verdadero.

§ 2.- Uno legó a su mujer el fundo, en que él habitaba, tal como estuviese provisto; habiendo consultado respecto a las mujeres que labraban la lana si se comprenderían en el apero, respondió, que ciertamente no eran del apero del fundo, pero que como el mismo padre de familia, que lo había legado, hubiese habitado en aquel fundo, no se debía dudar que se considerarían legadas también todas las esclavas, y las demás cosas, con que hubiese estado provisto en este fundo el padre de familia.

17.- MARCIANO; *Instituta, libro VII.*- Asimismo, legados los utensilios de un pintor, ceden al legado las ceras, los colores, y las cosas semejantes a éstas; y también los pinceles, cauterios, y conchas.

§ 1.- Dice Aristón, que en los aparejos de pesca se comprenden las arquillas, que se prepararon para coger los peces; pero es más cierto que se comprenden también los pescadores.

§ 2.- Se ha dicho, que, legados los útiles de un balneario, se comprende el bañero en los útiles del

quomodo instrumento fundi saltuarium et topiarios, et instrumento cauponio institorem, cum balneae sine balneatoribus usum suum praeberere non possint.

18.- PAULUS: *libro II, ad Vitellium*.- Cum de lanionis instrumento quaeritur, semota carne mensas pondera ferramentaque laniandae carnis causa praeparata, item trutinas cultros dolabras instrumento relinquimus.

§ 1.- Instrumento legato aliquando etiam personas legantium necesse est inspicere. Ut ecce pistorio instrumento legato ita ipsi pistori inesse videri possunt, si pater familias pistrinum exercuit: nam plurimum interest, instrumentum pistoribus an pistrino paratum sit.

§ 2.- Asinam molendariam et molam negat neratius instrumento fundi contineri.

§ 3.- Item caccabos et patinas in instrumento fundi esse dicimus, quia sine his pulmentarium coqui non potest. Nec multum refert inter caccabos et aenum, quod supra focum pendet: hic aqua ad potandum calefit, in illis pulmentarium coquitur. Quod si aenum instrumento continetur, urcei quoque, quibus aqua in aenum infunditur, in idem genus rediguntur, ac deinceps in infinitum primis quibusque proxima copulata procedunt. Optimum ergo esse Pedius ait non propriam verborum significationem scrutari, sed in primis quid testator demonstrare voluerit, deinde in qua praesumptione sunt qui in quaque regione commorantur.

§ 4.- Cum de vilico quaereretur et an instrumento inesset et dubitaretur, Scaevola consultus respondit, si non pensionis certa quantitate, sed fide dominica coleretur, deberi.

bath is included; just as where a wood is devised, the forester, and where a wineshop is devised, the slave in charge of the same, are included; for baths cannot be used without the bathers.

18.- PAULUS; *On Vitellius, Book II*.- Whenever, in the case of the bequest of the implements of a butcher, any question arises, after excluding the meat, we leave the tables, the weights, the cleavers, the balances, the knives, and the axes as the equipment.

§ 1.- Where the equipment of anything is bequeathed, it is sometimes necessary to take into consideration the persons of those who leave the legacy; as, for instance, where the equipment of a mill is bequeathed, since the slaves who are the millers will only be included when the head of the household conducted the business of the mill himself; for it makes a great deal of difference whether the utensils were intended for the use of the millers, or for that of the mill.

§ 2.- Neratius says that the ass which turns the wheel of the mill and the millstone are not included in the equipment which goes with the transfer of the land.

§ 3.- Likewise, we say that pots and pans are included in the equipment of a tract of land, because, without them, cooking cannot be done, nor is there much difference between the pots and the cauldrons which are suspended over the fire; as in the latter drinking water is heated, and in the former food is boiled. If, however, the cauldrons are included in the equipment, the pitchers also, with which water is poured into the cauldrons, come under the same head; and thus one vessel follows another in regular succession. Therefore, Pedius says that it is best not to adhere too closely to the literal meaning of words, but above all things to find out what the testator intended to designate, and then ascertain the opinion of those residing in different districts of the province.

§ 4.- Where a question arises with reference to a farmer who is a slave, as to whether he is included as part of the equipment of the land, and there is any doubt on the subject; Scaevola, having been consulted, held that the slave should be included,

balneario, a la manera que en el apero de un fundo el guardabosque y los jardineros, y que en los utensilios de una hostería el encargado de ella, porque los balnearios no pueden prestar su servicio sin los bañeros.

18.- PAULO; *Comentarios a Vitelio, libro II*.- Cuando se pregunta respecto a los utensilios de un carnicero, dejamos en los utensilios, exceptuada la carne, las mesas, los pesos, y las herramientas preparadas para destrozarse la carne, y también las balanzas, los cuchillos, y las hachas.

§ 1.- A veces, legados los utensilios, es necesario que se atienda también a las personas de los que los legan, como, por ejemplo, legados los utensilios de una tahona, se puede considerar que están comprendidos los mismos tahoneros en este caso, si el padre de familia ejerció de tahonero; porque importa mucho saber si los utensilios fueron preparados para los tahoneros, o para la tahona.

§ 2.- Neracio dice, que no se comprenden en el apero de un fundo la burra de la tahona y la piedra de moler.

§ 3.- También decimos que son del apero del fundo las ollas y cazuelas, porque sin ellas no se puede cocer la comida; y no hay mucha diferencia entre las ollas y la caldera que pende sobre el fuego, pues en esta se calienta el agua de beber, y en aquellas se cuece la comida. Pero si la caldera se comprende en el apero, también se comprenden en la misma clase las orzas con las que se echa el agua en la caldera; y sucesivamente hasta lo infinito las cosas próximas que van unidas a otras anteriores. En su consecuencia dice Pedio, que lo mejor es no desentrañar la propia significación de las palabras, sino, ante todo, lo que haya querido demostrar el testador, y luego, en qué inteligencia estén los que habitan en cada región.

§ 4.- Preguntándose respecto al encargado de una granja, si estaría comprendido en el apero, y dudándose, consultado Scévola respondió, que sería debido, si no se cultivase por cierta cantidad de pensión, sino por fidelidad al señor.

§ 5.- Idem consultus de meta molendaria respondit, si rusticis eius fundi operariis moleretur, eam quoque deberi. Est autem meta inferior pars molae, catillus superior.

§ 6.- De bubulco quoque ita respondit, sive de eo, qui bubus ibi araret, sive de eo, qui boves eius fundi aratores pasceret, quaereretur, deberi.

§ 7.- De putatoribus quoque ita respondit, si eius fundi causa haberentur, inesse:

§ 8.- Pastores quoque et fossores ad legatarium pertinere.

§ 9.- Item cum fundus ita legatus esset: "Maevius fundum Seianum, ita ut optimus maximusque est, cum omni instrumento rustico et urbano et mancipiis quae ibi sunt" et quaereretur, an semina deberentur, respondit Verius esse deberi, nisi aliud testatorem sensisse heres probaret. Idem respondit de frumento reposito ad mancipiorum exhibitionem.

§ 10.- In instrumento medici esse collyria et emplastra et cetera eius generis Cassius scribit.

§ 11.- Cui fundum instructum legaverat, nominatim mancipia legavit: quaesitum est, an reliqua mancipia, quae non nominasset, instrumento cederent. Cassius ait responsum esse, tametsi mancipia instructi fundi sint, tamen videri eos solos legatos esse, qui nominati essent, quod appareret non intellexisse patrem familias instrumento quoque servos adnumeratos esse.

§ 12.- Sabinus: cui fundus quaeque ibi sint legata sunt, ei fundus et omnia, quae in eo solita sunt esse

where he was the confidential agent of his master, and did not cultivate the land for a certain amount of the income from the same.

§ 5.- The same authority, having been interrogated with reference to the lower millstone of a mill, answered that it also was included, if it was operated for the benefit of the slaves employed in the labors of the farm. The lower part of a millstone is called meta, and the upper part catillus.

§ 6.- Where inquiry was made with reference to a plowman, the answer was that, no matter whether one who actually tilled the land, or one who fed the oxen used in cultivating it, was meant, he was included in the legacy.

§ 7.- He also answered that trimmers of trees were included, if they were specially considered to be attached to the land.

§ 8.- Shepherds and excavators also belong to the legatee.

§ 9.- Likewise, where a tract of land is devised as follows, "I give to Maevius the Seian Estate in the very best condition in which it may be found, together with all the implements, rustic and urban, and the slaves who are there," the question was asked whether grain for seed would be included. The reply was that it certainly would be, unless the heir could prove that the intention of the testator was otherwise. The same authority rendered a similar opinion with reference to grain reserved for the maintenance of slaves.

§ 10.- Cassius says that in the equipment of a slave-physician eyewashes, plasters, and other things of this kind are included.

§ 11.- A testator left certain of his slaves, whom he mentioned by name, to a person to whom he had devised a tract of land with its equipment. The question arose whether his remaining slaves, whom he did not enumerate, were included in the equipment. Cassius says it was decided that, although the slaves constituted part of the equipment of the land, only those who were designated by name were considered to have been bequeathed, as it is evident that the head of the household did not intend that the others should also be classed as such.

§ 12.- Sabinus says that where a tract of land with everything thereon is devised, the soil itself, and

§ 5.- Consultado el mismo respecto a la meta de moler, dijo que también se debía ésta, si con ella se moliese para los trabajadores rústicos de este fundo; pues la meta es la parte inferior de la muela, y el catilo la superior.

§ 6.- También respondió así en cuanto al boyero, que se debía, ora se tratase del que arase allí con bueyes, ora del que apacentase los bueyes que aran aquel fundo.

§ 7.- Asimismo respondió respecto a los podadores, que estaban comprendidos, si se tuviesen por causa del fundo.

§ 8.- También le pertenecen al legatario los pastores, y los cavadores.

§ 9.- Además, habiéndose legado un fundo de este modo: «a Mevio el fundo Seyano, así tan bueno y grande como es, con todos sus aperos rústicos y urbanos, y los esclavos, que en él hay», y preguntándose si se deberían las simientes, respondió que es más cierto que se deben, a no ser que el heredero probase que el testador entendió otra cosa. Lo mismo respondió en cuanto al trigo almacenado para la manutención de los esclavos.

§ 10.- Escribe Cassio, que entre los utensilios de un médico están los colirios, los emplastos, y las demás cosas de este género.

§ 11.- A quien uno había legado un fundo provisto, le legó determinadamente unos esclavos; se preguntó, si se agregarían al apero los demás esclavos, que no hubiese nombrado. Cassio dice, que se respondió, que aunque los esclavos sean del fundo provisto, se considera, sin embargo, que fueron legados solos los que hubiesen sido nombrados; porque parecería que el padre de familia no entendió que también los esclavos estaban comprendidos en el apero.

§ 12.- Dice Sabino: a quien se legó un fundo, y las cosas que en él haya, se le consideran legados el

quaeque ibi maiore parte anni morari et hi, qui in eum manendi causa recipere se consueverunt, legati videntur: at si qua consulto in fundo congesta contractave sunt, quo legatum cumularetur, ea non videntur legata esse.

§ 13.- Quidam cum ita legasset: "villam meam ita ut ipse possedi cum suppellectile mensis mancipiis, quae ibi deputabuntur, urbanis et rusticis, vinis, quae in diem mortis meae ibi erunt, et decem aureis", et quaereretur, cum in diem mortis ibi libros et vitreamina et vesticulam habuerit, an eadem omnia legato cederent, quoniam quaedam enumerasset: Scaevola respondit specialiter expressa, quae legato cederent.

§ 14.- Domum instructam legavit cum omnibus adfixis: quaeritur de instrumentis debitorum, an ea legatarius habere potest. Respondit secundum ea quae proponerentur non posse.

19.- PAULUS; *libro XIII, Responsorum*.- Si mancipia quae, post testamentum factum in fundum Seiae relictum a testatore inducta, fundi colendi gratia in eodem fundo fuerint, ea quoque instrumento fundi contineri respondi: quamvis enim ea mancipia testator demonstrasset, quae tunc ibi essent cum legaret, tamen non minuendi legati, sed augendi causa mancipiorum quoque fecit mentionem. Ceterum instrumento fundi mancipia quoque colendi agri causa inducta contineri non ambigitur.

§ 1.- Paulus respondit villae instrumento neque fructus repositos neque equitium contineri, suppellectile autem legato cedere: servum vero arte fabrica peritum, qui annuam mercedem praestabat, instrumento villae non contineri.

whatever is ordinarily kept there, and remains for the greater part of the year, as well as those slaves who are accustomed to betake themselves thither for the purpose of residing on the land, are held to have been left, but anything which has been designedly conveyed there for the purpose of increasing the amount of the legacy will not be considered to have been bequeathed.

§ 13.- Where a testator made a bequest as follows, "I leave my country-house in the same condition as I myself possessed it, together with the furniture, tables, and the urban and rustic slaves which shall be sent there, and the wines that may be in said house at the time of my death, and ten aurei in addition," as upon the day of the testator's death he had books, articles of glass, and a small clothes-press in the house, the question arose whether these articles should be included among those enumerated in the bequest. Scaevola answered that only such articles as were specifically mentioned formed part of it.

§ 14.- A testator left his house furnished, together with everything attached to the same. The question arose whether the legatee was entitled to the obligations of debtors. The answer was that, in accordance with the facts stated, he was not entitled to them.

19.- PAULUS; *Opinions, Book XIII*.- I gave it as my opinion that if, after the execution of the will, any slaves were placed by the testator upon the land devised to Seia, for the purpose of cultivating the same, they belonged to the said land and were also included in its equipment; even though the testator enumerated the slaves who were there at the time that he made the devise, as he mentioned them not for the purpose of diminishing the legacy, but in order to increase it. Moreover, there is no doubt that slaves who have been brought on land for the purpose of cultivating it are included in its equipment.

§ 1.- Paulus held that neither crops which are stored, nor a stud of horses, are included in the devise of a country-house with its equipment, but that the furniture forms part of it. A slave skilled in the art of building, who pays his master a certain sum of money every year, is not included in the equipment of the house.

fundo y todas las cosas que en él solió haber, y las que solieron estar allí la mayor parte del año, y los que acostumbraron a recogerse en él para permanecer en él; pero si de intento se reunieron o acumularon algunas cosas en el fundo, para que se aumentase el legado, no se considera que ellas fueron legadas.

§ 13.- Habiendo uno legado este modo; «mi casa de campo, así como yo mismo la poseí, con el menaje, mesas, esclavos, que allí se hallaren, rústicos y urbanos, vinos que allí hubiere el día de mi muerte, y diez áureos», y preguntándose, porqué el día de su muerte había tenido allí libros, vasos de vidrio, y un vestidillo, si todas estas cosas cederían al legado, porque había enumerado algunas, respondió Scévola, que se expresaron especialmente las que cederían al legado.

§ 14.- Uno legó una casa provista, con todas las cosas adheridas; se pregunta respecto a las escrituras de deudores ¿acaso puede tenerlas el legatario? Respondió, que, según lo que se exponía, no podía.

19.- PAULO; *Respuestas, libro XIII*.- Si los esclavos, que fueron llevados por el testador después de hecho el testamento al fundo dejado a Seia para cultivar dicho fundo, hubieren permanecido en este fundo, respondí que también ellos se comprenden en el apero del fundo; porque aun cuando el testador hubiese designado los esclavos que hubiese allí cuando hiciera el legado, no hizo, sin embargo, mención de los esclavos para disminuir el legado, sino para aumentarlo; por los demás, no se duda que se comprenden en el apero del fundo también los esclavos llevados a él para cultivar el campo.

§ 1.- Paulo respondió, que en el apero de una casa de campo no se contienen ni los frutos almacenados, ni la yeguada, pero que el menaje cede al legado; mas que el esclavo perito en un arte fabril, que pagaba una pensión anual, no está comprendido en el apero de una granja.

20.- SCAEVOLA; *libro III, Responsorum*.- Seiae ex parte heredi institutae, si heres erit, fundos per praeceptionem dederat instructos cum suis vilicis et reliquis colonorum et codicillis ita scripsit: "postea mihi venit in mentem: seiae fundos quos reliqui, ita ut sunt instructi rustico instrumento suppellectile pecore et vilicis cum reliquis colonorum et apotheca habere volo". Quaesitum est, an etiam ea, quae patris familias usus cottidiani causa in fundis fuerunt, legato continerentur. Respondit testamento quidem ut proponeretur Seiae, insuper fundum, legatum, verum non amplius deberi, quam in codicillis, quos sane post oblivionem testamentariae scripturae fecisset, instructi appellatione contineri velle se manifeste ostendisset.

§ 1.- Liberto suo quidam praedia legavit his verbis: "Seio liberto meo fundos illum et illum do lego ita ut instructi sunt cum dotibus et reliquis colonorum et saltuariis cum contubernaliis suis et filiis et filiabus". Quaesitum est, an Stichus servus, qui praedium unum ex his coluit et reliquatus est amplam summam, ex causa fideicommissi Seio debeatur. Respondit, si non fidei dominica, sed mercede, ut extranei coloni solent, fundum coluisset, non deberi.

§ 2.- «Caio Seio alumno meo fundos meos illum et illum, ita ut instructi sunt, et domum superiorem dari volo»: quaesitum est, an etiam domum instructam dari voluerit. respondit secundum ea quae proponerentur ita videri dedisse, nisi is, a quo peteretur, aliud testatorem sensisse manifeste doceret: at si habitationis, id est aedificii instrumentum legasset, non cedere servos operae aliive rei paratos.

20.- SCAEVOLA; *Opinions, Book III*.- A testator left Seia, whom he had appointed heir to a portion of his estate, certain lands as a preferred legacy, together with the farmers who cultivated them, and any rent not yet paid by tenants, if she should become his heir; and then he made the following provision in a codicil: "It has afterwards occurred to me to mention that I wish Seia, to whom I devised my land, to also have all the farming implements, furniture, cattle, farmers, rent due from tenants, and supplies." The question arose whether those articles which were on the land and were intended for the daily use of the head of the household, were included in the legacy. The answer was that, in accordance with the facts stated, property over and above the land had been bequeathed to Seia; but that no more was due to her than the testator had specifically mentioned in the codicil which he had drawn up after having forgotten to clearly indicate this in his will, and which he showed he intended to be included in the term equipment.

§ 1.- A testator devised to his freedman certain lands as follows: "I do give and bequeath to my freedman, Seius, such-and-such and such-and-such tracts of land, provided with implements as they are, together with all dowries, and balances due from tenants, and also with the foresters, and their wives and their children." The question arose whether the slave, Stichus, who cultivated one of the said tracts of land and owed a considerable sum of money, was due to Seius under the terms of the trust. The answer was if he cultivated the land, not as a trusted agent of his master, but for the payment of rent, as foreign tenants are accustomed to do, Seius would not be entitled to him.

§ 2.- "I wish such-and-such tracts of land, provided with all implements, and the upper house, to be given to my foster-child Gaius Seius." The question arose whether the testator designed that the house should be given, fully furnished. The answer was that, in accordance with the facts stated, he seemed to have intended it to be so given, unless the party of whom it was demanded could clearly show that his intention was otherwise. If, however, he had bequeathed the equipment of the lodging, that is to say, of the building, any slaves who were destined for other purposes and whose services were employed

20.- SCÉVOLA; *Respuestas, libro III*.- A Seia, instituida heredera en una parte, le había dado uno, si fuere heredera, por prelegado unos fundos provistos, con sus encargados, y con los atrasos de los colonos, y escribió así en los codicilos: «después me ha venido a la imaginación que quiero que Seia tenga los fundos que le dejé, así como están provistos con sus aperos rústicos, con su menaje, con el ganado, con los encargados y con los atrasos de los colonos, y con la despensa», se preguntó, si se comprenderían en el legado también las cosas que había en los fundos para el uso cotidiano del padre de familia. Respondió, que ciertamente en el testamento se legó a Seia, según se exponía, además del fundo, pero que no se debe más que lo que claramente hubiese manifestado en los codicilos, que verdaderamente hubiese hecho después del olvido de la escritura del testamento, que él quería que se comprendiese con la denominación de fundo provisto.

§ 1.- Uno legó a su liberto unos predios en estos términos: «doy y lego a Seyo, mi liberto, tal y tal fundo, así como están provistos, con las dotes y los atrasos de los colonos, y con los guardabosques, con sus compañeras, y con sus hijos e hijas»; se preguntó si por causa del fideicomiso le será debido a Seyo el esclavo Stico, que cultivó uno de estos predios, y que se atrasó en una grande cantidad. Respondió, que no era debido, si hubiese cultivado el fundo no por fidelidad del señor, sino por merced, como suelen los colonos extraños.

§ 2.- «Quiero que le den a Cayo Seyo, mi alumno, mis fundos tal y tal, así como están provistos, y la casa superior»; se preguntó, si habrá querido que se dé también provista la casa. Respondió, que, según lo que se exponía, se consideraba que así la dio, a no ser que aquel a quien se pidiera probara evidentemente que otra cosa entendió el testador; pero que si hubiese legado el menaje de la habitación, esto es, del edificio, no cedían los esclavos destinados al trabajo o a otra cosa.

§ 3.- Praedia ut instructa sunt cum dotibus et reliquis colonorum et vilicorum et mancipiis et pecore omni legavit et pecuniis et cum actore: quaesitum est, an reliqua colonorum, qui finita conductione interposita cautione de colonia discesserant, ex verbis supra scriptis legato cedant. Respondit non videri de his reliquis esse cogitatum.

§ 4.- Idem quaesivit in actore legato, an uxor et filia legato cedant, cum actor non in praediis, sed in civitate moratus sit. respondit nihil proponi, cur cedant.

§ 5.- Idem quaesivit, cum testator facto testamento in provinciam sit profectus, an ea mancipia, quae post protectionem eius aut mortem sine cuiusquam auctoritate sponte sua ad parentes et notos sibi homines in fundos legatos transiere, legato cedant. Respondit non legatos eos, qui forte veluti comitantes transissent.

§ 6.- «Pamphilae libertae meae dari volo Fundum Titianum cum instrumento et his quae in eodem erunt cum moriar». Quaesitum est, si Stichus servus, ex eo fundo ante annum mortis testatoris abductus et in disciplinam traditus, postea in eum fundum non reversus sit, an debeatur. Respondit, si studendi causa misisset, non quo a fundo eum aliorum transferat, deberi.

§ 7.- «Tyrannae sorori meae fundum meum Graecianum cum stabulo et instrumento rustico omni relinquo». Queritur, an fundi appellatione etiam pascua, quae ad eum simul cum fundo pervenerint et quae semper in usibus huius possessionis habuerat, legato cederent. Respondit, si prae fundo Graeciano ita coniunxisset, uti sub una fundi appellatione haberentur, ea quoque deberi.

elsewhere would not be included in the legacy.

§ 3.- A man left certain lands, provided as they were with implements, together with all property and balances due from tenants and farmers, with the slaves and cattle, and including the pecunia and the steward. The question arose whether the balances due from tenants who, after their lease had expired and they had given security, had left their farms, would be included in the devise, under the words above mentioned. The answer was that the testator did not seem to have had these claims in his mind.

§ 4.- With reference to the steward who was bequeathed, the question was also asked whether his wife and daughter were included in the legacy, as the steward did not reside on the land, but in the city. The answer was that there was nothing in the case stated to show that they were included.

§ 5.- It was also asked, if a testator, after having made his will, should go on a journey into a province, whether those slaves who, after his departure, or after his death, had voluntarily and without the authority of anyone, betaken themselves to their relatives and acquaintances on the lands which had been devised, were included in the legacy. The answer was that those who were, so to speak, passing back and forth, were not bequeathed.

§ 6.- "I desire that the Titian Estate, provided with its equipment along with everything else that is there, be given to Pamphila, my freedwoman, when I die." The question arose whether the slave, Stichus, who a year before the death of the testator had been removed from the land to be educated, and afterwards did not return, would be included in the legacy. The answer was if the testator had sent him away merely for the purpose of instruction, and had not transferred him from the said tract of land to another, he would be included.

§ 7.- "I leave to my sister, Tyranna, my Grecian estate, together with the barn, and all the farming implements." The question arose whether the pastures, which the testator obtained at the same time with the said land, and which he had always kept for the use of the same, were included under the appellation, "Grecian estate," and were embraced in the devise. The answer was that if he had united them with the Grecian estate, so that they were included

§ 3.- Uno legó unos predios, tales como estaban provistos, con las dotes, y los atrasos de los colonos y de los granjeros, y con los esclavos, y con todo el ganado, y con los peculios, y con el administrador; se preguntó, si en virtud de las antes mencionadas palabras cederán al legado los atrasos de los colonos, que, concluido su arrendamiento, se habían marchado de la colonia habiendo prestado caución. Respondió que no parecía que se pensó en estos atrasos.

§ 4.- El mismo preguntó respecto al administrador que fue legado, si se agregarán al legado su mujer y su hija, no habiendo morado el administrador en los predios, sino en la ciudad. Respondió, que nada se exponía para que se agreguen.

§ 5.- Preguntó el mismo, si, habiendo el testador marchado a una provincia después de haber hecho testamento, cederán al legado los esclavos que después de su partida o de su muerte pasaron sin autorización de nadie por su propia voluntad a los fundos legados a los ascendientes y a hombres conocidos de él. Respondió, que no fueron legados los que hubiesen pasado acaso como acompañantes.

§ 6.- «Quiero que a Pánfila, mi liberta, se le dé el fundo Ticiano con el apero y con las cosas que en el mismo hubiere, cuando yo muera»; se preguntó, si se deberá el esclavo Stico, si, habiendo sido sacado de aquel fundo un año antes de la muerte del testador y habiendo sido puesto a estudiar, no hubiese vuelto después al fundo. Respondió, que, si lo hubiese enviado a estudiar, no para trasladarlo de aquel fundo a otra parte, se debía.

§ 7.- «Dejo a Tiranna, mi hermana, mi fundo Greciano con el establo y con todo el apero rústico»; se pregunta, si con la denominación del fundo cederán al legado también los prados, que juntamente con el fundo fueron a su poder, y que siempre había tenido para los usos de esta posesión. Respondió que si de tal manera hubiese unido los prados al fundo Greciano, que se tuviesen bajo la sola denominación del fundo, también se debían éstos.

§ 8.- Instructis domibus legatis crabattus argento inaurato tectus mortis Titiae tempore in domibus non est repertus, sed in horreis tantisper conditus: quaero, an is quoque praestandus sit. Respondit, si in domo esse soleret et quo tutiore loco haberetur, interim in horreo allatus esset, nihilo minus praestandum.

§ 9.- Quod adiecit testator "uti possedi" an hoc significet "sicut instructa in diem mortis habuit", id est cum mancipiis pecoribus instrumento rustico? Respondit: non de iure quaeritur.

21.- POMPONIUS; *libro I, Fideicommissorum*.- Quum fundus sine instrumento legatus sit, dolia molae olivariae et praelum et quaecumque infixae inaedificatae sunt fundo legato continentur, nulla autem ex his rebus quae moveri possunt paucis exceptis fundi appellatione continentur. De molis tum quaeri solet, cum ita adfixae itave inaedificatae sint, ut partes aedificiorum esse videantur.

22.- PAULUS; *libro III, Sententiarum*.- Fundo legato "ut optimus maximusque est" retia apraria et cetera venationis instrumenta continebuntur: quod etiam ad instrumenta pertinet, si quaestus fundi ex maxima parte in venationibus consistat.

§ 1.- Fundo legato cum mancipiis et pecoribus et omni instrumento rustico et urbano peculium actoris ante testatorem defuncti, si ex eodem fundo fuerit, magis placet ad legatarium pertinere.

23.- NERATIUS; *libro II, Responsorum*.- Quum quaeratur, quod sit tabernae instrumentum, interesse, quod genus negotiationis in ea exerceri solitum sit.

under one denomination, they would form part of the devise.

§ 8.- Where a house was left completely furnished, a silver-gilt bedstead, having temporarily been stored in a warehouse, was not found there at the time of the death of the testatrix, Titia. I ask if it also should be delivered to the legatee. The answer was that if it was ordinarily kept in the residence, and had, in the meantime, been taken to the warehouse in order to be in a safer place, it ought nevertheless, to be delivered to the legatee.

§ 9.- Where the testator added the following phrase, "Just as I have possessed it," does this refer to the way in which the land was equipped at the time of his death, that is to say, with slaves, cattle, and farming implements? The answer was that this has no reference to the legal rights of the legatee.

21.- POMPONIUS; *Trusts, Book I*.- Where a tract of land is devised without its equipment, the casks, olive-mills, presses, and everything else fastened to or built upon the land, are included in the devise; but none of these things which can be moved are, with very few exceptions, included under the designation real-property. Where any question arises concerning mills attached to the land, or erected upon it, they are considered as parts of the buildings.

22.- PAULUS; *Opinions, Book III*.- Where land is devised, "In the very best condition in which it may be found," the nets, and all other apparatus for hunting which refers to the equipment, are included in the devise, if the revenue of the land is principally derived from the chase.

§ 1.- Where a tract of real property was devised, "Together with the slaves and cattle, and all its rustic and urban equipment, the peculium acquired by the steward before the death of the deceased, if it was derived from the same land, is held by the greater number of authorities to belong to the legatee."

23.- NERATIUS; *Opinions, Book II*.- When the question is asked what is the equipment of a shop, it is usual to ascertain what kind of business is transacted therein.

§ 8.- Habiéndose legado provistas unas casas, no se encontró en las casas al tiempo de la muerte de Ticia la cama recubierta de plata sobredorada, sino guardada a la sazón en los almacenes; pregunto, si también deberá ser entregada. Respondió, que si hubiese solido estar en la casa, y para que se tuviese en lugar más seguro hubiese sido llevada interinamente a los almacenes, esto no obstante, se habrá de entregar.

§ 9.- Lo que añadió el testador; «tales como los poseí», ¿significará esto, como los tuvo provistos hasta el día de su muerte, esto es, con los esclavos; con los ganados, y con el apero rústico? Respondió; no se pregunta en cuanto al derecho.

21.- POMPONIO; *Fideicomisos, libro I*.- Cuando se ha legado un fundo sin el apero, se comprenden en el fundo legado las tinajas, las muelas para las aceitunas, la prensa, y todo lo que está fijado y edificado; mas ninguna de las cosas, que se pueden mover, excepto pocas, se comprende con la denominación del fundo. Respecto a las piedras de moler se suele dudar, cuando de tal modo estén fijadas o edificadas que se considere que son partes de los edificios.

22.- PAULO; *Sentencias, libro III*.- Habiéndose legado un fundo: «tan bueno y grande como es», se comprenderán las redes para jabalíes, y los demás utensilios de caza; lo que también pertenece al apero, si la utilidad del fundo consistiera en su mayor parte en la caza.

§ 1.- Habiéndose legado un fundo con los esclavos, y con los ganados, y con todos los utensilios rústicos y urbanos, se considera preferible que pertenezca al legatario el peculio del administrador fallecido antes que el testador, si hubiere sido del mismo fundo.

23.- NERACIO; *Respuestas, libro II*.- Cuando se pregunte cuáles sean los utensilios de una tienda, importa saber qué genero de negociación se haya solido hacer en ella.

24.- PAULUS; *libro III, ad Neratium*.- Fundus, qui locatus erat, legatus est cum instrumento: instrumentum, quod colonus in eo habuit, legato cedit. Paulus: an quod coloni fuit an tantum id quod testatoris fuit? Et hoc magis dicendum est, nisi nullum domini fuit.

25.- IAVOLENUS; *libro II, ex Posterioribus*.- Fundi instrumento legato id pecus cedere putabat Tubero, quod is fundus sustinere potuisset: Labeo contra quid enim fiet, inquit, si, cum mille oves fundus sustinere potuisset, duo milia ovium in eo fundo fuerint? quas oves potissimum legato cessuras existimabimus? Nec quaerendum esse, quid debuisset parari pecoris instrumenti fundi causa, sed quid paratum esset: non enim ex numero aut multitudinem legata aestimandum esse. labeonis sententiam proba.

§ 1.- Quidam cum in fundo figlinas haberet, figulorum opera maiore parte anni ad opus rusticum utebatur, deinde eius fundi instrumentum legaverat. Labeo Trebatius non videri figulos in instrumento fundi esse.

§ 2.- Item cum instrumentum omne legatum esset excepto pecore, pastores oviliones, ovilia quoque legato contineri ofilius non recte putat.

26.- IDEM; *libro V, ex Posterioribus Labeonis*.- Dolia fictilia, item plumbea, quibus terra adgesta est, et in his viridiaria posita aedium esse Labeo Trebatius putant. ita id verum puto, si ita illigata sint aedibus, ut ibi perpetuo posita sint.

§ 1.- Molas manuaris quidem suppellectilis, iumentarias autem instrumenti esse ofilius ait. Labeo Cascellius Trebatius neutras suppellectilis, sed potius instrumenti putant esse, quod verum puto.

24.- PAULUS; *On Neratius, Book III*.- A tract of land which had been leased was devised with its equipment. The implements which the tenant had on the farm are included in the legacy. Paulus: Does this refer to what belonged to the tenant, or only to what belonged to the testator? It must be said that the better opinion is that this is the case, unless none of the implements belonged to the owner.

25.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- When the equipment of a tract of land is devised, Tubero thinks that all the cattle which the land can support are included in the devise. Labeo is of the contrary opinion, for he says if, when the land could support a thousand sheep, two thousand were kept there, how many of them should we decide ought to be included in the devise? No inquiry should be made as to how many sheep the testator ought to have had there for the purpose of constituting the number to be included in the devise, but how many he actually had on the land; for the estimate should not be made from the number or the amount that was left. I concur in the opinion of Labeo.

§ 1.- A certain individual, who had potteries on his land, employed the services of his potters for the greater portion of the year in farm labor, and afterwards devised the land with its equipment. Labeo and Trebatius think that the potters should not be included in the equipment of the land.

§ 2.- Where all the equipment of a tract of land was left with the exception of the cattle, Ofilius improperly holds that the shepherds and the sheep are included in the bequest.

26.- THE SAME; *On the Last Works of Labeo, Book V*.- Earthenware, and leaden vessels in which earth is placed, and flowers planted in pots, Labeo and Trebatius think constitute a part of the house. I think this to be correct, if they are fastened to the house so as to always remain there.

§ 1.- Ofilius says that hand-mills should be classed with household goods, but those moved by animal power are appurtenant to the land. Labeo, Cascellius, and Trebatius think that neither should be classed as household goods, but rather as appurtenances. I think

24.- PAULO; *Comentarios a Neracio, libro III*.- Un fundo, que había sido dado en arrendamiento, fue legado con su apero; el apero que el colono tuvo en él cede al legado. Y dice Paulo: ¿acaso el que fue del colono, o solamente el que fue del testador? Y más bien se ha de decir esto, a no ser que ninguno haya habido del testador.

25.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro II*.- Legado el apero de un fundo, opinaba Tuberón, que se agregaba el ganado que este fundo hubiese podido sostener. Labeón al contrario; porque, ¿qué se hará, dice, si habiendo podido mantener el fundo mil ovejas, hubiere en el fundo dos mil ovejas; qué ovejas estimaremos con más razón que habrán de pertenecer al legado? Y no se ha de investigar cuánto ganado se habría debido destinar para apero del fundo, sino el que se haya destinado; porque no se ha de apreciar según el número o la muchedumbre legada; y apruebo la opinión de Labeón.

§ 1.- Uno, teniendo en el fundo alfarerías, utilizaba la mayor parte del año en las faenas rústicas el trabajo de los alfareros, y había legado después el apero de este fundo; Labeón y Trebacio decían, que no se consideraba que los alfareros fuesen del apero del fundo.

§ 2.- Asimismo, cuando se hubiese legado todo el apero, excepto el ganado, sin razón opina Ofilio que también se comprenden en el legado los apacentadores y los pastores, y los apriscos.

26.- EL MISMO; *Doctrina de las Obras póstumas de Labeón, libro V*.- Las tinajas de barro, y también las de plomo, en las que se ha echado tierra, y en ellas se han puesto plantas, opina Labeón y Trebacio, que son de las casas; yo considero esto verdadero de este modo, si de tal manera están adheridas a las casas, que estén allí puestas a perpetuidad.

§ 1.- Dice Ofilio, que las mulas de mano son ciertamente del menaje, pero que las que necesitan jumento son del apero; Labeón, Cascelio y Trebacio opinan, que ni unas ni otras son del menaje, sino más bien del apero; lo que creo verdadero.

27.- SCAEVOLA; *libro VI.- Digestorum.*- Praedia maritima cum servis qui ibi erunt et omni instrumento et fructibus qui ibi erunt et reliquis colonorum nutritori suo legavit. Quaesitum est, an servi piscatores, qui solebant in ministerio testatoris esse et ubicumque eum sequi et urbicis rationibus expungebantur nec mortis testatoris tempore in praediis legatis deprehensi fuerant, legati esse videantur. respondit secundum ea quae proponerentur non esse legatos.

§ 1.- Adfini suo ita legavit: "Fundum Cornelianum Titio ita ut est instructus cum omnibus rebus et mancipiis et reliquis colonorum dari volo". haec testatrix Romae litis causa ex Africa veniens mancipia quaedam ex fundo supra scripto, quo citius per hiemem operam elegeret, secum abduxit: quaesitum est, an ea mancipia fideicommisso cedant, cum quaedam ex his rusticis officiis ad tempus peregrinationis abducta sunt relictis conservabus et filiis suis et quaedam matribus et patribus. Respondit mancipia, de quibus quaereretur, secundum ea quae proponerentur ex causa fideicommissi deberi.

§ 2.- Idem quaesivit, an fructus eiusdem fundi, qui ibi in diem mortis coacti manserint, fideicommisso cedant, cum plenissima testatoris erga adfinem voluntas ab eo quoque manifestetur, quo reliqua colonorum eiusdem possessionis ad eum pertinere voluerit. Respondit in huiusmodi scriptura posse responderi hoc solum quaerendum, an manifeste appareat defuncta id, de quo quaereretur, dari noluisse.

that this is true.

27.- SCAEVOLA; *Digest, Book VI.*- A testator left to the man who had reared him his land near the sea, together with the slaves who were thereon, and all the implements and crops belonging to the same, as well as the balances due from his tenants. The question arose whether the slaves, who were fishermen, who were attached to the personal service of the testator, and accustomed to follow him everywhere, and whose names were carried on the accounts in the city, and at the time of the death of the testator were not found on the land which was devised, should be considered to have been bequeathed. The answer was that, in accordance with the facts stated, they were not bequeathed.

§ 1.- A testatrix made the following bequest to one of her relatives: "I desire the Cornelian Estate, provided that everything, just as it is, together with all the personal property and slaves, and the amounts due from the tenants, to be given to Titius." This testatrix having come, on account of a lawsuit, to Rome from Africa, brought with her certain slaves belonging to the aforesaid land, in order that she might avail herself of their services during the winter. The question arose whether the said slaves were embraced in the trust, as some of them had been removed from their duties on the farm at the time of the journey, and had left their wives and children, while others had left their fathers and mothers behind them. The answer was that, in accordance with the facts stated, the slaves which were the subject of the inquiry should be delivered under the terms of the trust.

§ 2.- It was also asked whether the crops of the same tract of land which had already been gathered and remained there at the time of the death of the testatrix were included in the trust; since it was evidently her intention to display the greatest liberality towards her relative, as was proved by her desire that the balance due from the tenants should also belong to him. The answer was that, when a provision of this kind was made, it should only be ascertained whether it was perfectly clear that the deceased intended to bequeath the property with reference to which the inquiry is made.

27.- SCÉVOLA; *Digesto, libro VI.*- Uno legó a su ayo unos predios marítimos con los esclavos, que en ellos hubiere, y con todos los aperos, y con los frutos que allí hubiere, y con los atrasos de los colonos; se preguntó, si se considerará que fueron legados los esclavos pescadores, que solían estar al servicio del testador, y seguirle a todas partes, y que disfrutaban de raciones urbanas, y que no hubieran sido hallados en los predios legados al tiempo de la muerte del testador. Respondió, que, según lo que se exponía, no fueron legados.

§ 1.- Una le legó así a un afín suyo: «quiero que se le dé a Ticio el fundo Cornelianiano, tal como está provisto, con todas las cosas, y con los esclavos, y con los atrasos de los colonos», esta testadora, viniendo de Africa a Roma por causa de un litigio, trajo consigo para despachar más pronto su negocio durante el invierno algunos esclavos del antes mencionado fundo; se preguntó, si pertenecerían estos esclavos al fideicomiso, habiendo sido separados algunos de ellos de sus faenas rústicas durante el tiempo del viaje dejando a sus coesclavas, y a sus hijos, y algunos sus madres y sus padres. Respondió, que, según lo que se exponía, se debían por causa del fideicomiso los esclavos respecto de los que se preguntaba.

§ 2.- El mismo preguntó, si los frutos del mismo fundo, que hubieren quedado en él reunidos hasta el día de la muerte, pertenecen al fideicomiso, puesto que la plenísima voluntad del testador a favor de su afín se manifestaba también en que había querido que le pertenecieran a estos los atrasos de los colonos del mismo fundo. Respondió, que respecto a semejante escritura se podía contestar, que se ha de investigar esto solo, si claramente aparece que la difunta no quiso que se diera aquello por que se preguntaba.

§ 3.- Liberto, quem heredem in parte rescripsit, fundum per praeceptionem dedit in haec verba: "Pamphile liberte, praecipito tibi que habeto fundum meum Titianum et agellum Sempronianum cum instrumento et his, quae in eodem erunt cum moriar, familiaque, quae in eo fundo moratur, exceptis quos manumisero". Quaesitum est, cum testator in eo fundo aliquantum vini in doliis habuerit, quod vivus totum vendiderat et partem tertiam pretii pro eo acceperat, an vinum in doliis remanens ad libertum ex causa praeceptionis pertineat. Respondit verbis quae proponerentur contineri, nisi manifeste contrariam voluntatem coheredes approbant. In eo fundo instrumenta calendarii et nummos reliquit. Responsum est de nummis quoque, ut supra responsum.

§ 4.- Ita legatum est: «Septiciae sorori meae fundi paterni mei Seiani partem dari volo sic ut est, et alteram partem ita, ut in diem mortis fuerit»: quaesitum est, an ex verbis supra scriptis aggeres et praela iam posita parataque, ut immittantur aedificio, item instrumentum urbanum et rusticum cum mancipiis, quae fundi causa erant, ad legatarios pertineant. Respondit: potest haec verba «sic ut est» ad instructum referri.

§ 5.- Fundos legavit in haec verba: "Sempronio fratri meo hoc amplius fundos meos ita, ut instructi sunt, Cassianum Nonianum cum suis salictis et silvis". quaesitum est, cum silvae et salicta non in fundis supra scriptis, sed in adiectis agellis et quos simul testator comparavit nec sine his fundi coli possint, an legato cederent. Respondit id tantum cedere legato, quod verbis comprehendisset.

§ 3.- A testator devised a tract of land as a preferred legacy to his freedman, whom he had appointed heir to a portion of his estate, as follows: "Pamphilus, my freedman, I desire you to have, as a preferred legacy my Titian Estate, together with my small Sempronian Estate, with all their appurtenances, and the personal property which shall be there at the time of my death, together with the slaves who reside on said land, with the exception of those whom I shall hereafter manumit." As the testator had a certain quantity of wine in casks on the said land, all of which he had sold during his lifetime, and the third part of the price of which he had received, the question arose whether the wine which remained in the casks would belong to the freedman under the terms of the preferred legacy. The answer was that, in accordance with the facts stated, it would be included, unless the co-heirs could prove that the intention of the testator was otherwise. The testator also left the claims in his account-book, and the money which was on said land. The opinion with reference to the money was the same as that above given.

§ 4.- A devise was made as follows: "I desire half of the Seian Estate, which came to me from my father, to be given to my sister Septitia, just as it is at present, and the other half in the condition in which it may be found at the time of my death." The question arose whether, under the words above quoted, the beams and joists already in position and prepared to be inserted into the building, as well as the urban and rustic equipment, and the slaves employed on the land would belong to the legatee. The answer was that the following words, "Just as it is," can have reference to the equipment of the land.

§ 5.- A testator devised certain lands as follows: "I also leave to my brother, Sempronius, my Cassian and Novian Estates, equipped just as they are, together with their willow-groves and woods." As the woods and willow-groves did not form part of the aforesaid land, but were in small tracts adjacent to the same, which the testator had purchased at the same time and without which the former lands could not be cultivated, the question arose whether they were included in the legacy. The answer was that that property only formed part of the legacy which was specifically designated by the testator.

§ 3.- Al liberto, a quien instituyó heredero de una parte, le dio uno por prelegado un fundo en estos términos: «Pánfilo, liberto, toma previamente y ten para ti mi fundo Ticiano y el campillo Semproniano con los aperos y las cosas que en el mismo hubiere, cuando yo muera, y con los esclavos que en el propio fundo moran, excepto los que yo hubiere manumitido», se preguntó, si, habiendo tenido el testador en aquel fundo algún vino en las tinajas, que en su totalidad había vendido en vida, habiendo recibido por él la tercera parte del precio, le pertenecerá al liberto por causa del prelegado el vino que quedaba en las tinajas. Respondió, que en las palabras que se exponían se comprendía, a no ser que evidentemente probaran los coherederos contraria voluntad. En este fundo dejó los documentos del libro de cuentas, y dinero; se respondió también respecto al dinero como antes se ha respondido.

§ 4.- Se hizo así un legado: «quiero que a Septicia, mi hermana, se le dé una parte de mi fundo paterno Seyano, como está, y la otra parte como estuviere el día de mi muerte», se preguntó, si en virtud de las mencionadas palabras les pertenecerán a los legatarios las vigas, y las prensas ya puestas y preparadas, para empotrarlas en el edificio, y también el menaje urbano y los aperos rústicos con los esclavos, que había por causa del fundo. Respondió: estas palabras: «como está», se pueden referir al fundo provisto.

§ 5.- Uno legó fundos en estos términos: «a Sempronio, mi hermano, además de esto mis fundos, Cassiano y Noniano, tales como están provistos, con sus sauzales y selvas»; se preguntó, si, no habiendo selvas y sauzales en los fundos antes mencionados, sino en campillos contiguos, que el testador compró al mismo tiempo, y no pudiéndose cultivar sin ellos los fundos, pertenecerían al legado. Respondió, que solamente pertenecía al legado lo que hubiese comprendido en las palabras.

28.- IDEM; *libro XXIII, Digestorum*.- Lucius Titius fundum, uti erat instructus, legaverat. quaesitum est, fundus instructus quemadmodum dari debeat, utrum sic ut instructus fuit mortis patris familiae tempore, ut quae medio tempore adgnata aut in fundum illata sunt heredis sint? an vero instructus fundus eo tempore inspicere debeat, quo factum est testamentum? an vero eo tempore, quo fundus peti coeperit, ut quidquid eo tempore instrumenti deprehendatur, legatario proficiat? Respondit ea quibus instructus sit fundus secundum verba legati quae sint in eadem causa, cum dies legati cedat, instrumento contineri.

29.- LABEO; *libro I*.- Si navem cum instrumento emisti, praestari tibi debet scapha navis. Paulus: immo contra. Etenim scapha navis non est instrumentum navis: etenim mediocritate, non genere ab ea differt, instrumentum autem cuiusque rei necesse est alterius generis esse atque ea quae quae sit: quod Pomponio libro septimo epistularum placuit.

TIT. VIII

DE PECULIO LEGATO

1.- PAULUS; *libro IV, ad Sabinum*.- Servo legato cum peculio et alienato vel manumisso vel mortuo legatum etiam peculii exstinguitur.

2.- GAIUS; *libro XVIII, ad Edictum provinciale*.- Nam quae accessionum locum optinent, exstinguuntur, cum principales res peremptae fuerint.

3.- PAULUS; *libro IV, ad Sabinum*.- At si ancilla cum suis natis legata sit, etiam mortua ea vel alienata vel manumissa nati ad legatarium pertinebunt, quia duo legata sunt separata.

28.- THE SAME; *Digest, Book XXIII*.- Lucius Titius devised a tract of land with all its equipment. The question arose how it should be delivered, whether as it was equipped at the time of the death of the testator, so that any slaves born, or taken to the land in the meantime should belong to the heir; or whether as it was equipped at the time that the will was executed; or whether it should be delivered in the condition it was when the land was claimed, so that any of the equipment found there at the time would be for the benefit of the legatee. The answer was that, in accordance with the terms of the legacy, the property found on the land at the time the devise was made, and which was in the same condition when the will was opened, would be included in the equipment.

29.- LABEO; *Probabilities, Book I*.- If you purchase a ship with its equipment, the boat belonging to it should be delivered to you. Paulus: By no means; for a ship's boat is not part of its equipment, as the boat differs from it in size, but not in kind. It is necessary for the equipment of anything to be of a different description, no matter what it may be. This opinion is adopted by Pomponius, in the Seventh Book of the Epistles.

TITLE VIII

CONCERNING LEGACIES OF PECULIUM

1.- PAULUS; *On Sabinus, Book IV*.- Where a slave is bequeathed with his peculium, and he is either alienated or manumitted, or dies, the legacy of the peculium is also extinguished.

2.- GAIUS; *On the Provincial Edict, Book XVIII*.- For those things which occupy the place of accessories are extinguished when the principal property is destroyed.

3.- PAULUS; *On Sabinus, Book IV*.- Where, however, a female slave is bequeathed with her children, and either dies, or is alienated or manumitted, her children will belong to the legatee, because there are two distinct legacies.

28.- EL MISMO; *Digesto, libro XXIII*.- Lucio Ticio había legado un fundo, tal como estaba provisto; se preguntó cómo se debería dar provisto el fundo, si como estuvo provisto al tiempo de la muerte del padre de familia, de modo que sea del heredero lo que nació o fue llevado al fundo en el tiempo intermedio, o si se deberá considerar provisto el fundo al tiempo en que se hizo el testamento, o al tiempo en que se hubiere comenzado a pedir el fundo, de manera que le aproveche al legatario lo que en este tiempo se halle que es del apero. Respondió, que, según las palabras del legado, se comprenden en el apero aquellas cosas con que esté provisto el fundo, que se hallen en la misma condición, cuando empiece a correr el término del legado.

29.- LABEÓN; *Dichos, libro I*.- Si compraste la nave con su aparejo, se te debe dar el esquite de la nave. Y dice Paulo; antes por el contrario, porque el esquite de la nave no es aparejo de la nave, porque difiere de ella por su pequeñez, no por el género; y es necesario que el instrumento de una cosa cualquiera sea de otro género, cualquiera que ella sea; lo que pareció bien a Pomponio en el libro séptimo de las Epístolas.

TÍTULO VIII

DEL LEGADO DEL PECULIO

1.- PAULO; *Comentarios a Sabino, libro IV*.- Legado un esclavo con su peculio, y habiendo sido enajenado, o manumitido, o habiendo muerto, se extingue también el legado del peculio.

2.- GAYO; *Comentarios al Edicto provincial, libro XVIII*.- Porque las cosas que tienen la condición de accesorias se extinguen cuando hayan perecido las cosas principales.

3.- PAULO; *Comentarios a Sabino, libro IV*.- Mas si hubiera sido legada una esclava con sus hijos, aun fallecida ella, o enajenada, o manumitida, le pertenecerán los hijos al legatario, porque hay dos legados separados.

4.- GAIUS; *libro XVIII, ad Edictum provinciale*.- Sed et si cum vicariis suis legatus sit servus, durat vicariorum legatum et mortuo eo aut alienato aut manumisso.

5.- PAULUS; *libro IV, ad Sabinum*.- Peculio legato constat heredem nomina pecuniaria persequi posse, et insuper ipsum si quid debeat servo, reddere legatario debere.

6.- ULPIANUS; *libro XXV, ad Sabinum*.- Si peculium legetur et sit in corporibus, puta fundi vel aedes, si quidem nihil sit, quod servus domino vel conservis liberisve domini debeat, integra corpora vindicabuntur: sin vero sit, quod domino vel supra scriptis personis debeatur, deminui singula corpora pro rata debebunt. Et ita et Iulianus et Celsus putant.

§ 1.- Et si fuerit legatum peculium non deducto aere alieno, verendum, ne inutile legatum sit, quia quod adicitur contra naturam legati sit. Sed puto verum hanc adiectionem non vitare legatum, sed nihil ei adicere: nec enim potest crescere vindictio peculii per hanc adiectionem. Plane si proponas legatarium nactum possessionem rerum, exceptione doli adversus heredem vindicantem uti potest: habet enim in solidis rebus voluntatem aeris alieni non deducendi. Sed et si dominus remittere se servo quod debet vel nihil sibi servum debere significaverit, valet haec adiectio, quia nuda voluntate potest dominus servo remittere quod ei debet.

§ 2.- Vicario autem meo mihi legato an et vicarii mei peculium ad me pertineat, quaeritur. Et putamus contineri legato vicarii eius peculium, nisi adversa sit voluntas testatoris.

4.- GAIUS; *On the Provincial Edict, Book XVIII*.- When, however, a slave is bequeathed with his sub-slaves, the legacy of the sub-slaves will continue to exist, if the slave dies, or is alienated or manumitted.

5.- PAULUS; *On Sabinus, Book IV*.- When peculium is bequeathed, it is well established that the heir can collect any debts due to the peculium, and be required to pay them to the legatee, over and above anything which he himself may owe to the slave.

6.- ULPIANUS; *On Sabinus, Book XXV*.- Where a peculium is bequeathed which consists of tangible property (as, for instance, lands or houses), it can be claimed in its entirety, if the slave is not indebted to his master, to his fellow-slaves, or to the children of his master. If, however, he owes anything to the latter, or to the other persons above mentioned, the property should be diminished pro rata. Julianus and Celsus are of the same opinion.

§ 1.- If a peculium should be bequeathed without the deduction of the indebtedness of the slave, it is to be apprehended that the legacy will be void, because what is added is contrary to the nature of the legacy. I think, however, that it is true that the validity of the legacy is not impaired by this addition, but the testator has also added nothing of the amount of it, as the claim to the peculium cannot be increased in this manner. It is clear that if you suppose that the legatee has obtained possession of the property, he can avail himself of an exception on the ground of bad faith against the heir, if he brings an action against him; for he is protected by the will of the testator, who directed that the debt should not be deducted. If, however, the master had stated that what the slave owed should be given to him, or indicated that the latter did not owe him anything, the addition above mentioned will be valid; because a master can, by the mere expression of his wishes, give to the slave what the latter owes him.

§ 2.- However, where my sub-slave has been bequeathed to me, the question arises whether the peculium of said sub-slave will be mine. We think that his peculium is included in the legacy of the sub-

4.- GAYO; *Comentarios al Edicto provincial, libro XVIII*.- Pero también si hubiera sido legado un esclavo con sus vicarios, subsiste el legado de las vicarios aun habiendo muerto aquel, o habiendo sido enajenado o manumitido.

5.- PAULO; *Comentarios a Sabino, libro IV*.- Legado el peculio, es constante que el heredero puede perseguir los créditos del peculio, y que además él, si algo le debiera al esclavo, debe dárselo al legatario.

6.- ULPIANO; *Comentarios a Sabino, libro XXV*.- Si se legara el peculio, y consistiera en cosas corporales, por ejemplo, en fundos o en casas, si verdaderamente no hubiera nada que el esclavo deba a su señor o a sus coesclavos, o a los hijos de su señor, se reivindicarán íntegras las cosas corporales; pero si hubiera algo que se deba al señor o a las susodichas personas, se deberán disminuir a prorrata cada una de las cosas corporales; y así opinan también Juliano y Celso.

§ 1.- Y si se hubiere legado el peculio sin haberse deducido las deudas, es de temer que no sea inútil el legado, porque lo que se añade se hace contra la naturaleza del legado; mas creo verdadero que esta adición no vicia el legado, pero que no le añade nada; porque no puede crecer con esta adición la reivindicación del peculio. Pero si expusieras que el legatario obtuvo la posesión de las cosas, puede utilizar la excepción de dolo contra el heredero que las reivindique; porque tiene respecto a todas las cosas la voluntad de que no se deduzcan las deudas. Mas también si el señor hubiere significado que él le condonaba al esclavo lo que debe o que nada le debía el esclavo, es válida esta adición, porque el señor puede con su nuda voluntad condonarle al esclavo lo que le debe.

§ 2.- Mas habiéndoseme legado mi vicario, se pregunta si me pertenecerá también el peculio de mi vicario; y opinamos, que se contiene en el legado el peculio de su vicario, si no fuera contraria la voluntad

§ 3.- Si servus et vicarius eius liberi esse iussi sint eisque peculia sua legata sint, verba secundum voluntatem testatoris exaudienda, tamquam de duobus separatisque peculiis testatore locuto: et secundum haec vicarius vicarii non communicabitur, nisi haec mens fuit testantis.

§ 4.- Sicut autem aes alienum, hoc est quod debetur domino, minuit legatum peculium, ita per contrarium id quod dominus debet servo augere debet. Sed huic sententiae adversatur Rescriptum Imperatoris nostri et patris eius, quod ita est: "cum peculium servo legatur, non etiam id conceditur, ut petitionem habeat pecuniae, quam se in rationem domini impendisse dicit". Quid tamen si haec voluntas fuit testatoris? cur non possit consequi? certe compensari debet hoc quod impendit cum eo quod domino debetur. An et quod dominus scripsisset se servo debere, peculio legato cederet? Pegasus negat: idem Nerva: et cum Gnaeus Domitius filiae suae peculium quod eius esset legasset, et annuum, quod ei solitus erat dare, biennio non dedisset, sed in rationibus suis rettulisset filiae se debere quinquaginta, Atilicinus existimavit legato non cedere, quod verum est, quia consonat Rescripto.

§ 5.- Non solum autem quod domino debetur peculio legato deducitur, sed et si quid heredi debitum fuit.

7.- POMPONIUS; *libro VII. ad Sabinus*.- Si quis creditori suo adrogandum se dederit et agetur de peculio cum adrogatore, idem puto dicendum, quod de herede dicitur.

8.- ULPIANUS; *libro XXV. ad Sabinum*.- Denique pegasus respondit, si statulibero, cui peculium legatum sit, heres interim crediderit, id ipso iure

slave, unless this is contrary to the intention of the testator.

§ 3.- Where a slave and his sub-slave are directed to be free by a will, and their peculia are bequeathed to them, the words of the bequest ought to be interpreted in accordance with the intention of the testator, as if the latter referred to separate and distinct peculia. In accordance with this, a sub-slave will not be held in common where there are two freedmen, unless such was the intention of the testator.

§ 4.- As on the one hand, the debt of the slave, that is to say what is due to his master, diminishes the legacy of the peculium; so, on the other, what the master owes to the slave should increase it. A Rescript of Our Emperor and his father, which is as follows, is however, opposed to this opinion: "Where a peculium is bequeathed to a slave, the right is not granted to the latter to recover from the heir any money which he may say he has expended on his master's account." But what if this was the intention of the testator, could he not then recover it? What he has expended for this purpose should certainly be subject to set-off against that which was due to his master. Will what his master stated in writing was due from him to the slave be included in the legacy of the peculium? Both Pegasus and Nerva say that it will not. When Gneus Domitius bequeathed his daughter her peculium, but he had not paid her, for two years, the allowance which he was accustomed to give her, but retained it for his own purposes and stated that he owed his daughter fifty aurei, Atilicinus held that this was not included in the legacy. This opinion is correct, for the reason that it agrees with the Rescript.

§ 5.- Not only what is due to the master is deducted from the peculium bequeathed, but also anything that may be due to the heir.

7.- POMPONIUS; *On Sabinus, Book VII*.- If anyone should give himself to his creditor to be arrogated, and proceedings based on the peculium are instituted against the arrogator, I think that the same rule will apply with reference to the heir.

8.- ULPIANUS; *On Sabinus, Book XXV*.- Finally, Pegasus gives it as his opinion that if an heir should lend money to a slave, who is to be free under a

del testador.

§ 3.- Si se hubiera dispuesto que sean libres el esclavo y su vicario, y se les hubieran legado sus peculios, se han de entender las palabras según la voluntad del testador, como si el testador hubiere, hablado de dos peculios separados; y según esto, no se hará común el vicario del vicario, si esta no fue la intención del testador.

§ 4.- Mas así como las deudas, esto es, lo que se debe al señor, disminuyen el peculio legado, así por el contrario debe aumentarlo lo que el señor le debe al esclavo. Pero a esta opinión se opone el Rescripto de nuestro Emperador y de su padre, que dice así: «Cuando se lega al esclavo el peculio, no se concede también esto, que tenga la reclamación del dinero que dice que él gastó por cuenta de su señor». Pero ¿qué se dirá, si esta fue la voluntad del testador? ¿Porqué no lo podría conseguir? Ciertamente que se debe compensar lo que gastó con lo que se le debe al señor. ¿Y cedería al peculio legado lo que el señor hubiese escrito que él le debía a su esclavo? Pegaso dice que no, y lo mismo Nerva, y habiendo legado Cneyo Domicio a su hija el peculio, que era de ésta, y no habiéndole dado en dos años la anualidad, que había solido darle, pero habiendo consignado en sus cuentas que él le debía cincuenta a su hija, opino Atilicino, que no se agregaban al legado; lo que es verdad, porque concuerda con el Rescripto.

§ 5.- Mas no solamente se deduce del peculio legado lo que se le debe al señor, sino también lo que se le deba al heredero.

7.- POMPONIO; *Comentarios a Sabino, libro VII*.- Si alguno se hubiere dado en arrogación a su acreedor, y se ejercitase la acción de peculio contra el arrogador, opino que se ha de decir lo mismo que se dice respecto al heredero.

8.- ULPIANO; *Comentarios a Sabino, libro XXV*.- Últimamente respondió Pegaso, que si al manumitido bajo condición en testamento, a quien se le

detrahi et corpora singula etiam per hoc aes alienum deminui.

§ 1.- Proinde si pure libertatem accipiet et heres vel vivo domino vel ante aditam hereditatem servo crediderit, legatum peculii minuetur secundum Iuliani sententiam, licet dominus servi numquam fuerit.

§ 2.- Qui stichum et pamphilum servos habebat, testamento eos manumisit et unicuique peculium suum legavit. Placet, quod alter alteri debet, de peculio eius decedere et alterius accedere legato.

§ 3.- Item quaeritur, si servo libertas data sit, si decem dedisset heredi, peculiumque ei legatum sit, an decem, quae dedisset heredi, debeant de peculio decedere. et est verum quod sabino placuit, hoc minus esse in peculio legato.

§ 4.- Plus ait sabinus, si statuliber servum heredi vendiderit, perinde desinere eum in peculio esse, atque si extraneo vendidisset.

§ 5.- His consequenter quaeritur, si servus cum domino de libertate pactus fuerit et partem pecuniae dederit et ante quam residuum dederit dominus decesserit liberumque esse testamento iusserit cum peculio legato, an quod domino dederit in peculio sit imputandum. et ait labeo de peculio decedere. plane si nondum dederat, sed, donec totum traderet, pro deposito apud eum fuerit, id in peculio esse placuit.

§ 6.- Item si servo peculium sit legatum et a debitore eius peculiari heres vetitus sit petere, verum est hoc minus esse in legato peculio, hoc est detrahendum id quod debitori legatum est.

certain condition, before the condition is fulfilled, the amount will be deducted by operation of law, and each individual part of the peculium will be diminished by this debt.

§ 1.- Hence, if a slave should receive his freedom unconditionally, and the heir should lend him money, either during the lifetime of the master, or before the estate was entered upon, a legacy of the peculium will be diminished, according to the opinion of Julianus, although the heir may never have become the master of the slave.

§ 2.- Where a testator owned the slaves, Stichus and Pamphilus, and, having manumitted them by his will, bequeathed to each of them his peculium, it was decided that what one of the slaves owed to his fellow-bondman should be taken from his peculium, and be added to the legacy of the other.

§ 3.- Where freedom was granted to a slave if he should pay the heir ten aurei, and his peculium was bequeathed to him, it was also asked whether the ten aurei which he had paid to the heir should be deducted from the peculium. Sabinus holds, and this is correct, that the legacy of the peculium is diminished to this extent.

§ 4.- Sabinus goes still farther, and says that if a slave to be free upon a condition should sell to the heir one of his own slaves, the latter must be deducted from the peculium just as if he had been sold to a stranger.

§ 5.- Consequently, the question is asked if, where a slave has made an agreement with his master with reference to the price of his freedom, and he pays a portion of the money, and before he pays the remainder his master should die, and the latter, by his will, directs that the said slave shall be free and receive the legacy of his peculium, must what he paid to his master be included in his peculium? Labeo says it should be deducted from it. It is evident, if he has not yet paid it but has kept it in his hands as a deposit until he could pay the entire amount, that it should be included in his peculium.

§ 6.- Likewise, where his peculium is bequeathed to a slave, and the heir has been forbidden to collect from a debtor to said peculium a claim which was due; it is a fact that this should be deducted from the peculium bequeathed, that is to say, that what was left

hubiera legado el peculio, le hubiere prestado mientras tanto el heredero alguna cosa, se deduce ésta de derecho, y se disminuyen también por esta deuda cada una de las cosas corporales.

§ 1.- Por lo tanto, si recibiere la libertad puramente, y el heredero le hubiere prestado al esclavo, o viviendo el señor, o antes de adida la herencia, se disminuirá el legado del peculio según la opinión de Juliano, aunque nunca haya sido señor del esclavo.

§ 2.- Uno que tenía los esclavos Stico y Pánfilo, los manumitió en su testamento, y le legó a cada uno su propio peculio; está determinado, que lo que uno le debe al otro se deduce de su peculio, y se agrega al legado del otro.

§ 3.- También se pregunta, si, habiéndosele dado a un esclavo la libertad si hubiese dado diez al heredero, y habiéndosele legado el peculio, se deberán deducir del peculio los diez que le hubiese dado al heredero. Y es verdad, lo que le pareció bien a Sabino, que esto hay de menos en el peculio legado.

§ 4.- Sabino dice además, que si el manumitido en testamento bajo condición le hubiere vendido al heredero un esclavo, éste deja de pertenecer al peculio lo mismo que si lo hubiese vendido a un extraño.

§ 5.- Consiguientemente a esto se pregunta, si, habiendo pactado el esclavo con su señor sobre su libertad, y habiéndole dado parte del dinero, antes que le hubiere dado el resto hubiere fallecido el señor; y hubiere dispuesto en su testamento que fuese libre con el peculio legado, se habrá de contar en el peculio lo que le hubiere dado al señor. Y dice Labeón, que se deduce del peculio; mas que si todavía no había pagado, pero estuviere en poder de él en calidad de depósito, hasta que le diese la totalidad, se determinó que esto estuviere en el peculio.

§ 6.- Asimismo, si a un esclavo se le hubiera legado el peculio, y al heredero se le hubiera vedado que reclamara a un deudor suyo del peculio, es verdad que hay de menos esto en el peculio legado, esto es, que se ha de deducir lo que se legó al deudor.

§ 7.- Interdum etsi non sit legatum peculium, velut legatum sic accipitur, id est in huiusmodi specie: quidam servo libertatem, si rationes reddidisset, dederat, et si heredibus centum intulisset. Imperator igitur noster cum patre Rescripsit, peculium quidem non nisi legatum deberi: "verum", inquit, "si conditionibus praescriptis paruit servus, testatorem voluisse eum retinere peculium interpretamur": videlicet ex eo, quod ex peculio eum iusserat centum inferre.

§ 8.- Utrum autem id demum peculium accipimus, quod mortis tempore fuit, an vero et quod postea accessit applicamus vel quod decessit detrahimus? et iulianus alias accipiendum legatum peculii ait, si ipsi servo legetur, alias, si alii: nam si ipsi, id tempus in legato spectandum, quo dies legati cedit: si vero extraneo, mortis tempus, sic tamen, ut incrementa ex rebus peculiaribus ad eum perveniant, ut puta partus ancillarum vel fetus pecorum: quod autem ex operis suis vel ex alia re accedit, id, si alii quam ipsi legetur peculium, non debetur.

Hoc utrumque iulianus secundum voluntatem testatoris scribit: cum enim ipsi suum peculium legatur, verisimile est eum omne augmentum ad ipsum pertinere voluisse, cui patrimonium manumisso futurum est, cum alii, non: sic tamen, ut, si in alterius persona hoc eum sensisse appareat, idem dicas.

9.- PAULUS; *libro IV. ad Sabinum.*- Id quod servo, qui in ipsius peculio est, debetur, non deducitur ex legato peculio, quamvis conservus eius sit.

to the said debtor should be taken from the peculium.

§ 7.- Sometimes, where the peculium is not bequeathed, this is understood to have been done, as appears from the following example. A certain man granted a slave freedom if he should render his accounts, and pay a hundred aurei to his heirs. With reference to this Our Emperor, together with his lather, stated in a Rescript that while the peculium was not due unless it was bequeathed, still, he said, if the slave complied with the conditions prescribed, he concluded that it was the intention of the testator that he should keep his peculium, especially as he had directed him to pay a hundred aurei out of his peculium to his heirs.

§ 8.- Moreover, shall we understand the peculium to be the amount of the latter at the time of death, or shall we add to it any subsequent accessions, or subtract from it any subsequent diminutions? Julianus says that where the peculium is bequeathed, a difference should be understood to exist when it was left to the slave himself, and when it was left to others. If it was left to himself, the time of the vesting of the legacy must be considered, but if it was left to a stranger, the time of death should be taken into account; but in such a way that the increase of the property composing the peculium may come into the hands of the legatee; as, for instance, the offspring of female slaves, or the increase of cattle. Any accession, however, derived from the labor of the slaves or from any other source, will be due to no one else than the slave to whom the peculium was bequeathed.

Julianus says that both of these cases should be decided in accordance with the intention of the testator; for, when his own peculium is bequeathed to the slave, it is probable that the testator intended the entire increase of the same to belong to him, in whom, after his manumission, his patrimony would vest. This is not the case where the peculium is bequeathed to another; still, you may say that the rule will apply if it is evident that the testator had the same intention with reference to the other party.

9.- PAULUS; *On Sabinus, Book IV.*- Anything which is due from one slave to another to whom the former is bequeathed with his own peculium, of

§ 7.- A veces, aunque no se haya legado el peculio, se considera como si se hubiera legado, esto es, en el siguiente caso; uno le había dado a su esclavo la libertad, si hubiese rendido cuentas, y dado ciento a los herederos. En su consecuencia respondió por rescripto nuestro Emperador juntamente con su padre, que no se debe ciertamente el peculio sino cuando fue legado, pero, dice, si el esclavo cumplió las condiciones prefijadas, interpretamos que el testador quiso que él retuviese el peculio, a saber, por esto, porque había mandado que del peculio él diese ciento.

§ 8.- Mas ¿entendemos por peculio solamente lo que hubo al tiempo de la muerte, o acaso también le aplicamos lo que se agregó después, o deducimos lo que faltó? Y Juliano dice, que de una manera se ha de entender el legado del peculio, si se le legara al mismo esclavo, y de otra, si a otro; porque si a el mismo, se ha de considerar en el legado el tiempo en que comienza a correr el término del legado, mas si a un extraño, el tiempo de la muerte, pero de modo, que vayan a él los aumentos provenientes de las cosas del peculio, como, por ejemplo, los partos de las esclavas, o los fetos de los ganados; pero lo que se aumenta por su propio trabajo, o por otra cosa, esto no se deberá, si el peculio fuese legado a otro que a él mismo.

Estas dos cosas escribe Juliano según la voluntad del testador; porque cuando a él mismo se le lega su propio peculio, es verosímil que él quiso que le perteneciera todo aumento a aquel de quien, manumitado, ha de ser el patrimonio; y cuando a otro, no es así, pero que, no obstante, si apareciera que él entendió esto respecto a la persona de otro, dirás lo mismo.

9.- PAULO; *Comentarios a Sabino, libro IV.*- Lo que se le debe al esclavo, que está en el peculio del mismo, no se deduce del peculio legado, aunque sea

§ 1.- Si conservum suum vulneraverit servus et viliozem fecerit, Marcellus non esse dubitandum deduci ex peculio, quod domino interesset; nam quid interest, conservum vulneret an scindat aliquid vel frangat an subripiat? quo casu sine dubio minuitur peculium, sed non ultra simplum.

§ 2.- Sed si se vulneravit vel etiam occidit, nihil est deducendum hoc nomine: alioquin dicemus et si fugerit, deducendum id, quanto vilior sit factus propter fugam.

10.- POMPONIUS; *libro VII. ad Sabinum*.- Si peculium servo vel filio praelegare velis, ne deducatur id quod tibi debetur, specialiter ea quae in peculio erunt leganda sunt.

11.- ULPIANUS; *libro XXIX. ad Edictum*.- Ei quoque, qui nihil in peculio habet, potest peculium legari: non enim tantum praesens, sed etiam futurum peculium legari potest.

12.- IULIANUS; *libro XXXVII. Digestorum*.- Tunc inutile legatum peculii fit, cum servus vivo testatore decedit: ceterum si mortis tempore servus vixerit, peculium legato cedit:

13.- CELSUS; *libro XIX. Digestorum*.- Aliter atque si servus vestitus legatus foret.

14.- ALFENUS, *libro V. Digestorum*.- Quidam in testamento ita scripserat: "Pamphilus servus meus peculium suum cum moriar sibi habeto liberque

which the legatee forms a part, is not deducted from the legacy, even though the legatee may be his fellow-slave.

§ 1.- If one slave should wound one of his fellow-slaves, and, by doing so, depreciate his value, Marcellus says that there is no doubt that the amount due to the master as damages should be deducted from the peculium of the slave. For what difference is there if one slave should wound his fellow-slave, or should cut to pieces, break, or steal any other property? In this instance, his peculium will undoubtedly be diminished, but not to a greater extent than the actual amount of the injury.

§ 2.- If, however, the slave should wound himself, or even commit suicide, nothing ought to be deducted from the peculium on this account. We would be of a different opinion if he should take to flight, for the amount of depreciation of his value, in consequence, should be deducted from his peculium.

10.- POMPONIUS; *On Sabinus, Book VII*.- If you wish to bequeath his peculium to your slave, or to your son as a preferred legacy, the property included in the peculium must be specially bequeathed, to prevent what he owes you from being deducted from the same.

11.- ULPIANUS; *On the Edict, Book XXIX*.- A peculium can also be bequeathed to someone who has none, for such a bequest can be made not only of peculium owned at the present time, but also of any which may subsequently be acquired.

12.- JULIANUS; *Digest, Book XXXVII*.- A bequest of peculium is void where the slave dies during the lifetime of the testator, but if he should be living at the time of his death, the peculium will be included in the legacy.

13.- CELSUS; *Digest, Book XIX*.- The rule is different where the slave is bequeathed with his clothing.

14.- ALFENUS VERUS; *Digest, Book V*.- A certain individual inserted the following provision into his will: "When I die, let my slave Pamphilus

su coesclavo.

§ 1.- Si un esclavo hubiere herido a su coesclavo, y lo hiciere de menor precio, dice Marcelo, que no se ha de dudar que se deduce del peculio lo que le importa al señor; porque ¿qué diferencia hay entre que hiera a su esclavo, o rasgue, o rompa, o sustraiga alguna cosa? En cuyo caso sin duda se disminuye el peculio, pero no es más de su simple importe.

§ 2.- Pero si él se hirió, o aun así se mató, nada se ha de deducir por tal concepto; en otro caso diremos, que también si hubiere huido se habrá de deducir aquello en que se hubiera hecho de menor precio por su fuga.

10.- POMPONIO; *Comentarios a Sabino, libro VII*.- Si quisieras prelegar a un esclavo o a un hijo el peculio, para que no se deduzca lo que se te debe, se han de legar especialmente las cosas que hubiere en el peculio.

11.- ULPIANO; *Comentarios al Edicto, libro XXIX*.- Se puede legar el peculio también al que nada tiene en el peculio; porque se puede legar no solamente el peculio presente, sino también el futuro.

12.- JULIANO; *Digesto, libro XXXVII*.- Se hace inútil el legado del peculio siempre y cuando fallece el esclavo viviendo el testador; pero si el esclavo hubiere vivido al tiempo de la muerte, el peculio pertenecerá al legado.

13.- CELSO; *Digesto, libro XIX*.- Y habrá de ser de otro modo si el esclavo hubiese sido legado vestido.

14.- ALFENO VARO; *Digesto, libro V*.- Uno había escrito así en su testamento: «tenga para sí, Pánfilo, mi esclavo, su peculio, cuando yo muera, y sea

esto". Consulebatur, rectene Pamphilo peculium legatum videretur, quod prius quam liber esset peculium sibi habere iussus esset. Respondit in coniunctionibus ordinem nullum esse neque quicquam interesse, utrum eorum primum diceretur aut scriberetur: quare recte peculium legatum videri, ac si prius liber esse, deinde peculium sibi habere iussus est.

15.- ALFENUS; *libro II. Digestorum a Paulo epitomarum.*- Servo manumisso peculium legatum erat: alio capite omnes ancillas suas uxori legaverat: in peculio servi ancilla fuit. servi eam esse respondit neque referre, utri prius legatum esset.

16.- AFRICANUS; *libro V. Quaestionum.*- Stichus habet in peculio Pamphilum: hunc dominus noxali iudicio defendit et damnatus litis aestimationem solvit: deinde Stichum testamento manumisit eique peculium legavit: quaesitum est, an quod Pamphili nomine praestitum sit, ex peculio vel ipsius Pamphili vel stichi deducendum sit. Respondit Pamphili quidem de peculio utique deducendum, quantumque ea summa esset, id est etiam si eum noxae dedere expedisset: quidquid enim pro capite servi praestitum sit, in eo debitorem eum domini constitui. quod si pamphili peculium non sufficiat, tunc ex peculio Stichi non ultra pretium Pamphili deduci debere.

§ 1.- Quaesitum est, si ex alia qua causa Pamphilus pecuniam domino debuisset nec ea ex peculio eius servari posset, an usque ad pretium eius ex peculio stichi possit deducere. Negavit: neque enim simile id superiori esse. Ibi enim propterea pretium vicarii deducendum, quod eo nomine ipse Stichus ob

have for himself his own peculium and let him be free." It was asked whether or not the peculium should be held to have been legally bequeathed to Pamphilus, for the reason that he was directed to take the peculium before he became free. The answer was that there was no order to be observed in the two provisions, which in this instance were joined, and that it did not make any difference which of the two was mentioned or written first; and therefore that the peculium was held to have been legally bequeathed, just as if the slave had been directed to be free first, and to receive the peculium afterwards.

15.- THE SAME; *Epitomes of the Digest by Paulus, Book II.*- His own peculium was bequeathed to a manumitted slave. By another clause of the will the testator left all his female slaves to his wife. One of these formed part of the peculium of the slave who had been manumitted, and it was decided that she belonged to the said slave, and that it did not make any difference which bequest had been made first.

16.- AFRICANUS; *Questions, Book V.*- Stichus had Pamphilus in his peculium, and the master defended him in a noxal action, and, having lost the case, paid the amount of the damages assessed. Then he manumitted Stichus by will, and bequeathed to him his peculium. The question arose whether what had been paid on account of Pamphilus, as damages, should be deducted from the peculium of Pamphilus himself, or from that of Stichus. The answer was that the deduction must be made from the peculium of Pamphilus, no matter what the sum might be; that is to say, even if it should be expedient to surrender him in satisfaction of the damage committed, for everything that is paid out by the master on account of a slave makes him a debtor to his master. If the peculium of Pamphilus was not sufficient, an amount not more than the value of Pamphilus should be deducted from the peculium of Stichus.

§ 1.- The question arose if Pamphilus, for some other reason, owed a sum of money to his master, and this could not be obtained from his peculium, whether an amount to the extent of his value could be deducted from the peculium of Stichus. This was denied, for the case is not similar to the former one.

libre»; se consultaba, si se consideraría legado válidamente a Pánfilo el peculio, puesto que antes que fuese libre se mandó que tuviera para sí el peculio. Respondió, que no hay ningún orden para las conjunciones, y que nada importaba que se diga o se escriba primero una de estas cosas; por lo cual, se consideraba legado válidamente el legado, lo mismo que si se le hubiese mandado primeramente que fuese libre, y después que tuviera para sí el peculio.

15.- EL MISMO; *Digesto compendiado por Paulo, libro II.*- Se le había legado el peculio a un esclavo manumitido, y en otro capítulo había legado el testador todas las esclavas a su mujer, y en el peculio del esclavo había una esclava; respondió, que ésta era del esclavo, y que no importaba que a uno o a otra se le hubiese hecho primero el legado.

16.- AFRICANO; *Cuestiones, libro V.*- Stico tiene en su peculio a Pánfilo, el señor defiende a este en juicio noxal, y habiendo sido condenado paga la estimación del litigio; después manumitió a Stico en su testamento, y le legó el peculio; se preguntó, si se habrá de deducir del peculio del mismo Pánfilo, o del de Stico, lo que se haya pagado en nombre de Pánfilo. Respondió, que se ha de deducir ciertamente del peculio de Pánfilo, cualquiera que fuese aquella suma, esto es, también si hubiese convenido entregarlo por la noxa; porque él se constituye deudor del señor por cuanto se haya pagado por razón del esclavo; pero si no bastara el peculio de Pánfilo, entonces no se debe deducir del peculio de Stico mas del precio de Pánfilo.

§ 1.- Se preguntó, si, debiendo Pánfilo por otra cualquier causa dinero a su señor; y no se pudiera recobrar aquel de su peculio, se podría deducir hasta su precio del peculio de Stico. Dijo que no, porque este caso no es semejante al anterior; pues en aquel se ha de deducir el precio del vicario, por esto, porque

defensionem vicarii sui domino debitor constituatur, at in proposito quia Stichus nihil debeat, ex eius peculio nihil esse deducendum, sed ex Pamphili dumtaxat, qui certe ipse in suo peculio esse intellegi non potest.

17.- IAVOLENUS; *libro II. ex Cassio*.- Qui peculium servi legaverat, iudicium eo nomine acceperat, deinde decesserat. placuit non aliter peculium ex causa legati praestari, quam si de accepto iudicio heredi caveretur.

18.- MARCIANUS; *libro VI. Institutionum*.- Si servo manumisso peculium legatum fuerit, in eum sine dubio creditoribus peculiariis actiones non competunt: sed non alias heres peculium praestare debet, nisi ei caveatur defensu iri adversus creditores peculiarios.

19.- PAPINIANUS; *libro VII. Responsorum*.- Cum dominus servum vellet manumittere, professionem edi sibi peculii iussit atque ita servus libertatem accepit. res peculii professioni subtractas non videri manumisso tacite concessas apparuit.

§ 1.- Testamento data libertate peculium legaverat eundemque postea manumiserat: libertus, ut et nominum peculii actiones ei praestarentur, ex testamento consequetur.

§ 2.- Filius familias, cui pater peculium legavit, servum peculii vivo patre manumisit: servus communis omnium heredum est exemptus peculio propter filii destinationem, quia id peculium ad legatarium pertinet, quod in ea causa moriente patre inveniatur:

The reason why the price of the sub-slave should be deducted is because Stichus himself became the debtor to his master on account of the defence of the sub-slave by the latter. But, in the instance proposed, nothing can be deducted from his peculium, because Stichus owes nothing, but the deduction must only be made for the peculium of Pamphilus, who certainly cannot himself be understood to form part of his own peculium.

17.- JAVOLENUS; *On Cassius, Book II*.- A certain individual who had bequeathed the peculium of his slave undertook to defend him in court, and afterwards died. It was decided that the heir was not compelled to deliver the peculium on account of the legacy, unless security to indemnify him for any loss arising from the defence of the slave was furnished.

18.- MARCIANUS; *Institutes, Book VI*.- If his own peculium should be bequeathed to a manumitted slave, there is no doubt that no action will lie against him in favor of the creditors of his peculium, but the heir will not be obliged to deliver it, unless security is furnished to defend him against the said creditors.

19.- PAPINIANUS; *Opinions, Book VII*.- Where a master wishes to manumit his slave, and directs him to furnish him with a list of the property of which his peculium is composed, and, after doing so, the slave receives his freedom, it is evident that any property belonging to the peculium which the slave had withheld from his statement will not have been tacitly given to him when he was manumitted.

§ 1.- Where freedom is granted by a will, and the testator also bequeaths the peculium, and afterwards manumits the slave, the freedman can, under the terms of the will, demand that the rights of action for claims belonging to the peculium shall be assigned to him.

§ 2.- A son under paternal control, to whom his father bequeathed his peculium, manumitted a slave who formed part of the same, during the lifetime of his father. This slave became the common property of all the heirs, and was removed from the peculium on account of the intention of the son, because that part of the peculium only belongs to the legatee which is

por tal título se constituye el mismo Stico deudor del señor por la defensa de su vicario, pero en el propuesto, como Stico no debe nada, nada se ha de deducir de su peculio, sino solamente del de Pánfilo, quien ciertamente no puede ser considerado como estando él mismo en su propio peculio.

17.- JAVOLENO; *Doctrina de Cassio, libro II*.- Uno que había legado el peculio de un esclavo, había aceptado con tal motivo un juicio, y había fallecido después; se determinó, que por causa del legado no se ha de entregar de otro modo el peculio, sino si al heredero se le diese caución por el juicio aceptado.

18.- MARCIANO; *Instituta, libro VI*.- Si al esclavo manumitido se le hubiere legado el peculio, sin duda no les competen a los acreedores del peculio acciones contra él; pero el heredero no debe entregar el peculio de otro modo, sino si se le diera caución de que habrá de ser defendido contra los acreedores.

19.- PAPINIANO; *Respuestas, libro VII*.- Queriendo el señor manumitir a un esclavo, mandó que a él se le diese declaración del peculio, y así recibió el esclavo la libertad; pareció que no se consideraban concedidas tácitamente al manumitido las cosas sustraídas en la declaración del peculio.

§ 1.- Uno, habiendo dado por testamento la libertad, había legado el peculio, y había manumitido después al mismo esclavo; el liberto conseguirá en virtud del testamento que se le cedan también las acciones de los créditos del peculio.

§ 2.- Un hijo de familia, a quien el padre legó el peculio, manumitió un esclavo del peculio viviendo su padre; es común de todos los herederos el esclavo sacado del peculio por la disposición del hijo, porque pertenece al legatario el peculio que a la muerte del padre se halle en tal condición.

found to be included in it at the time of the father's death.

20.- MARCIANUS; *libro VII. Institutionum.*- Nihilque interest, ante legatus, deinde inutiliter manumissus sit an contra.

20.- MARCIANUS; *Institutes, Book VII.*- In a case of this kind, it makes no difference whether the bequest of the peculium was made first, and the illegal manumission was granted afterwards; or vice versa.

20.- MARCIANO; *Instituta, libro VII.*- Y nada importa, que, legado antes, haya sido inútilmente manumitido después, o al contrario.

21.- SCAEVOLA; *libro VIII. Quaestionum.*- Si Stichus manumisso peculium legatum sit et Titio servus peculiaris, quantum peculio detractum erit ob id quod domino debetur, tantum ei accedere, cui vicarius legatus est, Iulianus ait.

21.- SCAEVOLA; *Questions, Book VIII.*- If, after Stichus has been manumitted, his peculium should be left to him, and a slave belonging to said peculium is bequeathed to Titius, Julianus says that the amount deducted from the peculium on account of the debt due to the master will be added to that received by him to whom the sub-slave was bequeathed.

21.- SCÉVOLA; *Cuestiones, libro VIII.*- Si a Stico, manumitido, se le hubiera legado el peculio, y a Ticio un esclavo del peculio, dice Juliano, que tanto cuanto se hubiere deducido del peculio por lo que se debe al señor, se le agrega a aquel a quien fue legado el vicario.

22.- LABEO; *libro II. Posteriorum a Iavoleno epitomarum.*- Dominus servum testamento manumiserat et ei peculium legaverat: is servus mille nummos domino debuerat et eos heredi solvit. respondi omnes eas res deberi orcino, si pecuniam orcinus quam debuerat solvisset.

22.- LABEO; *Last Epitomes by Javolenus, Book II.*- A master manumitted his slave by his will, and left him his peculium. The slave owed his master a thousand sesterces, and paid them to the heir. I rendered the opinion that all the property composing the peculium was due to the enfranchised slave, if he had paid the money which he owed.

22.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro II.*- El señor había manumitido por testamento a un esclavo, y le había legado el peculio; este esclavo le había debido mil monedas a su señor, y se las pagó al heredero; respondí, que todas estas cosas se le debían al orcino, si el orcino hubiese pagado el dinero que había debido.

§ 1.- Dominus servum, qui cum eo vicarium communem habebat, testamento manumiserat et peculium ei legaverat, deinde ipsum vicarium, qui communis erat, nominatim et ipsi et libertae suae legaverat. respondi partem quartam libertae, reliquam partem quartam liberti futuram: quod et trebatius.

§ 1.- A master manumitted his slave, who held a sub-slave in common with him, left the former his peculium, and then bequeathed specifically the sub-slave himself, who was held in common by them, to him and to his freedwoman. I held that a fourth part of the slave would belong to the freedwoman, and that the remaining three-fourths would belong to the freedman; which is also the opinion of Trebatius.

§ 1.- El señor había manumitido por testamento a un esclavo, que junto con él tenía un vicario común, y le había legado el peculio; después le había legado expresamente al mismo y a su liberta el mismo vicario, que era común; respondí, que una cuarta parte habrá de ser de la liberta, y del liberto la otra cuarta parte; lo que también respondió Trebacio.

23.- SCAEVOLA; *libro XV. Digestorum.*- Dominus Stichus servo suo, qui bona liberti eius gessit, cui pro parte dimidia testamento heres exstiterat, in quibus negotiis gestis et kalendaria fuerunt, testamento suo libertatem dederat, si rationem reddidisset, eique peculium suum per fideicommissum dedit: Stichus summas, quibus reliquatus erat tam ex kalendario quam ex variis causis, reddidit manentibus debitoribus, pro quibus ipse pecuniam heredibus patroni refuderat, libertatemque adeptus decessit. Quaesitum est, an heredibus Stichi adversus

23.- SCAEVOLA; *Digest, Book XV.*- A master, by his will, bequeathed freedom to his slave Stichus, who transacted the business of one of his freedmen, to half of whose estate the master was the testamentary heir; a list of claims being included among the assets. The bequest of freedom was dependent upon the condition that he should render an account; and he left him his peculium under a trust. Stichus rendered an account of the sums of money which he had collected from the claims, as well as those which he had obtained from other sources, the

23.- SCÉVOLA; *Digesto, libro XV.*- El señor había dado en su testamento la libertad a Stico, su esclavo, que administró los bienes de un liberto suyo, de quien por testamento había quedado heredero de la mitad, en cuyos negocios administrados había habido libros de cuentas, si hubiese rendido cuentas, y le dio por fideicomiso su propio peculio; Stico entregó las sumas, en que se había atrasado, tanto por virtud del libro de cuentas como por otras causas, quedando deudores por los cuales él mismo había pagado el dinero a los herederos del patrono, y habiendo

nomina debitorum, pro quibus Stichus pecuniam heredibus patroni intulit, heredes patroni ex causa fideicommissi compellendi sint actiones praestare, cum nihil aliud a Sticho patrono debitum fuerit. Respondit praestandum.

§ 1.- Testamento codicillisve servos manumisit et peculia legavit et de Sticho ita cavit: "Stichum servum meum liberum esse volo eique volo dari decem aureos et quidquid ex ratione loculorum meorum habet: rationes autem heredibus meis dari volo. His omnibus, quos hoc testamento manumisi, peculia sua concedi volo".

Quaesitum est, an, quod amplius rationi loculorum in diem mortis erogavit Stichus ex peculio suo, ab heredibus recipere debeat, cum ex consuetudine domus esset, ut quidquid amplius ex suo in ratione loculorum erogasset, dominica ratio ei deberet atque exsolveret. Respondit secundum ea, quae propter consuetudinem proponerentur, id quoque peculio legato contineri, quod et dominica ratio deberet et solita erat reddere.

§ 2.- Servis libertates legataque dederat et condicionem ita scripserat: quaesitum est, an peculia quoque legata his videbuntur. Respondit secundum ea quae proponerentur non videri legata.

§ 3.- Item quaesitum est, an ex isdem verbis reliqua rationum quasi legata retinere possint, aut si res dominicas apud se habuerint, aut, si qui eorum coloni praediorum fuerunt, pensiones. Respondit supra responsum.

debtors in whose behalf he himself had paid the heirs of his patron still remaining liable for their obligations; and having obtained his freedom, he died. The question arose whether, by virtue of the trust, the heirs of the patron could be compelled to assign to the heirs of Stichus their rights of action against the debtors for whom Stichus had made payment, when there was nothing else due from Stichus to the patron. The answer was that they could be compelled to do so.

§ 1.- A certain testator manumitted his slaves by his will and a codicil, bequeathed them their peculium, and made the following provision with reference to Stichus: "I wish my slave Stichus to be free, and that ten aurei be given to him, together with whatever money he may have in my purse, and I desire that he render an account to my heirs. I also wish the peculium of all the slaves whom I have manumitted to be given to them."

The question arose whether Stichus should receive from the heirs any excess over and above the contents of his master's purse, which he had expended for his benefit at the time of his death, as it was the custom of the household that, where he expended anything more than the contents of the purse, for him to be reimbursed for the same by his master. The answer was that, according to the facts stated with reference to the custom of the household, that also was included in the peculium bequeathed which was due to him from his master, and which the latter was accustomed to return to him.

§ 2.- A testator granted freedom to his slaves, left them certain legacies, and then prescribed the following condition: "I desire that no accounts be required from the slaves whom I have manumitted, and to whom I have bequeathed legacies." The question arose whether their peculium should be considered to have been bequeathed to them by this clause. The answer was that, according to the facts stated, the peculium was not considered to have been bequeathed.

§ 3.- It was also asked whether, under this provision, the slaves could retain as part of their legacies anything that remained due to them from their master, either if they had any of his property in their hands, or if, where they were his tenants, they

alcanzado la libertad falleció; se preguntó, si por causa del fideicomiso habrán de ser compelidos los herederos del patrono a cederles a los herederos de Stico las acciones contra los créditos de los deudores, por los cuales pagó Stico a los herederos del patrono el dinero, toda vez que ninguna otra cosa se le haya debido al patrono por Stico. Respondió, que se habrán de ceder.

§ 1.- Uno manumitió a unos esclavos por testamento o codicilos, y legó los peculios, y respecto de Stico dispuso así: «quiero que Stico, mi esclavo, sea libre, y quiero que se le den diez áureos y lo que tiene por razón de mi bolsillo particular; pero quiero que se les den cuentas a mis herederos; y quiero que a todos estos a quienes manumitió en este testamento se les concedan sus peculios»;

Se preguntó, si deberá recibir de los herederos lo que además de la cuenta del bolsillo particular gastó Stico de su propio peculio hasta el día de la muerte, habiendo sido costumbre de la casa que todo lo que de más hubiese gastado de lo suyo, por cuenta del bolsillo particular, se lo debiese a él Y se lo pagase la cuenta del señor. Respondió, que, según lo que se exponía por razón de la costumbre, se comprendía en el peculio legado también lo que debiera, y había acostumbrado a pagar, la cuenta del señor.

§ 2.- Uno había dado a sus esclavos la libertad y legados, y había escrito así la condición: «quiero que los mismos a quienes dejé libres y les di legados, queden sin rendir cuentas»; se preguntó, ¿se les considerarán legados también los peculios? Respondió, que, según lo que se exponía, no se consideran legados.

§ 3.- También se preguntó, si en virtud de las mismas palabras podrían retener los atrasos de las cuentas, como si les hubieran sido legados, o las pensiones, si, hubieren tenido en su poder bienes del señor o si algunos de ellos hubieren sido colonos de

24.- ULPIANUS; *libro XLIII. ad Sabinum*.- Si legatus fuerit servus, peculium excipere non est necesse, quia non sequitur, nisi legetur.

25.- CELSUS, *libro XIX. Digestorum*.- Si servus liber esse iussus sit eique peculium legatum sit, vicariorum eius vicarii legato continentur.

26.- SCAEVOLA; *libro III. Responsorum*.- "Titi fili, e medio praecipito sumito tibi que habeto domum illam, item aureos centum": alio deinde capite peculia filiis praelegavit. Quaesitum est, an peculio praelegato et centum aurei et usurae eorum debentur, cum rationibus brevianis in aere alieno et sortem et usuras inter ceteros creditores complexus sit. respondit, si id faenus nomine filii exercuisset et usuras ita, ut proponeretur, filio adscripsisset, id quoque peculio legato deberi.

TIT. IX

DE PENU LEGATA

1.- ULPIANUS; *libro XXIV. ad Sabinum*.- Uxor suae in annos singulos penoris aliquid heres dare iussus est, si non dedisset, nummos dare damnatus est: quaeritur, an penus legata peti possit an vero solummodo sit in praestatione et, si non praestetur, tunc quantitas petatur. et si quidem semel penus sit legata, non per singulos annos, certo iure utimur, ut et Marcellus libro trigésimo nono digestorum apud Iulianum notat, in praestatione esse dumtaxat penum, quantitatem vero et peti posse. Habebit igitur heres oblationem tamdiu, quamdiu lis cum eo de pecunia contestetur, nisi forte aliud tempus vel mente vel verbis testator praestituit. Quod si in annos

owed him rent. The reply was that the answer has already been given.

24.- ULPIANUS; *On Sabinus, Book XLIII*.- Where a slave is bequeathed, it is unnecessary to except his peculium, because, unless expressly specified, it is not included in the legacy.

25.- CELSUS; *Digest, Book XIX*.- When a slave is ordered to be free by a testator, and his peculium is left to him, the sub-slaves of his sub-slaves are embraced in three legacies.

26.- SCAEVOLA; *Opinions, Book III*.- "Let my son Titius take from the assets of my estate, as a preferred legacy, such-and-such a house, and a hundred aurei." Then, under another article, the testator left to his children their peculia as preferred legacies. The question arose, whether the hundred aurei and the interest on the same would be included in the preferred legacy of the peculium, together with the account-books containing the amounts due, both principal and interest, to the other creditors. The answer was if the father had lent money in the name of his son, and had credited the latter with interest on the same, as might be suggested, this also would be included in the legacy of the peculium.

TITLE IX

CONCERNING LEGACIES OF PROVISIONS

1.- ULPIANUS; *On Sabinus, Book XXIV*.- An heir was ordered by the testator to furnish the wife of the latter with a certain quantity of provisions every year, and in case he should not do so, he charged him to pay her a sum of money. The question arose whether she could bring an action to recover the provisions bequeathed, or whether the delivery was merely voluntary, and if the provisions were not furnished, whether they could be demanded. And, indeed, if such a legacy was only bequeathed once, and not payable annually, there is no doubt (as Marcellus observes in the Thirty-ninth Book of the Digest on Julianus) that the delivery of the articles themselves

los predios. Respondió, que arriba se había respondido.

24.- ULPIANO; *Comentarios a Sabino, libro XLIII*.- Si hubiere sido legado un esclavo, no hay necesidad de exceptuar el peculio, porque no le sigue, si no se legara.

25.- CELSO; *Digesto, libro XIX*.- Si se hubiera mandado que un esclavo fuera libre, y se le hubiera legado el peculio, se contienen en el legado los vicarios de los vicarios de él.

26.- SCÉVOLA; *Respuestas, libro III*.- «hijo Ticio, retira de la masa, toma, y ten para tí aquella casa, y también cien áureos»; después, en otro capítulo, prelegó a los hijos los peculios; se preguntó, ¿prelegado el peculio, se deben los cien áureos, y sus intereses, -habiendo comprendido en los resúmenes de sus cuentas el capital entre las deudas y los intereses entre los demás acreedores-? Respondió, que si a nombre de su hijo hubiese hecho este préstamo a interés, y le hubiese adscrito al hijo, así como se exponía, los intereses, se debe también esto en el peculio legado.

TÍTULO IX

DEL LEGADO DE LAS PROVISIONES

1.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Se le mandó al heredero que le diera a la mujer algunas provisiones para cada año, y fue condenado a dar cierta cantidad, si no las hubiese dado; se pregunta, si se podrán pedir las provisiones legadas, o si solamente estarán para la prestación, y, si no fueran prestadas, se pedirá entonces la cantidad. Y si verdaderamente las provisiones hubieran sido legadas por una sola vez, no para cada año, usamos del derecho cierto, como nota también Marcelo en Juliano en el libro trigésimo noveno del Digesto, que las provisiones figuran solamente para la prestación, pero que la cantidad también puede ser pedida;

singulos penus legata sit, per singulos annos penus adhuc poterit praestari, si minus, summae per singulos annos petentur.

Quid ergo, si una summa legata sit et primo penus non sit praestita? utrum tota summa debeatur, quasi toto penoris legato transfuso, an vero quantitas primi anni aestimationis sola sit translata, dubitari potest. Puto tamen sic voluntatem sequendam testatoris, ut tota summa ilico, postquam cessaverit heres dare penum uxori, praestetur, heredis indevotione coercenda.

2.- MARCIANUS; *libro III. Regularum*.- Penu certa cum vasis certis legata et consumpta ne vasa quidem cedunt legato exemplo peculii.

3.- ULPIANUS; *libro XXII.- ad Sabinum*.- Qui penum legat quid legato complectatur, videamus. Et quintus mucius scribit libro secundo Iuris Civilis penu legata contineri, quae esui potuique sunt. Idem Sabinus libris ad Vitellium scribit: quae harum, inquit, patris familiae uxoris liberorumve eius vel familiae, quae circa eos esse solet, item iumentorum, quae dominici usus causa parata sunt.

§ 1.- Sed aristo notat etiam quae esui potuique non sunt contineri legato, ut puta ea, in quibus esse solemus, oleum forte, garum muriam mel ceteraque his similia.

§ 2.- Plane, inquit, si penus esculenta legetur, labeo

is not required, but that suit can be brought to recover the amount in money. Therefore, the heir will have the right to tender the provisions, or the cash, until issue is joined in an action to recover their value in money; unless the testator, either by implication, or expressly, indicated some other time for payment. Where, however, the legacy of provisions was to be paid annually, it must still be furnished in kind every year, or, if it is not, suit for the amount due can be brought annually.

But what if a single sum of money was bequeathed, and the provisions were not furnished at the end of the first year? Can it be doubted that the whole sum would be payable, just as if the entire amount of the legacy of the provisions was due; or should the estimated value of the provisions to be furnished during the first year merely be taken into consideration? I think that the intention of the testator should be followed, and the entire sum ought to be paid at once, after the heir has failed to furnish the provisions to the wife, and that he should be punished for his want of filial piety.

2.- MARCIANUS; *Rules, Book III*.- Where a certain kind of provisions is bequeathed, together with the vessels in which they are contained, and they have been consumed, the vessels are not included in the legacy, as in the case of the peculium.

3.- ULPIANUS; *On Sabinus, Book XXII*.- Where anyone bequeaths provisions, let us see what is embraced in the legacy. Quintus Mucius says, in the Second Book of the Civil Law, that whatever can be eaten or drunk is considered as forming part of a legacy of provisions. Sabinus also says, in his Books on Vitellius, that everything is included in such a legacy that is ordinarily consumed by the head of the household, his wife, his children, or his slaves, and that this also applies to such beasts of burden as are destined for the use of the testator.

§ 1.- Aristo, however, remarks, that some things which are not eaten or drunk are included in the legacy; for instance, those that we are accustomed to use with them, as oil, sauce made from fish, brine, honey, and other articles of this kind.

§ 2.- If articles used with food are bequeathed, it is

tendrá, pues, el heredero derecho para la oferta hasta tanto que se conteste con él la demanda por el dinero, a no ser acaso que el testador haya prefijado otro tiempo, o con la intención o con las palabras. Pero si las provisiones hubieran sido legadas para cada año, todavía se podrán entregar las provisiones cada año; y si no, se pedirán las sumas cada año.

Luego, ¿qué se dirá si se hubiera legado una sola suma, y primeramente no se hubieran entregado las provisiones? Se puede dudar, si se deberá toda la suma, cual si se hubiera transferido todo el legado de las provisiones, o si se transfirió sola la cantidad de la estimación del primer año. Pero creo que se ha de seguir la voluntad del testador, de modo que se entregue toda la suma inmediatamente, después que el heredero hubiera dejado de dar las provisiones a la mujer, debiendo ser castigada la desobediencia del heredero.

2.- MARCIANO; *Reglas, libro III*.- Legadas ciertas provisiones con determinados vasos, y consumidas, ciertamente que ni los vasos pertenecen al legado, a semejanza que en el peculio.

3.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Veamos que comprenda en el legado el que lega las provisiones. Y escribe Quinto Mucio en el libro segundo del Derecho Civil, que en las provisiones legadas se comprenden las cosas que sirven para la comida y la bebida; lo mismo escribe Sabino en sus libros de Comentarios a Vitelio, aquellas cosas de estas, dice, que fueron destinadas para uso del padre de familia, de la mujer, o de sus hijos, o de la servidumbre que suele estar cerca de ellos, y aun de las caballerías; de uso del señor.

§ 1.- Pero observa Aristón, que también se comprenden en el legado las cosas que no sirven para la comida y la bebida, por ejemplo, aquellas con que solemos comer, como el aceite, la salsa de pescado, la salmuera, la miel, y otras cosas semejantes a estas.

§ 2.- Ciertamente, dice, si se legaran las provi-

libro nono posteriorum scribit nihil eorum cedere, quia non haec esse, sed per ea solemus. Trebatius in melle contra scribit, merito, quia mel esse solemus. sed proculus omnia haec contineri recte scribit, nisi contraria mens testatoris appareat.

§ 3.- Esculenta, utrum ea quae esse, an et ea per quae esse solemus, legaverit? Et ea quoque legato contineri credendum, nisi contraria mens patris familias doceatur. mella certe semper esculentae penui cedere, lacertas quoque cum muria sua contineri nec labeo negavit.

§ 4.- Poculenta penu ea, quae vini loco pater familias habuit, continebuntur, supra scripta vero non continebuntur.

§ 5.- Penori acetum quoque cedere nemo dubitat, nisi exstinguendi ignis causa fuit paratum: tunc enim esui potuique non fuit: et ita ofilius libro sexto decimo actionum scribit.

§ 6.- Sed quod diximus "usus sui gratia paratum" accipiendum erit et amicorum eius et clientium et universorum, quos circa se habet, non etiam eius familiae, quam neque circa se neque circa suos habet: puta si qui sunt in villis deputati. quos Quintus Mucius sic definiebat, ut eorum cibaria contineri putet, qui opus non facerent: sed materiam praebuit servio notandi, ut textorum et textricum cibaria diceret contineri: sed mucius eos voluit significare, qui circa patrem familias sunt.

§ 7.- Simili modo et iumentorum cibaria penui continentur, sed eorum iumentorum, quae usibus ipsius et amicorum deserviunt: ceterum si qua iumenta agris deserviebant vel locabantur, legato non cedere cibaria eorum.

clear (as Labeo says in the Ninth Book of his Last Works) that none of them should be embraced in the legacy, because we do not eat these things, but, by means of them, we are accustomed to eat others. Trebatius is of a different opinion so far as honey is concerned, and with good reason, because we are in the habit of eating honey. Proculus, however, very properly holds that all articles of this kind are included in the legacy, unless it is evident that this was not the intention of the testator.

§ 3.- Where a bequest is made of provisions, does this include articles which we are accustomed to eat, or those by means of which we eat others? It should be held that the latter are also included in the legacy, unless the intention of the testator is shown to be otherwise. It is certain that honey is always classed among provisions. Labeo himself does not deny that fish, together with the brine in which they are pickled, are also included.

§ 4.- All drinkables which the head of the household considered as wine are classed as provisions, but none of those above mentioned are included.

§ 5.- No one doubts that vinegar is also included in the term "provisions," unless it was kept for the purpose of extinguishing fire, for then it cannot be eaten or drunk. This Ofilius stated in the Sixteenth Book of Actions.

§ 6.- What we have said with reference to the clause, "Destined for the use of the testator," should be understood to apply to his friends, his clients, and all the persons whom he has about him, but not to his slaves, or to those who are not attendant upon him or his people; for example, the slaves who are employed upon his estates; and Quintus Mucius thinks that those only are included in bequests of provisions who do not perform any labor. This gives occasion to Servius to remark that food for the maintenance of male and female weavers is embraced in such a legacy. Mucius, however, only intended to designate those who are in attendance upon the testator.

§ 7.- Likewise, food intended for the subsistence of beasts of burden is included in the legacy; but this does not apply to such beasts of burden as are used by the testator himself and his friends. Food for such animals as are employed in farm labor, or are hired

siones de comer, escribe Labeón en el libro noveno de los Posteriores, que no se agregan ningunas de aquellas cosas, porque no acostumbramos a comerlas, sino a comer con ellas. Trebacio escribe lo contrario en cuanto a la miel; y con razón, porque solemos comer la miel. Pero acertadamente escribe Próculo que se comprenden todas estas cosas, si no apareciera contraria voluntad del testador.

§ 3.- ¿Habrá legado uno como comestibles las cosas que solemos comer, o también aquellas con las que solemos comer? Y se ha de creer que se comprenden en el legado también estas, a no ser que se pruebe contraria intención del padre de familia; pero la miel se agrega, a la verdad, siempre a las provisiones de comer; y Labeón no negó que se contuvieran también los lagartos con su salsa.

§ 4.- En las provisiones de beber se contendrán las cosas que el padre de familia tuvo en calidad de vino, pero no se comprenderán las antes mencionadas.

§ 5.- Nadie duda que el vinagre también se agrega a las provisiones, a no ser que hubiese sido destinado a extinguir incendios; porque entonces no sirvió para la comida y la bebida; y así lo escribe Ofilio en el libro décimo sexto de las Acciones.

§ 6.- Pero lo que hemos dicho, «destinado a su propio uso», se habrá de entender también al de sus amigos, al de sus clientes, y al de todos los que tiene cerca de sí; no también al de los esclavos suyos, que no tiene ni cerca de sí, ni cerca de los suyos, por ejemplo, si hay algunos destinados a las granjas, a los cuales los definía Quinto Mucio de este modo, que creía que se comprendían los alimentos de aquellos, que no hicieran faenas; pero le dio a Servio ocasión para notar, que añadiría que se comprendían los alimentos de los tejedores y de las tejedoras. Pero Mucio quiso significar los que están cerca del padre de familia.

§ 7.- De igual modo se comprenden también las provisiones alimenticias de las caballerías, pero de aquellas caballerías que sirven para uso del mismo y para el de sus amigos; pero si algunas caballerías servían para los campos, o se daban en

§ 8.- Sive autem frumentum sive quid leguminis in cella penuaria habuit, penori legato continebitur, sed et hordeum sive familiae sive iumentorum gratia: et Ofilius scribit libro sexto decimo actionum.

§ 9.- Ligna et carbones ceteraque, per quae penus conficeretur, an penori legato contineantur, quaeritur. Et Quintus Mucius et Ofilius negaverunt: non magis quam molae, inquit, continentur. Idem et tus et ceras contineri negaverunt. Sed Rutilius et ligna et carbones, quae non vendendi causa parata sunt, contineri ait. Sextus autem Caecilius etiam tus et cereos in domesticum usum paratos contineri legato scribit.

§ 10.- Servius apud Melam et unguentum et chartas epistulares penoris esse scribit et est verius haec omnia, odores quoque contineri: sed et chartas ad ratiunculam vel ad logarium paratas contineri.

§ 11.- Vasa quoque penuaria quin contineantur, nulla dubitatio est. Aristo autem scribit dolia non contineri, et est verum secundum illam distinctionem, quam supra in vino fecimus. nec frumenti nec leguminum thecae; arculae forte vel sportae, vel si qua alia sunt, quae horrei penuarii vel cellae penuariae instruendae gratia habentur, non continebuntur, sed ea sola continentur, sine quibus penus haberi non recte potest.

4.- PAULUS; *libro IV. ad Sabinum.*- Nam quod liquidae materiae sit quia per se esse non potest, rapit secum in accessionis locum id sine quo esse non potest: vasa autem accessio legatae penus, non legata sunt: denique penu consumpta vasa non debentur. sed et si penum cum vasis specialiter sit legatum, vasa non debebuntur vel consumpta penu vel adempta.

out, are not included in this legacy.

§ 8.- Any grain or vegetables which the testator kept in a storehouse are included in a legacy of provisions, as well as any barley for the subsistence of his slaves, or his beasts of burden; as Ofilius stated in the Sixteenth Book on Actions.

§ 9.- The question arises whether firewood, charcoal, and other combustibles by which food is prepared, are embraced in a legacy of provisions. Quintus Mucius and Ofilius deny that this is the case, and they say that these are not included, any more than millstones are. They also deny that either incense or wax is included. Rutilius, however, holds that both firewood and charcoal, if they are not kept for the purpose of sale, come under this head. Sextus and Caecilius also state that incense and wax tapers, kept for domestic use, are included.

§ 10.- Servius, On Mela, says that perfumes and papyrus for letters also should be classed as provisions. The better opinion is that all these articles, including perfumes, should be included, and that sheets of papyrus intended for the daily accounts of the testator belong to the same category.

§ 11.- There is no doubt that vessels for table-service are also included. Aristo, however, says that casks are not, and this is correct, in accordance with the distinction which we previously made with reference to wine. Nor are receptacles for grain or vegetables, or boxes, or baskets, or anything else of this kind, which is kept to be used in warehouses or cellars, where provisions are stored, included, but only those articles without which provisions cannot properly be made use of.

4.- PAULUS; *On Sabinus, Book IV.*- As liquids cannot be kept without receptacles, they take with them as accessories any articles without which they cannot be preserved. Vessels, however, which are accessories of the legacy of provisions, are not bequeathed. Finally, after the provisions have been consumed, the vessels which contained them will no longer be due. But even if the provisions were expressly bequeathed with the vessels, the latter will

arrendamiento, no se comprenden en el legado las provisiones para las mismas.

§ 8.- Mas ya si tuvo en la despensa de las provisiones trigo, ya si algunas legumbres, esto se comprenderá en el legado de las provisiones. Pero escribe Ofilio en el libro décimo sexto de las Acciones, que también la cebada, o para los esclavos, o para las caballerías.

§ 9.- Se pregunta, si se comprenderán en el legado de las provisiones la leña, el carbón y las demás cosas con las que se preparasen las provisiones. Y Quinto Mucio y Ofilio dijeron que no; no de otra suerte, dicen, que no se comprenden las piedras de moler. También negaron que se comprendieran el incienso y la cera. Pero Rutilio dice, que se comprenden la leña y el carbón, que no se destinaron a ser vendidos. Mas Sexto Cecilio escribe, que en el legado se comprenden también el incienso, y las velas de cera destinadas al uso doméstico.

§ 10.- Escribe Servio en sus notas a Mela, que son provisiones el ungüento y el papel de cartas; y es más verdadero que se comprenden todas estas cosas, y también los olores; pero se comprende también el papel destinado para las cuentas pequeñas y los gastos diarios.

§ 11.- No hay ninguna duda de que se comprenden también las vasijas de las provisiones. Pero escribe Aristón, que no se comprenden las tinajas; y es verdad, según aquella distinción que arriba hicimos en cuanto al vino. Y tampoco se comprenderán los depósitos del trigo, ni los de las legumbres, por ejemplo, las espuelas, u otras cosas que se tienen para que estén preparados los almacenes de provisiones, o las despensas de estas, sino que se comprenden solamente aquellas cosas sin las que no se pueden tener convenientemente las provisiones.

4.- PAULO; *Comentarios a Sabino, libro IV.*- Pues lo que es de materia líquida, como no puede estar por sí, lleva consigo en calidad de accesión aquello sin lo que no puede estar; pero las vasijas son accesión de las provisiones legadas, pero no son legadas. Finalmente, consumidas las provisiones no se deben las vasijas. Pero aunque se hayan legado las provisiones especialmente con las vasijas, no se deberán las vasijas, o consumidas, o quitadas, las

§ 1.- Si cui quae in promptuario sint legata fuerint, non omnis penus legata est.

§ 2.- Item si quis solitus fructus suos vendere penum legaverit, non omnia, quae et promercii causa habuit, legasse videtur, sed ea sola, quae in penum sibi separabat. Quod si promiscue uti solebat, tunc quantum ad annum usum ei sufficeret familiaeque eius ceterorumque, qui circa eum sunt, legato cedet: quod fere, inquit Sabinus, evenit in personis mercatorum aut quotiens cella est olei et vini, quae venire solebant, in hereditate relicta.

§ 3.- Nomen autem penus mihi traditum est omnibus generibus dictum.

§ 4.- Si ita legetur "penum, quae Romae sit", utrum quae est intra continentia, legata videtur an vero ea sola, quae est intra murum? et quidem urbes fere omnes muro tenus finiri, Romam continentibus, et urbem Romam aequae continentibus.

§ 5.- Quod si urbana penus sit legata, omnem, quae ubique est, legatam videri Labeo ait, etiam si in villis agrisque sit, si illa sit urbico usui destinata, sicuti urbana ministeria dicimus et quae extra urbem nobis ministrare consueverunt. si autem extra urbem, Romae tamen sit, sed et si in hortis sit urbi iunctis, idem erit dicendum.

§ 6.- Si cui penus legata sit praeter vinum, omnis penus legata videtur excepto vino: sed si ita scriptum sit "omnem penum praeter vinum quod Romae erit", sola penus quae Romae est legata videtur: et ita et Pomponius libro sexto ad Sabinum scribit.

not be due after the provisions have been consumed, or the legatee has been deprived of them.

§ 1.- Where provisions contained in a storehouse are left to anyone, all the provisions of the testator are not the subject of the legacy.

§ 2.- Likewise, if anyone who is accustomed to sell his crops should bequeath provisions, he is not held to have left everything which he had in his hands as merchandise, but only what he had set apart as supplies for himself. But if he was accustomed to make use of what he had indiscriminately, only the quantity which would be sufficient for the annual consumption of himself, his slaves, and the other persons whom he had about him, will be embraced in the legacy. Sabinus says that this usually occurs in the case of merchants, or when a warehouse containing oil or wine which was accustomed to be sold, forms part of an estate.

§ 3.- I have been informed that the term "provisions" is applicable to every kind of food.

§ 4.- Where a bequest is made of provisions which are at Rome, are those bequeathed which are situated in the suburbs, or only such as are within the walls? While, indeed, almost all towns are enclosed by walls, Rome is enclosed by its suburbs, and the City of Rome is bounded by its suburbs.

§ 5.- Where a legacy of provisions in a city is left, Labeo says that everything of the kind to be found anywhere should be considered as bequeathed, even articles which are at a country-seat, but are destined for urban consumption; just as we call those slaves "urban" whose services we are accustomed to make use of outside of the city. If, however, the provisions are situated outside of the City, they will, nevertheless, be considered to be at Rome, and if they are in the gardens adjoining the City, the same rule will apply.

§ 6.- Where provisions, with the exception of wine, are bequeathed to anyone, all the provisions except the wine will be considered as included in the legacy. Where, however, it was set forth explicitly in a will that all provisions, except the wine which was at Rome, were bequeathed, only the provisions which were at Rome were held to be embraced in the legacy. This was stated by Pomponius in the Sixth Book on

provisiones.

§ 1.- Si a alguien se le hubieren legado las cosas que están en la despensa, no se legaron todas las provisiones.

§ 2.- Asimismo, si alguno que solía vender sus frutos hubiere legado las provisiones, no se considera que legó también todas las cosas que tuvo por causa de tráfico, sino aquellas solas que para si separaba para provisiones; pero si solía usar promiscuamente de ellas, en este caso pertenecerá al legado cuanto le baste para el uso de un año, y para el de su servidumbre, y para el de los demás que están cerca de él; lo que de ordinario acontece, dice Sabino, tratándose de las personas de los comerciantes, o siempre que se dejó en la herencia una despensa de aceite y de vino, que se solía vender.

§ 3.- Pero a mí ha llegado que la palabra «provisiones» se dijo para todos los géneros.

§ 4.- Si se legara así: «las provisiones, que haya en Roma», ¿se consideran acaso legadas las que hay en las inmediaciones, o solamente las que hay dentro de los muros? Y ciertamente que de ordinario todas las ciudades terminan en las murallas, pero Roma en las inmediaciones, y la urbe de Roma igualmente en las inmediaciones.

§ 5.- Pero si se hubieran legado las provisiones urbanas, dice Labeón, que se consideran legadas todas, en cualquier lugar que estén, aunque estén en la casa de campo destinadas al uso de la ciudad, así como llamamos servidores urbanos también a los que acostumbraron a servirnos fuera de la ciudad. Pero se habrá de decir lo mismo, si estuvieran fuera de la ciudad, pero en Roma, y también si en huertos adjuntos a la ciudad.

§ 6.- Si a alguno se le hubiesen legado las provisiones excepto el vino, se consideran legadas todas las provisiones excepto el vino. Pero si se hubiera escrito así: «todas las provisiones excepto el vino, que hubiere en Roma», se consideran legadas solamente las provisiones que hay en Roma; y así lo escribe también Pomponio en el libro sexto de sus comentarios a Sabino.

Sabinus.

5.- PAULUS; *libro IV. ad Sabinum*.- Non omne quod bibetur in penu habetur: alioqui necesse est, ut omnia medicamenta quae biberentur contineantur. itaque ea demum penoris esse, quae alendi causa biberentur, quo in numero antidotum non est. Et sane vere Cassius sensit.

§ 1.- Sed quod quidam negaverunt piper et ligusticum et careum et laser et cetera huiusmodi in penu non esse, improbatum est.

6.- PAULUS; *libro X. ad Sabinum*.- Instrumentum pistrini, item universa vasa cocitatoria penu non continentur.

7.- SCAEVOLA; *libro III. Responsorum*.- "Penum meam omnem ad matrem liberosque meos, qui cum matre sunt, pertinere volo". Quaero, si tutores pupilli eam solummodo penum deberi, quae in caenaculo esset, dicant, sint autem et in horreis amphorae, an hae quoque deberentur. respondit, quidquid penoris usus causa ubicumque habuisset, deberi.

5.- THE SAME; *On Sabinus, Book IV*.- Everything which can be drunk is not included in the term "provisions," otherwise, it would be necessary for all medicines which are fluids to be included in the legacy. Hence, only such are included as are drunk for the purpose of nourishment, and antidotes do not belong to this category; as Cassius very properly remarks.

§ 1.- Certain authorities deny that pepper, lovage, caraway seed, assafoedita, and other articles of this kind, are included in provisions, but this opinion is not accepted.

6.- THE SAME; *On Sabinus, Book X*.- The utensils of a bakery, and all the vessels used for cooking, are not included in a bequest of provisions.

7.- SCAEVOLA; *Opinions, Book III*.- "I wish all my provisions to go to my mother, or to my children who are with her." I ask, if the guardians of a ward should say that only the provisions contained in his residence were bequeathed, and certain jars of wine were found in his storehouses, whether these are included in the legacy. The answer was that any provisions which he had anywhere for his own use were included.

5.- EL MISMO; *Comentarios a Sabino, libro IV*.- No todo lo que se bebe se comprende en las provisiones, pues de otra suerte sería necesario que se comprendieran todos los medicamentos, que se bebiesen; y así solamente son de las provisiones las cosas que se beban para alimentarse, en cuyo número no está el antidoto; y ciertamente opinó con verdad Cassio.

§ 1.- Pero se desestimó lo que algunos negaron, que la pimienta, el ligústico, la alcarabea, el benjuí, y otras cosas semejantes, no se comprenden en las provisiones.

6.- EL MISMO; *Comentarios a Sabino, libro X*.- Los utensilios del tahonero, y todos los vasos de cocina, no se comprenden en las provisiones.

7.- SCÉVOLA; *Respuestas, libro III*.- «Quiero que todas mis provisiones les pertenezcan a mi madre y a mis hijos, que están con mi madre»; pregunto, si, diciendo los tutores del pupilo que se deben solamente aquellas provisiones, que hubiese en el cenáculo, pero habiendo también ánforas en los almacenes, se deberán también estas. Respondió, que se debía todo lo que por causa de uso de provisiones hubiese tenido en cualquier parte.

TIT. X

TITLE X

TÍTULO X

DE SUPPELLECTILE LEGATA

CONCERNING BEQUESTS OF
HOUSEHOLD GOODS

DEI. LEGADO DEL AJUAR

1.- POMPONIVS; *libro VI. ad Sabinum*.- Supellex est domesticum patris familiae instrumentum, quod neque argento aurove facto vel vesti adnumeretur.

2.- FLORENTIVS; *libro XI. Institutionum*.- Id est res moventes non animales.

§ 3.- PAULUS; *libro IV. ad Sabinum*.- Suppellectili legata haec continentur: mensae, trapezophora,

1.- POMPONIVS; *On Sabinus, Book VI*.- Furniture, or any domestic utensils belonging to the head of a family, but not including articles of silver or gold, or clothing,

2.- FLORENTINVS; *Institutes, Book XI*.- That is to say, movable property, but not animals, is classed under this head.

3.- PAULUS; *On Sabinus, Book IV*.- The following are embraced in bequests of household goods,

1.- POMPONIO; *Comentarios a Sabino, libro VI*.- Son ajuar los utensilios domésticos del padre de familia, que no se cuenten en la plata o en el oro labrado, o entre los vestidos.

2.- FLORENTINO; *Instituta, libro XI*.- Esto es, cosas muebles, no animadas.

3.- PAULO; *Comentarios a Sabino, libro IV*.- En el ajuar legado se comprenden estas cosas; las mesas,

delficae, subsellia, scamna, lecti etiam inargentati, culcitae, toralia, imperia, vasa aquaria, pelves, aquiminalia, candelabra, lucernae, trulla.

§ 1.- Item vasa aenea vulgaria, id est quae non proprie essent loco adtributa:

§ 2.- Praeterea capsae, armaria. sed sunt qui recte putant capsas et armaria, si librorum aut vestium aut armamentorum gratia parata sint, non esse in suppellectili, quia ne hae quidem ipsae res, quibus adtributae essent, suppellectilis instrumento cederent.

§ 3.- Vitrea escaria et patoria in supellectili sunt sic ut fictilia, nec solum vulgaria, sed etiam quae in pretio magno sunt: nam et pelves argenteas et aquiminalia argenteae et mensae et lectos inargentatos vel inauratos atque gemmatis in supellectili esse non dubitatur, usque adeo, ut idem iuris sit et si tota argentea vel aurea sint.

§ 4.- De murrinis et crystallinis dubitari potest an debeant adnumerari supellectili propter eximium usum et pretium: sed et de his idem dicendum est,

§ 5.- Nec interest, cuius materiae sunt res, quae sunt in suppellectili. Sed craterem argenteum non esse in supellectili nec ullum vas argenteum secundum saeculi severitatem nondum admittentis supellectilem argenteam hodie, propter usum imperitorum si in argento relatum sit candelabrum argenteum, argenti esse videtur, et error ius facit.

4.- PAULUS; *libro singulari de instrumenti significatione*.- Redae et sedularia suppellectili adnumerari solent.

5.- PAULUS; *libro IV. ad Sabinum*.- De tapetis quaeri potest, subsellia cathedraria quibus interni

namely: cupboards, benches, bedsteads, beds, even such as are inlaid with silver, mattresses, coverlets, pillows, vases for water, basins, candelabra, lamps, and ladles.

§ 1.- Ordinarily, brazen vessels, for example, those which are not fastened to any certain place, are included.

§ 2.- In addition to these are strong boxes and coffers. Some authorities very properly hold that wardrobes and chests of drawers, if intended for the storage of clothes or books, should not be classed as household goods, because the articles for which they are designed are not included in that category.

§ 3.- Glass vessels for the table, used both for eating and drinking, are included among household goods, as well as earthenware vessels, not only common ones, but also such as are of great value. For there is no doubt that silver basins and bowls, tables and bedsteads inlaid with gold or silver and set with jewels, are included in the term household goods, even to the extent that the same rule applies where they are entirely made of these precious metals.

§ 4.- There is some doubt with reference to vases of iridescent glass, and of crystal, whether they form part of the household goods on account of their rarity and value, but the same rule must be said to also apply to them.

§ 5.- Nor does it make any difference of what material the articles composing the household goods are made, but neither silver cups, nor silver vases are included, on account of the severity of the age, which does not admit of silver furniture. At present, however, if a silver candlestick is placed among silver-ware, on account of a misconception of ignorant persons, it will be considered to form part of it, and the error will establish the right.

4.- THE SAME; *Concerning the Meaning of Equipment*.- A four-wheeled chariot and its cushions are included in the term household goods.

5.- THE SAME; *On Sabinus, Book IV*.- With reference to tapestry, and the other coverings of seats

los veladores, los trípodes, los bancos, los escaños, las camas aun las plateadas, los colchones, las colchas, los escarpines, los vasos para agua, los barreños, las palanganas, los candelabros, las lámparas y las garrafas.

§ 1.- También los vasos de metal vulgares, esto es, que no estén destinados propiamente a un lugar.

§ 2.- Además las cajas y los armarios; pero hay quienes opinan con razón, que las cajas y los armarios, si fueron destinados para libros, o vestidos, o armamentos, no se comprenden en el ajuar, porque ciertamente que ni estas mismas cosas, a las que estuviesen destinados, se comprenderían en los utensilios del ajuar.

§ 3.- Los objetos de vidrio para comer y beber se comprenden en el ajuar, como los hechos de barro, y no solamente los vulgares, sino también los que son de gran precio; porque no se duda que los barreños de plata, las palanganas de plata, las mesas, las camas plateadas, o doradas, y guarnecidas de piedras se comprenden en el ajuar de tal manera que el mismo derecho habría también si estas cosas fueran íntegramente de plata o de oro.

§ 4.- Se puede dudar en cuanto a los objetos de murra y de cristal, si se deberán contar en el ajuar a causa de su excepcional uso y precio; pero también se ha de decir lo mismo respecto a ellos.

§ 5.- Y no importa de qué materia sean las cosas que se comprenden en el ajuar; pero no se comprende en el ajuar la copa grande de plata, ni ningún vaso de plata, conforme a la severidad de los tiempos que no admitían todavía ajuar de plata, hoy, a causa del uso de los imperitos, si el candelabro de plata ha sido comprendido en la plata, se considera que es de la plata, y el error hace derecho.

4.- EL MISMO; *De la significación de la palabra instrumento, libro Único*.- Las carrozas y las banquetas se suelen contar en el ajuar.

5.- EL MISMO ; *Comentarios a Sabino, libro IV*.- Se puede dudar en cuanto a los tapetes, con que

solent utrum in veste sint, sicut stragula, an in suppellectili, sicut toralia, quae propria stragulorum non sunt. et hoc magis placuit ea suppellectili contineri.

§ 1.- De tapetis autem vel linteis, quibus insternuntur vehicula, dubitari potest, an sint in suppellectili. sed dicendum est potius instrumenti viatorii ea esse, sicut pelles, quibus involvuntur vestimenta, lora quoque, quibus hae pelles constringi solent.

6.- ALFENUS; *libro III. Digestorum a Paulo epitomarum.*- Suppellectilis eas esse res puto, quae ad usum communem patris familias paratae essent, quae nomen sui generis separatim non haberent: quare quae ad artificii genus aliquod pertinerent neque ad communem usum patris familias accommodatae essent, suppellectilis non esse.

§ 1.- Sed nec pugillares et codices in suppellectili sunt.

7.- CELSUS; *libro XIX.- Digestorum.*- Labeo ait originem fuisse suppellectilis, quod olim his, qui in legationem proficiscerentur, locari solerent, quae sub pellibus usui forent.

§ 1.- Tuberus hoc modo demonstrare suppellectilem temptat: instrumentum quoddam patris familiae rerum ad cottidianum usum paratarum, quod in aliam speciem non caderet, ut verbi gratia penum argentum vestem ornamenta instrumenta agri aut domus. Nec mirum est moribus civitatis et usu rerum appellationem eius mutatam esse: nam fictili aut lignea aut vitrea aut aerea denique suppellectili utebantur, nunc ex ebore atque testudine et argento, iam ex auro etiam atque gemmis suppellectili utuntur. quare speciem potius rerum, quam materiam intueri oportet, suppellectilis potius an argenti, an vestis sint.

and chairs, it may be asked whether they are included under the head of clothing, as coverlets, or under that of household goods, as pillows, which, properly speaking, are not coverlets. I think that the better opinion is that they should be classed as household goods.

§ 1.- So far as cloths or linen coverings which are placed over vehicles are concerned, is there any doubt whether they should be included among household goods? It must be said that they ought rather to be classed as baggage for a journey, just as skins in which clothing is wrapped up and with the straps with which the said skins are usually fastened.

6.- ALFENUS; *Epitomes of the Digest by Paulus, Book III.*- I think that such things as are intended for the ordinary use of the head of the family should be included among household goods, where they have no distinct name peculiar to them. Therefore, articles which are employed in some trade, and are not adapted to the ordinary use of the head of the family, are not embraced in the term household goods.

§ 1.- Small writing tablets and memorandum books are not classed as household goods.

7.- CELSUS; *Digest, Book XIX.*- Labeo says that the term "supellex" is derived from the custom of persons who, when about to start on a journey, were accustomed to place in skins such articles as would be of use to them.

§ 1.- Tuberus attempts to explain the term household goods as utensils destined for the daily use of the head of the family, which do not come under some other designation, as, for example, provisions, silver plate, clothing, ornaments, implements intended for farming or for a house. It is not strange that the name has changed with the manners of the citizens, and their use of different articles; for, in former times, household goods were composed of earthenware, wood, glass, or copper, and afterwards they were made of ivory, tortoise-shell, and silver, and, at present, gold and even jewels are employed as material for such things. Hence, it is necessary to consider the nature of the articles, rather than the material of which they are composed, in order to determine whether they should be classed as

se suelen cubrir los bancos de cátedra, si se comprenderán en los vestidos, como las cubiertas, o en el ajuar, como las colchas, que propiamente no son cubiertas, Y pareció mas bien, que ellos se comprendan en el ajuar.

§ 1.- Mas respecto a los tapetes o toldos con que se cubren los vehículos, se puede dudar si se comprenderán en el ajuar, Pero se ha de decir, que son mas bien utensilios de viaje, como las pieles en que se envuelven los vestidos, y también las correas con que se suelen atar estas pieles.

6.- ALFENUS; *Digesto compendiado por Paulo, libro III.*- Opino que son del ajuar aquellas cosas que estuviesen destinadas al uso común del padre de familia, que no tengan por separado nombre de su propio género; por lo cual las cosas que pertenezcan a algún género de arte, y no hubiesen sido acomodadas al uso común del padre de familia, no son del ajuar.

§ 1.- Pero tampoco son del ajuar las tablitas de escribir, ni los códices,

7.- CELSO; *Digesto, libro XIX.*- Dice Labeón, que el origen del ajuar (supellex) fue, que antiguamente se les solían poner bajo pieles, a los que marchaban a una legación, las cosas que habían de servir para su uso.

§ 1.- Tuberón intenta definir de este modo el ajuar: ciertos utensilios del padre de familia, de cosas destinadas al uso cotidiano, que no se comprendan en otra especie, como, por ejemplo, las provisiones, la plata, los vestidos, los adornos, los utensilios del campo, o de la casa. Y no es de extrañar, que con las costumbres de la ciudad y con el uso de las cosas se haya cambiado su denominación; porque usaban el ajuar de barro, o de madera, o de vidrio, o finalmente de cobre; ahora, de marfil, de concha, y de plata, y ya usan ajuar también de oro y de piedras preciosas; por la cual conviene mirar por la especie de las cosas más bien que por la materia, si son preferentemente del ajuar, o de la plata, o del vestido.

§ 2.- Servius fatetur sententiam eius qui legaverit aspici oportere, in quam rationem ea solitus sit referre: verum si ea, de quibus non ambigeretur, quin in alieno genere essent, ut puta escarium argentum aut paenulas et togas, supellectili quis adscribere solitus sit, non idcirco existimari oportere supellectili legata ea quoque contineri: non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere. Id tubero parum sibi liquere ait: nam quorsum nomina, inquit, nisi ut demonstrarent voluntatem dicentis? equidem non arbitrator quemquam dicere, quod non sentiret, ut maxime nomine usus sit, quo id appellari solet: nam vocis ministerio utimur: ceterum nemo existimandus est dixisse, quod non mente agitaverit.

Sed etsi magnopere me tuberónis et ratio et auctoritas movet, non tamen a servio dissentio non videri quemquam dixisse, cuius non suo nomine usus sit. nam etsi prior atque potentior est quam vox mens dicentis, tamen nemo sine voce dixisse existimatur: nisi forte et eos, qui loqui non possunt, conato ipso et sono quodam «inarticulata voce» dicere existimamus.

8.- MODESTINUS; *libro IX. Responsorum.*- Cum quidam uxori suae legaverat domum cum iure suo omni et instrumento et supellectili, quaerebatur, an videretur et argentum escale et pitorium legato contineri. respondit, si quid in supellectili argentum est, deberi, escale autem vel pitorium argentum non deberi, nisi hoc quoque testatorem sensisse legatarius doceat.

9.- PAPINIANUS; *libro VII. Responsorum.*- Lega-

household goods, silver plate, or clothing.

§ 2.- Servius admits that it is necessary to ascertain the intention of the person who made the bequest, and the category in which he was in the habit of placing the articles bequeathed. If, however, anyone is accustomed to designate as household goods things which there is no doubt should be classed otherwise (as, for instance, silver plate for the table, cloaks, and togas), it should not, for that reason, be held that the articles which he left are also included among his household goods; for the names should not be derived from the opinions of individuals, but from the custom of people in general. Tubero says that this does not seem to be clear to him, for he asks of what value are names unless to show the intention of the person who uses them. And, indeed, I do not think that anyone would say something which he did not intend, especially if he used the term by which the article was commonly designated; for we make use of speech, and no one should be presumed to have said what he did not have in his mind.

However, although the judgment and the authority of Tubero has great weight with me, still, I do not dissent from the opinion of Servius, that a man should not be considered to have said anything because he did not make use of the name by which it is indicated. For although the intention of the person speaking is preferable, and more important than his words, still, no one is held to have said anything without speech, unless indeed, those who cannot talk, and by their gestures and the utterance of certain sounds, that is to say, by inarticulate expressions, are considered to have spoken.

8.- MODESTINUS; *Opinions, Book IX.*- A husband having devised to his wife a house with all its appurtenances, its utensils, and its furniture, the question was asked whether the silver table service, both for eating and drinking, was included in the legacy. The answer was that if anything made of silver was found among the furniture, it would be included, but that the silver for table service would not be, unless the legatee could prove that the testator had the intention of bequeathing it also.

9.- PAPINIANUS; *Opinions, Book VII.*- Where a

§ 2.- Confiesa Servio, que se debe ver por la intención del que las legare, a qué cuenta haya solido referir estas cosas; pero si aquellas de que no se dudase que eran de otro género, por ejemplo, la vajilla de plata, o los capotes y las togas, las hubiere solido comprender uno en el ajuar, no por esto se debe pensar, que se comprenden también en el ajuar legado; porque no se deben entender los nombres según las opiniones de cada cual, sino con arreglo al uso común, esto dice Tuberón que está poco claro para él, porque ¿para qué los nombres, dice, sino para que demuestren la voluntad del que habla? Ciertamente, no creo que nadie diga lo que no siente, mayormente habiendo usado el nombre con que se suele llamar aquella cosa, porque nos valemos del medio de la voz; mas no se ha de estimar que nadie dijo lo que no tuvo en su mente.

Pero aunque pueden para mí mucho la razón y la autoridad de Tuberón, no disiento, sin embargo, de Servio, de que no parece que dijo una cosa el que no usó de su propio nombre; porque aunque es anterior y mas poderosa que la voz la intención del que habla, sin embargo, no se estima que nadie habló sin voz, a no ser acaso que estimemos que hablan con el mismo conato y cierto sonido (y voz *inarticulada*) también los que no pueden hablar.

8.- MODESTINO; *Respuestas, libro IX.*- Habiendo legado uno a su mujer una casa con todos sus derechos, con los utensilios y con el ajuar, se preguntaba, si se consideraría que se comprendían en el legado los objetos de plata para comer y beber. Respondió, que si en el ajuar hay alguna cosa de plata, se debía; pero que no se debían los objetos de plata para comer y beber, a no ser que el legatario pruebe que también a esto se refirió el testador.

9.- PAPINIANO; *Respuestas, libro VII.*- Cuando

ta supellectili cum species ex abundanti per imperitiam enumerentur, generali legato non derogatur: si tamen species certi numeri demonstratae fuerint, modus generi datus in his speciebus intellegitur. idem servabitur instructo praedio legato, si quaedam species numerum certum acceperint.

§ 1.- Supellectilis mensas esse cuiuscumque materiae, scilicet vel argenteas vel argento inclusas placet: nam et argenteos lectos, item argentea candelabra supellectili cedere posterior aetas recepit: cum et Ulixem ex auro et argento lectum viventis arboris truncis aedificatum ornasse, quem Penelopa recognoscendi viri signum accepit, ut voluit Homerus.

§ 2.- Supellectili sua omni legata acceptum argentum pignori non continebitur, quia supellectilem suam legavit, utique si non in usu creditoris id argentum voluntate debitoris fuit, sed propositum propter contractus fidem ac restituendae rei vinculum.

10.- IAVOLENUS; *libro III. ex Posterioribus Labeonis*.- Qui vestem omnem et res plurium generum supellectilis expenso ferre solitus erat, is uxori supellectilem legaverat. Recte negabant vestem legato cessuram labeo Ofilius Cascellius, quia non posset videri vestis appellatione supellectilis contineri.

11.- IAVOLENUS; *libro X. ex Posterioribus Labeonis*.- Vasa aenea salientis aquae posita, item si quid aliud magis deliciarum quam usus causa paratum esset, non esse supellectilis Labeo Trebatus putant. Murrea autem vasa et vitrea, quae ad usum, edendi et bibendi causa, parata essent, in supellectili dicuntur esse.

bequest of household goods is made, and the description of the articles is, through ignorance, set forth with unnecessary minuteness, it does not affect the general legacy. If, however, the number of the articles specified is stated, the amount is understood to have been reduced with reference to the kind of household goods referred to. The same rule shall be observed where land with all its equipment is devised, and a certain number of different kinds of implements are mentioned.

§ 1.- It is well established that tables of every kind of material (for instance, those of silver or inlaid with silver) are included in household goods. The custom of the present age classes silver bedsteads and silver candelabra among household goods; for, as Homer says, Ulysses ornamented with gold and silver a bedstead made of the trunk of a green tree, by which Penelope recognized her husband.

§ 2.- Where a testator bequeathed all of his household goods, certain silver plate which had been received by way of pledge was not held to be included, because he only bequeathed his own effects, especially as the said silver plate had not been used by the creditor, with the debtor's consent, but he had put it aside as security for the payment of the obligation, to be returned when the latter was discharged.

10.- JAVOLENUS; *On the Last Works of Labeo, Book III*.- A certain man who was accustomed to set down in his expense account all his clothing, as well as articles of different kinds, as "furniture," bequeathed his household goods to his wife. Labeo, Ofilius, and Cascellius very properly deny that the clothing was embraced in the legacy, because it cannot be said that clothing is classed as furniture.

11.- THE SAME; *On the Last Works of Labeo, Book X*.- Labeo and Trebatus think that brass vases placed under jets of water, and also other articles designed for pleasure rather than for use, are not included among household goods. Vessels of iridescent glass and of crystal, which are to be used for drinking purposes, it is said, should be classed as household goods.

legado el ajuar se enumeren a mayor abundamiento algunas especies por impericia, no se deroga el legado general; pero si se hubieren designado especies de cierto número, se entiende que al género se le dió límite en estas especies, lo mismo se observará habiéndose legado un predio provisto, si a algunas especies se les hubiere fijado cierto número.

§ 1.- Está determinado que son del ajuar las mesas de cualquier materia que sean, esto es, o de plata o embutidas en plata; porque los tiempos posteriores han admitido que las camas de plata y también los candelabros de plata se agreguen al ajuar, porque también Ulises adornó con oro y plata la cama construida con troncos de un árbol verde, que recibió Penélope en señal de reconocer a su marido, según dijo Homero.

§ 2.- Habiendo legado uno todo su ajuar, no se comprenderá la plata recibida en prenda, porque legó su propio ajuar; esto así, si por voluntad del deudor no estuvo esta plata al servicio del acreedor, sino depositada por razón de seguridad del contrato y como vínculo para la restitución de la cosa ajena.

10.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro III*.- Uno que había solido poner en la cuenta del ajuar todos los vestidos y cosas de varios géneros, había legado a su mujer el ajuar; con razón decían Labeón, Ofilio y Cascelio, que los vestidos no se habían de agregar al legado, porque no se podría considerar que con la denominación del ajuar se comprendiesen los vestidos.

11.- EL MISMO; *Doctrina de las Obras póstumas de Labeón, libro X*.- Opinan Labeón y Trebacio, que los vasos de bronce puestos para el agua de los surtidores, así como otra cualquier cosa que hubiere sido destinada más bien por causa de recreo que de uso, no son del ajuar. Pero los vasos de murra, y los de vidrio, que hubiesen sido destinados al uso de comer y de beber, se dice que están comprendidos en el

12.- LABEO; *libro IV. Pithanon a Paulo epitomatum.*- Quemadmodum urbanus servus et rusticus distinguitur non loco, sed genere usus, ita urbana penus et supellex ad usum urbanum, non ad locum urbanum aut peregrinum dirigenda est, multumque interest, penus et supellex ea quae in urbe sit an urbana legetur vel promittatur.

13.- MODESTINUS; *libro IX.- Responsorum.*- Respondit: numquam ex eo, quod supellectilem legavit maritus testamento, habitationem, in qua supellex fuit, legasse videtur. Quare contra defuncti voluntatem habitationem sibi mulierem vindicare procul dubio est.

14.- CALLISTRATUS; *libro III. de Cognationibus.*- Fundo legato instrumentum eius non aliter legato cedit, nisi specialiter id expressum sit: nam et domo legata neque instrumentum eius neque supellex aliter legato cedit, quam si id ipsum nominatim expressum a testatore fuerit.

12.- LABEO; *Epitomes of Probabilities by Paulus, Book IV.*- Just as urban and rustic slaves are distinguished, not by the place in which they are, but by the nature of their employment, so, likewise, urban provisions and household goods should be classified according to their use in a city, and not from the mere fact of their being situated there, or elsewhere; and it makes a great deal of difference whether provisions and household goods which are in the city are bequeathed, or where they are bequeathed as belonging to the city.

13.- MODESTINUS; *Opinions, Book IX.*- He gives it as his opinion that where a husband bequeaths his household goods to his wife by will, he should never be considered to have devised to her the residence in which the said household goods were situated; and therefore there is no doubt whatever, if the woman should claim the residence for herself, that this would be contrary to the intention of the deceased.

14.- CALLISTRATUS; *On Judicial Inquiries, Book III.*- When a tract of land is devised, its equipment will not be embraced in the legacy, unless this was expressly mentioned; for where a house is devised, neither its utensils nor its furniture are included, unless this was explicitly stated by the testator.

ajuar.

12.- LABEÓN; *Dichos recopilados por Paulo, libro IV.*- Así como el esclavo urbano y el rústico se distinguen no por el lugar, sino por el género de su uso, así también las provisiones urbanas y el ajuar urbano se han de referir al uso urbano, no al lugar urbano o al extranjero, y hay mucha diferencia entre que se leguen o se prometan las pensiones y el ajuar, que haya en la ciudad, o los urbanos.

13.- MODESTINO; *respondió en el libro IX de las respuestas.*- Nunca se considera, que, porque el marido legó en su testamento el ajuar, haya legado la habitación en que estuvo el ajuar; por lo cual no hay duda alguna de que la mujer reivindique para sí la habitación contra la voluntad del difunto.

14.- CALISTRATO; *De las Jurisdicciones, libro III.*- Legado un fundo, su apero no se agrega al legado de otro modo, sino si especialmente se hubiera expresado esto: porque tampoco si se hubiera legado una casa se agregan allegado ni los utensilios ni el ajuar de otro modo, sino si esto mismo hubiere sido determinadamente expresado por el testador.

LIBER QUARTUS-TRICESIMUS

TIT. I

DE ALIMENTIS VEL CIBARIIS
LEGATIS

1.- ULPIANUS; *libro V, de omnibus Tribunalis.*- Si alimenta fuerint legata, dici potest etiam aquam legato inesse, si in ea regione fuerint legata, ubi venundari aqua solet.

2.- MARCIANUS; *libro VIII, Institutionum.*- Si quis libertis alimenta reliquerit, et si legati fuerint servi et rogati legatarii manumittere, ad fideicommissum admittuntur, ut et divi quoque severus et antoninus rescripserunt.

§ 1.- Et licet ad fiscum bona fuerint devoluta, ex quibus alimenta debeantur, praestanda sunt, sicuti si ad quemlibet successorem transissent.

3.- ULPIANUS; *libro II, de officio Consulis.*- Solent iudices ex causa alimentorum libertos dividere, quotiens plures sunt heredes, ne a singulis heredibus minutatim alimenta petentes distringantur: quam divisionem perinde tueri oportet atque si pater familias ipse libertos divisisset. Solent et unum eligere, per quem alimenta praestentur, aut ex voluntate defuncti aut arbitrio suo, ut rescripta subiecta ostendunt: "exemplum libelli dati mihi a libertis sili mihi vobis, sciens ad exemplum istam rem pertinere, quia multi testamentis suis praestari libertis iubent necessaria, quae quia minimi aeris sunt, ad nihilum perducuntur, cum plures heredes coeperunt per successiones existere. Qua de causa puto vos recte facturos, si convocatis favillae heredibus procuratoribusve eorum constitueritis, cui a ceteris dari debeat pecunia, ex cuius usuris alimenta praestentur. Debebit autem is qui accipiet cavere eis qui dabunt redditurum se, ut quisque ex libertis decesserit aliove quo modo in civitate esse desierit,

BOOK XXXIV

TITLE I

CONCERNING LEGACIES OF
SUBSISTENCE OR FOOD

1.- ULPIANUS; *On All Tribunals, Book V.*- Where maintenance is bequeathed, it can be said that water is also included in the legacy, if the bequest is made in the region where water is ordinarily sold.

2.- MARCIANUS; *Institutes, Book VIII.*- Where anyone bequeaths maintenance to slaves whom he has enfranchised, even though the slaves themselves were bequeathed, and the legatees were requested to manumit them, they will be admitted to the benefit of the trust; as the Divine Severus and Antoninus stated in a Rescript.

§ 1.- And even if the property from which the maintenance is derived should be forfeited to the Treasury, the maintenance must still be furnished, just as if it had passed to any successor whomsoever.

3.- ULPIANUS; *On the Duties of Consul, Book II.*- When bequests for maintenance are made to freedmen judges are accustomed to divide with the latter in proportion to the number of heirs, in order that they may not be compelled to obtain their means of support in small quantities from each of them; and this division should be sustained, just as if the head of the household himself had divided the freedmen. They have adopted the practice of selecting one heir, by whom the means of support shall be provided, either in compliance with the wishes of the deceased, or according to their own judgment, as the following Rescripts show: "I send you a copy of the petition presented to me by the freedmen of Favilla, for the reason that many persons, in their wills, order necessities to be furnished to their freedmen, which, as they are of small amounts, are reduced to almost nothing where there are several heirs to an estate. Hence, I think that you will act properly, if, after having called together the heirs of Favilla, or their

LIBRO TRIGÉSIMO CUARTO

TÍTULO I

DEL LEGADO DE LOS ALIMENTOS
O DEL SUSTENTO

1.- ULPIANO; *De todos los Tribunales, libro V.*- Si se hubieren legado los alimentos, se puede decir, que también se comprende el agua en el legado, si se hubieren legado en región en que se suele vender el agua.

2.- MARCIANO; *Institutas, libro VIII.*- Si alguno hubiere dejado los alimentos a los libertos, aunque hubieren sido legados esclavos, y se les hubiere rogado a los legatarios que los manumitan, son admitidos al fideicomiso, como también respondieron por rescripto los Divinos Severo y Antonino.

§ 1.- Y aunque se hubieren devuelto al fisco los bienes de que se deban alimentos, se han de prestar, lo mismo que si hubiesen pasado a cualquier sucesos.

3.- ULPIANO; *Del cargo de Cónsul, libro II.*- Suelen los Jueces distribuir por causa de los alimentos los libertos, siempre que hay muchos herederos, a fin de que no se cansen pidiendo al menudeo los alimentos a cada uno de los herederos; cuya distribución debe ser respetada lo mismo que si el mismo padre de familia hubiese distribuido los libertos. Suelen elegir también a uno por quien se presten los alimentos, o por voluntad del difunto, o por su propio arbitrio, como lo demuestran los siguientes Rescriptos: «Os envié copia de la instancia a mi presentada por los libertos de Silio, sabiendo, que este caso serviría de ejemplo, porque mandan muchos en sus testamentos que se les den a los libertos las cosas necesarias, las cuales, como son de mínima entidad, se reducen a la nada, cuando por las sucesiones comenzó a haber muchos herederos. Por esta causa opino, que haréis bien, si, convocados los herederos de Favilla o sus procuradores, designareis a quién se le deba dar por los demás el

computatio".

Divus Pius rubrio cuidam Telesphoro rescripsit: "consules vocatis his, a quibus vobis alimenta deberi ex causa fideicommissi constiterit, vel omnes ab uno vel facta pro rata distributione quis et a quibus percipiatis, decernent. fiscus enim, si eo nomine quid ab eo vobis deberetur, exemplum sequetur. iam nunc sciatis partes eorum, qui solvendo esse desierint, non pertinere ad onus reliquorum heredum".

4.- MODESTINUS; *libro X, Responsorum*.- Libertis libertabusque meis, quos vivens in testamento et codicilis manumisi, vel manumittam, dari volo mea praedia, quae in Chio insula habeo; ad hoc, ut, quacunque vivente me acceperint, constituentur iis cibarii et vestiarii nomine;

Quaero, quam habeant significationem, utrum ut ex praediis alimenta ipsi capiant an vero ut praeter praedia et cibaria et vestimenta ab herede percipiant? et utrum proprietates an usus fructus relictus est? et si proprietates relictas sit, aliquid tamen superfluum invenitur in rebus, quam est in quantitate cibariorum et vestiariorum, an ad heredem patronae pertinet? et si mortui aliqui ex libertis sint, an pars eorum ad fideicommissarios superstites pertinet? et an die cedente fideicommissi morientium libertorum portiones ad heredes eorum an testatoris decurrant?

Modestinus respondit: videntur mihi ipsa praedia

sum of money shall be given, out of the interest of which the maintenance of the said freedman may be paid for. He who receives this money must furnish security to those who contribute it, that, in case any one of said freedmen should die, or should, in any other way, cease to be a citizen, he will refund as much of the principal as the computation pro rata may amount to."

The Divine Pius stated, as follows in a Rescript addressed to a certain Rubrius Telesphorus: "The Consuls, after having called together all those who have been charged with furnishing you with maintenance under the terms of the trust, shall determine whether all of the legatees shall receive what is due them from one of the heirs, or whether the distribution shall be made pro rata, and who shall be notified, and by whom this shall be done. If anything should be due from the testator to you on this ground, the Treasury also shall pursue the same course; and know now that the shares of those who are insolvent will not cause the burden of the remaining heirs to be increased."

4.- MODESTINUS; *Opinions, Book X*.- "I desire the lands which I have in the island of Chios to be given to my freedmen and freedwomen whom, during my lifetime, I have manumitted by my will or my codicil, or whom I may manumit hereafter, in order that they may obtain from them their food and clothing, as they did while I was living."

I ask what signification these words have; do they mean that the freedmen shall themselves obtain their support from the said lands, or that they shall receive from the heir their food and clothing, in addition to what is obtained from the lands? And was the ownership or the usufruct of the lands left? If the ownership was left, and a sum greater than what is needed for the supply of food and clothing should be obtained from the income of the lands, will the excess belong to the heir of the patron? And if some of said freedmen should die, will their shares pass to the surviving beneficiaries of the trust; and if they should die after the time appointed for the trust to take effect, will their shares belong to their heirs, or will they revert to the heirs of the testator?

Modestinus answered: "It seems to me that these

Pero deberá, el que lo recibiere dar caución, o los que lo dieran, de que devolverá, a medida que cada uno de los libertos hubiere fallecido, o que de otro cualquier modo hubiere dejado de pertenecer o la ciudadanía, tanto de capital como arrojar el cómputo a proporción».

El Divino Pio respondió por rescripto a un tal Telésforo: «los Cónsules, habiendo convocado a aquellos por quienes constate que se os deben los alimentos por causa de fideicomiso, decretarán a que todos los recibáis de uno, o, hecha a prorrata la distribución, quiénes y de quienes los hayáis de recibir; porque el fisco, si por sí se os debiere por tal motivo alguna cosa, seguirá el ejemplo, Y ahora sabed, que las partes de los que hubieren dejado de ser solventes no son carga de los demás herederos».

4.- MODESTINO; *Repuestas, libro X*.- «Quiero que a mis libertos y libertas, a quienes en vida manumité, o manumitiere, en testamento y por codicilos, se les den mis predios, que tengo en la isla de Quíos; con este objeto, con el de que todo lo que hubieren recibido, viviendo yo, se les constituya a título de sustento y de vestido»;

Pregunto, ¿qué significación tendrían estas palabras, acaso que de los predios tomen ellos los alimentos, o que además de los predios perciban del heredero el sustento y el vestido; ¿Y se dejó acaso la propiedad, o el usufruto. Y si se hubiera dejado la propiedad, pero se hallara en las rentas algún remanente sobre el importe de los alimentos y del vestido, ¿le pertenecerá al heredero de la patrona? y si se hubieran muerto algunos de los libertos, ¿corresponde acaso la parte de estos a los fideicomisarios sobrevivientes, y, comenzando a correr el término del fideicomiso, pasarán las porciones de los libertos, que fallezcan, a sus herederos, o a los del testador?

Modestino respondió: a mi me parece que estos

esse libertis relicta, ut pleno dominio haec habeant et non per solum usum fructum et ideo et si quid superfluum in redditibus quam in cibariis erit, hoc ad libertos pertineat. Sed et si decesserit fideicommissarius ante diem fideicommissi cedentem, pars eius ad ceteros fideicommissarios pertinet: post diem autem cedentem si qui mortui sint, ad suos heredes haec transmittent.

§ 1.- Lucius Titius testamento suo libertis libertabusque cibaria et vestiaria a liberis suis eisdemque heredibus praestari iussit nulla condicione addita: quaero, an, si sine patroni liberis idem liberti agant, cibaria et vestiaria accipere possint. Modestinus respondit nihil proponi, propter quod petitio eorum, quae testamento pure legata sunt, non competat.

5.- IDEM; *libro XI, Responsorum*.- Verba testamenti: "omnibus libertis nostris cibaria praestabitur pro arbitrio vestro, non ignorantes, quot ex his caros habuerim". Item alio loco: "Prothymum Polychronium Hypatium commendo: ut et vobiscum sint et cibaria praestetis, peto". Quaero, an omnibus cibaria debent dari an his quos commendavit et cum heredibus esse iussit? Modestinus respondit omnibus libertis cibaria relicta proponi, quorum modum viri boni arbitrio statuendum esse.

6.- IAVOLENUS; *libro II, ex Cassio*.- Legatis alimentis cibaria et vestitus et habitatio debetur, quia sine his ali corpus non potest: cetera quae ad disciplinam pertinent legato non continentur,

7.- PAULUS; *libro XIV, Responsorum*.- Nisi aliud testatorem sensisse probetur.

lands, and not merely the usufruct in the same, were left to the freedmen, in order that they might have full control over them; and, therefore, if anything more than is necessary for their support is obtained from the income of said lands, this will belong to the freedman. Even if one of the beneficiaries of the trust should die before it takes effect, his share will belong to the other beneficiaries, and those who die after the trust becomes operative will transmit their shares to their heirs."

§ 1.- Lucius Titius, by his will and without imposing any condition, ordered food and clothing to be furnished to his freedmen and freedwomen by his children who were his heirs. I ask if said freedman should institute proceedings without communicating with the children of their patron, whether they can obtain their food and clothing. Modestinus answered that there was nothing in the case stated to prevent suit being brought by them, where the legacy was unconditionally bequeathed by will.

5.- THE SAME; *Opinions, Book XI*.- The following words were inserted in a will: "You will furnish food to all our freedmen according to your judgment, as you are aware with what affection I regard them." Also, in another place, the testator said, "I commit Prothymus, Polychronius, and Hypatius, to your care, in order that they may live with you, and I ask you to provide them with food." I ask whether food should be given to all of them, or only to those whom he recommended to his heirs, and ordered to reside with them. Modestinus answered that, according to the case stated, subsistence was left to all of the freedmen, the amount of which was to be determined by the judgment of a good citizen.

6.- JAVOLENUS; *On Cassius, Book II*.- Where maintenance is bequeathed, food, clothing, and lodging are included, because without these the body cannot be sustained; but things which have reference to instruction are not embraced in the legacy,

7.- PAULUS; *Opinions, Book XIV*.- Unless it is proved that the testator intended otherwise.

predios fueron dejados a los libertos para que los tengan en pleno dominio, y no solamente en usufructo; y por lo tanto, aunque en las rentas hubiere algún remanente sobre lo que importaren los alimentos, aquel les pertenecerá a los libertos. Mas aun cuando hubiere fallecido un fideicomisario antes de comenzar a correr el término del fideicomiso, la parte de él les pertenece a los demás fideicomisarios; pero si algunos hubieran muerto después de comenzar a correr el término, las transmitirían a sus propios herederos.

§ 1.- Dispuso Lucio Ticio en su testamento, no habiendo añadido ninguna condición, que a los libertos y libertas se les diesen por sus hijos y herederos los alimentos y el vestido; pregunto, si, no viviendo estos mismos libertos con los hijos del patrono, podrían obtener los alimentos y el vestido. Modestino respondió, que no se exponía nada por lo que no competa la petición de las cosas, que se legaron puramente en el testamento.

5.- EL MISMO; *Respuestas, libro XI*.- Palabras de un testamento: «a todos nuestros libertos les prestaréis alimentos a vuestro arbitrio, no ignorando cuántos de estos me eran queridos; y también en otro lugar: os recomiendo a Protimo, a Policronio, y a Hipacio; para que estén también con vosotros, y os pido que les prestéis alimentos»; pregunto, ¿se les deben dar alimentos a todos, o a aquellos a quienes recomendó y dispuso que estuviesen con los herederos? Modestino respondió, que se exponía que a todos los libertos se les dejaron los alimentos, cuya cuantía se había de determinar al arbitrio de hombre bueno.

6.- JAVOLENO; *Doctrina de Cassio, libro II*.- Legados los alimentos, se deberán el sustento, el vestido y la habitación, porque sin estas cosas no se puede alimentar el cuerpo; lo demás, que corresponde a la educación, no se comprende en el legado,

7.- PAULO; *Respuestas, libro XIV*.- si no se prueba que otra cosa entendió el testador.

8.- PAPINIANUS; *libro VII. Responsorum.*- Pecuniae sortem alimentis libertorum destinatae unum ex heredibus secundum voluntatem defuncti praecipientem cavere non esse cogendum ex persona deficientium partes coheredibus restitui placuit: ob eam igitur speciem post mortem omnium libertorum indebiti non competit actio nec utilis dabitur.

Diversa causa est eius, cui legatorum divisio mandatur: nam ea res praesentem ac momentariam curam iniungit, alimentorum vero praebendorum necessitas oneribus menstruis atque annuis verecundiam quoque pulsantibus adstringitur.

9.- IDEM; *libro VIII. Responsorum.*- Alio herede instituto ita scripsit: "a te peto, gai sei, quidquid ex hereditate mea redegeris, illis alumnis meis de singulis denos aureos eandemque summam penes te esse volo, cuius ex incremento eos alere te volo: reliquum restitues numero coliberto nostro". Respondi, quamvis distrahere bona gaus seius alio scripto herede non possit, tamen eum, alumnis relictam pecuniam ut servet ac restituat, intra falcidiam recte petiturum: quod de superfluo probari non potest.

§ 1.- Eum quoque libertum inter eos, quibus cibaria, item vestiarius patrona, quae viva praestabat, reliquit, recte fideicommissum petiturum existimavi, qui annuos viginti aureos et menstruum frumentum atque vinum acceptavit.

10.- IDEM; *libro IX. Responsorum.*- Cum unus ex heredibus certam pecuniam praecipere iussus esset, de cuius sorte libertis alimenta praestaret, heredem quoque heredis ad praeceptionem admitti placuit. Si tamen plures heredes heres haberet, intentionem

8.- PAPINIANUS; *Opinions, Book VII.*- It has been decided that where the principal of a sum of money, intended for the support of freedmen, has been left as a preferred legacy to one of several heirs, in accordance with the will of the deceased, he cannot be compelled to give security to deliver to his co-heirs the shares of any of the freedmen who may die. Therefore, in this instance, no action on the ground of money not due will lie, nor will a praetorian action be granted, even after the death of all the freedmen.

The case is different, however, where the heir has been directed to make a distribution of the legacy; for this matter only requires momentary attention, but the necessity of furnishing support extends over months and years, and is also a source of trouble to the party responsible for it.

9.- THE SAME; *Opinions, Book VIII.*- A testator, having appointed two heirs, inserted the following provision into his will: "I request you, Gaius Seius, out of whatever you may obtain from my estate, to give to such-and-such of my foster-children ten aurei apiece, and I desire you to retain an equal sum in your hands, in order to support them with the interest thereof; and to pay the remainder to Numerius, our common freedman." The opinion rendered was that, although Gaius Seius could not sell the property of the estate, because another heir had been appointed, still, he had a right to claim the money which has been left to the foster-children in order that he might keep it and pay it to them, subject to the provisions of the Falcidian Law; but this will not apply to any excess of the sum bequeathed.

§ 1.- I have thought that where a patroness left to a certain freedman twenty aurei, payable annually, and a certain quantity of wheat and wine to be delivered every month, the benefit of a trust under which she bequeathed the same amount of food and clothing to others that she had been in the habit of furnishing them during her lifetime, could be legally claimed.

10.- THE SAME; *Opinions, Book IX.*- Where one of several heirs was directed to take a certain sum of money as a preferred legacy, to be used for the purpose of supporting the freedmen of the testator, it was decided that the heir of the heir should also be

8.- PAPINIANO; *Respuestas, libro VII.*- Se determinó, que uno de los herederos, que conforme a la voluntad del difunto retira de la masa la cantidad del dinero destinada a alimentos de los libertos, no ha de ser obligado a dar caución de que por razón de la persona de los que fallezcan se restituirán sus partes a los coherederos; así, pues, por este motivo no compete después de la muerte de todos los libertos la acción de lo no debido, ni se dará la útil.

Diversa condición es la de a aquel a quien se le encomienda la división de los legados, porque esta impone un cuidado presente y momentáneo, pero la necesidad de suministrar alimentos se liga con cargas mensuales y anuales, que afectan también al decoro.

9.- EL MISMO; *Respuestas, libro VIII.*- Habiendo instituido heredero a otro, escribió uno de este modo: «te pido, Cayo Seyo, que, sea lo que quiera lo que recogieres de mi herencia, le des a cada uno de aquellos alumnos míos diez áureos, y quiero que esté en tu poder esta misma suma, con cuyos réditos quiero que los alimentos; y lo restante lo restituirás a Numerio, nuestro coliberto»; respondí, que, aunque Cayo Seyo no pueda, habiendo sido otro instituido heredero, vender los bienes, sin embargo, él pedirá con razón el dinero dejado a los alumnos para guardarlo y restituirlo dentro de los límites de la Falcidia; lo que no se puede aprobar respecto de lo sobrante.

§ 1.- Yo opiné, que con razón pedirá el fideicomiso, entre aquellos a quienes la patrona les dejó los alimentos, y también el vestido, que en vida les prestaba, también el liberto que aceptó veinte áureos anuales y una cantidad mensual de trigo y de vino.

10.- EL MISMO; *Respuestas, libro IX.*- Cuando se hubiese mandado que uno de los herederos retire de la masa cierta cantidad de dinero, de cuyo capital prestase alimentos a los libertos, se determinó que también se admitía al prelegado el heredero del

quidem defuncti prima facie refragari, sed aliud probari non oportere: quid enim, si ceteros heredes suos evitavit et quietam ac verecundam atque etiam idoneam, libertis consulens, domum sequi maluit? et ideo ab omnibus heredibus heredis alimenta praestabuntur.

§ 1.- Verbis fideicommissi pure manumisso praeteriti quoque temporis alimenta reddenda sunt, quamvis tardius libertatem recipaverit nec heres moram libertati fecerit: tunc enim explorari moram oportet, cum de usuris fideicommissi quaeritur, non de ipsis fideicommissis.

§ 2.- Alimentis viri boni arbitratu filiae relictis ab herede filio pro modo legatae dotis, quam solam pater exheredatae filiae nubenti dari voluit, atque pro incrementis aetatis eam exhibendam esse respondi, non pro viribus hereditatis.

11.- PAULUS; *libro X, Quaestionum*.- Is, cui annua alimenta relicta fuerant, in metallum damnatus indulgentia Principis restitutus est. Respondi eum et praecedentium annorum recte cepisse alimenta et sequentium debere ei.

12.- IDEM; *libro XIV, Responsorum*.- Lucius Titius libertis suis cibaria et vestitaria annua certorum nummorum reliquit et posteriore parte testamenti ita cavuit: "obligatos eis ob causam fideicommissi fundos meos illum et illum, ut ex redditu eorum alimenta supra scripta percipiant". Quaesitum est, an, si quando minores redditus pervenerint, quam est quantitas cibariorum et vestiariorum, heredes ad

permitted to receive the said preferred legacy. If, however, the said heir should himself have several heirs, the wishes of the deceased will, at first sight, appear to have been disregarded, but no other course should be adopted. For what if the testator did not desire to charge the other heirs, and having in his mind the welfare of his freedmen, and desiring to have the distribution made quietly and honorably by a party who was solvent, preferred to have this done by a single member of the household? Therefore, the maintenance should be furnished by all the heirs of the heir aforesaid.

§ 1.- Where a slave is manumitted unconditionally by the terms of a trust, support must be furnished for the past time, even though he may have obtained his freedom after the others, and the heir was not in default in granting it; for the cause of the delay must be ascertained where a question arises with reference to interest due under a trust, but not where the trust itself is concerned.

§ 2.- Where maintenance was left to a daughter, the amount of which is to be determined in accordance with the judgment of a reliable citizen, I gave it as my opinion that the bequest with which the son, who was the heir, was charged should correspond with the dowry payable at the time of her marriage, which the father had left to his said daughter whom he had disinherited, according to her increase in age, and not in proportion to the value of his estate.

11.- PAULUS; *Questions, Book X*.- A certain individual to whom support had been bequeathed, payable annually, having been condemned to the mines, was afterwards restored to his rights by the favor of the Emperor. I held that he had lawfully received the support for the preceding years, and that he was entitled to it for those which followed.

12.- THE SAME; *Opinions, Book XIV*.- Lucius Titius left food and clothing for the support of his freedmen, devoting a certain sum of money annually to that purpose, and made the following provision in the last part of his will: "I leave such-and-such and such-and-such tracts of land in trust for the benefit of my said freedmen, in order that they may receive the maintenance above mentioned from the income of

heredero; pero que si el heredero tuviese muchos herederos, se contrariaba ciertamente a primera vista la intención del testador, mas no se debía aprobar otra cosa. porque ¿qué se dirá si huyó de los demás herederos, y mirando por los libertos prefirió elegir una casa pacífica, pudente, y también idónea? Y por lo tanto, se prestarán los alimentos por todos los herederos del heredero.

§ 1.- Al manumitido puramente con las palabras de un fideicomiso se le deben dar los alimentos también del tiempo pasado, aunque más tarde haya recuperado la libertad, y el heredero no hubiere causado mora para la libertad; porque entonces se debe investigar la mora cuando se trata de los intereses del fideicomiso, no de los mismos fideicomisos.

§ 2.- Habiéndose dejado alimentos a la hija a arbitrio de hombre bueno, respondí, que ella ha de ser alimentada por el hijo heredero en proporción a la dote legada, que sola quiso el padre que se le diera al casarse a la hija desheredada, y con arreglo a los progresos de la edad, no conforme a las fuerzas de la herencia.

11.- PAULO; *Cuestiones, Libro X*.- Uno, a quien se le habían dejado alimentos anuales, condenado a las minas, fue restituido por indulgencia del Príncipe; respondí, que con derecho percibió éste los alimentos también de los años anteriores, y se le debían los de los siguientes.

12.- EL MISMO; *Respuestas, libro XIV*.- Lucio Ticio dejó a sus libertos para cada año los alimentos y el vestido de cierta cantidad, y dispuso así en la última parte del testamento: «quedan obligados a favor de ellos por causa del fideicomiso mis fundos, tal y tal, para que de las ventas de los mismos perciban los susodichos alimentos»; se preguntó, sí, en cuanto las rentas llegaren a ser menores de lo que

supplendam eam onerari non debeant, vel, si alio anno excesserint, an supplendum sit, quod superiore anno minus perceperint.

Paulus respondit cibaria et vestiaria libertis defuncti integra deberi, neque ex eo, quod postea praedia his pignoris iure testator obligare voluit, ut ex reditu eorum alimenta perciperent, minuisse eum vel auxisse ea quae reliquerat videri.

13.- SCAEVOLA; *libro IV, Responsorum*.- Gaio Seio trecentos aureos legavit, ut ex usuris eius summae libertis cibaria et vestiaria praestaret, quae statuerat: codicillis autem eandem summam vetuit dari gaio seio, sed dari Publio Maevio voluit: quaero, an libertis fideicommissum debeat maevius. respondi Maevium, nisi aliud, de quo non deliberaretur, doceat sibi a testatore iniunctum, videri secundum voluntatem testatoris recepisse ea onera, quae adscripta erant ei summae, quae in eum codicillis transferebatur.

§ 1.- Imperator Antoninus Pius libertis Sextiae Basiliae. "quamvis verba testamenti ita se habeant, ut, quoad cum Claudio iusto morati essetis, alimenta et vestiarium legata sint, tamen hanc fuisse defunctae cogitationem interpretor, ut et post mortem iusti eadem vobis praestari voluerit". Respondit eiusmodi scripturam ita accipi, ut necessitas alimentis praestandis perpetuo maneat.

§ 2.- Item consultus de tali scriptura "et tecum sint semper volo": quaero, cum manumissi ab herede cum eo morati diu sint, sed ob graviores servitutes ab eo discesserint, an alimenta his debeantur, quae

the same." The question arose, if at any time the income from said lands should be less than what was required to provide food and clothing for the freedmen, whether the heirs should not be burdened with making up the deficiency; or if, in any year, there should be an excess, would they be entitled to this to supply what they had lost during the former year?

Paulus answered that the food and clothing must be furnished entirely to the freedmen of the deceased, and that the testator did not intend to have the legacy which he bequeathed to them either increased or diminished because he afterwards desired the said lands to be held by way of pledge, so that the freedmen might receive their support from the income of the same.

13.- SCAEVOLA; *Opinions, Book IV*.- A man bequeathed three hundred aurei to Gaius Seius, in order that out of the interest of the said sum he might provide his freedmen with food and clothing, as he had specified; but afterwards, by a codicil, he forbade the said sum to be given to Gaius Seius, but desired it to be paid to Publius Maevius. I ask whether Maevius was required to execute the trust for the benefit of the freedmen. I answered that Maevius, according to the intention of the testator, appeared to be charged with the duties for which the said sum of money was left, which were transferred to him by the codicil; unless he could prove that some other obligations had been imposed upon him by the testator which are not at present under discussion.

§ 1.- The Emperor Antoninus Pius to the freedman of Sextia Basilia, Greeting: "Although the terms of the will indicate that you shall be furnished with food and clothing as long as you reside with Claudius Justus, still, I think that the intention of the deceased was that this should be given to you after the death of Justus." The opinion was rendered that this clause must be understood to mean that the requirement to provide support shall be perpetual.

§ 2.- I, myself, was consulted with reference to the following clause in a will: "And I wish that they shall always remain with you." I ask, where freedmen have been manumitted by the heir, and remained with him

es la cantidad de los alimentos y del vestido, no se deberán gravar los herederos para suplir esta, o si, habiendo excedido en otro año, se haya de suplir lo que en el año anterior hubieren percibido de menos.

Paulo respondió, que a los libertos del difunto se les debían íntegros los alimentos y el vestido, y que no porque después quiso el testador obligarles con derecho de prenda los predios, para que de las rentas de los mismos percibiesen los alimentos, se considera que el disminuyó o aumento los que había legado.

13.- SCEVOLA; *Respuestas, libro IV*.- Uno legó a Cayo Seyo trescientos áureos, para que con los intereses de esta suma prestase a los libertos los alimentos y el vestido, que había señalado; mas en codicilos prohibió que se le diese esta misma suma a Cayo Seyo, pero quiso que se le diese a Publio Mevio; pregunto, si les debería Mevio el fideicomiso a los libertos. Respondí, que a no ser que Mevio probase que por el testador se le encargó otra cosa, sobre la cual no se deliberaba, se consideraba que aceptó conforme a la voluntad del testador las cargas que habían sido asignadas a esta suma, que se le transfería en los codicilos.

§ 1.- El Emperador Antonino Pío a los libertos de Sextia Basilia: «Aunque las palabras del testamento digan de este modo, que se os legaron los alimentos y el vestido mientras vivierais con Claudio Justo, interpreto, sin embargo, que la intención de la difunta fue esta, que quiso que también se os prestaran las mismas cosas después de la muerte de Justo». Respondió, que esta escritura se interpreta de modo que subsista perpetuamente la necesidad de prestar los alimentos.

§ 2.- Asimismo, consultado sobre esta cláusula: «y quiero que siempre estén contigo», pregunto, ¿habiendo los manumitidos por el heredero vivido largo tiempo con él, pero habiéndose separado de él

negat se praestare, nisi vice servitutis is uteretur. respondit secundum ea quae proponerentur deberi.

14.- ULPIANUS; *libro II, Fideicomissorum.*- Mela ait, si puero vel puellae alimenta relinquantur, usque ad pubertatem deberi. Sed hoc verum non est: tamdiu enim debetur, donec testator voluit, aut, si non paret quid sentiat, per totum tempus vitae debebuntur.

§ 1.- Certe si usque ad pubertatem alimenta relinquantur, si quis exemplum alimentorum, quae dudum pueris et puellis dabantur, velit sequi, sciat Hadrianum constituisse, ut pueri usque ad decimum octavum, puellae usque ad quartum decimum annum alantur, et hanc formam ab Hadriano datam observandam esse imperator noster rescripsit. Sed etsi generaliter pubertas non sic definitur, tamen pietatis intuitu in sola specie alimentorum hoc tempus aetatis esse observandum non est incivile.

§ 2.- Sed si alimenta, quae vivus praestabat, reliquerit, ea demum praestabuntur, quae mortis tempore praestare solitus erat: quare si forte varie praestiterit, eius tamen temporis praestatio spectabitur, quod proximum mortis eius fuit. Quid ergo, si, cum testaretur, minus praestabat, plus mortis tempore, vel contra? adhuc erit dicendum eam praestationem sequendam, quae novissima fuit.

§ 3.- Quidam libertis suis ut alimenta, ita aquam quodque per fideicommissum reliquerat: consulebar de fideicommisso. Cum in ea regione africae vel forte aegypti res agi proponebatur, ubi aqua venalis est, dicebam igitur esse emolumentum fideicommissi, sive quis habens cisternas id reliquerit sive non, ut sit in fideicommisso, quanto quis aquam

for a long time, but finally departed because the services he required of them were too severe; whether they would be entitled to the support with which he refused to furnish them, unless he had the benefit of their services. The answer is that, according to the facts stated, he would be obliged to furnish them support.

14.- ULPIANUS; *Trusts, Book II.*- Mela says that where maintenance is bequeathed to a boy or a girl, it must be furnished till he or she reaches the age of puberty. This, however, is not correct, for they should only be provided with it as long as the testator wished, and if his intention was not evident, they must be supported for life.

§ 1.- But if maintenance is bequeathed until the age of puberty, and anyone desires to follow the former custom with reference to boys and girls, he is hereby informed that Hadrian decided that boys shall be supported until their eighteenth year, and girls until their fourteenth. Our Emperor stated in a Rescript that this rule promulgated by Hadrian must be observed. But although the age of puberty is not ordinarily fixed in this way, still, it is not illegal for it to be so established in the individual instance of the matter of support, where natural affection is involved.

§ 2.- Where a testator bequeaths maintenance to the same extent that he furnished it during his lifetime, only such provision must be made as he was accustomed to make at the time of his death. Therefore, if different amounts were furnished at different times, that amount must be considered which was furnished just prior to the death of the testator. But what would be the case if the testator provided less at the time that he made his will, and more at the time of his death, or vice versa? In this case it must be held that the amount must be governed by what he provided last.

§ 3.- A certain man bequeathed to his freedmen food and water by a trust. Advice was taken with reference to the trust, as the question was raised in that part of Africa or Egypt where water was sold. Therefore, I stated that the benefit to be derived from the trust depended upon whether the party who left it had cisterns or not, and whether it was included in the

por causa de su dura esclavitud, se les deberán los alimentos que él se niega a prestarles, a no ser que se sirva de ellos a la manera que de esclavos. Respondió, que, según lo que se exponía, se debían.

14.- ULPIANO; *Fideicomisos, libro II.*- Dice Mela, que si a un joven o a una joven se le dejaran alimentos, se le deben hasta la pubertad. Pero esto no es verdad, porque se deberían tanto tiempo cuanto quiso el testador, o, si no aparece cual fuera su voluntad, se deberían durante todo el tiempo de la vida.

§ 1.- Ciertamente, si se dejaran los alimentos hasta la pubertad, si alguno quisiera seguir la manera de alimentos que hasta hace poco se daban a los niños y a las jóvenes, sepa que Adriano estableció, que los jóvenes fueran alimentados hasta los dieciocho años, y las jóvenes hasta los catorce; y nuestro Emperador resolvió por Rescripto, que se debía observar esta disposición dada por Adriano. Pero aunque generalmente no se define así la pubertad, sin embargo, por consideraciones de piedad no es contra derecho que en este solo caso de los alimentos se haya de observar este tiempo de edad.

§ 2.- Pero si uno hubiere dejado los alimentos, que en vida prestaba, se prestarán solamente los que había solido prestar al tiempo de la muerte; por lo cual, si acaso los hubiere prestado con diversidad, se atenderá, sin embargo, a la prestación de aquel tiempo, que fue próximo a su muerte. Luego, ¿qué se dirá, si prestaba menos al testar, y más al tiempo de la muerte, o al contrario? Aun se había de decir, que se ha de atender a la prestación, que fue la última.

§ 3.- Uno había dejado a sus libertos, así como los alimentos, también el agua por fideicomiso; se me consultaba sobre el fideicomiso, porque se exponía que el caso pasaba en una región de África o acaso en Egipto, donde el agua se vende; yo decía por lo tanto, que este era un emolumento del fideicomiso, ya si lo hubiere uno dejado teniendo cisternas, ya si no

sibi esset comparaturus. Nec videri inutile esse fideicommissum quasi servitute praedii non possessori vicinae possessionis relicta: Nam et haustus aquae ut pecoris ad aquam adpulsus est servitus personae, tamen ei, qui vicinus non est, inutiliter relinquitur:

In eadem causa erunt gestandi vel in tuo uvas premendi vel areae tuae ad frumenta ceteraque legumina exprimenda utendi. haec enim aqua personae relinquitur.

15.- SCAEVOLA; *libro XVII, Digestorum.*- A filio herede codicillis Seiae decem reliquit et alumno his verbis: "Maevio infanti alumno meo quadringenta dari volo, quae peto a te, Seia, suscipias et usuras ei quincunces in annum usque vicesimum aetatis praestes eumque suscipias et tuearis".

Quaesitum est, an Seia, postquam legatum suum acceperit, si nolit pecuniam alumno relictam suscipere vel in suscipienda ea cessaverit, onus alimentorum ex die mortis testatoris compellenda sit adgnosceret. respondit secundum ea quae proponerentur compellendam praestare, cum fideicommissum sit. Idem quaesiit, an heres quoque Seiae in annos viginti alimenta praestare debeat. Respondit debere.

§ 1.- Testator concubinae mancipia rustica numero octo legavit et his cibaria praestari iussit in haec verba: "eisque mancipiis, quae supra legavi, cibarii nomine ab heredibus meis praestari volo, quae me vivo accipiebant". Quaesitum est, cum vivo testatore semper mancipia rustica tempore messium et arearum delegata fuerint et eo tempore cibaria ex ratione domini sui numquam acceperint excepto

trust in order to provide for any amount which the beneficiary might have to pay for water for himself, and whether the trust did not appear to be void, as it was not the bequest of a servitude upon a tract of land for the benefit of a person who was not the possessor of one that adjoined it; for while the drawing of water, and the right of driving cattle to water, is a personal servitude, still, it is void if left to one who is not the owner of neighboring property.

Under the same head are classed the right of conveying burdens, or of pressing grapes, or of threshing wheat and other grain on the premises of someone else; but in this instance, the right to obtain water is bequeathed for the benefit of the person himself.

15.- SCAEVOLA; *Digest, Book XVII.*- A testator, having appointed his son his heir, by a codicil charged him with the payment of ten aurei to Seia, and provided for a foster-child as follows: "I desire forty aurei to be given to my foster-child, Mævius, which sum I ask Seia to take charge of, and to pay to Mævius the interest on the same at the rate of five per cent per annum, until he reaches the age of twenty years; and I also ask her to take charge of him, and rear him."

The question arose, if Seia, after having received her legacy, should refuse or neglect to take charge of the money left for the benefit of the foster-child, whether she would be compelled to assume the obligation of furnishing support for him from the time of the death of the testator. The answer was that, according to the facts stated, she would be compelled to provide support, as she had been charged with the execution of the trust. It was also asked whether the heir of Seia would be required to furnish Mævius support until he reached his twentieth year? The answer was that he would be required to do so.

§ 1.- A testator bequeathed to his concubine eight slaves belonging to his country seat, and directed her to provide them with food as follows: "I wish the said slaves whom I have bequeathed, as above stated, to be furnished with food by my heirs, just as they were during my lifetime." As the slaves during the life of the testator were always employed in farm labor during harvest, and when the grain was threshed, and,

teniéndolas, de modo que se contenga en el fideicomiso todo aquello con lo que uno hubiese de comprar para sí el agua; y que no se consideraba que fuese inútil el fideicomiso, cual si se hubiere dejado la servidumbre de un predio al que no era poseedor de la posesión vecina. Porque aunque el sacar agua, como el llevar el ganado a abreviar, es servidumbre personal, sin embargo, se deja inútilmente al que no es vecino.

En la misma condición estarán la de conducción, o la de prensar la uva en lugar tuyo, o la de utilizar tu era para trillar el trigo y las demás legumbres; porque esta agua se le deja a la persona.

15.- SCAEVOLA; *Digesto, libro XVII.*- Uno dejó en codicilos diez a cargo de su hijo, heredero, para Seya y para un alumno, en estos términos: «quiero que se den al niño Mevio, mi alumno, cuatrocientos, de los que te pido, Seya, que te encargues, y que le des al año intereses del cinco por ciento hasta la edad de veinticinco, y que de él te hagas cargo, y lo am pares»;

Se preguntó, si Seya, después que hubiere recibido su legado, no queriéndose encargar del dinero dejado para el alumno, o habiendo dejado de estar encargada de él, habrá de ser compelida a soportar la carga de los alimentos desde el día de la muerte del testador. Respondió, que, según lo que se exponía, habrá de ser compelida a prestarlos, pues se mandó por fideicomiso. El mismo preguntó, si también el heredero de Seya debía prestar los alimentos hasta los veinte años. Respondió, que debía.

§ 1.- El testador legó a su concubina esclavos rústicos en número de ocho, y mandó que se les prestasen alimentos en estos términos: «y a estos esclavos, que arriba he legado, quiero que se les dé por mis herederos, a título de alimentos, lo que viviendo yo recibían»; se preguntó, si, habiéndose dado siempre en arrendamiento en vida del testador los esclavos rústicos en el tiempo de la siega y de la

custode praedii, an heres eius quoque temporis, id est messis et arearum, et cibaria concubinae pro mancipiis rusticis praestare deberet. Respondit eum, cuius notio est, aestimaturum.

Claudius: merito: nam si eodem modo, quo apud testatorem fuerunt, et apud concubinam futura legavit, non debebantur eius temporis, de quo quaesitum est, cibaria: verum si velut in ministerium urbanum ab his transferentur, debebuntur.

§ 2.- Titia decedens testamento ita cavuit: "omnibus libertis libertabusque meis cibaria et vestiaria, quae viva praestabam, dari praestarique volo": quaesitum est, cum tribus solis eo tempore, quo ea vixit, sicut rationibus continebatur, cibaria et vestiaria praestiterit, an heres eius a ceteris quoque libertis conveniri possit, an vero tribus tantum sit obnoxius, qui rationibus ipsius cibaria et vestiaria accepisse reperiuntur? respondit ab omnibus.

16.- IDEM; *libro XVIII, Digestorum*.- Alimenta et vestiaria libertis suis dedit: quaesitum est, an, quia nominatim a moderato uno ex heredibus dari iussit testator, solus moderatus debeat, non etiam post mortem moderati heredes eius. Respondit et heredes teneri.

§ 1.- Libertis libertabusque, item quos quasque testamento codicillisve manumiserat, alimenta Commoda, quae viva praestabat, dari iusserat: item omnibus libertis libertabusque fundos: quaesitum est, an ad ea legata admitteretur liberti patrum libertus, cui scribere solebat ita: (Rufina prognato liberto nostro), epistula etiam emissa ad ordinem civitatis, unde oriunda erat, petierat, uti publice, quod medicus erat, salaria ei praestarentur, manifestando litteris suis eum suum esse libertum. Respondit eum, cuius

with the exception of the steward in charge of the land at that time, never received any food provided by their master; the question arose whether the heir would be obliged to furnish the concubine, at that time also, that is to say during the season of harvest and threshing, with provisions for the said slaves belonging to the farm. The answer was that this must be left to the court having jurisdiction of the case.

Claudius: This is reasonable, for if the slaves were to be employed in the same way by a concubine, as they had been by the testator, it would not be necessary for food to be furnished them during the time in question. If, however, they had been bequeathed for service in the city, food must be furnished them.

§ 2.- Titia, at the time of her death, provided as follows in her will: "I wish the food and clothing which I have been accustomed to furnish them during my lifetime to be given to all my freedmen and freedwomen." As during her lifetime she only furnished food and clothing to three of them, which was shown by her accounts, the question arose whether her heir could be sued by the remaining freedmen, or whether he would only be liable to the three who were found by the accounts of the testatrix to have previously received food and clothing. The answer was that he would be liable to all.

16.- THE SAME; *Digest, Book XVIII*.- A certain testator bequeathed food and clothing to his freedmen. The question arose, as the testator had ordered the trust to be discharged by Moderatus, one of his heirs, whom he mentioned by name, whether Moderatus alone would be responsible so that his heirs would not be liable after his death. The answer was that his heirs would be liable.

§ 1.- A testatrix left to her freedmen and freedwomen, whom she also manumitted by her will and codicil, suitable maintenance such as she had furnished during her lifetime, and she also directed certain lands to be given to all of them. The question arose whether the freedman of a freedman of the father of the testatrix, whom she was accustomed to address as follows: "To our freedman, the son of Rufinus," should be admitted to share in the legacy. A letter was also sent by her to the magistrates of her

trilla, y no habiendo recibido nunca en este tiempo alimentos por cuenta de su señor, excepto el guarda del predio, debería prestarle el heredero a la concubina para los esclavos rústicos los alimentos también de este tiempo, esto es, del de la siega y de la trilla. Respondió, que lo había de estimar aquel a quien compete el conocimiento en este asunto.

Y dice Claudio: y con razón, porque si los legó para que estuviesen en poder de la concubina del mismo modo que estuvieron en poder del testador, no se deberán los alimentos del tiempo de que se ha hablado, pero si se transfiriesen como para servicio urbano, se deberán.

§ 2.- Ticia, al fallecer, dispuso así en su testamento: «quiero que se les den y se presten a todos mis libertos y libertas los alimentos y el vestido, que en vida yo les prestaba, y se preguntó, si, habiéndoles prestado los alimentos y el vestido solamente a tres durante el tiempo que vivió, como consta en las cuentas, podrá ser demandado su heredero también por los demás libertos, o estará obligado únicamente a los tres, que por las cuentas de la misma se ve que recibieron los alimentos y el vestido. Respondió, que por todos.

16.- EL MISMO; *Digesto, libro XVIII*.- Uno dió a sus libertos los alimentos y el vestido; se preguntó, si, porque el testador mandó que determinadamente se dieran por Moderado, uno de sus libertos, los deberá solo Moderado, y no también después de la muerte de Moderado sus herederos. Respondió, que también estaban obligados los herederos.

§ 1.- Commoda había mandado que se diesen a sus libertos y libertas, y también a los y a las que había manumitido en testamento o en codicilos, los alimentos que en vida les prestaba, y además unos fundos a todos los libertos y libertas; se preguntó, si sería admitido a estos legados el libertino de un libertino del padre, a quien solía escribir así: «Rufina al libertino nuestro hijo»; habiendo enviado también una carta al ayuntamiento de la ciudad, de donde era oriunda, había pedido que de los fundos públicos, porque era

notio est, aestimaturum, ut, si quidem viva ea et ei praestabat, nihilo minus ad fideicommissum admitteretur, aliter vero non.

§ 2.- Basilice libertae decem dedit, quam apud epictetum et Callistum libertos esse voluit, ut, cum fuerit Basilice annorum viginti quinque, cum usuris quincuncibus restituerentur ita, ut ex usuris aleretur, prout aetatem ampliaverit: quaesitum est, an ex alio capite, quo generaliter libertis libertabusque cibaria et vestiaria et habitationem reliquit, etiam Basilice deberentur. Respondit secundum ea quae proponerentur non deberi, nisi hoc quoque ei datum probaretur. Claudius: quia destinaverat alimentis eius usuras pecuniae, quas specialiter ei praelegaverat.

§ 3.- Qui societatem omnium bonorum suorum cum uxore sua per annos amplius quadraginta habuit, testamento eandem uxorem et nepotem ex filio aequis partibus heredes reliquit et ita cavuit: "item libertis meis, quos vivus manumisi, ea quae praestabam". Quaesitum est, an et qui eo tempore, quo societas inter eos permansit, manumissi ab utrisque et communes liberti facti sunt, ea quae a vivente percipiebant solida ex fideicommisso petere possint. Respondit non amplius, quam quod vir pro sua parte praestabat, deberi.

17.- IDEM; *libro XIX, Digestorum.*- Servos ad custodiam templi reliquerat et his ab herede legaverat his verbis: "peto fideique tuae committo, ut des

native city, in which she requested that a salary be paid to him out of the public funds, for the reason that he was a physician, and stated that he was her freedman. The answer was that this point should be decided by the court having jurisdiction of the matter; and that the freedman could be admitted to share in the benefit of the trust, if the testatrix, during her lifetime, had provided him with support; otherwise he could not.

§ 2.- A testator bequeathed ten aurei to his freedwoman, Basilica, which he wished to remain in the hands of his freedmen Epictetus and Callistus, to be paid to Basilica with interest at the rate of five per cent, until she reached the age of twenty-five years, so that she might be supported by the interest of the money according to her age. The question arose whether Basilica was entitled to support under another clause of the same will, by which the testator, in general terms, left food, clothing, and lodging to his freedmen and freedwomen. The answer was that, according to the facts stated, she would not be entitled to it, unless it could be proved that it was given to her along with the others. Claudius: Because the testator intended the interest of a sum of money, which he has especially bequeathed to her, as a preferred legacy, to be employed for her support.

§ 3.- A certain individual, who had held all his property in partnership with his wife for more than forty years, left her and a grandson by a son of his, heirs to equal shares of his estate, and provided as follows: "I also bequeath to my freedmen, whom I have manumitted during my lifetime, what I have been accustomed to furnish them." The question arose whether those slaves who had been manumitted by both of the parties while the partnership existed, and had become the freedmen of their joint-owners, could, under the terms of the trust, claim the entire amount which they had been accustomed to receive during the lifetime of the husband. The answer was that they were not entitled to any more than what the husband was accustomed to furnish as his share.

17.- THE SAME; *Digest, Book XIX.*- A testator left certain slaves for the guardianship of a temple, and charged his heir with a legacy for their benefit as

médico, se le diesen salarios, manifestando en su carta que este era liberto suyo. Respondió, que aquel a quien compete el conocimiento decidirá, que, si verdaderamente ella en vida se los prestaba, sea no obstante admitido al fideicomiso, pero no de otro modo.

§ 2.- Uno le dió diez a la liberta Basílica, cuya suma quiso que quedase en poder de los libertos Epicteto y Calisto, para que se los restituyesen a Basílica con los intereses de cinco por ciento cuando fuere de veinticinco años, de suerte que se alimentase con los intereses, conforme creciese en edad; se preguntó, si en virtud de otro capítulo, en el que dejó en general a los libertos y libertas los alimentos y el vestido y la habitación, se le debería esto también a Basílica. Respondió, que, según lo que se exponía, no se le debía, a no ser que se probase que también se le dió esto. Y dice Claudio: porque había destinado para sus alimentos los intereses del dinero, que especialmente le había prelegado.

§ 3.- Uno que por más de cuarenta años tuvo con su mujer sociedad de todos sus propios bienes, dejó en su testamento herederos de partes iguales a la misma mujer y a un nieto habido de un hijo, y dispuso así: «y además a mis libertos, que en vida manumití, lo que yo les daba»; se preguntó, si también los que durante el tiempo que entre ellos subsistió la sociedad fueron manumitidos por ambos, y se hicieron libertos comunes, podrán pedir en virtud del fideicomiso íntegras las cosas que percibían viviendo aquel. Respondió, que no se debía mas de lo que el marido daba por su parte,

17.- EL MISMO; *Digesto, libro XIX.*- Uno había dejado esclavos para custodia de un templo, y les había hecho un legado a cargo del heredero en estos

praestes in memoriam meam pedisequis meis, quos ad curam templi reliqui, singulis menstrua cibaria et annua vestiaria certa". Quaesitum est, cum templum nondum esset exstructum, ex die mortis an vero ex eo tempore, quo templum explicitum fuerit, percipere servi debeant legatum. Respondit officio iudicis heredem compellendum servis relicta praestare, donec templum exstrueretur.

18.- IDEM; *libro XX, Digestorum*.- Libertis, quos testamento manumiserat, alimentorum nomine menstruos decem legaverat, deinde codicillis generaliter omnibus libertis menstruos septem et annuos vestiarii nomine denos legavit: quaesitum est, an et ex testamento et ex codicillis libertis fideicommissum heredes praestare debeant. Respondit nihil proponi, cur non ea, quae codicillis data proponerentur, praestari deberent: nam ab his, quae testamento cibariorum nomine legata essent, recessum est propter ea, quae codicillis relicta sunt.

§ 1.- Manumissis testamento cibaria annua, si cum matre morabuntur, per fideicommissum dedit: mater filio triennio supervixit neque cibaria neque vestiaria eis praestitit, cum in petitione fideicommissi liberti cessarent: sed et filia posteaquam matri heres exstitit, quoad vixit annis quattuordecim interpellata de isdem solvendis non est.

Quaesitum est, an post mortem filiae a novissimo herede petere possint et tam praeteriti temporis quam futuri id, quod cibariorum nomine et vestiarii relictum est. Respondit, si condicio exstisset, nihil proponi, cur non possent.

follows: "I ask, and I charge you in memory of me, to give and furnish to my footmen whom I have left to take care of the temple, such-and-such a quantity of food, every month, and such-and-such an amount of clothing every year." As the temple had not yet been erected, the question arose whether the slaves were entitled to receive their legacy from the day of the death of the testator, or from the time when the temple was completed. The answer was that it would be the duty of the judge to compel the heir to furnish the slaves with what was left to them until the temple should be built.

18.- THE SAME; *Digest, Book XX*.- A man bequeathed to his freedmen, whom he had manumitted by his will, ten aurei, payable monthly, for their support; and afterwards, in general terms, bequeathed by a codicil seven aurei to all his freedmen, payable monthly for food, and ten aurei, payable annually, for the purpose of providing them with clothing. The question arose whether the heirs were charged with one trust under the terms of the will, and with another under the codicil, for the benefit of the freedmen. The answer was that, in the case stated, there was reason why the heir should not furnish what was left by the codicil, for by the bequests contained in the latter, the testator seems to have revoked those relating to food which he had bequeathed by his will.

§ 1.- A testator having manumitted his slaves by his will, left them, in trust, food for their annual maintenance, if they should reside with his mother. The mother survived her son three years, but did not furnish the freedmen either food or clothing, because they did not demand the execution of the trust; and the daughter, who subsequently became her mother's heir, during the fourteen years which she lived, was not applied to for payment of the legacy by the slaves.

The question arose whether, after the death of the daughter, the freedmen could demand from the last heir, for the past, as well as for the future time, the legacies which had been left to provide them with food and clothing. The answer was that, if the condition had been complied with, there was nothing in the case stated to prevent them from presenting the claim.

términos: «pido, y encomiendo a tu fidelidad, que des y prestes en memoria mía a cada uno de mis pajes, que dejé para cuidado del templo, alimentos mensuales y ciertos vestidos al año»; se preguntó, si, no estando todavía construido el templo, deberán percibir los esclavos el legado desde el día de la muerte, o desde el tiempo en que se hubiere concluido el templo. Respondió, que el heredero había de ser compelido por ministerio del juez a darles a los esclavos lo que se les dejó, hasta que se edifique el templo.

18.- EL MISMO; *Digesto, libro XX*.- A los libertos que había manumitido en el testamento, uno les había legado diez al mes a título de alimentos, y después en codicilos legó en general a todos los libertos siete al mes, y diez al año por razón del vestido; se preguntó, si los herederos deberán pagar a los libertos el fideicomiso en virtud tanto del testamento como de los codicilos. Respondió, que nada se exponía para que no se deban dar las cosas, que se dice fueron dadas en los codicilos; porque hubo apartamiento, de las cosas que en el testamento se legaron a título de alimentos, por razón de las que se dejaron en los codicilos.

§ 1.- Uno dió por fideicomiso alimentos anuales a los manumitidos en su testamento, si habitasen con la madre; la madre sobrevivió tres años a su hijo, y no les dió ni los alimentos ni el vestido, porque los libertos dejaron de pedir el fideicomiso, y tampoco la hija, luego que quedó siendo heredero de la madre, fue demandada, mientras vivió, durante catorce años para el pago de las mismas cosas;

Se preguntó, si después de la muerte de la hija podrán pedir al último heredero, tanto por el tiempo pasado, como por el futuro, lo que se dejó a título de alimentos y de vestido. Respondió, que si se hubiese cumplido la condición, nada se exponía para que no pudiesen.

§ 2.- Ab heredibus Stichum manumitti voluit eique, si cum seio moraretur, cibaria et vestitaria praestari a seio: deinde haec verba adiecit: "te autem, sei, peto, ut, cum ad annum vicesimum quintum perveneris, militiam ei compares, si tamen te ante non reliquerit". Quaesitum est, Sticho statim libertatem consecuto, prius autem defuncto seio quam ad annum vicesimum quintum perveniret, an ab his, ad quos bona seii pervenerunt, militia Sticho comparari debet? et si placet deberi, utrum statim militia comparanda sit an eo tempore, quo Seius annum vicesimum quintum expleturus fuisset, si supervixisset? respondit, cum placeat comparandam, non ante deberi, quam id tempus cessisset.

§ 3.- Postumis heredibus institutis et patre et matre, et substitutione facta actores manumisit et peculia eis legavit et annua et certis libertis suis legata et aliis exteris plura: deinde post testamentum factum nata filia codicillis ita cavuit: "si quid testamento, quod ante hoc tempus feci, legavi cui dari volui, peto ab his, uti tertiam partem Paetinae filiae meae reddant":

secundis autem tabulis facta pupillari substitutione impuberibus libertis, quibus a parentibus libertates dedit, eo amplius alterum tantum, quantum in nummo praeter cibaria et vestitaria dari voluit.

Quaesitum est, cum supervixisset filia testamento aperto et codicillis, postea autem decesserit et fideicommissum datum ei de restituenda parte tertia ad heredes suos transmiserat, an etiam cibariorum et vestiariorum tertiae partes ei per fideicommissum datae esse videantur. Respondit non videri.

§ 2.- A testator wished Stichus to be manumitted by his heirs, and directed food and clothing to be furnished him by Seius, if he should reside with him, and then he added the following words: "I also ask you, Seius, when you reach the age of twenty-five years, to purchase a commission in the army for him, if he should not leave you before that time." As Stichus obtained his freedom immediately, and Seius died before he reached the age of twenty-five years, the question arose whether the commission in the army should be purchased for Stichus by those who acquired the estate of Seius; and if it was decided that this should be done, whether it should be purchased without delay, or at the time when Seius would have completed his twenty-fifth year, if he had survived. The answer was that, as was decided that the commission should be purchased, it was not necessary for this to be done before the time fixed by the testator had expired.

§ 3.- Where his posthumous children, together with the father and mother of a testator, were appointed his heirs, and then he, having made a substitution, manumitted the slaves who were his stewards, and bequeathed them their peculium, as well as an annual sum for their subsistence, and also left legacies to certain of his freedmen, and to strangers; and finally, a daughter having been born to him, after his will had been executed, he inserted the following provision in a codicil: "I wish that any property which, previous to this time, I have bequeathed to anyone to be given to them; and I ask them to deliver the third part of the same to my daughter Petina."

A pupillary substitution having been made, he desired the freedmen who had not reached puberty and whom the testator had charged his parents to liberate, to receive, in addition to the bequest of food and clothing, as much again as he had left them in money.

As his daughter survived the opening of the will and the codicil, but afterwards died, and transmitted to her heirs the trust by which she was charged to deliver the third part of the legacy, the question arose whether the third part of the food and clothing could also be claimed under the terms of the trust. The answer was that it could not

§ 2.- Quiso uno que Stico fuese manumitido por los herederos, y que, si habitase con Seyo, se le prestasen por Seyo los alimentos y el vestido; después añadió estas palabras: «pero te pido, Seyo, que cuando llegues a los veinticinco años le compres un cargo en la milicia, mas esto, si antes no te hubiere dejado»; se preguntó, si, habiendo conseguido inmediatamente la libertad Stico, pero habiendo fallecido Seyo antes que llegase a los veinticinco años, se deberá comprar para Stico el cargo en la milicia por aquellos a quienes fueron los bienes de Seyo, y, si se determina que se debe, si se habrá de comprar inmediatamente el cargo en la milicia, o al tiempo en que Seyo habría cumplido los veinticinco años, si hubiese sobrevivido. Respondió, que, determinandose que se ha de comprar, no se debía antes que hubiese comenzado a correr este tiempo.

§ 3.- Instituidos herederos unos póstumos, y el padre y la madre, y hecha la substitución, uno manumitió a los administradores, y les legó los peculios y pensiones anuales, y legados a ciertos libertos suyos, y varias cosas a otros extraños; luego, habiendo nacido una hija después de hecho el testamento, dispuso así en codicilos: «si en el testamento, que hice antes de ahora, legué y quise que se diera alguna cosa a alguien, les pido que restituyan la tercera parte a Petina, mi hija»;

Pero en las segundas tablas, habiendo hecho la substitución pupilar, quiso que a los libertos impúberos, a quienes a cargo de los ascendientes les dió la libertad, se les diese ademas de esto otro tanto de lo que en dinero, ademas de los alimentos y del vestido;

Se preguntó, si, habiendo sobrevivido la hija a la apertura del testamento y de los codicilos, pero habiendo fallecido después y habiendo transmitido a sus herederos el fideicomiso, que se le dió para restituir la tercera parte, se considerase que se le dieron por el fideicomiso también las terceras partes de los alimentos y del vestido. Respondió, que no se consideraba.

§ 4.- Idem quaesiit, an eorum, quae codicillis per fideicommissum relicta sunt, tertiae partes ad filiam pertinere deberent. Respondit non deberi. Idem quaesiit, an alterum tantum a substitutione legatum deducta tertia parte quantitatis legatorum testamento datorum computari debeat, ut duae partes quantitatis debeantur, praeter codicillos, quibus tertiam partem codicillis legatorum ad filiam suam pertinere voluit. Respondit integrum ex tabulis substitutionis deberi.

§ 5.- Cibaria et vestimenta per fideicommissum dederat et ita adiecerat: "quos libertos meos, ubi corpus meum positum fuerit, ibi eos morari iubeo, ut per absentiam filiarum mearum ad sarcophagum meum memoriam meam quotannis celebrent". quaesitum est, uni ex libertis, qui a die mortis neque ad heredes accesserit neque ad sepulchrum morari voluerit, an alimenta praestanda sint. Respondit non praestanda.

19.- IDEM; *libro XXII, Digestorum*.- Testamento ita cautum fuit: "libertis meis cibaria quaeque alia praestabam ab heredibus meis praestari volo": unus ex libertis ex voluntate patroni negotii sui gratia quadriennio ante diem mortis afuit: ex hac causa cibaria, quae ante acceperat, mortis tempore non accepit: cui tamen liberto eodem testamento patronus, sicut et aliis, quos vivus manumiserat, legatum quinque dederat. Quaesitum est, an isti quoque cibaria et reliqua, quae ceteris libertis legata sunt, debeantur. Respondit: cur non?

20.- IDEM; *libro III, Responsorum*.- "Stichus nutricis meae nepos liber esto: cui decem aureos annuos dari volo". Qui deinde interpositis nominibus eidem Stichus contubernalem eius et liberos legavit

§ 4.- It was likewise asked whether the third part of the property bequeathed in trust by the codicil would belong to the daughter. The answer was that it would not. Inquiry was also made whether the provision included in the substitution by which the freedmen who had not yet reached puberty would be entitled to as much again as they had been left in money, and the third part of the legacies bequeathed by will having been deducted, the calculation should be made so that two-thirds of the amount, in addition to what was left by the codicil, would be payable; the third part of which legacies the testator desired should belong to his daughter. The answer was that the entire amount mentioned in the substitution should be paid.

§ 5.- A certain testator left food and clothing in trust to his freedmen, and added: "I desire that they, my freedmen, shall reside where my body is buried, so that every year they may celebrate the anniversary of my death, at my tomb, in the absence of my daughters." The question arose whether support should be furnished to one of the freedmen who, after the death of the testator, did not present himself to the heirs, and refused to reside near the tomb. The answer was that it should not be furnished him.

19.- THE SAME; *Digest, Book XXII*.- The following provision was inserted into a will, "I desire that food, and whatever else I was accustomed to give my freedmen, shall be furnished them by my heirs." One of the said freedmen, with the consent of his patron, was absent for four years before the death of the testator, for the purpose of transacting his private business, and on this account he did not, at the time of the testator's death, receive the food which he formerly had received. Nevertheless, the patron left him a legacy of five aurei by the same will, just as he did to the others, whom he had manumitted during his lifetime. The question arose whether this freedman was also entitled to the food and other articles which were bequeathed to the remaining freedmen. The answer was, why not?

20.- THE SAME; *Opinions, Book III*.- "Let Stichus, the grandson of my nurse, be free, and I also wish ten aurei to be paid to him every year." Then the testator, having set aside certain credits for his

§ 4.- El mismo preguntó, si deberían pertenecerle a la hija las terceras partes de las cosas que en los codicilos se dejaron por fideicomiso. Respondió, que no se debían. Él mismo preguntó, si el otro tanto legado por la substitución se deberá computar deducida la tercera parte de la cantidad de los legados dados en el testamento, de suerte que se deban dos partes de la cantidad independientemente de los codicilos, en cuyos codicilos quiso que le perteneciera a su hija la tercera parte de los legados. Respondió, que se debía la totalidad en virtud de las tablas de la substitución.

§ 5.- Uno había dado por fideicomiso los alimentos y el vestido, y había añadido así: «cuyos libertos míos mando que habiten allí donde fuere enterrado mi cuerpo, para que en ausencia de mis hijas celebren todos los años mi memoria junto a mi sarcófago»; se preguntó, si se habrán de prestar los alimentos a cada uno de los libertos que desde el día de la muerte ni se hubiere acercado a los herederos, ni hubiere querido habitar cerca del sepulcro. Respondió, que no se le han de prestar.

19.- EL MISMO; *Digesto, libro XXII*.- Se dispuso así en un testamento: «quiero que por mis herederos se presten a mis libertos los alimentos y las otras cosas que yo les daba»; uno de los libertos estuvo ausente con consentimiento del patrono, por causa de negocio propio, cuatro años antes del día de la muerte; por esta causa no recibió al tiempo de la muerte los alimentos que antes había recibido; pero a este liberto le había dado el patrono en el mismo testamento un legado de cinco, como también a otros a quienes en vida había manumitido; se preguntó, si también a este se le deberán los alimentos y las demás cosas que se legaron a los otros libertos. Respondió: ¿por qué no?

20.- EL MISMO; *Respuestas, libro III*.- «Sea libre Stico, nieto de mi nodriza, a quien quiero que se le den diez áureos anuales»; el testador, habiendo interpuesto después algunos créditos, legó al mismo

hisque, quae vivus praestabat: deinde alio capite libertis omnibus quae vivus praestabat dari iussit. Quaero, an Stichus praeter suum legatum et alimenta percipere possit. Respondit secundum ea quae proponerentur non posse.

§ 1.- Item cum alimenta libertis utriusque sexus reliquerit a Republica et ex praediis, quae ei legavit, dari voluisset, quaero, Stichi contubernali et liberis utrum ab herede instituto an a Republica diaria et vestiaria, quae vivus dabat, praestari deberent. respondit posse benigna voluntatis interpretatione dici his quoque a Republica praestanda.

§ 2.- Titia usum fructum fundi legavit Maevio eiusque fidei commisit, ut ex redditu fundi praestaret Pamphilae et Sticho annuos centenos nummos quoad vivent: quaero, an mortuo Maevio heres alimenta debeat. Respondit nihil proponi, cur debeant praestari ab herede Titiae: sed nec ab herede legatarii, nisi id testator manifeste probetur voluisse etiam finito usu fructu praestari, si modo id, quod ex usu fructu receptum esset, ei rei praestandae sufficeret.

§ 3.- Mater filio herede instituto per fideicommissum libertatem Pamphilo servo dedit: eidem cibariis nomine legavit quinos aureos et vestiarii in singulos annos quinquagenos, si cum filio eius moretur: quaero, filio defuncto an alimenta debentur. Respondit, si condicioni paruisset, deberi et post mortem.

21.- ULPIANUS; *libro II, Fideicommissorum*.- Diariis vel cibariis relictis neque habitationem neque vestiarium neque calciarium deberi palam est, quoniam de cibo tantum testator sensit.

benefit, bequeathed to the said Stichus his wife and children, and to the latter what he had furnished them during his lifetime; and afterwards, under another head, he directed to be given to all of his freedmen what he, while living, had been accustomed to furnish them. I ask whether Stichus will, in addition to his legacy, be entitled to maintenance. The answer was that, according to the facts stated, he will not.

§ 1.- The same testator having charged the municipality of a city to provide support for his freedmen of both sexes, to be paid out of certain lands which he devised to it; I ask whether the daily allowance and the clothing which the testator had, while living, given to Stichus and his wife and children, should be given to them by the appointed heir, or by the municipality. The answer is that, in accordance with the most liberal interpretation of the will, it must be said that they should be furnished by the city.

§ 2.- Titia bequeathed the usufruct of a tract of land to Maevius, and charged him to pay Pamphila and Stichus a hundred sesterces annually, out of the income of said land, as long as they lived; I ask whether, after the death of Maevius, the heir of Titia will be required to provide support. The answer is that there was nothing in the case stated which would require it to be furnished by the heir of Titia, or by the heir of the legatee either; unless it was clearly proved that the testator intended it to be furnished after the extinction of the usufruct, provided that the amount obtained from the usufruct should be sufficient.

§ 3.- A mother, having appointed her son her heir, granted freedom to her slave Pamphilus, under a trust, and bequeathed him five aurei for the purpose of providing him with food, and fifty aurei, payable annually, for his clothing, on condition that he lived with her son. I ask whether the support must be furnished after the death of the son. The answer is that if the condition was complied with, it must be furnished after his death.

21.- ULPIANUS; *Trusts, Book II*.- Where a daily allowance or food is bequeathed, it is clear that neither lodging, clothing, nor shoes, are to be furnished, as the testator only had the provision of food in his mind.

Stico la compañera de éste y los hijos, y a estos lo que en vida les daba, y luego en otro capítulo mandó que se les diera a todos los libertos lo que en vida les daba; pregunto, si podrá percibir Stico además de su legado también los alimentos. Respondió, que, según lo que se exponía, no podía.

§ 1.- Asimismo, habiendo dejado ir los libertos de ambos sexos los alimentos a cargo de la República, y habiendo querido que se les dieran de los predios, que legó a esta, pregunto, si a la compañera y a los hijos de Stico se les deberán dar por el heredero instituido, o por la República, las raciones diarias y el vestido que en vida les daba. Respondió, que por benigna interpretación de la voluntad se debía decir, que también a ellos se les debía dar por la República.

§ 2.- Ticia legó a Mevio el usufruto de un fundo, y encomendó a su fidelidad que de la renta del fundo les diese a Pánfila y a Stico cien monedas anuales, mientras vivan; pregunto, si muerto Mevio deberá el heredero los alimentos. Respondió, que nada se expone para que deban ser prestados por el heredero de Ticia; pero ni aun por el heredero del legatario, a no ser que evidentemente se pruebe que el testador quiso que se diera esto también habiendo terminado el usufructo, si es que bastase para la prestación de esta cosa lo que por el usufructo se hubiese percibido.

§ 3.- Una madre, habiendo instituido heredero a su hijo, dio por fideicomiso la libertad al esclavo Pánfilo, y le legó al mismo cinco áureos a título de alimentos, y cincuenta cada año para el vestido si habitase con su hijo; pregunto, fallecido el hijo ¿se deberán los alimentos? Respondió, que, si hubiese cumplido la condición, se le debían también después de la muerte.

21.- ULPIANO; *Fideicomisos, libro II*.- Habiéndose dejado el diario o los alimentos, es evidente que no se debe ni la habitación, ni el vestido, ni el calzado, porque el testador se refirió solamente a la comida.

22.- VALENS; *libro I, Fideicommissorum*.- Cum alimenta per fideicommissum relicta sunt non adiecta quantitate, ante omnia inspiciendum est, quae defunctus solitus fuerat ei praestare, deinde quid ceteris eiusdem ordinis reliquerit: si neutrum apparuerit, tum ex facultatibus defuncti et caritate eius, cui fideicommissum datum erit, modus statui debebit.

§ 1.- Qui fratris sui libertis alimenta debebat, his testamento vineas cum hac adiectione reliquerat "ut habeant, unde se pascant". Si pro alimentis vineas reliquisset, non aliter eis ex fideicommissi causa eas praestari debere, quam si testamenti obligatione heredes liberassent: aut, si id omissum fuisset et postea ex testamento agerent, doli mali exceptione tutum heredem futurum, scilicet si non minus valent vineae quam alimentorum aestimatio. Illam autem adiectionem "ut habeant unde se pascant" magis ad causam praelegandi quam ad usum fructum constituendum pertinere.

23.- PAULUS; *libro IV, ad Neratium*.- Rogatus es, ut quendam educes: ad victum necessaria ei praestare cogendus es. Paulus: cur plenius est alimentorum legatum, ubi dictum est et vestiarium et habitationem contineri? immo ambo exaequanda sunt.

22.- VALENS; *Trusts, Book I*.- Where maintenance is left by the terms of a trust, and the amount is not stated, what the deceased was accustomed to furnish the legatee must be learned before anything else is done, and then what he left to others of the same rank must be ascertained. If neither of these things can be found out, the amount must then be determined according to the means of the deceased, and the affection which he entertained toward the party for whose benefit the trust was created.

§ 1.- A testator, who was already under obligations to provide support for the freedmen of his brother, bequeathed to them certain vineyards by his will, with the following addition: "That they may have them in order to provide themselves with food." If he left them these vineyards instead of the support which he was obliged to provide, they should not be transferred under the terms of the trust, unless the heirs are freed from the obligations imposed by the will; for if this should fail to be done, and he should afterwards bring suit under the will, the heir could protect himself by an exception on the ground of fraud; that is to say, if the vineyards were not worth less than the amount furnished for support. The addition, "That they may have them in order to provide themselves with food," rather shows the reason for making the bequest, than an intention to establish an usufruct.

23.- PAULUS; *On Neratius, Book IV*.- If you are asked to educate someone, you can be compelled to furnish him with the necessities of life. Paulus: Why is the scope of a legacy providing for support more extensive where it is stated that clothing and lodging are included? This is not the case, for both are equal.

22.- VALENTE; *Fideicomisos, libro I*.- Cuando por fideicomiso se dejaron los alimentos no habiéndose añadido la cantidad, se ha de ver ante todo qué había solido darle el difunto, y después qué les haya dejado a los demás de la misma clase; y si no apareciere ni una, ni otra cosa, entonces se deberá establecer la cuantía con arreglo a las facultades del difunto, y a su cariño a aquel a quien se le hubiere dado el fideicomiso.

§ 1.- Uno, que debía los alimentos a los libertos de su hermano, había dejado en su testamento unas viñas con esta adición: «para que tengan con que alimentarse». Si hubiese dejado las viñas por los alimentos, no se las deberá dar por causa del fideicomiso de otro modo, sino si hubiesen librado de la obligación del testamento a los herederos, o, si se hubiese omitido esto, y después ejercitaran la acción del testamento, el heredero estará seguro con la excepción de dolo malo, por supuesto, si las viñas no valiesen menos que la estimación de los alimentos; pero aquella adición: «para que tengan con que alimentarse», corresponde más bien a la causa de prelegar, que no a la constitución del usufruto,

23.- PAULO; *Comentarios a Neracio, libro IV*.- Se te rogó, que educaras a uno; has de ser obligado a darle lo necesario para el sustento. Y dice Paulo: ¿porqué es más pleno el legado de los alimentos, donde se ha dicho que se comprende así el vestido, como la habitación? Antes bien, se han de igualar ambos.

TIT. II

DE AURO, ARGENTO, MUNDO,
ORNAMENTIS, UNGUENTIS, VESTE
VEL VESTIMENTIS, ET
STATUIS LEGATIS

1.- POMPONIUS; *libro VI, ad Sabinum*.- Si alii vestimenta, alii vestis muliebris separatim legata sit, detractis muliebribus et ei adsignatis, cui specialiter legata sunt, reliquum alteri debetur. Idem est, cum alteri mundus muliebris, alteri argentum omne legatum esset, de argento quod in mundo esset. Item si duae statuae marmoreae tibi et deinde omne marmor legatum esset, praeter duas nulla statua marmorea legata est tibi. Idem urbanis servis tibi legatis, si mihi dispensator legatus sit.

§ 1.- Cui certum pondus argenti dare heres iussus sit, ei pecuniam numeratam dando iure ipso liberatur, si in ea pecunia eadem aestimatio fuerit: quod ita verum est, si non certum genus argenti legatum sit.

2.- AFRICANUS; *libro II, Quaestionum*.- Qui tibi mandaverat, ut ornamenta in usum uxoris suae emeris, eidem uxori uti adsolet legavit quae eius causa parata erunt: tu deinde post mortem mandatoris ignorans eum decessisse emisti. Non debentur mulieri, quoniam ea verba ad mortis tempus referuntur. At si vivente testatore, muliere autem mortua emeris, non ineleganter dicetur inefficax hoc legatum esse, quando non possit vere dici eius causa paratum videri, quae prius decessit. Eadem dicenda erunt et si vivat quidem mulier, sed diverterit et quaeratur, an post emptam ei debeantur, quasi non videantur uxoris causa parata.

TITLE II

CONCERNING LEGACIES OF GOLD,
SILVER, ORNAMENTS, JEWELS,
PERFUMES, CLOTHING, TAPESTRY
AND STATUES

1.- POMPONIUS; *On Sabinus, Book VI*.- Where clothing in general is left to one person, and women's garments separately to another, the women's garments will be removed and given to the party to whom they were specially bequeathed, and the remainder will belong to the other. The same rule applies with reference to silver articles included in ornaments, where ornaments suitable for women are bequeathed to one person, and all silver articles are bequeathed to another. Likewise, where two marble statues are left to you, and afterwards all the marble belonging to the testator is left to another legatee, no marble statue, excepting those two, is left to you. The same rule applies where the urban slaves of a testator are bequeathed to you, and the steward of the testator is bequeathed to me.

§ 1.- Where an heir is directed to deliver a certain weight of silver to someone, he is discharged from liability by operation of law if he pays him money, provided that the money is of the same value as the silver; which opinion is correct, if a certain kind of silver was not bequeathed.

2.- AFRICANUS; *Questions, Book II*.- Where anyone directed you to purchase certain ornaments for the use of his wife, and he then, as is customary, left his wife everything which he had provided for her use; and you, after the death of the testator and while you were not aware that he was dead, make the purchase, the woman will not be entitled to the ornaments, since the words employed have reference to the time of the testator's death. If, however, you should make the purchase during the lifetime of the testator, but after the death of his wife, it may not improperly be held that the legacy will be void, since it cannot truly be maintained that the ornaments were provided for the use of one who is already dead. The same must be said in the case of a woman who is still

TÍTULO II

DE LOS LEGADOS DEL ORO, DE LA PLATA,
DE LOS OBJETOS DE TOCADOR, DE LOS
ADORNOS, DE LOS UNGÜENTOS, DEL
VESTIDO O DEL VESTUARIO, Y DE
LAS ESTATUAS.

1.- POMPONIO; *Comentarios a Sabino, libro VI*.- Si separadamente se le hubiera legado a uno el vestuario, y a otro los vestidos de mujer, separados los de la mujer, y asignados a aquel a quien especialmente se le legaron, se le debe al otro lo demás. Lo mismo es, si a uno se le hubiesen legado los objetos de tocador de mujer, y a otro toda la plata, respecto a la plata que en los objetos de tocador hubiese. Igualmente, si se te hubiesen legado dos estatuas de mármol, y después hubiese sido legado todo el mármol, no se te legó ninguna otra estatua de mármol además de las dos. Lo mismo, habiéndosete legado los esclavos urbanos, si a mi me hubiera sido legado el administrador.

§ 1.- El heredero a quien se le mandó que diera a uno cierta cantidad de plata, dándole a éste dinero contante, queda libre de derecho, si en este dinero hubiere el mismo importe; lo que es verdad de este modo, si no se hubiera legado cierto género de plata.

2.- AFRICANO; *Cuestiones, libro II*.- Uno, que te había encomendado que comprases adornos para uso de su mujer, le legó a la misma mujer, como es costumbre, las cosas que por causa de ella hubieren sido preparadas, y tú luego, después de la muerte del mandante, ignorando que éste había fallecido, las compraste; no se le deberán a la mujer, porque estas palabras se refieren al tiempo de la muerte. Mas si las hubieres comprado viviendo el testador, pero habiendo fallecido la mujer, no sin discreción se dirá que este legado es ineficaz, porque no se puede en verdad decir que se preparó algo por causa de la que ya antes había fallecido. Lo mismo se habrá de decir, también si ciertamente viviera la mujer, pero se hubiere divorciado, y se preguntase si se le deberán

3.- CELSUS; *libro XIX, Digestorum*.- Uxori legavit quae eius causa parata sunt et ante mortem divortit. Non deberi, quia adempta videantur, Proculus ait. Nimirum facti quaestio est: nam potest nec repudiatae adimere voluisse.

4.- PAULUS; *libro LIV, ad Edictum*.- Cum quidam libertum suum in Asiam misisset ad purpuras emendas et testamento uxori suae lanam purpuream legasset, pertinere ad eam, si quam purpuram vivo eo libertus emisisset, Servius respondit.

5.- AFRICANUS; *libro II, Quaestionum*.- Apud Fufidium quaestionum libro secundo ita scriptum est: si mulier mandaverit tibi, ut sibi uniones usus sui causa emeris, si tu post mortem eius, cum putares eam vivere, emeris, Atilicinus negat esse legatos ei, cui mulier ita legaverit: "ornamenta, quae mea causa parata sunt eruntve": non enim eius causa videri parata esse, quae iam mortua ea empti fuerint.

6.- MARCELLUS; *libro singulari Responsorum*.- Seia ab herede Publio Maevio ita legavit: "Antoniae Tertullae lego auri pondo tot et unionem cum hyacinthis": postea unionem solvit neque ullum mortis tempore inter ornamenta sua unionem reliquit. Quaero, an heres ex causa fideicommissi aestimationem rei, quae in hereditate non est, praestare debeat. Marcellus respondit non debere.

living, but has been divorced, when the question is asked whether she is entitled to what has been purchased after her divorce, as it does not appear to have been provided for her use as a wife.

3.- CELSUS; *Digest, Book XIX*.- A certain man left his wife everything which he had provided for her use, and obtained a divorce from her before his death. Proculus says that she will not be entitled to the property, because it appears that it was taken from her. This, however, is a question of fact, for even though he may have repudiated her, he could not have intended to deprive her of the legacy.

4.- PAULUS; *On the Edict, Book LIV*.- A certain individual sent his freedmen into Asia for the purpose of buying purple, and by his will bequeathed his purple wool to his wife. Servius gave it as his opinion that the goods which the freedman had purchased during the lifetime of the testator belonged to her.

5.- AFRICANUS; *Questions, Book II*.- The following is contained in the Second Book of Questions by Phuphidius: "If a woman should direct you to purchase pearls for her use, and you should do so after her death, but while you thought that she was still living," Atilicinus denies that the pearls were left to a person to whom the woman made the following bequest: "I bequeath all the jewels which have been or shall be obtained for my use," for they cannot be considered to have been obtained for her use as she was already dead at the time when the purchase was made.

6.- MARCELLUS; *Opinions*.- Seia charged her heir, Publius Maevius, with a bequest as follows: "I give and bequeath to Antonia Tertylla such-and-such a weight of gold, and my large pearls set with hyacinths." She afterwards disposed of the pearls, and at the time of her death did not leave any among her jewels. I ask whether the heir will, under the terms of the trust, be compelled to furnish the value of property which does not form part of the estate. Marcellus answers that he will not be required to do so.

las cosas compradas después; como si no se considerase que fueron preparadas por causa de la mujer.

3.- CELSO; *Digesto, libro XIX*.- Uno legó a su mujer lo que se preparó por causa de ésta, y se divorció antes de morir; dice Próculo, que no se debe, porque se considera revocado; en realidad la cuestión es de hecho, porque puede no haber querido revocárselo a la repudiada.

4.- PAULO; *Comentarios al Edicto, libro LIV*.- Habiendo mandado uno a su liberto al Asia para que comprase púrpuras, y habiéndole legado en el testamento a su mujer la lana de color de púrpura, respondió Servio, que, si en vida de él hubiese comprado el liberto alguna púrpura, le pertenecía a ella.

5.- AFRICANO; *Cuestiones, libro II*.- Se halla así escrito en Fufio en el libro segundo de las Cuestiones: si una mujer te hubiere encomendado que le comprases perlas para su uso, si las hubieres comprado después de su fallecimiento, creyendo que vivía, dice Atilicino, que no le fueron legadas a quien se las hubiere legado así: «los adornos que fueron o fueren preparados por mi causa»; porque no se considera que fueron preparados por causa de ella las cosas que ya muerta ella hubieren sido compradas.

6.- MARCELO; *Respuestas, libro Único*.- Seya legó así a cargo de su heredero Publio Mevio: «doy y lego a Antonia Tertila tantas libras de oro, y una perla con jacintos»; después dio la perla, y al tiempo de su muerte no dejó entre sus adornos ninguna perla; pregunto, si por causa del fideicomiso deberá entregar el heredero la estimación de cosa, que no se halla en la herencia. Marcelo respondió, que no debía.

§ 1.- Item quaero, si probari possit Seiam uniones et hyacinthos quosdam in aliam speciem ornamenti, quod postea pretiosius fecit additis aliis gemmis et margaritis, convertisse, an hos uniones vel hyacinthos petere possit et heres compellatur ornamento posteriori eximere et praestare. Marcellus respondit petere non posse: nam quid fieri potest, ut legatum vel fideicommissum durare existimetur, cum id, quod testamento dabatur, in sua specie non permanerit, nam quodammodo extinctum sit? ut interim omittam, quod etiam dissolutione ac permutatione tali voluntas quoque videatur mutata.

§ 2.- Lucius Titius testamento scripsit: "heredem meum volo fideique eius committo, ut in patriam meam faciat porticum publicam, in qua poni volo imagines argenteas, item marmoreas": quaero, an legatum valeat. Marcellus respondit valere et operis ceterorumque, quae ibi testator poni voluerit, legatum ad patriam pertinere intellegi: enim potuit aliquod civitati accedere ornamentum.

7.- PAULUS; *libro VIII, ad Plautium*.- Si ita esset legatum: "vestem meam, argentum meum damnas esto dare", id legatum videtur, quod testamenti tempore fuisset, quia praesens tempus semper intellegeretur, si aliud comprehensum non esset: nam cum dicit "vestem meam", "argentum meum", hac demonstratione "meum" praesens, non futurum tempus ostendit. Idem est et si quis ita legaverit "servos meos".

8.- PAULUS; *libro IX, ad Plautium*.- Plautius: mulier ita legavit: "quisquis mihi heres erit, titiae vestem meam mundum ornamentaque muliebria damnas esto dare". Cassius ait, si non appareret quid sensisset, omnem vestem secundum verba testamenti legatam videri. Paulus: idem Iavolenus scribit, quia verisimile est, inquit, testatricem tantum ornamentorum universitati derogasse, quibus

§ 1.- I also ask, if it can be proved that Seia converted her necklace of pearls and hyacinths into some other kind of ornament, which afterwards became more valuable through the addition of other jewels and small pearls, whether the legatee can demand the said pearls and hyacinths; and whether the heir will be compelled to remove them from the other jewelry and deliver them. Marcellus answers that the demand cannot be made. For how can a legacy or a trust be held to exist when what is given by a will does not retain its original character? For the bequest is, as it were, extinguished, so that in the meantime it is lost sight of, and hence by this dismemberment and change the intention of the testatrix also appears to have been altered.

§ 2.- Lucius Titius made the following provision in his will, "I charge my heir to erect a public portico in my native town, in which I desire my silver and marble statues to be placed." I ask whether the legacy is valid. Marcellus answers that it is, and that the bequest of the labor, and of the other things which the testator desired to be placed there, will belong to the municipality, for he understood that the city would receive some adornment therefrom.

7.- PAULUS; *On Plautius, Book VIII*.- When a bequest is made as follows, "Let my heir be charged to give my clothing and silver plate," whatever belonged to the testator when he executed his will will be considered to have been bequeathed; for the reason that the present time is always understood to have been meant, where something else is not included; for when he says, "My clothing and silver plate," by the pronoun "my" he indicates the present and not the future. The same rule will apply where anyone makes a bequest of "My slaves."

8.- THE SAME; *On Plautius, Book IX*.- Plautius: A woman made a bequest as follows: "I charge my heir, whoever he may be, to give my clothes, my toilet articles, and my feminine ornaments to Titia." Cassius says, if it cannot be ascertained what the intention of the testatrix was, that all her clothing will be considered to have been bequeathed, according to the terms of the will. Paulus: Javolenus says the same

§ 1.- También pregunto, si, pudiéndose probar que Seya convirtió las perlas y algunos jacintos en otra especie de adorno, que después hizo de más precio habiéndole añadido otras piedras y margaritas, podrá pedir estas perlas o jacintos, y será obligado el heredero a quitarlos del adorno posterior y a darlos. Marcelo respondió, que no podía pedirlos; porque ¿qué se puede hacer para que se estime que subsiste el legado o el fideicomiso, no habiendo permanecido en su estado lo que se daba en el testamento, -pues en cierto modo se extinguió, ya que ahora omite, que además se considera también cambiada la voluntad con tales disolución y permuta-?

§ 2.- Lucio Ticio escribió así -en su testamento: «quiero que mi heredero, y a su fidelidad lo encomiendo, haga en mi patria un pórtico público, en el que quiero que se pongan estatuas de plata, y también de mármol»; pregunto, si será válido el legado. Marcelo respondió, que era válido, y que pertenece a la patria el legado con las obras y las demás cosas que el testador hubiere querido que se pusieran allí; porque se pudo entender que se añade a la ciudad algún ornato.

7.- PAULO; *Comentarios a Plaucio, libro VIII*.- Si así se hubiese hecho un legado: «esté condenado a dar mi vestido, y mi plata», se considera legado lo que hubiese habido al tiempo del testamento, porque se entendería siempre el tiempo presente, si no se hubiese expresado otro; porque cuando dice: «mi vestido, y mi plata», con esta indicación «mi» demuestra el tiempo presente, no el futuro. Lo mismo es, también si uno hubiere legado de este modo: «mis esclavos».

8.- EL MISMO; *Comentarios a Plaucio, libro IX*.- Dice Plaucio: una mujer legó así: «cualquiera que fuere mi heredero esté condenado a dar a Ticia mi vestido, los objetos de tocador, y los adornos de mujer»; dice Cassio, que, si no apareciera qué hubiese querido decir, se consideraban legados, según las palabras del testamento, todos los vestidos. Y añade Paulo: lo mismo escribe Javoleno, porque es

significationem muliebrium accommodasset: accedere eo, quod illa demonstratio "muliebria" neque vesti neque mundo applicari salva ratione recti sermonis potest.

9.- MODESTINUS; *libro IX, Regularum*.- Cum certum auri vel argenti pondus legatum est, si non species designata sit, non materia, sed pretium praesentis temporis praestari debet.

10.- POMPONIUS; *libro V, ad Quintum Mucium*.- Quintus Mucius ait: si pater familias uxori vas aut vestimentum aut quippiam aliud ita legavit "quod eius causa emptum paratumve esset", id videtur legasse, quod magis illius quam communis usus causa paratum esset. Pomponius: sed hoc verum est non solum, si ipsius viri et uxoris communis usus, sed etiam si liberorum eius aut alterius alicuius communis usus fuerit: id enim videtur demonstrasse, quod proprio usui uxoris comparatum sit.

Sed quod Quintus Mucius demonstrat "vas aut vestimentum aut quid aliud", efficit, ut falsa sint quae subieciimus: multum enim interest, generaliter an specialiter legentur haec. Nam si generaliter, veluti ita "quae uxoris causa comparata sunt", vera est illius definitio: si vero ita scriptum fuerit "vestem illam purpuram", ut certa demonstraret, licet adiectum sit "quae eius causa emptae paratae essent", licet neque emptae neque paratae neque in usum ei data sint, legatum omnimodo valet, quia certo corpore legato demonstratio falsa posita non peremit legatum. Veluti si ita sit scriptum: "stichum, quem ex venditione titii emi": nam si neque emit aut ex alia venditione emit, legatum nihilo minus valet.

thing, because, as he remarks, it is probable that the testatrix intended to limit her bequest to jewels, to which she gave the designation "feminine ornaments." It may be said, in addition, that the term "feminine" is not, in accordance with the proper manner of speaking, applicable to either clothing or toilet articles.

9.- MODESTINUS; *Rules, Book IX*.- Where a certain weight of gold or silver is bequeathed, and the kind is not indicated, not the material itself, but its value at the present time must be delivered.

10.- POMPONIUS; *On Quintus Mucius, Book V*.- Quintus Mucius says that where the head of a household bequeaths to his wife vases, clothing, or anything else whatsoever, as follows, "Which has been purchased and provided for her use," he is held to have bequeathed what was obtained for her individually rather than for their common use. Pomponius: This is true, not only where the articles were procured for the use of both husband and wife, but also when this was done for that of their children, or anyone else; as such a provision would seem to indicate that the property was acquired for the private use of the wife herself.

But when Quintus Mucius stated that vases, clothing, or anything else is included, the falsity of what we have stated appears to be established; since, as a rule, there is a great deal of difference where articles of this kind are generally or specially bequeathed, for if they are bequeathed in general terms (as, for instance, "Which have been procured for the use of my wife"), his explanation is correct. If, however, the subject of the bequest should be described as follows, "Such-and-such a purple garment," by which a certain garment was indicated, even though the words, "Which I have purchased or intended for her use," were added; for the reason that it was neither purchased nor intended for, nor given to her for her use, the legacy will undoubtedly be valid, because when a certain article is left, a false description of the same does not annul the legacy; just as if the following had been written, "Stichus, whom I purchased at the sale of Titius;" for if the testator did not purchase him at all, or bought him at

verosímil, dice, que la testadora solamente puso limitación a la totalidad de los adornos, a los que aplicó la denominación de mujer; y que a esto se añade, que aquella indicación, «de mujer», no se puede aplicar, quedando a salvo la corrección del lenguaje, ni al vestido, ni a los objetos de tocador.

9.- MODESTINO; *Reglas, libro IX*.- Cuando se legó cierto peso de oro o de plata, si no se hubiera designado la especie, no se debe entregar la materia, sino el precio del tiempo presente.

10.- POMPONIO; *Comentarios a Quinto Mucio, libro V*.- Dice Quinto Mucio: si el padre de familia legó a su mujer un vaso, o un vestido, u otra cualquier cosa de este modo: «lo que por causa de ella se hubiese comprado o preparado», se considera que legó lo que se hubiese preparado más bien por causa de ella que por causa de uso común. Y dice Pomponio: pero esto es verdad, no solamente si el uso hubiere sido común del mismo marido y de la mujer, sino también si hubiere sido común de sus hijos, o de otra cualquier persona; porque se considera que designó lo que se hubiera comprado para uso propio de la mujer.

Pero lo que Quinto Mucio indica, un vaso, o un vestido, u otra cualquier cosa, hace que sea falso lo que hemos dicho; porque hay mucha diferencia entre que estas cosas sean legadas general, o especialmente; porque si generalmente, como así: «las cosas que se compraron por causa de la mujer», es verdadera la definición de aquel; pero si se hubiere escrito así: «aquel vestido de púrpura», para designar cosas ciertas aunque se haya añadido: «que hubiesen sido compradas o preparadas por causa de ella», es de todos modos válido el legado, aun cuando las cosas no hayan sido ni compradas, ni preparadas, ni dadas para uso de ella, porque, legada una cosa cierta, la falsa indicación consignada no extingue el legado, como si se hubiese escrito as: «a Stico, a quien compró por venta de Ticio»; porque si no lo compró, o si lo compró en virtud de otra venta, es, sin embargo, válido el legado.

Plane si ita legatum fuerit "vas aut vestimenta, aut quae uxoris causa parata sunt", tunc aeque erit vera Quinti Muci sententia: quo casu sciendum est, etiam si alienae res hae fuerint, quas putavit testator suas esse, heredem teneri, ut eas det.

11.- PROCULUS; *libro V, Epistolarum*.- Si quis legaverit aurum gemmas margaritas quae in eo auro essent, etiam id aurum, cui neque gemmae neque margaritae inessent, legasse videtur.

12.- PAPINIANUS, *libro XVII.- Quaestionum*.- Si imaginem legatam heres derasit et tabulam solvit, potest dici actionem ex testamento durare, quia legatum imaginis, non tabulae fuit.

13.- SCAEVOLA; *libro XV, Digestorum*.- Uxori quis legavit his verbis: "mundum muliebrem omnem, ornamenta et quidquid vivus dedi donavi eius causa comparavi confeci, id omne dari volo": quaesitum est, an carrucha dormitoria cum mulis, cum semper uxor usa sit, ei debeatur. respondit, si eius usus causa habita esset, deberi. Idem quaesivit, an ex eadem clausula vestis, quam ancillis vel lecticariis eiusdem uxoris suae comparaverat vel fecerat, praestanda esset. Respondit praestandam.

14.- POMPONIUS; *libro V, ad Sabinum*.- Si statuam legavero et postea ex alia statua brachium ei adiecero, omnimodo statua a legatario vindicari potest.

some other sale, the legacy will, nevertheless, be valid.

It is clear that if the legacy was bequeathed as follows, "The vases, or clothing, or articles, intended for the use of my wife," then the opinion of Quintus Mucius will also be correct in this instance. It must be observed that even if the articles mentioned belonged to another, but the testator was under the impression that they were his, the heir will be obliged to furnish them.

11.- PROCULUS; *Epistles, Book V*.- Where anyone bequeaths gold, silver, and pearls which are set in the gold, gold in which neither jewels nor pearls are set will be held to have been bequeathed.

12.- PAPINIANUS; *Questions, Book XVII*.- If the heir should deface a painting which was bequeathed, and deliver the board on which it was painted, it may be said that an action will still lie under the will, because the legacy consisted of a painting and not of a board.

13.- SCAEVOLA; *Digest, Book XV*.- A certain man made a bequest to his wife as follows: "I wish all the toilet-articles and jewels, and whatever else I have given or donated to my wife, or acquired, or made for her use during my lifetime, to be given to her." The question arose whether a four-wheeled carriage for sleeping purposes, together with its mules, which the wife had always made use of, was included in the legacy. The answer was that if it had been acquired for her use, she was entitled to it. It was also asked whether, under the same clause, the garments which the testator had purchased for the female slaves or the litter-bearers of his wife should also be given to her. The answer was that they should be given.

14.- POMPONIUS; *On Sabinus, Book V*.- If I bequeath a statue, and afterwards add an arm to it taken from another, the entire statue can be claimed by the legatee.

Pero si se hubiere legado así: «los vasos», o «los vestidos», o «las cosas que se prepararon por causa de la mujer», entonces será igualmente verdadera la opinión de Quinto Mucio; en cuyo caso se ha de saber, que aunque hubieren sido ajenas estas cosas, que el testador creyó suyas, el heredero está obligado a darlas.

11.- PRÓCULO; *Epístolas, libro V*.- Si alguno hubiere legado el oro, las piedras preciosas, y las margaritas, que hubiese en aquel oro, se considera que legó también el oro en que no hubiese piedras preciosas, ni margaritas.

12.- PAPINIANO; *Cuestiones, libro XVII*.- Si el heredero raspó un retrato legado, y dio la tabla, se puede decir que subsiste la acción de testamento, porque legado fue del retrato, y no de la tabla.

13.- SCEVOLA; *Digesto, libro XV*.- Uno le legó a su mujer en estos términos: «todos los objetos de tocador de mujer, los adornos, y lo que en vida le dí y le doné, compré por causa de ella, e hice todo esto quiero que se le dé»; se preguntó, si se le deberá la carroza de dormir con sus mulas, puesto que de ella usó siempre la mujer. Respondió, que se debía, si hubiese sido tenuta por causa de uso de ella. El mismo preguntó, si en virtud de esta misma cláusula se habrían de dar los vestidos que había comprado y hecho para las esclavas o los mozos de litera de su misma mujer. Respondió, que se habían de dar.

14.- POMPONIO; *Comentarios a Sabino, libro V*.- Si yo hubiere legado una estatua, y después le hubiere añadido un brazo de otra estatua, de todos modos puede ser reivindicada la estatua por el legatario.

15.- SCAEVOLA; *libro XV, Digestorum*.- Species auri et argenti seiae legavit et ab ea petit in haec verba: "a te, Seia, peto, ut quidquid tibi specialiter in auro argento legavi, id cum morieris reddas restituas illi et illi vernis meis: quarum rerum usus fructus dum vives tibi sufficiet": quaesitum est, an usus fructus auri et argenti solus legatariae debeatur. Respondit verbis quae proponerentur proprietatem legatam addito onere fideicommissi.

16.- IDEM; *libro XVIII, Digestorum*.- Filiam in potestate patris manentem mater scripsit heredem eique patrem Maevium substituit et ita scripsit: "quisquis mihi heres erit, fidei eius committo, uti ornamenta mea omnia aurum argentum vestimenta, quibus ego usa sum, ne veneant et filiae meae reserventur": quaesitum est, cum filia recusante pater ex substitutione heres exstisset et intestato decessisset, filia autem bonis eius abstinuerat, an fideicommissum petere possit. Respondit secundum ea quae proponerentur videri patris utiliter fidei commissum. Claudius: quoniam verbo servandi, quod scriptum est, videri in id tempus dilatum fideicommissum, quo sui iuris futurus esset is cui dabatur.

17.- ULPIANUS; *libro XXI, ad Sabinum*.- Si gemma ex anulo legetur vel aliae materiae iunctae vel emblemata, recte legantur et separantur et praestanda sunt.

18.- SCAEVOLA; *libro XXII, Digestorum*.- Qui uxori suae legaverat bonorum suorum decimam et mancipia et species argenti quas expresserat, eidem anulos et vestem reddi ab heredibus petit, quasi propria uxoris fuissent: quaesitum est, si uxoris non fuerint, an praestari ex causa legati deberent. respondit legandi animo dedisse ea videri, nisi contrarium ab herede approbetur.

15.- SCAEVOLA; *Digest, Book XV*.- A testator bequeathed a certain kind of gold and silver to Seia, and made the following request of her: "I ask you, Seia, at the time of my death, to deliver any gold or silver which I have specifically bequeathed to you, to So-and-So, my slaves, and the usufruct of said property will be sufficient for you while you live." The question arose whether the usufruct alone of the gold and silver should be given to the legatee. The answer was that, in accordance with the facts stated, the ownership of the articles was also bequeathed under the terms of the trust.

16.- THE SAME; *Digest, Book XVIII*.- A mother appointed her daughter her heir while she was still under paternal control, substituted her father Maevius for her, and made the following provision in her will: "Whoever my heir may be, I charge him not to sell any of my jewelry, or my gold or silver-ware, or the clothing, which I make use of; but let them be kept for my daughter." The daughter having refused to accept the legacy, and the father, who was the heir under the substitution, having died intestate, the question arose whether she could still demand the execution of the trust. The answer was that, according to the facts stated, it appeared that the execution of the trust legally devolved upon the father's successor. Claudius: Because, by the term "to keep," which was used by the testatrix, the trust seems to have been deferred until the party for whose benefit it was created should be released from paternal control.

17.- ULPIANUS; *On Sabinus, Book XXI*.- Where a jewel set in a ring, or any other ornaments or articles which are joined together are bequeathed, this is in accordance with law, and they should be separated and delivered to the legatee.

18.- SCAEVOLA; *Digest, Book XXII*.- A testator left the tenth part of his estate, his slaves, and certain silver articles which he specified, to his wife, and he charged his heirs to give her his rings and his clothing, just as if they were her own private property. If these things did not actually belong to her, the question arose whether she would be entitled to them by virtue of the legacy. The answer was that it

15.- SCEVOLA; *Digesto, libro XV*.- Uno legó a Seya ciertas cosas de oro y plata, y le rogó en estos términos: «te pido, Seya, que todo lo que especialmente te legué en oro o plata, lo devuelvas y restituyas, cuando mueras, a tal y tal esclavos míos, nacidos en mi casa; el usufructo de cuyas cosas te bastará mientras vivas»; se preguntó, si se le deberá a la legataria el solo usufructo del oro y de la plata. Respondió, que con las palabras que se exponían, se legó la propiedad habiéndose añadido la carga del fideicomiso.

16.- EL MISMO; *Digesto, libro XVIII*.- Una madre instituyó heredera a una hija que permanecía bajo la potestad de su padre, y le substituyó a su padre Mevio, y escribió así: «cualquiera que fuere mi heredero, encomiendo a su fidelidad, que no se vendan ningunos adornos míos, el oro, la plata y los vestidos, que yo usé, y que se reserven para mi hija»; se preguntó, si, habiendo la hija rehusado la herencia, hubiese quedado el padre heredero en virtud de la substitución, y hubiese fallecido intestado, pero habiéndose abstenido de sus bienes la hija, podría pedir el fideicomiso. Respondió, que, según lo que se exponía, se consideraba que se encargó útilmente el fideicomiso al padre; y dice Claudio: porque con las palabras se reserven, que se escribieron, se considera que el fideicomiso fue referido al tiempo en que hubiese de ser de propio derecho aquel a quien se le daba.

17.- ULPIANO; *Comentarios a Sabino, libro XXI*.- Si se legase la piedra de un anillo, u otras materias adheridas, o adornos embutidos, se legán válidamente, y se separan, y se han de dar.

18.- SCÉVOLA; *Digesto, libro XXII*.- Uno que había legado a su mujer la décima parte de sus propios bienes, y esclavos, y los objetos de plata, que había expresado, les pidió a los herederos que le diesen a la misma los anillos y el vestido, como si hubiesen sido propios de la mujer; se preguntó, si se deberían dar por causa del legado, si no hubieren sido de la mujer. Respondió, que se considera que los dio

§ 1.- Idem testator fidei commisit uxoris, ut quidquid ad eam ex testamento eius pervenisset, alumno communi restitueret: quaesitum est, an etiam eas res, quas proprias uxoris suae fuisse testator sciat eique reddi praecepit, alumno praestare debeat. respondit, si propriae fuissent, non debere, si legato acquirerentur, debere.

§ 2.- Mulier testamento et postea codicillis multas species vestis argenti, quas vel ipsa se confecisse vel habere significavit, specialiter per fideicommissum reliquit: quaesitum est, an non aliae legatariis cederent, quam quae in hereditate inventae essent. respondit eas cedere, quae inventae essent.

19.- ULPIANUS; *libro XX, ad Sabinum*.- Cum aurum vel argentum legatum est, quidquid auri argentique relictum sit, legato continetur sive factum sive infectum: pecuniam autem signatam placet eo legato non contineri.

§ 1.- Proinde si certum pondus auri sit legatum vel argenti, magis quantitas legata videtur, nec ex vasis tanget.

§ 2.- Sed si argenti facti pondo centum sint legata, ex facto argento debebitur legatum. Unde est quaesitum apud Celsum, an et vascula possit separare: et scripsit vascula non separaturum, licet ei optio fuerit relicta.

§ 3.- Idem Celsus libro nono decimo Quaestionum quaerit, si centum pondo argenti fuerint relicta, an replumbari debeant, ut sic appendantur. Et Proculus et Celsus aiunt exempto plumbo appendi debere: nam et emptoribus replumbatae adsignantur et in rationes argenti pondus sic defertur: quae sententia habet rationem.

appeared that the testator intended to bequeath them to her, unless the contrary could be proved by the heir.

§ 1.- The same testator, under the terms of a trust, charged his wife to transfer to their common foster-child whatever came into her hands by his will. The question arose whether the heir would be compelled to deliver to the said foster-child any property which the testator knew belonged to his wife, and which he directed to be given to her. The answer was that, if the articles were her own property, the heir would not be required to deliver them, but if they were acquired by virtue of the legacy he would be compelled to give them up.

§ 2.- A certain woman under a trust inserted in her will and afterwards by a codicil, left specially several kinds of clothing and silverware which she stated that she had made herself, or had in her possession. The question arose whether any other articles not found among the assets of the estate would belong to the legatees. The answer was that only those which were found there would belong to them.

19.- ULPIANUS; *On Sabinus, Book XX*.- When gold or silver is bequeathed, any gold or silver which was left is included in the legacy, whether manufactured or not. It is, however, well established that money, which is coined, is not included in the legacy.

§ 1.- Hence, if a certain weight of gold or silver is bequeathed, the amount of the same is considered to have been left in bulk, and the legacy to have no reference to vases.

§ 2.- If, however, a hundred weight of manufactured silver is bequeathed, the legacy is due in manufactured silver. Wherefore it was asked by Celsus whether small vessels should be excluded. He was of the opinion that they could not be excluded, even if the choice of them had been left to the heir.

§ 3.- Celsus, in the Nineteenth Book of Questions, also asks where a hundred weight of silver is bequeathed, whether the leaden joints must be unsoldered, so that the silver can be weighed. Both Proculus and Celsus say that it must be weighed after the removal of the lead, for silver is delivered to purchasers unsoldered, and the weight of the same is taken into account; which opinion is reasonable.

con ánimo de legarlos, a no ser que por el heredero se probase lo contrario.

§ 1.- El mismo testador encomendó a la fidelidad de su mujer, que restituyese a un alumno común de ambos todo lo que por el testamento de él hubiese ido a la misma; se preguntó, si deberá entregale al alumno también aquellas cosas que el testador supiese que eran propias de su mujer, y que mandó le fuesen restituidas. Respondió, que si hubiesen sido propias no debía darlas, y que debía, si fuesen adquiridas por legado.

§ 2.- Una mujer dejó especialmente por fideicomiso en testamento, y después en codicilos, muchas clases de vestidos y de objetos de plata, que indicó que ella misma se hizo, o tenía; se preguntó, si no les pertenecerían a los legatarios otras sino las que hubiesen sido halladas en la herencia. Respondió, que les pertenecían las que hubiesen sido halladas.

19.- ULPIANO; *Comentarios a Sabino, libro XX*.- Cuando se legó el oro o la plata, se comprende en el legado todo el oro y toda la plata que se haya legado, ora labrado, ora por labrar; pero está establecido que no se comprende en este legado el dinero acuñado.

§ 1.- Por consiguiente, si se hubiera legado cierto peso de oro, o de plata, mas bien se considera legada una cantidad, y que no tocará a los vasos.

§ 2.- Pero si se hubieran legado cien libras de plata labrada, el legado se deberá de la plata labrada. Por lo cual se preguntó Celso, si podría separar también los vasos pequeños. Y escribió, que no habrá de separar los vasos pequeños, aunque a él se le hubiere dejado la opción.

§ 3.- Pregunta el mismo Celso en el libro décimo noveno de las Cuestiones, si habiéndose dejado cien libras de plata se deberán desoldar, para pesarlas de este modo. Y dicen Próculo y Celso, que deben ser pesadas habiéndoseles quitado el plomo; porque también a los compradores se les dan sin el plomo, y así. se pone en las cuentas el peso de la plata; cuya opinión tiene fundamento.

§ 4.- Plane si cui vascula argentea, ut puta lances quadratae sint legatae, etiam plumbum, quo continentur, eum sequetur.

§ 5.- Simili modo quaeritur, si cui argentum legetur, an emblemata aurea quae in eo sunt eum sequantur. Et Pomponius libro quinto ex Sabino distinguit multum interesse, certum pondus ei argenti facti legetur an vero argentum factum: si pondus, non contineri, si argentum factum, contineri, quoniam argento cedit, quod ad speciem argenti iunctum est, quemadmodum clavi aurei et purpurae pars sunt vestimentorum. Idem Pomponius libris epistularum, etsi non sunt clavi vestimentis consuti, tamen veste legata contineri.

§ 6.- Idem Celsus libro nono decimo Digestorum, Commentariorum septimo scribit auro legato ea, quae inaurata sunt, non deberi, nec aurea emblemata, quae in absidibus argenteis sint.

§ 7.- An autem auri appellatione anuli aurei contineantur, quaeritur: et Quintus Saturninus libro decimo ad Edictum scribit contineri.

§ 8.- Lectum plane argenteum vel si qua alia supellex argentea fuit, argenti appellatione non continetur, si numero argenti habita non est, ut in iunctura argentea scio me dixisse, quod non in argentario pater familias reponebat. Sed nec candelabra nec lucernae argenteae vel sigilla, quae in domo reposita sunt, vel imagines argenteae argenti appellatione continebuntur, nec speculum vel parieti adfixum vel etiam quod mulier mundi causa habuit, si modo non in argenti numero habita sunt.

§ 9.- Argento facto legato Quintus Mucius ait vasa argentea contineri, veluti parapsidas acetabula trullas pelves et his similia, non tamen quae supellectilis sunt.

§ 10.- Sed cui vasa sint legata, non solum ea continentur, quae aliquid in se recipiant edendi bibendique causa paratum, sed et quae aliquid sustineant:

§ 4.- It is clear that where small silver vessels, for instance, square plates, are bequeathed, the lead with which they are soldered goes with them.

§ 5.- Likewise, where silver-ware is bequeathed, the question arises whether any gold ornamentation united with it is included. Pomponius, in the Fifth Book on Sabinus, says that it makes a great deal of difference whether a certain weight of manufactured silver is bequeathed to him, or merely manufactured silver. If a certain weight of silver is bequeathed, it will not be included; if manufactured silver is bequeathed, it will be included, as anything united with any kind of silver-ware is, as it were, an accessory to the same; just as gold braid and purple form part of clothing. Pomponius, in the Books of the Epistles, says that braid is included in a legacy of clothing, even if it is not sewed to it.

§ 6.- Celsus also states, in the Nineteenth Book of the Digest and the Seventh of the Commentaries, that where gold is bequeathed, neither articles which are gilded, nor gold ornamentation on silver plate will be due.

§ 7.- Are gold rings included under the term "gold?" is asked. Quintus Saturninus says, in the Tenth Book on the Edict, that they are included.

§ 8.- It is evident that a silver bed is not included under the term silver-ware, nor any other silver furniture, if the testator did not consider it as such. I know that I decided that this was the case with reference to a silver clasp, because the head of the household did not regard it as part of his silver-ware. And, neither can candelabra, nor silver lamps, nor small images kept in the house, nor silver statues, be included under the term "silver-ware." Nor are mirrors attached to walls and which women use for their toilet included, provided they do not consider them as part of their silver-ware.

§ 9.- Where a bequest of silver-ware is made, Quintus Mucius says that silver vessels are included; as, for example, chafing dishes, oil-pots, bowls, basins, and other utensils of this kind which, however, are not classed as furniture.

§ 10.- Where vases are bequeathed to anyone, not only those are included which are intended for eating and drinking, but also such as are used to support

§ 4.- Pero si a alguno se le hubieran legado vasos de plata, por ejemplo, las fuentes cuadradas le corresponderá también el plomo con que se forman.

§ 5.- Del mismo modo se pregunta, si le pertenecerán a aquel a quien se legó la plata, los adornos de oro que hay en ella. Y Pomponio en el libro quinto hace con Sabino la distinción, de que hay mucha diferencia, si se le lega cierto peso de plata labrada, o la plata labrada; si cierto peso, no se contiene, y si la plata labrada, se comprende, porque cede a la plata lo que se unió al objeto de plata, así como los botones de oro y de púrpura son parte de los vestidos; y el mismo Pomponio dice, en sus libros de Epístolas, que, aunque no estén cosidos los botones a los vestidos, se comprenden, sin embargo, en el vestido legado.

§ 6.- Escribe el mismo Celso en el libro décimo noveno del Digesto, séptimo de los Comentarios, que legado el oro no se deben las cosas que son doradas, ni los adornos de oro que hay en los platos de plata.

§ 7.- Pero se pregunta, si con la denominación de oro se comprenderán los anillos de oro; y escribe Quinto Saturnino en el libro décimo de sus Comentarios al Edicto, que se comprenden.

§ 8.- Pero la cama de plata, u otro cualquier objeto de plata que hubo en el ajuar, no se comprende con la denominación de plata, si no fue tenida en el número de las cosas de plata, como recuerdo haber dicho respecto al arnés de plata, porque el padre de familia no lo colocaba en el armario de la plata. Pero tampoco se comprenderán con la denominación de plata ni los candelabros, ni las lámparas de plata, o las estatuas que se hallan colocadas en la casa, o las imágenes de plata; ni el espejo, o fijo en la pared, o aun el que tuvo la mujer para su tocador, si es que no fueron tenidos en el número de las cosas de plata.

§ 9.- Dice Quinto Mucio, que en el legado de plata labrada, se comprenden los vasos de plata, como los platos ovalados, las vinagreras, las garrafas, las fuentes, y otras cosas semejantes a estas; pero no las que son del ajuar.

§ 10.- Pero si a uno se le hubieran legado los vasos, se comprenderán no solamente las cosas que en sí reciban algo preparado para comer y beber, sino

Et ideo scutellas vel promulsidaria contineri. Repositoria quoque continebuntur: nam vasorum appellatio generalis est, dicimus vasa vinaria et navalia.

§ 11.- Infecti autem argenti appellatio rudem materiam continet, id est non factam. Quid ergo si coeptum sit argentum fabricari? nondum perfectum utrum facti an infecti appellatione contineatur, dubitari potest: sed puto magis facti. certe si iam erat factum, sed caelabatur, facti appellatione continebitur. An et caelati continebitur, quod caelari coepit? et puto contineri, si cui forte caelatum sit argentum legatum.

§ 12.- Si cui escarium argentum legatum sit, id solum debetur, quod ad epulandum in ministerio habuit, id est ad esum et potum. Unde de aquiminario dubitatum est: et puto contineri, nam et hoc propter escam paratur. Certe si caccabos argenteos habebat vel miliarium argenteum vel sartaginem vel aliud vas ad coquendum, dubitari poterit, an escario contineatur. et haec magis cocinatorii instrumenti sunt.

§ 13.- Perveniamus et ad gemmas inclusas argento auroque. Et ait Sabinus auro argentove cedere: ei enim cedit, cuius maior est species. Quod recte expressit: semper enim cum quaerimus, quid cui cedat, illud spectamus, quid cuius rei ornandae causa adhibetur, ut accessio cedat principali. cedent igitur gemmae, fialis vel lancibus inclusae, auro argentove.

§ 14.- Sed et in coronis mensarum gemmae coronis cedent et hae mensis.

something, as, for instance, saucers and trays. The sideboards in which they are kept are also included, for the term "vases" is a general one, by which we designate vessels to hold wine as well as those employed for refrigerating purposes.

§ 11.- The expression "unmanufactured silver," includes raw material, that is to say, such as has not been worked up. But what if some labor has been expended on the silver, but it has not yet been completed? There might be some doubt in this case whether or not it would come under the term "unmanufactured," but I think that the term "manufactured silver" will be more applicable. It would certainly be manufactured, and be included under that designation, if it was in the hands of the goldsmith to be adorned with gold. Where the gold ornamentation has been begun, should it be included under the term adorned with gold? I think it should be, if the silver ware was bequeathed, and the gold ornamentation had not been finished.

§ 12.- Where a bequest is made of silver-ware for the table, that only will be due to the legatee which the testator included in his own table service, that is to say such as he used for eating and drinking. Hence, there is some doubt concerning the basin for washing the hands; still, I think it would be included, because it has reference to the service of the table. It is certain that, if the testator had silver pots or caldrons, or kitchen utensils, or any other articles used for cooking purposes, it may be doubted whether these will be included in the legacy. It is my opinion that such things rather belong to the equipment of the kitchen.

§ 13.- Let us now discuss jewels set in gold and silver. Sabinus says that they are accessory to the gold and silver, as smaller things are accessory to those that are greater. This is correctly stated, for as we are sometimes at a loss to determine which of two articles is accessory, we must consider which one of them is used for the purpose of ornamenting the other, as the accessory follows the principal. Therefore, jewels inserted in drinking cups, or in gold or silver plates, are accessories to the same.

§ 14.- So far as the crowns of tables are concerned, their jewels are accessory to the crowns, and the latter are accessory to the tables.

también las que sustenten alguna cosa, y por lo tanto se comprenden los platillos para copas o para los entrantes. También se comprenderán los portaviandas, porque la denominación de vasos es general; pues decimos vasos para vino y de las naves.

§ 11.- Pero la denominación de plata sin labrar comprende la materia en bruto, esto es, no labrada. Luego ¿qué se dirá, si se hubiere comenzado a labrar la plata, y aún no se hubiere terminado? Se puede dudar si se comprenderá con la denominación de labrada, o con la de sin labrar; pero creo que más bien con la de labrada. Y a la verdad, si ya había sido labrada, pero se la cincelaba, se comprenderá con la denominación de labrada; pero ¿se comprenderá también en la de cincelada la que se comenzó a cincelar? Y opino, que se comprende, si acaso a alguno se le legó la plata cincelada.

§ 12.- Si a uno se le hubiera legado la plata de comer, se comprenderá aquella sola que tuvo en uso para dar banquetes, esto es, para la comida y la bebida. Por lo cual se dudó respecto del aguamanil; y opino que se comprende, porque también este se prepara por causa de la comida. Y ciertamente, si tenía ollas de plata, o caldera de plata, o sartén, u otra vasija para cocer, se podrá dudar si se comprenderá en lo que sirve para la comida. Y estas cosas son más bien utensilios de cocina.

§ 13.- Hablemos también de las piedras preciosas engastadas en plata y oro; y dice Sabino, que ceden al oro o a la plata, porque una cosa cede a la que es de mayor tamaño. Lo que esta perfectamente expresado; porque cuando preguntamos que cosa cede a otra, miramos siempre qué cosa se agrega para adornar otra cosa, a fin de que la accesión ceda a lo principal; cederán, pues, las piedras preciosas a las copas o a los platos, engastadas en oro o plata.

§ 14.- Pero también, en cuanto a las coronas de las mesas, las piedras preciosas cederán a las coronas, y estas a las mesas.

§ 15.- In margaritis quoque et auro idem est: nam si margaritae auri ornandi gratia adhibitae sunt, auro cedunt, si contra, aurum margaritis cedit.

§ 16.- Idem et in gemmis anulis inclusis.

§ 17.- Gemmae autem sunt perlucidae materiae, quas, ut refert Sabinus libris ad Vitellium, servius a lapillis eo distinguebat, quod gemmae essent perlucidae materiae, velut smaragdi chrysolithi amethysti, lapilli autem contrariae superioribus naturae, ut obsidiani, veientani.

§ 18.- Margaritae autem nec gemmis nec lapillis contineri satis constitisse ibidem sabinus ait, quia concha apud rubrum mare et crescit et coalescit.

§ 19.- Murrina autem vasa in gemmis non esse cassius scribit.

§ 20.- Auro legato vasa aurea continentur et gemmis gemmea vasa. Secundum haec sive gemmae sint in aureis vasis sive in argenteis, auro argentove cedent, quoniam hoc spectamus, quae res cuius rei ornandae causa fuerit adhibita, non quae sit pretiosior.

20.- PAULUS; *libro III, ad Sabinum*.- Si ut habilius gemmae geri possint, inclusae auro fuerint, tum aurum gemmis dicimus cedere.

21.- POMPONIUS; *libro VI, ad Sabinum*.- In argento potorio utrum id dumtaxat sit, in quo bibi possit, an etiam id, quod ad praeparationem bibendi comparatum est, veluti colum nivarium et urceoli, dubitari potest. Sed propius est, ut haec quoque insint.

§ 15.- The same rule applies to pearls set in gold, for if the pearls are inserted into the gold for the purpose of ornamenting it, they will be accessory to it; if the contrary is the case, the gold will be accessory to the pearls.

§ 16.- The same rule applies to jewels set in rings.

§ 17.- Jewels are of transparent material. Servius distinguished them from precious stones, as Sabinus states in his Books on Vitellius, for the reason that jewels are transparent; as, for instance, emeralds, chrysolites, and amethysts, while precious stones are of a different nature, as, for example, obsidian, and those that are found near Veii.

§ 18.- Sabinus also says that pearls should neither be classed as jewels nor as precious stones, which has frequently been established, because the shell on which they are found is formed and grows near the Red Sea.

§ 19.- Moreover, Cassius says that vessels of iridescent glass are not classed as jewels.

§ 20.- Where gold is bequeathed, vases of that metal are included, and where jewels are bequeathed, vases set with gems constitute part of the legacy. In accordance with this, where gold or silver vases are inlaid with jewels, they are accessory to the gold or silver; as we must consider which of the articles was intended for the ornamentation of the other, and not which of them is the more valuable.

20.- PAULUS; *On Sabinus, Book III*.- Where jewels are set in gold, in order to be more easily preserved, we then say that the gold is accessory to the jewels.

21.- POMPONIUS; *On Sabinus, Book VI*.- With reference to silver vessels used for drinking purposes, a doubt may arise whether those only used for actual drinking, or such as are employed for the preparation of beverages, as, for instance, strainers, and small pitchers are included. The better opinion is that they also should be included.

§ 15.- Lo mismo es también en cuanto a las margaritas y al oro; porque si las margaritas fueron puestas para adornar el oro, cederán al oro, y si al contrario, el oro cederá a las margaritas.

§ 16.- Lo mismo también en cuanto a las piedras preciosas puestas en los anillos.

§ 17.- Mas las piedras preciosas son materias muy transparentes, las cuales, como dice Sabino en sus libros de Comentarios a Vitelio, las distinguía Servio de otras piedras, en que las preciosas eran materias muy transparentes, como las esmeraldas, los crisolitos y las amatistas; pero las otras piedras, de naturaleza contraria a la de las anteriores, como las obsidianas, y las veientanas.

§ 18.- En el mismo lugar dice Sabino, que es bastante sabido que las margaritas no se comprenden ni en las piedras preciosas, ni en las otras piedras, porque la concha crece y se cuaja en el mar rojo.

§ 19.- Pero escribe Cassio, que los vasos de murrina no se cuentan entre las piedras preciosas.

§ 20.- En el oro legado se comprenden los vasos de oro y en las piedras preciosas los vasos de piedras preciosas; según esto, las piedras preciosas, ora estén en vasos de oro, ora en los de plata, cederán al oro o a la plata, porque miramos esto, qué cosa haya sido empleada para adorno de otra cosa, no cuál sea de más precio.

20.- PAULO; *Comentarios a Sabino, libro III*.- Si para que puedan ser llevadas con comodidad hubieren sido engastadas en oro las piedras preciosas, en este caso decimos que el oro cede a las piedras preciosas.

21.- POMPONIO; *Comentarios a Sabino, libro VI*.- Se puede dudar si en la plata para beber se comprende solamente aquella en que se puede beber, o también la que se compró para la preparación de las bebidas, como el colador para nieve, y las orzillas; pero es más probable que también se comprendan estas cosas.

§ 1.- Unguentis legatis non tantum ea legata videntur, quibus unguimur voluptatis causa, sed et valetudinis, qualia sunt commagena glaucina crina rosa muracolum nardum purum: hoc quidem etiam quo elegantiores sint et mundiores, unguuntur feminae.

§ 2.- Sed de aquiminario Cassius ait consultum se respondisse, cum alteri argentum potorium, alteri escarium legatum esset, escario cedere.

22.- ULPIANUS; *libro XXII, ad Sabinum*.- Vestimentum id est quod detextum est, etsi desectum non sit, id est si sit consummatum. Quod in tela est nondum pertextum vel detextum, contextum appellatur. Quisquis igitur vestem legaverit, neque stamen neque subtemen legato continebitur.

23.- IDEM; *libro XLIV. ad Sabinum*.- Vestis an vestimenta legentur, nihil refert.

§ 1.- Vestimentorum sunt omnia lanea lineaque vel serica vel bombycina, quae induendi praecingendi amiciendi insternendi iniciendi incubandive causa parata sunt et quae his accessionis vice cedunt, quae sunt insitae picturae clavique qui vestibus insuuntur.

§ 2.- Vestimenta omnia aut virilia sunt aut puerilia aut muliebria aut communia aut familiarica. Virilia sunt, quae ipsius patris familiae causa parata sunt, veluti togae tunicae palliola vestimenta stragula amfitapa et saga reliquaque similia. Puerilia sunt, quae ad nullum alium usum pertinent nisi puerilem, veluti togae praetextae aliculae chlamydes pallia quae filiis nostris comparamus.

Muliebria sunt, quae matris familiae causa sunt comparata, quibus vir non facile uti potest sine vituperatione, veluti stolae pallia tunicae capitia zonae mitrae, quae magis capitis tegendi quam

§ 1.- Where perfumes are bequeathed, not only those which are used for pleasure, but also such as we employ in illness as comagena, essences distilled from lilies, roses, and myrrh, as well as pure nard, which women use for the purpose of appearing more elegant and clean.

§ 2.- Cassius says with reference to basins used for washing the hands that, when his advice was asked, he gave it as his opinion where there were two legatees, to one of whom vessels for eating, and to the other those for drinking purposes were bequeathed, these should be considered as accessory to the table service of food.

22.- ULPIANUS; *On Sabinus, Book XXII*.- Under the term clothing is included any fabric which has been woven, even if it has not been cut off, that is to say made up. Material is classed as cloth, which is not yet completely woven, or finished. Therefore, where anyone bequeaths a garment, neither the warp nor the woof of a web will be included.

23.- THE SAME; *On Sabinus, Book XLIV*.- It makes no difference whether garments or clothing is bequeathed.

§ 1.- Under the term "clothing" are included all goods made of wool, flax, silk, or cotton, which are intended to be worn or used as garments, girdles, cloaks, wraps, carpets, or coverlets, and any designs, stripes, or embroidery sewed to such articles, are classed as accessories of the same.

§ 2.- Clothing is either intended for the use of men, women, or children, or is common to both sexes, or is used by slaves. That peculiar to men is such as is designed for the use of the head of the household, for instance, togas, tunics, small capes, mantles, military cloaks, and other things of this description. Garments peculiar to children, are such as are used for no other purpose, as for example, the toga praetexta,¹ short tunics, Greek cloaks, and capes such as we purchase for our offspring.

Women's clothing is that intended for the use of the mother of the family, and which a man cannot readily wear without censure; as for instance, gowns, mantles, tunics, capes, belts, and hoods, which are

§ 1.- Legados los ungüentos, no solo se consideran legados aquellos con que nos ungimos por placer, sino también por enfermedad; tales son, la comagena, la glaucina, la crina, la rosa, la mirra, el colo, y el nardo puro; con este, a la verdad, se ungen también las mujeres para estar más elegantes y limpias.

§ 2.- Pero respecto al aguamanil dice Cassio, que habiéndosele consultado respondió, que habiéndose legado a uno la plata que sirve para beber, y a otro la que para comer, cedía a la de comer.

22.- ULPIANO; *Comentarios a Sabino, libro XXII*.- Es vestido lo que ya está tejido, aunque no esté cortado, esto es, si hubiera sido acabado. Porque el que esta en el telar todavía no acabado, o tejido, se llama tejido. Así, pues, si cualquiera hubiere legado un vestido, no se comprenderá en el legado ni el estambre, ni la trama.

23.- EL MISMO; *Comentarios a Sabino, libro XLIV*.- No hay diferencia entre que se legue el vestido, o el vestuario.

§ 1.- Son vestidos todas las cosas de lana, y de lino, o de algodón, o de seda, que han sido preparadas para cubrirse, ceñirse, revestirse, recubrirse, echarse encima, o estar acostado; y las cosas que ceden a estas por vía de accesión, como son las pinturas hechas en ellas, y los botones que se cosen en los vestidos.

§ 2.- Todos los vestidos son o de hombre, o de niño, o de mujer, o comunes, o de esclavos. Son de hombre, los que fueron preparados por causa del mismo padre de familia, como las togas, las túnicas, las capillas, los sobretodos, los manteos, los sayos, y otras cosas semejantes. Son de niño, los que no sirven para ningún otro uso, sino para el de los niños, como las togas pretexts, las mangas de ángel, las clamides y las capas, que compramos para nuestros hijos.

Son de mujer, los que se compraron por causa de la madre de familia, de los que no puede usar fácilmente sin vituperio el varón, como las estolas, los mantos, las túnicas, las capuchas, los ceñidores, y las

ornandi causa sunt comparata, plagulae penulae. Communia sunt, quibus promiscui utitur mulier cum viro, veluti si eiusmodi penula palliumve est et reliqua huiusmodi, quibus sine reprehensione vel vir vel uxor utatur. Familiarica sunt, quae ad familiam vestiendam parata sunt, sicuti saga tunicae penulae lintea vestimenta stragula et consimilia.

§ 3.- Vestis etiam ex pellibus constabit,

24.- PAULUS; *libro XI, ad Sabinum*.- Cum et tunicas et stragula pellicia nonnulli habeant.

25.- ULPIANUS; *libro XLIV, ad Sabinum*.- Argumento sunt etiam nationes quaedam, veluti sarmatarum, quae pellibus teguntur.

§ 1.- Aristo etiam coactilia vesti cedere ait et tegimenta supselliorum huic legato cedere.

§ 2.- Vittae margaritarum, item fibulae ornamentorum magis quam vestis sunt.

§ 3.- Tapeta vesti cedunt, quae aut sterni aut inici solent: sed stragulas et babylonica, quae equis insterni solent, non puto vestis esse.

§ 4.- Fasciae cruales pedulesque et inpilia vestis loco sunt, quia partem corporis vestiunt. alia causa est udonum, quia usum calciamentorum praestant.

§ 5.- Cervicalia quoque vestis nomine continentur.

§ 6.- Si quis addiderit "vestem suam", apparet de ea eum sensisse, quam ipse in usus suos habuit.

§ 7.- Culcitae etiam vestis erunt.

§ 8.- Item pelles caprinae et aginae vestis erunt.

§ 9.- Muliebri veste legata et infantilem contineri et puellarum, et virginum, Pomponius libro vicesimo secundo ad Sabinum recte scribit: mulieres enim

designed rather to protect the head than for the purpose of ornament, veils, and travelling cloaks. Those are common to both sexes which both women and men use indiscriminately, such as cloaks, capes, and other garments of this kind, which either a man or his wife can wear without rendering themselves liable to unfavorable comment. The garments of slaves are such as are intended to clothe them, for example, capes, tunics, linen gowns, cloaks, wraps, smock frocks, and other articles of this description.

§ 3.- Where clothing is bequeathed, it may also consist of furs;

24.- PAULUS; *On Sabinus, Book XI*.- As some persons have tunics and robes made of furs.

25.- ULPIANUS; *On Sabinus, Book XLIV*.- This is proved by the fact that certain nations, for instance the Sarmatians, clothe themselves in skins.

§ 1.- Aristo says that receptacles for clothing, and the coverings of seats, are also included in a legacy of this kind.

§ 2.- Fillets set with pearls, as well as buckles, should rather be classed as ornaments than clothing.

§ 3.- Tapestry which is either used to recline upon, or as a covering, is also embraced in a bequest of clothing. I do not think that the cloths and housings used for horses should be considered as clothing.

§ 4.- Cloths with which to wrap the thighs or legs and felt caps are included under the term clothing, because by means of them a portion of the body is clad. Felt socks are also included, because they are used to protect the feet.

§ 5.- Pillows are also included in the term clothing.

§ 6.- Where anyone makes use of the expression "His clothing" it is evident that he means that which he himself has for his own use.

§ 7.- Mattresses are also clothing.

§ 8.- The skins of goats and lambs are clothing.

§ 9.- Pomponius, in the Twenty-second Book on Sabinus, very properly says that where the wardrobe of a woman is bequeathed the garments of female

mitras, que se compraron más bien para cubrir que para adornar la cabeza, las faldas y los gabanes. Son comunes, aquellos de que indistintamente usan la mujer y el hombre, como si de esta clase fuera el gabán o el manto, y otras de la misma naturaleza, de que sin censura usa el marido o la mujer. Son de esclavos, los que están destinados para vestir a la servidumbre, como los sayos, las túnicas, los gabanes, los pañuelos, los sobretodos, y otras cosas semejantes.

§ 3.- Ser vestido también el hecho de pieles.

24.- PAULO; *Comentarios a Sabino, libro XI*.- Porque algunos también tienen túnicas y sobretodos de pieles.

25.- ULPIANO; *Comentarios a Sabino, libro XLIV*.- Y sirven también de prueba algunas naciones, como la de los Sármatas, que se visten con pieles.

§ 1.- Aristón dice, que también los fieltros pertenecen al vestido, y que las cubiertas de los asientos pertenecen a este legado.

§ 2.- Las cintas de margaritas, y también las hebillas, pertenecen más bien al adorno que al vestido.

§ 3.- Los tapetes, que se suelen extender, o echar encima, pertenecen al vestido. Pero las mantas y los tapices, que se suelen poner a los caballos no creo que sean vestidos.

§ 4.- Las fajas para las rodillas y para los pies, y las polainas, están en la categoría de vestido, porque visten parte del cuerpo. Distinta es la condición de los escarpines, porque sirven para el calzado.

§ 5.- También las almohadas se comprenden con el nombre de vestido.

§ 6.- Si alguno hubiere añadido: «su vestido», se ve, que él entendió referirse al que él mismo tuvo para sus usos.

§ 7.- Los colchones serán también del vestido.

§ 8.- También serán del vestido las pieles de cabra y las de cordero.

§ 9.- Con razón escribe Pomponio en el libro vigésimo segundo de sus comentarios a Sabina, que, legados los vestidos de mujer se comprenden

omnes dici, quaecumque sexus feminini sunt.

§ 10.- Ornamenta muliebria sunt, quibus mulier ornatur, veluti in aures armillae viriolae anuli praeter signatorios et omnia, quae ad aliam rem nullam parantur, nisi corporis ornandi causa: quo ex numero etiam haec sunt: aurum gemmae lapilli, quia aliam nullam in se utilitatem habent.

Mundus mulieris est, quo mulier mundior fit: continentur eo specula matulae unguenta vasa unguentaria et si qua similia dici possunt, veluti lavatio riscus. Ornamentorum haec: vittae mitrae semimitrae calautica acus cum margarita, quam mulieres habere solent, reticula crocyfantia.

Sicut et mulier potest esse munda, non tamen ornata, ut solet contingere in his, quae se emundaverint lotae in balneo neque se ornaverint: et contra est aliqua ex somno statim ornata, non tamen conmundata.

§ 11.- Margarita si non soluta sunt vel qui alii lapides, si quidem exemptiles sint, dicendum est ornamentorum loco haberi: sed et si in hoc sint resoluti ut componantur, ornamentorum loco sunt. quod si adhuc sint rudes lapilli vel margaritae vel gemmae, ornamentorum loco non erunt, nisi alia mens fuit testantis, qui haec quoque, quae ad ornamenta paraverat, ornamentorum loco et appellatione comprehendere voluit.

§ 12.- Unguenta, quibus valetudinis causa unguimur, mundo non continentur.

26.- PAULUS; *libro XI, ad Sabium*.- Quamvis quaedam ex veste magis ornatus gratia, quam quo corpus tegant, comparentur, tamen quod eo nomine

infants and young girls are also included, for the term "woman" means all persons of the feminine sex.

§ 10.- Ornaments peculiar to woman are those with which she decorates herself, as, for instance, earrings, bracelets, necklaces, rings (with the exception of those used for seals), and all articles which are designed for no other purpose but the adornment of the body, to which class also belong trinkets of gold, jewels, and precious stones, for the reason that they themselves have no other use.

Toilet-articles consist of those things by the use of which a woman becomes more neat and clean. Among them are included mirrors, urinals, ointments, vessels to contain the latter, and other articles of the same kind, bathing utensils, and chests. The following are classed as ornaments, namely, fillets, coifs, small hoods, head dresses, pins set with pearls which women are accustomed to have, and small nets for the hair.

A woman can be clean and still not be adorned, as is the case with those who have washed themselves clean in the bath, and have not yet put on their ornaments; and, on the other hand, a woman may arise from her sleep decorated with her ornaments, but still she will not be clean.

§ 11.- Pearls, where they are not unstrung, or any other precious stones where they can be readily detached from their settings, may be said to be included among ornaments. Where, however, precious stones, pearls, or jewels are still rough, they will not be considered as ornaments, unless the intention of the testator was otherwise, when he desired articles of this kind intended for adornment to be included in the class and under the name of ornaments.

§ 12.- Ointments, such as are used in illness, do not come under the head of toilet-articles.

26.- PAULUS; *On Sabinus, Book XI*.- Although there are certain articles of dress which are intended for embellishment rather than to cover the body, still,

también los de las niñas, los de las muchachas, y los de las doncellas; porque se dice mujeres a todas las que son del sexo femenino.

§ 10.- Son adornos de mujer, aquellos con los que se adorna la mujer, como los pendientes, los brazaletes, las pulseras, los anillos, excepto los de sello, y todas las cosas que no se preparan para ninguna otra mas que para adornar el cuerpo; de cuyo número también son estas: el oro, las piedras preciosas, y otras piedras, porque no tienen en sí ninguna otra utilidad.

Son objetos del tocador de mujer, aquellos con los que la mujer está más aseada; se comprenden en él los espejos, los orinales, los ungüentos, los vasos para ungüentos, y otras cosas que se pueden decir semejantes, como los utensilios del baño y el cofre para ropa. Son adornos éstos: las cintas, las mitras, las cofias, las tocas, la aguja con margarita, que suelen tener las mujeres, las redecillas, y las escofietas.

Así como también la mujer puede estar aseada, pero no adornada, según suele acontecer con aquellas que se han aseado lavándose en el baño, y no se adornaron; y por el contrario, hay algunas que inmediatamente se adornan al despertarse, pero no se asean.

§ 11.- Las margaritas, si no están sueltas, u otras cualesquiera piedras, si verdaderamente fueran fáciles de quitar, se ha de decir que se consideran en la clase de adornos; pero aunque se hayan desgarrado para componerlas, están en la clase de adornos. Mas si estuvieran todavía en bruto las piedras, o las margaritas, o las piedras preciosas, no estarán en la clase de adornos, si no fue otra la intención del testador, que quiso que también estas cosas, que había destinado para adornos, se comprendieran en la clase y con la denominación de adornos.

§ 12.- Los ungüentos, con que nos untamos por causa de enfermedad, no se comprenden en los objetos de tocador.

26.- PAULO; *Comentarios a Sabino, libro XI*.- Aunque algunos vestidos se comprenden mas bien por razón de ornato que para cubrir el cuerpo, sin

sint reperta, potius habenda esse vestis numero quam ornamentorum. Similiter ornamentorum esse constat, quibus uti mulieres venustatis et ornatus causa coeperunt, neque referre, si quaedam eorum alium quoque usum praebeant, sicuti mitrae et anademata: quamvis enim corpus tegant, tamen ornamentorum, non vestis esse.

27.- ULPIANUS; *libro XLIV, ad Sabinum*.- Quintus Mucius libro secundo Iuris Civilis ita definit argentum factum vas argenteum videri esse.

§ 1.- An cui argentum omne legatum est, ei nummi quoque legati esse videantur, quaeritur. et ego puto non contineri: non facile enim quisquam argenti numero nummos computat. Item argento facto legato puto, nisi evidenter contra sensisse testatorem appareat, nummos non contineri.

§ 2.- Argento omni legato, quod suum esset, sine dubio non debetur id, quod in credito esset: hoc ideo, quia non videtur suum esse, quod vindicari non possit.

§ 3.- Cui aurum vel argentum factum legatum est, si fractum aut collisum sit, non continetur: servius enim existimat aurum vel argentum factum id videri, quo commode uti possumus, argentum autem fractum et collisum non incidere in eam definitionem, sed infecto contineri.

§ 4.- Cui legatum est aurum omne, quod suum esset cum moreretur, eius omne aurum fiet, quod tunc pater familias, cum moreretur, vindicare potuit suum esse. Sed si qua distributio eius rei facta est, tunc interest, quomodo sit legatum. Si factum aurum legatum est, omne ad eum pertinet cui legatum est ex quo auro aliquid est effectum, sive id suae sive alterius usionis causa paratum esset, veluti vasa

because they are designated by the name of clothing, they should be considered to belong to the category of garments, and not to that of ornaments. In like manner, it is well established that those articles should be classed as ornaments which women make use of to increase their beauty, and adorn themselves; and it makes no difference if some of these things are used for other purposes (as hoods and other head-dresses), for although they protect the body, they are still considered to be ornaments rather than clothing.

27.- ULPIANUS; *On Sabinus, Book XLIV*.- Quintus Mucius, in the Second Book on the Civil Law, says that silver plate should be classed as manufactured silver.

§ 1.- The question arises where a bequest of all the silver of a testator is made whether his silver coin should also be held to be included in the legacy. I think that this should not be done, for no one ordinarily classes his money as silver-ware. Likewise, where manufactured silver is bequeathed, I do not think that coins are included, unless it plainly appears that the intention of the testator was otherwise.

§ 2.- Where all the silver of the testator was bequeathed, there is no doubt that any which may have been placed with him for safe-keeping will not be due to the legatee, for the reason that what he cannot claim as his own is not considered to belong to him.

§ 3.- Where a legacy of manufactured gold or silver is bequeathed to anyone, and it has been broken or damaged, it will not be included in the legacy; for Servius is of the opinion that manufactured gold or silver should be held to be such as we can conveniently use, but that silver vessels which are broken or damaged, do not come under this head, and should be classed as manufactured silver.

§ 4.- Where a bequest is made to anyone of all the gold which may belong to the testator at his death, he can claim all the gold which the latter had at that time. Where, however, a distribution of his articles of gold was made by the testator, it then becomes a matter of importance to ascertain in what terms the legacy was expressed. If manufactured gold is bequeathed, where anything has been made out of the gold it will

embargo, como hayan sido encontrados con este nombre, han de ser tenidos en el numero de los vestidos mas bien que en el de los adornos. De igual modo es sabido que son adornos cosas de las que empezaron a usar las mujeres por embellecimiento y por ornato, y que no importa que algunas sirvan también para otro uso, como las mitras, y las cintas para la cabeza; porque aunque cubran el cuerpo, pertenecen, sin embargo, al adorno, y no al vestido.

27.- ULPIANO; *Comentarios a Sabino, libro XLIV*.- Quinto Mucio define así en el libro segundo del Derecho Civil: se considera que un vaso de plata es plata labrada.

§ 1.- Se pregunta, si se considerará que al que se le legó toda la plata se le legó también el dinero; y yo opino que éste no se comprende, porque no es fácil que nadie cuente el dinero entre los objetos de plata. Asimismo, legada la plata labrada, opino que no se comprende el dinero, a no ser que evidentemente aparezca que el testador entendió lo contrario.

§ 2.- Legada toda la plata, que fuese suya, sin duda no se debe la que se acreditase; y esto por tal razón, porque no se considera que es suya la que no pueda reivindicar.

§ 3.- Si a uno se le legó el oro o la plata labrada, no se comprende si estuviese rota o abollada, porque opina Servio, que se considera oro o plata labrada, aquella de que podemos usar cómodamente, pero que la plata rota o abollada no entra en esta definición, sino que se comprende en la que está sin labrar.

§ 4.- Aquel a quien se legó todo el oro que fuese suyo cuando muriese, pudo reivindicar el que fuese suyo. Pero si se hizo alguna distribución de él, entonces importa saber de qué modo se haya legado; si se legó el oro labrado, le pertenece al que se le legó todo lo que se hizo con aquel oro, ya si esto hubiese sido destinado para su propio uso, ya si para el de otro, como vasos de oro, adornos, sellos, objetos de

aurea emblemata signa aurum muliebre et cetera, quae his rebus sunt similia. Sed si infectum legatum est, quod eius ita factum est, ut eo, quod ad rem comparatum est, non possis uti sine refectioe, quodque ab eo patre familias infecti numero fuerat, id videtur legatum esse. Si autem aurum vel argentum signatum legatum est, id pater familias videtur testamento legasse, quod eius aliqua forma est expressum, veluti quae Filippi sunt itemque nomismata et similia.

§ 5.- Argento legato non puto ventris causa habitascaffia contineri, quia argenti numero non habentur.

§ 6.- Argentum factum recte quis ita definierit quod neque in massa neque in lamina neque in signato neque in suppellectili neque in mundo neque in ornamentis insit.

28.- ALFENUS VARUS; *libro VII, Digestorum*.- Cum in testamento alicui argentum, quod usus sui causa paratum esset, legaretur, itemque vestis aut supellex, quaesitum est, quid cuiusque usus causa videretur paratum esse, utrumne id argentum, quod victus sui causa paratum pater familias ad cotidianum usum parasset an et si eas mensas argenteas et eius generis argentum haberet, quo ipse non temere uteretur, sed commodare ad ludos et ad ceteras apparationes soleret. et magis placet, quod victus sui causa paratum est, tantum contineri.

29.- FLORENTINUS; *libro XI, Institutionum*.- Si quando alterius generis materia auro argenteove iniecta sit, si factum aurum vel argentum legetur, et id quod iniectum est debetur.

§ 1.- Utra autem utrius materiae sit accessio, visu atque usu rei, consuetudinis patris familias aestimandum est.

all belong to him to whom the legacy was left, whether it was intended for the use of the testator, or for that of someone else; as, for instance, gold vases, ornaments, seals, jewels for women, and all other articles of this description. When, however, unmanufactured gold is bequeathed, which is of such a character that it cannot be made use of without being worked up, and which the testator regarded as unmanufactured gold, it will be considered to have been bequeathed. But if engraved gold or silver is bequeathed, the testator will be held to have left by his will that on which any design is traced, as, for instance, articles made at Philippi, and also medals, and other things of this kind.

§ 5.- Where silver is bequeathed, I do not think that vessels used as receptacles for discharges from the bowels are included, because they are not classed as silver ware.

§ 6.- Anyone may properly define manufactured silver to be such as is not in bulk or in sheets, or which does not consist of inlaid pieces, or of furniture, toilet articles, or personal ornaments.

28.- ALFENUS VERUS; *Digest, Book VII*.- Where silver destined for the use of the testator is left by will to anyone, together with his wardrobe and his furniture, the question arises for what use these articles would seem to be intended; whether the silver designed for daily table service of the head of the household was meant, or whether the silver tables and other things of the same kind which the testator did not use continually, but was accustomed to lend for games, and on other important occasions were referred to. The better opinion is that the silver only is included in such a bequest which was designed for the ordinary table service of the testator.

29.- FLORENTINUS; *Institutes, Book XI*.- Where material of another description is inserted in gold or silver, and the legacy consists of manufactured gold or silver, whatever is inserted in them will be due to the legatee.

§ 1.- In order to determine which of the two materials is accessory, the intention and custom of the testator, as well as the use which he made of the article in question, must be ascertained.

oro para mujer, y otras cosas que son semejantes a estas; pero si se legó sin labrar, se considera que se legó el que de este se labró de modo que no puedas usarlo, sin volverlo a labrar, para el objeto a que se destinó, y el que había sido tenido por el padre de familia como no labrado; pero si se legó el oro o la plata acuñada, se considera que el padre de familia legó en el testamento la que en alguna forma esté acuñada, como las monedas que son de Filipo, y también las medallas, y otras cosas semejantes.

§ 5.- En la plata legada no creo que se comprenden los servicios tenidos para el vientre, porque no se consideran en el número de los objetos de plata.

§ 6.- Cualquiera definirá bien así la plata labrada, la que no esté ni en pasta, ni en láminas, ni acuñada, ni en el ajuar, ni en los objetos de tocador, ni en los adornos.

28.- ALFENO VARO; *Digesto, libro VII*.- Habiéndosele legado a uno en testamento la plata que hubiese estado destinada para uso de uno mismo, y además los vestidos, o el ajuar, se preguntó; qué se consideraría que fue preparado para uso de cualquiera, si la plata que para el cotidiano uso de su comida hubiese destinado el padre de familia, o si también las mesas de plata, y la plata de esta clase que tuviese, que él usase no inconsideradamente, sino que sabiese utilizar en los juegos, y en las demás ostentaciones. Y mas bien parece que solamente se comprenda la que se destinó para su propia comida.

29.- FLORENTINO; *Instituta, libro XI*.- Cuando al oro o a la plata se le hubiese unido materia de otro género, si se legase el oro o la plata labrada, se debe también aquello que se unió.

§ 1.- Pero se ha de estimar por la vista, y por el uso de la cosa, y por la costumbre del padre de familia, cual de dos materias sea accesión de la otra.

30.- PAULUS; *libro singulari de assignatione libertorum.*- Si quis ita legaverit: "uxori meae mundum ornamenta seu quae eius causa paravi, do lego", placet omnia deberi, sicuti cum ita legatur: "Titio vina, quae in urbe habeo seu in portu, do lego", omnia deberi: hoc enim verbum "seu" ampliandi legati gratia positum est.

31.- LABEO; *libro II, Posteriorum Javoleno epitomatorum.*- Qui lancem maximam minorem minimam relinquebat, ita legaverat: "lancem minorem illi lego". Mediae magnitudinis videri legatam lancem responsum est, si non appareret, quam lancem ex his pater familias demonstrare voluisset.

32.- PAULUS; *libro II, as Vitellium.*- Pediculis argenteis adiuncta sigilla aenea ceteraque omnia, quae ad eandem similitudinem redigi possunt, argento facto cedunt.

§ 1.- Auro facto adnumerantur gemmae anulis inclusae, quippe anulorum sunt, cymbia argentea crustis aureis illigata. Margaritae, quae ita ornamentis muliebribus contextae sunt, ut in his aspectus auri poterit sit, auro facto adnumerantur. aurea emblemata, quae in lapidibus apsidibus argenteis essent et replumbari possent, deberi Gallus ait: sed Labeo improbat. Tubero autem, quod testator auri numero habuisset, legatum deberi ait: alioquin aurata et inclusa vasa alterius materiae auri numero non habenda.

§ 2.- Argento pоторio vel escario legato in his, quae dubium est cuius generis sint, consuetudinem patris familias spectandam, non etiam in his, quae certum est eius generis non esse.

§ 3.- Quidam primipilaris uxori suae argentum escarium legaverat: quaesitum est, cum pater

30.- PAULUS; *On the Allotment of Freedmen.*- Where anyone bequeaths a legacy as follows, "I give and bequeath to my wife her toilet articles, her ornaments, or everything which I have acquired for her use," it is well established that everything is due. Likewise, when a bequest is made as follows, "I give and bequeath to Titius the wine which I have in the city, or in the harbor," he will be entitled to all of them; for the word "or" is introduced for the purpose of extending the scope of the legacy.

31.- LABEO; *Epitomes of the Last Works of Javoleno, Book II.*- A certain man left a large dish, one of medium size, and one still smaller, as follows: "I bequeath to So-and-So my smaller dish." It was held that the dish of medium size was bequeathed, if it did not appear which dish the testator intended to designate.

32.- PAULUS; *On Vitellius, Book II.*- Where manufactured silver is bequeathed, the legacy will include the brazen ornaments added to the feet of silver vessels, and all other articles which can be brought under the same category.

§ 1.- Under the term "manufactured gold" are included jewels set in rings, even though they belong to the rings. Small cups encrusted with gold, and pearls which are set in the jewelry of women in order that the brilliancy of the gold may be enhanced, are also included under the head of manufactured gold. Golden ornaments which are inserted in precious stones and silver plates, and which can be unsoldered, Gaius says are included in the legacy; but Labeo does not adopt his opinion. Tubero, however, says that the legacy includes everything that the testator classed as gold, otherwise articles of silver gilt and vases of any other material enclosed in gold should not be classed as gold.

§ 2.- Where silver vessels used for eating or drinking are bequeathed, and any doubt arises as to which of these classes they belong, the custom of the testator must be taken into consideration; but this is not the case where it is certain that an article does not belong to either class.

§ 3.- A certain officer of the triarii left his wife some silver articles to be used while eating, and, as the

30.- PAULO; *De la asignación de los libertos, libro único.*- Si alguien hubiere legado así: «doy y lego a mi mujer los objetos de tocador, los adornos, o las cosas que por causa de ella preparó», esta determinado que se deben todas las cosas, como cuando se lega así: «doy y lego a Ticio los vinos, que tengo en la ciudad, o en el puerto»; porque esta palabra «o» se empleó para ampliar el legado.

31.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro II.*- Uno que dejaba un plato grande, otro mediano, y otro pequeño, había legado así: «lego a aquel un plato menor»; se respondió, que se considera legado el plato de mediano tamaño, si no apareciese qué plato de estos haya querido indicar el padre de familia.

32.- PAULO; *Comentarios a Vitelio, libro II.*- Las estatuas de bronce adheridas a pedestales de plata, y todas las demás cosas, que se pueden reducir a análoga semejanza, ceden a la plata labrada.

§ 1.- En el oro labrado se cuentan las piedras preciosas engastadas en los anillos, porque son de los anillos. Los vasos de plata de dos asas, esmaltados con relieves de oro, y las margaritas, que de tal modo están unidas a los adornos femeniles, que en estos sea más visible el aspecto del oro, se cuentan en el oro labrado. Los adornos de oro, que hubiese en los platos de plata. y se pudiesen desoldar, dice Gallo que se deben, pero no lo aprueba Labeón. Mas Tuberón dice que se debe como legado lo que el testador hubiese tenido en el número de los objetos de oro, pues de otro modo no se han de tener en el número de los objetos de oro los vasos dorados y los adornados con otra materia.

§ 2.- Legada la plata para beber o para comer, se ha de atender a la costumbre del padre de familia en cuanto a aquellos objetos sobre los que haya duda de qué género sean, pero no también en cuanto a aquellos que es cierto que no son de esta clase.

§ 3.- Un primipilar había legado a su mujer la plata de comer; se preguntó, si, habiendo tenido el padre de

familias in argento suo vasa habuerat, quibus et potabat et edebat, an legato haec quoque vasa containerentur. Scaevola respondit contineri.

§ 4.- Idem, cum quaereretur de tali legato: "hoc amplius filia mea dulcissima e medio sumito tibi que habeto ornamentum omne meum muliebre cum auro et si qua alia muliebria apparuerint", cum testatrix negotiatrix fuerit, an non solum argentum, quod in domo vel intra horreum usibus eius fuit, legato cedit, sed etiam quod in basilica fuit muliebre: respondit, si testatrix habuit proprium argentum ad usum suum paratum, non videri id legatum, quod negotiandi causa venale proponi soleret, nisi de eo quoque sensisse is qui petat probet.

§ 5.- Neratius Proculus refert ita respondisse vasis electrinis legatis nihil interesse, quantum ea vasa, de quibus quaeritur, argenti aut electri habebant, sed utrum argentum electro an electrum argento cedat? id ex aspectu vasorum facilius intellegi posse: quod si in obscuro sit, inspiciendum est, in utro numero ea vasa is, qui testamentum fecit, habuerit.

§ 6.- Labeo testamento suo Neratae uxori suae nominatim legavit "vestem mundum muliebrem omnem ornamentaque muliebria omnia lanam linum purpuram versicoloria facta infectaque omnia" et cetera. sed non mutat substantiam rerum non necessaria verborum multiplicatio, quia Labeo testamento lanam ac deinde versicoloria scripsit, quasi desit lana tincta lana esse, detractoque verbo "versicolorio" nihilo minus etiam versicoloria debentur, si non appareat aliam defuncti voluntatem fuisse.

§ 7.- Titia mundum muliebrem Septiciae legavit:

the testator included among his silverware vessels used both for eating and drinking the question arose whether these also were embraced in the legacy. Scaevola gave it as his opinion that they were.

§ 4.- Likewise, where a question was raised with reference to the following legacy, "Let my dear daughter, in addition, take from the bulk of my estate, and let her have for her use my entire wardrobe, together with the gold, and everything else destined for the use of women," as the testatrix was engaged in business, it was asked whether not only the silver which was in her house or her wareroom for her own use was left, and also whether that which she had in her place of business could be considered silver for the use of women, and would be included in the legacy. The answer was if the testatrix had silver plate destined for her own use, that which she kept for the purpose of sale would not be held to have been bequeathed, unless the party who claimed it could prove that she also had this in her mind when she made the bequest.

§ 5.- Neratius relates that Proculus was of the opinion that where vases of electrum were bequeathed, it made no difference how much silver or electrum the vases in question contained. But how could it be decided whether the silver was accessory to the silver, or the silver to the electrum? This could be readily determined from the appearance of the vases. If the question should still remain in doubt, it should be ascertained in what class the party who made the will was accustomed to include the said vases.

§ 6.- Labeo, by his will, made a special bequest of her wardrobe to his wife Neratia, as follows: "All her toilet articles, and all her ornaments intended for the use of women, all wool, linen, and purple cloth dyed of various colors, both finished and unfinished, etc." This unnecessary multiplication of terms does not change the nature of the property, because Labeo mentioned the wool, and afterwards many different colored woollen articles, just as if wool ceased to be such after it was dyed, for even if the expression "of various colors" had been omitted, the wool of different colors would still be due, if it was not clear that the intention of the deceased was otherwise.

§ 7.- Titia bequeathed her toilet articles intended

familia entre sus objetos de plata vasos en los que bebía y comía, también estos vasos se comprenderían en el legado. Scévola respondió, que se comprendían.

§ 4.- Asimismo, preguntándose respecto a este legado: «además de esto, toma, cariñosísima hija mía, de la masa, y ten para tí, todos mis adornos de mujer con oro, y cualesquiera otros adornos de mujer que aparecieren», si, habiendo sido comerciante la testadora, cedería al legado no solamente la plata que hubo en la casa o dentro del almacén para uso de ella, sino también la de mujer que había en la tienda del comercio; respondió, que si la testadora tuvo plata propia destinada para su uso, no se considera legada aquella que se soliese exponer como vendible para hacer negocio, si no probara el que la pidiera que también se refirió a ella.

§ 5.- Refiere Neracio, que Próculo respondió así, que, habiéndose legado vasos de electro, nada importaba cuanta plata o cuánto electro tengan los vasos de que se trata, sino si cederá al electro la plata, o a la plata el electro; que esto se podía conocer más fácilmente por el aspecto de los vasos; pero que si no estuviese claro, se ha de ver en cual de las dos clases haya tenido estos vasos el que hizo el testamento.

§ 6.- Labeón legó en su testamento a Neracia, su mujer, determinadamente: «los vestidos, todo el tocador de mujer, todos los adornos de mujer, la lana, el lino, la púrpura, las lanas tejidas de varios colores, y todo lo labrado y sin labrar», y otras cosas; pero la innecesaria redundancia de palabras no cambia la sustancia de las cosas, porque Labeón escribió en el testamento la lana, y luego la tejida de varios colores, como si la lana tejida hubiere dejado de ser lana, y suprimidas las palabras «tejida de varios colores», no obstante se deberá también la teñida de varios colores, si no apareciera que otra fue la voluntad del difunto.

§ 7.- Ticia legó los objetos de tocador a Septicia;

ea putabat sibi legata et ornamenta et monilia, in quibus gemmae et margaritae insunt, et anulos et vestem tam coloriam: quaesitum est, an haec omnia mundo continentur. Scaevola respondit ex his quae proponerentur dumtaxat argentum balneare mundo muliebri contineri.

§ 8.- Item cum in aures, in quibus duae margaritae elenchi et smaragdi duo, legasset et postea elenchos eisdem detraxisset et quaereretur, an nihilo minus detractis elenchis in aures deberentur: respondit deberi, si maneat in aures, quamvis margarita eis detracta sint.

§ 9.- De alio idem respondit, cum quaedam ornamentum mamillatum ex cylindris triginta quattuor et tympanis margaritis triginta quattuor legasset et postea quattuor ex cylindris, etiam sex de margaritis detraxisset.

33.- POMPONIUS; *libro IV, ad Quintum Mucium*.- Inter vestem virilem et vestimenta virilia nihil interest: sed difficultatem facit mens legantis, si et ipse solitus fuerit uti quadam veste, quae etiam mulieribus conveniens est. Itaque ante omnia dicendum est eam legatam esse, de qua senserit testator, non quae re vera aut muliebris aut virilis sit. nam et quintus titius ait scire se quendam senatorem muliebribus cenatoriis uti solitum, qui si legaret muliebrem vestem, non videretur de ea sensisse, quae ipse quasi virili utebatur.

34.- IDEM; *libro IX, ad Quintum Mucium*.- Scribit Quintus Mucius: si aurum suum omne pater familias uxori suae legasset, id aurum, quod aurifici faciendum dedisset aut quod ei deberetur, si ab aurifice ei responsum non esset, mulieri non debetur.

for the use of women to Septicia. The latter understood that the jewelry and necklaces set with gems and pearls, and the rings, together with the garments of one color as well as those of different colors, were left to her. The question arose whether all these things were included under the head of toilet articles. Scaevola answered that, in accordance with the facts stated, only such silver vessels as were employed in the bath would be included in toilet articles for the use of women.

§ 8.- Again, where a testator bequeathed earrings set with two large pearls and two emeralds, and afterwards removed the pearls, the question arose whether the earrings would be due after the pearls had been removed. The answer was that they would still be due if the earrings remained, even though the pearls had been removed from them.

§ 9.- He also rendered a similar opinion in another case, where a man made a bequest of a necklace composed of thirty-four cylindrical stones, and an equal number of circular pearls, and afterwards removed four of the cylinders, and six of the pearls.

33.- POMPONIUS; *On Quintus Mucius, Book IV*.- There is no difference between the expressions garments for men, and clothing for men, but the intention of the testator sometimes creates difficulty, if he himself was accustomed to make use of some garment which was also suitable for women. Therefore it should, by all means, be ascertained whether the garment bequeathed was the one which the testator had in his mind, and not that which was actually destined for the use of women, or for men. For Quintus Mucius says that he knew a certain senator who was in the habit of wearing women's clothing at the table, and who, if he should bequeath a garment used by women, would not be considered to have had in his mind one which he himself was accustomed to make use of, as if it was one suitable for his sex.

34.- THE SAME; *On Quintus Mucius, Book IX*.- Quintus Mucius said that if the head of a household should bequeath all his gold to his wife, she would not be entitled to that which he had given to a goldsmith for the purpose of being manufactured, or

creía esta, que se le legaron también los adornos, y los aderezos, en los que hay engastadas piedras preciosas y margaritas, y los anillos, y los vestidos, tanto de un color como de varios; se preguntó, si se comprenderá todo esto en los objetos do tocador? Scévola respondió, que de estas cosas, que se exponían, solamente se comprendía la plata del baño en los objetos de tocador de mujer.

§ 8.- Asimismo, habiendo legado linos pendientes, en los que había dos margaritas conoideas, y dos esmeraldas, y habiéndoles quitado después las conoideas, y preguntandose si a pesar de haberse quitado las conoideas se deberían los pendientes, respondió quo se debían, si continuaran siendo pendientes, aunque se les hayan quitado las margaritas.

§ 9.- Lo mismo respondió respecto a otro caso, en que habiendo una legado un adorno del pecho, de treinta y cuatro cilindros y de treinta y cuatro margaritas tímpanas, hubiere quitado luego cuatro cilindros, y además seis margaritas.

33.- POMPONIO; *Comentarios a Quinto Mucio, libro IV*.- Ninguna diferencia hay entre vestido de hombre y vestuario de hombre, pero crea la dificultad la intención del que lega, si también él hubiere solido usar algún vestido, que es conveniente también para las mujeres; y así, se ha de decir ante todo, que se legó aquel a que se hubiere referido el testador, no el que en realidad sea de mujer, o de hombre; porque también Quinto Mucio dice, que él sabe que cierto senador solía usar vestidos de mujer para cenar, el cual, si hubiese legado los vestidos de mujer, no se consideraría que se refirió a aquellos que él mismo usaba como si fueran de hombre.

34.- EL MISMO; *Comentarios a Quinto Mucio, libro IX*.- Escribe Quinto Mucio: si un padre de familia hubiese legado a su mujer todo su oro, no se le debe a la mujer el oro que hubiese dado a un orífice para labrarlo, o el que a sí se le debiese, si no se le

Pomponius: Hoc ex parte verum est, ex parte falsum. Nam de eo, quod debetur, sine dubio: ut puta si auri libras stipulatus fuerit, hoc aurum quod ei deberetur ex stipulatu, non pertinet ad uxorem, cum illius factum adhuc non sit: id enim, quod suum esset, non quod in actione haberet, legavit.

In aurifice falsum est, si aurum dederit ita, ut ex eo auro aliquid sibi faceret: nam tunc, licet apud aurificem sit aurum, dominium tamen non mutavit manet tamen eius qui dedit et tantum videtur mercedem praestaturus pro opera aurifici: per quod eo perducimur, ut nihilo minus uxori debeatur. Quod si aurum dedit aurifici, ut non tamen ex eo auro fieret sibi aliquod corpusculum, sed ex alio, tunc, quatenus dominium transit eius auri ad aurificem (quippe quasi permutationem fecisse videatur), et hoc aurum non transibit ad uxorem.

§ 1.- Item scribit Quintus Mucius, si maritus uxori, cum haberet quinque pondo auri, legasset ita: "aurum quodcumque uxoris causa paratum esset, uti heres uxori daret", etiamsi libra auri inde venisset et mortis tempore amplius quam quattuor librae non deprehenduntur, in totis quinque libris heredem esse obligatum, quoniam articulus est praesentis temporis demonstrationem in se continens.

Quod ipsum quantum ad ipsam iuris obligationem pertineat, recte dicitur, id est ut ipso iure heres sit obligatus. Verum sciendum, si in hoc alienaverit testator inde libram, quod deminuere vellet ex legato uxoris suae, tunc mutata voluntas defuncti locum faciet doli mali exceptioni, ut, si perseveraverit mulier in petendis quinque libris, exceptione doli mali submoveatur.

Sed si ex necessitate aliqua compulsus testator,

any which was due to him and had not been returned by the goldsmith.

Pomponius: This opinion is partly true and partly false. For with reference to the gold which was due to him, there can be no question; for instance, if he had contracted for a certain number of pounds of gold, the gold to which he was entitled under the contract would not belong to his wife, since it had not yet become the property of her husband; for he bequeathed to her what belonged to him, and not that which he had a right to collect by an action at law.

So far as the goldsmith is concerned, the opinion is incorrect, if the party gave the metal to him in order that he might make something for him out of it; since, although the gold was in the hands of the goldsmith, this does not change its ownership, as it still remains the property of him who gave it, and he is only obliged to compensate the goldsmith for his labor, on which account we come to the conclusion that the wife will still be entitled to it. If, however, he gave the metal to the goldsmith, not in order that some article might be manufactured out of it, but out of other gold, then, as the ownership of the metal is transferred to the goldsmith, because an exchange is considered to have taken place, this gold will not pass to the wife.

§ 1.- Quintus Mucius also says that if a husband, having five pounds weight of gold, should make a bequest as follows, "Let my heir deliver to my wife any gold which I may have acquired for her use," even if the husband has sold a pound of gold, and, at the time of his death, not more than four pounds should be found, the heir will be obliged to furnish the entire five pounds, as the terms made use of are indicative of the present time.

This opinion, so far as it is applicable to the legal obligation, is correct; that is to say, the heir is liable by operation of law. It should, however, be remembered that if the testator alienated the above-mentioned pound of gold, because he desired to diminish the legacy to his wife, then the changed intention of the deceased will permit an exception based on bad faith to be pleaded, so that if the woman should insist in bringing suit to recover the five pounds of gold, she can be barred by an exception on that ground.

But where the testator disposed of the gold, having

hubiese devuelto por el orífice.

Y dice Pomponio: esto en parte es verdadero, y en parte falso; porque respecto al que se le debe, por ejemplo, si hubiere estipulado cien libras de oro, sin duda que este oro, que se le debería en virtud de la estipulación, no le pertenece a la mujer, puesto que todavía no se hizo de él; porque legó lo que fuese suyo, no aquello a que tuviese acción.

Respecto al orífice es falso, si le hubiere dado oro, para que de este oro le hiciese alguna cosa; porque entonces, aunque el oro esté en poder del orífice, no cambió, sin embargo, el dominio, permanece siendo del que lo dió, y se considera que solamente ha de pagar al orífice merced por el trabajo; por lo que se nos lleva a decir, que, esto no obstante, se le debe a la mujer, pero si le dió oro al orífice, mas no para que le hiciese alguna cosa de este oro, sino de otro, entonces, en tanto cuanto el dominio de este oro pasa al orífice, porque se considera que hubo como permuta, tam-poco pasará este oro a la mujer

§ 1.- También escribe Quinto Mucio, que, si, teniendo cinco libras de oro, el marido le hubiese legado a la mujer todo el oro que ha sido destinado para la mujer, para que a la mujer se lo diese el heredero, aunque después hubiese sido vendida una libra de oro, y al tiempo de la muerte no se hallasen más que cuatro libras, el heredero quedó obligado a todas las cinco libras, porque las palabras «ha sido» contienen en sí la indicación del tiempo presente.

Lo cual se diría con razón en cuanto a la misma obligación de derecho, esto es, que de derecho está obligado el heredero; pero se ha de saber, que si el testador hubiere enajenado una de estas libras con este objeto, porque quisiera disminuir el legado de su mujer, entonces, la voluntad cambiada del difunto dará lugar a la excepción de dolo malo, de suerte que, si la mujer hubiere perseverado en pedir las cinco libras, sea repelida con la excepción de dolo malo;

Pero si la enajenó el testador compelido por alguna

non quod vellet deminuere ex legato, tunc mulieri ipso iure quinque librae auri debebuntur nec doli mali exceptio nocebit adversus petentem.

§ 2.- Quod si ita legasset uxori "aurum quod eius causa paratum erit", tunc rectissime scribit Quintus Mucius, ut haec scriptura habeat in se et demonstrationem legati et argumentum: ideoque ipso iure alienata libra auri amplius quattuor pondo non remanebunt in obligatione, nec erit utendum distinctione, qua ex causa alienaverit testator.

35.- PAULUS; *libro XIV, Responsorum*.- "Titiae amicae meae, cum qua sine mendacio vixi, auri pondo quinque dari volo": quaero, an heredes ad praestationem integrae materiae auri an ad pretium et quantum praestandum compellendi sint. Paulus respondit aut aurum ei, de qua quaeritur, praestari oportere, aut pretium auri, quanti comparari potest.

§ 1.- Item quaero, si lite contestata Praetor ita pronuntiavit, ut materia praestetur, an tutores audiendi sint ab hac sententia pupillum, adversus quem pronuntiatum est, apud successorem eius in integrum restituere volentes. Paulus respondit Praetorem, qui auro legato certi ponderis materiam praestari iussit, recte pronuntiasse videri.

36.- SCAEVOLA; *libro III, Responsorum*.- "Seiae dulcissimae poculum aureum quod elegerit fidei heredum committo ut darent". Quaero, cum in hereditate non sint nisi truellae scyphi modiolii phialae, an Seia de his speciebus eligere possit. respondit, cum omnia potui parata pocula dicuntur, posse eam ex his eligere.

been compelled to do so through necessity, and not because he desired to diminish the legacy, then the five pounds of gold will be due to the woman by operation of law, and an exception on the ground of bad faith will avail the heir nothing against the claimant.

§ 2.- Where a testator makes a bequest to his wife as follows, "I bequeath to my wife any gold which may have been acquired for her use," Quintus Mucius very properly says that this clause contains in itself the designation and the proof of the legacy. Therefore, if the testator has alienated a pound of gold, no more than four pounds weight will remain due by operation of law, and it will not be necessary to consider for what reason the testator disposed of it.

35.- PAULUS; *Opinions, Book XIV*.- "I desire five pounds weight of gold to be given to Titia, with whom I have always lived without any disagreement." I ask whether the heirs shall be compelled to furnish the gold entirely in kind, or to pay the value of the same; and what amount they must pay. Paulus answers that either the gold in question must be furnished, or the price of the same, whatever it can be purchased for.

§ 1.- I also ask if, issue having been joined in the above-mentioned case, and the Praetor having decided that the gold itself must be furnished, whether the guardians of a minor, who is the heir against whom the decree was rendered, and who applied to the successor of the Praetor for a decree for the complete restitution of their ward, shall be heard with reference to the said decree. Paulus answered that the Praetor had rendered a proper decision who, where gold had been bequeathed, ordered the amount of the same to be delivered.

36.- SCAEVOLA; *Opinions, Book III*.- "I charge my heirs to deliver to my dearest Seia any golden cup which she may select." As the assets of the estate do not include anything but bowls, goblets, small measures, or drinking vessels, I ask whether Seia can make her collection from these articles. The answer was since the word "cup" is applicable to everything intended for drinking purposes, she can make her selection from them.

necesidad, no porque quisiera disminuir el legado, entonces se le deberán de derecho a la mujer las cinco libras de oro, y no le perjudicará, pidiéndola a la excepción de dolo malo.

§ 2.- Pero si le hubiese legado así a su hijo «el oro que se hubiere preparado por causa de ella», con muchísima razón escribe Quinto Mucio en este caso, que esta cláusula contiene en sí la indicación del legado, y su prueba; y por lo tanto, enajenada una libra de oro, de derecho no quedarán en la obligación más que cuatro libras, ni se habrá de utilizar la distinción de la causa por la que la haya enajenado el testador,

35.- PAULO; *Respuestas, libro XIV*.- «Quiero que a Ticia, mi amiga, con quien viví sin falsía, se le den cinco libras de oro» pregunto, si habrán de ser compelidos los herederos a la entrega de la materia de oro integra, o a dar el precio, y cuánto. Paulo respondió, que se le debe dar a ésta, de quien se trata, o el oro, o el precio del oro, en que se puede comprar.

§ 1.- También pregunto, si, contestada la demanda el Pretor falló que se entregue la materia habrán de ser oídos los tutores, que de esta sentencia quieran restituir por entero ante el sucesor de aquel al pupilo contra quien se falló. Paulo respondió, que se considera que el Pretor que mandó, habiéndose legado cierto peso de oro, que se entregase la materia, falló bien.

36.- SCÉVOLA; *Respuestas libro III*.- «Encomiando a la fidelidad de los herederos, que le den a la dulcísima Seya el vaso de oro, que hubiere elegido»; pregunto, si, no habiendo en la herencia mas que garrafas, tazas, pequeños modios, y copas, podrá elegir Seya entre estas especies. Respondió, que, como se dice que todos los vasos están destinados para la bebida, podía ella elegir entre estos.

37.- PAULUS; *libro XXI, Responsorum*.- Ornamentorum appellatione vestem muliebrem non contineri nec errorem heredis ius mutasse respondi.

38.- SCAEVOLA; *libro III, Responsorum*.- Titia testamento, item codicillis multas species tam argenti quam vestis specialiter per fideicommissum reliquit: quaero an non aliae species legato cedant, quam quae in hereditate inventae essent. Respondit eas cedere, quae inventae essent: de ceteris cavendum, ut, si inventae essent, praestentur.

§ 1.- "Semproniae Piae hoc amplius coopertoria Tavana et tunicas tres cum palliis quae elegerit dari volo": quaero an ex universa veste, id est an ex synthesi tunicas singulas et palliola sempronia eligere possit. Respondit, si essent tunicae singulares cum palliis relictas, ex his dumtaxat eligi posse: quod si non est, heredem vel tunicas et palliola set ex synthesi praestaturum vel veram aestimationem earum.

§ 2.- Seia testamento ita cavit: "si mihi per condicionem humanam contigerit, ipsa faciam: sin autem, ab heredibus meis fieri volo: iubeoque signum dei ex libris centum in illa sacra aede et in patria statui subscriptione nominis mei". Quaesitum est: cum in eo templo non nisi aut aerea aut argentea tantum sint dona, heredes Seiae utrum ex argento an ex auro signum ponere compellendi sunt an aereum? respondit secundum ea quae proponerentur argenteum ponendum.

39.- IAVOLENUS; *libro II, ex posterioribus Labeonis*.- Si uxori mundus muliebris legatus esset, ea tantummodo debere Ofilius Labeo responderunt, quae ex his tradita utendi causa uxori viro fuissent: aliter enim interpretantibus summam fore captiorem, si vascularius aut faber argentarius uxori ita legasset.

37.- PAULUS; *Opinions, Book XXL*.- I gave it as my opinion that woman's clothing is not included in the term "ornaments," and that a mistake of the heir does not change the law.

38.- SCAEVOLA; *Opinions, Book V*.- Titia, by her will and a codicil, specially bequeathed under a trust several articles of silver and of clothing. I ask whether any other property than that which may be found among the assets of the estate will be included in the legacy. The answer is that what is found will be included, and that security must be furnished to deliver the balance, in case it should be found.

§ 1.- "I wish my Tabian mantles, and three tunics with their capes, also to be given to Sempronia-Pia, to be selected by herself." I ask whether Sempronia will have the right to make her selection of the different tunics and capes from all the clothing of the deceased, that is to say, from her entire wardrobe. The answer is that if the tunics with the capes were left separately, she could only make her choice from those of the same kind; but if this was not the case, the heir would have a right to furnish them from the entire wardrobe, or to pay her their appraised value.

§ 2.- Seia made the following provision in her will: "If I, myself, should be prevented from doing so by the uncertainty of human affairs, I desire, and I direct that the bust of such-and-such a god, of a hundred pounds weight, be placed by my heirs in such-and-such a holy temple, with an inscription including my name, and stating that I have caused it to be set up in my native city." As there were no other gifts in this temple except some of bronze or silver, the question arose whether the heirs of Seia would be compelled to provide a silver, a gold, or a bronze bust. The answer was that, in accordance with the facts stated, one of silver should be placed there.

39.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- Where toilet articles intended for women are bequeathed to a wife, Ofilius and Labeo gave it as their opinion that she will only be entitled to such as have been given to her by her husband for her own use. If this should be interpreted otherwise, great harm would result when a goldsmith or a silversmith

37.- PAULO; *Respuestas, libro XXI*.- Respondí, que con la denominación de adornos no se comprende el vestido de mujer, y que el error del heredero no cambió el derecho.

38.- SCÉVOLA; *Respuestas, libro III*.- Ticia dejó especialmente por fideicomiso en testamento y también en codicilos muchas clases, tanto de objetos de plata, como de vestidos; Pregunto, si no pertenecerán al legado otras clases sino las que se hubiesen hallado en la herencia. Respondió, que le pertenecen las que hubiesen sido halladas, y que respecto a las demás se ha de dar caución de que se entregarán, si se hubiesen encontrado.

§ 1.- «Quiero que a Sempronia Pía se le den además de esto los cobertores de Tabia, y las tres túnicas con capillas, que hubiere elegido»; pregunto, si podrá elegir Sempronia entre todos los vestidos, esto es, en el guardarropa cada una de las túnicas y las capillas. Respondió, que si se hubiesen dejado túnicas especiales con capillas, solamente de estas se podía elegir; pero que si no se hubiesen dejado, el heredero habrá de entregar o las túnicas y las capillas, pero del guardarropa, o la verdadera estimación de ellas.

§ 2.- Seya dispuso así en su testamento: «si por la condición humana me fuere permitido, yo misma la haré; pero si no, quiero que se haga por mis herederos, y mando que se coloque una representación de Dios, de cien libras, en aquel templo y en mi patria con la inscripción de mi nombre al pie»; se preguntó, no habiendo en aquel templo donativos más que de bronce, o de plata, ¿han de ser compelidos los herederos de Seya a poner de plata, o de oro, o de bronce, la representación? Respondió, que, según lo que se exponía, se ha de poner de plata.

39.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro II*.- Si a la mujer se le hubiesen legado los objetos de tocador de mujer, Respondieron Ofilio y Labeón, que se deben únicamente los que de ellos se le hubiesen entregado por el marido a la mujer para usarlos porque los que lo interpretan de otro modo padecerían grave error, si así le hubiese

§ 1.- Cum ita legatum esset: "argentum, quod domo mea erit cum moriar", Ofilius nec quod depositum a se nec quod commodatum reliquisset argentum legatum videri respondit. idem Cascellius de commodato. Labeo, quod depositum esset, ita deberi, si praesentis custodiae causa, non perpetuae veluti thesauro depositum esset, quia illa verba "quod domo mea erit" sic accipi debere "esse solebat": et hoc proba.

§ 2.- Ateius servium respondisse scribit, cui argentum, quod in tusculano fundo cum moreretur habuisset, legatum esset, et quod antequam moreretur ex urbe in tusculanum iussu testatoris translatum esset, deberi: contra fore, si iniussu translatum esset.

40.- SCAEVOLA; *libro XVII. Digestorum.*- Medico suo contubernali et communium expeditionum comiti inter cetera ita legaverat: "argentum viatorum meum dari volo". Quaesitum est, cum pater familias in diversis temporibus rei publicae causa afuerat, quod viatorum argentum hoc legato comprehensum esse videtur. Respondit, quod habuisset argentum viatorum eo tempore cum testamentum faciebat, deberi.

§ 1.- Uxori suae testamento ita legatum est: "Semproniae dominae meae hoc amplius argentum balneare": quaesitum est, an etiam id argentum, quo diebus festis in balneo uti consuevit, legato cedat. Respondit omne legatum videri.

§ 2.- Mulier decedens ornamenta legaverat ita: "Seiae amicae meae ornamenta universa dari volo". eodem testamento ita scripserat: "funerari me arbitrio viri mei volo et inferri mihi quaecumque sepulturae meae causa feram ex ornamentis lineas duas ex margaritis et viriolas ex smaragdis": sed

makes such a bequest to his wife.

§ 1.- Where a legacy was bequeathed as follows, "I leave to So-and-So the silver which may be found in my house at the time of my death," Ofilius holds that silver deposited with the testator or loaned to him, ought not to be included. Cascellius is of the same opinion with reference to silver that was loaned. Labeo thinks that what was deposited with him will be due to the legatee, if it was left with him forever as treasure, and not merely for temporary safe-keeping; because the words, "Which may be found in my house at the time of my death," should be understood to mean that which was ordinarily there. I approve of this opinion.

§ 2.- Attius says Servius held that where a testator left a certain person the silver "which he might have on his Tuscan estate when he died;" that also was included in the legacy, which, before the testator's death, had, by his direction, been taken from the city to the Tuscan estate. The case, however, would be different if it had been removed without his order.

40.- SCAEVOLA; *Digest, Book XVII.*- A testator bequeathed to his physician, who resided with him and accompanied him on all his journeys, among other things, the following, "I wish the silver, which is used on my journeys, to be given to him." As the testator was absent at different times on public business the question arose what silver should be considered as included in this legacy. The answer was that that would be included which the testator had in his possession at the time when he made his will.

§ 1.- A bequest was made by a husband to his wife as follows, "I bequeath to my wife, Sempronia, in addition, the silver-ware used in the bath." The question arose whether the silver which the testator was accustomed to use in the bath on feast-days was embraced in the legacy. The answer was that all of it was considered to have been bequeathed.

§ 2.- A woman, at the time of her death, made the following bequest of her ornaments: "I wish all my jewelry to be given to my friend Seia." She also added in the same will: "I desire my funeral to be conducted in compliance with the wishes of my husband, and whatever my burial ceremonies may

legado a su mujer un fabricante de vasos o un platero.

§ 1.- Cuando se hubiese legado así: «la plata que hubiere en mi casa, cuando yo muera», Respondió Afilio, que no se considera legada ni la plata que hubiese dejado depositada por él, ni la dada en comodato; lo mismo dice Cascelio respecto a la dada en comodato, Labeón dice, que la que hubiese sido depositada se deberá, si hubiere sido depositada por causa de custodia presente, no perpetua, por ejemplo, en un tesoro, porque aquellas palabras: «que hubiere en mi casa», deben entenderse de este modo: «que solía haber»; y lo apruebo.

§2.- Escribe Ateyo que respondió Servio, que a aquel a quien se le hubiese legado la plata, que cuando muriese tuviese en el fundo Tusculano, se le debe también la que antes que hubiese hubiera sido trasladada de la ciudad al fundo Tusculano por orden del testador; y que lo contrario se da, si hubiese sido trasladada sin su mandato,

40.- SCÉVOLA; *Digesto, libro XVII.*- uno le había legado así a su médico, que vivía con él y le acompañara en expediciones comunes de ambos, entre otras cosas: «quiero que se le dé mi plata de viaje»; se preguntó, habiéndose ausentado el padre de familia en diversas épocas por causa de la República, ¿qué plata de viaje se considera que fue comprendida en este legado? Respondió, que se debe la plata de viaje que hubiere tenido al tiempo en que se hacia el testamento.

§ 1.- Uno legó así en su testamento a su mujer: «a Sempronia, mi señora, además de esto la plata del baño»; se preguntó, si pertenecerá al legado también la plata que acostumbró a usar en el baño los días de fiesta. Respondió, que se considera legada toda.

§ 2.- Una mujer, al fallecer; había legado así los adornos: «quiero que a Seya, mi amiga, se le den todos los adornos»; en el mismo testamento había escrito de este modo: «quiero que se me hagan los funerales a arbitrio de mi marido, y que se entierren conmigo todos los adornos que yo llevé a mi

neque heredes neque maritus, cum humi corpus daret, ea ornamenta, quae corpori iussus erat adici, dederunt: quaesitum est, utrum ad eam, cui ornamenta universa reliquerat, pertineant an ad heredes. Respondit non ad heredes, sed ad legatariam pertinere.

TIT. III

DE LIBERATIONE LEGATA

1.- ULPIANUS; *libro XXI, ad Sabinum*.- Omnibus debitoribus ea quae debent recte legantur, licet domini eorum sint.

§ 1.- Iulianus scripsit, si res pignori data legetur debitori a creditore, valere legatum habereque eum actionem, ut pignus recipiat, priusquam pecuniam solvat. sic autem loquitur Iulianus, quasi debitum non debeat lucrari: sed si alia testantis voluntas fuit, et ad hoc pervenietur exemplo Luitionis.

2.- POMPONIUS; *libro VI, ad Sabinum*.- Here-dem, damnatum a fideiussore non petere, a reo petere posse, sed a reo petere vetitum, si a fideiussore petat, reo ex testamento teneri Celsus putat.

§ 1.- Idem Celsus ait nullam dubitationem habere, quin herede petere a debitore vetito nec heres heredis petere possit.

3.- ULPIANUS; *libro XXIII, ad Sabinum*.- Liberationem debitori posse legari iam certum est.

be, I desire to have buried with me, of my jewelry, two strings of pearls, and my emerald bracelets." When the body of the deceased was committed to the earth, neither her heirs nor her husband buried her with the jewelry, which she directed to be placed upon her body. The question arose whether the aforesaid articles would belong to the woman to whom she left all her jewelry, or to her heirs. The answer was that they would not belong to the heirs, but to the legatee.

TITLE III

CONCERNING THE BEQUEST OF A RELEASE FROM LIABILITY

1.- ULPIANUS; *On Sabinus, Book I*.- Obligations due from all kinds of debtors can be lawfully bequeathed to them, even though they may be the owners of said obligations.

§ 1.- Julianus stated that if property which is pledged is bequeathed by a creditor to his debtor, the legacy will be valid, and the debtor will be entitled to an action to recover the pledge before he pays the money due. In this instance, Julianus seems to have had in his mind a case where the debtor would not profit by the transaction. Where, however, the intention of the testator was otherwise, he can be released from the obligation just as if he had paid the debt.

2.- POMPONIUS; *On Sabinus, Book VI*.- When an heir was charged not to demand anything of the security, he can collect the debt from the principal debtor; but when he was forbidden to collect it from the latter, and demands it of the security, Celsus thinks that he will be liable to the principal debtor under the terms of the will.

§ 1.- Celsus also says that he has no doubt that where an heir has been forbidden to collect a debt from a debtor, his own heir cannot collect it.

3.- ULPIANUS; *On Sabinus, Book XXIII*.- It is certain that, at present, a release can be bequeathed to

sepultura, dos sartas de margaritas, y las pulseras de esmeraldas»; pero ni los herederos, ni el marido, dieron, al entregar a la tierra el cuerpo, los adornos que se había dispuesto que se unieran al cuerpo; se pregunta, si le pertenecerán a aquella a quien le había dejado todos los adornos, o a los herederos. Respondió, que no les pertenecen a los herederos, sino al legatario.

TÍTULO III

DEL LEGADO DE LA LIBERACIÓN

1.- ULPIANO; *Comentarios a Sabino, libro XXI*.- Válidamente se legan a todos los deudores las cosas que deben, aunque sean dueños de ellas.

§ 1.- Escribió Juliano, que si al deudor se le legase por el acreedor la cosa dada en prenda, es válido el legado, y tiene la acción para recobrar la prenda antes de pagar el dinero; pero así habla Juliano, como si no debiera lucrar la deuda; pero si fue otra la voluntad del testador, también se llegará a esto a la manera que por el pago.

2.- POMPONIO; *Comentarios a Sabino, libro VI*.- Opina Celso, que el heredero condenado a no pedir al fiador, puede reclamarle al deudor; pero que aquel a quien se le vedó reclamarle al deudor queda obligado al deudor en virtud del testamento, si le reclamara al fiador.

§ 1.- El mismo Celso dice, que no hay duda alguna de que habiéndose vedado al heredero que le reclame al deudor, tampoco podrá pedirle el heredero del heredero.

3.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Ya es cosa cierta que se le puede legar al

§ 1.- Sed et si chirographum quis decedens debitori suo dederit, exceptionem ei competere puto, quasi pro fideicommisso huiusmodi datione valitura.

§ 2.- Iulianus etiam libro quadragesimo Digestorum scripsit: si quis decedens chirographum seii titio dederit, ut post mortem suam Seio det aut, si convaluisse, sibi redderet, deinde Titius defuncto donatore Seio dederit et heres eius petat debitum, Seius doli exceptionem habet.

§ 3.- Nunc de effectu legati videamus. Et si quidem mihi liberatio sit relicta, cum solus sim debitor, sive a me petatur, exceptione uti possum, sive non petatur, possum agere, ut liberer per acceptilationem. Sed et si cum alio sim debitor, puta duo rei fuimus promittendi, et mihi soli testator consultum voluit, agendo consequar, non ut accepto liberer, ne etiam conreus meus liberetur contra testatoris voluntatem, sed pacto liberabor.

Sed quid si socii fuimus? videamus, ne per acceptilationem debeam liberari: alioquin, dum a conreo meo petitur, ego inquietor. Et ita Iulianus libro trigesimo secundo Digestorum scripsit, si quidem socii non simus, pacto me debere liberari, si socii, per acceptilationem.

§ 4.- Consequenter quaeritur, an et ille socius pro legatario habeatur, cuius nomen in testamento scriptum non est, licet commodum ex testamento ad utrumque pertineat, si socii sunt. Et est verum non solum eum, cuius nomen in testamento scriptum est, legatarii habendum, verum eum quoque, qui non est scriptus, si et eius contemplatione liberatio relicta esset.

§ 5.- Utrique autem legatarii habentur et in hoc casu. Nam et si quod ego debeo Titio sit ei legatum mei gratia, ut ego liberer, nemo me negabit

a debtor.

§ 1.- But, even if the testator, at the time of his death, should give a debtor his note, I think that the latter will be entitled to an exception, as the surrender of the note will be valid as a trust.

§ 2.- Julianus, in the Fortieth Book of the Digest, says that if anyone, when about to die, should give a note of Seius to Titius, and direct him to deliver it to Seius after his death; or, if he should recover, return it to him; and then Titius should give the note to Seius after the death of the creditor, and the heir of the latter should attempt to collect the debt, Seius will be entitled to an exception on the ground of fraud.

§ 3.- Let us now see what will be the effect of this legacy. And, indeed if the release of a debt is left to me the only debtor, and an attempt is made to collect it from me, I can avail myself of an exception; or, if such an attempt is not made, I can bring an action to obtain a discharge from liability by means of a receipt. Still, even though I may be a joint-debtor with another party, for instance, where both of us are principal debtors, and the testator desired to favor me alone, I can bring suit, not to be discharged from liability by a receipt, nor that my fellow-debtor may be released against the intention of the testator, but that I may be released by an agreement.

But what if we were partners? Let us see whether I should be released by means of a receipt; otherwise, would I not be subjected to annoyance, if suit were brought against my fellow-debtor? Julianus, in the Thirty-second Book of the Digest, states that if we are not partners, I ought to be released by an agreement, but if we are partners, this should be effected by means of a receipt.

§ 4.- Hence the question arises, whether a partner should be considered a legatee whose name is not mentioned in a will, although it is an advantage to both parties if they are partners. It is true that not only he whose name is mentioned in a will should be considered a legatee, but also he who is not mentioned therein, if the testator had him in his mind at the time when the release was bequeathed.

§ 5.- Both parties, however, are considered to be legatees in this instance. For if I owe anything to Titius, and, in order to favor me, the bequest is made

deudor la liberación.

§ 1.- Pero también si uno al morir le hubiere dado a su deudor el quirógrafo, opino que le compete excepción, como si esta dación hubiese de valer por fideicomiso.

§ 2.- También Juliano escribió en el libro cuadragésimo del Digesto, que si alguno al morir hubiere dado a Ticio un quirógrafo de Seyo, para que después de su muerte se lo dé a Seyo, o para que si él hubiese convallecido se lo devuelva, y después Ticio, habiendo fallecido el donador, se lo hubiere dado a Seyo, y el heredero de aquel pidiese la deuda, Seyo tiene la excepción de dolo.

§ 3.- Veamos ahora el efecto del legado; y si verdaderamente se me hubiera dejado la liberación, siendo yo solo el deudor, si se me reclama, puedo usar de excepción, y si no se me reclama, puedo ejercitar la acción, para que se me libere por la acetilación. Pero aunque yo sea deudor junto con otro, por ejemplo, si fuimos dos los que prometimos, y el testador quiso mirar solamente por mí, ejercitando yo la acción conseguiré, no que se me libere como si se hubiera pagado; para que no sea liberado también mi codeudor contra la voluntad del testador, sino que quedará libre por pacto.

Mas ¿qué se dirá si fuimos socios? Veamos si no deberé quedar libre por la aceptilación, pues de otro modo, reclamándosele a mi codeudor, soy molestado. Y así, escribió Juliano en el libro trigésimo segundo del Digesto, que si verdaderamente no fuéramos socios, debo ser liberado por pacto, y si fuéramos socios, por la aceptilación.

§ 4.- Consiguientemente se pregunta, si será tenido como legatario también aquel socio, cuyo nombre no se escribió en el testamento, aunque el beneficio del testamento les pertenezca a ambos, si son socios. Y es verdad, que ha de ser tenido como legatario no solamente aquel cuyo nombre se escribió en el testamento, sino también el que no fue inscrito, si también por consideración a él hubiese sido dejada la liberación.

§ 5.- Pero ambos son considerados legatarios también en este caso; porque también si lo que yo le debo a Ticio le hubiera sido legado a este por consi-

legatarium, ut et Iulianus eodem libro scribit. Et Marcellus notat utriusque legatum esse tam meum quam creditoris mei, etsi solvendo fuero: interesse enim creditoris duos reos habere.

4.- POMPONUIS; *libro VII, ex Plautio*.- Quid ergo est, cum agere poterit creditor ex testamento? non aliter heres condemnari debebit, quam si caveatur ei adversus debitorem defensu iri. item agente debitore nihil amplius heres praestare debet, quam ut eum adversus creditorem defendat.

5.- ULPIANUS; *libro XXIII, ad Sabinum*.- Si quis reum habeat et fideiussorem et reo liberationem leget, Iulianus ibidem scripsit reum per acceptilationem liberandum: alioquin si fideiussorem coeperit convenire, alia ratione reus convenitur. Quid tamen, si donationis causa fideiussor intervenit nec habet adversus reum regressum? vel quid si ad fideiussorem pecunia pervenerit et ipse reum dederit vice sua ipseque fideiusserit? pacto est reus liberandus.

Atquin solemus dicere pacti exceptionem fideiussori dandam, quae reo competit: sed cum alia sit mens legantis, alia paciscentis, nequaquam hoc dicimus.

§ 1.- Quod si fideiussori sit liberatio legata, sine dubio, ut et Iulianus scripsit, pacto erit fideiussor liberandus. Sed et hic puto interdum acceptilationem liberandum, si vel reus ipse vere fuit aut in eam rem socius reus.

§ 2.- Idem Iulianus eodem libro scripsit, si filius

to him on condition that I shall be released, no one will deny that I am a legatee, as Julianus states in the same Book; and Marcellus says in a note that the legacy is bequeathed to both parties, as much as to my creditor, even though I may be solvent, for it is always to the interest of the creditor to have two debtors liable for the same obligation.

4.- POMPONIUS; *On Plautius, Book VII*.- What then must be done, as the creditor can bring an action under the will? The heir should not have judgment rendered against him, unless security is furnished him for defence against the debtor. Likewise, if the debtor should institute proceedings, the heir is required to do nothing more than to protect him against the creditor.

5.- ULPIANUS; *On Sabinus, Book XXIII*.- Where a testator has a principal and a surety indebted to him, and bequeaths a release to the principal, Julianus states in the same place that the principal ought to be released by means of a receipt; otherwise, if the heir should sue the surety, the principal debtor will be brought into the case in another way. But what if the surety intervenes for the purpose of making a donation, and has no recourse against the principal debtor? Or, what course must be pursued if the money had come into the hands of the surety, and he had given a principal in his stead, to whom he himself furnished a surety? In this instance, the principal debtor should be released by agreement.

We are, however, accustomed to hold that the same exception on the ground of contract to which the principal debtor is entitled should be granted the surety. We say that this does not, in any way, apply to this case; as, when a testator leaves a legacy, his intention is one thing, and that of the heir when he makes an agreement is another.

§ 1.- If, however, a release should be bequeathed to a surety, there is no doubt, as Julianus says that the surety should be released by the agreement of the heir. Still, I think that in a case of this kind he should sometimes be released by a receipt, if the party himself was the actual debtor, or if he was a partner with the principal in the transaction.

§ 2.- Julianus, in the same Book, also states that if a

deración a mí, para que yo quede libre, nadie dirá que no soy legatario, como escribe también Juliano en el mismo libro, y observa Marcelo, que el legado es de ambos, tanto mío, como de mi acreedor, aun cuando yo fuere solvente; porque le interesa al acreedor tener dos deudores.

4.- POMPONIO; *Doctrina de Plaucio, libro VII*.- ¿Qué se dirá, pues, cuando el acreedor pudiere ejercitar la acción del testamento. Que el heredero no deberá ser condenado de otra suerte, sino si se le diera caución de que habrá de ser defendido contra el deudor. Asimismo, ejercitando la acción el deudor, el heredero no debe responder de nada mas, sino de que lo defenderá contra el acreedor,

5.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Si alguien tuviera deudor y fiador, y legara al deudor la liberación, escribió Juliano en el mismo lugar, que el deudor ha de quedar libre por aceptilación, porque de otra suerte, si hubiere comenzado a demandar al fiador es demandado por otra razón el deudor, pero ¿qué se dirá si intervino fiador por causa de donación, y no tiene repetición contra el deudor, o qué, si el dinero hubiere ido al fiador, y él hubiere dado deudor en su lugar, y él mismo hubiere afianzado? Que el deudor ha de ser liberado por pacto.

Mas solemos decir, que al fiador se le ha de dar la excepción del pacto, que compete al deudor; pero siendo una la intención del que lega, y otra la del que pacta, de ninguna manera decimos esto.

§ 1.- Pero si la liberación hubiera sido legada al fiador, sin duda que, como escribió también Juliano, habría de ser liberado por pacto el fiador; pero aun en este caso creo que a veces habrá de ser liberado por aceptilación, si él mismo fue verdaderamente deudor, o socio deudor en este negocio.

§ 2.- El mismo Juliano escribió en el mismo libro,

familias debitor fuerit et patri eius fuerit liberatio relicta, patrem pacto liberandum esse, ne etiam filius liberetur. Et parvi, inquit, refert, si sit aliquid in peculio die legati cedente necne: securitatem enim pater per hoc legatum consequitur: maxime, inquit, cum rei iudicandae tempus circa peculium spectetur.

Huic patri similem facit Iulianus maritum, cui uxor post divortium liberationem dotis legavit: nam et hunc, licet die legati cedente solvendo non sit, legatarius esse: et utrumque ait solum repetere non posse. Sed est Verius quod Marcellus notat patrem petere posse (nondum enim erat debitor, cum solveret), maritum non posse, quod debitum solvit. patrem enim etsi quis debitorem existimaverit, attamen loco esse condicionalis debitoris, quem solum repetere posse non ambigitur.

§ 3.- Sed si damnatus sit heres filium liberare, non adicit Iulianus, utrum acceptilatione filius an pacto sit liberandus: sed videtur hoc sentire, quasi acceptilatione debeat liberari, quae res patri quoque proderit. quod optinendum est, nisi evidenter approbetur contrarium sensisse testatorem, id est ne filius inquietetur, non ne pater: tunc enim acceptilatione eum non liberandum, sed pacto.

§ 4.- Idem Iulianus scripsit, si pro filio pater fideiusserit eique liberatio sit legata, eum pacto liberandum quasi fideiussorem, non quasi patrem, et ideo de peculio posse conveniri. hoc ita demum putat, si dumtaxat quasi fideiussorem eum voluit testator liberari: ceterum si et quasi patrem, et de peculio erit liberandus.

son under paternal control should become a debtor, and his release is bequeathed to his father, the latter ought to be discharged from liability by an agreement, to avoid the son from being released. And he adds that it makes little difference whether there is any property in the peculium of the son on the day when the legacy vests, or not, for the father will always be secured by means of the legacy; and he holds that this is especially the case when the amount of the peculium is considered with reference to the time when the judgment was rendered.

Julianus compares a husband to a father where his wife, after divorce, bequeathed him a release from liability for her dowry; for he, also, although he may not have been solvent at the time when the legacy vested, will be a legatee, and he says that both the parties cannot recover what has already been paid. The better opinion, however, as Marcellus observes, is that the father can bring an action, for he was not yet a debtor when he made payment, as the husband cannot do this, if he has paid the debt. For even if anyone should think that the father was a debtor, still, he only occupies the place of a conditional debtor, and there is no doubt that he can recover what he paid.

§ 3.- Where, however, an heir is charged to release the son, Julianus does not add that the former should be released, either by a receipt or by an agreement, but he seems to think that the son should be discharged from liability, as it were, by a receipt; which transaction would also be a benefit to the father. This rule should prevail, unless it can be clearly proved that the testator intended otherwise, that is to say, that neither the son nor the father should be annoyed; for in this instance he ought to be released, not by means of a receipt, but by an agreement.

§ 4.- Julianus also says that where a father becomes surety for his son, and his release is bequeathed to him, he should be discharged from liability by an agreement, as a surety, and not as a father; and therefore suit can be brought against him with reference to the peculium. Finally, he thinks that this rule only applies where the testator intended that he should be released as a surety, but if he intended that he should also be released as a father, he should also be discharged from liability for the peculium.

que si un hijo de familia hubiere sido deudor, y a su padre le hubiere sido dejada la liberación, el padre habrá de ser liberado por pacto, para que no sea liberado también el hijo; y poco importa, dice, si hay, o no, algo en el peculio al correr el término del legado; porque el padre consigue por este legado la seguridad, mayormente, dice, porque respecto al peculio se atiende al tiempo de ser juzgado el negocio.

A este padre asemeja Juliano el marido, a quien la mujer le legó después del divorcio la liberación de la dote; porque también este es legatario, aunque no sea solvente al correr el término del legado, y ni uno ni otro, dice, pueden repetir lo pagado, pero es mas verdadero lo que observa Marcelo, que el padre puede pedirlo; porque todavía no era deudor cuando pagó; pero el marido no puede, porque paga lo que debía, pues aunque alguien juzgare deudor al padre, está, sin embargo, en el lugar del deudor condicional, el cual no se duda que puede repetir lo pagado.

§ 3.- Pero si el heredero hubiera sido condenado a liberar al hijo, no añade Juliano, si el hijo haya de ser liberado por aceptación, o por pacto, Pero parece que entendió esto, que debería ser liberado como por aceptación; lo cual le aprovecharía también al padre. Esto se ha de observar, a no ser que evidentemente se pruebe que el testador entendió lo contrario, esto es, que no sea molestado el hijo, no que no le sea el padre; porque entonces no habrá de ser liberado él por la aceptación, sino por pacto.

§ 4.- Escribió el mismo Juliano, que si el padre hubiere sido fiador del hijo, y le hubiera sido legada la liberación, ha de ser liberado por pacto, como fiador, no como padre, y que por lo tanto puede ser demandado con la acción de peculio; esto lo dice así solamente, si el testador quiso que fuese liberado únicamente como fiador; pero si también como padre, también habrá de ser liberado de la acción de peculio.

6.- IAVOLENUS; *libro VI, Epistolarum*.- Post emancipationem vero filii eatenus pater actionem habebit, quatenus aliquid ex peculio aut in rem verso praestaturus est: id enim legatorum nomine ad patrem pertinebit, quod eius intererit.

§ 1.- Illud quaeri potest, an eo quoque nomine pater ex testamento agere possit, ut etiam filius actione liberetur. Quibusdam eo usque extendi actionem placebat, quia patris interesse videatur, si peculium filio post emancipationem concessisset, integrum ius eius permanere. Ego contra sentio: nihil quicquam amplius patri praestandum ex eiusmodi scriptura testamenti puto, quam ut nihil ex eo, quod praestaturus heredi fuerit, praestet.

7.- ULPIANUS; *libro XXIII, ad Sabinum*.- Non solum autem quod debetur remitti potest, verum etiam pars eius vel pars obligationis, ut est apud Iulianum tractatum libro trigesimo tertio Digestorum.

§ 1.- Si is qui stipulatus stichum aut decem damnaverit heredem Stichum non petere, legatum valere constat: sed quid contineat, videamus. Et Iulianus scribit actionem ex testamento in hoc esse videri, ut debitor accepto liberetur: quae res utique debitorem et in decem liberabit, quia acceptilatio solutioni comparatur, et quemadmodum, si Stichum solvisset, debitor liberaretur, ita et acceptilatione Stichi liberari.

§ 2.- Sed si debitorem decem damnatus sit heres viginti liberare, idem Iulianus scripsit libro trigesimo tertio nihilo minus esse liberandum decem: nam et si ei viginti accepto ferantur, in decem liberabitur.

§ 3.- Sed si duobus heredibus institutis alterum ex his damnaverit creditori solvere, valet legatum

6.- JAVOLENUS; *Epistles, Book VI*.- But, after the emancipation of the son, the father will only be entitled to an action to the extent of whatever forms part of the peculium of his son, or when the latter may have paid out anything for the benefit of his father; since the property which it is to the interest of the father to have, will belong to him by virtue of the legacy.

§ 1.- The inquiry may be made, whether the father can bring suit under the will for this purpose, with the result that the son will also be released from liability to an action. It has been held by certain authorities that the proceeding has this effect, because it is considered that it is to the interest of the father that his rights should remain unimpaired, where he gives his son his peculium after his emancipation. I, however, hold the contrary opinion, and I think that nothing more should be granted to the father under the terms of the will, than that he should be required to pay only what could be collected by the heir.

7.- ULPIANUS; *On Sabinus, Book XXIII*.- Moreover, not only what is due can be remitted, but also a portion of the same, that is to say, a part of the obligation, as is stated by Julianus in the Thirty-third Book of the Digest.

§ 1.- Where he who has stipulated for the delivery of Stichus, or ten aurei, charges his heir not to demand Stichus, it is established that the legacy is valid; but let us consider what it includes. Julianus says that it appears that an action can be brought under the will to compel the discharge of the debtor by a receipt, which will also release him so far as the ten aurei are concerned, because a receipt is equivalent to payment; and just as the debtor should be released if he had delivered Stichus, so he will be discharged from liability by the receipt for Stichus.

§ 2.- If, however, the heir should be charged to release the debtor from the payment of twenty aurei, Julianus also states, in the Thirty-third Book, that the debtor should, nevertheless, be released from liability for ten, as if he obtains a receipt for twenty, he will be discharged from liability for the former amount.

§ 3.- Where two heirs have been appointed by a debtor, and he charges one of them to pay his creditor,

6.- JAVOLENO; *Epístolas, libro VI*.- Pero después de la emancipación del hijo tendrá acción el padre en tanto cuanto ha de entregar alguna cosa en virtud de la acción de peculio, o de lo que se convirtió en su provecho; porque a título de legados le pertenecerá al padre lo que le interesare.

§ 1.- Se puede preguntar, si también con este título podría ejercitar el padre la acción de testamento, para que también el hijo quede libre de la acción. A algunos les parecía bien que la acción se extendiese hasta aquí, porque se consideraba que al padre le interesaba, si después de la emancipación le hubiese concedido el peculio al hijo, que permaneciese íntegro el derecho de este. Yo opino lo contrario; creo que en virtud de la escritura de semejante testamento no se le ha de conceder al padre ninguna otra cosa más, sino que no dé nada de lo que hubiere de haber dado al heredero.

7.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Mas se puede perdonar no solamente lo que se debe, sino también parte de ello, o parte de la obligación, como se expuso por Juliano en el libro trigésimo tercero del Digesto.

§ 1.- Si el que estipulo a Stico, o la suma de diez, hubiere condenado al heredero a no pedir a Stico, consta que es válido el legado; pero veamos qué sea lo que contenga. Y escribe Juliano, que se considera que hay la acción de testamento para esto, para que el deudor quede libre por aceptilación; lo cual ciertamente liberará también de los diez al deudor, porque la aceptilación se compara al pago; y así como si el deudor hubiese entregado a Stico, se liberaría, así también se libera con la aceptilación de Stico.

§ 2.- Pero si el heredero hubiera sido condenado a liberar de veinte a un deudor de diez, escribió el mismo Juliano en el libro trigésimo tercero, que, no obstante, ha de ser liberado de los diez; porque también si se le tienen por pagados los veinte, se le liberaría de los diez.

§ 3.- Pero si habiendo instituido dos herederos, hubiere condenado a uno de ellos a pagarle a un

propter coheredem eumque ex testamento acturum, ut creditori solvatur.

§ 4.- Liberatio autem debitori legata ita demum effectum habet, si non fuerit exactum id a debitore, dum vivat testator: ceterum si exactum est, evanescit legatum.

§ 5.- Unde quaerit Iulianus, si ab impuberis substituto sit liberatio relicta, deinde impubes exegerit quod debetur, an evanescat legatum. Et cum constet pupillum in his, quae a substituto relinquuntur, personam sustinere eius a quo sub condicione legatur, consequens est substitutum actione ex testamento teneri, si pupillus a debitore exegerit.

§ 6.- Idemque est et si pupillus non exegerit, sed solummodo litem sit contestatus, teneri eum, ut remittat actionem.

§ 7.- Nam et si debitori liberatio sub condicione legata fuisset et vel lis fuisset contestata vel etiam exactum pendente condicione, ex testamento actio maneret liberatione relicta.

8.- POMPONIUS; *libro VI, ad Sabinum*.- Non solum nostrum debitorem, sed et heredis et cuiuslibet alterius ut liberetur, legare possumus.

§ 1.- Potest heres damnari, ut ad certum tempus non petat a debitore: sed sine dubio nec liberare eum intra id tempus debebit, et, si debitor decesserit, ab herede eius intra id tempus peti non poterit.

§ 2.- Illud videndum est, an eius temporis, intra quod petere heres vetitus sit, vel usuras vel poenas petere possit. Et Priscus Neratius existimabat committere eum adversus testamentum, si petisset: quod verum est.

§ 3.- Tale legatum: "heres meus a solo Lucio Titio

the legacy will be valid so far as his co-heir is concerned, and the latter will have a right to bring suit to compel payment to the creditor.

§ 4.- A release bequeathed to a debtor only becomes effective where payment has not been required from him, during the lifetime of the testator; if, however, it has been required, the legacy is extinguished.

§ 5.- Therefore Julianus asks, if a release is bequeathed, and the substitute of a minor child is charged with the same, and the minor afterwards exacts payment of what is due, whether the legacy will be extinguished. And, as it is established that a minor, so far as a legacy with which his substitute is charged is concerned, occupies the same position as an heir charged with a conditional bequest, the result is that the substitute will be liable to an action under the will, if the minor should demand payment of the claim by the debtor.

§ 6.- The same rule applies where the minor does not exact payment, but only institutes proceedings in court, for the substitute will be compelled to have the action dismissed.

§ 7.- For if the release had been bequeathed to the debtor conditionally, and either issue had been joined, or payment had been exacted before the condition was fulfilled, the debtor will still be entitled to his action under the will to obtain the release which was bequeathed to him.

8.- POMPONIUS; *On Sabinus, Book VI*.- We can not only make a bequest releasing our debtor, but also one releasing our heir and anyone else whomsoever.

§ 1.- An heir can be charged not to demand payment of a debtor within a certain time, but there is no doubt that he should not release him during the intermediate time; and if the debtor should die, the debt cannot be collected from his heir within the said period.

§ 2.- It should be considered whether the heir can collect interest on penalties for the time during which he is forbidden to demand the debt. Priscus Neratius held that to make such a demand would be contrary to the will, which is correct.

§ 3.- A bequest like the following: "My heir must

acreedor, es válido el legado por causa del coheredero, y éste ejercerá la acción de testamento para que se pague al acreedor.

§ 4.- Mas la liberación legada al deudor solamente tiene efecto de este modo, si no se hubiere cobrado del deudor, viviendo el testador; pero, si se cobró, se extingue el legado.

§ 5.- Por lo cual pregunta Juliano, si, habiéndose dejado la liberación a cargo del substituto de un impúbere hubiere cobrado después el impúbere lo que se debe, se extinguirá el legado. Y como consta que el pupilo representa en las cosas, que se dejan a cargo del substituto, la persona de aquel a cuyo cargo se lega bajo condición, es consiguiente que el substituto esté obligado por la acción de testamento, si el pupilo hubiere cobrado del deudor.

§ 6.- Y lo mismo es, también si el pupilo no hubiere cobrado, sino que solamente hubiera contestado la demanda, pues aquel está obligado a remitir la acción.

§ 7.- Porque también si al deudor le hubiese sido legada bajo condición la liberación, y o se hubiese contestado la demanda, o aun se hubiese cobrado estando pendiente la condición, quedaría la acción del testamento habiéndose dejado la liberación.

8.- POMPONIO; *Comentarios a Sabino, libro VI*.- Podemos legar, para que sea liberado, no solamente a un deudor nuestro, sino también al del heredero y al de otro cualquiera.

§ 1.- El heredero puede ser condenado a no pedirle al deudor hasta cierto tiempo; pero sin duda no deberá liberarlo dentro de este tiempo, y si el deudor hubiere fallecido, no se le podrá pedir al heredero dentro de este tiempo,

§ 2.- Se ha de ver, si podrá pedir o los intereses, o las prendas, del tiempo dentro del cual se le hubiera vedado al heredero pedir, Y opinaba Prisco Neracio, que infringía el testamento, si hubiese pedido; lo que es verdad,

§ 3.- Tal legado: «solamente a Lucio Ticio no le

ne petito" ad heredem Lucii Titii non transit, si nihil vivo Lucio Titio adversus testamentum ab herede, eo quod ab eo exigere debitum temptavit, sit commissum: quotiens enim cohaeret personae id quod legatur, veluti personalis servitus, ad heredem eius non transit, si non cohaeret, transit.

§ 4.- Si verba liberationis in rem sint collata, pro eo est, quasi heres ab eo debitore heredeque eius petere vetitus sit, ut adiectio heredis perinde nihil valeat, atque non esset valitura ipsius debitoris persona non comprehensa.

§ 5.- Is, qui reddere rationes iussus sit, non videtur satisfacere, si reliquum reddat non editis rationibus.

§ 6.- Si heres vetitus sit agere cum eo, qui negotia defuncti gesserit, non videtur obligatio ei praelegata, quae dolo vel ex fraude eius qui negotia gesserit commissa sit, et testator id videtur sensisse. Ideo si heres negotiorum gestorum egisset, agens procurator ex testamento incerti doli mali exceptione excludi potest.

§ 7.- Et ei liberatio recte legatur, apud quem deposuero vel cui commodavero pignori dederam vel ei quem ex furtiva causa mihi dare oportet.

9.- ULPIANUS; *libro XXIV, ad Sabinum*.- Si quis rationes exigere vetetur, ut est saepissime Rescriptum, non impeditur reliquas exigere, quas quis se reliquavit, et si quid dolo fecit qui rationes gessit.

Quod si quis et haec velit remittere, ita debet legare: "damnas esto heres meus, quidquid ab eo

not collect the debt from Lucius Titius alone," does not pass to the heir of Lucius Titius, if, during the lifetime of the latter, nothing was done in opposition to the will by the heir attempting to collect the debt from him; for whenever property which is bequeathed attaches to the person of the legatee, it is in the nature of a personal servitude, and does not pass to his heir; but if it does not attach to his person, it will be transmitted to his heir.

§ 4.- If the words granting the release refer to matters in rem, the effect is the same as if the heir had been specifically forbidden to collect the claim from either the debtor, or his heir, as the addition of the heir is of no force or effect; just as would be the case if the person of the debtor himself had not been included.

§ 5.- He who is directed to render accounts is not considered to have complied with the wishes of the testator, if he does not produce his accounts, but merely pays the balance remaining in his hands.

§ 6.- Where an heir is forbidden to bring suit against the agent who attended to the affairs of the deceased, it is not considered to be for the benefit of the legatee, if the obligation was contracted by the bad faith or the fraud of him who transacted the business, and the testator will be held to have entertained this opinion. Therefore, if the heir should institute proceedings against the agent on the ground of business transacted, and the latter brings suit under the will for an indeterminate amount, he can be barred by an exception on the ground of fraud.

§ 7.- A release may also legally be bequeathed to anyone with whom I leave a deposit, or to whom I make a loan for use, or give property in pledge, or to one who is obliged to make good to me the proceeds of a theft.

9.- ULPIANUS; *On Sabinus, Book XXIV*.- When an heir is forbidden to require the rendition of accounts, it has been very frequently stated in rescripts that he will not be prevented from demanding balances which are due, where the parties have them in their possession, or where the agent who transacted the business has been guilty of any fraudulent act.

If anyone should desire to release another from liability on this account also, he should make his

pida mi heredero» no pasa al heredero de Lucio Ticio, si viviendo Lucio Ticio, nada se le hubiera hecho contra el testamento, por el heredero, porque siempre y cuando va unido a la persona lo que se lega, como una servidumbre personal, no pasa a su heredero y pasa si no va unido.

§ 4.- Si las palabras de la liberación hubieran sido referidas a una cosa, es lo mismo que si se le hubiera vedado al heredero pedirle al deudor y al heredero de este, de suerte que la adición del heredero no valdrá nada, lo mismo que no habrá de valer no habiéndose expresado la persona del mismo deudor.

§ 5.- Aquel a quien se le haya mandado dar cuentas, no se considera que cumple, si entrega lo sobrante sin haber presentado las cuentas.

§ 6.- Si al heredero se le hubiera vedado ejercitar la acción contra aquel que hubiere gestionado negocios del difunto no se considera que se prelegó la obligación que se haya contraído por dolo, o por fraude del que hubiera gestionado los negocios; y parece que esta fue la intención del testador; por lo tanto, si el heredero hubiese ejercitado la acción de negocios, ejercitando el procurador en virtud del testamento de la cosa incierta, puede ser rechazado con la excepción de dolo malo.

§ 7.- También se lega válidamente la liberación a aquel en quien no hubiere depositado, o a quien yo le hubiere entregado en comodato, o dado en prenda, o a aquel que me debe dar por causa de hurto,

9.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si a alguno se le vedara exigir cuentas, no se le impide, como muchísimas veces se respondió por Rescripto, exigir los remanentes que uno quedó debiendo, y por lo que hizo con dolo el que llevo las cuentas.

Mas si alguno quisiera remitir también estas cosas, debe legar así: «esté condenado mi heredero a

exegerit illa vel illa actione, id ei restituere" vel "actionem ei remittere".

10.- IULIANUS; *libro XXXIII, Digestorum*.- Si damnatus heres fuerit a fideiussore quidem non petere, quod autem reus debet, Titio dare, pacisci debet, ne a fideiussore petat, et adversus reum actiones suas praestare legatario: quemadmodum damnatus heres, ne a reo petat, et damnatus dare quod fideiussor debet, et reo acceptum facere et legatario litis aestimationem sufferre cogatur.

11.- IDEM; *libro XXXVI.- Digestorum*.- Si debitor fideiussorem suum ab herede suo liberari iusserit, an fideiussor liberari debeat? respondit debere. Item quaesitum est, an, quia mandati actione heredes tenerentur, inutile legatum esset, quemadmodum inutile legatum est quod debitor creditori suo legat. Respondit, quotiens debitor creditori suo legaret, ita inutile esse legatum, si nihil interesset creditoris ex testamento potius agere quam ex pristina obligatione. Nam et si Titius mandaverit Maevio, ut pecuniam promitteret, deinde liberari eum iusserit a stipulatore, manifestum est, quantum intersit promissoris liberari potius quam praestare ex stipulatu, deinde mandati agere.

12.- IDEM; *libro XXXIX, Digestorum*.- Lucius Titius cum Erotem actorem haberet, codicillis ita cavit: "Erotum liberum esse volo: quem rationes reddere volo eius temporis, quod erit post novissimam meam subscriptionem". Postea vivus Erotum manumisit in eodem actu habuit rationesque subscripsit usque in eum diem, qui fuit ante paucissimos dies quam moreretur. Heredes Lucii Titii dicunt quasdam summas et servum adhuc Erotum et postea liberum accepisse neque in eas

bequest as follows: "Let my heir be charged to return to So-and-So anything which he has collected from him by such-and-such and such-and-such a suit, or release him from liability under said actions."

10.- JULIANUS; *Digest, Book XXXIII*.- Where an heir is charged not to collect anything from a surety, and to pay to Titius what the principal owes; he ought to agree not to make a demand of the surety, and to assign to the legatee his rights of action against the principal debtor; just as when an heir is charged not to collect anything from the principal debtor, and to pay to a third party the amount that the surety owes, he must give a receipt to the principal, and will be compelled to pay to the legatee the amount fixed by the court as due from the surety.

11.- THE SAME; *Digest, Book XXXVI*.- If a debtor should order his surety to be released by his heir, ought he to be released? The answer is that he should be. As the heirs are liable to an action on mandate, the inquiry was also made whether the legacy was not void, as the debtor made a bequest to his creditor. The answer was that, whenever a debtor makes a bequest to his creditor, the legacy will be void if it should not rather be to the interest of the creditor to bring an action under the will, than one founded on the original obligation; for if Titius should have directed Maevius to promise the payment of a certain sum of money, and afterwards should direct him to be released by the stipulation, it is clear that it is more to the interest of the party making the promise to be released than to pay the amount in accordance with the stipulation, and then to bring an action on mandate.

12.- THE SAME; *Digest, Book XXXIX*.- Lucius Titius, who employed Eros as his agent, made the following provision in his codicil, "I desire Eros to be free, and I wish him to render an account of all that he has done, during the time subsequent to my last signature." He, afterwards, while still living, manumitted Eros, and, at the same time, the slave rendered his accounts, and the testator signed them up to that date, which was only a few days before he died. The heirs of Lucius Titius alleged that Eros had

restituirle todo lo que le hubiere exigido con tal o cual acción, o a remitirle la acción».

10.- JULIANO; *Digesto, libro XXXIII*.- Si el heredero hubiere sido condenado a no pedirle ciertamente el fiador y cederle al legatario sus propias acciones contra el deudor, a la manera que el heredero condenado a no pedirle al deudor, y condenado a dar lo que debe el fiador, está obligado a tener por cumplido al deudor, y a darle al legatario la estimación del litigio.

11.- EL MISMO; *Digesto, libro XXXVI*.- Si el deudor hubiere mandado que por su heredero sea liberado su fiador, ¿deberá ser liberado el fiador? Respondió, que debía, también se preguntó, si, porque los herederos estarían obligados con la acción de mandato, es inútil el legado, que el deudor lega a su acreedor. Respondió, que siempre que el deudor legase a su propio acreedor era inútil el legado, si nada le interesase al acreedor reclamar por el testamento más bien que en virtud de la primitiva obligación; porque también si Ticio le hubiere mandado a Mevio que prometiese dinero luego hubiere dispuesto que él quedase liberado por el estipulador es evidente cuanto le interesa al que prometió ser liberado más bien que dar en virtud de lo estipulado, y que ejercitar después la acción de mandato.

12.- EL MISMO; *Digesto, libro XXXIX*.- Lucio Ticio, teniendo a Eros como administrador, dispuso así en los codicilos; «quiero que Eros sea libre; el cual quiero que rinda cuentas del tiempo que hubiere transcurrido después de la última firma»; después en vida manumitió a Eros, y en el mismo acto tuvo y firmó las cuentas hasta aquel día, que fue muy pocos días antes que muriese; dicen los herederos de Lucio Ticio, que Eros, siendo todavía esclavo, y después siendo libre, recibió algunas sumas, y que no las

rationes, quae a Lucio Titio subscriptae sunt, intulisse: quaero, an heredes ab erote nihil exigere debent eius temporis, quo Lucius Titius subscripsit. Respondi erotem ex ea causa quae proponeretur liberationem petere non posse, nisi et hoc specialiter ei remissum est.

13.- IDEM; *libro LXXXI, Digestorum*.- Si creditor debitori, qui se exceptione perpetua tueri poterat, legaverit quod sibi deberet, nullius momenti legatum erit. At si idem debitor creditori legaverit, intelligendum erit exceptionem eum remitti creditori voluisse.

14.- ULPIANUS; *libro I, Fideicommissorum*.- Idem est et si in diem debitor fuit vel sub condicione.

15.- IDEM; *libro LXIV, ad Edictum*.- Si quis in testamento damnatus est, ne a titio debitore exigat, neque ipsum neque heredem eius potest convenire: nam neque heredis heres agere neque ab heredis herede potest peti. Heredis autem heres potest damnari, ne exigat debitorem.

16.- PAULUS; *libro IX, ad Plautium*.- Ei cui fundum in quinquennium locaveram legavi quidquid eum mihi dare facere oportet oportebit ut sineret heres sibi habere. Nerva Atilicinus, si heres prohiberet eum frui, ex conducto, si iure locationis quid retineret, ex testamento fore obligatum aiunt, quia nihil interesset, peteretur an retineret: totam enim locationem legatam videri,

received certain sums of money, both while he was still a slave and after he became free, and did not include these in the accounts which were signed by Lucius Titius. I ask whether the heirs can collect anything from Eros for the time preceding the last signature of Lucius Titius. I answered that, according to the facts stated, Eros cannot demand his freedom, unless the sums referred to had been specifically remitted to him.

13.- THE SAME; *Digest, Book LXXXI*.- If a creditor should make a bequest to a debtor of what he owes him, and the former can protect himself by a perpetual exception, the legacy will be of no force or effect. If, however, the same debtor should make a bequest to his creditor of what he owes him, he will be understood to have intended that his creditor shall be released from the operation of the aforesaid exception.

14.- ULPIANUS; *Trusts, Book I*.- The same rule will apply where the debtor was required to make payment within a certain time, or under some condition.

15.- THE SAME; *On the Edict, Book LXIV*.- Where anyone is charged in a will not to collect a debt from Titius, he cannot sue either him or his heir; nor can the heir of the heir bring an action; nor can the payment of the obligation be demanded of the heir of the debtor's heir. The heir of the heir of the testator can also be charged not to collect the claim from the debtor.

16.- PAULUS; *On Plautius, Book IX*.- If I should rent a tract of land to anyone for five years, and then bequeath whatever the tenant was obliged to do for me or pay to me, or would be obliged to pay or give to me in the future, and the heir is charged to allow the tenant to have this himself; both Nerva and Atilicinus say that if the heir should prevent him from enjoying the legacy, he would be liable to an action on the lease, and if he should retain anything arising out of the contract of hiring, he would be liable to an action under the will; for the reason that it makes no difference whether he demands something from the

incluyó en las cuentas que fueron firmadas por Lucio Ticio; pregunto ¿no deberán los herederos exigir nada a Eros por el tiempo en que Lucio Ticio las firmó? Respondí, que Eros no podía pedir la liberación en virtud de la causa que se exponía, si especialmente no se le remitió también esto.

13.- EL MISMO; *Digesto, libro LXXXI*.- Si a un deudor, que se podía amparar con excepción perpetua, le hubiere legado el acreedor lo que le debiese, el legado será de ningún valor. Mas si el mismo deudor le hubiere legado al acreedor, se habrá de entender, que quiso que se le remitiera al acreedor la excepción.

14.- ULPIANO; *Fideicomisos, libro I*.- Lo mismo es, también si el deudor lo fue a término o bajo condición.

15.- EL MISMO; *Comentarios al Edicto, libro LXIV*.- Si alguno fue condenado en testamento a no exigirle al deudor Ticio, no puede demandar a éste, ni a su heredero; porque ni el heredero del heredero puede ejercitar la acción, ni se le puede pedir al heredero del heredero. Pero el heredero del heredero puede ser condenado a no exigirle al deudor.

16.- PAULO; *Comentarios a Plautio, libro IX*.- A aquel a quien yo había dado en arrendamiento por un quinquenio un fundo, le legué todo lo que él me debe o debiere dar y hacer, de suerte que el heredero dejase que lo tuviera para sí; Nerva y Atilicino dicen, que si el heredero prohibiera que lo disfrutase, estaría obligado por la acción de conducción, y que si retuviese alguna cosa por derecho de locación, lo estaría en virtud del testamento, porque nada importaría que se pidiese, o que retuviera; pues se considera legada toda la locación.

tenant, or retains possession of it, as the entire lease is held to have been bequeathed.

17.- IAVOLENUS; *libro II, Labeonis Posteriorum*.- Reliqua quoque: in iudicio locationis venire.

18.- PAULUS; *libro IX, ad Plautium*.- Cassius. etiam si habitatio eo modo legata esset, gratuitam habitationem heres praestare deberet. Et praeterea placuit agere posse colonum cum herede ex testamento, ut liberetur conductione: quod rectissime dicitur.

19.- MODESTINUS; *libro IX, Regularum*.- Cum ita testemur: "heres meus damnas esto liberare illum, quod is negotia mea gessit, et si quid eum mihi dare facere oportet, ab eo non exigere", damnatur heres nec creditas ab eo quoque pecunias exigit. in simili autem legato vix est, ut de eo quoque legando pater familias senserit, quod servis eius peculii nomine debetur.

20.- IDEM; *libro X, Responsorum*.- "Aurelio Sempronio fratri meo. Neminem molestari volo nomine debiti neque exigere aliquid ab eo, quamdiu viveret, neque de sorte aut usurae nomine debiti: et absolvo ei et libero ex pignoribus eius domum et possessionem caperlatam". Modestinus respondit ipsum debitorem, si conveniatur, exceptione tutum esse: diversum in persona heredis eius.

§ 1.- Gaius Seius cum adolevisset, accepit curatores publium Maevium et Lucium Sempronium. Sed enim idem Gaius Seius intra legitimam aetatem constitutus cum in fatum concederet, testamento suo de curatoribus suis ita cavuit: "quaestionem curatoribus meis nemo faciat: rem enim ipse tractavi". Quaero, an rationem curae heredes adulti a curatoribus petere possint, cum defunctus, ut ex

17.- JAVOLENUS; *On the Last Works of Labeo, Book II*.- Any balance due on the lease is also included in the legacy.

18.- PAULUS; *On Plautius, Book IX*.- Cassius: Even if a lodging has been bequeathed in this way, the heir will be obliged to furnish it gratuitously; and moreover, it has been decided that the tenant can bring an action based on the will against the heir, in order to be relieved of liability under his lease; which opinion is perfectly correct.

19.- MODESTINUS; *Rules, Book IX*.- If we make a bequest as follows, "Let my heir be charged to release from liability So-and-So, who has transacted my business, and not to exact anything from him which he may be obliged to pay to, or do for me," the heir will be charged not to collect any money from the legatee which has been lent to him. It is, however, hardly credible that, by a legacy of this kind, the testator intended there should also be bequeathed to the legatee whatever was due from him to his slaves as their peculium.

20.- THE SAME; *Opinions, Book X*.- "To my brother Aurelius Sempronius. I do not desire that any of my debtors shall be annoyed on account of their obligations, nor that anything, either principal or interest, shall be collected from them as long as they live; and I return, free from liability and released from pledge, the house and the Carpathian land to the party interested in the same." Modestinus gives it as his opinion that if the debtor himself should be sued, he will be protected by an exception, but that this will not be the case so far as his heir is concerned.

§ 1.- When Gaius Seius was growing up, he received Publius Maevius and Lucius Sempronius as his guardians. While still under lawful age, the said Gaius Seius, being about to die, made the following provision in his will with reference to his curators: "Let no one raise any question concerning my curators, for I myself have transacted my business." I ask whether the heirs of the minor can demand an

17.- JAVOLENO; *Obras póstumas de Labeón, libro II*.- Y también los atrasos se comprenden en el juicio de locación.

18.- PAULO; *Comentarios a Plaucio, libro IX*.- Dice Cassio: aunque de este modo hubiese sido legada la habitación, debería el heredero prestar gratuita la habitación; y además se determinó, que podía el colono ejercitar contra el heredero la acción de testamento, para que se le libere de la conducción; lo que se dice con muchísima razón.

19.- MODESTINO; *Reglas, libro IX*. - Cuando testamos así: «esté condenado mi heredero a liberar a aquel, porque aquel administró mis negocios, y a no exigirle lo que el deba darme y hacerme» se condena al heredero a que no exija tampoco las cantidades prestadas por él; pero en semejante legado es difícil que al hacer el legado se haya referido el padre de familia también a lo que se debe a sus esclavos por razón del peculio.

20.- EL MISMO; *Respuestas, libro X*.- «A Aurelio Sempronio, mi hermano. Quiero que no se moleste a fulano por razón de deuda, y que no se le exija cosa alguna, mientras viva, ni por capital o por intereses, por razón de la deuda; y le absuelvo y libero de empeñar su casa y la posesión Caperlata; Modestino respondió, que, si fuera demandado, estaría amparado con excepción el mismo deudor; y que diversa cosa era respecto a la persona de su heredero.

§ 1.- Habiendo llegado a ser adolescente Cayo Seyo, recibió como curadores a Publio Mevio y a Lucio Sempronio; pero hallándose el mismo Cayo Seyo dentro de la menor edad, al fallecer, dispuso así en su testamento respecto a sus curadores: «nadie promueva cuestión a mis curadores, porque yo mismo he administrado mis bienes»; pregunto, si podrán los herederos del adulto pedirles a los

verbis testamenti apparet, confessus sit se omnem rem suam administrasse.

Modestinus respondit, si quid dolo curatores fecerunt aut si quae res testatoris penes eos sunt, eo nomine conveniri eos posse.

§ 21.- TERENCEUS CLEMENS, *libro XII, ad legem Iuliam et Papiam*.- Si id quod mihi deberes vel tibi vel alii legavero idque mihi solveris vel qualibet alia ratione liberatus a me fueris, exstinguitur legatum.

§ 1.- Unde Iuliano placuit et si debitori heres exstiterit creditor posteaque ipse creditor decesserit, legatum extingui: et hoc verum est, quia confusione perinde exstinguitur obligatio ac solutione.

§ 2.- Sed si sub condicione dato legato heres praeoccupaverit et exegerit debitum, aliud dici oportet, quia in arbitrio heredis esse non debet, ut quandoque condicione existente neque ipsi legatario debeatur legatum, si tum vivat et capere possit, neque ei, ad quem hoc commodum pervenit, si legatarius capere non possit.

22.- PAPINIANUS; *libro XIX.- Quaestionum*.- "Quod mihi Sempronius debet, peti nolo": non tantum exceptionem habere debitorem, sed et fideicommissum ut liberetur petere posse responsum est.

23.- IDEM; *libro VII, Responsorum*.- Procurator, a quo rationem heres exigere prohibitus eoque nomine procuratorem liberare damnatus est, pecuniam ab argentario debitam ex contractu, quem ut procurator fecit, iure mandati cogetur restituere vel actiones praestare.

accounting for the curatorship from the curators, since the deceased, as is apparent from the terms of his will, acknowledged that he had attended to all of his business himself.

Modestinus was of the opinion that if the curators had committed any fraudulent act, or if any of the property of the testator was in their hands, suit could be brought against them on this ground.

21.- TERENCEUS CLEMENS; *On the Lex Julia et Papia, Book XII*.- If I should bequeath anything which you owe me, either to yourself or to a third party, and you should pay it to me, or be released by me for any other reason, the legacy will be extinguished.

§ 1.- Hence, it was held by Julianus that, even if a creditor should become the heir of his debtor and should afterwards die, the legacy will be extinguished; and this is correct, because an obligation is, as it were, extinguished by confusion, just as it is by payment.

§ 2.- Where, however, a legacy is bequeathed under some condition, and the heir comes in beforehand and collects the debt, another opinion must be rendered; because, while the condition is still pending, the prevention of the payment of the legacy to the legatee, if he is still living and entitled to receive it, does not depend upon the inclination of the heir, nor, if the legatee should not be legally capable of taking it, can the heir prevent the party entitled to the benefit of the legacy from obtaining the same.

22.- PAPINIANUS; *Questions, Book XIX*.- "I do not wish anything that Sempronius owes me to be collected." It was decided that the debtor, in order to compel his release, was not only entitled to an exception, but also to an action under the will.

23.- THE SAME; *Opinions, Book VII*.- An agent from whom the heir was forbidden to require an accounting, and whom he was also charged to release from all liability for any act performed in that capacity, can still be required, by an action on mandate, to pay to the heirs all the money that may be due to him from a banker under a contract which he entered into as an agent, or to assign his rights of

curadores cuenta de la curatela, habiendo confesado el difunto, como aparece de las palabras del testamento, que él administró todos sus bienes.

Modestino respondió, que si los curadores hicieron alguna cosa con dolo, o si en poder de ellos están algunas cosas del testador, pueden ellos ser demandados por este motivo.

21.- TERENCEIO CLEMENTE; *Comentarios a la ley Julia y Papia, libro XII*.- Si a ti o a otro hubiere yo legado lo que me debieses, y me lo hubieres pagado, o por cualquier otra razón hubieres sido liberado por mí, se extingue el legado.

§ 1.- Por lo cual le pareció bien a Juliano, que, aunque el acreedor hubiere quedado heredero del deudor, y después hubiere fallecido el mismo acreedor, se extinguía el legado; y esto es verdad, porque por la confusión se extingue la obligación lo mismo que por el pago.

§ 2.- Pero si dado bajo condición un legado el heredero se hubiere anticipado, y hubiere exigido la deuda, se debe decir otra cosa, porque no debe estar al arbitrio del heredero, que, cumpliendose alguna vez la condición, no se deba el legado ni al mismo legatario, si viviera entonces y pudiera adquirir, ni a aquel a quien va este beneficio, si el legatario no pudiera adquirir.

22.- PAPIANO; *Cuestiones, libro XIX*.- «No quiero que se pida lo que Sempronio me debe»; se respondió, que el deudor tiene no solamente la excepción, sino que también puede pedir el fideicomiso, para que se le libere.

23.- EL MISMO; *Respuestas, libro VII*.- El procurador, de quien se prohibió que exigiera cuentas el heredero, que por tal razón fue condenado a liberar al heredero, será obligado por derecho de mandato a restituir el dinero debido por un banquero en virtud de contrato, que como procurador hizo.

24.- IDEM; *libro VIII, Responsorum*.- Cum heres rogatur debitorem suum liberare, de eo tantum cogitatum videtur, quod in obligatione manserit: itaque si quid ante tabulas apertas fuerit solutum, ad causam fideicommissi non pertinebit. Quod autem post tabulas apertas ante aditam hereditatem ab eo, qui voluntatem defuncti non ignoravit, fuerit exactum, dolo proximum erit ideoque repeti potest.

25.- PAULUS; *libro X, Quaestionum*.- Legavi Titio quod mihi debetur vel adiecta certa quantitate sive specie vel non adiecta, aut ex contrario aequae cum distinctione, veluti "Titio quod ei debeo" vel ita "Titio centum quae ei debeo": quaero, an per omnia requirendum putes, an debitum sit. Et plenius rogo quae ad haec spectant attingas: cotidiana enim sunt. Respondi: si is, cui Titius debebat, debitum ei remittere voluit, nihil interest, heredem suum iussit ut eum liberaret an prohibeat eum exigere: utroque enim modo liberandus est debitor et utroque casu competit ultro ad liberandum debitori actio.

Quod si etiam centum aureorum vel fundi debiti mentionem fecit, si quidem debitor fuisse probetur, liberandus est: quod si nihil debeat, poterit dici quasi falsa demonstratione adiecta etiam peti quod comprehensum est posse. sed poterit hoc dici si ita legavit: "centum aureos, quos mihi debet" vel "Stichum, quem debet, heres meus damnas esto non petere".

Quod si sic dixit: "heres meus centum aureos, quos mihi Titius debet, damnas esto ei dare", etiam illud temptari poterit, ut petere possit quasi falsa demonstratione adiecta: quod mihi nequaquam placet, cum dandi verbum ad debitum referre se

action against the said banker.

24.- THE SAME; *Opinions, Book VIII*.- Where an heir is requested to release his debtor, it is held that this only applies to what remains due on the obligation. Therefore, where any of the debt was paid before the will was opened, it will not be included in the trust. But if, after the will has been opened, and before the estate has been entered upon by the heir, who was aware of the intention of the deceased, payment of what is owing should be required, this will closely resemble fraud, and hence the amount can be recovered by the legatee.

25.- PAULUS; *Questions, Book X*.- Where I bequeathed to Titius what he owed me, either stating or not stating the amount, or, on the other hand, where I make a bequest with a difference, as for instance: "I leave to Titius what I owe him," or "I leave to Titius a hundred aurei, which I owe him;" I ask if you think that it should, by all means, be ascertained whether anything is really due; and I furthermore request you to inform me in what way you interpret these matters, which are of every day occurrence. I answered that if the party to whom Titius is indebted wishes to release the debt, it makes no difference whether he directs his heir to discharge him from liability, or forbids him to collect the debt; for, in either instance, the debtor should be released, and in both cases an action will lie in favor of the debtor against the heir, for the purpose of procuring his release.

If the testator mentioned the sum of a hundred aurei, or a certain tract of land as being due, and it can be proved that the legatee was the debtor, he should be released. If, however, he does not owe anything, as a false statement has been made, it may be said that he can also bring an action to recover what is embraced in the legacy. This principle also applies where the bequest was as follows: "Let my heir be charged not to collect the hundred aurei which he owes me," or "Stichus whom he owes me."

If, however, he had said, "Let my heir be charged to give to Titius the hundred aurei which he owes me," it may be maintained that he can claim them, although the statement is untrue. However, I by no means agree to this, as the testator must have thought that the

24.- EL MISMO; *Respuestas, libro VIII*.- Cuando se le ruega al heredero que libere a su deudor, se considera que se pensó únicamente en lo que hubiere permanecido en la obligación; y así, si antes de haberse abierto el testamento se hubiere pagado alguna cosa, no pertenecerá a la disposición del fideicomiso, Mas lo que después de abierto el testamento, antes de adida la herencia, se hubiere exigido por quien no ignoró la voluntad del difunto, estará próximo al dolo, y por lo tanto puede ser repetido.

25.- PAULO; *Cuestiones, libro X*.- Le legué a Ticio lo que se me debe, habiendo expresado cierta cantidad o especie, o no habiéndola expresado, o, por el contrario, igualmente con la distinción, por ejemplo: «a Ticio, lo que le debo», o así: «a Ticio, los ciento, que le debo»; pregunto, si crees que en todo caso se ha de averiguar si se haya debido, y te ruego encarecidamente que trates las cuestiones que a esto se refieren, porque son de cada día. Respondí, que si aquel, a quien Ticio le debía, quiso remitirle la deuda, nada importa que hubiere mandado a su heredero que lo libere, o que prohíba que lo exija; porque de ambos modos ha de ser liberado el deudor, y en uno y en otro caso le compete además al deudor acción para ser liberado.

Pero si también hizo mención de cien áureos, o de un fundo debido, ha de ser liberado, si se probase que verdaderamente fue deudor; mas si no debiera nada, se podrá decir que también se puede pedir lo que se expresó, como si se hubiere hecho una falsa demostración. Pero se podrá decir esto, si legó así: «los cien áureos, que me debe», o: «esté condenado mi heredero a no reclamarle el esclavo Stico, que me debe».

Mas si dijo de este modo: «los cien áureos, que Ticio me debe, esté condenado a dárselos mi heredero», también se podrá intentar que los pueda pedir, como si se hubiese añadido una falsa demostración; lo que a mí de ningún modo me parece bien, porque el

testator existimaverit. Contra autem si debitor creditori leget, nullam utilitatem video, si sine quantitate leget. Sed et si id demonstret, quod debere se confitetur, nulla utilitas est nisi in his speciebus, in quibus emolumentum debiti ampliatur.

Quod si centum aureos, quos se debere dixit, legavit, si qui-dem debet, inutile est legatum, quod si non fuit debitor, placuit utile esse legatum: certa enim num-morum quantitas similis est Sticho legato cum demonstratione falsa: idque et Divus Pius rescripsit certa pecunia dotis acceptae nomine legata.

26.- SCAEVOLA, *libro IV, Responsorum*.- Tutor decedens aliis heredibus scriptis pupillo suo, cuius tutelam gessit, tertiam partem bonorum dari voluit, si heredibus suis tutelae causa controversiam non fecerit, sed eo nomine omnes liberaverit: pupillus legatum praetulit et postea nihilo minus petit quidquid ex distractione aliave causa ad tutorem suum ex tutela pervenerit: quaero, an verbis testamenti ab his exactionibus excludatur.

Respondit, si prius, quam condicioni pareret, fideicommissum percepisset et pergeret petere id, in quo contra condicionem faceret, doli mali exceptionem obstaturam: nisi paratus esset, quod ex causa fideicommissi percepisset, reddere: quod ei aetatis beneficio indulgendum est.

27.- TRYPHONINUS; *libro VIII.- Disputatio-num*.- Videamus, si ei, cum quo de peculio actio erit, liberatio testamento legata sit, an, si die, quo legata cedere solent, nihil in peculio sit, legatarii loco

the word "give" had reference to the debt. On the other hand, if the debtor makes a bequest to his creditor, I do not see that the legacy has any validity, if the amount is not stated. But if he should mention the sum which he acknowledges that he owes, the legacy will not be valid except in those instances where its payment will be more advantageous than that of the debt.

For if the debtor should bequeath a hundred aurei, which he says that he owes, and he does owe them, the legacy is void. If, however, he should not owe them, it has been held that the legacy is valid; for, where a certain sum of money is mentioned, the case is similar to that where Stichus was bequeathed under a false statement. This rule the Divine Pius stated in a Rescript, where a certain sum of money was bequeathed as having been received by way of dowry.

26.- SCAEVOLA; *Opinions, Book IV*.- A guardian having appointed certain heirs at the time of his death, desired to give to his ward, whose guardianship he had administered, the third part of his estate, provided he did not raise any controversy with his heirs on account of the guardianship, but released them all from liability with reference to the same. The ward obtained the legacy, and, nevertheless, afterwards demanded of the heirs everything which had come into the hands of his guardian from the sale of property, or from any other source connected with the guardianship. I ask whether, by the terms of the will, he should be excluded from bringing actions of this kind.

The answer was that, if he received the benefit of the trust before complying with the condition imposed, and then proceeded to make the claim contrary to the terms of the legacy, an exception on the ground of bad faith could be interposed against him by the heirs, unless he was ready to return what he had received from the trust, which had been granted him as a favor on account of his age.

27.- TRYPHONINUS; *Disputations, Book VIII*.- Let us see whether a person to whom a release has been granted by a will, and against whom an action on the peculium is pending, shall be considered to

testador estimó referir la palabra dar a la deuda. Mas por el contrario, si el deudor legara al acreedor, no veo ninguna utilidad, si le legara sin expresión de cantidad. Pero también si indicara lo que confiesa que debe, no hay ninguna utilidad, sino en cuanto a las especies en que se amplía el emolumento de la deuda.

Mas si legó los cien áureos, que dijo que él debía, el legado es inútil, si verdaderamente los debe; pero si no fue deudor, se determinó que el legado es útil, porque una cantidad cierta de monedas es semejante a Stico legada con falsa demostración; y esto respondió también por Rescripto el Divino Pío, habiéndose legado una cierta cantidad a título de dote recibida.

26.- SCEVOLA; *Respuestas, libro IV*.- Un tutor, al fallecer, habiendo instituido otros herederos quiso que se dieran a su pupilo, cuya tutela administró, la tercera parte de los bienes, si no les hubiere promovido controversia a sus herederos por causa de la tutela, sino que a todos los hubiere liberado por tal concepto; el pupilo aceptó el legado y, no obstante, pidió después todo lo que por enajenación o por otra causa hubiere ido a su tutor por causa de la tutela; pregunto, si con las palabras del testamento estará excluido de estas exacciones.

Respondió, que, si hubiese percibido el fideicomiso antes que se atuviese a la condición, y procediese a reclamar esto, en lo que obraría contra la condición, habrá de obstarle la excepción de dolo malo, a no ser que estuviese dispuesto a devolver lo que hubiese percibido por causa del fideicomiso; lo que se le ha de permitir por beneficio de la edad.

27.- TRIFONINO; *Disputas, libro VIII*.- Veamos, si, habiéndose legado en testamento la liberación a aquel contra quien hubiere la acción de peculio, será considerado en clase de legatario, si nada hubiera en

habetur? atquin nondum debitor fuit, nec procedit, ut emolumentum aliquid ex legato ad eum perveniat nisi propter spem futuri peculii. Numquid ergo in pendenti sit, an legatarius fuerit, perinde atque si qua alia causa spem legati dubiam faceret?

28.- SCAEVOLA; *libro XVI, Digestorum.*- Aurelius Symphorus fideiusserat pro tutore quodam et decedens eisdem pupillis legavit in haec verba: "Arellio Latino et Arellio Felici singulis quina, quum quis eorum quattuordecim annorum fuerit: ad quod tempus praestari eis volo singulis alimentorum nomine menstruos denarios senos et vestiarii nomine annuos denarios viginti quinque. Quo legato contenti esse debetis, quando tutela vestra non minimo damno rationem meam adflixerit. A vobis autem, heredes mei, peto, ne quid ex ratione tutelae ab his exigere vel ab hoc legato eorum retinere velitis".

Quaesitum est, si heres eius ex causa fideiussionis aliquid praestiterit, an herede filiorum eius, pro quo fideiusserat, repetere possit. Respondit verbis quae proponerentur id solum videri heredum fidei commissum, ne exigerent, quod ex ratione tutelae, quam ipse Symphorus administraverat, ab Arellis sibi deberetur.

§ 1.- Testamento facto debitoribus liberationem reliquerat, post inciso lino et recognito testamento aliud testamentum fecit, in quo repetit legatum his verbis: "quibusque legata in eo testamento quod incideram dedi, omnia rata esse et quaequae scripta sunt volo".

Quaesitum est, adita ex sequenti testamento hereditate an debitores, quibus priori testamento liberatio relicta erat, consequi possint, ut etiam eius quantitatis nomine, quam post prius testamentum debere coeperant, liberarentur, et si ab his heredes

occupy the position of a legatee, if, at the time when a legacy usually vests, nothing should be found in the peculium. Even if he is not yet a debtor, it does not follow that he would derive any advantage from the legacy, unless through the hope of some future addition to his peculium. Therefore, will his condition as legatee be in suspense, just as it would be if, for any reason, he should render the expectation of the legacy doubtful? This is the better opinion.

28.- SCAEVOLA; *Digest, Book XVI.*- Aurelius Symphorus became surety for a certain guardian, and at his death made a bequest to the wards of the latter as follows: "I bequeath five aurei to Arellius Latinus and Arellius Felix, individually, when they shall have attained the age of fourteen years, at which time I desire to be paid to each one of them six denarii every month for their support, and twenty-five denarii every year for their clothing, with which legacy they must be content, since their guardianship has caused me no small amount of annoyance. I also charge my heirs to collect nothing from them on account of the guardianship, nor to retain anything by reason of this legacy."

The question arose, if the said heirs had paid out anything on account of the suretyship, whether they could recover it from the heir of the children, or the party for whom the testator had become surety. The answer was that, in accordance with the facts stated, the heirs of the latter appeared to have been solely charged not to claim anything on account of the guardianship which Symphorus had administered, and which might be due from the wards named Arellius.

§ 1.- A man, having made a will, bequeathed a release to his debtors, and then having unsealed the will and reread it, he executed another in which he repeated the legacy as follows: "I confirm every bequest made in a will which I unsealed, and everything that is written therein."

After the estate had been entered upon under the second will, the question arose whether the debtors who had been released by the first will could demand to be discharged from liability for the sums of money for which they had become indebted after the making

el peculio el día en que suelen correr los términos de los legados. Mas no fue deudor todavía, y no procede que del legado vaya a él algún emolumento, sino por la esperanza del futuro peculio; luego ¿estará acaso pendiente si hubiese sido legatario, lo mismo que si alguna otra causa hiciera dudosa la esperanza del legado?.

28.- SCAEVOLA; *Digesto, libro XVI.*- Aurelio Sinforo se había constituido fiador de cierto tutor, y al morir legó a los mismos pupilos en estos términos: «a Arelio Latino y a Arelio Félix cinco para cada uno, cuando cualquiera de ellos fuere de catorce años, en cuyo tiempo quiero que se le den a cada uno seis denarios al mes a título de alimentos, y veinticinco denarios anuales por razón de vestido; con cuyo legado debéis estar contentos, puesto que vuestra tutela gravó con no pequeño perjuicio mi patrimonio; pero os pido, herederos míos, que no les exijais cosa alguna por razón de la tutela, o que no queráis retenérselo de este legado»;

Se preguntó, si, habiendo entregado alguna cosa su heredero por causa de la fianza, podrá repetirla del heredero de los hijos de aquel por quien había sido fiador. Respondió, que en las palabras que se exponían parecía que a la fidelidad de los herederos se encomendó solamente esto, que no exigiesen lo que por razón de la tutela, que el mismo Sinforo había administrado, se les debiese por los Arelios.

§ 1.- Uno, habiendo hecho testamento, les había dejado a sus deudores la liberación, y después abierto y reconocido el testamento hizo otro testamento, en el cual repitió el legado con estas palabras: «quiero que para aquellos a quienes di legados en el testamento que he roto, sean válidos todos, y los que han sido escritos»;

Se preguntó, habiendo sido adida la herencia en virtud del segundo testamento, si podrán conseguir los deudores, a quienes en el primer testamento les había sido dejada la liberación, que fuesen liberados también por razón de la cantidad, que habían

petere coeperint, an doli mali exceptione summo-verentur. Respondit non liberari.

§ 2.- Titius Seio debitori suo ita legavit: "do lego seio denarios decem: item dono illi, quidquid sortis et usurarum nomine mihi debebat". Praeterea generaliter damnavit heredes fideique eorum commisit, uti darent restituerent unicuique, quidquid ei legasset. Postea Seius aliam praeterea pecuniam a Titio mutuatus est. Quaero, an haec quoque pecunia, quae post testamentum factum data esset seio, legata intellegitur. respondit, quum in praeteritum tempus verba collata proponerentur, non esse posterius credendum legatum.

§ 3.- Titius testamento facto et filiis heredibus institutis de patre tutore suo quondam facto ita locutus est: "Seium patrem meum liberatum esse volo ab actione tutelae". Quaero, haec verba quatenus accipi debent, id est an pecunias, quas vel ex venditionibus rerum factis aut ex nominibus exactis in suos usus convertit vel nomine suo faeneravit, filiis et heredibus testatoris nepotibus suis debeat reddere. Respondit eum, cuius notio est, aestimaturum. Praesumptio enim propter naturalem affectum facit omnia patri videri concessa, nisi alius sensisse testatorem ab heredibus eius approbetur.

§ 4.- Maevia testamento suo alterum ex heredibus suis actione tutelae voluit liberari his verbis: "rationem tutelae, quam egit Iulius Paulus quum Antistio Cicerone, posci ab eo nolo eoque nomine causa omni liberatum esse volo": quaero, an, si qua pecunia ex tutela apud eum remansit, peti ab eo possit. Respondit nihil proponi, cur pecunia, quae pupillae est et apud tutorem posita maneret, legata videretur.

of the first will; and if the heirs brought an action against them, whether they could be barred by an exception on the ground of bad faith. The answer was that they would not be released.

§ 2.- Titius made the following bequest to his debtor Seius: "I give and bequeath ten denarii to Seius. I also give five to him, in addition to this, all that he owes me both principal and interest." He also, in a general clause, charged his heirs to give and deliver to each one of the legatees what he had left him. Seius afterwards borrowed more money from Titius. I ask whether this money, which was borrowed after the will was made, should also be understood to have been bequeathed to Seius. The answer was that, as the words used by the testator had reference to past time, it should not be held that the last sum borrowed was bequeathed.

§ 3.- Titius, having made a will and appointed his sons his heirs, expressed himself as follows with reference to his father, who also had formerly been his guardian: "I desire my father Seius to be released from liability to any action on guardianship." I ask in what way these words should be understood, that is to say, whether they mean that the money which had been obtained from the sale of property or the collection of claims, and which the father had converted to his own use, or lent at interest in his own name, should be paid to the children and heirs of the testator, or to his grandchildren. The answer was that this must be determined by the court having jurisdiction of the case, for the presumption of law is that on account of the natural affection entertained by a son, the father should be released from all liability, unless it can be proved by the heirs of the testator that his intention was otherwise.

§ 4.- Mævia, in her will, desired one of her heirs to be released from liability to an action on guardianship, in the following words: "I do not wish an account of the guardianship which Julianus Paulus administered with Antistius Cicero, be required of him, and I wish him to be released from all liability on account of the same." I ask, if any money derived from the guardianship should remain in his hands, whether it can be collected from him. The answer was that there was nothing in the case stated why money which belonged to the ward and remained in the

comenzado a deber después del primer testamento, y si serían repelidos con la excepción de dolo malo, si los herederos hubieren comenzado a reclamarles. Respondió, que no se liberaban.

§ 2.- Ticio legó así a Seyo, su deudor: «doy y lego a Seyo diez denarios; y también le dono todo lo que me debía por razón de capital y de intereses»; además de esto condenó en general a los herederos, y lo encomendó a su fidelidad, a que diesen y restituyesen a cada uno lo que le hubiese legado: después Seyo recibió de Ticio en mutuo además otra cantidad: pregunto, ¿se entiende legado también este dinero, que después de hecho el testamento hubiese sido dado a Seyo? Respondió, que exponiéndose que las palabras se refirieron al tiempo pasado, no se ha de creer que se legó lo posterior.

§ 3.- Ticio, habiendo hecho testamento, y habiendo instituido herederos a sus hijos, habló así de su padre, nombrado tutor suyo en otro tiempo: «quiero que Seyo, mi padre, sea liberado de la acción de tutela»; pregunto, ¿cómo deben entenderse estas palabras, esto es, deberá entregar a los hijos y herederos del testador, nietos suyos, las cantidades que procedentes de ventas que hizo de bienes, o de créditos cobrados, aplicó a sus propios usos, o prestó a interés en su propio nombre? Respondió, que lo habrá de estimar aquel a quien corresponde el conocimiento del asunto, porque por su natural efecto hace la presunción, que se considere que todo se le concedió al padre, si no se probase por los herederos que otra cosa entendió el testador.

§ 4.- Quiso Mevia en su testamento que uno de sus herederos fuese liberado de la acción de tutela, en estos términos: «no quiero, que de la tutela, que administró Julio Paulo con Antistio Cicerón, se le pidan cuentas, y quiero que por tal título esté liberado de toda reclamación»; pregunto, si, habiendo quedado en su poder algún dinero procedente de la tutela, se le podrá pedir. Respondió, que nada se exponía para que se considerase legado el dinero, que es de la pupila, y que permaneciese depositado en poder del tutor.

§ 5.- Testamento ita scripserat: "Titio adfini meo, quidquid mihi quaquumque ex causa debebat, remitti volo eoque amplius decem do": codicillis ita scripsit: "Titio hoc amplius adfini et debitori meo usuram pecuniae, quam mihi debet, ab herede meo donec advivet: quod si exigere ultra voluntatem meam putaverit, eius sortis usuram eidem Titio ab heredibus meis donec vivit praestari volo". quaesitum est, quum augendi potius quam minuendi testator voluntatem habuerit, an heredes ex causa fideicommissi Titio teneantur, ut eum omni debito liberent. Respondit secundum ea quae proponerentur videri minutum legatum, quod primo dederat.

§ 6.- Legatum est testamento hoc modo: "Seio concedi volo, quidquid mihi ab eo debitum est vel fidem meam pro eo obligavi": quaero, utrum id solum, quod testamenti facti tempore debebatur, legatum sit, an etiam, si quid ex ea summa usurarum nomine postea accessit, legato cedat. Respondit videri omnem obligationem eius debiti per fideicommissum solvi voluisse.

§ 7.- Stichus testamento manumisso fundum instructum et alia legavit et haec verba adiecit: "quem rationem reddere veto, quia instrumenta penes se habet": quaesitum est, an Stichus reliqua, quae ex administratione actus debuerat, reddere debuerit. respondi Stichum eo nomine non teneri.

Claudius: nemo enim ex servitutis actu post libertatem tenetur et consultatio ad ius debiti relata fuerat: retineri ergo reliqua possunt quum peculio aut ex eo deduci, si legatum est.

the hands of the guardian should be considered to have been bequeathed.

§ 5.- A testator made the following provision in his will, "I wish my relative Titius to be released from every debt whatsoever that he owes me, and in addition I give him ten aurei;" and he inserted the following in a codicil: "I desire, in addition, my heir to release my relative and debtor, Titius, from the payment of interest on any money which he owed me during his lifetime. If my heir should attempt to collect the said interest from him contrary to my wishes, then I desire the said interest be paid to Titius by my heirs as long as he lives." As the testator evidently had the intention rather to increase than to diminish the legacy, the question arose whether his heirs would, under the terms of the trust, be liable to Titius to compel them to release him from all indebtedness. The answer was that, in accordance with the facts stated, the legacy which the testator had bequeathed in the first place appeared to have been diminished.

§ 6.- Where a testamentary bequest was made as follows, "I wish everything that Seius owes me, or for which I have pledged my faith for him, to be given to him," I ask whether only that which was due at the time when the will was executed was bequeathed, or whether the amount which accrued afterwards by way of interest, was included in the legacy. The answer was that the testator intended that every obligation of the debtor should be cancelled by the trust.

§ 7.- Stichus, having been manumitted by will, the testator left him a tract of land with all its equipment, together with other property, and added the following: "I forbid any account to be rendered by him, because he has the records in his possession." The question arose whether Stichus would be obliged to pay over any sum of money remaining in his hands from the administration of his stewardship. I answered that Stichus was not liable on that ground.

Claudius: No one, after his manumission, is liable for any act committed by him during servitude, and advice has been taken with reference to ascertaining the law as to what is due. Hence the heirs can retain the balance remaining in their hands, along with the peculium, or it can be deducted from the peculium if

§ 5.- Uno había escrito así en su testamento: «quiero que a Ticio, mi afin, le sea condonado todo lo que por cualquier causa me debía, y además de esto le doy diez»; en codicilos escribí de este modo: «además de esto quiero que por mi heredero se le condone a Ticio, afin y deudor mío, el interés del dinero que me debía, mientras viva; pero si contra mi voluntad hubiere pensado exigirlo, quiero que por mis herederos se le den al mismo Ticio, mientras viva, los intereses de aquel capital»; se preguntó, si, habiendo tenido el testador voluntad más bien de aumentar que de disminuir, estarán obligados a favor de Ticio, por causa del fideicomiso los herederos, para liberarlo de toda deuda. Respondió, que, según lo que se exponía, se consideraba disminuido el legado, que había dado primeramente.

§ 6.- Se legó de este modo en un testamento; «quiero que se conceda a Seyo todo lo que por él se me debió, o aquello por lo que me obligué mi fianza»; pregunto, si se habrá legado solamente lo que se debía al tiempo en que se hizo el testamento, o si también cederá al legado lo que por esta suma se agregó después a título de intereses. Respondió, que parece que quiso que se disolviera por el fideicomiso toda obligación de esta deuda.

§ 7.- A Stico, manumitado en el testamento, le legó uno un fundo provisto, y otras cosas, y añadió estas palabras: «el cual prohíbo que rinda cuentas, porque tiene en su poder los documentos»; se preguntó, si deberá entregar Stico los atrasos que había debido por actos de su administración. Respondí, que Stico no estaba obligado por este concepto.

Y dice Claudio: porque nadie está obligado después de su libertad por actos del tiempo de su esclavitud, y la consulta había sido referida al derecho de la deuda; luego se pueden retener los atrasos con el peculio, o ser deducidos de éste, si fue legado.

§ 8.- "Centum, quae apud Apronianum deposita habeo, apud ipsum esse volo, donec filius meus ad annos viginti pervenerit, eiusque pecuniae usuram exigi veto". Quaesitum est, an ex causa fideicommissi apronianus consequi possit, ne ante tempus a testatore praescriptum ea summa ab eo exigatur. respondit secundum ea quae proponerentur consequi posse.

§ 9.- Filias heredes scripserat, quarum fidei commisit in haec verba: "ne a Caio Seio rationes actus rei meae, quae per mensam eius sive extra mensam in diem mortis meae gesta est, exigatis eoque nomine eum liberetis". Quaesitum est, quum universas rationes in diem mortis iste administraverit et per mensam suam et quae extra administrabantur, an ad rationes reddendas heredibus teneatur. Respondit liberationem quidem secundum ea quae proponerentur legatam esse, sed quatenus praestanda sit, ex qualitate disceptationis iudicem aestimaturum.

§ 10.- Eum, qui tutelam ipsius administraverat, et fratrem suum et alios quosdam scripsit heredes et tutori legavit, quae impenderat in se et fratrem ipsius, decem: quaesitum est, an utile esset in persona eius fideicommissum. Respondit, si id dederit per fideicommissum quod debebatur, peti non posse.

§ 11.- Idem quaesiit, si in tutoris persona inutile esset, an in persona fratris utile videretur, quoniam illi proficeret, cuius et ipsius tutelam administrasset. respondit fratri utiliter esse legatum, quum suo debito liberetur.

§ 12.- Idem quaesiit, si tutor amplecteretur fideicommissum ita, ut quibusdam stari vellet verbis testamenti, in quibusdam autem recedat, quod mi-

the latter is bequeathed.

§ 8.- "I desire the hundred aurei which I deposited with Apronianus to remain in his hands until my son reaches the age of twenty years, and I forbid any interest on said money to be collected from him." The question arose whether Apronianus could, under the terms of the trust, maintain that the aforesaid sum was not collected from him before the time prescribed by the testator. The answer was that, according to the facts stated, he could assert such a claim.

§ 9.- A testator appointed his daughters his heirs, and charged them with a trust as follows: "My daughters, do not require Gaius Seius to render any account for the administration of my property, which he has managed in his bank, or out of it, up to the time of my death, and release him from all liability with reference thereto." As the said Gaius Seius had charge of all the property of the testator at the time of his death, and had invested the same in his bank, and out of it, the question arose whether he would be compelled to render an account thereof to the heirs of the testator. The answer was that, in accordance with the facts stated, a release had been bequeathed, but the court must decide what was to be done under the circumstances.

§ 10.- A testator appointed, as his heir, his former guardian, together with his own brother and certain other persons, and bequeathed to his said guardian ten aurei, which the latter had expended on his account and on that of his brother. The question arose whether the trust was valid, so far as the guardian was concerned. The answer was that, if the testator had left the amount which was due under a trust, the execution of the trust could not be demanded.

§ 11.- The inquiry was also made if the bequest should prove to be void, so far as the guardian was concerned, whether it would be valid with reference to the brother of the testator; since it was for his benefit, as well as for that of the party who had administered his guardianship, also. The answer was that the legacy was valid so far as the brother was concerned, as he was released from his debt.

§ 12.- The question also was asked whether the guardian should be heard if he agreed to accept the trust, provided that certain clauses of the will were

§ 8.- «Quiero que los ciento, que tengo depositados en poder de Aproniano, estén en poder del mismo hasta que mi hijo haya llegado a los veinticinco años; y prohíbo que se exijan intereses de este dinero»; se preguntó, si por causa del fideicomiso podría conseguir Aproniano que no se le exija esta suma antes del tiempo fijado por el testador. Respondió, que, según lo que se exponía, lo podía conseguir.

§ 9.- Uno había instituido herederos a las hijas, a quienes encomendó un fideicomiso en estos términos: «no le exijais a Cayo Seyo cuentas de la administración de bienes míos, que en su banco o fuera de su banco fueron administrados hasta el día de mi muerte, y liberadlo por este concepto», se preguntó, si, habiendo administrado éste todos los capitales, así en su banco, como los que se administraban fuera, estaría obligado a rendir cuentas a los herederos. Respondió, que, según lo que se exponía, se legó ciertamente la liberación, pero que el juez habrá de estimar por la naturaleza de la controversia hasta donde se haya de conceder.

§ 10.- Uno instituyó herederos al que había administrado la tutela del mismo, a su propio hermano, y a algunos otros, y le legó al tutor los diez, que para él y para su hermano había gastado; se preguntó, si sería útil respecto a la persona de éste el fideicomiso. Respondió, que si hubiere dado por fideicomiso lo que se debía, no se podía pedir.

§ 11.- El mismo preguntó, si, siendo inútil respecto a la persona del tutor, se consideraría útil en cuando a la persona del hermano, porque le aprovecharía también a aquel cuya tutela hubiese administrado. Respondió, que se legó útilmente al hermano, porque se liberaría de su deuda.

§ 12.- El mismo preguntó, si, aceptando el tutor el fideicomiso de modo que quiera que se esté a algunas palabras del testamento, pero se apartase de otras,

norem quantitatem sumptuum dicat fideicommisso contineri quam ipse erogaverat, an audiri deberet. Respondit non impediri eum scriptura testamenti, quo minus omne, quod sibi deberi probasset, petere posset.

§ 13.- Quidam ita legavit: "Semproniae uxori meae reddi iubeo ab heredibus meis quinquaginta ea, quae mutua acceperam chirographo particulatim in negotia mea": quaesitum est, an, si vere uxoris debitor fuerit, fideicommissum constiterit. Respondit, si debita fuissent, nullum esse fideicommissum.

§ 14.- Idem quaesivit, an, si hanc pecuniam ut debitam apud iudicem petierit et victa fuerit, an fideicommissum peti possit. Respondit secundum ea quae proponuntur posse ex causa fideicommissi peti, quod apparuisset non fuisse ex alia causa debitum.

29.- PAULUS; *libro VI, ad legem Iuliam et Papiam*.- Si is, qui duos reos promittendi habet, damnaverit heredem, ut utrosque liberet, si alter ex his capere non possit nec socii sint, delegari debet is qui nihil capit ei cui hoc commodum lege competit: cuius petitione utrumque accidit, ut et hoc commodum ad eum perveniat et is qui capit liberetur.

Quod si socii sint, propter eum qui capax est et ille capit per consequentias liberato illo per acceptilationem: id enim eveniret, etiamsi solum capacem liberare iussus esset.

30.- IDEM; *libro X, Quaestionum*.- Petitor vel possessor damnavit heredem suum, ne Centumvirale Iudicium exercent: de effectu legati quaeritur. Et dictum ita demum utile videri legatum esse, si malam causam adversarius testatoris habuit, ut litigante herede vinci debuerit: tunc enim non tantum litis

allowed to stand, and others were rejected, alleging, as a reason, that the amount specified in the trust was less than he had advanced for expenses. The answer was that he was not prevented by the terms of the will from claiming everything which he could prove was due to him.

§ 13.- A testator made the following bequest: "I direct the sum of fifty aurei, which I have borrowed from my wife on a note to be used in my business, to be paid to her by my heirs." The question arose whether the trust would stand if the husband should prove to be actually the debtor of his wife. The answer was that if the indebtedness existed the trust would be void.

§ 14.- The question also was asked whether the execution of the trust could be demanded, if the wife, having brought suit to collect the money due, should lose the case. The answer was that, according to the facts stated, she could demand the execution of the trust, because it was apparent that the debt was not due on any other ground.

29.- PAULUS; *On the Lex Julia et Papia, Book VI*.- Where a testator has two principal debtors, and charges his heir to release both of them, and one of them is not capable of receiving a legacy, and they are not partners; the heir should transfer his right of action from the debtor who cannot take the legacy to the one upon whom the law does confer this benefit, and by this proceeding two things will happen, that is, the one who cannot receive the legacy will participate in the benefit, and the one who can receive it, will be released.

If, however, the debtors are partners, the one who is incapacitated will necessarily profit through the other who can receive the legacy, and he will be released by means of a receipt; for the same thing will happen even if the testator had directed that the only one entitled to take under the will should be released.

30.- THE SAME; *Questions, Book X*.- The plaintiff or the defendant, having charged his heir not to take judgment in the Court of the Centumvirs, the question arose as to the effect of this on the legacy. It was decided that the latter was only valid where the adversary of the testator had a bad case, so that he

porque dijera que en el fideicomiso se comprendía menor cantidad de gastos que la que él mismo había pagado, debería ser oído. Respondió, que no se le impedía en la escritura del testamento que pudiera pedir todo lo que hubiese probado que se le debe.

§ 13.- Uno legó así: «mando que por mis herederos se le den a Sempronia, mi mujer, los cincuenta que yo había recibido en mutuo con quirógrafo particularmente para mis negocios»; se preguntó, si subsistiría el fideicomiso, si verdaderamente hubiere sido deudor de su mujer. Respondió, que, si hubiesen sido debidos, era nulo el fideicomiso.

§ 14.- El mismo pregunto, si, habiendo pedido ella ante el juez este dinero como debido, y habiendo sido vencida, se podría pedir el fideicomiso. Respondió, que, según lo que se expone, se podía pedir por causa del fideicomiso lo que hubiese aparecido que no se debió por otra causa.

29.- PAULO; *Comentarios a la ley Julia y Papia, libro VI*.- Si el que tiene dos obligados por promesa, hubiere condenado a su heredero a que los libere a ambos, si uno de ellos no pudiera adquirir, y no fueran socios, el que nada adquiere deberá ser delegado a aquel a quien por la ley compete este beneficio; con cuya petición suceden estas dos cosas, que este beneficio vaya a él, y que sea liberado el que adquiere.

Pero si fueran socios, por causa del que es capaz adquiere también aquel por consecuencia, quedando él libre por aceptilación, porque sucediera esto, aunque se hubiere mandado que liberase solamente al capaz.

30.- EL MISMO; *Cuestiones, libro X*.- El demandante o el poseedor condenó a su heredero a que no ejercitase la acción centumviral, se pregunta en cuanto al efecto de este legado. Y se dijo, que se considera que el legado es útil solamente en este caso, si el adversario del testador tuvo mala causa, de

emolumentum, sed etiam sumptus heres legatario praestare cogitur. Nam in bona causa nihil videtur esse in legato nec propter sumptus, quod quidam existimaverunt.

31.- SCAEVOLA; *libro III, Responsorum*.- Creditor debitori legavit ita: "Gaio Seio, quidquid mihi sub pignore hortorum suorum debuit, ab heredibus meis dari volo": quaero, quum testator vivus a Seio aliquid recepit, an id ex causa legati peti possit. respondit secundum ea quae proponerentur non posse.

Idem repetiit et ait item testatorem ante factos codicillos, quibus legavit, paene omnem pecuniam sortis et usurarum recepisse, ita ut modicum sortis et usurarum debeatur, et quaesiit, an ei repetitio competere propter verba ad praeteritum relata "quidquid mihi debuit". Respondit: prius quidem secundum ea quae proponerentur recte responsum est, verum posterius propter ea, quae in tempore adderentur, ita ab iudice aestimandum, ut inspiceret, oblivione pecuniae solutae, aut quod eo inscio numerata esset, id fecisset, an consulto, quod quantitatem quondam debitam, non ius liberationis dare voluisset.

§ 1.- Inter cetera liberto ita legavit: "et si quid me vivo gessit, rationes ab eo exigi veto". Quaeritur, an chartas, in quibus rationes conscriptae sunt, item reliquas secundum accepta et expensa heredibus reddere debeat. Respondit ea de quibus quaereretur posse heredem vindicare, id autem, quod conservis, qui remanent in hereditate, crediderit et in rem domini versum esset, desisse in reliquis esse.

would be beaten in a contest with the heir; for then the heir would not only be obliged to surrender the property which was the subject of the suit, but also to pay all the expenses of litigation to the legatee. But if he had a good case, there does not seem to be anything in the legacy, not even the expenses, as some authorities have held.

31.- SCAEVOLA; *Opinions, Book III*.- A creditor made the following bequest to his debtor: "I desire everything due to me from Gaius Seius, and which he has secured by pledging his gardens, to be given to him by my heirs." If the testator, during his lifetime, had received any payment from Seius, I ask whether this could be claimed as due under the legacy. The answer was that, in accordance with the facts stated, it could not be claimed.

The same party again applied for advice, alleging that the testator, before making the codicil by which he left the bequest, had received almost all the principal and interest of the debt, so that but a very small portion of the debt remained, and asked whether he would have a right of action for recovery on account of the clause, "everything due to me which is related to the past." The answer was that, with reference to the facts stated in the first place, my opinion was correct; but so far as those stated subsequently were concerned, something had been added, and the point must be decided by the court, who should ascertain whether the testator, having forgotten that the money had been paid, had made this provision; or because payment was without his knowledge; or whether he had acted designedly, as he wished that the amount due, rather than the right to demand a release, should be bequeathed.

§ 1.- A testator, among others, made the following bequest to his freedman: "If he has transacted any business for me during my lifetime, I forbid any accounting to be required of him therefor." The question arose whether he would be compelled to surrender to the heirs the books in which the accounts were kept, as well as any sums remaining in his hands as shown by the entries of receipts and expenditures. The answer, with reference to the matter in question, was that the heir was also entitled to claim what the steward had lent to his fellow slaves who formed part

suerte que hubiere debido ser vencido, litigando el heredero; porque entonces es obligado el heredero a darle al legatario no solamente el importe del litigio, sino también los gastos; porque tratándose de una causa buena, no se considera que haya nada en el legado ni por razón de los gastos, como algunos juzgaron.

31.- SCÉVOLA; *Respuestas, libro VII*.- Un acreedor legó así a su deudor: «quiero que por mis herederos se le dé a Cayo Seyo todo lo que me debió con prenda de sus huertos»; pregunto, si, habiendo recibido el testador en vida alguna cosa de Cayo Seyo, podría ser pedida ésta por causa del legado. Respondió, que, según lo que se exponía, no podía.

El mismo repuso, y dijo, que también el testador recibió antes de haber sido hechos los codicilos, en que legó, casi todo el dinero del capital y de los intereses, de tal suerte que se debía una módica cantidad por capital e intereses, y preguntó, si le competía a él la petición por virtud de las palabras referidas a lo pasado: «todo lo que me debió». Respondió: antes ciertamente se respondió bien según lo que se exponía, pero después en razón a lo que se añade respecto al tiempo, se ha de estimar por el juez, de suerte que vea si esto lo hizo por olvido de que se había pagado la cantidad, o porque hubiese sido pagada ignorándolo él, o deliberadamente, porque hubiese querido dar la cantidad en otro tiempo debida, no el derecho de liberación.

§ 1.- Entre otras cosas, uno legó así a su liberto: «y si viviendo yo fue gestor de alguna cosa, vedo que se le exijan cuentas»; se pregunta, si deberá entregarles a los herederos los papeles en que están escritas las cuentas, y también los sobrantes con arreglo a lo recibido y lo gastado. Respondió que el heredero podía reivindicar estas cosas respecto a las que se preguntaba, pero que lo que hubiere prestado a los coesclavos, que permanecen en la herencia, y se hubiese aplicado a cosa del señor, dejó de pertenecer a los sobrantes.

of the estate, which sums, expended for the benefit of his master, should be deducted from the balance in his hands.

§ 2.- Titia, quae duos tutores habuerat, ita cavit: "rationem tutelae meae, quam egit Publius Maevius quum Lucio Titio, reposci ab eo nolo": quaeritur, an, si qua pecunia apud eum ex tutela remansit, peti ab eo possit. Respondit nihil proponi, cur pecunia, quae pupillae esset et apud tutorem remaneret, legata videretur.

§ 3.- Item quaeritur, an contutor liberatus videtur. Respondit contutorem non liberari.

§ 4.- "Gaio Seio optime merito hoc amplius lego concedique volo neque ab eo peti neque ab heredibus eius, quidquid mihi aut chirographis aut rationibus debitor est vel quidquid a me mutuum accepit vel fidem meam pro eo obligavi". Quaero, utrum id solum, quod eo tempore, quo testamentum fiebat, debebatur, legatum sit an et si quid ex ea summa usurarum nomine postea accessit legato cedat. Respondit secundum ea quae proponerentur videri omnem obligationem seio eius debiti per fideicommissum solvi voluisse.

§ 5.- Item quaeritur, si postea novatione facta et ampliata summa coeperit debere, an id, quod ex vetere contractu debebatur, nihilo minus in causa legati duret et an vero novatione facta quasi novus debitor ampliatae summae possit conveniri.

Respondit id dumtaxat legatum videri quod tunc debuisset, si tamen mansit in ea voluntate testator, quae tunc fuisset.

§ 2.- Titia, who had had two guardians, made the following provision in her will: "I do not wish an account of my guardianship which Publius Maevius and Lucius Titius administered, to be required of the former." The question arose whether any money remaining in his hands from the administration of the guardianship could be collected from him. The answer was that there was nothing in the case stated to lead to the belief that the money which belonged to the ward, and remained in the hands of the guardian, was bequeathed.

§ 3.- The question was also asked whether the fellow guardian should also be considered to have been released. The answer was that the fellow guardian was not released.

§ 4.- "With reference to Gaius Seius, who has been especially deserving, I do not wish that anything he owes me in notes, or on account, or whatever he has borrowed from me, or any obligations I may have contracted for his benefit be required either of him or of his heirs." I ask whether only the amount of money due at the time when the will was made was bequeathed, or whether any of the interest which had accrued on the said sum afterwards, was included in the legacy. The answer was that, in accordance with the facts stated, it appeared that the testator intended all the obligations of Seius due to himself to be discharged by virtue of the trust.

§ 5.- It was also asked, after an obligation had been renewed and the amount of the debt increased, whether what was due under the old contract would still be included in the legacy; or where a renewal had been made, and the party having become, as it were, a new debtor, he could be sued for the increased amount.

The answer was that only that was considered to have been bequeathed which the party owed at the time, but if the testator still adhered to his original intention, the legacy would include all the indebtedness existing at the time of his death.

§ 2.- Ticia, que había tenido dos tutores, dispuso así: «no quiero que a Publio Mevio se le pida cuenta de mi tutela, que administró junto con Lucio Ticio»; se pregunta, si habiendo quedado en su poder algún dinero de la tutela, se le podría pedir. Respondió, que nada se exponía para que no se considerase legado el dinero que fuese de la pupila, y estuviera en poder del tutor.

§ 3.- Asimismo, se pregunta, si se consideraría liberado el cotutor. Respondió, que no se liberaba el cotutor.

§ 4.- «Lego muy merecidamente a Cayo Seyo además de esto, y quiero que se le conceda, que no se le pida a él, ni a sus herederos, cualquiera cosa de la que me es deudor o por quirógrafo o por cuentas, o lo que de mi recibí en mutuo, o aquello por lo que obligué mi fianza»; pregunto, si se habrá legado solamente lo que se debía al tiempo en que se hacía el testamento, o si cederá al legado también lo que por tal suma se agregó después a título de intereses. Respondió, que, según lo que se exponía, se consideraba que quiso que para Seyo se disolviese por el fideicomiso toda obligación de esta deuda.

§ 5.- También se pregunta, si, hecha después novación y ampliada la suma hubiere comenzado a deber, subsistirá, sin embargo, en la condición de legado lo que se debía en virtud del antiguo contrato, o si, habiéndose hecho novación, podría ser demandado como nuevo deudor de la suma ampliada.

Respondió, que se consideraba legado solamente lo que entonces hubiese debido, si, no obstante, el testador permaneció en aquella voluntad, que hubiese tenido entonces.

TIT. IV

DE ADIMENDIS VEL TRANFERENDIS
LEGATIS VEL FIDEICOMMISUM

1.- PAULUS; *libro III, ad Sabinum*.- Qui actu legato iter adimat, nihil adimit, quia numquam actus sine itinere esse potest.

2.- POMPONIUS; *libro V, ad Sabinum*.- Fundo legato adimi ita potest: "fundum illi praeter usum fructum neque do neque lego", ut usus fructus in legato relinquitur.

§ 1.- Sed et fructus adimi potest, ut proprietates relinquantur.

§ 2.- Item pars fundi legati adimi potest.

3.- ULPIANUS; *libro XXIV, ad Sabinum*.- Si quis ita legaverit: "Titio fundum do lego: si Titius decesserit, Seio heres meus dare damnas esto", recte translatus legatus videtur. Sed et si iam mortuo eo, cui legatum erat, eadem res transtulerit, Sempronius debetur.

§ 1.- Si quis Titio legaverit sic: "Titio dato aut, si Titius ante decesserit quam accipiat, Sempronius dato", secundum meram supplitatem utrique obligatum videri heredem, id est et Sempronio et heredi Titii. Sed si quidem mora Titio ab herede facta est, ad heredes eius legati exactio transmittitur sempronio repellendo: sin autem nulla mora intercesserit, tunc Sempronius legatum accipit, et non Titii heredes. Sed si ante diem legati cedentem decesserit Titius, soli Sempronio debetur legatum.

TITLE IV

CONCERNING THE CANCELLATION
OR TRANSFER OF LEGACIES
AND TRUSTS

1.- PAULUS; *On Sabinus, Book III*.- Where a testator, having bequeathed the right to drive cattle through his land, does not grant the right of way, he omits nothing from the legacy, for the reason that the right to drive cattle cannot exist without the right of way.

2.- POMPONIUS; *On Sabinus, Book V*.- Where a tract of land is devised, a reservation may be made as follows, "I do not give or bequeath to So-and-So any other right attaching to the said land except the usufruct of the same," in order that the usufruct may constitute the legacy.

§ 1.- The usufruct, however, can be reserved, so that only the mere ownership will be left.

§ 2.- In like manner, a part of the land bequeathed may be reserved.

3.- ULPIANUS; *On Sabinus, Book XXIV*.- If anyone should make a testamentary disposition as follows, "I give and devise such-and-such a tract of land to Titius, and if Titius should die, let my heir be charged to give it to Seius," the devise is held to be legally transferred. Even if the party to whom it was left in the first place should be dead at the time of the transfer of the property, Seius will be entitled to it.

§ 1.- If anyone should make a bequest to Titius as follows, "Let my heir give such-and-such an article to Titius, or if Titius should die before receiving it, let him give it to Sempronius," according to the strict construction of the law, the heir will appear to be bound to both parties, that is to say to Sempronius and to the heir of Titius. If, however, the testator's heir should be in default in delivering the property to Titius, the right to demand the legacy will be transmitted to his heirs, and Sempronius will have no claim to it; but if there should have been no default, Sempronius, and not the heirs of Titius, will then be entitled to receive the legacy. But if Titius should die before the time when the legacy vests, Sempronius

TÍTULO IV

DE LA REVOCACIÓN O DE LA
TRANSFERENCIA DE LOS LEGADOS O DE
LOS FIDEICOMISOS

1.- PAULO; *Comentarios a Sabino, libro III*.- El que habiendo legado la servidumbre de conducción quitase la de paso, no quita nada, porque nunca puede haber conducción sin paso.

2.- POMPONIO; *Comentarios a Sabino, libro V*.- Legado un fundo se puede revocar así: «ni le doy, ni le lego a aquel el fundo, salvo el usufructo», de suerte que se deje en el legado el usufructo.

§ 1.- También se puede quitar el usufructo, de modo que se deje la propiedad.

§ 2.- También se puede quitar parte del fundo legado.

3.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si uno hubiere legado así: «doy y lego a Ticio un fundo; si Ticio falleciere, esté condenado mi heredero a dárselo a Seyo» se considera bien transferido el legado; pero aunque habiendo ya muerto aquel a quien se le había legado, hubiere transferido las mismas cosas, se le debe a Sempronio.

§ 1.- Si alguno hubiere legado a Ticio de este modo; «dele a Ticio, o si Ticio hubiere fallecido antes de recibirlo, dele a Sempronio, conforme a mera sutileza se considera que el heredero fue obligado a ambos, esto es, así a Sempronio, como al heredero de Ticio. Pero si verdaderamente a Ticio se le causó mora por el heredero, se transmite a sus herederos la exacción del legado repeliendo a Sempronio; mas si no hubiere mediado ninguna morosidad, entonces Sempronio recibe el legado, y no los herederos de Ticio; pero si Ticio hubiere fallecido antes de correr el término del legado, el legado se le debe solamente a Sempronio.

§ 2.- Idem dicendum est et fideicommissa hereditate puero data aut, si ante restitutam decessisset, matri eius relicta: ut, si puer ante diem legati cedentem decessisset, matri debeatur, si postea, ad pupilli heredes fideicommissum transmittatur utpote re ipsa mora subsequuta.

§ 3.- Sed et quum quis ita legasset: "heres meus Titio dato: si non dederit, Sempronio dato", ita demum sempronio debetur, si dies eius in persona Titii non cessisset.

§ 4.- Si quis ita legaverit: "heres meus Titio fundum dato et si Titius eum fundum alienaverit, heres meus eundem fundum Seio dato", oneratus est heres: non enim a Titio fideicommissum relictum est, si alienasset fundum, sed ab herede ei legatum est. heres igitur debet doli exceptione posita prospicere sibi cautione a Titio de fundo non alienando.

§ 5.- Si quis plus quam dedit ademerit, ademptio valet, veluti si quis viginti legaverit et quadraginta ademerit.

§ 6.- Si loci usum fructum leget testator et iter adimat, non valet ademptio nec vitiatur legatum: sicuti qui proprietatem fundi legat, iter adimendo legatum non minuit.

§ 7.- Si duobus Titii separatim legaverit et uni ademerit nec appareat, cui ademptum sit, utrique legatum debetur, quemadmodum et in dando, si non appareat cui datum sit, dicemus neutri legatum.

§ 8.- Si Titio fundus pure eidemque sub condicione legatus sit, deinde postea ademptum sit sic: "Titio fundum, quem sub condicione legavi, heres meus ne dato", ex nulla datione debetur, nisi specialiter dixerit pure eum legatum velle accipere.

alone will be entitled to it.

§ 2.- The same thing must be said where an estate is left in trust for the benefit of a boy, and his mother becomes the legatee if he should die before obtaining the estate, so that if he dies before the time when the legacy vests the mother will be entitled to it; but if he dies afterwards, the benefit of the trust will pass to the heirs of the child, just as if there had been default in the execution of the trust itself.

§ 3.- Where, however, anyone makes a bequest as follows, "Let my heir deliver such-and-such property to Titius, and if he does not do so, let him deliver it to Sempronius," Sempronius will only be entitled to the legacy, if at the time it vests, Titius should be incapable of acquiring it.

§ 4.- If anyone should make a bequest as follows, "Let my heir give such-and-such a tract of land to Titius, and if Titius should alienate the same, let my heir give it to Seius," the heir will be charged with both trusts; for Titius is not charged with the trust if he should alienate the land, but the heir is charged with the devise to him. Therefore the heir, by filing an exception on the ground of bad faith, should provide for himself and exact security from Titius not to alienate the land.

§ 5.- If anyone reserves more than he leaves, his reservation will be valid; as, for instance, if he should bequeath twenty aurei, and reserve forty.

§ 6.- If a testator should bequeath the usufruct of certain land, and reserve the right of way, his reservation is void, but the legacy will not be invalidated, just as where a person leaves the ownership of land, reserving the right of way, the legacy will not be diminished.

§ 7.- If a testator should bequeath a legacy separately to two persons of the name of Titius, and afterwards deprives one of them of the bequest, but it is not clear which one is meant, both of them will be entitled to the legacy; just as where, in making a bequest, it is not apparent to which of two parties it is given, we say that it is bequeathed to neither of them.

§ 8.- Where a tract of land was devised to Titius absolutely, and then was left to him under a condition, and finally he was deprived of it, as follows, "My heir shall not give to Titius the tract of land which I left to him conditionally," he will not be

§ 2.- Lo mismo se ha de decir, también habiéndose dado por fideicomiso una herencia a un niño o habiéndosela dejado a su madre si él hubiese fallecido antes de que le fuera restituida, de suerte que se le deba a la madre si el niño hubiese fallecido antes de correr el término del legado, y se transmita el fideicomiso a los herederos del pupilo, si después, como habiéndose seguido mora por la misma cosa.

§ 3.- Pero también cuando alguno hubiese legado así: «dele a Ticio mi heredero; si no le diere, dele a Sempronio», se le debe a Sempronio solamente en este caso, si el término de esto no hubiese corrido en cuanto a la persona de Ticio.

§ 4.- Si uno hubiere legado así: «dele mi heredero a Ticio un fundo, y si Ticio hubiere enajenado este fundo, dele mi heredero el mismo fundo a Seyo», fue gravado el heredero; porque el fideicomiso no fue dejado a cargo de Ticio, si hubiese enajenado el fundo, sino que fue legado a aquel a cargo del heredero. Luego deberá el heredero, habiéndose opuesto la excepción de dolo, mirar por sí con caución dada por Ticio de no enajenar el fundo.

§ 5.- Si alguno hubiere quitado más de lo que dio, es válida la revocación, como si alguno hubiere legado veinte y hubiere quitado cuarenta.

§ 6.- Si el testador legara el usufruto de un lugar, y quitara la servidumbre de paso, no es válida la revocación ni se vicia el legado; así como el que lega la propiedad de un fundo, no disminuye el legado quitando el paso.

§ 7.- Si alguien hubiera hecho por separado un legado a dos Ticios, y le hubiere revocado para uno, y no apareciera para quien haya sido revocado, se deberá a ambos el legado; así como también en el caso de darlo, si no apareciera para quien haya sido dado, diremos que no se legó para ninguno de los dos.

§ 8.- Si un fundo hubiera sido legado a Ticio puramente, y a él mismo bajo condición, y luego después se hubiera hecho así la revocación: «no le dé a Ticio mi heredero el fundo, que bajo condición le legué», no se debe por ninguna dación, si especial-

§ 9.- *Conditio legati an adimi possit vel hereditatis vel statuliberi, videndum. Et Iulianus scribit in statulibero detractam condicionem non repraesentare libertatem. Papinianus quoque libro septimo decimo quaestionum scribit generaliter condicionem adimi non posse: nec enim datur, inquit, condicio, sed adscribitur: quod autem adscribitur, non potest adimi, sed quod datur. Sed melius est sensum magis quam verba amplecti et condiciones sicut adscribi, ita et adimi posse.*

§ 10.- *Quum Titio centum testamento legasset et eidem codicillis ita legasset: "Titio quinquaginta dumtaxat nec amplius heres meus dato", non amplius quinquaginta legatarium petiturum.*

§ 11.- *Non solum autem legata, sed et fideicommissa adimi possunt et quidem nuda voluntate. Unde quaeritur, an etiam inimicitias interpositis fideicommissum non debeat: et si quidem capitales vel gravissimae inimicitiae intercesserint, ademptum videri quod relictum est: sin autem levis offensa, manet fideicommissum. Secundum haec et in legato tractamus doli exceptione opposita.*

4.- *IDEM; libro XXXIII, ad Sabinum.-* Quod si iterum in amicitiam redierunt et paenituit testatorem prioris offensae, legatum vel fideicommissum relictum reintegratur: ambulatoria enim est voluntas defuncti usque ad vitae supremum exitum.

5.- *GAIUS; libro II, ad Edictum urbicum.-* Sicut adimi legatum potest, ita et ad alium transferri, veluti hoc modo: "quod Titio legavi, id Seio do lego": quae res in personam Titii tacitam ademptionem continet.

entitled to it under either provision, unless the testator expressly stated that he desired him to receive the legacy absolutely.

§ 9.- Let us see whether the condition on which a legacy, an estate, or the freedom of a slave is dependent, can be revoked. Julianus says that, in the case of the freedom of a slave, the removal of the condition does not immediately confer freedom upon him. Papinianus, also, in the Seventeenth Book of Questions, says that, generally speaking, the condition cannot be revoked, for he holds that a condition is not given but is imposed, and what is imposed cannot be taken away, as this applies only to what is given. It is, however, better that the signification of the words, rather than the words themselves, should be considered; and, as conditions can be imposed, so also they can be rescinded.

§ 10.- Where a testator, by his will, left a hundred aurei to Titius and made the following bequest to him in a codicil, "Let my heir give to Titius fifty aurei, and no more," the legatee cannot claim more than fifty aurei.

§ 11.- Not only legacies, but also trusts can be revoked, even by a mere wish. Hence, it is asked whether a trust will be due in case enmity has arisen between the parties. If, indeed, the enmity relates to a capital offence or is of an extremely serious character, what has been bequeathed will be held to have been revoked; if, however, the offence is a light one, the trust will continue to exist. In accordance with this we can include legacies, and an exception on the ground of bad faith may be filed.

4.- THE SAME; *On Sabinus, Book XXXIII.-* If the parties should renew their friendship, and the testator should repent of his former resolution, the legacy or trust which was left will be restored in its entirety, for the will of the deceased was alterable until the last moment of his life.

5.- *GAIUS; On the Urban Edict, Book II.-* Just as a legacy can be taken away from one person, so also it can be transferred to another, for instance, as follows: "I give and bequeath to Seius what I have bequeathed to Titius." This clause contains a tacit deprivation of the legacy, so far as Titius personally is concerned.

mente no hubiere dicho que quería que él lo recibiese legado puramente.

§ 9.- Se ha de ver si se podrá revocar la condición de un legado, o de una herencia, o del manumitido por testamento; y escribe Juliano, que respecto al manumitido por testamento la condición revocada no anticipa la libertad. También Papiniano en el libro décimo séptimo de las Cuestiones escribe en general, que no se puede quitar una condición, porque no se da, dice, una condición, sino que se añade; mas no se puede quitar lo que se añade, sino lo que se da. Pero es mejor atenerse al sentido más bien que a las palabras, y que las condiciones así como se añaden, así también puedan ser quitadas.

§ 10.- Cuando uno hubiese legado a Ticio ciento en el testamento, y al mismo le hubiese legado así en los codicilos: «dele mi heredero a Ticio solamente cincuenta, y no más», el legatario no habrá de pedir más que cincuenta.

§ 11.- Mas no solamente se pueden revocar los legados, sino también los fideicomisos, y ciertamente, por la nuda voluntad. Por lo cual se pregunta, si no se deberá el fideicomiso tampoco habiendo mediado enemistades. Y si verdaderamente hubieron sobrevenido enemistades capitales o gravísimas, se considera revocado lo que se dejó; pero si leve ofensa, subsiste el fideicomiso. Esto mismo decimos también respecto al legado, opuesta la excepción de dolo.

4.- EL MISMO; *Comentarios a Sabino, libro XXXIII.-* Pero si de nuevo volvieron a la amistad, y el testador se arrepintió de la anterior ofensa, se reintegra el legado o el fideicomiso dejado porque la voluntad del difunto es variable hasta el último momento de su vida.

5.- *GAYO; Comentarios al Edicto urbano, libro II.-* Así como puede ser revocado un legado, así también puede ser transferido a otro, por ejemplo de este modo: «lo que le legué a Ticio, se lo doy y lego a Seyo»; lo cual contiene en sí una tacita revocación respecto a la persona de Ticio.

6.- PAULUS; *libro V, ad legem Iuliam et Papiam*.- Translatio legati fit quattuor modis: aut enim a persona in personam transfertur: aut ab eo qui dare iussus est transfertur, ut alius det: aut quum res pro re datur, ut pro fundo decem aurei: aut quod pure datum est, transfertur sub condicione.

§ 1.- Sed si id, quod a Titio dedi, a Maevio dem, quamvis soleant esse duo eiusdem rei debitores, tamen verius est hoc casu ademptum esse legatum: nam quum dico: "quod Titium dare damnavi, Seius damnas esto dare", videor dicere, ne Titius det.

§ 2.- Item si pro fundo decem legentur, quidam putant non esse ademptum prius legatum: sed verius est ademptum esse: novissima enim voluntas servatur.

7.- ULPIANUS; *libro XXIV, ad Sabinum*.- Quod si alii legetur sub condicione, quod alii pure datum est, non plene recessum videtur a primo, sed ita demum, si condicio sequentis exstiterit: ceterum si hoc animo fuerit testator, ut omnimodo recessum a primo putaverit, dicendum erit a primo ademptum legatum.

8.- IULIANUS; *libro XXXII, Digestorum*.- Et ideo si vivo testatore mortuus fuerit is, in quem translatum legatum fuerit, nihilo magis ad eum, a quo translatum fuerit, pertinebit.

9.- ULPIANUS; *libro V, Disputationum*.- Quum centum, quae quis pure reliquit, condicione adiecta iterum eidem legavit, si quidem quasi aliam hanc summam esse voluit, et quod pure relictum est statim debetur et quod sub condicione adscriptum est, si condicio exstiterit. Quod si eandem summam mutata

6.- PAULUS; *On the Lex Julia et Papia, Book V*.- The transfer of a legacy is made in four ways. It can either be transferred by substituting one person for another; or this may be done by the party who directed it to be bestowed, so that another may give it; or where one kind of property is left instead of another, as ten aurei instead of a tract of land; or where the legacy was absolute, and it is transferred under a condition.

§ 1.- If, however, I should give to Mævius what I have already given to Titius, although it is customary to hold that they are both charged with the delivery of the same property, still, the better opinion is that, in this case, the first legatee is deprived of the bequest, for where I say, "Let Seius be charged with giving what I have charged Titius to give," I shall be considered to have said that Titius shall not deliver the property.

§ 2.- Likewise, where ten aurei are bequeathed instead of a tract of land, certain authorities think that the first bequest is not revoked; but, as a matter of fact it is, for the last will is the one to be carried into effect.

7.- ULPIANUS; *On Sabinus, Book XXIV*.- Where the bequest of an article is made to anyone under a condition, and the same article has already been absolutely left to another, the first bequest is not held to have been absolutely revoked, but only in case the condition of the second one should be complied with. If, however, it was the intention of the testator that the first legacy should, under all circumstances, be cancelled, this must be held to have been done.

8.- JULIANUS; *Digest, Book XXXII*.- Therefore, if he to whom the legacy was transferred should die during the lifetime of the testator, it will, nevertheless, not belong to the person who was previously deprived of it.

9.- JULIANUS; *Disputations, Book V*.- If anyone, after having left a hundred aurei to a person absolutely, then bequeathed the same sum to him conditionally, and intended to leave him this second sum in addition, what he left him absolutely will be due at once, and what was bequeathed to him under

6.- PAULO; *Comentarios a la ley Julia y Papia libro V*.- La transferencia de un legado se hace de cuatro modos porque o se transfiere de persona a persona o se transfiere de aquel a quien se mandó que lo diera, para que otro lo dé, o cuando se da una cosa por otra como diez áureos por un fundo, o se transfiere bajo condición lo que se dio puramente.

§ 1.- Pero si yo diera a cargo de Mevio lo que di a cargo de Ticio, aunque suele haber dos deudores de una misma cosa, es sin embargo mas verdadero que en este caso fue revocado el legado; porque cuando digo; «esté condenado a dar Seyo lo que a Ticio le condené a dar», parece que digo que no lo dé Ticio.

§ 2.- Asimismo, si en lugar de un fundo se legara la suma de diez, opinan algunos que no se revocó el primer legado; pero es más verdadero que fue revocado, porque se observa la última voluntad.

7.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Pero si a uno se le legara bajo condición, lo que a otro se le dió puramente, no se considera que haya habido completo apartamiento del primer legado, sino solamente en este caso, si se hubiere cumplido la condición del segundo; mas si el testador hubiere tenido tal intención, que hubiere creído haberse apartado de todos modos del primero, se habrá de decir que el legado fue revocado para el primero.

8.- JULIANO; *Digesto, libro XXXII*.- Y por lo tanto, si en vida del testador hubiere muerto aquel a quien hubiere sido transferido el legado, no por esto le pertenecerá a aquel de quien hubiere sido transferido.

9.- ULPIANO; *Disputas; libro V*.- Cuando los ciento que uno dejó puramente los legó de nuevo al mismo habiendo añadido una condición, si verdaderamente quiso que esta suma fuese como distinta, se deberá desde luego lo que se dejó puramente, y lo que se añadió bajo condición, si se hubiere cumplido

voluntate sub condicione reliquit, pura datio condicionalis effecta videbitur. Quare si in eodem testamento, in quo centum adscripserat, postea quinquaginta reliquerit, si quidem alia voluit esse haec quinquaginta, centum quinquaginta debebuntur, sin vero quinquaginta tantum deberi voluit, quinquaginta tantum debebuntur.

Idem est et si in codicillis id fuerit factum.

10.- IULIANUS; *libro XXXVII, Digestorum*.- Si legatum pure datum Titio adimatur sub condicione et pendente condicione Titius decesserit, quamvis condicio defecerit, ad heredem Titii legatum non pertinebit: nam legatum quum sub condicione adimitur, perinde est, ac si sub contraria condicione datum fuisset.

§ 1.- Quod ita legatum est: "Titio decem heres meus dato: si Titio non dederit, eadem decem sempronio dato", si moriatur Titius ante diem legati, Sempronius legatum utiliter petet: translatus enim legatum intellegi debebit.

11.- IDEM; *libro LIV, Digestorum*.- Qui hominem legat et Stichum adimit, non peremit legatum, sed extenuat,

12.- ULPIANUS; *libro L, ad Sabinum*.- Ut Stichum legatarius eligere non possit.

13.- MARCIANUS; *libro VI, Institutionum*.- Divi Severus et Antoninus Rescripserunt, quum testator postrema scriptura quaque ratione motus pessimum libertum esse adiecisset, ea quae priore scriptura ei relicta fuerant adempta videri.

the condition will be payable if the condition should be fulfilled. Where, however, through having changed his mind, he left him the same sum under a condition, the absolute bequest may be considered to have become conditional. Hence, if in the same will by which he bequeathed a hundred aurei he afterwards left fifty, and he intended these fifty to constitute a new bequest, a hundred and fifty aurei will be due. But if he intended the bequest to consist of but fifty aurei, only fifty will be payable.

The same rule will apply where this was done by means of a codicil.

10.- JULIANUS; *Digest, Book XXXVII*.- Where a legacy is absolutely bequeathed to Titius, and he is deprived of it under a certain condition, and dies while the condition is pending, even though the condition should fail, the legacy will not belong to the heir of Titius; for where a legacy once given is taken away under a condition, the effect is the same as if in the first place it had been left under the opposite condition.

§ 1.- Where a bequest is made as follows, "Let my heir pay ten aurei to Titius, and if he should not pay them to Titius, let him pay the said ten aurei to Sempronius," if Titius should die before the day when the legacy vests, Sempronius can legally claim the legacy, for it should be understood to have been transferred to him.

11.- THE SAME; *Digest, Book LIV*.- Where a testator bequeaths a slave, in general terms, and reserves Stichus, he does not annul the legacy, but he weakens it;

12.- ULPIANUS; *On Sabinus, Book L*.- As the legatee cannot select Stichus.

13.- MARCIANUS; *Institutes, Book VI*.- The Divine Severus and Antoninus stated in a Rescript that where a testator, induced by some motive or other, in his last will mentioned one of his freedmen as being of extremely bad character, he was considered to have deprived him of all that had been left to him previously.

la condición. Pero si habiendo cambiado de voluntad dejó bajo condición la misma suma, se considerará que la dación pura fue hecha condicional. Porque si en el mismo testamento en que había adjudicado ciento hubiere dejado después cincuenta, si verdaderamente quiso que estos cincuenta fuesen distintos, se deberán ciento cincuenta; mas si quiso que fueran debidos únicamente cincuenta, se deberán solo los cincuenta.

Lo mismo es, también si esto hubiere sido hecho en codicilos.

10.- JULIANO; *Digesto, libro XXXVII*.- Si se revocan bajo condición el legado dado a Ticio puramente, y Ticio hubiere fallecido estando pendiente la condición, aunque llegare a faltar la condición, el legado no pertenecerá al heredero de Ticio; porque cuando bajo condición se revoca un legado, es lo mismo que si hubiese sido dado bajo condición contraria.

§ 1.- Pero si se legó así: «dele mi heredero diez a Ticio, y si no se los hubiere dado a Ticio, dele los mismos diez a Sempronio», si Ticio muriese antes del término del legado, Sempronio pedirá útilmente el legado; porque se deberá entender transferido el legado.

11.- EL MISMO; *Digesto, libro LIV*.- El que lega un esclavo, y exceptúa a Stico, no extingue el legado, sino que lo limita,

12.- ULPIANO; *Comentarios a Sabino, libro L*.- de modo que el legatario no pueda elegir a Stico.

13.- MARCIANO; *Instituta, libro VI*.- Respondieron por Rescripto los Divinos Severo y Antonino, que cuando el testador, movido por una razón cualquiera, hubiese añadido en su última escritura que un liberto era pésimo, se consideran revocadas las cosas que en la primera escritura le habían sido dejadas.

14.- FLORENTINUS; *libro XI, Institutionum*.- Legata inutiliter data ademptione non confirmantur, veluti si domino herede instituto, servo pure legatum sub condicione adimatur: nam pure legatum si sub condicione adimatur, sub contraria condicione datum intellegitur et ideo confirmatur. ademptio autem, quo minus, non quo magis legatum debeatur, intervenit.

§ 1.- Quibus ex causis datio legati inutilis est, ex isdem causis etiam ademptio inefficax habetur, veluti si viam pro parte adimas aut pro parte liberum esse vetes.

15.- PAULUS; *libro singulari de assignatione libertorum*.- Quum servus legatus a testatore et alienatus rursus redemptus sit a testatore, non debetur legatario opposita exceptione doli mali. Sane si probet legatarius novam voluntatem testatoris, non submovebitur.

16.- IDEM; *ex libro singulari de Iure Codicillorum*.- Nihil interest, inducatur quod scriptum est an adimatur.

17.- CELSUS; *libro XXII, Digestorum*.- Nihil prohibet priorem scripturam posteriore corrigere commutare rescindere.

18.- MODESTINUS; *libro VIII, Differentiarum*.- Rem legatam si testator vivus alii donaverit, omnimodo exstinguitur legatum. Nec distinguimus, utrum propter necessitatem rei familiaris an mera voluntate donaverit, ut, si necessitate donaverit, legatum debeatur, si nuda voluntate, non debeatur: haec enim distinctio in donantis munificentiam non cadit, quum nemo in necessitatibus liberalis existat.

14.- FLORENTINUS; *Institutes, Book XI*.- Legacies which are void when granted, are not rendered valid by being suppressed; as, for instance, after having appointed the master of a slave his heir, the testator conditionally deprives the said slave of an absolute bequest which he had made to him of the same. For where an absolute bequest is taken away by imposing a condition, it is held to have been bequeathed under the contrary condition, and therefore is confirmed. This, however, does not apply where the legacy which was suppressed was not valid in the first place.

§ 1.- The same reasons for which a legacy becomes void when bequeathed, cause its suppression also to become of no force or effect; as, for example, if you deprive a legatee of a part of his right of way, or direct a slave to be only partly free.

15.- PAULUS; *On the Allotment of Freedmen*.- Where a slave bequeathed by a testator is alienated, and then repurchased by him, he will not be due to the legatee, against whom an exception on the ground of bad faith may be interposed. It is evident, however, that he will not be barred by it if the legatee can prove that the testator had renewed his intention to give him the slave.

16.- THE SAME; *On the Law of Codicils*.- It makes no difference whether the legacy contained in the will is erased, or taken away.

17.- CELSUS; *Digest, Book XXII*.- There is nothing to prevent a testator from correcting, changing, or revoking a former will by a succeeding one.

18.- MODESTINUS; *Differences, Book VIII*.- If a testator, during his lifetime, should give away to another the property which he had bequeathed, the legacy will be absolutely extinguished, nor do we make any distinction as to whether he disposed of his property through necessity, or merely through inclination; so that if he gave it away through necessity, the legacy will still be payable, but if he disposed of it merely through inclination, it will not be payable. This distinction, however, will not apply

14.- FLORENTINO; *Instituta, libro XI*.- Los legados dados inútilmente no se confirman con la revocación, como si habiendo sido instituido heredero el señor, se le quitara bajo condición al esclavo lo legado puramente; porque si se quitara bajo condición lo legado puramente, se entiende dado bajo la condición contraria, y por lo tanto se confirma; pero la revocación media, para que no se deba, no para que se deba más bien el legado.

§ 1.- Por las mismas causas por que es inútil la dación de un legado, se considera ineficaz también su revocación, como si en parte revocases la servidumbre de camino, o vedases que en parte uno sea libre.

15.- PAULO; *De la asignaciones de los libertos, libro Único*.- Cuando el esclavo legado y enajenado por el testador haya sido comprado de nuevo por el testador, no se le debe al legatario habiéndose opuesto la excepción de dolo malo; pero, a la verdad, si probase el legatario una nueva voluntad del testador, no será repelido.

16.- EL MISMO; *Del Derecho de los Codicilos, libro Único*.- Ninguna diferencia hay entre que sea borrado, o revocado, lo que se escribió,

17.- CELSO; *Digesto, libro XXII*.- Nada prohíbe que uno corrija, cambie, o rescinda una escritura anterior por otra posterior.

18.- MODESTINO; *Diferencias, libro VIII*.- Si en vida hubiere el testador donado a otro la cosa legada, se extingue enteramente el legado; y no distinguimos si la haya donado por necesidad de las cosas de familia, o por mera voluntad, de suerte que si la hubiere donado por necesidad, se debe el legado, y si por nuda voluntad, no se deba, para que esta distinción no es aplicable a la liberalidad del que dona, porque nadie es liberal estando en necesidades.

to a party who makes a donation through liberality, for no one is liberal when impelled by necessity.

19.- IDEM; *libro XI, Responsorum*.- Modestinus respondit, si adimendo legatum, quod Maevio relictum sit, fideicommissum ab eo datum defunctus revocare noluit, heredes ex causa fideicommissi conveniri posse recte probari.

20.- POMPONIUS; *libro I, ad Quintum Mucium*.- Licet transferam legatum in eum, quum quo nobis testamenti factio non est, sive in servum proprium, cui sine libertate legavero, licet eis non debeatur, nec illi tamen debebitur, cui fuerit ademptum.

21.- LICINIUS RUFINUS; *libro IV, Regularum*.- Legatum nulli alii adimi potest quam cui datum est: quapropter si filio aut servo alieno legatum fuerit, domino aut patri legatum adimi non potest.

22.- PAPINIANUS; *libro VI, Responsorum*.- Ex parte heres institutus etiam legatum acceperat: eum testator inimicitiis gravissimis persecutus, quum testamentum aliud facere instituisset neque perficere potuisset, praeteriit. hereditariae quidem actiones ei non denegabuntur, sed legatum si petat, exceptione doli mali submovebitur.

23.- IDEM; *libro VII, Responsorum*.- Pater inter filios facultatibus divisit filiam ex ratione primipili commodorum trecentos aureos accipere voluit ac postea de pecunia commodorum possessionem paravit. Nihilo minus fratres et coheredes sorori fideicommissum praestabunt: non enim absumptum videtur, quod in corpus patrimonii versum est. Quum autem inter filios diviso patrimonio res indivisas ad omnes coheredes pertinere voluisset, ita possessionem ex commodis comparatam dividi placuit, ut in eam superflui pretii filia portionem hereditariam accipiat: hoc enim eveniret in bonis pecunia relictā.

19.- THE SAME; *Opinions, Book XI*.- Modestinus gave it as his opinion that if the deceased, by depriving Mævius of a legacy which was bequeathed to him, did not intend to revoke the trust with which he was charged, the heirs can be sued by virtue of the trust; and this opinion shall be approved.

20.- POMPONIUS; *On Quintus Mucius, Book I*.- Although I may transfer a legacy to a person who has not the right to receive it under my will, or bequeath the legacy without the grant of freedom to my own slave, even if they are not entitled to receive it, it will still not be payable to the person who was deprived of the same.

21.- LICINIUS RUFINUS; *Rules, Book IV*.- Only he can be deprived of a legacy to whom it was bequeathed, and therefore if a bequest should be made to the son or the slave of another, the father or the master cannot be deprived of it.

22.- PAPINIANUS; *Opinions, Book VI*.- An heir appointed to a share of an estate also received a legacy by the will. The testator afterwards regarded him with intense hatred, and intended to make another will which he began, but could not finish, and passed the party over without mentioning him. His rights of action as heir could, indeed, not be denied him, but if he should claim the legacy, he could be barred by an exception on the ground of bad faith.

23.- THE SAME; *Opinions, Book VII*.- A father, having divided his property among his children, desired that his daughter should receive the sum of three hundred aurei, derived from the profit which he obtained from the advantages he enjoyed as the chief Centurion of the Triarii; and he afterwards used this money in acquiring a tract of land. Notwithstanding this fact, the brothers and co-heirs of the sister will be still obliged to execute the trust, for what was used for the benefit of the testator could not be held to have been consumed. But, as he had apportioned his property among his children, he intended that

19.- EL MISMO; *Respuestas, libro XI*.- Modestino respondió, que si revocando el legado, que haya sido dejado a Mevio, no quiso el difunto revocar el fideicomiso dado a cargo de él, con razón se aprueba que los herederos puedan ser demandados por causa del fideicomiso,

20.- POMPONIO; *Comentarios a Quinto Mucio libro I*.- Aunque yo transfiera el legado a aquel con quien no tenemos testamentifacción, o a un esclavo propio, al cual le hubiere yo hecho el legado sin la libertad, aun cuando no se les deba a estos, tampoco, sin embargo, se le deberá a aquel a quien le hubiere sido revocado.

21.- LICINIO RUFINO; *Reglas, libro IV*.- El legado no puede ser revocado a otro ninguno sino a quien se le dió; por lo cual, si a un hijo o a un esclavo ajeno se le hubiere hecho un legado, el legado no se le puede quitar al señor o al padre.

22.- PAPINIANO; *Respuestas, libro VI*.- Uno, instituido heredero de una parte, había recibido también un legado, y el testador, habiéndolo perseguido por gravísimas enemistades cuando había determinado hacer otro testamento, falleció, y no pudo terminarlo; no se le denegaran ciertamente las acciones de la herencia, pero si pidiera el legado, será repelido con la excepción de dolo malo.

23.- EL MISMO; *Respuestas, libro VII*.- Un padre, habiendo dividido sus bienes entre los hijos, quiso que la hija recibiese trescientos áureos por cuenta de las utilidades del cargo de primipilo, y después compró con el dinero de las utilidades una posesión; esto no obstante, los hermanos y coherederos le entregaran a la hermana el fideicomiso; porque no se considera consumido lo que se invirtió en el cuerpo del patrimonio. Mas como habiendo dividido entre los hijos el patrimonio hubiese querido que los bienes indivisos pertenecieran a todos los coherederos, se determinó que la posesión comprada

anything which had not been divided should belong to them in common; and hence it was decided that the land which had been acquired by means of funds derived from the office in the army should also be divided, so that the daughter might receive her share of the estate out of the amount paid for said land. This also would be the case, if money had been included in the assets of the estate.

24.- IDEM; *libro VIII, Responsorum*.- Legatum sub condicione datum quum transfertur, sub eadem condicione transferri videtur, si non condicio priori personae cohaereat: nam si quis uxori sublati liberis legaverit, repetita condicio non videbitur, quae fuit in persona mulieris necessaria.

§ 1.- Pater hortos instructos filiae legavit: postea quaedam ex mancipiis hortorum uxori donavit. Sive donationes confirmavit sive non confirmavit, posterior voluntas filiae legato potior erit: sed etsi non valeat donatio, tamen minuisse filiae legatum pater intellegitur.

25.- IDEM; *libro IX, Responsorum*.- Alteri ex heredibus praeceptionem praedii dedit: mox alteri praestari adversus debitorem actiones ad eum finem mandavit, quo praedium fuerat comparatum. Quum postea praedio distracto citra ullam offensam eius, qui praeceptionem acceperat, pretium in corpus patrimonii redisset, non esse praestandas actiones coheredi respondi.

26.- PAULUS; *libro IX, Quaestionum*.- Si, servo quum libertate dato legato, et alienato adimatur libertas, quamvis alieno inutiliter adimatur, tamen legatum ad emptorem non perventurum; et merito, constitit enim ademptio, quia possit redimi, sicut datio, quum in eum confertur, qui testamenti faciendi

24.- THE SAME; *Opinions, Book VIII*.- Where a legacy bequeathed under a condition is transferred to another party, it is held to have been transferred subject to the same condition, unless it was one not attaching to the person of the first legatee. For if anyone should bequeath property to his wife, provided she should have children, and the legacy should be transferred, the condition which was necessarily attached to the person of the first woman will not be considered to have been repeated.

§ 1.- A father devised his gardens with all their appurtenances to his daughter, and afterwards presented some of the slaves belonging to the said gardens to his wife. Whether he confirmed the donation or not, his last wishes will take precedence of the bequest to his daughter. But even if the donation should not be valid, still the father will be understood to have diminished the legacy of his daughter.

25.- THE SAME; *Opinions, Book IX*.- A testator left to one of his heirs a tract of land as a preferred legacy, and afterwards directed that certain rights of action, to the amount of the purchase of said tract of land, should be assigned to another. Afterwards, having sold the land without causing any injury to the party entitled to it as a preferred legacy, he placed the price received for the same among the property of his estate. I gave it as my opinion that the rights of action should not be assigned to his co-heir.

26.- PAULUS; *Questions, Book IX*.- Where a legacy was bequeathed to a slave with his freedom, and he was afterwards sold, and the bequest of his freedom was revoked, although such a revocation is void with reference to a slave belonging to another, still, the purchaser will not be entitled to the legacy.

con las utilidades se dividiera de tal suerte, que en ella reciba la hija la porción hereditaria del precio excedente; porque esto sucedería habiéndose dejado el dinero entre los bienes.

24.- EL MISMO; *Respuestas, libro VIII*.- Cuando se transfiere el legado dado bajo condición, se considera que se transfiere bajo la misma condición, si la condición no fuese inherente a la primera persona; porque si alguno hubiere legado a su mujer si hubiese tenido hijos, no se considerara repetida una condición, que fue necesaria respecto a la persona de la mujer.

§ 1.- Un padre legó a su hija unos huertos provistos, y después donó a su mujer algunos de los esclavos de los huertos; ora si confirmó las donaciones, ora si no las confirmó, la última voluntad tendrá mas fuerza que el legado de la hija. Pero aunque no sea válida la donación, se entiende, sin embargo, que el padre disminuyó el legado de la hija.

25.- EL MISMO; *Respuestas, libro IX*.- Uno dió por prelegado a uno de los herederos un predio, y después mandó que se le cediesen a otro las acciones contra un deudor para el fin con que había sido comprado el predio; como después, habiendo vendido el predio sin ofensa alguna del que había recibido el prelegado, hubiese aportado el precio al cuerpo del patrimonio, respondí, que no le han de ser cedidas las acciones al coheredero.

26.- PAULO; *Cuestiones, libro IX*.- Si habiéndose dado con la libertad un legado a un esclavo, y, habiendo sido enajenado, se le quitara la libertad, aunque inútilmente se le quite al ajeno, sin embargo, el legado no ira al comprador; y con razón, pues fue válida la revocación, porque puede ser comprado de

tempore fuit testatoris, deinde alienato codicillis libertas datur.

§ 1.- Quid ergo, si eum, quem liberum esse quis iusserat, manumiserat vivus, deinde codicillis libertatem ei ademerit? videamus, an perdiderit legatum vana ademptio libertatis. Quod quidam putant: sed supervacua scriptura non nocet legato.

27.- IDEM; *libro XXI, Quaestionum*.- Servus legatus est et ei aliquid. si alienato eo adimatur quod ei legatum est, valet ademptio, quia et legatum potest procedere, si redimatur.

§ 1.- Servo legato et inter vivos manumisso si legatum adimatur, nullius momenti ademptio est: igitur legatum, quod ipsi datum est, capiet. Nam etsi rursus in servitutem ceciderit, non tamen legatum eius resuscitabitur: novus enim videtur homo esse.

28.- VALENS; *libro V, Fideicommissorum*.- Si tibi certam rem legavero et rogavero te, ut eam Titio restitueres, deinde eandem rem tibi fideicommisero nec rogavero te, ut alii eam praestares, quaeritur, an in tua potestate sit ex causa fideicommissi eligere, ut fideicommissum non praestes. Et magis posteriorem scripturam testamenti placuit spectari.

29.- PAULUS; *libro III, Sententiarum*.- Libertus, qui in priore parte testamenti legatum acceperat et ingratus postea eadem scriptura a testatore appellatus est, commutata voluntate actionem ex testamento habere non potest.

There is reason in this, for the revocation will stand, as the slave can be repurchased, just as the bequest of the legacy is valid when it is made to one who, at the time the will was made, belonged to the testator, but who, after having been sold, obtained his freedom by means of a codicil.

§ 1.- What would be the case if the testator, during his lifetime, should manumit a slave whom he had directed to be free by his will, and should then revoke his grant of freedom by a codicil? Let us see whether the mere revocation of his freedom would annul the legacy. Some authorities think that it would, but a superfluous provision does not affect a legacy.

27.- THE SAME; *Questions, Book XXV*.- When a slave is bequeathed, and something is left to him, and he afterwards should be sold, and deprived of what was bequeathed to him, the revocation will be valid, because the legacy will take effect if the slave should be repurchased.

§ 1.- Where a slave is bequeathed, and is manumitted during the lifetime of the parties, and he is deprived of his legacy, the deprivation will be of no force or effect; therefore he can take the legacy bequeathed to him, for, even if he should again be reduced to slavery, his legacy will still not be revived, for he is considered to be a new man.

28.- VALENS; *Trusts, Book V*.- If I should bequeath certain property to you, and ask you to deliver it to Titius, and then should leave you the same property under a trust, but should not request you to deliver it to anyone, the question arises whether it is in your power to select the property under the terms of the second trust in order to avoid the execution of the first one. It has been established that it is better to take into consideration the last provision of the will.

29.- PAULUS; *Sentences, Book III*.- A freedman who received a legacy by the first part of the will afterwards was stigmatized by the testator as ungrateful in the same instrument, and the testator having changed his mind, the freedman will not be entitled to an action based on the will.

nuevo, así como la dación, cuando es concedida a aquel que fue del testador al tiempo de hacerse el testamento, y habiendo sido enajenado después se le da la libertad en codicilos.

§ 1.- Qué se dirá, pues, si uno en vida hubiere manumitido a quien él había mandado que fuese libre, y después le hubiere quitado en codicilos la libertad? Veamos, si la vana revocación de la libertad habrá invalidado el legado; y así lo creen algunos; pero una escritura superflua no perjudica al legado.

27.- EL MISMO; *Cuestiones, libro XXI*.- Fue legado un esclavo, y legóse a este una cosa; si habiendo sido él enajenado se le quitara lo que se le legó, es válida la revocación, porque también puede ser procedente el legado, si aquel fuese comprado de nuevo.

§ 1.- Si a un esclavo legado y manumitido entre vivos se le revocara un legado, es de ningún valor la revocación; luego percibirá el legado que a si mismo se le dió; porque aunque de nuevo hubiere caído en esclavitud, no se resucitará, sin embargo, su legado, porque se considera que es un hombre nuevo.

28.- VALENTE; *Fideicomisos, libro V*.- Si yo te hubiere legado una cosa cierta, y te hubiere rogado que se la restituyeras a Ticio, y después te hubiere dejado por fideicomiso la misma cosa, y no te hubiere rogado que se la entregues a otro, se pregunta, si estará en tu facultad elegir por causa del fideicomiso no entregar el fideicomiso. Y se determinó, que más bien se atendiera a la cláusula posterior del testamento.

29.- PAULO; *Sentencias, libro III*.- Un liberto, que en la primera parte del testamento había recibido un legado, y después en la misma escritura fue llamado ingrato por el testador, no puede tener, habiéndose cambiado la voluntad, la acción del testamento.

30.- SCAEVOLA; *libro XX, Digestorum*.- Alumnae suae plura legaverat: quaedam ex his abstulit, quaedam ut praestarentur, ab herede suo petit, in quibus et viginti dari voluit his verbis: "hoc amplius do lego darique volo viginti auri libras" et adiecit: "fideique tuae, atti, committo, ut in primis Semproniam sororem tuam pro tua pietate et regere et tueri velis, et, si putaveris eam ad bonam vitae consuetudinem reversam, ita viginti auri libras ei reddere, quum morieris. Interim tamen redditus eius, id est usuras semisses ei praestes".

Postea codicillis ad Maevium legatarium easdem viginti libras auri transtulit et fidei eius commisit in haec verba: "viginti libras auri, quas testamento Semproniae alumnae meae reliqui, eas dari volo Maevio cautionibus interpositis, ut ex ea summa eidem Semproniae, quamdiu advixerit, praestet menstruos denarios quinque et vestiarii nomine denarios centenos vicenos quinos, idque fidei vestrae committo: certa sum autem te, Maeui, pro tua pietate petiturum ab herede tuo, ut voluntas mea in persona alumnae meae duret".

Quaesitum est, an Maevius legatarius cogendus sit post mortem suam viginti libras auri Semproniae restituere, sicut rogatus fuerat Attius heres. Respondit secundum ea quae proponerentur viginti quidem auri libras non cogendum praestare, sed alia, quae ab eo alumnae relictas sunt, deberi et a Maevio et ab herede eius, donec vivit alumna.

§ 1.- Titia testamento Seiam libertam eandemque collactaneam ex parte duodecima heredem instituerat, Pamphilo liberto suo praedia per fideicommissum dedit, in quibus et (latifundium) praediorum quae appellabatur Circa Colonen: eidem liberto postea per epistulam alias etiam res donavit, in quibus de Seia et Pamphilo ita est locuta Titia: Heredibus meis salutem. Volo firma esse, quae inferius ordinata sunt, quacunque in nomen Pamphili

30.- SCAEVOLA; *Digest, Book XXX*.- A testatrix left several articles to her foster-child, and afterwards revoked the bequest of some of them, and charged her heir to substitute others in their stead, among which she desired twenty pounds of gold to be bestowed, as follows: "In addition to this, I give and bequeath, and I wish twenty pounds of gold to be given to her." She also added: "And I charge you, Attius, above all, to care for and protect your sister Sempronia, with due affection, and if you think that she has returned to a good mode of life, leave her when you die the abovementioned twenty pounds of gold; and, in the meantime, pay her the income of said sum, that is to say, interest on the same at the rate of six per cent."

She afterwards transferred the same twenty pounds of gold to her legatee, Maevius, by a codicil, and charged him with a trust as follows: "I desire the twenty pounds of gold which I have left to my foster-child, Sempronia, by my will, to be given to Maevius, after taking security from him to pay five denarii every month out of said sum to the said Sempronia, as long as she may live, in addition to a hundred and twenty-five denarii for her clothing; and this I beg you to do. I am certain that you, Maevius, on account of your affection, will charge your heir at your death to carry out my wishes with reference to my foster-child."

The question arose whether Maevius, as legatee, would, at the time of his death, be compelled to pay the twenty pounds of gold to Sempronia, as the heir Attius had been charged to do. The answer was that, according to the facts stated, he could not be compelled to pay her the twenty pounds of gold; but that the other things with which he had been charged for the benefit of the foster-child must be furnished by Maevius and his heir, as long as the said foster-child lived.

§ 1.- Titia, by her will, appointed her freedwoman Seia, who was also her foster-sister, heir to a twelfth part of her estate. She left certain lands to her freedman Pamphilus under a trust, among which were certain fields of large extent, designated as being near Colone; and she afterwards, by a letter, also gave other property to the same freedman, in which letter she referred to Seia and Pamphilus as follows: "To my heirs, Greeting. I wish that everything stated

30.- SCÉVOLA; *Digesto, libro XX*.- Una había legado a su hermana muchas cosas, le quitó algunas de estas, y le pidió a su heredero que se le diesen otras, entre las que quiso que se le diese también la suma de veinte, en estos términos: «además de esto doy y lego, y quiero que se den veinte libras de oro», y añadió: «encomiendo a tu fidelidad Atcio, que ante todo, quieras dirigir y amparar con tu cariño a Sempronia, tu hermana, y que si creyeres que ha vuelto a buena costumbre de vida en este caso le entregues las veinte libras de oro cuando tú mueras, pero que mientras tanto le des sus réditos, esto es, los intereses del seis por ciento anual»;

Y después en codicilos transfirió al legatario Mevio estas mismas veinte libras de oro y le hizo un fideicomiso en estos términos: «las veinte libras de oro, que en el testamento dejé a Sempronia, mi alumna, quiero que sean dadas a Mevia habiéndose interpuesto cauciones para que de esta suma le dé a la misma Sempronia, mientras viviere, cinco denarios mensuales, y ciento veinticinco denarios por razón de vestido, y esto lo encomiendo a vuestra fidelidad; pero estoy cierta, Mevio que por tu piedad le pedirás a tu heredero que dure «mi voluntad respecto a la persona de mi alumna»;

Se preguntó, si habrá de ser obligado el legatario Mevio a restituírle después de su muerte a Sempronia las veinte libras de oro, como se le había rogado al heredero Atcio, Respondió, que, según lo que se exponía, no ha de ser ciertamente obligado a entregar las veinte libras de oro, pero que así por Mevio, como por el heredero de éste, se deben, mientras viva la alumna, las otras cosas que a cargo de aquel se le dejaron a la alumna.

§ 1.- Ticia había instituido en su testamento heredera de una duodécima parte a Seya su liberta y hermana de leche; a Pánfilo, su liberto, le dió por fideicomiso unos predios, entre los cuales también el latifundio de predios, que se denominaba cerca de Colone; después le donó por carta al mismo liberto también otras cosas, y en estas escrituras habló así Ticia de Seya y de Pánfilo: «Salud a mis herederos, quiero que sea firme lo que más abajo ha sido

iam ante constitui; si Seia collactanea mea, heres non fiet ex parte, es qua eam scripsi, volo ei dari synetesi, quae est circa Colonen.

Quaesitum est, quum Seia liberta omnia parte hereditatis ei testamento adscripta ex codicillis fideicommissum, id est (latifundium) Circa Colonen, eligat, an, si Pamphilus ex causa fideicommissi eadem praedia vindicet, doli mali exceptione summoferi debeat. respondit translatum videri fideicommissum praediorum, id est (latifundium) quae est Circa Colonen, in Seiam libertam.

§ 2.- Ab heredibus petierat, ut, si in provincia decessisset, sexaginta Lucio Titio darentur, ut is corpus eius curaret in patriam reportari, et adiecerat haec verba: "cui concedi volo, si quid ex ea pecunia supererit". Eadem die codicillos ad heredes suos ita scripserat: "peto a vobis, ut, si in provincia siue in via aliquid mihi humanitus acciderit, corpus meum curetis et in campania et in monumentum filiorum meorum reportare". Quaesitum est, an id, quod superfuisset ex sexaginta, a Lucio Titio tacite ademerit. Respondit ademptum videri.

§ 3.- Qui filias ex disparibus portionibus testamento heredes instituerat, paene omnium bonorum suorum eodem testamento divisionem fecit, deinde haec verba adiecit. Reliqua autem omnia bona existentia mihi, similiter et hereditaria onera, erunt solum duarum, filiarum mearum, scilicet Primae et Secundae, vel quae ex his subsistat. Postea codicillis longe aliam divisionem fecit bonorum inter easdem, inter quas et testamento diviserat, quaedam tamen nulli nominatim dedit. Quaesitum est, an prima et secunda filiae ex verbis testamenti consequi possint, ut solae habeant ea, quae nominatim nulli relicta sunt in divisione, quae novissima a patre facta est. respondit non a tota voluntate recessisse videri, sed his tantum rebus quas reformasset.

below be carried out, as well as any provisions which I have already made with reference to Pamphilus. If my foster-sister, Seia, should not become my heir to the share of my estate to which I have appointed her, I wish all the lands near Colon to be given to her."

As the freedwoman Seia rejected the share of the estate left her by will, and selected what had been given to her by the codicil the question arose, if Pamphilus should claim the same land under the terms of the trust, whether he could be barred by an exception on the ground of bad faith. The answer was that the trusts having reference to the lands, that is to say to those which were situated near Colon, were considered to have been transferred to the freedwoman Seia.

§ 2.- A testator requested his heirs that, if he should die in a province, sixty aurei should be given to Lucius Titius, in order that he might take charge of his body, and bring it back to his country. He also added the following: "If anything remains of said sum of money, I wish it to be given to him." On the same day he addressed a codicil to his heirs, in the following terms: "If I should happen to die either in the province or on my journey, I ask you to have my body taken to Campania, and placed in the tomb of my children." The question arose whether the testator, by this provision, tacitly deprived Lucius Titius of anything remaining out of the above mentioned sum of sixty aurei. The answer was that he should be considered to have been deprived of it.

§ 3.- A father appointed his daughters by his will heirs to unequal portions of his estate, and by the same will made a division of almost all his property, and then he added the following: "All my remaining property, as well as any liabilities attaching to my estate, shall belong only to my two daughters namely, Prima and Secunda, or whichever of them survives." He afterwards, by a codicil, made a very different division of his property among them than he had done by his will, and some of it he did not leave specifically to anyone. The question arose whether the daughters, Prima and Secunda, could, under the terms of the will, claim that they alone were entitled to the property which was not specifically bequeathed to anyone by the last disposition which their father made of his estate. The answer was that he

ordenado, sea lo que quiera lo que yo antes dispuse respecto a Pánfilo; si Seya, mi hermana de leche, no fuere heredera de la parte en que la instituí, quiero que se le dé el latifundio, que hay cerca de Colone;

Se preguntó, si, cuando la liberta Seya, habiendo prescindido de la parte de herencia que se le asignó en el testamento, eligiese en virtud de los codicilos el fideicomiso, esto es, el latifundio de cerca de Colone, en el caso de que Pánfilo reivindicara por causa del fideicomiso los mismos predios, debería ser repelido con la excepción de dolo malo, Respondió, que se considera transferido a la liberta Seya el fideicomiso de los predios, esto es, el latifundio que esta cerca de Colone.

§ 2.- Uno había pedido a sus herederos, que si hubiese fallecido en una provincia, se le diesen sesenta a Lucio Ticio, para que éste se cuidase de que su cuerpo fuese llevado a su patria, y había añadido estas palabras: «a quien, si algo sobrare de este dinero, quiero que se le conceda»; en el mismo día había escrito así codicilos para sus herederos: «os pido, que si me aconteciere morir en una provincia, o en camino, cuidéis de llevar mi cuerpo a la Campania y al monumento de mis hijos»; se preguntó, si le habrá quitado tácitamente a Lucio Ticio lo que hubiere sobrado de los sesenta, Respondió, que se consideraba quitado.

§ 3.- Uno que en su testamento había instituido a sus hijas herederas de partes desiguales, hizo en el mismo testamento la división de casi todos sus bienes; después añadió estas palabras: «pero todos los demás bienes que me queden, así como también las cargas de la herencia, serán solamente de mis dos hijas, a saber, de Prima y de Segunda, o de la que de ellas sobreviva»; después en codicilos hizo otra división muy diversa de sus bienes entre las mismas entre quienes los había dividido también por testamento, pero a ninguna le dió determinadamente cosa alguna; se preguntó, si las hijas Prima y Segunda podrían conseguir en virtud de las palabras del testamento, que ellas solas tengan las cosas que determinadamente no fueron dejadas a nadie en la división última que se hizo por el padre. Respondió,

§ 4.- Quum post apertas tabulas testamenti Priscillianus vixerit, de cuius legato portioneque hereditatis mater epistula ita caverat: "quoniam cognovi Priscillianum filium meum in extremis esse, iustissimum et piissimum duxi portionem eius hereditatis, quam ei testamento dederam, legare Mariano fratri meo et Ianuario marito meo aequis portionibus: et si quid ei amplius legaveram, ut si quid ei humanitus contigerit, do lego darique eis volo": postea ex eadem infirmitate Priscillianus decessit. quaesitum est, an legatum quoque eius ad Ianuarius et Marianus ex causa fideicommissi pertineat. respondit posse videri, si decessisset ex ea infirmitate, omnimodo et legatum ad eos de quibus quaereretur transtulisse.

31.- IDEM; *libro XIV, Digestorum*.- Filio ex parte heredi instituto duos fundos quum mancipiis et instrumento omni legavit: idem uxori plura legata et servos Stichum et Damam legavit: sed quum in altero ex fundis filio praelegatis cognovisset viliquum non esse, Stichum misit et tam rei rusticae quam rationibus fundi praecepit: quaesitum est, Stichus utrum ad uxorem an ad filium pertineret. Respondit, quum memor erat eorum, quae testamento cavisset, Stichum his praediis, in quae translatus est, actorem cedere nec uxorem posse Stichum ex fideicommissi causa petere.

§ 1.- Matri suae heredi ex parte institutae quattuor praedia legavit et fidei eius commisit, ut ex his duo socero restitueret: deinde codicillis socero ademit fideicommissum: quaesitum est, an nihilo minus ex praelegatione ad matrem pertineret. Respondi nihil proponi, cur ad matrem pertineret.

did not appear to have revoked his entire will, but had only made changes with reference to certain property which he had disposed of in a different manner.

§ 4.- A mother made the following provision in a letter concerning a legacy and a share of her estate bequeathed to her son: "As I know that my son Priscillianus is at the point of death, I consider it only just and proper to bequeath to my brother Marianus, and my husband Januarius, equal shares of that portion of my estate which I have given to my son; and, in case he should die I do give and bequeath, and I desire to be delivered to them anything else, in addition, which I may leave to him." Priscillianus lived until after the will was opened, and then died of the same disease. The question arose whether the legacy left to him would, under the terms of the trust, belong to Januarius and Marianus. The answer was that it could be held that, if the son should die of the same disease from which he was suffering at the time that the legacy would be absolutely transferred to those with respect to whom the inquiry was made.

31.- THE SAME; *Digest, Book XIV*.- A testator who had appointed his son heir to a part of his estate left him also two tracts of land with the slaves and all the implements belonging to the same. He also left several things to his wife, as well as the slaves Stichus and Damas. But, having ascertained that there was no steward in charge of one of the estates devised to his son, he sent Stichus, and appointed him superintendent of the cultivation of the said land, and gave him charge of the accounts relating to the same. The question arose whether Stichus would belong to his wife or his son. The answer was that, as the testator was mindful of the matters for which he was provided in his will, Stichus, as steward, would belong to the land to which he was transferred, and that the wife could not claim him under the terms of the trust.

§ 1.- A certain individual bequeathed four fields to his mother, whom he had appointed heir to a portion of his estate, and charged her to deliver two of said fields to his father-in-law; and afterwards, by a codicil, he suppressed the trust which he had created for the benefit of his father-in-law. The question arose whether the said two fields would belong to the

que no se consideraba que se separó de toda su voluntad, sino solamente en las cosas, que hubiese reformado.

§ 4.- Habiendo vivido Prisciliano después de abiertas las tablas del testamento, respecto a cuyo legado y a su porción de herencia había dispuesto así por carta su madre: «puesto que conocí que Prisciliano, mi hijo, se hallaba en sus últimos momentos, consideré muy justo y piadoso legar a Mariano, mi hermano, y a Januario, mi marido, por partes iguales, la porción que yo le había dado en el testamento. Y si además le había yo legado alguna cosa, se la doy y lego a éstos, y quiero que se les dé, si le aconteciere morir»; después falleció Prisciliana de la misma enfermedad; se preguntó, si por causa del fideicomiso les pertenecería a Januario y a Mariano también el legado de aquel. Respondió, que se puede considerar, que, si hubiese fallecido de aquella enfermedad, transfirió en absoluto también el legado a aquellos de quienes se trataba.

31.- EL MISMO; *Digesto, libro XIV*.- Uno legó a su hijo, instituido heredero de una parte, dos fundos con los esclavos y con todos los aperos; el mismo dejó a su mujer muchos legados, y los esclavos Stico y Dama; pero habiendo sabido que en uno de los fundos prelegados a su hijo no había mayordomo, envió a Stico, y lo encargó tanto de las cosas del campo, como de las cuentas del fundo; se preguntó, si Stico pertenecería a la mujer, o al hijo. Respondió, que, habiéndose acordado de lo que hubiese dispuesto en el testamento, el administrador Stico se agregaba a los predios a que fue trasladado, y que la mujer no podía pedir a Stico por causa del fideicomiso.

§ 1.- Uno legó a su madre, instituida heredera de una parte, cuatro predios, encomendó a su fidelidad que restituyese dos de ellos a su suegro, y luego le quitó en codicilos a su suegro el fideicomiso; se preguntó, si, no obstante, le pertenecería a la madre en virtud del prelegado. Respondí, que nada se exponía para que le pertenecieran a la madre.

§ 2.- Seia testamento suo legavit auri pondo quinque: Titius accusavit eam, quod patrem suum mandasset interficiendum: Seia post institutam accusationem codicillos confecit nec ademit Titio privigno legatum et ante finem accusationis decessit: acta causa pronuntiatum est patrem Titii scelere seiae non interceptum. Quaero, quum codicillis legatum, quod testamento Titio dederat, non ademerit, an ab heredibus seiae Titio debeatur. Respondit secundum ea quae proponerentur non deberi.

§ 3.- Filiae, quam in potestate habebat, inter cetera legavit peculium: idem post factum testamentum pecuniam a debitore filiae exegit et in suam rationem convertit: quaero, an filia eo nomine quum heredibus patris agere possit. Respondit, si probaret non adimendi animo factum, agere posse.

32.- VENULEIUS; *libro X, Actionum*.- Detrahare legatis vel adicere, si nihil praeter pecuniam numeratam legatum sit, promptum est: quum vero res corporales intervenient, et scriptura difficilior fit et obscura portio.

§ 1.- Quum libertas adimitur, legata servis relicta nihil attinet adimi.

TIT. V

DE REBUS DUBIIS

1.- PAPINIANUS; *libro VII, Responsorum*.- Fundum Maevianum aut Seianum Titio legaverat, quum universa possessio plurium praediorum sub appellatione fundi Maeviani rationibus demons-

mother as a preferred legacy. I answered that there was nothing in the case stated why they should not belong to her.

§ 2.- Seia, by her will, made a bequest of five pounds of gold. Titius accused her of having ordered the death of her father. After the accusation was made, Seia executed a codicil, but did not deprive her stepson Titius of the legacy previously mentioned, and she died before the accusation was heard. The case having proceeded to trial, it was decided that the father of Titius did not lose his life on account of any criminal act of Seia. As she did not by the codicil deprive Titius of the legacy which she had given him by will, I ask whether it should be paid to Titius by the heirs of Seia. The answer was that, according to the facts stated, it was not due to them.

§ 3.- A certain individual, among other things, bequeathed his peculium to his daughter, who was under his control. After he had made his will, he collected money belonging to his daughter from a debtor of the latter, and used it on his own account. I ask whether the daughter can, on this ground, bring an action against her father's heirs. The answer was that if she can prove that he did this without the intention of depriving her of the legacy, she can bring the action.

32.- VENULEIUS; *Actions, Book X*.- It is easy to take anything from, or add anything to a legacy, where only a sum of money was bequeathed, but where certain corporeal property is concerned, it is more difficult to express this in writing, and the division is likely to be unintelligible.

§ 1.- Where the freedom bequeathed to slaves is taken away from them, nothing is gained by specifically depriving them of their legacies.

TITLE V

CONCERNING DOUBTFUL MATTERS

1.- PAPINIANUS; *Opinions, Book VII*.- A testator left the Mævian, or the Seian Estate to Titius. As several tracts of land were mentioned in the records under the name of the Mævian Estate, I answered that

§ 2.- Seia legó en su testamento cinco libras de oro; Ticio la acusó de que había mandado matar a su padre; Seia, después de formulada la acusación, hizo codicilos, y no le quitó el legado a su hijastro Ticio, y falleció antes del término de la acusación; terminada la causa, se falló que el padre de Ticio no había sido muerto por delito de Seia; pregunto, si, no habiendo revocado en los codicilos el legado que le había dado a Ticio en el testamento, se le deberá a Ticio por los herederos de Seia. Respondió, que, según lo que se exponía no se le debía.

§ 3.- Uno le legó a la hija, que tenía bajo su potestad, entre otras cosas el peculio; él mismo después de hecho el testamento cobró dinero de un deudor de la hija, y lo invirtió en sus propias cuentas; pregunto, si por este motivo podrá la hija ejercitar acción contra los herederos del padre. Respondió, que si probase que esto no se hizo con ánimo de revocar, podía ejercitarla.

32.- VENULEYO; *Acciones, libro X*.- Quitar o añadir a los legados es cosa fácil, si no se hubiera legado nada más que dinero contante; mas cuando mediaren cosas corporales, la disposición se hace mas difícil, y dudosa la porción.

§ 1.- Cuando se quita la libertad, nada importa que se quiten los legados dejados a los esclavos.

TÍTULO V

DE LAS COSAS DUDOSAS

1.- PAPINIANO; *Respuestas, libro VII*.- Uno había legado a Ticio el fundo Meviano o el Seyano; como con la denominación de fundo Meviano se indicaba en las cuentas toda una posesión de muchos

traretur. Respondi non videri cetera praedia legato voluisse defunctum cedere, si fundi Seiani pretium a fundi Maeviani pretio non magna pecunia distingueretur.

2.- IDEM; *libro IX, Responsorum*.- Civibus civitatis legatum vel fideicommissum datum civitati relictum videtur.

3.- PAULUS; *libro XIV, Quaestionum*.- In ambiguo sermone non utrumque dicimus, sed id dumtaxat quod volumus: itaque qui aliud dicit quam vult, neque id dicit quod vox significat, quia non vult, neque id quod vult, quia id non loquitur.

4.- IDEM; *libro XIX, Responsorum*.- Paulus respondit: quum nomen fideicommissarii testamento adscriptum non sit, nulli personae neque certae neque incertae datum fideicommissum videri indubitatum est.

§ 5.- IDEM; *libro XIX, Responsorum*.- Paulus respondit, id, quod conditionis implendae causa datum est, sine dubio et certis, et incertis personis dari debere, ut fideicommissi petitio possit competere.

6.- GAIUS; *libro I, Fideicommissorum*.- Quidam relegatus facto testamento post heredis institutionem et post legata quibusdam data ita subiecit: "si quis ex heredibus ceterisque amicis, quorum hoc testamento mentionem habui, sive quis alius restitutionem mihi impetraverit ab imperatore et ante decessero, quam ei gratias agerem: volo dari ei qui id egerit a ceteris heredibus aureos tot".

Unus ex his, quos heredes scripserat, impetravit ei restitutionem et antequam id sciret, decessit. quum de fideicommisso quaereretur, an deberetur, consultus Iulianus respondit deberi: sed etiam si non

it did not appear that the deceased intended all of said tracts to be included in the devise, provided the value of the Seian Estate did not greatly differ from that of the Maevian Estate.

2.- THE SAME; *Opinions, Book IX*.- Where a legacy is bequeathed to or a trust is created for the benefit of the citizens of a town, it is considered to have been left to the town.

3.- PAULUS; *Questions, Book XIV*.- Where a sentence is ambiguous, we cannot interpret it both ways, but only according to the intention of the testator. Therefore, where anyone said something that he did not intend to say, he did not say what the words mean, because this was not his intention; nor did he say what he intended, because he did not make use of language suitable for that purpose.

4.- THE SAME; *Opinions, Book XIX*.- Paulus was of the opinion that, where a legacy is bequeathed dependent upon compliance with a condition, it must undoubtedly be paid to certain or uncertain persons in such a way that an action to compel the execution of the trust will lie.

5.- THE SAME; *Opinions, Book XIX*.- Paulus also gave it as his opinion that, where the name of the beneficiary of a trust is not inserted in the will, there is no doubt whatever that no person, either certain or uncertain, is entitled to the benefit of the trust.

6.- GAIUS; *Trusts, Book I*.- A certain individual, having been sent into exile, made a will, and after appointing an heir and making bequests to several persons added the following: "If any one of my heirs or other friends whom I have mentioned in this my will, or anyone else, should obtain my recall from the Emperor, and I should die before I can manifest my gratitude to him, I wish such-and-such a sum of money to be given by my other heirs to him who does this."

One of the heirs whom he had appointed obtained his recall, but before the testator knew it he died. The question arose as to the execution of the trust. Julianus, having been consulted, gave it as his

predios, respondí, que no parecía que el difunto quiso que pertenecieran al legado los demás predios, si el precio del fundo Seyano no se diferenciase del precio del fundo Meviano en mucho dinero.

2.- EL MISMO; *Respuestas, libro IX*.- El legado o el fideicomiso dado a los ciudadanos de una ciudad se considera dejado a la ciudad.

3.- PAULO; *Cuestiones, libro XIV*.- En una expresión ambigua no decimos una y otra cosa, sino solamente lo que queremos; y así, el que dice cosa distinta de lo que quiere, ni dice lo que significa la voz, porque no quiere, ni lo que quiere, porque no lo expresa.

4.- EL MISMO; *Respuestas, libro XIX*.- Paulo respondió, que lo que se dió para cumplir una condición se debe dar sin duda tanto a las personas ciertas como a las inciertas, para que pueda competir la petición del fideicomiso.

5.- EL MISMO; *Respuestas, libro XIX*.- Paulo respondió, que cuando no se haya escrito el nombre del fideicomisario en el testamento, es indudable que se considera que el fideicomiso no fue dado a ninguna persona, ni cierta, ni incierta.

6.- GAYO; *Fideicomisos, libro I*.- Un cierto relegado, habiendo hecho testamento, añadió así después de la institución de heredero y después de haber dado legados a varios: «si alguno de los herederos o de los demás amigos, de quienes en este testamento he hecho mención, o si otro alguno me hubiere impetrado del Emperador la restitución y yo hubiere fallecido antes que le diera las gracias, quiero que se le den al que esto hubiere hecho tantos áureos por los demás herederos»;

Uno de estos, a quienes había instituido herederos, impetró para él la restitución, y falleció antes que lo supiese; dudándose respecto al fideicomiso si se debería, consultado Juliano, respondió, que se debía;

heres vel legatarius, sed alius ex amicis curavit eum restitui, et ei fideicommissum praestari.

§ 1.- Si tibi et postumo suo vel alieno hereditatem restituere quis rogaverit.

7.- MAECIANUS; *libro III, Fideicommissorum.*- Vel ex parte te et ex parte postumum heredem instituisset legatumve similiter vel fideicommissum dedisset.

8.- GAIUS; *libro I, Fideicommissorum.*- Utrum ita postumus partem faciat, si natus sit, an et si natus non sit, quaeritur. Ego commodius dici puto, si quidem natus non est, minime eum partem facere, sed totum ad te pertinere, quasi ab initio tibi solido relicto: sin autem natus fuerit, utrosque accipere quantum cuique relictum est, ut uno nato pars tibi dimidia debeatur, duobus natis tertia tibi debeatur, tribus natis, quia trigemini quoque nascuntur, quarta debeatur. Et nostra quidem aetate serapias alexandrina mulier ad divum hadrianum perducta est quum quinque liberis, quos uno fetu enixa est. Sed tamen quod ultra tres nascitur, fere portentosum videtur.

§ 1.- Quum quidam pluribus heredibus institutis unius fidei commisisset, ut, quum moreretur, uni ex coheredibus, cui ipse vellet, restitueret eam partem hereditatis, quae ad eum pervenisset: verissimum est utile esse fideicommissum: nec enim in arbitrio eius qui rogatus est positum est, an omnino velit restituere, sed cui potius restituat: plurimum enim interest, utrum in potestate eius, quem testator obligari cogitat, faciat, si velit dare, an post necessitatem dandi solius distribuendi liberum arbitrium concedat.

opinion that the trust should be executed; and even if the party who obtained the recall of the testator was neither his heir nor legatee, but one of his friends, that the latter was entitled to the benefit of the trust.

§ 1.- If anyone should charge you to deliver his estate to his posthumous heir, or a stranger;

7.- MARCIANUS; *Trusts, Book III.*- Or if he should appoint you his heir along with his posthumous child, or should bequeath legacies to both of you, or make you the beneficiaries of a trust;

8.- GAIUS; *Trusts, Book I.*- It is asked if the posthumous child, whether he was born or not, could prevent you from profiting by your share of the estate. I think it is more proper to hold that if the posthumous child should not be born, he will not enable you to share in the estate, but the whole of it will belong to you, just as if it had been entirely left to you in the first place; but if he should be born, both of you will be entitled to what was left to each, and if one child is born, you will be entitled to half the estate; if two are born, you will be entitled to a third; and if three children are brought forth at once (for triplets are also born), you will be entitled to a fourth of the estate. And, even in our time, Serapias, an Alexandrian woman, was presented to the Divine Hadrian with her five children, whom she had had at a single birth. Where, however, more than three children come into the world at the same time, the event is considered a prodigy.

§ 1.- Where a certain man, after having appointed several heirs, charged one of them under a trust to deliver the share of the estate which might come into his hands to any one of his co-heirs whom he might select at the time of his death, it is absolutely certain that this trust is a valid one; as it is not left to the discretion of the heir of whom the request was made, whether he should deliver the property at all, but to whom he prefers to deliver it. For it makes a great deal of difference whether the testator places it in the power of the trustee whom he desires to deliver, or not to deliver certain property, or whether, after having imposed upon him the necessity of delivering it, he grants him alone the unrestricted choice of distribution.

pero que también si no un heredero o un legatario, sino otro de los amigos, cuidó de que él fuera restituido, se le entregaba a éste el fideicomiso.

§ 1.- Si alguno hubiere rogado que os restituyan la herencia a ti y a un póstumo suyo o ajeno,

7.- MECIANO; *Fideicomisos, libro III.*- o te hubiese instituido heredero de una parte, y a un póstumo de otra parte, o hubiese dado igualmente un legado o un fideicomiso,

8.- GAYO; *Fideicomisos, libro I.*- se pregunta, si el póstumo hará parte, si hubiera nacido, o también si no hubiera nacido. Yo creo que se dice mas convenientemente, que si verdaderamente no nació, de ningún modo forma él parte, sino que todo te pertenece, como si desde un principio se te hubiera dejado la totalidad; pero que si hubiere nacido, ambos reciben cuanto a cada uno se le dejó, de suerte que, nacido uno, se te deba la mitad; nacidos dos, se te deba la tercera parte, y, nacidos tres, porque también nacen tres mellizos, se deba la cuarta. Y, a la verdad, en nuestro tiempo fue presentada al Divino Adriano Serapias, mujer de Alejandría, con cinco hijos que había dado a luz en un solo parto; pero, no obstante, se considera casi portentoso que nazcan más de tres.

§ 1.- Cuando alguien, habiendo instituido varios herederos, hubiere encomendado a la fidelidad de uno sólo, que, cuando muriese, restituyera a uno de los coherederos, al que él quisiera, la parte de herencia que hubiese ido a poder de él, es muy cierto que el fideicomiso es válido; porque no se dejó al arbitrio del que fue rogado, si en absoluto quiera restituir, sino a quién le restituiría preferentemente. Porque hay mucha diferencia entre que deje al arbitrio de aquel que el testador piensa que se obligue, si quiere dar, o que después de la necesidad de dar le conceda el libre arbitrio de la sola distribución.

§ 2.- Quaesitum est, si coheredes ex disparibus partibus scripti sunt, utrum partem suam in viriles partes restituere singulis debeat an pro portionibus hereditariis, ex quibus heredes scripti sint. Et placuit, si testator ita restitui iussisset partem, si aliquam pecuniam dedissent, si quidem aequas partes iussi fuerint dare, conveniens videri esse etiam ex fideicommisso aequas partes eis restitui oportere: si vero dispare in ea pecunia distribuenda significavit testator, ut videantur hereditariis portionibus congruere, consentaneum esse etiam fideicommissum pro hereditariis partibus eis restitui debere.

9.- PAULUS; *libro II, Sententiarum*.- Si inter virum et uxorem donatio facta fuerit, priore defuncto cui donatum est ad eum res redit qui donaverat: quod si simul tam is cui donatum est quam is qui donaverit, quaestio decidenda gratia magis placuit valere donationem, eo maxime, quod donator non supervivat, qui rem condicere possit.

10.- TRYPHONINUS; *libro XXI, Disputationum*.- Qui duos impuberes filios habebat, ei qui supremus moritur Titium substituit: duo impuberes simul in nave perierunt: quaesitum est, an substituto et cuius hereditas deferatur. Dixi, si ordine vita decessissent, priori mortuo frater ab intestato heres erit, posteriori substitutus: in ea tamen hereditate etiam ante defuncti filii habebit hereditatem. In proposita autem quaestione ubi simul perierunt, quia, quum neutri frater superstes fuit, quasi utrique ultimi decessisse sibi videantur? an vero neutri, quia comparatio posterioris decedentis ex facto prioris mortui sumitur? sed superior sententia magis admittenda est, ut utrique heres sit: nam et qui unicum filium habet, si supremum morienti substituit, non videtur inutiliter substituisse: et proximus adgnatus intellegitur etiam qui solus est quique neminem

§ 2.- Where co-heirs are appointed to unequal shares of an estate, the question arose whether the heir should be required to give each one equal shares, or only shares in proportion to those to which they are appointed heirs. It was decided that if the testator directed one of his heirs to give up his share to his co-heirs, if they paid him a certain sum of money, to which they were directed to contribute equally; it would seem to be just that equal portions of the property should be given to them by virtue of the trust. If, however, in the distribution of said money, the testator intended that they should contribute unequal shares, in order that they might correspond with the shares of the estate to which they were entitled, it would appear to be reasonable that, under the terms of the trust, the property should be delivered to them in proportion to their respective shares of the estate.

9.- PAULUS; *Sentences, Book II*.- Where a donation is made between husband and wife, and the one to whom it was made dies before the other, the property reverts to the one who gave it. If both parties should die at the same time, in order to decide the question, it was held that the donation was valid, and that this was especially the case, because the donor who could claim the property did not survive.

10.- TRYPHONINUS; *Disputations, Book XXI*.- A testator, who had two minor children, substituted Titius for the one who might die first. Both of them perished at the same time in a shipwreck. The question arose whether the estate would pass to the substitute, and to which one of the two minors he was to be considered the heir. I said that if the brothers had died in the ordinary course of nature, the brother of the one that died first would become his heir ab intestato, and the substitute would succeed to the second one; nevertheless, he would be entitled to the estate of the one that died first, as it was included in that of the other. In the question proposed, however, where both of them perished at once, and as neither brother survived the other, should it be held that both of them died last, or that neither of them died last, because the decision as to which died last was

§ 2.- Se preguntó, si, habiendo sido instituidos dos coherederos en partes desiguales, deberá restituir a cada uno su parte por porciones viriles, o con arreglo a las porciones de herencia en que hayan sido instituidos herederos. Y se determinó, que si el testador hubiese mandado que se restituya la parte de este modo, si hubiesen dado algún dinero, si verdaderamente se les hubiere mandado no dieran partes iguales, parece que es conveniente que se les deban restituir partes iguales también en virtud del fideicomiso; pero que si el testador las designó desiguales al distribuir este dinero, para que parezcan acomodarse a las porciones hereditarias, es consiguiente que también se les deba restituir el fideicomiso con arreglo a las partes de la herencia.

9.- PAULO; *Sentencias, libro II*.- Si se hubiere hecho donación entre marido y mujer, fallecido primero aquel a quien se donó, la cosa vuelve al que la había donado; pero si fallecieron a un tiempo así aquél a quien se le donó, como el que hubiere donado, pareció más bien para decidir la cuestión, que la donación fuese válida, principalmente no sobreviviendo el donador, que pueda reivindicar la cosa.

10.- TRIFONINO; *Disputas, libro XXI*.- Uno que tenia dos hijos impúberos sustituyó a Ticio al último que muriese, y los dos impúberos perecieron al mismo tiempo en una nave; se preguntó, si se le deferirá la herencia al substituto y cual. Dije: si hubiesen fallecido por orden, el hermano será heredero abintestato del fallecido primero, y el substituto del último; pero en esta herencia tendrá también la herencia del hijo fallecido antes, Pero en el caso propuesto, en el que perecieron al mismo tiempo, ¿Se considerará como si uno y otro fallecieron el último, porque ningún hermano sobrevivió al otro, o que ninguno de los dos porque, la comparación del que muere último ¿se toma del hecho del que muere primero? Pero se ha de admitir preferentemente la primera opinión, de suerte que sea heredero de ambos; porque también el que tiene

antecedit: et hic utrique, quia neutri eorum alter superstes fuit, ultimi primique obierunt.

§ 1.- Quum bello pater quum filio perisset materque filii quasi postea mortui bona vindicaret, adgnati vero patris, quasi filius ante perisset, divus Hadrianus credidit patrem prius mortuum.

§ 2.- Si quum filio suo libertus simul perierit intestati, patrono legitima defertur hereditas, si non probatur supervixisse patri filius: hoc enim reverentia patronatus suggerente dicimus.

§ 3.- Si maritus et uxor simul perierint, stipulatio de dote ex capitulo "si in matrimonio mulier decessisset" habebit loquum, si non probatur illa superstes viro fuisse.

§ 4.- Si Lucius Titius quum filio pubere, quem solum testamento scriptum heredem habebat, perierit, intellegitur supervixisse filius patri et ex testamento heres fuisse, et filii hereditas successoribus eius defertur, nisi contrarium approbetur. quod si impubes quum patre filius perierit, creditur pater supervixisse, nisi et hic contrarium approbetur.

11.- ULPIANUS; *libro VI, Disputationum*.- Si fuerit legatum relictum ex cognatis meis qui primus capitolium ascenderit, si simul duo venisse dicantur nec apparet, quis prior venerit, an impediatur legatum? vel ei qui monumentum fecerit, et plures fecerint? vel ei qui maximus natu est, et duo pares aetate sint? sed et si legatum Sempronio amico fuerit

dependent upon the fact that one of them died first? The former opinion, however, namely, that the substitute is the heir of both the minors, should prevail. For where a testator, who has only one son, appoints a substitute for the one that dies last, he is not considered to have made an invalid substitution; just as the next of kin is understood where there is but one who does not precede anyone else, and in this instance, as neither one of the brothers survived the other, both of them are considered to have died first and last.

§ 1.- Where a son and his father lost their lives in war, and the mother claimed the estate of her son on the ground of his having died last, and the relatives of her father declared that the son died first, the Divine Hadrian decided that the father died first.

§ 2.- If a freedman should die at the same time as his son, the estate passes by operation of law to the patron of the intestate freedman, unless it is proved that the son survived his father. We hold that this is the case on account of the respect attaching to the right of patronage.

§ 3.- Where a husband and a wife die at the same time, and a stipulation with reference to the dowry was entered into providing that it should belong to the husband, if the woman died during marriage, this will take effect, if it is not proved that she survived her husband.

§ 4.- If Lucius Titius should lose his life at the same time as his son who had reached the age of puberty, and whom he had appointed his sole heir by his will, the son is understood to have survived the father, and will be his heir under the will, and the estate of the son will pass to the successors of the latter, unless the contrary can be proved by the heirs of the father. If, however, the son, who perished with the father, had not reached the age of puberty, it is held that his father survived him, unless the contrary can be proved.

11.- ULPIANUS; *Disputations, Book VI*.- Where a legacy was left to the one of my relatives who may first ascend to the Capitol, and two of them are said to have done so at the same time, and it is not apparent which one arrived first, will the legacy be prevented from taking effect? Or, it may be asked, what is the rule if the testator made a bequest "to the one who

un hijo único, si substituyó el último al que muera, no parece que substituye o inútilmente, y se entiende próximo agnado también el que es sólo, y el que no precede a nadie, y en este caso, como a ninguno de ellos les sobrevivió el otro, ambos fallecieron los últimos y los primeros.

§ 1.- Habiendo muerto en una batalla un padre con su hijo, y reivindicando la madre los bienes del hijo, como si hubiese muerto después, y los agnados del padre, como si el hijo hubiese perecido antes, creyó el Divino Adriano que el padre murió primero.

§ 2.- Si un libertus hubiere perecido simultáneamente con su hijo, se le defiende al patrono la herencia legítima del intestado, si no se prueba que el hijo sobrevivió al padre; porque decimos esto por sugerirlo el respeto al patronato.

§ 3.- Si juntamente hubieren perecido marido y mujer, tendrá lugar la estipulación sobre la dote en virtud de este capítulo: «si la mujer hubiese fallecido en el matrimonio», si no se prueba que ella sobrevivió al marido.

§ 4.- Si hubiere fallecido Lucio Ticio con un hijo púbero, al cual había instituido único heredero en el testamento, se entiende que el hijo sobrevivió al padre, y que fue heredero en virtud del testamento, y la herencia del hijo se les defiende a sus sucesores, si no se probase lo contrario. Pero si junto con el padre hubiere perecido un hijo impúbero, se cree que sobrevivió el padre, si también en este caso no se probara lo contrario.

11.- ULPIANO; *Disputas, libro VI*.- Si se hubiere dejado un legado: «de mis cognados al que hubiere subido primero al Capitolio», si se dijera que los dos llegaron simultáneamente, y no aparece quien haya llegado primero, ¿se invalidará el legado? O si al que «hubiere hecho un monumento», y lo hubieren hecho varios, o al que «es mayor de edad», y dos fueran

legatum, puta Semproniis, mox Sempronio ademptum sit nec appareat, cui ademptum sit: utrum datio in utriusque persona infringitur an ademptio nulla est, quaeri potest. item si ex pluribus servis eiusdem nominis uni vel quibusdam libertas relicta est. Et verius est in his omnibus etiam legata et libertates impediri, ademptionem autem in utrumque valere.

§ 1.- Plane si ita libertatem acceperit ancilla: "si primum marem pepererit, libera esto" et haec uno utero marem et feminam peperisset: si quidem certum est, quid prius edidisset, non debet de ipsius statu ambigi, utrum libera esset nec ne, sed nec filiae: nam si postea edita est, erit ingenua. Sin autem hoc incertum est nec potest nec per supilitatem iudicalem manifestari, in ambiguis rebus humaniorem sententiam sequi oportet, ut tam ipsa libertatem consequatur quam filia eius ingenuitatem, quasi per praesumptionem priore masculo edito.

12.- IULIANUS; *libro XXXVI, Digestorum*.- Quotiens libertis usus fructus legatur et ei, qui novissimus supervixerit, proprietates, utile est legatum: existimo enim omnibus libertis proprietatem sub hac condicione "si novissimus supervixerit" dari.

13.- IDEM; *libro L, Digestorum*.- Quotiens in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi, quo res de qua agitur magis valeat quam pereat.

14.- IDEM; *libro singulari de Ambiguitatibus*.- Si is qui ducenta deposuit ita legat: "Seio quum ducentis quae apud eum deposui trecenta lego", singulae

should erect a monument to him," and several of them erect one; or if a bequest is made to one who is the older of two persons, and both of them are of the same age; or where a legacy is bequeathed by the testator to his friend Sempronius, and there are two persons of the same name held in equal esteem? But if a legacy is bequeathed to two men of the same name, for instance, to two called Sempronius, and one of them is afterwards deprived of the legacy, and it does not appear which one was meant; will the legacy be extinguished, so far as both parties are concerned, or will its revocation be void?

§ 1.- It is clear that if a female slave should receive her freedom under the following provision, "Let her be free, if the first child she bears is a male," and she brings forth a male and a female child at a single birth, and it is certain which one was born first, there should be no doubt with reference to her condition; that is to say, whether she will be free or not; nor should there be any doubt so far as that of the girl is concerned, for if she was born after the boy, she will be freeborn. If, however, there is any uncertainty in this respect, and it cannot be removed by judicial investigation, where matters are doubtful it is better to adopt the more equitable opinion, and to presume that the male child was born first, so that the slave may obtain her freedom and her daughter be freeborn.

12.- JULIANUS; *Digest, Book XXXVI*.- Whenever an usufruct is bequeathed to freedmen, and the ownership of the property to the last survivor, the bequest is valid, for I think that, in this instance, the property is left under the following condition: "If he should be the last survivor."

13.- THE SAME; *Digest, Book V*.- Whenever there is any ambiguous clause in the phraseology of an action or an exception, it is most convenient to understand it in such a way that the property to which it relates shall rather be preserved than be lost.

14.- THE SAME; *On Ambiguities*.- Where a man who had deposited two hundred aurei made the following bequest, "I leave to Seius three hundred

iguales de edad; pero también sí se le hubiere dejado un legado al amigo Sempronio, y hubiera dos unidos por el mismo afecto. Mas también si se hubiere hecho un legado a dos hombres de un mismo nombre, por ejemplo, del de Sempronio, y no apareciera a quien le haya sido quitado, se puede preguntar si se invalida la dación respecto a la persona de ambos, o si es nula la revocación. Asimismo, si a uno solo entre muchos esclavos del mismo nombre, o a algunos, fué dejada la libertad; y es mas verdadero que también en todos estos casos se invalidan los legados y las libertades, pero que es válida la revocación respecto a ambos.

§ 1.- A la verdad, si una esclava hubiere recibido así la libertad: «sea libre, si hubiere parido primero un varón, y ella hubiese parido en un parto un varón y una hembra, si verdaderamente es cierto lo que hubiese dado a luz primero, no se debe dudar respecto al estado de la misma, si sería libre, o no; pero tampoco en cuanto al de la hija, porque, si nació después, será ingenua. Mas si esto es incierto, y no se puede evidenciar ni aun por la escrupulosidad judicial, se debe seguir el parecer más humano en las cosas dudosas, a fin de que tanto ella consiga la libertad, como su hija la ingenuidad, cual si por presunción hubiese sido dado a luz primero el varón.

12.- JULIANO; *Digesto, libro XXXVI*.- Siempre que se lega el usufruto a los libertos, y la libertad al último que sobreviviere, es útil el legado; porque opino que a todos los libertos se les da la propiedad bajo esta condición: «si fuere el último que sobreviviere»,

13.- EL MISMO; *Digesto, libro L*.- Siempre que en las acciones o en las excepciones es ambigua una oración, es lo más conveniente que el caso se entienda de modo que más bien sea válida, que no que perezca, la cosa de que se trata.

14.- EL MISMO; *De las Ambigüedades, libro único*.- Si el que depositó doscientos legara así: «lego a Seyo trescientos con los doscientos que en él

summae separate quidem certam habent demonstrationem, coniunctione vero tali incidunt in ambiguitatem. Sed dicendum est non trecenta, sed quingenta deberi, quia duae summae iunguntur.

§ 1.- Si quis leget: "fundum Seianum heres meus attio quum Dione Maevii servo dato", dubitatur quidem, Dioni quoque fundus legatus sit an dio quum fundo legatus sit. Sed magis dicendum est non solum fundum, sed etiam servum Dionem esse legatum, maxime si nullas iustas causas habuit Dioni legandi.

§ 2.- Quum ita stipulationem concipimus: "si hominem aut fundum non dederis, centum dari spondes?" utrumque est faciendum, ne stipulatio committatur, id est sive alterum sive neutrum factum sit, tenebit stipulatio.

Idemque est evidenter, quum propositis specialiter pluribus rebus, quas fieri volumus, ita stipulamur: "si quid eorum factum non erit": veluti "Stichum et Damam et erotem sisti? si quis eorum non steterit, decem dari?" necesse est enim omnes esse sistendos, ut stipulationi satisfiat. Vel ut propius accedamus, fingamus ita stipulationem factam: "si Stichum et Damam et erotem non sisteris, decem dari?" neque enim dubitabimus, quin aequae omnes sisti oporteat.

§ 3.- Utrum ita concipias stipulationem "si illud aut illud factum non erit" an hoc modo "si quid eorum factum non erit, quae ut fierent, comprehensa sunt", hoc interest, quod, quamvis altero facto verum sit hoc aut illud vere factum esse, non ideo tamen verum erit hoc aut illud factum non esse. Nam simul ea possunt esse vera, quamvis inter se contraria sunt, quia quum significatio non ex universo, sed ex aliquo sumitur, si veri aliquid inde sit, veram efficit totam orationem:

aurei, in addition to the two hundred which I have deposited with him," these two sums, taken separately, have a certain designation, but where they are taken together, they give rise to ambiguity. It must, however, be held that not three hundred, but five hundred aurei are due, because the two sums are united.

§ 1.- Where anyone makes a bequest as follows, "Let my heir give to Attius, together with Dion, the slave of Mævius, the Seian estate," there is some doubt as to whether the land was also left to Dion, or whether Dion was bequeathed along with the land. It is better to hold that not only the land, but also the slave Dion was left, and especially if the testator had no good reason to bequeath a legacy to Dion.

§ 2.- Where we frame a stipulation as follows: "If you do not furnish such-and-such a slave, or such-and-such a tract of land, do you promise to pay a hundred aurei?" The penalty will be due, whether the stipulation is carried out or not; that is to say, the stipulation will be binding, whether neither one nor the other act is performed.

It is evident that the same rule will apply where several things which we desire to be done are specifically mentioned, and we stipulate as follows, "If either of these things is not done," or, for example, "Do you agree to appear for Stichus, Damus, and Eros in court? If one of them is not represented, do you promise to pay ten aurei?" It is necessary for the party to appear for all of them, in order that the terms of the stipulation may be complied with. Or that the case may be more clearly stated, let us suppose the stipulation to be worded as follows: "Do you promise to pay ten aurei if you do not appear for Stichus, Damus, and Eros?" For we can have no doubt in this instance that all of them must be represented.

§ 3.- There is a difference between the two following stipulations: "You will pay So-and-So so much if such-and-such a thing, or such-and-such a thing is not done," or, "If either of the things which it has been agreed should be done, is not done, you will pay such-and-such a sum," for while it is true that one or the other other is to be done, it is not, for this reason, true that one or the other of the two things is not to be done, for both of these propositions may be

deposité», cada una de las sumas separadas tiene verdaderamente demostración cierta, pero por tal conjunción incurren en ambigüedad; pero se ha de decir, que se deben no trescientos, sino quinientos, porque se unen las dos sumas.

§ 1.- Si alguno legara así: «dele mi heredero a Atcio junto con Dión, esclavo de Mevio, el fundo Seyano». se duda ciertamente si también a Dión se le haya legado el fundo, o si Dión haya sido legado con el fundo; pero mas bien se ha de decir, que fue legado no solamente el fundo, sino también el esclavo Dion, principalmente, si no tuvo ningunas justas causas para hacer el legado a Dión.

§ 2.- Cuando concebimos una estipulación de este modo: «¿si no hubieres dado el esclavo o el fundo, prometes dar ciento? se ha de hacer una y otra cosa, para que no se verifique la estipulación, esto es, que ya si se hubiera hecho una cosa, ya si ninguna de las dos, obligará la estipulación;

Y lo mismo es evidentemente, cuando habiendo propuesto especialmente muchas cosas, que queremos que se hagan, estipulamos así: «si alguna de estas cosas no hubiere sido hecha», por ejemplo: «que comparezca en juicio Stico, Dama, y Eras; si alguno de ellos no hubiere comparecido, prometes que se den diez» porque es necesario que todos hayan de comparecer, para que se cumpla con la estipulación. O para aproximarnos más, supongamos que se hizo la estipulación: «si no presentares a Stico, Dama, y Eras, ¿Prometes que se den diez» porque no dudaremos que todos deben ser presentados igualmente.

§ 3.- Si concibieras así la estipulación: «si no se hubiere hecho esto o aquello», o de este modo: «si no se hubiere hecho alguna de estas cosas que se incluyeron, para que se hicieran», hay esta diferencia, que, aunque hecha una cosa sea verdad que verdaderamente se hizo esto o aquello, no por esto será, sin embargo, verdad que no se hizo esto o aquello; porque a un mismo tiempo pueden ser verdad estas cosas, aunque son entre sí contrarias

sicut e contrario duae orationes pugnantia continentes simul falsae sunt, veluti si qui liberorum partim puberes, partim impuberes decesserint, nam et hoc falsum erit omnes impuberes decessisse et illud omnes puberes decessisse.

Id accidit, quia significatio sumitur ex universo, in quo si aliquid falsum est, totam orationem falsam efficit. Animadvertendum igitur est, quid sit, de quo quaeritur. nam quum ita concipio "si illud aut illud non fuerit", quaeri debet, an aliquid factum non sit: illius effectus hic est, ut neutrum fiat, huius autem, ut utrumque fiat: nec in illo prodest aliquid non fecisse, si aliquid factum sit, neque in hoc aliquid fecisse, si aliquid factum non sit.

§ 4.- Proinde si quis ita interroget: "eorum quid, quae obiciuntur tibi, fecisti?" ille neget, hoc exprimat: "eorum quid, quae obiciuntur, non feci", id est "nihil horum feci".

§ 5.- Si quis autem plura in stipulatum deducat, quorum unum fieri velit, ita comprehendere debet: "illud aut illud fieri spondes? si nihil eorum factum erit, tantum dabis?"

§ 6.- Item si pater familias in testamento ita scripserit: "si quis mihi filius aut filia genitur, heres mihi esto: "si mihi filius aut filia heres non erit, seius heres esto", non satis voluntatem suam declaravit, si non aliter extraneum heredem esse volet, quam si neque filius neque filia heres sit: hoc enim modo concipi oportet: "si mihi neque filius neque filia heres erit". Potest autem interdum superior scriptura esse necessaria, si quis, quum filium et filiam habeat,

true, although they are opposed to one another; because when the meaning is not general, but has reference to some specific matter, if any of it is true it renders the whole clause true. Just as, on the other hand, two clauses containing statements which are opposite are both false at the same time; for instance, where some children of a testator die after reaching puberty, and others die before reaching that age, since on the one hand it is incorrect to say that all of them died under the age of puberty, and, on the other, it is also incorrect to say that they all died after that age.

This results because the meaning is taken in a general sense, and in this case, if anything is false, it renders the entire clause untrue. Therefore it should be ascertained what the subject of the inquiry is, for if I should say such-and-such a thing, or such-and-such a thing should not be done, it ought to be asked if anything has not been done? The effect of the former proposition is that neither of the things should be done; that of the latter that they both should be done. In the former instance, it will be of no advantage to the person not to have done one of the two things, if he did the other; and in the latter, it will not benefit him if he proves that he has done one of the two things, if he did not do the other.

§ 4.- Hence, if anyone should put the following interrogatory: "Did you do any of those things with which you are charged?" and the party says he did not, he means to say, "I did not do any of those things with which I am charged," that is, "I did none of them."

§ 5.- Where anyone inserts several things in a stipulation, one of which he desires to be done, he should frame the stipulation as follows: "Do you promise that such-and-such a thing, or such-and-such a thing shall be done, and if neither of them is done, will you pay such-and-such a sum?"

§ 6.- Moreover, if the head of a household should insert the following in his will, "If a son or a daughter is born to me, let him or her be my heir; but if neither a son nor a daughter should become my heir, let Seius be my heir," he does not declare his purpose clearly enough if he intended to appoint a foreign heir, only in case neither his son nor his daughter should become his heir; for this should be expressed as follows: "If neither my son nor my daughter should

porque cuando se toma la significación no de la totalidad, sino de algo, si algo de ello fuera verdadero, hace verdadera toda la oración; así como por el contrario, dos oraciones que contienen cosas contradictorias son falsas simultáneamente, por ejemplo: «si algunos de los hijos hubieren fallecido parte púberos, y parte impúberos», porque también será falso esto, que todos fallecieron impúberos, y aquello, que todos fallecieron púberos; esto sucede, porque la significación se toma de la totalidad, en la que si algo es falso, hace falsa toda la oración.

Así, pues, se ha de advertir, qué es de lo que se trata; porque cuando concibo así: «si no fuere esto o aquello», se debe preguntar, si no se haya hecho alguna cosa; el efecto de aquello es este, que no se haga ninguna de las dos cosas, pero de esto, que se hagan ambas; y no aprovecha en aquello no haber hecho alguna cosa, si se hubiera hecho otra, ni en esto, haber hecho alguna, si no se hubiera hecho otra.

§ 4.- Por consiguiente, si alguno interrogase así: «¿hiciste alguna de las cosas que se te imputan?» y él lo negara, se expresa así: no hice cosa alguna de las que se imputan, esto es, no hice ninguna de ellas,

§ 5.- Mas si alguien comprendiera en una estipulación muchas cosas, de las que quisiera que se hiciera una sola, debe comprenderlas así: «prometes que se haga esto o aquello? ¿Darás tanto, si no se hubiere hecho ninguna de estas cosas?»

§ 6.- Asimismo, si un padre de familia hubiere escrito así en su testamento: «si me negare algún hijo, o alguna hija, sea mi heredero; si mi hijo o hija no fuere mi heredero, sea heredero Seyo», no declaró suficientemente su voluntad, si no quisiera que un extraño fuera heredero de otro modo, sino si ni el hijo, ni la hija, fuera heredero. Porque se debe expresar de este modo: «si ni el hijo ni la hija fuere mi heredero»; mas puede a veces ser necesaria de

utrumque heredem instituere velit, sed sive alter heres futurus sit, extraneum miscere, sive neuter, extraneum substituere. Sed proclivior est sententia testatoris sic esse interpretanda, ut, sive filius sive filia nati ei fuerint, extraneus non admittatur, nisi specialiter hoc testator expresserit.

15.- MARCIANUS; *libro VI, Institutionum*.- Si quis ita scripserit: "illis, qui testamentum meum signaverint, heres meus decem dato", Trebatius utile legatum esse putat: quod Pomponius Verius esse existimat, quia ipsum testamentum confirmatur testibus adhibitis, quod verum esse existimo.

16.- IDEM; *libro II, Regularum*.- Quaedam sunt, in quibus res dubia est, sed ex post facto retro ducitur et apparet, quid actum est. Ut ecce si res legata fuerit et deliberante legatario eam rem heres alii tradiderit: nam si quidem voluerit legatarius habere legatum, traditio nulla est, si vero repudiaverit, valet.

Tantundem est et si pecuniam hereditariam legatam crediderit heres: nam si quidem non repudiaverit legatarius, alienam pecuniam creditit, si vero repudiaverit, suam pecuniam credidisse videtur. Quid ergo, si consumpta fuerit pecunia? utique idem erit ex eventu dicendum.

17.- IDEM; *libro III, Regularum*.- Quod de pariter mortuis tractamus, et in aliis agitatum est. Ut ecce si mater stipulata est dotem a marito mortua filia in matrimonio sibi reddi et simul quum filia perit, an ad heredem matris actio ex stipulatu competere? et

become my heir." Sometimes, however, the former clause becomes necessary; as, for example, where anyone who has a son and a daughter desires to make both of them his heirs, and if only one of them should become his heir, to appoint a stranger with him or her, or if neither should become his heir, to substitute a stranger. That opinion, however, should be adopted which seems rather to correspond with the intention of the testator, so that if either a son or a daughter should be born to him, a stranger shall not be admitted to the succession, unless the testator expressly stated that this must be done.

15.- MARCIANUS; *Institutes, Book VI*.- If anyone should make the following provision in his will, "Let my heir pays ten solidi to the witnesses who sealed my will," Trebatius holds that the legacy is valid. Pomponius also considers this to be true, because the will itself is confirmed by the production of the witnesses. This opinion I think to be correct.

16.- THE SAME; *Rules, Book II*.- There are certain matters in which at first it is difficult to arrive at a conclusion, but in the end what has been done appears to be clear; as, for instance, where a bequest has been made, and, while the legatee is deliberating as to whether he will accept it or not, the heir transfers the property in question to a third party. In this instance the transfer will be void if the legatee should decide to accept the legacy; but if he should reject it, the transfer will be valid.

The case would be the same if the heir should loan money belonging to the estate which was bequeathed; for if the legatee did not reject it, it would be held that the heir had loaned money belonging to someone else, but if the legatee rejected the estate he would be held to have lent his own money. But what if the money was expended? The same rule would apply, in accordance with the circumstances of the case.

17.- THE SAME; *Rules, Book III*.- When we consider the case of persons dying at the same time, as well as the discussion of other matters; for example, where a mother stipulated that the dowry of her daughter should be returned to her by the

anterior manera de escribir, si alguno, teniendo un hijo y una hija, quisiera instituirlos herederos a ambos, pero mezclar a un extraño, si el uno hubiera de ser heredero, o substituido el extraño, si ninguno de los dos. Pero es más lógico que la intención del testador haya de ser interpretada de este modo, que, ya si le hubiere nacido un hijo, ya si una hija, no sea admitido el extraño, si el testador no hubiere expresado especialmente esto.

15.- MARCIANO; *Instituta, libro VI*.- Si alguno hubiere escrito así: «a los que hubieren sellado mi testamento deles diez mi heredero», Opina Trebacio que es útil el legado; lo que estima Pomponio que es más verdadero, porque el mismo testamento se confirma con los testigos presentados; lo que juzgo que es verdad.

16.- EL MISMO; *Reglas, libro II*.- Hay algunos actos en los que la cosa es dudosa, pero se vuelve atrás por un hecho posterior, y aparece qué es lo que se hizo. Como, por ejemplo, si se hubiere legado una cosa, y mientras deliberaba el legatario, el heredero hubiere entregado a otro esta cosa; porque si verdaderamente hubiere querido el legatario tener el legado, la entrega es nula, y si lo hubiere repudiado, es válida.

Otro tanto sucede, también si el heredero hubiere prestado el dinero legado de la herencia; porque si verdaderamente el legatario no hubiere repudiado, prestó dinero ajeno, pero si hubiere repudiado, se considera que prestó su propio dinero. ¿Qué se dirá, pues, si el dinero hubiere sido consumido? Ciertamente que se habrá de decir lo mismo atendiendo al resultado.

17.- EL MISMO; *Reglas, libro III*.- Lo que hemos examinado respecto a. los fallecidos al mismo tiempo, se discutió también respecto a otros, como por ejemplo, si, habiendo estipulado la madre que fallecida la hija en el matrimonio se le restituyera a

Divus Pius rescripsit non esse commissam stipulationem, quia mater filiae non supervixit.

§ 1.- Item quaeritur, si extraneus, qui dotem stipulatus est, simul quum marito decesserit vel quum ea, propter quam stipulatus esset, an ad heredem suum actionem transmittat.

18.- PAULUS; *libro XII, ad Plautium*.- Idem est, si dos uxori praelegata sit et simul quum marito perierit.

19.- MARCIANUS; *libro III, Regularum*.- Sed et in illo quaeritur, si pariter pupillus et qui ei substitutus erat frater necessarius decesserit, an frater fratri exsistat heres an contra: vel si duo invicem necessarii substituti sunt et una perierint, an heredes exstittisse videantur: vel alter alteri (hoc est si invicem) hereditatem rogati fuerint restituere. In quibus casibus si pariter decesserint nec appareat, quis ante spiritum emisit, non videtur alter alteri supervixisse.

§ 1.- Sed et circa legem Falcidiam, si dominus quum servis simul vita functus sit, servi, quasi in bonis eius mortis tempore fuerint, non computantur.

20.- ULPIANUS; *libro XXV, ad Sabinum*.- Si cognatis legatum sit et hi cognati quidem esse desierunt, in civitate autem maneat, dicendum deberi legatum: cognati enim testamenti facti tempore fuerunt. Certe si quis testamenti facti tempore cognatus non fuit, mortis tempore factus est

husband, if her daughter should die during marriage, and the mother died at the same time as her daughter, the question arises whether an action based on the stipulation would lie in favor of the heir of the mother. The Divine Pius stated in a Rescript that the stipulation would not allow such an action to be brought, because the mother did not survive the daughter.

§ 1.- The question was also asked if a stranger who stipulated for the return of a dowry should die at the same time as the husband, or at the same time as the wife on whose account he entered into the stipulation, could he transfer the right of action to his heir?

18.- PAULUS; *On Plautius, Book XII*.- The same rule applies where a dowry is left as a preferred legacy to a wife, and she dies at the same time as her husband.

19.- MARCIANUS; *Rules, Book III*.- In the following instance, where a minor and his brother, who was his necessary heir, and was substituted for him, died at the same time, the question arises whether the brother would be the heir to his brother or not. Moreover, where two necessary heirs have been substituted for one another, and they perished together, will both be considered as the heirs of the testator, or will one of them be the heir of the other, that is to say, if they had been asked to deliver the estate to one another at the time of their death? In cases of this kind, if they should die at the same time, and it does not appear which of them was the first to lose his life, one of them will not be considered to have survived the other.

§ 1.- However, with reference to the Falcidian Law, if a master dies at the same time as his slaves, the latter will not be reckoned as forming part of his estate at the time of his death.

20.- ULPIANUS; *On Sabinus, Book XXV*.- Where a legacy is bequeathed to relatives, and the said relatives have forfeited their rights as such, but still remain citizens, it must be said that they are entitled to the legacy, for they were members of the family at the time when the will was executed. It is certain that

ella por el marido la dote, y habiendo fallecido al mismo tiempo con la hija, le competería al heredero de la madre la acción de lo estipulado. Y respondió por rescripto el Divino Pío, que no hubo lugar a la estipulación, porque la madre no sobrevivió a la hija.

§ 1.- Asimismo se pregunta, si, habiendo fallecido juntamente con el marido el extraño que estipuló la dote, o con aquella por causa de la cual la hubiese estipulado, transmitiría la acción a su heredero.

18.- PAULO; *Comentarios a Plaucio, libro XII*.- Lo mismo es, si a la mujer se le hubiese prelegado la dote, y hubiere fallecido juntamente con su marido.

19.- MARCIANO; *Reglas, libro III*.- Pero también se pregunta en este caso, si, habiendo fallecido juntamente el pupilo y el hermano que le había sido substituido como heredero necesario, quedará el hermano heredero del hermano, o al contrario; o si habiendo sido substituidos recíprocamente dos herederos necesarios, y habiendo fallecido al mismo tiempo, se considerará que quedaron herederos, o que uno lo fue de otro, esto es, si se les hubiere rogado que recíprocamente se restituyeran la herencia. En cuyos casos, si hubieren fallecido a un mismo tiempo, y no apareciera quién murió primero, no se considera que el uno sobrevivió al otro.

§ 1.- Pero también respecto a la Ley Falcidia, si el señor hubiera fallecido juntamente con sus esclavos, no se cuentan los esclavos, como si hubieren existido en sus bienes al tiempo de la muerte.

20.- ULPIANO; *Comentarios a Sabino, libro XXV*.- Si se les hubiera legado a los cognados, y éstos hubieran ciertamente dejado de ser cognados, pero permanecieran en la ciudadanía, se ha de decir, que se debe el legado; porque fueron cognados al tiempo de haberse hecho el testamento. Pero, a la verdad, si

per adrogationem, facilius legatum consequitur.

§ 1.- Si quis cognationi leget, idem est atque si cognatis legasset.

21.- PAULUS; *libro XII, ad Plautium*.- Quum Senatus temporibus Divi Marci permiserit collegiis legare, nulla dubitatio est, quod, si corpori cui licet coire legatum sit, debeatur: cui autem non licet si legetur, non valebit, nisi singulis legetur: hi enim non quasi collegium, sed quasi certi homines admittentur ad legatum.

22.- IDEM; *libro XIV, ad Pautium*.- Ubi est verborum ambiguitas, valet quod acti est, veluti quum Stichum stipuler et sint plures stichi, vel hominem, vel carthagini, quum sint duae carthagines; semper in dubiis id agendum est, ut quam tutissimo loco res sit bona fide contracta, nisi quum aperte contra leges scriptum est.

23.- IAVOLENUS; *libro V, ex Cassio*.- Quum pubere filio mater naufragio periit: quum explorari non possit, uter prior exstinctus sit, humanius est credere filium diutius vixisse.

24.- GAIUS; *libro V, ad legem Iuliam et Papiam*.- Si mulier quum filio impubere naufragio periit, priorem filium necatum esse intellegitur.

25.- MARCELLUS, *libro XI, Digestorum*.- Quum in testamento ambigue aut etiam perperam scriptum est, benigne interpretari et secundum id, quod

if anyone was not a member of the family when the will was made, but became one through arrogation, at the time of the death of the testator, he will, still more, be entitled to the legacy.

§ 1.- If anyone should make a bequest to his kindred, it is the same as if he had made it to his relatives.

21.- PAULUS; *On Plautius, Book XII*.- As the Senate, in the time of the Divine Marcus, permitted bequests to be made to corporations, there is no doubt that if a bequest is made to a body which has a legal right to assemble, the latter will be entitled to it. However, a legacy left to one which has no right to assemble will not be valid, unless it is specially left to the members composing the same, for the latter will then be permitted to receive the legacy, not as an association, but as separate individuals.

22.- THE SAME; *On Plautius, Book XIV*.- Where any ambiguity of language exists, the validity of a transaction will depend upon the intention of the parties; for instance, if I should stipulate for Stichus, and there are several slaves of that name; or for a slave in general; or for something to be delivered at Carthage, and there are two cities so called; and in every instance where doubt arises, it must be considered that the contract was made in good faith to be carried out in the place where it was most convenient, unless it is clear that it has been drawn up contrary to law.

23.- JAVOLENUS; *On Cassius, Book V*.- A mother lost her life in a shipwreck at the same time as her son who had reached the age of puberty. If it cannot be ascertained which of them died first, it is more natural to suppose that the son lived the longer.

24.- GAIUS; *On the Lex Julia et Papia, Book V*.- Where a woman perishes in a shipwreck, at the same time with her son who is under the age of puberty, the son is understood to have lost his life first.

25.- MARCELLUS; *Digest, Book XI*.- It has been decided that where any statement, which is ambiguous, or even incorrect, is made in a will, it

alguno no fue cognado al tiempo de haberse hecho el testamento, mas se hizo por la arrogación al tiempo de la muerte, consigue más fácilmente el legado.

§ 1.- Si alguno le legara a la cognación, es lo mismo que si les hubiese legado a los cognados.

21.- PAULO; *Comentarios a Plaucio, libro XII*.- Habiendo permitido el Senado en tiempos del Divino Marco legar a los Colegios, no hay duda alguna que si se hubiera hecho un legado a una Corporación, a la cual sea lícito asociarse, se deberá. Mas si se legara a la que no es lícito, no sera válido a no ser que se legue a cada uno; porque estos serán admitidos al legado, no como Colegio, sino como hombres ciertos.

22.- EL MISMO; *Comentarios a Plaucio, libro XIV*.- Donde hay ambigüedad de palabras, es válido lo que es propio de lo que se hizo, como cuando yo estipulara a Stico, y hubiere muchos Sticos, o un esclavo, o para Cartago, habiendo dos Cartagos; siempre en los casos dudosos se ha de hacer de modo que se halle en lugar segurísimo la cosa contratada de buena fe, a no ser que se haya escrito abiertamente contra las leyes.

23.- JAVOLENO; *Doctrina de Cassio, libro V*.- Una madre pereció con un hijo púbero en un naufragio; no pudiendose investigar cuál de los dos haya muerto primero, es más humano creer que el hijo vivió más tiempo.

24.- GAYO; *Comentarios a la ley Julia y Papia, libro V*.- Si la mujer pereció con el hijo impúbbero en un naufragio, se entiende que el hijo murió primero.

25.- MARCELO; *Digesto, libro XI*.- Cuando en un testamento se escribió con ambigüedad, o aun malamente, se ha de creer que se interpreta benigna-

credibile est cogitatum, credendum est.

26.- CELSUS; *libro XXII, Digestorum*.- "Quem heredi meo dixero velle me liberum esse, liber esto. cui ut dare Damnas sit heres meus, dixero, ei heres meus dare Damnas esto". Testatoris voluntas, si quibusdam argumentis apparebit, de quo dixit, adimplenda est.

27.- IDEM; *libro XXVI, Digestorum*.- Quum quaeritur in stipulatione, quid acti sit, ambiguitas contra stipulatorem est.

28.- MODESTINUS; *libro I, Regularum*.- Si quis de pluribus unum manumitti voluerit nec appareat, de quo manumittendo testator sensit, nulli eorum fideicommissa competit libertas.

29.- IAVOLENUS; *libro III, ex Posterioribus Labeonis*.- Qui habebat Flacuum fullonem et Philonium pistorem, uxori flacuum pistorem legaverat: qui eorum et num uterque deberetur? placuit primo eum legatum esse, quem testator legare sensisset. Quod si non apparet, primum inspicendum esse, an nomina servorum dominus nota habuisset: quod si habuisset, eum deberi, qui nominatus esset, tametsi in artificio erratum esset. Sin autem ignota nomina servorum essent, pistorem legatum videri perinde ac si nomen ei adiectum non esset.

30.- SCAEVOLA; *libro XVIII, Digestorum*.- Plures testamento manumiserat, in quibus Sabinam et Cyrogeniam, quum quisque eorum ad trigesimum annum aetatis pervenisset et quum liber quisque eorum esset, certam summam dari voluerat.

should be interpreted favorably, and in accordance with what is supposed to have been the intention of the testator.

26.- CELSUS; *Digest, Book XXII*.- "Let him be liberated whom I may tell my heir I desire shall be given his freedom, and let my heir be charged to give such-and-such a sum to him whom I shall designate." The wishes of the testator should be carried out, if the identity of the slave whom he had in his mind can be established in any way.

27.- THE SAME; *Digest, Book XXVI*.- Where any question arises as to the intention of the parties in a stipulation, the ambiguity should be interpreted against the stipulator.

28.- MODESTINUS; *Rules, Book I*.- Where a man desired one of his slaves to be manumitted, and it does not appear which one the testator intended to be liberated, none of them will be entitled to freedom under the terms of the trust.

29.- IAVOLENUS; *On the Last Works of Labeo, Book III*.- A certain individual that owned the slave Flaccus, who was a fuller, and Philonicus, who was a baker, left to his wife the baker Flaccus; and the question arose which of the slaves was due, and whether both of them were not included in the legacy. It was held, in the first place, that that slave was bequeathed whom the testator intended should form part of the legacy. If this could not be ascertained, an investigation should then be made to learn whether the master knew the names of his slaves. If this was the case, the slave would then be due whom he mentioned by name, even if he had made a mistake with reference to his trade. Where, however, the names of the slaves were unknown to him, the baker should be considered to be the subject of the legacy, just as if his name had not been mentioned.

30.- SCAEVOLA; *Digest, Book XVIII*.- A testator manumitted several slaves by his will, and among them Sabina and Cyrogenia, when each of them had reached the age of thirty years, and as soon as they became free, he desired a certain sum of money to be

mente, y en conformidad a lo que se pensó que es creíble.

26.- CELSO; *Digesto, libro XXII*.- «Sea libre el que yo le hubiere dicho a mi heredero que yo quería que fuese libre; y a quien yo hubiere dicho que esté condenado a darle mi heredero, esté condenado a darle mi heredero» se ha de cumplir la voluntad del testador, si por algunos argumentos apareciere de quien habló.

27.- EL MISMO; *Digesto, libro XXVI*.- Cuando en una estipulación se duda cuál sea el objeto de lo hecho, la ambigüedad va contra el que estipula.

28.- MODESTINO; *Reglas, libro I*.- Si alguien hubiere querido que de muchos esclavos fuera manumitido uno solo, y no apareciera a cual se refirió el testador para que fuera manumitido, a ninguno de ellos le compete la libertad dada por fideicomiso.

29.- JAVOLENO; *Doctrina de las Obras póstimas de Labeón, libro III*.- Uno que tenía a Flaco, batenero, y a Filónico, panadero, había legado a su mujer el panadero Flaco; ¿cuál de los dos se deberá, o acaso ambos? Se determinó, que primeramente fue legado el que el testador hubiese entendido legar; pero si no apareciera, se ha de averiguar lo primero, si el señor había tenido conocimiento de los nombres de los esclavos; y si lo hubiese tenido, se debe el que hubiese sido nombrado, aunque se hubiese errado en el oficio; pero si fuesen desconocidos los nombres de los esclavos, se considera legado el panadero, lo mismo que si no se le hubiese añadido el nombre.

30.- SCÉVOLA; *Digesto, libro XVIII*.- Uno había manumitido en su testamento a varios, entre ellos a Sabina y a Ciprogenia, cuando cada uno de ellos hubiese llegado a los treinta años de edad, y había querido que cuando cada uno de ellos fuese libre se le

Et coniuncta scriptura ita caverat: "Sabinae et Cyprogeniae dari volo, quum ad statutam aetatem pervenerint, singulis decem et hoc amplius alimentorum nomine in annos singulos quoad vivent singulis decem". Quaesitum est, utrum omnibus manumissis alimenta debeantur an vero Sabinae et Cyprogeniae solis. Respondit secundum ea quae proponerentur videri omnibus alimenta legata.

TIT. VI

DE HIS, QUAE POENAE CAUSA
RELINQUUNTUR

1.- AFRICANUS; *libro Quaestionum*.- Filio familias vel servo herede instituto etiam si in patris dominive poenam illicite vel probrose datum est, nullius momenti legatum esse respondit: non enim id solum, quod in heredes, sed omne, quod in cuiusque lucrum aliquid ex ultima voluntate sentientis talem poenam in testamento scriptum sit, nullius momenti habendum.

2.- MARCIANUS; *libro VI, Institutionum*.- Poenam a condicione voluntas testatoris separat et an poena, an condicio, an translatio sit, ex voluntate defuncti apparet: idque divi severus et antoninus rescripserunt.

TIT. VII

DE REGULA CATONIANA

1.- CELSUS; *libro XXXV, Digestorum*.- Catoniana regula sic definit, quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandoquumque decesserit, non valere. Quae definitio in

given to them; and he made the following provision, in which both slaves were included:

"I wish ten aurei to be given to Sabina and Cyprogenia, each, when they arrive at the age above mentioned, and, in addition to this, I desire ten aurei to be paid to each of them every year, for their support, as long as they live." The question arose whether support should be furnished to all the slaves manumitted, or only to Sabina and Cyprogenia. The answer was that, according to the facts stated, support seemed to have been bequeathed to all of them.

TITLE VI

CONCERNING BEQUESTS MADE BY
WAY OF PENALTY

1.- AFRICANUS; *Questions*.- Where a son under paternal control or a slave is appointed an heir, and the testator also illegally or insultingly bequeaths a legacy which will operate as a penalty against the father or the master, it has been held that the legacy is of no force or effect; for every bequest included in a will which is prompted by a desire for revenge, whether it is left to an heir or to anyone else who derives benefit from the last will of the testator, must be considered void.

2.- MARCIANUS; *Institutes, Book VI*.- The will of the testator distinguishes a penalty from a condition, and whether it is a penalty, a condition, or a transfer that is referred to in the legacy, must be ascertained from the intention of the deceased. This the Divine Severus and Antoninus stated in a Rescript.

TITLE VII

CONCERNING THE RULE OF CATO

1.- CELSUS; *Digest, Book XXXV*.- The Rule of Cato is stated as follows, "Any legacy that would be void if the testator died immediately after making his will will not be valid no matter how long afterwards

diese cierta cantidad, y había dispuesto así en la cláusula inmediata:

«Quiero que a Sabina y a Ciprogenia se les den diez a cada una cuando hayan llegado a la edad establecida, y además de esto diez a cada una cada año, mientras viviesen, a título de alimentos»; se preguntó, si se deberán los alimentos a todos los manumitidos, o solamente a Sabina y a Ciprogenia. Respondió, que, según lo que se exponía, se consideraban legados a todos los alimentos.

TÍTULO VI

DE LAS COSAS QUE SE DEJAN POR
CAUSA DE PENA

1.- AFRICANO; *Tratado de Cuestiones*.- Instituido heredero un hijo de familia o un esclavo, respondió, que aun si se dió ilícita o ignominiosamente para pena del padre o del señor, el legado era de ningún valor, porque se ha de tener como de ningún valor no solamente lo que en el testamento se haya escrito como tal pena del heredero, sino también todo lo que para pena de cualquiera que obtenga algún lucro por virtud de la última voluntad.

2.- MARCIANO; *Instituta, libro VI*.- La voluntad del testador separa de la condición la pena, y por la voluntad del difunto aparece si sea pena, o condición, o transferencia; y esto respondieron por Rescripto los Divinos Severo y Antonino.

TÍTULO VII

DE LA REGLA CATONIANA

1.- CELSO; *Digesto, libro XXXV*.- La regla Catoniana define de este modo: que si hubiere de ser inútil, si el testador hubiese fallecido al tiempo de haberse hecho el testamento, el legado no es válido,

quibusdam falsa est.

§ 1.- Quid enim, si quis ita legaverit: "si post kalendas mortuus fuero, titio dato?" an cavillamur? nam hoc modo si statim mortuus fuerit, non esse datum legatum, verius est, quam inutiliter datum.

§ 2.- Item si tibi legatus est fundus, qui scribendi testamenti tempore tuus est, si eum vivo testatore alienaveris, legatum tibi debetur, quod non debetur, si testator statim decessisset.

2.- PAULUS; *libro IV, ad Plautium*.- Sed et si sic legaverit: "si filia mea titio nupta erit", sufficere visum est, si mortis tempore nupta inveniatur, licet testamenti facti tempore fuerit impubes.

3.- PAPINIANUS; *libro XV, Quaestionum*.- Catoniana Regula non pertinet ad hereditates neque ad ea legata, quorum dies non mortis tempore, sed post aditam cedit hereditatem.

4.- ULPIANUS; *libro X, ad Sabinum*.- Placet Catonis Regulam ad condicionales institutiones non pertinere.

5.- IDEM; *libro XXII, ad Sabinum*.- Regula Catoniana ad novas leges non pertinet.

TIT. VIII

DE HIS, QUAE PRO NON SCRIPTIS
HABENTUR

1.- IULIANUS; *libro LXXVIII, Digestorum*.- Si quis hereditatem vel legatum sibi adscripserit, quaeritur, an hereditas vel legatum pro non scripto

he may die." This rule does not hold good in certain cases.

§ 1.- But what if anyone should make a bequest as follows: "Let such-and-such a sum be paid to Titius, if I should die after the Kalends." Shall we quibble with reference to this? For, in this instance, if the testator should die immediately, it is better to hold that the legacy was not bequeathed at all, than that it was bequeathed illegally.

§ 2.- In like manner, if a tract of land left to you was yours at the time the will was executed, and you alienated it during the lifetime of the testator, you will be entitled to the bequest, but you will not be entitled to it if the testator died immediately after having made his will.

2.- PAULUS; *On Plautius, Book IV*.- If, however, a bequest should be made as follows, "If my daughter should marry Titius," it is held to be valid if she should be married at the time of the death of the testator, even though at the time the will was made she was not marriageable.

3.- PAPINIANUS; *Questions, Book XV*.- The Rule of Cato is not applicable to either inheritances or legacies, the time of the vesting of which is not to be referred to the date of the death of the testator, but to that of the acceptance of the estate.

4.- ULPIANUS; *On Sabinus, Book X*.- It is well established that the Rule of Cato is not applicable to the conditional appointments of heirs.

5.- THE SAME; *On Sabinus, Book XXII*.- The Rule of Cato does not apply to new laws.

TITLE VIII

CONSIDERING TESTAMENTARY
PROVISIONS WHICH ARE CONSIDERED AS
NOT HAVING BEEN WRITTEN

1.- JULIANUS; *Digest, Book LXXVIII*.- Where anyone has been asked to write the bequest of an estate or a legacy in a will to himself, the question

cuando quiera que hubiere fallecido el testador; cuya definición es falsa en algunos casos.

§ 1.- Porque ¿qué se dirá, si uno hubiere legado así: «si yo hubiere muerto después de las kalendas, désele a Ticio»? ¿Nos chanceamos? Porque de este modo, si hubiere muerto inmediatamente, es más verdadero que no se dio el legado, que no que se dio inútilmente.

§ 2.- Asimismo, si se te legó un fundo, que al tiempo de escribirse el testamento es tuyo, si lo hubieres enajenado viviendo el testador, se te debe el legado; el cual no se te debería, si el testador hubiese fallecido inmediatamente.

2.- PAULO; *Comentarios a Plautio, libro IV*.- Pero también si uno hubiere legado así: «si mi hija se hubiere casado con Ticio,» se consideró que bastaba, si se hallara casada al tiempo de la muerte, aunque hubiere sido impúbera al tiempo de haberse hecho el testamento.

3.- PAPINIANO; *Cuestiones, libro XV*.- La regla Catoniana no es aplicable a las herencias, ni a aquellos legados cuyo término no corre al tiempo de la muerte, sino después de adida la herencia.

4.- ULPIANO; *Comentarios a Sabina, libro X*.- Está determinado, que la regla de Catón no es aplicable a las instituciones condicionales,

5.- EL MISMO; *Comentarios a Sabino, libro II*.- La regla Catoniana no es aplicable a las leyes nuevas.

TÍTULO VIII

DE LAS DISPOSICIONES QUE SE TIENEN
POR NO ESCRITAS

1.- JULIANO; *Digesto, libro LXXVIII*.- Si alguno se hubiere adscrito una herencia o un legado, se pregunta, ¿se considerará como no escrita la herencia, o

habeatur. Et quid, si substitutum habeat huiusmodi institutio? respondit: pars hereditatis, de qua me consuluisti, ad substitutum pertinet: nam senatus quum poenas Legis Corneliae constitueret adversus eum, qui sibi hereditatem vel legatum scripsisset, eodem modo improbasse videtur, quo improbatæ sunt illae: "qua ex parte me titius heredem scriptum in tabulis suis recitaverit, ex ea parte heres esto", ut perinde haberentur, ac si insertæ testamento non fuissent.

2.- ALFENUS VARUS; *libro V, Digestorum*.- Quæ in testamento scripta essent neque intelligerentur quid significarent, ea perinde sunt ac si scripta non essent: reliqua autem per se ipsa valent.

3.- MARCIANUS; *libro XI, Institutionum*.- Si in metallum damnato quid extra causam alimentorum relictum fuerit, pro non scripto est nec ad fisco pertinet: nam poenæ servus est, non Caesaris: et ita Divus Pius rescripsit.

§ 1.- Sed et si post testamentum factum heres institutus vel legatarius in metallum datus sit, ad fisco non pertinet.

§ 2.- Item si servo alieno quid legatum fuerit et postea a testatore redemptus sit, legatum extinguitur: nam quæ in eam causam pervenerunt, a qua incipere non poterant, pro non scriptis habentur.

4.- ULPIANUS; *libro XIII, ad legem Iuliam et Papiam*.- Si eo tempore, quo alicui legatum adscribebatur, in rebus humanis non erat, pro non scripto hoc habebitur.

§ 1.- Sed et si in hostium potestate erat, quo testa-

arises whether the said bequest of the estate or the legacy shall be considered as not having been written; and also whether under an appointment made in this way, an heir can have a substitute. The answer was that the portion of the estate concerning which you have asked advice belongs to the substitute, for when the Senate fixed the penalties of the Cornelian Law against a person who, in a will, appointed himself heir or legatee of an estate, he is also held to have, in the same way, rendered appointments of an inveigling character void, as for instance, the following, "Let Titius be my heir to the same portion of the estate for which he himself has appointed me by his will," as provisions of this kind are considered just as if they had not been inserted in the will.

2.- ALFENUS VARUS; *Digest, Book V*.- Where the meaning of any testamentary provision cannot be ascertained, it is just as if it had not been written, but the other provisions will still be valid.

3.- MARCIANUS; *Institutes, Book XI*.- Anything over and above a bequest for maintenance which is left to a criminal sentenced to the mines is considered as not having been written, but it is not forfeited to the Treasury, because the legatee is the slave of a penalty, and not the slave of the Emperor. The Divine Pius stated this in a Rescript.

§ 1.- If an heir or legatee, who was appointed, should be condemned to the mines after the will has been executed, the estate or the legacy will not be forfeited to the Treasury.

§ 2.- Likewise, if anything is left to the slave of another, and he is afterwards purchased by the testator, the legacy will be extinguished; for any bequests which are transferred to a place from which they cannot originate are considered as not having been written.

4.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- Where a bequest is made to anyone at a time when he is already dead, it is considered as not having been written.

§ 1.- Moreover, where a legatee is in the power of

el legado, y qué se dirá, si semejante institución tuviera substituto? Respondió: parte de la herencia, sobre que me consultaste, le pertenece al substituto; porque el Senado, estableciendo las penas de la Ley Cornelia contra el que se hubiese a sí mismo dejado escrita una herencia o un legado, parece que desaprobó ésta, del mismo modo que fueron desaprobadas aquellas otras disposiciones: «de la parte en que Ticio me hubiere llamado heredero en su testamento, de la misma sea heredero», de suerte que serían consideradas lo mismo que si no hubiesen sido insertadas en el testamento.

2.- ALFENUS V ARO; *Digesto, libro V*.- Lo que se hubiese escrito en un testamento, y no se entienda qué significa, es lo mismo que si no hubiese sido escrito; pero las demás disposiciones son válidas por sí mismas.

3.- MARCIANO; *Instituta, libro XI*.- Si a un condenado a las minas se le hubiere dejado algo no a título de alimentos, se tiene como no escrito, y no le pertenece al fisco; porque es esclavo de la pena, y no del César; y así respondió por rescripto el Divino Pío.

§ 1.- Pero no le pertenece al fisco, aunque después de hecho el testamento haya sido condenado a las minas el heredero instituido o el legatario.

§ 2.- Asimismo, si a un esclavo ajeno se le hubiere legado alguna cosa, y después hubiera sido comprado por el testador, se extingue el legado, porque lo que llegó al estado en que no podía empezar, se tiene por no escrito.

4.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si uno no vivía al tiempo en que se le asignaba un legado, éste se tendrá por no escrito.

§ 1.- Pero también será considerado como no

mentum fiebat, neque ab hostibus rediit, pro non scripto erit: et ita Iulianus scribit.

5.- PAULUS; *libro XII, Quaestionum*.- Quod quis sibi adscripserit, si alii restituere a testatore iussus est, quum onere fideicommissum id apud heredem remanet, quamvis pro non scripto esset. Idem est et in testamento militis.

TIT. IX

DE HIS, QUAE UT INDIGNIS
AUFERUNTUR

1.- MARCIANUS, *libro VI, Institutionum*.- Divi Severus et Antoninus Rescripserunt quasi indignum carere legato seu fideicommissio libertum, quae ei testamento patroni relictæ erant, quum patronum suum post mortem eius quasi illicitæ mercis negotiatorem detulerat, quamvis et præmium meruit.

2.- IDEM, *libro XI, Institutionum*.- Aufertur hereditas ex asse et ad fiquum pertinet, si emancipatus filius contra tabulas bonorum possessionem patris ut præteritus petierit et ex substitutione impuberis adierit hereditatem.

§ 1.- Item si quis contra mandata duxerit uxorem ex ea provincia, in qua officium aliquid gerit, quod ei ex testamento uxoris adquisitum est Divi Severus et Antoninus Rescripserunt retinere eum non posse, tamquam si tutor pupillam contra decretum amplissimi ordinis in domum suam duxisset. Utroque ergo casu etsi ex asse heres institutus adierit hereditatem, fisco locus fit: nam quasi indigno ei aufertur hereditas.

the enemy at the time that the will is made, and does not return from captivity, the legacy is held not to have been written. This was also stated by Julianus.

5.- PAULUS; *Questions, Book XII*.- When anyone appoints himself the heir in a will by which he is directed to deliver the estate to someone else, the trust with its burden will still remain imposed upon him, even though what he has done will be considered as not having been written. The same rule also applies to the will of a soldier.

TITLE IX

CONCERNING THOSE WHO ARE
DEPRIVED OF THEIR LEGACIES AS
BEING UNWORTHY OF THEM

1.- MARCIANUS; *Institutes, Book VI*.- The Divine Severus and Antoninus stated in a Rescript that a freedman to whom property had been bequeathed by the will of his patron should be deprived of his legacy or trust as being unworthy of it, if, after the death of his patron, he accused him of having been engaged in some illegal transaction, even though he may have deserved a reward for doing so.

2.- THE SAME; *Institutes, Book XI*.- If an emancipated son, having been passed over, demands the possession of the estate of his father, in opposition to his will, and enters upon the estate as the substitute of a child under the age of puberty, he will be entirely deprived of the estate, which will be forfeited to the Treasury.

§ 1.- Again, if anyone should, contrary to law, marry a wife in a province in which he exercises any public employment, the Divine Severus and Antoninus stated in a Rescript that he could not retain anything which he might have acquired by the will of his father; just as in the case of a guardian who marries his female ward in violation of the Decree of the Senate. Therefore, in both instances, if the person is appointed an heir to the entire estate, and enters upon the same, there will be ground for confiscation

escrito, si se hallaba en poder de los enemigos al tiempo en que se hacía el testamento, y no volvió de los enemigos; y así lo escribe Juliano.

5. PAULO; *Cuestiones, libro XII*.- Lo que uno hubiere escrito para sí, si por el testador se le mandó que lo restituya a otro, queda como fideicomiso con su carga en poder del heredero, aunque se tuviese como no escrito; lo mismo es también tratándose del testamento de un militar.

TÍTULO IX

DE LO QUE SE LES QUITA A ALGUNOS
POR INDIGNOS

1.- MARCIANO; *Instituta, libro VI*.- Respondieron por Rescripto los Divinos Severo y Antonino, que el liberto era privado, como indigno, del legado o del fideicomiso, que se le había dejado en el testamento del patrono, cuando a su patrono lo había denunciado después de su muerte como a negociante de ilícita mercancía, aunque haya obtenido el premio.

2.- EL MISMO; *Instituta, libro XI*.- Se quita la herencia universal, y pertenece al fisco, si el hijo emancipado hubiere pedido como preterido la posesión de los bienes del padre contra las tablas del testamento, y hubiere adido la herencia por virtud de la substitución del impúbere.

§ 1.- Asimismo, si alguno contraviniendo a lo mandado se hubiere casado con mujer de la provincia en que desempeña algún cargo, respondieron por Rescripto los Divinos Severo y Antonino, que no puede retener él lo que para él se adquirió por el testamento de su mujer, como si el tutor hubiese tomado para mujer de su casa a su pupila contra el decreto del muy alto cuerpo. Luego en uno y en otro caso se hace lugar para el fisco, aunque el instituido heredero universal hubiere adido la herencia; porque se le quita la

§ 2.- Per contrarium autem ducta tam ab eo, qui officium in provincia gerebat, quam a tutore illicite magis est, ut dicatur capere illam ex testamento nec quasi indignam esse repellendam.

§ 3.- Idem erit, si quis vivi ignorantis bona vel partem bonorum alicuius cognati donaverit: nam quasi indigno aufertur.

3.- IDEM; *libro V, Regularum*.- Indignum esse Divus Pius illum decrevit, ut et Marcellus libro duodecimo digestorum refert, qui manifestissime comprobatus est id egisse, ut per neglegentiam et culpam suam mulier, a qua heres institutus erat, moreretur.

4.- ULPIANUS; *libro XIV, ad Edictum*.- Papinianus libro quinto quaestionum ait, si quis unum heredem quasi per falsum adscriptum accusavit, legatum ei non auferri a coherede relictum, quem non inquietavit.

5.- PAULUS; *libro I, de iure Fisci*.- Post legatum acceptum non tantum licebit falsum arguere testamentum, sed et non iure factum contendere: inofficiosum autem dicere non permittitur.

§ 1.- Ille, qui non iure factum contendit nec optinuit, non repellitur ab eo quod meruit: ergo qui legatum secutus postea falsum dixit, amittere debet quod consecutus est. De eo vero qui legatum accepit, si neget iure factum esse testamentum, divus pius ita rescripsit: "Cognati Sophronis licet ab herede instituto acceperant legata, tamen, si is eius conditionis fuerit visus, ut optinere hereditatem non possit, et iure intestati ad eos cognatos pertinet, petere hereditatem ipso iure poterunt. Prohibendi autem sint an non, ex cuiusque persona conditione aetate cognita causa a iudice constituendum erit".

by the Treasury, for he will be deprived of the estate as being unworthy of it.

§ 2.- On the other hand, however, this rule will not apply where a woman has married a man who is administering a public office in a province, nor to a female ward who has married her guardian unlawfully; but it is better to hold that she can take under the will, and should not be rejected as unworthy of doing so.

§ 3.- The same rule will apply where anyone gives away the entire estate, or a portion of the same, of some relative whom he has a right to succeed, but who he does not know is still living, for he will be deprived of the property as being unworthy.

3.- THE SAME; *Rules, Book V*.- The Divine Pius decided that a person was unworthy (as Marcellus states in the Twelfth Book of the Digest) who was clearly proved to have permitted the woman by whom he was appointed heir to die through his own negligence and fault.

4.- ULPIANUS; *On the Edict, Book XIV*.- Papinianus, in the Fifth Book of Questions, says that where anyone accuses an heir of forging an appointment in a will, he will not be deprived of a legacy with which his co-heir, whom he did not disturb, has been charged.

5.- PAULUS; *On the Rights of the Treasury*.- After a legacy has once been accepted, it will still be lawful to prove that the will was forged, and it will also be proper to claim that it is void; but no allegation as to its being inofficious will be permitted.

§ 1.- He who contends that a will is void and loses his case is not excluded from any provision made in his favor. Therefore, anyone who, having obtained a legacy, afterwards alleges that the will was forged, must lose what he received under it. However, with reference to him who received the legacy, and denies that the will is valid, the Divine Pius made the following statement in a Rescript: "Although the relatives of Sophron have received their legacies from the duly appointed heir, still, if they have good reason to suppose that the heir is not entitled to the estate, and that it belongs to them by the law of intestacy,

herencia como a indigno.

§ 2.- Mas por el contrario, respecto a la casada ilícitamente, tanto con el que desempeñaba un cargo en la provincia, como con su tutor, es mas cierto que se diga que adquiere por testamento, y que no ha de ser repelida como indigna.

§ 3.- Lo mismo será, si alguno hubiere donado los bienes de una persona viva que lo ignoraba, o parte de los bienes de algún cognado; porque se quitan como a un indigno.

3.- EL MISMO; *Reglas, libro V*.- El Divino Pío decretó, como refiere también Marcelo en el libro duodécimo del Digesto, que fuera indigno el que evidentísimamente se probó que obró de modo, que por negligencia y culpa suya muriese la mujer por quien había sido instituido heredero.

4.- ULPIANO; *Comentarios al Edicto, libro XIV*.- Dice Papiniano en el libro quinto de las Cuestiones, que si alguno acusó a uno de los herederos como inscrito falsamente, no se le quita el legado dejado a cargo del coheredero, a quien no molestó.

5.- PAULO; *Del derecho del Fisco, libro I*.- Después de aceptado un legado, sera lícito no solamente impugnar como falso el testamento, sino también sostener que no fue hecho con arreglo a derecho; pero no se permite llamarlo inoficioso.

§ 1.- El que sostuvo que no fue hecho conforme a derecho, y no venció, no es repelido de lo que mereció. Luego el que habiendo conseguido un legado dijo después que era falso, deberá perder lo que consiguió. Mas respecto al que recibió un legado, si dijera que el testamento no fue hecho con arreglo a derecho, respondió así por rescripto el Divino Pío: «Aunque los cognados de Sofrón habían recibido del heredero instituido los legados sin embargo, si éste hubiere parecido ser de tal condición, que no pudiera obtener la herencia, y por derecho de intestado perteneciera a aquellos cog-

§ 2.- Amittere id quod testamento meruit et eum placuit, qui tutor datus excusavit se a tutela: sed si consecutus fuerit, non admittitur ad excusationem. diversum puto in eo, qui legatum tantum meruit et a matre pupilli tutor petitus excusare se maluit: hic enim nihil contra iudicium defuncti fecit. Sed hoc legatum, quod tutori denegatur, non ad fisco transfertur, sed filio relinquitur, cuius utilitates desertae sunt.

§ 3.- Si pater accusaverit testamentum vel dominus, denegabitur ei actio etiam eius quod filio eius vel servo legatum est, si ad ipsos emolumentum rei perventurum est: quod si personam illorum spectet, diversum dicendum est.

§ 4.- Si servum suum rogatus sit manumittere qui legatum meruit vel etiam ipsi servo utrumque datum sit, dicendum est non debere obesse servo factum domini, sed a fisco redimendum, ut manumittatur, si tamen velit servum vendere, quia non potest cogi, qui iudicium sprexit defuncti.

§ 5.- Si filius familias falsum accusaverit testamentum, videndum est, an denegari debeat actio patri: et puto, si invito patre accusavit, non esse denegandam patri actionem.

§ 6.- Si is, cui rogatus sum legatum restituere, falsum dixerit, restituere id fisco debebo.

§ 7.- Qui accusavit falsum, heres legatario exstitit vel heredi scripto: nihil huic nocere dicendum est.

§ 8.- Similis est ei et qui inofficiosum dicit.

they can claim it under said law. It shall be determined by the court, after proper examination, whether they should be excluded from the estate or not, after due consideration of their persons, their rank, and their ages."

§ 2.- It has been well established that where a guardian has been appointed, and excuses himself from administering his trust, he will lose whatever he was entitled to under the terms of the will. If, however, he has already obtained it, he will not be allowed to excuse himself. I think that this rule will not apply to one who has only received a legacy, and having been requested by the mother of the minor to become his guardian, prefers to excuse himself; for, in this instance, he did nothing contrary to the will of the deceased. But the legacy which was refused to the guardian will not pass to the Treasury, but will be left to the son whose interests have been abandoned by the legatee.

§ 3.- If a father or a master should attack a will, an action will be denied him, where the legacy is left either to his son or his slave, if they would obtain any advantage from the same. A different opinion must be given where the said legatee has received the sole benefit of the bequest.

§ 4.- Where anyone entitled to a legacy is requested to manumit his slave, and anything is given to the slave by the will, it must be said that the act of the master will not prejudice the slave; and he should be purchased by the Treasury in order to be manumitted, provided the master is willing to sell him; but one who has refused to take under the will cannot be compelled to do this.

§ 5.- If a son under paternal control alleges that the will is forged, let us consider whether an action should be refused his father. I think that if he made the accusation against the will of his father, an action should not be denied the latter.

§ 6.- If anyone to whom I am charged to pay a legacy under a trust should say that the will is forged, I will be obliged to pay the legacy to the Treasury.

§ 7.- Where anyone who alleges that a will is forged becomes the heir of the legatee, or of the heir who is appointed, it must be held that his statements will not prejudice him.

§ 8.- The case is similar where a person alleges that

nados, podrán pedir de derecho la herencia». Mas con conocimiento de causa se habrá de determinar por el juez, atendiendo a la persona, condición y edad de cada uno, si hayan de ser, o no, excluidos.

§ 2.- Se determinó, que también el que nombrado tutor se excusó de la tutela, perdiera lo que obtuvo en el testamento; pero si lo hubiere recibido, no es admitido á la excusa. Lo contrario opino respecto al que obtuvo solamente un legado, y pedido como tutor por la madre del pupilo prefirió excusarse; porque éste no hizo nada contra la voluntad del difunto. Pero este legado, que se le deniega al tutor, no es transferido al fisco, sino que se le deja al hijo, cuyos intereses fueron abandonados.

§ 3.- Si el padre, o el señor, hubiere acusado el testamento, se le denegará la acción también de lo que se le legó a su hijo o esclavo, si a aquellos ha de ir el emolumento de la cosa; pero lo contrario se ha de decir, si correspondiera a la persona de estos.

§ 4.- Si se hubiera rogado a uno que manumitiera un esclavo suyo, que mereció un legado, o aun si ambas cosas hubieran sido dadas al mismo esclavo, se ha de decir, que no debe perjudicarle al esclavo el hecho de su señor, sino que ha de ser comprado por el fisco, para que sea manumitido; pero esto, si quisiera vender el esclavo, porque no puede ser obligado el que despreció la disposición del difunto.

§ 5.- Si un hijo de familia hubiere acusado de falso el testamento, se ha de ver si se le deberá denegar la acción al padre; y opino, que si lo acusó contra la voluntad del padre, no se le ha de denegar al padre la acción.

§ 6.- Si aquel a quien se me rogó que restituyera un legado, hubiere acusado de falso el testamento, deberé restituírselo al fisco.

§ 7.- Uno que acusó de falso un testamento, quedó heredero del legatario, o del heredero instituido; se ha de decir, que nada le perjudica a este.

§ 8.- Es semejante a este también el que lo acusa de

§ 9.- Aetati eius qui accusavit ignoscitur, et maxime si tutor vel curator dicere falsum vel inofficiosum velit: et ita Imperatores Severus et Antoninus Rescripserunt.

§ 10.- His vero, qui testimonio suo intentionem accusatoris adiuvaverunt, deneganda est actio: idque Divus Severus decrevit.

§ 11.- Sunt qui putant, et recte, et ei denegandam, qui accusatori adfuit vel fideiussor pro eo exstiterit.

§ 12.- Quidam et praesidem indignum putant, qui testamentum falsum pronuntiavit, si appellatione intercedente heres scriptus optinuit.

§ 13.- Advocatum fisci, qui intentionem delatoris exsequitur, in omnibus officii necessitas satis excusat.

§ 14.- Qui principale testamentum arguit, et a secundis tabulis repellendus est: item a codicillis ad testamentum factis licet non confirmatis. Non idem sequendum est, si secundas tabulas vel codicillos coarguit, quia non utrumque hoc casu improbasse videtur.

§ 15.- An libertas ei servo data, qui testimonio suo infringere voluerit testamentum, auferri debeat, videndum est. Fideicommissum utique non est dignus consequi: et de libertate Divus Pius iudicavit esse ea privandum.

§ 16.- Ei, qui tutor datus est, non prodest ad excusationem, quod falsum dixit: sed a legato removetur.

§ 17.- Qui mortis causa donationem accepit a testatore, non est similis in hac causa legatario.

§ 18.- Alia causa est eius qui propter testamentum a legatario vel a statulibero accipere iussus est: hic enim ut indignus repellitur.

a will is inofficious.

§ 9.- Indulgence must be shown to the person who makes the accusation on account of his age, and especially if his guardian or curator desires to prove that the will is either forged, or inofficious. This the Emperors Severus and Antoninus stated in a Rescript.

§ 10.- An action should be refused to those who have given testimony in favor of a party who alleged that the will was forged. This was decreed by the Divine Severus.

§ 11.- Some authorities think, and very properly, that those should be refused an action who aided the accuser, or became sureties for him.

§ 12.- Some authorities think that a governor who declared a will to be forged is unworthy, if the heir who was appointed under it gains the case on appeal.

§ 13.- In every instance, the requirements of his office will be sufficient excuse for the Advocate of the Treasury who has given assistance to the designs of the accuser.

§ 14.- Where anyone attacks the principal will, he ought to be excluded from the benefits of the second, as well as from those granted by a codicil subsequently executed, even though they may not be confirmed by it. The same rule should not be followed where the party attacks the second will or the codicil, because, in this instance, he is not considered to have impugned the validity of both instruments.

§ 15.- Let us consider whether a slave who attempted to break the will by his testimony should be deprived of the freedom granted him by the said will. He is not worthy to obtain the benefit of the trust, and so far as his liberty is concerned, the Divine Pius decided that he should be deprived of it.

§ 16.- Where a party is appointed a guardian, he cannot, by alleging that the will was forged, be excused from serving in that capacity, but he can be excluded from the benefit of the legacy.

§ 17.- Anyone who received from a testator a donation mortis causa does not, in this respect, resemble a legatee.

§ 18.- The case is different with him who, under the terms of a will, is directed to receive something from a legatee, or a slave who is to be liberated conditio-

inoficioso.

§ 9.- Se perdona a la edad del que lo acusó, y principalmente si el tutor o el curador quisiera acusarlo de falso o de inoficioso; y así lo respondieron por Rescripto los Emperadores Severo y Antonino.

§ 10.- Pero a los que ayudaron con su testimonio la demanda del acusador se les ha de denegar la acción; y esto lo decretó el Divino Severo.

§ 11.- Hay quienes opinan, y con razón, que se le ha de denegar también al que asistió al acusador, o al que por él hubiere sido fiador.

§ 12.- Algunos juzgan indigno también al Presidente, que declaró falso un testamento, si mediante la apelación ganó el heredero instituido.

§ 13.- La obligación de su cargo excusa suficientemente en todos los casos al abogado del fisco, que da curso a la demanda del testador.

§ 14.- El que impugna el testamento principal ha de ser repelido también de las segundas tablas, así como de los codicilos hechos a un testamento, aunque no hayan sido confirmados; no se ha de observar lo mismo, si impugnó las segundas tablas o los codicilos, porque no se considera que en este caso impugnó ambas cosas.

§ 15.- Se ha de ver si se le deberá quitar la libertad dada al esclavo, que con su testimonio hubiere querido romper el testamento. Ciertamente no es digno de conseguir el fideicomiso, y respecto a la libertad juzgó el Divino Pío, que debía ser privado de ella.

§ 16.- Al que fue nombrado tutor no le sirve para excusa que haya acusado de falso el testamento, sino que es repelido del legado.

§ 17.- El que recibió del testador una donación por causa de muerte, no es en esto semejante al legatario.

§ 18.- Otra es la condición de aquel a quien se le mandó que por causa del testamento recibiera del legatario o del manumitido bajo condición en el

§ 19.- Et falcidia¹ beneficium heredi scripto auferri debere Divus Pius et Divus Marcus putaverunt.

§ 20.- Omnes, qui ut indigni repellentur, summovendi sunt a praemio, quod secundum edictum Divi Traiani datur his qui se deferunt.

6.- MARCELLUS; *libro XXII, Digestorum*.- Rescriptum est a Principe heredem rei quam amovisset quartam non retinere. Et ideo si is qui quadringenta habebat universa quadringenta legavit et heres centum subtraxisset, trecentorum quartam retinebit, septuaginta quinque scilicet, et ducenta viginti quinque dabit legatariis: ex centum quae subripuit, legatariis quidem dabit septuaginta quinque, reliqua, id est viginti quinque, ad fisco² venient.

7.- MODESTINUS; *libro VI, Differentiarum*.- Qui Titii testamentum falsum dixit nec optinuit, heredi eius heres exsistere prohibendus non est, quia non principaliter in Titii hereditatem succedit.

8.- IDEM; *libro IX, Regularum*.- Indigno herede pronuntiato adempta hereditate confusas actiones restitui non oportet.

9.- ULPIANUS; *libro XIV, ad legem Iuliam et Papiam*.- Si inimicitiae capitales intervenerunt inter legatarium et testatorem et verisimile esse coeperit testatorem noluisse legatum sive fideicommissum praestari ei, cui adscriptum relictum est, magis est, ut legatum ab eo peti non possit.

§ 1.- Sed et si palam et aperte testatori maledixerit et infaustas voces adversus eum iactaverit, idem erit dicendum.

§ 2.- Si autem status eius controversiam movit, denegatur ei³ quod testamento accepit persecutio:

nally, for he can be excluded as being unworthy.

§ 19.- The Divine Pius and Marcus decided that under such circumstances the appointed heir should be excluded from the benefit of the Falcidian Law.

§ 20.- All those who are rejected as being unworthy shall be excluded from participating in the reward which, according to the Edict of the Divine Trajan, should be given to those who accuse themselves.

6.- MARCELLUS; *Digest, Book XXII*.- It was stated by the Emperor in a Rescript that an heir shall not retain the fourth part of an estate if he has appropriated any of the assets of the same; and therefore if the deceased left an estate of four hundred aurei, and the heir should abstract a hundred of them, and retain a quarter of the three hundred, that is to say, seventy-five, and give to the legatees two hundred and fifty, he must also give them seventy-five out of the hundred which he stole, and the remainder, that is to say, twenty-five, will be forfeited to the Treasury.

7.- MODESTINUS; *Differences, Book VI*.- Where anyone alleges that the will of Titius is forged, and does not prove his allegation, he will not be prevented from becoming the heir of the heir of Titius, because he does not succeed directly to the estate of Titius.

8.- THE SAME; *Rides, Book IX*.- Where an heir has been declared unworthy, and deprived of an estate, any rights of action which may have been merged cannot be restored to their original condition.

9.- ULPIANUS; *On the Lex Julia et Papia, Book XIV*.- If mortal hatred should have arisen between a legatee and the testator, and it should be probable that the latter was unwilling that he to whom a legacy, or the benefit of a trust was bequeathed, should enjoy the benefit of the same, the better opinion is that the legacy cannot be claimed by him.

§ 1.- Again, where he has openly and publicly abused the testator, and made malicious speeches against him, the same rule will apply.

§ 2.- Where, however, the civil condition of the testator is the cause of the controversy, raised by the

testamento; porque éste sera repelido como indigno.

§ 19.- El Divino Pío y el Divino Marco juzgaron, que al heredero instituido se le debía quitar también el beneficio de la Falcidia.

§ 20.- Todos los que fueren repelidos como indignos han de ser excluidos del premio, que conforme al Edicto del Divino Trajano se da a los que se delatan.

6.- MARCELO; *Digesto, libro XXII*.- Se respondió en rescripto por el Príncipe, que el heredero no retiene la cuarta parte de la cosa, que hubiese amovido; y por lo tanto, si uno que tenía cuatrocientos legó todos los cuatrocientos, y el heredero hubiese substraído ciento, retendrá la cuarta parte de los trescientos, a saber, setenta y cinco, y dará doscientos veinticinco a los legatarios; de los cien, que subtrajo, dará ciertamente setenta y cinco a los legatarios, y los demás, esto es, veinticinco, irán al fisco.

7.- MODESTINO; *Diferencias, libro VI*.- Al que acusó de falso el testamento de Ticio, y no, venció, no se le prohíbe que quede heredero de aquel, porque no sucedió principalmente en la herencia de Ticio.

8.- EL MISMO; *Reglas, libro IX*.- Declarado indigno un heredero, y quitada la herencia, no se deben restituir las acciones confundidas.

9.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIV*.- Si sobrevinieron enemistades capitales entre el legatario y el testador, y hubiere comenzado a ser verosímil que el testador no quiso que el legado o el fideicomiso se le diese a aquel a quien se le dejó escrito, es más cierto que por él no se podrá pedir el legado.

§ 1.- Pero también se habrá de decir lo mismo, si pública y claramente hubiere hablado mal del testador, y contra él hubiere lanzado malas voces.

§ 2.- Mas si promovió controversia sobre su estado, se le deniega la reclamación de lo que recibió

ex qua specie statim fisco deferetur.

10.- GAIUS; *libro XV, ad legem Iuliam et Papiam*.- In fraudem iuris fidem accomodat, qui vel id quod relinquitur vel aliud tacite promittit restitutum se personae quae legibus ex testamento capere prohibetur, sive chirographum eo nomine dederit sive nuda pollicitatione repromiserit.

§ 1.- Si quis ei qui capere possit rogatus fuerit restituere et is mortis tempore prohibetur legibus hoc capere, non dubito quin, etsi deficit fideicommissum, apud eum tamen, qui rogatus est restituere, manere debet, quia nulla fraus eius intervenisse videtur, nisi si in futurum casum fidem accommodavit, id est ut, licet capere legibus prohiberi coeperit, restituat.

§ 2.- Recte dictum est, si pater filii, quem in potestate habebat, tacitam fidem interposuerit, non debere id filio nocere, quia parendi necessitatem habuerit.

11.- PAPINIANUS; *libro XV, Quaestionum*.- Heres, qui tacitam fidem contra leges accomodavit, in ea parte, quae fraudem adhibuit, falcidia non utitur: et ita senatus censuit. Sed si maior modus institutionis quam fraudis fuerit, quod ad falcidiam attinet, de superfluo quarta retinebitur.

12.- IDEM; *libro XVI, Quaestionum*.- Quum quidam scripsisset heredes quos instituere non potuerat, quamvis institutio non valeret neque superius testamentum ruptum esset, heredibus tamen ut indignis, qui non habuerunt supremam voluntatem, abstulit iam pridem Senatus hereditatem. Quod Divus Marcus in eius persona iudicavit, cuius nomen peracto testamento testator induxerat:

legatee, the latter will not be entitled to what has been left him, which will, in this instance, immediately be forfeited to the Treasury.

10. -GAIUS; *On the Lex Julia et Papia, Book XV*.- He is guilty of a fraud against the law who tacitly agrees to deliver what is left to him, or anything else, to a person who is legally prohibited from taking under the will, whether he gives a written instrument to this effect, or undertakes to do so by a mere promise.

§ 1.- Where anyone was charged to deliver certain property to someone who can take under a will, and who, at the time of death, has been forbidden to do so, I have no doubt that although the trust is extinguished, it should still remain with him who was asked to deliver the property, because no fraud is held to have been committed by him, unless he bound himself with reference to what he knew would occur; that is to say, that he would deliver the property to the beneficiary even though he might be legally incapacitated from receiving it.

§ 2.- It has very properly been held that if the father of a son who is under his control makes a tacit agreement, this should not prejudice the son, because he is obliged to obey his father.

11.- PAPINIANUS; *Questions, Book XV*.- Where an heir has entered into an illegal tacit agreement, he cannot avail himself of the Falcidian Law with reference to the portion which was the subject of the fraudulent contract. This rule was established by the Senate. Where, however, the share of the estate to which he was appointed heir is larger than that which he fraudulently agreed to deliver, he can retain the Falcidian fourth from the excess of his share under the will.

12.- THE SAME; *Questions, Book XVI*.- Where a certain man appointed heirs whom he had no right to select, although designation of this kind is not valid, and the first will is not broken in consequence, still, the Senate long since decreed that the heirs who were entitled to the estate under the last will of the deceased should be deprived of the same as unworthy. This the Divine Marcus decided with

en el testamento; por cuyo motivo inmediatamente será deferido al fisco.

10.- GAYO; *Comentarios a la ley Julia y Papia libro XV*.- Presta su fidelidad en fraude de la ley el que promete tácitamente que restituirá o lo que se deja, u otra cosa, a persona a quien por las leyes se prohíbe adquirir por testamento, ya hubiere dado con tal motivo un quirógrafo, ya hubiere prometido con simple promesa.

§ 1.- Si se le hubiere rogado a uno que restituya una cosa a quien podía adquirir, y a este se le prohibiera por las leyes al tiempo de la muerte adquirirla, no dudo, que, aunque falta el fideicomiso debe quedar, sin embargo, en poder de aquel a quien se le rogó que lo restituyera, porque se considera que no medió ningún fraude suyo, a no ser que haya prestado su fidelidad para un caso futuro, esto es, para restituir, aunque por las leyes se hubiere llegado a prohibir que aquel adquiriera.

§ 2.- Con razón se ha dicho, que si el padre hubiere interpuesto la tácita fidelidad del hijo, que tenía bajo su potestad, esto no le debía perjudicar al hijo, porque habrá tenido la necesidad de obedecer.

11.- PAPINIANO; *Cuestiones, libro XV*.- El heredero, que prestó su tácita fidelidad contra las leyes, no disfruta de la Falcidia en aquella parte en que cometió fraude; y así lo dispuso el Senado. Pero si la cuantía de la institución fue mayor que hubiere sido la del fraude, por lo que atañe a la Falcidia, la cuarta parte se retendrá de lo que excede.

12.- EL MISMO; *Cuestiones, libro XVI*.- Cuando uno hubiese instituido herederos a los que no había podido instituir, aunque no sea válida la institución, ni haya sido roto el testamento anterior, sin embargo, ya de antiguo les quitó el Senado la herencia, como a indignos, a los herederos que no tuvieron a su favor la última voluntad, Así lo juzgó el Divino Marco respecto a la persona de uno cuyo nombre había

causam enim ad praefectos aerarii misit: verum ab eo legata relicta salva manserunt. De praeceptionibus eidem datis voluntatis erit quaestio: et legatum ei non denegabitur, nisi hoc evidenter testatorem voluisse appareat.

13.- IDEM; *libro XXXII, Quaestionum*.- Claudius Seleucus Papiniano suo salutem. Maevius in adulterio Semproniae damnatus eandem Semproniam non damnatam duxit uxorem: qui moriens heredem eam reliquit: quaero, an iustum matrimonium fuerit et an mulier ad hereditatem admittatur. Respondi neque tale matrimonium stare neque hereditatis lucrum ad mulierem pertinere, sed quod relictum est ad fisquum pervenire. Sed et si talis mulier virum heredem instituerit, et ab eo quasi ab indigno hereditatem auferri dicimus.

14.- IDEM; *libro XXXIII, Quaestionum*.- Mulierem, quae stupro cognita in contubernio militis fuit, etsi sacramento miles solutus intra annum mortem obierit, non admitti ad testamentum iure militiae factum et id quod relictum est ad fisquum pertinere proxime tibi respondi.

15.- IDEM; *libro VI, Responsorum*.- Heredi, qui falsos codicillos esse dixit neque optinuit, hereditas non aufertur: si tamen aliquid a coherede codicillis acceperit, eius actio denegabitur. Itaque si bonorum inter heredes divisionem defunctus codicillis fecerit, partes quidem hereditarias, in quibus legatum consistere non potuit, tenebit, sed falcidiae beneficio non utetur, si tantum in amissis portionibus erit, quod falcidiam aequitate compensationis recusaret.

reference to a person whose name the testator had erased from his will, after it had been executed, for he sent the case to the Prefects of the Public Treasury. The legacies left by the will, however, remained unimpaired. With reference to the preferred legacies bequeathed to the heir, a question as to the intention of the testator may arise, and these legacies will not be refused to him, unless it clearly appears that the intention of the testator was otherwise.

13.- THE SAME; *Questions, Book XXXII*.- Claudius Seleucus to his friend, Papinianus, Greeting. Mævius, having been condemned for adultery with Sempronia, married the said Sempronia, who had not been convicted of the offence, and he, at his death, appointed her his heir. I ask whether the marriage was legal, and whether the woman could be admitted to the succession. I answered that a marriage of this kind could not stand, and that the woman was not entitled to the benefit of the estate, but what was left by the will would be forfeited to the Treasury. Even though in a case of this kind the woman should appoint her husband her heir, we hold that he should be deprived of the estate as being unworthy of the same.

14.- THE SAME; *Questions, Book XXXIII*.- Where a woman has been living with a soldier as his concubine, even if the said soldier should die within a year after his discharge, after having made a will in favor of the woman, I have recently given you as my opinion that she cannot enjoy the benefit of such a will executed in accordance with military law, and whatever is left her will belong to the Treasury.

15.- THE SAME; *Opinions, Book VI*.- An heir who alleges that a codicil is false, and does not prove his case, shall not be deprived of the estate. If, however, his co-heir was charged by the same codicil with a trust for his benefit, an action to compel the execution of the trust will be refused him. Therefore, if the deceased made a distribution of his property among his heirs by means of the codicil, the party who asserts that it is forged will retain his hereditary share, except where a legacy has been left to him in trust; but he cannot enjoy the benefit of the Falcidian Law,

borrado el testador después de hecho el testamento, pues remitió la causa a los Prefectos del erario; pero quedaron a salvo los legados dejados por él. Respecto a los prelegados dados al mismo se examinara la voluntad, y no se le denegará lo legado, si no apareciera evidentemente que esto quiso el testador.

13.- EL MISMO; *Cuestiones, libro XXXII*.- Claudio Seleuco saluda a su amigo Papiniano. Mevio, condenado por adulterio con Sempronia, tomó por mujer a la misma Sempronia, no condenada, y al morir la dejó heredera; pregunto, si habrá sido legítimo el matrimonio, y si la mujer será admitida a la herencia. Respondí, que ni subsistía tal matrimonio, ni le pertenecía a la mujer el lucro de la herencia, sino que iba al fisco lo que se dejó. Pero aunque tal mujer hubiere instituido heredero al marido, decimos que también a él se le quita la herencia como a indigno.

14.- EL MISMO; *Cuestiones, libro XXXIII*.- Hace poco te respondí, que la mujer, que fue conocida en estupro en la tienda de un soldado, aunque libre el soldado de su juramento hubiere fallecido dentro de un año, no era admitida al testamento hecho con arreglo al derecho militar, y que lo que se le dejó pertenece al fisco.

15.- EL MISMO; *Respuestas, libro VI*.- Al heredero que dijo que los codicilos eran falsos, y no ganó, no se le quita la herencia; pero si en los codicilos hubiere recibido de su coheredero alguna cosa, se le denegará la acción de la misma. Y así, si el difunto hubiere hecho en codicilos la división de sus bienes entre los herederos, tendrá a la verdad las partes de la herencia, en las que no pudo subsistir el legado; pero no disfrutará del beneficio de la Falcidia, si en las porciones perdidas hubiere tanto, que excusara la Falcidia por equidad de la com-

16.- IDEM; *libro VIII, Responorum*.- Quum tabulis secundis pater impuberi filio fratris filios coheredibus datis substituisset ac substituti fratris filii post mortem pueri matrem eius partus subiecti ream postulassent, ut hereditatem patrum legitimam optinerent: victis auferendam esse partem hereditatis ex causa substitutionis respondi, quia ex testamento sententiam secundum se dictam non habent.

§ 1.- Quoniam stuprum in ea contrahi non placuit, quae se non patroni concubinam esse patitur, eius, qui concubinam habuit, quod testamento relictum est, actio non denegabitur. Idque in testamento Coccei Cassiani clarissimi viri, qui rufinam ingenuam honore pleno dilexerat, optimi maximique principes nostri iudicaverunt: cuius filiam, quam alumnam testamento Cassianus nepti coheredem datam appellaverat, vulgo quaesitam apparuit.

§ 2.- Quum heredis nomen mutata voluntate pater familias incisus tabulis induxisset atque ideo fisco portionis emolumentum adiudicatum fuisset, eam rem legatariis non obesse, qui retinuerant voluntatem, divo Marco placuit, et ideo quum suo onere fisci succedere.

17.- IDEM; *libro XIII, Responsorum*.- Heredem, qui sciens defuncti vindictam insuper habuit, fructus omnes restituere cogendum existimavi nec probe desideratum actionem confusam restituui: deceptum autem ignoracione facti bonae fidei possessoris defensionem habiturum ante motam scilicet controversiam, si ratio fructuum subducatur,

if, in that part of the estate which he forfeited there should be enough property to make up for the Falcidian portion which he lost under the just principle of set-off.

16.- THE SAME; *Opinions, Book VIII*.- Where, by a second will, a father made a pupillary substitution of his nephews for his son, who was under the age of puberty, and who had already been appointed the co-heirs of the latter, and the said nephews, substituted after the death of the minor, accused his mother of having produced a spurious child, in order to obtain the estate on the ground of intestacy, I answered that if they lost their case they should be deprived of the share of the estate to which they were entitled by the substitution, because a decree with reference to the will had not been rendered in their favor.

§ 1.- As it is not considered a disgrace for a woman to become the concubine of a man who is not her patron, an action to recover what was left him by her will will not be denied to him who kept a woman as a concubine. Our most illustrious Emperors took this view in the case of Cocceius Cassianus, a man of the highest rank, who had greatly favored Rufina, a freeborn woman, to whom he was much attached, and whose daughter he had referred to in his will as his foster-child, and had appointed co-heir with his granddaughter, although it was afterwards ascertained that she was illegitimate.

§ 2.- It was decided by the Divine Marcus that where a testator, having unsealed his will, erased the name of an heir through having changed his mind, and, in consequence of this, his share was adjudged to be forfeited to the Treasury, this fact would not prejudice the legatees with reference to whom the intention of the testator remained unaltered, and therefore that the share of the aforesaid heir would go to the Treasury with all its burdens.

17.- THE SAME; *Opinions, Book XIII*.- I held that an heir who, being aware of the murder of the deceased, failed to avenge his death should be compelled to surrender all the profits of the estate, without being able to legally demand that the rights of action which had been merged when he obtained the estate should be restored to their former

pensación.

16.- EL MISMO; *Respuestas, libro VIII*.- Habiendo un padre substituido en segundas tablas a su hijo impúbere los hijos de su hermano, con coherederos nombrados, y habiendo los substitutos hijos del hermano acusado después de la muerte del impúbere a la madre de éste como culpable de parto supuesto, para obtener la herencia legítima de su tío paterno, respondí, que a los vencidos se les habrá de quitar la parte de la herencia proveniente de la substitución, porque no tuvieron respecto al testamento sentencia pronunciada a favor de ellos.

§ 1.- Puesto que se determinó que no se comete estupro en la que consiente ser concubina de quien no es su patrono, no se denegará la acción de lo que se dejó en el testamento del que tuvo concubina; y así lo juzgaron los óptimos y muy grandes Príncipes nuestros tratándose del testamento de Cocceyo Cassiano, varón muy esclarecido, que había amado con plena consideración a Rufina, ingenua, cuya hija a quien Cassiano había llamado en su testamento alumna, habiéndosela dado como coheredera a su nieta, apareció que había nacido del vulgo.

§ 2.- Cuando el padre de familia, habiendo cambiado de voluntad, hubiese borrado, rotas las tablas, el nombre del heredero, y por esto se le hubiese adjudicado al fisco el emolumento de su porción, plugo al Divino Marco que esto no les perjudicase a los legatarios, que habían retenido la voluntad, y que por lo tanto sucediera el fisco con su propia carga.

17.- EL MISMO; *Respuestas, libro XIII*.- Yo estimé, que el heredero, que a sabiendas descuidó la venganza del difunto, ha de ser obligado a restituir todos los frutos, y que no pretenderá con probidad que se le restituya la acción confundida, pero que el engañado por ignorancia de hecho tendrá la defensa de poseedor de buena fe, por supuesto, antes de

nec improbe confusam actionem reddi postulaturum.

18.- IDEM; *libro XV, Responsorum*.- Eum, qui tacitum fideicommissum in fraudem legis suscepit, eos quoque fructus, quos ante litem motam percepit, restituere cogendum respondi, quod bonae fidei possessor fuisse non videtur exemplo bonorum fisco vindicatorum. Post motam de tacito fideicommisso controversiam ante pretia fructuum percepta quum usuris esse restituenda respondi, sed omnium fructuum quorum pretia percepta fuerant: quod si fructus in usu habuit, eorum pretia tantum restitui satis erit.

Sed Divus Severus bonorum tacite relictorum citra distinctionem temporis fructus dumtaxat deberi, non etiam usuras eorum benigne decrevit: quo iure utimur.

§ 1.- Bonis universis ex causa taciti fideicommissi fisco restitutis heredem onus aeris alieni non spectare convenit: nec aliud servatur morte non defensa. Si quid tamen ob aditam hereditatem actionibus aut servitutibus confusis amiserit, auxilio restitutionis non merebitur.

§ 2.- Pro parte heres institutus praedii legatum acceperat et in hereditate non capienti restituendi tacitum ministerium suscepit. quamquam legatum pro ipsius parte non constitisset ideoque portionem istam pro herede possideret, tamen ei praedium integrum esse relinquendum respondi: neque enim rationem iuris ac possessionis varietatem inducere

condition. Where, however, the heir has been misled by his ignorance of the crime, he will be entitled to the same defence, as a bona fide possessor, so far as the profits collected before the controversy arose are concerned; and in this case his demand that the rights of action which have been merged shall be restored to their former condition will not be improperly made.

18.- THE SAME; *Opinions, Book XV*.- I gave it as my opinion that a person who fraudulently undertook the execution of a trust could be compelled to also surrender those profits which he had collected before legal proceedings were instituted; for he is not considered to have been a bona fide possessor; just as is the case with those who hold property which is claimed by the Treasury. I held that, after the controversy arose with reference to the execution of a trust of this description the value of the profits previously collected, together with the interest on the same, should be surrendered; and this applies to all the profits for which a price has been paid, but if the party had used the profits himself, only their value without interest should be refunded.

The Divine Severus in a case of this kind graciously decreed that only the profits of the property, and not the interest on the same, would be due without any distinction of the time when they had been collected. This is the practice at the present time.

§ 1.- Where all the property of an estate has been forfeited to the Treasury on account of the execution of a trust fraudulently undertaken, it is not proper that the heir should remain subject to the burden of the debts of the estate. The same rule applies where the death of the testator is not avenged. If, however, the heir has sustained any loss by entering upon the estate through the merger of rights of action or of servitudes, he will not be considered worthy of the relief of restitution.

§ 2.- An heir, having been appointed to a share of an estate, received the devise of a tract of land, and agreed to deliver what he had received to a person who was legally incapable of receiving the same. Although the devise was not legal, so far as his share was concerned, that is to say, the portion to which he was entitled as heir, still, I gave it as my opinion that

promovida la controversia, si se pidiese cuenta de los frutos, y no reclamara sin probidad que se le restituya la acción confundida.

18.- EL MISMO; *Respuestas; libro XV*.- Respondí, que el que en fraude de la ley aceptó un fideicomiso tácito, ha de ser obligado a restituir también los frutos, que percibió antes de haberse promovido el litigio, porque no se considera que fue poseedor de buena fe, a la manera que de los bienes reivindicados para el fisco. Después de promovida la controversia sobre el fideicomiso tácito, respondí, que se ha de restituir con los intereses el precio percibido antes por los frutos; pero de todos los frutos cuyo precio había sido percibido, porque si tuvo los frutos para su uso, será bastante que se restituya solamente el precio de los mismos.

Pero el Divino Severo decretó por benignidad, que se debían únicamente, sin distinción de tiempo los frutos de los bienes dejados tácitamente, no también los intereses de los mismos; y este derecho observamos.

§ 1.- Restituídos al fisco todos los bienes por causa del fideicomiso tácito, conviene que el heredero no atienda a la carga de las deudas; y no se observa otra cosa no habiéndose vengado la muerte. Pero si por causa de haber adido la herencia hubiere perdido algo habiéndose confundido las acciones o las servidumbres, no merecerá el beneficio de la restitución.

§ 2.- El instituido heredero de una parte había recibido el legado de un predio, y había aceptado respecto a la herencia el tácito encargo de restituirla a quien no podía adquirir; aunque respecto a la parte del mismo no hubiese subsistido el legado, y poseyese por lo tanto esta porción como heredero, respondí, que, sin embargo, se le ha de dejar íntegro

divisionem voluntatis.

19.- PAULUS; *libro XVI, Responsorum respondit.*- Si scriptis heredibus ideo hereditas ablata est, quod testator aliud testamentum mutata voluntate facere voluit et impeditus ab ipsis est, ab universo iudicio priore recessisse eum videri.

20.- HERMOGENIANUS; *libro III, iuris Epitomarum.*- Ei, qui mortem uxoris non defendit, ut indigno dos aufertur.

21.- PAULUS; *libro V, Sententiarum.*- Portiones quoque eorum fisco vindicantur, qui mortem libertorum suspecto decedentium non defenderunt: omnes enim heredes vel eos qui loco heredis sunt officiose agere circa defuncti vindictam convenit.

22.- TRYPHONINUS; *libro V, Disputationum.*- Tutorem, qui pupilli sui nomine falsum vel inofficiosum testamentum dixit, non perdere sua legata, si non optinuerit, optima ratione defenditur et, si libertum patris pupilli sui nomine capitis accusaverit, non repellit a bonorum possessione contra tabulas, quia officii necessitas et tutoris fides excusata esse debet. nec quisquam iudicium calumnia notabit tutorem, qui non suis simultatibus accusationem sub nomine pupilli instituit, sed cogente forte matre pupilli vel libertis patris instantibus.

Et si tutor reum aliquem postulaverit pupilli nomine et ideo non sit exsecutus, quod interim ad pubertatem pupillus pervenerit, non oportet dici in turpillianum eum senatus consultum incidisse. Discreta sunt enim iura, quamvis plura in eandem personam devenerint, aliud tutoris, aliud legatarii: et

his right to the land was unimpaired, for neither the rule of law nor the difference of possession could accomplish the division of -the will of the testator.

19.- PAULUS; *Opinions, Book XVI.*- If the appointed heirs are deprived of the estate because the testator, having changed his mind, desired to make another will and was prevented by them from doing so, he will be considered to have entirely revoked his former will.

20.- HERMOGENIANUS; *Epitomes of Law, Book III.*- A husband who does not avenge the death of his wife shall be deprived of her dowry as being unworthy.

21.- PAULUS; *Sentences, Book V.*- The shares of the estates of freedmen that have lost their lives under suspicious circumstances, which are due to patrons who neglect to avenge their death, shall be forfeited to the Treasury. For all heirs, as well as those who occupy the position of heirs, are required, as a matter of duty, to avenge the death of the deceased.

22.- TRYPHONINUS; *Disputations, Book V.*- For the best of reasons, it can be maintained that a guardian who alleges in the name of his ward that a will is forged or inofficious, but is unable to prove his contention, does not lose his legacy. And even if he charges a freedman of the father of his ward with a capital crime, in the name of the latter, he shall not be excluded from possession of the estate in opposition to the terms of the will, because the requirements of his duty, and his responsibility as guardian should excuse him; nor can anyone convict a guardian of malicious prosecution who brings an accusation in the name of his ward, and not through any enmity entertained by himself, but, perhaps, induced by the representations of the mother of the ward, or at the instigation of the freedmen of the father.

If a guardian accuses anyone of a crime in the name of his ward, and does not prosecute the case, because, in the meantime, the ward has arrived at the age of puberty, it must not be said that he has become liable to the Turpillian Decree of the Senate, as the rights are distinct, even though several are united in the

el predio; porque ni la razón del derecho, ni la variación en la posesión hacen presumir división en la voluntad.

19.- PAULO; *Respondió; Respuestas, libro XVI.*- Si a los herederos instituidos se les quitó la herencia, porque habiendo cambiado de voluntad quiso el testador hacer otro testamento, y se le impidió por los mismos, se considera que él se separó de toda su primera disposición.

20.- HERMOGENIANO; *Epítome del Derecho, libro III.*- Al que no venga la muerte de su mujer se le quita como a indigno la dote.

21.- PAULO; *Sentencias, libro V.*- También se reivindicán para el fisco las porciones de los que no vengaron la muerte de los libertos que fallecen sospechosamente; porque conviene que todos los herederos, o los que están en el lugar de heredero, ejerciten con celo la acción respecto a la venganza del difunto.

22.- TRIFONINO; *Disputas, libro V.*- Con muy buena razón se defiende, que el tutor, que en nombre de su pupilo acusó de falso o de inoficioso el testamento, no pierde sus propios legados, si no hubiere vencido; y que si en nombre de su pupilo hubiere acusado de delito capital a un libertito de su padre, no es repelido de la posesión de los bienes contra las tablas, porque deben ser excusadas la necesidad del cargo y la fidelidad del tutor y ningún juez tachará de calumnia al tutor, que a nombre del pupilo formalizó la acusación no por sus propias enemistades, sino acaso obligándole la madre del pupilo, o a instancias de libertitos del padre.

Y si el tutor hubiere acusado a alguno como reo en nombre del pupilo, y no hubiera proseguido hasta el fin, porque mientras tanto hubiere llegado el pupilo a la pubertad, no se debe decir que él incurrió en el Senadoconsulto Turpiliano; porque son distintos los derechos, aunque muchos hayan recaído en la misma

quum non suae personae iure, sed pupilli accusaverit, propriam poenam mereri non debet. Denique pupillo relicta in eo testamento, nisi a principe conservata sint, pereunt: adeo ille est accusator, is defensor et quasi patronus. idem et Sabinus libris ad Vitellium scripsit.

23.- GAIUS; *libro singulari de tacitis fideicommissis*.- Si quilibet heres ex cuiusquumque testamento tacite rogatus fuerit, ut quadrantem, quem Legis Falcidiae beneficio retinuit, non capienti restituat, aequo locus erit Senatus consulto: neque enim multum intererit inter tale fideicommissum et quum quis id, quod ad se ex hereditate pervenerit, restituere rogatus sit.

24.- PAPINIANUS; *libro XVIII, Quaestionum*.- Si testamentum patris iure factum filius negavit, quoniam de iure disputavit, non iudicium impugnavit aut accusavit, retinet defuncti voluntatem.

25.- IDEM; *libro XIV, Responsorum*.- Si gener socerum heredem reliquerit, taciti fideicommissi suspicionem sola ratio paternae affectionis non admittit.

§ 1.- Apud Scaevolam libro trigesimo Digestorum Claudius notato; si vivo testatore decesserit is, cui illicite legatum relictum erat, non fisco hoc vindicatur, sed apud eum, a quo relictum est, remanet.

same person, for the rights of a guardian are one thing, and those of a legatee another; and where a guardian brings an accusation, not in his own name, but in that of his ward, he does not deserve punishment. Finally, property left to a ward by a will under such circumstances is lost, unless it is preserved by order of the Emperor; to such an extent is he the defender, and, as it were, the patron of him who makes the accusation. Sabinus says the same thing in his works on Vitellius.

23.- GAIUS; *On Implied Trusts*.- Where any heir whosoever, having been tacitly requested by the will of a testator to deliver to some person not entitled to receive it a fourth part of the estate to which he is entitled under the Falcidian Law, there will also be ground for the application of the Decree of the Senate; for there is not much difference between a trust of this kind and one where an heir is charged to give property which he has received from an estate to a party who is incapable of receiving it.

24.- PAPINIANUS; *Questions, Book XVIII*.- Where a son denies that his father's will is valid, as the controversy relates to the legality of the instrument, and he does not attack the testamentary provisions made by his father, or accuse him of any offence, he will retain what was left him by the deceased.

25. -THE SAME; *Opinions, Book XIV*.- Where a son-in-law appoints his father-in-law his heir, the sole incentive of paternal affection will not permit any suspicion to attach to the implied execution of the trust.

§ 1.- Claudius, in the Thirtieth Book of the Digest on Scævola, remarks that if the party to whom an unlawful bequest was made should die during the lifetime of the testator, the bequest will not be forfeited to the Treasury, but will remain in the hands of him who was charged with the execution of the trust.

persona, siendo uno el del tutor, y otro el del legatario; y cuando hubiere acusado no por derecho de su propia persona, sino de la del pupilo, no debe merecer propia pena. Finalmente, las cosas dejadas al pupilo en este testamento perecen, si no hubieran sido conservadas por el Príncipe; de tal suerte es él defensor del acusador, y como patrono; lo mismo escribió también Sabino en sus libros de Comen-tarios a Vitelio.

23.- GAYO; *De los fideicomisos tácitos, libro único*.- Si a cualquier heredero se le hubiere rogado tácitamente en virtud del testamento de cualquiera, que restituya, a quien no puede adquirir, la cuarta parte que retuvo por beneficio de la ley Falcidia, tendrá lugar igualmente el Senadoconsulto; porque no habrá mucha diferencia entre tal fideicomiso, y cuando a alguno se le hubiera rogado que restituya lo que a él hubiere ido de la herencia.

24.- PAPINIANO; *Cuestiones, libro XVIII*.- Si el hijo dijo que el testamento de su padre no fue hecho con arreglo a derecho, como quiera que disputó sobre el derecho, y no impugnó o acusó la última voluntad, retiene la voluntad del difunto.

25.- EL MISMO; *Respuestas, libro XIV*.- Si el yerno hubiere dejado heredero a su suegro, la sola razón de afecto paterno no admite la sospecha de un fideicomiso tacita.

§ 1.- Observa Claudio en Scévola en el libro trigésimo del Digesto: si viviendo el testador hubiere fallecido aquel a quien ilícitamente se le había dejado un legado, este no es reivindicado para el fisco, sino que queda en poder de aquel a cuyo cargo se dejó.

LIBER TRICESIMUS QUINTUS

TIT. I

DE CONDICIONIBUS ET
DEMONSTRATIONIBUS ET CAUSIS ET
MODIS EORUM

1.- POMPONIUS; *libro III, ad Quintum Mucium*.- Legatis quae relinquuntur aut dies incertus aut condicio adscribitur aut, si nihil horum factum sit, praesentia sunt, nisi si vi ipsa condicio insit.

§ 1.- Cum dies certus adscriptus est, quamvis dies nondum venerit, solvi tamen possunt, quia certum est ea debitu iri.

§ 2.- Dies autem incertus est, cum ita scribitur "heres meus cum morietur, decem dato": nam diem incertum mors habet eius. Et ideo si legatarius ante decesserit, ad heredem eius legatum non transit, quia non cessit dies vivo eo [ea], quamvis certum fuerit morituum heredem.

§ 3.- Inest autem condicio legati, veluti cum ita legamus: "quod ex arescusa natum fuerit, heres dato" aut "fructus, qui ex eo fundo percepti fuerint, heres dato" aut "servum, quem alii non legavero, Seio dato".

2.- ULPIANUS; *libro V, ad Sabinum*.- Conditionum quaedam sunt, quae quandoque impleri possunt etiam vivo testatore, ut puta "si navis ex asia venerit", nam quandoque venerit navis, conditioni paritum videtur: quaedam, quae non nisi post mortem testatoris "si decem dederit" "si capitolium ascenderit": nam ut paruisse quis conditioni videatur, etiam scire debet hanc conditionem insertam: nam si fato fecerit, non videtur obtemperasse voluntati.

BOOK XXXV

TITLE I

CONCERNING TESTAMENTARY
CONDITIONS AND DESIGNATIONS, THEIR
REASONS AND THEIR MODIFICATIONS

1.- POMPONIUS; *On Quintus Mucius, Book III*.- Either uncertain times or conditions are imposed upon legacies which are bequeathed; and if this is not done, they take effect at once, unless, by their very character, they are dependent upon some condition.

§ 1.- Where a certain date is prescribed for the payment of a legacy, even though the time has not yet arrived, the heirs can, nevertheless, pay it, because it is certain that it will be due.

§ 2.- When the time is uncertain, as in the following instance, "Let my heir pay ten aurei when he dies," as the date of his death is uncertain, hence, if the legatee should die before him the legacy will not pass to his heir, for the reason that the time did not arrive during his lifetime, although it is certain that the heir will die some time or other.

§ 3.- A condition is inserted in a legacy for example, where we make a bequest as follows, "Let my heir give the child born of Arescusa the slave," or "Let my heir give the crops which may be collected from such-and-such an estate," or "Let my heir give to Seius the slave whom I may have not bequeathed to anyone else."

2.- ULPIANUS; *On Sabinus, Book V*.- There are certain conditions which can be fulfilled even during the lifetime of the testator, for instance, "If a ship should come from Asia," for the condition will be held to have been fulfilled when the ship arrives. There are others which cannot be complied with until after the death of the testator, as "If he should pay him ten aurei, if he should ascend to the Capitol." For before anyone can be held to have complied with the condition, he must know that it has been inserted in the will; for if he should comply with it unintentionally he would not be considered to have

LIBRO TRIGÉSIMO QUINTO

TÍTULO I

DE LAS CONDICIONES, Y DE LAS
DEMOSTRACIONES, Y DE LAS CAUSAS, Y
DE LOS MODOS DE LO QUE SE ESCRIBE
EN EL TESTAMENTO

1.- POMPONIO; *Comentarios a Quinto Mucio, libro III*.- A los legados, que se dejan, se les adscribe o un término incierto, o una condición, o, si no se hubiera hecho nada de esto, son de presente, a no ser que por fuerza estuviera en ellos la misma condición.

§ 1.- Cuando fue señalado un término cierto, pueden ser pagados aunque todavía no hubiere vencido el término, porque es cierto que se habrán de deber.

§ 2.- Mas el término es incierto, cuando se escribe así: «cuando muera mi heredero, dé diez»; porque su muerte tiene un día incierto, y por lo tanto, si el legatario hubiere fallecido antes, el legado no pasa a su heredero, porque no empezó a correr el término viviendo él, aunque haya sido cierto que había de morir el heredero.

§ 3.- Pero es inherente al legado la condición como cuando legamos así: «dé el heredero lo que hubiere nacido de Arescusa», o: «dé el heredero los frutos, que se hubieren percibido de este fundo», o: «dele a Seyo el esclavo, que yo no hubiere legado a otro»,

2.- ULPIANO; *Comentarios a Sabino, libro V*.- Hay algunas condiciones que pueden cumplirse en cualquier tiempo, aun viviendo el testador, por ejemplo: «si la nave hubiere venido de Asia», porque cuando quiera que la nave hubiere venido, se considera que se dió cumplimiento a la condición; otras, que no, sino después de la muerte del testador: «si él hubiere dado diez, si hubiere subido al Capitolio», porque, para que se considere que uno cumplió la condición, debe saber también que había sido impuesta esta condición; porque si lo hubiere hecho por casualidad, no se considera que obedeció a

3.- ULPIANUS; *libro VI, ad Sabinum*.- Optinuit impossibiles condiciones testamento adscriptas pro nullis habendas.

4.- POMPONIUS; *libro III, ad Sabinum*.- Si his legatum est, quibus patronus legata praestat, temperare debet praetor condicionem, ut et patrono et heredibus scriptis pro portione dentur condicionis explendae gratia.

§ 1.- Si ita scriptum sit: "si in quinquennio proximo Titio filius natus non erit, tum decem Seiae heres dato", si Titius ante mortuus sit, non statim Seiae decem deberi, quia hic articulus "tum" extremi quinquennii tempus significat.

5.- PAULUS; *libro II ad Sabinum*.- Condicionibus pupillus et sine tutoris auctoritate parere potest. Nec quem moveri, quod expleta condicione necessarius heres aliquando esse potest: nam hoc iure potestatis fieri, non condicionis expletae.

§ 1.- Item servus vel filius familias sine iussu patris vel domini condicionem implere possunt, quia eo facto nemo fraudatur.

6.- POMPONIUS; *libro III ad Sabinum*.- Multa testamento non committitur ab herede vel legatario vel eo qui ex ultima voluntate aliquid lucratur, qui alicuius arbitratu monumentum facere iussus sit, si is cuius arbitrium est non vivat vel adesse non possit aut rei arbitrari nolit.

§ 1.- Si servos certos quis manumisisset, heres esse iussus erat. Quibusdam ex his ante mortuis Neratius respondit defici eum condicione nec aestimabat, parere posset condicioni nec ne. Sed Servius respondit, cum ita esset scriptum "si filia et mater mea vivant" altera iam mortua, non defici condicione. Idem est et apud Labeonem scriptum.

3.- THE SAME; *On Sabinus, Book VI*.- It has been established that where impossible conditions are prescribed by a will they shall be considered as void.

4.- POMPONIUS; *On Sabinus, Book III*.- Where legacies are bequeathed to persons to whom a patron is obliged to pay them, the Praetor should regulate the condition so that the amounts received by the patron and the appointed heirs, in compliance with the condition prescribed by the will, shall be in proportion to the respective shares of the legatees.

§ 1.- Where the following provision was included in a will, "If a son should not be born to Titius within the next five years, let my heir then pay ten aurei to Seia," and Titius should die before that time, Seia will not be immediately entitled to the ten aurei, because the word "then" means the date of the expiration of the five years.

5.- PAULUS; *On Sabinus, Book II*.- A ward can comply with a condition without the authority of his guardian. Let no one be apprehensive for the reason that, when the condition has been fulfilled, he may, in some cases, become the necessary heir, as he will become such by the right of paternal control, and not through the fulfillment of the condition.

§ 1.- Likewise, a slave or a son under paternal control can comply with a condition without the order of his father or his master, because no one is defrauded by his own act.

6.- POMPONIUS; *On Sabinus, Book III*.- A penalty is not imposed by a will upon an heir or legatee or upon anyone who profits in some manner by the last will of the testator, if he is ordered to erect a monument in accordance with the judgment of someone, and he who is to be consulted is not living, or cannot be present, or is unwilling to give his advice.

§ 1.- Where an heir was directed to manumit certain slaves, and some of them died before the will was executed, Neratius gave it as his opinion that the heir had failed to comply with the condition, but he did not decide whether the latter was able to comply with the condition, or not. Servius, however, held that, where the following was written, "If my mother

3.- EL MISMO; *Comentarios a Sabino, libro VI*.- Prevaleció, que las condiciones imposibles puestas en un testamento se han de considerar como nulas.

4.- POMPONIO; *Comentarios a Sabino, libro III*.- Si se legó a quienes el patrono paga los legados, el Pretor debe moderar la condición, de modo que para que se cumpla la condición se les den a proporción así al patrono, como a los herederos instituidos.

§ 1.- Si se hubiera escrito así: «si en el próximo quinquenio no le hubiere nacido un hijo a Ticio, entonces dele el heredero diez a Seia», si Ticio hubiera muerto antes, no se le deben a Seia inmediatamente los diez, porque esta palabra «entonces» significa el ultimo momento del quinquenio.

5.- PAULO; *Comentarios a Sabino, libro II*.- El pupilo puede cumplir las condiciones aun sin la autoridad del tutor, y no hace dudar, que, cumplida la condición, puede ser algunas veces heredero necesario; porque esto se verifica por derecho de la potestad, no de la condición cumplida.

§ 1.- Asimismo, el esclavo o hijo de familia puede cumplir una condición sin orden del padre o del señor, porque con este hecho nadie es defraudado.

6.- POMPONIO; *Comentarios a Sabino, libro III*.- Por el heredero, o por el legatario, o por el que en virtud de la última voluntad se lucrare alguna cosa, a quien se le hubiera mandado hacer un monumento a arbitrio de cualquiera, no se incurre en la pena del testamento, si no viviera aquel a cuyo arbitrio está, o no pudiera estar presente, o no quisiera dar su arbitrio sobre la cosa.

§ 1.- Se había mandado, que, si uno hubiese manumitido ciertos esclavos, fuese heredero; habiendo muerto antes algunos de ellos, respondió Neracio, que el faltaba a la condición, y no estimaba si se podía, o no, dar cumplimiento a la condición. Pero Servio respondió, que cuando se hubiese escrito así: «si vivieren mi hija y mi madre», no se falta a la

Sabinus quoque et Cassius quasi impossibiles eas condiciones in testamento positas pro non scriptis esse, quae sententia admittenda est.

7.- ULPIANUS; *libro XVIII, ad Sabinum.*- Mucianae cautionis utilitas consistit in conditionibus, quae in non faciendis sunt conceptae, ut puta "si in Capitolium non ascenderit" "si Stichum non manumiserit" et in similibus: et ita Aristoni et Neratio et Iuliano visum est: quae sententia et constitutione Divi Pii comprobata est. Nec solum in legatis placuit, verum in hereditatibus quoque idem remedium admissum est.

§ 1.- Unde si uxor maritum suum, cui dotem promiserat, ita heredem scripserit ex parte: "si dotem, quam ei promisi, neque petierit neque exegerit", denuntiare eum posse coheredi paratum se accepto facere dotem vel cavere et ita adire posse hereditatem. Sed si ex asse sit institutus maritus sub ea conditione, quoniam non est cui caveat, non impediri eum, quo minus adeat hereditatem: nam iure ipso videtur impleta condicio eo, quod non est, quem possit de dote convenire ipse adeundo hereditatem.

8.- POMPONIUS; *libro V ad Sabinum.*- Si quis ita legaverit: "dum uxor mea cum filio erit, heres meus ei tantum dato", si ea latitans patronum de medio discessit, ut tamen consilium retineret habendi secum liberos, debet ei legatum Trebatius et Labeo aiunt, quia non omne momentum exigendum sit ut cum liberis sit, sed si eam mentem et id propositum habeat, ne filium a semet dimittat neve per eam stet, quo minus cum ea filius educetur.

and my daughter should survive me," and one of them died, the condition had not failed. The same rule is also stated by Labeo. Sabinus and Cassius think that where conditions considered impossible are inserted into a will they ought to be regarded as not having been written, and this opinion should be adopted.

7.- ULPIANUS; *On Sabinus, Book XVIII.*- The advantage derived from the Mucian bond is apparent in conditions where something is not to be done; as, for instance, "If he should not ascend to the Capitol," "If he should not manumit Stichus," and in other cases of the same kind. This opinion was held by Aristo, Neratius, and Julianus, and is also confirmed by a Constitution of the Divine Pius. The above-mentioned remedy was held not only to apply to legacies but also to inheritances.

§ 1.- Where a wife appoints her husband, to whom she had promised her dowry, heir to a share of her estate, "If he should not demand, or exact the dowry which I have promised him," the husband must notify his co-heir that he is ready to give a receipt for the dowry, or to furnish security that he will not claim it, and he can then enter upon the estate. If, however, the husband should be appointed heir to the entire estate, under the same condition, and there should not be anyone to whom he can furnish such security, he will not be prevented from entering upon the estate on this account. For the condition will be considered to have been fulfilled by operation of law, because after he has once entered upon the estate, there is no one against whom he can bring an action to recover the dowry.

8.- POMPONIUS; *On Sabinus, Book V.*- Where anyone makes a bequest as follows, "Let my heir pay such-and-such a sum to my wife, as long as she remains with my son," and the wife, desiring to avoid her patron, leaves the neighborhood, but still retains the intention of keeping her children with her, Trebatius and Labeo say that she will be entitled to the legacy, because she should not be required to be every moment with her children; but the only question is whether she has the intention and design

condición habiendo ya muerto una; lo mismo se halla escrito también en Labeón, También dicen Sabino y Cassio, que estas condiciones imposibles puestas en el testamento se tienen por no escritas; cuya opinión ha de ser admitida.

7.- ULPIANO; *Comentarios a Sabino, libro XVIII.*- La utilidad de la caución Muciana consiste en las condiciones que están concebidas para no hacer, como, por ejemplo: «si él no hubiere subido al Capitolio, si no hubiere manumitido a Stico», y en otras semejantes; y así les pareció a Aristón, a Neracio, y a Juliano; cuya opinión fue confirmada también por una Constitución del Divino Pío. Y no se determinó solamente respecto a los legados, sino que también en las herencias fue admitido el mismo remedio,

§ 1.- Por lo cual, si la mujer hubiere instituido así heredero de una parte a su marido, al que le había prometido la dote: «si él no hubiere pedido ni exigido la dote, que le prometí», puede él hacerle saber a su coheredero, que esta dispuesto a dar por recibida la dote, o a dar caución, y así puede adir la herencia. Pero si el marido hubiera sido instituido heredero universal bajo esta condición, como no hay a quien dé caución, no se le impide que ada la herencia; porque de derecho se considera cumplida la condición, por esto, porque no haya quien él mismo pueda demandar por la dote adiando la herencia.

8.- POMPONIO; *Comentarios a Sabino, libro V.*- Si uno hubiere legado así: «mientras mi mujer viviere con mi hijo, dele tanto mi heredero», si ella por ocultarse del patrono se quitó de en medio, pero mantuviese su propósito de tener consigo a los hijos, dice Trebacio y Labeón, que se le debe el legado, porque no se ha de exigir que esté con los hijos todos los momentos, sino si tuviera la intención y el propósito de no separar de sí misma el hijo, o en ella no consista que el hijo no se eduque con ella.

9.- ULPIANUS; *libro XX, ad Sabinum*.- Solemus dicere eum, qui in tempus liberorum uxori legat, de his non sensisse, quos iam tunc uxor habuit, cum testaretur maritus.

10.- ULPIANUS, *libro XXIII, ad Sabinum*.- Haec condicio "filiae meae cum nupserit" talis est, ut qui testatus est impleri solummodo condicionem voluerit, non satis egerit quando: et ideo et si vivo testatore nupserit post testamentum factum, inpleta condicio videtur, praesertim cum condicio haec talis est, ut semel impleri debeat.

Sed enim non omnes coniunctiones implent condicionem: puta enim nondum nubilis aetatis in domum mariti deducta non paruit condicioni. Sed et si ei coniuncta sit, cuius nuptiis ei interdictum sit, idem dicemus. An tamen nubendo postea parere condicioni possit, quasi non nupserit, dubitari potest: et si testator de primo nuptiali iugo sensit, puto defectam condicionem: benigne tamen dicendum est nondum impletam condicionem defectam.

§ 1.- Si sic legatum sit "si navis ex asia venerit" et ignorante testatore navis venerit testamenti facti tempore, dicendum pro impleta haberi. Et si cui sic legatum est "cum pubes erit", simili modo hoc erit dicendum.

11.- PAULUS; *libro IV, ad Sabinum*.- Si iam facta sint quae condicionis loco ponuntur et sciat testator, quae iterum fieri possunt expectentur ut fiant: si vero nesciat, praesenti debeantur.

of not sending her son away, and whether it is not her duty to keep her son with her while he is being reared.

9.- ULPIANUS; *On Sabinus, Book XX*.- Where a husband bequeathed a legacy to his wife payable when she had children, we are accustomed to say that he did not have in his mind those children whom his wife already had at the time when he made his will.

10.- THE SAME; *On Sabinus, Book XXIII*.- The following condition, "I bequeath to my daughter, when she is married," signifies that the person who executed the will intended that the condition should only be fulfilled, and that it made no difference when this was done. Therefore, if the daughter should marry after the will was made, and during the lifetime of the testator, the condition will be held to have been complied with, and especially where it is of such a character that it should be complied with but once.

All material unions, however, do not bring about the fulfillment of a condition; for instance, where a girl who is not yet nubile is married, she does not comply with the condition. We say that the same rule will apply if she should marry anyone with whom she cannot be united according to law. But can any doubt arise whether she can comply with the condition by marrying afterwards, just as if she had not married the first time? If the testator had had in his mind the first marriage of his daughter, I think that the condition has failed; still the indulgent interpretation should be given that as the condition has not yet been fulfilled, it has not failed.

§ 1.- Where a legacy was bequeathed under the following condition: "If a ship should arrive from Asia," and the ship should arrive at the time that the will was made, but the testator was ignorant of the fact; it must be said that the condition has been fulfilled. This must also be said where a bequest is left to anyone, "When he arrives at puberty."

11.- PAULUS; *On Sabinus, Book IV*.- Where those things have already been done which were imposed by way of condition, and the testator was aware that they can be done a second time, the parties must wait until they are done the second time. If, however, the

9.- ULPIANO; *Comentarios a Sabino, libro XX*.- Solemos decir, que el que lega a su mujer para cuando tenga hijos, no se refirió a aquellos que ya tenía la mujer cuando testó el marido.

10.- EL MISMO; *Comentarios a Sabino, libro XXIII*.- Esta condición: «a mi hija, cuando se casare», es tal, que el que testó solamente quiso que se cumpliera la condición, sin haber expresado suficientemente cuándo; y por lo tanto, también si se hubiere casado en vida del testador después de hecho el testamento, se considera cumplida la condición, principalmente siendo esta condición tal, que se deba cumplir una sola vez,

Pero no todas las uniones cumplen la condición, como, por ejemplo, la que no siendo todavía de edad núbil fue llevada a la casa del marido no cumplió la condición; pero lo mismo diremos, aunque se haya unido a aquel con quien le estén prohibidas las nupcias. Pero se puede dudar si casándose después podrá cumplir la condición, como si no se hubiere casado. Y si el testador se refirió al primer yugo nupcial, opino que se faltó a la condición; pero por benignidad se ha de decir, que todavía no se cumplió la condición, ni se faltó a ella.

§ 1.- Si se hubiera legado así: «si la nave hubiere venido de Asia», e ignorándolo el testador hubiere llegado la nave al tiempo de hacerse el testamento, se ha de decir, que se tiene por cumplida. Y si a alguien se le legó así: «cuando fuere púbero», del mismo modo se habrá de decir esto.

11.- PAULO; *Comentarios a Sabino, libro IV*.- Si ya hubiera sido hecho lo que se pone por condición, y el testador lo supiera, espérese a que se haga lo que se puede hacer otra vez, y si no lo supiera, se debe desde luego.

testator did not know this, the legacies will be due immediately.

§ 1.- Item sciendum est promiscuas condiciones post mortem impleri oportere, si in hoc fiant, ut testamento pareatur, veluti "si Capitolium ascenderit" et similia, non promiscuas etiam vivo testatore existere posse, veluti "si Titius consul factus fuerit".

12.- ULPIANUS; *libro XXIV, ad Sabinum*.- Si ita legatum sit: "quoniam filius maior ex arca mea decem sustulit, heres minor filius decem e medio sumito", debetur legatum, quia idcirco relictum est, ut condicio filiorum exaequaretur. Et sane haec causa est: nam causa in praeteritum, poena in futurum confertur.

13.- PAULUS; *libro V, ad Sabinum*.- Si fundus alicui legatus fuerit, si pupillo vel furioso pecuniam dedisset, videtur explesse condicionem curatori vel tutori dando.

14.- POMPONIUS; *libro VIII, ad Sabinum*.- "Titius si statuas in municipio posuerit, heres esto". Si paratus est ponere, sed locus a municipibus ei non datur, Sabinus Proculus heredem eum fore et in legato idem iuris esse dicunt.

15.- ULPIANUS, *libro XXXV, ad Sabinum*.- Cui fuerit sub hac condicione legatum "si in familia nupsisset", videtur impleta condicio statim atque ducta est uxor, quamvis nondum in cubiculum mariti venerit. Nuptias enim non concubitus, sed consensus facit.

§ 1.- It also should be remembered that ordinary conditions must be fulfilled after the death of the testator, if this is necessary in order to comply with the provisions of the will, as, for example, "If he should ascend to the Capitol," and others of this kind. Unusual conditions can also be fulfilled during the lifetime of the testator, for instance, "If Titius should become Consul."

12.- ULPIANUS; *On Sabinus, Book XXIV*.- When a bequest is made as follows, "As my eldest son has taken ten aurei out of my chest, let my younger son take the same amount from the bulk of my estate," the legacy will be due, because it has been left in order that the condition of the children might be rendered equal. And it is clear that this is the case, for where anything is bequeathed for some reason, it refers to the past, but one which is left by way of penalty has reference to the future.

13.- PAULUS; *On Sabinus, Book V*.- Where an estate is left to anyone under the condition, "If he pays a certain sum to a minor, or an insane person," the legatee will be held to have complied with the condition if he pays the money to the curator or the guardian of the party interested.

14.- POMPONIUS; *On Sabinus, Book VIII*.- "Let Titius be my heir, if he erects statues in the city." If he is ready to erect the statues, but the municipal authorities will not furnish him with a place for that purpose, Sabinus and Proculus hold that he will become the heir, and that the same rule of law applies to a legacy.

15.- ULPIANUS, *On Sabinus, Book XXXV*.- Where a legacy is bequeathed under the following condition, "If she should marry in my family," the condition is held to have been complied with as soon as the marriage ceremony has been performed, although the woman has not yet entered the bed-chamber of her husband, for consent and not cohabitation constitutes marriage.

§ 1.- También se ha de saber, que las condiciones de cualquier tiempo se deben cumplir después de la muerte, si se cumplieran para esto, para atenerse al testamento, por ejemplo: «si hubiere subido al Capitolio», y otras semejantes; y que las que no son de cualquier tiempo, se pueden cumplir aún viviendo el testador, como: «si Ticio hubiere sido hecho Cónsul».

12.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si se hubiera legado así: «puesto que mi hijo mayor tomó de mi caja la suma de diez, tome diez de la masa mi hijo menor heredero», se debe el legado, porque se dejó precisamente para igualar la condición de los hijos; y, a la verdad, esta es una causa, porque la causa se refiere a lo pasado, y la pena a lo futuro.

13.- PAULO; *Comentarios a Sabino, libro V*.- Si a alguno se le hubiere legado un fundo, si le hubiese dado cierta cantidad a un pupilo, o a un furioso, se considera que cumplió la condición, dándosela al tutor o al curador.

14.- POMPONIO; *Comentarios a Sabino, libro VIII*.- «Sea heredero Ticio, si hubiere puesto estatuas en el municipio»; si está dispuesto a ponerlas, pero no se le da sitio por los del municipio, dicen Sabino y Próculo, que él habrá de ser heredero, y que el mismo derecho hay respecto a un legado.

15.- ULPIANO; *Comentarios a Sabino, libro XXXV*.- Si a una se le hubiere legado bajo esta condición: «si se hubiese casado en la familia», se considera cumplida la condición inmediatamente que fue tomada por mujer, aunque todavía no hubiere ido a la cámara del marido; porque no el concubito, sino el consentimiento, constituye las nupcias.

16.- GAIUS, *libro I, de testamento ad edictum praetoris*.- In his, quae extra testamentum incurrerent, possunt res ex bono et aequo interpretationem capere: ea vero, quae ex ipso testamento orerentur, necesse est secundum scripti iuris rationem expediri.

17.- GAIUS; *libro II, de legatis ad edictum praetoris*.- Demonstratio falsa est, veluti si ita scriptum sit: "servum Stichum, quem de Titio emi" "fundum Tusculanum, qui mihi a Seio donatus est". Nam si constat, de quo homine, de quo fundo senserit testator, ad rem non pertinet, si is, quem emisit significavit, donatus esset, aut quem donatum sibi esse significaverat, emerit.

§ 1.- Igitur et si ita servus legatus sit: "Stichum cocum", "Stichum sutorem Titio lego", licet neque cocus neque sutor sit, ad legatarium pertinebit, si de eo sensisse testatorem conveniat: nam et si in persona legatarii designanda aliquid erratum fuerit, constat autem, cui legare voluerit, perinde valet legatum ac si nullus error interveniret.

§ 2.- Quod autem iuris est in falsa demonstratione, hoc vel magis est in falsa causa, veluti ita "Titio fundum do, quia negotia mea curavit", item "fundum Titius filius meus praecipito, quia frater eius ipse ex arca tot aureos sumpsit": licet enim frater huius pecuniam ex arca non sumpsit, utile legatum est.

§ 3.- At si conditionaliter concepta sit causa, veluti hoc modo: "Titio, si negotia mea curavit, fundum do": "Titius filius meus, si frater eius centum ex arca sumpsit, fundum praecipito", ita utile erit legatum, si et ille negotia curavit et huius frater centum ex arca sumpsit.

16.- GAIUS; *On the Edict of the Praetor Relating to Wills*.- Where questions arise with reference to matters foreign to the will, they must receive a just and liberal interpretation; but those which arise concerning the will itself must be determined in strict accordance with the rules of the written law.

17.- THE SAME; *On the Edict of the Praetor Relating to Legacies*.- A designation is incorrect where it is made as follows, "I bequeath the slave Stichus, whom I have bought of Titius, the Tusculan estate which was presented to me by Seius," for if it is known to what slave or to what estate the testator referred, it will not be material if he whom he said that he had bought was really given to him, or if what he indicated had been donated to him he in fact had purchased.

§ 1.- Therefore, where a slave is bequeathed as follows, "I bequeath to Titius my cook Stichus, my shoemaker Stichus," although the slave may be neither a cook nor a shoemaker, he will belong to the legatee, if it should positively be ascertained that the testator had him in mind when he made the bequest. For even if the mistake is made in designating the person of the legatee, but it is clear to whom the testator intended to make the bequest, it will be as valid as if no error had been committed.

§ 2.- This rule with reference to a false designation is still more applicable where the reason is incorrectly stated, as, for instance, as follows, "I give such-and-such an estate to Titius, because he has had charge of my business." Likewise, "Let my son Titius receive, as a preferred legacy, such-and-such a tract of land, because his brother took such-and-such a sum of aurei from my chest," for even if the brother did not take the said sum of money from the chest, the legacy will be valid.

§ 3.- But if the legacy is mentioned in terms which impose a condition, for instance, as follows, "I give such-and-such a tract of land to Titius, if he has transacted my business," "Let my son Titius receive such-and-such a tract of land, as a preferred legacy, if his brother took a hundred aurei from my chest," the

16.- CAYO; *Comentarios al Edicto del Pretor, libro I de los testamentos*.- En aquello que caiga fuera del testamento, las cosas pueden admitir interpretación según lo bueno y equitativo. Pero lo que naciera del mismo testamento es necesario que se ejecute conforme a la razón del derecho escrito.

17.- EL MISMO; *Comentarios al Edicto del Pretor, libro II. de los legados*.- Es falsa la demostración, por ejemplo, si se hubiera escrito así: «el esclavo Stico, que compre a Ticio; el fundo Tusculano, que me fue donado por Seyo»; porque si consta de que esclavo, de qué fundo haya entendido hablar el testador, no hace al caso si hubiese sido donado el que indicó haber comprado, o si hubiere comprado el que había indicado que le había sido donado.

§ 1.- Así, pues, también si se hubiera legado así un esclavo: «lego a Ticio el cocinero Stico, el zapatero Stico», aunque no sea ni cocinero, ni zapatero, pertenecerá al legatario, si aparece que de él entendió hablar el testador; porque aunque se haya errado en algo al designar la persona del legatario, pero conste a quién le haya querido legar, es válido el legado lo mismo que si no mediase ningún error.

§ 2.- Mas el mismo derecho que hay respecto a la falsa demostración, existe con más razón en cuanto a una causa falsa, por ejemplo, en esta: «doy a Ticio un fundo, porque cuidó de mis negocios» y también: «tome de la masa mi hijo Ticio un fundo, porque su mismo hermano tomó de la caja tantos áureos»; porque aunque su hermano no haya tomado de la caja los tantos áureos, es válido el legado.

§ 3.- Pero si la causa estuviera concebida condicionalmente, por ejemplo, de este modo: «doy a Ticio un fundo, si cuidó de mis negocios; tome de la masa mi hijo Ticio un fundo, si su hermano tomó ciento de la caja», el legado será válido de este modo, si él cuidó de los negocios, y si su hermano tomó de la

§ 4.- Quod si cui in hoc legatum sit, ut ex eo aliquid faceret, veluti monumentum testatori vel opus aut epulum municipibus faceret, vel ex eo ut partem alii restitueret: sub modo legatum videtur.

18.- GAIUS; *libro XVIII. ad edictum provinciale.*- Is, cui sub condicione non faciendi aliquid relictum est, ei scilicet cavere debet Muciana cautione, ad quem iure civili, deficiente condicione, hoc legatum eave hereditas pertinere potest.

19.- ULPIANUS; *libro V, disputationem.*- In condicionibus primum locum voluntas defuncti optinet eaque regit condiciones. Denique et in ea condicione "si filia mea cum Titio nupta erit" placuit non semper mortis tempus observari, sed voluntate patrocinante tardius produci.

§ 1.- Haec scriptura "si primus heres erit, damnas esto dare" pro condicione non est accipienda: magis enim demonstravit testator, quando legatum debeatur, quam condicionem inseruit: nisi forte hoc animo fuerat testator, ut faceret condicionem. Proinde nec illud dicendum erit facere condicionem: "Quidquid mihi ephesi oportet dari, hoc do lego".

Sed si sic leget: "si primus mihi heres non erit, damnas esto secundus dare" et primus heres exstitit, legatum non debebitur: si primus adierit cum secundo, non exstitisse condicionem nequaquam ambigendum est.

legacy will be valid if the legatee transacted the business, or his brother took a hundred aurei out of the chest.

§ 4.- Where a legacy is bequeathed to anyone dependent upon his performing some act, as, for example, erecting a monument to the testator, or constructing some public work, or giving a banquet to the people of the city, or paying part of the legacy to another, the legacy will be considered to have been bequeathed under a certain modification.

18.- THE SAME; *On the Provincial Edict, Book XVIII.*- Where property is left to anyone under the condition of his not doing something, he must give security by means of the Mucian Bond to him to whom the legacy or the estate will belong under the Civil Law if the condition should fail to be complied with.

19.- ULPIANUS, *Disputations, Book V.*- The intention of the deceased occupies the first place in the conditions prescribed by him, and it controls the conditions. Hence, with reference to the following, "If my daughter should marry Titius," it was held that the date of the death of the testator ought not always to be considered, but that the time for the fulfillment of the condition could be extended beyond that event, where this was the wish of the testator.

§ 1.- The following clause, "If the first should be my heir, let him be charged to pay," is not to be considered as implying a condition; for the testator seems rather to have intended to indicate when the legacy should be payable than to insert a provision, unless he meant to impose a condition; hence the following should not be held to prescribe a condition, "I give and bequeath whatever is due to me at Ephesus."

If, however, a bequest is made as follows, "If the first should not be my heir, let the second be charged to pay," and the first becomes the heir, the legacy will not be due. If the first should enter upon the estate, along with the second, there can be no doubt whatever that the condition has not been fulfilled.

caja los ciento.

§ 4.- Mas si a uno se le hubiera hecho un legado para esto, para que con él hiciera alguna cosa, por ejemplo, un monumento al testador, o una obra, o para que diera un banquete a los individuos del municipio, o para que de él restituyese parte a otro, se considera que se legó bajo modo.

18.- EL MISMO; *Comentarios al Edicto provincial, libro XVIII.*- Aquel a quien se le dejó alguna cosa con la condición de no hacer, debe dar seguridad con la caución Muciana, por supuesto, a aquel a quien por Derecho Civil puede pertenecer este legado, o esta herencia, faltando la condición.

19.- ULPIANO; *Disputas, libro V.*- En las condiciones obtiene el primer lugar la voluntad del difunto, y ella regula las condiciones; por último, también en esta condición: «si mi hija se hubiere casado con Ticio», se determinó, que no se atienda siempre al tiempo de la muerte, sino que por apoyarlo la voluntad se prorroga más el término.

§ 1.- Esta cláusula: «si Primo fuere heredero, esté condenado a dar», no ha de ser admitida como condición; porque más bien demostró el testador cuándo se deberá el legado, que no que insertó una condición, a no ser acaso que el testador haya tenido el designio de poner una condición. Por lo tanto, se habrá de decir que tampoco esto constituye una condición: «doy y lego todo lo que se me deba dar en Efeso».

Pero si legara así: «si Primo no fuere mi heredero, esté Segundo condenado a dar», y Primo fue heredero, no se deberá el legado; si Primo hubiera adido la herencia con Segundo, de ningún modo se ha de dudar que no existió la condición.

§ 2.- Si patronus contra tabulas bonorum possessione accepta debitam portionem occupet, legata quae sic data sunt "si patronus heres non erit" non debet coheres patroni praestare.

§ 3.- Si a primo ita legatum est "si secundus heres non erit, viginti Titio dato", simili modo a secundo eidem Titio ita legatum est: "si primus heres non erit" et ambo heredes exstiterint, legati condicio deficiet: si alter heres exstitit, alter heres non exstitit, legatum debebitur.

20.- MARCELLUS; *notum ad Iuliani libro XXVII digestorum.*- Non dubitamus, quin turpes condiciones remittendae sunt: quo in numero plerumque sunt etiam iurisiurandi.

21.- IULIANUS, *libro XXXI, digestorum.*- Multum interest, condicio facti an iuris esset: nam huiusmodi condiciones "si navis ex asia venerit" "si Titius consul factus erit", quamvis impletae essent, impediunt heredem circa adeundam hereditatem, quamdiu ignoraret eas impletas esse: quae vero ex iure venient, in his nihil amplius exigendum, quam ut impletae sint. Veluti si quis se filium familias existimat, cum sit pater familias, poterit adquirere hereditatem: quare et ex parte heres scriptus, qui ignorat, an tabulae testamenti apertae sint, adire hereditatem poterit.

22.- IULIANUS; *libro XXXV, digestorum.*- Quotiens sub condicione mulieri legatur "si non nupserit" et eiusdem fidei commissum sit, ut Titio restituat, si nubat, commode statuitur et si nupserit, legatum eam petere posse et non esse cogendam fideicommissum praestare.

§ 2.- Where a patron, having obtained possession of an estate contrary to the provisions of the will, receives the share which is due to him by law, his co-heir will not be obliged to pay to him any legacies which have been bequeathed under the following condition, "If my patron should not be my heir."

§ 3.- Where the first heir has been charged with a legacy as follows, "If the second should not be my heir, let him pay Titius twenty aurei," and, in like manner if the second heir is charged with a bequest to Titius as follows, "If the first should not be my heir," and both parties become the heirs, the condition of the legacy will not be fulfilled. If one of the heirs should obtain the estate, and the other should not, the legacy will be due.

20.- MARCELLUS; *remarks as follows on Julianus, Digest, Book XXVII.*- We have no doubt that dishonorable conditions should be referred back to those who imposed them. Among these are, generally speaking, such as require an oath.

21.- JULIANUS, *Digest, Book XXXI.*- It makes a great deal of difference whether the condition is one of fact or one of law. For conditions like the following, "If a ship should arrive from Asia," "If Titius should become Consul," although they may not be fulfilled, they prevent the heir from entering upon the estate, so long as he is ignorant that they remain unfulfilled. Those, however, which refer to matters of law, only require to be unfulfilled whether the heir is aware of the fact or not. For instance, where anyone thinks he is under paternal control, when he is, in reality, the head of a household, he can acquire an estate. Wherefore, when anyone is appointed heir to a portion of an estate, although he may be ignorant whether the will has been opened or not, he can still enter upon the estate.

22.- THE SAME, *Digest, Book XXXV.*- Whenever a bequest is made to a wife under the condition that she will not marry, and she is charged to deliver the property bequeathed to Titius if she should marry, it has been well established that if she marries she can claim the legacy, and will not be compelled to

§ 2.- Si el patrono, habiendo recibido la posesión de los bienes contra las tablas, ocupara la porción debida, el coheredero del patrono no debe pagar los legados, que se dieron así: «si el patrono no fue heredero».

§ 3.- Si a cargo de Primo se lega así: «si Segundo no fuere heredero, dele veinte a Ticio», y de igual modo se le legó así al mismo Ticio a cargo de Segundo: «si Primo no fuere heredero», y ambos hubieren quedado siendo herederos, faltará la condición del legado; y si el uno fue heredero, y el otro no fue heredero, se deberá el legado.

20.- MARCELO *nota en Juliano; Digesto, libro XXVII.*- No dudamos, que las condiciones torpes se han de dispensar, en cuyo número están muchas veces también las de juramento.

21.- JULIANO; *Digesto, libro XXXI.*- Hay mucha diferencia entre que la condición sea de hecho, o de derecho; porque las condiciones de este género: «si la nave hubiere venido de Asia, si Ticio hubiere sido hecho Cónsul», aunque hayan sido cumplidas, le impedirán al heredero adir la herencia, mientras ignore que se cumplieron. Pero en las que provinieren del derecho no se ha de exigir nada más sino que hayan sido cumplidas, por ejemplo, si alguno se cree que es hijo de familia siendo padre de familia, podrá adquirir la herencia; por lo cual, también podrá adir la herencia el heredero instituido en una parte, que ignora si se abrieron las tablas del testamento.

22.- EL MISMO; *Digesto, libro XXXV.*- Siempre que se le lega a una mujer bajo esta condición, si no se hubiere casado, y se encomendó a su fidelidad que restituya a Ticio, si ella se casara, se determina convenientemente, que aunque se hubiere casado puede pedir el legado, y que no ha de ser obligada a

23.- IULIANUS; *libro XLIII, digestorum*.- Qui duobus heredibus decem dare iussus est et fundum sibi habere, verius est, ut condicionem scindere non possit, ne etiam legatum scindatur. Igitur quamvis alteri quinque dederit, nullam partem fundi vindicabit, nisi alteri quoque adeunti hereditatem reliqua quinque numeraverit aut illo omittente hereditatem ei, qui solus adierit hereditatem, tota decem dederit.

24.- IULIANUS; *libro LV, digestorum*.- Iure civili receptum est, quotiens per eum, cuius interest condicionem impleri, fit, quo minus impleatur, ut perinde habeatur, ac si impleta condicio fuisset: quod plerique et ad legata et ad heredum institutiones perduxerunt. Quibus exemplis stipulationes quoque committi quidam recte putaverunt, cum per promissorem factum esset, quo minus stipulator condicioni pareret.

25.- IULIANUS; *libro LIX, digestorum*.- Cum vir uxori, quandoque liberos habebit, fundum legat, si mulier divortio facto liberos ex alio procreaverit, deinde soluto secundo matrimonio ad priorem maritum redierit, non intellegitur expleta condicio, quod testatorem verisimile non est de his liberis sensisse, qui se vivo ex alio suscepti fuissentiarum

26.- IULIANUS; *libro LXXXII, digestorum*.- Haec scriptura "si viginti dederit aut iuraverit se aliquid facturum" unam condicionem exprimit habentem duas partes: quare si quicumque heres scriptus erit sub condicione "si iuraverit se decem daturum" aut "monumentum facturum", quamvis verbis edicti ad hereditatem vel legatum admittatur, tamen compellitur facere id quod facturum se iurare iussus est solo iureiurando remisso.

execute the trust.

23.- THE SAME; *Digest, Book XLIII*.- Where a testator directed his legatee to pay ten aurei to his two heirs, and to take for himself a certain tract of land, the better opinion is that the heir cannot divide the condition, unless the legacy is also divided. Therefore, although he may have paid five aurei to one of the heirs, he can claim no part of the land unless he pays the remaining five to the heir who enters upon the estate; or if he should reject it, he pays the entire ten to the one who alone accepts it.

24.- THE SAME, *Digest, Book LV*.- It has been established by the Civil Law that a condition is always considered to have been fulfilled where the party who is interested in not having this done opposes its fulfillment. Many authorities have extended the application of this rule to legacies and the appointment of heirs. Certain jurists have also very properly held that in cases of this kind, stipulations become operative when attempts are made by the promisor to prevent the stipulator from complying with the condition.

25.- THE SAME, *Digest, Book LIX*.- Where a husband bequeaths his estate to his wife, and they have children, and the woman, after a divorce has been obtained, has children by another man, and then, the second marriage having been dissolved, she returns to her first husband, the condition is not understood to have been complied with, for it is probable that the testator did not have in his mind the children who, during his lifetime, had been begotten by another man.

26.- THE SAME; *Digest, Book LXXXII*.- The following clause, "If he should pay twenty aurei or swear that he will perform a certain act," includes a condition which has two parts. Hence, if anyone should be appointed an heir under the condition that he will swear that he will pay ten aurei, or erect a monument, although he will be permitted, under the terms of the Edict, to receive the estate or the legacy, he will still be compelled to do what he was ordered to swear that he would do, as only the oath can be

cumplir el fideicomiso.

23.- EL MISMO; *Digesto, libro XLIII*.- Es más cierto que aquel a quien se le mandó que diera diez a dos herederos, y que tenga para sí un fundo, no puede dividir la condición, para que tampoco se divida el legado. Así, pues, aunque al uno le hubiere dado cinco, no reivindicará ninguna parte del fundo, si no hubiere entregado también al otro, que adiese la herencia, los cinco restantes, o no hubiere dado, dejando aquel de aceptar la herencia, todos los diez al único que hubiere adido la herencia.

24.- EL MISMO; *Digesto, libro LV*.- Está admitido en Derecho Civil, que siempre que por aquel, a quien le interesa que se cumpla la condición, se hace que no se cumpla, se considere lo mismo que si se hubiese cumplido la condición; lo que extendieron los mas también a los legados, y a las instituciones de herederos. Con cuyos ejemplos opinaron con razón algunos, que también se incurría en las estipulaciones, cuando por el que prometía se hubiese hecho de modo que el que estipulaba no cumpliera la condición.

25.- EL MISMO; *Digesto, libro LIX*.- Cuando el marido lega un fundo a su mujer, cuando quiera que tuviere hijos, si la mujer habiéndose divorciado hubiere procreado hijos de otro, y después, disuelto el segundo matrimonio, hubiere vuelto a su primer marido, no se entiende cumplida la condición, porque no es verosímil que el testador haya entendido hablar de estos hijos, que viviendo él se hubiesen tenido de otro.

26.- EL MISMO; *Digesto, libro LXXXII*.- Esta clausula: «si hubiere dado veinte, o jurado que hará alguna cosa», expresa una condición que tiene dos partes; por lo cual, si un heredero cualquiera hubiere sido instituido bajo esta condición, si hubiere jurado que dará diez, o que hará un monumento, aunque por las palabras del Edicto sea admitido a la herencia o al legado, es, sin embargo, compelido a hacer lo que se le mandó que jurase que haría, remitiéndose solo el juramento.

remitted.

§ 1.- Cum eadem res alteri pure, alteri sub condicione legatur aut cum alter pure, alter sub condicione heres scriptus est, pars legati vel hereditatis deficiente condicione adcrevit etiam heredi eius, cui pure legatum vel hereditas data est, si tamen hereditas eius adita fuerit.

27.- ALFENUS; *libro V, digestorum*.- In testamento quidam scripserat, ut sibi monumentum ad exemplum eius, quod in via Salaria esset Publii Septimii Demetrii, fieret: nisi factum esset, heredes magna pecunia multare et cum id monumentum Publii Septimii Demetrii nullum repperiebatur, sed Publii Septimii Damae erat, ad quod exemplum suspicabatur eum qui testamentum fecerat monumentum sibi fieri voluisse, quaerebant heredes, cuiusmodi monumentum se facere oporteret et, si ob eam rem nullum monumentum fecissent, quia non repperirent, ad quod exemplum facerent, num poena tenerentur.

Respondit, si intellegeretur, quod monumentum demonstrare voluisset is qui testamentum fecisset, tametsi in scriptura mendum esset, tamen ad id, quod ille se demonstrare animo sensisset, fieri debere: sin autem voluntas eius ignoraretur, poenam quidem nullam vim habere, quoniam ad quod exemplum fieri iussisset, id nusquam exstaret, monumentum tamen omnimodo secundum substantiam et dignitatem defuncti exstruere debere.

28.- PAULUS; *libro II, epitomarum Alfeni digestorum*.- Filiae suae ita quis legavit: "Si Attia filia mea arbitratu Lucii Titii nupserit, ei tot heres meus dato". Titio ante testatorem mortuo Attia nupserat: quaerebatur, an legatum ei deberetur. Respondit deberi.

§ 1.- Where the same property is bequeathed to one person absolutely, and to another conditionally, or where one heir is appointed absolutely, and another under a condition, and the condition fails, half of the legacy or the estate will accrue to the heir or the legatee to whom the legacy or the estate was absolutely bequeathed, provided the party accepted his share of the same.

27.- ALFENUS VARUS; *Digest, Book V*.- A certain individual provided in his will that a monument, like that of Publius Septimius Demetrius which stands on the Salarian Way, should be erected to him, and if this was not done, that his heirs should be liable to a considerable fine. As no monument to Publius Septimius Demetrius could be found, but there was one erected to Publius Septimius Damas, and it was supposed that the party who made the will intended that a monument should be erected to him like the one aforesaid, the heirs asked advice as to what kind of a monument they would be obliged to erect, and whether they would be liable to the penalty if they did not erect any, because they could not find one to use as a pattern.

The answer was that if it could be ascertained what kind of a monument the party who made the will intended to designate, even though he may not have described it in his will, it should still be erected in accordance with what he wished to indicate. If, however, his intention was not known, the penalty would have no force or effect, as there was no monument found which could serve as a pattern for the one which he ordered to be erected; but the heirs must, nevertheless, erect a monument corresponding in every respect with the wealth and rank of the deceased.

28.- PAULUS; *Epitomes of the Digest of Alfenus, Book III*.- A testator made the following bequest to his daughter, "If my daughter, Attia, should marry with the consent of Lucius Titius, let my heir give her such-and-such a sum." Titius having died before the testator Attia married, the question arose whether she would be entitled to the legacy. The answer was that

§ 1.- Cuando la misma cosa es legada a uno puramente, y a otro bajo condición, o cuando uno fue instituido heredero puramente, y otro bajo condición, faltando la condición, la parte del legado o de la herencia acrece también al heredero de aquel a quien se le dió puramente el legado o la herencia, si no obstante hubiere sido adida la herencia del mismo.

27.- ALFENO VARO; *Digesto, libro V*.- Uno había escrito en su testamento, que se le hiciera un monumento a semejanza del que fuese de Publio Septimio Demetrio en la vía Salaria, y que si no se le hubiese hecho, fueran multados los herederos en una gran cantidad; y como no se encontraba ningún monumento de Publio Septimio Severo, pero lo había de Publio Septimio Dama, a cuya semejanza se sospechaba que quiso el que había hecho el testamento que se le hiciera el monumento, preguntaban los herederos, de qué modo deberían hacer ellos el monumento, y si quedarían sujetos ala pena, si no hubiesen hecho ningún monumento por esta razón, porque no hallaron modelo para hacerlo.

Respondió, que si se entendiese qué monumento hubiese querido indicar el que hubiese hecho el testamento, aunque no estuviera expresado en la escritura, debe hacerse, sin embargo, como aquel que él hubiese entendido indicar con su intención; pero que si fuese ignorada su voluntad, no tenía ciertamente ninguna fuerza la pena, porque nunca se sabría a semejanza de cual había mandado que se hiciera; pero que de todos modos debían levantar un monumento con arreglo a la riqueza y a la voluntad del difunto.

28.- PAULO; *Epítome del Digesto de Alfenio, libro II*.- Uno legó así a su hija: «si Atcia, mi hija, se casare a arbitrio de Lucio Ticio, dele tanto mi heredero »; Atcia se había casado habiendo muerto Ticio antes que el testador; se preguntaba, si se le debería el legado. Respondió, que se le debía.

§ 1.- "Attia uxor mea Optato Philargyrum puerum, Agatheam ancillam, qui mei erunt cum moriar": is qui testamentum fecit Agatheam, quam testamenti tempore habuit, vendidit et postea ancillas emit, ex his uni Agatheae nomen imposuit:

Quaesitum est, an haec legata videretur. Respondit legatam videri.

29.- IULIANUS; *libro I. ad Urseium Ferozem*.- Haec condicio "si in Capitolium ascenderit" sic recipienda est "si cum primum potuerit Capitolium ascendere".

30.- IULIANUS; *libro I, ex Minicio*.- Si separatim mihi totus fundus pure, tibi sub condicione legatus fuerit et tu decesseris, antequam condicio exstiterit: non habeo necessitatem implere condicionem, utpote cum, etiamsi condicio defecerit, pars quam vindicaturus eras mihi adcreseat.

31.- AFRICANUS; *libro II, quaestionum*.- In testamento ita erat scriptum: "Stichus et Pamphila liberi sunt et si in matrimonium coierint, heres meus his centum dare damnas esto": Stichus ante apertas tabulas decessit. Respondit partem Stichi defectam esse: sed et Pamphilam defectam condicione videri ideoque partem eius apud heredem remansuram.

Sed et si uterque viveret et Stichus nollet eam uxorem ducere, cum mulier parata esset nubere, illi quidem legatum deberetur, Stichi autem portio inutilis fiebat. Nam cum uni ita legatum sit: "Titio, si Seiam uxorem duxerit, heres meus centum dato", si quidem Seia moriatur, defectus condicione intellegitur: at si ipse decedat, nihil ad heredem suum eum transmittere, quia morte eius condicio defecisse intellegitur: utroque autem vivente si quidem ipse nolit uxorem ducere, quia ipsius facto condicio deficit, nihil ex legato consequitur, muliere autem

she would.

§ 1.- "Let my wife Attia take the boy Philargyrus and the girl Agatheia from the slaves who will belong to me at the time of my death." The testator sold Agatheia, whom he owned at the time he made the will, and afterwards bought other female slaves, to one of whom he gave the name of Agatheia.

The question arose whether she should be considered as having been bequeathed. The answer was that she should be.

29.- JULIANUS; *On Urseius Ferox, Book I*.- The following condition, "If he should ascend to the Capitol," should be understood to mean if he should ascend to the Capitol as soon as he could.

30.- THE SAME; *On Minicius, Book I*.- If an entire estate should be bequeathed to me separately and absolutely, and to you conditionally, and you should die before the condition was complied with, I will not be required to comply with it, as even if the condition should fail, the share which you could have claimed will accrue to me.

31.- AFRICANUS; *Questions, Book II*.- The following provision was inserted into a will, "Let Stichus and Pamphila be free, and if they should be united in marriage, let my heir be charged to pay them a hundred aurei." Stichus died before the will was opened. The answer was that the right to the share of Stichus was extinguished, and that, as it appeared that Pamphila had failed to comply with the condition, her share would therefore remain in the possession of the heir.

If, however, both of them had lived, and Stichus had refused to marry her while the woman was ready to marry him, she would be entitled to her share of the legacy, but the right of Stichus to his share would be extinguished. For where a legacy is bequeathed to anyone as follows, "Let my heir pay a hundred aurei to Titius, if he marries Seia," and Seia should die, Titius is understood to have failed to comply with the condition. But if he himself should die, he will not transmit the legacy to his heir, because by his death the condition is understood not to have been fulfilled.

§ 1.- «Opte Atcia, mi mujer, por el joven Filargilo, o por la esclava Agatea, que fueren míos, cuando yo muera»; el que hizo el testamento vendió a Agatea, a quien tenía al tiempo del testamento, y después compró esclavas; a una de éstas le puso el nombre de Agatea;

Se preguntó, si se consideraría que ésta fue legada. Respondió, que se consideraba legada.

29.- JULIANO; *Comentarios a Urseyo Ferox, libro I*.- Esta condición: «si él hubiere subido al Capitolio»; ha de ser entendida así, si luego que hubiere podido subir al Capitolio.

30.- EL MISMO; *Doctrina de Minicio, libro I*.- Si por separado se me hubiese legado puramente todo el fundo, y a ti bajo condición, y tú hubieras fallecido antes que se hubiere cumplido la condición, no tendré necesidad de cumplir la condición, como quiera que también si hubiere faltado la condición me acrece la parte que tu habías de reivindicar.

31.- AFRICANO; *Cuestiones, libro II*.- Se había escrito así en un testamento.: «sean libres Stico y Pánfila, y si se hubieren unido en matrimonio, esté mi heredero condenado a darles ciento»; Stico falleció antes de haberse abierto las tablas; res-pondió, que faltó la parte de Stico; pero que se consideraba que también Pánfila faltó a la condición, y que por lo tanto su parte habrá de quedar en poder del heredero.

Pero aunque «ambos viviesen», y Stico no quisiera tomarla por mujer, estando dispuesta la mujer a casarse, se le debería a ella ciertamente el legado, pero se inutilizaba la porción de Stico. Porque cuando a uno solo se le hubiera legado así: «dele mi heredero ciento a Ticio, si hubiere tomado por mujer a Seya», si verdaderamente tuviese Seya, se entiende que faltó él a la condición; pero si el mismo falleciera, no transmite nada a su heredero, porque se entiende que con su muerte faltó la condición; mas viviendo ambos, si él no quisiera ciertamente tomarla por mujer, como quiera que falta la

nolente nubere, cum ipse paratus esset, legatum ei debetur.

32.- AFRICANUS; *libro IX, quaestionum*.- Quamvis rationes reddere nihil aliud sit quam reliqua solvere, tamen si et statuliberi et heredis culpa, sine fraude tamen servi minus solutum sit et bona fide redditae esse rationes existimatum fuerit, liberum fore: et nisi ita observetur, neminem, qui sub conditione ita manumissus esset, umquam ad libertatem perventurum, si per imprudentiam minus solutum esset.

Haec ita accipienda ait, si quando is, qui rationes reddere iussus sit, per aliquem errorem sine dolo malo ita rationes ediderit, ut dominus quoque circa computationem erraret.

33.- MARCIANUS; *libro VI, institutionum*.- Falsa demonstratio neque legatario neque fideicommissario nocet neque heredi instituto, veluti si fratrem dixerit vel sororem vel nepotem vel quodlibet aliud: et hoc ita Iuris Civilis ratione et constitutionibus divorum Severi et Antonini cautum est.

§ 1.- Sed si controversia sit de nomine inter plures: qui probaverit sensisse de se defunctum, ille admittitur.

§ 2.- Sed si cui quasi liberto, id est inter libertos legatum fuerit, non idcirco legatum amittit, quia postea anulos ab imperatore acceperit: nam honor eius auctus est, non condicio mutata: et ita divi Severus et Antoninus rescripserunt.

Where, however, both of them are living, and he refuses to marry her, for the reason that the condition fails through his act, he cannot obtain the legacy; but if the woman is unwilling to marry him, and he is ready to marry her, he will be entitled to it.

32.- THE SAME; *Questions, Book IX*.- Although the words, "Render his accounts," have no other signification than to pay the balance which was due, still, if less than is due is paid by a slave who is to be free under a certain condition, through the fault of the heir, and not on account of any fraud committed by the slave, and he is considered to have rendered his accounts in good faith, he will become free; and, unless this rule is observed, no slave who is manumitted under a condition would ever obtain his freedom, if, through want of knowledge, he should pay less than he ought to have paid.

This must be understood to refer to cases where a slave is ordered to render his accounts, and, through some mistake but without fraudulent intent, he does so in such a way that his master may also be mistaken with reference to his calculation.

33.- MARCIANUS, *Institutes, Book VI*.- A false designation does not benefit the legatee, the beneficiary of the trust, or an heir who has been appointed; for instance, where" the testator incorrectly refers to his brother, his sister, his grandson, or anything else.

This was provided for by the Civil Law, as well as by the Constitutions of the Divine Severus and Antoninus.

§ 1.- Where, however, a controversy arises with reference to several persons having the same name, that one will be admitted to the succession who can prove that the deceased had reference to him.

§ 2.- Where a bequest is made to anyone as to a freedman, that is to say, by mentioning him among other freedmen, he should not lose the legacy for the reason that afterwards he may have received a gold ring from the Emperor, for his dignity is increased, and his condition is not altered, as was stated by the Divine Severus and Antoninus in a Rescript.

tomarla por mujer, como quiera que falta la condición por hecho de él, no consigue nada del legado; pero no queriendo casarse la mujer, estando él dispuesto, se le debe el legado.

32.- EL MISMO; *Cuestiones, libro IX*.- Aunque dar cuentas no sea nada más que entregar los remanentes, sin embargo, si por culpa del manumitido en testamento bajo condición, y del heredero, pero sin fraude del esclavo, se hubiere entregado menos, y se hubiere estimado que las cuentas fueron dadas de buena fue, habrá de ser libre; y si así no se observase, nadie, que de tal manera hubiese sido manumitido bajo condición, llegaría nunca a la libertad, si por impericia se hubiese entregado menos. Y dice que esto se ha de entender así, cuando aquél, a quien se le hubiese mandado rendir cuentas, hubiere por algún error presentado sin dolo malo las cuentas de tal modo, que también el señor errase en el cómputo.

33.- MARCIANO; *Instituta, libro VI*.- La falsa demostración no perjudica ni al legatario, ni al fideicomisario, ni al heredero instituido, por ejemplo, si hubiere dicho hermano, o hermana, o nieto, u otra cosa cualquiera;

Y esto se dispuso así por razón del Derecho Civil y por Constituciones de los Divinos Severo y Antonino.

§ 1.- Pero si sobre el nombre hubiera controversia entre muchos, será admitido el que hubiere probado que el difunto entendió referirse a él.

§ 2.- Pero si a uno se le hubiere legado como a liberto, esto es, entre los libertos, no pierde el legado porque después hubiere recibido del Emperador los anillos; porque se aumentó su honor, pero no se cambió su condición; y así respondieron por Rescripto los Divinos Severo y Antonino.

§ 3.- Si quis legaverit rem ita, si mortis tempore eius erit, nec tunc eius invenitur, nec aestimatio eius legari videbitur.

§ 4.- Quid ergo, si quis ita scripserit: "Stichum et Pamphilum Titio do lego, si mei erunt cum moriar" et unum ex his alienaverit, an vel alter possit a legatario vindicari? Placet vindicari, nam hunc sermonem, licet pluralis sit, pro eo oportet accipi, atque si separatim dixisset: "Stichum, si meus erit cum moriar".

34.- FLORUS; *libro XI, institutionum*.- Nominatim alicui legatur ita "Lucio Titio" an per demonstrationem corporis vel artificii vel officii vel necessitudinis vel adfinitatis, nihil interest: nam demonstratio plerumque vice nominis fungitur. Nec interest, falsa an vera sit, si certum sit, quem testator demonstraverit.

§ 1.- Inter demonstrationem et condicionem hoc interest, quod demonstratio plerumque factam rem ostendit, condicio futuram.

35.- POMPONIUS; *libro singulari regularum*.- Levissima libertatis condicio ea intellegenda est, quae ad libertatem perducit, quamvis natura gravior et durior sit.

36.- MARCELLUS; *libro singulari responsorum*.- Publius Maevius testamento suo ita cavit: "Quisquis mihi heres heredesve erunt, do lego fideique eorum committo, uti dent Gaio Seio sororis meae filio in honorem consulatus quadringenta": vivo Maevio Seius consul designatus est et munus edidit: deinde ex calendis ianuariis consulatum ingressus est atque

§ 3.- If anyone should bequeath property as follows, "If it should belong to me at the time of my death," and it is not found at that time, the appraised value of said property will not be considered to have been bequeathed.

§ 4.- But what if anyone should provide by his will as follows, "I give and bequeath Stichus and Pamphilus to Titius, if they should belong to me at the time of my death," and he should alienate one of them, could the other be claimed by the legatee? It was decided that he could be claimed, for this clause, although it is in the plural number, must be understood just as if the testator had said separately, "I give and bequeath Stichus if he should be mine at the time of my death."

34.- FLORENTINE; *Institutes, Book XI*.- Where a bequest is made to anyone specifically, as, for example, to Lucius Titius; it would make no difference whether he designated him in this way, or by mentioning his physical characteristics, his trade, employment, relationship, or affinity; for a designation of this kind generally takes the place of the name, nor is it of any consequence whether it be false or true, provided it is positively known whom the testator meant.

§ 1.- There is this difference between designation and a condition: a designation generally refers to something which has already been done, a condition to something which is to take place.

35.- POMPONIUS; *Rules*.- The easiest of several conditions upon which freedom is dependent is considered to be the one which leads most directly to freedom, although it may be, by nature, harder and more difficult of accomplishment than the others.

36.- MARCELLUS; *Opinions*.- Publius Mævius provided by his will as follows: "I give and bequeath, and charge whoever shall be my heirs to pay to my sister's son Gaius Seius, forty aurei for his expenses during his Consulship." Seius was appointed Consul during the lifetime of Mævius, and gave the ordinary present, and afterwards, upon the Kalends of January,

§ 3.- Si alguno hubiere legado una casa de este modo, «si fuere suya al tiempo de la muerte», y entonces no se encuentra que sea de él, no se considerará que se lega ni la estimación de la misma..

§ 4.- ¿Qué se dirá, pues, si uno hubiere escrito así: «doy y lego Stico y Pánfilo a Ticio, si fueren míos, cuando yo muera», y hubiere enajenado a uno de éstos ¿podrá ser el otro reivindicado por el legatario? Está determinado que lo reivindique; porque esta frase, aunque sea plural, debe entenderse lo mismo que si por separado hubiese dicho: «Stico, si fuere mío, cuando yo muera».

34.- FLORENTINO; *Instituta, libro XI*.- Nominalmente se le lega a uno así: «a Lucio Ticio»; y nada importa que se legue mediante la designación del cuerpo, o del arte, o del oficio, o del parentesco, o de la afinidad; porque la designación hace de ordinario las veces del nombre, y no importa que sea falsa o verdadera, si fuese cierto aquel a quien el testador hubiere designado.

§ 1.- Entre la demostración y la condición hay esta diferencia, que la demostración designa por lo general una cosa hecha, y la condición una cosa futura.

35.- POMPONIO; *Reglas, libro único*.- Se ha de entender más favorable para la libertad la condición que lleva a la libertad, aunque por su naturaleza sea más gravosa y más dura.

36.- MARCELO; *Respuestas, libro único*.- Publio Mevio dispuso así en su testamento: «cualquiera o cualesquiera que fueren mi heredero o mis herederos, doy y lego, y encomiendo a su fidelidad, para que le den a Cayo Seyo, hijo de mi hermana, cuarenta para honor del Consulado»; Seyo fue designado Cónsul viviendo Mevio, y dió espectáculos; después

ita Maevius decessit: quaero, an quadringenta seio debeantur. Marcellus respondit deberi.

§ 1.- Titia codicillis de praediis, quae testamento Septiciae reliquerat, ita cavit: "A te peto, Septicia, ut filio meo, cum annorum sedecim esset, eadem praedia restitueres: quod si filius meus sedecim annos non impleverit, peto uti reddas ea restituas Publio Maevio et Gaio Cornelio".

Quaero, cum Septicia decesserit, deinde filius quintum decimum annum agens defunctus sit, an repraesentetur fideicommissum quinto decimo anno impleto et heredes Septiciae restituere id Publio Maevio et Gaio Cornelio debeant. Marcellus respondit Septiciam ius, quod in his praediis habuisset, heredi suo reliquisse: etenim videri contra voluntatem testatricis repraesentationem fideicommissi desiderari, ut amplius ad substitutos perveniat, quam ad puerum pervenire vel a Septicia vel ab heredibus potuisset.

Et verba quidem videntur repraesentare fideicommissum, sed non est verisimile, ut maturius voluerit testatrix ad substitutos id transferre. Nec quicquam mutat, quod Septicia ante decessit: nam etsi puer viveret, non prius Septiciae heredes quam Septicia possent conveniri.

37.- PAULUS; *libro singulari ad legem Fufiam Caniniam*.- Si quis eum, quem ipse manumittere non poterat, legaverit ita, ut eum legatarius manumitteret, etsi a legato non repellatur, non est compellendus, ut manumittat, quoniam totiens secundum voluntatem testatoris facere compellitur, quotiens contra legem nihil sit futurum. Idque Neratius scripsit.

Et tamen a legato non esse eum repellendum, quoniam magis legatarium aliquid commodum

assumed the duties of the Consulate, and then Mævius died. I ask whether Seius would be entitled to the forty aurei. Marcellus answered that he would.

§ 1.- Titia made the following provision with reference to certain lands which she had left to Septitia by her will, "I charge you, Septitia, to give to my son the same lands when he shall have reached the age of sixteen years. If, however, my said son should not reach the age of sixteen years, I charge you to deliver the said lands to Publius Mævius and Gaius Cornelius."

As Septitia died, and the son also died during his fifteenth year, I ask whether the trust should be executed, and the heirs of Septitia be compelled to deliver the land to Publius Mævius and Gaius Cornelius, the son not having completed his fifteenth year. Marcellus answered that Septitia had transmitted to her heirs the same right which she herself had in the land; for it would be contrary to the intention of the testatrix for the execution of the trust to be demanded immediately, as in that case more benefit would be derived by the substitutes than by the boy, either through Septitia or her heirs.

The words used by the testatrix would, indeed, seem to indicate that the trust should be executed as soon as her son died, but it is not probable that she intended the benefit to be enjoyed by the substitutes sooner than it could have been by her son. The aspect of the case is not at all changed because Septitia died first, for even if the boy had lived, the heirs of Septitia could not have been sued by him any sooner than Septitia herself could.

37.- PAULUS, *On the Lex Fusia Caninia*.- If anyone should make a bequest to a slave, whom he himself could not manumit, under the condition that "his legatee should manumit him," the legatee will not be excluded from receiving the legacy, but he cannot be compelled to manumit the slave, as one is only obliged to execute the will of the testator, when, by its terms, nothing is to be done contrary to law; and this opinion was stated by Neratius.

The legatee will not be deprived of the legacy, as the testator preferred that he should obtain the benefit

ingresó en el Consulado desde las Calendas de Enero, y entonces falleció Mevio; pregunto, si se deberán a Seyo los cuarenta. Marcelo respondió, que se le debían.

§ 1.- Ticia dispuso así en codicilos, respecto a unos predios que había dejado a Septicia en el testamento: «te pido, Septicia, que restituyas estos mismos predios a mi hijo, cuando sea de dieciséis años; pero si mi hijo no cumpliera los dieciséis años, te pido que los devuelvas y restituyas a Publio Mevio y a Cayo Cornelio»;

Pregunto, si, habiendo fallecido Septicia, y habiendo muerto después el hijo teniendo quince años, si anticiparía el fideicomiso cumplidos los quince años, y si deberán restituírselos a Publio Mevio y a Cayo Cornelio los herederos de Septicia. Marcelo respondió, que Septicia dejó a su heredero el derecho que en aquellos predios hubiese tenido; porque se consideraba contra la voluntad de la testadora, que se pretendiese el pago anticipado del fideicomiso, de modo que vaya a los substitutos más de lo que por Septicia o por los herederos hubiese podido ir al menor; y verdaderamente las palabras parecen anticipar el fideicomiso.

Pero no es verosímil que la testadora hubiere querido transferírsele más pronto a los substitutos. Y en nada altera esto, que Septicia haya fallecido antes, porque aunque viviese el menor, no podrían ser demandados los herederos de Septicia antes de lo que podría haberlo sido Septicia.

37.- PAULO; *Comentarios a la ley Fusia Caninia, libro único*.- Si al que uno no podía manumitir por sí lo hubiere legado para que el legatario lo manumitiese, aunque no sea repelido del legado, no ha de ser compelido a manumitirlo, porque uno es compelido a hacer conforme a la voluntad del testador, siempre y cuando no se haya de hacer nada contra la ley; y así lo escribió Neracio;

Y que, sin embargo, no ha de ser él repelido del legado, porque mas bien quiso el testador que el

testator in hoc servo quam heredem habere voluisset.

38.- PAULUS; *libro singulari de iure codicillorum*.- Si ita scripsero: "Quantum codicillis Titio legavero", licet codicillis legatum explicetur, tamen ex testamento valet solaque quantitas in codicillo delata est. Nam et apud veteres legata talia fuere: "Quantum ei per epistulam scripsero": "Quantum ex illa actione detraxero, heres dato".

39.- IAVOLENUS; *libro I, ex posterioribus Labeonis*.- Quae condicio ad genus personarum, non ad certas et notas personas pertineat, cum existimamus totius esse testamenti et ad omnes heredes institutos pertinere: at quae condicio ad certas personas accommodata fuerit, eam referre debemus ad eum dumtaxat gradum, quo hae personae institutae fuerunt.

§ 1.- Cum ita in testamento scriptum erat "ut aliquid in foro fiat" neque adscriptum erat in quo foro, Labeo ait, si non appareat, quid mortuus senserit, in eius municipii foro faciendum, in quo is qui testamentum fecerit domicilium habuerit: quam sententiam ego quoque probo.

40.- IAVOLENUS; *libro II, ex posterioribus Labeonis*.- Quibus diebus vicinus tuus te via publica, cum ad parendum condicioni ire velles, ire prohibuerit nec per te staret, quo minus agendo ob calumnias eum summoveas, hi dies condicioni non imputabuntur.

§ 1.- Quidam ita legaverat: "Si Publius Cornelius impensam, quam in fundum Seianum feci, heredi meo dederit, tum heres meus Publio Cornelio fundum Seianum dato". Cascellius aiebat etiam

of the slave rather than that his own heir should have him.

38.- THE SAME; *On the Law of Codicils*.- If I should say in my will, "I bequeath to So-and-So as much as I shall bequeath to Titius by my codicil," although the legacy is only explicitly mentioned by the codicil, still it is valid under the terms of the will, and only the amount inserted in the codicil will be due. For legacies like the following were sustained by the ancients, namely, "Let my heir give to So-and-So an amount equal to that I shall state to him in a letter, or which I shall obtain from such-and-such an action."

39.- JAVOLENUS; *On the Last Works of Labeo, Book I*.- Where a condition has reference to a certain class of persons, and not to individuals who are well known, we think that it relates to the entire will, and to all the heirs who have been appointed; but where the condition only has reference to certain individuals, we should consider it as relating only to that degree in which the said parties have been appointed heirs.

§ 1.- Where a clause was inserted in a will providing that a "building may be erected in the Forum," and it is not stated in what Forum, Labeo says that if it does not appear what the intention of the deceased was, the building should be erected in the Forum of the town in which the party who made the will resided. I also approve this opinion.

40.- THE SAME; *On the Last Works of Labeo, Book II*.- If your neighbor should, upon certain days, hinder you from using a highway when you wish to travel upon it in order to comply with a condition, and you are not to blame for not bringing an action against him to prevent him from doing this, these days shall not be included in the time imposed by the condition.

§ 1.- A certain man made a bequest as follows, "If Publius Cornelius should pay my heir for the expense which I have incurred with reference to the Seian Estate, then let my heir deliver the Seian Estate to

legatario tuviese alguna utilidad con este esclavo, que no el heredero.

38.- EL MISMO; *Del derecho de los codicilos, Libro único*.- Si yo hubiere escrito así: «cuanto en codicilos yo hubiere legado a Ticio», aunque en los codicilos se explique el legado, es válido sin embargo, en virtud del testamento, y solo la cantidad fue comprendida en el codicilo; porque también entre los antiguos hubo legados como estos: «dé el heredero cuanto yo le escribiere en carta cuanto yo sacare de aquella acción».

39.- JAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro I*.- La condición que pertenezca a un género de personas, no a personas ciertas y conocidas, estimamos que es de todo el testamento, y que pertenece a todos los herederos constituidos; pero la condición que hubiere sido aplicada a ciertas personas, debemos referirla solamente a aquel grado en que estas personas fueron instituidas.

§ 1.-Habiéndose escrito así en un testamento: «para que se haga alguna cosa en el foro», y no habiéndose añadido en qué foro, dice Labeón, que si no apareciera a cual haya entendido referirse el difunto, se ha de hacer en el foro de aquel municipio en que haya tenido su domicilio el que hubiere hecho el testamento; cuya opinión también yo la apruebo.

40.- EL MISMO; *Doctrina de las Obras póstumas de Labeón, libro II*.- Los días durante los que tu vecino te hubiere impedido la vía pública, cuando tú quisieras ir a cumplir la condición, y en ti no consistiese no repelerlo ejercitando la acción de calumnias, no se computaran para la condición.

§ 1.- Uno había legado así: «si Publio Cornelio hubiere dado a mi heredero las impensas que hice en este fundo Seyano, en este caso dele mi heredero a Publio Cornelio el fundo Seyano»; decía Caso Celio,

pretium fundi dari debere, Ofilius impensae verbo negat pretium significari, sed eos dumtaxat sumptus, quos in eum posteaquam emptus esset fecit. Idem Cinna scribit adiecto eo, quod non deductis fructibus impensarum ratio haberi debeat: et hoc magis verum puto.

§ 2.- Quidam Titio centum legaverat, deinde infra ita iusserat: "Quas pecunias cuique legavi, eas heres meus, si mater mea moritur, dato": mortuo patre familias Titius vixerat et viva matre familias decesserat. Mortua matre heredibus Titii legatum deberi Ofilius respondit, quoniam non sub conditione esset legatum, sed ante legatum pure, deinde dies solvendi adiecta. Videamus, inquit Labeo, ne id falsum sit, quia nihil intersit, utrum ita scribatur: "Quas pecunias cuique legavi, eas heres meus, si mater mea moritur, dato" an ita: "Nisi mater mea moritur, ne dato": utrobique enim sub conditione vel datum vel ademptum esse legatum. Labeonis responsum probro.

§ 3.- Dominus servo aureos quinque eius legaverat: "Heres meus Stichus servo meo, quem testamento liberum esse iussi, aureos quinque, quos in tabulis debeo, dato". Nihil servo legatum esse Namusa servium respondisse scribit, quia dominus servo nihil debere potuisset: ego puto secundum mentem testatoris naturale magis quam civile debitum spectandum esse, et eo iure utimur.

§ 4.- Qui dotalem fundum nullum habebat, ita legaverat: "Fundum Cornelianum, quem illa mihi doti dedit, ei heres dato". Labeo Ofilius Trebatius responderunt fundum nihilo minus legatum esse, quia, cum fundus Cornelianus in rerum natura sit,

Publius Cornelius." Cascellius said that the legatee ought also to pay to the heir the price of the land. Ofilius denies that the price is included in the term "expenses," but that only -those expenses are meant which the party paid out of the land after it had been purchased. Cinna holds the same opinion, and adds that an account of the expenses must be taken without deducting the profits. I think that this is the better opinion.

§ 2.- A testator bequeathed a hundred aurei to Titius, and afterwards made the following provision in his will, "Let my heir give the sums of money which I have bequeathed, if my mother should die." Titius survived the testator, and died during the life of the mother. Ofilius gave it as his opinion that, after the death of the mother, the heirs of Titius were entitled to the legacy, as it had not been left under a condition, but had been bequeathed absolutely in the first place, and the time of its payment had been added afterwards. Labeo says, "Let us see if this opinion is not false," because it makes no difference whether a bequest is made as follows, "Let my heir pay to my legatee the money which I have bequeathed to him, if my mother should die," or, in these terms, "Let him not pay the money, unless my mother should die," for, in either instance, the legacy is given or taken away under a condition. I approve the opinion of Labeo.

§ 3.- A master bequeathed five aurei to his slave, as follows: "Let my heir pay to my slave Stichus, whom I have ordered to be free by my will, the five aurei which I owe him on account." Namusa says that Servius gave it as his opinion that the bequest of the slave was void, because a master cannot be indebted to his slave. I think that, according to the intention of the testator, the debt should rather be considered a natural than a civil one, and this is the present practice.

§ 4.- A husband, who had received no dotal land, made the following testamentary disposition, "Let my heir give to my wife the Cornelian Estate, which she gave to me as her dowry," Labeo, Ofilius, and Trebatius held that the devise of the land was,

que también se debía dar el precio del fundo. Ofilio niega que con la palabra impensas se signifique el precio, sino solamente aquellos gastos que hizo en él después que lo compró. Lo mismo escribe Cinna, añadiendo, que se debe tener cuenta de las impensas sin haberse deducido los frutos; y opino que esto es mas verdadero.

§ 2. - Uno le había legado ciento a Ticio, y después había dispuesto así a continuación: «dé mi heredero las cantidades que a cada cual legué, si muere mi madre»; Ticio había vivido después de haber muerto el padre de familia, y había fallecido viviendo la madre de familia. Afilio respondió, que, muerta la madre, se les debe a los herederos de Ticio el legado, porque no se legó bajo condición, sino que primero se legó puramente, y después se añadió el día para pagar. Veamos, dice Labeón, si esto es falso, porque nada importe que se escriba así: «dé mi heredero las cantidades que a cada cual legué, si muere mi madre», o de este modo: «no las dé, si no muere mi madre»; porque en ambos casos o se dió, o se quitó, el legado bajo condición. Apruebo la respuesta de Labeón.

§ 3.- Un señor había legado cinco áureos a su esclavo: «dele mi heredero a Stico, mi esclavo que dispuse en el testamento que fuese libre, los cinco áureos que en mis libros le debo»; escribe Namusa que respondió Serviú, que nada se le legó al esclavo, porque el señor no habría podido deberle nada al esclavo. Yo opino, que, conforme a la intención del testador, se ha de atender más bien a una deuda natural, que a una civil; y este derecho observamos.

§ 4.- Uno, que no tenía ningún fundo dotal, había legado así: «dele mi heredero el fundo Cornelianus, que ella me dió en dote»; Labeón, Ofilio y Trebacio respondieron, que, esto no obstante, fue legado el fundo, porque existiendo realmente el fundo

demonstratio falsa legatum non peremit.

§ 5.- Thermus minor quorum arbitratu monumentum sibi fieri vellet testamento scripserat, deinde ita legaverat: "Luciis Publiis Corneliis ad monumentum meum aedificandum mille heres meus dato". Trebatius respondit pro eo [ea] habendum ac si ita legatum esset, si satisdedit se ita id monumentum ex ea pecunia facturos. Labeo Trebatii sententiam probat, quia haec mens testantis fuisset, ut ea pecunia in monumentum consumeretur: idem et ego et Proculus probamus.

41.- ULPIANUS; *libro XXXIV, ad edictum*.- Legata sub condicione relicta non statim, sed cum condicio exstiterit deberi incipiunt, ideoque interim delegari non potuerunt.

42.- AFRICANUS; *libro II, quaestionum*.- Filio familias legatum est sub hac condicione "si in potestate patris mansisset": magis patri legatum videri ait et patrem suo nomine legatum petere.

Idem iuris esse et si servo similiter legetur: argumentum rei est, quod et si cibaria servis Titii legentur, procul dubio domini est, non servorum legatum.

43.- PAULUS; *libro VIII, ad Plautium*.- Plautius. Rogatus est heres a liberto testatore, ut perceptis sibi decem totam hereditatem revenderet: postea patronus defuncti bonorum possessionem contra tabulas petierat et partem hereditatis, quae debebatur, abstulerat. Proculus Cassius fideicommissarium pro rata quod solvit repetere debere aiunt. Paulus. Hoc iure utimur: nam quemadmodum praestatione

nevertheless, binding, because as the Cornelian Estate actually existed, the false designation did not affect the devise.

§ 5.- Thermus Junior mentioned in his will the names of certain persons by whose advice he desired a monument to be erected to himself, and then made the following bequest, "Let my heir pay to Lucius, Publius, and Cornelius a thousand aurei for the purpose of erecting my monument." Trebatius gave it as his opinion that this is just the same as if the bequest had been made on condition that the party should give security for the erection of the monument with the said money. Labeo concurs in the opinion of Trebatius, because it was the intention of the testator that the sum should be used for the erection of a monument. Both Proculus and myself approve this opinion.

41.- ULPIANUS; *On the Edict, Book XXXIV*.- When a legacy is bequeathed under a condition, it does not become payable at once, but only after the condition has been complied with, and hence it cannot, in the meantime, be transferred by the heir.

42.- AFRICANUS; *Questions, Book II*.- A legacy was bequeathed to a son under paternal control, subject to the condition that he remained in the power of his father. It was held that the legacy seemed to have been bequeathed to the father, and that the latter could claim it in his own name.

The same rule of law applies where a bequest is made in this way to a slave. The proof of this contention is, that even though provisions should be bequeathed to the slaves of Titius, there is no doubt that the legacy belongs to the master and not to the slaves.

43.- PAULUS; *On Plautius, Book VIII*.- Plautius: An heir was charged by the testator, who was a freedman, to sell the entire estate and reserve ten aurei for himself. The patron of the deceased subsequently claimed possession of the estate in opposition to the will, and took that portion of the same to which he was entitled by law. Proculus and Cassius say that the beneficiary can recover from the

Corneliano, la falsa designación no invalida el legado.

§ 5.- Termo, el Menor, había consignado en su testamento las personas a cuyo arbitrio quería que se le hiciese un monumento, y después había legado así: «deles mi heredero a los Lucios, Publios, y Cornelios la cantidad de mil para edificar mi monumento»; Trebacio respondió, que esto ha de ser considerado lo mismo que si se hubiese legado así, si hubiesen dado fianza de que con este dinero harán ellos así el monumento. Labeón aprueba la opinión de Trebacio, porque esta fue la intención del testador, que este dinero se gastase para el monumento; lo mismo aprobamos yo y Próculo.

41.- ULPIANO; *Comentarios al Edicto, libro XXXIV*.- Los legados dejados bajo condición no se empiezan a deber inmediatamente, sino cuando se hubiere cumplido la condición; y por lo tanto, no se podrán delegar mientras tanto.

42.- AFRICANO; *Cuestiones, libro II*.- Se le legó a un hijo de familia bajo esta condición, si hubiese permanecido bajo la potestad de su padre; dice, que más bien parece que se le legó al padre, y que el padre pide el legado en su propio nombre.

Y que el mismo derecho hay, también si del mismo modo se le legara a un esclavo. Es prueba de esto, que aunque se leguen los alimentos a los esclavos de Ticio, sin duda alguna el legado es del señor, no de los esclavos.

43.- PAULO; *Comentarios a Plaucio, libro VIII*.- Dice Plaucio: a un heredero se le rogó por un testador liberto, que percibiendo diez para sí revendiese toda la herencia; después el patrono del difunto había pedido contra las tablas la posesión de los bienes, y había tomado la parte de herencia, que se le debía; Próculo y Cassio dicen, que el fideicomisario debe repetir a prorrata lo que pagó. Y dice Paulo:

fideicommissorum et legatorum heres exoneratur per praetorem, ita etiam ipse partem consequi debet.

§ 1.- Diversum est, si Falcidia interveniat et minuat legatum: nam his casibus nihil repetetur, quia in solidum condicioni paretur.

§ 2.- Item scinditur ius dandi, si is cui legatum est non potest partem hereditatis sibi relictam totam capere: nam verius est partem eum praestare debere, partem illos, qui auferunt ab eo, quod plus relictum est, quam a lege conceditur.

§ 3.- Neratius libro primo responsorum scribit, ex duobus scriptis heredibus si unus rogatus sit tibi hereditatem restituere, tu Titio certam summam dare, et beneficio legis Falcidiae in restituendo heres utatur, quanto minus tibi praestiterit, tanto minus te Titio praestare non esse iniquum.

44.- PAULUS; *libro IX, ad Plautium*.- Qui heredi dare iussus est, servo alieno instituto non domino dare debet. Nam et si alio herede instituto iussus est servo Titii dare, ipsi servo datur, quia quae facti sunt, non transeunt ad dominum, quemadmodum, si mihi aut servo Titii stipulatus sim, non Titio, sed servo eius dari potest: et haec vera sunt.

§ 1.- Sed cum heredi dare iussus est, videamus, ne domino dandum sit: et consequens est et hic servo dari.

heir a sum in proportion to what he himself has paid. Paulus: This is the present practice, for as an heir, through the payment of trusts and legacies, is discharged from liability by the Praetor, so also he should receive his share of the same.

§ 1.- The case is different where the Falcidian Law applies, and reduces the amount of the legacies, since in instances of this kind nothing can be recovered, because the condition has been entirely complied with.

§ 2.- Likewise, the right of payment is restricted where the party to whom the bequest was made cannot take the entire share of the estate which may be left to him, for the better opinion is that he should pay a part, and that those also should pay a part whose shares have been increased by the amount taken from him to whom more had been left than is allowed by law.

§ 3.- Neratius, in the First Book of Opinions, states that where two heirs have been appointed, and one of them is requested to deliver the estate to you, and you are asked to pay a certain sum to Titius, and the heir avails himself of the benefit of the Falcidian Law in delivering the property, it is not inequitable that you should pay as much less to Titius as the heir ought to pay to you.

44.- THE SAME; *On Plautius, Book IX*.- Where anyone is directed to pay a certain sum to an heir, and the latter is a slave belonging to another, he should not pay the sum to the master, for even if some other heir had been appointed, and directed to pay the sum to the heirs of Titius, it should be paid to the slave himself, because things which have already been done do not pass to the master; just as where I stipulate for myself or for the slave of Titius, payment should be made, not to Titius, but to his slave. These opinions are correct.

§ 1.- Where, however, a party is ordered to pay the heir, let us see whether the payment should be made to his master. It follows in this instance that payment should be made to the slave.

observamos este derecho, porque así como con la entrega de los fideicomisos y de los legados el heredero es descargado por el Pretor, así también debe el conseguir su parte.

§ 1.- Diversa cosa es si mediara la Falcidia, y disminuyera el legado; porque en estos casos no se repetirá nada, porque se cumple por completo con la condición.

§ 2.- Asimismo, se divide el derecho de dar, si aquel a quien se hizo un legado no puede adquirir toda la parte de herencia que se le dejó; porque es más verdadero, que él debe entregar una parte, y otra parte aquellos que le quitan lo que se le dejó sobre lo que se concede por la ley.

§ 3.- Escribe Neracio en el libro primero de las Respuestas, que si de dos herederos instituidos se le hubiera rogado a uno que te restituya la herencia, y a ti que le des a Ticio cierta suma, y el heredero usase al restituirla del beneficio de la ley Falcidia, no es injusto que cuanto menos te hubiere dado, tanto menos le des tú a Ticio.

44.- EL MISMO; *Comentarios a Plaucio, libro IX*.- Aquel a quien se le mandó que diera heredero, habiendo sido instituido un esclavo ajeno no debe darle al señor; porque también si instituido otro heredero, se le mandó que le diera al esclavo de Ticio, se le da al mismo esclavo, porque las cosas que son de hecho no pasan al señor, a la manera que si yo hubiera estipulado para mí o para el esclavo de Ticio, se le puede dar no a Ticio sino a su esclavo; y esto es verdad.

§ 1.- Pero habiéndosele mandado que le diera al heredero, veamos si no se habrá de dar al señor; y es consiguiente, que también en este caso se le dé al esclavo.

§ 2.- Certe statuliber quin domino dare debeat, non est dubium.

§ 3.- Contra qui domino debet dare, non implet condicionem dando servo eius, nisi si dominus consenserit: nemo enim in tali specie condicionem nesciente me vel nolente implere potest.

§ 4.- Cum hereditas ex Trebelliano Senatus consulto restituta est, heredi dandum est, ut impleatur condicio: nec hoc restituendum est ex causa fideicommissi.

§ 5.- Sed cum suspectam adiit et restituit, dubitabatur, an ei auferendum sit: et benignus est et in hoc casu nihil ei auferri.

6. Si autem me herede instituto controversia mihi fiet hereditatis, si cavet legatarius evicta hereditate reddi legatum, et ipsi cavendum est reddi quod dedit.

7. Sed si iussus sis mihi decem dare et accipere hereditatem ex senatus consulto, decem tibi ex causa fideicommissi non restituam.

8. Si duorum servo legatum sit sub condicione dandi, non posse per partes condicioni pareri quidam aiunt, sed semel dandam pecuniam: sed ego contra puto.

9. Si pars rei legatae usucapta sit, an in solidum parendum sit, dubito. Et potest dici pro parte parendum ex sententia testatoris.

§ 2.- It is certain that a slave who is to be free under some condition must pay the master.

§ 3.- On the other hand, a legatee who is charged with payment to the master does not comply with the condition by giving the amount to the slave, unless the master consents. For no one can comply with the condition in a case of this kind, if I am either ignorant or unwilling.

§ 4.- Where an estate is returned in compliance with the Trebellian Decree of the Senate, it should be given to the heir in order that the condition may be complied with, and it should not be returned by the latter under the trust.

§ 5.- When an heir enters upon an estate which he suspects of being insolvent, and gives it back to the trustee, a doubt may arise whether he shall be deprived of it, and the more equitable opinion is that, in this instance, he will not be deprived of anything.

§ 6.- Where, however, I am appointed heir, and a controversy arises as to my right to the estate, if the legatee should furnish security to return the legacy in case the estate should be evicted, security should also be given to him to return what he paid.

§ 7.- But if you should be ordered to pay me the sum of ten aurei, and receive the estate, under the Decree of the Senate, I shall not be compelled to return you the said ten aurei, by virtue of the trust.

§ 8.- Where a legacy is bequeathed to a slave belonging to two masters, under the condition of his paying something to the heir, certain authorities hold that the condition cannot be partially complied with, but that the money should be paid at once. I, however, hold the contrary opinion.

§ 9.- Where a part of the property bequeathed has been acquired by a third party through usucaption, I doubt whether the condition should be complied with in full. I think it can be said that it may be partially complied with, in accordance with the intention of

§ 2.- Ciertamente no hay duda, de que el manumitido bajo condición en el testamento deberá darle al señor.

§ 3.- Por el contrario, el que debe darle al señor no cumple la condición dándole a su esclavo, si el señor no lo consintiere; porque nadie puede cumplir en tal caso la condición, ignorándolo yo o no queriéndolo.

§ 4.- Cuando la herencia ha sido restituida en virtud del Senadoconsulto Trebeliano, se ha de dar al heredero, para que se cumpla la condición, y esto no ha de ser restituido por causa del fideicomiso.

§ 5.- Pero cuando adió y restituyó una herencia sospechosa, se dudaba si se le habrá de quitar; y es más benigno que tampoco en este caso no se le quita nada.

§ 6.- Mas si instituido yo heredero se me promoviere controversia sobre la herencia, si el legatario da caución de que hecha evicción de la herencia se devolverá el legado, también se le ha de dar caución a él de que se le devolverá lo que dio.

§ 7.- Pero si se te hubiera mandado que me dieras diez, y que recibieras la herencia en virtud del Senadoconsulto, no te restituiré, los diez por causa del fideicomiso.

§ 8.- Si al esclavo do dos se le hubiera hecho un legado bajo la condición de dar, dicen algunos que no se puede cumplir por partes con la condición, sino que se ha de dar el dinero de una sola vez; pero yo opino lo contrario.

§ 9.- Si hubiera sido usucapida parte de la cosa legada, dudo si se deba cumplir del todo la condición; y se puede decir, que se ha de cumplir con arreglo a la parte conforme a la voluntad del testador.

the testator.

§ 10.- Plautius. Uni ex heredibus fundum legavi, si centum heredibus dedisset: deducet suam partem hereditariam et reliquam summam heredibus pro portione eorum dabit. At si heres ex parte ita institutus esset, si heredibus decem dedisset, non aliter esset heres, quam si tota decem coheredibus dedisset, quia non ante ad hereditatem admitteretur, quam si omnem summam dedisset. Nam cum et servus testamento liber et ex parte heres ita scriptus esset, si heredibus decem dedisset, constitit non aliter eum liberum heredemque futurum, quam si tota decem coheredibus dedisset. Paulus: hoc iure utimur.

45.- PAULUS; *libro XVI, ad Plautium*.- Iulianus ait, si heredi legatarius, cui sub condicione legatum erat "si heredi decem dederit" id, quod ei deberet heres, accepto tulisset, non quidem videri condicioni paruisse, quasi dederit: sed quasi per heredem stet, quo minus pareat, posse petere legatum, quasi exstiterit condicio.

46.- PAULUS; *libro III, ad Vitellium*.- Si in diem exempli gratia centensimum imperatum est statulibero, ut pecuniam solveret, neque initium temporis eius quod futurum esset, adscriptum est, adita hereditate cedere dies incipit, quia absurdum visum est ante diem praeterire, quam is existeret, quem oportet accipere. Et hoc in omnibus, qui heredi dare iussi sunt, dicendum est: igitur et legatario ex adita hereditate ad parendum condicioni tempus computabitur.

47.- MARCELLUS; *libro XIV, digestorum*.- Servo libertatem ita dedit: "Ille, si meus erit, liber esto": legatum vel hereditatem sine condicione ei dedit:

§ 10.- Plautius: I bequeath a tract of land to one of several heirs under the condition that he will pay a hundred aurei to my heirs. He must deduct his share of the estate, and give the remainder to the heirs in proportion to their respective shares. Where, however, he had been appointed heir to a share of the estate, "if he should pay ten aurei to the heirs," he could only become the heir by paying the entire ten aurei to his co-heirs; because he could not be admitted to the succession before he paid the entire sum. For, in the case where a slave is granted his freedom by will, and made an heir to a share of the estate on condition that he pays ten aurei to the heirs, it was decided that he would not be free and become an heir until he had paid the entire sum of ten aurei to his co-heirs. Paulus: This is our practice at present.

45.- THE SAME; *On Plautius, Book XVI*.- Julianus says that where a legacy has been left to a person under the condition that he pays his heir ten aurei and the heir gives him a receipt for what he owes him, he is not considered as having complied with the condition, as he would if he had actually made payment; but, as it was the heir's fault that the condition was not complied with, the legacy can be claimed just as if this had been done.

46.- THE SAME; *On Vitellius, Book III*.- If, for example, a slave who is to be free under the condition of paying a certain sum of money in a hundred days, and the beginning of the term is not mentioned, it will begin to run from the day that the estate is entered upon, because it is absurd to hold that it would begin before the time arrived when he who was entitled to the legacy would be able to receive it. This rule will apply to all legatees who are directed to pay the heir under such circumstances. Therefore the time for complying with the condition by the legatee will be computed from the day when the estate was entered upon.

47.- MARCELLUS; *Digest, Book XIV*.- A master bequeathed freedom to his slave as follows, "Let him be free if he belongs to me at the time of my death."

§ 10.- Dice Plaucio: le legué a uno de los herederos un fundo, si hubiese dado ciento a los herederos; deducirá su parte de herencia, y les dará a los herederos la restante suma a proporción de su parte. Mas si el heredero hubiese sido instituido así en una parte, si hubiera dado diez a los herederos, no sería heredero de otro modo, sino si hubiese dado todos los diez a los coherederos, porque no sería admitido a la herencia antes que hubiese dado toda la suma; pues cuando el esclavo hubiese sido instituido libre en un testamento, y así heredero de una parte, si hubiese dado diez a los herederos, fue constante que él no habrá de ser libre y heredero, sino si hubiese dado todos los diez a los coherederos. Y dice Paulo: este derecho observamos.

45.- EL MISMO; *Comentarios a Plaucio, libro XVI*.- Dice Juliano, que si el legatario a quien se le había legado bajo esta condición: «si le hubiere dado diez al heredero», hubiese dado al heredero por pagado de lo que el heredero le debiera, no se considera ciertamente que cumplió la condición como si los hubiere dado, sino que como si consistiera en el heredero que no la cumpla, puede pedir el legado, como si se hubiere cumplido la condición.

46.- EL MISMO; *Comentarios a Vitelio, libro III*.- Si a un manumitido bajo condición por testamento se le mandó que pagase una cantidad dentro de término, por ejemplo, dentro de cien días, y no se fijó cual había de ser el comienzo de este término, el término comienza a correr habiendo sido adida la herencia, porque se consideró absurdo que transcurriese antes del día que existiera el que debe recibir; y esto se ha de decir respecto a todos a quienes se les mandó que dieran al heredero; luego también respecto al legatario se computará desde que fue adida la herencia el tiempo para cumplir la condición.

47.- MARCELO; *Digesto, libro XIV*.- Uno le dio a un esclavo la libertad de este modo: «sea él libre, si fuere mío»; le dio sin condición un legado o la

deinde eum alienavit. Debebitur domino eius legatum vel hereditas et iussu eius adiri poterit: nam id expressit "si meus erit" in libertate danda, quo futurum erat ut impediretur libertas, etiamsi expressum non esset. Saepenumero tamen mutatur rei effectus, quamquam id expresserit testator, quod et si non fecisset, inesset tamen.

48.- MARCELLUS; *libro XV, digestorum*.- Non putabam diem fideicommissi venisse, cum sextum decimum annum ingressus fuisset, cui erat relictum, cum ad annum sextum decimum pervenisset: et ita etiam Aurelius imperator Antoninus ad appellationem ex Germania iudicavit.

49.- CELSUS; *libro XXII, digestorum*.- Si in annos decem heres dare damnatus aut quis liber esse iussus est, novissimo eius temporis die legatum debebitur et libertas optingit.

50.- ULPIANUS; *libro I, de officio consulis*.- Si cui libertas data sit directo sub hac condicione "si rationes reddidisset", arbitrum a consulibus divus Pius dari permisit his verbis: "Aditi a vobis amplissimi consules arbitrum dabunt, qui excussis rationibus non tantum quae reliqua sunt epaphroditi constituent, verum etiam quas rationes quaeque instrumenta tradere aut exhibere dominis suis debeat: cuius sententiae cum fuerit satisfactum, non impediatur Epaphroditi libertas".

51.- MODESTINUS; *libro V, differentiarum*.- Sub diversis condicionibus disiunctim positus liber esse iussus eam condicionem eligere potest, quae sibi levior esse videbitur: legato vero eo modo relicto legatarium novissimae condicioni parere oportet.

He gave the legacy or the estate to him unconditionally, and then sold him. The legacy or the estate will be due to his new master, and the slave can accept it by his order; for the testator in granting him his liberty expressly stated, "If he belongs to me," with the result that, even if this condition had not been explicitly mentioned, his freedom would be prevented. Still, the disposition of property is very frequently changed, even where the testator specifically indicated something which, if it was not done, would still be understood.

48.- THE SAME; *Digest, Book XV*.- I do not think that the time for the execution of a trust has arrived when the beneficiary of the same has entered his sixteenth year, and the condition was when he should have reached the age of sixteen years. The Emperor, Aurelius Antoninus, rendered this decision in the case of an appeal from Germany.

49.- CELSUS; *Digest, Book XXII*.- Where an heir is charged to make a payment of a sum of money, or a slave is ordered to be free in ten years, the legacy will be payable, or the grant of freedom will become operative on the last day of the term.

50.- ULPIANUS; *On the Duties of Consul, Book I*.- Where freedom was bequeathed directly to a slave under condition of his rendering his accounts, the Divine Pius permitted the Consuls to appoint an arbiter to decide the matter in the following words, "The Consuls, having been applied to by you, shall appoint an arbiter to examine the accounts, and to decide not only what balance is due from Epaphroditus, as well as what accounts and what documents he must deliver or show to his masters, and when the judgment of the arbiter has been complied with, the freedom of Epaphroditus will no longer be interfered with."

51.- MODESTINUS; *Differences, Book V*.- Where a slave is ordered to be free under different conditions separately imposed, he can select the condition which seems to him to be the easiest complied with. Where, however, a legacy is bequeathed in this manner, the legatee must comply with the last

herencia, y después lo enajenó; se le deberá a su señor el legado o la herencia, y podrá ser adida por su orden, porqué expresó esto: «si fuere mío», al dársele la libertad, con lo que había de suceder que se impediría la libertad, aunque no se hubiese expresado. Pero muchas veces se cambia el efecto de una cosa, aunque el testador hubiere expresado lo que aún cuando no lo hubiese dicho hubiera sido, sin embargo, inherente.

48.- EL MISMO; *Digesto, libro XV*.- Yo no opinaba que había llegado el vencimiento del fideicomiso cuando hubiese entrado en el año décimo sexto aquel a quien se le había dejado, para cuando hubiese llegado a los dieciséis años; y así también lo juzgó el Emperador Aurelio Antonino en apelación procedente de Germania.

49.- CELSO; *Digesto, libro XXII*.- Si un heredero fue condenado a dar a los diez años, o se dispuso que uno fuese libre, se deberá el legado el último día de este tiempo, y subsiste la libertad.

50.- ULPIANO; *Del cargo de Cónsul, libro I*.- Si a alguno se le hubiera dado directamente la libertad bajo esta condición, si hubiese rendido las cuentas, el Divino Pío permitió en estos términos que por los Cónsules se nombrase un árbitro: «Los ilustres Cónsules a quienes por vosotros se haya recurrido nombrarán un árbitro, el cual, examinadas las cuentas, determinará no solamente cuáles son los remanentes de Epafrodito, sino también qué cuentas, y qué instrumentos deba entregar, o exhibir a sus señores; y cuando se hubiere cumplido la sentencia, no se impedirá la libertad de Epafrodito».

51.- MODESTINO; *Diferencias, libro V*.- El que se dispuso que fuese libre bajo diversas condiciones puestas disyuntivamente, puede elegir aquella condición, que le pareciere que es más fácil; pero habiéndose dejado de este modo un legado, el legatario debe cumplir la última condición.

§ 1.- Heredi decem dare iussus et liber esse et heredis heredi dando perveniet ad libertatem: quod non similiter in legatarii persona custodiri Publicius scribit.

52.- MODESTINUS; *libro VII, differentiarum*.- Nonnumquam contingit, ut quaedam nominatim expressa officiant, quamvis omissa tacite intellegi potuissent nec essent offutura. Quod evenit, si alicui ita legatur: "Titio decem do lego, si Maevius Capitolium ascenderit". Nam quamvis in arbitrio Maevii sit, an Capitolium ascendat et velit efficere, ut Titio legatum debeatur, non tamen poterit aliis verbis utiliter legari: "Si Maevius voluerit, Titio decem do": nam in alienam voluntatem conferri legatum non potest. Inde dictum est: expressa nocent, non expressa non nocent.

53.- MODESTINUS; *libro singulari de heurmatibus*. - Si quis servum liberum esse iusserit, si heredi rationes reddidisset, posteaque eum rationes reddere vetuerit quasi puram facturum libertatem, competit ex testamento libertas.

54.- JAVOLENUS; *libro II, ex Cassio*. - Si quis legata, quibus dies adposita non esset, annua bima trima die dari iussit et alicui, cum pubes esset, pecuniam legavit, id quoque legatum annua bima trima die post pubertatem praestandum esse in commentariis Gaii scriptum est, quia magis condicio quam dies legato adiecta esset.

Contra ego sentio, quia fere dies ponitur ad proroganda ea, quae ad praesens tempus, non etiam quae in futurum legata sunt, diesque pubertatis habet

condition imposed.

§ 1.- A slave was directed to pay ten aurei to the heir and become free, and, by paying the amount to the heir of the heir, he can obtain his freedom. Publicius says that, under similar circumstances, this rule must not be observed with reference to a legatee.

52.- THE SAME; *Differences, Book VII*. - It sometimes happens that certain provisions in a will, when explicitly stated, are disadvantageous, although if they could be tacitly understood this would not be the case. This occurs where a legacy is bequeathed to someone as follows, "I give and bequeath ten aurei to Titius, if Maevius should ascend to the Capitol." For although the choice is left to Maevius as to whether he will ascend to the Capitol or not, and therefore cause the legacy to be payable to Titius, still, a legacy cannot be legally bequeathed in these terms, namely, "I give ten aurei to Titius if Maevius should consent," as a legacy cannot be made dependent upon the will of another; hence it has been said that testamentary provisions specifically stated cause injury, but those expressed in general terms do not.

53.- THE SAME; *On Inventions*. - Where anyone directs a slave to be free if he renders accounts to the heir, and he should afterwards forbid him to do so; he grants him his freedom as it were, absolutely, and he will be entitled to it by virtue of the will.

54.- JAVOLENUS; *On Cassius, Book II*. - Where anyone orders legacies, for the payment of which he does not fix any time, to be paid in one, two and three years, and bequeaths a sum of money to a minor when he shall arrive at the age of puberty, it is stated in the Commentaries of Gaius that the last legacy mentioned should be paid in one, two or three years after the boy arrives at puberty; because a more important condition than the term of payment is attached to the legacy.

I think that the opposite opinion is correct, because where a time is prescribed, it has reference to the postponement of the payment of legacies which are

§ 1.- El que se mandó que diese diez al heredero, y que fuese libre, llegará a la libertad aun dándoselos al heredero del heredero; porque escribe Publicio, que no se observa del mismo modo en cuanto a la persona del legatario.

52.- EL MISMO; *Diferencias, libro VII*. - Sucede algunas veces, que perjudican algunas de las cosas determinadamente expresadas, aunque omitidas hubiesen podido ser entendidas tácitamente y no hubiesen de perjudicar, lo que acontece, si a alguien se le legara así: «doy y lego diez a Ticio, si Mevio hubiere subido al Capitolio»; porque aunque esté al arbitrio de Mevio subir al Capitolio y quiera hacer que se le deba a Ticio el legado no se podrá sin embargo, legar útilmente con estas otras palabras: «si Mevio hubiere querido, le doy diez a Ticio», porque no se puede referir un legado a ajena voluntad. Por lo cual se dijo: lo expreso perjudica, y lo no expreso no daña.

53.- EL MISMO; *Cuestiones nuevas, libro único*. - Si alguno hubiere mandado que fuese libre un esclavo, si hubiese dado cuentas al heredero, y después hubiere prohibido que él diera las cuentas como para dar puramente la libertad, compete en virtud del testamento la libertad.

54.- JAVOLENO; *Doctrina de Cassio, libro II*. - Si alguno mandó que los legados, para los que no se hubiese fijado día, se diesen dentro de uno, dos o tres años, y le legó a alguien una cantidad para cuando fuese púbero, se halla escrito en los Comentarios de Cayo que también este legado ha de ser pagado uno, dos, o tres años después de la pubertad, porque se le agregó al legado una condición mas bien que un término.

Yo opino lo contrario, porque de ordinario se pone un término para prorrogarlos que fueron legados para el tiempo presente, no también para el futuro, y el día

aliquam temporis demonstrationem.

§ 1.- Duobus eadem res, si heredi centum dedissent, legata est: si alter ex his quinquaginta dederit, partem legati consequetur et pars eius, qui non dederit, alteri cum sua condicione adcrebit.

55.- IAVOLENUS; *libro XIII, epistularum*.- Maevius, cui fundus legatus est, si Callimacho, cum quo testamenti factionem non habebat, ducenta dedisset: condicioni parere debet et ducenta dare, ut ad eum legatus fundus pertineat, licet nummos non faciat accipientis: quid enim interest, utrum tali personae dare iubeatur an aliquo loco ponere vel in mare deicere? Neque enim illud, quod ad talem personam perventurum est, testamenti nomine, sed mortis causa capitur.

56.- IAVOLENUS; *libro XIV, epistularum*.- Cui fundus legatus est, si decem dederit, partem fundi consequi non potest, nisi totam pecuniam numerasset. Dissimilis est causa, cum duobus eadem res sub condicione legata est: in hac enim quaestione statim a testamento, quo pluribus condicio adposita est, divisa quoque in singulas personas videri potest, et ideo singuli pro sua parte et condicioni parere et legatum capere possunt:

Nam quamvis summa universe condicionis sit adscripta, enumeratione personarum potest videri esse divisa. In eo vero, quod uni sub condicione legatum est, scindi ex accidenti condicio non debet, et omnis numerus eorum, qui in locum eius substituuntur, pro singulari persona est habendus.

due at present, but does not apply to those which are payable in the future, and the age of puberty establishes a certain date for the payment of the legacy.

§ 1.- The same property was bequeathed to two persons, if they should pay a hundred aurei to the heir. If one of them should pay him fifty, he will be entitled to his share of the legacy, and the share of the one who did not pay will accrue to the other, dependent upon compliance with the condition.

55.- THE SAME; *Epistles, Book XIII*.- An estate was left to Mævius if he paid two hundred aurei to Callimachus, who could not take anything under a will, and the legatee was, nevertheless, obliged to comply with the condition and to pay the two hundred aurei, in order to become entitled to the land which was devised to him, even though he did not transfer the ownership of the said sum to the person who received it. For what difference does it make whether anyone is directed to pay the money to such a person, or to deposit it in some place, or to throw it into the sea? Money cannot come into the hands of an individual of this kind under the terms of a will, but he can acquire it as a donation mortis causa.

56.- THE SAME; *Epistles, Book XIV*.- Where an estate is left to anyone on condition of his paying ten aurei, the devisee cannot obtain any portion of the land without paying the entire amount. The case, however, is different where the identical property is left to two persons under the same condition, for in this instance, under the terms of the will, the condition imposed upon the different parties may appear to have been divided among them separately, and therefore they can, as individuals, comply with it in proportion to their respective shares, and receive the legacy.

For although the entire sum, on the payment of which the legacy is dependent, seems to be divided by the enumeration of the different persons, the condition cannot be divided where some accidental occurrence takes place, in the case where the legacy is left to one person conditionally, and the entire number of those who are substituted for the legatee

de la pubertad tiene alguna demostración del tiempo.

§ 1.- Una misma cosa fue legada a dos, si al heredero le hubiesen dado ciento; si uno de ellos hubiere dado cincuenta, conseguirá la parte del legado, y la parte del que no los hubiere dado le acrece al otro con su propia condición.

55.- EL MISMO; *Epístolas, libro XIII*.- Mevio quien se le legó un fundo, si hubiese dado doscientos a Calimaco, con el cual no tenía testamentifacción, debe cumplir la condición y dar los doscientos, para que le pertenezca el fundo legado, aunque no haga del que lo recibe el dinero. Porque lo que importa que se mande que lo dé a tal persona, o que lo ponga en algún lugar o que lo tire al mar? Porque lo que ha de ir a poder de tal persona no se adquiere por razón del testamento, sino por causa de muerte.

56.- EL MISMO; *Epístolas, libro XIV*.- Aquel a quien se le legó un fundo, si hubiere dado diez, no puede conseguir parte del fundo, si no hubiese entregado todo el dinero. Diferente es el caso cuando una misma cosa fue legada a dos bajo condición; porque en este caso se puede considerar dividida también desde luego por el testamento entre cada una de las personas la condición que en el mismo fue puesta para muchos; y por lo tanto cada cual puede cumplir por su parte la condición y adquirir el legado.

Porque aunque se haya señalado la suma de toda la condición, se puede considerar que fue dividida con la enumeración de las personas; pero respecto a lo que fue legado a uno solo bajo condición, no se debe dividir la condición por un accidente, y todos los que son sustituidos en el lugar de aquel han de ser considerados como una sola persona.

should be considered as constituting but one individual.

57.- POMPONIUS; *libro IX, nono ad Quintum Mucium*.- Quaesitum est, an, si iussus fuerit servus quinque operas extraneo dare, ut liber sit, condicio talis sit recipienda, ut, quemadmodum circa pecuniae dationem dicitur, ita et circa praestationem operarum dicamus. Sed hoc iure utimur, ut, quemadmodum dictum est, si pecuniam ex peculio suo det extraneo, admitti eum ad libertatem, ita et, si operam praestiterit, necesse sit eum admitti ad libertatem. Itaque et in proposito sapienter faciet heres, si impudierit eum, quo minus praestet operas: hac enim ratione servus perveniet quidem ad libertatem, sed operis eius extraneus non utetur.

58.- POMPONIUS; *libro X, variis lectionibus*.- Si ancillae alienae, cum ea nupsisset, legatum sit, Proculus ait utile legatum esse, quia possit manumissa nubere.

59.- ULPIANUS; *libro XIII, ad legem Iuliam et Papiam*.- Intercidit legatum, si ea persona decesserit, cui legatum est sub condicione.

§ 1.- Quid ergo, si non decesserit, sed in civitate esse desierit? Puta alicui legatum "si consul fuerit" et is in insulam deportatus est: numquid non interim extinguatur legatum, quia restitui in civitate potest? Quod probabilius esse arbitror.

§ 2.- Non idem erit dicendum, si ea poena in eum statuta fuerit, quae irrogat servitutem, quia servitus morti adsimulatur.

60.- PAULUS; *libro VII, ad legem Iuliam et Papiam*.- In facto consistentes condiciones varietatem habent et quasi tripartitam recipiunt

57.- POMPONIUS; *On Quintus Mucius, Book IX*.- Where a slave was directed "to perform five acts for a stranger and become free," the question arose whether the condition should be understood to mean the same as where the payment of a sum of money had been directed, so that, instead of its delivery we can specify the performance of labor. This is our present practice, just as when it is provided that if a slave should pay a stranger a certain sum of money out of his peculium he shall be liberated, so, if he furnishes the labor, he must also be granted his freedom. Therefore, in the case stated, the heir will act wisely if he prevents his slave from performing the labor, for, by doing so, the slave will obtain his freedom, but the stranger will not get the benefit of his services.

58.- THE SAME; *On Various Passages, Book X*.- Where a legacy is left to a female slave belonging to another, "provided she should marry," Proculus says that the legacy is valid, because she can marry after having been manumitted.

59.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- A legacy becomes of no effect, if the person to whom it was bequeathed conditionally should die before the condition is fulfilled.

§ 1.- But what if he should not die, but should lose his civil rights? For instance, where a bequest was made to a certain man, "if he should become Consul," and he is deported to an island, will the legacy not be extinguished in the meantime, because he can be restored to his civil rights? I think that this is extremely probable.

§ 2.- The same rule cannot be said to apply where a penalty involving servitude is imposed upon him, because servitude resembles death.

60.- PAULUS; *On the Lex Julia et Papia, Book VII*.- Conditions relating to acts are of different kinds, and are susceptible, as it were, of a threefold division,

57.- POMPONIO; *Comentarios a Quinto Mucio, Libro IX*.- Se preguntó, si habiéndose mandado que un esclavo prestase cinco servicios a un extraño, para que sea libre, habrá de ser admitida tal condición, de suerte que también digamos en cuanto a la prestación de servicios lo que se dice respecto a la entrega de dinero. Pero observamos este derecho, que así como se ha dicho que si de su peculio diese dinero a un extraño, era admitido a la libertad, así también será necesario que sea admitido a la libertad si hubiere prestado servicios. Y por lo tanto también en el caso presente obrará sabiamente el heredero, si le impidiere que preste también los servicios; porque por esta razón el esclavo llegará ciertamente a la libertad, pero el extraño no se utilizara de su trabajo.

58.- EL MISMO; *Doctrina de autores varios, libro X*.- Si se le hubiera legado a una esclava ajena, para cuando ésta se hubiese casado, dice Próculo que el legado es útil, porque puede casarse manumitida.

59.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIII*.- Se extingue el legado, si hubiere fallecido la persona a quien se le legó bajo condición.

§ 1.- Luego ¿qué se dirá si no hubiere fallecido, pero hubiere dejado de ser ciudadano, -por ejemplo, se le legó a uno, si fuere Cónsul, y fue deportado a una isla-, acaso no se extingue el legado mientras tanto, porque puede ser restituido a la ciudadanía? Y esto es lo que juzgo más probable.

§ 2.- No se habrá de decir lo mismo, si se hubiere impuesto pena, que irroga esclavitud, porque la esclavitud se asemeja a la muerte.

60.- PAULO; *Comentarios a la ley Julia y Papia, Libro VII*.- Las condiciones que consisten en un hecho tienen cierta variedad, y en cierto modo se

divisionem, ut quid detur, ut quid fiat, ut quid optingat, vel retro ne detur, ne fiat, ne optingat. Ex his dandi faciendique condiciones in personas collocantur aut ipsorum, quibus quid relinquitur, aut aliorum: tertia species in eventu ponetur.

§ 1.- Fiscus iisdem condicionibus parere debet, quibus persona, a qua ad ipsum quod relictum est pervenit, sicut etiam cum suo onere hoc ipsum vindicat.

61.- ULPIANUS; *libro VIII, ad legem Iuliam et Papiam*.- Si vir uxori ad tempus liberorum legaverit, dubitari potest, an de his dumtaxat filiis sensisset testator qui post mortem eius nati fuissent an et de his, qui vivo eo ab eo suscepti fuissent post testamentum factum, cum manente matrimonio decessisset: verum aequum est proficere, sive vivo marito sive post mortem nascatur.

62.- CLEMENTIS; *libro IV, ad legem Iuliam et Papiam*.- Sed si hoc specialiter expressit testator, etiamsi ex alio post mortem suam liberos procreaverit, nihilo minus eam ad legatum admitti.

§ 1.- Cuidam non solidum capienti amplius lege concessae portionis relictæ est, si heredi aliquid dedisset: quaeritur, an id, quod condicionis implendae causa dederat, consequi ex causa legati possit (quasi non capiat id quod erogat) an vero id extra sit nec ideo magis ex bonis testatoris amplius capiat, quam capturus esset, si sine condicione legatum esset.

that is to say where something must be given, or something must be done, or something must occur; or, on the other hand, where something must not be given, or not be done, or not occur. The conditions of giving something or of performing some act have reference either to those to whom a bequest was made, or to others; the third class depends upon some event taking place.

§ 1.- The Treasury is obliged to comply with the same conditions by which the person from whom the Treasury obtained possession of the property was bound; just as it can also claim the property which is the subject of the legacy, with any burdens attaching to the same.

61.- ULPIANUS; *On the Lex Julia et Papia, Book VIII*.- Where a man leaves a legacy to his wife payable at the time that she has children, some doubt may arise whether the testator only had reference to such children as might be born after his death, or whether he had in his mind those also who were born to him after his will was made, if he died while the marriage continued to exist. I think it is but proper that this should apply not only to children born during the lifetime of the husband, but also to those born after his death.

62.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book IV*.- Children born to a woman by another person after the decease of her husband will still be allowed to receive a legacy, if the testator expressly stated that this should be the case.

§ 1.- Where a bequest was made of more than the law allowed to a certain person who could not receive the entire amount, "if he should pay something to the heir," the question arose whether what he gave for the purpose of complying with the condition could be acquired by virtue of the legacy, for the reason that he did not receive what he paid to the heir; or whether what he paid should be considered in excess of the legacy, and therefore that he will not be entitled to any more of the estate of the testator than he would have been if the legacy had been bequeathed unconditionally.

dividen en tres clases: para que se dé alguna cosa, para que se haga, para que suceda, o al contrario: para que no se dé, no se haga, no suceda. De estas, las condiciones de dar y de hacer se refieren a las personas, o de los mismos a quienes se deja alguna cosa, o de otros; la tercera especie se refiere a un acontecimiento.

§ 1.- El fisco debe cumplir las mismas condiciones que la persona de quien va a él lo que se dejó, así como también reivindica esto mismo con su propia carga.

61.- ULPIANO; *Comentarios a la ley Julia y Papia, libro VIII*.- Si el marido hubiere legado a su mujer para cuando tenga hijos, se puede dudar si el testador haya entendido referirse solamente a aquellos hijos que hubiesen nacido después de su muerte, o también a los que en vida suya hubiesen sido tenidos de él después de hecho el testamento, cuando hubiese fallecido subsistiendo el matrimonio; pero es equitativo que aprovechen, ya si nacieran viviendo el marido, ya si después de su muerte.

62.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro IV*.- Pero si el testador expresó esto especialmente: también si de otro hubiere procreado hijos después de su muerte, es, sin embargo, admitida ella al legado.

§ 1.- A uno que no podía adquirir la totalidad se le dejó más de la porción permitida por la ley si hubiese dado alguna cosa al heredero; se preguntó, si podría conseguir por causa del legado lo que había dado para cumplir la condición, como si no adquiriera que pagase, o si será excluido esto y no recibirá, por lo tanto de los bienes del testador más de lo que hubiese de adquirir si el legado se hubiese hecho sin condición.

Et Iulianus rectissime scribit tanto amplius eum capturum, quantum condicionis implendae causa dare eum oportet, nec interesse, heredi an extraneo dare iussus sit, quia computatione facta, quae semper in persona eius introduceretur, non amplius lege concessae portionis ad eum subsideret.

§ 2.- Cum vir uxori "si a liberis ne nupserit" in annos singulos aliquid legavit, quid iuris sit? Iulianus respondit posse mulierem nubere et legatum capere. Quod si ita scriptum esset "si a liberis impuberibus ne nupserit", legem locum non habere, quia magis cura liberorum quam viduitas iniungeretur.

63.- GAIUS; *libro III, ad legem Iuliam et Papiam*.- Cum ita legatum sit "si Titio non nupserit" vel ita "si neque Titio neque Seio neque Maevio nupserit" et denique si plures personae comprehensae fuerint, magis placuit, cuilibet eorum si nupserit, amissuram legatum, nec videri tali condicione viduitatem iniunctam, cum alii cuilibet satis commode possit nubere.

§ 1.- Videamus et si ita legatum sit "si Titio nupserit". Et quidem si honeste Titio possit nubere, dubium non erit, quin, nisi paruerit condicioni, excludatur a legato: si vero indignus sit nuptiis eius iste Titius, dicendum est posse eam beneficio legis cuilibet nubere. Quae enim Titio nubere iubetur, ceteris omnibus nubere prohibetur: itaque si Titius indignus sit, tale est, quale si generaliter scriptum esset "si non nupserit". Immo si verum amamus, durior haec condicio est quam illa "si non nupserit": nam et ceteris omnibus nubere prohibetur et Titio, cui inhoneste nuptura sit, nubere iubetur.

Julianus very properly thinks that he will be entitled to as much more of the legacy as he may have paid for the purpose of complying with the condition, nor does it make any difference whether he was directed to make payment to the heir, or to a stranger; because after the calculation, which he is always obliged to make, is completed, no more will remain for him than the share authorized by the law.

§ 2.- Where a man bequeaths an annual legacy to his wife under the condition that she shall not marry as long as she has children; what is the rule of law? Julianus answers that the woman can marry and take the legacy. If, however, the testator provided that she should not marry as long as her children were under the age of puberty, the rule would not apply; because the duty of caring for the children, rather than remaining in the state of widowhood, was enjoined by the testator.

63.- GAIUS; *On the Lex Julia et Papia, Book II*.- Where a legacy was bequeathed as follows, "If she should not marry Titius," or, "If she should marry neither Titius, Seius, nor Mævius," and finally a large number of persons were included in the prohibition, it was held to be the better opinion that the woman would lose her legacy if she married any one of them; for it does not appear that widowhood was imposed by such a condition, because she could very easily marry someone else.

§ 1.- Let us see what would be the case if a legacy was bequeathed to a woman under the condition that she married Titius. And, indeed, if she could marry Titius honorably, there can be no doubt that she would be excluded from the legacy, unless she complied with the condition. If, however, the said Titius was unworthy of contracting marriage with her, it must be said that she can marry anyone that she pleases, by the beneficent provision of the law. For when she was ordered to marry Titius, she was forbidden to marry anyone else, and therefore, if Titius is unworthy of her, the provision is the same as if it had been stated in general terms, "If she should not marry." And, moreover, if she entertains a genuine affection, this condition is harder than the

Y con muchísima razón escribe Juliano, que él recibirá de más tanto cuanto debe dar para cumplir la condición, y que no importa que se le haya mandado que le dé al heredero o a un extraño, porque hecha la cuenta, que siempre se haría respecto a su persona, no queda para él más de la porción permitida por la ley.

§ 2.- ¿Qué derecho habrá, cuando el marido legó a su mujer alguna cosa para cada año, «si no se casare teniendo hijos»? Juliano respondió, que la mujer podía casarse y adquirir el legado; pero si se hubiese escrito así: «si no se casare teniendo hijos impúberos», no tiene lugar la ley, porque se impondría más bien el cuidado de los hijos que la viudedad.

63.- GAYO; *Comentarios a la ley Julia y Papia, libro III*.- Cuando se haya legado así: «si no se hubiere casado con Ticio», o así: «si no se hubiere casado, ni con Ticio, ni con Seyo, ni con Mevio», y finalmente, si se hubieren comprendido muchas personas, pareció mejor, que si se hubiere casado con alguno de ellos, habrá de perder el legado, y que no se considera que con tal condición se impuso la viudedad, pudiéndose casar con bastante facilidad con otro cualquiera.

§ 1.- Veamos también si se hubiera legado así: «si se casare con Ticio», y a la verdad, si honestamente se pudiera casar con Ticio, no habrá duda de que será excluida del legado, si no hubiere cumplido la condición; pero si este Ticio no fuese digno de las nupcias con ella, se ha de decir, que ella puede casarse por beneficio de la ley con cualquiera; porque a la que se le manda que se case con Ticio se le prohíbe que se case con todos los demás. Y así, si Ticio fuera indigno, esto es lo mismo que si en general se hubiese escrito: «si no se casare», aun más, si amamos la verdad, esta condición es más dura que aquella: «si no se casare»; porque se le prohíbe casarse con todos los demás, y se le manda casarse con Ticio, con quien ella se habría de casar des-

64.- CLEMENTIUS; *libro V, ad legem Iuliam et Papiam*.- Hoc modo legato dato "si Lucio Titio non nupserit" non esse legi locum Iulianus aiebat.

§ 1.- Quod si ita scriptum esset "si Ariciae non nupserit", interesse, an fraus legi facta esset: nam si ea esset, quae aliubi nuptias non facile possit invenire, interpretandum ipso iure rescindi, quod fraudandae legis gratia esset adscriptum: legem enim utilem rei publicae, subolis scilicet procreandae causa latam, adiuvandam interpretatione.

65.- PAULUS; *libro LXII, ad edictum*.- Legato sub condicione relicto si heres, a quo sub condicione legatum est, pendente condicione moriatur, heredem suum obligatum relinquit.

66.- MODESTINUS; *libro X, responsorum*.- Heres statuliberum, cui in eventum condicionis fideicommissum restituere rogatus erat, manumisit: quaero, an fideicommissum ei praestare debeat. Herennius Modestinus respondit, quamquam statuliberum heres manumiserit, tamen fideicommissum, quod sub iisdem condicionibus relictum ei debet, ita praestare cogitur, si condiciones impletas esse praestabit aut per eum stetit, quo minus impleantur.

67.- IAVOLENUS; *libro XI, epistularum*.- Cum sub hac condicione fundus alicui legatus esset "si servum non manumiserit" et, si manumiserit, legatum fundi ad Maevium translatus esset, legatarius de non liberando satisdedit et legatum

one, "If she should not marry," for she is forbidden to marry anyone else but Titius, with whom her marriage would be dishonorable.

64.- TERENCEIUS CLEMENS; *On the Lex Julia et Papist, Book V*.- Where a legacy is bequeathed under the following condition, "If she should not marry Lucius Titius," Julianus says that the law will not apply.

§ 1.- If, however, the testator had said, "If he should not marry Aricia," it should be ascertained whether a fraud on the law has not been perpetrated; for if the said Aricia was a woman who could not easily find another man to marry, it should be held that what the testator had said for the purpose of evasion became void by operation of law, for a law which is beneficial to the State and which has been enacted for the purpose of increasing the population should be aided by a favorable interpretation.

65.- PAULUS; *On the Edict, Book LXII*.- Where a legacy is bequeathed under a condition, and the heir who is charged with it dies while the condition is pending, he will leave his own heir charged with the legacy.

66.- MODESTINUS; *Opinions, Book X*.- An heir manumitted a slave whom he was ordered to set free on the fulfillment of a condition, and who was also made the beneficiary of a trust. I ask whether the heir was obliged to pay him what was left him under the trust. Herennius Modestinus answered that, although the heir had manumitted the slave absolutely, he must, nevertheless, pay him what he was entitled to by virtue of the trust which had been left to him under the same conditions, provided that the slave could show that the conditions had been complied with, or that it was the fault of the heir that this had not been done.

67.- JAVOLENUS; *Epistles, Book XI*.- Where land was devised to a certain person under the following condition, "If he should not manumit his slave," and, if he did manumit him, that the devise of the land should pass to Mævius, the legatee furnished security

con Ticio, con quien ella se habría de casar deshonrosamente.

64.- TERENCEIO CLEMENTE; *Comentarios a la Ley Julia y Papia; Libro V*.- Dado un legado de este modo: «si no se casare con Lucio Ticio», decía Juliano, que no había lugar a la ley.

§ 1.- Pero si se hubiese escrito así: «si no se casare en Aricia», importa saber si se haya defraudado a la ley; porque si se tratase de la que no pudiera encontrar fácilmente casamiento en otra parte, se ha de interpretar que de derecho se rescinde lo que se hubiese escrito para defraudar la ley; porque se debe favorecer con la interpretación una ley útil a la República, dada ciertamente para la procreación de prole.

65.- PAULO; *Comentarios al Edicto, libro LXII*.- Habiéndose dejado bajo condición un legado, si pendiente la condición muriese el heredero a cuyo cargo se legó bajo condición, deja obligado a su propio heredero.

66.- MODESTINO; *Respuestas, libro X*.- Un heredero manumitió al que en el testamento se le dejó la libertad bajo condición, a quien se le había rogado que restituyera un fideicomiso al cumplimiento de una condición; pregunto, si se le deberá entregar el fideicomiso. Herennio Modestino respondió: aunque el heredero haya manumitido al que en el testamento se le dio la libertad bajo condición, sin embargo, es obligado a entregar el fideicomiso que le debe, dejado bajo las mismas condiciones, en este caso, si constare que se cumplieron las condiciones, o en él consistió que no se cumplieran.

67.- JAVOLENO; *Epístolas, libro XI*.- Habiéndose legado a uno un fundo bajo esta condición: «si no hubiere manumitido a un esclavo», y habiéndose transferido a Mevio el legado del fundo, si lo hubiere manumitido, el legatario dio fianza de no darle la

accepit et postea liberavit: quaero, an aliquid Maevio detur. Respondit, si cui ita legatum erit "si servum non manumiserit", satisfactione interposita accipere ab herede legatum poterit et, si postea servum manumiserit, commissa stipulatione heredi vel fundum vel quanti ea res est restituet eoque casu heres ei, cui ex sequenti condicione legatum debuerit, restituet.

68.- IAVOLENUS; *libro II, ex Cassio*.- Si ita legatum esset "cum nupserit", si nupta fuerit et hoc testator scisset, alterum matrimonium erit expectandum nihilque intererit, utrum vivo testatore an post mortem ea iterum nupserit.

69.- GAIUS; *libro XIII, ad legem Iuliam et Papiam*.- Si ita expressum erit: "Titio, si voluerit, do lego", apud Labeonem Proculus notat non aliter ad heredem legatarii pertinere, quam si ipse legatarius voluerit ad se pertinere, quia condicio personae iniuncta videtur.

70.- PAPINIANUS; *libro XVI, quaestionum*.- Duos mater filios sub condicione emancipationis ex partibus heredes instituit eis plurium rerum praeceptiones pure dedit: hereditatem adierunt. Patrem a legatorum commodo illa quoque ratio debet summovere, quod emancipando filios obsecutus voluntati supremum iudicium uxoris suae custodiri voluit.

71.- PAPINIANUS; *libro XVII, quaestionum*.- Titio centum ita, ut fundum emat, legata sunt: non esse cogendum Titium cavere Sextus Caecilius existimat, quoniam ad ipsum dumtaxat emolumentum legati rediret. Sed si filio fratri alumno minus industrius prospectum esse voluit, interesse

not to free the slave, received the bequest, and afterwards emancipated him. I ask whether anything is due to Mævius. The answer was that if the bequest had been as follows, "If he should not manumit his slave," and security was furnished, the party could receive the legacy from the heir, and if he afterwards manumitted the slave, the agreement, having become operative, he must either deliver the land to the heir, or pay him its value, and in this instance the heir must give it to him to whom the legacy was due under this condition.

68.- THE SAME; *On Cassius, Book II*.- Where a legacy is bequeathed to take effect when a woman marries, if she was already married and the testator was aware of the fact, the parties must wait for a second marriage, and it will make no difference whether the woman marries again during the lifetime of the testator or after his death.

69.- GAIUS; *On the Lex Julia et Papia, Book XIII*.- If the testator expressed himself as follows, "I give and bequeath to Titius such-and-such property, if he is willing," Proculus, on Labeo, remarks that the legacy will not belong to the heir of the legatee, unless the legatee himself desired him to have it, because the condition appears to be attached to the person.

70.- PAPINIANUS; *Questions, Book XVI*.- A mother appointed her two children heirs to certain shares of her estate under the condition that they should be emancipated, and left them absolutely bequests of certain articles as preferred legacies. They entered upon the estate. Their father should be excluded from the benefit of the legacies, because by emancipating his children in compliance with her wishes, he desired that the last will of his wife should be observed.

71.- THE SAME; *Questions, Book XVII*.- A hundred aurei were bequeathed to Titius, in order that he might purchase a tract of land. Sextus Caecilius thinks that Titius should not be compelled to give security, because, in any event, the entire benefit of the legacy would accrue to him. If, however, the

libertad, recibió el legado, y después lo manumitió; pregunto, si se le dará alguna cosa a Mevio. Respondió, que si a uno se le hubiere legado así: «si no hubiere manumitido a un esclavo», habiendo interpuesto fianza, podrá recibir del heredero el legado; y si después manumitiere al esclavo, habiendo incurrido en la estipulación, le restituirá al heredero el fundo, o cuanto vale esta cosa; y en este caso el heredero restituirá a aquel a quien le debiere el legado en virtud de la siguiente condición.

68.- EL MISMO; *Doctrina de Cassio, libro II*. - Si se hubiese legado así: «cuando se casare», si estuviere casada y el testador lo hubiese sabido, se habrá de esperar a otro matrimonio; y nada importará, que ella se casare de nuevo o viviendo el testador o después de su muerte.

69.- GAYO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si se hubiere expresado así: «doy y lego a Ticio, si el quisiere», observa Próculo en Labeón, que el legado no pertenece al heredero del legatario de otro modo sino si el mismo legatario hubiere querido que le perteneciera a él, porque se considera la condición aneja a la persona.

70.- PAPINIANO; *Cuestiones, libro XVI*.- Una madre instituyó herederos de partes a dos hijos bajo condición de emancipación, y les dio puramente prelegados de muchas cosas; adieron la herencia; también debe repeler del beneficio de los legados al padre la razón de que emancipando a los hijos, habiendo cumplido la voluntad, quiso que se guardase la última disposición de su mujer.

71.- EL MISMO; *Cuestiones, libro XVII*.- Se le legaron a Ticio ciento para que comprase un fundo; opina Sexto Cecilia, que no ha de ser obligado Ticio a dar caución, porque a él solamente iría el emolumento del legado. Pero si quiso haber mirado por un hijo, hermano, o alumno poco industrioso, se ha de

heredis credendum est atque ideo cautionem interponendam, ut et fundus comparetur ac postea non alienaretur.

§ 1.- Titio centum relicta sunt ita, ut Maeviam uxorem quae vidua est ducat: condicio non remittetur et ideo nec cautio remittenda est. Huic sententiae non refragatur, quod, si quis pecuniam promittat, si Maeviam uxorem non ducat, praetor actionem denegat: aliud est enim eligendi matrimonii poenae metu libertatem auferri, aliud ad testamentum certa lege invitari.

§ 2.- Titio centum relicta sunt ita, ut a monumento meo non recedat vel uti in illa civitate domicilium habeat. Potest dici non esse locum cautioni, per quam ius libertatis infringitur. Sed in defuncti libertis alio iure utimur.

§ 3.- "Titio genero meo heres meus dotis Seiae filiae meae nomine centum dato". Legati quidem emolumentum ad Seiam, quae dotem habere incipit, pertinebit, sed quia non tantum mulieri, sed Titio quoque, cui pecuniam legavit, consultum videtur, prope est, ut ipse legatarius intellegatur et legatum petere debeat. Si post divortium genero pecuniam heres solverit, aequè liberabitur, quoniam in dotem solutio convertitur.

Constante autem matrimonio etiam prohibente muliere Titio recte solvetur: hoc enim et mulieris interest, ut incipiat esse dotata. Nam et si quis ipsam quoque petitionem habere responderit eaque pecuniam petat neque dotis fieri velit, non dubie doli summovebitur exceptione. Ante nuptias vero Titio

testator intended to benefit the son of his brother, whom he had reared, and who was hardly capable of transacting business, it must be held that the heir was interested, and therefore security should be furnished that the land would be purchased, and would not afterwards be alienated.

§ 1.- A hundred aurei were left to Titius, under the condition that "he would marry Maevia who is a widow." In this instance, the legatee cannot be released from compliance with the condition, and hence he will not be excused from giving security. This opinion cannot be successfully opposed, for if anyone should promise to pay the money to Titius if he should not marry Maevia, the Praetor will refuse him an action; for it is one thing for a man to be deprived of the freedom of marriage through fear of a penalty, and another to be induced to contract matrimony under a certain condition.

§ 2.- A hundred aurei were bequeathed to Titius, under the condition, "That he will not leave my monument," or "Or that he will always reside in such-and-such a city." It can be said that there is no ground for demanding security by which the right of liberty may be infringed. We make use of a different rule with reference to the freedman of a deceased person.

§ 3.- "Let my heir give to my son-in-law Titius a hundred aurei by way of dowry for my daughter Seia." The benefit of the legacy will belong to Seia because she begins to have a dowry; but as the testator seemed to have had in his mind not only the woman, but also Titius to whom he bequeathed a sum of money, it is proper that he himself should be understood to be the legatee, and therefore be able to claim the legacy. If the heir should pay the money through the son-in-law, after a divorce had taken place, he will also be released, as the payment was converted into the dowry.

Payment can legally be made to Titius during the existence of the marriage, even if the woman should forbid this to be done, for it is to her interest that she should begin to be endowed. And if anyone should say that she herself is entitled to a right of action and can bring suit to recover the money, and does not

creer que le interesa al heredero; y que por lo tanto se ha de interponer caución, así de que se comprará el fundo, como de que no será enajenado después.

§ 1.- Se le dejaron ciento a Ticio para que tomase por mujer a Mevia, que es viuda; no se dispensará la condición, y por lo tanto tampoco se ha de dispensar la caución. A esta opinión no se opone que el Pretor deniegue la acción, si alguno prometiera dinero, si no tomase por mujer a Mevia; porque una cosa es que con el temor de la pena se quite la libertad de elegir matrimonio, y otra que se invite al matrimonio con cierta condición.

§ 2.- A Ticio se le dejaron ciento de este modo: «para que no se separe de mi monumento», o: «para que tenga su domicilio en aquella ciudad»; se puede decir, que no ha lugar a la caución, por la cual se infringe el derecho de libertad; pero observamos otro derecho respecto a los libertos del difunto.

§ 3.- «Déle mi heredero a Ticio, mi yerno, ciento por razón de la dote de Seya, mi hija»; el emolumento del legado pertenecerá ciertamente a Seya, la cual comienza a tener dote; pero como se considera que se miró no solamente por la mujer, sino también por Ticio, a quien legó el dinero, es verosímil que el mismo sea considerado legatario, y que deba pedir el legado si el heredero hubiere pagado al yerno el dinero después del divorcio, se librará igualmente, porque el pago se convierte en dote.

Pero durante el matrimonio, válidamente le pagará a Ticio, aun prohibiéndolo la mujer; porque también a la mujer le interesa comenzar a estar dotata. Pues aunque alguno respondiere que también ella tiene la petición, y ella pidiese el dinero, y no quisiera que se hiciese de la dote, sin duda será repelida con la

vel muliere defunctis legatum apud heredem manet. Quod si nolit eam uxorem ducere, causa legati, quod ad mulieris personam attinet, satisfactum intellegitur, sed Titio legatum petenti nocebit exceptio doli. Sabinus autem existimabat nupta muliere Titio sine cautione legatum deberi, quoniam pecunia dotis efficeretur: sed cum ante nuptias, quia purum legatum est, peti potest, cautio "mulieri pecuniam reddi" necessaria erit.

Quod si maritus vitio suo causa ceciderit neque solvendo sit, numquid adversus heredem mulieri, quae nihil deliquit, succurri debeat ob eam pecuniam, quae doti fuerat destinata? Sed quoniam ambo legati petitionem habuerunt, salvam habebit, non soluta pecunia viro, mulier actionem.

72.- PAPINIANUS; *libro XVIII, quaestionum*.- Cum tale legatum esset relictum Titiae "si a liberis non discesserit", negaverunt eam recte cavere, quia vel mortuis liberis legati condicio possit exsistere. Sed displicuit sententia: non enim voto matris opponi tam ominosa non interponendae cautionis interpretatio debuit.

§ 1.- Et cum patronus liberto certam pecuniam legasset, si a liberis eius non discessisset, permisit imperator velut Mucianam cautionem offerri: fuit enim periculosum ac triste libertum coniunctum patroni liberis eorum mortem exspectare.

§ 2.- Titius heredem institutum rogavit post mortem suam hereditatem restituere, si fideicommissi cautio non fuisset petita. Mucianae cautionis exemplum ante constitutionem remissae cautionis locum habere non potuit, quoniam vivo eo, cui relictum est, impleri condicio potuit.

wish it to constitute her dowry, there is no doubt that she can be barred by an exception on the ground of bad faith. If Titius or the woman should die before contracting marriage, the legacy will belong to the heir. If Titius should not be willing to marry the woman, the legacy will be valid so far as she is personally concerned, but if Titius should claim it, he can be barred by an exception on the ground of bad faith. Sabinus was of the opinion that if the woman was married to Titius, the legacy would be due without any security, as the money would become her dowry. Security for payment, however, would be necessary before marriage, because the legacy, being absolute, can be demanded.

But if the husband should lose his case through his own fault, and should prove to be insolvent, ought the woman to be entitled to relief against the heir for the money which was intended as her dowry, where she was not at all to blame? As both husband and wife have rights of action in this case, the woman will retain hers if the legacy is not paid to her husband.

72.- THE SAME; *Questions, Book XVIII*.- Where a legacy is left as follows, "I bequeath to Titia, if she does not abandon her children," authorities deny that she can be legally required to give security, because the condition can be fulfilled even if the children should die. This opinion was not adopted, however, for an ominous interpretation of this kind should not be opposed to the desire of the mother, and compel her to give security.

§ 1.- Where a patron bequeathed a certain sum of money to his freedman on condition that he would not abandon his children, the Emperor permitted a kind of Mucian bond to be given, because it would be both dangerous and distressing for a freedman who was intimately associated with the children of his patron to anticipate their death.

§ 2.- Titius charged the heir whom he had appointed to deliver to another his estate at the time of his death, if security was not demanded by the beneficiary of the trust. The beneficiary cannot require a Mucian bond to be filed before releasing the heir from giving security, since the condition can be

excepción de dolo. Pero habiendo fallecido Ticio o la mujer antes de las nupcias, queda el legado en poder del heredero; mas si no quisiera tomarla por mujer, se entenderá haberse cumplido con la causa del legado en lo que atañe a la persona de la mujer, pero al pedir Ticio el legado le perjudicará la excepción de dolo. Pero opinaba Sabino, que, casada la mujer con Ticio, se debía sin caución el legado, porque el dinero se haría de la dote; pero cuando se puede pedir antes de las nupcias, porque el legado es puro, será necesaria la caución de que «se restituirá el dinero a la mujer».

Mas si el marido perdiera por su culpa la causa, y no fuera solvente, ¿se le deberá acaso auxiliar contra el heredero a la mujer, que en nada delinquirá, por razón del dinero, que había sido destinado para la dote? Pero como ambos tuvieron la petición del legado, la mujer tendrá salva la acción, no habiéndosele pagado al marido el dinero.

72.- EL MISMO; *Cuestiones. libro XVIII*.- Habiéndose dejado este legado: «a Ticia, si no se hubiere separado de sus hijos», dijeron que con razón no daba ella caución, porque podría cumplirse la condición del legado también habiéndose muerto los hijos; pero no pareció bien esta opinión, porque no se debió oponer al deseo de la madre interpretación de tan mal agüero para que no interponga la caución.

§ 1.- Y cuando el patrono hubiese legado cierta cantidad al liberto si no se hubiese separado de sus hijos, permitió el Emperador que se ofreciese una especie de caución Muciana; porque fue peligroso y triste que el liberto unido a los hijos de su patrono esperase la muerte de los mismos.

§ 2.- Ticio rogó al heredero instituido que después de su muerte restituyese la herencia, si no se hubiese pedido caución del fideicomiso; antes de la constitución, que remite la caución, no pudo tener lugar el efecto de la caución Muciana, porque se pudo cumplir la condición viviendo aquel a quien se

§ 3.- Quid ergo, si ita scriptum sit: "Peto, post mortem tuam restituas hereditatem ita, ne satis fideicommissi petatur neve ratio exigatur". Sine dubio per huiusmodi verba non interponendae quidem cautionis condicio videbitur adscripta, rationi vero non exigendae modus adhibitus, scilicet ut culpa, non etiam dolus remissus intellegatur: idque in eius persona, qui negotia gessit cuique rationis reddendae necessitas fuerat testamento remissa, rescriptum est.

§ 4.- "Si arbitratu Titii Seia nupserit, heres meus ei fundum dato". Vivo Titio etiam sine arbitrio Titii eam nubentem legatum accipere respondendum est eamque legis sententiam videri, ne quod omnino nuptiis impedimentum inferatur. Sed si Titius vivo testatore decedat, licet condicio deficit, quia tamen suspensa quoque pro nihilo foret, mulieri succurretur.

§ 5.- "Maeviae, si non nupserit, fundum cum morietur lego". Potest dici et si nupserit, eam confestim ad legatum admitti. Non idem probatur, si certus dies incertusve alius legato fuerit adscriptus.

§ 6.- Falsam causam legato non obesse verius est, quia ratio legandi legato non cohaeret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.

complied with during the lifetime of the party to whom the legacy was bequeathed.

§ 3.- What should be done if the following clause was inserted in the will, "I wish you, after my death, to deliver my estate to So-and-So, in such a way that no bond for the execution of the trust, nor any account will be required of you?" From these words it will undoubtedly appear that the condition of giving bond will not be required, and a certain degree of indulgence may be exercised in demanding an account, that is, so far as negligence is concerned; but the heir will not be excused from presenting one where fraud has been committed. A rescript on this point was issued with reference to a certain person who had transacted the business of the testator, and by the will of the latter had not been required to render an account.

§ 4.- "If Seia should marry with the approval of Titius, let my heir give her such-and-such a tract of land." If Seia should marry during the lifetime of Titius, and he granted his consent, it should be held that she could receive the legacy; for it is the spirit of the law that nothing shall be done in any way to interfere with marriage. If, however, Titius should die during the lifetime of the testator, relief must be granted to the woman, even though the condition has failed, because, being in suspense, it would be of no force or effect.

§ 5.- "I bequeath to Maevia, at her death, such-and-such a tract of land, if she should not marry." It can be said that even if she should marry, she will immediately be entitled to the legacy. This, however, would not apply, if a certain date, or any other indefinite time, should be fixed for the payment of the legacy.

§ 6.- It is more equitable to hold that a false motive should not interfere with the payment of a legacy, for the reason that the cause of bequeathing it is not included in the legacy. Generally, however, an exception on the ground of bad faith will be available, if it should be proved that the testator would not otherwise have made the bequest.

dejó.

§ 3.- Luego, ¿qué se dirá, si se hubiera escrito así: «te pido, que después de tu muerte restituyas la herencia, con tal que no se pida fianza del fideicomiso, o no se exija cuenta»? Sin duda que con tales palabras se considerará impuesta la condición de que no se interponga ciertamente la caución, pero habiéndose añadido modo para que no se exija cuenta, esto es, para que se entienda perdonada la culpa, pero no también el dolo; y esto se respondió por rescripto respecto a la persona del que fue gestor de negocios, a quien en el testamento le había sido dispensada la necesidad de rendir cuentas.

§ 4.- «Si Seya se casare a arbitrio de Ticio, déle un fundo mi heredero»; se ha de responder, que casándose ella en vida de Ticio, aun sin la voluntad de Ticio, adquiere el legado; y este parece que es el sentido de la ley, para que no se ponga absolutamente ningún impedimento a las nupcias. Pero si Ticio falleciera. viviendo el testador, aunque falta la condición, como no obstante también estando pendiente sería tenida por nula, se le auxiliará a la mujer.

§ 5.- «Lego a Mevia, si no se hubiere casado, un fundo para cuando muera»; se puede decir, que también si se hubiere casado, sería ella admitida desde luego al legado. No se aprueba lo mismo, si al legado le hubiere sido asignado un término cierto u otro incierto.

§ 6.- Es más verdadero que una causa falsa no perjudica al legado, porque no es inherente al legado la razón de legado; pero las más de las veces tendrá lugar la excepción de dolo, si se probase que de otro modo no hubiera de haber hecho el legado.

§ 7.- Falsam condicionem Cassius et Caelius Sabinus impossibilem esse dixerunt, veluti: "Pamphilus, si quod Titio debeo solverit, liber esto", si modo nihil Titio fuit debitum: quod si post testamentum factum testator pecuniam exsolvit, defecisse condicionem intellegi.

§ 8.- Falsam legati demonstrationem non facere legatum Sabinus respondit (veluti si quis, cum Titio nihil legasset, ita scriptum reliquerit: "Ex centum, quae Titio legavi, quinquaginta heres Seio dato") idque sumpsit ex defuncti voluntate, quia non animo legandi, sed deminuendi legatum, quod falso datum existimaret, ita scriberet. Propter falsam tamen demonstrationem legati non plus Seius adsequetur, quam si vere demonstratum fuisset.

73.- PAPINIANUS; *libro XIX, quaestionum*.- Titio fundus, si in Asiam non venerit, idem, si pervenerit, Sempronio legatus est. Cum in omnibus condicionibus, quae morte legatariorum finiuntur, receptum est, ut Muciana cautio interponatur, heres cautionem a Titio accepit et fundum ei dedit. Si postea in Asiam pervenerit, Sempronio heres, quod ex stipulatu cautionis interpositae consequi potest, utili actione praestare cogitur. Sed si cautio medio tempore defecerit, quae sollicitate fuerat exacta, non de suo praestabit heres, sed quia nihil ei potest obici, satis erit actiones praestari. Si tamen, Titius cum in Asiam venisset, Sempronius, priusquam legatum accipiat, decesserit, heredi eius deberetur, quod defunctus petere potuit.

74.- PAPINIANUS; *libro XXXII, quaestionum*.- Mulieri et Titio usus fructus, si non nupserit mulier, relictus est. Si mulier nupserit, quamdiu Titius et

§ 7.- Cassius and Caelius-Sabinus say that a false condition can be classed as impossible; as, for instance, "Let Pamphilus be free if he pays Titius what I owe him," provided nothing was due to Titius. If, however, after the execution of the will, the testator should pay him what he owed him, the condition will be understood to have failed.

§ 8.- Sabinus gives it as his opinion that the false designation of a legacy does not constitute one, for example, where a testator who had left nothing to Titius inserted the following provision in his will: "Let my heir pay Seius fifty aurei out of the hundred which I have bequeathed to Titius." Sabinus came to this conclusion after consideration of the will of the deceased who made this provision, not with the intention of making a bequest, but for the purpose of diminishing one which he thought he had already made. Seius, however, cannot obtain any greater legacy on account of the false designation than if it had actually been true.

73.- THE SAME; *Questions, Book XIX*.- A certain tract of land was left to Titius, "If he should not go into Asia," and, if he should go there it was left to Sempronius. As in the case of all conditions which are terminated by the death of the legatees, it was decided that a Mucian bond must be furnished, and the heir received a bond from Titius, and transferred the land to him. If he should afterwards go to Asia, suit can be brought against the heir to compel him, by a praetorian action, to pay to Sempronius what he could recover under the stipulation secured by the bond which had been given. If the bond, which had been taken with all due caution, should in the meantime become worthless, the heir will not be required to make good the amount out of his own property; but as he can in no way be blamed, it will be sufficient for him to assign his rights of action. If, however, Titius should go into Asia, and Sempronius should die before receiving the legacy, the rights of the deceased will pass to his heir.

74.- THE SAME; *Questions, Book XXXII*.- The usufruct of certain property was bequeathed to the wife of the testator and to Titius, provided the woman

§ 7.- Cassio y Celio Sabino dijeron que la condición falsa es imposible, por ejemplo: «sea libre Pánfilo, si él hubiere pagado lo que debo a Ticio», si es que nada se le debió a Ticio; pero si el testador pagó el dinero después de hecho el testamento, se entiende que falló la condición.

§ 8.- Sabino respondió, que la falsa demostración de un legado no constituye el legado, por ejemplo, si alguno, no habiéndole legado nada a Ticio, hubiere dejado así escrito: «de los ciento que le legué a Ticio dé el heredero cincuenta a Seyo»; y esto lo infirió de la voluntad del difunto, porque no escribía así con ánimo de legar, sino de disminuir el legado, que falsamente creía haber dado. Pero por causa de la falsa demostración del legado no conseguirá Seyo más que si se hubiese hecho una verdadera demostración.

73.- EL MISMO; *Cuestiones, libro XIX*.- Se legó a Ticio un fundo, si no fuere a Asia, y el mismo a Sempronio, si fuere; habiéndose admitido respecto a todas las condiciones, que se extinguen con la muerte de los legatarios, que se interponga la caución Muciana, el heredero recibió de Ticio la caución, y le dio el fundo; si después hubiere ido a Asia, es obligado el heredero por la acción útil a darle a Sempronio lo que puede conseguir por la estipulación de la caución interpuesta. Pero si en el tiempo intermedio hubiere faltado la caución, que solícitamente había sido exigida, no pagará el heredero con lo suyo, sino que como nada se le puede objetar, será bastante que preste las acciones; pero si, habiendo ido Ticio a Asia, Sempronio hubiere fallecido antes de recibir el legado, se le debería al heredero de éste lo que el difunto pudo pedir.

74.- EL MISMO; *Cuestiones libro XXXII*.- Se les dejó a una mujer ya Ticio el usufruto, si la mujer no se casare; si la mujer se casare, mientras viviere Ticio, y

vivit et in eodem statu erit, partem usus fructus habebit: tantum enim beneficio legis ex legato concessum esse mulieri intellegendum est, quantum haberet, si condicioni paruisset. Nec si Titius, qui condicione defectus est, legatum repudiet, ea res mulieri proderit.

75.- PAPINIANUS; *libro XXXIV, quaestionum*.- Dies incertus condicionem in testamento facit.

76.- PAPINIANUS; *libro VI, responsorum*.- Fideicommissum a filiis relictum "si quis ex his sine liberis diem suum obierit" adoptionis commento non excluditur.

77.- PAPINIANUS; *libro VII, responsorum*.- Avia, quae nepotem sub condicione emancipationis pro parte heredem instituerat, ita postea codicillis scripsit: "Hoc amplius nepoti meo, quam quod eum heredem institui, lego praedia illa". Condicionem emancipationis repetitam videri placet, quamvis avia nullam in legatis, ut in hereditate, substitutionem fecisset. Nam et cum servus pure quidem liber, heres autem sub condicione scriptus et, si heres non exstiterit, legatum accipere iussus est, in legato repetitam videri libertatem divus Pius rescripsit.

§ 1.- Muciana cautio locum non habet, si per aliam condicionem actio legati differri possit.

§ 2.- "Titio, si mulier non nupserit, heres centum dato": quam pecuniam eidem mulieri Titius restituere rogatus est. Si nupserit mulier die legati cedente, fideicommissum petet: remoto autem fideicommisso legatarius exemplum Mucianae cautionis non habebit.

did not marry. If she should marry, as long as Titius lived and remained in the same civil condition, she would be entitled to half of the usufruct, for it should be understood that, under the law, she would be entitled to as much by virtue of the legacy as she would have been if she had complied with the condition; and if Titius, with reference to whom the condition actually failed, should reject the legacy, the woman will obtain no advantage.

75.- THE SAME, *Questions, Book XXXIV*.- An uncertain date mentioned in a will imposes a condition.

76.- THE SAME; *Opinions, Book VI*.- Where a trust has been left to be executed by children, "If any of them should die without issue," it will not be invalidated by the legal fiction of adoption.

77.- THE SAME; *Opinions, Book VII*.- A grandmother who had appointed her grandson heir to a certain portion of her estate, on condition that he should be emancipated, afterwards inserted the following in a codicil, "I also devise such-and-such lands to my grandson, in addition to what I have already left him as my heir." It was held that the condition of emancipation was repeated, although the grandmother had made no substitution either with reference to the legacies, or the estate. For indeed where a slave was bequeathed his freedom absolutely, but was appointed an heir under a certain condition, and if he should not be the heir, he was directed to receive a legacy, the Divine Pius stated in a Rescript that his grant of freedom should be considered as repeated in the legacy.

§ 1.- The Mucian bond does not apply, if payment of the legacy is deferred by some other condition.

§ 2.- "Let my heir pay a hundred aurei to Titius, if my wife does not marry again." Titius was charged to pay the money to the same woman under the terms of a trust. If the woman should marry, she can demand the execution of the trust on the day when the legacy is payable; and if she is excluded from the benefit of

permaneciere en el mismo estado, tendrá su parte de usufruto; porque se ha de entender que por beneficio de la ley se le concedió del legado a la mujer tanto cuanto tendría, si hubiese cumplido la condición; y si Ticio, respecto del cual faltó la condición, repudiara el legado, esto no le aprovechará a la mujer.

75.- EL MISMO; *Cuestiones, libro XXXIV*.- El término incierto constituye una condición en el testamento.

76.- EL MISMO; *Respuestas, libro VI*.- Un fideicomiso dejado a cargo de los hijos: «si alguno de ellos hubiere fallecido sin hijos», no se extingue con la ficción de la adopción.

77.- EL MISMO; *Respuestas, libro VII*.- Una abuela, que había instituido heredero de parte a su nieto bajo condición de emancipación, escribió después así en los codicilos: «además de que lo instituí heredero, le lego a mi nieto aquellos predios»; parece bien, que se considere repetida la condición de la emancipación, aunque la abuela no hubiese hecho en los legados, como en la herencia, ninguna substitución. Porque también cuando un esclavo fuera a la verdad instituido libre puramente, pero heredero bajo condición, y se mandó que si no fuere heredero recibiera un legado, respondió por rescripto el Divino Pío, que se consideraba repetida la libertad en el legado.

§ 1.- La caución Muciana no tiene lugar, si la acción del legado se pudiera diferir por medio de otra condición.

§ 2.- «Dé el heredero ciento a Ticio, si no se casare la mujer»; cuyo dinero se le rogó a Ticio que lo restituyera a la misma mujer; si la mujer se hubiere casado pedirá el fideicomiso al correr el término del legado, pero habiéndose prescindido del fideicomiso el legatario no tendrá el beneficio de la caución

§ 3.- Pater exheredatae filiae tutores dedit eosque, si mater eius, impubere filia constituta, vita decessisset, ad rem gerendam accedere iussit, cum uxori mandatum esset, ut moriens filiae communi decies restitueret. Non sub condicione tutores videbuntur dati nec, si quid aliud interea puella quaesisset, eius administratione prohiberi, cautio vero fideicommissi matri remissa. Quocumque indicio voluntatis cautio legatorum vel fideicommissorum remitti potest. Itaque si cautionis non petendae condicio legato vel fideicommisso praescribatur, condicionem ea res non faciet: non enim deficiet, si quis cavere desideraverit, onere cautionis non secuto, quod adversus invitum hodie iure publico sequi non potest, postquam remitti posse cautionem placuit.

78.- PAPINIANUS; *libro IX, responsorum*.- Cum pupillus aut tutor eius condicionem in personam pupilli collatam impedit, tam legati quam libertatis iure communi condicio impleta esse videtur.

§ 1.- Disiunctivo modo condicionibus adscriptis alteram defecisse non oberit altera vel postea impleta, nec interest, in potestate fuerint accipientis condiciones an in eventum collatae.

79.- PAPINIANUS; *libro I, definitionum*.- "Heres meus, cum morietur Titius, centum ei dato". Purum legatum est, quia non condicione, sed mora

trust, the legatee will not be entitled to security such as the Mucian bond.

§ 3.- A father appointed guardians for his daughter whom he had disinherited, and directed them to begin to transact the business of their ward, if her mother should die before the girl reached the age of puberty; and he charged his wife, at her death, to pay to their common daughter a million sesterces. The guardians are not considered to have been appointed under a condition, so that, if, in the meantime, the girl should have acquired any other property, they will not be prevented from administering it. The bond to be executed for the performance of the trust was not required of the mother, and that to be exacted from the heirs to secure the payment of the legacies, or the execution of the trust, can be remitted by any indication whatsoever of the wish of the deceased. Therefore, if the condition not to demand a bond is prescribed in the case of a legacy or a trust, this fact does not render them conditional; for if any of the parties should desire a bond to be furnished, and one is not executed, the condition will not fail, for, at present, under the public law, the heir cannot be compelled to furnish a bond against his will, after it has been decided that he can be excused from giving one.

78.- THE SAME; *Opinions, Book IX*.- Where a ward or a guardian prevents compliance with a condition which has reference to the person of the former, whether a legacy or a grant of freedom is concerned, the condition is considered by the Common Law to have been fulfilled.

§ 1.- Where two conditions have been prescribed in different ways, it will not affect the legacy if one of them should fail, and the other should afterwards be fulfilled. For it makes no difference whether the conditions imposed could be performed by the party entitled to the legacy, or were dependent upon some event taking place.

79.- THE SAME; *Definitions, Book I*.- "Let my heir pay Titius a hundred aurei at the time of the latter's death." The legacy is absolute for the reason

Muciana.

§ 3.- Un padre nombró tutores para su hija desheredada, y les mandó que si la madre de ésta hubiese fallecido siendo impúbera la hija, se aplicasen a administrar los bienes; habiéndosele mandado a la mujer que al morir restituyese diez a la hija común, no se considerarán dados bajo condición los tutores, y si mientras tanto hubiese adquirido la joven alguna otra cosa, no se le prohíbe su administración, pero se le remite a la madre la caución del fideicomiso. Con cualquier indicio de la voluntad se puede remitir la caución de los legados o de los fideicomisos. Y así, si en el legado o en el fideicomiso se prescribe la condición de no pedir caución, esto no constituirá una condición, porque no faltará, si alguno hubiere deseado que se dé la caución, no habiéndose seguido la carga de la caución; lo que hoy no puede suceder por derecho público contra el que no quiere, después que se determinó que se pudiese remitir la caución,

78.- EL MISMO; *Respuestas, libro IX*.- pues cuando el pupilo o su tutor impide la condición referida a la persona del pupilo, se considera por derecho común que se cumplió la condición, tanto del legado, como de la libertad.

§ 1.- Habiéndose puesto condiciones en modo disyuntivo no perjudicará que haya faltado la una, habiéndose cumplido la otra aunque después; y no importa que las condiciones hayan estado en la potestad del que recibe, o sido referidas a un hecho eventual.

79.- EL MISMO; *Definiciones, libro I*.- «Cuando muera Ticio déle ciento mi heredero»; el legado es puro, porque se suspende no por una condición, sino

suspenditur: non potest enim condicio non existere.

§ 1.- "Heres meus, cum ipse morietur, centum Titio dato". Legatum sub condicione relictum est: quamvis enim heredem moriturum certum sit, tamen incertum est, an legatario vivo. Dies legati non cedit et non est certum ad eum legatum perventurum.

§ 2.- Qui post Mucianam cautionem interpositam legatum accepit, si contra cautionem aliquid fecerit, stipulatione commissa etiam fructus heredi restituet: hoc enim legatarius et in exordio cavere cogitur.

§ 3.- Quamvis usus fructus, cum morietur legatarius, inutiliter legetur, tamen cautionis Mucianae remedium usu fructu quoque sub condicionem alicuius non faciendi legato locum habet.

§ 4.- Quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet, veluti: "Titio patri centum, si filia, quam habet in potestate, non nupserit, heres dato" vel: "Filio familias, si pater eius uxorem non duxerit, heres dato".

80.- SCAEVOLA; *libro VIII, quaestionum*.- Eas causas, quae protinus agentem repellunt, in fideicommissis non pro conditionalibus observari oportet: eas vero, quae habent moram cum sumptu, admittemus cautione oblata: nec enim parem dicemus eum, cui ita datum sit, si monumentum fecerit, et eum, cui datum est, ut monumentum faciat.

81.- PAULUS; *libro XXI, quaestionum*.- Iulius

that it is not dependent upon the condition, but upon delay; for a condition cannot exist under such circumstances.

§ 1.- "Let my heir, when he dies, pay Titius a hundred aurei." This legacy is bequeathed under a condition. For although it is certain that the heir will die, it is, nevertheless, uncertain whether the time for the payment of the legacy will arrive during the life of the legatee, and it is not certain that he will receive it.

§ 2.- Where anyone receives a legacy after having furnished a Mucian bond, and does something contrary to the terms of the bond, and the stipulation becomes operative, he must also restore the profits of the property to the heir. In this instance the legatee should be compelled to give security from the beginning.

§ 3.- Although an usufruct to take effect at the time of the death of the legatee, when bequeathed in this way is void, still, the remedy of the Mucian bond will be available where the usufruct of property is bequeathed to anyone under the condition that he will not perform some act.

§ 4.- Anything which is done to evade the law by preventing marriage has no force or effect, as for example, "Let my heir pay Titius a hundred aurei if his daughter, whom he has under his control, does not marry," or "Let my heir pay the said sum to such-and-such a son under paternal control, if his father does not marry."

80.- SCAEVOLA; *Questions, Book VIII*.- Reasons which immediately exclude the party from taking action must not be considered conditional with reference to trusts, but we can only consider those as such which cause delay with expense, where the legatee can receive his bequest after having furnished a bond. For we cannot say that the following cases are similar, namely, where property is bequeathed, "If the legatee will erect a monument," and where it is bequeathed, "to enable him to erect a monument."

81.- PAULUS; *Questions, Book XXI*.- Julius

por una demora; porque la condición no puede no cumplirse.

§ 1.- «Cuando el mismo muera dé mi heredero ciento a Ticio»; el legado fue dejado bajo condición; porque aunque sea cierto que el heredero había de morir, es sin embargo incierto si el término del legado no correrá viviendo el legatario, y no es cierto que a él haya de ir el legado.

§ 2.- El que recibió un legado después de haberse interpuesto la caución Muciana, si hiciera algo contra la caución, restituirá, habiendo incurrido en la estipulación, también los frutos al heredero; porque de esto es obligado el legatario a dar caución aun desde el principio.

§ 3.- Aunque se legue inútilmente el usufruto para cuando muere el legatario, sin embargo tiene lugar el remedio de la caución Muciana también habiéndose legado el usufruto bajo la condición de no hacer alguna cosa.

§ 4.- No tiene fuerza alguna lo que en fraude de la ley se escribió para impedir las nupcias, por ejemplo: «déle el heredero ciento a Ticio, padre, si no se casare la hija, que él tiene bajo su potestad», o: «déle el heredero al hijo de familia, si su padre no tomare mujer».

80.- SCÉVOLA; *Cuestiones, libro VIII*.- No se deben considerar como condicionales en los fideicomisos las causas que inmediatamente repelen al actor, pero admitiremos, habiéndose ofrecido caución, las que tienen mora con gasto; porque no diremos que son iguales este a quien se haya dado así: «si hubiere hecho un monumento», y este, a quien se le dió: «para que haga un monumento».

81.- PAULO; *Cuestiones, libro XXI*.- Julio Paulo a

Paulus Nymphidio. Quaesisti, si ita in testamento cautum esset: "Stichus si rationes reddiderit, cum contubernali sua liber esto eis que decem heres dato", an Stichus mortuo antequam rationes redderet, vel pariatore vel reliqua habente, libera esset mulier? Et an de legato idem accipiamus.

Libertate data, si rationes reddiderit, hanc conditionem rationum reddendarum, ut iussus videatur reliqua reddere, si qua habet, cum fide actus sui. Quae si nulla sunt, pure accepisse libertatem videbuntur: et si post aditam hereditatem decessit, competente libertate etiam legatum eos secutum est.

Quod si, cum adhuc reliqua haberet, decessit, sub eadem conditione et contubernalis eius libertatem accepisse videtur et defecta videbitur condicione. Sed non ineleganter illud dicetur Stichum quidem sub condicione manumissum, contubernalem autem eius pure et illam coniunctionem non ad coniungendam condicionem, sed ad necessitudinem demonstrandam pertinere.

§ 1.- Tunc demum pro impleta habetur condicio, cum per eum stat, qui, si impleta esset, debitorus erat.

82.- CALLISTRATUS; *libro II, quaestionum*.- Cum servus ita liber esse iussus sit "si rationes reddiderit" eique fundum heres dare damnas sit, videamus, utrum condicio libertati praeposita sit an vero et legato. Et quidem si libertati soli accipiamus praepositam, nullus tractatus amplius superest: nam legatum purum invenitur et ideo inutile fit: quod si condicio etiam legato insita sit, quod quidam recte putant, simul cum libertate dies quoque legati utiliter cedit. Quid ergo continetur his verbis "si rationes reddiderit?" quidam hoc aiunt "si reliqua reddiderit",

Paulus to Numphidius, Greeting. Where the following was provided by a will: "If Stichus should render his accounts, let him be free, along with his wife; and let my heir pay him ten aurei;" and Stichus should die before rendering his accounts, whether they balanced, or he owed something, you. ask if the woman would become free, and whether we should have the same understanding with reference to the legacy.

Freedom being dependent upon rendering his accounts, this condition is required of the slave in order to show the good faith of his administration, as he seems to have been ordered to account for any balance, in his hands if there was any, and if there was none, both the parties will be held to be absolutely entitled to their freedom; and if the slave should die after the estate was entered upon, both having obtained their freedom, they will also be entitled to the legacy.

If, however, the slave should die with a balance in his hands unaccounted for, his wife will not be considered to have obtained her freedom, which was dependent on the same condition which was not fulfilled. It may not, however, improperly be said, that while Stichus was manumitted under a certain condition, his wife was absolutely manumitted, and that the same condition did not apply to her, but was only mentioned through the necessity of designating their union.

§ 1.- A condition is considered to have been complied with where the party who will be indebted if it is complied with is responsible for this not being done.

82.- CALLISTRATUS; *Questions, Book II*.- Where a slave is directed to be free as follows, "Let my heir be charged with the delivery of such-and-such a tract of land to my slave, if he renders his accounts," let us see whether the condition has reference to the grant of freedom, or to the legacy. And, indeed, if we decide that it only refers to the grant of freedom, no further consideration is necessary, for the legacy is absolute, and therefore void. If, however, the condition was imposed on the legacy, as some authorities very properly hold, it

Ninfidio. Preguntaste, si, habiéndose dispuesto así en el testamento: «si hubiere tendido las cuentas, sea libre Stico juntamente con su compañera, y déles diez el heredero», y muerto Stico antes de que rindiese las cuentas, o estando liquidado, o teniendo los sobrantes, sería libre la mujer, y si admitimos lo mismo respecto al legado.

Habiéndose dado la libertad «si hubiere rendido las cuentas», esta condición de que rinda las cuentas sirve para que se considere que se le mandó que entregase los sobrantes, si algunos tiene, con la fidelidad de su administración; y si no hay ningunos, se considerará que recibieron puramente la libertad, y si falleció después de adida la, herencia, compe-tiéndoles la libertad también les siguió el legado.

Pero si falleció teniendo todavía algunos remanentes, se considera que también su compañera recibió la libertad bajo la misma condición, y se considera que respecto de ella se falta a la condición. Pero no sin discreción se dirá esto, que Stico ciertamente fue manumitido bajo condición pero que su compañera lo fue puramente, y que aquella conjunción no sirve para unir la condición, sino para demostrar el parentesco.

§ 1.- Se tiene por cumplida la condición siempre y cuando consiste en quien había de deber, si hubiese sido cumplida.

82.- CALISTRATO; *Cuestiones, libro II*.- Cuando así se haya mandado que un esclavo sea libre: «si hubiere dado las cuentas», y el heredero haya sido condenado a darle un fundo, veamos si la condición haya sido puesta para la libertad, o si también para el legado. Y, a la verdad, si la entendiéramos puesta sólo para la libertad, ya no queda ningún otro examen, porque se halla que el legado es puro, y por lo tanto se hace inútil; pero si la condición hubiera sido puesta también para el legado, lo que con razón opinan algunos, juntamente con la libertad corre útilmente

quasi nihil intersit, utrum sub hac condicione "si reliqua" vel hac "si rationes reddiderit".

Sed nos neque condicionem meram putamus esse, quae in datione existit, neque meram condicionem, quae in facto sit, sed eam condicionem, quae ex mixtura quadam consistit. Nam non utique si ille in folle reliqua optulerit, liber erit: non enim testator hoc sensit, sed illud, ut rationes reddat, quomodo servus reddere solet, id est legendas offerre rationes primum, deinde computandas, ut explorari possit, imputationes probe an improbe referantur, accepta recte relata an non recte: ita enim incipit quidem res a facto, pervenit autem ad pecuniam. Inest his verbis etiam heredes notitia instrui rationum, ut sciant, quid in quaque ratione scriptum sit. Nam quod ipse vivus facturum erat, ab heredibus suis fieri iussisse intellegitur: ille autem utique non sic solebat servo suo ostendenti reliqua rationes subscribere, sed ita, ut legeret examinaret exciperet. Itaque cum servo sub hac condicione testamento libertas datur "si rationes reddiderit", non hanc solam habet significationem, si cautiones instrumentaque omnia actus sui exhibuerit heredi, sed et si reliqua solverit.

83.- PAULUS; *libro XII, responsorum*.- Lucius Titius ita testamentum fecit: "Aurelius Claudius natus ex illa muliere, si filium meum se esse iudici probaverit, heres mihi esto". Paulus respondit filium de quo quaeretur non sub ea condicione institutum videri, quae in potestate eius est, et ideo testamentum nullius esse momenti.

becomes legally payable at the very moment when the slave obtains his freedom. What then is the meaning of the words, "If he renders his accounts"? Certain jurists say that it signifies if he should give a statement of the balance in his hands, just as if there was no difference between the two conditions, "If he renders an account of the balance remaining in his hands," or, "If he renders his accounts."

We, however, do not think that the condition only has reference to payment, or to some act which is to be performed, but that it includes both of these things, since if the slave should tender the balance of the money in a bag, he will not be released from liability, as this was not the intention of the testator, but he wished him to render his accounts in the way in which a slave usually does so; that is to say, that if he should first show the accounts to the heir, and then the calculations, in order that it may be ascertained whether they are correctly or incorrectly made out, and whether the receipts which have been taken correspond with the statement, or not. In this way the investigation begins with an act, and finishes with the payment of money. These words also mean that the heirs can ascertain from the examination of each item what is contained in the several accounts, for the heir is understood to have ordered the same thing to be done by his heirs which he himself would have done if he had been living. For he was certainly not accustomed to sign accounts, where his slave merely showed him the balance which was due, but he was accustomed to read them, scrutinize them, and take exception to them; therefore, where freedom is left to a slave under the condition, "If he renders his accounts," it has not merely the signification that he will deliver to his heir all the bonds and documents relating to his administration, but that he will also pay him any balance remaining in his hands.

83.- PAULUS; *Opinions, Book XII*.- Lucius Titius made a will as follows, "Let Aurelius Claudius, the son of such-and-such a woman, be my heir, if he proves in court that he is my son." Paulus gave it as his opinion that the son in question did not appear to have been appointed under any condition which it was in his power to comply with, and therefore that the will was of no force or effect.

útilmente también el término del legado. Luego, ¿qué se comprenderá en estas palabras: «si hubiere dado las cuentas»? Unos dicen esto: «si hubiere entregado los remanentes», como si ninguna diferencia hubiera entre esta condición: «si hubiere entregado los remanentes», y esta: «si hubiere dado las cuentas».

Pero nosotros no creemos que es mera condición, que consiste en dar, ni mera condición, que consiste en un hecho, sino condición que consiste en algo que es mixto; porque no será ciertamente libre, si él ofreciere en una bolsa los remanentes. Porque el testador no entendió esto, sino que diera las cuentas como suele dadas un esclavo, esto es, que ofreciera las cuentas primeramente para leerlas, después para calcularlas, para que se pueda examinar, si con probidad o sin ella se anotan las partidas, y si los ingresos se anotan bien o mal. Así, pues, la cosa comienza ciertamente por un hecho, pero llega a una cantidad de dinero, se comprende también en estas palabras, que se instituya a los herederos con noticia de las cuentas, para que sepan qué se ha escrito en cada cuenta; porque se entiende que mandó que se haga por sus herederos lo que él mismo había de hacer en vida. Mas él ciertamente no solía suscribirle así las cuentas a su esclavo, que le presentaba los remanentes, sino de este modo, leyéndolas, examinándolas, y poniéndoles reparos. Y así, cuando a un esclavo se le da en el testamento la libertad bajo esta condición: «si hubiere dado las cuentas», no tiene ella esta sola significación, si le exhibiere al heredero las cauciones y todos los instrumentos de su administración, sino si entregare también los remanentes.

83.- PAULO; *Respuestas, libro XII*.- Lucio Ticio hizo así testamento: «Sea mi heredero Aurelio Claudio, nacido de tal mujer, si le probare al juez que él es hijo mío»; Paulo respondió, que no consideraba que el hijo de que se trataba fue instituido bajo condición que está en su potestad, y que por lo tanto el testamento era de ningún valor.

84.- PAULUS; *libro XIV, responsorum*.- "Illis libertis alimentorum nomine, si cum filio meo morati fuerint, menstruos denarios centenos et vestiaria dari volo". Liberti in obsequio fuerunt, quamdiu adulescens ad militiam promoveretur: qua causa effectum est, ut quibusdam romae relictis proficisceretur, et apud castra defunctus est: quaesitum est, an ab heredibus eius alimenta debeantur. Paulus respondit condicionem quidem in persona libertorum, qui cum filio defuncti morati sunt aut per eos non stetit, quo minus morarentur, mortuo filio testatoris defecisse non videri. Sed si testator propter filii utilitatem his, qui cum eo morati fuissent, alimenta praestari voluit, contra voluntatem defuncti petentes audiri non oportere.

85.- SCAEVOLA; *libro III, responsorum*.- Titia heredis instituti liberos habentis filii fidei commisit, uti rem eius universam restitueret filiis eius liberisve eorum, cum ipsi petissent, sine ulla iuris cavillatione: quaero, an his verbis "cum illi a te petierint" condicio fideicommisso adscripta videatur. Respondit non videri.

86.- MAECENATUS; *libro III, fideicommissorum*.- Iulianus noster eum, qui decem dare et ita liber esse iussus esset, si a vivente manumissus esset, non aliter legatum, quod ei cum libertate datum esset, habiturum, quam si condicioni libertatis paruisset: item in emptorem, si alienatus esset. Sed id tunc locum habet, cum omnimodo simul cum libertate legatum adquiri potuit, licet legato imposito non sit, veluti cum in tempus libertatis legatum collatum esset.

§ 1.- Cum vero libertas sub condicione, legatum autem praesenti die datum est, in hoc quaestio est, an

84.- THE SAME; *Opinions, Book XIV*.- "I wish ten denarii and their clothing to be given to such-and-such freedmen every month, for their support, if they reside with my son." The said freedmen remained in attendance on the son until the latter, having grown up, was appointed to a command in the army, the result of which was he set out on his journey, having left some of his freedmen at Rome, and died in camp. The question arose whether support should be furnished by the heirs of the son. Paulus was of the opinion that the condition should not be considered to have failed, so far as the freedmen who continued to reside with the son of the deceased were concerned, as the son having died, it was not their fault that they did not continue to reside with him; but if the testator had desired support to be furnished to those freedmen who resided with his son for the convenience of the latter, and the freedmen demanded it contrary to the wishes of the deceased, they should not be heard.

85.- SCAEVOLA; *Opinions, Book III*.- Titia, having appointed her son, who also had children, her heir, charged him to deliver all her property to his children or grandchildren, whenever they should claim it, and to do so without any legal controversy. I ask whether, by these words, "Whenever they shall claim it," a condition appears to have been imposed upon the trust. The answer was that it does not.

86.- MAECIANUS; *Trusts, Book III*.- Our Julianus says that where a slave is ordered to pay ten aurei and be free, and he is manumitted during the lifetime of his owner, he will not be entitled to the legacy which was left him with his freedom, unless he complies with the condition under which it was granted. This also applies to a purchaser of the slave, if he should be sold. It, however, only applies where he could obtain the legacy unconditionally with his freedom, even though no condition was imposed on the payment of the legacy; as, for instance, where the legacy was to vest at the time when he obtained his freedom.

§ 1.- Where, however, his freedom was granted under a condition, and the legacy was payable at

84.- EL MISMO; *Respuestas, libro XIV*.- «Quiero que a aquellos libertos se les den a título de alimentos cien denarios mensuales y el vestido, si vivieren con mi hijo»; los libertos cumplieron su deber hasta que el adolescente fué promovido a la milicia; por cuya causa sucedió, que, habiendo dejado algunos en Roma, partió, y murió en el campamento; se preguntó, si por sus herederos se deberán los alimentos. Paulo respondió, que, muerto el hijo del testador, no se consideraba ciertamente que hubiera faltado la condición respecto a la persona de los libertos, que habitaron con el hijo del difunto, o respecto de aquellos en quienes no consistió que no habitaran; pero que si el testador quiso que por utilidad del hijo se les prestaran los alimentos a los que con él hubiesen habitado, no debían ser oídos los que piden contra la voluntad del difunto.

85.- SCÉVOLA; *Respuestas, libro III*.- Ticia encomendó a la fidelidad de su hijo, que tenía descendientes, instituido heredero, que restituyese todos sus bienes a los hijos del mismo, o a los descendientes de estos, cuando ellos lo hubiesen pedido, sin ninguna cavilación de derecho; pregunto, si con estas palabras: «cuando ellos te lo hubieren pedido», se considerará añadida una condición al fideicomiso. Respondió, que no se consideraba.

86.- MECIANO; *Fideicomisos, libro III*.- Dice nuestro Juliano, que aquel a quien se le mandó que diera diez, y que así fuese libre, si hubiese sido manumitido por el testador en vida, no habrá de tener el legado, que con la libertad se le hubiese legado, de otro modo sino si hubiese cumplido la condición de la libertad; y lo mismo respecto al comprador, si hubiese sido enajenado. Pero esto tiene lugar siempre y cuando de todos modos se pudo adquirir el legado juntamente con la libertad, aunque no haya sido impuesta al legado, por ejemplo, cuando el legado hubiese sido referido al tiempo de la libertad.

§ 1.- Pero cuando la libertad fue dada bajo condición, y el legado de presente, estriba la cuestión

constiterit legatum: etenim nec Catonianae sententiae locum in proposito esse, quia etsi statim testator decessisset, non tamen omnimodo inutile esset legatum, cum posset condicio libertatis ante aditam hereditatem impleri et legatum manumisso deberi, nisi forte necessarius heres exstisset: tunc enim omnimodo inutile erit legatum iure ipso, quia sub condicione acceperit libertatem.

87.- VALENS; *libro I, fideicommissorum*.- Quod traditum est in legatis novissimam, in libertatibus levissimam condicionem spectandam esse,

88.- GAIUS; *libro I, fideicommissorum*.- Id est quae ipsi servo commodior sit,

89.- VALENS; *libro I, fideicommissorum*.- Non ad ea dumtaxat pertinet, quae saepius sub diversis condicionibus, sed etiam quae primo pure, deinde sub condicione dantur. Itaque quod heres pure dare iussus est quodve pure legatum est, cum id ex intervallo sub condicione legatum est, posterius valet: si prius sub condicione, deinde pure legatum est, praesens debetur. Quod si pure legatum ex continenti heres sub condicione damnatus aut rogatus est dare, perinde est, ac si iuncta subiecta scriptura idem legatum esset, vel ut praesens vindicari, si hoc voluerit legatarius, vel, cum condicio exstiterit, ab herede peti possit, nisi commemoratione superioris legati posterius scriptum fuerit, velut: "Stichum, quem illi legavi, heres meus ei, si illud factum erit, dato": tunc enim revocandi animo praesens legatum et sub condicione dandi ita scripsisse videbitur: et si ante condicionem rem vindicet, doli exceptio locum habere poterit.

once, the question arises whether the legacy is valid. For, in this case there is no ground for the application of the Rule of Cato, since, even if the testator should die immediately after making his will, the legacy will not be absolutely void, as the condition upon which the freedom of the slave is dependent may be complied with before the estate is entered upon, and the manumitted slave be entitled to the legacy, unless he should be appointed a necessary heir; for, in this instance, the legacy will be absolutely void by operation of law because the slave received his freedom under a condition.

87.- VALENS; *Trusts, Book I*.- The following rule which has been handed down, namely, that where several conditions have been imposed with reference to grants of freedom, the one which is the most easily complied with, and, in the case of legacies, the last one, shall be considered.

88.- GAIUS; *Trusts, Book I*.- (That is to say, the one which will be the most convenient for the slave himself to carry out.)

89.- VALENS; *Trusts, Book I*.- This has reference not only to provisions which are often dependent upon different conditions, but also to dispositions which are at first absolutely made, and have afterwards become conditional. Therefore, where the heir is ordered to pay something absolutely, or where the bequest is absolute, and the same property is subsequently bequeathed under a condition, the last bequest will be valid. If the property is first left under a condition and afterwards absolutely, it will be payable immediately. If, however, the legacy is bequeathed absolutely and the heir is charged or requested to pay it at once under a certain condition, it is the same as if the bequest had been made in two places, so that, if the legatee desires, he can bring suit for its recovery immediately, or it can be claimed by the heir when the condition has been fulfilled, unless the legacy has only been mentioned the second time by way of calling attention to the first, for example, "Let my heir give Stichus to the party to whom I have bequeathed him, if he does such-and-such a thing," for, in this instance, the testator is not considered to

en si subsistirá el legado. En efecto, en el caso presente no tiene lugar la regla Catoniana, porque aunque el testador hubiese fallecido inmediatamente, no se da, sin embargo, enteramente inútil el legado, pudiéndose cumplir la condición de la libertad antes de ser adida la herencia, y deber el legado al manumitido, a no ser acaso que hubiese quedado heredero necesario; pues entonces el legado sera enteramente inútil de derecho; porque habrá recibido la libertad bajo condición.

87.- VALENTE; *Fideicomisos, libro I*.- Lo que se ha dicho, que en los legados se ha de atender a la última condición, y en las libertad a la menos gravosa,

88.- GAYO; *Fideicomisos, libro I*.- Esto es, a la que sea más cómoda para el mismo esclavo,

89.- VALENTE; *Fideicomisos, libro I*.- no se refiere solamente a los que se dan muchas veces bajo diversas condiciones, sino también a los que primero puramente, y después bajo condición. y así, lo que al heredero se le mandó dar puramente, o lo que fue legado puramente, cuando después de un intervalo fue legado bajo condición, es válido en la forma posterior. Si primero fue legado bajo condición, y después puramente, se debe de presente. Mas si se legó puramente, e inmediatamente se condenó o se rogó al heredero para que lo diera bajo condición, es lo mismo que si se hubiese legado la misma cosa habiéndose añadido la siguiente cláusula, o para que pueda ser reivindicado de presente, si así lo quisiera el legatario, o para que pueda ser pedido al heredero cuando se haya cumplido la condición, a no ser que el posterior haya sido escrito con mención del legado anterior, por ejemplo; «déle mi heredero el esclavo Stico, que le legué, si se hubiere hecho tal cosa»; porque entonces se considerará que escribió así con intención de revocar el legado de presente, y de darlo bajo condición; y si se reivindicara la cosa antes de

90.- GAIUS; *libro I, fideicommissorum*.- Fideicommissum varie data libertate non levissima spectanda est, sed novissima, quia posterior voluntas potior haberi debet: cui consonat etiam rescriptum divi Antonini.

91.- MAECENATUS; *libro II, fideicommissorum*.- Condicionum, quae in futurum conferuntur, triplex natura est, ut quaedam ad id tempus, quo testator vivat, quaedam ad id, quod post mortem eius futurum sit, quaedam ad alterutrum pertineant, tempus autem vel certum vel infinitum comprehendatur: quae omnia non minus in fideicommissis quam in institutionibus ac legatis incidere solent: ut haec condicio "Titiae, si mihi nupserit" non dubie nisi vivente testatore, illa autem "si ad exequias funeris mei venerit" nisi post mortem impleri non possit, illa vero "si filio meo nupserit" vel vivente vel mortuo testatore impleri possit. Et prima quidem ac tertia ex relatis condicionibus infinitum tempus habent: quandoque enim nupserit, impletur condicio: secunda ad certum tempus adscripta est.

92.- ULPIANUS; *libro V, fideicommissorum*.- Si cui legatum fuerit relictum isque rogatus sit liberos suos emancipare, an cogi debeat manumittere? Et retineo me dixisse defici eos a petitione fideicommissi: neque enim praetor fideicommissarius eos ad libertatem tuetur ut servos. Papinianum quoque libro nono responsorum scribere referebam non esse cogendum emancipare filios suos. Arbitror tamen extra ordinem debere constitui eum qui adgnoscat id,

have made this provision for the purpose of revoking the bequest, and changing it to a conditional one, and if the legatee should bring suit to recover the property before the condition was complied with, an exception on the ground of bad faith will be a bar to further proceedings.

90.- GAIUS; *Trusts, Book I*.- Where freedom is bequeathed to a slave several times by a trust, not the condition most easy of fulfillment but the last one should be considered, in order that the final desire of the deceased may have the preference. A Rescript of the Divine Antoninus confirms this opinion.

91.- MAECIANUS; *Trusts, Book II*.- The nature of conditions which have reference to the future is threefold; some relate to the time during which the testator may live, some relate to that following his decease, and some relate to both, and the date of their fulfillment may be either certain or indefinite. All these things are accustomed to be taken into consideration, not only in the case of trusts, but also with reference to the appointments of heirs, and the bequests of legacies. For instance, there is no doubt that the following condition, "I bequeath to Titia, if she should marry me," must be complied with during the lifetime of the testator; this one, however, "If he should attend my funeral," cannot be complied with until after his death. The following one, namely, "If she should marry my son," can be complied with either during the lifetime, or after the death of the testator. The first and the third of the conditions mentioned refer to an indefinite time, for the condition will be complied with whenever the girl marries; but the second condition has reference to a certain time.

92.- ULPIANUS; *Trusts, Book V*.- Where a person to whom a legacy was bequeathed is asked to emancipate his children, should he be compelled to emancipate them? I remember that I said on this point that the children were excluded from demanding the execution of the trust; for the Praetor, acting as trustee, does not protect children who desire emancipation as he does slaves. I am aware that Papinianus also in the Ninth Book of Opinions stated

cumplida la condición, podrá tener lugar la excepción de dolo.

90.- GAYO; *Fideicomisos, libro I*.- Habiéndose dado por fideicomiso la libertad de varios modos, no se ha de atender a la condición menos gravosa, sino a la última, porque debe ser considerada preferida la última voluntad; con lo cual concuerda también el Rescripto del Divino Antonino.

91.- MECIANO; *Fideicomisos, libro II*.- Triple es la naturaleza de las condiciones que se refieren a lo futuro, de suerte que unas corresponden al tiempo en que vive el testador, otras al que haya de seguir después de su muerte, y otras a ambos, comprendiéndose un tiempo cierto, o indefinido. Todo lo cual suele tener lugar no menos en los fideicomisos que en las instituciones y en los legados, de suerte que esta condición: «a Ticia, si se hubiere casado conmigo», sin duda que no se puede cumplir sino viviendo el testador; pero esta; «si fuere a las exequias de mi funeral», no se podría cumplir a no ser después de la muerte; mas esta; «si se casare con mi hijo», se podría cumplir o viviendo, o muerto el testador. Y, a la verdad, la primera y la tercera de las mencionadas condiciones tienen tiempo indefinido, porque en cualquier tiempo en que se casare se cumple la condición, y la segunda está sujeta a un tiempo cierto,

92.- ULPIANO; *Fideicomisos, libro V*.- Si se hubiere dejado un legado a alguien, y a este se le hubiera rogado que emancipara a sus propios hijos, ¿deberá ser obligado a manumitirlo? Y recuerdo que dije que éstos carecen de acción para pedir el fideicomiso; porque ni el Pretor fideicomisario los ampara para la libertad, como a los esclavos, Decía yo que también Papiniano escribió en el libro noveno de las Respuestas, que no ha de ser obligado a

quod sibi relictum est hac contemplatione, ut liberos suos emanciparet, cogendum emancipare: neque enim debet circumveniri testantium voluntas: sic deinde hoc accipiendum, quemadmodum si sub condicione liberorum emancipandorum ei fuisset legatum vel ita relictum, ut eos emanciparet.

Cui rei consequens est, quod divus Severus rescripsit. Nam cum quaedam mulier nepotes suos heredes instituisset et ipsum filium coheredem filiis suis dedisset eosque invicem substituisset rogassetque filium, ut filios emanciparet, non autem rogasset, ut hereditatem eis restitueret: ex auctoritate divi Severi emancipare eos compulsus est hisque restituere hereditatem. Et adiectum est, ut, si tardius id faceret, quasi ex mora usuras praestaturum: videri enim eum, qui moram faceret emancipationi, moram restitutioni fideicommissi eam facere.

93.- PAPINIANUS; *libro VIII, responsorum*.- Mater filio suo coheredes sine ulla condicione filias ipsius dedit ac petit, ut filias suas emanciparet, ita ut curatores a praetore acciperent. Filii videri fidei commississe placuit, ut eas sui iuris constitutas ad hereditatem aviae pervenire pateretur, nec ad rem pertinere, si portionem filiarum iure substitutionis quaesisset.

94.- HERMOGENIANUS; *libro I, primo iuris epitomarum*.- Cum ita datur libertas: "Si Titio" (qui non est heres) "decem dederit", certa persona demonstratur ac propterea in personam eius tantum condicio impleri potest. Sane si cum cesserit dies pecuniam condicioni comprehensam statuliber habuerit, iure constituto nulli dando consequitur

that a father should not be compelled to emancipate his children. I think, however, that an extraordinary rule should be established in such cases, and that a father should be forced to emancipate his children when he has received property which was left to him with the understanding that he would emancipate them, for the intentions of testators should not be evaded. Hence this should be understood in the same way as where a legacy was bequeathed to him on condition of his emancipating his children, to enable him to emancipate them.

The rule stated by the Divine Severus in a Rescript, agrees with this; for when a certain woman appointed her grandchildren her heirs, and appointed her son, their father, their co-heir, and substituted them for one another, requesting her son that he should emancipate her children, but did not ask him to transfer the estate to them, he was compelled by the authority of the Divine Severus to emancipate them, and to deliver the estate to them, and it was added that if he should delay to do this, he would be liable for interest on the amount unpaid while he was in default; for it was held that he who was in default in granting their emancipation was guilty of the same default with reference to the delivery of the property under the terms of the trust.

93.- PAPINIANUS; *Opinions, Book VIII*.- A mother having appointed her son her heir, and designated the daughters of the latter as his co-heirs, charged him to emancipate the latter, so that they might receive a curator from the Praetor. It was held that the son was charged with a trust to permit his daughter to become independent of his authority, so that they could obtain the estate of their grandmother, and that it did not make any difference if he should acquire the shares of his daughters by the right of substitution.

94.- HERMOGENIANUS; *Epitomes of Law, Book I*.- Where freedom is bequeathed to a slave on condition that he will pay ten aurei to Titius, who was not the heir, a certain person is designated, and, on this account, the condition cannot be complied with except with reference to him. It is clear that, when the day for the payment of the legacy arrives, the slave

emancipar a sus hijos. Pero juzgo que extraordinariamente se debe determinar, que el que aceptó lo que se le dejó con la mira de que emancipare a sus hijos, ha de ser obligado a emanciparlos; porque no debe ser defraudada la voluntad de los testadores. Finalmente, esto se ha de entender así, como si se hubiese hecho el legado bajo la condición de emancipar a los hijos, o se le hubiese dejado de este modo, para que los emancipase.

A lo cual es consiguiente lo que respondió por Rescripto el Divino Severo; pues habiendo cierta mujer instituido herederos a sus nietos, y dado a sus hijos como coheredero el mismo hijo, y habiéndolos substituido recíprocamente, y habiéndole rogado al hijo que emancipase a los hijos, no habiéndole, sin embargo rogado, que les restituyese la herencia, fue compelido por la autoridad del Divino Severo a emanciparlos, y a restituirles la herencia; y se añadió, que si esto lo hiciese tardíamente, habría de pagar intereses como por morosidad; porque se consideraba que el que causase mora para la emancipación, también causaba mora para la restitución del fideicomiso.

93.- PAPINIANO; *Respuestas, libro VIII*.- Una madre dió a su hijo como coherederas sin ninguna condición las hijas del mismo, y le pidió que emancipase a sus propias hijas, de suerte que del Pretor recibiesen curadores; se determinó, que se consideraba que encomendó a la fidelidad del hijo que consintiese que constituidas ellas de propio derecho llegaran a la herencia de la abuela; y que no hacía al caso que hubiese adquirido la porción de las hijas por derecho de substitución.

94.- HERMOGENIANO; *Epítome del Derecho, libro I*.- Cuando así se da la libertad: «si a Ticio, que no es heredero, le hubiere dado diez», se designa una persona cierta, y por lo tanto sólo en esta persona se puede cumplir la condición. Ciertamente, si cuando comenzare el término el instituido libre bajo condición tuviere el dinero comprendido en la con-

libertatem. Diversa causa est legatarii, in cuius persona placuit condicionem deficere, si, antequam dederit legatarius pecuniam, Titius moriatur.

§ 1.- Ex his verbis "si heredi" vel "si heredi Titio decem dederit, liber esto", non tantum heredi, sed etiam heredis heredi dando pervenit ad libertatem: at si nullus heredi successerit, iure constituto nulli dando ad libertatem perveniet.

95.- HERMOGENIANUS; *libro IV, iuris epitomatum*.- Legatum sub condicione relictum et ad alium translatum, si non condicio personae cohaereat, sub eadem condicione translatum videtur.

96.- PAULUS; *libro I, ad Neratium*.- Titio usus fructus servi legatus est et, si ad eum pertinere desisset, libertas servo data est. Titius vivo testatore decessit. Libertas non valet, quia condicio nec initium accepit. Paulus. Ergo et si viveret Titius et capere non potest, idem dicendum est: desisse enim non videtur, quod nec incipit.

§ 1.- Servi usus fructus mulieri, quoad vidua esset, legatus, idem servus, si ea nupsisset, liber esse iussus est. Si mulier nupserit, liber erit, quia potior est legato libertas.

97.- PAULUS; *libro II, ad Neratium*.- Municipibus, si iurassent, legatum est. Haec condicio non est impossibilis. Paulus. Quemadmodum ergo pareri potest per eos? Itaque iurabunt, per quos municipii res geruntur.

who is to be free under a condition will, according to the law which has been established, be entitled to the money dependent upon said condition, and will gain his freedom without payment to anyone. The case of a legatee is different, and the condition with reference to him is considered to have failed if Titius should die before the legatee has paid the money.

§ 1.- Where a condition is expressed in the following terms, "Let So-and-So, a slave, be free, if he pays ten aurei to the heir," or "Or if he pays ten aurei to Titius, the heir," he will obtain his freedom if he pays the money not only to the heir, but to the heir of the latter. But if there should be no successor to the heir he will, according to the established law, obtain his freedom without payment to anyone.

95.- THE SAME; *Epitomes of Law, Book IV*.- Where a legacy bequeathed under a condition is transferred to another, it is considered to have been transferred under the same condition, if it was not personal.

96.- PAULUS; *On Neratius, Book I*.- The usufruct of a slave was bequeathed to Titius, and freedom was granted to the slave when it should cease to belong to the legatee. Titius died during the lifetime of the testator. The grant of freedom was not valid, because the condition did not have a beginning. Paulus: Hence, if Titius should live, and should not be able to receive the legacy, it must be said that the same rule will apply; for anything which did not have a beginning cannot be held to have ceased to exist.

§ 1.- The usufruct of a slave was bequeathed to a woman as long as she remained unmarried, and the same slave was directed to be free if she did marry. If the woman should marry the slave would become free, because a grant of freedom has more force than a legacy.

97.- THE SAME; *On Neratius, Book II*.- A legacy was bequeathed to the citizens of a municipality on condition of their taking an oath. This condition is not an impossible one. Paulus: How then can it be complied with? The officials by whom the affairs of

dición, consigue por derecho establecido la libertad sin darselo a nadie. Diversa situación es la del legatario, respecto a cuya persona se determinó que faltaba la condición, si Ticio muriese antes que el legatario hubiere dado el dinero.

§ 1.- En virtud de estas palabras: «si al heredero», o «si a Ticio, heredero, le hubiere dado diez, sea libre», llega a la libertad no sólo dándolos al heredero, sino también al heredero del heredero; mas si ninguno le hubiese sucedido al heredero, por derecho establecido llegará a la libertad sin dárselos a nadie.

95.- EL MISMO; *Epítome del Derecho, libro IV*.- El legado dejado bajo condición, y transferido a otro, si la condición no fuese inherente a la persona, se considera transferido bajo la misma condición.

96.- PAULO; *Comentarios a Neracio, libro I*.- Se legó a Ticio el usufruto de un esclavo, y, si hubiese dejado de pertenecerle, se le dió la libertad al esclavo; falleció Ticio en vida del testador; no es válida la libertad, porque la condición aun no tuvo principio. Paulo dice: luego también si viviera Ticio, y no puede adquirir, se ha de decir lo mismo; porque no se considera que dejó de ser, lo que no empieza.

§ 1.- Se legó a una mujer el usufruto de un esclavo, mientras estuviese viuda, y se mandó, que, si ella se hubiese casado, fuese libre el mismo esclavo; si la mujer se hubiere casado, sera libre porque la libertad es preferente al legado.

97.- EL MISMO; *Comentarios a Neracio libro II*.- Se hizo un legado a los individuos de un municipio, si hubiesen jurado; esta condición no es imposible. Y pregunta Paulo: ¿pero de qué modo puede ser cumplida? Así, pues, jurarán por ellos aquellos por

98.- PAULUS; *libro III, tertio ad Neratium*.- Mea res sub condicione legari mihi potest, quia in huiusmodi legatis non testamenti facti tempus, sed condicionis expletæ spectari oportet.

99.- PAPINIANUS; *libro XVIII, quaestionum*.- Condiciones extrinsecus, non ex testamento venientes, id est quæ tacite inesse videantur, non faciunt legata condicionalia.

100.- PAPINIANUS; *libro VII, responsorum*.- Titiae, si non nupserit, ducenta, si nupserit, centum legavit: nupsit mulier. Ducenta, non etiam centum residua petat: ridiculum est enim eandem et ut viduam et ut nuptam admitti.

101.- PAPINIANUS; *libro VIII, responsorum*.- Pater Severianam Proculam Aelio Philippo cognato nuptiis testamento designavit: eidem filiae praedium, si Aelio Philippo nupsisset, verbis fideicommissi reliquit: quod si non nupsisset, idem praedium Philippo dari voluit: nondum viripotens puella diem suum obiit. Respondi, cum in condicionibus testamentorum voluntatem potius quam verba considerari oporteat, Aelio Philippo fideicommissum ita datum videri, si ei Procula defuncti filia nubere nolisset: quare cum ea prius, quam viripotens fieret, vita decesserit, condicionem exstiterit non videri.

§ 1.- Ita fideicommisso dato: "Volo restituas, si sine liberis decedas" condicio deficit ex voluntate vel uno filio superstite relicto.

§ 2.- Condicionum verba, quæ testamento praescribuntur, pro voluntate considerantur: et ideo

the town are conducted can take the oath for the citizens.

98.- THE SAME; *On Neratius, Book III*.- My own property can be bequeathed to me under a condition, because, in bequests of this kind, not the time when the will is executed but the time when the condition is fulfilled must be considered.

99.- PAPINIANUS; *Questions, Book XVIII*.- Conditions which are not specifically stated in a will, that is to say, such as seem to have been tacitly included therein, do not render legacies conditional.

100.- THE SAME; *Opinions, Book VII*.- A testator bequeathed two hundred aurei to Titia, if she should not marry, and a hundred to her if she should. The woman married. She can claim the two hundred aurei, but not the other hundred; for it would be absurd for her to be considered a widow and a married woman at the same time.

101.- THE SAME; *Opinions, Book VIII*.- A father, by his will, designated Severiana Procula, his daughter, as the wife of Aelius Philippus, one of her relatives. He left a certain estate to his said daughter in trust if she should marry Aelius Philippus, and if she should not marry him, he wished the same estate to be given to Philippus. The girl died before arriving at a marriageable age. I gave it as my opinion that in conditions mentioned in wills the intention, rather than the words of the testator, should be considered; and hence that Aelius Philippus seemed to have been made the beneficiary of a trust if Procula, the daughter of the deceased, should refuse to marry him.

§ 1.- Where a trust is created as follows, "I wish you to surrender my estate, if you should die without children," according to the intention of the testator the condition will fail if only one child should survive the beneficiary of the trust.

§ 2.- The terms of a condition prescribed by a will are considered only for the purpose of ascertaining

quienes son administrados los intereses del municipio.

98.- EL MISMO; *Comentarios a Neracio, libro III*.- Se me puede legar bajo condición una cosa mía, porque en semejantes legados no se debe atender al tiempo en que se hizo el testamento sino a aquel en que se cumplió la condición,

99.- PAPINIANO; *Cuestiones, libro XVIII*.- Las condiciones extrínsecas, no provenientes del testamento, esto es, las que se consideran que tácitamente son inherentes, no hacen condicionales los legados.

100.- EL MISMO; *Respuestas, libro VII*.- Uno legó doscientos a Ticia, si no se casare, ciento si se casare; la mujer se casó; pida los doscientos, no también los ciento restantes; porque es ridículo que ella misma sea admitida como viuda y como casada.

101.- EL MISMO; *Respuestas, libro VIII*.- Un padre designó en su testamento a Severiana Prócula para contraer nupcias con su cognado Elio Filipo, y con palabras de fideicomiso le dejó a la misma hija un predio, si se hubiese casado con Elio Filipo; pero si no se hubiese casado, quiso que el mismo predio fuese dado a Filipo; la doncella falleció no siendo todavía casadera. Respondí, que como en las condiciones de los testamentos se debe considerar más bien la voluntad que las palabras, se considera que el fideicomiso se le dió a Elio Filipo de este modo, si Prócula, la hija del difunto, no hubiese querido casarse con él; por lo cual, como ella haya fallecido antes de llegar a ser casadera, no se considera que se cumplió la condición.

§ 1.- Dado así un fideicomiso: «quiero que lo restituyas, si fallecieras sin hijos», falta la condición según la voluntad, aunque sólo se haya dejado un solo sobreviviente.

§ 2.- Las palabras de las condiciones, que se prescriben en un testamento, son consideradas con

cum tutores testamento dati, quoniam interea puer adoleverat, id egerint, ut curatores ipsi constituerentur, condicio fideicommissi talis praescripta: "Si tutelam in annum octavum decimum gesserint" defecisse non videbitur.

§ 3.- Socrus nurui fideicommissum ita reliquerat: "si cum filio meo in matrimonio perseveraverit": divortio sine culpa viri post mortem socrus facto defecisse condicionem respondi. Nec ante diem fideicommissi cedere, quam mori coeperit nupta vel maritus, et ideo nec Mucianam cautionem locum habere, quia morte viri condicio possit exsistere.

§ 4.- Fideicommissa menstrua et annua sub ea condicione liberti relictas "quamdiu res patroni filiae gesserit" etsi praestari necesse est filia prohibente res suas administrari, tamen voluntatem filia mutante condicionem resumunt, quoniam plura sunt.

102.- PAPINIANUS; *libro IX, responsorum*.- Cum avus filium ac nepotem ex altero filio heredes instituisset, a nepote petit, ut, si intra annum trigesimum moreretur, hereditatem patruo suo restitueret: nepos liberis relictis intra aetatem supra scriptam vita decessit. Fideicommissi condicionem coniectura pietatis respondi defecisse, quod minus scriptum, quam dictum fuerat, inveniretur.

103.- PAULUS; *libro XIV, quaestionum*.- Si ita legatum sit "Titio post decem annos dato, si satis ab herede non exegerit" et Titius intra decimum annum decesserit, ad heredem suum transmittat legatum,

the intention of the testator, and therefore where testamentary guardians are appointed to administer the affairs of the minor until he grows up, and the condition of a trust is, "If they should administer the guardianship until he reaches his eighteenth year," it will not be considered to have failed to be fulfilled if the guardians should cause themselves to be appointed his curators.

§ 3.- A mother-in-law left a trust for the benefit of her daughter-in-law, under the condition, "That she should remain married to my son." A divorce having been obtained without the fault of the husband after the death of the mother-in-law, I gave it as my opinion that the condition had failed, that the day for the execution of the trust did not begin before the death of either the wife or the husband, and hence that there would be no ground for the Mucian bond because the condition could be fulfilled during the life of the husband.

§ 4.- Where a monthly and annual allowance was left to a freedman by a trust, under the condition, "As long as he may transact the business of the daughter of the patron," the money must be paid, even if the daughter should forbid the freedman to transact her business; still, if she should change her mind, the trusts will be restored to their former condition, for the reason that there are several of them.

102.- THE SAME; *Opinions, Book IX*.- A grandfather appointed his son and a grandson by another son his heirs, and requested his grandson if he should die before reaching his thirtieth year, to deliver his share of the estate to his uncle. The grandson died within the period above mentioned, leaving children. I gave it as my opinion that, on account of paternal affection, the condition of the trust failed of fulfillment, because it should be considered that less had been prescribed than had been intended.

103.- PAULUS; *Questions, Book XIV*.- Where a legacy was bequeathed as follows, "Let such-and-such a sum be paid to Titius, after ten years, if he does not require security from my heirs," and Titius should

arreglo a la voluntad; y por lo tanto, cuando los tutores nombrados en el testamento hubieren hecho que ellos mismos fuesen constituidos curadores, porque en el intermedio el niño se había hecho adolescente, esta condición prescrita para un fideicomiso: «si hubieren administrado la tutela hasta los dieciocho años», no se considerará que faltó.

§ 3.- Una suegra había dejado a su nuera un fideicomiso de este modo: «si hubiere continuado en matrimonio con mi hijo»; habiéndose verificado sin culpa del marido el divorcio después de la muerte de la suegra, respondí que faltó la condición, y que el término del fideicomiso no corre antes que haya comenzado a estar muerta la mujer casada, o el marido; y por lo tanto, que tampoco tiene lugar la caución Muciana, porque podría cumplirse la condición con la muerte del marido.

§ 4.- Los fideicomisos mensuales y anuales dejados a un liberti bajo esta condición: «mientras administrar los bienes de la hija del patrono», aunque es necesario darlos, prohibiendo la hija que se administren sus bienes, sin embargo, cambiando de voluntad la hija recobran la condición, porque son muchos los fideicomisos.

102.- EL MISMO; *Respuestas, libro IX*.- Habiendo un abuelo instituido herederos a un hijo y a un nieto habido de otro hijo, le pidió al nieto, que, si muriese dentro de los treinta años, restituyese la herencia a su tío paterno; el nieto falleció dentro de la mencionada edad habiendo dejado hijos; respondí, que por conjetura de piedad faltó la condición del fideicomiso, porque se entendería que se había escrito menos que se había dicho.

103.- PAULO; *Cuestiones, libro XIV*.- Si se hubiera legado así: «déle a Ticio después de diez años, si no pidiera fianza al heredero», y Ticio hubiere fallecido dentro de los diez años, transmite el legado a su

quia moriente eo condicio exstitit.

104.- PAULUS; *libro XIV, responsorum*.- Eum, qui post apertum testamentum deportatus et restitutus est, fideicommissum petere posse, cuius condicio postea exstitit, quam civitatem Romanam recipiat.

105.- POMPONIUS; *libro V, epistularum*.- Si fundum a testatore sub condicione legatum heres alii pendente condicione legavit, post existentem condicionem, quae priori testamento praeposita fuerat, neque proprietatem a priore legatario recedit nec locum religiosum in eo fundo heres facere nec servitutem imponere poterit: sed et imposita servitus finietur exsistente condicione.

106.- IULIANUS, *libro XXV, digestorum*.- Hoc genus legati "si Titio non nupserit" perinde habendum est, ac si post mortem Titii legatum fuisset, et ideo nec Muciana satisfactio interposita capere legatum potest. Sed et alii nubendo nihilo minus legatum consequitur.

107.- GAIUS, *libro singulari de casibus*.- Aliquando accidit, ut sub condicione datum legatum purum intellegatur, veluti quod sub eadem condicione relictum est, sub qua etiam heres alius institutus est, item quod sub hac condicione relictum est "si hereditatem adierit". Ex diverso quoque purum datum legatum condicionalis videtur, veluti quod sub condicione ademptum est, quia sub contraria condicione datum intellegitur.

108.- SCAEVOLA; *libro XIX, digestorum*.- Libertis omnibus legavit domum et haec verba

die before the term of ten years has elapsed, he will transmit the legacy to his heir, because the condition was complied with at the time of his death.

104.- THE SAME; *Opinions, Book XIV*.- The beneficiary of a trust who was banished after the will was opened and was afterwards restored to the rights can demand the execution of the trust, where the condition upon which the same was dependent was fulfilled after he had recovered his position as a Roman citizen.

105.- POMPONIUS; *Epistles, Book V*.- Where, while the condition was pending, an heir left to a third party land devised by the testator under a condition, after the condition imposed by the first will has been complied with, the ownership of the property will not be lost by the prior legatee; nor can the heir render any part of the land religious, or impose a servitude upon the same, and if he does impose a servitude, it will be extinguished when the condition is fulfilled.

106.- JULIANUS; *Digest, Book XXV*.- When a legacy is bequeathed under the condition, "If she should not marry Titius," it must be considered just as if it had been bequeathed after the death of Titius; and therefore the legatee will be entitled to it without furnishing the Mucian bond. The woman will have a right to the legacy, even if she should marry someone else.

107.- GAIUS; *On Events*.- It sometimes happens that a legacy bequeathed conditionally may be understood to be absolute; as where something is left dependent upon the same condition under which another heir was also appointed. The same rule applies where a bequest is left under the condition that the heir enters upon the estate. On the other hand, where a legacy is bequeathed absolutely, it may be held to have been conditional; as, for example, where the property bequeathed is taken away under a condition, because it is understood to have been left under an opposite condition.

108.- SCAEVOLA; *Digest, Book XIX*.- A certain man left a house to all his freedmen, and added the

heredero, porque muriendo él se cumplía la condición.

104.- EL MISMO; *Respuestas, libro XIV*.- El que después de abierto el testamento fue deportado y restituido, puede pedir el fideicomiso, cuya condición se cumplió después que recobre la ciudadanía romana.

105.- POMPONIO; *Epístolas, libro V*.- Si el heredero legó a otro, estando pendiente la condición, el fundo legado bajo condición por el testador, después de cumplida la condición, que se había puesto en el primer testamento, ni se separa del primer legatario la propiedad, ni el heredero podrá hacer religioso un lugar en aquel fundo, ni imponerle servidumbre; sino que hasta la servidumbre impuesta se extinguirá al cumplirse la condición.

106.- JULIANO; *Digesto, libro XXV*.- Este género de legado: «Si no se hubiere casado con Ticio», ha de ser considerado lo mismo que si se hubiese hecho el legado para después de la muerte de Ticio, y por lo tanto, ni aún habiéndose interpuesto la caución Muciana puede adquirir el legado; pero ni aún casándose con otro consigue el legado.

107.- GAYO; *Casos, Libro único*.- Sucede alguna vez, que se considera puro el legado dado bajo condición, por ejemplo, el que se dejó con la misma condición bajo la que también fue otro instituido heredero; igualmente el que se dejó bajo esta condición: «si adiere la herencia». Por el contrario, también se considera condicional el legado dado puramente, por ejemplo, el que fue quitado bajo condición, porque se entiende dado bajo condición contraria.

108.- SCAEVOLA; *Digesto, libro XIX*.- Uno legó una casa a todos los libertos, y añadió estas palabras:

adiecit: "Ut in ea habitent liberti, ne de nomine exeat et ut ad unum, qui novissimus exstiterit, perveniat: et eo amplius eisdem libertis meis dari volo fundum sosianum". Quaesitum est, an condicio adposita, ne de nomine exiret, ad sequens quoque legatum pertineret. Respondit pertinere.

109.- SCAEVOLA; *libro XX, digestorum*.- A testatore rogatus, ut acceptis centum nummis restitueret hereditatem Titiae coheredi suae, adita hereditate decessit: similiter et Titia, antequam daret centum: quaesitum est, an heres Titiae offerendo centum fideicommisso partem hereditatis consequi possit. Respondit heredem conditioni parere non posse. Claudius. Magno ingenio de iure aperto respondit, cum potest dubitari, an in proposito condicio esset.

110.- POMPONIUS; *libro IX, epistularum*.- Etiam si invitis heredibus ex peculio statuliber pecuniam Titio det, liber quidem fit: sed Titius, qui invitis heredibus sciens accepit, pro possessore videtur eam pecuniam possidere, ut advocare eam hi, qui inviti fuerunt, possint.

111.- POMPONIUS; *libro XI, epistularum*.- Qui sub condicione rationum reddendarum liber esse iussus est, docere debet constare fidem omnibus, quae ab eo gesta sunt, ut neque subtraxerit quid ex his quae acceperit neque expensum rationibus praescripserit quod non dederat: sed et quod reliquum per contextum scriptum est remanere apud eum, solvere debet: neque enim aliter liber esse potest, quam si hoc modo condicioni, sub quam data est libertas, satisfecerit.

Ceterum debitores, cum quibus ipse contraxit, non

following words, "In order that my freedmen may always reside in the said house, and that it may never pass away from persons bearing my name, and may belong to the last survivor; and, in addition to this I wish the Sosian Estate be given to my said freedmen." The question arose whether the condition, "That it may never pass away from persons bearing my name," was also applicable to the second bequest. The answer was that it did apply to it.

109.- THE SAME; *Digest, Book XX*.- An heir, having been charged by the testator to accept a hundred sesterces, and surrender his share of the estate to Titia, his co-heir, died after entering upon the estate; and Titia also died before paying the hundred sesterces. The question arose whether the heir of Titia, by tendering a hundred sesterces, could, under the terms of the trust, obtain her share of the estate. The answer was that the heir could not comply with the condition. Claudius: The opinion of Scaevola is stated with a great deal of ability, where the law is clear; but, still, some doubt may arise whether in the present instance a condition was not imposed.

110.- POMPONIUS; *Epistles, Book IX*.- A slave who is to be liberated on condition of paying a certain sum of money to Titius will become free if he pays the money out of his peculium, even without the consent of the heirs; but if Titius knowingly accepts the money against the consent of the heirs, he will only be considered to hold it as the possessor, and not the owner, and the heirs, who were unwilling that it should have been paid, can deprive him of it.

111.- THE SAME; *Epistles, Book XI*.- A slave who is ordered to be free under the condition of rendering his accounts must show that he has been honest in all the business transacted by him, and that he has not embezzled anything of what he received, and has not included in his accounts any expenses which he did not incur. He must also pay over whatever his accounts show remains in his hands by way of balance, for he cannot become free unless he, in this way, complies with the condition under which freedom was granted to him.

He will not, however, be obliged to prove that the

«para que en ella habiten los libertos, y no salga de la familia, y para que vaya a poder del último que quedare; y además de esto, quiero que se les dé a mis mismos libertos el fundo Sosiano»; se preguntó, si la condición puesta: para que no salga de la familia, pertenecería también al siguiente legado. Respondió, que pertenecía.

109.- EL MISMO; *Digesto, libro XX*.- Uno a quien se le rogó por el testador, que recibiendo cien monedas restituyese la herencia a Ticia, su coheredera, falleció habiendo sido adida la herencia, e igualmente falleció Ticia, antes de dar las cien monedas; se preguntó, si ofreciendo el heredero de Ticia las cien del fideicomiso, podría conseguir la parte de la herencia. Respondió, que el heredero no podía cumplir la condición. Y dice Claudio: con grande ingenio respondió sobre un punto claro de derecho, pudiéndose dudar si en el caso propuesto habría condición.

110.- POMPONIO; *Epístolas, libro IX*.- Aunque el instituido libre bajo condición dé de su peculio una cantidad a Ticio contra la voluntad de los herederos, es ciertamente libre; pero se considera que Ticio, que la recibió a sabiendas contra la voluntad de los herederos, posee esta cantidad como poseedor, de suerte que puedan reclamarla los que no lo consintieron.

111.- EL MISMO; *Epístolas, libro XI*.- El que se mandó que fuese libre bajo condición de rendir cuentas, debe probar y hacer constar su fidelidad en todas las cosas que por él fueron administradas, Y que ni sustrajo cosa alguna de las que hubiere recibido, ni anotó en las cuentas como gastado lo que no había dado. Pero también debe pagar el remanente que conste escrito que hay en su poder; porque no puede ser libre de otra manera, si no si de este modo hubiere cumplido la condición bajo la cual le fue dada la libertad.

Pero ciertamente no debe ser obligado a responder

utique in diem mortis domini sui fuisse idoneos praestare cogendus est, sed eo tempore, quo his creditum est, eius condicionis fuisse, ut diligens pater familias his crediturus fuerit.

112.- POMPONIUS; *libro XII, epistularum*.- Tales condiciones "si monumentum", puta, "fecerint" pluribus propositae non possunt nisi in omnibus simul personis exsistere.

§ 1.- Item: "si Symphoro et Ianuario centum Titius praestiterit, fundum ei lego". Symphoro mortuo an legatum perisset? Sed hoc quoque sic puto interpretandum ut si, dum quisque eorum vivet, praestitisset. Sed benigna interpretatione dicendum, si non post moram Titii Symphorus decessit, debere partem dimidiam Ianuario dantem partem fundi dimidiam legatarium esse consecuturum.

§ 2.- De illo quoque quaeritur: fundus quibusdam legatus est, si pecuniam certam in funus impensamque perferendi corporis in aliam regionem dedissentiarum nam nisi uterque dederit, neutri est legatum, quoniam condicio nisi per utrumque expleri non potest. Sed haec humanius interpretari solemus, ut, cum duobus fundus legatus sit, si decem dedissent, et alteri dando partem legatum quoque debeatur.

§ 3.- Priscus respondit statuliberum non utique ibi ubi pater familias decessit aut ubi ipse relictus sit aut ubi velit, rationes reddere debere, sed interim proficisci ad eum, cui reddere debeat, utique si is rei publicae causa aberit: verissimum est autem, ut alias aliud ex persona locoque sit aestimandum.

solvency of the debtors with whom he made contracts existed at the time of the death of his master, but that when he lent them money, their credit was such as would have induced the diligent head of a family to trust them.

112.- THE SAME; *Letters, Book XII*.- Conditions like the following, "If they should erect a monument," if imposed upon several persons, cannot be complied with unless by all of them at the same time.

§ 1.- Likewise, "If Titius should pay to Symphorus and Ianuarius a hundred aurei, I leave him such-and-such a tract of land." If Symphorus dies, will the devise be extinguished? I think that it ought to be interpreted in this way, if the legatee should pay the amount during the lifetime of either of the parties. According to the most indulgent interpretation, it must be said that, if Symphorus should die without Titius being in default, he could claim half of the land which was devised, if he tendered half the money to Ianuarius.

§ 2.- A question arose with reference to the following case: A tract of land was devised to certain persons, if they paid a specified sum of money for funeral expenses, and for transporting the body into another province; for unless both of them made the payment, neither would be entitled to the devise, as the condition could not be complied with unless by both. We, however, are accustomed to make a more liberal interpretation in cases of this kind, just as where a tract of land is devised to two persons if they pay ten aurei, and one of them pays his share, he will be entitled to his portion of the devise.

§ 3.- Priscus gives it as his opinion that a slave who is to become free on condition of rendering an account, cannot do this where the testator died, or where he himself may happen to be, or where he may desire to render it; but, in the meantime, he must present himself to the person to whom he is obliged to render the account, and by all means, if the latter should be absent on business for the State. It is, however, extremely probable that another conclusion

de que fueron abonados al tiempo de la muerte de su señor los deudores con quienes él contrató; sino que al tiempo en que se les dió crédito fueron de tal condición, que un diligente padre de familia les habría concedido crédito.

112.- EL MISMO; *Epístolas, libro XII*.- Estas condiciones: por ejemplo, «si hubieren hecho un monumento», puestas, a muchos, no pueden cumplirse sino conjuntamente en todas las personas.

§ 1.- Así mismo: «Si Ticio le hubiere dado ciento a Sinforo y a Ianuario, le lego un fundo», ¿muerto Sinforo, se habrá extinguido el legado? Pero opino que también esto se ha de interpretar de este modo, como si los hubiese dado viviendo cada uno de ellos. Mas por benigna interpretación se ha decir, que si Sinforo falleció no después de mora de Ticio, dando la mitad de la suma a Ianuario, debe conseguir el legatario la mitad del fundo.

§ 2.- Se pregunta también sobre esto: se legó un fundo a unos, si hubiesen dado cierta cantidad para el funeral y para los gastos de transportar el cadáver a otra región; pues, a no ser que ambos la hubiesen dado, no se habrá hecho el legado ni al uno ni al otro, porque a no ser por ambos no se puede cumplir la condición. Pero esto lo solemos interpretar con más humanidad, de suerte que, cuando a dos haya sido legado un fundo, si hubiesen dado la suma de diez, se deba también el legado a uno de ellos, dando su parto.

§ 3.- Prisco respondió, que el instituido libre bajo condición no debía ciertamente rendir cuentas allí donde falleció el padre de familia, o donde el mismo fue dejado, o donde quiera, pero que mientras tanto debe dirigirse a aquel a quien deba darlos; esto solamente si él estuviere ausente por causa de la República; pero es muy cierto, que estos, se habrá de estimar de otro modo atendiendo a las circunstancias de la persona y del lugar.

might be arrived at in a case of this kind, where the rank of the parties and the distance of the places must be taken into consideration.

113.- PAULUS; *imperialium sententiarum in cognitionibus prolatarum ex liberis sex libro secundo*.- Cum filius rogatus fuisset a patre, si, antequam res suas administrare posset, decessisset, hereditatem Titio restituere, et egressus viginti annos decessisset, rescriptum est fideicommissum deberi.

113.- PAULUS; *From the Second Book of the Collection of Imperial Decisions in Matters Brought Before the Emperors; Embraced in Six Books*.- Where a son was charged by his father, "To deliver his estate to Titius, if he should die before he himself could administer his affairs," and the son died after reaching the twentieth year, it was stated in a Rescript that the trust must be executed.

113.- PAULO; *Libro II de los seis de Sentencias Imperiales dadas en juicio extraordinario*.- Como por un padre de familia se hubiese rogado a su hijo, que, si falleciera antes que pudiera administrar sus bienes, restituyese la herencia a Ticio, y hubiese fallecido habiendo cumplido veinte años, se decidió por rescripto que se debía el fideicomiso.

TIT. II

TITLE II

TÍTULO II

AD LEGEM FALCIDIAM

CONCERNING THE FALCIDIAN LAW

SOBRE LA LEY FALCIDIA

1.- PAULUS; *libro singulari ad legem Falcidiam*.- Lex Falcidia lata est, quae primo capite liberam legandi facultatem dedit usque ad dodrantem his verbis: "Qui cives Romani sunt, qui eorum post hanc legem rogatam testamentum facere volet, ut eam pecuniam easque res quibusque dare legare volet, ius potestasque esto, ut hac lege sequenti licebit".

1.- PAULUS; *On the Lex Falcidia*.- The Falcidian Law, by its first Article, conferred the power of disposing of an estate up to and including three-fourths of the same, as follows: "Those Roman citizens who desire to make a will after the enactment of this law shall have the right and the power to give and bequeath their money and their property to anyone whom they may select, in accordance with the following provisions."

1.- PAULO; *Comentarios a la ley Falcidia, libro Único*.- Se promulgó la ley Falcidia, la cual concedió en el primer capítulo libre facultad para legar hasta las tres cuartas partes con estas palabras: «Cualquier ciudadano romano, que después de promulgada esta ley quiera hacer testamento, tenga derecho y potestad para dar y legar este dinero y estas cosas a quienes quiera, en la forma que le sería lícito por las siguientes partes de esta ley».

Secundo capite modum legatorum constituit his verbis: "Quicumque civis Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam iure publico dare legare volet, ius potestasque esto, dum ita detur legatum, ne minus quam partem quartam hereditatis eo testamento heredes capiant, eis, quibus quid ita datum legatumve erit, eam pecuniam sine fraude sua capere liceto isque heres, qui eam pecuniam dare iussus damnatus erit, eam pecuniam debeto dare, quam damnatus est".

In the second Article, the amount of the legacies which can be bequeathed is established in the following words: "Any Roman citizen who may execute a will after the passage of this law shall have the right and the power to bequeath as large a sum of money as he wishes to any other Roman citizen, in accordance with public law; provided the legacy is left in such a way that his heirs will receive not less than a fourth part of his estate under the terms of the will. Those to whom any money is given or bequeathed shall be entitled to receive the same without being liable for fraud; and an heir who is ordered and charged to pay said money must pay it in compliance with the directions prescribed."

En el segundo capítulo estableció el límite de los legados, con estas palabras: «Cualquier ciudadano romano, que después de promulgada esta ley hiciere testamento, tenga derecho y potestad para dar y legar a cualquier ciudadano romano por derecho público cuanto dinero quiera, con tal que el legado se dé de modo que los herederos no perciban por este testamento menos de la cuarta parte de la herencia. Sea lícito a quienes así se hubiere dado o legado alguna cosa, percibir este dinero sin fraude propio; y este heredero a quien se le hubiere mandado o a quien se le hubiere con-denado a dar este dinero, deba dar el dinero a que fue condenado».

§ 1.- Lex Falcidia etiam ad eos, qui apud hostes moriuntur, propter legem Corneliam pertinere videtur, quod ea lex perinde eorum testamenta confirmat, atque si in civitate decessissent: propter

§ 1.- On account of the Cornelian Law, the Lex Falcidia is also considered to apply to those who die in the hands of the enemy; for the reason that the Cornelian Law confirms their wills just as if they had

§ 1.- Se considera que por razón de la ley Cornelia la ley Falcidia es aplicable también a los que mueren en poder de los enemigos, porque aquella ley confirma sus testamentos, como si hubiesen falle-

quam fictionem lex Falcidia et omnes testamentariae pertinent, quae tamen possint locum habere.

§ 2.- Ad eos, qui omissa causa testamenti possident hereditatem, non pertinet lex Falcidia: sed per edictum praetoris inducitur potestas legis.

§ 3.- Idemque est, si iurisiurandi condicio remissa sit.

§ 4.- Sed et si servo suo testator data libertate legaverit, quia differtur in id tempus, quo liber futurus est, item ei qui apud hostes est aut ei qui nondum natus est datum sit aliquid, haec lex locum habebit.

§ 5.- Ad municipum quoque legata vel etiam ea, quae deo relinquuntur, lex Falcidia pertinet.

§ 6.- Non solum autem ad res proprias testatoris legatas, sed et alienas lex pertinet.

§ 7.- Et omne quod ex bonis defuncti erogatur refertur ad hanc legem, sive in corpore constet certo incertove sive pondere numero mensura valeat aut etiam si ius legatum sit (ut usus fructus) aut quod in nominibus est.

§ 8.- Item si ita legatum sit: "Heres meus Seio penum dato: si non dederit, decem dato", quidam putant omnimodo in legato decem esse, penum autem mortis causa capi nec in Falcidiam imputare id heredem posse. Ego autem didici, si in continenti heres penum solverit, videri hoc legatum esse et in legem Falcidiam imputari posse: et quod dixi "in continenti" ita accipiendum cum aliquo spatio. Quod si iam mora facta solverit heres penum, tunc nec

lost their lives in their own country, by reason of which fiction the Lex Falcidia and all others relating to wills which can be considered to have the same application are included in this category.

§ 2.- The Lex Falcidia does not have reference to those who reject an estate left by a will, in order to obtain possession of it on the ground of intestacy; but the power of the law can be applied by means of the Edict of the Praetor.

§ 3.- The rule is the same where the condition of taking an oath is remitted.

§ 4.- Where a testator makes a bequest to his slave with the grant of his freedom this law will apply, because payment of the legacy is postponed until the time when the slave will become free; and this is also the case where the person to whom property is left is in the hands of the enemy or has not yet been born.

§ 5.- The Falcidian Law also applies to legacies bequeathed to municipalities, or even for religious purposes.

§ 6.- Again, it not only applies to bequests of property of the testator, but also to those of property belonging to others.

§ 7.- Everything which must be paid or delivered out of the estate of the deceased is subject to the provisions of this law, whether it is certain or uncertain, and whether it is to be weighed, counted, or measured; and the law also applies where the right of property is bequeathed, as, for instance, the usufruct, or any claim which may be due.

§ 8.- Likewise, where a legacy is bequeathed as follows, "Let my heir furnish Seius with provisions, and if he should not do so, let him pay him ten aurei," some authorities hold that the legacy is limited to ten aurei, that the provisions can only be acquired as a donation mortis causa, and that the heir cannot avail himself of the benefit of the Falcidian Law. When stated that provisions must be furnished without delay, it should be understood to mean after a

cido en la ciudadanía; por cuya ficción son aplicables la ley Falcidia, y todas las testamentarias, que, sin embargo, puedan tener aplicación.

§ 2.- La ley Falcidia no es aplicable a aquellos que poseen la herencia habiéndose omitido la causa del testamento, pero por el Edicto del Pretor se extiende la autoridad de la ley.

§ 3.- Y lo mismo es, si se hubiera remitido la condición del juramento.

§ 4.- Pero también tendrá lugar esta ley si el testador habiéndole dado la libertad, hubiere hecho un legado a su esclavo, porque se le refiere para el tiempo en que ha de ser libre; y lo mismo si se hubiere dado alguna cosa al que esta en poder de los enemigos, o al que no ha nacido todavía.

§ 5.- La ley Falcidia es aplicable también a los legados de los individuos de un municipio, y aun también a los que se dejan a Dios.

§ 6.- Mas no solamente es aplicable la ley a los bienes legados propios del testador, sino también a los ajenos.

§ 7.- Y se refiere a esta ley todo lo que se saca de los bienes del difunto, ora conste de cuerpo cierto o incierto, ora valga por peso, número o medida, o también, si se hubiera legado un derecho como el usufructo, o cosa que consiste en codicilos.

§ 8.- Asimismo, si se hubiere legado así: «dé mi heredero a Seyo los comestibles, y si no se los diere, déle diez», opinan algunos que de todos modos se comprenden los diez en el legado, pero que los comestibles se adquieren por causa de muerte, y el heredero no puede comprarlos para la Falcidia. Pero yo aprendí, que si el heredero hubiere entregado inmediatamente los comestibles, se considera que estos fueron legados, y que podían ser computados

legatum eum accepisse nec in Falcidiam imputari posse: iam enim transfusum legatum esse et decem deberi. Idemque erit et si ab initio ita legatum datum sit: "Si penum non dederit, decem dato", quia hic penus non est legata et penus si datur, mortis causa capitur, quia deficit legati condicio.

§ 9.- Si usus fructus legatus sit (qui et dividi potest, non sicut ceterae servitutes individuae sunt), veteres quidem aestimandum totum usum fructum putabant et ita constituendum, quantum sit in legato. Sed Aristo a veterum opinione recessit: ait enim posse quartam partem ex eo sic ut ex corporibus retineri idque Iulianus recte probat. Sed operis servi legatis cum neque usus neque usus fructus in eo legato esse videtur, necessaria est veterum sententia, ut sciamus quantum est in legato, quia necessario ex omnibus, quae sint facti, pars decedere debet, nec pars operae intellegi potest. Immo et in usu fructu si quaeratur, quantum hic capiat, cui usus fructus datus est, quantum ad ceterorum legatorum aestimationem aut etiam huius ipsius, ne dodrantem excedat legatum, necessario ad veterum sententiam revertendum est.

§ 10.- Si quis creditori suo quod debet legaverit, aut inutile legatum erit, si nullum commodum in eo versabitur, aut si (propter repraesentationis puta commodum) utile erit, lex quoque Falcidia in eo commodo locum habebit.

reasonable time. If, however, the heir should furnish them after having been in default, the legatee will have no right to receive them, and the Falcidian Law will not apply; for the provisions which were bequeathed have now been transformed into a pecuniary legacy, and the ten aurei are due. The rule will be the same if, in the beginning, the bequest had been made as follows, "If he should not furnish the provisions, let him pay ten aurei," for in this instance the provisions are not the object of the bequest, and if they are furnished they will be acquired mortis causa, since the condition of the legacy has not been fulfilled.

§ 9.- Where an usufruct is bequeathed, as it can be divided, it is different from other servitudes which are indivisible; and certain ancient authorities were accustomed to hold that the entire usufruct should be appraised, and in that way the amount included in the legacy be determined. Aristo, however, dissents from this opinion of the ancients, for he says that a fourth part of this can be reserved, as in the case of corporeal property. Julianus very properly approves this opinion. But where the services of a slave are bequeathed, as neither use nor usufruct is considered to be included in a legacy of this kind, the decision of the ancients must necessarily be adopted, in order that we may ascertain what is embraced in the legacy; because, necessarily, in all acts which are to be performed, a part must be deducted to comply with the Falcidian Law, and part of the labors of a slave cannot be understood to exist. Even if, in the case of the usufruct, the question should arise to how much the legatee to whom the usufruct was given will be entitled, and what proportion should be allotted to the other legatees, in order that the share of the said legatee may not exceed three-fourths of the estate, recourse must necessarily be had to the rule of the ancient jurists.

§ 10.- Where anyone bequeaths to his creditor the amount that he owes him, the legacy will either be void, if no advantage enures to the creditor; or, if he is benefited by it, for instance, by immediate payment, the Falcidian Law will also apply with reference to the advantage obtained by the creditor.

para la ley Falcidia; y lo que dije que inmediatamente, se ha de entender así: con algún intervalo, Pero que si el heredero hubiera entregado los comestibles habiendo ya, causado mora, entonces ni él recibió un legado, ni podía computarse esto para la Falcidia; porque ya se había refundido el legado, y se debían los diez. Y lo mismo será, también si desde un principio se hubiera dado así el legado: «si no hubiere dado los comestibles, de diez», porque en este caso no se legaron los comestibles; y si se dan los comestibles, se adquieren por causa de muerte, porque falta la condición del legado.

§ 9.- Si se hubiera legado el usufructo, que también se puede dividir, no como las demás servidumbres, las cuales son indivisibles, opinan ciertamente los antiguos que el usufructo había de ser estimado en totalidad, y que de esta manera se había de determinar cuánto importe el legado; pero Aristón se separa de la opinión de los antiguos; porque dice, que se podía retener de él la cuarta parte, como de las cosas corporales; y esto mismo aprueba con razón Juliano. Pero legado el trabajo de un esclavo, como en este trabajo no se considera comprendido ni el uso, ni el usufructo, es necesario seguir la opinión de los antiguos para que sepamos cuánto esta comprendido en el legado, porque necesariamente se debe separar una parte de todos los que consistan en hecho, y no se puede concebir parte del trabajo. Aun también en el usufructo, si se preguntara cuanto percibe aquel a quien le fue dado el usufructo, se ha de volver por necesidad a la opinión de los antiguos en cuanto a la estimación de los demás legados, o aun también a la de este mismo, para que el legado no exceda de los tres cuartos.

§ 10.- Si alguno hubiera legado a su acreedor lo que le debe, o sera inútil lo legado, si en él no resultare ningún provecho, o si fuere útil, por ejemplo, por el provecho del pago en efectivo, también tendrá lugar la ley Falcidia respecto a este provecho.

§ 11.- Si legatarius possessionem nactus est et non potest avocari ei res, quia voluntate heredis errantis nactus est possessionem, dabitur actio heredi, ut id quod supra dodrantem est offeratur.

§ 12.- Interdum omnimodo necessarium est solidum solvi legatario interposita stipulatione "quanto amplius, quam per legem Falcidiam ceperit, reddi": veluti si quae a pupillo legata sint non excedant modum legis Falcidiae, veremur autem, ne impubere eo mortuo alia legata inveniantur, quae contributione facta excedant dodrantem.

Idem dicitur et si principali testamento quaedam sub condicione legata sunt, quae an debeantur incertum est. Et ideo, si heres sine iudice solvere paratus sit, prospiciet sibi per hanc stipulationem.

§ 13.- Id, quod ex substitutione coheredis ad coheredem pervenit, proficit legatariis: is enim similis est heres ex parte pure, ex parte sub condicione heredi instituto. Sed ea, quae ab eo legata sunt, si omiserit hereditatem, non augebuntur, scilicet si ab eo nominatim data sunt, non "quisquis mihi heres erit".

§ 14.- Si coheredis mei portio exhausta sit, mea integra et illam vindicavero, Cassius confundendas esse partes existimat, Proculus contra: in qua specie et Iulianus Proculo adsensit, quam sententiam probabiliorum esse puto. Sed et divus Antoninus iudicasse dicitur commiscendas esse utrasque partes in computatione legis Falcidiae.

§ 11.- If the legatee has obtained possession of the property bequeathed, and he cannot be deprived of it because he obtained possession of the same with the consent of the heir, who gave it while laboring under a mistake, an action will be granted to the heir to recover everything over and above three-fourths of the value of said property.

§ 12.- It sometimes becomes absolutely necessary for the entire legacy to be paid to the legatee, if he enters into a stipulation to return anything which he may receive above the amount allowed by the Falcidian Law; for example, where a minor is charged with the payment of legacies which do not exceed the amount authorized by that law, for there is reason to believe that other legacies may come to light after the death of the minor, which, after contribution has been made, will amount to more than three-fourths of the estate.

The same rule may be said to apply where legacies are bequeathed conditionally under the first will, and it is uncertain whether they will be payable or not; and therefore if the heir is ready to pay them without application to court, he can protect his interest by means of the stipulation above mentioned.

§ 13.- The share obtained by an heir through the substitution of his co-heir will benefit the legatee, for, in this instance, the heir resembles one who has been appointed absolutely for one part of the estate, and conditionally for another. Where, however, he refuses to accept the estate, the legacies with which he is charged will not increase by accrual; for instance, where they are bequeathed specifically, and not in general terms, as to "Whomever shall be my heir."

§ 14.- If the share of my co-heir is exhausted, mine remains unimpaired, and if I should claim his, Cassius thinks that the two shares ought to be merged. Proculus, however, holds the contrary. In this case Julianus agrees with Proculus, which opinion I think to be the more correct one. The Divine Antoninus, however, is said to have decided that both shares should be united in computing what is due under the Falcidian Law.

§ 11.- Si el legatario adquirió la posesión, y no se le puede reclamar la cosa, porque adquirió la posesión por voluntad del heredero que erró, se da la acción al heredero para que se quite lo que excede de los tres cuartos.

§ 12.- A veces es absolutamente necesario que se pague la totalidad al legatario interpuesta esta estipulación: «que se devuelva cuanto hubiere percibido de más que por la ley Falcidia», por ejemplo, si las cosas que se legaron a cargo de un pupilo no excedieran del límite de la ley Falcidia. Pero tememos que muerto este impúbere no se hallen otros legados, que, hecha la cuenta, excedan de los tres cuartos.

Lo mismo se dice, si en el testamento principal se legaron bajo condición algunas cosas que es incierto si se deben; y por lo tanto, si el heredero estuviera dispuesto a pagar sin intervención del juez, mirará por sí con esta estipulación.

§ 13.- Lo que por virtud de la su substitución de un coheredero va a otro coheredero, aprovecha a los legatarios; porque este heredero es semejante al heredero instituido puramente en una parte, y bajo condición en otra. Pero no se aumentarán los legados que se dejaron a su cargo, si hubiere rehusado la herencia, por supuesto, si determinadamente fueron dejados a su cargo, y no así: «cualquiera que fuere mi heredero».

§ 14.- Si hubiera sido agotada la parte de mi coheredero, y la mía estuviese íntegra, y yo reivindicare aquella, opina Cassio que se han de confundir las partes, y Próculo por el contrario, en cuyo caso también Juliano conviene con Próculo; cuya opinión creo que es más aceptable. Pero se dice que también el Divino Antonino juzgó que se deben unir ambas partes para la computación de la ley Falcidia.

§ 15.- Si coheredem meum post aditam hereditatem adrogavero, non dubitabitur, quin separandae sint portiones, perinde atque si coheredi meo heres exstitissem.

§ 16.- Si in annos singulos legatum sit Titio, quia multa legata et condicionalia sunt, cautioni locus est quae in edicto proponitur "quanto amplius accipit reddi".

§ 17.- Id, quod natura hereditati debetur et peti quidem non potest, solutum vero non repetitur, non esse computandum in hereditate quidam putant. Sed Iulianus et haec ex eventu augere patrimonium aut non augere existimat et hereditario iure id quoque capi ideoque et in restitutionem hereditatis venturum.

§ 18.- Si debitor creditori heres existat, quamvis confusione liberetur, tamen locupletiores hereditatem percipere videtur, ut computetur ei quod debet, quamvis aditione confusum sit.

§ 19.- De impensa monumenti nomine facta quaeritur, an deduci debeat. Et Sabinus ita deducendum putat, si necessarium fuerit monumentum extruere.

Marcellus consultus, an funeris monumentique impensa, quantum testator fieri iussit, in aere alieno deduci debeat, respondit non amplius eo nomine, quam quod funeris causa consumptum est, deducendum. Nam eius, quod in extruccionem monumenti erogatum est, diversam esse causam: nec enim ita monumenti aedificationem necessariam esse, ut sit funus ac sepultura. Idcirco eum, cui pecunia ad faciendum monumentum legata sit, Falcidiam passurum.

§ 15.- If I should arrogate my co-heir after the estate has been entered upon, there is no doubt that the shares ought to be separated, just as if I became the heir of my co-heir.

§ 16.- If a legacy, payable annually, is bequeathed to Titius for the reason that there are several legacies, and they are conditional, there will be ground for the furnishing of the bond mentioned in the Edict, in order to secure the return of any amount received over and above that allowed by the Falcidian Law.

§ 17.- Certain authorities hold that payment of what is naturally due to the estate and cannot be demanded should not be required, and ought not to be reckoned as part of the assets. Julianus, however, thinks that these claims will, according to circumstances, either increase the amount of the estate or will not increase it, and if paid, this can be acquired by the heir through hereditary right, and hence would be included in the distribution of the estate.

§ 18.- Where a debtor becomes the heir of his creditor, although he may be released from liability by reason of the merger resulting therefrom; still, as he is considered to have received a larger inheritance on this account, the amount of his indebtedness must be computed, although it may have been extinguished by his acquiring the estate.

§ 19.- The question arises whether expenses incurred for the erection of a monument should be deducted. Sabinus thinks that they should be deducted if it becomes necessary to erect the monument.

Marcellus, having been consulted as to whether the expenses for a monument which the testator ordered to be erected should be deducted as part of the debts of the estate, answered that no more ought to be deducted on this account than was expended for the funeral. For the case is different with reference to the expense incurred for the erection of a monument, since it is not necessary, as that of the funeral and the burial are. Therefore, the person to whom money is bequeathed for the erection of a monument must

§ 15.- Si yo hubiere adrogado a mi coheredero después de haber sido adida la herencia, no se duda que se habrán de separar las porciones lo mismo que si yo hubiese quedado heredero de mi coheredero.

§ 16.- Si a Ticio se le hubiera legado para cada año, como quiera que son muchos y condicionales los legados, ha lugar a la caución que se establece en el Edicto: «que se devuelva lo que recibe de más».

§ 17.- Lo que naturalmente se le debe a la herencia, y no puede ciertamente ser pedido, pero que pagado no se repite, opinan algunos que no ha de ser computado en la herencia. Pero Juliano opina que también estas cosas aumentan o no aumentan, según el resultado, el patrimonio, y que también se adquiere esto por derecho de herencia, y que por tanto ha de ir también comprendido en la restitución de la herencia.

§ 18.- Si el deudor quedase heredero del acreedor, aunque por la confusión se haría libre, se considera, sin embargo, que recibe una herencia más pingüe para que se le compute lo que debe, aunque por la adición se haya confundido.

§ 19.- Respecto a los gastos hechos por razón de un monumento se pregunta si se deberán deducir, y opina Sabino que se han de deducir en este caso, si hubiere sido necesario levantar el monumento.

Consultado Marcelo, si se debían deducir como deuda los gastos de funeral y de monumento, de la cuantía que el testador mandó que se hicieran, respondió, que no se ha de deducir por tal título más que lo que se gastó por causa del funeral; porque era diversa la causa de lo que se invirtió en la construcción del monumento, pues no era tan necesaria la construcción del monumento, como son el funeral y la sepultura; y por lo tanto, aquel a quien se le hubiera legado dinero para hacer un monumento

2.- MARCELLUS; *libro XXII, digestorum*.- Nec amplius concedendum erit, quam quod sufficiat ad speciem modicam monumenti.

3.- PAULUS; *libro singulari ad legem Falcidiam*.- Si heres institutus eam hereditatem quae solvendo non est vendiderit, vix quidem poterit persuaderi non fuisse eam hereditatem solvendo, quae emptorem invenerit: vera autem ratione nihil legatariis debetur, quia magis ex stultitia emptoris habere videtur heres institutus quam ex bonis defuncti. Nam et e contrario si male vendiderit res hereditarias, non erit hoc legatariorum detrimentum: ita ergo commodum debet esse heredis, si bene res administraverit.

§ 1.- Sed et si is qui solvendo non est legaverit et heres cum creditoribus deciderit, ne solidum solveret, et ob eam decisionem factum sit, ut aliquid retineret, nihil tamen legatariis debitum, quia eam pecuniam non ex hereditate, sed ex decisione habet.

§ 2.- Item si rei publicae in annos singulos legatum sit, cum de lege Falcidia quaeratur, Marcellus putat tantum videri legatum, quantum sufficiat sorti ad usuras trientes eius summae, quae legata est, colligendas.

4.- PAPINIANUS; *libro XVI, quaestionum*.- Fundo legato mihi sub condicione pendente legati condicione heres me heredem instituit ac postea legati condicio exstitit. In Falcidia ratione fundus non iure hereditario, sed legati meus esse intellegitur.

suffer the deduction under the Falcidian Law.

2.- MARCELLUS, *Digest, Book XXII*.- A larger sum should not be allowed than will be sufficient for the erection of an ordinary monument.

3.- PAULUS; *On the Falcidian Law*.- Where an heir is appointed and sells the estate, which is insolvent, it would be very difficult to persuade anyone that it was not solvent, since it found a purchaser. If this is a fact, however, the legatees will not be entitled to anything, because the heir appears to have profited more from the folly of the purchaser than from the estate of the deceased.

On the other hand, if he should sell the property of the estate for too low a price, this will not prejudice the rights of the legatees, and therefore if the heir has made a good bargain he should enjoy the benefit of it.

§ 1.- If, however, a person who is not solvent should make bequests, and the heir should agree with the creditors not to pay them in full, and, by reason of this agreement, be able to retain something from the estate, still, the legatees will not be entitled to anything, because the heir obtained the money not from the estate, but through the agreement with the creditors.

§ 2.- Likewise, if a legacy payable annually to a municipality is bequeathed, and a question arises with reference to the Falcidian Law, Marcellus thinks that only as much should be considered to have been bequeathed as will amount to a sum which, at four per cent interest, will provide the annual payments of the legacy.

4.- PAPINIANUS; *Questions, Book XVI*.- A tract of land having been devised to me under a condition, the heir of the testator appointed me his heir while the condition of the legacy was pending, and the condition was subsequently fulfilled. In considering the application of the Falcidian Law in this case, the land will be understood to be mine, not by hereditary right, but by virtue of the legacy.

habrá de soportar la Falcidia.

2.- MARCELO; *Digesto, libro XXII*.- Y no se habrá de conceder más de lo que baste para una moderada especie de monumento.

3.- PAULO; *Comentarios a la ley Falcidia, libro único*.- Si el heredero instituido hubiere vendido la herencia, que no es solvente, a la verdad, difícilmente se podrá persuadir de que no fue solvente una herencia que haya encontrado comprador; mas con verdadero fundamento nada se deberá a los legatarios, porque se considera que el heredero instituido tiene más bien por necesidad del comprador, que por los bienes del difunto. Porque también por el contrario, si hubiere malvendido los bienes de la herencia, este no será perjuicio de los legatarios; así pues, el provecho será del heredero si hubiere administrado bien los bienes.

§ 1.- Pero si hubiere legado el que no es solvente, y el heredero hubiere decidido con los acreedores que no pagada la totalidad, y por virtud de esta decisión hubiera sucedido que retuviese alguna cosa, no deberá, sin embargo, nada a los legatarios, porque no tiene esta cosa por la herencia, sino por la decisión.

§ 2.- Asimismo, si a la República se le hubiera legado para cada año, tratándose de la ley Falcidia, opina Marcelo que se considera legado tanto cuanto baste a un capital para que al cuatro por ciento se obtengan intereses, de la misma suma que fue legada.

4.- PAPINIANO; *Cuestiones, libro XVI*.- Habiéndoseme legado bajo condición un fundo, estando pendiente la condición del legado el heredero me instituyó heredero, y después se cumplió la condición del legado; en la cuenta de la Falcidia se entiende que el fundo es mío no por derecho de herencia, sino de legado.

5.- PAPINIANUS; *libro VIII, responsorum*.- Verbis legati vel fideicommissi non necessarie civitati relinquitur, quod ex causa pollicitationis praestari necesse est. Itaque si debiti modum testamento dominus excessit, superfluum dumtaxat Falcidia minuatur. Quare nec fidei committi legatarii poterit. Quod si dies aut condicio legatum fecerit, non utilitatis aestimatio, sed totum petetur quod datum est. Nec si vivo testatore dies venerit aut condicio fuerit impleta, fiet irritum, quod semel competit.

6.- VENULEIUS; *libro III, stipulationum*.- Si vir uxori heres exstiterit et in funus eius inpendere, non videbitur totum quasi heres inpendere, sed deducto eo, quod quasi dotis nomine quam lucri facit conferre debuerit.

7.- PAPINIANUS; *libro VII, quaestionum*.- Lege Falcidia interveniente legata servitus, quoniam dividi non potest, non aliter in solidum restituatur, nisi partis offeratur aestimatio.

8.- PAPINIANUS; *libro XIV, quaestionum*.- In legem Falcidiam aeris alieni rationem in hereditate relictis, quod unus ex heredibus solvere damnatus sit, ipse solus habebit.

9.- PAPINIANUS, *libro XIX, quaestionum*.- In Falcidia placuit, ut fructus postea percepti, qui maturi mortis tempore fuerunt, augeant hereditatis aestimationem fundi nomine, qui videtur illo in tempore fuisse pretiosior.

5.- THE SAME; *Opinions, Book VIII*.- A bequest left to a city by the terms of a legacy or a trust is not valid where it consists of what must be paid on account of a promise already made. Therefore, if the testator, by the disposition of his will, exceeded the amount of what was due, only the excess will be diminished by the Falcidian Law, hence the creditor cannot be charged with a trust as a legatee. If, Tiowever, the legacy is dependent upon the arrival of a certain date, or compliance with some condition, the estimate of the advantage should not be made, but the entire amount bequeathed can be demanded; and even if the time for payment should arrive, or the condition should be fulfilled during the lifetime of the testator, what in the first place was valid will not become void.

6.- VENULEIUS; *Stipulations, Book XIII*.- If a man should become the heir of his wife, and incur expenses for her funeral, he will not be considered to have expended the entire amount as her heir, but he should contribute in proportion to the extent that he is pecuniarily benefited, after having deducted what was due on account of the dowry.

7.- PAPINIANUS; *Questions, Book VII*.- In considering the application of the Falcidian Law with reference to the bequest of a servitude, as a servitude cannot be divided, the legacy of the same need not be entirely delivered, unless an appraised value of a portion of the same is tendered.

8.- THE SAME, *Questions, Book XIV*.- Where one of several heirs is charged to pay a debt of the estate, and the application of the Falcidian Law is considered, those who have received bequests shall not take any account of the said debt which the heir alone is to pay.

9.- THE SAME, *Questions, Book XIX*.- It was decided with reference to the Falcidian Law that, after the crops which had matured at the date of the death of the testator have been gathered, they increase the value of the estate as forming part of the land, which is held to have been worth more at that time.

5.- EL MISMO; *Respuestas, libro VIII*.- Con palabras de legado o de fideicomiso no se deja necesariamente a una ciudad lo que es necesario que se le dé por causa de promesa. Y así, si en el testamento el dueño se excedió de la cuantía de la deuda, solamente el exceso se disminuirá por la Falcidia; por lo cual ni podrá ser encomendado a la fidelidad del legatario. Pero si el término o la condición constituyere el legado, no se pedirá la estimación de la utilidad, sino todo lo que se dio; y si viviendo el testador llegare el vencimiento, o se hubiere cumplido la condición, no se hará irrito el que una vez correspondió.

6.- VENULEYO; *Estipulaciones, libro XIII*.- Si el marido hubiere quedado heredero de la mujer, y hubiere gastado en sus funerales, no se considerará que lo gastó todo como heredero, sino deducido aquello con que hubiere debido contribuir como por razón de la dote que gana.

7.- PAPINIANO; *Cuestiones, libro VII*.- Median-do la ley Falcidia, la servidumbre legada, como quiera que no se puede dividir, no se dará por completo de otro modo, sino si se ofreciera la estimación de la parte.

8.- EL MISMO; *Cuestiones libro XIV*.- En la ley Falcidia la cuenta de una deuda dejada en la herencia, que uno solo de los herederos haya sido condenado a pagar, le corresponderá a este sólo.

9.- EL MISMO; *Cuestiones, libro XIX*.- En la ley Falcidia se determinó, que los frutos percibidos después, y que estuvieron maduros al tiempo de la muerte, aumenten la estimación de la herencia por razón del fundo, que se considera fue de más valor en aquel tiempo.

§ 1.- Circa ventrem ancillae nulla temporis admissa distinctio est nec immerito, quia partus nondum editus homo non recte fuisse dicitur.

10.- PAPINIANUS; *libro XX, quaestionum*.- Quod supra quadrantem apud heredem potest pervenire, supra dodrantem in pecuniam legatum non onerat heredem, veluti hereditas pupilli, si forte substitutus sit exheredato qui patri pupilli heres exstitit.

11.- PAPINIANUS; *libro XXIX, quaestionum*.- In ratione legis Falcidiae retentiones omnis temporis heredi in quadrantem imputantur.

§ 1.- Si servus sub condicione libertate data vita decessit, si quidem impleta condicio quandoque fuerit, heredi non videbitur perisse: quod si defecerit, in contrarium ratio trahit, sed quanti statuliber moriens fuisse videbitur.

§ 2.- Imperator Marcus Antoninus decrevit heredes, quibus pars bonorum ablata est, non in ampliore partem quam pro ea parte quae relicta est legatorum nomine teneri.

§ 3.- Cum quidam parte dimidia bonorum adempta fuisset relegatus idemque provocatione interposita testamento postea facto obisset atque post mortem eius non iuste appellatum esset pronuntiatum: quaesitum est, utrum aeris alieni loco pars dimidia abscederet, ut residua sola videretur fuisse in bonis, an vero succurri heredi necessarium esse videbitur. Sed videtur succurri debere, cum animus litigantis et optinendi votum hanc opinionem admittit.

§ 1.- No distinction with reference to time is admitted, so far as the unborn child of a female slave is concerned. This is not unreasonable, because as the child has not yet come into the world, it cannot properly be called a slave.

10.- THE SAME; *Questions, Book XX*.- Anything over and above the fourth established by the Falcidian Law which goes into the hands of the heir, does not bind him beyond the other three-fourths, so far as the amount of the legacies is concerned; as, for instance, in the case of the estate of a minor, where he who becomes the heir of the father of the said minor is substituted for the disinherited son.

11.- THE SAME; *Questions, Book XXIX*.- In estimating the amount due under the Falcidian Law, any property which has been retained by the heir at any time is included in the fourth of the estate to which he is entitled.

§ 1.- Where a slave is to become free under a certain condition, and the condition is fulfilled at any time whatsoever, the heir will not be held to have sustained any loss, so far as his fourth interest in said slave is concerned. If, however, the condition should fail to be fulfilled, an opposite opinion must be adopted, and the value of the slave should be estimated at what he was worth at the time of his death.

§ 2.- The Emperor Marcus Antoninus decided that heirs who have been deprived of their shares of an estate shall not be liable for a larger sum for legacies than the remainder amounts to.

§ 3.- Where a certain individual was sentenced to be banished after the confiscation of half his property, and having taken an appeal made a will and died, and, after his death, his appeal was decided to have been improperly taken, the question arose whether the half of his estate which had been forfeited to the Treasury should be considered as a debt, and the remaining half alone should constitute his estate; or whether it would be necessary to come to the relief of the heir. It appears that relief should be

§ 1.- En cuanto a lo que esta en el vientre de una esclava no se admitió ninguna distinción de tiempo; y no sin razón, porque el parto que aun no ha sido dado a luz no se dice con razón que sea un hombre.

10.- EL MISMO; *Cuestiones, libro XX*.- Lo que además de la cuarta parte puede ir a poder del heredero no grava al heredero sobre las tres cuartas partes legadas en dinero, por ejemplo, la herencia de un pupilo, si acaso hubiere sido substituido al desheredado, que quedó heredero del padre del pupilo.

11.- EL MISMO; *Cuestiones, Libro XXIX*.- En la cuenta de la ley Falcidia se le computan al heredero en la cuarta parte las retenciones de todo tiempo.

§ 1.- Si habiéndosele dado bajo condición la libertad falleció el esclavo, no se considerará que falleció para el heredero, si verdaderamente la condición hubiere sido cumplida en algún tiempo, pero si hubiere faltado, la razón lleva a lo contrario, mas se considerara cuanto valió al morir el instituido libre bajo condición.

§ 2.- El Emperador Marco Antonino decretó, que los herederos, a quienes se quitó parte de los bienes, no estaban obligados por razón de los legados por mayor parte que la que se les dejó.

§ 3.- Como habiéndosele quitado la mitad de los bienes hubiera sido uno relegado, y éste mismo, habiendo interpuesto apelación, hubiese fallecido después de haber hecho testamento, y se hubiese fallado después de su muerte que no se apeló con justicia, se preguntó, ¿se separaría en calidad de deuda la mitad, de suerte que se considerase que en los bienes no hubo más que solos los restantes, o se considerará que es necesario que se ampare al heredero? Mas parece que se le debe amparar, porque

granted the heir, as the intention of the testator who took the appeal, and his evident desire warrant this opinion.

§ 4.- Si servus testamento manumissus ante aditam hereditatem decedat, heredi quidem perisse intellegitur: sed cuius pretii erit, qui, si viveret, non aestimaretur? Nam et eos, qui moriente domino ea valetudine affecti fuerant, ut eos non posse vivere certum esset, tamen, si postea moriantur, hereditati perisse responsum est. Nec aliud in his, qui sub eodem tecto fuerunt, cum dominus a familia necaretur.

§ 5.- Quod vulgo dicitur in tabulis patris et filii unam Falcidiam servari quam potestatem habeat, videndum est: quamvis enim substitutus quae a pupillo relictas sunt, cum filius heres exstitit, ut aes alienum quodlibet debeat, tamen propter ea, quae data sunt tabulis secundis, contributioni locus est. Secundum quae poterit evenire, ne substitutus quicquam retineat vel ut longe plus habeat quartae paternae hereditatis.

Quid ergo, si non sufficiat pupilli hereditas legatis, cum patris suffecisset? De suo (quadrante nimirum) dabit substitutus, quoniam pater legavit de suo: nec ad rem pertinet, quod ex nullo testamento praestatur ultra vires patrimonii, cum in hac parte iuris legata, quae tabulis secundis relinquuntur, quasi primis sub conditione relictas intelleguntur.

§ 6.- Si filio suo duos substituerit et alterius portionem oneraverit, tractari solet, an ex persona sua Falcidiam possit inducere substitutus, quam pupillus non haberet vel unus pupilli substitutus. Et facile quis dixerit consequenter prioribus, quae de patrimonii ratione dicta sunt, non esse Falcidia

§ 4.- Where a slave manumitted by a will dies before the estate is entered upon, it is understood that the heir must sustain the loss. But how can his value be estimated, who, if he had lived, could not be appraised? For those who, at the time of the death of their master, are attacked by a disease which renders it certain that they cannot live, and they afterwards die, it has been decided that the loss must be borne by the estate. Nor is the case different with respect to those who are under the same roof when the master was killed by his slaves.

§ 5.- Let us examine what is the effect of the common rule, namely: "But one Falcidian portion can exist in the will of a father and his minor sons." For, although the substitute may have been charged with the distribution of property left by the minor, when he becomes the heir he will only be liable for it as an ordinary debt; still, on account of other legacies left by the pupillary substitution, there will be ground for contribution. Hence it may happen that the substitute cannot retain anything from the father's estate, or that he may obtain much more than the fourth to which he is entitled by the Falcidian Law.

But what if the estate of the minor should not be sufficient to pay the legacies, while that of the father would have been sufficient to pay those which he bequeathed? The substitute will certainly be required to employ his fourth for their payment, as the father made the bequests out of his own estate, and it makes no difference that payment cannot be required beyond the assets of the estate by any will; for in this instance, the legacies left under the pupillary substitution are understood to have been bequeathed, as it were, conditionally, by the original will.

§ 6.- Where a testator makes a substitution of two persons for his son, and charges each one with the payment of a legacy, the question arises: can the substitute personally claim the Falcidian portion which the minor does not possess, or shall there be but one substitute for the minor? Anyone might (in

la intención del litigante y el deseo de ganar admiten esta opinión.

§ 4.- Si el esclavo manumitido en un testamento falleciera antes de adida la herencia, se entiende que ciertamente pereció para el heredero; ¿pero de qué precio será el que si viviera no sería valorado? Porque se respondió, que perecen para la herencia también los que al morir el señor estaban atacados de tal enfermedad, que fuese cierto que no podían vivir, si, no obstante, muriesen después. Y no otra cosa se dice respecto a los que estuvieron bajo un mismo techo cuando el señor fuese muerto por los esclavos.

§ 5.- Se ha de ver cual sea la eficacia de lo que vulgarmente se dice, que en los testamentos del padre y del hijo se guarda una sola Falcidia. Porque aunque el substituto deba como una deuda cualquiera lo que se dejó a cargo del pupilo, cuando el hijo quedó heredero, sin embargo, ha lugar a la contribución por razón de lo que se dió en el segundo testamento. Según lo que podrá suceder, que el substituto no retenga cosa alguna, o que tenga mucho más de la cuarta parte de la herencia paterna.

¿Luego, qué se dirá, si la herencia del pupilo no bastara para los legados, cuando hubiese bastado la del padre? Sin duda el substituto dará de su propia cuarta parte, porque el padre legó de lo suyo, y no importa al caso que por ningún testamento se da más de la cuantía del patrimonio porque en esta parte del derecho los legados que se dejan en el segundo testamento se entienden como dejados bajo condición en el primero.

§ 6.- Si uno hubiere dado dos substitutos a su hijo, y gravado la porción de uno de ellos, se suele discutir si por razón de su propia persona podría el substituto sacar la Falcidia, que no tendría el pupilo, o el único substituto del pupilo, Y fácilmente dirá alguno a consecuencia de lo anterior, que se ha dicho sobre la

locum et ultra vires portionis conveniendum alterum substitutum.

Sed verior est diversa sententia perinde huic quartam relinquendam existimantium atque ita si patri heres exitisset: ut enim opes patris et contributio legatorum inde capiunt et formam et originem, ita plures substituti subducta persona pupilli revocandi sunt ad intellectum institutionis.

Quid tamen dicemus de altero substituto, qui non est oneratus? Si forte nondum legata pupillus a se relictas solvit et aliquid ultra dodrantem sit in omnibus, et ipsum Falcidiam habiturum?

Atquin quartam habet neque idem patiaturs instituti comparatio. Rursus si negemus, aliud aperte, quam quod vulgo probatum est, respondetur. Itaque varietas existet, ut is quidem, qui proprio nomine oneratus est, velut institutus desideret quartam, alter autem, qui non est oneratus, ut substitutus, licet portio largiatur eius, non in solidum conveniatur propter calculi confusionem.

Huic consequens est, ut, si pupillo de Falcidia cautum fuit, duobus committatur stipulatio, videlicet in eam quantitatem, quam unusquisque sibi retinere potuisset.

§ 7.- Quaesitum est, si quis pupillo coheredem substituisset, quemadmodum legis Falcidiae ratio inquiri debeat? Et quale est, quod vulgo diceretur, legatorum rationem separandam? Dixi, quantum ad legata, quae pater a filio, item a substituto reliquit, nullam fieri posse separationem, cum communi calculo subiciantur et invicem inducant contributionem. Sed legata, quae ab instituto extero data sunt, permisceri ceteris non oportere: ideoque quartam pupillo datae portionis habere substitutum, quamvis suam portionem habeat ut institutus: et

conformity to what has been already laid down with reference to the established rule governing estates), easily say that the Falcidian Law will not apply, and that suit can be brought against the other substitute for an amount over and above his share.

The opposite opinion is, however, the better one, as it should be held that he has the right to deduct his fourth, just as if he had become the heir of his father; for as it is from this that the property of the father and the distribution of the legacies derive their form and origin, so where there are several substitutes, and the person of the minor is not to be considered, recourse must be had to the meaning of the appointment.

But what shall we say with reference to the other substitute who was not charged, so that, if the minor should die before paying the legacies with which he was burdened, and they amount to more than three-fourths of the estate, will he be authorized to deduct the Falcidian portion from all of them?

But he still has the fourth, and the same conclusion cannot be arrived at as in the case of the other appointment. Again, if we deny that this should be done, it must be held that such a course is contrary to the general rule. Therefore, a difference exists, as he who was charged in his own name can retain the fourth just as if he had been appointed an heir, and the other substitute, who was not charged, although his share may be increased, cannot be sued for the entire amount, on account of confusion in the estimate.

The result of this is that if security with reference to the Falcidian portion was furnished to the minor, it will enure to the advantage of both parties; that is to say, so far as the amount which each one will be able to retain for himself is concerned.

§ 7.- Where a testator appointed a co-heir with his minor son, the question arose: in what way should the portion authorized by the Falcidian Law be ascertained, and what was the meaning of the ordinary rule that it should apply separately to different legacies? I said that, with reference to any legacies with which a father charged his son, as well as those with which he charged a substitute, no separation can be made, as they should be subjected to a common estimate and both must contribute in turn; but where legacies with the payment of which a

cuenta del patrimonio, que no ha lugar a la Falcidia, y que el otro substituto ha de ser demandado por mas de la cuantía de su porción.

Pero es más verdadera la opinión contraria de los que piensan que se ha de dejar a éste la cuarta lo mismo que si de este modo hubiese sido heredero del padre, porque así como el haber del padre y la contribución de los legados toman de allí forma y origen, así muchos substituidos desaparecida la persona del pupilo, han de ser comprendidos en el sentido de la institución.

¿Pero ¿qué diremos del otro substituto, que no fue gravado, -si acaso el pupilo aun no pagó los legados dejados a su cargo, y excedieran algo de los tres cuartos-, tendrá también él la Falcidia sobre todos los bienes?

Mas tiene la cuarta, y no comporta lo mismo la comparación del instituido, a su vez si lo negáremos, se responde claramente cosa distinta de lo que vulgarmente se ha aprobado. Y así habrá esta diferencia, que éste ciertamente, que fue gravado en su propio nombre, pretenderá la cuarta como instituido, y el otro, que no fue gravado, aunque su porción sea suficiente, no será demandado por la totalidad, como substituto, por razón de la confusión del cálculo.

A esto es consiguiente, que si al pupilo se le hubiera dado caución por la Falcidia, se verifique la estipulación para los dos, a saber, por aquella cantidad que cada uno hubiese podido retener para sí.

§ 7.- Se preguntó, si uno hubiese substituido al pupilo un coheredero, de qué modo se deberá averiguar la cuenta de la ley Falcidia, y cual sea el sentido de lo que vulgarmente se dice, que se ha de separar la cuenta de los legados. Dije, que en cuanto a los legados que el padre dejó a cargo del hijo, así como a cargo del substituto, no se podía hacer ninguna separación, porque se sujetan a un calculo común, e inducen recíprocamente la contribución; pero que los legados, que se dieron a cargo de un instituido extraño, no se debían mezclar con los

aliam causam esse eius, qui ex variis portionibus heres scriberetur: ibi enim legatorum confundi rationem non minus, quam si semel fuisset nuncupatus ex ea portione, quae conficeretur ex pluribus, neque referre, pure saepe an sub diversis condicionibus sit heres institutus.

§ 8.- Si quis exheredato filio substituit heredem institutum et ab eo tabulis quoque secundis legaverit, necessario ratio confundetur, cum ideo legata valere dixerit Iulianus a substituto relicta, quod idem patri heres exstiterit.

12.- PAPINIANUS; *libro XXX, quaestionum*.- Si debitor creditore herede instituto petisset, ne in ratione legis Falcidia ponenda creditum suum legatariis reputaret, sine dubio ratione doli mali exceptionis apud arbitrum Falcidia defuncti voluntas servatur.

13.- PAPINIANUS; *libro XXXVII, quaestionum*.- Si tacitum fideicommissum servus iniungente domino susceperit, habiturum eum legis Falcidia beneficium, quia parere domino debuit, constitutum est: idemque placuit in filio, qui fuit in patris potestate.

14.- PAPINIANUS; *libro IX, responsorum*.- Pater filiam, quae a viro diverterat, heredem pro parte instituit et ab ea petit, ut fratri et coheredi suo portionem hereditatis acceptam deducta sexta restitueret, admissa compensatione dotis in Falcidia ratione. Si pater dotem consentiente filia non

foreign heir is charged are bequeathed, they cannot be mingled with the others, and therefore the substitute will be entitled to a fourth of the share which was given to the minor, although he may be entitled to his own share as the appointed heir. Another rule, however, is applicable where an heir is appointed to different portions of an estate; for in this instance the legacies will be merged not less than if he had been appointed but once to one share which is composed of several; and it does not make any difference whether he was appointed heir to the several shares absolutely, or under different conditions.

§ 8.- Where anyone substitutes an heir who has been appointed instead of his disinherited son, and charges him with the payment of a legacy by the second will, the legacies are necessarily merged; and therefore Julianus says that those with the payment of which the substitute was charged are valid, because he is the heir of the father.

12.- THE SAME; *Questions, Book XXX*.- Where a debtor, who has appointed his creditor his heir, requests that, in estimating the sum reserved by the Falcidian Law, his obligation should not be included with the bequests to the legatees, there is no doubt that the will of the deceased can be sustained in court by filing an exception on the ground of fraud, when the amount due under the Falcidian Law is to be determined.

13.- THE SAME; *Questions, Book XXXVII*.- Where a slave undertakes the execution of an implied trust under the direction of his master, it has been decided that, because he was obliged to obey his master, he will be entitled to the benefit of the Falcidian Law.

14.- THE SAME; *Opinions, Book IX*.- A father appointed his daughter, who was separated from her husband, heir to a portion of his estate, and charged her to deliver to her brother and co-heir the share of it which she had received, after having deducted the sixth part of the same. In determining the amount to

demás, y que por lo tanto el substituto tenía la cuarta de la porción dada al pupilo, aunque tenga su porción como instituido; y que otro era el caso del que fuese instituido heredero de varias porciones; porque entonces se confundía la cuenta de los legados, no de otra suerte que si una sola vez hubiese sido llamado por aquella porción, que se formaría de muchas; y que no importa que el heredero hubiera sido instituido puramente muchas veces, o bajo diversas condiciones.

§ 8.- Si al hijo desheredado le substituyó alguno el heredero instituido, y a cargo de éste hubiere legado también en el segundo testamento, por necesidad se confundirá la cuenta, porque dijo Juliano, que los legados dejados a cargo del substituto eran válidos por esto, porque el mismo quedó heredero del padre.

12.- EL MISMO; *Cuestiones, libro XXX*.- Si el deudor, habiendo sido instituido heredero el acreedor, hubiese pedido que en la cuenta de la ley Falcidia que se ha de hacer no les computase su propio crédito a los legatarios, sin duda que por razón de la excepción de dolo malo se mantiene ante el arbitro de la Falcidia la voluntad del difunto.

13.- EL MISMO; *Cuestiones, libro XXXVII*.- Si mandándosele su señor un esclavo se hubiere encargado de un fideicomiso tácito, se estableció que él habrá de tener el beneficio de la ley Falcidia, porque debió obedecer a su señor. Y lo mismo se determinó respecto al hijo, que estuvo bajo la potestad de su padre.

14.- EL MISMO; *Respuestas, libro IX*.- Un padre instituyó heredera de parte a una hija, que se había divorciado de su marido, y le pidió que restituyese a su hermano y coheredero, deducida la sexta parte, la porción de herencia recibida, admitiendo la compensación de la dote en la cuenta de la Falcidia;

petisset, Falcidiam quidem iure hereditario, dotem autem iure proprio filiam habituram respondi, quia dos in hereditate patris non inveniretur.

§ 1.- Avia nepotibus heredibus institutis fideicommisit, ut omissa retentione, quae per legem Falcidiam ex alio testamento competeat, solida legata fratribus et coheredibus solverent. Recte datum fideicommissum respondi, sed huius quoque onus in contributionem venire.

§ 2.- Duobus impuberibus substitutum utrique heredem existentem in alterius hereditate Falcidia non uti convenit, si de bonis alterius impuberis quartam partem hereditatis patris, quae ad filios pervenerit, retineat.

§ 3.- Quod si frater fratri legitimus heres exstitit et impuberi supremo substitutus, portio quidem paternorum bonorum, quam intestatus puer accepit, rationi Falcidiae non confundetur, sed quartam eius tantum portionem substitutus retinebit, quam impubes accepit qui substitutum habuit.

15.- PAPINIANUS; *libro XIII, responsorum*.- Quod bonis iure Falcidiae contribuendum est a debitore, cui mortis causa pacto debitum remissum est, in factum concepta replicatione retinebitur.

§ 1.- Frater cum heredem sororem scriberet, alium ab ea cui donatum volebat stipulari curavit, ne Falcidia uteretur et ut certam pecuniam, si contra fecisset, praestaret. Privatorum cautione legibus non esse refragandum constitit et ideo sororem iure publico retentionem habituram et actionem ex

be reserved under the Falcidian Law, would the dowry be liable to contribution? If the father, with the consent of his daughter, did not claim her dowry, I gave it as my opinion that she would be entitled to the Falcidian portion by hereditary right, but she would be entitled to the dowry in her own right, because it should not be included in her father's estate.

§ 1.- A grandmother, having appointed her grandchildren her heirs, charged some of them, without having deducted the amount to which they were entitled to by the Falcidian Law under another will, to pay the entire legacy to their brothers and co-heirs. I gave it as my opinion that the trust was legally created, but that the amount with which it was charged would also be liable to contribution.

§ 2.- It is not proper, where a substitute was appointed for two minors under the age of puberty, and became the heir to both, that the Falcidian Law should apply to the estate of only one of them; if, out of the property of the other minor, he should retain the fourth part of the estate of the father which passed to his children.

§ 3.- If, however, one brother, who is legitimate, should become the heir to the other, and be substituted for the survivor, the share of the father's estate which the surviving son receives on the ground of intestacy will not be subject to contribution to the Falcidian portion, but the substitute can only retain the fourth part of what the minor who had a substitute acquired.

15.- THE SAME; *Opinions, Book XIII*.- Where a debt has been remitted by an agreement mortis causa, the debtor must contribute to the amount due under the Falcidian Law, and this can be retained by the heir by filing a replication in factum.

§ 1.- Where a brother appointed his sister his heir, and charged her with a donation which he wished to give to another, who stipulated with her that she would not take advantage of the Falcidian Law, and if she did so, that she would pay him a certain sum of money, as it has been well established that the laws

respondí, que si el padre no hubiese pedido la dote con el consentimiento de la hija, tendrá la hija la Falcidia ciertamente por derecho de herencia, y la dote por derecho propio, porque no se hallaría la dote en la herencia del padre.

§ 1.- Una abuela, habiendo instituido herederos a sus nietos, encomendó a su fidelidad, que, prescindiendo de la retención que por la ley Falcidia les compelia por el otro testamento, pagasen íntegros los legados a sus hermanos y coherederos; respondí, que el fideicomiso estuvo bien dado, pero que también la carga de este se comprendía en la contribución.

§ 2.- No es conveniente que el substituido a dos impúberos, que queda heredero de ambos, use de la Falcidia en la herencia de uno, si de los bienes del otro impúbero retuviera la cuarta parte de la herencia del padre, que hubiere ido a los hijos.

§ 3.- Pero si un hermano quedó heredero legítimo del hermano, y substituido al último impúbero, ciertamente no se confundirá para la cuenta de la Falcidia la porción de los bienes paternos, que el joven intestado recibió, sino que el substituto retendrá solamente la cuarta porción de aquel, que recibió el impúbero que tuvo substituto.

15.- EL MISMO; *Respuestas, libro XIII*.- Aquello con que por derecho de Falcidia se ha de contribuir a los bienes por un deudor, a quien con pacto por causa de muerte se le remitió la deuda, se retendrá habiéndose formulado la réplica por el hecho.

§ 1.- Un hermano, al instituir heredera a su hermana, cuidó de que otro, a quien quería hacer una donación, estipulase de ella, que no usaría de la Falcidia, y que pagada cierta cantidad, si hubiese hecho lo contrario; fue constante que no se debe contrariar a las leyes por convenio de los parti-

stipulatu denegandam.

§ 2.- Non idcirco minus Falcidiae rationem in ceteris annuis legatis admitti visum est, quod primo ac secundo anno sine ulla detractioe fuissent legatario soluta.

§ 3.- Quod avus ex causa tutelae nepoti debuit, cum avo nepos solus heres exstisset, ratio Falcidiae si poneretur, in aere alieno bonis deducendum respondi. Nec ad rem pertinere, quod heredem avus idemque tutor rogaverat, ut, si sine liberis ante certam aetatem decederet, tam hereditaria quam propria bona restitueret: non enim ex hoc hereditatem debito compensatam videri, cum vel ideo maxime declaratur non esse compensationem factam, quoniam heredem suum habere propria bona defunctus ostendit.

Plane si condicio fideicommissi fuerit impleta, fructus hereditatis post mortem avi percepti pari pecunia debito tutelae compensabuntur, sed quartam heres nepotis de bonis dumtaxat, quae moriens avus reliquit, retinebit.

§ 4.- Cum fideicommissum, ex voluntate matris a patre moriente debitum, filio pater hereditate sua, quam in filium conferebat, compensari voluit: quod filio debetur, si ratio Falcidiae poni coeperit, fini quadrantis, quem ex bonis patris cum effectu percepit, compensabitur atque ita superfluum aeris alieni dodranti tantum detrahetur.

cannot be violated by any agreement entered into by private individuals, the sister will be entitled by public law to retain the Falcidian portion, and an action based on the stipulation will be refused to the other party.

§ 2.- Where annual legacies have been bequeathed, it has been decided that an heir will, none the less, be permitted to retain the Falcidian portion, because during the first and second years he paid the legatee without making any deduction.

§ 3.- Where a grandfather was indebted to his grandson on account of his administration of his guardianship, and the latter afterwards became the sole heir of his grandfather, if the Falcidian Law should be applicable, it was held that the amount, along with the other debts, must be deducted from the assets of the estate. It makes no difference whether the grandfather, who was also the guardian, charged his heir, if he should die before reaching a certain age without having any children, to deliver the estate, as well as his own property to a third party; for it was not held that the estate should be set off against this debt, and it was practically admitted that such a set-off ought not to be made, as the deceased indicated that his heir should have his own property.

It is clear that if the condition of the trust was complied with, and the profits of the estate collected after the death of the grandfather, they should be set off against an equal sum of the money due to the guardianship; but the heir would only be entitled to retain the fourth part of the property of the grandson, which the grandfather left him at his death.

§ 4.- Where a father was charged with a trust for the benefit of his son, by the will of the mother of the latter, which trust he had not executed, he wished a set-off against it to be made of the estate which he left to his son. If a calculation was made to determine the amount due under the Falcidian Law, what the son was entitled to should be set off against the fourth which he had actually obtained from his father's estate, and he could only deduct the excess of the three-fourths of what was owing to the heirs.

culares; y que por lo tanto la hermana habrá de tener por derecho público la retención, y se ha de denegar la acción de lo estipulado.

§ 2.- No porque en el primer y en el segundo año se le hayan pagado sin ninguna disminución al legatario, se consideró que no se admitía la cuenta de la Falcidia en los demás legados anuales.

§ 3.- Lo que el abuelo le debió por causa de tutela al nieto, cuando sólo el nieto hubiese quedado heredero del abuelo, respondí, que, si se tratase de la cuenta de la Falcidia, se ha de deducir de los bienes como deuda, y que no importa al caso que el abuelo y al mismo tiempo tutor hubiera rogado al heredero, que si falleciera sin hijos antes de cierta edad, restituyese tanto los bienes de la herencia como los propios; porque no por esto se considera compensada la herencia con la deuda cuando aun por esto principalmente se declara que no se hizo la compensación, puesto que el difunto manifiesta que su heredero tiene bienes propios.

A la verdad, si se hubiere cumplido la condición del fideicomiso, los frutos de la herencia percibidos después de la muerte del abuelo se compensarán por igual suma con la deuda de la tutela pero el heredero del nieto retendrá la cuarta solamente de los bienes que al morir dejó el abuelo.

§ 4.- Cuando el padre quiso que el fideicomiso debido al morir por el padre al hijo por voluntad de la madre fuese compensado con su propia herencia, que dejaba al hijo, lo que se le debe al hijo, si se hubiere comenzado a plantear la cuenta de la Falcidia, se compensará hasta el límite de la cuarta parte, que efectivamente percibió de los bienes del padre, y así lo restante de las deudas se deducirá solamente de los tres cuartos.

§ 5.- Ex donationibus in uxorem collatis quod heres eius reddere viro cogitur, in bonis mulieris non erit. Nam ita fit locupletior, ut tanto pauperior esse videatur: quod autem heres inde minuit, viro non perit.

§ 6.- Fructus praediorum sub condicione verbis fideicommissi relictorum in causam fideicommissi non deductos heres in ratione Falcidiae sic accepto facere sibi cogitur, ut quartam, et quartae fructus ex die mortis, bonorum quae mortis tempore fuerunt habeat. Nec ad rem pertinet, quando Falcidia lex admissa sit: nam etsi maxime post impletam condicionem fideicommissorum locum habere coepit, tamen ex die mortis fructus quadrantis apud heredem relinqui necesse est.

§ 7.- Fideicommissum portionis supplendae gratia, pro qua matrem filius heredem instituit, eidem matri datum ratione Falcidiae minuitur et eam pecuniam mater supra quartam portionis suae percipiet.

§ 8.- Quarta, quae per legem Falcidiam retinetur, aestimatione quam testator fecit non magis minui potest, quam auferri.

16.- SCAEVOLA; *libro III, quaestionum*.- Si ex pluribus rebus legatis heres quasdam solverit, ex reliquis Falcidiam plenam per doli exceptionem retinere potest etiam pro his, quae iam data sunt.

§ 1.- Sed et si una res sit legata, cuius pars soluta sit,

§ 5.- Whatever the heir is compelled to deliver to a husband out of donations made by him to his wife shall not be counted as part of her estate; as the woman, so far from becoming more wealthy, is considered to have become poorer to that extent. Again, when any diminution of the donations for which the heir is responsible takes place, the loss will not be borne by the husband.

§ 6.- In fixing the amount due under the Falcidian Law, the heir cannot be compelled to give a receipt for the crops of land left conditionally under the terms of a trust; and where he has not been charged to deliver the crops to the beneficiary of the trust, he will be entitled to a fourth, and the profits of the fourth of the property of the deceased which belonged to him at the time of his death. Nor does it make any difference when the Falcidian Law begins to be operative, for although it will commence to apply to the trust immediately after the conditions have been fulfilled; still, the profits of the fourth must be left in possession of the heir from the time of the death of the testator.

§ 7.- Where a son appointed his mother his heir, and bequeathed her, under a trust, a sum to make up the deficiency of what he should have left her, but did not do so; what was left to her can be diminished by the amount of the Falcidian portion, and the mother can receive the money left her in excess of the quarter of the share.

§ 8.- In calculating the fourth to be reserved under the Falcidian Law, the amount cannot be diminished by the estimate made by the testator, any more than the heir can be entirely deprived of it.

16.- SCAEVOLA; *Questions, Book III*.- If an heir should deliver only certain articles out of several which have been bequeathed, he can retain the entire Falcidian portion out of the remainder, and can interpose an exception on the ground of bad faith against the legatee, even with reference to the property which he has already delivered.

§ 1.- If only one article has been bequeathed, and a

§ 5.- Lo que de las donaciones hechas a la mujer es obligado su heredero a devolverle al marido no estar a entre los bienes de la mujer; porque así se hace más rica, de suerte que en otro tanto se considere que es más pobre; más lo que de allí disminuyó el heredero, no se pierde para el marido.

§ 6.- Los frutos de predios, dejados bajo condición con palabras de fideicomiso, no comprendidos en la causa del fideicomiso, es obligado el heredero a darlos por recibidos en la cuenta de la Falcidia, de suerte que tenga la cuarta, y los frutos, desde el día de la muerte, de la cuarta parte de los bienes que hubo al tiempo de la muerte. Y no importa al caso cuando haya sido admitida la ley Falcidia; porque aunque el fideicomiso comenzó a tener lugar principalmente después de cumplida la condición, sin embargo, es necesario que se dejen en poder del heredero los frutos de la cuarta parte desde el día de la muerte.

§ 7.- El fideicomiso dado a la madre para suplir la porción en que el hijo instituyó heredera a la misma madre, se disminuye por razón de la Falcidia; y la madre percibirá esta suma además de la cuarta de su propia porción.

§ 8.- La cuarta, que por la ley Falcidia se retiene, no se puede ni disminuir ni tampoco quitar por la estimación que hizo el testador..

16.- SCEVOLA; *Cuestiones, libro III*.- Si de muchas cosas legadas el heredero hubiere entregado algunas, puede por la excepción de dolo retener de las restantes íntegra la Falcidia aun por aquellas cosas que ya se dieron.

§ 1.- Pero aunque haya sido legada una sola cosa,

ex reliquo potest plena Falcidia retineri.

17.- SCAEVOLA; *libro VI, quaestionum*.- Si post missionem faciat codicillos miles et intra annum decedat, ex testamento, quod in militia iure militari fecit, plena legata, ex codicillis habita Falcidia ratione praestari debere dicitur. Sed res ita expeditur: si, cum quadringenta haberet, testamento quadringenta, codicillis centum legaverit, ex quinta parte, id est octoginta, quae ad legatarium ex codicillis pervenirent, si Falcidiam non pateretur, quartam, id est viginti heres retinebit.

18.- PAULUS; *libro XI, quaestionum*.- Filius familias qui militaverat decedens patris sui fidei commisit codicillis, ut peculium suum castrense Titio post mortem restitueret: quaerebatur, an ut heres quartam deducere possit. Dixi legem Falcidiam inductam esse a divo Pio etiam in intestatorum successione propter fideicommissa: sed in proposito nec hereditatem esse, quamvis placeret mihi extraneo herede instituto fieri hereditatem aditione eius: nam cum apud patrem remanet, ius pristinum durat et peculium est. Nec huic contrarium est, quod in testamento eius qui apud hostes decessit exercetur Falcidia: nam fictio legis Corneliae et hereditatem et heredem facit.

Sed me non dubitare, quin debeat id quoque indulgeri legis beneficium, siquidem quasi patris familiae bona restituere cogitur et heres scriptus omnia ex testamento aditione exemplo edicti legatorum nomine conveniuntur.

§ 1.- His consequens erit, ut, si ex fructibus medio tempore quartam et quartae fructus habuerit pater, etiam Trebellianum senatus consultum inducamus et

part of the same has been delivered, the heir can reserve the entire Falcidian portion out of the remainder.

17.- THE SAME; *Questions, Book VI*.- If a soldier should make a codicil, and die within a year after his discharge, the legacies bequeathed by his military will, in accordance with military law, must be fully paid, but it is held that those left by his codicil must be paid after the Falcidian portion has been deducted. This matter should be explained as follows: If the testator has four hundred aurei and bequeaths four hundred by his will, and a hundred by his codicil, out of the fifth part (that is to say eighty, which the legatee would be entitled to by the codicil if it was not subject to the Falcidian Law), the heir will be entitled to retain a fourth, that is to say twenty aurei.

18.- PAULUS; *Questions, Book XI*.- A son under paternal control who had served in the army, at his death, charged his father to give Titius his peculium castrense. The question arose whether the heir could deduct a fourth of it. I said that the Falcidian Law, as interpreted by the Divine Pius, also included the successions of intestates where there had been trusts created; but in the case stated the peculium was not a part of the estate although I would hold that where a foreign heir was appointed it would become a portion of the estate by his entering upon the same. For when the peculium remains in the hands of the father, his ancient right continues to exist, and the property is still peculium. Nor is this contrary by the fact that the Falcidian Law applies to the wills of those who die in the hands of the enemy, since the fiction of the Cornelian Law creates both the estate and the heir.

However, I do not doubt that the father ought also to enjoy the benefit of the law; for if, indeed, he is required to surrender the property as having belonged to the head of the family, the appointed heir, having failed to enter upon the estate under the will, can be sued by the legatees in conformity with the terms of the Edict.

§ 1.- The consequence of this is that if the father should, in the meantime, obtain the fourth and the profits of the same, we can apply the Trebellian

de la que se haya entregado una parte, se puede retener de lo restante toda la Falcidia.

17.- EL MISMO; *Cuestiones, libro VI*.- Si después de su licenciamiento hiciera codicilos un militar, y falleciera dentro del año, se dice que deben ser pagados íntegros los legados en virtud del testamento que con fuero militar hizo en la milicia, tenida cuenta de la Falcidia en virtud de los codicilos pero se ejecutará así: si teniendo cuatrocientos; hubiere legado cuatrocientos en el testamento, y ciento en los codicilos, el heredero retendrá de la quinta parte, esto es, de los ochenta que por los codicilos irían al legatario, si no soportase la Falcidia, el cuarto, esto es, veinte.

18.- PAULO; *Cuestiones, libro XI*.- Un hijo de familia, que había sido militar, al morir encargó en codicilos a la fidelidad de su padre, que después de su muerte restituyese su propio peculio castrense a Ticio; se preguntaba, si podría deducir la cuarta como heredero. Dije, que la ley Falcidia había sido aplicada por el Divino Pío a causa de los fideicomisos también a las sucesiones de los intestados, pero que en el caso propuesto ni hay herencia, aunque a mí me parecería bien, instituido heredero un extraño, que con la adición de este se constituyera la herencia; porque permaneciendo en poder del padre, subsiste el antiguo derecho, y es peculio. Y no es contrario a esto, que se aplique la Falcidia en el testamento del que falleció en poder de los enemigos; porque la acción de la ley Cornelia constituye así herencia como heredero.

Pero que yo no dudo que se deba conceder también este beneficio de la ley, puesto que es obligado a restituir los bienes como si fuesen de un padre de familia, y el heredero instituido, habiendo prescindido de la adición en virtud del testamento, será demandado, conforme al Edicto, por razón de los legados.

§ 1.- A esto será consiguiente, que, si de los frutos hubiere percibido el padre durante el tiempo intermedio la cuarta y los frutos de la cuarta, apliquemos

utiles actiones exerceri possint fiatque hereditas post restitutionem.

19.- SCAEVOLA; *libro VIII, quaestionum*.- Si dignum decem fundum damnetur heres quinque vendere, sine dubio quinque erunt imputanda Falcidia.

20.- SCAEVOLA; *libro IX, quaestionum*.- Si a servo meo herede instituto mihi legetur et mihi adquiratur hereditas, negat Maecianus id legatum in Falcidia computari, quia non debeatur.

21.- PAULUS; *libro XII, quaestionum*.- Si pupillus, cui sine tutore auctore decem mutua data sunt, legatum a creditore meruerit sub hac condicione, si decem quae acceperit heredi reddiderit, una numeratione et implet condicionem et liberatur naturali obligatione, ut etiam in Falcidia heredi imputentur, quamvis non imputarentur, si tantum condicionis implendae causa data fuissententiarum adeo autem et solvere videtur, ut repudiato legato vel Stichus qui legatus est mortuo nihil repetere possit.

§ 1.- Si ego et servus meus heredes instituti simus ex diversis partibus nec a servo erogatus dodrans, his quibus a me legatum est contra Falcidiam proderit quod ex portione servi ad me pervenit supra Falcidiam eius portionis.

Ex contrario si servo meo servus et mihi decem legata fuerint, servi Falcidia ex [et] decem mihi legatis non tenetur exemplo eodem Falcidiae: nam quartam retineo ex persona servi, quamvis de mea portione nihil exhaustum sit.

Decree of the Senate, and equitable actions can be brought in order that the property may become a part of the estate after restitution has been made.

19.- SCAEVOLA; *Questions, Book VIII*.- Where an heir is charged to sell a tract of land for five aurei, which is worth ten, there is no doubt that the five aurei will be subject to the operation of the Falcidian Law.

20.- THE SAME; *The Same, Questions, Book IX*.- If my slave, after having been appointed my heir, is charged with a legacy for my benefit, and acquires an estate for me, Maecianus denies that the legacy should be subject to the Falcidian Law because it is not valid.

21.- PAULUS; *Questions, Book XII*.- Where a ward who has borrowed ten aurei without the authority of his guardian receives a legacy from his creditor on condition that he will pay his heir the ten aurei which he borrowed, and he does so in one payment, he will both comply with the condition and be released from a natural obligation, so that the Falcidian Law will also apply to the money paid to the heir; although this would not be the case if it had been paid only for the purpose of complying with the condition. Moreover, this is considered a payment to such an extent that if the legacy should be rejected, or the slave Stichus, who was bequeathed, should die, the ward cannot recover anything.

§ 1.- If my slave and myself are appointed heirs to unequal shares of an estate, and the three-fourths of the share of the slave are not exhausted by the payment of legacies, those legatees in whose favor I am charged will be benefited, in opposition to the Falcidian Law, by the amount which will come into my hands out of the share of the slave in excess of the Falcidian portion of his share.

On the other hand, if a slave is bequeathed to my slave, and ten aurei are bequeathed to me, the Falcidian portion of the slave will not, in conformity with the Falcidian Law, be deducted from the ten aurei bequeathed to me, for I shall retain the fourth of the person of the slave, even though my share of the

también el Senadoconsulto Trebeliano, y se puedan ejercitar las acciones útiles, y se constituya herencia después de la restitución.

19.- SCÉVOLA; *Cuestiones, libro VIII*.- Si el heredero fuese condenado a vender por cinco un fundo que valga diez, sin duda se deberán computar cinco para la Falcidia.

20.- EL MISMO; *Cuestiones, libro IX*.- Si a mí se me legara a cargo de un esclavo mío instituido heredero, y se adquiriese para mí la herencia, dice Meciano que este legado no se computa en la Falcidia, porque no se debe.

21.- PAULO; *Cuestiones, libro XII*.- Si un pupilo, a quien sin la autoridad del tutor se le dieron en mutuo diez, hubiere merecido de su acreedor un legado bajo esta condición, si devolviera a la herencia los diez que hubiere recibido, con un solo pago cumple la condición y se libra de la obligación natural, de suerte que también se le imputen en la Falcidia al heredero, aunque no se le imputarían, si solamente hubiesen sido dados para que se cumpliera la condición. Mas de tal manera se considera que paga, que, repudiado el legado, o muerto Stico, que fue legado, no puede repetir nada.

§ 1.- Si yo y mi esclavo fuéramos instituidos herederos de diversas partes, y no se gastaron por el esclavo los tres cuartos, a aquellos a quienes se les legó a mi cargo les aprovechará contra la Falcidia lo que de la porción del esclavo vino a mí sobre la Falcidia de su porción.

Por el contrario, si a mi esclavo le hubiere sido legado un esclavo, y a mí la suma de diez, la Falcidia del esclavo no se obliga, según este mismo ejemplo de Falcidia, por los diez que se me legaron; porque retengo la cuarta por la persona del esclavo, aunque nada se haya sacado de mi porción.

22.- PAULUS, *libro XVII, quaestionum*.- Nesen-nius Apollinaris Iulio Paulo. Ex facto, domine, species eiusmodi incidit. Titia filias suas tres numero aequis ex partibus scripsit heredes et a singulis legata invicem dedit, ab una tamen ita legavit tam coheredibus eius quam extraneis, ut Falcidia sit locus.

Quaero, an adversus coheredes suas, a quibus legata et ipsa accepit, uti possit Falcidia et, si non possit vel doli exceptione summovenda est, quemadmodum adversus extraneos computatio Falcidiae iniri possit. Respondi: id quidem, quod a coherede legatorum nomine percipitur, non solet legatariis proficere, quo minus Falcidiam patiantur:

Sed cum is qui legatum praestaturus est ab eodem aliquid ex testamento petit, non est audiendus desiderans uti adversus eum Falcidiae beneficio, si id quod percepturus est ex voluntate testatoris suppleat, quod deducere desiderat. Plane ceteris legatariis non universum, quod coheredi praestat, imputabit, sed quantum daturus esset, si nihil ab eo perciperet.

§ 1.- Servo herede instituto si a domino fideicommissa, a servo legata data sunt, prius ratio legatorum habenda est, deinde ex eo quod superest fideicommissorum. Dominus enim ideo tenetur, quod ad eum pervenit: pervenit autem, quod deductis legatis superest. Plane Falcidiam exercet.

§ 2.- Sed et si dominus omissa hereditatis aditione servum sibi substitutum adire iussit, prius erogantur

bequest may not be exhausted.

22.- THE SAME, *Questions, Book XVII*.- "Nesennius Apollinaris to Julius Paulus. The following case actually occurred. Titia appointed her three daughters heirs to equal shares of her estate, and left them charged with legacies for the benefit of one another, but she charged one of them in such a way that the Falcidian Law would apply as well to her co-heirs as to strangers to whom other property was bequeathed."

I ask whether the Falcidian Law is applicable against her co-heirs who were themselves charged with legacies for her benefit, and, if it should not be applicable, and she is barred by an exception on the ground of bad faith, how can the computation of the Falcidian portion be made as against the foreign legatees? I answered that what is received from a co-heir, as a legacy, does not profit the legatee by releasing him from the operation of the Falcidian Law.

Where, however, an heir who is obliged to pay a legacy demands something from the same person under the terms of the will, he should not be heard, if he wishes to avail himself of the benefit of the Falcidian Law against the said person, if what he is entitled to receive under the will of the testator, is equal to what he wishes to deduct from the legacy. With reference to the other legatees, it is evident that the heir will not be required to subject to the operation of the Falcidian Law all that he pays to his co-heir, but only what he actually gives him, that is, if he receives nothing from him.

§ 1.- Where a slave is appointed an heir by someone, and his master is charged with a trust and the slave with a legacy, the calculation must first be made with reference to the legacy, and then the trust will be discharged out of what remains. The master, however, will only be liable for what comes into his hands, and, moreover, he will only receive what remains after the legacies have been deducted. It is clear that the Falcidian Law will apply.

§ 2.- But if the master who was appointed heir fails to accept the estate and orders his slave, who was

22.- EL MISMO; *Cuestiones, libro XVII*.- Nesen-nio Apolinar a Julio Paulo. De un hecho resulta, señor, el siguiente caso: Ticia instituyó herederas por iguales partes a sus tres hijas, y dio legados recíprocamente a cargo de cada una, pero a cargo de una de ellas legó tanto para sus coherederos como para extraños, de suerte que hubiera lugar a la Falcidia;

Pregunto, si podría usar de la Falcidia contra sus coherederas, a cargo de las que también ella recibió legados, y, si no pudiera, o hubiera de ser repelida con la excepción de dolo, de qué modo se pueda hacer contra los extraños la computación de la Falcidia. Respondí: ciertamente lo que se percibe de un coheredero a título de legados no suele aprovechar a los legatarios para que no sufran la Falcidia;

Pero cuando el que ha de pagar el legado le pide al mismo alguna cosa en virtud del testamento, no ha de ser oído al pretender usar contra él del beneficio de la Falcidia, si lo que por voluntad del testador ha de percibir supliera lo que pretende deducir. Y a la verdad, no imputará a los demás legatarios todo lo que paga al coheredero, sino cuanto habría de dar, si nada percibiera de él.

§ 1.- Instituido heredero un esclavo, si se dieron fideicomisos a cargo del señor, y legados a cargo del esclavo, se ha de hacer primero la cuenta de los legados, y después, de lo que resta, la de los fideicomisos, porque el señor esta obligado por lo que fue a su poder; pero fue a su poder lo que resta después de deducidos los legados; utilizará a la verdad la Falcidia.

§ 2.- Pero también si el señor, no habiendo hecho adición de la herencia, mandó al esclavo, a él

quae ab ipso domino data sunt, tunc eorum quae a servo relictæ sunt ratio initur, si patitur Falcidia.

§ 3.- Si debitori liberatio legata sit, quamvis solvendo non sit, totum legatum computetur, licet nomen hoc non augeat hereditatem nisi ex eventu. Igitur si Falcidia locum habeat, hoc plus videbitur legatum, quod huic legatum esset: cetera quoque minuentur legata per hoc et ipsum hoc per alia; capere enim videtur eo, quod liberatur.

§ 4.- Sed si alii hoc nomen legetur, nullum legatum erit nec ceteris contribuetur.

23.- SCAEVOLA; *libro XV, quaestionum*.- Si fundus mihi legetur et via, in Falcidia ratione, si tantum sit in via, quantum amplius est in Falcidia, integer fundus capietur et via perit.

Sed si via legetur nec solvendo sit hereditas, non debebitur. Videndum etiam, si fundo et via legato minus ex utroque desideret quam sit viae pretium. Potest coacta ratione dici non tantum fundum solidum capi, sed etiam, ut doli exceptio tantum sarciat, quantum deest, ne plus habeat, quam Falcidia desiderat: ut tunc solum via intercidat, quotiens plus Falcidia desiderat quam est viae pretium.

24.- PAULUS; *libro XIV, responsorum Respondit*.-

substituted for him, to do so, the legacies with which the master himself was charged must first be paid, and then, after reserving the Falcidian portion, payment should be made of those with which the slave was charged.

§ 3.- Where a release from his obligation is bequeathed to a debtor, even though the latter may not be solvent, the entire legacy must be computed, although the bequest of the claim cannot increase the estate except in the event of payment. Therefore, if the Falcidian Law is applicable, what was bequeathed to the debtor will be held to have increased the amount of the legacy. The other legacies will also be diminished by this one, and it will be diminished by the others; for the debtor is considered to receive the legacy by the mere fact of his being released from liability.

§ 4.- Where, however, the claim is bequeathed to a third party, the legacy is void, and it will not be liable to contribution with the others.

23.- SCAEVOLA; *Questions, Book XV*.- Where a tract of land with a right of way is devised to me, and, after the deduction of the Falcidian portion, the estimated value of the right of way is greater, I will be entitled to the land without incumbrance, and the right of way will be extinguished. If, however, the right of way should be bequeathed, and the estate should prove insolvent, the right of way will not be due.

Where the land and the right of way are both devised, it should also be considered whether the heir will be entitled to make, from one or the other, a deduction of less than the value of the right of way. Strictly speaking, it may be said that, in this instance, the devisee will not only be entitled to the entire tract of land, but can also file an exception on the ground of bad faith, in order to obtain what is lacking, so that he may not have more than can be claimed under the Falcidian Law. Hence the right of way will only be lost where the requirements of the Falcidian Law amount to more than its value.

24.- PAULUS; *Opinions, Book XIV*.- Paulus says

substituido, que la adiera, primeramente se paga lo que se dió a cargo del mismo señor, y luego se hace la cuenta de lo que se dejó a cargo del esclavo, si comporta la Falcidia.

§ 3.- Si a un deudor le hubiera sido legada la liberación, aunque no sea solvente, se computará todo el legado, aun cuando este crédito no aumente la herencia, sino por el resultado eventual. Así, pues, si tuviera lugar la Falcidia, se considerará además legado lo que a éste se le hubiese legado, y los demás legados también se disminuirán por este, y este mismo por los otros; porque se considera que adquiere porque se libra.

§ 4.- Pero si este crédito fuese legado a otro, será nulo el legado, y no se añadirá a los demás.

23.- SCEVOLA; *Cuestiones, libro XV*.- Si se me legaran un fundo y la servidumbre de vía, si en la cuenta de la Falcidia importara la servidumbre de vía tanto cuanto hay de exceso en la Falcidia, se adquirirá integro el fundo, y se extingue el legado de la vía.

Pero si se legara la servidumbre de vía, y la herencia no fuera solvente, no se deberá. Se ha de ver también, si, legados un fundo y la servidumbre de vía, reclamara de uno y de otra menos de lo que sea el precio de la vía; se puede decir, que, reunida la cuenta, no solamente se adquiere todo el fundo, sino también la vía, pero de suerte que la excepción de dolo resarza tanto cuanto falta, a fin de que no tenga más de lo que reclama la Falcidia, de modo que solamente se extinga él legado de vía cuando la Falcidia requiera más de lo que es el precio de la vía.

24.- PAULO *respondió; Respuestas, libro XIV*.- Si

Falcidia legis rationem si haberi oportet, ita habendum, ac si hae res, quae ab herede subtractae sunt, in hereditate relictæ non fuissentiarum

§ 1.- Idem respondit partus ancillarum ante diem fideicommissi editos ad heredes eius qui rogatus est pertinere eosque in quartam et quartae fructus computandos, si de lege Falcidia quaestio intercedat.

§ 2.- Idem respondit fructus ex propria re heredis, quae legata est, post diem fideicommissi cedentem perceptos, etsi non sint restituendi fideicommissario, heredi in quartam imputari non solere.

25.- SCAEVOLA; *libro IV, quarto responsorum*.- Maritum suum et filium communem aequis partibus heredes instituit: quaesitum est, an in ratione legis Falcidia imputandum sit marito, quod ad eum ex eadem hereditate per filium pervenit. Respondit, si ex institutione filii tantum retineat, quantum ad Falcidiam satis sit, nihil quartae nomine deducendum.

§ 1.- A liberto, cui fundum legaverat, per fideicommissum Seiae annua decem dedit: quaesitum est, si lex Falcidia liberti legatum minuerit, an Seiae quoque annum fideicommissum minutum videatur, cum redditus largiatur annuam praestationem. Respondit secundum ea quae proponerentur non videri minutum, nisi alia mens testatoris probetur.

26.- SCAEVOLA; *libro V, responsorum*.- Lineam

that where property belonging to an estate has been abstracted by the heir, and the amount due under the Falcidian Law must be ascertained, the estimate shall be made just as if what has been taken had been included in the estate.

§ 1.- The same authority gives it as his opinion that the offspring of female slaves born before the day when the trust took effect will belong to the heirs of him who was charged with the execution of the trust; and where a question with reference to the Falcidian Law arises, a fourth of the value of the children and a fourth of the interest on the same must be computed.

§ 2.- The same authority gives it as his opinion that where a legacy of property belonging to the heir is bequeathed, any profits of said property, which have been collected by him after the day when the trust became operative, cannot be charged against the fourth of the heir, even though he is not required to deliver them to the beneficiary of the trust.

25.- SCAEVOLA; *Opinions, Book IV*.- A woman appointed her husband and their son heirs to equal shares of her estate. The question arose whether, in calculating the portion allowed by the Falcidian Law, the share of the husband which had come into his hands from the same estate through his son should be charged. The answer was that, if by the appointment of his son, he had received as much as was sufficient for the Falcidian portion, nothing should be deducted on that account.

§ 1.- A testator bequeathed an estate to his freedman, and charged him by a trust to pay ten aurei to Seia, every year. The question arose, if the Falcidian Law diminished the legacy of the freedman, whether the annual trust with which he was charged for the benefit of Seia would also be diminished, provided that the income exceeded the annual payment. The answer was that, according to the facts stated, it would not appear to have been diminished, unless the intention of the testator was proved to be otherwise.

26.- THE SAME; *Opinions, Book V*.- A testator

conviene que se haga la cuenta de la ley Falcidia, se ha de hacer como si las cosas que fueron substraídas por el heredero no hubiesen sido dejadas en la herencia.

§ 1.- El mismo respondió, que los partos de las esclavas dados a luz antes del término de un fideicomiso pertenecen a los herederos de aquel que fue rogado, y que ellos han de ser computados para la cuarta y los frutos de la cuarta, si mediara cuestión sobre la ley Falcidia.

§ 2.- Respondió el mismo, que los frutos de una cosa propia del heredero, que fue legada, percibidos después de correr el término del fideicomiso, aunque no se le hayan de restituir al fideicomisario, no se le suelen computar al heredero para la cuarta.

25.- SCEVOLA; *Respuestas, libro IV*.- Una instituyó herederos por partes iguales a su marido y al hijo común; se preguntó, si en la cuenta de la ley Falcidia se le haya de computar al marido lo que por medio del hijo fue de la misma herencia a poder de él. Respondió, que si por la institución del hijo retuviera tanto cuanto fuera bastante para la Falcidia, no se ha de deducir nada a título de la cuarta.

§ 1.- Uno dió a Seia por fideicomiso la suma de diez por año a cargo de un liberto, al que había legado un fundo; se preguntó, si en el caso de que la ley Falcidia hubiere disminuido el legado del liberto, se consideraría disminuido también el fideicomiso anual de Seia, bastando la renta para el pago de la anualidad. Respondió, que, según lo que se exponía, no se consideraba disminuido, a no ser que se probare que otra fue la intención del testador.

26.- EL MISMO; *Respuestas, libro V*.- Uno legó

margaritorum triginta quinque legavit, quae linea apud legatarium fuerat mortis tempore: quaero, an ea linea heredi restitui deberet propter legem Falcidiam. Respondit posse heredem consequi, ut ei restituatur, ac, si malit, posse vindicare partem in ea linea, quae propter legis Falcidiae rationem deberet remanere.

§ 1.- Quaesitum est, an pretium statuarum Falcidiam pati debeat. Respondit debere.

27.- SCAEVOLA; *libro VI, responsorum*.- "Seius et Agerius si intra diem trigesimum mortis meae rei publicae nostrae caverint contentos se futuros tot aureis legis Falcidiae beneficio omisso, heredes mihi sunt. Quos invicem substituto. Quod si voluntati meae non consenserint, exheredes sunt".

Quaesitum est, an heredes instituti hereditatem adire possint, si conditioni parere nolunt, cum habeant substitutos eadem conditione praescripta. Respondit Seium et Agerium primo loco institutos perinde adire posse, ac si ea condicio, quae fraudis causa adscripta est, adscripta non esset.

28.- MAECIANUS; *libro I, fideicommissorum*.- Pater quoque in legatis, quae filius ei dedit alio herede instituto, legis Falcidiae rationem patitur.

29.- PAULUS; *libro II, fideicommissorum*.- Si a me tibi fideicommissum vel legatum est tuque id post tempus rogatus sis mihi restituere, non puto hoc imputandum esse in Falcidiam, quia incipio postea quasi fideicommissarius id recipere.

30.- MAECIANUS; *libro VIII, fideicommissorum*.

bequeathed a string of thirty-five pearls, which was in the possession of the legatee at the time of his death. I ask whether the said string of pearls should be restored to the heir, in order to enable him to reserve a portion of them under the Falcidian Law. The answer was that the heir could bring an action to compel its restitution to him, and if he preferred to do so, he could bring suit to recover that portion of the string of pearls which he was entitled to keep under the provisions of the Falcidian Law.

§ 1.- The question arose whether the value of statues is subject to the operation of the Falcidian Law. The answer was that it is.

27.- THE SAME; *Opinions, Book VI*.- "Let Seius and Agerius be my heirs, if within thirty days after my death they execute a bond to my town that they will be content with such-and-such a sum of aurei, and will renounce the benefit of the Falcidian Law; and I hereby substitute the said heirs for one another. If they should not comply with my wishes, let them be disinherited."

The question arose whether the appointed heirs, having been substituted under the same condition, could enter upon the estate if they refused to comply with the condition. The answer was that Seius and Agerius, who were appointed in the first place, could enter upon the estate, just as if the condition which had been fraudulently imposed had not been imposed at all.

28.- MAECIANUS; *Trusts, Book I*.- Where a foreign heir has been appointed by a son, the Falcidian Law applies even to a legacy which the son has bequeathed to his father.

29.- PAULUS; *Trusts, Book II*.- When I am charged with a trust or a legacy for your benefit, and you are requested after a certain time to deliver the same to me, I do not think that this should be subject to the operation of the Falcidian Law, because I shall begin to receive the property subsequently as the beneficiary of a trust.

30.- MAECIANUS; *Trusts, Book VIII*.- In the

una sarta de treinta y cinco margaritas, cuya sarta se hallaba en poder del legatario al tiempo de la muerte: pregunto, si se le debería restituir esta sarta al heredero por causa de la ley Falcidia. Respondió, que el heredero podía conseguir que se le restituya, y que, si lo prefiriese, podía reivindicar la parte de aquella sarta, que por la cuenta de la ley Falcidia le debiese quedar.

§ 1.- Se preguntó, si el precio de las estatuas debería soportar la Falcidia. Respondí, que debía.

27.- EL MISMO; *Respuestas, libro VI*.- «Sean mis herederos Seyo y Agerio, si dentro de los treinta días de mi fallecimiento hubieren dado a nuestra República caución de que se contentaran con tantos áureos, habiendo prescindido del beneficio de la Falcidia; a los cuales los substituyo recíprocamente; pero si no se conformaren con mi voluntad, sean desheredados»;

Se preguntó, si podrían adir la herencia los herederos instituidos, si no quieren cumplir la condición, teniendo substitutos con la misma condición prescrita. Respondió, que Seyo y Agerio, instituidos en primer lugar, podían adirla lo mismo que si no se hubiese impuesto aquella condición, que se impuso por causa de fraude.

28.- MECIANO; *Fideicomisos, libro I*.- También el padre soporta la cuenta de la ley Falcidia en los legados que el hijo le dió, habiendo sido otro instituido heredero.

29.- PAULO; *Fideicomisos, libro II*.- Si a mi cargo se te dejó un fideicomiso o un legado, y se te hubiera rogado que me lo restituyeras después de cierto tiempo, no opino que esto se haya de computar en la Falcidia, porque comienzo a recibirlo después como fideicomisario.

30.- MECIANO; *Fideicomisos, libro VIII*.- En la

sorum.- In ratione legis Falcidiae mortes servorum ceterorumque animalium, furta, rapinae, incendia, ruinae, naufragia, vis hostium praedonum latronum, debitorum facta peiora nomina, in summa quodcumque damnum, si modo culpa legatarii careant, heredi pereunt: quemadmodum ad heredis lucrum pertinent fructus, partus ancillarum et quae per servos acquisita sunt, ut stipulationes, rerum traditiones, legata hereditatesve his datae, ceterae donationes, item servitutes, quibus liberata praedia pretiosiora fierent, actionesque acquisitae, ut furti damni iniuriae similesque, quorum nihil in rationem legis Falcidiae cadit.

§ 1.- Vendere autem vel emere iussus certo pretio fundum aliamve quampiam rem in legis Falcidiae ratione, cum quantum sit legatum requiratur, tantum eo nomine inducetur, quanto pluris minorisve sit res ea quantitate, quam quo pretio testator accipi derive iussit, sed ut ei quidem portioni, quae legatis deductis facienda erit, amplius deducetur: quippe non nostri causa capi id pretium, sed eo deducto pretium reliquum legatum esse intellectum est.

§ 2.- Prorsus diligenter animadvertendum est, ne quod dicitur damna post mortem testatoris illata ad solum heredem respicere usque quaque et sine ulla distinctione recipiatur. Quod enim remota lege Falcidia in totum iuris foret, hoc idem fore in ea parte, quae lege Falcidia constitueretur: hoc enim attinet damna postea facta non deduci, ne amota portio legatis fidei commissis detrahatur.

application of the Falcidian Law, losses caused by the death of slaves and other animals, or by theft, robbery, fires, the ruin of houses, shipwreck, and violence of enemies, depredators and thieves, or by debtors, in fine, any loss whatsoever, must be borne by the heirs, provided that the legatees are not to blame. In like manner, the profits obtained by the heir from crops, the offspring of female slaves, and any acquisitions made by slaves (as, for instance, through stipulations, the delivery of property, legacies, or estates left to them, and other donations of every description) as well as servitudes—where lands become more valuable through being released from them—or where any rights of action, for example, those for theft, damage, injury, and others of this kind, are none of them liable to the operation of the Falcidian Law.

§ 1.- Where the heir is directed either to sell or purchase a tract of land or any other kind of property for a certain price before estimating the Falcidian portion, in order to ascertain the amount of the legacy, only that sum is considered as bequeathed which either amounts to more or less than the price which the testator ordered to be paid or received for the said property. Then, from the portion which remains after the legacies have been deducted, a still further deduction will be made, since the said price is not acquired mortis causa, but after the deduction has been made, the remainder is understood to have been bequeathed.

§ 2.- It should also be carefully noted that the ordinary rule, "All losses which occur after the death of the testator concern the heir alone," is of universal application, and must be accepted without any distinction. For as even where the Falcidian Law does not apply at all, the heir will legally be compelled to bear the entire loss, so he must bear his share of it in cases where the Falcidian Law is operative. For, generally speaking, this is the rule, since losses sustained after the death of the testator cannot be deducted, in order to prevent the portion which is lost from being taken from the legacies or trusts.

cuenta de la ley Falcidia van a cargo del heredero el fallecimiento de esclavos y de los demás animales, los hurtos, los robos, los incendios, las ruinas, los naufragios, las violencias de los enemigos, de los depredadores, de los ladrones, los créditos empeorados de los deudores, en suma, cualquier daño, si los legatarios estuvieran exentos de culpa; a la manera que pertenecen al lucro del heredero los partos de las esclavas, y lo que se adquirió por medio de los esclavos, como estipulaciones, entregas de cosas, legados, o herencias dadas a ellos, las demás donaciones, y también las servidumbres con cuya liberación se harían de más valor los predios, y las acciones adquiridas, como las de hurto, de daño, de injuria, y otras semejantes, de cuyas cosas nada cae dentro de la cuenta de la ley Falcidia.

§ 1.- Mas habiéndosele mandado a uno que venda o que compre por cierto precio un fundo u otra cualquier cosa, preguntándose cuánto importa lo legado, se incluirá por este motivo en la cuenta de la Falcidia solamente cuanto la cosa valga de más o de menos de la cantidad que por precio mandó el testador que se diera o se recibiera, pero, a la verdad, para esta porción, que deducidos los legados se habrá de hacer, se deducirá más, porque este precio no se adquiere por causa nuestra; mas deducido esto, se entendió que el precio restante fue legado.

§ 2.- Por otra parte, se ha de advertir con cuidado, que lo que se dice, que los daños causados después de la muerte del testador incumben sólo al heredero, no se admite en absoluto y sin alguna distinción; porque lo que sería de derecho para la totalidad, habiéndose prescindido de la ley Falcidia, esto mismo habría de serlo para aquella parte que se constituiría por la ley Falcidia, porque esto se refiere a que no se deducen los daños causados después, para que la porción separada no se deduzca de los legados, o de los fideicomisos.

§ 3.- Verum est autem his solis, quae pondere numero mensura constant, nec damno postea incidente ex portione, quae fieri ad aestimationem eorum bonorum, quae mortis tempore fuerunt, quicquam detrahi.

§ 4.- Certis vero corporibus et his ipsis ita relictis: "Pecuniam, quam in illa arca", "vinum, quod in illis doleis", "pondus argenti, quod in illis horreis habeo", si sine culpa heredis deperierunt vel deteriora sunt facta, procul dubio aut nihil debetur aut eorum quae exstabant qualia erunt ea portio debetur, quae per legem Falcidiam efficiatur ex aestimatione bonorum, quae mortis testatoris tempore fuerint.

§ 5.- Incertae autem res relictæ distinctionem recipiunt: nam si ex suis rebus incertam rem testator reliquisset, veluti "argentum quod elegerit", et omne argentum testatoris interisset sine culpa heredis, nihil deberetur: sin vero argenti pondus pure relictum esset, quamvis omne argentum testatoris deperisset, admissa lege Falcidia portio eius quantitatis sumetur, quae fuit in bonis eo tempore quo testator decessit, nec ad imminuendam eam quicquam damna postea incidentia proficiunt.

§ 6.- Res tamen, quae interierint, pro nulla parte ac ne aestimatio quidem debeatur, non magis quam si omnes res per speciem enumeratae relictæ essentiarum

§ 7.- Tametsi autem legis Falcidiae ratione, quae condicionis implendae causa heredi sunt data, in quartam non computantur, tamen id, quod non figura

§ 3.- It is, however, true that no deduction can be made except with reference to such articles alone as can be weighed, counted, or measured; and where any loss happens after the death of the testator the deduction must be made from the share belonging to the legatee, dependent upon the appraised value of the estate of the deceased at the time of his death.

§ 4.- With regard to property which can be positively designated, and other articles left as follows, "The money which I have in such-and-such a chest," "The wine which I have in such-and-such casks," "The weight of silver which I have in such-and-such a building," and the property is lost, or becomes deteriorated without the fault of the heir, there is no doubt that either none of the legacy will be due under such circumstances, or, after the deduction of the Falcidian portion, the legatees will be entitled to a share of whatever remains, based upon an estimate of the value of the property belonging to the testator at the time of his death.

§ 5.- Where property is left which is of an uncertain character, a distinction must be made; for if a testator should bequeath some articles without specifically designating them, as, for instance, where he leaves to anyone the silver plate which he may select, and all the silver plate should be lost without the heir being to blame, nothing will be due to the legatee. If, however, a certain amount of silver was absolutely bequeathed, even though all the silver of the testator should be lost, the Falcidian Law will apply, and that portion of the amount can be taken which was with the property of the estate at the time that the testator died, and any losses which may subsequently have occurred will not cause any diminution of the legacy.

§ 6.- The heir will not be liable for any portion of the property bequeathed which is lost, and not even for the appraised value of the same, any more than if all the articles bequeathed had been specifically enumerated.

§ 7.- In estimating the amount due to the heir under the Falcidian Law, anything which is paid to him in compliance with the conditions of the will shall not

§ 3.- Mas es verdad que solo de estas cosas, que constan de peso, número y medida, y no ocasionándose después el daño, se deduce alguna cosa de la porción que suele hacerse para la estimación de los bienes, que hubo al tiempo de la muerte.

§ 4.- Pero habiéndose legado cosas ciertas corpóreas, y estas mismas de este modo: «el dinero que tengo en aquella arca, el vino que tengo en aquellas tinajas, la cantidad de plata que tengo en aquellos almacenes», si perecieron sin culpa del heredero, o se deterioraron, sin duda que o no se deberá nada, o que de las cosas que subsistieren, tales cuales estuvieren, se deberá esta porción, que por la ley Falcidia se haga con arreglo a la estimación de los bienes, que existieren al tiempo de la muerte del testador.

§ 5.- Pero las cosas inciertas dejadas admiten una distinción, porque si el testador tuviese dejado una cosa incierta de sus propios bienes, por ejemplo: «la plata, que hubiere elegido», y toda la plata del testador hubiese perecido sin culpa del heredero, no se debería nada; mas si se hubiese dejado puramente una cantidad de plata, aunque hubiese perecido toda la plata del testador, admitida la ley Falcidia se tomará la porción de esta cantidad, que hubo en los bienes al tiempo en que falleció el testador; y para disminuirla no aprovecharía nada los daños que después sobrevengan.

§ 6.- Pero las cosas, que hayan perecido, no se deben en parte ninguna, ni ciertamente su estimación, no de otra suerte que si hubiesen sido dejadas todas las cosas enumeradas por especie.

§ 7.- Mas aunque en la cuenta de la ley Falcidia no se computan para la cuarta las cosas que se le dieron al heredero para cumplir una condición, sin embargo,

condicionis accipere iussus est ab eo, cui hereditatem restituere rogatus est, Celso et Iuliano nostro placuit computari, quemadmodum si ea summa heres vendere eas res iussus esset, quia non condicionis implendae causa, sed quodammodo pro pretio inferre sunt iussi. Quo loco amplius quaesitum est, an fideicommissarius quoque invitatus cogatur dare eam summam et recipere hereditatem, quasi et ipsius fidei commissum esset: sed et verisimile non est, cum talis oratio magis ipsius causa, quam contra ipsum posita videatur.

§ 8.- Cum lex Falcidia intervenit, non veniunt in contributionem, quae ipsi heredi a semetipso vel servo eius legata fidei commissum sunt. Alia causa est eorum, quae in die certa dantur: nam si libertatis dies coepit cedere, ei debentur et in contributionem veniunt. Ac ne ea quidem, quae quis servis suis inutiliter sine libertate legavit fidei commissum, in computationem eius legis cedunt.

§ 9.- Res, quas neque per fideicommissum relinqui posse certum est, in legis Falcidiae computationem non veniunt.

31.- POMPONIVS; *libro II, fideicommissorum*.- Is cui fideicommissum solvitur sicut is cui legatum est satisfacere debet, quod amplius cepit, quam per legem Falcidiam ei licuerit, reddi: veluti cum propter condicionem aliorum fideicommissorum vel legatorum legis Falcidiae causa pendebit. Sed et secundum Cassii et veterum opinionem, si a pupillo fideicommissa capiuntur, propter ea, quae a substituto erunt relicta, cavere debet is cui solvatur. Nam quamvis repetitio sit eorum, quae

be charged against his fourth; still, it is held by Celsus and our Julianus that a charge should be made when he was directed to receive a sum of money from the beneficiary of the trust, to whom he has been ordered to deliver the estate, where the testator did not direct the beneficiary to pay the said sum under some condition; as, for instance, where the heir was directed to sell the property for a specified amount, for then he will pay the money to the heir, not for the purpose of complying with a condition, but as a price. In a similar case, it has also been asked whether the beneficiary of the trust can be compelled to pay the said sum, and take the estate, even if he is unwilling to do so, just as if he himself had been charged with a trust for the benefit of the heir. This is not probable, however, as a provision of this kind appears to have been made in favor of the beneficiary of the trust rather than against him.

§ 8.- When the Falcidian Law applies, that property is not subject to contribution where the heir himself is charged with a trust for the benefit of himself, or his slave. The case, however, is different where the legacies to the slave are payable at a certain time; for when the day of his freedom arrives he will be entitled to them, and they become subject to contribution. Where, however, anyone makes a bequest to a slave without the grant of his freedom, and which, for this reason, is void, or leaves it subject to a trust, it will not be considered as liable to contribution under this law.

§ 9.- Property, which it is certain cannot legally be left in trust, is not included in that liable to contribution under the Falcidian Law.

31.- POMPONIVS; *Trusts, Book II*.- The person to whom payment is made in compliance with the terms of a trust, just as one to whom a legacy is bequeathed, is obliged to give security to return anything which he receives in excess of what he is entitled to under the Falcidian Law; as, for example, where the amount due under the Falcidian Law is still in suspense, on account of the condition upon which other trusts or legacies are dependent not having yet been fulfilled. But, according to the opinion of Cassius and the

a Celso y a nuestro Juliano les pareció bien que se computará lo que no en forma de condición se le mandó que recibiera de aquel para quien se le rogó que restituyera la herencia, a la manera que si se le hubiese mandado al heredero que por esta suma vendiese aquellas cosas, porque no se les mandó pagar para que se cumpliera una condición, sino en cierto modo por vía de precio. En cuyo punto se preguntó más, si el fideicomisario será obligado también contra su voluntad a dar esta suma, y a recibir la herencia, como si el fideicomiso fuese también de él mismo. Pero esto no es verosímil, porque tal cláusula parece puesta mas bien por causa del mismo, que contra el mismo.

§ 8.- Cuando media la ley Falcidia, no se comprenden para la contribución las cosas que se legaron o se dejaron en fideicomiso al mismo heredero a su propio cargo o al de un esclavo. Diferente es la condición de las cosas que se dan para día cierto; porque si comenzó a correr el día de la libertad, se le deberán, y se comprenden para la contribución. Y ciertamente tampoco entran para la computación de esta ley las cosas que uno legó o dejó en fideicomiso a sus esclavos inútilmente sin la libertad.

§ 9.- Las cosas, que es cierto que ni por fideicomiso pueden ser dejadas, no se comprenden en la computación de la ley Falcidia.

31.- POMPONIO; *Fideicomisos, libro II*.- Aquel a quien se paga un fideicomiso, como aquel a quien se hizo un legado, debe dar caución de que se devolverá lo que hubiere recibido de exceso sobre lo que por la ley Falcidia le fuere lícito, por ejemplo, cuando por causa de condición de otros fideicomisos o legados estuviere pendiente la causa de la ley Falcidia. Pero también según la opinión de Cassio y de los antiguos, si se reciben fideicomisos por el pupilo, deberá dar caución, por razón de lo que se dejó a cargo del

substituto erunt relictæ, cavere debebit is cui solvatur. Nam quamvis repetitio sit eorum, quæ fideicommissi nomine non debita solventur, tamen satisdato cautum debet esse ei, a quo pecunia proficisceretur, ne damnum sentiat deficiente eo, cui solutum erit.

32.- MAECIANUS; *libro IX, fideicommissorum*.- Poenales actiones sive legitimæ sive honorariæ exceptis popularibus in bonis actoris non ideo minus computandæ sunt, quia morte reorum interciderere possunt. E contrario autem eadem actiones nihil bonis rei defuncto eo detrahunt. Sed ne in actoris quidem bonis defuncto eo iniuriarum actio poterit computari, quia et ipsa simul cum eo intercidit, ut usus fructus et id quod in dies menses annosve singulos alicui quoad vivat debeatur. Etenim ea demum obligatio rei bonis diminutionem præstat, quæ in heredem transit. Nec contrarium est, quod vivente reo eo minus in bonis eius intellegebatur: nam et si ita stipulatus esset, ut cum moreretur debere ei inciperet, tamen augerentur bona eius, quemadmodum, si ipse sub eadem conditione promississet, defuncto eo minuerentur.

§ 1.- Honorariæ quoque actiones, quæ intra certum tempus a prætore promittuntur, cum bonis actoris defuncto eo augmentum rei decessionemve, si tales erunt, ut in heredem quoque transeant, præstabunt.

§ 2.- Iulianus scribit, si utriusque heredis pars exhausta est legatis et alter ex heredibus cautionem prætoriam accepit a legatariis, non aequaliter, sed

ancient authorities, where a minor is charged with a trust, he to whom the amount is paid should furnish security with reference to the property with which the substitute was charged; for although there may be a repetition of what has been paid under the provisions of the trust, which really is not due, still it is more satisfactory for security to be given to him by whom the money is paid, so that he may not sustain any loss through the party who receives it becoming insolvent.

32.- MAECIANUS; *Trusts, Book IX*.- Penal actions, whether they are derived from the Civil or the Praetorian Law, with the exception of popular actions, should, none the less, be reckoned among the assets of the party entitled to them, because they become extinguished by the death of the criminal. Moreover, on the other hand, these actions do not take anything from the estate of the culprit in case of his death. But a right of action for injury sustained cannot be counted as a part of the estate of the person entitled to the same, in case of his death; because it itself is extinguished at that time, just as an usufruct, or an allowance which is payable to anyone at stated periods, for instance monthly or annually, as long as he lives. For an obligation of any kind only affords ground for the diminution of the property of a debtor, where it is transferred to his heir; nor, on the other hand, should the debtor be understood to have had that much less property during his lifetime, since, if anyone should stipulate that a sum shall begin to be due when he dies, his estate will, nevertheless, be increased, just as if he himself should promise, under the same condition, that it shall be diminished at the time of his death.

§ 1.- Honorary actions, also, which are permitted by the Praetor to be brought within a certain time, increase the estate of the person entitled to bring them, at the time of his death, and decrease that of the person against whom they can be brought, if they are such as also pass to the heir.

§ 2.- Julianus says that if the shares of two heirs are exhausted by legacies, and one of them has received a Praetorian bond from the legatees, he will be entitled

substituto, aquel a quien se pague. Porque aunque haya la repetición de lo que a título de fideicomiso se pagare no siendo debido, se le debe, sin embargo, dar caución a aquel de quien proviniese el dinero, con fianza de que no sufrirá perjuicio al faltar aquel a quien se hubiere pagado.

32.- MECIANO; *Fideicomisos, libro IX*.- Las acciones penales, ora legítimas, ora honorarias, excepto las populares, no se han de dejar de contar en los bienes del actor, porque pueden extinguirse con la muerte de los reos; sino que por el contrario, esas mismas acciones no disminuyen nada de los bienes del reo, fallecido éste. Pero ciertamente no se podrá computar en los bienes del actor, fallecido éste, la acción de injurias, porque también ella se extingue juntamente con él, como el usufruto, y como lo que se deba a alguno cada día cada mes, o cada año, mientras viva; porque solamente produce disminución en los bienes del reo la obligación que pasa contra el heredero. Y no es obstáculo que viviendo el reo se le consideraba con esto menos en sus bienes; porque aunque se hubiese estipulado así, que cuando muriese comenzará a deberle, se le aumentarían, sin embargo, sus bienes así como, si él mismo hubiese prometido bajo la misma condición, se disminuirían fallecido él.

§ 1.- También las acciones honorarias, que por el Pretor se prometen dentro de cierto tiempo producirán con los bienes del actor, fallecido éste, aumento o disminución de la cosa, si fueren tales, que pasen también contra el heredero.

§ 2.- Escribe Juliano, que si la parte de ambos herederos fue agotada por los legados, y uno de los herederos recibió de los legatarios la caución

pro suo modo legis Falcidiae rationem et actionem ex stipulatu habiturum. Omnes enim praetorias stipulationes eiusdem interpretationis esse: nam constare ex iudicatum solvi stipulatione, sive a parte actoris sive a rei plures heredes exstissent, non omnibus nec adversus omnes actionem contingere, sed dumtaxat his qui vicissent et adversus victos, hisque, adversus quos res defensa non esset, adversus eos, qui rem non defendissentiarum

§ 3.- Annua bima trima die aureis centenis legatis ex omnibus summis, non tantum ex posterioribus portionem legis Falcidiae detrahi placuit.

§ 4.- Si Titio viginti legatis portio per legem Falcidiam detracta esset, cum ipse quoque quinque Seio rogatus esset restituere, Vindius noster tantum Seio pro portione ex quinque detrahendum ait, quantum Titio ex viginti detractum esset. Quae sententia et aequitatem et rationem magis habet, quia exemplo heredis legatarius ad fideicommissa praestanda obligabitur: nec quia ex sua persona legatarius inducere legem Falcidiam non possit, idcirco quod passus esset non imputaturum: nisi forte testator ita fidei eius commisisset [commisisset], ut totum, quidquid ex testamento cepisset, restitueret.

§ 5.- Si autem manumittere servum vel suum vel alienum rogatus sit, omnimodo praestare debet libertatem, nec hoc contrarium est superiori, quia favor libertatis saepe et alias benigniores sententias exprimit.

33.- PAULUS; *libro III, fideicommissorum*.- Si servus tibi legatus sit eumque rogatus sis manumittere nec praeterea capias, unde quartam,

to bring an action on the stipulation, not for half, but in proportion to his share of everything acquired by them over and above the amount authorized by the Falcidian Law. For all Praetorian stipulations are subject to the same interpretation, as where a stipulation has been made it is settled that the judgment shall be paid, whether the plaintiff or the defendant leaves several heirs. The action cannot be brought by all, or against all of them, but only in favor of the heirs -of those who gained the suit, and against the heirs of those who lost it, and in favor of those against whom no defence was made, and against those who did not defend the suit.

§ 3.- Where a legacy of a hundred aurei is left, payable in one, two, and three years, it has been decided that the Falcidian portion shall be deducted from all the payments made, and not merely from the last one.

§ 4.- Where part of the legacy of twenty aurei bequeathed to Titius has been deducted under the Falcidian Law, and the legatee was requested to pay five aurei to Seius, our Vindius says that the same proportion can be deducted by the legatee from the five due to Seius as was deducted from the twenty due to Titius. This opinion is founded both on equity and reason, because, like the heir, the legatee is obliged to execute the trust, and, as he cannot, personally, profit by the Falcidian Law, the loss which he has sustained must not be borne by him, unless the testator had charged him to deliver everything that he had received under the terms of the will.

§ 5.- If, however, the legatee should be requested to manumit either his own slave, or one belonging to another, he must, by all means, give him freedom. This is not contrary to what is above stated, because the favor conceded to liberty frequently gives rise to other and even more indulgent decisions.

33.- PAULUS; *Trusts, Book III*.- Where a slave is bequeathed to you, and you are charged to manumit him, and there is nothing more from which you can

pretoria, no tendrá igualmente, sino con arreglo a su porción, la cuenta de la ley Falcidia y la acción de lo estipulado, porque todas las estipulaciones pretorias tienen esta misma interpretación; porque es sabido que de la estipulación de pagarse lo juzgado, ora hubiesen quedado muchos herederos por parte del actor, ora por la del reo, no nace para todos, ni contra todos acción, sino solamente para los que hubiesen vencido, y contra los vencidos, y para aquellos, en oposición a los que no hubiese sido defendida la cosa, contra los que no la hubiesen defendido.

§ 3.- Habiéndose legado cien áureos en uno, dos, tres años, se determinó que se detrajera la porción de la ley Falcidia de todas las sumas, no solamente de las posteriores.

§ 4.- Si legados veinte a Ticio se hubiese detraído la porción por la ley Falcidia, habiéndosele rogado también; así que restituyera cinco a Seyo, dice nuestro Vindio, que se ha de deducir de los cinco a Seyo en proporción tanto cuanto a Ticio se le hubiese deducido de los veinte. Cuya opinión es más conforme equidad y a razón, porque a ejemplo del heredero estará obligado el legatario a entregar los fideicomisos; y no porque por razón de su persona no pueda el legatario aplicar la ley Falcidia, y precisamente porque lo hubiese consentido, no lo computará, a no ser acaso que el testador le hubiese encargado el fideicomiso de esta suerte, para que restituyera todo lo que hubiese recibido por el testamento.

§ 5.- Mas si se le hubiera rogado que manumita un esclavo, o suyo o ajeno, deberá de todos modos darle la libertad; y no es esto contrario a lo anterior, porque el favor de la libertad hace muchas veces, y en otras materias, más favorables las decisiones.

33.- PAULO; *Fideicomisos, libro III*.- Si se te hubiera legado un esclavo, y se te hubiere rogado que lo manumitieses, y además no adquirieras de donde

quae per Falcidiam retinetur, recipere possis, senatus censuit cessare Falcidiam.

34.- MARCELLUS; *notum ad Iuliani libro XLII, digestorum* .- In testatoris servo non erit Falcidiae locus: si vero pecuniam aliudve quid legaverit fideique legatarii commiserit, ut alienum servum vel legatarii manumitteret, locus erit.

35.- ULPIANUS; *libro VI disputationem*.- Plane si quid sit praeterea legatum ipsi servo, Falcidiae locum fore senatus declaravit. Unde Scaevola ait in eo, quod praeterea servo legatum est, ita Falcidiam admittendam, ut inde et quod pro servo praestandum est sumatur.

36.- PAULUS; *libro III, fideicommissorum*.- Sed si non servus ipse legatus sit, sed pecunia rogatusque sit legatarius servum suum manumittere, Falcidiam patietur et nihilo minus cogetur manumittere, quia tanti aestimasse videbitur servum suum.

§ 1.- Quid si alienus servus fuerit? In eo non plus quam accepit ad redimendum cogitur impendere.

§ 2.- Sin vero heres servum rogatus sit manumittere, placet pretium eius, ut aes alienum, deducendum esse.

§ 3.- Si solus servus legatus et fideicommissa libertate donatus fuerit, licet Falcidia interveniente totus vindicari petive potest. Sed et si aliud praeterea capiat legatarius, adhuc servus totus peti potest: quartam autem utriusque ex legato retinendam, ne impediatur libertas.

§ 4.- Si incertum sit, an libertas praestari debeat,

obtain the fourth which an heir can reserve under the Falcidian Law, the Senate has decided that the Falcidian Law will not apply.

34.- MARCELLUS; *Digest, Book XLII*.- The Falcidian Law is applicable to the case of a slave bequeathed for manumission by the testator; but if the latter left money, or anything else, and charged the legatee to manumit his own slave, or that of another, the law will apply.

35.- ULPIANUS; *Disputations, Book VI*.- If anything besides was left to the slave, it is clear that the Senate declared that the Falcidian Law would be applicable. Therefore, Scse-vola says that the Falcidian Law will apply to anything which was bequeathed to the slave in addition to his freedom, and hence the price which is to be paid for him would be liable to contribution.

36.- PAULUS; *Trusts, Book III*.- Where the slave himself has not been bequeathed, but a sum of money has, and the legatee is asked to manumit his slave, he will be subject to the operation of the Falcidian Law, and will, nevertheless, be compelled to manumit him; because his slave is considered to be worth as much as the sum bequeathed.

§ 1.- But what if the slave should belong to another? In this instance he cannot be compelled to pay more for him than he received.

§ 2.- If, however, the heir is charged to manumit the slave, it has been decided that the value of the latter should be deducted as a debt of the estate.

§ 3.- Where a slave alone is bequeathed, and presented with his freedom, under a trust, although the Falcidian Law will apply, the legatee can claim or recover the entire slave, and even if the legatee should have received something in addition to the slave, the entire slave can still be demanded, but the fourth part of each legacy shall be retained, in order that the grant of freedom may take effect.

§ 4.- Where it is uncertain whether freedom should

puedas percibir la cuarta, que por la Falcidia se retiene, decretó el Senado que deja de tener lugar la Falcidia.

34.- MARCELO; *nota, Digesto de Juliano, libro XLII*.- Respecto al esclavo del testador no habrá lugar a la Falcidia; pero si hubiere legado dinero u otra cosa cualquiera, y hubiere encomendado a la fidelidad del legatario que manumitiese un esclavo ajeno o del legatario, habrá lugar a ella.

35. ULPIANO; *Disputas, libro VI*.- A la verdad, si además se le hubiera legado alguna cosa al mismo esclavo, declaró el Senado que habría de haber lugar a la Falcidia; por lo cual dice Scévola, que respecto de aquello, que además se le legó al esclavo, se debe admitir la Falcidia de suerte que de ello se tome también lo que se ha de dar por el esclavo.

36.- PAULO; *Fideicomisos, libro III*.- Pero si no se hubiera legado el mismo esclavo, sino dinero, y se le hubiera rogado al legatario que manumita su propio esclavo, soportará la Falcidia, y será, no obstante, obligado a manumitirlo, porque se considerará que en tanto estimó a su esclavo.

§ 1.- ¿Qué se dirá si fuere ajeno el esclavo? No se le obliga a gastar en él para comprarlo mas de lo que recibió.

§ 2.- Mas si se le hubiera rogado al heredero que manumita un esclavo, se determina que el precio de este ha de ser deducido como deuda.

§ 3.- Si hubiere sido legado sólo el esclavo, y se le hubiere hecho donación, dándole por fideicomiso la libertad, aunque interviniendo la Falcidia, todo le puede ser reivindicado o pedido; pero aunque el legatario reciba además otra cosa, aun puede ser pedido todo el esclavo, pero se habrá de retener del legado la cuarta de lo uno y de lo otro, para que no se impida la libertad.

§ 4.- Si fuera incierto si se deberá dar la libertad,

veluti quod sub condicione vel post tempus data sit, numquid incerto eo an praestetur, cum possit aut servus mori aut condicio deficere, interim Falcidia admittenda est, deinde cum libertas competere vel deberi coeperit, tum legatarius illam partem recipiat, quam Falcidia detraxit? Caecilio placebat, si quid ex operis eius medio tempore consecutus fuerit heres, id in pretium eius erogare eum debere propter legis Falcidiae rationem.

37.- VALENS; *libro VI de fideicommissorum.*- Eius servi aestimatio perinde ac statuliberi fieri debet.

§ 1.- Sed et si heres servum alienum rogatus est manumittere, placuit ut etiam huius pretium ex aestimatione hereditatis deduci debeat.

38.- HERMOGENIANUS; *libro I iuris epitomae.*- Statuliber heredis non auget familiam.

§ 1.- Communes servi in utriusque patrimonio connumerantur.

§ 2.- Cuius usus fructus alienus est, in dominio domini proprietatis connumeratur, pignori dati in debitoris, sub lege commissoria distracti, item ad diem addicti in venditoris.

39.- PAULUS; *libro III, sententiarum.*- Aeris alieni loco deducuntur non solum pretia eorum, quibus libertas data est, et eorum, qui supplicio sunt adfecti, sed et eius, quem praetor propter indicium proditae mortis vel detectae eorum coniurationis libertate donavit.

be granted or not, for instance, because it was bequeathed under some condition, or to take effect after a certain time, and while the uncertainty exists whether it should be bestowed or not, should the application of the Falcidian Law be permitted, as, in the meantime, the slave may either die, or the condition fail of fulfilment? When the slave is entitled to his freedom, or it is due, can the legatee claim that portion which was deducted on account of the Falcidian Law? It was held by Csecilius that if the heir, during the intervening time, had gained anything through the services of the slave, he should include it in the value of the latter in deducting the Falcidian portion.

37.- VALENS; *On Trusts, Book VI.*- The appraisal of such a slave should be made in the same way as that of one who is to become free under a certain condition.

§ 1.- Where, however, the heir was charged to manumit a slave belonging to another, it was decided that the price of the said slave should also be deducted from the assets of the estate.

38.- HERMOGENIANUS; *Epitomes of Law, Book I.*- A slave who is to become free under a certain condition does not increase the number of the slaves of the heir.

§ 1.- Slaves held in common are counted as belonging to the estate of each of their masters.

§ 2.- When the usufruct of a slave belongs to another, his ownership forms part of the estate of his master; when he is pledged, he belongs to the estate of the debtor when he is sold under the terms of the Lex Commissoria, or conditionally, for a certain time, he belongs to the vendor.

39.- PAULUS; *Decisions, Book III.*- Not only the value of those slaves to whom freedom was granted, but also that of those who have been condemned to death, is deducted from the assets of the estate, just as the value of those whom the Praetor has liberated on account of their having given information of

por ejemplo, porque haya sido dada bajo condición, o para después de tiempo, ¿acaso siendo incierto si se dará, porque o podría morir el esclavo, o faltar la condición, se ha de admitir entretanto la Falcidia? ¿Y después, cuando hubiere comenzado a competir o a ser debida la libertad, recobrará entonces el legatario la parte que detrajo la Falcidia? Parecía bien a Cecilia, que si en el tiempo intermedio hubiere obtenido alguna cosa el heredero con el trabajo de aquel, debe emplearlo él para precio del mismo por razón de la cuenta de la ley Falcidia;

37.- VALENTE; *Fideicomisos, libro VI.*- y la estimación de ese esclavo se debe hacer lo mismo que la del instituido libre bajo condición.

§ 1.- Pero también si se le pagó al heredero que manumita un esclavo ajeno, se determinó que se deberá deducir de la estimación de la herencia también el precio de este.

38.- HERMOGENIANO; *Epitome del derecho, libro I.*- El instituido libre bajo condición no aumenta el número de esclavos del heredero.

§ 1.- Los esclavos comunes se cuentan en el patrimonio de ambos.

§ 2.- Aquel cuyo usufructo es de otro se cuenta en el dominio del propietario, los dados en prenda en el del deudor, los enajenados bajo la ley Comisaria, y también los adjudicados a término, en el del vendedor.

39.- PAULO; *Sentencias, libro III.*- Se deduce en calidad de deuda no sólo el precio de los esclavos a quienes se les dió la libertad, y el de los que fueron condenados al suplicio, sino también el de aquel a quien el Pretor hizo donación de la libertad por haber dado indicio de la muerte denunciada, o de la con-

40.- HERMOGENIANUS; *libro IV, iuris epitomatum*.- Ad veterani testamentum, sive pater familias sive filius familias sit, licet intra annum missionis decedat, lex Falcidia pertinet.

§ 1.- Si cui, si decem dedisset, viginti fundus fuisset legatus, is in toto fundo legatarius habebitur.

41.- PAULUS; *libro IX, ad edictum*.- Dolo carere non videtur, si iam mota quis controversia hereditatis legata sine cautionibus det.

42.- ULPIANUS; *libro XIV, ad edictum*.- In Falcidia aestimatio pretii rerum ex veritate facienda est.

43.- ULPIANUS; *libro IX, ad edictum*.- Servi qui apud hostes sunt post mortem testatoris reversi, quod ad Falcidiam pertinet, locupletiores faciunt hereditatem.

44.- ULPIANUS; *libro XXI, ad edictum*.- Falcidia intervenire non potest, si statuliber de alieno dedit, non de bonis defuncti, vel alias est homo liber, qui condicionem implevit.

45.- PAULUS; *libro LX, ad edictum*.- In lege Falcidia non habetur pro puro, quod in diem relictum est: medii enim temporis commodum computatur.

§ 1.- In his legatis, quae sub condicione relicta

projected assassination, or for having revealed a conspiracy, is also deducted.

40.- HERMOGENIANUS; *Epitomes of Law, Book IV*.- The Falcidian Law applies to the will of a veteran, whether he be the head of a household or a son under paternal control, even if he should die within a year after his discharge.

§ 1.- If a tract of land of the value of twenty aurei should be devised to anyone on condition of his paying ten, the devisee will be entitled to the entire tract of land.

41.- PAULUS; *On the Edict, Book IX*.- He is not considered to be free from bad faith who pays legacies without security having been furnished, where a controversy has already arisen with reference to the estate.

42.- ULPIANUS; *On the Edict, Book XIV*.- In estimating the amount due under the Falcidian Law, the actual value of the property must be appraised.

43.- THE SAME; *On the Edict, Book XIX*.- Where slaves who have been in the hands of the enemy return after the death of the testator, they increase the value of the estate, so far as the Falcidian Law is concerned.

44.- THE SAME; *On the Edict, Book XXI*.- The Falcidian Law will not be applicable where a slave is to become free on condition of his paying a certain sum, and he does so with money belonging to another person, and not with what forms part of the estate of the deceased, or where he who is to comply with this condition becomes free for other reasons.

45.- PAULUS; *On the Edict, Book LX*.- In the consideration of the Falcidian Law, anything which is left to be paid within a certain period is not held to have been absolutely bequeathed; for the value of advantage enjoyed by the heir in the meantime must be computed.

§ 1.- Proculus thinks that where a question arises

juración de los mismos descubierta.

40.- HERMOGENIANO; *Epitome del derecho, libro IV*.- La ley Falcidia es aplicable al testamento de un veterano, ora sea padre de familia, ora hijo de familia, aunque fallezca dentro del año de su licenciamiento.

§ 1.- Si se hubiese legado un fundo, que valiese veinte, a uno, si hubiese dado diez, éste será considerado legatario de todo el fundo.

41. PAULO; *Comentarios al Edicto, libro IX*.- Si promovida ya controversia sobre la herencia diera uno sin cauciones los legados, no se considera que está exento de dolo.

42.- ULPIANO; *Comentarios al Edicto, libro XIV*.- En la Falcidia se ha de hacer con arreglo a la verdad la estimación del precio de las cosas.

43.- EL MISMO; *Comentarios al Edicto, libro XIX*.- Los esclavos que estén en poder de los enemigos, y que volvieron después de la muerte del testador, hacen, por lo que a la Falcidia se refiere, mas rica la herencia.

44.- EL MISMO; *Comentarios al Edicto, libro XXI*.- No puede mediar la Falcidia, si el instituido libre bajo condición dió algo de lo ajeno, no de los bienes del difunto, o si de otro modo es hombre libre el que cumplió la condición.

45.- PAULO; *Comentarios al Edicto, libro LX*.- En la ley Falcidia no se tiene como puro el legado que se dejó para cierto día; porque se computa el provecho del tiempo intermedio.

§ 1.- Respecto a los legados que se dejaron bajo

sunt, Proculus putabat, cum quaeritur de lege Falcidia, tantum esse in legato, quanti venire possunt: quod si est, et deductio sic potest fieri, ut tantum videatur vi deberi, quanti nomen venire potest. Sed haec sententia non probatur: cautionibus ergo melius res temperabitur.

46.- ULPIANUS; *libro LXXVI, ad edictum*.- Qui quod per Falcidiam retinere poterat, voluntatem testatoris secutus sponndit se daturum, cogendus est solve.

47.- ULPIANUS; *libro LXXIX, ad edictum*.- Lex Falcidia si interveniat, in omnibus pensionibus locum habet: sed hoc ex post facto apparebit. Ut puta in annos singulos legatum relictum est: quamdiu Falcidia nondum locum habet, integrae pensiones annuae dabuntur: sed enim si annus venerit, quo fit, ut contra legem Falcidiam ultra dodrantem aliquid debeatur, eveniet, ut retro omnia legata singulorum annorum imminuantur.

§ 1.- Numquam legatarius vel fideicommissarius, licet ex Trebelliano senatus consulto restituitur ei hereditas, utitur legis Falcidiae beneficio.

48.- PAULUS; *libro II, ad edictum aedilis curulis*.- Cum emptor venditori vel contra heres exstitit, evicto homine utrum duplum in aes alienum deducere vel computare debeat an simplum? Duplum enim esset, si alius heres exstisset. Et benignius est eodem herede existente simplum ei imputari.

49.- PAULUS; *libro XII, ad Plautium*.- Plautius. Servo, quem tibi legaveram, fundum legavi. Atilicinus Nerva Sabinus primum in servo rationem

under the Falcidian Law with reference to legacies conditionally bequeathed, that only such property as is salable is included in them. If this is the case, and the deduction can be made, as much will be considered to be due as the claim will bring, if sold. This opinion, however, has not been adopted, therefore it is better that the transaction should be arranged by both parties giving security.

46.- ULPIANUS; *On the Edict, Book LXXVI*.- Where a person who is entitled to retain the Falcidian portion promises, in compliance with the will of the testator, that he will renounce his claim to it, he will be compelled to carry out his agreement.

47.- THE SAME; *On the Edict, Book LXXIX*.- When, the Falcidian Law is operative, it includes all payments. Sometimes, however, it can only be determined subsequently whether it is applicable or not, as for example, where a legacy is left payable annually, as long as the Falcidian Law does not apply, the payments will be made every year without deduction. If, however, a year should come when it does apply, and what is payable exceeds three-fourths of the value of the estate, the result will be that all the payments previously made every year will be diminished.

§ 1.- Neither the legatee nor the beneficiary of a trust can enjoy the benefit of the Falcidian Law, even though the estate may be delivered to him under the terms of the Trebellian Decree of the Senate.

48.- PAULUS; *On the Edict of the Curule Aediles, Book II*.- Where the purchaser of a slave becomes the heir of the vendor, or vice versa, and the slave is evicted, shall double his value be deducted, or only his actual value, in computing the amount due under the Falcidian Law; for the amount would be double if there should be another heir? The more equitable opinion is, that while the heir is the same, only the actual value of the slave should be calculated.

49.- THE SAME; *On Plautius, Book XII*.- Plautius: I devised a tract of land to a slave whom I had already bequeathed to you. Atilicinus, Nerva, and Sabinus

condición opinaba Próculo, que, tratándose de la ley Falcidia, importaba tanto el legado como aquello en que puede ser vendido. Si esto es así, también se puede hacer la deducción de modo, que por fuerza se considere que se debe tanto cuanta es la cantidad en que se puede vender el crédito; pero no se aprueba esta opinión; luego mejor se acomodará la cosa con cauciones.

46.- ULPIANO; *Comentarios al Edicto, libro LXXVI*.- El que ateniéndose a la voluntad del testador prometió que daría lo que podía retener por la Falcidia, ha de ser obligado a pagarlo.

47.- EL MISMO; *Comentarios al Edicto, libro LXXIX*.- La ley Falcidia, si tuviera lugar, tiene aplicación en todas las pensiones. Pero esto aparecerá de hecho posterior, por ejemplo, se dejó un legado para cada año; mientras no tiene todavía aplicación la Falcidia, se darán íntegras las pensiones anuales; mas, sin embargo, si llegare un año en el que suceda que contra la ley Falcidia se deba algo mas de los tres cuartos, acontecerá que se disminuirán retroactivamente todos los legados de cada año.

§ 1.- El legatario o el fideicomisario, aunque por el Senadoconsulto Trebeliano se le restituye la herencia, no utiliza nunca el beneficio de la ley Falcidia,

48.- PAULO; *Comentarios al Edicto de los Ediles Curules, libro II*.- Cuando el comprador quedó heredero del vendedor, o al contrario, ¿hecha evicción del esclavo, se deberá acaso deducir o computar en las deudas el duplo, o el simple importe pues sería el duplo, si otro hubiese quedado heredero? y es mas equitativo, que quedando heredero el mismo se le compute el simple importe.

49.- EL MISMO; *Comentarios a Plaucio, libro XII*.- Y dice Plaucio: legué un fundo al esclavo que yo te había legado. Atilicino, Nerva y Sabino dicen, que

legis Falcidiae habendam et quota pars ex eo decederet, eam partem in fundo legato inutilem futuram, deinde ex reliquis partibus fundi legis Falcidiae portionem decessuram, sicut ex omnibus legatis.

Cassius, quod servo pars lege Falcidia decedat, incipere servum fieri communem heredis et legatarii, communi autem servo cum legatum sit, totum pertinere ad socium, quia in eam personam legatum consistere possit: qua ratione semel ex fundo partem legis Falcidiae decessuram.

Paulus. Cassii sententia utimur: nam et divus Pius rescripsit servo communi fideicommissum datum totum ad socium pertinere.

§ 1.- Interdum evenit, ut propter rationem legis Falcidiae sequens legatum extinguatur, veluti si fundus et ad eum via legata sit per alium fundum: nam si pars fundi remanserit in hereditate, non potest procedere viae legatum, quia per partem servitus adquiri non potest.

50.- CELSUS; *libro XIV, digestorum*.- Non est dubium, quin ea legata, a quibus heres summovere exceptione petitorum potest, in quartam ei imputentur nec ceterorum legata minuant.

51.- IULIANUS; *libro LXI, digestorum*.- Nec interest, utrum ab initio quasi inutile fuerit an ex accidenti postea in eum casum pervenisset legatum, ut actio eius denegaretur.

52.- MARCELLUS; *libro IX, digestorum*.- Ex asse patronum heredem instituit libertus, cum ducentos aureos in bonis haberet, et legavit filio centum

think that the Falcidian portion should be first calculated with reference to the slave, and whatever part should be deducted from his value ought not to be considered, so far as the land which was devised was concerned; and then the Falcidian portion should be deducted from the remainder of the land, just as is the case with all legacies.

Cassius says that as soon as the Falcidian portion is deducted, the slave begins to become the common property of the heir and the legatee. When, however, a legacy is made to a slave held in common by him and another, the entire legacy will belong to the other joint-owner, because it can only be valid with reference to his person; for which reason the deduction of the portion authorized by the Falcidian Law can be made from the land but once.

Paulus: We adopt the opinion of Cassius, for the Divine Pius stated in a Rescript that where the slave was made the beneficiary of the trust, under these circumstances the entire bequest would belong to the joint-owner.

§ 1.- It sometimes happens that a second legacy is extinguished on account of the Falcidian Law; as, for example, where a tract of land and a right of way through another tract to give access to it is granted. For if a part of the land should be retained by the heir under the Falcidian Law, the devise of the right of way cannot stand, because a servitude cannot be partially acquired.

50.- CELSUS; *Digest, Book XIV*.- There is no doubt that those legacies from which the heir can exclude the legatee by means of an exception should be included in his fourth, and hence they do not diminish the legacies of others.

51.- JULIANUS; *Digest, Book LXI*.- It makes no difference whether a legacy becomes void in the beginning, or something occurs subsequently on account of which an action cannot be brought by the legatee to recover it.

52.- MARCELLUS; *Digest, Book IX*.- A freedman appointed his patron heir to his entire estate, which amounted to two hundred aurei, and then bequeathed

que primeramente se ha de hacer en el esclavo la cuenta de la ley Falcidia, y que tanta parte como de él se separase, otra tanta parte habrá de ser inútil en el fundo legado, y que después se habrá de separar la porción de la ley Falcidia de las restantes partes del fundo, así como de todos los legados.

Y dice Cassio: porque al esclavo se le deduzca una parte por la ley Falcidia, comienza el esclavo a hacerse común del heredero y del legatario, mas cuando se haya hecho un legado a un esclavo común, todo el legado pertenece al consocio, porque en cuanto a esta persona podía subsistir el legado; por esta razón sólo una vez se deducirá del fundo la parte de la ley Falcidia.

Y dice Paulo: observamos la opinión de Cassio, porque también el Divino Pío respondió por rescripto, que el fideicomiso dado a un esclavo común corresponde íntegro al consocio.

§ 1.- A veces sucede, que por causa de la cuenta de la ley Falcidia se extingue el legado siguiente, por ejemplo, si se hubiera legado un fundo, y el camino para él por medio de otro fundo; porque si quedare en la herencia parte del fundo, no puede tener efecto el legado de la vía, porque una servidumbre no se puede adquirir en parte.

50.- CELSO; *Digesto, libro XIV*.- No es dudoso, que los legados de que con excepción puede el heredero rechazar al demandante, se le computan para la cuarta, y no disminuyen los legados de los demás.

51.- JULIANO; *Digesto, libro LXI*.- Y no importa, que desde un principio hubiere sido como inútil, o que por accidente hubiese llegado después a un caso tal el legado, que se denegara su acción.

52. MARCELO; *Digesto, libro IX*.- Un liberto instituyó a su patrono heredero de la totalidad, teniendo doscientos áureos en sus bienes, y legó al

viginti, extraneo reliqua: deminutio legati, quod extraneo praestat legatum, proficit filio ad consequenda solida, quae ei legata sunt.

§ 1.- Quaecumque ex causa legata non praestantur, imputantur heredi in quartam partem quae propter legem Falcidiam remanere apud eum debet.

53.- CELSUS; *libro XVII, digestorum*.- Si propter ea, quae sub condicione legata sunt, pendet legis Falcidiae ratio, praesenti die data non tota vindicabuntur.

54.- MARCELLUS; *libro XV, digestorum*.- Pater filium, ex quo tres habebat nepotes, heredem instituit fideique eius commisit, ne fundum alienaret et ut in familia eum relinqueret: filius decedens tres filios scripsit heredes. Quaerendum est, an omnino quasi creditores unusquisque in ratione legis Falcidiae aliquid possit deducere, quia in potestate sua habuit pater, cui ex his potius relinqueret. Sed hac ratione nemo in Falcidiae ratione quicquam deducet. Quod videndum, ne dure constituatur: utique enim in alieno aere habuit fundum, necessitate quippe obstrictus fuisset filiis eum relinquendi.

55.- MARCELLUS; *libro XX digestorum*.- Cum Titio in annos singulos dena legata sunt et iudex legis Falcidiae rationem inter heredem et alios legatarios habeat, vivo quidem Titio tanti litem aestimare debeat, quanti venire id legatum potest, in incerto posito, quamdiu victurus sit Titius: mortuo autem Titio non aliud spectari debet, quam quid heres ex ea causa debuerit.

56.- MARCELLUS; *libro XXII, digestorum*.- Cum quo de peculio agi poterat, heres creditori exstitit:

a hundred and twenty to his son, and the balance to a stranger. The diminution of the legacy which was paid to the stranger will benefit the son in acquiring the entire legacy which was bequeathed to him.

§ 1.- Where, for some reason or other, legacies are not required to be paid, they are included in the fourth part which the heir is entitled to retain under the Falcidian Law.

53.- CELSUS; *Digest, Book XVII*.- Where the portion due under the Falcidian Law is in suspense, on account of some condition which has been imposed on the payment of the legacy, those legacies which are due at once cannot be claimed in full.

54.- MARCELLUS; *Digest, Book XV*.- A father appointed his son, by whom he had three grandsons, his heir, and charged him not to alienate a certain tract of land, but to leave it in the family. The son, at his death, appointed his three sons his heirs. The question arose whether each of the said sons, as the creditor of his father, could make a deduction of anything from the estate, on account of the Falcidian Law; as it was in the power of their father to bequeath the entire trust to any one of his sons whom he might select. None of them for this reason could deduct anything on account of the Falcidian Law.

It appears, however, that this opinion will be productive of hardship, for as the father considered the land as a debt due to his children, he was necessarily obliged to leave it to them.

55.- THE SAME; *Digest, Book XX*.- Where ten aurei, payable every year, are bequeathed to Titius, the judge having jurisdiction under the Falcidian Law to establish the proportion payable by the heir and other legatees should estimate the value of the legacy at whatever it could have brought during the life of Titius, it being uncertain how long Titius might live. After the death of Titius, however, the judge should not consider anything else than the amount that the heir owned by reason of the legacy.

56.- THE SAME; *Digest, Book XXII*.- The owner of a slave who was liable to an action having

hijo la suma de ciento veinte, y lo demás a un extraño; la disminución del legado, que presta al extraño, le aprovecha al hijo para conseguir íntegro lo que a él se le legó.

§ 1.- Cualquiera que sea la causa por la que no se pagan los legados, se le computan al heredero para la cuarta parte, que por virtud de la ley Falcidia debe quedar en su poder.

53.- CELSO; *Digesto, libro XVII*.- Si la cuenta de la ley Falcidia está pendiente por causa de las cosas que se legaron bajo condición, las dadas de presente no se reivindicarán íntegras.

54.- MARCELO; *Digesto, libro XV*.- Un padre instituyó heredero a un hijo, del que tenía tres nietos, y encomendó a su fidelidad que no enajenase un fundo, y que lo dejase en la familia; el hijo al morir instituyó herederos a sus tres hijos; se ha de preguntar, si en absoluto como acreedores podrá cada uno de ellos deducir alguna cosa en la cuenta de la ley Falcidia, porque el padre tuvo en su potestad el dejarla preferentemente a cualquiera de ellos. Pero por esta razón ninguno deducirá cosa alguna en la cuenta de la ley Falcidia, lo que se ha de ver, para que no se establezca con dureza; porque ciertamente tuvo el fundo en calidad de deuda, pues habría sido obligado por la necesidad de dejarlo a los hijos.

55.- EL MISMO; *Digesto, libro XX*.- Habiéndosele legado a Ticio diez para cada año, y teniendo que hacer el juez la cuenta de la ley Falcidia entre el heredero y otros legatarios, a la verdad, viviendo Ticio, debe estimar el litigio en tanto en cuanto se puede vender este legado, considerado como incierto el tiempo que haya de vivir Ticio; pero muerto Ticio, no se debe considerar otra cosa mas que lo que por esta causa hubiere debido el heredero,

56.- EL MISMO; *Digesto, libro XXII*.- Uno contra quien se podía ejercitar la acción de peculio quedó

quaeris, cuius temporis peculium computari oporteat in Falcidia lege. Plerique putant, quod tunc in peculio fuerit, cum adiretur hereditas, inspiciendum. Ego dubito, quoniam mortis tempus in ratione legis Falcidia ineunda placuit observari: quid enim interest, peculium servi post mortem creditoris deminutum sit an debitor pauperior factus sit?

§ 1.- Aliquis dicet: quid ex contrario, si ante aditam hereditatem adquisierit servus? Et ego quaeram, si debitoris, qui tunc non erat solvendo, ampliatae facultates fuerunt? Et cum in isto placuerit ex post facto uberiores videri fuisse hereditatem, sicuti cum condicio crediti exstitit post mortem, ita etiam peculii incrementum pleniores faciet hereditatem.

§ 2.- Scaevola notat: quid ergo, si idem servus defuncto et alii dena debuit et una decem habuit? Augetur scilicet et his hereditas, decem, quae defuncto naturaliter debebantur, in hereditate manentibus.

§ 3.- Is, qui in bonis unum dumtaxat servum habebat, legavit eum Titio et fidei eius commisit, ut post triennium manumitteret: debet ex eo, quod interim ex operis servi ad Titium pervenire potest, quarta apud heredem remanere, quemadmodum si directo post triennium servo libertatem dedisset eiusque usum fructum ei legasset, aut ei proprietatem per fideicommissum relinquit.

§ 4.- Stichum tibi, servo tuo decem legavit vel contra tibi decem, servo tuo Stichum, libertatemque Stichi fidei eius commisit. Lex Falcidia minuit

reference to the peculium of the latter became the heir of the creditor. You ask what time should be considered in computing the value of the peculium under the Falcidian Law. Several authorities hold that the value of the peculium at the time that the estate was entered upon should be considered. I doubt whether this is the case, as it has been determined that the time of the death of the testator is the date to be observed in calculating the proportion due under the Falcidian Law. But what difference does it make whether the peculium of the slave is diminished after the death of the creditor, or whether the debtor becomes poorer?

§ 1.- On the other hand, someone may ask what course should be pursued if the slave acquires property before the estate was entered upon? I, myself, ask whether, the means of the debtor who, at that time, was not solvent, are increased. And, as it has been decided in the latter instance that the estate has, after this event, been increased in value; so, if the condition upon which the claim depended was fulfilled after the death of the creditor, the increase of the peculium would augment the value of the estate.

§ 2.- Scaevola inquires what should be done if the said slave owed ten aurei to the deceased and another person, and had ten aurei altogether in his peculium. Of course the estate is increased by the ten aurei, which were naturally due to him, and remain as a portion of his estate.

§ 3.- A certain person, whose entire estate only consisted of one slave, bequeathed him to Titius, and charged the latter to manumit him at the end of three years. The heir will, in the meantime, while he is employed by Titius, be entitled to one-fourth of the value of the services of the slave, in the same manner as if the testator had directly given the slave his freedom after the lapse of three years, and had bequeathed the usufruct or the ownership of said slave to someone under a trust.

§ 4.- A testator bequeathed his slave Stichus to you, and ten aurei to your slave; or, on the other hand, he bequeathed ten aurei to you and Stichus, your slave,

heredero del acreedor; preguntas, de qué tiempo se deberá computar el peculio en la ley Falcidia. Y los mas opinan, que se ha de considerar lo que hubiere en el peculio cuando se adiese la herencia. Yo lo dudo, porque se determinó que al hacerse la cuenta de la ley falcidia se atendiera al tiempo de la muerte; porque ¿qué importa que el peculio del esclavo se haya disminuido después de la muerte del acreedor, o que el deudor se haya hecho más pobre?

§ 1.- Alguno dirá, ¿qué será, por el contrario, si el esclavo hubiere adquirido antes de adida la herencia? Y yo preguntaré, ¿y si se aumentaron los bienes del deudor, que entonces no era solvente? Y como en este caso se determinó, que se considerase que por un hecho posterior se hizo más pingüe la herencia, como cuando la condición del crédito se cumplió después de la muerte, así también el aumento del peculio hará más pingüe la herencia.

§ 2.- Nota Scévola: Luego ¿qué se dirá, si el mismo esclavo debió diez al difunto y diez a otro, y solamente tuvo diez? Se aumentará, por supuesto, también con estos la herencia, quedando en la herencia los diez que naturalmente se debían al difunto.

§ 3.- Uno, que en sus bienes tenia un solo esclavo, lo legó a Ticio, y encomendó a la fidelidad de éste que lo manumitiese después de tres años; de lo que por el trabajo del esclavo puede ir mientras tanto a poder de Ticio, debe quedar en poder del heredero la cuarta, lo mismo que si directamente le hubiese dado la libertad al esclavo después de tres años, y le hubiese legado el usufruto del mismo, o que si le dejó por fideicomiso la propiedad.

§ 4.- Uno te legó a Stico, y diez a un esclavo tuyo, o al contrario, a tí diez, y a Stico a tu esclavo, y encomendó a tu fidelidad la libertad de Stico; la ley

legata: redimere ab herede partem debes, quemadmodum si tibi utrumque legasset.

§ 5.- Saepius evenit, ne emolumentum eius legis heres consequatur: nam si centum aureorum dominus viginti quinque alicui dedisset et eum instituerit heredem et dodrantem legaverit, nihil aliud sub occasione legis Falcidia intervenire potest, quia vivus videtur heredi futuro providere.

57.- MARCELLUS; *libro XXVI, digestorum*.- Cum dotem maritus alicui legaverit, ut uxori restitueretur, non habere legem Falcidiam locum dicendum est. Et sane in plerisque ita observatur, ut omnia interpositi capientis persona spectetur.

58.- MODESTINUS; *libro IX, regularum*.- Legis Falcidia beneficium heres etiam post longum tempus mortis testatoris implorare non prohibetur.

59.- MODESTINUS; *libro IX, pandectarum*.- Beneficio legis Falcidia indignus esse videtur, qui id egerit, ut fideicommissum interdicat.

§ 1.- Praeterea qui non capienti rogatus est restituere hereditatem, senatus consulto Planciano non conceditur quartam retinere: sed ea quarta, quam non retinuit, ad fiscum pertinet ex rescripto divi Pii.

60.- IAVOLENUS; *libro XIV, ex Cassio*.- Cum pater impuberi filiae heredem substituit, id quod ei legatorum nomine a patre obvenit, cum hereditas ad substitutos pertinet, in computationem legis Falcidia non venit.

and charged you to manumit Stichus. The Falcidian Law diminishes the legacy, and you should purchase a part of the slave from the heir, just as if the testator had bequeathed you both legacies.

§ 5.- It frequently happens that the heir does not enjoy the benefit of this law, for if a testator, whose estate amounted to a hundred aurei, should give twenty-five to someone and then appoint him his heir, and bequeath three-fourths of his estate to another, the heir cannot obtain anything else under the Falcidian Law, because the testator, during his lifetime, is considered to have made provision for his future heir.

57.- THE SAME; *Digest, Book XXVI*.- Where a husband bequeaths a dowry of his wife to someone in order that it may be returned to her, it must be said that the Falcidian Law does not apply; and it is clear that in very many instances arrangements are made to leave out the intermediate party for the benefit of the person entitled to the legacy.

58.- MODESTINUS; *Rules, Book IX*.- The heir is not prevented from claiming the benefit of the Falcidian Law, even a long time after the death of the testator.

59.- THE SAME; *Pandects, Book IX*.- He is considered to be unworthy of the benefit of the Falcidian Law, who acts in such a way as to cause the trust to be extinguished.

§ 1.- Moreover, where an heir is requested to transfer the estate to some one who is not entitled to receive it, he will not, by the Plancian Decree of the Senate, be permitted to retain the fourth of said estate; but the said fourth, in accordance with a Rescript of the Divine Pius, will belong to the Treasury.

60.- JAVOLENUS; *On Cassius, Book XIV*.- Where a father substitutes an heir for his daughter, who has not yet arrived at puberty, any property which has been received as a legacy by the substitute from the father will not, when the estate passes to the former,

Falcidia disminuye los legados, y debes rescatar del heredero la parte, lo mismo que si te hubiese legado una y otra cosa.

§ 5.- Sucede muchas veces, que el heredero no consigue el beneficio de esta ley, porque si el dueño de cien áureos hubiese dado a uno veinticinco, y lo hubiere instituido heredero, y hubiere legado los tres cuartos, no puede ocurrir nada con ocasión de la ley Falcidia, porque se considera que en vida provee al futuro heredero.

57.- EL MISMO; *Digesto, libro XXVI*.- Cuando un marido hubiere legado a otro la dote para que se la restituya a la mujer, se ha de decir, que no tiene lugar la ley Falcidia; y a la verdad, en la mayor parte de los casos se observa así, que prescindiéndose de la persona interpuesta, se atiende a la del que adquiere.

58.- MODESTINO; *Reglas, libro IX*.- No se le prohíbe al heredero implorar el beneficio de la ley Falcidia aun después de largo tiempo de la muerte del testador.

59.- EL MISMO; *Pandectas, libro IX*.- Se considera que es indigno del beneficio de la ley Falcidia el que hubiere obrado de modo que se extinga el fideicomiso.

§ 1.- Además de esto, al que se le rogó que restituya la herencia a un incapaz de adquirir, no se le concede por el Senadoconsulto Plauciano que retenga la cuarta, sino que según rescripto del Divino Pío esta cuarta le pertenece al fisco.

60.- JAVOLENO; *Doctrina de Cassio, libro XIV*.- Cuando el padre substituyó un heredero a su hija impúbera, no se comprende en la computación de la ley Falcidia lo que del padre va a él a título de legados, cuando la herencia pertenece a los substi-

§ 1.- Legato petito cum in litem iuratum est, ratio legis Falcidiae non eius summae, in quam legatarius iuravit, haberi debet, sed eius, quanti re vera id fuit quod petitum est: nam id quod poenae causa adcrevit in legem Falcidiam non incidit.

61.- IAVOLENUS; *libro IV, epistularum*.- Alienus fundus tibi legatus est: hunc heres cum emere nisi infinito pretio non posset, emit multo pluris, quam quanti erat, qua emptione effectum est, ut legatarii ad legem Falcidiam revocarentur. Quaero, cum, si fundus tanti, quanti re vera, emptus esset, legata non fuerant excessura ius legis Falcidiae, an hoc ipso heres institutus partem revocandi a legatariis ius habeat, quod ex voluntate defuncti pluris emerit fundum, quam quanti erat. Respondit: quod amplius heres quam pretium fundi legatario solvit, id lege Falcidia imputari non potest, quia negligentia eius nocere legatariis non debet, utpote cum is confitendo veram aestimationem praestare poterat.

62.- ULPIANUS; *libro I, ad legem Iuliam et Papiam*.- In lege Falcidia hoc esse servandum Iulianus ait, ut, si duo rei promittendi fuerint vel duo rei stipulandi, si quidem socii sint in ea re, dividi inter eos debere obligationem, atque si singuli partem pecuniae stipulati essent vel promississent: quod si societas inter eos nulla fuisset, in pendentem esse, in utrius bonis computari oporteat id quod debetur vel ex cuius bonis detrahi.

§ 1.- Corpora si qua sunt in bonis defuncti, secun-

be included in the computation made to ascertain the proportion due under the Falcidian Law.

§ 1.- Where a legacy is claimed, and an oath was made in court by the legatee, the amount due under the Falcidian Law shall not be ascertained from the sum to which the legatee has made oath, but from the true value of the property which is claimed; for what accrues by way of penalty does not come within the scope of the Falcidian Law.

61.- THE SAME; *Epistles, Book IV*.- A tract of land belonging to another was bequeathed to you. As the heir could not obtain it, except at an unreasonable price, he bought it for a sum far above its actual value, and the result of the purchase was that a reduction of the legacies was required under the Falcidian Law.

I ask if the land had been bought for what it was really worth, and the legacies had not been subject to diminution, whether, in this instance, the heir would have the right to reserve a part due to the legatees, because, in compliance with the will of the deceased, he had purchased the land for more than its value. The answer was that the heir could not, under the Falcidian Law, charge the other legacies with what he had paid to the legatee over and above the true price of the land, because his negligence ought not to prejudice the legatee, any more than he could release himself from liability by tendering the actual value of the property.

62.- ULPIANUS; *On the Lex Julia et Papia, Book I*.- Julianus says that, in estimating the portion due under the Falcidian Law, the following rule should be observed, namely, where there are two promising, or two stipulating debtors, and they are partners, the common obligation should be divided between them; just as if each one had stipulated or promised to pay the amount individually. If, however, no partnership existed between them, the matter would remain in abeyance, and a calculation should be made in order to determine what is due to the estates of the creditors, or what should be deducted from those of the debtors.

§ 1.- Any property belonging to the estate of the

tutos.

§ 1.- Pedido un legado, cuando se juró para el litigio, se debe considerar como cuenta de la ley Falcidia no la de aquella suma, por la que juró el legatario, sino la de aquella que verdaderamente importa lo que se pidió; porque lo que acreció por causa de pena no cae dentro de la ley Falcidia.

61.- EL MISMO; *Epístolas, libro IV*.- Se te legó un fundo ajeno; no pudiéndolo comprar el heredero sino por precio excesivo, lo compró por mucho más de lo que valía, con cuya compra sucedió que los legatarios puedan ser sujetos a la ley Falcidia; pregunto, si, no habiendo de haber excedido los legados del límite legal de la ley Falcidia, si el fundo hubiese sido comprado por tanto cuanto verdaderamente valía, tendrá por esto mismo el heredero instituido derecho para reclamar de los legatarios la parte, puesto que por voluntad del difunto compró el fundo en más de cuanto valía. Respondió; no se puede computar en la ley Falcidia lo que sobre el precio del fundo pagó el heredero al legatario, porque su negligencia no debe perjudicar a los legatarios, puesto que podía pagar declarando la verdadera estimación.

62.- ULPIANO; *Comentarios a la ley Julia y Papia, libro I*.- Dice Juliano, que en la ley Falcidia se ha de observar esto, que si hubiere dos reos de prometer o dos reos de estipular, si verdaderamente fueran consocios, se debe dividir sobre esta cosa entre ellos la obligación, lo mismo que si cada uno de ellos hubiese estipulado o prometido parte del dinero; pero que si entre ellos no hubiese habido ninguna sociedad, queda en Suspense en los bienes de cual de los dos haya de computarse lo que se deba, o de los bienes de quién haya de deducirse.

§ 1.- Si hay algunas cosas corporales en los bienes

dum rei veritatem aestimanda erunt, hoc est secundum praesens pretium: nec quicquam eorum formali pretio aestimandum esse sciendum est.

63.- PAULUS; *libro II, ad legem Iuliam et Papiam*.- Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur. Nec enim qui filium naturalem possidet tanto locupletior est, quod eum, si alius possideret, plurimo redempturus fuisset. Sed nec ille, qui filium alienum possidet, tantum habet, quanti eum patri vendere potest, nec exspectandum est, dum vendat, sed in praesentia, non qua filius alicuius, sed qua homo aestimatur. Eadem causa est eius servi, qui noxam nocuit: nec enim delinquendo quisque pretiosior fit. Sed nec heredem post mortem testatoris institutum servum tanto pluris esse, quo pluris venire potest,

Pedius scribit: est enim absurdum ipsum me heredem institutum non esse locupletiozem, antequam adeam, si autem servus heres institutus sit, statim me locupletiozem effectum, cum multis causis accidere possit, ne iussu nostro adeat: acquirit nobis certe cum adierit, esse autem praeposterum ante nos locupletes dici, quam adquisierimus.

§ 1.- Cuius debitor solvendo non est, tantum habet in bonis, quantum exigere potest.

§ 2.- Nonnullam tamen pretio varietatem loca temporaque adferunt: nec enim tantidem Romae et in Hispania oleum aestimabitur nec continuis sterilitatibus tantidem, quanti secundis fructibus, dum hic quoque non ex momentis temporum nec ex

deceased must be estimated at its value, that is to say, at the price it will bring at the present time; and it should be understood that the appraisal must not be made of the value which the property would have under certain conditions.

63.- PAULUS; *On the Lex Julia et Papia, Book II*.- The value of property should be estimated, not by affection nor according to any particular advantage attaching to it, but for what it can be disposed of at an ordinary sale. For where a father is in possession of a slave who is his natural son, he is none the more wealthy because, if the slave was in the possession of another person, he would be willing to pay a larger sum to recover him than someone else. Nor will he who has possession of the natural son of another be considered to have the value of the price for which he could sell him to his father, since the prospective time of his sale ought not to be considered, but his value at present; and not the fact that he is the son of someone else, but what he is worth as a slave. The same rule applies to a slave who has caused some damage, for no one becomes any more valuable for having committed an offence.

Pedius says that a slave who has been appointed an heir after the death of his master is no more valuable for the reason that he will bring more at a sale; for it is absurd to suppose that where I have been appointed an heir, I am any the richer before I accept the estate, or where my slave is appointed an heir, that I immediately become more wealthy, as there may be many reasons why he should not accept the estate by my order. It is certain that he will acquire the estate for me when he does enter upon it, but it is preposterous to assume that we become enriched thereby before we obtain the property.

§ 1.- Where a debtor of the testator is not solvent, the claim is only considered to be worth what can be collected from him.

§ 2.- Places and times occasionally cause a difference in the price of property, for oil does not sell at the same price in Rome that it does in Spain, nor has it the same value in continuous bad years that it has in favorable ones; hence, under such

del difunto, habrán de ser estimadas conforme a la verdad de la cosa, esto es, según el precio presente; y se ha de saber, que no se ha de estimar cosa alguna de ellas según el precio formal.

63.- PAULO; *Comentarios a la ley Julia y Papia, libro II*.- Los precios de las cosas se establecen no por el afecto, ni por la utilidad de cada una de ellas, sino por la estimación común. Porque el que posee un hijo natural no es tanto más rico porque lo hubiese de comprar en muchísimo más si otro lo poseyera; y el que posee un hijo ajeno tampoco tiene aquella cantidad en que puede vendérselo a su padre, ni se ha de esperar a que lo venda; sino que se estima de presente, no por la cantidad que el hijo de determinada persona, sino por la que un esclavo. La misma es la condición del esclavo que causó algún daño; porque nadie se hace de más precio delinquiendo.

Pero escribe Pedio, que tampoco el esclavo instituido heredero después de la muerte del testador es de más valor, porque puede ser vendido en más; porque es absurdo, que instituido yo mismo heredero no sea más rico antes que yo ada la herencia, pero que si hubiere sido instituido heredero un esclavo, inmediatamente me haya hecho yo más rico, cuando por muchas causas puede suceder que no ada por nuestro mandato, y adquiere ciertamente para nosotros, cuando hubiere adido, pero es intempestivo que nos digamos ricos antes de que hayamos adquirido.

§ 1.- Aquel cuyo deudor no es solvente tiene en sus bienes tanto cuanto puede cobrar.

§ 2.- Los lugares y los tiempos producen, sin embargo, alguna variedad en el precio; porque no se estimará igualmente el aceite en Roma y en España, ni del mismo precio con continuos años estériles que con frutos abundantes, con tal que tampoco en estos

ea quae raro accidat caritate pretia constituentur.

64.- ULPIANUS; *libro XIII, ad legem Iuliam et Papiam*.- Si in testamento ita scriptum sit: "Heres meus Lucio Titio decem dare damnas esto et quanto quidem minus per legem Falcidiam capere poterit, tanto amplius ei dare damnas esto", sententiae testatoris standum est.

65.- PAULUS; *libro VI, ad legem Iuliam et Papiam*.- Si fundus legatus sit quinquaginta dignus sub hac condicione, si quinquaginta heredi dedisset, plerique putant utile esse legatum, quia condicionis implendae causa datur: nam constat etiam Falcidiam eum pati posse. Sed si quinquaginta aurei legati sint, si quinquaginta dedisset, dicendum inutile esse legatum et magis ridiculum esse.

66.- ULPIANUS; *libro XVIII, ad legem Iuliam et Papiam*.- Circa legem Falcidiam in eo, quod sub condicione vel in diem alicui relictum est, hoc observandum est: si decem sub condicione alicui fuerint relicta eaque condicio post decennium forte exstiterit, non videtur decem huic legata, sed minus decem, quia intervallum temporis et interusurium huius spatii minorem facit quantitatem decem.

§ 1.- Sicuti legata non debentur, nisi deducto aere alieno aliquid supersit, nec mortis causa donationes debentur, sed infirmantur per aes alienum. Quare si immodicum aes alienum interveniat, ex re mortis causa sibi donata nihil aliquis consequitur.

67.- CLEMENTIUS; *libro IV, ad legem Iuliam et Papiam*.- Quotiens cuidam amplius legatum sit,

circumstances, the value of articles should not be fixed by their scarcity at certain periods, nor on account of something which rarely occurs.

64.- ULPIANUS; *On the Lex Julia et Papia, Book XIII*.- Where the following provision is included in a will, "Let my heir be charged with the payment of ten aurei to Lucius Titius, and let as much more be given him as he will lose by the operation of the Falcidian Law," the will of the testator must be executed.

65.- PAULUS; *On the Lex Julia et Papia, Book VI*.- Where a tract of land, worth fifty aurei, is devised under the condition that the party to whom it is left shall pay fifty aurei to the heir, many authorities think that the devise is valid, because the reason for complying with the condition is stated. It is established that the devise is subject to the Falcidian Law. Where, however, fifty aurei are bequeathed on condition that the legatee pays fifty to the heir, the legacy is not only void, but also ridiculous.

66.- ULPIANUS; *On the Lex Julia et Papia, Book XVIII*.- The following must be noted with reference to the operation of the Falcidian Law, where a legacy is bequeathed to anyone conditionally, or payable after a certain time. If ten aurei should be bequeathed to someone under a condition, and the condition is fulfilled, for instance, after the lapse of ten years, the said ten aurei will not be considered to have been bequeathed to the legatee, but a smaller amount, for the interval, and the interest during that interval cause reduction of the original sum of ten aurei.

§ 1.- Just as legacies are not payable unless a balance remains after deducting the amount of the debts from the property of the estate, so donations mortis causa will not be due, but may be annulled by the indebtedness of the estate. Therefore, if the indebtedness is very large, no one can receive property given to him mortis causa, out of the funds of the estate.

67.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book IV*.- Whenever more is bequeathed to

casos se establezcan los precios por circunstancias momentáneas de los tiempos, ni por carestía, que rara vez acontezca.

64.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si en el testamento se hubiera escrito así: «esté condenado mi heredero a darle diez a Lucio Ticio; y cuanto verdaderamente pudiere recibir de menos por causa de la ley Falcidia, otro tanto más esté condenado a darle», se ha de estar a la disposición del testador.

65.- PAULO; *Comentarios a la ley Julia y Papia, libro VI*.- Si se hubiera legado un fundo, que valiese cincuenta, bajo esta condición: «si le hubiese dado cincuenta al heredero», opinan los más que es útil el legado, porque se da para que se cumpla la condición; porque consta que también este puede soportar la Falcidia; pero si se hubieran legado cincuenta áureos, si hubiese dado cincuenta, se ha de decir que el legado es inútil, y mas, que es ridículo.

66.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XVIII*.- Acerca de la ley Falcidia se ha de observar esto, respecto a lo que se dejó a alguno bajo condición o para cierto día, que si a uno se le hubieren dejado diez bajo condición, y esta condición se cumpliera acaso después de diez años, no se consideran legados a este los diez, sino menos de diez, porque el intervalo del tiempo y los intereses de este espacio intermedio hacen menor la cantidad de los diez.

§ 1.- Así como no se deben los legados, sino si deducidas las deudas quedara algo, tampoco se deberán, sino que se invalidan por las deudas, las donaciones por causa de muerte; por lo cual, si hubiera deudas excesivas, nada obtiene uno con cosa que le haya sido donada por causa de muerte.

67. TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro IV*.- Siempre que a uno se le

quam ei capere liceret, et lex Falcidia locum haberet, prius Falcidiae ratio habenda est, scilicet ut subducto eo, quod lex Falcidia exceperit, reliquum, si non excedat statutam lege portionem, debeatur.

68.- MACER; *libro II, ad legem vicesimam hereditatium*.- Computationi in alimentis faciendae hanc formam esse Ulpianus scribit, ut a prima aetate usque ad annum vicesimum quantitas alimentorum triginta annorum computetur eiusque quantitatis Falcidia praestetur, ab annis vero viginti usque ad annum vicesimum quintum annorum viginti octo, ab annis viginti quinque usque ad annos triginta annorum viginti quinque, ab annis triginta usque ad annos triginta quinque annorum viginti duo, ab annis triginta quinque usque ad annos quadraginta annorum viginti. Ab annis quadraginta usque ad annos quinquaginta tot annorum computatio fit, quot aetati eius ad annum sexagesimum deerit remisso uno anno: ab anno vero quinquagesimo usque ad annum quinquagesimum quintum annorum novem, ab annis quinquaginta quinque usque ad annum sexagesimum annorum septem, ab annis sexaginta, cuiuscumque aetatis sit, annorum quinque. Eoque nos iure uti Ulpianus ait et circa computationem usus fructus faciendam. Solitum est tamen a prima aetate usque ad annum trigesimum computationem annorum triginta fieri, ab annis vero triginta tot annorum computationem inire, quot ad annum sexagesimum deesse videntur. Numquam ergo amplius quam triginta annorum computatio initur. Sic denique et si rei publicae usus fructus legetur, sive simpliciter sive ad ludos, triginta annorum computatio fit.

§ 1.- Si quis ex heredibus rem propriam esse contendat, deinde hereditariam esse convincatur, quidam putant eius quoque Falcidiam non posse retineri, quia nihil intersit, subtraxerit an hereditariam esse negaverit: quod Ulpianus recte improbat.

any person than he is legally entitled to receive, and the Falcidian Law is applicable, the amount due under it must first be estimated, so that, after what is excepted by the Falcidian Law has been deducted, the balance will be payable, if it does not exceed the amount specified by law.

68.- AEMILIUS MACER; *On the Law of Five Per Cent Tax of Estates, Book II*.- Ulpianus says that the following rule should be adopted in making the estimate of maintenance to be furnished. The amount bequeathed to anyone for this purpose from the first to the twentieth year is computed to have lasted for thirty years, and the Falcidian portion of that sum shall be reserved. From twenty to twenty-five years, the amount is calculated for twenty-eight years, from twenty to thirty years, the amount is calculated for twenty-five years; from thirty to thirty-five years, the amount is calculated for twenty-two years, from thirty to forty years, it is computed for twenty years; from forty to fifty years, the computation is made for as many years as the party lacks of the sixtieth year after having omitted one year; from the fiftieth to the fifty-fifth, the amount is calculated for nine years; from the fifty-fifth to the sixtieth year, it is calculated for seven years; and for any age above sixty, no matter what it may be, the computation is made for five years. Ulpianus also says that we use this same rule in making the calculation with reference to the legacy of an usufruct. Nevertheless, it is the practice for the computation to be made for thirty years from the first to the thirtieth, but after the age of thirty years it is made for as many years as the legatee lacks of being sixty; hence the computation is never made for a longer time than thirty years. Finally, in like manner, the computation is made for the period of thirty years, where the usufruct of property is bequeathed to the State, either simply, or for the purpose of celebrating games.

§ 1.- Where one of the heirs claims that certain property belongs to him individually, and it is afterwards proved to constitute part of the estate, certain authorities hold that the Falcidian portion cannot be reserved out of said property, because it makes no difference whether the heir appropriated it,

haya legado más de lo que le fuese lícito adquirir, y tuviera lugar la ley Falcidia, se ha de hacer primero la cuenta de la ley Falcidia, a saber, para que, deducido lo que hubiere tomado la ley Falcidia, se deba lo restante, si no excediera de la porción establecida en la ley Falcidia.

68.- EMILIO MACER; *Comentarios a la ley vigésima de las herencias, libro II*.- Escribe Ulpiano, que para la computación que se ha de hacer en los alimentos hay esta norma, que desde la primera edad hasta los veinte años se compute la cantidad de alimentos de treinta años, y que de esta cantidad se preste la Falcidia; que de los veinte años hasta los veinticinco, la de veintiocho años; desde veinticinco años hasta treinta, la de veinticinco; desde treinta hasta treinta y cinco años, la de veintidós; desde treinta y cinco hasta cuarenta, la de veinte años; desde cuarenta años hasta cincuenta se hace la computación de tantos años cuantos faltaren a su edad para los sesenta, deducido un solo año; desde cincuenta años hasta cincuenta y cinco, la de nueve años; desde cincuenta y cinco hasta sesenta años, la de siete años; y desde sesenta años, de cualquiera edad que sea, la de cinco años; y este derecho observamos, dice Ulpiano, también respecto a la computación que se ha de hacer del usufruto. Pero se acostumbró a hacer la computación de treinta años desde la primera edad hasta los treinta años; y desde los treinta años se ha de hacer la computación de tantos años cuantos se ve que faltan para los sesenta; luego nunca se hace computación de mas que de treinta años. Así, finalmente, también si a la República se legara el usufruto, ora simplemente, ora para juegos, se hace la computación de treinta años.

§ 1.- Si alguno de los herederos sostuviera que una cosa es suya propia, y después fuese convicto de que es de la herencia, opinan algunos que no se podía retener también de ella la Falcidia, porque nada importaría que la hubiere substraído, o que hubiere dicho que no era de la herencia; lo que con razón

69.- POMPONIUS; *libro V, ad Sabinum*.- Usu fructu bonorum legato aes alienum ex omnibus rebus deducendum est, quoniam post senatus consultum nulla res est, quae non cadit in usus fructus legatum.

70.- ULPIANUS; *libro XVI, ad Sabinum*.- Falcidiae stipulatio statim committitur, ubi condicio legati vel debiti exstitit.

71.- PAULUS; *libro XXXII, ad edictum*.- Potest heres in vendenda hereditate cavere, ut et lege Falcidia interveniente solida legata praestentur, quia ea lex heredis causa lata est nec fraus ei fit, si ius suum deminuat heres.

72.- GAIUS; *libro III, de legatis ad edictum praetoris*.- Quantitas patrimonii deducto etiam eo, quidquid explicandarum venditionum causa impenditur, aestimatur.

73.- GAIUS; *libro XVIII, ad edictum provinciale*.- In quantitate patrimonii exquirenda visum est mortis tempus spectari. Qua de causa si quis centum in bonis habuerit et tota ea legaverit, nihil legatariis prodest, si ante aditam hereditatem per servos hereditarios aut ex partu ancillarum hereditiarum aut ex fetu pecorum tantum accesserit hereditati, ut centum legatorum nomine erogatis habiturus sit heres quartam partem, sed necesse est, ut nihilo minus quarta pars legatis detrahatur.

Et ex diverso, si ex centum septuaginta quinque legaverit et ante aditam hereditatem in tantum decreverint bona, incendiis forte aut naufragiis aut

or denied that it belonged to the estate. This opinion Ulpianus very properly does not accept.

69.- POMPONIUS; *On Sabinus, Book V*.- Where the usufruct of property is bequeathed, the debts must be deducted from all the assets of the estate; as, according to the Decree of the Senate, there is no property which is not included in the legacy of an usufruct.

70.- ULPIANUS; *On Sabinus, Book XVI*.- The stipulation for the Falcidian portion takes effect immediately, when the condition on which the legacy or the debt depends is fulfilled.

71.- PAULUS; *On the Edict, Book XXXII*.- In disposing of his rights to an estate, an heir can provide that in case the Falcidian Law should apply, the entire legacy shall be paid by the purchaser, because this law was enacted for the benefit of the heir, and the latter is not defrauded, if he himself diminishes his own right.

72.- GAIUS; *On the Edict of the Praetor with Reference to Legacies, Book III*.- The value of an estate is estimated after having deducted any expenses which may be incurred by the sale of property.

73.- THE SAME; *On the Provincial Edict, Book XVIII*.- In appraising an estate, it has been decided that its value at the time of the death of the testator should be ascertained. Therefore, if anyone has property worth a hundred aurei and bequeaths all of it, no profit will accrue to the legatees, if, before the estate is entered upon it should be increased by anything obtained through slaves belonging to it, or by the birth of the offspring of female slaves, or from the increase of flocks, to such an extent that the hundred aurei, included in the legacies, having been paid, the heir will still have enough for his fourth; but it will, nevertheless, be necessary for the fourth part of the legacies to be deducted.

On the other hand, if the testator should bequeath seventy-five aurei out of the hundred, and, before the estate was entered upon, the amount should be

desaprueba Ulpiano.

69.- POMPONIO; *Comentarios a Sabino, libro V*.- Legado el usufruto de los bienes, se han de deducir de todas las cosas las deudas, porque después del Senadoconsulto no hay cosa alguna que no caiga dentro del legado del usufruto.

70.- ULPIANO; *Comentarios a Sabino, libro XVI*.- La estipulación de la Falcidia produce su efecto inmediatamente que se cumplió la condición del legado o de la deuda.

71.- PAULO; *Comentarios al Edicto, libro XXXII*.- Puede el heredero, al vender la herencia, dar caución de que aun interviniendo la ley Falcidia se pagarán íntegros los legados, porque esta ley fué promulgada por causa del heredero; y no se defrauda a ella, si el heredero disminuyera su derecho.

72.- GAYO; *Comentarios al Edicto del Pretor, libro III de los legados*.- Se estima la cuantía del patrimonio deduciéndose también todo lo que se gasta para verificar las ventas.

73.- EL MISMO; *Comentarios al Edicto Provincial, libro XVIII*.- Pareció que para averiguar la cuantía del patrimonio se atendiese al tiempo de la muerte. Por cuya causa, si uno hubiere tenido ciento en sus bienes, y los hubiere legado todos, de nada les aprovecha a los legatarios, si antes de adida la herencia se haya agregado a la herencia, por los esclavos de la herencia, o con el parto de las esclavas de la herencia, o con las crías del ganado, tanto, que pagados los cien a título de legados hubiera de tener el heredero la cuarta parte; sino que es necesario que no obstante se detraiga de los legados la cuarta parte.

Y por el contrario, si de ciento hubiere legado setenta y cinco, y antes de adida la herencia los bienes hubieren disminuido tanto, acaso por

morte servorum, ut non plus quam septuaginta quinque vel etiam minus relinquatur, solida legata debentur. Nec ea res damnosa est heredi, cui liberum est non adire hereditatem: quae res efficit, ut necesse sit legatariis, ne destituto testamento nihil consequantur, cum herede in portionem legatorum pacisci.

§ 1.- Magna dubitatio fuit de his, quorum condicio mortis tempore pendet, id est an quod sub condicione debetur in stipulatoris bonis adnumeretur et promissoris bonis detrahatur. Sed hoc iure utimur, ut, quanti ea spes obligationis venire possit, tantum stipulatoris quidem bonis accedere videatur, promissoris vero decedere. Aut cautionibus res explicari potest, ut duorum alterum fiat, aut ita ratio habeatur, tamquam pure debeatur, aut ita, tamquam nihil debeatur, deinde heredes et legatarii inter se caveant, ut exsistente condicione aut heres reddat, quanto minus solverit, aut legatarii restituant, quanto plus consecuti sint.

§ 2.- Sed et si legata quaedam pure, quaedam sub condicione relicta efficiant, ut exsistente condicione lex Falcidia locum habeat, pure legata cum cautione redduntur. Quo casu magis in usu est solvi quidem pure legata perinde ac si nulla alia sub condicione legata fuissent, cavere autem legatarios debere ex eventu condicionis quod amplius acceperissent redditu iri.

§ 3.- Cuius generis cautio necessaria videtur et si quibusdam servis eodem testamento sub condicione

diminished (for instance by fire, shipwreck, or the death of slaves), to such an extent that not more than seventy-five aurei, or even less than that sum, remains, the legacies must be paid in full; for this cannot be considered injurious to the heir, as he is at liberty not to accept the estate. Hence it becomes necessary for the legatees to compromise with the heir for a part of their legacies, in order to avoid obtaining nothing in case he should refuse to take under the will.

§ 1.- Very serious doubts arise with reference to certain matters, the condition of whose accomplishment depends upon the time of the death of the testator; that is to say, where a debt is due under a condition, shall it be counted as part of the assets of the stipulator, or shall it be deducted from the estate of the promisor? Our present practice is that the amount which the obligation will bring, if sold, shall be considered as added to the estate of the stipulator, but deducted from that of the promisor; or the question can be settled by the parties giving security to one another; so that the claim may be considered as absolutely due, or as if nothing was due at all; therefore the heirs and the legatees can furnish one another security, so that, if the condition should be fulfilled, the heir may pay to the legatees the amount which he has withheld, or the legatees may refund whatever they have received in excess of that to which they were entitled.

§ 2.- Even where some legacies have been absolutely bequeathed, and some have been bequeathed under a condition, and the condition was fulfilled, the Falcidian Law will apply, but the legacies absolutely bequeathed should only be paid after security has been taken. In a case of this kind, it is generally the custom for the legacies absolutely bequeathed to be paid just as if no others had been left conditionally; the legatees, however, should give security that after the condition has been complied with, they will return any excess which they may have received.

§ 3.- A bond of this kind is considered necessary, where freedom is granted to certain slaves

incendios, o por naufragios, o por muerte de esclavos, que no se dejen más de setenta y cinco, o aun menos, se deben íntegros los legados; y esto no es perjudicial para el heredero, quien tiene libertad para no adir la herencia; lo cual hace que los legatarios tengan necesidad de pactar con el heredero respecto a la porción de los legados, no sea que no consigan nada habiendo quedado sin efecto el testamento.

§ 1.- Grande duda hubo respecto a aquello cuya condición está pendiente al tiempo de la muerte, esto es, sobre si lo que se debe bajo condición se cuenta en los bienes del estipulante, y se deduce de los bienes del que lo promete. Pero usamos de este derecho, que se considere que a la verdad se agrega a los bienes del estipulante, y se deduce de los del que promete, otro tanto de la cantidad en que se pueda vender esta esperanza de la obligación; o se puede resolver el caso dándose cauciones de que se hará una de estas dos cosas, o que se considerará la cuenta como si se debiera puramente, o como si nada se debiese. Y después los herederos y los legatarios se darán entre si caución de que, cumpliéndose la condición, o el heredero dará cuanto hubiere pagado de menos, o los legatarios restituirán cuanto hayan conseguido de más.

§ 2.- Pero aunque los legados, dejados unos puramente, y otros bajo condición, hagan que cumpliéndose la condición tenga lugar la ley Falcidia, los legados puramente se pagan con caución; en cuyo caso está mas en uso, que se paguen ciertamente los legados puros lo mismo que si no hubiese ningunos otros legados bajo condición, pero los legatarios deben dar caución de que se devolverá, en virtud del cumplimiento de la condición, lo que hubiesen recibido de más.

§ 3.- Se considera necesaria caución de este género, también si en el mismo testamento hubiera

libertas data sit, quorum pretia condicione existente bonis detrahuntur.

§ 4.- In diem relicta legata alterius esse iuris palam est, cum ea omnimodo tam ipsi legatario quam heredibus eius deberi certum est: sed tanto minus erogari ex bonis intellegendum est, quantum interea donec dies optingit, heres lucraturus est ex fructibus vel usuris.

§ 5.- Ergo optimum quidem est statim ab initio ita testatorem distribuere legata, ne ultra dodrantem relinquantur. Quod si excesserit quis dodrantem, pro rata portione per legem ipso iure minuuntur: verbi gratia si is, qui quadringenta in bonis habuit, tota ea quadringenta erogaverit, quarta pars legatariis detrahitur: si trecenta quinquaginta legaverit, octava. Quod si quingenta legaverit habens quadringenta, initio quinta, deinde quarta pars detrahi debet: ante enim detrahendum est, quod extra bonorum quantitatem est, deinde quod ex bonis apud heredem remanere oportet.

74.- GAIUS; *libro III, de legatis ad edictum praetoris*.- Quod autem dicitur, si ex iudicio defuncti quartam habeat heres, solida praestanda esse legata, ita accipere debemus, si hereditario iure habeat: itaque quod quis legatorum nomine a coherede accepit, in quadrantem ei non imputatur.

75.- MARCELLUS; *ex libro XL, digestorum*.- Iuliani Marcellus. Sed si ideo legatum ei datum est, ut integra legata vel fideicommissa praestet, deneganda erit actio legati, si lege Falcidia uti mallet.

conditionally by the same will, because the value of said slaves should be deducted from the bulk of the estate, after the condition has been complied with.

§ 4.- It is evident that the law is different, where legacies are bequeathed payable within a certain time, since it is absolutely certain that they will be due to the legatee himself, or to his heirs. It must, however, be understood that as much less will be deducted from the assets of the estate as the heir, in the meantime, until the day for payment arrives, will obtain by way of profit from the crops, or from interest.

§ 5.- Therefore the best course will be for the testator, in bequeathing his property, to make such a disposition of the same that nothing over three-fourths of it will remain. If anyone should exceed the three-fourths, the legacies will be diminished pro rata, by operation of law. For example, where a man has an estate of four hundred aurei, and bequeaths the whole of it in legacies, the fourth part of his legacy will be taken from each legatee. If he should bequeath three hundred and fifty aurei, the eighth of each legacy will be deducted; if, however, he should bequeath five hundred aurei, and should only have four hundred; in the first place, the fifth part, and afterwards the fourth part will be deducted, for the amount should first be deducted which is in excess of the value of the property of the estate, and afterwards what the heir is entitled to out of the actual assets of the same.

74.- THE SAME; *On the Edict of the Praetor with Reference to Legacies, Book V*.- Where, however, it is said that an heir who is entitled to his fourth under the will of the deceased is obliged to pay the legacies in full, we must understand that this applies where he receives the estate by hereditary right, for what anyone receives from his co-heir, as a legacy, shall not be charged to his fourth.

75.- MARCELLUS; *On the Digest of Julianus, Book XL*.- Where a bequest is made to an heir in order that he may pay the legacies in full, as well as the trust with which he is charged, an action based on the

sido dada bajo condición la libertad a algunos esclavos, cuyo precio se deduce de los bienes al cumplirse la condición.

§ 4.- Es evidente, que otro derecho hay para los legados dejados a término, pues es cierto que estos son de todos modos debidos, tanto al mismo legatario, como a sus herederos; pero se ha de entender, que se gasta de los bienes tanto menos cuanto mientras llega el término ha de lucrar el heredero con los frutos o con los intereses.

§ 5.- Luego ciertamente es lo mejor, que inmediatamente desde un principio distribuya el testador los legados de modo, que no se dejen más de las tres cuartas partes; pero si alguno se excediere de los tres cuartos, se disminuyen de derecho por la ley a proporción, por ejemplo, si el que tuvo cuatrocientos en sus bienes, hubiere empleado todos estos cuatrocientos, se les detrae a los legatarios la cuarta parte, y la octava, si hubiere legado trescientos cincuenta; pero si teniendo cuatrocientos hubiere legado quinientos, se debe deducir primero la quinta y luego la cuarta parte, porque antes se ha de deducir lo que está fuera de la cuantía de los bienes, y luego lo que de los bienes debe quedar en poder del heredero.

74.- EL MISMO; *Comentarios al Edicto del Pretor, libro III*.- de los legados.- Pero lo que se dice, que, si por la disposición del difunto tuviera el heredero la cuarta, se han de pagar íntegros los legados, debemos entenderlo de este modo, si la tuviera por derecho de herencia; y así, lo que uno recibió de su coheredero a título de legados, no se le computa para la cuarta.

75.- MARCELO; *Doctrina tomada del libro XL, del Digesto de Juliano*.- Mas si se le dio el legado precisamente para que pagara íntegros los legados o los fideicomisos, se le habrá de denegar la acción de

76.- GAIUS; *libro III, de legatis ad edictum praetoris*.- Id autem, quod condicionis implendae causa vel a coherede vel a legatario vel a statulibero datur, in Falcidia non imputatur, quia mortis causa capitur. Sane si a statulibero peculiares nummos accipiat, pro sua parte quadranti eos imputare debet, quia pro ea parte non mortis causa capere, sed hereditario iure eos habere intellegitur.

§ 1.- Qua ratione placuit legata, quae legatarii non capiunt, cum apud heredes subsederint, hereditario iure apud eos remanere intellegi et ideo quadranti imputanda, nec quicquam interesse, utrum statim ab initio legatum non sit an quod legatum est remanserit.

77.- GAIUS; *libro XVIII, ad edictum provinciale*.- In singulis heredibus rationem legis Falcidiae componendam esse non dubitatur. Et ideo si Titio et Seio heredibus institutis semis hereditatis Titii exhaustus est, Seio autem quadrans totorum bonorum relictus sit, competit Titio beneficium legis Falcidiae.

78.- GAIUS; *libro III, de legatis ad edictum praetoris urbani*.- Quod si alterutro eorum deficiente alter heres solus exstiterit, utrum perinde ratio legis Falcidiae habenda sit, ac si statim ab initio is solus heres institutus esset, an singularum portionum separatim causae spectandae sunt? Et placet, si eius pars legatis exhausta sit, qui heres exstiterit, adiuvare legatarios per deficientem partem, quia ea non est legatis onerata, quia et legata quae apud heredem remanent efficiunt, ut ceteris legatariis aut nihil aut minus detrahatur: si vero defecta pars fuerit exhausta, perinde in ea ponendam rationem legis

legacy will be refused him if he prefers to avail himself of the benefit of the Falcidian Law.

76.- GAIUS; *On the Edict of the Praetor, Book III*.- Any property, however, which is given either by a co-heir, a legatee, or a slave who is to be free conditionally, for the purpose of complying with the condition, shall not be charged to the Falcidian portion, because it is obtained mortis causa. It is clear that if the heir should receive any money from the peculium of the slave, he must charge it proportionally to his share, because the said proportional share does not pass to him mortis causa, but he is understood to acquire it by hereditary right.

§ 1.- For which reason it has been decided that any bequests which legatees have no right to receive, and which, on this account, will belong to the heirs, the latter do not obtain by hereditary right, and therefore they must be charged to the fourth; for it does not make any difference whether property is bequeathed to him in the first place, or whether, after it has been bequeathed, it remains in his hands.

77.- THE SAME; *On the Provincial Edict, Book XVIII*.- There is no doubt that the advantages conferred by the Falcidian Law are available by every individual heir, and therefore, if Titius and Seius have been appointed heirs, and the half of the estate belonging to Titius is exhausted in legacies, so that the fourth part of the entire property is left to Seius, Titius will be entitled to the benefit of the Falcidian Law.

78.- THE SAME; *On the Edict of the Urban Praetor with Reference to Legacies, Book III*.- If, however, one of two heirs should fail to accept his share of the estate, and the other should become the sole heir to the same, will the Falcidian Law apply, just as if the entire estate had been left to the latter heir in the beginning, or should the two portions of it be considered separately with reference to the operation of the Falcidian Law? It is established that if the share of the legacy of him who became the heir is exhausted, the legatees will be benefited by the share which was not accepted, for the reason that it was not

legado, si prefiriera usar de la ley Falcidia.

76.- GAYO; *Comentarios al Edicto del Pretor, libro III, de los legados*.- Mas lo que para cumplir una condición se da a cargo o de un coheredero, o de un legatario, o del que fue dejado libre bajo condición, no se computa en la Falcidia, porque se adquiere por causa de muerte. Y a la verdad, si del que fue dejado libre bajo condición recibe dinero del peculio, debe computarlo por su parte en la cuarta, porque respecto a aquella parte se entiende que no lo adquiere por causa de muerte, sino que lo tiene por derecho de herencia.

§ 1.- Por cuya razón plugo, que se entienda que los legados que los legatarios no adquieren permanecen, cuando hubieren quedado en poder de los herederos, en poder de estos por derecho de herencia, y han de ser por lo tanto computados en la cuarta; y que nada importa, que no se haya legado inmediatamente desde un principio, o que haya quedado lo que se legó.

77.- EL MISMO; *Comentarios al Edicto provincial, libro XVIII*.- No se duda, que la cuenta de la ley Falcidia ha de formarse respecto de cada heredero; y por lo tanto, si instituidos herederos Ticio y Seyo se agotó toda la mitad de la herencia correspondiente a Ticio, pero a Seyo se le hubiera dejado la cuarta parte de todos los bienes, le compete a Ticio el beneficio de la ley Falcidia.

78.- EL MISMO; *Comentarios al Edicto del Pretor urbano, libro III*.- Pero si faltando uno de ellos, hubiere quedado solo el otro heredero, ¿acaso se habrá de hacer la cuenta de la ley Falcidia lo mismo que si inmediatamente desde el principio sólo este hubiese sido instituido heredero, o se han de considerar por separado las causas de cada porción? Y se determina, que si se hubiera agotado la parte del que hubiere quedado heredero, se beneficia a los legatarios con la parte vacante, que no fue gravada con legados, porque también los legados, que quedan en poder del heredero, hacen que a los demás

Falcidia, atque si ad eum ipsum pertineret, a quo defecta fieret.

79.- GAIUS; *libro XVIII, ad edictum provinciale*.- In duplicibus testamentis sive de patrimonio quaeramus, ea sola substantia spectatur, quam pater cum moreretur habuerit, nec ad rem pertinet, si post mortem patris filius vel adquisierit aliquid vel deminuerit: sive de legatis quaeramus, tam ea quae in primis quam ea quae in secundis tabulis relicta sunt in unum contribuuntur, tamquam si et ea, quae a filii herede reliquisset testator, a suo herede sub alia conditione legasset.

80.- GAIUS; *libro III, de legatis ad edictum praetoris*.- Si is, qui quadringenta in patrimonio habebit, filio impubere herede instituto ducenta legaverit eique Titium et Seium heredes substituerit et a Titio centum legaverit, videamus, quid iuris sit. Si nondum solutis legatis pupillus decesserit et ob id ea legata utrique debent.

Solus heres Titius utetur lege Falcidia: cum enim ducenta ex hereditate pupilli ad eum pertineant, ducenta legatorum nomine debet, centum ex ducentis quae pupillus debebat, centum quae ipse dare iussus est: itaque ex utraque quantitate quarta deducta habebit quinquaginta.

In persona vero Seii lex Falcidia non intervenit, cum ad eum ex hereditate pupilli ducenta pertineant et debeat legatorum nomine centum ex ducentis, quae a pupillo relicta sunt. Quod si pupillus solvat legata, debent curare tutores pupilli, ut caveant legatarii.

burdened with legacies, since those remaining in the hands of the heir will cause either nothing at all, or only a small sum to be deducted from what is to be paid to the other legatees. If, however, the share which was not accepted is exhausted, it will be subject to the operation of the Falcidian Law, just as if it belonged to the party by whom it was refused.

79.- THE SAME; *On the Provincial Edict, Book XVIII*.- In the case of double wills,¹ when we make inquiry with reference to the estate, only the property which the father possessed at the time of his death should be considered, as it does not make any difference whether the son either gained or lost anything after the death of his father; and, when we investigate the legacies, both those which are bequeathed in the first, as well as in the second will, are liable to contribution, just as if those with which the testator charged his son, as heir, had been left to him under some other condition.

80.- THE SAME; *On the Edict of the Praetor with Reference to Legacies, Book III*.- Where a testator left an estate of four hundred aurei, and, having appointed his son who had not reached the age of puberty his heir, bequeathed him two hundred aurei, and substituted Titius and Seius for him as heirs, and charged Titius with a legacy of a hundred aurei; let us see what the law is, if the minor should die before the legacies with which the two substitutes were charged have been paid.

The heir Titius is the only one who can make use of the Falcidian Law, for as the two hundred aurei forming part of the estate of the minor belong to him, he will owe two hundred on account of the legacy, that is a hundred out of the two hundred which the minor owed, and the hundred which he himself was ordered by the testator to pay. Therefore, having deducted the fourth of each of these sums, he will have fifty.

The Falcidian Law, however, is not applicable to Seius personally, since the two hundred aurei belong to him as a part of the estate of the minor, and he will owe in legacies a hundred out of the two hundred which were left by the minor. If, however, the minor himself should pay the legacies, his guardians should

legatarios o no se les deduzca nada, o se les deduzca menos; pero si se hubiere agotado la parte vacante, se ha de formar respecto a ella la cuenta de la ley Falcidia de igual manera que si le perteneciese al mismo por quien hubiese quedado vacante.

79.- EL MISMO; *Comentarios al Edicto provincial, libro XVIII*. - En los testamentos dobles, si tratamos del patrimonio, se consideran aquellos solos bienes que el padre hubiere tenido al morir, -y no importa al caso, si después de la muerte del padre el hijo hubiere adquirido o disminuido alguna cosa-, y si tratáramos de los legados, se computan juntos, tanto los que se dejaron en el primer testamento, como los que en el segundo, de igual modo que si los que el testador hubiese dejado a cargo del heredero del hijo los hubiese legado también a cargo de su propio heredero bajo otra condición.

80.- EL MISMO; *Comentarios al Edicto del Pretor, libro III, de los legados*.- Si el que tuviere cuatrocientos en su patrimonio hubiere legado doscientos habiendo instituido heredero a su hijo impúbere, y a éste le hubiere substituido como herederos a Ticio y a Seyo, y a cargo de Ticio hubiere legado ciento, veamos qué derecho habrá, si el pupilo hubiere fallecido no habiéndose pagado todavía los legados, y por esto debiesen ambos los legados.

Sólo el heredero Ticio usará de la ley Falcidia; porque perteneciéndole doscientos de la herencia del pupilo, debe doscientos a título de legados, ciento de los doscientos que el pupilo debía, y ciento que a él mismo se le mandó dar; y así, deducida la cuarta de ambas cantidades, tendrá cincuenta.

Mas respecto a la persona de Seyo no tiene lugar la ley Falcidia, porque a él le pertenecen doscientos de la herencia del pupilo, y debe a título de legados ciento de los doscientos que se dejaron a cargo del pupilo. Pero si el pupilo pagara los legados, los tutores del pupilo deben cuidar de que den caución

§ 1.- Quaedam legata divisionem non recipiunt, ut ecce legatum viae itineris actusve: ad nullum enim ea res pro parte potest pertinere. Sed et si opus municipibus heres facere iussus est, individuum videtur legatum: neque enim ullum balineum aut ullum theatrum aut stadium fecisse intellegitur, qui ei propriam formam, quae ex consummatione contingit, non dederit: quorum omnium legatorum nomine, etsi plures heredes sint, singuli in solidum tenentur. Haec itaque legata, quae dividuitatem non recipiunt, tota ad legatarium pertinent. Sed potest heredi hoc remedio succurri, ut aestimatione facta legati denuntiet legatario, ut partem aestimationis inferat, si non inferat, utatur adversus eum exceptione doli mali.

81.- GAIUS; *libro XVIII, ad edictum provinciale*.- Sed usus fructus legatus venit in computationem legis Falcidiae, nam divisionem recipit adeo, ut, si duobus legatus fuerit, ipso iure ad singulos partes pertineant.

§ 1.- Dos relegata extra rationem legis Falcidiae est, scilicet quia suam rem mulier recipere videtur.

§ 2.- Sed et de his quoque rebus, quae mulieris causa emptae paratae essent, ut hae quoque extra modum legis essent, nominatim ipsa Falcidia lege expressum est.

82.- ULPIANUS; *libro VIII, disputationem*.- Quaerebatur, cum is qui solum in nomine quadringenta in bonis habebat ipsi debitori liberationem, Seio autem quadringenta legaverit, si debitor vel

see that the legatees furnish him with security.

§ 1.- There are certain legacies which are not susceptible of division; for instance, those of rights of way, of rights of passage, and of rights to drive cattle through land, for things of this kind cannot partly belong to anyone. Where, however, an heir is directed to build some public work for a municipality, the legacy is considered to be undivided, for it is not understood that he constructed a bath, a theatre, or a racecourse, until it has assumed its proper form, which only happens at its completion. In cases of this kind, even though there are several heirs, they are individually liable, and the bequest belongs to all the legatees. Hence, where bequests which are not susceptible of division are made, they belong wholly to the legatee. Still, relief can be granted to the heir, if he notifies the legatee to return to him his share of the amount, after an estimate has been made of the value of the legacy. If he should not do this, the heir can avail himself of an exception on the ground of fraud, in bar to legal proceedings instituted by the legatee to recover the bequest.

81.- THE SAME; *On the Provincial Aedict, Book XVIII*.- The bequest of an usufruct, however, is subject to computation under the terms of the Falcidian Law, for it is susceptible of division; so that if it is bequeathed to two parties, they will each be entitled to his share under the law.

§ 1.- Where a dowry is bequeathed to a wife, it does not come within the terms of the Falcidian Law, for the reason that she is considered to have received her own property.

§ 2.- It is expressly provided by the Falcidian Law that such property as has been purchased or prepared for the use of a wife is not subject to its operation.

82.- ULPIANUS; *Disputations, Book VIII*.- The question arose, where a testator, whose sole estate consisted of a claim of four hundred aurei, bequeathed to his debtor the release of his claim, but

los legatarios.

§ 1.- Algunos legados no son susceptibles de división, como por ejemplo, el legado de vía, de paso, o de conducción; porque esto a nadie le puede pertenecer en parte. Pero también si al heredero se le mandó hacer una obra para los de un municipio, se considera indivisible el legado; pues no se entiende que hizo baño alguno, o teatro, o estadio, el que no le hubiere dado la forma propia, que resulta de la terminación; por razón de todos cuyos legados, aunque sean muchos los herederos, está cada uno obligado por la totalidad. Y así, estos legados; que no son susceptibles de división, pertenecen íntegros al legatario. Pero se le puede amparar al heredero con este remedio, que, hecha la estimación del legado, la haga saber al legatario para que pague parte de la estimación, y, si no la pagara, ejercite contra él la excepción de dolo malo.

81.- EL MISMO; *Comentarios al Edicto provincial, libro XVIII*.- Pero el usufructo legado se comprende en la computación de la ley Falcidia; porque admite división, de tal manera, que, si hubiere sido legado a dos, de derecho le corresponde a cada uno su parte.

§ 1.- La dote legada está fuera de la cuenta de la ley Falcidia, a saber, porque se considera que la mujer recibe cosa propia suya.

§ 2.- Pero también se expresó determinadamente en la misma ley Falcidia, respecto a las cosas que hubiesen sido compradas o preparadas para la mujer, que también éstas estuviesen fuera de la tasa de la ley.

82.- ULPIANO; *Disputas, libro VIII*.- Se preguntaba, en el caso de que uno, que en sus bienes tenía solamente cuatrocientos en un crédito, hubiere legado la liberación al mismo deudor, y a Seyo los

solvendo non sit vel centum facere possit, quantum quisque habeat interventu legis Falcidia. Dicebam legem Falcidiam ex eo quod refici ex hereditate potest quartam heredi tribuere, residuum dodrantem inter legatarios distribuere.

Quare cum nomen minus solvendo est in hereditate, eius quod exigi potest pro rata fit distributio, residui venditio facienda est, ut id demum in hereditate computetur, quanti nomen distrahi potest.

Sed cum debitori liberatio relinquitur, ipse sibi solvendo videtur et quod ad se attinet, dives est: quippe si ei mortis causa accepto feratur id quod debet, quadringenta cepisse videbitur, licet nihil facere possit: sensisse enim liberationem plenam videtur, quamvis nihil facere possit. Si soli ei liberatio relicta est, et ideo Falcidia interveniente trecenta accepto illi ferri debent, residua centum durabunt in obligationem et si quidem facere posse coeperit, exigentur ab eo dumtaxat usque ad centum.

Idemque erit dicendum, et si mortis causa accepto ei quadringenta ferantur. Unde eleganter dicitur acceptilationem in pendenti fore, ut, si quidem mortis tempore quadringenta tota inveniantur, in trecenta valeat acceptilatio: si vero praeterea aliquid inveniatur, quod quadrantem suppleat heredi, in quadringenta acceptilatio proficiet.

Quod si debitor iste quadringentorum dumtaxat centum facere potest, quia sibi solvendo est, necesse habebit centum refundere. Cum igitur debitor sibi solvendo sit, eveniet, ut, si herede aliquo instituto ipsi debitori liberatio et alii quadringenta legata sint, si quidem solvendo sit debitor, centum quinquaginta ex trecentis retineat, alia centum quinquaginta

left four hundred aurei to Seius, if the debtor should be insolvent, or was not worth the hundred aurei, how much each one would be compelled to contribute under the Falcidian Law. I stated that the Falcidian Law intended that a fourth should be paid to the heir out of what could be obtained from the estate, and that the remaining three-fourths should be distributed among the legatees.

Therefore, when a claim which is not perfectly good forms part of an estate, a distribution of what can be collected should be made pro rata, and the remainder should be sold so that the value of what can be sold should only be counted among the assets of the estate.

Where, however, a release of the claim is bequeathed to the debtor, he himself is considered to be solvent, and, so far as he himself is concerned he is rich, although, if he had received the amount which he owed mortis causa, he would be considered to have received four hundred aurei, even though he could not pay anything, for he is understood to have been fully released from liability, even though he may have nothing if he is released; and hence, upon the application of the Falcidian Law, the heir should give him a receipt for three hundred aurei, and retain the remainder of the obligation of a hundred, for if the debtor should become solvent, he can only collect a hundred aurei from him.

The same rule must be held to apply where, on account of a donation mortis causa, a receipt is given to the debtor for four hundred aurei. Wherefore, it has been very properly held that the effect of the release remains in suspense, for if, at the time of the death, the entire four hundred aurei should be found belonging to the debtor, the release of three hundred will be valid. If, however, any property, in addition, should be found which would be sufficient for the fourth of the heir, the release will be valid for the entire sum of four hundred aurei.

But if the debtor can only pay a hundred, for the reason that he is always considered solvent so far as he himself is concerned, he will be required to refund a hundred aurei to the heir. Therefore, as the debtor is considered to be individually solvent, the result will be that if an heir should be appointed, and a release should be bequeathed to the debtor, and four hundred

cuatrocientos, cuánto tendrá cada uno por la aplicación de la ley Falcidia, si el deudor no fuera solvente, o pudiera pagar ciento. Yo decía, que la ley Falcidia le concede al heredero la cuarta de lo que se puede percibir de la herencia, y distribuye entre los legatarios los tres cuartos restantes.

Por lo cual, cuando en la herencia hay un crédito no cobrable del todo, se hace a prorrata la distribución de lo que se puede cobrar; pero se ha de hacer la venta del resto, para que sólo se compute en la herencia la cantidad en que se puede vender el crédito.

Mas cuando al deudor se le deja la liberación, él es considerado solvente para sí mismo, y, por lo que a él atañe, es rico; porque si por causa de muerte se le diese por pagado lo que debe, se considerará que recibió cuatrocientos, aunque nada pueda pagar; pues se considera que experimentó la liberación plena, aunque nada pudiera pagar, si a él solo se dejó la liberación; y por lo tanto, mediando la Falcidia, se le deben dar por recibidos trescientos, y subsistirán en la obligación los ciento restantes, y si verdaderamente hubiere comenzado a poder pagar, se exigirán de él solamente hasta ciento.

Y lo mismo se habrá de decir, también si por causa de muerte se le diesen por recibidos cuatrocientos. Por lo que con discreción se dice, que la aceptilación quedaría en suspenso, para que, si verdaderamente se hallaran todos los cuatrocientos al tiempo de la muerte, sea válida por trescientos la aceptilación; pero si además se encontrara alguna cosa, que complete la cuarta, la aceptilación aprovechará para los cuatrocientos.

Mas si este deudor de los cuatrocientos solamente puede pagar ciento, como para sí es solvente, tendrá necesidad de pagar ciento. Así, pues, siendo el deudor solvente para sí, sucederá, que, si instituido alguien heredero, se le hubiera legado al mismo deudor la liberación, y a otro cuatrocientos, si verdaderamente fuera solvente el deudor, retendrá de

legatario praestentur, heres centum habeat: sin vero centum tantum facere possit, heredi ex refecto quarta servanda est: sic fiet, ut centum, quae praestari possunt, in quattuor partes dividantur, tres partes ferant legatarii, heres viginti quinque habeat, debitor, qui solvendo non est, secum centum quinquaginta compenset. De residuis centum quinquaginta, quae exigi non possunt, venditio fiet nominis idque, quasi solum in bonis fuerit, repraesentatur.

Quod si nihil facere debitor potest, aequè in centum quinquaginta accepto liberandus est: de residuo venditionem nominis faciendam Neratius ait, quod et nos probamus.

83.- IULIANUS; *libro XII, digestorum*.- Si creditor filii tui heredem te instituerit et legis Falcidia rationem ponas, peculii quantitas, quod aditae hereditatis tempore fuisset, in quadrantem tibi imputabitur.

84.- IULIANUS; *libro XIII, digestorum*.- Reperitur casus, quo heres agere potest, quamvis testator agere non potuerit: veluti si tutor, cum solveret legata, non interposuerit stipulationem, quanto plus quam per legem Falcidiam capi licuerit solutum fuerit, reddi: pupillus quidem eo nomine tutelae non agit, sed heredi eius hoc quoque nomine tutor obligatus erit.

85.- IULIANUS; *libro XVIII, digestorum*.- Si dos socero data est et solus filius heres patri exstitisset, dotem confestim in computatione hereditatis et Falcidia ratione in aere alieno deducet: aliter enim videbitur indotatam uxorem habere.

aurei to someone else; if the debtor should be solvent, the heir can retain a hundred and fifty aurei out of the three hundred, and can pay a hundred and fifty to the legatee, and in this way he will have his hundred. But if the debtor can only pay a hundred aurei, a fourth of the same should be reserved by the heir, and consequently the hundred which can be paid will be divided into four parts, three-fourths of which will belong to the legatees, the heir will have twenty-five, the insolvent debtor will credit himself with a hundred and fifty, the balance of the claim which cannot be collected should be sold, and this shall be considered as the only property belonging to the estate.

If, however, the debtor is unable to pay anything, he must also be released from liability for the said one hundred and fifty aurei, and Neratius says a sale should be made of the balance of the claim, which opinion we also approve.

83.- JULIANUS; *Digest, Book XII*.- If the creditor of your son should appoint you his heir, and you should desire to obtain the portion due to you under the Falcidian Law, the amount of the peculium which existed at the time that the estate was entered upon shall be included in your fourth.

84.- THE SAME; *Digest, Book XIII*.- A case sometimes occurs in which the heir is entitled to an action, although the testator could not have availed himself of it; as, for instance, where a guardian, at the time when he paid the legacies with which his ward was charged, did not enter into a stipulation with the legatees, binding them to refund anything which they might receive above the amount allowed by the Falcidian Law. The ward, indeed, cannot bring suit against his guardian on this account, but the latter will be liable to the heir of the minor.

85.- THE SAME; *Digest, Book XVIII*.- Where a dowry has been given to the father of the husband, and the son alone is heir to his father, the dowry will, in the first place, be included in calculating the amount of the estate and the Falcidian portion, and will be deducted as a debt; otherwise, it would appear that the wife had no dowry.

los trescientos ciento cincuenta, se darán al legatario otros ciento cincuenta, y el heredero tendrá ciento; más si solamente pudiera pagar ciento, se le ha de reservar al heredero la cuarta de lo recobrado. Así sucederá, que los ciento que se pueden pagar se dividirán en cuatro partes, de las que los legatarios se llevarán tres, el heredero tendrá. veinticinco, y el deudor, que no es solvente, compensará consigo mismo ciento cincuenta; y en cuanto a los restantes ciento cincuenta, que no se pueden cobrar, se hará la venta del crédito, y esto se representa, como si hubiere sido lo único que hubiere habido en los bienes.

Mas si el deudor no puede pagar nada, ha de ser igualmente liberado de ciento cincuenta dándoselos por recibidos; y en cuanto al resto, dice Neracio que se hará la venta del crédito; lo que también aprobamos nosotros.

83.- JULIANO; *Digesto, libro XII*.- Si un acreedor de tu hijo te hubiere instituido heredero, y formalizaras la cuenta de la ley Falcidia, se te computará para la cuarta la cantidad del peculio, que hubiese habido al tiempo de haber sido adida la herencia.

84.- EL MISMO; *Digesto, libro XIII*.- Se da el caso en que el heredero puede ejercitar la acción, aunque el testador no haya podido ejercitarla, como si el tutor, al pagar los legados, no hubiere interpuesto estipulación de que se devolverá cuanto se hubiere pagado de más de lo que por la ley Falcidia hubiere sido lícito adquirir. El pupilo no ejercita ciertamente por este título la acción de tutela, pero el tutor estará obligado a su heredero también por este título.

85.- EL MISMO; *Digesto, libro XVIII*.- Si al suegro se le dió la dote, y sólo el hijo hubiese quedado heredero del padre, deducirá inmediatamente como deuda la dote en la computación de la herencia, y para la cuenta de la Falcidia; porque de otra manera parecerá que tenía indotada a la mujer.

Quod si filius extraneum coheredem habeat, ipse quidem semper pro qua parte patri heres erit dotem in aere alieno deducet, et coheres eius, antequam dos a filio praecipiat.

86.- IULIANUS; *libro XL, digestorum*.- Titia testamento suo Titium fratrem suum ex parte tertia heredem instituit fideique eius commisit, ut hereditatem retenta quarta parte secundae et proculae restituat: eadem fratri quaedam praedia praelegavit: quaero, an Titius ea quae praelegata sunt etiam pro ea parte hereditatis, quam rogatus est ut [restitueret], restituere an integra retinere debeat. Respondi Titium legata integra retinere debere, sed in partem quartam imputari oportere duodecimam partem praediorum. Sed si non esset adiectum, ut pars quarta deduceretur, totum trientem praediorum legi Falcidiae imputari oportere, quoniam contra sententiam matris familiae lex Falcidia induceretur.

87.- IULIANUS; *libro LXI, digestorum*.- Qui fundum solum in bonis centum relinquebat, si heredem suum damnaverit, ut eum quinquaginta Titio venderet, non est existimandus amplius quam quinquaginta legasse, ideoque lex Falcidia locum non habet.

§ 1.- Item is, qui duos fundos in bonis centum haberet, si me et Titium heredes instituisset et damnasset me, ut Titio fundum Cornelianum quinquaginta venderem et contra Titium damnasset, ut mihi fundum Seianum quinquaginta venderet: non animadverto, quemadmodum lex Falcidia locum habere possit, cum uterque heredum unius fundi partem dimidiam hereditario iure habiturus sit, in qua pars dimidia hereditatis est: nam certe qui damnatus est fundum Cornelianum vendere, Seiani fundi partem hereditario iure habet, item qui damnatus est Seianum fundum vendere, partem Cornelianum fundi hereditario iure retinet.

If, however, the son should have a foreign co-heir, he can always deduct as a debt of the estate that part of the dowry which he will inherit from his father, and his co-heir can also do so, before the dowry has been received by the son.

86.- THE SAME; *Digest, Book XL*.- Titia, by her will, appointed her brother Titius heir to a third part of her estate, and charged him to transfer the estate to Secunda and Procula, after having reserved a fourth part of the same. She also left certain land to her brother as a preferred legacy. I ask whether Titius can retain all the land which was left to him in this way, or only what was in proportion to the share of the estate which he was asked to deliver to the beneficiaries. I answered that Titius could keep the entire devise, but that he should charge the twelfth part of said land to his fourth. If it had not been stated that the fourth part of the estate must be deducted, he would have been obliged to include in his fourth the entire third of the land, under the Falcidian Law, as the Falcidian Law in this instance operates against the desire of the testatrix.

87.- THE SAME; *Digest, Book LXI*.- Where a man left an estate composed of a tract of land worth a hundred aurei, and charged his heir to sell it to Titius for fifty, he should not be considered to have devised more than fifty, and therefore the Falcidian Law will not apply.

§ 1.- Moreover, where a testator has an estate composed of two tracts of land, each worth a hundred aurei, and appoints Titius and myself his heirs, and charges me to sell the Cornelian Estate to Titius for fifty aurei, and, on the other hand, charges Titius to sell the Seian Estate to me for fifty aurei, I do not think that the Falcidian Law will apply, as each of the heirs will be entitled to half of one of the tracts of land by hereditary right, which is equal to half of the estate. For there is no doubt that the one who is charged to sell the Cornelian Estate will be entitled by hereditary right to half of the Seian Estate, and also he who is charged to sell the Seian Estate can retain by hereditary right the half of the Cornelian Estate.

Pero si el hijo tuviera un coheredero extraño, él, ciertamente deducirá siempre como deuda la dote con relación a la parte en que fuere heredero del padre, y su coheredero, antes que la dote sea retirada por el hijo.

86.- EL MISMO; *Digesto, libro XL*.- Ticia en su testamento instituyó a Ticio, su hermano, heredero de la tercera parte, y encomendó a su fidelidad, que retenida la cuarta parte restituyese la herencia a Segunda y a Prócula; la misma le prelegó al hermano algunos predios; pregunto, si deberá Ticio retener los que fueron prelegados, también en cuanto a la parte de herencia que se le rogó que restituyera, o íntegros. Respondí, que Ticio debía retener íntegros los legados, pero que para la cuarta parte se debía computar la duodécima parte de los predios; pero si no se hubiese añadido que se dedujera la cuarta parte, se debería computar para la ley Falcidia todo el tercio de los predios, porque la ley Falcidia se aplicaría contra la disposición de la madre de familia.

87.- EL MISMO; *Digesto, libro LXI*.- Si el que dejaba en sus bienes sólo un fundo que valía ciento, hubiere condenado a su heredero a que se lo vendiese por cincuenta a Ticio, no se ha de estimar que legó más de cincuenta; y por lo tanto no tiene lugar la ley Falcidia.

§ 1.- Igualmente, si el que tuviera en sus bienes dos fundos que valiesen ciento, nos hubiese instituido a mí y a Ticio herederos, y me hubiese condenado a que le vendiese a Ticio por cincuenta el fundo Cornelianum, y por el contrario, hubiese condenado a Ticio a venderme en cincuenta el fundo Seyano, no atino de qué manera pueda tener lugar la ley Falcidia, pues cada uno de los herederos habrá de tener por derecho de herencia la mitad de un solo fundo, en cuya parte consiste la mitad de la herencia; porque a la verdad, el que fue condenado a vender el fundo Cornelianum tiene por derecho de herencia parte del fundo Seyano, e igualmente, el que fue condenado a vender el fundo Seyano retiene por derecho de herencia parte del fundo Cornelianum.

§ 2.- Si quis heredem instituerit eum, cui rogatus fuerat post mortem suam centum restituere, in ratione legis Falcidia centum deducere debet, quia, si alius quilibet heres exstisset, haec centum in aere alieno ponerentur.

§ 3.- Si tu ex parte quarta, Titius ex parte quarta heredes scripti fueritis, deinde tu ex parte dimidia heres institutus fueris sub condicione, et legata, item libertates datae fuerint: pendente condicione libertates competent, legata tota praestabuntur, quia sive condicio exstiterit, te herede existente utraque valent, sive condicio defecerit, tu et Titius heredes eritis. De lege Falcidia, si hoc quaeris, an existente condicione miscetur quadrans tuus et semis atque ita pro dodrante ratio ponenda est cum his, quibus a te pure herede legatum est, respondebimus misceri duas partes.

§ 4.- Qui filium suum impuberem et Titium aequis partibus heredes instituerat, a filio totum semissem legaverat, a Titio nihil et Titium filio substituerat. Quaesitum est, cum Titius ex institutione adisset et impubere filio mortuo ex substitutione heres exstisset, quantum legatorum nomine praestare deberet. Et placuit solida legata eum praestare debere: nam confusi duo semisses efficerent, ut circa legem Falcidiam totius assis ratio haberetur et solida legata praestarentur.

Sed hoc ita verum est, si filius antequam patri heres exsisteret decessisset. Si vero patri heres fuit, non ampliora legata debet substitutus, quam quibus pupillus obligatus fuerat, quia non suo nomine obligatur, sed defuncti pupilli, qui nihil amplius

§ 2.- If any one should appoint as his heir a person to whom he had been asked to pay a hundred aurei at his death, the hundred aurei should be deducted in computing the proportion due under the Falcidian Law, because if anyone else had been the heir, the said hundred aurei would have been included among the debts of the estate.

§ 3.- If you and Titius are each appointed heirs to the fourth part of an estate, and then you are appointed heirs to the remaining half under a condition, and legacies, as well as the freedom of slaves, have been bequeathed, they should obtain their freedom, and all the legacies should be paid while the condition is pending; because, if the condition is complied with, and you should become the heir, both the legacies and the grants of freedom will be valid; or if the condition should fail, Titius and yourself will become the heirs. If you ask how the Falcidian portion can be estimated, and whether, when the condition is fulfilled, your quarter and your half of the estate should be combined, and hence the Falcidian portion must be calculated on three-fourths of the estate, if you pay the legacies with which you are absolutely charged as heir, we give it as our opinion that the two shares should be combined.

§ 4.- Where a testator appointed his son, who was under the age of puberty, and Titius, heirs to equal shares of his estate, and charged his son with legacies amounting to his entire half, but charged Titius with nothing, and substituted Titius for his son, Titius having entered upon the estate under his appointment, and the minor son having died, and Titius having become his heir by virtue of the substitution, the question arose how much he should pay as legacies. It was decided that he must pay the legacies in full, for the two halves of the estate having become merged, cause the Falcidian Law to apply to the entire inheritance, and hence the legacies would be due without any deduction.

This is, however, true only where the son dies before becoming the heir of his father. But if he should become his heir, the substitute ought not to pay more of the legacies than the minor would have been compelled to do, because he is not bound in his

§ 2.- Si a aquel, a quien se le había rogado que después de su muerte restituyera ciento a alguien, lo hubiere alguno instituido heredero, debe éste deducir los ciento en la cuenta de la ley Falcidia, porque si otro cualquiera hubiese quedado heredero, se pondrían estos ciento entre las deudas.

§ 3.- Si tu hubieres sido instituido heredero de una cuarta parte, y Ticio también de una cuarta parte, y después tú hubieres sido instituido heredero de la mitad bajo condición, y se hubieren dado legados y también libertades, competerán las libertades estando pendiente la condición, y se pagarán íntegros los legados, porque, si se hubiere cumplido la condición quedando tú heredero, serán válidas ambas cosas, y si hubiere faltado la condición, tú y Ticio seréis los herederos. Y si respecto a la ley Falcidia preguntas esto, ¿cumpliéndose la condición, se mezclarán tu cuarta parte y tu mitad, y se ha de hacer de este modo la cuenta respecto a los tres cuartos con aquellos a quienes se les legó a tu cargo, instituido tú heredero puramente? Responderemos, que se mezclan las dos partes.

§ 4.- Uno, que había instituido herederos por partes iguales a su hijo impúbere y a Ticio, había legado a cargo de su hijo toda la mitad de la herencia, y nada a cargo de Ticio, y a Ticio lo había substituido al hijo; se preguntó, habiendo adido Ticio en virtud de la institución, y habiendo quedado heredero por la substitución, muerto impúbere el hijo, cuánto debería dar a título de legados. Y se determinó, que él debía pagar íntegros los legados, porque las dos mitades confundidas harían que en cuanto a la ley Falcidia se tuviese cuenta de toda la herencia, y se pagasen íntegros los legados.

Pero esto es verdad de este modo, si el hijo hubiese fallecido antes que quedara heredero del padre. Mas si fue heredero del padre, el substituto no debe más legados que aquellos a qué había sido obligado el pupilo, porque no se obliga en su propio nombre,

quam semmissis dodrantem praestare necesse habuit.

§ 5.- Quod si extranei heredis semis totus legatus fuerit isque pupillo, a quo nihil legatum erat, ex substitutione heres exstiterit, poterit dici augeri legata et perinde agendum, ac si cuilibet coheredi substitutus fuisset eoque omittente hereditatem ex asse heres exstisset, quia semper substitutus rationem legis Falcidiae ex quantitate bonorum, quae pater reliquerit, ponet.

§ 6.- Eadem dicenda sunt et si pater duos impuberes heredes instituerit et eosdem invicem substituerit, deinde iure substitutionis ad alterum hereditas recciderit et legis Falcidiae ratio habenda sit.

§ 7.- Qui filios impuberes duos habebat, alterum heredem instituit, alterum exheredavit, deinde exheredatum instituto substituit ac postea exheredato Maevium et ab eo legavit: et exheredatus fratri impuberi exstitit heres, deinde impubes decessit. Cum iudicio patris facultates paternae per causam hereditariam ex substitutione ad eum perveniant, potest dici legata ab eo relicta praestanda esse habita ratione legis Falcidiae in his bonis, quae pater mortis tempore reliquerit.

Nec huic contrarium est, quod, cum exheredato pater legatum dederit, nihilo magis substitutus legatis obligabitur, quia eo casu non hereditatis paternae portio, sed legatum ad eum pervenit. Dicit aliquis: quid ergo, si exheredatus filius non ex substitutione fratri suo heres exstiterit, sed aut lege aut per interpositam personam atque ita impubes decesserit? Sic quoque existimandus erit substitutus

own name, but in that of the deceased minor, who would not have been required to deliver more than three-fourths of his half to the legatees.

§ 5.- If, however, the entire half of the foreign heir should have been bequeathed, and he, by virtue of pupillary substitution, becomes heir to the minor, who was not charged with the payment of any legacies, it can be said that they will be increased, and proceedings must be taken just as if the party had been substituted for any heir whomsoever, and the latter having refused to accept the estate, the substitute becomes entitled to all of it; for the reason that the substitute, in fixing the portion due under the Falcidian Law, always takes into consideration the amount of the property which the father left.

§ 6.- The same must be said if the father should appoint his two minor children his heirs, and substitute them for one another, as under these circumstances the estate will vest in the other by the right of substitution, and the amount of the Falcidian Law must be established.

§ 7.- Where a testator had two minor sons, and appointed one of them his heir, and disinherited the other, and subsequently substituted the disinherited son for the one whom he had appointed heir, and then substituted Msevius for the one whom he had disinherited, and charged him with the payment of legacies, the disinherited brother became the heir to the other, and afterwards died. As, by his father's will, the estate of the latter passed to him by hereditary right under the terms of the substitution, it can be said that the legacies with which he was charged must, after deducting the Falcidian portion, be paid out of the property which the father left at the time of his death.

The following case is not opposed to this opinion, namely: when a father bequeaths a legacy to his disinherited son, the substitute is not obliged to pay the legacy on this account; because, in this instance, the son does not receive a part of his father's estate but only a legacy. Still, someone may ask what must be done if the disinherited son did not become the heir of his brother under the substitution, either by law, or

sino en el del pupilo fallecido, el cual no tuvo necesidad de dar nada más que los tres cuartos de la mitad de la herencia.

§ 5.- Pero si se hubiere legado íntegra la mitad de la herencia correspondiente a un heredero extraño, y este por virtud de substitución hubiere quedado heredero del pupilo, a cargo del cual no se había legado nada, se podrá decir que se aumentan los legados, y que se ha de proceder lo mismo que si hubiese sido substituido a un coheredero cualquiera, y prescindiendo este de la herencia hubiese quedado heredero de toda ella, porque el substituido formalizará siempre la cuenta de la ley Falcidia en virtud de la cantidad de bienes que el padre hubiere dejado.

§ 6.- Lo mismo se ha de decir, también si el padre hubiere instituido herederos a dos impúberos, y los hubiere substituido recíprocamente, y después por derecho de la substitución hubiere recaído en uno de ellos la herencia, y se hubiere de hacer la cuenta de la Falcidia.

§ 7.- Uno, que tenía dos hijos impúberos, instituyó heredero a uno, desheredó al otro, después substituyó el desheredado al instituido, y luego a Mevio al desheredado, e hizo legados a cargo de aquel, y el desheredado quedó heredero del hermano impúbero, y después falleció impúbero; yendo a él por disposición del padre los bienes paternos por causa de la herencia en virtud de la substitución, se puede decir que se han de pagar los legados dejados a cargo de él, habida la cuenta de la ley Falcidia respecto a los bienes que el padre hubiere dejado al tiempo de la muerte.

Y no es contrario a esto, que, habiéndole dado el padre un legado al desheredado, en nada mas estará obligado por legados el substituto, porque en este caso no va a poder de él una porción de la herencia paterna, sino un legado, Dirá alguno, ¿luego qué será, si el hijo desheredado hubiere quedado heredero de su hermano, no por virtud de la substitución, sino o por la ley, o por medio de otra

legata debere? Minime: nam quantum intersit, exheredatus filius ex substitutione fratri suo heres existat an alio modo, vel ex eo apparet, quod alias ab eo legare pater potuit, alias non potuit. Est igitur rationi congruens, ne plus iuris circa personam substituti testator habeat, quam habuerat in eo, cui eum substituebat.

§ 8.- Coheres pupillo datus si pro parte sua legata, habita legis Falcidiae ratione, praestiterit, deinde impubere mortuo ex substitutione heres exstiterit et semis pupilli legatis exhaustus esset, ex integro legis Falcidiae ratio ponenda erit, ut contributis legatis, quae ab ipso et quae a pupillo data fuerant, pars quarta bonorum apud eum remaneat. Licet enim pupillo heres existat, tamen circa legem Falcidiam perinde ratio habetur ac si patri heres exstisset. Nec aliter augebuntur legata, quae ab ipso ultra dodrantem data fuerant, quam augentur, cum ex parte heres institutus et coheredi suo substitutus deliberante coherede legata, habita ratione legis Falcidiae, solvit, deinde ex substitutione alteram quoque partem hereditatis adquirat.

88.- AFRICANUS; *libro V quaestionum*.- Qui quadringenta habebat, trecenta legavit: deinde fundum tibi dignum centum aureis sub hac condicione legavit, si legi Falcidiae in testamento suo locus non esset: quaeritur, quid iuris est. Dixi twn aporwn hanc quaestionem esse, qui tractatus apud dialecticos tou qeudomenou dicitur. Etenim quidquid constituerimus verum esse, falsum

through the intervention of some third party, and then should die before reaching the age of puberty. Could it be held, under such circumstances, that the substitute must pay the legacy with which he was charged? By no means. For it makes a difference whether the disinherited son becomes the heir of his brother by virtue of the substitution or in some other way, and it is clear that in one of these cases the father can charge the son with a legacy, but in the other he cannot; and hence it is agreeable to reason to hold that the testator has no more right with reference to the substitute than he would have had with reference to him for whom he was appointed.

§ 8.- The co-heir of a minor, after reserving the Falcidian portion, paid the legacies bequeathed by the testator in proportion to his share of the estate. Then the minor having died, the other became his heir by virtue of the substitution, and the half of the estate which belonged to the minor having been exhausted, the portion due under the Falcidian Law should be deducted from all the legacies, so that all of them with which he and the minor were charged having been subjected to contribution, the fourth part of the estate will remain in his possession; for although he is the heir of the minor, still the deduction under the Falcidian Law must be made, just as if he had been the heir of his father. The legacies with which the heir was charged, and which amounted to more than three-fourths of his share, will not be increased unless the heir who was appointed to a part of the estate and substituted for his co-heir, should pay the legacies, after having deducted the Falcidian portion, while his co-heir was deliberating; and then, after the latter had rejected the estate, the other, by virtue of the substitution, should also acquire the remaining part of the same.

88.- AFRICANUS; *Questions, Book V*.- Where a man, who had an estate of four hundred aurei, bequeathed three hundred of them, and then devised to you a tract of land worth a hundred aurei under the condition that the Falcidian Law should not apply to his will, the question arises, what is the rule? I replied that this is one of those perplexing questions which are discussed by dialecticians, and are designated by

persona, y así hubiere fallecido impúbero; también de este modo se habrá de estimar que el substituto debe los legados? De ninguna manera, porque cuánta sea la diferencia entre que el hijo desheredado quede heredero de su hermano en virtud de la substitución, o de otro modo, aparece de esto, de que en un caso pudo el padre legar a cargo de él, y en el otro no pudo. Es, pues, conforme a razón, que no tenga el testador respecto a la persona del sustituto más derecho que el que había tenido respecto a aquel a quien lo substituía.

§ 8.- Si el coheredero dado al pupilo hubiere pagado los legados con arreglo a su parte, habida la cuenta de la ley Falcidia, y después, fallecido el impúbero, hubiere quedado heredero por substitución, y la mitad de la herencia correspondiente al pupilo se hubiese agotado con legados, se habrá de formar de nuevo la cuenta de la ley Falcidia, para que, reunidos los legados, los que se habían dado a cargo de él, y los que al del pupilo, quede en poder de él la cuarta parte de los bienes; porque aunque quede heredero del pupilo, sin embargo, respecto a la ley Falcidia se hará la cuenta lo mismo que si hubiese quedado heredero del padre y no se aumentarán los legados, que por más de los tres cuartos se habían dado a cargo de el mismo, de otro modo, que como se aumentan cuando el heredero instituido en una parte, y substituido a su coheredero, paga, mientras delibera el coheredero, los legados, habida la cuenta de la ley Falcidia, y adquiere después por la substitución también la otra parte de la herencia.

88.- AFRICANO; *Cuestiones, libro V*.- Uno que tenía cuatrocientos, legó trescientos, y después te legó un fundo, que valía cien áureos, bajo esta condición, si en su testamento no hubiese lugar a la ley Falcidia; se pregunta, ¿qué derecho hay? Dije, que esta cuestión era de las perplejas, cuyo tratado se llama entre los dialécticos de cosa vana y cavilosa. Porque cualquier cosa que decidiéramos que era

repperietur. Namque si legatum tibi datum valere dicamus, legi Falcidia locus erit ideoque deficiente condicione non debetur. Rursus si, quia condicio deficiat, legatum valitum non sit, legi Falcidia locus non erit:

Porro si legi locus non sit, existente condicione legatum tibi debetur. Cum autem voluntatem testatoris eam fuisse appareat, ut propter tuum legatum ceterorum legata minui nollet, magis est, ut statuere debeamus tui legati condicionem defecisse.

§ 1.- Quid ergo dicemus, si ducenta legavit et tibi similiter sub eadem condicione ducenta legata esse proponantur? Nam aut exstittisse aut defecisse legati tui condicionem, ut aut totum aut nihil tibi debeatur, et iniquum et contra voluntatem testatoris existimabitur: rursus partem deberi rationi non congruit, quando necesse est totius legati condicionem vel exstittisse vel defecisse. Ergo per exceptionem doli mali tota ea res temperanda erit.

§ 2.- Quare cum quis tale quid consequi velit, sic consequetur: "Si quo amplius legavi vel legavero, quam per legem Falcidiam licebit, tum quantum ad supplendum quadrantem deduci oportet, ex eo legato quod Titio dedi heres meus damnas esto dare".

§ 3.- Qui ducenta in bonis relinquebat, legavit mihi centum praesenti die, tibi aequum centum sub condicione: post aliquantum temporis exstitit condicio, ita tamen, ut ex redditu eius summae, quae

them sophistical, or illusory; for, in a case of this kind, whatever we may decide to be true will be found to be false. For if we should say that the devise left to you is valid, there will be ground for the application of the Falcidian Law, and therefore the legacy will not be payable, as the condition has not been fulfilled. Again, if the legacy should not be considered valid, because the condition has not been complied with, there will be no ground for the application of the Falcidian Law.

If, however, the law is not applicable, and the condition should be complied with, you will be entitled to the devise. But as the intention of the testator appears to have been that the other legacies should not be diminished on account of yours, the better opinion is to decide that the condition upon which your legacy is dependent has not been fulfilled.

§ 1.- Therefore, what shall we say if the testator bequeathed two hundred aurei in other legacies, and left you two hundred under the same condition, for the condition upon which your legacy is dependent either was, or was not fulfilled; hence you will be entitled to all of it, or to none, and this will be considered unjust, and contrary to the intention of the testator. Again, it is not reasonable to hold that you are entitled to a part of the legacy, when it is necessary for the condition on which the entire legacy depends either must have been fulfilled, or must have failed. Therefore the whole matter should be disposed of by having recourse to an exception based on fraud.

§ 2.- For which reason, when a testator desires to obtain compliance with his wishes, he should provide as follows: "If I have bequeathed, or should bequeath anything more than is legal under the Falcidian Law, let my heir be charged to deduct as much as is necessary to make up his fourth out of the legacy which I have left to Titius."

§ 3.- Where a testator left an estate of two hundred aurei, and bequeathed to me a hundred payable immediately, and also a hundred to you payable conditionally, and the condition was complied with

verdadera, se hallará que es falsa; pues si dijéramos que era válido el legado que se te dió, habrá lugar a la ley Falcidia, y por lo tanto, faltando la condición, no se deberá; y a su vez, si porque falte la condición no hubiera de ser válido el legado, no habrá lugar a la ley Falcidia;

Pero si no hubiera lugar a la ley, cum-pliéndose la condición; se te deberá el legado. Mas apareciendo que la voluntad del testador fue esta, que no quería que por causa de tu legado se disminuyesen los legados de los demás, es mejor que debamos decidir que faltó la condición de tu legado.

§ 1.- Luego ¿qué diremos, si legó doscientos, y se expusiera que igualmente se te legaron doscientos bajo la misma condición? Porque o que se cumplió, o que faltó la condición de tu legado, de suerte que o se te deba todo, o nada, será estimado así injusto, como contrario a la voluntad del testador; a su vez, que se debe una parte, no es conforme a razón, pues es necesario o que se haya cumplido, o que haya faltado, la condición de todo el legado; luego todo esto se habrá de regular mediante la excepción de dolo malo.

§ 2.- Por lo cual, cuando alguno quiera conseguir alguna cosa así, la conseguirá de este modo: «si legué o hubiere legado alguna cosa más de lo que fuere lícito por la ley Falcidia, en este caso esté condenado mi heredero a dar, del legado que le dí a Ticio, cuanto para completar la cuarta debe deducirse».

§ 3.-Uno, que en sus bienes dejaba doscientos, me legó ciento de presente, y a ti igualmente ciento bajo condición; después de algún tiempo se cumplió la condición, pero de suerte, que de la renta de la suma,

tibi relicta est, non amplius quam viginti quinque reciperet. Legis Falcidiae ratio ita habenda erit heredi, ut viginti quinque conferre ei debeamus et amplius fructus quinquaginta medii temporis, qui verbi gratia efficiant quinque. Cum igitur triginta sint conferenda, quidam putant quina dena ab utroque nostrum conferenda esse, quod minime verum est: licet enim eandem quantitatem acceperimus, manifestum tamen est aliquanto uberius esse meum legatum. Quare statuendum erit tanto minus in tuo legato esse, quantum ex fructibus eius heres perceperit. Secundum quod in proposita specie computationem ita iniri oportet, ut ex septem partibus ego quattuor, tu tres conferamus, quoniam quidem quarta pars amplius in meo quam in tuo legato est.

89.- MARCIANUS; *libro VII, institutionum*.- Divi Severus et Antoninus rescripserunt pecuniam relictam ad alimenta puerorum Falcidiae subiectam esse et ut idoneis nominibus collocetur pecunia, ad curam suam revocaturum praesidem provinciae.

§ 1.- Divi Severus et Antoninus generaliter rescripserunt bononio maximo usuras praestaturum eum, qui frustrationis causa beneficium legis Falcidiae imploravit.

90.- FLORUS; *libro XI, institutionum*.- Si heres, cuius fidei commissum est, ut accepta certa pecunia hereditatem restituat, a voluntate eius qui testamentum fecit discedat et postea legis Falcidiae beneficio uti volet: etsi non detur ei, quo accepto hereditatem restituere rogatus est, tamen fideicommissum restituere cogi debet, quoniam quod ei pater familiae dari voluit legis Falcidiae commodum praestat.

91.- MARCIANUS; *libro XIII, institutionum*.- In quartam hereditatis, quam per legem Falcidiam heres

after some time, in such a way, however, that out of the income which was left to you the heir did not receive more than twenty-five aurei, he will be entitled to the benefit of the Falcidian Law, and we must pay him twenty-five, and, in addition to this, the interest on fifty during the meantime, which (for example) amounts to five aurei. Therefore, as thirty aurei must be paid, certain authorities hold that fifteen shall be due from each of us, which opinion is entirely incorrect; for although we have each received the same amount, it is still evident that my legacy is somewhat more valuable than yours. Hence, it should be decided that your legacy is diminished by the amount that the heir has received from the profits; and according to this, the following computation should be made, namely, what is due to the heir must be divided into seven parts of which I will be required to pay four, and you three, since my legacy is a fourth larger than yours.

89.- MARCIANUS; *Institutes, Book VII*.- The Divine Severus and Antoninus stated in a Rescript that money left for the support of children was subject to the operation of the Falcidian Law, and that it was the duty of the Governor of the Province to see that it was lent to persons who were solvent.

§ 1.- The Divine Severus and Antoninus stated in a general Rescript, addressed to Bononius Maximus, that interest should be paid by anyone who claimed the benefit of the Falcidian Law for the purpose of committing fraud.

90.- FLORENTINUS; *Institutes, Book XI*.- Where an heir, who was charged by a trust to transfer the estate to someone after the receipt of a certain sum of money, refuses to carry out the will of the testator, and afterwards desires to avail himself of the benefit of the Falcidian Law, even though the money may not have been paid to him who, on receipt of it, was asked to transfer the estate; still, he will be compelled to execute the trust, since what the testator wished to be given him will take the place of the Falcidian portion.

91.- MARCIANUS; *Institutes, Book XIII*.- An heir is entitled to have, as a fourth of the estate under the

que se te dejó, no percibiese más que veinticinco; al heredero se le habrá de hacer la cuenta de la ley Falcidia de modo, que le debamos aportar veinticinco, y además los frutos de cincuenta del tiempo intermedio, que, por ejemplo, importarán cinco. Debiéndose, pues, aportar treinta, opinan algunos, que se habrán de aportar quince por cada uno de nosotros; lo que de ninguna manera es verdad. Porque aunque hayamos recibido la misma cantidad, es, sin embargo, evidente que mi legado es algo más pingüe. Por lo cual se habrá de determinar, que en tu legado hay de menos tanto cuanto de sus frutos hubiere percibido el heredero. Según lo cual, en el caso propuesto debe hacerse la computación de modo que de siete partes yo aporte cuatro, y tú tres, porque ciertamente hay en el mío una cuarta parte más que en tu legado.

89.- MARCIANO; *Instituta, libro VII*.- Respondieron por rescripto los Divinos Severo y Antonino, que el dinero dejado para alimentos de niños esta sujeto a la Falcidia, y que el Presidente de la provincia debe tomar a su cuidado que el dinero se coloque en créditos seguros.

§ 1.- Los Divinos Severo y Antonino respondieron en general por rescripto a Bononio Máximo, que debe pagar intereses el que por causa de fraude imploró el beneficio de la ley Falcidia.

90.- FLORENTINO; *Instituta, libro XI*.- Si el heredero, a cuya fidelidad se encomendó que recibiendo cierta cantidad restituyese la herencia, se apartara de la voluntad del que hizo el testamento, y después quisiera usar del beneficio de la ley Falcidia, aunque no se le dé aquello con cuyo recibo se le rogó que restituyera la herencia, debe ser, sin embargo, obligado a restituir el fideicomiso, porque lo que el padre de familia quiso que se le diera, proporciona el provecho de la ley Falcidia.

91.- MARCIANO; *Instituta, Libro XIII*.- Para la cuarta de la herencia, que por la ley Falcidia debe

habere debet, imputantur res, quas iure hereditario capit, non quas iure legati vel fideicommissi vel implendae condicionis causa accipit: nam haec in quartam non imputantur.

Sed in fideicommissaria hereditate restituenda sive legatum vel fideicommissum datum sit heredi sive praecipere vel deducere vel retinere iussus est, in quartam id ei imputatur: pro ea vero parte, quam accepit a coherede extra quartam id est, quod a coherede accipitur.

Sed et si accepta pecunia hereditatem restituere rogatus sit, id quod accipit in quartam ei imputatur, ut divus Pius constituit. Si quid vero implendae condicionis causa heres accipiat a legatariis, in Falcidiae computationem non prodesse: et ideo si centum praedium legaverit defunctus, si quinquaginta heredi legatarius dederit, centum legatis computationem fieri et quinquaginta extra hereditatem haberi, ne in quartam ei imputentur.

92.- MACER; *libro II, de re militare*.- Si miles testamento facto partem dimidiam hereditatis suae tibi restitui iusserit, deinde post missionem factis codicillis alteram partem Titio restitui rogaverit: si quidem post annum missionis suae decesserit, et tibi et Titio heres partem quartam retinebit, quia eo tempore testator decessit, quo testamentum eius ad beneficium principale pertinere desierat: si vero intra annum missionis decesserit, solus Titius deductionem partis quartae patietur, quia eo tempore fideicommissum ei relictum est, quo testator iure militari testari non potuit.

Falcidian Law, all that he acquires in this capacity, but not any property which he can claim by hereditary right, or which he received as a legacy, or by virtue of a trust, or in order to comply with a condition; for none of these things are included in his fourth.

But where he is charged under the terms of a trust to transfer the entire estate, or where either a legacy is left him, or he becomes the beneficiary of a trust, or where he is directed to take certain property as a preferred legacy, or to deduct or retain anything from the estate, this will be included in his fourth. With reference, however, to the share which he receives from his co-heir, this will not be included.

Even though he may be requested to transfer the estate on receipt of a certain sum of money, what he receives shall be included in his fourth, as has been decided by the Divine Pius. And where anything is given to him by the beneficiary of the trust in compliance with a condition, it should be noted that this must also be included in his fourth. But if the heir should receive anything from the legatee for the purpose of fulfilling a condition, this does not come within the scope of the Falcidian Law; therefore, if the deceased devised a tract of land worth a hundred aurei, provided the devisee paid fifty to the heir, the legacies should be counted as a hundred, and the heir will be entitled to fifty, in addition to his share of the estate, and this will not be included in his fourth.

92.- MACER; *On Military Affairs, Book II*.- If a soldier, having made his will, directs half of his estate to be delivered to you, and then executes a codicil after he has been discharged, by which he requests the other half of his estate to be delivered to Titius, and dies a year after his discharge, the heir shall retain his fourth out of what was due to yourself and Titius; because the testator died at a time when his will could not receive the benefit of the Imperial privilege relating to military wills. If, however, he should die within a year after his discharge, Titius alone must suffer the deduction of the Falcidian fourth, because the trust was left to him at a time when the testator could not make a will under military law.

tener el heredero, se computarán las cosas que por derecho de herencia adquiere, no las que recibe por derecho de legado o de fideicomiso, o para que se cumpla una condición; porque estas no se computan para la cuarta.

Pero al restituir una herencia fideicomisaria, ya si al heredero se le hubiera dado un legado o un fideicomiso, ya si se le haya mandado tomar previamente, o deducir, o retener alguna cosa, se le computa para la cuarta; pero respecto a la parte, que recibió del coheredero, fuera de la cuarta, esto es, de lo que se recibe del coheredero.

Pero aunque se le haya rogado que restituya la herencia habiendo recibido una cantidad, se le computa para la cuarta lo que recibe, según determinó el Divino Pío. Pero se ha de saber, que también el fideicomiso que se da al heredero para que se cumpla una condición, ha de ser admitido de este mismo modo; y si el heredero recibiera de los legatarios alguna cosa para que se cumpla una condición, no aprovecha para la computación de la Falcidia; y por lo tanto, si el difunto hubiere legado un predio que valiese ciento, si el legatario le hubiere dado cincuenta al heredero, se hace la computación con los ciento legados, y se consideran los cincuenta fuera de la herencia, para que no se le computen en la cuarta.

92.- MACER; *De los asuntos militares, libro II*.- Si en el testamento hecho hubiese mandado un militar que se le restituya la mitad de su herencia, y luego habiendo hecho codicilos después de su licenciamiento hubiere rogado que la otra parte se le restituya a Ticio, si verdaderamente hubiere fallecido después de un año de su licenciamiento, el heredero os retendrá a ti y a Ticio la cuarta parte, porque el testador falleció en tiempo en que su testamento había dejado de estar comprendido en el beneficio del Príncipe; pero si hubiere fallecido dentro del año de su licenciamiento, sólo Ticio sufrirá la deducción de la cuarta parte, porque el fideicomiso se le dejó en tiempo en que el testador no pudo testar por derecho militar.

93.- PAPINIANUS; *libro XX, quaestionum*.- Acceptis a Maevio centum hereditatem Maevio restituere pecuniamque post mortem suam Titio dare rogatus est. Quamquam haec centum quartam bonorum efficiant, tamen propter fideicommissum sequens quartae retentioni locus erit: tunc enim ex constitutione divi Hadriani Falcidiae satisfacit ea quantitas, cum apud heredem remanet. Sed Falcidiam patietur solus cui hereditas relicta est: nam in centum, quae mortis causa capiuntur, admitti Falcidia non potest. Plane si quis ita scripsit: "Acceptis centum peto restituas hereditatem" neque personam dantis demonstraverit, quasi retentam et praeceptam pecuniam, si quartae sufficiat, inducere Trebellianum.

94.- SCAEVOLA; *libro XXI, digestorum*.- Filio et filia scriptis heredibus singulis certa praelegavit, sed longe minus filiae, cui etiam domum obligatam praelegavit cum instrumentis et quicquid ibi fuerit et adiecit haec verba: "Sed ea condicione lego, ut quidquid aeris alieni in ea domo erit, Titius libertus filii mei exsolvat et sit eis utrisque domus communis".

Quaesitum est, si filia legis Falcidiae beneficio uti volet ad quartam retinendam, an ex hereditate, quae ei relicta est, deducto aere alieno eius quod superfuerit quartam consequi debeat. Respondit iure quidem id postulaturam, verum non alias ea, quae ei data sunt, accepturam, si modo ea quartam suppleant, quam voluntati defuncti solvendum praestando pareret.

93.- PAPINIANUS; *Questions, Book XX*.- An heir was charged to transfer an estate to Maevius on condition of his receiving a hundred aurei from him, and at his death, to leave the money to Titius. Although the said hundred aurei were sufficient to compose a fourth of the estate, still, because of the subsequent trust, there will be ground for the retention of a fourth of the first bequest; for, according to a Constitution of the Divine Hadrian, the amount only comes within the terms of the Falcidian Law where it remains in the hands of the heir; but he alone is subject to the operation of the Falcidian Law to whom the estate was bequeathed, hence it does not apply to the hundred aurei which were donated mortis causa. It is clear that, if anyone should make the following testamentary provision, "I ask you to transfer my estate on the receipt of a hundred aurei," and the testator should not designate any person to pay the money, it can be retained and deducted by the heir under the terms of the Trebellian Decree of the Senate, if it is sufficient to make up his fourth.

94.- SCAEVOLA, *Digest, Book XXI*.- A testator, after having appointed his son and daughter his heirs, bequeathed certain property to each of them as preferred legacies, but he left much less to his daughter than to his son. He devised to the former, in addition, a house which was encumbered, including everything belonging to it and all its utensils, and added the following clause, "I make this devise on condition that Titius, the freedman of my son, shall pay any debts due on said house, and if he does, the house shall belong to both of them in common."

If the daughter should desire to avail herself of the benefit of the Falcidian Law for the purpose of reserving her fourth, the question arose whether the debts should be deducted from the share of the estate which was left to her, and she should obtain her fourth out of what was left. The answer was that she could claim it by law, but that she could not accept what was left to her, if it was sufficient to make up her fourth, without complying with the wishes of the deceased, and paying what she had been charged with.

93.- PAPINIANO; *Cuestiones, libro XX*.- A uno se le rogó que recibiendo de Mevio ciento restituyese a Mevio la herencia, y que después de su muerte diese el dinero a Ticio; aunque estos ciento constituyan la cuarta de los bienes, habrá, sin embargo, lugar a la restitución de la cuarta a causa del segundo fideicomiso; porque, según la constitución del Divino Adriano, esta cantidad suple a la Falcidia siempre y cuando permanece en poder del heredero. Pero sólo soportará la Falcidia aquel a quien se le dejó la herencia; porque respecto a los ciento, que se adquieren por causa de muerte, no se puede admitir la Falcidia. A la verdad, si uno escribió así: «te pido que recibiendo ciento restituyas la herencia», y no hubiere designado la persona del que la debía dar, esta cantidad, como si hubiese sido retenida y tomada previamente, si bastara para la cuarta, da lugar al Senadoconsulto Trebeliano.

94.- SCÉVOLA; *Digesto, libro XXI*.- Uno, habiendo instituido herederos a su hijo y a su hija, prelegó ciertas cosas a cada uno, pero mucho menos a la hija, a la cual también le prelegó con los instrumentos una casa obligada, y todo lo que en ella hubiere, y añadió estas palabras: «pero la lego con esta condición, que Ticio, liberto de mi hijo, pague cualquier deuda que hubiere sobre esta casa, y sea la casa común para ellos dos»;

Se preguntó, si, queriendo usar la hija del beneficio de la ley Falcidia para retener la cuarta, deberá conseguir la cuarta de lo que hubiere quedado, deducidas las deudas de la herencia que se le dejó. Respondió, que ella ciertamente lo pedirá con derecho, pero que no recibirá lo que se le dio, si esto supliera la cuarta, de otra manera, sino si obedeciese a la voluntad del difunto dando lo que se debe pagar.

95.- SCAEVOLA; *libro XXI, digestorum.*- Maritus uxoris res extra dotem constitutas administravit eaque decedens ante rationem sibi redditam administrationis ex asse eundem maritum heredem reliquit eiusque fidei commisit, ut decem uncias filio communi cum moreretur restitueret, duas autem uncias nepoti. Quaesitum est, an id quoque, quod ex administratione rerum apud maritum resedissee constiterit, cum ceteris bonis pro rata decem unciarum filio restitui debeat. Respondit id, quod debuisset hereditati, in rationem venire debere.

§ 1.- Filiae, quam mater rogaverat, si impubes decessisset, restituere hereditatem Titio, patruus legitimus heres exstitit: in ratione legis Falcidiae ponenda desiderat deduci sortes, ex quarum usuris alimenta impubes defuncta ex persona testatricis suae pluribus debita praestitit: quaesitum est, an, si eas deduxerit, cavere debeat defunctorum alimentarium portiones pro modo sortium se restitutum. Respondit debere cavere.

§ 2.- Post aditam hereditatem triennio exacto legatariis heres legem Falcidiam opponit idcirco, quod administravit tutelas testator, quarum ratio nondum reddita sit et quod neget tantum redigi ex nominibus posse, quantum in cautione deductum est. Quaesitum est, an rationes defuncti et omnium instrumentorum hereditationum et pupillarum rationum legatariis desiderantibus heres describendi potestatem facere debeat, ne in potestate eius sit proferre quod velit et per hoc in fraudem legatarii inducantur. Respondit ad iudicis officium pertinere explorare ea, per quae probetur, quanti sit in bonis.

95.- THE SAME; *Digest, Book XXI.*- A husband had charge of the property of his wife, which did not include her dowry, and she, having died before her husband had rendered her an account of his administration, left him heir to her entire estate, and charged him, when he died, to deliver ten shares of the same to their common son, and to deliver two shares to her grandson. The question arose whether what was found to have remained in the hands of her husband from his administration of the property should be transferred to the son, along with the other assets, in proportion to ten shares of the estate. The answer was that what the husband owed the estate would also be included in the distribution.

§ 1.- The paternal uncle of a girl, whom her mother requested to transfer her estate to Titius, if she should die before reaching the age of puberty, became her legal heir. In estimating the amount due under the Falcidian Law, the heir desired to deduct from the estate the principal, out of the interest of which the deceased minor had paid several persons money that was due for support furnished on account of the testatrix. If he should make this deduction, the question arose whether he ought to give security to pay the principal of said sums of money, the amounts of the same to be determined by the time of death of each of the parties entitled to support. The answer was that he should give such security.

§ 2.- Three years after having entered upon the estate an heir wished to enforce the Falcidian Law against the legatees, for the reason that the testator had administered certain guardianships of which no account had yet been rendered, and because he denied that as much could be recovered from the claims due to the minor as had been deducted on account of the security given by the testator. The question arose whether on the demand of the legatees copies should be taken of the accounts of the deceased, and of all the documents belonging to the estate, as well as a statement of the sums due to the wards, in order to prevent the heir from producing what papers he might select, and in this way defraud the legatees. The answer was that it was the duty of the court to examine any documents by which the

95.- EL MISMO; *Digesto, libro XXI.*- Un marido administró los bienes extradotales de su mujer, y ésta al fallecer, antes de habérsele dado cuenta de la administración, dejó a su mismo marido heredero de la totalidad, y encomendó a su fidelidad, que cuando él muriese restituyera diez dozavos a un hijo común de los dos, y dos dozavos a un nieto; se preguntó, si se le deberá restituir al hijo con los demás bienes a prorrata de los diez dozavos también lo que constare que quedó en poder del marido por virtud de la administración de los bienes. Respondió, que lo que hubiese debido a la herencia debe ser comprendido en la cuenta.

§ 1.- El tío paterno quedó heredero legítimo de una hija a quien su madre había rogado que, si falleciese impúbera, restituyera a Ticio la herencia; desea que en la cuenta de la ley Falcidia que se ha de formar se deduzcan los capitales, con cuyos intereses la impúbera difunta prestó alimentos debidos a muchos por razón de la persona de su testadora; se preguntó, si, habiéndolos deducido, deberá dar caución de que él restituirá a proporción de los capitales las porciones de los alimentistas fallecidos. Respondió, que debía dar caución.

§ 2.- Transcurridos tres años después de adida la herencia el heredero les opone a los legatarios la ley Falcidia por esta razón, porque el testador administró tutelas, cuyas cuentas no habían sido dadas todavía, y porque decía que no se podía recobrar de los créditos tanto cuánto se dedujo en la caución; se preguntó, si deberá el heredero dar, a los legatarios que la desean, facultad para copiar las cuentas del difunto y todos los instrumentos de la herencia, y las cuentas de los pupilos, para que no esté en su facultad producir lo que quiera, y de este modo sean inducidos a error los legatarios. Respondió, que al ministerio del juez correspondía explorar aquello con que se pruebe cuanto haya en los bienes.

96.- SCAEVOLA; *libro singulari quaestionum publice tractarum*.- Miles si, dum paganus erat, fecerit testamentum, militiae tempore codicillos, lex Falcidia in codicillis locum non habet, in testamento locum habebit.

amount of the estate might be established.

96.- THE SAME; *Questions, Publicly Discussed*.- If a civilian executed a will before he becomes a soldier, and then executes a codicil during his time of military service, the Falcidian Law does not apply to the codicil, but it does apply to the will.

96.- EL MISMO; *Cuestiones tratadas en público, libro único*.- Si mientras era paisano un militar hubiere hecho testamento, y codicilos durante el tiempo de la milicia, la ley Falcidia no tiene lugar en los codicilos, y la tendrá en el testamento.

TIT. III

SI CUI PLUS, QUAM PER LEGEM
FALCIDIAM LICUERIT LEGATUM ESSE
DICETUR

1.- ULPIANUS; *libro LXXIX, ad edictum*.- Si cui plus quam licuerit legetur et dubitari iuste possit, utrum lex Falcidia locum habitura est nec ne, subvenit praetor heredi, ut ei legatarius satisfaciat, ut, si apparuerit eum amplius legatorum nomine cepisse quam e lege Falcidia capere licebit, quanti ea res erit, tantam pecuniam det dolusque malus ab eo afuturus sit.

§ 1.- Neque interest, utrum in primis tabulis hoc fiat an in pupillaribus an in utrisque: etenim legem Falcidiam semel esse admittendam, etiamsi duplex sit testamentum, iam convenit, contributis legatis tam his, quae ab ipso pupillo quam his, quae a substituto impuberi relicta sunt.

§ 2.- Si non fuisset interposita stipulatio ex persona pupilli, tutelae actio heredi pupilli adversus tutorem competit. Sed ut Pomponius ait, et ipsi pupillo et heredi eius poterit committi stipulatio, ipsi quo casu vivo eo Falcidia incipit locum habere. De tutelae quoque actione idem scribit.

§ 3.- Marcellus ait: qui quadringenta in bonis

TITLE III

WHERE MORE IS SAID TO HAVE BEEN
BEQUEATHED TO ANYONE THAN
IS PERMITTED BY THE FALCIDIAN LAW

1.- ULPIANUS; *On the Edict, Book LXXIX*.- Where more property is bequeathed to anyone than is permitted by law, and there is good reason to doubt whether the Falcidian Law is applicable or not, the Praetor will come to the relief of the heir, and compel the legatee to furnish him with security that, if it should become apparent that he has received a larger legacy than he is entitled to under the Falcidian Law, he will refund to him an amount equal to the excess, and that no attempt will be made to defraud him.

§ 1.- It makes no difference whether this occurs in the first will, in the pupillary substitution, or in both, for it has already been decided that the Falcidian Law applies but once, even where there are two wills, and that all the legacies will be subject to contribution, not only those with which the minor himself is charged, but also those which his substitute is obliged to pay.

§ 2.- Where no stipulation has been entered into with reference to the ward, the heir will be entitled to an action on guardianship against the guardian of the former. But, as Pomponius says, the stipulation can take effect with reference to both the ward himself and his heir, in which case the Falcidian Law will begin to become operative during his lifetime. He also lays down the same rule with reference to the action on guardianship.

§ 3.- Marcellus says that a man whose estate

TÍTULO III

DE SI SE DIJERE QUE A ALGUNO SE LE
LEGÓ MÁS DE LO QUE POR LA LEY
FALCIDIA HUBIERE SIDO LÍCITO

1.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- Si a alguno se le legara mas de lo que fuere lícito, y con justicia se pudiera dudar si ha de tener, o no, aplicación la ley Falcidia, el Pretor auxilia al heredero, para que el legatario le dé fianza, de que, si apareciere que él recibió a título de legados más de lo que por la ley Falcidia fuere lícito adquirir, dará tanto dinero cuanto valiere aquella cosa, y de que estará lejos de él el dolo malo.

§ 1.- Y no importa que esto se haga en el primer testamento, o en el del pupilo, o en ambos; porque ya se convino que la ley Falcidia ha de ser aplicada una sola vez, aunque el testamento sea doble, reuniéndose los legados, tanto los que se dejaron a cargo del mismo pupilo, como los que a cargo del substituto impúbbero.

§ 2.- Si no se hubiese interpuesto estipulación por virtud de la persona del pupilo, le compete al heredero del pupilo la acción de tutela contra el tutor. Pero, como dice Pomponio, la estipulación podrá tener efecto tanto para el mismo pupilo, como para su heredero, y en el caso de que para él, comienza a tener lugar la Falcidia viviendo él. Lo mismo escribe también respecto a la acción de tutela.

§ 3.- Dice Marcelo: uno que tenía cuatrocientos en

habebat, inpuberem filium heredem instituit eique substituit Titium et Seium: nihil a pupillo testator legavit, sed a Titio trecenta: utrum ducenta, inquit, praestabuntur an centum quinquaginta? Nam trecenta nullo modo eum praestare. Mihi videtur verius non amplius eum parte sua erogare compelli, certe nec minus: secundum quod eveniret, ut non soli committatur stipulatio, sed omnibus heredibus interponenda est, sed causa cognita.

§ 4.- Falcidiam locum habere et legatorum modus facit et aeris alieni onus. Et si quidem evidens aes alienum est vel certum, facilis est computatio: si autem adhuc incertum est, quia forte vel condicio eius pendet vel creditor litem contestatus est et necdum lis finita est, dubitabitur, quantum legatariis debeatur propter incertum.

§ 5.- Hodie tamen subsimile aliquid fit in fideicommissis.

§ 6.- Cum dicitur lex Falcidia locum habere, arbiter dari solet ad ineundam quantitatem bonorum, tametsi unus aliquid modicum fideicommissum persequatur: quae computatio praeiudicare non debet ceteris, qui ad arbitrum missi non sunt. Solet tamen ab herede etiam ceteris denuntiari fideicommissariis, ut veniant ad arbitrum ibique causam suam agant, plerumque et creditoribus, ut de aere alieno probent. Habet tamen rationem in legatariis, item in fideicommissariis, ut, si offerat integrum quod relictum est heres desiderans cavere sibi hac stipulatione, audiatur.

amounted to four hundred aurei appointed as his heir his son, who had not yet reached the age of puberty, substituted Titius and Seius for him, and did not charge the minor with any legacy, but charged Titius with the payment of three hundred aurei. Marcellus asks whether two hundred or a hundred and fifty aurei should be paid by the substitute, as, under no circumstances, he should be compelled to pay three hundred. It seems to me to be the better opinion that he ought not to be obliged to pay the legatees more than his share, and certainly he ought not to pay them less. It follows, according to this, that the stipulation does not take effect, so far as he alone is concerned, but it should be carried out for the benefit of all the heirs, since the Falcidian Law becomes applicable after proper cause has been shown, and is determined by the amount of the legacies and the debts of the estate.

§ 4.- If the indebtedness of the estate is evident, or certain, the calculation is easily made. If, however, the indebtedness is still uncertain, either because it is dependent upon some condition, or the creditor has brought an action to collect his claim, and the litigation has not yet been terminated, it will be doubtful how much is payable to the legatee on account of the uncertainty.

§ 5.- At the present day something very similar to this occurs with reference to trusts.

§ 6.- When it is said that the Falcidian Law is applicable, an arbiter is usually appointed to appraise the amount of the estate, even though there may be only one person demanding the execution of a very moderate trust. An appraisal of this kind should not prejudice others who have not been summoned before the arbiter. Still, it is usual for the other beneficiaries of the trust to be notified by the heir to appear before the arbiter and state their cases there. The creditors, frequently, are also notified to prove their claims before the arbiter. It is but reasonable that the heir should be heard against the claims of the legatees and beneficiaries of the trust, if he should offer to pay all that is left, and desires to protect himself by a stipulation of this kind.

sus bienes, instituyó heredero a su hijo impúbere, y le dió como substitutos a Ticio y a Seyo; si el testador no legó nada a cargo del pupilo, sino trescientos a cargo de Ticio, ¿se pagarán acaso, pregunta, doscientos, o ciento cincuenta? Porque él de ningún modo debe pagar los trescientos. A mí me parece mas verdadero, que él no es compelido a pagar más del importe de su parte, ni ciertamente menos; según lo que sucedería, que la estipulación no tendría efecto para él solo; sino que ha de ser interpuesta para todos los herederos. Pero así la cuantía de los legados, como el gravamen de las deudas, hacen que con conocimiento de causa tenga lugar la Falcidia.

§ 4.- Y si verdaderamente es evidente, o cierta, la deuda, es fácil la computación, pero si todavía es incierta, acaso porque o su condición esta pendiente, o el acreedor ha contestado la demanda, y no ha concluido aún el litigio, se dudará por causa de la incertidumbre cuanto se les debe a los legatarios.

§ 5.- Pero hoy se hace respecto a los fideicomisos algo un tanto semejante.

§ 6.- Cuando se dice que tiene lugar la ley Falcidia, se suele nombrar árbitro para que se haga la computación de los bienes, aunque sólo uno reclame un módico fideicomiso; cuya computación no debe perjudicar a los demás, que no fueron remitidos al árbitro. Mas por el heredero se les suele avisar también a los demás fideicomisarios, para que comparezcan ante el árbitro, y allí ejerciten su derecho; y las más de las veces también a los acreedores, para que prueben la deuda; pero respecto a los legatarios, y también a los fideicomisarios, tiene razón para que, si el heredero ofreciera íntegro lo que se dejó, se le oiga al desear que se le dé caución con esta estipulación.

§ 7.- Si legata quaedam praesenti die relicta sint, quaedam sub condicione, interponenda erit ista stipulatio propter legata condicionalia, dummodo ea legata, quae praesenti sint, integra solvantur. Iulianus denique scribit, si pure et sub condicione legata fuerint ne existente condicione lex Falcidia locum habeat, non aliter legatorum, quae pure data sunt, actionem dari debere, quam si cautum fuerit heredi "quanto amplius, quam per legem Falcidiam licuerit, ceperit".

§ 8.- Idem Iulianus scribit eum, cui quadrans sub condicione et dodrans pure legatus est, cavere debere "quanto amplius, quam per legem Falcidiam liceat, ceperit, reddi".

§ 9.- Haec stipulatio ideo locum habet, quia, etsi repeti potest id quod solutum est, tamen fieri potest, ut non sit solvendo is cui solutum est ac per hoc pereat quod datum est.

§ 10.- In mortis causa quoque donationibus potest dici hanc stipulationem esse interponendam.

§ 11.- Haec verba stipulationis "quod amplius legatorum nomine ceperis, quam e lege Falcidia capere licebit" non tantum eum comprehendunt, qui amplius accepit, quam ei Falcidia permisit, ut reddat partem, habeat partem, verum etiam eum qui totum debet restituere. Etenim sciendum est legem Falcidiam interdum partem eius quod datum est, interdum totum revocare. Cum enim habita ratione aeris alieni Falcidia ineatur, plerumque evenit, ut emergente debito vel condicione aeris alieni existente totum quod legatum est exhauriatur. Sed et libertatum condicio interdum existens efficit legatum omnino non deberi, quippe cum habita ratione libertatum et deductis pretiis eorum tunc demum legatorum ineatur ratio.

§ 7.- Where certain legacies are bequeathed that are payable immediately, and others that are payable under a condition, this stipulation should be entered into with reference to the conditional legacies, provided those which are immediately due are fully paid. Finally, Julianus says that where legacies are bequeathed absolutely and conditionally, in order to prevent the Falcidian Law from taking effect if the condition is complied with, an action will not be granted for the collection of the legacies which have been absolutely bequeathed, unless security is given to the heir to refund anything which has been received in excess of what is permitted by the Falcidian Law.

§ 8.- Julianus also says that where a fourth of an estate is left to a person under a condition, and three-fourths of it is bequeathed absolutely, security must be given to refund all that has been received above the amount authorized by the Falcidian Law.

§ 9.- Hence this stipulation also can be exacted, because, although the heir can recover any excess which he has paid, still, the party to whom payment was made may not prove to be solvent, and for this reason what has been paid will be lost.

§ 10.- It can be said that this stipulation should also be entered into with reference to donations mortis causa.

§ 11.- These words of the stipulation, "What you may have received as legacies in excess of what is authorized by the Falcidian Law," not only refer to one who has received more than is permitted by the Falcidian Law, and who must refund a part, and can retain a part of the same, but they also have reference to a person who is obliged to refund his entire legacy, for it should be understood that sometimes the Falcidian Law revokes a portion of the legacy which has been paid, and sometimes revokes all of it. For, as the calculation of the Falcidian portion is made after an account of the indebtedness has been taken, it frequently happens that other indebtedness is discovered, or a condition is fulfilled upon which the payment of a debt depended, and the entire amount of

§ 7.- Si se dejaron algunos legados de presente, y otros bajo condición, se deberá interponer esta estipulación por causa de los legados condicionales, con tal que se paguen íntegros los legados que sean de presente. Finalmente escribe Juliano, que si hubiere legados puros y condicionales, para que cumpliéndose la condición no tenga lugar la ley Falcidia, no se debe dar la acción de los legados, que fueron dados puramente, de otro modo, sino si se le hubiere dado caución al heredero de que le devolverá cuanto hubiere percibido más de lo que por la ley Falcidia hubiere sido lícito.

§ 8.- Escribe el mismo Juliano, que aquel a quien se le legó una cuarta parte bajo condición, y tres cuartos puramente, debe dar caución de que se devolverá cuanto hubiere percibido más de lo que por la ley Falcidia sea lícito.

§ 9.- Esta estipulación tiene lugar por esto, porque aunque se puede repetir lo que se pagó, sin embargo, puede suceder que no sea solvente aquel a quien se le pagó, y que por esto se pierda lo que se dió.

§ 10.- Se puede decir que también en las donaciones por causa de muerte se ha de interponer esta estipulación.

§ 11.- Estas palabras de la estipulación: «lo que a título de legados hubieres percibido más de lo que por la ley Falcidia fuere lícito adquirir», comprenden no solamente al que recibió más de lo que le permitió la Falcidia para que devuelva parte y retenga otra parte, sino también al que lo debiera restituir todo. Porque se ha de saber, que la ley Falcidia a veces revoca parte de lo que se dió, y a veces la totalidad; porque cuando formada la cuenta de las deudas se calcula la Falcidia, sucede muchas veces que surgiendo una deuda, o cumpliéndose la condición de una deuda, se agota la totalidad de lo que se legó; pero también a veces cumpliéndose la condición de las libertades hará que no se deba en absoluto el legado, porque solamente se forma la cuenta de los

the legacy is exhausted; sometimes, however, a condition is fulfilled upon which the freedom of slaves depends, which renders a legacy not due under any circumstances, since the calculation of the amount of the legacies is not made until that of the slave has been completed, and their value deducted from the assets of the estate.

legados cuando se ha hecho la cuenta de las libertades y se ha deducido el precio de los esclavos.

§ 12.- In quibusdam autem testamentis Falcidia quidem locum non habet, verumtamen ita observatur, ut, licet quadrantem heres non retineat, tamen hactenus legata debeantur, quatenus patrimonii vires sufficiunt, utique deducto aere alieno, item deductis pretiis eorum, qui libertatem in testamento vel directam vel fideicommissariam acceperunt.

§ 12.- Moreover, the Falcidian Law does not apply to certain wills; still, with reference to them, the rule is observed that although the heir may not be entitled to reserve his fourth, yet the legacies would only be payable in case the assets of the estate should be sufficient, of course, after deducting the indebtedness, as well as the value of the slaves who have received their freedom by the will either directly, or under the terms of a trust.

§ 12.- Mas en algunos testamentos no tiene lugar ciertamente la Falcidia, pero se observa que aun cuando el heredero no retenga la cuarta parte, se deben no obstante los legados hasta donde son suficientes los recursos del patrimonio, a la verdad, deducidas las deudas, y deducido también el precio de los que en el testamento recibieron la libertad o directamente o por fideicomiso.

§ 13.- Sed et legatario cavendum est, a quo fideicommissum relinquitur.

§ 13.- Security should also be given by the beneficiary of a trust to the legatee who is charged with the execution of the same.

§ 13.- Pero también se le ha de dar caución al legatario a cuyo cargo se deja un fideicomiso.

§ 14.- Interdum non legis Falcidia, sed etiam alterius legis in hac stipulatione ratio facienda est, ut puta si patronus ex asse heres institutus sit et pure quincunx legatus sit et sub condicione aliquid supra debitam patrono partem: nam in hunc casum ratio facienda est illius legis, quae patronos vocat, non legis Falcidia.

§ 14.- Sometimes, the agreement set forth in this stipulation has reference not to the Falcidian, but to some other law; as, for instance, where a patron is appointed heir to an entire estate, and is charged absolutely with a legacy of five-twelfths of the same, and is afterwards charged conditionally with another bequest in excess of the amount to which he is entitled as patron; for in this instance recourse must be had to that law which provides for patrons, and not to the Falcidian Law.

§ 14.- A veces en esta estipulación se ha de hacer la cuenta no de la ley Falcidia, sino de otra ley, por ejemplo, si el patrono hubiera sido instituido heredero universal, y se hubieran legado puramente cinco dozavos, y bajo condición alguna cosa más de la parte debida al patrono; porque en este caso se ha de hacer la cuenta de la ley que llama a los patronos, no la de la ley Falcidia.

§ 15.- Si res, quae legata sit, apud legatarium interierit, probandum est exceptione succurri ei qui promisit,

§ 15.- Where property which has been bequeathed is lost while in the hands of the legatee, the better opinion is that relief should be granted, by means of an exception, to the party who made the promise.

§ 15.- Si la cosa que hubiera sido legada hubiere perecido en poder del legatario, se ha de aprobar que se auxilie con la excepción al que prometió;

2.- PAULUS; *libro LXXV, ad edictum*.- Etiam si quanti ea res sit promisit,

2.- PAULUS; *On the Edict, Book LXXV*.- Even if he consented to pay the value of the property.

2.- PAULO; *Comentarios al Edicto, libro LXXV*.- aunque hubiera prometido lo que valga la cosa,

3.- ULPIANUS; *libro LXXIX, ad edictum*.- Nisi si dolo ipsius aliquid factum sit: tunc enim etiam ex doli clausula, quae in ista stipulatione continetur, tenebitur et replicatione repelli poterit.

3.- ULPIANUS; *On the Edict, Book LXXIX*.- Unless some fraudulent act was committed by the legatee himself, for then he will also be liable under the clause relating to bad faith, which is included in this stipulation, and can be opposed by a reply.

3.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- a no ser que con dolo del mismo se haya hecho alguna cosa; porque entonces estará obligado también por la cláusula de dolo, que se contiene en esta estipulación, y podrá ser repelido con la réplica.

§ 1.- Haec cautio, quae propter legem Falcidiam interponitur, fideiussorum habet praestationem.

§ 2.- Si in plures dies pecunia legata est, cum certum sit legem Falcidiam locum habere, non stipulationi, sed computationi locum esse Pedius ait, ut aestimetur, quanti sit quod in diem legatum est et tantum credatur esse legatum, quantum efficit aestimatio, ut pro modo eius ex omnibus legatis statim legis Falcidiae ratio habeatur.

§ 3.- Quotiens futurum est, ut palam sit et ante diem venientem iam Falcidiam locum habere, totiens computatio eius fit. Nam si condicio in mora est, exspectabimus condicionem, quoad exsistat: si autem dies superest, iam hic intercapedinis temporis habita ratione atque aestimatione sic de Falcidia disputabimus et committi stipulationem dicemus.

§ 4.- Quamvis autem omnes legatarii et fideicommissarii necesse habeant hac stipulatione cavere, tamen quibusdam remitti divi fratres rescripserunt, ut puta his, quibus minuta alimenta sunt relictas. Pompeiae enim Faustinae rescripserunt sic: "Non eandem causam esse decem aureorum, quos annuos tibi testamento Pompeiae Crispianae patronae tuae relictos proponis, atque fuit alimentorum et vestiarum libertis relictorum, quibus propterea cautionis onus remittendum existimavimus".

§ 5.- Item sciendum est fiscum hanc cautionem non pati, sed perinde conveniri posse, ac si cavisset. Ceteros autem, cuiuscumque dignitatis sint, licet iam legata perceperint, compelli debere ad cavendum

§ 1.- This bond, which is executed on account of the Falcidian Law, has reference to the furnishing of sureties.

§ 2.- Where legacies are bequeathed which are payable at different times, as it is certain that the Falcidian Law will be applicable, Pedius says that there is no ground for a stipulation, but there is one for a calculation, and that an estimate should be made of the sum payable at different times, and in this way the total amount of the legacies will be established. The result of the estimate is that the amount due under the Falcidian Law will be fixed in proportion to what is to be deducted from all the legacies.

§ 3.- Whenever it is clear that a legacy will be due and payable even before the time the Falcidian Law will begin to apply, the calculation of the legacy must be made. If, however, fulfillment of the condition upon which it depends is delayed, we must wait until it is complied with. But where the time for its fulfillment has not yet arrived, in this instance, an account should be taken of the profits received during the intermediate time, and an estimate made, so that we can determine the amount under the Falcidian Law, and can say that the stipulation has become operative.

§ 4.- Although all legatees and beneficiaries of a trust may by means of this stipulation be obliged to give security, still, the Divine Brothers stated in a Rescript that some of them are excused from doing so, as, for instance, those to whom small allowances for support have been bequeathed. For they stated in a Rescript, addressed to Pompeius Faustina: "The bequest of the ten aurei payable annually under the will of Pompeia Crispiana, your patroness, which you allege have been left to you, is different from that by which food and clothing were left to her other freedwomen, for which reason we think that a bond should not be required."

§ 5.- Moreover, it should be noted that the Treasury ought not to be required to furnish security, but an action can be brought against it, just as if it had done so. Still, the Divine Pius stated in a Rescript that

§ 1.- Esta caución, que se interpone por causa de la ley Falcidia, comprende la dación de fiadores.

§ 2.- Si se legó una cantidad para muchos términos, siendo cierto que tiene lugar la ley Falcidia, dice Pedio que no ha lugar a la estipulación sino a la computación, para que se estime cuánto importa lo que se legó a término, y se crea que tanto fue lo que legó; y la estimación hace que con arreglo a su cuantía se haga desde luego la cuenta de la ley Falcidia sobre todos los legados.

§ 3.- Siempre que ha de suceder que sea evidente que aun antes de llegar el vencimiento tiene lugar la Falcidia, se hace su computación; porque si la condición está pendiente, esperaremos hasta que se cumpla la condición; pero si resta plazo, ya en este caso, hecha la cuenta y la estimación del intervalo de tiempo, calcularemos de este modo respecto a la Falcidia, y diremos que tiene efecto la estipulación.

§ 4.- Mas aunque todos los legatarios y fideicomisarios tengan necesidad de dar caución con esta estipulación, sin embargo, respondieron por Rescripto los Divinos hermanos que se les dispensa a algunos, por ejemplo, a los que se les dejaron unos cortos alimentos. Porque respondieron así por rescripto a Pompeya Faustina: no es la misma la causa de los diez áureos que expones se te dejaron para cada año en el testamento de Pompeya Crispiniana, tu patrona, que fue la de los alimentos y del vestido dejados a los libertos, a quienes por lo tanto hemos juzgado que se les debía dispensar la carga de la caución.

§ 5.- También se ha de saber, que el fisco no está obligado a dar esta caución, pero que puede ser demandado lo mismo que si lo hubiese dado; pero el Divino Pío respondió por rescripto, que los demás,

divus Pius rescripsit: ex quo rescripto etiam illud accipimus, quod etiam post soluta legata voluit stipulationem interponi.

§ 6.- Si legatarius heredi, qui controversiam hereditatis patitur iam vel sperat, de restituendo legato sibi praestito caverit et evicta hereditas sit, sed neglegentia vel dolo eius qui legatum praestitit, dicemus non committi stipulationem propter viri boni arbitrium, quod inest huic stipulationi.

§ 7.- Item si ipse, qui praestitit legatum, ex alia causa sibi evicerit, ut puta quia invenitur sequenti testamento heres scriptus, in quo legatum iste legatarius non acceperat, dicemus committi stipulationem propter viri boni arbitrium.

§ 8.- Et generaliter ubicumque hereditatem vel quantitatem vel emolumentum praestitit is, qui hac stipulatione sibi prospexerat, dicendum est ibi committi eam, si modo culpa abest ab eo, qui stipulatus est.

§ 9.- Quaesitum est, an saepius committatur. Et placet etiam saepius eam committi, si per partes ablata est hereditas.

§ 10.- Si legatum fuerit praestitum ante interpositam hanc stipulationem, an condici possit, ut cautio ista interponatur? Movet quaestionem, quod ea, quae per errorem omitta vel soluta sunt, condici possunt et hic ergo quasi plus solum videtur ex eo, quod cautio intermissa est. Et ait Pomponius conditionem interponendae satisfactionis gratia competere et puto hoc probandum quod Pomponius, utilitatis gratia.

others, no matter what their rank, and though they may have already received their legacies, should be compelled to give security. We also learn from this Rescript that the Emperor intended that a stipulation should be entered into, even after the legacies have been paid.

§ 6.- When a legatee has given security to an heir with reference to the return of the legacy which has been paid to him, and the heir is already involved in a controversy on account of the estate, or expects to be, and the estate is evicted, either on account of the negligence or fraud of him who paid the legacy, we hold that the stipulation will not take effect, so far as the judgment of a good citizen is concerned, because it contains the element of good faith.

§ 7.- Likewise, if he who paid the legacy should, for some other reason, deprive himself of the estate (for instance, because he is appointed heir by a second will, under which the said legatee did not receive the legacy), we say that, in accordance with the judgment of a good citizen, the stipulation will become operative.

§ 8.- And, generally speaking, where he who provided for himself by a stipulation of this kind, and has transferred an estate, or a sum of money, or some advantage, it must be said that the stipulation will take effect; provided he who entered into it was not guilty of bad faith.

§ 9.- The question arose whether the stipulation can take effect more than once. And it is established that it can take effect repeatedly, if the heir is deprived of different parts of the estate at different times.

§ 10.- If the legacy should be paid before the stipulation is entered into, and legal proceedings are instituted to compel security to be furnished, this suggests the point that proceedings can be instituted where anything has been omitted, or paid through mistake. Therefore, in this instance, as no security was given, more is considered to have been paid than is due. Pomponius says that an action to compel security to be furnished will lie, and I think that his

de cualquier dignidad que sean, deben ser compelidos a dar la caución, aunque ya hubieren percibido los legados; por cuyo rescripto admitimos también esto, que quiso que se interpusiera la estipulación aun después de pagados los legados.

§ 6.- Si el legatario le hubiere dado al heredero, que ya soporta cuestión sobre la herencia, o que la espera, caución de restituir el legado que se le entregó, y se hubiera hecho evicción de la herencia, pero por negligencia, o por dolo del que entregó el legado, diremos que no produce su efecto la estipulación por razón del arbitrio de hombre bueno, que es inherente a esta estipulación.

§ 7.- Y también si el mismo que entregó el legado hiciere para sí la evicción por otra causa, por ejemplo, porque se halla instituido heredero en un testamento posterior, en el cual este legatario no había recibido el legado, diremos que produce su efecto la estipulación por razón del arbitrio y hombre bueno.

§ 8.- Y en general, siempre que el que había mirado por sí con esta estipulación entregó la herencia, o una cantidad, o un emolumento, se ha de decir que ella produce su efecto, si es que no hay culpa en el que estipuló.

§ 9.- Se preguntó, si producirá su efecto muchas veces y esta determinado, que ella produce su efecto muchas veces, si la herencia fue tomada por partes.

§ 10.- Si se hubiere entregado el legado antes de haberse interpuesto esta estipulación ¿se podría ejercitar la condición, para que se interponga esta caución? Promueve esta cuestión el que se puede reclamar por la condición lo que por error se omitió o se pagó; y aquí, en efecto, parece como que se pagó mas por esto, porque se omitió la caución. Y dice Pomponio, que compete la condición para que se interponga la fianza; y opino que se ha de aprobar

4.- PAULUS; *libro LXXV, ad edictum*.- Haec autem satisfactio locum habet, si iusta causa esse videbitur: nam iniquum erat omnimodo caveri nondum illata controversia litis, cum possint ei lusoriae minae fieri: ideoque eam rem praetor ad cognitionem suam revocat.

§ 1.- Si duo ex testamento hereditatem in solidum sibi vindicent, forte quod eiusdem nominis sint, tam in possessorem quam in petitem competunt actiones et creditoribus et legatariis.

§ 2.- Haec cautio utique necessaria est, si quis pecuniam suam solvat vel rem tradat: si vero pecuniam hereditariam solvat vel rem tradat, quidam non putant cavendum, quia nec teneri potest eo nomine victus, cum non possideat vel dolo fecerit, quo minus possideat. Hoc si ante motam controversiam solvat: quod si postea, tenebitur culpa nomine.

§ 3.- Sed cum de nomine inter duos quaestio est, numquid non sit cavendum ei, qui hereditariam rem tradat, quia omnimodo unus liberatur: quemadmodum si aes alienum hereditarium solvatur? Sed si petitor suam pecuniam solvet aut rem suam tradat, non habet unde retineat et ideo necessaria est ei cautio.

5.- MARCELLUS; *libro XXI, digestorum*.- Videamus, an stipulatio "qua amplius per Falcidiam ceperis licuerit dari" adversus eum non sufficiat, qui legatum alii restituere ex fideicommissi causa debet. Sufficiet autem dici nihil eius fidei commissum esse: cavebit scilicet legatario et is, qui fideicommissum accipiet, nisi forte malet legatarius circuitu sublato

opinion should be adopted on account of the benefit to be derived from it.

4.- PAULUS; *On the Edict, Book LXXV*.- Again, this security must be given where there appears to be good reason for it, as it would be unjust for it to be required where no controversy has as yet arisen with reference to the estate, and where only idle threats have been made, and therefore the Praetor must decide the question after proper investigation.

§ 1.- Where each of two parties claims the entire estate for himself, under the will, for example, where they are both of the same name, actions can be brought by the creditors as well as the legatees against both the party in possession, and the one who demands the estate.

§ 2.- This security is necessary where anyone pays his own money or delivers his own property. If he pays money or delivers property belonging to the estate, some authorities hold that security need not be furnished, for if he loses his case he will not be liable, since he was not in possession and did not commit fraud to avoid having possession. If he should make payment before any controversy has arisen, this rule will apply; because if he made payment afterwards he would be liable on the ground of negligence.

§ 3.- In the case of two persons having the same name, the question arises whether security must be furnished by him who transfers the property of the estate, for the reason that one of them is absolutely released from liability, just as if he had paid a debt due from the estate. If the party claiming the estate paid his own money, or delivered his own property, he will not have anything to retain, and therefore a bond must be given him.

5.- MARCELLUS; *Digest, Book XXI*.- Let us see whether this stipulation, namely, "Do you promise to return whatever you may have received above what is allowed by the Falcidian Law?" will not be sufficient as against the party who is obliged to pay a legacy to another under the terms of a trust. It will be sufficient for the heir to say that there is nothing to be

esto, que dice Pomponio, por razón de utilidad.

4.- PAULO; *Comentarios al Edicto, libro LXXV*.- Mas esta fianza tiene lugar si pareciere que hay justa causa; porque era injusto que de todos modos se diera caución, no habiéndose suscitado todavía la controversia del litigio, pudiéndosele hacer a él amenazas vanas; y por esto el Pretor avoca a su conocimiento este asunto.

§ 1.- Si en virtud de un testamento dos reivindicaran para sí toda la herencia, acaso porque sean de un mismo nombre, les competen así a los acreedores como a los legatarios acciones, tanto contra el poseedor, como contra el demandante.

§ 2.- Esta caución es ciertamente necesaria, si alguno pagara con dinero propio, o entregase una cosa suya; pero si pagara con dinero de la herencia, o entregase cosa de esta, algunos no creen que se deba dar caución, porque tampoco puede quedar obligado por este título el vencido, no poseyendo, o no habiendo hecho con dolo de modo que no posea; esto, si pagara antes de promovida la controversia, pero si después, estará obligado por razón de la culpa.

§ 3.- Pero cuando entre dos hay cuestión sobre el nombre, ¿acaso no se le habrá de dar caución al que entregue la cosa de la herencia, porque de todos modos uno queda libre, a la manera que si se pagara una deuda de la herencia? Mas si el demandante pagase con su propio dinero, o entregase una cosa suya, no tiene de donde retener, y por lo tanto le es necesaria la caución.

5.- MARCELO; *Digesto, libro XXI*.- Veamos si la estipulación: «que se dé lo que hubieres percibido mas de lo que fuere lícito por la Falcidia», no basta contra el que debe restituir a otro el legado por causa de fideicomiso. Mas bastará que se diga que no se encomendó nada a su fidelidad; dará, pues, caución al legatario también el que recibiere el fideicomiso, si

heredi caveri. Sed et legatario praeterea cavendum est, si (ut plerumque aequum est) pro rata ex fideicommisso retinere ei concedendum est, quamvis tantum ex legato apud eum erit remansurum, ut sufficere possit ad praestandum fideicommissum.

6.- CALLISTRATUS; *libro IV, de cognitionibus*. - Cum non facile satisfactionem offerre legatarius vel fideicommissarius possit et futurum sit, ut propter hoc a petitione liberalitatis ex testamento submoveantur, numquid onus satisfactionis eis remittendum erit? Quod videtur adjuvari rescripto divi Commodi in haec verba: "Is, cuius de ea re notio est, aditus si compererit ideo cautionem a te exigere, ut a fideicommissi petitione avertaris, onus satisfactionis tibi remitti curabit".

7.- PAULUS; *libro VII, ad legem Iuliam et Papiam*. - Divus Pius ab eo, qui annua legata praecipere ad distribuendum iussus erat, vetuit cautionem exigere cessantium partes reddi, nisi aperte cavere iussus esset.

8.- MAECENATUS; *libro X, fideicommissorum*. - Si heres partem bonorum vel etiam universa bona delata ad fiscum diceret, constaret autem de fideicommisso, decretum est, ut petitori caventi "evicta hereditate restitutu iri" solveretur.

9.- MAECENATUS; *libro XII, fideicommissorum*. - Si non in controversia sit proprietas, sed usus fructus (potest enim rei, cuius proprietas Titio legata est, usus fructus alii legari), tunc de eo restituendo non heredi, sed Titio caveri debeat. Interdum et si ab

done by him under the trust. For, in this case also, he who receives the benefit of the trust must furnish security to indemnify the legatee, unless the latter should prefer to give security to the heir in order to avoid circumlocation. Moreover, security must be given to the legatee if (as is perfectly proper), he should be permitted to retain a proportionate sum out of what was paid under the trust, even though enough of the legacy may remain in his hands to discharge the entire fiduciary obligation.

6.- CALLISTRATUS; *On Judicial Inquiries, Book IV*. - If the legatee or the beneficiary of the trust cannot readily furnish security, and for this reason runs the risk of being deprived of the benefit conferred by the will, shall he be released from the necessity of giving security? This opinion seems to be adopted in a Rescript of the Divine Commodus, which is in the following words: "If the court having jurisdiction of the case should ascertain that application has been made to him to compel you to give security in order to prevent you from claiming the benefit of the trust, he must see that you are released from the requirement of furnishing it."

7.- PAULUS; *On the Lex Julia et Papia, Book VII*. - The Divine Pius forbade security from being exacted from a person who was directed to oversee the distribution of certain annual legacies, requiring him to return to the heir the shares of those who failed to accept them, unless he was expressly ordered to do so by the testator.

8.- MARCIANUS; *Trusts, Book X*. - Where an heir alleges that part of an estate, or even all of it, is forfeited to the Treasury, and it should be established that he was also charged with a trust, it was decided that if the beneficiary should give security to restore the estate in case it should be evicted, he must be paid.

9.- THE SAME; *Trusts, Book XII*. - When the ownership of property is not in controversy, but the usufruct of the same is (for it may happen that the ownership is bequeathed to Titius, and the usufruct to someone else), then security to restore it should not

acaso el legatario no prefiriese que prescindiéndose del rodeo se le dé la caución al heredero. Pero también se le ha de dar además caución al legatario, si, como es justo las mas de las veces, se le ha de conceder que a Prorrata retenga del fideicomiso, aunque del legado hubiere de quedar en su poder tanto que pueda bastar para pagar el fideicomiso.

6.- CALISTRATO; *De las Jurisdicciones, libro IV*. - Cuando el legatario o el fideicomisario no pueda fácilmente ofrecer la fianza, y haya de suceder que por esto sean repelidos de la demanda de la liberalidad proveniente del testamento, ¿se les habrá de dispensar acaso la carga de la fianza? Lo que parece que se apoya en el rescripto del Divino Cómodo concebido en estos términos: «Si habiéndose recurrido al que compete el conocimiento de este negocio hubiere hallado que se te exige la caución para esto, para privarte de la demanda del fideicomiso, cuidará de que se te dispense la carga de la fianza».

7.- PAULO; *Comentarios a la ley Julia y Papia libro VII*. - El Divino Pío vedó que al que se le había mandado que percibiera legados anuales para distribuirlos se le exigiera esta caución: «de que se restituirían las partes de los que no las percibiesen», a no ser que claramente se le hubiese mandado que diera caución.

8. MECIANO; *Fideicomisos, libro X*. - Si el heredero dijese que parte de los bienes, o aun que todos los bienes habían sido deferidos al fisco, pero constase lo relativo al fideicomiso, se decretó que se pagase al demandante que diera caución «de que se restituiría, hecha evicción de la herencia».

9.- EL MISMO; *Fideicomisos, libro XII*. - Si no estuviera en litigio la propiedad, sino el usufruto, porque se puede legar a otro el usufruto de la cosa cuya propiedad fue legada a Ticio, en este caso se deberá dar caución de restituirlo, no al heredero, sino

herede legetur usus fructus, Titio cavendum est: veluti si detracto usu fructu proprietates ei legetur, usus fructus Seio: quid enim attinebit hoc casu heredi caveri, ad quem emolumentum intercidentis usus fructus non sit spectandum? Verum si usu fructu Seio legato proprietates Titio ita legetur, ut, cum ad Seium pertinere desierit, habeat proprietatem, tunc heredi caveri oportebit a fructuario, ab herede autem Titio, quia non sit certum usu fructu intercepto ad Titium proprietatem reversuram.

be given to the heir, but to Titius. Sometimes, even if the heir is charged with the transfer of the usufruct, security should be given to Titius; for instance, if the usufruct, having been reserved, the ownership is left to him, and the usufruct to Seius; for, in this instance, what advantage would it be for security to be given to the heir, since no benefit will accrue to him if the usufruct should be extinguished? If, however, the usufruct, having been bequeathed to Seius, and the ownership is left to Titius in such a way that when the usufruct ceases to belong to Seius, he will be entitled to the ownership, then security must be furnished to the heir by the usufructuary, and also by the heir to Titius, because it is not certain that, if the usufruct should be extinguished, the ownership will be acquired by Titius.

a Ticio. A veces también si el usufruto fuese legado a cargo del heredero, se le ha de dar caución a Ticio, por ejemplo, si deducido el usufruto, se le legara la propiedad, y a Seyo el usufruto; porque ¿qué conseguirá en este caso con que se le dé caución al heredero, a quien no haya de corresponder el emolumento del usufruto que se extingue? Pero si habiéndose legado a Seyo el usufruto, la propiedad fué legada a Ticio, de suerte que tenga la propiedad cuando hubiere dejado de pertenecer a Seyo, en este caso convendrá que por el usufructuario se le dé caución al heredero, y por el heredero a Ticio, porque no es cierto que extinguido el usufruto haya de volver a Ticio la propiedad.

DIGESTORUM - DIGEST - DIGESTO

PARS QUINTA - FIFTH PART - PARTE QUINTA

LIBER VICESIMUS OCTAVUS - BOOK XXVIII - LIBRO VIGÉSIMO OCTAVO

I.- Qui testamenta facere possunt et quemadmodum testamenta fiant. Who can make wills and in what manner they should be executed. Quiénes pueden hacer testamento, y cómo se hacen los testamentos.	1
II.- De liberis et postumis heredibus instituendis vel exheredanis. Concerning the appointment and disinheritance of children and posthumous heirs. De que los descendientes y los póstumos hayan de ser instituidos herederos o desheredados.	10
III.- De iniusto rupto irrito facto testamento. Concerning illegal, invalid, and broken wills. Del testamento injusto, roto, o que se hizo írrito.	25
IV.- De his quae in testamento delentur inducuntur vel inscribuntur. Concerning erasures, cancellations, or additions to a will. De lo que se borra, se tacha, o se sobrescribe en un testamento.	36
V.- De heredis instituendis. Concerning the appointment of heirs. De la institución de herederos.	39
VI.- De vulgari et pupillari substitutione. Concerning ordinary and pupillary substitutions. De la substitución vulgar y de la pupilar.	81

Titulus Titles Títulos	Pag.
VII.- De condicionibus institutionum. Concerning the conditions of appointments. De las condiciones de las instituciones.	105
VIII.- De iure deliberandi. Concerning the right of deliberating. Del derecho de deliberar.	115
 LIBER VICESIMUS NONUS - BOOK XXIX - LIBRO VIGÉSIMO NOVENO	
I.- De testamento militis. Concerning the will of a soldier. Del testamento del militar	118
II.- De acquirenda vel omittenda hereditate. Concerning the acquisition or rejection of estates. De la adquisición o de la no aceptación de la herencia.	136
III.- Testamenta quemadmodum aperiuntur inspiciantur et describantur. In what way wills should be opened, examined, and copied. De cómo se han de abrir, inspeccionar y transcribir los testamentos.	169
IV.- Si quis omissa causa testamenti ab intestato vel alio modo possideat hereditatem. Where anyone, through the rejection of his appointment as testamentary heir, obtains possession of the estate through intestacy or in any other way. De si alguno poseyere la herencia abintestato o de otro modo, habiendo prescindido del título del testamento.	172
V.- De Senatus consulto Silaniano et Claudiano quorum testamenta ne aperiuntur. Concerning the Silanian and Claudian Decrees of the Senate by the provisions of which wills cannot be opened. De los Senadoconsultos Silaniano y Claudiano, que trata de que no se abran los testamentos de algunos	187
VI.- Si quis aliquem testari prohibuerit vel coegerit. Where anyone prevents another from making a will, or compels him to make one. De si alguno hubiere impedido que otro teste, o a ello le hubiere obligado.	203

Titulus Titles Títulos	Pag.
VII.- De Iure Condicillorum. Concerning the Law of Codicils. Del Derecho de los Codicilos.	205
LIBER TRICESIMUS - BOOK XXX - LIBRO TRIGÉSIMO	
I.- De Legatis et Fideicommissis. Concerning Legacies and Trusts. De los Legados y de los Fideicomisos.	213
LIBER TRICESIMUS UNUS - BOOK XXXI - LIBRO TRIGÉSIMO PRIMERO	
I.- De Legatis et Fideicommissis. Concerning Legacies and Trusts. De los Legados y de los Fideicomisos	282
LIBER TRICESIMUS DUO - BOOK XXXII - LIBRO TRIGÉSIMO SEGUNDO	
I.- De Legatis et Fideicommissis. Concerning Legacies and Trusts. De los Legados y de los Fideicomisos.	341
LIBER TERTIUS-TRICESIMUS - BOOK XXXIII - LIBRO TRIGÉSIMO TERCERO	
I.- De annuis Legatis et Fideicommissis. Concerning annual Legacies ads Trusts. De los Legados y Fideicomisos anuales.	410

Titulus Titles Títulos	Pag.
II.- De Usu, et Usufructu, et Reditu, et Habitatione, et Operis per legatum vel Fideicommissum datis. Concerning Use, Usufruct, Income, Lodging, and Services left by Legacies or Trusts. Del Uso, del Usufructo, de la Renta, de la Habitación, y de los Servicios dados por Legado o Fideicomiso. .	423
III.- De Servitute Legata. Concerning the Legacy of Servitudes. De la Servidumbre Legada.	438
IV.- De Dote Praelegata. Concerning the preferred Legacy of a Dowry. De la Dote Prelegada.	440
V.- De Optione vel Electione Legata. Concerning the Option or Choice of Articles Bequeathed as a Legacy. Del Legado de Opción o de Elección.	450
VI.- De Tritico, Vino, vel Oleo Legato. Concerning Bequests of Wheat, Wine, and Oil. Del Legado de Trigo, Vino o Aceite.	456
VII.- De Instructo vel Instrumento Legato. Concerning Legacies of Equipment or Implements. Del Legado de Cosa Provista o del de los Utensilios.	461
VIII.- De Peculio Legato. Concerning Legacies of Peculium. Del Legado del Peculio.	484
IX.- De Penu Legata. Concerning Legacies of Provisions. Del Legado de las Provisiones.	494
X.- De Suppellectile Legata. Concerning Bequests of Household Goods. Del Legado del Ajuar.	499

LIBER QUARTUS-TRICESIMUS - BOOK XXXIV - LIBRO TRIGÉSIMO CUARTO

I.- De Alimentis vel Cibariis Legatis. Concerning Legacies of Subsistence or Food. Del Legado de los Alimentos o del Sustento.	505
II.- De Auro, Argento, Mundo, Ornamentis, Unguentis, Veste vel Vestimentis, et Statuis Legatis. Concerning Legacies of Gold, Silver, Ornaments, Jewels, Perfumes, Clothing, Tapestry and Statues. De los Legados del Oro, de la Plata, de los Objetos de Tocador, de los Adornos, de los Ungüentos, del Vestido o del Vestuario, y de las Estatuas.	520
III.- De Liberatione Legata. Concerning the Bequest of a Release from Liability. Del Legado de la Liberación.	542
IV.- De Adimendis vel Transferendis Legatis vel Fideicommisum. Concerning the Cancellation or Transfer of Legacies and Trusts. De la Revocación de la Transferencia de los Legados o de los Fideicomisos.	562
V.- De Rebus Dubiis. Concerning Doubtful Matters. De las Cosas Dudosas.	575
VI.- De his, quae Poenae causa relinquuntur. Concerning bequests made by way of penalty. De las cosas que se dejan por causa de pena.	586
VII.- De Regula Catoniana. Concerning the Rule of Cato. De la Regla Catoniana.	586
VIII.- De his, quae pro non scriptis habentur. Considering testamentary provisions which are considered as not having been written De las disposiciones que se tienen por no escritas.	587

IX.- De his, quae ut indignis auferuntur. Concerning those who are deprived of their legacies as being unworthy of them. De lo que se les quita a algunos por indignos.	589

LIBER TRICESIMUS QUINTUS - BOOK XXXV - LIBRO TRIGÉSIMO QUINTO

I.- De condicionibus et demonstrationibus et causis et modis eorum. Concerning Testamentary conditions and designations, their reasons and their modifications. De las condiciones, y de las demostraciones, y de las causas, y de los modos de lo que se escribe en el Testamento.	600
II.- Ad Legem Falcidiam. Concerning the Falcidian Law. Sobre la Ley Falcidia.	647
III.- Si cui plus, quam per Legem Falcidiam licuerit legatum esse dicetur. Where more is said to have been bequeathed to anyone than is permitted by the Falcidian Law. De si se dijere que a alguno se le legó más de lo que por la Ley Falcidia hubiere sido lícito.	701