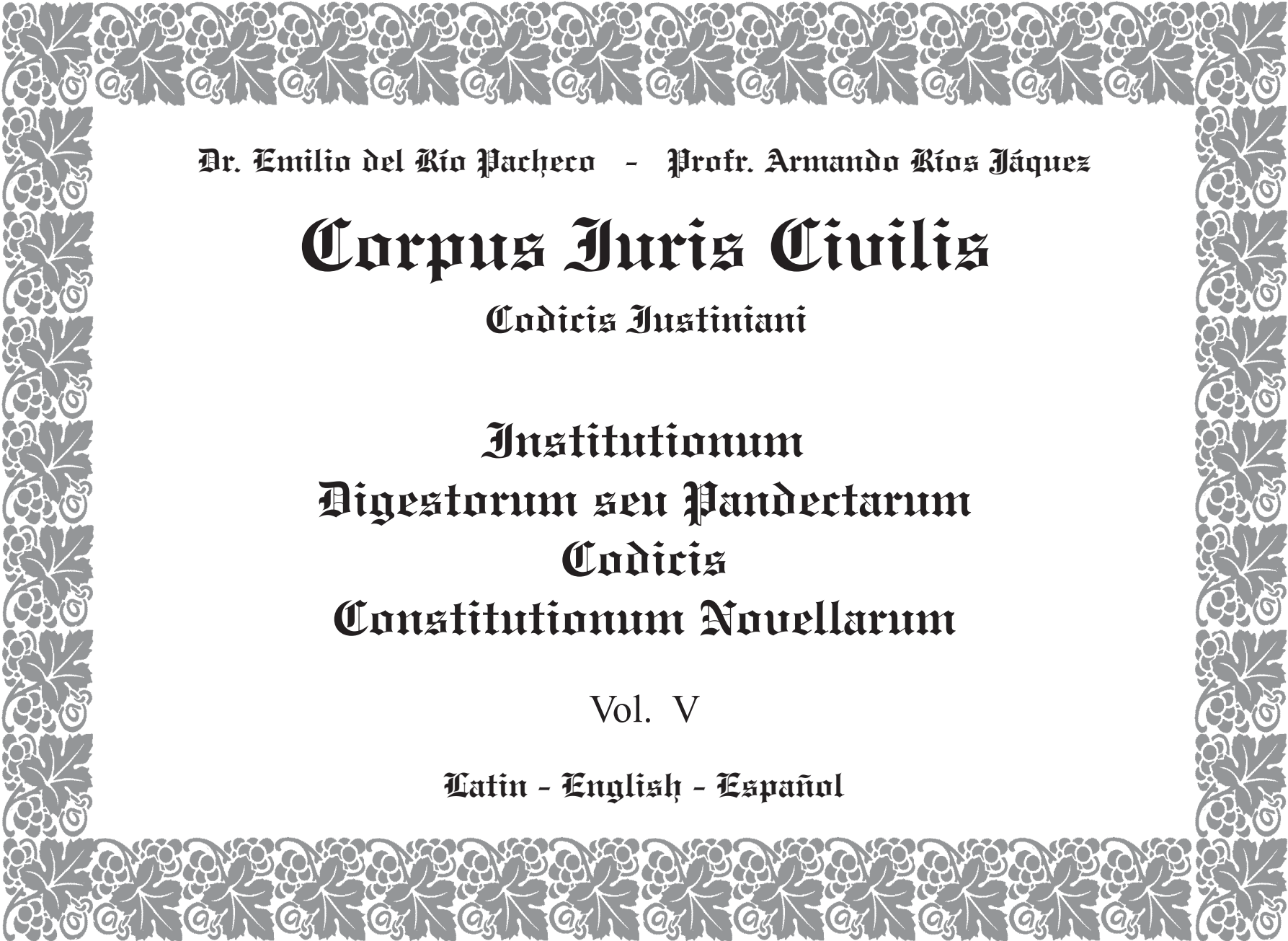




Dr. Emilio del Río Pacheco - Profr. Armando Ríos Jáquez

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Codicis Justiniani

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Constitutionum Nouellarum

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PARS QUINTA

DIGESTORUM SEU PANDECTARUM

IURIS ENUNCLEATI EX OMNI
VETERE IURE COLLECTI

**DOMINI NOSTRI SACRATISSIMI
PRINCIPIS IUSTINIANI**

(DE TESTAMENTIS)

LIBER SEXTUS-TRICESIMUS

TIT. I

AD SENATUS CONSULTUM
TREBELLIANUM

1.- ULPIANUS; *libro III, Fideicommissorum*.- Explicito tractatu, qui ad fideicommissa singularum rerum pertinet, transeamus nunc ad interpretationem Senatusconsulti Trebelliani.

§ 1.- Factum est enim Senatusconsultum temporibus Neronis octavo calendas Septembres Annaeo Seneca et Trebellio Maximo Consulibus.

§ 2.- Cuius verba haec sunt cum esset aequissimum in omnibus fideicommissariis hereditatibus, si qua de his bonis iudicia penderent, ex his eos subire, in quos ius fructusque transferretur, potius quam cuique periculosum esse fidem suam: placet, ut actiones, quae in heredem heredibusque dari solent, eas neque in eos neque his dari, qui fidei suae commissum sic, uti rogati essent, restituissent, sed his et in eos, quibus ex testamento fideicommissum restitutum fuisset, quo magis in reliquum confirmentur supremas defunctorum voluntates".

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 XXXVI

TITLE I

ON THE TREBELLIAN DECREE
OF THE SENATE

1.- ULPIANUS; *Trusts, Book III*.- After having discussed matters relating to trusts of different kinds of property, let us now pass to the interpretation of the Trebellian Decree of the Senate.

§ 1.- This Decree of the Senate was enacted in the time of Nero, on the eighth of the Kalends of September, during the Consulate of Annseus Seneca and Trebellius Maximus.

§ 2.- The words of the Decree are as follows: "As it is perfectly just that, with reference to all trusts involving estates where anything is to be paid out of property, recourse should be had to those to whom the rights and profits of the estate are transferred, rather than that the heirs should incur any risk on account of the faith reposed in them, it is hereby decreed that actions which are usually granted for and against the heirs shall not be allowed where the latter have transferred the property under the terms of a trust, as they were charged to do; but that in these instances actions shall be granted for and against those to whom the property has been transferred under the trust created by the will, in order that the last wishes of deceased persons may be more thoroughly executed, so far as the remainder of the

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 TRIGÉSIMO SEXTO

TÍTULO I

SOBRE EL SENADOCONSULTO
TREBELIANO

1.- ULPIANO; *Fideicomisos, libro III*.- Concluido el tratado que corresponde a los fideicomisos de cosas singulares, pasemos ahora a la interpretación del Senadoconsulto Trebeliano.

§ 1.- Porque se hizo un Senadoconsulto en tiempos de Nerón, a ocho de las Calendas de Septiembre, siendo cónsules Aneo Séneca y Trebelio Máximo.

§ 2.- Cuyas palabras son estas: «Siendo muy justo que en todas las herencias fideicomisarias si hubiere pendientes algunos juicios sobre estos bienes, sean por ellos responsables aquellos a quienes fuesen transferidos el derecho y los frutos más bien que el que le sea perjudicial a cada uno su fidelidad, se determina que las acciones que se suelen dar contra los herederos y a los herederos, no se den ni contra aquellos, ni a aquellos que hubiesen restituido, como se les hubiese rogado, lo encomendado a su fidelidad; sino a aquellos y contra aquellos a quienes en virtud del testamento se les hubiese restituido el fideicomiso, a fin de que en lo sucesivo se confirmen mejor las últimas voluntades de los difuntos».

§ 3.- Sublata est hoc Senatusconsulto dubitatio eorum, qui adire hereditatem recusare seu metu litium seu praetextu metus censuerunt.

§ 4.- Quamquam autem Senatus subventum voluit heredibus, subvenit tamen et fideicommissario: nam in eo, quod heredes, si conveniantur, exceptione uti possunt, heredibus subventum est: in eo vero, quod, si agant heredes, repelluntur per exceptionem quodque agendi facultas fideicommissariis competit, procul dubio consultum est fideicommissariis.

§ 5.- Hoc autem Senatusconsultum locum habet, sive ex testamento quis heres esset sive ab intesto rogatusque sit restituere hereditatem.

§ 6.- In filii quoque familias militis iudicio, qui de castrensi peculio vel quasi castrensi testari potest, Senatusconsultum locum habet.

§ 7.- Bonorum quoque possessores vel alii successores ex Trebelliano restituere potuerunt hereditatem.

§ 8.- De illo quaeritur, an is, cui ex causa fideicommissi restituta est hereditas ex Trebelliano Senatusconsulto, ipse quoque restituendo ex eodem Senatusconsulto transferat actiones: et Iulianus scribit etiam ipsum transferre actiones, quod et Maecianus probat et nobis placet.

§ 9.- Sed et quotiens quis rogatus duobus restituere hereditatem, alteri pure vel in diem, alteri sub condicione, suspectam dicit: ei, cui erat rogatus pure vel in diem restituere, interim universam hereditatem restitui Senatus censuit, cum autem exstiterit condicio, si velit alius fideicommissarius partem suam suscipere, transire ad eum ipso iure actiones.

§ 3.- By this Decree of the Senate, the doubts of those who have determined to refuse to accept the estate, either through apprehension of litigation or on account of fear are removed.

§ 4.- But, although the Senate intended to come to the relief of heirs, it also comes to the relief of the beneficiary of the trust. For it is granted to the heirs, since they can avail themselves of an exception if suit is brought against them; and if the heirs bring suit they can be barred by an exception which the beneficiaries of the trust have a right to avail themselves of, hence there is no doubt that their interests have likewise been consulted.

§ 5.- This Decree of the Senate applies whether anyone who is either a testamentary heir, or the heir-at-law, was charged to transfer the estate.

§ 6.- It also applies to the case of the will of a soldier who is under paternal control, and who has the right to dispose of his castrense peculium or his quasi castrense peculium.

§ 7.- The possessors of property under the Praetorian Law, or any other successors, can transfer an estate by virtue of the Trebellian Decree of the Senate.

§ 8.- The question arises whether he to whom an estate has been transferred by the terms of a trust under the Trebellian Decree of the Senate can himself assign his rights of action by the same Decree of the Senate, where he has been charged to transfer the estate. Julianus says that he also can assign his rights of action. This opinion Marcianus also approves, and we ourselves adopt it.

§ 9.- Where, however, anyone has been charged to transfer an estate to two persons, to one of them absolutely or within a certain time, and to the other under a condition, and he alleges that the estate is probably insolvent, the Senate decreed that the entire estate should be transferred to the party to whom the heir was asked to transfer it absolutely, or within a

§ 3.- Con este Senadoconsulto se quitó la duda de los que determinaron rehusar adir la herencia, o por temor a los litigios, o por pretexto de tal temor.

§ 4.- Mas aunque el Senado quiso que se auxiliase a los herederos, esto no obstante, auxilió también al fideicomisario; porque se auxilió a los herederos en esto, en que, si fueran demandados, los herederos pueden usar de la excepción, pero se miró sin duda por los fideicomisarios en esto, en que, si ejercitaran la acción los herederos, son repelidos con la excepción, y en que les compete a los fideicomisarios la facultad de ejercitar las acciones.

§ 5.- Mas este Senadoconsulto tiene lugar, ya si uno fuese heredero en virtud de testamento, ya si abintestato, y se le hubiere arrogado que restituyese la herencia.

§ 6.- El Senadoconsulto tiene lugar también respecto a la última voluntad del hijo de familia, militar, que puede testar del peculio castrense, o del casi castrense.

§ 7.- También los poseedores de los bienes, u otros sucesores, podrán restituir la herencia en virtud del Senadoconsulto Trebeliano.

§ 8.- Se pregunta, si aquel a quien por causa de fideicomiso fue restituida la herencia en virtud del Senadoconsulto Trebeliano, transferirá, restituyéndola también él, las acciones en virtud del mismo Senadoconsulto. Y escribe Juliano, que también él transfiere las acciones; lo que aprueba también Meciano, y a nosotros nos parece bien,

§ 9.- Pero también cuando aquel a quien se le hubiere rogado que restituya la herencia a dos, a uno puramente o a término, a otro bajo condición, dice que es sospechosa, dispuso el Senado que mientras tanto restituya toda la herencia a aquel a quien se le había rogado que se la restituyera puramente o a término; pero que cuando se hubiere cumplido la

certain time. If, however, the condition should be fulfilled, and the other beneficiary should desire to accept his share, the rights of action will pass to him by operation of law.

§ 10.- Si filio vel servo herede instituto rogatoque restituere hereditatem dominus vel pater restituat, ex Trebelliano transferuntur actiones: quod est etiam, si suo nomine rogati sunt restituere.

§ 11.- Idem est et si ipsi filio pater rogatus sit restituere hereditatem.

§ 12.- Sed et si tutor vel curator adolescentis vel furiosi rogatus sit restituere hereditatem, sine dubio trebelliano locus erit.

§ 13.- Fuit quaesitum, si ipsi tutori rogatus sit restituere pupillus, an ipso auctore restitutionem facere possit? et est decretum a divo severo non posse tutori se auctore restituere hereditatem, quia in rem suam auctor esse non potest.

§ 14.- Curatori tamen adolescentis ab adolescente poterit restitui hereditas, quoniam necessaria non est auctoritas ad restitutionem.

§ 15.- Si autem collegium vel corpus sit, quod rogatum est restituere decreto eorum cui, qui sunt in collegio vel corpore, in singulis inspecta eorum persona restitutionem valere: nec enim ipse sibi videtur quis horum restituere.

§ 16.- Si heres praecepto fundo rogatus sit hereditatem restituere, ex trebelliano Senatusconsulto restituet hereditatem. Nec multum facit, si fundus pignori datus est: neque enim aeris alieni personalis actio fundum sequitur, sed eum, cui hereditas ex

§ 10.- Where a son or a slave is appointed an heir, and is charged to transfer the estate, and the master or father should transfer it, the rights of action will pass to the beneficiary of the trust, by virtue of the Trebellian Decree of the Senate. This will be the case even if the parties are charged to transfer the property in their own names.

§ 11.- The same rule applies where a father is charged to transfer the estate by the son himself.

§ 12.- Where the guardian or curator of a minor or an insane person is charged to transfer an estate, the Trebellian Decree of the Senate will undoubtedly apply.

§ 13.- Where a minor was charged to transfer the estate to the guardian himself, the question arose whether he could do so by the authority of his guardian. It was decided by the Divine Severus that he could not transfer the estate to his guardian by the authority of the latter, because no one can act as judge in his own case.

§ 14.- Still, the estate of a minor can be transferred by him to his curator, as the authority of the latter is not necessary to render the transfer legal.

§ 15.- Moreover, where an association or a corporate body is charged to transfer an estate, the transfer will be valid where it is made to each of the different members individually, by the vote of those who belong to said association or corporate body; for, in this instance, each one of them is considered to have made the transfer to himself.

§ 16.- Where the heir is asked to transfer the estate, after having reserved a tract of land for himself, he can do so under the Trebellian Decree of the Senate; nor does it make much difference if the land given to him has been pledged, as a personal action for the

condición, si el otro fideicomisario quisiera recibir su parte, pasen a ser de derecho las acciones.

§ 10.- Si instituido heredero un hijo o un esclavo, y habiéndosele rogado que, restituya la herencia, la restituyera el señor o el padre, se transfieren las acciones en virtud del Senadoconsulto Trebeliano; lo que es así, aunque en su propio nombre hayan sido rogados para restituirla.

§ 11.- Lo mismo es, también si al padre se le hubiera rogado que restituya la herencia al mismo hijo.

§ 12.- Pero también si al tutor o al curador de un adolescente, o de un furioso se le hubiera rogado que restituya la herencia, tendrá lugar sin duda el Senadoconsulto Trebeliano.

§ 13.- Se preguntó, si, habiéndosele rogado al pupilo que la restituya al mismo tutor, podrá hacer la restitución con la autoridad de este mismo. Y se decretó por el Divino Severo, que no pudiera restituir la herencia al tutor con la autoridad de este, porque no puede ser autor en cosa propia.

§ 14.- Pero al curador del adolescente le podrá ser restituida por el adolescente la herencia, porque no es necesaria su autoridad para la restitución.

§ 15.- Mas si fuera un colegio o una corporación a quien se rogó que la restituya, es válida la restitución por decreto de los que son del colegio o de la corporación, respecto de cada uno, considerada la persona de ellos; porque no se considera que ninguno de ellos se la restituye a sí mismo.

§ 16. - Si al heredero se le hubiera rogado que tomando antes un fundo restituya la herencia, restituirá la herencia en virtud del Senadoconsulto Trebeliano, y no importa mucho, si el fundo estuvo dado en prenda; porque la acción personal de una

trebelliano Senatusconsulto restituta est. Sed cavendum est heredi a fideicommissario, ut, si forte fundus fuerit evictus a creditore, habeat heres cautum.

Iulianus autem cavendum non putat, sed aestimandum fundum, quanti valet sine hac cautione, hoc est quanti vendere potest sine cautione: et si potest tanti vendere non interposita cautione, quantum facit quarta pars bonorum, ex Trebelliano transituras actiones: si minoris, retento eo quod deest similiter ex Trebelliano restitutionem fieri: quae sententia multas quaestiones dirimit.

§ 17.- Si is, qui quadringenta in bonis habeat, trecenta legaverit et deductis ducentis rogaverit heredem seio restituere hereditatem, an trecentorum onus fideicommissarius subeat an vero hactenus, quatenus ad eum ex hereditate pervenit? Iulianus ait competere quidem adversus eum trecentorum petitionem, non autem amplius quam in ducentis actionem adversus fideicommissarium daturum, in heredem autem centum.

Et mihi videtur vera esse Iuliani sententia, ne damnum fideicommissarius sentiat ultra, quam ad eum ex hereditate quid pervenit: neminem enim oportere plus legati nomine praestare, quam ad eum ex hereditate pervenit, quamvis falcidia cesset, ut rescripto divi pii con-tinetur.

§ 18.- Denique nec ex militis testamento plus legatorum nomine praestatur, quam quantitas est hereditatis aere alieno deducto. Nec tamen quartam retinere fideicommissario permittitur.

recovery of the money loaned will not follow the land; but he will be liable to whom the estate has been transferred under the Trebellian Decree of the Senate. Security must be furnished by the beneficiary of the trust to the heir so that the heir will be indemnified if the land should happen to be evicted by the creditor.

Julianus, however, does not think that security should be given, but that an estimate ought to be made of the value of the land without the security, that is to say, how much it will sell for if security were not furnished; and if, where no bond had been given, it will sell for as much as the fourth part of the property would amount to, the rights of action will pass by the terms of the Trebellian Decree of the Senate; but if it would bring less, then, the deficiency having been reserved, a transfer of the remainder should likewise be made, in accordance with the Trebellian Decree of the Senate. This opinion disposes of many questions.

§ 17.- Where a man who had an estate of four hundred aurei bequeathed three hundred, and, having deducted two hundred, charged his heir to transfer the estate to Seius, will the beneficiary of the trust be liable for the three hundred aurei, or will he only be liable in proportion to the amount of the estate which came into his hands? Julianus says that a demand for three hundred aurei can be made upon him, but that an action will not be granted against the beneficiary of the trust for more than two hundred, and for a hundred against the heir.

This opinion of Julianus seems to me to be correct, in order that the beneficiary may not be liable for any more than the amount which he received from the estate. For no one is obliged to pay more of a legacy than the amount which came into his hands from the estate, even though the Falcidian Law may not apply, as is stated in a Rescript of the Divine Pius.

§ 18.- Finally, no more shall be paid as legacies under the will of a soldier than his estate amounts to, after deducting the indebtedness; and still the beneficiary of the trust will not be permitted to reserve the fourth.

§ 19.- Hence Neratius says that if the heir is

deuda no sigue al fundo, sino a aquel a quien fue restituida la herencia en virtud del Senadoconsulto Trebeliano. Pero se le ha de dar caución al heredero por el fideicomisario, para que, si acaso se hubiere hecho evicción del fundo por el acreedor, tenga garantía el heredero.

Pero Juliano no cree que se haya de dar caución, sino que se ha de estimar cuánto vale sin esta caución, esto es, en cuánto puede venderlo sin caución; y que si, no habiéndose interpuesto caución, puede venderlo en tanto cuanto importa la cuarta parte de los bienes, pasarán las acciones en virtud del Senadoconsulto Trebeliano, y si en menos, se hace igualmente la restitución en virtud del Senadoconsulto Trebeliano, habiéndose retenido lo que falta; cuya opinión dirime muchas cuestiones.

§ 17.- Si uno que tuviera cuatrocientos en sus bienes hubiere legado trescientos, y rogado a su heredero, que, deducidos doscientos, restituyese la herencia a Seyo, ¿soportará el fideicomisario la carga de los trescientos, o sólo por tanto cuanto de la herencia fue a poder de él?. Dice Juliano, que ciertamente compete contra éste acción para pedir los trescientos, pero que no dará contra el fideicomisario acción por más que por doscientos, y por ciento contra el heredero.

Y me parece que es ver-dadera la opinión de Juliano, a fin de que el fidei-comisario no sufra perjuicio mayor que lo que de la herencia fue a su poder; porque nadie debe dar a título de legado más de lo que de la herencia va a poder de él, aunque deje de tener lugar la Falcidia, como se contiene en un Rescripto del Divino Pío.

§ 18.- Finalmente, ni en virtud del testamento de un militar se da por razón de legados más de lo que importa la herencia deducidas las deudas; y tampoco se le permite al fideicomisario retener la cuarta.

§ 19.- Inde Neratius scribit, si heres rogatus restituere totam hereditatem non deducta Falcidia rogato et ipsi, ut alii restituat, non utique debere eum detrahare fideicommissario secundo quartam, nisi liberalitatem tantum ad priorem fideicommissarium heres voluit pertinere.

§ 20.- Sed si quadringenta habens ducenta legaverit Titio et partem dimidiam hereditatis Sempronio restituere rogaverit, ex Trebelliano restitutionem faciendam Iulianus ait et legatorum petitionem scindi sic, ut centum quidem petantur ab herede, centum vero alia legatarius a fideicommissario petat. quod idcirco dicit Iulianus, quoniam secundum hanc rationem integram quartam habet, id est centum integra.

§ 21.- Idem Iulianus scribit, si is, qui quadringenta in bonis habeat, trecenta legasset et deductis centum rogasset heredem, ut hereditatem Sempronio restituat, debere dici deductis centum restituta hereditate legatorum actionem in fideicommissarium dari.

2.- CELSUS; *libro XXI, Digestorum*.- Qui quadringenta reliquit, Titio trecenta legavit, heredis fidei commisit, ut tibi hereditatem restitueret, isque suspectam iussu Praetoris adiit et restituit: quaerebatur, quid legatario dare deberes. Dicendum est, quia praesumptum est voluisse testatorem cum onere legatorum fideicommissum restitui, tota trecenta te dare Titio debere: nam heres hoc rogatus intellegi debet, ut te suo loco constituat et quod heres perfunctus omnibus hereditariis muneribus, id est post legatorum dationem, reliquum habiturus foret, si non esset rogatus et tibi restitueret hereditatem, id tibi restituat. Quantum ergo haberet? nempe centum: haec ut tibi daret rogatus est. Itaque sic ineunda est Legis Falcidia ratio, quasi heres trecenta Titio dare

§ 19.- Hence Neratius says that if the heir is charged to transfer the entire estate without deducting the Falcidian portion, and he who is entitled to receive it is charged to transfer it to a third party, the heir cannot deduct the fourth from what the second beneficiary receives, as the testator only intended that the first beneficiary of the trust should enjoy his liberality.

§ 20.- Where a testator, having property worth four hundred aurei, left two hundred to Titius, and charged his heir to transfer half the estate to Sempronius, Julianus says that the transfer should be made according to the terms of the Trebellian Decree of the Senate, and that the action of the legatee should be divided so that he can bring one suit against the heir for a hundred aurei, and one against the beneficiary of the trust for the other hundred. Therefore, Julianus holds that in this way the heir will obtain his fourth unimpaired, that is, the hundred aurei without deduction.

§ 21.- Julianus also says that if anyone who has an estate of four hundred aurei should bequeath three hundred, and, having deducted a hundred, should charge his heir to transfer the estate to Sempronius, it must be said that if the estate is transferred after the deduction of the hundred aurei, an action to recover the legacy will be granted against the beneficiary of the trust.

2.- CELSUS; *Digest, Book XXI*.- Where a man who left four hundred aurei bequeathed three hundred to Titius, and charged his heir to transfer the estate to you, and the heir, who suspected the estate of being insolvent, entered upon it by order of the Praetor and transferred it, the question arose, what do you owe to the legatee? It must be held that, as the presumption is that the testator intended the trust to be transferred burdened with the legacies, you ought to pay the entire three hundred aurei to Titius; for the heir should be understood to have been requested to appoint you in his stead and to pay you the balance, and, after having performed all his duties with reference to the estate, that is to say, after he had paid the legacies, he would have been entitled to what was

§ 19.- Por lo cual escribe Neracio, que si al heredero se le rogó que sin haber deducido la Falcidia restituya toda la herencia a uno, a quien también se le rogó que la restituyese a otro, no debe ciertamente éste deducirle la cuarta al segundo fideicomisario, a no ser qué el heredero haya querido que la liberalidad corresponda únicamente al primer fideicomisario.

§ 20.- Pero si teniendo uno cuatrocientos hubiere legado doscientos a Ticio, y hubiere rogado que se restituya a Sempronio la mitad de la herencia, dice Juliano que se ha de hacer la restitución en virtud del Senadoconsulto Trebeliano, y que se divide la petición de los legados, de suerte que se pidan, a la verdad, ciento al heredero, y los otros ciento los pida el legatario al fideicomisario; lo que dice Juliano por esto, porque según esta cuenta tiene íntegra la cuarta, esto es, los ciento íntegros.

§ 21.- Pero escribe el mismo Juliano, que si uno que tuviese cuatrocientos en sus bienes hubiese legado trescientos, y hubiese rogado a su heredero que deducidos ciento restituyese la herencia a Sempronio, se debe decir, que, restituida la herencia deducidos los ciento, se da contra el fideicomisario la acción de los legados.

2.- CELSO; *Digesto, libro XXI*.- Uno que dejó cuatrocientos, legó trescientos a Ticio, y encomendó a la fidelidad del heredero que te restituyese la herencia; éste la adió como sospechosa por mandato del Pretor y la restituyó; se preguntaba, qué deberías darle al legatario. Se ha de decir, que como se presumió que el testador quiso que se restituyera el fideicomiso con la carga de los legados, debías darle a Ticio íntegros los trescientos. Porque debe entenderse que al heredero se le rogó esto, que te constituya en su propio lugar, y que te restituya el sobrante que habría de tener el heredero cuando hubiese satisfecho todas las cargas de la herencia, esto es, después de la entrega de los legados, si no se le hubiese rogado que te restituyera la herencia.

damnatus tibi centum dare damnatus sit: quo evenit, ut, si hereditatem sua sponte adisset, daret Titio ducenta viginti quinque, tibi septuaginta quinque. non ergo plus Titio debetur, quam si iniussu praetoris adita hereditas foret.

3.- ULPIANUS; *libro III, Fideicommissorum*.- Marcellus autem apud Iulianum in hac specie ita scribit: si ad heredis onus esse testator legata dixerit et heres sponte adiit hereditatem, ita debere computationem Falcidia iniri, ac si quadringenta per fideicommissum essent relictas, trecenta vero legata, ut in septem partes trecenta dividantur et ferat quattuor partes fideicommissarius, tres partes legatarius.

Quod si suspecta dicta sit hereditas et non sponte heres adiit et restituit, centum quidem de quadringentis, quae habiturus esset heres, resident apud fideicommissarium, in reliquis autem trecentis eadem distributio fiet, ut ex his quattuor partes habeat fideicommissarius, reliquas tres legatarius: nam iniquissimum est plus ferre legatarium ideo, quia suspecta dicta est hereditas, quam laturus esset, si sponte adita fuisset.

§ 1.- Quod autem in suspecta hereditate dictum est, hoc idem dici potest in his testamentis, in quibus Lex Falcidia locum non habet, in militis dico et si qui sunt alii.

§ 2.- Item Pomponius scribit, si deductis legatis restituere quis hereditatem rogatur, quaesitum est,

left if he had not been charged to transfer the estate to you. How much then would he have left? A hundred aurei, certainly. These are what he was charged to pay you, and therefore, in order to calculate the portion due under the Falcidian Law, as the heir was charged to pay three hundred aurei to Titius, and a hundred to you, the result will be that if he should enter upon the estate voluntarily, he must pay two hundred and twenty-five to Titius and seventy-five to you. Hence Titius will not be entitled to any more than if the heir had entered upon the estate without having been compelled to do so by the Praetor.

3.- ULPIANUS; *Trusts, Book III*.- Moreover, Marcellus, on Julianus, states with reference to this case that, if the testator had said that the heir should be charged with the legacies, and the latter voluntarily entered upon the estate, the calculation of the Falcidian portion must be made just as if four hundred aurei had been bequeathed under the trust, and three hundred had been left as a legacy; so that the three hundred ought to be divided into seven parts, to four of which the beneficiary of the trust would be entitled, and the other three would go to the legatee.

If, however, the estate should be alleged to be insolvent, and the heir did not voluntarily accept and transfer it, a hundred aurei out of the four hundred to which the latter would have been entitled can be retained by the beneficiary of the trust, and the same distribution should be made of the remaining three hundred, so that the beneficiary may receive four-sevenths and the legatee the remaining three; for it would be extremely unjust for the legatee, merely because the estate was suspected of being insolvent, to have more than he would have obtained if the heir had voluntarily entered upon it.

§ 1.- Again, what has been said with reference to an estate suspected of being insolvent is also applicable to wills to which the Falcidian Law does not apply. I refer to military wills and others of the same description.

§ 2.- Pomponius also says that where anyone is charged to transfer an estate after the legacies have

Luego, ¿cuánto tendría? Ciertamente ciento, y estos se le rogó que te diera. Así, pues, se ha de hacer la cuenta de la ley Falcidia como si el heredero hubiera sido condenado a darle a Ticio trescientos y condenado a darte ciento; de lo cual resulta, que, si espontáneamente hubiese adido la herencia, le daría a Ticio doscientos veinticinco, y a ti setenta y cinco. Luego no se le debe a Ticio mas que si se hubiera adido la herencia sin mandato del Pretor.

3.- ULPIANO; *Fideicomisos, libro III*.- Pero Marcelo escribe así en sus notas a Juliano sobre este caso: que si el testador hubiere dicho que los legados fuesen carga del heredero, y el heredero adió espontáneamente la herencia, se debía hacer la computación de la Falcidia como si se hubiesen dejado cuatrocientos por fideicomiso, pero trescientos como legados, para que los trescientos se dividan en siete partes, y el fideicomisario tome cuatro, y tres el legatario.

Pero si se hubiera dicho que la herencia es sospechosa, y el heredero la adió no espontáneamente y la restituyó, quedan ciertamente en poder del fideicomisario de los cuatrocientos los ciento, que el heredero habría tenido; y en los restantes trescientos se hará la misma distribución, de suerte que de ellos tenga cuatro partes el fideicomisario, y las otras tres el legatario; porque es muy injusto, que porque se dijo que la herencia era sospechosa el legatario lleve más de lo que habría llevado si hubiese sido adida espontáneamente.

§ 1.- Mas lo mismo que se ha dicho respecto a la herencia sospechosa se puede decir respecto a los testamentos en que no tiene lugar la ley Falcidia, me refiero a los del militar, y a otros, si los hay.

§ 2.- También escribe Pomponio: si a uno se le ruega que deducidos los legados restituya la heren-

utrum solida legata praestanda sint et quartam ex solo fideicommisso detrahare possit, an vero et ex legatis et ex fideicommisso quartam detrahare possit? et refert aristonem respondisse ex omnibus detrahendam, hoc est ex legatis et fideicommisso.

§ 3.- Res, quae ab herede alienatae sunt, in quartam imputantur heredi.

§ 4.- Quidam liberis suis, ex disparibus partibus institutis, datis praeceptionibus, ut ipse maximam partem patrimonii inter liberos ita divisisset, rogavit eum, qui sine liberis decederet, portionem suam fratribus restituere. Imperator noster rescripsit praeceptiones quoque fideicommisso contineri, quia non portionem hereditariam testator commemoravit, sed simpliciter portionem: in portionem autem et praeceptiones videri cecidisse.

§ 5.- Si is, qui rogatus fuerit hereditatem restituere, ante quaestionem de familia habitam vel tabulas aperuerit vel hereditatem adierit vel quid eorum quae Senatusconsulto prohibentur fecerit ac per hoc publicata fuerit hereditas, fiscus cum suis oneribus hereditatem acquirit. Quare commodum quartae, quod erat habiturus heres institutus, id ad fiscum pertinet et ex Trebelliano actiones transeunt. Sed et si prohibuerit testamentarium introducere vel testes convenire vel mortem testatoris non defendit vel ex alia causa hereditas fisco vindicata est, aequè quartae quidem commodum ad fiscum pertinebit, dodrans vero fideicommissario restitueretur.

4.- IDEM; *libro IV, Fideicommissorum*.- Quia

been deducted, the question arises whether the legacies should be paid in full, and whether the heir can deduct his fourth from what is left under the trust alone, or can deduct it from the legacies as well as the trust. He asserts that Aristo was of the opinion that it should be deducted from everything bequeathed by the testator, that is to say, from both the legacies and the trust.

§ 3.- Any property forming part of an estate which has been alienated by the heir shall be included in his fourth.

§ 4.- A certain man, having appointed his children his heirs to unequal portions of his estate, and having left them preferred legacies in such a way as to divide the larger part of his property among them, charged any one of them who might die without issue to leave his share to his brothers. Our Emperor stated in a Rescript that the preferred legacies were included in the trust, because the testator did not mention his share of the estate, but merely his share, and the preferred legacies were held to have been included in his share.

§ 5.- If anyone should be asked to deliver an estate before he has put the slaves to the torture, or opened the will, or entered on the estate, or done any of those things which are forbidden by the Decree of the Senate, and for this reason the estate should be confiscated, the Treasury will acquire it with all its burdens. Therefore, the benefit of the fourth to which the appointed heir was entitled will be transferred to the Treasury, and all rights of action belonging to the estate will pass to it under the Trebellian Decree of the Senate. If, however, the heir should have prevented anyone from drawing up the will, or should not have permitted the witnesses to assemble, or should have neglected to avenge the death of the testator, or if the estate had been claimed by the Treasury for any other reason, the benefit of the fourth will also belong to the Treasury, and the remaining three-fourths of the estate will be transferred to the beneficiary of the trust.

4.- THE SAME; *Trusts, Book IV*.- For the reason

cia, se preguntó, si se habrán de pagar íntegros los legados, y si podrá deducir la cuarta de solo el fideicomiso, o si podrá deducir la cuarta así de los legados, como del fideicomiso. Y dice que Aristón respondió, que se ha de deducir de todo, esto es, de los legados y del fideicomiso.

§ 3.- Las cosas que fueron enajenadas por el heredero se le computan al heredero para la cuarta.

§ 4.- Uno, habiendo instituido herederos de partes desiguales a sus hijos, y habiendo dado prelegados, de suerte que así dividió él mismo entre sus hijos la mayor parte del patrimonio, rogó al que falleciera sin hijos, que restituyese su porción a sus hermanos. Respondió por rescripto nuestro Emperador, que también los prelegados se comprenden en el fideicomiso, porque el testador no hizo mención de la porción hereditaria, sino simplemente de la porción, y se considera que en la porción se comprendieron también los prelegados.

§ 5.- Si aquel a quien se le hubiere rogado que restituya la herencia, hubiere, antes de sometidos los esclavos al tormento, abierto el testamento, o adido la herencia, o hecho alguna de las cosas que por el Senadoconsulto se prohíben, y por esto hubiere sido confiscada la herencia, el fisco adquiere la herencia con sus cargas; por lo cual, el provecho de la cuarta, que había de tener el heredero instituido, pertenece al fisco y se transmiten las acciones en virtud del Senadoconsulto Trebeliano. Pero también si hubiere prohibido que se introdujese al encargado de escribir el testamento, o que se reuniesen los testigos, o si no vengó la muerte del testador, o si por otra causa fue reivindicada por el fisco la herencia, le pertenecerá ciertamente del mismo modo al fisco el provecho de la cuarta, pero se restituirán los tres cuartos al fideicomisario.

4.- EL MISMO; *Fideicomisos, libro IV*.- porque

poterat fieri, ut heres institutus nolit adire hereditatem veritus, ne damno adficeretur, prospectum est, ut, si fideicommissarius diceret suo periculo adire et restitui sibi velle, cogatur heres institutus a praetore adire et restituere hereditatem. Quod si fuerit factum, transeunt actiones ex Trebelliano nec quartae commodum heres in restitutione utetur: nam cum alieno periculo adierit hereditatem, merito omni commodum arcebitur. Nec interest, solvendo sit hereditas nec ne: sufficit enim recusari ab herede instituto.

Neque illud inquiritur, solvendo sit hereditas an non sit. Opinio enim, vel metus vel color, eius, qui noluit adire hereditatem, inspicitur, non substantia hereditatis, nec immerito: non enim praescribi heredi instituto debet, cur metuat hereditatem adire vel cur nolit, cum variae sint hominum voluntates: quorundam negotia timentium, quorundam vexationem, quorundam aeris alieni cumulum, tametsi locuples videatur hereditas, quorundam offensas vel invidiam: quorundam gratificari volentium his, quibus hereditas relicta est, sine onere tamen suo.

5.- MAECIANUS; *libro VI, Fideicommissorum*.- Sed et qui magna praeditus est dignitate vel auctoritate, harenarii vel eius mulieris, quae corpore quaestum fecerit, hereditatem restituere cogetur.

6.- ULPIANUS; *libro IV, Fideicommissorum*.- Recusare autem non tantum praesentes, sed etiam absentes vel per epistulam possunt: nam etiam adversus absentes postulatur decretum, sive certior sit eorum voluntas recusantium adire et restituere hereditatem sive incerta: adeo praesentia eorum non

that the appointed heir may refuse to enter upon the estate, apprehending that he might be prejudiced by so doing, provision must be made for the beneficiary of the trust; so that if he should say that he wishes the heir to enter upon the estate at his risk, and transfer it to him, the appointed heir can be compelled to appear before the Praetor and deliver the estate. If this should be done, the rights of action will pass by the Trebellian Decree of the Senate, and the heir cannot avail himself of the benefit of the fourth, when he transfers the property; for as he enters upon the estate at the risk of another, it is but reasonable that he should be deprived of any advantage to which he would have been entitled. Nor does it make any difference whether the estate is solvent or not, for it is sufficient for it to have been rejected by the appointed heir.

No investigation shall be made as to whether the estate is solvent or not, but only the opinion, or the fear, or the pretext of the party who refused to accept it ought to be considered, and not the assets of the estate itself. This is not unreasonable, for the appointed heir should not be required to state why he fears to enter upon the estate, or why he is unwilling to do so. For men are actuated by different motives: some of them fear to attend to business, others dread the annoyance of it; and still others are apprehensive that the indebtedness may amount to a larger sum, even though the estate may appear to be solvent; and again, some fear the anger or envy of others; and some desire to favor those to whom the estate was bequeathed without, however, wishing to sustain any of the burdens of the same.

5.- MAECIANUS; *Trusts, Book VI*.- Where a man of exalted rank or authority is charged to transfer an estate by a gladiator, or by a woman who lives by prostitution, he will be compelled to do so.

6.- ULPIANUS; *Trusts, Book IV*.- Anyone can refuse to accept an estate not only when he is present, but also where he is absent, and he can do this even by means of a letter. For a decree can be asked with reference to parties who are absent, whether it is certain that they do not wish to enter upon the estate

podía suceder, que el heredero instituido no quisiera adir la herencia temiendo ser perjudicado, se proveyó, que, si el fideicomisario dijera que fuese adida a su riesgo, y que quería que le fuese restituida, el heredero instituido sea obligado por el Pretor a adir o restituir la herencia; pero si se hubiere hecho, pasan en virtud del Senadoconsulto las acciones, y el heredero no utilizará en la restitución el provecho de la cuarta. Porque habiendo adido la herencia a riesgo de otro, con razón será privado de todo provecho, y no importa que la herencia sea, o no, solvente; porque basta que sea rehusada por el heredero instituido, y no se inquiere si la herencia es, o no, solvente.

Porque se atiende a la opinión, o al miedo, o al pretexto del que no quiso adir la herencia, no al importé de la herencia; y no sin razón, porque no se le debe prescribir al heredero instituido por qué haya de temer adir la herencia, o por qué no la quiera adir, pues son diversas las voluntades de los hombres, temiendo unos los negocios, otros la molestia, otros el cúmulo de las deudas, aunque la herencia parezca rica, otros las ofensas o la envidia, y queriendo algunos que se gratifique a aquellos a quienes fué dejada la herencia, pero sin gravamen suyo.

5.- MECIANO; *Fideicomisos, libro VI*.- Pero también el que está revestido de grande dignidad o autoridad sera obligado a restituir la herencia de un gladiador, o de la mujer que hubiere hecho comercio con su cuerpo.

6.- ULPIANO; *Fideicomisos, libro IV*.- Mas pueden rehusar la herencia no sólo los presentes, sino también los ausentes, o por carta; porque también contra los ausentes se pide el decreto, ya sea cierta, ya incierta, la voluntad de los que rehúsan adir y restituir la herencia; de modo que no es necesaria la presencia

est necessaria.

§ 1.- Meminisse autem oportebit de herede instituto Senatum loqui: ideoque tractatum est apud Iulianum, ad intestatos locum habeat. sed est verius eoque iure utimur, ut hoc Senatusconsultum ad intestatos quoque pertineat, sive legitimi sive honorarii sint successores.

§ 2.- Sed et ad filium qui in potestate est hoc Senatusconsultum locum habet et in ceteris necessariis, ut a praetore compellantur miscere se hereditati, sic deinde restituere: quod si fecerint, transtulisse videbuntur actiones.

§ 3.- Si fisco vacantia bona deferantur nec velit bona agnoscere et fideicommissario restituere, acquissimum erit, quasi vindicaverit, sic fiscum restitutionem facere.

§ 4.- Item si municipes hereditatem suspectam dicant heredes instituti, dicendum erit cogi eos agnoscere hereditatem et restituere: idemque erit et in collegio dicendum.

§ 5.- Titius heres institutus Sempronio substituto rogatus est ipsi sempronio hereditatem restituere: institutus suspectam dicebat hereditatem: quaeritur, an cogendus est adire et restituere hereditatem. Et deliberari potest: sed verius est cogendum eum, quia interesse sempronii potest ex institutione quam ex substitutione hereditatem habere, vel legatis vel libertatibus onerata substitutione: nam et si legitimus heres fuerit is, cui fideicommissaria hereditas relicta est, idem dicitur.

and transfer it, or whether this is not known; to such an extent is their presence not necessary.

§ 1.- It must be remembered that the Senate speaks with reference to an appointed heir. And, therefore, Julianus discusses the question as to whether this decree applies in cases of intestacy. The better opinion, however, is the one which we adopt, namely, that this decree also applies to heirs by intestate succession, whether they are heirs-at-law or praetorian successors.

§ 2.- This Decree of the Senate also applies to a son under paternal control, and to all other necessary heirs, so that they may be compelled by the Praetor to take charge of the estate and afterwards transfer it. If they should do so, the rights of action are considered to have been transferred.

§ 3.- Where an estate without an owner is forfeited to the Treasury, and the latter is unwilling to accept it and transfer it to the beneficiary of the trust, it will be perfectly proper for the Treasury to return the property, just as if the beneficiary of the trust had recovered it.

§ 4.- Likewise, if the citizens of a town, after having been appointed heirs, should say that the estate is probably insolvent, and decline to accept it, it must be held that they can be compelled to do so, and to transfer the estate. The same rule applies with reference to an association.

§ 5.- Titius, having been appointed heir, and Sempronius substituted for him, he was charged to transfer the estate to Sempronius himself; but, after his appointment, Titius said that the estate was probably insolvent, and refused to accept it. The question arose whether he could be compelled to enter upon the estate, and transfer it, a point which is susceptible of argument. The better opinion, however, is that he can be compelled to do so, because it is more advantageous for Sempronius to obtain the estate by the appointment than by the substitution; for example, if the substitution is charged with legacies to be paid, or with freedom to

de los mismos.

§ 1.- Pero convendrá tener presente que el Senado habla del heredero instituido, y por esto discutió Juliano si tendrá lugar en caso de intestado; pero es mas verdadero, y observamos este derecho, que este Senadoconsulto sea aplicable también a los herederos abintestato, ya sean sucesores legítimos, ya honorarios.

§ 2.- Pero también al hijo, que está bajo potestad. Este Senadoconsulto tiene aplicación también a los demás herederos necesarios, para que por el Pretor sean compelidos a inmiscuirse en la herencia, y de este modo a restituirla después; y si así lo hubieren hecho, se considerará que transfirieron las acciones.

§ 3.- Si se le adjudicasen al fisco los bienes vacantes, y no quisiera aceptar los bienes y restituírselos al fideicomisario, será muy justo que así, como si los hubiere reivindicado, haga el fisco la restitución.

§ 4.- Igualmente, si instituidos herederos los habitantes de un municipio dijieran que es sospechosa la herencia, se habrá de decir que se les obliga a aceptar la herencia y a restituirla. Y lo mismo se habrá de decir también respecto a un colegio.

§ 5.- Instituido heredero Ticio, se le rogó, habiéndole sido substituido Sempronio, que restituya la herencia al mismo Sempronio; el instituido decía que la herencia era sospechosa; se pregunta, si ha de ser obligado a adir y a restituir la herencia; y se puede discutir. Pero es más verdadero, que ha de ser obligado, porque puede interesarle a Sempronio tener la herencia en virtud de la institución, más bien que por la substitución, gravada la substitución o con legados o con libertades; porque lo mismo se dice, aunque fuere heredero legítimo aquel a quien por fideicomiso se le dejó la herencia.

be granted. The same rule will apply if the estate should be left in trust to the heir-at-law.

§ 6.- Si quis alio loco restituere hereditatem iussus sit et suspectam eam dicat, Iulianus scribit cogendum eum esse similemque ei, qui in diem rogatus est restituere.

7.- MAECIANUS; *libro IV, Fideicommissorum*.- Sed sciendum est inpendiorum quoque, quae ad iter explicandum necessaria essent, rationem haberi debere: nam si ita institutus esset "si Titio decem dedisset", non aliter cogeretur, quam si ei pecunia offeratur. Sed et salutis ac dignitatis ratio habenda erit: quid enim si morbo applicitus alexandriae iussus fuit adire vel nomen vispellionis testatoris ferre?

8.- PAULUS; *libro II, Fideicommissorum*.- De aetate quoque et iure, id est liceat ei eo ire nec ne, aestimabitur.

9.- ULPIANUS; *libro IV, Fideicommissorum*.- Sed et si alio loco iussus est adire et rei publicae causa absit, aequè cogendum adire hereditatem et restituere Iulianus ait, ubi abest.

§ 1.- Plane si quis petierit ad deliberationem tempus et impetraverit, deinde post tempus deliberationis adierit et restituerit hereditatem, non videtur coactus hoc fecisse: nec enim suspectam coactus adit, sed sponte post deliberationem.

§ 2.- Quod si suspectam dicit, profiteri debet non sibi expedire adire hereditatem, neque hoc dici oportere non esse solvendo, sed profiteri eum oportet, quod non putat sibi expedire hereditatem adire.

§ 6.- Where anyone is directed to transfer an estate in some other place than where he lives, and alleges that he suspects it of being insolvent, Julianus says that he can be compelled to accept it, just as a person who is asked to deliver an estate within a certain time.

7.- MAECIANUS; *Trusts, Book IV*.- It should be noted that, in a case of this kind, an account of the necessary travelling expenses must be required. For if the heir was appointed under the condition of paying ten aurei to Titius, he cannot be compelled to accept the estate unless the money is tendered to the person entitled to it. Moreover, the condition of health and the rank of the heir must be taken into consideration. But what if, while he was suffering from illness, he would be ordered to go to Alexandria, or take the name of the testator, a man of inferior rank?

8.- PAULUS; *Trusts, Book II*.- The age and the rights of the party (that is to say, whether it would be lawful for him to go to the place designated, or not), must also be considered.

9.- ULPIANUS; *Trusts, Book IV*.- When, however, the heir is directed to go to some other place, and he is absent on business for the State, Julianus says he can likewise be compelled to accept the estate, and to transfer it, wherever he may be.

§ 1.- It is clear that if anyone requests time for deliberation, and obtains it, and after the time has elapsed enters upon the estate, and transfers it, he will not be considered to have been compelled to do so. For he is not obliged to enter upon the estate, even if he suspects it of being insolvent, but he does so voluntarily after deliberation.

§ 2.- If the heir should allege that he considers the estate to be insolvent, he should declare that it is not expedient for him to accept it. It is not necessary for him to say that it is insolvent, but he must state that he does not think it is expedient for him to enter upon the

§ 6.- Si a uno se le hubiera mandado restituir la herencia en otro lugar, y dijera que es sospechosa, escribe Juliano, que ha de ser obligado, y que es semejante a aquel a quien se le rogó que la restituyera a término.

7.- MECIANO; *Fideicomisos, libro IV*.- Pero se ha de saber, que se debe tener cuenta también de los gastos que fuesen necesarios para hacer el viaje; porque si hubiese sido instituido de este modo, si le hubiese dado diez a Ticio, no sería obligado de otra manera sino si se le ofreciese el dinero. Pero también se habrá de tener cuenta de la salud y de la dignidad; porque ¿qué se dirá, si atacado de enfermedad se le mandó que adiese en Alejandría, o llevar el nombre de un testador sepulturero?

8.- PAULO; *Fideicomisos, libro II*.- También se hará estimación de la edad, y del derecho, esto es, de si le será, o no, lícito ir allá.

9.- ULPIANO; *Fideicomisos, libro IV*.- Pero también si se le mandó que adiese en otro lugar, y estuviera ausente por causa de la República, dice Juliano, que igualmente ha de ser obligado a adir y a restituir la herencia donde está ausente.

§ 1.- A la verdad, si alguno hubiere pedido tiempo para deliberar, y lo hubiere logrado, y luego después del tiempo de la de liberación hubiere adido y restituido la herencia, no se considera que esto lo hizo compelido; porque no adió compelido la herencia sospechosa, sino espontáneamente después de deliberación.

§ 2.- Pero si dice que es sospechosa, debe declarar que no le conviene adir la herencia, y no debe decir esto, que no es solvente, sino que debe declarar que no cree que a él le convenga adir la herencia.

estate.

§ 3.- Si quis sub condicione fuit heres scriptus, pendente condicione nihil agit, tametsi paratus sit restituere hereditatem.

10.- GAIUS; *libro II, Fideicommissorum*.- Sed et si ante diem vel ante condicionem restituta sit hereditas, non transferuntur actiones, quia non ita restituitur hereditas, ut testator rogavit. Plane posteaquam exstiterit condicio vel dies venerit si ratam habeat restitutionem hereditatis, benignius est intellegi tunc translatas videri actiones.

11.- ULPIANUS; *libro IV, Fideicommissorum*.- Apud iulianum relatum est, si legatum fuit heredi instituto relictum "si heres non erit" et ob hoc suspectam dicat hereditatem ne perdat legatum, offerri ei oportere quantitatem legati a fideicommissario, deinde cogendum. Nec illud admittit Iulianus, ut, quasi hereditatem non adisset, sic legatum a coherede petat (adiit enim), sed magis arbitratur a fideicommissario ei praestandum. Sed et si quid aliud sua interesse dicet, non cogitur adire, nisi ei damnum vel lucrum a fideicommissario sarcitur vel a praetore onus remittatur, quod recusat.

§ 1.- Idem Iulianus ait, si duo fuerint a patre instituti cum filio eius impubere et idem substituti filio, sufficere ei, qui fideicommissum in secundis tabulis accepit, unum ex heredibus institutis cogere adire patris hereditatem: hoc enim facto confirmatisque patris tabulis poterunt ex substitutione ambo cogi adire et restituere hereditatem.

§ 3.- If anyone should be appointed heir under a condition, no act that he performs while the condition is pending will be lawful, even though he is ready to transfer the estate.

10.- GAIUS; *Trusts, Book II*.- If the estate should be delivered before the prescribed time has elapsed, or the condition has been complied with, the rights of action will not pass with it, because it was not delivered as the testator desired that it should be. It is evident that if the transfer of the estate should be ratified after the condition has been fulfilled, or the prescribed period has passed, it would be more equitable to consider that the rights of action were transferred at the same time.

11.- ULPIANUS; *Trusts, Book IV*.- It is stated by Julianus that where a legacy is left to an appointed heir, "in case he should not be the heir of the testator," and on this account the heir says that he suspects the estate of being insolvent, in order not to lose the legacy, the amount of the same must be tendered him by the beneficiary of the trust, and he can then be compelled to accept. Julianus does not admit that, in this instance, the heir can demand the legacy from the beneficiary of the trust as from his coheir, just as if he had not accepted the estate, for in fact he did accept it. It is, however, considered preferable for the legacy to be tendered him by the beneficiary of the trust. But when the heir, for some other reason, says that it is not his interest to accept the estate, he cannot be compelled to do so, unless the loss which he may sustain, or the profit which he may acquire, is made up to him by the beneficiary of the trust, or the charge, on account of which he refused the estate, is remitted by the Praetor.

§ 1.- Julianus also says that where two heirs are appointed by a father, along with his minor son, and they are also substituted for the son, it will be sufficient for him who accepted the trust under the pupillary substitution to compel one of the appointed heirs to enter upon the estate of the father. For, by doing this, the will of the father will be confirmed,

§ 3.- Si alguno fue instituido heredero bajo condición, no hace nada estando pendiente la condición, aunque esté dispuesto a restituir la herencia.

10.- GAYO; *Fideicomisos, libro II*.- Pero aunque la herencia haya sido restituida antes del plazo o antes de la condición, no se transfieren las acciones, porque no se restituye la herencia de la manera como rogó el testador. Y a la verdad, después que se hubiere cumplido la condición o que hubiere vencido el término, si ratificase la restitución de la herencia, es más benigno que se entienda que entonces se consideran transferidas las acciones.

11.- ULPIANO; *Fideicomisos, libro IV*.- Se halla escrito en Juliano, que, si al heredero instituido se le dejó un legado, «si no fuere heredero», y dijese que la herencia es sospechosa para no perder el legado, se le debe ofrecer por el fideicomisario la cantidad del legado, y que después ha de ser obligado. Y no admite Juliano, que, como si no hubiese adido la herencia, le pida al coheredero el legado, porque la adió; sino que más bien cree que se le debe entregar por el fideicomisario. Pero si dijere que tenía algún otro interés, tampoco es obligado a adirla, si no se le resarciera por el fideicomisario el perjuicio o el lucro, o si no se le dispensase por el Pretor la carga que rehúsa.

§ 1.- El mismo Juliano dice, que si dos hubiesen sido instituidos herederos por un padre juntos con el hijo impúbere de éste, y los mismos hubiesen sido substituidos al hijo, le bastaba, al que en el segundo testamento recibió el fideicomiso, obligar a uno de los herederos instituidos a adir la herencia del padre; porque hecho esto y confirmado el testamento del

§ 2.- Utrum autem praesenti an etiam absenti restitui possit procuratore adeunte praetorem, videndum est. Ego puto absenti quoque fideicommissario cogi posse heredem institutum adire et restituere nec vereri heredem oportere, ne forte in damno moretur: potest enim ei per praetorem succurri, sive cautum ei fiat, sive non et ante decesserit fideicommissarius, quam ei restituatur hereditas.

Est enim huius rei exemplum capere ex Rescripto Divi Pii in specie huiusmodi. Antistia decedens Titium heredem instituit et libertatem dedit Albinae directam eique filiam per fideicommissum reliquit rogavitque, ut filiam manumitteret: sed et Titium rogavit, ut manumissae Albinae filiae restitueret hereditatem. Cum igitur Titius suspectam diceret hereditatem, Rescriptum est a Divo Pio compellendum eum adire hereditatem: quo adeunte Albinae competituram libertatem eique filiam tradendam et ab ea manumittendam tutoremque filiae manumissae dandum, quo auctore restituatur hereditas filiae statim, quamvis sic fuisset ei rogatus restituere, cum nubilem aetatem complisset.

Cum autem possit, inquit, evenire, ut ante decedat ea, cui fideicommissaria libertas et hereditas relicta est, nec oporteat damno adfieri eum, qui rogatus adire hereditatem, remedium dedit, ut, si quid horum contigerit, perinde permittatur venumdari bona antistiae, ac si heres ei non exstisset. Cum igitur demonstraverit Divus Pius succurri heredi instituto, qui compulsus adire, dici potest etiam in ceteris causis exemplum hoc sequendum, sicubi evenierit, restituatur fideicommissaria hereditas ei, qui compulsi adire et restituere sibi hereditatem.

and both of them can, by virtue of the substitution, be compelled to enter upon the estate.

§ 2.- After application has been made to the Praetor, let us see whether the heir can transfer the estate to a present or an absent person through the intervention of an agent. I think that an appointed heir can be compelled to accept and transfer an estate to an absent beneficiary of the trust, and that the heir should not apprehend that he will be prejudiced by doing so. For relief can be granted him by the Praetor, whether he has been given security or not, even if the beneficiary of the trust should die before the estate had been delivered to him.

A case of this kind appears in a Rescript of the Divine Pius, where a certain Antistia, at the time of her death, appointed Titius her heir, granted freedom directly to her slave Albina, and left her her own daughter in trust, charging her to manumit the latter. She also asked Titius to transfer the estate to the daughter of Albina, after she had been manumitted. Therefore, when Titius said that he considered the estate to be insolvent, it was set forth in a Rescript of the Divine Pius that he should be compelled to accept it, and, having done so, that Albina must receive her freedom, that her daughter should be delivered to her, and manumitted by her, and that, after her manumission, a guardian should also be appointed for the daughter by whose agency the estate must be immediately transferred to her, although Titius had been charged to deliver it as soon as she reached the marriageable age.

The Emperor says that as it was possible that she to whom freedom and the estate were left in trust might die before the prescribed time, it would not be necessary to subject him to loss who, having been appointed, accepted the estate; and he afforded a remedy, so that if any of these things should take place, the property of Antistia would be sold, just as if she had had no heir. Hence, as the Divine Pius decided that relief might be granted an appointed heir who accepted the estate under compulsion, it could also be held that this precedent ought to be followed in other cases where an estate left in trust was transferred to the beneficiary who compelled the heir to enter upon it and deliver it to him.

padre, ambos podrán ser obligados a adir y a restituir la herencia en virtud de la substitución.

§ 2.- Mas se ha de ver si se le podrá restituir al que está presente, o también al ausente, dirigiéndose su procurador al Pretor. Yo opino, que también estando ausente el fideicomisario puede ser obligado el heredero instituido a adir y a restituir la herencia, y que el heredero no debe temer que acaso quede perjudicado; porque se le puede auxiliar por el Pretor, ora se le dé caución, ora no, y el fideicomisario hubiere fallecido antes que se le restituya la herencia.

Porque hay que tomar ejemplo de esto de un Rescripto del Divino Pío, en el siguiente caso: Antistia, al fallecer, instituyó heredero a Ticio, y le dio a Albina directamente la libertad, y a ella le dejó por fideicomiso su hija, y le rogó que manumitiese a su hija; pero rogó también a Ticio que restituyera la herencia a la hija manumitida de Albina. Y como Ticio dijese que la herencia era sospechosa, se respondió en rescripto por el Divino Pío, que él debía ser compelido a adir la herencia; que, adiéndola él, le competirá la libertad a Albina, y se ha de entregar a esta la hija, la cual ha de ser manumitida por ella, y que a la hija manumitida se le ha de nombrar tutor, con la autoridad del cual será restituida inmediatamente a la hija la herencia, aunque a él se le hubiese rogado que se la restituya en este caso, cuando hubiese cumplido la edad núbil.

Mas pudiendo suceder, dice, que antes fallezca aquella a quien por fideicomiso se le dejó la libertad y la herencia, y no conviniendo que sufra perjuicio el que rogado adió la herencia, dio este remedio, que, si aconteciere alguna de estas cosas, se permita que se vendan los bienes de Antistia como si no hubiese quedado heredero de ella. Habiendo, pues, determinado el Divino Pío que se auxilie al heredero instituido, que compelido adió la herencia, se puede decir, que también se ha de seguir este ejemplo en los demás casos, para que, si alguna vez aconteciere, se le restituya la herencia fideicomisaria a aquel que compelió a que se adiera y a que a él se le restituyera la herencia.

12.- PAPINIANUS; *libro XX, Quaestionum*.- Sed cum ab herede pro parte instituto fideicommissa hereditas sub condicione relicta esset, imperator Titus Antoninus Rescripsit non esse locum constitutioni suae neque pupillum extra ordinem iuvandum, praesertim si novum beneficium cum alterius iniuria postularetur.

13.- ULPIANUS; *libro IV, Fideicommissorum*.- Ille, a quo sub condicione fideicommissum relictum est, causari quid non poterit, ne condicio deficiat et haereat actionibus, cum nullum damnum sit futurum.

§ 1.- Secundum ea quae ostendimus iam igitur non desideratur heredis praesentia.

§ 2.- Si de testamento aliquid quaeratur, heres non debet audiri, si suspectam sibi hereditatem dicat: nam et si maxime dicatur vel ius testandi non habuisse eum qui testatus est vel de viribus testamenti vel de sua condicione, non erit audiendus.

§ 3.- Quid ergo si de viribus fideicommissi tractetur? haec quaestio praetori praetermittenda non erit. Sed quid si qui fideicommissarius dicat: "adeat prius et sic de hoc quaeratur?" credo interdum audiendum fideicommissarium, si cognitio prolixior tractatum habeat: finge enim verba fideicommissi de longinquo petenda et iustam deliberationem de quantitate fideicommissi incidere: dicendum erit compellendum eum adire, ne prius heres decedens fideicommissarium decipiat.

§ 4.- Tempestivum est requirere, per quem quis cogatur adire et restituere hereditatem: veluti si praetor aut consul fuerit heres institutus sus-

12.- PAPINIANUS; *Questions, Book XX*.- Where an heir appointed to a portion of an estate is conditionally charged with a trust having reference to the same, the Emperor Titus Antoninus stated in a Rescript that his Constitution did not apply, and that the minor was not entitled to extraordinary relief, especially if the relief requested would cause injury to another.

13.- ULPIANUS; *Trusts, Book IV*.- An heir who has been charged with a trust, under a condition, cannot defend himself in court by alleging that if the condition should fail to be fulfilled he will be liable to actions at law; for, according to what we have just stated, he cannot sustain any damage.

§ 1.- Therefore, the presence of the heir is no longer required.

§ 2.- Where the heir has any complaint to make on account of the will, he should not be heard if he alleges that he suspects the estate of being insolvent. For even if he should absolutely declare it to be insolvent, he should not be heard, if he says that the testator had no right to make a will, or if he impugns the validity of the instrument, or calls his own condition in question.

§ 3.- But what if the heir disputes the validity of the trust? This allegation must not be passed by. What if the beneficiary of the trust asserts his claim; can the heir enter upon the estate, and then raise this point? I think that the beneficiary of the trust should in the meantime be heard, if the inquiry is liable to be prolonged; for suppose that the terms of the trust cannot be explained without a protracted investigation, and that a reasonable doubt may arise with reference to the amount left under the trust. In this instance it must be said that the heir ought to be compelled to enter upon the estate, lest, if he should die before the controversy is terminated, the beneficiary of the trust may be defrauded.

§ 4.- It is proper to examine by whom a person can be compelled to enter upon and transfer an estate, so that, if a Praetor or a Consul should be appointed heir,

12.- PAPINIANO; *Cuestiones, libro XX*.- Mas cuando a cargo del instituido heredero de una parte se hubiese dejado bajo condición por fideicomiso la herencia, respondió por rescripto el Emperador Tito Antonino, que no tiene lugar su Constitución, y que no ha de ser auxiliado el pupilo extraordinariamente, en especial si el nuevo beneficio fuese pedido con perjuicio de otro.

13.- ULPIANO; *Fideicomisos, libro IV*.- Aquel a cuyo cargo se dejó bajo condición un fideicomiso, no podrá alegar cosa alguna, sobre que falte la condición y quede sujeto a las acciones, pues ningún perjuicio habrá de sobrevenir según lo que hemos expuesto.

§ 1.- Luego no se requiere ya la presencia del heredero.

§ 2.- Si respecto del testamento se discutiese alguna cosa, no debe ser oído el heredero, si dijese que para él es sospechosa la herencia; porque aunque principalmente se diga, o que no tuvo derecho de testar el que testó, o algo relativo a la validez del testamento, o sobre su propia condición, no deberá ser oído.

§ 3.- Luego ¿qué se dirá, si se tratase de la validez del fideicomiso? Esta cuestión no deberá ser desatendida; pero, ¿qué se dirá, si algún fideicomisario dijera que se ada primero, y que así se trate de esto? Creo, que a veces ha de ser oído el fideicomisario, si el conocimiento requiriese mas prolijo examen; porque supón que se haya de pedir de lejos el texto del fideicomiso, y que sobreviene justa deliberación sobre la cantidad del fideicomiso; se habrá de decir, que aquel debe ser compelido a adir la herencia, no sea que falleciendo antes el heredero engañe al fideicomisario..

§ 4.- Oportuno es preguntar por quién será uno obligado a adir y a restituir la herencia, por ejemplo, si un Pretor o un Cónsul hubiere sido instituido

pectamque hereditatem dicat, an cogi possit adire et restituere? Et dicendum est praetorem quidem in praetorem vel consulem in consulem nullum imperium habere: sed si iurisdictioni se subiciant, solet Praetor in eos ius dicere. Sed et si ipse praetor heres institutus suspectam dicat, ipse se cogere non poterit, quia triplici officio fungi non potest et suspectam dicentis et coacti et cogentis. Sed in his omnibus casibus atque similibus principale auxilium implorandum est.

§ 5.- Si quis filius familias sit et magistratum gerat, patrem suum, in cuius est potestate, cogere poterit suspectam dicentem hereditatem adire et restituere:

14.- HERMOGENIANUS; *libro IV, Fideicommissorum*.- Nam quod ad ius publicum attinet, non sequitur ius potestatis.

§ 1.- Sed et qui repudiavit hereditatem, coegetur adire et restituere ipsam hereditatem, si iustae causae allegentur.

§ 2.- Plane si bona venierint, non oportet praetorem ne quidem pupillum restituere nisi ex causa, ut Divus Pius Rescripsit.

§ 3.- Si quis compulsus adierit hereditatem ex testamento, quod secundas tabulas habebat, quaesitum est, an per aditionem et tabulae secundae firmarentur, quod videbantur evanuisse non adita patris hereditate. et Iulianus libro quinto decimo scribit et sequentes tabulas confirmari: quae sententia verissima est: nemo enim dubitat etiam legata praestari et libertates competere et cetera, quaecumque sint in testamento, perinde valere, ac si sua sponte heres hereditatem adisset.

and allege that he suspects the estate of being insolvent, it may be determined whether he can be compelled to accept and transfer it. It must be held that one Praetor has no jurisdiction over another, or one Consul over another, but if they are willing to subject themselves to his authority the Praetor can ordinarily decide the case. If, however, the Praetor himself, having been appointed heir, says that he suspects the estate of being insolvent, he cannot compel himself to accept it, because he cannot perform the duties of three persons; that is, of the one who declares the estate to be insolvent, the one who is compelled to accept it, and the one who forces him to do so. In all these cases, and in others like them, recourse should be had to the aid of the Emperor.

§ 5.- Where a son under paternal control becomes a magistrate, he can compel his father, to whose authority he is subject, to accept and transfer an estate, even if he may say that he suspects it of being insolvent.

14.- HERMOGENIANUS; *Trusts, Book XIV*.- For the right of paternal control does not apply to the duties of public office.

§ 1.- Where anyone has rejected an estate, he can be compelled to enter upon and transfer it, if good reasons are shown why he should do so.

§ 2.- It is clear that if the property should have been sold, restitution ought not to be granted the beneficiary of the trust, even though he be a minor, unless good reason is shown, as the Divine Pius stated in a Rescript.

§ 3.- Where anyone, through compulsion, enters upon an estate under the terms of the will, and a pupillary substitution has been made, the question arises whether the pupillary substitution is confirmed by the acceptance of the estate, as it would be considered extinguished if the estate of the father had not been entered upon. Julianus, in the Fifteenth Book, says that in a case of this kind the pupillary substitution is confirmed. This opinion is perfectly correct, for no one doubts that where legacies are

heredero, y dijese que la herencia era sospechosa, ¿podrá ser obligado a adirla y a restituirla? Y se ha de decir, que ciertamente no tiene el Pretor imperio alguno sobre el Pretor, o el Cónsul sobre el Cónsul, pero que, si se sometiesen a su jurisdicción, suele el Pretor juzgar contra ellos. Pero si el mismo Pretor instituido heredero dijese que era sospechosa, él no se podrá compeler a sí mismo, porque no puede desempeñar triple función, la del que dice que es sospechosa, la del compelido, y la del que compele; mas en todos estos casos y en otros semejantes se ha de implorar el auxilio del Príncipe.

§ 5.- Si alguno fuera hijo de familia, y desempeñara una magistratura, podrá obligar a su padre, bajo cuya potestad está, que dice que la herencia es sospechosa, a que la adiera y la restituya.

14.- HERMOGENIANO; *Fideicomisos, libro IV*.- Pues lo que al derecho público atañe no se sujeta al derecho de potestad.

§ 1.- Pero también el que repudió la herencia será obligado a adir, y a restituir la misma herencia, si se alegaran justas causas.

§ 2.- Ciertamente que si los bienes hubieren sido vendidos, no conviene que el que antes toma la herencia restituya ni aun al pupilo, sino con causa, como respondió por Rescripto el Divino Pío.

§ 3.- Si compelido hubiere uno adido la herencia en virtud de testamento, que contenía segundo testamento, se preguntó, si por la adición se confirmaría también el segundo testamento, porque parecía que se invalidó no habiendo sido adida la herencia del padre. Y escribe Juliano en el libro décimo quinto, que se confirma también el segundo testamento; cuya opinión es muy verdadera; porque nadie duda que también se pagan los legados, y que competen las libertades, y que es válido todo lo demás, que haya en

paid and freedom granted, they, as well as anything else mentioned in the will, are just as valid as if the heir had voluntarily accepted the estate.

el testamento, lo mismo que si espontáneamente hubiese el heredero adido la herencia.

§ 4.- Qui compulsus adit hereditatem, sicuti ceteris commodis caret, ita hoc quoque casu careat, ne possit paenitendo quartam retinere: et ita invenio ab Imperatore nostro et Divo patre eius rescriptum.

§ 4.- Where anyone accepts an estate under compulsion, he is, in this instance, deprived of all the advantages which he would otherwise have enjoyed, to such an extent that he cannot retain his fourth, even if he should change his mind. I find that there is a Rescript to this effect which was issued by Our Emperor and his Divine Father.

§ 4.- El que compelido adió la herencia, así como está privado de las demás ventajas, estará privado también en este caso de poder, arrepintiéndose, retener la cuarta; y así hallo que se respondió en rescripto por nuestro Emperador, y por su Divino padre.

§ 5.- Non omnis autem suspectam hereditatem repudiatione amissam cogere potest adiri et sibi restitui, sed is demum, ad quem actiones transire possunt: neque enim aequum est ad hoc quem compelli adire hereditatem, ut emolumentum quidem hereditatis refundat, ipse vero oneribus hereditatis obstrictus relinquatur.

§ 5.- Everyone cannot compel an estate suspected of being insolvent, and therefore rejected, to be entered upon and transferred to himself, but he only can do so to whom the rights of action belonging to the estate may pass, for it is not just to force an heir to accept an estate in such a way that he must relinquish every benefit attaching to it, and himself be left to sustain its burdens.

§ 5.- Mas no todo fideicomisario puede obligar a adir, y a que se le restituya, la herencia sospechosa perdida por repudio, sino solamente aquel a quien pueden pasar las acciones; porque no es justo que uno sea compelido a adir la herencia para esto, para que entregue ciertamente el emolumento de la herencia, y para que él quede sujeto a las cargas de la herencia.

§ 6.- Quare si fideicommissum pecuniarium alicui fuerit relictum, cessat compulsio, tametsi indemnitis cautio offeratur.

§ 6.- Hence, where a sum of money is left to anyone in trust, the right of compulsion does not apply, even though a bond of indemnity may be offered.

§ 6.- Por lo cual, si a uno se le hubiere dejado un fideicomiso pecuniario, deja de tener lugar el apremio, aunque se ofrezca caución de indemnidad.

§ 7.- Proinde qui hereditatem rogatur restituere, is demum compellitur restituere.

§ 7.- Therefore, where anyone is charged to surrender an estate, he alone can be compelled to transfer it,

§ 7.- Por lo tanto, solamente es compelido a restituirla aquel a quien se le ruega que restituya la herencia.

§ 8.- Sed et si quis bona rogatus sit vel familiam vel pecuniam rogetur vel universam rem meam,

§ 8.- But if anyone is asked to transfer all the property of the testator, his slaves, his money, or all his personal effects;

§ 8.- Pero también si a uno se le hubiera rogado, o se le rogara, que restituya los bienes, o los esclavos, o el dinero, o todas mis cosas,

15.- PAULUS; *libro II, Fideicommissorum.*- vel omnia sua.

15.- PAULUS; *Trusts, Book II.*- Or everything belonging to him:

15.- PAULO; *Fideicomisos, libro II.*- o todo lo suyo.

16.- ULPIANUS; *libro IV, Fideicommissorum.*- Cogi poterit: hoc idem et si patrimonium fuerit rogatus et si facultates et si quidquid habeo et si census meum et si fortunas meas et si substantiam meam. Et si peculium meum testator dixerit, quia plerique (deminutive) patrimonium suum peculium dicunt, cogendus erit: de successione enim sua et hic rogavit. nec ignoro in quibusdam ex his Maecianum dubitare et voluntatis esse dicere quaestionem, utrum de pecunia tantum an et de successione testator

16.- ULPIANUS; *Trusts, Book IV.*- He can be compelled to accept the estate. This same rule will apply if he should be charged to transfer his "patrimony," his "property," his "fortune," his "substance," or his "peculium," for the reason that many authorities hold that his peculium means his patrimony. In the above-mentioned instances the testator seems to have referred to his estate. I am not ignorant that Maecianus entertains doubt with reference to some of these cases, and says that there is

16.- ULPIANO; *Fideicomisos, libro IV.*- Podrá ser obligado. Y lo mismo, también si a uno se le hubiere rogado que restituya el patrimonio, o los bienes, o todo lo que tengo, o mi censo, o mi fortuna, o mi hacienda, o mi peculio, si así lo hubiere llamado el testador, porque muchos llaman en diminutivo peculio a su patrimonio, habrá de ser obligado; porque también éste rogó respecto a su sucesión. Y no ignoro, que en algunos de estos casos duda Meciano, y dice que hay respecto a la voluntad la

sensit. In ambiguo tamen magis de successione sensum dico, ne intercidat fideicommissum.

§ 1.- Sed et si quis ita rogaverit: quidquid ad te ex hereditate bonisve meis pervenerit, rogo restituas, cogi poterit adire et restituere hereditatem ex Trebelliano Senatusconsulto, quamquam pervenire proprie dicatur quod deductis oneribus ad aliquem pervenit.

§ 2.- Et generaliter autem potest dici ita demum quem non posse cogi adire et restituere hereditatem, si de re vel quantitate fuerit rogatus: ceterum si de universitate sensisse testatorem appareat, nulla quaestio est, quin, sive suspectam dicat, cogi possit, sive sponte adit, ex Trebelliano transeant actiones.

§ 3.- Inde quaeritur, si quis hereditatem rogatus sit restituere deducto aere alieno vel deductis legatis, an suspectam dicens cogi possit adire et restituere hereditatem, quia vi ipsa magis id, quod superest ex hereditate, quam ipsam hereditatem restituere sit rogatus. Et sunt qui putent, ut Maecianus, inutilem esse hanc deductionem: nec enim posse ex iure deduci quantitatem, non magis quam si fundum quis deducto aere alieno vel deductis legatis restituere sit rogatus: neque enim recipit fundus aeris alieni vel legati minutionem. sed Iulianum existimare refert Trebelliano Senatusconsulto locum esse et, ne dupliciter fideicommissarius oneretur, et cum heres aes alienum vel legatum deducit et cum convenitur a creditoribus et legatariis, restituta sibi ex Trebelliano hereditate debere aut deductionem eum non pati ab herede aut cavere illi heredem defensum iri eum adversus legatarios ceterosque.

a question as to the intention of the testator, and whether he had in his mind only a certain sum of money, or his entire estate. Still, where there is an ambiguity, I hold that the testator had the whole of his estate in his mind in order that the trust might not be extinguished.

§ 1.- But if anyone should make the following request, "I ask you to transfer to So-and-So everything which comes into your hands from my estate, or my property," the heir can be compelled to enter upon and transfer the estate, under the terms of the Trebellian Decree of the Senate; although the expression, "comes into your hands," may properly be said to mean what anyone receives after all claims have been deducted.

§ 2.- Moreover, it may generally be said that an heir cannot be compelled to accept and transfer an estate where he is only requested to do so with reference to a certain piece of property, or a certain sum of money. If, however, it appears that the testator had reference to his entire estate, there is no doubt that he can be compelled to enter upon it, whether he rejects it because he suspects it of being insolvent, or accepts it voluntarily, as the rights of action will pass under the Trebellian Decree of the Senate.

§ 3.- Hence, the question arises, where anyone is asked to transfer an estate after having deducted the debts or the legacies, and the heir alleges that he suspects the estate to be insolvent, can he be compelled to accept and transfer the estate, because he is charged to transfer rather what remains of the estate than the estate itself? Some authorities, and among them Msecianus, think that this deduction is void, for a sum of money cannot be deducted from a right, any more than if the heir were requested to transfer a tract of land after deducting the debts or the legacies, as land is not susceptible of diminution on account of debts or legacies. He states, however, that Julianus holds that the Trebellian Decree of the Senate will apply in this instance, in order that the beneficiary of the trust may not be liable to a double burden; that is to say, when the heir deducts the indebtedness or the legacies, and when suit is brought

cuestión de si el testador se refirió solamente al dinero, o si también a la sucesión; pero en caso de ambigüedad digo que más bien se refirió a la sucesión, para que no perezca el fideicomiso.

§ 1.- Pero también si uno hubiere rogado de este modo: «te ruego que restituyas todo lo que de la herencia o de mis bienes hubiere ido a tu poder», se podrá obligar a adir y a restituir la herencia en virtud del Senadoconsulto Trebeliano, aunque propiamente se diga «que llega a poder» lo que deducidas las cargas va a poder de uno.

§ 2.- Y en general se puede decir, que solamente no puede uno ser obligado a adir y a restituir la herencia, si hubiere sido rogado respecto a una cosa, o a una cantidad; mas si apareciera que el testador entendió referirse a la totalidad, no hay duda alguna, que, si dijera que era sospechosa, puede ser obligado, y que, si la adió espontáneamente, se transfieren las acciones en virtud del Senadoconsulto Trebeliano.

§ 3.- Por lo cual se pregunta, si, habiéndosele rogado a uno que, deducidas las deudas, o deducidos los legados, restituya la herencia, podrá, diciendo que es sospechosa, ser obligado a adir y a restituir la herencia, porque por la fuerza misma del caso más bien se le rogó que restituyera lo que resta de la herencia, que la misma herencia. Y hay quienes consideran, como Meciano, inútil esta deducción; porque de un derecho no se puede deducir una cantidad, no de otra suerte, que si a alguno se le hubiera rogado que; deducidas las deudas, o deducidos los legados, restituya un fundo, porque tampoco el fundo es susceptible de disminución por las deudas o por el legado. Pero refiere que Juliano estima, que ha lugar al Senadoconsulto Trebeliano, y que, para que no sea gravado dos veces el fideicomisario, así cuando el heredero deduce las deudas o el legado, como cuando es demandado por los

§ 4.- Si quis heres institutus rogatus fuerit hereditatem non totam, sed partem restituere, vel si duobus restituere sit rogatus et alter ex his velit sibi restitui hereditatem, alter recuset: Senatus censuit utroque casu exonerari eum, qui suspectam hereditatem dicit, totamque hereditatem transire ad eum, qui adire cogit.

§ 5.- Sed et si quis non hereditatis suae partem dimidiam rogavit heredem suum restituere, sed hereditatem Seiae, quae ad eum pervenerat, vel totam vel partem eius, heresque institutus suspectam dicat, cum placeat illud quod papinianus ait ex Trebelliano transire actiones, dici poterit, si suspecta dicatur hereditas, cogendum heredem institutum adire et restituere hereditatem totamque hereditatem ad eum cui restituitur pertinere.

§ 6.- Sed et si miles rogaverit quem res italicas restituere vel res provinciales, dicendum est suspectam dicentem cogi adire et restituere: nam, ut eleganter Maecianus libro sexto fideicommissorum ait, qua ratione ex certa re miles heredem instituere potest actionesque ei dabuntur, pari ratione etiam ex Trebelliano transibunt actiones: et quamvis placeat, cum quis hereditatem bonaque, quae sibi ab aliquo obvenerunt vel quae in aliqua regione habet, restituere rogat, ex Trebelliano non transeant actiones, tamen contra responderi in militis testamento ait: nam sicuti concessum est, inquit, militibus circa institutionem separare species bonorum, ita et, si per fideicommissum ab institutis heredibus id fecerit, admitteretur Trebellianum Senatusconsultum.

by the creditors and the legatees. For where the estate is delivered to him under the Trebellian Decree of the Senate, the beneficiary of the trust either ought not to suffer the loss of the deduction made by the heir, or the heir should furnish security to defend him against the legatees and other creditors.

§ 4.- Where anyone, who is appointed heir, is asked not to transfer the entire estate but only a portion of the same, or where he is asked to transfer it to two persons, and one of them wishes to accept it, and the other does not, the Senate decreed that the one who said that he suspected the estate of being insolvent should be released from liability, and that the entire estate should pass to him who compelled the heir to enter upon it.

§ 5.- If, however, a testator charges his heir to transfer, not his portion of the estate, but as much of it as came to him through Seia, and the appointed heir says that he believes the estate to be wholly or partly insolvent, the opinion of Papinianus, namely, that the rights of action pass under the Trebellian Decree of the Senate, will prevail; and it may be held that if the estate is alleged to be insolvent, the appointed heir can be compelled to enter upon and transfer it, and the entire estate will belong to him to whom it is transferred.

§ 6.- But where a soldier asks anyone to deliver his property which was situated in Italy, or some property situated in a province, it must be held that if the heir should say that he suspects the estate of being insolvent, he will be compelled to enter upon and transfer it. For, as Msecianus very properly says in the Sixth Book on Trusts, it is for this reason that a soldier can appoint an heir with reference to certain property, and the rights of action will be granted to him; likewise, for the same reason, rights of action will pass under the Trebellian Decree of the Senate. And, although it is well established that actions do not pass under the Trebellian Decree where the testator asks that property which came to him from anyone, or which he has in some country, shall be transferred, still, he says that the contrary opinion prevails with reference to military wills. For he

acreedores y por los legatarios, o debe él, habiéndosele restituido la herencia en virtud del Senadoconsulto Trebeliano, no consentirle al heredero la deducción, o debe el heredero darle caución de que él sera defendido contra los legatarios y los demás.

§ 4.- Si a uno, instituido heredero, se le hubiere rogado que restituya, no toda la herencia, sino parte, o si se le hubiera rogado que la restituya a dos, y uno de éstos quisiera que se le restituya la herencia, y el otro la rehusara, decidió el Senado, que en uno y en otro caso se descargaba al que dice que la herencia es sospechosa, y que toda la herencia pasa a aquel que obliga a adirla.

§ 5.- Pero también si alguno rogó a su heredero que restituya, no la mitad de su propia herencia, sino la herencia de Seia, que había ido a poder de él, o en totalidad, o en parte, y el heredero instituido la declara sospechosa, como se halla admitido lo que dice Papiniano, que en virtud del Senadoconsulto Trebeliano se transmiten las acciones se podrá decir, que, si se dijese que la herencia es sospechosa, el heredero instituido ha de ser obligado a adir y a restituir la herencia, y que toda la herencia pertenece a aquel a quien se le restituye.

§ 6.- Mas también si un militar le hubiere rogado a uno, que restituya los bienes de Italia, o los bienes de una provincia, se ha de decir, que al que declara sospechosa la herencia se le obliga a adirla y a restituirla; porque, como discretamente dice Meciano en el libro sexto de los Fideicomisos, por la misma razón por la que puede un militar, habiendo separado una cosa, instituir heredero, y se le darán a éste las acciones, pasarán también las acciones en virtud del Senadoconsulto Trebeliano. Y aunque esté determinado que cuando uno ruega que se restituyan la herencia y los bienes, que de otro fueron a su poder, o los que tiene en alguna región, no pasen las acciones en virtud del Senadoconsulto Trebeliano, dice, sin embargo, que se responde lo contrario respecto al testamento de un militar. Porque así como se les concedió, dice, a los militares, respecto a la

remarks, as soldiers, when they appoint heirs, are permitted to separate their different kinds of property, so also the Trebellian Decree of the Senate allows this to be done where heirs are charged with the execution of a trust.

§ 7.- Cum quidam duos heredes instituerit eosque invicem substituerit et ab his petierit, sive uterque sive alter heres esset, ut hereditas sua ex parte dimidia restitueretur alicui post quinquennium, et scripti suspectam sibi hereditatem dicant, fideicommissarius autem desideret suo periculo adiri hereditatem: censuit Senatus ambos heredes alterumve cogi adire hereditatem et fideicommissario eam restituere ita, ut fideicommissario et adversus eum actiones competant quasi ex Trebelliano restituta hereditate.

§ 8.- Maecianus scribit: cum quis ex fideicommissariis abesset et praesentes desiderent suo periculo adire hereditatem translatisque in solidum actionibus in eum qui coegit absentes, si velint fideicommissum suscipere, a praesente petent: consequenter ait nec quartam eum retenturum adversus fideicommissarios suos, quia nec heres potuit.

§ 9.- Idem Maecianus quaerit, an is, qui duobus vel pluribus rogatus est restituere hereditatem, cogente aliquo adire possit et in horum, qui id non desideraverunt, portionibus Falcidia beneficio uti, sive ipsi quoque desiderent sibi restitui sive alius in locum eorum successerit. Et cum hodie hoc iure utimur, ut totum transeat ad eum qui coegit, consequens erit dicere quartae retentionem amisisse eum qui coactus est, quia in solidum actiones transierint in eum qui coegit. Plane si proponas fideicommissarium non ita coegisse, ut tota hereditas in se transferatur: cum coeperint ceteri desiderare sibi restitui hereditatem, dicendum Falcidia eum uti posse. Recte igitur

§ 7.- If a certain man should appoint two heirs, and substitute them for one another, and charge them that if either became his heir, half of his estate should be transferred to a certain person after the lapse of five years, and the appointed heirs should say that they suspect the estate of being insolvent, and the beneficiary of the trust should wish them to accept it at his risk, the Senate decreed that both heirs, or one of them, could be compelled to enter upon the estate and transfer it to the beneficiary of the trust; so that the rights of action for and against the said beneficiary might pass just as where an estate is transferred under the Trebellian Decree of the Senate.

§ 8.- Maecianus says that when some of the beneficiaries of a trust are absent, and one who is present wishes the heir to enter upon the estate at his risk, and consequently the rights of action pass entirely to him who compelled the heir to accept, if the beneficiaries who are absent desire to share in the trust, they can make the demand upon him who was present. Maecianus states that the result will be that a beneficiary of the trust who was present cannot retain the fourth against his fellow beneficiaries, because the heir himself could not do so.

§ 9.- Maecianus also asks, where anyone is asked to transfer an estate to two or more beneficiaries, whether he can be compelled by one of them to enter upon it, and can avail himself of the benefit of the Falcidian portion, to which those who did not wish this to be done would have been entitled, whether they themselves wish the transfer to be made to them, or whether some other person, who has succeeded them, makes the demand. The rule which we make use of at present is that the entire estate shall pass to him who compelled its acceptance by the heir; and, in consequence, it must be said that the heir who was forced to accept it will lose the right to retain the fourth, because the rights of action pass unimpaired

institución, separar especies de bienes, así también si hubiere hecho esto por fideicomiso a cargo de los herederos instituidos, se admitiría el Senadoconsulto Trebeliano.

§ 7.- Cuando uno hubiere instituido dos herederos, y los hubiere substituido recíprocamente, y les hubiere pedido, ya ambos fuesen herederos, ya uno solo, que su herencia fuese restituida en la mitad a alguien después de un quinquenio, y los instituidos dijera que la herencia era sospechosa para ellos, pero el fideicomisario deseara que a su riesgo se adiese la herencia, decretó el Senado que se obligase a ambos herederos, o a uno de ellos, a adir la herencia y a restituirla al fideicomisario, de suerte, que las acciones competan al fideicomisario, y contra él, como si la herencia hubiese sido restituida en virtud del Senadoconsulto Trebeliano.

§ 8.- Escribe Meciano: cuando alguno de los fideicomisarios estuviese ausente, y los presentes desearan que a su riesgo se ada la herencia, y las acciones hubiesen sido transferidas por entero contra el que apremió, los ausentes, si quisieran recibir el fideicomiso, lo reclamarán al que está presente; y consiguientemente dice, que tampoco él retendrá la cuarta contra sus fideicomisarios, porque tampoco pudo retenerla el heredero.

§ 9.- Pregunta el mismo Meciano, si aquel a quien se le rogó que restituya la herencia a dos o más, podrá adirla apremiándole alguno, y utilizar el beneficio de la Falcidia sobre las porciones de los que no desearon tal cosa, ora si también éstos desearan que a si mismos se les restituya, ora si otro hubiere sucedido en el lugar de ellos. Y como hoy observamos este derecho, que todo pase a aquel que apremió, será consiguiente decir, que perdió la retención de la cuarta el que fue apremiado, porque las acciones pasaron por entero al que lo apremió. Pero la verdad, si expusieras que el fideicomisario no apremió de modo que toda la herencia se le transfiera a él,

Maecianus ait multum interesse, utrum totam restitui hereditatem sibi fideicommissarius desideraverit an suam tantummodo partem. Nam si sola pars transfertur, in residuo Falcidia erit locus: si tota hereditas translata sit, cessat huius legis beneficium.

§ 10.- Si servo duorum rogatus quis sit restituere hereditatem et alter cogere velit suspectam dicentem, alter restituere sibi recuset, hoc erit dicendum, quod in duobus, quorum alter suscipere voluit hereditatem, alter non.

§ 11.- Si pater filio, quem in potestate habet, rogetur restituere hereditatem, an filius patrem suum, si suspectam dicat hereditatem, cogere possit? et non est dubium patrem a filio per praetorem cogi posse.

§ 12.- Sed et si id fideicommissum ad castrense peculium spectaturum est et filius familias is fuit, qui munus militiae sustinebat aliove quo officio praeerat, multo magis dicendum erit posse eum postulare, ut pater suus cogatur adire et restituere hereditatem, quamvis contra obsequium patri debitum videtur id desideraturus.

§ 13.- Sed si servo suo rogatus sit cum libertate quis hereditatem restituere, sive directa data sit libertas sive fideicommissaria, dici poterit eum a servo suo non posse cogi adire hereditatem, quamvis, si sponte adisset, cogeretur praestare fideicom-

fourth, because the rights of action pass unimpaired to him who compelled the acceptance of the estate. It is clear that if you suggest that the first beneficiary should not compel the entire estate to be transferred to him, when the others demand that it shall be transferred to them, it must be said that the heir will be entitled to the benefit of the Falcidian Law. Therefore, Maecianus very properly holds that it makes a great deal of difference whether the beneficiary asks that the entire estate shall be transferred to him, or whether he asks only for his share of the same. For if only his share is transferred, the Falcidian Law will apply to the remainder; but if the entire estate is transferred, the heir will not enjoy the benefit of the law.

§ 10.- Where anyone is asked to transfer an estate to a slave belonging to two masters, and one of them wishes to compel the heir, who alleges that the estate is probably insolvent, to transfer it, and the other master refuses to accept it, it must be held that the case is the same as that where the heir is charged to transfer the estate to two persons, one of whom desires to accept it, while the other does not.

§ 11.- Where a father is charged to transfer an estate to his son, who is under his control, can the son compel his father to make the transfer, if the latter says that he thinks the estate is insolvent? There is no doubt that the father can be compelled to do so by the intervention of the Praetor.

§ 12.- Even when such a trust has reference to the castrense peculium of the son, who is in the military service, or holds some other office, it may more positively be said that the latter can demand that his father be compelled to enter upon the estate and transfer it to him, although in desiring this to be done he may appear to violate the filial respect due to his father.

§ 13.- If, however, anyone should be asked to transfer an estate to his slave with the grant of his freedom, whether freedom is directly granted to the slave, or this is done under the terms of a trust, it may be said that he cannot be compelled, by his own slave,

cuando los demás comenzaren a desear que se les restituya la herencia, se ha de decir, que él puede utilizar la Falcidia. Con razón, pues, dice Meciano, que hay mucha diferencia entre que el fideicomisario haya pretendido que se le restituya toda la herencia, o que solamente su parte; porque si se transfiere sola la parte, tendrá lugar sobre lo restante la ley Falcidia, y si hubiese sido transferida toda la herencia, deja de tener lugar el beneficio de esta ley.

§ 10.- Si a alguno se le hubiera rogado que restituya la herencia al esclavo de dos, y uno de éstos quisiera apremiar al que la declara sospechosa, y el otro rehusara que a él se la restituya, se habrá de decir lo mismo que respecto a dos, de los cuales uno quiso, y otro no, aceptar la herencia.

§ 11.- Si al padre se le rogara que restituya la herencia al hijo que tiene bajo su potestad, ¿podrá el hijo apremiar a su padre, si éste declarase sospechosa la herencia? Y no hay duda, que por medio del Pretor puede el padre ser apremiado por el hijo.

§ 12.- Pero aunque este fideicomiso haya de afectar al peculio castrense, y el hijo de familia haya sido persona que desempeñaba cargo en la milicia, o que ejercía otro cualquier cargo, con mucha más razón se habrá de decir que él puede pedir que sea obligado su padre a adir y a restituir la herencia, aunque parezca que él haya de pretender esto contra el respeto debido al padre.

§ 13.- Pero si a uno se le hubiera, rogado que con la libertad restituya la herencia a un esclavo suyo, ora haya sido dada la libertad directamente, ora por fideicomiso, se podrá decir que él no puede ser apremiado por su esclavo a adir la herencia, aunque,

missariam libertatem et hereditatem: idque Maecianus libro septimo de fideicommissis scribit.

§ 14.- Idem quaerit, si quis paratus sit domino cavere de indemnitate, an possit cogi adire hereditatem, maxime et si pretium servi offeratur. Et recte ait non oportere sub incerto cautionis committere se additioni hereditatis.

§ 15.- Hi qui solidum capere non possunt, ex asse heredes instituti et rogati restituere solidum, adire hereditatem et restituere cogentur, cum nihil oneris apud eos remansurum.

§ 16.- Si ego heres institutus et rogatus sim Stichum manumittere vel alius legatarius, fidei autem meae commissum sit, ut Titio hereditatem restituum, deinde Titii fidei commisit, ut Stichus eandem redderet: Stichus cogere me possit adire et restituere hereditatem.

§ 17.- Talis quoque casus a Divo Pio terminatus est: nam servo uni ex heredibus legato per fideicommissum erat ab eo libertas data et ab altero hereditas. Divus etenim Pius rescripsit Cassio Dextro in haec verba: "Hermias si Moscho Theodoto ex parte heredi instituto a Pamphilo testatore legatus est eumque Theodotus, postquam adierit hereditatem, prius quam a coherede eiusdem Pamphili adiretur hereditas, ad iustam libertatem perduxit et ob hoc in eum casum res perducta est, ut is qui legavit intestatus esse non possit, Hermia postulante mihi id Evarestus compellendus est periculo eius adire et ex causa fideicommissi hereditatem restituere".

to accept the estate; although if he should do so voluntarily, he will be forced to grant him his freedom, and transfer the estate to him under the terms of the trust. This Marcellus says in the Seventh Book on Trusts.

§ 14.- He also asks, when anyone is ready to give security to indemnify the master, whether the latter can be compelled to enter upon the estate, and especially if he should be tendered the price of the slave. He very properly holds that under the uncertain offer of the bond he is not required to venture to enter upon the estate.

§ 15.- Where heirs are appointed to an entire estate who are incapable of taking it under the will, and are asked to transfer the whole of it, they can be compelled to accept or transfer it, as they will be subject to no liability on this account.

§ 16.- If I should be appointed an heir and asked to manumit Stichus, or any other legatee should be asked to do so, and I should be charged to transfer the estate to Titius, and Titius should afterwards be charged to transfer the entire estate to Stichus, Stichus can compel me to enter upon and transfer the estate.

§ 17.- The following matter was settled by a decision of the Divine Pius. A slave having been bequeathed to one of the heirs of a testator, the said heir was charged to grant the slave his freedom, and another was charged to transfer the estate to the same slave. The Divine Pius addressed a Rescript to Cassius Dexter in the following words: "If the slave Hermias was bequeathed by the testator Pamphilus, to Mos-cus Theodotus, whom he appointed heir to a portion of his estate, and Theodotus should afterwards enter upon the same before it was accepted by his co-heir appointed by the said Pamphilus, and he should have granted the slave his freedom, on account of this, he who bequeathed the legacy could not be considered as intestate; and Hermias, having petitioned me, the co-heir, Evarestus must, under such circumstances, be compelled to accept the estate at the risk of Hermias,

si espontáneamente la hubiese adido, sería obligado a dar la libertad dejada por fideicomiso, y la herencia; y esto escribe Meciano en el libro séptimo de los Fideicomisos.

§ 14.- Pregunta el mismo, si, estando uno dispuesto a darle al señor caución de indemnidad, podría ser obligado a adir la herencia, mayormente si también se ofreciere el precio del esclavo. Y con razón dice que no conviene que bajo lo incierto de una caución se obligue uno a la adición de la herencia.

§ 15.- Los que no pueden adquirir la totalidad, instituidos herederos de toda la herencia, y rogados para que la restituyan íntegra, serán obligados a adir y a restituir la herencia, porque ninguna carga habrá de quedar sobre ellos.

§ 16.- Si yo hubiera sido instituido heredero, y a mí, o a otro legatario, se nos hubiera rogado que manumitamos a Stico, pero a mi fidelidad se hubiera encomendado que yo le restituya a Ticio la herencia, y después se hubiera encomendado a la fidelidad de Ticio que se la entregase a Stico, Stico puede obligarme a adir ya restituir la herencia.

§ 17.- También este caso fue resuelto por el Divino Pío; porque habiéndose legado un esclavo a uno de los herederos, se había dado a cargo de éste por fideicomiso la libertad, y a cargo de otro la herencia. Y el Divino Pío respondió por rescripto a Cassio Dextro en estos términos: «si Hermias fue legado por el testador Pánfilo a Mosco Teodoto, que había sido instituido heredero de una parte, y Teodoto, después que hubiere adido la herencia y antes que la herencia fuese adida por un coheredero del mismo Pánfilo, lo puso legalmente en libertad, y por esto la cosa fue puesta en tal estado que no pueda ser intestado el que hizo el legado, pidiéndomelo Hermias, ha de ser compelido Evaresto a adir a su riesgo la herencia, y a restituirla por causa del fideicomiso».

and to transfer it to him under the terms of the trust."

17.- IDEM; *libro II, Fideicommissorum*.- Ex facto tractatum est, an per fideicommissum rogari quis possit, ut aliquem heredem faciat. Et Senatus censuit rogari quidem quemquam, ut aliquem heredem faciat, non posse: verum videri per hoc rogasse, ut hereditatem suam ei restituat, id est quidquid ex hereditate sua consecutus est ut ei restitueret.

§ 1.- Iulianus quoque libro quadragesimo Digestorum fideicommissum tale valere ait: "fidei tuae committo, ut hereditatem Titii restituas", quum esset is qui rogatus est a titio heres institutus.

§ 2.- Non tantum autem si heredem quem scripsero, potero rogare, ut heredem faciat aliquem, verum etiam si legatum illi vel quid aliud reliquero: nam hactenus erunt obligati, quatenus quid ad eos pervenit.

§ 3.- Si quis caverit "peto ut illi des" aut "illi fideicommissum relinquo" aut "illi libertatem adscribas", admittenda sunt: nam cum in heredum institutione Senatus censuit utile, de ceteris quoque idem erit accipiendum.

§ 4.- Si quis rogatus fuerit, ut, si sine liberis decesserit, restituat hereditatem, Papinianus libro octavo responsorum scribit etiam naturalem filium efficere, ut deficiat condicio: et in libertino eodem coliberto hoc scribit. Mihi autem, quod ad naturales liberos attinet, voluntatis quaestio videbitur esse, de qualibus liberis testator senserit: sed hoc ex dignitate et ex voluntate et ex condicione eius qui fideicommissum accipiendum erit.

17.- THE SAME; *Trusts, Book II*.- In a matter which was under discussion, the question arose whether anyone could, under the terms of a trust, be charged to appoint another his heir. The Senate decreed that anyone could not be charged to appoint another his heir, but if he did so it was held that it would be the same as if he had been asked to transfer his estate to him; that is to say, to transfer to him anything which he may have received from his estate.

§ 1.- Julianus also, in the Fortieth Book of the Digest, says that a trust in the following terms will be valid, "I charge you to transfer the estate of Titius," when he who was asked to do this was appointed an heir by Titius.

§ 2.- If I should appoint someone my heir, I can not only ask him to appoint another person his heir, but also if I should bequeath to him a legacy, or anything else, I can do so; for persons of this kind are liable to the amount of any property which may come into their hands.

§ 3.- If anyone should insert the following into his will, "I ask you to give such-and-such an article to So-and-So," or "leave him something under a trust," or "bequeath him his freedom," such legacies are valid; for, as the Senate decreed that a trust is valid with reference to the appointment of heirs, so the same rule must be understood to apply to other testamentary dispositions.

§ 4.- If anyone should be asked to transfer an estate provided he died without issue, Papinianus, in the Eighth Book of Opinions, says that the condition will fail to be fulfilled if the person should leave even a natural child; and he asserts that the same rule will apply to a freedman, where a child of this kind is manumitted with him. For my part, however, I think that this question, so far as natural children are concerned, seems to depend upon the intention of the testator, and what kind of children he had in his mind; for when he charged anyone with a trust of this description, his rank, wishes, and condition must all

17.- EL MISMO; *Fideicomisos, libro II*.- Se discutió sobre un hecho, si podría uno ser rogado por fideicomiso para que haga heredero a alguien. Y decretó el Senado, que ciertamente no se le pudiera rogar a uno, que haga heredero a alguien, pero que se considerase que de este modo rogó que a aquel le restituyese su herencia, esto es; que le restituyera todo lo que percibió de su herencia.

§ 1.- También Juliano dice en el libro cuadragésimo del Digesto, que es válido este fideicomiso: «encomiendo a tu fidelidad que restituyas la herencia de Ticio», habiendo sido instituido heredero por Ticio el que fue rogado.

§ 2.- Mas no solamente si yo hubiere instituido a alguien heredero le podré rogar que haga heredero a otro, sino también si a él le hubiere yo dejado un legado, o alguna otra cosa; porque sólo quedarán obligados por tanto cuanto fue a poder de ellos.

§ 3.- Si alguno hubiere dicho: «pido que le des a aquél», o, «que le dejes a aquel un fideicomiso», o, «que le concedas a aquella libertad», se han de admitir estas disposiciones; porque habiéndolo considerado útil el Senado respecto a la institución de herederos, lo mismo se habrá de admitir también en cuanto a lo demás.

§ 4.- Si a uno se le hubiere rogado, que, si muriere sin hijos, restituya la herencia, escribe Papiniano en el libro octavo de las Respuestas, que también el hijo natural hace que falte la condición; y esto escribe respecto a un libertino y también coliberto. Pero a mí me parece, en cuanto atañe a los hijos naturales, que hay respecto a la voluntad cuestión sobre los hijos a que haya entendido referirse el testador; mas esto se habrá de interpretar por la dignidad, por la voluntad y por la condición del que dejó el fideicomiso.

be taken into account.

§ 5.- Ex facto tractatum memini: rogaverat quaedam mulier filium suum, ut, si sine liberis decessisset, restitueret hereditatem fratri suo: is postea deportatus in insula liberos suscepit: quaerebatur igitur, an fideicommissi condicio defecisset. Nos igitur hoc dicemus conceptos quidem ante deportationem, licet postea edantur, efficere, ut condicio deficiat, post deportationem vero susceptos quasi ab alio non prodesse, maxime cum etiam bona cum sua quodammodo causa fisco sint vindicanda.

§ 6.- Si quis rogatus fuerit filiis suis vel cui ex his voluerit restituere hereditatem, Papinianus libro octavo responsorum etiam deportato ei tribuit eligendi facultatem, cui liber factus fideicommissum restitui velit. sed si servus poenae fuerit constitutus, nullo ante concepto filio iam parere conditioni non poterit decessisseque sine liberis videtur. Sed cum decedit, electionem illam, quam Papinianus deportato dedit, huic dari non oportet.

§ 7.- Si quis autem suscepit quidem filium, verum vivus amiserit, videbitur sine liberis decessisse. sed si naufragio vel ruina vel adgressu vel quo alio modo simul cum patre perierit, an condicio defecerit, videamus. Et magis non defecisse arbitror, quia non est verum filium eius supervixisse. Aut igitur filius supervixit patri et extinxit condicionem fideicommissi, aut non supervixit et extitit condicio: cum autem, quis ante et quis postea decesserit, non apparet, extitisse condicionem fideicommissi magis dicendum est.

§ 5.- I remember that the following point was discussed. A certain woman requested her son to transfer the estate to his brother, if he should die without issue, and the son, after having been banished, had children in the island to which he was sent. Hence, the question arose whether the condition upon which the trust was dependent had failed to be complied with. We are of the opinion that where children are conceived before the banishment, even though they may be born afterwards, this causes the condition to fail; but where they are both conceived and born after the banishment, the case is different, because they are, as it were, born to a stranger, and especially should this be considered where all the property of the person is subject to confiscation by the Treasury.

§ 6.- Where a man is asked to transfer an estate to his children, or to anyone of them whom he may select, Papinianus, in the Eighth Book of Opinions, concedes the right of selection even to a person who has been banished; if, having become free, he desires the restoration of the trust. Where, however, he was condemned to penal servitude, without any child having previously been conceived, he will be unable to comply with the condition, for he is considered to have died without issue. But he cannot be granted the privilege of selection which Papinianus accords to a person who is under sentence of banishment at the time of his death.

§ 7.- If, however, he should have a child, but should lose it during his lifetime, he will be considered to have died without issue. But let us see if the child should die at the same time as its father, through a shipwreck, or the fall of a house, or an attack, or any other occurrence, whether the condition would fail to be fulfilled. I think that the condition would not fail, because, in this instance, it is not certain that the child survived its father, therefore it either survived its father and this extinguished the condition of the trust, or it did not survive him, and the condition was fulfilled. Moreover, as it is not apparent which one died before, and which one after the other, the better

§ 5.- Recuerdo que se discutió sobre este hecho: le había rogado cierta mujer a su hijo, que, si falleciese sin hijos, restituyera la herencia a su hermano; deportado él después a una isla, había tenido hijos; se preguntaba, pues, si había faltado la condición del fideicomiso. Y nosotros diremos esto, que ciertamente que los concebidos antes de la deportación hacían, aunque fueran dados a luz después, que faltara la condición, pero que los tenidos como si fueran de otro, después de la deportación, no aprovechaban, mayormente, habiéndose de reivindicar para el fisco también los bienes en cierto modo con su causa.

§ 6.- Si a uno se le hubiere rogado que restituya la herencia a sus hijos, o al que de éstos él hubiere querido, Papiniano en el libro octavo de las Respuestas le concede libertad, aunque esté deportado, para elegir aquel a quien, hecho él libre, quiera que se le restituya el fideicomiso. Pero si hubiere sido declarado esclavo de la pena, no habiendo sido concebido antes ningún hijo, no podrá ya cumplir la condición, y se considera que falleció sin hijos; mas cuando fallece, no se le debe dar la elección, que Papiniano dio al deportado.

§ 7.- Mas si alguno hubiere tenido ciertamente un hijo, pero lo hubiere perdido en vida, se considerará que falleció sin hijos. Pero veamos si habrá faltado la condición, si al mismo tiempo que el padre hubiere perecido en naufragio, o en ruina, o por acometida, o de otro cualquier modo. Y más bien creo que no faltó, porque no es verdad que le haya sobrevivido su hijo. Porque o el hijo sobrevivió al padre, y extinguió la condición del fideicomiso, o no le sobrevivió, y se cumplió la condición; mas no apareciendo quién haya fallecido antes, y quién después, más bien se ha de decir que se cumplió la condición del fideicomiso.

opinion is to hold that the condition of the trust was fulfilled.

§ 8.- Si quis ita fideicommissum reliquerit: "fidei tuae, fili, committo, ut, si alieno herede moriaris, restituas seio hereditatem", videri eum de liberis sensisse Divus Pius rescripsit: et ideo, cum quidam sine liberis decederet, avunculum ab intestato bonorum possessorem habens, extitisse condicionem fideicommissi rescripsit.

18.- IDEM; *libro XV, ad Sabinum*.- In fideicommissaria hereditatis restitutione constat non venire fructus, nisi ex mora facta est aut cum quis specialiter fuerit rogatus et fructus restituere.

§ 1.- Plane fructus in quartam imputantur, ut est et rescriptum.

§ 2.- Quotiens quis rogatur hereditatem restituere, id videtur rogatus reddere, quod fuit hereditatis: fructus autem non hereditati, sed ipsis rebus accepto feruntur.

§ 3.- Si legatum sit heredi relictum et rogatus sit portionem hereditatis restituere, id solum non debere eum restituere, quod a coherede accepit: ceterum quod a semetipso ei relictum est, in fideicommissum cadit: et id Divus Marcus decrevit.

19.- PAULUS; *libro III, ad Sabinum*.- Ubi pure fideicommissum datum est, si adiectum sit: "rogo des filio tuo faciasque, ut ad eum perveniat", rescriptum est videri in id tempus dari, quo capere potest, id est sui iuris fiat.

§ 1.- «Te rogo, Luci Titi, hereditatem meam cum

§ 8.- If anyone should leave a trust as follows, "My son, if you should die after having appointed a foreign heir, I charge you to transfer my estate to Seius," the Divine Pius stated in a Rescript that the testator seems to have had reference to the heir's children; therefore, where anyone dies without issue, leaving a maternal uncle entitled to praetorian possession, on the ground of intestacy, the Emperor declared in a Rescript that the condition of the trust had been fulfilled.

18.- THE SAME; *On Sabinus, Book XV*.- In the transfer of an estate under the terms of a trust, it is settled that the profits are not included unless the heir is in default, or was especially charged to transfer them.

§ 1.- It is clear that the profits should be included in the fourth, as was stated in the Rescript.

§ 2.- Whenever anyone is asked to transfer an estate, he is considered to have been asked to transfer everything belonging to it; the profits, however, are not considered to have been derived from the estate itself, but from the property belonging to the same.

§ 3.- Where a legacy is left to an heir, and he is asked to transfer his share of the estate, he must not only transfer any legacy which he has received from his co-heir, but whatever he himself is charged with is included in the trust. This was established by a Decree of the Divine Marcus.

19.- PAULUS; *On Sabinus, Book III*.- Where a trust is bequeathed absolutely, and the following words are added, "I charge you to deliver my estate to your son, and cause it to come into his hands," it is stated in a Rescript that the bequest is made to take effect at the time when the son can receive it, that is to say, when he becomes his own master.

§ 1.- "I ask you, Lucius Titius, to divide my estate

§ 8.- Si uno hubiere dejado así un fideicomiso: «encomiendo, hijo, a tu fidelidad, que, si murieses dejando heredero extraño, restituyas la herencia a Seyo», respondió por rescripto el Divino Pío, que se consideraba que éste entendió referirse a los hijos; y por lo tanto, respondió por rescripto, que cuando uno falleciera sin hijos, teniendo como poseedor de los bienes abintestato un tío materno, se cumplió la condición del fideicomiso.

18.- EL MISMO; *Comentarios a Sabino, libro XV*.- Es sabido, que en la restitución de la herencia por fideicomiso no se comprenden los frutos, a menos que se haya hecho con mora, o que a alguno se le hubiere rogado especialmente que restituya también los frutos.

§ 1.- Ciertamente que los frutos se computan para la cuarta, como también se respondió por rescripto.

§ 2.- Siempre que a uno se le ruega que restituya la herencia, se considera que se le rogó que entregue lo que fue de la herencia; pero los frutos no se le dan por recibidos a la herencia, sino á las mismas cosas.

§ 3.- Si al heredero se le hubiera dejado un legado, y se le hubiera rogado que restituya la porción de la herencia, no debe él restituir solamente lo que recibió del coheredero, sino que lo que se le dejó a cargo de el mismo cae dentro del fideicomiso; y esto decretó el Divino Marco.

19.- PAULO; *Comentarios a Sabino, libro III*.- Si cuando se dio puramente un fideicomiso, se hubiera añadido: «te ruego que le des a tu hijo, y que hagas que llegue a su poder», se respondió por rescripto, que se consideraba que se daba para el tiempo en que puede adquirir, esto es, para cuando se haga de propio derecho.

§ 1.- «Te ruego, Lucio Ticio, que partas mi herencia

attio partiaris». ex Senatusconsulto Trebelliano in eum, cui restituta est hereditas, actiones competere aristo ait, quia pro hoc accipiendum sit «rogo hereditatem illam restituas»: nec verba spectantur Senatusconsulti, sed sententia quibuscumque verbis, dum testator senserit, ut hereditas sua restituatur.

§ 2.- Qui in distrahendis conservandisque rebus hereditariis sumptus factus est, imputari heredi debet.

20.- ULPIANUS; *libro XIX, ad Sabinum*.- Sed et si ad tempus liberorum fuerit legatum relictum et si uxore praegnante decesserit, ad heredem suum transferat legatum.

21.- POMPONIUS; *libro XXII, ad Sabinum*.- Heres cum debuisset quartam retinere, totam hereditatem restituit nec cavet sibi stipulatione proposita. Similem eum esse aristo ait illis, qui retentiones, quas solas habent, omittunt: sed posse eum rerum hereditarium possessionem vel repetere vel nancisci et adversus agentem doli mali exceptione uti posse eum et debitoribus denunciare, ne solveretur.

22.- ULPIANUS; *libro V, Disputationum*.- Mulier, quae duobus filiis in potestate patris relictis alii nupserat, posteriorem maritum heredem instituit eumque rogavit liberis suis post mortem patris eorum hereditatem suam restituere vel ei qui eorum superesset: eisdem emancipatis a patre suo vitricus restituisse hereditatem dicebatur, mox alter ex filiis vivo patre decessisset: quaerebatur, an is, qui supererat ex filiis, partem fratri suo restitutam petere possit quasi praemature datam. Scaevola Divum Marcum in auditorio de huiusmodi specie iudicasse refert: Brasidas quidam Lacedaemonius vir praetorius, cum filiis suis ab uxore divortio separata,

with Attius." Aristo says that, under the Trebellian Decree of the Senate, the rights of action affecting the estate pass to him to whom the estate is transferred; because the words are understood to mean, "I ask you to transfer that estate." The terms of the Decree of the Senate are not to be considered, but the intention of the testator must be, no matter how it was expressed, provided he intended that his estate should be transferred.

§ 2.- Where any expense has been incurred by the sale, or through measures taken for the preservation of property forming part of an estate, it should be charged to the heir.

20.- PAULUS; *On Sabinus, Book XIX*.- Where, however, a legacy is left to someone to vest at the time when he shall have children, and he dies leaving his wife pregnant, he will transmit the legacy to his heir.

21.- POMPONIUS; *On Sabinus, Book XXII*.- Where an heir, who had a right to retain a fourth, transferred the entire estate, and did not provide for himself by a stipulation, Aristo says his case is similar to that of those who fail to reserve property to which they have no other right; but that he can recover or obtain possession of the assets of the estate, and can make use of an exception on the ground of bad faith against the party claiming the property, and can notify the debtors of the estate that payment should not be made.

22.- ULPIANUS; *Disputations, Book V*.- A woman who left two children under the control of their father married another man after a divorce, appointed her second husband her heir, and charged him to transfer her estate to her children, or to the survivor of them, after the death of their father. The said children having been emancipated by their father, the stepfather was said to have transferred the estate to them, and afterwards one of the children died during the lifetime of his father. The question arose whether the surviving child could demand that the share of his brother should be given to him, because it was prematurely transferred. Scse-vola relates that the

con Atcio»; dice Aristón, que en virtud del Senadoconsulto Trebeliano competen las acciones, contra aquel a quien fue restituida la herencia, porque se ha de entender como si hubiese dicho: «te ruego que restituyas aquella herencia»; y no se atiende a las palabras del Senadoconsulto, sino al sentido expresado con cualesquiera palabras, con tal que el testador haya entendido decir que se restituya su propia herencia.

§ 2.- El gasto que se hizo para enajenar o conservar bienes de la herencia se le debe contar al heredero.

20.- ULPIANO; *Comentarios a Sabino, libro XIX*.- Pero también si se hubiere dejado un legado para cuando uno tenga hijos, y éste hubiere fallecido estando embarazada su mujer, transfiere el legado a su heredero.

21.- POMPONIO; *Comentarios. a Sabino libro XXII*.- Un heredero, habiendo debido retener la cuarta, restituyó toda la herencia, y no se aseguró interponiendo estipulación; Aristón dice, que este es semejante a aquellos que prescinden de las solas retenciones que tienen, pero que puede o repetir o alcanzar la posesión de los bienes de la herencia, y que contra el demandante puede utilizar la excepción de dolo malo, y prevenir a los deudores para que no se pague.

22.- ULPIANO; *Disputas, libro V*.- Una mujer, que habiendo dejado dos hijos bajo la potestad del padre se había casado con otro, instituyó heredero a su segundo marido, y le rogó que restituyera su herencia a sus hijos después de la muerte del padre de estos, o al que de ellos sobreviviese; se decía, que, emancipados ellos por su padre, les restituyó el padrastrero la herencia, y que después, viviendo el padre, falleció uno de los hijos; se preguntaba, si el que de los hijos sobrevivía, podría pedir la parte restituida a su hermano, como si hubiese sido dada prematuramente. Refiere Scévola, que el Divino Marco juzgó en audiencia sobre un caso semejante: cierto Lace-

si morte patris sui iuris fuissent effecti, fideicommissum relictum esset, eos emancipaverat: post emancipationem fideicommissum petebant. Decrevisse igitur Divum Marcum refert fideicommissum eis repraesentandum intellecta matris voluntate, quae quia non crediderat patrem eos emancipaturum, distulerat in mortem eius fideicommissum non dilatura id in mortalitatem, si eum emancipaturum sperasset.

Secundum haec dicebam et in proposita quaestione decretum Divi Marci esse trahendum et recte fideicommissum utrisque solutum.

§ 1.- Non est dubitatum cogi posse heredem institutum adire et restituere hereditatem servis, sive directa sive fideicommissaria libertas eis data fuisset, cum aspernari heres non deberet personam cogentis: habet enim hic quoque aditum, ut, qui nondum petere fideicommissariam libertatem possit nec directam sibi vindicare, propter spem tamen libertatis et hereditatis aditum ad Praetorem et per se habeat.

§ 2.- Si heres post multum temporis restituat, cum praesenti die fidei commissum sit, deducta quarta restituet: fructus enim qui percepti sunt negligentia petentis, non iudicio defuncti percepti videntur.

Alia causa est, si sub condicione vel in diem rogatus fuerit: tunc enim quod percipitur summovet Falcidiam, si tantum fuerit, quantum quarta facit et quartae fructus: nam fructus, qui medio tempore percepti sunt, ex iudicio testantis percepti videntur.

Divine Marcus decided a case of this kind in his audience room. A certain Erasidas, a Lacedemonian, and a man of Pratorian rank, emancipated his children who had remained with him after his wife had been divorced, and to whom an estate had been left in trust in case they should become their own masters by the death of their father. After their emancipation they demanded the execution of the trust. Scsevola says that the Divine Marcus decided that they were entitled to the trust in accordance with the intention of their mother, who deferred its execution until the death of her husband, because she did not think that their father would emancipate them, and she would not have deferred it until his death if she had expected him to emancipate them.

In accordance with this, I held that the Decree of the Divine Marcus applied to the present case, and that the trust had been legally executed with reference to the two children.

§ 1.- There is no doubt that an appointed heir can be compelled to enter upon an estate and transfer it to slaves, where their freedom has been bequeathed to them either directly or under the terms of a trust, as the heir should not treat with contempt whoever compels him to accept the estate. For, although a slave cannot demand that the heir shall enter upon the estate, or claim his freedom directly under the trust, he has a right to appear before the Praetor in person, on account of the expectation which he has of obtaining his freedom and the estate.

§ 2.- Where an heir transfers an estate after a long period of time, when he was required to do so at once under a trust, he can still transfer the estate after having deducted his fourth; and any profits which he may have collected on account of the neglect of the claimant are considered not to have been obtained under the will of the deceased.

The case, however, is different if he was asked to transfer the estate under a condition, or within a certain time; for then anything which he has collected will take the place of the Falcidian portion, if it amounts to as much as his fourth and the profits of the

demonio, llamado Brasidas, varón pretorio, habiéndoseles dejado a sus hijos un fideicomiso por su mujer, separada por divorcio, si por la muerte de su padre se hubiesen hecho de propio derecho, los había emancipado; después de la emancipación pedían el fideicomiso; y refiere que el Divino Marco decretó que se les debía entregar el fideicomiso, interpretándose la voluntad de la madre, la cual, porque no había creído que el padre los emanciparía, había diferido hasta la muerte de aquel el fideicomiso, no habiendo de haberlo diferido hasta la muerte, si hubiese esperado que él los emanciparía.

Según esto, yo decía que el decreto del Divino Marco se debía aplicar también a la cuestión propuesta, y que con razón se les pagó a ambos el fideicomiso.

§ 1.- No se ha dudado que el heredero instituido puede ser obligado a adir y a restituir la herencia a los esclavos, ora se les hubiese dado directamente, ora por fideicomiso, la libertad, porque el heredero no debería despreciar la persona del que le obliga; pues también éste tiene facultad para comparecer, de suerte que, el que todavía no puede pedir la libertad dejada por fideicomiso, ni reivindicar para sí la directa, tenga, sin embargo, por causa de la esperanza de la libertad y de la herencia facultad para comparecer ante el Pretor también por sí mismo.

§ 2.- Si el heredero lo restituyera después de mucho tiempo, siendo de presente el fideicomiso, lo restituirá deducida la cuarta; porque los frutos, que fueron percibidos se consideran percibidos por negligencia del demandante, no por voluntad del difunto.

Otra cosa es, si se le hubiere rogado que bajo condición, o para plazo; porque entonces lo que se percibe excluye la Falcidia, si importare tanto cuanto basta para la cuarta, y para los frutos de la cuarta; porque los frutos, que se percibieron en el tiempo

§ 3.- Sed enim si quis rogetur restituere hereditatem et vel servi decesserint vel aliae res perierint, placet non cogi eum reddere quod non habet: culpa plane reddere rationem, sed eius quae dolo proxima est. Et ita Neratius libro primo responsorum scribit. Sed et si, cum distrahere deberet, non fecit lata culpa, non levi et rebus suis consueta negligentia, huiusmodi rei rationem reddet.

Sed et si aedes ustae sunt culpa eius, reddit rationem. Praeterea si qui partus extant et partuum partus, quia in fructibus hi non habentur. Sed et ipse si quem sumptum fecit in res hereditarias, detrahet. Quod si sine facto eius prolixitate temporis aedes usu adquisitae sint, aequisimum erit nihil eum praestare, cum culpa careat.

§ 4.- Cum proponeretur quidam filiam suam heredem instituisse et rogasse eam, ut, si sine liberis decessisset, hereditatem Titio restitueret, eaque dotem marito dedisse certae quantitatis, mox decedens sine liberis heredem instituisse maritum suum, et quaereretur, an dos detrahi possit, dixi non posse dici in eversionem fideicommissi factum, quod et mulieris pudicitiae et patris voto congruebat. Quare dicendum est dotem decedere, ac si quod superfuisset rogata esset restituere. Quod si tantos fructus ex hereditate mulier percepit, ut inde poterit doti satisfieri, dicendum est potius fructibus hoc expensum ferendum quam fideicommisso.

same. Any profits which have been obtained in the meantime are considered to have been collected in accordance with the will of the testator.

§ 3.- If a person is asked to transfer an estate, and before he does so any of the slaves belonging to it should die, or any of the property be lost, it is decided that he cannot be compelled to transfer anything which he does not have; but it is evident that he must account for his negligence, but only in case it resembles fraud. This was stated by Neratius in the First Book of Opinions. If he did not sell the property at a time when he should have done so, he is guilty of gross, and not of slight negligence, such as he would have avoided in the transaction of his own business, and he must, under such circumstances, be held responsible.

Moreover, if a house should be burned through his negligence, he must account for it. Again, he will be accountable for the children of slaves, and even the children of those children if they should die, because these are not included in the profits of the estate. He himself can deduct any expense which he has incurred on account of property belonging to the estate. But if, through no act of his, a house is acquired by use through lapse "of time, it is perfectly just that he should not be considered liable, as he is free from blame.

§ 4.- The following was proposed: "A certain man appointed his daughter his heir, and charged her, if she died without issue, to transfer her estate to Titius. She had given a dowry of a certain sum of money to her husband, and afterwards, having died without issue, she appointed her husband her heir." The question arose whether the dowry could be deducted. I said that it could not be held that the daughter intended to annul the trust, which was in accordance with both the duty of the woman and the wishes of her father; hence it must be said that the dowry has disappeared, just as if she had asked what remained of it to be transferred. If the woman collected enough income from the estate to be able to pay the amount of her dowry, it should be said that this expense ought to be charged to the profits rather than to the trust.

intermedio, se consideran percibidos por disposición del testador.

§ 3.- Mas, sin embargo, si a alguno se le rogara que restituya la herencia, y o los esclavos hubieren fallecido, u otras cosas hubieren perecido, está determinado que no se le obligue a entregar lo que no tiene; pero que ciertamente dé cuenta de la culpa, mas de aquella, que está próxima al dolo; y así lo escribió Neracio en el libro primero de las Respuestas. Pero también si debiendo enajenar no lo hizo por culpa lata, no por leve, ni por la negligencia acostumbrada en sus propias cosas, dará cuenta de semejante cosa.

Mas también si por su culpa se quemaron las casas, dará cuenta; y además, si hubiera algunos partos, y partos de los partos, porque ellos no son comprendidos en los frutos. Pero si hizo algún gasto en las cosas de la herencia, también lo deducirá él. Pero si sin hecho de él, por el transcurso de tiempo se hubieran adquirido casas por el uso, será muy justo que él de nada responda, porque está exento de culpa.

§ 4.- Proponiéndose que uno instituyó heredera a su hija, y le rogó, que, si falleciese sin hijos, restituyera a Ticio la herencia, y que ella le dió a su marido dote de cierta cantidad, y que después falleciendo sin hijos instituyó heredero a su marido, y preguntándose si se podría deducir la dote, dije que no se podía decir que se hubiese hecho para invalidación del fideicomiso lo que era conforme al decoro de la mujer y al deseo del padre; por lo cual se ha de decir, que se deduce la dote lo mismo que si a ella se le hubiese rogado que restituyera lo que hubiera quedado. Pero si la mujer percibió de la herencia tantos frutos que con ellos se pudiese pagar la dote, se ha de decir que este gasto se ha de cargar más bien a los frutos que al fideicomiso.

§ 5.- Ut Trebelliano locus esset, non sufficit de hereditate rogatum esse, sed quasi heredem rogari oportet. Denique si cui portio hereditatis fuerit legata (legari enim posse etiam portionem hereditatis placet nobis) rogatusque fuerit hanc partem restituere, dubio procul non fiet restitutio ex Senatusconsulto ideoque nec quarta retinetur.

23.- IULIANUS; *libro XXXIX, Digestorum*.- Quotiens pater familias unum vel duos heredes coheredibus suis restituere hereditatem iubet, intellegitur easdem partes in fideicommissis facere, quas in hereditate distribuenda fecerit. Sed si iubeantur hi, quibus fideicommissum datur, pecuniam numerare atque ita fideicommissa recipere, ex quantitate pecuniae, quam dare iubentur, voluntas colligenda est patris familias. Nam si ex disparibus partibus heredes scripti aequas partes dare iubentur, propius est, ut viriles recipere debeant: si vero summa pecuniae dandae congruit portionibus, hereditarias portiones accipere debebunt.

24.- PAPINIANUS; *libro XV.- Quaestionum*.- Nonnumquam autem ex voluntate varie rescriptum et iudicatum est, videlicet si non sub appellatione heredum, sed propriis nominibus expressis fideicommissum relinquitur.

25.- IULIANUS; *libro XXXIX, Digestorum*.- Quidam ita testamento scripserat: "a te, heres, peto fideique tuae committo, ut quidquid ex hereditate mea ad te pervenerit, filio meo prima quaque die aut, si prius quid ei acciderit, matri eius des reddas". Quaeritur, cum antequam adeatur hereditas puer decesserit, an fideicommissum matri debeatur. Respondi, si puer, antequam dies fideicommissi cedat, decessisset, fideicommissum translatum esse

§ 5.- In order that the Trebellian Decree of the Senate may apply, it is not sufficient for a bequest to be made merely with reference to the estate, but the heir must be charged to execute the trust in his capacity as heir. Hence, if a portion of an estate is bequeathed to anyone (for we are of the opinion that a portion of an estate can be bequeathed), and the legatee is asked to transfer this portion to another, there is no doubt that a transfer cannot be made under the Decree of the Senate, and therefore the fourth should not be reserved.

23.- JULIANUS; *Digest, Book XXXIX*.- Whenever a testator orders one or two heirs to transfer his estate to their co-heirs, he is understood to have made the same division with reference to the trust which he made in the distribution of the estate. If, however, those who are charged with the execution of the trust are directed to pay a certain sum of money to the person from whom they are to receive the benefit of the trust, the intention of the testator must be ascertained from the amount of money which the parties are ordered to pay. For where heirs are appointed to unequal shares of an estate, and are directed to pay equal sums, the better opinion is, that they should receive equal amounts under the trust. But if the sum of money to be paid corresponds with the shares to which they are entitled, they shall receive proportional amounts under the trust.

24.- PAPINIANUS; *Questions, Book XV*.- Sometimes, however, this point has been stated differently in rescripts and the decisions of courts; for instance, where a trust is left not under the general term of heirs, but under the individual names of the parties interested.

25.- JULIANUS; *Digest, Book XXXIX*.- A certain person made the following provision in his will: "My heir, I ask and charge you to transfer to my son whatever comes into your hands out of my estate, upon the first day; or if anything should happen to him before that time, I request you to deliver it to his mother." The question arises if the boy should die before the estate is entered upon, whether his mother would be entitled to the benefit of the trust. I

§ 5.- Para que tenga lugar el Senadoconsulto Trebelliano, no basta que se haya rogado respecto de la herencia, sino que se le debe rogar a uno como a heredero. Finalmente, si a uno se le hubiere legado una porción de la herencia, -porque nos parece bien que se pueda legar también una porción de la herencia-, y si le hubiere rogado que restituya esta parte, está lejos de duda que no se hará la restitución en virtud del Senadoconsulto, y que por consiguiente tampoco se retiene la cuarta.

23.- JULIANO; *Digesto, libro XXXIX*.- Siempre que un padre de familia manda a uno o a dos herederos que restituyan la herencia a sus coherederos, se entiende que hace en los fideicomisos las mismas partes que haya hecho al distribuir la herencia. Pues si a aquellos a quienes se les da el fideicomiso se les manda que entreguen alguna cantidad, y que de este modo reciban los fideicomisos, se ha de colegir la voluntad del padre de familia por la cantidad de dinero que se les manda dar. Porque si instituidos herederos de partes desiguales se les manda que den iguales partes, es más probable que deban recibir porciones viriles; pero si la suma del dinero que se ha de dar es proporcional a las porciones, deberán percibir las porciones señaladas para la herencia.

24.- PAPINIANO; *Cuestiones, libro XV*.- Pero algunas veces se respondió por rescripto y se juzgó diversamente por virtud de la voluntad, a saber, si el fideicomiso se dejara no bajo la denominación de herederos, sino habiéndose expresado los nombres propios.

25.- JULIANO; *Digesto, libro XXXIX*.- Uno había escrito así en su testamento: «te pido, heredero, y encomiendo a tu fidelidad, que todo lo que de mi herencia fuere a tu poder lo des y restituyas cuanto antes a mi hijo, o, si él hubiere fallecido antes, a su madre»; se pregunta, si, habiendo fallecido el hijo antes que sea adida la herencia, se le deberá a la madre el fideicomiso. Respondí, que si el hijo hubiese fallecido antes de que corra el término medio

ad matrem, postea autem quam dies fideicommissi cedit si decesserit, ad heredem pueri fideicommissum pertinere. Sed an ea voluntas fuit patris familias, ut, si ante restitutum fideicommissum puer decessisset, matri potius quam heredibus praestaretur, praetor aestimabit ex persona matris et ex persona heredis pueri.

Marcellus: sed testatoris voluntati congruum est, quandocumque puer decesserit, sive antequam dies fideicommissi cedit sive postea, ad matrem transferri fideicommissum, si non iam puer hoc acceperit, eoque iure utimur.

§ 1.- Si servo herede scripto dominus rogatus est eidem servo restituere hereditatem, cum liber esset, utile fideicommissum est.

§ 2.- Si quis filium suum ex asse heredem instituit et codicillis, quos post mortem filii aperiri iussit, fidei eius commisit, ut, si sine liberis decesserit, hereditatem suam sorori suae restitueret, et filius cum sciret, quod in codicillis scriptum esset, Stichum servum hereditarium testamento suo liberum esse iussit: heredes filii pretium eius servi sorori defuncti praestare debent libertate favore sui servata.

Hoc amplius et si ignorasset filius codicillos a patre factos, nihilo minus heredes eius pretium praestare debebunt, ne factum cuiusquam alteri damnum adferat.

§ 3.- Sed et si servus iste a Sempronio heres institutus sit eamque hereditatem, posteaquam ex testamento fratris ad libertatem pervenerat, adierit, hereditatis quoque aestimationem heredes fratris sorori eius praestare debent, quia, si manumissus non esset, iussu mulieris adire eam potuisset. Si vero vivente filio Sempronius decesserit, hereditas in causa fideicommissi non deduceretur: quippe ab ipso

answered that if the boy should die before the time arrived for the execution of the trust, it would be transferred to his mother; but if he should die after the day for its execution arrived, the heir of the boy would be entitled to the benefit of the trust. But, in order to ascertain the intention of the testator, namely, whether if the boy should die before the delivery of the property under the trust, it would be transferred to the mother rather than to the heirs, the Praetor must take into consideration the person of the mother as well as that of the heir of the boy.

Marcellus: It is, however, more in conformity with the will of the testator to hold that whenever the boy dies, whether he dies before the day for the execution of the trust, or afterwards, the trust will be transferred to his mother, if he should not already have received it. This is the rule which we now make use of.

§ 1.- Where a slave is appointed heir, and his master is charged to deliver the estate to the slave when he shall become free, the trust is valid.

§ 2.- When anyone appoints his son heir to his entire estate, and, by a codicil which he directed to be opened after the death of his son, he charges him to transfer his estate to his sister if he should die without issue, and the son, being aware of the contents of the codicil, directed by his will that the slave Stichus, who belonged to the estate of his father, should be free, the heirs of the son must pay the value of the slave to the sister of the deceased, for his freedom cannot be lost by means of a favor.

Moreover, even if the son should not be aware that his father had made a codicil, his heirs will, nevertheless, be obliged to pay the value of the slave, in order that the act of one may not injure another.

§ 3.- If, however, this slave was appointed an heir by Sempronius, and after he had obtained his freedom, entered upon the same estate by the will of the brother, the heirs of the latter must also pay his sister the appraised value of the estate; because if the slave had not been manumitted, he could enter upon the estate by order of the woman. But if Sempronius should die during the lifetime of the son, deduction of

del fideicomiso, el fideicomiso fue transferido a la madre; pero que si hubiere fallecido después que corra el término del fideicomiso, el fideicomiso pertenece al heredero del hijo. Pero el Pretor apreciará, atendiendo a la persona de la madre y a la persona del heredero, si la voluntad del padre de familia fue esta, que si el hijo hubiese fallecido antes de haberse restituido el fideicomiso, se le entregue a la madre mas bien que a los herederos.

Y dice Marcelo: pero es conforme a la voluntad del testador, que, haya fallecido el hijo en cualquier tiempo, o antes de que corra el término del fideicomiso, o después, se le transfiera a la madre el fideicomiso, si el hijo no lo hubiere ya recibido; y este derecho observamos.

§ 1.- Si habiendo sido instituido heredero un esclavo se le rogó al señor que le restituya la herencia al mismo esclavo, cuando fuese libre, es válido el fideicomiso.

§ 2.- Si uno instituyó a su hijo heredero universal, y en codicilos, que mandó que se abriesen después de la muerte del hijo, encomendó a su fidelidad, que, si falleciere sin hijos, restituyera la herencia a su hermana, y el hijo, sabiendo lo que se hallaba escrito en los codicilos, dispuso en su testamento que Stico, esclavo de la herencia, fuese libre, los herederos del hijo deben pagar el precio de este esclavo a la hermana del difunto, manteniéndose la libertad en favor de él;

Ademas de esto, aunque el hijo hubiese ignorado que por el padre se hicieron codicilos, esto no obstante, deberán pagar sus herederos el precio, para que el hecho de uno no causase perjuicio a otro.

§ 3.- Pero si este esclavo hubiera sido instituido heredero por Sempronio, y hubiere adido la herencia después que en virtud del testamento del hermano había llegado a la libertad, los herederos del hermano deben pagar a la hermana de éste también la estimación de la herencia; porque, si no hubiese sido manumitido, habría podido adirla por mandato de la mujer, pero si viviendo el hijo hubiere fallecido

filio adire iussus hereditatem ei acquireret.

26.- PAULUS; *libro singulari de Senatusconsultis*.- Omnibus civitatibus, quae sub imperio populi romani sunt, restitui debere et posse hereditatem fideicommissam apronianum Senatusconsultum iubet. Sed et actiones in eas placuit ex Trebelliano transferri: sed municipes ad eas admittuntur.

27.- IULIANUS; *libro XL, Digestorum*.- Itamen, ut hi quibus restitueretur hereditas actorem eligant et ad agendum et ad excipiendas actiones.

§ 1.- Si servum hereditarium heres, qui coactus adierit, iussisset adire hereditatem ab alio eidem servo relictam et tunc hereditatem, quam suspectam sibi esse dixerat, restituerit, an etiam eam hereditatem, quae per servum adquisita esset, restituere deberet, quaesitum est. dixi non magis hanc hereditatem in restitutionem venire, quam quod servus hereditarius post aditam hereditatem stipulatus fuisset aut per traditionem accepisset aut fructus, qui ex rebus hereditariis percepti fuissent, utique si nulla mora fideicommisso facta fuisset. Sed si quid ante aditam hereditatem servus stipulatus fuisset aut per traditionem accepisset, id restitui debebit, sicut fructus ante aditam hereditatem in restitutionem venient.

§ 2.- Qui suspectam sibi hereditatem dicit, nullum commodum ex testamento consequetur, quod habiturus non esset, si heres institutus non fuisset aut non adisset. et ideo si pupillo substitutus fuerit itaque: "quisquis mihi heres erit, idem filio meo heres esto", hereditatem, quae ex substitutione ad eum pervenerit, restituere cogendus erit. si vero detracto hoc

the estate on account of the trust shall be made, since the slave, having been ordered to accept the estate by the son himself, will acquire it.

26.- PAULUS; *On Decrees of the Senate*.- The Apronian Decree of the Senate directs that every estate left under a trust can and should be transferred to all cities subject to the authority of the Roman people. It was also decided that rights of action against such estates should be transferred under the Trebellian Decree of the Senate. The residents of the cities, however, are permitted to bring actions against the estates.

27.- JULIANUS; *Digest, Book XL*.- The cities, in order that the estates may be transferred to them, should select an agent who can sue and be sued.

§ 1.- Where an heir who was compelled to accept an estate orders a slave forming part of the same to enter upon another left to the said slave by a stranger, and then transfers the former estate which he says he suspects of being insolvent, the question arises whether he ought also to transfer the one which had been acquired by the slave. I held that this estate should not be included in the transfer, any more than if the slave belonging to the first estate had, after having accepted it, entered into a stipulation and received it by delivery, or had collected the income from the property of the estate without being in default in the execution of the trust. If, however, the slave, before accepting the estate, entered into any stipulation, or accepted it by delivery, he must restore the subject of the stipulation, as the income collected before the estate was accepted will be included in the transfer.

§ 2.- When an heir says that he suspects the estate of being insolvent, he will obtain no benefit under the will which he would not have obtained if he had not been appointed heir, or had not entered upon the estate. Therefore, if he was substituted for a minor as follows, "Let whoever shall be my heir also be my son's heir," he should be compelled to transfer the

Sempronio, la herencia no seria comprendida en la causa del fideicomiso, porque habiéndosele mandado por el mismo hijo que adiese la herencia, la adquiriría para él.

26.- PAULO; *De los Senadoconsultos, libro único*.- El Senadoconsulto Aproniano dispone que a todas las ciudades, que se hallan bajo el imperio del pueblo romano, se les debe y puede restituir la herencia dejada por fideicomiso. Pero se determinó, que en virtud del Senadoconsulto Trebeliano también se transfieran contra ellas las acciones; mas son admitidos para ejercitarlas los individuos del municipio.

27.- JULIANO; *Digesto, libro XL*.- Pero de suerte que aquellos a quienes se les restituye la herencia elijan actor, así para ejercitar las acciones, como para oponerles excepciones.

§ 1.- Si el heredero, que apremiado hubiere adido, hubiese mandado que un esclavo de la herencia adiese la herencia dejada por otro al mismo esclavo, y entonces restituyere la herencia que había dicho que para él era sospechosa, se preguntó, si debería restituir también la herencia que por medio del esclavo hubiese sido adquirida. Dije, que no con más razón se comprende esta herencia en la restitución, que lo que un esclavo de la herencia hubiese estipulado después de adida la herencia, y que lo que hubiese recibido por entrega, o que los frutos, que hubiesen sido percibidos de bienes de la herencia; por supuesto, si no se hubiese incurrido en mora en el fideicomiso, pero el esclavo hubiese estipulado alguna cosa antes de adida la herencia, o la hubiese recibido por entrega, deberá ser restituida, como se comprenderán para la restitución los frutos antes de adida la herencia.

§ 2.- El que dice que para él es sospechosa la herencia, no conseguirá en virtud del testamento ningún provecho, que no habría de tener, si no hubiese sido instituido heredero, o no hubiese adido. Y por lo tanto, si hubiere sido substituido al pupilo de este modo: «cualquiera que fuere mi heredero, sea también heredero de mi hijo», será obligado a res-

artículo "quisquis mihi heres erit" substitutus ita fuerit: "Titius filio meo heres esto", tum, si solus patri heres extiterit, nihilo minus cogendus erit hereditatem pupilli restituere, si vero coheredem habuerit, retinebit pupilli hereditatem, quia potuit coherede adeunte, quamvis ipse patris omisisset hereditatem, ex substitutione adire.

§ 3.- Si pater filium, quem in potestate habebat, heredem scripserit et ab eo petierit, ut hereditatem sempronio restitueret, isque suspectam sibi esse dicet, poterit ex Trebelliano Senatusconsulto hereditati restituere. Quare et si non immiscuerit se hereditati, nihilo minus actiones, quae ei et in eum competebant, ad sempronium transferentur.

§ 4.- A patre heres scriptus et exheredato filio substitutus si rogatus fuerit hereditatem, quae ad eum ex substitutione pervenerit, Titio restituere, cogendus non est vivo pupillo patris hereditatem adire, primum quia sub condicione fideicommissum datum est, deinde quia non probe de hereditate viventis pueri aget: mortuo autem pupillo compelli debet hereditatem patris adire.

§ 5.- Quod si duo heredes a patre instituti fuerint et utriusque fidei commissum sit, ut exheredati filii hereditatem restituerent, satis erit vel unum cogi adire: hoc enim facto etiam is, qui patris hereditatem non adit, filii hereditatem adire et restituere cogetur.

§ 6.- Quotiens filius emancipatus bonorum possessionem contra tabulas accipit, nulla ratio est compellendi heredis ad restituendam hereditatem et sicut neque legata neque fideicommissa cetera

estate which came into his hands by virtue of the stipulation. If, however, the clause, "Whoever shall be my heir," is omitted, and he should be substituted as follows, namely, "Let Titius be my son's heir," then, if the heir alone should survive the father he can, nevertheless, be compelled to transfer the estate of the minor. But if he should have a co-heir, he can retain the estate of the minor, because if his co-heir enters upon the estate, he can also enter by virtue of the substitution, even though he may have rejected the estate of the father.

§ 3.- Where a father appoints his son, whom he has under his control, his heir, and charges him to transfer his estate to Sempronius, and says that he suspects the estate of being insolvent, the son can be compelled to transfer it under the Trebellian Decree of the Senate. Wherefore, even if he should not have concerned himself with the affairs of the estate, still, any rights of action for or against him will pass to Sempronius.

§ 4.- When an heir, appointed by a father and substituted for his disinherited son, is charged to transfer to Titius the estate which may come to him by virtue of the substitution, he cannot be compelled to accept the estate of his father during the lifetime of the minor; in the first place, because the trust was established under a condition, and second, for the reason that an action with reference to the estate cannot legally be brought during the lifetime of the boy. When the minor dies, however, he should be compelled to enter upon the father's estate.

§ 5.- Where two heirs have been appointed by a father, and both of them have been charged to transfer his estate to a disinherited son, it will be sufficient for only one of them to be compelled to enter upon the same; for by this act he who did not enter upon the estate of the father can be compelled to enter upon and transfer the estate of the son.

§ 6.- Whenever an emancipated son acquires possession of the estate contrary to the provisions of the will, there is no reason to compel the heir to transfer the estate; and, as he is not compelled to pay

tituir la herencia que por virtud de la substitución hubiere ido a su poder; pero si suprimida esta cláusula: «cualquiera que fuere mi heredero», hubiere sido substituido así: «sea Ticio heredero de mi hijo», en este caso, si hubiere quedado único heredero del padre, esto no obstante, deberá ser obligado a restituir la herencia del pupilo. Mas si tuviere coheredero, retendrá la herencia del pupilo, porque pudo, adiéndola el coheredero, aunque él mismo hubiese dejado de aceptar la herencia del padre, adirla en virtud de la substitución.

§ 3.- Si el padre hubiere instituido heredero al hijo que tenía bajo potestad, y le hubiere pedido que restituyera la herencia a Sempronio, y éste dijera que era sospechosa para él, se podrá restituir la herencia en virtud del Senadoconsulto Trebeliano; por lo cual, aunque no se hubiere inmiscuido en la herencia, sin embargo, las acciones que a él y contra él competían serán transferidas a Sempronio.

§ 4.- El heredero instituido por el padre, y substituido, al hijo desheredado, si se le hubiere rogado que restituya a Ticio la herencia, que en virtud de la substitución hubiere ido a su poder, no ha de ser obligado, viviendo el pupilo, a adir la herencia del padre, en primer lugar porque el fideicomiso fue dado bajo condición, y en segundo lugar porque no reclamará con probidad respecto a la herencia del pupilo viviendo éste; pero muerto el pupilo, debe ser compelido a adir la herencia del padre.

§ 5.- Pero si por el padre hubieren sido instituidos dos herederos, y a la fidelidad de ambos se hubiera encomendado que restituyan la herencia del pupilo desheredado, sera suficiente que uno de ellos sea obligado a adirla; porque hecho esto, también el que no ade la herencia del padre sera obligado a adir y a restituir la herencia del hijo.

§ 6.- Cuando el hijo emancipado recibe la posesión de los bienes contra el testamento, no hay razón alguna para que el heredero sea compelido a restituir la herencia; y así como no es obligado a entregar ni

praestare cogitur, ita ne ad restitutionem quidem hereditatis compelli debet. Marcellus: plane non est compellendus adire, si iam filius bonorum possessionem, ne intercizat fideicommissum mortuo herede instituto et omitta a filio bonorum possessione.

§ 7.- Qui ex Trebelliano Senatusconsulto hereditatem restituit, sive petat a debitoribus hereditariis sive ab eo petatur, exceptione restitutae hereditatis adiuvari vel summoverti potest. Actiones autem fideicommissario competunt, quas habuit heres eo tempore, quo fideicommissum restituebat.

Marcellus: sed eas quoque actiones, quae sub conditione erant et quarum dies eo tempore non cesserat, fidei-commissario competere placet. Sed antequam restitueretur hereditas, exceptione aliqua heres adiuvandus non est: cum hoc minus ex causa fidei-commissi sit restitutus.

§ 8.- Trebellianum Senatusconsultum locum habet, quotiens quis suam hereditatem vel totam vel pro parte fidei heredis committit.

§ 9.- Quare si Maevius te heredem instituerit et rogaverit, ut hereditatem titii restituas, a quo esses heres institutus, et tu hereditatem maevii adieris, perinde a te fideicommissum petetur, ac si fundum, qui tibi a titio legatus esset, restituere rogatus fuisses: ideoque et si suspectam maevii hereditatem dixeris, cogi te non oportet eam adire.

§ 10.- Quod si Maevius te rogaverit et suam hereditatem et Titianam restituere tuque sponte adieris hereditatem, uteris Legis Falcidae commodo et partem quartam Maevianae hereditatis retinebis, dimidiam et quartam ex fideicommisso restitues, nec

either legacies or trusts, so he can not be forced to transfer any portion of the estate. Marcellus: It is clear that he should not be compelled to enter upon the estate, where the son has already obtained possession of the same to prevent the trust from being extinguished, if the appointed heir should die, and praetorian possession of the property should be refused by the son.

§ 7.- A person who has transferred an estate under the Trebellian Decree of the Senate can either be relieved or barred by an exception on the ground that the estate has been transferred, whether he is sued by the creditors of the estate, or sues the debtors. Moreover, the same actions can be brought by the beneficiary which the heir could have brought at the time when he transferred the property left under the trust.

Marcellus: It is also established that those actions which were subject to a condition, the time for the fulfillment of which had not yet arrived, will lie in favor of the beneficiary of the trust. The heir, however, cannot have recourse to any exception before the estate has been transferred, as otherwise he would transfer so much less under the trust.

§ 8.- The Trebellian Decree of the Senate is applicable whenever anyone charges his heir with the distribution of either the whole or a part of the estate, at a time.

§ 9.- Hence, if Maevius should appoint you his heir, and ask you to deliver the estate of Titius, and you should enter upon the estate of Maevius just as if you had been charged with the trust, and had been asked to transfer land which had been devised to you by Titius, and you should say that you had reason to think that the estate of Maevius was insolvent, you cannot be compelled to enter upon the same.

§ 10.- If Maevius should ask you to transfer to someone both his estate and that of Titius, and you voluntarily accept the estate, you can avail yourself of the benefit of the Falcidian Law, and retain the fourth part of the estate of Maevius, and transfer the

los legados, ni los demás fideicomisos, así tampoco debe ser compelido a la restitución de la herencia. Y dice Marcelo: ciertamente no ha de ser compelido a adirla, si ya el hijo recibió la posesión de los bienes, a fin de que no perezca el fideicomiso, muerto el heredero instituido, y habiéndose prescindido por el hijo de la posesión de los bienes.

§ 7.- El que en virtud del Senadoconsulto Trebelliano restituye la herencia, ora les pida a los deudores de la herencia, ora se le pida a él, puede ser auxiliado o repelido con la excepción de haber sido restituida la herencia; pero le competen al fideicomisario las acciones que tuvo el heredero al tiempo en que restituía el fideicomiso.

Y dice Marcelo: pero está establecido que le competen al fideicomisario también las acciones que eran condicionales, y cuyo término no había empezado a correr en aquel tiempo. Pero antes que se restituya la herencia no ha de ser auxiliado el heredero con excepción alguna, porque esto menos habrá de restituir por causa del fideicomiso.

§ 8.- Tiene lugar el Senadoconsulto Trebelliano siempre que uno encomienda a la fidelidad del heredero su herencia, o íntegra, o en parte.

§ 9.- Por lo cual, si Mevio te hubiere instituido heredero, y te hubiere rogado que restituyas la herencia de Ticio, y tu hubieres adido la herencia de Mevio, se te pedirá a tí el fideicomiso lo mismo que si se te hubiese rogado que restituyas el fundo que te hubiese sido legado por Ticio; por lo tanto, si hubieres declarado sospechosa la herencia de Mevio, no se te debe obligar a adirla.

§ 10.- Pero si Mevio te hubiere rogado que restituyas su herencia y la de Ticio, y tu hubieres adido espontáneamente la herencia, gozarás del beneficio de la Ley Falcidia, retendrás la cuarta parte de la herencia de Mevio, y restituirás en virtud del fideicomi-

intererit, eidem utramque hereditatem an alii Maevianam, alii Titianam rogatus fueris restituere. sed si suspectam Maevianam hereditatem dixeris, cogeris eam adire et restituere ei, cui rogatus fueris: si autem, cui Titianam hereditatem restituere rogatus fueris, non poterit te compellere ad adeundum.

§ 11.- Si ex Trebelliano hereditatem restituit heres et fructus praediorum retinet vel ipsa praedia, sive etiam debitor eius qui testamentum fecit fuerit, necessarium est actionem adversus eum fideicommissario dari.

Marcellus: hoc idem necessario faciendum est, cum parte hereditatis restituta familiae erciscundae iudicium inter eum qui restituit hereditatem et qui receperit accipietur.

§ 12.- Qui rogatus est emancipato filio restituere hereditatem, cogi debet adire et restituere, quamvis filius contra tabulas bonorum possessionem accipere possit.

§ 13.- Si patronus ex parte debita heres institutus et rogatus restituere hereditatem suspectam sibi esse dicat, puto rectius facturum praetorem, si coegerit eum adire hereditatem et restituere, quamvis possit mutata voluntate eam partem hereditatis retinere.

§ 14.- Si praeceptis quibusdam rebus heres rogatus sit restituere hereditatem et coactus eam adierit, an praecipere debeat? respondi eum, qui iussu praetoris adit hereditatem, omni commodo prohiberi debere.

other three-fourths in compliance with the terms of the trust. Nor will it make any difference whether you are asked to transfer both estates to the same individual, or the Msebian estate to one person, and the Titian estate to another. If you should say that the estate of Maevius is probably insolvent, you can be compelled to accept it and transfer it to the person to whom you are asked to deliver it; but he to whom you are charged to transfer the estate of Titius cannot compel you to enter upon it.

§ 11.- If the heir should transfer the estate under the Trebellian Decree of the Senate, and should retain the income of the land, or the land itself, or should even be the debtor of the person who made the will, it will be necessary for an action to be granted to the beneficiary against him.

Marcellus: It will also be necessary for this to be done where, only a portion of the estate having been transferred, an action in partition is brought between the person who delivered the estate and the one who received it.

§ 12.- Where anyone is asked to transfer an estate after a son has been emancipated, he should be compelled to accept and transfer it, even though the son can obtain praetorian possession of the same in opposition to the provisions of the will.

§ 13.- When a patron is appointed heir to that portion of the estate of his freedman to which he is entitled by law, and, having been asked to transfer the estate, says that he has reason to think that it is insolvent, I hold that the Praetor will act more justly if he compels him to enter upon and transfer the estate; although, notwithstanding this change of mind, he can retain that part of the same to which he is legally entitled.

§ 14.- Where, after the reservation of certain property as a preferred legacy, the heir is requested to transfer an estate, and is compelled to accept it, ought he to retain the preferred legacy? I answered that anyone who enters upon an estate by order of the Praetor should be prevented from enjoying any

so la mitad y la cuarta parte, y no importará que se te hubiere rogado que restituyas ambas herencias a uno mismo, o a uno la de Mevio, y a otro la de Ticio. Pero si hubieres declarado sospechosa la herencia de Mevio, serás obligado a adirla, y a restituirla a aquel a quien se te hubiere rogado que restituyas la herencia de Ticio, no podrá compelerte a adirla.

§ 11.- Si en virtud del Senadoconsulto Trebeliano restituyó el heredero la herencia, y retiene los frutos de los predios, o los mismos predios, o aun si fuere deudor del que hizo el testamento, es necesario que contra él se le dé acción al fideicomisario.

Y dice Marcelo: esto mismo se ha de hacer necesariamente cuando restituida parte de la herencia entre el que restituye la herencia y el que la hubiere recibido.

§ 12.- Aquel a quien se le rogó que restituya la herencia a un hijo emancipado, debe ser obligado a adirla y a restituirla, aunque el hijo pueda recibir la posesión de los bienes contra el testamento.

§ 13.- Si instituido el patrono heredero de la parte debida, y rogado para que restituya la herencia dijese que para él era sospechosa, opino que el Pretor obrará más rectamente, si le obligare a adir la herencia y a restituirla, aunque pueda, cambiando de voluntad, retener aquella parte de la herencia.

§ 14.- Si al heredero se le hubiere rogado que tomadas antes algunas cosas restituya la herencia, y la hubiere adido obligado, ¿deberá retirar los prelegados? Respondí, que el que por mandato del Pretor ade la herencia, debe ser excluido de todo provecho.

advantage.

§ 15.- Sed si eidem legatum esset sub hac condicione "si heres non esset" et suspectam sibi hereditatem dicat, non aliter cogendus est adire, quam ut legata, quae sub condicione "si heres non esset" data erant, restituantur, non quidem a coheredibus, ne onerentur, sed ab eo cui restituta fuerit hereditas. Nam sicut explendae fidei gratia cogendus est adire hereditatem, ita ob id ipsum damno adfici non debebit.

§ 16.- Heres ex asse erat instituta consobrina mea et eius fidei commissum, ut partem dimidiam hereditatis statim Publio Maevio restitueret, alteram partem, cum ipsa moreretur, eidem Publio Maevio: praeterea alia aliis legata data sunt. Maevius partem dimidiam hereditatis statim percepit et cavit, quod amplius quam per Legem Falcidiam liceret cepisset, redditu iri: sed et ceteri legata solida acceperant et similiter de restituendo quod amplius percepissent caverunt. Mortua consobrina mea Publius Maevius desiderat sibi alteram partem hereditatis cum fructibus restitui. Quaero itaque, quantum ei restituere debeam? utrum quod supra quadrantem bonorum penes consobrinam meam remanserat nec amplius quicquam? an et ab aliis, quibus legata soluta sunt, repetere quid debeam et quantum?

Item quaero, si quod ab his ex stipulatione percepero et quod apud consobrinam meam supra quadrantem remanserat, non efficiet partem dimidiam hereditatis, an ex incremento et fructibus eius summae, quae supra quadrantem bonorum penes consobrinam meam remansit, supplere ei debeam, dumtaxat ne partem dimidiam hereditatis quantitas quae restitueretur excedat? an vero, sicut Publius Maevius desiderat, quidquid seposito quadrante bonorum eiusque quadrantis fructibus perceptum est restitui ei debet? Respondi, quod supra

§ 15.- But if a bequest is left to the same person under the condition that he does not become the heir, and he alleges that he has reason to think the estate to be insolvent, he cannot be compelled to accept it unless he surrenders the legacies which were bequeathed dependent upon the condition of his not becoming the heir; and this should not be done by the co-heirs to avoid liability, but by him to whom the estate was transferred. For, as the heir is obliged to accept the estate in order that the wishes of the testator may be complied with, so he should not be subjected to loss on this account.

§ 16.- My cousin was appointed sole heir to an estate, and charged to transfer half of it immediately to Publius Maevius, and the other half after her death to the said Publius Maevius. Other legacies were also bequeathed to other persons. Maevius at once received his half of the estate, and gave security to return anything which he might have obtained over and above what was permitted by the Falcidian Law, and the others were paid their legacies in full, and likewise gave security to return any excess which they might have received. My cousin having died, Publius Maevius demanded that the other half of the estate, along with its income, should be delivered to him. Therefore, I ask how much I ought to transfer to him, and whether it should be what remained in the hands of my cousin in excess of the fourth part of the property, and nothing more; or whether I could recover something from the others to whom legacies had been paid, and if so, how much?

I also ask if what I may receive from them under the stipulations, and what remained in the hands of my cousin in excess of the fourth of the estate should not amount to half of the same, whether I shall be compelled to make up the deficiency from the increase and the income of the property which remained in the hands of my cousin over and above the fourth, in order that the amount which should be transferred may not exceed the fourth part of the estate. Or, as Publius Maevius demands, after the fourth of the estate had been excepted, must whatever

§ 15.- Pero si a uno se le hubiese legado bajo esta condición, si no fuese heredero, y declarase sospechosa para él la herencia, no ha de ser obligado a adirla de otro modo sino si se restituyeran los legados que habían sido dados bajo la condición si no fuese heredero, no ciertamente por los coherederos, a fin de que no sean gravados, sino por aquel a quien le hubiese sido restituida la herencia; porque así como ha de ser obligado a adir la herencia para que se cumpla con la confianza, así no debe ser perjudicado por esto mismo.

§ 16.- Mi prima había sido instituida heredera de la totalidad, y se encomendó a su fidelidad que restituyese inmediatamente a Publio Mevio la mitad de la herencia, y al mismo Publio Mevio la otra parte, cuando ella muriese; además de esto se dieron otros legados a otros; Mevio percibió inmediatamente la mitad de la herencia, y dió caución de que se restituiría lo que hubiese recibido sobre lo que fuera lícito por la ley Falcidia; pero también los demás habían recibirlo íntegros los legados, y dieron igualmente caución de restituir lo que de más hubiesen percibido; fallecida mi prima, pretende Publio Mevio que se le restituya a él la otra parte de la herencia con los frutos; y así, pregunto, cuánto le deberé restituir, si lo que además de la cuarta parte de los bienes había quedado en poder de mi prima, y ninguna cosa más, o si también deberé yo repetir algo de aquellos a quienes se les pagaron los legados, y cuánto;

También pregunto, si no constituyere la mitad de la herencia lo que de ellos hubiere yo percibido en virtud de la estipulación, y lo que además de la cuarta parte había quedado en poder de mi prima, ¿deberé suplirlo solamente con el aumento y con los frutos de la cantidad, que además de la cuarta parte de los bienes quedó en poder de mi prima, a fin de que la cantidad que se restituya no exceda de la mitad de la herencia, o, como pretende Publio Mevio, se le debe restituir a él todo lo que, exceptuada la cuarta parte de los bienes, se percibió con los frutos de este cuarto.

quadrantem penes consobrinam tuam remansit, si adiectis fructibus quantitatem partis dimidia hereditatis, quae mortis tempore fuit, non minuet, totum Publio Maevio restituendum: nec ex stipulatione ab his, quibus legata soluta sunt, repeti quicquam potest.

Si vero fructus quantitatem partis dimidia exuberant, quadranti tuo et fructibus eius accedet. Si vero fructus eius partis, quae supra quadrantem apud consobrinam tuam remanserat, non implent quantitatem partis dimidia bonorum, ex stipulatione agi poterit. in summa ratio ita ponenda est, ut tu omni modo quadrantem et fructus eius, praeterea, si eius quod quadrantem excedit fructus in tantum excreverit, ut quantitatem partis dimidia bonorum excedat, etiam id quod excesserit retineas.

§ 17.- Qui suos servos rogatus est manumittere et hisdem hereditatem restituere, detracto pretio servorum hereditatem restituere debet.

28.- AFRICANUS; *libro VI, Quaestionum.*- Ex asse heres institutus partem hereditatis mihi pure, tibi sub condicione restituere rogatus cum suspectam diceret, postulante me adit et mihi totam ex Senatus-consulto restituit: quandoque condicio extiterit, an fructus partis tuae restituere tibi debeam, non immerito dubitabatur. Et plerisque placet non esse eos praestandos, quia nec ab herede praestarentur, si sua sponte adisset, sufficiat autem ius tuum tibi integrum conservari, non etiam meliorem condicionem tuam fieri.

§ 1.- Idem tamen existimabant, si ex asse heres institutus mihi quadrantem pure, tibi aequo quadrantem sub condicione restituere rogatus sit et, cum suspectam hereditatem diceret, cogente me adit,

has been obtained from the profits of the said fourth be delivered to him? I answered that, if, with the addition of the income, whatever above the fourth remained in the hands of your cousin does not amount to less than half of the estate as it was at the time of her death, it must all be transferred to Publius Mseвий; and nothing can be recovered under the stipulation from those to whom legacies have been paid.

If, however, the income exceeds the value of half the estate, it must be added to your fourth and the income of the same. But if the income of your share which remained in the hands of your cousin in excess of the fourth does not amount to half of the estate, an action can be brought under the stipulation. In short, the calculation should be made in such a way that the income will actually be in excess of a fourth, and if it increased to such an extent as to amount to more than half of the estate, you can retain whatever is in excess.

§ 17.- When anyone is asked to manumit his slaves, and transfer the estate to them, he should do so after having deducted the price of the slaves.

28.- AFRICANUS; *Questions, Book VI.*- A person appointed sole heir to an estate, having been charged to transfer half of it to me absolutely, and half to you conditionally, alleged that he had reason to believe it to be insolvent, and upon my application entered upon the estate, and transferred the whole of it to me under the Decree of the Senate. When the condition was fulfilled, a doubt (which was not without foundation) arose, as to whether I should transfer to you the income of your share. It is held by several authorities that this should not be transferred, because it would not be paid by the heir if he had voluntarily accepted the estate, and it is sufficient for your right to be preserved unimpaired without your condition being improved.

§ 1.- Still, the same authorities hold that where a person is appointed sole heir to an estate, and is asked to transfer a fourth of the same to me absolutely, and a fourth to you under a condition, and alleges that he

Respondí: lo que además de la cuarta quedó en poder de tu prima, si añadidos los frutos no disminuyera el importe de la mitad de la herencia, que hubo al tiempo de la muerte, se ha de restituir íntegro a Publio Mevio; y no se puede repetir en virtud de la estipulación cosa alguna de aquellos a quienes se les pagaron los legados.

Pero si los frutos aumentan el importe de la mitad, se agregará a tu cuarta parte y a los frutos de ella; mas si los frutos de esta parte, que sobre la cuarta había quedado en poder de tu prima, no completan el importe de la mitad de los bienes, se podrá ejercitar la acción en virtud de esta estipulación. En suma, se ha de hacer la cuenta de suerte, que cuando los frutos exceden de todos modos de la cuarta, si aumentaren tanto que excedieran el importe de la mitad de los bienes, retengas también lo que hubiere de exceso..

§ 17.- Aquel a quien se le rogó que manumita a sus esclavos, y que a ellos mismos les restituya la herencia, deberá restituir la herencia deducido el precio de los esclavos,

28.- AFRICANO; *Cuestiones, libro VI.*- Habiéndosele rogado al que fue instituido heredero de la totalidad que a mí me restituya puramente parte de la herencia, y a tí bajo condición, como la declarase sospechosa, la adió a instancia mía, y me la restituyó toda en virtud del Senadoconsulto; no sin razón se dudaba, si, luego que se hubiere cumplido la condición, te deberé restituir los frutos de tu parte. Y les parece bien a los más, que no se han de entregar, porque tampoco se entregarían por el heredero, si hubiese adido espontáneamente; pero baste que se conserve íntegro tu derecho, no también que se haga mejor tu condición.

§ 1.- Pero opinaban los mismos, que si al instituido heredero de la totalidad se le hubiera rogado que me restituyese puramente una cuarta parte, y a ti igualmente una cuarta parte bajo condición, y declarando

quandoque condicio exstiterit, semissem tibi esse restituendum.

§ 2.- Sed nec Lege Falcidia in proposita specie usurum me puto, quamvis scriptus heres, si sponte adisset, uteretur.

29.- MARCIANUS; *libro IV, Institutionum*.- Si quis priore facto testamento posterius fecerit testamentum, etiamsi ex certis rebus in posteriores tabulas heredes instituit, superius tamen testamentum sublatum est, ut Divi quoque Severus et Antoninus Rescripserunt, cuius constitutionis verba rettuli, cum alia quoque praeterea in constitutione expressa sunt. "Imperatores Severus et Antoninus cocceio campano. Testamentum secundo loco factum, licet in eo certarum rerum heres scriptus sit, iure valere, perinde ac si rerum mentio facta non esset, sed teneri heredem scriptum, ut contentus rebus sibi datis aut suppleta quarta ex Lege Falcidia hereditatem restituat his, qui priore testamento scripti fuerant, propter inserta fideicommissaria verba, quibus ut valeret prius testamentum expressum est, dubitari non oportet". Et hoc ita intellegendum est, si non aliquid specialiter contrarium in secundo testamento fuerit scriptum.

30.- IDEM; *libro VIII, Institutionum*.- Si legatus suspectam hereditatem dicat, et legationis tempore compellendus est accipere iudicium, quia hic non multum officio occupatur: et licet deliberare se dicat an adeat, cogendus est adire, sed non ut statim restituat, sed ut reversus domum, si putaverit sibi expedire, commodum Falcidia vel testamenti utatur vel, si non putaverit, restituat totam hereditatem, ne onera patiatur.

has reason to think the estate to be insolvent, and is compelled by me to enter upon it, half of the estate must be delivered to you when the condition has been fulfilled.

§ 2.- I do not think that in the proposed case I can avail myself of the Falcidian Law, although the appointed heir can do so, if he should have entered upon the estate voluntarily.

29.- MARCIANUS; *Institutes, Book IV*.- If anyone, after having made a will, should afterwards make a second one, the first is annulled, even though by the last will he appointed heirs to certain property, as the Divine Severus and Antoninus stated in a Rescript, the words of which Constitution I quote, along with other matters included therein. "The Emperors Severus and Antoninus to Cocceius Campanus, Greeting. There is no doubt that a second will, although the heir may only have been appointed by it to receive certain property, is valid, just as if no mention of the property had been made; but the said appointed heir will be obliged to be content with whatever is left to him, or with enough to make up his fourth under the Falcidian Law; and he must transfer the estate to those mentioned in the former will, on account of the words creating the trust which were inserted, by which the testator stated that he intended the first will to be valid. This, however, must be understood to apply only where nothing especially contradictory was included in the second will."

30.- THE SAME; *Institutes, Book VIII*.- Where an envoy says that he has reason to think that an estate is insolvent, he should be compelled to accept it during the time of his employment with the embassy, because he is not constantly occupied with the duties of his office. And he can be compelled to enter upon the estate, even though he may say that he will take the matter under consideration; but he shall not be compelled to make the transfer at once, but must do so as soon as he returns home and he can avail himself of the benefit of the Falcidian Law, or of his

sospechosa la herencia, la adió apremiándolo yo, se te ha de restituir la mitad de la herencia cuando se hubiere cumplido la condición.

§ 2.- Pero opino que en el caso propuesto no he de usar de la ley Falcidia, aunque usaría de ella el heredero instituido, si hubiese adido espontáneamente.

29.- MARCIANO; *Instituta, libro IV*.- Si alguno habiendo hecho un primer testamento hubiere hecho otro testamento posterior, aunque en el testamento posterior haya instituido herederos de ciertas cosas, quedó, sin embargo, revocado el testamento anterior, según respondieron por rescripto también los Divinos Severo y Antonino; las palabras de cuya Constitución he mencionado, porque además se expresaron también otras cosas en la Constitución: «Los Emperadores Severo y Antonino a Cocceyo Campano. El testamento hecho en segundo lugar, aunque en él se haya instituido heredero de ciertas cosas, es válido en derecho lo mismo que si no se hubiese hecho mención de las cosas; pero no se debe dudar que el heredero instituido está obligado, contentándose con las cosas que se le dieron, o completándose la cuarta en virtud de la ley Falcidia, a restituirles la herencia a los que habían sido instituidos en el primer testamento, por razón de las palabras fideicomisarias insertas, con que se expresó que fuese válido el primer testamento». Y esto se ha de entender así, si especialmente no se hubiere escrito alguna cosa contraria en el segundo testamento.

30.- EL MISMO; *Instituta, libro VIII*.- Si un Legado declarase sospechosa la herencia, aun durante el tiempo de su legación ha de ser compelido a aceptar el juicio, porque éste no se ocupa mucho en su cargo; y aunque diga que delibera si adirá, ha de ser obligado a adir; pero no para que restituya inmediatamente, sino para que habiendo regresado a su casa, use, si juzgare que le conviene, del beneficio de la Falcidia o del testamento, o, si no lo juzgare, restituya toda la herencia, para que no soporte las cargas.

right under the will, if he thinks it is expedient; or, if he does not think so, he can transfer the entire estate to avoid being subjected to any burdens on account of the same.

§ 1.- Si quis "bona sua" vel "omnia sua" rogaverit restituere, fideicommissariam restitutionem esse intellegendum est: nam meorum et tuorum appellatione etiam actiones contineri dicendum est.

§ 2.- Si filio familias vel servo restituatur ignorante patre familias vel domino et postea pater vel dominus ratum habuerit, transeunt ex Trebelliano Senatusconsulto actiones.

§ 3.- Multum interest, utrum quarta pars iure hereditario retineatur an vero in re vel pecunia: nam superiore casu actiones dividuntur inter heredem et fideicommissarium, posteriore vero apud fideicommissarium sunt actiones.

§ 4.- Et heres institutus rogatusque hereditatem restituere praecepta aliqua summa vel re, etiamsi in praeceptione minus quam quarta pars esset, non amplius principem pati vindicaturum.

§ 5.- Sed et si sine ulla praeceptione rogatus fuerit hereditatem restituere, plerumque quarta donata est a principibus: et ita Divus Traianus et Hadrianus et Antoninus rescripserunt.

31.- IDEM; *libro IX, Institutionum*.- Si cui pure libertas et per fideicommissum sub condicione hereditas relicta est, cogitur heres adire hereditatem, si suspectam dicat, et restituere: et deficiente condicione libertas ei eripi non potest.

§ 1.- If anyone charges his heir to transfer "his property," or "all his property," this is understood to indicate a transfer by virtue of a trust; for under the terms "mine" and "yours," rights of action are also considered to be included.

§ 2.- Where an estate is transferred to a son under paternal control, or to a slave, and the father or the master subsequently ratifies the act, the rights of action will also be transferred under the Trebellian Decree of the Senate.

§ 3.- It makes a great deal of difference whether the fourth part is retained by hereditary right, or where the party can only reserve a specified article, or a certain sum of money. For, in the first instance, the rights of action are divided between the heir and the beneficiary of the trust, but in the last, the rights of action pass entirely to the beneficiary.

§ 4.- If an appointed heir, having been charged to transfer an estate after retaining for himself a certain sum of money or some article, although what is to be reserved is less than his fourth, he cannot claim more than that, even if he should be the Emperor.

§ 5.- But if he should be asked to transfer an estate without reserving anything for himself, he is authorized by the Emperors to retain a fourth. This the Divine Hadrian, Trajan, and Antoninus stated in Rescripts.

31.- THE SAME; *Institutes, Book IX*.- Where freedom is absolutely granted to a slave, and an estate is left to him conditionally under a trust, the heir will be compelled to accept the estate and transfer it, even if he alleges that he has reason to believe that it is insolvent; and the slave cannot be deprived of his freedom even if the condition should not be complied with.

§ 1.- Si uno hubiere rogado que restituya «sus bienes», o «todas sus cosas», se ha de entender que la restitución es fideicomisaria; porque se ha de decir que en la denominación de lo mío y de lo tuyo se comprenden también las acciones.

§ 2.- Si se hiciera la restitución a un hijo de familia o a un esclavo, y después el padre o el señor la hubiere ratificado, se transmiten las acciones en fuerza del Senadoconsulto Trebeliano.

§ 3.- Importa mucho saber si se retiene una parte por derecho de herencia, o en una cosa o en dinero; porque en el primer caso se dividirán las acciones entre el heredero y el fideicomisario, y en el segundo quedan en el fideicomisario las acciones.

§ 4.- Y si al heredero instituido se le rogó que restituya la herencia habiendo tomado antes alguna suma o cosa, aunque en el prelegado haya menos de lo que sería la cuarta parte, el Príncipe no consiente que haya de reivindicar más.

§ 5.- Pero también si se le hubiere rogado que restituya la herencia sin tomar antes cosa alguna, las más de las veces es donada la cuarta por los Príncipes; y así lo respondieron por rescripto el Divino Trajano, y Adriano y Antonino.

31.- EL MISMO; *Instituta, libro IX*.- Si a uno se le dejó la libertad puramente, y por fideicomiso la herencia bajo condición, es obligado el heredero a adir la herencia, si la declarase sospechosa, y a restituirla; y faltando la condición, no se le puede quitar la libertad.

§ 1.- Si autem ei, qui in diem libertatem accepit, hereditas per fideicommissum relicta fuerit, suspectam eam interim non posse adiri Divus Pius Cassio Hadriano rescripsit, cum non potest nondum libero hereditas restitui: nec rursus contra voluntatem defuncti libertatem esse praestandam.

§ 2.- Si sub condicione heres institutus rogatusque hereditatem restituere non vult condicioni parere et adire hereditatem, si facti est condicio, debet parere et adire et restituere vel, si in dando sit, offerente fideicommissario. Recusante autem herede factum adimplere licentia dabitur fideicommissario secundum imitationem dationis factum implere, et tunc necessitas imponitur heredi adire hereditatem.

Ceterae condiciones, quae non sunt in potestate heredis, ad officium praetoris non pertinent.

32.- CELSUS; *libro XX, Digestorum*.- Ballista filium familias heredem instituit ita: "Trebellianus si caverit coloniae Philippensium, si sine liberis morietur, quantacumque pecunia ex hereditate de bonis meis ad eum pervenit, eam pecuniam omnem ad coloniam Philippensium perventuram". Respondi: ex his verbis quae proponis, id est "pecuniam", existimo etiam fructus, quos ex hereditate percepit, restituere eum debere, perinde quasi specialiter hoc testator expressisset.

33.- MARCIANUS; *libro VIII, Institutionum*.- Scribit Celsus libro vicensimo digestorum, si qui quadringenta in bonis habebat petit ab herede suo, ut, si sine liberis moreretur, quanta pecunia ex hereditate sua ad eum pervenisset, Maevio restitueretur: si ex fructibus medio tempore quadringenta perceperit et sine liberis decesserit, heredem eius Maevio quadringenta debitum. et cum diu multumque

§ 1.- If an estate should be left under a trust to a slave who is to receive his freedom within a certain period, the Divine Pius stated in a Rescript addressed to Cassius Hadrian that the heir cannot, in the meantime, be compelled to enter upon the estate if he should consider it to be insolvent, as freedom cannot yet be granted to the slave; nor, on the other hand, can freedom be bestowed upon him in opposition to the will of the deceased.

§ 2.- Where an heir is appointed under a condition, and is asked to transfer the estate, but is unwilling to comply with the condition and enter upon the estate, if the condition consists of an act he must perform it, and transfer the estate; or, if it consists of giving something, and the beneficiary of the trust should tender it, but the heir should refuse to discharge his obligation, permission will be given to the beneficiary to act instead of the heir, and then the necessity to enter upon the estate will be imposed upon him.

Other conditions, which are not in the power of the heir, do not come within the jurisdiction of the Praetor.

32.- CELSUS; *Digest, Book XX*.- Ballista appointed a son under paternal control his heir, as follows, "Let Rebellianus be my heir, if he gives security to the colony of the Philippians that, if he should die without issue, all the money which may come into his hands from my estate will be given to the said colony of the Philippians." I gave it as my opinion that although the testator made use of the word "money," the heir must also surrender any other property which he may have received from the estate, just as if the testator has expressly designated it.

33.- MARCIANUS; *Institutes, Book VIII*.- Celsus, in the Twentieth Book of the Digest, says that if anyone, having an estate of four hundred aurei, charges his heir, if he should die without issue, to transfer to Msevius all the money which may come into his hands from his estate, and if, in the meantime, he should obtain four hundred aurei out of the income of said estate, and should die without leaving any

§ 1.- Mas si al que recibió la libertad para cierto día se le hubiere dejado por fideicomiso la herencia, respondió por rescripto el Divino Pío a Cassio Adriano, que no puede entretanto ser adida siendo sospechosa, porque la herencia no puede ser restituida al que todavía no es libre; ni por otra parte se ha de dar la libertad contra la voluntad del difunto.

§ 2.- Si el heredero instituido bajo condición, a quien se le rogó que restituyera la herencia, no quiere cumplir la condición y adir la herencia, si la condición es de hecho, debe cumplirla, y adir y restituir la herencia; y si consistiera en dar, ofreciendo el fideicomisario, pero rehusando el heredero ejecutar el hecho, se le dará licencia al fideicomisario para que ejecute el hecho como cuando consiste en dar; y entonces se impone la necesidad de adir la herencia.

Las demás condiciones, que no están en la facultad del heredero, no pertenecen al ministerio del Pretor.

32.- CELSO; *Digesto, libro XX*.- Balista instituyó así heredero a un hijo de familia: «Trebeliano, si diere caución a la colonia de los Filipenses, de que, si muriere sin hijos, habrá de ir a la colonia de los Filipenses todo el dinero que de la herencia de mis bienes fue a su poder»; respondí: en virtud de estas palabras, que expones, esto es, de la de «dinero», opino que él debe restituir también los frutos, que percibió de la herencia, lo mismo que si especialmente hubiese expresado esto el testador.

33.- MARCIANO; *Instituta, libro VIII*.- Escribe Celso en el libro vigésimo del Digesto, que si el que tenía cuatrocientos en sus bienes le pidió a su heredero, que, si muriere sin hijos, le fuese restituido a Mevio cuanto dinero hubiese ido de su herencia a poder de él, si en el tiempo intermedio hubiere percibido de los frutos cuatrocientos, y hubiere fallecido sin hijos, su heredero le deberá cuatrocientos a

tractavit, an, cum augmentum heres sensit, et periculum sustineat an per contrarium, novissime ait iniquum esse ad fideicommissarium damnum pertinere, ad quem augmentum non pertinet: et an ad supplendum, inquit, quodcumque ex quadringentis defuerit, etiam augmentum ad eum pertinebit, hoc est ut usque ad summam quadringentorum damni et fructus computentur: quod verius esse arbitror.

34.- IDEM; *libro II, Regularum*.- Si eius, qui novissimus ex filiis mortuus est, partem hereditatis propinquo voluit pater restitui et simul fratres diem suum obissent: propinquum, si non ostenderit quis novissimus obisset, ad partem hereditatis non admitti, sed matrem ex Tertulliano Senatusconsulto ad utriusque hereditatem admitti constat.

35.- ULPIANUS; *libro VI, de Officio Proconsulis*.- Cum heres instituta furiosa hereditatem esset rogata restituere, curatorem eius secundum tabulas bonorum possessione accepta posse transferre actiones Divus Pius decrevit.

36.- PAULUS; *libro XIII, ad Edictum*.- Cum hereditas ex fideicommissi causa restituta est, si ante cum herede compromissum est, puto fideicommissarium cavere debere heredi, sicut cum heres multa antequam restitueret administravit. Nam quod dicitur retinere eum oportere, non est perpetuum. Quid enim si nihil est, quod retineat? Veluti cum omnia in nominibus sunt aut in corporibus quae non possideat? Nempe enim is cui restituta est omnia persequitur et tamen heres iudiciis quibus conventus est aut stipulationibus quibus necesse habuit promittere, obstrictus manebit. ergo non alias cogetur restituere quam ei caveatur.

children, his heir will owe four hundred aurei to Maevius. He treats this question at great length, both as to whether the heir shall profit by the increase and take the risk of any loss, or vice versa; and says in conclusion that it would be unjust for the beneficiary of the trust to sustain the losses when he is not entitled to the profits. And, where some deficiency of the four hundred aurei must be made good, he asks whether any increase will also belong to the beneficiary, that is to say, whether an account of the losses and profits must be taken, up to the sum of four hundred aurei? I think this opinion to be correct.

34.- THE SAME; *Rules, Book II*.- Where a father desired that, in case his only surviving son should die, his share of the estate should be delivered to a relative, and the brothers died upon the same day, the said relative will not be entitled to a share in the estate if he cannot prove which one of the brothers died last; but it has been decided that their mother will be entitled to the estates of both of them under the Tertullian Decree of the Senate.

35.- ULPIANUS; *On the Duties of Proconsul, Book VI*.- The Divine Pius decreed that, where an insane woman was appointed heir and charged to transfer an estate, her curator could assign all rights of action after having obtained possession of the estate in accordance with the provisions of the will.

36.- PAULUS; *On the Edict, Book XIII*.- Where an estate is transferred on account of a trust before an agreement for arbitration has been made with the heir, I think that the beneficiary of the trust should give the heir security, just as where the latter had charge of the property of the estate before transferring it, since the common saying that he can retain certain property does not universally apply; for what if there should be nothing in the estate which he is able to retain; as, for instance, where it all consists of notes, or articles of which he has not possession? It is clear that he to whom the estate is transferred will obtain everything, and the heir will be bound by the judgments in cases where he has been sued, or by the stipulations which he was required to enter into and could not avoid. Therefore he cannot be compelled to

Mevio. Y habiendo discutido largo tiempo y mucho, si percibiendo el heredero el aumento soportará también la pérdida, o por el contrario, dice por último, que es injusto que le pertenezca el quebranto al fideicomisario, al cual no le pertenece el aumento; y si para completarlos, dice, faltare alguna, cosa a los cuatrocientos, también le pertenecerá a él el aumento, esto es, que hasta la suma de los cuatrocientos se computarán los daños y los frutos; lo que juzgo que es más verdadero.

34.- EL MISMO; *Reglas, libro II*.- Si un padre quiso que se restituya a un pariente la parte de herencia del que de los hijos haya muerto el último, y los hermanos hubiesen fallecido simultáneamente, es sabido que el pariente, si no hubiere probado cual haya muerto el último, no es admitido a la parte de herencia, sino que en virtud del Senadoconsulto Tertuliano es admitida la madre a la herencia de ambos.

35.- ULPIANO; *Del cargo de Procónsul, libro VI*.- Cuando instituida heredera una furiosa se le hubiese rogado que restituya la herencia, decretó el Divino Pio que su curador, habiendo recibido la posesión de los bienes conforme al testamento, puede transferir las acciones.

36.- PAULO; *Comentarios al Edicto, libro XIII*.- Cuando la herencia ha sido restituida por causa de fideicomiso, si antes se contrajo compromiso con el heredero, opino que el fideicomisario debe darle caución al heredero, como cuando el heredero administró muchas cosas antes que las restituyese; porque lo que se dice, que él debe retener, no es absoluto; porque ¿qué se dirá, si no hay nada que retenga, como cuando todo consiste en créditos o en cosas corpóreas, que él no posee?. Porque a la verdad, aquel a quien fue restituida lo persigue todo, y sin embargo, el heredero quedará obligado a los juicios a que fue citado, o a las estipulaciones en que tuvo necesidad de prometer; luego no se le obligará a restituir de otro modo, sino si se le diera caución.

transfer the estate unless security is given him.

37.- ULPIANUS; *libro XVI, ad Edictum*.- Restituta hereditas videtur aut re ipsa, si forte passus est heres possideri res hereditarias vel totas vel aliquas earum hac mente, ut vellet restitueret ille suscipere, non si ex alia causa putavit te possidere. Sed et si postea ratum habuit, idem erit dicendum.

Sed et si verbo dixit se restituere, vel per epistulam vel per nuntium restituat, audietur. Sed et si voluntate tua alii restituerit, in te transibunt actiones. Item si alius iussu meo restituit vel ratam habui restitutionem, transisse actiones videntur.

§ 1.- Pupillus autem ipse debet restituere tutore auctore, non tutor sine pupillo, nisi infans est, quia nec mandare actiones tutor pupilli sui potest. Ne se quidem auctore pupillum restituere potuisse hereditatem Divus Severus in persona Arri Honorati pupilli decrevit, qui Arrio Antonino patruo et tutori suo restituerat.

§ 2.- Sed et si pupillo sit restituenda, non posse pupillo sine tutoris auctoritate restitui constat:

38.- PAULUS; *libro XX, ad Edictum*.- Non enim solutio est hereditatis restitutio, sed et successio, quum obligetur.

39.- ULPIANUS; *libro XVI, ad Edictum*.- Sed nec ipsi tutori indistincte restitui potest.

37.- ULPIANUS; *On the Edict, Book XVI*.- An estate is considered to have been transferred where either the iproperty itself is delivered, or the heir is permitted to acquire possession of the property belonging to the estate, either wholly or in part, in such a way that one of the parties is willing to transfer it and the other to receive it, but not if the heir should think that you have obtained possession for any other reason. The same rule must be held to apply where the possession is afterwards ratified.

If, however, the heir should state that he transferred the property himself, or did so by a letter, or a messenger, he shall be heard. If he should deliver it to someone else, with your consent, the rights of action against you will also be transferred. Likewise, if another than the heir should transfer the estate by my order, or the heir should ratify the transfer, the rights of action will be considered to have passed.

§ 1.- Moreover, a ward should himself make a transfer of an estate with the authority of his guardian, but the guardian cannot do so without the consent of his ward, unless the latter is an infant; because a guardian cannot assign the rights of action belonging to his ward. The Divine Severus, in the case of a ward named Arrius Honoratus, decreed that a ward could not transfer an estate merely by the authority of his guardian, where the said Arrius Honoratus made a transfer of this kind to his uncle and guardian Arrius Antoninus.

§ 2.- When an estate is to be transferred to a ward, it is established that this cannot be done by the latter without the authority of his guardian.

38.- PAULUS; *On the Edict, Book XX*.- For the transfer of an estate is not merely a payment but a succession, as the beneficiary is liable.

39.- ULPIANUS; *On the Edict, Book XVI*.- Moreover, an estate cannot be indiscriminately transferred to the guardian himself.

37.- ULPIANO; *Comentarios al Edicto, libro XVI*.- La herencia se considera restituida realmente, si acaso consintió el heredero que se posean los bienes de la herencia, o todos, o algunos de ellos, con la intención de querer él restituirla, y de recibida el otro, no si él creyó que tú poseías en virtud de otra causa; pero también si él lo ratificó después, se habrá de decir lo mismo.

Mas también será oído si dijo de palabra que él restituía, o si restituyera por medio de carta o de mensajero. Pero aun si por tu voluntad la hubiere restituido a otro, pasarán a tí las acciones. Asimismo, si otro la restituyó por mi mandato, o si ratificó la restitución, se considera que pasaron las acciones.

§ 1.- Mas debe restituirla mismo el pupilo con la autoridad del tutor, no el tutor sin el pupilo, a menos que sea infante; porque el tutor no puede ni encomendar las acciones de su pupilo. Y que ciertamente con la autoridad de aquel no pudo el pupilo restituir la herencia, lo decretó el Divino Severo respecto a la persona del pupilo Arrio Honorato, que la había restituido a Arrio Antonino, su tío paterno y tutor.

§ 2.- Pero aunque haya de ser restituida al pupilo, es sabido que no puede serle restituida al pupilo sin la autoridad del tutor;

38.- PAULO; *Comentarios al Edicto, libro XX*.- porque la restitución de la herencia no es solamente un pago; sino también una sucesión, porque se contraen obligaciones.

39.- ULPIANO; *Comentarios al Edicto, libro XVI*.- Pero ni aun al mismo tutor se le puede restituir indistintamente.

40.- PAULUS; *libro XX, ad Edictum*.- Quamvis Senatus de his actionibus transferendis loquatur, quae Iure Civili heredi et in heredem competunt, tamen honorariae actiones transeunt: nulla enim separatio est: immo et causa naturalium obligationum transit.

§ 1.- Persona autem heredis instituti Trebelliano continetur: verum hoc iure utimur, ut et successor heredis recte ex Trebelliano restituat, veluti heres bonorumve possessor, vel pater dominusve, quibus adquisita est hereditas: omnes enim quod iuris habent, ex Trebelliano Senatusconsulto restituere debent, nec interest, is qui institutus est an pater dominusve rogatus est restituere.

§ 2.- Nihil interest, cui nostro nomine restituitur pater familias sit an is qui in aliena potestate est?.

41.- GAIUS; *libro II, Fideicommissorum*.- Mulier an masculus: et ideo servo quoque voluntate nostra vel si ratum habuerimus restitui potest,

42.- PAULUS; *libro XX, ad Edictum*.- Quia perinde est, atque si mihi restituta esset hereditas.

§ 1.- Restituta hereditate iura sepulchrorum apud heredem remanent.

43.- ULPIANUS; *libro XXII, ad Edictum*.- Papinianus tractat, si quis heres institutus ex semisse rogatus sit restituere hereditatem et eam suspectam dicens compulsus adit, deinde fideicommissarius gnarus sit adcrevisse portionem hereditatis post restitutionem scripto heredi, an opus sit ei alia actione. et ait securum esse eum posse de illo: plane de hoc solo quaerendum ait, an ei opus sit nova restitutione, posteaquam portio accrevit.

40.- PAULUS; *On the Edict, Book XX*.- Although the Senate referred to the transfer of these rights of action which, by the Civil Law, lie in favor as well as against the heir, still, praetorian rights of action are also assignable, for there is no difference between the two. Again cases involving natural obligations are likewise susceptible of transfer.

§ 1.- An appointed heir is specifically referred to in the Trebellian Decree of the Senate; still, we have adopted the rule that the successor of an heir can lawfully make the transfer under the Trebellian Decree of the Senate, just as an heir, the praetorian possessor of the property of an estate, a father, or a master by whom the estate is acquired, can do. For all should assign any rights which they may have under the Trebellian Decree of the Senate, and it makes no difference whether the appointed heir, the father, or the master, is asked to transfer the estate.

§ 2.- It is also immaterial to whom the transfer is made in our name, whether it be the head of a household, or someone who is under the control of another;

41.- GAIUS; *Trusts, Book II*.- A male or a female. Therefore, an estate can be transferred to a slave with our consent, or without it if we should afterwards ratify the act.

42.- PAULUS; *On the Edict, Book XX*.- Because it is just the same as if the estate had been transferred to me.

§ 1.- Where an estate is transferred, the rights of sepulture remain with the heir.

43.- ULPIANUS; *On the Edict, Book XXII*.- Papinianus discusses the following point. A person having been appointed heir to half of an estate was asked to deliver it to another, and, alleging that he considered it insolvent, was compelled to accept it. The beneficiary of the trust was not aware that a part of the estate had accrued to the appointed heir after it had been transferred, and the question arose whether another action would be required. Papinianus says

40.- PAULO; *Comentarios al Edicto, libro XX*.- Aunque el Senado habla de que se transfieran las acciones, que por Derecho Civil competen al heredero y contra el heredero, se transfieren, sin embargo, las acciones honorarias; porque no hay ninguna separación. Antes bien, se transfiere también la causa de obligaciones naturales.

§ 1.- Mas compréndese en el Senadoconsulto Trebeliano la persona del heredero instituido. Pero observamos este derecho, que válidamente restituye en virtud del Senadoconsulto Trebeliano también el sucesor del heredero, por ejemplo, el heredero o el poseedor de los bienes, o el padre, o el señor, para quienes fué adquirida la herencia; porque todos deben restituir en virtud del Senadoconsulto Trebeliano el derecho que tienen, y no importa que haya sido rogado para hacer la restitución el que fue instituido, o el padre, o el señor.

§ 2.- Nada importa que aquel a quien en nuestro nombre se restituye sea padre de familia, o esté bajo ajena potestad,

41.- GAYO; *Fideicomisos, libro II*.- o que sea mujer u hombre; y por lo tanto, se le puede restituir también al esclavo con nuestra voluntad, o si lo hubiéremos ratificado;

42.- PAULO; *Comentarios al Edicto, libro XX*.- porque es lo mismo que si la herencia me hubiese sido restituida.

§ 1.- Restituida la herencia, permanecen en poder del heredero los derechos de los sepulcros.

43.- ULPIANO; *Comentarios al Edicto, libro XXII*.- Examina Papiniano, si instituido uno heredero de la mitad de la herencia, se le hubiera rogado que restituya la herencia, y declarándola sospechosa la adió apremiado, y luego el fideicomisario ignorase que después de la restitución acreció una porción de la herencia al heredero instituido, acaso tendrá aquel necesidad de otra caución. Y dice que puede él estar seguro; ciertamente, dice, se ha de preguntar sólo

44.- MARCELLUS; *libro XV, Digestorum*.- Postulante Stichus, qui eodem testamento libertatem et fideicommissam hereditatem acceperat, heres suspectam adiit: mox Stichus, antequam moram in recipienda hereditate faceret, decessit relicto herede Titio. Quaero, an in Titium, si nolit recipere fideicommissam hereditatem, actiones ex Senatusconsulto competant. Respondi: quoniam fere is, qui compulsus est adire hereditatem, confestim ei restituet, de manumisso dumtaxat Senatusconsulto comprehensum est nec heredis facta est mentio.

Potest tamen evenire, ut restitutionem distulerit heres, veluti si pecuniam ei debuerit defunctus, quam retinere maluit quam petere. Ceterum existimo idem in herede eius constituendum, quod in illo constitutum est: cur enim recusaret, quam recusare non potuit is, cuius hereditatem suscepit? Quod si forte ante hereditatis restitutionem sine herede decesserit libertus, perinde bona eius creditoribus hereditariis vendere permittendum est, ac si restituta hereditate decessit.

§ 1.- Set in huiusmodi quaestione rogo respondeas, an recte senserim. Rogata est filia ex asse heres restituere hereditatis partem dimidiam deductis legatis minimis et aere alieno non magno, ut Legi Falcidiae locus non sit: mora facta non est restitutioni fideicommissi. Desidero verbo tenus mihi restitui hereditatem, ut ex Trebelliano Senatusconsulto agenti et ex eo competentibus actionibus etiam usuras debitas ex mortis die in tempus restitutionis persequar: item quaero et de pensionibus, quia locationum obligatio in hereditate fuit. Ab herede fructus nullos peto, sed illa desiderat refundere me aut concedere ei actiones usurarum et pensionum:

that the beneficiary would be secure. He also says that, in a case of this kind, it should be determined whether a new transfer will be necessary after the increase of the above-mentioned share.

44.- MARCELLUS; *Digest, Book XV*.- An heir, at the request of Stichus, who had received his freedom and the estate in trust under the same will, entered upon the said estate, which he suspected of being insolvent, and Stichus afterwards died before he was in default in accepting the estate, and left Titius his heir. I ask whether, under the Decree of the Senate, actions will lie against Titius if he refuses to accept the estate left in trust. I answered that, while ordinarily, he who is compelled to accept an estate can immediately transfer it to the beneficiary of the trust, the Decree of the Senate, in this instance, only appears to have reference to the manumitted slave, and no mention is made of the heir.

Still, it may happen that the heir will postpone the transfer; for example, where the deceased owed him money, and he preferred to retain it rather than to bring an action for its recovery. I think, however, that the same rule should apply to his heir which applies to him; for why should the former have the right to reject an estate which he from whom he inherits could not have rejected? If the freedman should die without leaving an heir, before the estate was transferred, the creditors of his estate would be permitted to sell his property, just as if he had died after the estate had been delivered.

§ 1.- I ask you to give me your opinion as to whether I am right in my decision of the following question. A daughter who had been appointed heir to the entire estate of her father was charged to transfer half of the same after having deducted all the legacies and the debts, none of which were very large, in order to avoid the application of the Falcidian Law. The heir was not in default in executing the trust. I ask her to transfer the estate to me verbally, just as if I had brought suit under the Trebellian Decree of the Senate, and I hold that, on this account, interest due from the day of the death of the testator to the time when the estate was transferred can be recovered by

sobre esto, sobre si tendrá él necesidad de nueva restitución, después que acreció la porción.

44.- MARCELO; *Digesto, libro XV*.- A petición de Stico, que en un mismo testamento había recibido la libertad y la herencia dejada por fideicomiso, el heredero la adió como sospechosa; después falleció Stico, antes que hubiese sido moroso para recibir la herencia, habiendo dejado por heredero a Ticio; pregunto, si en virtud del Senadoconsulto las acciones competarán contra Ticio, si no quisiera recibir la herencia dejada por fideicomiso. Respondí: como de ordinario el que fue compelido a adir la herencia se la restituye inmediatamente, en el Senadoconsulto se trató solamente del manumitido, y no se hizo mención del heredero.

Pero puede suceder que el heredero haya diferido la restitución, por ejemplo, si el difunto le hubiere debido dinero que él quiso retener más bien que pedir. Pero yo creo que se ha de determinar respecto a su heredero lo mismo que se determinó respecto a aquel; porque ¿cómo rehusaría el que no pudo rehusar aquel de quien aceptó la herencia? Mas si acaso el liberto hubiere fallecido sin heredero antes de la restitución de la herencia, se les ha de permitir a los acreedores de la herencia que vendan sus bienes, lo mismo que si hubiere fallecido habiendo sido restituida la herencia.

§ 1.- Pero te ruego que me respondas, si opiné bien en una cuestión de esta naturaleza: se le rogó a una hija, heredera de la totalidad, que restituyera la mitad de la herencia, deducidos legados pequeñísimos, y deuda no grande, de suerte que no había lugar a la ley Falcidia; no se causó mora para la restitución del fideicomiso; deseo que de palabra me sea restituida la herencia, para que reclamando en virtud del Senadoconsulto Trebeliano y de las acciones que por él competen, persiga yo también los intereses debidos desde el día de la muerte hasta el tiempo de la restitución. Asimismo, pregunto también respecto a las pensiones, porque hubo en la herencia una

non possum persuadere hereditatis appellatione, quam rogata erat mihi restituere, etiam hanc stipulationem usurarum ad me pertinere.

Respondi: omnia haec hereditatis appellatione continentur: quantum enim quod ad hoc refert, inter haec ceteraque, quae sub condicione sunt promissa aut in annos singulos vel menses, nihil interest. Sane pro fructu rei, quae hereditate continetur, haec cedunt, nec fructus fideicommissarium sequitur, si mora non intercessit. Sed quia non ut heres fideicommissum, ut sici dixerim, suppleat postulet, set qualis nunc est hereditas, desideret restitui sibi, nequaquam id debet heres recusare: nam et quodammodo in partem hereditatis Senatus recipi voluit fideicommissarium et haberi heredis loco, pro qua parte ei restituta esset hereditas.

Sed cum hereditarios nummos faeneravit aut ex fundis fructus percepit, nihil eo nomine praestat ei, cui hereditas per fideicommissum relicta est, si non intercessit mora, scilicet quia suo periculo faeneravit colendove fundo vel in cogendis fructibus insumpsit operam: nec aequum erat alterius, ut sic dixerim, procuratorem constitui. nullum autem impendium vel opera intercedit heredis, cum his modis, de quibus est quaesitum, augmentum hereditas recepit.

45.- MODESTINUS; *libro singulari de Heurematicis*.- Qui totam hereditatem restituere rogatus quartam retinere non vult fidumque obsequium defuncti precibus praebere desiderat, sua sponte

means of the proper actions. I also make a claim with reference to the rents of the estate, because the obligation growing out of the leases forms a part of it, but I do not demand any profits from the heir; still, she desires that I refund to her the amount of the rents, or assign to her my rights of action to collect the interest and the rents, and I cannot persuade her that, under the term "estate" which she was asked to transfer to me, I am also entitled to this stipulation for interest.

I gave it as my opinion that all these things are included in the term "estate," and that in the case you refer to there is no difference between these obligations and others which are contracted under a condition, or are payable annually, or monthly. It is clear that these things are considered as the income of property included in the estate, and that, if there has been no default, the income does not belong to the beneficiary of the trust. But as the beneficiary does not, as it were, demand that the heir shall add anything to the trust, but only asks that the estate shall be transferred to him in its present condition, the heir should not, by any means, refuse to do this; for the Senate intended that the beneficiary should receive half of the estate, and be considered as occupying the place of the heir with reference to that portion of it which might be transferred to him.

But if the heir should lend money of the estate at interest, or collect the income of the land, she will not be required to pay anything on this account to the person to whom the estate was left in trust, if she was not in default; for the reason that she lent the money at her own risk, and by cultivating the soil, or by gathering the crops she incurred expense, and it is not just that she should, so to speak, act as the agent of another. But when the heir receives an income from the estate in the manner which is the subject of the inquiry, no expense incurred or labor performed by the heir is involved.

45.- MODESTINUS; *On Inventions*.- Where an heir was asked to transfer an entire estate, and declines to retain the fourth because he desires to carry out the wishes of the deceased with greater

obligación de arrendamientos; no le pido ningunos frutos a la herencia. Pero ella pretende que yo los pague, o que le conceda las acciones de los intereses y de las pensiones; no puedo persuadirla de que con la denominación de la herencia, que se le había rogado que me restituyera, me pertenece también esta estipulación de los intereses.

Respondí: todas estas cosas están comprendidas en la denominación de la herencia; porque en cuanto a esto se refiere no hay ninguna diferencia entre estas cosas y las demás que se prometieron bajo condición, o para cada año, o mes. Ciertamente que estas cosas se comprenden como frutos de la cosa que se contiene en la herencia; y los frutos no van al fideicomisario, si no medió mora. Pero como aquel no pide que el heredero supla el fideicomiso, por decirlo así, sino que desea que le sea restituida la herencia tal como esta ahora, el heredero no debe rehusar esto de ninguna manera; porque el Senado quiso que también en cierto modo sea admitido el fideicomisario a una parte de la herencia, y que sea tenido en calidad de heredero respecto a aquella parte en que le hubiese sido restituida la herencia.

Pero cuando hubiere prestado a interés dinero de la herencia, o percibido los frutos de los fundos, no da por tal título nada a aquel a quien fue dejada por fideicomiso la herencia, si no medió mora, a saber, porque prestó a interés a su propio riesgo, o empleó su trabajo en cultivar el fundo o en recoger los frutos; y no era justo, que, por decirlo así, se constituyera procurador de otro. Mas no media ningún gasto o trabajo del heredero, cuando por estos modos, de que se ha tratado, recibió aumento la herencia.

45.- MODESTINO; *Cuestiones nuevas, libro único*.- El que rogado para que restituya toda la herencia no quiere retener la cuarta, y desea prestar a los ruegos del difunto el obsequio de confianza,

adire debbit hereditatem, quasi ex Trebelliano eam restitutus. Suaserim tamen, suspectam potius dicat hereditatem coactusque a praetore restituat: hoc enim casu ex ipso Trebelliano restituere videtur expositoque hereditario metu universas actiones in eum transfert, qui recepit hereditatem.

46.- IAVOLENUS; *libro XI, Epistolarum*.- Seius Saturninus archigubernus ex classe Britannica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum, a quo petit, ut filio suo Seio Oceanus, cum ad annos sedecim pervenisset, hereditatem restitueret. Seius Oceanus antequam impleteret annos, defunctus est: nunc Mallius Seneca, qui se avunculum Seii Oceani dicit, proximitatis nomine haec bona petit, Maximus autem trierarchus sibi ea vindicat ideo, quia defunctus est is cui restituere iussus erat. Quaero ergo utrum haec bona ad Valerium Maximum trierarchum heredem fiduciarium pertineant an ad Mallium Senecam, qui se pueri defuncti avunculum esse dicit.

Respondi: si Seius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, a Valerio Maximo fiducario herede restitui debeat, priusquam praefinitum tempus aetatis impleteret, decessit, fiduciaria hereditas ad eum pertinet, ad quem cetera bona Oceani pertinuerint, quoniam dies fideicommissi vivo Oceano cessit, scilicet si prorogando tempus solutionis tutelam magis heredi fiducario permisisse, quam incertum diem fideicommissi constituuisse videatur.

47.- POMPONIUS; *libro I, variarum lectionum*.- Si heredi eius, cui natura debuerit, aliquis solverit, ei, cui fideicommissa hereditas relicta sit, id reddend-

exactitude, he should voluntarily enter upon the estate as intending to transfer it under the Trebellian Decree of the Senate. I would also advise him, if he regards the estate as insolvent to reject it, in order that he may be compelled by the Praetor to transfer it; for in this instance he is considered to transfer it under the Trebellian Decree of the Senate; and where the heir has manifested fear of being liable to the indebtedness of the estate, all the rights of action will pass to the person who receives it.

46.- JAVOLENUS; *Epistles, Book XI*.- Seius Saturninus, Admiral of the Britannic Fleet, by his will appointed Valerius Maximus, captain of a trireme, his fiduciary heir, and charged him to transfer his estate to his son Seius Oceanus, when the latter arrived at the age of sixteen years. Seius Oceanus died before reaching that age. Then Malleus Seneca, who alleged that he was the uncle of Seius Oceanus, claimed his property on the ground of his being the-next of kin. Maximus, the captain of the trireme, also claimed the estate, because the person to whom he had been ordered to transfer it was dead. I ask to which of these persons the estate belongs, to Valerius Maximus, the captain of the trireme, the fiduciary heir, or to Mallius Seneca, who asserts that he is the uncle of the deceased boy?

I answered that, if Seius Oceanus, to whom the estate was bequeathed in trust by the will of Seius Saturninus, when he attained the age of sixteen years, was to be transferred by Valerius Maximus, the fiduciary heir, should have died before reaching the prescribed age, the estate left in trust would pass to him who was entitled to the other property of Oceanus, because the time for the execution of the trust arrived during the lifetime of Oceanus; that is to say, provided that, by prolonging the time of delivery, the testator was considered to have intended to commit the guardianship of his son to the fiduciary heir, rather than to have appointed an uncertain time for the execution of the trust.

47.- POMPONIUS; *Various Passages, Book I*.- If anyone, bound to a person only by a natural obligation, should discharge a debt to his heir, the

deberá adir espontáneamente la herencia, como para restituirla en virtud del Senadoconsulto Trebeliano. Pero yo aconsejaría que más bien declarase sospechosa la herencia, y que apremiado por el Pretor la restituya; porque en este caso se considera que la restituye en virtud del mismo Senadoconsulto Trebeliano, y que por el temor expuesto, respecto a la herencia, se transfieren todas las acciones contra aquel que recibió la herencia.

46.- JAVOLENO; *Epístolas, libro XI*.- Seyo Saturnino, primer piloto de la Armada Británica, dejó en su testamento heredero fiduciario a Valerio Máximo, capitán de una trirreme, a quien le pidió que restituyese la herencia a su propio hijo Seyo Oceano, cuando éste hubiese llegado a los dieciséis años; Seyo Oceano falleció antes que cumpliera los dieciséis años; ahora Malio Séneca, que se dice tío materno de Seyo Oceano, pide estos bienes a título de parentesco; pero Máximo, capitán de la trirreme, los reivindica para sí por esto, porque falleció aquel a quien se le había mandado que los restituyera; en su consecuencia, pregunto, si estos bienes le pertenecerán a Valerio Máximo, capitán de la trirreme, heredero fiduciario, o a Malio Séneca, que dice que es tío materno del joven fallecido.

Respondí: si Seyo Oceano, a quien se le debía restituir por Valerio Máximo, heredero fiduciario, la herencia dejada por fideicomiso en virtud del testamento de Seyo Saturnino, cuando tuviese dieciséis años, falleció antes de cumplir la edad prefijada, la herencia fiduciaria pertenece a aquel a quien hubieren pertenecido los demás bienes de Oceano, porque el término del fideicomiso corrió viviendo Oceano; por supuesto, si pareciera que prorogando el tiempo de la entrega, mas bien le permitió al heredero fiduciario la tutela, que no que fijó término incierto para el fideicomiso.

47.- POMPONIO; *Opiniones varias, libro I*.- Si uno hubiere pagado al heredero de aquel a quien le debiere por obligación natural, esto ha de ser de-

dum.

48.- PAULUS; *libro XIV, Responsorum*.- Paulus respondit: si certa portio hereditatis alicui relicta proponitur et is res hereditarias quasdam furatus sit, in his rebus, quas subtraxit, denegari ei petitionem oportere recte respondetur.

49.- PAPINIANUS; *libro III.- Quaestionum*.- Cum hereditas ex Trebelliano Senatusconsulto restituitur, si res urgeat et metus erit, ne per absentiam forte fideicommissarii dies actionis exeat, heres iudicium suscipere cogitur.

§ 1.- Similique modo filio de possessione contra tabulas deliberante scriptus heres a creditoribus hereditariis convenitur.

50.- IDEM; *libro XI, Quaestionum*.- Imperator Hadrianus, cum Vivius Cerealis filio suo Vivio Simonidi, si in potestate sua esse desisset, hereditatem restituere rogatus esset ac multa in fraudem fideicommissi fieri probaretur, restitui hereditatem filio iussit ita, ne quid ea pecunia, quamdiu filius eius viveret, iuris haberet. Nam quia cautiones non poterant interponi conservata patria potestate, damnum condicionis propter fraudem infligit. Post decreti autem auctoritatem in ea hereditate filio militi comparari debuit, si res a possessoribus peti vel etiam cum debitoribus agi oporteret. Sed paternae reverentiae congruum est egenti forte patri officio iudicis ex accessionibus hereditariis emolumentum praestari.

51.- IDEM; *libro XVII, Quaestionum*.- Cum heres

money must be paid over to him to whom the estate was left in trust.

48.- PAULUS; *Opinions, Book XIV*.- Paulus gave it as his opinion that, in a case where a certain portion of an estate was left to someone, and the latter had stolen property belonging to the estate, it may very properly be held that he can be refused an action having reference to what he had appropriated.

49.- PAPINIANUS; *Questions, Book III*.- Where an estate is to be transferred under the Trebellian Decree of the Senate, and the matter is urgent, and it is feared that the time for bringing an action may expire on account of the absence of the beneficiary of the trust, the heir can be compelled to defend the action brought against the estate.

§ 1.- In like manner, where a son is deliberating as to whether he will demand possession of the estate in opposition to the terms of the will, the appointed heir can be sued by the creditors of the estate.

50.- THE SAME; *Questions, Book XI*.- When Vivius Cerealis had been appointed heir, and directed to transfer the estate to his son Vivio Simonides, when he should be free from his control, and it was proved that many fraudulent acts had been committed for the purpose of avoiding the trust, the Emperor Hadrian ordered the estate to be delivered to the son, so that the father would have no right to the money as long as his son should live. For, as security cannot be given as long as paternal control exists, the Emperor inflicted this loss upon the father because of the fraud perpetrated by him. After a decree of this kind has been authorized, the son should, under such circumstances, be compared to the son of a soldier, where property is to be recovered from possessors, or where it is necessary to bring suit against the debtors of the estate. It is, however, in conformity for the reverence due to a father, in case the latter should be reduced to want, for the judge, in his discretion, to order some of the income of the estate to be given to him.

51.- THE SAME; *Questions, Book XVII*.- Where

vuelto a aquel a quien le haya sido dejada por fideicomiso la herencia.

48.- PAULO; *Respuestas, libro XIV*.- Paulo respondió: si se expone que a uno se le dejó cierta porción de la herencia, y éste hubiera hurtado algunas cosas de la herencia, con razón se responde que se le debe denegar acción para pedir respecto a las cosas que sustrajo.

49.- PAPINIANO; *Cuestiones, libro III*.- Cuando se restituye la herencia en virtud del Senadoconsulto Trebeliano, si el caso apremiase, y hubiere temor de que acaso por ausencia del fideicomisario transcurra el término de la acción, el heredero es obligado a aceptar el juicio.

§ 1.- Y del mismo modo, deliberando el hijo sobre la posesión contra el testamento, el heredero instituido es demandado por los acreedores de la herencia.

50.- EL MISMO; *Cuestiones, libro XI*.- Habiéndosele rogado a Vivio Cereal que restituyera una herencia a su hijo, Vivio Simónides, si hubiese dejado de estar bajo su potestad, y habiéndose probado que hizo muchas cosas en fraude del fideicomiso, el Emperador Adriano mandó que se le restituyera la herencia al hijo, de modo que aquel no tuviera ningún derecho sobre estos bienes mientras viviera su hijo; porque como conservada la patria potestad no se podían interponer cauciones, infligió por causa del fraude la pérdida de la condición, y después de la autoridad del decreto debió ser comparado respecto de esta herencia con un hijo militar, si se debieran pedir los bienes a los poseedores, o aun ejercitar las acciones contra los deudores. Pero es conforme al respeto debido al padre, que estando acaso necesitado el padre se le dé por ministerio del juez algún emolumento de las accesiones de la herencia.

51.- EL MISMO; *Cuestiones, libro XVII*.- Cuando

deductis legatis hereditatem per fideicommissum restituere rogatur, non placet ea legata deduci, quae peti non poterant. Sed cum uxori pro parte heredi scriptae dos praelegatur eaque deductis legatis hereditatem restituere rogatur: etiamsi quarta, quam per Legem Falcidiam retinet, tantum efficiat, quantum in dote est, tamen pro sua portione dotis praelegatae partem deducit. Cum enim utrumque consequitur, nihil interest inter hanc mulierem et quemvis alium creditorem heredem institutum et hereditatem restituere rogatum. Idem probatur et si non deductis legatis fideicommissum ab ea relictum sit.

52.- IDEM; *libro XIX, Quaestionum*.- Si res aliena titio legata fuerit isque domino rei herede instituto petierit, ut hereditatem Maevio restituat, Maevius legatum inutiliter petet: non enim poterit consequi, quod ad institutum, id est rei dominum pervenire non poterat.

§ 1.- Servus ab altero ex heredibus libertatem, ab altero fideicommissum hereditatis accepit. si neuter adire velit, nullae praetoris partes erunt, quia neque propter solam libertatem compellitur adire neque is, a quo libertas data non est, propter eum, qui nondum liber est, ut adeat, compellitur: et Senatusconsulto locus est, cum ab omnibus directa, vel fideicommissa libertas ab eo datur a quo hereditas quoque relinquitur. sed si forte is, a quo libertas data est, portionem suam repudiavit vel condicione exclusus est, cum portio eius ad alterum pervenerit, defendi poterit adire cogendum: quid enim interest, quo iure debitor libertatis et hereditatis idem esse coeperit?

an heir is charged to deliver an estate left in trust, after having deducted the legacies, it is not held that those should be deducted which cannot be recovered by an action. Where a dowry is bequeathed as a preferred legacy to a wife, who is appointed heir to a part of the estate of a testator, and she is charged to transfer the estate after having deducted the legacies, she can still deduct her share of the estate in proportion to the dowry, even if the fourth which she is entitled to retain by the Falcidian Law amounts to as much as her dowry. For, as she is entitled to both of these, there is no difference between this woman and any other creditor who may be appointed heir, and charged to transfer the estate. The same principle also applies where she is charged with a trust without the deduction of the legacies.

52.- THE SAME; *Questions, Book XIX*.- Where property belonging to a third party is bequeathed to Titius, and the latter charges his master, whom he has appointed his heir, to transfer the estate to Maevius, Maevius cannot legally claim the legacy, for he cannot acquire what has never come into the hands of the appointed heir, that is to say, the ownership of the property.

§ 1.- A slave obtained his freedom from one of two heirs who had been appointed, and from the other received an estate left in trust. If neither of the said heirs was willing to accept the estate, the Praetor would have no jurisdiction, because he cannot compel an heir to enter upon an estate for the sole purpose of securing the freedom of the slave, nor can he compel him by whom freedom has not been granted to accept the estate on behalf of a slave who has not yet been liberated, as the Decree of the Senate applies only where all the heirs are charged directly with a grant of freedom, or one is charged with it as well as with the delivery of the estate under the terms of a trust. If the heir who is charged with the grant of freedom should reject his share of the estate, or should be excluded because of the non-fulfillment of the condition upon which his appointment depends, as his share will pass to the other heir, it can be maintained that he should be forced to accept the estate. For what difference does it make under what

al heredero se le ruega que deducidos los legados restituya por fideicomiso la herencia, no parece bien que se deduzcan los legados que no se podían pedir. Pero cuando se prelega la dote a la mujer instituida heredera de una parte, y se le ruega que deducidos los legados restituya la herencia, aunque la cuarta que retiene por la ley Falcidia equivalga a tanto cuanto importa la dote, deduce, sin embargo, con arreglo a su porción la parte de la dote prelegada; porque cuando consigue una y otra cosa, no hay ninguna diferencia entre esta mujer y otro cualquier acreedor instituido heredero, y rogado para que restituya la herencia. Lo mismo se aprueba, también si a cargo de ella se hubiera dejado el fideicomiso sin haber deducido los legados.

52.- EL MISMO; *Cuestiones, libro XIX*.- Si a Ticio se le hubiere legado una cosa ajena, y él, habiendo instituido heredero al dueño de la cosa, le hubiere pedido que restituya la herencia a Maevio, inútilmente pedirá Maevio el legado; porque no podrá conseguir lo que no podrá ir a poder del instituido, esto es, del dueño de la cosa.

§ 1.- Un esclavo recibió por medio de uno de los herederos la libertad, y por medio de otro el fideicomiso de la herencia; si ninguno de los dos quisiera adirla, serán nulos los oficios del Pretor, porque ni se compele a adir por solo la libertad, ni es compelido a que ada aquel a cuyo cargo no fue dada la libertad, por causa del que todavía no es libre; y hay lugar al Senadoconsulto, cuando la libertad es dada directamente a cargo de todos, o por fideicomiso a cargo de aquel a cuyo cargo se deja también la herencia. Pero si acaso aquel a cuyo cargo fue dada la libertad rechazó su porción, o fue excluido por la condición, como quiera que su porción habrá ido a poder del otro, se podrá defender que ha de ser obligado a adir; porque ¿qué importa por qué derecho haya comenzado uno mismo a ser deudor de la libertad y de la herencia?

rule the same person should owe the slave both freedom and the estate?

53.- IDEM; *libro XX, Quaestionum*.- Non est cogendus heres suspectam adire hereditatem ab eo, cui libertas a legatario, hereditas ab herede relicta est, cum status hominis ex legato pendeat et nemo se cogatur adstringere hereditariis actionibus propter legatum. Quid enim, si inter moras non manumittente legatario servus decesserit? Si autem vivo testatore legatarius decesserit, benigne respondetur cogendum adire, cum in ipsius sit potestate manumisso restituere hereditatem.

54.- IDEM; *libro XIX, Quaestionum*.- Titius rogatus est, quod ex hereditate superfuisset, maevio restituere. quod medio tempore alienatum vel deminutum est, ita quandoque peti non poterit, si non interveniendi fideicommissi gratia tale aliquid factum probetur: verbis enim fideicommissi bonam fidem inesse constat. divus autem marcus cum de fideicommissaria hereditate cognosceret, his verbis: "quidquid ex hereditate mea superfuerit, rogo restituas" et viri boni arbitrium inesse credidit: iudicavit enim erogationes, quae ex hereditate factae dicebantur, non ad solam fideicommissi deminutionem pertinere, sed pro rata patrimonii, quod heres proprium habuit, distribui oportere. Quod mihi videtur non tantum aequitatis ratione, verum exemplo quoque motus fecisse. cum enim de conferendis bonis fratribus ab emancipato filio quaereretur, praecipuum autem, quod in castris fuerat adquisitum militi, relinqui placeret, consultus imperator sumptus, quos miles fecerat, non ex eo tantummodo patrimonio, quod munus collationis pati debuit, sed pro rata etiam castrensis pecuniae decedere oportere constituit. propter huiusmodi tractatus maevius fideicommissi nomine cautionem exigere debet: quod eo pertinet, non ut ex stipulatione petatur, quod ex fideicommisso peti non poterit, sed ut habeat fideiussores eius quantitatis, quam ex fideicommisso petere potuit.

53.- THE SAME; *Questions, Book XX*.- An heir should not be compelled to accept an estate, which he considers to be insolvent, by a slave on whom the said heir is charged to bestow freedom and the estate, as the condition of the slave depends upon the legacy, and no one can compel another to become liable to actions brought against an estate merely in order to secure the payment of a legacy. For what if the slave should die during the delay caused by the legatee in not manumitting him? If, however the legatee should die during the lifetime of the testator, the more equitable opinion would be that he should be compelled to accept the estate, as he has the power to transfer it to the slave after his manumission.

54.- THE SAME; *Questions, Book XIX*.- Titius was charged to transfer to Maevius the residue of an estate. The beneficiary can not recover anything which the heir may have in the meantime alienated or wasted, if it should be proved that he has not done this fraudulently and for the purpose of interfering with the trust; for it is established that good faith is an essential characteristic of a fiduciary bequest. The Divine Marcus, however, when he was deciding a matter involving an estate left in trust, which was contained in the following words, "I charge you to transfer anything which remains of my estate," held that this should be left to the judgment of a good citizen, and decided that any expenses which were said to have been incurred with reference to the estate should not only cause a diminution of the property included in the trust, but should also be distributed pro rata with reference to the patrimonial estate, to which the heir was entitled as his own. This seems to me to not only be based on equity, but also to be confirmed by example; for if a question should arise concerning the contribution of property by an emancipated son in favor of his brothers, it has been definitely settled that whatever was acquired by the son in the army he is entitled to retain; and the Emperor, having been consulted, decided that the expenses incurred by the soldier should not only be apportioned among the funds due from the estate, but

53.- EL MISMO; *Cuestiones, Libro XX*.- El heredero no ha de ser obligado a adir la herencia sospechosa por aquel a quien se le legó la libertad a cargo del legatario, y la herencia a cargo del here-dero, porque el estado del esclavo pende del legado, y nadie es obligado a sujetarse por causa de un legado a las acciones de la herencia; porque ¿qué se dirá si no manumitiéndolo el legatario hubiere fallecido el esclavo durante la mora? Mas si viviendo el testador hubiere fallecido el legatario, se responde por benignidad, que ha de ser obligado a adir, porque está en poder del mismo restituírle la herencia al manumitido.

54.- EL MISMO; *Cuestiones, libro XIX*.- Se le rogó a Ticio que restituyese a Mevio lo que hubiese sobrado de la herencia; lo que en el tiempo intermedio fue enajenado o disminuido, no se podrá pedir en cualquier tiempo, si no se probare que tal cosa se hizo para invalidar el fideicomiso; porque es sabido que en las palabras del fideicomiso está comprendida la buena fe. Pero el Divino Marco, conociendo de una herencia dejada por fideicomiso en estos términos: «te ruego que restituyas todo lo que hubiere quedado de mi herencia», creyó que estaba comprendido también el arbitrio de hombre bueno; porque juzgó que los gastos que se decían hechos en la herencia afectaban no sólo a la disminución del fideicomiso sino que se debían distribuir a prorrata del patrimonio, que el heredero tuvo como propio; lo que me parece que hizo movido no solamente por razón de equidad, sino también por analogía. Porque tratándose de hacer colación de bienes a sus hermanos por un hijo emancipado, y pareciendo bien que se dejase como preferente lo que en el campamento había sido adquirido para el militar, consultado el Emperador, determinó que los gastos que el militar había hecho debían deducirse, no solamente del patrimonio, que debió soportar la carga de la colación, sino también a prorrata del caudal castrense. Por razón de todo lo que debe exigir Mevio caución a título del fideicomiso; lo que tiene por

ought also to be deducted pro rata from the money forming part of the peculium. According to what has just been stated, Mseuius should require a bond to be given for the execution of the trust, not in order that he may, under the stipulation, make a claim for what he could not recover under the trust, but that he may have sureties for the amount which he could have recovered under the terms of the trust.

55.- IDEM; *libro XX, Quaestionum*.- Si patroni filius extrario restituerit ex Trebelliano hereditatem, operarum actio, quae transferri non potuit, apud heredem manebit, nec ei nocebit exceptio, cum eadem prodesse non posset ei qui fideicommissum accepit. Et generatim ita respondendum est non summo heredem neque liberari ex his causis, quae non pertinent ad restitutionem.

§ 1.- Imperator Titus Antoninus Rescripsit in tempus directo data libertate non esse repraesentandam hereditatis restitutionem, quando persona non est, cui restitui potest.

§ 2.- Qui fideicommissam hereditatem ex Trebelliano, cum suspecta diceretur, totam recepit, si ipse quoque rogatus sit alii restituere, totum restituere cogetur. Et erit in hac quoque restitutione Trebelliano locus: quartam enim Falcidiae iure fideicommissarius retinere non potuit. Nec ad rem pertinet, quod, nisi prior, ut adiretur hereditas, desiderasset, fideicommissum secundo loco datum intercidisset: cum enim semel adita est hereditas, omnis defuncti voluntas rata constituitur. Non est contrarium, quod legata cetera non ultra dodrantem praestat: aliud est enim ex persona heredis conveniri, aliud proprio nomine defuncti precibus adstringi. secundum quae potest dici non esse priore tantum desiderante cogendum institutum adire, ubi nulla portio remansura sit apud eum, utique si confestim vel post tempus cum fructibus rogatus est reddere: sed et si sine fructibus rogatus est reddere, non erit idonea quantitas ad inferendam adeundi

55.- THE SAME; *Questions, Book XX*.- If the son of a patron should transfer an estate to a stranger under the Trebellian Decree of the Senate, an action to recover the value of services which cannot be transferred will lie in favor of the heir, and he will not be prejudiced by an exception, as this cannot be of any advantage to the person entitled to the benefit of the trust. Generally speaking, it must be said that the heir can neither be barred from proceeding, nor released by obligations which have no reference to the delivery of the estate.

§ 1.- The Emperor Titus Antoninus stated in a Rescript, that where freedom has been bequeathed directly, to take effect within a certain time, transfer of the estate need not be made when there is no person to whom it can be delivered.

§ 2.- Where anyone has received an entire estate under the Trebellian Decree of the Senate, after alleging that he has reason to think that it is insolvent, if he was charged to transfer it to another, he will be obliged to deliver all of it, and, in this instance, there will also be ground for the application of the Trebellian Decree of the Senate, for the beneficiary of the trust cannot retain the fourth under the Falcidian Law. Nor does it make any difference, if the first beneficiary should not have demanded that the estate be entered upon, whether the trust created in the second place would not have taken effect, for when an estate has once been accepted, all the wishes of the deceased are considered to have been complied with. Nor is this opinion refuted because the beneficiary of the trust is not obliged to pay other legacies which amount to more than three-fourths of the estate. For it is one thing for suit to be brought against him in the name of the heir, and another for

objeto, no que se pida en virtud de la estipulación lo que no se podrá pedir en virtud del fideicomiso, sino que tenga fiadores de esta cantidad, que no pudo pedir en fuerza del fideicomiso.

55.- EL MISMO; *Cuestiones, libro XX*.- Si el hijo de un patrono hubiere restituido la herencia en virtud del Senadoconsulto Trebeliano, la acción de servicios, que no se pudo transferir, permanecerá en poder del heredero; y no le perjudicará la excepción, porque ella no podría aprovecharle al que recibió el fideicomiso; y en general se ha de responder de este modo, que no es repelido el heredero, ni queda libre en virtud de aquellas causas que no están comprendidas en la restitución.

§ 1.- Respondió por rescripto el Emperador Tito Antonino, que habiéndose dado directamente la libertad para cierto tiempo, no se debía anticipar la restitución de la herencia, no habiendo persona a quien se le pueda restituir.

§ 2.- El que, cuando se dijese que era sospechosa, recibió en virtud del Senadoconsulto Trebeliano íntegra la herencia dejada por fideicomiso, si también a él mismo se le hubiera rogado que la restituya a otro, será obligado a restituirlo todo; y también en esta restitución habrá lugar al Senadoconsulto Trebeliano, porque el fideicomisario no pudo retener la cuarta por derecho de Falcidia. Y no hace al caso, que si el primero no hubiese pretendido que se adiera la herencia habría perecido el fideicomiso dado en segundo lugar, porque cuando una vez fue adida la herencia queda ratificada toda disposición del difunto. Y no es contrario a esto que no paga los demás legados que exceden de los tres cuartos; porque una cosa es que sea demandado por razón de la persona del heredero, y otra que sea obligado en nombre propio a los ruegos del difunto. Según lo cual se puede decir, que, deseándolo solamente el primero, no ha de ser apremiado a adir

necessitatem. Nec ad rem pertinebit, si prior etiam libertatem accepit: ut enim pecuniam, ita nec libertatem ad cogendum institutum accepisse satis est.

Quod si prior recusaverit, placuit, ut recta via secundus possit postulare, ut heres adeat et sibi restituat.

§ 3.- Quid ergo, si non alii, sed ipsi heredi rogatus sit restituere? Quia non debet eidem quandoque quarta reddi quam perdidit, propter huius portionis retentionem erit audiendus. Sed nec illud translatiōe omittendum est instituto, qui coactus est adire, fideicommissi petitionem denegandam esse: cur enim non videatur indignus, ut qui destituit supremas defuncti preces consequatur aliquid ex voluntate? Quod fortius probabitur, si post impletam condicionem coactus est adire. Nam si pendente condicione, durum erit idem probare, cum et Falcidiam paenitendo potuit inducere: nec ignoro posse dici nullo modo fideicommissi petitionem denegandam ei qui, iura sepulchrorum adquiri insequuntur, adeo Senatus nihil apud eum ex ea parte, quam derelinquit, voluit relinquere, ut nec falcidiam exercere possit nec praeceptio apud eum relinquitur nec substitutio quoque secundarum tabularum ita facta: "quisquis mihi heres erit, filio meo heres esto" eidem daretur.

him to be sued in his own name through being bound by the wishes of the deceased. According to what has already been stated, the appointed heir should not be compelled to accept the estate merely on the demand of the first beneficiary of the trust, where the latter is not entitled to any portion of the same, just as if he was charged to transfer the estate, together with its income, immediately, or after a certain time. If, however, he should be charged to transfer it without its income, it may be inferred that the amount will not be sufficient to compel him to accept the estate, nor is it material if the first beneficiary should have also received his freedom, for neither the acceptance of the money, nor of the grant of freedom will be sufficient to compel the appointed heir to enter upon the estate.

But when the first beneficiary of the trust refuses to compel the heir to accept the estate, it has been decided that the second can legally demand that this shall be done, in order that the heir may enter upon it and transfer it to him.

§ 3.- But what if the first beneficiary should be charged not to deliver the estate to a third party, but to transfer it to the heir himself? For the reason that he ought not to transfer to him the fourth which he has lost, he should be heard with reference to the retention of this part of the estate. Yet the fact that the appointed heir who was compelled to accept the estate is refused the right to claim anything under the trust should not be dismissed without consideration. For why should he not be thought unworthy to obtain anything under the will of the deceased, who refused to comply with his wishes? This will be more thoroughly established, if the heir was forced to enter upon the estate after a condition had been fulfilled, for if he was compelled to do so while the condition was pending, it will be hard to prove this, as he, by merely changing his mind, will be able to claim the Falcidian fourth. And I am well aware that it may be said that, under no circumstances, the benefit of a trust should be denied to those who are asserting their claim to the right of sepulture. To such an extent was the Senate convinced that the heir should not obtain anything out of the share of the estate which he had

el instituido, cuando ninguna porción hubiera de quedar en su poder, por supuesto, si se le rogó que restituyera inmediatamente, o después de algún tiempo con los frutos; sino que también si se le rogó que restituyera sin los frutos, no habrá una cantidad suficiente para que se imponga la necesidad de adir. Y no importará al caso, si el primero recibió también la libertad, porque así como no es bastante para que el instituido sea apremiado que haya recibido dinero, así tampoco que haya recibido la libertad.

Mas si el primero lo hubiere rehusado, se determinó que pueda el segundo pedir directamente que el heredero adiera la herencia y se la restituya a él.

§ 3.- Luego ¿qué se dirá si se le hubiera rogado a uno que la restituya, no a otro, sino al mismo heredero, -porque no se le debe restituir alguna vez al mismo la cuarta, que perdió?- Que habrá de ser oído por causa de la retención de esta porción. Pero tampoco se ha de omitir por descuido que al instituido, que fue apremiado a adir, se le ha de denegar la petición del fideicomiso; pues el que desatiende los últimos ruegos del difunto ¿por qué no será considerado indigno de conseguir cosa alguna por virtud de la voluntad de aquél? Lo que con más razón se aprobará, si fue apremiado a adir después de cumplida la condición; porque si estando pendiente la condición, será duro aprobar lo mismo, porque arrepintiéndose pudo sacar también la Falcidia. Y no ignoro que se puede decir, que de ningún modo se les ha de denegar la petición del fideicomiso a aquellos que persiguen la adquisición de los derechos de sepulcros. De tal manera quiso el Senado no dejar en poder de éste nada de la parte, que abandonó, que ni puede utilizar la Falcidia, ni se le deja la percepción de prelegados, ni tampoco se le daría al mismo la substitución hecha así en un segundo testamento:

rejected, that he could not even avail himself of the Falcidian Law, or reserve any preferred legacy, or acquire any advantage under a second will, where the substitution is made as follows, "Let whoever becomes my heir, be the heir of my son."

«cualquiera que fuere mi heredero, sea heredero de mi hijo».

§ 4.- Cui Titiana hereditas ex Trebelliano Senatus-consulto restituta est, Maevianam hereditatem, quam Titius defunctus ex Trebelliano Sempronio restituere debuit, et ipse restituere poterit sic ut alius quilibet successor.

§ 4.- The person to whom the estate of Titius was transferred under the Trebellian Decree of the Senate can transfer to Sempronius the estate of Msevius which the deceased Titius was charged to transfer to him, just as any other successor whosoever could do.

§ 4.- Aquel a quien le fue restituida en virtud del Senadoconsulto Trebeliano la herencia de Ticio, podrá restituir también, como otro cualquier sucesor, la herencia de Mevio, que el difunto Ticio debió restituir a Sempronio en fuerza del Senadoconsulto Trebeliano.

§ 5.- Actiones temporariae Trebelliani solent esse evicta hereditate ab eo, qui, posteaquam fideicommissam restituit hereditatem, victus est, scilicet ante restitutionem lite cum eo contestata: potestas enim evictionis tollit intellectum restitutionis indebito fideicommisso constituto. Plane si fideicommissum ab eo quoque qui postea vicit relictum est: quia possessor in ratione reddendae hereditatis partem, quam fideicommissario restituit, heredi reputat, defendi potest actiones Trebelliani durare.

§ 5.- The actions which pass under the Trebellian Decree of the Senate are only temporary ones, where the estate is evicted from the party who lost the case after he had transferred the estate under the trust, if, of course, issue was joined with him before the delivery; for the force of the eviction renders the transfer null, because that the trust which was established was not due. It is clear that where the same person who gained the case was also charged with the trust, for the reason that the possessor, in transferring the estate, accounted to the heir for the same share which should have been delivered to the beneficiary; it can be maintained that the actions which pass under the Trebellian Decree of the Senate will not be barred by lapse of time.

§ 5.- Las acciones del Senadoconsulto Trebeliano suelen ser temporales, habiéndosele hecho evicción de la herencia al que fue vencido después que restituyó la herencia dejada por fideicomiso, por supuesto, habiéndose contestado con él la demanda antes de la restitución; porque la eficacia de la evicción quita la significación de la restitución, haciéndose indebido el fideicomiso. A la verdad, si el fideicomiso fue dejado también a cargo del que venció después, como el poseedor imputa al heredero en la cuenta de la herencia que se ha de restituir la parte que le restituyó al fideicomisario, se puede sostener que subsisten las acciones del Senadoconsulto Trebeliano.

56.- IDEM; *libro VII, Responsorum*.- Filiam fratribus certis rebus acceptis hereditatem restituere pater voluit: ante restitutam hereditatem in possessionem hereditatis filiam quoque mitti placuit. Cum autem interea filii res bonorum in solidum distraxissent, item alias pignori dedissent, hereditate postea restituta constitit ex eo facto ceterarum quoque portionum venditiones, item pignora confirmari.

56.- THE SAME; *Opinions, Book VII*.- A father wished that his daughter, after having reserved certain articles, should deliver his estate to her brothers. It was decided that the daughter ought to be placed in possession of the estate, before she made the transfer to her brothers. If, in the meantime, the brothers should have sold or encumbered all the property of the estate, and it was afterwards transferred to them, it is established that, on account of their act only, the sales or pledges of that portion of the estate which was not reserved, should be confirmed.

56.- EL MISMO; *Respuestas, libro VII*.- Un padre quiso que su hija, habiendo tomado ciertas cosas, les restituyese la herencia a sus hermanos se determinó que también fuera puesta la hija en posesión de la herencia antes de haber sido restituida la herencia; pero habiendo vendido entretanto los hijos por completo algunas cosas de los bienes, y habiendo dado también otras en prenda restituida después la herencia, fue constante que en virtud de este hecho se confirmaban las ventas también de las demás porciones, y asimismo las prendas.

57.- IDEM; *libro VIII, Responsorum*.- «Heredes mei quidquid ad eos ex hereditate bonisve meis pervenerit, id omne post mortem suam restituant patriae meae coloniae Beneventanorum»: nihil de

57.- THE SAME; *Opinions, Book VIII*.- "Let my heirs, at their death, transfer to the City of Beneventum, my birthplace, all of my estate or property which may come into their hands." It was

57.- EL MISMO; *Respuestas, libro VIII*.- «Restituyan mis herederos después de su muerte a mi patria, la colonia de los Beneventanos, todo lo que de la herencia o de mis bienes hubiere ido a poder de

fructibus pendente condicione perceptis petitum videri constitit.

§ 1.- Quum ita fuerat scriptum: "fidei filiorum meorum committo, ut, si quis eorum sine liberis prior diem suum obierit, partem suam superstiti fratri restituat: quod si uterque sine liberis diem suum obierit, omnem hereditatem ad neptem meam Claudiam pervenire volo": defuncto altero superstite filio, novissimo autem sine liberis neptis prima quidem facie propter condicionis verba non admitti videbatur: sed cum in fideicommissis voluntatem spectari conveniat, absurdum esse respondi cessante prima substitutione partis nepti petitionem denegari, quam totum habere voluit avus, si novissimus fratris quoque portionem suscepisset.

§ 2.- «Peto de te, uxor carissima, uti cum morieris hereditatem meam restituas filiis meis vel uni eorum vel nepotibus meis vel cui volueris vel cognatis meis si cui voles ex tota cognatione mea». Inter filios respondi substitutionem fideicommissi factam videri, circa nepotes autem et ceteros cognatos facultatem eligendi datam: ex ceteris autem cognatis, si nepotes superessent, non recte mulierem electuram propter gradus fideicommissi praescriptos: deficiente vero gradu nepotem ex cognatis quam velit personam eligi posse.

58.- IDEM; *libro IX, Responsorum*.- Deducta parte quarta restituere rogatus hereditatem, prius quam restitueret, hereditario debitori heres extitit. Quoniam actio eo confusa per Trebellianum reintegrari non potest, pecuniae quoque debitae dodrans ex causa fideicommissi petetur. Sed in eum diem, quo actio confusa est, usurae praeteriti temporis, quae in obligatione vel in officio iudicis

decided that none of the income collected by the heirs while a condition was pending was included in the trust.

§ 1.- The following provision was inserted into a will, "I charge the first one of my sons who may die without issue to leave his share of my estate to his surviving brother. If both of them should die without issue, I wish my entire estate to go to my granddaughter Claudia." If one of the heirs should die leaving a son, and the last one should die without issue, it would seem, at the first glance, that the granddaughter could not be admitted to the succession under the terms of the condition; but as, in the interpretation of trusts, it is proper to consider the intention of the testator, it would be absurd to hold that, because the first substitution did not take effect, the claim of the granddaughter to half of the estate should be refused, as the grandfather had intended that she should have all of it, if the last of the sons who died should receive the share of his brother.

§ 2.- "When I die, I charge you, my dear wife, to transfer my estate to my children, or to one of them, or to my grandchildren, or to any one of them whom you may select, or to my relatives, or to any one of all of my relatives whom you may select." I gave it as my opinion that a substitution of the trust was made with reference to the children, and, with reference to the grandchildren and the other relatives, the wife was given the right of selection, but that she could not legally make a choice of the other relatives if any of the grandchildren should be living, on account of the different degrees established by the terms of the trust; but where the degree of grandchildren had ceased to exist, the woman could select any one of the relatives whom she pleased.

58.- THE SAME; *Opinions, Book IX*.- An heir who was charged to transfer an estate after deducting the fourth of the same became the heir of a debtor of the estate before he transferred it. As, on this account, the right of action was merged and could not be restored under the Trebellian Decree of the Senate, three-fourths of the indebtedness might be claimed by virtue of the trust; but the interest for the past time

ellos»; es manifiesto, que no parece que se pidió nada respecto a los frutos percibidos estando pendiente la condición.

§ 1.- Habiéndose escrito así: «encomiendo a la fidelidad de mis hijos, que, si uno de ellos muriere primero sin hijos, le restituya su parte al hermano sobreviviente; pero si ambos falleciesen sin hijos, quiero que toda mi herencia vaya a mi nieta Claudia»; habiendo fallecido uno sobreviviéndole un hijo, y el otro sin hijos, parecía ciertamente a primera vista que no era admitida la nieta por causa de las palabras de la condición, pero como es conveniente que en los fideicomisos su atienda a la voluntad, respondí que era absurdo, que, dejando de existir la primera substitución, se le denegase a la nieta la petición de la parte, que el abuelo quiso que tuviera íntegra, si el último hubiese recibido también la porción del hermano.

§ 2.- «Te pido, queridísima mujer, que cuando mueras les restituyas mi herencia a mis hijos, o a uno solo de ellos, o a mis nietos, o al que quisieres, o a mis cognados, si a alguno quisieras de toda mi parentela»; respondí, que se consideraba hecha entre los hijos una substitución de fideicomiso, pero que respecto a los nietos y a los demás cognados se consideraba dada la facultad de elegir; y que entre los demás cognados, si sobreviviesen nietos, no elegiría con derecho la mujer por razón de los grados prescritos en el fideicomiso, pero que faltando el grado de los nietos se podía elegir entre los cognados la persona que ella quisiera.

58.- EL MISMO; *Respuestas, libro IX*.- Uno, a quien se le rogó que deducida la cuarta parte restituyera la herencia, quedó heredero de un deudor de la herencia antes de restituirla; como la acción de este modo confundida no puede ser reintegrada por el Senadoconsulto Trebeliano, se pedirá por causa del fideicomiso los tres cuartos también del dinero debido; pero se computarán hasta el día en que se

fuerunt, computabuntur: posterioris ita demum, si mora fideicommisso facta sit.

§ 1.- Cum hereditas ex causa fideicommissi in tempus restituenda est, non idcirco nominum periculum ad heredem pertinebit, quod heres a quibusdam pecuniam exegerit.

§ 2.- Qui post tempus hereditatem restituere rogatur, usuras a debitoribus hereditariis perceptas, quarum dies post mortem creditoris cessit, restituere non cogitur: quibus non exactis omnium usurarum actio (nam hereditaria stipulatio fuit) ex Trebelliano transferetur, et ideo nec indebiti repetitio erit.

Ac similiter hereditario creditori si medii temporis non solvantur usurae, fideicommissarium in his quoque Trebellianum tenebit nec ideo querellae locus erit, quod de fructibus heres, quos iure suo percipiebat, faenus non solverit. Quod si faenus heres medii temporis solverit, eo nomine non erit retentio, cum proprium negotium gessit, quippe sortem reddere creditori coactus fideicommissario nihil usurarum medii temporis imputabit.

§ 3.- Acceptis centum hereditatem rogatus restituere totam pecuniam iure Falcidia percipere videtur, et ita Divi Hadriani Rescriptum intellectum est, tamquam si ex bonis nummos retenturus fuisset.

Quod tunc quoque respondendum est, cum pro

which was due on the obligation, or on a judgment which had been obtained, must be calculated up to the time when the right of action was extinguished, and interest cannot be calculated for the ensuing time, unless the heir was in default in executing the trust.

§ 1.- Where an estate should be transferred within a certain time under the terms of a trust, no liability will attach to the heir on account of claims due to the estate, merely because he may have collected money from some of the debtors.

§ 2.- Where anyone is charged to transfer an estate after a certain time, he is not compelled to pay over any interest received from debtors of the estate, which was due after the death of the creditor, and if this is not collected, a right of action to recover all the interest (for the stipulation is a part of the estate) will pass under the Trebellian Decree of the Senate, and therefore will not be a claim for money which is not due.

And, in like manner, if the interest which has accrued during the intermediate time is not paid to a creditor of the estate, the beneficiary of the trust will also be liable for this under the Trebellian Decree of the Senate, and therefore there will be no ground for complaint that the heir did not pay the interest out of the income which he had a right to collect. Still, if the heir should pay the interest for the intermediate time, he will not be entitled to retain anything on this account, because he was transacting his own business, for as he was obliged to pay the principal to the creditor, he cannot be charged by the beneficiary of the trust with any interest paid during the intermediate time.

§ 3.- Where an heir is charged to transfer an estate worth a hundred aurei, after having reserved an equal amount, he is considered to have received the entire sum of money under the Falcidian Law, and the Rescript of the Divine Hadrian should be interpreted as if he had a right to reserve a certain sum out of the estate.

This opinion should also be given where an heir is

confundió la acción los intereses del tiempo pasado, que se comprendieron en la obligación o por ministerio del juez, y los del posterior solamente de este modo, si se hubiera causado mora en el fideicomiso.

§ 1.- Cuando por causa de fideicomiso la herencia ha de ser restituida en cierto tiempo, no porque el heredero haya cobrado el dinero de algunos le pertenecerá al heredero el riesgo de los créditos.

§ 2.- Aquel a quien se le ruega que después de algún tiempo restituya la herencia, no es obligado a restituir los intereses percibidos de deudores de la herencia, cuyo plazo corrió después de la muerte del acreedor; y no habiendo sido cobrados, la acción de todos los intereses, -porque la estipulación fue de la herencia-, se transferirá en virtud del Senadoconsulto Trebeliano, y por lo tanto, no habrá la repetición ni aun de lo no debido. Y de la misma manera, si a un acreedor de la herencia no se le pagaran los intereses del tiempo intermedio, el Senadoconsulto Trebeliano obligará al fideicomisario también respecto a ellos. Y no habrá lugar a queja porque el heredero no haya pagado los intereses con los frutos, que por su propio derecho percibía. Mas si el heredero hubiere pagado los intereses del tiempo intermedio, no habrá retención por este motivo, pues fue gestor de negocio propio, porque apremiado a devolverle el capital a un acreedor, no le pondrá en cuenta al fideicomisario nada por los intereses del tiempo intermedio.

§ 3.- Aquel a quien se le rogó que recibidos ciento restituya la herencia que vale ciento, parece que percibe todo el dinero por derecho de Falcidia; y así se entendió un rescripto del Divino Adriano, como si de los bienes hubiese de haber retenido el dinero.

Lo que se ha de responder también cuando se le

parte hereditatem coheredi suo restituere rogatur. Diversa causa est praediorum pro hereditaria parte retentorum: quippe pecunia omnis de portione retineri potest, praediorum autem alia portio non nisi a coherede, qui dominium habet, accipitur. Cum autem praedia maioris pretii quam portio hereditatis essent, in superfluo praediorum petenti fideicommissario Falcidiam intervenire visum est: concurrentem enim pecuniam compensari placuit.

§ 4.- Hereditatem post mortem suam exceptis redivitibus restituere rogatus ancillarum partus non retinebit nec fetus pecorum, qui summissi gregem retinent.

§ 5.- Ante diem fideicommissi cedentem fructus et usurae, quas debitor hereditarii cum postea accesset dies solverunt, item mercedes praediorum ab herede perceptae portioni quadrantis imputantur.

§ 6.- Cum autem post mortem suam rogatus hereditatem restituere res hereditarias distrahere non cogatur heres, sortium, quae de pretiis earum redigi potuerunt, usurae propter usum medii temporis perceptae non videbuntur: denique nec periculum mancipiorum aut urbanorum praediorum praestare cogitur: sed nihilo minus usus et casus eorum quadrantem quoque deminuit.

§ 7.- Quod ex hereditate superfuisset, cum moreretur, restituere rogatus fructus superfluos restituere non videtur rogatus, cum ea verba diminutionem quidem hereditatis admittant, fructuum autem aditamentum non recipiant.

charged to transfer a part of the estate to his co-heir. The case is different where a portion of the land belonging to an estate is to be retained, as money can always be retained, but a portion of the land cannot be, unless with the consent of his co-heir who has the ownership of the same. Moreover, if the land is of greater value than his share of the estate, it is held that the Falcidian Law will apply to the excess, where the beneficiary of the trust petitions this to be done; for it has been established that the money which is paid must be set off against the land.

§ 4.- Where an heir was charged to transfer an estate at the time of his death after reserving the income of the same, he cannot retain the offspring of female slaves, nor the increase of flocks which have replaced those that died.

§ 5.- The profits and the interest which debtors to an estate have paid before the day when the trust was to be executed, as well as those which have been paid afterwards, and also the rents of the fields collected by the heir, shall be included in the fourth to which he is entitled.

§ 6.- Moreover, where an heir is asked to transfer an estate at his death, he cannot be compelled to sell the property of the estate, and the interest on the principal obtained from the price of the said property cannot legally be claimed, and is not considered to have been received instead of the use of the said property during the intermediate time. Again, though the heir is not compelled to assume the risk of the death of slaves, or of the destruction of houses in the city, still, the use of the said property and any losses incurred on account of it will, to that extent, diminish his fourth under the Falcidian Law.

§ 7.- Where an heir is charged to deliver anything remaining from the estate at the time of his death, he is not considered to have been charged with the transfer of any profits which he may have collected, as these words of the testator refer to a diminution of the estate, and do not mean that the beneficiary of the trust shall profit by the addition of the income.

ruega que en parte restituya la herencia a su coheredero. Diversa cosa es respecto a los predios retenidos en lugar de parte de la herencia, porque todo dinero puede ser retenido de la porción; pero de los predios no se recibe otra porción a no ser del coheredero, que tiene el dominio. Mas cuando los predios fuesen de precio mayor que la porción de la herencia, se consideró que respecto al exceso de los predios tenía aplicación la Falcidia para el fideicomisario que la pidiera; porque se determinó que se compensaba la cantidad equivalente.

§ 4.- Aquel a quien se le rogó que después de su muerte restituya la herencia, exceptuadas las rentas, no retendrá los partos de las esclavas, ni las crías de los ganados, que reemplazados mantienen el rebaño.

§ 5.- Los frutos y los intereses, que los deudores de la herencia pagaron antes de correr el término del fideicomiso, y también las rentas de los predios percibidas por el heredero, se computarán, cuando después hubiese corrido el término, para la porción de la cuarta.

§ 6.- Mas como el heredero, a quien se le rogó que después de su muerte restituya la herencia, no es obligado a vender los bienes de la herencia, no se consideraran percibidos por causa del uso del tiempo intermedio los intereses de los capitales que con los precios de aquellos se pudieron reunir y finalmente, no es obligado a responder del quebranto de los esclavos o de los predios urbanos; pero esto no obstante, el uso y la pérdida de ellos disminuyen también la cuarta parte.

§ 7.- No se considera que al que se le rogó que restituya cuando muera lo que hubiese quedado de la herencia, se le haya rogado que restituya los frutos sobrantes, porque estas palabras admiten ciertamente la disminución de la herencia, pero no comprenden el aditamento de los frutos.

§ 8.- Heres eius, qui bonorum superfluum post mortem suam restituere fuerat rogatus, pignori res hereditarias datas, si non in fraudem id factum sit, liberare non cogitur.

59.- PAULUS; *libro IV, Quaestionum*.- Debitor sub pignore creditorem heredem instituit eumque rogavit restituere hereditatem filiae suae, id est testatoris: cum nollet adire ut suspectam, coactus iussu praetoris adit et restituit: cum emptorem pignoris non inveniret, desiderabat permitti sibi iure domini id possidere. Respondi: aditione quidem hereditatis confusa obligatio est: videamus autem, ne et pignus liberatum sit sublata naturali obligatione.

Atquin sive possidet creditor actor idemque heres rem sive non possidet, videamus de effectu rei. et si possidet, nulla actione a fideicommissario conveniri potest, neque pignoratitia, quoniam hereditaria est actio, neque fideicommissum, quasi minus restituerit, recte petetur: quod eveniret, si nullum pignus intercessisset: possidet enim eam rem quasi creditor.

Sed et si fideicommissarius rem teneat, et hic Serviana actio tenebit: verum est enim non esse solutam pecuniam, quemadmodum dicimus, cum amissa est actio propter exceptionem. Igitur non tantum retentio, sed etiam petitio pignoris nomine competit et solutum non repetetur. Remanet ergo propter pignus naturalis obligatio. In re autem integra non putarem compellendum adire, nisi prius de indemnitate esset ei cautum vel soluta pecunia esset: nam et cum de lucro heres scriptus a sit, quod forte legatum accepit, si heres non extitisset, responsum est non esse cogendum adire nisi legato praestito.

§ 8.- Where anyone is asked to transfer anything remaining from his estate at the time of his death, his heir will not be compelled to release any of the property which the deceased had pledged, provided this has not been done fraudulently.

59.- PAULUS; *Questions, Book IV*.- A debtor appointed his creditor, to whom he had given property in pledge, and his heir charged him to transfer his estate to his daughter, that is the daughter of the testator. The creditor, having refused to accept the estate because he suspected it of being insolvent, was compelled to do so by order of the Praetor, and transferred it. As he could not find a purchaser for the pledge, he asked that permission be granted him to retain it by the right of ownership. I gave it as my opinion that the obligation was extinguished by his acceptance of the estate. However, let us see whether the pledge was not released as the natural obligation was disposed of.

And let us also consider what the result will be, and whether the creditor who brings an action possesses the property, or whether the heir is, or is not, in possession of the same. If the creditor is in possession of it, suit cannot be brought against him by the beneficiary of the trust, nor can he be sued in an action on pledge, as the right to proceed belongs to the estate; nor can an action under the trust be properly brought on the ground that the heir has transferred less property than he should have done, which would be the case even if there had been no pledge: for the creditor, in this capacity, has possession of the property.

And even though the beneficiary of the trust may hold the property, he will be liable to the Servian Action, for it is certain that the money has not been paid; just as we hold when an action is lost on account of an exception. Therefore, not only the property can be retained but suit can be brought on the ground of the pledge, and what has already been paid cannot be recovered. Hence the natural obligation based on the pledge continues to exist. If matters remain in their original condition, I do not think that the creditor could be compelled to accept the estate, unless security was first given to indemnify him, or his

§ 8.- El heredero de aquel a quien se le había rogado que después de su muerte restituyera el remanente de los bienes, no es obligado a desempeñar las cosas de la herencia dadas en prenda, si esto no se hubiera hecho por fraude.

59.- PAULO; *Cuestiones, libro IV*.- Un deudor que había dado prenda instituyó heredero al acreedor, y le rogó que restituyera la herencia a su hija, esto es, a la del testador; no queriendo adirla como sospechosa, la adió apremiado por mandato del Pretor, y la restituyó; no encontrando comprador de la prenda, pretendía que se le permitiera poseerla por derecho de dominio; respondí: ciertamente que por la adición de la herencia se confundió la obligación, pero veamos si también haya sido desempeñada la prenda, habiendo desaparecido la obligación natural.

Mas veamos el efecto del caso, ora si posee la cosa el acreedor actor, y al mismo tiempo heredero, ora si no la posee; y si la posee, no puede ser demandado con ninguna acción por el fideicomisario, ni con la pignoratitia, porque la acción es de la herencia, ni se pedirá en derecho el fideicomiso, como si hubiere restituido menos, lo que sucedería si no hubiese mediado ninguna prenda, porque posee aquella cosa como acreedor.

Pero aunque el fideicomisario retenga la cosa, también en este caso obligara la acción Serviana; porque es verdad que no fue pagado el dinero, como decimos cuando por virtud de la excepción se perdió la acción. Así, pues, compete no solamente la retención, sino también la petición por razón de la prenda, y no se repetirá lo pagado; luego subsiste por causa de la prenda la obligación natural. Pero, estando íntegro el negocio no opinaría yo que haya de ser compelido a adir, si antes no se le hubiese dado caución de indemnidad, o hubiese sido pagado el dinero. Porque también cuando el heredero insti-

Ubi quidem potuit dici nec cogendum esse heredem adire quodammodo contra voluntatem defuncti, qui legando heredi, si non adisset, in ipsius voluntate posuit aditionem: sed cum testator alterutrum dederit, nos utrumque ei praestamus.

§ 1.- Ea quae dotem dabat pacta erat cum marito, ut mortua se in matrimonio dotis pars matri eius redderetur, nec eo nomine stipulatio a matre interposita est: moriens deinde matrem et maritum suum heredem fecerat et a matre petierat, ut hereditatem Titio restitueret: iudex addictus de hereditate dividenda partem dotis quasi ex utili pacto pro parte matri adiudicaverat: quaerebatur, an et ea portio ex causa fideicommissi praestanda sit. Quam non esse restituendam puto, quia non quasi heres, sed quasi mater ex pacto accepit nec occasione hereditatis, sed errore ex pacto eam habuit.

60.- IDEM; *libro XI, Quaestionum*.- Patronus ex debita portione heres institutus sextam partem restituere rogatus restituit: non transeunt ex Trebelliano actiones, quoniam non fuit debitum quod restituit, et ideo si per errorem fecit, etiam repetetur.

61.- IDEM; *libro XIV, Responsorum*.- Paulus respondit his verbis: "Semproni, heredem te non scripsi festinans per infirmitatem: ideoque ei dari volo tantum, quantum pro uncia hereditatis competeret"

claim was satisfied. For where an appointed heir proceeds against the beneficiary of the trust for his own advantage, for example, where he has received a legacy in case he should not become the heir, it has been decided that he ought not to be compelled to enter upon the estate, unless the legacy is paid; for indeed it may be said that the heir cannot be compelled to accept the estate contrary to the will of the deceased, who, by making a bequest to him provided he did not enter upon it, left the acceptance of the estate to his own choice. Where, however, the testator bequeathed his heir one of two things, we give him one or the other of them.

§ 1.- A woman, who gave a dowry, agreed with her husband that, if she died during the marriage, half of her dowry should be returned to her mother, but no stipulation to that effect was entered into by her mother. The woman afterwards, at the time of her death, appointed her mother and her husband her heirs, and charged her mother to transfer her estate to Titius. The court, in rendering a decision with reference to the division of the estate, adjudged half of the dowry to the mother in compliance with the terms of the agreement. The question arose whether this portion of the dowry should be paid in accordance with the provisions of the trust. I think that it should not be paid, because the mother did not receive it as an heir, but as the mother under a contract, and she was entitled to it, not on account of the estate, but through an error in the construction of the agreement.

60.- THE SAME; *Questions, Book XI*.- A patron who had been appointed heir to that portion of an estate to which he was legally entitled, having been charged to transfer the sixth part of the same, did so. In this instance the rights of action do not pass under the Trebellian Decree of the Senate, as the property which was transferred was not due, and therefore if this was done through mistake, it can be recovered.

61.- THE SAME; *Opinions, Book XIV*.- Paulus formulated an opinion in the following words, "Sempronius, I have not appointed you my heir, because I made my will hurriedly on account of my

tuido reclama respecto al lucro, porque acaso recibió un legado, si él no hubiese quedado heredero, se respondió, que no ha de ser obligado a adir, a no ser que se hubiese entregado el legado; en cuyo caso se pudo ciertamente decir que no ha de ser obligado el heredero a adir en cierto modo contra la voluntad del difunto, el cual legándole al heredero, si no hubiese adido, dejó la adición a la voluntad del mismo; pero habiéndole dado el testador una u otra cosa, nosotros se las concedemos ambas.

§ 1.- Una, que daba dote, había pactado con su marido, que, muerta ella durante el matrimonio, se le devolviese parte de la dote, y no se interpuso con tal motivo estipulación por la madre; después al morir había instituido herederos a la madre y a su propio marido, y le había pedido a la madre que restituyera a Ticio la herencia; el juez nombrado para dividir la herencia le había adjudicado a la madre como porción parte de la dote, como en virtud de un pacto útil; se preguntaba, si también se había de entregar aquella porción por causa de fideicomiso. Opino que no ha de ser restituida, porque no la recibió como heredera, sino como madre, en virtud del pacto, y no la tuvo con ocasión de la herencia, sino por error en virtud del pacto.

60.- EL MISMO; *Cuestiones, libro XI*.- Un patrono, instituido heredero de la porción debida, restituyó la sexta parte que se le había rogado que restituyera; no pasan las acciones en virtud del Senado-consulto Trebeliano, porque no fue debido lo que restituyó; y por lo tanto, también sera repetido, si lo hizo por error.

61.- EL MISMO; *Respuestas, libro XIV*.- Paulo respondió, que con estas palabras: «Sempronio, no te instituí heredero apresurándome por la enfermedad, y por esto quiero que se le dé tanto cuanto competería

videri quidem magis quantitatem, quam portionem hereditatis relictam, sed sic accipiendum, uti videatur de uncia etiam restituenda sensisse.

62.- SCAEVOLA; *libro IV, Responsorum*.- A filia petit, ut, si liberis superstitibus moreretur, partem eius quod ad eam ex bonis patris pervenisset, quod si sine liberis, universum fratri restitueret: quaeritur, defuncta ea in matrimonio superstita filia, an heres eius cum parte hereditatis eius quoque quod dotis nomine datum erat partem restituere debeat.

Respondit id, quod in dotem fuisset, non contineri in partem hereditatis quae restituenda est: sed et si ex promissione dotis aliquid debitum fuit, aeris alieni loco habendum.

§ 1.- Alumno certam pecuniam legavit et eam recipi a Sempronio mandavit et certas usuras alumno praestari, donec ad vicensimum annum perveniret: deinde alumni fidei commisit, ut, si sine liberis decederet, partem restitueret Sempronio, partem septiciae. Quaesitum est defuncto alumno intra annum vicensimum, an substituti fideicommissum petere possint an vero in id tempus sustinere, quo, si viveret, alumnus vicensimum annum impleteret. respondi secundum ea quae proponerentur posse.

63.- GAIUS; *libro II, Fideicommissorum*.- Facta in fideicommissarium restitutione statim omnes res in bonis fiunt eius, cui restituta est hereditas, etsi

illness, and therefore I wish you to receive an amount equal to a twelfth of my estate." By this it appears that the testator left to Sempronius a certain sum of money rather than a share of his estate, but this must be understood to mean that the testator intended to leave him in trust an amount equal to a twelfth of his property.

62.- SCAEVOLA; *Opinions, Book IV*.- A father charged his daughter, if she left any children at her death, to transfer to her brother half of what she obtained from the paternal estate, but if she should die without issue, he directed that she should transfer the whole of it to him. As the daughter died during the marriage, leaving a daughter, the question arose whether her heir should transfer to the brother half of the estate together with half of the dowry which had been given to her husband.

The answer was that what had been given by way of dowry was not included in that part of the estate which should be transferred; and that even if something was due by virtue of a promise made with reference to the dowry, it should be classed among the debts of the estate.

§ 1.- A testator left a certain sum of money to a boy whom he had brought up, and directed it to be paid to Sempronius, and that a certain amount of interest on said sum should be paid to the boy until he reached his twentieth year; and it was then provided that, if he should die without issue, he should pay half of the said sum to Sempronius, and half to Septitia. The boy, having died before reaching his twentieth year, the question arose whether those who had been substituted for him could claim the benefit of the trust at the time of his death, or whether the trust would continue to exist for that period of time which would have been required for the boy to reach his twentieth year, if he had lived. I answered that, according to the facts stated, the execution of the trust could be demanded at the time of the boy's death.

63.- GAIUS; *Trusts, Book II*.- As soon as delivery is made to the beneficiary of a trust, everything belonging to the estate becomes the property of the

por un dozavo de la herencia», parece ciertamente que se le dejó una cantidad más bien que una porción de la herencia, pero que se ha de entender de modo, que se considere que se refirió a que se restituya también la dozava parte.

62.- SCÉVOLA; *Respuestas, libro IV*.- Pidió uno a su hija, que, si muriese dejando hijos, le restituyese a su hermano parte de lo que a poder de ella hubiese ido de los bienes del padre, pero que, si sin hijos, la totalidad; se pregunta, si habiendo fallecido ella durante el matrimonio dejando una hija, deberá restituir se heredero con la parte de herencia la parte también de lo que había sido dado a título de dote.

Respondió, que lo que hubiese sido de la dote no se contiene en la parte de herencia, que se ha de restituir, sino que aun si por virtud de promesa de la dote se debió alguna cosa, ha de ser considerada en calidad de deuda.

§ 1.- Uno legó a un alumno cierta cantidad, y dispuso que esta fuese recibida por Sempronio, y que se le pagasen al alumno ciertos intereses, hasta que llegare a los veinte años; después encomendó a la fidelidad del alumno, que, si falleciera sin hijos, restituyese parte a Sempronio, y parte a Septicia; se preguntó, si habiendo fallecido el alumno antes de cumplir los veinte años, podrían pedir los substitutos el fideicomiso, o esperarían al tiempo en que si viviese el alumno cumpliría los veinte años. Respondí, que, según lo que se exponía, podían.

63.- GAYO; *Fideicomisos, libro II*.- Hecha la restitución al fideicomisario, inmediatamente se constituyen todas las cosas entre los bienes de aquel a

nondum earum nactus fuerit possessionem.

§ 1.- Si is qui hereditatem sibi reddi ab herede stipulatus sit eique ex stipulatu agenti restituta fuerit hereditas, constat nihilo minus transferri actiones. hoc ita est, si is cum quo actum sit restituat hereditatem: si vero ob id quod non restituerit aestimatione hereditatis condemnatus fuerit, remanent actiones hereditariae apud eum qui condemnatus sit, actor autem quantitatem consequitur.

§ 2.- Si heres scriptus restituerit hereditatem et postea de hereditate controversiam passus victus sit aut lite cesserit, durare actiones constitit in fideicommissarium semel translatas.

§ 3.- Si quis maiorem partem restituerit quam rogatus est, in eam partem quae excedit non transferuntur actiones. Sed cum praecepta aliqua re aut summa rogatus sit heres restituere et omnia retentione totam hereditatem restituerit, recte dicitur transferri actiones.

§ 4.- Si heres ante restitutam hereditatem servum hereditarium heredem ab aliquo institutum iusserit adire hereditatem, negat Iulianus debere hanc hereditatem restitui, quia de ea rogatus non esset: et hoc est fatendum. requirendum tamen et illud est, num cum incremento restituere heres rogatus sit hereditatem: si enim hoc fuerit subsecutum, etiam eam hereditatem restituere cogitur, nisi evidentissimis probationibus fuerit ab herede adprobatum contemplatione sui servum esse heredem institutum.

person to whom it is transferred, even though he may not yet have obtained possession of the same.

§ 1.- When anyone has stipulated that an estate shall be returned to him by the heir, and it has been transferred to him, after an action under the stipulation has been brought, it is established that the rights of action also pass, that is to say, if the person against whom suit was brought transfers the estate. If, however, the heir should lose the case because he did not transfer the estate, and should have judgment rendered against him for the amount of its appraisal in court, he will be entitled to retain the rights of action belonging to the estate, for the plaintiff has recovered the entire amount which he claimed.

§ 2.- If the appointed heir should transfer the estate, and should afterwards be sued and lose his case, or abandon it, it has been decided that the rights of action will always belong to the beneficiary of the trust, after they have been once transferred to him.

§ 3.- If anyone who was asked to transfer a portion of an estate should transfer a larger portion than he was charged to do, the rights of action will not be transferred. Where, however, the heir was charged to transfer an estate after having reserved for himself a certain article, or a sum of money, and he transfers the entire estate, without retaining what he was entitled to, it is very properly held that the rights of action are, nevertheless, transferred.

§ 4.- If an heir, before transferring the estate, should order a slave belonging to the same to accept another estate, to which he had been appointed heir by someone, Julianus denies that the latter estate should be transferred, because the heir was not charged to transfer it; and it must be confessed that this opinion is correct. Nevertheless, it must be ascertained whether the heir was charged to transfer the estate with any increase which might have accrued. For if this was the case, he can also be compelled to transfer the latter estate, unless the heir should prove by the clearest evidence that it was with

quien fue restituida la herencia, aunque todavía no hubiere adquirido la posesión de las mismas.

§ 1.- Si al que hubiese estipulado que por el heredero se le restituya la herencia le hubiere sido restituida la herencia ejercitando la acción de lo estipulado, es sabido, que esto no obstante, se transfieren las acciones. Esto es así, si aquel contra quien se haya ejercitado la acción, restituyese la herencia; pero si porque no la hubiere restituido hubiere sido condenado en la estimación de la herencia, las acciones de la herencia permanecen en poder del que haya sido condenado, pero el actor consigue la cantidad.

§ 2.- Si el heredero instituido hubiere restituido la herencia, y después, habiendo soportado controversia sobre la herencia, hubiera sido vencido, o hubiere desistido del litigio, fue constante que subsisten las acciones una vez transferidas al fideicomisario.

§ 3.- Si alguno hubiere restituido mayor parte que la que se le rogó, no se transfieren las acciones respecto a aquella parte que excedió; pero cuando se le hubiera rogado al heredero que haga la restitución habiendo tomado antes alguna cosa o suma, y habiendo prescindido de la retención hubiere restituido toda la herencia, con razón se dice que se transfieren las acciones.

§ 4.- Si antes de restituida la herencia el heredero le hubiere mandado a un esclavo de la herencia, instituido heredero por alguien, que ada la herencia, dice Juliano, que esta herencia no debe ser restituida, porque no se le había rogado respecto a ella; y esto es de confesar; pero también se ha de investigar esto, si se le haya rogado al heredero que restituya la herencia con el aumento; porque si se hubiere hecho esto, es obligado a restituir también esta herencia, a no ser que con evidéntísimas pruebas se hubiere probado por el heredero que por consideración a si propio fue instituido heredero el esclavo.

reference to himself that the slave was appointed an heir.

§ 5.- Rescripto Divi Antonini significatur, ut, si quis accepta a Titio pecunia, quae quartam hereditatis continet, rogatus sit ei restituere hereditatem, licet tardius detur pecunia, sine usuris eam dari debere, quia quanto tardius quisque pecuniam dat, tanto tardius ad fideicommissum pervenit et medii temporis fructus perdit. Quamobrem si ante datam pecuniam tenuerit hereditatem, fructus quos percepit restituere heredi eum oportere.

§ 6.- Idem iuris est et si quis ita heredis fidei commiserit: "rogo, si Titius tibi centum dederit, restituas ei hereditatem meam".

§ 7.- Si sub condicione heres institutus sit qui suspectam sibi hereditatem esse dicit, si neque difficultatem neque turpitudinem ullam habet condicio nec impendium aliquid, iubendus est parere condicioni et adire et ita restituere: si vero turpis aut difficilis sit condicio, aperte iniquum est cogi eum explere eam alterius gratia. Sed et remitti eam ab initio visum est: plus enim tribui a praetore ei qui fideicommissum petit, quam testator voluit, absurdum est: utique autem testator, nisi expleta sit condicio, neque scriptum heredem ad hereditatem vocavit neque per hunc illi voluit restitui hereditatem.

§ 8.- Si dandae pecuniae condicio adscripta est heredi, debet ei offerre pecuniam is qui poscit fideicommissum, ut hereditatem impleta condicione possit adire et restituere.

§ 5.- It is stated in a Rescript of the Divine Antoninus that where anyone has received from Titius a certain sum of money which amounts to a fourth of the estate, and is charged to deliver the entire estate to him, although the money may not be paid immediately, it must be paid without interest, because the later anyone makes payment the later he will receive the benefit of the trust, and, in the meantime, he will lose the profits. Wherefore, if the beneficiary of the trust has had possession of the estate before having paid the money, he must deliver to the heir any profits of the same which he may have collected.

§ 6.- The same rule of law applies where anyone charges his heir with a trust, as follows, "I ask you to transfer my estate to Titius, if he pays you a hundred aurei."

§ 7.- Where an heir is appointed under a condition, and says that he has reason to believe that the estate is insolvent, he can be ordered to comply with the condition, and to enter upon and transfer the estate, if the condition is not difficult, nor involves turpitude, nor presents any serious obstacle. If, however, the condition should be disgraceful or difficult of performance, it is clearly unjust to compel the heir to comply with it for the benefit of another. It has been held that he should be released in the beginning from compliance with such a condition, as it is absurd for more to be granted to the person claiming the benefit of the trust than the testator intended he should receive. Still, the testator did not call the appointed heir to the succession, unless the condition was complied with, nor did he intend that the estate should be transferred by him unless it was fulfilled.

§ 8.- Where the condition of the payment of a sum of money to the heir is imposed, he who claims the benefit of the trust should tender him the amount, so that the condition having been complied with, the heir can enter upon and transfer the estate.

§ 5.- En un rescripto del Divino Antonio se indica, que si a alguno se le hubiera rogado, que, recibida de Ticio una cantidad, que importa la cuarta parte de la herencia, le restituya la herencia, aunque el dinero se dé más tarde, debe ser dado sin los intereses, porque cuanto más tarde da uno el dinero, tanto más tarde adquiere el fideicomiso, y pierde los frutos del tiempo intermedio; por lo cual, si antes de haber dado el dinero hubiere tenido la herencia, debe devolverle al heredero los frutos que percibió.

§ 6.- El mismo derecho hay, también si uno hubiere hecho así una recomendación a la fidelidad del heredero: «te ruego, que, si Ticio te diere ciento, le restituyas mi herencia».

§ 7.- Si bajo condición hubiera sido instituido el heredero, el cual dice que para él es sospechosa la herencia, si la condición no implica dificultad, ni torpeza alguna, ni ningún gasto, se le ha de mandar que cumpla la condición, y que ada, y así restituya la herencia; pero si la condición fuera torpe o difícil, es manifiestamente injusto que él sea obligado a cumplirla por interés de otro. Pero también se consideró que se le remitía desde un principio, porque es absurdo que al que pidió el fideicomiso se le conceda por el Pretor más de lo que quiso el testador; pero, a la verdad, el testador, si no se hubiera cumplido la condición, ni llamó a la herencia al heredero instituido, ni quiso que por medio de éste fuera a aquel restituida la herencia.

§ 8.- Si se le impuso al heredero la condición de que se diera dinero, debe ofrecerle el dinero el que pide el fideicomiso, a fin de que cumplida la condición pueda adir y restituir la herencia.

§ 9.- Quod si condicio adscripta est et ea est, quam praetor remittit, sufficit edictum, ut Iulianus ait: hactenus iubendus est, ut constituat praetoris actionibus uti aut petat bonorum possessionem secundum tabulas, ut ita nactus actiones tunc restituta hereditate transferat eas ex Senatusconsulto.

§ 10.- Si vero nominis ferendi condicio est, quam praetor exigit, recte quidem facturus videtur, si eam expleverit: nihil enim male est honesti hominis nomen adsumere, nec enim in famosis et turpibus nominibus hanc condicionem exigit praetor.

Sed tamen si recuset nomen ferre, remittenda est ei condicio, ut Iulianus ait, et permittendae utiles actiones, aut bonorum possessio secundum tabulas danda est, uti nactus actiones transferat eas ex Senatusconsulto.

§ 11.- Si cum suspectam videret, hereditatem postulante me iussu praetoris adieris et restitueris mihi, ita utar legis Falcidiae beneficio adversus legatarios, si tu quoque ea lege uti poteras et quatenus uti poteras: nam si quid praeterea a me alicui per fideicommissum relictum sit, id quasi a legatario relictum non venit in computationem eius legis, sed extrinsecus numeratur.

§ 12.- Si Titius rogatus sit hereditatem Maevio restituere, Maevius seio certam pecuniam, et Titius quartae retinendae beneficio adversus Maevium usus fuerit: Neratius scribit Maevium quoque seio eo minus aequum esse praestare, ne ipse de suo damnum sentiat.

§ 9.- If, however, the condition imposed is one of those remitted by the Praetor, the authority of the Edict will be sufficient, so Julianus says. The heir can be compelled to accept by having recourse to the praetorian action, or he can demand possession of the property in accordance with the terms of the will; so that, having acquired the rights of action, he can then assign them in accordance with the Decree of the Senate, after having transferred the estate.

§ 10.- If, however, the condition is that of assuming the name of the testator, which is one that the Praetor requires to be fulfilled, the heir will be considered to have acted properly if he complies with it, as there is nothing reprehensible in assuming the name of an honorable man; for the Praetor does not require this condition to be observed in the case of names which are notorious and disgraceful.

If, however, the individual in question should refuse to take the name, Julianus says he ought to be excused from complying with the condition and should be granted praetorian actions, or he should be given possession of the property of the estate in accordance with the terms of the will, so that, having acquired the rights of action, he can assign them in accordance with the Decree of the Senate.

§ 11.- If you should suspect the estate to be insolvent, and, on my application, you are forced to enter upon it by order of the Praetor, and to transfer it to me, I can avail myself of the benefit of the Falcidian Law, as against the legatees, just as you can also obtain the benefit of that law, and to the same extent that you can do so; for if anything is left to me in trust for the benefit of another, as I am only charged with it as legatee, it is not included in making the calculation under the Falcidian Law, but must be computed separately.

§ 12.- Where Titius is charged to transfer an estate to Maevius, and Maevius is charged to pay a certain sum of money to Seius, and Titius avails himself of the privilege of retaining a fourth of the estate as against Maevius, Maevius, as Neratius says, will be this much less liable to Seius, in order to avoid

§ 9.- Pero si se impuso una condición, y esta es tal que la remite el Pretor, basta el Edicto, según dice Juliano, y se le ha de mandar que determine usar de las acciones pretorias, o que pida la posesión de los bienes conforme al testamento, de suerte que habiendo adquirido así las acciones, las transfiera entonces, restituida la herencia, en virtud del Senadoconsulto.

§ 10.- Mas si la condición que el Pretor exige es la de que se lleve un apellido, se considera que verdaderamente obrará bien, si la cumpliere; porque no hay mal alguno en tomar el apellido de un hombre honrado, pues tampoco el Pretor exige esta condición tratándose de apellidos infames y torpes.

Pero no obstante, si rehusara llevar el apellido, se le ha de dispensar la condición, según dice Juliano, y se le han de permitir las acciones útiles, o se le ha de dar la posesión de los bienes conforme al testamento, a fin de que habiendo adquirido las acciones las transfiera en virtud del Senadoconsulto.

§ 11.- Si, considerando tú sospechosa la herencia, a instancia mía la hubieres adido por mandato del Pretor, y me la hubieres restituido, usaré contra los legatarios del beneficio de la ley Falcidia, en este caso, si tú también podías utilizar esta ley, y en cuanto podías utilizarla; pero si además se le hubiera dejado a uno alguna cosa por fideicomiso, esta, como dejada a cargo del legatario no viene comprendida en la computación de esta ley, sino que es computada por separado.

§ 12.- Si a Ticio se le hubiera rogado que restituya a Mevio la herencia, y a Mevio que cierta cantidad a Seyo, y Ticio hubiere usado contra Mevio del beneficio de retener la cuarta, escribe Neracio, que es justo que también Mevio le dé a Seyo otro tanto de menos, a fin de que él no sufra perjuicio en lo suyo.

sustaining any loss of his own property.

§ 13.- Iulianus ait, si heres institutus Titio rogatus sit restituere, substitutus Maevio et institutus suspectam sibi hereditatem esse dicat, desiderante Titio iubendum eum adire et restituere.

§ 14.- Si quis bonorum possessoris fidei commiserit de hereditate restituenda et is passus fuerit diem bonorum possessionis agnoscendae transire aut per hoc tempus, quo is, cui restitui debebit hereditas, aliqua ex causa non potuit adire praetorem et postulare, ut petita bonorum possessione restituatur sibi hereditas, succurri ei debet, id est ut restituatur tempus bonorum possessionis admittendae exhibendi fideicommissi gratia.

§ 15.- Admonendi autem sumus, si is, qui solvendo non sit, Titio herede instituto servum liberum esse iusserit et rogaverit Titium hereditatem eidem restituere, vix esse, ut Titius recusans adire hereditatem cogatur. Nam licet desiderante servo Titius adierit hereditatem, non tamen potest libertas servo competere quasi in fraudem creditorum data, licet Titius locuples sit: qua de causa nec hereditas ei restitui potest. Sed ex sententia legis dicendum est perinde habendum, ac si is servus solus liber et heres scriptus esset nec Titius heres esset.

64.- MAECIANUS; *libro IV, Fideicommissorum.*- Si eius pupilli, cui sine tutoris auctoritate pecunia credita erat, restituta ex eo Senatusconsulto mihi fuerit hereditas, si solvam creditori, non repetam: adquin heres si post restitutionem solvat, repetet: non ob aliud, quam quod ab eo in me naturalis obligatio translata intellegitur. et si eius mihi restituta sit hereditas, qui pupillo sine tutoris auctoritate crediderit, si

§ 13.- Julianus holds that if an appointed heir is charged to transfer an estate to Titius, who is substituted for Maevius, and the appointed heir alleges that he considers the estate insolvent, on the application of Titius, he can be ordered to enter upon and transfer it.

§ 14.- If anyone should charge a person entitled to the possession of an estate under the Praetorian Law, to transfer the same, and the latter suffers the time for obtaining possession under that law to elapse, or he to whom the estate is to be transferred, for some reason or other, is not able to appear before the Praetor and assert his claim during the prescribed time; in order that the estate may be delivered to him who is entitled to possession of the same under the Praetorian Law, relief should be granted him, that is to say, he may be given sufficient time to obtain possession of the property for the purpose of executing the trust.

§ 15.- We should also note that if a person who is not solvent, after having appointed Titius his heir, orders one of his slaves to be free, and charges Titius to transfer the estate to him, if Titius refuses to accept the estate, he can hardly be compelled to do so; for although Titius may enter upon the estate on the application of the slave, still the latter cannot obtain his freedom, if it has been granted for the purpose of defrauding creditors, even though Titius may be wealthy, 'for which reason the estate cannot be transferred to him. But taking into consideration the spirit of the law, it must be said that the case is the same as if the slave was free and appointed the sole heir, and that Titius was not the heir at all.

64.- MAECIANUS; *Trusts, Book IV.*- If the estate of a ward, to whom money was lent without the authority of his guardian, is transferred to me under the Decree of the Senate, and I pay the creditor, I cannot recover the money. But if the heir should pay the debt after the property has been transferred, he can recover the amount, for no other reason than that the natural obligation was understood to have been

§ 13.- Dice Juliano, que si al heredero instituido se le hubiera rogado que restituya a Ticio la herencia, y al substituto que a Mevio, y el instituido dijera que para él es sospechosa la herencia, deseándolo Ticio se le ha de mandar que la ada y la restituya.

§ 14.- Si alguno hubiere encomendado a la fidelidad del poseedor de los bienes que restituya la herencia, y éste hubiere consentido que transcurra el término para que se admita la posesión de los bienes, o durante este tiempo en que aquel a quien se le debiere restituir la herencia no pudo por alguna causa recurrir al Pretor, y reclamar que pedida la posesión de los bienes se le restituya a él la herencia, se le debe auxiliar, esto es, para que se restituya el tiempo para ser admitida la posesión de los bienes, a fin de que se entregue el fideicomiso.

§ 15.- Mas debemos advertir, que si el que no fuera solvente hubiere mandado, habiendo instituido heredero a Ticio, que un esclavo fuese libre, y hubiere rogado que Ticio le restituyese al mismo la herencia, difícil es que rehusándolo Ticio sea obligado a adir la herencia; porque aunque deseándolo el esclavo hubiere Ticio adido la herencia, no puede, sin embargo, competarle al esclavo la libertad, como si hubiera sido dada en fraude de los acreedores, aunque Ticio sea rico. Por cuya causa, tampoco se le puede restituir la herencia, sino que con arreglo al sentido de la ley se ha de decir, que el caso ha de ser considerado lo mismo que si sólo este esclavo hubiese sido instituido libre y heredero, y Ticio no fuese heredero.

64.- MECIANO; *Fideicomisos, libro IV.*- Si en virtud de este Senadoconsulto me hubiere sido restituida la herencia de un pupilo, al cual se le había prestado dinero sin la autoridad del tutor, y yo pagare al acreedor, no lo repetiré; mas el heredero, si él pagase después de la restitución, lo repetirá no por otra razón sino porque se entiende que de él fue transferida a mí la obligación natural. Y si me hubiera

solverit mihi pupillus, non repetet: at si heredi solverit, repetet, non repetiturus, si ante restitutionem solvisset.

§ 1.- Si necessarii heredes sub condicione quamvis levissima heredes sint instituti, cui parere solent, dicendum est cogi restituere hereditatem desiderantibus his, quibus restituere rogati sunt, quia etiam necessari heredes fideicommissae hereditatis restituendae gratia condicioni parere erunt compellendi.

§ 2.- Si quis rogatus restituere hereditatem decessit, antequam eam restituat, heres eius poterit hereditatem restituere et ex Trebelliano Senatusconsulto transeunt actiones. Sed si duo ei heredes extitissent, uti quisque restituisset, pro ea parte transitorias actiones: nam et si ipse partem restituisset, pro parte interim transitorias verius est. Sed et si plures heredes extiterunt ei, qui rogatus est restituere hereditatem, si quidam interim restituerint, vel cum ei, cui restitui debuit, plures heredes extiterint: ut cui restituta erit, is pro ea parte ex hoc Senatusconsulto habebit actiones.

§ 3.- Si patronus ex parte debita heres institutus rogatus fuerit eam liberis exheredatis defuncti liberti restituere, si sua sponte adierit, erit falcidia locus, si coactus, in solidum transibunt actiones ex hoc Senatusconsulto.

transferred from him to me. On the other hand, if the estate of the person who made the loan to the ward without the authority of his guardian should be transferred to me and the ward should pay me, he cannot recover the money. If, however, he should pay the heir of the creditor, he can recover it, but he cannot do so if he paid him before the transfer of the estate had been made.

§ 1.- If necessary heirs are appointed under some condition which it is easy to comply with, and which is usually observed, it must be said that they can be compelled to transfer the estate upon the application of those to whom they are charged to transfer it; because even necessary heirs are compelled to comply with the condition for the purpose of executing a trust.

§ 2.- Where anyone is charged to transfer an estate, and dies before doing so, his heir can transfer it, and the rights of action pass to the beneficiary of the trust under the Trebellian Decree of the Senate. If, however, there are two heirs, and each of them is charged to transfer the estate, the rights of action will pass to the beneficiary in proportion to the share of each of the said heirs; for if each one should transfer his share, it is certain that the rights of action will pass in proportion to the said share. If the person who is asked to transfer the estate should leave several heirs, and some of them should transfer their shares before the others, or where he to whom the estate is to be transferred leaves several heirs, and a transfer is made to one of them, he will be entitled to the rights of action in proportion to his share, under this Decree of the Senate.

§ 3.- Where a patron is appointed heir to that portion of an estate to which he is legally entitled, and is asked to transfer it to the disinherited children of his deceased freedman, and he voluntarily accepts the estate, the Falcidian Law will apply; if he is compelled to accept it, the rights of action will pass entirely to the said children under this Decree of the Senate.

hubiera sido restituida la herencia del que le hubiere prestado al pupilo sin la autoridad del tutor, si el pupilo me hubiere pagado, no lo repetirá; mas si le hubiere pagado al heredero, lo repetirá, y no lo habrá de repetir, si hubiese pagado antes de la restitución.

§ 1.- Si herederos necesarios hubieran sido instituidos herederos bajo condición, aunque levísima, a la cual suelen sujetarse, se ha de decir, que son obligados a restituir la herencia, pretendiéndolo aquellos, a quienes fueron rogados que se la restituyeran, porque también los habrán de ser compelidos a para que sea restituida la fideicomiso.

§ 2.- Si habiéndosele rogado aunque restituya la herencia falleció antes de restituirla, podrá su heredero restituir la herencia, y se transfieren en virtud del Senadoconsulto Trebeliano las acciones. Pero si le hubiesen quedado dos herederos, según cada uno hubiese restituido se transferirán las acciones respecto a esta parte; porque también si él mismo hubiese restituido una parte, es más verdadero que respecto a la parte se transferirán mientras tanto las acciones. Mas también si le quedaron muchos herederos a aquel a quien se rogó que restituya la herencia, si algunos la hubieren restituido entretanto, o cuando a aquel a quien debió ser restituida le hubieren quedado muchos herederos, según a cada cual hubiere sido restituida, tendrá éste en virtud de este Senadoconsulto las acciones respecto a esta parte.

§ 3.- Si al patrono instituido heredero de la parte debida se le hubiere rogado que la restituya a los hijos desheredados del liberto fallecido, si hubiere adido espontáneamente, habrá lugar a la Falcidia, y si apremiado, pasarán por la totalidad las acciones en virtud de este Senadoconsulto.

invito domino vel ignorante non recte restituetur hereditas: sed si postea ratum habuerit, confirmabitur restitutio, verum ipsi domino adquirentur actiones. nec quia hereditatis acquisitionis similis est haec restitutio, iussum praecedere oportet, sed ut dictum est, etiam rati habitio subsequi poterit exemplo bonorum possessionis. Neque interest, quod ad propositum attinet, ipsi domino an servo quis rogetur restituere hereditatem, nec in ea re consensu aut opera servi opus est: atquin in bonorum possessione vel in adeunda hereditate consensus eius necessarius est. Itaque si qui suspectam dicent hereditatem, postulante domino compellendi erunt adire et restituere hereditatem.

§ 1.- Si testator rogasset heredem, ut restituat hereditatem mulieri, si non nupsisset, dicendum erit compellendum heredem, si suspectam dicat hereditatem, adire et restituere eam mulieri, etiamsi nupsisset. Idem in ceteris quoque condicionibus Iulianus noster probat, quae similiter nisi fine vitae expleri non possent. Secundum quam sententiam cautione praestita his, quorum interest, ab his, quibus restitui sub isdem condicionibus heres rogatus esset, restituet hereditatem.

§ 2.- Cum praetor cognita causa per errorem vel etiam ambitiose iuberet hereditatem ut ex fideicommisso restitui, etiam publice interest restitui propter rerum iudicatarum auctoritatem.

§ 3.- Si pupillo infanti restituere hereditatem quis rogatus sit, si sponte adierit, etiam servo eius et ipsi pupillo tutore auctore restituetur hereditas: si quidem eo, quod fieri non potest, non magis ea res impediatur, quam in muto pubere volente sibi restitui here-

legally be transferred to a slave, if his master is unwilling or not informed of the fact, but if he afterwards ratifies the transfer, it will be confirmed, and the rights of action will be acquired by the master himself, not for the reason that this transfer resembles the acquisition of the estate, and that the order of the master must precede it, but, as has already been stated, the subsequent ratification can be made just as in the case of the possession of property under the Praetorian Law. Nor does it make any difference, in the present instance, whether the master himself or his slave is charged to transfer his estate, nor is the consent nor the agency of the slave required but his consent is necessary where praetorian possession of the property is demanded, or an estate is to be accepted. Therefore, where heirs allege that they think an estate is insolvent, on the application of the master they can be compelled to enter upon and transfer it.

§ 1.- Where a testator charges his heir to transfer his estate to a woman, if she does not marry, it must be held that if the heir alleges that he suspects the estate of being insolvent, he can be compelled to accept and transfer it to the woman, even if she should marry. Our Julianus adopts this view with reference to other conditions which, in like manner, cannot be fulfilled except at the termination of life. In accordance with this opinion, a bond should be furnished by those to whom the heir has been charged to transfer the estate under similar conditions, to deliver it to the persons to whom it will belong if the condition should not be complied with.

§ 2.- If the Praetor, after proper investigation, should, either through mistake or partiality, order an estate to be transferred as due under a trust, it is to the interest of the community that it should be transferred, on account of the authority which invests judicial decisions.

§ 3.- Where anyone is charged to transfer an estate to a ward who is not old enough to talk, and he voluntarily enters upon said estate, it can be transferred either to the slave of the ward, or to the ward himself, with the authority of his guardian; and

restituirá bien la herencia a un esclavo, contra la voluntad de su señor, o ignorándolo éste, pero si después lo ratificare, se confirmará la restitución. Mas se adquirirán para el mismo señor las acciones, y como esta restitución es semejante a la adquisición de la herencia, no debe preceder mandato; pero, como se ha dicho, también podrá seguir la ratificación, a la manera que en la posesión de bienes. Y no importa, por lo que atañe al caso propuesto, que a uno se le ruegue que restituya la herencia al mismo señor, o al esclavo; ni se necesita en esto el consentimiento o la obra del esclavo, si bien es necesario su consentimiento en la posesión de bienes, o para adir la herencia. Y así, si algunos declarasen sospechosa la herencia, pidiéndolo el señor, deberán ser compelidos a adir y a restituir la herencia.

§ 1.- Si el testador hubiese rogado al heredero que le restituya la herencia a la mujer, si no se hubiese casado, se habrá de decir, que habrá de ser compelido el heredero, si declarase sospechosa la herencia, a adirla y a restituirla a la mujer, aunque se hubiese casado. Lo mismo aprueba nuestro Juliano también respecto a las demás condiciones, que igualmente tampoco se puedan cumplir hasta el fin de la vida; según cuya opinión, restituirá la herencia, habiéndose prestado caución a aquellos a quienes interesa por aquellos a quienes se le hubiese rogado al heredero que sea restituida bajo las mismas condiciones.

§ 2.- Cuando el Pretor, conocida la causa, mandase por error, o aun por parcialidad, que se restituya la herencia como por fideicomiso, es también de interés público que sea restituida por razón de la autoridad de las cosas juzgadas.

§ 3.- Si a uno se le hubiera rogado que restituya la herencia a un pupilo infante, si la hubiere adido espontáneamente, se le restituirá la herencia aun a su esclavo, y al mismo pupilo con la autoridad del tutor; pues porque no puede hablar no habrá impedimento

ditatem. Si autem heres recuset adire hereditatem, quemadmodum res expediri possit, difficile est, quia neque tutore desiderante periculo pupilli adire hereditatem Trebelliano Senatusconsulto locus sit futurus neque pupillus ipse id desiderare possit, cum dari non possit.

Quod aliquatenus circa mutos expediri potest, nam si auditus capaces sunt vel interrogati nutu possint significare velle se periculo suo hereditatem adire, quomodo absentes per nuntium. Sed et infanti non dubito omnimodo subveniendum idque ex similitudine Iuris Civilis vel honorarii constituendum est: sive enim heres institutus esset, non dubie pro herede tutore auctore gerere posse videtur, sive de bonorum possessione ageretur, peti ei per tutorem posset. ideoque et heres compelli per tutorem potest adire et restituere hereditatem. Quo exemplo et mutus, qui nihil intellegere potest, per curatorem adiuvatur.

§ 4.- Si singulae res ab herede traditae sunt iussu meo ei cui eas vendiderim, non dubitabimus mihi intellegi factam restitutionem. Idem erit, et si iussu meo tradantur, cui ego ex fideicommisso aliave qua causa eas praestare debuerim vel in creditum ire vel donare voluerim.

66.- PAULUS; *libro II, Fideicommissorum*.- Qui ita institutus esset "si coheres eius adisset", uti potest lege Falcidia, etsi coheres eius coactus adisset, modo si ipse non coactus adierit hereditatem.

the incapacity of the child to speak is no more an impediment to the transaction than exists in the case where a mute, who has reached the age of puberty, desires an estate to be delivered to him. If, however, the heir refuses to enter upon the estate, it is difficult to decide how the matter can be settled, because there will be no ground for the application of the Trebellian Decree of the Senate if the guardian should ask that the estate be accepted at the risk of his ward; nor can the ward ask that this be done, as he does not possess the faculty of speech.

This question may be more easily solved in the case of persons who are dumb, for if they are interrogated and can hear, they can indicate by a nod that they are willing to accept the estate at their own risk, just as persons who are absent can give their consent by a messenger. However, I have no doubt that relief ought to be granted the child, and that this rule should be established on account of the resemblance between the Civil and the Praetorian Law. But if the said ward should be appointed heir, there is no doubt that he can act as such under the authority of his guardian; or, where a question arises with reference to obtaining possession of an estate under the Praetorian Law, he can claim it by his guardian; hence if appointed heir, he can be compelled by his guardian to enter upon and transfer the estate. In the same manner, a person who is dumb and destitute of understanding can be assisted by his curator.

§ 4.- Where property is delivered by the heir, on my order, to the person to whom I have sold it, there is no doubt that the transfer should be considered to have been made to me as the beneficiary of the trust. The same rule will apply if, by my order, the property is delivered to anyone to whom I would be obliged to deliver it under the terms of a trust, or for any other reason; or to one to whom I intended to lend it, or give it.

66.- PAULUS; *Trusts, Book II*.- Where anyone is appointed an heir under the condition that his coheir will enter upon the estate, he can avail himself of the benefit of the Falcidian Law, even if his co-heir

para esto, no de otra suerte, que tratándose de un mudo púbero que quiere que se le restituya la herencia. Mas si el heredero rehusara adir la herencia, es difícil decir cómo se podría resolver el caso, porque ni aun deseando el tutor que sea adida la herencia a riesgo del pupilo, habría lugar al Senadoconsulto Trebeliano, ni el mismo pupilo podría pretender esto, porque no podría hablar.

Lo que en algún modo se puede arreglar respecto a los mudos, porque si son capaces de oír, aun interrogados podrían significar por señas que querían que ada a su riesgo la herencia, a la manera que los ausentes por medio de mensaje. Pero no dudo que de todos modos se haya de auxiliar también al que está en la infancia, y esto se ha de determinar por analogía del Derecho Civil, o del Honorario; porque si hubiese sido instituido heredero, sin duda parece que puede hacer gestiones como heredero con la autoridad del tutor, y si se tratase de la posesión de bienes, podría ser pedida para él por el tutor; y por lo tanto, también el heredero puede ser compelido por el tutor a adir y a restituir la herencia; a ejemplo del cual también el mudo, que nada puede entender, es auxiliado por medio del curador.

§ 4.- Si por el heredero fue entregada cada cosa por mi mandato a quien yo las hubiere vendido, no dudaremos que se entiende hecha a mí la restitución. Lo mismo será, también si por mi mandato se entregan a quien yo se la debiera dar por fideicomiso, o por otra cualquier causa, o a quien yo quisiere dárselas prestadas, o donárselas.

66. PAULO; *Fideicomisos, libro II*.- El que hubiese sido instituido de este modo, si su coheredero hubiese adido, puede usar de la ley Falcidia, aunque su coheredero hubiese adido apremiado, por

§ 1.- Etiam absentis procuratori, si desideraret, posse restitui hereditatem ex hoc Senatusconsulto Iulianus scripsit, si tamen caveat de rato habendo, si non evidens absentis voluntas esset. Sed dicendum est, ut heres, qui suspectam dicat, non sit compellendus adire, si incertum sit, an mandaverit, quamvis ei caveatur, propter fragilitatem cautionis. quod si sponte adierit hereditatem, non magna captio est: sed actiones, si non mandavit, transibunt eo tempore, quo ratum habuerit.

§ 2.- Si damnum in servo hereditario datum sit, licet per servum hereditarium heredi competere actio coepit, non tamen transit legis aquiliae actio ad fideicommissarium: hae enim actiones transeunt, quae ex bonis defuncti pendunt.

§ 3.- Si legatus Romae compulsus adierit hereditatem et restituerit, cogetur Romae actiones pati fideicommissarius, quamvis heres non cogetur.

§ 4.- An ubi defunctus conveniri debuit, et fideicommissarius debeat? videndum, si sua sponte heres adit et restituit hereditatem, an tribus locis fideicommissarius defendi debeat: ubi defunctus et ubi heres et ubi ipse domicilium habeat. Oportet itaque ibi fideicommissarium conveniri, ubi vel domicilium habet vel maior pars restitutae hereditatis habetur.

67.- VALENS; *libro III, Fideicommissorum*.- Si postulante me suspectam hereditatem ex decreto

should enter upon the estate under compulsion; provided that he himself is not compelled to do so.

§ 1.- Julianus says that under this Decree of the Senate an estate can be transferred to the agent of an absent beneficiary of the trust, if he should desire this to be done; provided, however, that he gives security to ratify the act, if the wishes of the absent party were not known. But it must be said that, if the heir alleges that he suspects the estate of being insolvent, he should not be compelled to accept it, if it is uncertain whether the beneficiary directed this to be done; even though a bond should be furnished, on account of the weakness of the security. If, however, he should enter upon the estate voluntarily, no great injury can result, but, if the beneficiary did not authorize it, the rights of action will not pass to him until he has ratified the transfer of the estate.

§ 2.- If some wrong has been committed against a slave belonging to the estate, although an action will lie in favor of the heir on account of the said slave, still, the right of action under the Aquilian Law will not pass to the beneficiary of the trust, for only those rights pass which were included in the property of the deceased.

§ 3.- If a deputy is compelled to enter upon and transfer an estate at Rome, the beneficiary of the trust will be compelled to defend actions at Rome, although the heir is not compelled to do so.

§ 4.- It is well to consider whether the beneficiary of the trust should be sued in the same place where the deceased ought to have been sued, and if the heir entered upon the estate voluntarily and transferred it, whether the beneficiary of the trust can make his defence in any one of three different places, namely, where the deceased was domiciled, or where the heir, or he himself, resides. Therefore, it must be held that the beneficiary of the trust should be sued either where he has his domicile, or where the greater part of the estate which was transferred is situated.

67.- VALENS; *Trusts, Book III*.- If, upon my application, and, under the decree of the Praetor, you

supuesto, si él mismo no hubiere adido la herencia apremiado.

§ 1.- Escribió Juliano, que en virtud de este Senadoconsulto se le podía restituir la herencia al procurador de un ausente, si lo pretendiera, si, no obstante, diera caución de que sería ratificado, si no fuese evidente la voluntad del ausente. Pero se ha de decir, que el heredero que la declara sospechosa no ha de ser compelido a adir la herencia, si fuera incierto que lo haya mandado, aunque a él se le dé caución, por causa de la inseguridad de la caución. Mas si espontáneamente hubiere adido la herencia, no es grande el perjuicio, pero las acciones, si no lo mandó, se transferirán al tiempo en que lo hubiere ratificado.

§ 2.- Si se hubiera causado daño a un esclavo de la herencia, aunque por medio del esclavo de la herencia comenzó a competirle la acción al heredero, no pasa, sin embargo, la acción de la ley Aquilia al fideicomisario; porque se transfieren las acciones que dependen de los bienes del difunto.

§ 3.- Si un Legado en Roma hubiere adido y restituido la herencia apremiado, será obligado el fideicomisario a contestar en Roma las acciones, aunque no fuere obligado el heredero.

§ 4.- Se ha de ver, si donde debió ser demandado el difunto deba serlo también el fideicomisario; Si el heredero adió espontáneamente la herencia y la restituyó, si se deberá defender el fideicomisario en tres lugares, donde el difunto, donde el heredero y donde él mismo tenga el domicilio. Así, pues, es conveniente que el fideicomisario sea demandado allí donde tiene el domicilio, o donde se halla la mayor parte de la herencia restituida.

67.- VALENTE; *Fideicomisos, libro III*.- Si a petición mía hubieres adido por decreto del Pretor

praetoris adieris nec ego postea eam mihi restitui velim nec bonis me immiscere, hoc fieri debet, ut (quod octavenu non ineleganter videbatur) a Praetore perinde actiones in me dentur, ac si hereditatem recepissem, quod est iustius.

§ 1.- Etiam eo tempore, quo creditorum fraudandorum consilium inieris, citra periculum interdicti fraudatorii hereditatem suspectam adibis et restitues mihi, quia et remoto fideicommisso liberum tibi fuerat nolenti adire hereditatem creditores tuos tali commodum fraudare, et ego nihil turpiter faciam recipiendo eam hereditatem, quam remota postulatione mea creditores compellere te ut adires non potuerint.

§ 2.- Sed et filius suus heres patri rogatus sit a patre hereditatem mihi restituere, cum suorum creditorum fraudandorum consilium inisset, tamquam suspectam ex decreto praetoris restituerit mihi, vix fraudatorio interdicto locus erit, quia bonis patris eius venditis nihil proprium creditores eius ex ea hereditate ferre potuerint: nisi forte proprii creditores filii audiri debeant, si postulent, ut dimissis patris eius bona vendere sibi permittatur.

§ 3.- Si donationis causa suspectam hereditatem sibi heres dixerit et restituerit ei, qui solidum capere non possit, auferetur ei id quod capere non potest. Idem dicendum est et si citra consilium donandi fiduciarius heres id fecerit.

68.- IDEM; *libro IV, Fideicommissorum*.- Si heres, ab eo qui cum moreretur solvendo non fuit rogatus

accept an estate suspected of being insolvent, and I should afterwards be unwilling to have it transferred to me, or to concern myself with it, the following course (which is not improperly approved by Octavenu) should be pursued, namely, the Praetor should grant actions against me just as if I had received the estate; which opinion is perfectly correct.

§ 1.- At the same time when you have formed a design to defraud your creditors, you can enter upon an estate suspected of being insolvent, and transfer it to me, without running the risk of an interdict on the ground of fraud; because, even though you were not charged with the trust in my favor, you are at liberty to refuse to accept the estate, and by doing so can defraud your creditors; and I will not act dishonorably in accepting the said estate which your creditors could not have compelled you to enter upon if I had not required you to do so.

§ 2.- Where a son, who is his own master, becomes the heir of his father, and is charged by him to transfer his estate to me; and, having formed the design of defrauding his creditors, transfers the estate to me under the decree of the Praetor, after having pretended that he believes it to be insolvent, there will hardly be ground for the application of an interdict based on fraud; because if the property of his father had been sold, his creditors could not have obtained anything belonging to him out of the estate; unless the creditors of the son himself should be heard, if they ask to be permitted to sell the property of the son without including that of the father.

§ 3.- If the heir, for the purpose of making a donation, should say that he suspects the estate of being insolvent, and should transfer it to someone who has no right to take it, the beneficiary of the trust shall be deprived of that to which he is not legally entitled. The same rule will apply where the fiduciary heir does this without the intention of making a donation.

68.- THE SAME; *Trusts, Book IV*.- Where an heir, who was asked to transfer an estate by a person who

una herencia sospechosa, y yo después no quisiera que me fuese restituida, ni inmiscuirme en los bienes, se debe hacer, lo que no indiscretamente le parecía a Octavenu, que por el Pretor se den contra mí las acciones, lo mismo que si yo hubiese recibido la herencia; lo que es más justo.

§ 1.- También en el tiempo en que formares el designio de defraudar a los acreedores adirás la herencia sospechosa sin riesgo de interdicto fraudatario, y me la restituirás, porque también habiéndose prescindido del fideicomiso habrías tenido libertad, no queriendo adir la herencia, para privar a tus acreedores de tal provecho; y yo no haré nada torpemente recibiendo la herencia, que, prescindiéndose de mi petición, no habrían podido los acreedores compelerte a adirla.

§ 2.- Pero también si al hijo, heredero suyo del padre, se le hubiera rogado por el padre que me restituya la herencia, cuando hubiese formado el designio de defraudar a sus acreedores, me la hubiere restituido como sospechosa por decreto del Pretor, difícilmente habrá lugar al interdicto fraudatario, porque vendidos los bienes de su padre, sus acreedores no habrían podido recoger de aquella herencia nada propio, a no ser acaso que deban ser oídos los acreedores propios del hijo, si pidieran, que, pagados los del padre, se les permita vender los bienes de él.

§ 3.- Si por causa de donación hubiere dicho el heredero que para él es sospechosa la herencia, y la hubiere restituido a quien no pudiera adquirir la totalidad, se le quitaría lo que no puede adquirir. Lo mismo se ha de decir, también si el heredero fiduciario hubiere hecho esto sin ánimo de hacer donación.

68.- EL MISMO; *Fideicomisos, libro IV*.- Si el heredero al que se le rogó, por quien al morir no fue

hereditatem restituere, suspectam sibi dicit, dubium non est, quin hodie coactus ex Trebelliano Senatusconsulto restituere possit. Sed et si sua sponte adierit, ex eodem Senatusconsulto restitutus est, quamvis, cum summa aut certum corpus per fideicommissum ab eo qui solvendo non fuit datum est, perinde non debeat atque si legatum esset: eo enim casu legatarii, superiore heredis vice fungi eum, cui fideicommissum relictum est.

§ 1.- Si totam hereditatem rogatus restituere tu sponte adieris et, sine deductione quartae partis restitueris, difficile quidem crederis per ignorantiam magis, non explendi fideicommissi causa hoc fecisse: sed si probaveris per errorem te quartam non retinuisse, recipere eam poteris.

69.- MAECIANUS; *libro VIII, Fideicommissorum*.- De evictione praediorum vel mancipiorum vel ceterarum rerum hereditariarum cavere heres, cum restituit hereditatem, non debet: quin immo in contrarium caveri heredi oportet, si quid ex his evictum esset, quae ab ipso herede venissent.

70.- POMPONIUS, *libro II, Fideicommissorum*.- Si heres institutus Titio rogatus fuerit restituere hereditatem et rursus Titius heredi post tempus, sufficiunt directae actiones heredi.

§ 1.- Si heres antequam fideicommissam hereditatem restitueret, alienaverit quid ex hereditate aut servum hereditarium manumiserit aut ruperit quid vel frerit vel usserit, non competit in eum ulla civilis actio restituta postea hereditate ex Trebelliano Senatusconsulto, sed ex fideicommissi causa erit hoc quod deperierit persequendum. Sin vero post restitutam hereditatem horum quid admiserit heres, dicendum est lege aquilia cum eo agi posse, si servum forte hereditarium aut vulneraverit aut

was bankrupt at the time of his death, alleges that he thinks that it is insolvent, there is no doubt that, under the present interpretation of the Trebellian Decree of the Senate, he can be compelled to transfer the estate, and, even though he should accept it voluntarily, it must be: transferred under the said Decree, although, if a certain sum of money, or a specified article of property should be given in trust by one who is insolvent, it is considered not to be due, just as if it had been directly bequeathed; for, in this instance, the person to whom the property is left in trust takes the place of a legatee, while, in the former one, he takes the place of the heir.

§ 1.- If, having been charged to transfer an estate, you accept it voluntarily, and deliver it without deducting the fourth, it will be difficult to believe that you have done this rather through ignorance, than for the purpose of more completely executing the trust. If, however, you can prove that you did not reserve the fourth through mistake, you can recover it.

69.- MAECIANUS; *Trusts, Book VIII*.- When the heir transfers an estate, he is not obliged to furnish security against the eviction of the land, slaves, or any other property belonging to the same; but, on the other hand, the beneficiary of the trust must give security to indemnify the heir, if he should be evicted of any of the property which was sold by the latter.

70.- POMPONIUS; *Trusts, Book II*.- If an appointed heir is asked to transfer the estate to Titius, and Titius is asked to return it to the heir after a certain time, direct actions will be sufficient to establish the rights of the heir.

§ 1.- If the heir, before he transfers the estate left in trust, alienates any portion of the same, or manumits a slave belonging to the estate, or destroys, breaks, or burns any of the property, no civil action can be brought against him, if he transfers the estate afterwards under the Trebellian Decree of the Senate, but suit can be brought against him under the trust, on account of the property which has been destroyed. If, however, the heir has committed any of these offences after the estate has been delivered, it must be

solvente, que restituya la herencia, dice que para él es sospechosa, no hay duda que hoy podría restituirla apremiado en virtud del Senadoconsulto Trebeliano. Pero aunque espontáneamente la hubiere adido, la ha de restituir en fuerza del mismo Senadoconsulto, aunque, cuando por el que no fue solvente se dió por fideicomiso cierta suma o cierta cosa, no sea debida, del mismo modo que si hubiese sido legada; porque en este caso hace veces de legatario, y en el anterior de heredero, aquel a quien se le dejó el fideicomiso.

§ 1.- Si habiéndosete rogado que restituyas toda la herencia la hubieres adido espontáneamente, y restituido sin la deducción de la cuarta parte, ciertamente que con dificultad se te creará que esto lo hiciste más bien por ignorancia, que no para cumplir el fideicomiso; pero si probares que por error no retuviste la cuarta, podrás recuperarla.

69.- MECIANO; *Fideicomisos, libro VIII*.- Cuando restituye la herencia no debe dar el heredero caución de la evicción de los predios, o de los esclavos o de las demás cosas; antes al contrario, se le debe dar caución al heredero, si se hubiese hecho evicción de alguna de las cosas que hubiesen sido vendidas por el mismo heredero.

70.- POMPONIO; *Fideicomisos, libro II*.- Si al heredero instituido se le hubiere rogado que restituya a Ticio la herencia, y a su vez a Ticio que después de algún tiempo se la restituya al heredero, le bastan al heredero las acciones directas.

§ 1.- Si el heredero, antes que restituyese la herencia dejada por fideicomiso, hubiere enajenado alguna cosa de la herencia, o manumitido un esclavo de la misma, o roto, o quebrado, o quemado alguna cosa, no compete contra él acción alguna civil habiendo sido restituida después la herencia en virtud del Senadoconsulto Trebeliano, pero por causa del fideicomiso se habrá de perseguir lo que hubiere perecido. Mas si después de restituida la herencia hubiere hecho el heredero alguna de estas cosas, se ha de

occiderit.

§ 2.- Si temporalis actio in hereditate relicta fuerit, tempus, quo heres experiri ante restitutam hereditatem potuit, imputabitur ei cui restituta fuerit.

71.- MAECIANUS; *libro X, Fideicommissorum*.- Omnes qui de hereditate deliberant desiderante eo, qui suo periculo velit adiri hereditatem, coguntur adire, sed non statim restituere, sed ut completo tempore deliberationis, si expedire sibi compererint hereditatem, sentiant commodum testamenti eo iure, quo si sponte adissent, sin vero contra onerosam crediderint, restituta ea exonerentur actionibus hereditariis.

72.- POMPONIUS; *libro IV, Fideicommissorum*.- Heres praecepto fundo rogatus erat hereditatem restituere: fundus alienus erat. Aristo aiebat videndum, utrum omnimodo penes heredem fundum esse voluit testator an ita demum, si ipsius est: sed sibi superius placere: ideoque aestimatio eius retinenda est.

73.- MAECIANUS; *libro XIII, Fideicommissorum*.- Si heres pecuniam hereditariam crediderit et in eam causam pignora acceperit, actiones non competunt ei, cui restituta fuerit hereditas, adversus ipsa pignora. Sed aliqua dubitatio remanebit, si in eum contractum, qui ex defuncto fuerit, interpositus heres, antequam restitueret hereditatem, pignus acceperit. Sed nec sic quidem ipse admitteretur: ex fideicommisso tamen habet adversus heredem actionem, ut ei cedat pro pignoris commodo actionem.

held that he can be sued under the Aquilian Law; for instance, if he has either wounded or killed a slave belonging to the estate.

§ 2.- If a temporary right of action is bequeathed to the estate, the time in which the heir could have brought it before transferring the estate will be charged against the person to whom the estate was transferred.

71.- MAECIANUS; *Trusts, Book X*.- All the heirs who deliberate with reference to an estate can be compelled to accept it, but not to transfer it immediately, on the application of anyone who desires it to be accepted at his risk; but in such a way that if, after the time of deliberation has passed, they should deem it expedient for them to accept it, they can enjoy the benefit of the will, just as if they had voluntarily entered upon the estate. But, on the other hand, if they should consider its acceptance unprofitable, they shall be released from liability by delivering it.

72.- POMPONIUS; *Trusts, Book IV*.- When an heir was charged to transfer an estate, after reserving a certain tract of land which belonged to someone else, Aristo says that it should be ascertained whether the testator intended that the said land should belong absolutely to the heir, or only in case it was ascertained to belong to himself. He holds that the former opinion should be adopted, and therefore that the estimated value of the land should be reserved from the estate.

73.- MSECIANUS; *Trusts, Book XIII*.- If an heir lends property belonging to an estate, and takes pledges to secure the loan, the rights of action will not pass to the person to whom the estate is transferred, as against the property which has been pledged. There is some doubt, however, in a case where the heir, before he transferred the estate, had received a pledge under a contract made by the deceased. Still, the beneficiary of the trust will not be permitted to bring suit to recover the pledge, but he can proceed against the heir, to compel him to assign to him his right of action for its recovery.

decir que se puede ejercitar contra él la acción de la ley Aquilia, si acaso hubiere herido, o matado, a un esclavo de la herencia.

§ 2.- Si en la herencia se hubiere dejado una acción temporal, el tiempo en que el heredero pudo ejercitar su acción antes de ser restituida la herencia se le computará a aquel a quien le hubiere sido restituida.

71.- MECIANO; *Fideicomisos, libro X*.- Todos los que deliberan sobre la herencia son obligados a adirla, deseándolo aquel que quiere que a su riesgo sea adida la herencia, pero no a restituirla inmediatamente, sino para que, cumplido el tiempo de la deliberación, experimenten, si hallaren que les conviene la herencia, el provecho del testamento con el mismo derecho que si la hubiesen adido espontáneamente; y para que si por el contrario la creyeren gravosa, se descarguen, restituida aquella, de las acciones de la herencia.

72.- POMPONIO; *Fideicomisos, libro IV*.- Se le había rogado a un heredero, que, tomando antes un fundo, restituyese la herencia, y el fundo era ajeno; decía Aristón, que se ha de ver, si quiso el testador que de todos modos quedase el fundo en poder del heredero, o solamente si es de él mismo; pero que a él le parecía bien lo primero; y por lo tanto se ha de retener su estipulación.

73.- MECIANO; *Fideicomisos, libro XIII*.- Si el heredero hubiere prestado dinero de la herencia, y por esta causa hubiere recibido prendas, no le competen las acciones contra las mismas prendas a aquel a quien hubiere sido restituida la herencia; pero quedará alguna duda, si para el contrato que hubiere sido interpuesto por el difunto, hubiere recibido prenda el heredero antes que restituyese la herencia. Mas ni así ciertamente sería admitido el mismo en virtud del fideicomiso; pero tiene acción contra el heredero, para que le ceda la acción por la utilidad de la prenda.

§ 1.- Cum ex Trebelliano Senatusconsulto restituitur hereditas, servitutes, quas mutuo praedia heredis et testatoris habent, nihilo minus valent.

74.- PAULUS; *libro II, Decretorum*.- Qui filium et filiam habebat, testamentum fecit et ita de filia sua caverat: *Mando tibi, non testare, donec liberi, tibi sint*. Pronuntiavit imperator fideicommissum ex hac scriptura deberi, quasi per hoc, quod prohibuisset eam testari, petisset, ut fratrem suum heredem faceret: sic enim accipiendam eam scripturam, ac si hereditatem suam rogasset eam restituere.

§ 1.- Fabius Antoninus impuberem filium Antoninum et filiam Honoratam relinquens exheredatis his matrem eorum Iuniam Valerianam heredem instituit et ab ea trecenta et quasdam res filiae reliquit, reliquam omnem hereditatem filio Antonino, cum ad annum vicensimum aetatis pervenisset, voluit restitui: quod si ante annum vicensimum decessisset filius, eam hereditatem honoratae restitui praecepit. Mater intestata decessit utrisque liberis legitimis heredibus relictis. Postea filius annum agens plenum nonum decimum et ingressus vicensimum necdum tamen eo expleto decessit filia herede Fabia Valeriana sua relicta, a qua amita fideicommissum et ex testamento patris portionem hereditatis petebat: et apud praesidem optinuerat.

Tutores Valerianae filiae Antonini egestatem eius praetendebant et recitabant Divi Hadriani constitutionem, in qua quantum ad munera municipalia iusserat eum annum, quem quis ingressus esset, pro impleto numerari. Imperator autem noster motus et aequitate rei et verbis testamenti "si ad annum vicensimum aetatis", quamvis scire se diceret a Divo Marco non excusatum a tutela eum qui septuagensimum annum aetatis ingressus fuisset, nobis et legis aeliae sentiae argumenta proferentibus et alia quaedam, contra

§ 1.- Where an estate is transferred under the Trebellian Decree of the Senate, the servitudes with which the lands of both the heir and the testator are mutually charged will still remain valid.

74.- PAULUS; *Decrees, Book II*.- A man who had a son and a daughter made a will, and provided as follows for his daughter, "I charge you not to make a will until you have children," the Emperor decided that a trust was created by this clause, and in this way the testator, by forbidding his daughter to make a will, manifested his desire that she should render her brother her heir, and that the said clause should be understood just as if the testator had charged her to transfer the estate to her brother.

§ 1.- Fabius Antoninus left a son Antoninus, who had not reached puberty, and a daughter Onorata, and, after having disinherited them, appointed their mother Junia Valeriana, his heir, charging her with a legacy of three hundred aurei and other property for the benefit of his daughter, and then desired all the remainder of his estate to be delivered to his son Antoninus, when he attained the twentieth year of his age. He also directed that the said estate should be transferred to Onorata, if his son should die before reaching his twentieth year. The mother died intestate, leaving her two children her heirs-at-law. Afterwards, the son, having passed his nineteenth year and entered his twentieth, which he had not yet completed, died, leaving his daughter Favia Valeriana his heir. Her paternal aunt brought suit under the trust, as well as for a share of the estate under the will of the father, and gained her case before the Governor of the province.

The guardians of Valeriana, the daughter of Antoninus, alleging her poverty, cited a Constitution of the Divine Hadrian by which he had ordered that where a certain age was required for the discharge of municipal duties, the year in which the person had entered should be considered to have expired. Our Emperor also, being influenced by the justice of the case, as well as by the words of the will, "When he reaches the twentieth year of his age," although he said that he knew that a man who had entered his seventieth year was not excused from guardianship

§ 1.- Cuando se restituye la herencia por virtud del Senadoconsulto Trebeliano, subsisten, sin embargo, las servidumbres que mutuamente tienen los predios del heredero y del testador.

74.- PAULO; *Decretos, libro II*.- Uno, que tenía un hijo y una hija, hizo testamento, Y dispuso así respecto a su hija: «te mando que no testes hasta que tengas hijos»; declaró el Emperador, que en virtud de esta cláusula se debía un fideicomiso, como si, por haberle prohibido que testara, le hubiese pedido que hiciera heredero a su hermano; porque esta cláusula ha de ser interpretada como si a ella le hubiese rogado que restituya su propia herencia.

§ 1.- Fabio Antonino, que dejaba un hijo impúbere, Antonino, y una hija, Honorata, habiéndolos desheredado, instituyó heredera a Junia Valeriana, madre de ellos, y a cargo de ésta dejó a la hija trescientos y ciertas cosas, y quiso que toda la demás herencia fuese restituida a su hijo Antonino, cuando hubiese llegado a los veinte años de edad; pero si el hijo hubiese fallecido antes de tener veinte años, dispuso que la herencia fuese restituida a Honorata; la madre falleció intestada, habiendo dejado como herederos legítimos a ambos hijos; después el hijo, teniendo diecinueve años cumplidos, y habiendo entrado en los veinte, pero sin haber cumplido estos todavía, falleció, habiendo dejado como heredera a su hija Favia Valeriana, de la cual pedía la tía paterna el fideicomiso y la porción de la herencia en virtud del testamento del padre, y la había obtenido ante el Presidente;

Los tutores de Valeriana, hija de Antonino, alegaban su pobreza, y citaban una Constitución del Divino Adriano, en la que había mandado, en cuanto a los cargos municipales, que se contase como cumplido el año en que cualquiera hubiese entrado. Pero nuestro Emperador, movido así por la equidad del caso, como por estas palabras del testamento: «si hubiese llegado a los veinte años de edad», aunque decía que sabía que por el Divino Marco no fue excusado de la tutela el que hubiese entrado en el año septuagésimo de edad, alegando nosotros también

petitricem pronuntiavit.

75.- SCAEVOLA; *libro XVIII, Digestorum*.- Epistulam ad heredem suum in haec verba scripsit: "Titius Cornelio heredi suo salutem. A te peto, Corneli, quoniam ad te devoluta est pars matris meae, item pars Sempronii curatoris quondam mei contraria fortuna usi et per hoc totus as meus apud te esse speratur, uti reddas restituas gaio seio uncias quattuor".

Quaesitum est, cum Sempronius in integrum restitutus sit ab imperatore, a quo fuerat deportatus et adierit hereditatem, an is quoque rogatus sit, ut ex sua portione restituat hereditatem. Respondit Sempronium quidem non proponi rogatum, Cornelium autem heredem debere pro rata portione matrum defuncti rerum restitutionem seio facere.

§ 1.- Mulier heredis instituti fidei commisit, ut retenta parte quarta reliquam partem restitueret nurui quondam suae, cuius fidei commisit in haec verba: "rogo te, ut id, quod ad te ex bonis meis pervenerit, facias pervenire ad filium tuum": quaesitum est, quando hoc fideicommissum restituere debeat, utrumne post mortem suam an iam nunc. Respondit ad tempus, quo nurus moreretur, fideicommissum aptandum esse.

76.- IDEM; *libro XIX, Digestorum*.- Scaevola respondit, si pater filium suum impuberem ex asse scripserit heredem eique codicillis substituerit, deinde filius impubes decesserit, licet substitutio inutilis sit, quia codicillis hereditas neque dari neque adimi potest, tamen benigna interpretatione placet, ut mater, quae ab intestato pupillo successit, substitutis fideicommissis obligetur: quod si invicem fuerunt substituti, et in fideicommissis substitutionem valere: unoque eorum mortuo qui supersunt totum accipiunt.

by the Divine Marcus, and although we cited the arguments of the law of Elia Sentia, decided against the aunt who made the claim.

75.- SCAEVOLA; *Digest, Book XVIII*.- Titius wrote a letter to his heir as follows: "Titius to Cornelius, his heir, Greeting. As the share left to my mother has come to you, as well as that of Sempronius, my former curator, who has met with a misfortune, on account of which it may be expected that you will obtain my entire estate, I charge you, Cornelius, to give and transfer one-third of the same to Gaius Seius."

As Sempronius had been granted complete restitution by the Emperor who banished him, and had accepted the estate, the question arose whether he also was charged to transfer his share of it. The answer was that Sempronius was not charged in any way, but that the heir, Cornelius, must deliver to Seius, pro rata, that portion of the estate of the mother of the testator which had come into his hands.

§ 1.- A woman asked her appointed heir, after he had reserved a fourth of the estate, to transfer the remainder to her daughter-in-law, the widow of her deceased son whom she also charged with a trust, as follows, "I ask you to deliver to your son all of my estate which may come into your hands." The question arose when the daughter-in-law should execute this trust, whether at her death, or immediately. The answer was that it should be executed at the time of the daughter-in-law's death.

76.- THE SAME; *Digest, Book XIX*.- Scaevola gave it as his opinion that, if a father should appoint his son heir to his entire estate, and substitute another for him by a codicil, and the son should die before reaching puberty, although the substitution would be void because an estate cannot either be bequeathed or taken away by a codicil, still, by an equitable interpretation, it should be held that the mother who succeeded the intestate minor will be liable to the substitute under the terms of the trust. Where several persons are substituted for one another the

argumentos de la ley Elia Sencia, y algunos otros, falló contra la demandante.

75.- SCÉVOLA; *Digesto, libro XVIII*.- Uno escribió a su heredero una carta en estos términos: «Ticio a Cornelio, su heredero, salud. Te pido, Cornelio, puesto que se te ha devuelto la parte de mi madre, y también la parte de Sempronio, mi curador en otro tiempo, que tuvo adversa suerte, por lo que se espera que vaya a tu poder toda mi herencia, que destituyas a Cayo Seyo cuatro dozavos»;

Se preguntó, si, habiendo sido Sempronio restituido por entero por el Emperador, por quien había sido deportado, y habiendo adido la herencia, se le habría rogado también a él que restituya la herencia con arreglo a su porción. Respondió, que no se expone ciertamente que haya sido rogado Sempronio, pero que el heredero Cornelio debía hacer a Seyo la restitución a prorrata de la porción de los bienes maternos del difunto.

§ 1.- Una mujer encomendó a la fidelidad del heredero instituido, que, retenida una cuarta parte, restituyese la restante parte a la que había sido su nuera, a la fidelidad de la cual hizo recomendación en estos términos: «te ruego que hagas llegar a tu hijo lo que a ti hubiere ido de mis bienes»; se preguntó, cuando deberá restituir este fideicomiso, si después de su muerte, o ya desde luego. Respondió, que el fideicomiso ha de ser referido al tiempo en que muriese la nuera.

76.- EL MISMO; *Digesto, libro XIX*.- Scévola respondió: si el padre hubiere instituido heredero de la totalidad a su hijo impúbere, y le hubiere nombrado substitutos en los codicilos, y luego hubiere fallecido el hijo impúbere, aunque sea inútil la substitución, porque por codicilos no se puede dar ni quitar la herencia, se determina, sin embargo, por benigna interpretación, que la madre, que abintestato sucedió al pupilo, se obligue a los sustitutos en fuerza del fideicomiso; pero si fueron substituidos recíprocamente, es válida la substitución aun en el fidei-

77.- IDEM; *libro XX, Digestorum*.- Heredibus institutis filiis utriusque sexus singulos rogavit, ut qui sine liberis decederet partem suam hereditatis sorori fratri restitueret aut, si frater sororve non esset, matri suae et haec verba adiecit: "vosque, liberi carissimi, hoc fideicommisso teneri invicem volo, donec binos liberos educaveritis".

Quaesitum est, si quis ex liberis duos filios procreaverit, quamvis superstites non reliquerit, an heredes eius fideicommissum debeant. Respondit secundum ea quae proponerentur videri fideicommissi onere liberatos.

§ 1.- Titius nepotes ex filia et furiosam filiam suam heredes instituit et fidei commisit filiae, ut, si sine liberis decessisset, pars ei data perveniret ad coheredes: eam furiosam ipse Titius in matrimonio collocavit et enixa est filiam post mortem patris. Quaesitum est, defuncta furiosa superstiti ex eiusmodi coniunctione parta filia, an fideicommissum ad coheredes pertineret. respondit, cum filiam reliquisse proponeretur, fideicommissum non deberi. claudius: nam etsi matrimonium cum furiosa non fuit, satis tamen factum est eiusmodi condicioni.

78.- IDEM; *libro XXI, Digestorum*.- Lucius Titius intestato moriturus, cum haberet uxorem et ex ea filiam emancipatam, codicillis haec verba inseruit: "pertinent autem hi codicilli ad uxorem et filiam. Itaque rogo, quidquid aut ego reliquero aut vos ipsae habeatis, commune vobis sit: quod si non ego rogarem, vos pro vestra pietate faceretis". Filia

substitution will be valid under the trust, and if one of them should die, the survivors will be entitled to the entire estate.

77.- THE SAME; *Book XX*.- A testator charged each one of his children of both sexes, whom he had appointed his heirs, if any of them should die without issue, to leave his or her share of the estate to his or her brother or sister, and if there should be no brother or sister, to leave it to his or her mother, and added the following words, "I charge you, my dear children, with this trust until you have brought up two children."

If anyone of the said heirs should have two children, although they might not survive, the question arose whether his or her heirs would be compelled to execute the trust. The answer was that, according to the facts stated, they would be considered to have been released from the obligation of the trust.

§ 1.- Titius appointed his grandsons by his daughter, and his daughter, who was insane, his heirs, and charged the said daughter with the trust that if she should die without issue, the share of his estate which had been given to her should pass to her co-heirs. Titius gave his insane daughter in marriage, and she brought forth a daughter after the death of her father. The said insane daughter, having died leaving a daughter as the issue of this union, the question arose whether the co-heirs were entitled to the benefit of the trust. The answer was that as, according to the facts stated, the heir had left a daughter, the trust was not due. Claudius: For though the marriage with the insane woman was not legally valid, still it was sufficient to enable the condition to be complied with.

78.- THE SAME; *Digest, Book XXI*.- Lucius Titius, expecting to die intestate, and having a wife and a daughter by her whom he had emancipated, inserted the following provision into a codicil, "This codicil has reference to my wife and my daughter. Therefore I ask that anything that I may leave you, or that you yourself have, will belong to you in

comiso, y fallecido uno de ellos, los que sobreviven adquieren la totalidad.

77.- EL MISMO; *Digesto, libro XX*.- Habiendo uno instituido herederos a sus hijos de ambos sexos, le rogó a cada uno, que el que falleciese sin hijos restituyera su parte de herencia a la hermana o al hermano, o, si no hubiese hermano o hermana, a su madre, y añadió estas palabras: «y quiero, queridísimos hijos, que por este fideicomiso quedéis vosotros obligados recíprocamente, hasta que hayáis educado dos hijos»;

Se preguntó, si, habiendo uno de los hijos procreado dos hijos, aunque no los hubiere dejado sobrevivientes, deberán sus herederos el fideicomiso. Respondió, que, según lo que se exponía, parecían libres de la carga del fideicomiso.

§ 1.- Ticio instituyó herederos a nietos habidos de una hija, y a una hija suya furiosa, y encomendó a la fidelidad de la hija, que, si falleciese sin hijos, la parte dada a ella fuese a los coherederos. El mismo Ticio colocó en matrimonio a la furiosa, y nació una hija después de la muerte del padre; se preguntó, si, habiendo fallecido la furiosa, y sobreviviendo la hija nacida de semejante unión, les pertenecería a los coherederos el fideicomiso. Respondió, que como se exponía que dejó una hija, no se debía el fideicomiso. Y dijo Claudio: porque aunque no hubo matrimonio con la furiosa, se cumplió, sin embargo, semejante condición.

78.- EL MISMO; *Digesto, libro XXI*.- Estando Lucio Ticio para morir intestado, teniendo mujer y una hija emancipada nacida de ella, insertó estas palabras en los codicilos: «mas pertenecen estos codicilos a mi mujer y a mi hija. Y así, os ruego, que todo lo que yo os hubiere dejado, o lo que vosotras mismas tengáis, lo tengáis en común. Pero si yo no os

intestati patris bonorum possessionem accepit: quaesitum est, an aliqua pars hereditatis Lucii Titii ex causa fideicommissi a filia matri debeatur. Respondit secundum ea quae proponerentur dimidiam partem deberi, si etiam uxor parata sit in commune bona sua conferre.

§ 1.- Maevia duos filios heredes reliquerat et eodem testamento ita cavit: "fidei autem heredum meorum committo, uti omnis substantia mea sit pro deposito sine usuris apud Gaium Seium et Lucium Titium, quos etiam, si licuisset, curatores substantiae meae dedissem remotis aliis, ut hi restituant nepotibus meis, prout quis eorum ad annos viginti quinque pervenerit, pro portione, vel si unus, ei omnem". Quaesitum est, an fideicommissum praestari a scriptis heredibus Lucio Titio et Gaio Seio debeat. Respondit secundum ea quae proponerentur Lucium Titium, item Gaium Seium fideicommissum petere non posse.

§ 2.- Tres heredes scripsit Maevium fratrem suum ex dodrante, seium ex sextante, Stichum eiusdem seii servum, filium autem naturalem Maevii ex uncia et fidei commisit Seii, uti Stichum manumitteret, in haec verba: "a te peto, sei, uti tu Stichum manumitteres: dedi unde faceres". Sed et codicillis ita cavit: "unciam, ex qua feci Stichum heredem, si quam Seius controversiam moveret, ad Maevium fratrem meum reverti volo. Tu, frater, secundum fidem et pietatem tuam, quidquid ad te pervenerit ex hereditate mea Sticho filio tuo restitues: quod ut facias, fidei tuae committo". Quaesitum est, cum Seius adierit hereditatem et propter hoc compulsus Stichum manumiserit, an unciam hereditatis, ex qua Stichus heres institutus est, Sticho manumisso restituere debeat. Respondit non proponi Seium rogatum unciam ei restituere.

common; and whatever I do not ask you to do, I am sure that you will do, through your affection for me." The daughter acquired possession of the estate of her intestate father under the Praetorian Law. The question arose whether any part of the estate of Lucius Titius was due from the daughter to her mother, on account of the trust. The answer was that, in accordance with the facts stated, a part of it was due, if the wife was ready to place her own property in a common fund with that of her daughter.

§ 1.- Maevia left two daughters her heirs, and in the same will she inserted the following provision: "I charge my heirs to leave all my property on deposit, without interest, with Gaius Seius and Lucius Titius, whom, if it should be lawful, I have appointed the curators of my estate, excluding all others, in order that they may transfer it to my grandchildren pro rata, when each one of them arrives at the age of twenty-five years; or if only one of them should reach that age, to transfer all my estate to him." The question arose whether the trust should be executed by the appointed heirs for the benefit of Lucius Titius and Seius. The answer was that, in accordance with the facts stated, Lucius Titius and Gaius Seius could not claim the trust.

§ 2.- A woman appointed three heirs, her brother Maevius to three-fourths of her estate, Seius to a sixth, and Stichus, the slave of the said Seius and the natural son of Maevius, to a twelfth; and she charged Seius to manumit Stichus, as follows, "I charge you, Seius, to manumit Stichus, and I have given you the means to do so." She also made the following provision in a codicil: "If Seius should originate any controversy with reference to the twelfth of my estate, to which I have appointed Stichus the heir, I desire it to revert to my brother Maevius; and my brother, as I rely upon your good faith and recollection, I ask to deliver everything which may come into your hands from my estate to your son Stichus, and I charge you to do this under a trust." As Seius entered upon the estate and on this account was compelled to manumit Stichus, the question arose whether he was obliged to transfer to Stichus, after his manumission, the twelfth of the estate to which

lo rogare, lo haríais vosotras por vuestra piedad»; la hija recibió la posesión de los bienes de su padre intestado; se preguntó, si por la hija se le deberá a la madre por causa del fideicomiso alguna parte de la herencia de Lucio Ticio. Respondió, que según lo que se exponía, se le debía, si también la mujer estuviera dispuesta a aportar en común su propios bienes.

§ 1.- Mevia había dejado como herederos dos hijos, y dispuso así en el mismo testamento: «pero encomiendo a la fidelidad de mis herederos, que todos mis bienes estén en depósito sin intereses en poder de Cayo Seyo y de Lucio Ticio, a quienes también, si hubiese sido lícito, yo habría nombrado curadores de mis bienes, habiendo excluido a otros, para que ellos los restituyan a mis nietos, a medida que cada uno de ellos llegare a los veinticinco años, a proporción, o si uno solo existiere, todos a éste»; se preguntó, si se les deberá entregar por los herederos instituidos el fideicomiso a Lucio Ticio y a Seyo. Respondió, que, según lo que se exponía, ni Lucio Ticio, ni Cayo Seyo podían pedir el fideicomiso.

§ 2.- Uno instituyó tres herederos, a su hermano Mevio en nueve onzas, a Seyo en dos onzas, y a Stico, esclavo del mismo Seyo, pero hijo natural de Mevio, en una onza, y encomendó a la fidelidad de Seyo que manumitiese a Stico, en estos términos: «te pido, Seyo, que manumitas a Stico: te dí con qué hacerlo». Pero también en codicilos dispuso así: «quiero que la onza, de que hice heredero a Stico, revierta a Mevio, mi hermano, si Seyo promoviere alguna controversia. Tú, hermano, restituirás a Stico, tu hijo, conforme a tu fidelidad y piedad, todo lo que a ti hubiere ido de mi herencia; lo que encomiendo a tu fidelidad para que lo hagas»; se preguntó, si, habiendo adido Seyo la herencia, y habiendo manumitido, compelido por esto, a Stico, deberá restituirle a Stico manumitido la onza de herencia, en que Stico fue instituido heredero. Respondió, que no se exponía que a Seyo se le hubiese rogado que le restituyese la onza.

the latter had been appointed heir. The answer was, that there was nothing stated to show that Seius was charged to transfer to him the twelfth part of the estate.

§ 3.- Idem quaesit, an, si aliquam controversiam Seius de uncia hac, ex qua Stichus institutus est, facere velit et Maevius unciam ex causa fideicommissi a Seio fuerit consecutus, utrum hanc solam unciam, ex qua Stichus institutus est, an vero et dodrantem, ex quo ipse Maevius institutus est, eidem Sticho restituere debeat. Respondit de omni restituendo, quod ad maevium quoquo modo pervenit, testatricem sensisse.

§ 4.- Pater puerum et puellam heredes instituit eosque invicem substituit et, si neuter heres esset, eis plures substituit substitutosque invicem substituit his verbis: "substitutos heredes invicem substituo": eorum filiorum fidei commisit, ut, qui eorum vita superasset et sine liberis intra annum trigensimum moreretur, hereditatem his, quos heredes substituerat, restituerat. Filius vita sororem superavit et intra trigensimum annum sine liberis decessit: quaesitum est, ex substitutis uno defuncto ante filium, pars eius, quae ad ceteros substitutos qui superviverent pertinet, utrum pro virilibus an pro hereditariis portionibus, quibus sunt substituti, pertineat. Respondit consequens esse pro his partibus, quibus substituti essent, fideicommissum pertinere.

§ 5.- Maevia filium heredem instituit ex quincuncie, Titiam filiam ex quadrante, Septicium filium ex triente, cuius fidei commisit in haec verba: "te rogo, fili Septici, si intra vicensimum annum sine liberis morieris, quicquid ex hereditate mea ad te pervenerit, hoc fratribus tuis restituas". Quaesitum est, an Septicio filio defuncto intra vicensimum annum sine liberis hoc fideicommissum utrum pro portionibus hereditariis ad fratrem et sororem eius

§ 3.- Inquiry was also made, if Seius wished to raise any question with reference to the twelfth to which Stichus had been appointed heir, and Maevius should obtain the said twelfth from Seius under the terms of the trust, whether he must also transfer to Stichus the three-fourths of the estate to which Maevius himself had been appointed heir. The answer was that it was the intention of the testatrix that all of the estate which had come into the hands of Maevius in any way whatsoever should be transferred to Stichus.

§ 4.- A father appointed his son and daughter his heirs, and substituted them for one another, and then substituted several heirs for them, in case neither of them should become an heir, and substituted the substitutes themselves for one another, by the following words, "I substitute the substituted heirs for one another." He also charged any one of his children who might survive the others and die without issue before reaching the age of thirty years to transfer his estate to those whom he had substituted as the heirs of the said child. His son survived his sister, and died without issue before reaching his thirtieth year. One of the substitutes having died before the son, as his share would belong to the other substitutes who survived, the question arose whether it would pass to them equally, or in proportion to the shares of the estate for which they had been substituted. The answer was that the substitutes were entitled to the benefit of the trust in proportion to their respective shares.

§ 5.- Maevius appointed her son heir to five-twelfths of her estate, her daughter, Titia, to a fourth, and her other son, Septitius, to a third; and she charged the latter with a trust in the following words, "My son, Septitius, I ask you to transfer to your brothers all of my estate which may come into your hands, if, before reaching your twentieth year, you should die without leaving any children." Septitius, having died without issue before reaching his

§ 3.- El mismo preguntó, si, habiendo querido Seyo promover alguna controversia sobre esta onza en que fue instituido Seyo, y habiendo Mevio conseguido de Seyo la onza por causa del fideicomiso, deberá restituirla al mismo Stico esta sola onza en que Stico fue instituido, o también las nueve onzas en que fue instituido el mismo Mevio. Respondió, que la testadora entendió referirse a que se restituyera todo lo que de cualquier modo fue a poder de Mevio.

§ 4.- Un padre instituyó herederos a un hijo y a una hija, y los substituyó recíprocamente, y si ninguno de los dos fuese heredero, les substituyó varios individuos, y substituyó recíprocamente los substitutos en estos términos: «substituyo recíprocamente los herederos substituídos»; encomendó a la fidelidad de los mismos hijos, que el que de ellos sobreviviese y muriese sin hijos antes de llegar a los treinta años, restituyese la herencia a los que había substituido como herederos; el hijo sobrevivió a la hermana, y falleció sin hijos antes de llegar a los treinta años; se preguntó, si, habiendo fallecido uno de los substitutos antes que el hijo, la parte de éste, que les pertenece a los demás substitutos que sobreviviesen, les pertenecerá por porciones viriles, o con arreglo a las de la herencia, en que fueron substituidos. Respondió, que es consiguiente que les pertenezca el fideicomiso con arreglo a las partes en que hubiesen sido substituidos.

§ 5.- Mevia instituyó a su hijo heredero de cinco onzas, a su hija Ticia de tres, y a su hijo Septicio de cuatro, a la fidelidad del cual hizo una encomienda en estos términos: «te ruego, hijo Septicio, que si murieses sin hijos antes de llegar a los veinte años, restituyas a tus hermanos todo lo que a ti hubiere ido de mi herencia»; se preguntó, si habiendo fallecido el hijo Septicio sin hijos antes de llegar a los veinte años, les pertenecerá este fideicomiso al hermano y a

pertineat an vero aequaliter. Respondit pro parte hereditaria.

§ 6.- Titia ex asse heres scripta partem dimidiam hereditatis Maeviae rogata restituerat: fundum a testatore obligatum luere noluit, sed eum vendente creditore mandavit redimendum Seiae: quaesitum est, an Titia ex causa fideicommissi Maeviae teneatur. Respondit, cum rogata hereditatem restituere proponatur, nihil proponi, cur non teneatur. Claudius: subest enim praestari oportere id, quanto pluris fundus fuit, quam ad creditorem pervenire oportuit.

§ 7.- Gaio Seio ex semisse, Titia ex quadrante et aliis ex reliquis portionibus heredibus institutis ita cavit: "fidei autem vestrae mando, Gaii Seii et Lucia Titiae, uti post obitum vestrum reddatis restituatis Titio et Sempronio semissem patrimonii et portionis eius, quam vobis dedi". Quaesitum est, cum utrique adierint hereditatem et postea Gaius Seius defunctus sit Lucia Titia herede instituta, an haec Lucia Titia partem dimidiam semissis, quam rogatus erat Gaius Seius restituere, protinus debeat? an vero post suam demum mortem universum fideicommissum tam ex sua persona quam ex Gaii Seii datum restituere debeat? respondit Luciam Titiam statim teneri, ut partem dimidiam semissis ex persona seii restituat.

§ 8.- Filiam suam heredem scripsit et nepotem, quem ex ea habebat, ei substituit et ita cavit: "Lucio Titio fratris mei filio genero meo ducentos aureos relinquo. Quo legato scio illum contentum esse, quoniam scripsi universam rem meam, eo quod filiam meam et nepotem meum heredes scripsi,

twentieth year, the question arose whether the estate would belong to the brother and sister in proportion to their respective shares of the same, or whether it would belong to them equally. The answer was that it would belong to them in proportion to their respective shares.

§ 6.- Titia, having been appointed sole heir to an entire estate and charged to transfer half of the same to Maevia, did so; she, however, refused to pay the amount for which a tract of land had been encumbered by the testator, but as the creditor sold the property she directed Seia to redeem it. The question arose whether Titia would be liable to Msevia under the terms of the trust. The answer was that, as the heir was charged to transfer the estate, there was nothing in what was stated to show that she should not be liable. Claudius: For she is obliged to pay Maevia half the value of the land, and as much more as had been necessary to satisfy the creditor.

§ 7.- A certain man, having appointed Gaius Seius heir to half of his estate, Titia heir to a quarter of the same, and other persons heirs to the remainder, inserted the following provision into his will, "I charge you, Gaius Seius, at your death to give and deliver to Titius and Sempronius half of my estate, that is to say, the portion which I have given to you." Both of the above-mentioned persons having accepted the estate, and Gaius Seius having subsequently died after appointing Lucia Titia his heir, the question arose whether the said Lucia Titia was obliged to transfer immediately half of the estate which Gaius Seius had been charged to deliver, or whether she should, at the time of her death, transfer the entire trust, not only that with which she was charged, but also that of Gaius Seius. The answer was that Lucia Titia was bound to immediately transfer half of the estate which Seius had received.

§ 8.- A testator appointed his daughter his heir, together with his grandson, who was her son, and after making a pupillary substitution to the latter, inserted the following provision into his will: "I bequeath to Lucius Titius, my nephew, and my son-in-law, two hundred aurei, and I know that he will be

su hermana con arreglo a las porciones de la herencia, o por partes iguales. Respondió, que con arreglo a la parte de herencia.

§ 6.- Ticia, instituida heredera de la totalidad, había restituido, rogada, la mitad de la herencia a Mevia, y no quiso desempeñar un fundo obligado por el testador, si no que al venderlo el acreedor le mandó a Seia que lo redimiese; se preguntó, si por causa del fideicomiso estará Ticia obligada a Mevia. Respondió, que, exponiéndose que se le rogó que restituyese la herencia, nada se exponía para que no esté obligada. Y dice Claudio: porque se sobreentiende que se debe entregar lo que el fundo valió más de lo que debió ir a poder del acreedor.

§ 7.- Habiendo uno instituido herederos a Cayo Seyo de la mitad de la herencia, a Ticia de la cuarta parte, y a otros de las restantes porciones, dispuso así: «pero encomiendo a vuestra fidelidad, Cayo Seyo y Lucia Ticia, que después de vuestra muerte volváis y restituyáis a Ticio y a Sempronio la mitad del patrimonio y de la porción que os di»; se preguntó, si, habiendo adido ambos la herencia, y habiendo fallecido después Cayo Seyo, habiendo sido instituida heredera Lucia Ticia, deberá restituir desde luego ésta Lucia Ticia la mitad de la mitad de la herencia, que a Cayo Seyo se le había rogado que restituyera, o si deberá restituir solamente después de su muerte todo el fideicomiso dado, tanto por razón de su propia persona, como por la de Cayo Seyo. Respondió, que, desde luego estaba obligada Lucia Ticia a restituir por razón de la persona de Seyo la mitad de la mitad de la herencia.

§ 8.- Uno instituyó heredera a su hija, y le substituyó un nieto que tenía de ella, y dispuso así: «dejo doscientos áureos a Lucio Ticio, hijo de mi hermano, yerno mío; con cuyo legado sé que él está contento, pues he distribuido todos mis bienes, porque como he instituido herederos a mi hija y a mi

universam substantiam eis communicasse. Quos invicem commendo". Filia adita patris hereditate divertit a marito: quaesitum est, an Titius quondam eius maritus suo vel filii sui nomine ex fideicommisso communionem bonorum consequi possit viva quondam uxore sua vel post mortem eius. Respondit nihil fideicommissi datum genero proponi praeter ducentos aureos.

§ 9.- Idem quaesiit eandem uxorem marito herede scripto fideicommississe, ut, cum moreretur, filio communi omne, quod ad eum ex hereditate sua pervenisset, restitueret: an illae quoque res et possessiones, quae in dotem datae et post divortium restitutae mulieri fuerant, fideicommisso contineantur. Respondit, quod mulier in bonis suis reliquisset, id fideicommisso contineri. Claudius: et alias de eodem facto consultus ita respondit, sive restitutae sint res, secundum id quod supra responsum est in bonis mulieris computari, sive non sint restitutae, quia ex stipulatione de dote reddenda interposita restituendae sint, eo auctiorem hereditatem computari.

§ 10.- Quae habebat filium et ex eo nepotem utrosque in mariti potestate, maritum ex asse scripsit heredem eiusque fidei commisit in haec verba: "si Titius maritus meus mihi heres erit, peto fideique eius committo, quidquid ex hereditate mea ad eum pervenerit, cum mori coeperit, det restituat Gaio filio nostro, ita tamen, ut decem quidem uncias Gaius habeat, duas autem uncias Seius nepos habeat: quod ut fiat, fidei eius Titi heredis mei committo". Pater emancipavit filium, nepotem amisit et superstiti filio decessit. Quaesitum est, an priore parte scripturae universa hereditas patris ex causa fideicommissi filio debeatur et illa sequentia verba "ita tamen, ut decem uncias filius, duas autem nepos habeat" ex voluntate

content with this legacy, as I have left all my estate to my daughter and my grandson, whom I have appointed my heirs, so that the entire estate will belong to them in common, and I commend them to one another." The daughter, having entered upon her father's estate, separated from her husband. The question arose whether Titius, her former husband, could, under the terms of the trust, in his own name or in that of his son, acquire the property held in common, either while his said former wife was living or after her death. The answer was that, according to the facts stated, there was nothing given to the son-in-law under the trust except two hundred aurei.

§ 9.- The same wife appointed her husband her heir, and charged him at the time of his death to transfer to their common son everything which he had received from her estate; it was also asked whether the property and effects which he had given by way of dowry, and which had been returned to the woman after the divorce, should be included in the trust. The answer was that all the property which the woman left was included therein. Claudius: Advice having been taken at another time with reference to the same question, the conclusion was that either the property should be transferred in accordance with the opinion above given, and should be computed as part of the estate of the woman; or, if this was not done because of a stipulation entered into with reference to the restoration of the dowry, the estate should be considered to have increased on this account.

§ 10.- A woman who had a son and by him a grandson, both of whom were under the control of her husband, appointed the latter her sole heir, and charged him with a trust as follows, "If my husband, Titius, should be my heir, I ask and charge him, at the time of his death, to give and transfer everything which may come into his hands from my estate, in such a way that our son Gaius may have ten-twelfths of the same, and our grandson Seius two-twelfths; and I charge my heir Titius to see that this is done." The father emancipated his son, lost his grandson, and then died, being survived by his son. The question arose whether the son, under the terms of the trust, by the first part of the will, was entitled to the

nieto, les he dado en común toda la herencia; a los cuales los encomiendo recíprocamente»; la hija, adida la herencia del padre, se divorció de su marido; se preguntó, si Ticio, en otro tiempo su marido, podría conseguir viviendo la que fue su mujer, o después de la muerte de ésta, a su propio nombre o en el de su hijo, la comunión de los bienes por virtud de fideicomiso. Respondió, que no se exponía que se le dio al yerno ningún fideicomiso, a excepción de los doscientos áureos.

§ 9.- El mismo preguntó, si, habiendo la misma mujer instituido heredero a su marido, encomendó a éste que cuando muriese restituyera al hijo común todo lo que de su herencia hubiese ido a poder de él, se comprenderán en el fideicomiso también las cosas y las posesiones, que habían sido dadas en dote, y restituidas a la mujer después del divorcio. Respondió, que todo lo que la mujer hubiese dejado en sus propios bienes estaba comprendido en el fideicomiso. Consultado Claudio también otras veces sobre el mismo hecho, respondió así: que si las cosas hubieran sido restituidas, se computaban en los bienes de la mujer, según lo que arriba se respondió, y que si no hubieran sido restituidas, se considera más rica con ello la herencia, porque habrán de ser restituidas en fuerza de la estipulación interpuesta para la restitución de la dote.

§ 10.- Una que tenía un hijo, y de él un nieto, ambos bajo la potestad de su marido, instituyó al marido heredero universal, e hizo una encomienda a la fidelidad de éste en estos términos: «si Ticio, mi marido, fuere mi heredero, le pido, y encomiendo a su fidelidad, que, cuando llegare a morir, dé y restituya a Cayo, nuestro hijo, todo lo que de mi herencia hubiere llegado a él, pero de suerte, que Cayo tenga ciertamente diez onzas, y las otras dos onzas las tenga el nieto Seyo; lo que encomiendo a la fidelidad de este Ticio, mi heredero, para que lo haga»; el padre emancipó al hijo, perdió al nieto, y falleció sobreviviéndole el hijo; se preguntó, si en virtud de la primera parte de la escritura se le debería al hijo por

defunctae ita demum locum haberent, si die fideicommissi cedente filius et nepos eorum in natura essent, cum autem non supervixit ad diem fideicommissi nepos, sequens scriptura cesset. Respondit ea quae proponerentur ostendere decem dumtaxat uncias filio datas.

§ 11.- Heres institutus uxori rogatus totam hereditatem restituere restituit detracta quarta: quaesitum est, cum uxor quartam partem hereditatis praesenti die et reliquam post tempus alii rogata a testatore fuisset restituere, an id, quod heres ei detraxisset quartae nomine, in restituendo fideicommisso imputare possit. Respondit, quatenus cepisset, fideicommisso obstrictam.

§ 12.- Heredum fidei commisit, ut, quidquid ex parte tertia hereditatis pervenerit ad eos, id redderent Gaio Maevio alumno testatoris, cum fuerit annis quindecim, et subiunxit haec verba: "interim ex refectui paupertatis, qui ad vos pervenerit, alatis eum ex usuris pro quantitate nummorum redactis. Hoc amplius eidem alumno meo hominem caletanum et vernam sutorem, qui eum artificio suo mercede data alere poterit". Quaesitum est, cum alimenta multo minora praestiterint heredes scripti, quam usurae summae redactae competebant, an et residuas praestare compelli debeant totius temporis an ex die, quo quantum decimum explesset? Et cum servi legati ei specialiter, ut ex mercedibus aleretur, statim venierint, utrum mercedes an usuras petere debeat? Respondit secundum ea quae proponerentur testatorem videri de omni re ditu et mercede servorum restituenda sensisse.

entire estate of his father, and whether the following words, "In such a way that my son may have twelfths of the same, and my grandson two-twelfths," should, in compliance with the intention of the deceased, only be applicable where both the son and grandson were living at the time the trust became due; or, as the grandson was not living at that time, whether the following clause of the will would be of no force or effect. The answer was that, in accordance with the facts stated, it was evident that only twelfths of the estate should be given to the son.

§ 11.- An appointed heir, having been asked to transfer three entire estates to the wife of the testator, did so, after having deducted a fourth of the same. The question arose, if the wife had been asked by the testator to transfer the fourth part to his estate immediately, and the remainder after a certain time had elapsed, whether that portion which the heir had deducted from it as a fourth should be accounted for when the property was transferred under the trust? The answer was that the woman was only liable for the amount which she had received under the trust.

§ 12.- A testator charged his heirs to transfer all of the third part of his estate, which might come into their hands, to Gaius Maevius, whom he had brought up, when the latter should reach the age of fifteen years, and added the following words: "In the meantime, you will employ the income of the amount which may come into your hands to keep him from poverty which amount should be lent at interest. In addition to this, I give to my said foster-child a certain slave, his foster-brother, born in my house, and another slave, a shoemaker, who can assist in supporting him with the proceeds of their labor." As the heirs had provided the child with maintenance at a cost much below the amount of the interest of the sum which had been bequeathed for that purpose, the question arose whether they could be compelled to pay the balance for the entire time during which support was due, or only after he had attained his fifteenth year. And, as the slaves who had been specially bequeathed to him in order to contribute to his support with the proceeds of their labor had been immediately sold by their heirs, it was also asked

causa de fideicomiso toda la herencia del padre, y si las siguientes palabras: «pero de suerte, que el hijo tenga diez onzas, y dos el nieto», tendrían aplicación en fuerza de la voluntad de la difunta solamente en este caso, si al correr el término del fideicomiso viviesen el hijo y el nieto de ellos, pero que no habiendo sobrevivido el nieto al término del fideicomiso, dejaría de tener aplicación la segunda cláusula. Respondió, que lo que se exponía mostraba que al hijo se le dieron solamente diez onzas.

§ 11.- Un heredero instituido, a quien se le rogó que restituyera a la mujer toda la herencia, la restituyó, deducida la cuarta parte; se preguntó, si, habiéndose rogado a la mujer por el testador que restituyese a otro la cuarta parte de la herencia inmediatamente, y la restante después de algún tiempo, podría computar al restituir el fideicomiso lo que el heredero le hubiese deducido por razón de la cuarta. Respondió, que estaba obligada en el fideicomiso hasta lo que hubiese recibido.

§ 12.- Uno encomendó a la fidelidad de los herederos, que todo lo que de la tercera parte de la herencia hubiere ido a ellos lo restituyeran a Cayo Mevio, alumno del testador, cuando fuere de quince años, y añadió estas palabras: «mientras tanto, con el producto de la pobreza, que hubiere llegado a vosotros, alimentadlo, recogiendo intereses con arreglo a la cantidad del dinero; además de esto dejo a mi mismo alumno el esclavo Caletano y el esclavo zapatero, nacido en mi casa, el cual podrá alimentarlo con el salario que se le dé por su oficio»; se preguntó, si, habiendo prestado los herederos instituidos alimentos mucho menores de lo que importaban los intereses de la suma reunida, deberían ser compelidos a pagar también los restantes de todo el tiempo, o desde el día en que hubiese cumplido los quince años; y si habiendo sido vendidos inmediatamente los esclavos legados especialmente a él, para que se alimentase con los salarios, debería pedir los salarios, o los intereses. Respondió, que, según lo que se exponía, parecía que el testador entendió que se había de restituir toda renta y salario de los

whether their wages, with interest, could be claimed by the child. The answer was that, according to the facts stated, the intention of the testator seemed to have been that the entire income of the estate, as well as the wages of the slaves, should be delivered.

§ 13.- Pluribus heredibus institutis, in quibus et libertis tribus ex dodrante, eisdem fundos per praeceptionem dedit et ab his petit, ne eos alienarent et ut, qui vita superasset, solidos eosdem fundos optineret: deinde unius ex his libertis Otacilii fidei commisit, uti quidquid ad eum ex hereditate bonisve pervenisset, deducto pro ea parte aere alieno et legatis et sibi viginti aureis restituat Titio: quaesitum est, an etiam partes tertias fundorum, praelegatorum cum collibertis eidem, deducere deberet. Respondit secundum ea quae proponerentur non debere restituere praeceptionem, cum ipse testator et legata excipi voluisset.

§ 14.- Maritus uxore instituta herede ex parte tertia et pluribus ei fideicommissis datis dotem quoque praelegavit his verbis: "seiae uxori meae dari volo a filiis meis summam dotis eius, quae mihi pro ea illata est" eiusdemque uxoris fidei commisit, ut partem hereditatis et quaecumque ei legasset post mortem suam Titio filio communi restitueret. Quaesitum est, an summam quoque dotis inter cetera legata ex causa fideicommissi filio suo restituere debeat. Respondit non alias, nisi manifestum esset de dote quoque restituenda testatorem sensisse: atque etiamsi sensisset et hoc fuerit adprobatum, ita eius quoque petitionem fore, si non minus in quantitate, quae Falcidiae nomine remaneret, foret quam in quantitate dotis.

§ 15.- Rogatus hereditatem restituere septicio, cum erit annis viginti, interea fundos, quos defunctus pignori acceperat, vendidit et propterea pigneraticia

§ 13.- A certain man having appointed several persons, including three freedmen, heirs to three-fourths of his estate, left them also some lands as a preferred legacy, and charged them "Not to alienate the said lands, so that whichever of them survived might acquire all for himself." He afterwards charged one of the said freedmen to transfer to Titius everything that came into his hands from his estate, or his property, after having deducted the debts and legacies, and reserved twenty aurei for himself. The question arose whether he should also have deducted the third of the lands which had been devised to him and his fellow freedmen as a preferred legacy. The answer was that, according to the facts stated, the lands should not be transferred, as the testator himself had desired the legacies to be excepted.

§ 14.- A husband, having appointed his wife heir to a third part of his estate, and charged her with several trusts, also bequeathed to her her dowry as a preferred legacy, in the following terms, "I wish the amount of her dowry which she brought me to be paid by my son to my wife, Seia," and he charged his wife, at the time of her death, to leave to their common son, Titius, her share of the estate, and anything else which he had bequeathed to her. The question arose whether she would also be obliged to transfer to her son the amount of her dowry, together with the other legacies which she had received by virtue of the trust. The answer was that the testator did not intend that her dowry should also be transferred, unless it was otherwise established; and even if it was proved that he had intended this to be done, it could not be demanded, unless the amount which could be retained under the Falcidian Law was less than that of the dowry.

§ 15.- An heir who was charged to transfer an estate to Septitius, when he reached the age of twenty years, in the meantime sold certain lands which the

esclavos.

§ 13.- Habiendo uno instituido varios herederos, entre los cuales también a tres libertos en nueve onzas, les dio a los mismos por prelegados unos fundos, y les pidió que no los enajenasen, y que el que sobreviviese obtuviera íntegros los mismos fundos; después encomendó a la fidelidad de uno solo de estos libertos, Otacilio, que le restituyese a Ticio todo lo que a él hubiese ido de la herencia o de los bienes, habiéndose deducido en proporción a esta parte las deudas, y los legados, y veinte áureos para él; se preguntó, si debería deducir también las terceras partes de los fundos prelegados a él mismo y a los co-libertos. Respondió, que, según lo que se exponía, no debía restituir el prelegado, porque el mismo testador había querido que se exceptuaran también los legados.

§ 14.- Un marido, habiendo instituido a su mujer heredera de la tercera parte, y habiéndole dado varios fideicomisos, le prelegó también la dote en estos términos: «quiero que a Seia, mi mujer, se le dé por mis hijos el importe de su dote, que me fue pagada por cuenta de ella», y encomendó a la fidelidad de la misma mujer que le restituyese el Ticio, hijo común, después de su muerte, la parte de herencia y cualquiera cosa que le hubiere legado; se preguntó, si por causa del fideicomiso debería restituirle a su hijo entre los demás legados también el importe de la dote, Respondió, que no a no ser que fuese manifiesto que el testador entendió que también se había de restituir la dote, y aun si lo hubiese entendido y esto se hubiere probado, habría acción para pedirla también, en este caso, si en la cantidad que quedara a título de Falcidia, no hubiese menos que en el importe de la dote.

§ 15.- Uno a quien se le legó que restituyera la herencia a Septicio, cuando tuviere veinte años, vendió entretanto unos fundos que el difunto había

iudicio a debitore conventus decessit herede relicto Sempronio et iudicio nondum finito restituit hereditatem Septicio. Quaesitum est, an iudicio nihilo minus ipse condemnari debeat, cum potuerit retinere (vel caveri sibi) id, quod ex causa iudicati praestaturus esset. Respondit iudicii executionem nihilo minus adversus heredem et post restitutam hereditatem mansisse.

§ 16.- Heres eius, qui post mortem suam rogatus erat universam hereditatem restituere, minimam quantitatem, quam solam in bonis fuisse dicebat, his quibus fideicommissum debebatur restituit: postea repetitis instrumentis apparuit quadruplo amplius hereditate fuisse: quaesitum est, an in reliquum fideicommissi nomine conveniri possit. Respondit secundum ea quae proponerentur, si non transactum esset, posse.

79.- IDEM; *libro singulari Quaestionum publice tractatarum*.- Si pupillus parenti suo heres extitit et fideicommissam hereditatis partem restituit, mox abstinetur paterna hereditate: optio deferenda est fideicommissario, ut aut portionem quoque pupilli adgnoscat aut toto discedat. Aut omnimodo bona vendenda sunt, ut id quod superfluum est pupillo servetur, et, si in solidum bona venire non possunt, omnimodo actiones fideicommissario denegandae erunt: erat enim in potestate illius universum suscipere et si quid plus erit, pupillo servare.

80.- IDEM; *libro V, Digestorum*.- Matrem et avunculum eosdemque creditores suos heredes scripsit Lucius Titius et eorum fidei commisit, ut post mortem restituerent, quod ex re familiari testatoris

deceased had received by way of pledge; and having been sued by the debtor on account of the pledge, died, leaving Sempronius his heir, who transferred the estate to Titius before the case was decided. The question arose whether Sempronius himself should, nevertheless, have judgment rendered against him; for he could have retained the property in his hands, or could have exacted security for what he might be compelled to pay if he was defeated in court. The answer was that the judgment against the heir could still be executed after the delivery of the estate.

§ 16.- The heir of a testator, who was charged to transfer the entire estate after his death, transferred only a small sum of money, which he alleged was all the property that belonged to the estate, to the beneficiaries of the trust who were entitled to it; and documents having subsequently been found, it appeared that there was four times as much in the estate as had been paid. The question arose whether suit could be brought against the heir for the remainder under the terms of the trust. The answer was that, in accordance with the facts stated, an action could be brought if no compromise had been made with him.

79.- THE SAME; *Questions Discussed in Public*.- If a minor child becomes the heir of his father, and transfers part of the estate which was left in trust, and afterwards rejects the estate, the beneficiary of the trust has the right to decide whether he will keep the part delivered to him by the minor, as well as the share of the latter; or reject all; or permit the entire property of the estate to be sold, in order that any amount over and above the indebtedness may be preserved for the minor. If the property cannot be disposed of as a whole, all actions at law should be refused the beneficiary of the trust; for it was in his power to take the entire estate, and to keep for the minor anything remaining after payment of the indebtedness.

80.- THE SAME; *Digest, Book V*.- Lucius Titius appointed his mother and his uncle, who were at the same time his creditors, his heirs, and charged them to transfer to Septitius any of his estate which might

recibido en prenda, y demandado por esta razón por el deudor con la acción pignoraticia, falleció habiendo dejado heredero a Sempronio, y no terminado todavía el juicio restituyó la herencia a Septicio; se preguntó, ¿deberá él ser no obstante condenado en el juicio, porque habría podido retener, o asegurarse para sí, lo que hubiese de pagar por causa de lo juzgado? Respondió, que la ejecución del juicio subsistió no obstante contra el heredero aun después de restituida la herencia.

§ 16.- El heredero de uno a quien se había rogado que después de su muerte restituyera toda la herencia, restituyó a aquellos a quienes se les debía el fideicomiso una pequeñísima cantidad, que decía fue la única que hubo en los bienes; después, habiéndose hallado instrumentos, apareció que en la herencia había cuatro veces más; se preguntó, si por razón del fideicomiso podría ser demandado por lo restante. Respondió, que, según lo que se exponía, podía serlo, si no se hubiese hecho transacción.

79.- EL MISMO; *Cuestiones tratadas en público, libro Único*.- Si un pupilo quedó heredero de su padre, y restituyó la parte de herencia dejada por fideicomiso, y después se abstiene de la herencia paterna, se le ha de dejar al fideicomisario opción para que o acepte también la porción del pupilo, o se abstenga de todo; o se han de vender todos los bienes, para que se le reserve al pupilo el sobrante que haya; y si los bienes no pueden ser vendidos por completo, se le habrán de denegar de todos modos las acciones al fideicomisario; porque estaba en su facultad tomarlo todo, y si hubiere algún sobrante reservarlo para el pupilo.

80.- EL MISMO; *Digesto, libro V*.- Lucio Ticio instituyó herederos a su madre y a su tío materno, que eran acreedores suyos, y encomendó a su fidelidad que después de su muerte le restituyeran a Septicio lo

superfuerit, Septicio. Heredes non modicam partem bonorum testatoris consumpserunt et multos heredes reliquerunt, quibus scientibus multa corpora, quae remanserant ex bonis Lucii Titii, Septicius possedit. Quaesitum est, an id, quod Lucius Titius debuit matri et avunculo, heredes eorum a Septicio petere possint. Respondit non posse. Claudius: aditione enim hereditatis confusa obligatio interciderat, sed fideicommissi repetitio erat: cuius aequitas defecit his, qui multa ex hereditate consumpsisse proponuntur.

81.- PAULUS; *Imperialium sententiarum in cognitionibus prolatarum ex libris VI, libro primo seu Decretorum libro II.*- Iulius Phoebus testamento facto, cum tres liberos heredes institueret, Phoebum et Heracliam ex eadem matre, Polycraten ex alia aequis portionibus, petit a Polycrate minore fratre, ut accepto certo praedio hereditatem fratribus concederet: et invicem eos, qui ex eadem matre erant, si qui eorum heres non fuisset, substituerat. Polycrati, si intra pubertatem decessisset, secundas tabulas fecit, quas matri eius commendavit aperiendas, si impubes obisset. Deinde petit a prioribus, ut, si quis eorum sine liberis decederet, portionem suam exceptis bonis maternis eorum et avitis ei vel eis qui superessent restitueret. Heraclia soror mortua sine liberis fratrem Phoebum heredem instituit: Polycrates fideicommissum petierat et optinuerat apud Aurelium Proculum Proconsulem Achaiae: appellatione facta, cum solus Phoebus egisset *altera parte absente*, victus est, quia "ei vel eis" verba utrosque fratres complecterentur. Adqui invicem duos illos tantum substituerat: sed et voluntas haec patris videbatur, qui exceperat eorum bona materna, quia Polycrates aliam matrem et quidem superstitem habebat, cuius etiam fideicommissum erat, ut legata, quae ei dederat in testamento, moriens Polycrati filio suo restitueret.

remain at the time of their death. The said heirs consumed a considerable part of the estate of the testator, and left several representatives who knew that Septicius had possession of many effects left from the estate of Lucius Titius. The question arose whether the heirs of the mother and the uncle could recover from Septicius anything which Lucius Titius owed them. The answer was that they could not do so. Claudius: The reason for this is that the obligations of the estate, having been merged, were extinguished; but that there could be a recovery on the ground of a trust, for those persons were destitute of justice who were alleged to have consumed much of the property belonging to the estate.

81.- PAULUS; *The Six Books of Imperial Opinions rendered in Judicial Proceedings, Book I, Otherwise, Decrees, Book II.*- Julius Phoebus, having made a will, appointed his three children heirs (that is to say, Phoebus and Heraclia by his first wife, and Polycrates by his second) to equal shares of his estate, and asked Polycrates, the younger brother, to give up the estate to his brothers, in consideration of receiving a certain tract of land; and he substituted the two other brothers, born of the same mother, for one another, if one of them should not become his heir. By a second will he made a pupillary substitution for Polycrates, if the latter should die before reaching puberty, and provided that this will should be opened by the mother, if the boy should die under that age. He then charged the two older brothers, if either of them should die without issue, to transfer his share to the survivor, or survivors, after deducting the property derived from the estates of their mother, and grandfather. The sister Heraclia died without leaving any children, and appointed her brother Phoebus, her heir. Polycrates brought an action to compel the execution of the trust, and gained his case before Aurelius Proculus, Proconsul of Achaia. An appeal having been taken by Phoebus alone, the other party to the suit being absent, he was defeated, because the words "The survivor or the survivors" included both brothers. Although reciprocal substitution was made only of the two oldest children, the intention of the father was held to be that he had excepted the property of the mother of

que de los bienes de familia del testador hubiere quedado; los herederos consumieron una parte no pequeña de los bienes del testador, y dejaron muchos herederos, con conocimiento de los que poseyó Septicio muchas cosas que habían quedado de los bienes de Lucio Ticio; se preguntó, si lo que Lucio Ticio debió a su madre y a su tío materno lo podrían pedir los herederos de estos a Septicio. Respondió, que no podían. Y dice Claudio: porque se había extinguido la obligación que se había confundido con la adición de la herencia; pero quedaba la repetición del fideicomiso, cuya equidad les faltó a los que se expone que consumieron muchas cosas de la herencia.

81.- PAULO; *libro I, de los seis de Sentencias Imperiales dadas en juicio contradictorio, o Decretos, libro II.*- Julio Febo, habiendo hecho testamento, al instituir herederos a tres hijos, a Febo y Heraclia de una misma madre, y a Polícrates de otra, en partes iguales, le pidió a Polícrates, hermano menor, que recibiendo cierto predio les concediese la herencia a los hermanos, y había substituido recíprocamente a los que eran de una misma madre, si alguno de ellos no hubiese sido heredero; hizo para Polícrates, si hubiese fallecido dentro de la pubertad, segundo testamento, que lo encomendó a su madre para que lo abriera, si hubiese muerto impúbere; después les pidió a los primeros, que, si alguno de ellos falleciera sin hijos, restituyera su porción, excepto los bienes maternos de los mismos y los de los abuelos, al que o a los que sobreviviesen; habiendo muerto sin hijos la hermana Heraclia, instituyó heredero a su hermano Febo; Polícrates había pedido el fideicomiso, y había ganado ante Aurelio Próculo, Procónsul de Acaya; interpuesta apelación, como solamente Febo la sostuviese, ausente la otra parte, fue vencido, porque las palabras «al o a los» comprendían a ambos hermanos; pero solamente había substituido recíprocamente a los dos; mas también parecía que era esta la voluntad del padre, el cual había exceptuado los bienes maternos de ellos, porque Polícrates tenía otra madre, y ciertamente sobreviviente, de quien también era el fideicomiso, para que muriendo intestada le restituyese a su hijo Polícrates los legados que le

the said children, because Polycrates had a different mother who was still living, and who had been charged to transfer to her son Polycrates the same legacies which had passed to her husband through his first wife having died intestate.

había dado.

TIT. II

TITLE II

TÍTULO II

QUANDO DIES LEGATORUM VEL
FIDEICOMMISSORUM CEDATAT WHAT TIME LEGACIES OR
TRUSTS TAKE EFFECTDE CUANDO CORRE EL TÉRMINO DE LOS
LEGADOS O DE LOS FIDEICOMISOS

1.- PAULUS; *libro II, ad Sabinum*.- Mortuo patre, licet vivo pupillo, dies legatorum a substituto datorum cedit.

1.- PAULUS; *On Sabinus, Book II*.- Legacies, with which a substitute is charged, take effect from the death of the father, even though the minor be living.

1.- PAULO; *Comentarios a Sabino, libro II*.- Muerto el padre, aunque viva el pupilo, corre el término de los legados dados a cargo del substituto.

2.- ULPIANUS; *libro XV, ad Sabinum*.- Si pure sit usus fructus legatus vel usus vel habitatio, neque eorum dies ante aditam hereditatem cedit neque petitio ad heredem transit. idem et si ex die sit usus fructus relictus:

2.- ULPIANUS; *On Sabinus, Book XV*.- Where the legacy of an usufruct, or use, or the right of habitation is bequeathed, it does not take effect until the estate is entered upon, and an action for its recovery does not pass to the heir. The same rule applies where an usufruct is bequeathed to begin at a certain time.

2.- ULPIANO; *Comentarios a Sabino, libro XV*.- Si puramente se hubiera legado el usufruto, o el uso, o la habitación, ni el término de ellos corre antes de haber sido adida la herencia, ni pasa al heredero su petición; lo mismo, también si se hubiera dejado el usufruto desde cierto día.

3.- IDEM; *libro V, Disputationum*.- Nam cum ad heredem non transferatur, frustra est, si ante quis diem eius cedere dixerit.

3.- THE SAME; *Disputations, Book V*.- For, as these rights cannot be transferred to the heir, it will be in vain to fix a day before that, when they will begin to take effect.

3.- EL MISMO; *Disputas, libro V*.- Porque cuando no se le transfiere al heredero, es inútil que alguno dijere que corre antes el término del mismo.

4.- IDEM; *libro XIX, ad Sabinum*.- Si "quum heres morietur" legetur, condicional legatum est: denique vivo herede defunctus legatarius ad heredem non transfert.

4.- THE SAME; *On Sabinus, Book XIX*.- If a bequest is made to anyone to take effect at the time of the death of the heir, the legacy is conditional, so that if the legatee should die during the lifetime of the heir, he will not transmit his right to his own heir.

4.- EL MISMO; *Comentarios a Sabino, libro XIX*.- Si se legara para cuando muera el heredero, el legado es condicional; y finalmente, viviendo el heredero, el legatario difunto no lo transfiere a su heredero.

§ 1.- Si vero, quum ipse legatarius morietur legetur ei, certum est legatum ad heredem transmitti.

§ 1.- If, however, the bequest should be made to the legatee to take effect at the time of his own death, it is certain that the legacy will pass to his heir.

§ 1.- Pero si se legara para cuando muriese el mismo legatario, es cierto que se transmite el legado a su heredero.

5.- IDEM; *libro XX, ad Sabinum*.- Si post diem legati cedentem legatarius decesserit, ad heredem suum transfert legatum.

5.- THE SAME; *On Sabinus, Book XX*.- If a legatee should die after the time when the legacy begins to take effect, he will transmit it to his own heir.

5.- EL MISMO; *Comentarios a Sabino, libro XX*.- Si el legatario hubiere fallecido después que corriese el término del legado, transfiere el legado a su heredero.

§ 1.- Itaque si purum legatum sit, ex die mortis dies eius cedit: si vero post diem sint legata relictas, simili modo atque in puris dies cedit, nisi forte id fuit

§ 1.- Therefore, if a legacy is bequeathed absolutely, it begins to become operative from the day of the death of the person who bequeathed it.

§ 1.- Y así, si el legado es puro, corre su término desde el día de la muerte; pero si los legados fueron dejados para después de su término, el término corre

legatum, quod ad heredem non transit: nam huius dies non ante cedit, ut puta si usus fructus sit post annum relictus: hanc enim sententiam probamus.

§ 2.- Sed si sub condicione sit legatum relictum, non prius dies legati cedit quam condicio fuerit impleta, ne quidem si ea sit condicio, quae in potestate sit legatarii.

§ 3.- Sed si ea condicio fuit, quam praetor remittit, statim dies cedit:

§ 4.- Idemque et in impossibili condicione, quia pro puro hoc legatum habetur.

§ 5.- Item si qua condicio sit, quae per legatarium non stat quo minus impleatur, sed aut per heredem aut per eius personam, in cuius persona iussus est parere condicioni, dies legati cedit, quoniam pro impleta habetur: ut puta si iussus sim heredi decem dare et ille accipere nolit. Sed et si ita mihi legatum sit, si Seiam uxorem duxero, nec ea velit nubere, dicendum erit diem legati cedere, quod per me non stat, quo minus paream condicioni, sed per alium stat, quo minus impleatur condicio.

§ 6.- Isdem autem diebus, id est isdem pensionibus heredi praestabitur legatum, quibus legatario ipsi praestabatur.

§ 7.- Si, quum dies legati cedere inciperet, alieni iuris est, deberi his legatum, quorum iuri fuit subiectus. Et ideo si purum legatum fuerit et post diem legati cedentem liber factus est, apud dominum legatum relinquet: sed si usus fructus fuerit legatus,

Where, however, legacies are bequeathed to take effect after a certain date, they begin to vest just as other absolute legacies do; unless something has been bequeathed which does not pass to the heir, for one of this kind will not become operative before the time prescribed; as for instance, where an usufruct is left to take effect after a year. We approve this opinion.

§ 2.- But where a legacy is bequeathed under a condition, it does not begin to vest before the condition is complied with, provided it is in the power of the legatee to comply with it.

§ 3.- Where, however, the condition is of such a nature that compliance with it is generally excused by the Praetor, it takes effect at once.

§ 4.- The same rule applies to a condition which is impossible, because a legacy of this kind is considered to be bequeathed absolutely.

§ 5.- Likewise, where the condition is such that the legatee is not responsible for non-compliance with it, but it is the fault of the heir, or of some other person who has been ordered to comply with the condition, the legacy will take effect, as the condition is considered to have been fulfilled; as, for instance, if I should be ordered to pay the heir ten OMrei, and he refuses to accept them. Where, however, a legacy is bequeathed to me if I marry Seia, and she is unwilling to marry me, it must be said that the legacy commences to vest, because it is not my fault that I do not comply with the condition, but another is to blame for its not being fulfilled.

§ 6.- A legacy shall be paid to the heir of the legatee at the same times, that is to say, in the same instalments as it is paid to the legatee himself.

§ 7.- If, when a legacy commences to be due, the legatee is under the control of someone else, it will be payable to those to whose authority he is subject. Hence, if the legacy is left absolutely to a slave, and he becomes free after the day when it is payable, the

del mismo modo que en los puros, a no ser acaso que se haya legado cosa que no pasa al heredero; porque el término de éste no corre antes, como por ejemplo, si se hubiera dejado el usufruto para después de un año; porque aprobamos esta opinión.

§ 2.- Pero si el legado hubiera sido dejado bajo condición, no corre el término del legado antes que se haya cumplido la condición; ni ciertamente aunque la condición sea tal, que esté en la facultad del legatario.

§ 3.- Pero si la condición fue una de las que remite el Pretor, al término corre desde luego.

§ 4.- Y lo mismo también tratándose de condición imposible, porque este legado es considerado como puro.

§ 5.- Igualmente, si hubiera alguna condición que no consista en el legatario que no se cumpla; pero si consistiera en el heredero, o en la persona de aquél, respecto a cuya persona se le mandó que cumpliera la condición, corre el término del legado, porque se tiene por cumplida, como, por ejemplo, si se me hubiera mandado que le diese diez al heredero, y él no quisiera recibirlos, Pero también, si se me hubiera legado así, si yo hubiere tomado por mujer a Seia, y ella no quisiera casarse, se habrá de decir que corre el término del legado, porque no consiste en mí que yo no cumpla la condición, sino que consiste en otro que la condición no sea cumplida.

§ 6.- Pero el legado se le dará al heredero en los mismos días, esto es, con las mismas pensiones, con que se le daba al mismo legatario.

§ 7.- Si, cuando comenzara a correr el término del legado, alguno fuese de ajeno derecho, se les debe el legado a aquellos a cuyo derecho estuvo sujeto; y por lo tanto, si el legado hubiere sido puro, y después de correr el término del legado se hizo libre, dejará el

licet post mortem testatoris, ante aditam tamen hereditatem sui iuris efficiatur, sibi legatum acquirit.

6.- PAULUS; *libro III, ad Sabinum*.- Quod pure datum est si sub condicione adimatur, quasi sub condicione legatum habetur.

§ 1.- At si extrinsecus suspendatur legatum, non ex ipso testamento: licet ante decedat legatarius, ad heredem transmississe legatum dicimus: veluti si rem dotalem maritus legaverit extero et uxori aliquam pro dotali re pecuniam, deinde deliberante uxore de electione dotis decesserit legatarius atque legatum elegerit mulier, ad heredem transire legatum dictum est. Idque et Iulianus respondit: magis enim mora quam condicio legato injecta videtur.

§ 2.- Eorum legatorum, quae in codicillis relicta sunt, perinde dies cedit atque testamento relictorum.

7.- ULPIANUS; *libro XX, ad Sabinum*.- Heredis aditio moram legati quidem petitioni facit, cessionis diei non facit.

§ 1.- Proinde sive pure institutus tardius adeat sive sub condicione per condicionem impediatur, legatarius securus est.

§ 2.- Sed et si nondum natus sit heres institutus aut apud hostes sit, similiter legatario non nocebit, eo quod dies legati cessit.

legacy will belong to his master. If, however, an usufruct is bequeathed, the slave will acquire the legacy for himself, even though he should become free after the death of the testator, and before the estate has been entered upon.

6.- PAULUS; *On Sabinus, Book III*.- Where a legacy is bequeathed absolutely, and is taken away under a condition, it is held to have been bequeathed conditionally.

§ 1.- If the effect of a legacy should be suspended for some reason which has no reference to the will, we hold that it will be transmitted to the heir, even though the legatee should die before it becomes operative. For instance, if a husband should bequeath dotal property to a stranger, and a certain sum of money to his wife in lieu of the said dotal property, and the legatee should die while the wife is deliberating as to the election of her dowry, and should choose the legacy, it has been decided that the legacy will pass to the heir. Julianus adopted this opinion, for delay rather than a condition seems to be attached to the legacy.

§ 2.- Legacies which are bequeathed by codicils take effect at the same time as those left by will.

7.- ULPIANUS; *On Sabinus, Book XX*.- The acceptance of the estate by the heir causes the claim for the legacy to be deferred, but does not prevent it from taking effect.

§ 1.- Hence, whether an heir who was appointed absolutely defers his acceptance of the estate, or, whether, if he was appointed conditionally, he is prevented from accepting it by the condition, the rights of the legatee will be protected.

§ 2.- If, however, an unborn heir, or a person who is in the hands of the enemy is appointed, in like manner, the rights of the legatee will not be prejudiced, because his legacy has begun to take effect.

legado en poder del señor. Mas si se hubiere legado el usufructo, aunque se haga de propio derecho después de la muerte del testador, pero antes de adida la herencia, adquiere para sí el legado.

6.- PAULO; *Comentarios a Sabino, libro III*.- Lo que fue dado puramente, si se quita bajo condición, es considerado como legado bajo condición.

§ 1.- Mas si se suspendiera el legado por una circunstancia extrínseca, no por virtud del mismo testamento, aunque el legatario fallezca antes, decimos que transmitió el legado al heredero; por ejemplo, si el marido hubiere legado a un extraño la cosa dotal, y a la mujer alguna cantidad en lugar de la cosa dotal, y luego, deliberando la mujer sobre la elección de la dote, hubiere fallecido el legatario, y la mujer hubiere elegido el legado, se dijo que el legado pasa al heredero; y esto respondió también Juliano; porque se considera que al legado se le puso más bien un retardo que una condición.

§ 2.- El término de los legados, que se dejaron en codicilos, corre del mismo modo que el de los dejados en testamento.

7.- ULPIANO; *Comentarios a Sabino, libro XX*.- La adición del heredero causa ciertamente mora para la petición del legado, y no la causa para que corra el término.

§ 1.- Por consiguiente, si el instituido puramente adiera más tarde, o si el instituido bajo condición estuviera impedido por la condición, está seguro el legatario.

§ 2.- Pero también si aun no hubiera nacido el heredero instituido, o estuviera en poder de los enemigos, de igual modo tampoco le perjudicará al legatario, porque corrió el término del legado.

§ 3.- Inde dicimus et si a substituto legatum sit relictum, quamdiu institutus deliberat defuncto legatario non nocebit, si postea heres institutus repudiavit: nam ad heredem suum transtulit petitionem.

§ 4.- Tantundem et si ab impuberis substituto legetur: nam ad heredem suum legatum transfert.

§ 5.- Tractari tamen potest, si impuberi substitutus damnatus sit, si intra pubertatem filius decesserit, seio centum dare, an vivo pupillo defunctus Seius ad heredem transferat, quasi ea condicio sit expressa, quae inerat. Et magis est ad heredem legatarii transire.

§ 6.- Interdum aditio heredis legatis moram facit, ut puta si forte servo manumisso vel ei cui servus legatus est et ideo servo aliquid legatum sit: nam servo legati relictis ante aditam hereditatem dies non cedit.

8.- IDEM; *libro XXIV, ad Sabinum*.- Nam cum libertas non prius competat quam adita hereditate, aequissimum visum est nec legati diem ante cedere: alioquin inutile fieret legatum, si dies eius cessisset antequam libertas competeret. Quod evenit, si servo pure legetur et liber esse sub condicione iubeatur et pendens condicio inveniatur et post aditam hereditatem.

§ 9.- IDEM; *libro XXI, ad Sabinum*.- Si habitatio filio familias vel servo legata sit, puto non adquiri domino vel patri legatum, si ante aditam hereditatem filius vel servus decesserit: nam quum personae cohaereat, recte dicitur ante aditam hereditatem diem

§ 3.- For this reason we say that where a substitute has been charged with a legacy, the legacy will not be affected, if, while the appointed heir is deliberating, the legatee should die; for his rights will not be prejudiced even if the appointed heir should afterwards reject the estate, since the legatee will transmit his claim to his own heir.

§ 4.- The case is the same where a substitute for a minor is charged with a legacy, for he also will transmit the legacy to his heir.

§ 5.- If the substitute of a minor is charged to pay a hundred aurei to Seius, and the son should die before reaching the age of puberty; it might be a subject of discussion whether, if Seius should die during the lifetime of the minor, he would transmit the legacy to his heir, just as if the condition upon which the legacy depended had been expressed. The better opinion is that the legacy will pass to the heir.

§ 6.- Sometimes the acceptance of the estate having been postponed by the heir, it causes the vesting of the legacies also to be postponed; as, for instance, where a slave is manumitted, or is left to someone, and a bequest is made to the slave on this account; for where a legacy is bequeathed to a slave, it never takes effect until the estate has been entered upon.

8.- THE SAME; *On Sabinus, Book XXIV*.- For as the slave is not entitled to his freedom before the estate has been accepted, it seems to be perfectly just that the legacy should not take effect before that time, otherwise, it would be void if it should become operative before the slave obtained his freedom, and this would be the case where a bequest was made absolutely to the slave, and he was ordered to be free under a certain condition, and the condition is ascertained to be pending after the estate has been entered upon.

9.- THE SAME; *On Sabinus, Book XXI*.- Where a right of habitation is bequeathed to a son under paternal control, or to a slave, I do not think that the legacy will be acquired by the master or the father, if the son of the slave should die before the estate is

§ 3.- Por lo cual decimos, que si el legado hubiera sido dejado a cargo del substituto, tampoco le perjudicará al legatario fallecido mientras el instituido delibera, si después el heredero instituido repudió; porque transfirió a su heredero la petición.

§ 4.- Lo mismo también si se legara a cargo del substituto de un impúbero; porque transfiere el legado a su heredero.

§ 5.- Mas si el substituto de un impúbero hubiera sido condenado a dar ciento a Seyo, si el hijo hubiere fallecido dentro de la pubertad, se puede discutir, si viviendo el pupilo lo transfiere el difunto Seyo al heredero, como si se hubiera expresado la condición que era inherente. Y es más cierto que pasa al heredero del legatario.

§ 6.- A veces la adición del heredero causa mora para los legados, por ejemplo, si acaso se hubiera legado alguna cosa a un esclavo manumitido, o a aquel a quien fue legado el esclavo, y, por lo tanto, al esclavo. Porque el término del legado dejado a un esclavo no corre antes de haber sido adida la herencia.

8.- EL MISMO; *Comentarios a Sabino, libro XXIV*.- Porque no compitiendo la libertad antes que haya sido adida la herencia, pareció muy justo que tampoco corriese antes el término del legado; de otro modo se haría inútil el legado, si hubiese corrido su término antes que competiese la libertad; lo que acontece, si a un esclavo se le legara puramente, y se mandara que fuese libre bajo condición, y se hallara pendiente la condición aun después de adida la herencia.

9.- EL MISMO; *Comentarios a Sabino, libro XXI*.- Si a un hijo de familia o a un esclavo hubiera sido legada la habitación, opino que no se adquiere para el señor o para el padre el legado, si el hijo o el esclavo hubiere fallecido antes de adida la herencia; porque

non cedere.

10.- IDEM; *libro XXIII, ad Sabinum*.- Quum in annos singulos legatur, non unum legatum esse, sed plura constat.

11.- IULIANUS; *libro XXXVII.- Digestorum*.- Nec refert, singuli aurei in annos singulos legentur an in annum primum mille aurei, in secundum homo, in tertium frumentum.

12.- ULPIANUS; *libro XXIII, ad Sabinum*.- Nec semel diem eius cedere, sed per singulos annos.

§ 1.- Sed utrum initio cuiusque anni an vero finito anno cedat, quaestionis fuit. Et Labeo Sabinus et Celsus et Cassius et Iulianus in omnibus, quae in annos singulos relinquuntur, hoc probaverunt, ut initio cuiusque anni huius legati dies cederet.

§ 2.- Inde Iulianus ait, hoc legatum si servo relinquatur, deinde post primum vel alterum annum sit liber, sibi eum adquirere.

§ 3.- Item Celsus scribit, quod et Iulianus probat, huius legati diem ex die mortis cedere, non ex quo adita est hereditas, et si forte post multos annos adeatur hereditas, omnium annorum legatario deberi.

§ 4.- Sed et si quotannis sit legatum, mihi videtur etiam in hoc initium cuiusque anni spectandum, nisi forte evidens sit voluntas testatoris in annuas pensiones ideo dividendis, quoniam non legatario consultum, sed heredi prospectum voluit, ne urgeretur ad solutionem.

accepted; for, as the legacy attaches to the person, it is very properly held that it does not take effect before the estate has been entered upon.

10.- THE SAME; *On Sabinus, Book XXIII*.- Where a legacy is bequeathed to be paid annually, it is evident that this is not one legacy, but several.

11.- JULIANUS; *Digest, Book XXXVII*.- It makes no difference whether so many aurei are payable every year, or the sum of a thousand aurei is to be paid at the end of the first year, and a slave is to be delivered at the end of the second, and grain at the end of the third.

12.- ULPIANUS; *On Sabinus, Book XXIII*.- Legacies of this kind are not merely payable once, but are payable annually.

§ 1.- The question arose whether such legacies were payable at the beginning, or at the end of every year. Labeo, Sabinus, Celsus, Cassius, and Julianus all were of the opinion that a legacy of this kind was payable at the beginning of every year.

§ 2.- Hence Julianus says that where a legacy of this kind is bequeathed to a slave, and he becomes free after the first or second year, he will acquire the legacy.

§ 3.- Celsus also says, and Julianus agrees with him, that such a legacy takes effect from the day of the death of the testator, and not from that on which the estate was accepted, and that if the estate should be entered upon after the lapse of several years, the legatee will be entitled to the legacy for all those years.

§ 4.- Where, however, a legacy payable annually is bequeathed, it seems to me that the beginning of every year should be understood also in this instance; unless it is clear that the intention of the testator, in dividing the legacy into annual payments, was rather to benefit the heir than the legatee, in order that he might not be compelled to pay the entire amount at

como es inherente a la persona, con razón se dice que no corre el término antes de haber sido adida la herencia.

10.- EL MISMO; *Comentarios a Sabino, libro XXIII*.- Es sabido que cuando se lega para cada año no hay un legado sólo, sino muchos.

11.- JULIANO; *Digesto, libro XXXVII*.- Y no importa que se legue un áureo para cada año, o mil áureos para el primer año, un esclavo para el segundo, y trigo para el tercero.

12.- ULPIANO; *Comentarios a Sabino, libro XXIII*.- Y que no corra su término una sola vez, sino para cada año.

§ 1.- Pero hubo cuestión sobre si correría al principio de cada año o si al fin del año. Y Labeón, Sabino, Celso, Cassio y Juliano aprobaron esto respecto a todos los que se dejan para cada año que el término de este legado corriese al principio de cada año.

§ 2.- Por lo cual dice Juliano, que si se le dejara a un esclavo, y luego fuese libre después del primero o del segundo año, él adquiere para sí este legado.

§ 3.- Asimismo escribe Celso, lo que aprueba también Juliano, que el término de este legado corre desde el día de la muerte, no desde aquel en que fue adida la herencia; y que si acaso fuera adida la herencia después de muchos años, se debían al legatario los de todos los años.

§ 4.- Pero aun si se hubiera legado para todos los años, me parece que también en este caso se ha de atender al principio de cada año, a no ser acaso que sea evidente la voluntad del testador que lo dividió en pensiones anuales, porque no quiso mirar por el legatario, sino atender al heredero, para que no fuese apremiado al pago.

once.

§ 5.- Si in habitationem aliquid vel in disciplinam legetur sic "annua" vel "quotannis", quibus diebus pensio debetur habitationis vel merces disciplinarum, isdem intellegitur legatum relictum, coniectura voluntatis facta.

§ 6.- Novissime Pomponius scribit nihil interesse, utrum "in annos singulos" vel "quotannis" an "in singulos menses" vel "quot mensibus" an "in singulos dies" vel "quot diebus" legetur. Ipse quoque huic sententiae accedo: proinde et si "annui" legentur tot aurei, idem erit dicendum.

§ 7.- Si cui homo generaliter sit legatus et antequam vindicet decesserit, ad heredem suum legatum transfert.

§ 8.- Si titio sit sic legatum "quem seius elegerit" et Seius post electionem decesserit, locus est vindicationi semel adquisitae.

13.- POMPONIUS; *libro VI, ad Sabinum*.- Huiusmodi legatum: "sive illud factum fuerit sive non fuerit, illi do lego", ad heredem non transit, nisi alter casus vivo legatario exstiterit, quoniam causa, ex qua debeatur, praecedere semper debet. Nec, quia certum est alterutrum futurum, omnimodo debebitur: nam tale legatum: "cum morietur, heres dato" certum est debitum iri et tamen ad heredem legatarii non transit, si vivo herede decedat.

§ 14.- ULPIANUS; *libro XXIV, ad Sabinum*.- Si usus fructus aut decem, utrum legatarius voluerit, sint legata, utrumque spectandum et mortem testatoris et aditionem hereditatis, mortem propter

§ 5.- Where a sum payable annually or every year was bequeathed to provide a lodging, or instruction, the conjecture of the will of the testator in making the bequest is that it will be payable at the time when the rent of the lodging, or the price of the instruction, is due.

§ 6.- In conclusion, Pomponius stated that it made no difference whether the legacy was payable every year, or annually; or every month, or monthly; or every day, or daily. I myself also adopt this opinion. Hence the same rule will apply where a certain sum of aurei payable annually is bequeathed.

§ 7.- Where a slave is bequeathed in general terms, and the legatee dies before claiming the slave, he transmits the legacy to his heir.

§ 8.- If a legacy is bequeathed to Titius as follows, "The slave whom Seius may select," and Seius should die after making his choice, there is ground for the recovery of the slave who has once been acquired by the legatee.

13.- POMPONIUS; *On Sabinus, Book VI*.- Where a legacy is bequeathed in the following terms, "I give and bequeath to So-and-So such-and-such an article, whether it has been made or not," the legacy does not pass to the heir, unless one or the other of the conditions has been fulfilled during the lifetime of the legatee; as the reason for which a legacy is due must always precede it, and not because it is certain that one or the other of two things will take place, and that the legacy will be due under all circumstances; for where a legacy is bequeathed as follows, "Let my heir give such-and-such property when he dies," it is certain that the legacy will be due, and still it does not pass to the successor of the legatee, if the latter should die during the lifetime of the heir.

14.- ULPIANUS; *On Sabinus, Book XXIV*.- Where "The usufruct of certain property, or the sum of ten aurei, whichever the legatee may select," is bequeathed, both the time of the death of the testator

§ 5.- Si para la habitación, o para la enseñanza se legara alguna cosa de este modo: «al año» o «cada año», se entiende, hecha conjetura de la voluntad, que se dejó el legado para los mismos días en que se debe la pensión de la habitación, o de los honorarios de la enseñanza.

§ 6.- Por último escribe Pomponio, que nada importa si se legara para cada año, o para todos los años, o para cada mes, o para tantos meses, o para cada día, o para tantos días; y yo mismo asiento también a esta opinión; por lo cual se habrá de decir lo mismo, aun si se legaran tantos áureos anuales.

§ 7.- Si en general se le hubiera legado a uno un esclavo, y hubiere fallecido antes que lo reivindicara, transfiere el legado a su heredero.

§ 8.- Si a Ticio se le hubiera legado así: «el que Seyo hubiere elegido», y Seyo hubiere fallecido después de la elección, hay lugar a la reivindicación una vez adquirida.

13.- POMPONIO; *Comentarios a Sabino, libro VI*.- Un legado de esta forma: «ora se hubiere hecho aquello, ora no se hubiere hecho, le doy y lego a aquel», no pasa al heredero, sino si uno de los casos se hubiere verificado viviendo el legatario porque siempre debe preceder la causa por que se deba, y no porque es cierto que uno de los dos ha de suceder se deberá de todos modos; porque este legado: «dé el heredero cuando muriere», es cierto que se ha de deber, y sin embargo, no pasa al heredero del legatario, si falleciera vi viendo el heredero.

14.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si se hubiera legado el usufruto, o diez monedas, lo que de las dos cosas quisiera el legatario, se ha de atender a ambas cosas, a la muerte del

decem, additionem propter usum fructum: quamvis enim electio sit legatarii, tamen nondum electioni locus esse potest, quum proponatur aut nondum testatorem decessisse aut eo mortuo hereditas nondum adita.

§ 1.- Inde quaerit Iulianus, si post mortem testatoris legatarius decedat, an ad heredem transferat decem legatum, et libro trigensimo septimo Digestorum scribit posse dici decem transtulisse, quia mortuo legatario dies legati cedit. Argumentum Iulianus pro sententia sua adfert tale: "Seiae decem aut, si pepererit, fundum heres meus dato": nam si, antequam pariat, inquit, decesserit, ad heredem suum decem transmittet.

§ 2.- Si ita quis legaverit filio familias, ut ipsi solvatur, potest procedere legatum nec imputari heredi, cur non patri, sed potius filio solvat: finge enim hoc nominatim expressum "ita ut filio solvat": certe si pater petat, exceptione erit repellendus.

§ 3.- Si dies legati cesserit, deinde legatarius in ius alienum pervenit, ipsi potius debetur legatum, in cuius ipse ius pervenit: transeunt enim cum eo, quae ei debebantur. Sed si sub condicione fuerit legatum, non transit, sed expectabit condicionem eique adquiratur, cuius iuris erit condicionis existentis tempore: quod si sui iuris fuerit eo tempore, sibi potius adquirit.

15.- IDEM; *libro V, Disputationum*.- Si ita esset liberis fideicommissum relictum, si morte patris sui

and that of the acceptance of the estate must be taken into consideration; the date of the death on account of the payment of the ten aurei, and that of the acceptance of the estate because of the usufruct. For, although the legatee has the right of choice, still, the selection cannot at once take effect, as it is supposed that the testator has not yet died, or if he has died, that his estate has not yet been entered upon.

§ 1.- Therefore, Julianus asks, if the legatee should die after the death of the testator, whether the legacy of the ten aurei will pass to the heir. He says, in the Thirty-seventh Book of the Digest, that the ten aurei may be considered to have been transmitted to him, because the legacy begins to vest at the time of the death of the legatee. Julianus gives the following example in support of his opinion, "Let my heir pay ten aurei to Seia; if she has a child let him convey to her such-and-such a tract of land," for he holds that if she should die before having a child, she will transmit the ten aurei to her heir.

§ 2.- If anyone should make a bequest to a son under paternal control and charge him to pay himself, the legacy will stand, and the heir will not be to blame for paying it to the son, rather than to the father; for suppose, for instance, that he had been especially directed to pay the son. It is certain that if the father brings suit to recover the legacy, he should be barred by an exception.

§ 3.- If, after the legacy takes effect, the legatee should be subjected to the control of another, the legacy will be due to the person under whose authority he has passed, for everything to which he is entitled is transferred with him. If, however, the legacy was bequeathed under a condition, it will not pass, but its delivery will be deferred until the condition has been fulfilled; and it will be acquired by the person under whose control the legatee was at the time when the condition was complied with. If the legatee should be his own master at that time, he himself will acquire the legacy.

15.- THE SAME; *Disputations, Book V*.- Where a trust is left to children, "If they should become their

testador, y a la adición de la herencia a la muerte, por causa de las diez monedas, y a la adición, por causa del usufructo; porque aunque la elección sea del legatario, no puede haber, sin embargo, todavía lugar a la elección, porque se expone o que todavía no falleció el testador, o que, habiendo fallecido éste, aun no fue adida la herencia.

§ 1.- Por lo cual pregunta Juliano, si, falleciendo el legatario después de la muerte del testador, se le transfiere al heredero el legado de las diez monedas. Y escribe en el libro trigésimo séptimo del Digesto, que se puede decir que transfirió las diez monedas, porque muerto el legatario corre el término del legado, Juliano aduce en apoyo de su opinión este argumento; «dele a Seia mi heredero diez monedas, o si hubiere parido, un fundo»; porque si hubiere fallecido, dice, antes que pariese, transmitirá las diez monedas a su heredero.

§ 2.- Si uno hubiere legado a un hijo de familia de modo que se le pague a él mismo, puede ser procedente el legado y no imputársele al heredero, porque no le pague al padre y si más bien al hijo; porque supón que determinadamente se hubiera expresado esto así, para que le pague al hijo; ciertamente que si el padre pidiera, habrá de ser repelido con la excepción.

§ 3.- Si hubiere corrido el término del legado, y después el legatario llegó a ser de derecho ajeno, se debe el legado mas bien a éste a cuyo derecho llegó a pertenecer aquel; porque pasan con él todas las cosas que a él se le debían. Pero si se hubiere hecho el legado bajo condición, no pasa, sino que esperará la condición, y se adquirirá para aquel de cuyo derecho fuere al tiempo de cumplirse la condición; mas si fuere de propio derecho en este tiempo, mas bien lo adquirirá para sí.

15.- EL MISMO; *Disputas, libro V*.- Si a los hijos se les hubiese dejado un fideicomiso de este modo, si

iuris essent effecti, nec mortalitate patris, sed emancipatione patres familiarum constituti sint, deberi eis fideicommissum nemo dubitaverit diemque eius emancipatione cessisse, qui morte patris cederet.

16.- IULIANUS; *libro XXXV, Digestorum*.- Quum ita legatum est: "Stichum vel quod ex Pamphila natum erit heres meus dato", non ante legati eius cedet, quam aliquid ex Pamphila natum fuerit aut certum fuerit nasci non posse.

§ 1.- Quum servo legato, antequam hereditas eius qui legaverat adiretur, usus fructus ab alio legatus fuerit et prior hereditas eius, qui usum fructum legaverit, adita fuerit: nulla ratio est, cur diem legati cedere existimemus, antequam ea quoque hereditas, ex qua servus legatus erat, adeatur, cum neque in praesentia ullum emolumentum hereditati adquiratur et, si interim servus mortuus fuerit, legatum extinguatur. Quare adita hereditate existimandum est usum fructum ad eum, cuius servus legatus esset, pertinere.

§ 2.- Quod si servus, cui usus fructus legatus fuerit, ipse legatus non fuerit, dicendum est usum fructum ad hereditatem pertinere, eo quod dies eius ante aditam hereditatem non cesserit.

17.- IDEM; *libro XXXVI, Digestorum*.- Cum legato servo aliquid legatur, dies eius legati quod servo datur non mortis tempore, sed aditae hereditatis cedit: et ideo impedimento non est regula iuris, quo minus manumisso legatum debeatur, quia etsi confestim pater familias moreretur, non in eiusdem personam et emolumentum legati et obligatio iuris concurreret. Perinde igitur est hoc, de quo quaeritur, ac si filio herede instituto patri legatum esset: quod consistere intellegitur eo, quod, quamvis

own masters by the death of their father," and they become independent, not through his death, but through emancipation by him, no one can doubt that they will be entitled to the benefit of the trust, and that the legacy which would have taken effect at the death of their father will vest from the time of their emancipation.

16.- JULIANUS; *Digest, Book XXXV*.- Where a legacy is bequeathed in the following terms, "Let my heir give Stichus, or any children born to Pamphila," the legacy will not be payable before the day when Pamphila has a child, or at a time when it will be certain that a child will not be born to her.

§ 1.- Where an usufruct is bequeathed by anyone to a slave, who was himself bequeathed by his master before the estate of the latter has been entered upon, and also before the estate of him who left the usufruct has been accepted, we think that there is no reason why the legacy should begin to take effect before the estate to which the slave who was bequeathed belonged is entered upon, as no advantage will at present accrue to the estate, and if in the meantime the slave should die, the legacy will be extinguished. Therefore, it must be held that as soon as the estate has been entered upon, the usufruct must be considered to belong to the person whose slave was bequeathed.

§ 2.- If the slave to whom the usufruct was left should not himself have been bequeathed, it must be said that the usufruct will belong to the estate, because the time for it to take effect did not arrive before the estate was accepted.

17.- THE SAME; *Digest, Book XXXVI*.- Where a legacy is left to a slave who is himself bequeathed, the legacy does not take effect at the time of the death of the testator, but at the time when the estate is entered upon; and hence the rule of law under which a legacy is not permitted to be given to a slave, even if he is manumitted, cannot be cited in opposition; for even if the testator should die immediately, the benefit of the legacy and the obligation of the law to pay the same are not concurrent in the person of the

por la muerte de su padre se hubiesen hecho de propio derecho y se hubieran hecho padres de familia, no por el fallecimiento del padre, sino por la emancipación, nadie dudará que se les debe el fideicomiso, y que desde la emancipación de aquél corrió el término que correría desde la muerte del padre.

16.- JULIANO; *Digesto, libro XXXV*.- Cuando se legó así: «dé mi heredero a Stico, o lo que de Pánfila hubiere nacido», el término de este legado no correrá antes que algo hubiere nacido de Pánfila, o hubiere sido cierto que no podía nacer.

§ 1.- Cuando al esclavo que había sido legado, antes que se adiese la herencia del que lo había legado se le hubiere legado por otro un usufruto, y hubiere sido adida primero la herencia del que hubiere legado el usufruto, no hay ninguna razón para que estimemos que corre el término del legado antes que sea adida también la herencia en virtud de la que había sido legado el esclavo, por que de presente no se adquiere ningún emolumento para la herencia, y, si entretanto hubiere fallecido el esclavo, se extingue el legado; por lo cual, habiéndose adido la herencia, se ha de estimar que el usufructo le pertenece a aquel cuyo esclavo hubiese sido legado.

§ 2.- Pero si el esclavo a quien hubiere sido legado el usufruto no hubiere sido a su vez legado, se ha de decir que el usufructo le pertenece a la herencia, porque su término no habrá corrido antes de haber sido adida la herencia.

17.- EL MISMO; *Digesto, libro XXXVI*.- Cuando se lega alguna cosa al esclavo legado, el término del legado que se da al esclavo corre no desde el tiempo de la muerte, sino desde aquel en que fue adida la herencia; y por lo tanto, no es impedimento la regla de derecho para que no se deba el legado al manumitido, porque aunque inmediatamente muriese el padre de familia, no concurrirían en la persona del mismo el emolumento del legado y la obligación del derecho. Por lo cual, es lo mismo el caso de que se

statim pater familias moriatur, potest emancipatus adire hereditatem, ut patri legatum debeat.

18.- IDEM; *libro XXXVII, Digestorum*.- Is cui ita legatum est "quandoque liberos habuerit" si praegnate uxore relictas decesserit, intellegitur expleta condicione decessisse et legatum valere, si tamen postumus natus fuerit.

19.- IDEM; *libro LXX, Digestorum*.- Quum sine praefinitione temporis legatum ita datum fuerit: "uxori meae penum heres dato: si non dederit, centum dato", unum legatum intellegitur centum et statim peti potest, penoris autem causa eo tantum pertinet, ut ante litem contestatam tradita peno heres liberetur.

§ 1.- Quod si ita scriptum sit "si penum intra kalendas non dederit, centum dato", non efficitur, ut duo legata sint, sed ut centum legata sub condicione videantur: idcirco si uxor ante kalendas decesserit, heredi suo neque penum relinquet, quia legata non est, neque centum, quia dies legati cesserit necesse est legataria viva.

§ 2.- Statim dies mihi cedit, cum ab eo mihi fideicommissum datum est, cui sub condicione legatum est, quemadmodum si herede instituto sub condicione pure mihi legetur.

same individual. Therefore, the question under discussion is exactly the same as if a bequest had been made to a father, after his son had been appointed the heir of the testator; because it is understood that even if the father should die immediately, his son, having been emancipated, could enter upon the estate just as if he owed the legacy to his father.

18.- THE SAME; *Digest, Book XXXVII*.- Where a legacy is bequeathed to any one as follows, "When he shall have children," and he dies leaving his wife pregnant, it is understood that the condition was complied with at the time of his death, and the legacy will be valid, provided a posthumous child should be born.

19.- THE SAME; *Digest, Book LXX*.- Where a legacy is bequeathed without prescribing any time, as follows, "Let my heir provide my wife with provisions for her support, and if he does not do so, let him pay her a hundred aurei," the legacy is understood to be only one of a hundred aurei, and it can be claimed at once. The statement relative to provisions has no other effect than to release the heir from liability, if they are delivered before issue has been joined in the case.

§ 1.- Where the following provision was inserted into a will, namely, "If he should not furnish my wife with provisions before the Kalends of such-and-such a month, let him pay her a hundred aurei," it is held that the result is not that there have been two legacies created, but that a hundred aurei were bequeathed to her under a condition. Hence if the wife should die before the Kalends of the month designated, she will not leave the provisions to her heir, because they have not been bequeathed; nor will she leave him a hundred aurei, because the day for the payment of the legacy has not arrived.

§ 2.- Where a legacy is bequeathed under a condition to someone who is charged with a trust for my benefit, it is just as if the legacy was bequeathed to me absolutely, and the heir was appointed under a condition.

trata, que si instituido heredero el hijo se hubiese hecho al padre un legado, el cual se entiende que es válido por esto, porque aunque el padre de familia muera inmediatamente, puede el emancipado adir la herencia para deberle al padre el legado.

18.- E L MISMO; *Digesto, libro XXXVII*.- Si aquel a quien se le legó de este modo: «cuando hubiere tenido hijos», hubiere fallecido estando embarazada su mujer, se entiende que falleció cumplida la condición, y que el legado es válido, si, no obstante, hubiere nacido el póstumo.

19.- EL MISMO; *Digesto, libro LXX*.- Cuando sin fijación de tiempo se hubiere dado así un legado: «dele mi heredero las provisiones a mi mujer; si no se las diere, dele ciento», se entiende que hay un solo legado de ciento, y que puede ser pedido desde luego, pero la expresión de las provisiones tiene por objeto solamente que, entregadas las provisiones antes de contestada la demanda, quede libre el heredero.

§ 1.- Pero si se hubiera escrito así: «si no hubiere dado las provisiones dentro de las Calendas, dé ciento», no resulta que haya dos legados, sino que se consideran legados los ciento bajo condición; y por lo tanto, si la mujer hubiere fallecido antes de las Calendas, ni le dejara a su heredero las provisiones, que no fueron legadas, ni aquellos ciento, porque hubiere corrido el término del legado.

§ 2.- Cuando se me dio un fideicomiso a cargo de aquel a quien bajo condición se hizo un legado, se me lega puramente, a la manera que si el heredero hubiere sido instituido bajo condición.

§ 3.- Si debitori quod sub condicione debet legatum est, praesens legatum est agique ex testamento statim potest, ut liberatio praestetur, et, si post mortem testatoris decesserit, ad heredem transmitti actionem.

§ 4.- Haec dicenda erunt et si non ipsi debitori, sed alii cuilibet similiter legatum esse proponatur.

20.- MARCIANUS; *libro VI, Institutionum*.- Si quum praefinitione annorum legatum fuerit, veluti "Titio dena usque ad annos decem", Iulianus libro trigensimo Digestorum scribit interesse: et si quidem alimentorum nomine legatum fuerit, plura esse legata et futurorum annorum legatum legatarium mortuum ad heredem non transmitti: si vero non pro alimentis legavit, sed in plures pensiones divisit exonerandi heredis gratia, hoc casu ait omnium annorum unum esse legatum et intra decennium decedentem legatarium etiam futurorum annorum legatum ad heredem suum transmitti: quae sententia vera est.

21.- PAULUS; *libro II, ad Vitellium*.- Si dies adposita legato non est, praesens debetur aut contestum ad eum pertinet cui datum est: adiuncta quamvis longa sit, si certa est, veluti kalendis ianuariis centesimis, dies quidem legati statim cedit, sed ante diem peti non potest: at si incerta, quasi "quum pubes erit" "quum in familiam nupserit" "quum magistratum inierit" quum aliquid demum, quod scribenti comprehendere sit commodum, fecerit: nisi tempus condiciove optigit, neque res pertinere neque dies legati cedere potest.

§ 3.- Where a legacy of the amount which he owes is bequeathed to a debtor it is payable immediately, and an action can at once be brought under the will to obtain a release; and if the debtor should die after the death of the testator, he will transmit his right of action to his heir.

§ 4.- The same rule will apply where a legacy is left in the same manner, not to the debtor himself, but to someone else.

20.- MARCIANUS; *Institutes, Book VI*.- Where a legacy is bequeathed for a prescribed number of years, for instance, the sum of ten aurei is left to Titius payable annually for ten years, Julianus, in the Thirteenth Book of the Digest, says that a distinction must be made; for if the legacy is bequeathed for the purpose of support, there are several distinct legacies, and if the legatee should die he will not transmit to his heir those which are payable in years to come. If, however, the testator did not bequeath the legacy in order to provide support, but divided it into several payments for the convenience of the heir, in this instance, he says that the sums payable in future years will constitute but a single bequest, and if the legatee should die within ten years, he will transmit to his heir the amounts due for the ensuing time. This opinion is correct.

21.- PAULUS; *On Vitellius, Book II*.- If a day is not fixed for the payment of a legacy, it will be payable at once, or it belongs immediately to the person to whom it was given. Where a term is prescribed, even though it may be a long one, provided it is certain (as, for instance, after a hundred Kalends of January), the legacy vests immediately on the death of the testator, but it cannot be collected before the time which was fixed arrives. If, however, the time is uncertain (for example, when the boy arrives at puberty, or when he marries into my family, or when he obtains the office of magistrate, or finally, when he does something which it suited the testator to insert into his will), if the time does not arrive, or the condition take place, the property will not belong to the legatee, nor can the legacy take effect.

§ 3.- Si se legó a un deudor lo que debe bajo condición, el legado es de presente, y desde luego se puede ejercitar acción en virtud del testamento, para que se dé la liberación, y si hubiere fallecido después de la muerte del testador, transmite la acción al heredero.

§ 4.- Esto se habrá de decir también si se expusiera que del mismo modo se hizo el legado, no al mismo deudor, sino a otro cualquiera.

20.- MARCIANO; *Instituta, libro VI*.- Pero si el legado hubiere sido hecho con previa fijación de los años por ejemplo: «a Ticio diez hasta diez años», escribe Juliano en el libro trigésimo del Digesto, que hay diferencia; y que si verdaderamente se hubiere hecho el legado por razón de alimentos, hay muchos legados, y que el legatario fallecido no transmite al heredero el legado de los años venideros; pero si no lo legó por alimentos, sino que lo dividió en muchas pensiones para descargar al heredero, en este caso, dice, que es uno solo el legado de todos los años, y que el legatario que fallece dentro del decenio transmite a su heredero también el legado de los años futuros; cuya opinión es verdadera.

21.- PAULO; *Comentarios a Vitelio, libro II*.- Si no se fijó término en el legado, se debe de presente, o le pertenece desde luego a aquel a quien se le dió; habiéndose añadido, aunque sea largo, si es cierto, por ejemplo, para las centésimas Calendas de Enero, corre ciertamente, desde luego, el término del legado, pero no puede ser pedido antes del término. Mas si fuese incierto, como cuando fuere púbero, cuando ella se hubiere casado en la familia, cuando hubiere ingresado en la magistratura, cuando, finalmente, hubiere hecho alguna cosa que fuera fácil comprender en la escritura, si no llega el tiempo o se cumple la condición, ni puede pertenecer la cosa, ni puede correr el término del legado.

§ 1.- Si sub condicione, qua te heredem institui, sub ea condicione Titio legatum sit, Pomponius putat perinde huius legati diem cedere atque si pure relictum esset, quoniam certum esset herede existente debitum iri: neque enim per condicionem heredum fieri incerta legata nec multum interesse tale legatum ab hoc "si heres erit, dato".

22.- POMPONIUS; *libro V, ad Quintum Mucium*.- Si Titio, "quum is annorum quattuordecim esset factus", legatum fuerit et is ante quartum decimum annum decesserit, verum est ad heredem eius legatum non transire, quoniam non solum diem, sed et condicionem hoc legatum in se continet "si effectus esset annorum quattuordecim", qui autem in rerum natura non esset, annorum quattuordecim esse non intellexeretur. Nec interest, utrum scribatur "si annorum quattuordecim factus erit" an ita quum priore scriptura per condicionem tempus demonstratur, sequenti per tempus condicio, utrobique tamen eadem condicio est.

§ 1.- Quaedam autem condiciones etiam supervacuae sunt, veluti si ita scribat: "Titius heres esto. Si Titius hereditatem meam adierit, Maevio decem dato": nam pro non scripto ea condicio erit, ut omnimodo ad heredem Maevii legatum transeat, etiamsi Maevius ante aditam hereditatem decesserit. et idem, si ita fuerit scriptum: "si Titius hereditatem meam adierit, intra dies centum Maevio decem dato": nam hoc legatum in diem erit, non sub condicione, quia definitio labeonis probanda est dicentis id demum legatum ad heredem legatarii transire, quod certum sit debitum iri, si adeatur hereditas.

§ 2.- Si tamen duos heredes instituam et, si alter ex his adeat hereditatem, alicui legem ab omnibus heredibus: non erit pro supervacuo ea condicio, sed

§ 1.- Where a bequest is made to Titius subject to the same condition under which I have appointed you my heir, Pomponius thinks that the legacy will begin to take effect just as if it had been left absolutely, as it is certain that it will be payable whenever there is an heir; for a legacy does not become uncertain on account of a condition that there shall be an heir, since a bequest of this kind does not differ greatly from one dependent upon the following condition, "Let payment be made to him, if he should become my heir."

22.- POMPONIUS; *On Quintus Mucius, Book V*.- If a legacy should be made to Titius, payable when he reaches the age of fourteen years, and he dies before attaining his fourteenth year, it is true that the legacy will not pass to his heir, as it includes not only the time but also the condition under which it will take effect; that is to say, when the legatee reaches the age of fourteen years. Moreover, anyone who is not in existence cannot be understood to be fourteen years old. Nor does it make any difference whether the following clause, "If he should reach the age of fourteen years," is inserted; as, in the first instance, the time is indicated by the condition, and in the second, the condition is indicated by the time, since the same condition applies to both.

§ 1.- Again, some conditions are superfluous, as for example, if a testator should say, "Let Titius be my heir, and if he enters upon my estate, let him pay ten aurei to Mevius." This condition is considered not to have been written, as the legacy will pass to the heir of Maevius, even if the latter should die before the estate was accepted. The rule will be the same where it is written, "If Titius enters upon my estate, let him pay Maevius ten aurei within a hundred days." For this legacy was payable within a certain time, and not under a condition, and the rule of Labeo, who says that a legacy will pass to the heir of the legatee when it is certain that it will be payable if the estate is entered upon, should be adopted.

§ 2.- Still, if I appoint two heirs, and charge both of them with a trust for the benefit of someone, if either should accept the estate, this condition will not be

§ 1.- Si bajo la misma condición con que te instituí heredero se le hubiera legado a Ticio, opina Pomponio que corre el término de este legado lo mismo que si hubiese sido dejado puramente, porque sería cierto que se habría de deber existiendo el heredero; pues ni por la condición puesta a los herederos se hacen inciertos los legados, ni tal legado se diferencia mucho de este: «dé, si fuere heredero».

22.-POMPONIO; *Comentarios a Quinto Mucio libro V*.- Si se le hubiere legado a Ticio para cuando éste hubiese llegado a ser de catorce años, y él hubiere fallecido antes de cumplir los catorce años, es verdad que el legado no pasa a su heredero, porque este legado contiene en sí no solamente un término, sino también esta condición, si hubiese llegado a ser de catorce años; mas el que no viviese no se entendería que no era de catorce años. Y no importa que se escriba: «si hubiere llegado ir ser de catorce años», o de este modo, porque en la primera escritura se determina el tiempo por la condición, y en la segunda la condición por el tiempo; pero en ambos casos es la misma la condición.

§ 1.- Pero algunas condiciones son también superfluas, como si se escribiera así: «sea heredero Ticio; si Ticio hubiere adido mi herencia, dele diez a Mevio»; porque esta condición se tendrá por no escrita, de suerte que de todos modos pase el legado al heredero de Mevio, aunque Mevio hubiere fallecido antes de haber sido adida la herencia. Y lo mismo si se hubiere escrito de este modo: «si Ticio hubiere adido mi herencia, dele diez dentro de cien días»; porque este legado será a término, no bajo condición, pues se ha de aprobar la definición de Labeón, que dice, que solamente pasa al heredero del legatario el legado que sea cierto que se ha de deber, si se adiese la herencia.

§ 2.- Pero si yo instituyera dos herederos, y si uno de ellos adiera la herencia, hiciera yo un legado a alguno a cargo de todos los herederos, no será

in portionem quidem coheredis valebit, in ipsius autem, cuius persona in condicione comprehensa est, supervacua erit, perinde atque si solo eo herede instituto eo modo legatum esset.

23.- ULPIANUS; *libro IV, ad legem Iuliam et Papiam*.- Quum in annos singulos legatum relinquitur, sine dubio per annos singulos inspecta condicione legatarii aut capere. Et si plurium servus sit, singulorum dominorum erunt personae spectandae.

24.- PAULUS; *libro VI, ad legem Iuliam et Papiam*.- Si penum heres dare damnatus sit vel fundum et, si non dedisset, decem, ego accepi et penum legatam et translatam esse in decem, si noluerit penum heres dare, et tunc pecuniam deberi, cum interpellatus fundum non dedisset, et, si interea decesserit legatarius, tunc heredi eius non nisi fundum deberi. Namque cum dictum est: "at publicius fundum dato", perfectum est legatum et quum dicit: "si non dederit, centum dato", sub condicione fundi legatum ademptum videri eo casu, quo centum deberi coeperint. Quorum quia condicio vivo legatario non exstiterit, forte quia interpellatus heres non sit, evenit, ut ademptio nihil egerit fundique legatum duraverit.

§ 1.- Plane si sic legatum sit: "si penum non dederit, decem dato", dicimus non esse penum legatum.

25.- PAPINIANUS; *libro XVIII, Quaestionum*.- Quum illud aut illud legetur, enumeratio plurium

considered superfluous, but will be valid so far as the share of the co-heir is concerned; but it will be void with reference to the person to whom the condition relates, just as if the legacy had been bequeathed in the same way after the appointment of a single heir.

23.- ULPIANUS; *On the Lex Julia et Papia, Book IV*.- Where a legacy is bequeathed payable every year, it is said that there is no doubt that the condition of the legatee should be investigated every year, to determine whether he is capable of receiving it; and if he is a slave belonging to several masters, the condition of the different masters must be investigated.

24.- PAULUS; *On the Lex Julia et Papia, Book VI*.- Where an heir is charged with the delivery of provisions or land, and, if he should not deliver them, is required to pay ten aurei; and I have ascertained that the provisions which were the subject of the legacy have been changed into the sum of ten aurei, and if the heir refuses to deliver the provisions, the money will then be payable; and if, when notified to deliver the land, the heir does not do so, and, in the meantime he should die, his heir will not be entitled to anything but the land. For when anyone says, "Let my heir Publicius transfer such-and-such a tract of land," the legacy is complete, and if he should add, "If he does not transfer it, let him pay a hundred aurei," the legatee seems to have been deprived of the devise of the land on condition that the hundred aurei will begin to be due; and if the condition should not be fulfilled during the lifetime of the legatee, for instance, because no demand was made upon the heir, the result will be that the deprivation of the legacy will be of no force or effect, and the devise of the land will remain.

§ 1.- When a bequest is made as follows, "If my heir should not furnish the provisions, let him pay ten aurei," we hold that it is clear that no provisions have been bequeathed.

25.- PAPINIANUS; *Questions, Book XVIII*.- Where such-and-such an article, or such-and-such a

superflua esta condición, sino que valdrá ciertamente respecto a la porción del coheredero; pero será superflua respecto a la de aquel cuya persona fue comprendida en la condición, lo mismo que si habiendo sido instituido sólo el coheredero, se hubiese hecho de este modo el legado.

23.- ULPIANO; *Comentarios a la ley Julia y Papia, libro IV*.- Cuando se deja un legado para cada año, dice que atendida la condición del legatario lo adquiere sin duda cada año; y si el esclavo fuera de muchos, se habrá de atender a la persona de cada uno de los dueños.

24.- PAULO; *Comentarios a la ley Julia y Papia, libro VI*.- Si el heredero hubiera sido condenado a dar las provisiones, o un fundo, y, si no los hubiese dado, diez; monedas, entendí que se legaron las provisiones, y que si el heredero no hubiere querido dar las provisiones, fueron conmutadas por las diez monedas; y que entonces se debe el dinero cuando interpelado no hubiese dado el fundo; y si entretanto hubiere fallecido el legatario, en este caso no se debe a su heredero sino el fundo. Porque cuando se dijo: «mas dé Publicio un fundo», el legado es perfecto, y cuando dice: «si no lo hubiere dado, dé ciento», se considera quitado bajo condición el legado del fundo en el caso de que se hubieren comenzado a deber los ciento, porque como la condición de éstos no se había cumplido viviendo el legatario -acaso porque el heredero no fue requerido-, sucederá que la revocación no producirá ningún efecto, y subsistirá el legado del fundo.

§ 1.- Y a la verdad, si se hubiera legado así: «si no hubiere dado las provisiones, dé diez», decimos que no se legaron las provisiones.

25.- PAPINIANO; *Cuestiones, libro XVIII*.- Cuando se legue tal o cual cosa, la enumeración de

rerum disiunctivo modo comprehensa plura legata non facit. Nec aliud probari poterit, si pure fundum alterum vel alterum sub condicione legaverit: nam pendente condicione non erit electio nec, si moriatur, ad heredem transisse legatum videbitur.

§ 1.- Heres meus Titio dato quod mihi seius debet. Si Seius pupillus sine tutoris auctoritate nummos accepit nec locupletior factus est et creditor ad praesens debitum verba rettulit, quia nihil Seius debet, nullius momenti legatum erit: quod si verbo debiti naturalem obligationem et futuram solutionem cogitavit, interim nihil Titius petet, quasi tacite condicio inserta sit, non secus ac si ita dixisset: "Titio dato, quod pupillus solverit" vel si legasset "quod ex arethusa natum erit" vel "fructus, qui in illo fundo nascentur". Contrarium non est, quod, si medio tempore legatarius moriatur et postea partus edatur, fructus perveniant, pecuniam pupillus exsolvat, heres legatarii petitionem habet: namque dies legati, cui condicio non adscribitur, quamvis extrinsecus expectanda sit, cedit.

26.- IDEM; *libro IX, Responsorum*.- Firmio Heliodoro fratri meo dari volo quinquaginta ex redditu praediorum meorum futuri anni postea". Non videri condicionem additam, sed tempus solvendae pecuniae prolatum videri respondi: fructibus fini relictas pecuniae non perceptis ubertatem esse necessariam anni secundi.

§ 1.- Quum ab heredibus alumno centum dari voluisset testator et eam pecuniam ad alium trans-

piece of property is bequeathed, the enumeration of the different articles included in a disjunctive clause does not constitute several legacies. Nor can a different opinion be held if the testator should devise one tract of land absolutely, and another conditionally; for while the condition is pending, no choice can be made, and if the devisee should die, the devise will not be considered to have passed to his heir.

§ 1.- "Let my heir pay Titius what Seius owes me." ..If the ward, Seius, had borrowed a sum of money without the authority of his guardian, and did not become more wealthy on this account, and the testator had reference to this debt, as the ward did not owe him anything, the legacy will have no force or effect. If, however, the testator by the term "debt" had reference to the natural obligation incurred and to future payment, Titius can claim nothing; as the condition was tacitly imposed, and it is just the same as if the testator had said, "Let my heir pay Titius whatever the ward may pay," or, if he should bequeath any children who may be born to the slave Arathusa, or any crops which may be obtained from the said tract of land. If, in the meantime, the legatee should die, and the female slave should afterwards have a child, or crops should be gathered, or the ward should pay the money which was due, the heir of the legatee will be entitled to assert his claim; and this is not contrary to what has been already stated, for a legacy vests where a condition is not imposed, even though this is due to some external cause.

26.- THE SAME; *Opinions, Book IX*.- "I desire fifty aurei out of the income of my lands collected during the year after my death to be paid to my brother, Firmius Heliodorus." It was my opinion that the legacy was subject to no condition, but that the time of the payment of the money seemed to have been prolonged; and if the income of the land for the present year should be insufficient to make up the sum bequeathed, recourse must be had to the income of the following year.

§ 1.- A testator desired a hundred aurei to be paid by his heirs to his foster-child, and that the said sum of

muchas cosas hecha en modo disyuntivo no constituye muchos legados. Y no se podrá aprobar otra cosa, si uno hubiere legado un fundo puramente, u otro bajo condición; porque estando pendiente la condición no habrá la elección, y si muriere, no se considerará que el legado pasó al heredero.

§ 1.- «Dele a Ticio mi heredero lo que Seyo me debe»; si el pupilo Seyo hubiese recibido sin la autoridad del tutor el dinero, y no se hubiese hecho más rico, y el demandante refirió sus palabras a la deuda presente, como no debe nada de ella, el legado será de ningún valor; pero si con la palabra deuda imaginó referirse a la obligación natural y al futuro pago, Ticio no pedirá nada entretanto, como si tácitamente se hubiera puesto una condición, no de otro modo que si hubiese dicho así: «dele a Ticio lo que hubiere pagado el pupilo», o si hubiese legado: «lo que hubiere nacido de Aretusa», o «los frutos que nacieren en aquel fundo». Y no es contrario a esto que, si el legatario falleciera en el tiempo intermedio, y después se diera a luz el parto, o se percibieran los frutos, o el pupilo pagase el dinero, tiene el heredero del legatario acción para pedir; porque el término del legado, al cual no se le fija condición, corre aunque haya de ser esperado por una causa extrínseca.

26.- EL MISMO; *Respuestas, libro IX*.- «quiero que a Firmio Heliodoro, mi hermano, se le den cincuenta de las rentas de mis predios del año venidero»; respondí, que no se consideraba que después se añadió una condición, sino que parecía que se difirió el tiempo para que se pagara el dinero y que no habiéndose percibido frutos hasta el completo de la cantidad dejada, es necesaria la buena cosecha del año siguiente.

§ 1.- Habiendo querido el testador que por los herederos se le diesen ciento a su alumno, y que esta

ferri, ut in annum vicensimum quintum trientes usuras eius summae perciperet alumnus ac post eam aetatem sortem ipsam: intra vicensimum quintum annum eo defuncto transmissum ad heredem pueri fideicommissum respondi: nam certam aetatem sorti solvendae praestitutam videri, non pure fideicommisso relicto condicionem insertam. Quum autem fideicommissum ab eo peti non posset, penes quem voluit pecuniam collocari, propter haec verba "eamque alumno meo post aetatem supra scriptam curabis reddere" fideicommissum ab heredibus petendum, qui pecuniam dari stipulari debuerunt: sed fideiussores ab eo non petendos, cuius fidem sequi defunctus maluit.

§ 2.- Pater annua tot ex fructu bonorum, quem uxori legavit, accessura filii patrimonio praeter exhibitionem, quam aequae matri mandavit, ad annum aetatis eius vicensimum quintum ab uxore praestari voluit. Non plura, sed unum esse fideicommissum certis pensionibus divisum apparuit et ideo filio intra aetatem supra scriptam diem functo residui temporis ad heredem fideicommissum eius transmitti, sed non initio cuiusque anni peti pecuniam oportere, quod ex fructibus uxori datis pater filio praeberi voluit. Ceterum si pecuniam annuam pater alimentis filii destinasset, non dubie persona deficiente causa praestandi videtur extincta.

27.- SCAEVOLA; *libro III, Responsorum*.- Filium familias ex parte pure instituit heredem eique fideicommissum dedit et eodem testamento ita cavuit: "quod ego Lucium Titium heredem institui, ita

of money should be paid to a third party, so that the foster-child might receive the interest on the same at the rate of four per cent per annum, until he reached his twenty-fifth year; and then that he should be paid the principal. The said child having died before reaching his twenty-fifth year, I gave it as my opinion that the benefit of the trust was transmitted to his heir. For no condition seemed to be attached to the payment of the principal, except that it should be made when the beneficiary reached a certain age; and as the heir could not demand the execution of the trust from the third party aforesaid, with whom the testator desired the money to be deposited, because, on account of the following provision, "You will, without fail, pay the said sum of money to my foster-child, after he reaches the age above mentioned," the execution of the trust must be demanded of the heirs of the testator, who ought to stipulate for the payment of the money; as a person in whom the deceased reposed confidence cannot be required to furnish sureties by the heir of the beneficiary.

§ 2.- A father charged his wife, to whom he had bequeathed certain property, to pay to his son until he reached the age of twenty-five years a certain sum of money annually out of the income of said property, which was to form part of the estate of his son, in addition to the support of the latter which has been provided for. It appeared that there were not several trusts in this case, but one trust divided into several payments, and therefore the son, having died before reaching the aforesaid age, transmitted the trust for the remaining time to his heir; but the latter could not demand the payment of the money at the beginning of every year, because the father intended it should be paid to the son out of the income of the property given to the wife. Moreover, if the father intended the money, which was payable annually, to be used for the support of the son, there is no doubt that, after the death of the latter, the reason for paying it no longer existed.

27.- SCAEVOLA; *Opinions, Book III*.- A testator appointed a son under paternal authority the unconditional heir to a portion of his estate, charged him with a trust, and inserted the following provision

cantidad se transfiriese a otro para que el alumno percibiese hasta los veinticinco años los intereses del cuatro por ciento de esta suma, y después de esta edad el mismo capital, habiendo fallecido él antes de tener los veinticinco años respondí, que se transmitió el fideicomiso al heredero del menor; porque se consideraba fijada cierta edad para que se pagase el capital, y no inserta una condición en el fideicomiso dejado puramente. Mas como el fideicomiso no podría serle pedido a aquel, en cuyo poder quiso que se colocase el dinero, por virtud de estas palabras: «y cuidarás de entregársela a mi alumno después de la edad antes dicha», se les ha de pedir el fideicomiso a los herederos, que debieron estipular que se diera el dinero, pero no se le han de pedir fiadores a aquel a cuya fidelidad prefirió atenerse el difunto.

§ 2.- Un padre quiso que su mujer pagase de los frutos de los bienes que legó a su mujer tantas anualidades, que se habrían de agregar al patrimonio del hijo además de la manutención, la que igualmente encomendó a la madre, hasta los veinticinco años de la edad de aquel; pareció que no había muchos, sino un solo fideicomiso dividido en ciertas pensiones, y que por lo tanto, habiendo fallecido el hijo dentro de la edad antes mencionada, se transmitía a su heredero el fideicomiso del tiempo restante; pero no se debía pedir el dinero al principio de cada año, porque el padre quiso que se le pagase al hijo de los frutos dados a la mujer. Mas si el padre hubiese destinado para alimentos del hijo una cantidad anual, sin duda que, faltando la persona, se considera extinguida la causa de pagarla.

27.- SCÉVOLA; *Respuestas, libro III*.- Uno instituyó puramente heredero de una parte a un hijo de familia, y le dio un fideicomiso, y dispuso así en el mismo testamento: «porque instituí heredero a Lucio

cavit: "quod ego Lucium Titium heredem institui, ita eum adire hereditatem volo, si is patria potestate liberatus fuerit": quaesitum est, an a coheredibus eius adita hereditate legati filio familias dati dies cesserit. respondit, si pure sit datum, a coherede filii pro hereditaria parte fideicommissum peti posse.

§ 1.- Menstruos denarios denos manumissis legavit: quaesitum est, cum absentibus heredibus ex Senatusconsulto libertatem sunt consecuti, ex quo tempore eis cibaria debeantur. Respondit secundum ea quae proponerentur ex eo tempore his cibaria debeantur, quo liberi esse coeperint.

28.- IDEM; *libro IV, Responsorum*.- Si fundus instructus relictus erit, quaeritur, quemadmodum dari debeat, utrum sicut instructus fuit mortis tempore an eo tempore quo facti sunt codicilli an quo peti coepit. Respondit ea quibus instructus sit fundus, quum dies legati cedat, deberi.

29.- VALENS; *libro I, Fideicommissorum*.- "Rogo, quandoque heres meus Titio decem det": utique decem heres debebit, sed quando, dubitari potest: utrum quum primum potuerit, et dies cedit et ab ipso petitur.

30.- LABEO; *libro III, Posteriorum a Iavoleno epitomatorum*.- Quod pupillae legatum est "quandoque nupserit", si ea minor quam viripotens nupserit, non ante ei legatum debebitur, quam viripotens esse coeperit, quia non potest videri nupta, quae virum pati non potest.

31.- SCAEVOLA; *libro XIV, Digestorum*.- Uxori

into his will, "For the reason that I have appointed Lucius Titius my heir, I wish him to enter upon my estate, if he should be released from the control of his father." After the estate had been accepted by his co-heirs, the question arose whether the legacy left to the son would take effect. The answer was that if it was left without any condition, the execution of the trust could be demanded of the co-heirs of the son, in proportion to their respective shares in the estate.

§ 1.- A testator left ten denarii payable monthly to certain slaves whom he manumitted. As the heirs were absent, and the slaves obtained their freedom under the Decree of the Senate, the question arose from what time the payment of legacies for their support should be made. The answer was that, according to the facts stated, these legacies should be paid to them from the time when they began to be free.

28.- THE SAME; *Opinions, Book IV*.- When a tract of land, with all its equipment, is devised, the question arises in what way it should be delivered, whether in the condition it was at the time of the death of the testator, or at the time when the codicil was made, or at the time when it was claimed. The answer was that the land with its equipment should be delivered at the time when the legacy vested.

29.- VALENS; *Trusts, Book I*.- "I charge my heir to pay to Titius ten aurei at some time or other." There is no doubt that the heir owes ten aurei, but it is uncertain when he owes them. It seems that the legacy will take effect, and can be demanded of the heir as soon as he is able to pay it.

30.- LABEO; *Epitomes of the Last Works of Javoleno, Book III*.- Where a legacy is bequeathed to a female ward, to take effect when she marries, and she should marry before being nubile, she will not be entitled to the legacy before she reaches the marriageable age; because a girl cannot be considered to be married when she is incapable of cohabitation.

31.- SCAEVOLA; *Digest, Book XIV*.- A certain

Ticio, quiero que él adiera la herencia de este modo, si él hubiere sido librado de la patria potestad»; se preguntó, si habiendo sido adida la herencia por sus coherederos habrá corrido el término del legado dado al hijo de familia. Respondió, que si hubiera sido dado puramente, se podía pedir el fideicomiso con arreglo a la porción hereditaria al coheredero del hijo.

§ 1.- Uno legó a los esclavos manumitidos diez denarios mensuales; se preguntó, desde qué tiempo se les deberán los alimentos, habiendo conseguido la libertad en virtud del Senadoconsulto estando ausentes los herederos. Respondió: según lo que se exponía, se les deberán los alimentos desde el tiempo en que hayan comenzado a ser libres.

28.- EL MISMO; *Respuestas, libro IV*.- Si se hubiere dejado un fundo provisto, se pregunta cómo deberá ser dado, si como estuvo provisto al tiempo de la muerte, o al tiempo en que se hicieron los codicilos, o en el que comenzó a ser pedido. Respondió, que se debían aquellas cosas con que estuviera provisto el fundo cuando corra el término del legado.

29.- VALENTE; *Fideicomisos, libro I*.- «Ruego que en algún tiempo dé mi heredero diez a Ticio»; ciertamente deberá diez el heredero; pero se puede dudar cuándo, si corre el término, y se le pide, tan pronto como él pudiere.

30.- LABEÓN; *Obras póstumas compendiadas por Javoleno, libro III*.- Lo que se legó a una pupila, «para cuando se casare», si ella se hubiere casado no siendo todavía casadera, no se le deberá el legado antes que hubiere comenzado a ser casadera, porque no se puede considerar casada la que no es capaz de tener marido.

31.- SCAEVOLA; *Digesto, libro XIV*.- Uno nombró

ex parte sextante heredi institutae substituit et heredem fidei commisit, si uxor heres non erit, dotem ei et alia quaedam dari: post mortem mariti uxor ante condicionem et priusquam adeat hereditatem decessit. Quaesitum est, an dies fideicommissi cum moritur cessisse videatur ideoque heredibus eius debeatur. Respondi, si uxor prius decessit, quam hereditatem adiret, videri diem fideicommissi cessisse.

TIT. III

UT LEGATORUM SEU FIDEICOMMISSORUM
SERVANDORUM CAUSA CAVEATUR

1.- ULPIANUS; *libro LXXIX, ad Edictum*.- Legatorum nomine satisdari oportere praetor putavit, ut, quibus testator dari fieri voluit, his diebus detur vel fiat dolumque malum afuturum stipulentur.

§ 1.- Semper autem satisfacere cogitur, cuiuscumque sit dignitatis vel facultatum quarumcumque heres.

§ 2.- Nec sine ratione hoc praetori visum est, sicuti heres incumbit possessioni bonorum, ita legatarios quoque carere non debere bonis defuncti: sed aut satisfacitur eis aut, si satis non datur, in possessionem bonorum venire praetor voluit.

§ 3.- Non solum autem omnibus legatariis satisfacere oportet, sed et successoribus legatariorum satisfacere debere iam constat, quamvis isti non ex iudicio defuncti, sed successionis necessitate quasi ad aes alienum admittantur.

man having appointed his wife heir to a sixth part of his estate appointed a substitute for her, and charged his heirs by a trust, if his wife should not be his heir, to give her her dowry and certain other property; and the husband having died, the wife died also before the condition was complied with, and before she had entered upon the estate. The question arose whether the trust took effect at the time of her death, and whether her heirs were entitled to the benefit of it. I answered that if the wife died before entering upon the estate, they were entitled to the benefit of the trust from the time of her death.

TITLE III

CONCERNING SECURITY GIVEN FOR THE
PAYMENT OF LEGACIES OR THE
EXECUTION OF TRUSTS

1.- ULPIANUS; *On the Edict, Book LXXIX*.- The Praetor has decided that security must be furnished for the payment of legacies, so that the heir may be responsible for any fraud committed against those to whom the testator desired the payment of money to be made, or some act performed for their benefit; in order that the money may be paid, or the act performed at the time prescribed.

§ 1.- The heir is always compelled to give security, no matter what his rank or fortune may be.

§ 2.- This rule was not established by the Praetor without good reason. For, as the heir has possession of the estate, the legatees should not be deprived of the property of the deceased, and they must either be given security, or, if this is not done, the Praetor shall authorize them to take possession of the property bequeathed.

§ 3.- Security must not only be given to all the legatees, but also to their successors, as has been already decided, although the latter are admitted to take possession of the property, not on account of the will of the deceased, but because of the requirements of the succession, just as occurs in the case of a debt.

substituto para su mujer instituida heredera de la sexta parte, y encomendó a la fidelidad de los herederos, «que si su mujer no fuere heredera», se le diese la dote y algunas otras cosas; después de la muerte del marido falleció la mujer antes de cumplida la condición, y antes que adiese la herencia; se preguntó, si se considerará que corrió el término del fideicomiso cuando murió, y si por lo tanto se les deberá a sus herederos. Respondí, que si la mujer falleció antes que adiese la herencia, se considera que corrió el término del fideicomiso.

TÍTULO III

DE QUE SE DÉ CAUCIÓN POR LA
CONSERVACIÓN DE LOS LEGADOS O DE
LOS FIDEICOMISOS

1.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- Juzgó el Pretor que era conveniente que se diese caución por razón de los legados, para que se dé o se haga una cosa en los mismos días en que el testador quiso que se diera o se hiciese, y para que estipulen que no habrá de haber dolo malo.

§ 1.- Mas siempre es obligado a dar fianza el heredero, de cualquier dignidad o riqueza que él sea.

§ 2.- Y no sin razón le pareció al Pretor, que así como al heredero le incumbe la posesión de los bienes, así también no deben ser privados los legatarios de los bienes del difunto, sino que o se les dará caución, o, si no se les diera fianza, quiso el Pretor que entraran en posesión de los bienes.

§ 3.- Mas se les debe dar caución no solamente a todos los legatarios, sino que ya es sabido que se les debe dar fianza también a los sucesores de los legatarios, aunque éstos sean admitidos no por voluntad del difunto, sino por necesidad de la sucesión, como si fueran admitidos a una deuda.

§ 4.- Sed et procuratoribus legatariorum satisfaciendum est eoque iure utimur.

§ 5.- Plane si ei qui in potestate alicuius erit legatum sit, cavebitur ei cuius iuri subiectus est.

§ 6.- Non solum autem legatorum nomine heredes cavent, sed et successores eorum.

§ 7.- Is etiam, cui ex Senatusconsulto restituta est hereditas, nihilo minus ad cautionem compellitur.

§ 8.- Nec non et qui per alios heredes existunt sive honorarii successores ad satisfaciendum compelluntur.

§ 9.- Plane si quis omitta stipulatione litem de legato contestatus est, probandum est cessare debere stipulationem.

§ 10.- Idemque in fideicommissis quoque probandum est.

§ 11.- Si cui ita sit legatum vel fideicommissum relictum et si id perdidisset, rursus relictum, videamus, an satis sequentis legati sive fideicommissi petere possit. movet quaestionem, an fideicommissum hoc sive legatum debeatur et quotiens debeatur et an ipse legatarius cavere debeat se non perditurum. De his omnibus extat rescriptum Divi Pii ad Iunium Mauricum tale: "Clodio Fructulo secundum ea, quae epistula continentur, legata sive fideicommissa ex testamento Clodii Felicis praestari debent citra necessitatem cavendi nihil ex is diminuturum se. Nam quod fidei heredis ab eodem testatore commissum est, ut, si Fructulus perdidisset quod ei in testamento relictum est, rursus heres ei id restitueret, non eo pertinet, ut aut Fructulo priorum legatorum nomine satisfactio iniungenda aut onerandus sit heres in infinito, ut, quotiens is perdidisset, restituere ei tantumdem debeat, sed ut per

§ 4.- Security must also be given to the agents of the legatees, which is our practice at present.

§ 5.- It is clear that if a legacy is bequeathed to anyone who is under the control of another, security must be given to him to whose authority he is subject.

§ 6.- Moreover, not only the heirs must furnish security for the payment of legacies, but their successors must do so likewise.

§ 7.- He also to whom an estate has been transferred under the Decree of the Senate is compelled to give security.

§ 8.- Those who become heirs through the agency of other persons, as well as praetorian heirs, are obliged to furnish security.

§ 9.- It is clear that if the terms of the stipulation are not complied with, and suit is brought to recover the legacy, it must be said that the stipulation ceases to exist.

§ 10.- The same rule also applies in the case of trusts,

§ 11.- Where a legacy or a trust is bequeathed to anyone, with the understanding that it shall be renewed if the property is lost, let us see whether security can be required for the payment or execution of the second legacy, or trust. The question arises whether this trust or legacy is due, and how many times it is due, and whether the legatee himself should give security that he will not lose the property. There is extant a Rescript of the Divine Pius, addressed to Junius Mauritius, with reference to all these matters, which is as follows, "In accordance with the contracts of your letter, legacies or trusts should be paid or delivered to Clodius Fructulus under the will of Clodius Felix, without requiring a bond that none of said legacies or trusts will be lost by him. For, as the heir is charged by said testator that, if Fructulus should lose any of the property left to him by said will, the heir must make it up to him, this does

§ 4.- Pero también se les ha de dar caución a los procuradores de los legatarios; y este derecho observamos.

§ 5.- Ciertamente que si se hubiera legado a quien estuviere bajo la potestad de otro, se le dará caución a aquel a cuya autoridad está sujeto.

§ 6.- Mas darán caución por razón de los legados no sólo los herederos, sino también sus sucesores.

§ 7.- También aquel a quien fue restituida la herencia por virtud del Senadoconsulto será; esto no obstante, compelido a la caución.

§ 8.- Y también los que quedan herederos por medio de otros, o los sucesores honorarios, son compelidos a dar fianza.

§ 9.- Y a la verdad, si alguno, omitida la estipulación contestó la demanda sobre el legado, se ha de aprobar que debe cesar la estipulación.

§ 10.- Y lo mismo se ha de aprobar también en los fideicomisos.

§ 11.- Si a uno se le hubiera dejado así un legado o un fideicomiso, y se le hubiese dejado nuevamente si lo hubiese perdido, veamos si podrá pedir caución por el segundo legado o fideicomiso; promueve la cuestión, si se deberá este fideicomiso o legado, y cuantas veces se deberá, y si el mismo legatario deberá dar caución de que él no lo perderá. Acerca de todo esto queda este rescripto del Divino Pío dirigido a Junio Maurico: «Según lo que se contiene en tu carta, a Clodio Fructulo se le deben entregar en virtud del testamento de Clodio Félix los legados o los fideicomisos, sin necesidad de que dé caución de que él no disminuirá nada de ellos; porque lo que por el mismo testador se encomendó a la fidelidad del heredero, que si Fructulo hubiese perdido lo que se le dejó en el testamento, de nuevo se lo restituyese el heredero, no se refiere a que a Fructulo se le haya de imponer la fianza por razón de los anteriores legados,

fideicommissum posterius duplicata legata eius videantur nec amplius ad periculum heredis pertineat, si quid postea is consumpsit exsoluto ei posteriore fideicommisso". Rescripto ergo ostensum legatarium heredi non debere cavere se non perditurum. Versa vice an heres de sequenti legato sive fideicommisso cavere debeat, quaeritur. Et putem non oportere ei cavere, quum in suo arbitrio habeat, ne perdat id quod sibi relictum est, quamvis si quis inspexerit, quod sub condicione relictum est, dicere debeat satisfactionem exigendam.

§ 12.- Certe sive ex asse sive ex parte quis legatum debeat, cavere debet, sive institutus sit heres sive substitutus.

§ 13.- Bellissime quaeritur, an haec stipulatio incrementum ex fructibus vel usuris sentiat. Et recte placuit ex mora incrementum habituram stipulationem, ut id quod oportebit comprehendat.

§ 14.- Si quis sub condicione legatum stipulatus pendente condicione decesserit, stipulatio evanescit, quia nec legatum transmittitur. Huic stipulationi easdem causas et condiciones inesse sciendum est: proinde si qua sit exceptio, quae petenti legatum opponi solet, eandem ex stipulatu quoque agentis opponendam esse placet.

§ 15.- Procuratori eius, qui absens esse dicitur, si stipulanti legati nomine spondeat heres, ofilius ait ita

not have the effect of requiring Fructulus to give security against the loss of the first legacies, or that the heir should be rendered liable indefinitely; so that, as often as the legatee may lose any property the former will be required to restore it, but as, by the terms of the trust, it would seem that after the legacy has been paid a second time, the heir will no longer be liable if the legatee afterwards loses any of the property, the trust having been fully executed by the last payment." It therefore appears by this Rescript that the legatee is not required to give security to the heir against the loss of the property. On the other hand, the question arises whether the heir should give security with reference to the second legacy, or trust. I think that it is not necessary for him to do so, as it is in the power of the legatee to avoid losing what has been left to him. However, if anyone should ascertain that the second legacy was left under some condition, it must be said that security should be required.

§ 12.- It is evident that where anyone is charged with the payment of a legacy, either wholly or in part, he must furnish security, whether he is an appointed or a substituted heir.

§ 13.- The question is very seriously asked whether this stipulation involves the increase derived from profits or interest. It has been decided, and very properly, that the stipulation has reference to any increase which has taken place after the heir has been in default, as it includes whatever should be paid.

§ 14.- Where anyone has stipulated for the payment of a legacy under a condition, and, while the condition is pending, he dies, the stipulation becomes of no effect, because the legacy is not transmitted to the heir. It must also be noted that the same circumstances and conditions are embraced in this stipulation that are involved in the legacy. Hence, if there is an exception which can be filed in opposition to the person claiming the legacy, it is established that the same exception can be pleaded against anyone bringing an action based on the stipulation.

§ 15.- Ofilius says that if the heir is asked to give security with reference to the legacy by the agent of

o a que el heredero haya de ser gravado hasta lo infinito, para que cuantas veces aquel lo hubiere perdido, otras tantas deba restituírselo, sino a que se consideren duplicados por el fideicomiso posterior sus legados, y que nada más corresponda al riesgo del heredero, si aquel consumió después alguna cosa, habiéndosele pagado el segundo fideicomiso». Luego en este rescripto se demostró que el legatario no debe darle caución al heredero de que él no perderá la cosa. Y viceversa, se pregunta, si el heredero deberá dar caución por el segundo legado o fideicomiso. Y yo opinaría, que no se le debe dar caución, porque tiene en su arbitrio el no perder lo que se le dejó, aunque si alguno considerare que fue dejado bajo condición, deba decir que se ha de exigir la fianza.

§ 12.- Ciertamente que, ora si uno debiera un legado íntegramente, ora si en parte, debe dar caución, ya haya sido instituido heredero, ya substituido.

§ 13.- Con mucha razón se pregunta si esta estipulación comprenderá el incremento por razón de los frutos o de los intereses. Y con razón pareció bien, que por razón de mora haya de tener incremento la estipulación, para que comprenda lo que debiere.

§ 14.- Si alguno, habiendo estipulado lo legado bajo condición, hubiere fallecido estando pendiente la condición, se extingue la estipulación, porque ni se transmite el legado. Se ha de saber que a esta estipulación son inherentes las mismas causas y condiciones; por lo cual, si hubiera alguna excepción, que se suela oponer al que demanda el legado, se determina que la misma ha de oponerse también al que ejercita la acción de lo estipulado.

§ 15.- Si el heredero prometiera al procurador del que se dice que está ausente, al estipular por razón del

cavere debere, si is, cuius nomine caveat, vivat, videlicet ne teneatur illo ante defuncto.

§ 16.- Item quaeritur, in hanc stipulationem utrum ipsae res veniant quae legatae sunt an vero pretia earum. Et est verius in hanc stipulationem res vel pretia deduci.

§ 17.- Si decem quae in arca erant mihi legata sint, tibi eorum usus fructus legatus sit, si pure utrique legatum sit relictum, is cui proprietates legatae sunt ipso iure decem vindicabit, fructuarium autem ex Senatusconsulto acturum et quinque usum fructum petiturum constat. Sed quum decem vindicat proprietarius, per exceptionem doli repelli, quia fructuarius de restituendis quinque heredi cavit. Plane si decem aureorum possessionem legatarius habeat, Marcellus ait dandam vel heredi vel fructuario utilem actionem in legatarium, si modo ei caveatur. Sed si sub conditione ei decem legatae sint, fructuarium interim decem oblata cautione habiturum, legatario vero, cui proprietates relictas sunt, interim legatorum stipulatio praestanda est. Sed si omiserit stipulationem, existente conditione ad exhibendum eum posse agere Marcellus ait. Sed si ignorans heres legatum decem fructuario dedit, ad exhibendum eum non teneri palam est: succurrendum tamen legatario adversus fructuarium Marcellus ait.

§ 18.- Si ad fiscum portio hereditatis pervenerit, cessabit ista stipulatio, quia nec solet fiscus satisfacere.

the legatee, who is alleged to be absent, he should furnish it on condition that the person for whose benefit he does so is living, so that he will not be held liable if the legatee should have previously died.

§ 16.- The question also arises whether the property itself, which is bequeathed, is included in this stipulation, or whether it has reference merely to its value. The better opinion is that either the property itself, or its value, comes within the terms of the stipulation.

§ 17.- If ten aurei, which were in a certain chest, are bequeathed to me, and the usufruct of the same is bequeathed to you, and each bequest is absolute, he to whom the ownership is left can claim the ten aurei by law. Still, it is settled that the usufructuary can bring an action under the Decree of the Senate and demand the usufruct of five aurei. However, if the owner should claim the entire ten, he can be barred by an exception on the ground of bad faith, after the usufructuary, having received five aurei, has given security for their return. Marcellus says it is clear that if the legatee should obtain possession of the ten aurei, an equitable action should be granted to the heir or the usufructuary, against the legatee, provided security is given to him. Where, however, the ten aurei were left under a condition, the usufructuary can, in the meantime, hold them if a bond is furnished; and the legatee to whom the ownership was bequeathed can stipulate for the payment of his legacy. But if he should fail to demand the stipulation, and the condition should be fulfilled, Marcellus says that he can bring an action for the production of the property. If, however, the heir has paid the ten aurei to the usufructuary through mistake, it is evident that he will not be required to produce the property in court, and Marcellus holds that relief should be granted to the legatee against the usufructuary.

§ 18.- If a part of the estate should come into possession of the Treasury, the stipulation above mentioned will be of no force or effect, because it is not customary for the Treasury to give security.

legado, dice Ofilio que debe dar caución en este caso, si viviese aquel en cuyo nombre diera caución, a saber, para que no quede obligado habiendo fallecido antes aquel.

§ 16.- También se pregunta, si se comprenderán en esta estipulación las mismas cosas que fueron legadas, o sus precios. Y es más verdadero que se comprenden en esta estipulación las cosas, o los precios.

§ 17.- Si me hubiesen sido legadas las diez monedas que había en una caja, y a ti se te hubiera legado su usufructo, si el legado hubiera sido dejado a ambos puramente, aquel a quien le fue legada la propiedad reivindicará de derecho las diez monedas, pero el usufructuario ejercitará la acción del Senadoconsulto, y es constante que pedirá el usufructo de cinco; pero cuando el propietario reivindica las diez, es repelido por la excepción de dolo, porque el usufructuario le dio caución al heredero de restituir cinco. Y ciertamente, si el legatario tuviera la posesión de los diez áureos, dice Marcelo que se le ha de dar o al heredero, o al usufructuario, la acción útil contra el legatario, si se le diera caución. Pero que si los diez le hubieran sido legados bajo condición, el usufructuario habrá de tener entretanto los diez, habiendo ofrecido caución; pero que al legatario, a quien le fue dejada la propiedad, se le ha de conceder mientras tanto la estipulación de los legados. Mas si hubiere omitido la estipulación, dice Marcelo, que, cumplida la condición, puede él ejercitar la acción de exhibición; pero si por ignorancia el heredero le dio al usufructuario el legado de los diez, es evidente que él no está obligado a la exhibición; mas dice Marcelo, que se ha de auxiliar al legatario contra el usufructuario.

§ 18.- Si hubiere ido al fisco una porción de la herencia, dejará de tener lugar esta estipulación, porque el fisco no suele dar caución.

§ 19.- Qui minorem partem hereditatis possidet, quum ex maiore parte heres sit, si quidem ipso iure minuatur portio hereditatis, securior erit heres: neque enim ex maiore parte ex stipulatu tenetur legatariis, quam ex qua heres est: si vero nomen quidem heredis apud eos integrum maneat, verumtamen effectum minus habeant hereditatis et caverint legatorum nomine, videntur onerari, quia ipso iure pro ea parte legata debent, pro qua heredes sint. Sed enim aequissimum est non maiorem partem legatariis solvere, quam cuius habent emolumentum. Hoc autem evenit, quum hereditas pro aliqua parte ex Trebelliano restituitur: nam pro rata exonerandi sunt heredes eius partis nomine, cuius emolumentum sibi ablatum est.

§ 20.- Si ei, qui in alterius potestate erit, incerta die legatum fuerit, cavebitur ei, qui habet eum in potestate, non praecise, sed sub condicione "si, cum eius legati dies cedit, in potestate sit". Ceterum si sui iuris inveniatur, iniquum esse visum est patri cautum esse, cum alii legatum debeatur, quamquam etsi sine hac adiectione caveretur, verum tamen exceptione patrem vel dominum submoveremus, si existentis condicionis tempore non haberent eos in potestate. Evenit tamen secundum hoc, ut in casum non sit de legato cautum: nam si existentis condicionis tempore sui iuris sunt, non erit cautum.

2.- PAPINIANUS; *libro XXVIII, Quaestionum*.- Nec si forte velit pater cavere neminem amplius petiturum, compellendus erit heres legatum, quod iam filius petere potest, alii quam cui debetur

§ 19.- Where anyone is in possession of a small portion of the estate, although he may be heir to a larger share of the same, if a part of the estate is diminished by operation of law, the heir will become more secure, nor will he be liable under the stipulation for any more of the estate than that to which he is the heir. If, however, the capacity of the heir with reference to the interest of the legatees should remain unimpaired, still, in fact, he will be entitled to less of the estate and he will appear to be burdened if he has given security to indemnify the legatees, because, by operation of law, the legacies are due in proportion to the share of the estate to which he is the heir. It is perfectly just that he should not pay the legatees any more than is in proportion to the share of the estate from which he derives an income. This is also the case where an estate is proportionally transferred under the Trebellian Decree of the Senate, for the heir is released from liability to pay the legacy, so far as his share, the profit of which has been lost, is concerned.

§ 20.- If a bequest should be made payable at an indefinite time to someone who is under the control of another, security shall be given to him who has control of the legatee, not absolutely but conditionally; that is, provided he is subject to his authority when the time for the payment of the legacy arrives. If, however, the legatee should be ascertained to be his own master, it would seem to be unjust that security should be given to the father, when the legacy is payable to another. And even if security has been furnished without this addition, we can, nevertheless, bar the father or the master by an exception, if they have neither the son nor the slave under their control at the time when the condition is complied with. Still, according to this, the result will be that there is an instance in which security given with reference to a legacy does not take effect, for it will be void if the person in question is his own master at the time when the condition is fulfilled.

2.- PAPINIANUS; *Questions, Book XXVIII*.- Even if the father should be willing to give security that no one will afterwards claim the legacy, the heir cannot be compelled to pay it to anyone else than to the son

§ 19.- El heredero que posee menor parte de herencia que aquella de que es heredero, si verdaderamente la porción de la herencia se disminuyera de derecho, estará más seguro; porque en virtud de la estipulación no puede estar obligado a los legatarios en mayor parte de la que es heredero. Mas si verdaderamente quedara en ellos íntegro el título del heredero, pero efectivamente tuvieran menos herencia, y hubieren dado caución por razón de los legados, se considera que están gravados, porque de derecho deben los legados con arreglo a la parte en que sean herederos; pero será muy justo, que no paguen a los legatarios mayor parte que aquella cuyo emolumento tienen. Mas esto acontece cuando en virtud del Senadoconsulto Trebeliano se restituye la herencia en alguna parte; porque los herederos han de ser descargados a prorrata en razón a la parte cuyo emolumento se les quitó.

§ 20.- Si para día incierto se le hubiera hecho un legado al que estuviere en la potestad de otro, se le dará caución al que lo tiene en su potestad, no puramente, sino bajo la condición de si se hallara bajo la potestad cuando corra el término del legado. Pero si se hallara que es de propio derecho, pareció que era injusto que se le diese caución al padre debiéndose a otro el legado; aunque también si se diese caución sin esta adición, repeleríamos, sin embargo, con excepción al padre o al señor, si al tiempo de cumplirse la condición no los tuvieran bajo su potestad; pero acontece según esto, que en este caso no se dio caución respecto al legado, porque si al tiempo de cumplirse la condición son de propio derecho no se habrá dado caución.

2.- PAPINIANO; *Cuestiones, libro XXVIII*.- Y si acaso el padre quisiera dar caución de que nadie pedirá ya el legado, tampoco habrá de ser compelido el heredero a pagar el legado, que el hijo puede ya

exsolvere.

3.- ULPIANUS; *libro LXXIX, ad Edictum*.- Sed et ipsis, qui sunt in potestate, cavendum est, quemadmodum solet caveri, si eadem res duobus sub diversis vel contrariis condicionibus relicta sit: duobus enim satisdatur, sed in utroque casu isdem personis satisfactionem subituris.

4.- IDEM; *libro XV, ad Edictum*.- Si ex causa fideicommissi sit apud aliquem hereditas nec legatorum satisdat, in possessionem adversus eum legatarius mittitur.

5.- PAPINIANUS; *libro XXVIII, Quaestionum*.- Postquam heres ab hostibus captus est, condicio legati, cuius nomine proposita stipulatione cautum fuerat, extitit: fideiussores interim teneri negavi, quia neque ius neque persona esset, ad quam verba stipulationis derigi possint.

§ 1.- Imperator Marcus Antoninus Iulio Balbo rescripsit eum, a quo res fideicommissae petebantur, cum appellasset, cavere vel, si caveat adversarius, ad adversarium transferri possessionem debere. Recte placuit principi post provocationem quoque fideicommissi cautionem interponi: quod enim ante sententiam, si petitionis dies moraretur, fieri debuit, amitti post victoriam dilata petitione non oportuit. Sed quare non caverat de fideicommisso qui provocaverit, si caveret adversarius, ad eum possessionem esse transferendam rescripsit, cum alia sit edicti condicio? Non enim exigitur a legatario vice mutua cautum, sed vicaria custodiae gratia possessio datur et qui optinuit in possessionem per praetorem aut praesidem inducitur. Sed praetor quidem in omnium rerum possessione, quae in causa hereditaria permanent omnimodo, fideicommissi servandi gratia esse permittit: princeps autem earum rerum nomine, de quibus fuerat iudicatum, mutuas admisit cautiones: sicuti, cum de bonis suis conferendis filius accepta possessione cavere non

who it is entitled to, and can demand the same.

3.- ULPIANUS; *On the Edict, Book LXXIX*.- Security must also be given to those who are under the control of another, just as it is customary for this to be done where the same property is left to two persons under different conditions, for security is given to two legatees, but in both instances the same persons become sureties.

4.- THE SAME; *On the Edict, Book XV*.- Where an estate is in the hands of anyone under the terms of a trust, and he does not give security for the payment of the legacies, the legatee is placed in possession of the property as against him.

5.- PAPINIANUS; *Questions, Book XXVIII*.- The condition of a legacy for the payment of which security had been furnished was fulfilled after the heir had been captured by the enemy. I denied that the sureties could be held liable during the meantime, for there was neither a right nor a person to whom the terms of the stipulation could be applied.

§ 1.- The Emperor Marcus Antoninus stated in a Rescript addressed to Julius Balbus that a person by whom property left under a trust was claimed should give security when he took an appeal; or, if his adversary furnished security, he should be given possession of the property in dispute. It was very properly decided by the Emperor that security should be furnished, even after the appeal of the case brought under the trust. This should be done before the decision is rendered if the claimant is in default, for he should not lose his victory because of his delay. But why should the appellant not give security on account of the trust, if his adversary did so in order that he might be given possession, when the requirements of the Edict are different, was asked in a rescript? For security is not exacted of the legatee, as in the case of a loan, but vicarious possession is granted on account of safekeeping, and he who obtains the property is placed in possession of the same, either by the Praetor or the Governor. The Praetor permits possession to be taken of all the

pedir, a otro más que a quien se le debe.

3.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- Pero también se les ha de dar caución a los mismos que están bajo potestad, a la manera que se suele dar caución si una misma cosa hubiera sido dejada a dos bajo condiciones diversas o contrarias; porque se da fianza a dos, pero en uno y otro caso las mismas personas habrán de soportar la fianza.

4. EL MISMO; *Comentarios al Edicto, libro XV*.- Si por causa de fideicomiso estuviera en poder de alguien la herencia, y no da fianza por los legados, el legatario es puesto contra él en posesión.

5.- PAPINIANO; *Cuestiones, libro XXVIII*.- Después que el heredero fue aprisionado por los enemigos, se cumplió la condición del legado, por razón del que, habiéndose interpuesto estipulación, se había dado caución; dije, que entretanto no estaban obligados los fiadores, porque no habría ni derecho, ni persona a la cual se puedan dirigir las palabras de la estipulación.

§ 1.- El Emperador Marco Antonino respondió por rescripto a Julio Balbo, que aquel a quien se le pedían las cosas dejadas por fideicomiso diera caución cuando hubiese apelado, o que, si daba caución el adversario, se le debía transferir la posesión. Con razón le plugo al Príncipe, que también después de la apelación se interpusiera la caución del fideicomiso; porque lo que se debió hacer antes de la sentencia, si se demorase el día de la petición, no fue conveniente que se perdiera después de la victoria habiéndose diferido la petición. Mas porque no había dado caución respecto al fideicomiso el que hubiere apelado, respondió por rescripto que si diese caución el adversario, se le ha de transferir a él la posesión, porque es otra la condición del Edicto; porque no se exige que por el legatario se dé recíprocamente caución, sino que se da una posesión interina por causa de custodia, y el que gana es puesto en posesión por el Pretor, o por el Presidente. Pero, a la verdad, el Pretor permite que para conservar el fideicomiso esté de todos modos en posesión de

potest, quia denegamus ei actiones, defertur condicio cavendi fratribus ex forma iurisdictionis, quod ex portione fratris fuerint consecuti, cum bona propria conferre coeperit, se restitutos.

Sed si nec ipsi cavere possint, utiliter probatum est virum bonum ab utraque parte eligendum, apud quem ut sequestrem fructus deponantur quique utiles actiones a praetore datas exerceat. Possessio autem ex rescripto supra relato non aliter ad eum, qui fideicommissum petit, transfertur, quam si caverit, tametsi maxime adversarius non per inopiam, sed per contumaciam cavere noluerit: sed si is qui vicit non possit cavere, vel res deponenda vel iurisdictio restituenda erit.

§ 2.- Si dies aut condicio legati fidei commissi petitionem actionemve differre dicatur et ideo satisfactio desideretur, heres autem per calumniam postulari contendat et relictum neget, non aliter audiendus erit qui cavere postulat, quam si scripturam, qua relictum adfirmet, exhibuerit.

§ 3.- Cum quaerebatur, ubi fideicommissi servandi causa caveri oporteat, Imperator Titus Antoninus rescripsit, si domicilium Romae non haberet heres et omnis hereditas in provincia esset, ad satisfactionem fideicommissi nomine in provinciam fideicommissarium remittendum esse. Quare si heres in eum

property belonging to the estate, for the sole purpose of observing the condition of the trust; the Emperor, however, does so on account of the property which is the subject of litigation, and requires securities from both parties; just as where a son, having obtained possession, cannot give security to place all his property in the bulk of the estate, and, for the reason that we refuse him any action, the condition of his furnishing security to his brothers is deferred in accordance with the rule of the Praetorian Court, as his brothers must restore anything which they may have obtained from the share of their brother, when he does bring his own property into the bulk of the estate.

If, however, none of them can give security, it is established, for the purpose of convenience, that a good man shall be chosen by both sides with whom the income shall be deposited, and, as it were, sequestered, and who can bring the equitable actions granted by the Praetor. Moreover, possession under the terms of the Rescript previously cited is only transferred to the person who claims the benefit of the trust, where he gives security; even though his adversary may refuse to give it, not through inability to do so, but through obstinacy. But when the person who is successful cannot furnish security, the property itself must be deposited, or possession be given by a decree of the Praetor.

§ 2.- Where the term or the condition of a legacy or a trust is said to postpone the demand, or the action for the same, and therefore security is demanded, and the heir alleges that this is done for the purpose of annoyance, and denies that anything has been left to the parties who make the application, he who asked that security should be furnished shall not be heard, unless he produces the will by which he can prove that the legacy was bequeathed to him.

§ 3.- When the question was asked where security must be given for the purpose of preserving a trust, the Emperor, Titus Antoninus, stated in a Rescript that if the heir did not have his domicile at Rome, and all the property of the estate was situated in a province, the beneficiary of the trust who demanded

todas las cosas que permanecen siendo de la herencia, en tanto que el Príncipe admitió cauciones mutuas por razón de las cosas sobre las que se había juzgado; a la manera que cuando el hijo, recibida la posesión, no puede dar caución de colacionar sus propios bienes, porque le denegamos las acciones, se les defiende a los hermanos según la forma de la jurisdicción la condición de dar fianza, de que ellos restituirán lo que hubieren conseguido de la porción del hermano, cuando éste hubiere comenzado a colacionar sus propios bienes.

Mas si ni ellos mismos pudieran dar caución, se aprobó convenientemente que se ha de elegir por ambas partes un hombre bueno, en poder de quien, como secuestrador, se depositen los frutos y el cual ejerce las acciones útiles dadas por el Pretor; pero la posesión no se le transfiere por el Rescripto antes mencionado al que pide el fideicomiso, de otro modo, que si hubiere dado caución, especialísimamente si el adversario no hubiere querido dar caución no por inopia, sino por contumacia. Mas si el que venció no pudiera dar caución, o se habrá de depositar la cosa, o se habrá de restituir la jurisdicción.

§ 2.- Si se dijera que el término, o la condición del legado, difiere la petición o la acción del fideicomiso, y por esto se deseara la fianza, pero el heredero sostuviera que se pide por calumnia, y dijera que no fue dejado, no habrá de ser oído de otro modo el que pide que se dé caución, sino si hubiere exhibido la escritura en que afirme que se dejó.

§ 3.- Preguntándose dónde convenía que se diera caución por causa de conservar el fideicomiso, respondió por rescripto el Emperador Tito Antonino, que si el heredero no tuviese el domicilio en Roma, y toda la herencia estuviera en las provincias, el fideicomisario ha de ser remitido a la provincia para

locum cavendi gratia remitti desideret, ubi domicilium habet, legatarius autem ibi caveri postulet, ubi est hereditas, non erit heres remittendus. Idque Imperator Titus Antoninus rescripsit.

§ 4.- Quibus litteris adiectum et si bona iam distracta sunt vel testatoris permissu vel concedente legatario, pretium eorum fideicommissi servandi causa in deposito habendum.

6.- ULPIANUS; *libro VI, Fideicommissorum*.- Si quando incerta summa est fideicommissi, qui cognoscit taxationem quoque fideiussores petuntur.

§ 1.- Admonendi autem sumus rebus publicis remitti solere satisfactionem fideicommissorum etiam si quando necessitas dandi intercedat: re promissio plane exigenda est voluntati defuncti statu iri.

7.- PAULUS; *libro II, Manualium*.- Filio vel servo sub condicione a patre dominove herede instituto legatum est. Huius legati satis petere non possunt: sed pendente condicione emancipatus vel manumissus si satis petant, quaeritur, an audiendi sint, ne beneficium patris dominive ipsis onerosum sit, an sibi imputare deberent, qui dederunt eis postulandi adversus se facultatem. Sed melius est per medietatem causam dirimere, ut cautioni tantum cum hypotheca suarum rerum committantur.

that security be given should be sent back to the province. Hence, if the heir should ask to be sent back to his home for the purpose of giving security, and the legatee asks that security be given where the estate is situated, the heir should not be sent back. This was also stated by the Emperor Titus Antoninus in a Rescript.

§ 4.- It was added in this Rescript that, where property belonging to the estate had already been sold, either by the will of the testator or with the consent of the legatee, the price of said property should be placed upon deposit for the purpose of carrying out the provisions of the trust.

6.- ULPIANUS; *Trusts, Book VI*.- Where an indefinite amount is mentioned in a trust, sureties shall be demanded, after the amount has been established by the decision of the magistrate who has jurisdiction of the case.

§ 1.- We must also remember that in matters relating to property in which the public is interested, it is not customary for security to be required for the execution of trusts, even if sometimes a necessity should arise for giving it. It is clear, however, that a promise can be exacted that the will of the deceased shall be executed.

7.- PAULUS; *Manuals, Book II*.- Where, after a father or a master had been appointed an heir, and charged with a legacy payable to a son or a slave of the former, under a condition, neither can demand security for the preservation of the legacy. If, however, the son or the slave should be emancipated or manumitted while the condition is pending, and demands security, the question arises whether he should be heard, lest the benefit which he has received from his father or his master may be to his disadvantage, or whether the father and the master should blame themselves for having given them the power to make such a demand. The better opinion is to dispose of this point by adopting a middle course, and say that they can only be held liable for the hypothecation of their property.

la fianza por razón del fideicomiso. Por lo cual, si el heredero pretendiera que para dar la caución sea remitido al lugar en que tiene el domicilio, pero el legatario pidiera que se le dé caución allí donde está la herencia, no habrá de ser remitido el heredero; y esto respondió por rescripto el Emperador Tito Antonino.

§ 4.- En cuyo rescripto se añadió, que también si ya fueron vendidos los bienes, o con permiso del testador, o concediéndolo el legatario, se ha de tener en depósito su precio por causa de conservar el fideicomiso.

6.- ULPIANO; *Fideicomisos, libro VI*.- Si alguna vez es incierta la suma del fideicomiso, se piden también fiadores según tasación del que conoce.

§ 1.- Pero hemos de tener presente que a las repúblicas se les suele remitir la fianza de los fideicomisos, aun cuando haya necesidad de darla; pero se ha de exigir la promesa de que se habrá de estar a la voluntad del difunto.

7.- PAULO; *Manuales, libro II*.- A un hijo o a un esclavo, se le hizo bajo condición un legado a cargo del señor o del padre instituido heredero; no pueden pedir fianza de este legado, pero si emancipado o manumitido estando pendiente la condición pidieran la fianza, se pregunta si habrán de ser oídos, a fin de que este beneficio del padre o del señor no les sea gravoso a ellos mismos, o si deberían culparse a sí propios, que les dieron la facultad de pedir contra ellos. Pero es mejor, dirimir por un término medio la cuestión, para que queden sujetos solamente a la caución con hipoteca de sus propios bienes.

8.- ULPIANUS; *libro XLVIII, ad Sabinum*.- Quum legatorum nomine satisdatum est, simul dies legatorum cessit, protinus isdem diebus etiam ex stipulatione debentur,

9.- PAULUS; *libro XII, ad Sabinum*.- non tamen ut statim peti possint: deberi enim dicimus et quod die certa legatario praestari oportet, licet dies nondum venerit.

10.- POMPONIUS; *libro XXVI, ad Sabinum*.- Si a te herede legatum mihi sit sub condicione tuque, postquam adieris hereditatem, satisdederis legatorum et post mortem tuam ante aditam tuam hereditatem condicio legati extiterit, Sabinus ait fideicommissores mihi teneri, quia omnimodo dari oportet legatum et in rem esset concepta stipulatio.

11.- GAIUS; *libro XIII, ad Edictum provinciale*.- Si legatariis, qui adversus me in possessionem legatorum servandorum causa missi sunt, procurator vel quis alius meo nomine caverit, perinde mihi praetor accommodat interdictum, quo iubeantur discedere legatarii possessione, ac si ego cavissem.

12.- MARCIANUS; *libro VII, Institutionum*.- Licet, ut non petatur cautio, condicio testamento scripta fuerit, non videtur condicio: et ideo licet desideraverit quis caveri sibi, non videtur condicione defectus, quia postquam remitti talem cautionem iure publico placuit, nec onus cautionis sequitur nec quidem condicio intellegitur.

13.- NERATIUS; *libro VII, Membranarum*.- Ei quoque, cui legatorum actio datur in eum, qui

8.- ULPIANUS; *On Sabinus, Book XLVIII*.- Where security is given to pay legacies, the day of payment arrives under this stipulation as soon as the legacies begin to be due:

9.- PAULUS; *On Sabinus, Book XII*.- Not, however, to the extent that the legacies can be claimed at once, for we hold that payment should be made on a certain day, even though the time has not yet arrived.

10.- POMPONIUS; *On Sabinus, Book XXVI*.- If you have been appointed an heir, and have been charged with a legacy to me under a condition, and you should afterwards accept the estate and give security for the payment of the legacy, and, after your death, but before your estate has been entered upon, the condition of the legacy should be fulfilled, Sabinus says that the sureties will be liable to me, because the legacy must, by all means, be paid, even if the stipulation was general in character.

11.- GAIUS; *On the Provincial Edict, Book XIII*.- Where the legatees have been placed in possession of the property of an estate against me, on account of having given bond for the payment of the legacies, and my agent or anyone else has furnished security in my name, the Praetor can grant me an interdict on this ground, by which the legatees will be ordered to relinquish possession, just as if I myself had given security.

12.- MARCIANUS; *Institutes, Book VII*.- Even though the condition that no security shall be required may have been inserted into the will, such a condition will not be considered valid, and therefore, if any legatee should ask that security be given him, the condition will not be considered to have failed, because, after it has been established by public law that security of this kind can be remitted, the burden of a bond is not exacted, and no condition is understood to have been imposed.

13.- NERATIUS; *Parchments, Book VII*.- Security may also be given for the payment of legacies to him

8.- ULPIANO; *Comentarios a Sabino, libro XLVIII*.- Cuando se dio fianza por razón de los legados, tan pronto como corrió el término de los legados, se deben también, desde luego, en los mismos días en virtud de la estipulación.

9.- PAULO; *Comentarios a Sabino, libro XII*.- Pero no de suerte que se puedan pedir inmediatamente; porque decimos que se debe también el que se debe dar en día cierto, aunque todavía no haya llegado el día.

10.- POMPONIO; *Comentarios a Sabino, libro XXVI*.- Si a cargo tuyo como heredero se me hubiera hecho un legado bajo condición, y tú hubieres dado caución por los legados después que hubieres adido la herencia, y después de tu muerte se hubiere cumplido la condición del legado antes de haber sido adida tu herencia, dice Sabino, que me están obligados los fiadores, porque de todos modos se debe dar el legado, aunque la estipulación hubiese sido formada sobre la cosa.

11.- GAYO; *Comentarios al Edicto provincial, libro XIII*.- Si contra mi hubieran sido puestos los legatarios en posesión por causa de conservar los legados, y el procurador, u otro cualquiera hubiere dado caución en mi nombre, el Pretor me aplica el interdicto por el que se manda que los legatarios se separen de la posesión, del mismo modo que si yo hubiese dado caución.

12.- MARCIANO; *Instituta, libro VII*.- Aunque en el testamento se hubiere escrito la condición de que no se pida caución, no parece que es condición; y por lo tanto, aun cuando uno hubiere pretendido que se le dé caución, no se considera que faltó a la condición, porque después que plugo en el derecho público que se remitiera tal caución, ni es consiguiente la carga de la caución, ni ciertamente se considera condición.

13.- NERACIO; *Pergaminos, libro VII*.- También se da caución por los legados a aquel a quien se da la

praetermissa institutione ab intestato possidet hereditatem, legatorum satisdatur et, nisi satisdabitur, in possessionem legatorum servandorum causa mittitur: nam haec quoque praetor perinde salva esse vult atque ea quae Iure Civili debentur. idem ariston placet.

14.- ULPIANUS; *libro LXXIX, ad Edictum*.- Haec stipulatio et in fideicommissis locum habet, sive pure fideicommissum sit relictum sive ex die certa vel incerta vel sub condicione, sive res aliqua sive hereditas sive ius aliquod relictum est.

§ 1.- Divus quoque Pius rescripsit, quotiens evidens res est, ut certum sit nullo modo fideicommisso locum esse, perquam iniquum esse supervacua cautione onerari heredem.

15.- PAULUS; *libro LXXV, ad Edictum*.- Etiam de praesenti legato locum habet haec satisdatio, quoniam nonnullas moras exercitio iudicii habet.

§ 1.- Si et ab herede instituto legatorum satis acceperit legatarius et a Trebelliano fideicommissario, utraque quidem stipulatio committetur, sed exceptione se tuebitur heres, quia cavere non debuerit. Sed si pars hereditatis restituta sit, ab utroque cavendum est.

§ 2.- Etiam si ab intestato debeatur fideicommissum, locum habet haec stipulatio.

16.- GAIUS; *libro XXVII, ad Edictum provinciale*.- Si duo eiusdem nominis de legato contendant, utrisque satisdatur: nec onerari heredem, cum possit eosdem fideiussores ad utramque stipulationem adhibere, qui et ipsi non onerantur, cum futurum sit, ut uni tenerentur.

to whom an action is granted on account of said legacies as against one who, having rejected his appointment as heir, has acquired the estate on the ground of intestacy; and, unless security is furnished, he will be placed in possession of it for the purpose of preserving the legacies, as the Praetor desires them to be secure, just as in the case of those due under the Civil Law. Aristo holds the same opinion.

14.- ULPIANUS; *On the Edict, Book LXXIX*.- This stipulation also applies to trusts, where the trust is left either absolutely or to take effect after a certain day, or under a condition, or where certain property, or the entire estate, or any right dependent thereon, is bequeathed.

§ 1.- The Divine Pius also stated in a Rescript that, whenever it is clear and certain that there is no ground for the execution of the trust under any circumstances, it would be unjust for the heir to be required to furnish a bond when there is no necessity for it.

15.- PAULUS; *On the Edict, Book LXXV*.- This bond also applies to a legacy which is payable immediately, as judicial proceedings give rise to some delay.

§ 1.- If the legatee has received security from the appointed heir for the payment of his legacy, and has been charged with a trust under the Trebellian Decree of the Senate, both stipulations will take effect; but the heir can protect himself by an exception, because he is not obliged to give security. If, however, a portion of the estate has been transferred, security must be given by each of the parties.

§ 2.- This stipulation is also applicable where a trust is to be executed ab intestato.

16.- GAIUS; *On the Provincial Edict, Book XXVII*.- Where two persons of the same name claim a legacy, security must be given to both of them, but the heir will not be unnecessarily burdened on this account, as he can make the same sureties responsible under both stipulations; and the said

acción de los legados contra el que habiendo prescindido de la institución posee la herencia abintestato, y si no se diere caución, es puesto en posesión por causa de conservar los legados; porque el Pretor quiere que también estos queden a salvo, lo mismo que los que se deben por derecho civil; y lo mismo le parece bien a Aristón.

14.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- Esta estipulación tiene lugar también en los fideicomisos, ora si el fideicomiso hubiera sido dejado puramente, o si desde cierto día, o bajo condición, ora si se dejó alguna cosa, o una herencia, o algún derecho.

§ 1.- También respondió por rescripto el Divino Pío, que siempre que es evidente que sea cierto que de ningún modo tiene lugar el fideicomiso, es sumamente injusto que se grave al heredero con una caución superflua.

15.- PAULO; *Comentarios al Edicto, libro LXXV*.- También tiene lugar esta fianza respecto a un legado de presente, porque el ejercicio de la acción implica alguna dilaciones.

§ 1.- Si el legatario hubiere recibido caución por los legados, tanto del heredero instituido, como del fideicomisario Trebeliano, se verificarán ciertamente una y otra estipulación, pero el heredero se amparará con la excepción, porque no habría debido dar caución; mas si hubiera sido restituida parte de la herencia, se ha de dar caución por ambos.

§ 2.- Aunque el fideicomiso se deba abintestato, tiene lugar esta estipulación.

16.- GAYO; *Comentarios al Edicto provincial, libro XXVII*.- Si dos de un mismo nombre contendieran respecto a un legado, se les da caución a ambos; y no se grava al heredero, porque puede presentar los mismos fiadores para una y para otra estipulación; los cuales tampoco son gravados, por-

sureties are not unnecessarily burdened, since the result will be that they will only be liable under one obligation.

17.- PAULUS; *libro XLVIII, ad Edictum*.- Si ab uno ex heredibus legatorum satis accipimus, quum ab omnibus heredibus nobis legatum esset: si pars coheredis adcreseat promissori, in totum fideiussores tenentur, si solidum legatum is coeperit debere.

18.- SCAEVOLA; *libro XXIX, Digestorum*.- Quae filium legitimum relinquebat, patrem eundemque collibertum ex asse scripsit heredem fideique eius commisit, ut, quidquid ad eum ex hereditate eius pervenisset, cum moreretur, restitueret filio testatris nepoti suo, et haec verba adiecit: "satis a seio patre meo exigi veto". Quaesitum est, cum iste seius substantiam suam dissipat et veretur pater fideicommissarii, ne inane fideicommissum constituatur, an ad satisfactionem fideicommissi nomine patrem defunctae compellere possit. Respondit secundum ea quae proponerentur non compellendum cavere.

§ 1.- Idem quaesit: testatricem apud maritum suum, ex quo filium reliquerat, res deposuisse non exacta cautione depositionis: an ea res patri heredi restitui debeat, an vero quoniam emolumentum totius hereditatis ad filium defunctae reverti deberet, apud maritum remaneret, apud quem dos remansisset? Respondit, quod mulieris mansisset nec in dote fuisset, restituendum esse heredi.

§ 2.- Tutor, qui et coheres pupilli erat, absente pupillo, quum admonuerunt eum legatarii, fideicommissi nomine in solidum ipse cavet. Quaesitum est, an in pupillum adultum factum danda

17.- PAULUS; *On the Edict, Book XLVIII*.- If we take security from only one heir for the payment to us of a legacy which all the heirs are charged with, and the share of the said co-heir accrues to the promisor, the securities will be liable in full, if the heir should owe the entire legacy.

18.- SCAEVOLA; *Digest, Book XXIX*.- A woman who left a legitimate son appointed her father heir to her entire estate, he having been manumitted at the same time as herself, and charged him, at the time of his death, to transfer to his grandson, a son of the testatrix, all of her estate which might come into her hands, and added the following words, "I forbid any security to be required of my father Seius." As the said Seius had squandered all his property, and the father of the beneficiary of the trust was apprehensive that it would become of no effect, the question arose whether he could compel the father of the deceased to furnish security for the execution of the trust. The answer was that, according to the facts stated, he could not be compelled to give security.

§ 1.- The testatrix having deposited certain property with her husband, the father of the boy to whom she made the bequest, without requiring from him a bond for the deposit, it was also asked whether the said property should be delivered to the heir who was the father of the testatrix; or whether, as the entire estate must eventually revert to the son of the deceased, the property in question should remain in the hands of the husband, who had a right to the possession of the dowry. The answer was that all the property belonging to the woman which remained and was not included in her dowry must be delivered to the heir.

§ 2.- A guardian, who was also the co-heir of his ward, during the absence of the latter, and after having been notified by the legatees, himself gave security on account of the trust for the entire amount

que habrá de suceder que sólo a uno queden obligados.

17.- PAULO; *Comentarios al Edicto, libro XLVIII*.- Si de uno de los herederos recibimos caución por los legados, habiéndosenos legado a cargo de todos los herederos, si la parte del coheredero acreciera al que prometió, los fiadores están obligados por el todo, si éste hubiere comenzado a deber todo el legado.

18.- SCEVOLA; *Digesto, libro XXIX*.- Una que dejaba un hijo legítimo instituyó heredero universal a su padre y también coliberto, y encomendó a su fidelidad que todo lo que a él hubiese ido de su herencia lo restituyera, cuando muriese, al hijo de la testadora, nieto suyo, y añadió estas palabras: «prohibo que se le exija caución a Seyo, mi padre»; se preguntó, si disipando este Seyo sus bienes, y temiendo el padre del fideicomisario que se hiciera vano el fideicomiso, se podría compeler al padre de la difunta a dar caución por razón del fideicomiso. Respondió, que según lo que se exponía, no ha de ser compelido a dar caución.

§ 1.- El mismo preguntó, si, habiendo la testadora depositado cosas en poder de su marido, de quien había dejado un hijo, sin haber exigido caución del depósito, se le debería restituir esta cosa al padre heredero, o si por el contrario, como que el emolumento de toda la herencia debería volver al hijo de la difunta, permanecería en poder del marido, en poder del cual hubiese quedado la dote. Respondió, que lo que de la mujer hubiese quedado y no hubiese sido de la dote, debe ser restituido al heredero.

§ 2.- Un tutor, que era también coheredero del pupilo, habiéndole requerido los legatarios por razón de un fideicomiso, dio caución por el todo; se preguntó, si se habrá de dar la acción útil contra el pupilo

sit utilis actio. Respondit dandam.

TIT. IV

UT IN POSSESSIONE LEGATORUM VEL
FIDEICOMMISSORUM SERVANDORUM
CAUSA ESSE LICEAT

1.- ULPIANUS; *libro LII, ad Edictum*.- Si quis, quum vetitus esset satis accipere, acceperit, an repeti satisfactio ista possit, ut heres condicat liberationem? et quidem si sciens heres indebitum cavit, repetere non potest. Quid deinde, si ignoravit remissam sibi satisfactioem? potest condicere. Si vero hoc non potuisse remitti crediderit, numquid condicere possit qui ius ignoravit? adhuc tamen benigne quis dixerit satisfactioem condici posse. Quid deinde, si commissa sit stipulatio, fideiussores putamus exceptione uti posse an non? et magis est, ut utantur exceptione, quia ex ea causa intercessit satisfactio, ex qua non debuit.

§ 1.- Non exigit praetor, ut per heredem stet, quo minus caveat, sed contentus fuit per legatarium vel fideicommissarium non stare, quo minus ei caveatur. quare si non fuerit, qui interpelletur cautionis nomine, hoc est is a quo legatum fidei commissum relictum est, omnimodo poterit legatarius et fideicommissarius in possessionem ex hoc edicto mitti, quia verum est per eum, cui caveri oportebit, non fieri, quo minus caveatur. Non tamen et satisfactio debet offerri legatario, sed sufficit, sive desideravit et non cavetur, sive non habeat, a quo satis desideret.

left under the same. The question arose whether a praetorian action should be granted against the ward when he grew up. The answer was that it should be granted.

TITLE IV

WHEN THE LEGATEES OF THE
BENEFICIARIES OF A TRUST CAN BE
PLACED IN POSSESSION OF THE PROPERTY
OF THE ESTATE FOR THE PURPOSE OF
PRESERVING THE SAME

1.- ULPIANUS; *On the Edict, Book LII*.- If anyone should take security after he has been forbidden to do so, can the bond be recovered by the heir, so that he may be released? If, indeed, the heir knowingly gave security when it was not necessary he cannot be released. But what if he was not aware that he was excused from giving security? He can then recover. If, being ignorant of law, he thought that he could not be excused from giving security, can he recover the bond? In this instance, anyone may still very properly say that he can do so. But what if a stipulation had been entered into, shall we hold that the sureties can avail themselves of an exception, or not? The better opinion is that they can avail themselves of an exception, because security has been given in a case where none was required.

§ 1.- The Praetor does not demand that the furnishing of security should be opposed by the heir, but he will be satisfied if the failure to give it was not caused by either the legatee or the beneficiary of the trust. Therefore, if there is no one who can be called upon to give bond (that is to say, some person who has been charged to the payment of a legacy, or the execution of a trust), the legatee and the beneficiary can be placed in absolute possession of the property by the terms of this Edict, because it is true that the person to whom security should be given is not to blame for it not being furnished. Security, however, should not be offered to the legatee, but it will be sufficient if he demanded it, and it was not given, or if there was no one of whom he could ask it.

hecho adulto. Respondió, que se ha de dar.

TÍTULO IV

DE QUE SEA LÍCITO ESTAR EN POSESIÓN
POR CAUSA DE CONSERVAR
LOS LEGADOS Y LOS FIDEICOMISOS

1.- ULPIANO; *Comentarios al Edicto, libro LII*.- Si uno, habiéndosele prohibido recibir caución, la hubiere recibido, ¿se podría repetir esta caución, de suerte que el heredero recabe por la condición la liberación? Y a la verdad, si a sabiendas de que no era debida dio caución el heredero, no puede repetirla. ¿Pero qué se dirá si ignoró que le había sido remitida la caución? Que la puede reclamar por la condición. Pero si hubiere creído que esto no se le pudo remitir, ¿podrá acaso pedir por la condición el que ignoró el derecho? Y todavía habrá quien por benignidad diga que se puede repetir por la condición la fianza. Finalmente, ¿qué se dirá si se hubiera verificado la estipulación? ¿Juzgamos que los fiadores pueden usar de la excepción, o que no? Y es más cierto que usarán de la excepción, porque medió la caución por una causa por la cual no debió.

§ 1.- No exige el Pretor que consista en el heredero que no dé caución; sino que se contentó con que no consista en el legatario o en el fideicomisario que a él no se le dé caución. Por lo cual, si no hubiere quien sea requerido por razón de la caución, esto es, uno a cuyo cargo se dejó el legado o el fideicomiso, podrán de todos modos el legatario y el fideicomisario ser puestos en posesión en virtud de este Edicto, porque es verdad que no consiste que no se dé en aquel a quien se le debiere dar la caución. Pero tampoco se le debe ofrecer la caución al legatario, sino que basta que no se le dé caución, si la pidió, o que no tenga a quien pedir la caución.

§ 2.- Si debitori liberatio sit relictā, non est exigenda cautio, quia habet penes se legatum: quippe, si conveniatur, exceptione doli mali uti possit ei cui legatum solutum est.

§ 3.- Quum constet legatum non deberi, Divus Pius ad Aemilium Equestrem rescripsit non debere Praetorem satisfactionem admittere.

§ 4.- Tunc ante aditam hereditatem satisfaciendum de legatis est, cum adhuc dubium est, an hereditas adeatur. Ceterum si certum sit repudiata vel omittam hereditatem vel abstentis necessarios heredes, frustra hoc edictum imploratur, quum certum sit legatum vel fideicommissum non deberi.

2.- IDEM; *libro LXXIX, ad Edictum*.- Si autem certum sit hereditatem necdum aditam fuisse, nec satisfactio nec possessio locum habet.

3.- IDEM; *libro LII, ad Edictum*.- Si is, a quo satis petitur, offerat cognitionem et dicat: "hodie constet de fideicommisso, hodie agamus", dicendum est cessare satisfactionem, cum possit ante de fideicommisso quam de satisfactione constare.

§ 1.- Nec non illa cognitio imploranda erit ab herede, si forte dicatur per calumniam satis peti: hoc enim commune est omnium satisfactionum. Divus enim Pius rescripsit eum, apud quem satis petitur, debere explorare, num per calumniam satis petatur: de qua re summam debet cognoscere.

§ 2.- Si procurator satis legatorum desideret, si

§ 2.- Where the release of a claim is bequeathed to a debtor, no bond should be required, because he himself has the legacy in his hands; since, if an action is brought against him, he can interpose an exception on the ground of fraud.

§ 3.- The Divine Pius stated in a Rescript, directed to Aemilius of the Equestrian Order, that the Praetor should not permit a legatee, to whom his legacy has been paid, to ask security of the heir when it is established that the legacy is not due.

§ 4.- Security must be furnished for the payment of a legacy before the estate has been entered upon, when it is still doubtful whether it will be accepted. Moreover, where it is certain that it will be rejected or relinquished, or where the necessary heirs will not accept it, recourse will be had in vain to this Edict, as it is clear that the legacy will not be payable, or the trust executed.

2.- THE SAME; *On the Edict, Book LXXIX*.- Moreover, if it is certain that the estate has not yet been accepted, there will be no ground for demanding security, or praetorian possession of the property.

3.- THE SAME; *On the Edict, Book LII*.- Where the heir, of whom security is demanded, suggests a judicial investigation of the legality of the bequest, and says, "Institute proceedings immediately with reference to the trust, let us go into court at once," it must be said that the bond is no longer in force, as the validity of the trust must be established before that of the security is determined.

§ 1.- This judicial investigation can the more readily be solicited by the heir, if he alleges that a bond is demanded for the purpose of annoyance; for this is the ordinary rule in all cases where security is asked. The Divine Pius stated in a Rescript that the judge before whom a bond is demanded should ascertain whether this is done maliciously, or not. He should make this inquiry summarily.

§ 2.- Where the agent of a legatee demands

§ 2.- Si a un deudor se le hubiera dejado la liberación, no se ha de exigir caución, porque tiene en su poder el legado; pues si fuera demandado, podría usar de la excepción de dolo malo.

§ 3.- Cuando conste que no se debe el legado a aquel a quien se le pagó el legado, respondió por rescripto el Divino Pío a Emilio Equestre, que el Pretor no debe admitir la caución.

§ 4.- Antes de adirse la herencia se ha de dar caución por los legados siempre y cuando es todavía dudoso si será adida la herencia. Pero si fuera cierto que la herencia fue repudiada o abandonada, o que se abstuvieron los herederos necesarios, se implora en vano este Edicto, porque es cierto que no se debe el legado o el fideicomiso.

2.- EL MISMO; *Comentarios al Edicto, libro LXXIX*.- Mas si fuera cierto que todavía no había sido adida la herencia, no tiene lugar ni la fianza, ni la posesión.

3.- EL MISMO; *Comentarios al Edicto, libro LII*.- Si aquel a quien se pide la caución, ofreciera el conocimiento, y dijera: «conste hoy respecto al fideicomiso, ejercitemos hoy la acción», se ha de decir, que deja de tener lugar la fianza, porque es posible que conste respecto al fideicomiso antes que respecto a la fianza.

§ 1.- También se habrá de pedir por el heredero este conocimiento, si acaso se dijera que por calumnia se pedía la caución; porque esto es común a todas las cauciones. Pues el Divino Pío respondió por rescripto, que aquel ante quien se pide la fianza debe examinar si la fianza se pide por calumnia; de lo cual debe conocer sumariamente.

§ 2.- Si el procurador pidiera la caución de los lega-

quidem mandatum ei sit, non habebit necesse de rato cavere, sed erit ei satisdandum: si vero dubitetur, an mandatum sit vel non sit, de rato cautio erit exigenda.

§ 3.- Si semel fuerit satisdatum, quaesitum est, an etiam rursus cavendum sit, si forte dicatur egenos fideiussores esse datos. Et magis est, ut caveri non debeat: hoc enim Divus Pius rescripsit Pacuviae Licinianae: ipsam enim facilitati suae expensum ferre debere, quae minus fideiussores idoneos accepit: neque enim oportet per singula momenta onerari eum, a quo satis petitur.

4.- PAPINIANUS; *libro XXVIII, Quaestionum*.- Plane si nova causa allegetur, veluti quod fideiussor decesserit aut etiam rem familiarem inopinato fortunae impetu amiserit, aequum erit praestari cautionem.

5.- ULPIANUS; *libro LII, ad Edictum*.- Is cui legatorum fidei commissorum nomine non cavetur missus in possessionem nunquam pro domino esse incipit. Nec tam possessio rerum ei quam custodia datur: neque enim expellendi heredem ius habet, sed simul cum eo possidere iubetur, ut saltem taedio perpetuae custodiae extorqueat heredi cautionem.

§ 1.- Si alius damni infecti nomine missus sit in possessionem, alius legatorum servandorum causa, posse eum, qui legatorum servandorum causa in possessionem missus est, etiam damni infecti satisfacere: qui si satisfaciderit, non aliter decedere possessione debebit, quam ei cautum fuerit etiam eo nomine, quod se damni infecti obligavit.

security, if, indeed, he has been specially directed to do so, he himself will not be required to give bond that his act will be ratified, but security must be furnished him. If, however, it should be doubtful whether he has been appointed agent, or not, a bond for the ratification of his act shall be exacted of him.

§ 3.- Where security has once been given, the question arises whether it should be given a second time, when it is alleged that the sureties are poor. The better opinion is that security should not be given a second time; for the Divine Pius stated in a Rescript addressed to Pacuvia Liciniana that she herself must bear the loss caused by her acceptance of sureties who were insolvent. Nor is it necessary for the person of whom security may be demanded to be annoyed every moment.

4.- PAPINIANUS; *Questions, Book XXVIII*.- It is evident that it is but just that another bond should be given where some new reason is alleged for doing so; as, for instance, if the surety should die, or should lose his property by some unexpected misfortune.

5.- ULPIANUS; *On the Edict, Book LII*.- A person to whom security is not given for the payment of a legacy or the execution of a trust, even if he is placed in possession, does not begin to acquire the ownership of the same; for it is not so much the actual possession of the property as the safe-keeping of it which is granted him. He has no right to drive the heir away, but he is ordered to take possession of the property with him, so that by the annoyance of perpetual custody he may compel the heir to furnish security.

§ 1.- Where one person is placed in possession of property to avoid threatened injury to the same, and another is placed in possession for the purpose of preserving the legacies, he who has possession for the purpose of preserving the legacies can also give security against the damage which is apprehended, and, if he should do so, he need not relinquish possession, unless security is given to him to the amount for which he has bound himself in providing against threatened injury.

dos, no tendrá necesidad de dar fianza de ratificación, si verdaderamente se le hubiera mandado, sino que se le habrá de dar la caución; pero si se dudara si se le había, o no, mandado, se habrá de exigir fianza de ratificación.

§ 3.- Si una vez se hubiere dado caución, se preguntó si también se haya de dar otra caución, si acaso se dijera que se dieron fiadores insolventes. Y es más cierto que no se deba dar caución; porque respondió por rescripto el Divino Pío a Pacuvia Liciniana, que esto lo debía imputar a su propia facilidad ella misma, que aceptó fiadores que no eran abonados; pues no es conveniente que a cada momento se grave a aquel a quien se le pide la fianza.

4.- PAPINIANO; *Cuestiones, libro XXVIII*.- A la verdad, si se alegara nueva causa, por ejemplo, que el fiador haya fallecido, o también que hubiere perdido sus bienes de familia por inopinado golpe de la fortuna, será justo que se preste caución.

5.- ULPIANO; *Comentarios al Edicto Libro LII*.- Puesto en posesión aquel a quien no se le da caución por razón de los legados o de los fideicomisos, no comienza nunca a ser considerado como dueño, ni se le da tanto la posesión de los bienes, como su custodia; porque no tiene el derecho de expulsar al heredero, sino que se le manda que posea juntamente con el, para que a lo menos por el tedio, de la custodia perpetua le arranque al heredero la caución.

§ 1.- Si uno fuera puesto en posesión por razón del daño que se teme, y otro por causa de conservar los legados, puede el que fue puesto en posesión por causa de conservar los legados dar caución también por el daño que se teme; y si hubiere dado la caución, no deberá separarse de la posesión de otro modo, sino si a él se le hubiere dado caución también por este motivo, porque se obligó por el daño que se teme.

§ 2.- Si plures legatarii mitti in possessionem desideraverint, omnes venire debent in possessionem: is enim qui ex causa legatorum possidet sibi, non alii possidet. Alia est causa, cum creditores rei servandae causa mittuntur in possessionem: nam is qui possidet non sibi, sed omnibus possidet.

§ 3.- Qui prior missus est legatarius in possessionem, non praefertur ei qui postea mittitur: inter legatarios enim nullum ordinem observamus, sed simul omnes aequaliter tuemur.

§ 4.- Postquam rei servandae creditores possidere coeperunt, legatorum servandorum gratia missus in possessionem creditoribus potior non habebitur.

§ 5.- Qui in possessionem legatorum servandorum causa mittitur, in possessionem quidem rerum hereditarium omnimodo veniet, hoc est earum quae in causa hereditaria manent: earum autem, quae in causa hereditaria non erunt, non alias mittitur, quam si dolo malo in ea causa esse desierint, nec semper, sed causa cognita.

§ 6.- Bonorum autem appellatione hae res comprehensae videbuntur, quarum proprietas ad heredem pertinet.

§ 7.- Sed et si vectigales agri sunt et si qua pignora testatori data, in eorum quoque mittetur possessionem.

§ 8.- Sed et in partus ancillarum et fetus pecorum, item fructus aequae omni modo legatarius et fideicommissarius mittentur.

§ 2.- Where several legatees desire to be placed in possession of property, they must all go and take possession, for he who obtains it for the purpose of preserving legacies holds possession solely for himself, and not for anyone else. The case, however, is different where creditors are placed in possession in order to preserve the property, for in this instance, the one who obtains possession does so not merely for himself but for all the other creditors as well.

§ 3.- A legatee who has been given possession first is not preferred to one to whom it is given afterwards; for we observe no order of precedence among legatees, but protect all of them equally at the same time.

§ 4.- After creditors have obtained possession for the purpose of preserving property, a legatee who has been placed in possession to secure the payment of his legacy will not have preference over the creditors.

§ 5.- Where a person who has been placed in possession of property for the purpose of preserving his legacy comes into possession of the entire estate, that is to say, if the property in question still forms part of the estate, he will not acquire possession of property which does not belong to it, unless the said property has ceased to form part of the same through fraud, and his possession will not be perpetual, but will be dependent upon the result of the judicial inquiry.

§ 6.- Moreover, all those things are understood to be included in the term "property," whose ownership belongs to the heir.

§ 7.- Where there are lands which constitute part of the estate merely because they are subject to certain claims, and where articles have been given in pledge to the testator, the legatee will also be placed in possession of them.

§ 8.- The legatee and the beneficiary of the trust will also be given possession of the offspring of slaves, and the increase of flocks, as well as of all the crops.

§ 2. -Si muchos legatarios hubieren pedido ser puestos en posesión, todos deben entrar en posesión; porque el que posee por causa de legados, posee para sí, no para otro. Otra cosa es cuando los acreedores son puestos en posesión por causa de conservar los bienes; porque el que posee, lo posee para sí, sino para todos.

§ 3.- El legatario que primero fue puesto en posesión no es preferido al que es puesto después; porque no observamos ningún orden entre los legatarios, sino que a todos los amparamos juntamente por igual.

§ 4.- Después que los acreedores comenzaron a poseer por conservar los bienes, el que fue puesto en posesión para conservar los legados no será considerado preferido a los acreedores.

§ 5.- El que es puesto en posesión por causa de conservar los legados, entrará ciertamente de todos modos en posesión de los bienes de la herencia, esto es, de los que permanecen en la herencia; pero en la de los que no fueren de la herencia no es puesto de otro modo, sino cuando hubiere dejado de estar con dolo malo en tal situación, y no siempre, sino con conocimiento de causa.

§ 6.- Pero con la denominación de bienes se considerarán comprendidas aquellas cosas cuya propiedad pertenece al heredero.

§ 7.- Pero también si hay campos tributarios, y si al testador se le dieron algunas prendas, será puesto en posesión también de estas cosas.

§ 8.- Pero el legatario y el fideicomisario serán puestos igualmente de todos modos en posesión de los partos de las esclavas, y de las crías de los ganados, y también de los frutos.

§ 9.- Sed et si rem alienam defunctus bona fide emerit, in possessionem eius mittendum legatarium constat: nam et haec res in causa hereditaria est.

§ 10.- Si deposita res apud defunctum fuerit vel commodata, locum missio non habet, quia non sunt istae res hereditariae.

§ 11.- Si ex duobus heredibus alter satisfacere sit paratus, alter non, in partem eius missio locum utique habere debet. Missi itaque legatarii impediunt etiam eum, qui satisfacit, rei administratione: quare suadendum erit heredi, ut in assem satisfaciat, ne administratio eius impediatur.

§ 12.- Si ab impuberis substituto legata sint relicta et impubes decesserit, missio non solum in ea bona, quae testatoris fuerunt, verum ad ea quoque, quae impubes adquisiit, locum habebit: nam haec quoque hereditaria sunt: vivo autem impubere neque missio neque satisfactio locum habet.

§ 13.- Si heres non sit, a quo fideicommissum relictum est, sed alterius nominis successor, dicendum est, ut edicto locus sit et dolus eius sit aestimandus.

§ 14.- Sed et si heredis heres sit, qui dolo fecit, aequè nocere debet.

§ 15.- Dolum accipere debemus et culpam latam, sed non omnem dolum, sed qui in necem legatariorum et fideicommissariorum factus est.

§ 16.- Imperator Antoninus Augustus rescripsit

§ 9.- If, however, the deceased, in good faith, purchased property belonging to another, it has been settled that the legatee should be placed in possession of this also, for it forms part of the estate.

§ 10.- Where property has been deposited with, or loaned to the deceased, the legatee cannot be placed in the possession of the same, for such property is not included in the estate.

§ 11.- Where one of two heirs is ready to furnish security, and the other is not, the legatee can be placed in possession of the share of the estate belonging to the latter. Hence, the legatees who are placed in possession will also take precedence of the heir who gave security to the administration of the estate; therefore the heir should be induced to give security for the entire estate, in order to prevent his administration of the same from being interfered with.

§ 12.- Where the substitute of a minor under the age of puberty is charged with the payment of legacies, and the minor dies, possession will be granted, not only of the property which belonged to the testator, but also of that which the minor himself acquired, for it likewise forms part of the estate. During the lifetime of the minor, however, possession cannot be granted, nor can security be required.

§ 13.- If the person who is charged with the trust is not an heir, but a successor for some other reason, it must be said that the Edict will apply, and the bad faith of the trustee taken into consideration.

§ 14.- Moreover, where the heir of the heir is the one who is guilty of fraud, he also should suffer for it.

§ 15.- We should understand fraud in this instance to mean gross negligence, and not every kind of bad faith, but only such as is committed to the prejudice of legatees and beneficiaries of trusts.

§ 16.- The Emperor Antoninus Augustus stated in a

§ 9.- Pero también si el difunto hubiere comprado de buena fe una cosa ajena, consta que el legatario ha de ser puesto en posesión de ella; porque también esta cosa está comprendida en los bienes de la herencia.

§ 10.- Si una cosa hubiere sido depositada en poder del difunto, o dada a él en comodato, no tiene lugar la inmisión en posesión, porque estas no son cosas de la herencia.

§ 11.- Si de dos herederos uno estuviera dispuesto a dar caución, y otro no, la inmisión en posesión debe tener ciertamente lugar en la parte de éste. Y así los legatarios, puestos en posesión, impedirán también al que dio fianza la administración de la cosa; por lo cual se ha de aconsejar al heredero que dé caución por toda la herencia, para que no se le impida su administración.

§ 12.- Si los legados hubieran sido dejados a cargo del substituto de un impúbere, y el impúbere hubiere fallecido, la inmisión en posesión tendrá lugar no sólo respecto a aquellos bienes que fueron del testador, sino también en aquellos que adquirió el impúbere, porque también estos son de la herencia; pero viviendo el impúbere no tiene lugar ni la inmisión, ni la fianza.

§ 13.- Si no fuera heredero aquel a cuyo cargo se dejó el fideicomiso, sino sucesor de otro nombre, se ha de decir que el Edicto tiene lugar, y que ha de ser juzgado por su dolo.

§ 14.- Pero también si fuera el heredero del heredero el que obró con dolo, deberá perjudicar igualmente.

§ 15.- Debemos entender como dolo también la culpa lata, pero no todo dolo, sino el que se hizo en perjuicio de los legatarios y de los fideicomisarios.

§ 16.- El Emperador Antonino Augusto respondió

certis ex causis etiam in propria bona heredis legatarios et fideicommissarios esse mittendos, si post sex menses, quam aditi pro tribunali fuerint hi quorum de ea re notio est, in satisfactione cessatum est, inde fructus percepturos, quoad voluntati defunctorum satisfiat. Quod remedium servaretur et adversus eos, qui ex qua causa fideicommisso moram faciunt.

§ 17.- Satisfactionis verbum licet latius patet, tamen ad exsolvendum legatum refertur.

§ 18.- Proinde et si remissa sit satisfactio, rescriptum locum habebit, quia mora fit solutioni.

§ 19.- Sex autem mensum puto continuum tempus, non possessionum computandum.

§ 20.- Cessatum non accipimus, si pupillus tutorem non habeat nec curatorem furiosus vel adulescens: nam frustratio non debet huiusmodi personis nocere, quae sunt indefensae. Certe si hereditas iacuerit aliquo tempore, hoc tempus de medio detrahendum est.

§ 21.- Quaeri poterit, an in vicem usurarum hi fructus cedant, quae in fideicommissis debentur. Et quum exemplum pignorum sequimur, id quod ex fructibus percipitur primum in usuras, mox, si quid superfluum est, in sortem debet imputari: quin immo et si amplius quam sibi debetur perceperit legatarius, exemplo pigneraticiae actionis etiam utilis actio ad id refundendum dari debebit. Sed pignora quidem quis et distrahere potest, hic autem frui tantum ei constitutio permittit, ut festinetur ad sententiam.

Rescript that, in certain cases, legatees and beneficiaries should be placed in possession of property belonging to the heir himself, and if, within six months from the time when the legatees first appeared in the court of a magistrate invested with jurisdiction, their claims were not satisfied, they could collect the income of said property until the will of the deceased had been complied with. This remedy also is available against those who are in default in the execution of trusts with which they have been charged.

§ 17.- Although the term "satisfaction" has a usually broader signification, in this instance it refers to the payment of legacies.

§ 18.- Hence, even where the heir has been excused from giving security by the testator, the Rescript will apply, because the heir may be in default of payment.

§ 19.- Again, I think that the term of six months should be calculated continuously, and not with the sessions of the court.

§ 20.- We do not consider that a failure to pay the legacies takes place where a ward has no guardian, and an insane person, or a minor, has no curator. For failure to act should not prejudice persons of this kind who cannot defend themselves. It is certain that if the estate should be without an heir for a certain time, this should be deducted from the term of six months above mentioned.

§ 21.- It may be asked whether the crops which are due under the terms of the trust should take the place of interest, and, as we follow the example of pledges, whatever is collected by way of income should first be considered as interest, and anything in excess of this should be credited on the principal. And, indeed, if the legatee should collect more than he is entitled to, an equitable action, as in the case of an action on pledge, should be granted to compel him to refund the surplus. Anyone, however, can sell the pledges, and in this case the constitution only permits the legatee to collect the income in order to hasten the decision of the case.

por rescripto, que por ciertas causas los legatarios y fideicomisarios han de ser puestos en posesión también de los propios bienes del heredero; si después de seis meses, cuando se hubiere acudido al tribunal de aquellos a quienes compete el conocimiento de este asunto, se cesó en el cumplimiento, habrán de percibir desde entonces los frutos hasta que se dé cumplimiento a la voluntad de los difuntos. Cuyo remedio se observará también contra los que por cualquier causa originan mora para el fideicomiso.

§ 17.- Aunque la palabra satisfacción se extiende a más, se refiere, sin embargo, al pago del legado.

§ 18.- Por lo cual, aunque haya sido dispensada la fianza tendrá lugar el Rescripto, porque se causa mora para el pago.

§ 19.- Pero creo que se ha de computar continuo el tiempo de los seis meses, no el de las posesiones.

§ 20.- No entendemos que se cesó, si el pupilo no tuviera tutor ni curador el furioso o el adolescente; porque el daño de la demora no debe perjudicar a estas personas, que están indefensas. Ciertamente, si la herencia hubiere estado yacente algún tiempo, se ha de descontar este tiempo.

§ 21.- Se podrá preguntar, si estos frutos ceden por los intereses que se deben en los fideicomisos. Y como seguimos el ejemplo de las prendas, lo que de los frutos se percibe se debe aplicar primeramente a los intereses, y después, si hay sobrante, al capital. Aun mas, si el legatario hubiere percibido mas de lo que se le debe, se deberá dar para que lo devuelva también la acción útil a semejanza de la acción pigneraticia. Pero ciertamente que también puede uno vender las prendas; pero en el presente caso la Constitución le permite a éste solamente que disfrute, para que se apresure al cumplimiento de la sentencia.

§ 22.- Qui legatorum servandorum causa in possessionem mittitur, et fructus custodire et cetera debebit. Et pati quidem heredem colere agros et fructus redigere, sed custodire legatarium fructus oportebit, ne ab herede consumantur: quod si heres fructus nolit cogere, permittendum erit legatario cogere fructus et coactos servare. Quin immo si tales sint fructus, quos primo quoque tempore venire expediat, vendere quoque legatario permittendum est et pretium servare.

In ceteris quoque rebus hereditariis missi in possessionem hoc erit officium, ut universas res hereditarias colligat et ibi custodiat, ubi domicilium defunctus habuit, et, si nulla domus sit, habitationem conducat vel horreum quoddam, in quo res collectae custodiantur. Et puto ita legatarium custodire res hereditarias debere, ut neque heredi auferantur neque depereant deterioresve fiant.

§ 23.- Quod si ex constitutione quis in possessionem mittatur, curandum est, ne vis fiat utenti et fruenti legatario.

§ 24.- Satisfieri voluntati defuncti sic accipitur, quoad voluntati defuncti vel ex fructibus vel aliunde satisfiat.

§ 25.- Constitutio autem Divi Antonini pertinet ad eos, a quibus utiliter fideicommissum relictum est, quamvis heredes non sint: par enim utilitas est.

§ 26.- In possessionem missus legatorum servandorum causa si litem eo nomine contestatus sit, non ante decedere possessione debet, quam ei pro lite fuerit cautum.

§ 27.- Missus in possessionem si non admittatur,

§ 22.- Where anyone is placed in possession of property in order to provide for the payment of legacies, he must keep the income and all the other effects, and permit the heir to cultivate the fields and harvest the crops; but the legatee must take charge of the latter to prevent them from being consumed by the heir. If the heir should refuse to gather the crops, the legatee should be permitted to do so, and to keep possession of them. But where the crops are of such a nature that it is expedient to sell them immediately, the legatee should be permitted also to sell them, and to retain the price.

When anyone is placed in possession of other property belonging to the estate, it will be his duty to collect everything of this kind, and take care of it, wherever the deceased had his residence; and if there is no house there suitable for this purpose, he can hire one, or a warehouse in which the property which has been collected can safely be kept. I think also that the legatee should exercise such supervision over the property of the estate that the heir cannot be deprived of it, or it cannot be lost, or become deteriorated.

§ 23.- Where anyone has been placed in possession of property under the terms of the constitution, care must be taken to employ no force against any other legatee who has the use and enjoyment of the same.

§ 24.- The wishes of the deceased is understood to be complied with where this is done with reference to the income of the estate, or in any other way.

§ 25.- Moreover, the said Constitution of the Divine Antoninus also has reference to those who are legally charged with a trust, even if they are not heirs, for the obligation is the same.

§ 26.- Where a person is placed in possession of property in order to provide for the safety of legacies, and judicial proceedings are instituted against him on account of said property, he should not relinquish possession of the same, unless security is furnished him for the expense of litigation.

§ 27.- Where anyone is placed in possession, and is

§ 22.- El que es puesto en posesión por causa de conservar los legados, deberá custodiar los frutos y lo demás, y consentir, ciertamente, que el heredero cultive los campos, y recoja los frutos; pero convendrá que el legatario custodie los frutos, para que no sean consumidos por el heredero. Mas si el heredero no quisiera recoger los frutos, se le habrá de permitir al legatario que recoja los frutos y que guarde los recolectados; aun mas, si los frutos fuesen tales, que convenga venderlos cuanto antes, se le ha de permitir también al legatario que los venda, y que guarde el precio.

Y también respecto a los demás bienes de la herencia será deber del que fue puesto en posesión recoger todos los bienes de la herencia, y custodiarlos allí donde el difunto tuvo su domicilio; y si no hubiere ninguna casa, alquile una habitación, o algún almacén, en el cual se custodien las cosas recogidas; y opino que el legatario debe custodiar las cosas de la herencia de modo, que ni se le quiten al heredero, ni perezcan o se deterioren.

§ 23.- Pero si en virtud de la Constitución fuera uno puesto en posesión, se ha de procurar que no se haga violencia al legatario que usufructúe.

§ 24.- Se entiende que se satisface a la voluntad del difunto, en tanto que se da satisfacción a la voluntad del difunto, o con los frutos o de otro modo.

§ 25.- Pero la Constitución del Divino Antonino se refiere a aquellos a cuyo cargo se dejó útilmente un fideicomiso, aunque no sean herederos, porque es igual la utilidad.

§ 26.- Si el que fue puesto en posesión por causa de conservar los legados hubiera contestado a la demanda por este motivo, no debe separarse de la posesión antes que se haya dado caución por el litigio.

§ 27.- Si el que fue puesto en posesión no fuera

habet interdictum propositum: aut per viatorem aut per officialem praefecti aut per magistratus introducendus est in possessionem.

§ 28.- Missio autem locum habebit non tantum, si quis id ipsum, quod legatum est, rogatus sit, verum etiam si quid vel ex eo vel pro eo restituere fuerit rogatus.

§ 29.- Si Titio pure legatum fuerit et eius fidei commissum sub condicione, ut Sempronio restitueret, non inique praetorem statuturum Iulianus scripsit, si, antequam legatum consequatur legatarius, fideicommissi condicionalis satis non det, ut magis Sempronio det legati persecutionem, ut si legatario satisdet deficiente condicione reddi decem.

Sed et si acceperit Titius ab herede decem, aequum esse Iulianus ait cogi eum invicem satisfacere aut ipsa decem tradere et Sempronium Titio cavere: et hoc iure utimur, id enim et Marcellus ait.

§ 30.- Quid ergo, si et legatum sub condicione sit relictum et fideicommissum, neque fideicommissi satisfacetur? aequissimum erit fideicommissarium nomine legati satis accipere ab herede, si ei legatarius non caveat, scilicet ut et ipse legatario caveat. Quod si iam accepit legatarius ab herede satis, decernendum erit ex ea satisfactio magis fideicommissario quam legatario dandam actionem, in eum scilicet casum, quod fideicommissi eius condicio extitit: ipsius etiam legati persecutio danda erit fideicommissario, si nondum solutum est et condicio eius extitit, scilicet si fuerit fideicommissarius paratus cavere legatario.

not permitted to take it, he will be entitled to the interdict provided for this purpose, and must be placed in possession either by a court attendant, by an officer of the Praetor, or by a magistrate.

§ 28.- A legatee can be placed in possession, not only where anyone is charged to transfer the very property which is bequeathed, but also where he is charged to transfer a portion of the same, or something else instead of it.

§ 29.- Where a legacy is bequeathed absolutely to Titius, and he is charged under a condition to transfer it to Sempronius, Julianus says that the Praetor will not render an unjust decision if, before the legatee obtains the bequest, he refuses to give security for the execution of the conditional trust; and that he should then permit Sempronius himself to claim the legacy, in order that he may give security, and agree to pay ten aurei if the condition should not be fulfilled.

If, however, Titius should receive the ten aurei from the heir, Julianus says that it will be only just to compel him to give bond or to pay the ten aurei, and for Sempronius to furnish security to Titius. This is our present rule, which is adopted by Marcellus.

§ 30.- But what if the legacy is left under a condition, as well as the trust, and no security is furnished for the execution of the trust? It will be perfectly equitable for the beneficiary to take security from the heir for the payment of the legacy, if the legatee should not secure him; that is to say, in order that he himself may give bond to the legatee. Where, however, the legatee has already received security from the heir, it must be held that an action should be granted, on account of the security, to the beneficiary of the trust, rather than to the legatee; that is to say, in the event that the condition of the trust is fulfilled. The right to demand the legacy itself should be granted to the beneficiary of the trust, if it has not yet been paid, and the condition upon which it was dependent has been complied with, provided that the beneficiary was ready to furnish security to the legatee.

admitido, tiene el interdicto propuesto; y ha de ser puesto en posesión o por el alguacil, o por el oficial del Prefecto, o por los Magistrados.

§ 28.- Pero la inmisión en posesión tendrá lugar no solamente si a uno se le hubiera rogado que restituya lo mismo que se legó, sino también si se le hubiere rogado que restituya algo de aquello, o en lugar de aquello.

§ 29.- Si a Ticio se le hubiere hecho puramente un legado, y bajo condición se hubiere encomendado a su fidelidad que lo restituyera a Sempronio, escribió Juliano, que no injustamente determinará el Pretor, si antes que el legatario consiga el legado no diera caución del fideicomiso condicional, darle preferentemente a Sempronio la persecución del legado, para que él le dé al legatario fianza de que faltando la condición se devolverán los diez.

Pero aun si Ticio hubiere recibido diez del heredero, dice Juliano que es justo que él sea obligado a dar recíprocamente caución, o a dar los mismos diez, y que Sempronio le dé caución a Ticio; y este derecho observamos; porque también Marcelo dice esto.

§ 30.- Luego ¿qué se dirá, si así el legado como el fideicomiso hubieran sido dejados bajo condición, y no se diera caución por el fideicomiso? Será muy justo que el fideicomisario reciba del heredero caución por razón del legado, si a él no le diera caución el legatario, a saber para que él mismo le dé caución al legatario. Pero si el legatario recibió ya del heredero la caución, se habrá de determinar, que en virtud de esta fianza se ha de dar la acción más bien al fideicomisario, que al legatario, por supuesto, en este caso, porque se cumplió la condición de su fideicomiso; y también se le habrá de dar al fideicomisario la persecución del mismo legado, si todavía no fue pagado, y se cumplió su condición, a saber, si el fideicomisario hubiere estado dispuesto a darle caución al legatario.

6.- IULIANUS; *libro XXXVIII, Digestorum*.- Si pecuniae numeratae usus fructus legatus esset et in testamento cautum, ne eo nomine satis daretur, proprietates non est legata, sed legatario permittendum satisfacere et usum fructum pecuniae habere: et propemodum in hac propositione nullae praetoris erunt partes, quia, nisi satisfacatur, agi cum herede non poterit.

§ 1.- Qui fideicommissi servandi causa in possessionem missus est, non prius de possessione decedere debet, quam ei fideicommissum solutum aut eo nomine satisfactum fuerit: nam quod si integra re fieret, in possessionem non mitteretur, id cum offerretur, discedere a possessione debet.

7.- MODESTINUS; *libro III, Regularum*.- Dum venter in possessionem est, nullus legatorum servandorum causa in possessionem esse potest.

8.- PAPINIANUS; *libro VI, Quaestionum*.- Si legatorum satis non datur, restituta hereditate in earum quoque rerum possessionem legatarius mittendus erit, quae dolo malo eius, cui restituta est hereditas, in hereditaria causa desierunt.

9.- IDEM; *libro XIX, Quaestionum*.- Etiam si condemnatus heres fuerit nec pecuniam solvat, legatarius potest desiderare mitti in possessionem.

§ 1.- Quum sub condicionibus contrariis eadem res duobus legetur, si non caveatur, uterque mittitur in possessionem.

10.- PAULUS; *libro III, Sententiarum*.- Si nullae sint res hereditariae, in quas legatarii vel fideicommissarii mittantur, in rem quidem heredis mitti non possunt, sed per praetorem denegatas heredi

6.- JULIANUS; *Digest, Book XXXVIII*.- Where the usufruct of a sum of money is bequeathed, and it is provided by the will that security shall not be given on account of the same, the ownership of the money is not bequeathed, but the legatee should be permitted to give security and enjoy the usufruct of the money. In a case of this kind, the intervention of the Praetor is really not necessary, because, unless security is furnished, the legatee cannot bring an action against the heir.

§ 1.- Where a person is placed in possession of property for the purpose of executing a trust, he should not be compelled to relinquish it before the trust has been executed, or security furnished that it will be. For if this is done while the property remains intact, the legatee should not be placed in possession, and when the offer to do this is made, he should relinquish possession.

7.- MODESTINUS; *Rules, Book III*.- Where an unborn child is placed in possession of an estate, no legatee can be given possession of it to provide for the payment of the legacy.

8.- PAPINIANUS; *Questions, Book VI*.- If security is not given for the payment of a legacy, and the estate is transferred, the legatee shall be placed in possession of such property as has ceased to form part of the estate through the fraud of him to whom it was transferred.

9.- THE SAME; *Questions, Book XIX*.- Even if the heir should be ordered by the court to pay the legacy, and does not do so, the legatee can apply to be placed in possession.

§ 1.- Where the same property is bequeathed to two persons, under different conditions, and security is not furnished, both of them can be placed in possession of said property.

10.- PAULUS; *Sentences, Book III*.- Where there is no property belonging to an estate of which the legatees or beneficiaries of a trust can be placed in possession, they shall not, for this reason, be given

6.- JULIANO; *Digesto, libro XXXVIII*.- Si se hubiese legado el usufruto de dinero contante, y en el testamento se dispuso que no se diese por tal motivo caución, no se legó la propiedad, pero se le ha de permitir al legatario dar caución, y tener el usufructo del dinero; y en este caso casi será nula la intervención del Pretor', porque, si no se diera caución, no se podrá ejercitar la acción contra el heredero.

§ 1.- El que fue puesto en posesión por causa de conservar un fideicomiso, no debe separarse de la posesión antes que se le haya pagado el fideicomiso, o se le hubiere dado caución por tal motivo; porque debe separarse de la posesión cuando se ofrece aquello que si se hubiera hecho, estando íntegro el asunto, no habría sido el puesto en posesión.

7.- MODESTINO; *Reglas, libro III*.- Mientras el vientre está en posesión no puede estar nadie en posesión por causa de conservar los legados.

8.- PAPINIANO; *Cuestiones, libro VI*.- Si no se da caución por los legados, restituida la herencia, el legatario habrá de ser puesto en posesión también de aquellas cosas que dejaron de estar en la herencia por dolo malo de aquel a quien la herencia fue restituida.

9.- EL MISMO; *Cuestiones, libro XIX*.- Aunque el heredero hubiere sido condenado, si no paga el dinero, puede pedir el legatario ser puesto en posesión.

§ 1.- Cuando bajo condiciones contrarias se lega a dos una misma cosa, si no se diera caución, ambos son puestos en posesión.

10. PAULO; *Sentencias, libro III*.- Si no hubiera ningunas cosas de la herencia, en la posesión de las que sean puestos los legatarios o los fideicomisarios, no pueden ciertamente ser puestos en posesión de los

actiones ipsi persequuntur.

11.- HERMOGENIANUS; *libro IV, Iuris Epitomarum*.- Si fideicommissorum vel legatorum servandorum causa missus in possessionem eam rem teneas, quae mihi per fideicommissum relicta esset, aequius est me eam habere, cui ea ipsa relicta est, quam te, qui alterius fideicommissi nomine ingressus in eam esses. Nam et si mihi sub condicione legatum est et tu medio tempore in possessionem eius factus fueris legatorum servandorum causa, deinde condicio impleta esset, non denegabitur mihi eius rei integra persecutio. Sic enim et si statuliberum ex eadem causa possidere coepisset, impleta condicione iustam libertatem eius impedire non potest.

§ 1.- Si rei servandae causa in possessionem missus esset proprius creditor heredis et rei per fideicommissum mihi relictae adeptus fuerit, nihil me per eum laedi oportere convenit, non magis quam si ab ipso herede eam rem pignori accepisset.

12.- MAECIANUS; *libro XII, Fideicommissorum*.- Municipiis fideicommissum relinqui posse dubium non est. Sed si non caveatur, adversus municipes quidem non dubitavimus ex hoc edicto iri in possessionem posse: ipsos vero municipes, si his non caveatur, non idem adsecuturos: sed extraordinario remedio opus erit, videlicet ut decreto praetoris actor eorum in possessionem mittatur.

13.- CALLISTRATUS; *libro III, Edicti monitorii*.-

possession of property belonging to the heir; but they can bring any actions with reference to the estate, and such actions will be denied to the heir by the Praetor.

11.- HERMOGENIANUS; *Epitomes of Law, Book IV*.- If, after having been placed in possession of the property of an estate, in order to provide for the payment of legacies, or the execution of trusts, you should hold some article which has been bequeathed to me in trust, it is more equitable that I should have the said article which has been bequeathed to me than that you should have it, for the reason that you are only in possession of the same in order to insure the execution of another trust. Where, however, a legacy is bequeathed to me under a condition, and, in the meantime, you are placed in possession of the property for the purpose of securing the payment of legacies, and the condition should subsequently be complied with, I will not be refused permission to demand the property. In like manner, if anyone should obtain possession of a slave who is to be free under a condition, and the condition should be fulfilled, the legatee cannot prevent the slave from obtaining the freedom to which he is entitled.

§ 1.- If a creditor of the heir is placed in possession of property for the purpose of securing the payment of his claim, and he acquires possession of some article which has been left to me in trust, it is established that I will not be prejudiced on this account any more than if the creditor had received the said article in pledge from the heir himself.

12.- MAECIANUS; *Trusts, Book XII*.- There is no doubt that property can be left in trust to a municipality. If security should not be provided, we have no hesitation in saying that, according to the Edict, the citizens of the town can be placed in possession of the estate; but they themselves, if security should not be given them, cannot be placed in possession, but an extraordinary remedy will be required; that is to say, an agent who represents them can be placed in possession of the property by a decree of the Praetor.

13.- CALLISTRATUS; *On the Monitorial Edict*,

bienes del heredero, pero ellos mismos ejercitarán las acciones denegadas por el Pretor al heredero.

11.- HERMOGENIANO; *Epitome del Derecho, libro IV*.- Si, puesto en posesión por causa de conservar los fideicomisos o los legados, tuvieras la cosa que me hubiese sido dejada por fideicomiso, es más justo que la tenga yo, a quien fue dejada aquella cosa, que no tú, que habrías entrado en posesión de ella por razón de otro fideicomiso. Porque también si a mí se me hizo un legado bajo condición, y tú en el tiempo intermedio hubieres sido puesto en posesión de él por causa de conservar los legados, y después se hubiese cumplido la condición, no se me denegará la íntegra persecución de esta cosa; porque así también, si uno hubiese comenzado a poseer por la misma causa un esclavo a quien se dejó libre bajo condición, cumplida la condición no puede impedir la legítima libertad de aquel.

§ 1.- Si un acreedor propio del heredero hubiese sido puesto en posesión por causa de conservar una cosa, y hubiere obtenido la posesión de la cosa que se me dejó por fideicomiso, conviene que en nada deba yo ser perjudicado por él no de otra suerte, que si del mismo heredero hubiese recibido en prenda aquella cosa.

12.- MECIANO; *Fideicomisos, libro XII*.- No hay duda que se puede dejar un fideicomiso a los municipios, pero si no se diera caución, ciertamente no dudaremos que en virtud de este Edicto se puede entrar en posesión contra los municipes; pero los mismos municipes no conseguirán lo mismo, si a ellos no se les diera caución, sino que habrá necesidad de un remedio extraordinario, a saber, para que por decreto del Pretor sea puesto en posesión el agente de ellos.

13.- CALISTRATO; *Del Edicto monitorio, libro*

Quamvis minima res legata sit vel per fideicommissum relicta, tamen, si non solvatur ab herede vel eo nomine caveatur, cum caveri oporteat, in possessionem omnium bonorum, quae ex ea hereditate sunt, legatarium sive fideicommissarium praetor legatorum servandorum causa mittit.

14.- LABEO; *libro II, Posteriorum Iavoleno epitomatorum*.- Quae legatorum servandorum causa in bonis est, in causa vescendi deminuet, si filia neptis proneptis uxorve esset nec nupta sit nec suum quicquam habeat.

15.- VALENS; *libro VII, Actionum*.- Interdum licet dolo malo fecerit heres, quo minus res in causa hereditaria maneant, non poterit in possessionem earum legatarius mitti, veluti si locum religiosum fecerit aut quid publice consecraverit permissu scilicet Imperatoris aut aliquem non in fraudem creditoris manumiserit.

Book III.- Even though the property which has been bequeathed or left in trust may be only of trifling value, still, if it is not delivered by the heir, or security furnished by him to do so, when it is necessary to give security, the Praetor will place the legatee or the beneficiary of the trust in possession of the entire estate, for the purpose of securing the payment of the legacy.

14.- LABEO; *Epitomes of the Last Works of Javolenus, Book II*.- Where the daughter, granddaughter, great-granddaughter, or wife of the deceased, is not married, and has no property of her own, and has been placed in possession of the estate to insure the payment of legacies, she can use the property of said estate for her support.

15.- VALENS; *Actions, Book VII*.- Sometimes, although the heir may have acted fraudulently and caused the property of the estate to be diminished, the legatee can not be placed in possession of it; as, for example, where he has rendered some of the land religious, or has publicly consecrated a part of the same, for instance, with the consent of the Emperor; or where he has manumitted a slave without the intention of defrauding creditors.

III.- Aunque se haya legado, o dejado por fideicomiso, una cosa pequeñísima, esto no obstante, si no se pagara por el heredero, o por tal motivo no se diera caución, cuando deba darse la caución, el Pretor pone al legatario o al fideicomisario en posesión de todos los bienes, que son de aquella herencia, para que se conserven los legados.

14.- LABEON; *Obras póstumas compendiadas por Javoleno, libro II*.- La que esta en posesión de los bienes por causa de conservar los legados, los disminuirá por causa de alimentos, si fuese hija, nieta, bisnieta, o mujer, y no se hubiera casado, y no tuviera cosa alguna suya.

15.- VALENTE; *Acciones, libro VII*.- A veces, aunque el heredero hubiere hecho con dolo malo que las cosas no estén en la herencia, no podrá el legatario ser puesto en posesión de ellas, como por ejemplo, si hubiere hecho religioso un lugar, o hubiere consagrado públicamente alguna cosa, por supuesto, con permiso del Emperador, o hubiere manumitido a alguno no en fraude de acreedor.

PARS SEXTA

DIGESTORUM SEU PANDECTARUMIURIS ENUNCLEATI EX OMNI
VETERE IURE COLLECTI**DOMINI NOSTRI SACRATISSIMI
PRINCIPIS IUSTINIANI****LIBER SEPTIMUS-TRICESIMUS**

TIT. I

DE BONORUM POSSESSIONIBUS

1.- ULPIANUS; *libro XXXIX, ad Edictum*.- Bonorum possessio admissa commoda et incommoda hereditaria itemque dominium rerum, quae in his bonis sunt, tribuit: nam haec omnia bonis sunt coniuncta.

2.- IDEM; *libro XIV, ad Edictum*.- In omnibus enim vice heredum bonorum possessores habentur.

3.- IDEM; *libro XXXIX, ad Edictum*.- Bona autem hic, ut plerumque solemus dicere, ita accipienda sunt universitatis cuiusque successionem, qua succeditur in ius demortui suscipiturque eius rei commodum et incommodum: nam sive solvendo sunt bona sive non sunt, sive damnum habent sive lucrum, sive in corporibus sunt sive in actionibus, in hoc loco proprie bona appellabuntur.

§ 1.- Hereditatis autem bonorumve possessio, ut Labeo scribit, non uti rerum possessio accipienda est: est enim iuris magis quam corporis possessio. Denique etsi nihil corporale est in hereditate, attamen recte eius bonorum possessionem adgnitam labeo ait.

SIXTH 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****BOOK XXXVII**

TITLE I

CONCERNING THE PRAETORIAN
POSSESSION OF PROPERTY

1.- ULPIANUS; *On the Edict, Book XXXIX*.- Praetorian possession transfers both the benefits and inconveniences attached to an estate, as well as the ownership of the property belonging to the same; for all these things are associated with it.

2.- THE SAME; *On the Edict, Book XIV*.- Praetorian possessors, in every respect, take the place of heirs.

3.- THE SAME; *On the Edict, Book XXXIX*.- The term "property" in this instance (as we generally accept the term), must be understood to mean everything belonging to an estate to which succession is granted under the rights of the deceased, all benefits and disadvantages connected with it being included. For the estate is either solvent or insolvent, and is liable to loss or gain, or the assets consist of things which are corporeal, or of rights of action; and, under these circumstances, they are very properly designated property.

§ 1.- The possession of an estate, or praetorian possession (as Labeo says), should not be understood to be the actual possession of the property, for it is rather legal than real. Hence, where nothing corporeal belongs to the estate, Labeo holds that,

PARTE SEXTA DEL DIGESTO

O

PANDECTAS DEL DERECHO CORREGIDO

Y SACADO DE TODO EL ANTIGUO DERECHO

POR ORDEN

**DEL SACRATÍSIMO PRÍNCIPE
NUESTRO SEÑOR JUSTINIANO****LIBRO TRIGÉSIMO SÉPTIMO**

TÍTULO I

DE LA POSESIÓN DE LOS BIENES

1.- ULPIANO; *Comentarios al Edicto, libro XXXIX*.- La posesión de los bienes que ha sido admitida atribuye las ventajas y los inconvenientes de la herencia, y también el dominio de las cosas que se hallan en estos bienes, porque todo esto está conjunto con los bienes;

2.- EL MISMO; *Comentarios al Edicto, libro XIV*.- Pues en todo son considerados los poseedores de los bienes en la calidad de herederos.

3.- EL MISMO; *Comentarios al Edicto, libro XXXIX*.- Mas aquí bienes, como solemos decir de ordinario, se han de entender de este modo: la sucesión de una universalidad cualquiera, por la cual se sucede en el derecho del difunto, y se aceptan las ventajas y los inconvenientes de esta cosa; porque ya si son solventes los bienes, ya si no lo son, ya si producen daño, ya si lucro, ora si consisten en cosas corporales, ora si en acciones, en este lugar se llamarán propiamente bienes.

§ 1.- Pero la posesión de la herencia o de los bienes, como escribe Labeón, no ha de ser entendida como posesión de las cosas; porque es más bien posesión de un derecho, que de una cosa corpórea. Y finalmente, aunque ninguna cosa corpórea haya en la

nevertheless, praetorian possession may be acquired.

§ 2.- Bonorum igitur possessionem ita recte definiemus ius persecuendi retinendique patrimonii sive rei, quae cuiusque cum moritur fuit.

§ 3.- Invito autem nemini bonorum possessio adquiritur.

§ 4.- A municipibus et societatibus et decuriis et corporibus bonorum possessio adgnosci potest. Proinde sive actor eorum nomine admittat sive quis alius, recte competet bonorum possessio: sed et si nemo petat vel adgnoverit bonorum possessionem nomine municipii, habebit municipium bonorum possessionem praetoris edicto.

§ 5.- Dari autem bonorum possessio potest tam patris familias quam filii familias, si modo ius testandi habuit de peculio castrensi vel quasi castrensi.

§ 6.- Sed et eius, qui apud hostes decessit, bonorum possessionem admitti posse, quamvis in servitute decedat, nulla dubitatio est.

§ 7.- Acquirere quis bonorum possessionem potest vel per semetipsum vel per alium. Quod si me non mandante bonorum possessio mihi petita sit, tunc competet, quum ratum habuero id quod actum est. Denique si ante decessero quam ratum habeam, nulla dubitatio est quin non competet mihi bonorum possessio, quia neque ego ratum habui neque heres meus ratum habere potest, cum ad eum non transeat ius bonorum possessionis.

§ 8.- Si causa cognita bonorum possessio detur, non alibi dabitur quam pro tribunali, quia neque decretum de plano interponi neque causa cognita

§ 2.- Therefore, we define praetorian possession to be the right of recovering or retaining an estate, or the effects which belonged to someone at the time of his death.

§ 3.- Praetorian possession of property is not acquired by anyone against his will.

§ 4.- Praetorian possession can be acquired by municipalities, associations, decurite, and corporate bodies. Hence an agent of any of the said corporations can obtain it, or anyone else can do so in their name; and even if no one should demand or receive such possession in the name of a municipality, it still can acquire it under the Edict of the Praetor.

§ 5.- Praetorian possession of property can be granted to the head of a household, as well as to a son under paternal control, provided the latter has the right of disposing of his peculium castrense or quasi castrense, by will.

§ 6.- There is no doubt that praetorian possession of the estate of a person who has died in the hands of the enemy can be acquired, even though he may have died in a condition of slavery.

§ 7.- Any person can obtain praetorian possession either himself or through the agency of another. If, however, someone should demand possession for me, when I have not directed this to be done, his act will not be legal until I have ratified it. Moreover, there is no doubt that if I should die before ratifying his act, I will not be entitled to the possession of the property, because I have not consented to what he has done, and my heir cannot do so, as the right to claim praetorian possession does not pass to him.

§ 8.- Where praetorian possession is granted after proper cause has been shown, it shall not be granted anywhere else than in court, because the Praetor

herencia, ello no obstante dice Labeón que válidamente se aceptó la posesión de los bienes de la misma.

§ 2.- Así pues, de este modo definiremos convenientemente la posesión de los bienes; el derecho de perseguir y de retener el patrimonio, o la cosa que fue de alguno cuando muere.

§ 3.- Mas para ninguno se adquiere contra su voluntad la posesión de los bienes.

§ 4.- Se puede aceptar por los munícipes, y por sociedades y decurias y corporaciones la posesión de los bienes; por lo cual, ora si la admitiera en nombre de ellos el agente, ora si otro cualquiera competerá válidamente la posesión de los bienes. Pero aunque nadie pida o haya aceptado en nombre de un municipio la posesión de los bienes, el municipio tendrá la posesión de los bienes por el Edicto del Pretor.

§ 5.- Mas se puede dar la posesión de los bienes tanto de un padre de familia, como de un hijo de familia, si es que tuvo el derecho de testar de peculio castrense, o casi castrense.

§ 6.- Pero no hay duda alguna que se puede admitir la posesión de los bienes aun del que falleció en poder de los enemigos, aunque muera en esclavitud.

§ 7.- Puede uno adquirir la posesión de los bienes o por si mismo, o por medio de otro. Pero si no mandándolo yo se hubiera pedido para mí la posesión de los bienes, me competerá siempre y cuando hubiere ratificado lo que se hizo. Y finalmente, si yo hubiere fallecido antes que lo ratificara, no hay duda alguna que no me competerá la posesión de los bienes, porque yo no lo ratifiqué, ni mi heredero puede ratificarlo, puesto que a él no pasa el derecho de la posesión de los bienes.

§ 8.- Si la posesión de los bienes fuese dada con conocimiento de causa, no se dará en otra parte sino ante el tribunal, porque ni se puede interponer de

bonorum possessio alibi quam pro tribunali dari potest.

§ 9.- In bonorum possessione sciendum est ius esse adire: proinde si plures sint, quibus bonorum possessio competit, quorum unus admisit bonorum possessionem, ceteri non admiserunt,

4.- GAIUS; *libro VIII, ad legem Iuliam et Papiam*. - Veluti quod spreverunt ius suum aut tempore bonorum possessionis finito exclusi sunt aut ante mortui sunt quam petierunt bonorum possessionem,

5.- ULPIANUS; *libro XXXIX, ad Edictum*. - Ei, qui admisit, adire etiam hae portiones, quae ceteris competere, si petissent bonorum possessionem.

6.- PAULUS; *libro XLI, ad Edictum*. - Sed quum patrono quidem contra tabulas certae patris bonorum possessionem praetor polliceatur, scripto autem heredi secundum tabulas alterius partis: convenit non esse ius adire. Igitur non petente scripto secundum tabulas alterius quoque partis nominatim patrono possessionem pollicetur, quum ceteri, quibus adire ius est, semel debent agnoscere bonorum possessionem.

§ 1.- Bonorum possessionis beneficium multiplex est: nam quaedam bonorum possessiones competunt contra voluntatem, quaedam secundum voluntatem defunctorum, nec non ab intestato habentibus ius legitimum vel non habentibus propter capitis deminutionem. Quamvis enim iure Civili deficient liberi, qui propter capitis deminutionem desierunt sui heredes esse, propter aequitatem tamen rescindit eorum capitis deminutionem praetor. Legum quoque tuendarum causa dat bonorum possessionem.

cannot render such a decree without ceremony; nor, after an investigation, can praetorian possession be granted anywhere else than in his tribunal.

§ 9.- It should be remembered that the right of accrual applies to the Praetorian possession of property. Hence, if there are several persons entitled to such possession, and one of them obtains it, the others are not included:

4.- GAIUS; *On the Lex Julia et Papia, Book VIII*. - (For instance, where they have relinquished their right, or have been excluded from praetorian possession by lapse of time, or have died before demanding possession):

5.- ULPIANUS; *On the Edict, Book XXXIX*. - For the shares to which the others would have been entitled, if they had claimed possession of the estate, will accrue to the one who did obtain possession.

6.- PAULUS; *On the Edict, Book XLI*. - But where the Praetor promises possession of a certain part of an estate to a patron, contrary to the provisions of the will, and promises possession of the remainder to the appointed heir, in accordance with the terms of the will, it is held that the right of accrual does not apply. Therefore, he promises possession of his share expressly to the patron, when the appointed heir does not claim his share under the will; as those entitled to the right of accrual must, at least once, demand possession of the estate.

§ 1.- There are various advantages attaching to praetorian possession, for some kinds of possession are obtained contrary to the provisions of the will of the testator, and others in accordance with them; and sometimes the parties have a lawful right to it on the ground of intestacy, or they are not entitled to it because of having changed their civil status. For although, under the Civil Law, children are excluded from being direct heirs on account of their change of condition, still, the Praetor can, for equitable reasons, rescind this forfeiture of citizenship. He therefore grants possession of the property for the purpose of observing certain laws.

plano un decreto, ni con conocimiento de causa se puede dar la posesión de los bienes en otra parte que ante el tribunal.

§ 9.- Se ha de saber, que en la posesión de los bienes hay el derecho de acrecer; por lo cual, si fueran muchos aquellos a quienes compete la posesión de los bienes, y uno de ellos admitió la posesión de los bienes, y no la admitieron los demás.

4.- GAYO; *Comentarios a la ley Julia y Papia, libro VIII*. - Por ejemplo, porque despreciaron su derecho, o porque pasado el término de la posesión de los bienes fueron excluidos, o porque murieron antes que hubieran pedido la posesión de los bienes.

5.- ULPIANO; *Comentarios al Edicto, libro XXXIX*. - Al que la admitió le acrecerán también las porciones que le competirían a los demás, si hubiesen pedido la posesión de los bienes.

6.- PAULO; *Comentarios al Edicto, libro XLI*. - Pero cuando el Pretor prometa al patrono la posesión de cierta parte de los bienes contra el testamento, y al heredero instituido la de otra parte conforme al testamento, conviene que no haya derecho de acrecer; así pues, no pidiéndola el heredero instituido con arreglo al testamento, le promete al patrono expresamente también la posesión de la otra parte, porque los demás, que tienen el derecho de acrecer, deben aceptar sólo una vez la posesión de los bienes.

§ 1.- El beneficio de la posesión de los bienes es de muchas clases; porque algunas posesiones de bienes competen contra la voluntad, y otras conforme a la voluntad de los difuntos, y también abintestato a los que tienen el derecho legítimo, o a los que no lo tienen por causa de la disminución de cabeza. Porque aunque por Derecho Civil falten los hijos, que por razón de la disminución de cabeza dejaron de ser herederos suyos, sin embargo, el Pretor rescinde por equidad la disminución de cabeza de ellos. Y también por defender las leyes. da la posesión de los bienes.

§ 2.- Notis scriptae tabulae non continentur edicto, quia notas litteras non esse Pedius libro vicesimo quinto ad Edictum scribit.

7.- ULPIANUS; *libro I, ad Sabinum*.- Servus bonorum possessionem recte admittere potest, si Praetor de condicione eius certus sit: nam et absenti et non petenti dari bonorum possessio potest, si hoc ipsum Praetor non ignoret. Ergo et femina poterit alii bonorum possessionem petere.

§ 1.- Impubes nec bonorum possessionem admittere nec iudicium sine tutoris auctoritate accipere potest.

§ 2.- Quia tutor pupillo et pater infanti filio bonorum possessionem petere possunt, dies, quibus tutor aut pater scit, cedere placet.

8.- PAULUS; *libro VIII, ad Plautium*.- Tutor autem bonorum possessionem pupillo competentem repudiare non potest, quia tutori petere permissum est, non etiam repudiare.

9.- POMPONIUS; *libro III, ad Sabinum*.- Si plures gradus sint possessionis admittendae, quamdiu incertum sit petierit nec ne prior, posteriori diem non procedere constat.

10.- PAULUS; *libro II, ad Sabinum*.- In bonorum possessionibus iuris ignorantia non prodest, quo minus dies cedat, et ideo heredi instituto et ante apertas tabulas dies cedit. Satis est enim scire mortuum esse seque proximum cognatum fuisse copiamque eorum quos consuleret habuisse: scientiam enim non hanc accipi, quae iuris prudentibus sit, sed eam, quam quis aut per se habeat aut consulendo prudentiores adsequi potest.

§ 2.- Testamentary notes are not considered by the Edict as wills; for Pedius in the Twenty-fifth Book on the Edict says that notes are not letters.

7.- ULPIANUS; *On Sabinus, Book I*.- A slave can legally be granted possession of an estate if the Praetor is certain of his civil condition. Possession can also be granted to a person who is absent and does not demand it, if the Praetor is not aware that this is the case. A woman, also, can apply for praetorian possession in behalf of another.

§ 1.- A minor under the age of puberty cannot be granted possession of an estate by the Praetor, nor can he join issue in the case, without the authority of his guardian, because a guardian can demand possession for his ward, and a father can do so for his son.

§ 2.- It has been decided that the time when possession must be demanded for a minor begins when the guardian or father became aware that the minor was entitled to it.

8.- PAULUS; *On Plautius, Book VIII*.- Moreover, a guardian cannot reject the praetorian possession of an estate to which his ward is entitled, because a guardian is permitted to claim it, but not to reject it.

9.- POMPONIUS; *On Sabinus, Book III*.- Where there are several persons of different degrees of relationship entitled to praetorian possession, as long as it is uncertain whether one of them has the right to demand possession, or not, it has been settled that the time does not run against one of the last degree.

10.- PAULUS; *On Sabinus, Book II*.- Ignorance of the law is of no advantage in preventing the claim from being barred by lapse of time, in the case of praetorian possession of property. Hence, the time begins to run, so far as the appointed heir is concerned, even before the will has been opened; for it is enough for him to know that the testator is dead, and that he is his next of kin, and had access to persons of whom he could ask advice. For, in this

§ 2.- En el Edicto no se comprenden los testamentos escritos con cifras, porque escribe Pedio en el libro vigésimo quinto de sus Comentarios al Edicto, que las cifras no son letras.

7.- ULPIANO; *Comentarios a Sabino, libro I*.- El esclavo puede admitir válidamente la posesión de los bienes, si el Pretor estuviera cierto de la condición del mismo; porque se le puede dar la posesión de los bienes también al que está ausente, y al que no la pide, si esto mismo no lo ignorase el Pretor. Luego también la mujer podrá pedir para otro la posesión de los bienes.

§ 1.- El impúbere no puede admitir la posesión de los bienes, ni aceptar el juicio sin la autoridad del tutor, porque el tutor puede pedir la posesión de los bienes para el pupilo, y el padre para su hijo que no habla.

§ 2.- Está determinado que corran los días en que lo sabe el tutor o el padre.

8.- PAULO; *Comentarios a Plaucio, libro VIII*.- Mas el tutor no puede rechazar la posesión de los bienes que compete al pupilo, porque al tutor le está permitido pedir, no también rechazar.

9.- POMPONIO; *Comentarios a Sabino, libro III*.- Si hubiera muchos grados para que sea admitida la posesión, es sabido que mientras sea incierto si la haya pedido o no el anterior, no corre el término para el posterior.

10.- PAULO; *Comentarios a Sabino, libro II*.- En la posesión de bienes no aprovecha la ignorancia del derecho para que no corra el término, y por lo tanto el término corre para el heredero instituido aun antes de haber sido abierto el testamento; porque es bastante que sepa que murió, y que él fue su próximo pariente, y que tuvo a quienes consultar; porque no se entiende por conocimiento el que sea propio de los jurisconsultos, sino el que uno tiene por sí, o el que puede

instance, knowledge is not understood to be such as is possessed by persons learned in the law, but such as anyone whosoever may possess, or can acquire by applying to others who are more learned than himself.

11.- GAIUS; *libro IV, ad Edictum provinciale*.- Si pupillo tutor bonorum possessionem petierit et plus incommodi quam commodi haec bonorum possessio habeat, tutor tutelae iudicio tenetur.

12.- ULPIANUS; *libro XLVIII, ad Edictum*.- Non est ambigendum, quod plerumque et contra fiscum et contra rem publicam admitti debeant quidam, ut puta venter, item furiosus, item is qui captivi bonorum possessionem petit.

§ 1.- Ubi cumque lex vel Senatus vel constitutio capere hereditatem prohibet, et bonorum possessio cessat.

13.- AFRICANUS; *libro V, Quaestionum*.- Edicto praetoris bonorum possessio his denegatur, qui rei capitalis damnati sunt neque in integrum restituti sunt. Rei autem capitalis damnatus intellegitur is, cui poena mors aut aquae et ignis interdictio sit. Cum autem in relegationem quis erit, ad bonorum possessionem admittitur.

14.- PAPINIANUS; *libro XIII, Quaestionum*.- Quum quidam propinquus falsum testamentum accusaret ac post longum spatium temporis probasset, licet dies ei petendae possessionis, quam forte certus accusationis petere debuit, cessasse videtur, attamen quia hoc proposito accusationem instruit, ut suum ius sibi servet, agnovisse successionem non immerito videbitur.

11.- GAIUS; *On the Provincial Edict, Book XIV*.- Where a guardian claims praetorian possession in behalf of his ward, and it is found to be of greater disadvantage than benefit to him, the guardian will be liable to an action on guardianship.

12.- ULPIANUS; *On the Edict, Book XLVIII*.- There is no reason to doubt that persons can, very frequently, obtain praetorian possession against the Treasury, and against a municipality; as, for example, where an unborn child, a lunatic, or one who is a captive in the hands of the enemy, claims praetorian possession of property.

§ 1.- Whenever a law, a Decree of the Senate, or an Imperial Constitution forbids an estate to be taken, praetorian possession of it will not apply.

13.- AFRICANUS; *Questions, Book V*.- The possession of property by the Edict of the Praetor is refused to those who have been condemned for a capital crime, unless complete restitution has been granted them. A person is understood to have been condemned for a capital crime upon whom the penalty of death, or the interdiction of water and fire has been imposed. Anyone, however, who has been exiled, can be admitted to the praetorian possession of property.

14.- PAPINIANUS; *Questions, Book XIII*.- Where a near relative of the deceased alleges that his will was forged, and proves it after a long period of time, although the time for demanding possession is held to have elapsed, and the plaintiff, being certain of proving his allegations, may have claimed it, still, for the reason that he asserted his claim in order to preserve his rights, it is not unreasonable that he should be considered to have accepted the succession.

adquirir consultando a otros más instruidos.

11.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- Si el tutor hubiere pedido para el pupilo la posesión de los bienes, y esta posesión de los bienes tuviera más desventaja que provecho, el tutor queda obligado en el juicio de tutela.

12.- ULPIANO; *Comentarios al Edicto, libro XLVIII*.- No se ha de dudar, que muchas veces deben ser admitidos algunos aun contra el fisco y contra la república, por ejemplo, el vientre, y también el furioso, y asimismo el que pide la posesión de los bienes de un cautivo.

§ 1.- Siempre y cuando una ley, o un senado-consulta, o una constitución prohíbe adquirir la herencia, deja de tener lugar también la posesión de los bienes.

13.- AFRICANO; *Cuestiones, libro V*.- En el Edicto del Pretor se deniega la posesión de los bienes a los que fueron condenados como reos de pena capital, y no fueron restituidos por entero. Mas se entiende condenado como reo de pena capital el que como pena tenga la muerte, o la interdicción del agua y del fuego. Pero cuando alguno hubiere sido condenado a relegación, es admitido a la posesión de los bienes.

14.- PAPINIANO; *Cuestiones, libro XIII*.- Como cierto pariente acusara de falso un testamento, y lo hubiese probado después de largo espacio de tiempo, aunque parece que corrió para él el término para pedir la posesión, que acaso debió pedir estando cierto de la acusación, sin embargo, como formuló la acusación con el propósito de conservar para si su propio derecho, no sin razón se considerará que aceptó la sucesión.

15.- PAULUS; *libro XI, Responsorum*.- Paulus respondit petitionem matris solam non adquisisse filiae impuberi bonorum possessionem, nisi si is qui eam dedit evidenter voluit eam impuberi dare.

16.- IDEM; *libro III, Sententiarum*.- Quotiens is, cui bonorum possessio ab altero postulata est, furere coeperit, magis probatum ratum eum videri habuisse: rati enim habitio ad confirmationem prioris postulati pertinet.

TITULO II

SI TABULAE TESTAMENTI
EXTABUNT

1.- PAULUS; *libro III, ad Sabinum*.- Heredi, cuius nomen inconsulto ita deletum sit, ut penitus legi non possit, dari bonorum possessio minime potest, quia ex coniectura non proprie scriptus videretur, quamvis, si post prolatas tabulas deletum sit testamentum, bonorum possessio competat. Nam et si mortis tempore tabulae fuerint, licet postea interierint, competet bonorum possessio, quia verum fuit tabulas exstare.

TITULO III

DE BONORUM POSSESSIONE FURIOSO,
INFANTI, MUTO, SURDO, CAECO
COMPETENTE

1.- PAPINIANUS; *libro XV, Quaestionum*.- Furioso Titius substitutus est: bonorum possessionis tempus, quamdiu furiosus in eadem condicione est, neque instituto neque substituto cedit. Nec, si curator furiosi nomine possessionem accipere potest, idcirco spatium temporis, quod scientibus praefinitum est,

15.- PAULUS; *Opinions, Book XI*.- Paulus gave it as his opinion that the application of a mother, alone, could not acquire praetorian possession of an estate for her daughter, who was under the age of puberty, unless he who granted it evidently intended to give it to the minor child.

16.- THE SAME; *Sentences, Book III*.- When the person for whom praetorian possession is demanded subsequently becomes insane, the better opinion is that he will be held to have ratified the act, for a ratification only means the confirmation of a former demand.

TITLE II

CONCERNING PRAETORIAN POSSESSION
WHERE THERE IS A WILL

1.- PAULUS; *On Sabinus, Book III*.- Praetorian possession of property can, under no circumstances, be granted to an heir whose name has been erased from the will so that it can hardly be read, even though this has been done unintentionally; because the presumption is that it was not properly inserted, although such possession may be granted if the name has been defaced after the will has been produced. For if the will was in existence at the time of death, even though it may have been subsequently destroyed, praetorian possession of the estate can be granted, because it is true that there once was a will.

TITLE III

CONCERNING THE PRAETORIAN
POSSESSION OF PROPERTY GRANTED TO
AN INSANE PERSON, AN INFANT, OR ONE
WHO IS DUMB, DEAF, OR BLIND

1.- PAPINIANUS; *Questions, Book XV*.- Titius was substituted as the heir of an insane person. The time prescribed for demanding praetorian possession does not run either against the appointed heir, or the substitute, as long as the insane person remains in the same condition, and if the curator of one who is

15.- PAULO; *Respuestas, libro XI*.- Paulo respondió, que la sola petición de la madre no adquirió para la hija impúbera la posesión de los bienes, a no ser que el que la dió haya querido evidentemente dársela a la impúbera.

16.- EL MISMO; *Sentencias, libro III*.- Cuando aquel para quien se pidió por otro la posesión de los bienes hubiere comenzado a ser furioso, se aprobó como preferible que se considerase que él la ratificó; porque la ratificación corresponde a la confirmación de la anterior petición.

TÍTULO II

DE SI EXISTIERE TESTAMENTO

1.- PAULO; *Comentarios a Sabino, libro III*.- De ningún modo se le puede dar la posesión de los bienes al heredero cuyo nombre haya sido borrado inadvertidamente de tal suerte, que absolutamente no se pueda leer, porque parecería instituido por conjetura, no propiamente, aunque competa la posesión de los bienes, si el testamento hubiera sido borrado después de haber sido presentado; porque también si al tiempo de la muerte existiere el testamento, aunque después hubiere perecido, competirá la posesión de los bienes, porque fue verdad que existía el testamento.

TÍTULO III

DE LA POSESIÓN DE LOS BIENES QUE
COMPETE AL FURIOSO, AL INFANTE, AL
MUDO, AL SORDO Y AL CIEGO

1.- PAPINIANO; *Cuestiones, libro XV*.- Ticio fue substituido a un furioso; mientras el furioso esta en el mismo estado, el término de la posesión de los bienes no corre ni para el instituido, ni para el substituto, y si bien el curador puede recibir la posesión en nombre del furioso, no por esto se considerara que corre el

videbitur cedere: nam et pater infanti filio possessionem accipit, quo tamen cessante infans non excluditur. Quid ergo, si curator accipere nolit? nonne iustius atque utilius erit ad eundem modum proximo cuique possessionem dari, ne bona iaceant? Quo admissio substitutus cautionem praestare cogitur omnibus his, quibus bona restitui debent, si forte institutus in eodem furore decesserit aut compos mentis effectus ante mortem obierit, quam hereditatem agnosceret. Nam et fieri potest, ut vivo furioso substitutus decedat nec tamen furiosus obstet ceteris, si prius et ipse decesserit, quam hereditatem acquireret.

2.- ULPIANUS; *libro XXXIX, ad Edictum*.- Mutus surdus caecus bonorum possessionem admittere possunt, si quod agatur intellegant.

TITULO IV

DE BONORUM POSSESSIONE
CONTRA TABULAS

1.- ULPIANUS; *libro XXXIX, ad Edictum*.- In contra tabulas bonorum possessione liberos accipere debemus sive naturales sive adoptivos, si neque instituti neque exheredati sunt.

§ 1.- Vocantur autem ad contra tabulas bonorum possessionem liberi eo iure eoque ordine, quo vocantur ad successionem ex iure civili.

§ 2.- Haec autem clausula etiam ad postumos videtur pertinere.

insane acquires possession in his name, the time fixed for making the claim by those who are aware of the facts will not run against him. For a father can demand possession in behalf of his infant child, but if he fails to do so, the child will not, for that reason, be excluded. But what must be done if the curator refuses to make the application? Will it not be more just and proper to give possession to the next of kin to prevent the property from being without an owner? If this is admitted, the substitute can be compelled to give security to all those to whom the property should be transferred, if the appointed heir should die while insane, or if, having recovered his senses, he should afterwards die before accepting the estate; for the substitute himself might die during the lifetime of the insane person, and still he would not interfere with the claims of the others, if he himself should die before acquiring the estate.

2.- ULPIANUS; *On the Edict, Book XXXIX*.- A person who is dumb, deaf, or blind, can obtain praetorian possession of property, if he understands what is taking place.

TITLE IV

CONCERNING THE PRAETORIAN
POSSESSION OF PROPERTY CONTRARY TO
THE PROVISIONS OF THE WILL

1.- ULPIANUS; *On the Edict, Book XXXIX*.- We must understand the term "children" when used with reference to the praetorian possession of an estate contrary to the provisions of the will, to mean either natural or adopted children, where they have either been appointed heirs, nor disinherited.

§ 1.- Moreover, children are called to the praetorian possession of an estate contrary to the provisions of the will by the same right, and in the same order, in which they are called to the succession under the Civil Law.

§ 2.- This general principle is also held to apply to posthumous children.

espacio de tiempo, que se prefijó para los que lo saben; porque también el padre recibe la posesión para el hijo que está en la infancia, pero dejándola de recibir él no es excluido el infante. Luego ¿qué se dirá, si el curador no quisiera recibirla? ¿Acaso no será más justo y más útil que del mismo modo se le dé la posesión a cualquier próximo pariente, para que no estén yacentes los bienes? Admitido esto, el substituto es obligado a darles caución a todos aquellos a quienes deben ser restituidos los bienes, si acaso el instituido falleciere en la misma locura, o habiendo recobrado el juicio hubiere fallecido antes que aceptase la herencia; porque también puede suceder, que viviendo el furioso fallezca el substituto, y que sin embargo el furioso no sirva de obstáculo a los demás, si también él hubiere fallecido antes que adquiriese la herencia.

2.- ULPIANO; *Comentarios al Edicto, libro XXXIX*.- El mudo, el sordo, y el ciego pueden admitir la posesión de los bienes, si entendiesen lo que se hiciera.

TÍTULO IV

DE LA POSESIÓN DE LOS BIENES
CONTRA EL TESTAMENTO

1.- ULPIANO; *Comentarios al Edicto, libro XXXIX*.- En la posesión de los bienes contra el testamento debemos admitir a los hijos, ya naturales, ya adoptivos, si no fueron instituidos, ni desheredados.

§ 1.- Pero los hijos son llamados a la posesión de los bienes contra el testamento con el mismo derecho y por el orden con que por derecho civil son llamados a la sucesión.

§ 2.- Mas se considera que esta cláusula corresponde también a los póstumos.

§ 3.- Sed et si ab hostibus postliminio redierint filii, Pomponius putat ad contra tabulas bonorum possessionem eos admitti.

§ 4.- Si ex tribus filiis unus ab hostibus captus sit, duobus, qui sunt in civitate, bessis bonorum possessio competit.

§ 5.- Idem et in postumo: nam quamdiu postumus speratur, in ea causa est, ut partem faciat.

§ 6.- Et sui iuris factos liberos inducit in bonorum possessionem praetor (sive igitur emancipati sunt sive alias exierunt de patris potestate, admittuntur ad bonorum possessionem): sed adoptivi patris non potest: ut enim admitti possit, ex liberis esse eum oportet.

§ 7.- Qui habebat filium, habebat et nepotem ex eo, filium emancipavit et adoptavit in locum nepotis, deinde emancipavit: quaeritur an nepoti obstet. et mihi magis videtur hunc nepotem non excludi, sive pater eius in adoptione mansisset quasi nepos sive emancipatus est: puto enim et emancipato patre nepotem quoque quum patre suo ex Edicto admitti.

§ 8.- Filium habuit et ex eo nepotem: filius emancipatus vel in potestate manens deportatus est: quaeritur, an nepoti noceat. Et verius est in utroque casu nepotem admittendum: deportatos enim mortuorum loco habendos.

§ 9.- Si et pater et filius deportati sint et ambo restituti, dicemus ad bonorum possessionem admitti

§ 3.- Pomponius thinks that where children return from captivity by the enemy, and enjoy the right of postliminium, they can be admitted to praetorian possession contrary to the provisions of the will.

§ 4.- Where one of three sons has been taken prisoner by the enemy, the two remaining ones who are at home will be entitled to praetorian possession of two-thirds of the estate.

§ 5.- The same rule applies to a posthumous child, for as long as his birth is expected, he will be entitled to a share of the estate.

§ 6.- The Praetor gives possession of property to children who are their own masters. For if they have been emancipated, or released from parental control in some other manner, they are allowed to acquire possession of the estate; but this is not the case with an adopted child, since, in order for it to be admitted to praetorian possession, it must be included in the number of children.

§ 7.- A certain man had a son, and a grandson by the latter. He emancipated his son, and adopted him instead of his grandson, and then emancipated him a second time. The question arose whether he prejudiced the rights of the grandson. The better opinion seems to me to be that the grandson was not excluded, as his father either remained adopted as a grandson, or was emancipated. For I think that the father, having once been emancipated, the grandson, together with his father, should, under the terms of the Edict, be entitled to possession of the estate.

§ 8.- A man had a son, and by him a grandson; the son was emancipated, or, having remained under his father's control, was banished. The question arose whether this would prejudice the rights of the grandson. The better opinion is that, in either instance, the grandson should be permitted to have praetorian possession of the estate, for persons who are banished are considered to be dead.

§ 9.- Where a father and his son were both banished, and both regained their rights, we say that

§ 3.- Pero aunque por derecho de postliminio los hijos hubieren vuelto del poder de los enemigos, opina Pomponio que son ellos admitidos a la posesión de los bienes contra el testamento.

§ 4.- Si de tres hijos uno hubiera sido cogido por los enemigos, a los dos que se hallan en la ciudad les compete la posesión de los dos tercios de los bienes.

§ 5.- Lo mismo también respecto al póstumo; porque mientras se espera al póstumo, está en el caso de que constituya parte.

§ 6.- El Pretor pone en posesión de los bienes también a los hijos que se hicieron de propio derecho; así, pues, ora si fueron emancipados, ora si de otro modo salieron de la potestad del padre, son admitidos a la posesión de los bienes; pero no puede serlo a la de los del padre adoptivo, porque para que pueda ser admitido, debe ser del número de los hijos.

§ 7.- Uno que tenía un hijo, y de él tenía un nieto, emancipó al hijo, y lo adoptó en lugar de nieto, y después lo emancipó; se pregunta, si le servirá de obstáculo al nieto. Y a mi me parece más cierto, que no se excluye a este nieto, ora si su padre permaneció en la adopción como nieto, ora si fue emancipado; porque opino que aun emancipado el padre es admitido también el nieto junto con su padre en virtud del Edicto.

§ 8.- Uno tuvo un hijo, y de él un nieto; el hijo fue deportado habiendo sido emancipado o permaneciendo bajo potestad; se pregunta, si le perjudicará al nieto. Y es más cierto, que en ambos casos ha de ser admitido el nieto, porque los deportados han de ser considerados como fallecidos.

§ 9.- Si el padre y el hijo hubieran sido deportados, y ambos fueron restituidos, diremos que se admite al

filium. Sed et si filius in metallum damnatus vel alia poena, quae servum efficit, restitutus sit, nihilo minus admittetur: aliter non.

2.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Idemque est et si pater poenae et servus efficiatur et postea restituatur.

3.- ULPIANUS; *libro XXXIX, ad Edictum*.- Non tantum autem ipsi emancipati admittuntur ad bonorum possessionem, verum etiam hi quoque, qui ex his nati sunt.

§ 1.- Si duos habens nepotes alterum emancipatum loco filii adoptaverit, videndum, an solus ille quasi filius admittatur: quod ita scilicet procedit, si quasi patrem eius nepotis, quem retinuerat, sic adoptaverit: melius est autem dicere posse eum solum ad bonorum possessionem pervenire.

§ 2.- Sed si sit hic nepos emancipatus, verum est dicere non admitti eum quasi filium: hic enim quasi filius non est ex liberis, cum iura adoptionis emancipatione finita sint.

§ 3.- Si filium habens et ex eo nepotem in locum filii nepotem adoptavero, ambo admittentur: plane si fuerit emancipatus nepos, non admittetur, quia pater eum praecedit.

§ 4.- Si quis post emancipationem quaesitum sibi filium patri suo in adoptionem dederit in locum filii, aequissimum est ei praestari quod cuivis adrogato filio, idcircoque patri suo iungendus est. Sed si

the son ought to be admitted to praetorian possession of the estate. Where, however, the son was sentenced to the mines, or to any other punishment equivalent to servitude, and was afterwards restored to his rights, he will, nevertheless, be admitted to praetorian possession of the estate; but this will not be the case if he should not be restored to his former condition.

2.- HERMOGENIANUS; *Epitomes of Law, Book III*.- The same rule will apply if the father should be condemned to penal servitude, and should afterwards regain his rights.

3.- ULPIANUS; *On the Edict, Book XXXIX*.- Not only are emancipated children themselves admitted to the praetorian possession of property, but also their children as well.

§ 1.- Where a man has two grandsons, and after emancipating one of them adopts him instead of his son, let us see whether he alone will be entitled to praetorian possession as a son. This is based upon the presumption that the deceased adopted the said grandson as his son, and as the father of the other grandson whom he retained under his control. In this case it is better to hold that he alone will be entitled to possession of the estate under the Praetorian Law.

§ 2.- But if the said grandson should be emancipated, it is preferable to conclude that he will not be entitled to possession in the capacity of a son. For this so called son is not included in the number of children, as his right acquired by adoption has been lost by emancipation.

§ 3.- If I have a son, and by him a grandson, and adopt the grandson instead of the son, both will be entitled to praetorian possession; but it is clear that if the grandson should be emancipated he will not be permitted to have possession because his father takes precedence of him.

§ 4.- If anyone, after having been emancipated, should give his son to his father to be adopted as his own son, it is perfectly just that all rights to which any other arrogated child is entitled should be conceded

hijo a la posesión de los bienes. Pero aun si condenado el hijo a las minas, o a otra pena que lo hace esclavo, hubiera sido restituido, será, ello no obstante, admitido; y no de otro modo.

2.- HERMOGENIANO; *Epitome del Derecho, libro III*.- Y lo mismo es, también si el padre se hiciera esclavo de la pena, y después fuera restituido.

3. ULPIANO; *Comentarios al Edicto, libro XXXIX*.- Mas no solamente son admitidos a la posesión de los bienes los mismos emancipados, sino también los que nacieron de ellos.

§ 1.- Si el que tenía dos nietos hubiere adoptado en lugar de hijo a uno de aquéllos, que estaba emancipado, se ha de ver si sólo éste sea admitido como hijo. Lo que ciertamente es así procedente, si lo hubiere adoptado de este modo, como a padre del nieto que había retenido; pero es mejor decir, que sólo él puede llegar a la posesión de los bienes.

§ 2.- Pero si este nieto hubiera sido emancipado, es lo verdadero decir que él no es admitido como hijo; porque éste, como hijo, no está entre los descendientes, pues los derechos de la adopción se extinguieron con la emancipación.

§ 3.- Si teniendo un hijo, y un nieto nacido de éste, yo hubiere adoptado al nieto en el lugar de hijo, ambos serán admitidos; pero, a la verdad, si el nieto hubiera sido emancipado, no será admitido, porque le precede el padre.

§ 4.- Si el hijo que tuvo después de la emancipación se lo hubiere uno dado en adopción a su propio padre en el lugar de hijo, es muy justo que a éste se le dé lo que a cualquier hijo arrogado; y por lo tanto se ha de

emancipatus hic nepos post adoptionem proponatur, aequissimum erit eum abstinere (recipit enim locum suum) nec debet patri suo iungi.

§ 5.- Si emancipatus filius uxore non ex voluntate patris ducta filium fuerit sortitus, dein nepos patre iam mortuo ad bonorum possessionem avi velit venire, admittendus est ad eam: non enim per rescissionem is, qui filius iustus est, efficietur non filius, quum rescissio, quo magis admittantur, non quo minus, adhibeatur.

Nam etsi tam ignominiosam duxerit uxorem filius, ut dedecori sit tam ipsi quam patri mulierem talem habere, dicemus et ex ea natum ad bonorum possessionem avi admitti, cum possit avus iure suo uti eumque exheredare: nec enim minus in hoc nepote is, qui de inofficioso cogniturus est, quam merita nepotis patris eius delicta perpendet.

§ 6.- Si emancipatus filius praeteritus ante petitam bonorum possessionem adrogandum se dederit, amittit contra tabulas bonorum possessionem.

§ 7.- Si quis filio suo emancipato nepotem, quem ex eo retinuerat, dederit in adoptionem, nepos iste ad contra tabulas bonorum possessionem avi sui admittitur patre eius ante defuncto, quia in eius est familia, qui et ipse admitti potuit ad bonorum possessionem contra tabulas.

§ 8.- Idemque est et si emancipatus filium, quem

to him, and therefore he ought to be joined with his father, when praetorian possession of an estate is granted. If the said grandson should be emancipated after his adoption, it will be perfectly just for him to be excluded, for then he resumes his proper place, and should not be joined with his father.

§ 5.- If an emancipated son marries a woman without the consent of his father, and a child is born to him, and his father having died, the said grandson applies to be placed in possession of the estate of his grandfather, his application should be granted. For, by setting aside the emancipation by the Praetor, a legitimate son does not lose his rights as such; for a rescission of the emancipation is made in order that the children may, the more readily, obtain praetorian possession of the estate, and not be excluded from it.

And even if the son should marry a woman of such bad character that marriage to her would be dishonorable to himself, as well as to his father, still, we say that a child born of the said woman should be permitted to obtain possession of the property of the estate, as his grandfather could have availed himself of his right to disinherit him. In the decision of a case where the will has been attacked as inofficious, the magistrate who has jurisdiction, in rendering judgment must weigh the merits of the grandson as well as the offences of the father.

§ 6.- Where an emancipated son, who was passed over, gives himself to be arrogated before an application for praetorian possession of the estate is made, he loses his right to demand possession contrary to the provisions of the will.

§ 7.- Where anyone gives his grandson, whom he has under his control, in adoption to his emancipated son, the father of said grandson will be permitted to take possession of the estate of the grandfather, contrary to the provisions of the will, if his father is already dead, because he belongs to his family; and he himself can be permitted to take possession of the estate contrary to the provisions of the will.

§ 8.- The same rule applies where an emancipated

juntar con su padre. Pero si se dijera que éste nieto fue emancipado después de la adopción, sera muy justo que él se abstenga; porque recobra su lugar, y no debe juntarse con su padre.

§ 5.- Si un hijo emancipado, habiendo tomado mujer no con la voluntad de su padre, hubiere tenido un hijo, y después el nieto, muerto ya el padre, quisiera entrar en la posesión de los bienes del abuelo, ha de ser admitido a ella; porque por la rescisión no se hará que no sea hijo el que es hijo legítimo, pues la rescisión se hace más bien para que sean admitidos, que no para que no lo sean.

Porque aunque el hijo hubiere tomado mujer tan ignominiosa, que sea deshonor tanto para él como para el padre, diremos que tiene tal mujer, y que el nacido de ella es admitido a la posesión de los bienes del abuelo, porque podía el abuelo usar de su derecho, y desheredarlo; y en cuanto a este nieto, el que ha de conocer de la querella de testamento inoficioso tampoco estimará menos los méritos del nieto, que las culpas de su padre.

§ 6.- Si el hijo emancipado preterido se hubiere dado en adrogación antes de haber pedido la posesión de los bienes, pierde la posesión de los bienes contra el testamento.

§ 7.- Si alguno le hubiere dado en adopción a su hijo emancipado el nieto que nacido de él había retenido, este nieto es admitido contra el testamento a la posesión de los bienes de su abuelo habiendo muerto antes su padre, porque se halla en la familia de quien también pudo ser admitido a la posesión de los bienes contra el testamento.

§ 8.- Y lo mismo es, también si el emancipado le

post emancipationem quaesierat, patri suo in adoptionem dederit et decesserit: nam et hic nepos iste ad bonorum possessionem patris sui admitti debet, quasi non sit in alia familia.

§ 9.- Si pater alicuius pervenerit in adoptivam familiam, filius non, an patris sui in adoptiva familia mortui bonorum possessionem accipere possit? Et arbitror humaniorem esse hanc sententiam, ut filius hic, quamvis non sit in eadem familia, in qua pater, ad bonorum possessionem tamen eius admittatur.

§ 10.- Liberi, qui institui heredes iure non possunt, nec contra tabulas bonorum possessionem petere possunt. Haec autem verba "institui non possunt" ad mortis tempus referuntur.

§ 11.- Si quis ex liberis heres scriptus sit, ad contra tabulas bonorum possessionem vocari non debet: quum enim possit secundum tabulas habere possessionem, quo bonum est ei contra tabulas dari? Plane si alius committat edictum, et ipse ad contra tabulas bonorum possessionem admittetur.

§ 12.- Sed si sub condicione scriptus sit, bonorum possessionem contra tabulas accipere non potest, et ita Iulianus quoque libro vicesimo tertio Digestorum scripsit. Quid ergo, si defecerit condicio? Verum est eum contra tabulas accipere bonorum possessionem.

§ 13.- Si sub ea condicione filius emancipatus heres sit institutus, quae in ipsius potestate non est, quia scriptus heres est, bonorum possessionem secundum tabulas accipere potest et debet, nec contra tabulas potest: et si forte defecerit condicio, tuendus erit a praetore in tantum, quantum ferret, si contra tabulas bonorum possessionem accepisset.

son gives his own son, who was born after his emancipation, to his father, in adoption, and then dies; for, in this instance, the said grandson should be permitted to acquire possession of the estate of his father, just as if he did not belong to another family.

§ 9.- Where a father enters a family by adoption, and his son does not, can the son acquire possession of the estate of his father who died while a member of the adoptive family? I think that the more equitable opinion is, that the son, although he may not belong to the same family as his father, should still be permitted to take possession of the property of his estate under the Praetorian Law.

§ 10.- Children who cannot legally be appointed heirs are not entitled to demand possession of an estate contrary to the provisions of the will. The words, "Cannot be appointed," refer to the time of the death of their father.

§ 11.- Where one of several children is appointed heir, he should not be permitted to take possession of the estate in opposition to the provisions of the will. For if he was entitled to possession under the will, what good would it do to give him possession in opposition to it? It is clear that, if another child should have recourse to the Edict, he would be entitled to possession contrary to the provisions of the will.

§ 12.- Where, however, anyone is appointed heir under a condition, he cannot obtain possession of the estate in opposition to the will; and this was stated by Julianus in the Twenty-third Book of the Digest. But what if the condition should not be complied with? It is true that then he could obtain possession contrary to the provisions of the will.

§ 13.- If an emancipated son should be appointed heir under a condition which it is not in his power to comply with, he can receive praetorian possession of the estate contrary to the provisions of the will; and he ought to receive it, because he was appointed heir, but he cannot obtain it contrary to the provisions of the will. If, however, the condition should not be fulfilled, he must be protected by the Praetor to the

hubiere dado a su padre en adopción el hijo que había tenido después de la emancipación, y hubiere fallecido; porque también en este caso debe ser admitido este nieto a la posesión de los bienes de su padre, como si no estuviera en otra familia.

§ 9.- Si el padre de alguien hubiere entrado en una familia adoptiva, y no el hijo, ¿podría recibir la posesión de los bienes de su padre fallecido en la familia adoptiva? Y opino que es más equitativo este parecer, que este hijo, aunque no esté en la misma familia que el padre, sea, sin embargo, admitido a la posesión de los bienes de éste.

§ 10.- Los hijos, que por derecho no pueden ser instituidos herederos, tampoco pueden pedir la posesión de los bienes contra el testamento. Pero estas palabras: «no pueden ser instituidos», se refieren al tiempo de la muerte.

§ 11.- Si alguno de los hijos hubiera sido instituido heredero, no debe ser llamado a la posesión de los bienes contra el testamento; porque pudiendo tener la posesión de los bienes con arreglo al testamento, ¿qué utilidad le resulta de que se le dé contra el testamento? Pero a la verdad, si otro diera lugar al Edicto, también él será admitido a la posesión de los bienes contra el testamento.

§ 12.- Pero si hubiera sido instituido bajo condición, no puede recibir la posesión de los bienes contra el testamento; y así lo escribió también Juliano en el libro vigésimo tercero del Digesto. ¿Qué se dirá, pues, si la condición no se cumpliere? La verdad es, que él recibe la posesión de los bienes contra el testamento.

§ 13.- Si un hijo emancipado hubiera sido instituido heredero bajo una condición, que no está en la facultad del mismo, como quiera que fue instituido heredero, puede y debe recibir la posesión de los bienes conforme al testamento, y no puede recibirla contra el testamento; y si acaso no se hubiere cumplido la condición, habrá de ser am-

- fulfilled, he must be protected by the Praetor to the same extent as if he had obtained possession contrary to the provisions of the will.
- § 14.- Sed et si nepos sub huiusmodi condicione scriptus sit heres, idem erit dicendum.
- § 14.- Even if a grandson is appointed heir under a condition of this kind, the same rule will apply.
- § 15.- Si quis ex liberis non sit scriptus heres, sed servus eius scriptus sit eumque iusserit adire hereditatem, denegari ei debet bonorum possessio contra tabulas.
- § 15.- Where one of several children is not appointed heir, but his slave is appointed, and he orders him to accept the estate, possession contrary to the provisions of the will should be denied him.
- § 16.- Idemque est et si legatum relictum sibi vel servo suo elegerit: nam et hic dicimus bonorum possessionem contra tabulas debere denegari.
- § 16.- The same rule applies if the child should prefer to take what was left to him, or to his slave; for, in this instance, the possession of the estate contrary to the provisions of the will should be refused him.
- 4.- PAULUS; *libro XLI, ad Edictum*.- Illud notandum est, quod bonorum possessio contra tabulas quae liberis promittitur locum habet, sive quis heres exstiterit sive non: et hoc est quod dicimus contra ipsum testamentum liberis competere bonorum possessionem: quod in patrono contra est.
- 4.- PAULUS; *On the Edict, Book XLI*.- It should be noted that the possession of property contrary to the provisions of the will is promised to children whether there is an heir, or not. And this is the reason why we say that the children have a right to the possession of the estate in opposition to the will itself. The contrary rule applies to the case of a patron.
- § 1.- Si quis filium quem in potestate habuit instituerit heredem vel exheredaverit et ex eo nepotem omiserit, bonorum possessioni locus non est, quia non esset nepos suus heres futurus. Eadem sunt et in sequentibus gradibus.
- § 1.- Where anyone appoints an heir whom he has under his control, or disinherits him, and passes over a grandson by him, there is no ground for the application of the Praetorian Law, because the grandson will not be his legal heir. This rule is also applicable to more distant degrees of relationship.
- § 2.- Ad testamenta feminarum edictum contra tabulas bonorum possessionis non pertinet, quia suos heredes non habent.
- § 2.- The Edict granting possession contrary to the provisions of a will does not apply to the wills of women because they have no heirs-at-law.
- § 3.- Si quis eum qui in utero est praetermiserit, etiam nondum nato eo alius qui heres institutus est bonorum possessionem contra tabulas admittere potest, quia iniquum est neque quasi scriptum posse petere bonorum possessionem, quamdiu contra tabulas peti potest, nec contra tabulas, quamdiu non nascitur praeteritus: ut et si ante moriatur, bonorum possessionis beneficium ad heredem transmittat.
- § 3.- Where an unborn child is passed over, another child, who has been appointed heir to his father, can be permitted to take possession of the property of the estate, even before the birth of the child first mentioned; because it would be unjust for an heir, who was not appointed, to claim possession of the estate, so long as such possession can be demanded contrary to the provisions of the will, and possession

parado por el Pretor para tanto cuanto obtendría, si hubiese recibido la posesión de los bienes contra el testamento.

§ 14.- Pero se habrá de decir lo mismo, aunque un nieto haya sido instituido heredero bajo condición de tal naturaleza.

§ 15.- Si alguno de los hijos no hubiera sido instituido heredero, pero hubiera sido instituido su esclavo, y él le hubiere mandado que adiese la herencia, se le debe denegar la posesión de los bienes contra el testamento.

§ 16.- Y lo mismo es, también si hubiere elegido el legado dejado a él o a su esclavo; porque también en este caso diremos que se debe denegar la posesión de los bienes contra el testamento.

4.- PAULO; *Comentarios al Edicto, libro XLI*.- Se ha de notar esto, que la posesión de los bienes contra el testamento, que se les promete a los hijos, tiene lugar ya si hubiere algún heredero, ya si no. Y esto es lo que decimos, que les compete a los hijos la posesión de los bienes contra el mismo testamento, lo cual es al contrario tratándose del patrón.

§ 1.- Si alguno hubiere instituido heredero, o desheredado, al hijo que tuvo bajo su potestad, y hubiere preterido al nieto habido de él, no tiene lugar la posesión de los bienes, porque el nieto no habría de ser heredero suyo. Lo mismo se observa también en los grados siguientes.

§ 2.- El Edicto de la posesión de los bienes contra el testamento no se refiere a los testamentos de las mujeres, porque no tienen herederos suyos.

§ 3.- Si alguno hubiere preterido al que está en el claustro materno, aun no habiendo nacido todavía éste, puede otro, que fue instituido heredero, admitir la posesión de los bienes contra el testamento, porque es injusto que no pueda pedir ni como instituido la posesión de los bienes, mientras se puede pedir contra el testamento, ni contra el testamento, mientras no nace el preterido, de suerte que, también si

Quod maxime necessarium est in filio emancipato scripto herede, qui nec hereditatem interim adire potest.

5.- IULIANUS; *libro XXIV, Digestorum*.- Sed et si decesserint, antequam peterent bonorum possessionem, non est iniquum praetorem decernere heredibus eorum saluum fore commodum bonorum possessionis secundum tabulas vel contra tabulas.

§ 6.- PAULUS; *libro XLI, ad Edictum*.- Si emancipatus filius nepotem procreaverit et ita decederit, deinde avus eius, nepos ad avi bonorum possessionem venire potest.

§ 1.- Quod si et filium et nepotem emancipaverit, vivente quidem filio nepos non veniet, post mortem autem eius ad bonorum possessionem avi veniet.

§ 2.- Nepote quoque solo emancipato et avo mortuo, deinde patre eius, nepos praeteritus accipiet patris bonorum possessionem, quia suus heres esset futurus patri, si potestate avi non exisset.

§ 3.- Filio emancipato si nepos retentus sit et utrique praeteriti, utrique accipient bonorum possessionem.

§ 4.- Si filius emancipatus in adoptiva familia nepotem sustulerit, ne nepos quidem ad bonorum possessionem avi naturalis veniet. Sed et si emancipatus filius procreatis nepotibus in adoptionem se

cannot be granted contrary to the provisions of the will, as long as the child who has been passed over is not yet born; and even if he should die before birth he will, nevertheless, transmit the right of possession of the estate to his heir. This is especially necessary where an emancipated child has been appointed heir, as, in the meantime, he cannot enter upon the estate.

5.- JULIANUS; *Digest, Book XXIV*.- If, however, the children should die before demanding praetorian possession of the estate, it will not be unjust for the Praetor to decide that their heirs shall have the advantage of possession, either in compliance with the provisions of the will, or in opposition to the same.

6.- PAULUS; *On the Edict, Book XLI*.- Where an emancipated son has a son and then dies, and the grandfather dies afterwards, the grandson will be entitled to praetorian possession of the estate of his grandfather.

§ 1.- Where the grandfather has emancipated his son and grandson, the grandson will not be entitled to his estate during the lifetime of the son, but after the death of his father he will be entitled to praetorian possession of the estate of his grandfather.

§ 2.- If the grandson alone should be emancipated, and the grandfather, and then his father, should die, the grandson, who has been emancipated, will be entitled to the estate of his father, under the Praetorian Edict, because he would be the heir of his father if he had not been freed from the control of his grandfather.

§ 3.- Where a son has been emancipated, and the grandson retained under the control of the grandfather, and both of them have been passed over, both will be entitled to possession of the estate under the Praetorian Law.

§ 4.- If the son who has been emancipated belonged to an adoptive family, and has a son, the grandson will not be entitled to the possession of the estate of the natural grandfather under the Praetorian Edict.

muriese antes, transmita al heredero el beneficio de la posesión de los bienes; lo que principalmente es necesario tratándose de un hijo emancipado instituido heredero, el cual no puede adir entretanto la herencia.

5.- JULIANO; *Digesto, libro XXIV*.- Pero aunque hubieren fallecido antes que pidiesen la posesión de los bienes, no es injusto que el Pretor decrete que les quede a salvo a sus herederos el beneficio de la posesión de los bienes conforme al testamento, o contra el testamento.

6.- PAULO; *Comentarios al Edicto, libro XLI*.- Si el hijo emancipado hubiere procreado un nieto, y así hubiere fallecido, y después el abuelo, el nieto puede entrar en la posesión de los bienes del abuelo.

§ 1.- Pero si hubiere emancipado tanto al hijo como al nieto, a la verdad, viviendo el hijo no entrará en ella el nieto, pero después de la muerte de aquél entrará en la posesión de los bienes del abuelo.

§ 2.- También habiendo sido emancipado sólo el nieto, y muerto el abuelo, y después el padre de aquél, el nieto preterido recibirá la posesión de los bienes del padre, porque habría de haber sido heredero suyo del padre, si no hubiese salido de la potestad del abuelo.

§ 3.- Emancipado el hijo, si el nieto hubiera sido retenido, y ambos hubieren sido preteridos, ambos recibirán la posesión de los bienes.

§ 4.- Si el hijo emancipado hubiere dado un nieto en la familia adoptiva, ciertamente que el nieto no entrará en la posesión de los bienes del abuelo natural. Pero aunque el hijo emancipado, habiendo

dederit, ut eum filii sequantur, idem erit. Plane si is, qui apud adoptivum avum procreatus est, emancipatus sit, veniet ad bonorum possessionem avi naturalis. Adoptio tamdiu nocet, quamdiu quis in familia aliena sit. Ceterum emancipatus ad bonorum possessionem parentum naturalium venit, sed emancipatus vivis eis, non etiam post mortem eorum: hoc enim verius est post mortem eorum emancipatum non admitti.

7.- GAIUS; *libro XIV, ad Edictum provinciale*.- Si retentus fuerit in potestate nepos filio emancipato, admittitur nepos vivo avo ad patris bonorum possessionem.

8.- ULPIANUS; *libro XL, ad Edictum*.- Non putavit Praetor exheredatione notatos et remotos ad contra tabulas bonorum possessionem admittendos, sicuti nec Iure Civili testamenta parentum turbant: sane si velint inofficiosi querellam instituere, est in ipsorum arbitrio.

§ 1.- Aliqua parte tabularum exheredem scribi non sufficit, sed eo gradu, contra quem petitur bonorum possessio. Unde si a primo gradu exheredatus sit filius, a secundo praeteritus et primo gradu scripti non petierint bonorum possessionem, poterit contra tabulas accipere bonorum possessionem.

§ 2.- Non quaevis exhereditatio summovet filium a contra tabulas bonorum possessione, sed quae rite facta est.

And even if the emancipated son, after having had sons born to him, should give himself in adoption, the same rule will apply. It is clear that if a child born in the family of the adoptive grandfather should be emancipated, he will be entitled to praetorian possession of the estate of his natural grandfather. Adoption does not prejudice the rights of a child, so long as he remains in a strange family. Moreover, if he is emancipated, he can obtain possession of the estate of his parents under the Praetorian Edict; provided that he is emancipated during their lifetime, and not after their death; for it is certain that he cannot be emancipated after their decease.

7.- GAIUS; *On the Provincial Edict, Book XIV*.- If a son should be emancipated, and his son retained under the control of his grandfather, the grandson, during the lifetime of his grandfather, will be permitted to obtain praetorian possession of the estate of his father.

8.- ULPIANUS; *On the Edict, Book XL*.- The Praetor does not think that children who have been disgraced by disinheritance, and excluded from the succession, should be permitted to obtain praetorian possession, in opposition to the terms of the will, just as by the Civil Law, they do not prevent the execution of the will of their parents; for, under these circumstances, they have the right to attack the will as inofficious, if they desire to do so.

§ 1.- It is not sufficient for an heir to be disinherited by this being stated in any part of the will, but he must be specifically mentioned as belonging to that degree against which the possession of an estate is claimed under the Praetorian Law. Hence, if the son should be disinherited in the first degree, and passed over in the second, and the heirs appointed in the first degree do not demand praetorian possession of the estate, the said son can obtain possession of the same in opposition to the terms of the will.

§ 2.- Every disinheritance does not bar a child from obtaining possession of an estate contrary to the provisions of the will, but only where this is legally done.

procreado nietos, se hubiere dado en adopción, para que los hijos le sigan, será lo mismo. Mas, a la verdad, si el que fue procreado en poder del abuelo adoptivo, hubiera sido emancipado, entrará en la posesión de los bienes del abuelo natural. La adopción perjudica mientras uno se halle en la familia ajena. Por lo demás, el emancipado entra en la posesión de los bienes de sus ascendientes naturales, pero habiendo sido emancipado viviendo éstos, no también después de la muerte de los mismos; porque es más verdadero que no es admitido el emancipado después de la muerte de aquéllos.

7.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- Si el nieto hubiere sido retenido bajo potestad habiendo sido emancipado el hijo, el nieto es admitido, viviendo el abuelo, a la posesión de los bienes del padre.

8.- ULPIANO; *Comentarios al Edicto, libro XL*.- No juzgó el Pretor que debían ser admitidos a la posesión de los bienes contra el testamento los tachados con desheredación y excluidos, puesto que ni aun por Derecho Civil alteran los testamentos de los ascendientes; y, a la verdad, está en su arbitrio promover, si quisieran, la querella de testamento inoficioso.

§ 1.- No basta que uno sea desheredado en alguna parte del testamento, sino que lo sea en aquel grado contra el que se pide la posesión de los bienes; por lo cual, si el hijo hubiera sido desheredado del primer grado, y preterido del segundo, y los instituidos en el primer grado no hubieren pedido la posesión de los bienes, podrá recibir la posesión de los bienes contra el testamento.

§ 2.- No excluye al hijo de la posesión de los bienes contra el testamento cualquier desheredación, sino la que se hizo conforme a derecho.

§ 3.- Si ab uno ex heredibus sit filius exheredatus, Marcellus libro nono Digestorum scribit filium non videri exheredatum: idcirco contra tabulas bonorum possessionem peti posse contra utrumque heredem.

§ 4.- Si exheredatus sit filius et institutus, optinente eo gradu, in quo institutus est, puto commissio edicto ab alio filio contra tabulas eum bonorum possessionem petere posse.

§ 5.- A primo gradu praeteritus est filius, a secundo exheredatus. Si in primo gradu scripti non sint in rebus humanis mortis tempore testatoris, dicendum est contra tabulas bonorum possessionem praeteritum petere non posse: hereditas enim in secundo gradu versatur, non in primo, ex quo neque adiri hereditas neque bonorum possessio peti potest. Sed si post mortem testatoris decesserint heredes scripti, idem Marcellus putat contra tabulas bonorum possessionem semel natam competere. Sed et si defecerit condicio institutionis, adhuc tantundem dicit praeteritum ab eo gradu filium contra tabulas bonorum possessionem petiturum. Idem scribit et si postumus, qui institutus fuit, non fuerit natus: nam adhuc contra tabulas bonorum possessionem competere filio Marcellus ait.

§ 6.- Si quis sua manu se exheredem scripsit, an contra tabulas bonorum possessionem possit accipere, videamus. Et Marcellus libro nono digestorum nocere ei hanc exheredationem ait, quia Senatus hoc pro non scripto non facit, quod contra eum est.

§ 3.- When the son who is disinherited is one of several heirs, Marcellus, in the Ninth Book of the Digest, says that he is not considered to be disinherited, and therefore he can claim possession under the Praetorian Law, in opposition to the terms of the will, against any of the other heirs.

§ 4.- If a son is disinherited, and then appointed heir, and the degree in which he is appointed takes effect, I think the Edict will become operative with reference to the other son, and that he can demand praetorian possession of the estate in opposition to the terms of the will.

§ 5.- Where a son is passed over in the first degree, and disinherited in the second, and the heirs appointed in the first degree die before the death of the testator, it must be said that the son who has been passed over will not be entitled to praetorian possession of the estate in opposition to the terms of the will; for the condition of the estate with reference to the second degree is such that it cannot be entered upon in the first degree, nor can praetorian possession of it be claimed. If, however, the appointed heir should die after the death of the testator, Marcellus holds that the right of praetorian possession of the estate, contrary to the provisions of the will, having once vested in the son, he will continue to be entitled to it. And even if the condition upon which the appointment of the heir depended should fail to be fulfilled, he also says that the son who was passed over in that degree can also claim praetorian possession contrary to the provisions of the will. He also says that the same rule will apply even if a posthumous child, who was appointed the heir, should not be born; for he holds that, in this instance, the son will be entitled to praetorian possession of the estate in opposition to the terms of the will.

§ 6.- Where anyone writes his disinheritance with his own hand, let us consider whether he can obtain praetorian possession of the estate contrary to the provisions of the will. Marcellus, in the Ninth Book of the Digest, says that a disinheritance of this kind will prejudice his rights, because the Senate has not

§ 3.- Si el hijo hubiera sido desheredado respecto a uno solo de los herederos, escribe Marcelo en el libro noveno del Digesto, que no se considera que el hijo fue desheredado; y que se puede, por lo tanto, pedir contra uno y otro heredero la posesión de los bienes contra el testamento.

§ 4.- Si el hijo hubiera sido desheredado, e instituido, prevaleciendo el grado en que fue instituido, opino, que, habiéndose dado lugar al Edicto por otro hijo, puede aquél pedir la posesión de los bienes contra el testamento.

§ 5.- Un hijo fue preterido en el primer grado, y desheredado en el segundo; si los instituidos en el primer grado no estuvieran en este mundo al tiempo de la muerte del testador, se ha de decir, que el preterido no puede pedir la posesión de los bienes contra el testamento; porque la herencia se halla en el segundo grado, no en el primero, por lo cual no se puede adir la herencia, ni pedir la posesión de los bienes. Pero si los herederos instituidos hubieren fallecido después de la muerte del testador, opina el mismo Marcelo que compete, una vez adquirida, la posesión de los bienes contra el testamento. Pero aunque hubiere faltado la condición de la institución, todavía dice lo mismo, que el hijo preterido en este grado pedirá la posesión de los bienes contra el testamento. Lo mismo escribe, aunque no hubiere nacido el póstumo, que fue instituido; porque dice Marcelo, que aun le compete al hijo la posesión de los bienes contra el testamento.

§ 6.- Si alguno escribió con su propia mano su desheredación, veamos si podrá recibir la posesión de los bienes contra el testamento. Y dice Marcelo en el libro noveno del Digesto, que le perjudica esta desheredación, porque el Senado no considera como no escrito lo que es en contra de él.

prescribed that, where anyone performs some act against himself, it shall be considered as not having been written.

§ 7.- Si quis emancipatum filium exheredaverit eumque postea adrogaverit, Papinianus libro duodecimo Quaestionum ait iura naturalia in eo praevalere: idcirco exheredationem nocere.

§ 8.- Sed in extraneo Marcelli sententiam probat, ut exheredatio ei adrogato postea non noceat.

§ 9.- Postliminio autem reverso filio dicendum est exheredationem ante factam nocere.

§ 10.- Si filium in adoptiva familia constitutum pater naturalis exheredaverit, deinde sit filius emancipatus, nocebit ei exheredatio.

§ 11.- In adoptionem datos filios non summo verum praetor voluit, modo heredes instituti sint, et hoc iustissime eum fecisse labeo ait: nec enim in totum extranei sunt. Ergo si fuerint heredes scripti, accipiant contra tabulas bonorum possessionem, sed ipsi soli non committent Edictum, nisi fuerit alius praeteritus ex liberis qui solent committere Edictum. sed si ipse scriptus non sit, sed alius, qui ei acquirere hereditatem potest, non est in ea causa, ut eum ad bonorum possessionem contra tabulas admittamus.

§ 12.- Ut autem admittantur ad bonorum possessionem, ex liberis esse eos oportet. Ceterum si adoptivum filium dedi in adoptionem et heredem scripsi, commissio per alios edicto bonorum possessio contra tabulas ei non dabitur.

§ 7.- Where anyone, after having disinherited his emancipated son, arrogates him, Papinianus, in the Twelfth Book of Questions, says that natural rights will always prevail in a case of this kind, and therefore that such a disinheritance will prejudice the son.

§ 8.- With reference to a stranger, however, he adopts the opinion of Marcellus that disinheritance will not prejudice his rights, if he should subsequently be arrogated by his father.

§ 9.- Where a son has returned from captivity under the right of postliminium, it must be said that disinheritance previously made will injure him.

§ 10.- If a natural father should disinherit his son while he belongs to an adoptive father, and afterwards his son is emancipated, the disinheritance will prejudice his rights.

§ 11.- The Praetor does not wish that children who have been given in adoption should be excluded from the possession of an estate, provided they are the appointed heirs; and Labeo says that his decision is most just, for the children are not entirely strangers. Therefore, if they should be appointed heirs, they can obtain praetorian possession of the estate in opposition to the terms of the will; but they themselves, alone, cannot render the Edict operative, unless one of those who have been passed over can cause it to be applicable. If, however, this child should not be appointed heir, but another person, who can acquire the estate for him, is, there will be no reason why we should permit him to obtain possession contrary to the provisions of the will.

§ 12.- Moreover, in order that these children should be permitted to obtain praetorian possession, they must be the direct descendants of the testator, for if I have given in adoption a son, whom I myself have adopted, and the Edict is rendered operative by my

§ 7.- Si alguno hubiere desheredado a su hijo emancipado, y lo hubiere arrogado después, dice Papiniano en el libro duodécimo de las Cuestiones, que prevalecen en él los derechos naturales; y que por lo tanto perjudica la desheredación.

§ 8.- Pero respecto a un extraño aprueba el parecer de Marcelo, de suerte que la desheredación no le perjudique al que fue arrogado después.

§ 9.- Mas habiendo vuelto el hijo por el postliminio, se ha de decir que le perjudica la desheredación hecha antes.

§ 10.- Si el padre natural hubiere desheredado al hijo constituido en familia adoptiva, y después hubiera sido emancipado el hijo, le perjudicará la desheredación.

§ 11.- El Pretor quiso que los hijos dados en adopción no fueran excluidos, con tal que hubieran sido instituidos herederos; y dice Labeón, que esto lo hizo muy justamente, porque no son enteramente extraños. Luego si hubieren sido instituidos herederos, recibirán la posesión de los bienes contra el testamento; pero ellos solos no darán lugar al Edicto, a no ser que hubiere sido preterido uno de los hijos, que suelen dar lugar al Edicto. Pero si él mismo no hubiera sido instituido, sino otro, que puede adquirir para él la herencia, no está en el caso de que lo admitamos a la posesión de los bienes contra el testamento.

§ 12.- Mas para que sean admitidos a la posesión de los bienes, es necesario que ellos sean descendientes; pero si di en adopción un hijo adoptivo, y lo instituí heredero, habiéndose dado por otros lugar al Edicto, no se le dará a él la posesión de los bienes contra el

§ 13.-Datur autem ei, qui in adoptiva familia est, contra tabulas possessio, si eo gradu heres scriptus sit, contra quem peti potest bonorum possessio.

§ 14.- Non est novum, ut emancipatus praeteritus plus iuris scriptis heredibus fratribus suis tribuat, quam habituri essent, si soli fuissent: quippe si filius qui in potestate patris est ex duodecima parte heres scribatur emancipato praeterito, dimidiam partem beneficio emancipati occupat, qui, si emancipatum fratrem non haberet, duodecimam partem habiturus esset.

Sed si ex parte minima sit heres institutus, non pro ea parte, qua institutus est, tuendus est commissio Edicto, sed amplius per bonorum possessionem habere potest. Praetori enim propositum est, quum contra tabulas bonorum possessionem dat, eas partes unicuique liberorum tribuere, quas intestato patre mortuo in hereditate habiturus esset, si in potestate mansisset: et ideo sive emancipatus sive is qui in potestatem mansit sive in adoptionem datus ex minima parte heres scriptus sit, non redigitur ad eam portionem, ex qua institutus est, sed virilem accipit.

9.- GAIUS; *libro XIV, ad Edictum provinciale*.- Utrum autem pater adoptivus vivit an defunctus est, nihil interest: nam hoc solum quaeritur, an in adoptiva familia sit.

10.- ULPIANUS; *libro XL, ad Edictum*.- Si post mortem testatoris heres institutus filius in adop-

other children, praetorian possession of the estate contrary to the provisions of the will shall not be granted to the aforesaid child.

§ 13.- Praetorian possession in opposition to the terms of the will is also granted to a child belonging to an adoptive family, if he is appointed heir in the degree against which possession of the estate can be demanded.

§ 14.- It is not surprising that an emancipated son, who has been passed over, should be able to confer upon the appointed heirs greater rights than they would have been entitled to, if they had remained the sole heirs; for if a son, who was under the control of his father, is appointed heir to a fourth part of his estate, and another son, who has been emancipated, is passed over, he will receive half of the estate through the emancipated son, and if he did not have an emancipated brother, he would only be entitled to a twelfth part of the property.

Where an heir is only appointed for a very small share of an estate, and the Edict is applicable, he will be not only entitled to the enjoyment of the share to which he was appointed heir, but he can obtain much more through praetorian possession. For the Praetor, when he grants possession of an estate in opposition to the terms of the will, decides to give those shares to each of the children which they would have been entitled to, if their father had died intestate, and the child had remained under his control. Therefore, whether the child who was emancipated, or remained under his control, or was given in adoption, was appointed heir to a small share of the estate, he will not be restricted to that portion of the same to which he was appointed heir, but will be entitled to a full share.

9.- GAIUS; *On the Provincial Edict, Book XIV*.- It makes no difference whether the adoptive father is living or dead, for the only inquiry made is whether the child belongs to the adoptive family.

10.- ULPIANUS; *On the Edict, Book XL*.- If, after the death of the testator, the appointed heir should

testamento.

§ 13.- Pero se da la posesión de los bienes contra el testamento al que está en familia adoptiva, si hubiera sido instituido heredero en grado contra el cual se puede pedir la posesión de los bienes.

§ 14.- No es nuevo que el emancipado preterido dé a sus hermanos instituidos herederos más derecho que el que habrían de haber tenido, si hubiesen sido solos, porque si el hijo, que está bajo la potestad de su padre, fuera instituido heredero, habiendo sido preterido el emancipado, en la duodécima parte, posee la mitad por beneficio del emancipado, quien, si no tuviese un hermano emancipado, habría de haber tenido la duodécima parte.

Pero si hubiera sido instituido de una mínima parte, no ha de ser amparado, habiéndose dado lugar al Edicto, en la parte en que fue instituido, sino que puede tener más por la posesión de los bienes. Porque se propuso el Pretor, cuando da la posesión de los bienes contra el testamento, concederle a cada uno de los hijos las partes que, habiendo muerto intestado el padre, habría de haber tenido en la herencia, si hubiese permanecido bajo potestad; y por esto, ya si el emancipado, ya si el que permaneció bajo potestad, ya si el dado en adopción hubiera sido instituido heredero de una mínima parte, no es reducido a esta porción, en que fue instituido, sino que recibe una porción viril.

9.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- Mas nada importa si vive el padre adoptivo, o si falleció; porque solamente se investiga si está en la familia adoptiva.

10.- ULPIANO; *Comentarios al Edicto, libro XL*.- Si después de la muerte del testador se hubiere dado

tionem se dederit, bonorum possessionem contra tabulas accipere potest, quia scriptis heredibus instituti non solet nocere adoptio.

§ 1.- Si filius in adoptionem datus avo materno heres institutus sit a patre naturali, commissio per alium edicto magis est, ut bonorum possessionem accipere possit: nec enim exigimus, ut adeat hereditatem, sed sufficit, ut ei delata sit acquirere possit.

§ 2.- Si in adoptionem datus, posteaquam iussu patris adoptivi hereditatem adiit, emancipatus fuerit, potest contra tabulas bonorum possessionem accipere hereditatemque ipse potius habebit, quam pater adoptivus.

§ 3.- Illud notandum est, quod et si adierit hereditatem in adoptionem datus, contra tabulas ei datur: alias autem si quis legatum si quis portionem sibi datam adgnoverit, a contra tabulas bonorum possessione repellendus est.

§ 4.- Liberi, qui contra tabulas habere non possunt, nec partem faciunt, si per alios committatur edictum: quo enim bonum est eis favere ut partem faciant, nihil habituris?

§ 5.- Exhereditati liberi quemadmodum edictum non committunt, ita nec commissio per alios edicto cum illis venient ad bonorum possessionem unaque eis querella superest, si de inofficioso dicant.

§ 6.- Hi, qui propter alios contra tabulas bonorum possessionem petunt, non exspectant ut praeteriti possessionem accipiant, verum ipsi quoque bonorum possessionem petere contra tabulas possunt: cum

give himself in adoption, he can obtain praetorian possession of the estate contrary to the provisions of the will, because the adoption of the appointed heir does not prejudice other heirs mentioned in the will.

§ 1.- If a son should be given in adoption to his maternal grandfather by his natural father, and the Edict takes effect with reference to another child, the better opinion is that the latter can obtain possession of the estate; for we do not require him to enter upon it, but it is sufficient for it to be transferred to him, and that it can be legally acquired.

§ 2.- Where a son is given in adoption, and, after having accepted the estate by the order of his adoptive father, he is emancipated, he can obtain praetorian possession of the estate in opposition to the terms of the will; for he himself will be more entitled to it than the adoptive father.

§ 3.- It should be noted that if a son given in adoption should enter upon the estate, possession will be granted to him contrary to the provisions of the will; but, on the other hand, if anyone should receive a legacy or a share of the estate, he will be excluded from praetorian possession contrary to the terms of the will.

§ 4.- Children who are not entitled to possession contrary to the provisions of the will cannot even obtain a share of the estate, if the Edict is applicable; for what good would it do to favor them and enable them to have a portion of it, since they are not entitled to anything?

§ 5.- Children who have been disinherited cannot render the Edict operative, hence they cannot be joined with the others when the latter obtain possession of an estate under the Praetorian Law; and they have only one ground of complaint, that is, to allege that the will is inofficious.

§ 6.- Those who demand praetorian possession in opposition to the terms of the will, for the benefit of others, do not wait until those children who have been passed over make application for possession,

en adopción el hijo instituido heredero, puede recibir la posesión de los bienes contra el testamento, porque a los instituidos por escrito herederos no les suele perjudicar la adopción.

§ 1.- Si el hijo dado en adopción al abuelo materno hubiera sido instituido heredero por su padre natural, habiéndose dado lugar por otro al Edicto, es más cierto que puede recibir la posesión de los bienes; porque no exigimos que ada la herencia, sino que basta que le haya sido deferida y que pueda ser adquirida.

§ 2.- Si el dado en adopción, hubiere sido emancipado, después que por orden del padre adoptivo adió la herencia, puede recibir la posesión de los bienes contra el testamento, y más bien tendrá él la herencia que el padre adoptivo.

§ 3.- Se ha de notar esto, que también si el dado en adopción hubiere adido la herencia, se le da la posesión de los bienes contra el testamento; pero de otro modo, si alguno hubiere aceptado un legado, o la porción que se le dió, ha de ser repelido de la posesión de los bienes contra el testamento.

§ 4.- Los descendientes que no pueden tenerla contra el testamento, tampoco constituyen parte, si por otros se diera lugar al Edicto; porque ¿qué utilidad hay en favorecer, de modo que constituyan parte, a los que nada han de tener?

§ 5.- Los hijos desheredados, así como no dan lugar al Edicto, así tampoco, habiéndose dado lugar al Edicto por otros, entrarán con ellos en la posesión de los bienes, y les queda una sola querella, la de que acusen de inoficioso el testamento.

§ 6.- Los que por causa de otros piden la posesión de los bienes contra el testamento, no esperan que los preteridos reciban la posesión de los bienes, sino que también ellos mismos pueden pedir la posesión de

enim semel beneficio aliorum ad id beneficium fuerint admissi, iam non curant, petant illi nec ne bonorum possessionem.

11.- PAULUS; *libro XLI, ad Edictum*.- Si in adoptionem datus sub condicione scriptus sit heres a naturali patre, alio committente contra tabulas edictum et ipse veniet: sed si defecerit condicio, repellitur ab ea possessione. Idem puto et in eo, qui pure quidem, sed non iure scriptus sit heres.

§ 1.- Exemplo iuris legitimi et bonorum possessio contra tabulas distribuitur: igitur nepotes ex uno filio unam partem habebunt.

12.- GAIUS; *libro XIV, ad Edictum provinciale*.- Si duobus filiis et ex altero filio duobus nepotibus bonorum possessio competat et alter ex nepotibus non petat, pars eius fratri adcrebit. Si vero ex filiis alter non petat, tam fratri quam nepotibus id prodest: namque tunc duo semisses fiunt, ex quibus alterum filius, alterum nepotes consequuntur.

§ 1.- Si prius testamentum extet iure factum, quo filius exheredatus est, sequens imperfectum, in quo praeteritus sit filius, posteriore testamento praeteritus recte petet bonorum possessionem, si remoto quoque filio potiores sunt in ea hereditate posteriore testamento scripti heredes: et ita ius habet, ut, quum is, contra quem filius petit bonorum possessionem, amoto filio possit optinere hereditatem, filius quoque recte videatur petere bonorum possessionem, si vero ille non possit optinere hereditatem, filius quoque excludatur.

13.- IULIANUS; *libro XXIII, Digestorum*.- Quum

but they themselves can demand it at any time. For, having been once admitted to obtain it for the benefit of others, they do not concern themselves as to whether the former heirs intend to demand it or not.

11.- PAULUS; *On the Edict, Book XLI*.- Where a son given in adoption is appointed heir by his natural father, and another claims the benefit of the Edict contrary to the provisions of the will, the latter will be entitled to the preference. If, however, the condition should fail to be fulfilled, he will be excluded from possession. I think that this also applies to him who has been absolutely appointed an heir, but that was not done in conformity to law.

§ 1.- Praetorian possession of an estate contrary to the provisions of the will is divided in the same manner as legal succession on the ground of intestacy. Hence grandsons by one son will have a single share between them.

12.- GAIUS; *On the Provincial Edict, Book XIV*.- Where two sons together with two grandsons by another son are entitled to praetorian possession of an estate, and one of the grandsons does not claim it, his share will accrue to his brother; but if one of the sons does not claim possession, his brother, as well as the grandsons, will profit by it, for then the estate will be divided into two equal parts, of which the son will obtain one, and the grandsons the other.

§ 1.- Where there are two wills, and one, by which a son is disinherited, is properly drawn up, and the second, in which the son is passed over is imperfect, he who is passed over in the last will can legally claim praetorian possession of the estate, if the heirs mentioned in the second will are such as should have preference over those mentioned in the first, in case the son should be excluded. Hence the rule is established that, when he against whom the son claims praetorian possession of the estate can obtain it if the son should be excluded, the latter also can legally demand praetorian possession, but if he could not obtain the estate, the son will also be excluded.

13.- JULIANUS; *Digest, Book XXIII*.- Where an

los bienes contra el testamento; porque una vez que por el beneficio de los otros hayan sido admitidos a este beneficio, ya no se cuidan de que aquéllos pidan, o no, la posesión de los bienes.

11.- PAULO; *Comentarios al Edicto, libro XLI*.- Si el dado en adopción hubiera sido instituido bajo condición heredero por su padre natural, dándose por otro lugar al Edicto contra el testamento, entrará también él; pero si hubiere faltado la condición, es repelido de esta posesión. Lo mismo opino también respecto al que haya sido instituido heredero puramente, pero no con arreglo a derecho.

§ 1.- La posesión de los bienes contra el testamento se distribuye también a la manera que por el Derecho Civil; así, pues, los nietos habidos de un solo hijo tendrán una sola parte.

12.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- Si a dos hijos, y a dos nietos habidos de otro hijo les competiera la posesión de los bienes, y uno de los nietos no la pidiera, su parte acrece a su hermano. Mas si no la pidiera uno de los hijos, esto aprovecha tanto al hermano como a los nietos; porque entonces se hacen dos mitades, de las que el hijo consigue una, y los nietos la otra.

§ 1.- Si hubiera un primer testamento hecho con arreglo a derecho, en el que fue desheredado el hijo, y un segundo imperfecto, en el que haya sido preterido el hijo, el preterido en el testamento posterior pedirá con derecho la posesión de los bienes, si separado también el hijo son preferidos en aquella herencia los herederos instituidos en el testamento posterior; y así dispone el derecho, que cuando aquél contra quien el hijo pide la posesión de los bienes pueda obtener, separado el hijo, la herencia, se considere que también el hijo pide con derecho la posesión de los bienes, pero si aquél no pudiera obtener la herencia, sea excluido también el hijo.

13.- JULIANO; *Digesto, libro XXIII*.- Cuando el

emancipatus bonorum possessionem contra tabulas accipit, scriptus heres ei hereditatem petenti cogens est et praedia et servos hereditarios praestare: omne enim ius transferri aequum est, quod per causam hereditariam scriptus heres nanciscitur, ad eum, quem Praetor heredis loco constituit.

§ 1.- Qui duos filios et ex altero eorum nepotem habebat, eum in adoptionem dedit et heredem instituit praeterito altero filio: quaeritur, quid in his servari debeat, utrum in partem patris sui admittatur an virilem portionem habeat. Respondi: in adoptionem datus nepos et heres scriptus, quamdiu pater eius aut in potestate aut emancipatus est, non potest contra tabulas bonorum possessionem accipere: sed et si pater eius, antequam bonorum possessionem acciperet, decesserit, non admittitur nepos ad bonorum possessionem.

§ 2.- Si pater emancipato filio praeterito heredes duos scripserit, filium quem in potestate habebat et alterum quem in adoptionem dederat, ex quo duos nepotes in familia reliquerat, qui et ipsi testamento praeteriti sint: bonorum possessionem pro parte tertia emancipatus, pro parte tertia is qui in potestate remansit, pro parte tertia qui in adoptionem datus est et filii eius simul habebunt, ita ut sextans patri, sextans nepotibus cedat.

§ 3.- Si pater ex duobus filiis alterum habentem filios emancipaverit et unum ex nepotibus, quem ante emancipaverat, in locum filii adoptaverit, praeterito deinde emancipato decesserit, aequius erit nepoti, qui in locum filii venerit, succurri et in tres partes hereditatem diduci, ut unam habeat qui in potestate remanserit, alteram nepos adoptatus in locum filii, tertiam emancipatus cum filio suo, qui nepotis loco fuerit. Sed etsi mortuo filio alter ex nepotibus in locum filii adoptatus fuerit, tres partes in bonis fient, cum sit aequius eum, qui in locum filii

emancipated son obtains praetorian possession of an estate in opposition to the terms of the will, the appointed heir will be compelled to surrender to him the lands and slaves belonging to the estate; for it is only just that everything which the appointed heir has obtained from the estate should be transferred to him whom the Praetor has appointed in his place.

§ 1.- Where anyone has two sons, and gives in adoption a grandson by one of them, and appoints him his heir, after having passed over the other son, the question arises what rule should be followed in this instance, and whether the grandson should obtain merely the share of his father, or a full share of the inheritance. I answered that where a grandson is given in adoption and appointed an heir, as long as his father is under the control of another, or is emancipated, he cannot obtain praetorian possession in opposition to the terms of the will. If, however, his father should die before obtaining praetorian possession of the estate, the grandson will not be permitted to claim it.

§ 2.- If a father, after having passed over an emancipated son, should appoint his other two sons his heirs, one of them being still under his control, and the other given in adoption, and two grandsons by the latter belonging to the family were also passed over in the will, the emancipated son, the son who remained under his father's control, and the one given in adoption, together with his two children, can each demand possession of a third of the estate, in such a way that the last one mentioned will be entitled to a sixth, and his children to another sixth of the same.

§ 3.- Where a father, who had two sons, emancipated one of them who himself had children, and afterwards adopted one of the grandsons whom he had previously emancipated, instead of his son, died after having passed over the emancipated son in his will, it would be but just to grant relief to the grandson who took the place of the son, and for the estate to be divided into three parts, in such a way that the son who remained under the control of his father should have one; the grandson who was adopted instead of the son, another; and the emancipated son,

emancipado recibe la posesión de los bienes contra el testamento, el heredero instituido ha de ser obligado a entregarle al que pide la herencia también los predios y los esclavos de la herencia; porque es justo que todo derecho, que por causa hereditaria adquiere el heredero instituido, sea transferido a quien el Pretor pone en el lugar de heredero.

§ 1.- Uno que tenía dos hijos, y de uno de ellos un nieto, dio a éste en adopción, y lo instituyó heredero habiendo preterido al otro hijo; se pregunta, qué se debe observar respecto a ellos, si es que será admitido a la parte de su padre, o si tendrá una porción viril. Respondí: el nieto dado en adopción e instituido heredero no puede recibir la posesión de los bienes contra el testamento, mientras su padre está bajo potestad, o emancipado; pero aunque su padre hubiere fallecido antes que recibiese la posesión de los bienes, tampoco es admitido el nieto a la posesión de los bienes.

§ 2.- Si el padre, habiendo preterido a un hijo emancipado, hubiere instituido dos herederos, al hijo que tenía bajo su potestad, y a otro que había dado en adopción, del cual había dejado dos nietos en la familia, quienes también hubieran sido preteridos en el testamento, el emancipado tendrá la posesión de una tercera parte de los bienes, el que permaneció bajo potestad la de otra tercera parte, y el que fue dado en adopción y sus hijos conjuntamente la de la otra tercera parte, de suerte que al padre le corresponda una sexta parte, y otra sexta parte a los nietos.

§ 3.- Si un padre hubiere emancipado de dos hijos al que tenía hijos, y hubiere adoptado en el lugar de hijo a uno de los nietos, a quien antes había emancipado, y después hubiere fallecido habiendo preterido al emancipado, será más justo que se socorra al nieto, que viniere en el lugar de hijo, y que la herencia se divida en tres partes, de modo que tenga una el que hubiere permanecido bajo potestad, otra el nieto adoptado en el lugar de hijo, y la tercera el emancipado junto con su hijo, que hubiere estado en el lugar de nieto. Pero aunque muerto el hijo hubiere

adoptatus est, non minus habere, quam si non ex numero nepotum, sed extraneus adoptatus esset.

14.- AFRICANUS; *libro IV, Quaestionum*.- Si duobus filiis emancipatis alter heres institutus sit, alter praeteritus, si institutus adierit, quamvis verbis Edicti parum expressum sit, tamen non posse eum petere bonorum possessionem respondit, quia iudicium patris secutus sit: nec enim emancipatum, si legatum acceperit, admitti ad bonorum possessionem, sive ab heredibus institutis sive ab his, qui contra tabulas petierint, acceperit.

Sed illud observandum, ut Praetor eum, qui heres institutus adierit, in eam partem qua scriptus sit tueri debeat, dum tamen non ampliorem, quam habiturus esset, si bonorum possessionem accepisset: ut hactenus deteriorem causam suam fecerit, quod, si ex minore parte sit institutus, eam dumtaxat retinere possit et quod extraneis quoque legata praestare cogatur.

Quod si is qui in potestate est heres institutus sit, quoniam necessarius heres fit, non aliud dici posse, quam et ipsum petere posse bonorum possessionem, si modo hereditati se non immiscuerit: tunc enim, quia iudicium patris comprobasse videtur, in eodem loco quo emancipatum haberi debere.

§ 1.- Filius in adoptiva familia uxore ducta filium sustulit eumque post mortem patris adoptivi eman-

along with his own son who took the place of the grandson, the third. And even if the son should die and another of the grandsons be adopted in his stead, the estate must be divided into three parts, and it would be equitable for the grandson, who was adopted instead of the son, not to have less than he would have had if he had not been included among the grandsons, but a stranger had been adopted.

14.- AFRICANUS; *Questions, Book IV*.- If of two sons who had been emancipated one was appointed an heir, and the other was passed over in the will, and the one appointed should enter upon the estate, it is held that, although a case of this kind is not expressly referred to by the terms of the Edict, still, the son who was appointed heir cannot demand praetorian possession of the estate because he has accepted the will of his father. For the Edict does not permit an emancipated son to obtain praetorian possession if he has received the legacy, whether he received it from the appointed heir, or from those who under the Praetorian Law claim possession contrary to the provisions of the will.

It must, however, be observed that the Praetor should protect the appointed heir who accepts the share of the estate left him by the will, provided he does not receive a larger share of the same than he would have been entitled to, if he had obtained praetorian possession; and it is in this respect only that he can prejudice himself. But if he was appointed heir to a small portion of the estate, he can only retain that portion, and he will be compelled to pay any legacies which may be due to foreign heirs.

Where the appointed heir is under paternal control, and he becomes a necessary heir, it may be said that he can demand praetorian possession of the estate, provided he has not interfered in its affairs, for if he has, he will be considered to occupy the same position as an emancipated son, because he has approved the will of his father.

§ 1.- A son, while a member of an adoptive family, married and had a son, and emancipated him after the

sido adoptado en el lugar de hijo otro de los nietos, se harán de los bienes tres partes, porque es más justo que el que fue adoptado en el lugar de hijo no tenga menos que si hubiese sido adoptado no entre el número de los nietos, sino como extraño.

14.- AFRICANO; *Cuestiones, libro IV*.- Si de dos hijos emancipados uno hubiera sido instituido heredero, y preterido el otro, si el instituido hubiere adido la herencia, aunque no se haya expresado suficientemente en las palabras del Edicto, respondió, sin embargo, que no podía éste pedir la posesión de los bienes, porque se atuvo a la voluntad del padre; pues tampoco el emancipado es admitido a la posesión de los bienes, si hubiere recibido un legado, ya si lo hubiere recibido de los herederos instituidos, ya si de los que hubieren pedido la posesión de los bienes contra el testamento.

Pero se ha de observar esto, que el Pretor debe amparar, al que instituido heredero hubiere adido la herencia, en aquella parte en que haya sido instituido, con tal que no sea mayor que la que hubiese de haber tenido, si hubiese recibido la posesión de los bienes, de modo que hasta este punto hiciere peor su propia condición; pero si hubiera sido instituido en menor parte, podrá retener solamente ésta, y será obligado a pagarles los legados también a los extraños.

Mas si hubiera sido instituido heredero el que está bajo potestad, como quiera que se hace heredero necesario, no se puede decir otra cosa, sino que también él puede pedir la posesión de los bienes, si no se hubiere inmiscuido en la herencia; porque entonces, como parece que aprobó la voluntad del padre, debe ser considerado en el mismo lugar que el emancipado.

§ 1.- Un hijo, habiendo tomado mujer estando en la familia adoptiva, tuvo un hijo. y lo emancipó después

cipavit: hunc nepotem contra tabulas avi naturalis decreto posse petere bonorum possessionem respondit.

Item si filius emancipatus sublato filio et emancipato adrogandum se dederit et mortuo adoptivo patre decesserit, et contra patris et contra avi tabulas ex decreto hunc admitti minime dubitari debere, ne alioquin ab omnium bonis excluderetur.

15.- MARCIANUS; *libro V, Regularum*.- Si praeteritus filius emancipatus exceptionem doli mali agentis heredi patris opposuerit de eo quod patri debuit, non posse eum contra tabulas bonorum possessionem petere existimo: nam hoc ipso quasi repudiavit bonorum possessionem.

Quod ita intellegendum est, si heredem petentem debitum noluerit filius repellere illa exceptione "si non contra tabulas bonorum possessio filio dari potest", sed magis doli exceptione usus est.

16.- POMPONIUS; *libro IV, ad Sabinum*.- Si emancipatus filius nepoti in potestate avi relicto ab extraneo herede fideicommissam hereditatem, si liberatus avi potestate fuisset, reliquisset: si suspectus avus sit quasi consumpturus bona nepotis, non esse ei dandam bonorum possessionem.

17.- ULPIANUS; *libro XXXV, ad Sabinum*.- Si pater se dederit in adoptionem nec sequatur eum filius emancipatus ab eo antea factus, quia in alia familia sit pater, in alia filius, bonorum possessionem

death of his adoptive father. It was held that his grandson could, by a decree of the Praetor, claim possession of the property of the estate of his natural grandfather, in opposition to the will of the latter.

Again, if an emancipated son, after having himself had a son, and emancipated him, should give himself to be arrogated, and die after the death of his adoptive father, there can be no doubt that, under a decree of the Praetor, he would be entitled to praetorian possession contrary to the provisions of the wills of his father and grandfather, in order to prevent him from otherwise being excluded from the estate of both of them.

15.- MARCIANUS; *Rules, Book V*.- Where an emancipated son is passed over in a will, I do not think that he can claim praetorian possession of the estate in opposition to the terms of the will, if the appointed heir should interpose an exception on the ground of fraud, based on a debt which he owed his father; for, in this instance, he has, as it were, abandoned the right to claim praetorian possession of the estate.

This, however, must be understood to be applicable where the son was not willing to bar the heir claiming the debt, by means of the exception, "If possession of the estate contrary to the provisions of the will cannot be granted to the son," but prefers to avail himself of an exception on the ground of bad faith.

16.- POMPONIUS; *On Sabinus, Book IV*.- If an emancipated son should leave his son under the control of the grandfather of the latter, and charge a foreign heir under a trust to transfer his estate to him, if he should be released from the control of his grandfather, possession of the estate ought not to be given to the grandfather by the Praetorian Law, if there was reason to think that he would waste the property of the grandson.

17.- ULPIANUS; *On Sabinus, Book XXXV*.- If a father should give himself in adoption, and his son should not follow him on account of his having been previously emancipated, the son will not be

de la muerte de su padre adoptivo; respondió, que este nieto podía pedir la posesión de los bienes contra el testamento del abuelo natural en virtud de decreto.

Asimismo, si el hijo emancipado, habiéndosele quitado y emancipado el hijo, se hubiere dado en arrogación, y, muerto el padre adoptivo, hubiere fallecido, no se debe de ningún modo dudar que aquél es admitido en virtud de decreto así contra el testamento del padre, como contra el del abuelo, para que de otra suerte no fuese excluido de los bienes de todos.

15.- MARCIANO; *Reglas, libro V*.- Si preterido el hijo emancipado hubiere opuesto la excepción de dolo malo al heredero de su padre, que ejercitase acción por lo que le debió al padre, estimo que no puede él pedir la posesión de los bienes contra el testamento; porque por esto mismo repudió en cierto modo la posesión de los bienes;

Lo que se ha de entender así, si el hijo no hubiere querido repeler al heredero que pide la deuda con esta excepción: «si no se le puede dar al hijo la posesión de los bienes contra el testamento», sino que utilizó preferentemente la excepción de dolo.

16.- POMPONIO; *Comentarios a Sabino, libro IV*.- Si un hijo emancipado le hubiese dejado la herencia, dejada en fideicomiso a cargo de un heredero extraño, a un nieto que quedó bajo la potestad del abuelo, si hubiese sido librado de la potestad del abuelo, no se le ha de dar a éste la posesión de los bienes, si el abuelo fuera sospechoso así como de que consumiría los bienes del nieto.

17.- ULPIANO; *Comentarios a Sabino, libro XXXV*.- Si el padre se hubiere dado en adopción, y no le siguiera el hijo, que antes había sido emancipado por él, como quiera que el padre esté en una

contra tabulas non potest filius eius habere: et ita Iulianus scripsit.

Marcellus autem ait iniquum sibi videri excludi eos a bonorum possessione, cum pater se dedit in adoptionem: ubi enim filius non datur in adoptionem, at pater se dat, nullum patrem filio adsignat: quae sententia non est sine ratione.

18.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Sed sub condicione exheredatus contra tabulas bonorum possessionem petet, licet sub condicione heres institutus a contra tabulas bonorum possessione excludatur: certo enim iudicio liberi a parentum successione removendi sunt.

§ 1.- Ei, qui contra tabulas bonorum possessionem accepit, tam legati quam fideicommissi exactio, sed et mortis causa donationis retentio denegatur: nec interest, per semet ipsos an per alium quaeratur.

19.- TRYPHONINUS, *libro XV, Disputationum*.- Quod volgo dicitur liberis datam bonorum possessionem contra lignum esse sic intellegendum est, ut sufficiat exstitisse tabulas mortis tempore patris, ex quibus vel adiri hereditas vel secundum eas bonorum possessio peti potuit, quamvis neutrum eorum postea secutum sit vel sequi potuit: nam si vel omnes instituti substitutique ante testatorem decesserint vel is scriptus heres fuit, quum quo testamenti factio non fuit, peti contra tabulas inane est, quae sine effectu forent.

permitted to demand praetorian possession of his father's estate, because the latter belonged to one family and the son is a member of another. This opinion was also adopted by Julianus.

Marcellus, however, says that it seems to him to be unjust that the son should be excluded from praetorian possession of the estate, for the reason that his father gave himself in adoption, for when a son does not give himself in adoption and his father does, this leaves the son without any father; which opinion is not unreasonable.

18.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Where, however, a son is disinherited under a condition, and demands praetorian possession of the estate contrary to the provisions of the will, even though he may have been appointed heir under a condition, he shall be excluded from possession of the estate; for children are deprived of the estates of their parents in consequence of a positive resolution.

§ 1.- The retention of a legacy and of a donation mortis causa, as well as the execution of a trust is refused to one who has obtained praetorian possession of an estate in opposition to the terms of the will; and it makes no difference whether the bequest was acquired directly, or by the intervention of another.

19.- TRYPHONINUS; *Disputations, Book XV*.- When it is said that praetorian possession of an estate contrary to the provisions of the will is granted to children, this should be understood to mean that it is sufficient that there was a will at the time of the death of their father, under which they could either accept the estate, or demand possession of it under the Praetorian Edict; although neither of these things was done, or could have been done afterwards. For if all the appointed heirs and their substitutes should die before the testator, and an heir should be appointed who was not capable of taking under the will, it would be useless to claim possession contrary to the provisions of the will, which would be absolutely without effect.

familia, y en otra el hijo, no puede tener su hijo la posesión de los bienes contra el testamento; y así lo escribió Juliano.

Pero dice Marcelo, que le parece injusto que ellos sean excluidos de la posesión de los bienes, habiéndose dado en adopción el padre; por-que cuando el hijo no se da en adopción, pero se da el padre, no le asigna ningún padre al hijo; cuya opinión no está falta de razón.

18.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Mas el desheredado bajo condición pedirá la posesión de los bienes contra el testamento, aunque sea excluido de la posesión de los bienes contra el testamento el heredero instituido; porque los hijos deben ser excluidos por disposición cierta de la sucesión de los ascendientes.

§ 1.- Al que recibió la posesión de los bienes contra el testamento se le deniega tanto la petición del legado, como la del fideicomiso, y también la retención de la donación hecha por causa de muerte; y no importa que se adquiriera por ellos mismos, o por medio de otro.

19.- TRIFONINO; *Disputas, libro XV*.- Lo que vulgarmente se dice, que a los descendientes se les dió la posesión de los bienes contra el testamento, se ha de entender así, que baste que haya habido testamento al tiempo de la muerte del padre, en virtud del cual se haya podido adir la herencia, o pedir con arreglo al mismo la posesión de los bienes, aunque después no se haya ejecutado, o podido ejecutar, ninguna de estas dos cosas, porque si todos los instituidos y los substitutos hubieren fallecido antes que el testador, o si fue instituido heredero aquel con quien no hubo testamentifacción, es inútil que se pida contra el testamento la posesión de los bienes, que habría de quedar sin efecto.

20.- IDEM; *libro XIX, Disputationum.*- Filium quem in potestate habebat exheredavit, emancipatum praeteriit: quaesitum est, quatenus emancipatus bonorum possessionem habiturus sit. Dixi, si scripti heredes extranei adierint hereditatem, repellendum esse filium, qui mansit in potestate. Quod si hi repudiaverint hereditatem (quod facile sunt facturi nihil latari ex hereditate propter eum, qui contra tabulas accepit bonorum possessionem), filius ab intestato patris suus heres deprehendetur: emancipatus autem petens contra tabulas bonorum possessionem solus habebit bonorum possessionem. Sed quum exheredatio non adita hereditate ex testamento nullius sit momenti (ideoque non ob stare eam nec quo minus contra tabulas libertorum patris accipiat bonorum possessionem, Iulianus recte respondit, ne testamentum per omnia irritum ad notam exheredationis solam proficisse videatur), redit res ad intestati exitum, ut adversus filium suum ex asse heredem ab intestato patri emancipatum praetor in parte dimidia tueatur.

Erit ergo venale beneficium scripti heredis extranei, ut, cum ipse iure hereditatis nihil sit consecuturus, adeundo repellat filium in potestate relictum praestetque assem emancipato filio iure contra tabulas bonorum possessionis:

Si autem omiserit hereditatem, in portionem bonorum exheredatum effectum admittet, iure factum solum suum heredem. Sed quemadmodum Praetor emancipatum tueatur, si adita non fuerit hereditas, ita nec filius qui in potestate remansit aditione adhibita in totum expellendus erit, sed ad hereditatis petitionem admittendus est ex causa inofficiosi querellae

20.- THE SAME; *Disputations, Book XIX.*- A testator disinherited his son, who was under his control, and passed over another whom he had emancipated. The question arose under what circumstances the emancipated son would be entitled to praetorian possession of the estate. I answered that if the foreign heirs who were appointed should accept the estate, the son who remained under the control of his father would be excluded. If, however, the said heirs should reject it, which they could easily do, as they could obtain nothing from it on account of him who was entitled to praetorian possession contrary to the provisions of the will, and because the son who had remained under the control of his father, having become his own master, would be the heir-at-law of his father; still, the emancipated son, having demanded praetorian possession in opposition to the terms of the will, would alone be entitled to it. But, as disinheritance is of no force or effect, where an estate is not accepted under the will, Julianus very properly holds that this should not prevent the disinherited son from acquiring praetorian possession of the estate of his father contrary to the provisions of the will. In order to prevent a will, void in every other respect, from seeming to be effective solely so far as the reproach of disinheritance is concerned, the matter is referred to the death of the intestate, so that the Praetor may protect the emancipated son against the direct and sole heir-at-law, and secure for him half of the inheritance.

Therefore the benefit to be obtained from the appointed foreign heir is purchaseable, and as he can legally obtain nothing of the estate, by entering upon the same he can exclude the son remaining under parental control, and by law will transfer it in its entirety to the emancipated son, in opposition to the terms of the will.

If, however, the appointed heir should reject the estate, he will render the disinherited heir, who now becomes the sole heir, entitled to his share of the same. For, just as the Praetor protects the emancipated heir when an estate is not entered upon, so the son who remained under his father's control should not be absolutely excluded in case the estate

20.- EL MISMO; *Disputas, libro XIX.*- Uno desheredó al hijo que tenía bajo su potestad, y pretirió al emancipado; se preguntó, en qué porción habría de tener el emancipado la posesión de los bienes. Dije, que si los extraños instituidos herederos hubieren adido la herencia, había de ser repelido el hijo que permaneció bajo potestad. Pero si éstos hubieren repudiado la herencia, -lo que es fácil que hayan de hacer, porque no han de obtener nada de la herencia a causa del que recibió la posesión de los bienes contra el testamento-, el hijo será considerado heredero suyo del padre abintestato, y sólo el emancipado que pida la posesión de los bienes contra el testamento tendrá la posesión de los bienes. Mas como la desheredación no es de ningún valor no habiéndose adido la herencia en virtud del testamento, y por esto respondió con razón Juliano que ella no obstaba ni para que recibiese la posesión de los bienes contra los testamentos de los libertos del padre, a fin de que no parezca que el testamento irrito en todo subsistió solamente para la nota de la desheredación, la cosa se reduce al fallecimiento de un intestado, a fin de que contra su hijo, heredero de la totalidad, el Pretor ampare en la mitad al emancipado por el padre fallecido intestado.

Será, pues, vendible el beneficio del extraño instituido heredero, de suerte que, no habiendo de conseguir él nada por derecho de herencia, adiéndola repela al hijo dejado bajo potestad, y le dé al hijo emancipado la totalidad por derecho de posesión de los bienes contra el testamento;

Mas si hubiere prescindido de la herencia, admitirá a una porción de los bienes al que fue desheredado, hecho por el derecho único heredero suyo. Pero así como el Pretor ampara al emancipado, si no hubiere sido adida la herencia, así tampoco habrá de ser excluido por completo, hecha la adición, el hijo que permaneció bajo potestad, sino que ha de ser

contra emancipatum movendae.

§ 1.- Videamus tamen isto casu, quo utrique ad bona patris veniunt, an ei conferre debeat emancipatus: nam neque ex hac parte edicti verbis id facere cogitur, unde contra tabulas accepit bonorum possessionem, quae inter eos, quibus ita bonorum possessio dabitur, caveri de collatione ab emancipato iubet: iste enim qui mansit in potestate quod exheredatus nominatim fuit, non est vocatus ad bonorum possessionem contra tabulas: neque ex illa parte Edicti, qua intestato patre mortuo emancipatus ad bonorum possessionem admissus ad collationem compellitur, quia etsi frater ab intestato heres sit, emancipatus tamen non inde accepit bonorum possessionem.

Et vereor, ne hactenus filio suo profuerit factum heredis scripti non adeuntis, ut eum ad portionem admitteret bonorum paternorum, non etiam eorum, quae emancipatus propria habuit, et hoc sit consequens illi, quod, quum ex minore parte scriptus a patre heres relictus in potestate, admissio fratre emancipato ad contra tabulas bonorum possessionem, eius beneficio plus consequatur, quamvis edicti verbis collatio inducatur, ex mente praetoris denegandam eam respondetur.

Multo magis autem huic conferri non oportet, quia ei a patre exheredatus, a Praetore ad bonorum possessionem contra tabulas non vocatus occasione omissae hereditatis a scripto herede (nihil habituro propter delatam emancipato a praetore contra tabulas bonorum possessionem) nomen sui heredis adeptus est.

should be accepted; but he will be permitted to claim it, as against the emancipated son, on the ground that the will is inofficious.

§ 1.- Let us see, however, where both heirs obtain the estate of their father, whether the one who has been emancipated is subject to contribution to the other, as he is not obliged to do this by the terms of the Section of the Edict under which he obtains praetorian possession in opposition to the terms of the will, since it directs security for contribution to be furnished by the emancipated heir, to those to whom possession of the estate is given. For the heir who is under the control of his father is not called to the praetorian possession of the estate contrary to the provisions of the will, because he was expressly disinherited. Nor is contribution required by that Section of the Edict under which the emancipated son is permitted to obtain praetorian possession after his father has died intestate, for the reason that although his brother may be the heir-at-law; still, the emancipated son does not obtain praetorian possession of the estate on account of the above mentioned Section.

I fear that the act of the appointed heir, who rejects the estate, will not be of any benefit to the son, except to enable him to obtain half of the estate of his father; but by it he will not acquire half of the property of the son who was emancipated. In a case of this kind the result will be that, if the heir who is under the control of his father is appointed to a smaller share than he would otherwise have been entitled to, and if his emancipated brother has obtained praetorian possession of the estate, although contribution is indicated by the words of the Edict, still by the decision of the Praetor this advantage will be denied him.

There is, however, much more reason that he should not be benefited by contribution, because, having been disinherited by his father, he is not called to the praetorian possession of the estate in opposition to the terms of the will; and on account of the rejection of the estate by the appointed heir, he will not be entitled to anything, because the

admitido a la petición de la herencia por causa de la querrela de testamento inoficioso que se haya de promover contra el emancipado.

§ 1.- Pero veamos si en este caso, en que ambos concurren para los bienes del padre, deba hacerle colación a aquél el emancipado. Porque no es obligado a hacer esto ni por las palabras del Edicto de aquella parte, por la cual obtiene la posesión de los bienes contra el testamento, la que manda que por el emancipado se dé caución de colacionar entre aquellos a quienes de este modo se les diere la posesión de los bienes, -porque éste que permaneció bajo potestad, por cuanto fue desheredado nominalmente, no es llamado a la posesión de los bienes contra el testamento-, ni en virtud de aquella parte del Edicto, por la que, fallecido intestado el padre, es compelido a la colación el emancipado que fue admitido a la posesión de los bienes, porque, aunque el hermano sea heredero abintestato, el emancipado no obtiene, sin embargo, por esto la posesión de los bienes.

Y temo que el acto del heredero instituido, que no ade la herencia, no le aproveche a su hijo, de suerte que lo admita a una porción de los bienes paternos; no también de los propios que tuvo el emancipado. Y esto sería consiguiente a aquello de que, cuando el dejado bajo potestad e instituido por el padre heredero de una parte menor consigue, habiendo sido admitido a la posesión de los bienes contra el testamento el hermano emancipado, más por beneficio de éste, aunque por las palabras del Edicto se induzca la colación, se responde que debe ser esta denegada según la intención del Pretor.

Pero con mucha más razón no se debe hacer colación para éste, porque desheredado el padre, y no llamado por el Pretor a la posesión de los bienes contra el testamento, alcanzó el nombre de heredero suyo con ocasión de haberse prescindido de la herencia por el heredero instituido que nada había de obtener por haberle sido deferida por el Pretor al

§ 2.- Legata tamen ex parte sua iste emancipatus liberis et parentibus praestare cogetur non solida, sed deminuta in dimidium, quod relinquitur manenti in potestate. Sed nec adversus eum constituendae actionis legatorum ratio est, qui mero iure intestato heres exstitit. Sed qui accepit contra tabulas bonorum possessionem, etiamsi non fuerit adita hereditas a scripto, praestat legata ea parte testamenti data, contra quam bonorum possessio accepta est. Erit ergo melior hoc casu condicio in familia relictī filii, quam foret, si exheredatus non esset.

21.- MODESTINUS; *libro VI, Pandectarum*.- Si is, qui filium et ex eo nepotem in potestatem habebat, filium in adoptionem dedit nepote retento in potestate, postea filius emancipatus a patre adoptivo decessit extraneis heredibus institutis: filius huius, qui in potestate avi remansit, contra tabulas patris sui bonorum possessionem petere poterit, quamvis numquam in potestate huius fuerit. Ideo nec debuisse in potestate esse videtur. Nam, si aliter observatur, nec si emancipatus filius fuerit, nepos ex eo, qui in potestate avi remansit, bonorum possessionem contra tabulas petere poterit.

§ 1.- Idemque iuris est, si emancipato filio nepos ex eo in potestate avi remanserit et postea patri suo in adoptionem datus fuerit: id est contra tabulas avi bonorum possessionem petere poterit, quia per adoptionem in aliena familia non fuerit.

emancipated son, having obtained possession contrary to the provisions of the will from the Praetor, occupies the position of the proper heir.

§ 2.- The said emancipated son will be compelled to pay out of his share any legacies bequeathed to children, and ascendants of the deceased, not all of them, but only half; because of what remains of the inheritance for the son under paternal control. There is, however, no cause for the legatees to bring suit against him, since he is rightfully the heir at law. But where he received praetorian possession of the estate in opposition to the terms of the will, even if the estate should not be accepted by the appointed heir, he must pay the legacies granted by that part of the will in opposition to which he obtained possession of the estate. Therefore, in this instance, the condition of the son who remains under paternal control will, in fact, be better than if he had not been disinherited.

21.- MODESTINUS; *Pandects, Book VI*.- Where a man has a son, and by him a grandson under his control, and gives his son in adoption, but retains his grandson under his authority, and his son, having subsequently been emancipated by his adoptive father, dies, after appointing foreign heirs, the son of the one who remained under the control of his grandfather can demand praetorian possession of the estate of his father, although he may never have been under his control. Hence it is held that it is not indispensable for him to have been under his control; for if it is decided otherwise, and the son should not be emancipated, the grandson of him who remained under the control of his grandfather can demand praetorian possession of the estate contrary to the provisions of the will.

§ 1.- The same rule of law applies where a son, having been emancipated, a grandson by him remains under the control of his grandfather, and is afterwards given in adoption to his father; that is to say, he can demand praetorian possession of the estate of his grandfather in opposition to the terms of his will, because by this adoption he does not become a member of another family.

emancipado la posesión de los bienes contra el testamento.

§ 2.- Mas este emancipado será obligado a entregar de su parte a los descendientes y a los ascendientes los legados, no íntegros, sino disminuídos en la mitad, que se deja para el que queda bajo potestad. Pero no hay razón ni para que se dé la acción de legados contra el que fue heredero por mero derecho de intestado. Mas el que recibió la posesión de los bienes contra el testamento, aunque no haya sido adida la herencia por el instituido, entrega los legados dados en aquella parte del testamento contra la cual se recibió la posesión de los bienes. Luego en este caso será mejor la condición del hijo dejado en la familia de lo que habría sido, si no hubiese sido desheredado.

21.- MODESTINO; *Pandectas, libro VI*.- Si el que tenía bajo su potestad un hijo, y de éste un nieto, dio en adopción al hijo habiendo retenido al nieto bajo su potestad, y después el hijo, emancipado por el padre adoptivo, falleció habiendo instituido herederos extraños, el hijo del que quedó bajo la potestad del abuelo podrá pedir la posesión de los bienes contra el testamento de su padre, aunque nunca haya estado bajo la potestad de éste. Y, por lo tanto, parece que ni debió estar bajo potestad; porque si se observase otra cosa, ni aun si el hijo hubiere sido emancipado, podrá el nieto habido de él, que permaneció bajo la potestad del abuelo, pedir la posesión de los bienes contra el testamento.

§ 1.- Y el mismo derecho hay, si, emancipado el hijo, hubiere quedado el nieto habido de él bajo la potestad del abuelo, y después hubiere sido dado en adopción a su propio padre, esto es, podrá pedir la posesión de los bienes contra el testamento del abuelo, porque no habrá estado mediante la adopción en una familia ajena.

§ 2.- Sed si emancipatus filius meus adoptaverit extraneum filium, is qui adoptatus est filius contra tabulas meas bonorum possessionem petere non poterit, quia numquam nepotis loco apud me fuit.

TIT. V

DE LEGATIS PRAESTANDIS
CONTRA TABULAS BONORUM
POSSESSIONE PETITA

1.- ULPIANUS; *libro XL, ad Edictum*.- Hic titulus aequitatem quandam habet naturalem et ad aliquid novam, ut, qui iudicia patris rescindunt per contra tabulas bonorum possessionem, ex iudicio eius quibusdam personis legata et fideicommissa praestarent, hoc est liberis et parentibus, uxori nurique dotis nomine legatum.

§ 1.- Generaliter parentes et liberos Praetor exceptit nec gradus liberorum parentumve enumeravit: in infinitum igitur eis praestabitur. Sed nec personas prosecutus est, utrum ex virili sexu an ex feminino descendit. Quisquis igitur ex liberis parentibusque fuerit, ad legati petitionem admittetur, sed ita demum, si iura cognationis sunt inter eos.

§ 2.- Liberos autem etiam eos ad legatorum petitionem admittimus, qui in adoptionem dati sunt vel etiam adoptivi, dummodo maneat liberi.

§ 3.- Postumis liberis legata relicta utique praestabuntur:

2.- IULIANUS; *libro XXIII, Digestorum*.- Et ideo si praegnate uxore filius emancipatus fuerit et bonorum possessionem contra tabulas acceperit, legatum nepoti praestare debet.

§ 2.- If, however, my emancipated son should adopt a stranger as his son, the said adoptive son cannot demand praetorian possession of my estate contrary to the provisions of my will, for the reason that he never sustained the relation of grandson to me.

TITLE V

CONCERNING THE PAYMENT OF LEGACIES
WHERE PRAETORIAN POSSESSION OF AN
ESTATE IS OBTAINED CONTRARY TO THE
PROVISIONS OF THE WILL

1.- ULPIANUS; *On the Edict, Book XL*.- This Title treats of a principle of natural equity which is introduced for a definite purpose; that is, in order to compel those who render a will of no effect by obtaining possession in opposition to its provisions to pay legacies and execute trusts for the benefit of certain persons, namely, children and ascendants, wives and daughters-in-law, to whom bequests of dowries have been made.

§ 1.- The Praetor employs the terms ascendants and children in a general sense, and does not specify the different degrees of relationship; hence, payment must be made to them ad infinitum. Nor has the Praetor designated the different persons, or whether they belong to the male or the female sex. Therefore, anyone either in the ascending or descending line is permitted to claim his legacy; provided, however, the tie of blood-relationship exists between them.

§ 2.- We permit those children also to claim their legacies who have been given in adoption by the testator, or who are adoptive, in case they still remain children until his death.

§ 3.- Legacies bequeathed to posthumous descendants shall also be paid.

2.- JULIANUS; *Digest, Book XXIII*.- Therefore, if a son should be emancipated while his wife was pregnant, and receive praetorian possession of an estate in opposition to the terms of the will, he will be

§ 2.- Pero si mi hijo emancipado hubiere adoptado un hijo extraño, el hijo que fue adoptado no podrá pedir la posesión de los bienes contra mi testamento, porque nunca estuvo en mi poder en el lugar de nieto.

TÍTULO V

DE LOS LEGADOS QUE SE DEBEN DAR
HABIÉNDOSE PEDIDO LA POSESIÓN
DE LOS BIENES CONTRA EL
TESTAMENTO

1.- ULPIANO; *Comentarios al Edicto, libro XL*.- Este título contiene cierta equidad natural y nueva para alguna cosa, para que los que rescinden la última voluntad del padre mediante la posesión de los bienes contra el testamento, paguen por la voluntad de aquél los legados y los fideicomisos a ciertas personas, esto es, a los descendientes y a los ascendientes, y lo legado a la mujer y a la nuera a título de dote.

§ 1.- Mas el Pretor exceptuó en general los ascendientes y los descendientes, y no enumeró los grados de los descendientes o de los ascendientes, así, pues, los pagará a éstos hasta lo infinito. Pero tampoco determinó las personas, si habían de descender de sexo viril, o del femenino. Por lo tanto, cualquiera que fuere descendiente o ascendiente será admitido a la petición de un legado, pero solamente si entre ellos hay los derechos de la cognación.

§ 2.- Pero admitimos a la petición de los legados aun a aquellos descendientes que fueron dados en adopción, o también a los adoptivos, con tal que permanezcan siendo hijos.

§ 3.- A los descendientes póstumos se les pagarán ciertamente los legados que se les dejaron.

2.- JULIANO; *Digesto, libro XXIII*.- Y por lo tanto, si un hijo hubiere sido emancipado teniendo embarazada a su mujer, y hubiere obtenido la posesión de los bienes contra el testamento, deberá

3.- ULPIANUS; *libro XL, ad Edictum*.- Sed et si mortis causa donationes sunt in personas exceptas collatae, credo tuendae sunt: si autem excepti non sunt, auferendas eis puto mortis causa donationes.

§ 1.- Liberis autem tantum et parentibus Praetor prospexit, non etiam fratri et sorori conservavit legatum.

§ 2.- Hoc autem solum debetur, quod ipsis parentibus relictum est et liberis: ceterum si servo eorum fuerit adscriptum vel subiectae iuri eorum personae, non debetur: nec enim quaerimus, cui adquiratur, sed cui honor habitus sit.

§ 3.- Sed et si coniunctim ei fuerit legatum relictum cum eo, cui non praestatur, sua tantum portio ei conservabitur.

§ 4.- Item si quis ex his personis rogatus sit restituere extero quod sibi relictum est, dicendum non esse legatum praestandum, quia emolumentum ad eum non respicit.

§ 5.- Sed si proponas extero legatum rogatumque eum praestare hoc alicui ex liberis parentibusque, consequenter dicemus praestari debere.

§ 6.- Hoc amplius et si extraneo relictum sit sub hoc modo, ut alicui ex liberis praestet, aequissimum erit dicere non debere ei praetorem denegare actionem.

§ 7.- Ea autem legata sola praestant qui contra

obliged to pay a legacy bequeathed to the grandson.

3.- ULPIANUS; *On the Edict, Book XL*.- Where, however, donations mortis causa have been made, I think that they should be sustained; but if they are given to different persons than those above mentioned, it is my opinion that the recipients should be deprived of them.

§ 1.- The Praetor, however, had in mind only descendants and ascendants, for he does not include a legacy left to a brother or a sister.

§ 2.- Moreover, that solely is owing which was left directly to the ascendants or descendants; for if anything should be bequeathed to a slave belonging to them, or to a person subject to their authority, they will not be entitled to it, for we do not ask by whom the legacy is acquired, but who has received the honor.

§ 3.- Where, however, a legacy is bequeathed conjointly to one of the above-mentioned persons and to another to whom payment should not be made, only the portion belonging to the former will be preserved.

§ 4.- Likewise, if any one of those persons is charged to pay to a stranger a legacy which was left to himself, it must be said that it should not be paid, because he will obtain no advantage thereby.

§ 5.- If you suggest a case where a legacy is bequeathed to a stranger, and he is charged to pay it to one of the descendants or ascendants of the testator, we hold that, under the circumstances, it should be paid.

§ 6.- Moreover, if a bequest is left to a stranger under the condition that he shall pay it to one of the descendants of the testator, it is perfectly just to say that the Praetor ought not to refuse him an action to recover it.

§ 7.- Again, only those legacies which are legally

pagarle al nieto el legado.

3.- ULPIANO; *Comentarios al Edicto, libro XL*.- Pero si se hicieron donaciones por causa de muerte, creo que también han de ser amparadas; mas si no están exceptuados, opino que se les han de quitar a ellos las donaciones por causa de muerte.

§ 1.- Mas el Pretor favoreció solamente a los descendientes y a los ascendientes, y no les conservara el legado también al hermano y a la hermana.

§ 2.- Pero solamente se debe el que se les dejó a los mismos ascendientes, y a los descendientes; mas si hubiere sido asignado a un esclavo de ellos, o a persona sujeta a la potestad de los mismos, no se debe, porque no investigamos para quién se adquiriera, sino a quien se le haya tenido el honor.

§ 3.- Mas si se le hubiere dejado el legado conjuntamente con aquel a quien no se le entrega, se conservará solamente su porción.

§ 4.- Asimismo, si a alguna de estas personas se le hubiera rogado que restituya a un extraño lo que a ella se le dejó, se ha de decir que no se ha de entregar el legado, porque no corresponde a ella el emolumento.

§ 5.- Pero si propusieras que se hizo el legado a un extraño, y que se le rogó que lo entregase a alguno de los descendientes o de los ascendientes, diremos consiguientemente que se debe pagar.

§ 6.- Además de esto, si hubiera sido dejado a un extraño de este modo, para que lo entregue a alguno de los descendientes, también sera muy justo decir, que el Pretor no le debe denegar la acción.

§ 7.- Mas los que obtienen la posesión de los bienes

tabulas bonorum possessionem accipiunt, quae utiliter data sunt, verum idcirco non debentur, quod filius contra tabulas bonorum possessionem accipit,

4.- IULIANUS; *libro XXIII, Digestorum*.- quum propter hoc plerumque scripti heredes omittant hereditatem, cum scirent emancipatum aut petisse aut petiturum contra tabulas bonorum possessionem.

5.- ULPIANUS; *libro XL, ad Edictum*.- Filium quis impuberem heredem scripsit eique substituit, emancipatum autem filium praeteriit: deinde uterque filius acceperunt bonorum possessionem: legata sunt etiam a substituto impuberis relicta non tantum liberis et parentibus, verum etiam extraneis:

Quaeritur, an mortuo impubere cogatur substitutus ea praestare. et si quidem ab impubere relicta sunt, solis liberis parentibusque praestanda sunt: sin vero a substituto impuberis, omnibus eum praestare oportet habita ratione legis falcidiae, scilicet ut partis dimidia, quae ad eum ex bonis patris pervenit, quartam, id est totius assis sescunciam retineat.

§ 1.- Quod si impubes ex uncia dumtaxat institutus heres fuerit, magis est semissem usque legata praestaturum habita ratione legis falcidiae: licet enim ex uncia fuerit impubes institutus, tamen quod accessit, augebit legata a substituto relicta.

§ 2.- Omnibus autem liberis praestari legata praetor voluit exceptis his liberis, quibus bonorum

bequeathed should be paid by the persons who obtain praetorian possession of the estate contrary to the provisions of the will. Hence it is true that they are not payable where a son obtains praetorian possession in opposition to the terms of the will.

4.- JULIANUS; *Digest, Book XXIII*.- On this account it frequently happens that heirs who have been appointed reject the estate, because they know that an emancipated son has either demanded, or is about to demand, possession contrary to the provisions of the will.

5.- ULPIANUS; *On the Edict, Book XL*.- A testator appointed his son, who was under the age of puberty, his heir, and appointed a substitute for him, but passed over his emancipated son; and both sons afterwards obtained praetorian possession of the estate. Certain legacies were bequeathed which were to be paid by the substitute of the minor, not only to descendants and ascendants, but also to strangers.

The question arises, if the child under puberty should die, whether the substitute would be compelled to pay the legacies. It may be stated that if the said minor is charged with the legacies, they must be paid only to the descendants or ascendants of the testator; but if the substitute of the minor was charged with their payment, he must pay them to all the legatees, after taking into account the Falcidian Law; that is to say, he can retain the fourth of the half of the estate of the father which came into his hands, or an eighth of the entire estate.

§ 1.- If the said child under the age of puberty should be appointed heir to only one-twelfth of the estate, the better opinion is that the substitute must subject half of the assets to contribution and then pay the legacies, after having retained the fourth allowed by the Falcidian Law; for, even if the minor was appointed heir only to a twelfth of the estate, still, the accrual will increase the legacies with which the substitute is charged.

§ 2.- The Praetor, moreover, desires that legacies should be paid to all the children, excepting those to

contra el testamento pagan aquéllos solos legados que fueron dados útilmente, pero no se deben porque el hijo recibe la posesión de los bienes contra el testamento.

4.- JULIANO; *Digesto, libro XXIII*.- Pues las más de las veces abandonan la herencia los herederos instituidos, por esto, porque saben que el emancipado o pidió, o habrá de pedir, la posesión de los bienes contra el testamento.

5.- ULPIANO; *Comentarios al Edicto, libro XL*.- Uno instituyó heredero a su hijo impúbere, y le nombró substituto, pero pretirió a un hijo emancipado; después obtuvieron ambos hijos la posesión de los bienes; además se dejaron a cargo del substituto del impúbere legados, no solamente para los descendientes y los ascendientes, sino también para extraños;

Se pregunta, si muerto el impúbere sera obligado a pagarlos el substituto. Y si verda-deramente fueron dejados a cargo del impúbere, han de ser pagados solamente a los descendientes y a los ascendientes, pero si a cargo del substituto del impúbere, es conveniente que éste los pague a todos habida cuenta de la ley Falcidia, a saber, de suerte que de la mitad, que de los bienes del padre le corres-ponde, retenga la cuarta parte, esto es, onza y media de la totalidad de la herencia.

§ 1.- Pero si el impúbere hubiere sido instituido solamente en una onza, es más cierto que habrá de pagar los legados hasta la mitad de la herencia, habida cuenta de la ley Falcidia; porque aunque el impúbere hubiere sido instituido en una onza, sin embargo, lo que se agregó aumentará los legados dejados a cargo del substituto.

§ 2.- Mas el Pretor quiso que se les pagasen los legados a todos los descendientes, excepto a aquellos

possessionem praetor dedit ex causis supra scriptis: nam si dedit bonorum possessionem, non putat legatorum eos persecutionem habere. Constituire igitur apud se debet, utrum contra tabulas bonorum possessionem petat an vero legatum persequatur: si elegerit contra tabulas, non habebit legatum: si legatum elegerit, eo iure utimur, ne petat bonorum possessionem contra tabulas.

§ 3.- Si quis contra tabulas bonorum possessionem acceperit, deinde postea apparuerit eum ex his liberis non fuisse, qui eam bonorum possessionem accipere possunt, ex his tamen esse, quibus legata praestantur: optinuit non esse ei denegandam petitionem legatorum, sive ordinariam bonorum possessionem petierit sive Carbonianam.

§ 4.- Non solum autem legatum denegatur ei, qui bonorum possessionem accepit, verum etiam si quid aliud ex voluntate accepit. cui consequens est, quod Iulianus scripsit, si fratri suo impuberi substitutus sit acceperitque contra tabulas bonorum possessionem, denegari ei persecutionem hereditatis fratris impuberis mortui, cui a patre substitutus est.

§ 5.- Si legata fuerint relicta liberis et extraneis, licet utrorumque praestatio Falcidia locum faceret legataque liberorum recideret, tamen nunc ob hoc, quod extraneis non praestantur legata, liberorum augentur.

§ 6.- Sed et si portio hereditatis fuerit adscripta ei, qui ex liberis parentibusve est, an ei conservanda sit, ut solent legata? et Iulianus saepissime scripsit in portione quoque hereditatis idem quod in legato

whom he grants possession contrary to the provisions of the will, for the reasons above mentioned; since he does not think that they should be permitted to claim the legacies bequeathed to them after he has granted them praetorian possession. Hence a child should determine whether he prefers to demand praetorian possession in opposition to the terms of the will, or to claim his legacy. If he should elect to proceed against the will, he will not be entitled to the legacy; if he should accept the legacy, he cannot claim praetorian possession contrary to the provisions of the will; which is our present practice.

§ 3.- Where anyone obtains praetorian possession of an estate in opposition to the terms of the will, and it afterwards should appear that he is not one of the children who is entitled to it, but still is one of those to whom legacies should be paid, it has been established that he shall not be deprived of the right to claim his legacy, whether by the ordinary proceeding under the Praetorian Law, or by that authorized by the Carbonian Edict.

§ 4.- Again, a legacy may be refused not only if a person has obtained praetorian possession, but also if he has received anything by the will of the deceased. The result is, as Julianus says, that if an heir, who has obtained praetorian possession of the estate contrary to the provisions of the will, had already been appointed a substitute for his brother, who was under the age of puberty, in case of the death of his minor brother, he will be refused an action to recover his estate.

§ 5.- Where legacies are bequeathed to the children of the testator, and to strangers, although the deduction prescribed by the Falcidian Law will be made in the case of all of them, and will diminish the legacies of the children; still, for the reason that the legacies will not be paid to the strangers, those of the children will be increased.

§ 6.- If, however, a share of the estate should be bequeathed to one of the descendants or ascendants, must it be preserved for him in the same way as is customary with legacies? Julianus very properly

descendientes a quienes el Pretor les dio por las causas arriba dichas, la posesión de los bienes, porque si les dio la posesión de los bienes, no juzga que tengan ellos acción para reclamar los legados. Debe, pues, determinar para sí, si pedirá la posesión de los bienes contra el testamento, o si perseguirá el legado; si eligiere la posesión contra el testamento, no tendrá el legado, y si eligiere el legado, observamos este derecho, que no pida la posesión de los bienes contra el testamento.

§ 3.- Si alguno hubiere obtenido la posesión de los bienes contra el testamento, y luego después hubiere aparecido que él no era de los descendientes, que pueden obtener esta posesión de los bienes, sino que era de aquellos a quienes se les pagan los legados, prevaleció que no se le ha de denegar la petición de los legados, ya si hubiere pedido la posesión ordinaria de los bienes, ya si la Carboniana.

§ 4.- Mas al que recibió la posesión de los bienes se le deniega no sólo el legado, sino también otra cualquier cosa que recibió por la disposición. A lo cual es consiguiente, lo que escribió Juliano, que si hubiera sido substituido a su hermano impúbero, y hubiere recibido la posesión de los bienes contra el testamento, se le deniega la reclamación de la herencia del hermano impúbero fallecido, al cual fue substituido por el padre.

§ 5.- Si se hubieren dejado legados a descendientes ya extraños, aunque la prestación de unos y de otros daría lugar a la Falcidia, y disminuiría los legados de los descendientes, sin embargo, en este caso se aumentarán los legados de los descendientes, por esto, porque no se les pagan a los extraños.

§ 6.- Pero si se le hubiere asignado una porción de la herencia a uno de los descendientes o de los ascendientes ¿se le habrán de conservar, como se suelen conservar, los legados? Y escribió muchísimas veces

probandum, cuius sententia Rescripto Divi Pii comprobata est, cum hereditates non modo honestiore titulo, sed et pleniore onere tribuantur.

§ 7.- Ad eum autem modum talibus personis succurrendum est, ut ampliore quidem quam virili portione hereditatis data usque ad virilem tueantur, in minorem autem eatenus actiones his tribuantur, quatenus scriptae sint. Idem observatur et circa legata fidei commissae, quae his data fuerint, et in mortis causa donationibus.

§ 8.- Is autem, cui portio hereditatis conservatur, utrum omnibus an tantum exceptis personis legata cogatur praestare? Et magis probatur exceptis personis solis praestanda: nec tamen solius commodo id cedit. Nam si legatis onerata sit portio tam liberorum parentumve quam extraneorum, id, quod extraneis non praestatur, liberis parentibusve profuturum non dubitamus. Igitur ita demum quod extraneis non praestatur communicatur cum eo, qui contra tabulas petit, si non legatariis liberis parentibusque dandum sit.

§ 6.- IULIANUS; *libro XXIII, Digestorum*.- Salvius Aristo Iuliano salutem. Qui filium emancipatum habebat, praeterito eo patrem suum et extraneum heredem instituit et patri legatum dedit: filius contra tabulas bonorum possessionem petit: quaero, si aut uterque hereditatem adisset aut alter ex his aut neuter, an et quantum legatorum nomine patri debeatur. Respondit: saepe animadverti hanc partem edicti, qua emancipatus accepta contra tabulas bonorum possessione liberis et parentibus legata praestare iubetur, habere nonnullas reprehensiones:

holds that, in this instance, the same rule should be observed with reference to a share of the estate, as has been adopted with respect to a legacy. This opinion is approved by a Rescript of the Divine Pius, as estates are not only bestowed by an honorable title, but such testamentary dispositions are also invested with greater distinction than where mere legacies are bequeathed.

§ 7.- Moreover, relief should be granted persons of this kind to the extent, however, of protecting only their full shares, even though they may have been left a larger portion of the estate; for if they had received a smaller portion, they would be only entitled to an action to recover as much as had been bequeathed to them. The same rule should be observed with reference to legacies, property left in trust, and donations mortis causa.

§ 8.- Shall he to whom a portion of the estate has been left be compelled to pay the bequest to all the legatees, or only to certain privileged persons? It is approved as the better opinion that they should be paid only to the privileged persons. He, however, will not be the only one to be benefited by this; for if any share of the estate is charged with legacies, whether to descendants, ascendants, or strangers, we can entertain no doubt that whatever is not paid to the strangers will benefit the descendants and ascendants. Therefore, the only instance where legacies not paid to strangers will accrue to him who demands praetorian possession in opposition to the terms of a will is where they should not be paid to legatees who are either descendants or ascendants.

6.- JULIANUS; *Digest, Book XXIII*.- Salvius Aristo to Julianus, Greeting. A certain man had an emancipated son, and, having passed him over in his will, he appointed his father and a stranger his heirs, and gave his father a legacy in addition. The son demanded praetorian possession of the estate in opposition to the terms of the will. I ask, if both the heirs entered upon the estate, or if either of them did, or if neither of them should have done so, whether the legacy would be payable to the father, and if so, how much of it he would be entitled to? I answered that I

Juliano, que también respecto de una porción de la herencia se ha de aprobar lo mismo que en cuanto a un legado; cuya opinión fue confirmada por Rescripto del Divino Pío, por cuanto las herencias se conceden no por un título honroso, sino aun por mayor honor.

§ 7.- Mas a tales personas se les ha de socorrer de modo, que, habiéndoseles dado de la herencia mayor porción que la viril, se las ampare hasta la viril, pero en cuanto a una menor se les concedan acciones sólo por tanto en cuanto hayan sido instituidas. Lo mismo se observa también respecto a los legados o a los fideicomisos, que les hubieren sido dados, y en las donaciones por causa de muerte.

§ 8.- Pero éste a quien se le conserva una porción de la herencia, ¿será obligado a darles a todas, o solamente a las personas exceptuadas, los legados? Y más bien se admite que se les han de dar solamente a las personas exceptuadas. Mas esto no redundaría en utilidad de él sólo; porque si la porción hubiera sido gravada con legados, tanto de descendientes o de ascendientes, como de extraños, no dudamos que les habrá de aprovechar a los descendientes o a los ascendientes lo que no se les da a los extraños. Así, pues, solamente lo que no se les da a los extraños se hace común con aquel que pidió contra el testamento, si no se les hubiera de dar a descendientes y a ascendientes legatarios.

6.- JULIANO; *Digesto, libro XXIII*.- Salvio Aristo a Juliano, salud. Uno que tenía un hijo emancipado, habiéndolo preterido, instituyó herederos a su padre y a un extraño, y le dió un legado a su padre; el hijo pidió la posesión de los bienes contra el testamento; pregunto, si o ambos, o uno de ellos, o ninguno hubiesen adido la herencia, ¿se le debería acaso al padre, y cuánto a título de legados? Respondió: muchas veces advertí, que esta parte del Edicto, por la que se le manda al emancipado, habiendo obtenido la posesión de los bienes contra el

nam si dodrans legatus fuerit, plus habiturus est cui legatum erit quam emancipatus. Decreto itaque ista temperari debebunt, ut et hereditatis partem emancipatus praestet ita, ne scriptus heres amplius habeat quam emancipatus, et legatorum modus temperaretur, ut nihil plus ex legatis ad aliquem perveniat, quam apud emancipatum bonorum possessionis nomine remansurum est.

7.- TRYPHONINUS, *libro XVI, Disputationum*.- Nam secundum Constitutionem Divi Pii ad Tuscium Fuscianum Numidiae Legatum placuit parentes et liberos heredes quoque institutos tueri usque ad partem virilem exemplo legatorum, ne plus haberent ex institutione tales personae, quam ad eum perventurum esset, qui contra tabulas bonorum possessionem accepit.

8.- ULPIANUS; *libro XL, ad Edictum*.- Virilis portio quemadmodum accipienda sit, videamus. pone duos esse, qui contra tabulas bonorum possessionem accipiunt, unum esse ex liberis parentibusque: virilis tertia erit portio: sed si tres sunt, qui contra tabulas acceperunt, quarta erit virilis: hoc idem et in legatis observabitur.

Sed si unus sit ex liberis, qui accepit contra tabulas bonorum possessionem, plures sint, qui ex liberis parentibusque legata acceperunt, sic hoc accipiendum est, ut filius praeteritus semissem habeat, ceteri omnes, qui sunt ex liberis

have often remarked, that the Section of the Edict by which an emancipated son who has obtained praetorian possession of an estate contrary to the provisions of the will is ordered to pay legacies, bequeathed to children and parents, is somewhat defective; for if three-fourths of an estate should be bequeathed to anyone, he to whom it was left would be entitled to more than the emancipated son. This, therefore, should be regulated by a decree in such a way that the emancipated son may have his share of the estate, and that the appointed heir will not receive more than he does; and the amount of the legacies should be regulated so that no more will be paid to anyone on this account than will remain in the hands of the emancipated son by virtue of praetorian possession of the estate.

7.- TRYPHONINUS; *Disputations, Book XVI*.- For, according to a Constitution of the Divine Pius, addressed to Tuscus Fuscianus, Governor of Numidia, parents and children, who have been appointed heirs, should be protected to the amount of their full shares, just as in the case of legacies, in order that such persons may not obtain any more through their appointment as heirs than would proportionally come into the hands of one who had obtained praetorian possession of the estate contrary to the provisions of the will.

8.- ULPIANUS; *On the Edict, Book XL*.- Let us see what we should understand by the term "full shares." Suppose, for instance, that there are two persons who have obtained praetorian possession contrary to the provisions of the will, and there is only one heir among the descendants and ascendants, the third of the estate would be the full share due to each. Where, however, there are three persons who have obtained praetorian possession in opposition to the terms of the will, the full share due to each will be one-fourth. This rule is also observed in the case of legacies.

Where, however, one of the descendants obtains praetorian possession in opposition to the terms of the will, and several of the descendants and ascendants have received legacies, we must understand the rule to be, that a son who has been

testamento, que les pague los legados a los descendientes y a los ascendientes, tenía algunas limitaciones; porque si se hubieren legado tres cuartas partes, ha de tener mas aquel a quien se hubiere hecho el legado, que el emancipado. Así, pues, se deberá moderar esto por decreto, tanto para que el emancipado entregue la parte de la herencia de modo que el heredero instituido no tenga más que el emancipado, como para que se modere la cuantía de los legados, de suerte que no vaya por razón de legados a poder de nadie más de lo que ha de quedar en poder del emancipado a título de la posesión de los bienes.

7.- TRIFONINO; *Disputas, libro XVI*.- Porque según la Constitución del Divino Pío dirigida a Ticio Fusciano, Legado de la Numidia, se determinó amparar a la manera que en los legados hasta una porción viril a los ascendientes y a los descendientes instituidos también herederos, a fin de que en virtud de esta institución no tengan tales personas más de lo que habría de ir a poder del que obtuvo la posesión de los bienes contra el testamento.

8.- ULPIANO; *Comentarios al Edicto, libro XL*.- Veamos cómo se haya de entender la porción viril. Supón que son dos los que obtienen la posesión de los bienes contra el testamento, y que haya un solo descendiente o ascendiente: la porción viril será la tercera parte; pero si fueron tres los que la recibieron contra el testamento, la porción viril será la cuarta parte; y esto mismo se observará también en los legados.

Pero si hubiera un solo descendiente, que obtuvo la posesión de los bienes contra el testamento, y varios descendientes y ascendientes que recibieron legados, esto se ha de entender de modo, que el hijo preterido tenga la mitad de la herencia, y todos los demás

parentibusve, semissem.

§ 1.- Si quis ex liberis parentibusque et heres institutus sit et legatum acceperit, utrum tantum portionem ei conservamus an vero et legatum an alterutrum quod elegerit? Et magis est, ut utrumque conservetur, sed sic, ne amplius in utroque quam virilem habeat.

§ 2.- Si adierit hereditatem is cui virilis conservatur, libertates competent ex necessitate per aditionem: verumtamen videndum est, an de dolo actione teneatur qui adit. Et magis est, ut, si denuntiante eo, qui praeteritus accepit contra tabulas bonorum possessionem, hic adiit hereditatem pollicente eo portionem virilem, sit quod ei imputetur et de dolo actione teneatur: damno enim adficit hereditatem, dum competunt libertates.

§ 3.- Si quid uxori nuruique fuerit legatum praeter dotem, accepta contra tabulas bonorum possessione non praestabitur.

§ 4.- Nurus autem appellatione et pronurus ceterasque contineri nulla dubitatio est.

§ 5.- Quum autem dotis nomine legatur, non puto ad virilem uxorem nurumve redigendam, cum mulier ista ad aes alienum veniat.

passed over will be entitled to half of the estate, and that all the other heirs who are among the number of descendants and ascendants will be entitled to the remaining half.

§ 1.- Where any one of the descendants or ascendants is appointed an heir, as well as a legatee, shall we preserve for him only his legal share of the estate, or shall we also pay him his legacy; or shall we only give him which of the two he may select? The better opinion is, that both should be preserved for him, in such a way, however, that in receiving both he shall not have any more than the share of the estate to which he is entitled.

§ 2.- If he for whom the share is preserved enters upon the estate, the grants of freedom made by the testator will necessarily become valid through his acceptance. Nevertheless, we must consider whether he who enters upon the estate should be liable to an action on the ground of bad faith. The better opinion is that, if after notice has been served upon him by the heir who was passed over, he obtained praetorian possession of the estate contrary to the provisions of the will, he should accept it, promising to pay the other his full share, he will be somewhat to blame, and will be liable to an action on the ground of bad faith, for he injures the estate, as the grants of freedom will become valid.

§ 3.- Where anything has been bequeathed to the wife or daughter-in-law of the testator over and above her dowry, the excess shall not be paid, where praetorian possession has been obtained contrary to the provisions of the will.

§ 4.- There is no doubt, whatever, that by the term "daughter-in-law" the wives of grandsons and others are not indicated.

§ 5.- Moreover, where a dowry is increased, I do not think that the bequest should be reduced to the full share, where it was left to the wife or the daughter-in-law, as these women are entitled to it as a valid debt.

descendientes y ascendientes la otra mitad.

§ 1.- Si alguno de los descendientes o de los ascendientes hubiera sido instituido heredero, y hubiere recibido un legado, ¿le conservamos solamente su porción, o también el legado, o la una o la otra cosa, que hubiere elegido? Y es más cierto que se le conservan ambas cosas, pero de este modo, con tal que con una y otra no tenga más que la porción viril.

§ 2.- Si hubiere adido la herencia aquel a quien se le conserva una porción viril, competirán necesariamente las libertades mediante la adición; pero se ha de ver, si está obligado por la acción de dolo el que adió la herencia. Y es más cierto, que, si anunciándolo el que habiendo sido preterido recibió la posesión de los bienes contra el testamento, éste adió la herencia prometiendo él la porción viril, haya algo que se le impute, y que esté obligado por la acción de dolo; porque perjudicó a la herencia, compitiendo libertades.

§ 3.- Si a la mujer o a la nuera se le hubiere hecho un legado además de la dote, no se le pagará habiéndose obtenido la posesión de los bienes contra el testamento.

§ 4.- Mas no hay duda alguna de que en la denominación de nuera se comprenden también la mujer del nieto, y las demás.

§ 5.- Pero cuando se lega a título de dote, no creo que la mujer o la nuera se haya de reducir a la porción viril, porque esta mujer concurre para una deuda.

§ 6.- Non solum autem dotem praelegatam praetor complectitur, verum etiam si pro dote aliquid fuerit relictum, ut puta si dos in rebus sit et pro rebus ei quantitas relinquatur vel contra: dum tamen hoc nominetur, quod pro dote relinquatur.

9.- PAULUS; *libro XLI, ad Edictum*.- Sed et si plus sit in legato quam in dote, dabitur illis actio.

10.- ULPIANUS; *libro XL, ad Edictum*.- Sed et si pro dote ex parte aliqua eandem heredem scripserit, tuendam esse puto.

§ 1.- Esse autem uxorem mortis tempore exigemus. Si nurui dotem praelegaverit eaque mortis tempore nupta sit, nullum legatum est, quia dos nondum debeatur: sed quum et constante matrimonio adversus heredes soceri dabitur actio, dicendum est etiam praelegatae dotis petitionem dari debere.

§ 2.- Non omnia, quae ab omnibus gradibus relicta sunt, legata praestare eum oportet qui contra tabulas petit, sed ea sola, quae in eo gradu data sunt, contra quem bonorum possessionem accepit. Sed nonnumquam contra alium quidem gradum petita est bonorum possessio, ex alio vero legata praestanda sunt: ut ecce duos gradus heredum fecit, emancipatum praeteriit, ab utroque tamen gradu liberis et parentibus legata adscripsit.

Ait Iulianus: si quidem aliquis ex primo gradu vivit, ea legata praestabit, quae liberis et parentibus a primo gradu data sunt: sin vero nemo vivit eorum, ea quae a sequenti: quod si neque ex primo gradu neque ex secundo quisquam in rebus fuerit humanis, quum testator moritur, tunc ab intestato magis bonorum

§ 6.- The Praetor not only includes a dowry as a privileged bequest, but also anything which has been left instead of the dowry; as, for example, where the dowry consists of certain property, and a sum of money can be bequeathed in its stead, or vice versa; provided, however, that it is expressly stated that the money is left in lieu of the dowry.

9.- PAULUS; *On the Edict, Book XLI*.- An action will be granted to the woman, even though the legacy is larger than the dowry.

10.- ULPIANUS; *On the Edict, Book XL*.- I think that the woman should also be protected, even if she has been appointed heir to a certain portion of the estate in lieu of her dowry.

§ 1.- Moreover, we require that the woman should have been the wife of the testator at the time of his death. If he left the dowry as a preferred legacy to his daughter-in-law, and she should be married at the time of his death, the legacy is void, because the dowry is not yet payable. But as, while the marriage exists, an action will be granted against the heirs of the father-in-law, it must be held that the woman has the right to claim this preferred legacy of her dowry.

§ 2.- He who demands praetorian possession in opposition to the terms of the will is not obliged to pay all the legacies bequeathed in the different degrees mentioned in the will, but only those which are bequeathed in that degree against which he obtained praetorian possession. For possession is sometimes demanded against another degree in which legacies must be paid; as, for example, when the testator has established two degrees of heirs, and has passed over his emancipated son, and still, in both degrees, he bequeathed legacies to descendants and ascendants.

Julianus says that if anyone appointed in the first degree is living, the person obtaining praetorian possession must pay the legacies bequeathed to children and parents in the first degree; if, however, none of them are living, he must pay those left to persons in the second degree. But if no one belonging

§ 6.- Mas el Pretor comprende no solamente la dote prelegada, sino también lo que se hubiere dejado por la dote, por ejemplo, si la dote consistiese en cosas, y por las cosas se le dejase una cantidad, o al contrario, con tal, sin embargo, que se exprese lo que se deja por la dote.

9.- PAULO; *Comentarios al Edicto, libro XLI*.- Pero aunque el legado importase más que la dote, se les dará la acción.

10.- ULPIANO; *Comentarios al Edicto, libro XL*.- Pero opino que ha de ser amparada, aunque por la dote la hubiere instituido a la misma heredera de alguna parte.

§ 1.- Mas exigimos que sea mujer al tiempo de la muerte. Si le hubiere prelegado a la nuera la dote, y ésta estuviera casada al tiempo de la muerte, es nulo el legado, porque todavía no se debe la dote; pero cuando se diere la acción contra los herederos del suegro aun subsistiendo el matrimonio, se ha de decir, que también se debe dar acción para pedir la dote prelegada.

§ 2.- Pero el que pidió la posesión de los bienes contra el testamento no debe pagar todos los legados que se dejaron a cargo de todos los grados, sino aquellos solos que fueron dados en aquel grado contra el cual obtuvo la posesión de los bienes. Mas a veces se pidió la posesión de los bienes contra un grado, y se han de pagar los legados de otros, como por ejemplo, hace uno dos grados de herederos, pretirió a un emancipado, y dejó legados a cargo de uno y de otro grado para descendientes y ascendientes;

Dice Juliano, que si verdaderamente vive alguno del primer grado, pagará aquellos legados, que a cargo del primer grado les fueron dados a los descendientes y a los ascendientes; mas si no vive ninguno de ellos, los que a cargo del segundo; pero que si cuando muere el testador no viviere ninguno

possessionem praeterito filio competere nec legata cuiquam praestanda: quod si post mortem testatoris ante aditam hereditatem instituti decesserint, contra ipsos quidem videri petitam, verumtamen ab eis relicta legata non esse praestanda, sed quae a substitutis relicta sunt.

11.- PAULUS; *libro XLI, ad Edictum*.- At ubi institutus et substitutus vivant, licet nemo adeat hereditatem, ea tamen legata deberi dicimus, quae ab instituto data sunt.

12.- ULPIANUS; *libro XL, ad Edictum*.- Sive autem omiserint instituti sive non omiserint, dicendum est legata, quae ab ipsis relicta sunt, praestanda, quamvis secundo gradu instituti omittentibus eis adierint hereditatem.

13.- TRYPHONINUS; *libro II, Disputationum*.- Item a substituto legata deberi dicimus, si institutus condicione defectus esset, quae in ipsius potestate non fuit: nam si eam, quae in ipsius potestate fuit, non implevit, pro eo habendus est, qui noluit adire hereditatem, quando nihil habiturus emolumenti condicioni merito non paruerit.

14.- ULPIANUS; *libro XL, ad Edictum*.- Nonnumquam contra tabulas bonorum possessionem quis habet iure secundum tabulas bonorum possessionis: ut puta heres institutus est emancipatus filius, alius emancipatus praeteritus, institutus accepit contra tabulas bonorum possessionem, praeteritus omisit: apertissimum est, ut cogatur omnibus perinde legata praestare, atque si commissum edictum non fuisset:

to either the first or the second degree should be alive at the time of the death of the testator, then, the son who has been passed over would seem to be entitled to praetorian possession ab intestato, and the legacies need not be paid to anyone. If, however, the appointed heirs should die after the death of the testator, and before the acceptance of the estate, the claim for praetorian possession would appear to be asserted against them; and any legacies with which they were charged should not be paid, but only those with which the substitutes have been charged.

11.- PAULUS; *On the Edict, Book XLI*.- Where both the appointed heir and the substitute are living at the time of the testator's death, we hold that the legacies with which the appointed heir was charged should be paid, even though no one may enter upon the estate.

12.- ULPIANUS; *On the Edict, Book XL*.- Whether the appointed heirs accept the estate or not, it must be said that the legacies with which they are charged shall be paid, although those appointed in the second degree may have accepted the estate, after the first ones have rejected it.

13.- TRYPHONINUS *Disputations, Book II*.- We also hold that legacies with which a substitute is charged are payable where the appointed heir has failed to comply with a condition, which was not in his power. For if he should not comply with it when he was able to do so, he should be considered as occupying the same position as an heir who refuses to accept an estate, as he will not be entitled to any benefit from it, and deservedly so, as he did not observe the condition.

14.- ULPIANUS; *On the Edict, Book XL*.- Sometimes a person obtains praetorian possession of an estate contrary to the provisions of the will, by a right which he enjoys in accordance with its provisions; for instance, where an emancipated son is appointed the heir, and another emancipated son is passed over in the will, and the appointed heir obtains praetorian possession in opposition to the terms of

del primero, ni del segundo grado, es más cierto que entonces le compele abintestato al hijo preterido la posesión de los bienes, y que no se han de pagar legados a nadie; mas si los instituidos hubieren fallecido después de la muerte del testador y antes de haber sido adida la herencia, se considera que se hizo la petición contra ellos mismos, pero que no se han de pagar los legados dejados a cargo de ellos, sino los que se dejaron a cargo de los substitutos.

11.- PAULO; *Comentarios al Edicto, libro XLI*.- Mas cuando vivan el instituido y el substituto, aunque ninguno ada la herencia, decimos, sin embargo, que se deben los legados, que se dieron a cargo del instituido.

12.- ULPIANO; *Comentarios al Edicto, libro XL*.- Pero ya si los instituidos hubieren prescindido de la herencia, ya si no hubieren prescindido de ella, se ha de decir que se han de dar los legados, que se dejaron a cargo de los mismos, aunque, prescindiendo de ella éstos, hubieren adido la herencia los instituidos en el segundo grado.

13.- TRIFONINO; *Disputas, libro II*.- También decimos que se deben los legados a cargo del substituto, si el instituido hubiese faltado a la condición, que no estuvo en la posibilidad del mismo; porque si no cumplió la que estuvo en su posibilidad, ha de ser considerado como el que no quiso adir la herencia, porque no habiendo de tener ningún emolumento con razón no se sujetó a la condición.

14.- ULPIANO; *Comentarios al Edicto, libro XL*.- A veces tiene uno la posesión de los bienes contra el testamento por derecho de posesión de los bienes con arreglo al testamento; por ejemplo, un hijo emancipado fue instituido heredero, y otro emancipado fue preterido; el instituido obtuvo la posesión de los bienes contra el testamento, y el preterido prescindió de ella; es evidentísimo, que es obligado a pagarles a

nec enim occasio emancipati praeteriti debet institutum lucro adficere, cum praeteritus iure suo non utatur.

§ 1.- Si ab uno ex filiis herede instituto nominatim alicui ex liberis parentibusque legatum datum sit et acceperit bonorum possessionem contra tabulas cum aliis, melius est probare omnes, qui contra tabulas bonorum possessionem acceperunt, cogendos id legatum praestare.

15.- PAULUS; *libro XLI, ad Edictum*.- Is qui in potestate est praeteritus legata non debet praestare, etsi contra tabulas bonorum possessionem petierit, quia et non petita bonorum possessione intestati hereditatem optineret: nec enim exceptio doli mali huic nocet et absurdum est eum cogi legata praestare, quia bonorum possessionem petierit, cum et sine hac hereditatem habiturus sit suo iure.

Unde si duo praeteriti sunt, emancipatus et is qui in potestate est, quidam nec emancipatum praestare debere legata existimant, quia effectum fratris aufert partem dimidiam, cum et si hic non peteret, suus solus rem habiturus esset.

Quid ergo est? ubi praeteritus sit suus, verius est quod dictum est: ubi vero scriptus est et voluntatem patris habet, debet teneri legatariis, etiamsi omiserit bonorum possessionem.

the will, and the heir who has been passed over fails to apply for it. In this instance, it is perfectly clear that the former can be compelled to pay all the legacies, just as if recourse had not been had to the Edict; for the accident of the emancipated son who was passed over ought not to be a source of profit to the heir who was appointed, merely because he who was passed over did not avail himself of his right.

§ 1.- Where a son has been appointed heir by a testator, and is charged with a legacy to one of his descendants, or ascendants, and together with the others obtains praetorian possession of the estate in opposition to the terms of the will; it is better to decide that all those who have obtained praetorian possession in opposition to the terms of the will should be compelled to pay this legacy.

15.- PAULUS; *On the Edict, Book XLI*.- Where a son who is under paternal control is passed over, he will not be obliged to pay the legacies, even though he should demand possession of the estate in opposition to the terms of the will; because he will obtain the estate on the ground of intestacy, and not through having claimed praetorian possession. An exception based on fraud will not prejudice his rights; and it would be absurd for him to be compelled to pay the legacies because he demanded praetorian possession; as, without this, he would be entitled to the whole estate as heir at law.

Whence, if there are two heirs who have been passed over, namely, one who has been emancipated, and the other who was still under paternal control, some authorities hold that the emancipated heir is not obliged to pay the legacies, because by the act of his brother he obtained half of the estate, when if he had not made the demand he would have been entitled to all of it.

What, then, should be done when the proper heir is passed over? The rule which has just been mentioned will apply. Where, however, an heir is appointed and has the will of his father, he should be liable to the legatees, even if he fails to demand praetorian possession of the estate.

todos los legados, lo mismo que si no se hubiese dado lugar al Edicto; porque la circunstancia de que un emancipado hubiese sido preterido no debe producir lucro al instituido, porque el preterido no use de su derecho.

§ 1.- Si a cargo de uno de los hijos instituido heredero se hubiera dado expresamente un legado para alguno de los descendientes o de los ascendientes, y hubiere obtenido junto con otros la posesión de los bienes contra el testamento, es preferible admitir que todos los que recibieron la posesión de los bienes contra el testamento han de ser obligados a pagar este legado.

15.- PAULO; *Comentarios al Edicto, libro XLI*.- Habiendo sido preterido el que está bajo potestad, no deberá pagar los legados, aunque hubiere pedido la posesión de los bienes contra el testamento, porque aun no habiendo pedido la posesión de los bienes obtendría la herencia del intestado; pues ni la excepción de dolo malo le perjudica a éste, y es absurdo que sea él obligado a pagar los legados, porque haya pedido la posesión de los bienes, pues aun sin ésta habría de haber tenido por su propio derecho la herencia.

Por lo cual, si dos fueron preteridos, uno emancipado y otro que está bajo potestad, opinan algunos que tampoco el emancipado debe pagar los legados, porque quita, en efecto, la mitad de la parte del hermano, puesto que, aunque éste no la pidiese, sólo el heredero suyo habría de tener los bienes.

Luego ¿qué sucede cuando el preterido fuera heredero suyo? Que es más verdadero lo que se dijo. Mas cuando fue instituido, y tiene a su favor la voluntad del padre, debe estar obligado a los legatarios, aunque hubiere prescindido de la posesión de los bienes.

§ 1.- Sed si unus emancipatus heres scriptus sit, alter praeteritus et utrique contra tabulas bonorum possessionem acceperint, et institutus eadem praestat quae praeteritus. Sed si solus heres institutus contra tabulas bonorum possessionem acceperit, omnibus debet legata praestare, perinde atque si adisset hereditatem. Sed si scriptus quidem adierit hereditatem, praeteritus autem bonorum possessionem acceperit:

Hic quidem, qui bonorum possessionem acceperit, certis personis legata debet, de scripto autem quaeritur. Et complures putant certis personis et eum praestare debere, quod puto verius esse: nam et Praetor hac ratione eum tuetur, quod ex liberis est qui contra tabulas petere potuerunt.

§ 2.- Ita autem tuendus est in partem dimidiam, si aut ex maiore parte quam dimidia heres institutus sit aut ex semisse: quod si ex minore parte quam dimidia institutus sit, dicimus non ex maiore parte, quam institutus sit, tuendum eum esse: qua enim ratione maiorem partem habere potest, cum nec bonorum possessionem accepit nec ex maiore parte institutus sit?

§ 3.- Ei, quae dotem non habet, nullum legatum debetur, licet sub praetextu dotis legetur.

§ 4.- Si extraneo herede instituto sub hac conditione exceptae personae legatum sit, si heredi decem dederit, ita ei legatorum actio dabitur, si ei, qui contra tabulas bonorum possessionem accepit, dederit, non si heredi instituto, quia absurdum est illum commodam hereditatis habere, alium onera sustinere in praestando legato. Sed et si Titio iussus fuerit dare, non illi, sed filio dare debet.

§ 1.- But if one of the sons who was emancipated is appointed heir, and the other is passed over, and both of them obtain praetorian possession of the estate in opposition to the terms of the will, the one who was appointed heir, as well as the one who was passed over, must pay the legacies. If, however, the appointed heir is the only one who obtained praetorian possession contrary to the provisions of the will, he must pay the legacies to all the legatees, just as if he had accepted the estate. But if he should accept the estate, and the one who was passed over should obtain praetorian possession of the same, the latter must pay the legacies only to those persons who are privileged.

A question arises with reference to the appointed heir, and many authorities hold that he should pay the legacies to the privileged persons. I think this opinion to be correct, since the Praetor protects him, for the reason that he is one of the children who can demand possession of the estate contrary to the provisions of the will.

§ 2.- He must also be protected with reference to half of the estate, if he was appointed heir to a larger share than that amount, or was appointed heir to exactly one-half. Where he was appointed heir to less than half, we hold that he should be protected for no larger amount than that to which he was appointed; for how could he be entitled to more, since he did not obtain praetorian possession of the estate, and was not appointed heir to a greater portion?

§ 3.- No legacy shall be paid to a woman who did not bring any dowry to her husband, even though it is bequeathed under the pretext of the return of her dowry.

§ 4.- Where a foreign heir is appointed under the condition that a legacy shall be bequeathed to a privileged person, if he should pay ten aurei to the heir, an action will be granted him to recover his legacy, if he should pay it to anyone who has obtained possession of the estate contrary to the provisions of the will, but not if he should pay it to the appointed heir; for it is absurd that he should enjoy the benefit of

§ 1.- Mas si un solo emancipado hubiera sido instituido heredero, y otro fuese preterido, y ambos hubieren obtenido la posesión de los bienes contra el testamento, también el instituido paga lo mismo que el preterido. Pero si el solo heredero instituido hubiere obtenido la posesión de los bienes contra el testamento, les deberá pagar a todos los legados, lo mismo que si hubiese adido la herencia. Mas si el instituido hubiere ciertamente adido la herencia, pero el preterido hubiere obtenido la posesión de los bienes, éste que hubiere recibido la posesión de los bienes deberá los legados a ciertas personas.

Pero se pregunta respecto al instituido; y opinan muchos, que también él debe pagarlos a ciertas personas; lo que juzgo que es más verdadero, porque también el Pretor lo ampara por esta razón, porque es de los descendientes, que pudieron pedir la posesión de los bienes contra el testamento.

§ 2.- Mas ha de ser amparado de este modo en la mitad, si hubiera sido instituido heredero o de parte mayor que la mitad, o de la mitad; pero si hubiera sido instituido en parte menor que la mitad, decimos que no ha de ser amparado en parte mayor de la que haya sido instituido; pues ¿por qué razón puede tener mayor parte, no habiendo obtenido la posesión de los bienes, ni habiendo sido instituido en mayor parte?

§ 3.- A la que no tiene dote no se le deberá ningún legado, aunque se le legue so pretexto de dote.

§ 4.- Si instituido heredero un extraño, se le hubiera hecho a persona exceptuada un legado bajo esta condición, si le diere diez al heredero, se le dará la acción de legados en este caso, si se los hubiere dado al que obtuvo la posesión de los bienes contra el testamento, no si al heredero instituido, porque es absurdo que uno tenga las utilidades de la herencia, y que otro soporte las cargas pagando el legado; mas

16.- ULPIANUS; *libro IV, Disputationum*.- Si duo proponantur esse unus in potestate praeteritus, alius emancipatus institutus, apparet commissum esse edictum per eum, qui in potestate est: et si ambo petissent contra tabulas bonorum possessionem, is quidem, qui in potestate mansit, cum rem ab intestato habeat, non praestabit liberis et parentibus legata.

Emancipatus vero numquid nec ipse praestat, quia ei rem auferret, qui praestaturus non erat, si solus esset? Sed verius est vel hunc saltem debere liberis et parentibus praestare legata. Proinde si contra tabulas non accepit, dicendum est tuendum eum in partem et utique liberis parentibusque legata praestaturum. Sed an et omnibus, dubito: tamen quia plena fruatur voluntate, plenum et obsequium praestare testatoris iudicio pro sua parte debet.

17.- IULIANUS; *libro XXXVI, Digestorum*.- Si emancipato filio praeterito pater extraneum heredem instituisset et ab eo rem legasset eaque adita hereditate dolo scripti heredis perisset, adversus emancipatum utilis actio dari debebit ei scilicet personae, cui filius legata praestare cogitur, quia praetori propositum est sine iniuria ceterarum personarum bonorum possessionem contra tabulas testamenti dari.

the estate, and that the other should sustain the burden of paying the legacy. If, however, he should be ordered to pay it to Titius, he must not pay it to him, but to his son.

16.- ULPIANUS; *Disputations, Book IV*.- If we suppose the case of two children, one of whom, being under the control of his father, was passed over in his will, and the other, having been emancipated, was appointed by him his heir, the Edict will be applicable so far as the one who is under parental control is concerned. If both of them should demand praetorian possession contrary to the provisions of the will, he who remained subject to the authority of his father will not be required to pay the legacies to the descendants and ascendants of the testator as he is entitled to the property ab intestato.

But can it be said that the emancipated son should not pay them himself, because he was deprived of the estate by one who would not be compelled to pay them, if he were alone? The better opinion is that the latter should, by all means, pay the legacies to the descendants and ascendants; hence if he did not obtain praetorian possession contrary to the provisions of the will, it must be said that he should be protected with reference to half of the estate, and that he must pay the legacies to the legal representatives of the testator. I doubt whether he will be obliged to pay all the legatees; still, for the reason that he is in full enjoyment of the property of the testator, he should discharge his entire duty under the will, so far as his share of the estate is concerned.

17.- ULPIANUS; *Digest, Book XXXVI*.- Where an emancipated son was passed over in a will, and his father appointed a foreign heir, and charged him with the delivery of property which was lost through the fraud of the said heir, after the estate has been accepted, a praetorian action should be granted against the emancipated son, that is to say, in favor of the person to whom the son was obliged to pay the legacy; because the intention of the Praetor is that possession of an estate in opposition to the terms of the will should be granted without prejudicing the rights of other persons.

aunque se le hubiere mandado que los diese a Ticio, no debe dárselos a él, sino al hijo.

16.- ULPIANO; *Disputas, libro IV*.- Si se supusiera que hay dos, uno constituido bajo potestad y preterido, otro emancipado e instituido, aparece que se dió lugar al Edicto por el que esta bajo potestad; y si ambos hubiesen pedido la posesión de los bienes contra el testamento, el que permaneció bajo potestad no les pagará los legados a los descendientes y a los ascendientes, porque tiene los bienes abintestato;

Pero ¿no paga acaso tampoco el emancipado, porque le quitaría los bienes al que no había de pagarlos, si hubiese sido solo? Pero es mas verdadero, que a lo menos éste debe también pagarles los legados a los descendientes y a los ascendientes. Por consiguiente, si no recibió la posesión de los bienes contra el testamento, se ha de decir, que ha de ser él amparado en su parte, y que ciertamente habrá de pagarles los legados a los descendientes y ascendientes. Pero dudo si también a todos; mas como disfrute de la plena voluntad del testador, debe también prestar por su parte pleno acatamiento a la disposición del testador.

17.- JULIANO; *Digesto, libro XXXVI*.- Si preterido un hijo emancipado el padre hubiese instituido heredero a un extraño, y hubiese legado a cargo de éste una cosa, y habiendo sido adida esta herencia hubiese perecido por dolo del heredero instituido, se deberá dar contra el emancipado la acción útil; por supuesto, a persona a la que es obligado el hijo a pagarles los legados, porque el Pretor se propuso que se diese la posesión de los bienes contra el testamento sin perjuicio de las demás personas.

18.- AFRICANUS; *libro IV, Quaestionum*.- Nepos qui in potestate mansit et filius suus heredes instituti sunt: nepoti legatum dedit: pater eius emancipatus petit bonorum possessionem: nepos legato contentus est. Quidam in eum solum, qui in potestate esset, legati actionem nepoti dandam responderunt, quia ei nihil auferatur et emancipatus partem filii sui occupet, in qua onus legatorum non consisteret. Sed rectius dicetur in emancipatum solum dandam esse actionem nepoti, et quidem non ultra quadrantem,

19.- IDEM; *libro V, Quaestionum*.- Quia, et si omnes petissent bonorum possessionem, semis nepotis inter eum et patrem eius divideretur.

20.- MARCIANUS; *libro IV, Regularum*.- Si filius emancipatus contra tabulas bonorum possessionem petierit, tuendos quidem liberos et parentes constat. Sed si varie donatum fuerit exceptis personis a testatore mortis causa, pro rata conferent ad virilem emancipato, sicut accidit in portionibus hereditariis et legatis.

§ 1.- Intestato autem mortuo patre super donationibus mortis causa factis non poterit filius quaeri, quoniam comparatio nulla legatorum occurrit.

21.- PAPINIANUS; *libro XIII, Quaestionum*.- Si portio hereditatis, quam excepta persona beneficio legis habere potuit, repudietur, pro ea quoque parte filius, qui bonorum possessionem accepit, non aliis quam exceptis personis legata praestabit.

22.- IDEM; *libro V, Responsorum*.- Bonorum pos-

18.- AFRICANUS; *Questions, Book IV*.- A son and grandson were under the control of their father, were appointed his heirs, and the testator, in addition to this, left a legacy to the grandson. The father of the latter, another son, who had been emancipated, demanded praetorian possession of the estate, and the grandson remained content with the legacy. Certain authorities were of the opinion that an action to recover the legacy should be granted to the grandson against the son alone who remained under his father's control, because he was deprived of nothing, and the son who was emancipated obtained the share of his son, which could not be burdened with a legacy. The more just decision is that an action would lie only against the emancipated son, and, indeed, for not more than a fourth of the estate,

19.- THE SAME; *Questions, Book V*.- For the reason that if all the heirs should demand praetorian possession of the estate, half of it would be divided between the grandson and his father.

20.- MARCIANUS; *Rules, Book IV*.- If the emancipated son should demand praetorian possession contrary to the provisions of the will, it is established that the descendants and ascendants of the testator should be protected. If, however, various donations mortis causa should have been made to privileged persons by the testator, they must contribute pro rata to the share of the emancipated son, just as happens in the case of the division of an estate and legacies.

§ 1.- Where, however, a father dies intestate, his son cannot complain of donations mortis causa, as no contribution of legacies takes place.

21.- PAPINIANUS; *Questions, Book XIII*.- If the portion of an estate to which a privileged person is entitled through the benefit of the law is rejected, the son who has received praetorian possession will profit by that share, but he shall not pay the legacies to anyone else than to privileged persons.

22.- THE SAME; *Opinions, Book V*.- Where

18.- AFRICANO; *Cuestiones, libro IV*.- Fueron instituidos herederos un nieto, que permaneció bajo potestad, y un hijo heredero suyo; se le dio un legado al nieto; el padre de éste, que estaba emancipado, pidió la posesión de los bienes, y el nieto se contentó con el legado; algunos respondieron, que la acción del legado se le ha de dar al nieto contra aquél solo que estuviese bajo potestad, porque a él nada se le quitaría, y el emancipado tomaría la parte de su hijo, sobre la cual no pesaría la carga de los legados. Pero se dirá más bien, que la acción se le ha de dar al nieto solamente contra el emancipado, y ciertamente no por más de la cuarta parte.

19.- EL MISMO; *Cuestiones, libro V*.- Porque aunque todos hubiesen pedido la posesión de los bienes, la mitad del nieto se dividiría entre él y su padre.

20.- MARCIANO; *Reglas, libro IV*.- Si un hijo emancipado hubiere pedido la posesión de los bienes contra el testamento, es sabido que deben ser amparados ciertamente los descendientes y los ascendientes; pero si por el testador se hubieren hecho con desigualdad donaciones por causa de muerte a personas exceptuadas, contribuirán a prorrata para la porción viril del emancipado, como acontece respecto a las porciones hereditarias y a los legados.

§ 1.- Pero habiendo muerto intestado el padre no podrá el hijo quejarse de las donaciones hechas por causa de muerte, porque no hay analogía ninguna con los legados.

21.- PAPINIANO; *Cuestiones, libro XIII*.- Si fuere repudiada la porción de herencia, que una persona exceptuada pudo tener por beneficio de la ley, el hijo que obtuvo la posesión de los bienes pagará también con arreglo a esta parte los legados, no a otras personas, sino a las exceptuadas.

22.- EL MISMO; *Respuestas, libro V*.- Habién-

sessione contra tabulas testamenti praeterito emancipato filio data, scriptus heres alter filius, qui possessionem accepit vel Iure Civili contentus non accepit, legata praecipua non habebit.

23.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Hi, quibus vel relictum vel virilem Divus Pius conservari constituit, ex servis, qui libertatem propter bonorum possessionem contra tabulas acceptam consequi non potuerunt, nihil habebunt.

24.- TRYPHONINUS; *libro XVI, Disputationum*.- Intervenit illa quaestio, quando numero liberorum esse debeat is cui legatum datum est, ut id ferre possit a filio contra tabulas bonorum possessionem accipiente. Et placet sufficere in ea necessitudine tunc esse, quando dies legati cedit.

25.- MARCELLUS; *libro IX, Digestorum*.- Qui filium emancipaverat et nepotem ex eo retinuerat in potestate, testamento filium exheredavit, nepotem ex aliqua parte instituit heredem et alium filium emancipatum praeteriit. Potest defendi nepotem quoque bonorum possessionem contra tabulas petere posse: nam pro ea parte, qua quisque intestato suus heres esset, si pater suus heres non esset, bonorum possessio defertur.

§ 1.- Is, cuius filius in adoptione erat, nepotem, quem filius postea procreaverat, scripsit heredem, emancipatum filium praeteriit: num habet nepos ex edicto bonorum possessionem? Tuendus tamen exemplo parentum et liberorum, quibus legata praestare coguntur qui bonorum possessionem contra tabulas acceperunt.

praetorian possession of the estate contrary to the provisions of the will is given to an emancipated son, who has been passed over, the other son, that is the appointed heir, who has also obtained praetorian possession, or who, having been content with what he acquires under the Civil Law, does not apply for praetorian possession, he will not be entitled to any preferred legacy which may have been left to him.

23.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Those whom the Divine Pius stated could retain either what was left to them, or their legal shares of the estate, shall obtain nothing from slaves who have been unable to secure their freedom on account of praetorian possession given contrary to the provisions of the will.

24.- TRYPHONINUS; *Disputations, Book XVI*.- The following question has arisen, namely: should he to whom a legacy has been bequeathed be included among the number of children, so that it can be paid to him by the son who has obtained praetorian possession of the estate in opposition to the terms of the will? It was decided that he must sustain this character at the time when the legacy begins to be payable.

25.- MARCELLUS; *Digest, Book IX*.- A certain man who had emancipated his son, and retained his grandson under his control, disinherited his son, appointed his grandson his heir to a certain part of his estate, and passed over his other emancipated son in his will. It can be maintained that the grandson had a right to demand praetorian possession of the estate contrary to the provisions of the will; for praetorian possession is distributed in proportion to the share which each one would have obtained in case of intestacy, if the father had not been a proper heir.

§ 1.- A testator, whose son had been adopted, appointed as his heir his grandson, whom his son had subsequently begotten, and passed over the emancipated son. Will the said grandson be entitled to praetorian possession of the estate under the Edict? He ought, nevertheless, to be protected, just as ascendants and descendants are to whom legacies

dosele dado a un hijo emancipado preterido la posesión de los bienes contra las tablas del testamento, el otro hijo instituido heredero, que obtuvo la posesión, o que no la recibió por haberse contentado con lo dispuesto en el derecho civil, no tendrá privilegiados los legados.

23.- HERMOGENIANO; *Epitome del Derecho, libro III*.- Aquellos para quienes el Divino Pío determinó que se conservase o lo que se dejó, o una porción viril, no tendrán nada de los esclavos, que no pudieron conseguir la libertad por causa de la posesión de los bienes obtenida contra el testamento.

24.- TRIFONINO; *Disputas, libro XVI*.- Surge la cuestión de cuándo deba estar en el número de los descendientes aquel a quien se le dio un legado, para que pueda obtenerlo del hijo que recibe la posesión de los bienes contra el testamento; y se determina, que basta que se halle en tal condición cuando corre el término del legado.

25.- MARCELO; *Digesto, libro IX*.- Uno que había emancipado a un hijo y retenido bajo su potestad a un nieto habido de él, desheredó en el testamento al hijo, instituyó heredero de alguna parte al nieto, y pretirió a otro hijo emancipado; se puede defender, que también el nieto puede pedir la posesión de los bienes contra el testamento; porque se defiende la posesión de los bienes respecto a aquella parte en que cada uno sería heredero suyo del intestado, si el padre no fuese heredero suyo.

§ 1.- Uno, cuyo hijo estaba en adopción, instituyó heredero al nieto que el hijo había procreado después, y pretirió a un hijo emancipado; ¿tiene acaso el nieto la posesión de los bienes en virtud del Edicto? Ha de ser, sin embargo, amparado a la manera que los ascendientes y los descendientes, a quienes los que recibieron la posesión de los bienes contra el testa-

§ 2.- Si forte ex eodem filio retinuerat nepotem unum pluresve, indubitata pro ea parte tuendus est, pro qua parte tueretur, si ex filia nepos aut mater defuncti heredes instituti essent: nam his comparatur.

must be paid by those who have obtained praetorian possession in opposition to the terms of the will.

§ 2.- If the testator had retained under his control one or more grandsons by his said son, there is no doubt whatever that he or they should be protected to the same extent, as would have been the case if the grandson by his son, or the mother of the deceased, had been appointed heirs, for he can be compared to them.

mento son obligados a pagarles los legados.

§ 2.- Si acaso había retenido uno o más nietos habidos del mismo hijo, ha de ser indudablemente amparado en aquella parte en que sería amparado, si hubiesen sido instituidos herederos un nieto habido de una hija, o la madre del difunto; porque se le compara con éstos.

TIT. VI

DE COLLATIONE

1.- ULPIANUS; *libro XL, ad Edictum*.- Hic titulus manifestam habet aequitatem: cum enim Praetor ad bonorum possessionem contra tabulas emancipatos admittat participesque faciat cum his, qui sunt in potestate, bonorum paternorum: consequens esse credit, ut sua quoque bona in medium conferant, qui appetant paterna.

§ 1.- Inter eos dabitur collatio, quibus possessio data est.

§ 2.- Plane si minorem vel alium, quem restituere in integrum solet praetor, restituerit ad bonorum possessionem contra tabulas petendam quam omiserat, utique etiam collationis commodum ei restituit.

§ 3.- Si ex dodrante fuit institutus filius qui erat in potestate, extraneus ex quadrante, emancipatum accipientem contra tabulas pro quadrante tantum bona sua collaturum Iulianus ait, quia solum quadrantem fratri abstulit: argumentum pro hac sententia adfert Pomponius, quod filius emancipatus nepotibus ex se natis solis conferre cogitur.

TITLE VI

CONCERNING THE COLLATION
OF PROPERTY

1.- ULPIANUS; *On the Edict, Book XL*.- The subject of this Title manifestly is an equitable one; for the Praetor permits emancipated children to obtain possession of the estate in opposition to the terms of the will, and thus makes them share in the paternal estate with those who were under the control of the testator; and he thinks, on account of this, that those who desire to obtain the property of their father should place all their own property in the mass of the estate.

§ 1.- Collation affects all those to whom praetorian possession has been given.

§ 2.- It is clear that if the Praetor should grant complete restitution to a minor, or to anyone else entitled to it, he will also reinvest him with the right to obtain possession of the estate contrary to the provisions of the will, which he had failed to take advantage of, and will, in addition, restore to him the advantage of collation.

§ 3.- If a son, who is under the control of his father, should be appointed heir to three-fourths of his estate, and a stranger heir to the remaining fourth, Julianus says that an emancipated son, who has obtained praetorian possession contrary to the provisions of the will, will only be compelled to collate his own property in proportion to a fourth of

TÍTULO VI

DE LA COLACIÓN

1.- ULPIANO; *Comentarios al Edicto, libro XL*.- Este título tiene una equidad manifiesta; porque como el Pretor admite a los emancipados a la posesión de los bienes contra el testamento, y los hace participes de los bienes paternos en unión de los que están bajo potestad, cree que es consiguiente que lleven al acervo común también sus propios bienes los que solicitan los paternos.

§ 1.- Se dará la colación entre aquellos a quienes se les dio la posesión.

§ 2.- Pero si al menor o a otro, a quien el Pretor suele restituir por entero, lo hubiere restituido para que pida la posesión de los bienes contra el testamento, de que había prescindido, ciertamente le restituye también el beneficio de la colación.

§ 3.- Si fue instituido en tres cuartas partes el hijo que estaba bajo potestad, y un extraño en una cuarta parte, dice Juliano que el emancipado que obtiene la posesión de los bienes contra el testamento, colacionara sus propios bienes sólo en la cuarta parte, porque le quitó al hermano solamente la cuarta parte. Aduce Pomponio a favor de esta opinión el argu-

§ 4.- Pater filium quem in potestate habebat et extraneum heredem scripsit, emancipatum praeteriit: bonorum possessionem contra tabulas uterque filius accepit. Potest non incommode dici emancipatum ita demum conferre fratri suo debere, si aliquid ei ex causa hereditaria abstulerit: nam si minore ex parte quam dimidia is qui in potestate erat heres scriptus fuerit, inique videbitur collationem postulare ab eo, propter quem amplius hereditate paterna habiturus est.

§ 5.- Totiens igitur collationi locus est, quotiens aliquo incommodo adfectus est is qui in potestate est interventu emancipati: ceterum si non est, collatio cessabit.

§ 6.- Vel maxime autem tunc emancipatum conferre non oportet, si etiam iudicium patris meruit nec quicquam amplius nanciscitur, quam ei pater dedit.

§ 7.- Sed et si legatis meruit semissem vel tantum, quantum contra tabulas bonorum possessione occupat, dicendum est non esse cogendum ad collationem.

§ 8.- Ibidem Iulianus ait, si bonorum possessione accepta decesserit is qui in potestate est, ad collationem bonorum cogendum emancipatum, ut tantum heredi eius conferat, quantum conferret ipsi, si viveret. Quod si ante acceptam bonorum possessionem decesserit suus, heredem eius praetor ita tueri debebit, inquit, pro ea parte, qua heres scriptus fuit is qui in potestate erat, non tamen ultra virilem: ad collationem autem non admittit eum in hunc casum, quia bonorum possessio admissa non est.

the estate, because he deprived his brother of only that amount. In proof of this opinion Pomponius states that an emancipated son is only obliged to collate his property with the grandsons of the testator, who were his own sons.

§ 4.- A father appointed his son, whom he retained under his control, and a stranger his heirs, and passed over an emancipated son in his will. Both sons obtained praetorian possession of his estate in opposition to the terms of the will. It can, and not improperly, be held that the emancipated son should only collate with his brother in proportion to the amount of the estate of which he deprived him; for if the son who was under the father's control had been appointed heir to less than half the property, it would seem unjust that collation should be required of him through whom the other son obtained a larger share of his father's estate.

§ 5.- Therefore, there is ground for collation as often as the heir who is under paternal authority is caused any inconvenience by the intervention of the emancipated heir. Where, however, this is not the case, there no reason for collation exists.

§ 6.- Moreover, it is certainly not necessary for the emancipated son to place his property in the mass of the estate, when he obtained it through the will of his father and received no more than the latter left him.

§ 7.- If he received half of the estate as a legacy, or as much as he could by praetorian possession contrary to the provisions of the will, it must be said that he cannot be subjected to collation.

§ 8.- Julianus, in the same place, says that if after praetorian possession has been obtained by the emancipated son, the son who was under paternal control should die, the former can be compelled to make collation of his property in such a way as to contribute as much to his nephew as he would have contributed to his brother himself, if he had lived. If, however, the proper heir should die before having obtained praetorian possession of the estate, he says that the Praetor must protect his heir to the extent of

mento de que el hijo emancipado es obligado a llevar a colación solamente para los nietos nacidos de él.

§ 4.- Un padre instituyó herederos al hijo que tenía bajo su potestad, y a un extraño, y pretirió al emancipado; ambos hijos obtuvieron la posesión de los bienes contra el testamento; se puede decir sin inconveniente, que el emancipado debe colacionar para su hermano, solamente si por causa de la herencia le hubiere quitado alguna cosa; porque si el que estaba bajo potestad hubiere sido instituido heredero en menor parte que la mitad, parecerá que injustamente pide la colación aquél por cuya causa ha de tener más en la herencia paterna.

§ 5.- Así, pues, tiene lugar la colación siempre y cuando por la intervención de un emancipado sufre algún perjuicio el que está bajo potestad; pero si no está, dejará de tener lugar la colación.

§ 6.- Pero principalísimamente no debe colacionar el emancipado cuando también mereció la voluntad del padre; y no obtiene nada más que lo que el padre le dió.

§ 7.- Pero también si obtuvo la mitad de la herencia en legados, o tanto cuanto toma de la posesión de los bienes contra el testamento, se ha de decir que no ha de ser obligado a la colación.

§ 8.- Dice en el mismo lugar Juliano, que si obtenida la posesión de los bienes hubiere fallecido el que está bajo potestad, ha de ser obligado el emancipado a la colación de los bienes para que colacione para su heredero tanto cuanto colacionaría para el mismo, si viviese. Pero si el heredero suyo hubiere fallecido antes de haber obtenido la posesión de los bienes, dice que el Pretor deberá amparar a su heredero de este modo, en aquella parte en que fue instituido heredero el que está bajo potestad, pero no

the portion to which the son who was under paternal control was appointed heir, provided this does not exceed his share of the estate; but he does not permit him to apply for collation in this instance, because praetorian possession does not take effect.

§ 9.- Iubet autem praetor ita fieri collationem, ut recte caveatur: caveri autem per satisfactionem oportere Pomponius ait. An pignoribus caveri possit, videamus: et Pomponius libro septuagesimo nono ad Edictum scripsit et reis et pignoribus recte caveri de collatione, et ita ego quoque puto.

§ 10.- Si frater cavere non possit, curator portionis eius constituitur, apud quem reflecta pecunia collocetur, ut tunc demum recipiat quod redactum est, cum bona propria contulerit. Quod si per contumaciam actiones denegatae sint, oblata postea cautione recipit pristinum ius.

§ 11.- Quamvis autem Edictum Praetoris de cautione loquatur, tamen etiam re posse fieri collationem Pomponius libro septuagesimo nono ad Edictum scripsit. aut enim re, inquit, aut cautione facienda collatio est. Igitur dividat, inquit, bona sua cum fratribus et quamvis non caveat, satisfacit edicto. Sed et si quaedam dividat, de quibusdam caveat, aequae dicimus eum satisfacisse. Sed cum possint esse quaedam in occulto, non satis confert qui non cavit, quamvis dividat. Si igitur constet inter partes, quid sit in bonis emancipati, sufficiens collatio est divisio: si non constet, sed dicantur quaedam non esse in commune redacta, tunc propter incertum cautio erit interponenda.

§ 9.- Again, the Praetor orders collation to be made in order that sufficient security may be given. Pomponius says that security should be furnished by means of sureties; but let us see whether it can also be furnished by depositing pledges. Pomponius, in the Seventy-ninth Book on the Edict, asserts that security for collation can be legally given either by sureties, or by pledges; and I concur in this opinion.

§ 10.- If the brother cannot furnish security, a curator of his share must be appointed, with whom the money obtained from the estate should be deposited, so that the emancipated son can receive what was paid in after he has placed his own property in the mass of the estate. If, however, on account of his obstinacy, an action to collect his share of the estate should be refused him, after having given bond, he can recover his former rights.

§ 11.- Moreover, although a bond is mentioned in the Edict of the Praetor, still Pomponius, in the Seventy-ninth Book of the Edict, states that even collation of the property itself can be made; for he remarks that collation can be made either by delivering the actual property or by executing a bond. Therefore, as he says, the emancipated heir divides his property with his brothers, and, although he does not give security, the terms of the Edict are complied with. We may also hold that they are complied with if he divides a portion of the property with them, and gives security to contribute more. But as some articles may remain concealed, he who does not furnish security will not make collation sufficiently, even though he divides his property. If, however, it is known of what the property of the emancipated son consists, the division of the same will constitute a sufficient collation. If this is not known, but it is said that certain effects have not been brought into the common mass, then bond must be given on account

en más de la porción viril; mas en este caso no lo admite a la colación, porque no fue admitida la posesión de los bienes.

§ 9.- Pero manda el Pretor, que la colación se haga de modo que se dé conveniente caución; mas dice Pomponio, que se debe dar caución mediante fianza. Pero veamos si se puede dar caución con prendas; y escribió Pomponio en el libro septuagésimo noveno de sus Comentarios al Edicto, que se da convenientemente caución respecto a la colación así con fiadores, como con prendas; y así opino yo también.

§ 10.- Si el hermano no pudiera dar caución, se constituye un curador de su porción, en cuyo poder se ponga el dinero recogido, para que reciba lo que se recogió solamente cuando hubiere llevado a colación sus propios bienes. Pero si por contumacia le hubieran sido denegadas las acciones, habiendo ofrecido después la caución recobra su antiguo derecho.

§ 11.- Mas aunque el Edicto del Pretor hable de caución, escribió, sin embargo, Pomponio en el libro septuagésimo noveno de sus Comentarios al Edicto, que también podía hacerse la colación con bienes; porque la colación se ha de hacer, dice, o con bienes, o con caución. Divida, pues, dice, sus bienes con sus hermanos, y aunque no dé caución cumple con el Edicto. Pero aunque divida unos, y dé caución respecto a otros, decimos igualmente que él cumplió. Mas cuando pueda haber algunos ocultos, no colaciona suficientemente el que no da caución, aunque divida. Si, pues, constara entre las partes cuántos sean los bienes del emancipado, es suficiente colación la división; y si no constara, sino que se dijera que algunos no habían sido llevados al acervo común, entonces se habrá de interponer la caución a causa de la incertidumbre.

of their uncertainty.

§ 12.- Sed et si tantum forte in bonis paternis emancipatus remittat, quantum ex collatione suus habere debet, dicendum est emancipatum satis contulisse videri: idem et si nomen paterni debitoris delegaverit vel fundum remve aliam dederit pro portione bonorum, quae conferre debuit.

§ 13.- Si, quum duobus conferre deberet, alteri contulerit, alteri non, vel cum cavet vel quum dividit: videndum est, utrum sextantis tantum ei auferatur emolumentum an vero trientis totius detrahi debeat. et puto, si quidem per contumaciam non caveat, totius trientis ei denegandas actiones (nec enim videtur cavisse, qui non omnibus cavit): quod si per inopiam, sextantis tantum denegandas, sic tamen, ut possit supplere cautionem vel collatione vel ceteris modis quibus supra diximus, aut curator constituatur rem ei salvam facturum: haberi enim debet ratio eius, qui non per contumaciam collationem non implet.

§ 14.- Is quoque, qui in adoptiva familia est, conferre cogitur, hoc est non ipse, sed is qui eum habet, si maluerit contra tabulas bonorum possessionem accipere. Plane si hic adoptivus pater ante bonorum possessionem petitam emancipaverit eum, non cogetur ad collationem, et ita Rescripto Divorum Fratrum expressum est: sed ita demum adoptivus emancipatus collatione fratres privabit, si sine fraude hoc factum sit.

§ 12.- But even if the emancipated son should only place in the mass of the estate of his father as much of his own property as he will be entitled to, aside from the collation, he is said to have contributed sufficiently. The same rule applies where he surrenders the note of a debtor to the estate, or transfers a tract of land, or any other property, instead of what he should place in the common mass.

§ 13.- If the emancipated son is obliged to make collation with two of his brothers, and does so with one, but not with the other, whether he gives him security, or divides his own property with him, it should be considered whether he will lose only one-sixth of the estate, or whether he should be deprived of the entire third of the same. I think that if he does not furnish security through obstinacy, an action to recover the entire third should be refused him; for he is not considered to have given security who did not provide for the indemnification of all the parties interested. But if he is not able to furnish it, only an action to recover the sixth should be denied him; in such a way, however, that he can supply the defect of the bond of the collation by the other means which we have mentioned above, or a curator may be appointed for the preservation of his property. Some allowance should, however, be made for one who does not fully contribute for some other reason than through obstinacy.

§ 14.- A child who belongs to an adoptive family is compelled to make collation; that is to say, not he himself but the person to whose authority he is subject when required to do so, if he prefers to obtain praetorian possession contrary to the provisions of the will. It is evident that if his adoptive father should emancipate him before he claims praetorian possession of the estate, he will not be compelled to make collation, and this was stated in a Rescript of the Divine Brothers; provided, however, that the adopted son who has been emancipated releases his brothers from collation, if this was done without fraud.

§ 12.- Pero aunque el emancipado renuncie en los bienes paternos acaso a tanto cuanto por la colación debe tener el heredero suyo, se ha de decir, que se considera que el emancipado colacionó lo bastante. Lo mismo también si hubiere delegado un crédito de un deudor del padre, o hubiere dado un fundo, u otra cosa, por la porción de bienes, que debió llevar a colación.

§ 13.- Si, cuando debiese colacionar para dos, hubiere colacionado para uno, y no para el otro, ora dando caución, ora dividiendo, se ha de ver si se le quita el emolumento solamente de la sexta parte, o si se le deba quitar de todo el tercio. Y opino, que si verdaderamente no diera caución por contumacia, se le han de denegar las acciones de todo el tercio; porque no se considera que haya dado caución el que no dio caución para todos; mas si por falta de bienes, se le han de denegar solamente respecto a la sexta parte, pero de suerte que pueda suplir la caución o con la colación, o por los demás modos, que arriba dijimos, o que se constituya un curador que le haya de dejar a salvo los bienes; porque se debe tener consideración al que no cumple con la colación no por contumacia.

§ 14.- También es obligado a colacionar el que esta en familia adoptiva, esto es, no él mismo, sino el que lo tiene, si hubiere preferido recibir la posesión de los bienes contra el testamento. Mas si este padre adoptivo lo hubiere emancipado antes de haberse pedido la posesión de los bienes, no será obligado a la colación; y así se expresó en el Edicto de los Divinos Hermanos. Pero el adoptivo emancipado privará de la colación a los hermanos solamente si esto hubiera sido hecho sin fraude.

§ 15.- Nec castrense nec quasi castrense peculium fratribus confertur: hoc enim praecipuum esse oportere multis constitutionibus continetur.

§ 16.- Sed an id, quod dignitatis nomine a patre datum est vel debetur, conferre quis in commune cogatur, videamus. Et ait Papinianus libro tertio Quaestionum non esse cogendum: hoc enim propter onera dignitatis praecipuum haberi oportere. Sed si adhuc debeatur, hoc sic interpretandum est, ut non solus oneretur is qui dignitatem meruit, sed commune sit omnium heredum onus hoc debitum.

§ 17.- Qui ab hostibus captus post mortem patris reddit, licet moriente patre nihil habuit, quum apud hostes fuerit, tamen et ad bonorum possessionem admittetur et conferet scilicet ea, quae moriente patre haberet, si ab hostibus captus non fuisset. Sed et si redemptus ab hostibus mortis tempore patris inveniat, aequo collatio erit facienda.

§ 18.- Si emancipato legatum fuerit, cum pater morietur, etiam hoc conferre debet.

§ 19.- Si ab ipso patre herede instituto filio eius fideicommissum fuerit relictum, cum morietur, an id conferendum est, quoniam utile est hoc fideicommissum? Et eveniet, ut pro eo habeatur, atque si post mortem patris relictum fuisset, nec cogetur hic conferre, quia moriente eo non fuisset.

§ 15.- Neither castrense peculium, nor quasi castrense peculium is the subject of collation among brothers; for it is laid down in many Imperial Constitutions that such property must belong exclusively to each individual.

§ 16.- But let us see whether anyone can be compelled to place, in the common mass of the estate, property which has been given by the father, or which is still due and payable on account of some office. Papinianus, in the Thirteenth Book of Questions, says that he should not be compelled to place such property in the common mass; for it must be considered to be of a private nature, on account of the obligations attaching to the office. If, however, it should still be due, the matter must be settled, so that not he alone who has obtained the office shall be liable for the debt, but that the common burden shall be sustained by all the heirs.

§ 17.- Where a son, having been captured by the enemy, returns after the death of his father, even though at that time he had no property while he was in the hands of the enemy, he will, nevertheless, be permitted to obtain praetorian possession of the estate, and he must make collation of the property which he would have had at the time of his father's death, if he had not been taken prisoner. Collation must also be made by him, if it should be ascertained that he had been ransomed from the enemy at the time of his father's death.

§ 18.- If a legacy should be bequeathed to an emancipated son, to take effect at the time of his father's death, he must also make collation of the legacy.

§ 19.- If a father should be appointed an heir, and a legacy be left to him in trust for his son, to be paid at the time of his death, must this also be the subject of collation, since the trust is valid? The fact is that it should be considered just as if it had been left after the death of the father, and the son will not be compelled to place it in the mass of the estate, because, at the time of his father's death, it did not belong to him.

§ 15.- No se lleva a colación para los hermanos ni el peculio castrense, ni el casi castrense; porque en muchas Constituciones se expresa, que este es privativo.

§ 16.- Pero veamos si será alguno obligado a llevar al acervo común lo que a título de dignidad se le dió o se le debe por el padre. Y dice Papiniano en el libro décimo tercero de las Cuestiones, que no ha de ser obligado; porque es conveniente que esto lo tenga privativo por causa de las cargas de la dignidad. Pero si todavía se debiera, esto se ha de interpretar de modo que no sea gravado sólo el que obtuvo la dignidad, sino que esta deuda sea carga común de todos los herederos.

§ 17.- Si el que aprisionado por los enemigos regresó después de la muerte del padre, aunque nada tuvo él, al morir el padre, porque estaba en poder de los enemigos, sera, sin embargo, admitido a la posesión de los bienes, y llevará, por supuesto, a colación lo que tendría, al morir el padre, si no hubiese sido aprisionado por los enemigos; pero aunque se hallara rescatado de los enemigos al tiempo de la muerte del padre, se habrá de hacer igualmente la colación.

§ 18.- Si se le hubiere hecho un legado a un emancipado, también debe llevarlo a colación cuando muera el padre.

§ 19.- Si a cargo del mismo padre instituido heredero se hubiere dejado un fideicomiso para su hijo, cuando muriese, ¿se ha de llevar esto a colación, porque es útil este fideicomiso? Y sucederá, que será considerado lo mismo que si hubiese sido dejado después de la muerte del padre; y no será aquél obligado a llevarlo a colación, porque al morir éste no habría sido suyo.

§ 20.- Emancipatus filius si dotem habeat ab uxore acceptam, hoc minus confert, etsi ante uxor decesserit.

§ 21.- Si impuberi adrogato secundum Divi Pii Rescriptum quarta debetur, videndum est, an, si patris naturalis bonorum possessionem petat, conferre quartam debeat. Quaestio in eo est, an heredi suo relinquat quartae actionem an non. Et magis est, ut ad heredem transferat, quia personalis actio est: igitur etiam de quarta conferenda cavere eum oportebit, sed hoc ita demum, si iam nata est quartae petitio. Ceterum si adhuc pater adoptivus vivat, qui eum emancipavit, dicendum est cautionem quoque cessare: praematura est enim spes collationis, cum adhuc vivat is, cuius de bonis quarta debetur.

§ 22.- Si is qui bona collaturus est habeat filium peculium castrense habentem, non cogetur utique peculium eius conferre. Sed si iam tunc mortuus erat filius eius et castrense peculium habebit, cum morietur is cuius bonorum possessio petenda est: an conferre cogatur? Quum autem vindicari id patri non sit necesse, dici oportebit conferendum: non enim nunc adquiritur, sed non adimitur. Amplius dico, et si institutus fuerit a filio heres nec dum adierit habeatque substitutum, quia non magis nunc quaeritur peculium quam nunc non alienatur, conferri debere.

§ 23.- Confertur autem etiam si quid eius non fuerit, dolo malo autem factum sit, quo minus esset: sed hoc sic accipiendum est, ut hoc demum conferatur, quod eius esse desiit dolo malo: ceterum si id egit, ne acquireret, non venit in collationem: nam hic

§ 20.- If an emancipated son has received a dowry from his wife, he will not be required to place it in the mass of the estate, even if his wife should have died before the death of the testator.

§ 21.- Where a minor, under the age of puberty, has been arrogated, he will be entitled to a fourth of the estate, in accordance with a Rescript of the Divine Pius; but let us see if he claims praetorian possession of the estate of his natural father, whether he must make collation of the said fourth. This question is merely whether he shall relinquish his right of action for the fourth to his heir, or not. The better opinion is that it passes to his heir, because the action is a personal one, and therefore he must give security to place the fourth in the mass of the estate. This, however, only takes place where the right to obtain the fourth has been already established; for if the adoptive father, who emancipated the heir, is still living, it must be said that no reason exists why security should be furnished; for the hope of collation is still premature, as he, the fourth of whose estate is due, is still living.

§ 22.- Where a person who should make collation of his property has a son who is in possession of peculium, castrense, he cannot be compelled to place the peculium in the mass of the estate. If, however, the son who had the castrense peculium, and the possession of whose estate was claimed under the Praetorian Edict, should already be dead at the time, can the father be compelled to subject the peculium to collation? As it is not necessary for the father to claim it, it must be said that it should be placed in the mass of the estate; for it is neither acquired nor taken away. I further hold that if an heir has been appointed by the son, but he does not accept the estate, and should have a substitute, the peculium should be placed in the mass of the estate, for the reason that it is neither acquired nor alienated at that time.

§ 23.- Moreover, collation must take place where property no longer, belongs to the emancipated son, and he has been guilty of fraud to avoid having possession of the same. This, however, must be understood to mean that it shall only be the subject of

§ 20.- Si el hijo emancipado tuviera la dote recibida de la mujer, no la lleva a colación, aunque la mujer hubiere fallecido antes.

§ 21.- Si arrogado un impúbero se debe la cuarta parte según el Rescripto del Divino Pío, se ha de ver, si deberá llevar a colación la cuarta, si pidiera la posesión de los bienes del padre natural; la cuestión estriba en esto, en sí le deja, o no, a su heredero la acción de la cuarta; y es más probable que la transfiera al heredero, porque es acción personal. Así, pues, convendrá que él dé caución de llevar a colación también la cuarta; pero esto así solamente, si ha nacido ya la acción para pedir la cuarta; mas si viviera todavía el padre adoptivo, que lo emancipó, se ha de decir que también deja de tener lugar la caución; porque es prematura la esperanza de la colación, viviendo todavía aquél de cuyos bienes se debe la cuarta.

§ 22.- Si el que ha de llevar a colación los bienes, tuviese un hijo que tuviera peculio castrense, no será ciertamente obligado a llevar a colación el peculio de aquél; pero si ya a la sazón había muerto su hijo, Y tuvo, al morir, el peculio castrense aquél de cuyos bienes se ha de pedir la posesión, ¿será acaso obligado a llevarlo a colación? Mas como el padre no tiene necesidad de reivindicarlo, se deberá decir, que ha de ser llevado a colación; porque entonces no se adquiere, sino que se quita, y digo mas, que aunque por el hijo hubiere sido instituido heredero, y todavía no hubiere hecho la adición, y tuviera substituto, debe ser llevado a colación, porque entonces no se adquiere el peculio, sino que más bien no se enajena.

§ 23.- Mas se lleva a colación, aunque alguna cosa no hubiere sido de uno, pero se hubiera hecho con dolo malo que no lo fuese; pero esto se ha de entender de modo, que se lleve a colación solamente lo que por dolo malo dejó de ser de aquél. Mas si lo hizo para no

et sibi insidiatus est.

§ 24.- Portiones collationum ita erunt faciendae: ut puta duo sunt filii in potestate, unus emancipatus habens trecenta: ducenta fratribus confert, sibi centum: facit enim eis partem, quamvis is sit, cui conferri non solet. Quod si duo sint filii emancipati habentes trecenta et duo in potestate, aequè dicendum est singulos singulis, qui sunt in potestate, centena conferre, centena retinere, sed ipsos invicem nihil conferre.

§ 25.- Dotis quoque collatio in eundem modum fiet, ut quicumque confert, etiam suam personam numeret in partibus faciendis.

2.- PAULUS; *libro XLI, ad Edictum*.- Quum emancipati filii nomine nepotem postumum post avi mortem editum dicimus bonorum possessionem accipere oportere, necessarium erit dicere bona sua eum conferre, licet non potest dici mortis tempore avi bona habuisse, qui ipse nondum in rerum natura erat. Igitur sive hereditatem a patre sive legatum acceperit, hoc conferre debebit.

§ 1.- Illud autem intellegendum est filium in bonis habere, quod deducto aere alieno superest. Sed si sub condicione debeat, non statim id deducere debebit, sed id quoque conferre: contra autem caveri ei oportebit ab eo qui in potestate est, ut existente condicione defendatur pro ea parte quam contulit.

collation where he has relinquished possession of it fraudulently, but if he has done something in order to avoid obtaining the property, it will not be subject to collation; for, in this instance, he has plotted against himself.

§ 24.- Collation must be made of different shares as follows: for instance, where there are two sons under the control of their father, and another who, having been emancipated, has three hundred aurei of his own, he must contribute two hundred to his brothers, after reserving a hundred for himself; for in this way he will share equally with them, even though he may be one who ordinarily does not make collation. Where, however, there are two emancipated sons, who have three hundred aurei, and two of them are under the control of their father, it must also be said that each one must contribute a hundred aurei to each brother who is under paternal control, and retain a hundred; but the emancipated brothers themselves will not be liable to collation with one another.

§ 25.- The collation of a dowry is made in the same manner, so that whoever makes it will also include himself among those who share it.

2.- ULPIANUS; *On the Edict, Book XLI*.- When we say that a grandson, born after the death of his grandfather, can obtain praetorian possession of the estate of the latter, in the name of an emancipated son, it will be necessary to hold that his property will be subject to collation; although it cannot be said that he who had not yet been born had the property at the time of his grandfather's death. Therefore, he must place the property in the mass of the estate, whether he received all of it from his father, or merely a legacy.

§ 1.- The property of a son is understood to mean what he has left after deducting his debts. If, however, he owes a sum of money under a condition, it should not immediately be deducted, but it still ought to be placed in the mass of the estate. On the other hand, a son who is under the control of his father should give him security that, if the condition

adquirir, no se comprende en la colación; porque en este caso se perjudicó también a sí mismo.

§ 24.- Las porciones de las colaciones se habrán de hacer así, por ejemplo, si hay dos hijos bajo potestad, y un emancipado tiene por valor de trescientos, llevará a colación doscientos para los hermanos y retendrá ciento para sí; porque hace parte para ellos, aunque él sea uno para quien no se suele llevar a colación. Mas si fueran dos los hijos emancipados que tuvieran por valor de trescientos y dos los que están bajo potestad, se ha de decir igualmente que cada uno lleva a colación ciento para cada uno de los que están bajo potestad, y retiene otros ciento, pero que ellos mismos no llevan nada a colación entre sí.

§ 25.- Y del mismo modo se hará también la colación de la dote, de suerte que cualquiera que la lleve a colación cuente también su propia persona al hacer las partes.

2.- PAULO; *Comentarios al Edicto, libro XLI*.- Cuando decimos que el nieto póstumo nacido después de la muerte del abuelo debe recibir la posesión de los bienes en nombre del hijo emancipado, será necesario decir que él lleva a colación sus propios bienes, aunque no se puede decir que tuvo bienes al tiempo de la muerte del abuelo el que no había nacido todavía; así, pues, ora si hubiere recibido del padre la herencia, ora si un legado, deberá llevado a colación.

§ 1.- Mas se ha de entender que el hijo tiene como bienes lo que le queda deducidas las deudas. Pero si debiera bajo condición, no deberá deducir esto luego, sino que lo deberá llevar también a colación; mas, por el contrario, se le deberá dar por el que está bajo potestad caución de que, cumpliéndose la condición, sera defendido en cuanto a la parte que llevó a

§ 2.- De illis, quae sine culpa filii emancipati post mortem patris perierunt, quaeritur, ad cuius detrimentum ea pertinere debeant. Et plerique putant ea, quae sine dolo et culpa perierint, ad collationis onus non pertinere: et hoc ex illis verbis intellegendum est, quibus Praetor viri boni arbitratu iubet conferri bona: vir autem bonus non sit arbitraturus conferendum id, quod nec habet nec dolo nec culpa desiit habere.

§ 3.- Id quoque, quod sub condicione ex stipulatu debetur emancipato, conferri debet. Diversum est in legato condicionali, quia et si in potestate fuisset et post mortem patris condicio extitisset, ipse haberet actionem.

§ 4.- Emancipatus filius si iniuriarum habet actionem, nihil conferre debet: magis enim vindictae quam pecuniae habet persecutionem: sed si furti habeat actionem, conferre debebit.

§ 5.- Si tres emancipati, duo in potestate sint, Gaius Cassius libro septimo Iuris Civilis tertias conferendas putat, ut emancipati, quia invicem non conferunt, unius loco sint: nec indignari eos oportere, si plus conferant et minus accipiant, quia in potestate eorum fuerit bonorum possessionem omittere. Iulianus quoque cassii sententiam sequitur.

is fulfilled, he will protect him with reference to that portion of which he has made collation.

§ 2.- Where property has been lost after the death of the father without the emancipated son being to blame, the question arises, who shall suffer the loss? Many authorities hold that property which has been lost without fraud or negligence should not be subjected to the burden of collation; and this is understood from the words with which the Praetor orders the property to be subjected to collation, in accordance with the judgment of a reliable citizen; for a reliable citizen would not decide that property is liable to collation which a person no longer has, and which he did not lose either through fraud or negligence.

§ 3.- Property which, by virtue of an agreement, is due under a condition, should be placed in the mass of the estate by the emancipated son. The rule is different with reference to a conditional legacy; for, even if he should be under the control of his father, and the condition should be complied with after the death of the latter, he himself will be entitled to an action.

§ 4.- If the emancipated son brings suit against anyone for injury committed, he need not make it the subject of collation; for a proceeding of this kind is brought rather for the gratification of revenge than for the recovery of money. If, however, he has an action growing out of theft, he should make collation of the same.

§ 5.- Where there are three emancipated sons, and also two who are under the control of their father, Gaius Cassius, in the Seventh Book of the Civil Law, says that the emancipated sons should make collation of a third of their private property; so that, although they do not contribute to one another, they may be regarded as a single individual. They should not consider themselves ill treated if they contribute more, and receive less; because it was in their power not to apply for praetorian possession of the estate. Julianus also assents to the Opinion of Cassius.

colación.

§ 2.- Respecto a las cosas que sin culpa del hijo emancipado perecieron después de la muerte del padre, se pregunta en perjuicio de quién deban ellas redundar. Y opinan los mas, que las que hubieren perecido sin dolo y culpa no corresponden a la carga de la colación; y se ha de entender esto en virtud de aquellas palabras con que el Pretor manda que se colacionen los bienes a arbitrio de buen varón; mas un buen varón no habrá de determinar que deba colacionar lo que ni tiene, ni dejó de tener por dolo ni culpa.

§ 3.- También se debe colacionar para el emancipado lo que bajo condición se debe en virtud de estipulación. Diversa cosa es tratándose de un legado condicional, porque aunque hubiese estado bajo potestad, y se hubiese cumplido la condición después de la muerte del padre, él mismo tendrá la acción.

§ 4.- El hijo emancipado, si tiene acción de injurias, no debe llevar nada a colación; porque tiene mas bien la persecución de la vindicta, que la de una cantidad; pero si tuviera la acción de hurto, la deberá llevar a colación.

§ 5.- Si hubiera tres emancipados, y dos bajo potestad, opina Cayo Cassio en el libro séptimo del Derecho Civil, que se han de llevar a colación terceras partes, de suerte que los emancipados, como no colacionan entre sí, estén en lugar de uno solo, y no deben ellos quejarse si colacionaran mas y recibieran menos, porque en su potestad estuvo prescindir de la posesión de los bienes; y también Juliana sigue el parecer de Cassio.

§ 6.- Si ex emancipato filio nepos emancipatus mortuo patre simul et avo bonorum possessionem utriusque acceperit, quum uterque eorum suum heredem reliquerit: eo modo collatio explicari potest, ut, si verbi gratia centum in bonis habuit, et patruo quinquaginta et fratri quinquaginta conferre debet: hoc enim ratio facit, sive personas sive portiones numeremus.

§ 7.- Si duo nepotes ex filio mortuo emancipati bonorum possessionem avi petant, utrum dimidias an quartas patruo conferre debeant, quaeritur. Et verius est semisses conferre eos oportere, quia et si vivo avo, quum in eius potestate essent, ducenta puta adquisissent, centum filius, centum duo fratres per hereditatem avi haberent.

§ 8.- Si duo emancipati bonorum possessionem petierint et unus contulerit, alter non contulerit, huius portio tantum ei qui in potestate est prodesse debet, non etiam emancipato, quoniam eius causa qui in potestate est denegantur ei actiones.

§ 9.- Si per inopiam emancipatus cavere non possit, non statim ab eo transferenda est possessio, sed sustinendum, donec possit invenire fideiussores, ut tamen de his, quae mora deteriora futura sunt, his qui in potestate sunt actio detur ipsique caveant in medium collatuos, si cautum eis fuerit.

3.- IULIANUS; *libro XXIII, Digestorum*.- Praetor non sub condicione collationis bonorum possessionem contra tabulas promittit, sed demonstrat, quid data bonorum possessione fieri oportet. Alioquin

§ 6.- If an emancipated grandson, born to an emancipated son, after the death of both his father and his grandfather, should obtain praetorian possession of the estates of both, each having left a proper heir, the collation to be made can be explained as follows: for example, if he has property worth a hundred aurei, he should contribute fifty to his uncle, and fifty to his brother, for this ratio applies whether we take into consideration the persons themselves, or the shares of the estate to which they are entitled.

§ 7.- Where there are two emancipated grandsons, the issue of a deceased son, who demand praetorian possession of the estate of their grandfather, the question arises whether they should contribute half, or a quarter, of their property to their uncle, by way of collation. The better opinion is that each should contribute half of his property, for if, during the lifetime of their grandfather, and while they were under his control, they had received, for instance, two hundred aurei, the son would be entitled to a hundred, and the two brothers to two hundred out of the estate of the grandfather.

§ 8.- Where two emancipated sons demand praetorian possession of an estate, and one of them makes collation, and the other does not, the share of the latter will only benefit a son who is under paternal control, and not the one who has been emancipated, as it is on account of the one who is under paternal control that an action is denied to the other.

§ 9.- Where an emancipated son cannot furnish security, he must not immediately be deprived of praetorian possession, but he may retain it until he can find sureties, in such a way, however, that an action can be granted to those who are under paternal control for the recovery of any property which is liable to be damaged by delay; and they must give security to place it in the mass of the estate, if they also are secured against loss.

3.- JULIANUS; *Digest, Book XXIII*.- The Praetor does not promise possession of the property of an estate in opposition to the terms of the will, under the condition that collation shall be made, but he shows

§ 6.- Si un nieto emancipado habido de un hijo emancipado hubiere recibido, fallecidos simultáneamente el padre y el abuelo, la posesión de los bienes de ambos, habiendo dejado ambos un heredero suyo, la colación se puede explicar de modo que si, por ejemplo, tuvo bienes por valor de ciento, deberá llevar a colación cincuenta para el tío paterno, y cincuenta para el hermano; porque es lo que da la cuenta, ora contemos las personas, ora las porciones.

§ 7.- Si dos nietos emancipados habidos de un hijo fallecido pidieran la posesión de los bienes del abuelo, se pregunta si deberán llevar a colación para el tío paterno mitades o cuartas partes. Y es más verdadero que deben ellos llevar a colación mitades, porque también si viviendo el abuelo hubiesen adquirido, estando bajo su potestad, por ejemplo, doscientos, el hijo tendría ciento, y ciento los dos hermanos, por la herencia del abuelo.

§ 8.- Si dos emancipados hubieren pedido la posesión de los bienes, y uno hubiere colacionado, y el otro no, la porción de éste debe aprovechar solamente al que esta bajo potestad, no también al emancipado, porque por causa del que está bajo potestad se le deniegan a él las acciones.

§ 9.- Si el emancipado no pudiera por falta de bienes dar caución, no se le ha de quitar desde luego la posesión, sino que ha de ser sostenido en ella hasta que pueda encontrar fiadores, pero de suerte que, respecto a las cosas que se han de deteriorar con la demora, se les dé acción a los que están bajo potestad, y estos mismos den caución de llevarla a colación, si a ellos se les hubiere dado caución.

3.- JULIANO; *Digesto, libro XXIII*.- El Pretor no promete la posesión de los bienes contra el testamento bajo la condición de la colación, sino que indica lo que se debe hacer habiéndose dado la pose-

magna captio erit emancipati, si non aliter bonorum possessionem accipere intellexeretur, nisi cavisset de collatione: nam si interim ipse decessisset, heredi suo nihil relinqueret. Item si frater eius decessisset, non admitteretur ad bonorum possessionem. Quid ergo est? Intellegendum est bonorum possessionem accipere et antequam caveat, sed si non caverit, ita observabitur, ut tota hereditas apud eum, qui in potestate fuerit, remaneat.

§ 1.- Emancipatus filius controversiam facit impuberi, qui se filium et in potestate patris fuisse debet: quaero, si bona sua ei emancipatus conferre debeat. Paulus notat: puto conferendum esse exacta cautione, ut victus sicut hereditatem, ita et quae collata sunt praestet.

§ 2.- Iulianus: quotiens contra tabulas bonorum possessio datur, emancipati bona sua conferre debent his solis, qui in potestate patris fuerint. Hoc quemadmodum expediri oporteat, quaeri solet: nam si bona a patre relicta et emancipatorum in medium conferantur et ita viriles partes sumantur, eveniet, ut et emancipatis quoque collatio ab ipsis facta prosit. Videamus ergo, ne commodissimum sit emancipatos quartam partem ex bonis paternis ferre, ex suis tertiam: quod dico, exemplo manifestius fiet. Ponamus patrem quadringenta reliquisse et duos in potestate filios, duos emancipatos, ex quibus alterum centum, alterum sexaginta in bonis habere: is qui centum habebit centum triginta tria et trientem feret, is vero qui sexaginta contulerit centum viginti, atque ita eveniet, ut collationis emolumentum ad solos, qui in potestate remanserint, perveniat.

what must be done after possession has been given. Otherwise, great advantage would be taken of an emancipated son, if he was not understood to have obtained praetorian possession of the estate, unless he had given security to make collation; for if, in the meantime, he himself should die, he would leave nothing to his heir. Moreover, if his brother should die, he will not be permitted to obtain praetorian possession of the estate. What should be done under such circumstances? It must then be held that he obtained legal possession of the estate, even before he gave security; but if he should not give security, the result will be that the entire estate will go to the son under paternal control.

§ 1.- An emancipated son entered into a controversy with a minor under the age of puberty, who declared that he was his brother, and was under the control of his father. I ask whether the emancipated son should make collation of his property with him. Paulus remarks on this point: "I think that collation should be made, after a bond has been required that, if the minor loses the case, he will transfer the estate as well as the property of which collation was made."

§ 2.- Julianus: Whenever praetorian possession is given contrary to the provisions of the will, the emancipated sons should make collation of their property only with those who remain under the control of their father. The question arises how this can be done. For, if the property left by the father, as well as that belonging to the emancipated sons, is placed in one mass, and full shares of the same are taken, the result will be that the emancipated sons will profit by the collation made by themselves. Therefore, let us see whether it will not be more convenient for the emancipated sons to receive a fourth of their father's estate, and a third of their own property. What I mean will become more plain by an example. Let us suppose that a father left four hundred aurei, and two sons under his control, and two have been emancipated. Of these one will have a hundred and the other sixty aurei out of his estate; the one who will be entitled to a hundred will obtain in all a hundred and thirty-three and a third; and he who contributed sixty will obtain a hundred and twenty, so

sión de los bienes. De otra suerte, sería grande el perjuicio del emancipado, si se entendiese que no recibiría la posesión de los bienes de otro modo, sino si hubiese dado caución respecto a la colación; porque si entretanto él hubiese fallecido, no le dejaría nada a su heredero; y asimismo, si hubiese muerto su hermano, no sería admitido a la posesión de los bienes ¿Qué se dirá pues? Se ha de entender, que recibe la posesión de los bienes aun antes de que dé caución; pero si no diere la caución, se hará de modo que toda la herencia permanezca en poder del que hubiere estado bajo potestad.

§ 1.- Un hijo emancipado promete controversia a un impúbero, que dice que es hijo, y que estuvo bajo la potestad del padre; pregunto, si el emancipado le deberá llevar a colación sus propios bienes. Paulo observa: opino que debe llevarlos a colación, habiéndose obtenido caución de que el vencido entregará así como la herencia, también lo que se colacionó.

§ 2.- Dice Juliano: siempre que se da la posesión de los bienes contra el testamento, deben los emancipados llevarles a colación sus propios bienes a aquellos solos que hubieren estado bajo la potestad del padre; se suele preguntar de qué modo se ejecutará esto; porque si se llevan al acervo común los bienes dejados por el padre y los de los emancipados, y de esta suerte se hicieran las porciones viriles, sucederá que les aprovechará también a los emancipados la colación hecha por ellos mismos. Veamos, pues, si no será lo más conveniente que los emancipados tomen la cuarta parte de los bienes paternos, y la tercera de los suyos propios. Lo que digo aparecerá más claro con un ejemplo; supongamos, que el padre dejó cuatrocientos, y dos hijos bajo potestad, y dos emancipados, de los cuales uno tiene bienes por valor de ciento, y el otro por el de sesenta; el que tuviere ciento tomará ciento treinta y tres y tercio, y el que hubiere llevado a colación sesenta ciento veinte, y así resultará, que el beneficio de la colación corresponderá a aquellos solos que

§ 3.- Emancipati bona sua conferre quum his, qui in potestate fuerunt, iubentur.

§ 4.- Quare sicut is, qui in potestate est, dotem uxoris praecipit, ita emancipatus quoque, quasi praecipiat, retinere debet.

§ 5.- Emancipatus praeteritus si, dum deliberat, caverit de bonorum collatione nec bonorum possessionem petierit, agente fratre ex stipulatu ipso iure tutus erit. Sed et si pecuniam contulerit, condictione eam repetit: omisa enim bonorum possessione incipit pecunia sine causa esse apud heredem.

§ 6.- Qui duos filios in potestate habebat et ex uno eorum nepotem, emancipavit filium, ex quo nepotem habebat: deinde emancipatus factus procreavit filium, quem avus in locum filii adoptavit et vel intestatus, vel testamento facto praeterito emancipato filio, decessit:

Quaesitum est, quid de bonorum possessione, quid de collatione iuris esset. Respondi bonorum, de quibus quaeritur, tres partes fieri debent, ex quibus una pertinet ad filium qui in potestate remansit, altera ad nepotem, qui in locum filii adoptatus est, tertia ad emancipatum filium et nepotem, qui in potestate remanserit, ita ut pater soli ei conferat, cum quo bonorum possessionem accipiat.

that the result will be that those only who remained under the control of their father will obtain the benefit of the collation.

§ 3.- Emancipated sons are ordered to place their property in collation with those who are under the control of their father.

§ 4.- Wherefore, as he who is under the control of his father receives the dowry of his wife as a preferred legacy, so, also, can an emancipated son retain that of his wife as a preferred legacy.

§ 5.- Where an emancipated son, who was passed over in a will, gives security with reference to the collation of his property, while he is deliberating whether he will demand praetorian possession of the estate or not, and he does not do so, and his brother brings suit against him on the stipulation, he will be secure under the will. If, however, he has deposited money by way of collation, he can recover it by an action; for, after he has declined to apply for praetorian possession, there will be no reason for the money to remain in the hands of the heir.

§ 6.- A man who had two sons under his control, and also a grandson who was the son of one of them, emancipated the one by whom he had the grandson; and, after having been emancipated, the son had another son whom his grandfather adopted in his stead; and then the grandfather died, either intestate, or after making a will in which his emancipated son was passed over.

The question arose, what would the rule be with reference to praetorian possession, and what ought to be done with respect to collation? The answer was that, so far as the property was concerned, three parts should be made of it, one of which would belong to the son who remained under paternal control, the second to the grandson who was adopted instead of the son, and the third to the emancipated son and the grandson who remained under paternal control; so that the father would be liable to collation only with the one who had obtained praetorian possession of the estate.

hubieren permanecido bajo potestad.

§ 3.- A los emancipados se les manda que lleven sus propios bienes a colación con los que estuvieron bajo potestad.

§ 4.- Por lo cual, así como el que está bajo potestad toma previamente la dote de la mujer, así también debe retener el emancipado, como si tomase previamente.

§ 5.- Si el emancipado preterido hubiere, mientras delibera, dado caución por la colación de los bienes, y no hubiere pedido la posesión de los bienes, estará de derecho seguro al ejercitar su hermano la acción de lo estipulado. Pero si hubiere llevado a colación dinero, lo reclamará por la condición; porque, habiéndose prescindido de la posesión de los bienes, comienza a estar sin causa el dinero en poder del heredero.

§ 6.- Uno que tenía dos hijos bajo su potestad, y de uno de ellos un nieto, emancipó al hijo, de quien tenía un nieto, después el que fue emancipado procreó un hijo, al que adoptó el abuelo en el lugar de hijo, y falleció o intestado, o habiéndose preterido al hijo emancipado en el testamento que hizo;

Se preguntó, qué derecho regiría en cuanto a la posesión de los bienes, y cuál respecto a la colación. Respondí: de los bienes, de que se trata, se deben hacer tres partes, de las que una le pertenece al hijo, que permaneció bajo potestad; otra al nieto, que fue adoptado en el lugar de hijo; y la tercera al hijo emancipado y nieto, que hubiere permanecido bajo potestad, de suerte que el padre lleve a colación para aquél solo con quien reciba la posesión de los bienes.

4.- AFRICANUS; *libro IV, Quaestionum*.- Filium emancipatum dotem, quam filiae suae nomine dedit, conferre non debere, quia non, sicut in matris familias bonis esse dos intellegatur, ita et in patris, a quo sit profecta.

§ 5.- ULPIANUS; *libro LXXIX, ad Edictum*.- Si quis filium habeat sui iuris et ex eo nepotem in potestate sua, consequenter erit dicendum, si nepos patris sui emancipati accipiat bonorum possessionem, de conferendis suis quoque bonis cavere eum debere et esse similem ei qui adoptavit: hoc enim Divi Fratres rescripserunt, ut ad collationem avus compellatur. Plane eodem rescripto adiectum est sic: "nisi forte avus iste nullum ex his bonis fructum adquirere vult paratusque est de potestate nepotem dimittere, ut ad emancipatum omne emolumentum bonorum possessionis perveniat. Nec idcirco ea filia, quae post emancipationem nata patri heres exstitit, iuste queri poterit", inquit, "quod eo facto a collationis commodo excluditur, quum avo quandoque defuncto ad bona eius simul cum fratre possit venire". Haec in patre adoptivo ratio reddi non potest et tamen et ibi idem dicemus, si sine dolo malo emancipaverit.

§ 1.- Stipulatio autem collationis tunc committitur, quum interpellatus quum aliquo spatio, quo conferre potuit, non facit, maxime quum boni viri arbitratu collationem fieri edicto praetoris insertum est.

§ 2.- Sive ergo in totum collatio facta non est sive in partem facta, locum habebit haec stipulatio:

4.- AFRICANUS; *Questions, Book IV*.- An emancipated son is not obliged to place in collation the dowry which he gave to his daughter, because it is not understood to be included in the property of the father from whom it was derived, as it is in that of the mother.

5.- ULPIANUS; *On the Edict, Book LXXIX*.- Where anyone has a son who is his own master, and by him a grandson who is under his control, it must be said that if the grandson receives praetorian possession of the estate of his emancipated father, he must give security to place his property in collation, and he is like one who has adopted the son of another; for the Divine Brothers stated in a Rescript that the grandfather was compelled to place his property in the mass of the estate. It is true that the following is added in the same Rescript: "Unless the grandfather does not desire to obtain any benefit from his property, and is ready to release his grandson from his authority, so that all the benefit of praetorian possession of the estate may be enjoyed by him after his emancipation." Hence a daughter, who was born after the emancipation of her father, and who became his heir, cannot justly complain of being excluded from the benefit of the collation by what has been done; as after her grandfather dies, she can, along with her brother, succeed to the estate. This reason cannot be advanced in the case of an adoptive father, and, still we adopt the same rule with reference to him, if he emancipated the son without committing any fraud.

§ 1.- The stipulation referring to collation takes effect when the person called upon does not act within the time when he ought to have placed his property in the mass of the estate; especially as it is inserted in the Edict of the Praetor that collation should be made in accordance with the judgment of a good citizen.

§ 2.- Therefore, if collation does not take place in accordance with the terms prescribed, or if it is only partially carried out, the stipulation will become operative.

4.- AFRICANO; *Cuestiones, libro IV*.- El hijo emancipado no debe llevar a colación la dote, que dio a nombre de su hija, porque no se entiende que como de los bienes de la madre de familia forme la dote parte también de los del padre, de quien haya proveído.

5.- ULPIANO; *Comentarios al Edicto, libro LXXIX*.- Si alguno tuviera un hijo de propio derecho, y de él un nieto bajo su potestad, se habrá de decir consiguientemente, que, si el nieto obtuviera la posesión de los bienes de su padre emancipado, deberá aquél dar caución de llevar a colación también sus propios bienes, y que es semejante al que hizo una adopción; porque esto respondieron por rescripto los Divinos Hermanos, para que el abuelo fuese compelido a la colación. Mas en el mismo rescripto se añadió esto: «a no ser acaso que este abuelo no quiera adquirir ningún fruto de estos bienes, y esté dispuesto a sacar de su potestad al nieto, para que vaya al emancipado todo el provecho de la posesión de los bienes». Y dice, que ni la hija, que, nacida después de la emancipación, fue heredera de su padre, podrá querellarse con justicia por esto, porque por tal derecho es excluida del beneficio de la colación, puesto que, en cualquier tiempo que el abuelo haya fallecido, podrá ella concurrir conjuntamente con su hermano a los bienes de aquél. No se puede dar esta razón respecto al padre adoptivo, y, sin embargo, diremos también en este caso lo mismo, si hubiere hecho la emancipación sin dolo malo.

§ 1.- Mas se da lugar a la estipulación de la colación siempre y cuando el requerido con algún espacio de tiempo, dentro del cual pudo hacer la colación, no la hizo, mayormente habiéndose consignado en el Edicto del Pretor que la colación se haga a arbitrio de hombre bueno.

§ 2.- Luego, ora si en absoluto no se hizo la colación, ora si hubiera sido hecha en parte, tendrá lugar esta estipulación.

§ 3.- Et sive quis non conferat ex hac stipulatione sive dolo fecerit, quo minus conferat, quanti ea res erit, in tantam pecuniam condemnabitur.

6.- CELSUS; *libro X, Digestorum*.- Dotem, quam dedit avus paternus, an post mortem avi mortua in matrimonio filia patri reddi oporteat, quaeritur. Occurrit aequitas rei, ut, quod pater meus propter me filiae meae nomine dedit, perinde sit atque ipse dederim: quippe officium avi circa neptem ex officio patris erga filium pendet et quia pater filiae, ideo avus propter filium nepti dotem dare debet. Quid si filius a patre exheredatus est? existimo non absurde etiam in exheredato filio idem posse defendi, nec infavoreabilis sententia est, ut hoc saltem habeat ex paternis, quod propter illum datum est.

7.- IDEM; *libro XIII, Digestorum*.- Si nepotes in locum filii successerunt, una portio is conferri debet, uti bonorum possessionis unam partem habent: sed et ipsi ita conferre debent, quasi omnes unus essent.

8.- PAPINIANUS; *libro III, Quaestionum*.- Nonnumquam Praetor variantem non repellit et consilium mutantis non aspernatur. unde quidam filium emancipatum, qui de bonis conferendis cavere fratribus noluit, audiendum postea putaverunt, si vellet oblata cautione beneficium bonorum possessionis exercere. Tametsi responderi potest videri eum possessionem repudiasset, qui formam possessionis conservare noluit:

Sed benignior est diversa sententia, maxime quum

§ 3.- And, whether the son does make collation or not, according to the terms of the stipulation, or whether he avoids doing it by means of some fraudulent act, judgment shall be rendered against him for a sum equal to the value of the property.

6.- CELSIUS; *Digest, Book X*.- The question arises whether the dowry given by a paternal grandfather should be returned to the father after the death of the grandfather, the woman having died during marriage. The equity of the case seems to be that what my father has given to my daughter on my account is just the same as if I had given it myself, for the duty of a grandfather towards his granddaughter depends upon the affection which a father entertains toward a son, and because the father should endow his daughter, so a grandfather should endow his granddaughter for the sake of his son. But what if the son was disinherited by his father? I hold that it would not be absurd for the same rule to be maintained in the case of a disinherited son. I think that it is not an improper opinion that the son should be entitled to what was bestowed out of his father's estate on his account.

7.- THE SAME; *Digest, Book XIII*.- Where grandsons succeed to the place of sons, only one share should be contributed to them by way of collation, so that they may have one share of the estate under praetorian possession. They themselves, however, must place their property in the mass of the estate, just as if all of them only constituted one person.

8.- PAPINIANUS; *Questions, Book III*.- The Praetor sometimes does not exclude one who is irresolute, or reject him after he has changed his mind. Therefore, certain authorities have held that an emancipated son who refused to give security with reference to placing his property in the mass of the estate ought afterwards to be heard, if, after having furnished security, he should desire to take advantage of the benefit of the praetorian possession of the estate; although it might be said that he seemed to have rejected possession who was unwilling to observe the formalities by which it could be acquired.

The former opinion, however, is the more equitable

§ 3.- Y ya si uno no hiciera la colación en virtud de esta estipulación, ya si hubiere obrado con dolo para no hacer la colación, será condenado en tanta cantidad cuanta valiere la cosa,

6.- CELSO; *Digesto, libro X*.- Se pregunta, si la dote que dio el abuelo paterno deberá ser devuelta al padre después de la muerte del abuelo habiendo fallecido la hija durante el matrimonio. La equidad del caso consiste en que lo que mi padre dio por mi causa en nombre de mi hija sea considerado como si yo mismo lo hubiere dado, porque el deber del abuelo respecto a la nieta depende del deber del padre respecto al hijo, y por la razón que el padre a la hija, debe el abuelo darle dote a la nieta por causa del hijo. ¿Qué se dirá si el hijo fue desheredado por el padre? Opino que no absurdamente se puede defender lo mismo también en cuanto al hijo desheredado; y no necesita indulgencia el parecer de que a lo menos tenga de los bienes paternos lo que se dió por causa de él.

7.- EL MISMO; *Digesto, libro XIII*.- Si los nietos sucedieron en el lugar de un hijo, se les debe llevar a colación una sola porción, así como tienen una sola parte de la posesión de los bienes; pero también ellos mismos deben llevar a colación, así como si todos fuesen uno solo.

8.- PAPINIANO; *Cuestiones, libro III*.- A veces el Pretor no repele al que varía de opinión, y no desprecia al que cambia de propósito. Por lo cual algunos opinaron que el hijo emancipado, que no quiso dar a sus hermanos caución de llevar a colación los bienes, ha de ser oído después, si quisiera utilizar, habiendo ofrecido la caución, el beneficio de la posesión de los bienes; sin embargo, se puede responder, que parece que repudió la posesión el que no quiso conservar la forma de la posesión.

Pero es mas equitativa la opinión contraria, princi-

de bonis parentis inter fratres disputetur. Quem tamen facilius admittendum existimo, si intra tempus delatae possessionis cautionem offerat: nam post annum, quam delata esset bonorum possessio, voluntariam moram cautionis admittere difficilius estado

9.- IDEM; *libro V, Responsorum*.- Filius emancipatus intestati patris bonorum possessionem accepit. Nepos ex eodem in familia retentus semissem hereditatis quum emolumento collationis habebit. Idem nepos si postea possessionem intestati patris accipiat, fratri post emancipationem patris quaesito et in familia retento bona sua conferre cogetur.

10.- SCAEVOLA; *libro V, Quaestionum*.- Si filius in potestate heres institutus adeat et emancipato petente bonorum possessionem contra tabulas ipse non petat, nec conferendum est ei: et ita edictum se habet. Scaevola: sed magis sentio, ut, quemadmodum pro parte hereditatem retinet iure eo, quod bonorum possessionem petere posset, ita et conferri ei debeat, utique quum iniuriam per bonorum possessionem patiatur.

11.- PAULUS; *libro XI, Responsorum*.- Paulus respondit ea, quae post mortem patris filio reddi debuerunt, emancipatum filium, quamvis prius consecutus sit quam deberentur, fratri qui in potestate patris relictus est conferre non debere, quum post mortem patris non tam ex donatione, quam ex causa debiti ea possidere videatur.

one, especially where a dispute arises among brothers with reference to their father's estate; and I think that the emancipated son should be permitted to obtain possession, if, in the time prescribed for doing so, he offers to give security; for it will be more difficult to excuse voluntary delay in giving security after the lapse of a year, within which time praetorian possession of an estate can be granted.

9.- THE SAME; *Opinions, Book V*.- An emancipated son obtained praetorian possession of the estate of his intestate father. The grandson by the said son, who remained in the family, will be entitled to half of the estate, together with the benefit of collation. If the same grandson should afterwards obtain praetorian possession of the estate of his intestate father, he will be obliged to place his property in the mass of the estate by way of collation with his brother, who was born after the emancipation of his father.

10.- SCAEVOLA; *Questions, Book V*.- If a son under the control of his father, after having been appointed his heir, enters upon his estate, and an emancipated son demands praetorian possession of the same contrary to the provisions of the will, and he himself does not do so, no contribution by way of collation should be made for his benefit; and it is so stated in the Edict. I think, however, that just as he can legally retain the estate in proportion to his share, because he can demand praetorian possession of it, so, also, he certainly should contribute by way of collation for the benefit of his brother, as the latter suffers wrong through his obtaining praetorian possession.

11.- PAULUS; *Opinions, Book XI*.- Paulus gives it as his opinion that an emancipated son is not obliged to make collation of such property as should be transferred to him after the death of his father, for the benefit of his brother who was left under paternal control, even if he obtained the said property before he was entitled to it; as he is held to have had possession of the same after the death of his father, not so much by virtue of the donation, as on account of the debt.

palmente cuando entre hermanos se dispute sobre los bienes de un ascendiente; pero opino que aquél ha de ser admitido más fácilmente, si ofreciera la caución dentro del término de deferirse la posesión; porque después de un año que hubiese sido deferida la posesión de los bienes, es mas difícil admitir la voluntaria demora de la caución.

9.- EL MISMO; *Respuestas, libro V*.- Un emancipado recibió la posesión de los bienes de su padre intestado; el nieto habido del mismo, retenido en la familia, tendrá la mitad de la herencia con el beneficio de la colación. El mismo nieto, si después recibiera la posesión de los bienes del padre intestado, será obligado a llevar a colación sus propios bienes para el hermano nacido después de la emancipación del padre y retenido en la familia.

10.- SCÉVOLA; *Cuestiones, libro V*.- Si instituido heredero el hijo que se halla bajo potestad adiese la herencia, y pidiendo uno emancipado la posesión de los bienes contra el testamento él no la pidiera, no se ha de hacer colación para él; y así lo dice el Edicto. Pero yo más bien opino, que, así como retiene en parte la herencia por la razón de derecho de que podría pedir la posesión de los bienes, así también se debe hacer colación para él; a la verdad, cuando sufra perjuicio por la posesión de los bienes.

11.- PAULO; *Respuestas, libro XI*.- Paulo respondió, que aquellas cosas, que se le debieron devolver al hijo después de la muerte del padre, no las debe llevar a colación el hijo emancipado, aunque las haya obtenido antes que se le debieran al hermano que fue dejado bajo la potestad del padre, porque se considera que después de la muerte del padre las posee no tanto en virtud de donación, como por causa de deuda.

12.- IDEM; *libro XLI, ad Edictum*.- Si praegnantem quis uxorem reliquerit et ea ventris nomine in possessionem missa fuerit, interim cessat collatio: nam antequam nascatur, non potest dici in potestate morientis fuisse: sed nato conferetur.

TITULO VII

DE DOTIS COLLATIONE

1.- ULPIANUS; *libro XL, ad Edictum*.- Quamquam ita demum ad collationem dotis praetor cogat filiam, si petat bonorum possessionem, attamen etsi non petat, conferre debet, si modo se bonis paternis misceat. Et hoc Divus Pius Ulpio Adriano rescipit etiam eam, quae non petierit bonorum possessionem, ad collationem dotis per arbitrum familiae heriscundae posse compelli.

§ 1.- Si in stipulatum deducta sit dos, si quidem ipsa mulier stipulata sit vel ipsi negotium gestum, aequae conferre cogetur: Si vero alii quaesita est stipulatio, dicendum est cessare collationem. Etsi tantum promissa sit dos, collatio eius fiet.

§ 2.- Si sit nepos et neptis ex eodem filio et dotata sit neptis, sit et filius non pater eorum: neptis omnem dotem soli fratri collatura est. Emancipata autem neptis dotem et bona sua soli nepoti, non etiam patruo conferet.

12.- THE SAME; *On the Edict, Book XLI*.- Where anyone leaves a wife who is pregnant, and she obtains praetorian possession in the name of her unborn child, collation is suspended for a time; for before the child was born it could not be said to have been under the control of the deceased; but after it is born, collation must be made.

TITLE VII

CONCERNING COLLATION OF THE DOWRY

1.- ULPIANUS; *On the Edict, Book XL*.- Although the Praetor only compels a daughter to make collation of her dowry where she demands possession of the estate under the Edict; still if she does not do so she should make collation, provided she meddles with the estate of her father. This was stated by the Divine Pius in a Rescript addressed to Ulpian; for, according to it, a woman who does not demand praetorian possession of an estate can be compelled to contribute her dowry in collation by means of an action in partition brought by her coheirs.

§ 1.- Where a dowry has been provided for under an agreement, and the woman herself has stipulated for it, or someone has done so who has charge of her business, she can also be compelled to place it in the mass of the estate. If, however, the stipulation was solicited by another, it must be said that collation need not be made, and where the dowry was merely promised, collation of the same ought to take place.

§ 2.- Where there is a grandson, as well as a granddaughter by the same son, and the granddaughter was endowed, and there was another son who was not the father of the said children, the granddaughter must place her dowry in collation for the benefit of her brother alone. Moreover, if the granddaughter should be emancipated, she must place her dowry and her property in the mass of the estate for the benefit of her brother alone, and not for that of her uncle.

12.- EL MISMO; *Comentarios al Edicto, Libro XLI*.- Si alguno hubiere dejado embarazada a su mujer y ésta hubiere sido puesta en posesión en nombre del feto, no tiene lugar entretanto la colación, porque antes que nazca no se puede decir que estuvo bajo la potestad del que fallece, pero se hará la colación en naciendo.

TÍTULO VII

DE LA COLACIÓN DE LA DOTE

1.- ULPIANO; *Comentarios al Edicto, libro XL*.- Aunque el Pretor obligue a la hija a la colación de la dote solamente si pidiera la posesión de los bienes, sin embargo, también si no la pidiera, deberá colacionar aquélla, si se inmiscuyera en los bienes paternos; y el Divino Pio respondió por rescripto a Ulpio Adriano esto, que también la que no hubiere pedido la posesión de los bienes puede ser compelida por el árbitro de la partición de la herencia a la colación de la dote.

§ 1.- Si la dote fue comprendida en estipulación, ya si la misma mujer estipuló, ya si se gestionó negocio para ella, será igualmente obligada a llevarla a colación; pero si la estipulación fue hecha para otro, se ha de decir, que deja de tener lugar la colación; y si solamente hubiera sido prometida la dote, se hará su colación.

§ 2.- Si hubiera un nieto y una nieta habidos del mismo hijo, y la nieta hubiere sido dotada, y hubiera un hijo que no fuera el padre de ellos, la nieta ha de llevar a colación para su sólo hermano toda la dote; pero la nieta emancipada llevará a colación la dote y sus propios bienes al nieto solo, no también al tío paterno.

§ 3.- Sed si sit neptis sola, non etiam nepos ex eodem, tunc confertur patruo itemque nepoti vel nepti ex alio.

§ 4.- Sed et si duae neptes sint ex diversis filiis, conferent et invicem et patruo, si ex eodem patre, tantum invicem conferent.

§ 5.- Quum dos confertur, impensarum necessariarum fit detractio, ceterarum non.

§ 6.- Quod si iam factum divortium est et maritus non sit solvendo, non debet integra dos computari mulieri, sed id quod ad mulierem potest pervenire, hoc est quod facere maritus potest.

§ 7.- Si sub condicione pater vel extraneus dotem promiserit, cautione opus erit, ut tunc conferat mulier dotem, cum dotata esse coeperit.

§ 8.- Filiam, quae ab intestato patri heres sit, conferre quidem dotem oportet: consequens autem est, ut ex pollicitatione dotis pro parte dimidia fratrem suum liberet: aequius enim est in solidum de suo eam dotatam esse.

§ 9.- Si emancipatus filius, qui contra tabulas bonorum possessionem accepit, filiam dotatam habeat, non debet dotem eius conferre, quia in bonis eius non est.

2.- GAIUS; *libro XIV, ad Edictum provinciale*.- Filia in adoptionem data et heres instituta debet sic ut emancipata non solum bona sua, sed et dotem, quae ad eam pertinere poterit, conferre. Si adhuc pater adoptivus vivit, hic necesse habebit conferre.

§ 3.- Where, however, there is only a granddaughter, and no grandson by the same father, then collation must be made for the benefit of the paternal uncle, as well as for that of cousins of either sex.

§ 4.- Where there are two granddaughters by different sons, they contribute in collation reciprocally, and for the benefit of their uncle; if they have the same father, they only contribute reciprocally.

§ 5.- Where a dowry is placed in the mass of an estate, a deduction of necessary expenses, but of no others, is made.

§ 6.- If a divorce has taken place, and the husband is insolvent, the wife is not compelled to account for her entire dowry, but only as much of it as can come into her hands; that is, as much as her husband is able to pay.

§ 7.- If, however, the father or a stranger has promised a dowry under a condition, a bond must be given; and then the woman can make collation of her dowry as soon as she is endowed.

§ 8.- A daughter who is the heir at law of her father must also contribute her dowry, and the result will be that where the dowry is promised she will release her brother from half the obligation; for it is more just that she should be endowed out of her own property.

§ 9.- Where an emancipated son, who has obtained praetorian possession of the estate in opposition to the terms of the will, has a daughter who has been endowed by someone else, he will not be obliged to place her dowry in the mass of the estate, because it does not constitute any part of his property.

2.- GAIUS; *On the Provincial Edict, Book XIV*.- A daughter who has been given in adoption and appointed heir must, in the same manner as an emancipated daughter, contribute for collation her private property, as well as the dowry which she may have received. If her adoptive father should still be

§ 3.- Pero si hubiera una nieta sola, no también un nieto habido del mismo hijo, entonces se hace colación para el tío paterno, y también para el nieto o la nieta habidos de otro.

§ 4.- Mas también si hubiera dos nietas nacidas de diversos hijos, colacionarán entre sí, y con el tío paterno; y si del mismo padre, colacionarán solamente entre ellas.

§ 5.- Cuando se lleva a colación la dote se hace deducción de los gastos necesarios, no de los demás.

§ 6.- Pero si ya se hizo el divorcio, y el marido no fuera solvente, no se le deberá computar íntegra la dote a la mujer, sino lo que puede ir a poder de la mujer, esto es, lo que el marido puede satisfacer.

§ 7.- Mas si el padre o un extraño hubiere prometido la dote bajo condición, habrá necesidad de caución, para que la mujer lleve a colación la dote cuando hubiere comenzado a estar dotada.

§ 8.- Conviene ciertamente, que la hija, que abintestato se hace heredera del padre, lleve a colación la dote, pero es consiguiente, que en virtud de la promesa de la dote libre de la mitad a su hermano; porque es más equitativo que ella esté dotada por completo con lo suyo.

§ 9.- Si el hijo emancipado, que obtuvo la posesión de los bienes contra el testamento, tiene una hija dotada, no debe colacionar la dote de ella, porque no está comprendida en sus bienes.

2.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- La hija dada en adopción e instituida heredera debe, como la emancipada, llevar a colación no solamente sus bienes, sino también la dote, que pudiere corresponderle; si el padre adoptivo vive todavía, tendrá él necesidad de llevarla a colación.

3.- ULPIANUS; *libro IV, Disputationum*.- Si filia fuerit heres instituta, collatione dotis non fungetur. unde si commissio ab altero Edicto necesse habuerit contra tabulas bonorum possessionem accipere, dicendum est, quoniam nullam iniuriam fratri facit, non debere eam dotem conferre: nam quod habuit ex iudicio, convertitur ad contra tabulas bonorum possessionem.

Plane si ex minore parte fuit heres instituta et alia quaedam in eam contulit contra tabulas bonorum possessio aucta portione eius, dicendum erit collationis munere eam fungi, nisi forte contenta fuerit portione, ex qua instituta est: tunc enim dicendum est ex iudicio parentis eam venientem non debere munus collationis sustinere.

4.- POMPONIUS, *libro III, ad Quintum Mucium*.- Si pater pro filia dotem promiserit, deinde exheredatae, vel etiam emancipatae et praeteritae legatum dederit, habebit filia etiam dotem praecipuam et legatuin.

5.- PAPINIANUS; *libro V, Responsorum*.- Filius emancipatus, qui possessionem contra tabulas accipere potuit, intestati patris possessionem accepit: atque ita filia, quae mansit in potestate, quum eiusdem familiae fratre heres instituta, possessionem intestati patris errorem fratris emancipati secuta accepit. Dotem scripto fratri conferre non cogetur, quum ea possessio frustra petita sit et filia patris voluntatem fini virilis partis retineat, id est ut omnes trientes habeant et bonorum possessio unde liberi fingatur pro contra tabulas esse petita.

living, it will be necessary for him to make the collation.

3.- ULPIANUS; *Disputations, Book IV*.- If a daughter should be appointed heir, she will not be required' to place her dowry in the mass of the estate. Therefore, if another child has taken advantage of the Edict, she also must obtain possession of the estate in opposition to the terms of the will, for since she commits no wrong against her brother, she need not contribute her dowry, as what she obtained by the will is changed into what she would obtain through praetorian possession of the estate, contrary to its provisions.

It is clear that, if she was appointed heir to a smaller portion of the estate than her legal share, and she obtained something else through the praetorian possession, as her share is increased thereby, she will be obliged to contribute for collation, unless she remains content with the share which was left her. For then it must be held that she will not be obliged to perform the duty of collation, as she acquired the property by the will of her father.

4.- POMPONIUS; *On Quintus Mucius, Book III*.- Where a father promised a dowry for his daughter whom he afterwards disinherited, or if he bequeathed her a legacy after she had been emancipated, and passed her over in his will, she will be entitled to the dowry as a preferred legacy, as well as to the legacy.

5.- PAPINIANUS; *Opinions, Book V*.- An emancipated son, who could have obtained praetorian possession contrary to the provisions of the will, acquired possession of the estate of his father, under the Edict, on the ground of intestacy. A daughter also, who remained under parental control, having been appointed heir along with a brother of the same family, repeated the error of her emancipated brother, and obtained possession under the Edict on the ground of intestacy. She will not be obliged to contribute her dowry by way of collation for the benefit of her brother, who was appointed heir; as the praetorian possession which she claimed was of no force or effect, and she will retain her entire

3.- ULPIANO; *Disputas, libro IV*.- Si la hija hubiere sido instituida heredera, no hará colación de la dote; por lo que si habiéndose dado por otro lugar al Edicto hubiere tenido necesidad de recibir la posesión de los bienes contra el testamento, se ha de decir, que puesto que no causa ningún perjuicio al hermano, no debe ella colacionar la dote; porque lo que tuvo en virtud del testamento se convierte en la posesión de los bienes contra el testamento.

Mas si fue instituida heredera en una parte menor, y la posesión de los bienes contra el testamento le dió algunas otras cosas, aumentada su porción, se habrá de decir, que ella soporta la carga de la colación, a no ser acaso que se hubiere contentado con la porción en que fue instituida; porque entonces se ha de decir, que concurriendo ella por voluntad del ascendiente no debe soportar la carga de la colación.

4.- POMPONIO; *Comentarios a Quinto Mucio, libro III*.- Si el padre hubiere prometido la dote por la hija, y después le hubiere dado un legado habiéndola desheredado, o aun habiéndola emancipado y preterido, la hija tendrá además de la dote preferente también el legado.

5.- PAPINIANO; *Respuestas, libro V*.- Un hijo emancipado, que pudo obtener la posesión contra el testamento, recibió la posesión de los bienes del padre intestado, y de este modo la hija, que permaneció bajo potestad, instituida heredera con un hermano de la misma familia, obtuvo la posesión de los bienes del padre intestado, habiendo seguido el error del hermano emancipado; no será obligada a llevarle a colación la dote al hermano instituido, porque en vano haya sido pedida esta posesión, y retenga la hija del hermano la disposición hasta el límite de la porción viril, esto es, para que todos tengan una tercera parte, y se suponga que se pidió la posesión de los bienes «Unde liberi» en lugar de la

§ 1.- Filia, quae soluto matrimonio dotem conferre debuit, moram collationi fecit: viri boni arbitratu cogetur usuras quoque dotis conferre, quum emancipatus frater etiam fructus conferat et filia partis suae fructus percipiat.

6.- IDEM; *libro VI, Responsorum*.- Pater filium emancipatum heredem instituit et filiam exheredavit, quae inofficiosi lite perlata partem dimidiam hereditatis abstulit. Non esse fratrem bona propria conferre cogendum respondi: nam et libertates competere placuit:

7.- PAULUS; *libro XI, Responsorum*.- Nec ipsa dotem fratribus suis conferet, cum diverso iure fratres sunt heredes.

8.- PAPINIANUS; *libro XI, Responsorum*.- Pater nubenti filiae quasdam res praeter dotem dedit eamque in familia retinuit ac fratribus sub condicione, si dotem et cetera quae nubenti tradidit contulisset, coheredem adscripsit. Quum filia se bonis abstinuisset, fratribus res non in dotem datas vindicantibus exceptionem doli placuit obstare, quoniam pater filiam alterutrum habere voluit.

9.- TRYPHONINUS; *libro VI, Disputationum*.- Fuit quaestionis, an, si sua heres filia patri cum fratribus contenta dote abstineat se bonis, compellatur eam conferre. Et divus marcus rescripsit

share of the estate under the will of her father; that is to say, each of the three children will have a third, and it will be presumed that the praetorian possession of the estate contrary to the provisions of the will, designated unde liberi, was demanded.

§ 1.- A daughter, who was obliged to contribute her dowry after the dissolution of her marriage, delayed doing so. She will be obliged to pay interest on the dowry in accordance with the judgment of a good citizen, since her emancipated brother must also place his income in collation, and she has received the income of her share.

6.- THE SAME; *Opinions, Book VI*.- A father appointed his emancipated son his heir, and disinherited his daughter, who, having brought an action to declare the will inofficious, recovered half of the estate. I gave it as my opinion that her brother should not be compelled to place his own property in the mass of the estate; for it has been established that under such circumstances even bequests of freedom are valid.

7.- PAULUS; *Opinions, Book XI*.- Nor shall she contribute her dowry for the benefit of her brothers, as the latter are heirs under a different right than hers.

8.- PAPINIANUS *Opinions, Book XI*.- A father gave his daughter, at the time of her marriage, certain property in addition to her dowry, retained her under his control, and appointed her co-heir with her brothers, subject to the condition that she would contribute her dowry, and any other property which he had given her when she was married, by way of collation. As the daughter did not accept the estate, it was held that she could interpose an exception, on the ground of bad faith, against her brothers who brought an action to recover the property not included in the dowry, for the reason that her father intended that she should have one or the other of these.

9.- TRYPHONINUS; *Disputations, Book VI*.- The question was raised whether a daughter who, along with her brothers, was a proper heir of her father and, being content with her dowry, refused to accept the

que contra el testamento.

§ 1.- La hija, que disuelto su matrimonio debió colacionar la dote, fue morosa para la colación; será obligada a arbitrio de hombre bueno a llevar a colación también los intereses de la dote, puesto que el hermano emancipado también colaciona los frutos, y la hija percibe los frutos de su parte.

6.- EL MISMO; *Respuestas, libro VI*.- Un padre instituyó heredero a un hijo emancipado y desheredó a una hija, que habiendo promovido la querella de inoficioso, retiró la mitad de la herencia; respondí, que no ha de ser obligado el hermano a colacionar sus propios bienes, porque se determinó que competiesen también las libertades.

7.- PAULO; *Respuestas, libro XI*.- Y ella no les llevará a colación a sus hermanos la dote, porque los hermanos son herederos por distinto derecho.

8.- PAPINIANO; *Respuestas, libro XI*.- Un padre al casarse su hija le dió además de la dote algunas cosas, y la retuvo en la familia, y la instituyó coheredera de sus hermanos bajo la condición de que les llevase a colación la dote y lo demás que al casarse le entregó; habiéndose abstenido de la herencia la hija, se determinó que a sus hermanos que reivindicasen los bienes no dados en dote les obstase la excepción de dolo, porque el padre quiso que la hija tuviese una y otra cosa.

9.- TRIFONINO; *Disputas, libro VI*.- Hubo cuestión sobre si una hija heredera suya del padre sería compelida, si contenta con la dote se abstuviera de la herencia, a llevar aquélla a colación. Y res-

non compelli abstinenter se ab hereditate patris. Ergo non tantum data apud maritum remanebit, sed et promissa exigitur etiam a fratribus et est aeris alieni loco: abscessit enim a bonis patris.

TIT. VIII

DE CONIUNGENDIS CUM EMANCIPATO
LIBERIS EIUS

1.- ULPIANUS; *libro XL, ad Edictum*.- Si quis ex his, quibus bonorum possessionem Praetor pollicetur, in potestate parentis, quum is moritur, non fuerit, ei liberisque quos in eiusdem familia habuit, si ad eos hereditas suo nomine pertinebit neque notam exheredationis meruerunt, bonorum possessio eius partis datur, quae ad eum pertineret, si in potestate permansisset, ita ut ex ea parte dimidiam, reliquam liberi eius hisque dumtaxat bona sua conferat.

§ 1.- Hoc edictum aequissimum est, ut neque emancipatus solus veniat et excludat nepotes in potestate manentes, neque nepotes iure potestatis obiciantur patri suo.

§ 2.- Et in adoptionem datus filius et heres institutus ad hoc edictum pertinet, ut ei iungatur nepos, qui in avi sui naturalis potestate est. iungitur autem nepos patri suo emancipato, sive pater praeteritus sit sive institutus. Et haec erit differentia inter in adoptionem datum et emancipatum, quod in adoptionem quidem dato non alias iungitur nisi instituto et alio committente edictum, emancipato

estate, could be compelled to place it in collation. The Divine Marcus stated in a Rescript that, if she did not accept her father's estate, she could not be forced to do so. Therefore, the dowry which was given will not only remain in the hands of the husband, but also, if it has been promised it can be collected from her brothers, and is considered a debt, as it is no longer included in the estate of the father.

TITLE VIII

CONCERNING THE CONTRIBUTION TO BE
MADE BETWEEN AN EMANCIPATED SON
AND HIS CHILDREN

1.- ULPIANUS; *On the Edict, Book XL*.- Where anyone of those to whom the Praetor promises the possession of an estate is not under paternal control at the time of the death of his father, and he has children forming part of the family of the testator, and the estate will belong to them in their own right, and they have not been disinherited, possession of his share of the estate which would have belonged to him if he had remained under the control of his father is given him by the Praetor, in such a way that his share will be divided into two parts, one of which will belong to him, and the other to his children, and he will be compelled to place his own property in collation for their benefit alone.

§ 1.- This Section of the Edict is perfectly equitable, as it provides that the emancipated son cannot alone obtain the estate, and thereby exclude the grandsons remaining under paternal control, and the grandsons cannot interfere with their father on the ground that they themselves were under the control of the testator.

§ 2.- The case where a son is given in adoption, and a grandson, who is under the control of his natural grandfather, is joined with him in the succession, is also referred to in this Section of the Edict. Moreover, the grandson is joined with his emancipated father, whether his father was passed over, or was appointed an heir. There is this difference, however, between a son given in adoption and one who is emancipated,

pondió por rescripto el Divino Marco, que no es compeliada la que se abstiene de la herencia del padre; luego no solamente permanecerá en poder del marido la dada, sino que se les exigirá también a los hermanos la prometida; y está en calidad de deuda, porque se separó de los bienes del padre.

TÍTULO VIII

DE QUE SE HAYAN DE UNIR CON EL
EMANCIPADO SUS HIJOS

1.- ULPIANO; *Comentarios al Edicto. libro XL*.- Si alguno de aquellos a quienes promete el Pretor la posesión de los bienes no hubiere estado bajo la potestad del ascendiente, cuando éste muera, se les da a éste y a los hijos, que tuvo en la familia del mismo, si en su propio nombre les perteneciere la herencia, y no merecieron nota de desheredación, la posesión de los bienes de la parte que le pertenecería, si hubiese permanecido bajo potestad, de suerte que tenga de esta parte la mitad, y sus hijos la otra mitad, y lleve a colación solamente para éstos sus propios bienes.

§ 1.- Este Edicto es muy justo, para que ni concurra solo el emancipado, y excluya a los nietos que permanecen bajo la potestad, ni se opongan a su padre los nietos por el derecho de potestad.

§ 2.- También se comprende en este Edicto el hijo dado en adopción e instituido heredero, para que se le una el nieto que está bajo la potestad de su abuelo natural; mas se une el nieto a su padre emancipado, ora haya sido preterido, ora instituido el padre. Y habrá esta diferencia entre el dado en adopción y el emancipado, que ciertamente no se une de otra suerte con el dado en adopción, sino habiendo sido insti-

autem, sive sit institutus emancipatus sive sit praeteritus.

§ 3.- Filio in potestate ex besse, emancipato ex triente herede instituto Iulianus ait nepotem praeteritum petita contra tabulas bonorum possessione patruo sextantem, patri unciam ablaturum.

§ 4.- Si pater emancipatus exheredatus sit nepotibus ex eo praeteritis qui erant in potestate retenti, nepotes admittuntur: absurdum enim est, quum patri praeterito iungantur, instituto eo vel exheredato non admitti.

§ 5.- Sed et si patruus eorum, qui erat in potestate, sit praeteritus, pater exheredatus, debent nepotes admitti: nam exheredatus pater eorum pro mortuo habetur.

§ 6.- Si pater in potestate manens exheredatus vel institutus sit, nepotem ex eo sive in potestate manentem sive emancipatum ad bona avi neque vocari neque vocandum esse Scaevola ait: totiens enim nepoti consulendum est, quotiens in potestate retentus est patre emancipato. Liberos igitur in familia esse oportet, ut huic Edicto locus sit, eius scilicet familia, cuius bonorum possessio petitur. Sed et si postumus natus sit ex emancipato ante emancipationem conceptus, idem erit dicendum.

namely: the grandson is not joined with the one given in adoption unless he has been appointed an heir, and a third part is responsible for the Edict taking effect; but he is joined with an emancipated son, whether the latter was appointed an heir or passed over in the will.

§ 3.- Julianus says that, where a son under paternal control is appointed an heir to two-thirds of the estate, and an emancipated son to one-third, if the grandson who has been passed over should obtain praetorian possession contrary to the provisions of the will, he will take from his uncle one-sixth, and from his father one-twelfth of the estate.

§ 4.- If the emancipated father should be disinherited, and his children, the grandsons of the testator under paternal control, should be passed over, the said grandsons will be permitted to obtain praetorian possession; for it is absurd that, as they were joined with their father, and he was passed over in the will, they should not be admitted to praetorian possession, when their father has either been appointed an heir, or disinherited.

§ 5.- If the uncle of the said grandchildren, who was under parental control, was passed over in the will, and their father should be disinherited, the said grandsons must be permitted to obtain praetorian possession, as their father, having been disinherited, is considered as dead.

§ 6.- Scaevola says that if a father, who remains under paternal control, is either disinherited or appointed an heir, a son born to him, whether he remains subject to paternal authority or has been emancipated, cannot, and should not be called to the succession of his grandfather; for the Praetor only provides for a grandson as long as he is retained under the control of the testator, his father having been emancipated. Therefore, for this Section of the Edict to be applicable, children must remain in the family, that is to say, that family the possession of whose estate is demanded. If, however, a posthumous child, having been conceived before his emancipation, should be born to the emancipated son, the same rule must be held to apply.

tuido y dándose lugar por otro al Edicto, pero con el emancipado, ora haya sido instituido el emancipado, ora haya sido preterido.

§ 3.- Instituido heredero de dos tercios un hijo que estaba bajo potestad, y en un tercio otro emancipado, dice Juliano, que pedida la posesión de los bienes contra el testamento, el nieto preterido le habrá de quitar a su tío paterno una sexta parte, y a su padre una dozava, de la herencia.

§ 4.- Si el padre emancipado hubiera sido desheredado habiendo sido preteridos los nietos habidos de él, que habían sido retenidos bajo potestad, son admitidos los nietos; porque es absurdo que juntándose con el padre preterido no sean admitidos, habiendo sido éste instituido o desheredado.

§ 5.- Pero también deben ser admitidos los nietos, si hubiera sido preterido el tío paterno de ellos, que estaban bajo potestad, y desheredado el padre; porque desheredado su padre es considerado como fallecido.

§ 6.- Si hubiera sido desheredado o instituido el padre que permanece bajo potestad, dice Scévola que el nieto habido de él, ora si permanece bajo potestad, ora si fue emancipado, no es, ni debe ser llamado a los bienes del abuelo; porque se ha de mirar por el nieto siempre y cuándo fue retenido bajo potestad habiendo sido emancipado el padre. Así, pues, deben estar en la familia los hijos para que haya lugar a este Edicto, por supuesto, en la familia de aquél cuya posesión de bienes se pide. Pero se habrá de decir lo mismo, también si del emancipado hubiera nacido un póstumo, concebido antes de la emancipación.

§ 7.- Liberos autem non omnes simul vocat praetor, sed gradatim, hoc est eos, qui sui sunt, scilicet nepotes, si sunt, si minus, eos qui sunt inferioris gradus: nec eos miscebimus. Plane si sint ex emancipato nepos et ex nepote eius alio pronepos, dicendum erit utrumque ei iungi: ambo enim in suorum loco successerunt.

§ 8.- Si postliminio nepos redierit, dicendum est eum patri emancipato coniungi.

§ 9.- Si pater ex duobus filiis, quos in potestate habuit, alterum emancipaverit et nepotem ex eo in locum filii adoptaverit et praeterito emancipato decesserit: Iulianus ait nepoti in locum filii adoptato succurri oportere, ut quasi filius portionem habeat, quam haberet et si extraneus adoptatus esset. Sic fiet, inquit, ut filius, qui in potestate fuit, tertiam partem, nepos in locum filii adoptatus aliam tertiam emancipatus filius quum nepote altero retento in potestate partiatur: nec enim minus debet ferre nepos in locum filii adoptatus, quam si ab extraneo esset adoptatus.

§ 10.- Illud non interest, quota portio hereditatis ad nepotem pertineat, an perquam modicam: nam et si modica sit, attamen dicemus locum esse huic parti edicti.

§ 11.- Inter ipsum filium et liberos eius dividitur hereditas ita, ut ipse dimidium, liberi dimidium habeant. Proinde pone solum esse filium emancipatum, esse et nepotes in potestate duos, neminem praeterea ex liberis: habebit emancipatus dimidiam partem hereditatis et aliam dimidiam duo nepotes, ut quadrantes ferant. Sed si sit praeterea alius filius, eveniet, ut filius habeat dimidiam partem hereditatis, ex quo nepotes non sunt, alius filius semissem quum

§ 7.- The Praetor does not call all the descendants to the succession indiscriminately, but according to their several degrees; that is to say, first the direct heirs, for instance, the grandsons, if there are any, and if there are none, those of a lower degree; but we must not mix them. It is clear that if a grandson is descended from an emancipated son, and a great-grandson from another grandson, it must be said that both of them should be joined, for both have succeeded to the place of direct heirs.

§ 8.- If a grandson should return under the law of postliminium, it must be held that he should be joined with his emancipated father.

§ 9.- If a father should emancipate one of his two sons, both of whom he has under his control, and adopt a grandson by one of them, instead of his son, and, having passed over his emancipated son in his will, should die, Julianus says that relief must be granted the grandson who was adopted instead of the son, so that, in the capacity of son, he will have that share of the estate to which a stranger would have been entitled if he had been adopted by the testator. He says that the result will be that the son under paternal control will be entitled to a third part of the estate; the grandson adopted instead of the son will be entitled to another third; and the emancipated son will divide the remaining third with the other grandson remaining under the control of the testator.

§ 10.- It makes no difference to what portion of the estate the grandson may be entitled, or even if it is very small; for in case it is insignificant, we still hold that there will be ground for the application of this Section of the Edict.

§ 11.- The estate is divided between the son and his children so that he will obtain one-half, and they the other. Hence, if you suppose that there is only one son emancipated, and two grandsons remaining under paternal control, and that there are no other descendants besides these, the emancipated son will be entitled to half of the estate, and the two grandsons to the other half, after dividing it into fourths. If there should happen to be another son from whom no

§ 7.- Mas el Pretor no llama simultáneamente a todos los descendientes, sino por grados, esto es, a los que son herederos suyos, a saber, a los nietos, si los hay, y si no, a los que son de grado inferior; y no los mezclaremos; mas si hubiera un nieto nacido del emancipado, y otro bisnieto nacido de su nieto, se habrá de decir que se le juntan uno y otro, porque ambos sucedieron en el lugar de herederos suyos.

§ 8.- Si el nieto hubiere vuelto por el derecho de postliminio, se ha de decir que es unido al padre emancipado.

§ 9.- Si de dos hijos que tuvo bajo su potestad hubiere el padre emancipado a uno, y hubiere adoptado en el lugar de hijo a un nieto habido de aquél, y falleciere habiendo preterido al emancipado, dice Juliano que es conveniente que se socorra al nieto adoptado en el lugar de hijo, para que como hijo tenga la porción que tendría aunque hubiese sido adoptado un extraño. Y así resultará, dice, que el hijo que permaneció bajo potestad tendrá la tercera parte, otra tercera parte el nieto adoptado en el lugar de hijo, y el hijo emancipado partirá con el otro nieto retenido bajo potestad; porque el nieto adoptado en el lugar de hijo no debe percibir menos que si hubiese sido adoptado por un extraño.

§ 10.- Y no importa que al nieto le pertenezca una cuarta parte de la herencia, u otra muy pequeña; porque aunque sea módica, diremos, sin embargo, que tiene lugar esta parte del Edicto.

§ 11.- La herencia se divide entre el mismo hijo y sus descendientes, de modo que él tenga la mitad y los descendientes la otra mitad. Por lo cual, supón que hay un solo hijo emancipado, y dos nietos bajo potestad, y ningún otro descendiente; el emancipado tendrá la mitad de la herencia. y la otra mitad los dos nietos, de suerte que perciban cuartas partes. Pero si además hubiera otro hijo, sucederá que el hijo de quien no hay nietos tendrá la mitad de la herencia, y

filiis suis ita, ut quadrantem hereditatis ipse ferat, quadrans inter liberos eius dividatur. Sed si ambo filii sint emancipati et habeant singuli nepotes, eveniet, ut singuli singulos semisses quum nepotibus suis dividant ita, ut ipsi quidem quadrantes ferant, nepotes autem residuos quadrantes: et si alter duos filios, alter tres habeant, quadrans unus inter duos, alius inter tres dividitur.

§ 12.- Si quis ex nepotibus portionem suam omiserit, eveniet, ut non ad patrem eius, sed magis ad fratrem pertineat. Sed et si omnes nepotes omittant, patruo nihil adcreset, sed soli patri: quod et si pater omiserit, tunc patruo adcreset.

§ 13.- Emancipatus filius si quidem nepotes in avi potestate non habeat, fratribus suis conferet: sed si sint nepotes, voluit eum praetor filiis suis qui sunt in potestate solis conferre, merito, quia veniendo ad bonorum possessionem illis solis iniuriam facit.

§ 14.- Nunc videamus, quantum eis conferat. Et quidem semper, quum fratribus emancipatus confert, virilem sibi detrahit: utrum et in eo casu virilem detrahat, an vero, quia dimidiam partem habeat bonorum possessionis, dimidiam partem etiam bonorum suorum conferat? et puto dimidiam tantum bonorum eis partem conferre: nam et si alius emancipatus sit filius, alius in potestate retentus, filius emancipatus his duobus nepotibus unam partem tantum conferet et patruo eorum qui in potestate mansit unam partem dabit, tertiam ipse habebit: nec quod nepotibus confertur a patruo emancipato, ipsi patri conferent: hoc enim non de bonis avi, sed propter bona postea eis accessit.

grandsons have ascended, he will be entitled to half the estate, and the other son, along with his sons, to the other half, so that he himself will have a fourth of the estate, and the other fourth will be divided among his children. Where, however, both sons have been emancipated, and both of them have issue, the result will be that each must divide half of the estate with his children, so that they themselves will each have a fourth, and their children respectively the remaining fourth. If one of them has two sons, and the other three, one-fourth will be divided among the two, and the other among the three children.

§ 12.- Where one of the grandchildren refuses to accept his share of the estate, the result will be that his share will not belong to his father, but preferably to his brother. If, however, all the grandchildren refuse to accept their shares, none of them will accrue to the uncle, but to the father alone. If, however, their father should refuse them, then they will accrue to their uncle.

§ 13.- If an emancipated son has no children under the control of their grandfather, the testator must place his property in collation for the benefit of his brothers. If there are any grandchildren, the Praetor wishes him to make collation only for the benefit of those of his children who are under the control of their grandfather. This is reasonable, because by obtaining praetorian possession of the estate he prejudices only the rights of his children.

§ 14.- Now let us see how much he must contribute for their benefit. And, indeed, when the emancipated son makes collation for the benefit of his brothers, does he always deduct his own share for himself? And, in the above-mentioned instance, shall he deduct his entire share, or must only half of his own private property be placed in the mass of the estate, as he only is entitled to half of the share of what is obtained by praetorian possession? I think that he should contribute only half of his own private property for their benefit; but even if one son has been emancipated, and the other remains under the control of the testator, the emancipated son will only contribute one share for the benefit of the two

el otro hijo la otra mitad junto con sus hijos, de suerte que él obtendrá la cuarta parte de la herencia y la otra cuarta parte se dividirá entre sus hijos. Mas si ambos hijos estuvieran emancipados y cada uno tuviera nietos, sucederá que cada uno dividirá con sus nietos su respectiva mitad, de suerte que ellos se llevarán cuartas partes, y los nietos las restantes cuartas partes. Y si uno tuviera dos hijos, y otro tres, una cuarta parte se divide entre los dos, y la otra entre los tres.

§ 12.- Si alguno de los nietos hubiere abandonado su parte, sucederá que no le pertenecerá a su padre, sino más bien a su hermano. Mas aunque todos los nietos la abandonasen, no le acrecerá nada al tío paterno, sino sólo al padre; pero si la hubiere abandonado el padre, entonces acrecerá al tío paterno.

§ 13.- El hijo emancipado, si verdaderamente no tuviera nietos bajo la potestad del abuelo, llevará a colación con sus hermanos; pero si hubiera nietos, quiso el Pretor que él llevase a colación solamente para sus hijos, que están bajo potestad; y con razón, porque viniendo a la posesión de los bienes a ellos solos les causa perjuicio.

§ 14.- Veamos ahora cuánto les llevará a colación; y a la verdad, siempre que el emancipado lleva a colación para los hermanos, retira para sí una porción viril. ¿Deducirá acaso la porción viril también en este caso, o puesto que tiene la mitad de la posesión de los bienes llevará a colación también la mitad de sus propios bienes? Y opino que les lleva a colación solamente la mitad de los bienes; porque aunque haya otro hijo emancipado, y otro esté retenido bajo potestad, el hijo emancipado llevará a colación para estos dos nietos solamente una parte, le dará otra parte al tío paterno de ellos, que permaneció bajo potestad, y él tendrá la tercera; y lo que se les lleva a colación a los nietos por el tío emancipado, no se lo

grandsons, and one-third for the benefit of the uncle of those retained under the power of the testator, and he himself will be entitled to the other third. For whatever is placed in collation for the grandsons by the emancipated uncle, they themselves will not place in collation for the benefit of their own father; for they do not obtain this from the estate of their grandfather, but it is done on account of property which they have subsequently received.

§ 15.- Eveniet igitur, ut pater emancipatus si centum in bonis habeat, quinquaginta sibi detrahat, residua quinquaginta omnibus nepotibus, id est filiis suis conferat, aut si unum nepotem habeat et duos ex alio pronepotes, ita dividat quinquaginta, ut nepos habeat viginti quinque, pronepotes ex alio una viginti quinque: nam et bonorum possessionis ambo unam partem habent.

§ 16.- Si sit filius in potestate, alius emancipatus, ex defuncto unus nepos in potestate, alius nepos emancipatus, eleganter scaevola tractat, patruus emancipatus quantum nepotibus, quantum fratri suo conferat. Et ait posse dici tres eum partes facere, unam sibi, unam fratri, unam istis collaturum: quamvis hi minus quam patruus ex hereditate avi concurrente patre sint habituri: quae sententia vera est.

§ 17.- Sed et si sint duo nepotes ex eodem filio hique emancipati sunt et ex altero eorum pronepos in potestate defuncti: partem habebit nepos unus, aliam nepos cum filio suo.

§ 18.- Sed et si nepos et ex alio nepote defuncto duo

§ 15.- Hence, the result will be that if the emancipated father has a hundred aurei among his property, he will retain fifty for himself, and give the remaining fifty in collation to all the grandchildren, that is to say, to his own children; or if he has one grandson, and two great-grandsons by another grandson, he must divide the fifty aurei so that the grandson may have twenty-five, and the great-grandsons twenty-five together; for both are entitled to only one share in the praetorian possession of the estate.

§ 16.- Scaevola ingeniously discusses the following question, namely: where there is one son under the control of his father, and another is emancipated, and a grandson of a deceased son under the control of the testator, and another grandson who has been emancipated, how much should the emancipated uncle place in collation for the benefit of his nephews, and how much for that of his brother? He says it can be held that the property ought to be divided into three shares, one of which he shall retain, one shall be placed in collation for the benefit of his brother, and one for that of his nephews, although the latter, if they share with their father in the estate of their grandfather, will have less than their uncle. This opinion is correct.

§ 17.- Even if there are two grandsons by the same son, and they are emancipated, and a great-grandson by one of them was under the control of the deceased, one grandson will have one share of the estate and the other grandson, together with his son, will be entitled to the other.

§ 18.- If there is a grandson, and two great-

llevarán ellos a colación al padre; porque esto no les va a ellos de los bienes del abuelo, sino después por causa de los bienes.

§ 15.- Sucederá, pues, que el padre emancipado, si tuviera ciento en sus bienes, detraerá para sí cincuenta, y llevará a colación los otros cincuenta para todos los nietos, esto es, para sus hijos, o si tuviera un solo nieto, y dos bisnietos nacidos de otro, dividirá los cincuenta de modo que el nieto tenga veinticinco, y veinticinco los bisnietos nacidos del otro solo; porque también tienen ambos una sola parte de la posesión de los bienes.

§ 16.- Si hubiera un hijo bajo potestad, y otro emancipado, un solo nieto bajo potestad, nacido del difunto, y otro nieto emancipado, examina discretamente Scévola cuánto llevará el tío paterno emancipado a colación para los nietos, y cuánto para su hermano; y dice, que se puede decir que él hace tres partes para llevar a colación, una para él, otra para el hermano, y otra para aquéllos, aunque éstos hayan de tener, concurriendo el padre, menos que el tío paterno en la herencia del abuelo; cuya opinión es verdadera.

§ 17.- Pero aunque haya dos nietos nacidos del mismo hijo, los cuales estén emancipados, y bajo la potestad del difunto un bisnieto nacido de uno de aquéllos, el nieto solo tendrá una parte, y la restante el nieto junto con su hijo.

§ 18.- Mas aun cuando hubiera un nieto, y dos

pronepotes: unus ex pronepotibus emancipatus soli fratri suo conferat vel, si frater non est, soli patruo, non etiam patruo maiori.

2.- PAULUS; *libro XLI, ad Edictum*.- Nihil in hac parte Edicti cavit Praetor, ut legata exceptis personis nepos praestet: sed potest superior sermo et ad hunc casum referri. Nam absurdum est patrem quidem eius legata praestare, ipsum vero plus habere, quum eadem condicione in eandem partem vocantur.

3.- MARCELLUS; *libro IX, Digestorum*.- Qui duos filios habebat, alterum ex his emancipavit, nepotem ex eo in potestate retinuit: emancipatus filium sustulit et a patre exheredatus est: quaero, quum frater eius et ipse emancipatus praeteritus sit et nepotes ex emancipato filio ab avo heredes instituti, quid de bonorum possessione iuris sit? Et quid intersit, si emancipatum quoque, ex quo nepotes erant nati, praeteritum esse ponamus. Respondi, si filium retento ex eo nepote emancipaverit et emancipatus procreaverit filium et heres uterque nepos institutus fuerit, pater eorum exheredatus, alius filius praeteritus: solus filius praeteritus bonorum possessionem contra tabulas petere poterit: exheredatus enim obstat filiis suis post emancipationem susceptis.

Nepoti tamen retento in potestate bonorum possessio dari debet, quoniam, si pater eius emancipatus praeteritus esset, simul quum eo bonorum possessionem accipere posset propter id caput edicti, quod a Iuliano introductum est, id est ex nova clausula, nec debet deterioris esse condicionis, quia pater eius exheredatus sit. Idque ei praeterito quoque praestari oportebit. Sed fratris eius, qui post

grandsons by another grandson who is dead, and one of the said great-grandsons has been emancipated, he will only make collation for the benefit of his brother, or if he has no brother, for the benefit of his uncle, and not for that of his great uncle.

2.- PAULUS; *On the Edict, Book XLI*.- In this section of the Edict the Praetor makes no provision with reference to legacies which the grandson shall pay to privileged persons. What has previously been said on this point is applicable here, for it is absurd that the father of the grandson should be obliged to pay such legacies, and that the grandson should have more, where, under the same circumstances, he is called to the same share under the Praetorian Law.

3.- MARCELLUS; *Digest, Book IX*.- A father who had two sons emancipated one of them, and retained his grandson by the latter under his control. The emancipated son himself had a son, who was disinherited by his father. I ask, if his brother and the emancipated son himself should be passed over in the will, and the grandsons of the emancipated son be appointed by the grandfather heirs to his estate, what would be the rule, in case of praetorian possession, and what difference would it make if we suppose that the emancipated son, from whom the grandsons were descended, should also be passed over in the will? I answered that if the testator should have emancipated his son, and retained the grandson by the latter under his control, and the emancipated son should have a son, and both grandsons should be appointed heirs, and their father be disinherited, and the other son passed over, the latter alone could demand praetorian possession in opposition to the terms of the will; for the disinherited son is an impediment in the way of his own children born after emancipation.

Praetorian possession should, however, be granted to the grandson remaining under the control of his grandfather; as, if his father, who had been emancipated, should be passed over in the will, he can obtain praetorian possession of the estate under that Section of the Edict which was introduced by Julianus; that is to say, under the new clause. Nor would he be in worse condition because his father

bisnietos habidos de otro nieto fallecido, el único emancipado de los bisnietos llevará a colación para su solo hermano, o si no hay hermano, para su solo tío paterno, no también para el hermano del abuelo paterno.

2.- PAULO; *Comentarios al Edicto, libro XLI*.- En esta parte del Edicto no dispuso nada el Pretor para que el nieto pague los legados a las personas exceptuadas. Pero se puede referir también a este caso la cláusula anterior; porque es absurdo que el padre pague ciertamente los legados de aquél, y que aquél tenga más, siendo llamados con la misma condición a la misma parte.

3.- MARCELO; *Digesto, libro IX*.- Uno que tenía dos hijos emancipó a uno de ellos, y retuvo bajo su potestad a un nieto habido de él; el emancipado tuvo un hijo, y fue desheredado por el padre; pregunto, habiendo sido preterido su hermano que también fue emancipado, y habiendo sido instituidos por el abuelo herederos los nietos habidos del hijo emancipado, qué derecho habrá respecto a la posesión de los bienes, y qué diferencia habrá, si supusiéramos que también fue preterido el emancipado, del cual habían nacido los nietos. Respondí: si hubiere emancipado al hijo habiendo retenido al nieto nacido de éste, y el emancipado hubiere procreado un hijo, y uno y otro nieto hubieren sido instituidos herederos, el padre de ellos desheredado, y el otro hijo preterido, sólo el hijo preterido podrá pedir la posesión de los bienes contra el testamento; porque el desheredado es obstáculo para sus propios hijos habidos después de la emancipación.

Pero se le debe dar la posesión de los bienes al nieto retenido bajo potestad, porque, si su padre emancipado hubiese sido preterido, podría obtener conjuntamente con él la posesión de los bienes por virtud de este capítulo del Edicto, que fue introducido por Juliano, esto es, por virtud de la nueva cláusula; y no debe ser de peor condición, porque haya sido desheredado su padre; y convendrá

emancipationem natus est, diversa condicio est: conservanda est tamen et illi ad virilem partem hereditas, sicut etiam Imperator Antoninus in persona nepotis ex filia rescripsit.

4.- MODESTINUS; *libro VI, Pandectarum*.- Emancipato quis filio retinuit ex eo nepotes in potestate: filius emancipatus susceptis postea liberis decessit. placuit in avi potestate manentes simul quum his, qui post emancipationem nati sunt, decreto bonorum possessionem accipere, manente eo, ut, si vellet avus sibi per nepotes adquiri, bona sua conferat aut nepotes emancipet, ut sibi emolumentum paternae hereditatis adquirant: idque ita divus marcus rescripsit.

§ 5.- IDEM; *libro VI, Differentiarum*.- Si nepos exheredatus heres extiterit ei, quem avus heredem fecerat, deinde pater eius emancipatus testamento praeteritis accipiat contra tabulas patris bonorum possessionem, iungi patri suo nepos non poterit, sed ut extraneus excludetur, quia non suo nomine avo heres extiterit.

6.- SCAEVOLA; *libro V, Quaestionum*.- Si quis filium habens in potestate extraneum in nepotis locum quasi ex eo filio natum adoptet, mox filium emancipet, non iungetur hic nepos filio emancipato, quia desinit esse emancipato ex liberis.

7.- TRYPHONINUS; *libro XVI, Disputationum*.-

was disinherited, and he must be shown the same consideration if he himself had been passed over in the will. The condition of his brother, however, who was born after emancipation, is different; for the estate must be preserved for his benefit, so far as his entire share is concerned, as the Emperor Antoninus stated in a Rescript with reference to a granddaughter, the child of the daughter of the testator.

4.- MODESTINUS; *Pandects, Book VI*.- A certain man, having emancipated his son, retained the children of the latter under his control. The emancipated son, having had children, afterwards died. It was decided that those grandchildren who remained under the control of their grandfather, were, by virtue of a special decree, entitled to praetorian possession of the estate of the latter, together with those who were born after the emancipation, with the exception that, if the grandfather desired to obtain the estate of his son, by means of his grandchildren, he could place his property in collation, or he could emancipate them, in order that they might obtain for themselves the benefit of their father's estate. This the Divine Marcus stated in a Rescript.

5.- THE SAME; *Differences, Book VI*.- If the disinherited grandson should become the heir of him whom the grandfather appointed his heir, and then his emancipated father, who had been passed over in the will, should obtain praetorian possession of the estate of his father contrary to the provisions of the will, the grandson could not be joined with his father, but would be excluded as a stranger, because he is not the heir of his grandfather in his own right.

6.- SCAEVOLA; *Questions, Book V*.- Where anyone who has a son under his control adopts a stranger in the place of his grandson, just as if he had been born to his son, and afterwards emancipated his son, the grandson will not be joined with the emancipated son in the praetorian possession, because he has ceased to be included among the children of the latter.

7.- TRYPHONINUS; *Disputations, Book XVI*.- If

que esto se le dé también a él, preterido. Pero es distinta la condición de su hermano, que nació después de la emancipación; mas se le ha de conservar también a él la herencia hasta la porción viril, según respondió por rescripto también el emperador Antonino en cuanto a la persona de la nieta habida de una hija.

4.- MODESTINO; *Pandectas, libro VI*.- Uno, habiendo emancipado a su hijo, retuvo bajo su potestad a los nietos habidos de él, y después de haber tenido otros hijos falleció el hijo emancipado; se determinó, que los que permanecieron bajo la potestad del abuelo obtienen por decreto la posesión de los bienes juntamente con los que nacieron después de la emancipación, sin perjuicio de que, si el abuelo quisiera que sea adquirida para él por medio de los nietos, lleve a colación sus propios bienes, o emancipe a los nietos, para que adquieran para sí el emolumento de la herencia paterna; y así lo respondió por rescripto el Divino Marco.

5.- EL MISMO; *Diferencias, libro VI*.- Si el nieto desheredado hubiere sido heredero de aquel a quien el abuelo lo había hecho heredero, y después su padre emancipado y preterido en el testamento obtuviera la posesión de los bienes contra el testamento del padre, el nieto no podrá ser unido a su padre, sino que será excluido como un extraño, porque no habrá sido heredero del abuelo en su propio nombre.

6.- SCÉVOLA; *Cuestiones, libro V*.- Si uno, teniendo un hijo bajo su potestad, adoptara a un extraño en el lugar de nieto, como hijo nacido de aquél, y después emancipara al hijo, no será unido este nieto al hijo emancipado, porque dejó de ser de los descendientes para el emancipado.

7.- TRIFONINO; *Disputas, libro XVI*.- Si después

Si post emancipationem filii susceptus ex eo fuerit nepos, conservanda illi erit portio, sed quanta videamus. Finge enim patruo scripto heredi coheredem datum hunc nepotem, patrem autem eiusdem praeteritum accepisse contra tabulas bonorum possessionem. Quod ad Edictum Praetoris attinet, semisses bonorum fient:

Nunc vero post constitutionem Divi Pii si conservatur pars nepoti, utrum virilis an quarta debeat servari? Nam si in avi natus potestate fuisset, coniungebatur in unam partem quum patre suo. Et proponamus esse alium ex eodem nepotem in familia avi: duo unam quartam habituri erant patre eorum accipiente contra tabulas bonorum possessionem, si fuissent in avi potestate: an ergo nunc in rescunciam tuendus sit, qui non in familia retentus est? Et cui abscedet pars, quae huic cessura est, patri eius tantum an et patruo? Et puto et patruo: nam et legatum eidem datum praestaret.

TIT IX

DE VENTRE IN POSSESSIONEM MITTENDO,
ET CURATORE EIUS

1.- ULPIANUS; *libro XLI, ad Edictum*.- Sicuti liberorum eorum, qui iam in rebus humanis sunt, curam Praetor habuit, ita etiam eos, qui nondum nati sint, propter spem nascendi non neglexit. nam et hac parte Edicti eos Tuitus est, dum ventrem mittit in possessionem vice contra tabulas bonorum possessionis.

a testator, after the emancipation of his son, has a grandson by the latter, his share of the estate of his grandfather must be preserved for him. Let us, however, see how much this will amount to. For suppose that the grandson was appointed co-heir with his uncle, and that the father of the said grandson, having been passed over in the will, should obtain praetorian possession contrary to the testamentary provisions, in accordance with the terms of the Praetorian Edict, the property of the estate would be divided into two parts.

Now, however, after the Constitution of the Divine Pius has been promulgated, must that to which the grandson is entitled be his entire share, or merely a fourth? For if, after his birth, he had been under the control of his grandfather, he will be joined with his father, and both together will be entitled to half of the estate. Let us suppose that there was another grandson, descended from the same son, and belonging to the family of the grandfather, the two grandsons together would be entitled to a fourth of the estate, if their father had obtained praetorian possession in opposition to the terms of the will, and they had been under the control of their grandfather. Must he who had not been retained in the family now be permitted to receive an eighth of the estate? And who must be deprived of his share to obtain what is given him? Would it be taken only from his father, or from his uncle as well? I think it would only be taken from his uncle, for he would be compelled to pay the legacy bequeathed to the said grandson.

TITLE IX

CONCERNING THE PLACING OF AN
UNBORN CHILD IN POSSESSION OF AN
ESTATE, AND HIS CURATOR

1.- ULPIANUS; *On the Edict, Book XLI*.- The Praetor not only provides for the welfare of children who are already born, but also does not neglect those who are as yet unborn; for he protects their interests in one of the Sections of the Edict by placing an unborn child in possession of an estate instead of praetorian possession contrary to the terms of the

de la emancipación de un hijo se hubiere tenido de él un nieto, se le habrá de conservar una porción; pero veamos cuánta. Porque supón que este nieto fue nombrado coheredero del tío paterno instituido heredero, pero que el padre del mismo, que había sido preterido, recibió la posesión de los bienes contra el testamento; por lo que atañe al Edicto del Pretor, se harán dos mitades de los bienes;

Pero en la actualidad después de la Constitución del Divino Pío, si se conserva una parte para el nieto ¿se le deberá conservar una porción viril, o la cuarta? Porque si hubiese nacido bajo la potestad del abuelo, sería unido con su propio padre para una sola parte. Y supongamos que en la familia del abuelo hay otro nieto nacido del mismo; los dos habrían de tener una sola cuarta, recibiendo el padre de ellos la posesión los bienes contra el testamento, si hubiesen estado bajo la potestad del abuelo; luego ¿habrá de ser amparado en una octava parte el que no fue retenido en la familia? ¿Y a quién se le deducirá la parte, que se le ha de dar a él, solamente a su padre, o también al tío paterno? Y opino, que también al tío paterno; porque también pagaría el legado dado al mismo.

TÍTULO IX

DE LA POSESIÓN QUE SE HA DE
DAR AL QUE ESTÁ EN EL CLAUSTRO
MATERNO, Y A SU CURADOR

1.- ULPIANO; *Comentarios al Edicto, libro XLI*.- Así como el Pretor cuidó de los descendientes que ya habían nacido, no descuidó tampoco, por la esperanza de que nacieran, a los que todavía no habían nacido; porque también los amparó en esta parte del Edicto, poniendo al que está en el claustro materno en posesión en lugar de darle la posesión de los

Will.

§ 1.- Praegnatem esse mulierem oportet omnimodo nec dicere se praegnatem sufficit: quare nec tenet datio bonorum possessionis, nisi vere praegnas fuit et mortis tempore et eo, quo mitti in possessionem petit.

§ 2.- Totiens autem mittitur in possessionem venter, si non est exheredatus et id quod in utero erit inter suos heredes futurum erit. Sed et si incertum sit, aliquo tamen casu possit existere, quo qui editur suus futurus sit, ventrem mittemus: aequius enim est vel frustra nonnumquam impendia fieri quam denegari aliquando alimenta ei, qui dominus bonorum aliquo casu futurus est.

§ 3.- Quare et si ita exhereditatio facta sit: "si mihi filius unus nascetur, exheres esto", quia filia nasci potest vel plures filii vel filius et filia, venter in possessionem mittitur: satius est enim sub incerto eius qui edetur ali etiam eum qui exheredatus sit, quam eum qui non sit exheredatus fame necari: ratumque esse debet, quod deminutum est, quamvis is nascatur, qui repellitur.

§ 4.- Idem erit dicendum et si mulier, quae fuit in possessione, abortum fecisset.

§ 5.- Sed et si sub condicione postumus sit exheredatus, pendente condicione pedii sententiam admittimus existimantis posse ventrem in possessionem mitti, quia sub incerto utilius est ventrem ali.

§ 1.- It is absolutely necessary that the woman should be pregnant, and it is not sufficient for her to merely allege that she is in this condition. Therefore, such a grant of the possession of an estate is not valid, unless she was actually pregnant at the time of the death of the testator, on account of which she demands to be placed in possession.

§ 2.- An unborn child is placed in possession of an estate whenever it is not disinherited, and where it will afterwards be included among the proper heirs. When, however, it is uncertain whether this will be the case, we sometimes place the unborn child in possession, if it may, under certain circumstances, become a proper heir; as it is sometimes more equitable for unnecessary expenses to be incurred than for maintenance to be refused to one who may become the owner of the estate.

§ 3.- Therefore, if disinheritance is expressed in the following terms, "If a son should be born to me, let him be disinherited," because a daughter may be born, or several sons, or a son and a daughter, and in either of these cases the unborn child will be placed in possession of the estate; for, while it is still uncertain what the birth will be, it is better for the child that has been disinherited to be supported than for one which may not be disinherited to perish with hunger, and any diminution of the estate made on this account ought to be ratified, even though the child who was excluded from the succession should be born.

§ 4.- The same rule will apply if the woman who was in possession of the estate should have a miscarriage.

§ 5.- If, however, the posthumous child was disinherited under a condition while the condition is pending, we adopt the opinion of Pedius, who held that the unborn child should be placed in possession of the estate; because, in case of uncertainty, it is always better for it to be supported.

bienes contra el testamento.

§ 1.- Es de todo punto necesario que la mujer esté embarazada, y no basta que ella diga que está embarazada; por lo cual no subsiste la dación de la posesión de los bienes, sino si verdaderamente estuvo embarazada tanto al tiempo de la muerte, como en el que pide que se la ponga en posesión.

§ 2.- Mas el que está en el claustro materno es puesto en posesión siempre que no fue desheredado, y lo que hubiere en el claustro materno habrá de ser considerado entre los herederos suyos. Mas aunque sea incierto, con tal que en algún caso pueda suceder que el que es dado a luz haya de ser heredero suyo, pondremos en posesión al que está en el claustro materno; porque es más equitativo que alguna vez se hagan inútilmente gastos, que no que en alguna ocasión se le denieguen los alimentos al que en algún caso ha de ser dueño de los bienes.

§ 3.- Por lo cual, también si la desheredación hubiera sido hecha así: «si me naciere un solo hijo, sea desheredado», como quiera que puede nacer una hija, o varios hijos, o un hijo y una hija, será puesto en posesión lo que está en el claustro materno; porque es preferible que en la incertidumbre de lo que nacerá sea alimentado también el que haya sido desheredado, que no que sea muerto de hambre el que no haya sido desheredado; y debe ser válido lo que se haya gastado, aunque nazca el que es repelido.

§ 4.- Lo mismo se habrá de decir, también si hubiese abortado la mujer que estuvo en posesión.

§ 5.- Pero también si el póstumo hubiera sido desheredado bajo condición, estando pendiente la condición, admitimos la opinión de Pedio que estima que puede ser puesto en posesión el que está en el claustro materno, porque en la incertidumbre es más conveniente que sea alimentado el que está en el claustro materno.

§ 6.- Si venter ab institutis exheredatus sit, a substitutis Praeteritus, Marcellus negat in possessionem eum mitti posse viventibus institutis, quia exheredatus est: quod verum est.

§ 7.- Per contrarium autem si ab institutis praeteritus sit venter, a substitutis exheredatus, vivis institutis mittendus est in possessionem: quod si non vivat, negat mittendum, quia ad eum gradum devoluta hereditas est, a quo exheredatus est.

§ 8.- Si filius ab hostibus captus sit, uxor eius praegnans in possessionem soceri bonorum mittenda est: nam aliquo casu spes est id quod nascitur inter suos heredes futurum, ut puta si pater eius apud hostes decedat.

§ 9.- Sed et si quis ventrem exheredasset: "qui mihi intra menses tres mortis meae natus erit, exheres esto" vel "qui post tres menses", venter in possessionem utique mittetur, quia aliquo casu suus heres futurus est: et sane benigniorem esse praetorem in hanc partem oportebit, ne qui speratur ante vitam necetur.

§ 10.- Rectissime autem Praetor nusquam uxoris fecit mentionem, quia fieri potest, ut mortis tempore uxor non fuerit, quae se ex eo praegnatem dicit.

§ 11.- Etiam ex emancipato venter ad possessionem admittitur. Unde apud Iulianum libro vicensimo septimo Digestorum quaeritur, si emancipatus quis sit uxore iam praegnate, deinde decessisset et pater eius mortuus sit, an venter in possessionem emancipati patris mitti possit. Et rectissime scripsit rationem non esse, cur venter, quem Edictum admittit, repellere debeat: est enim aequissimum partui consuli, qui natus bonorum possessionem accepturus est. Sed et si avus viveret,

§ 6.- Where an unborn child is disinherited in the first place, and passed over as a substitute, Marcellus denies that it can be placed in possession while the appointed heirs are living, for the reason that it was disinherited; which is true.

§ 7.- On the other hand, if an unborn child is passed over, as one of the appointed heirs, and is disinherited as a substitute, it should be placed in possession of the estate while the appointed heirs are living. If, however, they are not living, he says that this should not be done, because the estate passes to the degree in which the child was disinherited.

§ 8.- Where a son has been captured by the enemy, and his wife is pregnant, she should be placed in possession of the estate of her father-in-law, for a case might occur where the child, after its birth, may become a direct heir; as, for instance, if its father should die in the hands of the enemy.

§ 9.- If, however, anyone should disinherit an unborn child as follows, "If a child should be born to me within three months after my death, let it be disinherited," or "After three months," the unborn child is placed in possession because there is a chance that it may become a direct heir. In cases of this kind, the Praetor should always be very indulgent, in order that the child whose birth is expected may not die before it is born.

§ 10.- Again, the Praetor never mentions the name of the wife, because it may happen that the woman who alleges that she is pregnant by her husband may not have been his wife at the time of his death.

§ 11.- The unborn child of an emancipated son also may obtain possession of his estate. Therefore, in the Twenty-seventh Book of the Digest, the question is asked, if a son who was emancipated while his wife was pregnant, should afterwards die, and his father should also die, whether the unborn child can be placed in possession of the estate of his emancipated father. And he very correctly says that there is no reason why the unborn child whom the Edict permits to obtain possession should be excluded from it; for it

§ 6.- Si el que está en el claustro materno hubiera sido desheredado entre los instituidos, y preterido entre los substituidos, dice Marcelo que él no puede ser puesto en posesión viviendo los instituidos, porque fue desheredado; lo que es verdad.

§ 7.- Pero al contrario, si el que está en el claustro materno hubiera sido preterido entre los instituidos, y desheredado entre los substituidos, ha de ser puesto en posesión viviendo los instituidos; pero si no vivieran, dice que no ha de ser puesto en posesión, porque la herencia fue deferida al grado en que fue desheredado.

§ 8.- Si el hijo hubiera sido aprisionado por los enemigos, su mujer embarazada ha de ser puesta en posesión de los bienes del suegro; porque hay la esperanza de que en algún caso haya de estar entre los herederos suyos lo que nace, por ejemplo, si su padre falleciera en poder de los enemigos.

§ 9.- Pero aun si alguno hubiese desheredado así al que está en el claustro materno: «sea desheredado el que me hubiere nacido dentro de tres meses de mi fallecimiento», o «el que después de tres meses», será ciertamente puesto en posesión el que está en el claustro materno, porque en algún caso ha de ser heredero suyo; y, a la verdad, convendrá que en esta parte sea más benigno el Pretor, para que no sea muerto antes de nacer el que es esperado.

§ 10.- Pero con muchísima razón no hizo nunca el Pretor mención de la mujer, porque puede suceder, que al tiempo de la muerte no sea mujer de uno la que dice que de él está embarazada.

§ 11.- También es admitido a la posesión el hijo del emancipado, que está en el claustro materno. Por lo cual se pregunta Juliano en el libro vigésimo séptimo del Digesto, si, habiendo sido uno emancipado, estando ya embarazada su mujer, después hubiese fallecido, y su padre hubiera muerto, podría ser puesto en posesión el hijo del padre emancipado; que estuviera en el claustro materno. Y con muchísima razón escribió, que no había razón para que deba ser repelido el que está en el claustro materno, al cual

similiter ventrem admitteremus.

§ 12.- Si filius in adoptionem datus decesserit praegnate uxore, tunc deinde adoptator defunctus fuerit, mittetur venter in possessionem avi adoptivi. sed an etiam in eius, qui in adoptionem dederat filium, mittetur, videamus: et si hic nepos postumus heres ab avo naturali institutus sit, mittetur in possessionem, quia et nato ei, si nemo ex liberis sit alius bonorum possessio secundum tabulas dari potest, aut, si sint liberi praeteriti, etiam contra tabulas quum ipsis potest accipere.

§ 13.- Si pater nuru praegnate filium emancipaverit, non in totum repelli uterus debet: namque natus solet patri ex novo edicto iungi. Et generaliter quibus casibus patri iungitur natus, admittendus est venter in possessionem.

§ 14.- Si ea, quae in possessionem vult ire, uxor negetur vel nurus vel esse vel fuisse vel ex eo praegnans non esse contendatur: decretum interponit Praetor ad exemplum carboniani edicti. Et ita Divus Hadrianus Claudio Proculo Praetori Rescripsit, ut summam de re cognosceret et, si manifesta calumnia videbitur eius, quae ventris nomine in possessione mitti desiderat, nihil novi decerneret: si dubitari de re poterit, operam daret, ne praeiudicium fiat ei, quod in utero est, sed ventrem in possessionem mitti oportet. Apparet itaque, nisi manifesta sit calumniatrix mulier, debere eam decretum eligere: et ubi omnino iuste dubitari poterit, an ex eo praegnans sit, decreto tuenda est, ne praeiudicium partui fiat. Idemque est et si status mulieri contro-

is perfectly just to provide for the child who, after its birth, will be entitled to possession of the estate. If its grandfather should still be living, we also permit the unborn child to obtain possession of the estate of its father.

§ 12.- If a son who is given in adoption should die, leaving his wife pregnant, and then the adoptive father should die, the unborn child will be placed in possession of the estate of his adoptive father. Let us, however, see whether he should also be placed in possession, of the estate of the father who gave his son in adoption. If this posthumous grandson is appointed heir of his natural grandfather, he will be placed in possession of his estate, because if there was no other child at the time of his birth, praetorian possession in accordance with the provisions of the will could be given him; or if there were other children, who had been passed over, he could, also, along with them obtain praetorian possession in opposition to the terms of the will.

§ 13.- If a father should emancipate his son while his daughter-in-law is pregnant, the unborn child ought not to absolutely be excluded; for, after it has been born, it can be joined with the father under the new clause of the Edict. And, generally speaking, in those cases where a child, after its birth, can be joined with its father in the succession, it should be permitted to obtain possession before it is born.

§ 14.- Where the woman who desires to be placed in possession of an estate is not the wife of the testator, nor his daughter-in-law, nor has ever sustained such a relation to him, or it is asserted that she is not pregnant by him, the praetor will render a decree, as under the Carbonian Edict. This the Divine Hadrian stated in a Rescript addressed to the Praetor, Claudius Proculus, directing him to assume summary jurisdiction of the case; and if it was evident that the woman who desired to be placed in possession of the estate in the name of her unborn child had been guilty of fraud, he must not decide in her favor. If, however, any doubt should exist, he was ordered to be careful not to cause any injury to the unborn child, but to place it in possession of the

admite el Edicto; porque es muy equitativo que se mire por el feto, que, nacido, ha de obtener la posesión de los bienes. Pero aunque viviese el abuelo, igualmente admitiremos al que está en el claustro materno.

§ 12.- Si el hijo dado en adopción hubiere fallecido estando embarazada su mujer, y después hubiere muerto el adoptante, sera puesto el que está en el claustro materno en posesión de los bienes del abuelo adoptivo. Pero veamos si será puesto también en la de los del que había dado al hijo en adopción. y si este nieto póstumo hubiera sido instituido heredero por el abuelo natural, será puesto en posesión, porque también a este hijo se le puede dar la posesión de los bienes conforme al testamento, si no hubiera ningún descendiente, o si hubiera descendientes preteridos, puede obtener junto con los mismos también la posesión contra el testamento.

§ 13.- Si el padre hubiere, estando embarazada la nuera, emancipado al hijo, el feto no debe ser repellido por completo; porque el nacido suele ser unido al padre en virtud del nuevo Edicto. Y en general, en aquellos casos en que el hijo es unido al padre ha de ser admitido a la posesión el que está en el claustro materno.

§ 14.- Si se dijera que la que quiere entrar en posesión no es o no fue mujer, o nuera, o se sostuviera que no estaba embarazada del que dice, el Pretor interpone decreto a la manera del Edicto Carboniano. Y así lo respondió por rescripto el Divino Adriano al Pretor Claudio Próculo, para que conociese sumariamente del asunto, y, si pareciere manifiesta la calumnia de la que desea ser puesta en posesión a nombre del que está en el claustro materno, no determinase nada de nuevo; y para que, si se pudiese dudar sobre el particular, procurase que no se le perjudicara al que está en el claustro materno; sino que éste debe ser puesto en posesión. Aparece, pues, que si la mujer no fuera manifiestamente calumniadora, debe ella optar por el decreto, y que cuando

versia fiat.

§ 15.- Et generaliter ex quibus causis Carbonianam bonorum possessionem puero Praetor dare solitus est, ex hisdem causis ventri quoque subvenire Praetorem debere non dubitamus, eo facilius, quod favorabilior est causa partus quam pueri: partui enim in hoc favetur, ut in lucem producat, puero, ut in familiam inducatur: partus enim iste alendus est, qui et si non tantum parenti, cuius esse dicitur, verum etiam rei publicae nascitur.

§ 16.- Si quis prima uxore praegnate facta mox aliam duxerit eamque praegnatem fecerit diemque suum obierit, edictum ambobus sufficiet, videlicet cum nemo contendit nec calumniatricem dicit.

§ 17.- Quotiens autem venter in possessionem mittitur, solet mulier curatorem ventri petere, solet et bonis. Sed si quidem tantum ventri curator datus sit, creditoribus permittendum in custodia bonorum esse: si vero non tantum ventri, sed etiam bonis curator datus est, possunt esse securi creditores, cum periculum ad curatorem pertineat. Idcirco curatorem bonis ex inquisitione dandum, idoneum scilicet, oportet creditores curare vel si quis alius est, qui non edito partu successionem speret.

estate. Hence, it appears that, unless the woman was evidently guilty of deceit, she could demand a decision of the Praetor; and in case there should be any reasonable doubt as to whether she was pregnant by her husband, she must be protected by a decree, in order that the rights of the unborn child might not be prejudiced. The same rule is applicable where a controversy arises with reference to the social status of the woman.

§ 15.- Generally speaking, we do not doubt that the Praetor should come to the relief of an unborn child in all those instances in which he is accustomed to grant possession under the Carbonian Decree where the child is already born; and this is done the more readily because the case of an unborn child is treated with greater indulgence than that of one who is already born; for this preference is conceded to the former in order that it may be brought into the world. A child is favored after it is born in order that it may be reared in the family, and an unborn child must be supported, because if he is not the son of his alleged father he will still be born to the State.

§ 16.- If anyone, after having rendered his first wife pregnant, marries a second, and also renders her pregnant, and then dies, the Edict will suffice for both cases, provided no one disputes the right of either of the women, or accuses either of fraud.

§ 17.- Moreover, whenever an unborn child is placed in possession of an estate, the mother usually asks that a curator be appointed for it, as well as for the estate. If, however, a curator is only appointed for the child, the creditors of the estate will be permitted to take charge of the property for safe keeping; but if a curator is appointed, not only for the child, but also for the estate, the creditors may rest secure, as the curator must assume the responsibility. Hence a curator should be appointed for the estate after an examination as to its solvency; and the creditors, or any other person interested in it, must see that the curator is solvent, and is not one who will be entitled to the succession, in case the child should not be born.

con toda justicia se pudiere dudar si está embarazada del que dice, ha de ser amparada por el decreto, para que no se le cause perjuicio al feto. Y lo mismo es, también si a la mujer se le promoviera controversia sobre su estado.

§ 15.- Y en general, no dudamos que por las mismas causas por las que el Pretor solió dar al impúbbero la posesión Carboniana de los bienes, debe auxiliar el Pretor al que está en el claustro materno, con tanta más razón cuanto que es más digna de favor la causa del feto, que la del impúbbero; porque al feto se le favorece para esto, para que sea dado a luz, y al impúbbero para que sea introducido en la familia; pues ha de ser alimentado este feto, que nace no solamente para el padre, de quien se dice que es, sino también para la república.

§ 16.- Si alguno, habiendo dejado embarazada a su primer mujer, hubiere tomado inmediatamente otra, y la hubiere hecho embarazada, y falleciere, bastará para ambas el Edicto, por supuesto, cuando ninguno impugna, ni dice que es calumniadora la mujer.

§ 17.- Mas siempre que el que está en el claustro materno es puesto en posesión, suele pedir la mujer un curador para él, y también para los bienes. Pero si el curador hubiera sido dado ciertamente sólo para el que está en el claustro materno, se les ha de permitir a los acreedores que custodien los bienes; mas si el curador fue nombrado no solamente para el que está en el claustro materno, sino también para los bienes, pueden estar seguros los acreedores, porque la responsabilidad le corresponde al curador. Por lo tanto, es conveniente que cuiden los acreedores, u otro cualquiera que espere le sucesión no habiendo sido dado a luz el parto, de que se dé en virtud de información curador, por supuesto, abonado, para los bienes.

§ 18.- Hoc autem iure utimur, ut idem curator et bonis et ventri detur: sed si creditores instant vel qui sperat se successurum, diligentius atque circumspectius id fieri debet et plures, si desiderentur, dandi sunt.

§ 19.- Mulier autem in possessionem missa ea sola, sine quibus fetus sustineri et ad partum usque produci non possit, sumere ex bonis debet: et in hanc rem curator constituendus est, qui cibum potum vestitum tectum mulieri praestet pro facultatibus defuncti et pro dignitate eius atque mulieris.

§ 20.- Deminutio autem ad hos sumptus fieri debet primum ex pecunia numerata: si ea non fuerit, ex his rebus, quae patrimonia onerare magis impendio quam augere fructibus consueverunt.

§ 21.- Item si periculum est, ne interim res usu capiantur, ne debitores tempore liberentur, idem curare debet.

§ 22.- Ita igitur curam hoc quoque officio administrabit, quo solent curatores atque tutores pupillorum.

§ 23.- Eligitur autem curator aut ex his, qui tutores dati sunt postumo, aut ex necessariis adfinibusque aut ex substitutis aut ex amicis defuncti aut ex creditoribus, sed utique is, qui idoneus videbitur: aut si de personis eorum quaestio moveatur, vir bonus eligitur.

§ 24.- Quod si nondum sit curator constitutus (quia plerumque aut non petitur aut tardius petitur aut serius datur), servius aiebat res hereditarias heredem institutum vel substitutum obsignare non debere, sed tantum pernumerare et mulieri adsignare.

§ 18.- The present practice is to appoint the same curator for both the property and the child. If, however, creditors, or anyone who has hopes of succeeding to the estate appears, the appointment should be made more carefully and circumspectly, and several curators should be appointed, if this is requested.

§ 19.- Moreover, a woman who is placed in possession of an estate should take from the property only those things without which her child cannot be either nourished or born; and it is for this purpose that a curator ought to be appointed who will furnish food, drink, clothing, and lodging to the woman, in proportion to the means and rank of the deceased, and that of the woman.

§ 20.- The deduction required for these expenses should be first made from the ready money belonging to the estate, and, if there is none, from the property which causes the greatest expense to the estate rather than from that which increases it by its income.

§ 21.- Again, if there is any danger that some of the property may be obtained by usucaption, or debtors of the estate be released from liability by lapse of time, the curator must also attend to these matters.

§ 22.- Therefore he must discharge the duties of his office just as the curators and guardians of wards are accustomed to do.

§ 23.- A curator is selected from among those who have been appointed guardians of a posthumous child; or from the near relatives and connections; or from the substitutes; or from the friends or creditors of the deceased. A person who is considered solvent should be chosen; and if there is any question as to the personal character of those above mentioned, an honorable man must be selected.

§ 24.- If no curator should yet be appointed (for the reason that frequently application is not made for one, or it is made too late, or the appointment is made too late), Servius says that the testamentary heir or the substitute need not seal up the property, but shall

§ 18.- Mas observamos este derecho, que se dé el mismo curador así para los bienes, como para el que está en el claustro materno. Pero si instan los acreedores, o el que espera que habrá de suceder, esto se deberá hacer con más diligencia y circunspección, y se han de nombrar varios, si se pidiesen.

§ 19.- Pero la mujer que fue puesta en posesión debe tomar de los bienes solamente aquello sin lo que el feto no se podría mantener y ser llevado hasta el parto; y para esto se ha de nombrar curador, que le dé a la mujer comida, bebida, vestido y habitación con arreglo a los bienes del difunto, y a la dignidad de éste y de la mujer.

§ 20.- Mas para estos gastos se debe hacer consumo en primer lugar del dinero contante; y si no lo hubiere, de aquellas cosas que salieron gravar el patrimonio con gastos, más bien que aumentarlo con frutos.

§ 21.- Si hay riesgo, debe cuidar igualmente el mismo de que entretanto no sean usucapidos los bienes, y de que no se libren por el transcurso de tiempo los deudores.

§ 22.- Así, pues, administrará esta curatela con la oficiosidad con que suelen los curadores y los tutores de los pupilos.

§ 23.- Mas el curador es elegido o de los que le fueron dados como tutores al póstumo, o de los parientes y afines, o de los substituidos, o de los amigos del difunto, o de los acreedores, pero siempre el que pareciere idóneo; o, si se promoviera cuestión sobre las personas de éstos, es elegido un hombre bueno.

§ 24.- Pero si todavía no se hubiera nombrado el curador, porque las más de las veces o no se pide, o se pide mas tarde, o se da más tardíamente, decía Servio, que el heredero instituido o substituido no debe sellar los bienes de la herencia, sino únicamente

§ 25.- Idem ait ad custodienda ea, quae sine custodia salva esse non possunt, custodem ab herede ponendum (ut puta pecoris, et si nondum messis vindemiave facta sit): et si fuerit controversia, quantum deminui oporteat, arbitrum dandum.

§ 26.- Curatore autem constituto haec omnia cessare puto: conscribere tamen curatori debent et vendenti et inventarium rerum facienti.

§ 27.- Tamdiu autem venter in possessionem esse debet, quamdiu aut pariat aut abortum faciat aut certum sit eam non esse praegnatem.

§ 28.- Et si sciens prudensque se praegnatem non esse consumpserit, de suo eam id consumpsisse Labeo ait.

2.- PAULUS; *libro XLI, ad Edictum*.- Sed et si eum ediderit qui repulsus est, discedere debet.

3.- HERMOGENIANUS; *libro III, Iuris Epitoma*.- Sumptus autem ab ea facti bona fide non repetuntur.

4.- PAULUS; *libro XLI, ad Edictum*.- Habitatio quoque, si domum defunctus non habuit, conducenda erit mulieri.

§ 1.- Servis quoque mulieris, qui necessarii sunt ad ministerium eius secundum dignitatem, cibaria praestanda sunt.

5.- GAIUS; *libro XIV, ad Edictum provinciale*.- Curator ventris alimenta mulieri statuere debet. Nec ad rem pertinet, an dotem habeat, unde sustentare se possit, quia videntur quae ita praestantur ipsi

make an inventory of it, and assign to the woman what she may require.

§ 25.- He also says that a custodian ought to be appointed by the heir to take care of such property as cannot otherwise be preserved; as for instance, flocks or grain, and vintages, where the crops have not been gathered. If any controversy should arise as to how much should be taken from the estate, an arbiter must be appointed.

§ 26.- I think that all this is disposed of when a curator has been appointed; the bills of sale and the inventory of the estate should, however, be signed by him.

§ 27.- The unborn child should remain in possession until it comes into the world; or the mother has a miscarriage; or until it is certain that she is not pregnant.

§ 28.- If she, being well aware that she was not pregnant, should use part of the estate, Labeo says that it should be taken out of her property.

2.- PAULUS; *On the Edict, Book XLI*.- If she should have a child that has been excluded from the estate, she must withdraw.

3.- HERMOGENIANUS; *Epitomes of La/w, Book III*.- Where any expense has been incurred by her in good faith, it should not be recovered from her.

4.- PAULUS; *On the Edict, Book XLI*.- A lodging, also, must be rented for the woman, if the deceased did not have a house.

§ 1.- The slaves of the woman likewise must be provided with subsistence—where they are necessary for her service—in accordance with her social rank.

5.- GAIUS; *On the Provincial Edict, Book XIV*.- The curator of the unborn child should also provide the woman with maintenance; for it makes no difference whether she has a dowry by means of

recontarlos y asignárselos a la mujer.

§ 25.- El mismo dice, que por el heredero se debe poner un guarda para custodiar las cosas que no pueden estar a salvo sin custodia, por ejemplo, los ganados; y si aun no se hubiera hecho la siega o la vendimia, y hubiera controversia sobre cuánto se deba gastar, se ha de nombrar árbitro.

§ 26.- Pero opino que nombrado el curador debe cesar todo esto; mas deben aquéllos suscribir con el curador así al vender, como al hacer el inventario de los bienes.

§ 27.- Mas el que está en el claustro materno debe permanecer en posesión hasta tanto que para o aborte la mujer, o hasta que sea cierto que ella no está embarazada.

§ 28.- Y si hubiere consumido algo sabiendo y constándole que no estaba embarazada, dice Labeón que lo consumió de lo suyo.

2.- PAULO; *Comentarios al Edicto, libro XLI*.- Pero también si hubiere dado a luz a uno que fue rechazado, debe ella separarse de la posesión.

3.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Mas no se reclaman los gastos hechos por ella de buena fe.

4.- PAULO; *Comentarios al Edicto, libro XLI*.- También se habrá de alquilar habitación para la mujer, si el difunto no tenía casa.

§ 1.- También a los esclavos de la mujer, que le son necesarios para su servicio, se les han de prestar alimentos conforme a la dignidad de ella.

5.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- El curador del que está en el claustro materno debe fijar los alimentos para la mujer, y no hace al caso que tenga dote con la que ella pueda

praestari qui in utero estado

§ 1.- Curator ventri datus solvendi debiti rationem habere debet, utique eius, quod sub poena aut pignoribus pretiosis debetur.

6.- ULPIANUS; *libro XLI, ad Edictum*.- Extraneo postumo herede instituto non aliter venter in possessionem mittitur, nisi mater aliunde se alere non possit, ne forte ei, qui natus bonorum possessor futurus est, denegasse alimenta videamur.

7.- IDEM; *libro XLVII, ad Edictum*.- Ubi cumque ab intestato admittitur quis, illic et venter admittitur, scilicet si talis fuerit is qui in utero est, ut, si in rebus humanis esset, bonorum possessionem petere posset: ut in omnibus partibus Edicti pro superstite habeatur is qui in utero est.

§ 1.- Interdum non passim, sed cum causae cognitione mitti venter in possessionem debet, si qui sit, qui controversiam referat. Sed hoc tantum ad eum ventrem erit referendum, qui quum liberis admittitur. ceterum si mittatur unde legitimi vel qua alia ex parte, dicendum est non esse causae cognitionem necessariam: nec enim aequum est in tempus pubertatis ventrem vesci de alieno in tempus pubertatis dilata controversia. Sed enim placet omnes controversias, quae quasi status controversiam continent, in tempus pubertatis differri, sed non ut in possessione sit status controversia dilata, sed sine possessione.

which she can support herself, or not, because what is furnished her is considered to have been given for her unborn child.

§ 1.- Where a curator is appointed for an unborn child, he should take care to pay the debts of the estate, especially those whose non-payment involve pecuniary penalties, or where valuable pledges have been deposited as security.

6.- ULPIANUS; *On the Edict, Book XLI*.- Where a posthumous heir is appointed who is a stranger, the unborn child will not be placed in possession of the estate unless its mother cannot support herself otherwise; for we hold that maintenance should not be denied to one who, after his birth, will become the possessor of the estate.

7.- THE SAME; *On the Edict, Book XLI*.- Whenever anyone becomes an heir ab intestato, in this instance also, an unborn child is permitted to obtain possession of the estate; that is to say, if it is such a child that when it is born, it will be entitled to praetorian possession; and in all the Sections of the Edict an unborn child is considered as a survivor.

§ 1.- Sometimes, but not indiscriminately, an unborn child should not be placed in possession of the estate; but only after proper cause is shown, where anyone contests its right. This, however, merely has reference to an unborn child who, with other children of the deceased, can obtain possession. But if it should be placed in possession as the next of kin, or under any other Section of the Edict, it must be said that an investigation will not be necessary; for it is not just that the child should be supported by the property of another until it arrives at puberty, because the settlement of the controversy should be deferred until that time. It is established that all controversies relating to the condition of children must be postponed until they arrive at puberty; not that the child can remain in possession during the existence of the disputes, but that the delay should be without possession.

sustentarse, porque se considera que los que en este caso se prestan, se le prestan al mismo que está en el claustro materno.

§ 1.-El curador nombrado para el que está en el claustro materno debe tener cuidado de pagar las deudas, especialmente aquellas que se deben bajo pena, o mediante prendas de precio.

6.- ULPIANO; *Comentarios al Edicto, libro XLI*.- Instituido heredero un póstumo extraño, el que está en el claustro materno no es puesto en posesión de otra suerte, sino si la madre no pudiera alimentarse con otros bienes, a fin de que no parezca que acaso le denegamos los alimentos al que, nacido, ha de ser poseedor de los bienes.

7.- EL MISMO; *Comentarios al Edicto, libro XLVII*.- Siempre y cuando es admitido alguno abintestato, es admitido también el que está en el claustro materno, por supuesto, si el que está en el claustro materno fuere tal, que pudiera pedir la posesión de los bienes, si viviese, de suerte que en todas las partes del Edicto sea considerado como sobreviviente el que está en el claustro materno.

§ 1.- A veces, si hubiera quien promoviese controversia, no debe ser puesto indistintamente, sino con conocimiento de causa, en posesión el que está en el claustro materno. Mas esto se habrá de referir solamente al que está en el claustro materno, que es admitido con los descendientes; pero si fuera puesto en posesión por la parte *Unde legitimi*, o por otra cualquiera, se ha de decir que no es necesario el conocimiento de causa; porque no es equitativo que el que está en el claustro materno sea alimentado con lo ajeno basta el tiempo de la pubertad, por haberse diferido la controversia hasta el tiempo de la pubertad. Mas está determinado que todas las controversias, que comprenden cuestión en cierto modo sobre el estado, se difieran al tiempo de la pubertad, pero no para que esté en posesión, sino sin ella, habiéndose diferido la controversia sobre el estado.

§ 2.- Quamvis autem Praetor ventrem in possessionem mittat quum his, quibus possessionem dederit, attamen etiam solus venter admittetur ad bonorum possessionem.

8.- PAULUS; *libro I, de Adulteris*.- Si ventris nomine mulier missa sit in possessionem, Divus Hadrianus Calpurnio Flacco differendam accusationem adulterii rescripsit, ne quod praeiudicium fieret nato.

9.- ULPIANUS; *libro XV, ad Sabinum*.- Quum venter mittitur in possessionem, quod in ventris alimenta deminutum est detrahitur velut aes alienum.

10.- PAULUS; *libro VII, Quaestionum*.- Postumus natus quocumque tempore, qui tamen testatoris morte conceptus iam erit, potest agnoscere bonorum possessionem: nam et ventrem praetor ex omnibus partibus edicti mittit in possessionem bonorum, non missurus scilicet, si ei nato daturus non esset bonorum possessionem.

TITULO X

DE CARBONIANO EDICTO

1.- ULPIANUS; *libro XLI, ad Edictum*.- Si cui controversia fiet, an inter liberos sit, et impubes sit, causa cognita perinde possessio datur ac si nulla de ea re controversia esset et iudicium in tempus pubertatis causa cognita differtur.

§ 1.- Eum qui controversiam facit, si pro pupillo satis ei non detur, simul in possessionem eorum bonorum esse praetor iubet.

§ 2.- Moreover, although the Praetor can place the unborn child in possession of the estate, along with those to whom he has already granted it; still, the unborn child alone may be permitted to hold possession of the property.

8.- PAULUS; *On Adultery, Book I*.- Where a woman is placed in possession of an estate in the name of her unborn child, the Divine Hadrian stated in a Rescript addressed to Calpurnius Flaccus that an accusation of adultery should be postponed, in order that no wrong may be done to the child.

9.- ULPIANUS; *On Sabinus, Book XV*.- Where an unborn child is placed in possession of an estate, what is taken from the estate for its support should be deducted as a debt.

10.- PAULUS; *Questions, Book VII*.- A posthumous child, no matter when it may be born, provided it was conceived at the time of the death of the testator, can obtain praetorian possession of the estate, for the Praetor places it in possession under all the Sections of the Edict by which it may obtain it, but it will not be placed in possession, if, after its birth, it is not entitled to it.

TITLE X

CONCERNING THE CARBONIAN EDICT

1.- ULPIANUS; *On the Edict, Book XLI*.- If a dispute should arise as to whether a child under the age of puberty should be included among the descendants of the deceased, possession will be given it after proper cause is shown, just as if no controversy had arisen with reference to the matter; and, after investigation has taken place, the decision will be postponed until the time that the child arrives at puberty.

§ 1.- If security for the minor is not given to him who raises the question, the Praetor orders him to be placed in possession of the estate along with the minor.

§ 2.- Mas aunque al que está en el claustro materno lo ponga el Pretor en posesión junto con aquellos a quienes hubiere dado la posesión, será, sin embargo, admitido también solo a la posesión de los bienes el que está en el claustro materno.

8.- PAULO; *De los Adúlteros, libro I*.- Si la mujer hubiera sido puesta en posesión en nombre del que está en el claustro materno, respondió por rescripto el Divino Adriano a Calpurnio Flacco, que se ha de diferir la acusación de adulterio, a fin de que no se le cause algún perjuicio al hijo.

9.- ULPIANO; *Comentarios a Sabino, libro XV*.- Cuando el que está en el claustro materno es puesto en posesión, se deduce como deuda lo que se gastó para alimentos del que está en el claustro materno.

10.- PAULO; *Cuestiones, libro VII*.- El póstumo nacido en cualquier tiempo, pero que hubiere sido ya concebido a la muerte del testador, puede recibir la posesión de los bienes; porque el Pretor pone en posesión de los bienes en virtud de todas las partes del Edicto también al que está en el claustro materno, y no lo pondría, si a él, nacido, no le hubiese de dar la posesión de los bienes.

TÍTULO X

DEL EDICTO CARBONIANO

1.- ULPIANO; *Comentarios al Edicto, libro XLI*.- Si a alguno se le promoviera controversia sobre si es del número de los descendientes, y fuera impúbere, se le da la posesión con conocimiento de causa lo mismo que si no hubiese controversia alguna sobre este punto, y se difiere con conocimiento de causa el juicio para el tiempo de la pubertad.

§ 1.- El Pretor manda que el que promueve la controversia, si a él no se le diera fianza por el pupilo, esté junto con él en posesión de sus bienes.

§ 2.- Non tantum masculi, sed et feminae ex virili sexu descendentes Carboniani commodum habebunt.

§ 3.- Et generaliter dicimus his demum Carbonianum competere, quibus contra tabulas bonorum possessio competit, his vero non competere, qui repelluntur a contra tabulas bonorum possessione.

§ 4.- Si quis non ab aliquo hanc controversiam patiat, quod inter liberos non sit, sed ab ipso patre, ut puta nepos, qui se retentum in potestate avi dicit, ab emancipato patre, cui iungi desiderat, an differri debeat? Et magis est, ut differatur: parvi enim refert, quis ei controversiam faciat, quum et si testator eum negaverit ex liberis, non tamen exheredem scripserit, carboniano possit esse locus.

§ 5.- Sed et si quis non tantum ex liberis negetur esse, verum servus etiam esse dicatur forte ex ancilla editus, Iulianus scripsit adhuc Carboniano locum esse: quod et Divus Pius Rescripsit: nam vel magis consulendum est his quibus maius periculum intenditur. nam si aliter observetur, inventa erit ratio, quemadmodum audacissimus quisque maiore iniuria impuberem adficiat, quod et plura et graviora de eo mentiat.

§ 6.- Sed et si ipse defunctus servus esse dicatur, idem erit dicendum.

§ 7.- Sed et si fiscus facit impuberi controversiam, Carbonianum Edictum potest locum habere.

§ 2.- Not only males, but also females descendants from males, are entitled to the benefit of the Carbonian Edict.

§ 3.- In general, we say that those are entitled to the benefit of the Carbonian Edict who can obtain praetorian possession of an estate contrary to the provisions of the will; but those are not entitled to it who are excluded from obtaining such possession.

§ 4.- If a child is made the subject of a controversy of this kind, namely: where it is denied that he should be included among the descendants of the deceased, and the question was raised not by a stranger, but by his own father; as, for instance, where a grandson alleges that his father was emancipated, and that he was retained under the control of his grandfather, and asks to be joined with his father, should the decision in this case be postponed? The better opinion is that it should be; for it makes very little difference who raises the controversy, as even if the testator should deny that he was included among his descendants, and he, nevertheless, did not disinherit him, there will be ground for the application of the Carbonian Edict.

§ 5.- If anyone should deny not only that the child has a right to be included among the descendants of the testator, and should even allege that he is a slave, for instance, born of a female slave, Julianus says that there is ground for the application of the Carbonian Edict, which the Divine Pius also stated in a Rescript. For great care should be exercised with reference to those who are threatened with a serious wrong; as, if it were otherwise, any extremely bold man could inflict injury upon a minor under the age of puberty by relating many grave slanders and falsehoods about him.

§ 6.- The same rule will apply, even where the deceased himself is said to have been a slave.

§ 7.- here will also be ground for the application of the Carbonian Edict, where the Treasury raises the question as to the status of a minor under the age of puberty.

§ 2.- No solamente los varones, sino también las hembras descendientes por sexo viril, tendrán el beneficio del Edicto Carboniano.

§ 3.- Y en general decimos, que el Edicto Carboniano compete solamente a aquellos a quienes les compete la posesión de los bienes contra el testamento, pero que no les compete a los que son repelidos de la posesión de los bienes contra el testamento.

§ 4.- Si alguno no soportase esta controversia, sobre que no figure entre los descendientes, promovida por otro, sino por el mismo padre, por ejemplo, si un nieto, que dice que él fue retenido bajo la potestad del abuelo, la soportase promovida por el padre emancipado, al cual pretende ser unido, ¿deberá ser diferida? Y es más cierto que se difiere; porque poco importa quién le promueva la controversia, pues aunque el testador hubiere dicho que él no era de los descendientes, si no obstante no lo hubiere desheredado, podría haber lugar al Edicto Carboniano.

§ 5.- Mas aunque se diga no solamente que uno no es de los descendientes, sino que también se diga que es esclavo, acaso nacido de una esclava, escribió Juliano que aun hay lugar al Edicto Carboniano; lo que también respondió por rescripto el Divino Pío; porque principalmente se ha de mirar por aquellos contra quienes se intenta mayor perjuicio; porque si se observase de otra manera, se habría hallado el medio para que cualquiera muy audaz le causara mayor perjuicio al impúbero mintiendo respecto de él muchas y muy graves cosas.

§ 6.- Pero lo mismo se habrá de decir, aunque se dijera que el mismo difunto era esclavo.

§ 7.- Mas también si el fisco le promueve controversia al impúbero puede tener lugar el Edicto Carboniano.

§ 8.- Pomponius libro septuagensimo nono ad Edictum scripsit, quum filius heres vel exheres scriptus est, Carbonianum Edictum cessare, quamvis filius esse negetur, quia vel quasi scriptus habet bonorum possessionem, etiamsi filius non est, vel repellitur quasi exheredatus, etsi filius esse videatur: nisi forte postumus, inquit, est heres institutus et natus negetur esse filius, sed subiectus esse dicetur, quo casu eius partis tantum danda est ei bonorum possessio, ex qua institutus estado

§ 9.- Idem ait, quum quidam exheredem scripsisset filium, quod diceret eum ex adulterio conceptum, quia fieret ei haec controversia, an inter liberos sit, ex hac parte edicti ei bonorum possessionem competere, quum, si sine elogio exheres scriptus esset, non haberet bonorum possessionem. Idemque et si ita sit scriptum: "quisquis est, qui filium meum se esse dicit, exheres esto", quia non est filius exheredatus.

§ 10.- Si quis filium suum heredem instituerit ex minima parte sic "ille qui ex illa natus est heres esto", non quasi filium suum, deinde hic contendat patrem intestatum decessisse seque ei suum heredem esse, interest, coheredes eius utrum negent eum filium an vero contendunt testamentum valere. si testamentum valere contendunt, controversia non est differenda et Carbonianum cessat: quod si filium eum negant et ad ipsos potius quasi ad consanguineos hereditatem pertinere dicunt, data bonorum possessione impuberi controversia in tempus pubertatis differtur.

§ 11.- Si mater subiecti partus arguatur, an differenda sit quaestio propter statum pueri, quaeritur. Et si quidem pupilli status in dubium devocatur, differri

§ 8.- Pomponius, in the Seventy-ninth Book of the Edict, says that where a son is appointed an heir, or is disinherited, the Carbonian Edict will not apply, even though it is denied that he is a son; because being, as it were, appointed heir, he has possession of the estate, even if he is not a son, or he will be excluded because of being disinherited, even if it should appear that he is a son; unless a posthumous child is appointed an heir, and, after his birth, it is denied that he is a son, although he is said to be under paternal control; in which case praeto-rian possession should only be given to him in proportion to the share of the estate to which he was appointed heir.

§ 9.- He also holds that where anyone has disinherited his son, because he said that he was conceived in adultery, or where it was disputed as to whether he should be included among his children, he will be entitled to possession of the estate under this Section of the Edict; for, since he had been disinherited without giving any reason for it, he would not be entitled to possession of the estate. The same rule will apply where the following clause was inserted into a will, "Let anyone who says that he is my son be disinherited," because a son is not disinherited in this way.

§ 10.- If anyone should appoint his son his heir to a very small portion of his estate, as follows, "Let So-and-So, born of such-and-such a woman, be my heir," and afterwards the said son should not admit that his father died intestate, and that he was his heir at law, it makes a difference whether his co-heirs deny that he is the son of the testator, or whether they say that the will is valid. If they say that the will is valid, the dispute should not be deferred, and the Carbonian Decree will not apply. If, however, they deny that he is the son of the testator, and allege that the estate belongs to them, as being the next of kin; possession of the estate will be given to the minor, and the decision of the controversy will be postponed until he arrives at the age of puberty.

§ 11.- If the mother is accused of introducing a supposititious child, the question arises whether the controversy with reference to the civil condition of

§ 8.- Escribió Pomponio en el libro septuagésimo noveno de sus Comentarios al Edicto, que cuando el hijo fue instituido heredero o desheredado deja de tener lugar el Edicto Carboniano, aunque se diga que él no es hijo, porque o como instituido tiene la posesión de los bienes, aunque no sea hijo, o como desheredado es repelido, aunque parezca que es hijo; a no ser acaso, dice, que un póstumo haya sido instituido heredero, y se diga que el nacido no es hijo, sino que se pretenda que es supuesto; en cuyo caso se le ha de dar la posesión de los bienes, solamente de la parte en que fue instituido.

§ 9.- El mismo dice, que cuando alguno hubiese desheredado a un hijo, porque dijese que éste fue concebido de adulterio, como quiera que se le promovería esta controversia, sobre si era de los descendientes, le compete la posesión de los bienes en virtud de esta parte del Edicto, porque, si hubiese sido desheredado sin esta indicación, no tendría la posesión de los bienes. Y lo mismo, también si se hubiera escrito así: «cualquiera que sea el que diga que él es hijo mío, sea desheredado», porque no fue desheredado el hijo.

§ 10.- Si alguno hubiere instituido a un hijo suyo heredero de una mínima parte, en esta forma: «sea heredero el que nació de aquélla», no como a hijo suyo, y después éste sostuviera que el padre falleció intestado; y que él es de aquél heredero suyo, hay diferencia si sus coherederos dijeran que él no es hijo, o si contendieran sobre si es válido el testamento. Si impugnan que sea válido el testamento, no se ha de diferir la controversia, y deja de tener lugar el Edicto Carboniano; pero si niegan que aquél sea hijo, y dicen que la herencia les pertenece a ellos mismos preferentemente como a consanguíneos, dada al impúbero la posesión de los bienes, se difiere la controversia hasta el tiempo de la pubertad.

§ 11.- Si la madre fuese acusada de parto supuesto, se pregunta si se haya de diferir la cuestión por virtud del estado del impúbero. Y si verdaderamente se

quaestio in tempus pubertatis debet, quum metus potest esse, ne minus idonee defendatur: quum vero mater rea postulatur utique integra fide, et maiore constantia causam defensura recenti tempore, dubium non est cognitionem fieri oportere, et post eventum cognitionis, si suppositum apparuerit, actiones hereditariae puero denegandae sunt omniaque perinde habenda, atque si heres scriptus non fuisset.

2.- MARCIANUS; *libro XIV, Institutionum*.- Licet mulier, quae partum subiecisse dicitur, decesserit, tamen, si participes maleficii sint, in praesenti cognoscendum est. Si autem nemo sit qui puniri possit, quia omnes participes facinoris forte decesserint, secundum Carbonianum Edictum in tempus pubertatis differenda cognitio est.

3.- ULPIANUS; *libro XLI, ad Edictum*.- Carbonianum Edictum aptatum est ad contra tabulas bonorum possessionem et intestati, quum et in secundum tabulas in quibusdam casibus possit videri necessarium edictum, veluti si pater familias ita instituerit: "postumus heres esto" vel "postuma heres esto" et negetur esse verum, quod in testamento scriptum est.

§ 1.- Et quum de fideicommissis vel de legatis quaeritur, differri potest causa in tempus pubertatis: id enim Divus Pius Claudio Hadriano Rescripsit.

§ 2.- Quamvis scripto heredi non promitti bonorum possessionem ex Edicto Carboniano certum sit, tamen quaestionem status in tempus pubertatis differri procul dubio est. Ergo si quidem de parentis

the child should be deferred for decision. Where only the condition of the child is in doubt, the question should be deferred until the age of puberty, because there may be reason to fear that it will not properly be defended. But where the mother herself is accused, as there is no doubt that she will, from the first moment, defend the civil status of the child, with the greatest good faith and constancy, there is no doubt that an investigation should be made, and if after the investigation it appears that the child was supposititious, every action for the recovery of the estate must be refused to it, and everything will remain in the same condition as if the child had not been appointed heir.

2.- MARCIANUS; *Institutes, Book XIV*.- Although the woman who is said to have introduced a supposititious child may be dead, still, if there are any others implicated in the crime, an investigation should take place at once. When, however, there is no one who can be punished, because all those who participated in the offence are dead, the investigation must be deferred until the time of puberty, in accordance with the Carbonian Edict.

3.- ULPIANUS; *On the Edict, Book XLI*.- The Carbonian Edict is applicable to the praetorian possession of an estate contrary to the provisions of the will, as well as to the possession ab intestato; since in some instances, the application of the Edict may become necessary when praetorian possession in accordance with the terms of the will has been granted; for example, where the testator appointed an heir as follows, "Let my posthumous child, whether it be a boy or girl, be my heir," and it is denied that the statement in the will is true.

§ 1.- Where a question arises with reference to a trust or a legacy, the matter can be deferred until the time of puberty; as the Divine Pius stated in a Rescript addressed to Claudius Hadrian.

§ 2.- Although it is certain that praetorian possession under the Carbonian Edict is not promised to an appointed heir, still, there is no doubt whatever that any question as to his condition must

pone en duda el estado del pupilo, se debe diferir la cuestión al tiempo de la pubertad, porque puede haber el temor de que no sea defendido convenientemente. Mas cuando es demandada como reo la madre, la cual defendería ciertamente en el tiempo inmediato la causa con íntegra fe y con mayor constancia, no hay duda que se debe celebrar el conocimiento; y después del resultado del conocimiento, si apareciere que el parto fue supuesto, se le han de denegar al impúbere las acciones de la herencia, y ha de ser considerado todo lo mismo que si no hubiese sido instituido heredero.

2.- MARCIANO; *Instituta, libro XIV*.- Mas aunque hubiere fallecido la mujer que es acusada de haber supuesto el parto, no obstante, si hubiera cómplices del delito, se habrá de conocer de presente; mas si no hubiera nadie que pudiera ser castigado, porque acaso hubieren fallecido todos los cómplices del delito, se ha de diferir el conocimiento al tiempo de la pubertad conforme al Edicto Carboniano.

3.- ULPIANO; *Comentarios al Edicto, libro XLI*.- El Edicto Carboniano fue aplicado a la posesión de los bienes contra el testamento, y a la de un intestado, porque también en la posesión con arreglo al testamento podría parecer en algunos casos necesario el Edicto, por ejemplo, si el padre de familia hubiere hecho así la institución: «sea heredero el póstumo», o, «sea heredera la póstuma», y se negara que sea verdad lo que se escribió en el testamento.

§ 1.- Y cuando se trata de fideicomisos, o de legados, se puede diferir la causa al tiempo de la pubertad; porque esto respondió por rescripto a Claudio Adriano el Divino Pío.

§ 2.- Aunque sea cierto que al heredero instituido no se le promete en virtud del Edicto Carboniano la posesión de los bienes, está, sin embargo, lejos de duda que la cuestión sobre el estado es diferida hasta

bonis simul et de statu controversia fiat, hoc edictum locum habebit: sin vero tantum status, differetur quaestio in tempus pubertatis, sed non ex Carboniano, sed ex constitutionibus.

§ 3.- Puberi quamvis minori viginti quinque annis Carbonianum non succurrit. Sed et si, quum esset pubes, quasi impubes obrepserit bonorumque possessionem accepit, dicendum erit nihil eum egisse: nam et si impubes esset mox pubes factus, finiretur bonorum possessionis emolumentum.

§ 4.- Causae cognitio in eo vertitur, ut, si manifesta calumnia apparet eorum, qui infantibus bonorum possessionem peterent, non daretur bonorum possessio. summam ergo, cum petitur ex Carboniano bonorum possessio, debet praetor cognoscere: et si quidem absolutam causam invenerit evidenterque probatur filium non esse, negare debet ei bonorum possessionem Carbonianam: si vero ambigam causam, hoc est vel modicum pro puero facientem, ut non videatur evidenter filius non esse, dabit ei Carbonianam bonorum possessionem.

§ 5.- Duae autem sunt causae cognitiones, una dandae Carbonianae possessionis, quae habet commodum illud, ut, perinde atque si nullam controversiam pateretur impubes, possessionem accipiat, alia causae cognitio illa, utrum differri debeat in tempus pubertatis cognitio an repraesentari. Hoc autem diligentissime praetori examinandum est, an expediat pupillo repraesentari cognitionem an potius differri in tempus pubertatis, et maxime inquirere hoc a cognatis matre tutoribusque pupilli debet. Finge esse testes

be postponed until he reaches puberty. Hence, if at the same time a controversy arises with reference to the estate of his father and his own condition, this Edict will be applicable. Where, however, only his civil condition is in dispute, the question will be postponed until the time of puberty, not under the Carbonian Edict, but in accordance with the Imperial Constitutions.

§ 3.- The Carbonian Edict gives no relief to children who have arrived at puberty, even though they are under twenty-five years of age. If, however, a child, who has arrived at puberty, represents himself as being under that age, and obtains praetorian possession of the estate, it must be said that the decree is void. For even if he was under the age of puberty, as soon as he arrives at that age, the benefit of the possession of the estate will terminate.

§ 4.- In cases of this kind, an investigation is instituted to prevent possession of an estate from being given, if the deceit of those who demand possession of property in behalf of children should be clearly established; therefore, where possession is demanded under the Carbonian Edict, the Praetor should immediately take cognizance of the case. If he finds that it can be easily decided, and it is positively proved that the child is not a son, he can refuse to grant it Carbonian possession of the estate. But when he finds that the matter is involved in doubt, that is to say, that there is some slight evidence in favor of the child, and it does not clearly appear that he is not the son of the testator, he shall grant him Carbonian possession of the estate.

§ 5.- Two causes exist for this investigation: one of them is to determine whether Carbonian possession which confers the advantage of enabling the minor to obtain praetorian possession, just as if no controversy had arisen, shall be granted; and the other is, to ascertain whether a decision ought to be rendered at once, or deferred until the age of puberty. The Praetor should carefully examine whether it is advantageous for the minor to have the decision rendered at once; or whether it will be better to postpone it until he reaches the age of puberty; and this he must, by all

el tiempo de la pubertad. Luego si verdaderamente se promoviera controversia al mismo tiempo sobre los bienes del ascendiente y sobre el estado, tendrá lugar este Edicto; mas si solamente sobre el estado, se difiere la cuestión hasta el tiempo de la pubertad, pero no por virtud del Edicto Carboniano, sino por las Constituciones.

§ 3.- El Edicto Carboniano no socorre al púbero, aunque sea menor de veinticinco años. Pero si siendo púbero, se hubiere presentado engañosamente como impúbero, y obtuvo la posesión de los bienes, se habrá de decir, que no hizo nada válido; porque aunque fuese impúbero, hecho después púbero, se extinguiría el beneficio de la posesión de los bienes.

§ 4.- El conocimiento de la causa versa sobre esto, para que, si apareciese manifiesta la calumnia de los que pidieran para infantes la posesión de los bienes, no se dé la posesión de los bienes. Luego cuando se pide la posesión de los bienes en virtud del Edicto Carboniano, el Pretor debe conocer sumariamente. Y si verdaderamente encontrare una causa cierta y se prueba evidentemente que no es hijo, debe negarle la posesión Carboniana de los bienes; pero si una causa ambigua, esto es, favorable, aunque poco al impúbero, de suerte que no parezca evidentemente que no es hijo, le dará la posesión Carboniana de los bienes.

§ 5.- Mas dos son los conocimientos de la causa: uno para dar la posesión Carboniana, que tiene la ventaja de que el impúbero reciba la posesión lo mismo que si él no soportase ninguna controversia; el otro conocimiento de la causa es para si se debe diferir el conocimiento al tiempo de la pubertad, o para si se debe anticipar. Mas se ha de examinar muy diligentemente por el Pretor si le conviene al pupilo que se anticipe el conocimiento, o más bien que sea diferido al tiempo de la pubertad; y principalmente debe inquirir esto por los cognados, por la madre y

quosdam, qui dilata controversia aut mutabunt consilium aut decedent aut propter temporis intervallum non eandem fidem habebunt: vel finge esse anum obstetricem vel ancillas, quae veritatem pro partu possunt insinuare, vel instrumenta satis idonea ad victoriam vel quaedam alia argumenta, ut magis damnum patiatur pupillus, quod differtur cognitio, quam compendium, quod non repraesentatur:

Finge pupillum satisfacere non posse et admissos in possessionem, qui de hereditate controversiam faciunt, multa posse subtrahere novare moliri: aut stulti aut iniqui Praetoris erit rem in tempus pubertatis differre cum summo eius incommodo, cui consultum velit.

Divus etiam Hadrianus ita rescripsit: "quod in tempus pubertatis res differri solet, pupillorum causa fit, ne de statu periclitentur, antequam se tueri possint. Ceterum si idoneos habeant, a quibus defendantur, et tam expeditam causam, ut ipsorum intersit mature de ea iudicari, et tutores eorum iudicio experiri volunt: non debet adversus pupillos observari, quod pro ipsis excogitatum est, et pendere status eorum, quum iam possit indubitatus esse".

§ 6.- Si mater impuberis subiecti partus rea postulat causam optinuerit, poterit adhuc superesse status quaestio, ut puta si dicatur aut non esse ex ipso defuncto conceptus aut ex ipso quidem, sed non ex matrimonio editus.

§ 7.- Si is, qui status controversiam filio faciebat et

means, learn from the relatives, the mother, and the guardians of the minor. Suppose, for instance, that there are certain witnesses who, if the decision of the case is postponed, may either change their minds, or die, or whose testimony will not have the same force after a long period of time. Or, suppose there is some old midwife, or certain female slaves who can tell the truth with reference to the child; or that certain documents essential to his success are in existence; or that there are other proofs, and the minor will suffer greater injury if the examination is deferred than he will obtain benefit if the case is not decided at once.

Suppose that the minor cannot give security, and that those who have been permitted to obtain possession of the estate are the persons who raised the controversy with reference to it, and who can abstract, change, or destroy much of the property belonging to the same; it would be either foolish or unjust for the Praetor to defer the matter until puberty, to the serious disadvantage of him who desires the matter to be disposed of.

The Divine Hadrian stated in a Rescript: "Where the decision is ordinarily deferred until the age of puberty, this is done for the benefit of the minors, in order that this condition may not be imperiled before they are able to protect themselves. Moreover, if they have persons by whom they may be properly defended, and if it is to the interest of the said minors that the case should be quickly brought to trial, and a decision rendered, and the guardians of the minors desire it to be heard, what has been devised for the benefit of the minors should not be employed against them, and their condition remain in suspense when it can be established beyond a doubt."

§ 6.- If the mother of the minor, after being accused of having introduced a supposititious child, gains her case, the question as to the condition of the child may still remain unsettled; for example, it may be alleged that it was not begotten by the deceased, or, if it was, that it was not born in wedlock.

§ 7.- If the person who disputed the condition of the

los tutores del pupilo. Supón, que hay algunos testigos, que, diferida la controversia, o mudarán de parecer, o fallecerán, o no tendrán el mismo crédito por causa del intervalo de tiempo; o supón que hay una comadrona vieja, o esclavas que pueden insinuar la verdad a favor del parto, o instrumentos bastante eficaces para la victoria, o algunos otros argumentos, de suerte que el pupilo experimente más bien perjuicio de que se difiera el conocimiento, que ventaja de que no se anticipe;

supón, que el pupilo no pueda dar fianza, y que los admitidos a la posesión, que promueven la controversia sobre la herencia, pueden substraer, innovar, o maquinar muchas cosas; sería propio de un Pretor necio o injusto diferir el asunto hasta el tiempo de la pubertad con grandísimo perjuicio de aquel a quien quería favorecer.

También el Divino Adriano respondió así por rescripto: «el que se suela diferir el asunto hasta el tiempo de la pubertad se hace por causa de los pupilos, a fin de que no peligren respecto a su estado antes que puedan defenderse; pero si tuvieran personas idóneas por quienes sean defendidos, y una causa tan buena que a ellos mismos les interese que sobre ella se juzgue cuanto antes, y sus tutores quieren defenderlos en el juicio, no debe observarse en contra de los pupilos lo que se imaginó en favor de ellos mismos, y quedar pendiente su estado, cuando ya pueda ser indudable.»

§ 6.-Si la madre del impúbero, acusada como reo de parte supuesto, hubiere ganado la causa, podrá subsistir todavía la cuestión sobre el estado, por ejemplo; si se dijese o que no fue concebido del mismo difunto, o que ciertamente es de él, pero que no nació de matrimonio.

§ 7.- Si el que le había promovido a un hijo con-

solum se filium dicebat, decesserit et mater ei heres extiterit, si quidem eandem controversiam impuberi mater faciat, qui se ex alia natum adfirmat, quam filius eius faciebat, scilicet ut neget eum filium, idcircoque ad se totam hereditatem ex persona filii sui defuncti pertinere debere: in tempus pubertatis differri Iulianus ait, quia nihil interest, suo an hereditario nomine controversiam faciat. Plane si mater concedat hunc quoque defuncti filium esse idcircoque partem dimidiam hereditatis solam sibi vindicet ex bonis paternis, non erit iudicium in tempus pubertatis differendum: non enim de paternis, sed de fraternis bonis impuberi fit controversia.

§ 8.- Ibidem Iulianus quaerit: si duo impuberes patiantur status controversiam et alter eorum puberit, expectari alterius quoque pubertas debet, scilicet ut sic de utriusque statu agatur, ne aliquod praeiudicium fiat impuberi per puberis personam.

§ 9.- Parvi refert, utrum petitor sit impubes an possessor, qui status controversiam patitur: nam sive possideat sive petat, in tempus pubertatis differtur.

§ 10.- Si duo impuberes invicem faciant status controversiam, interest, utrum quisque se solum filium dicat an et se. nam si se solum dicat filium, dicendum est debere controversiam ad utriusque pubertatem differri, sive petitor sive possessor sit. Si vero alter se solum, alter et se dicat, si quidem ille adoleverit qui se solum dicat, adhuc differtur controversia propter pueritiam eius qui et se dicit, sed de parte, non de toto: de parte enim utique nec litigatur. quod si ille adoleverit qui et se dicit, ille impubes sit qui se solum dicit, non differtur controversia: nec enim patitur impubes status controversiam, sed facit, quum hic pubes et se dicat, illum non neget filium.

§ 11.- Si quis liber et heres esse iussus status controversiam impuberi faciat, qui filius esse et testamentum patris rupisse dicitur, Iulianus ait utraque iudicia et hereditatis et libertatis in tempus pubertatis differenda: neutrum enim eorum ita explicari potest, ut non condicioni eius, qui se filium esse contendat, praeiudicetur. Ceterae quoque

child, and alleged that he himself was the only son, should die, and his mother should become his heir, and raise the same controversy with reference to the minor, that her own son did, stating that he was born of another woman; that is to say, if she should deny that he was the child of the deceased, and therefore that she herself was entitled to the entire estate of the deceased son, as his heir, Julianus says that a decision should not be rendered until the age of puberty, because it makes no difference whether the person who raises the question does so in his own name, or in that of the estate. It is evident that if the mother should admit that the child is the son of the deceased, and therefore claims for herself only half of the estate of the father, the decision of the case should not be deferred until the time of puberty; for she does not dispute the claim of the minor to the estate of his father, but to that of his brother.

§ 8.- Julianus says, in the same place, that if a dispute arises with reference to the status of two minors under the age of puberty, and one of them reaches that age, they should wait until the other also arrived at puberty, so that the condition of both may be determined in such a way that the rights of the one who had not arrived at puberty, may not be prejudiced through a decision rendered against the one who had reached that age.

§ 9.- It makes little difference whether the claimant is a minor under the age of puberty, or the possessor of the estate who raises the question as to the condition of the minor, for whether he is in possession, or demands it, the decision must be deferred until the time of puberty.

§ 10.- Where two minors under the age of puberty raise a question as to the condition of one another, it makes a difference whether one of them alleges that he is the only son, or whether the other alleges that he also is a son. For if one says that he is the only son, it must be held that the decision of the case should be postponed until both of them arrive at puberty, whether the claimant or the possessor is the one who gives rise to the controversy. If, however, one alleges that he is the only son, and the other says that he is

troversia sobre su estado, y decía que sólo él era hijo, hubiere fallecido, y fuere su heredera la madre, si verdaderamente la madre le promoviera al impúbbero, que afirma que nació de otra, la misma controversia que sostenía su hijo, de suerte que negara que aquél sea hijo, y que por lo tanto debe pertenecerle a ella toda la herencia por razón de la persona de su propio hijo fallecido, dice Juliano que se difiere hasta el tiempo de la pubertad, porque nada importa que promueva la controversia en nombre propio o como heredera. Mas si la madre concediera que también éste era hijo del difunto, y por lo tanto reivindicara para sí solamente la mitad de la herencia de los bienes paternos, no se habrá de diferir el juicio para el tiempo de la pubertad; porque al impúbbero no se le promueve controversia sobre los bienes paternos, sino sobre los del hermano.

§ 8.- En el mismo lugar investiga Juliano, si soportando dos impúberos controversia sobre su estado, y habiendo llegado uno de ellos a la pubertad, se debe esperar también la pubertad del otro, a saber, para que de este modo se discuta sobre el estado de ambos, a fin de que no se le cause ningún perjuicio al impúbbero por la persona del púbero.

§ 9.- Poco importa que el impúbbero, que soporta la controversia sobre su estado, sea demandante o poseedor, porque ya si posee, ya si demanda, se difiere hasta el tiempo de la pubertad.

§ 10.- Si dos impúberos se promovieran recíprocamente controversia sobre su estado, importa saber si cada uno dice que sólo él es hijo, o si que también él lo es. Porque si dijera que sólo él es hijo, se ha de decir que la controversia se debe diferir hasta la pubertad de ambos, ya sea demandante, ya poseedor. Pero si uno dijera que él sólo lo es, y el otro que también él, y hubiere llegado a la pubertad el que dijera que él sólo lo es, también se difiere la controversia por razón de la impubertad del que dice que también él lo es; pero respecto a una parte, no respecto a la totalidad, porque ciertamente no se litiga respecto a una parte. Mas si hubiere llegado a la pubertad el que dice que también él lo es, y fuera impúbbero el que dice que sólo él lo es, no se difiere la

qui se solum dicit, non differtur controversia: nec enim patitur impubes status controversiam, sed facit, cum hic pubes et se dicat, illum non neget filium.

§ 11.- Si quis liber et heres esse iussus status controversiam impuberi faciat, qui filius esse et testamentum patris rupisse dicitur, Iulianus ait utraque iudicia et hereditatis et libertatis in tempus pubertatis differenda: neutrum enim eorum ita explicari potest, ut non condicioni eius, qui se filium esse contendat, praeiudicetur. Ceterae quoque libertatis quaestiones ex testamento pendentes in tempus pubertatis differuntur.

§ 12.- Quum extaret impubes, qui se filium defuncti diceret, debitoresque negent eum filium esse defuncti et intestati hereditatem ad agnatum, qui forte trans mare aberit, pertinere: necessarium erit puero carbonianum edictum. Sed et absenti erit prospiciendum, ut cautio praestetur.

§ 13.- Missum autem ex Carboniano in possessionem student praetores possessorem constituere. quod si coeperit aut hereditatem petere quasi bonorum possessor Carbonianus aut singulas res, rectissime Iulianus libro vicensimo quarto Digestorum scribit exceptione eum summovendum: contentus enim esse debet hac praerogativa, quod possessorem eum Praetor tantisper constituit. Si igitur vult hereditatem aut singulas res petere, petat, inquit, directa actione quasi heres, ut ea petitione

also a son, and the former should be the first to reach the age of puberty, the decision must be deferred on account of the youth of the one who asserts that he is a son; but this must be done partially and not entirely, for there is no dispute with reference to half of the estate. Where he who declares that he is also a son is the first one to attain the age of puberty, and he who alleges that he is the only son is under that age, the decision shall not be deferred; for there is no question with reference to the condition of the latter, since he is the one who makes the contest, as the one who has reached puberty, while he says that he is a son, does not deny that the other is also a son.

§ 11.- Where a slave who is ordered to be free, and is appointed an heir, disputes the status of a minor, who is said to be the son of the testator, and has broken the will of his father, Julianus says that the decision with reference to both the estate and the bequest of freedom should be deferred until the age of puberty; for neither of these questions can be determined at once without prejudicing the rights of him who says that he is the son of the testator. Other matters with reference to testamentary bequests of freedom, and which are pending, shall also be postponed until the time of puberty.

§ 12.- Where a minor under the age of puberty appears, and alleges that he is the son of the deceased, and debtors to the estate deny that this is true, but say that the property of the deceased intestate belongs to a relative, who, for instance, is beyond seas, the child must have recourse to the Carbonian Edict; but the interest of the absent person must be consulted by requiring security to be given.

§ 13.- The Praetors exert themselves to place in actual possession those to whom possession has been given under the Carbonian Edict. If, however, a possessor under the Carbonian Edict should attempt to claim the estate, or any particular property belonging to the same, Julianus, in the Twenty-fourth Book of the Digest, very properly says that he should be barred by an exception, for he ought to remain content with the privilege of possession which the Praetor in the meantime has granted him. Therefore,

que también él lo es; pero respecto a una parte, no respecto a la totalidad, porque ciertamente no se litiga respecto a una parte. Mas si hubiere llegado a la pubertad el que dice que también él lo es, y fuera impúbero el que dice que sólo él lo es, no se difiere la controversia; porque no soporta el impúbero controversia sobre su estado, sino que la promueve, puesto que el púbero dice que también él es hijo, y no niega que lo sea el otro.

§ 11.- Si alguno respecto del cual se dispuso que fuese libre y heredero le promoviera controversia sobre su estado a un impúbero, que se dice que es hijo, y que rompió el testamento del padre, dice Juliano, que ambos juicios, tanto sobre la herencia, como sobre la libertad, se deben diferir al tiempo de la pubertad; porque ninguno de ellos se puede ventilar, de suerte que no perjudique a la condición del que sostenga que él es hijo. También se difieren hasta el tiempo de la pubertad las demás cuestiones sobre la libertad, que sean dependientes del testamento.

§ 12.- Cuando hubiese un impúbero que dijera que él es hijo del difunto, y los deudores dijeren que no es hijo del difunto, y que la herencia del intestado le pertenece a un agnado, que acaso estuviere ausente en ultramar, le será necesario al impúbero el Edicto Carboniano; pero también se habrá de mirar por el ausente, de suerte que se le preste caución.

§ 13.- Mas los Pretores cuidarán de constituir poseedor al que fue puesto en posesión en virtud del Edicto Carboniano; pero si hubiere comenzado á pedir o la herencia como poseedor Carboniano de los bienes, o cosas determinadas, con muchísima razón escribe Juliano en el libro vigésimo cuarto del Digesto, que ha de ser repelido con excepción; porque debe estar contento con la prerrogativa de que el Pretor lo haya constituido poseedor por algún tiempo. Si, pues, quiere pedir la herencia o cosas

iudicari possit, an quasi ex liberis heres sit, ne praesumptio Carbonianae bonorum possessionis iniuriam adversariis afferat: quae sententia habet rationem et aequitatem.

§ 14.- Haec autem possessio intra annum datur, sicuti ordinariae quoque, quae liberis dantur, intra annum dantur.

§ 15.- Sed oportebit hunc, qui se filium dicit, non solum Carbonianam bonorum possessionem accipere, verum etiam ordinariam agnoscere.

§ 16.- Currunt autem tempora ad utramque bonorum possessionem separatim, ordinariae quidem, ex quo patrem suum decessisse scit et facultatem bonorum possessionis petendae habuit, Carbonianae vero ex eo tempore, ex quo controversiam sibi fieri cognovit.

4.- IULIANUS; *libro XXIV, Digestorum*.- Ideo si ex prima parte Edicti bonorum possessionem non petierit, alias poterit ex sequenti parte Edicti ad exemplum Carboniani accipere bonorum possessionem, alias non poterit. nam si confestim post patris mortem controversia ei facta fuerit, an inter liberos bonorum possessionem accipere possit, simul ad utriusque Edicti causam annus cessisse videbitur: si vero interposito tempore scierit controversiam sibi moveri, poterit etiam finito tempore, intra quod ex prima parte bonorum possessionem acceperat, ex sequenti bonorum possessionem petere, quam cum acceperit, perpetuo possessorii actionibus utetur: sed si post pubertatem contra eum iudicatum fuerit, denegabuntur ei actiones.

if he wishes to claim the estate, or any property forming part of the same, he says that he must do so by means of a direct action in the capacity of heir; so that, after his application, it may be determined whether he is an heir, and is included among the children, in order that the presumption of Carbonian possession of the estate may not injure his adversaries. This opinion is both reasonable and just.

§ 14.- Moreover, this possession is granted within the year, just as ordinary ones which are given to children.

§ 15.- It is, however, necessary that he who alleges that he is a son should not only obtain Carbonian possession of the estate, but should also demand the ordinary praetorian possession.

§ 16.- The periods necessary for obtaining both possessions run separately. The one which has for its object ordinary praetorian possession runs from the time when the son knew that his father was dead, and had the power to demand praetorian possession of the estate; and that of Carbonian possession runs from the time when the son knew that his condition was disputed.

4.- JULIANUS; *Digest, Book XXIV*.- Therefore, if a child does not demand possession of the estate under the First Section, he can, in some instances, obtain possession under the following Section of the Carbonian Edict, and sometimes he cannot do so; for if a controversy should arise immediately after the death of the father as to whether he could demand possession of the estate with the other children, the year will be considered to have expired at the same time, so far as both periods are concerned. If, however, after a certain term has elapsed, he should ascertain that his rights were disputed, he can, even if the time has expired during which he could have demanded possession of the estate under the First Section of the Edict, demand it under the Second Section; and when he has obtained it, he can always avail himself of the possessory actions. But where judgment has been rendered against him after he has reached puberty, the actions will be refused him.

determinadas, pídalas, dice, por la acción directa como heredero, para que con esta petición se pueda juzgar si es heredero como descendiente, a fin de que la presunción de la posesión Carboniana de los bienes no cause perjuicio á los adversarios; cuya opinión está fundada en razón y en equidad.

§ 14.- Pero esta posesión se da dentro del año, como se dan también dentro del año las ordinarias que se dan a los hijos.

§ 15.- Pero convendrá que el que dice que él es hijo obtenga no solamente la posesión Carboniana de los bienes, sino que acepte también la ordinaria.

§ 16.- Mas corren por separado los términos para una y otra posesión de los bienes, para la ordinaria, desde que sabe que falleció su padre, y tuvo facultad para pedir la posesión de los bienes, pero para la Carboniana desde el momento en que supo que se le promovía controversia.

4.- JULIANO; *Digesto, libro XXIV*.- Por lo tanto, si no hubiere pedido la posesión de los bienes en virtud de la primera parte del Edicto, podrá unas veces, y otras no podrá, recibir la posesión de los bienes en fuerza de la segunda parte del Edicto a la manera del Carboniano; porque si inmediatamente después de la muerte del padre se le hubiere promovido controversia sobre si podía obtener la posesión de los bienes entre los hijos; parecerá que el año transcurrió simultáneamente para la causa de uno y de otro Edicto; pero si habiendo mediado tiempo hubiere sabido que se le promovía controversia, podrá, aun finido el término dentro del cual había obtenido la posesión de los bienes en virtud de la primera parte, pedir la posesión de los bienes en fuerza de la segunda; y si la hubiere obtenido, usará perpetuamente de las acciones posesorias; mas si después de la pubertad se hubiere sentenciado contra él, se le denegarán las acciones.

5.- ULPIANUS; *libro XLI, ad Edictum*.- Sed si is, qui controversiam impuberi facit, ex liberis sit, eveniet, ut, sive caveat hic, cui status fit controversia, sive non caveat, attamen simul sit in possessionem.

§ 1.- Si impubes non defendatur idcircoque missus sit in possessionem etiam adversarius eius, actiones hereditarias quis exercebit? Et ait Iulianus libro vicensimo quarto Digestorum curatorem constitui debere, qui omnia curet actiones exerceat. Denique scribit etiam eum, qui quum impubere missus est in possessionem, actiones posse adversus curatorem intendere nec esse prohibendum: nullum enim per hoc praeiudicium hereditati fieri: nam et adversus ipsum pupillum, si satis dedisset, recte experiretur.

§ 2.- Quotiens impubes satis non dat, mittitur in possessionem adversarius eius, sive satis det sive non det. Si velit adversarius committi sibi administrationem, satis dare debet pupillo: ceterum si satis non det, debet curator constitui, per quem bona administrantur. Adversarius autem si satis dederit, res, quae tempore periturae aut deteriores futurae sint, distrahere debet: item a debitoribus, qui tempore liberabuntur, exigere debet: cetera quum pupillo possidebit.

§ 3.- An autem vescendi causa diminuere possit is qui ex Carboniano missus est, videamus. Et si quidem satis impubes dedit, sive decrevit praeses sive non, diminuet vescendi causa et hoc minus restituet hereditatis petitori. Quod si satis dare non potuit et aliter alere se videtur non posse, diminuendi causa usque ad id, quod alimentis eius necessarium est, mittendus est. Nec mirum debet videri hereditatem propter alimenta minui eius, quem fortasse iudicabitur filium non esse, quum omnium edictis venter in possessionem mittatur et alimenta mulieri

5.- ULPIANUS; *On the Edict, Book XLI*.- If he who institutes a contest against the minor is one of the children of the deceased, the result will be, whether he whose condition is in dispute gives security, or whether he does not do so, he will still be placed in possession.

§ 1.- If the child under the age of puberty is not defended, and therefore his adversary is placed in possession, who will have the right to bring the actions in which the estate is interested? Julianus, in the Twenty-fourth Book of the Digest, says that a curator should be appointed who can take charge of everything, and bring the actions. He, moreover, says that the person who is placed in possession with the minor is not forbidden to institute proceedings against the curator, for in this way no injury is done to the estate, as he can legally bring his actions against the minor himself, if he has furnished security.

§ 2.- Whenever a minor under the age of puberty does not give security, his adversary is placed in possession, whether he himself gives security or not. If his adversary wishes the administration of the property to be entrusted to him, he should furnish security to the minor; but if he does not do so, a curator should be appointed by whom the property shall be administered. Again, if the adversary should give security, he ought to sell any property which is liable to be either destroyed or depreciated by delay, and he must also collect all debts from the debtors, if they will be released by lapse of time; the remainder of the estate he shall keep possession of along with the minor.

§ 3.- Moreover, let us see whether he who is placed in possession under the Carbonian Edict can diminish the estate in order to provide for his own support. If the minor has given security, he can use part of the estate for his support, whether a decree authorizing him to do so has been granted, or not; and he must return the remainder of the estate to the person who claims it. If, however, he is unable to give security, and it is evident that he cannot otherwise support himself, he should be placed in possession in order to enable him to obtain what is necessary for his

5.- ULPIANO; *Comentarios al Edicto, libro XLI*.- Pero si fuera uno de los hijos el que le promueve controversia al impúbbero, sucederá que, ya si diera caución aquel a quien se le promueve controversia sobre su estado, ya si no la diera, será, sin embargo, puesto juntamente en posesión.

§ 1.- Si el impúbbero no fuera defendido, y por esto hubiera sido puesto en posesión también su adversario, ¿quién ejercitará las acciones de la herencia? Y dice Juliano en el libro vigésimo cuarto del Digesto, que se debe nombrar un curador, que cuide de todo y que ejercite las acciones. Finalmente, escribe que también el que fue puesto en posesión junto con el impúbbero puede ejercitar las acciones contra el curador, y que no se le ha de prohibir; porque no se causa con esto ningún perjuicio a la herencia, porque con razón se ejercitará también contra el mismo pupilo, si hubiese dado caución.

§ 2.- Cuando el impúbbero no da caución, es puesto en posesión su adversario, ora dé caución, ora no la dé. Si el adversario quisiera que se le encomiende a él la administración, debe darle caución al pupilo; pero si no diera caución, se debe nombrar un curador, por quien sean administrados los bienes. Mas si el adversario hubiere dado caución, debe enajenar las cosas que se hubieran de perder, o de deteriorar con el tiempo; también debe reclamarles a los deudores que se hubieren de librar por el tiempo, y lo demás lo poseerá juntamente con el pupilo.

§ 3.- Mas veamos si por causa de alimentos puede consumir algo el que fue puesto en posesión en virtud del Edicto Carboniano. y si verdaderamente dio caución el impúbbero, consumirá por causa de alimentos, ya si lo decretó el Presidente, ya si no, y esto menos le restituirá al que pide la herencia; pero si no pudo dar caución, y parece que no se puede alimentar de otro modo, ha de ser puesto en posesión para que consuma hasta lo que es necesario para sus alimentos. Y no debe parecer extraño que se disminuya la herencia por razón de los alimentos de quien acaso se

praestentur propter eum, qui potest non nasci, maiorque cura debeat adhiberi, ne fame pereat filius, quam ne minor hereditas ad petitem perveniat, si apparuit filium non esse.

§ 4.- Maxime autem puto, si missus fuerit in possessionem adversarius, desiderandum a praetore, ne instrumenta in possessionem suam redigat: ceterum decipietur pupillus, dum vel instruitur adversarius eius vel etiam intercipere ea potest.

§ 5.- Quum autem in satisfactione et pupillus et adversarius eius cessant, curator constituendus est, qui bona administret et quandoque ei qui iudicio vicerit restituat. quid tamen, si tutores pupilli velint administrare? Non erunt audiendi, nisi satis dederint nomine pupilli aut curatores quoque idem ipsi sint constituti.

6.- PAULUS; *libro XLI, ad Edictum*.- De bonis matris an decretum interponendum sit, quaeritur. Et decretum quidem non est interponendum, dilatio autem longissima danda est, quae in tempus pubertatis extrahet negotium.

§ 1.- Plane si simul de paternis et de maternis bonis controversia sit vel etiam de fratribus, et has controversias in tempus pubertatis differendas esse Iulianus respondit.

§ 2.- Huic autem Edicto locus est etiam si ab intestato ad bonorum possessionem veniant liberi, tametsi ex inferioribus partibus petant, qua legitimi vocantur, quoniam sui sunt, vel ex illa, qua cognatis datur.

subsistence. It ought not to appear surprising that a person, who may not prove to be the son of the deceased, is allowed to use part of the property for his support, since an unborn child is placed in possession of the entire estate by the Edicts, and support is given to his mother for the benefit of a child that may not be born; and greater care should be exercised to prevent the son from dying from hunger than to prevent a smaller amount of property coming into the hands of the claimant, if it should be decided that the child was not the son of the deceased.

§ 4.- I think that it should, by all means, be asked of the Praetor that the documents of the estate shall not be placed in the hands of the adversary, if he obtains possession; otherwise, the minor may be defrauded either by his adversary obtaining information through them, or by enabling him to suppress them.

§ 5.- When neither the minor nor his adversary gives security, a curator should be appointed who shall administer the property and deliver it to whoever gains the case. What, however, must be done if the guardians of the minor demand the administration? They should not be heard unless they give security in the name of the minor, or unless they themselves are appointed curators.

6.- PAULUS; *On the Edict, Book XLI*.- The question arises, can a decree be rendered with reference to the property of a mother? And, in fact, a decree cannot be rendered in this instance, under the Carbonian Edict; for a long delay should be granted which will defer the decision until the age of puberty.

§ 1.- Julianus says it is clear that if a controversy arises with reference to the estates of the father and mother, at the same time, or even with reference to that of a brother, the decision of the controversy must be postponed until the time of puberty.

§ 2.- There will be ground for the application of this Edict, even if the children should obtain praetorian possession ab intestato; even when they demand it under the last Sections of the Edict, where heirs at law are called to the succession as they are proper heirs,

juzgará que no es hijo, porque el que está en el claustro materno es puesto en posesión de todos los bienes por los edictos, y a la mujer se le prestan alimentos por causa del que puede no nacer, y se debe poner mayor cuidado en que no perezca de hambre el hijo, que en que no vaya disminuida la herencia al demandante, si resultó que no es hijo.

§ 4.- Pero principalmente opino, que, si hubiere sido puesto en posesión el adversario, se le ha de pedir al Pretor, que no ponga los instrumentos en posesión de aquél; de otra suerte seria perjudicado el pupilo, o utilizándolos su adversario, o pudiendo también substraerlos.

§ 5.- Mas cuando el pupilo y su adversario dejan de prestar fianza, se ha de constituir un curador, que administre los bienes, y que a su tiempo los restituya al que hubiere sido vencedor en el juicio. Pero ¿qué se dirá, si los tutores del pupilo quisieran administrar? No habrán de ser oídos, si no hubieren dado fianza en nombre del pupilo, o si ellos mismos no hubieran sido nombrados también curadores.

6.- PAULO; *Comentarios al Edicto, libro XLI*.- Se pregunta, si respecto a los bienes de la madre se haya de interponer decreto; y ciertamente no se ha de interponer decreto, pero se ha de dar una dilación muy larga, que difiera el negocio hasta el tiempo de la pubertad.

§ 1.- Mas si al mismo tiempo hubiera controversia sobre los bienes paternos y los maternos, o también sobre los del hermano, Juliano respondió, que también estas controversias han de ser diferidas al tiempo de la pubertad.

§ 2.- Pero ha lugar a este Edicto, aunque abintestato vayan los descendientes a la posesión de los bienes, pero la pidan en virtud de las últimas cláusulas, por la que son llamados los legítimos, puesto que son herederos suyos, o por aquella por la que se les da a los

§ 3.- Ita demum autem huic Edicto locus est, si status et hereditatis controversia sit: nam si tantum status (quod puta servus dicatur esse) nec ulla bonorum controversia sit, hoc casu liberale iudicium statim explicandum erit.

§ 4.- Qui pupillo controversiam facit si simul quum eo in possessionem missus est, ali ex bonis defuncti non debet nec quicquam de bonis deminuere: haec enim possessio pro satisfactione cedit.

§ 5.- Non solum alimenta pupillo praestari debent, sed et in studia et in ceteras necessarias impensas debet impendi pro modo facultatum.

§ 6.- Post pubertatem quaeritur, an actoris partes sustinere debeat qui ex Carboniano missus est in possessionem. Et responsum est rei partes eum sustinere debere, maxime si cavit. Sed et si non caverat, si nunc paratus sit cavere, quasi possessor conveniendus est: quod si nunc non caveat, possessio transfertur adversario satis offerente: perinde atque si nunc primum ab eo peteretur hereditas.

7.- IULIANUS; *libro XXIV, Digestorum*.- Si impubes negetur iure adoptatus et ideo paternae hereditatis ei controversia fiat, non erit iniquum simile carboniano decretum interponi.

§ 1.- Item si impubes in adoptionem datus esse dicatur et ideo negetur naturalis patris hereditas ad eum pertinere, quia et hoc casu quaeritur, an iure filii hereditatem optinere possit, locus erit Carboniano Edicto.

or under that Section by which possession is granted to cognates.

§ 3.- This Edict also applies where a controversy exists both with reference to the status of the minor, and his right to the estate; for if only his status is involved, as, for instance, where he is said to be a slave, and there is no dispute as to the estate, under such circumstances the question of his freedom should be immediately determined.

§ 4.- If he who raises a controversy concerning the minor is placed in possession with him at the same time, he should not be supported out of the property of the deceased, nor can he take anything from the estate, for this possession is only given him in lieu of security.

§ 5.- Not only should support be furnished the minor, but also money for his education, and all other necessary expenses should be paid in accordance with the amount of the estate.

§ 6.- The question arises whether he who has been placed in possession under the Carbonian Edict can, after he arrives at puberty, take the part of plaintiff in court. It has been established that he can take the part of defendant, especially if he gives security. Where he does not give security, and is not prepared to do so, suit can be brought against him as the possessor of the estate. If he does not then furnish security, possession will be transferred to his adversary, provided that he banishes it; just as if the estate had been, from that moment, claimed by him for the first time.

7.- JULIANUS; *Digest, Book XXIV*.- If it is denied that a minor has been legally adopted, and for that reason his right to the estate of his father is disputed, it will not be unjust for a decree similar to those issued under the Carbonian Edict to be rendered.

§ 1.- Likewise, where a minor, under the age of puberty, is said to have been given in adoption, and hence his right to the estate of his natural father is denied, since in this case the question arises whether he is entitled to the estate as a son, there will be

cognados.

§ 3.- Mas solamente tiene lugar este Edicto, si hubiera controversia sobre el estado y la herencia; porque si solamente sobre el estado, porque, por ejemplo, se diga que uno es esclavo, y no hubiera controversia alguna sobre los bienes, en este caso se habrá de ventilar inmediatamente el juicio sobre la libertad.

§ 4.- El que le promueve controversia a un pupilo, si fue puesto en posesión juntamente, no deberá ser alimentado de los bienes del difunto, ni disminuir cosa alguna de los bienes, porque esta posesión equivale a afianzamiento.

§ 5.- No solamente se le deben prestar alimentos al pupilo, sino que también se debe gastar en los estudios y en los demás gastos necesarios con arreglo a la cuantía de los bienes.

§ 6.- Se pregunta, si después de la pubertad debe sostener el papel de actor el que fue puesto en posesión en virtud del Edicto Carboniano. y se respondió, que debe sostener el papel de demandado, principalmente si dió caución; pero aunque no haya dado caución, si entonces estuviera dispuesto a dar caución, ha de ser demandado como poseedor. Mas si entonces no diera caución, se transfiere la posesión al adversario que ofrece fianza, lo mismo que si entonces se pidiese por primera vez por él la herencia.

7.- JULIANO; *Digesto, libro XXIV*.- Si se dijera que el impúbero no fue adoptado con arreglo a derecho, y por esto se le promoviera controversia sobre la herencia paterna, no será injusto que se interponga decreto semejante al Carboniano.

§ 1.- Además, si se dijera que el impúbero fue dado en adopción, y por esto se negara que le pertenezca la herencia del padre natural, como quiera que también en este caso se cuestiona si puede obtener la herencia por derecho de hijo, tendrá lugar el Edicto Carbo-

§ 2.- Qum vero proponitur exheredatus esse, non est necessarium controversiam in tempus pubertatis differri, quia non de ipsius filii, sed de testamenti iure quaeritur.

§ 3.- Si mater eius, cui et de libertate et de hereditate paterna controversia fit, in quaestionem libertatis vocatur, iudicium de matre non semper in tempus pubertatis differendum erit: nam et ipsi, qui subiectus esse dicitur, ex causa repraesentari solet.

§ 4.- Quotiens carbonianum decretum interponitur, eodem loco rem haberi oportet, quo esset, si nulla controversia fieret ei, qui bonorum possessionem acceperit.

§ 5.- Quum autem ex duobus fratribus ex hoc decreto missis alter pro parte sua paternam hereditatem non defendit, compellitur alter totam defendere aut universa creditoribus cedere.

§ 6.- Interdum etiam exheredatus filius ex Carboniano decreto bonorum possessionem accipiet, si non contra tabulas petit bonorum possessionem, sed ab intestato unde liberi (quia neget tabulas testamenti patris tales esse, ut secundum eas bonorum possessio dari possit) et dicatur non esse filius.

§ 7.- Si pupillus liberti paterni bonorum possessionem petet, negaretur autem filius patroni esse, quia de paternis bonis nulla controversia ei fieret, differendum hoc iudicium non est. Si vero post interpositum Carbonianum Decretum haec quoque controversia moveretur, hoc iudicium in id tempus differri debet.

ground for the application of the Carbonian Edict.

§ 2.- If, however, we suppose that the son is disinherited, it will not be necessary to postpone the decision of the controversy until the age of puberty, because the question does not involve the right of the son himself, but the validity of the will.

§ 3.- If the mother of the person whose freedom and claim to the estate of his father are in dispute is called into court to testify in a suit brought to establish his freedom, the decision with reference to his mother should not always be deferred to the time of puberty; for there are instances where the cases of those who are said to be supposititious children are determined without delay.

§ 4.- Whenever a decree is rendered under the Carbonian Edict, the matter is considered to be in the same condition in which it would have been if no controversy had arisen with reference to the person who obtained praetorian possession of the estate.

§ 5.- Again, where two brothers have been placed in possession under this decree, and one of them refuses to defend his share of his father's estate, the other will be compelled to defend the whole of it, or abandon it all to the creditors.

§ 6.- Sometimes, a disinherited son obtains possession of the estate under the Carbonian Edict, where he does not demand praetorian possession contrary to the provisions of the will, but, on the ground of intestacy, which is granted to children; because he denies that his father's will is such that praetorian possession can be given under it, as it is alleged that he is not his son.

§ 7.- If a minor demands possession of the estate of a freedman of his father, and it is denied that he is the son of the patron, for the reason that there is no dispute with reference to the estate of his father, the determination of the controversy should not be postponed. If, however, this controversy should arise after a decree under the Carbonian Edict had been rendered, its determination should be deferred until

niano.

§ 2.- Mas cuando se dice que fue desheredado, no es necesario que se difiera la controversia al tiempo de la pubertad, porque no se cuestiona sobre el derecho del mismo hijo, sino sobre el del testamento.

§ 3.- Si fuera llamada a cuestión sobre su libertad la madre de aquel a quien se le promueve controversia tanto sobre la libertad como sobre la herencia paterna, no siempre se habrá de diferir al tiempo de la pubertad el juicio sobre la madre; porque también respecto al mismo que se dice que es supuesto se suele anticipar en virtud de causa.

§ 4.- Siempre que se interpone el decreto Carboniano, debe ser considerado el negocio en la misma situación en que estaría, si no se le promoviese ninguna controversia al que hubiere obtenido la posesión de los bienes.

§ 5.- Mas cuando de dos hermanos puestos en posesión en virtud de este decreto uno no defiende en cuanto a su parte la herencia paterna, el otro es compelido a defenderla toda, o a cederla íntegra a los acreedores.

§ 6.- A veces, también el hijo desheredado obtendrá por el Decreto Carboniano la posesión de los bienes, si no pide la posesión de los bienes contra el testamento, sino abintestato la *Unde liberi*, porque niegue que las tablas del testamento del padre sean tales que se pueda dar conforme a ellas la posesión de los bienes, y se dirá que él no es hijo.

§ 7.- Si el pupilo pidiera la posesión de los bienes de un liberto de padre, pero se negase que él sea hijo del patrono, como quiera que no se le promovería ninguna controversia sobre los bienes paternos, no se ha de diferir este juicio. Mas si después de interpuesto el decreto Carboniano se promoviese también esta controversia, se debe diferir este juicio hasta aquel tiempo.

the time of puberty.

§ 8.- Quaesitum est, an simul et pupillus ex Carboniano et scripti heredes secundum tabulas bonorum possessionem haberent. Respondi, si filius non esset aut non accepisset contra tabulas vel ab intestato bonorum possessionem, simul et ipsum ex Carboniano et scriptos heredes secundum tabulas habituros bonorum possessionem.

8.- AFRICANUS; *libro IV, Quaestionum*.- Decessit, quem ego filium meum et in mea potestate esse dico: existit impubes, qui eum patrem familias et ad se hereditatem pertinere dicat: decretum necessarium esse respondit.

§ 1.- Item emancipatus decessit intestato superstite filio impubere, qui se ei suum esse dicit: ego considerando ante emancipationem conceptum atque ideo in mea potestate esse et bona emancipati ad me pertinere. Et quidem hunc filium esse constat: sed hactenus de statu eius quaeritur, quod in potestate patris fuerit nec ne: sententia tamen Edicti procul dubio ex Carboniano admittitur.

9.- NERATIUS; *libro VI, Membranarum*.- Quod Labeo scribit, quotiens suppositus esse dicitur pupillus, quum quo de patris eius hereditate controversia est, curare praetorem debere, ut is in possessione sit: de eo puto eum velle intellegi, qui post mortem patris familiae, qui se sine liberis decedere credidit, filius eius esse dici coepit: nam eius, qui agnitus est ab eo, de cuius bonis quaeritur, iustior in ea re causa est quam postumi.

§ 8.- The question arose whether a minor could have possession under the Carbonian Edict at the same time with the appointed heirs, who obtained it in accordance with the terms of the will. I answered that if he should not be the son, or had not obtained praetorian possession of the estate contrary to the provisions of the will, on the ground of intestacy, he could obtain it under the Carbonian Edict, at the same time that the appointed heirs acquired praetorian possession of the estate in accordance with the provisions of the will.

8.- AFRICANUS; *Questions, Book IV*.- The person whom I declare to be my son, and under my control, died. A minor, under the age of puberty, appeared, who alleged that the deceased was the father of a family, and that the estate belonged to him. It was held that the decree should be rendered.

§ 1.- Again, my emancipated son died intestate, leaving a son under the age of puberty, who alleged that he was the direct heir. I maintain the latter was conceived before emancipation took place, and, for this reason, was under my control, and that the estate of the emancipated son belonged to me. It was established that this child was the son of the deceased, but a question arose as to his legal condition, that is to say, whether he was under the control of his father, or not; and there is no doubt whatever that the Carbonian Edict is applicable in this instance.

9.- NERATIUS; *Parchments, Book VI*.- Labeo stated that whenever a minor is said to be supposititious, and a controversy arises with reference to his right to his father's estate, the Praetor should be careful to place him in possession of the same. I think that Labeo intended this to be applicable to a child born after the death of his father, who alleges that he was his son, even though the deceased thought that he had no children; for he who has been acknowledged by the person whose estate is in dispute has a more equitable claim to it than a posthumous child.

§ 8.- Se preguntó, si tendrían al mismo tiempo la posesión de los bienes el pupilo en virtud del decreto Carboniano, y los herederos instituidos con arreglo al testamento. Respondí, que si aquél no fuese hijo, o no hubiese recibido la posesión de los bienes contra el testamento o abintestato, habrán de tener al mismo tiempo la posesión de los bienes, aquél en virtud del decreto Carboniano, y los herederos instituidos con arreglo al testamento.

8.- AFRICANO; *Cuestiones, libro IV*.- Falleció uno que yo digo que era hijo mío, y que estaba bajo mi potestad; quedó un impúbero, que dice que aquél era padre de familia, y que a él le pertenece la herencia; respondió que era necesario el decreto.

§ 1.- Asimismo, falleció intestado un emancipado, sobreviviéndole un hijo impúbero, que dice que es de él heredero suyo; yo sostengo, que fue concebido antes de la emancipación, y que por lo tanto esta bajo mi potestad, y que me pertenecen los bienes del emancipado; y es sabido ciertamente que éste es hijo. Pero ahora se cuestiona respecto a su estado, sobre si haya estado, o no, bajo la potestad del padre; pero sin duda alguna es admitido por el espíritu del Edicto en virtud del Carboniano.

9.- NERACIO; *Pergaminos, libro VI*.- Lo que escribe Labeón, que siempre que se dice que es supuesto el pupilo con el cual hay controversia sobre la herencia del padre, debe cuidar el Pretor de que él sea puesto en posesión, opino que quiere que se entienda respecto de aquél que después de la muerte del padre de familia, que creyó que él fallecía sin hijos, comenzó a decir que era hijo de éste; porque en este caso la causa del que fue reconocido por aquél, de cuyos bienes se trata, es más justa, que la del póstumo.

10.- MARCELLUS; *libro VII, Digestorum*.- Quum mulier deferente herede iuraverit se praegnatam esse, bonorum possessio ex Edicto Carboniano dari debet, vel denegari, si illa heredi detulit iusurandum, quum causa cognita detur possessio, ne aut heredi bonorum possessio data faciat praeiudicium aut denegata ius ordinarium eripiat pupillo.

11.- PAPINIANUS; *libro XIII, Quaestionum*.- Quum sine beneficio praetoris qui patitur controversiam filius heres esse potest, forte quia scriptus est, edicto carboniano locus non est: ac similiter quum certum est, quamvis filius sit, eum tamen heredem non fore, veluti si Titio herede instituto postumus aut impubes exheredatus negetur filius. nec ad rem pertinet, quod interest illius in quibusdam filium esse, veluti propter fratris ex alia matre nati bona vel iura libertorum et sepulchrorum: istos enim casus ad Carbonianum constat non pertinere.

12.- IDEM; *libro XIV, Quaestionum*.- Scriptus heres, contra quem filius impubes, qui subiectus dicitur, ex Edicto primo bonorum possessionem petit, exemplo legitimi secundum tabulas interim accipere non potest. Quod si medio tempore scriptus vel ille, qui intestati possessionem habere potuerit, moriantur, heredibus eorum succurrendum erit: quid enim, si non potuerunt adire hereditatem iure cessante vel ob litem in dubio constituti?

13.- PAULUS; *libro XI, Responsorum*.- Titia post mortem mariti sui postumam enixa est: eidem Titiae crimen adulterii Sempronius apud Praesidem

10.- MARCELLUS; *Digest, Book VII*.- Where a woman, to whom an oath has been tendered by the heir, swears that she is pregnant, possession of the estate should be granted under the Carbonian Edict, or it should be refused if she tendered the oath to the heir; for possession should be given after proper cause has been shown to prevent the heir from being prejudiced if it should be given; or if it should be denied, to avoid depriving the minor of his legal rights.

11.- PAPINIANUS; *Questions, Book XIII*.- There is no ground for the application of the Carbonian Edict, where the son, whose civil condition is contested, cannot become the heir without the intervention of the Praetor; for example, if he has been appointed. The same rule applies where it is certain that he still cannot be the heir, even though he may be the son; as, for instance, if Titius was appointed heir, and a posthumous child or a disinherited minor should be denied to be the son of the testator. Nor does it make any difference what interest the minor may have in being proved to be the son, with reference to other matters, for example, in order to obtain the property of his brother by another mother; or to acquire rights over freedmen and burial places; for it is established that these cases do not come under the Carbonian Edict.

12.- THE SAME; *Questions, Book XIV*.- An appointed heir, against whom a minor son who is said to be supposititious demands praetorian possession under the First Section of the Edict, as in the case of an heir at law, cannot, in the meantime, obtain possession in accordance with the provisions of the will. If, however, in the interim, either the appointed heir, or he who is entitled to possession as the heir at law, should die, relief must be granted to his heirs. For what if they had not been able to enter upon the estate, because the law prevented them from doing so, or on account of the decision of the controversy being doubtful pregunta

13.- PAULUS; *Opinions, Book XI*.- Titia had a posthumous child after the death of her husband, and Sempronius brought an accusation of adultery

10.- MARCELO; *Digesto, libro VII*.- Cuando defiriéndole el juramento el heredero hubiere jurado la mujer, que estaba embarazada, debe dársele la posesión de los bienes en virtud del Edicto Carboniano, o denegársele, si ella defirió el juramento al heredero, porque la posesión se da con conocimiento de causa, a fin de que la posesión de los bienes dada no le cause perjuicio al heredero, o no le arrebatase la denegada su derecho ordinario al pupilo.

11.- PAPINIANO; *Cuestiones, libro XIII*.- Cuando sin el beneficio del Pretor puede ser heredero el hijo que sufre la controversia, acaso porque fue instituido, no ha lugar al Edicto Carboniano; y análogamente, cuando es cierto, que aunque sea hijo, no habrá de ser, sin embargo, heredero, por ejemplo, si instituido heredero Ticio se negara que el póstumo o el impúbere desheredado es hijo. Y no importa al caso, que el ser hijo le interese para algunas cosas, por ejemplo, por razón de los bienes de un hermano nacido de otra madre, o por los derechos de los libertos y de sepulcros; porque es sabido que estos casos no están comprendidos en el Edicto Carboniano.

12.- EL MISMO; *Cuestiones, libro XIV*.- El heredero instituido, contra quien el hijo impúbere, que se dice que es supuesto, pide a la manera que los legítimos la posesión de los bienes por el primer Edicto, no puede obtener mientras tanto la posesión con arreglo al testamento; pero si en el tiempo intermedio muriese el instituido, o el que hubiere podido tener la posesión abintestato, se habrá de socorrer a sus herederos. Porque ¿qué se dirá si no pudieron adir la herencia por faltarles el derecho, o porque se hallaron en duda por causa del litigio?

13.- PAULO; *Respuestas, libro XI*.- Ticia dio a luz una póstuma después de la muerte de su marido, y Sempronio le opuso a la misma Ticia ante el

Provinciae obiecit: quaero, an in tempus pubertatis quaestio adulterii differri debeat, ne praeiudicium postumae fiat. Paulus respondit, si ei pupillae, de qua quaeritur, bonorum paternorum quaestio non moveatur, sine causa tutores desiderare adulterii quoque quaestionem in tempus pubertatis pupillae differri.

14.- SCAEVOLA; *libro II, Responsorum*.- Quaeritur, an impubes, qui bonorum possessionem ex Carboniano accepit, si, antequam possessio ad eum translata fuerit, pubes factus sit, petitoris partibus fungi debeat. Respondit in eo, quod a possessore petet, probationem ei incumbere.

15.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Haec bonorum possessio, si satis datum sit, non tantum ad possessionem apiscendam, sed ad res etiam persequendas et debitum exigendum et collationem bonorum et dotis et omnium quae conferri diximus prodest.

16.- PAULUS; *libro XLI ad Edictum*.- Sed sicuti de bonis paternis emancipato cavetur, ita de istis quae ipsi confert cavendum est.

TIT. XI

DE BONORUM POSSESSIONIBUS
SECUNDUM TABULAS

1.- ULPIANUS; *libro XXXIX, ad Edictum*.- Tabulas testamenti accipere debemus omnem materiae figuram: sive igitur tabulae sint lignae sive cuiuscumque alterius materiae, sive chartae sive membranae sint vel si corio alicuius animalis, tabulae recte dicuntur.

against her before the Governor of the province. I ask whether trial of the accusation of adultery should be deferred until the age of puberty, in order that the rights of the posthumous child may not be prejudiced. Paulus answered that if there was no question as to the right of the minor to the estate of her father, her guardians have no reason to defer the trial for adultery until their ward reaches the age of puberty.

14.- SCAEVOLA *Opinions, Book II*.- The question arises whether a minor under puberty has obtained possession of an estate by the Carbonian Edict, and reaches that age before the possession has been transferred to him, can perform the duties of plaintiff. The answer was that he must introduce proof of any claim which he makes against the possessor.

15.- HERMOGENIANUS; *Epitomes of Law, Book III*.- This possession will benefit the minor if security is furnished not only to obtain actual possession, but also to recover property, to collect debts, to give dowries, and to do everything else which we have already stated is liable to contribution in collation.

16.- PAULUS; *On the Edict, Book XLI*.- Just as security is given to an emancipated son with reference to the estate of his father, so it must also be given to a minor with reference to the property which he himself places in collation.

TITLE XI

CONCERNING PRAETORIAN POSSESSION
OF AN ESTATE IN ACCORDANCE WITH THE
PROVISIONS OF THE WILL

1.- ULPIANUS; *On the Edict, Book XXXIX*.- By a will we should understand any kind of material upon which it is written; therefore, whether it is written upon tablets of wood, or upon those of any other kind of material, or upon papyrus, or parchment, or upon the skin of any animal whatsoever, it is also properly designated a will.

Presidente de la provincia la acusación de adulterio; pregunto, si la cuestión de adulterio deberá ser diferida al tiempo de la pubertad, para que no se le cause perjuicio a la póstuma. Paulo respondió, que, si a la pupila de que se trata no se le promoviera cuestión sobre los bienes paternos, sin causa desean los tutores que también la cuestión de adulterio sea diferida al tiempo de la pubertad de la pupila.

14.- SCÉVOLA; *Respuestas, libro II*.- Se pregunta, si el impúbere, que recibió la posesión de los bienes en virtud del Edicto Carboniano, deberá desempeñar la función de demandante, si se hubiera hecho púbero antes que á él se le hubiere transferido la posesión. Respondió, que respecto a lo que le pidiera al poseedor le incumbe la prueba.

15.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Esta posesión de los bienes, si se hubiera dado caución, aprovecha no solamente para alcanzar la posesión, sino también para perseguir los bienes, para exigir las deudas, y para la colación de los bienes, de la dote, y de todo lo que hemos dicho que se lleva a colación.

16.- PAULO; *Comentarios al Edicto, libro XLI*.- Pero así como se le da al emancipado caución respecto a los bienes paternos, así también se ha de dar caución por los que él mismo lleva a colación.

TÍTULO XI

DE LA POSESIÓN DE LOS BIENES CON
ARREGLO AL TESTAMENTO

1.- ULPIANO; *Comentarios al Edicto, libro XXXIX*.- Debemos entender por tablas del testamento las de toda clase de materia; así, pues, ora sean de madera, ora de otra cualquier materia, ya sean de papel, ya de pergamino, o de cuero de algún animal, se las llamara debidamente tablas.

§ 1.- Non autem omnes tabulas Praetor sequitur hac parte Edicti, sed supremas, hoc est eas, quae novissimae ita factae sunt, post quas nullae factae sunt: supremae enim hae sunt non quae sub ipso mortis tempore factae sunt, sed post quas nullae factae sunt, licet hae veteres sint.

§ 2.- Sufficit autem extare tabulas, etsi non proferantur, si certum sit eas extare. Igitur etsi apud furem sint vel apud eum, apud quem depositae sunt, dubitari non oportet admitti posse bonorum possessionem: nec enim opus est aperire eas, ut bonorum possessio secundum tabulas agnoscatur.

§ 3.- Semel autem exstittisse tabulas mortuo testatore desideratur, tametsi exstare desierint: quare et si postea interciderunt, bonorum possessio peti poterit.

§ 4.- Scientiam tamen exigemus, ut sciat heres extare tabulas certusque sit delatam sibi bonorum possessionem.

§ 5.- Si quis in duobus exemplaribus fecerit testamentum et aliud extet, aliud non extet, tabulae extare videntur petique potest bonorum possessio.

§ 6.- Sed et si in duobus codicibus simul signatis alios atque alios heredes scripserit et utrumque extet, ex utroque quasi ex uno competit bonorum possessio, quia pro unis tabulis habendum est et supremum utrumque accipiemus.

§ 7.- Sed si unum fecerit testator quasi testamentum, aliud quasi exemplum, si quidem id extat quod voluit esse testamentum, bonorum possessio petetur, si vero id quod exemplum erat, bonorum possessio peti non poterit, ut Pomponius scripsit.

§ 1.- The Praetor does not, under this Section of the Edict, confirm all wills, but only the last ones; that is to say, those which were most recently made, and after which no others have been drawn up. A last will is not one which was executed at the very time of death, but one after which no other has been executed, even though it is old.

§ 2.- It is sufficient for there to be a will, although it may not be produced, if it is certain that it does exist. Therefore, if it is in possession of a thief, or in the hands of one with whom it has been deposited for safe-keeping, there is no doubt that praetorian possession of the estate should be granted; for it is not necessary to open the will in order that praetorian possession may be obtained in accordance with its provisions.

§ 3.- Again, it is necessary for the will to have been in existence at the time of the death of the testator, even if it may have ceased to exist afterwards, hence, where it has subsequently been destroyed praetorian possession can be demanded.

§ 4.- Nevertheless, we require that the heir should know that the will existed, and be certain that the possession of the estate was given to him by its provisions.

§ 5.- Where anyone makes two copies of his will, and one of them remains, and the other is destroyed, the will is considered to be in existence, and praetorian possession of the estate can be demanded.

§ 6.- Even if the testator made two wills, and sealed them at the same time, and appointed different heirs by each one, and both are in existence; possession of the estate can be obtained under both, because they are considered as one document and the last will of the testator.

§ 7.- If, however, a testator should execute a will, and also a copy of the same, and if the one which he intended to be his will is in existence, praetorian possession of the estate can be demanded; but Pomponius says that if only the copy is in existence,

§ 1.- Mas en esta parte del Edicto no atiende el Pretor a todos los testamentos, sino al último, esto es, al que de tal modo fue hecho el último, que después de él no se hizo ninguno; porque es el último no el que se hizo al mismo tiempo de la muerte, sino aquel después del cual no se hizo ninguno, aunque aquél sea antiguo.

§ 2.- Pero basta que haya testamento, aunque no se presente, si fuera cierto que lo hay. Así, pues, aunque esté en poder de un ladrón, o en el de aquel en quien fue depositado, no se debe dudar que se puede admitir la posesión de los bienes; y no hay necesidad de abrirlo, para que se reconozca la posesión de los bienes con arreglo al testamento.

§ 3.- Mas se requiere que una vez haya existido el testamento después de muerto el testador; porque, aunque luego haya perecido, se podrá pedir la posesión de los bienes.

§ 4.- Pero exigimos el conocimiento, de suerte que sepa el heredero que hay testamento, y que esté cierto de que le fue deferida la posesión de los bienes.

§ 5.- Si alguno hubiere hecho testamento en dos ejemplares, y existiera uno, y otro no, se considera que existe el testamento, y se puede pedir la posesión de los bienes.

§ 6.- Mas aunque en dos códigos sellados al mismo tiempo hubiere instituido diversos herederos, y existan ambos, compete la posesión de los bienes por ambos como por uno solo, porque han de ser considerados como un solo testamento, y ambos los admitiremos como último.

§ 7.- Pero si uno lo hubiere hecho el testador como testamento, y otro como copia, si verdaderamente existiera el que quiso que fuera testamento, se pedirá la posesión de los bienes; pero si el que era copia, no se podrá pedir la posesión de los bienes, según

§ 8.- Exigit Praetor, ut is, cuius bonorum possessio datur, utroque tempore ius testamenti faciendi habuerit, et quum facit testamentum et quum moritur. proinde si impubes vel furiosus vel quis alius ex his qui testamentum facere non possunt testamentum fecerit, deinde habens testamenti factionem decederit, peti bonorum possessio non poterit.

Sed et si filius familias putans se patrem familias testamentum fecerit, deinde mortis tempore pater familias inveniatur, non potest bonorum possessio secundum tabulas peti. Sed si filius familias veteranus de castrensi faciat, deinde emancipatus vel alias pater familias factus decedat, potest eius bonorum possessio peti.

Sed si quis utroque tempore testamenti factionem habuerit, medio tempore non habuerit, bonorum possessio secundum tabulas peti poterit.

§ 9.- Si quis autem testamentum fecerit, deinde amiserit testamenti factionem vel furore vel quod ei bonis interdictum est, potest eius peti bonorum possessio, quia iure testamentum eius valet: et hoc generaliter de omnibus huiusmodi dicitur, qui amittant mortis tempore testamenti factionem, sed ante factum eorum testamentum valet.

§ 10.- Si linum, quo ligatae sunt tabulae, incisum sit, si quidem alius contra voluntatem testatoris incidierit, bonorum possessio peti potest: quod si ipse testator id fecerit, non videntur signatae et ideo bonorum possessio peti non potest.

possession of the estate cannot be claimed.

§ 8.- For possession to be given of an estate of anyone, the Praetor requires that he should have the right of testation, not only when he made the will, but also at the time of his death; hence, if a minor under the age of puberty, or an insane person, or anyone else of those who have not testamentary capacity should make a will and afterwards became competent to do so, and die, praetorian possession of his estate cannot be demanded.

If, however, a son under paternal control, thinking that he was the head of a household when he was not, should make a will, and afterwards be found to be his own master at the time of his death, possession of his estate in accordance with the provisions of the will cannot be claimed under the terms of the Praetorian Edict. But if a son under paternal control, who was a veteran, should make a will disposing of his castrense peculium, and afterwards be emancipated, or become the head of a family and then die, praetorian possession of his estate can be demanded.

If anyone should have the power to make a will at both the times above mentioned, but should not have that power in the interval, praetorian possession of his estate can be claimed in accordance with the provisions of his will.

§ 9.- Moreover, if anyone should make a will, and afterwards be deprived of testamentary capacity either through becoming insane, or for the reason that he was forbidden to manage his property, possession of his estate can be demanded under the Edict, because his will is valid in law. Generally speaking, this may be said of all persons of this kind who have lost the power to make a will at the time of their death; but their wills executed before that time are valid.

§ 10.- Where the cord which binds the tablets of the will together is cut, even though this was done against the wish of the testator, praetorian possession of the estate can be demanded. If, however, the testator himself should cut it, the will is not considered to have been sealed, and therefore

escribió Pomponio.

§ 8.- Exige el Pretor, que aquel de cuyos bienes se da la posesión haya tenido el derecho de hacer testamento en uno y otro tiempo, así cuando hace el testamento, como cuando muere. Por lo cual, si un impúbero, o un furioso, u otro cualquiera de los que no pueden hacer testamento, hubiere hecho el testamento, y después hubiere fallecido teniendo el derecho de hacer testamento, no se podrá pedir la posesión de los bienes.

Pero si creyéndose padre de familia un hijo de familia hubiere hecho testamento, y luego al tiempo de la muerte se encontrara siendo padre de familia, tampoco se puede pedir la posesión de los bienes con arreglo al testamento. Mas si lo hiciera de su peculio castrense un hijo de familia veterano, y luego falleciera emancipado o hecho de otro modo padre de familia, se puede pedir la posesión de sus bienes.

Pero si alguno hubiere tenido en uno y otro tiempo derecho de hacer testamento, y no lo hubiere tenido en el tiempo intermedio, se podrá pedir la posesión de los bienes con arreglo al testamento.

§ 9.- Mas si alguno hubiere hecho testamento, y después hubiere perdido la facultad de hacerlo o por locura, o porque se le puso interdicción en sus bienes, se puede pedir la posesión de sus bienes, porque en derecho es válido su testamento; y en general se dice esto de todos los que de este modo pierdan al tiempo de la muerte la facultad de hacer testamento; pero es válido su testamento hecho antes.

§ 10.- Si hubiera sido cortado el lino con que fueron atadas las tablas del testamento, si verdaderamente lo hubiere cortado otro contra la voluntad del testador, se puede pedir la posesión de los bienes; pero si esto lo hubiere hecho el mismo testador, no se consideran selladas, y por lo tanto no se puede pedir

§ 11.- Si rosae sint a muribus tabulae vel linum aliter ruptum vel vetustate putrefactum vel situ vel casu, et sic videntur tabulae signatae, maxime si proponas vel unum linum tenere. Si ter forte vel quater linum esset circumductum, dicendum est signatas tabulas eius extare, quamvis vel incisa vel rosa sit pars uni.

2.- IDEM; *libro XLI, ad Edictum*.- Aequissimum ordinem Praetor secutus est: voluit enim primo ad liberos bonorum possessionem contra tabulas pertinere, mox, si inde non sit occupata, iudicium defuncti sequendum. Exspectandi igitur liberi erunt, quamdiu bonorum possessionem petere possunt: quod si tempus fuerit finitum aut ante decesserint vel repudiaverint vel ius petendae bonorum possessionis amiserint, tunc revertetur bonorum possessio ad scriptos.

§ 1.- Si sub condicione heres institutus filius sit, Iulianus peraeque putavit secundum tabulas competere ei quasi scripto bonorum possessionem, qualisqualis condicio sit, etiam si haec "si navis ex asia venerit": et quamvis defecerit condicio, praetor tamen filium, qui admiserit secundum tabulas, tueri debet ac si contra tabulas acceperit: quae tuitio ei qui emancipatus est necessaria estado

possession of the estate cannot be claimed.

§ 11.- If the tablets on which the will is written should be gnawed by mice, or the cord be broken in some other way, either through being decayed by age, or by the dampness of the place where it was deposited, or by a fall, the will is considered to have been sealed; especially if you suppose that it is fastened with only one cord. If a cord is wound three or four times around the tablets, it must be held that they are sealed, even though it may be cut or gnawed in one place.

2.- THE SAME; *On the Edict, Book XLI*.- The Praetor has adopted a most equitable order of succession in the Edict. For he desires that, in the first place, the children shall be entitled to possession of the estate in opposition to the terms of the will, and then, if this should not be done, the will of the deceased must be complied with. Therefore the matter must remain in abeyance for the time during which the children can demand possession of the estate. When this period has elapsed, or if before this they should die, or reject the estate, or should lose the right to claim possession of it, then possession of the estate under the Praetorian Edict will revert to the appointed heirs.

§ 1.- Where a son is appointed an heir under a condition, Julianus very properly holds that he can demand possession of the estate in accordance with the terms of the will, in the capacity of appointed heir, no matter what the condition is, even if it should be as follows, "when a ship should arrive from Asia." And although the condition may not be fulfilled, the Praetor must, nevertheless, protect the son whom he permits to have possession in accordance with the provisions in opposition to them. This protection is especially necessary to a son who has been emancipated.

§ 2.- Each appointed heir shall be given possession of the estate in proportion to the share of the same which has been bequeathed to him, in such a way, however, that if there is no one who demands it with him

la posesión de los bienes.

§ 11.- Si las tablas del testamento hubieran sido roídas por ratones, y el lino hubiera sido roto de otro modo, podrido o por antigüedad, o por moho, o por casualidad, también en este caso se consideran selladas las tablas, mayormente si alegaras que aun subsiste un solo hilo. Si acaso se hubieren dado tres o cuatro vueltas con el lino, se ha de decir, que subsisten selladas las tablas del testamento, aunque haya sido cortada, o roída, parte del lino.

2.- EL MISMO; *Comentario, al Edicto, libro XLI*.- El Pretor siguió un orden muy justo; porque quiso que en primer lugar les perteneciera a los hijos la posesión de los bienes. contra el testamento, y que después, si de este modo no hubiera sido ocupada, se haya de cumplir la disposición del difunto. Así, pues, habrán de ser esperados los hijos mientras pueden pedir la posesión de los bienes; pero si hubiere finido el término, o hubieren fallecido antes, o hubieren repudiado, o hubieren perdido el derecho de pedir la posesión de los bienes, entonces la posesión de los bienes vuelve a los instituidos.

§ 1.- Si un hijo hubiera sido instituido heredero bajo condición, opinó muy justamente Juliano, que le compete, como a instituido, la posesión de los bienes con arreglo al testamento, cualquiera que sea la condición, aun si fuera esta: «si la nave viniere de Asia»; y aunque hubiere faltado la condición, deberá, sin embargo, el Pretor amparar al hijo, como si la hubiere obtenido contra el testamento; cuyo amparo es necesario para el que fue emancipado.

§ 2.- Cada uno recibirá la posesión de los bienes respecto a la parte en que fue instituido heredero, de suerte que, si no hubiera quien concurra con él, él solo tendrá la posesión de los bienes; pero mientras uno de los herederos delibera si admitirá, o no, la

utrum admittat bonorum possessionem an non, portio bonorum possessionis eius coheredi non defertur.

§ 3.- Si primus quidem ita substitutus sit, si intra decem, secundus, si post decem intra quattuordecim annos: si quidem intra decem decesserit, primus solus heres erit et accipiet bonorum possessionem, si vero post decem intra quattuordecim, secundus solus heres erit et accipiet bonorum possessionem, nec sibi iunguntur, quum ad suam quisque causam substitutus sit.

§ 4.- Defertur bonorum possessio secundum tabulas primo gradu scriptis heredibus, mox illis non petentibus sequentibus, non solum substitutis, verum substituti quoque substitutis, et per seriem substitutos admittimus. Primo gradu autem scriptos accipere debemus omnes, qui primo loco scripti sunt: nam sicuti ad adeundam hereditatem proximi sunt, ita et ad bonorum possessionem admittendam.

§ 5.- Si quis ita scripserit: "primus ex parte heres esto: si primus heres non erit, secundus heres esto. tertius ex alia parte dimidia heres esto: si non erit, quartus heres esto", primus et tertius priores ad bonorum possessionem invitantur.

§ 6.- Siquis ita instituerit heredes: "uter ex fratribus meis seiam uxorem duxerit, ex dodrante mihi heres esto, uter non duxerit, ex quadrante heres esto", si quidem mortua fuerit seia, aequas partes habituros heredes constat: quod si ab altero uxor ducta fuerit, dodrantem et quadrantem eis competere: bonorum autem possessionem, antequam existat condicio, neutrum petere.

him he may have sole possession. Nevertheless, while one of the heirs is deliberating whether or not he will take praetorian possession of the estate, possession of the share of his co-heir shall not be granted the latter.

§ 3.- Where one substitute has been appointed for an heir if he should die within ten years, and another if he should die between the ages of ten and fourteen years, and the heir dies before he is ten years old, the first substitute will become the heir, and will obtain praetorian possession of the estate; but if the heir should die after he is ten years old, and before he reaches his fourteenth year, the second substitute will become the heir, and will obtain possession; but both cannot be joined, as each of them is substituted under a different condition.

§ 4.- Praetorian possession of an estate in accordance with the terms of the will is granted to heirs appointed in the first degree, and afterwards, if they do not claim it, to the substitutes who come next in order, as well as to those who were substituted for the substitutes; and we grant possession to substitutes in regular order. We should understand heirs to be appointed in the first degree who are appointed first; for as they have the prior right to accept the estate, so also they should be the first entitled to praetorian possession.

§ 5.- If anyone should say in his will, "Let the first be heir to half of my estate and if he should not be my heir, let the second be my heir; let the third be my heir to half of my estate, and if he does not become my heir, let the fourth be my heir," the first and the third are those who will be permitted to obtain praetorian possession of the estate.

§ 6.- If anyone should appoint heirs as follows, "Let whichever of my brothers who shall marry Seia be the heir to three-fourths of my estate, and let the one who does not marry her be the heir to a fourth of the same," it is evident that if Seia should die, the heirs will be entitled to equal shares of the estate. If, however, she should be married to one of them, he will be entitled to three-fourths, and the other to one-

uno de los herederos delibera si admitirá, o no, la posesión de los bienes, no se defiere a su coheredero su porción de la posesión de los bienes.

§ 3.- Si el primero hubiera sido ciertamente substituido así, si muriere dentro de los diez años, y el segundo si después de los diez y dentro de los catorce, si verdaderamente hubiere fallecido dentro de los diez, sólo el primero será heredero, y recibirá la posesión de los bienes; mas si después de los diez, y dentro de los catorce, sólo el segundo será heredero, y obtendrá la posesión de los bienes; y no se unen, porque cada cual fue substituido para su propio caso.

§ 4.- Se defiere la posesión de los bienes con arreglo al testamento a los herederos instituidos en el primer grado, y después, no pidiéndola ellos, a los siguientes, no solamente substitutos, sino también substitutos del substituto, y admitimos por serie a los substitutos. Mas debemos entender instituidos en el primer grado a todos los que fueron escritos en primer lugar; porque así como son inmediatos para adir la herencia, así también lo son para recibir la posesión de los bienes.

§ 5.- Si alguno hubiere escrito de este modo: «el primero sea heredero de una parte; si el primero no fuere heredero, sea heredero el segundo; el tercero sea heredero de otra mitad; si no lo fuere, sea heredero el cuarto», el primero y el tercero son invitados como primeros a la posesión de los bienes.

§ 6.- Si alguno hubiere instituido así herederos: «el que de mis dos hermanos hubiere tomado por mujer a Seya sea heredero mío por dos tercios, y el que no la hubiere tomado sea heredero de una cuarta parte»; si verdaderamente hubiere muerto Seya, es sabido que los herederos habrán de tener partes iguales; pero que si por uno hubiere sido tomada por mujer, les competen los dos tercios y la cuarta parte, pero

§ 7.- Si consulto sit inductum nomen heredis, indubitanter probatur bonorum possessionem petere eum non posse, quemadmodum non potest, qui heres scriptus est non consulto testatore: nam pro non scripto est, quem scribi noluit.

§ 8.- Si duo sint heredes instituti primus et secundus, secundo tertius substitutus, omittente secundo bonorum possessionem tertius succedit: quod si tertius noluerit hereditatem adire vel bonorum possessionem accipere, reccidit bonorum possessio ad primum. Nec erit ei necesse petere bonorum possessionem, sed ipso iure ei ad crescit: heredi enim scripto sicut portio hereditatis, ita et bonorum possessio ad crescit.

§ 9.- Si servus heres scriptus sit, ei domino defertur bonorum possessio, ad quem hereditas pertinebit: ambulat enim quum dominio bonorum possessio. quare si mortis tempore Stichus heres institutus fuit servus Sempronii nec Sempronius eum iussit adire, sed vel decessit vel etiam eum alienavit et coepit esse Septicii: evenit, ut, si Septicius eum iusserit, Septicio deferatur bonorum possessio: ad hunc enim hereditas pertinet. unde si per multos dominos transierit servus tres vel plures, novissimo dabimus bonorum possessionem.

3.- PAULUS; *libro XLI, ad Edictum*.- Verum est omnem postumum, qui moriente testatore in utero fuerit, si natus sit, bonorum possessionem petere posse.

fourth of the estate, respectively; but neither of them can demand praetorian possession before the condition has been complied with.

§ 7.- If the name of the heir has been designedly erased, it is settled beyond a doubt that he cannot demand praetorian possession of the estate, any more than one who has been appointed an heir without consulting the testator; for he is considered as not having been designated whom the testator did not wish to appoint.

§ 8.- Where two heirs are appointed, namely the first and the second, and a third is substituted for the second, if the second declines to take possession of the estate, the third will succeed to his place. If, however, the third should refuse to enter upon the estate, or to take praetorian possession of the same, possession of it will revert to the first; nor will it be necessary for him to demand praetorian possession, for it will accrue to him by operation of law, as praetorian possession accrues to an appointed heir in the same manner as his share of the estate.

§ 9.- Where a slave is appointed an heir, praetorian possession of the estate is given to his master to whom the estate will belong; for praetorian possession follows the ownership of the property. Therefore, if at the time of the death of the testator, the appointed heir, Stichus, was the slave of Sempronius, and Sempronius did not order him to enter upon the estate because of his death, or for the reason that he had alienated the slave, and the latter had become the property of Septicius, the result will be that if Septicius should order the slave to accept the estate, praetorian possession of the same will be given to Septicius, for the estate will belong to him. Wherefore, if a slave should pass to three or four masters in succession we will grant praetorian possession of the estate to the last of them.

3.- PAULUS; *On the Edict, Book XLI*.- It is true that every posthumous child who was unborn at the time of the death of the testator can demand praetorian possession of the estate after his birth.

ninguno de los dos pedirá la posesión de los bienes antes que se cumpla la condición.

§ 7.- Si deliberadamente hubiera sido borrado el nombre del heredero, se admite indudablemente que él no puede pedir la posesión de los bienes, como tampoco puede el que fue escrito heredero sin conocimiento del testador; porque se tiene por no escrito el que él no quiso que fuera escrito.

§ 8.- Si hubieran sido instituidos dos herederos, Primo y Segundo, y Tercero hubiera sido substituido a Segundo, prescindiendo Segundo de la posesión de los bienes sucede Tercero; mas si Tercero no hubiere querido adir la herencia, o recibir la posesión de los bienes, recae en Primo la posesión de los bienes, y no tendrá él necesidad de pedir la posesión de los bienes, sino que de derecho le acrecerá a él; porque, así como la porción de la herencia, así también le acrecerá al heredero instituido la posesión de los bienes.

§ 9.- Si un esclavo hubiera sido instituido heredero, la posesión de los bienes se le defiende al señor, a quien le pertenecerá la herencia, porque la posesión de los bienes acompaña al dominio. Por lo cual, si al tiempo de la muerte fue instituido heredero Stico, esclavo de Sempronio, y Sempronio no le mandó que adiese, sino que o murió, o aun lo enajenó, y aquél comenzó a ser de Septicio, acontece que, si Septicio le hubiere mandado que adiese, se le defiende a Septicio la posesión de los bienes; porque la herencia le pertenece a éste; por lo cual, si el esclavo hubiere pasado por muchos dueños, tres o más, le daremos al último la posesión de los bienes.

3.- PAULO; *Comentarios al Edicto, libro XLI*.- La verdad es, que todo póstumo, que al morir el testador estuviere en el claustro materno, puede pedir la posesión de los bienes, si hubiera nacido.

4.- ULPIANUS; *libro XLII, ad Edictum*.- Chartae appellatio et ad novam chartam refertur et ad deleticiam: proinde et si in opisthographo quis testatus sit, hinc peti potest bonorum possessio.

5.- IDEM; *libro IV, Disputationum*.- Si sub condicione heres quis institutus sit et accepta bonorum possessione secundum tabulas condicio defecerit, interdum evenit, ut res possessori concedenda sit, ut puta si filius sit emancipatus sub condicione heres institutus: nam si defecerit condicio, attamen secundum tabulas bonorum possessionem eum accipere Iulianus scribit. Sed et si is fuerit, qui ab intestato bonorum possessor futurus esset, tuendum esse scripsit, et hoc iure utimur.

§ 1.- Videndum, an legata ab eis debeantur. Et filius quidem quasi contra tabulas bonorum possessione accepta rem habere videtur, ceteri vero quasi ab intestato: et ideo filius liberis parentibusque legata relicta solis praestare cogetur, ceteris non. Plane ei, cui ab intestato fideicommissum relictum est, erit praestandum, quasi videatur hoc ipso fraudatus, quod ex testamento petita sit bonorum possessio.

6.- IDEM; *libro VIII, Disputationum*.- Hi demum sub condicione heredes instituti bonorum possessionem secundum tabulas etiam pendente condicione necdum impleta petere possunt, qui utiliter sunt instituti: quod si inutiliter quis sit institutus, nec ad bonorum possessionem inutilis institutio proficit.

7.- IULIANUS; *libro XXIII, Digestorum*.- Quum

4.- ULPIANUS; *On the Edict, Book XLII*.- The term "papyrus" applies not only to such as is new, but also to that which has been already used. Hence, if anyone should draw up his will upon a sheet the back of which is already written on, praetorian possession of property based on such a will can be obtained.

5.- THE SAME; *Disputations, Book IV*.- Where anyone is appointed an heir under a condition, and after he has obtained praetorian possession in accordance with the terms of the will, the condition is not fulfilled, the result will be that the property in the meantime will remain in the hands of the possessor; as, for instance, where an emancipated son is appointed an heir conditionally. For, if the condition should fail to be fulfilled, Julianus says that he can, nevertheless, obtain praetorian possession in accordance with the terms of the will; but he also says that he should be protected if he is one who can obtain praetorian possession of the estate as heir at law. This is our present practice.

§ 1.- Let us see whether legacies must be paid by these heirs. The son, indeed, who has obtained possession, as it were, contrary to the [provisions of the will, is considered to hold the estate by virtue of his appointment, but the others hold it as heirs at law; therefore the son is only compelled to pay the legacies left to descendants and ascendants, but not those left to others. It is evident that a trust must be executed for the benefit of him who was entitled to it as heir-at-law; as otherwise it would seem that praetorian possession under the terms of the will had been claimed for the purpose of defrauding him.

6.- THE SAME; *Disputations, Book VIII*.- Those who have been appointed heirs conditionally can demand praetorian possession in accordance with the terms of the will, even while the condition is pending, and has not yet been fulfilled, provided they have been legally appointed; for where anyone has been illegally appointed, his nomination will be of no advantage to him in obtaining praetorian possession of the estate.

7.- JULIANUS; *Digest, Book XXIII*.- When the

4.- ULPIANO; *Comentarios al Edicto, libro XLII*.- La denominación de carta se refiere así a la nueva, como a la borrada; por lo cual, si alguno hubiera testado al dorso de una carta, también en este caso se puede pedir la posesión de los bienes.

5.- EL MISMO; *Disputas, libro IV*.- Si alguno hubiera sido instituido heredero bajo condición, y obtenida conforme al testamento la posesión de los bienes hubiere faltado la condición, á veces sucede que se le ha de conceder la cosa al poseedor, por ejemplo, si bajo condición hubiere sido instituido heredero un hijo emancipado; porque si hubiere faltado la condición, escribe Juliano que, ello no obstante, obtiene él la posesión de los bienes conforme al testamento. Pero si éste fuere uno que abintestato hubiese de ser poseedor de los bienes, escribió que también ha de ser amparado; y este derecho observamos.

§ 1.- Se ha de ver, si se deberán por ellos los legados. Y, a la verdad, se considera que el hijo tiene la herencia como si hubiese obtenido la posesión de los bienes contra el testamento, pero los demás como si abintestato; y por esto el hijo será obligado a pagarles solamente a los descendientes y a los ascendientes, no a los demás, los legados dejados. Pero a aquel a quién abintestato se le dejó un fideicomiso se le habrá de entregar, como si se considerara que fue defraudado por lo mismo que se pidió la posesión de los bienes en virtud del testamento.

6.- EL MISMO; *Disputas, libro VIII*.- Solamente pueden pedir, estando aun pendiente y no cumplida todavía la condición, la posesión de los bienes conforme al testamento, los herederos instituidos bajo condición, que fueron útilmente instituidos; pero si alguno hubiera sido instituido inútilmente, ni para la posesión de los bienes le aprovecha la institución inútil.

7.- JULIANO; *Digesto, libro XXIII*.- Cuando las

tabulae testamenti plurium signis signatae essent et quaedam ex his non parent, septem tamen signa maneant, sufficit ad bonorum possessionem dandam septem testium signa comparere, licet non omnium qui signaverint maneant signa.

8.- IDEM; *libro XXIV, Digestorum*.- Si ita scriptum sit: "Sempronius ex parte dimidia heres esto. Titius, si navis ex asia venerit, ex parte tertia heres esto. idem titius, si navis ex asia non venerit, ex parte sexta heres esto": Titius non ex duabus partibus heres scriptus, sed ipse sibi substitutus intellegi debet ideoque non ex maiore parte quam tertia scriptus videtur. Secundum hanc rationem quum sextans vacuus relinquatur, bonorum possessionem Titius accipiet non solum tertiae partis, sed eius quoque, quae ex sextante eidem adcrecit.

§ 1.- Qui filio impuberi substituitur ita: "si filius meus moriatur, priusquam in suam tutelam veniat, tunc Titius mihi heres esto", sicut hereditatem vindicat, perinde ac si verbum hoc "mihi" adiectum non esset, ita bonorum quoque eius possessionem accipere potest.

§ 2.- Sed et quum in praenomine cognomine erratum est, is ad quem hereditas pertinet etiam bonorum possessionem accipit.

§ 3.- Is autem, cuius nomen in testamento voluntate testatoris perductum est, sicut ad adeundam hereditatem, ita ad petendam bonorum possessionem scriptus non intellegitur, quamvis nomen eius legatur.

§ 4.- Quidam testamentum in tabulis sibi fecit, filio autem impuberi per nuncupationem substituit. respondi sententiam praetoris in danda bonorum possessione eam esse, ut separatim patris, separatim filii heredes aestimari debeant: nam quemadmodum

tablets of the will were sealed in several places, and some of the seals are broken but seven still remain, this will be sufficient to enable praetorian possession of the estate to be granted; just as where the seals of seven witnesses appear, although they may not include the seals of all who sealed the will.

8.- THE SAME; *Digest, Book XXIV*.- If the following was inserted into a will, "Let Sempronius be the heir to half of my estate; let Titius be an heir to a third of my estate, if a ship should arrive from Asia; and let the said Titius be the heir to a sixth of my estate, if a ship should not arrive from Asia," in this instance, Titius is not appointed heir to two different shares of the estate, but he is understood to be substituted for himself, and therefore he is held to be entitled to no larger a share than one-third. In accordance with this statement, as a sixth of the estate remains undisposed of, Titius will not only obtain possession of a third of the same under the Praetorian Edict, but also of the sixth which will accrue to him.

§ 1.- Where a substitute is appointed for a son under the age of puberty, as follows, "If my son should die before reaching the age of puberty, then let Titius be my heir," he can claim the estate just as if the word "my" had not been added, and he can also obtain praetorian possession of it.

§ 2.- If a mistake is made in the name or the surname of the person entitled to the estate, he can, nevertheless, obtain praetorian possession of the same.

§ 3.- Moreover, where the name of the heir has been erased in the will at the desire of the testator, even though it can still be read, he is not understood to have been appointed, so that he can either enter upon the estate, or demand praetorian possession of the same in accordance with the Civil Law.

§ 4.- A certain man drew up his will in writing, but appointed orally a substitute for his son, who was under the age of puberty. I gave it as my opinion that the intention of the Praetor in granting possession of the estate was that the heirs of the son and those of the

tablas del testamento hubiesen sido signadas con sellos de muchos, y no parecieran algunos de ellos, pero subsistan siete sellos, basta para que se dé la posesión de los bienes que aparezcan los sellos de siete testigos, aunque no subsistan los sellos de todos los que hubieren sellado.

8.- EL MISMO; *Digesto, libro XXIV*.- Si se hubiera escrito así: «sea Sempronio heredero de la mitad; Ticio sea heredero de una tercera parte, si la nave hubiere llegado de Asia; y sea heredero el mismo Ticio de una sexta parte, si la nave no hubiere llegado de Asia», no se debe entender que Ticio fue instituido heredero en las dos partes, sino que fue substituido a sí mismo, y por lo tanto no se le considera instituido en mayor parte que en la tercera; conforme a esta cuenta, como se deja vacante una sexta parte, Ticio recibirá la posesión de los bienes no solamente de la tercera parte, sino también de la que de la sexta le acrece al mismo.

§ 1.- El que es substituido a un hijo impúbbero de este modo: «si muriese mi hijo antes que llegue a su tutela, sea entonces Ticio mi heredero», así como reivindica la herencia lo mismo que si no se hubiese añadido la palabra «mi», así también puede obtener la posesión de sus bienes.

§ 2.- Pero aun cuando se haya errado en el nombre o en el sobrenombre, obtiene también la posesión de los bienes aquel a quien le pertenece la herencia.

§ 3.- Mas aquel cuyo nombre fue borrado en el testamento por voluntad del testador, así como no se entiende que fue instituido para adir la herencia, así tampoco se entiende que lo fue para pedir la posesión de los bienes, aunque se lea su nombre.

§ 4.- Uno hizo en tablas testamento para sí, pero a su hijo le nombró substituto de palabra; respondí, que la sentencia del Pretor, al dar la posesión de los bienes, era tal, que debían estimarse por separado los herederos del padre, y por separado los del hijo; por-

scripto filii heredi separatim ab heredibus patris, ita nuncupato potest videri separatim a scriptis patris heredibus bonorum possessio dari.

9.- POMPONIUS; *libro II, ad Sabinum*.- Ut bonorum possessio secundum pupillares tabulas admitti possit, requiritur, an patris testamentum signatum sit, licet secundae tabulae resignatae proferantur.

10.- PAULUS; *libro VIII, ad Plautium*.- Si servus sub condicione heres institutus sit, an bonorum possessionem accipere potest, dubitatur. Et scaevola noster probat posse.

11.- PAPINIANUS; *libro XIII, Quaestionum*.- «Qui ex liberis meis impubes supremus morietur, ei titius heres esto». Duobus peregre defunctis si substitutus ignoret, uter novissimus decesserit, admittenda est Iuliani sententia, qui propter incertum condicionis etiam prioris posse peti possessionem bonorum respondit.

§ 1.- Filius heres institutus post mortem patris ab hostibus rediit: bonorum possessionem accipiet et anni tempus a quo rediit ei computabitur.

§ 2.- Testamento facto Titius adrogandum se praebuit ac postea sui iuris effectus vita decessit. scriptus heres si possessionem petat, exceptione doli mali summovebitur, quia dando se in adrogandum testator quum capite fortunas quoque suas in familiam et domum alienam transferat. Plane si sui iuris effectus codicillis aut aliis litteris eodem testamento se mori velle declaraverit, voluntas, quae defecerat, iudicio recenti redisse intellegitur, non secus ac si quis aliud testamentum fecisset ac

father should be considered separately. For just as praetorian possession of an estate is granted to the appointed heir of the son separately from the heirs of the father, so it should also be given separately from the appointed heirs of the father, where the heir is orally appointed.

9.- POMPONIUS; *On Sabinus, Book II*.- In order that praetorian possession of an estate may be granted in accordance with the pupillary substitution, inquiry should be made whether the will of the father was sealed, even though that portion containing the substitution was produced unsealed.

10.- PAULUS; *On Plautius, Book VIII*.- When a slave is appointed an heir conditionally, there is some doubt as to whether he can obtain praetorian possession of the estate, or not. Our Scaevola holds that he can obtain it.

11.- PAPINIANUS; *Questions, Book XIII*.- "Let Titius be the heir of the one of my children who shall be the last to die before reaching the age of puberty." If the two children should die in a very distant place, and the substitute did not know which one of them died last, the opinion of Julianus must be adopted, which was that, on account of the uncertainty of the condition, possession of the estate of even one who died first could be demanded by the substitute.

§ 1.- Where a son who was appointed heir returns from captivity after the death of his father, he can obtain praetorian possession of his estate, and the term of a year in which he can do so will be computed from the day of his return.

§ 2.- Titius, after having made his will, gave himself to be arrogated, and then, having become his own master, died. If the appointed heir should demand praetorian possession, he will be barred by an exception on the ground of fraud; because, by giving himself to be arrogated, the testator transferred all his property, together with himself, to the family and household of another. It is clear that if, having become his own master, he stated in a codicil, or in some other document that he wished to die

que así como se puede considerar que al hijo instituido heredero se le da la posesión de los bienes separadamente de los herederos del padrea, así se puede considerar que se le da al designado de palabra separadamente de los herederos del padre, escritos.

9.- POMPONIO; *Comentarios a Sabino, libro II*.- Para que se pueda admitir la posesión de los bienes conforme al testamento del pupilo, se requiere que el testamento del padre esté sellado, aunque el segundo testamento sea presentado con los sellos quitados.

10.- PAULO; *Comentarios a Plaucio, libro VIII*.- Si un esclavo hubiera sido instituido heredero bajo condición, se duda si puede obtener la posesión de los bienes; y prueba nuestro Scévola, que puede.

11.- PAPINIANO; *Cuestiones, libro XIII*.- «Sea Ticio heredero del último de mis hijos que fallezca impúbere»; habiendo fallecido dos muy lejos, si el substituido ignorase cuál haya fallecido el último, se ha de admitir la opinión de Juliano, quien respondió que a causa de lo incierto de la condición se puede pedir también la posesión de los bienes del primero.

§ 1.- Un hijo instituido heredero regresó de los enemigos después de la muerte de su padre; obtendrá la posesión de los bienes, y el tiempo de un año se le computará desde que regresó.

§ 2.- Ticio, habiendo hecho testamento, se dio en arrogación, y después, habiéndose hecho de propio derecho, falleció; el heredero instituido, si pidiera la posesión, será repelido con la excepción de dolo malo, porque el testador dándose en arrogación transfiere juntamente con su cabeza también sus bienes a familia y a casa ajenas. Mas si hecho de propio derecho hubiere declarado en codicilos, ó en otras cartas, que quería morir con el mismo testamento, se entenderá que la voluntad, que había

supremas tabulas incidisset, ut priores supremas relinqueret. Nec putaverit quisquam nuda voluntate constitui testamentum: non enim de iure testamenti maxime quaeritur, sed viribus exceptionis. Quae in hoc iudicio quamquam actori opponatur, ex persona tamen eius qui opponit aestimatur.

12.- PAULUS; *libro VII, Quaestionum*.- Ut scriptus heres agnoscere possit bonorum possessionem, exigendum puto, ut et demonstratus sit propria demonstratione et portio adscripta ei inveniri possit, licet sine parte institutus sit: nam qui sine parte heres institutus est, vacantem portionem vel alium assem occupat.

Quod si ita heres scriptus sit, ut interdum excludatur a testamento, eo quod non invenitur portio, ex qua institutus est, nec bonorum possessionem petere potest. Id evenit, si quis ita heredem instituat: "Titius quanta ex parte priore testamento eum heredem scriptum habeo, heres esto" vel "quanta ex parte codicillis scriptum eum habeo, heres esto", sic scriptus non inveniatur.

Quod si ita scripsero: "Titius, si eum priore testamento ex semisse scriptum heredem habeo" vel "si eum codicillis ex semisse heredem scripsero, ex semisse heres esto", tunc accipiet bonorum possessionem quasi sub condicione heres scriptus.

without changing his will, the will which had become inoperative is understood to have been restored by this subsequent statement, in the same way as if he had executed another will and had torn it up, so as to leave the first one in force. Nor should anyone think that a will can be made by the mere expression of a wish; for, in this instance, no question whatever is raised with reference to the legality of the instrument, but only with reference to the force of the exception that, under these circumstances, may be filed against the plaintiff, which must depend upon the person of the adversary.

12.- PAULUS; *Questions, Book VII*.- In order that the appointed heir may obtain praetorian possession of the estate I think it should be required that his identity be established by a suitable designation, so that the share to which he is entitled can be found, even if he was appointed without any share; for when an heir is appointed without a share he can take one which is undisposed of, or some other portion of the estate.

If, however, the heir was designated in such a way as to seem to be excluded by the will, because the share of the estate to which he was appointed cannot be found, he shall not obtain praetorian possession. This occurs where anyone appoints an heir as follows, "Let Titius be my heir to the same portion of my estate to which I have appointed him by my first will," or "Let him be my heir to the same share to which I have appointed him by my codicil," and it should be ascertained that he was not appointed.

If, however, I should say, "Let Titius be my heir if I have appointed him heir to half of my estate in my first will," or "Let him be my heir if I have appointed him heir to half of my estate in my codicil," he can then obtain possession of my estate, as he was appointed heir conditionally.

quedado invalidada, volvió con la reciente última disposición, no de otro modo que si alguno hubiese hecho otro testamento, y hubiese roto las últimas tablas, para que las anteriores quedasen como últimas. Y nadie juzgará que se constituye el testamento por la nuda voluntad; porque no se trata principalmente del derecho del testamento, sino de la fuerza de la excepción, que en este juicio, aunque se le oponga al actor, es, sin embargo, estimada según la persona del que la opone.

12.- PAULO; *Cuestiones, libro VII*.- Para que el heredero instituido pueda aceptar la posesión de los bienes, opino que se ha de exigir que haya sido designado con propia designación, y que se pueda hallar la parte a él adscrita, aunque haya sido instituido sin parte; porque el que sin parte fue instituido heredero, ocupa la porción vacante, u otro as.

Mas si el heredero hubiera sido instituido de modo, que en algún caso sea excluido del testamento, porque no se encuentra la porción en que fue instituido, tampoco puede pedir la posesión de los bienes; esto acontece, si alguno instituye así el heredero: «sea Ticio heredero de cuanta parte lo tengo instituido heredero en mi anterior testamento», o, «sea heredero de la parte en que lo tengo instituido en mis codicilos», y no se hallara así instituido.

Pero si yo hubiere escrito así: «Ticio, si en mi anterior testamento lo tengo instituido heredero de la mitad», o, «si en codicilos lo hubiere yo instituido heredero de la mitad, sea heredero de la mitad», en este caso recibirá la posesión de los bienes como si hubiese sido instituido heredero bajo condición.

TIT. XII

SI A PARENTE QUIS MANUMISSUS SIT

1.- ULPIANUS; *libro XLV, ad Edictum*.- Emancipatus a parente in ea causa est, ut in contra tabulas bonorum possessione liberti patiat exitum. Quod aequissimum Praetori visum est, quia a parente beneficium habuit bonorum quaerendorum: quippe si filius familias esset, quodcumque sibi acquireret, eius emolumentum patri quaereret. Et ideo itum est in hoc, ut parens exemplo patroni ad contra tabulas bonorum possessionem admittatur.

§ 1.- Enumerantur igitur edicto personae manumissorum sic: "in eo, qui a patre avove paterno proavove paterni avi patre".

§ 2.- Nepos ab avo manumissus dedit se adrogandum patri suo: sive manens in potestate patris decesserit sive manumissus diem suum obeat, solus admittetur avus ad eius successionem ex interpretatione edicti, quia perinde defert praetor bonorum possessionem atque si ex servitute manumissus esset: porro si hoc esset, aut non esset adrogatus, quia adrogatio liberti admittenda non est, aut si obrepserit, patroni tamen nihilo minus ius integrum maneret.

§ 3.- Si parens vel accepit pecuniam, ut emanciparet, vel postea vivus in eum filius quantum satis est contulit, ne iudicia eius inquietet, exceptione doli repellitur.

TITLE XII

CONCERNING PRAETORIAN POSSESSION
WHERE A SON HAS BEEN MANUMITTED BY
HIS FATHER

1.- ULPIANUS; *On the Edict, Book XLV*.- A son who has been emancipated by his father is in the same condition, so far as praetorian possession contrary to the provisions of the will is concerned, as that of a freedman. This appears to the Praetor to be perfectly just, because the son obtains the advantage of acquiring property from his father; whereas, if he was under paternal control, and should acquire anything for himself, his father would reap the benefit of it. Hence, the rule was established that the father should be allowed to obtain praetorian possession contrary to the provisions of the will, just as a patron is permitted to do.

§ 1.- Therefore, persons who have been manumitted are enumerated in the Edict as follows, "He who had been emancipated by his father, or by his paternal grandfather, or by his paternal great-grandfather."

§ 2.- Where a grandson, who has been manumitted by his grandfather, gives himself in arrogation to his father, even if he should die while still under paternal control, or should die after having been manumitted, his grandfather will only be admitted to the succession in accordance with the interpretation of the Edict; because the Praetor grants the possession of the estate, just as where a slave has been manumitted from servitude. If, however, this should be the case, or if the son should not be arrogated because the arrogation of a freedman is not permitted, or if it should be done fraudulently, the rights of the patron would, nevertheless, remain unimpaired.

§ 3.- If a father has either received money to induce him to emancipate his son, or if, afterwards the son, during his lifetime, should pay him enough to prevent him from opposing his will; he will be barred by an exception on the ground of bad faith.

TÍTULO XII

DE SI ALGUNO HUBIERA SIDO
MANUNITIDO POR SU ASCENDIENTE

1.- ULPIANO; *Comentarios al Edicto, libro XLV*.- El emancipado por su ascendiente se halla en el caso de soportar en la posesión de los bienes contra el testamento el resultado que el libertino; lo que le pareció muy justo al Pretor, porque por el ascendiente tuvo el beneficio de adquirir los bienes, pues, si hubiese sido hijo de familia, adquiriría para su padre el emolumento de todo lo que adquiriese para sí; y por esto se llegó a que el ascendiente fuese admitido a la manera que el patrono a la posesión de los bienes contra el testamento.

§ 1.- Así, pues, se enumeran en el Edicto las personas de los manumisores de este modo: «respecto de aquél que por el padre, o por el abuelo paterno, ó por el bisabuelo padre del abuelo paterno.»

§ 2.- Un nieto manumitido por el abuelo le dió en arrogación a su propio padre; ya si hubiere muerto permaneciendo bajo la potestad de su padre, ya si falleciera manumitido, sera admitido sólo el abuelo A su sucesión en virtud de la interpretación del Edicto, porque el Pretor defiere la posesión de los bienes lo mismo que si hubiese sido manumitido de la esclavitud. Mas ya si fuese esto, ya si no hubiese sido arrogado, porque no se ha de admitir la arrogación de un libertino, ya si lo hubiere hecho por sorpresa, esto no obstante le quedaría íntegro su derecho al patrono.

§ 3.- Si el ascendiente recibió dinero para emancipar, o si después el hijo en vida le dió cuanto es suficiente para que no contrarie sus últimas disposiciones, será repelido con la excepción de dolo.

§ 4.- Est et alius casus, quo bonorum possessionem contra tabulas parens non accipit, si forte filius militare coeperit: nam Divus Pius Rescripsit patrem ad contra tabulas bonorum possessionem venire non posse.

§ 5.- Liberos autem manumissoris non venire ad contra tabulas bonorum possessionem filii constat, quamvis patroni veniant.

§ 6.- Patrem autem accepta contra tabulas bonorum possessione et ius antiquum, quod et sine manumissione habebat, posse sibi defendere Iulianus scripsit: nec enim ei nocere debet, quod iura patronatus habebat, quum sit et pater.

2.- GAIUS; *libro XV, ad Edictum Provinciale*.- Non usque adeo exaequandus est patrono parens, ut etiam Faviana aut Calvisiana actio ei detur, quia iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.

3.- PAULUS; *libro VIII, ad Plautium*.- Paconius ait: si turpes personas, veluti meretricem, a parente emancipatus et manumissus heredes fecisset, totorum bonorum contra tabulas possessio parenti datur: aut constitutae partis, si non turpis heres esset institutus.

§ 1.- Si filius emancipatus testamento suo patrem suum praeterierit sive heredem instituerit, fideicommissa non cogetur pater praestare ex sua parte, quae ei debetur, etiamsi adierit hereditatem. Sed et si filia vel neptis manumissa sit et pater vel avus praeteritus petat bonorum possessionem, eadem quae in filio dicenda sunt.

§ 4.- There is another instance in which a father does not obtain ipossession of the estate of his emancipated son, contrary to the provisions of the will, and that is where the son happens to enter the army; for the Divine Pius stated in a Rescript that the father could not, under these circumstances, obtain possession of the estate of his emancipated son in opposition to the terms of the will.

§ 5.- It is settled that the children of a father, who manumitted his son, cannot obtain possession of the estate of the latter, in opposition to the terms of the will; even though the children of a patron can do so.

§ 6.- Julianus says that where a father has obtained possession of the estate of his emancipated son, in opposition to the terms of the will, he will retain the former privilege which he enjoyed without manumission; for he should not be prejudiced because he possessed the rights of a patron, as he is still a father.

2.- GAIUS; *On the Provincial Edict, Book XV*.- A father is not to be considered the equal of a patron to the extent that the Favian or Calvisian Action may be granted him, for the reason that it is unjust for freeborn men not to have unrestricted power to alienate their property.

3.- PAULUS; *On Plautius, Book VIII*.- Paconius says that if a son who had been emancipated and manumitted by his father should appoint some disreputable persons his heirs (as, for instance, prostitutes), possession of his entire estate contrary to the provisions of the will shall be given to his father; otherwise he would be entitled to only half of the estate, if a disreputable heir had not been appointed.

§ 1.- If an emancipated son should pass his father over in his will, or should appoint him his heir, the father will not be obliged to execute any trust, so far as the share of the estate to which he is entitled is concerned, even if he enters upon it. Where, however, a daughter or a granddaughter is manumitted, and the father or grandfather, having been passed over in the will, demands praetorian possession of the estate, the

§ 4.- Hay también otro caso en el que el ascendiente no recibe la posesión de los bienes contra el testamento, si acaso el hijo comenzó a ser militar; porque el Divino Pío respondió por rescripto, que el padre no puede acudir a la posesión de los bienes contra el testamento.

§ 5.- Mas es sabido, que los descendientes del manumisor no van a la posesión de los bienes contra el testamento del hijo, aunque vayan los del patrono.

§ 6.- Escribió Juliano, que el padre, obtenida la posesión de los bienes contra el testamento, puede defender para sí también el antiguo derecho, que tenía aun sin la manumisión; porque no le debe perjudicar que haya tenido los derechos de patronato, puesto que también es padre.

2.- GAYO; *Comentarios al Edicto Provincial, libro XV*.- No se ha de igualar el padre con el patrono hasta el punto de que se le dé también la acción Faviana o Calvisiana, porque es injusto que los hombres ingenuos no tengan libertad para enajenar sus propias cosas.

3.- PAULO; *Comentarios a Plaucio, libro VIII*.- Dice Paconio: si el emancipado y manumitido por un ascendiente hubiese instituido herederos a personas torpes, por ejemplo, a una ramera, se le da al ascendiente la posesión de todos los bienes contra el testamento, o de la parte establecida, si no hubiese instituido heredero a una persona torpe.

§ 1.- Si el hijo emancipado hubiere preterido en su testamento a su padre, o si lo hubiere instituido heredero, el padre no será obligado a entregar los fideicomisos de la parte que a él se le debe, aunque hubiere adido la herencia. Mas también si hubiera sido manumitida la hija o la nieta, y el padre o el abuelo preterido pidiera la posesión de los bienes, se ha de decir lo mismo que respecto al hijo.

same rule will apply as in the case of a son.

4.- MARCELLUS; *libro IX, Digestorum*.- Patri qui filium emancipavit de his, quae libertatis causa imposita fuerint, praetor nihil edicit, et ideo frustra pater operas stipulabitur de filio.

4.- MARCELLUS; *Digest, Book IX*.- The Praetor makes no provision in the Edict with reference to a father who has emancipated his son, and imposed upon the latter certain conditions in consideration of granting him freedom; and therefore the father can enter into no valid stipulation as to any services to be rendered by his son.

4.- MARCELO; *Digesto, libro IX*.- El Pretor no resuelve nada a favor del padre, que emancipó a un hijo, respecto a las imposiciones que se hubieren hecho por causa de la libertad; y por lo tanto en vano el padre estipulará del hijo servicios.

5.- PAPINIANUS; *libro XI, Quaestionum*.- Divus Traianus filium, quem pater male contra pietatem adficebat, coegit emancipare. Quo postea defuncto, pater ut manumissor bonorum possessionem sibi competere dicebat: sed consilio Neratii Prisci et Aristonis ei propter necessitatem solvendae pietatis denegata estado

5.- PAPINIANUS; *Questions, Book XI*.- The Divine Trajan compelled a father to emancipate his son whom he had treated badly, and in a way contrary to that dictated by paternal affection, and the son, having afterwards died, the father declared that he was entitled to the possession of his estate on account of having manumitted him. This, however, was refused him on the advice of Neratius Priscus and Aristo as the emancipation took place through necessity, because of the want of paternal affection.

5.- PAPINIANO; *Cuestiones, libro XI*.- El Divino Trajano obligó a emancipar a un hijo, a quien el padre maltrataba contra los deberes de piedad, y fallecido después aquél, el padre, como manumisor, decía que le competía la posesión de los bienes; pero por consejo de Neracio Prisco y de Aristo le fue denegada porque por necesidad rescindió los deberes de piedad.

TITULO XIII

DE BONORUM POSSESSIONE EX
TESTAMENTO MILITIS

1.- ULPIANUS; *libro XLV, ad Edictum*.- Non dubium est, quin debeant ratae voluntates esse eorum, qui in hostico loco suprema iudicia sua quoquo modo ordinassent ibidemque diem suum obissent. Quamquam enim distet condicio militum ab his personis constitutiones principales separent, tamen qui in procinctu versantur Quum eadem pericula experiantur, iura quoque eadem merito sibi vindicant. Omnes igitur omnino, qui eius sunt condicionis, ut iure militari testari non possint, si in hostico loco deprehendantur et illic decedant, quomodo velint et quomodo possint, testabuntur, sive praeses quis sit provinciae sive legatus sive quis alius, qui iure militari testari non potest.

TITLE XIII

CONCERNING PRAETORIAN POSSESSION
OF AN ESTATE IN THE CASE OF THE WILL
OF A SOLDIER

1.- ULPIANUS; *On the Edict, Book XLV*.- There is no doubt that the wishes of those who make their last wills while in arms against the enemy, no matter in what way they may do so, and who die while in the army, should be observed. For, although the condition of a soldier is different from that of those persons who are privileged by the Imperial Constitutions, still, as men who constantly go into battle are exposed to the same dangers, it is only reasonable that they should claim the same privileges for themselves. Therefore, all who are in such a position that they cannot make wills under military law, if they are found in the train of the army and die there, can execute wills in whatever way they desire, and in whatever way they may be able, whether they are governors of provinces, Imperial deputies, or any others who are incapable of testation in accordance with military law.

TÍTULO XIII

DE LA POSESIÓN DE LOS BIENES EN
VIRTUD DEL TESTAMENTO DE UN MILITAR

1.- ULPIANO; *Comentarios al Edicto, libro XLV*.- No es dudoso que deben ser válidas las voluntades de los que en lugar de enemigos hayan hecho de cualquier modo sus últimas disposiciones, y allí hayan fallecido; porque aunque diste la condición de los militares de la de las personas a quienes separan las Constituciones de los príncipes, sin embargo, los que están en el campo de la batalla, como quiera que corren los mismos peligros, con razón reivindicán para sí los mismos derechos. Así, pues, absolutamente todos los que son de tal condición que no pueden testar conforme al derecho militar, si se hallaran en lugar de enemigos, y en él murieren, testarán como quieran y como puedan, ya sea él Presidente de provincia, ya sea Legado, ya otro cualquiera que no puede testar conforme al derecho militar.

§ 1.- Item navarchos et trierarchos classium iure militari posse testari nulla dubitatio est. In classibus omnes remiges et nautae milites sunt. Item vigiles milites sunt et iure militari eos testari posse nulla dubitatio estado

§ 2.- Si quis militum ex alio numero translatus sit in alium, quamvis et hinc sit exemptus et illo nondum pervenerit, tamen poterit iure militari testari: est enim miles, quamvis in numeris non sit.

TIT. XIV

DE IURE PATRONATUS

1.- ULPIANUS; *libro IX, de Officio Proconsulis*.- Patronorum querellas adversus libertos praesides audire et non translaticie exsequi debent, quum, si ingratus libertus sit, non impune ferre eum oporteat. sed si quidem inofficiosus patrono patronae liberisve eorum sit, tantummodo castigari eum sub comminatione aliqua severitatis non defuturæ, si rursus causam querellae praeberit, et dimitti oportet. Enimvero si contumeliam fecit aut convicium eis dixit, etiam in exilium temporale dari debebit: quod si manus intulit, in metallum dandus erit: idem et si calumniam aliquam eis instruxit vel delatorem subornavit vel quam causam adversus eos temptavit.

2.- IDEM; *libro I, Oponionum*.- Liberti homines negotiatione licita prohiberi a patronis non debent.

3.- MARCIANUS; *libro II, Institutionum*.- Si quis tutor datus, quum sibi legata esset ancilla et rogatus eam manumittere, manumiserit adgnito legato et tutela pupilli se excusaverit, Divi Severus et

§ 1.- Moreover, there is no doubt that the captains of ships and the commanders of triremes can make wills under military law. All the oarsmen and sailors of fleets are considered as soldiers, and also the guards are classed as such; and there is no doubt that all these are capable of testation in accordance with military law.

§ 2.- If a soldier is transferred from one command to another, even though he may have left one and not yet have been enrolled in another, he can, nevertheless, make a will according to military law; for he is still a soldier, although he may not yet have been assigned to any particular legion.

TITLE XIV

CONCERNING THE RIGHT OF PATRONAGE

1.- ULPIANUS; *On the Office of Proconsul, Book IX*.- Governors should hear the complaints of patrons against their freedmen, and their cases should be tried without delay; for if a freedman is ungrateful, he should not go unpunished. Where, however, the freedman fails in the duty which he owes to his patron, his patroness, or their children, he should only be punished lightly, with a warning that a more severe penalty will be imposed if he again gives cause for complaint, and then be dismissed. But if he is guilty of insult or abuse of his patrons, he should be sent into temporary exile. If he offers them personal violence, he must be sentenced to the mines. The same rule will apply where he has caused them annoyance by means of a vexatious lawsuit, or suborned an informer against them, or has attempted to make some accusation against them.

2.- THE SAME; *Opinions, Book I*.- Freedmen should not be forbidden by their patrons to transact lawful business.

3.- MARCIANUS; *Institutes, Book II*.- Where anyone is appointed a testamentary guardian, and a female slave is bequeathed to him, and he is asked to manumit her, and, after doing so, he receives a legacy

§ 1.- No hay duda alguna de que también los capitanes de naves y de triremes de la armada pueden testar conforme al derecho militar. En la armada todos los remeros y los marineros son militares. También son militares los vigilantes, y no hay ninguna duda de que pueden testar con arreglo al derecho militar.

§ 2.- Si algún militar hubiera sido trasladado de un cuerpo a otro, aunque de uno haya salido y todavía no haya llegado al otro, podrá, sin embargo, testar conforme al derecho militar; porque es militar, aunque no se halle en las filas.

TÍTULO XIV

DEL DERECHO DE PATRONATO

1.- ULPIANO; *Del cargo de Proconsul, libro IX*.- Los presidentes deben oír y cumplimentar sin dilaciones las querellas de los patronos contra los libertos, porque si el liberto fuera ingrato, no conviene que lo tolere impunemente. Mas si verdaderamente fuera desatento para el patrono, la patrona, o sus hijos, es conveniente que sea castigado solamente con la conminación de que no faltará severidad, si de nuevo hubiere dado motivo para querella. Porque si les hizo ultraje, o les dijo injuria, deberá ser condenado hasta a destierro temporal. Pero si puso la mano en ellos, habrá de ser condenado a las minas. Lo mismo, si les promovió alguna calumnia, o sobornó al delator, o intentó alguna causa contra ellos.

2.- EL MISMO; *Opiniones, libro I*.- A los hombres libertos no se les debe prohibir por los patronos que negocien lícitamente.

3. MARCIANO; *Instituta, libro II*. - Si alguno que fue nombrado tutor, habiéndosele legado una esclava y habiéndosele rogado que la manumita, la hubiere manumitido habiendo aceptado el legado, y se

Antoninus Rescripserunt hunc esse quidem patronum, sed omni commodo patronatus carere.

4.- IDEM; *libro V, Institutionum*.- Iura libertorum patronorum liberis, quum pater eorum erat perduellionis damnatus, salva esse Divi Severus et Antoninus benignissime rescripserunt, sicut ex alia causa punitorum liberis iura libertorum salva sunt.

5.- IDEM; *libro XIII, Institutionum*.- Divus Claudius libertum, qui probatus fuit patrono delatores summisisse, qui de statu eius facerent ei quaestionem, servum patroni esse iussit eum libertum.

§ 1.- Imperatoris nostri Rescripto cavetur, ut, si patronus libertum suum non aluerit, ius patroni perdat.

6.- PAULUS; *libro II, ad legem Aeliam Sentiam*.- Adigere iureiurando, ne nubat liberta vel liberos tollat, intellegitur etiam is, qui libertum iurare patitur. sed si ignorante eo suus filius adegerit stipulatus fuerit, nihil ei nocebit: certe si iussu patroni is qui in potestate est idem fecerit, dicendum est eum hac lege teneri.

§ 1.- Stipulatus est centum operas aut in singulas aureos quinos dari: non videtur contra legem stipulatus, quia in potestate liberti est operas dare.

§ 2.- Quamvis nulla persona lege excipiat, tamen intellegendum est de his legem sentire, qui liberos tollere possunt. Itaque si castratum libertum iure-

and excuses himself from accepting the guardianship of the minor, the Divine Severus and Antoninus stated in a Rescript that while he was, in fact, a patron of the slave, he should be deprived of all the rights attaching to the condition of patronage.

4.- THE SAME; *Institutes, Book V*.- The Emperors Severus and Antoninus very properly stated in a Rescript that the rights over freedmen are preserved for children, where their father has been convicted of treason; just as such rights are preserved for the children of those who are punished for any other cause.

5.- THE SAME; *Institutes, Book XIII*.- The Divine Claudius ordered that a freedman who had been proved to have instigated informers to raise a question as to the civil status of his patron should again become the patron's slave.

§ 1.- It is provided by a Rescript of our Emperor that if a patron does not support his freedman, he shall forfeit his right of patronage.

6.- PAULUS; *On the Lex Elia Sentia, Book II*.- He who permits his freedman to swear that he will not marry, or have any children, is understood to be in the same position as one who compels his freedwoman to swear that she will not marry, or have any children. If, however, his son should do this, without his father's knowledge, or if he should enter into a stipulation with the freedman, this will not prejudice him in any way; but if a son who is under the control of his father should do so by his order, it is clear that he will be liable under the above-mentioned law.

§ 1.- A patron stipulated for a hundred days of labor to be performed, or five aurei to be paid for each day by his freedman. This agreement does not seem to be contrary to law, because the freedman has the power to perform the labor.

§ 2.- Although no person is excepted by this law, still it should be understood only to refer to those who can have children. Hence, if anyone should compel a

hubiere excusado de la tutela del pupilo, respondieron por rescripto los Divinos Severo y Antonino, que éste es ciertamente patrono, pero que está privado de todas las utilidades del patronato.

4.- EL MISMO; *Instituta, libro V*.- Muy benigneamente resolvieron por rescripto los Divinos Severo y Antonino, que les quedaran salvos a los hijos de los patronos los derechos de los libertos, cuando su padre había sido condenado como reo de lesa majestad, así como les quedan salvos los derechos de los libertos a los hijos de los condenados por otra causa.

5. EL MISMO; *Instituta, libro XIII*. - El Divino Claudio dispuso, que fuese esclavo del patrono el liberto a quien se le hubiere probado que sobornó delatores que al patrono le promoviesen cuestión sobre su estado.

§ 1.- Se dispone en Rescripto de nuestro Emperador, que, si el patrono no alimentare a su liberto, pierda el derecho de patronato.

6.- PAULO; *Comentarios a la ley Elia Sencia, libro II*. - Se entiende que obliga con juramento a que no se case una liberta, o a que no tenga hijos, también el que consiente que jure la liberta. Pero si ignorándolo éste la hubiere obligado su hijo, o lo hubiere estipulado, en nada le perjudicará a él; pero ciertamente que si por mandato del patrono hubiere hecho lo mismo el que está bajo la potestad, se ha de decir que queda él obligado por esta ley.

§ 1.- El que estipuló cien servicios, o que por cada uno se le dieran cinco áureos, no parece que estipuló contra la ley, porque en la potestad del liberto esta prestar los servicios.

§ 2.- Aunque en la ley no esté exceptuada ninguna persona, se ha de entender, sin embargo, que la ley se refiere a los que pueden tener hijos; y así, si alguno

iurando quis adegerit, dicendum est non puniri patronum hac lege.

§ 3.- Si patronus libertam iureiurando adegerit, ut sibi nuberet, si quidem ducturus eam adegit, nihil contra legem fecisse videbitur: si vero non ducturus propter hoc solum adegit, ne alii nuberet, fraudem legi factam Iulianus ait et perinde patronum teneri, ac si coegisset iurare libertam non nupturam.

§ 4.- Lege Iulia de maritandis ordinibus remittitur iusiurandum, quod liberto in hoc impositum est, ne uxorem duceret, libertae, ne nuberet, si modo nuptias contrahere recte velint.

7.- MODESTINUS, *libro singulari de Manumissionibus*.- Divus Vespasianus decrevit, ut, si qua hac lege venierit, ne prostitueretur et, si prostituta esset, ut esset libera, si postea ab emptore alii sine condicione veniit, ex lege venditionis liberam esse et libertam prioris venditoris.

§ 1.- Mandatis Imperatorum cavetur, ut etiam in provinciis praesides de querellis patronorum ius dicentes secundum delictum admissum libertis poenas irrogent. Interdum illae poenae a liberto ingrato exiguntur: vel pars bonorum eius aufertur et patrono datur: vel fustibus caeditur et ita absolvitur.

8.- IDEM; *libro VI, Regularum*.- Servum a filio familias milite manumissum Divus Hadrianus Rescripsit militem libertum suum facere, non patris.

§ 1.- Servus non manumissus libertatem conse-

freedman who has been castrated to take such an oath, it must be said that he cannot be held liable under this law.

§ 3.- If a patron should compel his freed woman to swear to marry him, and he does so with the intention of marrying her, he will not be considered to have done anything illegal. If, however, the patron should not marry her, and only required her to take the oath to prevent her from marrying another, Julianus says that he has committed a fraud against the law, and that he should be liable, just as if he had compelled his freedwoman to swear not to marry at all.

§ 4.- An oath is permitted by the Lex Julia relating to marriages of different orders, which, in this instance, is imposed upon a freedman or a freedwoman, not to marry, provided they desire to contract a legal marriage.

7.- MODESTINUS; *On Manumissions*.- The Divine Vespasian decreed if a female slave had been sold under this law upon condition that she should not be prostituted, and she should be prostituted, that she would become free; and that if she afterwards came into the possession of another purchaser, without this condition, that she should be free by virtue of the sale, and become the freedwoman of the former vendor.

§ 1.- It is provided by the Decrees of the Emperors that the governors of provinces, who have jurisdiction over the complaints of patrons, should impose penalties upon their freedmen in proportion to the gravity of their offences. These penalties are sometimes required in the case of an ungrateful freedman, and he is either deprived of a part of his property which is given to his patron, or he is scourged with whips, and then discharged.

8.- THE SAME; *Rules, Book VI*.- The Divine Hadrian stated in a Rescript that where a slave was manumitted by a son under paternal control, who was a soldier, he became the freedman of the soldier and not of his father.

§ 1.- A slave who is not manumitted will obtain his

hubiere obligado con juramento a un liberto castrado, se ha de decir, que el patrono no es castigado por esta ley.

§ 3.- Si el patrono hubiere obligado con juramento a una liberta a casarse con él, si es que la obligó para tomarla por mujer, se considerara que no hizo nada contra la ley; pero si no habiéndola de tomar por mujer la obligó solamente para que no se casase con otro, dice Juliano que se defraudó a la ley, y que queda responsable el patrono lo mismo que si hubiese obligado a la liberta a jurar que no se casara.

§ 4.- Por la ley Julia sobre cómo se han de casar los órdenes se dispense el juramento que se le impuso al liberto para que no tomara mujer, y a la liberta para que no se casara, si quisieran contraer debidamente matrimonio.

7.- MODESTINO; *De las Manumisiones, libro único*.- Decretó el Divino Vespasiano, que si alguna hubiere sido vendida con la condición de que no sea prostituida, y de que si hubiese sido prostituida fuese libre, si después fue vendida a otro sin esta condición por el comprador, fuese libre en virtud de la condición de la venta, y liberta del primer vendedor.

§ 1.- En mandatos de los emperadores se dispone, que también en las provincias impongan los presidentes, que juzgan sobre las querellas de los patronos, penas a los libertos en conformidad al delito cometido. A veces al liberto ingrato se le imponen estas penas, o se le quita parte de sus bienes y se le da al patrono, o es azotado, y así se le absuelve.

8.- EL MISMO; *Reglas, libro VI*.- Respondió por rescripto el Divino Adriano, que, manumitido un esclavo por un hijo de familia, militar, el militar lo hace liberto suyo, no de su padre.

§ 1.- Consigue la libertad un esclavo que no fue

quitur is, qui ea lege distractus est, ut manumittatur intra tempus: quod superveniens, licet non manumittatur, faciet tamen libertum emptoris.

9.- IDEM; *libro IX, Regularum*.- Filii hereditate paterna se abstinentes ius, quod in libertis habent paternis, non amittunt: idem et in emancipato.

§ 1.- Ut in bonis liberti locum quidam non habent, lege excipiuntur: rei capitalis damnatus, si restitutus non est: si index cuius flagitii sit fuerit vel maior annis viginti quinque quum esset, capitis accusaverit libertum paternum.

10.- TERENCE CLEMENS; *libro IX, ad legem Iuliam et Papiam*.- Eum patronum, qui capitis libertum accusasset, excludi a bonorum possessione contra tabulas placuit. Labeo existimabat capitis accusationem eam esse, cuius poena mors aut exilium esset. Qui nomen detulit, accusasse intellegendus est, nisi abolitionem petit: idque etiam Proculo placuisse Servilius refert.

11.- ULPIANUS; *libro X, ad legem Iuliam et Papiam*.- Is autem nec ad legitimam hereditatem, quae ex lege duodecim tabularum defertur, admittitur.

12.- MODESTINUS; *libro I, Responsorum*.- Gaius Seius decedens testamento ordinato inter filios suos Iulium libertum suum, quasi et ipsum filium, ex parte heredem nominavit: quaero, an huiusmodi scriptura possit libertum statum condicionis mutare. Modestinus respondit statum mutare non posse.

freedom when he is sold under the condition that he be manumitted within a certain time; and, after the time has elapsed, he will become the freedman of the purchaser, even though he may not have been manumitted.

9.- THE SAME; *Rules, Book IX*.- Sons who refuse to accept the estates of their fathers do not lose their rights over the freedmen of the latter. The same rule applies to an emancipated son.

§ 1.- Some masters, who do not retain their rights as patrons over the property of their freedmen, are excepted by the law, as in the case of one who has been condemned to death, and has not been restored to his civil rights; or one who has been the informer of a crime committed by his freedman; or where a son, over twenty-five years of age, has accused a freedman belonging to his father of a capital crime.

10.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book IX*.- It has been decided that a patron who has accused his freedman of a capital crime is excluded from praetorian possession of his estate contrary to the provisions of the will. Labeo thinks that the accusation of a capital crime should include both those which involve the penalty of death, and those punished by exile. An accuser is understood to be one who gave the name of the alleged guilty person, unless he asks that he receive immunity. Servilius says that this was also the opinion of Proculus.

11.- ULPIANUS; *On the Lex Julia et Papia, Book X*.- Moreover, he will not be admitted to the succession of his intestate freedman which is granted him by the Law of the Twelve Tables.

12.- MODESTINUS; *Opinions, Book I*.- Gaius Seius, having died after making his will, appointed his freedman Julius, together with his sons, heir to part of his estate, just as if he had been his own child. I ask whether an appointment of this kind can change the civil condition of the freedman. Modestinus gave it as his opinion that it would not change his condition.

manumitido, si fue enajenado con la condición de que fuese manumitido dentro de cierto término, el cual, llegado, hará, aunque no sea manumitido aquél, que no obstante sea del comprador el liberto.

9.- EL MISMO; *Reglas, libro IX*.- Los hijos que se abstienen de la herencia paterna no pierden el derecho que tienen sobre los libertos paternos; lo mismo también respecto al emancipado.

§ 1.- Se exceptúa por la ley a algunos para que ciertamente no tengan cabida a los bienes del liberto: el condenado a pena capital, si no fue restituido, el que sea o hubiere sido delator de algún crimen, o el que siendo mayor de veinticinco años hubiere acusado de delito capital a un liberto de su padre.

10.- TERENCE CLEMENTE; *Comentarios a la ley Julia Papia, libro IX*.- Se determinó que el patrono, que hubiese acusado de delito capital a su liberto, fuese excluido de la posesión de los bienes contra el testamento. Labeón opinaba que era acusación de delito capital aquella cuya pena fuese la muerte o el destierro. El que delató un nombre se ha de entender que acusó, si no pidió la abolición; y refiere Servilio que esto le pareció bien también a Próculo.

11.- ULPIANO; *Comentarios a la ley Julia y Papia, libro X*.- Mas éste no es admitido ni a la herencia legítima, que se defiende por la ley de las Doce Tablas.

12.- MODESTINO; *Respuestas, libro I*.- Cayo Seyo al morir, habiendo dispuesto su testamento entre sus hijos, nombró heredero de una parte a Julio, su liberto, como si también fuese hijo; pregunto, si tal escritura le podría cambiar al liberto el estado de su condición. Modestino respondió, que no puede cambiar su estado.

13.- IDEM; *libro I, Pandectarum*.- Filius familias servum peculialem manumittere non potest. Iussu tamen patris manumittere potest: qui manumissus libertus fit patris.

14.- ULPIANUS; *libro V, ad legem Iuliam et Papiam*.- Si iuravero me patronum esse, dicendum est non esse me quantum ad successionem patronum, quia iusiurandum patronum non facit: aliter atque si patronum esse pronuntiatum sit: tunc enim sententia stabitur.

15.- PAULUS; *libro VIII, ad legem Iuliam et Papiam*.- Qui contra legem aeliam sentiam ad iurandum libertum adegit, nihil iuris habet nec ipse nec liberi eius.

16.- ULPIANUS; *libro X, ad legem Iuliam et Papiam*.- Si libertus minorem se centenario in fraudem legis fecerit, ipso iure non valebit id quod factum est, et ideo quasi in centenarii liberti bonis locum habebit patronus: quidquid igitur quaquaratione alienavit, ea alienatio nullius momenti est.

Plane si qua alienaverit in fraudem patroni, adhuc tamen post alienationem maior centenario remaneat, alienatio quidem vires habebit, verumtamen per favianam et Calvisianam actionem revocabuntur ea quae per fraudem sunt alienata: et ita Iulianus saepissime scribit eoque iure utimur. Diversitatis autem ea ratio est.

Quotiens in fraudem legis fit alienatio, non valet quod actum est: in fraudem autem fit, quum quis se minorem centenario facit ad hoc, ut legis praeceptum evertat. At quum alienatione facta nihilo minus centenarius est, non videtur in fraudem legis factum, sed tantum in fraudem patroni: idcirco Faviano vel

13.- THE SAME; *Pandects, Book I*.- A son under paternal control cannot manumit a slave who is part of his peculium, unless he does so by order of his father; and the slave, after having been manumitted, becomes the freedman of the father.

14.- ULPIANUS; *On the Lex Julia et Papia, Book V*.- If I should swear in court that I am the patron of a certain slave, it must be held that I am not entitled to his estate in that capacity, because an oath does not constitute a patron. The case would, however, be different, if it had been judicially decided that I was his patron, for then the judgment will stand.

15.- PAULUS; *On the Lex Julia et Papia, Book VIII*.- Anyone who compels his freedman to be sworn contrary to the Lex Aelia Sentia will neither himself nor his children have any rights over the freedman.

16.- ULPIANUS; *On the Lex Julia et Papia, Book X*.- When a freedman commits a fraud against the law, in order that he may die worth less than a hundred thousand sesterces, his act is void by operation of law; and therefore his patron will succeed him as a freedman possessed an estate of that amount. Hence, everything which he has alienated, for any reason whatsoever, will be of no force or effect.

It is evident that if he should alienate any property for the purpose of defrauding his patron, and, after doing so, he should remain worth more than a hundred thousand sesterces, the alienation will be valid, but any property which was fraudulently disposed of can be recovered by the Favian or the Calvisian action. Julianus has frequently stated this, and it is our practice. The reason for this difference is that whenever an alienation of anything is made for the purpose of defrauding the law the act is void.

Moreover, he is guilty of fraud who diminishes the value of his estate to less than a hundred thousand sesterces for the purpose of evading the provisions of the law. But if, after the alienation has taken place, he still remains the owner of property worth a hundred thousand sesterces, he is not considered to have

13.- EL MISMO; *Pandectas, libro I*.- El hijo de familia no puede manumitir a un esclavo de su peculio, pero puede manumitirlo por orden de su padre; y el manumitido se hace liberto del padre.

14.- ULPIANO; *Comentarios a la ley Julia y Papia, libro V*.- Si yo hubiere jurado que soy patrono, se ha de decir que en cuanto a la sucesión yo no soy patrono, porque el juramento no hace al patrono; de otra suerte será, si se hubiera fallado que soy patrono, porque se estará a la sentencia.

15.- PAULO; *Comentarios a la ley Julia y Papia, libro VIII*.- Si contra la ley Elia Sencia obligó uno a jurar a su liberto, ni él mismo, ni sus hijos tienen derecho alguno.

16.- ULPIANO; *Comentarios a la ley Julia y Papia, libro X*.- Si en fraude de la ley se hubiere hecho un liberto de menor fortuna que centenario, de derecho no será válido lo que se hizo y por lo tanto el patrono tendrá cabida en los bienes del liberto como si éste fuese centenario; así, pues, cualquiera que sea la cosa que por alguna razón enajenó, es de ningún valor tal enajenación.

Mas si hubiere enajenado algunas cosas en fraude del patrono, pero después de la enajenación continuara siendo de mayor fortuna que un centenario, la enajenación tendrá ciertamente validez, pero por la acción Faviana y Calvisiana se revocará lo que fue enajenado por fraude; y así lo escribió muchísimas veces Juliano, y este derecho observamos. Pero la razón de la diversidad es esta: que cuando se hace una enajenación en fraude de la ley, no es válido lo que se hizo.

Mas se hace en fraude, cuando alguno se hace de menor fortuna que centenario para esto, para eludir el precepto de la ley; pero cuando hecha la enajenación es todavía centenario, no se considera que se obró en fraude de la ley, sino solamente en fraude del patrono; y por esto se revocará con la acción Faviana

Calvisiano iudicio revocabitur id quod alienatum estado.

§ 1.- Si quis plures res simul alienando minorem se centenario fecerit, quarum una revocata vel omnium partibus maior centenario efficitur: utrum revocamus omnes an pro rata ex singulis, ut centenarium eum faciamus? Magisque est, ut omnium rerum alienato facta nullius momenti sit.

§ 2.- Si quis plane non semel alienaverit, sed quasdam res ante, quasdam postea, alienatio earum rerum quae postea alienatae sunt ipso iure non revocabitur, sed priorum: in posterioribus Favianae locus erit.

17.- IDEM; *libro XI, ad legem Iuliam et Papiam*.- Divi fratres in haec verba rescripserunt: "comperimus a peritioribus dubitatum aliquando, an nepos contra tabulas aviti liberti bonorum possessionem petere possit, si eum libertum pater patris, quum annorum viginti quinque esset, capitis accusasset, et Proculum, sane non levem iuris auctorem, in hac opinione fuisse, ut nepoti in huiusmodi causa non putaret dandam bonorum possessionem. Cuius sententiam nos quoque secuti sumus, quum rescriberemus ad libellum Caesidia Longinae: sed et Volusius Maecianus amicus noster ut et Iuris Civilis praeter veterem et bene fundatam peritiam anxie diligens religione rescripti nostri ductus sit ut coram nobis adfirmavit non arbitratum se aliter respondere debere. Sed quum et ipso Maeciano et aliis amicis nostris iuris peritis adhibitis plenius tractaremus, magis visum est nepotem neque verbis neque sententia legis aut Edicti Praetoris ex persona vel nota patris sui excludi a bonis aviti liberti: plurium etiam iuris auctorum, sed et salvi Iuliani

committed a fraud against the law, but only against his patron; and therefore the property which he has disposed of can be recovered by either the Favian or the Calvisian Action.

§ 1.- Where anyone, for the purpose of diminishing the value of his property to an amount under a hundred thousand sesterces, alienates several articles at once, so that by revoking the sale of one, or of portions of all of them, he will be worth more than a hundred thousand sesterces, will it be necessary for us to revoke the sale of all the articles, or that of each one pro rata, in order to render his fortune equal to a hundred thousand sesterces? The better opinion is that the alienation of all the articles is of no force or effect.

§ 2.- If anyone should not sell all of his property at once, but a part of it at one time, and a part of it at another, the subsequent alienation will not be revoked by operation of law, but the former one will be; and there will be ground for the institution of the Favian Action with reference to the property last disposed of.

17.- THE SAME; *On the Lex Julia et Papia, Book XI*.- The Divine Brothers stated the following in a Rescript: "We have ascertained from those who are the most learned in the law that it was sometimes doubtful whether a grandson could demand praetorian possession of the estate of his grandfather contrary to the provisions of the will, if his father, who was over twenty-five years of age, had accused him of a capital crime. "It is true that Proculus, a jurist of great authority, was of the opinion that, in a case of this kind, praetorian possession should not be given to the grandson; and we adopted this opinion when we issued a Rescript in answer to the application of Csesidia Longina. But, our friend Volusius Maecianus, Praetor of the Civil Law, and one who pays the greatest attention to old and well-founded precedents, being influenced by his respect for Our Rescript (as he stated to Us) did not think that he could decide otherwise. But as We have discussed this point very fully with Maecianus himself, and with others of our friends learned in the law, the better

o Calvisiana lo que se enajenó.

§ 1.- Si alguno se hubiere hecho de menor fortuna que centenario enajenando al mismo tiempo muchas cosas, y con la revocación de una de ellas, o con la de partes de todas se hace de más fortuna que un centenario, ¿las revocamos todas, o a prorrata de cada una, de suerte que lo hagamos centenario? Y es lo más cierto, que es de ningún valor la enajenación hecha de todas las cosas.

§ 2.- Mas si uno no las hubiere enajenado al mismo tiempo, sino algunas cosas antes, y otras después, de derecho no se revocará la enajenación de las cosas que hayan sido enajenadas después, sino la de las primeras; y respecto a las posteriores tendrá lugar la acción Faviana.

17.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XI*.- Los Divinos Hermanos resolvieron por rescripto en estos términos: «Hemos sabido que por los más peritos se ha dudado alguna vez, si el nieto podría pedir la posesión de los bienes contra el testamento de un liberto de su abuelo, si el padre, siendo de veinticinco años, hubiese acusado de delito capital a este liberto. Y que ciertamente Próculo, autor de derecho de no escasa autoridad, fue de opinión, que no creía que en este caso se le hubiese de dar al nieto la posesión de los bienes. Cuya opinión seguimos también nosotros, cuando respondimos por rescripto al libelo de Cesidia Longina Pero también Volusio Meciano, amigo nuestro, y muy amante además del antiguo y bien fundado conocimiento del Derecho Civil, llevado por el respeto de nuestro rescripto, según afirmó ante nosotros, no creyó que él debía responder de otro modo; pero cuando habiendo acudido al mismo Meciano y a otros amigos nuestros, jurisperitos, lo tratamos más plenamente, pareció más cierto que el

amici nostri clarissimi viri hanc sententiam fuisse".

§ 1.- Item quaesitum est, si patroni filius capitis accusaverit libertum, an hoc noceat liberis ipsius. Et Proculus quidem in hac fuit opinione notam adspersam patroni filio liberis eius nocere, Iulianus autem negavit: sed hic idem quod Iulianus erit dicendum.

18.- SCAEVOLA; *libro IV, Responsorum*.- Quaero, an libertus prohiberi potest a patrono in eadem colonia, in qua ipse negotiatur, idem genus negotii exercere. Scaevola respondit non posse prohiberi.

19.- PAULUS; *libro I, Sententiarum*.- Ingratus libertus est, qui patrono obsequium non praestat vel res eius filiorumve tutelam administrare detractat.

20.- IDEM; *libro III, Sententiarum*.- Sicut testamento facto decedente libertus potestas datur patrono vel libertatis causa imposita petere vel partis bonorum possessionem, ita et quum intestato decesserit, earum rerum electio ei manet.

21.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Sive patronus sive libertus deportetur et post restituatur, amissum patronatus et petendae contra tabulas bonorum possessionis ius recipitur: quod ius servatur et si in metallum patronus vel libertus damnatus restituatur.

opinion seems to be that a grandson will not be excluded from the estate of his freedman's grandfather, either by the words or the spirit of the law, or by the Edict of the Praetor, or on his own account, or by the stigma attaching to his father. "We are also aware that this opinion has been adopted by many eminent jurists, as well as by that most illustrious man Salvius Julianus, our friend."

§ 1.- The question also arose, if a son accused the freedman of his father of a capital offence, whether this would prejudice the rights of his children. Proculus held that the stigma attaching to the son of the patron would prejudice his children. Julianus, however, denies that this is the case; and it must be held that the opinion of Julianus should be adopted.

18.- SCAEVOLA; *Opinions, Book IV*.- I ask whether a freedman can be prevented by his patron from carrying on the same kind of business which his patron is transacting in the same colony. Scaevola answered that he could not be prevented from doing so.

19.- PAULUS; *Sentences, Book I*.- A freedman is ungrateful when he does not show proper respect for his patron, or refuses to manage his property, or undertake the guardianship of his children.

20.- THE SAME; *Sentences, Book III*.- Where a freedman dies after making his will, power is given to his patron to demand either payment of whatever was due for granting him his freedom, or praetorian possession of a part of his estate; and even if the freedman should die intestate, the patron will still have the choice of these two things.

21.- HERMOGENIANUS; *Epitomes of Law, Book III*.- If the patron or the freedman has been banished, and afterwards restored to his civil condition, the right of patronage, as well as that to demand praetorian possession contrary to the provisions of the will, which have been lost, will be restored; and this right is preserved, even if the patron or the freedman should be restored to his former status after having been sentenced to the mines.

nieto, ni por las palabras, ni por el espíritu de la Ley, o del Edicto del Pretor, era excluido, por virtud de la persona o de la nota de su padre, de los bienes del libertus del abuelo, y que esta fue la opinión también de muchos autores de derecho, y también de Salvio Juliano, amigo nuestro, varón muy esclarecido.

§ 1.- También se preguntó, si, habiendo el hijo del patrono acusado de crimen capital al libertus, esto les perjudicará a los hijos del mismo. Y Próculo fue de opinión, que la nota puesta al hijo del patrono perjudicaba a los hijos de éste; pero Juliano lo negó; y en este caso se habrá de decir lo mismo que Juliano.

18.- SCÉVOLA; *Respuesta, libro IV*.- Pregunto, si por el patrono se le puede prohibir al libertus que haga la misma especie de negocio en la misma colonia en que él mismo negocia; Scévola respondió, que no se le puede prohibir.

19.- PAULO; *Sentencias, libro I*.- Es ingrato el libertus que no le guarda atención al patrono, o que rehúsa administrar los bienes de él o la tutela de sus hijos.

20.- EL MISMO; *Sentencias, libro III*.- Así como muriendo el libertus habiendo hecho testamento se le da facultad al patrono para pedir o las imposiciones hechas por causa de la libertad, o la posesión de una parte de los bienes, así también cuando hubiere fallecido intestado le queda la elección de estas cosas.

21.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Ora sea deportado el patrono, ora el libertus, si después es restituido, se recobra el perdido derecho de patronato y el de pedir la posesión de los bienes contra el testamento; cuyo derecho se observa también si el patrono o el libertus condenado a las minas fuese restituido.

§ 1.- Excluditur contra tabulas bonorum possessione patronus et si ex unica heres instituat et id, quod deest ad supplendam debitam portionem, per servum iudicio liberti sine condicione et dilatione ei, hereditate vel legato sive fideicommisso, quaeri potest.

§ 2.- Ex duobus patronis unus, ex debita parte heres institutus sine condicione et dilatione, contra tabulas bonorum possessionem petere non poterit, licet, si minor ei portio esset relicta et contra tabulas bonorum possessionem petisset, alia etiam portio ei adincrepere potuisset.

§ 3.- Naturales liberi liberti exheredati facti, alio ex parte herede instituto, si per servum ex alia parte parenti successerint, obiciuntur patrono.

§ 4.- Liberti filius heres institutus si bona repudiaverit, patronus non excluditur.

22.- GAIUS; *libro singulari de Casibus*.- Satis constat, etiamsi in potestate sit parentis filius patronae, nihilo minus legitimo iure ad eum pertinere hereditatem.

23.- TRYPHONINUS; *libro XV, Disputationum*.- Si filius patris necem inultam reliquerit, quam servus detexit et meruit libertatem, dixi non habendum pro patroni filio, quia indignus estado

§ 1.- Quum ex falsis codicillis, qui veri aliquo tempore crediti sunt, heres ignorans quasi ex fideicommisso libertatem servis praestitisset, rescriptum est a Divo Hadriano liberos quidem eos esse, sed aestimationem sui praestare debere: et hos liberos

§ 1.- A patron is excluded from praetorian possession contrary to the provisions of the will when he is appointed heir to only a twelfth of the estate; and what is necessary to make up the amount to which he is entitled can be obtained through his slave by a bequest of the freedman payable unconditionally, and without delay, either by leaving him the estate, or a legacy, or a sum of money payable under a trust.

§ 2.- Where only one of two patrons is appointed heir to what is due to him unconditionally, and without delay, he cannot demand praetorian possession in opposition to the provisions of the will; even if a smaller amount than he was entitled to has been left to him, and he should demand praetorian possession of the estate contrary to the provisions of the will, the share of the other patron will accrue to him.

§ 3.- If the natural children of a freedman, who had been disinherited by him, should through their slaves succeed to a share of the estate of their father, a stranger having been appointed heir to the remainder, this will affect the right of the patron.

§ 4.- Where the son of a freedman is appointed his heir, and rejects the estate, the patron will not be excluded.

22.- GAIUS; *On Special Cases*.- It is well established that even if the son of a patroness is under parental control, the estate will still belong to him by law.

23.- TRYPHONINUS; *Disputations, Book XV*.- When a son left the death of a father unavenged, and a slave having detected the murderer, had deserved his freedom on this account, I held that the son should not be considered as the patron of the slave, for the reason that he was unworthy.

§ 1.- Where a false codicil had been made, which at first was considered to be genuine, and the heir, ignorant of the fact, granted freedom to certain slaves by virtue of a trust created by said codicil, it was stated in a Rescript of the Divine Hadrian that the

§ 1.- El patrono es excluido de la posesión de los bienes contra el testamento, también si el heredero fuera instituido en un dozavo, y por medio de un esclavo se puede adquirir para él por disposición del liberto, sin condición ni dilación, por herencia, legado o fideicomiso, lo que falta para completar la porción debida.

§ 2.- Si de dos patronos uno fue instituido heredero de la parte debida sin condición ni dilación, no podrá pedir la posesión de los bienes contra el testamento, aunque, si se le hubiese dejado menor porción, y hubiese pedido la posesión de los bienes contra el testamento, le hubiese podido acrecer a él también la otra porción.

§ 3.- Los hijos naturales del liberto que fueron desheredados, habiendo sido otro instituido heredero de una parte, son obstáculo para el patrono, si por medio de un esclavo le hubieren sucedido en la otra parte a su ascendiente.

§ 4.- Si el hijo de un liberto instituido heredero hubiere repudiado los bienes, no es excluido el patrono.

22.- GAYO; *Casos, libro único*.- Es bien sabido, que aunque se halle bajo la potestad de su ascendiente el hijo de la patrona, le pertenece, no obstante, por legítimo derecho la herencia.

23.- TRIFONINO; *Disputas, libro XV*.- Si el hijo hubiere dejado sin vengar la muerte de su padre, que descubrió un esclavo, y éste obtuvo la libertad, dije que aquél no ha de ser tenido como hijo del patrono, porque es indigno.

§ 1.- Cuando en virtud de falsos codicilos, que algún tiempo fueron creídos verdaderos, el heredero, que lo ignoraba, hubiese dado la libertad a esclavos como por virtud de fideicomiso, se respondió por Rescripto por el Divino Adriano, que eran cierta-

manumissoris esse recte probatur, quia saluum est etiam in his libertis ius patroni.

24.- PAULUS; *Imperialim sententiarum in cognitionibus prolatarum, sive decretorum ex libris sex libro I.*- Camelia Pia ab Hermogene appellaverat, quod diceret iudicem de dividenda hereditate inter se et coheredem non tantum res, sed etiam libertos divisisse: nullo enim iure id eum fecisse. Placuit nullam esse libertorum divisionem: alimentorum autem divisionem a iudice inter coheredes factam eodem modo ratam esse.

TIT. XV

DE OBSEQUIIS PARENTIBUS ET PATRONIS PRAESTANDIS

1.- ULPIANUS; *libro I, Opinionum.*- Etiam militibus pietatis ratio in parentes constare debet: quare si filius miles in patrem aliqua commisit, pro modo delicti puniendus estado

§ 1.- Et inter colibertos matrem et filium pietatis ratio secundum naturam salva esse debet.

§ 2.- Si filius matrem aut patrem, quos venerari oportet, contumeliis adficit vel impias manus eis infert, Praefectus Urbis delictum ad publicam pietatem pertinens pro modo eius vindicat.

§ 3.- Indignus militia iudicandus est, qui patrem et matrem, a quibus se educatum dixerit, maleficos appellaverit.

slaves would be free, but that they must pay the heir their full value. And it was justly held that the said slaves should become the manumitted freedmen of the heir, for the reason that his right over them as patron still remained in force.

24.- PAULUS; *In the First of the Six Books of the Imperial Decrees Rendered in Council; or the Imperial Decisions.*- Camelia Pia appealed from the decision of Hermogenes, which set forth that the judge who had jurisdiction over an estate to be divided between herself and her co-heir had divided not only the property, but the freedmen as well. It was decided that this had not been done in accordance with any law, and that the division of the freedmen was void; but that the appointment of the provisions made by the judge among the co-heirs should be confirmed without any alteration.

TITLE XV

CONCERNING THE RESPECT WHICH SHOULD BE SHOWN TO PARENTS AND PATRONS

1.- ULPIANUS; *Opinions, Book I.*- The filial affection due to parents should also be manifested by soldiers. Wherefore, if a son, who is a soldier, commits any improper act towards his father, he must be punished in proportion to his offence.

§ 1.- Filial affection between a mother and a son who have been liberated from slavery together should be maintained in accordance with natural law.

§ 2.- If a son, by the use of abusive language, should insult his father or his mother, whom it is his duty to respect, or should lay impious hands upon either of them, the Prefect of the City shall punish the crime, which affects public order, in proportion to its gravity.

§ 3.- A son should be considered as unworthy to be a soldier, who calls his father and his mother, by whom he acknowledges that he has been brought up,

mente libres, pero que debían pagar su propia estimación; y con razón se reconoce que éstos son libertos del manumisor, porque también sobre estos libertos está a salvo el derecho del patrono.

24.- PAULO; *libro I, de los seis de Sentencias imperiales dadas en juicio extraordinario, o sea de Decretos.*- Camelia Pía había apelado de Hermógenes, porque decía que el juez de la división de la herencia dividió entre él y su coheredero no solamente las cosas sino también los libertos, y porque esto lo hizo él sin derecho alguno; se determinó, que era nula la división de los libertos, pero que era válida la división de los alimentos hecha del mismo modo por el juez entre los coherederos.

TÍTULO XV

DE LAS ATENCIONES QUE SE LES HAN DE PRESTAR A LOS ASCENDIENTES Y A LOS PATRONOS

1.- ULPIANO; *Opiniones, libro I.*- Aun para los militares debe existir la razón de piedad hacia sus ascendientes; por lo cual, si el hijo militar cometió alguna falta contra su padre, ha de ser castigado con arreglo a su delito.

§ 1.- Aun entre colibertos, madre e hijo, debe quedar a salvo la razón de piedad conforme a la naturaleza.

§ 2.- Si el hijo infiere contumelia a su madre o a su padre, a quienes debe venerar, o les pusiese encima sus impías manos, el Prefecto de la Ciudad castiga según su gravedad este delito, que afecta a la moral pública.

§ 3.- Ha de ser juzgado indigno de la milicia el que hubiere llamado malhechores al padre y a la madre, por quienes dijere que él fue educado.

malefactors.

2.- IULIANUS; *libro XIV, Digestorum*.- Honori parentium ac patronorum tribuendum est, ut, quamvis per procuratorem iudicium accipiant, nec actio de dolo aut iniuriarum in eos detur: Licet enim verbis edicti non habeantur infames ita condemnati, re tamen ipsa et opinione hominum non effugiunt infamiae notam.

§ 1.- Interdictum quoque Unde vi non est adversus eos reddendum.

3.- MARCELLUS; *libro singulari Responsorum*.- Titius puerum emit, quem post multos annos venire iussit: postea exoratus accepto ab eo pretio eum manumisit: quaero, an eum filius et heres manumissoris ut ingratum accusare possit. Respondit posse, si nihil aliud esset impedimento: nam plurimum interesse, a suo servo quis vel etiam ab amico eius acceptis nummis dederit libertatem, an ab eo servo, qui quum esset alienus in fidem eius devenit. etenim ille etiamsi non gratuitum, beneficium tamen praestitit, iste nihil amplius quam operam suam accommodare videri potest.

4.- MARCIANUS; *libro II, Publicorum Iudiciorum*.- Per procuratorem ingratum libertum posse argui Divus Severus et Antoninus Rescripserunt.

5.- ULPIANUS; *libro X, ad Edictum*.- Parens, patronus patrona, liberive aut parentes patroni patronave, neque si ob negotium faciendum vel non faciendum pecuniam accepisse dicerentur, in factum actione tenentur.

2.- JULIANUS; *Digest, Book XIV*.- The respect due to parents and patrons is of such a character that an action for fraud or injury can not be granted against them, even though they may appear by an attorney; for although, by the terms of the Edict, if judgment be rendered against them, they might not be considered infamous; still, according to public opinion itself, they will not escape the imputation of infamy through the very proceeding.

§ 1.- Judgment for forcible possession is also forbidden to be rendered against them.

3.- MARCELLUS; *Opinions*.- Titius purchased a boy slave, and after the lapse of several years ordered him to be sold, but subsequently having been begged to manumit him, did so, having received from him a sum of money as his value. I ask whether the son and heir of the master who manumitted him can accuse the freedman of being ungrateful. The answer was that he could, if there was no other obstacle; for it makes a great deal of difference where anyone has given freedom to his slave in consideration of money obtained from him, or from a friend of his, and where a slave, who had belonged to another, becomes his property and pays him a sum of money for his freedom. For the former confers a benefit upon him, although it is not gratuitous; the latter, however, can be considered to have done nothing more than to have lent him his aid.

4.- MARCIANUS; *Public Decisions, Book II*.- The Divine Severus and Antoninus stated in a Rescript that an ungrateful freedman could be accused by the agent of his patron.

5.- ULPIANUS; *On the Edict, Book X*.- A parent, a patron, a patroness, or the children of relatives of the latter, will not be liable to an action in factum on account of a transaction, in which they are said to have received a sum of money, in consideration of either the performance or nonperformance of some act.

2.- JULIANO; *Digesto, libro XIV*.- Se le ha de conceder al honor de los ascendientes y de los patronos, que, aunque acepten el juicio por medio de procurador, no se dé contra ellos ni la acción de dolo, ni la de injurias; porque aunque por las palabras del Edicto no sean considerados infames los así condenados, no se libran, sin embargo, de la nota de infamia por la cosa en sí y por la opinión de los hombres.

§ 1.- Tampoco se ha de dar contra ellos el interdicto *Unde vi*.

3.- MARCELO; *Respuestas, libro único*.- Ticio compró un impúbero, y muchos años después mando que fuese vendido; luego, habiendo sido rogado, lo manumitió habiendo recibido de él el precio; pregunto, si el hijo y heredero del manumisor podría acusarlo como ingrato. Respondió, que podía, si no hubiese ningún otro impedimento; porque hay muy grande diferencia, si alguno le hubiere dado la libertad habiendo recibido dinero de su propio esclavo, o aun de un amigo de éste, o habiéndolo recibido del mismo esclavo, que, siendo ajeno, llegó a depender de la fidelidad de éste; porque aquél, aunque no gratuito, prestó, sin embargo, un beneficio, y éste se puede considerar que no presta nada más que su propio trabajo.

4.- MARCIANO; *Juicios públicos, libro II*.- Respondieron por rescripto el Divino Severo y Antonino, que el liberto puede ser acusado de ingrato por medio de procurador.

5.- ULPIANO; *Comentarios al Edicto, libro X*.- El ascendiente, el patrono, la patrona, o los descendientes o ascendientes del patrono o de la patrona, ni aunque se dijera que recibieron dinero por hacer, o no hacer, un negocio, están obligados por la acción por el hecho.

§ 1.- Sed nec famosae actiones adversus eos dantur, nec hae quidem, quae doli vel fraudis habent mentionem,

6.- PAULUS; *libro XI, ad Edictum*.- Nec servi corrupti agetur,

7.- ULPIANUS; *libro X ad Edictum*.- Licet famosae non sint.

§ 1.- Et in quantum facere possunt, damnantur.

§ 2.- Nec exceptiones doli patiuntur vel vis metusve causa, vel interdictum unde vi vel quod vi patiuntur.

§ 3.- Nec deferentes iusiurandum de calumnia iurant.

§ 4.- Nec non et si ventris nomine in possessionem calumniae causa missa dicatur patrona, libertus hoc dicens non audietur, quia de calumnia patroni quaeri non debet. His enim personis etiam in ceteris partibus edicti honor habebitur.

§ 5.- Honor autem his personis habebitur ipsis, non etiam interventoribus eorum: et si forte ipsi pro aliis interveniant, honor habebitur.

8.- PAULUS; *libro X, ad Edictum*.- Heres liberti omnia iura integra extranei hominis adversus patronum defuncti habet.

9.- ULPIANUS; *libro LXVI ad Edictum*.- Liberto et filio semper honesta et sancta persona patris ac patroni videri debet.

10.- TRYPHONINUS; *libro XVII, Disputatio*-

§ 1.- Neither will actions implying moral turpitude, nor such as are based upon bad faith, or fraud, be granted against them.

6.- PAULUS; *On the Edict, Book XI*.- Nor can suit be brought against them for corrupting a slave:

7.- ULPIANUS; *On the Edict, Book X*.- Although such actions may not imply moral turpitude.

§ 1.- And judgment shall be rendered against them only for the amount which they are able to pay.

§ 2.- Nor can they be opposed by exceptions on the ground of bad faith, or for force, or fear, or by interdicts *Unde vi*, or for any injury suffered through violence.

§ 3.- When these persons tender an oath, they are not compelled to swear that this is not done maliciously.

§ 4.- When a freedman alleges that his patroness has fraudulently been placed in possession of an estate in the name of her unborn child, he shall not be heard, because he cannot accuse his patroness of fraud, for such persons are entitled to respect; as is stated in the Sections of the Edict.

§ 5.- Respect, however, is only due to them personally, and not to those who represent them; but if they themselves should appear for others, they will still be entitled to respect.

8.- PAULUS; *On the Edict, Book X*.- The heir of a freedman is entitled to all the rights of a stranger against the patron of the deceased.

9.- ULPIANUS; *On the Edict, Book LXVI*.- The persons of a father and a patron should always appear honorable and sacred in the eyes of a freedman and a son.

10.- TRYPHONINUS; *Disputations, Book XVII*.-

§ 1.- Pero ni las acciones infamantes se dan contra ellos, ni tampoco las que tienen mención de dolo o de fraude;

6.- PAULO; *Comentarios al Edicto, libro XI*.- Ni se ejercitará la acción de esclavo corrompido.

7.- ULPIANO; *Comentarios al Edicto, libro X*.- Aunque no sean infamantes.

§ 1.- Y son condenados a cuanto pueden hacer.

§ 2.- Y no soportan ni las excepciones de dolo, o las que por causa de fuerza o miedo, o el interdicto *Unde vi*, o *Quod vi*.

§ 3.- Defiriendo el juramento tampoco juran de calumnia.

§ 4.- Y si se dijera que la patrona fue puesta en posesión por causa de calumnia a nombre del que está en el claustro materno, tampoco será oído el liberto que esto diga, porque no debe querellarse de calumnia contra el patrono; porque a estas personas se les tendrá respeto aun por las demás partes del Edicto.

§ 5.- Mas se les tendrá respeto a estas mismas personas, no también a los que por ellas intervienen; y si acaso intervinieran ellas por otras, se les tendrá respeto.

8.- PAULO; *Comentarios al Edicto, libro X*.- El heredero del liberto tiene contra el patrono del difunto íntegros todos los derechos de un hombre extraño.

9.- ULPIANO; *Comentarios al Edicto, libro LXVI*.- Al liberto y al hijo les debe parecer siempre honesta y santa la persona del padre y del patrono.

10.- TRIFONINO; *Disputas, libro XVII*.- El padre

num.- Nullum ius libertatis causa impositorum habet in mancipato filio, quia nihil imponi liberis solet. Nec quisquam dixit iureiurando obligari filium patri manumissori ut libertum patrono: nam pietatem liberi parentibus, non operas debent.

11.- PAPINIANUS; *libro XIII, Responsorum.*- Liberta ingrata non est, quod arte sua contra patronae voluntatem utitur.

A father has no right to place any obligation upon his emancipated son, in consideration of having granted him his freedom, for the reason that nothing of this kind can be imposed upon children. Nor can anyone say that a son is bound by an oath to his father, who manumits him, in the same way as a freedman is to his patron, as children owe their parents affection and not menial services.

11.- PAPINIANUS; *Opinions, Book XIII.*- A freedwoman is not considered ungrateful because she works at her trade in opposition to the wishes of her patron.

no tiene ningún derecho sobre el hijo emancipado por las imposiciones que le hizo a causa de la libertad, porque nada se les suele imponer a los hijos, y nadie dijo que el hijo se obligase con juramento al padre que lo manumite, como el liberto a favor del patrono; porque los hijos deben a los padres piedad, no servicios.

11.- PAPINIANO; *Respuestas, libro XIII.*- La liberta no es ingrata porque ejercite su arte contra la voluntad de su patrona.

LIBER TRIGESIMUS OCTAVUS

TIT. I

DE OPERIS LIBERTORUM

1.- PAULUS; *libro singulari de variis lectionibus*.- Operae sunt diurnum officium.

2.- ULPIANUS; *libro XXXVIII, ad Edictum*.- Hoc edictum praetor proponit coartandae persecutionis libertatis causa impositorum: animadvertit enim rem istam libertatis causa impositorum praestationem ultra excrevisse, ut premeret atque oneraret libertinas personas.

§ 1.- Initio igitur praetor pollicetur se iudicium operarum daturum in libertos et libertas.

3.- POMPONIUS; *libro VI, ad Sabinum*.- Operas stipulatus ante peractum diem operam eius diei petere non potest.

§ 1.- Nec pars operae per horas solvi potest, quia id est officii diurni. Itaque nec ei liberto, qui sex horis dumtaxat antemeridianis praesto fuisset, liberatio eius diei contingit.

4.- IDEM; *libro IV, ad Sabinum*.- A duobus manu-missus utrique operas promiserat: altero ex his mortuo nihil est, quare non filio eius, quamvis superstite altero, operarum detur petitio. Nec hoc quicquam commune habet quum hereditate aut bonorum possessione: perinde enim operae a libertis ac pecunia credita petitur. haec ita aristo scripsit, cuius sententiam puto veram: nam etiam praeteritarum operarum actionem dari heredi extraneo sine metu exceptionis placet. Dabitur igitur et vivo altero

BOOK XXXVIII

TITLE I

CONCERNING THE SERVICES OF FREEDMEN

1.- PAULUS; *On Various Passages*.- The services above mentioned signify daily labor.

2.- ULPIANUS; *On the Edict, Book XXXVIII*.- The Praetor promulgated this Edict in order to restrict the demands for services imposed in consideration of the grant of freedom; for he perceived that the demands for services imposed in return for freedom increased excessively, for the purpose of oppressing and annoying freedmen.

§ 1.- Therefore, in the first place, the Praetor promises that he will grant actions with a view to requiring services to be rendered by freedmen and freedwomen.

3.- POMPONIUS; *On Sabinus, Book IV*.- Where a patron has stipulated for services to be performed by his freedmen, he cannot demand them until after the time has passed when they are due.

§ 1.- Nor can a part of the services be performed by the freedmen working a certain number of hours, because the obligation requires the labor of an entire day. Hence a freedman who has only worked six hours in the forenoon will not be released from labor for the entire day.

4.- THE SAME; *On Sabinus, Book IV*.- A slave who was manumitted by two masters promised his services to both. One of them having died, there is no reason why a demand for the services of the slave should not be made by his son, even though the other master may be living. This has nothing in common with the succession to, or praetorian possession of an estate; as services are demanded from freedmen just as if money had been lent to them. This was the opinion of Aristo, and I think it to be correct; for it is

LIBRO TRIGÉSIMO OCTAVO

TÍTULO I

DE LOS SERVICIOS DE LOS LIBERTOS

1.- PAULO; *Doctrina de autores varios, libro único*.- Servicios son el trabajo diario.

2.- ULPIANO; *Comentarios al Edicto, libro XXXVIII*.- El Pretor publicó este Edicto para restringir la reclamación de las imposiciones hechas por causa de la libertad; porque observó que la prestación de las imposiciones hechas por causa de la libertad se extendió demasiado, de suerte que oprimía y gravaba a las personas libertinas.

§ 1.- Así, pues, promete el Pretor al principio que él dará contra los libertos y las libertas la acción de servicios.

3.- POMPONIO; *Comentarios a Sabino, libro VI*.- El que estipuló servicios no puede pedir antes de transcurrido el día el servicio de este día.

§ 1.- Tampoco se puede pagar por horas parte de un servicio, porque este es el trabajo de un día y así, al liberto que hubiese estado disponible solamente seis horas antes del mediodía, no le compete la exención de este día.

4.- EL MISMO; *Comentarios a Sabino, libro IV*.- Uno que fue manumitado por dos les había prometido servicios a ambos; habiendo fallecido uno de ellos, no hay razón alguna por la que no se le dé a su hijo acción para pedir los servicios, aunque sobreviva el otro. Y esto no tiene cosa alguna común con la herencia o con la posesión de los bienes; porque a los libertos se les piden los servicios lo mismo que se pide el dinero prestado. Así lo escribió Aristo, cuya opinión juzgo verdadera; porque está establecido que

for services which were due but not performed, without the fear of his being barred by an exception; and therefore, it should be granted to the son, even if the other patron is living.

también acción por los servicios pasados; luego se dará aun viviendo el otro patrono.

5.- ULPIANUS; *libro XV, ad Sabinum*.- Si quis operas sit stipulatus sibi liberisque suis, etiam ad postumos pervenit stipulatio.

5.- ULPIANUS; *On Sabinus, Book XV*.- If anyone should stipulate for services to be rendered for the benefit of himself and his children, the stipulation will also apply to his posthumous heirs.

5.- ULPIANO; *Comentarios a Sabino, libro XV*.- Si alguno hubiera estipulado servicios para sí y para sus hijos, la estipulación alcanza también a los póstumos.

6.- IDEM; *libro XXVI, ad Sabinum*.- Fabriles operae ceteraeque, quae quasi in pecuniae praestatione consistunt, ad heredem transeunt, officiales vero non transeunt.

6.- THE SAME; *On Sabinus, Book XXVI*.- Services appertaining to a trade, and others which are the same as the payment of money, pass to the heir; but those relating to the duties of the freedmen do not pass to him.

6.- EL MISMO; *Comentarios a Sabino, libro XXVI*.- Los trabajos fabriles y los demás, que consisten en una prestación de dinero, pasan al heredero; pero no pasan las de obsequio personal.

7.- IDEM; *libro XXVIII, ad Sabinum*.- Ut iurandi obligatio contrahatur, libertum esse oportet qui iuret et libertatis causa iurare.

7.- THE SAME; *On Sabinus, Book XXVIII*.- In order that, in a case of this kind, the obligation of an oath may be contracted in accordance with law, it is necessary that the person who is sworn be a freedman, and that he does so in consideration of the freedom which he has received.

7.- EL MISMO; *Comentarios a Sabino, libro XXVIII*.- Para que por juramento se contraiga obligación, es menester que sea liberto el que jure, y que jure por causa de la libertad.

§ 1.- Plane quaeritur, si quis liberto suo legaverit, si filio suo iuraverit se decem operarum nomine praestaturum, an obligetur iurando. Et Celsus Iuventus obligari eum ait parvique referre, quam ob causam de operis libertus iuraverit: et ego Celso adquiesco.

§ 1.- The question arises, if anyone should bequeath a legacy to his freedman, provided he will swear to pay ten aurei to his son, instead of giving his services, whether he will be bound by the oath. Celsus Juventius says that he will be bound, and that it makes very little difference for what reason the freedman takes an oath with reference to his services. I assent to the opinion of Celsus.

§ 1.- Mas se pregunta, si, habiéndole hecho alguien un legado a su liberto, si le hubiere jurado a su propio hijo que le satisfará diez a título de servicios, se obligará jurándolo. Y dice Celso Juvencio que éste se obliga, y que poco importa por qué causa haya jurado respecto a los servicios el liberto; y yo asiento a la opinión de Celso.

§ 2.- Iurare autem debet post manumissionem, ut obligetur: et sive statim sive post tempus iuraverit, obligatur.

§ 2.- In order that the oath may be binding, the freedman must take it after his manumission, and he will be equally bound whether he takes it immediately, or after a certain time.

§ 2.- Mas para que se obligue debe jurar después de la manumisión, y ya si hubiere jurado inmediatamente, ya si después de algún tiempo, se obliga.

§ 3.- Iurare autem debet operas donum munus se praestaturum, operas qualescumque, quae modo probe iure licito imponuntur.

§ 3.- Moreover, he should swear that he will give his services, a gift, or a present; and he can promise any services whatsoever, provided that they can be lawfully and properly proposed.

§ 3.- Pero debe jurar que él prestará los servicios, la donación o el regalo, cualesquiera que sean los servicios que con probidad se imponen por lícito derecho.

§ 4.- Rescriptum est a Divo Hadriano et deinceps cessare operarum persecutionem adversus eum, qui ex causa fideicommissi ad libertatem perductus est.

§ 4.- It was stated in a Rescript by the Divine Hadrian, and also subsequently by other Emperors, that a demand for services cannot be made against one who has obtained his freedom in consideration of

§ 4.- Se respondió por rescripto por el Divino Adriano, y por sus sucesores, que deja de tener lugar la acción persecutoria de servicios contra el que por causa de fideicomiso obtuvo la libertad.

the execution of a trust.

§ 5.- Dabitur et in impuberem, quum adoleverit, operarum actio: sed interdum et quamdiu impubes est: nam huius quoque est ministerium, si forte vel librarius vel nomenclator vel calculator sit vel histrio vel alterius voluptatis artifex.

§ 6.- Si liberi patroni ex inaequalibus partibus essent instituti, utrum pro parte dimidia an pro hereditariis habeant operarum actionem? et puto verius liberos pro aequalibus habituros actionem.

§ 7.- Parvi autem refert, in potestate fuerint liberi an vero emancipati.

§ 8.- Sed si in adoptionem datum heredem scripserit patronus, magis est, ut operae ei debeantur.

§ 9.- Nec patronae liberi summoventur ab operarum petitione.

8.- POMPONIUS; *libro VIII, ad Sabinum*.- Si quando duobus patronis iuraverit libertus operas se daturum, Labeoni placet et deberi et peti posse partem operae, quum semper praeterita opera, quae iam dari non possit, petatur. Quod contingit, si vel ipsis patronis iuretur vel promittatur vel communi eorum servo vel complures heredes uni patrono existant.

§ 1.- Pro libertis iurante fideiubere quemvis posse placet.

§ 5.- The action to compel the performance of services will be granted against a minor when he reaches the age of puberty, and sometimes even while he is under that age; for services can be performed by him if he is a copyist, or one familiar with the names of citizens, or an accountant, or an actor, or the minister of any other kind of pleasure.

§ 6.- If the children of a patron have been appointed to unequal shares of the estate, should they be entitled to an action to compel the performance of the services of freedmen, in accordance with their hereditary right to the estate, or to their shares? I think that the better opinion is that they will be entitled to an action in proportion to their hereditary right to the estate.

§ 7.- It, however, makes little difference whether the children were under the control of the patron, or had been emancipated.

§ 8.- If a patron should appoint his son, whom he had given in adoption, his heir, the better opinion is that he is entitled to the services of the freedmen.

§ 9.- The children of a patroness are not excluded from demanding services from the freedmen of their mother.

8.- POMPONIUS; *On Sabinus, Book VIII*.- Where a freedman has sworn to render his services to two patrons, it is held by Labeo that he owes a portion of them to each, and that this can be demanded of him; for services which have not been and could not be performed at the time are constantly required. This occurs whether the freedman has sworn to, or promised the patrons themselves, or a slave owned by both of them, to render his services, or where there are several heirs of one patron.

§ 1.- It is established that anyone can act as surety for a freedman who takes an oath to render his services.

§ 5.- La acción de servicios se dará también contra el impúbere, cuando llegare a la pubertad; pero a veces también mientras es impúbere; porque también hay servicio propio de éste, por ejemplo, si fuera copista, momenclátor, o calculista, o histrión, o artista de otra clase de recreo.

§ 6.- Si los hijos del patrono hubiesen sido instituidos herederos de partes desiguales, ¿tendrán acaso la acción de servicios por mitad, o con arreglo a sus porciones hereditarias? Y juzgo mas verdadero, que los hijos habrán de tener la acción por partes iguales.

§ 7.- Pero poco importa, que los hijos estuvieren bajo potestad o emancipados.

§ 8.- Mas si el patrono hubiere instituido heredero al que fue dado en adopción, es más cierto que se le deben los servicios.

§ 9.- Y ni los hijos de la patrona serán excluidos de la petición de los servicios.

8.- POMPONIO; *Comentarios a Sabino, libro VIII*.- Si alguna vez hubiere jurado un liberto a dos patronos que él les prestaría servicios, le parece bien a Labeón que se debe, y que se puede, pedir parte de un servicio, porque siempre se reclama el servicio pasado, que no se puede prestar; lo cual acontece, si se les jurase, o se les prometiese a los mismos patronos, o a un esclavo común de ellos, o si hubiera muchos herederos de un solo patrono.

§ 1.- Está determinado que cualquiera puede ser fiador del liberto que jura.

9.- ULPIANUS; *libro XXXIV, ad Sabinum*.- Operae in rerum natura non sunt.

§ 1.- Sed officiales quidem futurae nec cuiquam alii deberi possunt quam patrono, quum proprietates earum et in edentis persona et in eius cui eduntur constituit: fabriles autem aliae eius generis sunt, ut a quocumque cuicumque solvi possint. Sane enim, si in artificio sint, iubente patrono et alii edi possunt.

10.- POMPONIUS; *libro XV, ad Sabinum*.- Servus patroni a liberto male ita stipulatur: "operas mihi dare spondes?" itaque patrono dari stipulandum est.

§ 1.- Libertus operarum nomine ita iurando "patrono aut Lucio Titio" solvere Lucio Titio non potest, ut a patrono liberetur.

11.- IULIANUS; *libro XXII, Digestorum*.- Nihil autem interest, extraneus sit Lucius Titius an filius.

12.- POMPONIUS; *libro XV, ad Sabinum*.- Quia aliae operae erunt, quae Lucio Titio dantur. Sed si libertatis causa pecuniam promittat libertus egenti patrono aut Titio, omnimodo adiectio Titii valet.

13.- ULPIANUS; *libro XXXVIII, ad Edictum*.- Si quis hac lege emptus sit, ut manumittatur, et ex constitutione Divi Marci pervenerit ad libertatem, operae ei impositae nullum effectum habebunt.

9.- ULPIANUS; *On Sabinus, Book XXXIV*.- Services are not property which, in the nature of things, exists.

§ 1.- Services, however, to be performed from a sense of obligation, and which are to be rendered hereafter, are not due to anyone but the patron; as their ownership attaches to the person of the one who performs them, and to that of him to whom they are rendered. Services relating to a trade, and others of the same description, can be rendered by anyone and to anyone whomsoever; for where they have reference to some trade, they can be rendered to another by order of the patron.

10.- POMPONIUS; *On Sabinus, Book XV*.- The slave of a patron cannot make the following stipulation with reference to a freedman: "Do you promise to render me your services?" Hence the stipulation should be made for the services to be rendered to his patron.

§ 1.- Where a freedman takes the following oath with reference to his services, "I swear to render my services to my patron, or to Lucius Titius," he cannot be released from those which he owes to his patron by rendering his services to Lucius Titius.

11.- JULIANUS; *Digest, Book XXII*.- It makes no difference whether Lucius Titius is a stranger, or the son of the patron:

12.- POMPONIUS; *On Sabinus, Book XV*.- Because the services rendered to Lucius Titius are different from those to which the patron is entitled. Where, however, the freedman promises a certain sum of money to his patron, who is poor, in consideration of receiving his freedom, or promises it to Titius, the addition of the name of Titius will certainly be valid.

13.- ULPIANUS; *On the Edict, Book XXXVIII*.- When a slave is purchased under this law, subject to the condition that he shall be manumitted, and he obtains his freedom in accordance with the Constitution of the Divine Marcus, any services

9.- ULPIANO; *Comentarios a Sabino, libro XXXIV*.- Los servicios no existen en la naturaleza.

§ 1.- Pero los que verdaderamente han de ser de obsequio personal no se le pueden deber a otro cualquiera sino al patrono, porque la propiedad de ellos consiste tanto en la persona del que los presta, como en la de aquel para quien se prestan; pero los fabriles u otros son de tal naturaleza, que por cualquiera pueden ser prestados a cualquiera; porque, a la verdad, si consistieran en un oficio, mandandolo el patrono, se le pueden prestar también a otro.

10.- POMPONIO; *Comentarios a Sabino, libro XV*.- Un esclavo del patrono estipula malamente del liberto de este modo: «¿prometes darme servicios?» y así, se ha de estipular que se le den al patrono.

§ 1.- Jurando el liberto de este modo por razón de servicios: «al patrono o a Lucio Ticio», no los puede prestar a Lucio Ticio, de suerte que quede libre por parte del patrono.

11.- JULIANO; *Digesto, libro XXII*.- Mas nada importa, que Lucio Ticio sea extraño, o hijo.

12.- POMPONIO; *Comentarios a Sabino, libro XV*.- Porque serán otros servicios, los que se dan a Lucio Ticio. Pero si por causa de la libertad el liberto prometiese dinero al patrono indigente, o a Ticio, es de todos modos válida la adición de Ticio.

13.- ULPIANO; *Comentarios al Edicto, libro XXXVIII*.- Si alguno hubiera sido comprado con la condición de que fuese manumitido, y hubiere llegado a la libertad en virtud de la Constitución del Divino Marco, no tendrán ningún efecto los servicios

which have been imposed upon him will be of no force or effect.

que se le impusieron.

§ 1.- Sed nec cui bona addicta sunt ex constitutione Divi Marci libertatium conservandarum causa, poterit operas petere neque ab his, qui directas, neque ab his, qui fideicommissarias acceperunt, quamvis fideicommissarias libertates qui acceperunt, ipsius liberti efficiantur: non enim sic fiunt liberti, ut sunt proprii, quos nulla necessitate cogente manumimus.

§ 1.- Nor can services be demanded from a freedman to whom property has been assigned under the Constitution of the Divine Marcus promulgated for the purpose of preserving the freedom of slaves, whether they have obtained their freedom directly, or in accordance with the terms of a trust, even if those who have obtained it as the beneficiaries of a trust become the freedmen of the person himself; for they do not become freedmen under the same circumstances as slaves whom we manumit without being compelled to do so.

§ 1.- Pero aquel a quien se le adjudicaron los bienes por virtud de la Constitución del Divino Marco para conservar las libertades no podrá pedirles servicios a los que recibieron la libertad directamente, ni a los que por fideicomiso, aunque los que recibieron por fideicomiso la libertad se hagan libertos del mismo; porque de este modo no se hacen libertos, como son los propios, a los cuales manumitimos sin apremiarnos ninguna necesidad.

§ 2.- Iudicium de operis tunc locum habet, quum operae praeterierint. Praeterire autem non possunt, antequam incipiant cedere, et incipiunt, posteaquam fuerint indictae.

§ 2.- The action to compel the performance of services will lie when the time for performing them has passed; the time, however, cannot elapse before the services begin to be due, and they begin to be due after the time for their performance has been indicated.

§ 2.- La acción por servicios tiene lugar cuando los servicios hubieren pasado; mas no pueden pasar antes que comience a correr su término; y comienzan, después que hubieren sido impuestos.

§ 3.- Etiam si uxorem habeat libertus, non prohibetur patronus operas exigere.

§ 3.- Even if the freedman should have a wife, his patron is not prevented from demanding his services.

§ 3.- Aunque el liberto tenga mujer, no se le prohíbe al patrono que le exija servicios.

§ 4.- Si impubes sit patronus, voluntate eius non videtur liberta nupta, nisi tutoris auctoritas voluntati accesserit.

§ 4.- If the patron is a minor under the age of puberty, his freedman is not considered to be married with his consent unless the authority of his guardian confirms it.

§ 4.- Si el patrono fuera impúbero, no se considera que la liberta se casó con la voluntad de él, a no ser que a esta voluntad le hubiere asistido la autoridad del tutor.

§ 5.- Rati quoque habitio patrono obest in nuptiis libertae.

§ 5.- Where the marriage of a freed woman is ratified by her patron, it will bar him from objecting to it subsequently.

§ 5.- También la ratificación le obsta al patrono en las nupcias de su liberta.

14.- TERENCE CLEMENS; *libro VIII, ad legem Iuliam et Papiam*.- Plane quum desierit nupta esse, operas peti posse omnes fere consentiunt.

14.- TERENCE CLEMENS; *On the Lex Julia, et Papist, Book VIII*.- It is evident, when the freedwoman ceases to be married, that her services can be demanded, as almost all authorities hold.

14.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro VIII*.- A la verdad, casi todos convienen en que se pueden pedir los servicios cuando hubiere dejado de estar casada.

15.- ULPIANUS; *libro XXXVIII, ad Edictum*.- Libertus, qui post indictionem operarum valetudine impeditur, quo minus praestet operas, non tenetur: nec enim potest videri per eum stare, quo minus operas praestet.

15.- ULPIANO; *On the Edict, Book XXXVIII*.- A freedman, after his services have been indicated, becomes so ill that he cannot perform them. Will he be liable, because it is clear that it is not his fault that he does not perform the services?

15.- ULPIANO; *Comentarios al Edicto, libro XXXVIII*.- El liberto que después de la imposición de servicios se ve por enfermedad impedido de prestar los servicios, no está obligado; porque no se puede considerar que en él consista no prestar los servicios.

§ 1.- Neque promitti neque solvi nec deberi nec

§ 1.- Services cannot be promised, rendered, due,

§ 1.- Los servicios no se podrán prometer, ni

peti pro parte poterit opera. Ideo Papinianus subicit: si non una, sed plures operae sint et plures heredes existant patrono qui operas stipulatus est, verum est obligationem operarum numero dividi. Denique Celsus libro duodecimo scribit, si communis libertus patronis duobus operas mille daturum se iuraverit aut communi eorum servo promiserit, quingenas potius deberi, quam singularum operarum dimidias.

16.- PAULUS; *libro XL, ad Edictum*.- Eius artificii, quod post manumissionem didicerit libertus, operas debet praestare, si haec sint, quae quandoque honeste et sine periculo vitae praestantur, nec semper hae, quae manumissionis tempore praestari debuerunt. Sed si turpes operas postea exercere coeperit, praestare debet eas, quas manumissionis tempore praestabat.

§ 1.- Tales patrono operae dantur, quales ex aetate dignitate valetudine necessitate proposito ceterisque eius generis in utraque persona aestimari debent:

17.- IDEM; *libro singulari de iure patronatus*.- Nec audiendus est patronus, si poscit operas, quas vel aetas recusat vel infirmitas corporis non patitur vel quibus institutum vel propositum vitae minuitur.

18.- IDEM; *libro XL, ad Edictum*.- Suo victu vestituque operas praestare debere libertum Sabinus ad Edictum Praetoris Urbani libro quinto scribit: quod si alere se non possit, praestanda ei a patrono alimenta:

19.- GAIUS; *libro XIV, ad Edictum provinciale*.- Aut certe ita exigendae sunt ab eo operae, ut his quoque diebus, quibus operas edat, satis tempus ad

or demanded in part. Therefore Papinianus gave the following opinion, namely: where there are several distinct services and not merely one, and the patron who stipulated for them left several heirs, it is true that the obligation should be divided in proportion to the number of the heirs. Finally, Celsus, in the Twelfth Book, says that if a freedman, who has two patrons, should swear that he will render a thousand services to a slave held by them in common, five hundred, rather than a thousand halves of the services will be due to each one.

16.- PAULUS; *On the Edict, Book XL*.- A freedman must render those services to his patron which belong to a trade that he learned after his manumission, provided they are such as can be performed honorably and without danger to life; but those which he learned at the time of his manumission should not always be rendered. If, however, he adopted some dishonorable occupation after his manumission, he must perform those services which he could have rendered at the time when he obtained his freedom.

§ 1.- Such services should be rendered to a patron as are suitable to the age, rank, health, requirements, and mode of life of both parties.

17.- THE SAME; *On the Right of Patronage*.- A patron should not be heard if he demands services which the age of the freedman does not permit, or the weakness of his body cannot endure, or by the performance of which his condition, or mode of life will be injuriously affected.

18.- THE SAME; *On the Edict, Book XL*.- Sabinus, in the Fifth Book of the Edict of the Urban Praetor, says that a freedman must render his services, and provide his own food and clothing. If, however, he cannot support himself, his food must be furnished him by his patron.

19.- GAIUS; *On the Provincial Edict, Book XIV*.- It is clear that services should not be required of a freedman without giving him certain days upon

prestar, ni deber, ni pedir en parte. Y por esto añade Papiniano: si los servicios fueran no uno sino varios, y hubiera muchos herederos del patrono, que estipuló los servicios, es la verdad que la obligación de los servicios se divide por el número de aquellos. Por último, escribe Celso en el libro duodécimo, que si un liberto común hubiere jurado a dos patronos que él les prestará mil servicios, o si se lo hubiere prometido a un esclavo común de los mismos, se deben quinientos a cada uno más bien que la mitad de cada servicio.

16.- PAULO; *Comentarios al Edicto, libro XL*.- El liberto deberá prestar los servicios del oficio que hubiere aprendido después de la manumisión, si éstos fueran de los que en algún tiempo se pueden prestar honestamente y sin peligro de la vida; mas si después hubiere comenzado a ejercer oficios torpes, deberá prestar los que prestaba al tiempo de la manumisión.

§ 1.- Al patrono se le prestan servicios tales cuales respecto de una y de otra persona se deben estimar en razón a la edad, a la dignidad, al estado de salud, a la necesidad, al propósito, y a las demás circunstancias de esta clase.

17.- EL MISMO; *Del derecho de patronato, libro único*.- Y no debe ser oído el patrono, si reclama servicios que o los rechaza la edad, o no los consiente la salud del cuerpo, o con los que se menoscaba el instituto o el propósito de su vida.

18.- EL MISMO; *Comentarios al Edicto, libro XL*.- Escribe Sabino en el libro quinto de sus Comentarios al Edicto del Pretor Urbano, que el liberto debe prestar los servicios, cuidando de su alimentación y de su vestido; pero si él no pudiera alimentarse, se le han de prestar alimentos por el patrono,

19.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- O, a la verdad, se le han de exigir los servicios, de suerte que aun en los días en que preste

quaestum faciendum, unde ali possit, habeat:

20.- PAULUS; *libro XL, ad Edictum*.- Quod nisi fiat, Praetorem ipsam patrono denegaturum operarum praestationem: idque est verum, quia unusquisque, quod spondit, suo impendio dare debet, quamdiu id quod debet in rerum natura est.

§ 1.- Ex provincia libertum Romam venire debere ad reddendas operas Proculus ait: sed qui dies interea cesserint, dum Romam venit, patrono perire, dummodo patronus tamquam vir bonus et diligens pater familias Romae moraretur vel in provinciam proficiscatur: ceterum si vagari per orbem terrarum velit, non esse iniungendam necessitatem liberto ubique eum sequi.

21.- IAVOLENUS; *libro VI, ex Cassio*.- Operae enim loco edi debent ubi patronus moratur, sumptu scilicet et vectura patroni.

22.- GAIUS; *libro XIV, ad Edictum provinciale*.- Quum patronus operas stipulatus sit, tunc scilicet committitur stipulatio, quum poposcerit nec libertus praestiterit. Nec interest, adiecta sint haec verba "quum poposcero" an non sint adiecta: aliud enim est de operis, aliud de ceteris rebus. Quum enim operarum editio nihil aliud sit quam officii praestatio, absurdum est credere alio die deberi officium, quam quo is vellet, cui praestandum est.

§ 1.- Cum libertus promiserit patrono operas se daturum neque adiecerit "liberisque eius", constat liberis eius ita demum deberi, si patri heredes extiterint. Heredes tamen extitisse liberos parenti ita demum prodesse ad operarum petitionem Iuliano placet, si non per alium heredes extiterunt. Itaque si quis exheredato emancipato filio servum eius

which to perform them, and allowing him sufficient time for earning enough to support himself.

20.- PAULUS; *On the Edict, Book XL*.- Unless this is done, the Praetor will not permit the services of a freedman to be rendered to his patron. This is entirely proper, because each one of them should furnish what he promised at his own expense, so long as what he owes is in existence.

§ 1.- Proculus says that a freedman should go to Rome from his province in order to render his services; but, where he does so, the patron will lose the time consumed by him while coming to Rome. This is the case, provided the patron, as a good citizen and the careful head of a household, resides at Rome, or travels into the province, but if he wishes to wander about the world, the necessity of following him everywhere should not be imposed upon the freedman.

21.- JAVOLENUS; *On Cassius, Book VI*.- For the services should be rendered in the place where the patron resides, and of course at his expense for food and transportation.

22.- GAIUS; *On the Provincial Edict, Book XIV*.- Where a patron stipulates for services, the stipulation becomes operative when the patron makes the demand, and the freedman does not render them. Nor does it make any difference whether the words "when I demand them" are added or not; as one rule applies to the services of the freedman, and another to other matters. For as the performance of services is nothing more than the discharge of a duty, it is absurd to suppose that a duty should be performed on some other day than the one on which the person who is entitled to it wishes it to be done.

§ 1.- When a freedman promises his patron to render him services, and does not include his children, it is settled that the services will only be due to his children if they become the heirs of their father. Julianus holds that, even if they become the heirs of their father, they will only have a right to demand the benefit of the services of the freedman where they did

los servicios tenga suficiente tiempo para que gane con que pueda alimentarse.

20.- PAULO; *Comentarios al Edicto, libro XL*.-Si no se hiciera esto, el Pretor le denegará al patrono la misma prestación de los servicios; y esto es verdad, porque cada cual debe dar á su costa lo que prometió, mientras está en la naturaleza de las cosas lo que debe.

§ 1.- Dice Próculo, que el liberto debe ir de una provincia a Roma para prestar los servicios; pero que los días que hayan transcurrido mientras llega a Roma se pierden para el patrono, con tal que el patrono more en Roma, o marche a una provincia, como hombre bueno y diligente padre de familia; mas si quisiera andar vagando por el orbe de la tierra, no se le ha de imponer al liberto la necesidad de que lo siga a todas partes.

21.- JAVOLENO; *Doctrina de Cassio, libro VI*.- Porque los servicios se deben prestar en el lugar en que mora el patrono, por supuesto, con gastos y transportes a cargo del patrono.

22.- GAYO; *Comentarios al Edicto provincial, libro XIV*.- Cuando el patrono haya estipulado servicios, se incurre, a la verdad, en la estipulación, cuando los hubiere pedido, y el liberto no los hubiere prestado, y no importa que se hayan añadido estas palabras: «cuando los hubiere yo pedido», o que no se hayan añadido; porque una cosa es tratándose de servicios, y otra de las demás cosas. Porque no siendo la prestación de servicios otra cosa que la prestación de un oficio, es absurdo creer que se debe el oficio en otro día que en el que lo quiera aquel a quien se le ha de prestar.

§ 1.- Cuando el liberto le hubiere prometido al patrono que le prestará servicios, y no haya añadido y a sus hijos, es sabido que se los debe a sus hijos, solamente si hubieren quedado siendo herederos de su padre. Mas a Juliano le parece, qué el haber quedado los hijos herederos de su ascendiente aprovecha para la petición de los servicios, solamente si

heredem instituerit et per eum servum heres extiterit filius, repelli eum ab operarum petitione debere, perinde ac repelleretur patronus, qui operas non imposuisset vel quas imposuit revendidisset.

§ 2.- In omnibus operis praecipue observandum est, ut temporis spatia, quae ad curam corporis necessaria sunt, liberto relinquuntur.

23.- IULIANUS; *libro XXII, Digestorum*.- Hae operae, quas libertus promittit, multum distant a fabrilibus vel pictoriis operis. Denique si libertus faber aut pictor fuerit, quamdiu id artificium exercebit, has operas patrono praestare cogitur. Quare sicut fabriles operas quis potest sibi aut Titio stipulari, ita patronus a liberto operas sibi aut Sempronio recte stipulatur: Et libertus obligatione solvetur, si tales operas extraneo dederit, quales patrono praestando liberaretur.

§ 1.- Si patroni plures consulto in diversas regiones discesserint et liberto simul operas indixerint, potest dici diem operarum cedere, sed libertum non obligari, quia non per eum, sed per patronos staret, quo minus operae dentur, sicut accidit, cum aegrotanti liberto operae indicuntur. Quod si diversarum civitatum patroni sint et in sua quisque moretur, consentire debent in operis ab eo accipiendis: durum alioquin est eum, qui se liberare potest decem diebus operando, simul operis indictis, si in accipiendis non consentiant, compelli ad praestandam alteri quinque operarum aestimationem.

not become heirs through the intervention of another person. Therefore, if anyone, after having disinherited his emancipated son, should appoint his slave his heir, and the former should become his heir through the said slave, he ought to be barred from demanding the services of the freedman; just as a patron would be barred who did not impose any services upon his freedmen, or had sold those which he did impose.

§ 2.- It should, by all means, be noted that in every kind of services such periods of time as are necessary for the proper care of his body should be granted to the freedman.

23.- JULIANUS; *Digest, Book XXII*.- Services such as are promised by a freedman differ materially from those attaching to a trade or a profession; hence, if the freedman is an artisan, or a painter, as long as he is employed in this way he will be compelled to render his patron services of this kind. Therefore, just as anyone can stipulate for the performance of services relating to a trade for his own benefit, or for that of Titius, so, also, a patron can lawfully stipulate with his freedman for his services to be rendered either to himself, or to Sempronius; and the freedman will be released from his obligation by rendering his services to a stranger, just as he would be if he had performed them for his patron.

§ 1.- Where there are several patrons who have designedly gone into different provinces, and have, at the same time, demanded the performance of services by a freedman, it may be said that the services are due, but that the freedman will not be bound, because it is not his fault, but that of his patrons, that the services are not performed; just as is the case where services are demanded from a freedman who is ill. Where the patrons are residents of two different towns, and each one has his domicile there, they should agree with reference to the rendition of services by the freedman; otherwise, it would be a hardship that one who can be released by working for ten days, should, because his patrons do not agree with reference to the rendition of his services, and both demand them at once, be

no fueron herederos por medio de otro. Y así, si alguno, habiendo desheredado a su hijo emancipado, hubiere instituido heredero a un esclavo de él, y por medio de este esclavo quedare heredero el hijo, debe ser éste repelido de la petición de los servicios, lo mismo que sería repelido el patrono, que no hubiese impuesto servicios, o que hubiese revendido los que impuso.

§ 2.- Mas en todos los servicios se ha de atender principalmente a que se le dejen al liberto los espacios de tiempo que son necesarios para el cuidado del cuerpo.

23.- JULIANO; *Digesto, libro XXII*.- Estos servicios, que prometió el liberto, distan mucho de los trabajos fabriles o pictóricos. Mas si el liberto fuere artesano o pintor, será obligado a prestarle al patrono estos servicios mientras ejerciere este oficio. Por lo cual, así como cualquiera puede estipular para sí o para Ticio trabajos fabriles, así también el patrono estipula perfectamente del liberto servicios para sí o para Sempronio; y el liberto se eximirá de la obligación, si le hubiere prestado al extraño tales servicios, que lo eximirían habiéndoselos prestado al patrono.

§ 1.- Si siendo muchos los patronos se hubieren marchado deliberadamente a diversas regiones, y al liberto le hubieren exigido simultáneamente los servicios, se puede decir que corre el término para los servicios, pero que el liberto no está obligado, porque no consistiría en él, sino en los patronos, que no se prestasen los servicios, como acontece cuando se le exigen servicios a un liberto enfermo. Pero si los patronos fueran de diversas ciudades, y cada uno morase en la suya, deben concertarse para exigirle los servicios; por otra parte, es duro que el que puede librarse trabajando diez días, por habérsele exigido al mismo tiempo los servicios, sea compelido, si no se concertaran para recibirlos, a pagarle a otro la estimación de cinco días de trabajo.

compelled to work for five days for one of them, and to pay the other the value of the five days of labor to which he is entitled.

24.- IDEM; *libro LII, Digestorum*.- Quotiens certa species operarum in stipulationem deducitur, veluti pictoriae fabriles, peti quidem non possunt nisi praeteritae, quia etsi non verbis, at re ipsa inest obligationi tractus temporis, sicuti quum Ephesi dari stipulemur, dies continetur. Et ideo inutilis est haec stipulatio: "operas tuas pictorias centum hodie dare spondes?" Cedunt tamen operae ex die interpositae stipulationis. Sed operae, quas patronus a liberto postulat, confestim non cedunt, quia id agi inter eos videtur, ne ante cederent quam indictae fuissent, scilicet quia ex commodo patroni libertus operas edere debet: quod in fabro vel pictore dici non convenit.

25.- IDEM; *libro LXV, Digestorum*.- Patronus, qui operas liberti sui locat, non statim intellegendus est mercedem ab eo capere: sed hoc ex genere operarum, ex persona patroni atque liberti colligi debet.

§ 1.- Nam si quis pantomimum vel archimimum libertum habeat et eius mediocris patrimonii sit, ut non aliter operis eius uti possit quam locaverit eas, exigere magis operas quam mercedem capere existimandus est.

§ 2.- Item plerumque medici servos eiusdem artis libertos perducunt, quorum operis perpetuo uti non aliter possunt, quam ut eas locent. Ea et in ceteris artificibus dici possunt.

24.- THE SAME; *Digest, Book LII*.- Whenever a certain kind of service is specified in the stipulation, as, for instance, those of a painter, or of some artisan, they cannot be demanded unless the time for their performance has elapsed, as in the contract itself, time for performance is understood to be given, although it may not be expressed in words; for example, when we make a stipulation for services to be rendered at Ephesus, sufficient time to do so is implied. Hence the following stipulation is void, "Do you promise to give me to-day a hundred pictures which you have painted?" Services, however, begin to be due from the date of the stipulation. Those which a patron requires from his freedman are not due immediately, because it is understood to be agreed among the parties that they shall not be due before the time for their performance has been indicated; that is to say, that the freedman shall perform his services according to the convenience of his patron; which cannot be said with reference to those of an artisan, or a painter.

25.- THE SAME; *Digest, Book LXV*.- A patron who hires the services of his freedman is not always understood to receive payment for said services; but this should be ascertained from the nature of the services, and The position of the patron and the freedman.

§ 1.- For, if anyone has a freedman who is a comedian, or the chief actor in a pantomime, and his means are moderate, so that he cannot avail himself of his services unless he leases them, it should be considered that it is the services of the freedman that he requires, rather than the compensation therefor.

§ 2.- Likewise physicians very frequently manumit their slaves who belong to the same profession, as they cannot make use of their services without hiring them. The same rule can be said to apply to other occupations.

24.- EL MISMO; *Digesto, libro LII*.- Cuando se comprende en la estimación cierta especie de trabajos, como pictóricos, o fabriles, ciertamente que no se pueden pedir, sino siendo pasados, porque, aunque no por las palabras, es inherente a la obligación por la naturaleza de la cosa cierto espacio de tiempo, así como, cuando estipulamos que se dé en Efeso, se comprende un término. Y por lo tanto, es inútil esta estipulación: «¿prometes prestarme hoy cien servicios tuyos de pintor?» Mas se deben los servicios desde el día en que se interpuso la estipulación, pero los servicios que el patrono le pide a liberto no se deben inmediatamente, porque se considera que entre ellos se convino que no se debiesen antes que se hubiesen exigido, a saber, porque el liberto debe prestar los servicios según la conveniencia del patrono; lo que no se debe decir tratándose de un artesano o de un pintor.

25.- EL MISMO; *Digesto, libro LXV*.- No se ha de entender que el patrono, que da en arrendamiento los servicios de su liberto, recibe inmediatamente de él retribución, sino que esto se debe colegir por el género de los servicios, y atendiendo a la persona del patrono y del liberto.

§ 1.- Porque si alguno tuviera un liberto pantomima o primer mímica, y fuera de tan modesta fortuna que no pudiera utilizar sus servicios de otro modo sino dándolos en arrendamiento, se ha de estimar que más bien exige los servicios, que no que percibe su retribución.

§ 2.- Asimismo, las más de las veces los médicos hacen libertos a esclavos de la misma profesión, cuyos servicios no pueden utilizar continuamente sino dándolos en arrendamiento. Lo mismo se puede decir también respecto a los demás que ejercen un arte.

§ 3.- Sed qui operis liberti sui uti potest et locando pretium earum consequi mallet, is existimandus est mercedem ex operis liberti sui capere.

§ 4.- Nonnumquam autem ipsis libertis postulantibus patroni operas locant: quo facto pretium magis operarum quam mercedem capere existimandi sunt.

26.- ALFENUS VARUS; *libro VII, Digestorum*.- Medicus libertus, quod putaret, si liberti sui medicinam non facerent, multo plures imperantes sibi habiturum, postulabat, ut sequerentur se neque opus facerent: id ius est nec ne? Respondit ius esse, dummodo liberas operas ab eis exigeret, hoc est ut adquiescere eos meridiano tempore et valetudinis et honestatis suae rationem habere sineret.

§ 1.- Item rogavi, si has operas liberti dare nollent, quanti oporteret aestimari. Respondit, quantum ex illorum operis fructus, non quantum ex incommo dando illis, si prohiberet eos medicinam facere, commodi patronus consecuturus esset.

27.- IULIANUS; *libro I, ex Minicio*.- Si libertus artem pantomimi exerceat, verum est debere eum non solum ipsi patrono, sed etiam amicorum ludis gratuitam operam praebere: sicut eum quoque libertum, qui medicinam exercet, verum est voluntate patroni curaturum gratis amicos eius. Neque enim oportet patronum, ut operis liberti sui utatur, aut ludos semper facere aut aegrotare.

28.- PAULUS; *libro singulari de Iure patronatus*.- Si duorum pluriumve communis liberta unius patroni voluntate nupserit, alteri patrono ius operarum

§ 3.- But where anyone can make use of the services of a freedman, and prefers by hiring them to obtain their value, he should be considered to receive compensation for the services of his freedman.

§ 4.- Sometimes, however, patrons hire the services of their freedmen at the request of the latter, and when this is done, they should be considered rather as receiving the price of their services than compensation for them.

26.- ALFENUS VARUS; *Digest, Book VII*.- Where a physician, who thought that if his freedmen did not practice medicine he would have many more patients, demanded that they should follow him and not practice their profession, the question arose whether he had the right to do this or not. The answer was that he did have that right, provided he required only honorable services of them; that is to say, that he would permit them to rest at noon, and enable them to preserve their honor and their health.

§ 1.- I also ask, if the freedmen should refuse to render such services, how much the latter should be considered to be worth. The answer was that the amount ought to be determined by the value of their services when employed, and not by the advantage which the patron would secure by causing the freedmen inconvenience through forbidding them to practice medicine.

27.- JULIANUS; *On Minicius, Book I*.- If a freedman exercises the calling of a comic actor, it is evident that he should employ his services not only for the benefit of the patron himself, but also gratuitously at the entertainments of his friends; just as a freedman who practices medicine should, at the desire of his patron, treat the friends of the latter without compensation; for, in order that he may employ the services of his freedman it is not necessary for a patron always to give entertainments, or constantly to be ill.

28.- PAULUS; *On the Right of Patronage*.- Where a freedwoman, who has two or more patrons, marries with the consent of one of them, the other will

§ 3.- Mas el que puede utilizar los servicios de su liberto, y prefiriese obtener su precio dándolos en arrendamiento, ha de ser considerado que percibe retribución por los trabajos de su liberto.

§ 4.- Pero a veces los patronos dan en arrendamiento los servicios a petición de los mismos libertos, y habiéndose hecho esto se ha de estimar que percibe más bien el precio de los servicios, que retribución.

26.- ALFENUS VARO; *Digesto, libro VII*.- Un liberto médico, estimando que si sus libertos no ejercieran la medicina tendría muchos más que lo llamaran, pedía que lo acompañasen, y que no trabajaran: ¿es esto justo, o no? Respondió, que era justo, con tal que exija de ellos trabajos liberales, esto es, que los deje descansar al mediodía, y cuidar de su salud y de su decoro.

§ 1.- También pregunté, en cuánto se deberían estimar, si los libertos no quisieran prestar estos servicios. Respondió, que en cuanto producto hubiese de obtener el patrono por virtud de los trabajos de aquéllos, no en cuanta utilidad hubiese de alcanzar por la molestia que les hubiese de dar, si les prohibiese ejercer la medicina.

27.- JULIANO; *Doctrina de Minicio, libro I*.- Si el liberto ejerciera el arte de pantomima, es la verdad que él debe prestar gratuitos sus servicios no solamente al mismo patrono, sino también en los juegos de sus amigos, así como es verdad que también el liberto que ejerce la medicina debe curar gratuitamente por voluntad de su patrono a los amigos de éste; porque no es necesario que el patrono, para utilizar los servicios de su liberto, haga constantemente juegos, o esté enfermo.

28.- PAULO; *Del Derecho de patronato, libro único*.- Si la liberta común de dos o más se hubiere casado con el consentimiento de un solo patrono, le

manet.

29.- ULPIANUS; *libro LXIV, ad Edictum*.- Si operarum iudicio actum fuerit quum liberto et patronus decesserit, convenit translationem heredi extraneo non esse dandam: filio autem et si heres non extat et si lis contestata non fuerat, tamen omnimodo competit, nisi exheredatus sit.

30.- CELSUS; *libro XII, Digestorum*.- Si libertus ita iuraverit dare se, quot operas patronus arbitratus sit, non aliter ratur fore arbitrium patroni, quam si aequum arbitratus sit. Et fere ea mens est personam arbitrio substituentium, ut, quia sperent eum recte arbitraturum, id faciant, non quia vel immodice obligari velint.

§ 1.- In libertam, quae voluntate patroni nupsit, praeteritarum ante nuptias operarum actio datur.

31.- MODESTINUS; *libro I, Regularum*.- Operis non impositis manumissus, etiamsi ex sua voluntate aliquo tempore praestiterit, compelli ad praestandas, quas non promisit, non potest.

32.- IDEM; *libro VI, Pandectarum*.- Is qui onerandae libertatis causa pecuniam patrono repromiserit, non tenetur: vel patronus, si pecuniam exegerit, bonorum possessionem contra tabulas eius non potest petere.

33.- IAVOLENUS; *libro VI, ex Cassio*.- Imponi operae ita, ut ipse libertus se alat, non possunt.

34.- POMPONIUS; *libro XXII, ad Quintum Mucium*.- Interdum et deminutionem et augmentum et mutationem recipere obligationes operarum scien-

continue to have the right to her services.

29.- ULPIANUS; *On the Edict, Book LXIV*.- Where suit is brought against a freedman to compel the performance of services, and his patron dies, it is established that the right of action does not pass to a foreign heir. If, however, there is a son, and he should not be the heir, even though issue may not have been joined in the case, he will, nevertheless, be entitled to the services of the freedman, unless he has been disinherited.

30.- CELSUS; *Digest, Book XII*.- If a freedman should swear to render all the services that his patron may desire, the wishes of the patron will not be considered, except so far as is consistent with justice. The intention of freedmen who leave their services to the discretion of their patrons is based upon the fact that the latter will act with justice, and not because they wish to bind themselves heedlessly.

§ 1.- An action is granted to a patron against his freedwoman, who marries without his consent, for services due from her before marriage.

31.- MODESTINUS; *Rules, Book I*.- A freedman cannot be compelled to render services which he did not promise, where none were imposed, even if he may for some time voluntarily perform them.

32.- THE SAME; *Pandects, Book VI*.- A freedman who promised money to his patron, which the latter demanded of him for the purpose of rendering his freedom oppressive, will not be liable; and if the patron should exact the money, he cannot obtain possession of his estate contrary to the provisions of the will of the freedman.

33.- JAVOLENUS; *On Cassius, Book VI*.- Services cannot be imposed upon a freedman in such a way that he shall be required to support himself.

34.- POMPONIUS; *On Quintus Mucius, Book XXII*.- It should be noted that obligations for the performance of services are sometimes subject to

queda al otro patrono el derecho a los servicios.

29. ULPIANO; *Comentarios al Edicto, libro LXIV*.- Si se hubiere ejercitado contra el liberto la acción de servicios, y el patrono falleciere, es conveniente que no se le haya de hacer la transferencia a un heredero extraño; pero al hijo, aunque no sea heredero, le compete, sin embargo, de todos modos, aun cuando no se hubiera contestado la demanda, a no ser que haya sido desheredado.

30.- CELSO; *Digesto, libro XII*.- Si el liberto hubiere jurado que prestaría tantos servicios cuantos hubiera determinado el patrono, no habrá de ser válido el arbitrio del patrono, de otra suerte, sino si hubiera determinado equitativamente. Y de ordinario la intención de los que someten su persona al arbitrio de otro es que hacen esto, porque esperan que él determinará con rectitud, no porque quieran obligarse demasiado inmoderadamente.

§ 1.- Contra la liberta, que se casó con el consentimiento de su patrono, se da acción por los servicios pasados antes de las nupcias.

31.- MODESTINO; *Reglas, libro I*.- No habiéndosele impuesto servicios, el manumitido no puede ser compelido a prestar los que no prometió, aunque por su voluntad los hubiere prestado algún tiempo.

32.- EL MISMO; *Pandectas, libro VI*.- El que para gravar su libertad hubiere prometido dinero a su patrono, no está obligado, y si el patrono le hubiere exigido el dinero, no puede pedir la posesión de los bienes contra el testamento del mismo.

33.- JAVOLENO; *Doctrina de Cassio, libro VI*.- No se pueden imponer servicios de suerte que el mismo liberto se alimente.

34.- POMPONIO; *Comentarios a Quinto Mucio, libro XXII*.- Se ha de saber, que a veces las obligaciones de servicios sufren disminución,

dum est. Nam dum languet libertus, patrono operae, quae iam cedere coeperunt, pereunt. Sed si liberta, quae operas promisit, ad eam dignitatem perveniat, ut inconueniens sit praestare patrono operas, ipso iure hae intercedunt.

35.- PAULUS; *libro II, ad legem Iuliam et Papiam*.- Liberta maior quinquaginta annis operas praestare patrono non cogitur.

36.- ULPIANUS; *libro XI, ad legem Iuliam et Papiam*.- Labeo ait libertatis causa societatem inter libertum et patronum factam ipso iure nihil valere palam esse.

37.- PAULUS; *libro II, ad legem Iuliam et Papiam*.- Qui libertinus duos pluresve a se genitos natusve in sua potestate habebit praeter eum, qui artem ludicram fecerit quive operas suas ut quum bestiis pugnaret locaverit: ne quis eorum operas doni muneris aliudve quicquam libertatis causa patrono patronae liberisve eorum, de quibus iuraverit vel promiserit obligatusve erit, dare facere praestare debeto. Et si non eodem tempore duo in potestate habuerit vel unum quinquennem, liberabitur operarum obligatione.

§ 1.- Amissi antea liberi ad eas operas, quae postea imponuntur, prosunt, ut Iulianus ait.

§ 2.- Sed et si uno amisso obliget se, deinde alter nascatur, multo magis pomponius ait amissum huic iungi, uti liberetur.

§ 3.- Nihil autem interest, utrum ipsi promittat

diminution, increase, and modification; for when a freedman is enfeebled, the patron loses his services which had already begun to be due. If, however, a freedwoman who had promised her services is raised to such a rank that it will be improper for her to render them to her patron, the obligation will be annulled by operation of law.

35.- PAULUS; *On the Lex Julia et Papia, Book II*.- A freedwoman, who is more than fifty years of age, is not compelled to render services to her patron.

36.- ULPIANUS; *On the Lex Julia et Papia, Book XI*.- Labeo says that it is clear that a partnership formed between a freedman and a patron, in consideration of freedom being granted to the former, is void in law.

37.- PAULUS; *On the Lex Julia et Papia, Book II*.- "A freedman who has two or more male or female children under his control (exclusive of any who may have adopted the profession of buffoon, or have hired themselves to fight with wild beasts), will not be required to render their patron or patroness, or the children of the latter any services, or to make them any donation or present, or to do anything else which they have agreed to furnish, bestow, or perform, in consideration of freedom, with reference to which they have sworn, promised, or bound themselves; and if the said freedman should not, at the same time, have two children under his control, but only one of the age of five years, he shall be released from the obligation of performing services."

§ 1.- Julianus says that the death of children is an advantage to a freedman, as releasing him from services subsequently imposed.

§ 2.- If, after having lost a child, the freedman binds himself to render services to his patron and another child is afterwards born, Pomponius says that there is all the more reason for the child who is dead to be joined with the living one, in order to release the freedman from liability.

§ 3.- It makes no difference whether the freedman

aumento, o alteración. Porque mientras el liberto está enfermo se pierden para el patrono los servicios, que ya comenzaron a deberse. Pero si la liberta, que prometió servicios, llegara a tal dignidad, que sea inconveniente que preste los servicios al patrono, se extinguirán ellos de derecho.

35.- PAULO; *Comentarios a la ley Julia y Papia, libro II*.- La liberta mayor de cincuenta años no es obligada a prestarle servicios al patrono.

36.- ULPIANO; *Comentarios a la Ley Julia y Papia, libro XI*.- Dice Lebeón, que es evidente, que nada vale de derecho la sociedad hecha entre el liberto y el patrono por causa de la libertad.

37. PAULO; *Comentarios a la ley Julia y Papia, libro II*.- «El libertino que tuviere bajo su potestad dos o más hijos o hijas suyos, excepto el que ejerciere arte escénica, o el que hubiere dado en arrendamiento sus servicios para luchar con las fieras, no deba dar, hacer o prestar al patrono, o a la patrona, o a los hijos de éstos, servicios, donativo, regalo, u otra cualquier cosa respecto de las que hubiere jurado o prometido, o se hubiere obligado, por causa de la libertad; y si hubiere tenido bajo su potestad los dos hijos no al mismo tiempo, o tuviere sólo uno de cinco años, se librá de la obligación de los servicios.»

§ 1.- Los hijos perdidos antes aprovechan para la exención de los servicios que se imponen después, como dice Juliano.

§ 2.- Pero también si se obligara habiendo perdido uno, y después le naciera otro, dice Pomponio que es mucho más cierto que para que él se exima se le une a éste el que perdió.

§ 3.- Mas nada importa que se los prometa al

patrono an eis qui in potestate eius sint.

§ 4.- Sed si creditori suo libertum patronus delegaverit, non potest idem dici: solutionis enim vicem continet haec delegatio. Potest tamen dici, si in id, quod patrono promisit, alii postea delegatus sit, posse eum liberari ex hac lege: nam verum est patrono eum expromisisse, quamvis patrono nunc non debeat: quod si ab initio delegante patrono libertus promiserit, non liberari eum.

§ 5.- Non solum futurarum, sed etiam praeteritarum operarum liberatio fit.

§ 6.- Iulianus etiam si iam petitae sunt operae, liberis sublati absolutionem faciendam. Sed si iam operarum nomine condemnatus est, non potest liberari, quoniam iam pecuniam debere coepit.

§ 7.- Postumus liberti heredes patris sui non liberat, quod proficisci liberatio a liberto debet nec quisquam post mortem liberari intellegi potest. Ex lege autem nati liberi prosunt.

§ 8.- Etiam si in personam liberti collata liberatio est, fideiussores quoque liberabuntur ex sententia legis: quod si libertus expromissorem dederit, nihil hoc caput ei proderit.

38.- CALLISTRATUS; *libro III, Edicti monitorii*.- Hae demum impositae operae intelleguntur, quae sine turpitudine praestari possunt et sine periculo vitae. Nec enim si meretrix manumissa fuerit, easdem operas patrono praestare debet, quamvis adhuc corpore quaestum faciat: nec harenarius manumissus tales operas, quia istae sine periculo

promises his services to the patron himself, or to those who are under his control.

§ 4.- If the patron should assign the services of his freedman to a creditor, the same rule cannot be said to apply; for this assignment is made instead of a payment. It may, however, be said that the freedman can be released by the above-mentioned law, if the patron has assigned the services to another, after the freedman has promised them; for it is true that he promised them to his patron, although he no longer owes them to him. But if in the beginning, the freedman should promise his services on account of the assignment of his patron, he will not be released.

§ 5.- The release from the rendition of services not only has reference to those to be performed in the future, but also to such as are already due.

§ 6.- Julianus says that even if suit has already been brought to compel the performance of services, a release will take place if children should be born. Where, however, a decision has been rendered for services to be performed, the freedman cannot be released, as he has begun to owe a sum of money.

§ 7.- A posthumous child does not discharge the heirs of his father from liability, because the release should be derived from the freedman, and no one can be considered to be discharged after death. But children born before the death of the freedman will cause a release under the above-mentioned law.

§ 8.- According to the spirit of the said law, even if the release has special reference to the person of the freedman, his sureties will also be discharged. If, however, the freedman should furnish a debtor as his substitute, this will be of no advantage to him.

38.- CALLISTRATUS; *On the Monitorial Edict, Book III*.- Services are only understood to be properly imposed where they can be performed without disgrace, and without danger to life. For if a slave, who is a prostitute, should be manumitted, she ought not to render the same services to her patron, although she may still profit by the sale of her body;

mismo patrono o a los que estén bajo su potestad.

§ 4.- Pero no se puede decir lo mismo, si el patrono hubiere delegado al liberto a un acreedor suyo; porque esta delegación hace veces de pago. Mas se puede decir, que si en lo que le prometió al patrono hubiera sido delegado después a otro, puede él eximirse en virtud de esta ley; porque es verdad que él le prometió al patrono, aunque ahora no le deba al patrono; pero si el liberto hubiere prometido delegándolo desde un principio el patrono, no se exime él.

§ 5.- Se hace la liberación no solamente de servicios futuros, sino también de los pasados.

§ 6.- Dice Juliano, que también si ya se pidieron los servicios se ha de conceder la exención habiéndose tenido hijos; pero si ya fue condenado por razón de los servicios, no puede eximirse, porque ya comenzó a deber el dinero.

§ 7.- El póstumo del liberto no exime a los herederos de su padre, porque la exención debe provenir del liberto, y no se puede entender que alguno se exima después de la muerte; mas en virtud de la ley aprovechan los hijos que nacieron.

§ 8.- Aunque la liberación haya sido concedida a la persona del liberto, se eximirán también los fiadores por el espíritu de la ley; pero si el liberto hubiere dado promotor, para nada le aprovechará este capítulo.

38.- CALISTRATO; *Del Edicto monitorio, libro III*.- Se entienden impuestos solamente aquellos servicios, que se pueden prestar sin torpeza, y sin peligro de la vida; porque si hubiera sido manumitida una ramera, no le debe prestar al patrono los mismos servicios, aunque todavía haga comercio con su cuerpo, ni el gladiador manumitido debe prestar tales

vitae praestari non possunt.

§ 1.- Si tamen libertus artificium exercent, eius quoque operas patrono praestare debebit, etsi post manumissionem id didicerit. Quod si artificium exercere desierit, tales operas edere debebit, quae non contra dignitatem eius fuerint, veluti ut quum patrono moretur, peregre proficiscatur, negotium eius exercent.

39.- PAULUS; *libro VII, ad Plautium*.- Si ita stipulatio a patrono facta sit: "si decem dierum operas non dederis, viginti nummos dare spondes?" videndum est, an nec viginti actio danda sit, quasi onerandae libertatis gratia promissi sint, nec operarum, quae promissae non sint? An vero operae dumtaxat promissae fingi debeant, ne patronus omnimodo excludatur? et hoc Praetor quoque sentit operas dumtaxat promissas.

§ 1.- Sequens illa quaestio est, an libertus impetrare debeat, ne maioris summae quam viginti condemnetur, quia videtur quodammodo patronus tanti operas aestimasse ideoque non deberet egredi taxationem viginti. Sed iniquum est nec oportet liberti hoc indulgere, quia non debet ex parte obligationem comprobare, ex parte tamquam de iniqua queri.

40.- PAPINIANUS; *libro XX, Quaestionum*.- Si bona patroni venierint, operarum, quae post venditionem praeterierint, actio patrono dabitur, etsi alere se possit: ante venditionem praeteritarum non dabitur, quoniam ex ante gesto agit.

and if a gladiator should be manumitted, he does not owe his patron the same services, because these cannot be performed without danger to life.

§ 1.- Where, however, a freedman is employed in some trade, he should give his services relating thereto, even if he has learned the trade after his manumission. If he ceases to exercise that trade, he should contribute such services as are not inconsistent with his rank; as, for example, he can live with his patron, travel with him, or transact his business.

39.- PAULUS; *On Plautius, Book VII*.- A stipulation was entered into by a patron as follows, namely, "If you do not give me your services for ten days, do you promise to pay me twenty sesterces?" It must be considered whether an action for the twenty sesterces should not be granted, as having been promised for the purpose of rendering freedom burdensome; or whether services which have not been promised can be given; or whether this ought only to be assumed to have been promised, in order that the patron may not be entirely excluded? The Praetor decides that services have only been promised.

§ 1.- Hence the following point arises, namely, whether the freedman can prevent a judgment for a larger sum than twenty sesterces from being rendered against him, because the patron seems to have valued his services at that amount, and therefore he himself should not desire to increase it. It would, however, be unjust to do this, nor is it necessary to show such indulgence to the freedman, for he should not, on the one hand, agree to the stipulation, and on the other complain of it as being unjust.

40.- PAPINIANUS; *Questions, Book XX*.- If the property of a patron is sold, an action will still be granted him to obtain any services of his freedman which have begun to be due after the sale. If he is able to support himself, an action will not be granted him to compel performance of the services which should have been rendered before the sale, since this relates to what took place before the property was disposed

servicios, porque no se pueden prestar éstos sin peligro de la vida.

§ 1.- Mas si el liberto ejerciera algún arte, deberá prestarle al patrono también los trabajos de aquél, aunque lo hubiere aprendido después de la manumisión; pero si hubiere dejado de ejercer el arte, deberá prestar tales servicios que no sean contrarios a su dignidad, como, por ejemplo, morar con el patrono, ir con él de viaje, y administrar sus negocios.

39.- PAULO; *Comentarios a Plautio, libro VII*.- Si la estipulación hubiera sido hecha para el patrono de este modo: «si no me dieras diez días de servicios, ¿prometes darme veinte monedas?», se ha de ver, si no se habrá de dar la acción ni por las veinte monedas, como si se hubieran prometido para gravar la libertad, ni por los servicios, que no se prometieron; o ¿se deberá suponer que solamente se prometieron los servicios, a fin de que el patrono no sea excluido en absoluto? Y el Pretor entendió también que solamente se prometieron los servicios.

§ 1.- Es consiguiente la duda de si deberá impetrar el liberto que no se le condene a mayor suma que a la de las veinte monedas, porque parece en cierto modo que el patrono estimó en tanto los servicios, y que por esto él no debería excederse de la tasación de las veinte monedas. Pero esto es injusto, y no se le debe conceder al liberto, porque no debe aprobar en parte la obligación, y en parte quejarse de ella como injusta.

40.- PAPINIANO; *Cuestiones, libro XX*.- Si fueron vendidos los bienes del patrono, se le dará al patrono acción por los servicios, que hubieren vencido después de la venta; y si él pudiera alimentarse, no se le dará acción por los vencidos antes de la venta, porque reclama por hecho anterior.

of.

41.- IDEM; *libro V, Responsorum*.- Libertus, qui operarum obligatione dimissus est atque ita liberam testamenti factionem adsecutus est, nihilo minus obsequi verecundiae tenetur. Alimentorum diversa causa est, quum inopia patroni per invidiam libertum convenit.

42.- IDEM; *libro IX, Responsorum*.- «Cerdonem servum meum manumitti volo ita, ut operas heredi promittat». Non cogitur manumissus promittere: sed etsi promiserit, in eum actio non dabitur: nam iuri publico derogare non potuit, qui fideicommissariam libertatem dedit.

43.- IDEM; *libro XIX, Responsorum*.- Operis obligatus militiae nomen non sine iniuria patroni dabit.

44.- SCAEVOLA; *libro IV, Quaeestionum*.- Si libertus moram in operis fecerit, fideiussor tenetur: mora fideiussoris nulla est. At in homine debito fideiussor etiam ex sua mora in obligatione retinetur.

45.- IDEM; *libro II, Responsorum*.- Libertus negotioris vestiarum an eandem negotiationem in eadem civitate et eodem loco invito patrono exercere possit? Respondit nihil proponi, cur non possit, si nullam laesionem ex hoc sentiet patronus.

46.- VALENS; *libro V, Fideicommissorum*.- Liberta si in concubinato patroni esset, perinde ac si nupta eidem esset, operarum petitionem in eam dari non oportere constat.

47.- IDEM; *libro VI, Fideicommissorum*.-

41.- THE SAME; *Opinions, Book V*.- A freedman who has been released from the obligation to render services, and hence has acquired full testamentary capacity, shall, nevertheless, be compelled to treat his patron with respect. The case is different with reference to furnishing support, where the necessities of the patron are assumed for the purpose of annoying the freedman.

42.- THE SAME; *Opinions, Book IX*.- "I wish my slave, So-and-So, who is a mechanic of a low order, to be manumitted, in order that he may perform services for my heir." The manumitted slave v/as not compelled to promise, but, if he should do so, an action will not be granted against him, for he who gave him his freedom under a trust cannot alter a public law.

43.- THE SAME; *Opinions, Book XIX*.- A slave who is obliged to render services to his patron cannot, without injury to the latter, enlist in the army.

44.- SCSEVOLA; *Questions, Book IV*.- If a freedman is in default in rendering his services, his surety will be liable, but the surety himself cannot be in default. A surety, however, who has agreed to furnish a substitute for the debtor will be liable for delay.

45.- THE SAME; *Opinions, Book II*.- Can the freedman of a merchant who deals in clothing conduct the same business in the same town, and in the same place, if his patron is unwilling for him to do so? The answer was that there is no reason, in the case stated, why he cannot do so, if his patron sustains no injury thereby.

46.- VALENS; *Trusts, Book V*.- Where a freedwoman is the concubine of her patron, it is settled that he cannot bring an action against her to compel the performance of services, any more than if she was married to him.

47.- THE SAME; *Trusts, Book VI*.- Campanus says

41.- EL MISMO; *Respuestas, libro V*.- El liberto, que fue eximido de la obligación de servicios, y que de este modo alcanzó la libre facultad de testar, está, sin embargo, obligado a guardar respeto. Diverso es el caso respecto a los alimentos, cuando la pobreza del patrono demanda al liberto por envidia.

42.- EL MISMO; *Respuestas, libro IX*.- Quiero que sea manumitido mi esclavo Cerdon, de suerte que le prometa servicios al heredero»; el manumitido no es obligado a prometerlos, pero aunque los hubiere prometido, no se dará acción contra él; porque no pudo derogar el derecho público el que dió la libertad por fideicomiso.

43.- EL MISMO; *Respuestas, libro XIX*.- El que está obligado á servicios no dará sin injuria del patrono su nombre para la milicia.

44.- SCÉVOLA; *Cuestiones, libro IV*.- Si el liberto fuere moroso en la prestación de los servicios, se obliga el fiador; no hay mora del fiador, mas si se debiera un esclavo, también el fiador queda retenido en la obligación por virtud de su propia mora.

45.- EL MISMO; *Respuestas, libro II*.- El liberto de un comerciante en vestidos ¿podrá ejercer el mismo comercio en la misma ciudad y en el mismo lugar contra la voluntad del patrono? Respondió, que nada se exponía para que no pueda, si ninguna lesión sufiere por ello el patrono.

46.- VALENTE; *Fideicomisos, libro V*.- Si la liberta estuviese en concubinato con el patrono, es sabido que, lo mismo que si estuviese casada con él, no se debe dar contra ella acción para pedirle los servicios.

47.- EL MISMO; *Fideicomisos, libro VI*.- Escribe

Campanus scribit non debere praetorem pati donum munus operas imponi ei, qui ex fideicommissi causa manumittatur. Sed si, quum sciret posse se id recusare, obligari se passus sit, non inhiendam operarum petitionem, quia donasse videtur.

48.- HERMOGENIANUS; *libro II, Iuris Epitomarum*.- Sicut patronus, ita etiam patroni filius et nepos et pronepos, qui libertae nuptiis consensit, operarum exactionem amittit: nam haec, cuius matrimonio consensit, in officio mariti esse debet.

§ 1.- Si autem nuptiae, quibus patronus consensit, nullas habeant vires, operas exigere patronus non prohibetur.

§ 2.- Patronae, item filiae et nepti et pronepti patroni, quae libertae nuptiis consensit, operarum exactio non denegatur, quia his nec ab ea quae nupta est indecore praestantur.

49.- GAIUS; *libro singulari de Casibus*.- Duorum libertus potest aliquo casu singulis diversas operas uno tempore in solidum edere, veluti si librarius sit et alii patrono librorum scribendorum operas edat, alter vero peregre quum suis proficiscens operas custodiae domus ei indixerit: nihil enim vetat, dum custodit domum, libros scribere. Hoc ita Neratius libris membranarum scripsit.

50.- NERATIUS; *libro I, Responsorum*.- Operarum editionem pendere ex existimatione edentis: nam dignitati facultatibus consuetudini artificio eius convenientes edendas.

§ 1.- Non solum autem libertum, sed etiam alium quemlibet operas edentem alendum aut satis

that the Praetor should not allow the promise of any gift, present, or service to be imposed upon a slave who is manumitted under the terms of a trust. If, however, he permitted himself to be bound by an obligation, when he was aware that he could refuse, a suit to compel the performance of services should not be denied, because the slave is held to have donated them.

48.- HERMOGENIANUS; *Epitomes of Law, Book II*.- As in the case of a patron, so, also, his son, his grandson, and his great-grandson who consents to the marriage of a freedwoman, loses the right to require her services; for she to whose marriage he consented ought to be entirely at the disposal of her husband.

§ 1.- If, however, the marriage to which the patron consented is void, he will not be prevented from exacting her services.

§ 2.- The exaction of the services of the freed woman is not refused to her patroness, or to the daughter, granddaughter, or great-granddaughter of her patron, where any of them consented to her marriage; because it is not improper that the services of a freedwoman who was married should be rendered to them.

49.- GAIUS; *On Cases*.- A freedman who has two patrons can, in some instances, perform different services for both of them, at the same time; as, for example, if he is a copyist, and works for one of his patrons by writing books, and takes charge of the house of the other while the latter is on a journey with his family; for nothing will prevent him from writing books while he is in charge of the house. Neratius stated the same opinion in his Works of Parchments.

50.- NERATIUS; *Opinions, Book I*.- The nature of the services to be rendered depends upon the status of the person who renders them, for they must conform to his rank, his means, his mode of life, and his occupation.

§ 1.- Moreover, a freedman, and everyone else who is required to perform services, must be supported, or

Campano, que el Pretor no debe permitir que se impongan donativo, regalo, servicios, al que sea manumitado por causa de fideicomiso; pero que si sabiendo que podía rehusarlo hubiera consentido obligarse, no se ha de denegar la petición de los servicios, porque se considera que hizo donación de ellos.

48.- HERMOGENIANO; *Epítome del Derecho, libro II*.- Así como el patrono, así también el hijo del patrono, y el nieto, y el biznieto, que consintió las nupcias de la liberta, pierde la exacción de los servicios; porque ésta, cuyo matrimonio consintió, debe estar para las atenciones del marido.

§ 1.- Mas si no tuvieran validez alguna las nupcias, que consintió el patrono, no se le prohíbe al patrono exigir los servicios.

§ 2.- A la patrona, y a la hija, nieta, o bisnieta del patrono, que consintieron las nupcias de la liberta, no se les deniega la exacción de los servicios, porque a ellas no se les prestan indecorosamente ni aun por la que está casada.

49.- GAYO; *Casos, libro único*.- El liberto de dos puede en algún caso prestarle a cada uno diversos servicios íntegramente al mismo tiempo, por ejemplo, si fuera copista, y a un patrono le prestara el servicio de copiar libros, y el otro al partir de viaje con los suyos le hubiere exigido el servicio de guardarle la casa; porque nada impide, que, mientras custodia la casa, copie los libros; y así lo escribió Neracio en sus libros de los Pergaminos.

50.- NERACIO; *Respuestas, libro I*.- La prestación de los servicios depende de la estimación del que los presta, porque se han de prestar los convenientes a su dignidad, a sus facultades, a su costumbre, y a su oficio.

§ 1.- No solamente ha de ser alimentado el liberto, sino también otro cualquiera que preste servicios, o

temporis ad quaestum alimentorum relinquendum et in omnibus tempora ad curam corporis necessariam relinquenda.

51.- PAULUS; *libro II, Manualium*.- Interdum operarum manet petitio, etiamsi ius patroni non sit: ut evenit in fratribus eius, cui adsignatus est libertus, aut nepote alterius patroni extante alterius patroni filio.

TITULO II

DE BONIS LIBERTORUM

1.- ULPIANUS; *libro XLII, ad Edictum*.- Hoc edictum a Praetore propositum est honoris, quem liberti patronis habere debent, moderandi gratia. Namque ut servius scribit, antea soliti fuerunt a libertis durissimas res exigere, scilicet ad remunerandum tam grande beneficium, quod in libertos confertur, quum ex servitute ad civitatem Romanam perducuntur.

§ 1.- Et quidem primus Praetor Rutilius edixit se amplius non daturum patrono quam operarum et societatis actionem, videlicet si hoc pepigisset, ut, nisi ei obsequium praestaret libertus, in societatem admitteretur patronus.

§ 2.- Posteriores praetores certae partis bonorum possessionem pollicebantur: videlicet enim imago societatis induxit eiusdem partis praestationem, ut, quod vivus solebat societatis nomine praestare, id post mortem praestaret.

he must be given sufficient time to provide for his maintenance; and, in every instance, time must be granted him for the proper and necessary care of his person.

51.- PAULUS; *Manuals, Book II*.- The right to demand services sometimes remains even after the right of patronage has ceased to exist, which occurs in the case of the brothers of him to whom the freedman has been assigned; or with reference to the grandson of one patron, where there is a son of another patron.

TITLE II

CONCERNING THE PROPERTY OF FREEDMEN

1. ULPIANUS; *On the Edict, Book XLII*.- This Edict was promulgated by the Praetor with the intention of modifying the deference which freedmen should show to their patron. if or (as Servius says) in former times they were accustomed to require the most onerous services from their freedmen, by way of remuneration for the extraordinary benefit conferred upon the latter, when, after having been liberated from slavery, they were made Roman citizens.

§ 1.- The Praetor Rutilius was the first who published an Edict providing that an action should not be granted to a patron against his freedman, except with reference to services, or property held in partnership; for instance, where it was agreed that unless the freedman would perform services for his patron, the latter should be permitted to have joint ownership of his property.

§ 2.- Succeeding praetors were accustomed to promise possession of a certain portion of the estate of a freedman; for as the partnership existing between the parties implied the performance of services by the freedman, what he was required to furnish as his share of the partnership during his lifetime, he was also obliged to furnish after his

se les ha de dejar el tiempo suficiente para procurarse el sustento, y en todos los casos se les ha de dejar el tiempo necesario para el cuidado de su cuerpo.

51.- PAULO; *Manuales, libro II*.- A veces subsiste la petición de los servicios, aunque no haya derecho del patrono, como acontece tratándose de los hermanos de aquel a quien fue asignado el liberto, o en cuanto al nieto de otro patrono, habiendo hijo de otro patrono.

TÍTULO II

DE LOS BIENES DE LOS LIBERTOS

1.- ULPIANO; *Comentarios al Edicto, libro XLII*.- Este Edicto fue publicado por el Pretor para moderar, la consideración que los libertos deben tener a los patronos. Porque, como escribe Servio, antes se solió exigir de los libertos durísimas cosas, para remunerar, por supuesto, el beneficio tan grande que se les confiere a los libertos, cuando de la esclavitud son llevados a la ciudadanía romana.

§ 1.- Y en efecto, el Pretor Rutilio fue el primero que manifestó por edicto que él no le daría al patrono mas que la acción de servicios y la de sociedad, por supuesto, si hubiese pactado que si el liberto no le prestase el obsequio, sería admitido a sociedad el patrono.

§ 2.- Los Pretores posteriores prometían la posesión de cierta parte de los bienes; a saber, porque el remedo de sociedad introdujo la prestación de la misma parte, a fin de que prestase después de la muerte lo que en vida solía prestar a título de sociedad.

death.

2.- POMPONIUS; *libro IV, ad Sabinum*.- Si patronus a liberto praeteritus bonorum possessionem petere potuerit contra tabulas et antequam peteret decesserit vel dies ei bonorum possessionis agnoscendae praeterierit, liberi eius vel alterius patroni petere poterunt ex illa parte edicti, qua, primis non petentibus aut etiam nolentibus ad se pertinere, sequentibus datur, atque si priores ex eo numero non essent.

§ 1.- Sed si patronus heres institutus vivo liberto decessisset superstitibus liberis, quaesitum est, an illi contra tabulas testamenti bonorum possessionem petere possint: et eo decursum est, ut mortis tempus, quo defertur bonorum possessio, spectari debeat, an patronus non sit, ut, si sit, ex prima parte Edicti liberi eius bonorum possessionem petere non possint.

§ 2.- Si filius emancipatus nepotem in potestate avi reliquisset, bonorum possessionem partis dimidia dandam ei filio intestati liberti, quamvis iure ipso legitima hereditas ad nepotem pertineat, quia et contra tabulas eius liberti filio potius bonorum possessio partis debita daretur.

3.- ULPIANUS; *libro XLI, ad Edictum*.- Etiam si ius anulorum consecutus sit libertus a principe, adversus huius tabulas venit patronus, ut multis rescriptis continetur: hic enim vivit quasi ingenuus, moritur quasi libertus.

§ 1.- Plane si natalibus redditus sit, cessat contra tabulas bonorum possessio:

2.- POMPONIUS; *On Sabinus, Book IV*.- If a patron, who was passed over in the will of his freedman, could demand praetorian possession of his estate contrary to the provisions of the will, and before doing so, died, or the time prescribed for demanding said possession has elapsed, his children, or those of another patron, can demand possession under that Section of the Edict by which when the first parties do not claim possession, or are unwilling to claim it, it is granted to those next in succession, just as if the former were not in existence.

§ 1.- If a patron, who was appointed heir by his freedman, should die during the lifetime of the latter, leaving children, the question arose whether they could demand praetorian possession of the estate of the freedman, contrary to the provisions of the will. It was decided with reference to this point that the time of death, to which praetorian possession is referred, should be considered in order to ascertain whether there is any patron or not; so that, if there is one, his children cannot demand praetorian possession under the First Section of the Edict.

§ 2.- If an emancipated son should leave a grandson under the control of his grandfather, praetorian possession of half of the property of the intestate freedman ought to be given to the son, although the estate may, by operation of law, belong to the grandson; for the reason that possession of the part which was due should be granted to the son contrary to the provisions of the will of the freedman.

3.- ULPIANUS; *On the Edict, Book XLI*.- Even if the right to wear a gold ring may have been obtained from the Emperor by a freedman, his patron will be admitted to praetorian possession contrary to the provisions of the will, as is stated in several rescripts; for this privilege only confers upon him the rights of a freeborn citizen, but he dies as a freedman.

§ 1.- It is clear that, if he should be restored to his birthright by a judicial decision, praetorian possession of his estate contrary to the provisions of

2.- POMPONIO; *Comentarios a Sabino, libro IV*.- Si el patrono preterido por el liberto hubiere podido pedir la posesión de los bienes contra el testamento, y hubiere fallecido antes que la pidiese, o hubiere transcurrido el término para que él obtuviese la posesión de los bienes, sus hijos o los del otro patrono podrán pedirla en virtud de aquella parte del Edicto, por la que, no pidiéndola los primeros, o también no queriendo que les pertenezca, se les da a los siguientes, como si los anteriores no fuesen de este número.

§ 1.- Pero si el patrono instituido heredero hubiese fallecido en vida del liberto sobreviviéndole hijos, se preguntó si éstos podrían pedir la posesión de los bienes contra el testamento. Y se determinó, que se debe ver al tiempo de la muerte, en que se defiere la posesión de los bienes, si no existe el patrono, para que, si existiera, no puedan sus hijos pedir en virtud de la primera parte del Edicto la posesión de los bienes.

§ 2.- Si el hijo emancipado hubiese dejado un nieto bajo la potestad del abuelo, se le ha de dar al hijo del liberto fallecido intestado la posesión de la mitad de los bienes, aunque de derecho le pertenezca al nieto la herencia legítima, porque también contra el testamento de este liberto se le daría preferentemente al hijo la posesión de los bienes de la parte debida.

3.- ULPIANO; *Comentarios al Edicto, libro XLI*.- Aunque el liberto haya conseguido del Príncipe el derecho de anillos, es admitido el patrono a la posesión de los bienes contra el testamento de aquel, como en muchos Rescriptos se contiene; porque este vive como ingenuo, y muere como liberto.

§ 1.- Y a la verdad, si hubiera sido restituido en su condición natal, deja de tener lugar la posesión de los bienes contra el testamento.

the will cannot be obtained.

§ 2.- Idem et si a Principe liberam testamenti factionem impetravit.

§ 2.- The same rule will apply where he has obtained from the Emperor unrestricted power to make a will.

§ 2.- Lo mismo también si impetró del Príncipe la libre facultad de testar.

§ 3.- Sed si hac lege emit quis, ut manumittat, ad hanc partem Edicti pertinebit.

§ 3.- If anyone purchases a slave under the condition that he will manumit him, this will come under the above-mentioned Section of the Edict.

§ 3.- Pero si alguno lo compró con la condición de manumitirlo, estará comprendido en esta parte del Edicto.

§ 4.- Si quis nummos accepit, ut manumitteret, non habet contra tabulas bonorum possessionem.

§ 4.- When anyone receives a sum of money on condition that he will manumit his slave, he will not be entitled to praetorian possession of his estate in opposition to the terms of the will.

§ 4.- Si alguno recibió dinero para que lo manumitiera, no tiene la posesión de los bienes contra el testamento.

§ 5.- Ut patronus contra tabulas bonorum possessionem accipere possit, oportet hereditatem aditam esse aut bonorum possessionem petitam: sufficit autem vel unum ex heredibus adisse hereditatem bonorumve possessionem petisse.

§ 5.- In order that the patron may be able to obtain praetorian possession contrary to the provisions of the will, the estate must be entered upon, or praetorian possession of it demanded. It is, however, sufficient for one of the heirs to enter upon the estate, or to claim praetorian possession of the same.

§ 5.- Para que el patrono pueda obtener la posesión de los bienes contra el testamento, es menester que se haya adido la herencia, o pedido la posesión de los bienes; pero basta que uno solo de los herederos haya adido la herencia, o pedido la posesión de los bienes.

§ 6.- Patronus contra ea bona liberti omnino non admittitur, quae in castris sunt quaesita.

§ 6.- A patron has not the same right to the property of his freedman which the latter acquired while in the army, which he has to that otherwise acquired.

§ 6.- El patrono no es de ningún modo admitido contra los bienes del liberto, que fueron adquiridos en los campamentos.

§ 7.- Si deportatus patronus restitutus sit, liberti contra tabulas bonorum possessionem accipere potest. Idemque et in liberto deportato et restituto dicendum est.

§ 7.- Where a patron, after having been banished, is restored to his civil rights, he can obtain praetorian possession of the estate of his freedman contrary to the provisions of the will. The same rule must be held to apply to a freedman who has been banished and afterwards restored to his rights.

§ 7.- Si el padre deportado hubiera sido restituido, puede obtener la posesión de los bienes contra el testamento del liberto; y lo mismo se ha de decir también en cuanto al liberto deportado y restituido.

§ 8.- Si quis filius familias servum de castrensi peculio manumiserit, ex Constitutione Divi Hadriani patronus est admittique poterit ad contra tabulas bonorum possessionem ut patronus.

§ 8.- If a son under paternal control manumits a slave who forms part of his castrense peculium, he becomes his patron by a Constitution of the Divine Hadrian, and, in the capacity of patron, he can obtain praetorian possession of the estate of the freedman in opposition to the terms of the will.

§ 8.- Si algún hijo de familia hubiere manumitido un esclavo de su peculio castrense, es patrono en virtud de la Constitución del Divino Adriano, y podrá ser admitido a la posesión de los bienes contra el testamento, como patrono.

§ 9.- Si capitis libertum accusaverit is, cui adsignatus est, non potest is petere contra tabulas bonorum possessionem fratribusque suis non obstat: sed hi contra tabulas bonorum possessionem petent, quemadmodum peterent, si ex altero filio nepotes essent: libertus enim, qui alteri ex filiis adsignatur,

§ 9.- If he to whom a freedman has been assigned should accuse the latter of a capital crime, he cannot demand praetorian possession of his estate in opposition to the terms of the will, but this does not prevent his brothers from doing so, for they must demand praetorian possession just as they would do

§ 9.- Si al liberto lo hubiere acusado de delito capital aquel a quien fue asignado, no puede pedir éste la posesión de los bienes contra el testamento, y no les obstará a sus hermanos; pero éstos pedirán la posesión de los bienes contra el testamento, como la pedirían si fuesen nietos habidos de otro hijo; porque

non desinit alterius filii libertus esse. Amplius dicendum est: etiamsi omiserit frater bonorum possessionem, alter frater, cui adsignatus non est, potest succedere et contra tabulas bonorum possessionem petere.

§ 10.- Totiens ad bonorum possessionem contra tabulas invitatur patronus, quotiens non est heres ex debita portione institutus.

§ 11.- Si patronus sub condicione sit institutus eaque condicio vivo testatore extitit, contra tabulas bonorum possessionem accipere non potest.

§ 12.- Quid ergo, si mortis tempore pependit, extitit tamen, antequam patrono deferatur bonorum possessio, hoc est ante aditam hereditatem, an invitetur ex hac parte edicti? Et magis est, ut aditae hereditatis tempus spectetur: hoc enim iure utimur.

§ 13.- Si tamen in praeteritum collata sit condicio vel ad praesens, non videtur sub condicione institutus: aut enim impleta est et pure institutus est, aut non est et nec heres institutus est.

§ 14.- Si libertus patronum suum ita heredem scripserit: "si filius meus me vivo morietur, patronus heres esto", non male videtur testatus: nam si decesserit filius, poterit hic existente condicione accipere bonorum possessionem.

§ 15.- Si debita patrono portio legata sit, etsi

if they were the grandsons of the other son, as the freedman who was assigned to him does not cease to be the freedman of the remaining sons. It must further be said that even if one brother should refuse to demand praetorian possession, the other to whom the freedman was not assigned can take his place, and claim praetorian possession of the estate contrary to the provisions of the will.

§ 10.- A patron is entitled to praetorian possession of the estate of his freedman, contrary to the provisions of the will, whenever he is not appointed heir to that portion of said estate to which he is entitled.

§ 11.- If a patron is appointed under a condition, and the condition is complied with during the lifetime of the testator, he cannot obtain praetorian possession of the estate in opposition to the terms of the will.

§ 12.- What course should then be pursued if, at the time of death, the condition was in suspense, but was fulfilled before praetorian possession was granted to the patron; that is to say, before the estate of the freedman was entered upon? Would he be called to the praetorian succession under this section of the Edict? The better opinion is that the time when the estate was entered upon should be considered; and this is our practice.

§ 13.- Still, if the condition has reference to the past or the present time, the patron will not be held to have been appointed heir conditionally; for the condition has either been complied with and he is held to have been appointed absolutely; or it has not been complied with, and he is not appointed heir.

§ 14.- Where a freedman appointed his heir as follows, "If my son should die during my lifetime, let my patron be my heir," the will is not considered to have been improperly drawn; for if the son should die, as the condition has been fulfilled, the patron can obtain praetorian possession of the estate.

§ 15.- If the portion of the estate to which he is

el liberto, que es asignado a uno de los hijos, no deja de ser liberto del otro hijo; todavía se ha de decir más: que aunque el hermano hubiere prescindido de la posesión de los bienes, el otro hermano, al que fue asignado, no puede suceder, y pedir la posesión de los bienes contra el testamento.

§ 10.- El patrono es invitado a la posesión de los bienes contra el testamento siempre que no fue instituido heredero en la porción debida.

§ 11.- Si el patrono hubiera sido instituido bajo condición, y esta condición se cumplió viviendo el testador, no puede obtener la posesión de los bienes contra el testamento.

§ 12.- ¿Qué se dirá, pues, si estuvo pendiente al tiempo de la muerte, pero se cumplió antes que se defiriese al patrono la posesión de los bienes, esto es, antes de haber sido adida la herencia, será acaso invitado en virtud de esta parte del Edicto? Y es mejor que se atienda al tiempo en que se adió la herencia; porque este derecho observamos.

§ 13.- Mas si la condición hubiera sido referida al tiempo pasado, o al presente, no se considera instituido bajo condición; porque o se cumplió, y fue instituido puramente, o no se cumplió, y ni fue instituido heredero.

§ 14.- Si el liberto hubiere instituido así heredero a su patrono: «si mi hijo muriere viviendo yo, sea heredero el patrono», no se considera que testó malamente; porque si el hijo hubiere fallecido, podrá aquel, cumpliéndose la condición, obtener la posesión de los bienes.

§ 15.- Si al patrono le hubiera sido legada la porción

scriptus heres non fuerit, satis ei factum est.

§ 16.- Sed et si institutus sit ex parte minore quam ei debetur, residua vero pars suppleta est ei legatis sive fideicommissis, et ita satisfactum ei videtur.

§ 17.- Sed et mortis causa donationibus poterit patrono debita portio suppleri: nam mortis causa donationes vice legatorum funguntur.

§ 18.- Sed et si non mortis causa donavit libertus patrono, contemplatione tamen debitaie portionis donata sunt, idem erit dicendum: tunc enim vel quasi mortis causa imputabuntur vel quasi adgnita repellent patronum a contra tabulas bonorum possessione.

§ 19.- Si patrono condicionis implendae causa quid datum sit, in portionem debitam imputari debet, si tamen de bonis sit liberti profectum.

§ 20.- Debitam autem partem eorum, quae cum moritur libertus habuit, patrono damus: mortis enim tempus spectamus. Sed et si dolo malo fecit, quo minus haberet, hoc quoque voluit praetor pro eo haberi, atque si in bonis esset.

4.- PAULUS; *libro XLII, ad Edictum*.- Si necem domini detexerit servus, praetor statuere solet, ut liber sit: et constat eum quasi ex Senatusconsulto libertatem consecutum nullius esse libertum.

§ 1.- Si libertus captus ab hostibus ibi decesserit, quamvis liberti appellatio eum non tangat, tamen propter legem corneliam, quae testamentum sic

entitled is bequeathed to the patron, enough has been done for him, even if he should not have been appointed heir.

§ 16.- Where, however, he was appointed to a smaller share than he was entitled to, and the remainder has been made up to him, either by legacies or trusts, he is held to have been satisfied.

§ 17.- The share to which the patron is entitled by law can also be made up to him by donations mortis causa, for these take the place of legacies.

§ 18.- The same rule will apply where a freedman did not make a donation to his patron mortis causa, but gave him property in consideration of the amount of the estate to which he was entitled; for then it will either be held to have been given mortis causa, or what the patron has received will exclude him from obtaining praetorian possession of the estate contrary to the provisions of the will.

§ 19.- Where anything is given to a patron for the purpose of complying with a condition, it should be included in the legal share of the latter, if it was derived from the estate of the freedman.

§ 20.- We grant the patron his legal share of the property which the freedman had at the time of his death, for we take into consideration the time when he died. If, however, he diminished his property by some fraudulent act, the Praetor will decide that the patron is also entitled to it, just as if it belonged to the estate.

4.- PAULUS; *On the Edict, Book XLII*.- Where a slave has detected the murderer of his master, the Praetor should decide that he is free, and it is established that he will be the freedman of no one, having obtained his liberty under a decree of the Senate.

§ 1.- Where a freedman, after having been taken captive, dies in the hands of the enemy, although the name of freedman does not apply to him, still, in

debida, se le satisfizo, aunque no haya sido instituido heredero.

§ 16.- Pero también si hubiera sido instituido en menor parte que la que se le debe, pero la restante se le suplió con legados, o con fideicomisos, se considera que también así se le satisfizo.

§ 17.- Mas también con donaciones por causa de muerte se le podrá suplir al patrono la porción debida; porque las donaciones por causa de muerte hacen veces de legados.

§ 18.- Pero también se habrá de decir lo mismo si el liberto no le hizo al patrono donación por causa de muerte, pero se le hicieron donaciones en consideración a la porción debida; porque entonces o serán imputadas como por causa de muerte, o como si hubieran sido admitidas repelerán de la posesión de los bienes contra el testamento al patrono.

§ 19.- Si para cumplir la condición se hubiera dado alguna cosa al patrono, debe ser computada en la porción debida, con tal que haya provenido de los bienes del liberto.

§ 20.- Mas le damos al patrono la parte debida de lo que el liberto tuvo al morir; porque atendemos al tiempo de la muerte. Pero aunque con dolo malo haya hecho de modo que no tenga alguna cosa, el Pretor quiso que también ésta fuese considerada lo mismo que si la tuviese en sus bienes.

4.- PAULO; *Comentarios al Edicto, libro LXII*.- Si un esclavo hubiere descubierto la muerte de su señor, suele determinar el Pretor que sea libre, y es sabido que éste, como por haber conseguido la libertad en virtud del Senadoconsulto, no es liberto de nadie.

§ 1.- Si el liberto aprisionado por los enemigos falleciere en poder de ellos, aunque no le alcance la denominación de liberto, sin embargo, por virtud de

confirmat atque si in civitate decesserit, patrono quoque bonorum possessio danda erit.

§ 2.- Si deportatus patronus sit, filio eius competit bonorum possessio in bonis liberti nec impedimento est ei talis patronus, qui mortui loco habetur. Et dissimile est, si patronus apud hostes sit: nam propter spem postliminii obstat liberis suis.

§ 3.- Si extraneus a liberto heres institutus rogatus sit filio hereditatem restituere, quum ex Senatus-consulto Trebelliano restituta hereditate heredis loco filius habetur, patronus summovendus est.

5.- GAIUS; *libro XV, ad Edictum provinciale*.- Libertinus, qui patronum patronique liberos habet, si patronum ex parte debita heredem instituit, liberos eius in eandem portionem substituere debet, ut, licet patronus vivo liberto mortuus fuerit, satisfactum videatur liberis eius.

§ 1.- Si patroni filium emancipatum et nepotem ex eo, qui in avi familia remansit, libertus habeat, filio tantum, non etiam nepoti satisfacere debebit libertus: nec ad rem pertinet, quod ad parentis bona pariter vocantur.

6.- ULPIANUS; *libro XLIII, ad Edictum*.- Etsi ex modica parte instituti sint liberi liberti, bonorum possessionem contra tabulas patronus petere non potest: nam et Marcellus libro nono digestorum scripsit quantulumque ex parte heredem institutum liberti filium patronum expellere.

§ 1.- Quum patroni filia heres instituta esset a

accordance with the Cornelian Law which confirms his will just as if he had died at home, possession of his estate should be granted to his patron.

§ 2.- If a patron should be banished, his son will have a right to praetorian possession of the estate of his freedman, and his father, as patron, will be no impediment to this, as he is considered to be dead. The case, however, is different where a patron is in the hands of the enemy, for he is an impediment to his children, on account of the hope of his return, and the law of postliminium.

§ 3.- If a stranger has been appointed heir by a freedman, and is charged to transfer the estate to his son, the patron should be excluded; as the estate is delivered under the Trebellian Decree of the Senate, and the son takes the place of the heir.

5.- GAIUS; *On the Provincial Edict, Book XV*.- Where a freedman has a patron, and the latter has children, and he appoints his patron heir to the share of his estate to which the latter is entitled, he should substitute his children for the same share, in order that, although the patron may die during the lifetime of the freedman, he can be considered to have satisfied the claims of his children.

§ 1.- If a freedman has the emancipated son of his patron, and grandsons descended from another son, who is under the control of the grandfather, the freedman must only leave what he owes to the son, and not to the grandsons; for, in this instance, it makes no difference whether they are equally called to the succession of their grandfather, or not.

6.- ULPIANUS; *On the Edict, Book XLIII*.- If the children of a freedman should be appointed heirs to only a small portion of his estate, the patron cannot demand praetorian possession contrary to the provisions of the will; for Marcellus, in the Ninth Book of the Digest, says that no matter to how small a share of the estate of a freedman his son may be appointed heir, the patron will be excluded.

§ 1.- Where the daughter of a patron was appointed

la ley Cornelia, que confirma el testamento como si hubiere fallecido en la ciudadanía, se le habrá de dar también al patrono la posesión de los bienes.

§ 2.- Si el patrono hubiera sido deportado, le compete a su hijo la posesión de los bienes en los bienes del liberto, y no le es impedimento un patrono que se reputa como muerto. Y diversa cosa es, si el patrono estuviera en poder de los enemigos; porque les obsta a sus hijos por razón de la esperanza del postliminio.

§ 3.- Si al extraño instituido heredero por el liberto se le hubiera rogado que le restituyese la herencia: al hijo, como por virtud del senadoconsulto Trebeliano, restituida la herencia, es tenido el hijo por heredero, ha de ser repelido el patrono.

5.- GAYO; *Comentarios al Edicto provincial, libro XV*.- El libertino, que tiene patrono e hijos del patrono, si instituyó al patrono heredero de la parte debida, debe substituir a los hijos de aquél en la misma porción, a fin de que, aunque el patrono hubiere fallecido viviendo el liberto, se considere que se les satisfizo a sus hijos.

§ 1.- Si el liberto tuviera un hijo del patrono, emancipado, y nietos habidos del que permaneció en la familia del abuelo, el liberto deberá satisfacer solamente al hijo, no también al nieto, y no hace al caso que sean llamados juntamente a los bienes del ascendiente.

6.- ULPIANO; *Comentarios al Edicto, libro XLIII*.- Aunque los hijos del liberto hayan sido instituidos en una pequeña parte, no puede pedir el patrono la posesión de los bienes contra el testamento; porque también Marcelo escribió en el libro noveno del Digesto, que el hijo del liberto, que haya sido instituido heredero en cualquier parte pequeña, excluía al patrono.

§ 1.- Como la hija de un patrono hubiese sido

liberto falsumque testamentum dictum esset, in quo scripta erat, et appellatione interposita et pendente diem suum obisset: heredibus eius Divus Marcus subvenit, ut id haberent, quod haberet patroni filia, si viveret.

§ 2.- Si filius liberti heres ab eo institutus abstinerit, quamvis nomine sit heres, patronus admittitur.

§ 3.- Sed et si per in integrum restitutionem is, qui mixtus est paternae hereditati vel qui adit hereditatem, abstinerit se, poterit quis patronum admittere.

§ 4.- Patronus patronique liberi si secundum voluntatem mortui liberti hereditatem adierint legatumve aut fideicommissum petere maluerint, ad contra tabulas bonorum possessionem non admittuntur.

7.- GAIUS; *libro XV, ad Edictum provinciale*.- Nam absurdum videtur licere eidem partim comprobare iudicium defuncti, partim evertere.

8.- ULPIANUS; *libro XLIII, ad Edictum*.- Si vero non habuit effectum petitio eius, dico non impediri, quo minus adiuvetur. Quin immo et si sic adit quasi ex debita portione institutus, mox apparuit eum minorem partem quam speravit accepisse, aequissimum est admitti eum ad suum auxilium. Sed et si testato convenisset heredem, ut sibi legatum solveretur, mox paenitisset, puto eum posse adiuvari.

§ 1.- Si patronus legatum sibi relictum adgnoverit

heir by the freedman of her father, and the will by which she was appointed was alleged to be forged, and an appeal was taken, and before it was heard the daughter died, the Divine Marcus came to the relief of the heirs, and decided that they should have whatever the daughter would have been entitled to if she had lived.

§ 2.- If the son of the freedman, who had been appointed his heir, should reject the estate, although he will retain the name of heir, the patron can acquire praetorian possession.

§ 3.- If the son should meddle with the estate of his father, or the heir who had entered upon it should obtain complete restitution of his rights, after having rejected the estate, the patron can be admitted to the succession.

§ 4.- If the patron and his children should enter upon the estate of the freedman in accordance with the will of the deceased, or should prefer to claim a legacy or a trust bequeathed to them, they shall not be permitted to obtain praetorian possession in opposition to the provisions of the will.

7.- GAIUS; *On the Provincial Edict, Book XV*.- For it would be absurd to allow the same person to partly approve the will of the deceased, and partly reject it.

8.- ULPIANUS; *On the Edict, Book XLIII*.- If, however, the demand of the patron has had no effect, I think that there is no reason why relief should not be granted him. And, indeed, if he has entered upon the estate, under the impression that he had been appointed heir to the share to which he was legally entitled, and it should afterwards appear that he has obtained a smaller share than he had a right to expect, it is perfectly just that relief should be granted him. If, however, he notified the heir in the presence of witnesses to pay him his legacy, and should afterwards change his mind, I think that he is entitled to relief.

§ 1.- Where a patron has received the legacy

instituida heredera por el liberto, y se hubiese dicho que era falso el testamento, en que había sido instituida, y hubiese fallecido habiéndose interpuesto y estando pendiente la apelación, el Divino Marco auxilió a sus herederos, para que tuviesen lo mismo que tendría la hija del patrono, si viviese.

§ 2.- Si el hijo de un liberto, instituido heredero por éste, se hubiere abstenido de la herencia, aunque él sea de nombre heredero, es admitido el patrono.

§ 3.- Pero también podrá alguno admitir al patrono, si mediante la restitución por entero se hubiere abstenido el que se inmiscuyó en la herencia paterna, o el que adió la herencia.

§ 4.- El patrono y los hijos del patrono, si hubieren adido la herencia conforme a la libertad del liberto fallecido, o hubieren preferido pedir un legado o fideicomiso, no son admitidos a la posesión de los bienes contra el testamento.

7.- GAYO; *Comentarios al Edicto provincial, libro XV*.- Porque parece absurdo que a uno mismo le sea lícito aprobar en parte, y en parte impugnar, la voluntad del difunto.

8.- ULPIANO; *Comentarios al Edicto, libro XLIII*.- Pero si no tuvo efecto su petición, digo que esto no impide que se le favorezca. Antes bien, si adió así, como si hubiera sido instituido en la porción debida, y después apareció que él recibió menor parte que la que esperó, es muy justo que se le conceda auxilio. Mas si hubiese demandado al heredero por testamento para que se le pagase un legado, y después se hubiese arrepentido, opino que puede él ser auxiliado.

§ 1.- Si el patrono hubiere aceptado el legado que se

idque fuerit evictum, competit ei legitimum auxilium, quia id, quod speravit se habiturum, non habet. Sed et si non totum evictum sit, verum aliquo minus habet quam putavit, erit ei subveniendum.

§ 2.- Si servo vel filio suo aliquid relictum patronus adgnoverit, perinde a contra tabulas bonorum possessione repellitur atque si adgnosset sibi relictum.

§ 3.- Sed et si mortis causa donationem adgnoverit, dicendum est repelli eum a contra tabulas bonorum possessione, sic tamen, si post mortem liberti adgnovit. Ceterum si ei vivus libertus donavit, ille accipit, non idcirco erit repulsus a contra tabulas bonorum possessione, quia potest dicere sperasse quod in testamento quoque gratus circa eum fieret, remittique ei debet ab eis decedere vel ea compensare in portionem pro rata.

§ 4.- Quare dicitur et si condicionis implendae causa quid fuerit datum patrono post mortem liberti, repelli eum a contra tabulas bonorum possessione, quasi adgnoverit iudicium.

§ 5.- Si patronus minor annis viginti quinque liberti iudicium adgnoverit, in integrum restitui eum oportere existimamus, ut possit contra tabulas accipere.

9.- PAULUS; *libro XLII, ad Edictum*.- Qui in servitute libertum paternum petierit, nec nomine liberorum bonorum possessionem accipere potest.

bequeathed to him, and afterwards has been evicted, he will have a right to demand his lawful share of the estate, because he did not receive what he expected to have. If, however, he is not deprived of the entire legacy by eviction, but obtains less than he had a right to expect, he will be entitled to relief.

§ 2.- If a patron has received a legacy bequeathed to his slave, or to his son, he will be excluded from praetorian possession of the estate contrary to the provisions of the will, just as if he had accepted a legacy bequeathed to himself.

§ 3.- And if he has received a donation mortis causa, it must be held that he is excluded from praetorian possession in opposition to the provisions of the will, just as if he had received it after the death of the freedman. Moreover, if the freedman, during his lifetime, had given it to him, and he had accepted it, he will not, for this reason, be excluded from praetorian possession in opposition to the provisions of the will, because it may be said that he expected that some additional favor would be shown to him by the will of the freedman, and he should be permitted to reject what he has received, or the share to which he was entitled should be given to him pro rata.

§ 4.- Therefore, it is said that if, for the purpose of complying with a condition, something has been given to the patron after the death of the freedman, the former will be excluded from praetorian possession of the estate in opposition to the terms of the will, as having, so to speak, accepted it.

§ 5.- If the patron of twenty-five years will have accepted the last will of I free, we considered that he must entirely be restituted, in order that he can obtain the possession against the will.

9.- PAULUS; *On the Edict, Book XLII*.- Where anyone has wrongfully attempted to again reduce to slavery a freedman belonging to his father, he cannot either himself, or in the name of his children, obtain praetorian possession of his estate.

le dejó, y de éste se hubiere hecho evicción, le compete el auxilio legal, porque no tiene lo que esperó tener. Pero también se le habrá de auxiliar, si no se hubiera hecho evicción de todo, pero tiene algo menos de lo que pensó.

§ 2.- Si el patrono hubiere aceptado alguna cosa dejada a su esclavo o a su hijo, será rechazado de la posesión de los bienes contra el testamento, lo mismo que si hubiese aceptado cosa dejada a él.

§ 3.- Pero si hubiere aceptado una donación por causa de muerte, también se ha de decir que él es repelido de la posesión de los bienes contra el testamento, pero esto así, si la aceptó después de la muerte del libertus. Mas si viviendo el libertus le hizo donación, y él la aceptó, no por esto será rechazado de la posesión de los bienes contra el testamento, porque puede decir que esperó que también se le mostrase agradecido en el testamento; y se le debe permitir o que se aparte de aquellas cosas, o que las compense a prorrata para su porción.

§ 4.- Por lo cual se dice, que también si para cumplir una condición se le hubiere dado alguna cosa al patrono después de la muerte del libertus, es repelido él de la posesión de los bienes contra el testamento, como si hubiere aprobado la última voluntad.

§ 5.- Si el patrono menor de veinticinco años hubiere aceptado la última voluntad del libertus, estimamos que debe él ser restituido por entero, a fin de que pueda obtener la posesión contra el testamento.

9.- PAULO; *Comentarios al Edicto, libro XLII*.- El que hubiere demandado a esclavitud a un libertus, de su padre, no puede obtener la posesión de los bienes ni aun en nombre de sus hijos.

10.- ULPIANUS; *libro XLIV, ad Edictum*.- Si ex patronis alicui satisfactum non erit ita, ut alii amplius sua portione ex bonis liberti relinquatur: ei, cui satisfactum non erit, ita actio dabitur, ut eius portio suppleatur ex eo, quod extraneo heredi et quod patrono supra suam portionem relictum est. Eadem ratio et in pluribus patronis servabitur.

§ 1.- Iulianus ait eum, qui ab avo suo exheredatus est, a bonis libertorum eius summoverti, a patris vero sui libertorum bonis non excludi: quod si a patre sit exheredatus, ab avo non sit, non solum a libertorum paternorum bonis, verum etiam ab avi quoque excludi debere, quia per patrem avitos libertos consequitur: quod si pater eius sit ab avo exheredatus, ipse non sit, posse nepotem avitorum libertorum contra tabulas bonorum possessionem petere. Idem ait, si pater me exheredavit, avus meus patrem meum et prior avus decesserit, ab utriusque libertis me repelli: sed si ante pater decessisset, postea avus, dicendum erit nihil mihi nocere patris exheredationem ad avitorum libertorum bona.

11.- JULIANUS; *libro XXVI, Digestorum*.- Quod si pater meus a patre suo sit exheredatus, ego neque a patre meo neque ab avo, mortuo quidem patre et adversus avitos et adversus paternos libertos ius habeo, vivente patre, quamdiu in potestate eius ero, non petam contra tabulas avitorum libertorum bonorum possessionem, emancipatus non summovebor.

10.- ULPIANUS; *On the Edict, Book XLIV*.- If satisfaction has not been given to one of two patrons, and more than his share of the estate of a freedman has been left to the other, an action will be granted to the one who did not receive that to which he was entitled, in such a way that his portion will be made up out of what was bequeathed to a foreign heir, and left to the other patron in excess of his own share. The same rule shall also be observed where there are several patrons.

§ 1.- Julianus says that he who has been disinherited by his grandfather is also barred from acquiring the estates of his freedmen, but will not be excluded from acquiring those of the freedmen belonging to his father. If, however, he has been disinherited by his father, but not by his grandfather, he should be excluded not only from the estates of the freedmen of his father, but also from those of his grandfather as well; because it is through his father that he acquires rights over the freedmen of his grandfather. If, however, his father has been disinherited by his grandfather, and he himself has not, a grandson can demand praetorian possession of the estates of the freedmen of his grandfather, in opposition to the provisions of the will. He also says that if my father should disinherit me, and my grandfather should disinherit my father, and my grandfather should die first, I will be excluded from praetorian possession of the estates of the freedmen of both. But if my father should die first, and my grandfather afterwards, it must be said that the disinheritance of my father will not prejudice me, so far as the estates of the freedmen of my grandfather are concerned.

11.- JULIANUS; *Digest, Book XXVI*.- If, however, my father was disinherited by his father, and I have been disinherited neither by my father nor my grandfather, and my grandfather should die, I will be entitled to the rights over the freedmen of both my grandfather and my father. But I cannot, during the lifetime of my father and as long as I remain under his control, demand praetorian possession of the estates of the freedmen of my grandfather; but if I have been emancipated, I will not be prevented from doing so.

10.- ULPIANO; *Comentarios al Edicto, libro XLIV*.- Si no se hubiere satisfecho a alguno de los patronos, de suerte que a otro se le deje más de su porción de los bienes del libertado, al que no hubiere sido satisfecho se le dará acción para que se le complete su porción con lo que se le dejó al heredero extraño, y a otro patrono sobre su porción. La misma regla se observará también tratándose de muchos patronos.

§ 1.- Dice Juliano, que el que fue desheredado por su abuelo es repelido de los bienes de los libertos de éste, pero no es excluido de los bienes de los libertos de su padre; pero si hubiera sido desheredado por su padre, y no lo hubiera sido por el abuelo, debe ser excluido no solamente de los bienes de los libertos de su padre, sino también de los bienes de los del abuelo, porque por medio del padre adquiere los libertos del abuelo; pero si su padre hubiera sido desheredado por el abuelo, y él no lo hubiera sido, puede pedir el nieto la posesión de los bienes contra el testamento de los libertos del abuelo. Dice el mismo, que si mi padre me desheredó, y mi abuelo, desheredó a mi padre, y hubiere fallecido primero mi abuelo, soy repelido de los bienes de los libertos de ambos; pero que si mi padre hubiese fallecido antes, y después mi abuelo, se habrá de decir que en nada me perjudica la desheredación de mi padre respecto a los bienes de los libertos de mi abuelo.

11.- JULIANO; *Digesto, libro XXVI*. - Pero si mi padre hubiera sido desheredado por su padre, y yo no lo hubiera sido ni por mi padre, ni por mi abuelo, muerto mi padre, tendré derecho tanto contra los libertos de mi abuelo, como contra los de mi padre; y viviendo mi padre, no pediré, mientras yo estuviere bajo su potestad, la posesión de los bienes contra el testamento de los libertos de mi abuelo, pero, estando emancipado, no seré repelido.

§ 12.- ULPIANUS; *libro XLIV, ad Edictum*.- Si patronus testamento iure militari facto filium silentio exheredaverit, debet nocere ei exheredatio: verum est enim hunc exheredatum esse.

§ 1.- Si quis libertum filio suo adsignaverit eumque exheredaverit, admitti potest ad bonorum liberti possessionem.

§ 2.- Si quis non mala mente parentis exheredatus sit, sed alia ex causa, exheredatio ipsi non nocet: ut puta pone furoris causa exheredatum eum vel ideo, quia impubes erat, heredemque institutum rogatum ei restituere hereditatem.

§ 3.- Si quis, cum esset exheredatus, pronuntiatus vel perperam sit exheredatus non esse, non repellitur: rebus enim iudicatis standum est.

§ 4.- Si filius patroni exheredatus in partem optinuerit de inofficioso, in partem victus sit, videamus, an noceat ei exheredatio. Et nocere arbitror, quia testamentum valet, a quo exheredatus est.

§ 5.- Ex testamento autem, ex quo neque adita hereditas est neque petita bonorum possessio, liberis exheredatio non nocet: absurdum est enim in hoc tantum valere testamentum, ut exheredatio vigeat, quum alias non valeat.

§ 6.- Si patroni filius priore gradu sit heres scriptus, secundo exheredatus, huic non nocet exheredatio, quum voluntate patris vel extiterit heres vel existere potuerit: neque enim debet videri pater indignum existimasse filium bonis libertorum, quem ad hereditatem suam primum vocaverit. Ac ne eum

12.- ULPIANUS; *On the Edict, Book XLIV*.- If a patron, having made his will in accordance with military law, should disinherit his son by passing him over in silence in his will, the disinheritance will prejudice him, for he will be actually disinherited.

§ 1.- If anyone should assign a freedman to his son whom he has disinherited, the son can obtain praetorian possession of the estate of the freedman.

§ 2.- If a son should be disinherited by his father without any evil intention, but for some other reason, the disinheritance will not prejudice him; as, for instance, suppose that he has been disinherited on account of insanity, or because he was under the age of puberty, and the appointed heir was charged to transfer the estate to him.

§ 3.- When anyone is disinherited, and it is judicially decided that this was not the case, even should the judgment be wrongful, he will not be excluded; for matters which are decided by a court must stand.

§ 4.- If the son of a patron is disinherited, and succeeds in obtaining a judicial decision that the will is inofficious, but is defeated with reference to a part of his claim, let us see whether the disinheritance will prejudice his rights. I think that it will prejudice them, because the instrument by which he was disinherited is valid.

§ 5.- Disinheritance causes no injury to children if the will is such that the estate cannot be entered upon, or praetorian possession obtained by it; for it is absurd that a will should be valid only so far as the disinheritance is concerned, while it is void in other respects.

§ 6.- Where the son of a patron is appointed heir in the first degree, and is disinherited in the second, the disinheritance does not prejudice him, as he has been, or can be the heir under the will of his father; for his father could not be believed to have thought that his son was unworthy to obtain the property of his

12.- ULPIANO; *Comentarios al Edicto, libro XLIV*.- Si el patrono, habiendo hecho testamento según fuero militar, hubiere desheredado a su hijo no haciendo mención de él, deberá perjudicarle a éste la desheredación; porque es verdad que éste fue desheredado.

§ 1.- Si uno le hubiere asignado un liberto a su hijo, y a éste lo hubiere desheredado, puede ser admitido a la posesión de los bienes del liberto.

§ 2.- Si alguno hubiera sido desheredado no con mala voluntad del ascendiente, sino por otra causa, no le perjudica la desheredación; supón, por ejemplo, que fue desheredado por causa de locura, o porque era impúbere, y que al heredero instituido se le rogó que le restituyera la herencia.

§ 3.- Si habiendo sido uno desheredado, se hubiera fallado, aunque malamente, que no estaba desheredado, no es repelido; porque se ha de estar a la cosa juzgada.

§ 4.- Si el hijo del patrono, desheredado, hubiere ganado en parte la querella de inoficioso, y en parte hubiera sido vencido, veamos si le perjudicará la desheredación. Y opino que le perjudica, porque es válido el testamento en que fue desheredado.

§ 5.- Mas no les perjudica a los hijos la desheredación de testamento en virtud del cual ni fue adida la herencia, ni pedida la posesión de los bienes; porque es absurdo que el testamento sea válido solamente para esto, para que subsista la desheredación, no siendo válido en lo demás.

§ 6.- Si el hijo del patrono hubiera sido instituido heredero en el primer grado, y desheredado en el segundo, no le perjudica la desheredación, porque por la voluntad del padre o fue heredero, o habría podido serlo; y, a la verdad, no debe parecer que el padre estimó indigno de los bienes de los libertos al

quidem existimandum est summoveri a bonis liberti, qui a primo gradu exheredatus et idem substitutus est. Ergo is, qui institutus sit heres vel primo gradu vel sequenti vel alio quo gradu, licet exheres sit eodem testamento, non est summovendus a liberti bonis.

§ 7.- Si patroni filius emancipatus noluerit adire hereditatem vel qui in potestate est retinere, nihilo minus liberti bonorum possessionem habebit.

13.- IULIANUS; *libro XXVI, Digestorum*.- Filius patroni exheredatus, quamvis nepos ex eo heres scriptus fuerit, bonorum possessionem contra tabulas paternorum libertorum accipere non potest: licet enim necessarius existat patri suo, non per semetipsum, sed per alium ad hereditatem admittitur. Et certe constat: si emancipatus filius exheredatus fuerit et servus eius heres scriptus, etsi iusserit servo hereditatem adire et ita patri suo heres extiterit, non habebit contra tabulas paternorum libertorum bonorum possessionem.

§ 14.- ULPIANUS; *libro XLV, ad Edictum*.- Qui, quum maior natu esset quam viginti quinque annis, libertum capitis accusaverit aut in servitutem petierit, removetur a contra tabulas bonorum possessione.

§ 1.- Si vero accusaverit minor, dicendum est hunc non excludi, sive ipse sive tutor eius vel curator accusaverit.

§ 2.- Sed si minor quidem instituerit accusationem, maior autem factus sententiam acceperit, benigne erit dicendum ignosci ei debere, quia minor coepit. Neque enim imputare ei possumus, cur non deseruit

freedmen, when he himself had called him to his own succession in the first degree. And it is not credible that a son who has been disinherited in the first degree, and appointed as a substitute for the heir, would be excluded from the estate of a freedman. Therefore, a son appointed heir in the first or second degrees, or, indeed, in any other degree, even though he may have been disinherited by the same will, is not excluded from obtaining the estate of his freedman.

§ 7.- If an emancipated son refuses to accept the estate, or a son who is under paternal control refuses to keep it, neither of them will be entitled to possession of the estate of the freedman. .

13.- JULIANUS; *Digest, Book XXVI*.- The disinherited son of a patron, even though his own son has been appointed heir by the latter, cannot obtain praetorian possession of the estates of his father's freedmen in opposition to the terms of the will; for although he may be the necessary heir of his father, he is not admitted to the succession by himself, but through another. And it has been positively decided that if an emancipated son is disinherited and his slave is appointed the heir, and he orders his slave to enter upon the estate, and in this way he becomes the heir of his father, he will not be entitled to praetorian possession of the estates of the freedmen of his father, contrary to the provisions of the will.

14.- ULPIANUS; *On the Edict, Book XLV*.- A patron who is over the age of twenty-five years, and accuses a freedman of a capital crime, or makes application to have him reduced to slavery, shall be excluded from possession contrary to the provisions of the will.

§ 1.- It must be said, however, if he was a minor when he made the accusation, that he is not excluded, whether he himself, or his guardian or curator brought the accusation.

§ 2.- If, however, he should bring the accusation while he was a minor, and after he became of age should obtain judgment, he must be said to be entitled to indulgence, and should be pardoned, because he

hijo, a quien en primer lugar lo hubiere llamado a su propia herencia. Y ciertamente que tampoco se ha de considerar que está excluido de los bienes del liberto el que, desheredado en el primer grado, fue también substituido. Luego el que haya sido instituido heredero en el primer grado, o en el siguiente, o en otro cualquier grado, no ha de ser excluido de los bienes del liberto, aunque esté desheredado en el mismo testamento.

§ 7.- Si el hijo del patrono, emancipado, no hubiere querido adir la herencia, o retenerla el que está bajo potestad, tendrá, sin embargo, la posesión de los bienes del liberto.

13.- JULIANO; *Digesto, libro XXVI* - El hijo del patrono, desheredado, aunque haya sido instituido heredero el nieto habido de él, no puede obtener la posesión de los bienes contra el testamento de los libertos del padre; porque aunque sea heredero necesario de su padre, no es admitido a la herencia por si mismo, sino por medio de otro. Y es ciertamente sabido, que si el hijo emancipado hubiere sido desheredado, e instituido heredero un esclavo suyo, y le hubiere mandado al esclavo que adiese la herencia, y de este modo hubiere sido heredero de su padre, no tendrá la posesión de los bienes contra el testamento de los libertas del padre.

14.- ULPIANO; *Comentarios al Edicto, libro XLV*.- El que siendo mayor de veinticinco años hubiere acusado de delito capital al liberto, o lo hubiere reclamado a esclavitud, es excluido de la posesión de los bienes contra el testamento.

§ 1.- Mas si lo hubiere acusado un menor, se ha de decir que éste no es excluido, ya lo hubiere acusado él mismo, ya su tutor o curador.

§ 2.- Pero si siendo ciertamente menor hubiere formulado la acusación, y hubiere obtenido la sentencia siendo ya mayor, se habrá de decir por benignidad, que se le debe perdonar, porque co-

accusationem vel cur abolitionem non petierit, quum, alterum si fecisset, in turpillianum incideret, alterum non facile impetretur. Certe si abolitione publice data repetit iamiam maior, dicendum est hunc esse removendum: maior enim factus potuit sine timore deserere abolitam accusationem.

§ 3.- Is demum videtur capitis accusasse, qui tali iudicio appetit, cuius poena aut supplicium habuit aut exilium, quod sit vice deportationis, ubi civitas amittitur.

§ 4.- Si tamen quis libertum eo crimine accusaverit, cuius poena non est capitis, verumtamen iudicanti placuit augere poenam, non obest hoc patroni filio: neque enim imperitia aut severitas iudicantis obesse debet patroni filio, qui crimen levius importavit.

§ 5.- Sed si non accusaverit, sed testimonium in caput liberti dixit aut subiecit accusatorem, puto eum a contra tabulas removeri.

§ 6.- Si libertus maiestatis patroni filium accusavit et patroni filius calumniae eum capitis puniri desideravit, non debet repelli hoc edicto. Idem puto et si ab eo petitus retorsit in eum crimina: ignoscendum enim est ei, si voluit se ulcisci provocatus.

§ 7.- Si patris mortem defendere necesse habuerit, an dicendum sit hic quoque ei succurrendum, si libertum paternum propter hoc accusavit, medicum

instituted proceedings while he was a minor. Nor ought we to blame him for not having abandoned the accusation, or for not demanding that it be dismissed, for if he had done one of these things, he would be liable to the penalty of the Turpillian Decree of the Senate, and he could not have easily obtained the other. If, however, the case had been publicly dismissed, and the patron, having attained his majority, should repeat his demand, it must be said that he will be excluded from the succession, for, having become of age, he can without any risk abandon an accusation which has been dismissed.

§ 3.- He only is considered to have brought an accusation of a capital crime who, by means of such a proceeding, seeks to have the accused party suffer the punishment of death or exile, instead of banishment, which causes the forfeiture of civil rights.

§ 4.- If, however, anyone accuses his freedman of an offence, the penalty of which is not a capital one, and, nevertheless, the judge decides to increase the penalty, this will be of no disadvantage to the son of the patron; for neither the ignorance nor the severity of the judge should prejudice the son of the patron, who has brought a less serious accusation against the freedman.

§ 5.- Where, however, he does not accuse him, but gives his testimony against his freedman in a capital case, or provides the accuser, I think that he should be excluded from obtaining possession of his estate contrary to the provisions of the will.

§ 6.- If a freedman accuses the son of his patron of the crime of lese majeste, and the son demands that the freedman be punished for slander, I think that he should not be excluded from the succession under the terms of this Edict; and if he has been accused by him and brings a counter accusation, the same rule will apply, for the patron should be excused, if after having been attacked, he desires to revenge himself.

§ 7.- If a son is compelled to avenge his father's death and accuses his father's freedman, who was his physician, of the crime, or accuses his slave who slept

menzó siendo menor; pues no podemos imputarle que no haya dejado desierta la acusación, o que no haya pedido la abolición, porque si hubiese hecho lo uno, incurriría en el senadoconsulto Turpiliano, y lo otro no lo impetraría fácilmente. Mas si dada públicamente la abolición repitió, siendo ya mayor, la acusación, se ha de decir que ha de ser excluido; porque hecho mayor pudo abandonar sin temor la acusación abolida.

§ 3.- Se reputa que acusó de delito capital solamente el que acusó en juicio tal, que tuvo por pena o el suplicio, o el destierro, que sea en lugar de la deportación, donde se pierde la ciudadanía.

§ 4.- Mas si alguno hubiere acusado al liberto de un crimen, cuya pena no es la capital, pero al juzgador le plugo aumentar la pena, esto no le obsta al hijo del patrono; porque ni la impericia, ni la severidad del juzgador debe perjudicarle al hijo del patrono, que lo acusó de crimen más leve.

§ 5.- Pero si no lo hubiere acusado, sino que prestó testimonio contra la vida del liberto, o indujo al acusador, opino que es excluido de la posesión de los bienes contra el testamento.

§ 6.- Si el liberto acusó del delito de lesa majestad al hijo del patrono, y el hijo del patrono pidió que aquél fuese castigado a pena capital por la calumnia, no debe ser repelido por este Edicto. Lo mismo opino, también si acusado por él volvió contra él la acusación; porque se le debe perdonar, si provocado quiso vengarse.

§ 7.- Si hubiere tenido necesidad de defender la muerte de su padre, ¿se habrá de decir quizá que también en este caso ha de ser socorrido, si acusó al

forte patris aut cubicularium aut quem alium, qui circa patrem fuerat? Et puto succurrendum, si affectione et periculo paternae substantiae ducente necesse habuit accusationem vel calumniosam instituere.

§ 8.- Accusasse autem eum dicimus, qui crimina obiecit et causam perorari usque ad sententiam effecit: ceterum si ante quievit, non accusavit: et hoc iure utimur. Sed si appellatione interposita desiit, benigne dicetur non pertulisse accusationem. Si igitur pendente appellatione decessit libertus, patroni filius admittetur ad bonorum possessionem, quia sententiae libertus morte subtractus est.

§ 9.- Si patroni filius advocacionem accusatori liberti praestitit, non est repellendus: neque enim advocatus accusat.

§ 10.- Si pater testamento caverit, ut accusaretur libertus, quasi venenum sibi parasset aut quid aliud in se admisisset: magis est, ut ignosci liberis deberet, qui non sponte accusaverunt.

§ 11.- Sed et si accusaverit libertum et probaverit crimen patroni filius posteaque hic libertus sit restitutus, non erit repellendus: crimen enim quod intendit etiam perfecit.

15.- TRYPHONINUS; *libro XVII, Disputationum*.- Idem est et si crimen quidem, quod in liberto probatum est, meruerat capitis poenam, benignius

in the same room with him, or any other who was attached to the person of his father, can it be said that relief should be granted him? I think that it should be, if it was necessary for him to bring an accusation against the freedman of his father, and he was influenced by motives of affection, and the risk he ran of losing his father's estate if he did not do so, even though the accusation should prove to be false.

§ 8.- Moreover, we say that he has brought an accusation who alleges that another is guilty of crime, and causes the case to be tried until sentence is imposed. If, however, he does not proceed so far, he is not considered to have brought the accusation, and this is our present practice. But if he should desist after an appeal is taken, it has been very equitably decided that he has not prosecuted the case to a conclusion. Hence, if the freedman dies while the appeal is pending, the son of the patron shall be permitted to obtain possession of his estate, because the freedman has been removed by death from the consequences of the sentence.

§ 9.- If the son of a patron gives his assistance, as an advocate, to the accuser of a freedman of his father, he should not be excluded from the succession on this account, for the advocate does not make the accusation.

§ 10.- Where a father provides by his will that his freedman shall be accused of having prepared poison for him, or to have committed some other act of this kind to his injury, the better opinion is that his children who did not voluntarily bring the accusation ought to be excused.

§ 11.- If the son of a patron should accuse the freedman of his father, and should convict him of a crime, and the said freedman should afterwards be restored to his rights, he shall not be excluded, for he prosecuted the accusation which was brought to the end.

15.- TRYPHONINUS; *Disputations, Book XVII*.- The same rule applies where the crime which was proved against the freedman carries with it capital

liberto de su padre por esto, porque acaso había sido médico de su padre, o camarero, u otro cualquiera que había estado cerca de su padre? Y opino que se le ha de socorrer, si impulsándole el efecto o el temor de perder los bienes del padre tuvo necesidad de entablar acusación aunque calumniosa.

§ 8.- Mas decimos que acusó el que imputó crímenes, e hizo que la causa se persiguiese hasta la sentencia; pero si desistió antes, no acusó, y observamos este derecho. Mas si interpuesta apelación la desamparó, se dirá por benignidad, que no llevó a término la acusación. Si, pues, falleció el liberto estando pendiente la apelación, el hijo del patrono será admitido a la posesión de los bienes, porque con la muerte se libró de la sentencia el liberto.

§ 9.- Si el hijo del patrono prestó sus servicios de abogado al acusador del liberto, no ha de ser excluido; porque el abogado no acusa.

§ 10.- Si el padre hubiere dispuesto en el testamento que fuese acusado el liberto, como si le hubiese preparado un veneno, o hubiese cometido contra él algún otro delito, es más cierto que se debería perdonar a los hijos, los cuales no acusaron espontáneamente.

§ 11.- Mas si el hijo del patrono hubiere acusado al liberto, y probado el crimen, y después este liberto hubiera sido restituido, no habrá de ser repelido; porque llevó a término la acusación que intentó.

15.- TRIFONINO; *Disputas, libro XVII*.- Lo mismo es, también si el crimen que se probó contra el liberto había merecido pena capital, pero el liberto

autem punitus est libertus, veluti tantum relegatus: de calumniatore enim sensit praetor.

16.- ULPIANUS; *libro XLV, ad Edictum*.- In servitute petisse non is videtur, qui ei, qui in possessione erat servitutis, petenti se in libertatem contradixit, verum is, qui ex libertate petit in servitute.

§ 1.- Sed et si quis non totum suum, sed pro parte vel usum fructum in eo suum dicat vel quid aliud, quod habere non potest in eo, nisi servus sit, an repellatur quasi in servitute petierit? Quod est verius.

§ 2.- Si petierit in servitute et optinuerit, mox cognita veritate passus sit in libertate morari, non debet ei obesse, maxime si habuit iustam causam errandi.

§ 3.- Petisse in servitute non videtur, qui ante litem contestatam destitit: sed et si post litem contestatam, dicendum est nec id nocere debere, quia non usque ad sententiam duravit.

§ 4.- Si patroni filius sit vel exheredatus vel si in servitute libertum patrum petiit vel capitis accusaverit libertum, non nocet hoc liberis eius, qui in potestate non sunt: et hoc Divi Fratres Quintillii Rescripserunt.

§ 5.- Si quis bonorum possessionem contra tabulas liberti acceperit, ab omni liberti iudicio repellitur, nec tantum si ipsi liberti heres fuerit scriptus, verum etiam si impuberi filio substitutus. Nam et Iulianus

punishment, but the freedman was subjected to a lower penalty; as, for instance, he was only banished, for the Praetor only takes cognizance of a patron who brings a false accusation.

16.- ULPIANUS; *On the Edict, Book XLV*.- He is not considered to have demanded that a freedman be reduced to slavery, who opposes one who is already a slave, and denies that he be given his freedom; but he who demands that one who is in the enjoyment of freedom shall be reduced to slavery.

§ 1.- Where anyone alleges that a slave is not entirely his, but that he has a share in him, or the usufruct of him, or some other right to which he would not be entitled unless the man was a slave, shall he be excluded from the succession of the freedman, as demanding that he be returned to slavery? This is the better opinion.

§ 2.- If a patron should demand that his freedman should be reduced to slavery, and should succeed, and the truth having been afterwards ascertained, he suffers him to remain at liberty, this should not prejudice him, especially if he had good cause for his mistake.

§ 3.- He is not considered to have made a demand to reduce the freedman to slavery who abandons the case before issue has been joined. If, however, he does so after issue has been joined, it must be said that this will not prejudice him, because he did not continue until a decision had been rendered.

§ 4.- If the son of a patron, who has either been disinherited, or has demanded that a freedman of his father should be returned to slavery, or has accused the freedman of a capital crime, it will not prejudice his children, if they are not under his control. This the Divine Brothers stated in a Rescript to the Quintilians.

§ 5.- If anyone should obtain praetorian possession of the estate of his freedman contrary to the provisions of his will, not only if he was appointed heir by the said freedman, but also if he had been

fue castigado con más benignidad, por ejemplo, siendo relegado solamente; porque el Pretor se refirió al calumniador.

16.- ULPIANO; *Comentarios al Edicto, libro XLV*.- No se considera que reclamó a uno a esclavitud el que contradijo al que estaba en posesión de la esclavitud al reclamar éste su libertad, sino el que del estado de libertad reclamó a uno para el de esclavitud.

§ 1.- Pero si alguno dijera que el liberto no es suyo en totalidad, sino en parte, o que sobre él tiene el usufruto, o alguna otra cosa que no puede tener sobre él, como éste no sea esclavo, ¿será repelido, como si lo hubiere reclamado a esclavitud? Y esto es lo más cierto.

§ 2.- Si lo hubiere reclamado a esclavitud, y lo hubiere obtenido, y después, conocida la verdad, hubiera consentido que viviese en libertad, esto no debe perjudicarle, mayormente si tuvo justa causa para errar.

§ 3.- No se considera que reclamó a uno a esclavitud el que desistió antes de haber sido contestada la demanda; pero si después de contestada la demanda, también se ha de decir que tampoco debe perjudicarle esto, porque no persistió hasta la sentencia.

§ 4.- Si el hijo del patrono hubiera sido desheredado, o si reclamó a esclavitud al liberto de su padre, o si hubiere acusado de delito capital al liberto, esto no les perjudica a sus hijos, que no están bajo su potestad; y esto respondieron por Rescripto los Divinos Hermanos a los Quintilios.

§ 5.- Si alguno hubiere obtenido la posesión de los bienes contra el testamento del liberto, es repelido de toda última voluntad del liberto, y no solamente si hubiere sido instituido heredero del mismo liberto,

scripsit, si post petitam bonorum possessionem adierit impuberis filii liberti hereditatem patronus, denegari ei debere actiones.

§ 6.- Sed et si quid codicillis fuerit patrono relictum vel mortis causa donatum, simili modo horum quoque persecutio denegabitur.

§ 7.- Nonnumquam plane post petitam bonorum possessionem dabitur patrono legati persecutio, si nihil ad emolumentum eius perventurum sit, quia forte rogatus est alii restituere.

§ 8.- Praeterea non tantum quod ipsis nominatim datum est, id se Praetor denegaturum ait, verum etiam si quid proponas ad ipsos per alios perventurum, ut puta per subiectas personas, quod quidem sunt habituri, non restituri.

§ 9.- Dabimus legati petitionem patrono, si servo patroni dederit libertatem pretio eius patrono praelegato.

§ 10.- Ei, qui substitutus erit patrono, qui contra tabulas possessionem petierit, actio eius partis, cuius patrono possessio data erit, non datur.

§ 11.- Si patronus sit substitutus et patronus vivo testatore decesserit, filium patroni petentem contra tabulas bonorum possessionem non solius substituti partem occupare, verum omnibus heredibus pro parte aliquid auferre constat.

substituted for his minor son, he will be excluded from all the benefits under the will of the said freedman. For Julianus says that if a patron, after making a demand for the praetorian possession of the estate of his freedman, should enter upon the estate of the minor son of said freedman, actions must be denied him.

§ 6.- If, however, anything should be left to the patron by a codicil or a donation mortis causa, in like manner participation in these benefits shall be refused him.

§ 7.- Sometimes it is evident that the right to claim a legacy should be granted to the patron, after he has demanded possession of the estate of his freedman, if he will receive no benefit therefrom; for the reason that he has been asked to transfer the legacy to another.

§ 8.- Again, the Praetor says that he will not only refuse an action to the patron to recover what is specifically given to him, but also to recover anything which you may suggest might come into his hands through others; as, for instance, through those who are subjected to his authority, because he can retain such property, and will not be obliged to surrender it.

§ 9.- We should grant the right to demand a bequest to a patron if the freedman had bequeathed a preferred legacy of the price of a slave to his patron, on condition that the latter should liberate the said slave.

§ 10.- If the substitute for a patron should be asked by him to deliver possession of the estate of a freedman contrary to the provisions of the will, an action to recover the share of him to whose patron possession was given shall not be granted.

§ 11.- Where a patron has been substituted for the heir, and dies during the lifetime of the testator, it is settled that if the son of the patron demands praetorian possession of the estate of the freedman contrary to the provisions of the will he can not only

sino también si hubiera sido substituido a un hijo impúbbero; porque también Julianus escribió, que si después de pedida la posesión de los bienes hubiere adido el patrono la herencia del hijo impúbbero del liberto, se le deben denegar las acciones.

§ 6.- Mas también si en codicilos se le hubiere dejado alguna cosa al patrono, o donado por causa de muerte, se le denegará de igual modo la acción persecutoria de estas cosas.

§ 7.- A veces ciertamente después de pedida la posesión de los bienes se le dará al patrono la acción persecutoria de un legado, si ningún emolumento hubiera de pertenecerle, porque acaso se le rogó que lo restituyera a otro.

§ 8.- Además dice el Pretor, que él denegará no solamente lo que nominalmente se les dio a ellos, sino también lo que dijeras que por medio de otros había de ir a poder de los mismos, por ejemplo, por medio de personas sujetas a ellos; si ciertamente esto lo hubieran de tener ellos, y no lo hubieran de restituir.

§ 9.- Le daremos al patrono la petición del legado, si le hubiere dado la libertad a un esclavo el patrono, habiéndole prelegado su precio al patrono.

§ 10.- Al que hubiere sido substituido al patrono, que hubiere pedido la posesión de los bienes contra el testamento, no se le da acción por aquella parte, cuya posesión hubiere sido dada al patrono.

§ 11.- Si el patrono fuera substituto, y el patrono hubiere fallecido viviendo el testador, es sabido que el hijo del patrono, pidiendo la posesión de los bienes contra el testamento, no solamente ocupa la parte del substituto, sino que a todos los herederos les quita

acquire the share of the substitute, but can deprive all the heirs of a certain portion of their inheritance, in order to make up the amount to which he is legally entitled.

17.- IDEM; *libro XLVII, ad Edictum*.- Liberto sine liberis mortuo in primis patronus et patrona bonorum possessionem accipere possunt et quidem simul. Sed et si patrono et patronae proximi sunt aliqui, simul admittentur.

18.- PAULUS; *libro XLIII, ad Edictum*.- Patronae quidem liberi etiam volgo quaesiti accipient materni liberti bonorum possessionem, patroni autem non nisi iure quaesiti.

19.- ULPIANUS; *libro IV, Disputationum*.- Si patronus ex minore parte quam legitima heres institutus falsum testamentum dixisset nec optinisset, non est ambiguum contra tabulas ei non deferri bonorum possessionem, eo quod facto suo perdidit hereditatem, quum temere falsum dixit.

§ 1.- Quod si ex debita parte fuerit institutus, sive adiit sive non, a contra tabulas bonorum possessione repellitur, quasi debitam sibi portionem acceperit. nec poterit contra tabulas bonorum possessionem petere.

20.- IULIANUS; *libro XXV, Digestorum*.- Libertus sub condicione iurisiurandi, quam Praetor remittere solet, patronum instituit heredem: non puto dubitandum, quin a bonorum possessione submoveatur: verum est enim eum heredem factum.

§ 1.- Si Titio legatum fuisset eiusque fidei com-

17.- THE SAME; *On the Edict, Book XLVII*.- When a freedman dies without leaving any children, his patron and his patroness can, at once, demand praetorian possession of his estate, and they can even do so together. Any persons who are next of kin to the patron and patroness can also be admitted to the succession together.

18.- PAULUS; *On the Edict, Book XLIII*.- The illegitimate children of a patroness can also obtain praetorian possession of the estate of a freedman of their mother, but children cannot be admitted to the succession of the estate of a freedman of their father unless they are legitimate.

19.- ULPIANUS; *Disputations, Book IV*.- Where a patron is appointed heir to a smaller share of an estate than he is legally entitled to, and alleges that the will is forged, and loses his case, there is no doubt that praetorian possession of the estate contrary to the provisions of the will should not be granted him, for the reason that he lost the estate by his own act when he rashly declared that the will was forged.

§ 1.- If he has been appointed heir to the share of the estate to which he was entitled, whether he accepts it or not, he will be excluded from praetorian possession of the same contrary to the provisions of the will; for, as he received the share to which he was entitled, he cannot demand praetorian possession contrary to the provisions of the will.

20.- JULIANUS; *Digest, Book XXV*.- A freedman appointed his patron his heir, under the condition of his being sworn (which condition the Praetor is accustomed to remit), and I do not think that there is any doubt that the patron will be excluded from praetorian possession of the estate, as it is true that he has been appointed heir.

§ 1.- Where a legacy was left to Titius, and he was

algo a proporción de su parte.

17. EL MISMO; *Comentarios al Edicto, libro XLVII*.- Habiendo fallecido sin hijos el liberto, pueden obtener en primer lugar la posesión de los bienes el patrono y la patrona, y ciertamente al mismo tiempo; pero si hay algunos próximos parientes del patrono y de la patrona, también son admitidos conjuntamente.

18.- PAULO; *Comentarios al Edicto, libro XLIII*.- Los hijos de la patrona, aunque habidos del vulgo, obtendrán la posesión de los bienes del liberto materno, pero los del patrono, solamente si hubieran sido tenidos legítimamente.

19.- ULPIANO; *Disputas, libro IV*.- Si el patrono instituido heredero de menor parte que la legítima hubiese acusado de falso el testamento, y no hubiese vencido, no es dudoso que no se le defiere la posesión de los bienes contra el testamento, porque por un hecho suyo perdió la herencia, pues temerariamente lo acusó de falso.

§ 1.- Mas si hubiere sido instituido en la parte debida, ya si adió, ya si no, es repelido de la posesión de los bienes contra el testamento, como si hubiere obtenido la porción que se le debía; y no podrá pedir la posesión de los bienes contra el testamento.

20.- JULIANO; *Digesto, libro XXV*.- Un liberto instituyó heredero al patrono bajo condición de juramento, que suele remitir el Pretor; no creo que se haya de dudar que será excluido de la posesión de los bienes, porque es verdad que él fue hecho heredero.

§ 1.- Si a Ticio se le hubiese hecho un legado, y se

missum, ut patrono restitueret, denegatur legatorum actio Titio, si patrono pro debita parte a scripto herede fuerit satisfactum.

§ 2.- Libertus patronum et extraneum coniunctim ex parte dimidia heredem scripsit: quadrans, ex quo institutus erat patronus, totus ipsi imputari debebit, residuum ex debita sibi parte omnibus heredibus pro portione cuiusque aufert.

§ 3.- Idem servari conveniet in legato, quod patrono coniunctim et Titio datum fuerit, ut pars legati in portionem debitam patrono imputetur, ex reliqua parte tantum Titio detrahatur, quantum ab herede, pro rata portione.

§ 4.- Si libertinus filium emancipatum sub condicione heredem instituerit et deficiente condicione substitutus adierit, quaero, utrum patrono adversus substitutum in partem debitam praetor an emancipato filio in totam hereditatem succurrere debeat. Respondi, quum pater filium sub condicione primo gradu heredem instituit, si deficiente condicione, sub qua filius heres institutus est, ad secundum gradum hereditas pertinet vel adhuc pendente condicione filius decesserit, patrono partis debitae bonorum possessionem adversus substitutum competere.

Idemque est et si filius vel non petierit bonorum possessionem tempore exclusus vel repudiaverit. Si vero deficiente condicione hereditas ad filium pertineat, emancipatum potius tuebitur Praetor adversus substitutum. Existimo autem, quotiens sub condicione heres filius scribitur, alias necessariam esse exheredationem a substitutis, alias super-vacuum: nam si id genus condicionis fuerit, quae in

charged to transfer it to his patron, an action to recover the legacy should be denied to Titius, if the amount to which the patron is legally entitled has been paid to him by the appointed heir.

§ 2.- A freedman appointed his patron and a stranger joint heirs to half of his estate. The fourth to which the patron was appointed heir should, all of it, be credited to him on his legal share, and the remainder which is due on said share should be deducted pro rata from the shares of all the other heirs.

§ 3.- The same rule should be observed with reference to a legacy bequeathed to the patron and Titius conjointly; so that a part of the legacy may be credited upon the share due to the patron, and as much should be deducted from the share of Titius, proportionally, as that which ought to be deducted from the portion of the heir.

§ 4.- Where a freedman appoints his emancipated son his heir under a certain condition, and the condition having failed, his substitute enters upon the estate, I ask whether the Praetor should give the patron possession of the share to which he was entitled against the substitute, or whether he should come to the relief of the emancipated son with reference to the entire estate. The answer was that, as the father had appointed his son his heir in the first degree conditionally, and the condition under which he was appointed had failed to be fulfilled, the estate will belong to the second degree; or if the son should die while the condition is still pending, the patron will acquire possession of the estate to the amount to which he was entitled by law, as against the substitute.

The same rule will apply where the son does not obtain possession of the estate through having been excluded by lapse of time, or because of his rejecting it. Therefore, if the condition should fail to be fulfilled, the estate will belong to the son, and the Praetor will, in preference, protect the emancipated son against the substitute. Moreover, I think whenever a son is appointed an heir conditionally,

hubiere encomendado a su fidelidad que lo restituyese al patrono, se le deniega a Ticio la acción de los legados, si por el heredero instituido se le hubiere satisfecho al patrono con arreglo a la porción debida.

§ 2.- Un liberto instituyó conjuntamente herederos de la mitad al patrono y a un extraño; toda la cuarta parte, en que había sido instituido el patrono, se le deberá atribuir al mismo, y lo restante de la parte que se le debe se lo quita a todos los herederos con arreglo a la porción de cada uno.

§ 3.- Lo mismo convendrá que se observe en el legado, que conjuntamente hubiere sido dado al patrono y a Ticio, de suerte que la parte del legado le sea computada al patrono para la porción debida, y de la restante parte se le deduzca a Ticio tanto cuanto al heredero proporcionalmente.

§ 4.- Si un libertino hubiere instituido heredero bajo condición a un hijo emancipado, y faltando la condición hubiere adido la herencia el substituto, pregunto si el Pretor deberá auxiliar contra el substituto al patrono en cuanto a la porción debida, o al hijo emancipado respecto a toda la herencia. Respondí, que habiendo el padre instituido bajo condición heredero al hijo en el primer grado, si, faltando la condición bajo la cual fue instituido heredero el hijo, la herencia le pertenece al segundo grado, o el hijo hubiere fallecido estando todavía pendiente la condición, le compete al patrono contra el substituto la posesión de los bienes de la parte debida.

Y lo mismo es, también si el hijo o no hubiere pedido, habiendo sido excluido por el tiempo, la posesión de los bienes, o hubiere repudiado la herencia. Pero si faltando la condición le perteneciera al hijo la herencia, el Pretor amparará preferentemente al emancipado contra el substituto. Mas opino, que cuando el hijo es instituido heredero bajo condición, unas veces es necesaria la desheredación respecto a

potestate filii esset, veluti "quum testamentum fecerit", puto etiam ommissa condicione filium locum substitutis facere: si vero condicio non fuerit in potestate filii, veluti "si Titius consul factus fuerit", tunc substitutus non admittitur, nisi filius ab eo nominatim exheredatus fuerit.

§ 5.- Si libertus filium emancipatum heredem instituerit eiusque fidei commiserit, ut totam hereditatem Sempronio restitueret, et filius, quum suspectam sibi hereditatem diceret, iussu praetoris adierit eam et sempronio restituerit: non inique patrono bonorum possessio partis debita dabitur, perinde ac si non filius, sed is cui hereditas restituta est libertus heres exstisset. Item cum filius hereditatem liberti patris omiserit et coheres eius totius hereditatis onus suscepit, danda erit patrono bonorum possessio. Utrouque enim casu non filio, sed extraneo pars eripitur.

21.- IDEM; *libro XXVI, Digestorum*.- Ex tribus patronis uno cessante bonorum possessionem petere duo aequas partes habebunt.

22.- MARCIANUS; *libro I, Institutionum*.- Si filius familias miles manumittat, secundum Iuliani quidem sententiam, quam libro vicensimo septimo Digestorum probat, patris libertum faciet: sed quamdiu, inquit, vivit, praefertur filius in bona eius patri. Sed Divus Hadrianus Flavio Apro Rescriptis suum libertum eum facere, non patris.

that, in some instances, disinheritance is necessary with reference to the substitution, and in others it is superfluous. For if the condition should be of such a nature that it is in the power of the son to comply with it; for instance, if it was that he should make a will, I hold that if the condition was not fulfilled, the son must give way to the substitute. If, however, the condition was such that it was not in the power of the son to comply with it, for instance, if it was that Titius should become Consul, then the substitute ought not to be admitted to the succession, unless the son had been specifically disinherited.

§ 5.- If a freedman should appoint his emancipated son his heir, and charge him to deliver the entire estate to Sempronius, and the son should allege that he suspected the estate of being insolvent, but should enter upon 'the same by order of the Praetor and transfer it to Sempronius, possession of the share of the estate to which he was entitled will, very properly, be granted to the patron, just as if not the son, but he to whom the estate was transferred, had been the heir of the freedman. Moreover, if the son should reject the inheritance of his father's freedman, and his co-heir should assume all the burdens of the estate, praetorian possession must be granted to the patron; for, in either event, the share of the latter is not taken from that of the son, but from that of the stranger.

21.- THE SAME; *Digest, Book XXVI*.- Where one of three patrons fails to demand praetorian possession of the estate, the other two will be entitled to equal shares of the same.

22.- MARCIANUS; *Institutes, Book I*.- If a son under paternal control, who is a soldier, manumits his slave, he makes him the freedman of his father, according to the opinion of Julianus, which he adopts in the Twenty-seventh Book of the Digest; but he says that as long as his son is living, he will have the preference over his father with reference to the estate of the freedman. The Divine Hadrian stated in a Rescript addressed to Flavius Aper, that, in this instance, he made him his own freedman and not that of his father.

los substitutos, y otras es superflua; porque si tal fuere la clase de la condición, que fuese potestativa para el hijo, como: «cuando hubiere hecho testamento», opino que aun habiendo faltado la condición hace el hijo lugar a los substitutos; mas si la condición no estuviere en la potestad del hijo, por ejemplo: «si Ticio hubiere sido hecho cónsul», entonces no es admitido el substituto, a no ser que el hijo hubiere sido nominalmente desheredado con relación a él.

§ 5.- Si el libertus hubiere instituido heredero a su hijo emancipado, y hubiere encomendado a su fidelidad que restituyese a Sempronio toda la herencia, y el hijo, habiendo dicho que la herencia era sospechosa para él, la hubiere adido por orden del Pretor, y la hubiere restituido a Sempronio, no injustamente se le dará al patrono la posesión de los bienes de la parte debida, lo mismo que si hubiese quedado siendo heredero del libertus no el hijo, sino aquel a quien le fue restituida la herencia. Asimismo, cuando el hijo hubiere prescindido de la herencia de un libertus del padre, y su coheredero hubiere aceptado la carga de toda la herencia, se le habrá de dar al patrono la posesión de los bienes; porque en uno y otro caso la parte no se le quita al hijo, sino al extraño.

21.- EL MISMO; *Digesto, libro XXVI*.- Dejando de pedir uno de tres patronos la posesión de los bienes, tendrán los otros dos iguales partes.

22.- MARCIANO; *Instituta, libro I*.- Si un hijo de familia, militar, manumitiese a un esclavo, según la opinión de Juliano, que aprueba en el libro vigésimo séptimo del Digesto, lo hará libertus de su padre, pero dice que, mientras vive, el hijo es preferido al padre en los bienes de aquél; mas el Divino Adriano respondió por rescripto a Flavio Apro, que él lo hace libertus suyo, y no del padre.

23.- IULIANUS; *libro XXVII, Digestorum*.- Si libertus praeterito patrono extraneum instituerit heredem et patronus, antequam contra tabulas bonorum possessionem petierit, in adoptionem se dederit, deinde scriptus omiserit hereditatem: patronus totorum bonorum liberti possessionem ut legitimus petere potest.

§ 1.- Si libertus intestato decesserit relictis patroni filio et ex altero filio duobus nepotibus, nepotes non admittuntur, quamdiu filius esset, quia proximum quemque ad hereditatem liberti vocari manifestum est.

§ 2.- Si autem ex duobus patronis alter unum filium, alter duos reliquisset, dixi viriles inter eos partes fieri.

24.- IDEM; *libro LXV, Digestorum*.- Communi liberto si ex duobus patronis alter iusiurandum exegerit ne uxorem ducat, vel vivo liberto decesserit: is qui extra hanc culpam fuerit vel supervixerit partis utrique debitae bonorum possessionem solus habebit.

25.- IDEM; *libro I, ad Urseium Ferozem*.- Quamdiu patrono bonorum possessio partis debitae dari potest, exceptio debitoribus datur adversus heredem petentem: "si non in ea causa sit patronus, ut bonorum possessionem pro parte debita contra tabulas petere possit".

26.- AFRICANUS; *libro II, Quaestionum*.- Libertus octoginta habenti fundus quadraginta legatus est: is die cedente legati decessit extraneo herede instituto. Respondit posse patronum partem debitam vindicare: nam videri defunctum mortis tempore amplio rem centum, quum hereditas eius propter computationem legati pluris venire

23.- JULIANUS; *Digest, Book XXVII*.- If a freedman should pass over his patron in his will and appoint a foreign heir, and his patron should give himself in adoption before demanding praetorian possession in opposition to the terms of the will, and the appointed heir should reject the estate, the patron can, then, as heir at law, demand possession of the entire estate of the freedman.

§ 1.- If a freedman should die intestate, and his patron should have a son and two grandsons by another son, the grandsons shall not be admitted to the succession of the freedman, as long as there is a son, because it is evident that the person who is in the nearest degree is the one who is called to the succession of the freedman.

§ 2.- Moreover, if the freedman had two patrons, one of whom left a son and the other left two, I stated that the estate should be equally divided between them.

24.- THE SAME; *Digest, Book LXV*.- Where two patrons had a freedman in common, and one of them required him to swear that he would not marry, and the other to whom this fault could not be imputed either died during the lifetime of the freedman, or survived him, he alone can acquire the shares of the estate to which both were legally entitled.

25.- THE SAME; *On Urseius Ferox, Book I*.- Whenever praetorian possession of the share of the estate due to him can be granted to a patron, an exception may be granted to the debtors against the heir who demands payment, if the patron should not, in opposition to the terms of the will, demand praetorian possession of the share to which he is legally entitled.

26.- AFRICANUS; *Questions, Book II*.- A freedman devised land worth forty sesterces out of his estate which was valued at eighty, and after having appointed a stranger his heir, died on the day when the devise became due. I gave it as my opinion that the patron could demand the share of the estate to which he was entitled by law; for the deceased, at the

23.- JULIANO; *Digesto, libro XXVII*.- Si, habiendo preterido al patrono, el libertus hubiere instituido heredero a un extraño, y el patrono se hubiere dado en adopción antes que hubiere pedido la posesión de los bienes contra el testamento, y después el instituido hubiere prescindido de la herencia, el patrono puede pedir como heredero legítimo la posesión de los bienes del libertus.

§ 1.- Si el libertus hubiere fallecido intestado, dejando un hijo del patrono, y de otro hijo dos nietos, los nietos no serán admitidos mientras vive el hijo, porque es manifiesto que a la herencia del libertus es llamado el más próximo.

§ 2.- Mas si de dos patronos uno hubiese dejado un hijo, y otro dos, dije que se hacen partes viriles entre ellos.

24.- EL MISMO; *Digesto, libro LXV*.- Si de dos patronos uno le hubiere exigido al libertus común el juramento de no tomar mujer, o hubiere fallecido viviendo el libertus, el que no tuviere esta culpa, ó hubiere sobrevivido, tendrá él solo la posesión de los bienes de la porción debida a ambos.

25.- EL MISMO; *Comentarios a Urseyo Ferox, libro I*.- Mientras se le puede dar al patrono la posesión de los bienes de la porción debida, contra el heredero que pide se les da a los deudores esta excepción: «si el patrono no estuviera en el caso de poder pedir en cuanto a la parte debida la posesión de los bienes contra el testamento.»

26.- AFRICANO; *Cuestiones, libro II*.- A un libertus que tenía ochenta se le legó un fundo que valía cuarenta; corriendo el término del legado falleció aquél habiendo instituido heredero a un extraño; respondió, que el patrono podía reivindicar la parte debida, porque se considera que el difunto tuvo al tiempo de la muerte una fortuna que valía más de

possit. Neque referre, heres institutus repudiet legatum liberto relictum nec ne: nam et si de lege Falcidia quaeratur, tale legatum quamvis repudiatum in quadrantem hereditatis imputatur legatariis.

27.- IDEM; *libro IV, Quaestionum*.- Vivo filio si nepos exheredatur, nocebit ei exhereditatio ad bona libertorum avitorum.

28.- FLORENTIUNS; *libro X, Institutionum*.- Si in libertinum animadversum erit, patronis eius ius, quod in bonis eius habituri essent, si is in quem animadversum est sua morte decessisset, eripiendum non est. Sed reliquam partem bonorum, quae ad manumissorem iure Civili non pertineat, fisco esse vindicandam placet.

§ 1.- Eadem servantur in bonis eorum qui metu accusationis mortem sibi consciverint aut fugerint, quae in damnatorum bonis constituta sunt.

29.- MARCIANUS; *libro IX, Institutionum*.- Qui ex causa fideicommissi manumittitur, est quidem libertus manumissoris et tam contra tabulas quam ab intestato ad bona eius venire potest quasi patronus: sed operas ei imponere non potest nec impositas ab eo petere.

§ 1.- Sed si defunctus filio suo legavit servum et rogavit, ut eum manumittat, ea mente, ut plenum ius patroni habeat, defendendum est posse eum operas iure imponere.

time of his death, appeared to have had an estate of more than a hundred sesterces, as it could have been sold for more than that, including the amount of the legacy. It would make no difference whether the appointed heir rejected the legacy left by the freedman, or not; for if a question should arise under the Falcidian Law, a bequest of this kind, even though it were rejected, would be charged by the legatees to the quarter of the estate due to the heir.

27.- THE SAME; *Questions, Book IV*.- If a grandson should be disinherited by his grandfather, the patron, during the lifetime of his son, the disinheritance will prejudice him, so far as the estate of the freedman of his grandfather is concerned.

28.- FLORENTINUS; *Institutes, Book X*.- If a freedman has incurred the penalty of death, the claim of his patron to that share of his estate to which he is entitled will not be extinguished, if he who had been sentenced to be executed should die a natural death; but it has been decided that the remainder of the estate which, under the Civil Law, would not belong to the person who emancipated him, may be demanded by the Treasury.

§ 1.- The same rule should be observed with reference to the estates of those who have killed themselves, or have taken to flight, through fear of being accused, as has been established with respect to the property of those who have been condemned to death.

29.- MARCIANUS; *Institutes, Book IX*.- Where a slave is manumitted under the terms of a trust, he becomes the freedman of the person who manumits him, and the latter can, as his patron, claim his estate, and can obtain praetorian possession of it contrary to the provisions of the will, as well as acquire it ab intestato; but no services can be imposed upon him, nor, if they have been imposed, can they be exacted.

§ 1.- If, however, a father, at his death, should bequeath a slave to his son, and request the latter to manumit him, with the understanding that he shall have the full right of patronage over him, it may be

ciento, porque por razón de la computación del legado su herencia podía ser vendida en más, y no importa que el heredero instituido repudiara, o no, el legado dejado al liberto; porque, también si se tratase de la ley Falcidia, este legado, aunque repudiado, se les computaría a los legatarios para la cuarta de la herencia.

27.- EL MISMO; *Cuestiones, libro IV*.- Si viviendo el hijo fuera desheredado el nieto, le perjudicaría la desheredación en cuanto a los bienes de los libertos del abuelo.

28.- FLORENTINO; *Instituta, libro X*.- Si se hubiere condenado a muerte a un libertino, no se les ha de quitar a sus patronos el derecho que habrían de haber tenido en los bienes de él, si el que fue condenado a muerte hubiese fallecido de muerte natural; pero esta determinado, que la restante parte de los bienes, que por derecho civil no le pertenezca al manumisor, ha de ser reivindicada para el fisco.

§ 1.- Lo mismo, que se estableció en cuanto a los bienes de los condenados, se observa respecto a los bienes de los que por miedo a la acusación se hubieren dado muerte, o huyeren.

29.- MARCIANO; *Instituta, libro IX*.- El que es manumitido por causa de fideicomiso es ciertamente libertus del manumisor, y puede éste como patrono entrar en los bienes de aquél tanto contra el testamento como abintestato, pero no puede imponerle servicios, ni pedirle los impuestos.

§ 1.- Mas si el difunto legó un esclavo a su hijo, y le rogó que lo manumitiera, con la intención de que tenga el pleno derecho de patrono, se ha de defender que después le impone con arreglo a derecho servi-

30.- GAIUS; *libro II, ad Edictum Praetoris Urbani titulo de liberali causa.*- Si quis libertum patrum in servitutem ea voluntate petierit, ut causam evictionis sibi conservet, non amittit beneficium bonorum possessionis.

31.- MARCELLUS; *libro IX, Digestorum.*- Patrono libertus fundum, quem ab eo alienum emerat, legavit et constituit patronus ad se pertinere legatum: contra tabulas bonorum possessionem accipere non potest, etsi nihil profecit ei legatum, quia alienam rem legaverit ei libertus, quia patronus ipse eum liberto vendiderat.

32.- IDEM; *libro X, Digestorum.*- Si libertus meus in servitutem redactus postea ab alio liberatus est et eius coeperit esse libertus, praefertur mihi in contra tabulas bonorum possessione qui eum manumisit.

33.- MODESTINUS; *libro singulari de Manumissionibus.*- Si patronus non aluerit libertum, lex Aelia Sentia adimit eius libertatis causa imposita tam ei, quam ipsi ad quem ea res pertinet, item hereditatem ipsi et liberis eius, nisi heres institutus sit, et bonorum possessionem praeterquam secundum tabulas.

34.- IAVOLENUS; *libro III, ex Cassio.*- Si libertus, quum duos patronos haberet, alterum praeteriit, alterum ex semisse fecit heredem et alteri extraneo semissem dereliquit, scriptus quidem patronus

maintained that he can afterwards legally impose services upon the said slave.

30.- GAIUS; *On the Edict of the Praetor; Title, Concerning the Cause of Freedom, Book II.*- If a son demands that a freedman of his father shall be reduced to slavery, in order to preserve for himself a case of eviction against a third party, he will not lose the benefit of praetorian possession of the estate.

31.- MARCELLUS; *Digest, Book IX.*- Where a freedman devised to his patron a tract of land which he himself had purchased from him but which belonged to another, and the patron asserted that the legacy belonged to him, he cannot obtain praetorian possession of the estate contrary to the provisions of the will, even though the devise was of no benefit to him; because the freedman bequeathed to him property belonging to someone else, as well as for the reason that the patron himself had sold the land to his freedman.

32.- THE SAME; *Digest, Book X.*- If my freedman, after having been returned to slavery, is afterwards liberated by another, he will become the freedman of the latter, and the person who manumitted him will have preference over me in obtaining praetorian possession of the estate of the freedman in opposition to the terms of the will.

33.- MODESTINUS; *On Manumissions.*- If a patron does not support the freedman, the Lex Aelia Sentia deprives him of all the services to which he was entitled in consideration of the grant of freedom; and this includes not only himself but also those who may have any interest in the property, and it also deprives him and his children of the estate, unless the patron was appointed the heir, and it also deprives him of praetorian possession of the estate, except where this is acquired in accordance with the provisions of the will.

34.- IAVOLENUS; *On Cassius, Book III.*- When a freedman, who has two patrons, passes one of them over in his will, and appoints a stranger heir to half of his estate, the patron who is appointed heir can claim

cios.

30.- GAYO; *Comentarios al Edicto del Pretor Urbano, libro II título de los Juicios sobre libertad.*- Si alguno hubiere reclamado a esclavitud a un liberto de su padre, con la intención de conservar para sí la causa de evicción, no pierde el beneficio de la posesión de los bienes.

31.- MARCELO; *Digesto, libro IX.*- Un liberto legó al patrono el fundo ajeno que había comprado de él, y determinó el patrono que le perteneciera a él el legado; no puede obtener la posesión de los bienes contra el testamento, aunque en nada le aprovechó el legado, porque el liberto le legó una cosa ajena, pues el mismo patrono se la había vendido al liberto.

32.- EL MISMO; *Digesto, libro X.*- Si reducido a esclavitud un liberto mío, fue después hecho libre por otro, y hubiere comenzado a ser liberto suyo, es preferido a mí en la posesión de los bienes contra el testamento el que lo manumitió.

33.- MODESTINO; *De las Manumisiones, libro Único.*- Si el patrono no alimentare al liberto, la ley Aelia Sentia priva de las imposiciones por causa de la libertad tanto a él, como a aquel a quien le pertenece la cosa; y asimismo de la herencia a él y a sus descendientes, a no ser que hubiera sido instituido heredero, y de la posesión de los bienes, salvo de la que es conforme al testamento.

34.- JAVOLENO; *Doctrina de Cassio, libro III.*- Si el liberto, teniendo dos patronos, pretirió a uno, y a otro lo hizo heredero de la mitad, y a otro extraño le dejó la otra mitad, el patrono instituido tiene

debitam sibi partem immunem habet: de cetera autem parte patroni, quae supra debitum ei relicta est, et de semisse extraneo relicto alteri patrono pro rata portione satisfieri oportet.

35.- IDEM; *libro III, Epistolarum*.- A liberto suo herede Seius usum fructum fundi Maevio legavit: is libertus Maevio herede relicto decessit: quaero, quum contra tabulas testamenti petierit filius Seii adversus Maevium, utrum deducto usu fructu pars debita ei fundi restituenda sit an solida, quia eorum bonorum acceperit possessionem, quae liberti quum moreretur fuerunt. Respondit: usum fructum in causam pristinam restituendum puto. Optimum itaque erit arbitrum postulare, ut arbitrio eius usus fructus in integrum restitatur.

36.- IDEM; *libro VIII, Epistolarum*.- Libertus, qui solvendo non erat, praeterito patrono extrarios relinquere heredes: quaero, an possit patronus petere contra tabulas bonorum possessionem. respondit: quum a scriptis hereditibus adita est hereditas, patronus contra tabulas bonorum possessionem petere potest, quia solvendo hereditas est, quae inveniat heredem. Et sane absurdum est ius patroni in petenda bonorum possessione contra tabulas aliorum computatione, non iudicio ipsius patroni aestimari auferrique patrono, quod modicum vindicaturus est. Multi enim casus intervenire possunt, quibus expediat patrono petere bonorum possessionem, quamvis aeris alieni magnitudo, quam libertus reliquerit, facultates patrimonii eius excedat, veluti si praedia sunt aliqua ex bonis liberti, in quibus maiorum patroni sepulchra sint et magni aestimat patronus bonorum possessione iura pro parte ea ad se pertinere, vel aliquid mancipium, quod non pretio, sed affectu sit aestimandum. non ergo ideo minus habere debet ius petendae bonorum possessionis, qui animo potius quam aliorum computatione bona liberti aestimat, quum eo

the share to which he is entitled without deduction; and out of the other share which was left over and above what was due to him, and out of the remaining half bequeathed to the stranger, an amount shall be taken pro rata to make up the share to which the other patron is entitled by law.

35.- THE SAME; *Epistles, Book III*.- Seius, having appointed his freedman his heir, charged him with a legacy to Maevius of the usufruct of a tract of land. The freedman died, leaving Msevius his heir. I ask if the son of Seius should demand praetorian possession of the estate of the freedman against Maevius, whether the share of the land which was due to him, after deducting the usufruct, shall be transferred to him; or whether all of it ought to be transferred, because he had obtained possession of the property which belonged to the freedman at the time of his death. The answer was, I think that the usufruct should be restored to its original condition; therefore it would be best to demand an arbiter, in order that, by his decision, the usufruct may be transferred in its entirety.

36.- THE SAME; *Epistles, Book VIII*.- A freedman who died insolvent, having passed over his patron, left his estate to foreign heirs. I ask whether the patron can demand praetorian possession contrary to the provisions of the will. The answer was that, as the estate had been entered upon by the appointed heirs, the patron can demand praetorian possession, because an estate is considered to be solvent ^whenever an heir is found to accept it: And, indeed, it is absurd that the right of the patron to demand praetorian possession of an estate should be based on the estimate of others, and not on the wishes of the patron himself; and that the little that the latter can claim in a case of this kind should be taken from him. For many reasons may arise for which it might be expedient for the patron to demand praetorian possession, even if the amount of the indebtedness which the freedman left behind him exceeds the assets of the estate; for instance, if certain lands are included in the estate of the freedman in which are situated the burial places of the ancestors of the patron, and the latter takes advantage of his rights to

ciertamente inmune la parte a él debida, pero con la restante parte del patrono, que se le dejó sobre lo que se le debía, y con la mitad dejada al extraño, se le deberá hacer pago a prorrata al otro patrono.

35.- EL MISMO; *Epístolas, libro III*.- Seyo legó a Mevio por medio de su liberto y heredero el usufructo de un fundo, y el liberto falleció habiendo dejado heredero a Mevio; pregunto, si habiendo pedido el hijo de Seyo contra Mevio la posesión de los bienes contra el testamento, se le habrá de restituir la parte debida del fundo, deducido el usufructo, porque habrá obtenido la posesión de los bienes, que fueron del liberto al morir. Respondió: opino que el usufructo ha de ser restituido a su primer estado; y así, será lo mejor pedir árbitro para que por su arbitrio sea restituido por entero el usufructo.

36.- EL MISMO; *Epístolas, libro VIII*.- Un liberto, que no era solvente, habiendo preterido al patrono, dejó herederos extraños; pregunto, si podrá pedir el patrono la posesión de los bienes contra el testamento. Respondió, que habiendo sido adida la herencia por los herederos instituidos, puede pedir el patrono la posesión de los bienes contra el testamento, porque es solvente la herencia que halla heredero. Y a la verdad, es absurdo que el derecho del patrono para pedir la posesión de los bienes contra el testamento, sea estimado por el cómputo de los otros, y no a juicio del mismo patrono, y que se le quite al patrono lo poco que ha de adquirir; porque pueden ocurrir muchos casos, en los que le convenga al patrono pedir la posesión de los bienes, aunque el importe de las deudas, que hubiere dejado el liberto, exceda de la cuantía del patrimonio de éste, por ejemplo, si en los bienes del liberto hay algunos predios en los que están los sepulcros de los ascendientes del patrono, y el patrono estima en mucho que por la posesión de los bienes le pertenezcan los derechos respecto a esta parte, o algún esclavo, que

ipso sufficere patrimonium videri possit, quod et heredem habeat et bonorum possessorem.

obtain praetorian possession, in order that the said burial places may be obtained by him as his share, he considering this right to be of great importance to him; or, for example, where a slave whom the patron values, not from the price which he might bring but for the affection which he entertains for him, forms part of the estate. Therefore, the patron should be none the less entitled to claim possession of the estate, who forms an estimate of the value of the property of the freedman, rather by his own opinion, than by the computation of others; for an estate should be considered to be solvent both because an heir is found for it, and for the reason that praetorian possession of the same is demanded.

se haya de apreciar no por su precio, sino por afección. Luego no debe tener menos derecho a pedir la posesión de los bienes el que estima los bienes del liberto más bien por afecto que por la apreciación de los otros, pudiendo parecer por esto mismo que el patrimonio es suficiente para que tenga heredero, y poseedor de los bienes.

37.- ULPIANUS; *libro XI, ad legem Iuliam et Papiam*.- Iulianus ait, si patronus libertatis causa imposita libertae revendiderit, filium eius a bonorum possessione summoverti, scilicet quia nec contra tabulas testamenti liberti bonorum possessionem accipiat, quotiens pater eius donum munus operas liberto revendiderit. Plane si patroni filius libertatis causa imposita revendiderit, nihilo minus familiam bonorum possessionem contra tabulas liberti accipere ait, quia filius revendendo libertatis causa imposita fratrem suum non summovet.

37.- ULPIANUS; *On the Lex Julia et Papia, Book XI*.- Julianus says that if a patron should sell to his freedman the obligations which had been imposed upon him in consideration of liberating him from slavery, his son can be barred from obtaining praetorian possession of the estate of the freedman, for the reason that he does not obtain possession of the said estate in opposition to the terms of the will, as his father sold to him the gift, present, or services for which he obtained his freedom. He says that it is evident if the son of the patron should sell to him the services which were imposed upon the latter in consideration of giving him his liberty, that the brother of the patron can, nevertheless, obtain possession of the freedman's estate contrary to the provisions of the will, because the son, by selling to the latter the services which were the consideration of his freedom, did not bar his uncle from asserting the claim.

37.- ULPIANO; *Comentarios a la ley Julia y Papia, libro XI*.- Dice Juliano, que si el patrono le hubiere revendido a la liberta las imposiciones hechas por causa de la libertad, su hijo es excluido de la posesión de los bienes, a saber, porque no recibe la posesión de los bienes contra el testamento del liberto, cuando su padre le hubiere revendido al liberto el donativo, el regalo o los servicios. Mas si el hijo del patrono hubiere revendido las imposiciones hechas por causa de la libertad, dice que, sin embargo, obtiene la familia la posesión de los bienes contra el testamento del liberto, porque el hijo revendiendo las imposiciones hechas por causa de la libertad no excluye a su hermano.

§ 1.- Si libertus heredem scripserit isque prius, quam de familia quaestionem haberet, adierit hereditatem, patronum ad contra tabulas bonorum possessionem non admitti Iulianus ait: debuit enim et patronus liberti necem vindicare. Quod et in patrona erit dicendum.

§ 1.- If the freedman should appoint an heir, and the latter should enter upon the estate before having put the slaves of the deceased to torture, Julianus says that the patron will not be permitted to obtain possession of the estate in opposition to the terms of the will, for he also should avenge the death of the freedman. This rule, likewise, is applicable to the patroness.

§ 1.- Si el liberto lo hubiere instituido heredero, y éste hubiere adido la herencia antes de promover la cuestión de tormento de los esclavos, dice Juliano que el patrono no es admitido a la posesión de los bienes contra el testamento; porque también el patrono debió vengar la muerte del liberto; lo que se habrá de decir también respecto a la patrona.

38.- TERENCE CLEMENS, *libro IX, al legem Iuliam et Papiam*.- Quaeritur, an filio exheredato

38.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book IX*.- When a son has been disinherited by

38.-TERENCIO CLEMENTE; *Comentarios a la ley Julia y Papia, libro IX*.- Se pregunta, si, habiendo

etiam nepotes ex eo a bonorum possessione liberti excludantur. Quod utique sic dirimendum est, ut vivo filio, donec in potestate eius liberi manent, non admittantur ad bonorum possessionem, ne qui suo nomine a bonorum possessione summoventur per alios eam consequantur, sin autem emancipati a patre fuerint vel alio modo sui iuris effecti, sine aliquo impedimento ad bonorum possessionem admittantur.

§ 1.- Si filius liberti omiserit patris sui hereditatem, hoc patrono proficiet.

39.- IDEM; *libro X, ad legem Iuliam et Papiam*.- Patroni filia si in adoptiva familia sit, ad bona libertorum paternorum admittitur.

40.- IDEM; *libro XII, ad legem Iuliam et Papiam*.- Si pater exheredato filio ita cavit, ut ius in libertum saluum ei esset, nihil ei ad hanc rem nocet exhereditatio.

41.- PAPINIANUS; *libro XII, Quaestionum*.- Si libertus patrono, quod ad debitam portionem attinet, satisfaciatur, invito tamen aliquid extorquere conetur, quid statuendum est, quaeritur. Quid enim, si ex parte debita instituto decem praeterea legentur et rogetur servum proprium, qui sit decem vel minoris pretii, manumittere? Iniquum est et legatum velle percipere et libertatem servo non dare: sed parte debita accepta et legato temperare et libertatem imponere non cogi, ne servum (forte de se male meritum) cogatur manumittere. Quid ergo si solo eodem herede instituto idem libertus petierit? Si substitutum habebit, aequo decreti remedium poterit procedere, ut accepta debita portione cetera pars ad substitutum perveniat ita, ut, si forte servus redimi potuisset, praestaretur libertas:

his father, the question arises whether the grandsons by said son are excluded from praetorian possession of the estate of a freedman of their grandfather. This point must be disposed of by deciding that as long as the son is living, and his children remain under his control, they cannot be admitted to praetorian possession of the freedman's estate to prevent those who are excluded from obtaining possession in their own names, or from acquiring it through the intervention of others. If, however, they have been emancipated by their father, or have become their own masters in any other way, they can obtain praetorian possession of the estate of the freedman without encountering any obstacle.

§ 1.- If the son of the freedman rejects the estate of his father, it will be to the advantage of the patron.

39.- THE SAME; *On the Lex Julia et Papia, Book X*.- If the daughter of the patron belongs to an adoptive family, she can obtain praetorian possession of the estate of a freedman of her father.

40.- THE SAME; *On the Lex Julia et Papia, Book XII*.- If a father makes such a provision for his disinherited son that his right over his freedman remains unimpaired, the disinheritance will not prejudice his rights in this respect.

41.- PAPINIANUS; *Questions, Book XII*.- Where a freedman has satisfied the claim of his patron so far as the share of his estate to which he is legally entitled is concerned, but at the same time, being unwilling to concede it to him, attempts to deprive him of certain property, the question arises, how should the matter be decided? For what if, having appointed the patron his heir to the share to which he is legally entitled, he should bequeath him ten aurei, in addition, and charge him to manumit his own slave who is worth ten aurei, or less? It would be unjust for the patron to decide to accept the legacy, and not free his slave, but, having accepted his legal share, he cannot be compelled to accept the legacy and liberate the slave. This rule is adopted to prevent him from being forced to manumit a slave who is unworthy of it. But what

sido desheredado el hijo, los nietos nacidos de él son excluidos de la posesión de los bienes del liberto. Lo que ciertamente se ha de decidir de suerte, que, viviendo el hijo, no sean admitidos a la posesión de los bienes sus hijos mientras permanecen bajo su potestad, a fin de que no la consigan por medio de otros los que en su propio nombre son excluidos de la posesión de los bienes; mas si hubieren sido emancipados por el padre, o de otro modo se hubieren hecho de propio derecho, sean admitidos sin impedimento alguna a la posesión de los bienes.

§ 1.- Si el hijo de un liberto hubiere prescindido de la herencia de su padre, esto le aprovechará al patrono.

39.- EL MISMO; *Comentarios a la ley Julia y Papia, libro X*.- La hija del patrono, si estuviera en familia adoptiva, es admitida a los bienes de los libertos de su padre.

40.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XII*.- Si el padre, habiendo desheredado a su hijo, dispuso que a éste le quedase salvo su derecho sobre el liberto, la desheredación en nada le perjudica para esto.

41.- PAPINIANO; *Cuestiones, libro XII*.- Si el liberto le satisficiera al patrono lo que atañe a la porción debida, pero intentase arrancarle alguna cosa contra su voluntad, se pregunta ¿qué se ha de determinar? Porque ¿qué se dirá si al instituido en la parte debida se le legaran además diez, y se le rogara que manumitiese a un esclavo propio, que valiese diez o menor precio? Que es injusto que quiera percibir el legado, y no darle la libertad al esclavo, pero que obtenida la parte debida no es obligado a atenerse al legado y a dar la libertad, a fin de que no se vea obligado a manumitir acaso a un esclavo que no lo mereció. Luego ¿qué se dirá si habiendo sido instituido él, único heredero, el liberto hubiere pedido lo mismo? Que si tuviere substituto, podrá ser procedente igualmente el remedio del decreto, a fin

liberti amplectentem Praetor, qui de fideicommisso cognoscit, libertatem servo eum imponere cogat.

42.- IDEM; *libro XIII, Quaestionum*.- Filius, qui patri heres extitit, fratrem exheredatum adrogavit atque ita herede eo relicto defunctus est: bonorum possessionem libertum patris naturalis exheredatus non habebit: nam cui non exheredato talis adoptio noceret, nocere debet exheredato, quoniam poena, quae legibus aut edicto irrogaretur, adoptionis remedio non oblitteraretur. Paulus notat: ei, qui alio iure venit quam eo, quod amisit, non nocet id quod perdidit, sed prodest quod habet: sic dictum est patrono eodemque patronae filio non obesse, quod quasi patronus deliquit, si ut patronae filius venire possit.

§ 1.- Papinianus: Castrensiū bonorum Titium libertus fecit heredem, ceterorum alium: adita est a Titio hereditas: magis nobis placebat nondum patronum possessionem contra tabulas petere posse. Verum illa quaestio intervenit, an omittente eo qui reliqua bona accepit perinde Titio adcrecant, ac si partes eiusdem hereditatis accepissent. Verius mihi videtur intestati iure deferri bona cetera. Titius igitur heres non poterit invitare manumissorem, quum Titio nihil auferatur, nec bonis ceteris, quae nondum ad causam testamenti pertinent.

course must be pursued, if, having appointed his patron his sole heir, the freedman should make the same request of him? If the patron has a substitute, a decision may be rendered in such a way that the patron, having received the share to which he was entitled, the remainder will pass to the substitute; so that if the slave can be purchased, he may obtain his freedom. Where, however, no substitution has been made, the Praetor, who has jurisdiction of the trust, may compel the patron who accepts the estate of the freedman to grant freedom to his slave.

42.- THE SAME; *Questions, Book XIII*.- A son, who was his father's heir, arrogated his disinherited brother and died, leaving the latter his heir. In this case the disinherited son will not have the right to demand possession of the estate of the freedman of his natural father. For although an adoption of this kind does not affect the rights of a son who is not disinherited, it will prejudice those of one that is; as the penalty imposed both by the Civil Law and the Praetorian Edict is not rendered inoperative by the act of adoption. Paulus says that anyone who obtains an estate by a different title than the one which he lost is not prejudiced by the latter, but is benefited by the one which he has acquired. Hence it has been settled by the Edict, that a patron, who is at the same time the son of a patroness, will not be excluded from, obtaining praetorian possession of the estate of a freedman, where he has committed some offence as patron.

§ 1.- Papinianus: A freedman appointed Titius heir to his castrensiā property, and another heir to his other property. Titius entered upon the estate. The better opinion seemed to us to be that the patron could not yet demand praetorian possession of the estate contrary to the provisions of the will. However, the following question arose, namely, if the person to whom the remainder of the estate had been left should refuse to accept it, would it accrue to Titius, just as if they had accepted two different shares of the same estate? It seems to me more equitable that the remainder of the estate should be considered to be without legal heirs. Therefore, Titius could not require the patron to contribute, as the former had lost

de que, percibida la porción debida, vaya la otra parte al substituto, de suerte que si acaso hubiese podido ser comprado el esclavo, se le daría la libertad; porque no habiendo substitución, el Pretor que conoce del fideicomiso, obligará al patrono que acepta la herencia del liberto a darle la libertad al esclavo.

42.- EL MISMO; *Cuestiones, libro XIII*.- Un hijo, que quedó heredero de su padre, recibió en arrogación a su hijo desheredado, y habiéndolo dejado así heredero, falleció; el desheredado no tendrá por la posesión de los bienes al liberto del padre natural; porque si al que no fue desheredado le perjudicaría tal adopción, le debe perjudicar también al que fue desheredado, pues la pena que se impone en las Leyes o en el Edicto no se invalida con el remedio de la adopción. Y observa Paulo: al que sucede por otro derecho distinto del que perdió, no le perjudica el que perdió, sino que le aprovecha el que tiene; y por esto se dijo que al patrono y también hijo de la patrona, no le perjudica lo que como patrono perdió, si pudiera suceder como hijo de la patrona.

§ 1.- Y dice Papiniano: un liberto instituyó a Ticio heredero de sus bienes castrenses, y a otro, de los demás; la herencia fue adida por Ticio; a nosotros nos parecía mejor que el patrono no pudiese pedir todavía la posesión contra el testamento; pero surge la cuestión de si renunciándolos el que obtuvo los demás bienes, le acrecerán éstos a Ticio lo mismo que si ellos hubiesen obtenido partes de una misma herencia. Y me parece más verdadero, que los demás bienes se defieren por derecho de intestado. Así, pues, el heredero Ticio no podrá invitar al manumisor, porque a Ticio nada se le quita, ni en cuanto a los demás bienes, los cuales no pertenecen todavía a la causa del testamento.

nothing, nor had anything been taken from the remaining assets which had not yet been disposed of by the will.

§ 2.- Quum filius liberti impubes, qui subiectus dicitur, ex prima parte bonorum possessionem accipiat, an patronus defuncti possessionem accipere possit, quaesitum est. Et sine dubio qui sequentis gradus sunt, non admittuntur interim: quum enim praecedit alia possessio, qui sequitur accipere non potest. Plane si contra eum qui subiectus dicitur fuerit iudicatum, data non intellegitur. Sed et in patrono pendente controversia idem erit dicendum. Plane quod ad patroni quoque personam pertinet, differri controversia debet.

§ 3.- Si falsum liberti testamentum ab aliis in provincia dictum atque ita res per appellationem extracta esset, defuncta medio tempore patroni filia, quam libertus heredem instituerat, filio mulieris servavit Divus Marcus eam partem bonorum, quam filia patroni vel iure intestati, si vixisset, habere potuit.

43.- IDEM; *libro XIV, Quaestionum*.- Iulianus putat patronum, qui Titio pro parte dimidia heredi instituto substitutus eo deliberante bonorum possessionem contra tabulas accepit, si postea Titius non adierit hereditatem, nihil ei, qui adit hereditatem, abstulisse, non magis quam si sub condicione fuisset institutus. Igitur Titio deliberante res in incerto erit, utrumne semis ex substitutione in possessionem convertatur an Titio adeunte singulis heredibus partes debita auferantur.

§ 2.- Where the minor son of a freedman, who is under the age of puberty and is alleged to be supposititious, obtains praetorian possession of the estate of his father, under the First Section of the Edict, the question arises whether the patron also can obtain praetorian possession. There is no doubt that those who are in the second degree cannot, under the Edict, be admitted to the succession, so long as there are others entitled to it under the First Section; for, as long as another possession has precedence, those that follow cannot be permitted to take place. There is no doubt that if a decision should be rendered against the child who is alleged to be supposititious, it is understood that possession will not be granted him; and the same rule will apply with reference to the patron, while the controversy is pending. It is clear that examination of the controversy should be deferred until the age of puberty, so far as the patron also is concerned.

§ 3.- Where the will of a freedman is alleged to be forged by persons living in a province, and an appeal has been taken from the judgment, and, in the meantime, the daughter of the patron, whom the freedman appointed his heir, dies, the Divine Marcus decided that the share of the estate to which the daughter of the patron would have been entitled if she had lived should be preserved for her son.

43.- THE SAME; *Questions, Book XIV*.- Where a patron, having been appointed a substitute for Titius (who himself had been appointed heir to half of the estate), while the latter was deliberating whether he would accept, or not, obtained praetorian possession of the estate of a freedman contrary to the testamentary provisions, and Titius should afterwards accept the estate, Julianus thinks that he has not been deprived of anything, any more than if he had been appointed under a condition. Therefore, as long as Titius deliberates, it will be uncertain whether half the estate will come into possession of

§ 2.- Se preguntó, si, cuando el hijo impúbere del liberto, que se dice que es supuesto, obtuviera la posesión de los bienes en virtud de la primera parte del Edicto, podría el patrono del difunto obtener la posesión. Y sin duda que los que son del siguiente grado no son admitidos entretanto; porque cuando precede otra posesión no la puede obtener el que sigue. Mas si se hubiere fallado contra el que se dice que es supuesto, no se entiende que fue dada. Mas lo mismo se habrá de decir también respecto al patrono estando pendiente la controversia; y a la verdad, se deberá diferir la controversia también por lo que atañe a la persona del patrono.

§ 3.- Si por otros hubiese sido acusado de falso en una provincia el testamento de un liberto, y de este modo la cuestión hubiese salido de ella por virtud de la apelación, habiendo fallecido en el tiempo intermedio la hija del patrono, a la que el liberto había instituido heredera, el Divino Marco le reservó al hijo de la mujer aquella parte de los bienes que la hija del patrono pudo tener aunque por derecho de intestado, si hubiese vivido.

43.- EL MISMO; *Cuestiones, libro XIV*.- Opina Juliano, que el patrono, que substituido a Ticio instituido heredero de la mitad obtuvo, estando éste deliberando, la posesión de los bienes contra el testamento, no le quitó nada al que adió la herencia, si después no hubiere adido Ticio la herencia, no de otra suerte que si hubiese sido instituido bajo condición; así, pues, estando deliberando Ticio, será incierto si en virtud de la substitución la mitad se convertirá en posesión, o si adiando la herencia Ticio se le quitarán a cada heredero las porciones debidas.

the patron under the substitution, or, whether, if Titius should accept, the heirs will be compelled to contribute from their shares the amount legally due to the patron.

44.- PAULUS; *libro V, Quaestionum*.- Si patronum ex debita portione heredem instituas et pure roges fundum dare eique sub condicione tantundem leges, in condicionem fideicommissum redigitur. Erit tamen et hic quod moveat: onerabitur enim patronus satisfatione fideicommissi. Sed dicendum est ab eo fideicommissario cavendum, a quo patrono legatum est, ut undique patronus suum ius habeat immutatum.

§ 1.- Patronus heres institutus legato ei servo, per quem suppleretur debita ei portio, non petet contra tabulas bonorum possessionem, quamvis servus clusis tabulis decessit.

§ 2.- Si ex bonis, quae mortis tempore fuerunt, debitam partem dedit libertus in hereditate vel legato, servus tamen post mortem liberti reversus ab hostibus augeat patrimonium: non potest patronus propterea queri, quod minus habeat in servo, quam haberet, si ex debita portione esset institutus. Idem est et in alluvione, quum sit satisfactum ex his bonis, quae mortis tempore fuerunt. Idem est et si pars legati liberti relictus ab eo, cui simul datum erat, vel hereditatis nunc illis abstinentibus adcreseat.

45.- IDEM; *libro IX, Quaestionum*.- Si patronus ex sexta et servus eius ex reliqua parte sit heres institutus, nec ex servi portione fideicommissum debetur: at si servus dumtaxat heres institutus est,

44.- PAULUS; *Questions, Book V*.- If you appoint a patron heir to the share to which he is entitled by law, and charge him to transfer absolutely a tract of land to someone, and bequeath him a legacy of the same value as said land, under a condition, the trust becomes conditional. There is something here, however, which may cause annoyance, for the patron will be burdened with the execution of the trust. It must be said in this instance that security should be given by the trustee who is charged with the legacy to the patron, so that the latter may not, under any circumstances, suffer a diminution of his rights.

§ 1.- A patron having been appointed an heir, and a slave having been bequeathed to him in order to make up the share to which he was entitled by law, cannot demand praetorian possession contrary to the terms of the will, even though the slave should die before the will is opened.

§ 2.- If a freedman, either by appointing him his heir, or by a legacy, leaves his patron the share of his estate to which he is legally entitled at the time of his death, and, after the decease of the freedman, another slave having returned from captivity increases the value of the estate; the patron cannot, on this account, complain that he had a smaller interest in the slave than he would have had if he had been appointed heir to the share in him to which he was entitled by law. The same rule applies with reference to alluvium, provided the patron is satisfied out of the estate which the freedman left at the time of his death. This is also the case when a portion of a legacy or of an estate is left to a freedman at the same time with others, and the latter refuse to accept, and their share accrues to the estate of the freedman.

45.- THE SAME; *Questions, Book IX*.- Where a patron is appointed heir to the sixth of the estate of his freedman, and the slave of the latter is appointed heir to the remainder, the trust with which heirs are

44.- PAULO; *Cuestiones, libro V*.- Si al patrono lo instituyeras heredero de la porción debida, y le rogases puramente que diera un fundo, y le legases otro tanto bajo condición, el fideicomiso se sujeta a la condición; pero también en este caso habrá algo que haga vacilar, porque se gravará al patrono con la fianza del fideicomiso. Mas se ha de decir, que al fideicomisario se le ha de dar caución por aquel a cuyo cargo se le hizo el legado al patrono, a fin de que en todo caso el patrono tenga sin menoscabo su derecho.

§ 1.- El patrono instituido heredero, a quien se legó un esclavo para completarle con él la porción debida, no pedirá la posesión de los bienes contra el testamento, aunque el esclavo haya fallecido estando todavía cerrado el testamento.

§ 2.- Si el libertino dio por herencia o legado la parte debida de los bienes que tuviere al tiempo de la muerte, pero un esclavo que volviese del poder de los enemigos después de la muerte del libertino aumentara el patrimonio, no puede querellarse el patrono porque tenga en el esclavo menos de lo que tendría, si hubiese sido instituido heredero de la porción debida. Lo mismo se dice también respecto al aluvión, cuando se haya satisfecho con los bienes que hubo al tiempo de la muerte. Lo mismo es también; si la parte del legado dejado a un libertino a cargo de aquel a quien al mismo tiempo le había sido dado, o si la parte de la herencia, acreciera por abstenerse ahora aquéllos.

45.- EL MISMO; *Cuestiones, libro IX*.- Si el patrono hubiera sido instituido heredero en la sexta parte y su esclavo en la restante, ni aun por la porción del esclavo se debe el fideicomiso; mas si solamente

puto nec hic ex debita portione praestandum.

46.- IDEM; *libro III, Responsorum*.- Paulus respondit: patronus, qui deceptus falsum iudicium testatoris secutus est, bonorum possessionem contra tabulas testamenti liberti petere non prohibetur.

47.- IDEM; *libro XI, Responsorum*.- Paulus respondit exheredationem nepotis, quae non notae gratia, sed alio consilio adiecta est, nocere ei non oportere, quo minus contra tabulas libertorum avi bonorum possessionem petere possit.

§ 1.- Quaero, an, si Titia patroni filia iactat Titium patrem suum, priusquam moreretur, litteras ad se fecisse, quibus adiceret per libertos suos maleficiis appetitum easque litteras se secutam post mortem patris libertos accusare, an aliquid ei prodesse possit haec excusatio. Paulus respondit eam, quae ex voluntate patris accusavit, non debere repelli a bonorum possessione contra tabulas, quoniam non suum iudicium, sed alienum exsecuta est.

§ 2.- Patroni filius epistulam talem liberto emisit: "Sempronius Zoilo liberti suo salutem. Ob merita tua fidemque tuam, quam mihi semper exhibuisti, concedo tibi liberam testamenti factionem". Quaero, an patroni filio nihil relinquere debeat. Paulus respondit eum libertum, de quo quaeritur, liberam testamenti factionem consecutum non videri.

§ 3.- Paulus respondit nepotem etiam post mortem

charged in favor of the patron will not apply to the share of the slave. If, however, the slave should be appointed sole heir, I do not think that the share due to the patron should contribute to the legacies bequeathed under the trust.

46.- THE SAME; *Opinions, Book III*.- Paulus gave it as his opinion that a patron who was deceived, and who accepted the forged will of his freedman as genuine, is not prevented from obtaining praetorian possession of his estate in opposition to the terms of the will.

47.- THE SAME; *Opinions, Book XI*.- Paulus also held that the disinheritance of a grandson, which was not made by way of reproach, but for some other reason, did not injure him to the extent of preventing him from demanding praetorian possession of the estate of the freedman of his grandfather in opposition to the terms of the will.

§ 1.- I ask if Titia, the daughter of a patron, should allege that her father Titius had written a letter to her before his death, in which he said that he had been badly treated by his freedman, and if relying upon this letter, she accused the freedman after the death of her father, whether this excuse would be of any advantage to her. Paulus answered that she who accused the freedman in accordance with the wishes of the father should not be excluded from praetorian possession of his estate contrary to the provisions of the will, since she relied, not only on her own judgment, but also on that of another.

§ 2.- The son of a patron sent the following letter to his freedman: "Sempronius to his freedman Zoilus, Greeting. I grant you full power to make a will because you deserve it on account of the fidelity which you have always displayed towards me." I ask whether the freedman should not leave something to the son of his patron. Paulus answered that the freedman in question does not appear to have obtained the full right to make a will by the above-mentioned letter.

§ 3.- Paulus gave it as his opinion that a grandson

fue instituido heredero el esclavo, opino que tampoco en este caso ha de ser pagado por la parte debida.

46.- EL MISMO; *Respuestas, libro III*.- Paulo respondió, que al patrono que engañado se atuvo a un falso testamento del testador, no se le prohíbe pedir la posesión de los bienes contra las tablas del testamento del liberti.

47.- EL MISMO; *Respuestas, libro XI*.- Paulo respondió, que la desheredación del nieto, que fue hecha no por razón de tacha, sino con otro propósito, no le debe perjudicar, de suerte que no pueda pedir la posesión de los bienes de los libertos de su abuelo contra el testamento.

§ 1.- Pregunto, si, manifestando Ticia, hija del patrono, que su padre Ticio le dirigió antes de morir una carta, en la que le decía que había sido atacado con maleficios por sus libertos, y habiéndose ella atenido a esta carta acusa a los libertos después de la muerte de su padre, le podría aprovechar a ella para algo esta excusa. Paulo respondió, que la que acusó por voluntad de su padre no debe ser repelida de la posesión de los bienes contra el testamento, porque no se atuvo a su propio juicio, sino al de otro.

§ 2.- Un hijo del patrono dirigió al liberti esta carta: «Sempronio a Zoilo, su liberti, salud. Por tus méritos, y por la fidelidad que siempre me mostraste, te concedo libre facultad para hacer testamento»; pregunto, si no le deberá dejar nada al hijo del patrono. Paulo respondió, que este liberti, de que se trata, no parece que consiguió la libre facultad de hacer testamento.

§ 3.- Paulo respondió, que también el nieto conce-

avi conceptum superstitute liberto bonorum possessionem contra tabulas liberti avari petere posse et ad hereditatem legitimam eius admitti: responsum enim Iuliani tantum ad hereditatem legitimam, item bonorum possessionem avari petendam pertinere.

§ 4.- Paulus respondit, quamvis filii a patre milite praeteriti pro exheredatis habeantur, tamen non eo usque silentium patris eis nocere debere, ut et a bonis libertorum avitorum repellere debeant. Idem responsum est etiam de bonis libertorum paternorum.

48.- SCAEVOLA; *libro II, Responsorum*.- Quaero de eo, qui libertum effracturae crimine accusavit. Respondit, si eiusmodi effracturae crimine accusatus sit, ex quo, si probaretur, in metallum datus esset, denegandam bonorum possessionem.

49.- PAULUS; *libro III, Sententiarum*.- Liberto per obreptionem adrogato ius suum patronus non amittit.

50.- TRYPHONINUS; *libro XVII.- Disputationum*.- Nihil interest, ipse patronus scriptus heres ex minore parte adierit hereditatem an servum suum scriptum iusserit adire hereditatem, quam retinet: nihilo minus enim repulsus erit a contra tabulas bonorum possessione.

§ 1.- Si tamen antequam iuberet liberti hereditatem adire, servum vendiderit aut manumiserit et ita ipse novus libertus aut emptor heredes extiterint, verbis Edicti non prohibetur patronus accipere contra tabulas bonorum possessionem.

had a right to demand praetorian possession of the estate of a freedman of his grandfather, contrary to the provisions of the will, even if he had been conceived after the death of his grandfather, who survived the freedman; and that he could be admitted to the succession as the heir at law. For the opinion of Julianus only has reference to a succession on the ground of intestacy, and the demand for praetorian possession of the estate of the grandfather.

§ 4.- Paulus also gave it as his opinion that although sons who have been passed over by the will of a father who was serving in the army are considered as disinherited, still, the silence of their father should not prejudice their rights in such a way that they can be excluded from the estates of the freedman of their grandfather. The same opinion was given with reference to the estates of the freedmen of the father.

48.- SCAEVOLA; *Opinions, Book II*.- I ask what should be decided in the case of one who accused his freedman of the crime of burglary. The answer was that if the offence of which he was accused was such that, if it were proved, the freedman would be sentenced to the mines, the patron should be denied Praetorian possession of the estate.

49.- PAULUS; *Opinions, Book III*.- Where a freedman is fraudulently arrogated, his patron does not lose his right to his estate.

50.- TRYPHONINUS; *Disputations, Book XVII*.- It makes no difference whether the patron, having been appointed heir, accepts a smaller share of the estate of his freedman than the one he is entitled to by law, or whether he orders his own slave, who was appointed heir, to enter upon the estate, and he retains the same, as he will, in either instance, be excluded from praetorian possession of the estate of his freedman in opposition to the terms of the will.

§ 1.- If, however, he should sell the slave before ordering him to enter upon the estate of the freedman, or manumit him, so that the new freedman himself or the purchaser will become the heir, the patron is not prohibited by the terms of the Edict from accepting

bido después de la muerte del abuelo podía, sobreviviendo al liberto, pedir la posesión de los bienes contra el testamento del liberto del abuelo, y ser admitido a la herencia legítima de éste; porque la respuesta de Juliano se refiere solamente a la herencia legítima, y también a la posesión que de los bienes del abuelo haya de pedirse.

§ 4.- Paulo respondió, que aunque los hijos preteridos por el padre militar sean considerados como desheredados, no debe, sin embargo, perjudicarles el silencio del padre hasta el punto de que deban ser también repelidos de los bienes de los libertos del abuelo. Lo mismo se respondió también respecto a los bienes de los libertos del padre.

48.- SCÉVOLA; *Respuestas, libro II*.- Pregunto respecto del que acusó al liberto del delito de fractura. Respondió, que si hubiera sido acusado de tal delito de fractura, que, en virtud de él, si se probara, fuese condenado a las minas, se le ha de denegar la posesión de los bienes.

49.- PAULO; *Sentencias, libro III*.- Arrogado el liberto con engaño, el patrono no pierde su derecho.

50.- TRIFONINO; *Disputas, libro XVII*.- Nada importa, que el mismo patrono instituido heredero de una parte menor haya adido la herencia, o que haya mandado que un esclavo suyo instituido adiera la herencia, que retiene; porque, esto no obstante, será rechazado de la posesión de los bienes contra el testamento.

§ 1.- Mas si antes que mandase adir la herencia del liberto hubiere vendido, o manumitido, al esclavo, y de este modo el mismo nuevo liberto o el comprador hubieren quedado herederos, no se le prohíbe por las palabras del Edicto al patrono recibir la posesión de

praetorian possession of the estate of the freedman contrary to the provisions of the will.

§ 2.- Sed numquid praetor ei denegare possessorias actiones debeat, si fraudem Edicto eius facere voluit, ut pretio ubi percipere vel tacita pactione etiam hereditatis ex institutione delatae commodum et bonorum possessionis contra tabulas haberet? facilius suspicio per filium scriptum heredem quamvis emancipatum adeuntem liberti hereditatem ipsum patronum habere, quum omnia, quae nostra sunt, liberis nostris ex voto paremus.

§ 3.- Si tamen clausis adhuc tabulis testamenti liberti, quum ignoraret iudicium eius patronus, eorum quid, quae supra scripta sunt, circa institutum subiectum iuri suo fecit, amota fraudis suspicione suo iure in bonorum possessione contra tabulas utetur.

§ 4.- Si patronus ex debita portione a liberto scriptus rogatusque hereditatem restituere suspectam dixit et compulsus adire, quum retinere posset, restituerit, non poterit accipere contra tabulas bonorum possessionem, et quia agnovit iudicium liberti et quia sprexit et quasi damnavit eam possessionem.

§ 5.- Longe distat ab hoc patroni filius, quem libertus adrogavit et ex minore parte heredem scripsit, quum nemo ex familia patroni alius esset: quamquam enim hic ipso iure, quippe suus, heres deprehendatur, si tamen se non immiscuit hereditati ut patris, sed abstinuit, quasi patroni tamen filius admittendus est ad contra tabulas bonorum possessionem.

§ 2.- But ought the Praetor to refuse him the action to obtain possession, because he attempted to evade the Edict for the purpose of acquiring praetorian possession contrary to the provisions of the will either by receiving a larger price from the purchaser, or by making a tacit agreement with the slave to gain an undue advantage from his appointment as heir to the estate? The suspicion is still greater where the patron himself acquires the estate of the freedman through the acceptance of his son, who was appointed heir, even though he was emancipated, as everything which we have we wish to go to our children.

§ 3.- If, however, while the will remains unopened, and the patron is still ignorant of the intentions of his freedman, he commits any of the above-mentioned acts, having reference to the heir who was appointed while under his control, and there is no suspicion of fraud, he can avail himself of his right to obtain praetorian possession of the estate in opposition to the terms of the will.

§ 4.- Where a patron, who is appointed by his freedman heir to the share of his estate to which he is legally entitled, and is charged to transfer the estate to another, alleges that he considers it to be insolvent, and, having been compelled to accept it, although he could retain the share to which he was entitled, transfers the same, he cannot obtain praetorian possession contrary to the testamentary provisions, both because he accepted the will of the freedman, and despised, and, as it were, rejected his right to the possession of his legal share of the estate.

§ 5.- The case of the son of a patron, whom a freedman has arrogated and appointed heir to a smaller share of his estate than that to which he was entitled, is very different from this, where there is no one else belonging to the family of the patron. For, although he is, by operation of law, the proper heir of the freedman, if he did not interfere with the estate of the latter as belonging to his father, but abstained

los bienes contra el testamento.

§ 2.- Pero deberá acaso el Pretor denegarle las acciones posesorias, si quiso defraudar a su Edicto, para que, habiendo percibido mayor precio, o por un pacto tácito, tuviese también el provecho de la herencia deferida en virtud de la institución, y el de la posesión de los bienes contra el testamento? Y sospecho con más facilidad, que el mismo patrono, que ade por medio de su hijo instituido heredero, aunque emancipado, tiene la herencia del liberti, porque todas las cosas que son nuestras las acumulamos con el deseo de que sean para nuestros hijos.

§ 3.- Mas si estando todavía cerradas las tablas del testamento del liberti, el patrono, ignorando la última voluntad del mismo, hizo respecto al instituido sujeto a su potestad alguna de las cosas, que arriba se escribieron, excluida la sospecha de fraude, usará de su derecho respecto a la posesión de los bienes contra el testamento.

§ 4.- Si el patrono instituido por el liberti en la porción debida, y a quien se le rogó que restituyera la herencia, dijo que era sospechosa, y compelido a adirla la hubiere restituido, pudiendo retenerla, no podrá obtener la posesión de los bienes contra el testamento, tanto porque aprobó la última voluntad del liberti, como porque despreció y en cierto modo condenó esta posesión.

§ 5.- Dista mucho de esto el hijo del patrono, a quien arrogó el liberti, y lo instituyó heredero de menor parte, no habiendo otro ninguno de la familia del patrono; porque aunque se halle que éste es de derecho heredero, ciertamente suyo, si no obstante no se inmiscuyó en la herencia, como siendo del padre, sino que se abstuvo de ella, como siendo del patrono, el hijo ha de ser, sin embargo, admitido a la

§ 6.- Si debenti patrono certam pecuniam liberationem libertus reliquisset isque usus est adversus heredem petentem debitum doli exceptione aut acceptilatione liberatus est debito propter legatum, dicendum est eum non posse accipere contra tabulas bonorum possessionem.

51.- LABEO; *libro I, Pithanon a Paulo epitomatorem*.- Si eundem libertum et tu capitis accusasti et pater tuus manumisit, non poterit tibi eius liberti bonorum possessio ex Edicto Praetoris dari. Paulus: immo contra accidet, si quem servum accusaveris, deinde is patris tui fuerit factus et is postea eum manumisit.

TIT. III

DE LIBERTIS UNIVERSITATUM

ULPIANUS; *libro XLIX, ad Edictum*.- Municipibus plenum ius in bonis libertorum libertarum defertur, hoc est id ius quod etiam patrono.

§ 1.- Sed an omnino petere bonorum possessionem possint, dubitatur: movet enim, quod consentire non possunt, sed per alium possunt petita bonorum possessione ipsi adquirere. sed qua ratione senatus censuit, ut restitui eis ex trebelliano hereditas possit: qua ratione alio senatus consulto heredibus eis institutis a liberto adquirere hereditatem permissum est: ita bonorum quoque possessionem petere dicendum est.

from doing so in order to retain his right as patron, the son will, nevertheless, be permitted to obtain praetorian possession of the estate contrary to the testamentary provisions.

§ 6.- If a freedman should leave to his patron, who owed him a certain sum of money, a release from liability, and he should avail himself of an exception on the ground of bad faith against an heir demanding payment of the debt, or he is released on account of the legacy, it must be said that he cannot obtain praetorian possession of the estate in opposition to the provisions of the will.

51.- LABEO; *Epitomes of Probabilities, By Paulus*.- If you have accused the freedman of your father of a capital crime, and your father has manumitted him, praetorian possession of the estate of the freedman cannot be granted to you under the Edict of the Praetor. Paulus: The contrary rule will apply if you should bring such an accusation against a slave who afterwards becomes the property of your father, and the latter subsequently manumits him.

TITLE III

CONCERNING THE FREEDMEN OF MUNICIPALITIES

1.- ULPIANUS; *On the Edict, Book XLIX*.- Full rights over the estate of their freedmen and freedwomen is granted to municipalities, that is to say, they have the same rights over them as other patrons have.

§ 1.- Is there, however, any doubt whether they can demand praetorian possession of the estates of their freedman? There is some difficulty on this point, because they cannot give their consent, still, they can obtain praetorian possession through the agency of another. But, as the Senate decided that estates should be transferred to them under the Trebellian Decree, so, by virtue of another decree, when a municipality has been appointed heir by a freedman, it is permitted to acquire his estate; hence it must be

posesión de los bienes contra el testamento.

§ 6.- Si al patrono que le debía cierta cantidad le hubiese dejado el liberto la liberación, y aquél utilizó la excepción de dolo contra el heredero que le pedía la deuda, o por razón del legado fue eximido de la deuda por la aceptilación, se ha decir, que él no puede obtener la posesión de los bienes contra el testamento.

51.- LABEON; *Dichos recopilados por Paulo, libro I*.- Si al mismo liberto tú lo acusaste de delito capital, y tu padre lo manumitió, no se te podrá dar por el Edicto del Pretor la posesión de los bienes de este liberto. Y dice Paulo: antes bien sucederá lo contrario, si hubieres acusado a un esclavo, y luego él hubiere sido hecho de tu padre, y éste lo manumitió después.

TÍTULO III

DE LOS LIBERTOS DE UNIVERSALIDADES

ULPIANO; *Comentarios al Edicto, libro XLIX*.- A los munícipes se les defiende pleno derecho sobre los bienes de los libertos, y de las libertas, esto es, el mismo derecho, que también al patrono.

§ 1.- Pero se duda si pueden en todo caso pedir la posesión de los bienes, pues mueve a ello que no pueden consentir; mas pueden adquirir para sí habiendo pedido por medio de otro la posesión de los bienes. Pero por la misma razón por la que dispuso el Senado que se les pudiera restituir a ellos la herencia en virtud del Senadoconsulto Trebeliano, y por la misma razón por la que se permitió por otro Senadoconsulto que, instituidos ellos herederos por el liberto, adquiriesen la herencia, se ha de decir que

§ 2.- Temporaque bonorum possessionis petendae cedere municipibus exinde, ex quo decernere de petenda potuerunt. Quod et papinianus respondit.

said that it can obtain praetorian possession of the estates of its freedmen.

§ 2.- The time fixed for claiming praetorian possession of the estate of a freedman begins to run against a municipality from the date when it passes an ordinance authorizing the demand. This was also the opinion of Papinianus.

piden también la posesión de los bienes.

§ 2.- Y los términos para pedir la posesión de los bienes corre para los munícipes desde que pudieron determinar pedirla; lo que también respondió Papi-niano.

TIT. IV

DE ASSIGNANDIS LIBERTIS

1.- ULPIANUS; *libro XLIX, ad Edictum*.- Senatus-consulto quod factum est Claudianis temporibus Velleo Rufo et Osterio Scapula consulibus de adsignandis libertis in haec verba cavetur: "si, qui duos pluresve liberos iustis nuptiis quaesitos in potestate haberet, de liberto libertave sua significasset, cuius ex liberis suis eum libertum eamve libertam esse vellet, is eave, quandoque is, qui eum eamve manumisit inter vivos vel testamento, in civitate esse desisset, solus ei patronus solave patrona esset, perinde atque si ab eo eave libertatem consecutus consecutave est. Utique, si ex liberis quis in civitate esse desisset neque ei liberi ulli essent, ceteris eius liberis qui manumisit perinde omnia iura serventur, ac si nihil de eo liberto eave liberta is parens significasset".

§ 1.- Quamvis singulari sermone Senatus consultum scriptum est, tamen et pluribus liberis et plures libertos libertasve posse adsignari certum est.

§ 2.- Is quoque libertus, qui apud hostes est, adsignari potest.

§ 3.- Adsignare autem quis potest quibuscumque verbis vel nutu, vel testamento vel codicillis vel

TITLE IV

CONCERNING THE ASSIGNMENT OF FREEDMEN

1.- ULPIANUS; *On Sabinus, Book XIV*.- By a decree of the Senate enacted in the time of the Emperor Claudius, during the Consulate of Velleius Rufus and Osterius Scapula, with reference to the assignment of freedmen, it was provided as follows: "Where anyone has two or more children born in lawful marriage, and has indicated to one of them that he wishes to assign to him or her a certain freedman or freedwoman, whom he designates, the said male or female child, after the death of the person who manumitted the said slave during his lifetime, or by his will, shall become the sole patron or patroness of the said freedman or freedwoman, just as if he or she had been liberated directly by said child. And if either of said children should die without issue, all the rights of the person who manumitted the slave shall pass to the other children, just as if he who manumitted him or her had made no special provision with reference to them."

§ 1.- Although the Decree of the Senate is expressed in language indicating the singular number, it is, nevertheless, certain that several freedmen can be assigned to several children as well as to one.

§ 2.- A freedman who is in the hands of the enemy can also be assigned.

§ 3.- Moreover, a patron can assign his freedman by any words whatsoever, or by a gesture, or by his

TÍTULO IV

DE LA ASIGNACIÓN DE LOS LIBERTOS

1.- ULPIANO; *Comentarios a Sabino, libro XIV*.- Por un senadoconsulto, que se hizo en los tiempos de Claudio, siendo cónsules Veleo Rufo y Osterio Scápula, sobre la asignación de los libertos, se dispone en estos términos: «Si el que tuviese bajo su potestad dos o más hijos habidos de legítimas nupcias hubiese significado respecto de un liberto o liberta suyos de cuál de sus hijos quería que fuese este liberto o esta liberta, cuando el que lo manumitió o la manumitió entre vivos o por testamento hubiese dejado de tener la ciudadanía, sería único patrono o única patrona aquél o aquélla, lo mismo que si de él o de ella hubiese conseguido uno o una la libertad. Y si alguno de los hijos hubiese dejado de tener la ciudadanía, y no le quedasen ningunos hijos, se les reservarán todos los derechos a los demás hijos del que hizo la manumisión, lo mismo que si el ascendiente no hubiese significado nada respecto a este liberto o a esta liberta»

§ 1.- Aunque el Senadoconsulto fue escrito en número singular, es, sin embargo, cierto que se puede hacer la asignación así a muchos hijos, como de muchos libertos o libertas.

§ 2.- También puede ser asignado el liberto que está en poder de los enemigos.

§ 3.- Mas cualquiera puede asignar con cualesquiera palabras, o por seña, o en testamento, o en

vivus.

§ 4.- Adimere adsignationem etiam nuda voluntate poterit.

§ 5.- Sed et si exheredato filio libertum quis adsignaverit, valet adsignatio, nec nocet ei nota exheredationis quantum ad ius patronatus.

§ 6.- Sed si post adsignationem fuerit exheredatus, non semper exhereditatio adimet adsignationem, nisi hoc animo facta sit.

§ 7.- Sed si is cui adsignatus est repudiaverit, puto verius, quod et Marcellus scripsit, posse admitti fratres eius.

§ 8.- Si sit ex patrono filius unus, ex altero duo et uni eorum libertus adsignatus est, videndum, quot partes fiant hereditatis liberti, utrum tres, ut duas habeat is cui adsignatus est, id est suam et fratris, an vero aequales partes fiant, quoniam per adsignationem alius excluditur. Et Iulianus libro septuagésimo quinto scripsit magis esse, ut bessem hic habeat, qui fratrem excludit: quod verum est, quamdiu frater eius vivat vel admitti potuit ad legitimam hereditatem: ceterum si fuerit capite minutus, aequales partes habebunt.

§ 2.- POMPONII; *libro IV, Senatusconsultorum*.- Sed si is, cui adsignassem, decessisset relicto filio et fratre et alterius patroni filio, semissem habiturum eum nepotem, quem esset filius meus si qui vivit habiturus, si ego eum libertum non adsignassem.

§ 3.- ULPIANUS; *libro XV, ad Sabinum*.- Idem erit

will or codicil, or during his lifetime.

§ 4.- He can also annul the assignment by the mere expression of his will.

§ 5.- If, however, anyone should assign the freedman to his son, whom he had disinherited, the assignment will be valid, nor will the reproach of disinheritance prejudice the son, so far as the right of patronage is concerned.

§ 6.- If the son should be disinherited after the assignment, the act of disinheritance does not always annul it, unless it was done with this intention.

§ 7.- Where the child to whom the assignment was made declines to accept it, I think that the better opinion is the one stated by Marcellus, that is, that his brother shall be admitted to the right of patronage.

§ 8.- Where one patron left one son, and another two, and the freedman is assigned to one of the two last, it should be considered into how many shares the estate of the freedman must be divided, whether into three, of which the one to whom the assignment is made will be entitled to two shares, that is to say, his own and that of his brother, or whether there ought to be two equal shares, as the other brother is excluded by the assignment. Julianus, in the Seventy-fifth Book, says that the better opinion is that the one who excludes his brother should have two-thirds of the estate. This opinion is correct so long as his brother is living, or can become the heir at law of the freedman; but if he should forfeit his civil rights the estate must be divided into two parts.

2.- POMPONII; *Decrees of the Senate, Book IV*.- If, however, the child to whom I have made the assignment should die, leaving a son, and his brother, and there should also be a son of another patron, the grandson will be entitled to half of the estate, which my son, who is living, would have if I had not assigned the said freedman.

3.- ULPIANUS; *On Sabinus, Book XV*.- The same

codicilos, o en vida.

§ 4.- Podrá revocar la asignación aun por nuda voluntad.

§ 5.- Mas también si alguno hubiere asignado un liberto a un hijo desheredado, es válida la asignación, y no le perjudica la nota de la desheredación en cuanto al derecho de patronato.

§ 6.- Pero si hubiere sido desheredado después de la asignación, la desheredación no siempre revocará la asignación, a no ser que haya sido hecha con tal intención.

§ 7.- Pero si aquel a quien uno fue asignado lo hubiere repudiado, opino que es mas verdadero, lo que también escribió Marcelo, que pueden ser admitidos sus hermanos.

§ 8.- Si de. un patrono hubiera un solo hijo, y de otro dos, y el liberto fue asignado a uno de éstos, se ha de ver cuántas partes se harán de la herencia del liberto, si tres, para que tenga dos aquel a quien fue asignado, esto es, la suya y la de su hermano, o si se harán partes iguales, porque por la asignación es excluido uno. Y escribió Juliano en el libro septuagésimo quinto, que es más cierto que tenga dos tercios el que excluye a su hermano; lo que es verdad, mientras vive su hermano, o pudo ser admitido a la herencia legítima; pero si hubiera sido disminuido de cabeza, tendrán partes iguales.

2.- POMPONIO; *Senadoconsultos, libro IV*.- Pero si aquel a quien yo hubiese hecho la asignación hubiese fallecido dejando un hijo y un hermano, y un hijo de otro patrono, el nieto tendrá la mitad, que hubiese de haber tenido el hijo mío que vive, si yo no hubiese asignado este liberto.

3.- ULPIANO; *Comentarios a Sabino, libro XV*.-

dicendum et si is, qui filium et nepotem habebat, nepoti libertum adsignaverit: admittetur nepos ad legitimam hereditatem, licet sit alterius patroni filius, et hoc contingit patrum vita: ceterum si ille non esset, nihil ei prodesset adsignatio ad deminuendum ius alterius patroni filii.

§ 1.- Posse autem et nepoti adsignari certum est et praeferrí filio nepotem adsignatoris constat.

§ 2.- Unde quaeri poterit, an, si filium habeat et ex eo nepotem, possit, quasi duos habeat in potestate, ius Senatusconsulti inducere. In qua specie quum placeat etiam ei, qui in potestatem recasurus est, adsignari quare non admittimus, quum utrumque esse in potestate negare non possumus?

§ 3.- An autem ad legitimam hereditatem admitti possit hic qui est in potestate, tractari poterit. et quum multi sint casus, quibus et libertum habere qui in potestate est possit, cur non hoc quoque admittendum sit, ut per eum pater ad legitimae hereditatis admittatur emolumentum? Quod et Pomponio recte videtur. Habent autem libertos etiam filii familias, ut puta si castrensem servum eorum quis manumiserit.

§ 4.- Emancipatos quoque filios eius, cui adsignatus est libertus, habere commodum Senatusconsulti puto, non ut ad legitimam hereditatem admittantur, sed ad ea quae possunt.

§ 5.- Secundum quod liberto intestato defuncto, quoniam ad legitimam hereditatem admitti non

rule will apply where a person who had a son and a grandson assigns the freedman to the grandson, for the latter will be admitted to the succession of the freedman, even if there is a son of another patron. This will occur during the lifetime of his uncle. But if his uncle should no longer be living, the assignment made to the grandson will be of no advantage to him, by diminishing the right of the son of the other patron.

§ 1.- Moreover, it is certain that a freedman can be assigned to a grandson by his grandfather, and it is established that, in this instance, the grandson will take precedence over the son.

§ 2.- Wherefore, it may be asked if the patron should have a son and a grandson, whether he can cause the Decree of the Senate to apply just as if he had both of them under his control. In this case, as it is settled that the assignment can be made to him who will again come under the control of his father, why should we not admit that they are both subject to the authority of the patron?

§ 3.- Again, can a question arise as to whether the grandson, who is under the control of the father, can be admitted as heir at law of the freedman? And as there are many cases under which a child who is under paternal control can have a freedman, why should it not be conceded in this instance that a father can obtain the benefit of the lawful inheritance of the estate of the freedman through his son? This opinion is very properly adopted by Pomponius. Sons under paternal control also have freedmen; as, for example, where someone manumits a slave who forms part of his peculium castrense.

§ 4.- I also think that the emancipated sons of a person to whom a freedman has been assigned are entitled to the benefit of the Decree of the Senate; not that they may be admitted as the heirs at law of the freedman, but that they may acquire what property they can.

§ 5.- According to this, where a freedman dies after having been appointed heir, since emancipated sons

Lo mismo se habrá de decir, también si el que tenía un hijo y un nieto le hubiere asignado un liberto al nieto; será admitido el nieto a la herencia legítima, aunque haya un hijo de otro patrono. Y esto acontece en vida del tío paterno; pero si éste no existiese, de nada le aprovecharía la asignación para disminuir el derecho del hijo del otro patrono.

§ 1.- Mas es cierto que se le puede hacer la asignación también a un nieto; y es sabido que el nieto del que asigna es preferido al hijo.

§ 2.- Por lo cual se podrá preguntar, si, teniendo un hijo y de éste un nieto, podrá aplicar el derecho del Senadoconsulto, como si tuviera a los dos bajo su potestad. En cuyo caso, como está admitido que se haga asignación aun al que ha de recaer bajo potestad, ¿por qué no lo admitimos, puesto que no podemos negar que uno y otro están bajo potestad?

§ 3.- Mas se podrá discutir, si podrá ser admitido a la herencia legítima el que está bajo potestad; y como son muchos los casos en los que puede tener liberto también el que está bajo potestad, ¿por qué no se habrá de admitir también que por medio de éste sea admitido el padre al emolumento de la herencia legítima? Lo que también le parece bien a Pomponio; pero tienen libertos también los hijos de familia, por ejemplo, si alguno de ellos hubiere manumitido un esclavo del peculio castrense.

§ 4.- Yo opino que tienen el beneficio del Senadoconsulto también los hijos emancipados de aquel a quien fue asignado el liberto, no para que sean admitidos a la herencia legítima, sino a lo que pueden.

§ 5.- Según lo que, fallecido intestado el liberto, como quiera que no pueden ser admitidos a la heren-

possunt, videndum, ne admittatur filius adsignatoris in familia remanens an non? Et putem emancipatos per Praetorem praeferendos.

§ 6.- Liberos autem eius, cui adsignatus est, accipere debemus non solum filios, verum etiam nepotes et neptes et deinceps descendentes.

§ 7.- Si quis duobus adsignaverit libertum et alter in civitate esse sine liberis desierit, alter non,

4.- POMPONIUS; *libro IV, Senatusconsultorum*.- vel vivus noluerit ad se hereditatem liberti pertinere,

5.- ULPIANUS; *libro XIV, ad Sabinum*.- Utrum portio eius, qui in civitate esse desiit vel repudiavit, in familiam redeat? An vero ei potius adcreseat, in cuius persona durat adsignatio? Et Iulianus libro septuagésimo quinto scripsit adsignationem in huius solius persona locum habere et solum admittendum, quod est verum.

§ 1.- Quod si non sine liberis decesserit, an cum vivo admittantur? et putat adhuc solum admittendum, defuncto autem eo liberos alterius succedere, non in familiam libertum redire.

§ 2.- Sed si ex duobus istis alter filios, alter nepotes reliquerit, an simul ad legitimam hereditatem admittantur? Et puto ordinem inter eos faciendum.

6.- MARCIANUS; *libro VII, Institutionum*.- Si servus liber esse iussus fuerit et filio legatus, deinde vivus testator eum manumiserit, ad filium libertus

cannot be admitted to the succession as heirs at law, let us see whether the son of the assignor, who remains under his control, can be admitted or not. I think that the emancipated children should be preferred by the Praetor under such circumstances.

§ 6.- By the children of the person to whom the assignment is made we must understand not only his sons, but also his grandsons, and his granddaughters, and his other descendants.

§ 7.- Where anyone assigns a freedman to two children, and one of them dies without issue, and the other does not:

4.- POMPONIUS; *Decrees of the Senate, Book IV*.- Or the one who survives declines to accept the estate of the freedman:

5.- ULPIANUS; *On Sabinus, Book XIV*.- Shall the share of him who has lost his civil rights, or rejected the estate, revert to the family, or will it rather accrue to him in whose person the assignment continues to exist? Julianus, in the Seventy-fifth Book, says that the assignment will only become operative with respect to the person of the latter, and that he alone should be admitted to the succession; which is correct.

§ 1.- But what if one of the children should die, leaving issue, can the latter be admitted to the succession, if the other child is living? Julianus thinks that he alone should be admitted, but after his death the children of the other will succeed to the estate; and that the right over the freedman will not revert to the family.

§ 2.- But if one of these two children leaves sons, and the other grandsons; shall they be admitted together to the succession of the freedman as heirs at law? I think that the regular order of descent should be preserved between them.

6.- MARCIANUS; *Institutes, Book VII*.- If a slave should be ordered to be free, and afterwards is bequeathed to the son of the testator, and the latter

cia legítima, se ha de ver si será admitido, o no, el hijo del que asignó, que permanece en la familia. Y yo opinaría, que han de ser preferidos por el Pretor los emancipados.

§ 6.- Mas por hijos de aquel a quien se hizo la asignación debemos entender no solamente los hijos, sino también los nietos y las nietas, y los demás descendientes.

§ 7.- Si alguien les hubiere asignado a dos un liberto, y uno, sin hijos, hubiere dejado de tener la ciudadanía, y otro no.

4.- POMPONIO; *Senadoconsultos, libro IV*.- O en vida no hubiere querido que a él le perteneciera la herencia del liberto.

5.- ULPIANO; *Comentarios a Sabino, libro XIV*.- ¿La porción del que dejó de tener la ciudadanía, o del que repudió, volverá acaso a la familia, o más bien le acrecerá a aquél en cuya persona subsiste la asignación? Y escribió Juliano en el libro septuagésimo quinto, que la asignación tiene lugar en la persona de éste solo, y que sólo él ha de ser admitido; lo que es verdad.

§ 1.- Pero si no hubiere fallecido sin hijos, ¿serán admitidos juntamente con el vivo? Y opina que aun así ha de ser admitido solo; pero que, fallecido él, suceden los hijos del otro, y que el liberto no vuelve a la familia.

§ 2.- Mas si de éstos dos uno hubiere dejado hijos, y otro nietos, ¿serán acaso admitidos juntamente a la herencia legítima? Y opino que se ha de guardar orden entre ellos.

6.- MARCIANO; *Instituta, libro VII*.- Si se hubiere mandado que un esclavo fuese libre, y hubiere sido legado a un hijo, y después el testador en vida lo

quasi adsignatus pertinet. Hoc ita est, sive expressum est vel certe intellexit non quasi servum eum legasse, sed quasi libertum adsignasse.

7.- SCAEVOLA; *libro II, Regularum*.- Adsignare et pure et sub condicione, et per epistulam vel testationem vel chirographum possumus, quia adsignatio liberti neque quasi legatum neque quasi fideicommissum percipitur: denique nec fideicommissio onerari potest.

8.- MODESTINUS; *libro VII, Differentiarum*.- Liberi patroni quamquam et ipsi in plerisque causis manumissoris iure censentur, tamen paternum libertum liberis suis adsignare non potuerunt, etiamsi eis a parente fuerit adsignatus: idque et Iulianus et Marcellus probant.

9.- IDEM; *libro IX, Pandectarum*.- Utrum ei tantum qui in potestate sit an etiam emancipato filio adsignare libertum patronus possit, si modo non pauciores quam duos praeterea in potestate habeat, dubitari solet: et magis est posse.

10.- TERENCE CLEMENES; *libro XII, ad legem Iuliam et Papiam*.- Sub condicione vel in diem liberti adsignato interim pendente die vel condicione omnia perinde observabuntur, ac si adsignatus non esset: itaque mortuo eo interim ad omnes liberos hereditas et bonorum possessio pertinebit.

§ 1.- Si uni pure, alii sub condicione libertus adsignatus sit, eum, cui pure adsignatus sit, pendente condicione solum patroni ius habere dicendum est.

afterwards manumits him, the freedman will belong to the son, just as if he had been assigned to him. This will be the case whether it is either expressly stated, or clearly understood that the slave was not bequeathed as a slave, but assigned as a freedman.

7.- SCAEVOLA; *Rules, Book II*.- We can make an assignment absolutely and conditionally, by a letter, in the presence of witnesses, or by means of a written instrument, because the assignment of a freedman is not acquired either as a legacy or under the terms of a trust, nor can it be charged with the execution of a trust.

8.- MODESTINUS; *Differences, Book VII*.- Although the children of a patron are, in many instances, considered to enjoy the same rights as the person who manumitted the slave, still, they cannot assign a freedman of their father to their own children, even if he has been assigned to them by their parents. This opinion is adopted by both Julianus and Marcellus.

9.- THE SAME; *Pandects, Book IX*.- Some doubt exists on the point as to whether a patron can only assign a freedman to his son, who is under his control, or to his emancipated son, provided he has at least two others under his control. The better opinion is that he can do so.

10.- TERENCE CLEMENS; *On the Lex Julia, et Papia, Book XII*.- Where a freedman is assigned under a condition, or after a certain period, everything will remain unchanged while the condition is pending, or the day has not arrived, just as if the freedman had not been assigned. Therefore, if, in the meantime, he should die, his estate, both under the Civil Law and the Praetorian Edict, will belong to all the children.

§ 1.- Where a freedman has been assigned to one child absolutely, • and to another conditionally, the one to whom he was assigned absolutely must be said to alone have the right of a patron over him, while the condition is pending.

hubiere manumitido, el liberto le pertenece al hijo como si le hubiese sido asignado; y esto es así, ya si se expresó, ya si ciertamente entendió, que no lo legó como a esclavo, sino que lo asignó como a liberto.

7.- SCÉVOLA; *Reglas, libro II*.- Podemos hacer la asignación puramente, bajo condición, por carta, ante testigos, o con quirógrafo, porque la asignación de un liberto no es considerada ni como un legado, ni como un fideicomiso; y finalmente, tampoco puede ser gravada con un fideicomiso.

8.- MODESTINO; *Diferencias, libro VII*.- Los hijos del patrono, aunque también ellos sean considerados en muchos casos con el derecho del manumisor, no podrán, sin embargo, asignar a sus propios hijos un liberto del padre, aunque a ellos les hubiere sido asignado por el ascendiente; y esto aprueban también Juliano y Marcelo.

9.- EL MISMO; *Pandectas, libro IX*.- Se suele dudar si el patrono puede asignar un liberto solamente al hijo que tiene bajo potestad, o si también al emancipado, si no tuviera además menos de dos bajo potestad; y es más cierto que puede.

10.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro XII*.- Asignado un liberto bajo condición o a término, mientras esté pendiente el término o la condición se observará todo lo mismo que si no hubiese asignado; y así, muerto éste mientras tanto, la herencia y la posesión de los bienes les pertenecerán a todos los hijos.

§ 1.- Si el liberto hubiera sido asignado a uno puramente, y a otro bajo condición, se ha de decir que sólo aquél, a quien haya sido asignado puramente, tiene el derecho de patrono estando pendiente la condición.

11.- PAPINIANUS; *libro XIV, Responsorum*.- Alimentorum causa libertos filiis adtributos filiis adsignatos non videri respondi, quum ea ratione libertis consuli patronus voluerit, quo facilius voluntatis emolumentum consequantur, salvo iure communi.

12.- POMPONIUS; *libro XII, Epistolarum*.- Si ex duobus patronis alter eorum filio suo libertum adsignaverit, non obstat, quo minus alter patronus ius solidum suum haberet.

13.- IDEM; *libro IV, Senatusconsultorum*.- Testamento potest quis et servum manumittere et eundem ut libertum adsignare.

§ 1.- De liberis, qui sunt in potestate, Senatus locutus est: ergo de postumis nihil hoc Senatusconsulto provisum est: magis tamen puto etiam postumos contineri.

§ 2.- Quod inquit senatus "si ex liberis quis in civitate esse desisset", eum significat, qui in perpetuum in civitate esse desierit, non etiam si quis ab hostibus captus reverti possit.

§ 3.- Ex die quoque certa adsignari potest, sed usque in diem certum vix potest: nam ipse Senatus huic negotio finem praecepit.

TITULO V

SI QUID IN FRAUDEM PATRONI
FACTUM SIT

1.- ULPIANUS; *libro XLIV, ad Edictum*.- Si quid dolo malo liberti factum esse dicetur, sive testamento facto sive intestato libertus decesserit, quo minus quam pars debita bonorum ad eorum quem perveniat, qui contra tabulas bonorum possessionem accipere possunt: cognoscit praetor et operam dat, ne ea res ei

11.- PAPINIANUS; *Opinions, Book XIV*.- I gave it as my opinion that where freedmen have been allotted to children for the purpose of providing them with support, they are not to be considered as assigned to them, as the patron intended to benefit his freedmen in order that they can, the more readily, enjoy the advantages of his will, without violating the requirements of the Common Law.

12.- POMPONIUS; *Epistles, Book XII*.- Where one of two patrons assigns the freedman to his son, there is no reason why the other should not retain his rights over him unimpaired.

13.- THE SAME; *Decrees of the Senate, Book IV*.- Anyone can, by his will, manumit a slave, and assign him to one of his children as his freedman.

§ 1.- The Senate refers to children who are under the control of their father. Must it therefore be understood that no provision is made for posthumous children by this decree? I think that the better opinion is that posthumous children are also included.

§ 2.- Where the Decree of the Senate says, "If anyone should lose his civil rights," it refers to a person who has lost them forever, and not to one who has been captured by the enemy, and may return.

§ 3.- An assignment can also be made to begin at a certain date, but it can hardly be made for a certain term, as the Senate itself fixed the limit of the transaction.

TITLE V

WHERE ANYTHING IS DONE TO
DEFRAUD THE PATRON

1.- ULPIANUS; *On the Edict, Book XLIV*.- Where a fraudulent act is said to have been committed by a freedman in order to prevent a part of his estate from coming into the hands of those who have the right to obtain possession contrary to the testamentary provisions, the Praetor takes cognizance of the case,

11.- PAPINIANO; *Respuestas, libro XIV*.- Respondí, que los libertos encomendados a los hijos por causa de alimentos no eran considerados como asignados a los hijos, porque el patrono quiso que se mirase por los libertos por esta razón, para que más fácilmente consigan el beneficio de su voluntad quedando a salvo el derecho común.

12.- POMPONIO; *Epístolas, libro XII*.- Si de dos patronos uno de ellos hubiere asignado el liberto a su hijo, esto no obsta para que el otro patrono tenga íntegro su derecho.

13.- EL MISMO; *Senadoconsultos, libro IV*.- Cualquiera puede manumitir a un esclavo en su testamento, y asignar al mismo como liberto.

§ 1.- El Senadoconsulto habló de los hijos que están bajo potestad; luego, ¿no se proveyó nada en este senadoconsulto respecto a los póstumos? Yo, sin embargo, creo más bien, que también se contienen en él los póstumos.

§ 2.- Lo que dice el Senadoconsulto: «si alguno de los hijos hubiese dejado de ser ciudadano», se refiere al que para siempre hubiere dejado de ser ciudadano, no también al que aprisionado por los enemigos pueda volver.

§ 3.- También se puede asignar desde cierto día, pero difícilmente se puede hasta día cierto; porque el mismo Senadoconsulto prefijó el término a este negocio.

TÍTULO V

DE SI SE HUBIERA HECHO ALGO EN
FRAUDE DEL PATRONO

1.- ULPIANO; *Comentarios al Edicto, libro XLIV*.- Si se dijere que se hizo alguna cosa con dolo malo del liberto, ya si el liberto hubiere fallecido habiendo hecho testamento, ya si en testado, a fin de que no vaya la parte debida de los bienes a cualquiera de los que pueden obtener la posesión de los bienes

fraudi sit.

§ 1.- Si alienatio dolo malo facta sit, non quaerimus, utrum mortis causa facta sit an non sit: omni enim modo revocatur. si vero non sit dolo malo facta, sed alias, tunc actori probandum erit mortis causa factam alienationem. Si enim proponas mortis causa factam alienationem, non requirimus, utrum dolo malo facta sit an non sit: sufficit enim docere mortis causa factam, nec immerito: mortis causa enim donationes comparantur legatis et sicut in legatis non quaerimus, dolo malo factum sit an non sit, ita nec in mortis causa donationibus.

§ 2.- Quod autem mortis causa filio donatum est, non revocatur: nam cui liberum fuit legare filio quantum quantum vellet, is donando non videtur fraudasse patronum.

§ 3.- Omne autem, quodcumque in fraudem patroni gestum est, revocatur.

§ 4.- Dolum accipere nos oportet eius qui alienavit, non eius cui alienatum est: et ita evenit, ut qui fraudis vel doli conscius non fuit, carere debeat re in fraudem patroni alienata, etsi putavit ingenuum nec credidit libertinum.

§ 5.- Adversus conpatronum, qui contra tabulas bonorum possessionem omisit, Faviana non competit, si non plus sit in eo quod donatum est quam pars debita patrono. Quare si mortis causa ei donatum sit, partem faciet conpatrono, quemadmodum legatarius patronus facit.

and sees whether he made a will or died intestate, and that the patron is not defrauded.

§ 1.- Where an alienation is fraudulently made, we do not inquire whether it was made mortis causa, or not, for it is revoked, no matter how it was done. If, however, it was not made with fraudulent intent, but for some other reason, the plaintiff must then prove that the alienation was made mortis causa. For if you suppose an alienation to have been made mortis causa, we do not inquire whether or not this was done with fraudulent intent; for it is sufficient to show that it was made mortis causa. This rule is not unreasonable, for donations mortis causa are compared to legacies, and, as in the case of legacies, we do not ask whether they were made with fraudulent intent or not, so we should not institute such an inquiry with reference to donations mortis causa.

§ 2.- Again, whatever has been given to a son mortis causa is not revoked, for, as anyone is at liberty to bequeath to his son as much as he chooses, he is not considered to have defrauded his patron by making the donation.

§ 3.- Everything, however, no matter what it is, that is done in order to defraud a patron, is revoked.

§ 4.- We must understand the term "fraud" to apply to the person who alienates the property, and not to him to whom it is transferred; hence, it happens that where the recipient is not conscious of the fraud or bad faith which has been committed, he must still be deprived of the property which has been alienated, for the purpose of defrauding the patron, even if he thought the freedman was freeborn, and not one who had been manumitted.

§ 5.- The Favian Action will not lie against a fellow-patron who was refused praetorian possession of the estate in opposition to the terms of the will, on account of the donation, where the latter is not more valuable than the share to which the patron was legally entitled. Therefore, if the donation was made mortis causa, his fellow-patron will be entitled to his

contra el testamento, el Pretor conoce del asunto, y procura que esto no le defraude.

§ 1.- Si la enajenación hubiera sido hecha con dolo malo, no investigamos si fue hecha, o no, por causa de muerte, porque de todos modos es revocada; pero si no hubiera sido hecha con dolo malo, sino de otra manera, entonces habrá de probar el actor que la enajenación fue hecha por causa de muerte. Porque si propusieras que la enajenación fue hecha por causa de muerte, no investigamos si fue hecha, o no, con dolo malo; porque basta probar que fue hecha por causa de muerte. Y no sin razón, porque las donaciones por causa de muerte se asemejan a los legados; y así como en los legados no investigamos, si se hayan hecho, o no, con dolo malo, así tampoco en las donaciones por causa de muerte.

§ 2.- Mas no se revoca lo que por causa de muerte fue donado al hijo; porque no se considera que el que fue libre de dejarle al hijo cuanto quisiese haya defraudado al patrono haciéndole donación.

§ 3.- Mas se revoca todo cuanto se hizo en fraude del patrono.

§ 4.- Conviene que atendamos al dolo del que enajenó, no al de aquel a quien se enajenó; y así sucede, que el que no fue sabedor del fraude del dolo, debe ser privado de la cosa enajenada en fraude del patrono, aunque lo haya considerado ingenuo, y no lo haya creído libertino.

§ 5.- Contra el copatrono, que prescindió de la posesión de los bienes contra el testamento, no compete la acción Faviana, si lo que se donó no valiera más que la parte debida al patrono. Por lo cual, si se hubiera donado por causa de muerte, hará parte con el copatrono, como la hace el patrono legatario.

share of the same, just as if one of the patrons had been a legatee.

§ 6.- Utrum autem ad ea sola revocanda Faviana pertinet, quae quis libertus de bonis deminuit, an etiam ad ea, quae non adquisiit, videndum est. Et ait Iulianus libro vicensimo sexto digestorum, si hereditatem libertus non adierit fraudandi patroni causa vel legatum reppulerit, Favianam cessare: quod mihi videtur verum. quamvis enim legatum retro nostrum sit, nisi repudietur, attamen quum repudiatur, retro nostrum non fuisse palam est. In ceteris quoque liberalitatibus, quas non admisit si libertus cui quis donatum voluit, idem erit probandum Favianam cessare: sufficit enim patrono, si nihil de suo in necem eius libertus alienavit, non si non adquisiit: proinde et si, quum sub condicione ei legatum esset, id egit, ne condicio existeret, vel, si sub condicione stipulatus fuerit, maluit deficere condicionem, dicendum est Favianam cessare.

§ 7.- Quid si in lite vinci voluit? si quidem condemnatus est data opera vel in iure confessus, dicendum erit Favianam locum habere: quod si noluit optinere, quum peteret, hic videndum. Et puto hunc deminuisse de patrimonio: actionem enim de bonis deminuit, quemadmodum si passus esset actionis diem abire.

§ 8.- Sed si puta querellam inofficiosi, quam potuit, vel quam aliam, forte iniuriarum vel similem instituere noluit, non potest patronus ob eam rem Faviana experiri.

§ 6.- Moreover, let us consider whether the Favian Action only has reference to the revocation of such alienations-as those by which the freedman diminishes his estate, or does it also have reference to other property which he did not obtain? Julianus, in the Twenty-sixth Book of the Digest, says that the Favian Action will not apply where a freedman, with the intention of defrauding his patron, does not accept an estate, or rejects a legacy which has been bequeathed to him. This appears to me to be true. For, although a legacy is said to belong to us from the time of the death of the testator, unless it should be rejected, still, when it is rejected, it is clear that it never did belong to us; and the same rule should be adopted with reference to other acts of generosity, where anyone wishes to make a donation to a freedman, and he declines to accept it; as it is sufficient for the patron if his freedman did not alienate any property to his prejudice, and not if he did not acquire the same. Hence, if the legacy was bequeathed to him under a condition, and the freedman should prevent the condition from being fulfilled; or if he should make a stipulation under a condition, and preferred to permit the condition to fail, it must be said that the Favian Law does not apply.

§ 7.- But what if the freedman should voluntarily lose a lawsuit? If he lost it intentionally, or confessed judgment, it must be said that the Favian Law will be applicable; but if he refused to present his claim in such a way as to collect it, in this instance, the matter deserves consideration. I think that, under such circumstances, the freedman has diminished his estate, for he has taken away a right of action from his property, just as if he had permitted the time for bringing the action to elapse.

§ 8.- The patron, however, cannot make use of the Favian Action, where, for instance, the freedman refuses to bring suit to declare the will inofficious, or to bring another action, for example, one for injury, or to institute any legal proceeding of this kind.

§ 6.- Pero se ha de ver si la acción Faviana corresponde para revocar solamente lo que algún liberto disminuyó de los bienes, o también lo que no adquirió. Y dice Juliano en el libro vigésimo sexto del Digesto, que si el liberto no hubiere adido la herencia para defraudar al patrono, o hubiere rechazado el legado, deja de tener lugar la acción Faviana; lo que me parece verdad, porque aunque el legado sea nuestro desde antes, si no fuera repudiado, es, sin embargo, evidente, que cuando es repudiado no fue nuestro desde antes. Y también respecto a las demás liberalidades, que no admitió el liberto, a quien uno quiso que se le hiciera donación, se habrá de aprobar lo mismo, que deja de tener lugar la acción Faviana; porque le basta al patrono si el liberto no enajenó nada de lo suyo en perjuicio de él, no también si no adquirió. Por lo cual, también si cuando se le hubiese legado bajo condición hizo que no se cumpliera la condición, o si habiéndose estipulado bajo condición prefirió que faltara la condición, se ha de decir que deja de tener lugar la acción Faviana.

§ 7.-¿Qué se dirá, si quiso ser vencido en el litigio? Si verdaderamente fue condenado procurándolo él, o confesó en el juicio, se habrá de decir, que tiene lugar la acción Faviana; mas si no quiso vencer cuando fuese demandante, en este caso se habrá de ver lo que se dirá. Y opino, que éste disminuyó el patrimonio; porque privó a los bienes de la acción, así como si hubiese consentido que transcurriese el término de la acción.

§ 8.- Pero si, por ejemplo, no quiso entablar la querella de inoficioso, que pudo, u otra cualquiera, acaso la de injurias, u otra semejante, no puede el patrono ejercitar por ello la acción Faviana.

§ 9.- At si transegit in fraudem patroni, poterit patronus faviana uti.

§ 10.- Sed si libertus filiam dotavit, hoc ipso, quod dotavit, non videtur fraudare patronum, quia pietas patris non est reprehendenda.

§ 11.- Si pluribus in fraudem libertus donaverit vel pluribus mortis causa, aequaliter patronus adversus omnes in partem sibi debitam sive Faviana sive Calvisiana experietur.

§ 12.- Si quis in fraudem patronorum rem venderit vel locaverit vel permutaverit, quale sit arbitrium iudicis, videamus. Et in re quidem distracta deferri condicio debet emptori, utrum malit rem emptam habere iusto pretio an vero a re discedere pretio recepto: neque omnimodo rescindere debemus venditionem, quasi libertus ius vendendi non habuerit, nec fraudemus pretio emptorem, maxime quum de dolo eius non disputetur, sed de dolo liberti.

§ 13.- Sed si emerit in fraudem patroni libertus, aequè dicendum, si magno emit, in pretio relevandum patronum, condicione non ipsi delata, an velit ab emptione discedere, sed venditori, utrum malit de pretio remittere an potius rem quam vendidit recipere persoluto pretio. Et in permutatione et in locatione et conductione similiter idem observabimus.

§ 14.- Sed si rem quidem bona fide vendiderit et sine ulla gratia libertus, pretium autem acceptum alii

§ 9.- But if the freedman has committed some act in order to defraud his patron, the latter can avail himself of the Favian Action.

§ 10.- If, however, the freedman endowed his daughter, he is not considered to have defrauded his patron of the amount which he gave to her by way of dowry, because paternal affection should not be blamed.

§ 11.- If a freedman should make donations to several persons for the purpose of defrauding his patron, either during his lifetime, or mortis causa, the patron can bring either the Favian or Calvisian Action against all the parties equally, to recover the share to which he is entitled.

§ 12.- If anyone should either sell, hire, or exchange property, for the purpose of defrauding his patrons, let us see what the decision of the judge should be. Where the property has been sold, the choice should be given to the buyer either to retain the article which has been purchased, at its proper value, or to surrender it, after having received the price which he paid. We should not absolutely rescind the sale, as if the freedman had no right whatever to sell the property, to avoid causing the purchaser to lose the price which he paid, especially where no fraud is alleged on his part, but only where the fraud of the freedman is to be taken into consideration.

§ 13.- If, however, a freedman should purchase property for the purpose of defrauding a patron, it must also be said that if he purchased it at too high a price, relief should be granted the patron on this account, and he should not be given the choice of annulling the sale, or not; but the vendor should be permitted either to surrender as much of the price as exceeded the true value of the property, or to recover what he sold, and return the price which he received. We observe the same rule in the exchange, the hiring, and the leasing of property.

§ 14.- If, however, the freedman sold the property in good faith, and without showing any partiality, but

§ 9.- Mas si transigió en fraude del patrono, podrá utilizar el patrono la acción Faviana.

§ 10.- Pero si el liberto dotó a la hija, no parece que por el hecho de haberla dotado defrauda al patrono, pues no ha ser reprendida la piedad del padre.

§ 11.- Si por fraude hubiere hecho el liberto donación a muchos, o hubiere donado a muchos por causa de muerte, el patrono ejercitará igualmente contra todos por la parte que se le debe o la acción Faviana, o la Calvisiana.

§ 12.- Si alguno hubiere vendido, o dado en arrendamiento, o permutado, una cosa en fraude de los patronos, veamos cuál sea la determinación del juez. Y, a la verdad, tratándose de cosa vendida, se le debe dar al comprador la facultad de decir si prefiere tener por su justo precio la cosa comprada, o separarse de la cosa recibiendo el precio; porque de ningún modo debemos rescindir la venta, como si el liberto no hubiere tenido el derecho de vender, a fin de que no defraudemos en el precio al comprador, mayormente no discutiéndose sobre su dolo, sino sobre el dolo del liberto.

§ 13.- Pero si el liberto hubiere comprado en fraude del patrono, se dirá igualmente, que si compró por más, ha de ser relevado en el precio el patrono, no dándosele al mismo la facultad de decir si quiere separarse de la venta, sino al vendedor la de si prefiere rebajar el precio, o más bien recobrar la cosa que vendió, devolviendo el precio; y lo mismo observaremos igualmente en la permuta, en la locación y en la conducción.

§ 14.- Mas si el liberto hubiere vendido una cosa verdaderamente de buena fe, y sin ningún favor, pero

donavit, videndum erit, quis Faviana inquietetur, utrum qui rem emit an vero is qui pretium dono accepit? Et Pomponius libro octagensimo tertio recte scripsit emptorem non esse inquietandum: fraus enim patrono in pretio facta est: eum igitur qui pretium dono accepit Faviana conveniendum.

§ 15.- Et alias videamus, si dicat patronus rem quidem iusto pretio venisse, verumtamen hoc interesse sua non esse venundatam inque hoc esse fraudem, quod venierit possessio, in quam habet patronus affectionem vel opportunitatis vel vicinitatis vel caeli vel quod illic educatus sit vel parentes sepulti, an debeat audiri volens revocare. Sed nullo pacto erit audiendus: fraus enim in damno accipitur pecuniario.

§ 16.- Sed si forte et res vilis distracta sit et pretium alii donatum, uterque Faviano iudicio convenietur et qui vili emit et qui pecuniam accepit muneris. Is tamen qui emit si malit rem restituere, non alias restituet, quam si pretium quod numeravit recipiat. Quid ergo, si delegatus emptor solvit ei cui donabat libertus, an nihilo minus reciperet? Et magis est, ut recipere debeat, licet pretium ad alium pervenit, qui solvendo non est: nam et si acceptum pretium libertus prodegit, diceremus nihilo minus eum qui dedit recipere debere, si velit ab emptore discedere.

§ 17.- Si mutuam pecuniam libertus in fraudem patroni acceperit, an Faviana locum habeat, videamus. Et quod remedium in hoc est? Accepit

donated the price which he received to another, it must be considered whether he who purchased the property, or he who received the price as a gift, will be liable to the Favian Action. Pomponius, in the Eighty-third Book of the Digest, very properly says that the purchaser should not be molested, for the fraud was committed against the patron with reference to the price, and therefore that he who received the price as a gift would be liable under the Favian Law.

§ 15.- Let us, however, see if the patron should allege that, although the property was sold at a just price, it was to his interest, nevertheless, that it should not have been sold at all; and that the fraud consists in the fact that possession was alienated of something to which the patron was attached, either on account of its convenience, or its neighborhood, or the purity of the air, or because he was educated there, or his parents were buried therein, if he desires to have the sale revoked, whether he should be heard. He should not be heard in any case of this kind, for the fraud is understood to involve pecuniary loss.

§ 16.- But if the property was sold for too low a price, and the purchase money should be donated to another, the Favian Action can be brought against both parties, that is to say, against the one who bought the property for less than its true value, and the one who received! the price as a gift. If he who purchased it is willing to surrender it, he will not be compelled to do so, unless he receives the price which he paid. Then what must be done if the purchaser, having been delegated, should pay him to whom the freedman made the gift, would he still be entitled to recover the price? The better opinion is that he would be entitled to recover it, even though it may have come into the hands of a person who is insolvent. For if the freedman squandered the purchase money which he received, we should, nevertheless, hold that he who paid it can recover it, if he is willing to rescind the sale.

§ 17.- Let us see whether the Favian Action will lie, in case a freedman should borrow a sum of money for the purpose of defrauding his patron, and what the

le donó a otro el precio recibido, se habrá de ver quién será molestado con la acción Faviana, si el que compró la cosa, o si el que por donación recibió el precio. Y con razón escribió Pomponio en el libro octagésimo tercero, que no ha de ser molestado el comprador, -porque el fraude se le hizo al patrono en el precio-, y que por consiguiente ha de ser demandado con la acción Faviana el que por donación recibió el precio.

§ 15.- Y veamos en otro caso, si, diciendo el patrono que la cosa fue ciertamente vendida en su justo precio, pero que le interesaba que no hubiese sido vendida, y que el fraude consistía en que se hubiere vendido una posesión a la que el patrono tiene afecto o por su ventajosa situación, o por su vecindad, o por su cielo, o porque en ella fue educado, o fueron enterrados sus ascendientes, deberá ser oído al querer revocarla. Mas por ningún pacto deberá ser oído, porque el fraude se entiende respecto al perjuicio pecuniario.

§ 16.- Pero si acaso la cosa hubiera sido vendida por menos, y el precio fue donado a otro, ambos serán demandados con la acción Faviana, así el que compró por menos, como el que por donación recibió el dinero; pero si el que la compró prefiriera restituir la cosa, no la restituirá de otra suerte, sino si recibiera el precio que entregó. Luego ¿qué se dirá, si delegado el comprador le pagó a aquel a quien el liberto hacía la donación, esto no obstante lo recuperaría? Y es más cierto, que debe recuperarlo, aunque el precio haya ido a quién no es solvente; porque también si el liberto hubiese disipado el precio recibido, diríamos, sin embargo, que lo debía recuperar el que lo dió, si quisiera separarse de la compra.

§ 17.- Si en fraude del patrono hubiere recibido dinero en mutuo el liberto, veamos si tendrá lugar la acción Faviana, y qué remedio hay en este caso.

mutuam: si quod accepit donavit, convenit eum patronus cui donavit libertus: sed accepit et prodegit: non debet perdere qui mutuum dedit, nec ei imputari, cur dedit.

§ 18.- Plane si non accepit et spopondit stipulanti, erit Favianae locus.

§ 19.- Si fideiussit apud me libertus vel rem suam pro alio pignori dedit in necem patroni, an Faviana locum habeat, videamus, et numquid quum damno meo non debeat patrono subveniri: neque enim donavit aliquid mihi, si pro aliquo intervenit, qui non fuit solvendo: eoque iure utimur. Igitur creditor non poterit Faviana conveniri: debitor poterit quidem, sed potest et mandati: plane si deficiat mandati actio, quia donationis causa intervenit, erit Favianae locus.

§ 20.- Sed et si mandator extitit pro aliquo libertus, idem erit probandum.

§ 21.- Quamvis autem in partem Faviana competat, attamen in his quae dividi non possunt in solidum competit, ut puta in servitute.

§ 22.- Si servo meo vel filio familias libertus in fraudem patroni quid dederit, an adversus me iudicium Favianum competat, videamus. Et mihi videtur sufficere adversus me patremque arbitrioque iudicis contineri tam id, quod in rem verum est, condemnandi, quam id quod in peculio.

§ 23.- Sed si iussu patris contractum quum filio est, pater utique tenebitur.

remedy would be in this instance. If the freedman gave away the money which he received, the patron can sue the person to whom the freedman gave it, but if he received it and squandered it, he who lent it should not lose it, nor- can he be blamed for having lent it.

§ 18.- It is evident that there will be ground for the Favian Action, if the freedman did not receive the money, but entered into a stipulation with the person who was to lend it to him.

§ 19.- Let us see whether the Favian Action will lie where a freedman becomes surety for me, or pledges his property to another in order to defraud his patron, and whether relief should not be granted to the patron at my expense. For the freedman did not give anything to me, if he became security for someone who was not solvent; and this is our practice. Therefore, the creditor cannot be sued by the Favian Action, but the debtor can be, as well as by the action on mandate. It is clear that if the action on mandate should fail for the reason that a donation had been made, there will be ground for the Favian Action.

§ 20.- The same rule should be adopted where the freedman directs something to be done for the benefit of another.

§ 21.- Although the Favian Action will only lie with reference to the share of the patron, still, where property cannot be divided, it will lie for the entire amount; as for instance, in the case of a servitude.

§ 22.- If a freedman should give anything to my slave, or a son under my control, for the purpose of defrauding his patron, let us see whether the Favian Action can be brought against me. And it seems to me that it will be sufficient if the action is brought against me as a master or a father, and that when the judge renders his decision, not only that has been done for the benefit of my property, but also anything relating to the peculium should be taken into consideration.

§ 23.- If, however, an agreement has been made with a son, by order of his father, the latter will

Recibió dinero en mutuo; si donó lo que recibió, el patrono demanda a aquel a quien el liberto hizo la donación. Pero lo recibió y lo dispuso; no debe perderlo el que lo dio en mutuo, ni se le debe imputar porque lo haya dado.

§ 18.- Mas si no lo recibió, y lo prometió al que lo estipuló, tendrá lugar la acción Faviana.

§ 19.- Si el liberto fue fiador en mi interés, o a otro le dió en prenda una cosa suya en perjuicio del patrono, veamos, ¿tendrá lugar la acción Faviana, o es que con perjuicio mío no deberá ser auxiliado el patrono, -porque no me donó cosa alguna, si fue fiador por quién no era solviente-? Y este derecho observamos. Así, pues, el acreedor no podrá ser demandado con la acción Faviana; pero lo podrá ser ciertamente el deudor, y también con la de mandato; mas si faltara la acción de mandato, porque intervino por causa de donación, tendrá lugar la acción Faviana.

§ 20.- Mas también se habrá de aprobar lo mismo, si el liberto fue mandante por alguno.

§ 21.- Pero aunque la acción Faviana compete por una parte, compete, sin embargo, por la totalidad respecto a las cosas que no se pueden dividir, por ejemplo, respecto a una servidumbre.

§ 22.- Pero si el liberto hubiere dado alguna cosa a un esclavo mío, o a un hijo de familia, en fraude del patrono, veamos si competirá contra mí la acción Faviana. Y me parece que basta que contra mí y el padre se contenga en el arbitrio del juez la facultad de condenar tanto por lo que se invirtió en provecho de la cosa, como por lo que en el del peculio.

§ 23.- Pero si por mandato del padre se contrató con el hijo, estará ciertamente obligado el padre.

certainly be liable.

§ 24.- Si quum servo in fraudem patroni libertus contraxerit isque fuerit manumissus, an Faviana teneatur, quaeritur. Et quum dixerimus dolum tantum liberti spectandum, non etiam eius quum quo contraxit, potest manumissus iste Fabiana non teneri.

§ 25.- Item quaeri potest, manumisso vel mortuo vel alienato servo an intra annum agendum sit. Et ait Pomponius agendum.

§ 26.- Haec actio in personam est, non in rem, et in heredem competit et in ceteros successores, et heredi et ceteris successoribus patroni, et non est hereditaria, id est ex bonis liberti, sed propria patroni.

§ 27.- Si libertus in fraudem patroni aliquid dederit, deinde, defuncto patrono vivo liberto, filius patroni acceperit bonorum possessionem contra tabulas liberti, an Fabiana uti possit ad revocanda ea quae sunt alienata? Et est verum, quod et Pomponius probat libro octagesimo tertio, item Papinianus libro quarto decimo quaestionum, competere ei Favianam: sufficere enim, quod in fraudem patronatus factum sit: magis enim fraudem rei, non personae accipimus.

§ 28.- In hanc actionem etiam fructus veniunt, qui sunt post litem contestatam percepti.

2.- MARCIANUS; *libro III, Regularum*.- In Faviana et Calvisiana actione recte dicetur etiam

§ 24.- If a freedman should contract with a slave for the purpose of defrauding his patron, and the slave should be manumitted, the question arises whether he will be liable to the Favian Action. As we have already stated, it is only the fraud of the freedman which should be considered, and not that of him with whom he made the agreement; hence the said manumitted slave will not be liable to the Favian Action.;

§ 25.- It may also be asked if the manumitted slave should die, or be alienated, must the action be brought within a year? Pomponius says that it must be.

§ 26.- This action is a personal and not a real one, and will lie against the heir and other successors, as well as in favor of the heir and other successors of the patron; and it does not form part of the estate, that is to say, of the property of the freedman; but belongs to the patron personally.

§ 27.- If a freedman should give anything away for the purpose of defrauding his patron, and then the latter should die during the lifetime of the freedman, and the son of the patron should obtain praetorian possession of the estate of the freedman contrary to the provisions of the will, can the Favian Action be employed for the purpose of recovering the property which has been alienated? It is true, as Pomponius says in the Eighty-third Book, and Papinianus also, in the Fourteenth Book of Questions, that the Favian Action will lie in favor of the son, as it is sufficient if the act was committed for the purpose of evading the right of patronage; for we understand this to be done rather as a fraud against the property than against the person.

§ 28.- The profits obtained after issue has been joined are also included in this action.

2.- MARCIANUS; *Rules, Book III*.- It is very properly held that even the profits which have

§ 24.- Si en fraude del patrono hubiere el liberto contratado con un esclavo, y éste hubiere sido manumitido, se pregunta si estará obligado por la acción Faviana. Y como hemos dicho que se ha de atender solamente al dolo del liberto, no también al de aquel con quien contrató, puede este manumitido no estar obligado por la acción Faviana.

§ 25.- También se puede preguntar, si, manumitido, o fallecido, o enajenado el esclavo, se haya de ejercitar la acción dentro del año. Y dice Pomponio, que se ha de ejercitar.

§ 26.- Esta acción es personal, no real, y compete contra el heredero y contra los demás sucesores, y al heredero y a los demás sucesores del patrono; y no es de la herencia, esto es, de los bienes del liberto, sino propia del patrono.

§ 27.- Si el liberto hubiere dado alguna cosa en fraude del patrono, y luego, fallecido el patrono viviendo el liberto, el hijo del patrono hubiere obtenido la posesión de los bienes contra el testamento del liberto, ¿podrá utilizar la acción Faviana para revocar las enajenaciones que se hicieron? Y la verdad es, lo que también aprueba Pomponio en el libro octagésimo tercero del Digesto, e igualmente Papiniano en el libro décimo cuarto de las Cuestiones, que le compete la acción Faviana; porque basta que se haya obrado en fraude del patronato; pues atendemos más bien al fraude de la cosa, que no al de la persona.

§ 28.- En esta acción se comprenden también los frutos, que se percibieron después de contestada la demanda.

2.- MARCIANO; *Reglas, libro III*.- Con razón se dirá que en la acción Faviana y Calvisiana se

praeteritos fructus venire, quatenus Praetor omnem fraudem libertorum vult rescindere.

§ 3.- ULPIANUS; *libro XLIV, ad Edictum*.- Si patronus heres institutus ex debita parte adierit hereditatem, dum ignorat aliqua libertum in fraudem suam alienasse, videamus, an succurri ignorantiae eius debeat, ne decipiatur liberti fraudibus. Et Papinianus libro quarto decimo Quaestionum respondit in eadem causa manere ea, quae alienata sunt, idcircoque patronum sibi imputare debere, qui, quum posset bonorum possessionem accipere contra tabulas propter ea quae alienata vel mortis causa donata sunt, non fecit.

§ 1.- Haec actio in perpetuum datur, quia habet rei persecutionem.

§ 2.- Patronum ex asse heredem institutum volentem Faviana actione uti praetor admittit, quia erat iniquum excludi eum a Faviana, qui non sponte adiit hereditatem, sed quia bonorum possessionem contra tabulas petere non potuit.

§ 3.- Si intestatus libertus decesserit, patronus adeundo hereditatem eius revocat per Calvisianam actionem ea, quae alienata sunt dolo malo, quo minus pars ex testamento debita bonorum liberti ad patronum liberosve eius perveniret: idque est, sive petita sit a patrono ab intestato bonorum possessio sive non sit.

§ 4.- Si plures sint patronae et patroni, singuli virilem tantum revocabunt vel Calvisiana.

already been obtained are included in the Favian and Calvisian Actions, since it is the intention of the Praetor to annul every fraudulent act of a freedman.

3.- ULPIANUS; *On the Edict, Book XLIV*.- If a patron who has been appointed heir to the share of an estate to which he is entitled by law should accept the estate without being aware that the freedman had alienated any property with the intention of defrauding him, let us see whether he can be relieved on account of his ignorance, in order to prevent him from being deceived by the fraudulent conduct of his freedman. Papinianus, in the Fourteenth Book of Questions, gives it as his opinion that the property which was alienated remains in the same condition as before; and therefore the patron should blame himself for not having obtained praetorian possession contrary to the provisions of the will with reference to what was either alienated or donated mortis causa, when he could have done so.

§ 1.- This action is granted perpetually, because its object is the recovery of property.

§ 2.-The Praetor permits a patron who has been appointed heir to an entire estate to avail himself of the Favian Action, because it would be unjust for him to be excluded from the benefit of the action, when he did not voluntarily enter upon the estate, and did so only because he was unable to demand praetorian possession contrary to the provisions of the will.

§ 3.- If a freedman should die intestate, the patron, by entering upon the estate can, by means of the Calvisian Action, revoke all alienations fraudulently made, by which, in accordance with the terms of the will, a smaller share of the estate of the freedman will come into the hands of the patron or his children. This occurs whether praetorian possession of the estate is demanded by the patron on the ground of intestacy, or not.

§ 4.- Where there are several patronesses and patrons, each of them can recover the share to which he or she is legally entitled, or they can bring the Calvisian Action for this purpose.

comprenden también los frutos pasados, porque el Pretor quiere deshacer todo fraude de los libertos.

3.- ULPIANO; *Comentarios al Edicto, libro XLIV*.- Si el patrono instituido heredero en la parte debida hubiere adido la herencia, ignorando que en fraude suyo haya enajenado el liberto algunas cosas, veamos si se deberá socorrer a su ignorancia, para que no sea engañado por fraudes del liberto y respondió Papiniano en el libro décimo cuarto de las Cuestiones, que las cosas que se enajenaron permanecen en el mismo estado; y que, por lo tanto, el patrono debe imputarse a si mismo, que, pudiendo obtener la posesión de los bienes contra el testamento por razón de las cosas que fueron enajenadas, o donadas por causa de muerte, no lo haya hecho.

§ 1.- Esta acción se da a perpetuidad, porque contiene la persecución de la cosa.

§ 2.- El Pretor admite al patrono instituido heredero de la totalidad que quiere usar de la acción Faviana, porque era injusto que fuera excluido de la acción Faviana el que no adió la herencia espontáneamente, sino porque no pudo pedir la posesión de los bienes contra el testamento.

§ 3.- Si el liberto hubiere fallecido intestado, adiando el patrono su herencia, revoca por la acción Calvisiana las enajenaciones que se hicieron con dolo malo, para que no fuese al patrono o a sus hijos la parte de los bienes del liberto debida por testamento; y esto es así, ya si hubiera sido pedida, ya si no, por el patrono, la posesión de los bienes abintestato.

§ 4.- Si hubiera muchos patronos y patronas, cada uno revocará solamente una porción viril, aun por la acción Calvisiana.

§ 5.- Si libertus intestatus decesserit relictis patrono debita portione aut aliquo amplius, aliquid etiam alienaverit, Papinianus libro quarto decimo Quaestionum scribit nihil esse revocandum: nam qui potuit alicui relinquere quid testamento, si debitam portionem patrono relinquit praeterea, donando nihil videtur in fraudem facere.

4.- IDEM; *libro XLIII, ad Edictum*.- Quodcumque dolo malo liberti alienatum est, Faviana actione revocatur.

§ 1.- Etsi plures patroni sint, omnes unam partem habebunt: sed si viriles non petent, portio ceteris adrescet. Quod in patronis dixi, et in liberis patronorum est: sed non simul venient, sed patronis deficientibus.

5.- PAULUS; *libro XLII, ad Edictum*.- Tenetur Faviana actione tam is qui accepit ipse, quam qui iussit alii dari id quod ipsi donabatur.

§ 1.- In actione Faviana si res non restituatur, tanti damnabitur reus, quanti actor in litem iuraverit.

§ 6.- IULIANUS; *libro XXVI, Digestorum*.- Si libertus, quum fraudare patronum vellet, filio familias contra Senatusconsultum pecuniam crediderit, non erit inhibenda actio Faviana, quia libertus donasse magis in hunc casum intellegendus est in fraudem patroni quam contra Senatusconsultum credidisse.

7.- SCAEVOLA; *libro V, Quaestionum*.- Ergo si Senatusconsultum locum non habet, cessat Faviana, quum exigi possit.

§ 5.- When a freedman dies intestate, after leaving to his patron the share to which the latter is legally entitled, or something more, and also alienates some of his property, Papinianus, in the Fourteenth Book of Questions, states that none of his dispositions should be revoked. For he can leave something to anyone by his will, provided he bequeaths to the patron the share to which the latter is entitled, and by making any other donation he is not considered to have committed a fraud.

4.- THE SAME; *On the Edict, Book XLIII*.- Everything which was fraudulently alienated by a freedman is revoked by the Favian Action.

§ 1.- Where there are several patrons, each will have an equal share, but if some of them do not claim their shares, they will accrue to the others. What I have stated with reference to patrons also applies to the children of a patron; but they have no right to share at the same time, but only where the patrons are not in existence.

5.- PAULUS; *On the Edict, Book XLII*.- He also is liable to the Favian Action who himself receives a donation, rather than one who orders what is to be given to himself to be presented to another.

§ 1.- In the Favian Action, if the property is not returned, judgment shall be rendered against the defendant for the amount which the plaintiff swears in court that it was worth.

6.- JULIANUS; *Digest, Book XXVI*.- Where a freedman, with the intention of defrauding his patron, and in violation of the Decree of the Senate, lends money to a son under paternal control, the Favian Action will not be granted him; because, in this instance, the freedman should be understood to have rather donated the property for the purpose of defrauding his patron than to have left the money in violation of the Decree of the Senate.

7.- SCAEVOLA; *Questions, Book V*.- Therefore, if the Decree of the Senate does not apply, neither will the Favian Action, as the property can be recovered

§ 5.- Si el liberto hubiere fallecido intestado habiendo dejado al patrono la porción debida, o algo más, y hubiere enajenado también alguna cosa, escribe Papiniano en el libro décimo cuarto de las Cuestiones, que no se ha de revocar nada; porque el que pudo dejar a alguien alguna cosa por testamento, si le dejara al patrono la porción debida, no parece que hace nada en fraude haciendo donación de lo demás.

4.- EL MISMO; *Comentarios al Edicto, libro XLIII*.- Todo lo que fue enajenado con dolo malo del liberto es revocado por la acción Faviana.

§ 1.- Y si hubiera muchos patronos, todos tendrán una sola parte; pero si no pidieren su porción viril, esta porción acrecerá a los demás. Lo que dije respecto a los patronos es aplicable también a los hijos del patrono; pero no concurrirán juntamente, sino faltando los patronos.

5.- PAULO; *Comentarios al Edicto, libro XLII*.- Está obligado por la acción Faviana tanto el mismo que recibió la cosa, como el que mandó que se le diera a otro lo que se le donaba a él.

§ 1.- En virtud de la acción Faviana, si la cosa no fuese restituida, el reo será condenado a tanto cuanto el actor hubiere jurado para el litigio.

6.- JULIANO; *Digesto, libro XXVI*.- Si queriendo el liberto defraudar al patrono, le hubiere prestado dinero a un hijo de familia en contravención del Senadoconsulto, no se habrá de denegar la acción Faviana, porque en este caso se ha de entender que el liberto donó más bien en fraude del patrono, que no que prestó en contravención del Senadoconsulto.

7.- SCÉVOLA; *Cuestiones, libro V*.- Luego si no tiene lugar el Senadoconsulto, deja de tenerlo la acción Faviana, pudiéndose exigir.

by another proceeding.

8.- IULIANUS; *libro XXVI, Digestorum*.- Sed si minori quam viginti quinque annis natu filio familias crediderit, causa cognita ei succurri debet.

9.- IDEM; *libro LXIV, Digestorum*.- Vivus libertus donare bene merentibus amicis potest: legare vero nec bene merentibus amicis potest, quo patroni partem minuat.

10.- AFRICANUS; *libro I, Quaestionum*.- Si id, quod a liberto in fraudem alienatum est, non extet, actio patroni cessat, quemadmodum si pecuniam in fraudem abieciisset aut etiam si is, qui mortis causa a liberto accepisset, eam rem vendidisset et bonae fidei emptor eam usu cepisset.

11.- PAULUS; *libro III, ad legem Aeliam Sentiam*.- Non videtur patronus fraudari eo quod consentit: sic et quod volente patrono libertus donaverit, non poterit Faviana revocari.

12.- IAVOLENUS; *libro III, Epistolarum*.- Libertus quum fraudandi patroni causa fundum Seio tradere vellet, Seius Titio mandavit, ut eum accipiat, ita ut inter Seium et Titium mandatum contrahatur. Quaero, post mortem liberti patronus utrum quum Seio dumtaxat qui mandavit actionem habet, an quum Titio qui fundum retinet, an quum quo velit agere possit? Respondit: in eum, cui donatio quaesita est, ita tamen si ad illum res pervenerit, actio datur, quum omne negotium, quod eius voluntate gestum sit, in condemnationem eius conferatur. Nec potest videri id praestaturus quod alius possidet, quum actione mandati consequi rem possit, ita ut aut ipse patrono restituat aut eum quum quo mandatum contraxit restituere cogat. Quid enim dicemus, si is, qui in re interpositus est, nihil dolo fecit? Non

8.- JULIANUS; *Digest, Book XXVI*.- When, however, the freedman lends money to a son under paternal control, who is under twenty-five years of age, after proper cause has been shown relief should be granted to the patron.

9.- THE SAME; *Digest, Book LXIV*.- A freedman can, during his lifetime, legally make donations to his friends who are entitled to them, but he cannot bequeath legacies to such friends, when, by so doing, he diminishes the share of his estate to which his patron is entitled.

10.- AFRICANUS; *Questions, Book I*.- If the property which was fraudulently alienated by the freedman is no longer in existence, the patron cannot bring the action, just as if the freedman had thrown away the money in order to perpetrate a fraud; nor, even if he who obtained a donation mortis causa from the freedman should have sold the property, and a bona fide purchaser has acquired it by usucaption.

11.- PAULUS; *On the Lex ^Elia Sentia, Book III*.- A patron is not considered to be defrauded by an act to which he consents.¹ Hence, where his freedman makes a donation with the consent of his patron, it cannot be recovered by the Favian Action.

12.- JAVOLENUS; *Epistles, Book III*.- A freedman who desired to transfer a tract of land to Seius for the purpose of defrauding his patron took the following course. Seius directed Titius to receive the land in such a way that an obligation of mandate was contracted between Seius and Titius. I ask whether after the death of the freedman, the patron will only be entitled to an action against Seius, who gave the mandate, or against Titius who holds the property, or whether he can proceed against either of them whom he may select. The answer was that the action will be granted against the person who obtained the donation, provided the property came into his hands, since the entire transaction which was carried on with his consent should be embraced in the decision rendered against him. It cannot be held that he should

8.- JULIANO; *Digesto, libro XXVI*. - Pero si le hubiere prestado a un hijo de familia: menor de veinticinco años, se debe socorrer a éste con conocimiento de causa.

9.- EL MISMO; *Digesto, libro LXIV*.- El liberto en vida puede hacer donación a los amigos que lo merezcan, pero no puede legar ni aun a los que lo merezcan, de suerte que disminuya la parte del patrono.

10.- AFRICANO; *Cuestiones, libro I*.- Si no existiera lo que en fraude fue enajenado por el liberto, se extingue la acción del patronato, a la manera que si en fraude hubiese tirado el dinero, o también si el que por causa de muerte hubiese recibido del liberto una cosa la hubiese vendido, y el comprador de buena fe la hubiese usucapido.

11.- PAULO; *Comentarios a la ley Elia Sencia, libro III*.- No se considera que es defraudado el patrono en lo que consintió; y así, tampoco se podrá revocar con la acción Faviana la donación que el liberto hubiere hecho con la voluntad del patrono.

12.- JAVOLENO; *Epístolas, libro III*.- Queriendo un liberto dar un fundo a Seyo para defraudar al patrono, Seyo le mandó a Ticio que lo recibiera, de suerte que entre Seyo y Ticio se celebrase mandato; pregunto, si después de la muerte del liberto tendrá el patrono acción solamente contra Seyo, que mandó, o si podrá ejercitarla contra Ticio, que retiene el fundo, o contra el que quiera. Respondió, que la acción se da contra aquel para quien fue adquirida la donación, pero así, si la cosa hubiere ido a su poder, porque se comprende en su condenación todo negocio, que haya sido hecho con su voluntad; y no se puede considerar que haya de dar lo que otro posee, porque puede conseguir la cosa con la acción de mandato, de suerte que, o la restituirá él mismo al patrono, u obligará a aquel a quien celebró el mandato a

dubitabimus, quin omnimodo quum eo agi non possit. Quid enim non potest videri dolo fecisse, qui fidem suam amico commodavit quam alii quam sibi ex liberti fraude adquisiit.

13.- PAULUS; *libro X, ad legem Iulia et Papiam*.- Constitutione Divi Pii cavetur de impubere adoptando, ut ex bonis, quae mortis tempore illius qui adoptavit fuerunt, pars quarta ad eum pertineat, qui adoptatus est: sed et bona ei, quae adquisiit patri, restitui iussit: si causa cognita emancipatus fuerit, quartam perdit. Si quid itaque in fraudem eius alienatum fuerit, quasi per Calvisianam vel Favianam actionem revocandum est.

TIT. VI

SI TABULAE TESTAMENTI NULLAE
EXTABUNT, UNDE LIBERI

1.- ULPIANUS; *libro XLIV, ad Edictum*.- Posteaquam Praetor locutus est de bonorum possessione eius qui testatus est, transitum fecit ad intestatos, eum ordinem secutus, quem et lex duodecim tabularum secuta est: fuit enim ordinarium ante de iudiciis testantium, dein sic de successione ab intestato loqui.

§ 1.- Sed successionem ab intestato in plures partes divisit: fecit enim gradus varios, primum liberorum, secundum legitimorum, tertium cognatorum, deinde viri et uxoris.

be forced to deliver property of which another has possession, as he can recover it by an action on mandate, so that he can either himself restore it to the patron, or he can compel him with whom he contracted the mandate to do so. But what shall we say if the party who intervened was in no way guilty of fraud? We entertain no doubt that an action cannot be brought against him. For he must not be considered guilty of fraud who did a favor for his friend, by which he made an acquisition for another than himself, through the fraudulent act of the freedman.

13.- PAULUS; *On the Lex Julia et Papia, Book X*.- It is provided by a Constitution of the Divine Pius, which has reference to the adoption of minors under the age of puberty, that, out of the property which the adoptive father possessed at the time of his death, a fourth shall belong to the child who was adopted. The Emperor also ordered any property which he had obtained from his adoptive father to be given him, and if he should be emancipated after proper cause was shown, he will lose his fourth. Therefore, where property has been alienated for the purpose of defrauding the child, it can be recovered by an action resembling the Calvisian or Favian Action.

TITLE VI

WHERE NO WILL IS IN EXISTENCE
BY WHICH CHILDREN MAY
BE BENEFITED

1.- ULPIANUS; *On the Edict, Book XLIV*.- The Praetor, after speaking of the possession of the property of those who execute wills, passes to intestate estates, following the same order adopted by the Law of the Twelve Tables; for it is usual to first treat of the wills of testators, and afterwards of intestate succession.

§ 1.- The Praetor, however, divided intestate succession into four classes. Of the various degrees, the first he establishes is that of children, the second that of heirs at law, the third of cognates, and the

restituirla. Porque ¿qué diremos, si el que fue puesto como intermediario en el negocio no hizo nada con dolo? No dudaremos que de ningún modo se podrá ejercitar la acción contra él. ¿Qué se dirá, pues? Que no puede parecer que obró con dolo el que le prestó a un amigo su confianza, con la cual adquirió para otro, mas bien que para si por virtud del fraude del liberto.

13.- PAULO; *Comentarios a la ley Julia y Papia, libro X*.- Se dispone por la Constitución del Divino Pío sobre la adopción del impúbere, que le pertenezca al que fue adoptado la cuarta parte de los bienes, que al tiempo de la muerte fueron del que lo adoptó; pero mandó que se le restituyeran también los bienes, que adquirió para el padre; si hubiere sido emancipado con conocimiento de causa, pierde la cuarta. Así, pues, si en fraude suyo hubiere sido enajenada alguna cosa, ha de ser revocada a la manera que por la acción Calvisiana o Faviana.

TÍTULO VI

DE LA POSESIÓN DE LOS BIENES
«UNDE LIBERI», SI NO EXISTIEREN
TABLAS DE TESTAMENTO

1.- ULPIANO; *Comentarios al Edicto, libro XLIV*.- Después que el Pretor habló de la posesión de los bienes del que testó, pasó a los intestados, habiendo seguido el orden que siguió también la ley de las Doce Tablas; porque fue lo ordinario hablar antes de las últimas voluntades de los que testan, y después de la sucesión abintestato.

§ 1.- Pero dividió en varias partes la sucesión abintestato; porque hizo varios grados, el primero el de los descendientes, el segundo el de los legítimos, el tercero el de los cognados, y el último el del marido

§ 2.- Ita autem ab intestato potest competere bonorum possessio, si neque secundum tabulas neque contra tabulas bonorum possessio agnita sit.

§ 3.- Plane si tempora quidem petendae bonorum possessionis ex testamento largiebantur, verumtamen repudiata est bonorum possessio, dicendum erit ab intestato bonorum possessionem iam incipere: quum enim is qui repudiavit petere bonorum possessionem non potest post repudiationem, consequens erit, ut ab intestato posse peti incipiat.

§ 4.- Sed et si ex Carboniano Edicto bonorum possessio data sit, magis est, ut dicere debeamus ab intestato nihilo minus posse peti: ut enim suo loco ostendimus, non impedit bonorum possessionem Edictalem Carboniana bonorum possessio.

§ 5.- Recte autem praetor a liberis initium fecit ab intestato successionis, ut, sicuti contra tabulas ipsi defert, ita et ab intestato ipsos vocet.

§ 6.- Liberos autem accipere debemus quos ad contra tabulas bonorum possessionem admittendos diximus, tam naturales quam adoptivos. Sed adoptivos hactenus admittimus, si fuerint in potestate: ceterum si sui iuris fuerint, ad bonorum possessionem non invitantur, quia adoptionis iura dissoluta sunt emancipatione.

§ 7.- Si quis filium suum emancipatum in locum

fourth of husband and wife.

§ 2.- Praetorian possession of an estate ab intestato can only be acquired where no one appears to demand possession in accordance with the provisions of the will, or in opposition thereto.

§ 3.- It is clear that if the prescribed time for demanding praetorian possession of an estate in accordance with the terms of the will has not expired, but possession of the estate has been rejected, it must be said that praetorian possession of the same ab intestato may be demanded at once. For he who rejected the estate cannot demand praetorian possession after having done so, and the result will be that he can immediately make the claim for possession on the ground of intestacy.

§ 4.- If, however, possession of an estate is granted under the Carbonian Edict, the better opinion is for us to hold that praetorian possession on the ground of intestacy can still be demanded, for, as we shall show in its proper place, praetorian possession under the Carbonian Edict does not interfere with that obtained by the Praetorian Edict.

§ 5.- In the case of succession ab intestato, the Praetor very properly begins with the descendants; for, just as he grants them (before all others), possession contrary to the provisions of the will, so he calls them first to the succession in case of intestacy.

§ 6.- Moreover, we must understand the term "descendants" to mean those whom we have stated to be entitled to praetorian possession contrary to the provisions of the will; that is to say, natural, as well as adopted children. We admit adopted children, however, only where they were under paternal control, at the time of their father's death. If, however, they were their own masters at that time, we do not permit them to obtain praetorian possession of the estate, because the rights of adoption are extinguished by emancipation.

§ 7.- If anyone adopts his emancipated son, instead

y de la mujer.

§ 2.- Mas puede competere abintestato la posesión de los bienes, solamente si ni conforme al testamento ni contra el testamento hubiera sido aceptada la posesión de los bienes.

§ 3.- Mas si verdaderamente duraban los términos para pedir la posesión en virtud del testamento, pero fue repudiada la posesión de los bienes, se habrá de decir, que comienza entonces la posesión de los bienes abintestato; porque no pudiendo el que la repudió pedir la posesión de los bienes después del repudio, será consiguiente que comience a poder ser pedida abintestato.

§ 4.- Pero aunque haya sido dada la posesión de los bienes en virtud del Edicto Carboniano, es más cierto que debemos decir que ello no obstante puede ser pedida abintestato; porque, como en su lugar mostramos, la posesión Carboniana de los bienes no impide la posesión de los bienes por el Edicto.

§ 5.- Pero con razón dio el Pretor comienzo por los descendientes a las sucesiones abintestato, para llamarlos también abintestato, así como les defiende la posesión contra el testamento.

§ 6.- Mas debemos entender por descendientes, los que dijimos que deben ser admitidos a la posesión de los bienes contra el testamento, tanto naturales, como adoptivos; pero a los adoptivos los admitimos solamente si estuvieren bajo potestad; mas si fueren de propio derecho, no son invitados a la posesión de los bienes, porque por la emancipación se disolvieron los derechos de la adopción.

§ 7.- Si alguno adoptó en el lugar de nieto a un hijo

nepotis adoptavit et emancipavit, quum haberet et nepotem ex eo, quaesitum est apud Marcellum, an adoptio rescissa impediatur nepotem. Sed quum soleat emancipato patri iungi nepos, quis non dicat, etsi adoptatus sit et quasi filius, nihilo minus filio suo eum non obstare, quia quasi filius adoptivus est in potestate, non quasi naturalis?

§ 8.- Si heres institutus non habeat voluntatem, vel quia incisae sunt tabulae vel quia cancellatae vel quia alia ratione voluntatem testator mutavit voluitque intestato decedere, dicendum est ab intestato rem habituros eos, qui bonorum possessionem acceperunt.

§ 9.- Si emancipatus filius exheres fuerit, is autem qui in potestate fuerat praeteritus, emancipatum petentem ab intestato bonorum possessionem unde liberi tueri debet praetor usque ad partem dimidiam, perinde atque si nullas tabulas pater reliquisset.

2.- IULIANUS; *libro XXVII, Digestorum*.- Emancipatus praeteritus si contra tabulas bonorum possessionem non acceperit et scripti heredes adierint hereditatem, sua culpa amittit paternam hereditatem: nam quamvis secundum tabulas bonorum possessio petita non fuerit, non tamen eum praetor tuetur, ut bonorum possessionem accipiat unde liberi. Nam et patronum praeteritum, si non petat contra tabulas bonorum possessionem, ex illa parte Edicti, unde legitimi vocantur, non solet tueri Praetor adversus scriptos heredes.

3.- ULPIANUS; *libro VIII, ad Sabinum*.- Bonorum

of his grandson, and then again emancipates him while he has a grandson by him, the question was raised by Marcellus whether, after the adoption was rescinded, this would be an obstacle to the grandson desiring to obtain praetorian possession on the ground of intestacy. But as the grandson is ordinarily joined with the emancipated father, cannot it be said that, though the latter was adopted and occupied the place of a son, still, he should not stand in the way of his own child? For the reason that he was under paternal control as an adopted, and not as a natural son.

§ 8.- If an appointed heir cannot take advantage of the will, either because it has been erased or cancelled, or because the testator is shown to have changed his mind in some other way, and that he intended to die intestate, it must be said that those who obtain praetorian possession of the estate will be entitled to it on the ground of intestacy.

§ 9.- Where an emancipated son is disinherited, and a son who was under paternal control is passed over in the will, the Praetor should protect the emancipated son who claims possession of the estate on the ground of intestacy under the provision unde liberi, so far as half of the estate is concerned, just as if the father had left no will.

2.- JULIANUS; *Digest, Book XXVII*.- Where an emancipated son, who was passed over, does not demand praetorian possession of the estate contrary to the provisions of the will, and the appointed heirs enter upon the estate, he will lose his father's estate by his own fault, for although praetorian possession in accordance with the provisions of the will may not have been demanded, the Praetor still will not protect him so as to enable him to obtain praetorian possession as a descendant. The Praetor is not accustomed to protect a patron who has been passed over in the will against the appointed heirs, if he does not demand praetorian possession of the estate contrary to the provisions of the will, under that Section of the Edict which refers to heirs at law.

3.- ULPIANUS; *On Sabinus, Book VIII*.-

suyo emancipado, y lo emancipó teniendo también un nieto de él, se preguntó por Marcelo, si la adopción rescindida ponía impedimento al nieto. Pero como el nieto suela ser unido al padre emancipado, ¿quién no dirá, que aunque haya sido adoptado, y como hijo, no le obsta, sin embargo, él a su propio hijo, porque está bajo potestad como hijo adoptivo, no como natural?

§ 8.- Si el heredero instituido no tuviera a su favor voluntad, o porque fueron cortadas las tablas, o porque fueron canceladas, o porque por otra razón cambió de voluntad el testador, y quiso fallecer intestado, se ha de decir, que habrán de tener abintestato la herencia los que obtuvieron la posesión de los bienes.

§ 9.- Si el hijo emancipado hubiere sido desheredado, y preterido el que había estado bajo potestad, el Pretor debe amparar hasta en la mitad al emancipado que pide abintestato la posesión de los bienes *Unde liberi*, lo mismo que si el padre no hubiese dejado ningún testamento.

2.- JULIANO; *Digesto, libro XXVII*.- El emancipado preterido, si no hubiere obtenido la posesión de los bienes contra el testamento, y los herederos instituidos hubieren adido la herencia, pierde por su propia culpa la herencia paterna; porque aunque no hubiere sido pedida la posesión de los bienes conforme al testamento, no le ampara, sin embargo, el Pretor, para que obtenga la posesión de los bienes *Unde liberi*. Porque al patrono preterido, si no pidiera la posesión de los bienes contra el testamento en virtud de aquella parte del Edicto, en la que son llamados los legítimos, tampoco suele ampararlo el Pretor contra los herederos instituidos.

3.- ULPIANO; *Comentarios a Sabino, libro VIII*.-

possessio potest peti ab intestato, si certum sit tabulas non extare septem testium signis signatas.

4.- PAULUS; *libro II, ad Sabinum*.- Liberi et capite minuti per Edictum Praetoris ad bonorum possessionem vocantur parentium, nisi si adoptivi fuerint: hi enim et liberorum nomen amittunt post emancipationem. Sed si naturales emancipati et adoptati iterum emancipati sint, habent ius naturale liberorum.

5.- POMPONIUS; *libro IV, ad Sabinum*.- Si quis ex his, quibus bonorum possessionem Praetor pollicetur, in potestate parentis, de cuius bonis agitur, quum is moritur, non fuerit, ei liberisque, quos in eiusdem familia habebit, si ad eos hereditas suo nomine pertinebit neque nominatim exheredes scripti erunt, bonorum possessio eius partis datur, quae ad eum pertineret, si in potestate permansisset, ita, ut ex ea parte dimidiam habeat, reliquum liberi eius, hisque dumtaxat bona sua conferat.

§ 1.- Sed et si filium et nepotem ex eo pater emancipaverit, filius solus veniet ad bonorum possessionem, quamvis capitis deminutio per Edictum nulli obstet. Quin etiam hi quoque, qui in potestate numquam fuerunt nec sui heredis locum optinuerunt, vocantur ad bonorum possessionem parentium. Nam si filius emancipatus reliquerit in potestate avi nepotem, dabitur ei, qui in potestate relictus sit, patris emancipati bonorum possessio: et si post emancipationem procreaverit, ita nato dabitur avi bonorum possessio, scilicet non obstante ei patre suo.

Praetorian possession of an estate can be demanded on the ground of intestacy, when it is certain that the will has not been signed by at least seven witnesses.

4.- PAULUS; *On Sabinus, Book II*.- Children, even those who have lost their civil rights, are called to the possession of an estate under the Edict of the Praetor, unless they have been adopted, for the latter lose the name of children after emancipation. If, however, they are natural children, and have been emancipated and adopted, and emancipated a second time, they retain their original character of natural children.

5.- POMPONIUS; *On Sabinus, Book IV*.- Where one of those children to whom the Praetor promises the possession of an estate is not under the control of the parent whose property was in dispute at the time of his death, the possession of that share of the estate to which he would have been entitled if he had remained under paternal control is granted to him, and to his children who were under the control of the deceased, if the estate belonged to him in his own name and they were not specifically disinherited; so that he himself will only have half of said share, and the other half will be given to his children, and he can distribute his own property among them alone, without any restriction.

§ 1.- If a father should emancipate his son and his grandson by the latter, the son alone will be entitled to the possession of his estate on the ground of intestacy, although the loss of civil rights would not be an obstacle to anyone in distributing the estate under the Edict. Moreover, those children who have never been under paternal control, and have not obtained the place of proper heirs, are called to the praetorian possession of the estate of their parents; for if an emancipated son should leave a grandson under the control of his grandfather, praetorian possession of the estate of the emancipated father shall be given to the child who remains under the control of his grandfather; and, if the latter should have been begotten after the emancipation of his father, praetorian possession of the estate of his grandfather will be given to him after his birth;

Se puede pedir abintestato la posesión de los bienes, si fuera cierto que no existen tablas selladas con los sellos de siete testigos.

4.- PAULO; *Comentarios a Sabino, libro II*.- Los descendientes y disminuidos de cabeza son llamados por el Edicto del Pretor a la posesión de los bienes de los ascendientes, si no fueren adoptivos; porque éstos pierden después de la emancipación hasta el nombre de descendientes. Pero si los naturales hubieran sido emancipados y adoptados, y emancipados de nuevo, tienen el derecho natural de los descendientes.

5.- POMPONIO; *Comentarios a Sabino, libro IV*.- Si alguno de aquellos, a quienes el Pretor promete la posesión de los bienes, no estuviere bajo la potestad del ascendiente, de cuyos bienes se trata, cuando éste fallece, a él y a los descendientes, que tuviere en la familia del mismo, si a ellos les perteneciere en su propio nombre la herencia, y no hubieren sido nominalmente desheredados, se les da la posesión de los bienes de la parte que le pertenecería a aquél, si hubiese permanecido bajo potestad, de suerte que tenga de esta parte la mitad, y la restante sus descendientes, y a éstos solamente les lleve a colación sus propios bienes.

§ 1.- Pero aunque el padre haya emancipado a un hijo y al nieto habido de éste, sólo el hijo ira a la posesión de los bienes, aunque a ninguno le obste por el Edicto la disminución de cabeza. Antes bien, aún los que nunca estuvieron bajo potestad, ni obtuvieron el lugar de heredero suyo, son llamados a la posesión de los bienes de sus ascendientes; porque si el hijo emancipado hubiere dejado bajo la potestad del abuelo un nieto, se le dará al que haya sido dejado bajo potestad la posesión de los bienes del padre emancipado; y si después de la emancipación hubiere procreado un hijo, al así nacido se le dará la posesión de los bienes del abuelo, por supuesto, no obstandole su padre.

provided the condition of his father offers no obstacle to this being done.

§ 2.- Si filius emancipatus non petierit bonorum possessionem, ita integra sunt omnia nepotibus, atque si filius non fuisset, ut quod filius habiturus esset petita bonorum possessione, hoc nepotibus ex eo solis, non etiam reliquis adcreseat.

§ 2.- If an emancipated son should not demand praetorian possession of an estate on the ground of intestacy, all of the rights of the grandsons will remain unimpaired, just as if there had been no son; and what the son would have been entitled to if he had demanded praetorian possession of the estate of his father on the ground of intestacy will accrue to the grandsons alone who are descendants of the said son, and not to any others.

§ 2.- Si el hijo emancipado no hubiere pedido la posesión de los bienes, les quedan todos íntegros a los nietos, lo mismo que si el hijo no existiese, de suerte que lo que hubiese de haber tenido el hijo habiendo pedido la posesión de los bienes, les acrezca solamente a los nietos habidos de él, no también a los demás.

6.- ULPIANUS; *libro XXXIX, ad Edictum*.- Si pater filium emancipaverit, nepotem retinuerit, deinde filius decesserit: et rei aequitas et causa Edicti, quo de bonorum possessione liberis danda cavetur, efficit, ut eius ratio habeatur et bonorum possessio intestato patris detur, ut tamen bona sorori, quae necessaria heres patri extitit, conferre cogatur avus, qui per eum bonorum possessionis emolumentum adquisiturus est: nisi forte avus iste nullum ex his fructum acquirere vult paratusque est de potestate nepotem dimittere, ut ad emancipatum emolumentum omne bonorum possessionis perveniat. Nec idcirco soror, quae patri heres extitit, iuste queri poterit, quod eo facto a collationis commodo excluditur, quum avo quandoque intestato defuncto ad bona eius simul quum fratre possit venire.

6.- ULPIANUS; *On the Edict, Book XXXIX*.- If a father should emancipate his son, retaining his grandson under his control, and his son should afterwards die, both the equity of the case and the terms of the Edict by which it is provided that praetorian possession of the estate of a father shall be granted to his children, on the ground of intestacy, will have the effect of causing an account to be taken, and the possession of the estate of the intestate father to be delivered; so that the grandfather who will obtain the benefit of praetorian possession of the estate through his grandson will be compelled to make contribution to a sister who becomes her father's necessary heir; unless the grandfather should not wish to obtain any benefit from the property, and is ready to release his grandson from his control in order that, after his emancipation, he may obtain all the advantages of praetorian possession. Therefore, the sister, who becomes the heir of her father, cannot justly complain of being in this way excluded from the benefit of contribution; since, if her grandfather should die intestate, she will be entitled to share equally with her brother in his estate.

6.- ULPIANO; *Comentarios al Edicto, libro XXXIX*.- Si el padre hubiere emancipado al hijo, y retenido al nieto, y luego hubiere fallecido el hijo, tanto la equidad del caso, como la autoridad del Edicto, en que se dispone que se haya de dar la posesión de los bienes a los ascendientes, hacen que se tenga cuenta de él, y que se dé la posesión de los bienes del padre abintestato, pero de suerte que a la hermana, que quedó heredera necesaria de su padre, sea obligado a llevarle a colación los bienes el abuelo, que por medio de él ha de adquirir el emolumento de la posesión de los bienes, a no ser acaso que este abuelo no quiera adquirir ningún fruto de ellos, y esté dispuesto a separar de su potestad al nieto, para que vaya al emancipado todo el emolumento de la posesión de los bienes. Y ni por esto podrá quejarse con justicia la hermana, que quedó heredera de su padre, de que por este hecho es excluida del beneficio de la colación, porque, fallecido intestado en cualquier tiempo el abuelo, podrá ir a los bienes de éste juntamente con el hermano.

7.- PAPINIANUS; *libro XXIX, Quaestionum*.- Scripto herede deliberante filius exheredatus mortem obit atque ita scriptus heres omisit hereditatem. Nepos ex illo filio susceptus avo suus heres erit neque pater videbitur obstitisse, cuius post mortem legitima defertur hereditas. Nec dici potest heredem, sed non suum nepotem fore, quod proximum gradum numquam tenuerit, quum et ipse fuerit in potestate neque pater eum in hac successione praevenierit. Et

7.- PAPINIANUS; *Questions, Book XXIX*.- A disinherited son died while the testamentary heir was deliberating whether or not he would accept the estate, and he finally rejected it. The grandson, by the said disinherited son, will be the heir of his grandfather, nor will his father be considered as an obstacle to this, since it was after his death that the estate came to the grandson as heir at law. It cannot be said that the grandson is the heir, but not the direct

7.- PAPINIANO; *Cuestiones, libro XXIX*.- Estando deliberando el heredero instituido, falleció el hijo desheredado, y en esta circunstancia prescindió de la herencia el heredero instituido; el nieto habido de este hijo será heredero suyo del abuelo, y no parecerá que fue obstáculo el padre, después de cuya muerte se defiende la herencia legítima. Y no se puede decir que el nieto será heredero, pero no suyo, porque nunca tuvo el grado próximo, pues aunque él

alioquin si non suus heres est, quo iure heres erit, qui sine dubio non est adgnatus? Ceterum et si non sit exheredatus nepos, adiri poterit ex testamento hereditas a scripto herede filio mortuo: quare qui non obstat iure intestati, iure testati videbitur obstitisse.

§ 1.- Non sic parentibus liberorum, ut liberis parentum debetur hereditas: parentes ad bona liberorum ratio miserationis admittit, liberos naturae, simul et parentum commune votum.

8.- IDEM; *libro VI, Responsorum*.- Filius familias ut proximus cognatus patre consentiente possessionem adgnovit: quamvis per condicionem testamento datam, quod in patris potestate manserit, ab hereditate sit exclusus, tamen utiliter possessionem adgnovisse videbitur nec in edicti sententiam incidet, quoniam possessionem secundum tabulas non adgnovit, quum inde rem habere non poterit nec in filii potestate condicio fuerit nec facile pater emancipare filium cogi poterit.

§ 9.- PAULUS; *libro XI, Responsorum*.- Si postea, quam filius emancipatus bonorum possessionem patris petit, statum suum mutavit, nihil obesse ei, quo minus id quod adquisiit retineat: quod si prius condicionem suam mutavit, bonorum possessionem eum petere non posse.

heir, of his grandfather, because he was never in the first degree ; as he himself was under the control of his grandfather, and his father did not precede him in the succession. And, besides, if he was not a direct heir, under what right will he be the heir, as there was no doubt that he was not an agnate? Moreover, even if the grandson should not be disinherited, the estate can be entered upon by the testamentary heir after the death of the son. Therefore, if the father was no obstacle to the son by the right of intestacy, he will be considered to have been an obstacle under the right conferred by the will.

§ 1.- Parents are not entitled to the estates of their children in the same manner as children are entitled to the estates of their parents. It is only the consideration of compassion which entitles parents to the estates of their children, but children obtain those of their parents on account of the intention of nature, as well as that of their parents.

8.- THE SAME; *Opinions, Book VI*.- A son under paternal control, with the consent of his father, took praetorian possession of an estate as the next of kin to the deceased. Although he should be excluded from the estate by the condition stated in the will, if he remained under the control of his father, still he must be considered to have obtained possession legally. He is not liable to the penalty of the Edict, as he did not obtain possession in accordance with the provisions of the will; as in that way he could not hold the property, nor was it in his power to comply with the condition, as a father cannot easily be forced to emancipate his son.

9.- PAULUS; *Opinions, Book XI*.- If a son, after having been emancipated, demands praetorian possession of the estate of his father, and subsequently changes his condition, there is no reason why he should not retain what he has acquired. If, however, he had changed his condition beforehand, he cannot demand praetorian possession of the estate.

mismo hubiere estado bajo potestad, tampoco le habría precedido el padre en esta sucesión; y por otra parte, si no es heredero suyo, ¿con qué derecho será heredero el que sin duda no es agnado? Por lo demás, aunque no haya sido desheredado el nieto, podrá ser, adida en virtud del testamento la herencia por el heredero instituido, habiendo muerto el hijo; porque el que no obsta por derecho de intestado, se considerará que obstó habiéndose testado.

§ 1.- No se les debe a los ascendientes la herencia de los descendientes al modo que a los descendientes la de los ascendientes, pues una razón de conmiseración admite a los ascendientes a los bienes de los descendientes, y a los descendientes el voto común de la naturaleza y de los ascendientes.

8.- EL MISMO; *Respuestas, libro VI*.- Un hijo de familia aceptó como próximo cognado la posesión consintiéndolo su padre; aunque por la condición impuesta en el testamento haya sido excluido de la herencia, porque haya permanecido bajo la potestad del padre, se considerará, sin embargo, que aceptó útilmente la posesión, y no incurrirá en la pena del Edicto, porque no aceptó la posesión conforme al testamento, pues no habría podido tener de este modo los bienes, ni la condición estuvo en la posibilidad del hijo, ni el padre puede ser fácilmente obligado a emancipar al hijo.

9.- PAULO; *Respuestas, libro XI*.- Si después que el hijo emancipado pidió la posesión de los bienes del padre mudó su estado, no le obsta nada para retener lo que adquirió; pero si mudó antes su condición, no puede pedir él la posesión de los bienes.

TITULO VII

UNDE LEGITIMI

1.- IULIANUS; *libro XXVII, Digestorum*.- Haec verba Edicti "Tum quem ei heredem esse oporteret, si intestatus mortuus esset" (large et quum extensione) et quum quodam temporis spatio accipiuntur: non ad mortis testatoris tempus referuntur, sed ad id, quo bonorum possessio peteretur. Et ideo legitimum heredem, si capite deminutus esset, ab hac bonorum possessione summo veri palam est.

2.- ULPIANUS; *libro XLVI, ad Edictum*.- Si repudiaverint sui ab intestato bonorum possessionem, adhuc dicemus ob stare eos legitimis, hoc est his, quibus legitima potuit deferri hereditas, idcirco, quia repudiando quasi liberi bonorum possessionem hanc incipiunt habere quasi legitimi.

§ 1.- Haec autem bonorum possessio non tantum masculorum defertur, verum etiam feminarum, nec tantum ingenuorum, verum etiam libertinorum. Communis est igitur pluribus. Nam et feminae possunt vel consanguineos vel adgnatos habere, item libertini possunt patronos patronasque habere.

§ 2.- Nec tantum masculi hanc bonorum possessionem accipere possunt, verum etiam feminae.

§ 3.- Si quis decesserit, de quo incertum est, utrum pater familias an filius familias sit, quia pater eius ab hostibus captus adhuc vivat vel quod alia causa suspendebat eius statum, magis est, ne possit peti bonorum eius possessio, quia nondum intestatum eum esse apparet, quum incertum sit, an testari possit. Quum igitur coeperit certi status esse, tunc demum petenda est bonorum possessio: non quum certum esse coeperit intestatum esse, sed quum

TITLE VII

CONCERNING PRAETORIAN POSSESSION
BY AGNATES

1.- JULIANUS; *Digest, Book XXVII*.- The following terms of the Edict, "If he who should have been the heir of the testator dies intestate," must be taken in their broadest sense, and understood to have reference to a certain period of time, not to the date of the testator's death, but to that when praetorian possession of his estate is demanded. Hence, if the heir-at-law has lost his civil rights, it is clear that he can be barred from obtaining this kind of praetorian possession of the estate.

2.- ULPIANUS; *On the Edict, Book XLVI*.- When the proper heirs reject possession of an estate ab intestato, we hold that they offer no obstacle to the heirs-at-law, that is to say, to those to whom the estate can legally pass. The reason for this is because, by rejecting the possession of the estate in the capacity of children, they begin to be entitled to it as heirs-at-law.

§ 1.- Moreover, this kind of praetorian possession not only passes to males, but also to females, and not only to freeborn persons but also to freedmen; and therefore it is common to several. For women may have either blood relatives or agnates, and freedmen may also have patrons and patronesses.

§ 2.- Not only can males obtain praetorian possession of this kind, but females likewise can do so.

§ 3.- Where anyone dies, and it is uncertain whether he is the head of a household or a son under paternal control, for the reason that his father, who has been captured by the enemy, is still living, or because his civil status is in suspense for some other reason, the better opinion is that praetorian possession of his estate cannot be demanded, as it is not apparent that he has died intestate, and it is uncertain whether he can make a will or not.

TÍTULO VII

DE LA POSESIÓN DE LOS BIENES
«UNDE LEGITIMI»

1.- JULIANO; *Digesto, libro XXVII*. - Estas palabras del Edicto: «Entonces el que debiere ser heredero de éste, si hubiese muerto intestado», se entienden amplia y extensamente, y con cierto espacio de tiempo, y no se refieren al tiempo de la muerte del testador, sino a aquel en que se pidiese la posesión de los bienes; y por lo tanto es manifiesto, que si el legítimo heredero hubiese sido disminuido de cabeza, es excluido de esta posesión de los bienes.

2.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Si los herederos suyos hubieren repudiado la posesión de los bienes abintestato, todavía diremos que ellos les obstan a los legítimos, esto es, a aquellos a quienes pudo ser deferida la herencia legítima, por esto, porque repudiando la posesión de los bienes como descendientes, la comienzan a tener como legítimos.

§ 1.- Mas esta posesión de los bienes se defiende no solamente tratándose de varones, sino también de hembras, y no sólo tratándose de ingenuos, sino también de libertinos. Es, pues, común a muchos, porque también las hembras pueden tener consanguíneos, o agnados; y también los libertinos pueden tener patronos y patronas.

§ 2.- Y no solamente pueden recibir esta posesión de los bienes los varones, sino también las hembras.

§ 3.- Si hubiere fallecido alguno, respecto del cual sea incierto si es padre o hijo de familia, porque vivía todavía su padre aprisionado por los enemigos, o porque otra causa tenía en suspenso su estado, es más cierto que no se puede pedir la posesión de los bienes del mismo, porque todavía no aparece que él quedó intestado, por cuanto es incierto si podía testar. Así, pues, solamente cuando comenzare a ser cierto su estado se ha de pedir la posesión de los bienes, no

certum esse coeperit patrem familias esse.

§ 4.- Haec autem bonorum possessio omnem vocat, qui ab intestato potuit esse heres, sive lex duodecim tabularum eum legitimum heredem faciat sive alia lex Senatusconsultum. Denique mater, quae ex Senatusconsulto venit Tertulliano, item qui ex orphitiano ad legitimam hereditatem admittuntur, hanc bonorum possessionem petere possunt.

3.- Generaliter igitur sciendum est, quotienscumque vel lex vel Senatus defert hereditatem, non etiam bonorum possessionem, ex hac parte eam peti oportere: quum vero etiam bonorum possessionem dari iubet, tum ex illa parte, qua ex legibus, peti debere: sed et ex hac parte poterit.

4.- IULIANUS; *libro XXVII, Digestorum*.- Si ex duobus fratribus alter decesserit testamento iure facto, dein deliberante herede alter quoque intestato decesserit et scriptus heres omiserit hereditatem, patruus legitimam hereditatem habebit: nam haec bonorum possessio "tum quem heredem esse oportet" ad id tempus refertur, quo primum ab intestato bonorum possessio peti potuisset.

5.- MODESTINUS; *libro III, Pandectarum*.- Inter adgnatos et cognatos hoc interest, quod in adgnatis et cognati continentur, in cognatis non utique et adgnati. verbi gratia patris frater, id est patruus, et

Therefore, when his condition is ascertained beyond a doubt, praetorian possession of his estate can be demanded; not from the time when it began to be positively known that he died intestate, but when it became certain that he was the head of a household when he died.

§ 4.- Moreover, this kind of praetorian possession includes everyone who can succeed to the inheritance on the ground of intestacy, whether the provision of the Twelve Tables, or some other enactment, or a decree of the Senate constitutes him an heir at law. Finally the mother, who is entitled to the succession under the Tertullian Decree of the Senate, and also the children, who, under the Orphitian Decree of the Senate, are admitted to the succession of their mother as her heirs at law, can demand praetorian possession.

3.- PAULUS; *On the Edict, Book XLIII*.- Hence, generally speaking, it should be remembered that every time that a law or a Decree of the Senate grants an estate to anyone, praetorian possession of the same must be demanded under this Section of the Edict. If the law directs praetorian possession of an estate to be granted it can be demanded, and this can either be done under the Section of the Edict relating to special enactments, or under that Section which is the subject of discussion at present.

4.- JULIANUS; *Digest, Book XXVII*.- If one of two brothers should die after having made a will in accordance with law, and then, while his heir was deliberating with reference to accepting the estate, the other brother should die intestate, and the appointed heir should reject the inheritance, the paternal uncle of the brothers will be entitled to it as heir at law; for that kind of praetorian possession which refers to him "who should be the heir" has reference to the time when the possession of an estate can first be claimed on the ground of intestacy.

5.- MODESTINUS; *Pandects, Book III*.- There is this difference between agnates and cognates: cognates are included among agnates, but agnates are not included among cognates ; for example, the

cuando hubiere comenzado a ser cierto que murió intestado, sino cuando hubiere comenzado a ser cierto que era padre de familia.

§ 4.- Mas esta posesión de los bienes llama a todo el que pudo ser heredero abintestato, ora lo haga heredero legítimo la ley de las Doce Tablas, ora otra ley o senadoconsulto. Finalmente, pueden pedir esta posesión de los bienes la madre que acude en virtud del Senadoconsulto Tertuliano, y también los que son admitidos a la herencia legítima en virtud del Orficiano.

3.- PAULO; *Comentarios al Edicto, libro XLIII*.- Se ha de saber, pues, en general, que siempre que o la ley o un Senadoconsulto defiera la herencia, pero no también la posesión de los bienes, debe pedirse ésta en virtud de esta parte del Edicto; pero cuando manda que se dé también la posesión de los bienes, entonces se debe pedir también en virtud de aquella parte por la que se permite en las leyes; mas también se podrá pedir en virtud de esta parte.

4.- JULIANO; *Digesto, libro XXVII*.- Si de dos hermanos uno hubiere fallecido habiendo hecho legalmente testamento, y después, estando deliberando el heredero hubiere muerto el otro in testado, y el heredero instituido hubiere prescindido de la herencia, tendrá el tío paterno la herencia legítima; porque esta posesión de los bienes «entonces el que debe ser heredero», se refiere al tiempo en que primeramente se habría podido pedir la posesión de los bienes.

5.- MODESTINO; *Pandectas, libro III*.- Entre los agnados y los cognados hay esta diferencia, que en los agnados se comprenden también los cognados, y en los cognados no ciertamente también los agnados,

adgnatus est et cognatus, matris autem frater, id est avunculus, cognatus est, adgnatus non est.

§ 1.- Quamdiu spes est suum heredem aliquem defuncto existere, tamdiu consanguineis locus non est: puta si defuncti uxor praegnas sit aut defuncti filius apud hostes sit.

6.- HERMOGENIANUS; *libro III, Iuris Epitomarum*.- Nati post mortem patris vel post captivitatem sive deportationem, sed et hi, qui tempore, quo capiebatur vel deportabatur pater, in potestate fuerunt, ius inter se consanguinitatis habent, etsi heredes patri non extiterint, sicuti exheredati.

TITULO VIII

UNDE COGNATI

1.- ULPIANUS; *libro XLVI, ad Edictum*.- Haec bonorum possessio nudam habet praetoris indulgentiam neque ex Iure Civili originem habet: nam eos invitat ad bonorum possessionem, qui Iure Civili ad successionem admitti non possunt, id est cognatos.

§ 1.- Cognati autem appellati sunt quasi ex uno nati, aut, ut Labeo ait, quasi commune nascendi initium habuerint.

§ 2.- Pertinet autem haec lex ad cognationes non serviles: nec enim facile ulla servilis videtur esse cognatio.

§ 3.- Haec autem bonorum possessio, quae ex hac parte edicti datur, cognatorum gradus sex complectitur et ex septimo duas personas sobrino et

brother of a father, that is, the paternal uncle, is both an agnate and a cognate, but the brother of a mother, that is to say, the maternal uncle, is an agnate, but not a cognate.

§ 1.- As long as there is any hope that a deceased person will have a direct heir, there is no ground for the claim of blood relatives to the estate; for example, where the wife of the deceased is pregnant, or his son is in the hands of the enemy.

6.- HERMOGENIANUS; *Epitomes of Law, Book III*.- Children born after the death of their father, or after his captivity or banishment, as well as those who are under his control at the time when he was captured or banished, retain the right of consanguinity, even though they may not be the heirs of their father, just as is the case with children who are disinherited.

TITLE VIII

CONCERNING THE PRAETORIAN POSSESSION GRANTED TO COGNATES

1.- ULPIANUS; *On the Edict, Book XLVI*.- This kind of praetorian possession depends entirely upon the indulgence of the Praetor, and does not derive its origin from the Civil Law, for he calls those to the possession of an estate who, under the Civil Law, cannot be admitted to the succession, that is to say, cognates.

§ 1.- They are called cognates on account of their having the same birth; or, as Labeo says, because they have a common origin, so far as their birth is concerned.

§ 2.- Moreover, this law refers to such cognate relationship as is not servile, for any cognation can hardly be considered servile.

§ 3.- Again, the praetorian possession which is granted by this Section of the Edict includes six degrees of cognates, and two persons in the seventh,

por ejemplo, el hermano del padre, esto es, el tío paterno, es agnado y cognado; mas el hermano de la madre, esto es, el tío materno, es cognado, pero no agnado.

§ 1.- Mientras hay esperanza de que exista algún heredero suyo del difunto, no tienen lugar los consanguíneos, por ejemplo, si la mujer del difunto estuviera embarazada, o si el hijo del difunto estuviera en poder de los enemigos.

6.- HERMOGENIANO; *Epítome del Derecho, libro III*.- Los nacidos después de la muerte del padre, o después del cautiverio, o de la deportación, y también los que estuvieron bajo potestad al tiempo en que era aprisionado o deportado el padre, tienen el derecho de consanguinidad entre sí, aunque no hayan sido herederos del padre, como los desheredados.

TÍTULO VIII

DE LA POSESIÓN DE LOS BIENES «UNDE COGNATI»

1.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Esta posesión de los bienes cuenta con la sola indulgencia del Pretor, y no tiene origen en el Derecho Civil; porque invita a la posesión de los bienes a los que por Derecho Civil no pueden ser admitidos a la sucesión, esto es, a los cognados.

§ 1.- Mas se llamaron cognados, como nacidos de uno solo, o, según dice Lebeón, como si hubieren tenido común origen al nacer.

§ 2.- Pero refiérese esta ley a los cognados no serviles; porque no es fácil que se considere que hay cognación alguna servil.

§ 3.- Mas esta posesión de los bienes, que se da en virtud de esta parte del Edicto, comprende seis grados de cognados, y a dos personas del séptimo, al

sobrina natum et natam.

§ 4.- Cognationem facit etiam adoptio: etenim quibus fiet adgnatus hic qui adoptatus est, isdem etiam cognatus fiet: nam ubicumque de cognatis agitur, ibi sic accipiemus, ut etiam adoptione cognati facti contineantur. Evenit igitur, ut is qui in adoptionem datus est tam in familia naturalis patris iura cognationis retineat quam in familia adoptiva nanciscatur: sed eorum tantum cognationem in adoptiva familia nanciscatur, quibus fit adgnatus, in naturali autem omnium retinebit.

§ 5.- Proximus autem accipietur etiam is qui solus est, quamvis proprie proximus ex pluribus dicitur.

§ 6.- Proximum accipere nos oportet eo tempore, quo bonorum possessio defertur.

§ 7.- Si quis igitur proximus cognatus, dum heredes scripti deliberant, diem suum obierit, sequens quasi proximus admittetur, hoc est quicumque fuerit tum deprehensus proximum locum optinens.

§ 8.- Si quis proximior cognatus nasci speretur, in ea condicione est, ut dici debeat obstare eum sequentibus: sed ubi natus non est, admitteremus eum, qui post ventrem proximus videbatur. Sed hoc ita demum erit accipiendum, si hic qui in utero esse dicitur vivo eo de cuius bonorum possessione agitur fuit conceptus, nam si post mortem, neque obstabit alii neque ipse admittetur, quia non fuit proximus cognatus ei, quo vivo nondum animatus fuerit.

that is, the children of a male or a female cousin.

§ 4.- Adoption also constitutes cognation. For anyone who is adopted becomes the cognate of those persons of whom he becomes the agnate; since whenever the rights of agnates are taken into account, we understand that those who are made cognates by adoption are included. The result is, therefore, that where a person is given in adoption, he will still retain his rights of cognation in the family of his natural father, as well as those which he obtains in his adoptive family; but he will only obtain cognation in the adoptive family with reference to those persons of whom he becomes the agnate; and he will retain the rights of cognation with all the members of his natural family.

§ 5.- Moreover, he who is alone will be understood to be the next of kin among the cognates; although, strictly speaking, the next of kin is referred to as one of several.

§ 6.- It is proper for us to examine the rights of the next of kin among the cognates at the time when praetorian possession of an estate is granted.

§ 7.- Hence, if the nearest cognate should die while the appointed heirs were deliberating whether to accept the estate or not, the next of kin in the succession will take his place; that is to say, whoever is ascertained to have a right to the next place.

§ 8.- If there is any prospect that a cognate who will be the next of kin may be born, the condition is such that it must be said that he offers an obstacle to those who follow him in the line of descent. But if the child should not be born, we must admit to the succession the person who appears to be next of kin to the said unborn child. This rule, however, should only be adopted where the child who is said to be unborn was conceived during the lifetime of him the possession of whose estate is in question; for if he should have been conceived after the death of the latter, he will offer no obstacle to the other, nor will he himself be admitted to the succession; because he was not the cognate next of kin to him in whose lifetime the

hijo y a la hija del sobrino y de la sobrina.

§ 4.- La adopción también produce cognación; porque de los mismos de quienes se hará agnado el que fue adoptado, se hará también cognado; pues siempre que se trate de cognados, lo entenderemos de modo que se comprendan también los que por la adopción se hicieron cognados. Resulta, pues, que el que fue dado en adopción retiene en la familia del padre natural los derechos de la cognación, así como también los adquiere en la familia adoptiva; pero en la familia adoptiva adquirirá la cognación solamente de aquellos de quienes se hizo agnado, mas en la natural retendrá la de todos.

§ 5.- Mas será reputado próximo también el que es solo, aunque propiamente se dice próximo al que lo es entre muchos.

§ 6.- Pero conviene que admitamos como próximo al que lo es al tiempo en que se defiende la posesión de los bienes.

§ 7.- Así, pues, si hubiere fallecido algún próximo cognado mientras deliberaban los herederos instituidos, será admitido como próximo el siguiente, esto es, cualquiera que se hallare entonces ocupando el próximo lugar.

§ 8.- Si se esperase que nazca un cognado más próximo, está en tal condición, que se deberá decir que el les obsta a los siguientes. Pero cuando no nació, admitiremos al que era considerado próximo después del que estaba en el claustro materno. Mas esto se habrá de admitir así solamente, si el que se dice que está en el claustro materno, fue concebido viviendo aquel de cuya posesión de los bienes se trata; porque si fue concebido después de la muerte, ni le obstará a otro, ni él mismo será admitido, porque no fue próximo cognado de aquél en vida del cual él no hubiere sido animado todavía.

unborn child was not yet in existence.

§ 9.- Si qua praegnas decesserit et utero execto partus sit editus, in ea condicione est partus iste, ut matris suae accipere bonorum possessionem possit "unde proximi cognati". Sed post Senatusconsultum Orphitianum et "Unde legitimi" petere poterit, quia mortis tempore in utero fuit.

§ 10.- Gradatim autem admittuntur cognati ad bonorum possessionem: ut qui sunt primo gradu, omnes simul admittuntur.

§ 11.- Si quis apud hostes fuerit mortis tempore eius, de cuius bonorum possessione quaeritur, dicendum est bonorum possessionem peti ab eo posse.

2.- GAIUS; *libro XVI, ad Edictum provinciale*.- Hac parte proconsul naturali aequitate motus omnibus cognatis promittit bonorum possessionem, quos sanguinis ratio vocat ad hereditatem, licet Iure Civili deficient. Itaque etiam vulgo quaesiti liberi matris et mater talium liberorum, item ipsi fratres inter se ex hac parte bonorum possessionem petere possunt, quia sunt invicem sibi cognati, usque adeo ut praegnas quoque manumissa si pepererit, et is qui natus est matri et mater ipsi et inter se quoque qui nascuntur cognati sint.

3.- IULIANUS; *libro XXVII, Digestorum*.- Capitis deminutione peremuntur cognationes, quae per adoptionem adquisitae sunt. Igitur si post mortem verbi gratia fratris adoptivi intra centensimum diem adoptivus frater capite deminutus fuerit, bonorum

§ 9.- If a woman should die while pregnant, and an operation should afterwards be performed to deliver the child, the latter is in such a position that it can obtain praetorian possession of the estate of its mother, as the nearest cognate. Since the passage of the Orphitian Decree of the Senate, the child can demand possession of the estate as heir at law, because it was in its mother's womb at the time of her death.

§ 10.- Moreover, cognates are permitted to obtain praetorian possession in regular gradation, so that those who belong to the first degree are all admitted at once.

§ 11.- If a cognate should be in the hands of the enemy, at the time of the death of the person the praetorian possession of whose estate is in question, it must be said that praetorian possession of the same can be demanded by him.

2.- GAIUS; *On the Provincial Edict, Book XVI*.- In this Section of the Edict, the proconsul, actuated by sentiments of natural equity, promises praetorian possession to all cognates whom the tie of blood calls to the succession, even though they may not be entitled to it under the Civil Law. Therefore, even the illegitimate children of the mother, as well as the mother of such children, and brothers of this description, can demand praetorian possession of an estate from one another; for the reason that they are cognates, reciprocally. This rule applies to the extent that where a female slave who was pregnant when she was manumitted has a child, the child subsequently born is the cognate of the mother, and the mother is the cognate of the child, and any children who are afterwards born to her are also cognates of one another.

3.- JULIANUS; *Digest, Book XXVII*.- Rights of cognation acquired by adoption are extinguished by the loss of civil rights. Therefore, for example, if within a hundred days after the death of his adopted brother, an adopted son loses his civil rights, he

§ 9.- Si hubiere fallecido alguna embarazada, y abriéndosele el útero se le extrajo el feto, se halla este feto en tal condición, que puede obtener la posesión de los bienes de su madre *Unde proximi cognati*; pero después del senadoconsulto Orficiano podrá pedir también la *Unde legitimi*, porque al tiempo de la muerte estaba en el claustro materno.

§ 10.- Mas los cognados son admitidos por grados a la posesión de los bienes, de suerte que todos los que están en el primer grado serán admitidos conjuntamente.

§ 11.- Si alguno estuviere en poder de los enemigos al tiempo de la muerte de aquél de cuya posesión de bienes se trata, se ha de decir, que se puede pedir por él la posesión de los bienes.

2.- GAYO; *Comentarios al Edicto provincial, libro XVI*.- En esta parte, movido el Procónsul por la equidad natural promete la posesión de los bienes a todos los cognados, a quienes llama a la herencia la razón de la consanguinidad, aunque no sean admitidos por el Derecho Civil. Y así, también los hijos de la madre habidos del vulgo, y la madre de tales hijos, y también los mismos hermanos entre sí pueden pedir en virtud de esta parte la posesión de los bienes, porque son cognados entre sí; y tanto así, que también si manumitida la que está embarazada hubiere parido, el que nace es cognado de la madre, y la madre lo es de él, y los que nacen lo son también entre sí.

3.- JULIANO; *Digesto, libro XXVII*.- Con la disminución de cabeza se extinguen las cognaciones, que se adquirieron por la adopción; así, pues, si después de la muerte, por ejemplo, del hermano adoptivo, su hermano adoptivo hubiere sido dis-

possessionem accipere non poterit, quae proximitatis nomine fratris defertur: praetorem enim non solum mortis tempus, sed etiam id, quo bonorum possessio petitur, intueri palam est.

4.- ULPIANUS; *libro VI, Regularum*.- Si spurius intestato decesserit, iure consanguinitatis aut adgnationis hereditas eius ad nullum pertinet, quia consanguinitatis itemque adgnationis iura a patre oriuntur: proximitatis autem nomine mater eius aut frater eadem matre natus bonorum possessionem eius ex Edicto petere potest.

5.- POMPONIUS; *libro IV, ad Sabinum*.- Legitimis capite deminutis non datur bonorum possessio iure heredis legitimi, quia non eadem causa eorum est, quae liberorum: sed gradu cognatorum rursus vocantur.

6.- ULPIANUS; *libro XLV, ad Edictum*.- Cognatis accusatio nihil obest ad successionem, si accusaverint cognatos suos.

7.- MODESTINUS; *libro VI, Regularum*.- Is, qui aliqua ratione servus factus est, manumissione nulla ratione recipit cognationem.

8.- IDEM; *libro XIV, Responsorum*.- Modestinus respondit non ideo minus ad aviae maternae bona ab intestato nepotes admitti, quod vulgo quaesiti proponuntur.

9.- PAPINIANUS; *libro VI, Responsorum*.- Octavi gradus adgnato iure legitimi heredis, etsi non extiterit heres, possessio defertur: ut proximo autem cognato, quamvis extiterit heres, non defertur.

cannot obtain praetorian possession of the estate of his brother, which would otherwise pass to him as being the next of kin. For it is clear that not only the time of the death, but also the time when possession of the estate was demanded, should be taken into consideration by the Praetor.

4.- ULPIANUS; *Rules, Book VI*.- If an illegitimate child should die intestate, his property will belong to no one by the right of consanguinity or cognation; because the rights of consanguinity, as well as those of cognation, are derived from the father. However, on the ground of being next of kin, his mother, or his brother by the same mother, can demand praetorian possession of his estate under the terms of the Edict.

5.- POMPONIUS; *On Sabinus, Book IV*.- Praetorian possession based on the right of legal inheritance is not granted to such heirs at law as have lost their civil rights, because their position is not the same as that of children; but such heirs are then called to the succession as belonging to the degree of cognates.

6.- ULPIANUS; *On the Edict, Book XLV*.- Where cognates accuse one another of crime, such an accusation offers no obstacle to succession to their estates.

7.- MODESTINUS; *Rules, Book VI*.- Anyone who has become a slave in any way whatsoever can, under no circumstances, regain his rights of cognation by manumission.

8.- THE SAME; *Opinions, Book XIV*.- Modestinus stated that grandchildren, even though they are illegitimate, are not, for that reason, excluded from the intestate succession of their maternal grandmother.

9.- PAPINIANUS; *Opinions, Book VI*.- Praetorian possession can be obtained by an agnate of the eighth degree, as the heir-at-law, even if he would not have been the true heir, but it is not granted to a cognate who is next of kin, although he would have been the true heir.

minuido de cabeza dentro de los cien días, no podrá obtener la posesión de los bienes, que a título de proximidad se le defiere al hermano; porque es manifiesto que el Pretor atiende no sólo al tiempo de la muerte, sino también a aquél en que se pide la posesión de los bienes.

4.- ULPIANO; *Reglas, libro VI*.- Si un espurio hubiere fallecido intestado, su herencia no le pertenece a nadie por derecho de consanguinidad o de agnación, porque los derechos de la consanguinidad y también de la agnación provienen del padre; pero a título de proximidad puede su madre, o el hermano nacido de la misma madre, pedir la posesión de los bienes de él por virtud del Edicto.

5.- POMPONIO; *Comentarios a Sabino, libro IV*.- A los legítimos disminuidos de cabeza no se les da por derecho de heredero legítimo la posesión de los bienes, porque no es la misma la causa de éstos que la de los descendientes, sino que son llamados de nuevo en el grado de los cognados.

6.- ULPIANO; *Comentarios al Edicto, libro XLV*.- A los cognados no les obsta en nada para la sucesión la acusación, si hubieren acusado a sus cognados.

7.- MODESTINO; *Reglas, libro VI*.- El que por alguna razón fue hecho esclavo, por ninguna razón recobra con la manumisión la cognación.

8.- EL MISMO; *Respuestas, libro XIV*.- Modestino respondió, que no porque se diga que fueron habidos del vulgo dejan los nietos de ser admitidos abintestato a los bienes de la abuela materna.

9.- PAPINIANO; *Respuestas, libro VI*.- Al agnado de octavo grado se le defiere por derecho de heredero legítimo la posesión de los bienes, aunque no hubiere quedado heredero, de suerte que no se le defiere al cognado próximo, aunque haya sido heredero.

§ 1.- Fratrís filius pro parte heres institutus, quum patrum surdum esse contenderet atque ideo testamentum facere non potuisse, possessionem ut proximus cognatus accepit. Ex die mortis temporis haberi rationem placuit, quia verisimile non videbatur tam coniunctum sanguine defuncti valedudinem ignorasse.

10.- SCAEVOLA; *libro II, Responsorum*.- Intestata reliquit sororem Septiciam diverso patre natam et praegnatem matrem ex alio marito: quaero, si mater hereditatem repudiaverit, dum adhuc praegnas est, posteaque enixa fuerit semproniam, an etiam Sempronia bonorum Titiae possessionem accipere possit. Respondit, si mater hereditate exclusa est, eam quae, ut proponeretur, postea nata est, accipere posse.

TITULO IX

DE SUCCESSORIO EDICTO

1.- ULPIANUS; *libro XLIX, ad Edictum*.- Successorium Edictum idcirco propositum est, ne bona hereditaria vacua sine domino diutius iacerent et creditoribus longior mora fieret. E re igitur Praetor putavit praestituere tempus his, quibus bonorum possessionem detulit, et dare inter eos successionem, ut maturius possint creditores scire, utrum habeant, quum quo congregiantur, an vero bona vacantia fisco sint delata, an potius ad possessionem bonorum procedere debeant, quasi sine successore defuncto.

§ 1.- Unus enim quisque suam bonorum possessionem repudiare potest, alienam non potest.

§ 1.- A nephew, who had been appointed heir to a part of his paternal uncle's estate, having alleged that his uncle was deaf, and therefore could not make a will, obtained possession of his estate as being the nearest cognate of the deceased. It was decided that the time should be reckoned from the day of his death, for the reason that it did not seem to be probable that anyone so closely related by blood to the deceased could not have been aware of his illness.

10.- SCAEVOLA; *Opinions, Book II*.- A woman, dying intestate, left a sister, Septitia, the daughter of another father, and her mother pregnant by a second husband. I ask, if the mother should reject the estate while she is still pregnant, and should afterwards have a daughter named Sempronia, whether the said Sempronia can obtain praetorian possession of the estate of her sister Titia. The answer was that, according to the facts stated, if her mother was excluded from the estate, she who was subsequently born could obtain praetorian possession of the same.

TITLE IX

CONCERNING THE SUCCESSORY EDICT

1.- ULPIANUS; *On the Edict, Book XLIX*.- The Successory Edict was promulgated in order that estates might not remain too long without ownership, and the creditors suffer from too protracted a delay. Therefore, the Praetor thought that a limit should be prescribed for those to whom he granted praetorian possession, and to establish a succession among them, in order that the creditors might sooner ascertain to whom they must apply; whether the estate escheated to the Treasury for want of ownership, or whether they themselves should institute proceedings to obtain praetorian possession, just as if the deceased had died without leaving any successor.

§ 1.- For even one can reject praetorian possession which is granted to himself, but he cannot reject that which is granted to another.

§ 1.- El hijo del hermano, instituido heredero de una parte, sosteniendo que su tío paterno era sordo, y que por lo tanto no pudo hacer testamento, obtuvo la posesión como próximo cognado; se determinó, que se tuviese cuenta desde el día de la muerte, porque no parecía verosímil que persona tan conjunta por la sangre hubiese ignorado la enfermedad del difunto.

10.- SCÉVOLA; *Respuestas, libro II*.- Una que falleció intestada dejó a su hermana Septicia nacida de otro padre, y a su madre embarazada de otro marido; pregunto, si, habiendo repudiado la madre la herencia, mientras estaba embarazada, y habiendo dado después a luz a Sempronia, podría también Sempronia obtener la posesión de los bienes de Ticia. Respondió, que si la madre fue excluida de la herencia, puede obtenerla la que, según se dice, nació después.

TÍTULO IX

DEL EDICTO SUCESORIO

1.- ULPIANO; *Comentarios al Edicto, libro XLIX*.- Se publicó el Edicto sucesorio para que los bienes de la herencia no yacieran mucho tiempo vacantes sin dueño, y para que no se les causara más larga demora a los acreedores. Y por esto juzgó el Pretor haber de prefijar un término a los que les definió la posesión de los bienes, y haber de dar entre ellos la sucesión, para que los acreedores pudieran saber más pronto si tienen con quien contender, o si los bienes han sido deferidos como vacantes al fisco, o si preferentemente deben proceder a la posesión de los bienes, como si el deudor hubiere fallecido sin sucesor.

§ 1.- Porque cada uno puede repudiar su propia posesión de los bienes, pero no la de otro.

§ 2.- Proinde procurator meus sine mea voluntate meam bonorum possessionem repudiare non potest.

§ 3.- Per servum delatam bonorum possessionem dominus repudiare potest.

§ 4.- Tutor impuberis an repudiare possit bonorum possessionem, videamus. Et magis est, ne possit: sed ille ex auctoritate tutoris repudiare potest.

§ 5.- Furiosi curator nequaquam poterit repudiare, quia necdum delata est.

§ 6.- Qui semel noluit bonorum possessionem petere, perdidit ius eius, etsi tempora largiantur: ubi enim noluit, iam coepit ad alios pertinere bonorum possessio aut fiscum invitare.

§ 7.- Decretalis bonorum possessio an repudiari possit, videamus. Et quidem diebus finiri potest: sed repudiari eam non posse verius est, quia nondum delata est, nisi quum fuerit decreta: rursum posteaquam decreta est, sera repudiatio est, quia quod acquisitum est repudiari non potest.

§ 8.- Si intra centensimum diem mortuus sit prior, statim sequens admitti potest.

§ 9.- Quod dicimus "intra dies centum bonorum possessionem peti posse", ita intellegendum est, ut et ipso die centesimo bonorum possessio peti possit, quemadmodum intra kalendas etiam ipsae kalendae sunt. Idem est et si "in diebus centum" dicatur.

§ 2.- Therefore, my agent cannot reject praetorian possession to which I am entitled, without obtaining my consent to do so.

§ 3.- A master can reject praetorian possession to which he is entitled through a slave.

§ 4.- Let us see whether a guardian can reject praetorian possession of an estate to which his ward is entitled. The better opinion is that he cannot do so, but the ward himself can reject it with the authority of his guardian.

§ 5.- The curator of an insane person can, under no circumstances, reject praetorian possession of an estate to which the latter is entitled because the latter has not yet obtained it.

§ 6.- Where a person has once refused to demand praetorian possession of an estate, he loses his right, even though the prescribed time for doing so had not yet expired; for, when he refused to accept it, possession of the estate had already begun to belong to others, or to escheat to the Treasury.

§ 7.- Let us see whether praetorian possession of an estate authorized by a decree can be rejected. And, indeed, it may be terminated by lapse of time, but it is none the less true that it cannot be rejected, because it was not granted before the decree was issued. Again, after the decree has been issued, the rejection will be too late, as a right which has once been acquired cannot be rejected.

§ 8.- If the relative first in degree should die within the prescribed hundred days, the one next in succession can immediately demand possession of the estate.

§ 9.- What we have said with reference to demanding praetorian possession within a hundred days must be understood to mean that it can be demanded even on the hundredth day; just as where an act is to be performed within certain kalends, the kalends themselves are included. The same rule applies where some act is to be performed within a

§ 2.- Por lo cual, mi procurador no puede repudiar sin mi voluntad mi posesión de los bienes.

§ 3.- El señor puede repudiar la posesión de los bienes que se le defirió por medio del esclavo.

§ 4.- Veamos si el tutor de un impúbbero podrá repudiar la posesión de los bienes. Y es más cierto que no puede; pero él puede repudiarla con la autoridad del tutor.

§ 5.- El curador del furioso no podrá de ninguna manera repudiarla, porque aun no le fue deferida.

§ 6.- El que una vez no quiso pedir la posesión de los bienes, perdió el derecho a ella, aunque dure el término; porque desde que no quiso, comenzó la posesión de los bienes a pertenecerles a otros o a invitar al fisco.

§ 7.- Veamos si se podrá repudiar la posesión de los bienes concedida por decreto. Y verdaderamente se puede perder por el tiempo; pero es más cierto que no puede ser repudiada; porque no fue deferida sino cuando hubiere sido decretada; y por otra parte, después que fue decretada es tardía la repudiación, porque no se puede repudiar lo que se adquirió.

§ 8.- Si el más próximo hubiera muerto dentro de los cien días, puede ser admitido inmediatamente el que sigue.

§ 9.- Lo que decimos, que se puede pedir dentro de cien días la posesión de los bienes, se ha de entender de modo, que aun en el mismo día centésimo se pueda pedir la posesión de los bienes, a la manera que dentro de las kalendas están también las mismas kalendas. Y lo mismo es, también si se dijera en cien días.

hundred days.

§ 10.- Quibus ex Edicto bonorum possessio dari potest, si quis eorum aut dari sibi noluerit aut in diebus statutis non admiserit, tunc ceteris bonorum possessio perinde competit, ac si prior ex eo numero non fuerit.

§ 11.- Sed videndum est, an inter ceteros ipse quoque qui exclusus est admittatur. Ut puta filius est in potestate: delata est ei bonorum possessio ex prima parte, unde liberis defertur: exclusus est tempore aut repudiatione: ceteris defertur: sed ipse sibi succedat ex hac successoria parte? Et magis est, ut succedat, ut unde legitimi possit petere et post hos suo ordine ex illa parte, unde proximi cognati vocantur. et hoc iure utimur, ut admittatur: poterit igitur ex sequenti parte succedere ipse sibi. Item hoc dici poterit et in secundum tabulas bonorum possessione, ut, si secundum tabulas non petierit bonorum possessionem is qui potuit et ab intestato succedere, ipse sibi succedat.

§ 12.- Largius tempus parentibus liberisque petendae bonorum possessionis tribuitur, in honorem sanguinis videlicet, quia artandi non erant, qui paene ad propria bona veniunt. Ideoque placuit eis praestitui annum, scilicet ita moderate, ut neque ipsi urguerentur ad bonorum possessionis petitionem neque bona diu iacerent. Sane nonnumquam urgentibus creditoribus interrogandi sunt in iure, an sibi bonorum possessionem admittant, ut, si repudiare se dicant, sciant creditores, quid sibi agendum esset: si deliberare se adhuc dicant, pra-

§ 10.- Where one of those to whom praetorian possession may be given under the terms of the Edict refuses, or neglects to demand it for himself within the specified time, the other heirs in the next degree can claim praetorian possession of the estate, just as if the one in the first degree had not been included in the number of those entitled to the same.

§ 11.- However, it should be considered whether the one who is excluded in this way can also be admitted to share with the others; for instance, a son who is under paternal control, where possession of an estate ab intestato has been granted to him under the First Section of the Edict relating to children. He is excluded by lapse of time, or by rejection of the estate, and praetorian possession passes to the heirs next in degree. Will he himself succeed by virtue of this Section relating to succession? The better opinion is that he can do so; for he can demand possession of the estate as one of the heirs at law, and after them, in his own degree, under the Section where the cognates, who are next of kin, are called to the succession. This is our practice, so that the son is admitted to the succession in this manner, and therefore, he can succeed himself in accordance with the Second Section of the Edict. This rule can also be said to apply with reference to praetorian possession in accordance with the provisions of the will; so that if he who can succeed to the praetorian succession on the ground of intestacy does not apply for it in accordance with the terms of the will, he can still in this way succeed himself.

§ 12.- A longer time to demand praetorian possession of an estate is accorded to parents and children on account of the honor attaching to blood, because those who are, so to speak, coming into possession of their own property, should not be too closely restrained. It has, therefore, been determined that they shall be given a year, so that they may be afforded a reasonable time for demanding praetorian possession of the estate, and not be pressed to do so; and that, on the other hand, the property may not remain too long without an owner. It is true that

§ 10.- Si alguno de aquellos, a quienes por virtud del Edicto se les puede dar la posesión de los bienes, no hubiere querido que se le dé a él, o no la hubiere admitido en los días establecidos, en este caso les compete a los demás la posesión de los bienes, lo mismo que si el anterior no hubiere sido de tal número.

§ 11.- Pero se ha de ver, si también el mismo, que fue excluido, será admitido entre los demás; por ejemplo, un hijo está bajo potestad, se le defirió la posesión de los bienes en virtud de la primera parte, por la cual se les defiere a los descendientes; fue excluido por el tiempo, o por repudiación; se les defiere a los demás; pero ¿sucederá también él en virtud de esta parte sucesoria? Y es más cierto que sucede, de modo que puede pedir la posesión *Unde legitimi*; y después de estos por su orden en virtud de aquella parte en la que son llamados los próximos cognados; y observamos este derecho, que sea admitido; podrá, pues, suceder a sí mismo en virtud de la siguiente parte. Igualmente se podrá decir esto también en la sucesión de los bienes conforme al testamento, de modo que si no hubiere pedido la posesión de los bienes con arreglo al testamento el que pudo suceder también abintestato, él se sucederá a sí mismo.

§ 12.- A los ascendientes y a los descendientes se les concede más largo tiempo para pedir la posesión de los bienes, en consideración, por supuesto, a la sangre, porque no debían ser estrechados los que suceden casi en sus propios bienes; y por esto plugo que a ellos se les prefijara un año, así, a la verdad, moderadamente, para que ni ellos fuesen apremiados a la petición de la posesión de los bienes, ni quedasen yacentes largo tiempo los bienes. A veces ciertamente, apremiando los acreedores, han de ser interrogados en juicio sobre si admiten para sí la

ecipitandi non sunt.

sometimes when they are interrogated in court by impatient creditors, they must state whether they will demand praetorian possession or not; so that, if they say that they intend to reject it, the creditors may know what they will have to do. If they say that they are still deliberating, they should not be hurried.

posesión de los bienes, para que, si dijeran que la repudian, sepan los acreedores qué hayan de hacer ellos; y si dijeran que todavía están deliberando, no se les ha de precipitar.

§ 13.- Si quis autem a patre suo impuberi filio sit substitutus, non intra annum, sed intra diem centesimum bonorum possessionem petere poterit.

§ 13.- When anyone is substituted by his father for his brother, who is under the age of puberty, he must demand praetorian possession of his estate, not within a year, but within a hundred days.

§ 13.- Mas si alguno hubiera sido substituido por su padre a un hijo impúbere, no podrá pedir la posesión de los bienes dentro de un año, sino dentro de cien días.

§ 14.- Non solum autem quum suo nomine veniunt liberi parentesque, hoc eis tribuitur, verum etiam si servus eius, qui ex liberis patentibusque est, heres institutus est, intra annum competit bonorum possessio: persona enim ea est, quae meruit hoc beneficium, quae petat.

§ 14.- This favor is granted to parents and children, not only where they are themselves directly in the line of succession, but also where a slave of one of the children or parents is appointed an heir; for in this case, praetorian possession can be demanded within a year. For it is the person who demands possession who is entitled to this benefit.

§ 14.- Pero no solamente se les concede esto a los descendientes y a los ascendientes cuando suceden en su propio nombre, sino que también si fue instituido heredero un esclavo de uno de los descendientes o de los ascendientes, compete dentro de un año la posesión de los bienes; porque la persona que lo pida es la que mereció este beneficio.

§ 15.- Sed et si pater emancipati filii bonorum possessionem contra tabulas accipere velit, anni tempus ei competere constat.

§ 15.- If, however, the father of an emancipated son desires to obtain praetorian possession of his estate in opposition to the provisions of the will, it is settled that he has a year in which to do so.

§ 15.- Pero también si el padre del hijo emancipado quisiera recibir la posesión de los bienes contra el testamento, es sabido que le compete el tiempo de un año.

§ 16.- Et generaliter ait Iulianus ex omnibus causis liberis parentibusque intra annum bonorum possessionem competere.

§ 16.- Julianus says that, generally speaking, praetorian possession can, under all circumstances, be demanded by parents and children within a year.

§ 16.- Y en general dice Juliano, que en todos los casos les compete a los descendientes y a los ascendientes la posesión de los bienes dentro de un año.

2.- PAPINIANUS; *libro VI, Responsorum*.- Inferioris gradus cognatus beneficium Edicti successorii non habuit, quum prior ex propria parte possessionem accepisset: nec ad rem pertinuit, quod abstinendi facultatem ob auxilium aetatis prior cognatus acceperat. Igitur fisco vacantia bona recte deferri placuit.

2.- PAPINIANUS; *Opinions, Book VI*.- A cognate of an inferior degree is not entitled to the benefit of the Successory Edict, when one in the first degree has obtained praetorian possession under his own Section of the Edict. Nor will it make any difference whether the cognate, first in degree, obtained the right of rejection on account of his age. Hence it was decided that the property is legally escheated to the Treasury as being without an owner.

2.- PAPINIANO; *Respuestas, libro VI*.- El cognado de grado inferior no tuvo el beneficio del Edicto sucesorio, cuando otro anterior hubiese recibido en virtud de su propia parte la posesión. Y no fue del caso que el cognado precedente hubiera obtenido por beneficio de su edad la facultad de abstenerse. Así, pues, con razón se determinó que como vacantes fuesen deferidos los bienes al fisco.

TITULO X

DE GRADIBUS, ET AFFINIBUS, ET
NOMINIBUS EORUM

1.- GAIUS; *libro VIII, ad Edictum provinciale*.- Gradus cognationis alii superioris ordinis sunt, alii inferioris, alii ex transverso sive a latere. Superioris ordinis sunt parentes. Inferioris liberi. Ex transverso sive a latere fratres et sorores liberique eorum.

§ 1.- Sed superior quidem et inferior cognatio a primo gradu incipit, ex transverso sive a latere nullus est primus gradus et ideo incipit a secundo. Itaque in primo gradu cognationis superioris quidem et inferioris ordinis cognati possunt concurrere, ex transverso vero numquam eo gradu quisquam concurrere potest. at in secundo et tertio et deinceps in ceteris possunt etiam ex transverso quidam concurrere et cum superioris ordinis cognatis.

§ 2.- Sed admonendi sumus, si quando de hereditate vel bonorum possessione quaeramus, non semper eos, qui eiusdem gradus sint, concurrere.

§ 3.- Primo gradu sunt supra pater mater. Infra filius filia.

§ 4.- Secundo gradu sunt supra avus avia. Infra nepos neptis. Ex transverso frater soror.

§ 5.- Tertio gradu sunt supra proavus proavia. Infra pronepos proneptis. Ex transverso fratris sororisque filius filia: et convenienter patruus amita, avunculus matertera.

TITLE X

CONCERNING THE DEGREES OF
RELATIONSHIP AND AFFINITY AND THEIR
DIFFERENT NAMES

1.- GAIUS; *On the Provincial Edict, Book VIII*.- The degrees of relationship are, some of them, in the ascending, and some of them in the descending line, or in the collateral line. Those in the direct ascending line are parents; those in the direct descending line are children; those in the collateral line are brothers and sisters and their children.

§ 1.- Relationship in the direct ascending and descending lines begins with the first degree, but in the collateral line there is no first degree, and therefore it begins with the second. Hence cognates in the first degree of the direct ascending and descending lines can share equally with one another; but no one can do this in the collateral line in this degree, but in the second and third degrees, and in those which follow, the collateral heirs can share with one another, and sometimes even with those of a higher degree.

§ 2.- We should, however, remember, whenever we consider the questions relating to inheritance or to the pratorian possession of an estate, that those who belong to the same degree do not always share equally with one another.

§ 3.- Heirs who are first in the ascending line are the father and the mother; those first in the descending line are the son and the daughter.

§ 4.- Those first in the second degree of the direct ascending line are the grandfather and the grandmother; those first in the direct descending line are the grandson and the granddaughter; those first in the collateral line are the brother and the sister.

§ 5.- Those first in the third degree in the direct ascending line are the great-grandfather and the great-grandmother; those first in the descending line are the great-grandson and the great-granddaughter;

TÍTULO X

DE LOS GRADOS, Y DE LOS AFINES, Y DE
SUS NOMBRES

1.- GAYO; *Comentarios al Edicto provincial, libro VIII*.- Los grados de la cognación son unos del orden superior, otros del inferior, y otros del transversal o colateral. Del orden superior son los ascendientes; del inferior los descendientes; del transversal o colateral los hermanos y las hermanas, y sus descendientes.

§ 1.- Pero la cognación superior y la inferior comienzan en el primer grado; en la transversal o colateral no hay primer grado, y por ello comienza en el segundo. Y así, en el primer grado de la cognación pueden concurrir ciertamente los cognados del orden superior y del inferior, pero del transversal no puede concurrir nunca nadie en este grado; mas en el segundo y en el tercero y en los demás subsiguientes pueden concurrir también algunos del transversal juntamente con los cognados del orden superior.

§ 2.- Pero debemos advertir, que cuando se trata de herencia o de posesión de los bienes, no siempre concurren los que son del mismo grado.

§ 3.- En el primer grado se hallan, ascendiendo, el padre y la madre; descendiendo, el hijo y la hija.

§ 4.- En el segundo grado están, ascendiendo, el abuelo y la abuela; descendiendo, el nieto y la nieta; y en el orden transversal el hermano y la hermana.

§ 5.- En el tercer grado se hallan, ascendiendo, el bisabuelo y la bisabuela; descendiendo, el bisnieto y la bisnieta; y en el orden transversal el hijo y la hija del hermano y de la hermana, y consiguientemente el

those first in the collateral line are the son and the daughter of the brother and the sister, and, next in order, the paternal uncle and the paternal aunt, the maternal uncle and the maternal aunt.

§ 6.- Quarto gradu sunt supra abavus abavia. Infra abnepos abneptis. Ex transverso fratris sororisque nepos neptis: et convenienter patruus magnus amita magna (id est avi frater et soror), avunculus magnus matertera magna (id est aviae frater et soror): item fratres patruales sorores patruales (id est qui quaeve ex duobus fratribus progenerantur), item consobrini consobrinaeque (id est qui quaeve ex duabus sororibus nascuntur, quasi consororini), item amitini amitinae (id est qui quaeve ex fratre et sorore propagantur). Sed fere vulgus omnes istos communi appellatione consobrinos vocant.

§ 7.- Quinto gradu sunt supra atavus atavia. Infra adnepos adneptis. ex transverso fratris et sororis pronepos proneptis: et convenienter propatruus et proamita (id est proavi frater et soror), proavunculus et promatertera (id est proaviae frater et soror): item fratris patruelis sororis patruelis filius filia, et similiter consobrini consobrinae, item amitini amitinae filius filia: propior sobrino propior sobrina (isti sunt patrui magni amitae magnae, avunculi magni materterae magnae filius filia),

2.- ULPIANUS; *libro XLVI, ad Edictum*.- hoc est patris eius, de cuius cognatione quaeritur, conso-

§ 6.- In the fourth degree of the direct ascending line are the great-great-grandfather and the great-great-grandmother, in the direct descending line the great-great-grandson and the great-great-granddaughter; in the collateral line the grandson and the granddaughter of the brother and the sister, and, in their order, the great-paternal uncle and the great paternal aunt, that is to say, the brother and sister of the grandfather; the great maternal uncle and the great maternal aunt, that is to say, the brother and sister of the grandmother; likewise, the brothers and sisters of the great maternal uncle, that is to say, children both male and female descended from two brothers; also the children both male and female, born of two sisters; and children of both sexes, the issue of a brother and a sister. All of these are known under the common appellation of first cousins.

§ 7.- In the fifth degree of the direct ascending line are the great-great-great-grandfather and the great-great-great-grandmother; in the direct descending line the great-great-great-grandson and the great-great-great-granddaughter; in the collateral line the great-grandson and the great-granddaughter of the brother and the sister; and, in the same order, the great-great paternal uncle and the great-great paternal aunt, that is to say, the brother and sister of the great-grandfather, and the great-great-maternal uncle and the great-great-maternal aunt, that is to say, the brother and sister of the great-grandmother; also the son and daughter of male cousins, and the son and daughter of female cousins, likewise other male and female cousins and the sons and daughters of the latter on both sides, and those of both sexes and are next to cousins in degree; these being the sons and daughters of the great paternal uncle and the great paternal aunt and the great maternal uncle and the great maternal aunt:

2.- ULPIANUS; *On the Edict, Book XLVI*.- That is to say the male and female cousins of the father of

tío y la tía paternos, y el tío y la tía maternos.

§ 6.- En el cuarto grado están, ascendiendo, el tatarabuelo y la tatarabuela; descendiendo, el tataranieto y la tataranieta; y en el orden transversal el nieto y la nieta del hermano y de la hermana; y consiguientemente los grandes tío y tía paternos, esto es, el hermano y la hermana del abuelo, y los grandes tío y tía maternos, esto es, el hermano y la hermana de la abuela; además los primos y las primas hermanas paternos, esto es, los que o las que descenden de dos hermanos; también los consobrinos y las consobrinas, esto es, los que o las que nacen de dos hermanas, en cierto modo codescendientes de hermanas; y además los primos y las primas por hermano y hermana, esto es, los que o las que nacen de hermano y de hermana; pero el vulgo llama de ordinario a todos éstos con la denominación común de consobrinos.

§ 7.- En el que quinto grado se hallan, ascendiendo, los cuartos abuelo y abuela; descendiendo, los cuartos nieto y nieta; transversalmente, el bisnieto y la bisnieta del hermano y de la hermana; y consiguientemente los terceros tío y tía paternos, esto es, el hermano y la hermana del bisabuelo, los terceros tío y tía maternos, esto es, el hermano y la hermana de la bisabuela; además el hijo y la hija del primo hermano y de la prima hermana paternos, y análogamente del consobrino y de la consobrina, y también el hijo o la hija del primo y de la prima por hermano y hermana, el mas próximo al sobrino, y el más próximo a la sobrina; éstos son, el hijo y la hija de los grandes tío y tía paternos, y de los grandes tío y tía maternos.

2.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Esto es, el consobrino y la consobrina, o el

brinus consobrina sive frater patruelis.

3.- GAIUS; *libro VII, ad Edictum provinciale*.- Sexto gradu sunt supra triavus triavia. Infra trinepos trineptis. Ex transverso fratris et sororis abnepos abneptis; et convenienter abpatruus abamita (id est abavi frater et soror), abavunculus abmatertera (id est abaviae frater et soror): item patruui magni amitae magnae, avunculi magni materterae magnae nepos neptis: item fratris patruelis sororis patruelis, consobrini consobrinae, amitini amitinae nepos neptis: propatruui proamitae, proavunculi promaterterae filius filia. Item qui ex fratribus patruelibus aut consobrinis aut amitinis undique propagantur, quae proprie sobrini vocantur.

§ 1.- In septimo gradu quam multae esse possint personae, ex his quae diximus satis apparet.

§ 2.- Admonendi tamen sumus parentum liberorumque personas semper duplicari: avum enim et aviam tam maternos quam paternos intellegemus, item nepotes neptesque tam ex filio quam ex filia: quam rationem scilicet in omnibus deinceps gradibus supra infraque sequemur.

4.- MODESTINUS; *libro XII, Pandectarum*.- Non facile autem, quod ad nostrum ius attinet, quum de naturale cognatione quaeritur, septimum gradum quis excedit, quatenus ultra eum fere gradum rerum natura cognatorum vitam consistere non patitur.

him whose relationship is in question, or the children of a father's brother.

3.- GAIUS; *On the Provincial Edict, Book VIII*.- In the sixth degree, in the direct ascending line, are the great-great-great-great-grandfather and the great-great-great-great-grandmother. In the direct descending line are the great-great-great-great-grandson and the great-great-great-great-granddaughter; and in the collateral line, the great-great-grandson and the great-great-granddaughter of the brother and sister; and in their order, the great-great-paternal uncle and the great-great-paternal aunt, that is to say, the brother and sister of the great-great-grandfather; and the great-great-maternal uncle and great-great-maternal aunt, that is to say, the brother and sister of the great-great-grandmother. Likewise, the grandson and the granddaughter of the great paternal uncle, and the great paternal aunt, and of the great maternal uncle and the great maternal aunt. Also, the grandson and the granddaughter of first cousins of both sexes, and the son and the daughter of the great-paternal uncle and the great-paternal aunt, and of the great-maternal uncle and the great maternal aunt; as well as the children of cousins on both sides who are properly called the issue of first cousins.

§ 1.- It is sufficiently apparent, from what we have said, how many persons there can be in the seventh degree.

§ 2.- We must also remember that the relatives in the ascending and descending lines must always be doubled; because we understand that there is a grandfather and a grandmother on the maternal as well as the paternal side, as well as grandchildren of both sexes, the children of sons as well as daughters; and this order must be followed in all degrees both ascending and descending.

4.- MODESTINUS; *Pandects, Book XII*.- So far as our law is concerned, it is not easy to go beyond the seventh degree, when a question arises with reference to natural relationship, as nature hardly permits the existence of cognates to extend beyond

primo hermano paterno del padre de aquél de cuya cognación se trata.

3.- GAYO; *Comentarios al Edicto provincial, libro VIII*.- Son del sexto grado, ascendiendo, los quintos abuelo y abuela, y descendiendo, los quintos nieto y nieta; y transversalmente, el tataranieto y la tataranieta del hermano y de la hermana; y consiguiientemente, los cuartos tío y tía paternos, esto es, el hermano y la hermana del tatarabuelo, los cuartos tío y tía maternos, esto es, el hermano y la hermana de la tatarabuela; también el nieto y la nieta de los grandes tío y tía paternos, y de los grandes tío y tía maternos; también el nieto y la nieta del primo hermano y de la prima hermana paternos, del consobrino y de la consobrina, del primo y de la prima por hermano y hermana; el hijo y la hija de los terceros tío y tía paternos y de los terceros tío y tía maternos; y también los que descendieren de primos hermanos paternos, o de consobrinos, o de primos por hermano y hermana, que propiamente se llaman sobrinos.

§ 1.- De lo que hemos dicho aparece con bastante claridad qué multitud de personas puede haber en el séptimo grado.

§ 2.- Pero hemos de advertir, que las personas de los ascendientes y de los descendientes siempre se duplican; porque por abuelo y por abuela entendemos tanto los maternos como los paternos; y también por nietos y por nietas, así los nacidos de hijo, como los de hija; cuya regla seguiremos, por supuesto, en todos los ulteriores grados, ascendiendo y descendiendo.

4.- MODESTINO; *Pandectas, libro XII*.- Mas, en cuanto a nuestro derecho atañe, nadie pasa fácilmente del séptimo grado, cuando de la cognación natural se trata, porque la naturaleza de las cosas no consiente de ordinario que haya vida de cognados

§ 1.- Cognati ab eo dici putantur, quod quasi una communiterve nati vel ab eodem orti progenitive sint.

§ 2.- Cognationis substantia bifariam apud Romanos intellegitur: nam quaedam cognationes Iure Civili, quaedam Naturali conectuntur, non-numquam utroque iure concurrente et Naturali et Civili copulatur cognatio. Et quidem naturalis cognatio per se sine civili cognatione intellegitur quae per feminas descendit, quae vulgo liberos peperit. Civilis autem per se, quae etiam legitima dicitur, sine iure naturali cognatio consistit per adoptionem. Utrouque iure consistit cognatio, quum iustis nuptiis contractis copulatur. Sed naturalis quidem cognatio hoc ipso nomine appellatur: civilis autem cognatio licet ipsa quoque per se plenissime hoc nomine vocetur, proprie tamen adgnatio vocatur, videlicet quae per mares contingit.

§ 3.- Sed quoniam quaedam iura inter adfines quoque versantur, non alienum est hoc loco de adfinibus quoque breviter disserere. Adfines sunt viri et uxoris cognati, dicti ab eo, quod duae cognationes, quae diversae inter se sunt, per nuptias copulantur et altera ad alterius cognationis finem accedit: namque coniugendae adfinitatis causa fit ex nuptiis.

§ 4.- Nomina vero eorum haec sunt: socer socrus, gener nurus, noverca vitricus, privignus privigna.

§ 5.- Gradus autem adfinitati nulli sunt.

§ 6.- Et quidem viri pater uxorisque socer, mater autem eorum socrus appellatur, quum apud Graecos proprie viri pater, mater vero vocitetur, uxoris autem pater penveros et mater penvera vocatur. Filii autem uxor nurus, filiae vero vir gener appellatur. Uxor liberis ex alia uxore natis noverca dicitur, matris vir ex alio viro natis vitricus appellatur: eorum uterque

that degree.

§ 1.- The term "cognates" is thought to be derived from the fact that relatives are descended from one ancestor, or have a common origin or birth.

§ 2.- Relationship among the Romans is understood to be two fold, for some connections are derived from the Civil and others from Natural Law, and sometimes both coincide, so that the relationship by the Natural and the Civil Law is united. And, indeed, a natural connection can be understood to exist without the civil one, and this applies to a woman who has illegitimate children. Civil relationship, however, which is said to be legal, arises through adoption without Natural Law. Relationship exists under both laws when a union is made by marriage lawfully contracted. Natural relationship is designated by the term cognation; but civil relationship, although it may very properly be designated by the same name, is more accurately styled agnation, which has reference to relationship derived through males.

§ 3.- As certain special rights exist with reference to persons connected by affinity, it is not foreign to the subject to briefly discuss this connection. Persons related by affinity are the cognates of husband and wife, so called for the reason that two relationships, differing from one another, are joined by marriage, and one is transferred to the other. For affinity is derived from marriage.

§ 4.- The following are the terms of affinity, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, and stepdaughter.

§ 5.- There are no degrees of affinity.

§ 6.- The father of the husband or the wife, is called the father-in-law, and the mother of either of them is called the mother-in-law. Among the Greeks the father of the husband was called and the mother the father of the wife was called and the mother. The wife of the son is called the daughter-in-law, the husband of a daughter the son-in-law. A second wife is called

más allá de este grado.

§ 1.- Mas se considera que se llaman cognados, porque son como nacidos juntamente o en común, o nacidos y engendrados de uno mismo.

§ 2.- La esencia de la cognación se entiende entre los Romanos de dos modos; porque unas cognaciones unirán por Derecho Civil, y otras por Derecho Natural; y a veces la cognación se liga concurriendo uno y otro Derecho, así el Civil como el Natural. Y se entiende ciertamente que es cognación natural por sí sin cognación civil, la que desciende por hembra, que parió hijos del vulgo; pero la cognación civil por sí, que también se dice legítima, subsiste sin derecho natural, por la adopción. La cognación descansa en uno y otro derecho, cuando se une habiéndose contraído justas nupcias. Mas la cognación ciertamente natural se denomina con este mismo nombre; pero la cognación civil, aunque también ella se llame por sí muy ampliamente con este nombre, se llama, sin embargo, propiamente agnación, por supuesto, la que proviene por varones.

§ 3.- Mas como también hay algunos derechos entre los afines ¿es acaso ajeno a este lugar tratar aunque brevemente de los afines? Afines son los cognados del marido y de la mujer, llamados así, porque por las nupcias se unen dos cognaciones que son entre sí diversas, y la una de aproxima al fin de la otra cognación; porque la causa de unirse la afinidad proviene de las nupcias.

§ 4.- Los nombres de ellas son estos: suegro, suegra, yerno, nuera, madrastra, padrastro, hijastro, hijastra.

§ 5.- La afinidad no tiene grado alguno.

§ 6.- Y, a la verdad, el padre del marido y de la mujer se llama suegro, y la madre de ellos suegra, llamándose entre los Griegos propiamente suegro, al padre del marido, y suegra a la madre; pero al padre de la mujer se le llama suegro y suegra a la madre; mas la mujer del hijo es llamada nuera, y el marido de la hija yerno. A la mujer se le dice madrastra respecto

natos aliunde privignos privignasque vocant. Potest etiam sic definiri. Socer est uxoris meae pater, ego illius sum gener: socer magnus dicitur uxoris meae avus, ego illius sum progener: et retro pater meus uxoris meae socer est, haec illi nurus: et avus meus uxoris meae socer magnus est, illa illi pronurus. Item prosocrus mihi uxoris meae avia est, ego illius sum progener: et retro mater mea uxoris meae socrus est, illa huic nurus: et avia mea uxoris meae socrus magna est et uxor mea illi pronurus est. Privignus est uxoris meae filius ex alio viro natus, ego illi sum vitricus: et in contrarium uxor mea liberis, quos ex alia uxore habeo, noverca dicitur, liberi mei illi privigni. Viri frater levir. Is apud Graecos appellatur, ut est apud homerum relatum: sic enim Helena ad Hectorem dicit:

(Levier mei, canis omnis mali causatrix, horridae).

Viri soror glos dicitur, apud Graecos. Duorum fratrum uxores iantrices dicuntur, apud Graecos. Quod uno versu idem homerus significat:

(An aliquo ag glorum, an ad fratrarium elegantibus peplis indutarum aedes).

§ 7.- Hos itaque inter se, quod adfinitatis causa parentum liberorumque loco habentur, matrimonio copulari nefas est.

§ 8.- Sciendum est neque cognationem neque adfinitatem esse posse, nisi nuptiae non interdictae sint, ex quibus adfinitas coniungitur.

§ 9.- Libertini libertinaeque inter se adfines esse possunt.

§ 10.- In adoptionem datus aut emancipatus

the stepmother of children born of a former one; the husband of a mother having children by a former husband is called the stepfather, and children born of either of them are designated stepsons, and stepdaughters; a father-in-law may also be dened as the father of my wife, and I am his son-in-law. The grandfather of my wife is called my grandfather-in-law, and I am his grandson-in-law; on the other hand, my father is the father-in-law of my wife, and she is his daughter-in-law, and my grandfather is her grandfather-in-law, and she is his granddaughter-in-law; likewise, the grandmother of my wife is my grandmother-in-law, and I am her grandson-in-law; and my mother is the mother-in-law of my wife, and she is her daughter-in-law; and my grandmother is her grandmother-in-law, and my wife is her granddaughter-in-law. The stepson of my wife is the son of her former husband, and I am his stepfather; on the other hand, my wife is said to be the stepmother of children whom I have by a former wife, and my children are her stepchildren. The brother of a husband is the brother-in-law of his wife, and is called by the Greeks, as is stated by Homer. The sister of the husband is a sister-in-law of the wife called by the Greeks. The wives of two brothers are called sisters-in-law, designated among the Greeks as, which Homer also mentions.

§ 7.- It is wrong for such persons to contract marriage reciprocally for the reason that, on account of their affinity, they bear the relation of parents and children to one another.

§ 8.- It must be remembered that neither cognation nor affinity can exist unless the marriage which gives rise to affinity is not forbidden by law.

§ 9.- Freedmen and freedwomen can become connected with one another by affinity.

§ 10.- A child given in adoption, or emancipated,

a los hijos nacidos de otra mujer, y el marido de la madre es llamado padrastro de los hijos de otro marido; y una y otro llaman hijastros e hijastras a los nacidos de otro y de otra. Se puede definir también así al suegro, el padre de mi mujer, y yo soy yerno de él; se dice grande suegro al abuelo de mi mujer, y de él soy yo proyerno; y volviendo atrás, mi padre es suegro de mi mujer, y ella nuera de él; y mi abuelo grande suegro, y ella pronuera de él. Asimismo, es prosuegra mía, la abuela de mi mujer, y yo soy proyerno de ella; y retrocediendo, mi madre es suegra de mi mujer, y ésta nuera de ella; y mi abuela es grande suegra, y mi mujer pronuera de ella. Es hijastro el hijo de mi mujer nacido de otro marido, y yo soy padrastro de él; y al contrario, mi mujer es llamada madrastra de los hijos, que tengo de otra mujer, y mis hijos son hijastros de ella. El hermano del marido se llama cuñado, los Griegos, como se halla en Homero; porque así le dice Elena a Hector:

*Cuñado amado mío, de esta autora
Horrible e imprudente de desdichas.*

La hermana del marido se llama cuñada, entre los Griegos. Las mujeres de dos hermanos se llaman concuñadas, entre los Griegos según indica el mismo Homero en un verso:

..... ¿Fué a ver de mis hermanos
A una de las esposas, o a cualquiera
De mis hermanas?

§ 7.- Así, pues, es nefando que se unan éstos en matrimonio entre sí, porque por causa de la afinidad son considerados en el lugar de ascendientes y de descendientes.

§ 8.- Se ha de saber, que no puede haber ni cognación ni afinidad, a no ser que no estén prohibidas las nupcias por virtud de las que se contrae la afinidad.

§ 9.- Los libertinos y las libertinas pueden ser afines entre sí.

§ 10.- El que fue dado en adopción, o emancipado,

quascumque cognationes adfinitatesque habuit, retinet, agnationis iura perdit. Sed in eam familiam, ad quam per adoptionem venit, nemo est illi cognatus praeter patrem eosque, quibus agnoscitur: adfinis autem ei omnino in ea familia nemo est.

§ 11.- Is cui aqua et igni interdictum est aut aliquo modo capite deminutus est ita, ut libertatem et civitatem amitteret, et cognationes et adfinitates omnes, quas ante habuit, amittit.

5.- PAULUS; *libro VI, ad Plautium*.- Si filium naturalem emancipavero et alium adoptavero, non esse eos fratres: si filio meo mortuo Titium adoptavero, videri eum defuncti fratrem fuisse Arrianus ait.

6.- ULPIANUS; *libro V, ad legem Iuliam et Papiam*.- Labeo scribit nepotis ex filia mea nati uxorem nurum mihi esse.

§ 1.- Generi et nurus appellatione sponsus quoque et sponsa continentur: item socii et socrus appellatione sponsorum parentes contineri videntur.

7.- SCAEVOLA; *libro IV, Regularum*.- Privignus etiam is est, qui vulgo conceptus ex ea natus est quae postea mihi nupsit, aequae et is qui, quum in concubinato erat mater eius, natus ex ea est quae postea alii nupta sit.

8.- POMPONIUS; *libro I, Enchiridii*.- Servius recte dicebat socii et socrus et generi et nurus appellationem etiam ex sponsalibus adquiri.

9.- PAULUS; *libro IV, Sententiarum*.- Stemmata cognationum directo limite in duas lineas separantur, quarum altera superior, altera inferior: ex superiore autem et secundo gradu transversae lineae pendent, quas omnes latiore tractatu habito in librum

retains all the relationship by cognation and affinity which he formerly possessed, but he loses the rights of agnation. But with reference to the family into which he came by adoption, no one is his cognate except his adoptive father, and those to whom he becomes the agnate. No one belonging to the adoptive family is related to him by affinity.

§ 11.- Anyone who has been interdicted from fire and water, or has lost his civil rights in any way, so as to have forfeited his freedom and his citizenship, also loses all his connections of cognation and affinity which he previously had.

5.- PAULUS; *On Plautius, Book VI*.- If I emancipate my natural son and adopt another, they will not be brothers. Arrianus says that if, after the death of my son, I adopt Titius, he will be considered the brother of the deceased.

6.- ULPIANUS; *On the Lex Julia et Papia, Book V*.- Labeo says that the wife of my grandson, the son of my daughter, is my granddaughter.

§ 1.- Persons who are betrothed are included in the terms son-in-law and daughter-in-law, likewise the parents of such persons are considered to be included in the terms father-in-law and mother-in-law.

7.- SCAEVOLA; *Rules, Book IV*.- The illegitimate child of a woman whom I afterwards marry is also my stepson, just as is the case with one whose mother formerly lived in concubinage with some man, and was afterwards married to another.

8.- POMPONIUS; *Enchiridion, Book I*.- Servius very properly says that the terms father-in-law and mother-in-law, son-in-law and daughter-in-law, are also derived from betrothal.

9.- PAULUS; *Sentences, Book IV*.- The direct line of relationship is divided into two parts, one of which is the ascending and the other the descending. Collateral lines are also derived from the ascending line as well as from the second degree. We have

conserva todas las cognaciones o las afinidades que tuvo, y pierde los derechos de la agnación; pero en la familia, en que entró por la adopción, nadie es cognado de él salvo el padre, y aquellos de quienes se hace agnado; mas nadie absolutamente es afín de él en aquella familia.

§ 11.- Aquel a quien se le puso interdicción en el agua y el fuego, o que de algún modo fue disminuido de cabeza, así como perdería la libertad y la ciudadanía, pierde las cognaciones y todas las afinidades que antes tuvo.

5.- PAULO; *Comentarios a Plaucio, libro VI*. - Si yo hubiere emancipado a un hijo natural, y hubiere adoptado a otro, éstos no son hermanos; si muerto mi hijo yo hubiere adoptado a Ticio, dice Arriano que se considera que éste fue hermano del difunto.

6.- ULPIANO; *Comentarios a la ley Julia y Papia, libro V*.- Escribe Labeón, que la mujer del nieto nacido de mi hija es nuera mía.

§ 1.- En la denominación de yerno y de nuera se comprenden también el esposo y la esposa; y asimismo parece que en la denominación de suegro y de suegra se comprenden también los padres de los esposos.

7.- SCÉVOLA; *Reglas, libro IV*.- Es también hijastro el que concebido del vulgo nació de aquella que luego se casó conmigo; e igualmente el que, hallándose su madre en concubinato, nació de ella, y ésta se casó después con otro.

8.- POMPONIO; *Manual, libro I*.- Con razón decía Servio, que la denominación de suegro y suegra, y de yerno y nuera, se adquiría también por los esponsales.

9.- PAULO; *Sentencias, libro IV*.- Las series de las cognaciones se separan directamente en un límite en dos líneas, una de ellas superior, y otra inferior; pero de la superior y en el segundo, grado penden las líneas transversales, todas las que las expusimos en

singularem conteximus.

10.- IDEM; *libro singulari de gradibus, et affinitibus, et nominibus eorum.*- Iuris consultus cognatorum gradus et adfinium nosse debet, quia legibus hereditates et tutelae ad proximum quemque adgnatum redire consuerunt: sed et Edicto Praetor proximo cuique cognato dat bonorum possessionem: praeterea lege iudiciorum publicorum contra adfines et cognatos testimonium inviti dicere non cogimur.

§ 1.- Nomen cognationis a graeca voce dictum videtur: suggeneis enim illi vocant, quos nos cognatos appellamus.

§ 2.- Cognati sunt et quos adgnatos lex duodecim tabularum appellat, sed hi sunt per patrem cognati ex eadem familia: qui autem per feminas coniunguntur, cognati tantum nominantur.

§ 3.- Proximiores ex adgnatis sui dicuntur.

§ 4.- Inter adgnatos igitur et cognatos hoc interest quod inter genus et speciem: nam qui est adgnatus, et cognatus est, non utique autem qui cognatus est, et adgnatus est: alterum enim civile, alterum naturale nomen est.

§ 5.- Non parcimus his nominibus, id est cognatorum, etiam in servis: itaque parentes et filios fratresque etiam servorum dicimus: sed ad leges serviles cognationes non pertinent.

§ 6.- Cognationis origo et per feminas solas contingit: frater enim est et qui ex eadem matre tantum natus est: nam qui eundem patrem habent, licet diversas matres, etiam adgnati sunt.

explained more fully in a special Book everything which has reference to all these.

10.- THE SAME; *On Degrees and Affinities and Their Different Names.*- A person learned in the law should be familiar with the degrees of relationship and affinity, because, by the laws, it is customary for estates and guardianships to pass to the next of kin. The Praetor, however, by his Edict, grants the possession of an estate to the nearest cognate. Moreover, under a law relating to criminal trials, we cannot be compelled, against our will, to give testimony against persons connected with us by affinity, and cognates.

§ 1.- The term cognation appears to be derived from a Greek word, for the Greeks designated as "suggeneis", persons whom we call cognates.

§ 2.- Those are cognates whom the Law of the Twelve Tables styles agnates, but the latter are really such from the same family through the father. Those to whom we are related through women, are only designated cognates.

§ 3.- The next of kin among agnates are called "proper."

§ 4.- The same difference exists between agnates and cognates as exists between genus and species. An agnate is also a cognate, but a cognate is not an agnate; for one of these is a civil, and the other a natural designation.

§ 5.- We make use of this term, that is to say, cognates, even with reference to slaves. Therefore, we speak of the parents, the children, and the brothers of slaves; but cognation is not recognized by servile laws.

§ 6.- The origin of cognation is derived from women alone, for he is a brother who was only born of the same mother; but where persons have the same father, but different mothers, they are agnates.

un libro especial tratándolas con mas extensión.

10.- EL MISMO; *De los grados de parentesco y de afinidad, y de sus nombres, libro único.*- El jurisconsulto debe conocer los grados de los cognados y de los afines, porque fue costumbre que por las leyes pasaran las herencias y las tutelas al próximo agnado; pero también por su Edicto da el Pretor la posesión de los bienes al próximo cognado además, por la ley de los juicios públicos no somos obligados a prestar contra nuestra voluntad testimonio contra los afines y los agnados.

§ 1.- El nombre de cognación parece que se derivó de una voz griega; porque ellos llaman "suggeneis" a los que nosotros llamamos cognados.

§ 2.- Son cognados también aquellos a quienes llama agnados la ley de las Doce Tablas; pero éstos son cognados por parte de padre, de la misma familia; mas los que se unen por medio de hembras son llamados solamente cognados.

§ 3.- Los más próximos de los agnados se llaman suyos.

§ 4.- Así, pues, entre agnados y cognados hay la misma diferencia que entre el género y la especie; porque el que es agnado es también cognado, mas a la verdad, el que es cognado no es también agnado; porque la una es denominación civil, y la otra natural.

§ 5.- No excusamos estas denominaciones, esto es, las de los cognados, aun tratándose de esclavos; y así decimos también padres e hijos y hermanos de los esclavos; pero las cognaciones de los esclavos no están comprendidas en las leyes.

§ 6.- El origen de la cognación proviene también por hembras solas; porque es hermano también el que nació solamente de la misma madre; pues los que tienen un mismo padre, aunque diversas madres, también son agnados.

§ 7.- Parentes usque ad tritavum apud Romanos proprio vocabulo nominantur: ultiores qui non habent speciale nomen maiores appellantur: item liberi usque ad trinepotem: ultra hos posteriores vocantur.

§ 8.- Sunt et ex lateribus cognati, ut fratres sororesque et ex his prognati: item patruī amitae et avunculi et materterae.

§ 9.- Nam quotiens quaeritur, quanto gradu quaeque persona sit, ab eo incipiendum est cuius de cognatione quaerimus: et si ex inferioribus aut superioribus gradibus est, recta linea susum verum vel deorsum tendentium facile inveniēmus gradus, si per singulos gradus proximum quemque numeramus: nam qui ei, qui mihi proximo gradu est, proximus est, secundo gradu est mihi: similiter enim accedentibus singulis crescit numerus. Idem faciendum in transversis gradibus: sic frater secundo gradu est, quoniam patris vel matris persona, per quos coniungitur, prior numeratur.

§ 10.- Gradus autem dicti sunt a similitudine scalarum locorumve proclivium, quos ita ingredimur, ut a proximo in proximum, id est in eum, qui quasi ex eo nascitur, transeamus.

§ 11.- Nunc singulos gradus numeramus.

§ 12.- Primo gradu cognationis sunt susum verum duo pater et mater. Deorsum verum duo filius et filia: qui tamen et plures esse possunt.

§ 13.- Secundo gradu duodecim personae continentur hae. Avus, hoc est patris et matris pater. Item

§ 7.- Ascendants, as far as the great-great-great-great-grandfather, are indicated among the Romans by special names, relatives beyond that degree, who have no particular designation are called ancestors. Likewise, children as far back as the great-great-great-great-grandson have special names, and those who are beyond this degree are styled posterity.

§ 8.- There are also cognates in the collateral degree, as brothers and sisters and their descendants, as well as paternal and maternal aunts.

§ 9.- Whenever a question arises as to the degree of relationship existing between one person and another, we must begin with him whose relationship is in question; and if it is in the superior or inferior degree in the direct ascending or descending line, we can easily ascertain the relationship by following the line up or down, if we enumerate each one who is next of kin through the different degrees. For anyone who is the next of kin to a person who is in the next degree to me is in the second degree to me; and, in like manner, the number increases with each additional person. The same course should be taken with reference to the degrees in the collateral line. Hence, a brother is in the second degree, as the father and mother from whom his relationship is derived is counted first.

§ 10.- Degrees are so called from their resemblance to ladders, or places which are sloping, so that we ascend by passing from one to the next, that is, we proceed to one who, as it were, originates from another.

§ 11.- Now let us consider each degree separately.

§ 12.- In the first degree of relationship, in the ascending line, are two persons, the father and the mother; in the direct descending line there are also two, the son and the daughter, who may be several in number.

§ 13.- In the second degree, twelve persons are included, namely, the grandfather, that is to say the

§ 7.- Entre los romanos los ascendientes hasta el quinto abuelo se llaman con denominación propia, y los ultiores, que no tienen nombre especial, son llamados mayores; y asimismo los descendientes hasta el quinto nieto, mas allá del cual son llamados posteridad.

§ 8.- Hay cognados también de las líneas colaterales, como los hermanos y las hermanas, y los descendientes de éstos; y también los tíos y tías paternos, y los tíos y tías maternos.

§ 9.- Porque siempre que se busca en qué grado esté una persona, se ha de comenzar por aquél de cuya cognación tratamos. Y si es de los grados inferiores o de los superiores, encontramos fácilmente los grados de los que en línea recta se dirigen hacia arriba o hacia abajo, si por cada grado contamos cada próximo pariente; porque el que es próximo del que respecto de mí está en el grado próximo, está respecto mí en segundo grado; porque del mismo modo crece el número por cada uno que se agrega. Lo mismo se ha de hacer en los grados transversales; así, el hermano está en segundo grado, porque la persona del padre o de la madre, por medio de los que se une, es contada la primera.

§ 10.- Mas se llamaron grados a semejanza de las escaleras o de los lugares pendientes, en los cuales entramos de modo que pasemos del inmediato al próximo, esto es, al que en cierto modo nace de aquél.

§ 11.- Ahora enumeramos cada uno de los grados.

§ 12.- En el primer grado de la cognación se hallan hacia arriba dos personas: el padre y la madre, y hacia abajo dos: el hijo y la hija, los que, sin embargo, pueden ser también muchos.

§ 13.- En el segundo grado se contienen estas doce personas: el abuelo, esto es, el padre del padre y el de

avia, similiter tam paterna quam materna. Frater quoque per utrumque parentem accipitur, id est aut per matrem tantum aut per patrem aut per utrumque, id est ex utroque parente eodem. Sed hic numerum non auget, quod nihil differt hic ab eo, qui eundem patrem habet tantum, nisi quod is eosdem cognatos tam paternos quam maternos habet: et ideo evenire solet in his, qui diversis parentibus nati sunt, ut qui meo fratri frater sit meus cognatus non sit. Pone me fratrem habere ex eodem tantum patre, illum habere ex eadem matre: illi inter se fratres sunt, mihi alter cognatus non est. Soror similiter numeratur ut frater. Nepos quoque dupliciter intellegitur ex filio vel filia natus. Idem est et in nepte.

§ 14.- Tertio gradu personae continentur triginta duo. Proavus, qui quadrifariter intellegitur: est enim avi paterni aut materni pater, item aviae paternae aut aviae maternae pater. Proavia quoque quattuor personas complectitur: est enim aut avi paterni aut aviae paternae mater, item avi materni et similiter aviae maternae mater. Patruus, is autem est patris frater et ipse dupliciter intellegendus est ex patre vel matre. Avia paterna mea nupsit patri tuo, peperit te, aut avia paterna tua nupsit patri meo, peperit me: ego tibi patruus sum et tu mihi. Id evenit, si mulieres altera alterius filio nupserit: nam qui ex his masculi nati fuerint, invicem patruus sunt, quae feminae, invicem amitae, item masculi feminis similiter patruus, feminae illis amitae. Si vir et mulier ille filiam eius duxerit, illa filio eius nupserit: qui ex patre adulescentis nati erunt, ex matre puellae natos fratris filios, illi eos patruos et amitas appellabunt. Avunculus est matris frater eadem significatione, qua in patruo diximus contigit. Si duo viri alter alterius filiam duxerint, qui ex his masculi nati fuerint, invicem avunculi, quae feminae, invicem materterae erunt, et eadem ratione masculi puellis avunculi et illae illis erunt materterae. Amita est patris soror sicut supra accipiendi. Matertera est matris soror similiter ut supra. Illud notandum est non, quemadmodum patris matrisque fratres et sorores patruus amitae,

father of the father and the mother, and the grandmother, both paternal and maternal. The brother is also understood to belong to one or the other of the parents, either only to the mother, or to the father, or to both. This does not increase the number, however, because there is no difference between him who has the same parents, and him who has only the same father, except that the former has the same paternal and maternal cognates. Therefore, the result, so far as those who are born of different parents are concerned, is that the brother of my brother may not be my cognate. For suppose that I have a brother only by the same father, and he has one by the same mother, the two are brothers, but the other is not my cognate. The relation of sister is computed in the same way as that of a brother. The relation of grandson is also understood in two ways, for he is the son of a son, or the son of a daughter.

§ 14.- Thirty-two persons are included in the third degree. The term great-grandfather is understood in four different ways, for he is the father of the paternal grandfather or the maternal grandfather, or of the paternal grandmother or of the maternal grandmother; the term great-grandmother also includes four different persons, for she is the mother of either the maternal grandfather or the paternal grandmother, or the mother of the maternal grandfather or of the maternal grandmother. The term paternal uncle (that is to say, the brother of the father) is also to be understood in a double sense; that is, whether he had the same father or the same mother. My paternal grandmother married your father, and gave birth to you; or your paternal grandmother married my father, and gave birth to me; I am, therefore, your paternal uncle, and you are mine. This happens where two women marry the son of one another, for the male children who are born of them are the paternal uncle of one another, and the female children are the maternal aunts of one another. If a man gives his son in marriage to a woman whose daughter he himself has married, the male children born to the father of the young man will call those born to the mother of the girl their nephews, and the latter will call the others their paternal uncles, and their paternal aunts. A maternal uncle is a brother of

la madre; también la abuela, del mismo modo tanto la paterna, como la materna; se admite también como hermano al que lo es por uno y otro padre, esto es, o solamente por madre, o por padre, o por una y otro, es decir, por unos mismos padres, -pero éste no aumentará el número, porque éste en nada difiere del que tiene solamente el mismo padre, sino en que tiene los mismos cognados, tanto paternos, como maternos; y por esto suele suceder respecto a los que nacieron de diversos padres, que el que es hermano de mi hermano, no es cognado mío; supón, que yo tengo un hermano por parte solamente del mismo padre, y que él lo tiene por parte de la misma madre, ellos son entre sí hermanos, pero uno de ellos no es cognado mío-. La hermana se cuenta análogamente como el hermano. El nieto es considerado también de dos maneras, nacido de hijo, o de hija; y lo mismo es también en cuanto a la nieta.

§ 14.- En el tercer grado se comprenden treinta y dos personas: el bisabuelo, que es considerado de cuatro maneras; porque es padre del abuelo paterno o del materno, y también padre de la abuela paterna, o de la materna. La bisabuela comprende también cuatro personas; porque es madre o del abuelo o de la abuela paternos, y también madre del abuelo materno, y del mismo modo de la abuela materna. El tío paterno, el cual es hermano del padre, también ha de ser entendido de dos maneras, por parte de padre, o de madre. Mi abuela paterna se casó con tu padre, y te parió, o tu abuela paterna se casó con mi padre, y me parió; yo soy tío paterno tuyo, y tú lo eres mío. Acontece esto, si de dos mujeres cada una se casó con el hijo de la otra; porque los que de ellas hubieren nacido varones, son recíprocamente tíos paternos; y las que hembras, recíprocamente tías paternas; además los varones serán análogamente tíos paternos de las hembras, y las hembras tías paternas de aquéllos. Si habiendo un varón y una mujer, aquél se hubiere casado con la hija de ella, y ella con el hijo de él, los que hubieren nacido del padre del adolescente llamarán hijos de hermano a los nacidos de la madre de la joven, y ellos a éstos tíos y tías paternos. El hermano de la madre es tío materno con la misma significación que dijimos tratando del tío paterno; acontece que, si de dos varones cada uno se hubiere

avunculi materterae dicuntur, ita fratris sororisque filios filias nomen speciale cognationis habere, sed ita demonstrari fratris sororisque filios filias: quod quidem et in aliis accidere ex posterioribus apparebit. pronepos quoque et proneptis quadrifariter intelleguntur: aut enim ex nepote ex filio aut ex nepote ex filia descendunt, aut ex nepte ex filio aut ex nepte ex filia propagantur.

§ 15.- Quarto gradu personae continentur octoginta. Abavus, cuius intellectus in octo personas porrigitur: est enim proavi paterni aut materni pater, quos singulos duplici modo intellegendos diximus, aut proaviae paternae aut maternae pater, quae et ipsae singulae dupliciter accipiuntur. Abavia: et haec octies numeratur: est enim proavi paterni aut materni, item proaviae paternae aut maternae mater. Patruus magnus est frater avi: qui avus, item frater quum duobus modis intelleguntur, quattuor personas hoc nomen amplexitur, ut sit avi paterni vel materni frater, qui vel eodem patre, id est proavo, vel tantum matre eadem, id est proavia natus est: qui autem mihi patruus magnus est, is patri meo vel matri meae patruus est. Amita magna est avi soror: avus autem, item soror, ut supra diximus, dupliciter intelleguntur et ideo hic quoque quattuor personas intellegimus: similiter quae patris mei vel matris meae amita est, mihi erit amita magna. avunculus magnus est aviae

the mother, and the same can be said of her which we have stated with reference to the paternal uncle; for if two men should marry each other's daughters, the males born to them will be reciprocally maternal uncles, and the females will be reciprocally maternal aunts. And, under the same rule, if males are born by one marriage and females by another, the males will be the maternal uncles of the females, and the females will be the maternal aunts of the males. The paternal aunt is the sister of the father, and what has been above mentioned will apply to her. The maternal aunt is a sister of the mother, and likewise what has been previously stated will apply to her. It must be remembered that, while the brothers and sisters of the father and the mother are called paternal uncles and aunts, and maternal uncles and aunts, the sons and daughters of brothers and sisters have no special name to designate their relationship, but they are merely referred to as the sons and daughters of brothers and sisters. It will hereafter be shown that this is also the case with their descendants. The terms great-grandson and great-granddaughter are also understood in four different ways, for they are either descended from a grandson by his son, or from a grandson by his daughter; or from a granddaughter by her son, or from a granddaughter by her daughter.

§ 15.- Eighty persons are included in the fourth degree. Great-great-grandfather is a term which extends to eight persons, for he is either the father of the paternal great-grandfather, or of the maternal great-grandfather, whom we have stated should each be understood in a double sense; or he is the father of the paternal great-grandmother, or of the maternal great-grandmother, each of which names we also understand to be of twofold signification. The term great-great-grandmother also includes eight persons, for she is the mother of the paternal great-grandfather, or the maternal great-grandfather; or the mother of the paternal great-grandmother, or of the maternal great-grandmother. The paternal great-uncle is the brother of the grandfather, and he can be understood to be both grandfather and brother in two ways, hence this term includes four persons; as he may be the brother of the paternal or the maternal grandfather, that is to say, he may be descended from

casado con la hija del otro, los que de ellos hubieren nacido varones serán recíprocamente tíos maternos, y las que hembras, recíprocamente tías maternas; y por la misma razón los varones serán tíos maternos de las jóvenes, y ellas tías maternas de ellos. Tía paterna es la hermana del padre, la cual ha de ser considerada como arriba se ha dicho. Tía materna es la hermana de la madre, la cual se ha de entender análogamente como antes se expuso. Se ha de notar, que así como los hermanos y las hermanas del padre y de la madre se llaman tíos y tías paternos, tíos y tías maternos, los hijos y las hijas de hermano y de hermana, no tienen del mismo modo nombre especial de cognación, sino que se designan así: hijos e hijas de hermano y de hermana; lo que ciertamente aparecerá que acontece también respecto a otros de los grados posteriores. También el bisnieto y la bisnieta son considerados de cuatro maneras; porque descenden o de nieto habido de hijo, o de nieto habido de hija, o provienen de nieta nacida de hijo, o de nieta nacida de hija

§ 15.- En el cuarto grado se contienen ochenta personas: el tatarabuelo, cuya denominación se extiende a ocho personas; porque él es el padre del bisabuelo paterno o del materno, cada uno de los que hemos dicho que ha de ser entendido de dos modos; o es el padre de la bisabuela paterna o de la materna, cada una de las cuales es considerada también de dos modos. La tatarabuela, y también ésta se cuenta ocho veces; porque es]a madre del bisabuelo paterno o del materno, y también de la bisabuela paterna o de la materna. El grande tío paterno es el hermano del abuelo, el cual abuelo y también su hermano se entienden de dos modos; este nombre comprende cuatro personas, de modo que sea hermano del abuelo paterno o del materno, el cual nació o del mismo padre, esto es, del bisabuelo, o solamente de la misma madre, esto es, de la bisabuela; mas el que es grande tío paterno mío, es tío paterno de mi padre o de mi madre. La grande tía paterna es la hermana del

frater: quattuor personae huic nomini eadem ratione subiectae sunt mihi quae is est avunculus magnus, qui patri meo vel matri meae avunculus est.

Matertera magna est aviae soror: quattuor modis et haec ob eandem causam intellegitur: ea, quae patri meo vel matri meae matertera est, mihi matertera magna vocatur. eodem gradu sunt et illi qui vocantur fratres patruales, item sorores patruales, amitini amitinae, consobrini consobrinae: hi autem sunt, qui ex fratribus vel sororibus nascuntur. Quos quidam ita distinxerunt, ut eos quidem, qui ex fratribus nati sunt, fratres patruales, item eas, quae ex fratribus natae sunt, sorores patruales: ex fratre autem et sorore amitinos amitinas: eos vero et eas, qui quaeve ex sororibus nati natae sunt, consobrinos consobrinas quasi consororinos: sed plerique hos omnes consobrinos vocant, sicut Trebatius. Sub hac appellatione nominum personae cadunt sedecim hae. Patruus filius, item filia bifariam sicut supra numerantur (nam patris mei frater esse potest vel ex patre solo vel etiam ex matre sola): amitae filius, item filia: avunculi filius, item filia: materterae filius, item filia, amita avunculo matertera acceptis duplici intellectu secundum eandem rationem. Fratris sororisque nepos ac neptis eodem gradu sunt: sed et frater, item soror, neposve et neptis dupliciter accepti continebunt personas sedecim sic. Fratris eodem patre nati nepos ex filio nepos ex filia fratris eadem matre, alio patre nati nepos ex filio nepos ex filia fratris eodem patre nati neptis ex filio neptis ex filia fratris alio patre eadem matre nati neptis ex filio neptis ex filia eademque causa octo personae efficient, ut aliae octo accedunt ex sorore natorum nepotes neptesque et similiter numerantur a nobis. Fratris autem mei nepos neptisque me patruum magnum appellant: sororum fratrumque meorum nepotes neptesque,

the same father, namely, the great-grandfather, or only from the same mother, namely, the great-grandmother. Moreover, he who is my great uncle is the uncle of my father or mother. My paternal great-aunt is the sister of my grandfather, and the term grandfather, as well as that of sister (as we stated above) is interpreted in two different ways, and therefore, in this instance, we understand the term great-aunt to refer to four different persons. In like manner, she who is the paternal aunt of my father or my mother will be my paternal great-aunt.

The maternal great-uncle is the brother of the grandmother, and under the same rule, there are four persons embraced in this appellation, and my maternal great-uncle is the maternal uncle of my father or my mother. The maternal great-aunt is the sister of the grandmother, and, in accordance with the same rule, this term is to be understood in four different ways; for she who is the maternal aunt of my father or my mother is my maternal great-aunt. There are also in this degree the children of brothers and sisters or first cousins of both sexes. They are children born to brothers or sisters, and whom certain authorities distinguish as follows: those who are born to brothers being designated paternal first cousins, and those born to a brother or a sister are called amitini and amitinae, and children of either sex born of two sisters are called cousins on account of their descent. According to Trebatius, many authorities call all of these children cousins. Sixteen different persons are included in this appellation; namely, the son and the daughter of a paternal uncle are designated in a twofold manner, as is stated above; for the brother of my father may, with him, be descended only from a common father, or a common mother. The son and daughter of a paternal aunt, and the son and daughter of a maternal uncle, is the son and daughter of a maternal uncle, and the son and daughter of a maternal aunt, as well as the terms paternal aunt, maternal uncle, and maternal aunt are to be understood as having double signification in accordance with this rule. The grandson and granddaughter of a brother and sister also belong to this degree. But as the terms brother, sister, grandson,

abuelo; mas el abuelo, y también la hermana, se entienden de dos modos, como antes hemos dicho, y por esto entendemos que también aquí hay cuatro personas; y análogamente, la que es tía paterna de mi padre o de mi madre, será mi grande tía paterna. El grande tío materno es el hermano de la abuela; y por la misma razón se comprenden con este nombre cuatro personas, y es grande tío materno mío el que es tío materno de mi padre o de mi madre. La grande tía materna es la hermana de la abuela; y por la misma causa también ésta es entendida de cuatro modos; la que es tía materna de mi padre o de mi madre es llamada grande tía materna mía.

En el mismo grado están también los que se llaman primos y primas, por hermanos, (primos y primas por hermano y hermana), consobrinos y consobrinas; mas éstos son los que nacen de hermanas o de hermanas; a los que algunos los distinguieron de suerte, que llamaron primos y primas, por hermanos, a los que o a las que nacieron de hermanos; primos y primas, por hermano y hermana, a los que o a las que de hermano y hermana, y a los que, o a las que nacieron de hermanas consobrinos y consobrinas, así como codescendientes de hermanas; pero los más llaman consobrinos a todos éstos, como Trebacio. Bajo esta denominación de nombres se comprenden estas dieciséis personas: el hijo y la hija del tío paterno, -los cuales, como arriba, se cuentan dobles, porque el hermano de mi padre puede serlo o por parte de padre solo, o solamente por la de madre-. El hijo y la hija de la tía paterna. El hijo y la hija del tío materno. El hijo y la hija de la tía materna; entendiéndose por la misma razón con doble extensión la tía paterna, y el tío y la tía maternos. En el mismo grado están el nieto y la nieta del hermano y de la hermana. Mas contándose duplicados el hermano y la hermana, o el nieto y la nieta, comprenderán dieciséis personas, a saber: el nieto de hijo, y el nieto de hija, del hermano nacido de un mismo padre; el nieto de hijo, y el nieto de hija, del hermano nacido de la misma madre y de otro padre; la nieta de hijo, y la nieta de hija, del hermano nacido del mismo padre; la nieta de hijo, y la nieta de hija, del hermano nacido de otro padre y de la misma madre. Y por la misma causa harán estas ocho personas, que se agreguen otras ocho, nietos y nietas habidos de los hijos de la

et similiter numerantur a nobis. Fratris autem mei nepos neptisque me patrum magnum appellant: sororum fratrumque meorum nepotes neptesque, item mei inter se consobrini sunt.

Abnepos, abneptis: hi sunt pronepotis proneptis filius filia, nepotis neptisque nepos neptis, filii filiaeque pronepos proneptis, nepote vel ex filio nato vel ex filia, nepte vel ex filio nata vel ex filia acceptis, ut ad singulas personas gradu descendamus sic. Filius nepos pronepos abnepos filius nepos pronepos abneptis filius nepos proneptis abnepos filius nepos proneptis abneptis filius neptis pronepos abnepos filius neptis pronepos abneptis filius neptis proneptis abnepos filius neptis proneptis abneptis similiter hae personae enumerabuntur proposita filia et sic fient sedecim.

§ 16.- Quinto gradu personae continentur centum octoginta quattuor. Atavus scilicet et atavia: atavus

and granddaughter are to be understood in a double sense, sixteen persons are included herein; namely, the grandson born to the son and the grandson born to the daughter of a brother, by the same father; the grandson born to the son and the grandson born to the daughter of the brother by the same mother, but by another father; the granddaughter born to a son and the granddaughter born to a daughter of a brother by the same father, and the granddaughter born to a son, or a daughter of a brother by the same mother, but by a different father. Under this rule there are eight persons and another eight will be added if we count the grandsons and the granddaughters born to the sister. Moreover, the grandson and the granddaughter of my brother and sister call me their great-uncle. The grandchildren of my brothers and sisters and my own call each other cousins.

A great-great-grandson and a great-great-granddaughter are the son and the daughter of a great-grandson or a great-granddaughter; the grandson or the granddaughter of a grandson or a granddaughter, the great-grandson and the great-granddaughter of the grandson of a son or a daughter; it being understood that the grandson is such for the reason that he is the son of my own son or my daughter, and my granddaughter is such because she is the daughter of my son, or my daughter; so that we descend by a degree to each person as follows: the son, the grandson, the great-grandson, the great-great-grandson; the son, the grandson, the great-grandson, the great-great-granddaughter; the son, the grandson, the great-granddaughter, the great-great-grandson; the son, the grandson, the great-granddaughter, the great-great-granddaughter; the son, the granddaughter, the great-grandson, the great-great-grandson; the son, the granddaughter, the great-grandson, the great-great-granddaughter; the son, the granddaughter, the great-great-granddaughter, the great-great-grandson; the son, the granddaughter, the great-great-granddaughter, the great-great-granddaughter. In calculating the descent from the daughter the same persons are enumerated, and in this way they make sixteen.

§ 16.- A hundred and eighty-four persons are included in the fifth degree, as follows, the great-

hermana; y análogamente son enumeradas por nosotros. Mas el nieto y la nieta de mi hermano me llaman grande tío paterno; y los nietos y las nietas de mis hermanas y de mis hermanos, y también los míos, son entre sí consobrinos.

El tataranieta y la tataranieta; éstos son el hijo y la hija del bisnieto y de la bisnieta; nieto y nieta del nieto o de la nieta; bisnieto y bisnieta del hijo o de la hija; entendiéndose el nieto nacido o de hijo o de hija, y la nieta nacida o de hijo o de hija, para que por grado descendamos a cada persona de este modo: hijo, nieto, bisnieto, tataranieta; hijo, nieto, bisnieto, tataranieta; hijo, nieto, bisnieta, tataranieta; (hijo, nieto, bisnieta, tataranieta; hijo, nieta, bisnieto, tataranieta; hijo, nieta, bisnieto, tataranieta; hijo, nieta, bisnieta, tataranieta; hijo, nieta, bisnieta,) tataranieta. De la misma manera se enumerarán estas personas partiendo de una hija, y así serán dieciséis.

§ 16.- En el quinto grado se contienen ciento ochenta y cuatro personas. Los cuartos abuelo y

est abavi vel abaviae pater, proavi vel proaviae avus, avi aviaque proavus, patris vel matris abavus: huius appellatio personas complectitur sedecim, enumeratione facta tam per mares quam per feminas, ut sic ad singulas perveniamus. Pater avus proavus abavus atavus pater avus proavus abavia atavus pater avus proavia abavia atavus pater avia proavus abavus atavus pater avia proavus abavia atavus pater avia proavia abavus atavus pater avia proavia abavia atavus similiter matris persona proposita enumeratio fiet. Atavia totidem personas continet eadem ratione numeratas, id est sedecim.

Patruus maior est proavi frater, patris vel matris patruus magnus: sub hoc nomine erunt personae octo et sic enumerabuntur: Pater avus proavus abavus frater proavi pater avus proavus abavia frater proavi pater avia proavus abavus frater proavi pater avia proavus abavia frater proavi totidem erunt matris persona et proavo eius propositis. Ideo autem fratrem proavi enumerantes ante abavum ponimus, quod, ut supra significavimus, non aliter pervenietur ad eum de quo quaeritur, nisi per eos transitum erit, ex quibus nascitur. Avunculus maior: is est proaviae frater, patris vel matris avunculus magnus: eadem denominatione hic quoque octo personas computabimus, hoc tantum immutato, ut is frater

great-great-grandfather, and the great-great-great-grandmother. The great-great-great-grandfather is the father of the great-great-grandfather, or the great-great-grandmother; the grandfather of the great-grandfather or the great-grandmother; the great-great-grandfather of the father or the mother. This appellation includes sixteen persons, the enumeration being made by males as well as females, in order that we may reach each one thus designated; namely, the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandmother, the great-great-great-grandfather; the father, the grandfather, the great-grandmother, the great-great-grandfather; the father, the grandmother, the great-great-grandfather; the father, the grandmother, the great-great-grandfather; the father, the grandmother, the great-great-grandmother, the great-great-great-grandfather; the father, the grandmother, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather. The enumeration is made in like manner on the mother's side. The term great-great-great-grandmother, according to the same rule, includes the same number of persons, that is to say sixteen.

The great-great-paternal uncle is the brother of the great-grandfather, or the great paternal uncle of the father or mother. Under this name eight persons enumerated as follows are included, the father, the grandfather, the great-grandfather, the great-great-grandfather, the brother of the great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandmother, the brother of the great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandfather, the brother of the great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandmother, the brother of the great-grandfather. There are the same number of persons in making the calculation

abuela; el cuarto abuelo es padre del tatarabuelo o de la tatarabuela, abuelo del bisabuelo o de la bisabuela, bisabuelo del abuelo y de la abuela, tatarabuelo del padre o de la madre. La denominación de éste comprende dieciséis personas, hecha la enumeración tanto por varones, como por hembras, para que de este modo lleguemos a cada una; padre, abuelo, bisabuelo, tatarabuelo, cuarto abuelo; padre, abuelo, bisabuelo, tatarabuela, cuarto abuelo; padre, abuelo, bisabuela, tatarabuelo, cuarto abuelo; padre, abuelo, bisabuela, tatarabuela, cuarto abuelo; padre, abuela, bisabuelo, tatarabuelo, cuarto abuelo; padre, abuela, bisabuelo, tatarabuela, cuarto abuelo; padre, abuela, bisabuela, tatarabuelo, cuarto abuelo; padre, abuela, bisabuela, tatarabuela, cuarto abuelo; y análogamente se hará la enumeración partiendo de la persona de la madre. La cuarta abuela comprende otras tantas personas, enumeradas de la misma manera, esto es, dieciséis.

El tío paterno mayor es hermano del bisabuelo, grande tío paterno del padre o de la madre; con este nombre habrá ocho personas, y se enumerarán así: padre, abuelo, bisabuelo, tatarabuelo, hermano del bisabuelo; padre, abuelo, bisabuelo, tatarabuela, hermano de bisabuelo; padre, abuela, bisabuelo, tatarabuelo, hermano del bisabuelo; padre, abuela, bisabuelo, tatarabuela, hermano del bisabuelo. Y habrá otras tantas partiendo de la persona de la madre y de su bisabuelo. Mas al enumerar los hermanos del bisabuelo ponemos antes al tatarabuelo por esto, porque, como arriba hemos indicado, no se llegará de otra suerte a aquel de quien se trata, sino si se hubiere pasado por aquellos de quienes nace. El tío materno

patris vel matris avunculus magnus: eadem enumeratione hic quoque octo personas computabimus, hoc tantum immutato, ut is frater proaviae ponatur. Amita maior: ea est proavi soror, patris vel matris amita magna: quod ad numerum et expositionem personarum eadem erunt immutato hoc, ut proavi soror ad extremum ponatur. Matertera maior: haec est soror proaviae, patris vel matris matertera magna: numerus personarum idem est, ut in novissimo ponatur proaviae soror. Hos omnes a patruo maiore quos rettulimus quidam appellant ita: propatruus proavunculus, proamita promatertera: quos tamen ego ita nomino, illi contra fratris vel sororis pronepotem me demonstrant.

Patrui magni filius filia: hi sunt avi fratris filius filia, proavi aut proaviae nepos neptis ex filio, patris vel matris consobrinus consobrina: octo personas et hic computabimus, quod avus et frater, ut iam dictum est, dupliciter accipiuntur et ideo patrui magni filius quattuor implet, totidem filia. Amitae magnae filius filia: hi sunt avi sororis filius filia, proavi proaviae nepos neptis ex filia, patris vel matris consobrinus consobrina: numerus personarum idem qui supra. Avunculi magni filius filia: hi sunt aviae fratris filius filia, proavi aut proaviae nepos neptis ex filio, patris vel matris consobrinus aut consobrina: numerus idem. Materterae magnae filius filia: hi sunt aviae sororis filius filia, proavi proaviae nepos neptis ex filia, patris vel matris consobrinus consobrina: computatio eadem. Personae quas enumeravimus a patrui magni filio ei, de cuius cognatione quaeritur, propius sobrinis vocantur: nam, ut Massurius ait,

from the mother to her great-grandfather. However, before mentioning the brother of the great-grandfather, we place before him the great-great-grandfather for the reason (as we stated above) that we cannot reach him whose relationship is in question, unless we pass through those from whom he has descended, the maternal great-great-uncle, that is the brother of the great-grandmother, maternal great-uncle of the father or mother. By the same method of calculation, we also, in this instance, compute eight persons except that, only with this change, the brother of the great-grandmother is introduced. The paternal great-great-aunt is the sister of the great-grandfather and the great-aunt of the father or mother. In this case the same enumerations of persons are made as before, except that the sister of the great-grandfather is introduced last. The maternal great-great-aunt is the sister of the great-grandmother, and the maternal great-aunt of the father or mother. In this instance, the number of persons is the same, except that the sister of the great-grandmother is placed last. Certain authorities designate all those whom we have mentioned as descended from the paternal great-uncle as follows, paternal uncle, maternal uncle, paternal aunt, maternal aunt; those whom I designate as such call me the great-grandson of their brother or sister.

In this degree are also included the son and daughter of the paternal great-uncle, who are the son and daughter of the brother of the grandfather, the grandson and granddaughter of the great-grandson or the great-granddaughter by their sons or daughters, and the first cousin of the father or the mother. In this instance we also compute eight persons; for the reason that the grandfather and the brother (as has already been stated), can exist in this capacity in two ways, and therefore the character of son or daughter of a paternal great-aunt belongs to four persons; the son and the daughter of the paternal great-aunt are the son and the daughter of the sister of the grandfather, and the grandson or the granddaughter by the daughter of the great-grandfather, or the great-grandmother, and cousins of the father or mother; the number of the persons being the same as above stated. The son and the daughter of the maternal

mayor; éste es hermano de la bisabuela, grande tío materno del padre o de la madre; con la misma enumeración contaremos también aquí ocho personas, cambiándose solamente esto, que este hermano sea puesto como de la bisabuela. La tía paterna mayor; ésta es hermana del bisabuelo, grande tía paterna del padre o de la madre; y en cuanto al número y exposición de las personas será lo mismo, cambiándose esto, que se ponga al extremo la hermana del bisabuela. La tía materna mayor; ésta es hermana de la bisabuela, grande tía materna del padre o de la madre; el número de las personas es el mismo con tal que en último lugar se ponga la hermana de la bisabuela. A todos éstos, que partiendo del tío paterno mayor hemos relacionado, los llaman algunos así: protío paterno, protío materno, protía paterna, protía materna; pero aquellos a quienes yo los nombro así, me llaman por el contrario bisnieto del hermano o de la hermana.

El hijo y la hija del grande tío paterno; éstos son hijo e hija del hermano del abuelo; nieto y nieta de hijo del bisabuelo o de la bisabuela; consobrinus y consobrina del padre o de la madre. También aquí computaremos ocho personas, porque el abuelo y el hermano se entienden, según ya se ha dicho, duplicados; y por esto el hijo del grande tío paterno comprende a cuatro, y a otros tantos la hija, El hijo y la hija de la grande tía paterna; éstos son hijo e hija de la hermana del abuelo; nieto y nieta de hijo del bisabuelo y de la bisabuela; consobrinus y consobrina del padre o de la madre; el número de las personas es el mismo que más arriba. El hijo y la hija del grande tío materno; son éstos hijo e hija del hermano de la abuela; nieto y nieta de hijo del bisabuelo o de la bisabuela; consobrinus o consobrina del padre o de la madre; su número es el mismo. El hijo y la hija de la grande tía materna; éstos son hijo e hija de la

quem quis appellat propiorem sobrino, qui est patris matrisve consobrinus aut consobrina, ab eo consobrini consobrinaeve filius filia nominatur.

Patrui nepos neptis: hi sunt avi paterni vel aviae paternae pronepos proneptis ex nepote vel ex nepte filio natis, consobrini consobrinae filius filia: octo personas continebunt, quattuor nepos, quattuor neptis, quia et patruus dupliciter accipitur et nepos vel neptis sub singulis patruorum personis duplicatur. Amitae nepos vel neptis: hi sunt avi paterni vel aviae paternae pronepos proneptis ex nepote vel nepte filia natis, consobrini consobrinae filius filia: numerus idem est. Avunculi nepos neptis: hi sunt avi materni vel aviae maternae pronepos proneptis: cetera eadem, quae in patrui nepote vel nepte.

His omnibus, quos a patrui nepote proposuimus, is, de cuius cognatione quaeritur, propius sobrino est:

great-uncle are the son and daughter of the brother of the grandmother, or the grandson and granddaughter by the son, and the male and female cousins of the father or the mother; and the number is the same as that given above. The son and the daughter of the maternal great-aunt, that is to say, the children of a sister of the grandmother, the grandson and granddaughter by the daughter of the great-grandfather or great-grandmother, and the cousins of the father or mother according to the same computation. The persons whom we have just enumerated from the son of the paternal great-uncle, concerning whose relationship a question may arise, are properly designated cousins, for, as Massurius says, a person whom anyone calls next in degree to his cousin, who is a cousin of his father or mother, is designated by him as the son or daughter of the cousin.

The grandson and granddaughter of the paternal uncle are the great-grandson and the great-granddaughter of the paternal grandfather or the paternal grandmother, descended from a grandson or a granddaughter by a son, and are the children of cousins. These include eight persons, that is four grandsons and four granddaughters, for the reason that the term paternal uncle is understood to be one of twofold meaning, and the grandson or the granddaughter are doubled, so far as the two kinds of uncles are concerned. The grandson or the granddaughter of the paternal aunt are the great-grandson and the great-granddaughter born to a grandson or a granddaughter of the paternal grandfather or grandmother, and are the sons and daughters of cousins; and the number is the same. The grandson and granddaughter of the maternal uncle are the great-grandson and great-granddaughter of the maternal grandfather or grandmother. The remainder are the same, as in the case of grandson or granddaughter of the paternal uncle (the grandson and granddaughter of the maternal aunt, that is to say, the great-grandson of the great-granddaughter, by a grandson or granddaughter of the maternal grandfather or grandmother; and the number of persons is the same).

All those whom we have just mentioned from the grandson of the paternal uncle, in the case where

hermana de la abuela; nieto y nieta de hija del bisabuelo o de la bisabuela; consobrino o consobrina del padre o de la madre; la computación es la misma. Las personas que hemos enumerado partiendo del hijo del grande tío paterno se llaman más próximos a los sobrinos de aquél de cuya cognación se trata; porque, como dice Massurio, aquel a quien uno llama más próximo al sobrino, el cual es consobrino o consobrina del padre o de la madre, es llamado por éste hijo o hija del consobrino o de la consobrina.

El nieto y la nieta del tío paterno; éstos son bisnieto o bisnieta, de nieto o nieta nacidos de hijo, del abuelo paterno o de la abuela paterna; hijo e hija del consobrino o de la consobrina. Comprenderán ocho personas: cuatro el nieto, y cuatro la nieta, porque también el tío paterno es considerada por duplicado, y el nieto o la nieta se duplica bajo cada una de las personas de los tíos paternos. El nieto o la nieta de la tía paterna; éstos son bisnieto o bisnieta, de nieto o nieta nacidos de hija, del abuelo paterno o de la abuela paterna; hijo e hija del consobrino y de la consobrina; el número es el mismo. El nieto y la nieta del tío materno; éstos son bisnieto y bisnieta del abuelo materno o de la abuela materna; lo demás lo mismo que tratándose del nieto o de la nieta del tío paterno. (El nieto y la nieta de la tía materna; éstos son bisnieto y bisnieta, de nieto o nieta nacidos de hija, del abuelo materno o de la abuela materna; el número de las personas es el mismo).

Este, de cuya cognación se trata, es más próximo al sobrino de todos éstos, que hemos expuesto

nam patris vel matris eorum consobrinus est.

Fratris pronepos proneptis: continebunt hi personas sedecim fratre dupliciter et pronepote et pronepte singulis quadrifariam, ut supra demonstravimus, acceptis. Sororis pronepos proneptis similiter sedecim personas continent.

Adnepos adneptis: hi sunt abnepotis vel abneptis filius filia, pronepotis vel proneptis nepos neptis, nepotis vel neptis pronepos proneptis, filii vel filiae abnepos abneptis: numerabuntur sub hac appellatione triginta duo personae, quia abnepos sedecim habet et totidem abneptis.

§ 17.- Sexto gradu continentur personae quadringentae quadraginta octo hae. Tritavus: est autem tritavus patris et matris atavus, avi vel aviae abavus, proavi proaviae proavus, abavi vel abaviae avus, atavi vel ataviae pater, dictus quasi tertius avus: personas autem complectitur triginta duo: geminetur enim necesse est numerus, qui in atavo fuit immutatione per singulas personas propter ataviam facta, ut sedecies tritavus intellegatur atavi pater et totiens ataviae. Tritavia similiter numerata faciet personas triginta duo.

Patruus maximus: is est abavi frater, atavi et

relationship is in question, are considered next in line to the cousin, for he is the cousin of the father or mother.

The great-grandson and the great-granddaughter of a brother: in this degree sixteen persons are included, the term brother being understood in two ways, and the great-grandson and the great-granddaughter each being understood in four ways (as we previously mentioned). The degree of great-grandson and great-granddaughter of the sister likewise includes sixteen persons.

The great-great-great-grandson and the great-great-great-granddaughter are the children of the great-great-grandson and the great-great-granddaughter, the grandson and granddaughter of the great-grandson or the great-granddaughter, the great-grandson and the great-granddaughter of the grandson or the granddaughter; the great-great-grandchildren of the son or the daughter. Thirty-two persons are included under this appellation, for the great-great-great-grandson includes sixteen, and the great-great-great-granddaughter the same number.

§ 17.- Four hundred and forty-eight persons are included in the sixth degree, as follows: the great-great-great-grandfather, the great-great-great-grandfather of the father, or mother, the great-great-grandfather, the grandfather or grandmother, the great-grandfather of the great-grandfather or great-grandmother, the grandfather of the great-great-grandfather or the grandmother, and the grandfather of the great-great-grandfather or grandmother, and the father of the great-great-great-grandfather or the great-great-great-grandmother. He is called the grandfather in the third degree. Thirty-two persons are included in this class. For the number to which the great-great-great-grandfather belongs must be doubled, a change being made with reference to each person, so far as the relation of great-great-great-grandfather is concerned; so that there are sixteen ways of being the father of the great-great-great-grandfather, and as many of being the father of the great-great-great-great-grandmother. The term great-great-great-great-grandmother likewise includes thirty-two persons.

The paternal great-great-uncle, that is to say the

partiendo del nieto del tío paterno; porque es consobrinio del padre o de la madre de ellos.

El bisnieto y la bisnieta del hermano; éstos comprenderán dieciséis personas, contándose dos veces el hermano, y cuatro cada bisnieto y bisnieta, según antes hemos demostrado. El bisnieto y la bisnieta de la hermana comprenden del mismo modo dieciséis personas.

El cuarto nieto y la cuarta nieta; éstos son hijo e hija del tataranieto o de la tataranieta; nieto y nieta del bisnieto o de la bisnieta; bisnieto y bisnieta del nieto o de la nieta; cuarto nieto y cuarta nieta del hijo o de la hija. Bajo esta denominación se contarán treinta y dos personas, porque el cuarto nieto comprende dieciséis, y otras tantas la cuarta nieta.

§ 17.- En el sexto grado se contienen estas cuatrocientas cuarenta y ocho personas: el quinto abuelo; mas el quinto abuelo es cuarto abuelo del padre y de la madre, tatarabuelo del abuelo o de la abuela, bisabuelo del bisabuelo y de la bisabuela, abuelo del tatarabuelo o de la tatarabuela, padre del cuarto abuelo o de la cuarta abuela, llamado así como si fuera abuelo en tercera vez; comprende treinta y dos personas, porque es necesario que se duplique el número, que resultó en el cuarto abuelo, haciéndose alteración por cada persona por causa de la cuarta abuela, de suerte que el padre del cuarto abuelo sea considerado dieciséis veces quinto abuelo, y otras tantas el de la cuarta abuela. La quinta abuela, contada de análoga manera, hará treinta y dos personas.

El tío paterno máximo, es hermano del tatarabuelo,

ataviae filius, patris vel matris patruus maior: personas continebit sedecim sic. Pater avus proavus abavus atavus abavi frater pater avus proavia abavus atavus frater abavi pater avus proavia abavus atavia frater abavi pater avus proavus abavus atavia frater abavi pater avia proavus abavus atavia frater abavi pater avia proavia abavus atavus frater abavi pater avia proavia abavus atavia frater abavi;

Totidem erunt matris appellatione proposita. Avunculus maximus: is est abaviae frater, patris vel matris avunculus maior: et numerus idem et personarum expositio eadem quae supra hoc dumtaxat immutato, ut pro abavi fratre abaviae fratrem ponas. Amita maxima: ea est abavi soror, patris vel matris amita maior: cetera ut in patruo maximo immutato hoc tantum, ut ubi est abavi frater ponatur abavi soror. Matertera maxima: ea est abaviae soror, patris vel matris matertera maior: cetera ut supra ad extremum dumtaxat pro abaviae fratre proposita abaviae sorore.

brother of the great-great-grandfather, the son of the great-great-great-grandfather and mother, the paternal great-great-uncle of the father or mother. The sixteen persons mentioned as included in the term are the following: the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandmother, the brother of the great-great-grandfather; the father, the grandfather, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandfather, the great-grandmother, the great-great-grandfather, the great-great-great-grandmother, the brother of the great-great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandmother, the great-grandfather, the great - great - grandfather, the great - great - great - grandmother, the brother of the great-great-grandfather; the father, the grandmother, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandmother, the great-grandmother, the great-great-grandfather, the great-great-great-grandmother, the brother of the great-great-grandfather.

The same number are included on the mother's side. The maternal great-great-uncle, that is to say the brother of the great-great-grand-mother, and the maternal great-uncle of the father or mother. The number in the order of the persons is the same as above mentioned; the only change being that the brother of the great-great-grandmother is introduced instead of the brother of the great-great-grandfather. The paternal great-great-aunt is the sister of the great-great-grandfather, and the maternal great-great-aunt of the mother; and the others proceed in regular order, as in the case of the paternal great-great-uncle, with the exception that the sister of the great-great-grandfather is substituted instead of the brother of the great-great-grandfather. The maternal great-great-aunt is the sister of the great-great-

hijo del cuarto abuelo y de la cuarta abuela, tío paterno mayor del padre o de la madre, y comprenderá dieciséis personas, de este modo: padre, abuelo, bisabuelo, tatarabuelo, cuarto abuelo, hermano del tatarabuelo; padre, abuelo, bisabuelo, tatarabuelo, cuarta abuela, hermano del tatarabuelo; padre, abuelo, bisabuela, tatarabuelo, cuarto abuelo, hermano del tatarabuelo; padre, abuelo, bisabuela, tatarabuelo, cuarta abuela, hermano del tatarabuelo; padre, abuela, bisabuelo, tatarabuelo, cuarto abuelo, hermano del tatarabuelo; padre, abuela, bisabuelo, tatarabuelo, cuarta abuela, hermano del tatarabuelo; (padre, abuela, bisabuela, tatarabuelo, cuarto abuelo, hermano del tatarabuelo); padre, abuela, bisabuela, tatarabuelo, cuarta abuela, hermano del tatarabuelo;

Y serán otros tantos partiendo de la denominación de la madre. El tío materno máximo; éste es hermano de la tatarabuela, tío materno mayor del padre o de la madre; y su número es el mismo, y la exposición de las personas la misma, que se halla más arriba, con solo este cambio, con que pongas hermano de la tatarabuela. en lugar de hermano del tatarabuelo. La tía paterna máxima; ésta es hermana del tatarabuelo, tía paterna mayor del padre o de la madre; lo demás, como en el tío paterno máximo, con esta sola alteración, que donde esta el hermano del tatarabuelo se ponga la hermana del tatarabuelo. La tía materna máxima; ésta es hermana de la tatarabuela, tía materna mayor del padre o de la madre; lo demás, como arriba, poniendo solamente a lo último hermana de la tatarabuela en lugar de hermano de la

Hos omnes, quos a patruo maximo posuimus, quidam his nominibus designant: abpatruus abavunculus, abamita abmatertera: itaque et nos indifferenter hos ponemus. quos ego autem appello abpatruos abavunculos, abamitas abmaterteras, illi me demonstrant fratris sororisque abnepotem.

Patruus maioris filius filia: hi sunt proavi fratris filius filia, abavi abaviae per proavum nepos neptis ex filio: personae sub hoc erunt sedecim, enumeratione sic ducta ut in quinto gradu, quum patrum maiorem demonstraremus, fecimus, adiecto dumtaxat filio filia, quia filius patruus maioris totidem necesse est personas complectatur, quot patruus maior, id est octo. Totidem ex filiae persona computatis is numerus efficietur, quem supra posuimus. Amitae maioris filius filia: hi sunt proavi sororis filius filia, abavi abaviae per proavum nepos neptis ex filia: et hic eadem ratione personas dinumerabimus totidem. Avunculi maioris filius filia: hi sunt proaviae fratris filius filia, abavi abaviae per proaviam nepos neptis ex filio. Eadem hic dinumeratio facienda est, quae in patruus maioris filio filia. materterae maioris filius filia: hi sunt proaviae sororis filius filia, abavi abaviae per proaviam nepos neptis ex filia: circa numerum personarum et expositionem ut supra. Hi omnes, quos proposuimus a patruus maioris filio, avo aviae eius, de cuius cognatione quaeritur, fratribus et sororibus eorum consobrini consobrinae sunt: at patri matrique eiusdem fratribusque et sororibus utriusque eorum propius sobrini.

grandmother, and the great-aunt of the father or mother, and the other degrees proceed as above, except that, at the last, the sister of the great-great-grandmother is introduced instead of the brother of the great-great-grandmother.

Certain authorities designate by the following specific names all those whom we have traced from the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt; therefore, we use these terms indiscriminately. Those whom I designate by these names call me the great-great-grandson of their brother or their sister.

The son and the daughter of the paternal great-great-uncle are the son and daughter of the brother of the great-grandfather, and the grandson and granddaughter of the great-great-grandfather or great-great-grandmother, by the great-grandfather through his son. There are sixteen persons in this class, the enumeration being made in the same manner as was done in the fifth degree, when we explained the relation of the paternal great-great-uncle; only adding one more son or daughter, because it is necessary to include as many persons in this class, as in those of the paternal great-great-uncle, that is to say, eight. With reference to the person of the daughter, the number computed is the same as that mentioned above; the son and the daughter of the paternal great-great-aunt are the children of the sister of the great-grandfather, and the grandson and the granddaughter by the great-great-grandfather or the great-great-grandmother through the great-grandfather by a daughter. In this instance, we compute the persons according to the same rule. The son and daughter of the maternal great-great-uncle are the children of the great-grandfather and the great-grandmother, and the grandchildren of the great-great-grandfather, and the great-great-grandmother through the great-grandmother by a son. The enumeration, in this case, should be made just as in that of the son and daughter of the paternal great-great-uncle. The son and the daughter of the maternal great-great-aunt are the son and the

tatarabuela.

A todos éstos, que hemos expuesto partiendo del tío paterno máximo, los designan algunos con estos nombres: hermano del tatarabuelo, hermano de la tatarabuela, hermana del tatarabuelo, hermana de la tatarabuela y así, también nosotros los pondremos indiferentemente; mas aquellos a quienes yo llamo hermanos del tatarabuelo, hermanos de la tatarabuela, hermanas del tatarabuelo y hermanas de la tatarabuela, me llaman tataranieto del hermano y de la hermana.

El hijo y la hija del tío paterno mayor; éstos son hijo e hija del hermano del bisabuelo, nieto y nieta, de hijo por bisabuelo, del tatarabuelo y de la tatarabuela; bajo él habrá dieciséis personas, haciéndose la enumeración como la hicimos en el quinto grado, cuando designamos al tío paterno mayor, añadiendo solamente hijo, hija, porque es necesario que el hijo del tío paterno mayor comprenda tantas personas como el tío paterno mayor, esto es, ocho; y computadas otras tantas procedentes de la persona de la hija se formara el número, que arriba pusimos. El hijo y la hija de la tía paterna mayor; éstos son hijo e hija de la hermana del bisabuelo, nieto y nieta, de hijo por bisabuelo, del tatarabuelo y de la tatarabuela; y aquí contaremos por la misma razón otras tantas personas. El hijo y la hija del tío materno mayor; éstos son hijo e hija del hermano de la bisabuela, nieto y nieta, de hijo por bisabuela, del tatarabuelo y de la tatarabuela; debiéndose hacer aquí la misma enumeración, que al tratar del hijo y de la hija del tío paterno mayor. El hijo y la hija de la tía materna mayor; éstos son hijo e hija de la hermana de la bisabuela, nieto y nieta, de hijo por bisabuela, del tatarabuelo y de la tatarabuela; y respecto al número de las personas y a la exposición, como arriba. Todos éstos, que hemos expuesto partiendo del hijo del tío paterno mayor, son consobrinos o consobrinas de abuelo y de la abuela de aquél de cuya cognación se trata, y de los hermanos y de las hermanas de ellos; pero son más próximos a los sobrinos del padre y de la madre del

Patrui magni nepos vel neptis, amitae magnae nepos vel neptis, avunculi magni nepos vel neptis, materterae magnae nepos vel neptis: haec singula nomina continent personas sexaginta quattuor: nam quum patrui magni verbi gratia persona quadrifariam intellegatur, nepotis bifariam, geminatur is numerus nepote dumtaxat adnumerato et quadruplatur is qui geminatus erat: duplicatur etiam nepte computata. Et tantum unius denumerationem proponimus exempli gratia: pater avus proavus frater avi qui est patruus magnus filius eius nepos eiusdem ex filio item neptis pater avus proavia frater avi qui est patruus magnus filia eius nepos eiusdem ex filia item neptis pater avus proavia frater avi qui est patruus magnus filia eius nepos eiusdem ex filia item neptis totidem et eadem ratione exponuntur matris nomine anteposito, id est ut avi materni fratris nepotes et neptes computemus. Item in amita magna, id est avi sororis, nepotes neptesque enumerabimus: idemque in avunculo magno, id est aviae fratris: eadem ratione in materterae magnae, id est aviae sororis: ex quibus universus numerus completur sexaginta quattuor. Hi omnes proavi aut proaviae eius, de cuius cognatione quaeritur, pronepotes et proneptes, eiusdem avi aviaeve fratris sororisve nepotes neptesve: et contra horum eiusdem avus avia patruus magnus amita magna, avunculus magnus matertera magna: erunt autem pater materve eiusdem fratresque et sorores utrius eorum propii sobrini: ipse his sobrinus est et invicem huic illi sobrini.

daughter of the sister of the great-grandmother, and the grandson and granddaughter of the great-great-grandfather and the great-great-grandmother through the great-grandmother by a daughter, the number and definitions of the persons being the same as above.

All of those whom we have mentioned as descended from the son of the paternal great-great-uncle are cousins of the grandfather and grandmother, and the great-uncles and great-aunts of the person whose relationship is in question; and they are also distant cousins of the brothers and sisters of the father or mother on both sides. The grandson and the granddaughter of a paternal great-uncle and a paternal great-aunt, of a maternal great-uncle and a maternal great-aunt, each of which classes includes sixty-four persons. For as the person of the great-uncle has four different significations, that of the grandson has two, the number is doubled in speaking of the grandson, and he who is doubled is also quadrupled. Where the granddaughter is concerned, the number is also doubled; and we will mention one of these enumerations, by way of example. The father, the grandfather, the great-grandfather, the brother of the grandfather, who is the paternal great-uncle, his son, and his grandson, by a son, and also his granddaughter; the father, the grandfather, the great-grandmother, the brother of the grandfather, who is the paternal great-uncle, his son, his grandson by his son, and his granddaughter; the father, the grandfather, the great-grandfather, the father of the grandfather who is the paternal great-uncle of his daughter, and his grandson by his daughter, likewise, his grand-daughter; the father, the grandfather, the great-grandmother, the brother of the grandfather, who is the paternal great-uncle, his daughter, his grandson by his daughter, and also his granddaughter. Under the same rule, there are as many, beginning with the mother, that is to say if we compute the grandsons and granddaughters of the brother of the maternal grandfather. This also applies to the paternal great-aunt; that is to say, where we enumerate the grandchildren of the sister of the grandfather. The same rule also applies to the maternal great-uncle, that is to say, the brother of the

mismo, y de los hermanos y de las hermanas de cada uno de ellos.

El nieto o la nieta del grande tío paterno, el nieto o la nieta de la grande tía paterna, el nieto o la nieta del grande tío materno, el nieto o la nieta de la grande tía materna. Cada uno de estos nombres comprende sesenta y cuatro personas; porque como, por ejemplo, la persona del grande tío paterno se entiende de cuatro maneras, y de dos la del nieto, se duplica este número con solo contar el nieto, y se cuadruplica el que se había duplicado; también se duplica contándose la nieta; exponremos la enumeración de uno solo por vía de ejemplo; padre, abuelo, bisabuelo, hermano del abuelo, el cual es grande tío paterno, hijo de éste, nieto del mismo, habido de hijo, y también nieta; padre, abuelo, bisabuela, hermano del abuelo, el cual es grande tío paterno, hijo de éste, nieto del mismo, habido de hijo, y también nieta; (padre, abuelo, bisabuelo, hermano del abuelo, el cual es grande tío paterno, hija de éste, nieto del mismo, habido de hija, y también nieta); padre, abuelo, bisabuela, hermano del abuelo, el cual es grande tío paterno, hija de éste, nieto del mismo, habido de hija, y también nieta; otros tantos se exponen también por la misma razón anteponiéndose el nombre de la madre, esto es, de modo que computemos los nietos y las nietas del hermano del abuelo materno; asimismo tratándose de la grande tía paterna, esto es, que enumeraremos los nietos y las nietas de la hermana del abuelo; lo mismo en cuanto al grande tío materno, esto es, los nietos y las nietas del hermano de la abuela; y en la misma forma los de la grande tía materna, esto es, de la hermana de la abuela; con los que se completa al número total de sesenta y cuatro. Todos éstos son bisnietos y bisnietas del bisabuelo o de la bisabuela de aquél de cuya cognación se trata; nietos o nietas del hermano o de la hermana del abuelo o de la abuela del mismo; y por el contrario, el abuelo y la abuela del mismo son grande tío paterno, grande tía paterna, grande tío materno y grande tía materna de ellos; y el padre o la

El bisnieto y la bisnieta del tío paterno comprenden ocho personas; porque las de uno y otro sexo hacen dieciséis, de este modo: padre, abuelo, tío paterno, hijo de tío paterno, nieto del mismo de hijo, bisnieto y bisnieta del mismo de nieto nacido de hijo; padre, abuela, tío paterno, hijo de tío paterno, nieto del mismo de hijo, bisnieto y bisnieta de nieto nacido de hijo; padre, abuelo, tío paterno, hija de tío paterno, nieto del mismo de hija, bisnieto y bisnieta de nieto nacido de hija; padre, abuelo, tío paterno, hija de tío paterno, nieto del mismo de hija, bisnieto y bisnieta de nieto nacido de hija; padre, abuelo, tío paterno, hijo de tío paterno, nieta del mismo de hijo, bisnieto y bisnieta de nieta nacida de hija; padre, abuela, tío paterno, hijo de tío paterno, nieta del mismo de hijo, bisnieto y bisnieta de nieta nacida de hijo; padre, abuelo, tío paterno, hija de tío paterno, nieta del mismo de hija, bisnieto y bisnieta de nieta nacida de hija; padre, abuela, tío paterno, hija de tío paterno, nieta del mismo de hija, bisnieto y bisnieta de nieta nacida de hija. El bisnieto y la bisnieta de la tía paterna; también éste comprende por la misma razón otras tantas personas, con solo tomar en lugar del tío

personarum inuenimus. Hi omnes eius, de cuius cognatione quaeritur, consobrinorum nepotes neptesve sunt.

Fratris sororisque abnepos abneptis: efficiunt personas sexaginta quattuor, ut ex supra scriptis apparere potest.

Trinepos trineptis: hi sunt filii filiaeve adnepos adneptis, nepotis neptis abnepos abneptis, pronepotis proneptisve pronepos pro-neptis, abnepotis abneptisve nepos neptisve, adnepotis adneptis filius filia. Hae appellationes demonstrant personas sexaginta quattuor, nam tri-ginta duo trinepos complet, totidem trineptis. Ab nepote enim numerus quadruplatus in se efficit triginta duo, ipso nepote duas significante, pronepote quattuor, abnepote octo, adnepote sedecim: his accedunt trinepos trineptis, una ex adnepote nati, altera ex adnepte. Per singulos autem gradus ideo geminatio fit, quia maribus adiciuntur feminae, ex quibus proximus quisque progenitur, et numera-buntur sic: filius nepos pronepos abnepos adnepos trinepos item trineptis filia nepos pronepos abnepos adnepos trinepos item trineptis filius neptis pronepos abnepos adnepos

granddaughter by his son, his great-grandson born to his son through his granddaughter, and also his great-granddaughter; the father, the grandfather, the great-uncle, the daughter of the great-uncle, his granddaughter by his daughter, his great-grandson born to his granddaughter by his daughter, and his great-granddaughter; the father, the grandmother, the paternal uncle, the daughter of the paternal uncle, his granddaughter by his daughter, his great-grandson by his granddaughter through his daughter, and his granddaughter, the great-grandson and the great-granddaughter of the paternal aunt. Under the same rule this class contains the same number of persons by substituting the paternal aunt for the paternal uncle. This also applies to the great-grandson and great-granddaughter of the maternal uncle, the latter being introduced instead of the paternal uncle. The great-grandson and great-granddaughter of the paternal aunt, and, in this instance, the maternal aunt is substituted instead of the paternal uncle, and we find the same number of persons. All of these are the grandsons or granddaughters of the cousins of him whose relationship is in question.

The great-great-grandson and the great-great-granddaughter of the brother and sister give rise to sixty-four persons, as appears from what is above stated.

The great-great-great-grandson and great-great-great-granddaughter, the great-great-grandson or the great-great-granddaughter of the son of the daughter, and the great-great-grandson and the great-great-granddaughter of the great-grandson, and the great-granddaughter of the great-grandson, or the great-granddaughter of the great-grandson or the great-granddaughter, or the grandson and granddaughter of the great-great-grandson or the great-great-granddaughter, or the son of the daughter of the great-great-grandson or the great-great-granddaughter. These appellations include sixty-four persons, for the grandson in the third degree gives rise to thirty-two, and the granddaughter in the third degree to the same number. For from the great-great-grandson the number is quadrupled, making thirty-two, as the term grandson itself signifies two persons, the great-

paterno la tía paterna. Asimismo el bisnieto y la bisnieta del tío materno; poniendo también tío materno en lugar de tío paterno. El bisnieto y la bisnieta de la tía materna; también aquí hallaremos el mismo número de personas contando a la tía materna donde se ha puesto el tío paterno. Todos estos son nietos o nietas de los consobrinos de aquél de cuya cognación se trata.

El tataranieto y la tataranieta del hermano y de la hermana; hacen sesenta y cuatro personas, como puede verse por lo antes dicho.

El quinto nieto y la quinta nieta; estos son cuartos nieto y nieta del hijo o de la hija, tataranieto y tataranieta del nieto o de la nieta, bisnieto y bisnieta del bisnieto o de la bisnieta, nieto o nieta del tataranieto o de la tataranieta, hijo o hija de los cuartos nieto o nieta. Estas denominaciones denotan sesenta y cuatro personas; porque el quinto nieto comprende treinta y dos, y otras tantas la quinta nieta; porque cuadruplicado el número de nietos hace treinta y dos, significando dos el mismo nieto, cuatro el bisnieto, ocho el tataranieto, y dieciséis el cuarto nieto; a éstos se añaden el quinto nieto y la quinta nieta, nacidos unos del cuarto nieto, y otros de la cuarta nieta; mas se hace en cada grado la duplicación, porque a los varones se les agregan las hembras, de las cuales nace cada próximo cognado; y se contarán así: hijo, nieto, bisnieto, tataranieto,

[illegible]

grandson and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-grandson, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the grandson, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the

granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter.

§ 18.- Septimo gradu personae continentur mille viginti quattuor hae: tritavi itemque tritaviae pater mater: Personas efficiunt centum viginti octo: tritavi enim patres tot sunt quot ipsius tritavi, item eiusdem matres totidem, fiunt sexaginta quattuor: idem numerus tritaviae patris matrisque.

Atavi ataviae frater sororve: hi sunt tritavi filius filia, abavi abaviaeve patruus avunculus amita matertera, proavi proaviae patruus magnus avunculus magnus amita magna matertera magna, avi aviaeve propatruus proavunculus proamita promatertera, patris vel matris abpatruus abavunculus abamita abmatertera: fiunt personae atavi fratris triginta duo: nam sedecim, quas atavus explet, accedunt totidem propter fratris duplicem personam: necesse est nam sedecim fratres atavi ex patre computentur, sedecim ex matre. Similiter atavi sorores triginta duo: fiunt sexaginta quattuor: et totidem ataviae fratris, item sororis.

§ 18.- One thousand and twenty-four persons are included in the seventh degree, beginning with the father and the mother of the great-great-great-great-grandfather and the great-great-great-great-grandmother. These constitute in all a hundred and twenty-eight persons, for there are as many fathers and mothers of the great-great-great-great-grandfather as of the great-great-great-great-grandmother, and these make sixty-four.

The brother and the sister of the great-great-great-grandfather and the great-great-great-grandmother are the son and daughter of the great-great-great-great-grandfather, the paternal and maternal uncle and the paternal and maternal aunt of the great-great-grandfather and the great-great-grandmother; the paternal great-uncle and the maternal great-uncle, the paternal great-aunt and the maternal great-aunt of the great-grandfather and the great-grandmother; the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt of the grandfather or grandmother; the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt and the maternal great-great-aunt of the father or mother. The persons connected with the brother of the great-great-great-grandfather are thirty-two in number, for there are sixteen derived from the great-great-great-grandfather, and as many more are necessarily added on account of the duplication of the person of the brother. For sixteen brothers of the great-great-great-grandfather are computed as descending from his father, as well as sixteen from his mother. In like manner the sisters of the great-great-great-grandfather are thirty-two in number. This makes sixty-four in all, and as many for the brother and sister of the great-great-great-grandmother must be

§ 18.- En el séptimo grado se contienen estas mil veinticuatro personas: el padre y la madre del quinto abuelo y de la quinta abuela; hacen ciento veintiocho personas; porque los padres del quinto abuelo son tantos como las personas del mismo quinto abuelo, y además otras tantas las madres del mismo; hacen sesenta y cuatro; el mismo número de padre y madre de la quinta abuela.

El hermano o la hermana del cuarto abuelo o de la cuarta abuela; éstos son hijo e hija del quinto abuelo; tío paterno o materno, o tía paterna o materna del tatarabuelo o de la tatarabuela; grande tío paterno o materno, o grande tía paterna o materna del bisabuelo o de la bisabuela; tío paterno o materno mayor, o tía paterna o materna mayor del abuelo o de la abuela. El máximo tío paterno o materno, o la máxima tía paterna o materna del padre o de la madre; hacen treinta y dos personas de hermano del cuarto abuelo; porque es necesario que a las dieciséis que constituye el cuarto abuelo se agreguen otras tantas por razón de la doble persona del hermano; pues se computarán dieciséis hermanos del cuarto abuelo por parte de padre, y dieciséis por parte de madre; y del mismo modo las treinta y dos hermanas del cuarto abuelo hacen sesenta y cuatro, y otros tantos del hermano y de la hermana de la cuarta abuela.

Patrui maximi filius filia: hi sunt atavi nepos neptis ex filio, abavi fratris filius filia. Amitae maximae filius filia: hi sunt atavi nepos neptis ex filia, abavi sororis filius filia. Avunculi maximi filius filia: hi sunt atavi nepos neptis ex filio, abaviae fratris filius filia. Materterae maximae filius filia: hi sunt atavi nepos neptis ex filia, abaviae sororis filius filia. Hae omnes personae, quas a patrui maximi filio enumeravimus, proavi proaviaeque eius, de cuius cognatione quaeritur, consobrinae sunt, avi aviaeque eiusdem propius sobrini. Singulae appellationes continent personas sedecim, quia, quum patruus maximus sedecim efficiat, filius eius eandem habet enumerationem totidemque filia: et fit ex omnibus his, quas a patrui maximi filio comprehendimus, ductis per octo sedecies, centum viginti octo.

Patrui maioris nepos personas continet sedecim (est enim abavi abaviaeque pronepos) et quum abavus octies numeretur, nepotes bis octies computati supra scriptum numerum efficiunt. Patrui maioris neptis item. Avunculi maioris nepos neptis eadem ratione personas complebunt triginta duo. Amitae maioris nepos neptis item. Materterae maioris nepos neptis item. Et sic ex omnibus colliguntur centum viginti octo. His personis avus avia eius, de cuius cognatione quaeritur, propius sobrini sunt, pater mater sobrini sobrina: is de cuius cognatione quaeritur, sobrino natus est: hic proximo nomine definitur parentis sui sobrini, ut Trebatius ait, rationemque nominis hanc reddit, quod ultimi

reckoned.

The son and the daughter of the paternal great-great-uncle are the grandson of the great-great-great-grandfather and the granddaughter by his son, the son and daughter of the brother of the great-great-grandfather. The son and the daughter of the paternal great-great-aunt are the grandson of the great-great-great-grandfather and granddaughter by his daughter, the son and the daughter of the sister of the great-great-grandfather. The son and the daughter of the maternal great-great-uncle are the grandson of the great-great-great-great-grandfather and the granddaughter by his son, the son and the daughter of the brother of the great-great-grandmother. The son and the daughter of the maternal great-great-aunt are the grandson and the granddaughter of the great-great-great-grandfather, by his granddaughter by a daughter, the son and daughter of the sister of the great-great-grandmother. All these persons whom we have mentioned as being descended from the son of the paternal great-great-uncle are the cousins of the great-grandfather and the great-grandmother whose relationship is in question, one degree above the cousins of his grandfather and grandmother. Each one of these names includes sixteen persons, because when the paternal great-great-uncle gives rise to sixteen, his son and his daughter each gives rise to the enumeration of as many more; and from all those which we trace back to the son of the paternal great-great-uncle by multiplying eight by sixteen, we obtain one hundred and twenty-eight.

The term grandson of the paternal great-uncle includes sixteen persons. For he is the great-grandson of the great-great-grandfather and the great-great-grandmother, and as the great-great-grandfather is counted eight times, the grandsons being counted twice eight times, make up the above-mentioned number. The same rule applies to the granddaughter of the paternal great-uncle. According to the same rule the grandson and granddaughter of the maternal great-great-uncle include thirty-two persons. The grandson and granddaughter of the paternal great-aunt under this classification includes the same number. This also applies to the grandson and the granddaughter of a maternal great-aunt, and hence,

El hijo y la hija del tío paterno máximo; éstos son nieto y nieta, de hijo, del cuarto abuelo, hijo o hija del hermano del tatarabuelo. El hijo y la hija de la tía paterna máxima; éstos son nieto y nieta, de hija, del cuarto abuelo, hijo o hija de la hermana del tatarabuelo. El hijo y la hija del tío materno máximo; éstos son nieto y nieta, de hijo, del cuarto abuelo, hijo e hija del hermano de la tatarabuela. El hijo y la hija de la tía materna máxima; éstos son nieto y nieta, de hija, del cuarto abuelo, hijo o hija de la hermana de la tatarabuela. Todas estas personas, que hemos enumerado partiendo del hijo del tío paterno máximo, son consobrinas del bisabuelo y de la bisabuela de aquél de cuya cognación se trata; y más próximas a los sobrinos del abuelo y de la abuela del mismo. Cada denominación comprende dieciséis personas, porque, haciendo dieciséis el tío paterno máximo, su hijo comprende el mismo numero, y otro igual la hija; y de todas las que hemos comprendido, partiendo del tío paterno máximo, resultan, multiplicando dieciséis por ocho, ciento veintiocho.

El nieto del tío paterno mayor comprende dieciséis personas; porque es bisnieto del tatarabuelo y de la tatarabuela, y como se cuenta ocho veces el tatarabuelo, computados dos veces ocho los nietos hacen el susodicho número. Lo mismo la nieta del tío paterno mayor; el nieto y la nieta del tío paterno mayor completarán por la misma razón treinta y dos personas; el nieto y la nieta de la tía paterna mayor lo mismo por la misma razón; y lo mismo el nieto y la nieta de la tía materna mayor; y así resultan de todos ciento veintiocho. De estas personas son más próximos a los sobrinos el abuelo y la abuela de aquél de cuya cognación se trata; el padre y la madre son sobrino y sobrina; aquél, de cuya cognación se trata,

cognationum gradus sobrinorum fiunt itaque sobriini filium recte proximum nomen. Ab eo ipso huius sobriini filius dicitur, et ideo eos, qui ex sobrinis nati sunt, inter se proximum nomen appellare: hos enim nullum proprium habere nomen, quo inter se vocentur.

Patrui magni pronepos proneptis. Avunculi magni pronepos proneptis. Amitae magnae pronepos proneptis. Materterae magnae pronepos proneptis. Ex his omnibus centum viginti octo personae efficiuntur, quia singulae appellationes sedecim complent: nam quum exempli gratia patruus magnus quadrifariam intellegitur, ad singulorum patruorum magnorum personas quadruplicatus pronepos, item proneptis triginta duo personas reddet, totque quater numeratae illam, quae proposita est, summam efficiunt. Eorum patres matresque ei, de cuius cognatione quaeritur, sobriini sobrinaeque sunt, ipse autem isdem sobrino sobrinave natus.

Patrui abnepos abneptis. Avunculi abnepos abneptis. Amitae abnepos abneptis. Materterae abnepos abneptis. Haec singula vocabula senas denas continent personas: verbi enim gratia patrui abnepos sic enumerabitur, ut bifariam patruo accepto quater pronepos, totiens proneptis ducatur et sic ad eorum filios veniatur sedecies computatos: eadem ratione ad filiam: item in ceteros: et per hoc ex omnibus efficietur numerus personarum centum viginti octo. Hi sunt ei, de cuius cognatione quaeritur, conso-brinorum nepotes neptesque, ipsi eorum, de

for all of these, a hundred and twenty-eight persons are obtained. The grandfather and grandmother of the person whose relationship is in question are related in the degree above cousins to the persons hereinbefore mentioned, namely, the father, the mother and the male and female cousins. He whose degree of relationship is in question is their cousin, but in an inferior degree, and, as Trebatius says, this is done to indicate that they are related; and he gives as the reason for this, that the last degrees of relationship are those of cousins. Therefore, the son of my cousin is very properly called my near relative; and he is also called the son of my cousin. Hence those who are born of cousins call one another near relatives, for they have no special name by which they may be designated.

The great-grandson and the great-granddaughter of the paternal great-uncle, the great-grandson and the great-granddaughter of the maternal great-uncle, the great-grandson and the granddaughter of the paternal great-aunt, the great-grandson and the great-granddaughter of the maternal great-aunt: from all these a hundred and twenty-eight persons are derived, because each of these appellations includes sixteen. For example, the term paternal great-uncle is understood in four different ways, the persons of each paternal great-uncle being quadrupled; the great-grandson and the great-granddaughter include thirty-two persons; and this number multiplied by four makes the entire number above mentioned. The fathers and mothers of these are the cousins of him whose degree of relationship is in question, and he is their cousin.

The great-great-grandson and the great-great-granddaughter of the paternal uncle, the great-great-grandson and the great-great-granddaughter of the maternal uncle, the great-great-grandson and the great-great-granddaughter of the paternal aunt, the great-great-grandson and the great-great-granddaughter of the maternal aunt: each of these terms includes sixteen persons; for example, the great-great-grandson of the paternal uncle is enumerated in such a way that his great-grandson and great-granddaughter shall be counted as four, and

nació del sobrino; éste con la denominación de próximo es definido, según dice Trebacio, sobrino de su padre o madre; y da esta razón de la denominación, que los últimos grados de la cognación son los de los sobrinos; y así, el de hijo de sobrino es con razón el nombre próximo; y por él mismo será llamado hijo de este sobrino; y por lo tanto, los que nacieron de los sobrinos se llaman entre sí con el nombre próximo; porque éstos no tienen ningún nombre propio con que llamarse entre sí.

El bisnieto y la bisnieta del grande tío paterno; el bisnieto y la bisnieta del grande tío materno; el bisnieto y la bisnieta de la grande tía paterna; el bisnieto y la bisnieta de la grande tía materna; de todos éstos resultan ciento veintiocho personas, porque cada denominación comprende dieciséis; pues como, por ejemplo, el grande tío paterno es considerado de cuatro modos, cuadruplicado el bisnieto y también la bisnieta, por la persona de cada grande tío paterno, dará treinta y dos personas, y contadas ellas cuatro veces hacen la suma, que se ha expuesto. Los padres y las madres de éstos son sobrinos y sobrinas de aquél de cuya cognación se trata, y él para ellos es hijo de sobrino o de sobrina.

El tataranieta y la tataranieta del tío paterno; el tataranieta y la tataranieta del tío materno; el tataranieta y la tataranieta de la tía paterna; el tataranieta y la tataranieta de la tía materna; cada una de estas denominaciones comprende dieciséis personas; porque, por ejemplo, el tataranieta del tío paterno será contado de modo, que, considerado de dos maneras el tío paterno, se cuente cuatro veces el bisnieto, y otras tantas la bisnieta, y así se llegará a tener computados dieciséis veces los hijos de ellos; y con la misma cuenta respecto a la hija, y también

cuius cognatione quaeritur, patruī maximi avunculi maximi amitae maximae materterae maximae filius filia, item proavi proaviae consobrinus.

Fratris sororisque adnepos adneptis: personas continent centum viginti octo. Trinepotis filius, item filia: trineptis filius, item filia. Hi centum viginti octo fiunt, quod, quum trinepos trineptisque, ut supra demonstravimus, sexaginta quattuor impleant, filius eorum eadem enumeratione totidemque filia computabitur.

TIT. XI

UNDE VIR ET UXOR

1.- ULPIANUS; *libro XLVIII, ad Edictum*.- Ut bonorum possessio peti possit unde vir et uxor, iustum esse matrimonium oportet. Ceterum si iniustum fuerit matrimonium, nequaquam bonorum possessio peti poterit, quemadmodum nec ex testamento adiri hereditas vel secundum tabulas peti bonorum possessio potest: nihil enim capi propter iniustum matrimonium potest.

§ 1.- Ut autem haec bonorum possessio locum

their children will amount to sixteen. The same rule applies to the daughter as to the others, and in this way the entire number is brought up to a hundred and twenty-eight. These are the great-grandson and the great-granddaughter of the cousins of him whose degree of relationship is in question; the sons and daughters of the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt, of those whose degree of relationship is in question.

The same rule applies to the cousin of the great-grandfather and the great-grandmother. The great-great-great-grandson and the great-great-great-great-granddaughter of the brother or sister include one hundred and twenty-eight persons. The son and daughter of the great-great-great-great-grandson, and the son and daughter of the great-great-great-great-granddaughter: these also constitute a hundred and twenty-eight persons, because as the great-great-great-great-grandson and the great-great-great-great-granddaughter include sixty-four persons (as we have previously stated), their son and their daughter under the same enumeration will each include as many more.

TITLE XI

CONCERNING PRAETORIAN POSSESSION
WITH REFERENCE TO HUSBAND
AND WIFE

1.- ULPIANUS; *On the Edict, Book XLVII*.- In order that praetorian possession of an estate may be demanded in case of the intestacy of either the husband or the wife, there must be a lawful marriage. On the other hand, if the marriage is unlawful, praetorian possession of the estate cannot be demanded. In like manner, the estate cannot be entered upon under the will, nor can praetorian possession, in accordance with the terms of the will be claimed; for nothing can be acquired where a marriage is illegal.

§ 1.- In order that praetorian possession of this kind

respecto a los demás; y de este modo se formará con todos el número de ciento veintiocho personas; éstos son bisnietos y bisnietas de los consobrinos de aquél de cuya cognación se trata; y éste, de cuya cognación se trata, hijo o hija de los máximos tíos paterno y materno, y de las máximas tías paterna y materna de ellos; y también consobрино del bisabuelo o de la bisabuela.

El cuarto nieto y la cuarta nieta del hermano y de la hermana; comprenden ciento veintiocho personas. El hijo y la hija del quinto nieto; el hijo y la hija de la quinta nieta; éstos hacen ciento veintiocho, porque, como el quinto nieto y la quinta nieta comprenden, según antes hemos demostrado, sesenta y cuatro, el hijo de ellos será computado con el mismo número, y en otro igual la hija.

TÍTULO XI

DE LA POSESIÓN DE LOS BIENES
«UNDE VIR ET UXOR»

ULPIANO; *Comentarios al Edicto, libro XLVII*.- Para que se pueda pedir la posesión de los bienes *Unde vir et uxor* es menester que el matrimonio sea legítimo; mas si el matrimonio fuere ilegítimo, no se podrá pedir de ninguna manera la posesión de los bienes, así como no se puede adir la herencia en virtud del testamento, ni pedir la posesión de los bienes con arreglo al testamento; porque nada se puede adquirir por causa de matrimonio ilegítimo.

§ 1.- Mas para que esta posesión de los bienes tenga

habeat, uxorem esse oportet mortis tempore. Sed si divortium quidem secutum sit, verumtamen iure durat matrimonium, haec successio locum non habet. Hoc autem in huiusmodi speciebus procedit. Liberta ab invito patrono divortit: Lex Iulia de maritandis ordinibus retinet istam in matrimonio, dum eam prohiberet alii nubere invito patrono. Item Iulia de adulteriis, nisi certo modo divortium factum sit, pro infecto habet.

TIT. XII

DE VETERANORUM ET MILITUM
SUCCESSIONE

1.- MACER; *libro II, de re militari*.- Militi, qui capite puniri meruit, testamentum facere concedendum paulus et menander scribunt eiusque bona intestati, si punitus sit, ad cognatos eius pertinere, si tamen ex militari delicto, non ex communi punitus est.

2.- PAPINIANUS; *libro XVI, Responsorum*.- Bona militis intestati defuncti castrensis fisco non vindicantur, quum heres legitimus ad finem quinti gradus extitit aut proximus cognatus eiusdem gradus intra tempus possessionem acceperit.

TIT. XIII

QUIBUS NON COMPETIT BONORUM
POSSESSIO

1.- IULIANUS; *libro XXVIII, Digestorum*.- Servo meo herede instituto dolo feci, ne testamentum mutaretur, eumque postea manumisi: quaesitum est, an actiones ei denegandae essent. Respondi: hic casus verbis Edicti non continetur. Sed aequum est, si dominus dolo fecerit, ne testamentum mutaretur, quo

may be obtained, the woman must be the wife of her husband at the time of his death. If a divorce has occurred, even though the marriage still exists according to law, this succession will not take place. This may happen in certain instances; for example, where a freedwoman is divorced without the consent of her patron; as the Lex Julia relating to the marriages of different orders still retains the woman in the matrimonial condition, and forbids her to marry another against the consent of her patron. The Lex Julia with reference to adultery renders a divorce void if it is not obtained in a certain way.

TITLE XII

CONCERNING THE SUCCESSION OF
VETERANS AND SOLDIERS

1.- MACER; *On Military Affairs, Book II*.- Paulus and Menander say that a soldier who deserves to suffer the punishment of death should be permitted to make a will; and if he should die intestate, after having been punished, his property will belong to his next of kin; provided he is punished for a military offence, and not for an ordinary crime.

2.- ULPIANUS; *Opinions, Book XVI*.- The castrensis property of a soldier who died intestate cannot be claimed by the Treasury, if he left a lawful heir, who is within the sixth degree; or one next of kin in the same degree demands praetorian possession within the prescribed time.

TITLE XIII

CONCERNING THOSE WHO ARE NOT
ENTITLED TO PRAETORIAN POSSESSION OF
AN ESTATE

1.- JULIANUS; *Digest, Book XXVIII*.- If my slave was appointed an heir, and I fraudulently prevented the testator from changing his will, and I afterwards manumitted the slave, the question arises whether actions to recover the estate should be refused to him. I answered, that this case is not included in the terms

lugar, es necesario que la mujer esté casada al tiempo de la muerte; mas si verdaderamente se hubiera seguido divorcio, pero subsiste de derecho el matrimonio, no tiene lugar esta sucesión. Mas esto sucede en casos de esta naturaleza: una liberta se divorció de su patrono contra la voluntad de éste; la ley Julia, sobre la manera de casarse los individuos de cada orden, la retiene a ésta en el matrimonio, en cuanto le prohíbe que se case con otro contra la voluntad del patrono; además, la ley Julia sobre los adulterios tiene por no hecho el divorcio, si no se hubiera hecho de cierto modo.

TÍTULO XII

DE LA SUCESIÓN DE LOS VETERANOS
Y DE LOS MILITARES

1.- MACER; *De los asuntos militares, libro III*.- Escriben Paulo y Menandro, que al militar, que mereció ser condenado a muerte, se le ha de conceder que haga testamento; y que sus bienes, muerto intestado, pertenecen, si hubiera sido condenado, sus cognados, con tal que haya sido condenado por delito militar, no por uno común.

2.- PAPINIANO; *Respuestas, libro XVI*.- Los bienes castrenses del militar que falleció intestado no son reivindicados para el fisco, cuando quedó heredero legítimo dentro del límite del quinto grado, o un próximo cognado del mismo grado hubiere recibido dentro del término la posesión.

TÍTULO XIII

A QUIÉNES NO COMPETE LA POSESIÓN
DE LOS BIENES

JULIANO; *Digesto, libro XXVIII*.- Habiendo sido instituido heredero mi esclavo, hice con dolo que no se cambiase el testamento, y después lo manumité; se preguntó, si se habrían de denegar las acciones. Respondí: este caso no está comprendido en las palabras del Edicto, pero es equitativo que se le

servus eius heres scriptus erat, quamvis manumissus adierit hereditatem, ei denegari, quum etiam emancipato filio denegetur, si pater dolo fecerit, ne testamentum mutaretur.

TIT. XIV

UT EX LEGIBUS SENATUSVE CONSULTIS
BONORUM POSSESSIO DETUR

1.- ULPIANUS; *libro XLIX, ad Edictum*.- Praetor ait: "uti me quaque lege Senatusconsulto bonorum possessionem dare oportebit, ita dabo".

§ 1.- Numquam bonorum possessio, quae ex alia parte edicti adgnita est, impedit istam bonorum possessionem.

§ 2.- Quum ex lege duodecim tabularum quis habet hereditatem, hinc non petit, sed inde "tum quem ei heredem esse oportet", quippe quum non alias hinc competat bonorum possessio, quam si lex specialiter deferat bonorum possessionem.

TIT. XV

QUIS ORDO IN POSSESSIONIBUS
SERVETUR

1.- Modestinus; *libro VI, Pandectarum*.- Intestati hi gradus vocantur: primum sui heredes, secundo legitimi, tertio proximi cognati, deinde vir et uxor.

§ 1.- Sive tabulae testamenti non exstent, sive extent, si secundum eas vel contra eas bonorum

of the Edict; it is, however, but just, if the master was guilty of fraud, to prevent the will by which a slave was appointed heir from being changed; and he, even though he was manumitted, should accept the estate, the actions should be denied him, as an action is denied an emancipated son, where his father has committed fraud in order to prevent the testator from changing his will.

TITLE XIV

CONCERNING PRAETORIAN POSSESSION
OF PROPERTY GRANTED BY SPECIAL LAWS
OR DECREES OF THE SENATE

1.- ULPIANUS; *On the Edict, Book XLIX*.- The Praetor says: "I will grant the possession of property, whenever it must be given under the terms of any law or decree of the Senate."

§ 1.- Praetorian possession of property, although obtained under some other Section of the Edict, does not interfere with possession of this kind.

§ 2.- Where anyone is entitled to an estate by the Law of the Twelve Tables, he cannot demand it under this part of the Edict, but under another Section relating to necessary heirs; for, under this Section, praetorian possession is not granted unless a special law provides for it.

TITLE XV

WHAT ORDER IS TO BE OBSERVED
IN GRANTING PRAETORIAN POSSESSION

1.- MODESTINUS; *Pandects, Book VI*.- The following are the degrees of praetorian possession on the ground of intestacy: first, that of the proper heirs; second, that of the heirs at law; third, that of the next of kin; finally that of husband and wife.

§ 1.- Praetorian possession on the ground of intestacy is granted where there is no will, or where

denieguen, si el señor hubiere hecho con dolo que no se cambiase el testamento, aunque el manumitido hubiere adido la herencia, porque también se le deniega al hijo emancipado, si el padre hubiere hecho con dolo que no se cambiase el testamento.

TÍTULO XIV

DE QUE SE DÉ LA POSESIÓN DE LOS BIENES
CON ARREGLO A LAS LEYES Y A LOS
SENADOCONSULTOS

ULPIANO; *Comentarios al Edicto, libro XLIX*.- Dice el Pretor: «Como conviniere que por cualquier ley, o Senadoconsulto, dé yo la posesión de los bienes, así la daré.»

§ 1.- La posesión de los bienes, que fue obtenida en virtud de otra parte del Edicto, no impide esta posesión de los bienes.

§ 2.- Cuando alguno tiene la posesión de los bienes en virtud de la ley de las Doce Tablas, no pide en virtud de esta parte, sino de aquella: «entonces el que debe ser heredero de él,» porque en virtud de esta parte no compete la posesión de los bienes en otro caso, sino cuando una ley defiere especialmente la posesión de los bienes.

TÍTULO XV

DEL ORDEN QUE SE OBSERVARÁ EN LA
POSESIÓN DE LOS BIENES

1.- MODESTINO; *Pandectas, libro VI*.- Abintestato son llamados estos grados: primeramente los herederos suyos, en segundo lugar los legítimos, en tercero los próximos cognados, y después el marido y la mujer.

§ 1.- Ora no haya tablas de testamento, ora las haya, si nadie recibió con arreglo a ellas, o contra

possessionem nemo accepit, intestati detur bonorum possessio.

§ 2.- Intestati patris liberis bonorum possessio datur non tantum his, qui in potestatem parentis usque in mortis tempus fuerunt, sed emancipatis.

2.- ULPIANUS; *libro XLIX, ad Edictum*.- Utile tempus est bonorum possessionum admittendarum: ita autem utile tempus est, ut singuli dies in eo utiles sint, scilicet ut per singulos dies et scierit et potuerit admittere: ceterum quacumque die nescierit aut non potuerit, nulla dubitatio est, quin dies ei non cedat. Fieri autem potest, ut qui initio scierit vel potuerit bonorum possessionem admittere, hic incipiat nescire vel non posse admittere: scilicet si, quum initio cognovisset eum intestatum decessisse, postea quasi certiore nuntio allato dubitare coeperit, numquid testatus decesserit vel numquid vivat, quia hic rumor postea perreperat. Idem et in contrarium accipi potest, ut qui ignoravit initio, postea scire incipiat.

§ 1.- Dies bonorum possessionis utiles esse palam est: sed non sessionum numerabuntur, si modo ea sit bonorum possessio, quae de plano peti potuit. Quod si ea, quae causae cognitionem pro tribunali desiderat vel quae decretum exposcit, sessiones erunt nobis computandae, quibus sedit is quibusque per ipsum praetorem factum non est, quo minus daret bonorum possessionem.

there is one and no application is made for possession of the estate either in accordance with the provisions of the will, or in opposition to them.

§ 2.- Praetorian possession of the estate of a father dying intestate is granted to his children; not only to such as were under his control at the time of his death, but also to those who have been emancipated.

2.- ULPIANUS; *On the Edict, Book XLIX*.- The time for claiming praetorian possession of the estate is an available one. It is designated available, because all the days of which it is composed can be taken advantage of; that is to say, all the days are included on which he who was entitled to the succession had knowledge of, and could have accepted it. There is no doubt, however, that the days on which he did not know of the succession, or could not have demanded it, are not included. Still, it may happen that where the person interested was aware of the facts, or could have claimed possession in the first place, was subsequently misinformed, or thought that he had no right to acquire possession; for instance, if he knew from the beginning that the owner of the property had died intestate, and afterwards doubted whether this was the case, or whether he died testate, or whether he was still living; because a rumor of this kind was afterwards circulated. On the other hand, it may also happen that a person who at first was ignorant that he had a right to the succession may afterwards ascertain that he was entitled to it.

§ 1.- It is clear that while the days prescribed for demanding praetorian possession of an estate are available ones, those during which court is in session are not included, provided the praetorian possession is of such a nature that it can be demanded without ceremony. But what if the possession is such that it requires an investigation by a tribunal, or a decree of the Praetor? In this instance, the days of the session of the tribunal during which the Praetor has rendered his decision, and on which nothing has been done by him to prevent possession of the estate from being granted, must be computed.

ellas, la posesión de los bienes, se dará la posesión de los bienes abintestato.

§ 2.- La posesión de los bienes del padre que falleció intestado se les da a los hijos, no solamente a los que estu vieron bajo la potestad de su ascendiente hasta el tiempo de la muerte, sino también a los emancipados.

2.- ULPIANO; *Comentarios al Edicto, libro XLIX*.- Hay tiempo útil para admitir la posesión de los bienes. Mas el tiempo es útil cuando en él sean útiles todos los días, esto es, cuando cada día hubiere uno sabido que la podía admitir, y hubiere podido admitirla; pero no hay duda alguna que si algún día no lo hubiere sabido, o no hubiere podido, este día no corre para él. Pero puede suceder que el que en un principio hubiere sabido que la podía admitir, o hubiere podido admitir la posesión de los bienes, comience a ignorarlo, o a no poder admitirla; a saber, si habiendo sabido al principio que uno falleció intestado, después, como por haber llegado noticia más cierta, hubiere comenzado a dudar, si aquel falleció intestado, o si vive, porque después se había esparcido este rumor. También por el contrario se puede admitir, que el que lo ignoró al principio, comience a saberlo después.

§ 1.- Es manifiesto que los días para pedir la posesión de los bienes son útiles; pero no se contarán los de audiencia, si la posesión de los bienes fuera tal, que se pudo pedir de plano ¿Qué se dirá, si es tal que requiere conocimiento de causa ante el tribunal, o que exige decreto? Que se nos han de computar los días en que tiene audiencia el Pretor, y en los que no consistió en él que no se diese la posesión de los bienes.

§ 2.- In bonorum possessione, quae pro tribunali datur, illud quaeritur, si sedit quidem praetor pro tribunali, sed postulationibus non dedit: potest dici tempus ad bonorum possessionem non cedere, quum praeses aliis rebus aut militaribus aut custodiis aut cognitionibus fuerit occupatus.

§ 3.- Si praeses provinciae in proxima fuit civitate, accedere debet ad utilitatem temporis ratio itineris, scilicet numeratione viginti milium passuum facta: nec enim expectare debemus, ut praeses provinciae veniat ad eum, qui bonorum possessionem petiturus est.

§ 4.- Si venter in possessionem missus sit, bonorum possessionis tempus non cedere sequentibus nequaquam ambigendum est, nec tantum intra centesimum diem, verum etiam quamdiu nasci possit: nam et si natus fuerit, ante ei deferri bonorum possessionem sciendum est.

§ 5.- Scientiam eam observandam Pomponius ait, non quae cadit in iuris prudentes, sed quam quis aut per se aut per alios adsequi potuit, scilicet consulendo prudentiores, ut diligentiores patrem familias consulere dignum sit.

3.- PAULUS; *libro XLIV, ad Edictum*.- Circa tempora bonorum possessionis patris scientia ignoranti filio non nocet.

4.- IULIANUS; *libro XXVIII, Digestorum*.- Si coheredi tuo substitutus fuisses et bonorum possessionem acceperis, quandoque coheres tuus constituerit nolle petere bonorum possessionem, tibi data tota intellegitur, coheres tuus amplius petendae bonorum possessionis facultatem non habebit.

§ 2.- With reference to the praetorian possession of an estate which is granted in court, inquiry is made whether the Praetor presided in his tribunal, and did not grant possession to the parties demanding it; for it must be said that the time for obtaining possession does not begin to run while the presiding magistrate is occupied with other matters, either those relating to military affairs, or the custody of prisoners, or special investigations.

§ 3.- If the Governor of the province was in the neighboring town, the time required for making the journey must be added to that prescribed by law, that is to say, by allowing twenty thousand paces to a day; nor should we expect the Governor of the province to come to the home of him who claims possession of the estate.

§ 4.- When an unborn child is placed in possession, there is no doubt that the prescribed time for demanding it should not run against those in the next degree, not only during the hundred days, but also for the time during which the child may be born; for it must be remembered that, even if he is born before this time, praetorian possession will be granted him.

§ 5.- Pomponius says that the knowledge which is necessary is not such as is exacted from persons learned in the law, but is what anyone can acquire, either by himself or through others; that is to say, by taking the advice of persons learned in the law, as the diligent head of the household should do.

3.- PAULUS; *On the Edict, Book XLIV*.- The knowledge of the father with reference to praetorian possession will not prejudice the rights of a son in such a way as to make the prescribed time run against him, if he is not informed.

4.- JULIANUS; *Digest, Book XXVIII*.- If you have been substituted for your co-heir, and you obtain possession of an estate, and your co-heir determines not to demand possession of the same, the entire possession will be understood to be given to you, and your co-heir will not even have the power of afterwards claiming possession.

§ 2.- Respecto a la posesión de los bienes que se da en el tribunal se pregunta, si el Pretor asistió ciertamente al tribunal, pero no proveyó a las peticiones; se puede decir, que no corre el término para la posesión de los bienes, cuando el Presidente hubiere estado ocupado en otras cosas, o en las militares, o en asuntos de cárceles, o jurisdiccionales.

§ 3.- Si el Presidente de la provincia estaba en la ciudad próxima, se debe añadir al tiempo útil la cuenta del camino, haciéndose, por supuesto, el cómputo por cada veinte mil pasos; porque no debemos esperar que el Presidente de la provincia vaya a donde está el que ha de pedir la posesión de los bienes.

§ 4.- Si el que está en el claustro materno hubiera sido puesto en posesión, de ningún modo se ha de dudar que el término para la posesión de los bienes no corre para los siguientes, no solamente durante los cien días, sino aun hasta que pueda nacer; porque aunque hubiere nacido, se ha de saber que también se le defiere antes la posesión de los bienes.

§ 5.- Dice Pomponio, que se ha de atender no a aquel conocimiento que es propio de un jurisconsulto, sino al que cada cual pudo obtener o por sí, o por medio de otros, consultando, por supuesto, a personas más instruidas, como es digno que consulte un más diligente padre de familia.

3.- PAULO; *Comentarios al Edicto, libro XLIV*.- Respecto al término para la posesión de los bienes el conocimiento del padre no le perjudica al hijo que lo ignora.

4.- JULIANO; *Digesto, libro XXVIII*.- Si hubieses sido substituido a tu coheredero, y hubieses recibido la posesión de los bienes, cuando tu coheredero hubiere determinado no querer pedirla, se entiende que se te dió toda, y tu coheredero no tendrá ya facultad para pedir la posesión de los bienes.

§ 1.- Filius non solum si tamquam filius, sed et si tamquam adgnatus vel tamquam cognatus ad bonorum possessionem vocatur, annum spatium habet: sicuti pater, qui filium manumisisset, quamvis ut manumissor bonorum possessionem accipiat, tamen ad bonorum possessionem accipiendam annum spatium habet.

5.- MARCELLUS; *libro IX, Digestorum*.- Quum filio familias bonorum possessio delata est, dies, quibus certiorare patrem non potest, ut vel iubeat agnoscere bonorum possessionem vel ratam habeat agnitionem bonorum possessionis, non cedunt. Fingamus statim primo die, quo fuerit delata, agnovisse eum bonorum possessionem, certiorare patrem, ut comprobet, non posse, non cedent dies centum: incipient autem cedere, quum certior fieri potuit. Praeteritis autem centum diebus frustra ratum habebit.

§ 1.- Quaeri potest, si, quum posset filius petere bonorum possessionem, patre ita absente, ut certiorare eum non possit, vel etiam furente, petere neglexerit, an peti amplius non possit. Sed quid noceat non petitam bonorum possessionem, quae, si petita esset, tamen non ante acquireretur, quam pater comprobasset?

§ 2.- Si servus alienus heres institutus venisset, quaeritur, an posteriori domino dies bonorum possessionis petendae imputari oporteret. Et placet, quantum priori domino superfuisset, ei imputari.

§ 1.- A son is entitled to the term of one year in which to demand possession, not only where he does so as a son, but where he demands it as an agnate, or a cognate; just as where a father manumits his son, and although he may demand possession of the estate, as having been manumitted, still, he will be entitled to a term of a year in which to do so.

5.- MARCELLUS; *Digest, Book IX*.- Where praetorian possession of an estate is granted to a son under paternal control, the days on which he is unable to notify his father, so that the latter may either direct him to accept possession, or ratify the possession which has already taken place, will not run against him. Suppose that, on the first day when he knew that he was entitled to praetorian possession of the estate he had accepted it, and could not notify his father in order that he might approve of what he had done, the hundred days will not run against him. They will, however, begin to run from the date when his father could have been informed, but, after the hundred days have elapsed, the ratification will be void.

§ 1.- It may be asked if, when a son was able to demand praetorian possession of an estate, his father was absent so that he could not notify him; or if he was insane, and the son should neglect to demand possession, whether he could do so afterwards. But how can it prejudice his rights, if the possession of the estate was not demanded, when, if this had been done, it could not have been obtained unless the father had ratified the act?

§ 2.- If a slave belonging to another is appointed heir, and then is sold by his master, the question arises whether the days prescribed for demanding praetorian possession must be considered to run against the new master. It is settled that the time to which the former master was entitled will run against him.

§ 1.- El hijo tiene el espacio de un año, no solamente si como hijo es llamado a la posesión de los bienes, sino también si como agnado, o como cognado; así como, si el padre hubiese manumitido al hijo, aunque como manumisor reciba la posesión de los bienes, tiene, sin embargo, el espacio de un año para recibir la posesión de los bienes.

5.- MARCELO; *Digesto, libro IX*.- Cuando la posesión de los bienes fue deferida a un hijo de familia, no corren los días en que no puede hacérselo saber al padre, o para que mande que se acepte la posesión de los bienes, o para que tenga por ratificada la aceptación de la posesión de los bienes. Supongamos, que inmediatamente, en el primer día, en que le hubiere sido deferida, aceptó él la posesión de los bienes, pero que no puede hacérselo saber para que lo apruebe; no correrán los cien días, sino que empezarán a correr, cuando haya podido ser hecho sabedor; mas transcurridos los cien días, en vano hará la ratificación.

§ 1.- Se puede preguntar, si, pudiendo el hijo pedir la posesión de los bienes hubiere descuidado pedirla, por estar ausente su padre de modo que no pudiera hacérselo saber, o aun por estar loco, no podría ya pedirla. Mas ¿cómo le perjudicará no haber pedido la posesión de los bienes, que, aunque hubiese sido pedida, no sería, sin embargo, adquirida antes que el padre lo hubiese aprobado?

§ 2.- Si el esclavo ajeno instituido heredero hubiese sido vendido, se pregunta, si se le deberían imputar al dueño posterior los días para pedir la posesión de los bienes; y se determinó, que se le contasen a él cuantos le hubieren restado al dueño anterior.

TIT. XVI

DE SUIS ET LEGITIMIS HEREDIBUS

1.- ULPIANUS; *libro XII, ad Sabinum*.- Intestati proprie appellantur, qui, quum possent testamentum facere, testati non sunt. Sed et is, qui testamentum fecit, si eius hereditas adita non est vel ruptum vel irritum est testamentum, intestatus non improprie dicitur decessisse. Plane qui testari non potuit proprie non est intestatus, puta impubes furiosus vel cui bonis interdictum est: sed hos quoque pro intestatis accipere debemus: eum quoque, qui ab hostibus captus est, quoniam per Legem Corneliam successio his deferitur, quibus deferretur, si in civitate decessisset: nam et eius hereditas fuisse creditur.

§ 1.- Quæri poterit, si ex ea, quæ in fideicommissa libertate moram passa est, conceptus et natus sit, an suus patri existat. et quum placeat eum ingenuum nasci, ut est a Divis Marco et vero et Imperatore nostro Antonino Augusto Rescriptum, cur non in totum pro manumissa hæc habeatur, ut uxor ducta suum pariat? Nec mirum sit, ex serva ingenuum nasci, quum et ex captiva rescriptum sit ingenuum nasci. Quare ausim dicere, etsi pater huius pueri eiusdem sortis fuerit, cuius mater moram passa in libertate fideicommissa, ipseque moram passus est, suum eum patri nasci exemplo captivorum parentum, quum quibus rediit. Ergo sive postea pater eius post moram manumittatur, recipiet eum in potestate, sive ante decesserit, definiendum erit suum existere.

TITLE XVI

CONCERNING PROPER HEIRS
AND HEIRS AT LAW

1.- ULPIANUS; *On Sabinus, Book XII*.- Those are properly called intestates who, having testamentary capacity, did not exert it. Moreover, where a man has made a will and his estate has not been entered upon, or if his will is broken, or void, he is not improperly said to have died intestate. It is clear that anyone who cannot make a will is not correctly styled intestate, as, for example, a minor under the age of puberty, an insane person, or one who is forbidden to have charge of his own property; still, we should also understand such persons to be intestate. He also is regarded as intestate who has been captured by the enemy, since by the Cornelian Law his succession passes to those to whom it would go if he had died in his own country; for his estate is held to be transmitted to his heirs.

§ 1.- It may be asked, if a child conceived by and born of a female slave who has suffered from delay in the execution of a trust granting her her freedom will be the proper heir of its father. And, as it has been established that it was born free, in accordance with a Rescript of the Divine Marcus and Verus, and Our Emperor Antoninus Augustus, why should not the said female slave be considered as absolutely manumitted, so that, after having been married, she may be able to bring forth a proper heir? It is not strange that a child can be born free whose mother is a female slave, as it has been stated in a rescript that a child born of a woman who is a captive is freeborn. Wherefore, I venture to say that if the father of the child was of the same condition as the mother, that is, if he suffered from the delay of the heir in granting his freedom under a trust, the child born to the father would be his heir, just as in the case where his parents are captives, and he returns with them. Therefore, if the father should manumit him, subsequent to the delay, he will receive him under his control. Or if he should die before being manumitted, the child will be born the proper heir.

TÍTULO XVI

DE LOS HEREDEROS SUYOS Y
DE LOS LEGÍTIMOS

1.- ULPIANO; *Comentarios a Sabino, libro XII*.- Se llama propiamente intestados a los que pudiendo hacer testamento no testaron. Pero también se dirá no sin propiedad que falleció intestado el que hizo testamento, si no fue adida su herencia, o si se rompió o invalidó el testamento. A la verdad, el que no pudo testar no es propiamente intestado, por ejemplo, el impúbero, el furioso, o aquel a quien se le puso interdicción en sus bienes; pero también a éstos los debemos considerar como intestados. También al que fue aprisionado por los enemigos, porque por la ley Cornelia se les defiere la sucesión a quiénes se les deferiría, si hubiese fallecido en la ciudadanía, porque también se cree que la herencia fue de él.

§ 1.- Se podrá preguntar, si el que fue concebido y nació de la que sufrió mora en la libertad que se le dejó por fideicomiso queda heredero suyo de su padre. Y como está determinado que éste nace ingenuo, según se resolvió en rescripto por los Divinos Marco y Vera y por nuestro emperador Antonino Augusto, ¿por qué no habrá de ser tenida ésta como manumitida por completo, de suerte que tomada por mujer para heredero suyo? Y no se extrañe que de una esclava nazca un ingenuo, por que se resolvió por rescripto que también de una cautiva nace un ingenuo. Por lo cual yo me atrevería a decir, que aunque el padre de este impúbero fuere de la misma condición que la madre, que sufrió mora en la libertad que se le dejó por fideicomiso, y él mismo haya sufrido mora, aquél nace heredero suyo de su padre, a la manera que el de padres cautivos, con los cuales regresó. Luego si posteriormente fuera manumitido después de la mora su padre, lo recobrará bajo su potestad, y si hubiere fallecido antes, se habrá de decidir que queda siendo heredero suyo.

§ 2.- Suos heredes accipere debemus filios filias sive naturales sive adoptivos.

§ 3.- Interdum etiam filius suus heres excluditur fisco praelato, ut puta si perduellionis fuerit damnatus pater post mortem suam, hoc quo, ut nec iura sepulchrorum hic filius habeat.

§ 4.- Si filius suus heres esse desiit, in eiusdem partem succedunt omnes nepotes neptesque ex eo nati qui in potestate sunt: quod naturali aequitate contingit. Filius autem suus heres esse desinit, si capitis deminutione vel magna vel minore exiit de potestate. Quod si filius apud hostes sit, quamdiu vivit nepotes non succedunt. Proinde etsi fuerit redemptus, nondum succedunt ante luitionem: sed si interim decesserit, quum placeat eum statu recepto decessisse, nepotibus obstat.

§ 5.- Sed si quis non desiit esse in potestate, sed numquam coepit, ut puta si filius meus vivo patre meo ab hostibus captus est, mox ibi me patre familias facto decesserit, nepotes in eius locum succedent.

§ 6.- Non minus autem neptes quam nepotes succedent in locum parentum.

§ 7.- Interdum licet parens alicuius in potestate esse non desierit, sed nec coeperit, tamen dicimus succedentes ei liberos suos existere: ut puta adrogavi eum, cuius filius ab hostibus erat captus, nepos autem in civitate: mortuo filio adrogato, mortuo et captivo apud hostes pronepos iste suus heres mihi erit.

§ 2.- We understand proper heirs to be children of both sexes, and natural or adopted children.

§ 3.- Sometimes a son who is a proper heir is excluded from the estate of his father, and the Treasury is preferred to him; for example, if his father should after his death be condemned for treason, what must be done in this case? In this case the son would be deprived of the rights of sepulture.

§ 4.- When a son ceases to be a proper heir, all the grandsons and grandchildren born to him will succeed to his share of the estate, where they are under his control. This rule is based on the principles of natural equity. Again, a son ceases to be a proper heir if, through the entire or partial loss of civil rights, he leaves the control of his father. But if the son is in the hands of the enemy, the grandsons will not succeed him as long as he lives. Hence, if he is ransomed from captivity, they will not succeed him until he has reimbursed the person who ransomed him. If, however, in the meantime, he should die, as it is settled that at the time of his death he had recovered his former condition, he will be an obstacle to the succession of his grandchildren.

§ 5.- If a child does not cease to be under the control of his father, because he has never begun to be under his control, as, for instance, if my son should be taken captive by the enemy during the lifetime of my father, and should die in captivity after I have become my own master, my grandson will be entitled to the succession in his place.

§ 6.- Granddaughters, as well as grandsons, succeed to the place of their parents.

§ 7.- Sometimes, although a father does not cease to be under paternal control, and, indeed, has never begun to be under such control, we, nevertheless, say that his children succeed to him as proper heirs; for instance, where I have arrogated a man whose son has been captured by the enemy, and whose grandson was at home, and the son who was arrogated having died, and the captive who was in the hands of the enemy having also died, the great-grandson of the

§ 2.- Debemos entender que son herederos suyos los hijos y las hijas, ya naturales, ya adoptivos.

§ 3.- A veces es excluido aun el hijo heredero suyo, siendo preferido el fisco, como, por ejemplo si el padre hubiere sido condenado después de su muerte como reo de lesa majestad; ¿y esto por qué? Porque ni el derecho de sepulcros tiene este hijo.

§ 4.- Si el hijo dejó de ser heredero suyo, suceden en la parte del mismo todos los nietos y las nietas nacidos de él, que están bajo potestad; lo que tiene lugar por equidad natural. Mas el hijo deja de ser heredero suyo si por la disminución de cabeza, grande o menor, salió de la potestad. Pero si el hijo estuviera en poder de los enemigos, no suceden los nietos, mientras vive, por lo cual, aunque hubiere sido rescatado, no suceden todavía antes del pago del rescate; pero si hubiere fallecido mientras tanto, como está determinado que él falleció habiendo recobrado su estado, les obstará los nietos.

§ 5.- Si alguno no dejó de estar bajo potestad, sino que nunca comenzó a estar en ella, por ejemplo, si un hijo mío fue aprisionado, viviendo mi padre, por los enemigos, y luego hubiere fallecido en poder de ellos habiendo sido yo hecho padre de familia, los nietos sucederán en el lugar de él.

§ 6.- Mas no de otra suerte que los nietos, suceden las nietas en el lugar de sus padres.

§ 7.- A veces, aunque el padre de alguno no haya dejado de estar bajo potestad, sino que no haya comenzado a estar en ella, decimos, sin embargo, que los hijos que le suceden son herederos suyos; por ejemplo, arrogué a uno, cuyo hijo estaba aprisionado por los enemigos, pero cuyo nieto estaba en la ciudadanía; muerto el hijo arrogado, y fallecido también el aprisionado en poder de los enemigos, este bisnieto me será heredero suyo.

latter will become my proper heir.

§ 8.- Sciendum est autem nepotes et deinceps interdum, etiamsi parentes eos mortis tempore praecesserunt, tamen posse suos heredes existere, quamvis successio in suis heredibus non sit. Quod ita procedit. Si pater familias testamento facto decesserit exheredato filio, mox deliberante herede instituto filius decessit, postea deinde repudiavit heres institutus: nepos poterit suus heres esse, ut et Marcellus libro decimo scripsit, quoniam nec delata est filio hereditas. Idem erit dicendum et si filius ex asse sub condicionem, quae fuit in arbitrio ipsius, vel nepos sub omni institutus non impleta condicionem decesserint: nam dicendum erit suos posse succedere, si modo mortis testatoris tempore vel in rebus humanis vel saltem concepti fuerint: idque et Iuliano et Marcello placet.

§ 9.- Post suos statim consanguinei vocantur.

§ 10.- Consanguineos autem Cassius definit eos, qui sanguine inter se conexi sunt. Et est verum eos esse consanguineos, etiamsi sui heredes non extiterunt patri, ut puta exheredatos: sed et si pater eorum deportatus fuerit, nihilo minus eos inter se esse consanguineos, licet patri sui heredes non extitissent: et qui numquam in potestate fuerunt, erunt sibi consanguinei, ut puta qui post captivitatem patris nascuntur vel qui post mortem.

§ 11.- Non solum autem naturales, verum etiam adoptivi quoque iura consanguinitatis habebunt quum his qui sunt in familia vel in utero vel post mortem patris nati.

§ 8.- It must, however, be remembered that grandsons and their successors, although their parents may precede them at the time of death, can still sometimes be proper heirs, although succession does not exist among proper heirs. This may take place where the head of a household, having made a will, dies after disinheriting his son, and while the appointed heir is deliberating whether or not he will accept the estate, the son dies, and the appointed heir afterwards rejects the estate. The grandson can then be the proper heir, as Marcellus, in the Tenth Book, also says, since the estate has never passed to the son. The same rule will apply where the son is appointed heir to the entire estate, under a condition with which it was within his power to comply; or a grandson is appointed under any kind of a condition, and both of them die before it is complied with. For it must be held that those can succeed as proper heirs, provided they were either born, or even had been conceived at the time of the testator's death. This opinion is also adopted by Julianus and Marcellus.

§ 9.- After the proper heirs, the heirs related by blood are called to the succession.

§ 10.- Cassius defines heirs by blood to be those who are united with one another by the tie of consanguinity. It is true that these are heirs by blood, even if they are not the proper heirs of their father; as, for example, where they have been disinherited. But even if their father has been banished, they will, none the less, be related by blood, even though they should not be the proper heirs of their father. Those, also, who have never been under paternal control, will be related to one another by blood; as, for instance, those who are born after the captivity or death of their father.

§ 11.- Moreover, not only natural children, but also those who have been adopted, will also enjoy the rights of consanguinity with such as belong to their family, even where they are yet unborn, or have been born after the death of their father.

§ 8.- Pero se ha de saber, que a veces los nietos y los demás descendientes, aunque les hayan precedido los ascendientes al tiempo de la muerte, pueden, sin embargo, ser herederos suyos, por mas que no haya sucesión en los herederos suyos; lo que acontece así, si, hecho testamento, hubiere fallecido el padre de familia habiendo desheredado al hijo, y luego, estando deliberando el heredero instituido, falleció el hijo, y después repudió la herencia el heredero instituido; el nieto podrá ser heredero suyo, como también escribió Marcelo en el libro décimo, porque no se le defirió la herencia al hijo. Lo mismo se habrá de decir, también si el hijo instituido heredero de la totalidad bajo una condición, que estaba en su arbitrio, o el nieto instituido bajo cualquiera, hubieren fallecido sin haberse cumplido la condición; porque se deberá decir que pueden suceder los herederos suyos, si vivieren o al menos hubieren sido concebidos, al tiempo de la muerte del testador; y esto les parece bien a Iuliano y a Marcelo.

§ 9.- Inmediatamente después de los herederos suyos son llamados los consanguíneos.

§ 10.- Mas Cassio define que son consanguíneos los que entre sí están unidos por la sangre. Y es verdad que éstos son consanguíneos, aunque no hayan quedado siendo herederos suyos del padre, por ejemplo, si hubieran sido desheredados; mas también si hubiere sido deportado su padre, son ellos, sin embargo, consanguíneos entre sí, aunque no hubiesen quedado siendo herederos suyos de su padre; aun los que no estuvieron nunca bajo potestad serán consanguíneos de él, por ejemplo, los que nacen después de la cautividad del padre o después de su muerte.

§ 11.- Pero no solamente los naturales, sino también los adoptivos tendrán derechos de consanguinidad con los que están en la familia, o en el claustro materno, o con los que nacieron después de la muerte del padre.

2.- IDEM; *libro XIII, ad Sabinum*.- Post consanguineos admittuntur adgnati, si consanguinei non sunt, merito. Nam si sunt consanguinei, licet non adierint hereditatem, legitimis non defertur. Sed hoc sic erit accipiendum, si nec sperantur esse: ceterum si vel nasci consanguineus vel de captivitate reverti potest, adgnati impediuntur.

§ 1.- Adgnati autem sunt cognati virilis sexus ab eodem orti. Nam post suos et consanguineos statim mihi proximus est consanguinei mei filius et ego ei: patris quoque frater, qui patruus appellatur: deincepsque ceteri, si qui sunt hinc orti, in infinitum.

§ 2.- Haec hereditas proximo adgnato, id est ei, quem nemo antecedit, defertur, et, si plures sint eiusdem gradus, omnibus, in capita scilicet. Ut puta duos fratres habui vel duos patruos, unus ex his unum filium, alius duos reliquit: hereditas mea in tres partes dividetur.

§ 3.- Parvi autem refert, adgnatus hic nativitate an adoptione sit quaesitus: nam qui adoptatur isdem fit adgnatus, quibus pater ipsius fuit, et legitimam eorum hereditatem habebit vel ipsi eius.

§ 4.- Legitima hereditas tantum proximo defertur. Nec interest, unus solus sit an ex duobus prior pluribusve an duo pluresve ab eodem gradu venientes, qui vel ceteros antecendant vel soli sint: quia is est proximus quem nemo antecedit, et is ultimus quem nemo sequitur, et interdum idem primus postremusque, qui solus occurrit.

2.- THE SAME; *On Sabinus, Book XIII*.- Next in succession to blood-relatives, agnates are admitted, where there are no blood-relatives. This is reasonable, for where there are blood-relatives the estate does not pass to the heirs at law, even if the former do not accept the estate. This should be understood to be the case where no blood-relative is expected to come into existence. Moreover, if a blood-relative can be born, or can return from captivity, the agnates are prevented from claiming the succession.

§ 1.- Again, agnates are cognates of the male sex, descended from the same person. For after my proper heirs and my blood-relatives, the son of my blood-relative is next of kin to me, as I am to him. The same rule applies to the brother of my father, who is called my paternal uncle, as well as to the others in succession, and all who are descended from the same source, ad infinitum.

§ 2.- This inheritance passes to the agnate who is the next of kin, namely, him whom no one precedes, and where there are several in the same degree to all of them; that is to say per capita. For instance, if I had two brothers, or two paternal uncles, and one of them left one son, and the other two, my estate would be divided into three parts.

§ 3.- It makes little difference, however, whether the agnate referred to acquired that character by birth or by adoption, for one who is adopted becomes the agnate of the same persons to whom his adopted father sustains the same relationship, and he will be entitled to their estates by law, just as they will be to his.

§ 4.- An estate only passes by law to the next agnate. Nor does it make any difference whether there is only one, or several of which one stands first, or where there are two or more of the same degree who precede the others, or are alone; because he is next in succession whom no one precedes, and he is the last whom no one follows; and sometimes the same one is both first and last, for the reason that he happens to be the only one.

2.- EL MISMO; *Comentarios a Sabino, libro XIII*.- Después de los consanguíneos son admitidos los agnados, si no hay consanguíneos; y con razón, porque si hay consanguíneos, aunque no hayan adido la herencia, no se les defiende a los legítimos. Pero esto se habrá de entender así, si no se espera que los haya; pero si puede nacer un consanguíneo, o volver uno del cautiverio, les sirve de impedimento a los agnados.

§ 1.- Mas son agnados los cognados de sexo viril nacidos de uno mismo; porque inmediatamente después de los herederos suyos y de los consanguíneos es próximo mío el hijo de mi consanguíneo, y yo lo soy de él; también lo es el hermano del padre, que se llama tío paterno; y los demás descendientes, si hay algunos, nacidos de él hasta lo infinito.

§ 2.- Esta herencia se le defiende al agnado próximo, esto es, a aquel a quien nadie le precede, y si hubiera muchos del mismo grado, a todos, por supuesto, por cabezas; por ejemplo, tuve dos hermanos, o dos tíos paternos, y uno de ellos dejó un solo hijo, y otro dos; mi herencia se dividirá en tres partes.

§ 3.- Mas poco importa que este agnado haya sido tenido por nacimiento, o por adopción; porque el que es adoptado se hace agnado de los mismos de quienes lo fue su padre, y tendrá la herencia legítima de ellos, o ellos la de él.

§ 4.- La herencia legítima se defiende solamente al próximo; y no importa que sea uno solo, o el primero de dos o más, o que haya dos o más provenientes del mismo grado, que, o precedan a los demás, o que sean solos, porque es próximo aquel a quien nadie le precede, y es último aquel a quien nadie sigue, y a veces es primero y último el mismo que acude solo.

§ 5.- Interdum ulteriorem adgnatum admittimus: ut puta fecit quis testamentum, quum haberet patruum et patruī filium, deliberante herede scripto patruus decessit, mox heres institutus repudiavit hereditatem: patruī filius admittetur: ergo et bonorum possessionem petere potest.

§ 6.- Proximum non eum quaerimus, qui tunc fuit, quum moreretur pater familias, sed eum, qui tunc fuit, quum intestatum decessisse certum est. secundum quae et si suus erat qui praecedebat vel consanguineus, si nemo eorum, quum repudiatur hereditas, vivit, proximum eum accipimus, qui tunc, quum repudiatur hereditas, primus est.

§ 7.- Unde belle quaeri potest, an etiam post repudiationem adhuc demus successionem. Propone heredem scriptum rogatum restituere hereditatem repudiasset eam, quum nihilo minus compelli potuit adire hereditatem et restituere, ut Divus Pius Rescripsit: finge eum supervixisse centum diebus verbi gratia et interim proximum decessisse, mox et eum, qui erat rogatus restituere: dicendum posteriorem admitti quum onere fideicommissi.

3.- IDEM; *libro XIV, ad Sabinum*.- Intestato liberto mortuo primum suis deferri hereditatem verum est: si hi non fuerint, tunc patrono.

§ 1.- Libertum accipere debemus eum, quem quis ex servitute ad civitatem Romanam perduxit sive sponte sive necessitate, quoniam rogatus fuit eum manumittere: nam et ad huius legitimam hereditatem admittitur.

§ 5.- Sometimes, we admit to the succession an agnate who is of a more distant degree; as, for instance, where someone, who has a paternal uncle, and that uncle a son, makes a will, and, while the appointed heir is deliberating whether or not he will accept the estate, the uncle dies, after which the appointed heir rejects the estate, then the son of the paternal uncle will be admitted to the succession. Hence he can also demand pratorian possession of the estate.

§ 6.- We do not consider him to be the next of kin who was such at the time that the head of the household died, but he who was such at the time that it is certain that he died intestate. According to this, even if he who was entitled to precedence was the proper heir or a blood-relative, and neither of them was living at the time that the estate was rejected, we consider him to be the next heir who was first in succession at the time when the estate was rejected.

§ 7.- Hence, it may be very fairly asked whether we can still grant the succession, even after the rejection of the estate. Suppose that the appointed heir was requested to transfer the estate, and rejected it; as the Divine Pius stated in a Rescript, he could, nevertheless, be compelled to accept and transfer the estate. Suppose, for example, that he had lived over the hundred days prescribed by law and that, in the meantime, the next heir had died, and that afterwards, he also, who was asked to transfer the estate died. It must be said that the heir in the next degree should be admitted to the succession with the charge of executing the trust.

3.- THE SAME; *Sabinus, Book XIV*.- When a freedman dies without making a will, it is certain that his estate first passes to his proper heirs, and, if there are none of these, then to his patron.

§ 1.- We should understand a freedman to mean one whom any person has raised from servitude to the dignity of a Roman citizen, either voluntarily or through necessity, having been charged to manumit him, for his patron will also be admitted to the legal succession of the freedman.

§ 5.- A veces admitimos a un agnado más remoto, por ejemplo, hizo alguien testamento, teniendo tío paterno y un hijo de este tío; mientras deliberaba el heredero instituido, falleció el tío paterno, y después el heredero instituido repudió la herencia; será admitido el hijo del tío paterno; luego también puede pedir la posesión de los bienes.

§ 6.- No buscamos al que fue próximo cuando murió el padre de familia, sino al que lo fue cuando fue cierto que falleció intestado. Según lo que, aunque fuera heredero suyo o consanguíneo, el que precedía, si ninguno de ellos vive cuando es repudiada la herencia, consideramos próximo al que es el primero cuando es repudiada la herencia.

§ 7.- Por lo cual, con razón se puede preguntar si también después de la repudiación aun daremos la sucesión; supón que el heredero instituido, a quien se le rogó que restituyese la herencia, la repudió habiendo podido, ello no obstante, ser compelido a adir la herencia y a restituirla, según respondió por Rescripto el Divino Pío; supón que él sobrevivió, por ejemplo, cien días, y que mientras tanto falleció el próximo agnado, y después aquel a quien se le rogó que restituyera la herencia; se ha de decir, que es admitido el posterior con la carga del fideicomiso.

3.- EL MISMO; *Comentarios a Sabino, libro XIV*.- La verdad es, que habiendo fallecido intestado un liberto la herencia se les defiende primeramente a los herederos suyos; y si no los hubiere, al patrono.

§ 1.- Debemos entender por liberto aquel a quien alguno lo llevó de la esclavitud a la ciudadanía romana, ya espontáneamente, ya por necesidad, porque se le regó que lo manumitiera; pues es admitido también a la herencia legítima de éste.

§ 2.- Si dotalem quis servum manumisit, ipse patronus habetur et ad legitimam hereditatem admittitur.

§ 3.- Is plane, quem hac lege emi, ut manumittam, etsi ex constitutione Divi Marci pervenerit ad libertatem, tamen, ut eadem constitutione expressum est, meus libertus est et legitima eius hereditas mihi deferretur.

§ 4.- Quid si necem domini detexit et ex Senatus-consulto libertatem meruerit? Si quidem adsignavit praetor, cuius libertus sit, sine dubio eius erit et ei legitima hereditas deferretur: quod si non addidit, efficietur quidem civis Romanus, sed eius erit libertus, cuius proxime fuerit servus et ad legitimam hereditatem ipse admittetur, nisi sicubi quasi indigno deneganda fuerit hereditas.

§ 5.- Si quis libertam sic iureiurando adegit "ne illicite nubat", non debere incidere in legem aeliam sentiam. sed si "intra certum tempus ne ducat" "neve aliam, quam de qua patronus consenserit" vel "non nisi collibertam" aut "patroni cognatam", dicendum est incidere eum in legem aeliam sentiam nec ad legitimam hereditatem admitti.

§ 6.- Si municipes servum manumiserint, admittentur ad legitimam hereditatem in bonis liberti vel libertae intestatorum.

§ 7.- Miles manumittendo servum pecularem suum faciet libertum et ad legitimam hereditatem eius admittitur.

§ 8.- Principem ad bona libertorum suorum admitti plus quam manifestum est.

§ 2.- If anyone should manumit a dotal slave, he will be considered his patron, and will be entitled to his estate as the heir at law.

§ 3.- It is clear that he whom I have purchased under the condition of manumitting him, even though he may obtain his freedom by the Constitution of the Divine Marcus, still (as is stated in the same Constitution) he will become my freedman, and his estate will pass to me as heir at law.

§ 4.- Where a slave has deserved his freedom under the Decree of the Senate, for detecting the murder of his master, and the Praetor has assigned him to anyone to become his freedman, he will undoubtedly become such, and his estate will belong to his patron as his heir at law; but if the Praetor did not assign him to anyone, he will indeed become a Roman citizen, but he will be the freedman of him of whom he was recently the slave, and the former will be admitted to his succession as his heir at law, unless he should be excluded from his estate as being unworthy to receive it.

§ 5.- Anyone who compels his freed woman to swear that she will not marry unlawfully does not come within the terms of the Lex Aelia Sentia. If, however, he should compel his freedman to swear that he will not marry within a certain time, or marry anyone without the consent of her patron, or her fellow-freedwoman, or a female relative of his patron, it must be said that he will be liable under the Lex Aelia Sentia, and cannot be admitted, as the heir at law, to the freedman's estate.

§ 6.- If municipal magistrates should manumit a slave of either sex, and he or she should afterwards die intestate, he or she shall be admitted to the succession as heir at law.

§ 7.- A soldier, by manumitting a slave constituting part of his peculium, will make him his freedman, and can be admitted to his estate as heir at law.

§ 8.- It is perfectly evident that the Emperor can be admitted to the succession of the estates of his

§ 2.- También si uno manumitió a un esclavo de la dote es tenido él como patrono, y admitido a la herencia legítima.

§ 3.- A la verdad, el que yo compré con la condición de manumitirlo, aunque haya llegado a la libertad por virtud de la Constitución del Divino Marco, es, sin embargo, según se expresó en la misma Constitución, liberto mío, y se me deferirá su herencia legítima.

§ 4.- Si alguno descubrió la muerte de su señor, y hubiere obtenido la libertad en virtud del Senado-consulto, si verdaderamente designó el Pretor de quién haya de ser liberto, lo será, sin duda, de éste, y a él se le deferirá la herencia legítima; pero si no lo asignó, se hará ciertamente ciudadano romano, pero será liberto de aquel de quien últimamente hubiere sido esclavo, y éste será admitido a la herencia legítima, a no ser que en algún caso se le hubiere de denegar la herencia como a indigno.

§ 5.- Si alguno constriñó con juramento a su liberta para que no se casara ilícitamente, no debe incurrir en la pena de la ley Elia Sencia. Pero si fue para que el liberto no se casara dentro de cierto tiempo, o con ninguna, sino con la que consintiere el patrono, o con una coliberta, o con una cognada del patrono, se ha de decir que él incurre en la ley Elia Sencia, y que no es admitido a la herencia legítima.

§ 6.- Si los municipales hubieren manumitido un esclavo, serán admitidos a la herencia legítima en los bienes del liberto o de la liberta fallecidos intestados.

§ 7.- El militar, manumitiendo un esclavo de su peculio, lo hará liberto suyo, y será admitido a la herencia legítima de éste.

§ 8.- Es más que evidente, que el príncipe es admitido a los bienes de sus libertos.

§ 9.- Utique et ex lege duodecim tabularum ad legitimam hereditatem is qui in utero fuit admittitur, si fuerit editus. Inde solet remorari insequentes sibi adgnatos, quibus praefertur, si fuerit editus: inde et partem facit his qui pari gradu sunt, ut puta frater unus est et uterus, vel patrum filius unus natus et qui in utero est.

§ 10.- Est autem tractatum, pro qua partem faciat, quia ex uno utero plures nasci possunt. Et placuit, si in rerum natura certum sit hanc, quae se dicit praegnatem, praegnatem non esse, ex asse iam esse heredem hunc, qui iam natus est, quoniam et ignorans heres fit. Quare si medio tempore decesserit, integram hereditatem ad heredem suum transmittit.

§ 11.- Post decem menses mortis natus non admittitur ad legitimam hereditatem.

§ 12.- De eo autem, qui centesimo octogesimo secundo die natus est, hippocrates scripsit et Divus Pius pontificibus rescripsit iusto tempore videri natum, nec videri in servitutem conceptum, quum mater ipsius ante centesimum octogensimum secundum diem esset manumissa.

4.- POMPONIUS; *libro IV, ad Sabinum*.- Hi, quorum parens capite minutus est, legitimae hereditatis ius et in ceteris personis et inter se retinent et alii adversus eos.

5.- ULPIANUS; *libro XLVI, ad Edictum*.- Si quis, quum haberet fratrem et patrum, decesserit testamento facto, deinde pendente condicione heredum scriptorum frater intestato decesserit, mox condicio defecerit: patrum posse utriusque adire legitimam hereditatem constat.

§ 9.- It is also certain that an unborn child will be admitted, as heir at law, to an estate by a provision of the Twelve Tables, if he should afterwards be born; and hence the agnates next in succession to him, and over whom he has preference, must wait, in case he should be born. Hence, he shares with those who are in the same degree; for instance, where there is a brother of the deceased, and the unborn child; or a son of the paternal uncle, and the child who is yet unborn.

§ 10.- Moreover, the question arose in what way a division should be made in this case, for the reason that several children might be born at a single birth. It was decided that if it was absolutely certain that the woman who alleged that she was pregnant was not in that condition, the child who was already born would be the heir to the entire estate, since he becomes the heir without his knowledge. Wherefore, if in the meantime he should die, he will transmit the estate unimpaired to his own heir.

§ 11.- A child born after ten months is not admitted to the succession as heir at law.

§ 12.- Hippocrates says, and the Divine Pius also stated in a Rescript addressed to the Pontiffs, that a child was considered to have been born within the time prescribed by law, and could not be held to have been conceived in slavery, if its mother had been manumitted before the one hundred and eighty-second day previous to delivery.

4.- POMPONIUS; *On Sabinus, Book IV*.- Children, the civil status of whose father has been altered, retain the right of inheritance, both with reference to other persons and among themselves, and vice versa.

5.- ULPIANUS; *On the Edict, Book XLVI*.- Where anyone, having a brother and a paternal uncle, dies after having made a will, and the brother then dies intestate while a condition imposed upon the appointed heir is still pending, and the condition should not afterwards be complied with, it is settled that the paternal uncle can enter upon the estates of

§ 9.- Ciertamente que también por la ley de las Doce Tablas es admitido a la herencia legítima el que estaba en el claustro materno, si hubiere sido dado a luz. Por lo cual les suele hacer esperar a los agnados que le siguen, a los cuales es preferido, si fuere dado a luz. De aquí también que hace parte con los que están en igual grado, por ejemplo, hay un solo hermano, y el que está en el claustro materno, o un solo hijo nacido del tío paterno, y el que está en el claustro materno.

§ 10.- Mas se discutió de que cuantía hará la parte, porque pueden nacer muchos de un solo parto. Y se determinó, que si fuera cierto en realidad que la que se dice embarazada no lo estaba, fuese ya heredero de la totalidad el que ya había nacido, porque se hace heredero aun ignorándolo; por lo cual, si hubiere fallecido en el tiempo intermedio, transmite íntegra la herencia a su propio heredero.

§ 11.- El nacido después de diez meses de la muerte no será admitido a la herencia legítima.

§ 12.- Mas respecto al que nació a los ciento ochenta y dos días, escribió Hipócrates, y respondió por rescripto a los pontífices el Divino Pío, que se considera que nació en tiempo legítimo, y que no se considera que fue concebido en esclavitud, porque su madre hubiese sido manumitida antes de los ciento ochenta y dos días.

4.- POMPONIO; *Comentarios a Sabino, libro IV*.- Aquellos cuyo ascendiente fue disminuido de cabeza, retienen el derecho a la herencia legítima, tanto entre las demás personas, como entre sí, y los otros contra ellos.

5.- ULPIANO; *Comentarios al Edicto, libro XLVI*.- Si alguno, teniendo hermano y tío paterno, hubiere fallecido habiendo hecho testamento, y luego, estando pendiente la condición de los herederos instituidos, hubiere fallecido intestado el hermano, y después hubiere faltado la condición, es sabido que puede el tío paterno adir la herencia

6.- IULIANUS; *libro LIX, Digestorum*.- Titius exheredato filio extraneum heredem sub condicione instituit: quaesitum est, si post mortem patris pendente condicione filius uxorem duxisset et filium procreasset et decessisset, deinde condicio instituti heredis defecisset, an ad hunc postumum nepotem legitima hereditas avi pertineret. Respondit: qui post mortem avi sui concipitur, is neque legitimam hereditatem eius tamquam suus heres neque bonorum possessionem tamquam cognatus accipere potest, quia lex duodecim tabularum eum vocat ad hereditatem, qui moriente eo, de cuius bonis quaeritur, in rerum natura fuerit,

7.- CELSUS; *libro XXVIII, Digestorum*.- Vel si vivo eo conceptus est, quia conceptus quodammodo in rerum natura esse existimatur.

8.- IULIANUS; *libro LIX, Digestorum*.- Item praetor edicto suo proximitatis nomine bonorum possessionem pollicetur his, qui defuncto mortis tempore cognati fuerint. Nam quod in consuetudine nepotes cognati appellantur etiam eorum, post quorum mortem concepti sunt, non proprie, sed per abusionem vel potius anaforikws accidit.

§ 1.- Si quis praegnatem uxorem reliquisset et matrem et sororem, si viva uxore mater mortua fuisset, deinde uxor mortuum peperisset, ad sororem solam legitima hereditas pertinet, quia certum esset matrem eo tempore decessisse, quo legitima hereditas ad eam non pertinebat.

9.- MARCIANUS; *libro V, Institutionum*.- Si ex pluribus legitimis heredibus quidam omiserint adire hereditatem vel morte vel qua alia ratione impediti fuerint, quo minus adeant, reliquis, qui adierint, adcrecit illorum portio et licet decesserint,

both the deceased brothers.

6.- JULIANUS; *Digest, Book LIX*.- Titius, having disinherited his son, appointed a foreign heir under a condition. The question arose, if after the death of the father and while the condition was pending, the son should marry a wife and have a child, and then should die, and the condition imposed upon the appointed heir should not subsequently be complied with, whether the estate would belong by law to the posthumous grandson, or to the grandfather. The answer was, that a child conceived after the death of its grandfather cannot, as the proper heir, obtain his estate, or, as his cognate, acquire praetorian possession of the same; for the reason that the Law of the Twelve Tables calls to the succession him who was in existence at the time of the death of the person the disposition of whose estate is in question.

7.- CELSUS; *Digest, Book XXVIII*.- Or, if he had been conceived in his lifetime, because a child who has been conceived is, to a certain extent, considered as being in existence.

8.- JULIANUS; *Digest, Book LIX*.- The Praetor, by his Edict also, on the ground of their being next of kin, promises the possession of an estate to those who were cognates of the deceased at the time of his death. For, although it is customary to call those cognates grandsons who were conceived after the death of their grandfather, this designation is not proper, but susceptible of abuse, as it is based on analogy.

§ 1.- If anyone should leave his wife pregnant, and a mother and a sister, and the mother should die during the lifetime of his wife, and his wife should afterwards have a dead child, the estate will pass to the sister alone, as the heir at law; because it is certain that the mother died at a time when she could not lawfully have acquired the estate.

9.- MARCIANUS; *Institutes, Book V*.- Where some of several heirs at law, having been prevented by death, or by some other cause fail to accept the estate, their shares will accrue to the others who do accept it; and even though the latter may die before

legítima de ambos.

6.- JULIANO; *Digesto, libro LIX*.- Ticio, habiendo desheredado a su hijo, instituyó heredero bajo condición a un extraño; se preguntó, si cuando después de la muerte del padre, estando pendiente la condición, se hubiere casado el hijo, y hubiese tenido un hijo, y hubiese fallecido, y luego hubiese faltado la condición del heredero instituido, le pertenecería a este nieto póstumo la herencia legítima del abuelo. Respondió: el que es concebido después de la muerte de su abuelo no puede obtener ni la herencia legítima de éste como heredero suyo, ni la posesión de los bienes como cognado, porque la ley de las Doce Tablas llama a la herencia al que existiere al morir aquél de cuyos bienes se trata.

7.- CELSO; *Digesto, libro XXVIII*.- O si viviendo éste fue concebido, porque se estima que el concebido existe en cierto modo.

8.- JULIANO; *Digesto, libro LIX*.- El Pretor también promete en su Edicto la posesión de los bienes a título de proximidad a los que hubieren sido cognados del difunto al tiempo de la muerte de éste. Porque esto de que por la costumbre los nietos se llamen cognados aun de aquéllos, después de cuya muerte fueron concebidos, no se hace con propiedad, sino por abuso, o más bien por relación.

§ 1.- Si alguno hubiese dejado a su mujer embarazada, y a su madre y una hermana, y viviendo la mujer hubiese muerto la madre, y luego hubiese parido la mujer un hijo muerto, la herencia legítima le pertenece a sola la hermana, porque es cierto que la madre falleció al tiempo en que no le pertenecía a ella la herencia legítima.

9.- MARCIANO; *Instituta, libro V*.- Si de varios herederos legítimos, algunos hubieren dejado de adir la herencia o se hubieren visto impedidos de adirla por la muerte o por otra cualquier razón, la porción de ellos acrece a los demás que la hubieren adido, y

antequam adcreveret, hoc ius ad heredes eorum pertinet. Alia causa est instituti heredis et coheredi substituti: huic enim vivo defertur ex substitutione hereditas, non etiam, si decesserit, heredem eius sequitur.

10.- MODESTINUS; *libro VI, Differentiarum*.- Si ad patrem manumissorem filii intestati legitima hereditas perveniat vel non manumissori bonorum possessio competat, mater defuncti summovetur.

11.- POMPONIUS; *libro X, ad Quintum Mucium*.- Capitis deminutione pereunt legitimae hereditates, quae ex lege duodecim tabularum veniunt, sive vivo aliquo sive antequam adeatur hereditas eius capitis minutio intercessit, quoniam desinit suus heres vel adgnatus recte dici: quae autem ex legibus novis aut ex Senatusconsultis, non utique.

12.- IDEM; *libro XXX, ad Quintum Mucium*.- Filius patri adgnatus proximus est.

13.- GAIUS; *libro X, ad legem Iuliam et Papiam*.- Nulla femina aut habet suos heredes aut desinere habere potest propter capitis deminutionem.

14.- IDEM; *libro XIII, ad legem Iuliam et Papiam*.- In suis heredibus aditio non est necessaria, quia statim ipso iure heredes existunt.

15.- PAPINIANUS; *libro XXIX, Quaestionum*.- Si pater apud hostes moriatur, defunctum iam in civitate filium credimus patrem familias decessisse, quamvis patria potestate, quamdiu vixerit, non fuerit in plenum liberatus: itaque heredem habiturus est iste non reverso patre. Sed si postliminio redierit pater iam defuncto filio, quidquid medio tempore per eum quaesitum est, habebit: et non est mirum, si peculium

this takes place, the right will still pass to their heirs. The case of an appointed heir is different where his co-heir has been substituted for him, as the estate will pass to the other, by virtue of the substitution, if he is living; but if he should die, it will not descend to his heir.

10.- MODESTINUS; *Differences, Book VI*.- If the property of an intestate son passes to his father, who manumitted him, as the heir-at-law, or, if not having manumitted him, he should be entitled to praetorian possession of the same, the mother of the deceased will be excluded.

11.- POMPONIUS; *On Quintus Mucius, Book X*.- The rights of succession by law are extinguished by forfeiture of civil rights, where these are derived from the Twelve Tables, and the forfeiture takes place during the lifetime of anyone entitled to the estate, or before she enters upon it, as he can no longer correctly be styled either the proper heir or an agnate. This rule, however, is by no means applicable to successions regulated by new enactments, or decrees of the Senate.

12.- THE SAME; *On Quintus Mucius, Book XXX*.- The son is the nearest agnate of his father.

13.- GAIUS; *On the Lex Julia et Papia, Book X*.- No woman either has proper heirs, or can cease to have them, on account of her loss of civil rights.

14.- THE SAME; *On the Lex Julia et Papia, Book XIII*.- Formal acceptance is not necessary for proper heirs, because they immediately become heirs by operation of law.

15.- PAPINIANUS; *Questions, Book XXIX*.- When a father dies in the hands of the enemy, we consider that his son, who has already died in his own country, was the head of the household at the time of his death; although, as long as he lived, he was not completely released from paternal authority. Therefore, this son can have an heir, if his father does not return from captivity. If, however, his father should return after

aunque hubieren fallecido antes que les acreciera, les pertenece este derecho a sus herederos. Otra cosa es tratándose del heredero instituido y del substituto del coheredero; porque a éste se le defiende en vida la herencia por virtud de la substitución, pero si hubiere fallecido no pasa también a su heredero.

10.- MODESTINO; *Diferencias, libro VI*.- Si la herencia legítima del hijo que falleció intestado fuera a su padre, que lo manumitió, o si la posesión de los bienes competiese al que no lo manumitió, será excluida la madre del difunto.

11.- POMPONIO; *Comentarios a Quinto Mucio, libro X*.- Con la disminución de cabeza se pierden las herencias legítimas, que provienen de la ley de las Doce Tablas, ya si sobrevino la disminución de cabeza en vida de alguno, ya si antes que sea adida su herencia, porque dejó de llamarse debidamente heredero suyo o agnado; mas no ciertamente las que son deferidas por las nuevas leyes o por los Senadoconsultos.

12.- EL MISMO; *Comentarios a Quinto Mucio, libro XXX*.- El hijo es próximo agnado del padre.

13.- GAYO; *Comentarios a la ley Julia y Papia, libro X*.- Ninguna mujer puede tener herederos suyos, o dejar de tenerlos, por causa de la disminución de cabeza.

14.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XIII*.- Tratándose de herederos suyos, no es necesaria la adición, porque inmediatamente son de derecho herederos.

15.- PAPINIANO; *Cuestiones, libro XXIX*.- Si el padre muriese en poder de los enemigos, creemos que su hijo, que ya había fallecido en la ciudadanía, murió siendo padre de familia, aunque mientras haya vivido no haya estado plenamente libre de la patria potestad; y así ha de ser tenido éste como heredero no habiendo regresado el padre. Pero si el padre hubiere vuelto por el postliminio habiendo ya fallecido el

quoque defuncti pridem filii defertur patri, quum ex eo natus potestatis ipsius fiat per suspensi iuris constitutionem.

16.- IDEM; *libro XII, Responsorum*.- Pater instrumento dotali comprehendit filiam ita dotem accepisse, ne quid aliud ex hereditate patris speraret: eam scripturam ius successionis non mutasse constitit: privatorum enim cautiones legum auctoritate non censi.

TIT. XVII

AD SENATUSCONSULTUM TERTULLIANUM
ET ORPHITIANUM

1.- ULPIANUS; *libro XII, ad Sabinum*.- Sive ingenua sive libertina mater est, admitti possunt liberi ad hereditatem eius ex Senatusconsulto Orphitiano.

§ 1.- Si ea sit mater, de cuius statu dubitatur, utrum mater familias sit an filia familias, ut puta quoniam pater eius ab hostibus captus sit: si certum esse coeperit matrem familias esse, liberi admittentur. Unde tractari potest, an medio tempore, dum status pendet, succurri eis per praetorem debeat, ne, si medio tempore decesserint, nihil ad heredem transmittant: et magis est, ut subveniatur, ut in multis casibus placuit.

§ 2.- Sed et vulgo quaesiti admittuntur ad matris legitimam hereditatem.

the death of his son, he will, under the law of postliminium, be entitled to whatever property the former acquired in the meantime; and there is nothing extraordinary in the fact that, in this case, the peculium of the deceased son will pass to the father, as the former has always been under his control by the constitution which establishes that the right has only been in abeyance.

16.- THE SAME; *Opinions, Book XII*.- A father inserted into the dotal contract executed at the time of his daughter's marriage that she should receive a dowry, with the understanding that she must expect nothing more from her father's estate. It Was decided that this clause did not change the right of succession, for the contracts of private individuals are not held to supersede the authority of the laws.

TITLE XVII

ON THE TERTULLIAN AND ORPHITIAN
DECREES OF THE SENATE

1.- ULPIANUS; *On Sabinus, Book XII*.- Under the Orphitian Decree of the Senate children can be admitted to the succession of their mother whether she is freeborn or manumitted.

§ 1.- When any doubt exists with reference to the condition of the mother, namely, whether she is independent or subject to paternal control (as for instance, where her father is a captive in the hands of the enemy), whenever it is positively established that she was her own mistress when she died, her children will be entitled to her estate. Hence the question arose whether or not, during the intermediate time and while her condition was in suspense, relief should be granted to the children by the Praetor, for fear that if they should die in the interim they might not be able to transmit anything to their heirs. The better opinion is that relief should be granted them, as has been decided in many cases.

§ 2.- Illegitimate children are also admitted to the succession of their mother as heirs at law.

hijo, tendrá todo lo que en el tiempo intermedio se adquirió por medio de éste; y no es de extrañar, si también se le defiende al padre el peculio del hijo fallecido antes, porque el nacido de éste se hace de la potestad del mismo por virtud de la constitución del derecho que estaba en suspenso.

16.- EL MISMO; *Respuestas, libro XII*.- Un padre consignó en el instrumento dotal, que la hija había recibido la dote para que no esperase ninguna otra cosa de la herencia del padre; es lo cierto, que esta escritura no alteró el derecho de la sucesión, porque la convención de los particulares no es considerada con la autoridad de las leyes.

TÍTULO XVII

SOBRE EL SENADO CONSULTO
TERTULIANO Y SOBRE EL ORFICIANO

1.- ULPIANO; *Comentarios a Sabino, libro XII*.- Ya si es ingenua, ya si libertina, la madre, pueden ser admitidos a su herencia los hijos en virtud del Senadoconsulto Orficiano.

§ 1.- Si la madre es una respecto a cuyo estado se duda si es madre de familia o hija de familia, por ejemplo, porque su padre estuviera aprisionado por los enemigos, si comenzare a ser cierto que es madre de familia, serán admitidos los hijos. Por lo cual se puede discutir si deberá socorrérseles por el Pretor en el tiempo intermedio mientras está pendiente el estado, de suerte que, si fallecieren en el tiempo intermedio, no transmitan nada al heredero, Y es más cierto que se les socorre, como se determinó en muchos casos.

§ 2.- Pero también son admitidos a la herencia legítima de la madre los habidos del vulgo.

§ 3.- Interdum et in servitute quaesito erit concedenda hereditas legitima, veluti si post moram fideicommissariae libertati matris suae factam natus sit. Certe si post manumissionem matris fuerit natus, licet in servitute conceptus, ad legitimam eius hereditatem admittetur. Sed et si apud hostes conceptus a captiva procreatus quum ea rediit, secundum Rescriptum Imperatoris nostri et Divi patris eius ad Ovinium Tertullum poterit ex hoc Senatusconsulto admitti quasi vulgo quaesitus.

§ 4.- Filio, qui mortis tempore matris civis Romanus fuit, si ante aditam hereditatem in servitute deducatur, legitima hereditas non defertur nec si postea liber factus sit, nisi forte servus poenae effectus beneficio principis sit restitutus.

§ 5.- Sed si matris execto ventre filius editus sit, magis dicendum est hunc quoque ad legitimam hereditatem admitti: nam et institutus secundum tabulas et ab intestato unde cognati et multo magis unde legitimi bonorum possessionem petere potuit: argumento est, quod venter in possessionem ex omni parte edicti mittitur.

§ 6.- Qui operas suas ut quum bestiis pugnaret locavit quive rei capitalis damnatus neque restitutus est, ex Senatusconsulto Orphitiano ad matris hereditatem non admittebatur: sed humana interpretatione placuit eum admitti. Idem erit dicendum et si hic filius in eius sit potestate, qui in causa supra scripta sit, posse eum ex Orphitiano admitti.

§ 7.- Sed si mater testamento facto filium heredem

§ 3.- An estate is sometimes granted to a son born in slavery, as heir at law; for example, where he was born of a female slave while the heir was in default for not granting his mother freedom under the terms of a trust. It is certain that if he was born after the manumission of his mother, he will be entitled to her estate as heir at law, even though he was conceived in slavery; and even if he was conceived while his mother was in the hands of the enemy but was born in captivity, and returned with his, mother, he will have a right to her estate as heir at law, just as an illegitimate child; according to a Rescript of our Emperor and his Divine Father addressed to Ovinus Tertullus.

§ 4.- The estate of a mother is not transmitted to her son as heir at law, who, at the time of her death, was a Roman citizen, and before the estate was entered upon was reduced to slavery; not even if he should afterwards become free, unless he had been made a penal slave and was subsequently restored to his civil rights by the indulgence of the Emperor.

§ 5.- If, however, the son was born after a surgical operation had been performed upon his mother for that purpose, the better opinion is, that he will be entitled to her estate as heir at law. For he can demand praetorian possession, whether he was appointed heir, or his mother died intestate, as belonging to the class of cognates, and, still more, as one of the heirs at law. The proof of which is, that an unborn child is admitted to praetorian possession of the estate under every Section of the Edict.

§ 6.- Anyone who hires his services for the purpose of fighting wild beasts, or who has been condemned for a capital crime and not restored to his civil rights, is not entitled to the estate of his mother under the Orphitian Decree of the Senate; but, on the ground of humanity, it has been held that he can obtain it. The same rule will apply where the son is under the control of him who is in the above-mentioned condition, for he can be admitted to the succession of his mother under the Orphitian Decree of the Senate.

§ 3.- A veces se habrá de conceder la herencia legítima aun al tenido en la esclavitud, por ejemplo, si hubiera nacido después de habérsele causado mora a su madre respecto a la libertad que se le dejó por fideicomiso. Y ciertamente que si hubiere nacido después de la manumisión de la madre, aunque hubiere sido concebido en la esclavitud, será admitido a la herencia legítima de ella. Pero también si concebido en poder de los enemigos, y procreado de una cautiva, volvió con ésta, podrá, según un Rescripto de nuestro Emperador y de su Divino Padre, dirigido a Ovinio Tértulo, ser admitido en virtud de este senadoconsulto, como si hubiera sido habido del vulgo.

§ 4.- Al hijo, que al tiempo de la muerte de su madre era ciudadano Romano, si antes de haber adido la herencia fuese reducido a esclavitud, no se le defiere la herencia legítima, ni aunque después haya sido hecho libre, a no ser acaso que hecho esclavo de la pena haya sido reintegrado por beneficio del príncipe.

§ 5.- Pero si el hijo hubiera sido dado a luz habiéndosele abierto el vientre a la madre, se ha de decir preferentemente que también éste es admitido a la herencia legítima; porque también habiendo sido instituido puede pedir la posesión de los bienes con arreglo al testamento, y abintestato la *Unde cognati*, y mucho mejor la *Unde legitimi*; y la razón es, porque el que está en el claustro materno es puesto en posesión en fuerza de todas las partes del Edicto.

§ 6.- El que dió en arrendamiento sus servicios para luchar con las fieras, o el que fue condenado a pena capital y no fue restituido, no era admitido a la herencia de su madre por el senadoconsulto Orficiano; pero se determinó por humana interpretación que fuese admitido. Lo mismo se habrá de decir, también si este hijo se hallara bajo la potestad de quien se encuentre en el susodicho estado, que puede él ser admitido en virtud del senadoconsulto Orficiano.

§ 7.- Pero si en el testamento que hizo la madre

scripserit unum sub condicione, quum plures haberet, si condicione pendente possessionem petierit et postea condicio defecit, aequum est ceteris etiam filiis legitimam hereditatem non auferri: quod et Papinianus libro sexto decimo quaestionum scripsit.

§ 8.- Capitis minutio salvo statu contingens liberis nihil nocet ad legitimam hereditatem: nam vetus sola hereditas, quae lege duodecim tabularum defertur, capitis minutione peremittitur, novae vel ex lege vel ex Senatusconsultis delatae non peremuntur capitis deminutione. Proinde sive quis ante delatam capite minuatur, ad legitimam hereditatem admittetur, nisi magna capitis deminutio interveniat, quae vel civitatem adimit, ut puta si deportetur.

§ 9.- «Si nemo filiorum eorumve, quibus simul legitima hereditas defertur, volet ad se eam hereditatem pertinere, ius antiquum esto». Hoc ideo dicitur, ut, quamdiu vel unus filius vult legitimam hereditatem ad se pertinere, ius vetus locum non habeat: itaque si ex duobus alter adierit, alter repudiaverit hereditatem, ei portio adcreset. Et si forte sit filius et patronus, repudiante filio patrono defertur.

§ 10.- Si quis adita matris hereditate per in integrum restitutionem fuerit abstentus, an ius antiquum possit locum habere? verba admittunt, ut possit: "volet ad se", inquit, "eam hereditatem pertinere": nam et hic non vult, etsi aliquando voluit: et dico posse ius antiquum locum habere.

make a will and appoint one of them her heir under a condition, and the child should demand pratorian possession of the estate while the condition was still pending, and afterwards, the condition should not be fulfilled, it is but just that the other children should not be deprived of the estate as heirs at law. This Papinianus also stated in the Sixteenth Book of Questions.

§ 8.- The forfeiture of civil rights which takes place in the case of children without affecting their legal position, does not, in any way, prejudice them as heirs at law; for it is only the ancient right of inheritance which passes by the Law of the Twelve Tables that is extinguished by the forfeiture of civil status, but those new rights which are established by special laws or by the decrees of the Senate are not lost under such circumstances. Hence, whether the civil rights of a child were lost before or after it was entitled to its mother's estate, it will still be admitted to the succession as heir at law, unless the greater diminution of civil rights, which deprives a person of citizenship, as, for instance, where he is deported, has taken place.

§ 9.- "Let the ancient law be observed, where none of the children, or none of those who are entitled to the estate as heir at law, desires to obtain the estate." This clause was enacted in order that the ancient law might not apply as long as there was a single child who wished to obtain his mother's estate as heir at law. Hence, if one of two children should accept the estate, and the other should reject it, the share of the latter will accrue to the former. And if the mother should leave a son and a patron, and the son should reject the estate, it will pass to the patron.

§ 10.- If anyone, after having entered upon the estate of his mother, should then reject it and obtain complete restitution, must the ancient law be observed? The terms of the law admit that this can be done, as it says, "Desires to obtain the estate," for, in this instance, he has not this desire, although he had it originally; therefore I hold that the ancient law will be applicable.

hubiere instituido heredero bajo condición a un solo hijo, teniendo muchos, y pendiente la condición hubiere él pedido la posesión de los bienes, y después faltó la condición, es equitativo que no se les quite tampoco a los demás hijos la herencia legítima; lo que escribió también Papiniano en el libro décimo sexto de las Cuestiones.

§ 8.- La disminución de cabeza que sobreviene dejando a salvo el estado, en nada les perjudica a los hijos para la herencia legítima; porque por la disminución de cabeza se pierde solamente la antigua herencia, que se defiere por la ley de las Doce Tablas; pero las nuevas que han sido deferidas por la ley, o por los Senadoconsultos, no se pierden por la disminución de cabeza. Por lo cual ya si uno fue disminuido de cabeza antes de haber sido deferida la herencia, ya si después, será admitido a la herencia legítima, a no ser que medie la grande disminución de cabeza, que priva de la ciudadanía, como, por ejemplo, si uno fuese deportado.

§ 9.-«Si ninguno de los hijos, o de aquellos a quienes juntamente se les defiere la herencia legítima, quisiera que a él le pertenezca esta herencia, obsérvese el derecho antiguo.» Se dice esto para que, mientras por lo menos un hijo quiere que a él le pertenezca la herencia legítima, no tenga lugar el antiguo derecho, y así, si de dos uno hubiere adido, y otro repudiado, la herencia, le acrecerá a aquélla porción, y si acaso hubiere un hijo y un patrono, repudiandola el hijo, se le defiere al patrono.

§ 10.- Si alguno, habiendo adido la herencia de su madre, se hubiere abstenido por la restitución por entero, ¿podrá tener acaso lugar el derecho antiguo? Las palabras admiten, que puede: «quisiera, dice, que a él le pertenezca la herencia»; porque tampoco éste quiere, aunque alguna vez quiso; y digo, que puede tener lugar el derecho antiguo.

§ 11.- Utrum autem ei defertur successio, qui tunc legitimus deprehenditur, an vero ei, qui tunc fuit, quum filio defertur? Ut puta proponamus fuisse defunctae consanguineum eiusque filium, deliberante filio defunctae consanguineum obisse, mox filium repudiasset matris hereditatem: an consanguinei filius admitti possit? Et Iulianus recte putat circa tertullianum locum esse succedenti agnato.

§ 12.- Quod ait senatus: "quae iudicata transacta finitave sunt, rata maneat", ita intellegendum est, ut "iudicata" accipere debeamus ab eo cui iudicandi ius fuit, "transacta" scilicet bona fide, ut valeat transactio, "finita" vel consensu vel longo silentio sopita.

2.- IDEM; *libro XIII, ad Sabinum*.- Sive ingenua sit mater sive libertina, habebit Tertullianum commodum.

§ 1.- Filium autem vel filiam accipere debemus, sive iuste sint procreati vel vulgo quaesiti: idque in vulgo quaesitis et Iulianus libro quinquagesimo nono Digestorum scripsit.

§ 2.- Sed si filius vel filia libertini sint effecti, mater legitimam hereditatem vindicare non poterit, quoniam mater esse huiusmodi filiorum desiit: idque et Iulianus scripsit et constitutum est ab imperatore nostro.

§ 3.- Sed si in servitute concepit filium et manumissa ediderit, ad legitimam eius hereditatem admittitur: idemque et si serva poenae concepit et restituta edidit: hoc idem et si libera concepit, edidit serva poenae, mox restituta est: sed et si libera concepit et in servitutem redacta edidit, mox manumissa est, ad

§ 11.- Moreover, will the succession pass to him who was at the time the heir at law, or will it go to him who was the heir at law when the estate passed to the son? Suppose, for instance, that there was a blood-relative of the deceased, as well as her son, and that the said blood-relative died while the son was deliberating whether or not he would accept the estate of his mother, and he should then reject the estate; can the son of her blood-relative be admitted to the succession? Julianus very properly thinks that, by the Tertullian Decree of the Senate, there is ground for the admission of the nearest agnate.

§ 12.- The enactment of the Senate says, "Whatever has been judicially decided is finally settled and terminated, and shall be valid," must be understood to mean a decision rendered by someone who had the right to do so, whether reference is had to a transaction made in good faith, in order to render it valid; or it was ended by consent, or quieted by a long silence.

2.- THE SAME; *On Sabinus, Book XIII*.- A mother is entitled to the benefit of the Tertullian Decree of the Senate, whether she is freeborn, or has been manumitted.

§ 1.- We should understand the law referring to the son or the daughter to apply to either such as are lawfully begotten or illegitimate. Julianus, in the Fifty-ninth Book of the Digest, adopts this opinion with reference to legitimate children.

§ 2.- If the son or the daughter has been manumitted, the mother cannot claim his or her estate as heir at law, for she has ceased to be the mother of children of this kind. This was the opinion of Julianus, and it has also been decided by our Emperor.

§ 3.- Where, however, a woman conceived a child while in slavery, and it was born after she was manumitted, it will be entitled to her estate as her heir at law. The same rule applies if the slave conceived while serving out a sentence, and the child was born after she was restored to her rights. This will also be

§ 11.- ¿Mas se le defiere acaso la sucesión al que entonces se halla que es legítimo, o al que lo fue cuando se le defiere al hijo? Supongamos, por ejemplo, que había un consanguíneo de la difunta, y un hijo de la misma; estando deliberando el hijo falleció el consanguíneo de la difunta, y luego el hijo repudió la herencia de la madre; ¿podría ser admitido el hijo del consanguíneo? Y con razón opina Juliano respecto al Senadoconsulto Tertuliano, que ha lugar al agnado subsiguiente.

§ 12.- Lo que dice el senadoconsulto: «lo que fue juzgado, transigido, o terminado, subsista firme», se ha de entender de modo, que debamos admitir lo «juzgado», por quien tuvo el derecho de juzgarlo, lo «transigido», por supuesto, de buena fe, para que valga la transacción, y como «terminado», lo que quedó apaciguado o por el consentimiento, o por largo silencio.

2.- EL MISMO; *Comentarios a Sabino, libro XIII*.- Ya si la madre fuera ingenua, ya si libertina, tendrá el beneficio del Senadoconsulto Tertuliano.

§ 1.- Mas debemos entender por hijo o hija, tanto los que hayan sido procreados legítimamente, como los que hayan sido habidos del vulgo; y esto escribió también Juliano en el libro quincuagésimo noveno del Digesto respecto a los habidos del vulgo.

§ 2.- Pero si el hijo o la hija hubieran sido hechos libertinos, la madre no podrá reivindicar la herencia legítima, porque dejó de ser madre de tales hijos; y esto escribió también Juliano, y fue establecido por nuestro emperador.

§ 3.- Mas si una concibió en la esclavitud un hijo, y lo hubiere dado a luz estando manumitada, será admitida a su herencia legítima. Y lo mismo también, si lo concibió siendo esclava de la pena, y lo dio a luz habiendo sido restituida. Esto mismo, también si lo concibió siendo libre, lo parió siendo esclava de la

legitimam hereditatem eius admittetur. Item si adhuc praegnas manumissa est, dicendum erit prodesse. Et in servitute editi filii ad legitimam hereditatem mater admittetur, ut puta si post moram factam in fideicommissa libertate peperit, vel apud hostes et quum eo rediit, vel si redempta edidit.

§ 4.- Si mulier sit famosa, ad legitimam hereditatem liberorum admittetur.

§ 5.- Impuberem, cui pater secundas tabulas fecit, tunc certum est intestatum decessisse, quum omiserint substituti hereditatem eius. Quare et si impubes adrogatus sit, dicendum est matrem ad bona eius admitti, quae haberet, si intestatus decessisset.

§ 6.- Liberi defuncti sui quidem obstabunt matri eius tam virilis sexus quam feminini, tam naturales quam adoptivi matremque excludunt, bonorum possessores vero etiam non sui et quidem soli naturales. Adoptivi autem liberi post emancipationem ita admittuntur, si ex liberis naturalibus fuerint, ut puta nepos naturalis ab avo adoptatus: nam licet sit emancipatus, bonorum possessione accepta matri obstabit.

§ 7.- Si vero apud hostes est filius vel nasci speratur, pendet ius matris, donec redierit vel

the case where she was free when she conceived, but was serving out a sentence when the child was born, and afterwards was restored to her rights. If, however, she was free when she conceived, and the child was born after she had been reduced to slavery, and she was subsequently liberated, the child will be admitted to the succession as her heir at law. Likewise, it must be said that she will be entitled to the benefit of the law, if she was manumitted while pregnant. The mother will inherit the estate of her child born in slavery, as its heir at law; for instance, if it was born after the heir was in default in granting her her freedom, in compliance with a trust; or where it was born while she was in the hands of the enemy, and returned with her from captivity; or if it was born after she was ransomed.

§ 4.- When a woman is of infamous reputation, she will, nevertheless, be entitled to the estate of her child as heir at law.

§ 5.- A minor under the age of puberty, for whom his father made a pupillary substitution, certainly dies intestate when his substitutes reject the inheritance. Therefore, if the minor should be arrogated, it must be said that his mother is entitled to the property which he would have left if he had died intestate.

§ 6.- The children of the deceased, whether they are of the male or female sex, or natural or adopted, if they are proper heirs, stand in the way of their mother, and exclude her from succession as heir at law; and those entitled to possession of the estate under the Praetorian Edict also exclude their mother, even if they are not proper heirs, provided they are natural children. Adopted children are also admitted to the succession, after their emancipation, if they belong to the number of natural children; as for instance, a natural grandson adopted by his grandfather; for, even though he may be emancipated, if he obtains praetorian possession, he will take precedence of his mother.

§ 7.- Where, however, a son is in the hands of the enemy, or is yet unborn, the mother's right remains in

pena, y después fue restituida. Mas si lo concibió siendo libre, y lo parió reducida a esclavitud, y luego fue manumitida, también sera admitida a su herencia legítima. Si fue manumitida estando todavía emba-razada, también se habrá de decir que esto le aprovecha. La madre sera admitida a la herencia legítima aun del hijo nacido en la esclavitud, por ejemplo, si lo hubiere parido después de habersele causado mora respecto a la libertad que se le dejó por fideicomiso, o si lo dio a luz en poder de los enemigos y regresó con él, o habiendo sido rescatado.

§ 4.- Si la mujer fuera infame, sera admitida a la legítima herencia de sus hijos.

§ 5.- Es cierto que murió intestado el impúbere para quien su padre hizo segundo testamento, cuando hubieren prescindido de su herencia los substitutos. Por lo cual, también se ha de decir, que si el impúbere hubiera sido arrogado, la madre es admitida a los bienes de él, que habría tenido, si hubiese fallecido intestado.

§ 6.- Los descendientes del difunto, que son herederos suyos, le obstaran a la madre de éste, tanto si son del sexo masculino como del femenino, tanto si son naturales como adoptivos, y excluyen a la madre; pero los poseedores de los bienes, aunque no sean herederos suyos, y sean solamente hijos naturales. Mas los descendientes adoptivos son admitidos después de la emancipación, si fueren descendientes naturales, por ejemplo, un nieto natural adoptado por el abuelo; porque aunque haya sido emancipado, habiendo admitido la posesión de los bienes, le obstará a la madre.

§ 7.- Pero si el hijo esta en poder de los enemigos, o se espera que nazca, queda pendiente el derecho de la

nascatur.

§ 8.- Sed si sint sui heredes, verum hereditas ad eos non pertineat, videamus, an mater admittatur, ut puta abstinuit se hereditate. Africanus et Publicius temptant dicere in casum, quo se abstinere sui, matrem venire, et tunc ei obstat, quotiens rem haberent, ne nudum nomen sui heredis noceat matri: quae sententia aequior est.

§ 9.- Sed si quis decessisset relicta filia, quam in adoptionem legitime dederat, relicta et matre, Divus Pius decrevit cessare Senatusconsultum Tertullianum et simul esse admittendas ad bonorum possessionem unde proximi cognati matrem et filiam. Sed quod idem Iulianus scripsit matrem ex Senatusconsulto non posse admitti, si filia in bonorum possessione petenda cessaverit, verum non erit: succedit enim filiae. Et ideo dicendum erit matrem, donec filia bonorum possessionem petere potest, bonorum possessionem accipere non posse, quoniam succedere quasi legitima speraretur.

§ 10.- Si bonorum possessione accepta filius emancipatus abstinerit se hereditate per in integrum restitutionem, verum est Senatusconsultum posse locum habere: sed si fuerit rursus immixtus, rursus debet mater abstinere.

§ 11.- Si quis ex liberis, dum est in utero, in possessione missus sit, mox natus sit et ante bonorum possessionem acceptam decesserit, an matri noceat, videndum, quasi bonorum possessor. Et puto non nocere, si non suus patri agnoscitur: neque enim sufficit mitti in possessionem, nisi natus quoque acceperit bonorum possessionem. Igitur et si furioso decreto petita sit possessio et priusquam ipse mentis compos factus bonorum possessionem petierit,

suspense until he returns from captivity, or is born.

§ 8.- When there are proper heirs, who, however, are not entitled to the estate, let us see whether the mother can be admitted to the succession; for instance, when they reject the estate. Africanus and Publicius venture to hold that the mother will be admitted if the children do not accept the estate, and will take precedence of her whenever they are entitled to the property, in order that the mere name of proper heir may not prejudice the right of the mother; which opinion is the more equitable one.

§ 9.- Where anyone dies, leaving a daughter whom he had legally given in adoption, and her mother, the Divine Pius decided that the Tertullian Decree of the Senate did not apply to such a case; and that the mother and daughter, as the next of kin, should be entitled to praetorian possession of the estate. Julianus, however, says that the mother cannot be admitted to the succession under the Decree of the Senate, if the daughter should fail to demand possession under the Praetorian Edict; but this is not true, for she succeeds her daughter, and hence it must be held that the other cannot obtain praetorian possession of the estate while the daughter has the right to demand it, as she has the expectation of succeeding as heir at law.

§ 10.- If an emancipated son, after having acquired praetorian possession of the estate, should abstain from taking it, in order to obtain complete restitution, it is true that the Decree of the Senate will apply. If, however, he should again meddle with the estate, the mother must, a second time, refrain from applying for it.

§ 11.- Where one of the children of the deceased, who is yet unborn, is placed in possession of the estate, and is afterwards born, and dies before obtaining actual praetorian possession, let us see whether the rights of the mother of the deceased will be prejudiced as praetorian possessor of the estate. I think that her rights will not be affected, provided the child was not born the proper heir of his father; for if it is not sufficient for him to formally be placed in

madre hasta que volviere, o nazca.

§ 8.- Mas si hubiera herederos suyos, pero no les perteneciera la herencia, veamos si sera admitida la madre, por ejemplo, si el heredero se abstuvo de la herencia. Africano y Publicio intentan decir, que en el caso en que se abstienen los herederos suyos, entra la madre, y que le obstan siempre y cuando tengan ellos la herencia, a fin de que no le perjudique a la madre el simple título de heredero suyo; cuya opinión es mas equitativa.

§ 9.- Pero si alguno hubiese fallecido dejando una hija, a la que legítimamente la había dado en adopción, y dejando también a su madre, decretó el Divino Pío que deja de tener lugar el Senadoconsulto Tertuliano, y que madre e hija han de ser admitidas juntamente a la posesión de los bienes que corresponde a los próximos cognados. Pero no será verdad lo que escribió el mismo Juliano, que la madre no podía ser admitida en virtud del Senadoconsulto, si la hija hubiere dejado de pedir la posesión de los bienes, porque le sucede a la hija; y por esto se habrá de decir, que mientras la hija puede pedir la posesión de los bienes, no puede la madre obtener la posesión de los bienes, porque se espera que suceda como legítima.

§ 10.- Si habiendo obtenido la posesión de los bienes el hijo emancipado se hubiere abstenido de herencia por virtud de la restitución por entero, es verdad que puede tener lugar el Senadoconsulto; pero si se hubiere inmiscuido de nuevo, debe abstenerse otra vez la madre.

§ 11.- Si alguno de los hijos hubiera sido puesto en posesión mientras estaba en el claustro materno, y después nació, y hubiere fallecido antes de haber obtenido la posesión de los bienes, se ha de ver si le perjudicará a la madre como poseedor de los bienes; y opino que no le perjudica, si no nace heredero suyo del padre; porque no basta que sea puesto en posesión, si habiendo nacido no hubiere aceptado también la posesión de los bienes. Así, pues, si se

decesserit, matri non obstat.

§ 12.- Sed si quis, quum status controversiam pateretur, Carbonianam solam acceperit, an noceat matri bonorum possessio, quaesitum quidem est: sed quum haec tempore finiatur, dicendum est matri post tempus non nocere aut, si impubes decesserit, matrem posse admitti.

§ 13.- Sed si infanti per tutorem petita sit possessio, licet statim decesserit, dicendum erit matri obstatisse: non enim similis est ei, quae furioso datur.

§ 14.- Ita demum autem mater Senatusconsulti beneficio excludetur, si filius adiit legitimam hereditatem: ceterum si omiserit legitimam hereditatem, mater ex Senatusconsulto Tertulliano admittetur. Sed si non sit solus iste filius legitimus heres, sed sint qui quum eo admittantur, nec in partem eorum mater ex Senatusconsulto erit vocanda.

§ 15.- Obicitur matri pater in utriusque bonis tam filii quam filiae, sive heres sive bonorum possessor existat. Sed neque avus neque proavus in Tertulliano matri nocent, quamvis fiduciam contraxerint. Pater autem tantum naturalis, non etiam adoptivus matri nocet: verius est enim, quum pater esse desierit, a matre eum excludi: sed nec ad bonorum possessionem contra tabulas eum admitti, quum pater esse desierit.

possession, unless, after his birth, he obtained actual praetorian possession. Therefore, if possession is granted to an insane person by a decree of the Praetor, and he should die before he recovers his senses, and before actually acquiring praetorian possession, he will not interfere so as to exclude his mother.

§ 12.- If a child, whose condition is in controversy, has only obtained Carbonian, praetorian possession, the question arises whether such possession will prejudice the rights of the mother. Under these circumstances, as possession of this description is terminated after a prescribed period, it must be said that, after this period has elapsed, the rights of the mother will not be prejudiced; or if the child should die under the age of puberty, the mother will be entitled to the estate.

§ 13.- When, however, possession has been demanded for an infant by his guardian, even though he may die immediately, it must be said that his mother will be excluded, for this case is not similar to the one where praetorian possession is given to an insane person.

§ 14.- Moreover, the mother is only excluded from the benefit of the Decree of the Senate, where her son enters upon the estate as the heir at law, but if he should fail to do so, his mother will be admitted to the inheritance under the Tertullian Decree. Where, however, this son is not the only heir at law, but there are others who can be admitted with him, the mother will not be called to the succession of their shares by the Decree of the Senate.

§ 15.- The father takes precedence of the mother in the succession of either a son or a daughter, whether he appears as the heir, or is entitled to praetorian possession of the estate. However, neither the grandfather nor the father exclude the mother, under the Tertullian Decree of the Senate, even though they may be charged with a trust. Only the natural, and not the adoptive father takes precedence of the mother, for the better opinion is that when the adoptive father ceases to be such, he will be excluded by the mother; since he is not entitled to praetorian possession of the

hubiera pedido por decreto la posesión para un furioso, y hubiere fallecido antes que recobrado el juicio hubiere él mismo pedido la posesión de los bienes, tampoco le obstará a la madre.

§ 12.- Mas si alguno, cuando sufriese controversia sobre su estado, hubiere obtenido la sola posesión Carboniana, se preguntó si le perjudicará a la madre la posesión de los bienes; pero como ésta se extingue por el tiempo, se ha de decir que no le perjudica a la madre después del término, o que si hubiere fallecido impúbere, puede ser admitida la madre.

§ 13.- Pero si por el tutor hubiera sido pedida la posesión para el que está en la infancia, se habrá de decir, que, aunque hubiere fallecido inmediatamente, le obstará a la madre; porque no es análoga a la que se le da al furioso.

§ 14.- Pero la madre será excluida del beneficio del Senadoconsulto, solamente si el hijo adió la herencia legítima; pero si hubiere prescindido de la herencia legítima, la madre será admitida en virtud del Senadoconsulto Tertuliano. Mas si este hijo no fuera el único heredero legítimo, sino que hubiera otros que fuesen admitidos con él, la madre no habrá de ser llamada por el Senadoconsulto ni a la parte de ellos.

§ 15.- El padre le obsta a la madre en los bienes de uno y de otra, tanto del hijo como de la hija, ora sea heredero, ora poseedor de los bienes. Mas ni el abuelo ni el bisabuelo le perjudican a la madre respecto al Senadoconsulto Tertuliano, aunque hayan contraído fiducia. Mas le perjudicará a la madre solamente el padre natural, no también el adoptivo; porque es mas cierto que cuando hubiere dejado de ser padre es excluido él por la madre, pero cuando hubiere dejado de ser padre no es admitido él ni a la posesión de los bienes contra el testamento.

estate contrary to the provisions of the will, because he is no longer the father.

§ 16.- Undecumque autem acceperit bonorum possessionem pater naturalis, sive legitimus sive contra tabulas, ex quavis parte excludit matrem.

§ 17.- Si sit adgnatus defuncti et naturalis pater sit in adoptiva familia, sit et mater, admittimus matrem, quoniam patrem adgnatus exclusit.

§ 18.- Si sit consanguinea soror defuncti, sit et mater, sit et pater adoptatus vel emancipatus: si consanguinea velit habere hereditatem, matrem ex Senatusconsulto una quum ea venire, patrem excludi placet: si consanguinea repudiet, matrem ex Senatusconsulto propter patrem non venire: et quamvis alias non soleat mater exspectare consanguineam, velit nec ne adire hereditatem, nunc tamen exspectaturam: consanguinea enim est, quae patrem excludit. repudiante igitur consanguinea bonorum possessionem habebit mater quum patre quasi cognata, sed et in hac moram patietur nec ante accipiet bonorum possessionem quam pater petierit, quoniam omittente eo potest ex Senatusconsulto succedere.

§ 19.- Sed et si ipsa mater eadem sit et soror consanguinea, ut puta quoniam pater matris nepotem suum ex filia adoptavit, sit praeterea et pater naturalis: haec mater si quidem quasi consanguinea veniat, excludet patrem: si ius consanguineae repudiavit vel capitis deminutione amisit, ex Senatusconsulto venire propter patrem non potest, repudiante vero patre rursum ex Senatusconsulto potest venire.

§ 16.- However, no matter in what way the natural father may have obtained praetorian possession, whether on the ground of intestacy, or in opposition to the terms of the will, in every instance, he excludes the mother.

§ 17.- If an agnate of the deceased and his mother survive him, and his natural father belongs to an adoptive family, we admit the mother to the succession, as the agnate excludes the father.

§ 18.- If a sister related by blood to the deceased survives him as well as his mother, his father having either been adopted or emancipated, and his sister desires to obtain the estate, it is settled by the Decree of the Senate that the mother can be admitted with the sister, and the father will be excluded. If the sister rejects the estate, the mother cannot be admitted under the Decree of the Senate, because of the father. Although, under other circumstances, the mother is not required to wait until the sister decides whether or not she will accept the estate; still, in this instance, she should wait, for it is the sister who excludes the father. Therefore, if the sister rejects the estate, the mother will be entitled to praetorian possession of the same, along with the father, in the capacity of cognates. In this case, she must suffer the delay, and cannot obtain praetorian possession of the estate before the father himself demands it; since if he fails to do so, she can then succeed under the Decree of the Senate.

§ 19.- But if the mother herself is the sister by blood of the deceased (for example where the father of the mother adopted a grandson by the daughter) and there is also a natural father; the mother who is entitled to the succession as sister will exclude the father; if, however, she rejects the right derived from her sister, or loses it through alteration of her civil status, she cannot be admitted to the succession under the Decree of the Senate, on account of the father, but if he rejects the estate, she can still be admitted under the Decree of the Senate.

§ 16.- Mas de cualquier manera que el padre natural haya obtenido la posesión de los bienes, ya como heredero legítimo, ya contra el testamento, excluye de cualquier parte a la madre.

§ 17.- Si hubiera agnado del difunto, y padre natural que estuviese en familia adoptiva, y también madre, admitimos a la madre, porque el agnado excluyó al padre.

§ 18.- Si hubiera hermana consanguínea del difunto, y la madre, y el padre, adoptado o emancipado, si la consanguínea quisiera tener la herencia, está determinado que por virtud del Senadoconsulto la madre concurre juntamente con ella, y que es excluido el padre; que si la consanguínea la repudiara, no concurre por virtud del Senadoconsulto la madre a causa del padre, y que aunque en otro caso no suela la madre esperar a que la consanguínea quiera o no adir la herencia, debe, sin embargo, esperar en el presente; porque es la consanguínea la que excluye al padre. Así, pues, repudiándola la consanguínea, tendrá la madre la posesión de los bienes juntamente con el padre, como agnado; pero también en este caso esperará, y no recibirá la posesión de los bienes antes que el padre la hubiere pedido, porque dejándola de pedir éste, sucede en virtud del Senadoconsulto.

§ 19.- Pero si la misma madre fuera también hermana consanguínea, por ejemplo, porque el padre de la madre adoptó a un nieto suyo habido de una hija, y además existiera el padre natural, esta madre, si acudiese ciertamente como consanguínea, excluirá al padre; si repudió el derecho de consanguínea o lo perdió por la disminución de cabeza, no puede acudir en fuerza del Senadoconsulto a causa del padre; pero repudiándola el padre, puede acudir de nuevo por virtud del Senadoconsulto.

§ 20.- Si mater hereditatem filii filiaeve non adierit ex Senatusconsulto Tertulliano, in bonorum possessione antiquum ius servandum est: quum enim esset praelatio matre omittente Senatusconsulti beneficium, ius succedit vetus.

§ 21.- Sed si mater repudiaverit bonorum possessionem, de adeunda autem hereditate deliberet, dicendum erit adgnatum non succedere, quoniam nondum verum est non adisse matrem.

§ 22.- Quod autem diximus ius antiquum servari matre non adeunte, cui personae deferatur hereditas, videndum, utrum ei, quae nunc proxima invenitur, quum mater repudiat, an ei quae fuit, quum intestato decessisse certum est? Ut puta fuit patruus, quum intestato decederet, et patrum filius: quum mater repudiasset, patruo nondum delatam hereditatem atque ideo defuncto eo matre deliberante patruum filium vocari.

§ 23.- Si mater non petierit tutores idoneos filiis suis vel prioribus excusatis reiectisve non confestim aliorum nomina ediderit, ius non habet vindicandorum sibi bonorum intestatorum filiorum. Et quidem si non petit, incidit: ait enim "vel non petere". Sed a quo non petere? Loquitur quidem de praetore constitutio: sed puto et in provinciis locum habere, etiamsi a magistratibus municipalibus non petat, quoniam et magistratibus municipalibus dandi necessitas iniungitur.

§ 24.- Quid ergo, si petiit, sed admonita vel a libertis vel a cognatis, an incidat in Senatus-

§ 20.- If the mother of a son or a daughter does not enter upon the estate under the Tertullian Decree of the Senate, the ancient law with reference to the inheritance of their property must be observed; for the ancient law becomes operative when the preference granted to the mother no longer exists, as will be the case, if she neglects to take advantage of the Decree of the Senate.

§ 21.- If the mother should reject the praetorian possession, and deliberate as to whether she will enter upon the estate under the provisions of the Civil Law, it must be said that the agnate will not succeed, as it has not yet been announced that the mother will not accept the estate.

§ 22.- We, having said that the ancient law must be observed if the mother does not accept the estate, must consider to whom it will pass, whether to the next of kin at the time, or to the person who was next of kin when it was certain that the son died intestate. For instance, if there was a paternal uncle living at the time he died intestate, and a son of the said paternal uncle living at the time when the mother rejected the succession, the estate will not yet pass to the uncle; and therefore, if the latter should die while the mother is deliberating, his son will be called to the succession.

§ 23.- If the mother did not demand solvent guardians for her children, or if the former ones having been excused or rejected, she did not immediately present the names of others, she will not have the right to claim for herself the property of her intestate children. And, indeed, if she does not apply for guardians, she will be liable to the penalty of the constitution, for it says, "Or not demand." But of whom must this demand be made? The constitution, indeed, mentions the Praetor, but I think that it will also be applicable in the provinces, if she does not have recourse to the municipal magistrates, since the necessity of making the appointment imposes an obligation upon them.

§ 24.- But what if she did make the demand, only after having been notified to do so by her freedman,

§ 20.- Si la madre no hubiere adido la herencia del hijo o de la hija en fuerza del Senadoconsulto Tertulliano, se ha de observar respecto a los bienes de ellos el antiguo derecho; porque habiendo prelación, dejando de aceptar la madre el beneficio del Senadoconsulto, sucede el antiguo derecho.

§ 21.- Mas si la madre hubiere repudiado la posesión de los bienes, pero deliberase sobre adir la herencia, se habrá de decir que no sucede el agnado, porque todavía no es verdad, que no haya adido la madre.

§ 22.- Mas como hemos dicho, que no adiendo la madre se observa el antiguo derecho, se ha de ver a qué persona se le deferirá la herencia, si a la que se halla que es próxima cuando la madre repudia, o a la que lo fue cuando es cierto que el difunto falleció intestado; por ejemplo, había un tío paterno cuando falleció intestado, y un hijo del tío paterno, cuando repudió la madre; al tío paterno no se le defirió todavía la herencia, y por lo tanto, fallecido él mientras deliberaba la madre, es llamado el hijo del tío paterno.

§ 23.- Si la madre no hubiere pedido tutores idóneos para sus hijos, o habiéndose excusado o habiendo sido rechazados los primeros no hubiere presentado inmediatamente los nombres de otros, no tiene derecho para reivindicar para sí los bienes de sus hijos intestados; y verdaderamente, si no los pidió, incurre en la pena, porque dice: «o no los pidiere.» Pero ¿si no los pidiere a quién? La Constitución habla ciertamente del Pretor, pero opino que también tiene lugar en las provincias, aunque sea a los magistrados municipales a quienes no los pida, porque también a los magistrados municipales les está impuesta la necesidad de darlos.

§ 24.- ¿Qué se dirá, pues, si los pidió, pero requerida por los libertos o los cognados? ¿Incurrirá acaso

consultum? Et puto eam incidere, si compulsa fecit, non si, quum petere non cunctaretur, admonita est.

§ 25.- Quid si pater eis peti prohibuerat tutorem, quoniam per matrem rem eorum administrari voluit? Incidet, si nec petat nec legitime tutelam administrat.

§ 26.- Quod si penitus egenis filiis non petit, ignoscendum est ei.

§ 27.- Sed si forte absens a libertis praeventa est vel ab aliis, dicendum est eam non excludi, nisi forte quum frustraretur, id contigit.

§ 28.- Filiis autem non petendo punitur, utique et filiabus. Quid si nepotibus? similiter non petendo punitur.

§ 29.- Quid si curatores non petiit? Verba rescripti deficiunt, sed dicendum est, si quidem impuberibus curatores non petiit, eandem esse rationem, si iam puberibus, cessare debere.

§ 30.- Quid si quum praegnas esset, bonis non petiit curatorem? Dico in sententiam incidere: nam et si apud hostes habuit impuberem, idem erit dicendum.

§ 31.- Quid si furioso tutorem vel curatorem non petiit? magis est, ut incidat.

§ 32.- Non solum autem quae non petiit coercetur, sed et quae defunctorie petiit, ut rescripto declaratur,

or her relatives, would she be liable to the penalty of the Decree of the Senate? I think that she would be, if she allowed herself to be compelled to do so; but not if, after having been notified, she did not delay in making the demand.

§ 25.- What course should be pursued if their father forbade the children to demand a guardian, as he desired their property to be administered by their mother? She will be liable to the penalty, if she does not make the demand, and does not administer the guardianship in a proper manner.

§ 26.- She could be excused if she does not demand guardians for her children, when they are extremely poor.

§ 27.- If, during her absence, she has been anticipated by her freedmen or by others, it must be said that she will not be excluded, unless this has happened after she had refused to make the demand.

§ 28.- She will be punished for not demanding a guardian for her children; but what if she does not demand one for her grandchildren? If she does not demand one for them, she will also be punished.

§ 29.- What if she should not demand curators for her children? The rescript is silent on this point, but it must be said that if she does not demand curators for such of them as are under the age of puberty, the same rule will apply; but this will not be the case where all of them have reached the age of puberty.

§ 30.- But what if a woman, who is pregnant, does not demand a curator for the property of her unborn child? I say that she will be liable to the penalty, and also where she has a child under the age of puberty, who is in the hands of the enemy.

§ 31.- What if she should not demand a guardian or a curator for her insane son? The better opinion is that she will be liable.

§ 32.- Not only she who does not make the demand, but also she who has done so without using proper

en el Senadoconsulto? Y yo opino que ella incurre, si obró compelida, y no, si porque no se apresuraba a pedirlos fue advertida.

§ 25.-¿Qué se dirá si el padre había prohibido que se pidiera tutor para ellos, porque quiso que los bienes de éstos fueran administrados por la madre? Incurrirá si no los pidiera, y no administrará legítimamente la tutela.

§ 26.- Pero si no los pidió para los hijos absolutamente pobres, se le ha de dispensar.

§ 27.- Pero si estando acaso ausente se le anticiparon los libertos u otros, se ha de decir que ella no es excluida, a no ser acaso que esto haya sucedido, porque se tratase de engañar.

§ 28.- Mas es castigada no pidiéndolos para los hijos, y también para las hijas. ¿Qué se dirá, si no los pidió para los nietos? Que es castigada del mismo modo no pidiéndolos.

§ 29.-¿Qué, si no pidió curadores? Nada dicen las palabras del rescripto; pero se ha de decir, que si verdaderamente no pidió curadores para los impúberos, hay la misma razón, y que si para los ya púberos, debe dejar de haberla.

§ 30.- ¿Qué se dirá, si estando embarazada no pidió curador para los bienes? Digo que incurre en el espíritu de la Constitución; porque también se habrá de decir lo mismo, si ella tenía el impúbero en poder de los enemigos.

§ 31.- ¿Qué, si no pidió tutor o curador para el furioso? Es más cierto que incurre en la pena.

§ 32.- Mas no solamente es castigada la que no los pidió, sino también la que los pidió sin instancia,

vel privilegio munitum vel oneratum tribus puta tutelis, sed ita demum, si data opera hoc fecit.

§ 33.- Quid ergo, si tales petiit et susceperunt nihilo minus vel detenti sunt? Excusata erit mater.

§ 34.- Quid si indignos, id est minus habiles ad tutelam petierit, quoniam sciebat Praetorem eos non daturum? Quid tamen si dedit eos Praetor matris petitionem secutus? Iam quidem Praetoris delictum est, sed et matris punimus consilium.

§ 35.- Igitur si forte excusati sint illi vel improbat, debet mater alios sine mora petere.

§ 36.- Ergo sive non petierit sive idoneos non petierit, punietur, etiamsi dati fuerint minus idonei praetore errante.

§ 37.- Idoneos autem utrum facultatibus an et moribus petere debeat, dubitationis esse potest. Puto autem facile ei ignosci, si locupletes sint hi, quos petiit.

§ 38.- Sed et si prioribus excusatis reiectisve non confestim aliorum nomina ediderit, punietur.

§ 39.- Quid ergo, si non fuerint omnes excusati vel omnes reiecti? Videndum, an ei imputetur, cur in locum excusati non petiit: et puto imputandum.

care, is punishable (as is set forth in the rescript), for instance, where a guardian is demanded who is exempt by reason of some privilege; or who is already charged with three guardianships; but in such a case she will only be liable to punishment where she has acted designedly.

§ 33.- What must be done if she demanded persons of this kind, and they, nevertheless, accepted or were retained? The mother shall be excused.

§ 34.- But what if she should demand, as guardians, persons who are incompetent, that is to say, not qualified for the guardianship, being perfectly aware that the Praetor would not appoint them? And what must be done if the Praetor should appoint them, in accordance with the demand of the mother? In this instance, the Praetor is guilty of the offence; but we also punish the design of the mother.

§ 35.- Hence, if these guardians are either excused or rejected, the mother should apply for the appointment of others without delay.

§ 36.- Therefore, she will be punished if she does not apply for guardians at all, or does not apply for such as are suitable, even if, through the fault of the Praetor, persons who are incompetent should be appointed.

§ 37.- It may be a matter of doubt whether, by suitable guardians, it is meant that she should demand those who are solvent, or persons of good morals. I think that she can readily be excused if she applies for the appointment of such as are wealthy.

§ 38.- The mother is also punished if, when the first guardians applied for have been either excused or rejected, she does not immediately present the names of others.

§ 39.- But what if all of them should neither be excused nor rejected; for it must be considered whether she would be to blame for not having demanded the appointment of another, instead of one who was excused? I think that she would be to blame

como se declara en el rescripto, o pidió al que estaba amparado por privilegio, o gravado, por ejemplo, con tres tutelas; pero esto así, solamente si lo hizo de intento.

§ 33.- Luego ¿qué se dirá si pidió a tales personas, y ellas, sin embargo, aceptaron el cargo, o fueron retenidos en él? Que estará excusada la madre.

§ 34.- ¿Qué, si hubiere pedido para la tutela personas indignas, esto es, no hábiles, porque sabía que el Pretor no las nombraría? ¿Y qué, si el Pretor las nombró ateniéndose a la petición de la madre? La falta es ciertamente del Pretor, pero castigamos también el designio de la madre.

§ 35.- Y así, si acaso se excusaron ellos o fueron desaprobados, debe la madre pedir otros sin demora.

§ 36.- Luego, ya si no los hubiere pedido, ya si no hubiere pedido personas idóneas, será castigada, aunque por error del Pretor hubieren sido nombradas personas no idóneas.

§ 37.- Mas puede haber duda si debe pedir personas idóneas por sus bienes, o si también por sus costumbres. Y opino que fácilmente se le perdona, si fueran ricas las que pidió.

§ 38.- Pero también es castigada, si habiéndose excusado los primeros o habiendo sido rechazados no hubiere presentado inmediatamente los nombres de otros.

§ 39.- Luego ¿qué se dirá si no se hubieren excusado todos, o no hubieren sido rechazados todos? Se ha de ver si se le imputará que no haya pedido otro en lugar del que se excusó; y opino que se le ha de imputar.

for not having done so.

§ 40.- Quid si decesserint quidam? Puto, licet verba deficiant, sententiam constitutionis locum habere.

§ 41.- Sed quod diximus "reiectionem" utrum sic accipimus "a praetore non dati" an et si suspecti fuerint remoti vel ob negligentiam vel ignaviam repulsi? Etiam hos quis reiectos recte dicet. Ergo et si latitent? Sed longum est: nam nec hoc ei imputetur, cur suspectos non fecit: alioquin et si latitarent, potuit Edicto desiderare ut eos praetor adesse iuberet et suspectos eos removeret, si deessent.

§ 42.- Quid si non compulit eos miscere se tutelae? Et quum plenum officium a matre desideremus, et haec ei curanda sunt, ne in hereditate ei obstat.

§ 43.- "Confestim" autem sic erit accipiendum "ubi primum potuit", id est praetoris copiam habuit huic rei sedentis, nisi forte infirmitate impedita est vel alia magna causa, quae etiam mandare eam ad petendos tutores impediret: ita tamen, ut nullo modo annale tempus excederet. si enim mortalitate filii praeventa est, nihil matri imputetur.

§ 44.- Tractari belle potest, si pupillo amplum legatum sub conditione sit relictum "si tutores non habuerit" et propterea ei mater non petierit, ne conditione deficeretur, an constitutio cesset. Et puto cessare, si damnum minus sit cumulo legati. Quod et in magistratibus municipalibus tractatur apud Tertullianum: et putat dandum in eos actionem, quantum plus esset in damno quam in legato. Nisi forte

§ 40.- What if one of the guardians should die? I think that, although the law makes no provision on this point, the spirit of the constitution will apply.

§ 41.- When we said "Rejected," must we understand this to refer to those who were not appointed by the Praetor; or to such as have been removed, on account of being suspected; or to those who have been excluded because of negligence or ignorance? It is very properly held that the latter are included among those rejected. Will those who conceal themselves render her liable? This is difficult to decide, for she is not to blame for not having denounced them as suspicious. On the other hand, if they conceal themselves, she can, under the Edict, apply to the Praetor to order them to appear, and if they do not do so to remove them as being liable to suspicion.

§ 42.- What must be done if she does not compel them to administer the guardianship? As we require the mother to discharge her entire duty, she must be careful to do so, lest something may arise to exclude her from the estate.

§ 43.- The term "Without delay" must be understood to mean as soon as possible, that is to say, as soon as she has an opportunity to appear before the Praetor who has jurisdiction of the matter; unless she should be prevented by illness, or for any other good reason, which would hinder her from sending someone to apply for the appointment of guardians, provided that she does not exceed the term of a year in doing so. If, however, she should be prevented by the death of her son, she will not be at all responsible.

§ 44.- The following point can very properly be discussed; namely, where a large legacy is left to a minor under the condition that he shall not have any guardians; and, for this reason his mother does not demand any for him, in order that the condition may not fail to be fulfilled; will the condition be applicable to such a case? I think that it will not, if the loss is less than the amount of the legacy. This

§ 40.- ¿Qué, si hubieren fallecido algunos? Opino, que aunque no lo expresan las palabras, tiene lugar el espíritu de la Constitución.

§ 41.- Pero lo que decimos de los que fueron «rechazados» ¿lo entendemos acaso de los que no fueron nombrados por el Pretor, o también de los que hubieren sido removidos como sospechosos, o repelidos por su negligencia o su desidia? Cualquiera dirá, con razón, que también éstos fueron rechazados. Luego también se dirá lo mismo si se ocultaran; mas esto requiere larga discusión; porque no se le imputará que no los haya acusado como sospechosos, pues de otra suerte, también si se ocultasen pudo pretender por el Edicto que el Pretor mandara que ellos se presentasen, y que los removiese como sospechosos, si faltasen.

§ 42.- ¿Qué se dirá, si no los compelió a inmiscuirse en la tutela? Y puesto que requerimos de la madre pleno cumplimiento, también se ha de cuidar de esto por ella, para que no le obste en la herencia.

§ 43.- La palabra «inmediatamente» se habrá de entender de este modo, tan pronto como haya podido, esto es, que haya podido presentarse al Pretor que conoce de este asunto, a no ser acaso que haya estado impedida por enfermedad o por otra causa grave, que le impidiera hasta mandar a pedir los tutores, pero esto así, con tal que de ningún modo se exceda del término de un año; porque si fue sorprendida por la muerte del hijo, nada se le imputará a la madre.

§ 44.- Se puede muy bien discutir, si, habiéndosele dejado al pupilo un grande legado bajo esta condición: «si no tuviere tutores», y no habiéndolos pedido para él la madre por esto, para que no se faltase a la condición, dejaría de tener aplicación la Constitución. Y opino que deja de tenerla, si el perjuicio fuera menor que el importe del legado; lo que se discute por Tertuliano también respecto a los

quis putet condicionem hanc quasi utilitati publicae obpugnantem remittendam ut alias plerasque: aut verba cavillatus imputaverit matri, cur curatores non petierit. Finge autem plenius condicionem conscriptam: nonne erit matri ignoscendum? Aut hoc imputatur matri, cur non desideravit a principe condicionem remitti? Et puto non esse imputandum.

§ 45.- Ego etiam si mater ei, qui solvendo non erit, non petiit tutorem, puto ignoscendum: consuluit enim ei, ut minus inquietetur quasi indefensus.

§ 46.- Et si forte quis uxorem communis filii matrem heredem scripsit rogavitque remissa etiam satisfactione, ut filio puberi facto restitueret hereditatem, nec mater ei petiit tutores, debet dici cessare constitutionem, quum patris voluntatem secuta sit et nihil habenti filio tutores non petierit. Quod si ei remissa satisfactio non fuerit, contra erit, quoniam vel propter hoc debuit tutores habere. Sed si forte impubes post matris cessationem fuerit adrogatus et impubes obierit, dicendum erit matri adversus adrogatorem non competere ex stipulatu actionem.

§ 47.- Videndum est, matre prohibita ius suum vindicare utrum ceteros admittamus, atque si mater non esset, an ipsam heredem dicimus fieri vel aliud nomen successionis induere, sed denegamus ei actiones? Et invenimus Rescriptum ab Imperatore nostro Antonino Augusto et Divo patre eius

question is treated by Tertullianus with reference to municipal magistrates, and he thinks that an action should be granted against them to the extent that the amount of the loss exceeds the value of the legacy, unless someone may think that this condition is, as it were, opposed to the public welfare; and should be remitted, as many other conditions are under different circumstances; or quibbling with reference to the words employed, he may censure the mother for not applying for the appointment of guardians. Suppose, however, that the condition was more clearly expressed, should the mother be excused? Or should she be held responsible for not having petitioned the Emperor to remit the condition? I think that she ought not to be considered responsible.

§ 45.- I also think that the mother should be excused when she does not apply for a guardian for her insolvent son, since she consults his interest, because, not being defended, he will be subject to less annoyance.

§ 46.- If anyone should appoint his wife, who is the mother of their common son, his heir, and ask that she shall not be obliged to furnish security to transfer the estate to him when he reaches the age of puberty, and that his mother shall not be required to ask that guardians shall be appointed for him; it must be held that the constitution will not apply, as she has carried out the intention of the father, and did not demand guardians for her son, who had no property. If, however, she was not released from giving security, the -contrary rule will apply, since, on this account, he should have guardians. But if a minor under the age of puberty should be arrogated after his mother had failed to apply for the appointment of guardians, and should die, it must be said that she will not be entitled to an action under the stipulation, against the arrogator of her son.

§ 47.- When the mother is forbidden to claim her right under the Decree of the Senate, it should be considered whether we shall admit the other relatives, just as if there was no mother; or whether we may say that she herself can become the heir, or adopt any other means, in order to obtain the

magistrados municipales; y opina, que se ha de dar acción contra ellos, en cuanto importase más el perjuicio que el legado, a no ser acaso que alguno creyere que esta condición ha de ser dispensada, cual otras muchas, como contraria a la utilidad pública; o que sofisticando sobre las palabras le imputare a la madre el no haber pedido los curadores. Pero supón, que la condición fue escrita más plenamente; ¿no se le habrá, acaso, de dispensar a la madre, o se le imputará quizá a la madre, que no haya solicitado del príncipe que se remitiera la condición? Y opino, que no se le ha de imputar.

§ 45.- Yo opino, que aunque la madre no haya pedido tutor para quien no fuere solvente, se le ha de dispensar; porque miró por él, para que se le molestase menos, como indefenso.

§ 46.- Y si acaso alguno instituyó heredera a la mujer, madre de un hijo común, y le rogó, habiéndole dispensado también la fianza, que le restituyese la herencia al hijo luego que fuese púbero, y la madre no pidió para él tutores, se debe decir que deja de tener lugar la Constitución, porque se atuvo a la voluntad del padre, y no pidió tutores para un hijo que nada tenía. Pero lo contrario será, si no se le hubiere dispensado la confianza, porque precisamente por esto debió tener tutores; mas si acaso el impúbero hubiere sido arrogado después de cometida la falta de la madre, y el impúbero hubiere fallecido, se habrá de decir, que no le compete a la madre contra el arrogador acción por lo estipulado.

§ 47.- Se ha de ver, si habiéndosele prohibido a la madre que reivindique su propio derecho, admitiremos acaso a los demás, como si la madre no existiese, o si diremos que ella misma se hace heredera, o adquiere otro título de sucesión. Pero le denegamos las acciones; y hallamos que por rescripto se

Mammiae Maximinae pridie idus apriles Plautiano iterum consule matre remota eos admitti, qui venirent, si mater non fuisset: ergo et agnati ceterique succedent aut, si nemo sit, bona vacabunt.

3.- MODESTINUS; *libro VIII, Regularum*.- Patrem adoptivum matri non obesse plerique probant.

4.- IDEM; *libro IX, Regularum*.- Matris intestatae defunctae hereditatem ad omnes eius liberos pertinere, etiamsi ex diversis matrimoniis nati fuerint, iuris est.

5.- PAULUS; *libro singulari ad Senatusconsultum Tertullianum*.- Aequisimum visum est omnes filios matri praeferri, etiamsi per adoptionem in familiam relictis essent.

§ 1.- Sed et nepos ex adoptivo filio natus ex verbis Senatusconsulti matri obstat.

§ 2.- Si ex filio nepotem avus manumiserit isque patre et avo et matre superstitibus decesserit, potest quaeri, quis potior esse debeat. Nam si mater excluserit avum manumissorem, qui patri antepositur, Edicto Praetoris inducetur pater defuncti, quo admissio desinit Senatusconsulto locus esse et rursus avus vocabitur. Itaque rectius est avo ius suum conservare, qui et contra scriptos heredes bonorum possessionem accipere solet.

succession. We, however, refuse all actions to her under such circumstances, and we learn from a Rescript of our Emperor Antoninus Augustus and his Divine Father, addressed to Mammia Maximina, and dated the day before the Ides of April, during the second term of the Consulate of Plautianus, that if the mother is excluded, the other relatives will be admitted to the succession just as if there was no mother. Therefore, both the agnates and other relatives will succeed; or, if there are none, the estate will be without ownership.

3.- MODESTINUS; *Rules, Book VIII*.- Most authorities are of the opinion that an adoptive father does not exclude the mother.

4.- THE SAME; *Rules, Book IX*.- It is a rule of law that the property of a mother dying intestate belongs to all the children, even if they are the issue of different marriages.

5.- PAULUS; *On the Tertullian Decree of the Senate*.- It is considered perfectly just for all the children of the deceased to be preferred to the mother, even if they should be members of another family by adoption.

§ 1.- A grandson, born to an adopted son, will exclude his mother from the succession, according to the terms of the Decree of the Senate.

§ 2.- If the grandfather manumits his grandson by his son, and the former should die leaving his father, his grandfather, and his mother, it may be asked which of these is entitled to the preference? For if the mother excludes the grandfather, who was the emancipator, and who takes precedence of the father, the father of the deceased will then be admitted to the succession, by the Edict of the Praetor. This being the case, the Decree of the Senate will no longer apply, and the grandfather will again be called to the succession. It will, therefore, be more equitable to preserve the right for the grandfather, who is ordinarily entitled to praetorian possession of an estate even against the appointed heir.

respondió por nuestro Emperador, Antonino Augusto, y por su Divino padre a Mammia Maximina a uno de los Idus de Abril, bajo el segundo consulado de Plauciano, que, excluida la madre, son admitidos los que sucederían, si no hubiese habido la madre; luego también sucederán los agnados y los demás, o, si no hubiera nadie, quedarán vacantes los bienes.

3.- MODESTINO; *Reglas, Libro VIII*.- Los más admiten que el padre adoptivo no le obsta a la madre.

4.- EL MISMO; *Reglas, Libro IX*.- Es de derecho, que la herencia de la madre fallecida intestada pertenece a todos sus hijos, aunque hubieren nacido de diversos matrimonios.

5.- PAULO; *Comentarios al Senadoconsulto Tertuliano, libro único*.- Pareció muy justo que todos los hijos fuesen preferidos a la madre, aunque por adopción hubiesen quedado en la familia.

§ 1.- Pero también el nieto nacido de un hijo adoptivo le obstará a la madre en virtud de las palabras del Senadoconsulto.

§ 2.- Si el abuelo hubiere manumitido a un nieto, habido de su hijo, y éste hubiere fallecido sobreviviéndole su padre, su abuelo, y su madre, se puede preguntar quién deba ser preferente; porque si la madre hubiere excluido al abuelo manumisor que es antepuesto al padre, por el Edicto del Pretor será introducido el padre del difunto, y admitido éste deja de tener lugar el Senadoconsulto, y será llamado de nuevo el abuelo. Y así, es más justo que se le conserve su derecho al abuelo, el cual suele obtener la posesión de los bienes aun contra los herederos constituídos.

6.- IDEM; *libro singulari ad Senatusconsultum Orphitianum*.- Filii mater ex hoc Senatusconsulto, etiamsi in aliena potestate sit, ad hereditatem admittitur.

§ 1.- Filius, qui se nolle adire hereditatem matris dixit, an potest mutata voluntate adire, antequam consanguineus vel adgnatus adierit, videndum propter haec verba "si nemo filiorum volet hereditatem suscipere", quia extensiva sunt. Et quum verba extensiva sint, paenitentia eius usque ad annum admittenda est, quum et ipsa filii bonorum possessio annalis est.

7.- IDEM; *libro singulari ad Senatusconsultum Tertullianum et Orphitianum*.- Si quis intestatus decesserit relicta matre et fratre consanguineo vel sorore quamvis per adrogationem quaesitis, eadem iura in persona matris servantur, quae et naturalibus extantibus liberis.

8.- GAIUS; *libro singulari ad Senatusconsultum Tertullianum*.- In suspenso est ius matris, si filius defuncti emancipatus deliberet de bonorum possessione petenda.

9.- IDEM; *libro singulari ad Senatusconsultum Orphitianum*.- Sacratissimi principis nostri oratione cavetur, ut matris intestatae hereditas ad liberos, tametsi in aliena potestate erunt, pertineat.

10.- POMPONII; *libro II, Senatusconsultorum*.- Si filius familias miles non sit testatus de his, quae in castris adquisierit, an ea ad matrem pertineant, videndum est. Sed non puto: magis enim iudicio militum hoc beneficium concessum est, non ut omnimodo quasi patres familiarum in ea re sint.

6.- THE SAME; *On the Orphitian Decree of the Senate*.- Under the terms of this Decree, the mother of the son is entitled to his estate, even if she is under the control of another.

§ 1.- Let us see whether a son who has stated that he does not wish to accept the estate of his mother, can, by virtue of these words, "If none of them desires to accept the estate," enter upon it after having changed his mind, before a blood-relative or an agnate does so; because these terms have a broader meaning. And, as they have a broad meaning, a year should be granted him in which to change his mind, as he has a year in which to accept praetorian possession of the estate.

7.- THE SAME; *On the Tertullian and Orphitian Decrees of the Senate*.- When anyone dies intestate, leaving a mother, and a brother, or a sister related by blood, although they are such from being arrogated, the same rights will be preserved, so far as the person of the mother is concerned, as in the case where natural children survive.

8.- GAIUS; *On the Tertullian Decree of the Senate*.- The right of the mother will remain in suspense, if the emancipated son of the deceased deliberates as to whether he will demand praetorian possession of the estate, or not.

9.- THE SAME; *On the Orphitian Decree of the Senate*.- It is provided by a Decree of our Most Holy Emperor that the estate of a mother, dying intestate, belongs to her children, even though they may be under the control of another.

10.- POMPONII; *Decrees of the Senate, Book II*.- If a son under paternal control, who is a soldier, does not make a will disposing of the property which he acquired while in the service, let us see whether it will belong to his mother. I do not think that it will, for the privilege of disposing of property of this description is, in fact, granted by military law; and, under such circumstances, sons are, by no means, regarded as the heads of households, so far as such property is concerned.

6.- EL MISMO; *Comentarios al Senadoconsulto Orficiano, libro único*.- Por virtud de este Senadoconsulto es admitida la madre a la herencia del hijo, aunque esté bajo ajena potestad.

§ 1.- Se ha de ver si el hijo, que dijo que no quería adir la herencia de su madre, puede, habiendo cambiado de voluntad, adirla antes que la haya adido un consanguíneo o un agnado, en virtud de estas palabras: «si ninguno de los hijos quisiera aceptar la herencia», porque son extensivas; y puesto que son extensivas las palabras, se ha de admitir su arrepentimiento hasta dentro del año, porque también es de un año la misma posesión de los bienes del hijo.

7.- EL MISMO; *Comentarios al Senadoconsulto Tertuliano y al Orficiano, libro único*.- Si alguno hubiere fallecido intestado dejando madre, y hermano consanguíneo, o hermana, aunque tenidos por arrogación, se observan en cuanto a las personas de la madre los mismos derechos que cuando quedan hijos naturales.

8.- GAYO; *Comentarios al Senadoconsulto Tertuliano, libro único*.- El derecho de la madre está en suspenso, si el hijo del difunto, emancipado, deliberase para pedir la posesión de los bienes.

9.- EL MISMO; *Comentarios al Senadoconsulto Orficiano, libro único*.- Se dispone en una Oración de nuestro sacratísimo príncipe, que la herencia de la madre intestada les pertenezca a sus hijos, aunque estuvieren bajo ajena potestad.

10.- POMPONIO; *Senadoconsultos, libro II*.- Si el hijo de familia, militar, no hubiera testado de lo que hubiere adquirido en el campamento, se ha de ver si esto le pertenecerá a la madre. Pero no lo creo; porque este beneficio fue concedido más bien a las últimas voluntades de los militares, no para que de todos modos sean en esto como padres de familia.

§ 1.- Quando in pendent est, an quaedam personae possint obstare matri, et casus tulerit, ut non inducerentur, matris ius integrum erit, quod medio tempore appenderit: veluti si filio intestato mortuo postumus ei filius potuerit nasci nec natus sit aut mortuus editus, vel quod etiam filius qui in hostium potestate erat postliminio non sit reversus.

§ 1.- While the right of a mother remains in suspense, for the purpose of determining whether or not certain persons can exclude her from the succession, and the result is that they cannot do so, the right to which she was entitled during the intermediate time will be unimpaired; for instance, if a son should die intestate, and a posthumous child could have been born to him, but either was not born, or died at birth; or where a son, who was in the hands of the enemy, did not return, so as to take advantage of the law of postliminium.

§ 1.- Cuando esté en suspenso si pueden obstarle a la madre algunas personas, y el caso hiciere que no fueren puestas en posesión, quedará íntegro el derecho de la madre, que hubiere quedado pendiente en el tiempo intermedio, por ejemplo, si al hijo que hubiere fallecido intestado le pudiere nacer un hijo póstumo, y no hubiera nacido, o nació muerto, y porque también el hijo, que estuviera en poder de los enemigos, no hubiese vuelto por el postliminio.

LIBER TRIGESIMUS NONUS

TIT. I

DE OPERIS NOVI NUNTIATIONE

1.- ULPIANUS; *libro LII, ad Edictum*.- Hoc edicto promittitur, ut, sive iure sive iniuria opus fieret, per nuntiationem inhiaberetur, deinde remitteretur prohibitio hactenus, quatenus prohibendi ius is qui nuntiasset non haberet.

§ 1.- Hoc autem edictum remediumque operis novi nuntiationis adversus futura opera inductum est, non adversus praeterita, hoc est adversus ea quae nondum facta sunt, ne fiant: nam si quid operis fuerit factum, quod fieri non debuit, cessat edictum de operis novi nuntiatione et erit transeundum ad interdictum "quod vi aut clam factum erit ut restituatur", et "quod in loco sacro religioso" et "quod in flumine publico ripave publica factum erit": nam his interdictis restituetur, si quid illicite factum est.

§ 2.- Nuntiatio ex hoc edicto non habet necessariam Praetoris aditionem: potest enim nuntiare quis et si eum non adierit.

§ 3.- Item nuntiationem et nostro et alieno nomine facere possumus.

§ 4.- Item nuntiatio omnibus diebus fieri potest.

§ 5.- Et adversus absentes etiam et invitos et ignorantes operis novi nuntiatio procedit.

BOOK XXXIX.

TITLE I

CONCERNING THE NOTICE OF A
NEW STRUCTURE

1.- ULPIANUS; *On the Edict, Book LII*.- It is promised by this Section of the Edict that where a work is either rightfully or wrongfully undertaken, it can be prohibited by a notice; and the prohibition can be removed where the person who forbade the continuance of the work had no right to do so.

§ 1.- Moreover, this Edict, and the remedy of the notice granted on account of a new structure, applies to any that may hereafter be undertaken but does not apply to such as already have been completed; that is to say it can prevent those which have not yet been begun. For where a structure which the person had no right to erect has been finished, the Edict relating to notice to stop the same has no application, and recourse for the purpose of obtaining restitution must be had to the interdict *quod vi et clam*; and when anything has been built in a sacred or religious place, or in a public river, or on the bank of the same, restitution can be obtained under this Edict, if it was done contrary to law.

§ 2.- Notice under this Edict does not require previous application to the Praetor, for anyone can serve such a notice without appearing before him.

§ 3.- We can also serve a notice of this kind in our own name, as well as in that of another.

§ 4.- Such a notice can be served on any day.

§ 5.- This notice operates also against persons who are absent; against such as are unwilling to accept it; and against those who are not aware that a new work has been undertaken.

LIBRO TRIGÉSIMO NOVENO

TÍTULO I

DE LA DENUNCIA DE OBRA NUEVA

1.- ULPIANO; *Comentarios al Edicto, libro LII*.- Se promete por este Edicto, que se impedirá mediante denuncia una obra, ya se haga con derecho, ya sin él, y que después se levantará la prohibición en tanto cuanto no tenga derecho para prohibirla el que la hubiese denunciado.

§ 1.- Mas se estableció este Edicto y este remedio de la denuncia de obra nueva contra las obras futuras, no contra las hechas, esto es, contra las que aun no se hicieron, para que no se hagan; porque si se hubiere hecho alguna obra, que no se debió hacer, deja de tener lugar el Edicto de denuncia de obra nueva, y se habrá de recurrir al interdicto de lo que se hubiere hecho violenta o clandestinamente, para que se vuelva al anterior estado, o al de lo que se hubiere hecho en lugar sagrado o religioso, o al de lo que en río público, en ribera pública; porque con estos interdictos se repondrá en su estado lo que se haya hecho ilícitamente.

§ 2.- La denuncia que se hace por este Edicto no implica como condición necesaria que se recurra al Pretor; porque cualquiera puede hacer la denuncia aunque no hubiere acudido a él.

§ 3.- También podemos hacer la denuncia tanto en nuestro nombre, como en el de otro.

§ 4.- Asimismo, en todos los días se puede hacer la denuncia.

§ 5.- Y también es procedente la denuncia de obra nueva contra ausentes, contra los que no la quieran, y contra los que lo ignoren.

adversarium facimus.

§ 7.- Sed si is, cui opus novum nuntiatum est, ante remissionem aedificaverit, deinde coeperit agere ius sibi esse ita aedificatum habere, Praetor actionem ei negare debet et interdictum in eum de opere restituendo reddere.

§ 8.- Potest autem quis nuntiare etiam ignorans, quid opus fieret.

§ 9.- Et post operis novi nuntiationem committunt se litigatores praetoriae iurisdictioni.

§ 10.- Inde quaeritur apud Celsum libro duodecimo Digestorum, si post opus novum nuntiatum conveniat tibi cum adversario, ut opus faceres, an danda sit conventionis exceptio? Et ait Celsus dandam, nec esse periculum, ne pactio privatorum iussui Praetoris anteposita videatur: Quid enim aliud agebat Praetor quam hoc, ut controversias eorum dirimeret? A quibus si sponte recesserunt, debebit id ratum habere.

§ 11.- Opus novum facere videtur, qui aut aedificando aut detrahendo aliquid pristinam faciem operis mutat.

§ 12.- Hoc autem edictum non omnia opera complectitur, sed ea sola, quae solo coniuncta sunt, quorum aedificatio vel demolitio videtur opus novum continere. Idcirco placuit, si quis messem faciat, arborem succidat, vineam putet, quamquam opus faciat, tamen ad hoc edictum non pertinere, quia ad ea opera, quae in solo fiunt, pertinet hoc edictum.

§ 13.- Si quis aedificium vetus fulciat, an opus

reference to a new work, the adversary must be in possession.

§ 7.- Where he upon whom the notice of a new work has been served, began to build it before permission was obtained, and he afterwards attempts to prove that he had a right to do so, the Praetor should refuse to grant him any action, and should allow an interdict against him, to compel him to restore the property to its former condition.

§ 8.- Again, anyone can serve such a notice, even though he may be ignorant of what kind of a work is to be constructed.

§ 9.- After notice to suspend operations, the parties are subject to the jurisdiction of the Praetor.

§ 10.- Hence it is asked by Celsus, in the Twelfth Book of the Digest, whether an exception, based upon an agreement, should be granted, if you have made a compromise with your adversary, after notice has been served to prevent the erection of the building. And Celsus says that it should be granted, for there is no reason why any contract entered into by private individuals should take precedence of an order of the Praetor; for what else is the duty of the Praetor but to do this, and dispose of such controversies? Where the parties voluntarily settle their dispute, he should ratify their action.

§ 11.- He is considered to undertake a new work, who either by building or by removing anything, changes the original form of the property.

§ 12.- This Edict, however, does not refer to all kinds of building operations, but only to such as are attached to the soil and whose construction or demolition is considered to include some new work. Hence it has been held that where anyone gathers a harvest, cuts down a tree, or prunes a vineyard, although he does, work, it will not come within the terms of the Edict, because it only has reference to such labor as interferes with the soil.

§ 13.- If anyone props up an old building, let us see

poseedor al adversario.

§ 7.- Pero si aquel a quien se le denunció una obra nueva hubiere edificado antes de la dispensa, y después hubiere comenzado a sostener que tenía derecho para tenerlo edificado así, el Pretor debe denegarle la acción, y despachar contra él interdicto para que vuelva a su estado la obra.

§ 8.- Mas puede cualquiera denunciar aunque ignore qué obra se está haciendo.

§ 9.- Y después de la denuncia de una obra nueva se someten los litigantes a la jurisdicción del Pretor.

§ 10.- Por lo cual se pregunta Celso en el libro duodécimo del Digesto, si, después de denunciada la obra nueva te conviniste con el adversario para que hicieras la obra, se habrá de dar la excepción de la convención. Y dice Celso, que se ha de dar, y que no hay peligro de que parezca que se antepone un pacto de particulares al mandato del Pretor. Porque ¿qué otra cosa hacía el Pretor que dirimir las controversias de ellos, lo que debía tenerlo por ratificado, si de ellas se apartaron espontáneamente?

§ 11.- Se considera que hace una obra nueva el que o edificando, o demoliendo algo, muda el primitivo aspecto de la obra.

§ 12.- Mas este Edicto no comprende todas las obras, sino aquellas solas que están unidas al suelo, cuya edificación, o demolición parece que comprende una obra nueva. Y por lo tanto se determinó, que si alguno hiciera siega, o cortara un árbol o podara una viña, aunque hace una obra, no se comprende, sin embargo, en este Edicto, porque este Edicto se refiere a las obras que se hacen en el suelo.

§ 13.- Si alguno apuntala un edificio antiguo

novum nuntiare ei possumus, videamus. Et magis est, ne possimus: hic enim non opus novum facit, sed veteri sustinendo remedium adhibet.

§ 14.- Sive autem intra oppida sive extra oppida in villis vel agris opus novum fiat, nuntiatio ex hoc edicto locum habet, sive in privato sive in publico opus fiat.

§ 15.- Nunc videamus, quibus ex causis fiat nuntiatio et quae personae nuntient quibusque nuntietur et in quibus locis fiat nuntiatio et quis effectus sit nuntiationis.

§ 16.- Nuntiatio fit aut iuris nostri conservandi causa aut damni depellendi aut publici iuris tuendi gratia.

§ 17.- Nuntiamus autem, quia ius aliquid prohibendi habemus: vel ut damni infecti caveatur nobis ab eo, qui forte in publico vel in privato quid molitur: aut si quid contra leges edictave principum, quae ad modum aedificiorum facta sunt, fiet, vel in sacro vel in loco religioso, vel in publico ripave fluminis, quibus ex causis et interdicta proponuntur.

§ 18.- Quod si quis in mare vel in litore aedificet, licet in suo non aedificet, iure tamen gentium suum facit: si quis igitur velit ibi aedificantem prohibere, nullo iure prohibet, neque opus novum nuntiare nisi ex una causa potest, si forte damni infecti velit sibi caveri.

§ 19.- Iuris nostri conservandi aut damni depellendi causa opus novum nuntiare potest is ad quem res pertinet.

whether we can serve notice upon him to desist. The better opinion is that he cannot do so; for he is not erecting a new structure, but is merely providing a remedy by supporting an old one.

§ 14.- The notice served under this Edict applies to any new structures erected within or without the walls of towns, or in the country, whether the work is performed on private or on public lands.

§ 15.- Now let us see for what reasons such a notice may be served, who can serve it, upon whom it may be served, in what places this may be done, and what is the effect of the notice.

§ 16.- The notice is served either for the purpose of protecting our rights to avert threatened injury, or to maintain the public welfare.

§ 17.- Moreover, we serve this notice for the reason that we have a right to prevent the work either in order to protect ourselves from impending danger through the act of someone who is about to erect a structure in a public or private place, or where something has been done contrary to the laws and the Edicts of the Emperors, promulgated with reference to the manner of constructing buildings, whether this be done in a sacred, religious, or a public place, or on the bank of a stream; and in cases of this kind interdicts are also granted.

§ 18.- But if anyone constructs a building in the sea or on the shore of the same, although he does not build upon his own land, he renders it his by the Law of Nations. Therefore, if anyone desires to prohibit him from constructing it in such a place, he will have no right to do so, nor can he serve notice upon him not to erect a new structure, unless he is in a position to demand that security against threatened injury be furnished him.

§ 19.- The person to whom the property belongs has the right to serve the notice to suspend any undertaking, for the purpose of preserving his rights, or to avert threatened injury.

veamos si podemos denunciarle la obra nueva. y es mas cierto, que no podemos; porque éste no hace obra nueva, sino que aplica un remedio para sostener la antigua.

§ 14.- Mas ya si la obra nueva se hace dentro de las ciudades, o fuera de las ciudades en granjas o en campos, tiene lugar la denuncia por virtud de este edicto, ora si la obra se hiciera en lugar privado, ora si en otro público.

§ 15.- Veamos ahora por qué causas se hace la denuncia, qué personas denuncian, a quiénes se hace la denuncia, en qué lugares se hace la denuncia, y cual sea el efecto de la denuncia.

§ 16.- La denuncia se hace, o para conservar un derecho nuestro, o para alejar un perjuicio, o para defender un derecho público.

§ 17.- Pero denunciamos, porque tenemos algún derecho para prohibir, o para que por el daño que amenaza se nos dé caución por el que acaso en un lugar público o en otro privado emprende alguna obra, o si se hiciera alguna cosa contra las leyes o los edictos de los príncipes, que se dieron respecto a la forma de los edificios, o en lugar sagrado, o religioso, o público, o en la ribera de un río, por cuyas causas se dan también los interdictos.

§ 18.- Pero si alguno edificara en el mar o en la orilla, aunque no edifique en lo suyo, lo hace, sin embargo, suyo por el derecho de gentes. Así, pues, si alguno quisiera prohibirle que edifique allí, no se lo prohíbe con derecho alguno; y no puede denunciar la obra nueva sino por una sola causa, si acaso quisiera que se le diese caución por daño que le amenace.

§ 19.- Puede denunciar una obra nueva para conservar nuestro derecho, o para alejar un peligro aquel a quien le pertenece la cosa.

§ 20.- Usufructuarius autem opus novum nuntiare suo nomine non potest, sed procuratorio nomine nuntiare poterit, aut vindicare usum fructum ab eo qui opus novum faciat: quae vindicatio praestabit ei, quod eius interfuit opus novum factum non esse.

2.- IULIANUS; *libro XLIX, Digestorum*.- Si autem domino praedii nuntiaverit, inutilis erit nuntiatio: neque enim sicut adversus vicinum, ita adversus dominum agere potest ius ei non esse invito se altius aedificare: sed si hoc facto usus fructus deterior fiet, petere usum fructum debet.

3.- ULPIANUS; *libro LII, ad Edictum*.- In provinciali etiam praedio si quid fiat, operis novi nuntiatio locum habebit.

§ 1.- Si in loco communi quid fiat, nuntiatio locum habebit adversus vicinum. Plane si unus nostrum in communi loco faciat, non possum ego socius opus novum ei nuntiare, sed eum prohibebo communi dividundo iudicio vel per praetorem.

§ 2.- Quod si socius meus in communi insula opus novum faciat et ego propriam habeam, cui nocetur, an opus novum nuntiare ei possim? et putat labeo non posse nuntiare, quia possum eum alia ratione prohibere aedificare, hoc est vel per praetorem vel per arbitrum communi dividundo: quae sententia vera est.

§ 3.- Si ego superficiarius sim et opus novum fiat a vicino, an possim nuntiare? movet, quod quasi inquilinus sum: sed praetor mihi utilem in rem actionem dat, et ideo et servitutium causa actio mihi dabitur et operis novi nuntiatio debet mihi concedi.

§ 20.- An usufructuary, however, cannot serve such a notice in his own name, but he can do so as the agent of the owner; or he can claim his usufruct from the person who constructs the new work, and this claim will obtain for him an amount equal to his interest in not having it constructed.

2.- JULIANUS; *Digest, Book XLIX*.- If, however, the usufructuary should serve the notice upon the owner of the land himself, the service will be void, for he cannot bring an action against the owner, as he can against the neighbor, alleging that he has not built his house any higher against the usufructuary's consent. But if the usufruct become diminished in value through the construction of the new building, he can claim his usufruct.

3.- ULPIANUS; *On the Edict, Book LII*.- Where anything is constructed on land in a province a notice to suspend operations can be served.

§ 1.- Where anything of this kind is done on land held in common, a notice can be served against a neighbor. It is clear that if one of us erects a new structure upon ground held in common, I cannot, as a joint-owner, notify the other party not to proceed with it; but I can forbid him by an action for partition of property held in common, or I can do so by applying to the Praetor.

§ 2.- If a joint-owner with myself makes an addition to a house owned by us in common, and I have an adjoining house of my own, which will be injured by his doing so, can I serve notice upon him to stop the work? Labeo thinks that I cannot do so, because I can forbid him to build by other means, that is to say by applying to the Praetor, or by bringing an action for partition of property owned in common. This opinion is correct.

§ 3.- If I have only a right to the surface of the land, and a new building is erected by a neighbor, can I serve notice upon him to desist? In this case, there is a difficulty; because I am, as it were, only a tenant. The Praetor, however, will grant me an action in rem, and therefore I would also be entitled to an action on the

§ 20.- Mas el usufructuario no puede denunciar en su propio nombre una obra nueva, pero podrá denunciarla a título de procurador, o reivindicar el usufructo, del que hace la obra nueva; cuya reivindicación le dará lo que le importó que no se hubiese hecho la nueva obra.

2.- JULIANO; *Digesto, libro XLIX*.- Mas si hubiere hecho la denuncia al dueño del predio, será inútil la denuncia; porque no puede ejercitar acción contra el dueño a la manera que contra el vecino, porque no tenga derecho para edificar más alto contra su voluntad; pero si habiendo hecho esto se hubiere perjudicado el usufructo, deberá pedir el usufructo.

3.- ULPIANO; *Comentarios al Edicto, libro LII*.- También si se hiciera algo en un predio provincial tendrá lugar la denuncia de obra nueva.

§ 1.- Si se hiciera algo en un lugar común, la denuncia tendrá lugar contra el vecino. Pero si uno de los consocios hiciera la obra en un lugar común, yo como socio no puedo denunciarle la obra nueva, pero se la prohibiré con la acción de división de cosa común, o por medio del Pretor.

§ 2.- Mas si un socio mío hiciera una obra nueva en una casa común, y yo tuviera otra propia, a la cual se perjudicara, ¿podré denunciarle la obra nueva? Y opina Labeón, que no puedo denunciársela, porque puedo prohibirle de otra manera que edifique, esto es, o por medio del Pretor, o por medio del arbitro de división de cosa común; cuya opinión es verdadera.

§ 3.- Si yo fuera superficiario, y por el vecino se hiciera una obra nueva, ¿podría yo denunciarla? Se duda, porque yo soy como inquilino. Pero el Pretor me da acción útil contra la cosa, y por lo tanto se me dará acción también por causa de las servidumbres, y se me debe conceder la denuncia de obra nueva.

ground of a servitude; hence the right to serve the notice to suspend operations should be given me.

§ 4.- Si in publico aliquid fiat, omnes cives opus novum nuntiari possunt:

4.- PAULUS; *libro XLVIII, ad Edictum*.- Nam rei publicae interest quam plurimos ad defendendam suam causam admittere.

5.- ULPIANUS; *libro LII, ad Edictum*.- De pupillo quaesitum est: et Iulianus libro duodecimo Digestorum scripsit pupillo non esse operis novi nuntiationis executionem dandam, nisi ad ipsius privatum commodum res pertineat, veluti si luminibus eius officiat aut prospectui obsit. Non aliter autem pupilli rata habebitur nuntiatio quam intercedente tutore auctore.

§ 1.- Servo autem opus novum nuntiari potest, ipse vero nuntiari non potest neque nuntiatio ullum effectum habet.

§ 2.- Nuntiationem autem in re praesenti faciendam meminisse oportebit, id est eo loci, ubi opus fiat, sive quis aedificet sive inchoet aedificare.

§ 3.- Nuntiari autem non utique domino oportet: sufficit enim in re praesenti nuntiari ei, qui in re praesenti fuerit, usque adeo, ut etiam fabris vel opificibus, qui eo loci operantur, opus novum nuntiari possit. Et generaliter ei nuntiari opus novum potest, qui in re praesenti fuit domini operisve nomine, neque refert, quis sit iste vel cuius condicionis qui in re praesenti fuit: nam et si servo nuntietur vel mulieri vel puero vel puellae, tenet nuntiatio: sufficit enim in re praesenti operis novi nuntiationem factam sic, ut domino possit renuntiari.

§ 4.- Where a new work is begun in a public place, any citizen has the right to serve notice to suspend it.

4.- PAULUS; *On the Edict, Book XLVIII*.- For it is to the interest of the State that the greatest number of persons possible should be permitted to protect its property.

5.- ULPIANUS; *On the Edict, Book LII*.- The question was raised with reference to a ward. Julianus, in the Twelfth Book of the Digest, says that permission to serve notice to suspend the erection of a new work should not be granted to a ward, unless it interferes with his own private convenience; as, for instance, where it shuts off his light, or obstructs his view. Moreover, a notice served by a ward will not be valid unless this is done by the authority of his guardian.

§ 1.- Notice to suspend operations can also be served upon a slave, but he himself cannot serve such a notice, nor, if served by him, will it have any effect.

§ 2.- Again, it must be remembered that the service of a notice of this kind must be made on the property itself; that is to say, in the very place where the work is being done, whether anyone is already building, or has made preparations to build there.

§ 3.- It is not necessary that notice be served upon the owner himself, as it will be sufficient for it to be served on the premises and upon anyone who happens to be present, and this can even be done upon the workmen, or artisans who are performing the labor. And, generally speaking, notice to suspend operations can be served upon all those who are present in the name of the master, or upon the workmen themselves. Nor does it make any difference who he is, or what may be the rank of the person present at the time, for if the notice is served upon a slave, upon a woman, or a boy or a girl, it will be valid; as it is sufficient that service be made of the notice upon the premises in such a way that the owner

§ 4.- Si se hiciera alguna en un lugar público, todos los ciudadanos pueden denunciar la obra nueva.

4.- PAULO; *Comentarios al Edicto, libro XLVIII*.- Porque le importa a la república admitir a muchísimos para defender su causa.

5.- ULPIANO; *Comentarios al Edicto, libro LII*.- Se preguntó respecto al pupilo; y escribió Juliano en el libro duodécimo del Digesto, que no se le debía dar al pupilo la ejecución de la denuncia de obra nueva, a no ser que la cosa perteneciera al particular interés del mismo, por ejemplo, si se perjudicase a sus luces, o se le impidiese la vista; pero no se considerará válida la denuncia del pupilo de otra suerte, sino interviniendo la autoridad del tutor.

§ 1.- Pero a un esclavo se le puede denunciar la obra nueva; mas él no puede denunciarla, ni la denuncia tiene efecto alguno.

§ 2.- Mas convendrá recordar que la denuncia se ha de hacer en presencia de la cosa, esto es, en el lugar en que se hace la obra, ya sea que uno edifique, ya que comience a edificar.

§ 3.- Mas no es necesario ciertamente que la denuncia se haga al dueño; porque basta que en presencia de la cosa se haga la denuncia al que estuviere en dicha cosa, de tal manera que se puede denunciar la obra nueva también a los operarios, o a los artífices, que en aquel lugar trabajan. Y en general, se le puede denunciar la obra nueva al que está en la misma cosa a título de dueño o de operario; y no importa quién sea éste, o de qué condición el que estaba en la cosa; porque será válida la denuncia aun si se hiciera a un esclavo, o a una mujer, o a un muchacho, o a una muchacha; porque basta que la denuncia de obra nueva haya sido hecha en presencia de la cosa, de modo que pueda ser puesta en cono-

§ 4.- Si quis forte in foro domino opus novum nuntiat, hanc nuntiationem nullius esse momenti exploratissimum est: in re enim praesenti et paene dixerim ipso opere, hoc est in re ipsa, nuntiatio facienda est: quod idcirco receptum est, ut confestim per nuntiationem ab opere discedatur. Ceterum si alibi fiat nuntiatio, illud incommodi sequitur, quod, dum venit ad opus si quid fuerit operis per ignorantiam factum, evenit, ut contra Edictum Praetoris sit factum.

§ 5.- Si plurium res sit, in qua opus novum fiat et uni nuntietur, recte facta nuntiatio est omnibusque dominis videtur denuntiatio: sed si unus aedificaverit post operis novi nuntiationem, alii, qui non aedificaverint, non tenebuntur: neque enim debet nocere factum alterius ei qui nihil fecit.

§ 6.- Si plurium dominorum rei opus noceat, utrum sufficiet unus ex sociis nuntiatio an vero omnes nuntiare debeant? Et est verius unus nuntiationem omnibus non sufficere, sed esse singulis nuntiare necesse, quia et fieri potest, ut nuntiatorum alter habeat, alter non habeat ius prohibendi.

§ 7.- Si quis ipsi Praetori velit opus novum nuntiare, debet, ut interim testetur non posse se nuntiare: et si nuntiavit postea, et quod retro aedificatum erit destruendum erit, quasi repetito die nuntiatione facta.

§ 8.- Sed et si in aedes nostras quis immittit aut in loco nostro aedificet, aequum est nos operis novi

can be informed of it.

§ 4.- If anyone should serve notice upon the owner of property in a public place, it is perfectly clear that such a notice will be of no force or effect, for it must be served on the land, and I should say almost in the building itself; and this has been decided in order that by means of a notice the work may immediately be suspended. If, however, the notice is served elsewhere, the result will be that the same inconvenience would result as if any structure had been erected through ignorance during the time it took to reach the place, where this was done contrary to the Edict of the Praetor.

§ 5.- Where the property on which a new building is in course of construction belongs to several persons, and notice is served upon one of them, the service is properly made, and it is held that all the owners have been notified. If, however, one of them should continue to build after notice to stop has been served, those who did not continue will not be liable, for the act of another should not prejudice anyone who did nothing.

§ 6.- If the new structure should injure property belonging to several owners, will a notice served by one of the joint-owners be sufficient, or must they all serve it? The better opinion is that a notice by one of them is not sufficient for all, but each of them must serve the notice individually, because it might happen that one of them had the right to serve the notice to prohibit the construction of the work, and that the others did not have such a right.

§ 7.- Where anyone desires to serve notice upon the Praetor himself with reference to the erection of a new building, he should, in the meantime, show that he cannot serve the notice upon the other party; and if he should do so afterwards, whatever has been built after he notified the Praetor must be destroyed, just as if two notices had been served at different times.

§ 8.- But if anyone should insert beams into my house, or build upon my land, it is only just that I

cimiento del dueño.

§ 4.- Si acaso alguno le denuncia al dueño estando en el foro la obra nueva, es muy sabido que esta denuncia es de ningún valor; porque la denuncia se ha de hacer en presencia de la cosa, casi diría que en la misma obra, esto es, en la misma cosa; lo que se estableció para esto, para que inmediatamente se abstenga uno de la obra por medio de la denuncia. Mas si la denuncia se hiciera en otra parte, se sigue el inconveniente, que acontece que, si por ignorancia se hubiere hecho algo de la obra mientras se llega a ésta, se habría hecho contra el Edicto del Pretor.

§ 5.- Si fuera de muchos la cosa en la que se hace la obra nueva, y se denunciara a uno solo, la denuncia fue hecha debidamente, y se considera que se les denunció a todos los dueños. Pero si solo uno edificare después de la denuncia de obra nueva, no estarán obligados los otros, que no hubieren edificado; porque el hecho de uno no debe perjudicar al que nada hizo.

§ 6.- Si la obra perjudicara a cosa de muchos dueños, ¿bastará acaso la denuncia de uno solo de los condueños, o deberán hacer todos la denuncia y es más verdadero, que la denuncia de uno solo no les basta a todos, sino que cada uno tiene necesidad de hacer la denuncia, porque también puede suceder que uno de los denunciante tenga, y otro no tenga, derecho para impedir la obra.

§ 7.- Si alguno quisiera denunciarle una obra nueva al mismo Pretor, debe atestiguar que mientras lo es no puede él hacer la denuncia; y si la denunció después, se habrá de destruir lo que antes se hubiere edificado, como si se hubiera hecho la denuncia en el día antes mencionado.

§ 8.- Pero también si alguno introdujera algo en edificio nuestro, o edificara en lugar nuestro, es

§ 9.- Et belle Sextus Pedius definiit triplicem esse causam operis novi nuntiationis, aut naturalem aut publicam aut impositiciam: naturalem, quum in nostras aedes quid immittitur aut aedificatur in nostro, publicam causam, quotiens leges aut Senatusconsulta Constitutionesque Principum per operis novi nuntiationem tuemur, impositiciam, quum quis postea, quam ius suum deminuit, alterius auxit, hoc est postea, quam servitutem aedibus suis imposuit, contra servitutem fecit.

§ 10.- Meminisse autem oportebit, quotiens quis in nostro aedificare vel in nostrum immittere vel proicere vult, melius esse eum per praetorem vel per manum, id est lapilli ictum prohibere quam operis novi nuntiatione: ceterum operis novi nuntiatione possessorem eum faciemus, cui nuntiaverimus. At si in suo quid faciat, quod nobis noceat, tunc operis novi denuntiatio erit necessaria. Et si forte in nostro aliquid facere quis perseverat, aequissimum erit interdicto adversus eum quod vi aut clam aut uti possidetis uti.

§ 11.- Si quis rivos vel cloacas velit reficere vel purgare, operis novi nuntiatio merito prohibetur, quum publicae salutis et securitatis intersit et cloacas et rivos purgari.

§ 12.- Praeterea generaliter Praetor cetera quoque

erection of the building.

§ 9.- Sextus Pedius very properly remarks that there are three reasons which give rise to a notice to prevent the erection of a new structure, namely, a natural reason, a public reason, or a reason growing out of the imposition of a servitude. A natural reason exists where someone has inserted beams into my building, or erected a structure upon my land. A public reason exists where, by the service of notice to suspend a new work, we protect the execution of the laws, the Decrees of the Senate or the Imperial Constitutions. A reason growing out of the imposition of a servitude exists where anyone, after having diminished his own right, increases that of another; that is to say, after having imposed a servitude upon his own land, he performs some act against the right of him who was entitled to the servitude.

§ 10.- Moreover, it must be remembered that when anyone wishes to erect a building upon our land, to insert beams into our houses, or to project a structure over our property, it is better that he should be prevented from doing so, either by the Praetor or by one's own hand, that is to say, by casting a stone, than by serving notice to desist from the construction of a new work; for, by serving such a notice, we constitute the person upon whom it is served the possessor of the property.' If, however, he should do something upon his own land which may injure us, then the service of a notice to suspend operations will be necessary. And if anyone should continue to build upon our premises, it will be perfectly just for us to make use of the interdict Quod vi aut clam, or Uti possidetis against him.

§ 11.- Where anyone desires to repair or clean out any watercourses or sewers belonging to him, a notice to suspend operations cannot be served upon him; and this is reasonable, as it is to the interest of the public health and security, that sewers and streams should be cleaned out.

§ 12.- Moreover, generally speaking, the Praetor also excepts other works, when delay in their

derecho con la denuncia de obra nueva.

§ 9.- Y muy bien definió Sexto Pedio, que eran tres las causas de la denuncia de obra nueva, o natural, o pública, o impuesta; natural, cuando en un edificio nuestro se introduce alguna cosa, o cuando se edifica en lo nuestro; causa pública, cuando con la denuncia de obra nueva defendemos las leyes o los Senatusconsultos y las Constituciones de los Príncipes; impuesta, cuando alguno, después que disminuyó su derecho, aumentó el de otro, esto es, cuando, después que impuso una servidumbre a un edificio suyo, obró contra la servidumbre.

§ 10.- Mas convendrá tener presente que siempre que alguno quiere edificar en lo nuestro, o introducir en ello alguna cosa, o hacer que sobre ello proyecte lo que edifica, es mejor prohibírselo por medio del Pretor, o con la mano, esto es, arrojando una piedra, que no con la denuncia de obra nueva. Pero con la denuncia de obra nueva haremos poseedor a aquel a quien le denunciemos. Mas si hiciera en lo suyo alguna cosa, que nos perjudique, entonces será necesaria la denuncia de obra nueva. y si acaso persiste alguno en hacer algo en lo nuestro, será muy justo utilizar contra él el interdicto de lo que por violencia o clandestinamente, o el de como poseéis.

§ 11.- Si alguno quisiera reparar o limpiar canales o cloacas, con razón se prohibirá la denuncia de obra nueva, porque le importa a la salud y a la seguridad públicas que se limpien las cloacas y los canales.

§ 12.- Además de esto, el Pretor exceptuó en ge-

allatura est: nam in his quoque contemnendam putavit operis novi nuntiationem. Quis enim dubitat multo melius esse omitti operis novi nuntiationem, quam impediri operis necessarii urgentem extructionem? Totiens autem haec pars locum habet, quotiens dilatio periculum allatura est.

§ 13.- Proinde si quis, quum opus hoc mora periculum allaturum esset, nuntiaverit opus novum vel si in cloacis vel ripa reficiendis aliquid fieret, dicemus apud iudicem quaeri debere, an talia opera fuerint, ut contemni nuntiatio deberet: nam si apparuerit vel in cloaca rivo eove, cuius mora periculum allatura esset, dicendum est non esse verendum, ne haec nuntiatio noceret.

§ 14.- Qui opus novum nuntiat, iurare debet non calumniae causa opus novum nuntiare. Hoc iusiurandum auctore praetore defertur: idcirco non exigitur, ut iuret is ante, qui iusiurandum exigit.

§ 15.- Qui nuntiat, necesse habet demonstrare, in quo loco opus novum nuntiet, scituro eo cui nuntiatum est, ubi possit aedificare, ubi interim abstinendum est. Totiens autem demonstratio facienda est, quotiens in partem fit nuntiatio: ceterum si in totum opus fiat, non est necesse demonstrare, sed hoc ipsum dicere.

§ 16.- Si in pluribus locis opus fiat, utrum una nuntiatio sufficiat an vero plures sint necessariae? Et ait Iulianus libro quadragensimo nono digestorum, quia in re praesenti fit nuntiatio, plures nuntiationes esse necessarias et consequenter plures remissiones.

§ 17.- Si is, cui nuntiatum erit, ex operis novi nuntiatione satisdederit promiseritve aut per eum

construction is attended with danger. For, with reference to them, he thinks that a notice to suspend them should not be obeyed. For who can doubt that notice to suspend a new work should not be obeyed, rather than that the construction of some necessary building should be prevented? This Section of the Edict is applicable whenever delay is liable to cause injury.

§ 13.- Hence, where anyone, in a case where danger may be caused by delay, serves notice to stop some new work, for instance, where repairs are being made to the channel of a sewer, or to the walls of the same; we hold that an inquiry should be made in court whether the work is of such a character that a notice to suspend operations should be disregarded. For if it should be apparent that any danger will result from delay in repairing a sewer, or a water-course, or anything of this kind, it must be said that it should not be apprehended that the notice will cause any injury.

§ 14.- He who serves notice to stop a new work must swear that he does not do so for the purpose of annoyance. This oath is tendered by the authority of the Praetor; hence it is not required that he who exacts the oath should first be sworn.

§ 15.- The person who serves the notice must show in what place the new structure to which the notice has reference is situated; in order that he who is notified may know where he can build, and where he must refrain from building. This designation must be made as often as notice has been served with reference to a part of the edifice. If, however, the notice refers to the entire building, it is not necessary to show this, but merely to mention the fact.

§ 16.- Where the work complained of is being done in several places, will one notice be sufficient, or are several required? Julianus, in the Forty-ninth Book of the Digest, says that, because the notice should be served on the land itself, several notices as well as several withdrawals are necessary.

§ 17.- If he who was notified to suspend operations gives security or promises to indemnify the other

causar algún peligro; porque juzgó que también en ellas se debía rechazar la denuncia de obra nueva: pues ¿quién duda que es mucho mejor que se prescinda de la denuncia de obra nueva, que no que se impida la urgente ejecución de una obra necesaria? Mas esta parte tiene lugar siempre y cuando la dilación ha de causar perjuicio.

§ 13.- Por consiguiente, si alguno hubiere denunciado una obra nueva, cuando esta obra hubiese de causar perjuicio con su demora, o se hiciera alguna cosa para reparar cloacas o ribera, diremos que se debe investigar ante el juez si las obras son tales que se deba prescindir de la denuncia. Porque si apareciere que se hace en cloaca, o en arroyo, o donde la demora hubiese de causar perjuicio, se ha de decir, que no se debe temer que perjudique esta denuncia.

§ 14.- El que denuncia una obra nueva debe jurar que no denuncia la obra nueva por causa de calumnia. Este juramento se defiende con la autoridad del Pretor; por lo tanto, no se exige que jure uno antes que él exija el juramento.

§ 15.- El que denuncia tiene necesidad de determinar en qué lugar denuncia la obra nueva, para que sepa aquel a quien se le hizo la denuncia donde puede edificar y donde se debe abstener entre tanto. Mas esta determinación se ha de hacer siempre y cuando se hace la denuncia respecto a una parte; pero si se hiciera respecto a toda la obra, no hay necesidad de hacer determinación, sino de decir esto mismo.

§ 16.- Si la obra se hiciera en muchos lugares ¿basta acaso una sola denuncia, o serán necesarias muchas? Y dice Juliano en el libro cuadragésimo noveno del Digesto, que como la denuncia se hace en presencia de la obra, son necesarias muchas denuncias, y consiguientemente muchas dispensas.

§ 17.- Si aquel, a quien se hubiere hecho la denuncia, hubiere dado caución por la denuncia de obra

non fiet, quo minus boni viri arbitrato satisdet repromittatve, perinde est, ac si operis novi nuntiatio omissa esset. Habet autem hoc remedium utilitatem: nam remittit vexationem ad praetorem veniendi et desiderandi, ut missa fieret nuntiatio.

§ 18.- Qui procuratorio nomine nuntiaverit, si non satisdabit eam rem dominum ratam habiturum, nuntiatio omni modo remittitur, etiamsi verus sit procurator.

§ 19.- Qui remissionem absentis nomine desiderat, sive ad privatum sive ad publicum ius ea remissio pertinet, satisdare cogitur: sustinet enim partes defensoris. Sed haec satisfactio non pertinet ad ratihibitionem, sed ad operis novi nuntiationem.

§ 20.- Si procurator autem opus novum mihi nuntiaverit et satis acceperit, deinde interdicto adversus eum utar, ne vim mihi faciat, quo minus aedificem, ex interdicto eum oportet iudicatum solvi satisdare, quia partes sustinet defensoris:

6.- IULIANUS; *libro XLI, Digestorum.*- Et ideo neque exceptiones procuratoriae opponi ei debent nec satisdare cogendus est ratam rem dominum habiturum.

7.- ULPIANUS; *libro LII, ad Edictum.*- Et si satisfactio non dabit, summovendus erit ab executione operis novi, et actiones, quas domini nomine intendit, debent ei denegari.

§ 1.- Et tutor et curator opus novum recte nuntiant.

8.- PAULUS; *libro XLVIII, ad Edictum.*- Non solum proximo vicino, sed etiam superiori opus

party, or if it was not his fault that he did not give security, or promise indemnity, in accordance with the judgment of a good citizen; it is just the same as if the notice had not been served. This remedy is a convenient one, for it prevents the annoyance of appearing before the Praetor, and of making application to have notice issued.

§ 18.- Where the service of notice is made by an agent, and he does not give security that his principal will ratify his act, the notice will be without effect, even though the agent was regularly appointed.

§ 19.- Where anyone, in the name of an absent person, asks for a withdrawal, whether this has reference to a private or a public right, he will be compelled to furnish security, for he takes the part of a defendant. This security, however, does not refer to ratification by the principal, but merely to the notice to suspend the construction of the new work.

§ 20.- Again, if an agent should notify me to stop a new work, and accepts security from me, and I afterwards make use of an interdict against him to prevent him from employing force against me to prevent me from building, he will be obliged to give me security to execute the judgment, because he takes the part of a defendant.

6.- JULIANUS; *Digest, Book XLI.*- Therefore, exceptions based on agency should not be interposed against him, nor should he be compelled to furnish security that his principal will ratify his act.

7.- ULPIANUS; *On the Edict, Book LII.*- If he should not give security, he can be barred from the construction of the new work, and any actions which he may try to bring in the name of the principal must be refused him.

§ 1.- A guardian and a curator can serve notice to arrest the construction of a new building.

8.- PAULUS; *On the Edict, Book XLVIII.*- I can not only serve notice upon my nearest neighbor to

nueva, o hubiere prometido, o si en él no consistiere no dar fianza a arbitrio de hombre bueno, o no prometer, el caso es igual que si se hubiese prescindido de la denuncia de obra nueva. Mas este remedio tiene utilidad, porque dispensa de la molestia de recurrir al Pretor y de solicitar que se dé por remitida la denuncia.

§ 18.- Si el que hubiere denunciado a título de procurador, no hubiere dado fianza de que el dueño tendrá por ratificada la cosa, se prescinde en todo caso de la denuncia, aunque sea verdadero procurador.

§ 19.- El que pretende la remisión a nombre de un ausente, ya si esta remisión se refiere a Derecho Privado, ya si al Público, es obligado a dar fianza, porque hace veces de defensor; pero esta fianza no se refiere a la ratificación, sino a la denuncia de obra nueva.

§ 20.- Mas si un procurador me hubiere denunciado una obra nueva, y hubiere recibido fianza, y después utilizare yo contra él interdicto a fin de que no me haga violencia para que yo no edifique, es necesario que por virtud del interdicto dé él fianza de pagar lo juzgado, porque hace las veces de defensor.

6.- JULIANO; *Digesto, libro XLI.*- Y por lo tanto, ni se le deben oponer las excepciones relativas al procurador, ni ha de ser obligado a dar fianza de que el dueño ratificará la cosa.

7.- ULPIANO; *Comentarios al Edicto, libro LII.*- Y, si no diere fianza, habrá de ser privado de la ejecución de obra nueva, y se le deben denegar las acciones que intentase a nombre del dueño.

§ 1.- El tutor y el curador denuncian válidamente una obra nueva.

8.- PAULO; *Comentarios a Sabino, libro XLVIII.*- Yo podré denunciar la obra nueva, no solamente al

facienti nuntiare opus novum potero: nam et servitutes quaedam intervenientibus mediis locis vel publicis vel privatis esse possunt.

§ 1.- Qui opus novum nuntiat, si quid operis iam factum erit, in testationem referre debet, ut appareat, quid postea factum sit.

§ 2.- Si, quum possem te iure prohibere, nuntiavero tibi opus novum, non alias aedificandi ius habebis, quam si satisdederis.

§ 3.- Quod si nuntiavero tibi, ne quid contra leges in loco publico facias, promittere debebis, quoniam de eo opere alieno iure contendo, non meo, et tamquam alieni iuris petitor repromissione contentus esse debeo.

§ 4.- Sciendum est facta operis novi nuntiatione cui nuntiatum est abstinere oportere, donec caveat vel donec remissio nuntiationis fiat: tunc enim, si ius aedificandi habet, recte aedificabit.

§ 5.- Sed ut probari possit, quid postea aedificatum sit, modulos sumere debet is qui nuntiat, qui ut sumantur conferanturque, Praetor decernere solet.

§ 6.- Morte eius qui nuntiavit extinguitur nuntiatio, sicut alienatione, quia his modis finitur ius prohibendi.

§ 7.- Quod si is cui opus novum nuntiatum erat decesserit vel aedes alienaverit, non extinguitur operis novi nuntiatio: idque ex eo apparet, quod in stipulatione, quae ex hac causa interponitur, etiam heredis mentio fit.

suspend operations, but also upon one immediately beyond him; for servitudes may exist between two tracts of land which are separated by other property either public or private.

§ 1.- Anyone who serves notice to suspend operations where anything has already been done, must state this in his application, in order that what has been done afterwards may be apparent.

§ 2.- If I cannot legally prevent you from doing something, and I should notify you to suspend operations on a new structure, you will not have the right to proceed with your building unless you give me security.

§ 3.- If I should notify you to erect a building forbidden by the laws in a public place, you must bind yourself by a promise, because I contest your right to construct it not in my own name, but in that of another, and as I am maintaining the right of another, I should be content with a mere promise.

§ 4.- It must be remembered that where notice to suspend a new work has been served, the person notified must desist until he furnishes security, or until a withdrawal of a notice is made; for then, if he has the right to build, he can properly continue to do so.

§ 5.- In order to prove that any building was done after the notice was served, the party who served it must measure the building; and the Praetor ordinarily decrees that the measurement shall be taken and be produced.

§ 6.- Notice is extinguished by the death of the person who served it, or by the alienation of the property; because in these ways the right of preventing the construction of the work is lost.

§ 7.- Where the person on whom notice was served to discontinue a new work dies, or sells the house, the effect of the service of the notice will not be ended. The proof of this is apparent from the fact that mention is made therein of the heir, where a

vecino inmediato, sino también a otro de más arriba que haga la obra; porque también puede haber algunas servidumbres mediando lugares públicos o privados.

§ 1.- El que denuncia una obra nueva, si ya se hubiere hecho algo de la obra, debe consignarlo en un atestado, para que aparezca qué es lo que se haya hecho después.

§ 2.- Si, cuando yo pudiera prohibirtela con derecho yo te hubiere denunciado una obra nueva, no tendrás derecho para edificar de otra suerte, sino si hubieres dado fianza.

§ 3.- Pero si yo te hubiere denunciado para que no hagas algo contra las leyes en un lugar público, deberás prometer, porque respecto de esta obra litigo por derecho ajeno, no por el mío, y debo contentarme con la promesa, como demandante de derecho ajeno.

§ 4.- Se ha de saber, que hecha la denuncia de obra nueva, debe abstenerse de obrar aquel a quien se le denunció, hasta que dé acción o hasta que se haga remisión de la denuncia; porque entonces edificará convenientemente, si tiene derecho para edificar.

§ 5.- Mas para que se pueda probar qué es lo que se haya edificado después, el que hace la denuncia debe tomar medidas; y el Pretor suele decretar que se tomen y se comprueben.

§ 6.- La denuncia se extingue con la muerte del que denunció, así como por la enajenación, porque de estos modos se extingue el derecho de prohibir.

§ 7.- Pero si hubiere fallecido aquel a quien se le había denunciado la obra nueva, o si hubiere enajenado el edificio, no se extingue la denuncia de obra nueva; y esto aparece de que en la estipulación, que se interpone por esta causa, se hace mención

9.- GAIUS; *ad Edictum urbicum, titulo de operis novi nuntiatione*.- Creditori, cui pignoris nomine praedium tenetur, permittendum est de iure, id est de servitute, opus novum nuntiare: nam ei vindicatio servitutis datur.

10.- ULPIANUS; *libro XLV, ad Sabinum*.- Operis novi nuntiatio in rem fit, non in personam: et ideo furioso et infanti fieri potest nec tutoris auctoritas in ea nuntiatione exigitur.

11.- PAULUS; *libro XI, ad Sabinum*.- Cuilibet enim intellegenti, veluti fabro, nuntiatum infantem et furiosum tenet.

12.- IDEM; *libro XIII, ad Sabinum*.- Ex operis novi nuntiatione si caveatur, tanti stipulatio committitur, quanti iudicatum sit.

§ 13.- IULIANUS; *libro XLI, Digestorum*.- Quum procurator opus novum nuntiat et satisdat rem ratam dominum habiturum et remissio in domini personam confertur:

§ 1.- Si dominus opus novum nuntiaverit intra diem, quae stipulatione ex operis novi nuntiatione interposita comprehensa esset, committitur stipulatio: si praeterita ea die dominus nuntiaret, non committitur. Nam et ipsi domino, Quum semel nuntiaverit, non permittitur iterum nuntiare, quamdiu stipulatio ex operis novi nuntiatione teneret.

§ 2.- Si in remissione a patre eius, qui opus novum nuntiaverat, procurator interveniat, id agere Praetorem oportet, ne falsus procurator absenti

stipulation is entered into with reference to the matter.

9.- GAIUS; *On the Urban Edict, Under the Title, Concerning Notice to Suspend a New Work*.- A creditor, by whom a tract of land is held in pledge, can legally serve notice to discontinue a new work (that is to say where a servitude is involved), for the right to bring suit to recover the servitude is granted to him.

10.- ULPIANUS; *On Sabinus, Book XLV*.- Notice to discontinue a new work is a proceeding in rem and not in personam. Therefore, it can be served upon an insane person, or an infant, and the authority of his guardian is not required.

11.- PAULUS; *On Sabinus, Book XI*.- Notice served upon anyone of ordinary intelligence, for instance upon a laborer, will bind an infant or an insane person.

12.- THE SAME; *On Sabinus, Book XIII*.- If security is furnished with reference to a notice to discontinue a new work, the stipulation becomes operative in accordance with the judgment rendered.

13.- JULIANUS; *Digest, Book XLI*.- When an agent serves notice for a discontinuance of a new work, and gives security that his principal will ratify his act, withdrawal is also granted in the name of the owner.

§ 1.- If the owner serves notice for the discontinuance of a new work within a certain time, which is included in the stipulation made with reference to the notice, the stipulation will become operative; if he should serve the notice after the time has expired it will not become operative. For, after the owner has served notice once, he is not permitted to do so a second time, as long as the stipulation entered into with reference to the notice to discontinue the new work holds.

§ 2.- Where an agent appears with reference to withdrawal, on the part of him who served notice for the discontinuance of a new work, the Praetor should

también del heredero.

9.- GAYO; *Comentarios al Edicto Urbano, título de la denuncia de obra nueva*.- Al acreedor, a cuyo favor está obligado un predio a título de prenda, se le ha de permitir que denuncie una obra nueva respecto a su derecho, esto es, respecto a la servidumbre, porque se le da la reivindicación de la servidumbre.

10.- ULPIANO; *Comentarios a Sabino, libro XLV*.- La denuncia de obra nueva se hace contra la cosa, no contra la persona; y por lo tanto se le puede hacer al furioso y al que está en la infancia, y no se exige para esta denuncia la autoridad del tutor.

11.- PAULO; *Comentarios a Sabino, libro XI*.- Porque hecha la denuncia a cualquiera que entienda, por ejemplo, a un operario, obliga al que está en la infancia y al furioso.

12.- EL MISMO; *Comentarios a Sabino, libro XIII*.- Si se diera caución en virtud de denuncia de una obra nueva, se comprende en la estipulación tanto cuanto se haya juzgado.

13.- JULIANO; *Digesto, libro XLI*.- Cuando un procurador denuncia una obra nueva, da fianza de que el dueño ratificara la cosa, y la remisión se confiere a favor de la persona del dueño.

§ 1.- Si el dueño hubiere denunciado una obra nueva dentro del término que se hubiese comprendido en la estipulación celebrada por virtud de la denuncia de obra nueva, se incurre en la estipulación; y no se incurre, si el dueño la hubiere denunciado transcurrido este término. Porque ni aun al mismo dueño se le permite, cuando una vez hubiere hecho la denuncia, denunciar otra vez, mientras subsiste la estipulación por virtud de la denuncia de obra nueva.

§ 2.- Si en la remisión interviniera un procurador por parte del que había denunciado la obra nueva, es conveniente que el Pretor haga que un falso Pro-

noceat, quum sit indignum quolibet interveniente beneficium praetoris amitti.

14.- IDEM; *libro XLIX, Digestorum*.- Qui viam habet, si opus novum nuntiaverit adversus eum, qui in via aedificat, nihil agit: sed servitutem vindicare non prohibetur.

15.- AFRICANUS; *libro IX, Quaestionum*.- Si prius, quam aedificatum esset, ageretur ius vicino non esse aedes altius tollere nec res ab eo defenderetur, partes iudicis non alias futuras fuisse ait, quam ut eum, quum quo ageretur, cavere iuberet non prius se aedificaturum, quam ultro egisset ius sibi esse altius tollere. Idemque e contrario, si, quum quis agere vellet ius sibi esse invito adversario altius tollere, eo non defendente similiter, inquit, officio iudicis continebitur, ut cavere adversarium iuberet nec opus novum se nuntiaturum nec aedificanti vim facturum. Eaque ratione hactenus is, qui rem non defenderet, puniatur, ut de iure suo probare necesse haberet: id enim esse petitoris partes sustinere.

16.- ULPIANUS; *libro XIII, ad Edictum*.- Si opus novum Praetor iusserit nuntiari, deinde prohibuit, ex priore nuntiatione agi non potest, quasi adversus Edictum eius factum sit.

17.- PAULUS; *libro LVII, ad Edictum*.- Si procurator opus novum facientem prohibuerit, domino competit quod vi aut clam interdictum.

18.- PAPINIANUS; *libro III, Quaestionum*.-

make an investigation to prevent a false agent from prejudicing the rights of the absent party, as it would be intolerable if the benefit granted by the Praetor should be lost by the intervention of anyone else whomsoever.

14.- THE SAME; *Digest, Book XLIX*.- Where a person who is entitled to a right of way serves notice upon someone who has built a house where he has the right to pass, his act will be void; but he will not be prevented from bringing an action to recover the servitude to which he is entitled.

15.- AFRICANUS; *Questions, Book IX*.- Where suit is brought to prevent a house from being raised to a greater height by a neighbor, before any work has been performed, and the case is not defended by the said neighbor, it has been held to be the duty of the judge that nothing else shall be done before the party, against whom the action has been brought, shall be ordered to give security that he will not proceed with his building, before establishing his right to raise it higher. On the other hand, the same rule will apply when anyone brings an action, claiming that he has a right to build his house higher against his adversary's consent, and, in like manner, no defence is made; for it is held to be the duty of the judge to order the adversary to give security that he will not notify him to discontinue the new work, nor employ violence against him to prevent him from building. In this case, also, he who does not defend the action is punished by requiring him to prove his right, for this is, in fact, to take the part of the plaintiff.

16.- ULPIANUS; *On the Edict, Book XIII*.- If the Praetor should order notice to be served to discontinue a new work, and then should forbid it; an action founded upon the first notice will not lie, as this would be contrary to the ruling of the Praetor.

17.- PAULUS; *On the Edict, Book LVII*.- If an agent prevents the construction of a new work, the owner will be entitled to the interdict Quod vi aut clam.

18.- PAPINIANUS; *Questions, Book III*.- Where

curador no perjudique a un ausente, porque es indigno que por intervenir cualquiera se pierda el beneficio del Pretor.

14.- EL MISMO; *Digesto, libro XLIX*.- El que tiene la servidumbre de vía, si hubiere denunciado una obra nueva contra el que edifica en la vía, no hace cosa valida, pero no se le prohíbe que reivindique la servidumbre.

15.- AFRICANO; *Cuestiones, libro IX*.- Si antes que se hubiese edificado, se ejercitare acción porque el vecino no tenía derecho para levantar más su casa, y la cuestión no fuese defendida por él, dice que la función del juez no debió ser otra que la de mandar que diese caución aquel contra quien se ejercitase la acción, de que no edificará antes que voluntariamente hubiese demostrado que tenía el derecho de levantar más alto. Y el mismo por el contrario dice, que cuando alguno quiera probar que tiene derecho para levantar más alto contra la voluntad de su adversario, no defendiéndose éste igualmente, se contendrá en el ministerio del juez mandar que el adversario dé caución de que no denunciará él la obra nueva, ni hará violencia al que edifica, Y de este modo será castigado el que no defendiese la cuestión, a fin de que tenga necesidad de probar su derecho; porque esto es sostener el papel de demandante.

16.- ULPIANO; *Comentarios al Edicto, libro XIII*.- Si el Pretor hubiere mandado que se denuncie una obra nueva, y después lo prohibió, no se puede ejercitar acción por virtud de la primera denuncia, como si se hubiera obrado contra su decisión.

17.- PAULO; *Comentarios al Edicto, libro LVII*.- Si un procurador se hubiere opuesto al que hacía una obra nueva, le compete a su principal el interdicto de lo que se hizo con violencia o clandestinamente.

18.- PAPINIANO; *Cuestiones, libro III*.- Si trátan-

Aedibus communibus si ob opus novum nuntiatio uni fiat, si quidem ex voluntate omnium opus fiat, omnes nuntiatio tenebit, si vero quidam ignorent, in solidum obligabitur, qui contra Edictum Praetoris fecerit.

§ 1.- Nec ad rem pertinet, cuius solum sit, in quo opus fiat, sed quis eius soli possessor inveniatur, modo si eius nomine opus fiat.

19.- PAULUS; *libro Quaestionum*.- Sciendum est denegata exsecutione operis novi nihilo minus integras legitimas actiones manere, sicut in his quoque causis manent, in quibus ab initio operis novi denuntiationem Praetor denegat.

20.- ULPIANUS; *libro LXXI, ad Edictum*.- Praetor ait: "quem in locum nuntiatum est, ne quid operis novi fieret, qua de re agitur, quod in eo loco, antequam nuntiatio missa fieret aut in ea causa esset, ut remitti deberet, factum est, id restituas".

§ 1.- Interdictum hoc proponitur ex huiusmodi causis, edicto expressum est, ne post operis novi nuntiationem quicquam operis fiat, antequam vel nuntiatio missa fiat vel vice nuntiationis missae satisfactio de opere restituendo fuerit interposita. Qui igitur facit, etsi ius faciendi habuit, tamen contra interdictum praetoris facere videtur et ideo hoc destruere cogitur.

§ 2.- Sive autem vacuus locus sit, ubi nuntiatum est, sive aedificatus, aequo hoc interdicto locus erit.

notice to discontinue the construction of a new building is served upon one of several joint-owners, if the work is done by the consent of all of them, the notice will bind them all. If, however, some of them are not aware of the construction of the new building, he who has acted in violation of the Praetorian Edict will be individually liable in full.

§ 1.- Nor does it make any difference to whom the land upon which the work is in course of construction belongs, for he alone is considered who is in possession of the property, provided the work is done in his name.

19.- PAULUS; *Questions, Book VIII*.- It must be remembered that when the prosecution of a new work has been refused by the Praetor, the party interested can still have recourse to his legitimate actions, as the right to them continues to exist in all those cases in which the Praetor, in the beginning, refuses to permit service for discontinuance of the erection of a new structure.

20.- ULPIANUS; *On the Edict, Book LXXII*.- The Praetor says: "Where anyone has been notified on the ground to discontinue the construction of a new work, the right to proceed with which is in dispute, and he persists in doing so, in the same place, before withdrawal has been granted; or where the circumstances are such that withdrawal should be granted, he shall restore the property to its original condition."

§ 1.- An interdict is granted in the following instances. It is stated in the Edict that no work shall be done, after the service of notice, before withdrawal is granted, or, in lieu of this, security has been furnished to restore the property to its former condition. Therefore, he who proceeds with the work, even though he may have the right to do so, is, nevertheless, considered to have violated the interdict of the Praetor, and he will be compelled to demolish the structure.

§ 2.- There is ground for this interdict, whether notice has been served upon land which is vacant, or

dose de una casa común se le hiciera a uno solo de los condueños la denuncia por razón de una obra nueva, la denuncia obligará a todos, si verdaderamente se hiciera la obra por voluntad de todos; pero si algunos lo ignorasen, se obligará por la totalidad el que hubiere obrado contra el Edicto del Pretor.

§ 1.- Y no hace al caso saber de quién sea el suelo en que se hace la obra, sino quién se halla siendo poseedor de aquel suelo, si es que la obra se hiciera en su nombre.

19.- PAULO; *Cuestiones, libro.....*- Se ha de saber que denegada la ejecución de una obra nueva, subsisten sin embargo íntegras las acciones legítimas así como subsisten también en aquellos casos en que el Pretor deniega desde el principio la denuncia de una obra nueva.

20.- ULPIANO; *Comentarios al Edicto, libro LXXI*.- Dice el Pretor: «En el lugar en que se denunció que no se hiciese ninguna obra nueva, por lo que se reclama, repondrás lo que en aquel lugar se hizo antes que se remitiese la denuncia, o se hallase en estado de que se debiese remitir».

§ 1.- Se da este interdicto por las siguientes causas: se expresó en el Edicto, que después de la denuncia de una obra nueva no se hiciese cosa alguna de la obra, antes que o se hubiese remitido la denuncia, o se hubiere interpuesto fianza de reponer la obra en lugar de haber sido remitida la denuncia. Así, pues, el que obra, aunque haya tenido el derecho de obrar, es sin embargo considerado que obra contra el interdicto del Pretor, y es por lo tanto obligado a destruir lo hecho.

§ 2.- Mas ya si fuera vacío el lugar en que se hizo la denuncia, ya si estuviera edificado, habrá igualmente

§ 3.- Ait praetor: "quod factum est, restituas". Quod factum est, iubet restitui, neque interest, iure factum sit an non: sive iure factum est sive non iure factum est, interdictum locum habebit.

§ 4.- Quidquid autem ante remissionem fit vel illud quod loco remissionis habetur, pro eo habendum est, atque si nullo iure factum esset.

§ 5.- Si quis paratus fuerit satisfacere, deinde actor stipulari nolit, in ea causa est, ut remitti debeat: nam quum per actorem fiet, apparet in ea causa esse, ut remitti debeat.

§ 6.- Hoc interdictum perpetuo datur et heredi ceterisque successoribus competit.

§ 7.- Adversus ipsum quoque, qui opus fecit vel factum ratum habuit, interdicto locus erit.

§ 8.- Plane si quaeratur, an in heredem eius, qui opus fecit, interdictum hoc competat, sciendum est Labeonem existimasse in id quod ad eum pervenit dumtaxat dari oportere vel si quid dolo malo ipsius factum sit, quo minus perveniret. Nonnulli putant in factum esse dandam quam interdictum, quod verum est.

§ 9.- Deinde ait praetor: "quem in locum nuntiatum est, ne quid operis novi fieret, qua de re agitur, si de ea re satisfatum est, quod eius cautum sit aut per te stat, quo minus satisfatur: Quo minus illi in eo loco opus facere liceat, vim fieri veto".

which has been built upon.

§ 3.- The Praetor says, "He shall restore the property to its original condition." He orders what has been done to be restored, and it makes no difference whether it was done in accordance with law or not, hence, the interdict will be applicable whether the act was legal or illegal.

§ 4.- Again, whatever was done before withdrawal upon notice, or before anything occurred which is considered to take the place of a withdrawal, is held not to have been legally done.

§ 5.- If he who erected the building should be willing to give security, and the plaintiff refuses to enter into a stipulation, this should be considered as a withdrawal; for as this is the plaintiff's fault, it is evident that the circumstances are such that withdrawal ought to be made.

§ 6.- This interdict is granted perpetually, and will lie in favor of the heir and other successors.

§ 7.- There will be ground for the interdict against the person himself who constructed the work, or against him who ratified it after it was finished.

§ 8.- It is clear that this interdict will lie against the heir of him who constructed the work; and where this question arises, it must be noted that Labeo was of the opinion that it should only be granted against the heir where he had obtained some benefit from the structure, or where he had prevented himself, by fraudulent conduct on his part, from obtaining any benefit therefrom. Some authorities hold that an action in factum should be granted in addition to the interdict; which opinion is correct.

§ 9.- The Praetor next says: "Where anyone has been notified, on the premises, not to proceed with the new work, and if security has been given, or it is your fault that it was not given, I forbid force to be employed to prevent the other party from proceeding with the work in that place."

lugar a este interdicto.

§ 3.- Dice el Pretor: «Repondrás lo que se hizo»; manda que se reponga lo que se hizo, y no importa que se haya hecho con derecho, o sin él; y ya si se hizo con derecho, ya si se hizo sin él, tendrá lugar el interdicto.

§ 4.- Mas todo lo que se hizo antes de la remisión, o de lo que es tenido en lugar de remisión, ha de ser considerado lo mismo que si hubiese sido hecho sin ningún derecho.

§ 5.- Si alguno hubiere estado dispuesto a dar fianza, y después el actor no quisiera estipular, la denuncia está en el caso de que deba ser remitida; porque como consiste en el actor, es claro que está en el caso de que deba ser remitida.

§ 6.- Este interdicto se da a perpetuidad, y compete al heredero y a los demás sucesores.

§ 7.- El interdicto tendrá lugar también contra el mismo que hizo la obra, o ratificó lo que se hizo.

§ 8.- Mas si se preguntara si compete este interdicto contra el heredero del que hizo la obra, se ha de saber, que Labeón opinó que se debe dar solamente por lo que fue a su poder, o por lo que con dolo malo del mismo se hubiera hecho que no fuese a su poder. Algunos opinan que se ha de dar tanto la acción por el hecho, como el interdicto; lo que es verdad.

§ 9.- Después dice el Pretor: «Si en el lugar en que se denunció que no se hiciese ninguna obra nueva, se dio fianza por la cosa de que se trata, prohíbo, respecto a aquello por lo que se dio caución, o respecto de lo que en ti consiste que no se dé fianza, que se haga violencia para que no le sea lícito a uno hacer la obra en aquel lugar».

§ 10.- Hoc interdictum prohibitorium est, ne quis prohibeat facere volentem eum qui satisdedit: etenim pertinet ad decus urbium aedificia non derelinqui.

§ 11.- Nec quicquam interest, iure quis aedificet an non iure aedificet, quum sit securus is qui opus novum nuntiavit, posteaquam ei cautum est.

§ 12.- Hoc autem interdictum competit ei qui satisdedit: adicitur et illud "aut per te stat, quo minus satisdetur".

§ 13.- Proinde si satisdatum non est, sed repromissum, interdicto huic locus non erit: neque enim permittendum fuit in publico aedificare, priusquam appareat, quo iure quis aedificet.

§ 14.- Et si satisdatum sit, cautum tamen non perseveret, interdictum cessat.

§ 15.- Si aliquando stetit per nuntiatorem, quo minus satisdetur, nunc non stat, interdictum cessat.

§ 16.- Hoc interdictum etiam post annum et heredi ceterisque successoribus competit.

21.- IDEM; *libro LXXX, ad Edictum*.- Stipulatio de operis novi nuntiatione interponi solet, quotiens vicinus dicit ius sibi esse prohibere vicinum opus novum invito se facere.

§ 1.- Si quis autem vult post opus novum nuntiatum impune aedificare, offerre debet satis nuntiatori: quod si fecerit, utrique consultum est tam ei qui nuntiavit, quoniam cautum habet de opere

§ 10.- This interdict is prohibitory, as it prohibits interference with anyone, who gives security, from proceeding with his work, for the ornamentation of cities is concerned in not permitting buildings to be abandoned.

§ 11.- Nor does it make any difference whether the person in question is entitled by law to build, or not; as he who notified him to discontinue the new work is safe after security has been furnished him.

§ 12.- This interdict will also lie in favor of the person to whom security was given.

§ 13.- The Praetor adds, "Or if it is your fault that security was not given." Hence, there will not be ground for the interdict if security is not furnished, but merely a promise for indemnity is made; for a building should not be permitted to be erected in a public place, before it is ascertained by what authority this is done.

§ 14.- If security is given, but should not continue to exist, the interdict will cease to be applicable.

§ 15.- Where it was the fault of the person who served the notice that security was not furnished for a certain time, but it is no longer his fault, the interdict will cease to apply.

§ 16.- This interdict is also available after the lapse of a year, and will lie in favor of the heir and other successors.

21.- THE SAME; *On the Edict, Book LXXX*.- A stipulation is usually entered into with reference to the notice to discontinue the construction of a new work, whenever one neighbor says that he has a right to hinder another from constructing it against his consent.

§ 1.- Moreover, where anyone desires to proceed with impunity, and continue to build after having been notified to stop, he should offer security to the person who served the notice upon him. If he does

§ 10.- Este interdicto es prohibitorio, para que no prohíba nadie que obre, si quiere, el que dio fianza; porque importa al ornato de las ciudades que no se abandonen los edificios.

§ 11.- Y no importa nada que uno edifique con derecho, o que edifique sin él, estando seguro el que denunció la obra nueva, después que se le dió caución.

§ 12.- Mas este interdicto le compete al que dió fianza.

§ 13.- Se añade también esto: «o en ti consiste que no se dé fianza»; por lo cual, si no se dio fianza, sino que se hizo promesa, no habrá lugar a este interdicto; porque no se ha de permitir, que edifique en sitio público, antes que aparezca con qué derecho edifica uno.

§ 14.- Y si se hubiera dado fianza, pero no subsiste la fianza, deja de tener lugar el interdicto.

§ 15.- Si en algún tiempo consistió en el denunciante, que no se diera fianza, y ahora no consiste, deja de tener lugar el interdicto.

§ 16.- Este interdicto compete también después del hijo, y al heredero y a los demás sucesores.

21.- EL MISMO; *Comentarios al Edicto, libro LXXX*.- Se suele interponer estipulación sobre la denuncia de obra nueva, siempre que el vecino dice que él tiene derecho para prohibir al vecino que contra su voluntad haga una obra nueva.

§ 1.- Mas si alguno quiere después de denunciada una obra nueva edificarla impunemente, debe ofrecerle fianza al denunciante. Y si hubiere hecho esto, se habrá atendido al interés de ambos, tanto del

restituendo, quam ei cui nuntiatum est, quia molitio eius non impeditur: antequam enim caveat quidquid aedificaverit, interdicto restitutorio destruere compellitur.

§ 2.- Habet autem ista stipulatio condicionem, ut ita demum committatur, si iudicatum fuerit sive ante rem iudicatam causa quae acciderit neque res defendatur: et de dolo malo subicitur clausula.

§ 3.- Opus autem factum accipimus non, si unum vel alterum cementum fuit impositum, sed si proponatur instar quoddam operis et quasi facies quaedam facta operis.

§ 4.- Sive autem res iudicetur sive res non defendatur, stipulatio in id committitur, ut res viri boni arbitrato restituatur: quod si ita restitutum non erit, quanti ea res erit, tantam pecuniam dabit, si hoc petitori placuerit.

§ 5.- Quaesitum est, si plures domini aedificent, an omnes cavere debeant. Et ait Labeo unum cavere debere, quia restitutio operis fieri pro parte non possit.

§ 6.- Idem ait et si plures nuntient, curandum esse, ut uni caveatur, si inter eos conveniat: plane si non conveniat, et singulis erit cavendum.

§ 7.- Idem dicit adiciendum esse in stipulatione, ut tantum praestetur, quanti uniuscuiusque intersit, si hoc maluerint: ceterum si ita fuerit, inquit, cautum "quanti ea res erit", dubitabitur, utrum ad totius

this, it will be to the advantage of both parties; to that of the one who served the notice, as he has security to restore the premises to their former condition; and to him upon whom the notice was served, because his building is not interfered with. For if he builds at all before furnishing security, he can, by means of a restitutory interdict, be compelled to demolish what he has erected.

§ 2.- Again, this stipulation is dependent upon a condition, and only becomes operative after judgment has been rendered, unless something has happened before this was done, and the case was not defended; and the clause with reference to bad faith is also added.

§ 3.- We consider a structure to have been completed, not where one or two rows of stone have been laid, but where the work has assumed some form, and has the appearance of a building.

§ 4.- The stipulation becomes operative, and the property must be restored to its former condition in accordance with the judgment of a good citizen, whether a decision has been rendered in the case, or whether no defence is made. If the property is not restored to its former condition, the defendant must pay a sum of money in proportion to the damages sustained, if the plaintiff will consent to this.

§ 5.- Where several joint-owners construct a building, the question arises whether all of them must furnish security. Labeo says that one should do so, because the restoration of the property cannot be partially made.

§ 6.- He also says that even though several owners serve notice, care must be taken that security be given to one of them, if all agree to this; for it is evident that if one should not consent, security must be given to each of them.

§ 7.- He also says that it must be added in the stipulation that an amount equal to the interest of each must be paid; if the parties desire this to be done. If, however, security is furnished to the amount of the

que hizo la denuncia, porque tiene la caución de que será repuesta la obra, como de aquel a quien se hizo la denuncia, porque no se le impide su propósito; porque antes de que dé caución, es obligado por el interdicto restitutorio a destruir todo lo que hubiere edificado.

§ 2.- Pero esta estipulación contiene la condición de que solamente se incurra en ella si se hubiere juzgado, o si antes de juzgado el negocio hubiere surgido una cuestión, y no se defendiera el asunto, y se añade la cláusula de dolo malo.

§ 3.- Mas entendemos por «obra hecha», no si se colocó algún que otro material, sino si se dijera que hay cierta semejanza de obra, y hecha como alguna apariencia de la obra.

§ 4.- Pero ya si el negocio fuera juzgado, ya si no fuese defendido, se incurre en la estipulación para esto, para que sea repuesta la cosa a arbitrio de buen varón. Pero si así no hubiere sido repuesta, dará tanto dinero cuanto importare la cosa, si esto le pluguiere al demandante.

§ 5.- Se preguntó, si, cuando edificaran muchos dueños, deberán dar todos caución. Y dice Labeón, que sólo uno debe darla, porque la reposición de la obra no se puede hacer en parte.

§ 6.- Dice el mismo, que aunque sean muchos los que denuncien, se ha de cuidar de que se le dé caución a uno solo, si entre ellos se conviniera; pero que si no se conviniera, se le habrá de dar caución a cada uno.

§ 7.- El mismo dice, que se ha de añadir en la estipulación que se pagará tanto cuanto le interese a cada uno, si así lo hubieren preferido; mas si se hubiere dado caución, dice, de este modo: «cuanto

corporis aestimationem haec verba referuntur an vero ad quod eius interest qui stipulatur. Ego puto et si sic fuerit uni cautum "quanti ea res erit", defendi posse stipulationem sufficere: ad operis enim quantitatem ea refertur.

22.- MARCELLUS; *libro XV, Digestorum*.- Cui opus novum nuntiatum est, ante remissam nuntiationem opere facto decessit: debet heres eius patientiam destruendi operis adversario praestare: nam et in restituendo huiusmodi opere eius, qui contra edictum fecit, poena versatur, porro autem in poenam heres non succedit.

23.- IAVOLENUS; *libro VII, Epistolarum*.- Is, cui opus novum nuntiatum erat, vendidit praedium: emptor aedificavit: emptorem an venditorem teneri putas, quod adversus Edictum factum sit? Respondit: quum operis novi nuntiatio facta est, si quid aedificatum est, emptor, id est dominus praediorum tenetur, quia nuntiatio operis non personae fit et is demum obligatus est, qui eum locum possidet, in quem opus novum nuntiatum est.

TITULO II

DE DAMNO INFECTO ET DE SUGRUNDIS
ET PROTECTIONIBUS

1.- ULPIANUS; *libro I, ad Edictum*.- Quum res damni infecti celeritatem desiderat et periculosa dilatio praetori videtur, si ex hac causa sibi iurisdictionem reservaret, magistratibus municipalibus delegandum hoc recte putavit.

2.- GAIUS; *libro XXVIII, ad Edictum provinciale*.-

value of the property, he says that a doubt will arise whether these words refer to the value of the entire property, or merely to that of the interest of the party who enters into the stipulation. I think that if security for the value of the property is furnished one of the parties, it can be maintained that the stipulation will be sufficient for all of them; since this has reference to the amount of the damages caused by the work.

22.- MARCELLUS; *Digest, Book XV*.- The person upon whom notice was served died before obtaining the withdrawal of the notice. His heir must permit his adversary to demolish the structure, for in a restoration of this kind the penalty must be paid by him who violated the Edict; but the heir does not succeed to the penalty.

23.- JAVOLENUS; *Epistles, Book VII*.- A certain man who had been notified to discontinue the construction of a new building sold the land, and the purchaser continued the work; do you think that either the purchaser or the vendor is liable for having violated the Edict? The answer was that if, after notice had been served, the construction of the building was continued, the purchaser, that is to say, the owner of the land, would be liable; because a notice for discontinuance is not personal, and he only is liable who is in possession of the property on which the notice to discontinue the work was served.

TITLE II

CONCERNING THREATENED INJURY AND
THE ENCROACHMENTS AND PROJECTIONS
OF A NEIGHBORING HOUSE

1.- ULPIANUS; *On the Edict, Book I*.- Where the imminence of threatened injury demands celerity, and delay seems to the Praetor to be dangerous, and, on this account, he reserves jurisdiction for himself, he will act very properly if he delegates his authority to the municipal magistrates of the district.

2.- GAIUS; *On the Provincial Edict, Book*

valiere la cosa», se dudará, si estas palabras se refirán a la estimación de todo el cuerpo, o a lo que le interesa al que estipula. Yo opino que aunque se hubiere dado caución a uno solo de esta manera: «cuanto valiere la cosa», se puede defender que es suficiente la estipulación; porque ella se refiere al importe de la obra.

22.- MARCELO; *Digesto, libro XV*.- Uno, a quien se le denunció una obra nueva, falleció habiendo hecho la obra antes que se le hubiese remitido la denuncia; su heredero debe prestarle al adversario su consentimiento para que destruya la obra; porque la pena del que obró contra el Edicto consiste en la reposición de tal obra, pero, a la verdad, el heredero no le sucede en la pena.

23.- JAVOLENO; *Epístolas, libro VII*.- Uno, a quien se le había denunciado una obra nueva, vendió el predio, y el comprador edificó; ¿opinas que está obligado el comprador o el vendedor, porque se haya obrado contra el Edicto? Respondió, que habiéndose hecho la denuncia de obra nueva, si se edificó alguna cosa, está obligado el comprador, esto es, el dueño de los predios, porque la denuncia se hace por la obra, no a la persona; y solamente queda obligado el que posee el lugar en que fue denunciada la obra nueva.

TÍTULO II

DEL DAÑO QUE AMENAZA Y DE LOS
ALEROS Y DE LOS VOLADIZOS

1.- ULPIANO; *Comentarios al Edicto, libro I*.- Cuando la cosa requiere celeridad por el daño que amenaza, y al Pretor le parece peligrosa la dilación, si por esta causa se reservase para sí jurisdicción, con razón creyó que esto debía delegarlo a los magistrados municipales.

2.- GAYO; *Comentarios al Edicto provincial,*

Damnum infectum est damnum nondum factum, quod futurum veremur.

3.- PAULUS; *libro XLVII, ad Edictum*.- Damnum et damnatio ab ademptione et quasi deminutione patrimonii dicta sunt.

4.- ULPIANUS; *libro I, ad Edictum*.- Dies cautioni praestitutus si finietur, praetoris vel praesidis officium erit ex causa vel reum notare vel protelare eum et, si hoc localem exigit inquisitionem, ad magistratus municipales hoc remittere.

§ 1.- Si intra diem a praetore constituendum non caveatur, in possessionem eius rei mittendus est. "eius rei" sic accipe, sive tota res sit sive pars sit rei.

§ 2.- An tamen is, qui non admittit, etiam pignoribus a magistratibus coerceatur? Non puto, sed in factum actione tenebitur: nam et si a praetore missus non admittatur, eadem actione utendum est.

§ 3.- Duas ergo res magistratibus municipalibus praetor vel praeses iniunxit, cautionem et possessionem, cetera suae iurisdictioni reservavit.

§ 4.- Si forte duretur non caveri, ut possidere liceat (quod causa cognita fieri solet) non duumviros, sed praetorem vel praesidem permissuros: item ut ex causa decedatur de possessione.

§ 5.- Praetor ait: "dum ei, qui aberit, prius domum denuntiari iubeam". Abesse autem videtur et qui in iure non est: quod et Pomponius probat: verecunde autem praetorem denuntiari iubere, non extrahi de

XXVIII.- Threatened injury is such as has not yet taken place, but which we fear may be caused in the future.

3.- PAULUS; *On the Edict, Book XLVII*.- The terms damnum and damnatio have reference to the taking away, and, so to speak, the diminution of an estate.

4.- ULPIANUS; *On the Edict, Book I*.- If the time for furnishing security has elapsed, it is the duty of the Praetor or the Governor, after a hearing, either to hold the party liable, or release him; and, if the latter requires a local investigation, to send the case to the municipal magistrates for a decision.

§ 1.- If security is not furnished within the time fixed by the Praetor, the complainant should be placed in possession of the property, and by the term "property" is understood either all of it, or a portion of the same.

§ 2.- If the other party is unwilling to permit his neighbor to obtain possession, can he be compelled by the magistrate to furnish pledges? I do not think that he can; but he will be liable to an action in factum, for if he is not permitted to take possession after having been sent by the Praetor, he should have recourse to the above-named action.

§ 3.- Therefore, the Praetor or the Governor directs municipal magistrates to do two things; namely, to require security, and to grant possession; the other matters he reserves for his own jurisdiction.

§ 4.- If there is a delay in giving security, not the duumviri but the Praetor or the Governor should grant permission to take possession (which is usually done where proper cause is shown), and the same rule also applies where, after proper cause has been shown, possession is relinquished.

§ 5.- The Praetor says, "Where the party upon whom notice must be served is absent, I order that the notice shall be left at his residence." He is considered to be absent who does not appear in court; which

libro XXVIII.- Daño que amenaza es daño aun no hecho, que tememos que sobrevendrá.

3.- PAULO; *Comentarios al Edicto, libro XLVII*.- Daño y condenación se llamaron así de *ademptio* (privación), y como disminución del patrimonio.

4.- ULPIANO; *Comentarios al Edicto, libro I*.- Si finiere el término establecido para la caución, será de cargo del Pretor o del Presidente o hacérselo saber en virtud de causa al reo, o prorrogarlo, y si esto exige investigación local, encomendárselo a los magistrados municipales.

§ 1.- Si no se diera la caución dentro del término que se haya establecido por el Pretor, ha de ser uno puesto en posesión de la cosa; y «de la cosa» entendiéndolo de esta manera, ya sea toda la cosa, ya parte de una cosa.

§ 2.- Pero el que no admite al que fue puesto en posesión ¿será acaso constreñido por los magistrados también mediante prendas? No lo creo, pero estará obligado por la acción por el hecho; porque también se ha de usar de la misma acción, si no fuese admitido el que fue puesto en posesión por el Pretor.

§ 3.- Luego el Pretor o el Presidente encomendó dos cosas a los magistrados municipales, la caución y la posesión, y lo demás lo reservó para su propia jurisdicción.

§ 4.- Si acaso se persistiese en no dar caución, habrán de permitir no los duumviros, sino el Pretor o el Presidente, que sea lícito poseer; lo que se suele hacer con conocimiento de causa; y lo mismo para que uno se separe de la posesión en virtud de causa.

§ 5.- Dice el Pretor: «mandaré que al que estuviere ausente se le haga la denuncia primeramente en su casa»; pero se considera que esta ausente también el que no esta en el juicio; lo que aprueba también

domo sua. Sed "domum, in quam degit denuntiari" sic accipere debemus, ut et si in aliena domo habitet, ibi ei denuntietur. Quod si nec habitationem habeat, ad ipsum praedium erit denuntiandum vel procuratori eius vel certe inquilinis.

§ 6.- Totiens autem praetorem exigere denuntiationem intellegendum est, si sit cui denuntietur: ceterum si non sit, veluti quod hereditaria insula est nec dum hereditas adita, vel si heres non extet nec inhabitetur, cessat haec pars edicti. Est tamen tutius libellum ad ipsas aedes proponere: fieri enim potest, ut ita monitus defensor existat.

§ 7.- In eum, qui quid eorum quae supra scripta sunt non curaverit, quanti ea res est, cuius damni infecti nomine cautum non erit, iudicium datur: Quod non ad quantitatem refertur, sed ad id quod interest, et ad utilitatem venit, non ad poenam.

§ 8.- Hoc autem iudicium certam condicionem habet, si postulatum est: ceterum qui non postulavit, experiri non potest. Postulare autem proprie hoc dicimus pro tribunali petere, non alibi.

§ 9.- Si tam vicinum urbi municipium sit, ut magistratu se non interponente potuerit Praetor vel praeses adiri, potest dici cessare hanc actionem adversus magistratus, quasi nihil intersit, quum in tua potestate fuerit a praetore vel praeside desiderare in possessionem mitti.

opinion Pomponius approves. Moreover, the Praetor directs that the notice shall be served without rudeness, and not that the defendant shall be forcibly removed from his house. However, by the words, "The notice must be left at the house where he resides," we must understand that it must be served upon him there, even if he lives in a house belonging to another. When he has no domicile, the notice must be served on the premises, either upon his agent or the tenant.

§ 6.- Whenever the Praetor requires notice to be served, this means if there is anyone upon whom service can be made. If, however, no such person can be found, for example, because the house belongs to an estate which has not yet been entered upon, or if there is no heir, and the house is not inhabited, this Section of the Edict will not apply. The safer plan, however, is to attach a written notice to the house itself, for it may happen that in this way someone, having been notified, may appear for the defence.

§ 7.- If the judge should neglect any of the matters mentioned above, judgment will be granted against him for the amount of damages sustained through not requiring security to be furnished against threatened injury. This does not have reference to the amount that might have been recovered, but only for the interest that the plaintiff had in obtaining security, and is imposed for the benefit of the latter, and not as a penalty.

§ 8.- Again, this action is dependent upon a certain condition, that is if application was made to the judge, but where this was not done, suit cannot be brought against him. We say that the demand for security is properly made when application is made in court, and not elsewhere.

§ 9.- Where the town in which application is to be made is so near the City of Rome that if the magistrate does not intervene, the Praetor or the Governor can be applied to, it may be said that this action will not lie against the magistrate, for it is just as if the complainant had no interest, since it was in his power to ask to be placed in possession by either

Pomponio. Mas con razón manda el Pretor que se haga la denuncia, no que sea uno extraído de su casa. Pero «que se haga la denuncia en la casa en que vive», debemos entenderlo de modo, que aunque uno habite en casa ajena se le haga en ella la denuncia. Mas si no tuviera habitación, se habrá de hacer la denuncia al mismo predio, o a su procurador, o ciertamente a los inquilinos.

§ 6.- Mas se ha de entender que el Pretor exige la denuncia, si hubiera a quien se pueda denunciar; pero si no hubiera, por ejemplo, porque la casa es de la herencia, y la herencia no fue adida todavía, o si no hubiera heredero, ni se habitara en ella, deja de tener lugar esta parte del Edicto. Es, sin embargo, mas seguro fijar la denuncia en la misma casa; porque puede suceder, que advertido de este modo haya defensor.

§ 7.- Contra el que no hubiere observado alguna de las cosas que antes se han escrito, se da acción por cuanto vale la cosa por razón de la cual no se hubiere dado la caución del daño que amenaza; lo que se refiere no a una cantidad, sino a lo que importa, y sirve de utilidad y no de pena.

§ 8.- Mas esta acción contiene la condición cierta de que haya sido pedida; mas si alguno no la pidió, no puede ejercitarla. Mas decimos propiamente que la «pide» el que la pide ante el tribunal, no en otra parte.

§ 9.- Si el municipio estuviera tan próximo a la ciudad, que no interponiéndose el magistrado hubiere podido uno dirigirse al Pretor o al Presidente, se puede decir que deja de tener lugar esta acción contra los magistrados, como si nada importara, porque estuvo en tu potestad pretender que por el Pretor o el Presidente fueras puesto en posesión.

the Praetor or Governor.

§ 10.- Haec autem actio quum rei habeat persecutionem, et heredi et in heredem et perpetuo dabitur.

5.- PAULUS; *libro I, ad Edictum*.- Praetoris officium est, ut missus in possessionem etiam eam per longi temporis spatium in suum dominium capere possit.

§ 1.- Si plures sint domini, qui cavere debent, et aliquis non caveat, in portionem eius mittetur. Et contra si aliquot sint, qui caveri sibi desiderant, et alius pretiosiores, alius viliores habeat aedes, sive unius domus plures habeant dispaes partes: tamen non magnitudine domini quisque, sed aequaliter mittentur omnes in possessionem.

§ 2.- Si et dominus proprietatis et fructuarius desideret sibi caveri damni infecti, uterque audiendus est: nec enim iniuriam sentiet promissor, non plus cuique praestaturus, quam quod eius intersit.

6.- GAIUS; *libro I, ad Edictum provinciale*.- Evenit, ut nonnumquam damno dato nulla nobis competat actio non interposita antea cautione, veluti si vicini aedes ruinosae in meas aedes ceciderint: adeo ut plerisque placuerit nec cogi quidem eum posse, ut rudera tollat, si modo omnia quae iaceant pro derelicto habeat.

§ 7.- ULPIANUS; *libro LIII, ad Edictum*.- Praetor ait: "damni infecti suo nomine promitti, alieno satisfacere iubebo ei, qui iuraverit non calumniae causa id se postulare eumve cuius nomine aget postulaturum fuisse, in eam diem, quam causa cognita statuero. Si controversia erit, dominus sit nec ne qui

§ 10.- Moreover, this Section, which has for its object the pursuit of the property, is granted both in favor of and against an heir, and is a perpetual one.

5.- PAULUS; *On the Edict, Book I*.- It is the duty of the Praetor, where the plaintiff is placed in possession, to enable him to acquire ownership of the property, after he has held it for a long period of time.

§ 1.- Where there are several joint-owners who should furnish security, and one of them does not do so, the plaintiff shall be placed in possession of his share. And, on the other hand, where there are several persons who desire security to be furnished them, and some have houses more valuable than the others, or where they are all owners of unequal shares of the same house, all, nevertheless, will be placed in possession on an equal footing, and not with reference to the extent of their respective ownership.

§ 2.- If both the owner of the property and the usufructuary demand security against threatened injury, both of them should be heard; for the promisor does not suffer any wrong, because he will only be obliged to pay each one in proportion to the amount of his interest.

6.- GAIUS; *On the Provincial Edict, Book I*.- It sometimes happens that, where injury has been sustained, we will not be entitled to any action, if security had not previously been given; for instance, when the house of my neighbor, which is in a ruinous condition, falls upon my building. This rule is applicable to such an extent that it has been held by many authorities that he who is to blame can not even be compelled to remove the rubbish, provided he intends to abandon everything upon the ground.

7.- ULPIANUS; *On the Edict, Book LIII*.- The Praetor says, "In the case of threatened injury, I order every one who appears in his own behalf to promise indemnity, and all others to give security to the other party, who is willing to swear that neither he nor the person for whom he acts makes the demand for the

§ 10.- Mas esta acción, como contiene la persecución de la cosa, se dará al heredero y contra el heredero, y a perpetuidad.

6.- PAULO; *Comentarios al Edicto, libro I*.- Es de cargo del Pretor, que el que fue puesto en posesión pueda adquirirla también para su dominio por el espacio de largo tiempo.

§ 1.- Si hubiera muchos dueños, que deben dar caución, y alguno no la diera, será uno puesto en posesión de la parte de éste. Y por el contrario, si hubiera algunos, que pretenden que a ellos se les dé caución, y uno tuviera casa de más valor, y otro de menos, o si varios tuvieran desiguales partes de una sola casa, todos, sin embargo, serán puestos en posesión igualmente, y no cada uno según la extensión de su dominio.

§ 2.- Si pretendieran que se les dé caución del daño que amenaza, así el dueño de la propiedad, como el usufructuario, ambos han de ser oídos; porque el que promete no sufrirá por ello perjuicio, no habiendo de dar a cada uno mas de lo que le importa.

6.- GAYO; *Comentarios al Edicto provincial, libro I*.- Acontece, que a veces no nos compete ninguna acción por el daño causado, no habiéndose interpuesto antes caución, por ejemplo, si la casa ruinosa del vecino hubiere caído sobre mi casa; de tal modo, que a muchos les pareció bien que no pudiera ciertamente ser obligado aquél a quitar los escombros, si considerase como cosa abandonada todo lo que estuviere caído.

7.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Dice el Pretor: «En el día en que yo determinare con conocimiento de causa, mandaré que se prometa en propio nombre por el daño que amenaza, y que en nombre de otro se dé fianza, al que hubiere jurado que esto no lo pide por causa de calumnia, o que no lo

cavebit, sub exceptione satisdari iubebo. De eo opere, quod in flumine publico ripave eius fiet, in annos decem satisdari iubebo. Eum, cui ita non cavebitur, in possessionem eius rei, cuius nomine ut caveatur postulabitur, ire et, quum iusta causa esse videbitur, etiam possidere iubebo. In eum, qui neque caverit neque in possessione esse neque possidere passus erit, iudicium dabo, ut tantum praestet, quantum praestare eum oporteret, si de ea re ex decreto meo eiusve, cuius de ea re iurisdictio fuit quae mea est, cautum fuisset. Eius rei nomine, in cuius possessionem misero, si ab eo, qui in possessione erit, damni infecti nomine satisdabitur, eum, cui non satisdabitur, simul in possessione esse iubebo".

§ 1.- Hoc edictum prospicit damno nondum facto, quum ceterae actiones ad damna, quae contigerunt, sarcienda pertineant, ut in legis aquiliae actione et aliis. De damno vero facto nihil Edicto cavetur: quum enim animalia, quae noxam commiserunt, non ultra nos solent onerare, quam ut noxae ea dedamus, multo magis ea, quae anima carent, ultra nos non deberent onerare, praesertim quum res quidem animales, quae damnum dederint, ipsae extent, aedes autem, si ruina sua damnum dederunt, desierint extare.

§ 2.- Unde quaeritur, si ante, quam caveretur, aedes deciderunt neque dominus rudera velit egerere eaque derelinquat, an sit aliqua adversus eum actio. Et Iulianus consultus, si prius, quam damni infecti stipulatio interponeretur, aedes vitiosae corruissent,

purpose of causing annoyance; and that application may be made until the day which I shall fix for having the case. If it is disputed whether the party who is to give security is the owner of the property, or not, I direct that security shall be given provisionally. Where any structure is erected in a public stream, or on the bank of the same, I shall order security to be furnished for ten years. "Moreover, I shall order the party to whom security is furnished to take possession of the property, in the name of him who makes the demand for security; and, if just cause is shown, I shall order him to obtain actual possession of the same. I will grant an action against him who refuses to give security, or who does not permit the other party to remain in possession, or to acquire it; in order that he may pay as much as he would have been required to pay if security had been furnished with reference to said property, in accordance with my decree, or with that of a judge having jurisdiction over said property, which is also in my jurisdiction. "If he to whom I have granted possession in the name of another does not give security against threatened injury, I shall order him to whom security has not been furnished to be placed immediately in actual possession of the said property."

§ 1.- This Edict has reference to injury which has not yet been committed, while other actions which relate to injuries have reference to reparation, as that of the Aquilian Law, and others. Under this Edict nothing is provided with reference to injury already committed, for when animals have caused damage it is not customary to render us liable, except to compel us to surrender them by way of reparation; and there is much more reason for the same rule to be applicable where property destitute of life is considered, as we should not be liable to a greater amount; especially where the animals which committed the damage are still in existence; but the house that caused ruin by falling has ceased to exist.

§ 2.- Therefore, if the house should fall before security has been given, and the owner is not willing to remove the rubbish, and abandons it, the question arises whether an action can be brought against him. Julianus, in a case where a ruinous house had fallen,

habría de haber pedido aquel en cuyo nombre ejercitare la acción. Si hubiere controversia sobre si es o no dueño el que diere la caución, mandaré que se de fianza bajo excepción. Por la obra que se hiciere en río público o en su ribera, mandaré que se dé fianza por diez años. Mandaré que aquel a quien no se le diere de este modo caución entre en posesión de la cosa por razón de la que se pidiere que se dé caución y cuando pareciere que hay justa causa, mandaré también que se posea. Contra aquel que ni hubiere dado caución, ni hubiere consentido que otro estuviese en posesión ni poseyere, daré acción para que pague tanto cuanto él debería pagar, si sobre el particular se hubiere decidido por decreto mío, o de aquel de quien fue sobre este negocio la jurisdicción, que es mía. Si por razón de la cosa, en cuya posesión yo hubiera puesto a uno, no se diere fianza a título del daño que amenaza por el que estuviere en posesión, mandaré que esté en posesión juntamente aquel a quien no se le diere fianza.»

§ 1.- Este Edicto mira al daño aun no causado, en tanto que las demás acciones, como la acción de la ley Aquilia, y otras, se refieren al resarcimiento de los daños que sobrevinieron; mas respecto al daño causado nada se dispone en el Edicto; porque como los animales que hicieron daño no suelen gravarnos en más que a darlos por el daño, con mucha más razón no deben gravarnos en más las cosas que carecen de alma, principalmente porque las cosas animadas, que hubieren causado el daño, existen ciertamente ellas mismas, pero las casas, si con su ruina causaron daño, habrán dejado de existir.

§ 2.- Por lo cual se pregunta, si, habiéndose caído una casa antes que se diese caución, y no queriendo el dueño retirar los escombros, y abandonándolos, habrá contra él alguna acción. Y habiendo sido consultado Juliano sobre qué debería hacer aquél

quid facere deberet is, in cuius aedes rudera decidissent, ut damnum sarciretur, respondit, si dominus aedium, quae ruerunt, vellet tollere, non aliter permittendum, quam ut omnia, id est et quae inutilia essent, auferret, nec solum de futuro, sed et de praeterito damno cavere eum debere: quod si dominus aedium, quae deciderunt, nihil facit, interdictum reddendum ei, in cuius aedes rudera decidissent, per quod vicinus compelletur aut tollere aut totas aedes pro derelicto habere.

8.- GAIUS; *ad Edictum Praetoris urbani titulo de damno infecto*.- Quod forte tunc recte dicetur, quum non ipsius negligentia, sed propter aliquod impedimentum sibi non prospexit.

9.- ULPIANUS; *libro LIII, ad Edictum*.- Hoc amplius Iulianus posse dici compellendum eum, ut etiam de praeterito damno caveret: quod enim re integra custoditur, hoc non inique etiam post ruinam aedium praestabitur. Integra autem re unusquisque cogitur aut de damno infecto cavere, aut aedibus carere quas non defendit. Denique, inquit, si quis propter angustias temporis aut quia rei publicae causa aberat non potuerit damni infecti stipulari, non inique Praetorem curaturum, ut dominus vitiosarum aedium aut damnum sarciat aut aedibus careat. sententiam Iuliani utilitas comprobatur.

§ 1.- De his autem, quae vi fluminis importata sunt, an interdictum dari possit, quaeritur. Trebatius refert, quum tiberis abundasset et res multas multorum in

before a stipulation with reference to threatened injury had been entered into, having been consulted as to what he upon whose premises the rubbish had fallen should do in order to obtain damages, answered that if the owner of the house which had fallen wished to remove the rubbish, he should not be permitted to do so, unless he removed everything; that is to say, even what was worthless, and should also give security, not only with reference to future injury but also with reference to that which had already been sustained. If the owner of the house which has toppled over does not do anything; an interdict should be granted him upon whose premises the rubbish had fallen by which his neighbor may be compelled either to remove the rubbish, or to abandon the entire house which had been destroyed.

8.- GAIUS; *On the Edict of the Urban Praetor: Title, Concerning Threatened Injury*.- It may then very properly be said that these proceedings should not be taken where the owner of the ruined house failed to furnish security, not through negligence on his part, but on account of some obstacle which prevented him from doing so.

9.- ULPIANUS; *On the Edict, Book LIII*.- Julianus further says, it may be held that, in this case, the owner of the house can be compelled to give security for the damage which has already taken place; for, as protection can be provided while the building is still intact, it is not inequitable for it to be furnished after it has fallen into ruin. However, while it was intact, anyone can be compelled either to give security against threatened injury, or to abandon the house which he is unwilling to repair. Finally, he says that if anyone, on account of the shortness of the time required, or because of his absence on business for the State, cannot enter into a stipulation against threatened injury, it is not unjust for the Praetor to provide that the owner of the ruinous house should either repair the damage, or abandon it. Reason approves the opinion of Julianus.

§ 1.- The question arises whether an interdict can be granted with reference to things which have been transported by the current of a river. Trebatius says

sobre cuya casa hubiesen caído los escombros, para que se le resarciese el daño, si la casa ruinosa se hubiese caído antes que se interpusiera la estipulación de daño que amenaza, respondió, que si el dueño de la casa que se arruinó quisiera recoger los escombros, no se le ha de permitir de otra suerte sino si lo retirase todo, esto es, hasta lo que fuese inútil, y que no solamente debe dar caución por el daño futuro, sino también por el pasado; pero que si el dueño de la casa que se cayó, no hizo nada, se le ha de conceder a aquel sobre cuya casa hubiesen caído los escombros, interdicto, por el cual será compelido el vecino o a quitarlos, o a tener por abandonada toda la casa.

8.- GAYO; *Comentarios al Edicto del Pretor urbano, título del daño que amenaza*.- Lo que acaso se dirá con razón siempre y cuando no miró por sí, no por negligencia del mismo, sino por algún impedimento.

9.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Además de esto, añade Juliano, que se puede decir que él debe ser compelido a dar caución también por el daño pasado; porque lo que se observa estando íntegra la cosa, se hará no sin justicia también después de la ruina de la casa. Mas estando íntegra la cosa, es obligado cada cual o a dar caución por el daño que amenaza, o a quedar privado de la casa, que no defendió. Finalmente, dice, si alguno no hubiere podido estipular por el daño que amenaza a causa de lo corto del tiempo, o porque estaba ausente por causa de la república, no sin justicia habrá de cuidar el Pretor de que el dueño de la casa ruinosa o resarza el daño, o quede privado de la casa; y la utilidad convalida la opinión de Juliano.

§ 1.- Pero se pregunta, si se podrá dar el interdicto por las cosas que fueron arrastradas por la fuerza de un río. Trebacio refiere, que habiendo tenido una

aliena aedificia detulisset, interdictum a Praetore datum, ne vis fieret dominis, quo minus sua tollerent auferrent, si modo damni infecti repromitterent.

§ 2.- Alfenus quoque scribit, si ex fundo tuo crusta lapsa sit in meum fundum eamque petas, dandum in te iudicium de damno iam facto, idque Labeo probat: nam arbitrio iudicis, apud quem res prolapsae petentur, damnum, quod ante sensi, non contineri, nec aliter dandam actionem, quam ut omnia tollantur, quae sunt prolapsae. Ita demum autem crustam vindicari posse idem alfenus ait, si non coaluerit nec unitatem quum terra mea fecerit. Nec arbor potest vindicari a te, quae translata in agrum meum quum terra mea coaluit. Sed nec ego potero te quum agere ius tibi non esse ita crustam habere, si iam quum terra mea coaluit, quia mea facta est.

§ 3.- Neratius autem scribit, si ratis in agrum meum vi fluminis delata sit, non aliter tibi potestatem tollendi faciendam, quam si de praeterito quoque damno mihi cavisses.

§ 4.- Quaesitum est, si solum sit alterius, superficies alterius, superficiarius utrum repromittere damni infecti an satisfacere debeat. Et Iulianus scribit, quotiens superficialia insula vitiosa est, dominum et de soli et de aedificii vitio repromittere aut eum, ad quem superficies pertinet, de utroque satisfacere: quod si uterque cesset, vicinum in possessionem mittendum.

that when the Tiber becomes swollen, and carries the property of some persons upon the premises of others, an interdict is granted by the Praetor to prevent violence from being employed against the owners of said property to prevent them from removing what belongs to them; provided they promise indemnity against threatened injury.

§ 2.- Alfenus says that if a portion of your land falls upon mine, and you claim it, an action will be granted against you for injury already committed. This opinion is approved by Labeo; for the injury which I already have sustained cannot be left to the decision of the judge before whom the recovery of the earth which has fallen is demanded; nor should an action be granted unless everything which has fallen is removed. Alfenus also says that the earth which has fallen can only be claimed where it has not become united with, and constitutes a part of my land. Nor can a tree, which, having been carried into my field and has taken root in my soil, be claimed by you. Nor can I bring an action against you on the ground that you had no right to your part of the land deposited on mine, if it was already united with mine, for the reason that it then becomes my property.

§ 3.- Neratius, however, says that if your boat is carried upon my land by the force of the stream, you cannot remove it unless you furnish me with security for any injury which I may have sustained.

§ 4.- The question arose, when the land belongs to one person, and the surface of it to another, whether the latter should promise indemnity for threatened injury, or should give security. Julianus says that whenever a house which stands on the land of another is ruinous, the owner must promise indemnity, not only with reference to the defective condition of the land but also with reference to that of the building; or that he to whom the surface belongs must furnish security both with respect to the land and to the house; and if either one of them fails to do so, the neighbor should be placed in possession of the property.

crecida el Tiber, y habiéndose llevado muchas cosas de muchos a edificios de otros, se dio interdicto por el Pretor, a fin de que no se les hiciera violencia a los dueños para que no recogiesen y se llevasen lo suyo, si prometieran respecto al daño que amenazase.

§ 2.- También escribe Alfenio, que si de tu fundo hubiera caído una capa de tierra sobre un fundo mío, y la pidieras, se ha de dar contra ti acción por el daño ya causado; y esto aprueba Labeón, porque no se comprende en el arbitrio del juez, ante el cual se pidieren las cosas caídas, el daño que antes experimenté, ni se ha de dar acción de otro modo, sino para que se recoja todo lo que se cayó. Pero dice el mismo Alfenio, que la capa de tierra puede ser reivindicada solamente si no se hubiere juntado ni unido con mi tierra. Tampoco se puede reivindicar por ti el árbol, que fue trasladado a mi campo, cuando echó raíces en mi tierra. Pero yo tampoco podré sostener contra ti que no tienes derecho para tener la capa de tierra, si ya ésta se mezcló con mi tierra, porque se hizo mía.

§ 3.- Pero escribe Neracio, que si por la fuerza del río hubiera sido llevada una barca a un campo mío, no se te ha de dar facultad para llevártela, de otra suerte, sino si me hubieses dado caución también por el daño pasado.

§ 4.- Se preguntó, si, siendo el suelo de uno, y la superficie de otro, deberá el superficiario prometer, o dar fianza, por el daño que amenaza. Y escribe Juliano, que siempre que una casa superficialia está ruinosa, debe el dueño prometer por el vicio tanto del suelo, como del edificio, o dar fianza por ambas cosas aquel a quien le pertenece el edificio; pero que si uno y otro dejasen de darla, ha de ser puesto en posesión el vecino.

§ 5.- Celsus certe scribit, si aedium tuarum usus fructus Titiae est, damni infecti aut dominum repromittere aut Titiam satisfacere debere. Quod si in possessionem missus fuerit is, cui damni infecti cavendum fuit, Titiam uti frui prohibebit. Idem ait eum quoque fructuarium, qui non reficit, a domino uti frui prohibendum: ergo et si de damno infecto non cavet dominusque compulsus est repromittere, prohiberi debet frui.

10.- PAULUS; *libro XLVIII, ad Edictum*.- Quamvis alienus usus fructus sit, dominum promittere oportere cassius ait. Nisi proprietarius in totum repromittat vel fructuarius satisfacat, mitti oportet in possessionem eum, cui non caveatur. Sed nisi proprietario repromittenti fructuarius caveat, denegandam ei fructus petitionem Iulianus scribit. sed si fructuarius de soli vitio quid praestiterit, ius domini ad eum transferri oportet.

11.- ULPIANUS; *libro LIII, ad Edictum*.- Quid de creditore dicemus, qui pignus accepit? Utrum repromittere, quia suum ius tuetur, an satisfacere, quia dominus non est, debet? Quae species est in contrario latere apud Marcellum agitata, an creditori pignoratitio damni infecti caveri debeat. Et ait Marcellus inutiliter ei caveri: idemque etiam de eo cavendum qui non a domino emit: nam nec in huius persona committi stipulationem. Aequissimum tamen puto huic prospiciendum, id est creditori, per stipulationem.

§ 5.- Celsus very properly holds that if the usufruct of your house belongs to Titia, you, as the owner, must promise indemnity against threatened injury, or Titia must give security. If he to whom security against threatened injury should be furnished is placed in possession of the property, he will prevent the use and enjoyment of the same by Titia. He also says that an usufructuary, who does not repair the property, should be prevented by the owner from enjoying it; and therefore, if the usufructuary does not give security against threatened injury, and the owner is compelled to promise indemnity, the usufructuary should be prevented from enjoying the property.

10.- PAULUS; *On the Edict, Book XLVIII*.- Cassius says that even if the usufruct is separated from the property, the owner must promise indemnity for future-injury. Unless the owner promises indemnity in full, or the usufructuary furnishes security, the person to whom security is not given must be placed in possession of the property; but if the usufructuary does not give security to the owner, who was promised indemnity, Julianus says that he will not be entitled to an action to recover his usufruct. If, however, the usufructuary should pay anything on account of some defect of the land, the right of ownership should be transferred to him.

11.- ULPIANUS; *On the Edict, Book LIII*.- What shall we say with reference to a creditor who has received a house by way of pledge? Must he promise indemnity against threatened injury, in order that his rights may be protected; or must he give security because he is not the owner of the property? This point is treated in an opposite sense by Marcellus; for he asks whether security against threatened injury should be given to a creditor who holds a house by way of pledge. Marcellus says that it is not necessary for him to give security, and adds that the same rule will apply to a person who did not purchase the house from the owner, for the stipulation would have no force, so far as the latter is concerned. I think, however, that it would be perfectly just that the interest of the creditor should be taken into account; that is to say, that he should be secured by means of a

§ 5.- Con verdad escribe Celso, que si es de Ticia el usufructo de una casa tuya, o el dueño debe prometer por el daño que amenaza, o Ticia dar fianza; pero si hubiere sido puesto en posesión aquel a quien se le debió dar caución por el daño que amenazaba, prohibirá que Ticia la usufructúe. Dice el mismo, que también al usufructuario, que no la repara, se le ha de prohibir por el dueño que la usufructúe; luego también, si no da caución por el daño que amenaza, y el dueño fue compelido a prometer, se le debe prohibir que la usufructúe.

10.- PAULO; *Comentarios al Edicto, libro XLVIII*.- Dice Cassio, que aunque el usufructo sea de otro, es conveniente que prometa el dueño. Si el propietario no prometiera por la totalidad, o no diere fianza el usufructuario, es conveniente que sea puesto en posesión aquel a quien no se le diere caución. Mas si el usufructuario no le diera caución al propietario que promete, escribe Juliano que se le ha de denegar la petición de los frutos. Pero si el usufructuario hubiere dado algo por vicio del suelo, es conveniente que se le transfiera a él el derecho del dueño.

11.- ULPIANO; *Comentarios al Edicto, libro LIII*.- ¿Qué diremos del acreedor que recibió prenda? ¿Deberá acaso prometer, porque defiende su derecho, o dar fianza, porque no es dueño? Cuya cuestión es discutida por Marcelo bajo el aspecto contrario, sobre si al acreedor pignoratitio se le deberá dar caución por el daño que amenace; y dice Marcelo, que inútilmente se le da caución; y que lo mismo se ha de decidir respecto del que compró de quien no era dueño, porque ni aun respecto a la persona de éste se incurre en la estipulación; pero considero muy justo que se haya de atender a éste es decir, al acreedor, mediante la estipulación.

stipulation.

12.- PAULUS; *libro XLVIII, ad Edictum*.- His qui pignori rem acceperunt potior est is, cui damni infecti non cavetur, si possidere et per longum tempus rem capere ei permissum fuerit.

13.- ULPIANUS; *libro LIII, ad Edictum*.- Qui bona fide a non domino emit, videndum est, numquid repromittat, non etiam satisdet. Quod quibusdam videtur: habet autem rationem, ut magis repromittat quam satisdet: suo enim nomine id facit.

§ 1.- Sive corporis dominus sive is qui ius habet (ut puta servitutem) de damno infecto caveat, puto eum repromittere debere, non satisdare, quia suo nomine id facit, non alieno.

§ 2.- Quum inter aedes meas et tuas sint aliae aedes non vitiosae, videndum est, utrum tu solus mihi cavere debeas an vero et is, cuius aedes vitiosae non sunt, an ille solus, an ambo. Et magis est, ut ambo cavere debeant, quia fieri potest, ut aedes vitiosae in aedes non vitiosas incidentes damnum mihi dent. quamvis possit quis dicere non vitio incolumium aedium hoc factum, si aliae in eas incidentes damni causam praebuerunt: sed Quum prospicere sibi potuerit damni infecti cautionem, non prospexerit, merito convenietur.

§ 3.- Qui damni infecti caveri sibi postulat, prius de calumnia iurare debet: quisquis igitur iuraverit de calumnia, admittitur ad stipulationem, et non inquit

12.- PAULUS; *On the Edict, Book XLVIII*.- The condition of a person to whom security against threatened injury has not been furnished is preferable to that of creditors who have accepted property in pledge, if he should be permitted to take possession of it and acquire it by usucaption, after the lapse of a long period of time.

13.- ULPIANUS; *On the Edict, Book LIII*.- Let us see whether a purchaser in good faith, who obtained property from one who was not its owner, should promise indemnity against threatened injury, or should give security. The latter opinion is adopted by certain authorities; it, however, is reasonable that the purchaser should rather promise indemnity than give security, since he does so in his own name.

§ 1.- Where a question arises whether the owner of the land or one who has a right in it (as, for instance, a servitude), should furnish security against threatened injury, I think that he should promise indemnity, and not give security, because he acts in his own name and not in that of another.

§ 2.- Where another house, which is in good repair, stands between mine and yours which is ruinous, let us see whether you alone should give security to me, or whether he, whose house is in good condition, should alone obtain security; or whether I can require it of both of you. The better opinion is that both should furnish security; because it is possible that the ruinous house might injure mine by falling upon the one which is in good condition, although it may be said that this did not take place through any defect in the building, which was in good repair, if the other, by falling upon it, causes me damage. But, as the owner of the intervening house could have protected himself by obtaining security against threatened injury, it is but reasonable that he should be liable to an action.

§ 3.- Where anyone demands that security against threatened injury be given him, he must, in the first place, swear that this is not done for the purpose of

12.- PAULO; *Comentarios al Edicto, libro XLVIII*.- Aquel a quien no se le da caución por el daño que amenaza, es preferente a los que recibieron la cosa en prenda, si posee, y se le hubiere permitido adquirir la cosa por el transcurso de largo tiempo.

13.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Se ha de ver, si el que de buena fe compró de quien no era dueño, prometerá, y si no dará también fianza. Esto les parece a algunos; pero tiene razón para prometer más bien que para dar fianza, porque esto lo hace en su propio nombre.

§ 1.- Ya si diera caución por el daño que amenaza el dueño de la cosa, ya si también el que tiene un derecho, por ejemplo, una servidumbre, opino que éste debe prometer, y no dar fianza, porque esto lo hace en su propio nombre, no en el de otro.

§ 2.- Cuando entre mi casa y la tuya hubiere otra casa no ruinosa, se ha de ver si tú sólo me deberás dar caución, o si también aquél cuyas casas no son ruinosas, o si sólo él, o ambos; y es más cierto que ambos deben dar caución, porque puede suceder que la casa ruinosa al caer sobre la casa no ruinosa me cause daño, por más que alguno pueda decir que éste no fue causado por vicio de la casa no ruinosa, si cayendo otra sobre ella dio causa para el daño; pero si pudiendo mirar por sí con la caución del daño que amenaza, no hubiere mirado, con razón será demandado.

§ 3.- El que pide que se dé caución por daño que amenaza, debe jurar antes de calumnia. Así, pues, el que hubiere jurado de calumnia es admitido a la

retur, utrum intersit eius an non, vicinas aedes habeat an non habeat. Totum tamen hoc iurisdictioni Praetoriae subiciendum, cui cavendum sit, cui non.

§ 4.- Ceterum neque ei qui in meo deambulet neque ei qui in meo lavet vel in mea taberna devertat, caveri debet.

§ 5.- Vicinis plane inquilinisque eorum et inquilinorum uxoribus cavendum esse ait Labeo, item his qui quum his morentur.

§ 6.- De illo quaeritur, an inquilinis suis dominus aedium cavere possit. Et Sabinus ait inquilinis non esse cavendum: aut enim ab initio vitiosas aedes conduxerunt et habent quod sibi imputent, aut in vitium aedes inciderunt et possunt ex conducto experiri: quae sententia verior est.

§ 7.- Si quis iuxta monumentum aedificaverit vel iuxta aedificium suum monumentum fieri passus sit, de damno infecto ei postea cavendum non erit, quia rem illicitam admisit: alias autem si monumento aedificium noceat, in quo nihil sit, quod imputari possit ei, ad quem ius monumenti pertinet, cavendum est ei, ad quem ius monumenti pertinet.

§ 8.- Superficiarium et fructuarium damni infecti utiliter stipulari hodie constat.

§ 9.- Sed ei, qui bona fide a non domino emit, damni infecti stipulationem non competere Marcellus ait.

annoyance. Therefore, anyone who is willing to take an oath to this effect shall be permitted to enter into a stipulation, and no inquiry will be made whether he has any interest in the property, or whether he has an adjoining house, or not; for the entire matter must be submitted to the decision of the Praetor, who shall determine to whom security must be given, and who is not entitled to it.

§ 4.- But security should not be given to anyone who has a right to cross my land, or to wash thereon, or to lodge in my house.

§ 5.- Labeo says that it is clear that security should be given by the owner of a building, which is not in good repair, not only to the neighbors, their tenants and their wives, but also to those who reside with them.

§ 6.- The question arises whether the owner of the house should give security to his tenants. Sabinus says that security should not be given to the tenants, for they either rented the house which was ruinous in the beginning, and it is their own fault that they did so; or the house has subsequently become ruinous and they can bring an action under the lease. This opinion is the more correct one.

§ 7.- Where anyone builds a house near a monument, or suffers a monument to be erected near his house, security against threatened injury should not be given to him afterwards, because he allowed an unlawful act to be committed. In other cases, however, where a building injures a monument, and the person to whom the right to the monument belongs is not to blame, security must be furnished the latter.

§ 8.- It is now settled that persons who have the right to the surface and the usufruct of land can enter into a stipulation providing against threatened injury.

§ 9.- Marcellus, however, says that he who, in good faith, purchases property from someone who is not the owner of the same, cannot enter into a stipulation

estipulación; y no se investigará si tiene o no interés, si tiene o no casa vecina; pero todo esto, respecto a quien se le haya de dar caución, y a quien no, se ha de sujetar a la jurisdicción del Pretor.

§ 4.- Por lo demás, no se le debe dar caución ni al que se posee en lo mío, ni al que lava en lo mío, ni al que se alberga en mi hospedería.

§ 5.- Dice Labeón, que ciertamente se les ha de dar caución a los vecinos y a sus inquilinos, y a las mujeres, de los inquilinos; y también a los que con éstos moran.

§ 6.- Se pregunta, si el dueño de una casa podrá dar caución a sus propios inquilinos; y dice Sabino, que a los inquilinos no se les ha de dar caución; o porque desde un principio tomaron en arrendamiento casas ruinosas, y tienen esto que imputarse a sí mismos, o las casas se hicieron ruinosas, y pueden ejercitar la acción de conducción; cuya opinión es mas verdadera.

§ 7.- Si alguno hubiere edificado junto a un monumento, o hubiera consentido que se haga un monumento junto a un edificio suyo, no se habrá de dar después caución por el daño que amenaza, porque hizo una cosa ilícita; mas por el contrario, si el edificio le perjudicara al monumento, y en esto no hubiera nada que se pueda imputar a aquel a quien le pertenece el derecho del monumento, se le ha de dar la caución a aquel a quien le pertenece el derecho del monumento.

§ 8.- Hoy es sabido que el superficiario y el usufructuario estipulan útilmente por el daño que amenaza.

§ 9.- Pero dice Marcelo, que al que de buena fe compró de quien no era dueño, no le compete la estipulación del daño que amenaza.

with reference to threatened injury.

§ 10.- Si quis opus novum nuntiaverit, an nihilo minus damni infecti ei caveri debeat, Iulianus tractat. Et magis probat caveri oportere: nam et ei, qui egerit ius adversario non esse altius tollere aedificium, caveri debere. Item eum, adversus quem interdictum quod vi aut clam competit, cavere debere Iulianus ait, quia non est cautum neque de vitio aedium neque de damno operis.

§ 11.- Si quis, quia sibi non cavebatur, in possessionem aedium missus fuerit, deinde is cuius aedes fuerunt, quum praeterea alias aedes haberet, desideret ab eo, qui in possessionem missus est, ut sibi damni infecti harum aedium nomine, quarum in possessionem missus est, caveret, an sit audiendus, videamus. Et Iulianus scribit: is qui vitiosis aedibus cesserit, si integras retinuerit, numquid improbe ab eo, qui vitiosas aedes coepit possidere, cautionem exigit, quum ideo possessionem amiserit, quia ipse damni infecti satis non dederat? Et sane parum probe postulat ab eo caveri sibi earum aedium nomine, quarum ipse cavere supersedit: quae sententia vera est.

§ 12.- Si quis stipulaturus iuraverit nec fuerit stipulatus, an postea ei stipulari volenti iurandum sit, videamus. Et puto iterum iurandum, quia possit fieri, ut aut tunc aut modo calumniatur.

§ 13.- Si alieno nomine caveri mihi damni infecti postulem iurare debeo non calumniae causa id eum, cuius nomine cautum postulo, fuisse postulatum.

§ 10.- Where anyone serves notice for the discontinuance of a new work, Julianus discusses the question as to whether security against threatened injury should, nevertheless, be furnished him; and he is inclined to the belief that this ought to be done. Julianus also says that security should be given to a person entitled to the interdict *Quod vi et clam* against his adversary; because the security has no reference to any defects in a building or to any injury which may result from the work.

§ 11.- Where anyone is placed in possession of a house for the reason that security was not given him, and afterwards the person to whom the house belonged, who has other buildings adjoining the former, demands that security against threatened injury on account of the ruinous house should be furnished him by the complainant who has been placed in possession of the same; let us see whether the latter should be compelled to furnish security, or whether the other party should be heard. Julianus holds that the person who has surrendered the ruinous house and retained those which were in good condition acts very dishonorably in demanding security from him who has just taken possession of the one in bad repair, when he himself lost possession of it because he refused to furnish security against threatened injury. And, indeed, he can with little propriety demand security to protect himself on account of a building for which he neglected to furnish security. This opinion is correct.

§ 12.- Where anyone, about to enter into a stipulation, was sworn, but failed to conclude the agreement, let us see if he should again be sworn if he afterwards desires to enter into it. I think that he should be sworn a second time, for the reason that it is possible that either at first, or at present, he may have intended to cause annoyance.

§ 13.- If I demand that security be furnished me against threatened injury, in the name of another, I must swear that he in whose name I demand security

§ 10.- Si alguno hubiere denunciado una obra nueva, discute Juliano, si, esto no obstante, se le deberá dar caución por el daño que amenaza; y más bien admite que se debe dar caución; porque también se le debe dar caución al que hubiere sostenido que su adversario no tenía derecho para levantar mas un edificio. Y también dice Juliano que debe dar caución aquel contra quien compete el interdicto de lo que se hizo con violencia o clandestinamente, porque no se dio caución ni por vicio de la casa, ni por daño de una obra.

§ 11.- Si alguno hubiere sido puesto en posesión de una casa porque no se le daba caución, y después aquel de quien fueron las casas pretendiera, porque ademas tuviese otras casas, que por el que fue puesto en posesión se le diese caución del daño que amenaza por razón de las casas de que fue puesto en posesión, veamos si haya de ser oído. Y escribe Juliano: el que hubiere hecho cesión de casas ruinosas, si hubiere retenido las que estaban bien, ¿exige acaso sin razón caución del que comenzó a poseer las casas ruinosas, porque hubiere perdido la posesión precisamente porque él no había dado fianza por el daño que amenazaba? Y a la verdad, con poca probidad pretende que por él se le dé caución con motivo de aquellas casas por las cuales él mismo dejó de dar caución.

§ 12.- Si el que había de estipular jurare, y no hubiere estipulado, veamos si se haya de jurar después al querer él estipular; y opino que se ha de jurar de nuevo, porque podría suceder que, o entonces, o ahora, calumniase.

§ 13.- Si yo pidiera que en nombre de otro se me diese caución por el daño que amenaza, debo jurar que no habría de haber pedido esto por causa de

§ 14.- Sed si eius nomine postulem, qui, si ipse postulare, iurare non compelleretur, veluti patronus vel parens, dicendum est locum iuriurando non esse: de quo enim ille non iuraret, nec qui vice eius postulat in hac stipulatione debet iurare.

§ 15.- Huic stipulationi debet dies esse insertus, intra quem si quid damni contigerit, cautio locum habet: neque enim in infinitum obligatus esse debet stipulatione. Ipse igitur Praetor diem dabit stipulationi, aestimatione habita ex causa et ex qualitate eius damni, quod contingere speratur.

14.- PAULUS; *libro XLVIII, ad Edictum*.- In causae cognitione etiam longinquitas soli et operis magnitudo spectanda est.

15.- ULPIANUS; *libro LIII, ad Edictum*.- Si finita sit dies statuta in cautione, iterum arbitratu praetoris ex integro erit cavendum.

§ 1.- Si vero sine adiectione diei stipulatio fuerit interposita, si quidem ex conventionem, quandoque fuerit commissa, ex stipulatu agitur, si vero per errorem, magis est illud dicendum finito die, in quem alioquin caveri solet, desiderandum esse a Praetore, ut liberetur.

§ 2.- Deinde ait praetor: "de eo opere, quod in flumine publico ripave eius fiet, in annos decem satisfari iubebo". Hic exigitur satisfactio et tempus stipulationi praestituitur idcirco, quia in publico fit: quum autem in alieno fiat, satisfactionem praetor iniungit.

does not do so for the purpose of causing annoyance.

§ 14.- If, however, I make the demand in the name of a person who, if he did so in his own proper person, would not be compelled to be sworn, as for instance, a patron, or a parent, it must be held that there is no ground for an oath; as in a case where the principal need not be sworn, he who acts for him should "not make oath in a stipulation of this kind.

§ 15.- In this stipulation a certain term should be prescribed, within which the bond will become operative if any injury is sustained, for the person giving security should not perpetually be liable under the stipulation. Therefore, the Praetor himself prescribes the term for the stipulation, the circumstances of the case being taken into account, as well as the nature of the injury which it is apprehended may result.

14.- PAULUS; *On the Edict, Book XLVIII*.- In investigating the circumstances of the case, the distance separating the two pieces of property, and the dimensions of the structure should be considered,

15.- ULPIANUS; *On the Edict, Book LIII*.- If the time prescribed by the bond has passed, new security can be furnished by a decree of the Praetor.

§ 1.- When a stipulation is entered into without fixing any time, or where, by an agreement of the parties, the stipulation was to become operative when the injury was done; or if the omission was made through mistake, and the time has expired which it is customary to prescribe in such cases; the party who furnished the security can apply to the Praetor to be released.

§ 2.- The Praetor next says, "With reference to any structure erected in a public stream, or on the bank of the same, I shall order security to be given for ten years." A bond is necessary in this instance, and a time must be prescribed for the expiration of the stipulation; and this is done because the structure is erected in a public place. Moreover, where this is

calumnia aquel en cuyo nombre pido la caución.

§ 14.- Mas si yo pidiera en nombre de quien, si él mismo pidiese, no sería compelido a jurar, por ejemplo, un patrono, o un ascendiente, se ha de decir, que no ha lugar al juramento; porque por lo que él no juraría, tampoco debe jurar en esta estipulación el que pide en su lugar.

§ 15.- En esta estipulación debe estar incluido el término dentro del cual tiene lugar la caución si sobreviniere algún daño; porque no debe estar obligado a perpetuidad por esta estipulación. Así pues, el Pretor dará término para esta estipulación hecha estimación de la causa y del daño que se espera que sobrevenga.

14.- PAULO; *Comentarios al Edicto, libro XLVIII*.- En el conocimiento de la causa se ha de atender también a la extensión del suelo y a la magnitud de la obra.

15.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Si hubiera transcurrido el término fijado en la caución, se habrá de dar caución de nuevo a arbitrio del Pretor.

§ 1.- Mas si se hubiere interpuesto estipulación sin indicación de término, si verdaderamente se hubiere incurrido alguna vez en ella por virtud de convención, se ejercita la acción de lo estipulado; mas si por error, es preferible decir, que transcurrido el término para el que se suele dar en otro caso caución, se ha de solicitar del Pretor que declare que se está libre.

§ 2.- Después dice el Pretor: «Por la obra que se hiciere en río público o en su ribera, mandaré que se dé fianza por diez años. Exige, pues, en este caso fianza y prefijó tiempo para la estipulación, por esto, porque se obra en lugar público; mas cuando se obra en lugar ajeno, el Pretor impone la fianza.

done upon the property of another, the Praetor requires a bond to be furnished.

§ 3.- Notandum, quod non etiam de loci vitio, sed de operis tantum cavetur, quamvis, si in privato fiat, et de loci et de operis vitio caveatur: sed quum locus publicus sit, non erat necesse ibidem opus facienti de alio vitio quam operis satisfacere damni infecti.

§ 3.- It must be remembered that security is given not only on account of defects in the soil, but also with reference to the structure itself; and, even though the latter is erected upon private ground, the security applies both to the soil and to the building itself. Where, however, the land is public property, it is not necessary for security against threatened injury to be furnished with reference to anything but defects in the construction of the building.

§ 3.- Se ha de observar, que se da caución no también por vicio del lugar, sino solamente por vicio de la obra, aunque, si se hiciera en lugar privado, se daría caución, tanto por vicio del lugar como por el de la obra; pero siendo lugar público, no tendrá necesidad el que allí hace la obra de dar fianza del daño que amenaza por otro vicio que por el de la obra.

§ 4.- Si quid igitur damni intra decem annos acciderit, id stipulatione continetur.

§ 4.- Any damage which may occur within ten years is therefore included in this stipulation.

§ 4.- Si, pues, aconteciere algún daño dentro de los diez años, será comprendido en la estipulación.

§ 5.- Et quod ait praetor "de eo opere", sic accipe de eo damno, quod ex opere fiet.

§ 5.- Where the Praetor says, "With reference to any work," we must understand this to refer to any damage resulting from a structure erected on public land.

§ 5.- Y lo que dice el Pretor «por la obra», entiéndelo de este modo: por el daño que resultare de la obra.

§ 6.- Si quid in via publica fiat, quia in alieno fit, satisfacendum est.

§ 6.- Where anything is built on a public highway, security must be given for the reason that it is erected on the land of another.

§ 6.- Si se hiciera alguna en vía pública, se ha de dar caución, porque se hace en lugar ajeno.

§ 7.- Sed praetor causa cognita tempus pro conditione operis determinabit.

§ 7.- The Praetor, however, after investigation, will fix the time in accordance with the nature of the work.

§ 7.- Mas el Pretor determinará, con conocimiento de causa, el tiempo según la condición de la obra.

§ 8.- Sive autem quis muniat viam sive quid aliud in via publica faciat, debet cautio locum habere, ne per hoc damno privati contingantur.

§ 8.- Where anyone performs labor to protect a highway, or does any other work with reference to the same, security should be furnished to prevent damage being sustained by private persons.

§ 8.- Mas ya si alguno reparase una vía, ya si hiciera alguna otra cosa en la vía pública, deberá tener lugar la caución, a fin de que por ello no se le origine daño a los particulares.

§ 9.- De ceteris locis publicis nihil specialiter cavetur, verum ex generali sermone, quasi in alieno fiat, satisfacere debet damni infecti.

§ 9.- Nothing is expressly provided with reference to other public places, but, on account of the general clause referring to structures erected upon the premises of others, security against threatened injury should be furnished.

§ 9.- Respecto a los demás lugares públicos, no se dispone nada especialmente; pero en virtud de la cláusula general, deberá darse fianza por el daño que amenaza, como si se obrara en lugar ajeno.

§ 10.- Si publicus locus publice reficiatur, rectissime Labeo scribit, eoque iure utimur, de damno infecto non esse cavendum, si quid vitio loci aut operis fiat: certe legem dandam operis talem, ne quid noceat vicinis damnum detur.

§ 10.- Where a public place is repaired by public labor; Labeo very properly holds that the rule that security against threatened injury shall not be given applies, where any injury may result from either a defect in the land or the work; but the work should be performed in such a way that no injury or damage may be sustained by the neighbors.

§ 10.- Con muchísima razón escribe Labeón, y este derecho observamos, que si públicamente se reparase un lugar público, no se ha de dar caución por el daño que amenaza, Si se hiciera algo por vicio del lugar o de la obra, se ha de imponer ciertamente a la obra cierta condición, a fin de que nada les perjudique a los vecinos o les cause daño.

§ 11.- Ex hoc Edicto si non caveatur, mittitur in possessionem a Praetore in eam partem, quae ruinosa esse videtur.

§ 12.- An vero in totas aedes missio locum habeat, videamus. Et extat Sabini sententia in totas aedes mittendum: alioquin si ex superficie, inquit, damnum timeatur, non habebit res exitum, nec profuturum in possessionem eius rei mitti, quam quis possidere non possit aut ei non expediat: et verior est Sabini sententia.

§ 13.- Sed si in plures partes divisa domus sit, utrum in partem an in totam domum possidendam mitti quis debeat, videamus. Si tam ampla domus sit, ut et spatia inter vitiosam partem intercedant et eam quae vitium non facit, dicendum in eam solam partem mitti: si vero unita sit contextu aedificiorum, in totam. Itaque et in spatiosis domibus melius dicetur in eam partem domus mittendum, quae vitiosae parti unita est. Ceterum si modica portiuncula aedium amplissimarum vitium faceret, quale erat dicere totas aedes iubendum possidere eum, cui damni infecti non caveretur, quum sint amplissimae?

§ 14.- Item quid dicemus, si insula adiacens domui vitium faciat, utrum in insulae possessionem an vero in totius domus possessionem mittendum sit? Et magis est, ut non in domus possessionem, sed in insulae mittatur.

§ 15.- Si plures sunt, qui postulent ut caveatur, omnes mitti in possessionem solent. Idemque Labeo probat et si prius quis in possessionem missus sit et alius mitti desideret: nam non spectabimus ordinem, sed habebunt ambo possessionem. Quod si iam prior possidere iussus sit et alius damni infecti caveri

§ 11.- Under the terms of this Edict, if security is not furnished, the plaintiff is placed by the Praetor in possession of that part of the building which seems to be in a ruinous condition.

§ 12.- Let us see whether he should be placed in possession of the whole house. An opinion of Sabinus is extant which says that he should be placed in complete possession; otherwise, he says if damage is apprehended only on account of the building, the Edict cannot be carried into effect, nor will it benefit him to be placed in possession which he cannot legally hold, or which will be of no advantage to him. This opinion of Sabinus is the better one.

§ 13.- Where a building is divided into several parts, let us see whether the plaintiff should be placed in possession of a portion of the same, or of all of it. If it is so large that spaces exist between the part which is ruinous and that which is in good repair, it must be said that the plaintiff should be placed in possession of the ruinous portion alone; but if the entire building is closely united, he should be placed in complete possession of it. Therefore, in houses of great extent, the better opinion is that the plaintiff should be placed in possession of the part which is contiguous to that which is in a ruinous condition. If, however, but a very small portion of a house of great extent is in a ruinous state, how can it be held that the person to whom security against threatened injury has not been given should be directed to take possession of the entire building, when it is of such vast dimensions.

§ 14.- Again, what shall we say if an addition to the house is in a ruinous condition? Shall the plaintiff be placed in possession of the addition, or of the entire building? The better opinion is that he should not be placed in possession of the entire building, but only in possession of the addition to the same.

§ 15.- Where several persons demand that security shall be given to them, it is customary for all of them to be placed in possession. Labeo adopts this opinion, where one has already been placed in possession, and another desires this to be done; for we shall not consider the order in which they appear, but both of

§ 11.- En virtud de este Edicto, si no se diera caución, es puesto uno en posesión por el Pretor de aquella parte que parece que está ruinosa.

§ 12.- Pero veamos si tendrá lugar la puesta en posesión de toda una casa. Y hay la opinión de Sabino, según la que se ha de poner en posesión de toda la casa, porque de otra suerte, dice, si de la superficie se temiese daño, la cosa no tendrá efecto; y no aprovechara ser puesto en posesión de una cosa, que uno no pueda poseer, o que no le convenga; y es más verdadera la opinión de Sabino.

§ 13.- Pero si la casa estuviera dividida en varias partes, veamos si uno deberá ser puesto en posesión de una parte, o de toda la casa. Si la casa fuera tan grande, que mediaran espacios entre la parte defectuosa y la que no tiene defecto, se ha de decir que se pone en posesión de aquella sola parte; pero si estuviera unida por la trabazón de los edificios, de toda. Y así será mejor decir, aun respecto a las casas espaciosas, que se ha de poner en posesión de aquella parte de la casa que esté unida a la parte defectuosa. Pero si se resintiera de vicio una pequeña parte de una casa muy grande, ¿cómo se podrá decir que se ha de mandar que posea toda la casa, siendo grandísima, aquel a quien no se le diese caución por el daño que amenaza?

§ 14.- Asimismo ¿qué diremos si se resintiese de defecto un edificio aislado adyacente a una casa? ¿Se habrá de poner acaso en posesión del edificio aislado, o en posesión de toda la casa? Y es más cierto que no se pondrá en posesión de la casa, sino del edificio aislado.

§ 15.- Si son muchos los que piden que se les dé caución, todos suelen ser puestos en posesión. Y lo mismo aprueba Labeón, aunque uno haya sido primeramente puesto en posesión, y otro pretenda ser puesto; porque no atenderemos al orden, sino que ambos tendrán la posesión. Pero si ya se hubiera

desideret, tunc nisi cavetur, mittetur in possessionem posterior.

§ 16.- Iulianus scribit eum, qui in possessionem damni infecti nomine mittitur, non prius incipere per longum tempus dominium capere, quam secundo decreto a praetore dominus constituatur.

§ 17.- Si ante hoc decretum alius quoque in possessionem missus fuerit, aequaliter ambo aedium fiunt domini, scilicet quum iussi fuerint possidere. Si vero iam constituto domino eo, qui primus in possessionem missus est, Titius damni infecti sibi cavere desiderabit, cessante primo cavere solus Titius erit in possessione.

§ 18.- Quum autem plures mittuntur in possessionem, aequaliter mittuntur, non pro rata damni, quod unumquemque contingeret, et merito: nam et quum unus mittitur, non pro portione damni mittitur, sed in totum: cum igitur plures mittuntur, aequaliter omnes quasi in totum missi concursu partes habebunt.

§ 19.- Sed si quis eorum missus in possessionem sumptum fecerit, deinde iubeatur possidere, an sumptum consequi possit is qui fecit et quo iudicio? Et placet communi dividundo iudicio consequi eum posse.

§ 20.- Si quis autem in possessionem missus, nondum possidere iussus sit, an dominus decedere possessione debeat, videamus. Et ait Labeo non decedere, sicuti nec quum creditores vel legatarii mittuntur: idque est verius.

them will be entitled to possession. Where, however, one has already been directed to take possession, and another demands that security against threatened injury be furnished; then, unless this is done, the second one shall be placed in possession.

§ 16.- Julianus says that where anyone is placed in possession on account of threatened injury, he cannot acquire the title to the property by lapse of time, unless he is made the owner by a second decree of the Praetor.

§ 17.- If another has also been placed in possession before this decree was issued, both of the parties will become joint-owners of the house; that is to say, if they were ordered to take possession of the same. If, however, the one who is first placed in possession has become the owner, and Titius should demand that security against threatened injury be given him, and the first should refuse to furnish it, Titius alone will remain in possession.

§ 18.- Where several persons are placed in possession, they are all on the same footing, and the amount of damage which may affect each one is not considered; and this is reasonable, for when one person is placed in possession this is not done with reference to the proportion of damage which he may apprehend, but it is done for the benefit of all. Hence, where several are placed in possession, all of them equally obtain complete possession, and their shares are regulated by contribution.

§ 19.- If, however, anyone who is placed in possession should incur expense, and should afterwards be ordered to take possession by a second decree, can he recover the expense, and if he can, by what proceeding? It is established that he can recover the expense he has incurred by an action in partition.

§ 20.- Where, however, a person is placed in possession, but has not yet been ordered to take complete possession by a second decree, let us see whether the owner of the property is obliged to relinquish possession. Labeo says that he is obliged to do so, as is the case where neither creditors nor

mandado que poseyera el primero, y otro pretendiera que se le diese caución por daño que amenaza, entonces, si no se le diera, será puesto en posesión el posterior.

§ 16.- Escribe Juliano, que el que es puesto en posesión a título de daño que amenaza, no comienza a adquirir el dominio por el transcurso de largo tiempo antes que con segundo decreto sea constituido dueño por el Pretor.

§ 17.- Si antes de este decreto hubiere sido puesto también otro en posesión, ambos se hacen igualmente dueños de la casa, por supuesto, cuando se les hubiere mandado que la posean. Mas si, constituido ya como dueño el que primero fue puesto en posesión, pretendiere Ticio que a él se le diese caución por el daño que amenaza, dejando de dar la caución el primero, sólo Ticio estará en posesión.

§ 18.- Mas cuando muchos son puestos en posesión, son puestos por igual, no a proporción del daño que a cada uno amenazase; y con razón, porque también cuando uno solo es puesto en posesión, no se le pone en proporción del daño, sino de la totalidad; así, pues, cuando muchos son puestos en posesión, todos tendrán iguales partes, como si en concurso hubieran sido puestos en posesión de la totalidad.

§ 19.- Pero si alguno de ellos, puesto en posesión, hubiere hecho gastos, y después se le mandara que poseyera, ¿podría obtener el gasto el que lo hizo, y en qué juicio? Y está determinado que puede él conseguirlo con la acción de división de cosa común.

§ 20.- Mas si puesto alguno en posesión no se le hubiera mandado todavía que posea, veamos si el dueño deberá separarse de la posesión. Y dice Labeón, que no se separa, así como tampoco se separa cuando los acreedores o los legatarios son puestos en posesión; y esto es más verdadero.

legatees are placed in possession. This opinion is correct.

§ 21.- Non autem statim ubi misit Praetor in possessionem, etiam possidere iubet, sed tunc demum, quum iusta causa videbitur (ergo intervallum aliquod debebit intercedere), quod aut pro derelicto aedes longo silentio dominus videatur habuisse aut emissio in possessionem et aliquamdiu immorato nemo caveat.

§ 22.- Si forte dominus rei publicae causa abest aut ex alia iusta causa aut in ea sit aetate cui subveniri solet, probandum est non debere Praetorem festinare ad decernendum, ut iubeat possidere. Sed etsi decreverit, nemo dubitat in integrum restitutionem indulturum.

§ 23.- Ubi autem quis possidere iussus est, dominus deiciendus erit possessione.

§ 24.- Si qua sint iura debita his, qui potuerunt de damno infecto satisfacere, deneganda erit eorum persecutio adversus eum, qui in possessionem missus est: et ita labeo probat.

§ 25.- Item quaeritur in pignoraticio creditore, an pignoris persecutio denegetur adversus eum, qui iussus sit possidere. Et magis est, ut, si neque debitor repromisit neque creditor satisdedit, pignoris persecutio denegetur. Quod et in fructuario recte Celsus scribit.

§ 26.- Si de vectigalibus aedibus non caveatur, mittendum in possessionem dicemus nec iubendum

§ 21.- When the Praetor places anyone in possession of property, he does not grant them complete possession at once, but only after proper cause is shown. Therefore, a certain interval of time should elapse, in order to show that the owner, by a long silence, considers the house as abandoned, or where a person has been placed in possession, and, after he has remained there for some time, no one furnishes security.

§ 22.- If the owner should happen to be absent on business for the State, or for any other good reason, or if he should be of an age which entitles him to relief, the rule should be adopted that the Praetor ought not to use undue haste in promulgating the decree to place the party in complete possession of the property. And even if he should issue such a decree, there is no doubt that complete restitution will be granted the party interested.

§ 23.- Where anyone is ordered to take complete possession, the owner should be compelled to relinquish it.

§ 24.- Where any rights are due to the parties who have been able to give security against threatened injury, the assertion of those rights cannot be made against the person who has been placed in possession. Labeo approves this opinion.

§ 25.- In the case of a creditor who holds a ruinous house in pledge, the question arises whether he can assert his rights to the pledge against anyone who has been ordered to take complete possession by virtue of the second decree of the Praetor. The better opinion is that he will be refused the right to claim his pledge, if the debtor should not promise indemnity, or the creditor furnish security. Celsus very properly holds that this rule also applies to the case of an usufructuary.

§ 26.- Where a house is held under a perpetual lease, we are of the opinion that a person can be

§ 21.- Mas no manda el Pretor que también uno posea tan pronto como lo puso en posesión, sino solamente cuando apareciere justa causa. Luego deberá mediar algún intervalo o para que parezca que el dueño tuvo con su largo silencio por abandonada la casa, o para que nadie le dé caución al que fue puesto en posesión y permaneció en ella algún tiempo.

§ 22.- Si el dueño estuviera acaso ausente por causa de la república, o por otra justa causa, o se hallara en edad a la que se le suele auxiliar, se ha de aprobar que el Pretor no debe apresurarse a decretar mandando que otro posea. Pero aunque lo hubiere decretado, nadie duda que habrá de conceder la restitución por entero.

§ 23.- Mas luego que se mandó que alguno posea, deberá ser lanzado de la posesión el dueño.

§ 24.- Si hubiera algunos derechos debidos a los que pudieron dar fianza por el daño que amenazaba, se habrá de denegar la persecución de los mismos contra el que fue puesto en posesión; y así lo aprueba Labeón.

§ 25.- También se pregunta respecto a un acreedor pignoraticio, si se denegará la persecución de la prenda contra aquel a quien se le hubiera mandado poseer. Y es mas cierto, que, si ni el deudor prometió, ni el acreedor dio fianza, se denegará la persecución de la prenda; lo que con razón escribe Celso también en cuanto al usufructuario.

§ 26.- Si no se diera caución por una casa tributaria, diremos que ha de ser uno puesto en posesión, y que

possidere (nec enim dominium capere possidendo potest), sed decernendum, ut eodem iure esset, quo foret is qui non caverat: post quod decretum vectigali actione uti poterit.

§ 27.- Sed in vectigali praedio si municipes non caverint, dicendum est dominium per longum tempus adquiri.

§ 28.- Eleganter quaeritur, si, dum Praetor de danda stipulatione deliberat, damnum contigerit, an sarciri possit. Et missio quidem cessabit: Praetor tamen decernere debet, quidquid damni contigerit, ut de eo quoque caveatur, aut, si putat, quod utiliter actionem daturus sit, decernat.

§ 29.- Si pupillus tutorem non habeat, quo auctore damni infecti promittat, quasi non defendatur, missio in possessionem locum habebit.

§ 30.- Si quis damni infecti in possessionem missus sit, fulcire eum et reficere insulam debere sunt qui putent eamque culpam praestare exemplo eius, qui pignori accepit. Sed alio iure utimur: quum enim ob hoc tantum missus sit, ut vice cautionis in possessione sit, nihil ei imputari, si non refecerit.

§ 31.- Item videamus, si ei cautio offeratur, posteaquam missus est, an non prius decedere debeat, quam si ei caveatur etiam de eo damno, quod contigit, posteaquam missus est in possessionem? Quod quidem magis probatur: repetita igitur die promittendum erit. Hoc amplius de impensis quoque,

placed in possession, but cannot be authorized to obtain complete possession by a second decree of the Praetor; for the ownership of the property can never be acquired by possession. A decree should, however, be issued to the effect that the tenant will be in the same position as he who refused to give security, after which decree he can avail himself of the proper action for this purpose under his lease.

§ 27.- With reference to land leased by a municipality, however, if the authorities do not give security, it must be said that ownership can be acquired by lapse of time.

§ 28.- If the damage apprehended should occur while the Praetor is deliberating as to whether the stipulation should be granted or not, the following nice question has arisen; namely, whether the plaintiff can be indemnified. And, indeed, the placing in possession will not become operative. The Praetor should, nevertheless, decree that any damage which may have occurred shall also be included in that covered by the bond; or if he thinks that it would be proper for him to grant an action, he can issue a decree to that effect.

§ 29.- Where a ward has no guardian by whose authority he can promise indemnity for threatened injury, the plaintiff can be placed in possession, just as in the case where no defence was made.

§ 30.- Where anyone is placed in possession on account of threatened injury, some authorities hold that he should prop up and repair the building in question, and that he is responsible for negligence, as in the case of a person who receives a pledge. We, however, make use of another rule; for as he is only placed in possession instead of receiving security, he will not be to blame if he does not make repairs.

§ 31.- If security is offered him after he has been placed in possession, let us see whether he should be obliged to vacate the premises, unless security is also furnished him for any damage which may have been committed after he was placed in possession. This opinion, indeed, is the better one. Therefore, the time

no se ha de mandar que la posea; porque poseyéndola no puede adquirir su dominio; pero se ha de decretar que tenga el mismo derecho que tendría el que no había dado la caución; después de cuyo decreto podrá usar de la acción tributaria.

§ 27.- Mas si tratándose de un predio tributario no hubieren dado caución los municipes, se ha de decir que se adquiere el dominio por el transcurso de largo tiempo.

§ 28.- Discretamente se pregunta, si, habiendo sobrevenido algún daño mientras el Pretor delibera sobre si se ha de dar estipulación, se podrá resarcir. Y ciertamente dejará de ponerse en posesión, pero el Pretor debe decretar, que, cualquiera que sea el daño que hubiere sobrevenido, se de caución también respecto a él, o, si juzga que debe dar acción útil, lo decretará.

§ 29.- Si el pupilo no tuviera tutor con cuya autoridad prometa por el daño que amenaza, tendrá lugar la puesta en posesión, como si no se defendiera.

§ 30.- Si alguno hubiera sido puesto en posesión por daño que amenaza, hay quienes opinan que debe él apuntalar y reparar la casa, y que responde de la culpa, a la manera que el que recibió una prenda; pero observamos otro derecho; porque habiendo sido puesto en posesión solamente por esto, para que tenga la posesión en lugar de la caución, no se le imputa nada, si no la hubiere reparado.

§ 31.- Veamos también, si, ofreciéndosele la caución después que fue puesto en posesión, no pregunta deberá separarse de ésta antes que se le dé caución también por el daño, que sobrevino después que fue puesto en posesión. Lo que ciertamente es mas de admitir; así, pues, se habrá de prometer con fecha

si quas fecerit, erit ei cavendum.

§ 32.- Illud quaeritur, ex quo tempore damni ratio habeatur, utrum ex quo in possessionem ventum est an vero ex quo Praetor decrevit, ut eatur in possessionem. Labeo, ex quo decretum est: Sabinus, ex quo ventum est in possessionem: ego puto causa cognita modo hanc modo illam sententiam probandam. Plerumque enim subvenitur etiam ei, qui missus in possessionem aliqua ex causa aut non venit aut tardius venit in possessionem.

§ 33.- Posteaquam autem quis possidere iure domini a Praetore iussus est, nequaquam locus erit cautionis oblationi: et ita Labeo: ceterum nullus, inquit, finis rei invenietur: et est hoc verissimum seposito eo, quod quibusdam vel aetate vel qua alia iusta causa subvenitur.

§ 34.- Si iam ruerunt aedes, an in possessionem ruinae vel areae mittendus sit nihilo minus is, cui cautum non est, videamus. Et magis est, ut mitti debeat, et ita Labeo: sed adicit, si, posteaquam decreverit Praetor eum in possessionem mittendum, tunc aedes deciderint: et puto Labeonis sententiam veram. Proinde et si refecit aliquid, erit probandum non prius eum discessurum, quam si ei sarciatur et de praeterito caveatur. Potest autem et in factum actione recipere hoc quod impendit, sed non amplius, quam quod boni viri arbitratu factum sit: idem est et si alius iussu rogatus meo eorum quid sine dolo malo fecerit et eo nomine condemnatus sim aut dederim sine dolo malo.

prescribed should be stated twice in the promise for indemnity; and, moreover, security must be furnished him for any expense which he may have incurred.

§ 32.- The question arises from what date the account of the damage must be estimated, whether from the time when the plaintiff obtained possession, or from the time when the Praetor decreed that he should enter into possession. Labeo says that it should be from the time that the decree was issued; and Sabinus holds that it should date from the time when the plaintiff obtained possession. I think that the adoption of one or the other of these opinions depends upon the circumstances of the case; for it is customary to come to the relief of one who has been directed to take possession, and for some reason did not do so, or who obtained possession too late.

§ 33.- However, after anyone has been ordered by the Praetor to take complete possession by the right of ownership, there is no ground for the tender of security. Labeo adopts this opinion, for he says that, otherwise, the case would never be terminated. This is perfectly correct, except where the parties are entitled to relief, either on account of their age, or for some other good reason.

§ 34.- Where a house has already fallen down, let us see whether the person to whom security has not been given should still be placed in possession of the ruins, or of the land. The better opinion is that this should be done. Labeo concurs in this, but he adds that it should be adopted only where the house had fallen after the Praetor had issued a decree placing the plaintiff in possession. I think that the opinion of Labeo is correct. Hence, if the plaintiff makes any repairs, it should be held that he is not compelled to depart before he has been paid for them, and security has been furnished for damage previously sustained. He can, however, recover what he has expended by an action in factum, but he cannot recover more than ought to have been expended in accordance with the judgment of a good citizen. The same rule applies where someone else has incurred expense by my order or request, without fraudulent intent; and a

anterior; además de esto se habrá de dar caución también por los gastos, si hubiere hecho algunos.

§ 32.- Se pregunta desde qué tiempo se tendrá cuenta del daño, si desde que se entró en posesión, o desde que el Pretor decretó que se entrase en posesión. Labeón dice, que desde que se decretó, y Sabino, desde que se entró en posesión; yo opino, que con conocimiento de causa se debe aprobar ya una, ya otra opinión, porque las más de las veces se auxilia también al que puesto en posesión o no entró en ella por alguna causa, o entró en posesión tardíamente.

§ 33.- Mas después que se mandó por el Pretor que alguno poseyera con derecho de dominio, no habrá de ningún modo lugar a la oferta de la caución; y así lo dice Labeón. De otra suerte, dice, no se hallaría término alguno a la cosa; y esto es muy verdad, exceptuándose el caso en que a algunos se les auxilia o por razón de la edad, o por alguna otra causa justa.

§ 34.- Si ya la casa se desplomó, veamos si, ello no obstante, haya de ser puesto en posesión de las ruinas o del solar aquel a quien no se le dio la caución; y es más cierto que deberá ser puesto en posesión; y así lo dice Labeón, pero añade, que esto se entiende si la casa se hubiere caído después que el Pretor hubiere decretado que aquél debía ser puesto en posesión; y juzgo verdadera la opinión de Labeón. Por lo cual, también si reparó alguna cosa se habrá de admitir que no debe él separarse de la posesión antes que se le rasure, y que se le dé caución por lo pasado. Mas puede recuperar lo que gastó también mediante la acción por el hecho, pero no más de lo que se haya hecho a arbitrio de hombre bueno. Lo mismo es, también si otro hubiere hecho sin dolo malo alguna de estas cosas por mandato o ruego mío, y yo hubiera sido condenado por este concepto, o hubiere pagado sin dolo malo.

decision has been rendered against me on this account, or I have paid the amount in good faith.

§ 35.- Si quis metu ruinae decesserit possessione, si quidem, quum adiuuare rem non posset, id fecit, Labeo scribit integrum ius eum habere, perinde ac si in possessione perseverasset: quod si, quum posset succurrere, maluit relinquere, amisisse eum Praetoris beneficium neque, si postea succurri sibi velit, audiendum eum. Cassius autem ait, si metu ruinae recesserit, non hoc animo, ut aedificia derelinqueret, restituendum in possessionem: eum tamen, qui missus in possessionem non accesserit, si aedificia ruerint, beneficium Praetoris amisisse scribit. Hoc ita accipiendum erit, si venire in possessionem neglexit, non si dum venit ruerunt.

§ 36.- Si quis ex hoc edicto a praetore in possessionem missus non est admissus, in factum actione uti poterit, ut tantum praestetur ei, quantum praestari ei oporteret, si de ea re cautum fuisset: extenditur enim actio in id tempus, quo damnum committitur.

16.- PAULUS; *libro LX, ad Edictum*.- Antequam damnum detur, impunitum est factum eius, qui neque promisit neque admisit in possessionem, si tamen ante damnum datum vel cavit vel possessione cessit.

17.- ULPIANUS; *libro LIII, ad Edictum*.- Si quis missus in possessionem, quum esset in aliena potestate, non admiserit, plerique putant noxalem actionem eo nomine competere.

§ 1.- Quid deinde, si procurator prohibuerit, utrum in ipsum an in dominum dabimus? sed verius est in

§ 35.- Where anyone relinquishes possession of a house through fear that it will fall, and he does so when he cannot prevent it, Labeo says that his right will remain unimpaired, just as if he had continued in possession; because, if he preferred to abandon the house when its condition could be remedied, he will lose the benefit of the decision of the Praetor, and he should not be heard if he afterwards applies for relief. Cassius, however, says that if he withdrew through fear that the house would fall, and not with the intention of abandoning it, he should be restored to possession. He also says that where the person placed in possession does not appear, and the building collapses, he will lose the benefit of the decree of the Praetor. This should be understood to mean if he neglected to take possession, and not where the house fell after he had come with the intention of taking possession of it.

§ 36.- Where anyone has been sent by the Praetor to take possession under this Edict, and is not permitted to do so, he can avail himself of an action in factum, and ask that as much shall be paid to him as would have been required to be paid if security with reference to the property had been furnished. This action extends to the time when the damage was committed.

16.- PAULUS; *On the Edict, Book LX*.- Before the damage is done the act of him who refused to promise indemnity, or to permit the plaintiff to take possession, will remain unpunished, provided that, before the damage was committed, he either gave security, or relinquished possession of the property.

17. ULPIANUS; *On the Edict, Book LIII*.- Where anyone, who is under the control of another, refuses to admit the person who was placed in possession, many authorities hold that a noxal action on this ground will lie.

§ 1.- What course must be pursued if an agent should prevent him from taking possession? Shall we

§ 35.- Si alguno se hubiere salido de la posesión por miedo a la ruina, escribe Labeón, que si esto lo hizo verdaderamente porque no pudiera reparar la cosa, conserva él íntegro su derecho lo mismo que si hubiese perseverado en la posesión; pero que si pudiendo repararla prefirió abandonarla, perdió el beneficio del Pretor, y no ha de ser oído si después quisiera que se le auxiliara. Pero dice Cassio, que si se hubiere salido por miedo a la ruina, no con la intención de abandonar los edificios, ha de ser restituído en la posesión; pero escribe, que el que puesto en posesión no hubiere entrado en ella, perdió el beneficio del Pretor, si se hubieren arruinado los edificios. Esto se habrá de entender así, si fue negligente en entrar en la posesión, no si se arruinaron mientras iba a entrar.

§ 36.- Si, puesto alguno en posesión por el Pretor en virtud de este Edicto, no fue admitido en ella, podrá usar de la acción por el hecho, para que se le pague tanto cuanto se le debería pagar, si por esto se hubiese dado caución; porque la acción se extiende a aquel tiempo en que se causa el daño.

16.- PAULO; *Comentarios al Edicto, libro LX*.- Antes que se cause el daño queda impune el hecho del que ni prometió, ni admitió a otro en la posesión; con tal que o haya dado caución, o cedido la posesión, antes que se haya causado el daño.

17.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Si alguno, estando bajo la potestad de otro, no hubiere admitido al que fue puesto en posesión opinan los más, que compete por este motivo la acción noxal.

§ 1.- ¿Qué se dirá, si un procurador se hubiere opuesto? ¿La daremos acaso contra él mismo, o

ipsum dandam.

§ 2.- Sed et in actore municipum tutore ceterisque, qui pro aliis interveniunt, idem erit dicendum.

§ 3.- Actio ista, quae in factum est, perpetuo dabitur, et heredi et in heredem ceterasque itemque ceteris personis.

§ 4.- Iudex, qui de damno infecto cognoscit, etiam alienato praedio ab eo, quum quo actum fuerit, damnum aestimare solet omne, quodcumque ante iudicium contigit.

18.- PAULUS; *libro XLVIII, ad Edictum*.- Damni infecti stipulatio competit non tantum ei, cuius in bonis res est, sed etiam cuius periculo res est.

§ 1.- Quod opere facto consecutus sit dominii capione promissor, non teneri eum eo nomine Pomponius ait, quia nec loci nec operis vitio, sed publico iure id consecutus sit.

§ 2.- Ei, cuius usus fructus aedium est, de vitio earundem aedium caveri non oportet, etsi alias vicinas habeat, quia reficiendi habet facultatem: nam qui viri boni arbitratu uti deberet, reficiendi quoque potestatem consequitur. Ergo nec proprietarius audiri debet, si velit sibi caveri a fructuario aedium nomine, quas vicinas fructuario habeat, quia habet quum fructuario actionem, ut viri boni arbitratu is fruatur.

grant an action against him, or against his principal? The better opinion is that the action should be granted against the agent.

§ 2.- The same rule will apply to the agent of a municipality, a guardian, and those who appear for others.

§ 3.- This action, which is in factum, is granted perpetually, and passes to and against the heir, as well as to and against other persons.

§ 4.- The judge who has jurisdiction in a case of threatened injury, and also where a tract of land has been alienated by the party against whom suit was brought, ordinarily makes an estimate of all the damage which has been sustained before judgment is rendered.

18.- PAULUS; *On the Edict, Book XLVIII*.- The stipulation with reference to threatened injury can be given not only to the person who owns the property, but also to him who is responsible for the same.

§ 1.- Where, however, the promisor has, by doing some work, obtained ownership of the property by usucaption, Pomponius says that he will not be liable on this ground, for the reason that he did not acquire the property through any defect of the land or on account of the work, but by the operation of public law.

§ 2.- It is not necessary for security to be given to the person who has an usufruct in a house which is in bad repair, even though he may be the owner of other adjoining buildings, because he can make repairs; for he who should use property as becomes the careful head of a household has also the power to repair it. Therefore the owner of the house should not be heard if he desires security to be given him by the usufructuary for the protection of other houses which are near the one subject to the usufruct, since he has a right of action against the usufructuary to compel him to enjoy the property as a good citizen should do.

contra su principal? Pero es más verdadero que se ha de dar contra él mismo.

§ 2.- Pero se habrá de decir lo mismo, también respecto al agente de los municipales, al tutor, y a los demás que intervienen por otros.

§ 3.- Esta acción, que es por el hecho, se dará a perpetuidad, así al heredero, como contra el heredero, y también contra las demás y a las demás personas.

§ 4.- El juez que conoce del daño que amenaza suele, aunque haya sido enajenado el predio por aquel con quien se hubiere litigado, estimar todo el daño que haya sobrevenido antes del juicio.

18.- PAULO; *Comentarios al Edicto, libro XLVIII*.- La estipulación del daño que amenaza compete no solamente a aquel entre cuyos bienes está la cosa, sino también a aquel a cuyo riesgo está la cosa.

§ 1.- Mas dice Pomponio, que el promitente que habiendo hecho una obra adquirió alguna cosa con la usucapción del dominio, no está obligado por tal motivo, porque la consiguió no por vicio del lugar, ni de la obra, sino por el derecho público.

§ 2.- Al que tiene el usufructo de una casa no se le debe dar caución por vicio de la misma casa, aunque tenga otra vecina, porque tiene la facultad de repararla; pues el que debe usar a arbitrio de hombre bueno, obtiene también la facultad de reparar. Luego tampoco debe ser oído el propietario, si quisiera que por el usufructuario se le diera caución por razón de la casa, que tenga vecina a la del usufructuario, porque tiene acción contra el usufructuario, para que la usufructúe a arbitrio de hombre bueno.

§ 3.- Sed inquilino meo, si vicinas aedes habeat, cavere debebo damni infecti propter eas aedes.

§ 4.- Ei, qui in conducto solo superficiem imposuit, dominus soli, quod vitio soli damnum futurum sit, cavere non debet nec soli domino superficiarius, quia invicem ex conducto et locato habent actiones: in quas tamen actiones ultra culpam nihil venit. Plus autem in stipulationem venit damni infecti, quod quidem vitium eius esse dicitur.

§ 5.- Si is, qui unas aedes habebat, stipulatus fuerit, deinde vicinas comparaverit, an earum quoque nomine, quas post interpositam stipulationem comparasset, promissorem obligaret, quaesitum est. Iulianus scribit videndum, ne earum dumtaxat nomine cautum habeat, de quibus inter eum et promissorem initio actum fuerit. Cui consequens videri posse, ut et, cum aedium communium nomine duo socii stipulentur, de eo dumtaxat damno cavere videatur, quod in parte aedium cuique socio datum fuerit. sive ergo redemerit alteram partem quis ex his sive adjudicata fuerit, non augeri promissionis obligationem. Pomponius relata Iuliani scriptura dicit non se improbare.

§ 6.- Si autem res aliquas post stipulationem interpositam in domo habere coeperit stipulator, quae ex ruina vicinarum aedium perierint, agere ex stipulatu potest, licet tunc, quum stipularetur, hae res non fuerint.

§ 3.- I must, however, give security against threatened injury to my tenant, if he has houses near the one which he occupies, and which is in bad condition.

§ 4.- The owner of the ground is not compelled to furnish security with reference to any injury which may be caused by the condition of the ground to a man who has erected a house on the said land, after having leased it; and, on the other hand, the latter is not obliged to give security to the owner, because each of them is entitled to actions under the lease, and in these proceedings nothing but negligence is considered. More, however, is included in a stipulation having reference to threatened injury, because, in this case, the bad repair of the property is said to be involved.

§ 5.- If a person who has a house should enter into a stipulation, and then should purchase another neighboring house, the question arises whether the promisor will be bound with reference to the house which he purchased after the stipulation was entered into. Julianus says that it should be considered whether he who gave security is only liable for the condition of the house with reference to which the contract was entered into between him and the promisor, in the first place. The result of this would seem to be that where two joint-owners enter into a stipulation concerning a house held in common, security should only be given against any injury which might be sustained by either of the said joint-owners, with reference to his share in the building. Therefore, whether one of them purchased the share of the other, or the house was adjudged to him by the court, the obligation of the promise is not increased. Pomponius, in reporting this opinion of Julianus, says that he approves it.

§ 6.- If, however, the stipulator brought any personal property into the house after the stipulation was concluded, and the said personal property was destroyed by the ruin of the neighboring building, he can bring an action under the stipulation, even though at the time when it was entered into the said property was not in the house.

§ 3.- Pero a mi inquilino, si tuviera una casa vecina, le deberé dar por razón de esta casa caución por el daño que amenaza.

§ 4.- Al que construyó un edificio sobre suelo tomado en arrendamiento no le deberá dar caución el dueño del suelo porque haya de sobrevenir daño por vicio del suelo, ni al dueño del suelo el superficiario, porque tienen recíprocamente las acciones de conducción y de locación, en cuyas acciones no se comprende, sin embargo, nada además de la culpa; pero en la estipulación del daño que amenaza se comprende más, a la verdad, lo que se dice que es vicio de la cosa.

§ 5.- Si el que tenía una sola casa hubiere estipulado, y después hubiere comprado la vecina, se preguntó, si obligaría al prometedo también por razón de la que hubiese comprado después de interpuesta la estipulación. Juliano escribe, que se ha de ver si haya dado caución solamente por razón de aquella respecto a la que se hubiere convenido en un principio entre él y el prometedo. A lo cual puede parecer que es consiguiente, que también cuando dos consocios estipulan respecto a una casa común, se considere que se da caución únicamente por el daño que a cada socio se le hubiere causado en su parte de casa; luego ya si uno de ellos hubiere comprado la otra parte, ya si le hubiere sido adjudicada, no se aumenta la obligación de la promesa. Pomponio dice, habiendo referido lo escrito por Juliano, que él no lo desaprueba.

§ 6.- Mas si el estipulante hubiere comenzado a tener en la casa después de haberse interpuesto la estipulación algunas cosas, que hubieren perecido por virtud de la ruina de la casa vecina., puede ejercitar la acción de lo estipulado, aunque estas cosas no existieren cuando se estipulase.

§ 7.- Emptor praedii si ante traditionem stipulatus sit, cautum habebit de eo damno, quod post traditionem factum erit.

§ 8.- Venditorem autem aedium prius, quam possessionem tradat, stipulari oportet, quia huius quoque rei culpam praestat.

§ 9.- Sed quid fiet, si venditor sine culpa stipulari non potuerit et ob hoc emptor stipulatus fuerit? Nonne damnum patitur? An hoc damnum in aliena re acciderit, revolvitur autem ad emptorem, quia actionem ex empto non habet? Sed nihil in hac causa proficit stipulatio, nisi in id, quod post traditionem accidit, quia, dum venditoris custodia est, is stipulari debet omnemque diligentiam emptori praestare: et quod alia actione quaeri potest, id in stipulationem damni infecti omnino non deducitur.

§ 10.- Sed si venditor interposuerit stipulationem, etiam id damnum continebit, quod post traditionem emptori contigerit. Quod esse iniquissimum aristo ait, quoniam, si emptor quoque damni infecti stipulatus esset, duobus promissor eiusdem nomine obligaretur: nisi forte id contra se habeat, quia in hoc fit stipulatio, quanti ea res erit: ut possit videri nihil interesse iam venditoris.

§ 11.- Stipulatione damni infecti interposita Sabini sententia vera est existimantis, ut, si, dum aedificatur intra diem stipulationi comprehensum, supra parietem meum domus deciderit eumque vitiaverit, licet post diem stipulationis paries decidat, possim agere, quia damnum iam tunc acceperim,

§ 7.- If the purchaser of a tract of land entered into a stipulation before delivery, he will be secured against any damage which may take place after the property has been transferred.

§ 8.- The vendor of a house must, however, stipulate before he gives possession, because he gives security for any damage to the property through negligence.

§ 9.- But what must be done, where the vendor was unable to stipulate for security, through no fault of his, and the purchaser himself has stipulated for it? Must not the purchaser suffer the damage? As this damage has happened to property belonging to another, would it riot fall upon the purchaser, because he has no right of action based on the sale? A stipulation of this kind is of no benefit whatever, unless the damage occurred after the transfer of the property; because, as long as the vendor is charged with its custody, he should stipulate that he will be responsible to the purchaser for the exercise of the greatest diligence; and whatever the purchaser can obtain by means of another action should not, under any circumstances, be included in the stipulation providing against threatened injury.

§ 10.- If the vendor should make the stipulation, any damage which may happen after delivery of the property to the purchaser will be included therein. Aristo says that this is extremely unjust, since, if the purchaser had himself stipulated with reference to threatened injury, the promisor would be liable to two persons on the same ground, unless, perhaps, the contrary might occur; because, in this instance, the stipulation was made with reference to the interest of the stipulator, so that it might be held that the vendor had no longer any interest, after the stipulation with reference to threatened injury had been entered into.

§ 11.- The opinion of Sabinus is correct, who held that if, while I was building a house, a neighboring building should, within the time fixed by the stipulation, fall upon my wall, and damage it, and even though it should fall after the time fixed by the stipulation has passed, I can still bring an action,

§ 7.- Si el comprador de un predio hubiera estipulado antes de la entrega, tendrá caución por el daño que se hubiere causado después de la entrega.

§ 8.- Mas es conveniente que el vendedor de una casa estipule antes que entregue la posesión, porque responde también de la culpa en este negocio.

§ 9.- Pero ¿qué sucederá si sin culpa no hubiere podido estipular el vendedor, y por esto hubiere estipulado el comprador? ¿Por ventura sufre el daño? ¿O es que este daño recae sobre cosa ajena, pero se dirige al comprador, porque no tiene la acción de compra? Mas en este caso para nada aprovecha la estipulación, sino para lo que acontece después de la entrega, porque mientras la custodia le corresponde al vendedor, éste debe estipular y responderle de toda diligencia al comprador; y lo que se puede obtener con otra acción no se comprende de ningún modo en la estipulación del daño que amenaza.

§ 10.- Pero si el vendedor hubiere interpuesto estipulación, esta comprenderá también el daño que sobreviniere al comprador después de la entrega; lo que dice Aristo que es muy injusto, porque, si el comprador hubiese estipulado también por el daño que amenaza, el que promete se obligaría a dos por razón de una misma cosa, a no ser acaso que tenga en contra suya esto, porque la estipulación se hace por tanto cuanto valiere la cosa, de suerte que pueda parecer que nada le interesa ya al vendedor cuando se interpuso la estipulación del daño que amenaza.

§ 11.- Es verdadera la opinión de Sabino, que estima, que si mientras se edifica hubiere caído dentro del término comprendido en la estipulación una casa sobre mi pared, y la hubiere viciado, puedo yo reclamar, aunque la pared se caiga después del término de la estipulación, porque yo habría ya

quum paries vitiosus factus sit. Nec quicquam obstare, quo minus etiam antequam decidat agi possit: et, si ita concussus sit paries, ut nulla ratione recipi possit ideoque deponendus est, non minoris litem aestimandam, quam si decidisset.

§ 12.- Si vicinas aedes habeamus et invicem desideremus damni infecti caveri, nihil obstat, quo minus et ego in tuarum aedium possessionem mittar et tu in mearum.

§ 13.- Si pupillus prohibuit iri in possessionem damni infecti, placet in eum non iniuste competere hanc in factum actionem.

§ 14.- Si mandatu meo alius prohibuerit, in me haec actio competit.

§ 15.- Non solum autem eum punit praetor, qui in possessione esse, sed etiam eum, qui possidere passus non fuerit, quum alioquin, si is, qui iussu praetoris coepit possidere et possidendo dominium capere, aut non admissus aut eiectus inde fuerit, utile interdictum unde vi vel publicianam actionem habere potest. Sed si in factum actione egerit, his actionibus experiri non potest, quum Praetor id agat, ne damnum faciat actor, non ut in lucro versetur.

§ 16.- Si procurator meus damni infecti stipulatus sit, causa cognita mihi ex ea stipulatione actio competit.

19.- GAIUS; *ad Edictum Praetoris urbani, titulo de damno infecto*.- Eorum, qui bona fide absunt, in stipulatione damni infecti ius non corrumpitur, sed

because I sustained the damage at the time when the wall was in bad condition; nor is there anything to prevent the bringing of an action even before it falls; and if it is so shaken that it cannot be repaired, and therefore must be taken down, the estimate of the damage made in court should not be less than if the wall had fallen.

§ 12.- If you and I have adjoining houses, and we desire security against threatened injury to be reciprocally furnished, there is no reason why I should not be placed in possession of your house, and you be placed in possession of mine.

§ 13.- If a ward prevents anyone from taking possession on account of threatened injury, it is held that an action in factum can immediately be brought against him.

§ 14.- If another person, acting under my direction, prevents a person from taking possession, this action can be brought against me.

§ 15.- The Praetor not only punishes the person who was in possession at the time when the first decree was issued, but also him who will not permit possession to be obtained under the second decree; as otherwise, he who has begun to obtain possession under the second decree, and to acquire ownership by means of his possession, is either not permitted to enter upon the premises, or is ejected, he will be entitled to an interdict on the ground of violence, or to the Publician Action. If, however, he should bring an action in factum, he cannot avail himself of the other, as the Praetor permits this in order to prevent the plaintiff from causing any injury by which he may profit.

§ 16.- Where my agent enters into a stipulation with reference to threatened injury, I will be entitled to an action based on the stipulation, where proper cause is shown.

19.- GAMS; *On the Edict of the Urban Praetor: Title, Concerning Threatened Injury*.- In a stipulation for indemnity against threatened injury, the rights of

recibido el daño, cuando se vició la pared; y que en nada obsta que también se haya podido reclamar antes que se cayera; y si la pared se hubiera quebrantado de modo que de ninguna manera se pudiera reparar, y por ello hubiera de ser demolida, no se ha de estimar el litigio en menos que si se hubiese caído.

§ 12.- Si tuviéramos casas vecinas, y recíprocamente pretendiéramos que se diera caución por daño que amenaza, nada obstará para que yo sea puesto en posesión de tu casa, y tú de la mía.

§ 13.- Si un pupilo impidió que se entrase en posesión por daño que amenaza, está determinado que no sin justicia compete contra él esta acción por el hecho.

§ 14.- Si otro lo hubiere impedido por mandato mío, compete contra mí esta acción.

§ 15.- Mas el Pretor castiga no solamente al que no hubiere consentido que uno esté en posesión, sino también al que no hubiera permitido que éste posea, porque de otra suerte, si el que por mandato del Pretor había comenzado a poseer, y a adquirir poseyendo el dominio, o no hubiere sido admitido, o hubiere sido echado de ella, puede tener el interdicto útil «Donde con violencia, o la acción Publiciana» Mas si hubiere ejercitado la acción por el hecho, no puede ejercitar estas acciones porque el Pretor hace esto para que el actor no sufra daño, no para que realice lucro.

§ 16.- Si mi procurador hubiera estipulado por el daño que amenaza, me compete con conocimiento de causa la acción derivada de esta estipulación.

19.- GAYO; *Comentarios al Edicto del Pretor Urbano, título del daño que amenaza*.- En la estipulación del daño que amenaza no se menoscaba

reversis cavendi ex bono et aequo potestas datur, sive domini sint sive aliquid in ea re ius habeant, qualis est creditor et fructuarius et superficiarius.

§ 1.- Sive aedium vitio sive operis, quod vel in aedibus vel in loco urbano aut rustico, privato publicove fiat, damni aliquid futurum sit, curat Praetor, ut timenti damnum caveatur.

20.- IDEM; *libro XIX, ad Edictum provinciale*.- Inter fructuarium et dominum proprietatis ita damni infecti cautio locum habet, si fructuarius quidem de soli vitio caveri sibi desideret, dominus vero proprietatis de operis vitio, si quid fructuarius aedificet: nam de ruina aedium neuter ab altero cautionem desiderare potest, fructuarius ideo, quia refectio aedium ad eius ipsius onus non pertinet, proprietarius ideo, quia usitata stipulatio, qua de re restituenda fructuarius cavet, ad hunc quoque casum porrigitur.

21.- PAULUS; *libro VIII, ad Plautium*.- Si filius familias inquilinus sit, videamus, an damni infecti nomine in possessionem aedium vicinarum mittendus sit (quaeritur enim, an filius familias non videtur damnum pati, si res peculiares sint) et pater possit stipulari, si quid ei damni fiat. Et placet utrumque eorum in possessionem mitti, nisi sic filius conduxerat, ut eius periculo aedes essent: tunc enim, quia solus tenetur ex locato, recte dicitur ipsum mittendum in possessionem, nisi ei caveatur.

those who are absent in good faith are not prejudiced; if, after their return, power is granted them to give security which is only just, whether they are the owners of the property, or have any rights therein, either as creditors, usufructuaries, or ground lessees.

§ 1.- If any damage is apprehended through the bad condition of a house, or any other structure, which may happen with reference to a building situated either in the city or in the country, or in a private or a public place, the Praetor must see that security is furnished to the person who fears that such damage will occur.

20.- THE SAME; *On the Provincial Edict, Book XIX*.- Security against threatened injury takes place between the usufructuary and the owner of the property when the usufructuary demands that it be given him on account of bad condition of the ground, and the owner of the property on account of some defect of the work, when the usufructuary is constructing something, for neither of them can demand security from the other on account of a house which was in danger of falling; the usufructuary, because he is not responsible for the repair of the house, and the owner, for the reason that a stipulation is usually entered into by them, under which the usufructuary gives security to repair the property, a provision which applies to this case.

21.- PAULUS; *On Plautius, Book VIII*.- Where a son under paternal control is a tenant, let us see whether he can be placed in possession of a neighboring house on account of threatened injury; for the question arises whether a son under paternal control is not considered to sustain damage, when his property consists of his peculium, and his father can enter into a stipulation to provide against any damage which he may suffer. It is established that both of them should be placed in possession, unless the son, when he rented the house, agreed that it should be at his risk; for then, as he alone is liable under the lease, it is very properly held that he himself should be placed in possession, if security is not given him.

el derecho de los que están ausentes de buena fe, si a los que volvieron se les da facultad para prestar caución, conforme a lo bueno y a lo equitativo, ya sean dueños, ya tengan algún derecho sobre aquella cosa, como sería el acreedor, el usufructuario y el superficiario.

§ 1.- Ya si por vicio de la casa, ya si por el de la obra que se hiciera en la casa, o en lugar urbano o rústico, privado o público, hubiera de sobrevenir algún daño, el Pretor cuida de que se le dé caución al que tiene el daño.

20.- EL MISMO; *Comentarios al Edicto provincial, Libro XIX*.- Entre el usufructuario y el dueño de la propiedad tiene lugar la caución por daño que amenaza, si el usufructuario pretendiera que se le diese caución por vicio del suelo, y el dueño de la propiedad por vicio de la obra, si alguna edificara el usufructuario; porque por la ruina de la casa ninguno de los dos puede pedirle caución al otro, el usufructuario, por esto, porque la reparación de la casa no va a cargo del mismo, y el propietario, porque la estipulación acostumbrada, con la cual el usufructuario da caución de restituir la cosa, se extiende también a este caso.

21.- PAULO; *Comentarios a Plautio, Libro VIII*.- Si el inquilino fuera hijo de familia, veamos si haya de ser puesto en posesión de la casa vecina por razón de daño que amenaza; porque se pregunta, si no se considerara que el hijo de familia no sufre daño, si las cosas pertenecieran a su peculio, y pudiera estipular el padre, si algún daño se le causara a éste. Y se determina, que ambos sean puestos en posesión, a no ser que el hijo haya tomado el arrendamiento de modo que la casa vaya a riesgo suyo; porque entonces, como él sólo está obligado por la locación, se dirá con razón que él habrá de ser puesto en posesión, si no se le diese caución.

22.- IDEM; *libro X, ad Plautium*.- Si proprietarius de damno infecto repromississet vel forte aliquid praestitisset aut contra fructuarius aliquid praestitit, iniquum est alterum sine damno uti aedibus aut aedes habere. Et si optulerit proprietarius aliquid, non est fructuario permittendum uti, nisi contulerit: idemque fructuario praestandum est, ut proprietarius cogatur ei conferre. Ergo et solum retinebit fructuarius, si aedes ceciderint, donec praestetur ei damnum, ut, quod haberet vicinus missus in possessionem, id fructuarius habeat, qui damnum vicino sarcit. Eadem erunt et si minimum damnum detur.

§ 1.- Plautius: si ab eo, quem dominum esse negarem, vellem sub hac exceptione "si dominus non esset" satisfacere, ab eo vero, quem dominum esse dicerem, pure repromitti, constitit non debere me impetrare, sed debere me eligere, a quo velim mihi caveri.

23.- ULPIANUS; *libro LXIII, ad Edictum*.- In stipulatione damni infecti, quae aedium nomine interponitur, nisi in solidum fuerit cautum, mittetur in possessionem.

24.- IDEM; *libro LXXXI, ad Edictum*.- Fluminum publicorum communis est usus, sicuti viarum publicarum et litorum. In his igitur publice licet cuilibet aedificare et destruere, dum tamen hoc sine incommodo cuiusquam fiat. Propter quod operis dumtaxat nomine quum satisfactione cavetur, de vicio loci nihil cavetur, hoc est operis, quod quis facit. ceterum si ex loci vicio damnum timeatur, minime dicendum est damni infecti stipulationem interponi oportere: quis enim dubitat neminem esse, a quo stipuletur, quum nemine nihil faciente locus ipse

22.- THE SAME; *On Plautius, Book X*.- If the owner of the property promises indemnity against threatened injury, or has paid something on this account; or, on the other hand, the usufructuary has paid something, it is only just that one of them should enjoy the use of the house, or that the other should retain the ownership of the same without any risk. If the owner has paid anything on this account, the usufructuary should not be permitted to use the property unless he contributes his proportion. This also applies to the usufructuary, and the owner of the property will be compelled to contribute his share. Hence if the house should fall, the usufructuary can hold the ground until he is reimbursed for the damage, so that what the neighbor would have been entitled to, if he had been placed in possession, the usufructuary, who reimbursed him for the damage, should have. The same rule applies where even a very small amount is paid for damage sustained.

§ 1.- Plautius: I demand security from a person whom I deny to be the owner of certain property, under the exception, "If he should not be the owner," and I say that another, whom I consider to be the owner, must simply promise me indemnity. It has been settled that I cannot obtain both of these demands, but that I must choose which one of the parties I prefer to furnish me security.

23.- ULPIANUS; *On the Edict, Book LXIII*.- In a stipulation relating to security against threatened injury, which is entered into on account of a house, the plaintiff shall be placed in possession, unless the bond covers everything.

24.- THE SAME; *On the Edict, Book LXXXI*.- The use of public streams is common, as well as that of public highways, and the sea-shore; therefore anyone whosoever can build in such places, and tear down what he has constructed, provided this can be done without causing others inconvenience. For this reason a bond with sureties is only given with reference to the structure itself, and no provision is made for the bad condition of the ground; that is to say, the rule only applies to the work which anyone performs. If, however, there is any apprehension of

22.- EL MISMO; *Comentarios a Plaucio, libro X*.- Si el propietario hubiese prometido por razón del daño que amenaza, o si acaso hubiese entregado alguna cosa, o si por el contrario, la entregó el usufructuario, es injusto que el otro use de la casa, o tenga la casa, sin daño; y si el propietario hubiere ofrecido alguna cosa, no se le ha de permitir al usufructuario que use, si no aportare a colación; y lo mismo se le ha conceder al usufructuario, de suerte que el propietario sea obligado a llevarle a colación. Luego el usufructuario retendrá también el suelo, si se hubiere caído la casa, hasta que se le pague el daño, de modo que el usufructuario, que le resarcirá el daño al vecino, tenga lo que tendría el vecino que fue puesto en posesión; y lo mismo será aunque se cause pequeñísimo daño.

§ 1.-Y dice Plaucio: Si yo quisiera que por aquel que yo negaba que fuese dueño se diese fianza bajo esta excepción, «si no fuese dueño», y que por el que yo dijese que era dueño se prometiese puramente, es sabido que no debo yo impetrarlo, sino que debo elegir por quien quiera yo que se me dé caución.

23.- ULPIANO; *Comentarios al Edicto, libro LXIII*.- En la estipulación del daño que amenaza, que se interpone por razón de una casa, si no se hubiere dado caución por la totalidad, se pondrá en posesión.

24.- EL MISMO; *Comentarios al Edicto, libro LXXXI*.- El uso de los ríos públicos es común, así como el de las vías públicas y el de las riberas. Así, pues, a cualquiera le es lícito edificar y destruir públicamente en estos lugares, con tal, sin embargo, que esto lo haga sin perjuicio de cualquiera. Por lo cual se da caución con fianza solamente por razón de la obra, y no se da caución alguna por vicio del lugar, esto es, de la obra que uno hace; pero si se temiera daño por vicio del lugar, de ninguna manera se ha de decir que se debe interponer estipulación por el daño

publicus damnum inferat sui natura? Ad ea igitur opera stipulatio pertinet, quaecumque privatim fiant. Quid ergo, si publice opus fiat, de vitio eius quid faciemus? Et plane vel princeps adeundus est vel, si in provincia fiat, praeses provinciae. Sed quod dictum est "operis vitio" sic accipiendum est, etiam si proponas non tantum tempore, quo opus fit, sed etiam si postea contingat: quid enim si ideo, quia male aedificatum erat, corruit?

§ 1.- Adicitur in hac stipulatione et heredum nomen vel successorum eorumque, ad quos ea res pertinet. Successores autem non solum qui in universa bona succedunt, sed et hi, qui in rei tantum dominium successerint, his verbis continentur.

§ 2.- Sed ut ne quid aedium loci operisve vitio damnum factum sit, stipulatio interponitur de eo sine satisfactione: quae non solum ad totas aedes, sed etiam ad partem aedium pertinet. Vitium autem aedium et loci esse Labeo ait, quod accidens extrinsecus infirmiores eas facit: denique nemo dixit palustris loci vel harenosi nomine quasi vitiosi committi stipulationem, quia naturale vitium est: et ideo nec ea stipulatio interponitur neque interposita committetur.

threatened injury on account of the bad condition of the ground, it can, by no means, be said that it is necessary to enter into a stipulation with reference to threatened injury, for who can doubt that there is no one from whom the stipulation can be obtained; since, if no one should build anything, suppose the public place aforesaid causes some damage on account of its nature. Therefore, the stipulation only has reference to such structures as are built by private individuals. What rule, then, will apply, if a public work is built, and what conclusion shall we come to with reference to any defect in its construction? It is clear that recourse must be had to the Emperor; or, if the structure was erected in the province, to the Governor of the latter. However, what has been said with reference to defects in the erection of a building must be understood to relate not only to the time when the work was done, but also to a case where any damage results subsequently; for what if the house should fall because it had been improperly constructed?

§ 1.- The names of the heirs or successors, and of all other persons who have an interest in the property, are included in this stipulation; and the term "successors" not only has reference to those who succeed to all of it, but also to such as only succeed to a certain portion of the same.

§ 2.- Any damage which may result to the house, the ground, or the work, on account of its bad condition, or its defective construction, is provided for by a stipulation without security, and this refers not only to the entire house, but also to a portion of the same. Labeo says that the bad condition of the house or the ground includes anything which, arising from an external source, renders either less durable. No one, however, can say that a stipulation will become operative on the assumption that the ground is in bad condition, where it is either marshy or sandy; because these are natural defects, and therefore the stipulation does not apply to such a case, and, even if it has been entered into, it will not become operative on this account.

que amenaza. Porque ¿quién duda que no hay nadie de quien estipular, puesto que no haciendo nadie nada el mismo lugar público causaría daño por su naturaleza? Así, pues, la estipulación se refiere a las obras que se hagan privadamente. Luego ¿qué se dirá si la obra se hiciera en público? ¿Qué haremos respecto a su vicio? Y a la verdad, o se ha de recurrir al príncipe, o, si se hiciera en una provincia, al presidente de la provincia. Pero lo que se ha dicho respecto al vicio de la obra, se ha de entender de este modo, aunque supongas que sobrevino no solamente al tiempo en que se hace la obra, sino también si después; porque ¿qué se dirá si se arruinó, porque se había edificado mal?

§ 1.- Se añade en esta estipulación también el nombre de los herederos, o de los sucesores, y el de aquellos a quienes pertenece la cosa; pero en estas palabras se comprenden no solamente los sucesores, que suceden en todos los bienes, sino también los que hubieren sucedido únicamente en el dominio de la cosa.

§ 2.- Mas para que no se cause algún daño por vicio de un edificio, de un lugar, o de una obra, se interpone respecto a él estipulación sin fianza; la cual se refiere no sólo a todo el edificio, sino también a parte del edificio. Pero dice Labeón, que es vicio del edificio o del lugar el que sobreviniendo extrínsecamente los hace menos firmes; y ciertamente que ninguno dijo que por razón de un lugar pantanoso o arenoso se incurra en la estipulación, como si fuera vicioso, porque el vicio es natural; y por lo tanto, ni se interpone esta estipulación, ni, interpuesta, se incurrirá en ella.

§ 3.- Haec stipulatio utrum id solum damnum contineat, quod iniuria fit, an vero omne damnum, quod extrinsecus contingat? Et Labeo quidem scribit de damno dato non posse agi, si quid forte terrae motu aut vi fluminis aliove quo casu fortuito acciderit.

§ 4.- Servius quoque putat, si ex aedibus promissoris vento tegulae deiectae damnum vicino dederint, ita eum teneri, si aedificii vitio id acciderit, non si violentia ventorum vel qua alia ratione, quae vim habet divinam. Labeo et rationem adicit, quo, si hoc non admittatur, iniquum erit: quo enim tam firmum aedificium est, ut fluminis aut maris aut tempestatis aut ruinae incendii aut terrae motus vim sustinere possit?

§ 5.- Idem servius putat, si controversia aquae insulam subverterit, deinde stipulatoris aedificia ceciderint, nihil eum ex stipulatu consecuturum, quia id nec operis nec loci vitio factum est. Si autem aqua vitiet fundamenta et sic aedificium ruisset, committi stipulationem ait: multum enim interesse, quod erat alioquin firmum, vi fluminis lapsum sit protinus, an vero ante sit vitiatum, deinde sic deciderit. Et ita Labeo probat: etenim multum interesse, quod ad aquiliam pertinet, sanum quis hominem occidat an vero factum inbecilliore.

§ 6.- Quamquam autem stipulatio committitur, quum vitio operis damnum factum sit, tamen, si opus factum est ab eo, quem promissor prohibere non potuit, stipulatio non committetur. Plane si prohibere potuit, committetur. Sed si quis promissoris nomine fecerit vel eius pro quo promissum est aut alius, qui prohiberi potuerit, stipulatio ista committetur.

§ 3.- The question arises whether this stipulation only refers to damage resulting from injury, or whether it also includes all damage arising from an outside source. Labeo says that proceedings cannot be instituted where damage has been sustained, if it occurred through an earthquake, an inundation, or any other fortuitous event.

§ 4.- Servius, also, says that where tiles, blown off by the wind, have fallen from the house of the promisor upon that of his neighbor, the former will only be liable if this occurred through some defect in his building, and was not caused merely by the violence of the storm, or by any other catastrophe due to Divine agency. Labeo gives as a reason for this that injustice would be done if this rule were not adopted; for where could a house be found strong enough to sustain the force of a river, or of the sea, or of a tempest, or of ruin, or of fire, or of an earthquake?

§ 5.- Servius also thinks that if the violence of a stream should overwhelm an island, and the buildings of the stipulator should fall, he can recover nothing under the stipulation, because the occurrence cannot be attributed to any defect of the buildings, or to the bad condition of the ground. If, however, the water should undermine the foundation of a building, and it should be ruined in consequence, he says that the stipulation would become operative; for it makes a great deal of difference where a structure which is substantially built is instantly overthrown by the force of the stream, and where it has previously become decayed, and afterwards falls. Labeo, also, approves this opinion, for this case by no means resembles that provided for by the Aquilian Law, where anyone kills a slave who is sound, or one who has become infirm.

§ 6.- Moreover, although the stipulation becomes operative when damage results through some defect of construction, still, if the work had been done by someone whom the promisor could not interfere with, the stipulation will not become operative. It is clear that it will become operative, if he could have prevented him from building. Where, however, anyone constructs the edifice in the name of the

§ 3.- ¿Esta estipulación comprenderá acaso solo el daño que se causa con injusticia, o quizá todo daño, que sobrevenga extrínsecamente? Y escribe ciertamente Labeón, que no se puede ejercitar acción por el daño causado, si acaso hubiere sobrevenido alguno por terremoto, o por violencia de río, o por algún otro caso fortuito.

§ 4.- También opina Servio, que si tejas arrojadas por el viento de la casa del que prometió le hubieren causado daño al vecino, aquél está obligado si esto hubiere acontecido por vicio del edificio no si por la violencia del viento, o por alguna otra razón, que tiene fuerza divina. Labeón añade también la razón de que si no se admitiera esto, sería injusto; porque ¿qué edificio hay tan firme que pueda resistir la fuerza de un río, o del mar, o de una tempestad, o de una ruina, incendio terremoto?

§ 5.- El mismo Servio opina, que si el ímpetu del agua hubiere hundido una casa, y después se hubieren caído los edificios del que estipuló, éste no conseguirá nada por virtud de lo estipulado, porque esto no sucedió por vicio ni de la obra, ni del lugar. Mas si el agua viciara los fundamentos, y por esto se hubiese arruinado el edificio, dice que se incurre en la estipulación; porque es muy diferente que por la fuerza del río haya sido derribado de pronto lo que antes estaba firme, o que esto estuviera viciado antes, y que así se hubiere caído después. Y así lo aprueba Labeón; porque hay mucha diferencia, por lo que a la ley Aquilia se refiere entre que uno mate a un hombre sano, o al que se halla más quebrantado.

§ 6.- Mas aunque se incurre en la estipulación cuando se haya causado daño por vicio de la obra, sin embargo, si la obra se hizo por aquel a quien el que promete no se la pudo prohibir, no se incurrirá en la estipulación; pero se incurrirá, si se la pudo prohibir. Mas si alguno la hubiere hecho a nombre del que prometió, o de aquel por quien se prometió, o si la hubiere hecho otro, que hubiere podido prohibirla, se

§ 7.- Praeterea si furni nomine damni infecti fuerit cautum, deinde furnarii culpa damnum datum fuerit, non venire in hanc stipulationem plerisque videtur.

§ 8.- Cassius quoque scribit, quod contra ea demum datum est, cui nulla ope occurri poterit, stipulationem non tenere.

§ 9.- Item apud vivianum relatum est, si ex agro vicini arbores vi tempestatis confractae in meum agrum deciderint eoque facto vitibus meis vel segetibus nocent vel aedificia demoliunt, stipulationem istam, in qua haec comprehenduntur "si quid arborum locive vitio acciderit", non esse utilem, quia non arborum vitio, sed vi ventorum damnum mihi datum est. Plane si vetustate arborum hoc fiebat, possumus dicere vitio arborum damnum mihi dari.

§ 10.- Idem ait, si damni infecti aedium mearum nomine tibi promisero, deinde hae aedes vi tempestatis in tua aedificia ceciderint eaque diruerint, nihil ex ea stipulatione praestari, quia nullum damnum vitio mearum aedium tibi contingit: nisi forte ita vitiosae meae aedes fuerint, ut qualibet vel minima tempestate ruerint. Haec omnia vera sunt.

§ 11.- Sed et quod Labeo putat verum est, referre, utrum impulsu fluminis ruit aedificium an deterius ante factum postea ceciderit.

promisor, or in the name of him for whose benefit indemnity has been promised, or of anyone else who can be prevented from doing the work, this stipulation will become effective.

§ 7.- If security should have been furnished to provide against injury resulting from the construction of an oven, and the damage should result from the negligence of the person having charge of the same, it is held by many authorities that this case will not come within the terms of this stipulation.

§ 8.- Cassius, also, says that where damage resulted from some cause against which there was no means of making provision, the stipulation will not apply.

§ 9.- The following case is mentioned by Vivianus. If the trees standing on the land of my neighbor are broken by the force of a storm, and fall in my field, and my vines or crops are injured thereby, or they demolish my buildings, a stipulation which contained the clause, "If any damage should result from trees being in bad condition," will have no effect; because the damage did not result from any defect of the trees, but was caused by the force of the wind. It is clear that if the damage resulted from the age of the trees, we can say that the accident occurred through their defect.

§ 10.- He also says that if I should promise you indemnity on account of threatened injury caused by my house, and it should be thrown upon your building by the force of a storm, and destroy it, nothing will be payable under the stipulation; because you sustained no damage through any defect in my house, unless it was so badly out of repair that it would have fallen under the force of even the smallest storm. All of which is true.

§ 11.- What Labeo thinks is also true, for it makes a difference whether a building is overthrown by the rising of a river, or whether it falls after having gradually been weakened.

incurrirá en esta estipulación.

§ 7.- Además, si se hubiere dado caución de daño que amenaza por razón de un horno, y después se hubiere causado daño por culpa del hornero, les parece a los mas, que no viene comprendido en esta estipulación.

§ 8.- También escribe Cassio, que el daño que se causó en contra de esto, y que no se pudiese evitar con ningún auxilio, no lo comprende la estipulación.

§ 9.- También se dijo por Viviano, que si los árboles del campo del vecino, quebrados por la fuerza de la tempestad, hubieren caído en mi campo, y por este hecho se perjudicara a mis vides o mieses, o se derribasen edificios, no era útil esta estipulación, en la que se comprende esta cláusula: «si algo hubiere ocurrido por vicio de los árboles o del lugar», porque el daño se me causó no por vicio de los arboles, sino por la fuerza del viento. Mas si esto acontecía por la vejez de los árboles, podemos decir, que el daño se me causa por vicio de los árboles.

§ 10.- El mismo dice, que si yo te hubiere prometido con motivo de una casa mía por daño que amenazara, y luego esta casa hubiere caído sobre tus edificios por fuerza de la tempestad, y éstos se hubieren derrumbado, no se responde de nada por virtud de esta estipulación, porque no te sobrevino ningún daño por vicio de mi casa, a no ser acaso que la casa estuviere de tal modo quebrantada, que se cayere con cualquier tempestad, aunque pequeña; todo lo cual es verdadero.

§ 11.- Pero también es verdad lo que opina Labeón, que hay diferencia entre que un edificio se caiga por ímpetu de un río, o que deteriorado antes se cayere después.

§ 12.- Item videamus, quando damnum dari videatur: stipulatio enim hoc continet, quod vitio aedium loci operis damnum fit. Ut puta in domo mea puteum aperio, quo aperto venae putei praecisae sunt: an tener? Ait trebatius non teneri me damni infecti: neque enim existimari operis mei vitio damnum tibi dari in ea re, in qua iure meo usus sum. Si tamen tam alte fodiam in meo, ut paries tuus stare non possit, damni infecti stipulatio committetur.

25.- PAULUS; *libro LXXVIII, ad Edictum*.- Trebatius ait etiam eum accipere damnum, cuius aedium luminibus officiatur.

26.- ULPIANUS; *libro LXXXI, ad Edictum*.- Proculus ait, quum quis iure quid in suo faceret, quamvis promississet damni infecti vicino, non tamen eum teneri ea stipulatione: veluti si iuxta mea aedificia habeas aedificia eaque iure tuo altius tollas, aut si in vicino tuo agro cuniculo vel fossa aquam meam avoces: quamvis enim et hic aquam mihi abducas et illic luminibus officias, tamen ex ea stipulatione actionem mihi non competere, scilicet quia non debeat videri is damnum facere, qui eo veluti lucro, quo adhuc utebatur, prohibetur, multumque interesse, utrum damnum quis faciat, an lucro, quod adhuc faciebat, uti prohibeatur. Mihi videtur vera esse proculi sententia.

27.- PAULUS; *libro LXXVIII, ad Edictum*.- Plures earundem aedium domini singuli stipulari debent sine adiectione partis, quia de suo quisque damno stipulatur: quin immo pars adiecta partis partem faciet. Contra si plures domini sint vitiosarum aedium, pro sua quisque parte promittere debet, ne

§ 12.- Now let us see when the damage should be held to be sustained; for the stipulation refers to damage caused by defects in the building, the land, or the construction. For instance, I dig a well in my premises, and, by doing so, I intercept the sources of your well; will I be liable? Trebatius says that I will not be liable on the ground of threatened injury, for there was no reason to believe that I caused you damage through any defect of my work, where I was only making use of a right to which I was entitled. If, however, I should make an excavation on my land so deep that your wall cannot stand, the stipulation of indemnity against threatened injury will become operative.

25.- PAULUS; *On the Edict, Book LXXVIII*.- Trebatius says that he also sustains damage who has the lights of his house cut off.

26.- ULPIANUS; *On the Edict, Book LXXXI*.- Proculus says that when anyone erects a building on his own land, which he has a right to erect there, even though he has promised indemnity for threatened injury to his neighbor, he will still not be liable under this stipulation; for example, if you have a building adjoining mine, and you raise it higher than you have a right to do; or if you turn my water-course into your field by means of a canal or a ditch. For although, in this instance, you divert my water and, in the former one, you intercept my light, I will, nevertheless, not be able to sue you under the stipulation, because he should not be considered to have committed an injury who prevents another from enjoying some benefit, which, up to that time, he had been accustomed to enjoy; and it makes a great deal of difference whether anyone causes damage, or whether he prevents another from enjoying a benefit which he had hitherto been accustomed to enjoy. The opinion of Proculus appears to me to be correct.

27.- PAULUS; *On the Edict, Book LXXVIII*.- Joint-owners of the same house should each one stipulate for indemnity, without mentioning his individual share in the property, for the reason that each one stipulates with reference to the injury which he himself may sustain. Moreover, if mention is made of

§ 12.- Veamos también cuando parecerá que se causa daño; porque la estipulación comprende el daño que se causa por vicio del edificio, del lugar, o de la obra; por ejemplo, abro en mi casa un pozo, y por haberse abierto éste se cortaron los manantiales de tu pozo; ¿estaré yo obligado? Dice Trebacio, que no estoy yo obligado por el daño que amenaza; porque no se estima que se te causa daño por vicio de obra mía en una cosa, en la que usé de mi derecho, Mas si yo cavare tan profundamente en lo mío, que no pudiera sostenerse tu pared, se incurrirá en la estipulación de daño que amenaza.

25.- PAULO; *Comentarios al Edicto, libro LXXVIII*.- Dice Trebacio, que también recibe daño aquel a quien se le perjudica en las luces de su casa.

26.- ULPIANO; *Comentarios al Edicto, libro LXXXI*. - Dice Próculo, que cuando uno hiciera alguna cosa en lo suyo, aunque hubiese prometido al vecino por daño que le amenaza, no está él, sin embargo, obligado por esta estipulación; por ejemplo, si junto a mis edificios tuviera edificios, y los alzara más alto en uso de tu derecho, o si llevaras a un campo vecino tuyo agua mía con un conducto subterráneo o con un canal; porque aunque en este caso me quites el agua, y en el otro perjudiques a mis luces, no me compete, sin embargo, acción por virtud de esta estipulación, a saber, porque no debe parecer que sufre daño aquel a quien se le impide, por ejemplo, un lucro del que hasta ahora disfrutaba, y hay mucha diferencia entre que uno sufra daño, o se le prohíba disfrutar del lucro que hasta ahora tenía; y me parece que es verdadera la opinión de Próculo.

27.- PAULO; *Comentarios al Edicto, libro LXXVIII*.- Si fueran muchos los dueños de una casa, cada uno debe estipular sin expresión de parte, porque cada cual estipula por su propio daño; antes bien, habiéndose expresado parte, esta significará una parte de su parte. Por el contrario, si muchos

singuli in solidum obligentur.

28.- ULPIANUS; *libro LXXXI, ad Edictum*.- In hac stipulatione venit, quanti ea res erit. Et ideo cassius scribit eum, qui damni infecti stipulatus est, si propter metum ruinae ea aedificia, quorum nomine sibi cavit, fulsit, impensas eius rei ex stipulatu consequi posse: idemque iuris esse, quum propter vitium communis parietis qui cavit sibi damni infecti, onerum eorum relevandorum gratia, quae in parietem incumbunt, aedificia sua fulsit. In eadem causa est detrimentum quoque propter emigrationem inquilinorum, quod ex iusto metu factum est. Aristo autem non male adicit, sicuti hic exigit cassius, ut si iustus metus migrandi causam praeberit, ita in eius personam qui fulsit eadem cassium dicere debuisset, si iusto metu ruinae fulcire coactus est.

29.- GAIUS; *libro XXVIII, ad Edictum provinciale*.- Sed et si conducere hospitium nemo velit propter vitium aedium, idem erit dicendum.

30.- ULPIANUS; *libro LXXXI, ad Edictum*.- Damni infecti stipulatio pertinet etiam, si quid eius operis, quod in fundo meo aquae ducendae causa fit, vitio damnum mihi contigerit: solet enim opus in alieno fieri, quum iure servitutis, quam quis habet alieno agro impositam, opus in alieno faciat.

§ 1.- Utrum autem de hoc opere promittere an satisfacere debeat, videamus. Movet, quod in alieno

each share, it would be just as if each stipulated only for the half. On the other hand, where there are several owners of a house which is in bad condition, each one must promise indemnity with reference to his own share of the same, in order to prevent each from being individually liable for the entire amount.

28.- ULPIANUS; *On the Edict, Book LXXXI*.- The amount of the interest of the person demanding it is included in this stipulation. Hence Cassius says that if he who stipulated for indemnity against threatened injury should prop up the building on account of which he obtained security because he feared that it would fall, he can recover the expenses of doing so under the stipulation. The same rule of law applies where anyone who has obtained security for threatened injury on account of the defects of a party-wall props up his own building for the purpose of diminishing the burden sustained by the wall. The damage suffered because of the removal of tenants influenced by fear of accident is included in the same category. Aristo, moreover, very properly adds (as Cassius requires in this instance), that, if there was good ground for the fear which caused the tenants to depart, Cassius should also have added with reference to the person who propped up the building, that he was compelled to do so through a reasonable fear that it would collapse.

29.- GAIUS; *On the Provincial Edict, Book XXVIII*.- The same rule applies where no one is willing to rent the house on account of it being out of repair.

30.- ULPIANUS; *On the Edict, Book LXXXI*.- The stipulation for indemnity against threatened injury is also applicable, where I sustain any damage through a defect in the work done by my neighbor on my land for the purpose of conducting water on his own premises. For it is usual for work to be performed by anyone upon the land of another, when it is done under the right of a servitude in his favor with which the land of the latter is charged.

§ 1.- In a case of this kind, let us see whether a person should merely promise indemnity, or should

fueran dueños de una misma casa ruinosa, cada uno debe prometer por su respectiva parte, a fin de que cada uno no se obligue por a totalidad.

28.- ULPIANO; *Comentarios al Edicto, libro LXXXI*.- En esta estipulación viene comprendido cuanto valiere la casa. Y por lo tanto escribe Cassio, que el que estipuló por daño que amenaza, si por temor a la ruina apuntaló los edificios por razón de los que se procuró caución, puede conseguir los gastos de esto por virtud de lo estipulado. Y el mismo derecho hay, cuando por vicio de una pared común apuntaló sus edificios el que se procuró caución de daño que amenaza, para sostener las cargas que gravitan sobre su pared. En el mismo caso está también el detrimento que por justo miedo se sufrió por causa del desocupo de los inquilinos. Mas no sin razón añade Aristón, que, como en este caso exige Cassio, si un justo miedo hubiere dado motivo para el desocupo, debió decir Cassio lo mismo respecto a la persona del que apuntaló, si se vio precisado a apuntalar por justo miedo a la ruina.

29.- GAYO; *Comentarios al Edicto provincial, libro XXVIII*.- Pero lo mismo se habrá de decir, también si nadie quisiera tomar en arrendamiento un albergue por causa de vicio del edificio.

30.- ULPIANO; *Comentarios al Edicto, libro LXXXI*.- La estipulación del daño que amenaza es procedente, también si me sobreviniere algún daño por vicio de la obra, que se hace en un fundo mío para conducir agua; porque se suele hacer en lo ajeno, cuando por el derecho de la servidumbre que uno tiene impuesta en un campo ajeno, hiciera obra en lo ajeno.

§ 1.- Pero veamos si deberá uno prometer por esta otra, o dar fianza. Hace vacilar, que se obra en lo

facit: qui autem de alieno cavet, satisdare debet, qui de suo, repromittere. Unde Labeo putabat eum, qui modulorum aut rivi faciendi causa opus faceret, etiam satisdare debere, quia in alieno solo faceret. sed quum de opere, quod faciet, exigatur stipulatio, consequens erit dicere sufficere repromissionem: quodam modo enim de re sua cavet.

§ 2.- Quod dictum est "aquae ducendae causa", exempli gratia scriptum est: ceterum ad omnia opera stipulatio accommodabitur.

31.- PAULUS; *libro LXXVIII, ad Edictum*.- Qui vias publicas muniunt, sine damno vicinorum id facere debent.

§ 1.- Si controversia sit, dominus sit nec ne is, a quo cautio exigitur, sub exceptione satisdare iubetur.

32.- GAIUS; *libro XXVIII, ad Edictum provinciale*.- Si aedibus meis proximae sint aedes meae et tuae, quaeritur, an, si hae vitium mihi faciant, cavere mihi debeas pro damno propriarum mearum aedium, scilicet pro qua parte dominus existes. Et hoc plerisque placet: sed movet me, quod ipse meas aedes reficere possim et impensas pro socio aut communi dividendo iudicio pro parte consequi. Nam et si unas aedes communes tecum habui eaque vitium faciant et circa refectionem earum cessare videaris, nostri praeceptores negant cavere te debere, quia ipse reficere possim recepturus pro parte, quod impenderim, iudicio societatis aut communi dividendo: ideo et interpositam cautionem minus utilem futuram, quia alia ratione damnum mihi posset sarciri. Et est plane nostrorum praeceptorum haec

give security. A difficulty arises because he does the work on the premises of another, and anyone who gives security for work performed under such circumstances must furnish sureties; but where he does the work on his own land, he merely promises indemnity. Wherefore Labeo thinks that he who does any work on the land of his neighbor, which has reference to water-courses, or canals, must furnish security, because the work is performed on the premises of another. Where, however, a stipulation is required with reference to something which is already constructed, the result is that a promise of indemnity will be sufficient; for, in this instance, the person, to a certain extent, gives security with reference to his own property.

§ 2.- What has been said with reference to conducting water has only been stated by way of example, but this stipulation is applicable to all kinds of labor.

31.- PAULUS; *On the Edict, Book LXXVIII*.- Those who repair public highways should do so without causing any damage to their neighbors.

§ 1.- If a dispute should arise whether the person from whom security is required is, or is not, the owner of the property, he must furnish security with the reservation of his rights.

32.- GAIUS; *On the Provincial Edict, Book XXVIII*.- If a house which belongs to yourself and me in common adjoins another, which is my property, the question arises whether, if the house owned in common threatens to cause me any damage, you should furnish me security against the injury which may be sustained by my own building; that is to say, for that portion of the said house of which you are the owner. This opinion is adopted by several authorities. I, however, perceive a difficulty because I myself can repair my own house, and I can recover, in an action of partnership or one in partition, any expenses incurred for a portion of the same. For if I have a building in common with you, which is in bad condition, and you are in default in repairing the same, our instructors deny that you should be

ajeno; mas el que da caución por lo ajeno debe dar fianza, y prometer el que por lo suyo. Por lo cual opinaba Labeón, que el que hiciera obra para hacer acueductos o arroyos, debe dar también fianza, porque también la haría en suelo de otro mas como se exige estipulación por la obra que hiciere, será consiguiente decir, que basta la promesa; pues en cierto modo da caución por cosa suya.

§ 2.- Lo que se ha dicho para conducir agua, se ha escrito por vía de ejemplo; por lo demás la estipulación se acomodará a toda clase de obra.

31.- PAULO; *Comentarios al Edicto, libro LXXVIII*.- Los que reparan vías públicas deben hacerla sin perjuicio de los vecinos.

§ 1.- Si hubiera controversia sobre si es o no dueño aquel a quien se le exige la caución, se mandará que dé fianza bajo excepción.

32.- GAYO; *Comentarios al Edicto provincial, libro XXVIII*.- Si próxima a una casa mía estuviera una casa mía y tuya, se pregunta, si, causandome ésta daño, me deberás dar caución por el daño de mi propia casa, por supuesto, con arreglo a la parte de que fueres dueño; y esto es lo que les parece bien a los más. Pero me hace dudar, que yo mismo pueda reparar mi casa y obtener con arreglo a mi parte los gastos con la acción de sociedad o de división de cosa común. Porque también si tuve una sola casa en común contigo, y ella sufriera quebranto, y pareciera que dejabas de hacer su reparación, dicen nuestros maestros que tú no debes dar caución, porque yo mismo podría repararla, habiendo de recobrar con arreglo a mi parte los gastos, que hubiere hecho, con la acción de sociedad o de división de cosa común; y

sententia, ut credamus inutilem esse damni infecti stipulationem, quo casu damnum alia actione sarciri possit: quod et in superiore casu intellegendum est.

33.- ULPIANUS; *libro XLII, ad Edictum*.- Inquilino non datur damni infecti actio, quia possit ex conducto agere, si dominus eum migrare prohiberet:

34.- PAULUS; *libro X, ad Sabinum*.- Utique si pro praeterita pensione satisfacere paratus fuit: alioquin iusta retentio pignoris domino fieri videretur. Sed et si quasi pignora retinuerit et ea interierint ruina vicinarum aedium, potest dici etiam pigneraticia actione locatorem teneri, si poterat eas res in locum tutiorem transferre.

35.- ULPIANUS; *libro XLII, ad Edictum*.- In parietis communis demolitione ea quaeri oportet, satis aptus fuerit oneribus ferendis an non fuerit aptus.

36.- PAULUS; *libro X, ad Sabinum*.- Sed ita idoneum esse plerique dixerunt, ut utrumque aedium onera, quae modo iure imponantur, communis paries sustinere possit.

37.- ULPIANUS; *libro XLII, ad Edictum*.- Nam si non fuit, utique demolire eum oportuit nec debet, si quid damni ex hac causa attigit, is qui demolitus est teneri, nisi sumptuose aut parum bonus novus paries sit restitutus. Quod si fuerit idoneus paries, qui demolitus est, in actionem damni infecti venit id, quanti interfuit actoris eum parietem stare: merito,

compelled to give security, because I myself can make the repairs and will be entitled to recover by an action on partnership, or in partition a proportionate share of the expenses which I have incurred; and therefore the giving of a bond would be of no use, because I can be reimbursed for any loss in another way. It is clear that the opinion of our instructors was, that we should consider a stipulation provided for indemnity in the case of threatened injury to be useless, where one can be indemnified for his loss by another action; which rule is understood to be applicable to the case above mentioned.

33.- ULPIANUS; *On Sabinus, Book XLII*.- An action under a bond of indemnity for threatened injury is not granted to a tenant, because he can proceed under his lease, if the owner of the property should prevent him from leaving;

34.- PAULUS; *On Sabinus, Book X*.- Provided always, that he is ready to give security for any rent which may have accrued; otherwise, the owner could justly retain his property by way of pledge. But even if he should retain it by way of pledge, and it should be destroyed by the fall of a neighboring house, it may be said that the owner would be liable to the tenant in an action on pledge, if he could have deposited the property in a safer place.

35.- ULPIANUS; *On Sabinus, Book XLII*.- In case of the demolition of a party-wall, inquiry must be made whether or not it was fitted to support the weight placed upon it.

36.- PAULUS; *On Sabinus, Book X*.- Several authorities hold that a party-wall, to be suitable, must be able to support the weights of both the houses which may legally be placed thereon.

37.- ULPIANUS; *On Sabinus, Book XLII*.- For, if it was not capable of sustaining these weights, it should be demolished. He who demolishes it should not be liable, if any damage results for this reason, unless he builds a new wall which is either too expensive, or not good enough for the purpose. If the wall which was demolished was a suitable one, the plaintiff will

que por esto, aunque se hubiere interpuesto caución, no habría de ser útil, porque se me podría resarcir el daño de otro modo. Y es ciertamente opinión de nuestros preceptores, que creamos que es inútil la estipulación del daño que amenaza, en el caso en que el daño pueda ser resarcido con otra acción; lo que también se ha de entender en el caso anterior.

33.- ULPIANO; *Comentarios a Sabino, libro XLII*.- Al inquilino no se le da la acción del daño que amenaza, porque podría ejercitar la de conducción, si el dueño le impidiese desalojar.

34.- PAULO; *Comentarios a Sabino, libro X*.- Con tal que haya estado dispuesto a satisfacer la pensión vencida; de otra suerte parecería que tiene el dueño justa retención de prenda. Pero aunque hubiere retenido una cosa como en prenda, y ésta hubiere perecido por ruina de la casa vecina, se puede decir que también el arrendador está obligado por la acción de prenda, si podía trasladar las cosas a lugar más seguro.

35.- ULPIANO; *Comentarios a Sabino, libro XLII*.- Tratándose de la demolición de una pared común, se debe investigar, si era, o no, bastante sólida para soportar las cargas.

36.- PAULO; *Comentarios a Sabino, libro X*.- Pero los más dijeron que una pared común es sólida cuando pueda sostener las cargas de una y otra casa, que se impongan en la medida legal.

37.- ULPIANO; *Comentarios al Edicto, libro XLII*.- Porque si no lo era, debió ciertamente ser demolida; y si algún daño sobrevino por esta causa, no debe estar obligado el que la demolió, a no ser que haya sido repuesta costosamente, o haciéndose una nueva pared poco sólida. Pero si hubiere sido sólida la pared que fue demolida, se comprende en la acción

nam si non debuit demoliri, restituere eum debet proprio sumptu. Sed et si qui reditus ob demolitionem amissus est, consequenter restitui eum Sabinus voluit. Si forte habitatores migraverunt aut non tam commodè habitare possunt, imputari id aedificatori potest.

38.- PAULUS; *libro X, ad Sabinum*.- Emptor aedium ante traditam sibi possessionem ideo inutiliter stipulatur, quia venditor omnem diligentiam ei praestare debet. Tunc certe utiliter stipulatur, quum omnis culpa a venditore aberit, veluti si precario emptori in his aedibus esse permisit custodiamque ei afuturus tradidit.

§ 1.- Si agri nomine non caveatur, in eam partem agri mittendum est, ex qua periculum timeatur: eiusque rei ratio haec est, quod in aedificiis partes quoque reliquae a vitiosa parte traherentur, at in agris non idem est. Sed dicendum est, ut in domibus quoque maioribus interdum causa cognita Praetor statuere debeat, in cuius partis possessionem is, cui non caveatur, mitti debeat.

§ 2.- Deducto veteris parietis pretio, si quid amplius sit, aestimari debet, et si quid ex veteri in novum coniectum sit, deduci ex aestimatione oportet.

39.- POMPONIUS; *libro XXI, ad Sabinum*.- Inter quos paries communis est, aedificiorum nomine, quae quisque propria habet, stipulari damni infecti solent: sed tunc ea cautio necessaria est, quum aut alter solus aedificat et vitium ex opere futurum est,

be entitled to an action under the stipulation for indemnity, to the amount of his interest in having the wall remain. This is reasonable, for if it ought not to have been demolished, he shall rebuild it at his own expense. Moreover, Sabinus says that if anyone lost any income on account of the demolition of the wall, it should be repaid to him. If the tenants leave the house, or cannot be so conveniently lodged, the builder of the new wall shall be responsible.

38.- PAULUS; *On Sabinus, Book X*.- The purchaser of a house cannot properly stipulate for indemnity before possession has been delivered to him; for the reason that the vendor is bound to exercise strict diligence with reference to the property, so far as the rights of the purchaser are concerned. It is certain that such a stipulation can be made, where the vendor is in no way to blame; for instance, if he permitted the purchaser to remain in the house under a precarious title, and when about to depart, he gave him the custody of the same.

§ 1.- If security is not furnished with reference to a field, the plaintiff should be placed in possession of that part of it where some damage is apprehended. The reason for this is, that in the case of buildings, the portions which are in good repair may be pulled down by those which are ruinous, and this is not true of vacant land. It must, however, be said that, with reference to very large houses, the Praetor should sometimes determine, after investigation, in which part of the building the person, to whom security has not been given, should be placed in possession.

§ 2.- Where a new wall is erected, the expense should be calculated after having deducted the cost of the old one to ascertain whether there is any excess; or if any of the old wall was used in the construction of the new one the value of it should be deducted in making the estimate.

39.- POMPONIUS; *On Sabinus, Book XXI*.- Where there is a party-wall between two houses, it is customary to stipulate against threatened injury with reference to the house belonging to each individual owner; but security is not necessary, except where

de daño causado cuanto le haya importado al actor que subsistiera aquella pared; y con razón, porque si no debió ser demolida, debe él reponerla a su propia costa. Pero también si se perdió alguna renta por causa de la demolición, quiso Sabino que consiguientemente fuera restituida. Si acaso la desalojaron los que la habitaban, o si no pueden habitarla tan cómodamente, se le puede imputar esto al que la edificó.

38.- PAULO; *Comentarios a Sabino, libro X*.- El comprador de una casa estipula inútilmente antes que se le haya entregado la posesión, porque el vendedor debe responderle de toda diligencia; y a la verdad, estipula útilmente cuando el vendedor estuviere exento de toda culpa, por ejemplo, si le permitió al comprador que en precario estuviese en aquella casa, y habiéndose de ausentar le encomendó su custodia.

§ 1.- Si no se diera caución con motivo de un campo, se ha de poner en posesión de aquella parte del campo, por la que se tema daño; y la razón de esto es, que en los edificios las restantes partes son arrastradas también por la parte viciosa; mas en los campos no es lo mismo, sino que se ha de decir que, como también en las casas mayores, debe determinar a veces el Pretor con conocimiento de causa en posesión de qué parte deba ser puesto aquel a quien no se le diera caución.

§ 2.- Se debe estimar lo que haya de más, deducido el precio de la pared vieja; y si de la antigua se hubiera aplicado algo a la nueva, se debe deducir de la estipulación.

39.- POMPONIO; *Comentarios a Sabino, libro XXI*.- Entre aquellos para quienes es común una pared, se suele estipular por daño que amenaza por razón de los edificios que cada uno tiene como propios. Pero esta caución es necesaria, o cuando uno

aut alter pretiosiora aedificia habet et plus damni sensurus sit decedente pariete: alioquin si aequale periculum est, quantum quis vicino praestat, tantum ab eo consequitur.

§ 1.- Si domus in controversia sit, dicendum est damni infecti onus possessoris esse, quum id quod praestiterit imputare domino praedii possit: quod si non caveat, possessionem ad petitem, qui caveri damni infecti sibi velit, transferant: nam iniquum est stipulatorem compelli relicto praedio, ex quo damnum vereatur, dominum quaerere.

§ 2.- Damni infecti stipulatio latius patet. Et ideo et ei, qui superficiariam insulam habet, utilis est ea stipulatio, si quid in superficie damnum datum fuerit, et nihilo minus et soli domino utilis est, si solo damnum datum fuerit, ut tota superficies tolleretur: fraudabitur enim dominus soli in pensione percipiendi.

§ 3.- Alieno nomine stipulari ita licet, ut quod damnum domino datum sit, comprehendatur: cavere autem debet is qui stipulabitur dominum ratam rem habiturum exceptioque procuratoria stipulationi inserenda erit, sicut in stipulatione legatorum: quod si ei non cavebitur, mittendus est in possessionem procurator omnimodo, ut ei exceptio procuratoria non noceat.

§ 4.- In aestimando novo pariete ratio haberi debet eius impensae, quae modum probabilem non excedet in vetere eius cultus, non qui non adgravet.

one of them alone builds, and damage is feared on account of the work, or where one of them has a more valuable house than the other, and will sustain greater damage if the wall should fall. Otherwise, where the risk is equal on both sides, the same amount of security given by one of them to his neighbor should also be exacted from the former.

§ 1.- Where the title to a building is in dispute, the burden of furnishing security against threatened injury rests upon the party in possession, as he can recover from the owner of the land whatever he may be compelled to pay out for this purpose. If, however, he should not furnish security, possession shall be given to the plaintiff, who demanded security against threatened injury; for it would be unjust for the stipulator to be compelled to abandon the land, which he fears may be damaged, in order to search for the owner.

§ 2.- The stipulation with reference to threatened injury has a very broad application. Hence this stipulation is advantageous to one whose house, built upon the land of another, is damaged. It is also advantageous to the owner of the land, in case the latter is injured in such a way that the entire surface is removed, for he will then lose the income which he would otherwise have received.

§ 3.- It is lawful to stipulate in the name of another that any damage which may be sustained by the owner shall be included. He, however, who stipulates should give security that the owner will ratify the transaction, and the exception referring to the agent should be inserted in the stipulation, as in the case of those relating to legacies. If security is not furnished him, the agent should, by all means, be placed in possession, so that the exception relative to his agency may not prejudice him.

§ 4.- In making the estimate for the new wall, an account must be taken of the expense, which should not exceed a reasonable sum; and the ornamentation of the old wall ought to be considered, provided the expense is not increased too much by doing so.

solo edifica, y de la obra ha de resultar vicio, o cuando el otro tiene edificios de más precio, y habría de sufrir más daño al caerse la pared; de otra suerte, si el riesgo es igual, cada cual consigue del vecino tanto cuanto le da al mismo.

§ 1.- Si la casa estuviera en litigio, se ha de decir que la carga del daño que amenaza es del poseedor, porque podría poner a cargo del dueño del predio lo que hubiere pagado. Mas si no diera caución, transfieran la posesión al demandante, que quisiera que a él se le diera caución por el daño que amenaza; porque es injusto que el que estipula sea compelido, habiendo dejado el predio, por virtud del que se teme el daño, a perseguir al dueño.

§ 2.- La estipulación del daño que amenaza se extiende a mas; y por lo tanto es útil esta estipulación también al que tiene como superficiario. Una casa, si se hubiere causado algún daño en la superficie; y no obstante, es útil también al dueño del suelo, si se hubiere causado daño en el suelo de suerte que se destruyese toda la superficie; porque será defraudado el dueño del suelo en la percepción de la pensión.

§ 3.- Es lícito estipular en nombre de otro, de suerte que se comprenda el daño que se haya causado al dueño; pero el que estipulare deberá dar caución de que el dueño ratificará la cosa, y se habrá de incluir en la estipulación la excepción procuratoria, como en la estipulación de los legados; pero si no se le diere caución, el procurador ha de ser puesto de todos modos en posesión, para que no le perjudique la excepción procuratoria.

§ 4.- Al hacer la estimación de una pared nueva se debe tener cuenta del gasto de la misma, que no exceda de la cuantía admisible, y, en la antigua, de su adorno, que no la aumente.

40.- ULPIANUS; *libro XLIII, ad Sabinum*.- Ex damni infecti stipulatione non oportet infinitam vel immoderatam aestimationem fieri, ut puta ob tectoria et ob picturas: licet enim in haec magna erogatio facta est, attamen ex damni infecti stipulatione moderatam aestimationem faciendam, quia honestus modus servandus est, non immoderata cuiusque luxuria subsequenda.

§ 1.- Quotiens communis parietis vitio quid accidit, socius socio nihil praestare debet, quum communis rei vitio contigerit. Quod si, quia alter eum presserat vel oneraverat, idcirco damnum contigit, consequens est dicere detrimentum hoc, quod beneficio eius contingit, ipsum sarcire debere. Quod si aequaliter utriusque oneribus pressus deciderit, rectissime Sabinus scripsit, parem utriusque causam esse. Sed si alter plures vel pretiosiores res amiserit, melius est dicere, quia ambo onera imposuerunt, neutri adversus alterum competere actionem.

§ 2.- Quotiens ex damni infecti plures agunt, quia in eadem re damnum passi sunt, id est in aedibus, non debet unusquisque eorum in solidum agere, sed in partem experiri: neque enim damnum, quod pluribus datum est, unicuique in solidum datum est, sed in partem datum esse videtur. Et ideo unicuique in partem competere actionem Iulianus scripsit.

§ 3.- Item si plurium sint aedes, quae damnosae imminet, utrum adversus unumquemque dominorum in solidum competit an in partem? Et scripsit Iulianus, quod et Sabinus probat, pro dominicis partibus conveniri eos oportere.

40.- ULPIANUS; *On Sabinus, Book XLIII*.- In entering into a stipulation for indemnity against threatened injury, an indefinite or extravagant valuation should not be made, as, for example, for stucco-work, or mural paintings; for even though great expense may have been incurred for these things, still, a moderate estimate should be made in the stipulation providing against threatened injury, because a just medium should be observed, and the extravagant luxury of anyone should not be encouraged.

§ 1.- Whenever injury results from a defect in a party-wall, one of the joint-owners will not be liable for any damage sustained by the other, for the reason that it was caused by defective property owned in common. If, however, the damage resulted from one of them placing too great a weight against it, or upon it, it must be said that he alone will be responsible for the damage which was caused by an attempt to benefit himself. If the wall should collapse on account of too great a burden having been imposed upon it by both parties, Sabinus very properly says that both of them will be liable. But if one of them loses more property, or property of greater value than the other, it is best to hold that neither of them will be entitled to an action against the other, because both placed the same burden on the party-wall.

§ 2.- Whenever several persons bring an action on a bond given to provide against threatened injury, for the reason that they have sustained damage with reference to the same property, for instance, a house, each of them should not sue for the entire amount, but in proportion to his share, because the damage which all are entitled to recover has not been sustained by each one in full, but merely for a part; hence Julianus says that an action only for a part will be in favor of each one of them.

§ 3.- Likewise, if a house which is in bad condition, and threatens to fall, belongs to several persons, can an action be brought against each of them for the entire amount, or only for a part? Julianus says, and Sabinus approves his opinion, that they should be sued for the interest which each one has in the

40.- ULPIANO; *Comentarios a Sabino, libro XLIII*.- No es conveniente que por virtud de la estipulación de daño que amenaza se haga una estimación excesiva o inmoderada, por ejemplo, a causa del estucado y de las pinturas; porque aunque en estas cosas se haya hecho grande gasto, se ha de hacer, sin embargo, una moderada estimación por virtud de la estipulación de daño que amenaza, porque se ha de observar una honesta medida, y no se ha de seguir el inmoderado lujo de cualquiera.

§ 1.- Siempre que por vicio de una pared común sucede algo, un condueño no debe responderle de nada a otro condueño, porque habrá sucedido por vicio de una pared común. Pero si sobrevino el daño porque uno de aquellos la había violentado o cargado, es consiguiente decir que él mismo debe resarcir este detrimento, que sobrevino por beneficio suyo; mas si se cayó gravada por igual con cargas de uno y de otro, con muchísima razón escribió Sabino, que era igual la condición de ambos, pero que si uno hubiere perdido muchas cosas, o de más valor, es mejor decir, que, como ambos echaron sobre ella cargas, no le compete a ninguno de los dos acción contra el otro.

§ 2.- Cuando muchos ejercitan la acción de daño que amenaza, porque sufrieron daño en la misma cosa, esto es, en una casa, no debe cada uno de ellos intentarla por la totalidad, sino ejercitarla por una parte; porque el daño que se les causó a muchos, no se les causó por entero a cada uno, sino que se considera que se les causó en parte; y por esto escribió Juliano, que a cada uno le compete acción por su parte.

§ 3.- Asimismo, si fuera de muchos la casa que amenaza con daño, ¿compete por la totalidad, o por una parte contra cada uno de los dueños? Y escribió Juliano, y también lo aprueba Sabino, que ellos deben ser demandados por la parte de que cada uno es dueño.

§ 4.- Si plures domini sint aedium, qui damni infecti sibi prospicere volunt, nec quisquam eis damni infecti caveat, mittendi omnes in possessionem erunt et quidem aequalibus partibus, quamvis diversas portiones dominii habuerint: et ita Pomponius scribit.

41.- POMPONIUS; *libro XXI, ad Sabinum*.- In reficiendo communi pariete ei potius facultas aedificandi praestatur, qui magis idonee reficere parietem velit. Idemque dicendum est et si de eodem itinere rivoque reficiendo inter duos vel plures quaeratur.

42.- IULIANUS; *libro LVIII, Digestorum*.- Si servus communis damni infecti stipulatus fuisset, perinde habetur, ac si ipsi domini sua voce pro partibus stipularentur.

43.- ALFENUS VARUS; *libro II, Digestorum*.- Damni infecti quidam vicino repromiserat: ex eius aedificio tegulae vento deiectae ceciderant in vicini tegulas easque fregerant: quaesitum est, an aliquid praestari oportet. Respondit, si vitio aedificii et infirmitate factum esset, debere praestari: sed si tanta vis venti fuisset, ut quamvis firma aedificia convelleret, non debere. Et quod in stipulatione est "sive quid ibi ruet", non videri sibi ruere, quod aut vento aut omnino aliqua vi extrinsecus admota caderet, sed quod ipsum per se concideret.

§ 1.- Quum parietem communem aedificare quis quum vicino vellet, priusquam veterem demoliret, damni infecti vicino repromisit adeoque restipulatus est: posteaquam paries sublatus esset et habitatores ex vicinis cenaculis emigrassent, vicinus ab eo mer-

property.

§ 4.- Where several owners of a house demand security against threatened injury and no one furnishes it, all of them should be placed in possession on the same footing; although they may have different shares in the ownership of the property. This is also stated by Pomponius.

41.- POMPONIUS; *On Sabinus, Book XXI*.- Where a party-wall is to be repaired, that owner should have the opportunity to do the work who can perform it in the most suitable manner. It must also be said that this rule will apply where the same road or water-course is to be repaired by two or more persons.

42.- JULIANUS; *Digest, Book LVIII*.- If a slave owned in common enters into a stipulation providing against threatened injury, it is considered the same as if his master had stipulated orally with reference to their respective shares.

43.- ALFENUS VARUS; *Digest, Book II*.- A certain man promised indemnity against threatened injury to his neighbor. Tiles from his building were thrown by the wind upon those of his neighbor and broke them. The question arose whether any damages were to be paid. The answer was that this should be done if the accident resulted from any defect or weakness of the building, but if the force of the wind was such that it could even have demolished buildings that were strongly constructed, no damages could be collected. And even though it were provided in the stipulation that damages would be payable even if anything should fall, nothing would be considered to have fallen, where anything was thrown down either by the violence of the wind, or by any other external force, but only what fell of itself.

§ 1.- A man who desired to rebuild a party-wall which he owned in common with his neighbor, before he demolished it, gave him security against threatened injury, and obtained the same from him. After the wall was removed, the lodgers in the rooms

§ 4.- Si fueran muchos los dueños de un edificio, que quieren que se les garantice por daño que amenaza, y nadie les diera caución del daño que amenaza, todos deberán ser puestos en posesión, y ciertamente por partes iguales, aunque tuvieren diversas porciones de dominio; y así lo escribe Pomponio.

41.- POMPONIO; *Comentarios a Sabino, libro XXI*.- Para reparar una pared común se le concede la facultad de edificarla preferentemente al que más convenientemente quiera reparar la pared. Y lo mismo se ha de decir, si entre dos o más se contendiese para reparar un mismo camino o arroyo.

42.- JULIANO; *Digesto, libro LVIII*.- Si un esclavo común hubiese estipulado por daño que amenaza, el caso será considerado lo mismo que si los mismos dueños estipulasen de propia voz por sus partes.

43.- ALFENO VARO; *Digesto, libro II*.- Uno le había prometido a su vecino por daño que amenazaba; de su edificio habían caído sobre las tejas del vecino tejas arrancadas por el viento, y las habían roto; se preguntó, ¿se le debe responder de algo? Respondió, que si esto sucedió por vicio y poca resistencia del edificio, se le debe responder; pero que si tanta hubiese sido la fuerza del viento, que quebrantase los edificios, aunque estuvieran firmes, no se le debía; y que en cuanto a lo que se halla en la estipulación, «o si alguna cosa se arruina allí», no se considera que se arruina para él lo que se cayese o por el viento, o por alguna otra fuerza en absoluto movida de fuera, sino lo que cayese por sí mismo.

§ 1.- Queriendo uno edificar una pared común con su vecino, antes de demoler la antigua le prometió al vecino por el daño que amenazaba, y a su vez estipuló por lo mismo; después que fue levantada la pared se mudaron los moradores de las habitaciones

cedem, quam habitatores non redderent, petere vult: quaesitum est, an recte petet. Respondit non oportuisse eos, quum communem parietem aedificarent, inter se repromittere neque ullo modo alterum ab altero cogi potuisse: sed si maxime repromitterent, tamen non oportuisse amplius quam partis dimidia, quo amplius ne extrario quidem quisquam, quum parietem communem aedificaret, repromittere deberet. Sed quoniam iam in totum repromisissent, omne, quod detrimenti ex mercede vicinus fecisset, praestaturum.

§ 2.- Idem consulebat, possetne, quod ob eam rem dedisset, rursus repetere, quoniam restipulatus esset a vicino, si quid ob eam rem, quod ibi aedificatum esset, sibi damnum datum esset, id reddi, cum et ipsam hanc pecuniam, quam daret, propter illud opus perderet. Respondit non posse propterea quia non operis vitio, sed ex stipulatione id amitteret.

44.- AFRICANUS; *libro IX Quaestionum*.- Quum postulassem, ut mihi damni infecti promitteres, noluisti et priusquam Praetor adiretur, aedes tuae corruerunt et damnum mihi dederunt: potius esse ait, ut nihil novi Praetor constituere debeat et mea culpa damnum sim passus, qui tardius experiri coeperim. At si quum Praetor ut promitteres decrevisset et te non promittente ire me in possessionem iussisset et prius, quam eo venissem, corruerunt, perinde omnia servanda esse existimavit, atque si posteaquam in possessionem venissem damnum datum esset.

§ 1.- Damni infecti nomine in possessionem

of the neighbor left, and the latter attempted to recover from the other joint-owner of the wall the rent which the lodgers had not paid. The question arose whether he could lawfully make such a demand. The answer was that, as the party-wall was being rebuilt, it was not necessary for the joint-owners of the same to give security to one another, nor could either of them, under any circumstances, be compelled to do so by the other; but if they did give security, they still could not give it for more than the half owned by each, for neither of them should give security, even to a stranger, for any more than this, when he intended to rebuild the party-wall. As, however, both had given security for the entire amount, the one who built the wall must be responsible for any damage sustained by his neighbor on account of the loss of his rent.

§ 2.- The same neighbor applied for advice as to whether he could not recover what he had paid on this account, for the reason that it had been agreed by his neighbor that he would reimburse him for any loss which he might have incurred on account of what he had built, and he had lost the money which he had paid on account of the work which he had done. The answer was that he could not do so, because the loss which he had sustained was not due to any defect of construction, but by virtue of the stipulation.

44.- AFRICANUS; *Questions, Book IX*.- I demanded that you give me a bond of indemnity against threatened injury and you refused to do so. Before I applied to the Praetor, your building fell down and caused me damage. It was held that the Praetor should not render any decision in this case, and that I suffered the damage through my own fault, because I began to institute proceedings too late. If, however, the Praetor decided that you should furnish me security, and you did not do so, and he then ordered me to take possession, and your building should collapse before I arrived, it was held that the same rule should be observed as if the injury had been sustained after I had come into possession of the property.

§ 1.- Having been placed in possession of property

vecinas, y el vecino quiere reclamarle el alquiler que no pagaban los moradores; se preguntó, ¿la pedirá con razón? Respondió, que, edificando una pared común, no debieron ellos prometerse entre sí, y que de ningún modo pudo el uno ser obligado por el otro; pero que aunque se prometiesen, no debieron, sin embargo, prometerse más que por la mitad; porque tampoco a un extraño le debería ciertamente prometer uno más al edificar una pared común; pero que como ya se prometieron por la totalidad, debería pagar todo el quebranto que el vecino hubiese sufrido por los alquileres.

§ 2.- Consultaba el mismo, si podría acaso repetir otra vez lo que hubiese dado por virtud de esto, porque había estipulado recíprocamente del vecino, que si porque se hubiese edificado allí algo se le hubiese causado algún daño, fuera éste reparado, puesto que por causa de aquella obra perdería también este mismo dinero que diese. Respondió, que no podía, por esto, porque lo perdería no por vicio de la obra, sino por virtud de la estipulación.

44.- AFRICANO; *Cuestiones, libro IX*.- Cuando te pedí que me prometieses por daño que amenazaba, no quisiste; y antes que se recurriera al Pretor, se cayó tu casa, y me causó daño; dice que es preferible que el Pretor no deba determinar nada nuevo, y que por mi culpa sufrí el daño yo, que comencé tardíamente a ejercitar la acción. Mas si habiendo decretado el Pretor que prometieras, y no prometiendo tú hubiese mandado que yo entrara en posesión, y antes que yo hubiese entrado en ella se cayó, estimó que todo se ha de observar lo mismo que si el daño hubiese sido causado después que yo hubiese entrado en posesión.

§ 1.- Uno que fue puesto en posesión, por razón de

missus possidendo dominium cepit, deinde creditor eas aedes pignori sibi obligatas persequi vult. Non sine ratione dicitur, nisi impensas, quas in refectionem fecerim, mihi praestare sit paratus, inhibendam adversus me persecutionem. Cur ergo non emptori quoque id tribuendum est, si forte quis insulam pigneratam emerit? Non recte haec inter se comparabuntur, quando is qui emit sua voluntate negotium gerat ideoque diligentius a venditore sibi cavere et possit et debeat: quod non aequum est de eo, cui damni infecti non promittatur, dici potest.

45.- SCAEVOLA; *libro XII, Quaestionum*.- Aedificatum habes: ago tibi ius non esse habere: non defendis. ad me possessio transferenda est, non quidem ut protinus destruat opus (iniquum enim est demolitionem protinus fieri), sed ut id fiat, nisi intra certum tempus egeris ius tibi esse aedificatum habere.

46.- PAULUS; *libro I, Sententiarum*.- Ad curatoris rei publicae officium spectat, ut dirutae domus a dominis extruantur.

§ 1.- Domum sumptu publico extructam, si dominus ad tempus pecuniam impensam cum usuris restituere noluerit, iure eam res publica distrahit.

47.- NERATIUS; *libro VI Membranarum*.- Quod conclave binarum aedium dominus ex aliis aedibus in aliarum usum convertit, non solum si contignatio, qua id sustinebitur, orietur ex parte earum aedium, in quarum usum conversum erit, earum fiet, sed etiam si transversa contignatio tota in aliarum aedium parietibus sedebit. Sed et Labeo in libris posteriorum scribit binarum aedium dominum utrisque porticum

on the ground of threatened injury, I obtained the ownership of the same through possession under the second decree of the Praetor. A creditor afterwards desired to prosecute his claim to the house which was hypothecated to him. It was held, and not without reason, that if I had incurred some expense in repairing the house, and the creditor was not willing to reimburse me for the same, he would not be permitted to bring suit against me. Why then should not this right also be conceded to a purchaser, if he had bought a house which had been hypothecated? These two cases cannot justly be compared with one another, since he who purchased the house entered into the transaction voluntarily, and therefore he could and should have been more diligent, and should have compelled the vendor to furnish him with security; but this cannot be said of him who failed to furnish indemnity against threatened injury.

45.- SCAEVOLA; *Questions, Book XII*.- You built a house, and I bring an action against you on the ground that you have no title to the same. You do not set up any defence. Possession should be granted me, but not in order that the house may be immediately demolished, for it would be unjust for this to take place at once, but it should be done within a certain time, unless you prove that you had the right to build it.

46.- PAULUS; *Sentences, Book I*.- It is the duty of the agent of a municipality to see that houses which have fallen into ruin are rebuilt by the owners.

§ 1.- Where a house has been rebuilt at the public expense, and the owner of the same refuses to pay the money disbursed for that purpose, with interest to a certain date, the town can legally sell the house.

47.- NERATIUS; *Parchments, Book VI*.- If the owner of two houses restricts the use of a passage which had been common to both of them, to one alone, it will only belong to the house to whose use it has been restricted, not only where the timbers by which it is supported form part of it, but even where they all rest upon the walls of another building. Moreover, Labeo, in his Last Works, says, where the

daño que amenaza, adquirió, poseyendo, el dominio, y después el acreedor quiere perseguir aquella casa que le estaba obligada a título de prenda; no sin razón se dirá, que a no ser que estuviera dispuesto a pagarme los gastos, que yo hubiere hecho para la reparación, se ha de denegar la persecución contra mí. Luego ¿porqué no se le ha de conceder esto también al comprador, si acaso alguno comprare una casa dada en prenda? No se compararán bien estas cosas entre sí, porque el que compra hace el negocio por su propia voluntad, y por esto puede y debe él procurarse con más diligencia caución por parte del vendedor; lo que no se puede decir igualmente también de aquel a quien no se le prometa por daño que amenaza.

45.- SCÉVOLA; *Cuestiones, libro XII*.- A quien se le pedirá el fundo, si no quisiera la cosa. Tienes algo edificado; ejercito la acción de que no tienes derecho para tenerlo; no te defiendes; se me ha de transferir la posesión, no ciertamente para que al punto sea destruida la obra, -porque es injusto que la demolición se haga inmediatamente-, sino para que se haga esto, si dentro de cierto tiempo no ejercitares la acción de que tienes derecho a tener lo edificado.

46.- PAULO; *Sentencias, libro I*.- Corresponde al cargo del curador de la república hacer que por sus dueños se levanten las casas derruidas.

§ 1.- La república vende con derecho la casa edificada con fondos públicos, si el dueño no hubiere querido restituir a su tiempo con los intereses el dinero gastado.

47.- NERACIO; *Pergaminos, libro VI*.- La cámara que el dueño de dos casas aplicó de una a uso de la otra, se hará de ésta, no solamente si las vigas en que se sostuviere arrancasen de una parte de la casa a cuyo uso hubiere sido destinada, sino también si todas las vigas son transversales y se apoyasen en las paredes de la otra casa. Pero también escribe Labeón en los libros de los Posteriores, que si el dueño de dos

superposuisse inque eam aditu ex alteris aedibus dato alteras aedes servitute oneris porticus servandae imposita vendidisse: totam porticum earum aedium esse, quas retinisset, quum per longitudinem utriusque domus extensa esset transversae contignationi, quae ab utraque parte parietibus domus, quae venisset, sustineretur. Nec tamen consequens est, ut superior pars aedificii, quae nulli coniuncta sit neque aditum aliunde habeat, alterius sit, quam cuius est id cui superposita est.

48.- MARCIANUS; *libro singulari de Delatoribus*.- Si quis ad demolendum negotiandi causa vendidisse domum partemve domus fuerit convictus: ut emptor et venditor singuli pretium, quo domus distracta est, praestent, constitutum est. Ad opus autem publicum si transferat marmora vel columnas, licito iure facit.

TIT. III

DE AQUA, ET AQUAE PLUVIAE
ARCENDAE

1.- ULPIANUS; *libro LIII, ad Edictum*.- Si cui aqua pluvia damnum dabit, actione aquae pluviae arcendae avertetur aqua. Aquam pluviam dicimus, quae de caelo cadit atque imbre excrescit, sive per se haec aqua caelestis noceat, ut tubero ait, sive quum alia mixta sit.

§ 1.- Haec autem actio locum habet in damno nondum facto, opere tamen iam facto, hoc est de eo opere, ex quo damnum timetur: totiensque locum habet, quotiens manu facto opere agro aqua nocitura est, id est quum quis manu fecerit, quo aliter fluere, quam natura soleret, si forte immittendo eam aut maiorem fecerit aut citatiorem aut vehementiorem

owner of two houses built a portico attached to both of them, and made an opening to one of the houses from said portico, and then sold the other house, after imposing upon it the servitude of supporting the portico, that the entire portico will belong to the house which the vendor retained; even though it may extend the entire length of both houses, and is crossed by timbers supported on both sides by the walls of the house which was sold. He, however, says that this rule will not apply when the upper part of the building, which is not joined to the portico, and has no other entrance, belongs to another house than the one by which the portico is supported.

48.- MARCIANUS; *On Informers*.- Where anyone is proved to have sold a house or a part of the same for the purpose of demolishing it and selling the materials, it has been decided that the purchaser and the vendor should each be liable for the amount for which the house was sold. If, however, he should dispose of the marbles or columns of his house to be used in some public work, he can legally do so.

TITLE III

CONCERNING THE RIGHT TO COMPEL A
NEIGHBOR TO TAKE CARE OF WATER AND
RAIN-WATER

1.- ULPIANUS; *On the Edict, Book LIII*.- Where rain-water causes damage to anyone, he will be entitled to an action to compel his neighbor to divert it from his premises. By rainwater we mean that which falls from the heavens, and increases after a heavy rain, whether it does the damage of itself, or, as Tubero says, is mixed with other water.

§ 1.- This action can be brought before the damage has been sustained, and after some building has been constructed, on account of which damage is apprehended. It will lie whenever water will probably result in injury through human agency, that is to say, whenever anyone does something which will cause the water to flow in some other way than it

casas cargó sobre ambas un pórtico, y habiéndole dado entrada por la otra casa vendió la otra casa con la servidumbre impuesta de conservar la carga del pórtico, todo el pórtico es de la casa que hubiese retenido, porque se hallaba extendido por la longitud de ambas casas sobre vigas transversales que por una y otra parte se sostuviesen en las paredes de la casa, que hubiese sido vendida. Pero no es consiguiente que la parte superior del edificio, que no esté unida a ninguna, y no tenga entrada por otra parte, sea de otro sino de aquel de quien es aquello sobre lo que está asentada.

48.- MARCIANO; *De los Delatores, libro único*.- Si alguno hubiere sido convicto de haber vendido una casa o parte de una casa para que fuese demolida por causa de hacer negocio, se determinó que el comprador y el vendedor pagasen cada uno el precio en que fue vendida la casa; pero si trasladase los mármoles o las columnas a una obra pública, lo hace con lícito derecho.

TÍTULO III

DEL AGUA, Y DE LA ACCIÓN PARA QUE
SE CONTENGAN LAS AGUAS
LLOVEDIZAS

1.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Si a alguno le causare daño el agua llovediza, será desviada el agua mediante la acción para que se contenga el agua llovediza. Decimos agua llovediza la que cae del cielo, y aumenta con la lluvia, ya si esta agua del cielo perjudica por sí, como dice Tuberon, ya si estuviera mezclada con otra.

§ 1.- Mas esta acción tiene lugar por el daño aun no causado, pero por obra ya hecha, esto es, por la obra de la que se teme el daño; y tiene lugar siempre y cuando por obra hecha a mano el agua ha de perjudicar a un campo, esto es, cuando alguno hubiere hecho a mano que corra de otra manera que como naturalmente solía, si acaso introduciéndola o la

aut si comprimendo redundare effecit. Quod si natura aqua noceret, ea actione non continentur.

§ 2.- Neratius scribit: opus, quod quis fecit, ut aquam excluderet, quae exundante palude in agrum eius refluere solet, si ea palus aqua pluvia ampliatur eaque aqua repulsa eo opere agris vicini noceat, aquae pluviae actione cogetur tollere.

§ 3.- De eo opere, quod agri colendi causa aratro factum sit, Quintus Mucius ait non competere hanc actionem. Trebatius autem non quod agri, sed quod frumenti dumtaxat quaerendi causa aratro factum solum exceptit.

§ 4.- Sed et fossas agrorum siccandorum causa factas mucius ait fundi colendi causa fieri, non tamen oportere corrivandae aquae causa fieri: sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.

§ 5.- Sed et si quis arare et serere possit etiam sine sulcis aquariis, teneri eum, si quid ex his, licet agri colendi causa videatur fecisse: quod si aliter serere non possit, nisi sulcos aquarios fecerit, non teneri. Ofilius autem ait sulcos agri colendi causa directos ita, ut in unam pergant partem, ius esse facere.

§ 6.- Sed apud servii auditores relatum est, si quis salicta posuerit et ob hoc aqua restagnaret, aquae pluviae arcendae agi posse, si ea aqua vicino noceret.

is naturally accustomed to do, that is, if by allowing it to run, he causes the amount to become greater, or the current to become more rapid, or stronger, or if, by confining it, he causes it to overflow. If, however, the water, by its nature, should cause damage, it cannot give rise to an action.

§ 2.- Neratius says a certain man constructed a levee to exclude the water which ordinarily flowed from a marsh upon the land; if the marsh should be filled with rain-water, and it, having been turned aside by the levee which he constructed, should damage the field of his neighbor, he can be compelled to remove it by an action brought for that purpose.

§ 3.- Quintus Mucius says that this action will not lie with reference to work performed with a plow, for the purpose of cultivating land. Trebatius, moreover, only allows this exception where the work done with the plow is only performed for the purpose of obtaining a better crop of grain, and not merely for the benefit of the land.

§ 4.- Where ditches are dug for the purpose of draining fields, Mucius says that this is done for the sake of cultivation, but it must not cause the water to flow in a single stream; for a man has a right to improve his land, but he must not do so by damaging that of his neighbor.

§ 5.- Moreover, if anyone can plow and sow his fields without making furrows for drainage, he will be liable if he makes any, even though he may be held to have done so for the purpose of cultivating his land. But if he could not sow his seed without opening furrows to carry off the water, he will not be liable. Ofilius, however, says that a person has a right to dig ditches for the purpose of cultivating his land, provided they all follow the same course.

§ 6.- It is said by the authors on Servius, that if anyone has planted willows, and the flow of the water is arrested by them, and damages a neighbor, the latter can bring an action on this account.

hiciera más abundante, o más rápida o más vehemente, o si comprimiéndola la hizo rebosar. Pero si el agua perjudicase naturalmente, no estará comprendida en esta acción.

§ 2.- Escribe Neracio: la obra que uno hizo para contener el agua, que al rebosar una laguna solía extenderse por su campo, será obligado a destruirla mediante la acción de agua llovediza, si aquella laguna creciera con el agua de lluvia, y esta agua, rechazada por aquella obra, perjudicara a los campos del vecino.

§ 3.- Dice Quinto Mucio, que esta acción no compete por la obra que se haya hecho con el arado para cultivar un campo; pero Trebacio exceptúa solamente la que se hizo no por causa del campo, sino con el arado para coger trigo.

§ 4.- Pero dice Mucio, que también las fosas hechas para desecar los campos se hicieron para cultivar el fundo, pero que no deben hacerse para dirigir las aguas a otro punto; porque uno debe mejorar su campo de suerte que no haga peor el del vecino.

§ 5.- Mas también si uno pudiera arar y sembrar aun sin surcos de desecación, esta obligado, si pareciera que hizo algo de esto, aunque para cultivar el campo; pero si de otra manera no pudiera sembrar, sino si hiciera surcos de desecación, no queda obligado. Pero dice Ofilio, que para cultivar un campo hay derecho para hacer surcos de tal modo rectos, que se dirijan a una sola parte.

§ 6.- Pero se dijo por los discípulos de Servio, que si alguno hubiere plantado sauces, y por esto inundase el agua, se puede ejercitar la acción para que se contenga el agua llovediza, si esta agua le perjudicara al vecino.

§ 7.- Labeo etiam scribit ea, quaecumque frugum fructuumque recipiendorum causa fiunt, extra hanc esse causam neque referre, quorum fructuum percipiendorum causa id opus fiat.

§ 8.- Item Sabinus Cassius opus manu factum in hanc actionem venire aiunt, nisi si quid agri colendi causa fiat:

§ 9.- Sulcos tamen aquarios, si quis faciat, aquae pluviae actione eum teneri ait.

§ 10.- Idem aiunt, si aqua naturaliter decurrat, aquae pluviae arcendae actionem cessare: quod si opere facto aqua aut in superiorem partem repellitur aut in inferiorem derivatur, aquae pluviae arcendae actionem competere.

§ 11.- Idem aiunt aquam pluviam in suo retinere vel superficiem ex vicini in suum derivare, dum opus in alieno non fiat, omnibus ius esse (prodesse enim sibi unusquisque, dum alii non nocet, non prohibetur) nec quemquam hoc nomine teneri.

§ 12.- Denique Marcellus scribit quum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.

§ 13.- Item sciendum est hanc actionem vel superiori adversus inferiorem competere, ne aquam, quae natura fluat, opere facto inibeat per suum agrum decurrere, et inferiori adversus superiorem, ne aliter aquam mittat, quam fluere natura solet.

§ 7.- Labeo, also, says that this action does not apply to anything which is done for the purpose of gathering grain and fruit, and it makes no difference what kind of crops are to be gathered by means of the work performed.

§ 8.- Both Sabinus and Cassius hold that this action is applicable to any work performed by the hand of man, unless it is done for the purpose of cultivating the soil.

§ 9.- They also say that a party will be liable to this action if he makes any water-course on his land which.

§ 10.- The same authorities say that an action to control rain-water will not lie where the water flows naturally, but if by means of any work it is turned back, or falls on land below, suit can be brought.

§ 11.- They also say that everyone has the right to retain rainwater on his own premises, or to use for his own benefit any which flows from those of his neighbor, provided he performs no work on the land of another; for no one is forbidden to profit by anything so long as he does not injure some one else, nor can anyone be held liable on this ground.

§ 12.- In conclusion, Marcellus says that when anyone, while excavating upon his own land, diverts a vein of water belonging to his neighbor, no action can be brought against him, not even one on the ground of malice. And it is evident that he should not have such a right of action, where his neighbor did not intend to injure him, but did the work for the purpose of improving his own property.

§ 13.- It must be remembered that this action can be brought by one owning land situated above against one owning land situated below, to prevent water which flows naturally from running over his fields as the result of some work which has been constructed, and by the owner of the land below to prevent him from diverting the water from its natural course.

§ 7.- Escribe también Labeón, que todo lo que se hace para recoger frutos y frutas queda fuera de este caso, y que no importa cuáles sean los frutos para cuya percepción se haga esta obra.

§ 8.- También dicen Sabino y Cassio, que se comprende en esta acción la obra hecha a mano, a no ser que se haga alguna para cultivar un campo.

§ 9.- Mas si alguno hiciera surcos para el agua, dice que queda él obligado por la acción de agua llovediza.

§ 10.- Dicen los mismos, que si el agua corriese naturalmente, deja de tener lugar la acción pese que se contenga el agua llovediza; pero que si con una obra hecha el agua es o repelida a la parte superior, o derivada a la inferior, compete la acción para que se contenga el agua llovediza.

§ 11.- Dicen los mismos, que todos tienen derecho para retener en lo suyo el agua llovediza o para derivar del fundo del vecino al suyo la sobrante, con tal que no se haga obra en lo ajeno, -porque no se prohíbe que cada cual se aproveche, mientras no perjudique a otro-, y que nadie está obligado por tal motivo.

§ 12.- Finalmente, escribe Marcelo, que ninguna acción, ni aun la de dolo, se puede ejercitar contra el que cavando en lo suyo desvió la fuente del vecino; y verdaderamente no debe tenerla éste si aquel no lo hizo con ánimo de perjudicar al vecino sino para mejorar su propio campo.

§ 13.- También se ha de saber, que esta acción le compele al superior contra el inferior, para que no impida con obra que haya hecho que el agua, que corra naturalmente, pase por su campo; y al inferior contra el superior, para que no le envíe el agua de otra manera que como naturalmente suele correr.

§ 14.- Huic illud etiam applicandum numquam competere hanc actionem, quum ipsius loci natura nocet: nam (ut verius quis dixerit) non aqua, sed loci natura nocet.

§ 15.- In summa puto ita demum aquae pluviae arcendae locum actionem habere, si aqua pluvia vel quae pluvia crescit noceat non naturaliter, sed opere facto, nisi si agri colendi causa id factum sit:

§ 16.- Imbre autem crescere eam aquam, quae colorem mutat vel increscit.

§ 17.- Item sciendum est hanc actionem non alias locum habere, quam si aqua pluvia agro noceat: ceterum si aedificio vel oppido noceat, cessat actio ista, agi autem ita poterit ius non esse stillicidia flumina immittere. Et ideo Labeo et Cascellius aiunt aquae quidem pluviae arcendae actionem specialem esse, de fluminibus et stillicidiis generalem et ubique agi ea licere. Itaque aqua, quae agro nocet, per aquae pluviae arcendae actionem coercebitur.

§ 18.- Nec illud quaeramus, unde oriatur: nam et si publico oriens vel ex loco sacro per fundum vicini descendat isque opere facto in meum fundum eam avertat, aquae pluviae arcendae teneri eum Labeo ait.

§ 19.- Cassius quoque scribit, si aqua ex aedificio urbano noceat vel agro vel aedificio rustico, agendum de fluminibus et stillicidiis.

§ 20.- Apud Labeonem autem invenio relatum, si ex agro meo aqua fluens noceat loco qui est intra continentia, hoc est aedificio, non posse me aquae

§ 14.- It should also be noted that this action will never lie where the nature of the ground causes the damage. For (properly speaking) , it is not the water, but the nature of the ground which causes it.

§ 15.- In short, I think that this action will only lie where the rainwater itself causes the damage, or where, having been allowed to collect it is the source of injury, and this occurs not naturally, but through human agency; unless the work is done for the purpose of cultivating the soil.

§ 16.- Water is said to be increased by the rain, when it changes its color, or the quantity is greatly augmented.

§ 17.- It must also be remembered that this action will not lie except where the water causes some injury to land, for it cannot be brought if it injures a building, or a house in a town; as, in the latter instance, suit can be brought on the ground that the neighbor has not the right to let the water drip or flow upon our premises. Therefore, Labeo and Cascellius say that an action of this kind is a special one, and that which has reference to canals and the dripping of water is one of general application, and can be brought everywhere. Hence, when water injures land, the party who is responsible can be sued to compel him to retain the water in its proper channel.

§ 18.- We do not inquire from what source the water is derived; for if it has its origin in a public or a sacred place, and runs through the land of a neighbor, and he, by some means, diverts it upon my premises, Labeo says he will be liable to this action.

§ 19.- Cassius also says that if water from a building in a city injures either land or a building in the country, an action must be brought under the law having reference to canals and the dripping of water.

§ 20.- Moreover, I find it stated by Labeo that if water flowing from my field injures land situated between two buildings, an action cannot be brought

§ 14.- A esto se ha de agregar también, que nunca compete esta acción, cuando sea la naturaleza del mismo lugar la que perjudica; porque, como con más verdad diría cualquiera, no perjudica el agua, sino la naturaleza del lugar.

§ 15.- En suma, opino, que la acción para que se contenga el agua llovediza tiene lugar solamente si el agua llovediza, o la que crece con la lluvia, perjudicara no naturalmente, sino por obra hecha, a no ser que ésta haya sido hecha para cultivar un campo.

§ 16.- Mas crece con la lluvia el agua que muda de color, o que aumenta.

§ 17.- También se ha de saber, que esta acción no tiene lugar de otra suerte, sino si el agua llovediza le perjudicara a un campo. Pero si le perjudicara a un edificio o a un castillo, deja de tener lugar esta acción; pero se podrá ejercitar la de que no tiene uno derecho para echar estilicidio, o canales. Y por esto dicen Labeón y Cascelio, que la acción para que se contenga el agua llovediza es especial, y que la de canales y estilicios es general, y que esta es lícito ejercitarla en cualquier parte. Y así, el agua que perjudica a un campo será desviada mediante la acción para que se contenga el agua llovediza.

§ 18.- Y no investigaremos de dónde nazca; porque también si naciendo de un lugar público, o sagrado, descendiera por un fundo del vecino, y éste la echara a mi fundo con obra que hubiera hecho, dice Labeón que él queda obligado por la acción para que se contenga el agua llovediza.

§ 19.- También escribe Cassio, que si el agua de un edificio urbano perjudica a un campo, o a un edificio rústico, se ha de ejercitar la acción de canales y de estilicios.

§ 20.- Pero hallo que dice Labeón, que si el agua que corre de mi campo perjudicara a un lugar, que está dentro de los suburbios, esto es, a un edificio, no

pluviae arcendae conveniri: quod si ex continentibus profluens in meum agrum defluat eique noceat, aquae pluviae arcendae esse actionem.

§ 21.- Sicut autem opus factum, ut aqua pluvia mihi noceat, in hanc actionem venit, ita per contrarium quaeritur, an posset aquae pluviae arcendae agi, si vicinus opus fecerit, ne aqua, quae alioquin decurrens agro meo proderat, huic prosit. Ofilius igitur et Labeo putant agi non posse, etiamsi intersit mea ad me aquam pervenire: hanc enim actionem locum habere, si aqua pluvia noceat, non si non prosit.

§ 22.- Sed et si vicinus opus tollat et sublato eo aqua naturaliter ad inferiorem agrum perveniens noceat, Labeo existimat aquae pluviae arcendae agi non posse: semper enim hanc esse servitutem inferiorum praediorum, ut natura profluentem aquam excipiant. Plane si propter id opus sublatum vehementior aqua profluat vel corrivetur, aquae pluviae arcendae actione agi posse etiam Labeo confitetur.

§ 23.- Denique ait condicionibus agrorum quasdam leges esse dictas, ut, quibus agris magna sint flumina, liceat mihi, scilicet in agro tuo, aggeres vel fossas habere: si tamen lex non sit agro dicta, agri naturam esse servandam et semper inferiorem superiori servire atque hoc incommodum naturaliter pati inferiorem agrum a superiore compensareque debere quum alio commodo: sicut enim omnis pinguitudo terrae ad eum decurrit, ita etiam aquae incommodum ad eum defluere. Si tamen lex agri non inveniatur, vetustatem vicem legis tenere. Sane enim et in servitutibus hoc idem sequimur, ut, ubi servitus non invenitur imposita, qui diu usus est servitute neque vi neque precario neque clam, habuisse longa consuetudine velut iure impositam servitutem videatur. Non ergo cogemus vicinum aggeres munire, sed nos in eius agro munimus: eritque ista

against me to compel me to take care of the rainwater. This action, however, can be brought where the water flows from a place of this kind upon my land and damages it.

§ 21.- Moreover, as where any work that is performed in such a way that rain-water causes me damage, this action can be brought; so, on the other hand, the question arises whether an action of this kind will lie if my neighbor should do some work to prevent the water from running over my land, and which is a benefit to him. Ofilius and Labeo hold that it cannot be brought, even if it was to my interest that I should have access to the water, because it will only lie where rain-water causes damage, and not where it is a benefit.

§ 22.- If a neighbor should remove the structure which he had erected, and, after its removal, the water following its natural course should injure the field belonging to the owner below, Labeo thinks that this action cannot be brought; since it is a perpetual servitude enjoyed by land situated below to receive water pursuing its natural course. Labeo, however, acknowledges that it is evident if, on account of the work having been removed, the water should flow more rapidly, or collect in its channel, an action of this description can be brought.

§ 23.- Finally, he says that certain laws have been enacted with reference to the different conditions of land; so that if on certain tracts there are large accumulations of water, I may be permitted to build levees or excavate ditches on your ground, for my own protection. Where, however, there is no condition mentioned with reference to land, the natural condition of the same must be preserved, and the lower tract will always be subject to the upper one; and this inconvenience must be naturally endured by the one situated below, for the benefit of the upper tract, and should be compensated for by other advantages; for, as all the fertile soil of the upper tract is carried upon the lower, so, also, the inconvenience of the water flowing upon it must be tolerated. But if no special law relating to the tract of land in question can be found, ancient custom is held

se me puede demandar con la acción para que se contenga el agua llovediza; pero si dimanando de los suburbios corriera sobre mi campo, y le perjudicara, hay acción para que se contenga el agua llovediza.

§ 21.- Mas así como se comprende en esta acción la obra hecha para que me perjudique el agua llovediza, así por el contrario se pregunta si se podrá ejercitar la acción para que se contenga el agua llovediza, si el vecino hubiere hecho la obra para que el agua, que corriendo de otro modo le aprovechaba a mi campo, no le aproveche a éste. Y opinan Ofilio y Labeón, que no se puede ejercitar, aunque me interese que el agua llegue a mi; porque esta acción tiene lugar, si perjudicara el agua llovediza, no si aprovecharse.

§ 22.- Pero aunque el vecino destruya una obra, y, destruida ésta, el agua llegando naturalmente a un campo inferior le perjudique, opina Labeón, que no se puede ejercitar la acción para que se contenga el agua llovediza; porque es siempre servidumbre de los predios inferiores que recojan el agua que corre naturalmente. Mas si por haber sido destruida la obra el agua corriese con más vehemencia o se dirigiese sobre un solo punto, confiesa también Labeón, que se puede ejercitar la acción para que se contenga el agua llovediza.

§ 23.- Finalmente dice, que hay establecidas ciertas leyes para las condiciones de los campos, de suerte que en los campos en que haya grandes corrientes me sea lícito tener diques u hoyas, por supuesto, en tu campo, si, no obstante, no se hubiera establecido para el campo la condición de que se haya de conservar la naturaleza del campo, y de que siempre el inferior le preste servidumbre al superior. Y esta incomodidad debe sufrirla naturalmente del superior el campo inferior, y compensarla con otra comodidad; porque así como a él corre toda la substancia de la tierra, así también corre a él la incomodidad del agua; pero si no se hallara condición establecida para el campo, la antigüedad hace veces de ley. Porque verdaderamente seguimos esto mismo también en las servidumbres, de suerte que donde no se halla servidumbre impuesta, el que usó

quasi servitus, in quam rem utilem actionem habemus vel interdictum.

2.- PAULUS; *libro XLIX, ad Edictum*.- In summa tria sunt, per quae inferior locus superiori servit, lex, natura loci, vetustas: quae semper pro lege habetur, minuendarum scilicet litium causa.

§ 1.- Apud Labeonem proponitur fossa vetus esse agrorum siccandorum causa nec memoriam extare, quando facta est: hanc inferior vicinus non purgabat: sic fiebat, ut ex restagnatione eius aqua fundo nostro noceret. Dicit igitur Labeo aquae pluviae arcendae quum inferiore agi posse, ut aut ipse purgaret aut te pateretur in pristinum statum eam redigere.

§ 2.- Praeterea si in confinio fossa sit neque purgari vicinus patitur eam partem quae tibi accedat, posse te magis aquae pluviae arcendae Labeo ait.

§ 3.- Cassius autem scribit, si qua opera aquae mittendae causa publica auctoritate facta sint, in aquae pluviae arcendae actionem non venire in eademque causa esse ea, quorum memoriam vetustas excedit.

§ 4.- Apud Ateium vero relatam est eam fossam, ex qua ad inferiorem fundum aqua descendit, cogendum esse vicinum purgare, sive extet fossae memoria sive non extet: quod et ipse puto probandum.

to take the place of law.¹ For, indeed, with reference to servitudes, we follow this rule that where a servitude is not found to have been imposed, and one has been enjoyed for a long time without force, or by a precarious title, or clandestinely, the servitude is held to have been created by a long-established custom, or by law. Therefore, we cannot compel a neighbor to build levees, but we ourselves can build them on his land, and to obtain the enjoyment of this species of servitude we are entitled to either a praetorian action or an interdict.

2.- PAULUS; *On the Edict, Book XLIX*.- In short, there are three causes by which a lower tract of land may be subject to an upper one; namely, a law, the nature of the ground, and ancient custom, which is always regarded as law, that is to say, for the purpose of terminating disputes.

§ 1.- The following case was suggested by Labeo. An old ditch was in existence for the purpose of draining certain fields, and no one remembered when it was made. The neighbor below did not clean it out, and, for this reason, the water, being obstructed in its course, injured our land. Hence Labeo says that suit can be brought against the person owning the land below, to compel him to clean out the ditch himself, or to permit you to restore it to its former condition.

§ 2.- Again, if the ditch is on the boundary line, and the neighbor does not permit the part which is on your side to be cleaned out, Labeo says that you can bring this action against him.

§ 3.- Cassius states that if any works are constructed by public authority for the purpose of conducting water, this action will not lie; and that matters will be in the same condition as where ancient usage transcends the memory of man.

§ 4.- It is, however, stated by Ateius that the neighbor above can be compelled to clean out a ditch by which the water flows upon the land of the neighbor below, whether the memory of its

de una servidumbre por largo tiempo, y no con violencia, ni en precario, ni clandestinamente, se considera que tuvo la servidumbre impuesta por larga costumbre, o en virtud de derecho. Luego no obligaremos al vecino a reparar los diques, sino que los repararemos en su campo, y será esta una como servidumbre; para cuya cosa tenemos la acción útil, o el interdicto.

2.- PAULO; *Comentarios al Edicto, libro XLIX*.- En suma, tres cosas hay por las cuales el lugar inferior presta servidumbre al superior; la ley, la naturaleza del lugar, y la antigüedad, que es considerada siempre como ley, para disminuir, por supuesto, los litigios.

§ 1.- Se supone por Labeón, que había un antiguo foso para desecar los campos, y que no había memoria de cuándo fue hecho; el vecino inferior no lo limpiaba; y así resultaba, que por virtud de su estancamiento su agua perjudicaba a nuestro fundo; dice en su consecuencia Labeón, que se puede ejercitar contra el inferior la acción para que se contenga el agua llovediza, para que él mismo lo limpie, o te consienta que lo pongas en su primitivo estado.

§ 2.- Además, si el foso estuviera en la linde, y el vecino no consintiera que se limpiase la parte que está contigua a ti, dice Labeón, que puedes ejercitar con más razón la acción para que se contenga el agua llovediza.

§ 3.- Pero escribe Cassio, que si con la autoridad pública se hubieran hecho algunas obras para introducir agua, no vienen comprendidas en la acción para que se contenga el agua llovediza y que en el mismo caso están aquellas cuya antigüedad excede a su memoria.

§ 4.- Mas se halla expuesto por Ateyo, que vecino ha de ser obligado a limpiar el foso de que baja agua al fundo inferior, ora haya, ora no memoria del foso; lo que también yo creo que se debe admitir.

construction survives or not. I myself think that this opinion should be approved.

§ 5.- Item Varus ait: aggerem, qui in fundo vicini erat, vis aquae deiecit, per quod effectum est, ut aqua pluvia mihi noceret. Varus ait, si naturalis agger fuit, non posse me vicinum cogere aquae pluviae arcendae actione, ut eum reponat vel reponi sinat, idemque putat et si manu factus fuit neque memoria eius exstat: quod si extet, putat aquae pluviae arcendae actione eum teneri. Labeo autem, si manu factus sit agger, etiamsi memoria eius non exstat, agi posse ut reponatur: nam hac actione neminem cogi posse, ut vicinus prosit, sed ne noceat aut interpellat facientem, quod iure facere possit. Quamquam tamen deficiat aquae pluviae arcendae actio, attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro eius, qui factus mihi quidem prodesse potest, ipsi vero nihil nociturus est: haec aequitas suggerit, etsi iure deficiamus.

§ 6.- Apud Namusam relatum est, si aqua fluens iter suum stercore obstruxerit et ex restagnatione superioris agro noceat, posse quum inferiore agi, ut sinat purgari: hanc enim actionem non tantum de operibus esse utilem manu factis, verum etiam in omnibus, quae non secundum voluntatem sint. Labeo contra Namusam probat: ait enim naturam agri ipsam a se mutari posse et ideo, quum per se natura agri fuerit mutata, aequo animo unumquemque ferre debere, sive melior sive deterior eius condicio facta sit. Idcirco et si terrae motu aut tempestatis magnitudine soli causa mutata sit, neminem cogi posse, ut sinat in pristinum locum condicionem redigi. Sed nos etiam in hunc casum aequitatem admisimus.

§ 5.- Varus says the force of the current has broken the levee on the land of a neighbor, and the result is that the rain-water causes me damage. He holds that if the levee was a natural one, that I cannot bring this action against him to compel him to repair the levee, or to permit it to be repaired. He also holds that if the levee was built by human agency, and it is remembered when this was done, the neighbor will be liable to this action. Labeo, also, says that if the levee was built by the hand of man, the action can be brought to compel it to be restored, even if it should not be remembered when it was constructed; for no one can be compelled by this proceeding to do something to benefit his neighbor, but only to prevent him from injuring him, or to force him to permit us to do what can be done by law. Although the action to compel him to take care of the rain-water cannot be brought, still I am of the opinion that I will be entitled to a praetorian action or an interdict against my neighbor, if I desire the levee to be rebuilt upon his land, which, if done, will be of advantage to me and at the same time will not cause him any injury. This course is suggested by equity, although we have no law which authorizes it.

§ 6.- It is said by Namusa that, if water flowing through its regular channel is obstructed by a deposit of soil, and on account of being arrested injures land situated above, an action can be brought against the owner of the land below, to compel him to permit the channel to be cleaned out; for this action is not only available in the case of work performed by human agency, but also has reference to all obstacles which do not owe their existence to our will. Labeo does not agree with Namusa, for he says that the nature of land can be changed by itself; and therefore where the nature of a field is changed in this manner, both parties should endure it with equanimity, whether their condition is improved, or made worse. Hence, if the nature of the ground is changed by an earthquake, or by the force of a tempest, no one can be compelled to permit the land to be restored to its former condition. We also adopt the principles of equity in a

§ 5.- También dice Varo: la fuerza del agua rompió el dique, que había en el fundo del vecino por lo cual resultó que me perjudicaba el agua llovediza; dice Varo, que si el dique era natural o con la acción para que se contenga el agua llovediza no puedo obligar al vecino a repararlo, o a que deje que sea reparado. Y lo mismo opina, también si hubiera sido hecho a mano, y no hubiera memoria de él; pero si la hubiera, opina que él está obligado por la acción para que se contenga el agua llovediza. Pero dice Labeón, que si el dique hubiera sido hecho a mano, aunque no haya memoria de él, se puede ejercitar acción para que sea reparado; porque con esta acción nadie puede ser obligado a beneficiar al vecino, sino a no perjudicarlo, o a no impedirle que haga lo que pueda hacer con derecho. Mas aunque falte la acción para que se contenga el agua llovediza, opino, sin embargo, que me compete contra el vecino la acción útil o el interdicto, si yo quisiera reparar en su campo el dique, que, hecho, me puede ser ciertamente provechoso, y a él en nada le ha de perjudicar; y esto es lo que sugiere la equidad, aunque carezcamos de derecho positivo.

§ 6.- Se dice por Namusa, que si el agua corriente obstruyere su cauce con estiércol, y por virtud del estancamiento perjudicase al campo superior, se puede ejercitar acción contra el dueño del inferior para que deje que se limpie; porque esta acción es útil no solamente respecto a las obras hechas a mano, sino también en cuanto a todas, que no dependen de la voluntad. Labeón argumenta contra Namusa; porque dice, que la misma naturaleza de un campo puede cambiarse por sí misma, y que por esto, cuando la naturaleza del campo se hubiere cambiado por sí misma, cada cual debe soportarlo con ánimo tranquilo, ya si se hubiera hecho mejor, ya si peor, su condición, y por lo tanto, que aunque por terremoto, o por violencia de tempestad se hubiere cambiado el estado del suelo, nadie podía ser obligado a dejar que se restableciera la primitiva condición del lugar; pero nosotros admitimos también en este caso la equidad.

case of this kind.

§ 7.- Idem Labeo ait, si in agro tuo aquarum concursus locum excavavit, aquae pluviae arcendae actione agi non posse tecum a vicinis: plane si fossam iure factam aut cuius memoria non extat, agi tecum posse aquae pluviae arcendae, ut reficias.

§ 8.- Idem Labeo ait, quum quaeritur, an memoria extet facto opere, non diem et consulem ad liquidum exquirendum, sed sufficere, si quis sciat factum esse, hoc est, si factum esse non ambigatur: nec utique necesse esse superesse qui meminerint, verum etiam si qui audierint eos, qui memoria tenuerint.

§ 9.- Idem Labeo ait, si vicinus flumen torrentem averterit, ne aqua ad eum perveniat, et hoc modo sit effectum, ut vicino noceatur, agi quum eo aquae pluviae arcendae non posse: aquam enim arcere hoc esse curare, ne influat. quae sententia verior est, si modo non hoc animo fecit, ut tibi noceat, sed ne sibi noceat.

§ 10.- Illud etiam verum puto, quod Ofilius scribit, si fundus tuus vicinus serviat et propterea aquam recipiat, cessare aquae pluviae arcendae actionem, sic tamen, si non ultra modum noceat. Cui consequens est, quod Labeo putat, si quis vicinus cesserit ius ei esse aquam immittere, aquae pluviae arcendae eum agere non posse.

3.- ULPIANUS; *libro LIII, ad Edictum*.- Apud Trebatium relatum est eum, in cuius fundo aqua oritur, fullonicas circa fontem instituisse et ex his aquam in fundum vicini immittere coepisse: ait ergo

§ 7.- Labeo adds that if the accumulation of water excavates a hole on your land, an action to divert the water cannot be brought against you by your neighbor. It is, however, clear that if a channel has been dug in accordance with law, or the right to it has been established by custom beyond the memory of man, an action of this kind can be brought against you to compel you to make repairs.

§ 8.- Labeo also says that when inquiry is made to ascertain whether the work was constructed within the memory of man, the exact date and the Consulate should not be required, but it will be sufficient if anyone knows when the work was constructed, that is to say, if there is no doubt on the subject; nor is it necessary that the persons who remembered it should be living, but only that others should have heard those who remembered its construction state the fact.

§ 9.- Labeo also says that if a neighbor turns aside a torrent to prevent the water from reaching him and, by doing so, his neighbor is injured, an action cannot be brought against him for diverting the water from its course; since, in order to divert it, it must be prevented from flowing upon his premises. This opinion is perfectly true, provided he did not act with the intention of injuring you, but to prevent injury to himself.

§ 10.- I also think that the opinion of Ofilius is correct, namely, if your land owes that of your neighbor a servitude, on account of which it receives its water, this action will not lie unless the damage sustained is excessive. The result of this is, and it coincides with the opinion of Labeo, that if anyone should transfer to his neighbor the right to allow water to flow upon his land, he cannot bring an action of this kind against him.

3.- ULPIANUS; *On the Edict, Book LIII*.- It is related by Trebatius that a certain person, on whose land there was a spring, established the business of a fuller near the said spring, and permitted the water,

§ 7.- Dice el mismo Labeón, que si la corriente de las aguas excavó en tu campo un lugar, no se podía ejercitar contra ti por los vecinos la acción para que se contenga el agua llovediza; pero si la hoya fue hecha con derecho, o de ella no hubiera memoria, se puede ejercitar contra ti la acción para que se contenga el agua llovediza, a fin de que la repares.

§ 8.- El mismo Labeón dice, que cuando se investiga si hay memoria de que haya sido hecha la obra, no se ha de averiguar a punto fijo el día y el cónsul, sino que basta si alguno sabe que se hizo, esto es, si no se duda que se hizo; y no es ciertamente necesario que sobrevivan los que se acordaren, sino si algunos hubieren oído a los que hubieren tenido memoria de ello.

§ 9.- Dice el mismo Labeón, que si el vecino hubiere desviado una corriente o un torrente a fin de que el agua no fuese a él, y esto hubiera sido hecho de modo que se le perjudicara al vecino, no se puede ejercitar contra él la acción para que se contenga el agua llovediza; porque contener el agua llovediza es cuidar de que no invada; cuya opinión es más verdadera, si esto no lo hizo con intención de perjudicarte, sino para no perjudicarse él.

§ 10.- También considero verdadero lo que escribe Ofilio, que si un fundo tuyo le prestara servidumbre al vecino, y por esto recibiera el agua, deja de tener lugar la acción para que se contenga el agua llovediza, pero esto así, si no le perjudicara desmesuradamente. A lo cual es consiguiente lo que opina Labeón, que si alguno le hubiere concedido al vecino que tenga el derecho de introducirle el agua, no puede él ejercitar la acción para que se contenga el agua llovediza.

3.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Se refirió por Trebacio, que uno, en cuyo fundo nace agua, estableció lavaderos junto a la fuente, y que de ellos comenzó a introducir el agua en el fundo del

non teneri eum aquae pluviae arcendae actione. Si tamen aquam conrivat vel si spurcam quis immittat, posse eum impediri plerisque placuit.

§ 1.- Idem Trebatius putat eum, cui aquae fluentes calidae noceant, aquae pluviae arcendae quum vicino agere posse: quod verum non est: neque enim aquae calidae aquae pluviae sunt.

§ 2.- Si vicinus, qui arvum solebat certo tempore anni rigare, pratum illic fecerit coeperitque adsidua irrigatione vicino nocere, ait Ofilius neque damni infecti neque aquae pluviae arcendae actione eum teneri, nisi locum complanavit eoque facto citatior aqua ad vicinum pervenire coepit.

§ 3.- Aquae pluviae arcendae non nisi eum teneri, qui in suo opus faciat, receptum est eoque iure utimur. Quare si quis in publico opus faciat, haec actio cessat, sibi imputare debet is, qui damni infecti cautione sibi non prospexit. Si tamen in privato opus factum sit et publicum interveniat, de toto agi posse aquae pluviae arcendae labeo ait.

§ 4.- Neque fructuarius neque quum eo aquae pluviae arcendae agi potest.

4.- IDEM; *libro LIII.*- Quamquam autem quum domino operis tantum aquae pluviae arcendae actio sit, tamen Labeo scribit, si quis sepulchrum aedificaverit, ex quo aqua noceat, etiamsi operis dominus esse desierit loco facto religioso, attamen magis probandum est, inquit, aquae pluviae arcendae eum teneri: fuit enim dominus, quum opus faceret: et

after being used in this way, to flow upon the land of his neighbor. He says that he would not be liable to an action of this kind brought by his neighbor, but many authorities hold that if he confines the water to a channel or throws any filth into it, he can be prevented from doing so.

§ 1.- Trebatius also thinks that where anyone is damaged by a flow of warm water, he can bring a suit of this kind against his neighbor, but this is not true, for warm water is not rain-water.

§ 2.- If a neighbor who was accustomed to irrigate a field during a certain season of the year should make a meadow of it, and by constant irrigation should cause his neighbor damage, Ofilius says that he will not be liable to an action on the ground of threatened injury, or for the diversion of rain-water, unless he has levelled the ground so that, in this way, the water will be carried more rapidly upon the land of his neighbor.

§ 3.- It has been established, and we adopt the rule, that a person is not liable to this action, except when he does the work, which causes the damage, upon his own land. Therefore, if anyone performs any work upon public land, this action will not lie; and he who did not provide against threatened injury by obtaining the execution of a bond has no one to blame but himself. If, however, the work is performed upon private premises, as well as upon public land, Labeo says that an action of this kind can be brought for everything.

§ 4.- An usufructuary cannot bring this action, nor can it be brought against him.

4.- THE SAME; *On the Edict, Book LIII.*- Moreover, although this action can only be brought against the owner of the work, still Labeo says that if anyone builds a sepulchre, and the water from it injures a neighbor, it is preferable to adopt the rule that the owner will be liable to this action, even if he had ceased to be such because of the ground having

vecino. Y dice, que éste no está obligado por la acción para que se contenga el agua llovediza; pero si alguno dirigiese sobre un punto el agua, o si la introdujera sucia, les pareció bien a los más que se le podría impedir.

§ 1.- Opina el mismo Trebacio, que aquel a quien le perjudiquen las aguas termales corrientes, puede ejercitar contra su vecino la acción para que se contenga el agua llovediza; lo que no es verdad, porque las aguas termales no son aguas llovedizas.

§ 2.- Si el vecino, que solía regar en cierta época del año un campo, hubiere hecho en él un prado, y hubiere comenzado a perjudicarle con el continuado riego al vecino, dice Ofilio, que no está él obligado ni por la acción de daño que amenaza, ni por la acción para que se contenga el agua llovediza, si no allanó el terreno, y por este hecho comenzó a ir el agua más rápida al vecino.

§ 3.- Se admitió que no estuviera obligado con la acción para que se contenga el agua llovediza sino el que hiciera obra en lo suyo; y este derecho observamos. Por lo cual, si alguno hiciera obra en sitio público, deja de tener lugar esta acción, y debe imputárselo a sí mismo el que no miró por sí con la caución de daño que amenaza; pero si la obra hubiera sido hecha en sitio privado, y mediase otro público, dice Labeón que se puede ejercitar por la totalidad la acción para que se contenga el agua llovediza.

§ 4.- Ni el usufructuario puede ejercitar la acción para que se contenga el agua llovediza, ni puede ser ejercitada contra él.

4.- EL MISMO; *libro LIII.*- Mas aunque la acción para que se contenga el agua llovediza se tenga solamente contra el dueño de la obra, escribe no obstante Labeón, que si alguno hubiere edificado un sepulcro, por virtud del cual perjudique el agua, aunque haya dejado de ser dueño de la obra por haberse hecho religioso el lugar, dice que, sin

si iussu iudicis compulsus opus restituerit, non esse sepulchri violati actionem.

§ 1.- Iulianus quoque scribit, si post iudicium aquae pluviae arcendae susceptum fundum alienaverit is quum quo actum esset, de praeterito damno et de opere restituendo id statuere iudicem debere, quod iudicaret, si nulla alienatio facta esset: nam et fundo alienato nihilominus iudicium manere et damni rationem venire etiam eius, quod alienationem contingit.

§ 2.- Idem Iulianus scribit aquae pluviae arcendae actionem non nisi quum domino esse idcircoque, si colonus ignorante domino opus fecerit, dominum fundi nihil amplius quam patientiam praestare debere, colonum autem interdicto Quod vi aut clam impensam quoque restituendi operis et damnum, si quod ex eo datum fuerit, praestare cogendum. Si tamen dominus desideret caveri sibi damni infecti ab eo, ex cuius praedio nocet, aequissimum erit caveri oportere.

§ 3.- Item si non ego, sed procurator meus tale opus fecerit, ut aqua pluvia noceat vicino, adversus me hactenus erit actio, quatenus adversus colonum: ipse autem procurator interdicto Quod vi aut clam conveniri poterit secundum Iuliani sententiam, etiam post opus restitutum.

5.- PAULUS; *libro XLIX, ad Edictum*.- Si colonus insciente domino opus fecerit, ex quo aqua vicino noceat, Labeo respondit colonum interdicto Quod vi aut clam teneri, dominum vero fundi aquae pluviae arcendae actione, quia is solus restituere opus potest: sed patientiam dumtaxat eum praestare debere, si ei

become religious, for he was the owner at the time when the structure was erected. If he should be compelled by order of court to restore the work to its former condition, an action for the violation of the sepulchre will not lie.

§ 1.- Julianus also said that, if after proceedings had been instituted to compel him to take care of the rain-water, and he against whom suit had been brought for damages previously sustained, and for the restoration of the property to its original condition, should alienate the land, the judge must render the same decision which he would have done if no alienation had taken place; for, after the land had been alienated, the case remains the same, and the account of the damage should include any which had been suffered after the alienation took place.

§ 2.- Julianus also says that this action cannot be brought against anyone but the owner of the property, and therefore, if a tenant should erect any structure without the owner of the land being aware of it, the latter is not compelled to do anything except to suffer the structure to be destroyed. The tenant, however, can, by the interdict Quod vi aut clam, be compelled to restore the property to its former condition, and to pay any damages which may have been sustained. If, however, the owner should wish to obtain security against threatened injury from the owner of the land, it would be perfectly just for it to be given him.

§ 3.- If, however, I did not construct such a work, but my agent did, and my neighbor is injured by the water, the action can be brought against me, just as it can be against the tenant. The agent, however, can, according to the opinion of Julianus, have proceedings instituted against him under the interdict Quod vi aut clam, even after the property has been restored to its former condition.

5.- PAULUS; *On the Edict, Book XLIX*.- If a tenant, without the knowledge of the owner, should construct a work by means of which the water injures a neighbor, Labeo gives it as his opinion that the tenant will be liable under the interdict Quod vi aut clam, and that the action relating to the care of rain-

embargo, se ha de admitir más bien que está él obligado por la acción para que se contenga el agua llovediza; porque fue dueño cuando hacía la obra y si compelido por mandato del juez hubiere repuesto la obra, no hay la acción de sepulcro violado.

§ 1.- Escribe también Juliano, que si después de haberse aceptado el juicio para que se contenga el agua llovediza hubiere enajenado el fundo aquel contra quien se hubiese ejercitado acción por el daño pasado y para que se repusiera la obra, debe determinar el juez lo mismo que juzgaría si no se hubiese hecho ninguna enajenación; porque aun después de enajenado el fundo subsiste todavía el juicio, y comprende también la cuenta del daño que sobrevino con la enajenación.

§ 2.- El mismo Juliano escribe, que la acción para que se contenga el agua llovediza no se da sino contra el dueño. Y por esto, si ignorándolo el dueño hubiere hecho el colono la obra, el dueño del fundo no debe hacer nada más que permitir su demolición; mas el colono ha de ser obligado por el interdicto de lo que se hizo con violencia o clandestinamente a pagar también el gasto de la reposición de la obra y el daño, si alguno se hubiere causado en ella. Mas si el dueño pretendiese que por el daño que amenaza se le diera caución por aquel con cuyo predio se le perjudica, será muy justo que se le deba dar caución.

§ 3.- Asimismo, si no yo, sino mi procurador hubiere hecho una obra tal, que el agua llovediza le perjudique al vecino, se dará contra mí la acción en tanto que contra el colono; mas el mismo procurador podrá ser demandado con el interdicto de lo que se hizo con violencia o clandestinamente, según la opinión de Juliano, aun después de repuesta la obra.

5.- PAULO; *Comentarios al Edicto, libro XLIX*. - Si sin saberlo el dueño hubiere hecho un colono una obra, por virtud de la que el agua le perjudicara al vecino, respondió Labeón, que el colono estaba obligado por el interdicto de lo que se hizo con violencia o clandestinamente; y el dueño del fundo,

damni infecti stipulatione caveatur, et, si quam impensam in restitutione operis fecerit, consequentur a colono locati actione: nisi si quis ideo non putet, quoniam non fuerit necesse ipsum restituere. sed si iussu domini fecisset, etiam interdicto dominum teneri.

6.- ULPIANUS; *libro LIII, ad Edictum*.- Si tertius vicinus opus fecerit, unde decurrens aqua per fundum primi vicini mei mihi noceat, Sabinus ait posse me vel cum primo vel cum tertio omisso primo agere: quae sententia vera est.

§ 1.- Si ex plurium fundo decurrens aqua noceat vel si plurium fundo noceatur, placuit eoque iure utimur, ut, sive plurium fundus sit, singuli in partem experiantur et condemnatio in partem fiat, sive quum pluribus agatur, singuli in partem conveniantur et in partem fiat condemnatio.

§ 2.- Inde quaeritur, si communi agro meo et tuo ex proprio agro tuo aqua noceat, an agi possit aquae pluviae arcendae: et putem agendum, sic tamen, ut pars damni praestetur.

§ 3.- Versa quoque vice si communis ager sit, qui nocet proprio, poterit aquae pluviae arcendae agi, ut quis damnum consequatur, sed in partem.

water can be brought against the owner of the land, because he alone can restore the property to its original condition; but, in this instance, he can only be compelled to allow it to be restored where a bond of indemnity providing against threatened injury has been obtained by a stipulation. If he should incur any expense in restoring the property to its former condition, he can recover it from the tenant in an action on lease, unless someone should decide that he cannot do so, because it was not necessary for him to restore it. If, however, he acted by the direction of the owner of the land, the latter will also be liable to the interdict.

6.- ULPIANUS; *On the Edict, Book LIII*.- If the neighbor next above the one adjoining me constructs a work by which the water, running over the land of my nearest neighbor, causes me damage, Sabinus says that I can bring an action either against the one immediately above me, or against the one above him, if the former fails to do so. This opinion is correct.

§ 1.- If the water flowing from land owned by several persons causes damage, or if it injures land belonging to several persons, it has been decided, and we adopt the same rule, that where it belongs to several owners, suit can be brought by each one in accordance with his interest, and judgment can be rendered proportionally; or where the action is brought against several persons, judgment shall be rendered against them individually in proportion to their respective shares.

§ 2.- Hence the question arises, if water from your land should cause damage to a field held in common by yourself and me, whether this action can be brought. I think that it can, in such a way, however, that only a portion of the damage shall be paid by the party who loses the case.

§ 3.- On the other hand, where the water from a field held by joint-owners damages land owned by one of them, an action of this kind can be brought, but the party who brings it can only obtain damages in proportion to his share.

con la acción para que se contenga el agua llovediza, porque sólo él puede demoler la obra; pero que él debe prestar solamente su consentimiento, si se le diera caución con la estipulación de daño que amenazara, y que si hubiere hecho algún gasto en la demolición de la obra lo obtendrá del colono con la acción de locación, a no ser que alguno no lo estime así, porque no hubiere sido necesario demolerla; mas si lo hubiese hecho por mandato del dueño, también queda obligado el dueño por el interdicto.

6.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Si un tercer vecino hubiere hecho una obra, por virtud de la cual me perjudique el agua que corre por el fundo de mi primer vecino, dice Sabino, que puedo yo ejercitar la acción contra el primero, o contra el tercero, prescindiendo del primero; cuya opinión es verdadera.

§ 1.- Si perjudicara el agua que corre de un fundo que es de muchos, o si se le causara daño a fundo que es de muchos, se determinó, y este derecho observamos, que, si el fundo fuera de muchos, cada uno ejerce la acción por su parte, y la condena se hará por una parte, y si se ejercitara la acción contra muchos, cada uno será demandado por su parte, y la condena se hará por cada parte.

§ 2.- Por lo cual se pregunta, si, perjudicándole a un campo mío común contigo el agua de otro campo tuyo propio, se podría ejercitar la acción para que se contenga el agua llovediza. Y yo opinaría que se puede ejercitar, pero de modo que se satisfaga parte del daño.

§ 3.- Y también viceversa, si fuera común el campo, que perjudicara a otro propio, se podrá ejercitar la acción para que se contenga el agua llovediza, a fin de que uno consiga la indemnización del daño, pero en parte.

§ 4.- Si quis prius, quam aquae pluviae arcendae agat, dominium ad alium transtulerit fundi, desinit habere aquae pluviae arcendae actionem eaque ad eum transibit, cuius ager esse coepit: quum enim damnum futurum contineat, ad eum qui dominus erit incipiet actio pertinere, quamvis, quum alterius dominium esset, opus a vicino factum sit.

§ 5.- Aquae pluviae arcendae actionem sciendum est non in rem, sed personalem esse.

§ 6.- Officium autem iudicis hoc erit, ut, si quidem a vicino opus factum sit, eum iubeat restituere damnumque sarcire, si quid post litem contestatam contigit: quod si ante litem contestatam damnum contigit, tantum opus restituere debebit, damnum non sarciet.

§ 7.- Celsus scribit, si quid ipse feci, quo tibi aqua pluvia noceat, mea impensa tollere me cogendum, si quid alius qui ad me non pertinet, sufficere, ut patiar te tollere. Sed si servus meus fecerit, aut is cui heres sum hoc fecit, servum quidem noxae dedere debeo: quod autem is cui heres sum fecit, perinde est, atque si ipse fecissem.

§ 8.- Aestimationem autem iudex faciet ex rei veritate, hoc est eius damni, quod apparuerit datum.

7.- PAULUS; *libro XVIII, ad Edictum*.- Is quum quo aquae pluviae arcendae agitur, quod opus fecit, licet cedere loco paratus sit, cogitur accipere iudicium, quoniam et suo nomine convenitur, ut opus tollat.

§ 4.- If anyone, before instituting proceedings, should transfer the ownership of the land to another, he will cease to have a right to bring this action, and it will pass to the person to whom the field belongs, for the action has reference to injury which may, in the future, be sustained the owner; although the work may have been done when the land belonged to the former proprietor.

§ 5.- It must be remembered that this action is not a real, but a personal one.

§ 6.- It is the duty of the judge, in a case of this kind, where any work has been done by a neighbor, to order him to restore the property to its former condition, and to pay all damages sustained after issue has been joined. If, however, any damage was caused before issue was joined, he should only compel him to restore the property to its original condition, and not to pay any damages.

§ 7.- Celsus says, that if I build anything by which rain-water may cause you any damage, I can be compelled to remove it at my own expense. If anyone else, over whom I have no authority, should do this, it will be sufficient if I permit you to remove the structure. But if my slave, or anyone whose heir I am, should do the work, I will be obliged to surrender the slave by way of reparation; but if the person whose heir I am, did it, it is just the same as if I myself had erected the building.

§ 8.- The judge must estimate the damage in accordance with the truth of the matter; that is to say, according to the amount of damage which appears to have been sustained.

7.- PAULUS; *On the Edict, Book XVIII*.- He against whom suit is brought to compel him to take care of rain-water, and who has performed the work rendering him liable to such an action, will be compelled to join issue in the case, even if he is ready to abandon it, since he is sued personally in his own name to compel him to remove the structure.

§ 4.- Si alguno, antes de ejercitar la acción para que se contenga el agua llovediza, hubiere transferido a otro el dominio del fundo, dejó de tener la acción para que se contenga el agua llovediza, y ella pasará a aquel de quien comenzó a ser el campo; porque como comprende el daño futuro, la acción comenzará a pertenecer a aquel que fuere dueño, aunque la obra haya sido hecha por el vecino cuando el dominio era de otro.

§ 5.- Se ha de saber, que la acción para que se contenga el agua llovediza no es real, sino personal.

§ 6.- Mas el ministerio del juez será este, que, si la obra hubiera sido hecha ciertamente por el vecino, le mande que la deshaga, y resarza el daño, si alguno sobrevino después de contestada la demanda; pero si el daño aconteció antes de contestada la demanda, solamente deberá deshacer la obra, y no resarcirá el daño.

§ 7.- Escribe Celso, que si yo mismo hice alguna cosa por virtud de la cual te perjudique el agua llovediza, he de ser obligado a destruirla a mi costa; y que si la hizo otro, que no me pertenece, basta que yo consienta que tú la deshagas. Pero si la hubiere hecho un esclavo mío, o la hizo aquel de quien soy heredero, debo ciertamente entregar el esclavo por el daño; mas si la hizo aquel de quien soy heredero, es igual que si yo mismo la hubiese hecho.

§ 8.- Mas el juez hará la estimación conforme a la verdad de la cosa, esto es, del daño que apareciere causado.

7.- PAULO; *Comentarios al Edicto, libro XVIII*.- Aquel contra quien se ejercita la acción para que se contenga el agua llovediza, porque hizo una obra, aunque estuviera dispuesto a ceder el lugar, es obligado a aceptar el juicio, porque es demandado también en su propio nombre, para que destruya la obra.

§ 1.- Aliud est in bonae fidei emptore: hic enim tantum patientiam praestat: igitur si et fundo cedat, audiendus est: plus enim praestat.

8.- ULPIANUS; *libro LIII, ad Edictum*.- In concedendo iure aquae ducendae non tantum eorum, in quorum loco aqua oritur, verum eorum etiam, ad quos eius aquae usus pertinet, voluntas exquiritur, id est eorum, quibus servitus aquae debebatur, nec immerito: quum enim minuitur ius eorum, consequens fuit exquiri, an consentiant. Et generaliter sive in corpore sive in iure loci, ubi aqua oritur, vel in ipsa aqua habeat quis ius, voluntatem eius esse spectandam placet.

9.- PAULUS; *libro XLIX, ad Edictum*.- In diem addicto praedio et emptoris et venditoris voluntas exquirenda est, ut, sive remanserit penes emptorem sive recesserit, certum sit voluntate domini factam aquae cessionem.

§ 1.- Ideo autem voluntas exigitur, ne dominus ignorans iniuriam accipiat: nullam enim potest videri iniuriam accipere, qui semel voluit.

§ 2.- Non autem solius eius, ad quem ius aquae pertinebit, voluntas exigitur in aquae cessione, sed etiam domini locorum, etsi dominus uti ea aqua non possit, quia recidere ius solidum ad eum potest.

10.- ULPIANUS; *libro LIII, ad Edictum*.- Si autem plures sint eiusdem loci domini, unde aqua ducitur, omnium voluntatem esse sequendam non ambigitur: iniquum enim visum est voluntatem unius ex modica forte portiuncula domini praeiudicium sociis facere.

§ 1.- The case is different with a bona fide purchaser, for he can only be compelled to permit the destruction of the work; and therefore if he abandons the property he should be heard, for he offers to do more than is required of him.

8.- ULPIANUS; *On the Edict, Book LIII*.- In granting the right to conduct water, the consent, not only of those on whose ground the source of the water is situated, but also of those who have the use of the same, must be obtained; that is to say, the consent of the persons to whom the servitude of said water is due. This is not unreasonable, for their right is diminished, and hence their consent is required. Generally speaking, it is held that the consent of all those who have any right to the water itself, or any interest in the land through which it flows, or on which its source is situated, must be obtained.

9.- PAULUS; *On the Edict, Book XLIX*.- In the case of the conditional sale of land, the consent of both the purchaser and the vendor must be obtained; so that it may be certain that the transfer of the right to the water is made with the permission of the owner, whether the property remains in the hands of the purchaser, or is returned to the vendor.

§ 1.- Therefore, consent is required to prevent the owner from being injured without his knowledge, for he who has once given his consent cannot be considered to have sustained any injury. 1

§ 2.- In the transfer of the right to use water, the consent not only of him to whom the right to the water belongs, but also that of the owner of the land is required, even though the latter cannot at present make use of the water, because the right to do so may afterwards revert to him absolutely.

10.- ULPIANUS; *On the Edict, Book LIII*.- When there are several owners of the same land in which a stream of water has its source, there is no doubt that the consent of all of them must be obtained; for it would be unjust if the consent of one who is the owner of, perhaps, a very small share, should prejudice the rights of the other joint-owners.

§ 1.- Otra cosa es tratándose de un comprador de buena fe; porque éste solamente presta su consentimiento; así, pues, si también cediera el fundo ha de ser oído, porque da más.

8.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Para conceder el derecho de conducir agua se requiere la voluntad no solamente de aquellos en cuyo lugar nace el agua, sino también de aquellos a quienes les pertenece el uso de esta agua, esto es, de aquellos a quienes se les debía la servidumbre de agua; y no sin razón, porque disminuyéndose el derecho de éstos, fue consiguiente que se requiriera que lo consientan. Y en general, ya si uno tuviera derecho sobre el fundo, o sobre un derecho del lugar donde nace el agua, ya si sobre la misma agua, está determinado que se haya de atender a su voluntad.

9.- PAULO; *Comentarios al Edicto, libro XLIX*.- Tratándose de predio vendido a término, se ha de requerir la voluntad así del comprador como del vendedor, de modo que sea cierto, ya si quedare en poder del comprador, ya si volviere de él, que la cesión de agua se hizo por voluntad del dueño.

§ 1.- Mas se exige la voluntad, para que ignorándolo el dueño no reciba daño injusto; porque no puede parecer que recibe ningún daño injusto el que una vez quiso.

§ 2.- Pero en la cesión de agua se exige la voluntad no sólo de aquel a quien le perteneciere el derecho del agua, sino también la del dueño de los lugares, aunque el dueño no pueda usar de aquella agua, porque puede volver a él el derecho íntegro.

10.- ULPIANO; *Comentarios al Edicto, libro LIII*.- Mas si fueran muchos los dueños del mismo lugar de donde se conduce el agua, no se duda que se ha de seguir la voluntad de todos; porque pareció injusto, que la voluntad de uno solo, acaso por una pequeña porción de dominio, causara perjuicio a los condueños.

§ 1.- An tamen subsequi voluntas possit, videamus. et placet nihil interesse, utrum praecedat voluntas aquae ductionem an subsequatur, quia et posteriorem voluntatem Praetor tueri debet.

§ 2.- Si flumen navigabile sit, non oportere Praetorem concedere ductionem ex eo fieri Labeo ait, quae flumen minus navigabile efficiat. Idemque est et si per hoc aliud flumen fiat navigabile.

11.- PAULUS; *libro XLIX, ad Edictum*.- Supra iter alienum arcus aquae ducendae causa non iure fiet: nec is, cui iter actus debetur, pontem, qua possit ire agere, iure extruet. at si specus (non cuniculum) sub rivo aget, aqua corrumpetur, quia suffosso eo aqua manabit et rivus siccatur.

§ 1.- Cassius ait, sive ex communi fundo sive communi aqua noceat, vel unum quum uno agere posse vel unum separatim cum singulis vel separatim singulos cum uno vel singulos quum singulis. Si unus egerit et restitutio operis litisque aestimatio facta sit, ceterorum actionem evanescere: item si quum uno actum sit et si praestiterit, ceteros liberari idque, quod sociorum nomine datum sit, per arbitrum communi dividundo recipiari posse.

§ 2.- Et ex sociis non utique quum eo agendum qui opus fecerit nec minus eum quoque damnum restituere debere, qui auctor operis fuit, apud

§ 1.- Let us see whether subsequent consent can be obtained. It is established that it makes no difference whether the consent precedes or follows the conducting of the water, because the Praetor must also take into consideration consent afterwards given.

§ 2.- Labeo says that, if a river is navigable, the Praetor must not grant permission for enough water to be taken from it to render it less navigable. The same rule applies where another river is rendered navigable by means of the water of the one in question.

11.- PAULUS; *On the Edict, Book XLIX*.- An aqueduct cannot legally be constructed so as to interfere with a right of way. Nor can a person who is entitled to a right of way legally build a bridge for the purpose of enjoying his right. But if, for this purpose, he should conduct the water by means of a covered, and not an open canal, the water will become deteriorated, because it remains under ground, and the stream will dry up.

§ 1.- Cassius says that if water flowing from a tract of land owned in common, or upon one owned in common, causes any damage, one of the joint-owners can bring an action against one of the proprietors of the other tract, or can sue each of them separately; or, on the other hand, each of them can sue one of their number, or they can all individually sue one another. If one of them brings suit, and the damage is estimated and paid in court, the right of action of the others is extinguished. Likewise, where one of them is sued and makes payment, the others will be released from liability, and whatever has been paid by him for the benefit of his fellow joint-owners can be recovered by an action in partition. The action, however, cannot be brought by the person who did the work against his fellow joint-owners, as he who was responsible for it must make restitution for all damages sustained.

§ 2.- Proculus says it is stated by Ferox that if an action of this kind is brought against one of several joint-owners, who did not himself do the work, he

§ 1.- Mas veamos si la voluntad pueda manifestarse después; y esta determinado que nada importa que la voluntad preceda o siga a la conducción del agua, porque el Pretor debe amparar también la voluntad posterior.

§ 2.- Si el río fuera navegable, dice Labeón que no conviene que el Pretor conceda que de él se haga conducción, que haga menos navegable al río. Y lo mismo es, si también por esto se hiciera navegable otro río.

11.- PAULO; *Comentarios al Edicto, libro XLIX*.- Sobre paso ajeno no se hará con derecho un arco para conducir agua; ni aquel a quien se le debe la servidumbre de paso o de conducción, construirá con derecho un puente por el que pueda pasar o conducir; mas si debajo de un canal hiciere una excavación, no galería cubierta, se perderá el agua, porque el agua manara a aquel socavón, y se secará el canal.

§ 1.- Dice Cassio, que si perjudicara el agua ya de un fundo común, ya a un fundo común, puede ejercitar la acción o uno solo contra uno solo, o uno separadamente contra los demás, o separadamente cada uno contra uno solo, o cada uno contra cada uno. Si uno solo la ejercitare, y se hubieran hecho la reposición de la obra y la estimación del litigio, se extingue la acción de los demás; asimismo si se hubiera ejercitado la acción contra uno solo, y éste hubiere pagado, se libran los demás; y lo que se hubiera dado a nombre de los condueños, puede ser recuperado por medio del arbitro de división de cosa común; y entre condueños no se ha de ejercitar ciertamente la acción contra el que hubiere hecho la obra; ni tampoco esta menos obligado a restituir el daño el que fue autor de la obra.

§ 2.- Dice Próculo, citado por Ferox, que si se hubiera ejercitado la acción contra uno de los dueños, que no hubiere hecho la obra, debe él deshacer a su

Ferocem Proculus ait: si quum uno dominorum actum sit, qui opus non fecerit, debere eum opus restituere sua impensa, quia communi dividundo actionem habet. Sed sibi magis placere patientiam dumtaxat eum praestare oportere, quia sua culpa actor id patiat, qui non agit quum eo, a quo opus factum sit, et est iniquum eum, qui non fecit, id restituere oportere, quoniam communi dividundo agere potest: quid enim fiet, si socius eius solvendo non fuerit?

§ 3.- Officium autem iudicis inter duos accepti quale futurum sit, dubitare se Iulianus ait, si forte unius fundus fuerit cui aqua noceat, si vero in quo opus factum sit, plurium et quum uno eorum agatur: utrum et eius damni nomine, quod post litem contestatam datum sit, et operis non restituti in solidum condemnatio fieri debeat, quemadmodum, quum servi communis nomine noxali iudicio quum uno agitur, condemnatio in solidum fiet, quoniam quod praestiterit, potest a socio recipere? An vero is quum quo agitur pro parte sua et damni dati et operis non restituti nomine damnandus sit, ut in actione damni infecti fiat, quum eius praedii, ex quo damnum metuatur, plures domini sint et quum uno eorum agatur? licet opus, ex quo damnum futurum sit, individuum sit et ipsae aedes solumque earum non potest pro parte dumtaxat damnum dare, nihilo minus eum quum quo agitur pro sua parte condemnari. magisque existimat id servandum in aquae pluviae arcendae actione, quod in actione damni infecti, quia utrobique non de praeterito, sed de futuro damno agitur.

must be reimbursed for his expenses, because he is entitled to an action in partition. He, however, holds that this joint-owner can only be compelled to allow the land to be restored to its former condition, because it was the fault of the plaintiff that he did not sue the person by whom the work had been performed, and it is unjust for him who did not perform it to be compelled to restore the land to its former condition, as he has a right to bring an action in partition. But what course must be pursued if his fellow joint-owner should not be solvent?

§ 3.- Julianus says that he is in doubt as to what course should be pursued by the judge, where the structure to which the injury is attributed belongs to two joint-owners, and the land damaged by the water belongs to one alone. If the land on which the work was done belongs to several persons, and suit is brought against one of them, shall judgment be rendered against all on account of any damage sustained after issue has been joined, and restoration of the property to its original condition has been refused; just as in the case of a slave owned in common, where a noxal action is brought against one of his owners, and judgment is rendered against both of them, since whatever one of them paid he can recover from his fellow joint-owner? Or shall we say that the owner who is sued on account of his share, and has judgment rendered against him for damages sustained and failure to restore the land to its original condition, as is done in an action for threatened injury where several persons own the land which it is feared will be damaged, and only one of them is sued, even though the work from which damage is apprehended is indivisible, and neither the building itself nor the ground can partially cause damage, the owner against whom the action is brought can, nevertheless, have judgment rendered against him in proportion to his share of the property? Julianus thinks that the same course should be pursued in an action to compel anyone to take care of rain-water, as is done to provide against threatened injury; because, in both instances, proceedings are instituted, not with reference to damage which has already been sustained, but on account of that which is apprehended.

costa la obra, porque tiene la acción de división de cosa común; pero que a él le parece mejor, que solamente debe prestar su consentimiento, porque por su propia culpa sufrirá esto el actor, que no ejercita la acción contra aquel por quien haya sido hecha la obra; y es injusto que el que no la hizo deba deshacerla, porque puede ejercitar la acción de división de cosa común; pues ¿qué se hará si su consocio no fuere solvente?

§ 3.- Mas dice Juliano, que él duda cuál haya de ser el deber del juez admitido por dos, si acaso fuere de uno solo el fundo al cual perjudica el agua; -si es que, si fuera de muchos aquel en que se hizo la obra, y se litigara contra uno solo de ellos, se deberá hacer la condenación íntegramente por razón tanto del daño que se hubiere causado después de contestada la demanda, como de la obra no deshecha-, a la manera que cuando contra uno solo se ejercita la acción noxal por razón de un esclavo común, se hará la condenación por el todo, porque lo que él hubiere pagado puede recobrarlo de su consocio, o si aquel contra quien se ejercita la acción habrá de ser condenado con arreglo a su parte por razón así del daño causado, como de la obra no deshecha, como sucede en la acción del daño que amenaza, que cuando son muchos los dueños del predio de que se teme el daño, y se ejercita la acción contra uno solo de ellos, aunque sea indivisible la obra de que haya de sobrevenir el daño, y la misma casa y su solar no puedan causar el daño solamente en parte; es, sin embargo, condenado con arreglo a su parte aquel contra quien se ejercita la acción. Y estima que más bien se ha de observar en la acción para que se contenga el agua llovediza lo que en la acción de daño que amenaza, porque en una y en otra se trata no del daño pasado, sino del futuro.

§ 4.- Quod si is fundus, cui aqua pluvia nocet, plurium sit, agere quidem vel singulos posse: sed damni, quod post litem contestatam datum sit, non amplius parte sua consecuturum: item si opus restitutum non fuerit, non amplius, quam quod pro parte eorum interfuerit opus restitui, condemnationem fieri oportere.

§ 5.- Si ex privato agro in agrum communem aqua immittatur, ofilius aut socium quum eo agere posse:

§ 6.- Trebatius existimat, si de eo opere agatur, quod manu factum sit, omnimodo restituendum id esse ab eo, quum quo agitur: si vero vi fluminis agger deletus sit aut glarea iniecta aut fossa limo repleta, tunc patientiam dumtaxat praestandam.

12.- IDEM; *libro XVI, ad Sabinum*.- Emptor nisi simulata venditio est, ceterique successores vel restituere, si velint, opus factum vel patientiam praestare debent: nam actori moram suam nocere debere manifestum est. In eadem causa est etiam socius eius qui opus fecit, si ipse auctor non fuit: idemque in donato fundo legatove est.

13.- GAIUS; *ad Edictum Praetoris urbani, titulo de aquae pluviae arcendae*.- Sed venditor aut donator interdicto quod vi aut clam de damno et impensis ab actore factis tenebitur.

14.- PAULUS; *libro XLIX, ad Edictum*.- Antaeus ait, si is qui opus fecerit potentiori vendiderit praedium, quatenus desierit dominus esse, agendum quum eo Quod vi aut clam: quod si annus praeterierit,

§ 4.- If the land injured by rain-water belongs to several persons, each one of them can bring suit against his neighbor; but he can not, after issue has been joined, obtain damages on account of injury sustained for an amount greater than his share. Moreover, if the land is not restored to its former condition, judgment must not be rendered against each one of the joint-owners for a larger sum than the value of his interest in the property.

§ 5.- Ofilius says that one joint-owner can bring an action against another, where water is conveyed from the private premises of one of them upon land belonging to both in common.

§ 6.- Trebatius thinks that if suit is brought on account of work due to human agency, the land must by all means be restored to its original condition by the party against whom the suit was brought. If, however, the land should be injured by the force of the water, or the ditches should be filled with gravel, or soil, then the owner of the land will only be compelled to permit this to be removed.

12.- THE SAME; *On Sabinus, Book XVI*.- The purchaser, as well as the other successors (unless the sale is a fictitious one), must either restore the property to its original condition, if they are willing to do so, or must permit this to be done; for it is clear that the plaintiff will be prejudiced by delay. The joint-owner of the person who performed the work is in the same position if he himself had nothing to do with it. The same rule also applies where land is acquired by donation or devise.

13.- GAIUS; *On the Edict of the Urban Praetor; Title, The Action Having Reference to Taking Care of Rain-water*.- The vendor, or the donor, however, will be liable for damages sustained as well as for expenses incurred by the plaintiff through the interdict Quod vi aut clam.

14.- PAULUS; *On the Edict, Book XLIX*.- Ateius says that if anyone, after having constructed a work which causes damage, should sell the land to a more powerful person in order to cease to be the owner of

§ 4.- Pero si fuera de muchos el fundo a que perjudica el agua llovediza, puede ciertamente cada uno ejercitar la acción, pero del daño que se hubiera causado después de contestada la demanda, no habrá de conseguir más que su parte; y asimismo, si la obra no hubiere sido deshecha, la condenación debe hacerse por no más que por lo que con arreglo a la parte de ellos les hubiere interesado que se deshiciera la obra.

§ 5.- Si de un campo privado se introdujera el agua en un campo común, dice Ofilio, que puede el condueño ejercitar contra su condueño la acción.

§ 6.- Estima Trebacio, que si se tratara de una obra que hubiera sido hecha a mano, ha de ser en todo caso deshecha por aquel contra quien se ejercita la acción; pero que si por la fuerza del río hubiera sido roto un dique, o se hubiera introducido cascajo, o el foso se hubiera llenado de limo, en este caso solamente se ha de prestar el consentimiento.

12.- EL MISMO; *Comentarios a Sabino, libro XVI*.- El comprador y los demás sucesores deben, si la venta no fue simulada, o deshacer la obra hecha, si quisieran, o prestar para ello su consentimiento; porque es evidente que al actor le debe perjudicar su morosidad. En el mismo caso está también el consocio del que hizo la obra, si él mismo no la hizo; y lo mismo es en cuanto a un fundo donado o legado.

13.- GAYO; *Comentarios al Edicto del Pretor urbano, título de que se contenga el agua llovediza*.- Pero el vendedor o el donante estará obligado por el interdicto de lo que con violencia o clandestinamente en cuanto al año y a los gastos hechos por el actor.

14.- PAULO; *Comentarios al Edicto, libro XLIX*.- Dice Ateyo, que si el que hubiere hecho la obra hubiere vendido el predio a una persona más poderosa, por cuanto dejó de ser dueño se ejercitará

de dolo iudicium dandum.

§ 1.- Quum agitur aquae pluviae arcendae, de facto quod nocet quaeritur: ideoque si vitio loci pars aliqua soli subsedit, quamvis per eam causam aqua pluvia inferiori noceat, nulla competit actio. Idem fortasse dicitur, si in agro manu factum aliquid subsederit.

§ 2.- In hoc iudicium, sicut in damni infecti, futurum damnum venit, quum reliquis fere omnibus iudiciis praeteritum praestetur.

§ 3.- De eo, quod ante datum est, quod vi aut clam agendum est. De eo, quod post sententiam iudicis futurum est, damni infecti caveri oportet vel ita opus restituendum est, ut nullum periculum damni supersit.

§ 4.- De eo opere, quod post litem contestatam factum est, novo iudicio agendum est.

5.- PAULUS; *libro XVI, ad Sabinum*.- Sed interdum opus et quod post litem contestatam factum est tollitur, si id quod antecessit tolli sine eo non potest.

16.- POMPONIUS; *libro XX, ad Sabinum*.- Post venditionem et traditionem quod noci-tum sit ei fundo, de quo ante iudicium acceptum sit aquae pluviae arcendae, nihilo minus eo iudicio venditorem posse consequi, non quia venditori, sed quod rei damnum datum sit, idque eum emptori restituere debere. Sed si ante quam noceatur is quum quo actum

the same, proceedings may be instituted against him under the interdict Quod vi aut clam, and after the expiration of a year, an action based on fraud can be granted against him.

§ 1.- When an action is brought to compel another to take care of rain-water, the question arises whether or not the injury results from some act already performed; and hence, if through some defect in the ground a part of the soil has settled, even though on this account damage may be caused by rain-water to a neighbor below, the action will not lie. The same rule will also apply where anything attributable to human agency is deposited upon the land.

§ 2.- In this action, as well as in that relating to threatened injury, anticipated damage is taken into consideration; while in almost all others payment is made for damages already sustained.

§ 3.- With reference to damage caused before the action was brought, proceedings should be instituted under the interdict Quod vi aut cla/m; and with regard to that which may occur after the decision has been rendered, security against threatened injury must be furnished, or the property must be placed in such a condition that there will be no longer any danger of injury.

§ 4.- A new action must be brought where a work has been constructed after issue has been joined in the case.

15.- THE SAME; *On Sabinus, Book XVI*.- Sometimes the work which has been constructed after issue has been joined is removed, where that which was constructed before it cannot be removed without destroying the other.

16.- POMPONIUS; *On Sabinus, Book XX*.- After the sale and transfer of land which has been injured, before judgment has been rendered in an action of this kind, the vendor can still obtain damages under the judgment; not because he has sustained any injury, but because the property has been damaged, and he must pay anything which he may recover to

contra él el interdicto de lo que con violencia o clandestinamente; pero si hubiere transcurrido el año, se dará la acción de dolo.

§ 1.- Cuando se ejercita la acción para que se contenga el agua llovediza, se trata de un hecho, que perjudica; y por lo tanto, si por vicio del lugar se hundió parte del suelo, aunque por esta causa le perjudique al inferior el agua llovediza, no compete ninguna acción, Acaso se dice lo mismo, si en el campo se hubiere hundido alguna cosa hecha a mano.

§ 2.- En esta acción se comprende, como en la de daño que amenaza, el daño futuro, cuando en casi todas las demás acciones se responde del pasado.

§ 3.- Respecto al que se causó antes, se ha de ejercitar el interdicto de lo que violenta o clandestinamente, y respecto al que haya de sobrevenir después de la sentencia del juez conviene que se dé la caución del daño que amenaza, o se ha de deshacer la obra de modo, que no quede ningún peligro de daño.

§ 4.- En cuanto a la obra que se hizo después de contestada la demanda, se ha de ejercitar una nueva acción.

15.- EL MISMO; *Comentarios a Sabino, libro XVI*.- Pero a veces se deshará también la obra que se hizo después de contestada la demanda, si sin ello no se puede quitar la que se hizo antes.

16.- POMPONIO; *Comentarios a Sabino, libro XX*.- El daño que después de la venta y de la entrega se haya causado al fundo, respecto al que se haya aceptado antes el juicio para que se contenga el agua llovediza, puede obtenerlo, no obstante, el vendedor en este juicio, no porque se le haya causado el daño al vendedor, sino a la cosa; y esto debe él restituírselo al

sit vendat, statim agendum quum emptore, vel intra annum quum eo qui vendiderit, si iudicii evitandi causa id fecerit.

17.- PAULUS; *libro XV, ad Plautium*.- Si prius nocturnae aquae servitus mihi cessa fuerit, deinde postea alia cessione diurnae quoque ductus aquae concessus mihi fuerit et per constitutum tempus nocturna dumtaxat aqua usus fuerim, amitto servitutem aquae diurnae, quia hoc casu plures sunt servitutes diversarum causarum.

§ 1.- Recto placuit non alias per lapidem aquam duci posse, nisi hoc in servitute constituenda comprehensum sit: non enim consuetudinis est, ut qui aquam habeat per lapidem stratum ducat: illa autem, quae fere in consuetudine esse solent, ut per fistulas aqua ducatur, etiamsi nihil sit comprehensum in servitute constituenda, fieri possunt, ita tamen, ut nullum damnum domino fundi ex his detur.

§ 2.- Via publica intercedente haustus servitutem constitui posse placuit et est verum: sed non solum si via publica interveniat, sed et si flumen publicum, eodem casu, quo interveniente flumine publico viae itineris actus servitus imponi potest, id est si non sit impedimento transeunti magnitudo fluminis.

§ 3.- Sic et si non proximo meo praedio servitutem vicinus debeat, sed ulteriori, agere potero ius esse mihi ire agere ad illum fundum superiorem, quamvis servitutem ipse per fundum meum non habeam, sicut interveniente via publica vel flumine quod vado transiri potest. Sed loco sacro vel religioso vel sancto

the purchaser. If, however, the party who was sued should sell the land before any damage was done, suit must either immediately be brought against the purchaser, or within a year against the person who sold the land, if he did so for the purpose of avoiding a judgment.

17.- PAULUS; *On Plautius, Book XV*.- If the servitude to draw water at night should be granted me, and afterwards, by another transfer, I should also obtain the privilege of drawing water by day, and, during the time prescribed by law, I should only make use of my privilege at night, I will lose the servitude to draw water during the day, for the reason that in this instance there are two servitudes derived from different causes.

§ 1.- It has been very properly decided that water cannot be conducted by means of stone aqueducts, unless this was included in the grant of the servitude, for it is not customary for a person who has water to conduct it through a channel made of stone. However, what is customary in cases of this kind can be done, as, for instance, water can be conducted through pipes, even if nothing on this point was stated in the grant of the servitude, provided always that no damage is caused to the owner of the land by doing so.

§ 2.- It has been decided that the servitude of drawing water can be granted where there is a public highway between two tracts of land; and this is true. This is not only the case where there is a public highway between the two tracts, but also where they are divided by a public stream, in case the servitude of driving or of passage can be established, notwithstanding that the public stream divides the two tracts of land, that is to say, where the width of the stream does not prevent it from being crossed.

§ 3.- The rule is the same where my neighbor owes a servitude to my land, which does not join his but joins another belonging to me, as I can bring an action against him, and maintain my right to pass through his premises to my land beyond, although I may not have a servitude attaching to my intermediate tract;

comprador. Pero si aquel contra quien se ejercitara la acción hubiese vendido antes que se causara el daño, se ha de ejercitar inmediatamente acción contra el comprador, o dentro del año contra el que hubiere vendido, si esto, lo hubiere hecho para evitar el juicio.

17.- PAULO; *Comentarios a Plautio, libro XV*.- Si antes se me hubiere concedido servidumbre para conducir agua por la noche, y luego después se me hubiere concedido por otra cesión la conducción de agua también por el día, y yo hubiere usado durante el tiempo establecido solamente del agua por la noche, pierdo la servidumbre del agua del día, porque en este caso hay varias servidumbres de diversas causas.

§ 1.- Con razón se determinó, que no se puede conducir el agua por acueducto de piedra, sino si esto se hubiera consignado al constituirse la servidumbre; porque no es costumbre que el que tiene la servidumbre de agua conduzca ésta por canal empedrado. Mas se puede hacer lo que de ordinario suele ser costumbre, de modo que se conduzca el agua por cañerías, aunque nada se haya expresado al constituir la servidumbre, pero de suerte que con ellas no se le cause daño alguno al dueño del fundo.

§ 2.- Se determino que se puede constituir la servidumbre de tomar agua aun mediando vía pública; y es verdad, pero no solamente si mediara vía pública, sino también si río público; y del mismo modo que mediando río público se puede imponer la servidumbre de vía, de paso, o de conducción, esto es, si la magnitud del río no fuera impedimento para el que pase.

§ 3.- Así también, si el vecino debiera la servidumbre no a un predio vecino mío, sino a otro mas lejano, podré ejercitar acción de que tengo derecho para pasar y conducir a aquel fundo superior, aunque yo no tenga servidumbre por medio de mi fundo, a la manera que mediando vía pública, o río,

interveniente, quo fas non sit uti, nulla eorum servitus imponi poterit.

§ 4.- Sed si fundus medius alterius inter me et te intercedit, haustus servitutem fundo tuo imponere potero, si mihi medius dominus iter ad transeundum cesserit, quemadmodum, si ex flumine publico perenni haustu velim uti, cui flumini ager tuus proximus sit, iter mihi ad flumen cedi potest.

18.- IAVOLENUS; *libro X, ex Cassio*.- Si in publico opus factum est, quo aqua pluvia noceret, agi non potest: interveniente loco publico agi poterit. Causa eius rei haec est, quod ea actione non tenetur nisi dominus solus.

§ 1.- Sine permissu principis aqua per viam publicam duci non potest.

19.- POMPONIUS; *libro XIV, ad Quintum Mucium*.- Labeo ait, si patiente vicino opus faciam, ex quo ei aqua pluvia noceat, non teneri me actione aquae pluviae arcendae:

20.- IDEM; *libro XXXIV, ad Sabinum*.- Sed hoc ita, si non per errorem aut imperitiam deceptus fuerit: nulla enim voluntas errantis est.

21.- IDEM; *libro XXXII, ad Quintum Mucium*.- Si in meo aqua erumpat, quae ex tuo fundo venas habeat, si eas venas incideris et ob id desierit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit, nec interdicto quod vi aut clam teneris.

just as where a public road, or river which can be crossed by fording, lies between two separate tracts of land. None of these servitudes, however, can be imposed where the intervening tract is sacred, religious, or holy, and cannot be used.

§ 4.- If there is an intermediate tract of land which belongs to a third party between your premises and mine, I can impose the servitude for drawing water upon your land if the owner of the intermediate tract grants me the right of way through his premises; just as when I wish to obtain the perpetual right to take water from a public stream which forms the boundary of your land you can grant me a right of way to the stream.

18.- JAVOLENUS; *On Cassius, Book X*.- If the work which causes damage by rain-water is erected in a public place, the action cannot be brought; but where the two tracts are separated by a public place, it can be. The reason for this is that the owner alone is liable under this action.

§ 1.- Water cannot be conducted across a public highway without the consent of the Emperor.

19.- POMPONIUS; *On Quintus Mucius, Book XIV*.- Labeo says that if I construct any work and my neighbor does not object, and in consequence he suffers damage from rain-water, I will not be liable to an action of this kind.

20.- THE SAME; *On Sabinus, Book XXXIV*.- This, however, only applies where he is not deceived through mistake or ignorance, for anyone who makes a mistake does not give consent.

21.- THE SAME; *On Quintus Mucius, Book XXXII*.- If water which has its source on your land rushes with great force upon mine, and you intercept its course, so that it ceases to flow upon my premises, you will not be considered to have acted with violence, if I was not entitled to any servitude for the use of the water; nor will you be liable to an interdict Quod vi aut clam.

que se puede pasar por vado. Pero mediando lugar sagrado o religioso, o santo, del cual no sea lícito usar, no se podrá imponer ninguna servidumbre de estas.

§ 4.- Pero si entre tú y yo hay un fundo intermedio de otro, podré imponerle a tu fundo la servidumbre de tomar agua, si el dueño intermedio me concediere camino para pasar, a la manera que si yo quisiera usar de la servidumbre de tomar agua de río público perenne, a cuyo río estuviere próximo tu campo, se me puede conceder el paso hasta el río.

18.- JAVOLENO; *Doctrina de Cassio, libro X*.- Si en sitio público se hizo una obra por la cual cause perjuicio el agua llovediza, no se puede ejercitar la acción; se podrá ejercitar mediando lugar público; la causa de esto es, que por esta acción no está obligado si no sólo el dueño.

§ 1.- Sin permiso del príncipe no se puede conducir agua por vía pública.

19.- POMPONIO; *Comentarios a Quinto Mucio, libro XIV*.- Dice Labeón, que si consintiéndolo el vecino yo hiciera obra por la cual le perjudicara el agua llovediza, no estoy yo obligado por la acción para que se contenga el agua llovediza.

20.- EL MISMO; *Comentarios a Sabino, libro XXXIV*.- Pero esto así, si no hubiere sido engañado por error o impericia; porque es nula la voluntad del que yerra.

21.- EL MISMO; *Comentarios a Quinto Mucio, libro XXXII*.- Si en el mío brotase el agua que tiene sus manantiales en tu fundo, y cortares estos manantiales, y por ello hubiere dejado de llegar el agua a mi fundo, no se considera que hayas obrado con violencia, si no se me debiere ninguna servidumbre por tal motivo, ni estarás obligado por el interdicto de lo que se hizo con violencia o clandestinamente.

22.- IDEM; *libro X, ex variis Lectionibus*.- Si usus fructus fundi legatus fuerit, aquae pluviae arcendae actio heredi et quum herede est, cuius praedium fuerit. Quod si ex opere incommodum aliquod patitur fructuarius, poterit quidem interdum vel interdicto experiri quod vi aut clam. Quod si ei non competet, quaerendum est, an utilis ei quasi domino actio aquae pluviae arcendae dari debeat an vero etiam contendat ius sibi esse uti frui: sed magis est utilem aquae pluviae arcendae ei actionem accommodare.

§ 1.- Non aliter restituere rem videtur is qui opus fecit, quam si aquam coerceat.

§ 2.- Sed et si fructuarius opus fecerit, per quod aqua pluvia alicui noceat, erit quidem actio legitima quum domino proprietatis: an vero etiam utilis in fructuarium actio aquae pluviae arcendae danda sit, quaesitum est: et magis est ut detur.

23.- Quod principis aut Senatus iussu aut ab his, qui primi agros constituerunt, opus factum fuerit, in hoc iudicium non venit.

§ 1.- Haec actio etiam in vectigalibus agris locum habet.

§ 2.- Aggeres iuxta flumina in privato facti in arbitrium aquae pluviae arcendae veniunt, etiamsi trans flumen noceant, ita, si memoria eorum extet et si fieri non debuerunt.

24.- ALFENUS; *libro IV, Digestorum a Paulo*

22.- THE SAME; *Various Passages, Book X*.- If the usufruct of land is bequeathed, the action to compel care to be taken of the rain-water will lie for, as well as against the heir of him to whom the property belonged. If the usufructuary should suffer any inconvenience on account of some work which has been performed, he can sometimes avail himself of the interdict Quod vi aut clam. If the action cannot be brought by the usufructuary, the question arises whether equitable action should be granted him, as the owner, to compel the water to be taken care of; or whether he can also maintain that he has the right to enjoy the property. The better opinion, however, is that an equitable action to compel care to be taken of the rain-water should be granted.

§ 1.- He who constructs a new work will not be considered to have restored the property to its former condition, unless he intercepts the course of the water of which complaint is made.

§ 2.- But even if the usufructuary should construct the work by which the rain-water may cause damage to anyone, the legal action against the owner of the property will lie; but the question arises whether an equitable action to compel the water to be taken care of should not be granted against the usufructuary. The better opinion is that it should be granted.

23.- PAULUS; *On Sabinus, Book XVI*.- Any work which is performed by order of the Emperor, or the Senate, or by those persons who have first rendered the land capable of cultivation, is not included in this action.

§ 1.- This action is also available with reference to lands owned and leased by the State.

§ 2.- Levees made upon private lands along the banks of streams are also the object of this action, even though they cause damage on the other side of the stream, provided they have been constructed within the memory of man, and there was no right to make them.

24.- ALFENUS; *Epitomes of the Digest by Paulus*,

22.- EL MISMO; *Doctrina de autores varios, libro X*.- Si se hubiere legado el usufructo de un fundo, la acción para que se contenga el agua llovediza compete al heredero y contra el heredero de quien fuere el predio; pero si el usufructuario sufre alguna molestia por alguna obra, podrá ejercitar ciertamente algunas veces aun el interdicto de lo que se hizo con violencia o clandestinamente. Mas si no le competiere, se ha de ver si se le deberá dar como a dueño la acción útil para que se contenga el agua llovediza, o si también sostendrá que tiene derecho para usufructuar; pero es más cierto que se le concede la acción útil para que se contenga el agua llovediza.

§ 1.- No se considera que el que hizo la obra la deshizo, sino si contuviera el agua.

§ 2.- Pero también si el usufructuario hubiere hecho una obra por la cual le perjudicara a alguno el agua llovediza, habrá ciertamente la acción legítima contra el dueño de la propiedad; pero se preguntó si se habrá de dar contra el usufructuario también la acción útil para que se contenga el agua llovediza; y es más cierto que se da.

23.- PAULO; *Comentarios a Sabino, libro XVI*.- No se comprende en esta acción la obra que hubiere sido hecha por mandato del príncipe o del Senado, o por los primeros que establecieron los campos.

§ 1.- Esta acción tiene lugar también en cuanto a los campos tributarios.

§ 2.- Los diques hechos junto a los ríos en terreno privado vienen comprendidos en la decisión arbitral para que se contenga el agua llovediza, aunque causen perjuicio al otro lado del río; y esto así si hubiera memoria de ellos, y si no se debieron hacer.

24.- ALFENO; *Digesto compendiado por Paulo*,

epitomatorum.- Vicinus loci superioris pratum ita arabat, ut per sulcos itemque porcas aqua ad inferiorem veniret: quaesitum est, an per arbitrum aquae pluviae arcendae possit cogi, ut in alteram partem araret, ne sulci in eius agrum spectarent. respondit non posse eum facere, quo minus agrum vicinus quemadmodum vellet araret.

§ 1.- Sed si quos sulcos transversos aquarios faceret, per quos in eius agrum aqua deflueret, hosce ut operiret, per arbitrum aquae pluviae arcendae posse cogere.

§ 2.- Sed et si fossas fecisset, ex quibus aqua pluvia posset nocere, arbitrum, si appareat futurum, ut aqua pluvia noceret, cogere oportere fossas eum explere et, nisi faceret, condemnare, tametsi antequam adiudicaret, aqua per fossas nunquam fluxisset.

§ 3.- Lacus quum aut crescerent aut decrescerent, numquam neque accessionem neque decessionem in eos vicinis facere licet.

25.- IULIANUS; *libro V, ex Minucio.*- Is, cuius fundo via debetur, aquae pluviae arcendae agere potest fundi sui nomine, quoniam deteriore via facta fundo nocetur.

26.- SCAEVOLA; *libro IV, Responsorum.*- Scaevola respondit solere eos, qui iuri dicundo praesunt, tueri ductus aquae, quibus auctoritatem vetustas daret, tametsi ius non probaretur.

Book IV.- A man who owned a field situated above that of another plowed it in such a way that the water was carried by the furrows and ridges upon the land of his neighbor below. The question arose whether he could be compelled by an action requiring him to take care of the rainwater, to plow in a different direction, so that the furrows would not be turned toward the premises of the neighbor. The answer was that he could not do anything to interfere with his neighbor plowing in any way that the latter desired.

§ 1.- If, however, anyone plows across a water-course, and by means of the furrows, the water should be diverted upon the land of a neighbor, in such a way as to obstruct the water-course, he can be compelled to open it by means of this action.

§ 2.- But if he should dig ditches by which the rain-water could injure a neighbor, he can be compelled by the court to fill them up, if it appears that the rain-water might afterwards cause damage, and judgment could be rendered against him, unless he did so; even though, before a decision was rendered, the water had not yet begun to flow through the ditches.

§ 3.- When lakes either rise or fall, the neighbors have no right to do anything to affect either the increase or the diminution of the water.

25.- JULIANUS; *On Minicius, Book V.*- Where a right of way is imposed upon the land of anyone, the person entitled to it can bring an action to compel care to be taken of rain-water for the benefit of the land, because by damaging the right of way the land also will be injured.

26.- SCAEVOLA; *Opinions, Book IV.*- Scaevola gave it as his opinion that those who have the right to render judicial decisions are accustomed to authorize the continuance of aqueducts, whose use has been confirmed by time, although the legal right by which they exist cannot be established.

libro IV.- El vecino de un fundo superior araba un prado de manera que por los surcos y también por los desagües iba el agua a otro inferior; se preguntó, si por medio del árbitro para que se contenga el agua llovediza se le podría obligar a que arase hacia otra parte, de modo que los surcos no se dirijan a su campo. Respondió, que éste no podía hacer que el vecino no are su campo del modo que quiera.

§ 1.- Pero si hiciera algunos surcos transversales de desagüe, por los cuales corriese el agua al campo de éste, puede ser obligado a cerrarlos por el árbitro para que se contenga el agua llovediza.

§ 2.- Pero también si hubiese hecho fosos por virtud de los que pudiera perjudicar el agua llovediza, si se viera que había de suceder que perjudicase el agua llovediza, debe obligarle el árbitro a rellenar los fosos, y, si no lo hiciera, condenarlo, aunque antes que juzgase nunca hubiese corrido el agua por los fosos.

§ 3.- Cuando los lagos crecen o menguan no les es lícito a los vecinos hacer nunca en ellos aumento o disminución.

25.- JULIANO; *Doctrina de Minucio, libro V.*- Aquel, a cuyo fundo se le debía la servidumbre de vía, puede ejercitar por razón de su fundo la acción para que se contenga el agua llovediza, porque deteriorada la vía se le perjudica al fundo.

26.- SCÉVOLA; *Respuestas, libro IV.*- Scévola respondió, que los que presiden para la declaración del derecho suelen amparar aquellos acueductos a los que la antigüedad les dé autoridad, aunque no se pruebe su derecho.

TIT. IV

DE PUBLICANIS ET VECTIGALIBUS
ET COMMISSIS

1.- ULPIANUS; *libro LV, ad Edictum*.- Praetor ait: "quod publicanus eius publici nomine vi ademerit quodve familia publicanorum, si id restitutum non erit, in duplum aut, si post annum agetur, in simplum iudicium dabo. Item si damnum iniuria furtumve factum esse dicetur, iudicium dabo. Si id ad quos ea res pertinebit non exhibebitur, in dominos sine noxae deditione iudicium dabo".

§ 1.- Hic titulus ad publicanos pertinet. publicani autem sunt, qui publico fruuntur (nam inde nomen habent), sive fisco vectigal pendant vel tributum consequantur: et omnes, qui quod a fisco conducunt, recte appellantur publicani.

§ 2.- Dixerit aliquis: quid utique hoc edictum propositum est, quasi non et alibi Praetor providerit furtis damnis vi raptis? Sed e re putavit et specialiter adversus publicanos edictum proponere.

§ 3.- Quod quidem edictum in aliqua parte mitius est, quippe quum in duplum datur, quum vi bonorum raptorum in quadruplum sit et furti manifesti aequae in quadruplum,

§ 4.- Et restituendi facultas publicano vi abreptum datur, quod si fecerit, omni onere exuitur et poenali actione ex hac parte edicti liberatur. Unde quaeritur, si quis velit quum publicano non ex hoc edicto, sed ex

TITLE IV

CONCERNING FARMERS OF THE PUBLIC
REVENUE, LEASES OF PUBLIC LANDS,
AND FORFEITURES

1.- ULPIANUS; *On the Edict, Book LV*.- The Praetor says: "If a farmer of the public revenue, or anyone belonging to the family of a farmer of the public revenue, takes anything by force in his name, and it is not restored to the owner, I will grant an action for double its value, and if suit is brought after a year has elapsed, I will grant one for its simple value. Moreover, I will grant an action, if any damage has been sustained, or any theft is said to have been committed. If the parties concerned in the matter are not produced, I will grant an action against the masters, without the privilege of surrendering their slaves by way of reparation."

§ 1.- This Title has reference to farmers of the public revenue. Those are farmers of the revenue who handle the public funds, and they bear this name whether they pay a certain percentage to the Treasury, or collect tribute. Those, also, who lease property from the Treasury are properly called farmers of the revenue.

§ 2.- Someone may ask, of what benefit is the Edict in question, just as if the Praetor had not elsewhere made provision for thefts, injuries, and robbery with violence. The Praetor, however, thought that, under the circumstances, it was best to issue a special Edict against farmers of the revenue.

§ 3.- The penalty inflicted by this Edict is, in some respects, less severe, as damages are given for double the amount; whereas in the case of robbery with violence, they are quadrupled, as they also are in the case of manifest theft.

§ 4.- Moreover, the farmer of the revenue is granted the power to restore property taken by violence, and if he does so, he will be released from all responsibility, and will not be liable to a penal action

TÍTULO IV

DE LOS PUBLICANOS, DE LOS TRIBUTOS
Y DE LOS COMISOS

1.- ULPIANO; *Comentarios al Edicto, libro LV*.- Dice el Pretor «Por lo que un publicano, o alguien en nombre de un publicano, o uno de la familia de los publicanos hubiere quitado con violencia, daré, si no hubiere sido restituido, acción en el duplo, o si se reclamare después del año, en el simple importe. También daré acción, si se dijere que injustamente se causó daño, o se cometió hurto. Si no fuere exhibido aquel esclavo a quienes les perteneciere la cosa, daré acción contra los dueños sin la entrega por el daño».

§ 1.- Este título se refiere a los publicanos. Mas son publicanos los que disfrutan de tributos públicos; porque de esto reciben el nombre, ya paguen el tributo al fisco, ya perciban para sí el tributo; y todos los que toman del fisco alguna cosa en arrendamiento se llaman con razón publicanos.

§ 2.- Alguien dirá: ¿qué se propuso este Edicto? ¿Acaso no proveyó en otra parte el Pretor sobre los hurtos, los daños y los robos? Pero en realidad consideró conveniente publicar también especialmente un Edicto contra los publicanos.

§ 3.- Cuyo Edicto es ciertamente más moderado en alguna parte, porque se da por el duplo, en tanto que la acción de bienes arrebatados con violencia es por el cuádruplo, e igualmente por el cuádruplo la de hurto manifiesto.

§ 4.- Y al publicano se le da la facultad de restituir lo arrebatado con violencia; pero si lo hiciere, es exonerado de toda carga, y librado de la acción penal en virtud de esta parte del Edicto. Por lo cual se

generali vi bonorum raptorum, damni iniuria vel furti agere, an possit? Et placet posse, idque Pomponius quoque scribit: est enim absurdum meliorem esse publicanorum causam quam ceterorum effectam opinari.

§ 5.- Familiae nomen hic non tantum ad servos publicanorum referemus, verum et qui in numero familiarum sunt publicani, sive igitur liberi sint sive servi alieni, qui publicanis in eo vectigali ministrant, hoc edicto continebuntur. Proinde et si servus publicani rapuit, non tamen in ea familia constitutus, quae publico vectigali ministrat, hoc edictum cessabit.

§ 6.- Quod novissime praetor ait "si hi non exhibebuntur, in dominos sine noxae deditione iudicium dabo", hoc proprium est huius edicti, quod, si non exhibeantur servi, competit iudicium sine noxae deditione, sive habeant eos in potestate sive non, sive possint exhibere sive non possint,

2.- GAIUS; *libro XXI, ad Edictum provinciale*.- Nec liceat domino absentem defendere eum,

3.- ULPIANUS; *libro LV, ad Edictum*.- Quum, si exhibuissent, noxali iudicio convenirentur. idcirco autem tam dura condicio eorum effecta est, quia debent bonos servos ad hoc ministerium eligere.

§ 1.- Quod ait "in dominos", sic accipiendum est "in socios vectigalis", licet domini non sint.

under this Section of the Edict. Hence, the question arises, if anyone desires to bring an action against a farmer of the revenue, not under this Edict, but under the general law relating to taking property by violence, unlawful damage, or theft, can he do so? It is established that he can, and Pomponius also holds the same opinion, for it would be absurd for the legal position of a farmer of the public revenue to be considered better than that of other persons.

§ 5.- The term "family," mentioned in the Edict, not only refers to the slaves of farmers of the revenue, but also to all those included in their households. Therefore, whether their own children or the slaves of others are employed in the collection of taxes, they will be included in this Edict. Hence, if the slave of a farmer of the revenue commits robbery with violence, but is not among the number of those who are employed in the collection of taxes, this Edict will not apply.

§ 6.- What the Praetor says in the last place, namely, "If they are not produced, I will grant an action against their masters, without the privilege of surrendering them by way of reparation," is a special provision of this Edict, because if the slaves are not produced, an action will be granted without the privilege of surrendering them by way of reparation, whether the masters have them in their power or not; and whether they can produce them or not.

2.- GAIUS; *On the Provincial Edict, Book XXI*.- A master shall not be allowed to defend his absent slave.

3.- ULPIANUS; *On the Edict, Book LV*.- If the slave should not be produced by the master, the noxal action should be brought against him. Therefore, what makes the condition of the farmers of the revenue so trying is that they must select good slaves for this employment.

§ 1.- Where the Praetor says, "Against the masters," we must understand this to mean against the associates of the collectors of taxes, although they may not be their masters.

pregunta, si alguno podría, si quisiera ejercitar contra un publicano no la acción de este Edicto, sino la general de cosas arrebatadas con violencia, la de daño con injuria, o la de hurto. Y está determinado que puede; y esto escribe también Pomponio; porque es absurdo opinar que se haya hecho mejor la causa de los publicanos, que la de los demás.

§ 5.- Mas el nombre de familia lo aplicaremos aquí no solamente a los esclavos de los publicanos, sino también a los que están en el número de los familiares del publicano. Así, pues, ya si fueran personas libres, ya si esclavos ajenos, los que auxilian a los publicanos en la exacción de este tributo, estarán comprendidos en este Edicto. Por lo cual, si cometió rapiña el esclavo de un publicano, pero que no formaba parte de la familia que administra el tributo público, también dejará de tener lugar este Edicto.

§ 6.- Y en cuanto a lo que últimamente dice el Pretor: «si no fueren exhibidos ellos, daré caución contra los dueños sin la entrega por el daño», es propio de este Edicto, que, si no se exhibieran los esclavos, compete acción sin la entrega por el daño, ya los tengan, ya no, bajo potestad, ora puedan, ora no puedan exhibidos.

2.- GAYO; *Comentarios al Edicto provincial, libro XXI*.- Y no le será lícito al dueño defender al ausente.

3.- ULPIANO; *Comentarios al Edicto, libro LV*.- Porque si los hubiesen exhibido, serían demandados con la acción noxal. Mas se hizo tan dura la condición de ellos por esto, porque deben elegir para este servicio buenos esclavos.

§ 1.- Lo que dice: «contra los dueños», se ha de entender de este modo, contra los consocios de la recaudación del tributo, aunque no sean dueños.

§ 2.- Ante autem actorem dicere oportet, quem vel quos desideret exhiberi, ut, si non exhibeantur, hinc agatur. Sed si dicatur: "exhibe omnes, ut possim dinoscere quis sit", puto audiendum.

§ 3.- Si plures servi id furtum vel damnum admiserint, hoc debet servari, ut, si tantum praestetur, quantum, si unus liber fecisset, absolutio fiat.

4.- PAULUS; *libro LII, ad Edictum*.- Si publicanus, qui vi ademit, decesserit, Labeo ait in heredem eius, quo locupletior factus sit, dandam actionem.

§ 1.- De rebus, quas in usus advehendas sibi mandant praesides, divus hadrianus praesidibus scripsit, ut, quotiens quis in usus aut eorum, qui provinciis exercitibusve praesunt, aut procuratorum suorum usus sui causa mittet quendam empturum, significet libello manu sua subscripto eumque ad publicanum mittat, ut, si quid amplius quam mandatum est transferet, id munificum sit.

§ 2.- In omnibus vectigalibus fere consuetudo spectari solet idque etiam principalibus constitutionibus cavetur.

5.- GAIUS; *ad Edictum Praetoris urbani, titulo de publicanis*.- Hoc edicto efficitur, ut ante acceptum quidem iudicium restituta re actio evanescat, post acceptum vero iudicium nihilo minus poena duret. Sed tamen absolvendus est etiam qui post acceptum iudicium restituere paratus est.

§ 1.- Quaerentibus autem nobis, utrum duplum totum poena sit et praeterea rei sit persecutio, an in

§ 2.- The plaintiff must mention beforehand the person or persons whom he may desire to be produced, so that, if this is not done, he will have a right of action. Even if he should say, "Produce all the parties, in order that I may recognize the one who is guilty," I think that he ought to be heard.

§ 3.- Where several slaves have committed the theft or the damage, the rule ought to be observed that if the farmer of the revenue pays as large a sum as if a freeman had perpetrated the offence, he should be released from liability.

4.- PAULUS; *On the Edict, Book LII*.- If a farmer of the revenue, who removed the property by force should die, Labeo says that the action should be granted against his heir who profited by the act.

§ 1.- The Divine Hadrian, in a Rescript addressed to the Governors of Gaul, stated with reference to property which the Governors were accustomed to have transported for their use, that when anyone sends for the purpose of making purchases for the benefit of those who command armies or govern provinces, or for that of their agents, he shall sign an order with his own hand, and send the same to the farmer of the revenue, so that if the latter should transfer anything more than he had been ordered to do, he must make it good.

§ 2.- In the collection of all revenues, the custom of the neighborhood is usually considered; and this is provided by the Imperial Constitutions.

5.- GAIUS; *On the Edict of the Urban Praetor, Title: Farmers of the Revenue*.- It is provided by this Edict that if the property should be restored before issue has been joined, the right of action will be extinguished; still, after this, suit for the penalty can be brought. If, however, the farmer of the revenue is ready to make restitution even after issue has been joined, he should be released from liability.

§ 1.- We may ask whether the payment of double damages provided by the Edict is entirely a penalty,

§ 2.- Mas antes debe decir el actor cuál o cuáles desea que sean exhibidos, para que, si no fueran exhibidos, se ejercite esta acción. Mas si se dijera: «exhíbelos todos, para que yo pueda conocer quién es», opino que se ha de oír.

§ 3.- Si muchos esclavos hubieren hecho el hurto o el daño, se debe observar esto, que se conceda la absolución si se entregara tanto cuanto se entregaría si lo hubiese hecho un solo hombre libre.

4.- PAULO; *Comentarios al Edicto, libro LII*.- Si hubiere fallecido el publicano que quitó algo con violencia, dice Labeón que se debe dar la acción contra su heredero por cuanto se haya hecho más rico.

§ 1.- Respecto a las cosas que los presidentes mandan que se les lleven para su uso, escribió el Divino Adriano a los presidentes, que siempre que alguno enviare a alguien para que compre cosas para su propio uso, o de los que gobiernan las provincias, o los ejércitos, o de sus procuradores, lo manifieste en escrito firmado de su mano, y lo dirija al publicano, para que si se transportare alguna cosa más de lo que se mandó, no esté exenta de tributo.

§ 2.- En casi todos los tributos se suele atender a la costumbre, y esto se dispone también en las constituciones de los príncipes.

5.- GAYO; *Comentarios al Edicto del Pretor urbano, título de los publicanos*.- Se hace por este Edicto, que, restituida la cosa antes de haber sido aceptado el juicio, se extinga la acción, pero que después de aceptado el juicio, subsista, no obstante, la pena; pero, sin embargo, debe ser absuelto también el que está dispuesto a restituir después de aceptado el juicio.

§ 1.- Mas preguntando nosotros si la pena sería de todo el duplo, y habría además la persecución de la

duplo sit et rei persecutio, ut poena simpli sit, magis placuit, ut res in duplo sit.

6.- MODESTINUS; *libro II, de Poenis*.- Si multi publicani sint, qui illicite quid exegerunt, non multiplicatur dupli actio, sed omnes partes praestabunt et quod ab alio praestari non potest, ab altero exigetur, sicut Divus Severus et Antoninus rescripserunt: nam inter criminis reos et fraudis participes multum esse constituerunt.

7.- PAPIRIUS IUSTUS; *libro II, de Constitutionibus*.- Imperatores Antoninus et verus rescripserunt in vectigalibus ipsa praedia, non personas conveniri et ideo possessores etiam praeteriti temporis vectigal solvere debere eoque exemplo actionem, si ignoraverint, habituros.

§ 1.- Item rescripserunt pupillo remittere se poenam commissi, si intra diem trigensimum vectigal intulisset.

8.- PAPINIANUS; *libro XIII, Responsorum*.- Fraudati vectigalis crimen ad heredem eius, qui fraudem contraxit, commissi ratione transmittitur.

§ 1.- Sed si unus ex pluribus heredibus rem communem causa vectigalis subripiat, portiones ceteris non auferuntur.

9.- Locatio vectigalium, quae calor licitantis ultra modum solitae conductionis inflavit, ita demum admittenda est, si fideiussores idoneos et cautionem

and suit can afterwards be brought for the recovery of the property; or whether the recovery of the property is included in the double damages, so that the penalty is only simple. The weight of opinion is that the property is included in the double damages.

6.- MODESTINUS; *On Penalties, Book II*.- Where several farmers of the revenue have unlawfully exacted something, the action to recover double damages is not multiplied, but all of them must pay their shares, and what cannot be paid by one shall be collected from another, as the Divine Severus and Antoninus stated in a Rescript; for they held that there was a great difference between persons who perpetrated a crime, and those who participated in the commission of a fraud.

7.- PAPIRIUS JUSTUS; *On Constitutions, Book II*.- The Emperors Antoninus and Verus stated in a Rescript that in the case of the taxes on public lands, the lands themselves, and not the persons holding them, should be made the subject of the action, and therefore that the possessors must pay any tax which was due, even for time which had passed before they obtained possession; and that, in a case of this kind, if they were not aware that any tax was due, they would be entitled to an action.

§ 1.- It was also stated in the Rescript that a ward would be released from liability to the penalty of confiscation, if he paid the tax within thirty days.

8.- PAPINIANUS; *Opinions, Book XIII*.- The offence of evading taxation by fraud is transmitted to the heir of the person who committed the fraud, to the extent of causing confiscation of the property.

§ 1.- Where one of several heirs for the purpose of evading the tax removes any of the property held in common, the others will not be deprived of their shares.

9.- PAULUS; *Sentences, Book V*.- If the heat of competition should induce a bidder desiring to obtain the farming of public revenues to raise his offer

cosa, o si en el duplo estaría la persecución de la cosa, de suerte que la pena sea del simple importe, se determinó como preferible, que la cosa esté comprendida en el duplo.

6.- MODESTINO; *De las penas, libro II*.- Si fueran muchos los publicanos que ilícitamente exigieron una cosa, no se multiplica La acción del duplo, sino que todos responderán de su parte; y lo que por uno no puede ser entregado, le será exigido a otro, según respondieron por rescripto el Divino Severo y Antonino; porque establecieron que había mucha diferencia entre los reos de un crimen y los partícipes de un fraude.

7.- PAPIRIO JUSTO; *De las Constituciones, libro II*.- Respondieron por rescripto los emperadores Antonino y Vero, que tratándose del pago de tributos, son demandados los mismos predios, no las personas, y que por lo tanto, los poseedores deben pagar el tributo también del tiempo pasado, y que por este motivo habrán de tener acción, si hubieren ignorado la falta de pago.

§ 1.- También respondieron por rescripto, que al pupilo le remitían ellos la pena del comiso, si dentro de los treinta días hubiese pagado el importe del tributo.

8.- PAPINIANO; *Respuestas, libro XIII*.- El delito de defraudación de tributo se transmite por razón del comiso al heredero del que cometió el fraude.

§ 1.- Pero si de varios herederos substraiese uno solo por causa de tributo una cosa común, no se les quitan a los demás sus porciones.

9.- PAULO; *Sentencias, libro V*.- El arrendamiento de los tributos, que el acaloramiento del licitador hizo subir a más de la cuantía del arrendamiento

is qui licitatione vicerit offerre paratus sit.

§ 1.- Ad conducendum vectigal invitus nemo compellitur et ideo impleto tempore conductionis elocanda sunt.

§ 2.- Reliquatores vectigalium ad iterandam conductionem, antequam superiori conductioni satisfaciant, admittendi non sunt.

§ 3.- Debitores fisci itemque rei publicae vectigalia conducere prohibentur, ne ex alia causa eorum debita onerentur: nisi forte tales fideiussores optulerint, qui debitis eorum satisfacere parati sint.

§ 4.- Soci vectigalium si separatim partes administrent, alter ab altero minus idoneo in se portionem transferri iure desiderat.

§ 5.- Quod illicite publice privatimque exactum est, quum altero tanto passis iniuriam exsolvitur. Per vim vero extortum quum poena tripli restituitur: amplius extra ordinem plectuntur: alterum enim utilitas privatorum, alterum vigor publicae disciplinae postulat.

§ 6.- Earum rerum vectigal, quarum numquam praestitum est, praestari non potest: quod si praestari consuetum indiligentia publicani omiserat, alius exercere non prohibetur.

§ 7.- Res exercitui paratas praestationi vectigalium subici non placuit.

above the ordinary amount, it must be accepted, if he who makes the highest bid is ready to furnish sufficient security.

§ 1.- No one can be compelled, against his consent, to lease the collection of taxes; and therefore when the time of the lease had expired, a new contract must be made.

§ 2.- Farmers of the revenue, who have not made a settlement for the taxes collected by them, and who wish to enter into a new contract, shall not be permitted to do so before paying what is due under the former one.

§ 3.- The debtors of the Treasury, as well as those of a city, are forbidden to contract to collect taxes, in order that their responsibilities may not be increased from another cause, unless they offer sureties who are able to satisfy their obligations.

§ 4.- Where partners in collecting the revenue administer their office separately, one of them can legally petition to have the share of another who is less fitted for the place transferred to himself.

§ 5.- Where anything has been unlawfully exacted, either from the public, or from private individuals, double the amount shall be paid to those who suffered the injury; anything, however, which has been extorted by violence shall be refunded together with a triple penalty, and, in addition to this, they will be liable to extraordinary prosecution; for, in the first instance, the right of private individuals, and in the second, the interest of the public demands it.

§ 6.- Taxes on property on which no tax has ever been paid cannot be collected. If the indulgence of the farmer of the revenue should release property from taxation, on which it has been customary to pay, another is not forbidden to make the collection.

§ 7.- It has been established that property for the use of the army is not liable to taxation.

acostumbrado, ha de ser admitido solamente si el que hubiere vencido en la licitación estuviera dispuesto a ofrecer fiadores abonados y caución.

§ 1.- Nadie es compelido contra su voluntad a tomar en arrendamiento los tributos, y por esto deben ser arrendados de nuevo cumplido el tiempo del arrendamiento.

§ 2.- Los deudores de atrasos no han de ser admitidos a renovar el arrendamiento de los tributos, antes que satisfagan lo debido por el primer arrendamiento.

§ 3.- A los deudores del fisco, y también a los de la república, se les prohíbe tomar en arrendamiento los impuestos, a fin de que por otra causa no se recarguen sus deudas, a no ser acaso que ofrecieren tales fiadores, que estuvieran dispuestos a satisfacer sus deudas.

§ 4.- Si los consocios de la cobranza de tributos administrasen partes por separado, con derecho pretende uno que por otro menos idóneo se le transfiera su porción.

§ 5.- Lo que ilícitamente se cobró en público y en privado, se les paga con otro tanto a los que sufrieron la injusticia, mas lo que se arrancó con violencia es restituido con la pena del triplo, además de lo que son castigados con pena extraordinaria sus autores; porque una cosa exige la utilidad de los particulares, y otra el vigor de la disciplina pública.

§ 6.- No se puede pagar tributo de aquellas cosas por las que nunca se pagó; pero si por falta de diligencia de un publicano se había dejado de pagar un tributo acostumbrado, no se prohíbe que otro lo exija.

§ 7.- No plugo que estuvieran sujetas a la prestación de tributos las cosas destinadas al ejército.

§ 8.- Fiscus ab omnium vectigalium praestationibus immunis est. Mercatores autem, qui de fundis fiscalibus mercari consueverunt, nullam immunitatem solvendi publici vectigalis usurpare possunt.

10.- HERMOGENIANUS; *libro V, Epitomarum*.- Vectigalia sine Imperatorum praecepto neque praesidi neque curatori neque curiae constituere nec praecedentia reformare et his vel addere vel deminueri licet.

§ 1.- Non solutis vectigalium pensionibus pelleri conductores necdum etiam tempore conductionis completo vel ab his usuras ex mora exigere permittitur.

11.- PAULUS; *libro V, Sententiarum*.- Cotem ferro subigendo necessariam hostibus quoque venundari, ut ferrum et frumentum et sales, non sine periculo capitis licet.

§ 1.- Agri publici, qui in perpetuum locantur, a curatore sine auctoritate principali revocari non possunt.

§ 2.- Dominus navis si illicite aliquid in nave vel ipse vel vectores imposuerint, navis quoque fisco vindicatur: quod si absente domino id a magistro vel gubernatore aut praeore nautave aliquo id factum sit, ipsi quidem capite puniuntur commissis mercibus, navis autem domino restituitur.

§ 3.- Illicitarum mercium persecutio heredem quoque adfligit.

§ 4.- Eam rem, quae commisso vindicata est, dominus emere non prohibetur vel per se vel per alios quibus hoc mandaverit.

§ 8.- The Treasury is exempt from the payment of any tax. Merchants, however, who are accustomed to deal in goods purchased with funds belonging to the Treasury cannot enjoy immunity from the payment of taxes.

10.- HERMOGENIANUS; *Epitomes, Book V*.- Neither the Governors of provinces, the agents of municipalities, nor assemblies of the people are permitted to impose taxes, or to modify, add to, or diminish those already imposed, without the authority of the Emperor.

§ 1.- Where farmers of the revenue have not paid what they owe to the Treasury, they cannot be discharged, even if the terms of their leases have expired; but interest can be collected from them when they are in default.

11.- PAULUS; *Opinions, Book V*.- It is not permitted, under penalty of death, to sell to enemies flints used for striking fire, iron, wheat, or salt.

§ 1.- Public lands, which are held under a perpetual lease, cannot be taken from the lessee by an agent of the government without the authority of the Emperor.

§ 2.- If either the owner of a ship, or any of the passengers, should unlawfully bring any merchandise on board, the ship as well as the merchandise can be confiscated by the Treasury. If anything of this kind is done in the absence of the owner, by the master, the helmsman, the pilot, or any sailor, he shall be put to death, and the merchandise shall be confiscated, but the vessel must be restored to the owner.

§ 3.- Prosecution for dealing in contraband merchandise also extends to the heir of the guilty party.

§ 4.- The owner of property which has been confiscated is not forbidden to purchase the same either himself, or through others whom he has directed to do so.

§ 8.- El fisco está exento de las prestaciones de todos los tributos, pero los mercaderes, que acostumbraron a comerciar con los fundos fiscales, no pueden usurpar ninguna inmunidad para no pagar el tributo público.

10.- HERMOGENIANO; *Epitomes, libro V*.- Sin orden de los emperadores no es lícito ni al presidente, ni al curador, ni a la curia, establecer tributos, ni reformar los anteriores, y aumentarlos o disminuirlos.

§ 1.- No habiéndose pagado las pensiones de los tributos, es permitido expulsar a los arrendatarios, aun no habiéndose cumplido todavía el tiempo del arrendamiento, o exigirles intereses por la mora.

11.- PAULO; *Sentencias, libro V*.- No es lícito venderles a los enemigos, sin riesgo de la vida, la piedra necesaria para afilar el hierro, como tampoco hierro, trigo, ni sal.

§ 1.- Los campos públicos que se dan en arrendamiento perpetuo no pueden ser quitados por el curador sin la autoridad del príncipe.

§ 2.- Si el mismo dueño de una nave, o los pasajeros hubieren cargado ilícitamente en ella alguna cosa, se confisca también la nave. Pero si hallándose ausente el dueño esto hubiera sido -hecho por el capitán, o por el piloto, o por algún vigía o marinero, éstos son evidentemente castigados a pena capital, siendo decomisadas las mercancías pero la nave es restituida a su dueño.

§ 3.- La persecución de las mercancías ilícitas amenaza también al heredero.

§ 4.- Al dueño no se le prohíbe que compre ya por sí, ya por otros a quienes se lo hubiere encomendado, la cosa que fue decomisada.

§ 5.- Qui maximos fructus ex redemptione vectigalium consequuntur, si postea tanto locari non possunt, ipsi ea prioribus pensionibus suscipere compelluntur.

12.- ULPIANUS; *libro XXXVIII, ad Edictum*.- Quanta audacia, quanta temeritatis sint publicanorum factiones, nemo est qui nesciat. idcirco Praetor ad compescendam eorum audaciam hoc Edictum proposuit:

§ 1.- Quod familia publicanorum furtum fecisse dicetur, item si damnum iniuria fecerit et id ad quos ea res pertinet non exhibetur: in dominum sine noxae deditione iudicium dabo".

§ 2.- Familiae autem appellatione hic servilem familiam contineri sciendum est. sed et si bona fide publicano alienus servus servit, aequae continebitur: fortassis et mala fide, plerumque enim vagi servi et fugitivi in huiusmodi operis etiam a scientibus habentur. ergo et si homo liber serviat, hoc Edictum locum habet.

§ 3.- Publicani autem dicuntur, qui publica vectigalia habent conducta.

13.- GAIUS; *libro XIII, ad Edictum provinciale*.- Sed et hi, qui salinas et cretifodinas et metalla habent, publicanorum loco sunt.

§ 1.- Praeterea et si quis vectigal conductum a re publica cuiusdam municipii habet, hoc Edictum locum habet.

§ 2.- Sive autem vendidit servum vel manumisit vel etiam fugit servus, tenebitur servi nomine, qui tam factiosam familiam habuit.

§ 5.- Persons who have profited greatly from the farming of the public revenues are compelled to take them on the same terms on which they formerly held them, if the same amount cannot be obtained from others.

12.- ULPIANUS; *On the Edict, Book XXXVIII*.- There is no one who is not aware of the audacity and insolence of farmers of the revenue, and therefore the Praetor promulgated this Edict for the purpose of controlling them.

§ 1.- "If anyone belonging to the household of a farmer of the revenue is accused of having committed theft, or has caused unlawful injury, and the property in question is not produced, I shall grant an action against the master, without the privilege of surrendering the slave by way of reparation."

§ 2.- It must be noted that, in this instance, the slaves of the farmer of the revenue are meant by the term "household." If, however, a slave belonging to another should be in the service of the farmer of the revenue, in good faith, he will also be included. Perhaps this would also be the case where he served him in bad faith, for wandering and fugitive slaves are often employed in work of this kind by persons who know who they are. Hence, if a freeman is serving in good faith as a slave, this Edict will also apply to him.

§ 3.- Those also are called farmers of the revenue who lease the income from public lands.

13.- GAIUS; *On the Provincial Edict, Book XIII*.- They also are included under the term farmers of the revenue who lease the income from salt pits, quarries, and mines belonging to the State.

§ 1.- This Edict also applies to one who leases from the government the collection of taxes from a municipality.

§ 2.- He who has a number of seditious slaves employed will be liable for the acts of one of them, if he should sell or manumit him, or even if the slave

§ 5.- Los que consiguen muy grandes frutos por virtud del arrendamiento de los tributos, si después éstos no pueden ser arrendados en tanto, son compelidos a tomarlos a su cargo con las anteriores pensiones.

12.- ULPIANO; *Comentarios al Edicto, libro XXXVIII*.- No hay nadie que no sepa de cuanta audacia, de cuánta temeridad sean las maneras de los publicanos; y por esto publicó el Pretor este Edicto para refrenar la audacia de los mismos.

§ 1.- «Si se dijere que la familia de los publicanos cometió un hurto, y también si hubiere hecho daño con injuria, y el esclavo no fuere exhibido a aquellos a quienes les pertenece la cosa, daré acción contra el dueño sin la entrega por el daño.»

§ 2.- Mas se ha de saber, que en la denominación de familia se comprende aquí la familia de esclavos. Pero también si un esclavo ajeno le sirviera de buena fe a un publicano, estará igualmente comprendido, y acaso también si de mala fe; porque muchas veces son tenidos en tales servicios aun por los que lo saben esclavos vagos y fugitivos. Luego también tiene lugar este Edicto si sirviera como esclavo un hombre libre.

§ 3.- Pero se llaman publicanos los que tienen tomados en arrendamiento los tributos públicos.

13.- GAYO; *Comentarios al Edicto provincial, libro XIII*. - Mas también están en la clase de publicanos los que tienen salinas, minas de greda, y de metales.

§ 1.- Además, también tiene lugar este Edicto, si alguno tiene tomados en arrendamiento los tributos de la república de cualquier municipio.

§ 2.- Mas ya si vendió el esclavo, ya si lo manumitió, o ya también si huyó el esclavo, estará obligado en nombre del esclavo el que tuvo familia tan

§ 3.- Quid tamen, si servus decesserit? Videndum, an publicanus teneatur quasi facti sui nomine: sed puto, quia facultatem non habet exhibendi nec dolus eius intercessit, debere eum liberari.

§ 4.- Hanc actionem perpetuam dabimus et heredi ceterisque successoribus.

14.- ULPIANUS; *libro VIII, Disputationum*.- Commissa vectigalium nomine etiam ad heredem transmittuntur. Nam quod commissum est, statim desinit eius esse qui crimen contraxit dominiumque rei vectigali acquiritur: eapropter commissi persecutio sicut adversus quemlibet possessorem, sic et adversus heredem competit.

15.- ALFENUS VARUS; *libro VII, Digestorum*.- Caesar quum insulae Cretae cotorias locaret, legem ita dixerat: "ne quis praeter redemptorem post idus Martias cotem ex insula Creta fodito neve eximito neve avellito". Cuiusdam navis onusta cotibus ante idus Martias ex portu Cretae profecta vento relata in portum erat, deinde iterum post idus Martias profecta erat. Consulebatur, num contra legem post idus Martias ex insula Creta cotes exisse viderentur. respondit, tametsi portus quoque, qui insulae essent, omnes eius insulae esse viderentur, tamen eum, qui ante idus Martias profectus ex portu esset et relatus tempestate in insulam deductus esset, si inde exisset non videri contra legem fecisse, praeterea quod iam initio evectae cotes viderentur, quum et ex portu navis profecta esset.

16.- MARCIANUS; *libro singulari de Delatoribus*.- Interdum nec vendendus est is servus qui in commissum cecidit, sed pro eo aestimatio a domino

should take to flight.

§ 3.- But what must be done if the slave should die? Let us see whether the farmer of the revenue will be responsible, as for his own act. I think that he should be released from liability, as he had not the power of producing the slave, and was not guilty of fraud.

§ 4.- We grant this action as perpetual, and it will pass to the heir and other successors.

14.- ULPIANUS; *Disputations, Book VIII*.- The confiscation of property on the ground of non-payment of taxes also extends to the heir, for what is confiscated immediately ceases to belong to the party who committed the crime, and the ownership of the same is acquired by the Treasury. Therefore, proceedings for confiscation can be instituted against the heir, just as against any possessor whomsoever.

15.- ALFENUS VARUS; *Digest, Book VII*.- When the Emperor leased the quarries of the island of Crete, he inserted the following clause in the lease: "No one except the farmer of the revenue shall make an excavation, or remove, or take out a single stone from the quarries of the Island of Crete, after the Ides of March." A ship belonging to a certain individual, which was loaded with flints, having departed from the harbor of Crete before the Ides of March, was driven back into the harbor by the wind and departed the second time after the Ides of March. Advice was asked whether the flints should be held to have been removed contrary to law after the Ides of March. The answer was that although the harbors, which themselves were parts of the island, should all be considered as belonging to it, still, as the vessel, having left the port before the Ides of March, was driven back to the island by a storm, and afterwards departed, it should not be held to have done so in violation of law; especially as the flints must be considered to have been removed before the time prescribed, since the ship had already left the harbor.

16.- MARCIANUS; *On Informers*.- Sometimes a slave, who has been confiscated, should not be sold, but his appraised value should be paid by his owner,

perturbadora.

§ 3.- Pero ¿qué se dirá, si hubiere fallecido el esclavo? Se ha de ver si el publicano estará obligado como por razón de un hecho propio; pero opino, que, como no tuvo facultad de exhibirlo, ni medió dolo suyo, debe él quedar libre.

§ 4.- Daremos esta acción perpetua al heredero y a los demás sucesores.

14.- ULPIANO; *Disputas, libro VIII*.- El decomiso a título de tributos se transmite también al heredero; porque lo que fue decomisado dejó al punto de ser del que contrajo el crimen, y su dominio se adquiere para los tributos públicos; por esto la persecución del comiso compete, así como contra cualquier poseedor, también contra el heredero.

15.- ALFENO VARO; *Digesto, libro VII*.- El Censor, al dar en arrendamiento en la isla de Creta canteras de piedras de afilar, había establecido esta ley: «ninguno, salvo el arrendatario, arranque, ni extraiga, ni transporte piedras de afilar de la isla de Creta después de los Idus de Marzo»; la nave de uno, que cargada de piedras de afilar había salido del puerto de Creta antes de los Idus de Marzo, había sido vuelta por el viento al puerto; luego había partido otra vez después de los Idus de Marzo; se consultaba, si se consideraría ahora que las piedras de afilar habían salido de la isla de Creta después de los Idus de Marzo. Respondió, que aunque se considerase que también todos los puertos, que hubiese en la isla, eran de esta isla, sin embargo, no parece que obró contra la ley el que hubiese salido de un puerto antes de los Idus de Marzo, y rechazado por una tempestad hubiese sido llevado a la isla, si de ella hubiese salido, porque ya desde un principio se considerarían transportadas las piedras de afilar, cuando la nave hubiese salido del puerto.

16.- MARCIANO; *De los Delatores, libro único*.- A veces, tampoco se ha de vender el esclavo, que cayó en comiso, sino que en su lugar se ha de dar por

danda est. Divi enim Severus et Antoninus Rescripserunt, quum is servus, qui actum domini gessisse diceretur, in commissum cecidisset, venire non debuisset, sed pro eo viri boni arbitrato aestimationem oportuisse dari.

§ 1.- Idem autem eadem epistula rescripserunt, si quis inprofessus servus fuerit et probabitur in commissum cecidisse, et aut uxorem corrupsisse domini dicatur aut aliud quid gravius admisisset, ut cognoscat procurator et, si in his causis esse compertus sit, aestimetur et ad poenam domino tradatur.

§ 2.- Idem Divi Severus et Antoninus Rescripserunt mancipiis commissis res peculiares non esse in eadem causa nisi hoc, quod proprio nomine in causam commissi incidit.

§ 3.- Quotiens quis mancipia invecta professus non fuerit sive venalia sive usualia, poena commissi est, si tamen novicia mancipia fuerint, non etiam veterana. Sunt autem veterana, quae anno continuo in urbe servierint: novicia autem mancipia intelleguntur, quae annum nondum servierint.

§ 4.- Servi, qui in fuga sunt, in commissum non cadunt, quum sine voluntate domini fines egressi sunt: et ita principalibus constitutionibus cavetur, sicut divus quoque pius saepissime rescripsit, ne, inquit, in potestate servorum sit invitis vel ignorantibus dominis fugae se tradendo potestati dominorum se subtrahere.

§ 5.- Licet quis se ignorasse dicat, nihilo minus eum in poenam vectigalis incidere Divus Hadrianus constituit.

instead. For the Divine Severus and Antoninus stated in a Rescript that where a slave, who was said to have transacted the business of his master, is confiscated, he should not be sold; but his appraised value should be paid in accordance with the judgment of a good citizen.

§ 1.- The same Emperors stated in this Rescript that if the slave should fail to file a proper account, and was proved to have rendered himself liable to confiscation, or was alleged to have corrupted the wife of his master, or had committed any other serious offence, the deputy of the Emperor should take cognizance of the matter, and if the slave is found to be guilty, his value should be appraised, and he must be delivered up to his master to be punished.

§ 2.- The Divine Severus and Antoninus also stated in a Rescript, that where slaves have made themselves liable to confiscation, their peculium is not included unless property forming part of it should itself have become subject to forfeiture.

§ 3.- Where anyone does not declare, as liable to taxation, slaves whom he is transporting either to be sold, or employed, he will incur the penalty of confiscation; still, this applies only to newly acquired slaves, and not to such as are old. Old slaves are those who have been in servitude for an entire year, in a town; new ones, however, are understood to be such as have not yet been in servitude for a year.

§ 4.- Slaves, who are in flight, are not liable to confiscation, as they went away without the consent of their masters. This has been expressly provided by the Imperial Constitutions, as the Divine Pius frequently stated in Rescripts that it was not in the power of slaves to escape the control of their masters by taking to flight, if the latter were unwilling, or were not aware of the fact.

§ 5.- The Divine Hadrian decided that, although a person may allege ignorance, he will, nevertheless, be liable to the penalty of confiscation.

el dueño su estimación; porque los Divinos Severo y Antonino respondieron por rescripto, que cuando hubiese caído en comiso el esclavo que se dijera que llevaba la administración de su señor, no debía ser vendido, sino que en lugar de él se debía dar su estimación a arbitrio de hombre bueno.

§ 1.- Mas los mismos respondieron, por rescripto en la misma carta: «que, si algún esclavo no hubiere sido declarado, y se probare que cayó en comiso, y o se dijera que corrompió a la mujer de su señor, o que cometió algún otro delito más grave, conozca de ello el procurador; y que si fuera hallado en uno de estos casos, fuese estimado, y entregado a su señor para su castigo».

§ 2.- Respondieron por rescripto los mismos Severo y Antonino, que, caídos en comiso los esclavos, no están en el mismo caso los bienes del peculio, a no ser lo que determinadamente cayó en comiso.

§ 3.- Cuando uno no hubiere declarado los esclavos introducidos, ya sea para venderlos, ya para su uso, hay la pena del comiso; pero esto, si los esclavos fueren novicios, no también si veteranos. Mas son veteranos los que en la ciudad hubieren servido un año continuo; pero son esclavos, novicios los que aun no hubieren servido un año.

§ 4.- Los esclavos que andan fugitivos no caen en comiso, porque se salieron de los confines sin la voluntad de su señor; y así se dispone en las Constituciones de los Príncipes, como también respondió muchísimas veces por rescripto el Divino Pío, a fin de que, dijo, «no esté en la potestad de los esclavos substraerse a la potestad de sus dueños, dándose a la fuga contra la voluntad de los dueños o ignorándolo éstos».

§ 5.- Aunque alguno diga que lo ignoró, determinó, sin embargo, el Divino Adriano, que él incurre en la pena del tributo.

§ 6.- Divi quoque Marcus et Commodus Rescripserunt non imputari publicano, quod non instruxit transgredientem: sed illud custodiendum, ne decipiat profiteri volentes.

§ 7.- Species pertinentes ad vectigal: cinnamomum, piper longum, piper album, folium pentasphaerum, folium barbaricum, costum, costamomum, nardi stachys, cassia Turiana, xylocassia, smurna, amomum, zingiberi, malabathrum, aroma Indicum, chalban, laser, alga Lycia, sargogalla, onyx Arabicus, cardamomum, xylocinnamomum, opus byssicum, pelles Babylonicæ, pelles Parthicae, ebur, ferrum Indicum, carpasum, lapis Universus, margarita, sardonix, ceraunium, hyacinthus, smaragdus, adamas, saffirinus, callainus, beryllus, chelyniae, opia Indica. vela certa, metaxa, vestis serica vel subserica, vela tincta carbacea, nema sericum, spadones, Indici leones, leaenae, pardi, leopardi, pantherae, purpura, item marocorum lana, fucus, capilli Indici.

§ 8.- Si propter necessitatem adversae tempestatis expositum onus fuerit, non debere hoc commissio vindicari divi fratres rescripserunt.

§ 9.- Divus quoque pius rescripsit, quum quidam intra legitimam aetatem esse dicebat et usus causa mancipia duxisset et in sola professione errasset, ignoscendum esse ei.

§ 10.- Divi quoque fratres rescripserunt, quum quidam non per fraudem, sed per errorem in causam commissi incidisset, ut duplo vectigali contenti publicani servos restituant.

§ 11.- Magnus Antoninus Rescripsit, si colonus vel

§ 6.- The Divine Marcus and Commodus also stated in a Rescript that a farmer of the revenue was not to blame for not instructing those who violated the law, but that he must be careful that those who were willing to declare their property for taxation should not be deceived.

§ 7.- Merchandise subject to duty is as follows: cinnamon, long pepper, white pepper, pentasphaerum, Barbary leaf, costum, costamomum, nard, Turian cassia, the wood of the cassia tree, myrrh, amomum, ginger, malabathrum, Indian spice, chalbane, benzoin, assafoetida, aloes, wood, Arabian onyx, cardamon, cinnamon wood, flax, Babylonian furs, Parthian furs, ivory, Indian iron, linen, all precious stones, pearls, sardonix, crystals, hyacinths, emeralds, diamonds, sapphires, beryls, callaini, Indian drugs, Sarmation cloth, silk and muslin, painted hangings, fine fabrics, silk goods, eunuchs, Indian lions and lionesses, male and female panthers, leopards, purple, wool, crimson dye and Indian hair.

§ 8.- The Divine Brothers stated in a Rescript that if a cargo was unavoidably exposed to bad weather it should not, on this account, be confiscated.

§ 9.- The Divine Pius stated in a Rescript that where a person, said to be a minor under twenty-five years of age, declared that his slaves were for his own use, and he made a mistake, merely in the return of said slaves, he should be excused.

§ 10.- The Divine Brothers also stated in a Rescript that where the slaves of anyone became liable to confiscation, not through fraud, but through mistake, the farmers of the revenue should remain content with double the amount of the tax, and should restore the slaves to the owner.

§ 11.- The great Antoninus stated in a Rescript that

§ 6.- También respondieron por Rescripto los Divinos Marco y Cómmodo, que no se le imputa a un publicano que no haya instruido al transgresor pero se ha de cuidar de que no engañe a los que quieran declarar.

§ 7.- Especies sujetas a tributo: el cinamomo, la pimienta larga, la pimienta blanca, la hoja pentasfera, la hoja barbárica, el costo, el costamomo, la vara de nardo, la casia tiriana, la jilocasia, la mirra, el amomo, el gengibre, el malabatro, el aroma de la India, el gálbano, el benjuí, el alga de Licia, la sarcocola, el ónice de Arabia, el cardamomo, el jilocinamomo, los tejidos de finísimo lino de Acaya, las pieles de Babilonia, las pieles de la Partia, el marfil, el hierro de la India, el carpasso, toda clase de piedra preciosa, la margarita, el sardónice, el ceraunio, el jacinto, la esmeralda, el diamante, el zafiro, la callais, el berilo, la quelonia, el opio de la India, toldos tejidos, seda cruda, vestidos de seda o de media seda, toldos teñidos, el lino carbaseo, los hilados de seda, los eunucos, los leones de la India, las leonas, los pardos, los leopardos, las panteras, la púrpura, y también el algodón, la tintura de púrpura, y pelos de la India.

§ 8.- Si la carga hubiere sido descargada por haber obligado a ello una tempestad, respondieron por rescripto los Divinos hermanos, que no debía ser ella decomisada.

§ 9.- También respondió por rescripto el Divino Pío, que cuando alguno decía que era de menor edad, y hubiese introducido esclavos para su uso, y solamente hubiese errado en la declaración, se le ha de perdonar.

§ 10.- También resolvieron por rescripto los Divinos hermanos, que, cuando alguno hubiese incurrido en causa de comiso no por fraude, sino por error, restituyan los publicanos los esclavos contentándose con el duplo del tributo.

§ 11.- Resolvió por rescripto Antonino el Grande,

servi domini praedii ferrum illicite in praedio fecerint ignorante domino, nulla poena dominum teneri.

§ 12.- Si quis professus apud publicanum fuerit, non tamen vectigal solverit, hoc concedente publicano, ut solent facere, Divi Severus et Antoninus Rescripserunt res in commissum non cadere: quum enim, inquit, professiones recitantur, commissum cessat, quum poterit satisfieri fisco ex bonis publicanorum vel fideiussorum.

§ 13.- Poenae ab heredibus peti non possunt, si non est quaestio mota vivo eo qui deliquit: et hoc sicut in ceteris poenis, ita et in vectigalibus est.

§ 14.- Si quid autem indebitum per errorem solventis publicanus acceperit, retro eum restituere oportere Divi Severus et Antoninus Rescripserunt.

TIT. V

DE DONATIONIBUS

1.- IULIANUS; *libro XVII, Digestorum*.- Donationes complures sunt. Dat aliquis ea mente, ut statim velit accipientis fieri nec ullo casu ad se reverti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exercent: haec proprie donatio appellatur. Dat aliquis, ut tunc demum accipientis fiat, cum aliquid secutum fuerit: non proprie donatio appellabitur, sed totum hoc donatio sub condicione est. Item quum quis ea mente dat, ut statim quidem faciat accipientis, si tamen aliquid factum fuerit aut non fuerit, velit ad se reverti, non proprie donatio dicitur, sed totum hoc donatio est, quae sub condicione solvatur. Qualis est mortis causa donatio.

if a tenant, or his own slaves, should unlawfully have a manufactory of arms on the land of the owner, without his knowledge, he would not be liable to any penalty.

§ 12.- If anyone should make a declaration to a farmer of the revenue, and does not pay the tax, and it should be remitted by the farmer of the revenue (as is customary at times), the Divine Severus and Antoninus stated in a Rescript that the property should not be confiscated; for they say that there is no ground for confiscation after the declaration has been made, as what is due to the Treasury can be collected from the property of the farmers of the revenue, or from that of their sureties.

§ 13.- Penalties cannot be collected from heirs where proceedings were not instituted during the lifetime of the person who was delinquent. This rule, as is the case with other penalties, is also applicable to those relating to taxation.

§ 14.- The Divine Severus and Antoninus stated in a Rescript that if a farmer of the revenue, through the mistake of the person making payment, receives more than is due, he must refund it.

TITLE V

CONCERNING DONATIONS

1.- JULIANUS; *Digest, Book XVII*.- There are several kinds of donations. A person makes a donation with the understanding that the property will at once belong to the person who receives it, and will, under no circumstances, revert to himself, and he does this for no other reason than to display his liberality and munificence. This is what is properly called a donation. Another gives something with the understanding that it will only become the property of the person who receives it, if something else takes place. This is not properly styled a donation, for it is a conditional gift. Likewise, when anyone gives something with the intention that it will immediately become the property of the person who receives it,

que, si un colono, o los esclavos del dueño del predio hubieren fundido ilícitamente hierro en un predio ignorándolo el dueño, no está sujeto el dueño a ninguna pena.

§ 12.- Si alguno hubiere hecho la declaración ante un publicano, pero no hubiere pagado el tributo, respondieron los Divinos Severo y Antonino, que, concediéndoselo esto el publicano, como suelen hacerlo, no caen las cosas en comiso; «porque, haciéndose, dicen, las declaraciones, deja de haber lugar al comiso, porque se le podrá satisfacer al fisco con los bienes de los publicanos o de los fiadores».

§ 13.- No se les pueden pedir las penas a los herederos, si la cuestión no fue promovida viviendo el que delinquiró; y esto es lo mismo tratándose de tributos que respecto a las demás penas.

§ 14.- Mas si un publicano recibió alguna cosa indebida por error del que la pagó, respondieron por rescripto los Divinos Severo y Antonino, que él debía restituirla.

TÍTULO V

DE LAS DONACIONES

1.- JULIANO; *Digesto, Libro XVII*.- Hay muchas clases de donaciones. Da uno con tal intención, que quiere que al punto se haga la cosa del que la recibe, y que en ningún caso vuelva a él; Y no lo hace por ninguna otra causa, sino para ejecutar acto de liberalidad y de munificencia; esta es la que propiamente se llama donación. Da alguien para que la cosa se haga del que la recibe solamente cuando se hubiere verificado algún suceso; esta no se llamará propiamente donación, sino que todo esto es una donación bajo condición. Asimismo, cuando alguno da con la intención de que la cosa se haga al punto del que la recibe; si, no obstante, quisiera que vuelva a él, si se hubiere realizado, o no, algún suceso, esta no se

but if something either happens, or does not happen, he wishes it to be returned to him; this is not properly called a donation, but it is merely a gift, which is dependent upon a condition; as, for instance, a donation mortis causa.

§ 1.- Igitur quum dicimus inter sponsum et sponsam donationem valere, propria appellatione utimur et factum demonstramus, quod ab eo proficiscitur, qui liberalitatis gratia aliquid dat, ut confestim faciat accipientis nec umquam ullo facto ad se reverti velit. Quum vero dicimus, si hac mente donat sponsus sponsae, ut nuptiis non secutis res auferatur, posse repeti, non contrarium priori dicimus, sed concedimus inter eas personas fieri donationem eam, quae sub condicione solvatur.

2.- IDEM; *libro LX, Digestorum*.- Si, quum filius familias pecuniam donare vellet, patris iussu eam promisit, valet donatio, perinde ac si fideiussorem dedisset.

§ 1.- Si vero pater donaturus Titio pecuniam iusserit filium suum eam promittere, poterit dici interesse, debitor filius patri suo fuerit nec ne: nam si tantundem filius patri debuit, quantum promisit, valere donatio intellegitur, perinde ac si quemlibet alium debitorem pater iussisset pecuniam promittere.

§ 2.- Quum vero ego Titio pecuniam donaturus te, qui mihi tantundem donare volebas, iussero Titio promittere, inter omnes personas donatio perfecta est.

§ 3.- Aliud iuris erit, si pecuniam, quam me tibi debere existimabam, iussu tuo sponderim ei cui donare volebas: exceptione enim doli mali tueri me potero et praeterea incerti conditione stipulatorem compellam, ut mihi acceptum faciat stipulationem.

§ 1.- Therefore, when we may say that a donation between betrothed persons is valid, we use the term in its correct sense, and we understand by it anything given by a person who bestows it for the sake of liberality in order that it may immediately become the property of the one who receives it, and that, under no circumstances, he desires it to be returned to him. And when we say that a man gives a donation to his betrothed with the understanding that, if the marriage should not take place, the gift may be returned, we do not contradict what was previously stated, but we mean that a donation can be made between such persons, and may become void under a certain condition.

2.- THE SAME; *Digest, Book LX*.- When a son under paternal control desires to make a donation of money, he promises it by the order of his father, and the donation will be just as valid as if he had furnished a surety.

§ 1.- If, however, the father, being about to donate the money to Titius, should order his son to promise it to him, it may be said that there is a difference if the son is indebted to his father, and if he is not. For where he owes his father a sum equal to what he promises, the donation is considered valid, just as if the father had ordered any other debtor to promise the money.

§ 2.- If, however, I am about to donate money to Titius, and I order you who intend to give me an equal sum, to promise it to Titius, the donation is complete, as far as all the persons are concerned.

§ 3.- A different rule of law will apply if, by your order, I promise to pay to someone, to whom you wish to make a donation, the money which I think that I owe you, for I can protect myself by an exception on the ground of fraud; and, moreover, I

llama propiamente donación, sino que todo esto es una donación, que se disuelve bajo condición, cual es la donación por causa de muerte.

§ 1.- Así, pues, cuando decimos que es válida la donación entre el esposo y la esposa, empleamos la denominación propia, e indicamos el hecho que emana del que por causa de liberalidad da alguna cosa para hacerla inmediatamente del que la recibe, y no quiere que por virtud de pacto alguno vuelva a él. Mas cuando decimos, que, si el esposo dona a la esposa con la intención de que no verificándose las nupcias se quite la cosa, se puede repetir esta, no decimos algo contrario a lo anterior, sino que concedemos que entre estas personas se haga la donación, que se disuelve bajo condición.

2.- EL MISMO; *Digesto, libro LX*.- Si queriendo un hijo de familia donar una cantidad la prometió por orden de su padre, es válida la donación, lo mismo que si hubiese dado fiador.

§ 1.- Mas si el padre que quería donar una cantidad a Ticio le hubiere mandado a su hijo que se la prometa, se podrá decir que importa saber si el hijo era, o no, deudor de su propio padre; porque si el hijo le debía al padre tanto cuanto prometió, se entiende que es válida la donación, lo mismo que si el padre le hubiese mandado a otro cualquier deudor que prometiese la cantidad.

§ 2.- Pero cuando yo, que quería donar una cantidad a Ticio, te hubiere mandado á ti, que querías donarme otra tanta cantidad, que se la prometas a Ticio, la donación se perfeccionó entre todos.

§ 3.- Otro será el derecho, si por orden tuya le hubiere yo prometido, a quien tú querías donárselo, el dinero que yo creía que tú me debías; porque me podré defender con la excepción de dolo malo; y además compeleré por la condición de cosa incierta

§ 4.- Item si ei, quem creditorem tuum putabas, iussu tuo pecuniam, quam me tibi debere existimabam, promisero, petentem doli mali exceptione summovebo et amplius incerti agendo quum stipulatore consequar, ut mihi acceptum faciat stipulationem.

§ 5.- Si pecuniam mihi Titius dederit absque ulla stipulatione, ea tamen condicione, ut tunc demum mea fieret, quum Seius consul factus esset: sive furente eo sive mortuo Seius consulatum adeptus fuerit, mea fiet.

§ 6.- Sed si quis donaturus mihi pecuniam dederit alicui, ut ad me perferret, et ante mortuus erit quam ad me perferat, non fieri pecuniam dominii mei constat.

§ 7.- Titio decem donavi ea condicione, ut inde Stichum sibi emeret: quaero, quum homo antequam emeretur mortuus sit, an aliqua actione decem recipiam. Respondit: facti magis quam iuris quaestio est: nam si decem Titio in hoc dedi, ut Stichum emeret, aliter non daturus, mortuo Sticho condicione repetam: si vero alias quoque donaturus Titio decem, quia interim Stichum emere proposuerat, dixerim in hoc me dare, ut Stichum emeret, causa magis donationis quam condicio dandae pecuniae existimari debebit et mortuo Sticho pecunia apud Titium remanebit.

3.- ULPIANUS; *libro LXXVI, ad Edictum*.- Et generaliter hoc in donationibus definiendum est multum interesse, causa donandi fuit an condicio: si

can compel the stipulator, by means of the proceeding called incerti, to give me a release from the obligation.

§ 4.- In like manner, if I, by your order, promise to pay a certain sum of money, which I think that I owe you, to a third party whom you believe to be your creditor, I can bar the person making the demand by an exception on the ground of fraud; and, in addition to this, by availing myself of the proceeding called incerti against the stipulator, I can compel him to release me from the stipulation.

§ 5.- If Titius should pay me a sum of money without any stipulation, but on the condition that it will only belong to me when Seius becomes Consul, the money will become mine when Seius obtains the consulship, even though the person who made the donation should be insane or dead at that time.

§ 6.- If anyone, desiring to make a donation of money to me, gives it to someone else to bring to me, and he should die before he does so, it is settled that the ownership of the money does not pass to me.

§ 7.- I gave Titius the sum of ten aurei on the condition that he would purchase Stichus with it. I ask, if the slave should die before he was purchased, whether I can recover the ten aurei by any action. The answer was that this is rather a question of fact than of law, for if I gave the ten aurei to Titius in order that he might purchase Stichus, and I would not have given them to him otherwise, and Stichus should die, I can recover the amount by an action. If, however, I had the intention of giving the ten aurei to Titius, in any event, and, in the meantime, he proposed to purchase Stichus, and I stated that I gave him the money in order that he might purchase him, what I have said should be considered rather a reason for the donation than the condition upon which the money was paid, and if Stichus should die, the money will remain in the hands of Titius.

3.- ULPIANUS; *On the Edict, Book LXXVI*.- And, generally speaking, this question must be considered in making donations, for there is a great deal of

al estipulante a que me dé por cumplida la estipulación.

§ 4.- Asimismo, si por orden tuya hubiere yo prometido, a quien tú creías que era acreedor tuyo el dinero que yo creía que yo te debía, rechazaré con la excepción de dolo malo al demandante; y además, ejercitando la acción de cosa incierta conseguiré con la estipulación, que me dé por cumplida la estipulación.

§ 5.- Si Ticio me hubiere dado dinero sin ninguna estipulación, pero con la condición de que solamente se haga mío cuando Seyo haya sido hecho cónsul, se hará mío, ora si Seyo hubiere alcanzado el consulado habiéndose vuelto loco aquél, ora si habiendo fallecido.

§ 6.- Pero si el que me había de donar dinero se lo hubiere dado a otro para que me lo llevase, y hubiere fallecido antes de llevármelo, es sabido que el dinero no se hace de mi dominio.

§ 7.- Le hice a Ticio donación de diez para que con ellos comprase para sí a Stico; pregunto, si habiendo fallecido el esclavo antes que fuese comprado, recibiré por alguna razón los diez. Respondió: la cuestión es más bien de hecho que de derecho; porque si le dí a Ticio los diez con objeto de que comprase a Stico, y no se los hubiera de haber dado de otro modo, muerto Stico, los repetiré por la condición; pero si también en otro caso le hubiera de haber donado a Ticio los diez, y porque él se hubiera propuesto entretanto comprar a Stico, yo hubiere dicho que los daba para esto, para que comprase a Stico, se deberá estimar más bien la causa de la donación que no una condición para dar el dinero, y muerto Stico, quedará el dinero en poder de Ticio.

3.- ULPIANO; *Comentarios al Edicto, libro LXXVI*.- Y en general, en las donaciones se ha de determinar esto, que hay mucha diferencia entre si

causa fuit, cessare repetitionem, si condicio, repetitioni locum fore.

4.- POMPONIUS; *libro XVII, ad Sabinum*.- Etiam per interpositam personam donatio consummari potest.

5.- ULPIANUS; *libro XXXII, ad Sabinum*.- Affectionis gratia neque honestae neque inhonestae donationes sunt prohibitae, honestae erga bene merentes amicos vel necessarios, inhonestae circa meretrices.

6.- IDEM; *libro XLII, ad Sabinum*.- Qui saxum mihi eximere de suo permisit donationis causa, statim quum lapis exemptus est meus fit, neque prohibendo me evehere efficit, ut meus esse desinat, quia quodammodo traditione meus factus est: plane si mercennarius meus exemit, mihi exemit. Sed si is qui a me emerat sive mercede conduxerat, ut paterer eum sibi iure eximere, si antequam eximat, me paenituerit, meus lapis durat, si postea, ipsius factum avocare non possum: quasi traditio enim facta videtur, quum eximitur domini voluntate. Quod in saxo est, idem erit etiam, si in arbore caesa vel dempta acciderit.

7.- IDEM; *libro XLIV, ad Sabinum*.- Filius familias donare non potest, neque si liberam peculii administrationem habeat: non enim ad hoc ei conceditur, libera peculii administratio, ut perdat.

§ 1.- Quid ergo, si iusta ratione motus donet, numquid possit dici locum esse donationi? Quod magis probabitur.

difference whether there was a cause for making the donation, and whether a condition upon which it is dependent was imposed. If there was a cause, the property cannot be recovered; if a condition was imposed, there will be ground for its recovery.

4.- PAULUS; *On Sabinus, Book XVII*.- A donation can be completed even by a party who intervenes.

5.- ULPIANUS; *On Sabinus, Book XXXII*.- Neither honorable nor dishonorable donations are prohibited, where they are made on account of affection. They are honorable where they are given to deserving friends or relatives; dishonorable, where they are given to harlots.

6.- THE SAME; *On Sabinus, Book XLII*.- Where anyone permits me, by way of donation, to remove stone from his property, as soon as the stone is taken out it will be mine, and he cannot prevent me from having it by forbidding its removal, because it becomes mine, as it were, by delivery. It is clear that if someone, who had been employed by me, should quarry the stone, he quarries it for me. If, however, anyone purchases the stone from me, or leases it for a consideration, in such a way that I can permit him to quarry for himself, and, before he does so, I change my mind, the stone will continue to belong to me. If I should change my mind afterwards I cannot revoke his act, as delivery is presumed to have been made when he quarried the stone with the consent of the owner. What applies to the stone should also be considered to apply where a tree is cut down, or is taken out by the roots, under similar circumstances.

7.- THE SAME; *On Sabinus, Book XLIV*.- A son under paternal control cannot make a donation even if he has free administration of his peculium, for this is not granted him in order that he may lose his property.

§ 1.- But what if, induced by some good reason, he makes a donation? Can it be said that there is legal ground for making it? The latter is the better opinion.

hubo causa para donar, o condición; si hubo causa, deja de tener lugar la repetición, y si condición, habrá de haber lugar a la repetición.

4.- POMPONIO; *Comentarios a Sabino, libro XVII*.- También se puede consumir la donación mediante interpuesta persona.

5.- ULPIANO; *Comentarios a Sabino, libro XXXII*.- No están prohibidas las donaciones por causa de un afecto honesto ni deshonesto; de un afecto honesto, a favor de amigos que las merecen, o de los parientes; de uno deshonesto, a favor de las meretrices.

6.- EL MISMO; *Comentarios a Sabino, libro XLII*.- Uno me permitió, por causa de donación, sacar piedra de su fundo; la piedra se hace mía al punto que fue extraída, y no hace que deje de ser mía prohibiéndome que la transporte, porque en cierto modo se hizo mía mediante entrega; y, a la verdad, si un mercenario mío la extrajo, la extrajo para mí. Pero si la extrajo el que había comprado de mí, o arrendado mediante retribución, que yo consintiese que él la extrajera para sí con derecho, la piedra permanece siendo mía, si yo me hubiere arrepentido antes que la extrajese; y si después, no puedo revocar lo hecho por el mismo, porque se considera hecha una especie de entrega, puesto que se hace la extracción por la voluntad del dueño. Y lo que sucede respecto a la piedra, sucederá también si el caso aconteciere tratándose de árbol cortado o quitado.

7.- EL MISMO; *Comentarios a Sabino, libro XLIV*.- El hijo de familia no puede hacer donación, ni aunque tenga la libre administración de su peculio; porque no se le concede la libre administración de su peculio para que lo pierda.

§ 1.- Luego, si hiciera donación movido por justo motivo, ¿se podrá decir acaso que tiene lugar la donación? Y esto es lo que preferentemente se admite.

§ 2.- Item videamus, si quis filio familias liberam peculii administrationem concesserit, ut nominatim adiceret sic se ei concedere, ut donare quoque possit, an locum habeat donatio: et non dubito donare quoque eum posse.

§ 3.- Nonnumquam etiam ex persona poterit hoc colligi: pone enim filium esse senatoriae vel cuius alterius dignitatis: quare non dicas videri patrem, nisi ei specialiter donandi facultatem ademit, hoc quoque concessisse, dum liberam dat peculii administrationem?

§ 4.- Pari autem ratione, qua donare filius familias prohibetur, etiam mortis causa donare prohibebitur: quamvis enim ex patris voluntate mortis quoque causa donare possit, attamen ubi cessat voluntas, inhibebitur haec quoque donatio.

§ 5.- Sed enim meminisse oportebit, si cui donare quoque permissum est, nisi specialiter etiam mortis causa donare fuerit permissum, non posse mortis causa donare.

§ 6.- Haec omnia locum habebunt in paganis: ceterum qui habent castrense peculium vel quasi castrense, in ea condicione sunt, ut donare et mortis causa et non mortis causa possint, quum testamenti factionem habeant.

8.- PAULUS; *libro XV, ad Sabinum*.- Quae liberti imposita libertatis causa praestant, ea non donantur: res enim pro his intercessit.

9.- POMPONIUS; *libro XXXIII, ad Sabinum*.- In aedibus alienis habitare gratis donatio videtur: id enim ipsum capere videtur qui habitat, quod mercedem pro habitatione non solvit. Potest enim et citra corporis donationem valere donatio, veluti si

§ 2.- Again, let us see if anyone should grant a son under paternal control the free administration of his peculium, and should add specifically that this is done to enable him to make a donation; will the donation be valid? I do not doubt that he can make a valid donation under such circumstances.

§ 3.- Sometimes the power to make a donation may be inferred from the rank of the person; for suppose that the son was of senatorial rank, or had been promoted to some other portion, why can it not be said that his father, when he gave him the free administration of his peculium, granted him also the privilege of making a donation of it, unless he expressly deprived him of the power of doing so?

§ 4.- For the same reason that a son under paternal control is forbidden to make a donation inter vivos, he is also forbidden to make one mortis causa. For although he can make a donation mortis causa with the consent of his father, he is prohibited doing so if his consent is not given.

§ 5.- It must, however, be remembered that if anyone is permitted to make a donation without it being specified that he can make one mortis causa, he cannot do so.

§ 6.- All these regulations apply to persons in civil life. Where, however, soldiers have a castrense or a quasi castrense peculium, they are in such a position that they can make a donation mortis causa as well as a donation inter vivos, since they have testamentary capacity.

8.- PAULUS; *On Sabinus, Book XV*.- Money paid by freedmen in order to obtain their liberty is not a donation, for a consideration is given for it.

9.- POMPONIUS; *On Sabinus, Book XXXIII*.- When permission is given anyone to lodge without payment in the house of another, it is considered a donation; for he who has the lodging is held to obtain as a gift the rent which he does not pay. A donation

§ 2.- Veamos también, si, habiéndole concedido uno a un hijo de familia la libre administración de su peculio, de suerte que añadiese expresamente que él se la concedía de modo que también pudiera hacer donación, tendrá lugar la donación. Y no dudo, que también éste puede donar.

§ 3.- A veces también se podrá colegir esto por razón de la persona; porque supón, que es hijo de una senatorial, o de otra de alguna dignidad; ¿porqué no dirás que parece que el padre, si especialmente no le quitó la facultad de hacer donación, se la concedió también al darle la libre administración de su peculio?

§ 4.- Por la misma razón por la que se le prohíbe al hijo hacer donación, se le prohibirá también que haga donación por causa de muerte; porque aunque con la voluntad del padre pueda donar también por causa de muerte, sin embargo, cuando deja de haber esta voluntad se prohibirá también esta donación.

§ 5.- Pero convendrá tener presente, que si a alguno se le permitió también hacer donación, no puede hacer donación por causa de muerte, si especialmente no se le hubiere permitido también hacer donación por causa de muerte.

§ 6.- Todo esto tendrá lugar tratándose de paisanos; pero los que tienen peculio castrense, o casi castrense, son de tal condición que pueden donar por causa de muerte, y también por causa que no sea de muerte, puesto que tienen facultad para hacer testamento.

8.- PAULO; *Comentarios a Sabino, libro XV*.- Las prestaciones que hacen los libertos, impuestas por causa de su libertad, no son donaciones; porque medió algo para ellas.

9.- POMPONIO; *Comentarios a Sabino, libro XXXIII*.- Se considera donación el habitar gratuitamente en casa ajena; porque se considera que el que la habita adquiere por lo mismo que no paga retribución por la habitación. También puede ser

donationis causa quum debitore meo paciscar, ne ante certum tempus ab eo petam.

§ 1.- Ex rebus donatis fructus perceptus in rationem donationis non computatur: si vero non fundum, sed fructus perceptionem tibi donem, fructus percepti venient in computationem donationis.

§ 2.- Quod filius familias patris iussu aut voluntate donavit, perinde est, ac si pater ipse donaverit aut si mea voluntate rem meam tu nomine tuo Titio dones.

§ 3.- Donari non potest, nisi quod eius fit, cui donatur.

10.- PAULUS; *libro XV, ad Sabinum*.- Absenti, sive mittas qui ferat, sive quod ipse habeat sibi habere eum iubeas, donari recte potest. Sed si nescit rem quae apud se est sibi esse donatam, vel missam sibi non acceperit, donatae rei dominus non fit, etiamsi per servum eius cui donabatur missa fuerit, nisi ea mente servo eius data fuerit, ut statim eius fiat.

11.- GAIUS; *libro III, de legatis ad Edictum Praetoris urbani*.- Quum de modo donationis quaeritur, neque partus nomine neque fructuum neque pensionum neque mercedum ulla donatio facta esse videtur.

12.- ULPIANUS; *libro III, Disputationum*.- Qui ex donatione se obligavit, ex Rescripto Divi Pii in quantum facere potest convenitur. Sed enim id, quod creditoribus debetur, erit detrahendum: haec vero, de quibus ex eadem causa quis obstrictus est, non debebit detrahere.

can also be valid without the delivery of the property; as, for instance, where, by way of donation I make an agreement with my debtor that I will not demand payment of him before a certain time has elapsed.

§ 1.- The income from property which is donated is not included as part of the donation. If, however, I should give you, not the ownership of a tract of land, but the right to gather the crops, this will be held to constitute a donation.

§ 2.- If a son under paternal control makes a donation by the order, or with the consent of his father, it is the same as if the father himself had made it, or if you should make a donation to Titius of my property with my consent in your own name.

§ 3.- No one can make a donation, unless what is given becomes the property of the person to whom it is made.

10.- PAULUS; *On Sabinus, Book XV*.- A donation can properly be made to a person who is absent, whether you send someone to take it to him, or whether you direct him to keep something which he has in his possession. If, however, he does not know that the property which is in his possession is given to him, or if, after it is sent to him, he should not accept it, he will not become the owner of the article designated, even if it has been sent to him by his own slave; unless it was given to the latter with the intention that it should instantly become the property of his master.

11.- GAIUS; *On the Edict of the Urban Praetor Concerning Legacies*.- When a dispute arises with reference to the amount of the donation, neither the children of female slaves, crops, rents, nor wages are held to be included.

12.- ULPIANUS; *Disputations, Book III*.- Anyone who binds himself to make a donation can, according to a Rescript of the Divine Pius, only be sued for an amount which he is able to pay, for what he owes to his creditors must first be deducted; but what he is bound to give in the same manner to others should not

válida una donación sin la donación de una cosa corpórea, por ejemplo, si por causa de donación pactare yo con un deudor mío, que no le reclamaré antes de cierto tiempo.

§ 1.- El fruto percibido de las cosas donadas no se computa en la cuenta de la donación; pero si yo te donase no el fundo sino la percepción de los frutos, los frutos percibidos vendrán comprendidos en el cómputo de la donación.

§ 2.- Lo que un hijo de familia donó por orden o con la voluntad de su padre, es lo mismo que si lo hubiere donado el mismo padre, o que si con mi voluntad tú le donaras en tu nombre a Ticio una cosa mía.

§ 3.- No se puede donar sino lo que se hace de aquel á quien se le dona.

10.- PAULO; *Comentarios a Sabino, libro XV*.- Se le puede hacer válidamente donación a un ausente ora le envíes quien se la lleve, ora mandándole que tenga para sí lo que él mismo tenía; pero si no supiera que le había sido donada la cosa que está en su poder, o si habiéndosele enviado no la hubiere recibido, no se hace dueño de la cosa donada, aunque ésta haya sido enviada por medio de un esclavo de aquel a quien se le donaba, a no ser que haya sido dada a su esclavo con la intención de que al punto se haga de él.

11.- GAYO; *Comentarios al Edicto del Pretor urbano, libro III de los legados*.- Cuando se duda sobre la cuantía de la donación, se considera que no se hizo donación alguna ni por razón de parto, ni de frutos, ni de pensiones, ni de retribuciones.

12.- ULPIANO; *Disputas, libro III*.- El que se obligó por virtud de una donación, es demandado en virtud de rescripto del Divino Pío por cuanto puede hacer; porque se habrá de deducir lo que se les debe a sus acreedores; pero no deberá deducir aquello a que uno se obligó por la misma causa.

be deducted.

13.- IDEM; *libro VII, Disputationum*.- Qui mihi donatum volebat, servo communi meo et Titii rem tradidit: servus vel sic accepit quasi socio adquisiturus vel sic quasi mihi et socio: quaerebatur quid ageret. Et placet, quamvis servus hac mente acceperit, ut socio meo vel mihi et socio adquirat, mihi tamen adquiri: nam et si procuratori meo hoc animo rem tradiderit, ut mihi adquirat, ille quasi sibi adquisiturus acceperit, nihil agit in sua persona, sed mihi adquiri.

14.- IULIANUS; *libro XVII, Digestorum*.- Qui alienum fundum donationis causa excolit, nullam retentionem propter impensas faciet, quia domini res ab eo iniectas continuo efficit.

15.- MARCIANUS; *libro III, Institutionum*.- Post contractum capitale crimen donationes factae non valent ex constitutione divorum Severi et Antonini, nisi condemnatio secuta sit.

16.- ULPIANUS; *libro II, Responsorum*.- Ex hac scriptura: "sciant heredes mei me vestem universam ac res ceteras, quascumque in diem mortis meae mecum habui, illi et illi libertis meis vivum donasse" dominium ad libertos benigna interpretatione pertinere.

17.- IDEM; *libro LVIII, ad Edictum*.- Si in stipulatum iudicatum novationis causa deductum sit et stipulatio donationis causa accepto lata, dicendum est locum liberationem habere.

13.- THE SAME; *Disputations, Book VII*.- A certain person, who desired to make a donation to me, delivered the property to a slave jointly owned by Titius and myself, and the slave received it as an acquisition for my fellow joint owner, or did so on behalf of both of us. The question arose, what should be done? It was decided that although the slave accepted the property with the intention of acquiring it for my fellow joint owner, or for both himself and me, he, nevertheless, acquired it for me alone. For if he delivered it to my agent, with the intention that he should acquire it for me, and he accepted it in order to obtain it for himself, this will have no effect so far as he is concerned, but he will acquire the property for me.

14.- JULIANUS; *Digest, Book XVII*.- Anyone who cultivates the land of another, by way of making a donation, cannot reserve anything on account of expenses which he may incur, because he immediately transfers to the owner the right to any implements which he takes upon the land.

15.- MARCIANUS; *Institutes, Book III*.- According to a Constitution of the Divine Severus and Antoninus, donations made after the accusation of a capital crime are valid, unless the defendant is convicted.

16.- ULPIANUS; *Opinions, Book II*.- By the following clause, "Let my heirs take notice that my entire wardrobe, and any other property which I had in my possession at the time of my death, has been given to So-and-So and So-and-So, my freedmen," the ownership of the property will, by a liberal interpretation, belong to the said freedmen.

17.- THE SAME; *On the Edict, Book LVIII*.- Where property awarded by a judicial decision has been included in a new stipulation, and a release had been made of the latter for the purpose of making a donation, it must be said that the release will be valid.

13.- EL MISMO; *Disputas, libro VIII*.- Uno que me quería donar una cosa, la entregó a un esclavo común, mío y de Ticio, y el esclavo la recibió o como si la hubiera de adquirir para el consocio, o como si para mí y para mi consocio; se preguntaba ¿qué se debería hacer? Y esta determinado, que aunque el esclavo la hubiere recibido con la intención de adquirirla para mi consocio, o para mi y para mi consocio, es adquirida, no obstante, para mí; porque aunque uno hubiere entregado la cosa a mi procurador con la intención de que la adquiriera para mí, y él la hubiere recibido como para adquirirla para sí, éste no hace nada respecto a su persona, sino que adquiere para mí.

14.- JULIANO; *Digesto, libro XVII*.- El que por causa de donación cultiva un fundo ajeno, no hará retención alguna por razón de los gastos, porque al momento hace del dueño las cosas introducidas allí por él.

15.- MARCIANO; *Instituta, libro III*.- No son válidas en virtud de Constitución de los Divinos Severo y Antonino las donaciones hechas después de cometido un delito capital, si se hubiera seguido condena.

16.- ULPIANO; *Respuestas, libro II*.- En virtud de esta escritura: «sepan mis herederos que yo en vida doné a éste y a aquél, libertos míos, todos mis vestidos, y las demás cosas, cualesquiera que yo tuviere el día de mi fallecimiento», el dominio les pertenece a los libertos por benigna interpretación.

17.- EL MISMO; *Comentarios al Edicto, libro LVIII*.- Si por causa de novación se hubiera comprendido en una estipulación lo juzgado, y por causa de donación se hubiera dado por cumplida la estipulación, se ha de decir que tiene lugar la liberación.

18.- IDEM; *libro LXXI, ad Edictum*.- Aristo ait, quum mixtum sit negotium cum donatione, obligationem non contrahi eo casu, quo donatio est, et ita et Pomponius eum existimare refert.

§ 1.- Denique refert aristonem putare, si servum tibi tradidero ad hoc, ut eum post quinquennium manumittas, non posse ante quinquennium agi, quia donatio aliqua inesse videtur: aliter atque, inquit, si ob hoc tibi tradidissem, ut continuo manumittas: hic enim nec donationi locum esse et ideo esse obligationem. Sed et superiore casu quid acti sit, inspiciendum Pomponius ait: potest enim quinquennium non ad hoc esse positum, ut aliquid donetur.

§ 2.- Idem aristo ait, si donationis causa in hoc tradatur servus, ut post quinquennium manumittatur, sit autem alienus, posse dubitari an usucapiatur, quia aliquid donationis interveniret. Et hoc genus quaestionis in mortis causa donationibus versari Pomponius ait et magis putat ut, si ita donetur, ut post quinquennium manumittatur, posse dici usucapionem sequi.

§ 3.- Labeo ait, si quis mihi rem alienam donaverit inque eam sumptus magnos fecero et sic mihi evincatur, nullam mihi actionem contra donatorem competere: plane de dolo posse me adversus eum habere actionem, si dolo fecit.

19.- IDEM; *libro LXXVI, ad Edictum*.- Hoc iure utimur, ut in rebus publicis, quum de donatione quaeritur, illud solum spectetur, utrum ob causam aliquam iustam rei publicae promittat quis vel polliceatur an non, ut, si ob honorem aliquem promittat, teneatur, si minus, non.

18.- THE SAME; *On the Edict, Book LXXI*.- Aristo says that when any other transaction is mixed with a donation, an obligation growing out of the former is not contracted with reference to the donation. Pomponius also says that he holds the same opinion.

§ 1.- He also says that Aristo thinks that if I deliver to you a slave on condition that you manumit him after five years, you cannot act before the five years have elapsed, because a species of donation is considered to be included in the transaction. He, however, states that it will be otherwise if I deliver the slave to you in order that you may manumit him immediately; for, in this instance, there is no donation, and hence the obligation exists. Pomponius, however, says that in the first instance the intention of the parties should be ascertained, for the term of five years may not have been prescribed with a view to making a donation.

§ 2.- Aristo also says, that if a slave is delivered for the purpose of making a donation on condition that he shall be manumitted after five years have elapsed, and the slave belongs to another, a doubt may arise whether the slave can be acquired by usucaption, because a species of donation exists in this case. Pomponius says that this question also applies to donations mortis causa, and he is inclined to think that if the slave was donated under the condition that he be manumitted after five years, it may be held that he can be acquired by usucaption.

§ 3.- Labeo says that if anyone should give me property belonging to another, and I should incur considerable expense on account of it, and then it should be evicted, I will not be entitled to any action on this account against the donor; but it is evident that I will be entitled to one against him on the ground of fraud, if he acted in bad faith.

19.- THE SAME; *On the Edict, Book LXXVI*.- It is our practice where, in public matters, a question arises with reference to a donation, to only ascertain whether the donor made a promise to the city for some just cause, or not; since if he did so in consideration of some office which he received, he

18.- EL MISMO; *Comentarios al Edicto, libro LXXI*.- Dice Aristón, que cuando con la donación se hubiera mezclado un negocio, no se contrae obligación en este caso, en el que hay donación; y dice Pomponio que también él lo estima así.

§ 1.- Refiere finalmente, que opina Aristón, que si yo te hubiere entregado un esclavo para esto, para que lo manumitas después de un quinquenio, no se puede ejercitar acción antes del quinquenio, porque se considera que hay aquí alguna donación. Otra cosa sería, dice, si yo te lo hubiere entregado para que inmediatamente lo manumitas; porque en este caso no tiene lugar la donación, y hay por lo tanto obligación. Pero aun en el caso anterior dice Pomponio que se ha de ver qué es lo que se haya hecho; porque se puede haber señalado el quinquenio no para hacer alguna donación.

§ 2.- Dice el mismo Aristón, que si por causa de donación se entregara un esclavo para que fuese manumitido después de un quinquenio, pero el esclavo fuera de otro, se podía dudar si sería usucapido, porque habría mediado una especie de donación. Y dice Pomponio, que este género de duda tiene lugar en las donaciones por causa de muerte, y juzga más cierto, que si se hiciera la donación para que sea manumitido después de un quinquenio, se puede decir que se verifica la usucapición.

§ 3.- Dice Labeón, que si alguno me hubiere donado una cosa ajena, y habiendo hecho yo en ella grandes gastos se me hiciera evicción de la misma, no me compete ninguna acción contra el donante; pero que si lo hizo con dolo, puedo tener contra él la acción de dolo.

19.- EL MISMO; *Comentarios al Edicto, libro LXXVI*.- Observamos este derecho, que respecto a cosas públicas, cuando se trata de donación, se atiende solamente a esto, a si alguno promete u ofrece a la república por alguna justa causa, o no por justa causa; de suerte que, si prometiera por algún

§ 1.- Labeo scribit extra causam donationum esse talium officiorum mercedes ut puta: si tibi adfuero, si satis pro te dederò, si qualibet in re opera vel gratia mea usus fueris.

§ 2.- Non potest liberalitas nolenti adquiri.

§ 3.- Si quis dederit pecuniam mutuam Titio reddendam Seio, cui donatum volebat, deinde Titius mortuo donatore seio dedisse proponatur, erit consequens dicere pecuniam Seio fieri, sive mortuum scivit sive ignoravit is qui dabat, quia pecunia fuit dantis: sed si quidem ignoravit mortuum, erit liberatus, si sic mutuam pecuniam accepit solvendam Seio. Si autem mandavero tibi, ut pecuniam Titio des, cui donare volebam, et tu ignorans me mortuum hoc feceris, habebis adversus heredes meos mandati actionem: si sciens, non habebis.

§ 4.- Si quis servo pecuniam crediderit, deinde si liber factus eam expromiserit, non erit donatio, sed debiti solutio. Idem in pupillo, qui sine tutoris auctoritate debuerit, dicendum est, si postea tutore auctore promittat.

§ 5.- Sed et hae stipulationes, quae ob causam fiunt, non habent donationem.

§ 6.- Denique pegasus putabat, si tibi centum spondero hac condicione, si iurasses te nomen meum laturum, non esse donationem, quia ob rem facta est, res secuta est.

20.- MARCELLUS; *libro XXII, Digestorum*.- Si

will be liable; otherwise, he will not.

§ 1.- Labeo says that compensation for services of this kind is not included in donations; for example, if they are made conditionally as follows, "If I come to your aid; if I give security for you; if you make use of my services, or influence in the transaction."

§ 2.- A donation cannot be acquired by anyone who is unwilling to accept it.

§ 3.- Where a man lends money to Titius to be paid to Seius, to whom he desires it to be donated, and Titius does not pay it to Seius until after the death of the donor; the result will be that it can be said that the money will belong to Seius, whether he who paid it knew that the donor was dead, or was not aware of that fact; because the money still belonged to the latter. If he did not know that the donor was dead, he will be released from his obligation, if he borrowed the money to be paid to Seius. If, however, I should direct you to pay a certain sum of money to Titius, to whom I intend to donate it, and you not being aware that I was dead should do so, you will be entitled to an action on mandate against my heirs; but if you knew it, you will not be entitled to this action.

§ 4.- If anyone lends money to a slave, and the slave, having afterwards become free, makes a new promise to pay it, this will not be a donation, but the acknowledgment of a debt. The same rule applies to the case of a ward, who becomes indebted without the authority of his guardian, if he afterwards, with the consent of his guardian, contracts a new obligation.

§ 5.- Stipulations which are entered into for a valid consideration are not held to be donations.

§ 6.- In conclusion, Pegasus thinks that if I promise you a hundred aurei, under the condition that you swear to bear my name, this will not be a donation, because the promise was made for a consideration, and a consideration was paid.

20.- MARCELLUS; *Digest, Book XXII*.- If a

honor, quede obligado, y si no, no.

§ 1.- Escribe Labeón, que están fuera de la condición de las donaciones las retribuciones de algunos oficios, por ejemplo, si yo te hubiere asistido, si por ti hubiere dado fianza, si en algún asunto te hubieres utilizado de trabajo ó de favor mío.

§ 2.- No se puede adquirir liberalidad para el que no la quiere.

§ 3.- Si alguno le hubiere dado a Ticio dinero en mutuo, para que se lo entregue a Seyo, al que quería hacerle donación, y se dijera que después Ticio, fallecido el donante, se lo dió a Seyo, será consiguiente decir que el dinero se hace de Seyo, ya si supo, ya si ignoró el que lo daba que aquél había muerto, porque el dinero era del que lo daba; pero si verdaderamente ignoró que había fallecido, quedará libre, si recibió en mutuo el dinero para entregárselo a Seyo. Mas si yo te hubiere encomendado que le des dinero a Ticio, al cual quería yo hacerle donación, y tú lo hubieres hecho ignorando que yo había fallecido, tendrás contra mis herederos la acción de mandato, y no la tendrás, si lo sabías.

§ 4.- Si alguno le hubiere prestado dinero a un esclavo, y después éste, hecho libre, lo hubiere prometido, esto no será donación, sino pago de una deuda. Y lo mismo se ha de decir respecto del pupilo, que debiere una cantidad sin la autoridad de tutor, si después la prometiera con la autoridad del tutor.

§ 5.- Pero tampoco contienen donación las estipulaciones que se hacen en virtud de causa.

§ 6.- Finalmente, opinaba Pegaso, que si yo te hubiere prometido ciento con esta condición, si jurases que llevarías mi nombre, no había condición porque se hizo por una causa, que se verificó.

20.- MARCELO; *Digesto, libro XXII*.- Si el

patronus ex debita parte heres instituatur et libertus fidei eius commisit, ut quid daret, et hoc stipulanti fideicommissario promiserit, non erit cogendus solvere, ne pars ex legibus verecundiae patronali debita minuatur.

§ 1.- De illo dubitari potest, qui, quod per Falcidiam retinere poterat, voluntatem testatoris secutus sponndit se daturum: sed magis est, ut non possit suae confessioni obviare. Quemadmodum enim, si solvisset, fidem testatori suo adimplere videbatur et nulla ei repetitio concessa fuerat, ita et stipulatione procedente contra fidem testatoris, quam agnovit, venienti ei merito occurreretur.

21.- CELSUS; *libro XXVIII, Digestorum*.- Ut mihi donares, creditori meo delegante me promisisti: factum valet, ille enim suum recepit.

§ 1.- Sed si debitorem meum tibi donationis immodicae causa promittere iussi, an summo veris donationis exceptione necne, tractabitur. Et meus quidem debitor exceptione te agentem repellere non potest, quia perinde sum, quasi exactam a debitore meo summam tibi donaverim et tu illam ei credideris. sed ego, si quidem pecuniae a debitore meo nondum solutae sint, habeo adversus debitorem meum rescissoriam in id, quod supra legis modum tibi promisisti ita, ut in reliquum tantummodo tibi maneat obligatus: sin autem pecunias a debitore meo exegisti, in hoc, quod modum legis excedit, habeo contra te conditionem.

22.- MODESTINUS; *libro VIII, Differentiarum*.- Eum, qui donationis causa pecuniam vel quid aliud

patron is appointed heir to the share of an estate to which he is legally entitled, and his freedman charges him to pay a certain sum of money to someone, and he promises to do so in the presence of the beneficiary of the trust, he will not be compelled to pay it, for fear that the share due to him as patron under the law may be diminished.

§ 1.- A doubt may arise with reference to an heir who, in accordance with the will of the testator, promises to pay a legatee what he would have a right to retain under the Falcidian Law, but the better opinion is that he cannot violate his obligation. For if he does make payment, he will be considered to have exactly complied with the wishes of the testator, and no suit for recovery will be granted him; just as where he had made a previous stipulation, and acted contrary to the wishes of the testator, which he already had acknowledged, his claim will, with good reason, be barred.

21.- CELSUS; *Digest, Book XXVIII*.- In order to make me a donation you bound yourself to my creditor, to whom I delegated you. The act is valid, for the creditor receives what he is entitled to.

§ 1.- If, however, I order my debtor to bind himself to you for the purpose of making you a donation greater than that authorized by law, the question arises whether or not you can be barred by an exception upon the ground of the donation. My debtor cannot avail himself of the exception against you, if you bring an action, because I am in the same position as if I had given you the amount, after having collected it from my debtor, and you had lent it to him. If the money has not been paid by my debtor, I will be entitled to an action against him to annul anything which he has promised you above the amount authorized by law, so that he will only remain liable to you for the balance. If, however, you have already collected the entire amount from my debtor, I will be entitled to an action against you to recover the excess of what the law prescribes.

22.- MODESTINUS; *Differences, Book VIII*.- It is perfectly equitable that he who has promised a sum of

patrono fuera instituido heredero de la parte debida, el liberto encomendó a su fidelidad, que diese alguna cosa, y se la hubiere prometido al fideicomisario que la estipulaba, no habrá de ser obligado a pagarla, a fin de que no se disminuya la parte debida en virtud de las leyes a la consideración del patrono.

§ 1.- Se puede dudar respecto al que prometió secundando la voluntad del testador, que él daría lo que podía retener por la ley Falcidia; pero es más cierto que no puede ir contra su manifestación; porque así como si lo hubiese entregado parecería que cumplió con la confianza de su testador, y no se le habría concedido acción alguna para repetirlo, así también verificándose estipulación con razón se le haría oposición al ir él contra la voluntad del testador, que acató.

21.- CELSO; *Digesto, libro XXVIII*.- Para hacerme una donación prometiste por delegación mía a un acreedor mío; es válido lo hecho, porque él recibe lo suyo.

§ 1.- Pero si yo le mandé a un deudor mío que te prometiera por causa de donación inmoderada, se discutirá si serás, o no, repelido con la excepción de la donación. Y ciertamente que mi deudor no puede repelerte con la excepción al ejercitar tú la acción, porque yo soy considerado lo mismo que si te hubiere donado la suma cobrada de mi deudor, y tú se la hubieres prestado. Pero si verdaderamente aun no hubieran sido pagadas las cantidades por mi deudor, tengo contra mi deudor la acción rescisoria por lo que te prometí sobre la tasa de la ley, de suerte que te quede obligado solamente por lo demás; mas si cobraste de mi deudor las cantidades, tengo contra ti la condición por lo que excedió de la tasa de la ley.

22.- MODESTINO; *Diferencias, libro VIII*.- Es de suma equidad, que el que por causa de donación

promisit, de mora solutionis pecuniae usuras non debere, summae aequitatis est, maxime quum in bonae fidei contractibus donationis species non deputetur.

23.- IDEM; *libro XV, Responsorum*.- Modestinus respondit creditorem futuri temporis usuras et remittere et minuere pacto posse nec in ea donatione ex summa quantitatis aliquid vitii incurrere.

§ 1.- Modestinus respondit mente captum donare non posse.

24.- IAVOLENUS; *libro XIV, ex Cassio*.- Fideius-sori eius, qui donationis causa pecuniam supra modum legis promisit, exceptio dari debet etiam invito reo, ne, si forte reus solvendo non fuerit, pecuniam fideiussor amittat.

25.- IDEM; *libro VI, Epistolarum*.- Si tibi dederim rem, ut Titio meo nomine donares, et tu tuo nomine eam ei dederis, an factam eius putes? Respondit, si rem tibi dederim, ut Titio meo nomine donares eamque tu tuo nomine ei dederis, quantum ad iuris suptilitatem accipientis facta non est et tu furti obligares: sed benignius est, si agam contra eum qui rem accepit, exceptione doli mali me summo-veri.

26.- POMPONIUS; *libro IV, ad Quintum Mu-cium*.- Nuda ratio non facit aliquem debitorem: ut puta quod donare libero homini volumus licet referamus in rationes nostras debere nos, tamen nulla donatio intellegitur.

27.- PAPINIANUS; *libro XXIX, Quaestionum*.- Aquilius Regulus iuvenis ad Nicostratum rhetorem

money, or anything else, for the purpose of making a donation, shall not be liable for interest on account of delay in paying the money; and this is especially the case where the donation is not included in the class of bona fide contracts.

23.- THE SAME; *Opinions, Book XV*.- Modestinus gives it as his opinion that a creditor can, by mere agreement, entirely remit or diminish the amount of interest to be due hereafter, without affecting the validity of the donation on the ground that the amount is illegal.

§ 1.- It is the opinion of Modestinus that a person whose mind is affected cannot make a donation.

24.- JAVOLENUS; *On Cassius, Book XIV*.- An exception should be granted to the surety of him who, for the purpose of making a donation, promised a sum of money greater than that authorized by law, even against the consent of the principal; for if the latter should not be solvent, the surety will lose the money.

25.- THE SAME; *Epistles, Book VI*.- If I give you something in order that you may donate it to Titius, in my name, and you give it to him in yours, do you think that it becomes his property? The answer was that if I give you something for you to give to Titius in my name, and you give it to him in your own name, so far as the technicality of the law is concerned, it does not become the property of the person who receives it, and you will be liable for theft; but the more liberal construction is that if I bring an action against the person who has received the property, I can be barred by an exception on the ground of fraud.

26.- POMPONIUS; *On Quintus Mucius, Book IV*.- A simple statement in an account does not render anyone a debtor; for instance, if we wish to make a donation to a freeman, we can make the statement in our account that we owe it, but no donation is understood to be made.

27.- PAPINIANUS; *Questions, Book XXIX*.- A young man named Aquilius Regulus wrote to

prometió dinero u otra cualquiera cosa, no deba intereses por la mora de la entrega del dinero, principalmente porque esta especie de donación no es considerada entre los contratos de buena fe.

23.- EL MISMO; *Respuestas, libro XV*.- Respondió Modestino, que el acreedor podía dispensar y disminuir por pacto los intereses del tiempo futuro, y que en esta donación no se incurre en vicio alguno por el importe de la cantidad.

§ 1.- Modestino respondió, que el mentecato no podía hacer donación.

24.- JAVOLENO; *Doctrina de Cassio, libro XIV*.- Al fiador del que por causa de donación prometió una cantidad sobre la tasa de la ley, se le debe dar excepción aun contra la voluntad del deudor, a fin de que, si el deudor no fuere solvente, no pierda el fiador la cantidad.

25.- EL MISMO; *Epístolas, libro VI*.- Si yo te hubiere dado una cosa para que en mi nombre se la donases a Ticio, y tú se la hubieres dado en tu nombre ¿opinarás acaso que se hizo de él? Respondió: si yo te hubiere dado la cosa para que en mi nombre se la donases a Ticio, y tú se la hubieres dado en tu nombre, por lo que se refiere a la sutileza del derecho no se hizo ella del que la recibió, y tú estarás obligado por la acción de hurto; pero es más equitativo, que, si yo ejercitara acción contra el que recibió la cosa, me repelas con la excepción de dolo malo.

26.- POMPONIO; *Comentarios a Quinto Mucio, libro IV*.- Una simple cuenta no constituye a nadie deudor; por ejemplo, lo que queremos donar a un hombre libre, aunque consignemos en nuestras cuentas que se lo debemos, no se entiende, sin embargo, que es una donación.

27.- PAPINIANO; *Cuestiones, libro XXIX*.- Aquilio Régulo, el joven, escribió así al retórico

ita scripsit: quoniam et quum patre meo semper fuisti et me eloquentia et diligentia tua meliorem reddidisti, dono et permitto tibi habitare in illo cenaculo eoque uti". Defuncto Regulo controversiam habitationis patiebatur Nicostratus et quum de ea re mecum contulisset, dixi posse defendi non meram donationem esse, verum officium magistri quadam mercede remuneratum regulum ideoque non videri donationem sequentis temporis irritam esse. Quod si expulsus Nicostratus veniat ad iudicem, ad exemplum interdicti, quod fructuario proponitur, defendendus erit quasi loco possessoris constitutus, qui usum cenaculi accepit.

28.- IDEM; *libro III, Responsorum*.- Hereditatem pater sibi relictam filiae sui iuris effectae donavit: creditoribus hereditariis filia satisfacere debet, vel, si hoc minime faciat et creditores contra patrem veniant, cogendam eam per actionem praescriptis verbis patrem adversus eos defendere.

29.- IDEM; *libro XII, Responsorum*.- Donari videtur, quod nullo iure cogente conceditur.

§ 1.- Quidam in iure interrogatus nihil sibi debere tutoris heredes respondit. Eum actionem iure amisisse respondi: licet enim non transactionem, sed donationis haec verba esse quis accipiat, attamen eum, qui in iure confessus est, suam confessionem infirmare non posse.

§ 2.- Donationem quidem partis bonorum proximae cognatae viventis nullam fuisse constabat: verum ei, qui donavit ac postea iure praetorio successit, quoniam adversus bonos mores et ius gentium festinasset, actiones hereditarias in totum denegandas respondit:

Nicostratus, his teacher of rhetoric, as follows: "Because you have always remained with my father, and have benefited me by your eloquence and your care, I give, and permit you to lodge in and make use of, such-and-such an apartment." Regulus having died, the right of Nicostratus to the apartment was disputed; and when he consulted me, I told him that the act of Regulus could not be maintained to be a mere donation, but that he had remunerated him for his services, and granted him this privilege by way of compensation, and therefore, that the donation should not be held to be void for the time following the death of Regulus. If Nicostratus had been ejected, he could have gone into court and protected himself by an interdict, in the same way in which an usufructuary could have done, as he obtained the use of the apartment through having been given possession of the same.

28.- THE SAME; *Opinions, Book III*.- A father donated an estate, which had been left to him, to his daughter, who had become her own mistress. The daughter must satisfy the creditors of the estate, and if she should not do so, and the creditors should have recourse to her father, she can be compelled by an action praescriptis verbis to defend her father against the creditors.

29.- THE SAME; *Opinions, Book XII*.- A donation is held to be made if property is given when the donor is not compelled to do so by any law.

§ 1.- A certain person, having been interrogated in court, answered that the heirs of his guardian did not owe him anything. I gave it as my opinion that, by doing so, he had lost his right of action, for although these words may be understood to indicate not a business transaction, but a donation, still, he who has made an admission in court cannot contradict it.

§ 2.- It has been settled that where anyone makes a donation of a portion of the estate of his next of kin, who is still living, it is void. But it was held that if he who made the donation afterwards succeeded to the estate under the praetorian law, all suits arising from it should be refused him, because his acting in such

Nicostrato: «puesto que siempre estuviste con mi padre, y me hiciste mejor con tu elocuencia y diligencia, te dono y te permito que habites en aquel cenáculo, y que uses de él»; fallecido Régulo, soportaba Nicostrato controversia sobre la habitación; y habiéndome consultado sobre el particular, dije, que se podía defender que esta no era una mera donación, sino que Régulo remuneró con cierta retribución el cargo de maestro, y que por lo tanto no parecía que fuese nula la donación por el siguiente tiempo; pero que si expulsado Nicostrato recurriese al juez, se habrá de defender a la manera que por el interdicto que se le da al usufructuario, como constituido en lugar de un poseedor, que aceptó el uso de un cenáculo.

28.- EL MISMO; *Respuestas, libro III*.- Un padre le donó a su hija, constituida de propio derecho, la herencia que a él se le había dejado; la hija debe pagar a los acreedores de la herencia, o, si no hiciera esto, y los acreedores se dirigieran contra el padre, ha de ser ella obligada por la acción de las palabras prescrites a defender a su padre contra ellos.

29.- EL MISMO; *Respuestas, libro XII*.- Se considera que se dona lo que se concede sin que a ello obligue ningún derecho.

§ 1.- Uno, interrogado en juicio, respondió que nada le debían los herederos de su tutor; respondió que en derecho perdió él la acción; porque aunque alguno entienda que no hay transacción, sino que estas palabras son de donación, sin embargo, el que confesó en juicio no puede invalidar su confesión.

§ 2.- Era sabido que era ciertamente nula la donación de parte de los bienes de una próxima cognada que vive, pero respondió, que al que hizo la donación y después sucedió por derecho pretorio, se le debían de negar por completo las acciones de la herencia, porque se había apresurado contra las

haste was contrary both to good morals and the Law of Nations.

30.- MARCIANUS; *libro singulari de Delatoribus*. - Nam ei ut indigno aufertur hereditas.

31.- PAPINIANUS; *libro XII, Responsorum*. - Donationes in concubinam collatas non posse revocari convenit nec, si matrimonium inter eosdem postea fuerit contractum, ad irritum reccidere quod ante iure valuit. An autem maritalis honor et affectio pridem praecesserit, personis comparatis, vitae coniunctione considerata perpendendum esse respondi: neque enim tabulas facere matrimonium.

§ 1.- Species extra dotem a matre filiae nomine viro traditas filiae quae praesens fuit donatas et ab ea viro traditas videri respondi nec matrem offensam repetitionem habere vel eas recte vindicare, quod vir cavisset extra dotem usibus puellae sibi traditas, cum ea significatione non modus donationis declaretur nec ab usu proprietatis separaretur, sed peculium a dote puellae distingueretur. Iudicem tamen aestimaturum, si mater iure contra filiam offensa eas revocare velit, et verecundiae matris congruam bonique viri arbitrio competentem ferre sententiam.

§ 2.- Pater, qui filiae, quam habuit in potestate, mancipia donavit et peculium emancipatae non ademit, ex post facto donationem videbatur perfectisse.

30.- MARCIANUS; *On Informers*. - For he should be deprived of the estate as being unworthy of it.

31.- PAPINIANUS; *Opinions, Book XIII*. - It is established that donations made to a concubine cannot be revoked, for not even if marriage should afterwards be contracted by the parties, will what formerly was valid by law become of no force or effect? But where the question was asked if marital honor and affection did not already exist, I answered that this should be determined by considering the character of the persons and the nature of their union in life, for a mere written contract does not constitute marriage.

§ 1.- Where certain property was given by a mother to the husband of her daughter, in addition to the dowry, I gave it as my opinion that it should be considered to have been given to the daughter, who herself was present, and delivered it to her husband; and that the mother, who was offended, had no right to recover the property, nor could she under the law bring a personal action to do so, because the husband had specifically provided that the said property should be given to him for the benefit of the girl, in addition to her dowry; since by this statement, not only was the character of the donation indicated, and it was clear that the property was not separated from the use of the same, but it also showed that it was a peculium separate and distinct from the dowry. The magistrate, however, should determine whether the mother should recover the property if she was justly offended with her daughter, and he must render a decision with proper regard to the respect to be manifested toward a mother, and one which will coincide with the judgment of a good citizen.

§ 2.- A. father who gave certain slaves to his daughter, who was under his control, and did not deprive her of her peculium when he emancipated her, is held to have perfected the donation by his subsequent act.

buenas costumbres y el derecho de gentes.

30.- MARCIANO; *De los Delatores, libro único*. - pues se le quita la herencia como a indigno.

31.- PAPINIANO; *Respuestas, libro XII*. - Es conveniente que no se puedan revocar las donaciones hechas a una concubina, y ni si después se hubiere contraído matrimonio entre los mismos, no se invalida lo que antes fue válido en derecho; pero sobre si precedieron antes la consideración y el afecto de marido, respondí que se debía hacer examen comparando las personas y considerando la unión de su vida; porque no son los instrumentos los que constituyen el matrimonio.

§ 1.- Respondí, que las cosas entregadas fuera de la dote por la madre al marido en nombre de la hija, se consideran que fueron donadas a la hija que estuvo presente, y que por ella fueron entregadas al marido; y que ofendida la madre, no tiene acción para repetir las o para reivindicarlas con razón, porque el marido hubiese dado caución de que le habían sido entregadas fuera de la dote para los usos de su mujer, porque con esta manifestación no se declara un modo de donación, ni el uso se separa de la propiedad, sino que se distinguiría el peculio de la dote de la mujer; pero que el juez habrá de estimar si ofendida la madre contra la hija quería revocarlas con derecho, y proferir sentencia adecuada al respeto debido a la madre, y conforme a arbitrio de hombre bueno.

§ 2.- El padre que donó esclavos a una hija que tuvo bajo su potestad, y que no le quitó emancipada el peculio, parece que perfeccionó con un hecho posterior la donación.

§ 3.- Eiusmodi lege deposita in aede arca, ut eam ipse solus qui deposuit tolleretur aut post mortem domini aelius speratus, non videri celebratam donationem respondi.

§ 4.- Ratae donationes esse non possunt post crimen perduellionis contractum, quum heredem quoque teneat, etsi nondum postulatus vita decesserit.

32.- SCAEVOLA; *libro V, Responsorum*.- Lucius Titius epistolam talem misit: "ille illi salutem. Hospitio illo quamdiu volueris utaris superioribus diaetis omnibus gratuito, idque te ex voluntate mea facere hac epistula notum tibi facio": quaero an heredes eius habitatione eum prohibere possunt. Respondit secundum ea quae proponerentur, heredes eius posse mutare voluntatem.

33.- HERMOGENIANUS; *libro VI, iuris Epitomarum*.- Qui id, quod ex causa donationis stipulanti sponponderat, solvi constituit, actione constitutae pecuniae non in solidum, sed in quantum facere potest convenitur: causam enim et originem constitutae pecuniae, non iudicii potestatem praevalere placuit. Sed et condemnatus ex causa donationis in actione iudicati non frustra desiderat in quantum facere potest conveniri.

§ 1.- Ea lege donationis causa pecunia Titio numerata, ut statim donatori mutuo detur, non impeditur dominii translatio: ac propterea isdem nummis donatori creditis novum dominium in his quaeritur.

§ 2.- Mutus et surdus donare non prohibentur.

§ 3.- I gave it as my opinion, that where property was deposited in a temple under the condition that he alone could remove it who left it there, or Julius Speratus, after the death of the owner, it would not be considered as a donation.

§ 4.- Donations cannot be valid after the crime of treason has been committed, as the heir is also liable, even though the guilty party should die before having been convicted.

32.- SCAEVOLA; *Opinions, Book V*.- Lucius Titius sent the following letter: "So-and-So to So-and-So, Greeting. You can make use of such-and-such an apartment and all the rooms above it, gratuitously; and I notify you by means of this letter that you can do so with my consent." I ask whether the heirs of the writer can forbid the use of the apartment? The answer was that, according to the facts stated, the heirs of the person who wrote the letter can change the intention of the latter.

33.- HERMOGENIANUS; *Epitomes of Law, Book VI*.- Anyone who has made a new promise to pay, after having entered into an agreement to make a donation, can be sued in an action based on the promise, not for the entire amount, but only for what he is able to pay; for it has been settled that the cause and origin of the promise to make payment, and not the authority of the judge, must be considered. He, however, who has had judgment rendered against him on account of a donation, and an action is brought against him to enforce the judgment, can very properly ask that he only be sued to the extent of his pecuniary resources.

§ 1.- Where money has been paid to Titius as a donation, under the condition that he will immediately lend it to the donor, the transfer of ownership is not prevented; and for this reason where the same money is lent to the donor, a new ownership of it is acquired.

§ 2.- Persons who are dumb and deaf are not prohibited from making donations.

§ 3.- Respondí, que, depositada en una casa un arca con la condición de que la tomase sólo el que la depositó, o, después de la muerte del dueño, Elio Sperato, no se consideraba celebrada una donación.

§ 4.- Las donaciones no pueden ser válidas después de cometido crimen de lesa majestad, porque éste obliga también al heredero aunque hubiere fallecido no habiendo sido acusado todavía.

32.- SCAEVOLA; *Respuestas, libro V*.- Lucio Ticio envió esta carta: «Este a aquél, salud. Usa gratuitamente en aquella hospedería, mientras quisieres, de todas las habitaciones superiores, y te hago saber por esta carta que esto lo hagas por mi voluntad»; pregunto, ¿pueden sus herederos prohibir esta habitación? Respondió, que según lo que se exponía, sus herederos pueden cambiar la voluntad.

33.- HERMOGENIANO; *Epítome del Derecho, libro VI*.- El que se obligó a pagar lo que había prometido al que estipuló por causa de donación, es demandado con la acción del dinero constituido, no por la totalidad, sino por cuanto puede pagar; porque se determinó que la causa y el origen de la constitución del dinero no prevalecieran a la fuerza del juicio; pero también el condenado por causa de donación pretende no inútilmente con la acción de cosa juzgada que sea demandado por lo que puede pagar.

§ 1.- Habiéndosele entregado a Ticio por causa de donación dinero con la condición de que inmediatamente se lo dé en mutuo al donante, no se impide la traslación del dominio, y por lo tanto, habiéndosele prestado al donante las mismas monedas, se adquiere sobre ellas un nuevo dominio.

§ 2.- Al mudo y al sordo no se les prohíbe que donen.

§ 3.- Si, quum primus tibi donare vellet et tu donandi secundo voluntatem haberes, primus secundo ex voluntate tua stipulanti promiserit, perficitur donatio et, quia nihil primus secundo, a quo convenitur, donavit, et quidem in solidum, non in id quod facere potest condemnatur. Idque custoditur et si delegante eo, qui donationem erat accepturus, creditori eius donator promiserit: et hoc enim casu creditor suum negotium gerit.

34.- PAULUS; *libro V, Sententiarum*.- Si pater emancipati filii nomine donationis animo pecuniam faeneravit eamque filius stipulatus est, ipso iure perfectam donationem ambigi non potest.

§ 1.- Si quis aliquem a latrunculis vel hostibus eripuit et aliquid pro eo ab ipso accipiat, haec donatio inrevocabilis est: non merces eximii laboris appellanda est, quod contemplatione salutis certo modo aestimari non placuit.

35.- SCAEVOLA; *libro XXXI, Digestorum*.- Ad eum, quem manumiserat, epistulam misit in haec verba: "Titius Stichus libertus tuo salutem. Quum te manumiserim, peculium quoque tuum omne, quicquid habes tam in nominibus quam in rebus moventibus sive in numerato, me tibi concedere hac epistula manu mea scripta notum tibi facio". Eundem libertum testamento ex herede scripsit heredem, Sempronium ex triente: nec peculium Stichus legavit nec actiones praestari iussit. Quaesitum est, utrum in assem Stichus actio detur eorundem nominum, quae in peculio habuit, an utrisque heredibus pro portionibus hereditariis. Respondit secundum ea quae proponerentur utrisque heredibus pro hereditariis portionibus competere.

§ 3.- When anyone desires to make a donation to you, and you intend to donate the same article to another, the donation will be perfected if the first promises, with your consent, to give it to the second; and because the first gave nothing to the second, by whom he can be sued, he can have judgment rendered against him for the entire amount, and not for as much as he is able to pay. The same rule is observed where he who is to receive the donation has delegated the donor to his creditor; for, in this instance, the creditor is merely transacting his own business.

34.- PAULUS; *Decisions, Book V*.- If a father should lend money at interest in the name of his emancipated son, with the intention of giving it to him as a donation, and the son makes a stipulation with reference to said money, there is no doubt that the donation is perfected by operation of law.

§ 1.- If anyone should rescue a person from the hands of robbers, or enemies, and receive something from him as a reward for doing so, a donation of this kind is irrevocable, and should not be designated a reward for an eminent service rendered; as it has been decided that no limit should be fixed to an act performed for the purpose of saving life.

35.- SCAEVOLA; *Digest, Book XXXI*.- A man wrote to a slave whom he had manumitted, as follows: "Titius to Stichus, his freedman, Greeting. After having manumitted you I notify you by this letter, written by my own hand, that I give to you everything which you have in credits, in movable property, and in money." He also made the same freedman heir to two-thirds of his estate by will, and Sempronius his heir to the remaining third; but he did not bequeath to Stichus his peculium, nor did he direct that he should have the rights of action growing out of the same. The question arose whether an action should be granted to Stichus for the entire amount of the credits, including his peculium; or whether it should be granted to both of the heirs in proportion to their respective shares of the estate. The answer was that, in accordance with the facts stated, the action should be granted to both of them in proportion to their respective shares of the estate.

§ 3.- Si queriendo Primo hacerte una donación, y teniendo tú voluntad de hacer otra donación a Segundo, Primo le hubiere prometido con tu voluntad a Segundo, que estipuló, se perfecciona la donación; y como Primo no le donó nada a Segundo, por quien es demandado, es condenado ciertamente a la totalidad, y no a lo que puede pagar. Y lo mismo se observa, también si delegando el que había de recibir la donación, le hubiere prometido el donante a su acreedor; porque también en este caso el acreedor es gestor de su propio negocio.

34.- PAULO; *Sentencias, libro V*.- Si con intención de hacer donación hubiere el padre prestado dinero a interés en nombre del hijo emancipado, y el hijo estipuló aquel dinero, no se puede dudar que de derecho es perfecta la donación.

§ 1.- Si uno arrebató a otro del poder de ladrones o de enemigos, y por esto recibiera de él alguna cosa, esta donación es irrevocable; y no se ha de llamar retribución de muy meritorio trabajo, porque no plugo en consideración a la salvación que fuere estimado en cierta cantidad.

35.- SCÉVOLA; *Digesto, libro XXXI*.- Al que uno había manumitido le envió una epístola en estos términos: «Ticio a Stico, su libertus, salud. Te hago saber por esta carta escrita de mi mano, que al manumitirte te he concedido también todo tu peculio, todo lo que tienes tanto en créditos, como en bienes muebles, o en numerario»; al mismo libertus lo instituyó en su testamento heredero de dos tercios, y a Sempronio de una tercera parte, y no le legó el peculio a Stico, ni mandó que se le cediesen las acciones; se preguntó, si se le daría a Stico acción por la totalidad de los mismos créditos que tenía en su peculio, o a ambos herederos con arreglo a sus porciones de herencia. Respondió, que, según lo que se exponía, les compete a ambos herederos con arreglo a sus porciones de herencia.

§ 1.- Lucius Titius fundum Maeviae donavit et ante traditionem eundem fundum post dies paucos Seio pignori obligavit et intra dies triginta Maeviam in vacuum possessionem eiusdem fundi induxit: quaero, an donatio perfecta sit. Respondit secundum ea quae proponerentur perfectam: verum creditorem firmam pignoris obligationem habere.

§ 2.- Avia sub nomine Labeonis nepotis sui mutuum pecuniam dedit, et usuras semper cepit et instrumenta debitorum a Labeone recepit, quae in hereditate eius inventa sunt: quaero, an donatio perfecta esse videatur. Respondit, quum debitor Labeoni obligatus est, perfectam donationem esse.

TIT. VI

DE MORTIS CAUSA DONATIONIBUS
ET CAPIONIBUS

1.- MARCIANUS; *libro IX, Institutionum*.- Mortis causa donatio est, quum quis habere se vult quam eum cui donat magisque eum cui donat quam heredem suum.

§ 1.- Sic et apud Homerum Telemachus donat Piraeo.

2.- ULPIANUS; *libro XXXII, ad Sabinum*.- Iulianus libro septimo decimo Digestorum tres esse species mortis causa donationum ait, unam, quum quis nullo praesentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, quum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, quum mors fuerit insecuta.

§ 1.- Lucius Titius gave to Maevia a tract of land, by way of a donation, and a few days afterwards before delivering the same, he pledged the land to Seius, and then, within thirty days, gave Maevia possession of the said land. I ask whether the donation was perfected or not. The answer was that, in accordance with the facts stated, it was perfected, but that the creditor was undoubtedly entitled to his right in the land under the pledge.

§ 2.- A grandmother lent money, in the name of Labeo, her grandson, and always collected the interest, and the evidences of indebtedness were received by Labeo, and were afterwards found among the assets of his estate. I ask whether the donation should be considered to have been perfected. The answer was that, as the debtors were liable to Labeo, the donation was perfected.

TITLE VI

CONCERNING DONATIONS AND OTHER
ACQUISITIONS MORTIS CAUSA

1.- MARCIANUS; *Institutes, Book IX*.- A donation mortis causa is one where the party wishes to retain the property himself instead of transferring it to him to whom he donates it, but prefers that the donee shall have it rather than his heir.

§ 1.- Telemachus gives a donation of this kind to Piraeus, in Homer.

2.- ULPIANUS; *On Sabinus, Book XXXII*.- Julianus, in the Seventeenth Book of the Digest, says that there were three kinds of donations mortis causa. The first, where the donor, who is under no apprehension of impending death, makes a donation solely with a view to his decease. He says another kind of donation mortis causa is where anyone is disturbed by the immediate prospect of death and makes a donation, so that the article immediately becomes the property of the person who receives it. He says that the third kind of donation is where a man, apprehensive of death, does not give the

§ 1.- Lucio Ticio le donó un fundo a Mevia, y antes de la entrega le obligó pocos días después el mismo fundo en prenda a Seyo, y dentro de treinta días puso a Mevia en la vacua posesión del mismo fundo; pregunto, si se habrá perfeccionado la donación. Respondió, que, según lo que se exponía, se perfeccionó, pero que el acreedor tenía firme la obligación de la prenda.

§ 2.- Una abuela dio dinero en mutuo a nombre de Labeón, su nieto, y percibió siempre los intereses, y recibió de Labeón los instrumentos de los débitos, que se hallaron en su herencia; pregunto, si se considerará que es perfecta la donación. Respondió, que, habiéndose obligado el deudor a favor de Labeón, se perfeccionó la donación.

TÍTULO VI

DE LAS DONACIONES Y ADQUISICIONES
POR CAUSA DE MUERTE

1.- MARCIANO; *Instituta, libro IX*.- Hay donación por causa de muerte cuando alguno quiere tener la cosa mas bien que no que la tenga aquel a quien la dona, y que la tenga éste a quien la dona mas bien que su heredero.

§ 1.- Así dona también en Homero Telémaco a Pireo.

2.- ULPIANO; *Comentarios a Sabino, libro XXXII*.- Juliano dice en el libro décimo séptimo del Digesto, que hay tres especies de donaciones por causa de muerte; una, cuando uno dona no aterrado por temor alguno de presente peligro, sino por la sola consideración de la muerte; dice que hay otra especie de donación por causa de muerte, cuando alguno impresionado por inminente peligro dona de suerte que la cosa se haga inmediatamente del que la recibe; y dice que la tercera especie de donación es, cuando alguno impulsado por un peligro no la da de modo que al punto se haga del que la recibe, sino solamente

3.- PAULUS; *libro VII, ad Sabinum*.- Mortis causa donare licet non tantum infirmæ valetudinis causa, sed periculi etiam propinquæ mortis vel ab hoste vel a prædonibus vel ab hominis potentis crudelitate aut odio aut navigationis ineundæ:

4.- GAIUS; *libro I, Rerum quotidianarum, sive Aureorum*.- Aut per insidiosa loca iturus.

5.- ULPIANUS; *libro II, Institutionum*.- Aut ætate fessus:

6.- PAULUS; *libro VII, ad Sabinum*.- Haec enim omnia instans periculum demonstrant.

7.- ULPIANUS; *libro XXXII, ad Sabinum*.- Si aliquis mortis causa donaverit et poena fuerit capitis affectus, removetur donatio ut imperfecta, quamvis ceteræ donationes sine suspitione poenæ factæ valeant.

8.- IDEM; *libro VII, ad Sabinum*.- Qui pretio accepto hereditatem prætermisit, sive ad substitutum perventura sit hereditas, sive ab eo ab intestato successurus, mortis causa capere videtur: nam quidquid propter alicuius mortem obvenit, mortis causa capitur: quam sententiam et Iulianus probat et hoc iure utimur. Nam et quod a statulibero condicionis implendæ causa capitur vel a legatario, mortis causa accipitur: et quod pater dedit propter mortem filii vel cognati, mortis causa capi Iulianus scripsit.

§ 1.- Denique et sic posse donari aut, ut, si convaluerit, recipiatur.

property so that its ownership will immediately vest in the person entitled to it, but provides that it shall belong to him after the death of the donor.

3.- PAULUS; *On Sabinus, Book VII*.- It is lawful to make a donation mortis causa not only when a person is induced to do so by failing health, but also because of the danger of impending death, either at the hands of enemies, or robbers; or on account of the cruelty or hatred of some powerful man, or when anyone about to undertake a sea voyage;

4.- GAIUS; *Diurnal or Golden Matters*.- Or travel through dangerous places.

5.- ULPIANUS; *Institutes, Book II*.- Or where one is exhausted by old age:

6.- PAULUS; *On Sabinus, Book VII*.- For all these conditions indicate impending danger.

7.- ULPIANUS; *On Sabinus, Book XXXII*.- If anyone convicted of a capital crime should make a donation mortis causa, the donation will be annulled as imperfect; although other donations made by him previous to the suspicion that he was liable to such a penalty may be valid.

8.- THE SAME; *On Sabinus, Book VII*.- Where anyone, having received a sum of money, rejects an estate, whether it passes to a substitute, or whether an heir succeeds to it on the ground of intestacy, he is considered to have obtained the money mortis causa; for whatever is acquired on account of the death of anyone is obtained mortis causa. Julianus adopts this opinion, and we make use of it. For where anything is received by a slave, who is to be free under a certain condition, for the purpose of complying with the condition; or anything is obtained by a legatee mortis causa; or where a father gives anything on account of the death of his son, or of a relative; Julianus states that it is acquired mortis causa.

§ 1.- Hence, he says that a donation can be made in such a way that it will revert to the donor, if the sick

cuando se hubiere seguido la muerte.

3.- PAULO; *Comentarios a Sabino, libro VII*.- Es lícito donar por causa de muerte, no solamente con motivo de enfermedad, sino también con motivo de peligro de muerte próxima, ya por causa de enemigo, ya por la de ladrones, ya por crueldad u odio de una persona poderosa, o por haber de emprender una navegación.

4.- GAYO; *Diario, libro I*.- O por haber de pasar por lugares peligrosos.

5.- ULPIANO; *Instituta, libro II*.- O por estar agobiado por la edad.

6.- PAULO; *Comentarios a Sabino libro VII*.- Porque todas estas cosas denotan un peligro inminente.

7.- ULPIANO; *Comentarios a Sabino, libro XXXII*.- Si alguno hubiere donado por causa de muerte, y hubiere sido condenado a pena capital, la donación será rechazada como no perfeccionada, aunque sean válidas las demás donaciones hechas sin sospecha de la pena.

8.- EL MISMO; *Comentarios a Sabino, libro VII*.- El que por precio recibido prescindió de la herencia parece que adquiere por causa de muerte, ya si la herencia hubiera de ir al substituto, ya si a éste hubieran de sucederle abintestato; porque cualquier cosa que va a uno por virtud de la muerte de otro se adquiere por causa de muerte; cuya opinión aprueba también Juliano; y observamos este derecho. Porque también se adquiere por causa de muerte lo que para cumplir la condición se adquiere por el instituido libre bajo condición, o por el legatario; y lo que el padre dio por causa de la muerte de un hijo o de un cognado, escribió Juliano, que se adquiría por causa de muerte.

§ 1.- Y finalmente dice, que también se puede donar de modo que si llegare uno a convalecer se

9.- PAULUS; *libro III, ad Sabinum*.- Omnibus mortis causa capere permittitur, qui scilicet et legata accipere possunt.

10.- ULPIANUS; *libro XXIV, ad Sabinum*.- Ei, cui mortis causa donatum est, posse substitui constat in hunc modum, ut promittat alicui, si ipse capere non possit, vel sub alia condicione.

11.- IDEM; *libro XXXIII, ad Sabinum*.- Mortis causa filii sui pater recte donare poterit etiam constante matrimonio filii.

12.- IDEM; *libro XLIV, ad Sabinum*.- Si mulier, ventris nomine per calumniam ut in possessionem mitti desideret, pecuniam accepit, forte dum substituto patrocinator, ut institutum aliqua ratione excludat, mortis causa eam capere Iulianus saepius scribit.

13.- IULIANUS; *libro XVII, Digestorum*.- Si alienam rem mortis causa donavero eaque usucapta fuerit, verus dominus eam condicere non potest, sed ego, si convaluero.

§ 1.- Marcellus notat: in mortis causa donationibus etiam facti quaestiones sunt. Nam et sic potest donari, ut omnimodo ex ea valetudine donatore mortuo res non reddatur: et ut reddatur, etiamsi prior ex eadem valetudine donator decesserit, si tamen mutata voluntate restitui sibi voluerit. Sed et sic donari potest, ut non aliter reddatur, quam si prior ille qui acceperit decesserit. Sic quoque potest donari mortis causa, ut nullo casu sit eius repetitio, id est nec si convaluerit quidem donator.

person should recover.

9.- PAULUS; *On Sabinus, Book III*.- Everyone is permitted to acquire a donation mortis causa who has the right to receive a legacy.

10.- ULPIANUS; *On Sabinus, Book XXIV*.- It is settled that he to whom a donation mortis causa is made can be substituted in such a way that he can promise the property to someone else, if the latter cannot himself acquire it, or cannot do so under some other condition.

11.- THE SAME; *On Sabinus, Book XXXIII*.- A father can legally make a donation on account of the death of his son, even during the existence of his son's marriage.

12.- THE SAME; *On Sabinus, Book XLIV*.- Where a woman fraudulently asks to be placed in possession of an estate in the name of her unborn child, and receives money on this account, in order to favor a substitute, or to exclude the appointed heir, for some reason or other, Julianus frequently stated that she obtained this money mortis causa.

13.- JULIANUS; *Digest, Book XVII*.- If I give property belonging to another as a donation mortis causa, and it should afterwards be acquired by usucaption, the true owner cannot recover it, but I can do so, if I regain my health.

§ 1.- Marcellus says that questions of fact may arise with reference to donations mortis causa, for the donation may be made in such a way that if the donor should die of his illness, it shall not be returned; or that it shall be returned if the donor, having changed his mind, desires it to be restored to him, even if he should die of the same illness. A donation of this kind can also be made subject to the provision that it shall not be returned unless the person who is to receive it dies first. A donation mortis causa can be made in such a way that the property shall not be returned in any event; that is to say, not even if the donor should recover his health.

recobre.

9.- PAULO; *Comentarios a Sabino, libro III*.- Se les permite adquirir por causa de muerte a todos los que, por supuesto, pueden recibir también legados.

10.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Es sabido que al que se le hizo donación por causa de muerte se le puede nombrar substituto, de modo que si el no pudiera adquirir la cosa se la prometa a otro, o bajo otra condición.

11.- EL MISMO; *Comentarios a Sabino, libro XXXIII*.- Por causa de la muerte de su hijo podrá el padre donar válidamente, aun durante el matrimonio del hijo.

12.- EL MISMO; *Comentarios a Sabino libro XLIV*.- Si mediante calumnia la mujer recibió, a nombre del que estaba en el claustro materno, dinero para que pretendiese ser puesta en posesión, acaso mientras patrocina al substituto para que por alguna razón excluya al instituido, escribe muchas veces Juliano que ella adquiere por causa de muerte.

13.- JULIANO; *Digesto, libro XVII*.- Si yo hubiere donado por causa de muerte una cosa ajena, y ésta hubiere sido usucapida, no puede reclamarla por la condición el verdadero dueño, sino yo, si hubiere convaltecido.

§ 1.- Nota Marcelo: en las donaciones por causa de muerte hay también cuestiones de hecho; porque se puede donar también de manera que, fallecido de aquella enfermedad el donante, no se devuelva de ningún modo la cosa, y para que se devuelva aunque el donante hubiere fallecido el primero de la misma enfermedad, si, cambiada ya la voluntad, hubiere querido que se le restituya a él. Pero también se puede hacer donación de modo que no se devuelva la cosa de otra suerte, sino si el que la hubiere recibido hubiere fallecido el primero, y también se puede donar por causa de muerte de modo que en ningún caso haya la repetición de la cosa, esto es, ni aun si verdaderamente hubiere convaltecido el donante.

14.- IDEM; *libro XVIII, Digestorum*.- Si mortis causa donatus fundus est et in eum impensae necessariae atque utiles factae sint, fundum vindicantes doli mali exceptione summoventur, nisi pretium earum restituant.

15.- IDEM; *libro XXVII, Digestorum*.- Marcellus notat: quum testamento relinquendi, cui velint, adepti sint filii familias milites liberam facultatem, credi potest ea etiam remissa, quae donationes mortis causa fieri prohibent. Paulus notat: hoc et constitutum est et ad exemplum legatorum mortis causa donationes revocatae sunt.

16.- IDEM; *libro XXIX, Digestorum*.- Mortis causa donatio etiam dum pendet, an convalescere possit donator, revocari potest.

17.- IDEM; *libro XLVII, Digestorum*.- Etsi debitor consilium creditorum fraudandorum non habuisset, avelli res mortis causa ab eo donata debet. Nam quum legata ex testamento eius, qui solvendo non fuit, omnimodo inutilia sint, possunt videri etiam donationes mortis causa factae rescindi debere, quia legatorum instar optinent.

18.- IDEM; *libro LX, Digestorum*.- Mortis causa capimus non tunc solum, quum quis suae mortis causa nobis donat, sed et si propter alterius mortem id faciat: veluti si quis filio vel fratre suo moriente donet maevio ea condicione, ut, si convaluerit alteruter eorum, reddatur sibi res, si decesserit, maneat apud Maevium.

§ 1.- Si donaturus mihi mortis causa debitorem tuum creditori meo delegaveris, omnimodo capere

14.- JULIANUS; *Digest, Book XVIII*.- Where a tract of land is donated mortis causa, and necessary and useful expenses are incurred with reference to it, parties bringing an action to recover the land can be barred by an exception on the ground of fraud, unless they reimburse the donee for the said expenses.

15.- THE SAME; *Digest, Book XXVII*.- Marcellus says that where sons under paternal control, who are serving in the army, have obtained the unrestricted right to dispose of their property by will to anyone whom they may select, it may be held that they are also released from the observance of the ordinary formalities required in the case of donations mortis causa. Paulus says, with reference to this, that it is established by the Imperial Constitutions that donations mortis causa can be revoked in the same way as legacies.

16.- JULIANUS; *Digest, Book XXIX*.- A donation mortis causa can be revoked even while it is yet uncertain whether or not the donor can recover his health or not.

17.- THE SAME; *Digest, Book XLVII*.- Even if a debtor may not have had the intention to defraud his creditors, his donee can be deprived of property given to him mortis causa; for, as legacies bequeathed by the will of a person who is insolvent are absolutely void, it can be held that donations mortis causa made under such circumstances should also be annulled because they resemble legacies.

18.- THE SAME; *Digest, Book LX*.- We obtain a donation mortis causa not only when anyone gives it to us on account of his death, but also where he makes the donation dependent on the death of another, as, for instance, if anyone should give to Maevius a donation in case of the death of his son, or his brother, under the condition that if either of them should recover from his illness, the property shall be restored to him, but if either of them should die, it will belong to Maevius.

§ 1.- If you should make a donation mortis causa to me, by directing your debtor to pay my creditor, I

14.- EL MISMO; *Digesto, libro XVIII*.- Si un fundo fue donado por causa de muerte, y en él se hubieran hecho gastos necesarios y útiles, los que reivindiquen el fundo serán repelidos con la excepción de dolo malo, si no restituyeran el importe de aquéllos.

15.- EL MISMO; *Digesto, libro XXVII*.- Observa Marcelo: como los hijos de familia militares han adquirido libre facultad para dejar por testamento a quienes quieran, se puede creer que se les dispensaron también las disposiciones que prohíben que se hagan donaciones por causa de muerte; y nota Paulo: esto se determinó, y las donaciones por causa de muerte fueron asemejadas a los legados.

16.- EL MISMO; *Digesto, libro XXIX*.- La donación por causa de muerte puede ser revocada también mientras está en duda si el donante puede convalecer.

17.- EL MISMO; *Digesto, libro XLVII*.- Aunque el deudor no haya tenido intención de defraudar a sus acreedores, debe ser quitada la cosa donada por él por causa de muerte; porque siendo absolutamente nulos los legados hechos en el testamento de quien no fue solvente, puede parecer que también deben ser rescindidas las donaciones hechas por causa de muerte, porque tienen semejanza de legados.

18.- EL MISMO; *Digesto, libro LX*.- Adquirimos por causa de muerte, no solamente cuando alguno nos dona por causa de muerte, sino también si esto lo hiciera por causa de la muerte de otro, como si alguno al estarse muriendo su hijo a su hermano le hiciera donación a Mevio con la condición de que si convaleciere uno de aquéllos se le devuelva a él la cosa, y si hubiere fallecido permanezca en poder de Mevio.

§ 1.- Si para hacerme donación por causa de muerte hubieres delegado un deudor tuyo a un acreedor mío,

videbor tantam pecuniam, quanta a creditore meo liberatus fuero. Quod si ab eodem ego stipulatus fuero, eatenus capere existimandus ero, quatenus debitor solvendo fuerit: nam et si convaluisset creditor idemque donator, condictione aut in factum actione debitoris obligationem dumtaxat reciperet.

§ 2.- Titia chirographa debitorum suorum Septicii et Maevii donatura illis Ageriae dedit et rogavit eam, ut ea, si decessisset, illis daret, si convaluisset, sibi redderet: morte secuta Maevia Titiae filia heres extitit: Ageria autem, ut rogata erat, chirographa Septicio et Maevio supra scriptis dedit. Quaeritur, si Maevia heres summam, quae debebatur ex chirographis supra scriptis, petat vel ipsa chirographa, an exceptione excludi possit? Respondit Maeviam vel pacti conventi vel doli mali exceptione summo veri posse.

§ 3.- Qui hominem noxae nomine vel alias obligatum mortis causa acceperit, tantum cepisse intellegendus est, quanti is homo venire potuisset. Idem in fundo qui obligatus est observari poterit, ut pretium excutiat.

19.- IDEM; *libro LXXX, Digestorum*.- Si filio familias res mortis causa data fuerit et convaluisset, donator actionem de peculio quum patre habet: at si pater familias, quum mortis causa donationem accepisset, in adoptionem se dederit, res ipsa a donatore repetitur. Nec huic similis est is, qui rem, quam mortis causa acceperat, alii porro dederit: nam donator huic non rem, sed pretium eius condiceret.

shall, in any event, be held to be entitled to as much money as will release me from liability to my creditor. If, however, I should make a stipulation with your debtor, I will be considered to be entitled to only as much as the debtor is able to pay. For even if you, being the creditor, should recover your health, and the donor should do the same, you can only bring an action for recovery, or one in factum for an amount equal to the obligation of the debtor.

§ 2.- Titia, desiring to donate to her debtors Septitius and Maevius their promissory notes, gave them to Ageria, and asked her to give them to the said debtors, if she, Titia, should die, but if she should be restored to health, to return them to her. She, having died, Maevia, the daughter of Titia, became her heir; but Ageria gave the notes to the above-mentioned Septitius and Maevius, as she had been requested to do. The question arises if Maevia, the heir, brought an action to recover the sum due on the above-mentioned notes, or one to recover the notes themselves, whether she could be barred by an exception. The answer was that Maevia could be barred by an exception based on the execution of the contract, or by one on the ground of fraud.

§ 3.- Where anyone has received a slave by way of satisfaction for damages caused by him, or for some other liability, as a donation mortis causa, he is understood to have only acquired as much as the slave can be sold for. The same rule should be observed with reference to a tract of land which is encumbered, in order to ascertain the value of what is donated.

19.- THE SAME; *Digest, Book LXXX*.- Where property is donated mortis causa to a son under paternal control, and the donor is restored to health, he can bring an action De peculio against his father. But if the head of the household receives the donation mortis causa, and then gives himself in adoption, the property given can be recovered by the donor. This case is not similar to that where he who receives a donation mortis causa gives it to another, for the donor cannot recover from him the property itself, but only its value.

se considerará que de todos modos adquiero tanto dinero cuanto sea el importe de aquello de que yo hubiere quedado libre de mi acreedor. Pero si yo lo hubiere estipulado del mismo, se considerará que adquiero en tanto cuanto el deudor fuere solvente; porque aunque hubiese convalidado el mismo acreedor y donante, recobraría por la condición o por la acción por el hecho solamente la obligación del deudor.

§ 2.- Ticia le dio a Ageria los quirógrafos de sus deudores, Septicio y Mevio, para hacerles donación a ellos, y le rogó que si falleciese se los diese ella, y que si convalidase se los devolviera; sobrevenida la muerte, quedó heredera Mevia, hija de Ticia, pero Ageria dio, como se le había rogado, los quirógrafos a los susodichos Septicio y Mevio; se pregunta, si al pedir la heredera Mevia la suma que se debía en virtud de los susodichos quirógrafos, o los mismos quirógrafos, podría ser repelida con excepción. Respondió, que Mevia podría ser excluida con la excepción del pacto convenido, o con la de dolo malo.

§ 3.- Se ha de entender, que el que por causa de muerte hubiere recibido un esclavo, que estaba obligado por razón de noxa, o de otra suerte, recibió tanto cuanto fue el importe en que aquel esclavo pudo ser vendido. Lo mismo se podrá observar tratándose de un fundo, que está obligado, para que se exija el precio.

19.- EL MISMO; *Digesto, libro LXXX*.- Si a un hijo de familia se le hubiere dado una cosa por causa de muerte, y el donante hubiese convalidado, tiene la acción de peculio contra el padre. Mas si un padre de familia, habiendo recibido una donación por causa de muerte, se hubiere dado en adopción, la misma cosa es reclamada por el donante. Y no es semejante a este el que luego le hubiere dado a otro la cosa que había recibido por causa de muerte; porque el donante no le reclamaría a éste por la condición la cosa, sino su precio.

20.- IDEM; *libro I, ad Urseium Ferozem*.- Ei, qui non amplius parte capere poterat, legatus est fundus, si decem dedisset heredi: non totam summam is dare debet, ut partem fundi haberet, sed partem dumtaxat pro rata, qua legatum consequitur.

21.- IDEM; *libro II, ad Urseium Ferozem*.- Eum, qui ut adiret hereditatem pecuniam accepisset, plerique, in quibus priscus quoque, responderunt mortis causa eum capere.

22.- AFRICANUS; *libro I, Quaestionum*.- In mortis causa donationibus non tempus donationis, sed mortis intuendum est, an quis capere possit.

23.- IDEM; *libro II, Quaestionum*.- Si filio familias mortis causa donatum sit et vivo donatore moriatur filius, pater vivat, quaesitum est, quid iuris sit. Respondit morte filii conditionem competere, si modo ipsi potius filio quam patri donaturus dederit: alioquin, si quasi ministerio eius pater usus sit, ipsius patris mortem spectandam esse. Idque iuris fore et si de persona servi quaeratur.

24.- IDEM; *libro IX, Quaestionum*.- Quod debitori acceptum factum esset mortis causa, si convaluerit donator, etiam tempore liberato ei potest condici: namque acceptilatione interveniente abutitur ab iure pristinae obligationis eamque in huius conditionis transfusam.

25.- MARCIANUS; *libro IX, Institutionum*.- Tam is qui testamentum facit quam qui non facit mortis causa donare potest.

20.- THE SAME; *On Urseius Ferox, Book I*.- A tract of land is devised to a person who cannot legally acquire but a portion of it, under the condition that he will pay ten aurei to the heir. He is not required to pay the entire sum in order to obtain his share of the land, but only an amount in proportion to the legacy which he is entitled to receive.

21.- THE SAME; *On Urseius Ferox, Book II*.- Several authorities, and among them Priscus, have held that a person who receives a sum of money to induce him to accept an estate obtains the money mortis causa.

22.- AFRICANUS; *Questions, Book I*.- In the case of a donation mortis causa, where the capacity of anyone to receive the property is the subject of investigation, the time of death, and not that of the donation should be considered.

23.- THE SAME; *Questions, Book II*.- Where a donation mortis causa is made to a son under paternal control, and he dies during the lifetime of the donor, but his father survives, the question arises, what is the rule of law in a case of this kind? The answer was that, by the death of the son, an action to recover the property will lie; provided the donor had the intention of giving it to the son rather than to the father. Otherwise, if the agency of the son was only employed for the benefit of his father, then the death of the father must be taken into consideration. The same rule will apply where a question arises with reference to the person of a slave.

24.- THE SAME; *Questions, Book IX*.- When a release is given to a debtor as a donation mortis causa, and the donor recovers his health, he can collect the debt, even if the debtor has been released by lapse of time; for, by the release, the creditor has renounced his claim under the prior obligation, and it has been merged in the right to recover the donation.

25.- MARCIANUS; *Institutes, Book IX*.- A donation mortis causa can be made whether the party executes a will or not.

20.- EL MISMO; *Comentarios a Urseyo Ferox, libro I*.- Se legó un fundo al que no podía adquirir más que una parte, si le hubiese dado diez al heredero; éste no debe dar toda la suma para tener la parte del fundo, sino solamente la parte a prorrata de aquella en que obtiene el legado.

21.- EL MISMO; *Comentarios a Urseyo Ferox, libro II*.- Los más, entre los que se halla también Prisco, respondieron que el que hubiese recibido dinero para adir la herencia, adquiría por causa de muerte.

22.- AFRICANO; *Cuestiones, libro I*.- En las donaciones por causa de muerte para saber si uno puede adquirir se ha de atender al tiempo de la donación, no al de la muerte.

23.- EL MISMO; *Cuestiones, libro II*.- Si por causa de muerte se le hubiera hecho una donación a un hijo de familia, y en vida del donante muriese el hijo, y viviera su padre, se preguntó cuál sería el derecho. Respondió, que a la muerte del hijo compete la condición, si uno hubiere dado la cosa para hacer donación más bien al hijo que al padre, de otra suerte, si el padre se hubiera valido del ministerio de aquél, se ha de atender a la muerte del mismo padre; y este será el derecho, también si se tratara de la persona de un esclavo.

24.- EL MISMO; *Cuestiones, libro IX*.- Lo que por causa de muerte se hubiese dado por recibido del deudor se le puede reclamar por la condición, aunque hubiese quedado libre por el transcurso de tiempo, si hubiere convalidado el donante; pues mediante la aceptación hubo apartamiento del derecho de la primitiva obligación, y ésta se convirtió en la de tal condición.

25.- MARCIANO; *Instituta, libro IX*.- Puede donar por causa de muerte tanto el que hace testamento como el que no lo hace.

§ 1.- Filius familias, qui non potest facere testamentum nec voluntate patris, tamen mortis causa donare patre permittente potest.

26.- IDEM; *libro II, Regularum*.- Si qui invicem sibi mortis causa donaverunt pariter decesserunt, neutrius heres repetet, quia neuter alteri supervixit. Idem iuris est, si pariter maritus et uxor sibi donaverunt.

27.- IDEM; *libro V, Regularum*.- Ubi ita donatur mortis causa, ut nullo casu revocetur, causa donandi magis est quam mortis causa donatio: et ideo perinde haberi debet atque alia quaevis inter vivos donatio. Ideoque inter viros et uxores non valet et ideo nec Falcidia locum habet quasi in mortis causa donatione.

28.- MARCELLUS; *libro singulari Responsorum*.- Avunculo suo debitori mortis causa donaturus quae debebat ita scripsit tabulae vel chirographum tot ubicumque sunt, inanes esse neque eum solvere debere: quaero, an heredes, si pecuniam ab avunculo defuncti petant, exceptione doli mali tueri se possint. Marcellus respondit posse: nimirum enim contra voluntatem defuncti heres petit ab eo.

29.- ULPIANUS; *libro XVII, ad Edictum*.- Si mortis causa res donata est et convaluit qui donavit, videndum, an habeat in rem actionem. Et si quidem quis sic donavit, ut, si mors contigisset, tunc haberet cui donatum est, sine dubio donator poterit rem vindicare: mortuo eo tunc is cui donatum est. Si vero sic, ut iam nunc haberet, redderet, si convaluisset vel de proelio vel peregre redisset, potest defendi in rem competere donatori, si quid horum contigisset, interim autem ei cui donatum est. Sed et si morte praeventus sit is cui donatum est, adhuc quis dabit in

§ 1.- A son under paternal control, who cannot make a will even with the consent of his father, can, nevertheless, make a donation mortis causa, if his father permits him to do so.

26.- THE SAME; *Rules, Book II*.- Where two persons make reciprocal donations, mortis causa, of the same property, and both of them die, the heir of neither can recover the property, for the reason that neither one survives the other. The same rule of law will apply, if a husband and wife should make reciprocal donations.

27.- THE SAME; *Rules, Book V*.- Where a donation mortis causa is made in such a way that it cannot be revoked under any circumstances, it is rather a donation inter vivos than one mortis causa. Hence it should be considered as any other donation inter vivos, and will be void as between husband and wife; and the Falcidian Law will not apply, as it does in the case of donations mortis causa.

28.- MARCELLUS; *Opinions*.- A nephew, desiring to make a donation mortis causa to his uncle of the amount which he owed him, made the following statement in writing, "I wish any registers or notes of mine, wherever they may be found, to be void, and that my uncle shall not be obliged to pay them." I ask, if the heirs bring suit to recover the money from the uncle of the deceased, whether they can be barred by an exception on the ground of fraud. Marcellus answered that they can be, for the heirs most assuredly are making a demand upon the uncle contrary to the wishes of the deceased.

29.- ULPIANUS; *On the Edict, Book XVII*.- Where property is donated mortis causa, and the donor recovers his health, let us see whether he will be entitled to an action in rem. If anyone should make a donation under the condition that, in case of death, the property should belong to the person to whom it was given, there is no doubt: that the donor can recover it, and if he should die, he to whom it was given can do so. If the condition was that the donee should immediately have the property as his own, but should return it if the donor recovered his health, or

§ 1.- El hijo de familia, que no puede hacer testamento ni aun con la voluntad del padre, puede, sin embargo, donar por causa de muerte permitiéndoselo el padre.

26.- EL MISMO; *Reglas, libro II*.- Si los que recíprocamente se hubiesen hecho donación por causa de muerte murieron al mismo tiempo, no la reclamará el heredero de ninguno de los dos, porque ninguno de los dos sobrevivió al otro. El mismo derecho hay, si al mismo tiempo se hicieron donación el marido y la mujer.

27.- EL MISMO; *Reglas, libro V*.- Cuando se hace donación por causa de muerte, de modo que en ningún caso sea revocada, hay más bien una causa de donar que una donación por causa de muerte; y por lo tanto debe ser considerada lo mismo que otra cualquiera donación entre vivos; y por esto no es válida entre marido y mujer; y por ello tampoco tiene lugar la Falcidia, como en la donación por causa de muerte.

28.- MARCELO; *Respuestas, libro único*.- Uno, para donarle por causa de muerte a su tío materno lo que éste le debía, escribió así: son nulas, donde quiera que se hallen, todas las escrituras o los quirógrafos, y no debe él pagarlas; pregunto, si, al pedirle los herederos el dinero al tío materno del difunto, podría ampararse con la excepción de dolo malo. Marcelo respondió, que podía; porque verdaderamente le pedía el heredero contra la voluntad del difunto.

29.- ULPIANO; *Comentarios al Edicto, libro XVII*.- Si una cosa fue donada por causa de muerte, y convalenció el que la donó, se ha de ver si tendrá acción real. Y si verdaderamente uno donó de suerte, que, si le sobreviniese la muerte, la tenga aquel a quien se le donó, sin duda podrá el donante reivindicar la cosa, y, muerto éste, aquel a quien se le donó. Pero si la donó de modo que la tuviese desde luego, y la devolviese si hubiese convalencido, o si hubiese vuelto de la guerra o de un viaje, se puede defender que le compete al donante la acción real, si

rem donatori.

30.- IDEM; *libro XXI, ad Edictum*.- Qui mortis causa donavit, ipse ex paenitentia conditionem vel utilem actionem habet.

31.- GAIUS; *libro VIII, ad Edictum provinciale*.- Mortis causa capitur, quum propter mortem alicuius capiendi occasio obvenit, exceptis his capiendi figuris quae proprio nomine appellantur. Certe enim et qui hereditario aut legati aut fideicommissi iure capit, ex morte alterius nanciscitur capiendi occasionem, sed quia proprio nomine hae species capiendi appellantur, ideo ab hac definitione separantur.

§ 1.- Iuliano placet, licet solvendo non sit debitor, cui acceptum latum sit, videri ei mortis causa donatum.

§ 2.- Sine donatione autem capitur veluti pecunia, quam statuliber aut legatarius alicui condicionis implendae gratia numerat, sive extraneus sit qui accepit sive heres. Eodem numero est pecunia, quam quis in hoc accipit, ut vel adeat hereditatem vel non adeat, quique in hoc accipit pecuniam, ut legatum omittat. Sed et dos, quam quis in mortem mulieris a marito stipulatur, capitur sane mortis causa: cuius generis dotes recepticiae vocantur. Rursus id, quod mortis causa donatur, aut in periculum mortis datur aut cogitationem mortalitatis, quod nos quandoque morituros intellegimus.

returned after a battle or a long journey, it can be maintained that the donor will be entitled to an action in rem, if any of these events take place; but, in the meantime, the property will belong to the person to whom it was donated. If, however, he to whom the donation was made, should predecease the donor, it may be held that the latter will be entitled to an action in rem.

30.- THE SAME; *On the Edict, Book XXI*.- Anyone who makes a donation mortis causa, and afterwards changes his mind, will be entitled to either an action to recover the property or to an equitable action.

31.- GAIUS; *On the Provincial Edict, Book VIII*.- Property is acquired mortis causa when an occasion arises for obtaining it on account of the death of anyone, except in such instances as have a particular designation; for it is certain that anyone who acquires property by hereditary right, or as a legatee or the beneficiary of a trust acquires it, on account of the death of another, but for the reason that these methods of acquiring property are designated by specific names, they are distinguished from the one in question.

§ 1.- It is held by Julianus that, although the debtor who has been released may not be solvent, the donation will still be considered to have been made mortis causa.

§ 2.- Property can also be acquired without a donation; as, for instance, where a slave or a legatee pays a sum of money for the purpose of complying with some condition, whether the person who receives it is a stranger, or an heir. The case is similar where anyone receives money to accept or reject an estate, or to refuse a legacy which has been bequeathed to him. Even a dowry which has been stipulated for and will belong to the husband if his wife should die, is evidently acquired mortis causa, and dowries of this kind are designated as returnable. Again, anything which is donated mortis causa, or is given while in imminent danger of death, or with the expectation of mortality, for the reason that we

Mas también si hubiera sido sorprendido por la muerte aquel a quien se donó, aun le dará alguno la acción real al donante.

30.- EL MISMO; *Comentarios al Edicto, libro XXI*.- El que donó por causa de muerte tiene si se arrepiente, la condición, o la acción útil.

31.- GAYO; *Comentarios al Edicto provincial, libro VIII*.- Se adquiere por causa de muerte cuando por causa de la muerte de alguno llega la ocasión de adquirir, exceptuandose aquellas maneras de adquirir, que se denominan con nombre propio; porque ciertamente también el que adquiere por derecho de herencia, o de legado, o de fideicomiso, obtiene la ocasión de adquirir por virtud de la muerte de otro; pero como estas maneras de adquirir se denominan con nombre propio, se excluyen de esta definición.

§ 1.- A Juliano le parece bien, que, aunque no sea solvente el deudor a quien se le dio por cobrado, se considere que se le hizo donación por causa de muerte.

§ 2.- Mas se adquiere sin donación, por ejemplo, el dinero que aquel a quien se le dejó la libertad bajo condición, o el legatario, entrega a alguno para cumplir la condición, ya sea extraño, ya heredero, el que lo recibe. En la misma condición esta el dinero que alguno recibe o para adir la herencia, o para no adirla, y el que recibe dinero para prescindir de un legado. Pero también la dote, que alguno estipula del marido para el caso de muerte de la mujer, se adquiere verdaderamente por causa de muerte; las dotes de cuya especie se llaman recepticias. Además, lo que se dona por causa de muerte es dado o por peligro de la muerte, o por pensamiento de la mortalidad, porque entendemos que alguna vez hemos de morir.

understand that we will die sooner or later, is included in this category.

§ 3.- Si iusseris mortis causa debitorem tuum mihi aut creditori meo expromittere decem, quid iuris esset quaeritur, si iste debitor solvendo non sit. Et ait Iulianus, si ego stipulatus fuerim, tantam pecuniam videri me cepisse, in quantum debitor solvendo fuisset: nam et si convaluisset, inquit, donator, obligationem dumtaxat debitoris recipere deberet. Si vero creditor meus stipulatus fuerit, tantam videri me pecuniam accepisse, in quantum a creditore meo liberatus essem.

§ 4.- Per accepti quoque lationem egens debitor liberatus totam eam pecuniam, qua liberatus est, cepisse videtur.

32.- ULPIANUS; *libro LXXVI, ad Edictum*.- Non videtur perfecta donatio mortis causa facta, antequam mors insequatur.

33.- PAULUS; *libro IV, ad Plautium*.- Qui alienam rem mortis causa traditam suscepit, non ab eo videtur cepisse, cuius res fuisset, sed ab eo, qui occasionem usucapionis praestitisset.

34.- MARCELLUS; *libro XXVIII, Digestorum*.- Mortis causa donatio etiam sic constitui potest, ut quid stipuletur in annos singulos quoad viveret, scilicet ut post mortem promissoris incipiat exactio.

35.- PAULUS; *libro VI, ad legem Iuliam et Papiam*.- Senatus censuit placere mortis causa donationes factas in eos, quos lex prohibet capere, in eadem causa haberi, in qua essent, quae testamento his legata essent, quibus capere per legem non liceret.

§ 3.- If, with the intention of making a donation mortis causa, you should direct your debtor to make a new promise to my creditor to pay ten aurei, the question arises, what would be the rule of law if the debtor should not prove solvent? Julianus says that if I stipulate in this way, I shall be held to have obtained as much money as your debtor is able to pay; for he says if the donor recovers his health, he will only be entitled to obtain the new obligation of the debtor. If, however, my creditor should enter into the stipulation, I will be held to have received only as much money as I would have the right to be released from payment of to my creditor.

§ 4.- When a debtor, who is poor, is released from his indebtedness by way of a donation, he is considered to have obtained all the money from the payment of which he was released.

32.- ULPIANUS; *On the Edict, Book LXXVI*.- A donation made mortis causa is not considered to be perfect until after the death of the donor.

33.- PAULUS; *On Plautius, Book IV*.- Where anyone acquires by usucaption property belonging to another which was donated mortis causa, he is not considered to have obtained it from the party to whom the property belongs, but from him who gave him the opportunity for usucaption.

34.- MARCELLUS; *Digest, Book XXVIII*.- A donation mortis causa can also be made, even if it can be proved that the donee stipulated for payment every year, as long as he lived; that is to say, that collection should begin after the death of the promisor.

35.- PAULUS; *On the Lex Julia et Pajna, Book VI*.- The Senate decreed that where donations mortis causa were made to those whom the law forbade to receive them, they are in the same position as persons to whom legacies are bequeathed by will, and who

§ 3.- Si por causa de muerte hubieres dispuesto que tu deudor prometa diez a mí o a mi acreedor, se pregunta cual sería el derecho, si este deudor no fuera solvente. Y dice Juliano, que si yo hubiere estipulado, se considera que yo recibí tanto dinero, por cuanto el deudor hubiese sido solvente; porque aunque el donante hubiese convallecido, dice, debería recuperar solamente la obligación del deudor; pero si hubiere estipulado mi acreedor, se considera que yo recibí tanto dinero por cuanto yo hubiese quedado libre respecto a mi acreedor.

§ 4.- También el deudor necesitado que quedo libre por la aceptilación parece que adquirió toda aquella cantidad de dinero, de que quedó libre.

32.- ULPIANO; *Comentarios al Edicto, libro LXXVI*.- No se considera perfeccionada la donación hecha por causa de muerte antes que sobrevenga la muerte.

33.- PAULO; *Comentarios a Plaucio, libro IV*.- El que usucapió una cosa ajena entregada por causa de muerte, no se considerará que la adquirió de aquel de quien hubiese sido la cosa, sino del que hubiese dado ocasión para la usucapión.

34.- MARCELO; *Digesto, libro XXVIII*.- Se puede hacer la donación por causa de muerte también de manera que uno estipule para cada año, mientras viva, por supuesto, de modo que la exacción comience después de la muerte del que prometió.

35.- PAULO; *Comentarios a la ley Julia y Papia, libro VI*.- Determinó el Senado, que pareciera bien que las donaciones hechas por causa de muerte a aquellos a quienes la ley les prohíbe adquirir, fuesen consideradas en la misma condición en que estarían

Ex hoc Senatusconsulto multae variaeque quaestiones agitantur, de quibus pauca referamus.

§ 1.- Donatio dicta est a dono quasi dono datum, rapta a graeco.

§ 2.- Sed mortis causa donatio longe differt ab illa vera et absoluta donatione, quae ita proficiscitur, ut nullo casu revocetur. Et ibi qui donat illum potius quam se habere mavult: at is, qui mortis causa donat, se cogitat atque amore vitae recepisce potius quam dedisse mavult: et hoc est, quare vulgo dicatur: "se potius habere vult, quam eum cui donat, illum deinde potius quam heredem suum".

§ 3.- Ergo qui mortis causa donat, qua parte se cogitat, negotium gerit, scilicet ut, quum convaluerit, reddatur sibi: nec dubitaverunt cassiani, quin conditione repeti possit quasi re non secuta propter hanc rationem, quod ea quae dantur aut ita dantur, ut aliquid facias, aut ut ego aliquid faciam, aut ut Lucius Titius, aut ut aliquid optingat, et in istis conditio sequitur.

§ 4.- Mortis causa donatio fit multis modis: alias extra suspicionem ullius periculi a sano et in bona valetudine posito et cui ex humana sorte mortis cogitatio est: alias ex metu mortis aut ex praesenti periculo aut ex futuro, si quidem terra marique, tam in pace quam in bello et tam domi quam militiae multis generibus mortis periculum metui potest. Nam et sic potest donari, ut omnimodo ex ea

are not permitted by law to accept them. A great variety of questions have arisen under this Decree of the Senate, a few of which we shall mention.

§ 1.- The word "donation" is derived from donum, meaning "presented with a gift." It is taken from the Greek.

§ 2.- A donation mortis causa, however, differs greatly from a genuine and absolute gift, which is made in such a way that it can, under no circumstances, be revoked; and where he who makes it would rather that the donee should have the property than he himself. On the other hand, he who makes a donation mortis causa thinks of himself and, through his love of life, prefers to keep the property, rather than to give it away. This is the reason why it is commonly said that the donor would rather have the property than allow him to whom he gives it to have it, but that he would rather that he should have it, than that it should pass to his heir.

§ 3.- Therefore, he who makes a donation mortis causa, so far as his thoughts of himself are concerned, concludes a business transaction; that is to say, he imposes the condition that the property shall be returned to him if he is restored to health. The followers of Cassius entertained no doubt that the property could be recovered, as in the case of an unfinished transaction; for the reason that, where anything is given, it is done either that you may perform some act, or that I may perform one, or that Lucius Titius may do so, or in case some event takes place; and in all these instances, the property may be recovered by an action.

§ 4.- A donation mortis causa is made in several different ways. Sometimes it is made by a man who is well and has no anticipation of immediate death, who enjoys excellent health, but who reflects that man is liable to die. Sometimes it is made through the fear of death, either on account of present or future danger. For the danger of death may be apprehended on land and sea, in peace and in war, at home as well as in the

las cosas que por testamento hubiesen sido legadas a aquellos a quienes no les fuese lícito por la ley adquirir. En virtud de este Senadoconsulto se discuten muchas y diversas cuestiones, respecto de las que diremos pocas palabras.

§ 1.- Donación fue llamada de don, como cosa dada en don, habiendo sido tomada del griego.

§ 2.- Pero la donación por causa de muerte difiere mucho de la verdadera y absoluta donación, que se hace de modo que en ningún caso sea revocada; y en la que el que dona prefiere que tenga la cosa otro mas bien que no él; mas el que dona por causa de muerte piensa en sí, y por amor a la vida prefiere recuperar mas bien que haber dado. Y por esto es por lo que vulgarmente se dice: que él prefiere tener mas bien que aquel a quien dona, y que después tenga éste mas bien que su heredero.

§ 3.- Luego el que dona por causa de muerte, en cuanto piensa en sí, hace su propio negocio, a saber, para que se le devuelva la cosa cuando él hubiere convaltecido. Los Cassianos no dudaron que se podía reclamar la cosa por la condición, como si no se hubiera verificado el caso, por la razón de lo que se da, o de lo que se da para que hagas algo, o para que yo, o Lucio Ticio hagamos algo, o para que suceda algo; y en estos casos tiene lugar la condición.

§ 4.- La donación por causa de muerte se hace de muchos modos; unas veces sin sospecha de peligro alguno por el que se halla sano y en buena salud, y tiene el pensamiento de la muerte por virtud de la condición humana; otras por temor de la muerte, o de algún peligro presente, o futuro, porque se puede temer peligro de muerte de muchas maneras, en la tierra y en el mar, tanto en paz como en guerra, y tanto

valetudine donatore mortuo res non reddatur, et ut reddatur, etiamsi prior ex eadem valetudine decesserit, si tamen mutata voluntate restitui sibi voluerit. Et sic donari potest, ut non aliter reddatur, quam si prior ille qui accepit decesserit. Sic quoque potest donari mortis causa, ut nullo casu sit repetitio, id est ne si convaluerit quidem donator.

§ 5.- Si quis societatem per donationem mortis causa inierit, dicendum est nullam societatem esse.

§ 6.- Si duobus debitoribus mortis causa donaturus creditor uni acceptum tulit et convaluerit, eligere potest, utri eorum condicat.

§ 7.- Sed qui mortis causa in annos singulos pecuniam stipulatus est, non est similis ei, cui in annos singulos legatum est: nam licet multa essent legata, stipulatio tamen una est et condicio eius cui expromissum est semel intuenda est.

36.- ULPIANUS; *libro VIII, ad legem Iuliam et Papiam*.- Quod condicionis implendae causa datur, licet non ex bonis mortui proficiscitur, capere tamen supra modum non poterit is, cui certum modum ad capiendum lex concessit. Certe quod a statulibero condicionis implendae causa datur, indubitate modo lege concesso imputatur: Sic tamen, si mortis tempore in peculio id habuit. Ceterum si post mortem, vel etiam si alius pro eo dedit, quia non fuit ex his bonis, quae mortis tempore testator habuit, in eadem erunt causa, in qua sunt, quae a legatariis dantur.

army. A donation may also be made under the condition that if the donor should die of his illness, the property shall not, under any circumstances, be returned; or that it shall be returned if he should change his mind, and desire it to be restored to him, even before he died of the same illness. A donation can also be made under the condition that it shall not be returned unless the person entitled to it dies before the donor. A donation mortis causa can also be made in such a way that it cannot be recovered in any event, that is, not even if the donor should recover his health.

§ 5.- If anyone should form a partnership with another for the purpose of making a donation mortis causa, it must be said that the partnership is void.

§ 6.- When a creditor wishes to make a donation mortis causa to two of his debtors, of what they owe him, and releases one of them from liability, and regains his health, he can sue either one of them that he may select.

§ 7.- He who stipulates for the payment of a sum of money annually as a donation mortis causa does not resemble the person to whom a legacy, payable annually, has been bequeathed; for although there are many legacies, still there is only one stipulation, and the status of him to whom the promise was made must always be considered.

36.- ULPIANUS; *On the Lex Julia et Papia, Book VIII*.- Where anything is given for the purpose of complying with a condition, although it may not be derived from the estate of the deceased, still, he whom the law says shall only receive a certain amount cannot receive a larger sum than that fixed by law. It is certain that where a sum of money is paid by a slave for the purpose of complying with the condition, the amount will be regulated in accordance with that which the legatee is legally entitled to receive, provided the slave had that much in his peculium at the time of his death. If, however, the sum was acquired after his death, or if another person gave it for him, as it did form part of the

en casa como en la milicia. Porque también se puede hacer donación de suerte, que de ningún modo se devuelva la cosa habiendo fallecido de aquella enfermedad el donante, y de manera que se devuelva aunque hubiere fallecido de aquella enfermedad el primero, si no obstante hubiere querido que se le restituya por haber cambiado de voluntad. Y se puede hacer donación de manera, que no sea restituida de otra suerte, sino si hubiere fallecido el primero el que la recibió. Y también se puede donar por causa de muerte de modo, que en ningún caso haya reclamación, esto es, ni aún si verdaderamente hubiere convallecido el donante.

§ 5.- Si alguno hubiere celebrado sociedad mediante donación por causa de muerte, se ha de decir que es nula la sociedad.

§ 6.- Si el acreedor que quería hacer donación por causa de muerte a dos deudores le dio por cobrado a uno, y hubiere convallecido, puede elegir a cuál de ellos le reclamará por la condición.

§ 7.- Pero el que por causa de muerte estipulo cierta cantidad para cada año no es semejante a aquel a quien se le legó para cada año; porque aunque haya muchos legados, es sin embargo una sola la estipulación, y la condición de aquel a quien se le prometió ha de ser considerada una sola vez.

36.- ULPIANO; *Comentarios a la ley Julia y Papia, libro VIII*.- Aquel, a quien la ley concedió cierta medida para adquirir, no podrá adquirir sobre esta tasa lo que se da para cumplir una condición, aunque ello no provenga de los bienes del difunto. A la verdad, lo que para cumplir la condición se da por aquel a quien se le dio la libertad bajo condición se imputa indudablemente a la cuantía permitida para un legado, pero esto así, si aquello lo tuvo en su peculio al tiempo de la muerte; pero si después de la muerte, o también si otro lo dio por él, como no perteneció a los bienes, que tuvo el testador al tiempo de la muerte, estará en la misma condición en que están las cosas que se dan por los legatarios.

property which the testator had when he died, the case will be the same as where charges are imposed on legatees.

37.- IDEM; *libro XV, ad legem Iuliam et Papiam*.- Illud generaliter meminisse oportebit donationes mortis causa factas legatis comparatas: quodcumque igitur in legatis iuris est, id in mortis causa donationibus erit accipiendum.

§ 1.- Iulianus ait: si quis servum mortis causa sibi donatum vendiderit et hoc vivo donatore fecerit, pretii conditionem donator habebit, si convaluisse et hoc donator elegerit. Alioquin et ipsum servum restituere compellitur.

38.- MARCELLUS; *libro I, ad legem Iuliam et Papiam*.- Inter mortis causa donationem et omnia, quae mortis causa quis ceperit, est earum rerum differentia: nam mortis causa donatur quod praesens praesenti dat, mortis causa capi intellegitur et quod non cadit in speciem donationis. Etenim quum testamento quis suo pamphilum servum suum liberum esse iussit, si mihi decem dederit, nihil mihi donasse videbitur, et tamen, si accepero a servo decem, mortis causa acceperis me convenit. Idem accidit, quod quis sit heres institutus, si mihi decem dederit: nam accipiendo ab eo, qui heres institutus est, conditionis explendae eius causa, mortis causa capio.

39.- PAULUS; *libro XVII, ad Plautium*.- Si is, cui mortis causa servus donatus est, eum manumisit, tenetur conditione in pretium servi, quoniam scit posse sibi condici, si convaluerit donator.

40.- PAPINIANUS; *libro XXIX, Quaestionum*.- Si mortis causa inter virum et uxorem donatio facta sit,

37.- THE SAME; *On the Lex Julia et Papia, Book XV*.- Generally speaking, it must be remembered that donations mortis causa are comparable to legacies. Therefore, any rule of law which applies to legacies must be understood also to apply to donations mortis causa.

§ 1.- Julianus says that if anyone should during the lifetime of the donor sell a slave given to him as a donation mortis causa, the latter will be entitled to a personal action to recover the price, if he should regain his health, and choose to do so; otherwise, the donee will be compelled to return the slave himself.

38.- MARCELLUS; *On the Lex Julia et Papia, Book I*.- The following difference exists between a donation mortis causa and other ways by which anyone acquires property by reason of death. A donation mortis causa is made when both parties are present, and anything not included in this kind of a donation, it is understood, may be obtained on account of death. For when a testator, by his will, directs his slave Pamphilus to be free under the condition that he pays me ten aurei, he is not considered to have made me a donation; and nevertheless, if I accept the ten aurei from the slave, it is established that I accept them mortis causa. The same thing happens where an heir is appointed on condition that he pay me ten aurei; as, by accepting the money from him who is appointed heir, I acquire it mortis causa, for the purpose of complying with the condition.

39.- PAULUS; *On Plautius, Book XVII*.- If he to whom a slave has been donated mortis causa manumits him, he will be liable to an action to recover the value of the slave, as he knows that he can be sued if the donor should regain his health.

40.- PAPINIANUS; *Questions, Book XXIX*.- If a donation mortis causa made between husband and

37.- EL MISMO; *Comentarios a la ley Julia y Papia, libro XV*.- Convendrá tener presente en general, que las donaciones hechas por causa de muerte están equiparadas a los legados; así, pues, lo que es de derecho en los legados habrá de ser admitido en las donaciones por causa de muerte.

§ 1.-Dice Juliano, que si alguno hubiere vendido un esclavo que se le donó por causa de muerte, y esto lo hubiere hecho en vida del donante, el donante tendrá la condición del precio, si hubiese convallecido, y el donante lo hubiere preferido; en otro caso se compele a restituir el mismo esclavo.

38.- MARCELO; *Comentarios a la ley Julia y Papia, libro I*.- Entre la donación por causa de muerte y todo lo que uno adquiriere por causa de muerte hay esta diferencia; que por causa de muerte se dona lo que el que está presente da a otro que está presente, mas por causa de muerte se entiende que se adquiere también lo que no cae dentro de la especie de donación. Porque cuando alguno dispuso en su testamento que fuese libre Pánfilo, su esclavo, si me hubiere dado diez, no parecerá que me donó nada; y, sin embargo, si yo hubiere recibido del esclavo los diez, es lo conveniente que yo los haya recibido por causa de muerte. Lo mismo acontece cuando alguno hubiera sido instituido heredero, si me hubiere dado diez; porque recibéndolos del que fue instituido heredero, con objeto de cumplir su condición, adquiero por causa de muerte.

39.- PAULO; *Comentarios a Plaucio, libro XVII*.- Si aquel, a quien por causa de muerte se le donó un esclavo, lo manumitió, está obligado por la condición al precio del esclavo, porque sabe que se le puede reclamar por la condición, si hubiere convallecido el donante.

40.- PAPINIANO; *Cuestiones, libro XXIX*.- Si entre marido y mujer hubiera sido hecha donación

morte secuta reducitur ad id tempus donatio, quo interposita fuisset.

41.- IDEM; *libro II, Responsorum*.- Quod statuliber uni ex heredibus de peculio dedit, ei qui accepit in Falcidia rationem venit et in hereditatis petitione, item ex Trebelliano restituitur. Ex peculio autem videtur dari, quod statuliber donatum accepit et dedit. Et quod ab alio nomine ipsius eo praesente datur, prope est, ut ab ipso datum intellegatur.

42.- IDEM; *libro XIII, Responsorum*.- Seia quum bonis suis traditionibus factis Titio cognato donationis causa cessisset, usum fructum sibi recepit et convenit, ut, si Titius ante ipsam vita decessisset, proprietates ad eam rediret, si postea superstitibus liberis Titii mortua fuisset, tunc ad eos bona pertinerent. Igitur si res singulas heredes Lucii Titii vindicent, doli non inutiliter opponetur exceptio. Bonae fidei autem iudicio constituto quaerebatur, an mulier promittere debeat se bona, quum moreretur, filiis Titii restitutura. Incurrerat haesitatio non extorquendae donationis, quae nondum in personam filiorum initium acceperat. Sed numquid interposita cautione prior donatio, quae dominio translato pridem perfecta est, propter legem in exordio datam retinetur, non secunda promittitur? Utrum ergo certae condicionis donatio fuit an quae mortis consilium ac titulum haberet? Sed denegari non potest mortis causa factam videri. Sequitur, ut soluta priore donatione, quoniam Seia Titio superstes fuit, sequens extorqueri videatur. Muliere denique postea diem functa liberi Titii si cautionem ex consensu mulieris acceperint, contributioni propter Falcidiam ex persona sua tenebuntur.

wife takes effect, the donation is referred to the time when it was made.

41.- THE SAME; *Opinions, Book II*.- Where a slave, who is to be free under the condition of paying a certain sum out of his peculium to one of the heirs to the estate, does so, he must account for that sum as well by reason of the Falcidian Law, as where suit is brought for the estate, and also where restitution is made under the Trebellian Decree of the Senate. What the slave received as a donation, and paid, is considered to have been given out of his peculium, and if it was paid by another in his presence, and in his name, it is understood as having been paid by himself.

42.- THE SAME; *Opinions, Book XIII*.- Seia, having transferred her property to her relative Titius, by way of donation, reserved the usufruct of the same for herself; and it was agreed that if Titius should die before she did, the said property should go to him, and if she died during the lifetime of the children of Titius, it should then belong to them. Hence, if the heirs of Lucius Titius should claim the property, they could not ineffectually be opposed by an exception on the ground of bad faith. However, suit having been brought in good faith, it was asked whether the woman was not obliged to promise to give the property to the children of Titius when he died. Some doubt arose on the point that the donation should not be extorted, where title to it had not yet vested in the children; still, might it not be said that, on account of the security given, the first donation which was perfected by the delivery of the property, and which, being actually given in the beginning, should be perpetuated; and not the second one which was merely promised? Therefore, was the donation made under a certain condition, and should it be so considered, or was it made on account of death? It cannot be denied that it should be considered to have been made mortis causa. The result is that the first donation having been annulled, the second one should be held to have been extorted, as Seia survived Titius. Finally, after the death of the woman, if the children of Titius had accepted the bond with her consent, they would be liable to contribute to the

por causa de muerte, sobrevinida la muerte la donación se retrotrae al tiempo en que hubiese sido hecha.

41.- EL MISMO; *Respuestas, libro II*.- Lo que aquel a quien se le dejó la libertad bajo condición dió de su peculio a uno de los herederos; se le computa en la cuenta de la Falcidia y en la petición de la herencia al que lo recibió; y es también restituido en virtud del Senadoconsulto Trebeliano. Pero se considera que se da del peculio lo que aquel a quien se le dejó la libertad bajo condición recibió por donación y lo dió; y lo que en nombre del mismo estando él presente se da por otro, casi se entiende dado por el mismo.

42.- EL MISMO; *Respuestas, libro XIII*.- Seya, habiendo cedido sus bienes, hechas las entregas, por causa de donación a su cognado Ticio, se reservó el usufructo, y convino, que, si Ticio hubiese fallecido antes que ella, volviese a ella la propiedad, y que si ella hubiese muerto después sobreviviendo hijos de Ticio, en este caso les pertenecieran a éstos los bienes; así, pues, si los herederos de Lucio Ticio reivindicaran cada uno de los bienes, no se les opondrá inútilmente la excepción de dolo; mas siendo de buena fe la acción, se preguntaba, si la mujer debía prometer que ella restituiría cuando muriese, los bienes a los hijos de Ticio. Surgía la duda de si no se debía exigir una donación, que aun no había tenido comienzo respecto a la persona de los hijos. Pero si habiéndose interpuesto caución se mantiene por virtud de la condición puesta en un principio la primera donación, que ya se perfeccionó habiéndose transferido el dominio, ¿no se promete acaso la segunda? ¿Fue acaso una donación de condición cierta, o donación que tenía motivo y nombre por causa de muerte? Mas no se puede negar que parece hecha por causa de muerte; síguese de aquí, que disuelta la primera donación, porque Seya sobrevivió a Ticio, se considera que se exige la segunda; y finalmente, habiendo fallecido después la mujer, los hijos de Ticio, si con el consentimiento de la mujer hubieren recibido caución, estarán sujetos por razón de su persona a contribución por causa de la Falcidia.

Falcidian portion in proportion to their respective shares.

§ 1.- Quum pater in extremis vitae constitutus emancipato filio quaedam sine ulla condicione redhibendi donasset ac fratres et coheredes eius bonis contribui donationes Falcidia causa vellent, ius antiquum servandum esse respondi: non enim ad alia constitutionem pertinere, quam quae lege certa donarentur et morte insecuta quodammodo bonis auferrentur spe retinendi perempta: eum autem, qui absolute donaret, non tam mortis causa quam morientem donare.

43.- NERATIUS; *libro I, Responsorum*.- Fulcinius: inter virum et uxorem mortis causa donationem ita fieri, si donator iustissimum mortis metum habeat. Neratius: sufficere existimationem donantis hanc esse, ut moriturum se putet: quam iuste nec ne susceperit, non quaerendum. Quod magis tuendum est.

44.- PAULUS; *libro I, Manualium*.- Si servo mortis causa donatum sit, videamus, cuius mors inspicere debeat, ut sit locus conditioni, domini an ipsius servi. Sed magis eius inspicenda est, cui donatum esset. Sed tamen post mortem ante apertas tabulas testamenti manumissum haec donatio non sequitur.

§ 1.- Where a father, at the point of death, gave certain property to his emancipated son, without imposing upon him the condition of returning the same, and his brothers and co-heirs desired contribution to be made out of the property, on account of the Falcidian Law, I gave it as my opinion that the ancient rule should be observed, as the new constitution had nothing to do with the other donations, which were made under positive conditions, and, in the case of death, there should be a deduction from the property of the estate, without the heirs having the hope of retaining it; for he who made the gift absolutely did so when dying, rather than as a donation mortis causa.

43.- NERATIUS; *Opinions, Book I*.- Fulcinius: A donation mortis causa can be made between husband and wife, if the donor has an exceedingly well-founded apprehension of death. Neratius: It is sufficient if the donor has a belief of this kind, and thinks that he is going to die, and no inquiry should be made whether his opinion was well grounded or not. This rule should be observed.

44.- PAULUS; *Manuals, Book I*.- Where a donation mortis causa is made to a slave, let us see whose death must be taken into consideration, that is to say, the death of the master, or that of the slave himself, in order that there may be ground for a personal action to recover the property. The better opinion is that the death of the person to whom the donation was made should be considered; still, the donation does not follow the manumitted slave after the death of his master, before the will is opened.

§ 1.- Como hallándose un padre en las postrimerías de su vida hubiese donado a un hijo emancipado algunos bienes sin ninguna condición de restituirlos, y quisieran sus hermanos y coherederos que las donaciones se llevaran a contribución con los bienes por causa de la Falcidia, respondí, que se debía observar el antiguo derecho; porque la Constitución no se refería a otros bienes que a los que se donasen con cierta condición, y habiendo sobrevenido la muerte, se quitarán en cierto modo de los bienes extinguida la esperanza de retenerlos; pero el que los donase en absoluto no los donaba tanto por causa de muerte como al morir.

43.- NERACIO; *Respuestas, libro I*.- Decía Fulcino, que entre marido y mujer se hace donación por causa de muerte en el caso de que el donante tenga justísimo temor de la muerte; y Neracio, que bastaba que fuese tal la creencia del donante que pensase que se había de morir, y que no se había de investigar si la había tenido o no con justo motivo; lo que preferentemente se ha de admitir.

44.- PAULO; *Manuales, libro I*.- Si por causa de muerte se le hubiera donado a un esclavo, veamos a la muerte de quién se deba atender para que tenga lugar la condición, si a la del señor, o a la del mismo esclavo. Pero se ha de atender preferentemente a la de aquel a quien se le hubiere hecho la donación; pero no obstante no se verificase esta donación habiendo sido manumitido después de la muerte y antes de haber sido abierto el testamento.

LIBER QUADRAGESIMUS

TIT. I

DE MANUMISSIONIBUS

1.- ULPIANUS; *libro VI, ad Sabinum*.- Placuit eum, qui calendis ianuariis natus est, post sextam noctis pridie kalendas, quasi annum vicensimum compleverit, posse manumittere: non enim maiori viginti annis permitti manumittere, sed minorem manumittere vetari: iam autem minor non est, qui diem supremum agit anni vicensimi.

2.- IDEM; *libro XVII, ad Sabinum*.- Si heres deliberante legatario servum legatum manumiserit, mox legatarius repudiaverit, manumissum liberum fore placet.

3.- PAULUS; *libro XXXIX, ad Edictum*.- Servus pignori datus, etiamsi debitor locuples est, manumitti non potest.

4.- ULPIANUS; *libro VI, Disputationum*.- Is qui suis nummis emitur epistula divorum fratrum ad Urbium Maximum in eam condicionem redigitur, ut libertatem adipiscatur.

§ 1.- Et primo quidem nummis suis non proprie videtur emptus dici, cum suos nummos servus habere non possit: verum coniventibus oculis credendum est suis nummis eum redemptum, quum non nummis eius, qui eum redemit, comparatur. Proinde sive ex peculio, quod ad venditorem pertinet, sive ex adventicio lucro, sive etiam amici beneficio vel liberalitate vel prorogante eo vel repromittente vel se delegante vel in se recipiente debitum redemptus sit, credendum est suis nummis eum redemptum: satis enim, quod is, qui emptioni suum nomen accommodaverit, nihil de suo impendit.

BOOK XL

TITLE I

CONCERNING MANUMISSIONS

1.- ULPIANUS; *On Sabinus, Book VI*.- It has been decided that anyone who is born on the Kalends of January can manumit his slave after the sixth hour of the night preceding the Kalends, as having, at that time, completed his twentieth year. For anyone more than twenty years old is permitted to manumit a slave, but a minor under that age is forbidden to do so. Hence, he is not considered under the age of twenty, who is in the last day of his twentieth year.

2.- THE SAME; *On Sabinus, Book XVII*.- If an heir should manumit a slave who has been bequeathed, while the legatee is deliberating whether he will accept him or not, it is settled that the slave will be free if the legatee should finally conclude to reject the bequest.

3.- PAULUS; *On the Edict, Book XXXIX*.- Where a slave is given by way of pledge, he cannot be manumitted, even if the debtor is wealthy.

4.- ULPIANUS; *Disputations, Book VI*.- An Epistle of the Divine Brothers, addressed to Urbium Maximus, sets forth that a slave purchased with his own money is in a position to demand his freedom.

§ 1.- In the first place, such a slave cannot properly be considered to have been purchased with his own money, as a slave cannot have money of his own. But if we close our eyes, he must be held to have been bought with his own money, since he was not purchased with that of him who redeemed him from slavery. Hence, whether the money came from the peculium which belongs to the vendor, or from some fortunate acquisition by the slave; or was provided by the kindness or liberality of a friend; or whether someone advanced it, or promised it, or caused himself to be delegated; or whether the slave was

LIBRO CUADRAGESIMO

TÍTULO I

DE LAS MANUMISIONES

1.- ULPIANO; *Comentarios a Sabino, libro VI*.- Se determinó, que el que nació en las calendas de Enero después de la hora sexta de la noche de la víspera de las calendas, puede, como si hubiere cumplido los veinte años, manumitir; porque al mayor de veinte años no se le permite manumitir pero se veda que manumita el menor; mas no es menor el que llega al último día del año vigésimo.

2.- EL MISMO; *Comentarios a Sabino, libro XVII*.- Si mientras delibera el legatario hubiere el heredero manumitido al esclavo legado, y después lo repudiare el legatario, está determinado que el manumitido haya de ser libre.

3.- PAULO; *Comentarios al Edicto, libro XXXIX*.- El esclavo dado en prenda no puede ser manumitido aunque el deudor sea rico.

4.- ULPIANO; *Disputas, libro VI*.- El que es comprado con su propio dinero es colocado por la epístola de los Divinos Hermanos dirigida a Urbio Máximo en tal condición, que adquiere la libertad.

§ 1.- Y en primer lugar, ciertamente que no parece que con propiedad se dice que fue comprado con su propio dinero, porque el esclavo no puede tener dinero propio; pero cerrando los ojos se ha de creer que él fue comprado con su dinero, porque no es comprado con dinero del que lo compró. Por lo cual, ya si hubiera sido comprado con su peculio, que pertenece al vendedor, ya con un lucro adventicio, ya si también con beneficio o liberalidad de un amigo, o anticipándole este el precio, o prometiéndolo, o delegándose para él, o asumiendo sobre si la deuda, se ha de creer que él fue comprado con dinero propio;

be considered to have been purchased with his own money. For it is sufficient if he who has lent his name to the purchase did not spend any of his own money.

§ 2.- Si ab ignoto emptus sit, postea autem pretium suum optulerit, dicendum erit non esse audiendum: ab initio enim hoc agi debet, ut imaginaria fieret emptio et per fidem contractus inter emptorem et servum agatur.

§ 3.- Sive igitur non hoc ab initio esset actum, ut suis nummis redimeretur, sive hoc acto nummos servus non dedit, cessabit libertas.

§ 4.- Unde quaeri poterit, si, quum hoc ab initio esset actum, emptor festinavit et pretium numeravit, an postea ei satisfacto servus constitutione uti possit: et puto posse.

§ 5.- Proinde et si ei nummos prorogavit emptor, quum ei pariaverit, poterit ad libertatem pervenire.

§ 6.- Sive autem exprimetur in contractu (velut in emptione) hoc "ut manumittatur" sive non exprimatur, verius est libertatem competere.

§ 7.- Ergo et si forte quis sic comparaverit suis nummis, ne eum manumittat, benigna est opinio dicentium hunc ad libertatem pervenire, quum et nomen emptionis imaginarius iste emptor accomodat et praeterea nihil ei absit.

§ 8.- Nihil autem interest, a quo quis suis nummis ematur, a fisco vel civitate vel a privato, cuiusque sit sexus is qui emit. Sed et si minor sit viginti annis qui vendidit, interveniet constitutio. Nec comparantis quidem aetas spectatur: Nam et si pupillus emat,

§ 2.- If a slave, purchased by someone who is unknown to him, should afterwards tender him the price for which he was sold, it must be said that he should not be heard, for this ought to be done in the beginning in order that a fictitious sale may be made, and a confidential agreement entered into between the purchaser and the slave.

§ 3.- Therefore, if this was not done in the first place to enable the slave to be ransomed with his own money, or if the slave did not give the money with this intention, he will not be entitled to his freedom.

§ 4.- Hence, it may be asked, when this was the intention in the beginning, and the purchaser hastened to pay the money, and he should afterwards be reimbursed, can the slave avail himself of the benefit of the Imperial Constitution? I think that he can do so.

§ 5.- Therefore, if the purchaser should advance the money to the slave, and the latter repays it to him, he can acquire his freedom.

§ 6.- Whether it was or was not mentioned in the contract (for instance, in the case of a sale), that the slave would be manumitted, the better opinion is that he will be entitled to his freedom.

§ 7.- Hence, if anyone should purchase a slave with the money of the latter, but without agreeing to manumit him, the humane opinion of those who have treated the question in that the slave should obtain his freedom, as the purchaser was merely fictitious and lent the use of his name, and besides, he has lost nothing.

§ 8.- It, however, makes no difference by whom a slave purchased with his own money is acquired, whether by the Treasury, by a municipality, or by a private individual, nor what may be the sex of the purchaser. If the vendor is under twenty years of age,

la compra no haya gastado nada de lo suyo.

§ 2.- Si hubiera sido comprado por un desconocido, pero después hubiere ofrecido su propio precio, se ha de decir que no ha de ser oído; porque esto se debe hacer al principio, para que se verifique una compra imaginaria, y se celebre un contrato confidencial entre el comprador y el esclavo.

§ 3.- Así, pues, ya si no se hubiese tratado en un principio que sería comprado con su propio dinero, ya si habiéndose tratado esto el esclavo no dió el dinero, dejará de tener lugar la libertad.

§ 4.- Por lo cual se podrá preguntar, si habiéndose apresurado el comprador y habiendo entregado el predio, cuando aquello se hubiese tratado desde un principio, podría el esclavo valerse de la Constitución habiéndole satisfecho después aquél. Y opino que puede.

§ 5.- Por lo tanto, también si el comprador le anticipó el dinero podrá, cuando se lo hubiere pagado, llegar a la libertad.

§ 6.- Mas ya si se expresa en el contrato o en la compra la condición de que sea manumitido, ya si no se expresa, es lo más cierto que compete la libertad.

§ 7.- Luego también si acaso alguno lo hubiere comprado con su dinero para no manumitirlo, es equitativa la opinión de los que dicen que él llega a la libertad, porque este comprador imaginario presta su nombre para la compra, y porque además a él nada le falta.

§ 8.- Mas nada importa por quién sea comprado uno con su propio dinero, si por el fisco, o por una ciudad, o por un particular, ni de qué sexo sea el que lo compró. Pero aun si fuera menor de veinte años el que lo vendió, intervendrá la Constitución. Y no se

aequum est eum fidem implere, quum sine damno eius hoc sit futurum. Idem et si servus est.

§ 9.- In illis sane servis non intervenit constitutio, qui in totum perducere ad libertatem non possunt, ut puta si exportandus vel hac lege venierit (vel testamento hanc condicionem acceperat), ne umquam manumitteretur.

§ 10.- Suis autem nummis redemptus etsi totum pretium non numeravit, ex operis tamen ipsius accesserit aliquid, ut repleti pretium possit, vel si quid suo merito adquisierit, dicendum est libertatem competere.

§ 11.- Quod si partem suis nummis redimeret, quum partem servi haberet, ad constitutionem non pertinebit, non magis quam qui, quum proprietatem haberet, usum fructum redemit.

§ 12.- Sed qui, quum fructuarius esset, proprietatem redemit, in ea condicione est, ut ad constitutionem pertineret.

§ 13.- Sed et si duo servum redemerint, alter propriis nummis, alter nummis servi, dicendum erit constitutionem cessare: nisi forte is qui propriis nummis redemit manumittere fuerit paratus.

§ 14.- Sed et si partem quis redemit, pars altera ex causa lucrativa accesserit, dicendum erit constitutionem locum habere.

5.- MARCIANUS; *libro II, Institutionum*.- Si quis dicat se suis nummis emptum, potest consistere quum domino suo, cuius in fidem confugit, et queri,

the constitution will apply. Nor is the age of the purchaser taken into consideration, for, even if he is a minor, it is only just that he should keep his word, as, by doing so, he will not sustain any injury. The same rule is applicable to the purchaser who is a slave.

§ 9.- The constitution does not apply to slaves who are absolutely incapable of being granted their freedom; as, for example, where a slave is to be sent out of the country, or has been sold or bequeathed by will under the condition that he shall never be manumitted.

§ 10.- When a slave is ransomed with his own money, even though he did not pay the entire price, it must be said that he is entitled to his freedom if he contributed his labor to make up what was due, or if he afterwards obtained property by his industry.

§ 11.- If he should purchase a part of himself with his own money, and the other part belonged to him already, the constitution will not apply, any more than if, having the ownership of himself, he only purchased the usufruct of the same.

§ 12.- But what if he owned the usufruct of himself, and he purchased the ownership? In this case, he is in such a position that the Imperial Constitution will apply.

§ 13.- Where two persons purchase a slave, one of them with his own money, and the other with the money of the slave, it must be held that the constitution will not be applicable, unless he who purchased him with his own money is prepared to manumit him.

§ 14.- Where, however, anyone buys half of a slave, and acquires the other half by some profitable transaction, it must be said that there is ground for the application of the constitution.

5.- MARCIANUS; *Institutes, Book II*.- If a slave should allege that he was purchased with his own money, he can appear in court against his master,

atiende ciertamente a la edad del comprador; porque también si lo comprara un pupilo, es justo que él cumpla con la fe del contrato, puesto que ello sé ha de hacer sin perjuicio de él; y lo mismo también si él es esclavo.

§ 9.- Mas la Constitución no interviene respecto a aquellos esclavos que en absoluto no pueden ser llevados a la libertad, por ejemplo, si hubiere de ser exportado o hubiere sido vendido con esta condición, o en testamento hubiera recibido la condición de que nunca sea manumitido.

§ 10.- Mas al que fue comprado con su dinero, aunque no haya pagado todo el precio, si no obstante hubiere agregado algo con su trabajo para que se pueda completar el precio, o si hubiere adquirido algo por su propio mérito, se ha de decir que le compete la libertad.

§ 11.- Pero si teniendo uno parte de un esclavo hubiere comprado la otra parte con dinero de él, no estará incluido en la Constitución, no de otra suerte que si teniendo uno la propiedad compró el usufructo.

§ 12.- Pero ¿qué se dirá cuando siendo usufructuario compró también la propiedad? Que se halla en el caso de estar comprendido en la Constitución.

§ 13.- Pero también si dos hubieren comprado un esclavo, uno con dinero propio, y otro con dinero del esclavo, se habrá de decir, que deja de tener lugar la Constitución, a no ser acaso que el que lo compró con dinero propio estuviera dispuesto a manumitirlo.

§ 14.- Pero si alguno compró una parte, y la otra parte hubiere ido a él por causa lucrativa, se habrá de decir que también tiene lugar la Constitución.

5.- MARCIANO; *Instituta, libro II*.- Si alguno dijera que él fue comprado con su propio dinero, puede comparecer en juicio contra su señor, a cuya

quod ab eo non manumittatur, Romae quidem apud praefectum urbis, in provinciis vero apud praesides ex sacris constitutionibus divorum fratrum, sub ea tamen denuntiatione, ut is servus, qui hoc intenderit nec impleverit, in opus metalli detur, nisi forte dominus reddi eum sibi maluerit, utique non maiorem ex ea causa poenam constituturus.

§ 1.- Sed et si rationibus redditus liber esse iussus fuerit, arbiter inter servum et dominum, id est here-dem, datur de rationibus excutiendis.

6.- ALFENUS VARUS; *libro IV, Digestorum.*- Servus pecuniam ob libertatem pactus erat et eam domino dederat: dominus prius quam eum manumitteret, mortuus erat testamentoque liberum esse iusserat et ei peculium suum legaverat. Consulebat, quam pecuniam domino dedisset ob libertatem, an eam sibi heredes patroni reddere deberent necne. respondit, si eam pecuniam dominus, posteaquam acceperat, in suae pecuniae rationem habuisset, statim desisse eius peculii esse: sed si interea, dum eum manumitteret, acceptum servo rettulisset, videri peculii fuisse et debere heredes eam pecuniam manumisso reddere.

7.- IDEM; *libro VII, Digestorum.*- Duo filii familias peculiare servos separatim uterque habebant: ex his alter servulum suum peculiarem vivo patre manumisit: pater utrique testamento peculium praelegaverat. Quaerebatur, servus iste utrum amborum, an eius a quo manumissus erat libertus esset. Respondit, si prius testamentum pater fecisset, quam filius eum liberum esse iussisset, unus esse libertum, ideo quod eum quoque in peculio legasse videretur: sed si postea testamentum pater fecisset, non videri eam mentem eius fuisse, ut eum, qui manumissus esset, legaret eumque servum,

whose good faith he impugns, and complain that he has not been manumitted by him; but he must do this at Rome, before the Urban Prefect, or in the provinces before the Governor, in accordance with the Sacred Constitutions of the Divine Brothers; under the penalty, however, of being condemned to the mines, if he should attempt this and not prove his case; unless his master prefers that he be restored to him, and then it should be decided that he will not be liable to a more severe penalty.

§ 1.- Where, however, a slave is ordered to be free after having rendered his accounts, an arbiter between the slave and his master, that is to say, the heir, shall be appointed for the purpose of having the accounts rendered in his presence.

6.- ALFENUS VARUS; *Digest, Book IV.*- A slave, having agreed to give a certain sum in order to obtain his freedom, paid it to his master, but the latter died before manumitting him, and ordered him to be free by his will, and also bequeathed him his peculium. The slave asked whether the money, which he had paid to his master in consideration of obtaining his freedom, should be refunded to him by the heirs of his patron, or not? The answer was that if, after the master had received the money, he kept an account of it as his own, it immediately ceased to form part of the peculium- of the slave; but if, in the meantime, before he manumitted him, he set the money aside, as having been paid by the slave, it should be considered to belong to his peculium, and the heirs must return it to the manumitted slave.

7.- THE SAME; *Digest, Book VII.*- Two sons under paternal control had, as part of the peculium of each, separate slaves. One of them, during the lifetime of his father, manumitted a young slave who belonged to his peculium. The father, by his will, bequeathed to each son his own peculium, as a preferred legacy. The question arose whether the above-mentioned slave became the freedman of both of the sons, or only of the one by whom he had been manumitted? The answer was that if the father made his will before the son manumitted the slave, he would only become the freedman of that one, for the reason that he would be

fidelidad se acogió, y querellarse de que no es manumitido por él, en Roma ante el Prefecto de la Ciudad, y en las provincias ante los Presidentes, en virtud de las sacras Constituciones de los Divinos Hermanos; pero bajo la prevención dé que el esclavo que hubiere intentado esto y no lo hubiere probado, será condenado al trabajo de las minas, a no ser acaso que su dueño prefiriese que se le entregue, por supuesto, no habiéndole de imponer por esta causa una pena mayor.

§ 1.- Pero también, si se hubiere dispuesto uno sea libre habiendo rendido cuentas, se nombra árbitro para que examine las cuentas entre el esclavo y su señor, esto es, y el heredero.

6.- ALFENO VARO; *Digesto, libro IV.*- Un esclavo había pactado cierta cantidad de dinero por su libertad, y la había entregado a su señor; el señor había fallecido antes de manumitirlo, y había dispuesto en el testamento que fuese libre, y le había legado su peculio; se consultaba si los herederos del patrono deberían o no devolverle la cantidad de dinero, que por la libertad le hubiese dado a su señor. Respondió, que si después que la recibió el señor comprendió esta cantidad de dinero en la cuenta de su propio dinero, al punto dejó ella de ser del peculio de aquél; pero si mientras lo manumitía se la hubiese dado por recibida al esclavo, se consideraba que era del peculio, y que los herederos debían devolverle este dinero al manumitido.

7.- EL MISMO; *Digesto, libro VII.*- Dos hijos de familia tenían separadamente cada uno esclavos en su peculio; uno de ellos manumitió en vida de su padre un esclavo pequeño de su peculio; el padre les había prelegado a uno y a otro en su testamento su peculio; se preguntaba, si este esclavo lo sería de ambos, o liberto de aquel por quien había sido manumitido. Respondió, que si el padre hubiese hecho el testamento antes que el hijo hubiese dispuesto que aquél fuera libre, era liberto de uno sólo, porque se consideraría que lo legó también en el peculio; pero que si el padre hubiese hecho después

quoniam praelegatus non esset, mortuo patre amborum servum fuisse.

8.- MARCIANUS; *libro XIII, Instituonum*.- Qui poenae servi efficiuntur, indubitate manumittere non possunt, quia et ipsi servi sunt.

§ 1.- Sed nec rei capitalium criminum manumittere servos suos possunt, ut et Senatus censuit.

§ 2.- Divus quoque Pius Calpurnio rescripsit libertates ab eo, qui iam lege Cornelia damnatus esset vel, quum futurum prospiceret ut damnaretur, servis datas non competere.

§ 3.- Sed ne quidem illos ad iustam libertatem pervenire Divus Hadrianus Rescripsit, qui ideo manumissi sunt, ut crimini subtraherentur.

9.- PAULUS; *libro singulari Regularum*.-Servus hac lege venditus, ne manumittatur, vel testamento prohibitus manumitti, vel a praefecto vel a praeside prohibitus ob aliquod delictum manumitti ad libertatem perducere non potest.

10.- IDEM; *Imperialium sententiarum in cognitionibus prolatarum ex libris sex libro II*.- Aelianus debitor fiscalis Euemeriam ancillam ante annos multos emerat hac lege, ut manumitteret, eamque manumiserat: procurator quum bona debitoris non sufficientia quaereret, etiam Euemeriae status quaestionem faciebat. Placuit non esse iuri fiscali locum, quo omnia bona debitorum iure pignoris tenerentur, quia ea lege empti est, et, si non manumitteretur, ex Constitutione Divi Marci ad

considered to have been bequeathed with the remainder of the peculium. If, however, the father had made his will afterwards, he would not be held to have intended to bequeath the slave who had been manumitted; and as he did not bequeath the said slave as a preferred legacy, after the death of the father he would be the slave of the two brothers.

8.- MARCIANUS; *Institutes, Book XIII*.- Those who are reduced to slavery by way of penalty undoubtedly cannot manumit anyone, because they themselves are slaves.

§ 1.- Nor can those who are accused of a capital crime manumit their slaves, as this has been decreed by the Senate.

§ 2.- The Divine Pius stated in a Rescript addressed to Calpurnius, that freedom given to slaves by a person who has been convicted under the Cornelian Law, or who was aware that he would be convicted, will be of no force or effect.

§ 3.- The Divine Hadrian stated in a Rescript that where slaves have been manumitted in order that their master might be released from liability for crime, they were not legally entitled to their freedom.

9.- PAULUS; *Rules*.- When a slave is sold under the condition that he shall not be manumitted, or is forbidden by will to be manumitted, or is forbidden to be manumitted by a prefect of the Governor on account of some offence which he has committed, he cannot obtain his freedom.

10.- *Book II of the Six Books of the Imperial Decrees having Reference to Judicial Investigations*.- Aelianus, a debtor of the Treasury, having many years before purchased a female slave named Evemeria under the condition that he should manumit her, did so. As the Agent of the Treasury did not find the property of the debtor sufficient to satisfy his creditors, he raised a question with reference to the status of Evemeria. It was decided that there was no ground for the exercise of the right of the Treasury,

el testamento, no parece que fue su intención legar al que había sido manumitido, y que este esclavo, como quiera que no había sido prelegado, fue esclavo de ambos a la muerte del padre.

8.- MARCIANO; *Instituta, libro XIII*.- Los que se hacen esclavos de la pena no pueden indudablemente manumitir, porque también ellos son esclavos.

§ 1.- Pero tampoco pueden manumitir a sus esclavos los reos de crímenes capitales, como también lo dispuso el Senado.

§ 2.- También el Divino Pío respondió por Rescripto a Calpurnio, que no les compete a los esclavos la libertad dada por el que ya hubiese sido condenado por la ley Cornelia, o por el que viese que había de suceder que sería condenado.

§ 3.- Pero el Divino Adriano respondió por Rescripto, que tampoco llegan a la libertad legítima los que fueron manumitidos para substraerlos a la pena de un crimen.

9.- PAULO; *Reglas; libro único*.- El esclavo vendido con la condición de que no sea manumitido, o respecto del que se prohibió en testamento que fuera manumitido, o por el Prefecto, o por el Presidente se prohibió por causa de algún delito que fuese manumitido, no puede ser constituido en libertad.

10.- EL MISMO; *libro II de los seis de las sentencias imperiales dadas en juicio extraordinario*.- Eliano, deudor del fisco, había comprado muchos años antes la esclava Euemeria con la condición de manumitirla, y la había manumitido; el procurador, no hallando suficientes los bienes del deudor, promovía cuestión también sobre el estado de Euemeria; se determinó, que no había lugar al derecho del fisco, porque todos los bienes de los deudores les estuviesen obligados por derecho de

libertatem perveniret.

11.- IDEM; *libro LXIV, ad Edictum*.- Servum, qui sub condicione legatus est, interim heres manumittendo liberum non facit.

12.- IDEM; *libro L, ad Edictum*.- Lege Fabia prohibetur servus, qui plagium admisit, pro quo dominus poenam intulit, intra decem annos manumitti. In hoc tamen non testamenti facti tempus, sed mortis intuebimur.

13.- POMPONIUS; *libro I, ex Plautio*.- Servus furiosi ab adgnato curatore manumitti non potest, quia in administratione patrimonii manumissio non est. Si autem ex fideicommissi causa deberet libertatem furiosus, dubitationis tollendae causa ab adgnato tradendum servum, ut ab eo cui traditus esset manumittatur, Octavenus ait.

14.- PAULUS; *libro XVI, ad Plautium*.- Apud eum, cui par imperium est, manumittere non possumus: sed praetor apud consulem manumittere potest.

§ 1.- Imperator quum servum manumittit, non vindictam imponit, sed quum voluit, fit liber is qui manumittitur ex lege augusti.

15.- MARCELLUS; *libro XXIII, Digestorum*.- Mortis causa servum manumitti posse non est dubitandum. Quod non ita tibi intellegendum est, ut ita liber esse iubeatur, ut, si convaluerit dominus, non fiat liber, sed quemadmodum si vindicta eum

under which all the property of debtors is liable by the law of pledge, because the slave had been purchased under the condition of being manumitted, and if this had not been done, she would have been entitled to her freedom under the Constitution of the Divine Marcus.

11.- THE SAME; *On the Edict, Book LXIV*.- An heir, by manumitting a slave who has been bequeathed under a condition, and does this while the condition is pending, does not render the slave free.

12.- THE SAME; *On the Edict, Book L*.- A slave who has been guilty of kidnapping, and for whom his master has paid the penalty, is forbidden by the Favian Law to be manumitted within ten years; and in this case we do not consider the time when the will was made, but the date of the death of the testator.

13.- POMPONIUS; *On Plautius, Book I*.- The slave of an insane person cannot be manumitted by a relative of the latter who has been appointed his curator, because the manumission of a slave is not included in the administration of the property. If, however, the insane person should owe the slave his freedom on account of a trust, Octavenus says that, in order to remove all doubt, the slave should be delivered by the curator to the person to whom he is to be transferred in order to be manumitted by him.

14.- PAULUS; *On Plautius, Book XVI*.- We cannot manumit a slave in the presence of one whose authority is equal to ours. A Praetor, however, can manumit a slave in the presence of a Consul.

§ 1.- When the Emperor manumits a slave he does not touch him with a wand, but the slave who is manumitted becomes free by the mere expression of the Imperial will, in accordance with the law of Augustus.

15.- MARCELLUS; *Digest, Book XXIII*.- There is no doubt that a slave can be manumitted mortis causa. You must not, however, understand if a slave is ordered to be free in this manner that he will not become so if his master should recover his health; for

prenda, pues aquella fue comprada con dicha condición, y, si no fuese manumitida, llegaría a la libertad en virtud de la Constitución del Divino Marco.

11.- EL MISMO; *Comentarios al Edicto, libro LXIV*.- Al esclavo, que fue legado bajo condición, no lo hace libre el heredero manumitiéndolo entretanto.

12.- EL MISMO; *Comentarios al Edicto, libro L*.- Por la ley Favia se prohíbe que el esclavo que cometió plagio, por el cual su dueño pagó la pena, sea manumitido dentro de diez años; pero respecto a esto no atenderemos al tiempo en que fue hecho el testamento, sino al de la muerte.

13.- POMPONIO; *Doctrina de Plaucio, libro I*.- El esclavo de un loco no puede ser manumitido por un agnado que sea curador, porque la manumisión no está comprendida en la administración del patrimonio. Mas si por causa del fideicomiso debiese el loco la libertad, dice Octaveno, que para quitar duda debe ser entregado el esclavo por el agnado, a fin de que sea manumitido por aquel a quien hubiese sido entregado.

14.- PAULO; *Comentarios a Plaucio, libro XVI*.- No podemos manumitir ante aquél que tiene igual jurisdicción; pero el Pretor puede manumitir ante el Cónsul.

§ 1.- El Emperador, cuando manumite a un esclavo, no le impone la vindicta, sino, que cuando él lo quiso se hace libre, en virtud de la ley de Augusto, el que es manumitido.

15.- MARCELO; *Digesto, libro XXIII*.- No se ha de dudar que un esclavo puede ser manumitido por causa de muerte. Lo que no has de entender de modo que se disponga que sea libre, de suerte que, si convaleciere el señor, no se haga libre, sino que a la

liberaret absolute, scilicet quia morituum se putet, mors eius expectabitur, similiter et in hac specie in extremum tempus manumissoris vitae confertur libertas, durante scilicet propter mortis causae tacitam condicionem voluntate manumissoris: quemadmodum quum rem ita tradiderit, ut moriente eo fieret accipientis, quae ita demum alienatur, si donator in eadem permanserit voluntate.

16.- MODESTINUS; *libro I, Regularum*.- Si consentiente patre filius minor annis viginti servum eius manumiserit, patris faciet libertum et vacat causae probatio ob patris consensum.

17.- IDEM; *libro VI, Regularum*.- Servi, quos filius familias in castris quaesivit, non in patris familia computabuntur: Nec enim pater tales filii servos manumittere poterit.

18.- GAIUS; *libro XII, ad legem Iuliam et Papiam*.- Eum qui venierit venditor et promissor quem promiserit manumittere possunt.

19.- PAPINIANUS; *libro XXX, Quaestionum*.- Si quis ab alio nummos acceperit, ut servum suum manumittat, etiam ab invito libertas extorqueri potest, licet plerumque pecunia eius numerata sit, maxime si frater vel pater naturalis pecuniam dedit: videbitur enim similis ei qui suis nummis redemptus est.

20.- IDEM; *libro X, Responsorum*.- Causam minor viginti annis, qui servum donatum manumittendi gratia accepit, ex abundanti probat post Divi Marci litteras ad Aufidium Victorinum: etenim, si non manumiserit, ad libertatem servus perveniet.

just as if he had been absolutely manumitted before the Praetor, when anyone thinks that he is about to die, and his death is expected, so, in this instance, freedom is granted during the last moments of the person who bestows the manumission, as his will is considered to continue to exist on account of the tacit condition of the death of the person manumitting the slave. The case is the same as if someone should deliver property under the condition that, if he dies, it shall belong to the person who receives it; since the property will not be alienated if the donor retains the same intention during his lifetime.

16.- MODESTINUS; *Rules, Book I*.- If a son under twenty years of age manumits his slave with the consent of his father, he makes him the freedman of the latter; and proof of the manumission is unnecessary, on account of the consent of the father.

17.- THE SAME; *Rules, Book VI*.- Slaves whom a son under paternal control acquires while in the army are not included in the property of the father, and the latter cannot manumit slaves of this kind.

18.- GAIUS; *On the Lex Julia et Papia, Book XII*.- The vendor can manumit a slave whom he has agreed to sell, and the promisor one whom he has contracted to deliver.

19.- PAPINIANUS; *Questions, Book XXX*.- Where anyone has received a sum of money from another in consideration of manumitting his slave, the freedom of the latter can be extorted from him without his consent, although it is frequently the case that his own money is paid, and, above all, if his brother or his natural father furnished it; for the case is similar to one where a slave is redeemed with his own money.

20.- THE SAME; *Opinions, Book X*.- It is superfluous for a minor of twenty years of age to prove the manumission of a slave, if he receives him for the purpose of manumitting him, after the promulgation of the Rescript of the Divine Marcus addressed to Aufidius Victorinus; for if he had not manumitted him, the slave would, nevertheless,

manera que si en absoluto lo hiciera libre por la vindicta, a saber, porque creyera que él se había de morir, se esperará a su muerte; del mismo modo también en este caso se confiere la libertad para el último momento de la vida del manumisor, subsistiendo, por supuesto, la voluntad del manumisor por razón de la condición tácita por causa de muerte; a la manera que cuando alguno hubiere entregado una cosa de modo que al morir él se haga del que la recibe, cuya cosa se enajena solamente si el donante hubiere permanecido en la misma voluntad.

16.- MODESTINO; *Reglas, libro I*.- Si consintiendo el padre un hijo menor de veinte años hubiere manumitido a un esclavo suyo, lo hará liberto del padre; y huelga la prueba de la causa por virtud del consentimiento del padre.

17.- EL MISMO; *Reglas, libro VI*.- Los esclavos, que un hijo de familia adquirió en los campamentos, no serán computados entre los esclavos del padre; porque tampoco el padre podrá manumitir a tales esclavos del hijo.

18.- GAYO; *Comentarios a la ley Julia y Papia libro XII*.- El vendedor y el prometedor pueden manumitir al que por aquél hubiere sido vendido y al que éste hubiere prometido.

19.- PAPINIANO; *Cuestiones, libro XXX*.- Si uno hubiere recibido dinero de otro para que manumita a un esclavo suyo, se le puede arrancar la libertad aun contra su voluntad, aunque las más de las veces se le haya entregado dinero de él mismo, mayormente si el dinero lo dio un hermano o el padre natural; porque éste parecerá semejante al que fue comprado con su propio dinero.

20.- EL MISMO; *Respuestas, libro X*.- El menor de veinte años, que por donación recibió un esclavo para manumitirlo, tiene suficientemente probada la causa después de la carta del Divino Marco a Aufidio Victorino; porque si no lo hubiere manumitido, el esclavo llegará a la libertad.

obtain his freedom.

§ 1.- Non idem in fideicommissaria libertate iuris est, cuius causam minor debet probare: nam libertas nisi ita manumisso non competit.

§ 2.- Puellam ea lege vendidit, ut post annum ab emptore manumitteretur: quod si non manumisisset, convenit, uti manum iniceret aut decem aureos emptor daret. Non servata fide nihilo minus liberam ex sententia constitutionis fieri respondit, quoniam manus iniectio plerumque auxilii ferendi causa intervenit: itaque nec pecunia petetur, quum emolumentum legis voluntatem venditoris secutum sit.

§ 3.- Tempore alienationis convenit, ut homo libertatis causa traditus post quintum annum impletum manumitteretur et ut certam mercedem interea menstruam praeberet. Conditionem libertati mercedes non facere, sed obsequio temporariae servitutis modum praestitutum esse respondi: neque enim in omnibus libertatis causa traditum comparari statulibero.

21.- IDEM; *libro XIII, Responsorum.*- Servum dotalem vir qui solvendo est constante matrimonio manumittere potest: si autem solvendo non est, licet alios creditores non habeat, libertas servi impediatur, ut constante matrimonio deberi dos intellegatur.

22.- IDEM; *libro II, Definitionum.*- Nepos ex filio voluntate avi ut filius voluntate patris potest manumittere, sed manumissus patris vel avi libertus est.

§ 1.- The same rule of law does not apply where the grant of freedom is charged by a trust; for, in this case, the donor must prove the fact, as the manumitted slave will not otherwise obtain his freedom.

§ 2.- A certain man sold a female slave under the condition that she should be manumitted by the purchaser after the expiration of a year; and, if this was not done, it was agreed that the vendor should lay his hand upon her, or that the purchaser should pay ten aurei. The contract not having been observed, it was decided that the slave, nevertheless, became free in accordance with the terms of the aforesaid constitution; as, very frequently, laying on of the hand takes place for the purpose of giving assistance. Therefore the money cannot be recovered, as the benefit of the law was secured in accordance with the wishes of the vendor.

§ 3.- At the time of the alienation of a slave, it was agreed that, having been transferred with the intention of granting him his freedom, he should be manumitted after the expiration of five years; and also that in the meantime he must pay a certain sum every month. I gave it as my opinion that the said monthly payments did not form part of the condition under which he was liberated from bondage, but in order to show that his servitude was only temporary; for a slave who has been transferred in order to be free cannot, in every respect, be compared to one who is to be manumitted under a certain condition.

21.- THE SAME; *Opinions, Book XIII.*- A husband who is solvent can manumit a dotal slave during the continuance of the marriage. If, however, he is not solvent, even though he may have no other liabilities, the slave will be prevented from obtaining his liberty, as the dowry is understood to be due as long as the marriage continues to exist.

22.- THE SAME; *Definitions, Book II.*- A grandson can manumit a slave with the consent of a grandfather, as a son can do with the consent of his father;

§ 1.- No hay el mismo derecho tratándose de la libertad dejada por fideicomiso, cuya causa debe probar el menor; porque no compete la libertad sino habiendo sido así manumitido.

§ 2.- Uno vendió una niña esclava con la condición de que fuese manumitida por el comprador después de un año; pero si no la manumitiese, se convino que le echaría mano, o que el comprador diese diez áureos; respondió, que, no habiéndose guardado fidelidad, se hacía, no obstante, libre en virtud del espíritu de la Constitución, porque la cláusula de echar mano se incluye las más de las veces para prestar auxilio; y así, ni se pedirá el dinero, porque el beneficio de la ley secundó la voluntad del vendedor.

§ 3.- Al tiempo de la enajenación se convino que el esclavo entregado por causa de la libertad fuese manumitido después de cinco años cumplidos, y que mientras tanto pagase cierta merced mensual; respondí, que las mercedes no constituían condición para la libertad, sino que se estableció medida para la prestación de la servidumbre temporal; porque el que fue entregado por causa de la libertad no se equipara en todo a aquel a quien se le dejó la libertad bajo condición.

21.- EL MISMO; *Respuestas, libro XIII.*- El marido, que es solvente, puede manumitir durante el matrimonio, a un esclavo de la dote; mas si no es solvente, aunque tenga otros acreedores, se impedirá la libertad del esclavo, de suerte que se entienda que durante el matrimonio se debe la dote.

22.- EL MISMO; *Definiciones, libro II.*- El nieto habido de un hijo puede manumitir con la voluntad del abuelo, como el hijo con la voluntad del padre,

23.- IDEM; *libro XV, Responsorum*.- Gaius Seius Pamphilam hac lege emit, ut intra annum manumitteretur: deinde intra annum Seius servus pronuntiatus est: quaero, an ex lege venditionis finito anno Pamphila libertatem consecuta sit. Paulus respondit, quum ea condicione ancillam emptam domino adquisitam, quum qua condicione venisse proponeretur.

24.- HERMOGENIANUS; *libro I, Iuris Epitomarum*.- Lege Iunia Petronia, si dissonantes pares iudicum exstant sententiae, pro libertate pronuntiari iussum.

§ 1.- Sed et si testes non dispari numero tam pro libertate quam contra libertatem dixerint, pro libertate pronuntiandum esse saepe constitutum est.

25.- GAIUS; *libro I, de Manumissionibus*.- Iuris ratio efficit, ut infantibus quoque competat libertas.

26.- IAVOLENUS; *libro IV, ex Posterioribus Labeonis*.- Servum furiosum omni genere manumissum ad libertatem perducere putat posse labeo.

TITULO II

DE MANUMISSIS VINDECTA

1.- POMPONIUS; *libro I, ad Sabinum*.- Apud Praetorem eundemque tutorem posse pupillum ipso auctore manumittere constat.

2.- ULPIANUS; *libro XVIII, ad Sabinum*.- Si minor sit annis viginti fructuarius, an consentire

but the manumitted slave will become the freedman of the father, or the grandfather.

23.- THE SAME; *Opinions, Book XV*.- Gaius Seius purchased Pamphila under the condition that she would be manumitted within a year; and, before that time had elapsed, Seius himself was judicially decided to be a slave. I ask whether Pamphila was entitled to her freedom after a year had elapsed, in accordance with the condition of the sale. Paulus answered that the slave who had been purchased was acquired by the master of Seius, under the same condition subject to which she had been sold.

24.- HERMOGENIANUS; *Epitomes of Law, Book I*.- It is provided by the Lex Junia Patronia that where the decisions of Courts are conflicting, judgment must be rendered in favor of freedom.

§ 1.- It has frequently been established by Imperial Decrees that, where witnesses for and against freedom appear in equal numbers, judgment must be rendered in favor of freedom.

25.- GAIUS; *On Manumissions, Book I*.- The law provides that even infants are entitled to freedom.

26.- IAVOLENUS; *On the Last Works of Labeo, Book IV*.- Labeo holds that a slave who is insane can be manumitted and obtain his freedom by every proceeding known to the law.

TITLE II

CONCERNING MANUMISSIONS BEFORE A MAGISTRATE

1.- POMPONIUS; *On Sabinus, Book I*.- It is settled that a ward can, with the authority of his guardian in the presence of the Prsetor, manumit his slave as well as before the said guardian acting as Prsetor.

2.- ULPIANUS; *On Sabinus, Book XVIII*.- Where a minor of twenty years of age is the usufructuary of a

pero el manumitido es liberto del padre o del abuelo.

23.- EL MISMO; *Respuestas, libro XV*.- Cayo Seyo compró a Pánfila con la condición de que fuese manumitida dentro de un año; después, dentro del año, fue Seyo declarado esclavo; pregunto, si por la ley de la venta Pánfila habrá conseguido la libertad finido el año. Paulo respondió, que la esclava comprada con esta condición fue adquirida para el señor, con la condición con que se dijese que fue vendida.

24.- HERMOGENIANO; *Epítome del Derecho, libro I*.- Por la ley Junia Pretonia se dispuso, que si fueren iguales los pareceres discordes de los jueces, se fallase a favor de la libertad.

§ 1.- Pero aunque los testigos hubieren declarado en número no desigual, tanto a favor de la libertad, como contra la libertad, se determinó muchas veces que se debía de fallar a favor de la libertad.

25.- GAYO; *Da las Manumisiones, libro I*.- La razón del derecho hace que también a los que aun no hablan les compete la libertad.

26.- IAVOLENO; *Doctrina de las Obras póstumas de Labeón, libro VI*.- Opina Labeón, que el esclavo furioso puede ser llevado a la libertad, manumitido de cualquier modo.

TÍTULO II

DE LOS MANUMITIDOS CON LA VINDICTA

1.- POMPONIO; *Comentarios a Sabino, libro I*.- Es sabido, que el pupilo puede manumitir ante el Pretor, que también sea tutor, con la autoridad de éste mismo.

2.- ULPIANO; *Comentarios a Sabino, libro XVIII*.- Si el usufructuario fuera menor de veinte

libertati possit? Et puto consentiendo posse ad libertatem perducere.

3.- IDEM; *libro IV, Disputationum*.- Si heres servum legatum manumittat, mox repudiet legatarius, retro competit libertas. Idemque est et si duobus pure servus legetur et post alterius manumissionem alter repudiaverit: nam et hic retro libertas competit.

4.- IULIANUS; *libro XLII, Digestorum*.- Si pater filio permiserit servum manumittere et interim decesserit intestato, deinde filius ignorans patrem suum mortuum libertatem imposuerit, libertas servo favore libertatis contingit, quum non appareat mutata esse domini voluntas. Sin autem ignorante filio vetuisset pater per nuntium et antequam filius certior fieret, servum manumisisset, liber non fit. Nam ut filio manumittente servus ad libertatem perveniat, durare oportet patris voluntatem: nam si mutata fuerit, non erit verum volente patre filium manumissee.

§ 1.- Quotiens dominus servum manumittat, quamvis existimet alienum esse eum, nihilo minus verum est voluntate domini servum manumissum et ideo liber erit. Et ex contrario si se Stichus non putaret manumittentis esse, nihilo minus libertatem contingere. Plus enim in re est, quam in existimatione et utroque casu verum est Stichum voluntate domini manumissum esse. Idemque iuris est et si dominus et servus in eo errore essent, ut neque ille se dominum nec hic se servum eius putaret.

§ 2.- Minor viginti annis dominus nec communem quidem servum sine consilio recte manumittit.

slave, can he consent to his obtaining his freedom? I think that the slave can obtain it, if he gives his consent.

3.- THE SAME; *Disputations, Book IV*.- If the heir manumits a slave who has been bequeathed, and the legatee afterwards rejects the legacy, the grant of freedom has a retroactive effect. The same rule applies where a slave is absolutely bequeathed to two persons, and one of them afterwards repudiates the manumission made by the other; for, in this instance also, the grant of freedom has a retroactive effect.

4.- JULIANUS; *Digest, Book XLII*.- If a father should permit his son to manumit his slave, and, in the meantime, should die intestate, and his son, not being aware that his father was dead, should grant the slave his freedom, the slave will become free through the favor conceded to liberty, as it does not appear that the master changed his mind. If, however, the father had, by means of a messenger, forbidden his son to liberate the slave, and the son did not know this, and, before ascertaining it, he should manumit the slave, the latter will not become free; for in order that a slave may obtain his freedom through the manumission of a son, the intention of the father must continue to exist; since, if he should change his mind, it would not be true that the son had manumitted the slave with his father's consent.

§ 1.- Whenever a master manumits his slave, even though he may think he belongs to another, it is, nevertheless, true that the slave is manumitted with the consent of his master, and therefore he will become free. And, on the other hand, if Stichus does not think that he belongs to the person who manumits him, he will, nevertheless, obtain his freedom, for there is more in the fact itself than in opinion; and, in both cases, it is true that Stichus was manumitted with the consent of his master. The same rule of law will apply where both the master and the slave are mistaken, and one of them thinks that he is not the master, and the other believes that he is not his slave.

§ 2.- A minor of twenty years of age, who is a master, cannot legally manumit without appearing

años, ¿podrá prestar su consentimiento para la libertad? Y opino, que prestando su consentimiento podrá llevar a la libertad.

3.- EL MISMO; *Disputas, libro IV*.- Si el heredero manumitiera un esclavo legado, y luego el legatario repudiara el legado, compete la libertad retroactivamente. Y lo mismo es también si un esclavo fuese legado puramente a dos, y después de la manumisión del uno lo repudiare el otro; porque también en este caso compete retroactivamente la libertad.

4.- JULIANO; *Digesto, libro XLII*.- Si un padre le hubiere permitido a su hijo manumitir a un esclavo, y mientras tanto hubiere fallecido intestado, y después, ignorando el hijo que su padre había fallecido, le hubiere dado la libertad, por favor a la libertad le corresponde la libertad al esclavo, no apareciendo que fue cambiada la voluntad del dueño. Mas si ignorándolo el hijo, el padre lo hubiese prohibido por medio de mensajero, y el hijo, antes que fuese hecho sabedor de ello, hubiese manumitido al esclavo, éste no se hace libre, porque para que manumitiéndolo el hijo llegue el esclavo a la libertad es necesario que subsista la voluntad del padre; pues si hubiere sido cambiada, no será verdad que el hijo manumitió con la voluntad del padre.

§ 1.- Cuando el dueño manumite a un esclavo, aunque estime que él es de otro, es, no obstante, verdad que el esclavo fue manumitido con la voluntad de su señor; y por lo tanto sera libre. Y por el contrario, si Stico no creyese que él era del que lo manumitía, alcanza, sin embargo, la libertad; porque hay más en la realidad que en la opinión en uno y en otro caso es verdad que Stico fue manumitido con la voluntad de su señor. Y el mismo derecho hay, también si el señor y el esclavo estuviesen en este error, de modo que ni aquél se creyese dueño, ni éste esclavo suyo.

§ 2.- El señor menor de veinte años no manumite válidamente sin consejo ni aun al esclavo común. Y

Paulus notat: sed si pignori obligatum sibi minor viginti annis manumitti patiat, recte manumittitur, quia non tam manumittere est quam non impedire manumittentem intellegitur.

5.- IULIANUS; *eodem libro*.- An apud se manumittere possit is qui consilium praebeat, saepe quaesitum est. Ego, qui meminisse iavolenum praeceptorem meum et in Africa et in Syria servos suos manumis, quum consilium praeberet, exemplum eius secutus et in praetura et consulatu meo quosdam ex servis meis vindicta liberavi et quibusdam praetoribus consulentibus me idem suasi.

6.- IDEM; *libro II, ad Urseium Ferozem*.- Servus communis quin a minoribus viginti annis dominis possit apud consilium manumitti, quamvis unus ex sociis causam adprobaverit, dubium non est.

7.- GAIUS; *libro I, Rerum quotidianarum sive Aureorum*.- Non est omnino necesse pro tribunali manumittere: itaque plerumque in transitu servi manumitti solent, quum aut lavandi aut gestandi aut ludorum gratia prodierit Praetor aut proconsul legatusve caesaris.

8.- ULPIANUS; *libro V, ad Edictum*.- Ego quum in villa quum Praetore fuisset, passus sum apud eum manumitti, etsi lictoris praesentia non esset.

9.- MARCIANUS; *libro XIII, Institutionum*.- Iusta causa manumissionis est, si periculo vitae infamiaeve dominum servus liberaverit.

§ 1.- Sciendum est, qualiscumque causa probata sit et recepta, libertatem tribuere oportere: nam divus pius rescipit causas probatas revocari non oportere, dum ne alienum servum possit quis manumittere:

before the proper authority. Paulus says that if a minor of twenty years of age permits a slave over whom he has the right of pledge to be manumitted, the manumission is legal; because he is not understood to have actually liberated him, but only not to have interfered with his manumission.

5.- JULIANUS; *In the Same Book*.- The question has often been asked whether a magistrate appointed for the purpose of examining manumissions can, himself, manumit a slave. I remember that Javolenus, my preceptor, manumitted his slaves in Africa and in Syria, when he was a member of the board of magistrates; and I followed his example, and liberated some of my slaves in my tribunal, both while I was Praetor and Consul; and I advised certain other Praetors and Consuls to do the same.

6.- THE SAME; *On Urseius Ferox, Book II*.- There is no doubt that a slave held in common by minors of twenty years of age can be manumitted before the proper tribunal; even though one of the owners may not assent to the proceedings.

7.- GAIUS; *Diurnal or Golden Matters, Book I*.- It is not absolutely necessary for the manumission to take place in the tribunal, and therefore slaves are frequently manumitted while in transit, when the Praetor, the Proconsul, the Deputy, or the Emperor confers this benefit upon them while on the way to the bath, to the tribunal, or to the public games.

8.- ULPIANUS; *On the Edict, Book V*.- When I was in the country with a Praetor, I permitted a slave to be manumitted before him, although no lictor was present.

9.- MARCIANUS; *Institutes, Book XIII*.- Just cause for manumission exists, where a slave has saved his master from the danger of losing his life, or from disgrace.

§ 10.- It should be remembered that freedom must be granted after it has once been received, no matter what reason may be alleged against it afterwards. For the Divine Pius stated in a Rescript that where a case

nota Paulo: pero si el menor de veinte años consintiera que fuese manumitido el que le estuviera obligado en prenda, es manumitido válidamente, porque se entiende no tanto que éste manumite como que no pone impedimento al que hace la manumisión.

6.- JULIANO; *en el mismo libro*.- Muchas veces se preguntó, si ante sí mismo podía manumitir el que presta consejo; yo, recordando que Javoleno, mi preceptor, manumitió esclavos suyos así en África como en Siria, aunque prestaba consejo, habiendo seguido su ejemplo di con la vindicta la libertad a algunos de mis esclavos, tanto desempeñando la Pretura como durante mi Consulado, y les aconsejé lo mismo a algunos Pretores que me consultaron.

6.- EL MISMO; *Comentarios a Urseyo Ferox, libro II*.- No hay duda que un esclavo común puede ser manumitido ante el consejo por sus dueños menores de veinte años, aunque sólo uno de los condueños hubiere probado la causa.

7.- GAYO; *Diario, libro I*.- No es absolutamente necesario hacer la manumisión ante el tribunal; y así, muchas veces suelen ser manumitidos los esclavos al paso, cuando el Pretor, o el Procónsul, o el legado del César saliere para ir a bañarse, o a pasearse, o para asistir a los juegos.

8.- ULPIANO; *Comentarios al Edicto, libro V*.- Yo, estando en una casa de campo con el Pretor, consentí que se manumitiera ante él, aun sin la presencia del lictor.

9.- MARCIANO; *Instituta, libro XIII*.- Es justa causa de manumisión si el esclavo hubiere librado a su dueño de peligro de la vida o de la infamia.

§ 1.- Se ha de saber, que una causa cualquiera que haya sido probada y admitida debe dar la libertad; porque respondió por rescripto el Divino Pío, que no debían ser revocadas las causas aprobadas, con tal

nam causae probationi contradicendum, non etiam causa iam probata retractanda est.

10.- IDEM; *libro III, Regularum*.- Surdi vel muti patris filius iussu eius manumittere potest: furiosi vero filius non potest manumittere.

11.- ULPIANUS; *libro VI, de Officio Proconsulis*.- Si minor annis viginti manumittit, huiusmodi solent causae manumissionis recipi: si filius filiae frater sororve naturalis sit.

12.- IDEM; *libro II, ad legem Aeliam Sentiam*.- Vel si sanguine eum contingit (habetur enim ratio cognationis):

13.- IDEM; *libro de Officio Proconsulis*.- Si collactaneus, si educator, si paedagogus ipsius, si nutrix, vel filius filiae cuius eorum, vel alumnus, vel capsarius (id est qui portat libros), vel si in hoc manumittatur, ut procurator sit, dummodo non minor annis decem et octo sit, praeterea et illud exigitur, ut non utique unum servum habeat, qui manumittit. item si matrimonii causa virgo vel mulier manumittatur, exacto prius iureiurando, ut intra sex menses uxorem eam duci oporteat: ita enim senatus censuit.

14.- MARCIANUS; *libro IV, Regularum*.- Alumnos magis mulieribus conveniens est manumittere: sed et in viris receptum est satisque est permitti eum manumitti, in quo nutriendo propensorem animum fecerint.

§ 1.- Sunt qui putant etiam feminas posse matrimonii causa manumittere, sed ita, si forte conservus suus in hoc ei legatus est. Et si spado velit matrimonii causa manumittere, potest: non idem est

has once been proved it cannot be revived, provided the person is not permitted to manumit a slave belonging to another; for anything that is alleged can be contradicted by evidence, but where it has once been proved, it cannot be reconsidered.

10.- THE SAME; *Rules, Book III*.- The son of a deaf or dumb father can manumit a slave by his order. The son of an insane person, however, cannot do so.

11.- ULPIANUS; *On the Duties of Proconsul, Book VI*.- When a minor under the age of twenty years manumits a slave, the manumission is ordinarily accepted, where the person who manumits is the natural son or daughter, brother or sister of the slave;

12.- THE SAME; *On the Lex Aelia Sentia, Book II*.- Or if they are related to him by blood (for such relationship is taken into consideration).

13.- THE SAME; *On the Duties of Proconsul*.- Or if he or she is the foster-brother, instructor, teacher, or nurse of the minor, or the son or daughter of the person above mentioned, or his pupil, or the attendant who carries his books, or if a slave is manumitted in order to become an agent; provided, in this instance, that he is at least eighteen years of age; and it is also required that the minor who manumits him shall have more than one slave. Likewise, if a virgin or a woman is manumitted for the purpose of marriage, if an oath is exacted from the master in the first place that she will be married within six months, as this was decreed by the Senate.

14.- MARCIANUS; *Rules, Book IV*.- It is more usual for women to manumit their foster-children, but this is also permitted in the case of men; and it is sufficient for one to be allowed to manumit a slave in whose support he has a more than ordinary interest.

§ 1.- There are some authorities who think that women can manumit a slave for the purpose of marrying him, but this should be limited to a case where he was bequeathed to the woman who has been

que uno no pueda manumitir un esclavo ajeno; porque se ha de contradecir la prueba de la causa, y no se ha de revocar la causa ya aprobada.

10.- EL MISMO; *Reglas, libro III*.- El hijo de un padre sordo o mudo puede manumitir por orden de éste; pero el hijo de un loco no puede manumitir.

11.- ULPIANO; *Del cargo de Procónsul, libro VI*.- Si el menor de veinte años manumite, se suelen admitir causas de manumisión de esta naturaleza, si fuera hijo o hija, hermano o hermana natural.

12.- EL MISMO; *Comentarios a la ley Elia Sencia, libro. II*.- O si está unido por vínculo de la sangre; porque se tiene cuenta de la cognación.

13.- EL MISMO; *Del cargo de Procónsul, libro.....*.- Si fue su hermano de leche, su ayo, o su pedagogo, si fue su nodriza, o hijo o hija de uno de éstos, o alumno, o acompañante, esto es, que le llevaba los libros, o si fuera manumitido para esto, para que sea procurador, con tal que no sea menor de dieciocho años; además se exige también esto, que no tenga ciertamente un solo esclavo el que manumite. Asimismo, si fuera manumitida una doncella o una mujer por causa de matrimonio, habiéndose exigido antes juramento, a fin de que deba ser tornada por mujer dentro de seis meses; porque así lo dispuso el Senado.

14.- MARCIANO; *Reglas, libro IV*.- A las mujeres les es más conveniente manumitir a los que alimentaron; pero también se admitió respecto a los varones, y es bastante que se permita que sea manumitido aquel a quien por haberlo alimentado hubieren inclinado su ánimo.

§ 1.- Hay quienes opinan que también las mujeres pueden manumitir por causa de matrimonio, pero esto es así, si es que a una le fue legado con este objeto un coesclavo suyo. Y si el espadón quisiera

in castrato.

15.- PAULUS; *libro I, ad legem Aeliam Sentiam*.- Etiam condicionis implendae causa minori viginti annis manumittere permittendum est, veluti si quis ita heres institutus sit, si servum ad libertatem perduxerit.

§ 1.- Ex praeterito tempore plures causae esse possunt, veluti quod dominum in proelio adiuvaverit, contra latrones tuitus sit, quod aegrum sanaverit, quod insidias detexerit. Et longum est, si exequi voluerimus, quia multa merita incidere possunt, quibus honestum sit libertatem quum decreto praestare: quas aestimare debet is, apud quem de ea re agatur.

§ 2.- Plures vindicta pariter manumitti possunt et sufficit praesentia servorum, ut vel plures manumitti possint.

§ 3.- Absens quoque causam probare per procuratorem poterit.

§ 4.- Si duo matrimonii causa manumittent, recipi causa non debet.

§ 5.- Hi qui in Italia vel alia provincia domicilium habent, apud alterius provinciae Praesidem consilio adhibito manumittere possunt.

16.- ULPIANUS; *libro II, ad legem Aeliam Sentiam*.- Illud in causis probandis meminisse iudices oportet, ut non ex luxuria, sed ex affectu descendentes causas probent: neque enim deliciis, sed iustis affectionibus dedisse iustam libertatem

his fellow-slave. If a man, who is impotent, wishes to manumit a female slave for the purpose of marrying her, he can do so. This rule, however, does not apply to one who has been castrated.

15.- PAULUS; *On the Lex Mlia Sentia, Book I*. A minor of twenty years of age should also be permitted to manumit a slave for the purpose of complying with a condition; for instance, where anyone has been appointed an heir under the condition of liberating a slave.

§ 1.- Many just causes for manumission may exist with reference to time past; for example, where the slave has assisted his master in battle, has protected him against robbers, has cured him when he was ill, or has revealed treachery with which he was threatened, and in other instances which it would take too long to enumerate; as there are a great many other reasons for which it would be honorable for freedom to be granted by a decree, and which should be taken into a consideration by the magistrate before whom the matter is brought.

§ 2.- Several slaves can be manumitted at the same time in the presence of a magistrate, and the presence of the slaves is sufficient to enable several to be manumitted.

§ 3.- A master who is absent can state the reason for manumissions by his attorney.

§ 4.- If two masters manumit the same female slave for the purpose of marrying her, the reason should not be accepted.

§ 5.- Those persons who have their domicile in Italy, or in some other province, can manumit their slaves before the Governor of another province, after having made application to the proper tribunal.

16.- ULPIANUS; *On the Lex Aelia Sentia, Book II*.- The judges, when hearing the reasons for manumissions, must remember that these must be based, not on dissoluteness, but on affection; for the Lex &lia Sentia is understood to grant lawful

manumitir por causa de matrimonio, puede hacerla; lo cual no es lo mismo tratándose de un castrado.

15.- PAULO; *Comentarios a la ley Elia Sencia, libro I*. - Al menor de veinte años se le ha de permitir que manumita también para que cumpla una condición, por ejemplo, si alguno hubiera sido instituido heredero, si hubiere dado la libertad a un esclavo.

§ 1.- Muchas pueden ser las causas relativas al tiempo pasado, por ejemplo, por haber ayudado al señor en la guerra, por haberlo amparado contra ladrones, por haberlo curado estando enfermo, por haberle descubierto acechanzas; y sería prolijo si quisiéramos enumerarlas todas, porque puede haber muchos méritos por los que sea honrado conceder con decreto la libertad; cuyas causas deberá estimar aquel ante quien se trate de este asunto.

§ 2.- Muchos pueden ser manumitidos al mismo tiempo con la vindicta, y basta la presencia de los esclavos para que muchos puedan ser manumitidos.

§ 3.- También el ausente podrá probar la causa por medio de procurador.

§ 4.- Si dos manumitieren por causa de matrimonio, no se debe admitir la causa.

§ 5.- Los que tienen su domicilio en Italia o en otra provincia, pueden manumitir, obtenido consejo, ante el Presidente de otra provincia.

16.- ULPIANO; *Comentarios a la ley Elia Sencia, libro II*.- Conviene que los jueces tengan presente al aprobar las causas, que no deben aprobar causas que provengan de ostentación, sino de afecto; porque no se ha de creer que la ley Elia Sencia concedió la

legem Aeliam Sentiam credendum.

§ 1.- Si quis minori viginti annis hac lege servum dederit aut pretio accepto vel donationis causa, ut eum liberum faciat, potest ille causam manumissionis istius probare, hoc ipsum allegans legem datam, et perducere ad libertatem: ergo hic debet ostendere hoc inter ipsos actum, ut proinde vel ex lege donationis vel ex affectione eius qui dedit res aestimetur.

17.- PAULUS; *libro L, ad Edictum*.- Apud proconsulem, postquam urbem egressus est, vindicta manumittere possumus

§ 1.- Sed et apud legatum eius manumittere possumus.

18.- IDEM; *libro XVI, ad Plautium*.- Apud filium familias magistratum manumitti potest, etiamsi ipse filius familias manumittere non potest.

§ 1.- Apud collegam suum Praetor manumittere non potest.

§ 2.- Filius quoque voluntate patris apud patrem manumittere poterit.

19.- CELSUS; *libro XXIX, Digestorum*.- Si minor annis apud consilium matrimonii causa praegnatem manumiserit eaque interim pepererit, in pendenti erit, servus an liber sit, quem ea peperit.

20.- ULPIANUS; *libro II, de Officio Consulis*.- Si rogatus sit minor viginti quinque annis manumittere per fideicommissum, incunctanter debet ei permitti, nisi si proprium servum rogatus fuit manumittere:

freedom, not for the purpose of pleasure, but on account of sincere attachment.

§ 1.- If anyone should transfer a slave to a minor of twenty-one years of age, either in consideration of a price paid, or as a donation, under the condition that he shall liberate him, he can offer this as a just reason for manumission, stating the condition which had been imposed, and can then grant the slave his freedom. He, however, will be required to show that this was the agreement between the parties, so that the matter may be decided in accordance with the condition of the donation, or with the affection of the person who gave the slave to be manumitted.

17.- PAULUS; *On the Edict, Book L*.- We can manumit a slave in the presence of the Proconsul after he has left the City.

§ 1.- We can also manumit a slave in the presence of his deputy.

18.- THE SAME; *On Plautius, Book XVI*.- A slave can be manumitted before a son under paternal control, who is acting as a magistrate, although he himself, being subject to paternal authority, has, as a private individual, no right to manumit a slave.

§ 1.- A Praetor cannot manumit a slave in the presence of his colleague.

§ 2.- A son can also manumit a slave in the presence of his father, with the consent of the latter.

19.- CELSUS; *Digest, Book XXIX*.- If a minor of twenty years of age manumits a female slave who is pregnant, before the proper tribunal, for the purpose of marrying her, and, in the meantime, she should have a child, the condition of the child whom she brought forth, that is to say, whether it is a slave or a freeman, shall remain undetermined.

20.- ULPIANUS; *On the Duties of Consul, Book II*.- If a minor of twenty-five years of age is charged by the terms of a trust to manumit a slave, he should be permitted to do so immediately, unless he was

libertad legal para placer, sino por afecciones legítimas.

§ 1.- Si alguno le hubiere dado, o por precio recibido, o por causa de donación, un esclavo a un menor de veinte años, con la condición de que lo haga libre, puede él probar con más justicia la causa de esta manumisión alegando esto mismo, la condición impuesta, y darle la libertad; así, pues, él debe probar que esto fue convenido entre ellos a fin de que de este modo se aprecie el caso, o por virtud de la condición de la donación, o por virtud del afecto del que la dió.

17.- PAULO; *Comentarios al Edicto, libro L*.- Ante el Procónsul, después que ha salido de la ciudad podemos manumitir con la vindicta.

§ 1.- Pero también podemos manumitir ante su legado.

18.- EL MISMO; *Comentarios a Plautio, libro XVI*.- Se puede manumitir ante un hijo de familia magistrado, aunque él como hijo de familia no puede manumitir.

§ 1.- El Pretor no puede manumitir ante su colega.

§ 2.- Un hijo podrá manumitir también ante su padre con la voluntad de su padre.

19.- CELSO; *Digesto, libro XXIX*.- Si un menor de edad hubiere manumitido ante el consejo por causa de matrimonio a una que estaba embarazada, y ella hubiere parido entretanto, estará en suspenso si es esclavo o libre el que ella hubiere parido.

20.- ULPIANO; *Del cargo de Cónsul, libro II*.- Si a un menor de veinticinco años se le hubiera rogado por fideicomiso que manumitiese, se le debe permitir inmediatamente, a no ser que se le haya rogado que

hic enim conferenda erit quantitas emolumenti, quae ad eum pervenit ex iudicio eius qui rogavit, quum pretio eorum quos rogatus est manumittere.

§ 1.- Sed et si hac lege ei servus fuerit donatus, ut manumittatur, permittendum erit manumittere, ne Constitutio Divi Marci superveniens cunctationem consulis dirimat.

§ 2.- Matrimonii causa manumittere si quis velit et is sit, qui non indigne huiusmodi condicionis uxorem sortiturus sit, erit ei concedendum.

§ 3.- Mulieri quoque volenti suum filium naturalem vel quem ex supra scriptis manumittere permittendum esse Marcellus scribit.

§ 4.- Consul apud se potest manumittere, etiamsi evenerit, ut minor annis viginti sit.

21.- MODESTINUS; *libro I, Pandectarum*.- Apud praefectum Aegypti possum servum manumittere ex Constitutione Divi Augusti.

22.- PAULUS; *libro XII, Quaestionum*.- Pater ex provincia ad filium sciens Romae agentem epistulam fecit, quae permisit ei, quem vellet ex servis, quos in ministerio secum hic habebat, vindicta liberare: postquam filius Stichum manumisit apud Praetorem: quaero, an fecerit liberum. Respondi: quare non hoc concessum credamus patri, ut permittere possit filio ex his, quos in ministerio haberet, manumittere? Solam enim electionem filio concessit, ceterum ipse manumittit.

charged to manumit his own slave. For, in this instance, the amount of the benefit, which he will obtain from the will of the person who made the request, must be compared with the value of the slave whom he was requested to manumit.

§ 1.- Where, however, a slave was donated to the minor under the condition that he should be manumitted, he ought to be allowed to manumit him, in order to prevent the Constitution of the Divine Marcus from becoming applicable during the delay granted by the Consul.

§ 2.-Where anyone wishes to manumit a female slave in order to marry her, and he can, without dishonor to his rank, marry a woman of this kind, he should be permitted to do so.

§ 3.- Marcellus also says that if a woman desires to emancipate her natural son, or any of the other persons previously mentioned, she should be allowed to do so.

§ 4.- A Consul can manumit a slave before himself, if he should happen to be a minor of twenty years of age.

21.- MODESTINUS; *Pandects, Book I*.- I can, in accordance with the Constitution of the Divine Augustus, manumit a slave in the presence of the Prefect of Egypt.

22.- PAULUS; *Questions, Book XII*.- A father sent a letter from a province to his son, whom he knew to be at Rome, by which he permitted him to liberate before a magistrate any slave whom he might select out of those whom he had with him for his personal service, and the son subsequently manumitted Stichus in the presence of the Praetor. I ask whether he rendered him free? The answer was, why should we not believe that the father could authorize his son to manumit any slaves which he had for his personal service? For he only granted his son the privilege of making a choice, and, as for the rest, he himself manumitted the slave.

manumita a su propio esclavo; porque en este caso se habrá de comparar la cuantía del emolumento, que fue a poder de él en virtud de la última voluntad de quien le rogó, con el precio de aquellos que se les rogó que los manumitiera.

§ 1.- Pero también si le hubiere sido donado un esclavo con la condición de que sea manumitido, se le habrá de permitir que lo manumita, a fin de que no interviniendo la Constitución del Divino Marco corrija la tardanza del Cónsul.

§ 2.- Si alguno quisiera manumitir por causa de matrimonio, y fuera tal que sin indignidad hubiera de tomar mujer de tal condición, se le habrá de permitir.

§ 3.- Escribe Marcelo, que también a la mujer que quiere manumitir a un hijo suyo natural, o a alguno de los susodichos, se le ha de permitir.

§ 4.- El Cónsul puede manumitir ante sí, aunque aconteciere que sea menor de veinte años.

21.- MODESTINO; *Pandectas, libro I*.- En virtud de la Constitución del Divino Augusto puedo manumitir ante el Prefecto de Egipto.

22.- PAULO; *Cuestiones, libro XII*.- Un padre, sabiendo que su hijo vivía en Roma le escribió desde una provincia una carta, por la que le permitió que diese con la vindicta la libertad al que él quisiera de los esclavos que allí tenía consigo a su servicio; y después el hijo manumitió a Stico ante el Pretor; pregunto, si lo habrá hecho libre. Respondí: ¿porqué no creemos que se le concedió al padre que pueda permitirle al hijo que dé la libertad a uno de los que tuviera a su servicio? Porque al hijo le concedió la sola elección, pero él mismo hizo la manumisión.

23.- HERMOGENIANUS; *libro I, Iuris Epitomarum*.- Manumissio per lictores hodie domino tacente expediri solet, et verba sollemnia licet non dicantur, ut dicta accipiuntur.

24.- PAULUS; *libro II, ad Neratium*.- Pupillus qui infans non est apud consilium recte manumittit. Paulus: scilicet tutore auctore, ita tamen, ut peculium eum non sequatur.

25.- GAIUS; *libro I, de Manumissionibus*.- Si tutoris habendi causa pupillus manumittat, probationi esse causam fufidius ait. Nerva filius contra sentit, quod verius est: namque perabsurdum est in eligendo tutore firmum videri esse iudicium pupilli, cuius in omnibus rebus ut infirmum iudicium tutore auctore regitur.

23.- HERMOGENIANUS; *Epitomes of Laiv, Book I*.- At the present time, it is usual for manumission to be made by means of the lictors, the master remaining silent, and although solemn words are not spoken, they are considered to be spoken.

24.- PAULUS; *On Neratius, Book II*.- A minor who is no longer an infant can legally manumit a slave before the proper tribunal. Paulus: Provided his guardian authorizes him to do so, and he liberates him in such a way that the peculium does not follow the slave.

25.- GAIUS; *On Manumissions, Book I*.- If a minor manumits a slave for the purpose of making him his guardian: Fufidius says that this should be approved. Nerva, the son, holds the contrary opinion, which is correct. For it would be the height of absurdity for the judgment of a minor to be held to be sufficiently good to enable him to select a guardian, when in every other transaction he is controlled by the authority of his guardian, because his judgment is weak.

23.- HERMOGENIANO; *Epítome del Derecho, libro I*.- Hoy día se suele verificar la manumisión por medio de los lictores quedando callado el señor, y las palabras solemnes, aunque no se digan, se tienen por dichas.

24.- PAULO; *Comentarios a Neracio, libro II*.- El pupilo, que ya no está en la infancia, manumite válidamente ante el consejo. Y dice Paulo: por supuesto, con la autoridad del tutor, pero de suerte que no le siga el peculio.

25.- GAYO; *De las Manumisiones, libro I*.- Si un pupilo manumitiera a esclavo para tener tutor, dice Fufidio que esta es causa plausible. Nerva, el hijo, opina lo contrario; lo que es más verdadero; porque es muy absurdo que para elegir tutor se considere que es firme el juicio del pupilo, en todas cuyas cosas es regido como débil su juicio por la autoridad del tutor.

TIT. III

TITLE III

TÍTULO III

DE MANUMISSIONIBUS, QUAE SERVIS AD UNIVERSITATEM PERTINENTIBUS IMPONUNTUR

CONCERNING THE MANUMISSION OF SLAVES BELONGING TO A COMMUNITY

DE LAS MANUMISIONES QUE SE DAN A LOS ESCLAVOS PERTENECIENTES A UNA UNIVERSIDAD

1.- ULPIANUS; *libro V, ad Sabinum*.- Divus Marcus omnibus collegiis, quibus coeundi ius est, manumittendi potestatem dedit:

1.- ULPIANUS; *On Sabinus, Book V*.- The Divine Marcus granted the power of manumission to all corporate bodies that have the right to assemble.

1.- ULPIANO; *Comentarios a Sabino, libro V*.- El Divino Marco les concedió a todos los colegios, que tenían derecho para reunirse, facultad para manumitir.

2.- IDEM; *libro XIV, ad Sabinum*.- Quare hi quoque legitimam hereditatem liberti vindicabunt.

2.- THE SAME; *On Sabinus, Book XIV*.- For this reason, such bodies can claim the estates of their freedmen to which they are legally entitled.

2.- EL MISMO; *Comentarios a Sabino, libro XIV*.- Por lo que también ellos reivindicarán la herencia legítima del liberto.

3.- PAPINIANUS; *libro XIV, Responsorum*.- Servus civitatis iure manumissus non ademptum peculium retinet ideoque debitor ei solvendo liberatur.

3.- PAPINIANUS; *Opinions, Book XIV*.- A slave belonging to a municipality, who has been lawfully emancipated, will retain his peculium, if he has not been previously deprived of it; and therefore his debtor is released from liability by paying him.

3.- PAPINIANO; *Respuestas, libro XIV*.- El esclavo de una ciudad legalmente manumitido retiene el peculio de que no se le privó; y por lo tanto, pagándole, se libra el deudor.

TIT IV

DE MANUMISSIS TESTAMENTO

1.- ULPIANUS; *libro IV, ad Sabinum*.- Quum saepius datur servo libertas, placet eam favore valere, ex qua pervenit ad libertatem.

2.- IDEM; *libro V, ad Sabinum*.- Si quis ita heredem instituerit "Titius heres esto; si Titius heres non erit, Stichus heres esto. Stichus liber esto", non esse Stichum liberum aristo ait Titio herede existente. Mihi videtur posse dici liberum fore, quasi non utique alio gradu acceperit libertatem, sed dupliciter: quo iure utimur.

3.- POMPONIUS; *libro I, ad Sabinum*.- Nec militi minori annis viginti permittitur posse testamento suo servum manumittere.

4.- IDEM; *libro II, ad Sabinum*.- Si quis ita scripserit "Stichus liber esto eique heres meus decem dato", nulla dubitatio est, quin debeantur etiam, si eum pater familias vivus manumiserit.

§ 1.- Sed et si sic: "Stichus liber esto" sive statim sive post tempus "eique, quum liber erit, heres meus decem dato", idem dicendum est.

§ 2.- Illud constabit, si libertate data sic fuerit legatum "eique, si eum vindicta liberavero, heres meus decem dato", licet ex nimia suptilitate separatum est a testamento, attamen humanitatis intuitu valebit legatum, si vivus eum manumiserit.

5.- IDEM; *libro III, ad Sabinum*.- In libertatibus levissima scriptura spectanda est, ut, si plures sint,

TITLE IV

CONCERNING TESTAMENTARY
MANUMISSIONS

1.- ULPIANUS; *On Sabinus, Book IV*.- Where freedom is granted to a slave several times in a will, that disposition will prevail by which he can best obtain his freedom.

2.- THE SAME; *On Sabinus, Book V*.- If anyone should appoint an heir as follows, "Let Titius be my heir, and if Titius should not be my heir, let Stichus be my heir; let Stichus be free," Aristo says that Stichus will not be free, if Titius becomes the heir. It seems to me that he can be held to be free, as he does not receive his liberty in two different degrees, but it is granted to him twice; which is our practice.

3.- POMPONIUS; *On Sabinus, Book I*.- A minor of twenty years of age, who is in the army, is not permitted to manumit his slave by will.

4.- THE SAME; *On Sabinus, Book II*.- If anyone should make the following provision in his will, namely, "Let Stichus be free, and let my heir pay him ten aurei," there is no doubt that the money will be due him, even if the head of the household should manumit him during his lifetime.

§ 1.- The same rule will apply if the testator should say: "Let Stichus be free, either immediately or after a certain time; and when he becomes free, let my heir pay him ten aurei."

§ 2.- It has been decided that if a legacy of freedom is bequeathed as follows, "Let my heir pay ten aurei to such-and-such a slave, if I grant him his freedom in the presence of the magistrate," although, strictly speaking, this is different from a testamentary manumission, still, according to the dictates of humanity, the legacy will be valid if the master, during his lifetime, should emancipate the slave.

5.- THE SAME; *On Sabinus, Book III*.- Those provisions which are the least burdensome should be

TÍTULO IV

DE LOS MANUMITIDOS EN
TESTAMENTO

1.- ULPIANO; *Comentarios a Sabino, libro IV*.- Cuando muchas veces se le da a un esclavo la libertad, está determinado que valga por favor aquella por la cual llegó a la libertad.

2.- EL MISMO; *Comentarios a Sabino, libro V*.- Si alguno hubiere instituido heredero de este modo: «Sea heredero Ticio; si Ticio no fuere heredero, sea heredero Stico; y Stico sea libre», dice Aristón, que Stico no es heredero, quedando heredero Ticio. A mí me parece que se puede decir, que habrá de ser libre, como si no hubiere recibido la libertad en otro grado, sino las dos veces; cuyo derecho observamos.

3.- POMPONIO; *Comentarios a Sabino, libro I*.- Ni aun al militar menor de veinte años se le permite que pueda manumitir por testamento a un esclavo.

4.- EL MISMO; *Comentarios a Sabino, libro II*.- Si alguno hubiere escrito así: «Sea libre Stico, y déle diez mi heredero», no hay duda alguna que se le deben, aunque el padre de familia lo hubiere manumitido en vida.

§ 1.- Pero si hubiere escrito así: «sea libre Stico o inmediatamente, o después de cierto tiempo y cuando fuere libre déle diez mi heredero», también se ha de decir lo mismo.

§ 2.- Lo mismo será, si habiéndose dado la libertad se hubiere legado de este modo: «y a éste si yo le hubiere dado la libertad con la vindicta déle diez mi heredero». Aunque en estricto rigor; esto sea diverso de lo hecho por testamento, valdrá, sin embargo, por consideración de humanidad el legado, si lo hubiere manumitido en vida.

5.- EL MISMO; *Comentarios a Sabino, libro III*.- En las manumisiones se ha de atender a la escritura

quae manumisso facilius sit, ea levissima intellegatur: sed in fideicommissariis libertatibus novissima scriptura spectatur.

6.- ULPIANUS; *libro XVIII, ad Sabinum*.- Si fructuarium dominus proprietatis heredem scripserit et servo sub condicione sit libertas data: quoniam interim fit heredis, confusione facta usus fructus, si extiterit condicio, perveniet ad libertatem.

7.- IDEM; *libro XIX, ad Sabinum*.- Neratius scribit eius, cui libertas sic data est "si mihi nullus filius erit quum moriar, Stichus liber esto", impediri libertatem postumo nato. Sed dum speratur nasci, utrum in servitute remanere dicimus an vero ex postfacto respondemus retro liberum fuisse nullo filio nato? quod magis arbitror probandum.

8.- POMPONIUS; *libro V, ad Sabinum*.- Si ita sit scriptum: "stichus, si rationes diligenter tractasse videbitur, liber esto", diligentiam desiderandam, quae domino, non quae servo erit utilis, coniuncta fidei bonae et in reliquis quoque reddendis.

9.- ULPIANUS; *libro XXIV, ad Sabinum*.- Si quis ita legatus sit, ut manumittatur, si manumissus non fuerit, liber esse iussus est eique legetur: et libertatem competere et legatum deberi saepe responsum est.

§ 1.- Quod constitutum est vetitum in testamento ad libertatem perducere non posse manumitti, hoc ad

considered where freedom is granted by a will, and where there are several provisions of this kind, that which is the least burdensome is understood to be the one the most advantageous to the person manumitted. Where, however, freedom is granted by a trust, the last clause written must be taken into account.

6.- ULPIANUS; *On Sabinus, Book XVIII*.- If the master of a slave appoints as his heir the usufructuary of said slave, and freedom is granted to the latter conditionally, as the slave in the meantime belongs to the heir, the usufruct will become extinguished on account of the merger which results, and if the condition should be fulfilled, the slave will obtain his freedom absolutely.

7.- THE SAME; *On Sabinus, Book XIX*.- Neratius says, that when freedom is granted to a slave as follows, "If I should have no child at the time of my death, let Stichus be free," he will be prevented from obtaining his freedom in case a posthumous child is born. But, while the birth is in anticipation, shall we say that the slave remains in servitude; or shall we hold that he will become a freedman by retroactive effect, if no child should be born? I think that the latter opinion should be adopted.

8.- POMPONIUS; *On Sabinus, Book V*.- Where the following provision was inserted into a will, "Let Stichus be free if he has transacted my business properly," the degree of diligence displayed by Stichus must be considered with reference to its benefit to the master, and not to the slave; and he must also manifest his good faith by paying over any balance which may remain in his hands.

9.- ULPIANUS; *On Sabinus, Book XXIV*.- Where a slave was bequeathed in order to be manumitted and, if he should not be manumitted, he was directed to be free, and a legacy was bequeathed to him, it has been frequently decided that he is entitled to his freedom, and that the legacy is due to him.

§ 1.- Where it is stated in a constitution that a slave cannot be manumitted who is forbidden by will to be

más llevadera, de suerte que, si hubiera muchas, se entienda que es más llevadera aquella por la cual sea más fácil la manumisión. Pero tratándose de libertad dejada por fideicomiso, se atiende a la última escritura.

6.- ULPIANO; *Comentarios a Sabino, libro XVIII*.- Si el dueño de la propiedad hubiere instituido heredero al usufructuario, y al esclavo se le hubiera dado bajo condición la libertad, como quiera que mientras tanto es del heredero, hecha la confusión del usufructo, llegará a la libertad si se hubiere cumplido la condición.

7.- EL MISMO; *Comentarios a Sabino, libro XIX*.- Escribe Neracio, que nacido un póstumo se impide la libertad de aquel a quien se le dio de este modo la libertad: «si yo no tuviere ningún hijo cuando muera, sea libre Stico»; pero mientras se espera que nazca, ¿decimos que permanece en esclavitud, o responderemos que por virtud de un hecho posterior se hizo retroactivamente libre, no habiendo nacido ningún hijo? Y esto es lo que considero que preferentemente se ha de aprobar.

8.- POMPONIO; *Comentarios a Sabino, libro V*.- Si se hubiera escrito así: «si se viere que Stico llevó con diligencia las cuentas, sea libre», se ha de exigir la diligencia que le fuere útil al señor, no la que al esclavo, junta con la buena fe y también con la entrega de los sobrantes.

9.- ULPIANO; *Comentarios a Sabino, libro XXIV*.- Si alguno hubiera sido legado de modo que sea manumitido, y se dispuso que si no hubiere sido manumitido fuese libre, y se le hiciera un legado, se respondió muchas veces que le compete la libertad y que se le debe el legado.

§ 1.- Lo que se estableció que no podía ser manumitido aquél respecto al cual se prohibió en

eos pertinere puto, qui testatoris fuerunt vel heredis: servo enim alieno id irrogari non poterit.

10.- PAULUS; *libro IV, ad Sabinum*.- Si peculium praelegatum est et vicarius liber esse iussus sit, liberum eum esse constat. Multum enim interest inter genus et speciem: speciem enim eximi de genere placet: quod est in peculio legato et vicario manumisso.

§ 1.- Si servus legatus liber esse iussus est, liber est. Sed si prius liber esse iussus, postea legatus sit, si quidem evidens voluntas sit testatoris, quod ademit libertatem, quum placeat hodie etiam libertatem adimi posse, legato eum cedere puto: quod si in obscuro sit, tunc favorabilius respondetur liberum fore.

11.- POMPONIUS; *libro VII, ad Sabinum*.- Si legato servo fideicommissa libertas relicta est, vel heres vel legatarius eum cogitur manumittere.

§ 1.- «Si Stichus et Pamphilus decem dederint, liberi sunt»: potest alter quinque dando liber esse, quamvis alter non dederit.

§ 2.- Quum testamento servus liber esse iussus est, vel uno ex pluribus heredibus institutis adeunte hereditatem statim liber est.

12.- ULPIANUS; *libro L, ad Edictum*.- Si quis libertatem sub iurisiurandi condicionem reliquerit, edicto praetoris locus non erit, ut iurisiurandi condicio remittatur, et merito: nam si quis remiserit condicionem libertatis, ipsam libertatem impedit,

set free, I think that this only refers to slaves belonging to the testator or to his heirs, for it cannot apply to a slave belonging to another.

10.- PAULUS; *On Sabinus, Book IV*.- Where the peculium of a slave is bequeathed as a preferred legacy, and a sub-slave, who forms part of the peculium, is directed to be free, it is established that he will become free, for there is a great deal of difference between genus and species. For it is settled that the species can be removed from the genus, as it consists of the peculium which was bequeathed, and the sub-slave who was manumitted.

§ 1.- If a slave who is bequeathed is ordered to be liberated from servitude he will become free; but where, in the first place, he is considered to be free, and he is afterwards bequeathed, if it is evident that the intention of the testator was that he should be deprived of his liberty, and as it is at present held that he will be deprived of it, I think that he will form part of the legacy. If, however, the matter is in doubt, then the more favorable opinion should prevail, and he will become free.

11.- POMPONIUS; *On Sabinus, Book VII*.- If, after a slave has been bequeathed, his freedom has been left him under a trust, the heir or the legatee will be compelled to manumit him.

§ 1.- "If Stichus and Pamphilus, pay ten aurei, let them be free;" one of them can become free by paying five aurei, even though the other may not pay anything.

§ 2.- Where a slave is ordered to be free by a will, he immediately becomes free just as soon as one of several appointed heirs enters upon the estate.

12.- ULPIANUS; *On the Edict, Book L*.- Where anyone leaves a slave his freedom under the condition of his taking an oath, there will be no ground for the application of the Praetorian Edict for the purpose of remitting the oath; and this is

testamento que fuera constituido en libertad, opino que se refiere a aquellos que fueron del testador o del heredero; porque esto no se le podrá atribuir a un esclavo ajeno.

10.- PAULO; *Comentarios a Sabino, libro IV*.- Si se prelegó el peculio, y se hubiera mandado que fuera libre un esclavo vicario, es sabido que éste es libre; porque hay mucha diferencia entre el género y la especie; porque está determinado que la especie sea deducida del género; lo que sucede habiendo sido legado el peculio y manumitido un esclavo vicario.

§ 1.- Si se dispuso que un esclavo legado fuese libre, es libre; pero si primeramente se mandó que fuese libre, y después hubiera sido legado, si verdaderamente fuera evidente la voluntad del testador, porque revocó la libertad, como quiera que hoy esta admitido que también se puede revocar la libertad, opino que él queda sujeto al legado; pero si estuviera dudoso, en este caso se responde mas favorablemente, que debe ser libre.

11.- POMPONIO; *Comentarios a Sabino, libro VII*.- Si a un esclavo legado se le dejó por fideicomiso la libertad. es obligado el heredero o el legatario a manumitirlo.

§ 1.- «Si Stico y Pánfilo hubieren dado diez, sean libres»; puede uno ser libre dando cinco, aunque el otro no los diere.

§ 2.- Cuando en testamento se dispuso que fuese libre un esclavo, es libre inmediatamente adiendo la herencia tan solo uno de los varios herederos instituidos.

12.- ULPIANO; *Comentarios al Edicto, libro L*.- Si alguno hubiere dejado la libertad bajo condición de juramento, no tendrá lugar el Edicto del Pretor para que se remita la condición del juramento; y con razón, porque si alguno remitiere la condición de la

dum competere aliter non potest, quam si paritum fuerit condicioni.

§ 1.- Proinde et si legatum quis quum libertate acceperit, non aliter legatum habebit, nisi condicioni iurisiurandi paruerit.

§ 2.- Sed si pure libertatem acceperit, legatum sub iurisiurandi condicionem, putat Iulianus libro trigesimo primo Digestorum remitti ei condicionem iurisiurandi.

§ 3.- Idem puto dicendum et si libertati quoque iniecta condicio sit, sed testator eum vivus manumiserit: nam et hic condicio legati remittetur.

13.- IDEM; *libro V, Disputationum*.- Si ita fuerit servis duobus libertas data, si insulam aedificaverint vel si statuam posuerint, dividi haec condicio non poterit. Solummodo illud habebit dubitationem, an altero faciente satisfactum voluntati videatur ideoque ad libertatem perveniat: quod magis est, nisi aliud expressit testator. Faciendo tamen sibi condicionem implevit, alteri non: quin immo extinguitur ei condicio: nec enim amplius parere condicioni potest, quum semel expleta sit.

§ 1.- Idem quaeri potest et si fabris duobus vel pictoribus, si membrum depinxissent vel si fabricassent navem, quid adscriptum sit: nam voluntatis erit quaestio, num alteri alterius facti condicionem iunxerit: quae res efficit, ut, quod alter cessat, alteri quoque, qui facere paratus est, condicio deficiat. Quod si ex his, quae scripsit vel dixit,

reasonable, for if anyone should remit the condition upon which the freedom of the slave depends, he will prevent the freedom itself from taking effect, as the slave cannot obtain it except by complying with the condition.

§ 1.- Hence, if anyone should bequeath a slave a legacy with his freedom, the latter will not be entitled to the legacy, unless he complies with the condition of taking the oath.

§ 2.- If, however, he should receive his freedom absolutely, and the legacy was granted under the condition of his taking the oath, Julianus, in the Thirty-first Book of the Digest, thinks that the condition of taking the oath should be remitted.

§ 3.- Moreover, I hold that the same rule will apply where the condition was imposed upon the grant of freedom, and the testator, during his lifetime, manumitted the slave; for, in this instance, the condition on which the legacy depended is remitted.

13.- THE SAME; *Disputations, Book V*.- Where freedom was granted to two slaves under the condition that they should build a house, or erect a statue, the condition cannot be divided between them. Doubt can only arise where one of them, having complied with the condition, appears to have carried out the wishes of the testator, and therefore will be entitled to his freedom, which is the better opinion; unless the testator had expressed himself otherwise. One of the slaves, by doing what he was directed to do, complied with the condition so far as he himself was concerned, and while he did not do so with respect to the other, still the condition will no longer bind the latter, for he cannot comply with it any further after it has once been fulfilled.

§ 1.- The same question can also arise where a legacy is bequeathed to two artisans or painters, under the condition that they shall paint a picture, or build a ship; for the intention of the testator must be considered, and if he imposed the condition of the performance of one upon the other, the result will be that when one of them does not do anything, the

libertad, impide la misma libertad, pues no puede competir de otro modo, sino si se hubiere obedecido a la condición.

§ 1.- Por consiguiente, también si uno hubiere recibido con la libertad un legado, no tendrá de otra suerte el legado, sino si hubiere obedecido a la condición del juramento.

§ 2.- Pero si hubiere recibido la libertad puramente, y un legado bajo condición de juramento, opina Juliano en el libro vigésimo primero del Digesto, que se le remite la condición del juramento.

§ 3.- Opino que se ha de decir lo mismo, también si para la libertad se hubiera impuesto una condición, pero el testador lo hubiere manumitido en vida; porque también en este caso se remitirá la condición del legado.

13.- EL MISMO; *Disputas, libro V*.- Si a dos esclavos se les hubiere dado la libertad, si hubieren edificado una casa, o si hubieren levantado una estatua, no se podrá dividir esta condición; solamente implicará duda esto, si haciendo uno aquello se considerará haberse cumplido la voluntad, y por lo tanto llegara a la libertad. Lo que es más cierto, si otra cosa no dispuso el testador, pero obrando éste cumplió para sí la condición, no para el otro; antes bien se extingue la condición para éste, porque no puede cumplir ya una condición, que una vez haya sido cumplida.

§ 1.- Lo mismo se puede preguntar, también si a dos artífices o pintores se les hubiera asignado alguna cosa, si hubiesen pintado parte de una casa o construido una nave; porque la cuestión se referirá a la voluntad, sobre si habrá impuesto al uno la condición del hecho de otro. Lo cual hace, que dejando de obrar el uno, falte la condición también

ostenditur contentus esse testator vel alterum facere, res erit expedita: nam alter faciendo aut et sibi et socio proderit aut sibi tantum, prout voluisse testatorem apparuerit.

§ 2.- Haec quaestio et in eo tractatur, si quis libertatem dederit servis duobus, si rationes reddiderint. Iulianus enim tractat, si alter reddere sit paratus, alter non sit, an alter per alterum impediatur: et rectissime ait, si quidem separatim rationes gesserunt, sufficere ad libertatem adipiscendam ei qui suas rationes reddit: si vero simul, non alias videri alterum paruisse, nisi utriusque reliqua exsolverit. In reliquis accipere debemus, ut et ipsa volumina rationum reddantur.

§ 3.- Sed et si ancilla quum filiis libera esse iussa sit, etsi nullos habeat, erit libera: vel si habeat quidem, filii autem eius ad libertatem pertinere non possint, idem erit dicendum: et si ipsa libera esse non possit, filii tamen eius pervenient ad libertatem. Nam haec adiectio "quum filiis" non facit condicionem, nisi mihi proponas aliam sententiam testatoris fuisse: tunc enim pro condicione erunt haec verba accipienda. condicionem autem non facere argumento est et Edictum Praetoris, quo ita cavetur "ventrem quum liberis in possessionem esse iubebo": placet enim, etsi nulli liberi sint, ventrem tamen ex Edicto in possessionem mittendum.

14.- IDEM; *libro VIII, Disputationum*.- Quum servus pure liber scribitur et heres sub condicione,

condition will not be fulfilled, although the other may be ready to do his share. If, however, it can be shown that the testator would have been content, if whatever he had written or stated was only done by one of them, the matter will be readily disposed of; for one of them will, by his act, benefit either himself and his associate, or himself alone, according as it appears to have been the intention of the testator.

§ 2.-This question can also be discussed in the case where a testator grants freedom to two slaves, if they render their accounts. For Julianus asks, if one of them is ready to render his account, and the other is not, whether the former will be prevented from doing so by the latter. And he very properly says that if their accounts were kept separately, it will be sufficient for the one who renders his to obtain his freedom; but if both of them kept their accounts together, one of them shall not be considered to have complied with the condition, unless he pays the balance remaining in the hands of the other. We must understand this to mean that the books containing the accounts shall also be given up.

§ 3.- If, however, a female slave, together with her children, is directed to be liberated, even if she has no children, she will, nevertheless, become free; or if she should have any, and they are not capable of obtaining their freedom, the result will be the same. This rule will also apply even though the slave herself cannot become free, as her children will still obtain their liberty; for the clause, "together with her children," does not impose a condition, unless you suggest that the intention of the testator was otherwise; since, under such circumstances, these words must be understood to establish a condition. But that they do not impose a condition is proved by the Edict of the Praetor by which it is provided as follows: "I will order the mother of the unborn child and her children to be placed in possession of the estate." For it is settled that even if there are no children, the mother of the unborn child should still be placed in possession of the estate.

14.- THE SAME; *Disputations, Book VIII*.- When a slave is granted his freedom absolutely, and is

para el otro que está dispuesto a obrar. Pero si por lo que escribió o dijo se demostrare que el testador se contentó con que a lo menos obre uno el caso será expedito; porque obrando uno, hará cosa provechosa o para sí y para su socio, o solamente para sí, según apareciere que lo quiso el testador.

§ 2.- Discútese también esta cuestión cuando alguno hubiere dado la libertad a dos esclavos si hubieren rendido las cuentas; porque Juliano examina, si, estando uno dispuesto a rendirlas, y otro no, se le causará al uno impedimento por el otro y con muchísima razón dice, que si verdaderamente hubieren llevado las cuentas por separado, le basta al uno para alcanzar la libertad haber rendido sus cuentas; pero que si juntamente, no se considera que uno cumplió, sino si hubiere entregado los residuos de uno y de otro. Debemos comprender en los residuos también la obligación de que se devuelvan los mismos libros de las cuentas.

§ 3.- Pero si se hubiera mandado que una esclava fuese libre juntamente con sus hijos, también será libre aunque no tenga ninguno; y si verdaderamente los tuviera, pero sus hijos no pudieran llegar a la libertad, se habrá de decir lo mismo; y si ella misma no pudiera ser libre, llegarán, sin embargo, a la libertad sus hijos. Porque esta adición: «juntamente con sus hijos», no constituye una condición, a no ser que me digas que fue otra la intención del testador; porque entonces estas palabras habrán de ser consideradas como condición. Mas prueba que no constituyen condición el Edicto del Pretor, en el que se dispone así: «mandaré que esté en posesión el que está en el claustro materno juntamente con los hijos»; porque está determinado, que aunque no haya ningunos hijos, ha de ser, sin embargo, puesto en posesión en virtud del Edicto el que está en el claustro materno.

14.- EL MISMO; *Disputas, libro VIII*.- Cuando un esclavo es instituido libre puramente, y heredero

placet deficiente condicione habere eum libertatem.

15.- IULIANUS; *libro XXXII, Digestorum.*- «Stichum Sempronio do lego. Si Sempronius Stichum intra annum non manumiserit, idem Stichus liber esto». Quaesitum est, quid iuris sit. Respondit hoc modo libertate data "si Sempronius non manumiserit, Stichus liber esto" Sempronium, nisi manumiserit, nihil iuris in Stichum habiturum, sed liberum eum futurum.

16.- IDEM; *libro XXXVI, Digestorum.*- Si ita scriptum fuerit: "quum Titius annorum triginta erit, Stichus liber esto eique heres meus fundum dato" et Titius, antequam ad annum trigensimum perveniret, decesserit, Stichus libertas competet, sed legatum non debebitur. Nam favore libertatis receptum est, ut mortuo Titio tempus superesse videretur, quo impleto libertas contingeret: circa legatum defecisse condicio visa est.

17.- IDEM, *libro XLII, Digestorum.*- Libertas, quae in ultimum vitae tempus confertur, veluti "Stichus quum morietur, liber esto", nullius momenti existimanda est.

§ 1.- Haec autem scriptura "Stichus si Capitolium non ascenderit, liber esto" ita accipienda est "si quum primum potuerit, Capitolium non ascenderit": isto enim modo perveniet Stichus ad libertatem, si facultate data ascendendi Capitolium abstinuerit.

§ 2.- Hac scriptura testamenti "Pamphilus liber esto, ita ut filiis meis rationem reddat" an sub condicione libertas data videretur, quaesitum est. Respondi pure quidem datam libertatem et illam adiectionem "ita ut rationes reddat" condicionem libertati non inicere: tamen quia manifesta voluntas testantis exprimeretur, cogendum eum ad rationes

appointed an heir under a condition, it has been decided that even if the condition is not complied with, he will be entitled to his freedom.

15.- JULIANUS; *Digest, Book XXXII.*- "I give and bequeath Stichus to Sempronius; if Sempronius should not manumit Stichus within a year, let the said Stichus be free." The question arose, what is the rule in this case? The answer was that where freedom is granted as follows, namely, "If Sempronius should not manumit Stichus, let Stichus be free," and Sempronius does not manumit him, he will have no right to Stichus, but he will be free.

16.- THE SAME; *Digest, Book XXXVI.*- Where the following provision is inserted into a will, "When Titius reaches the age of thirty years, let Stichus become free, and let my heir give him such-and-such a tract of land," and Titius dies before reaching his thirtieth year, Stichus will obtain his freedom, but he will not be entitled to the legacy. For it is only in favor of freedom that it is admitted, after the death of Titius, that a time is held to exist during which freedom may be granted; but the condition on which the legacy depended is considered to have failed.

17.- THE SAME; *Digest, Book XLII.*- Freedom which is granted to take effect at the last moment of life, as for example, "Let Stichus be free when he dies," is held to be of no force or effect.

§ 1.- The following testamentary disposition, "Let Stichus be free, if he does not ascend to the Capitol," must be understood to mean if he does not ascend to the Capitol as soon as he possibly can. Hence, Stichus would obtain his freedom in this way, if having the power to ascend to the Capitol he abstained from doing so.

§ 2.- The question arose whether freedom should be considered to have been conditionally granted by the following provision in a will: "Let Pamphilus be free, in order that he may render an account to my children." The answer was that freedom should be granted absolutely, and that the addition, "In order that he may render an account," does not impose any

bajo condición, está determinado, que faltando la condición tiene él la libertad.

15.- JULIANO; *Digesto, libro XXXII.*- «Doy y lego Stico a Sempronio; si Sempronio no hubiere manumitido Stico dentro de un año, sea libre el mismo Stico»; se preguntó, cuál sería el derecho. Respondió, que, dada la libertad de este modo: «si Sempronio no lo hubiere manumitido, sea libre Stico», Sempronio no tendrá ningún derecho sobre Stico, si no lo hubiere manumitido, sino que éste habrá de ser libre.

16.- EL MISMO; *Digesto, libro XXXVI.*- Si se hubiere escrito así «cuando Ticio fuere de treinta años sea libre Stico, y déle un fundo mi heredero», y Ticio hubiere fallecido antes de llegar a los treinta años, le competirá la libertad a Stico, pero no se deberá el legado; porque en favor de la libertad se admitió, que aun muerto Ticio se considerase que continuaba el término, hasta que cumplido éste competiese la libertad; pero respecto al legado se consideró que faltó la condición.

17.- EL MISMO; *Digesto, libro XLII.*- La libertad que se confiere para el último momento de la vida, por ejemplo: «Stico sea libre, cuando él muriere», ha de ser estimada de ningún valor.

§ 1.- Mas esta cláusula: «sea libre Stico, si no subiere al Capitolio», ha de ser entendida así, si no hubiere subido al Capitolio tan pronto como hubiere podido; porque de este modo llegará Stico a la libertad, si teniendo posibilidad de subir al Capitolio se hubiere abstenido.

§ 2.- Se preguntó, si con esta cláusula de un testamento: «sea libre Pánfilo, de suerte que rinda las cuentas a mis hijos», se consideraría dada bajo condición la libertad. Respondí, que la libertad fue, a la verdad, dada puramente, y que aquella adición: «de suerte que rinda las cuentas», no imponía una condición para la libertad, pero que, como se

reddendas.

§ 3.- Post annos indistincte liber esse iussus post biennium liber erit: idque et favor libertatis exigit, et verba patiuntur: nisi si aliud sensisse patrem familias manifestissimis rationibus is, a quo libertas relicta est, probaverit.

18.- IDEM; *libro II, ad Urseium Ferocem*.- Qui duos heredes instituebat, post alterius mortem servum liberum esse iusserat: is ex cuius morte libertas pendebat, vivo testatore decesserat. Sabinus respondit liberum futurum.

§ 1.- Haec condicio "quum moriar, liber esto" vitae tempus complectitur et idcirco inutilis esse videtur. Sed melius est verba benignius interpretari, ut post mortem suam videatur testator ei libertatem reliquisse.

§ 2.- Sed multo magis haec "ad annum liber esto" vel ita accipi potest "post annum, quam moriar, liber esto" et, licet hoc modo accipiatur "post annum, quam hoc testamentum factum erit, liber esto", si evenerit, ut intra annum testator decedat, inutilis non erit.

19.- IDEM; *libro III, ad Urseium Ferocem*.- heredem suum rogaverat, ut servum manumitteret: deinde, si heres eum non manumiserit, liberum eum esse iusserat eique legaverat: heres eum manumisit. plerique existimant hunc ex testamento libertatem consequi: secundum hoc legatum quoque ei debetur.

condition upon the grant of freedom; still, because the manifest wish of the testator was expressed, the slave should be compelled to render his account.

§ 3.- Where a slave is indefinitely ordered to be free after several years, he will become free after the expiration of two years. The favor-conceded to liberty requires this, and the words themselves are susceptible of such a construction; unless the person who is charged with the grant of freedom can prove by the clearest evidence that the intention of the testator was otherwise.

18.- THE SAME; *On Urseius Ferox, Book II*.- Where a testator appointed two heirs, and directed that his slave should be free after the death of one of them, and the heir upon whose death the freedom of the slave depended died during the lifetime of the testator, Sabinus gave it as his opinion that the slave would become free.

§ 1.- The following condition, "Let him be free when I die," includes the entire duration of life, and therefore is held to be void. It is better, however, that the words should be interpreted in a more favorable manner, and in such a way that the testator may be considered to have granted freedom to his slave after his death.

§ 2.- The following gives rise to greater doubt, "Let him be free in a year," as this can be understood to mean, "Let him be free after the year of my death," and it can also be understood as follows, "Let him be free after the year when I made this will," and if the testator should happen to die within a year, the grant of freedom will be of no force or effect.

19.- THE SAME; *On Urseius Ferox, Book III*.- A certain man charged his heir to manumit his slave, and if his heir did not do so he directed that he should be free, and he left him a legacy. The heir manumitted the slave. Several authorities hold that he obtained his freedom by the will, and, as this was the case, that he was also entitled to the legacy.

expresaba clara la voluntad del testador, debía ser obligado aquél a rendir las cuentas.

§ 3.- El que mandó que fuese libre indeterminadamente después de años, será libre después de un bienio; y esto exige el favor de la libertad, y consienten las palabras, a no ser que con evidéntísimas razones hubiere probado aquél, a cuyo cargo se dejó la libertad, que otra cosa entendió el padre de familia.

18.- EL MISMO; *Comentarios a Urseio Ferox, libro II*.- Uno, que instituía a dos por herederos, había mandado que un esclavo fuese libre después de la muerte del uno; aquél, de cuya muerte dependía la libertad, había fallecido en vida del testador; Sabino respondió, que el esclavo habrá de ser libre.

§ 1.- Esta condición: «Cuando yo muriere, sea libre», comprende el tiempo de la vida, y por esto se considera que es inútil; pero es mejor que las palabras sean interpretadas con más benignidad, de suerte que se considere que el testador le dejó la libertad para después de su propia muerte.

§ 2.- Pero con mucha más razón, esta cláusula: «sea libre al año», se puede entender de este modo: «sea libre después de un año que yo muera»; y aunque se entienda de este modo: «después de un año, que hubiere sido hecho este testamento, sea libre», si aconteciere que el testador falleciere dentro del año, no será inútil.

19.- EL MISMO; *Comentarios a Urseio Ferox, libro III*.- Uno le había rogado a su heredero, que manumitiese a un esclavo; luego había dispuesto, que si él heredero no lo hubiere manumitido, fuese libre, y le había hecho un legado; el heredero no lo manumitió; opinan los más, que éste consigue la libertad en virtud del testamento; según lo que, también se le debe el legado.

20.- AFRICANUS; *libro I, Quaestionum*.- Servos legavit et cavita ita: "rogo, si te promeruerunt, dignos eos libertate existimes". Praetoris hae partes sunt, ut cogat libertatem praestari, nisi si quid tale hi servi admiserint, ut indigni sint, quo libertatem consequantur, non etiam ut talia officia ab his exigantur, pro quibus libertatem mereri debent. Arbitrium tamen eius erit qui rogatus sit, quo tempore quemque velit manumittere, ita ut, si vivus non manumisisset, heres eius statim libertatem praestare cogatur.

21.- IDEM; *libro IV, Quaestionum*.- «Stichus, immo Pamphilus liber esto». pamphilum liberum futurum respondit: quodammodo enim emendasse errorem suum testatorem. Idemque iuris fore etiam, si ita scriptum fuerit: "Stichus liber esto, immo Pamphilus liber esto".

22.- IDEM; *libro IX, Quaestionum*.- Qui filium impuberem heredem instituit, Stichum ratione argenti, quod sub cura eius esset, reddita liberum esse iusserat: is servus parte argenti subtracta quum tutore divisit atque ita tutor ei parem rationem adscripsit. Consultus, an Stichus liber esset, respondit non esse liberum: nam quod alioquin placeat, si statuliber pecuniam dare iussus tutori det vel per tutorem stet, quo minus condicioni pareatur, pervenire eum ad libertatem, ita accipiendum, ut bona fide et citra fraudem statuliberi et tutoris id fiat, sicut et in alienationibus rerum pupillarium servatur. Itaque et si offerente statulibero pecuniam tutor in fraudem pupilli accipere nolit, non aliter libertatem contingere, quam si servus fraude careat. Eademque et de curatore dicenda. Item quaesitum est, rationem argenti reddere iussus in quem modum intellegendus sit condicioni paruisse, id est an, si quaedam vasa sine culpa eius perierint atque ita reliqua vasa heredi bona fide adsignaverit, perveniat ad libertatem. Respondit perventurum: nam sufficere, si ex aequo et bono rationem reddat: denique quam rationem bonus pater familias reciperet, ea heredi reddita impletam

20.- AFRICANUS; *Questions, Book I*.- A testator bequeathed his slaves, and made the following provision in his will: "I ask that you regard my slaves as worthy of their freedom, if they have acted meritoriously towards you." It is the duty of the Praetor to compel freedom to be given the slaves, unless they have done something which renders them unworthy of obtaining their freedom, without such services being required of them as may be considered necessary for them to deserve it. The person who was asked to liberate them will still have the right to fix the time when he will do so; as, if he does not manumit them during his lifetime, his heir can be compelled to grant them their freedom immediately after his death.

21.- THE SAME; *Questions, Book IV*.- "Let Stichus, or rather Pamphilus, be free." It was decided that Pamphilus should be free, for the testator appeared to have, as it were, corrected a mistake. The same rule will apply where it was stated in a will, "Let Stichus be free, or rather let Pamphilus be free."

22.- THE SAME; *Questions, Book IX*.- A testator appointed his son, who had not reached the age of puberty, his heir, and ordered that Stichus should be emancipated after he had rendered an account of the silver plate, which was in his care. This slave had stolen a portion of the silver plate, which he had divided with the guardian, and he gave the other part of it to the guardian who took an account of it. Advice having been asked as to whether Stichus was free, the reply was given that he was not. But, on the other hand, as it has been decided if a slave who is to be free under a certain condition is directed to pay a certain sum of money, and pays it to the guardian, or it is the guardian's fault that the condition was not complied with, he will obtain his freedom; this must be understood to mean that all is done in good faith, and without any fraud on the part of the slave or the guardian, just as is observed in the alienation of the property of a ward. Therefore, if the slave should tender the money and the guardian should not be willing to accept it because his ward will be defrauded, the slave cannot obtain his freedom, unless he was not guilty of fraud. The same rule

20.- AFRICANO; *Cuestiones, libro I*.- Uno legó unos esclavos, y dispuso así: «te ruego, que, si lo hubieren merecido de ti, los estimes dignos de la libertad»; será de la atribución del Pretor obligar a que se dé la libertad, a no ser que estos esclavos hubieren hecho una cosa tal, que sean indignos de que consigan la libertad, sin que también de ellos se exijan tales servicios que por ellos deban merecer la libertad. Mas estará a arbitrio de aquel, a quien se le hubiera rogado, el tiempo en que quiera manumitir a cada uno, de suerte que, si en vida no lo hubiese manumitido, sea obligado su heredero a darle inmediatamente la libertad.

21.- EL MISMO; *Cuestiones, libro IV*.- «Sea libre Stico, por mejor decir, Pánfilo»; respondió, que Pánfilo había de ser libre; porque en cierto modo el testador enmendó su error; y el mismo derecho habrá de haber, también si se hubiere escrito así: «sea libre Stico, por mejor decir, sea libre Pánfilo».

22.- EL MISMO; *Cuestiones, libro IX*.- Uno que instituyó heredero a su hijo impúbere, había dispuesto que Stico fuese libre, habiendo dado cuenta de la plata que estuviese a su cuidado; este esclavo, habiendo substraído parte de la plata, la dividió con el tutor, y de este modo el tutor le dio por buena la cuenta; habiendo sido consultado sobre si Stico sería libre, respondió, que no era libre, porque lo que en otro caso está admitido, que si a aquel a quien se le dio en testamento la libertad bajo condición se le hubiese mandado que le diera dinero al tutor, y lo diese, o en el tutor consistiera que no se cumpla la condición, llegue él a la libertad, se ha de entender de modo que esto se haga de buena fe y sin fraude de aquel a quien se le dejó la libertad bajo condición, ni del tutor, según se observa también en las enajenaciones de los bienes pupilares. Y así, aunque ofreciendo el dinero aquel a quien se le dejó la libertad bajo condición no lo quisiere recibir el tutor en fraude del pupilo, no obtiene la libertad de otro modo, sino si el esclavo estuviera exento de fraude; y lo mismo se ha de decir también respecto al curador. También se preguntó, de qué modo se ha de entender

condicionem videri.

23.- MARCIANUS; *libro I, Institutionum*.- Testamento manumissus ita demum fit liber, si testamentum valeat et ex eo adita sit hereditas, vel si quis omissa causa testamenti ab intestato possideat hereditatem.

§ 1.- Testamento data libertas competit pure quidem data statim, quam adita fuerit hereditas vel ab uno ex heredibus: si in diem autem libertas data est vel sub condicione, tunc competit libertas, cum dies venerit vel condicio extiterit.

24.- GAIUS; *libro I, Rerum quotidianarum*.- Nominatim videntur liberi esse iussi, qui vel ex officio vel quolibet alio modo evidenter denotati essent, veluti "dispensator meus" "cellarius meus" "cocus meus" "Pamphili servi mei filius".

25.- ULPIANUS; *libro IV, Regularum*.- Testamento liber esse iussus tum fit liber, quum adita fuerit hereditas qualibet ex parte, si modo ab eo gradu, quo liber esse iussus est, adita fuerit et pure quis manumissus sit.

26.- MARCIANUS; *libro I, Regularum*.- Divus

applies with reference to a curator. The question also arose, where the slave was ordered to render an account of the silver plate, in what way he should be understood to have complied with the condition; that is to say, if any vessels had been lost without his fault, and he delivered the remaining ones to the heir, in good faith, whether he would be entitled to his freedom. The answer was that he would be entitled to it, for it is sufficient if he rendered an honest and just account. In short, he is considered to have complied with the condition by rendering to the heir such an account as the careful head of a household would accept.

23.- MARCIANUS; *Institutes, Book I*.- A slave, who has been manumitted by a will, only becomes free when the will is valid, and the estate is entered upon on account of it; or where anyone obtains possession of the estate on the ground of intestacy because of the rejection of the will.

§ 1.- Where freedom is granted by a will, it is obtained as soon as the estate is accepted by one of the heirs. If it is granted after a certain period, or under a condition, it will be obtained when the time arrives, or the condition is fulfilled.

24.- GAIUS; *Diurnal or Golden Matters, Book I*.- Slaves ordered to be free are considered to be expressly mentioned where they are clearly designated, either by their trades or offices, or in any other manner whatsoever, as, for instance, "My steward; my butler; my cook; the son of my slave Pamphilus."

25.- ULPIANUS; *Rules, Book IV*.- Where a slave is ordered to be free by the terms of a will, he will obtain his freedom as soon as any portion of the estate whatsoever is accepted; provided it is accepted by one belonging to the degree in which the slave is ordered to be free, and that he has been unconditionally manumitted.

26.- MARCIANUS; *Rules, Book I*.- The Divine

que cumplió la condición aquel a quien se le mandó dar cuenta de la plata, esto es, si llegará a la libertad, si se hubieren perdido algunos vasos sin culpa suya, y de este modo le hubiere entregado de buena fe al heredero los restantes vasos. Respondió, que había de llegar; porque bastaba si conforme a lo bueno y a lo equitativo diera cuenta; y finalmente, que se considera cumplida la condición, dada al heredero aquella cuenta que admitiría un buen padre de familia.

23.- MARCIANO; *Instituta, libro I*.- El manumitido por testamento se hace libre solamente si fuera válido el testamento, y en virtud de él hubiera sido adida la herencia, o si alguno, habiendo prescindido de la causa del testamento, poseyera la herencia abintestato.

§ 1.- Compete la libertad dada por testamento, habiendo sido dada puramente, desde luego que hubiere sido adida la herencia aunque por uno solo de los herederos; mas si la libertad fue dada a término, o bajo condición, compete la libertad siempre y cuando hubiere llegado el término, o se hubiere cumplido la condición.

24.- GAYO; *Diario, libro I*.- Se considera que se mandó nominalmente que fueran libres los que evidentemente hubieren sido designados o por su arte, o por su oficio, o de otro cualquier modo, por ejemplo: «mi administrador, mi dispensero, mi cocinero, el hijo de mi esclavo Pánfilo».

25.- ULPIANO; *Reglas, libro IV*.- El que en testamento se dispuso que fuese libre se hace libre siempre y cuando la herencia hubiere sido adida por cualquiera parte, con tal que haya sido adida por aquel grado en que se mandó que fuese libre, y uno hubiera sido manumitido puramente.

26.- MARCIANO; *Reglas, libro I*.- El Divino Pío y

Pius et Divi Fratres favorabiliter Rescripserunt, quum servo quum libertate substituto legatum erat, si heres non esset, non adscripta libertate, perinde haberi, atque si adscripta esset et libertas.

27.- PAULUS; *libro I, ad legem Aeliam Sentiam*.- Qui potuerint apud consilium manumittendo ad libertatem perducere, possunt etiam necessarium heredem facere, ut haec ipsa necessitas probabilem faciat manumissionem.

28.- IDEM; *libro singulari de Iure codicillorum*.- «Stichus, si codicillis eum non vetuero liberum esse, liber esto»: sic est atque si diceret: «Stichus, si in capitolium non ascendero, liber esto»; nam et heres sic institui potest.

29.- SCAEVOLA; *libro XXIII, Digestorum*.- Uxo-rem praegnatam repudiaverat et aliam duxerat: prior enixa filium exposuit: hic sublatus ab alio educatus est nomine patris vocitatus usque: ad vitae tempus patris tam ab eo quam a matre, an vivorum numero esset, ignorabatur: mortuo patre testamentoque eius, quo filius neque exheredatus neque heres institutus sit, recitato filius et a matre et ab avia paterna agnitionem hereditatem patris ab intestato quasi legitimus possidet. Quaesitum est, hi qui testamento libertatem acceperunt utrum liberi an servi sint. Respondit filium quidem nihil praeiudicii passum fuisse, si pater eum ignoravit, et ideo, quum in potestate et ignorantis patris esset, testamentum non valere. Servi autem manumissi si per quinquennium in libertate morati sunt, semel datam libertatem infirmari contrarium studium favore libertatis est.

30.- ULPIANUS; *libro XIX, ad Edictum*.- Si servi qui apud hostes sunt liberi esse iussi sunt, ad libertatem perveniunt, quamvis neque testamenti neque

Pius and the Divine Brothers stated beneficently in a Rescript that where a slave, who was appointed a substitute, had been bequeathed a legacy, together with his freedom, in case he should not be an heir, but the bequest of his freedom was not repeated, the result would be the same as if this had been done.

27.- PAULUS; *On the Lex Aelia Sentia, Book I*.- Those who can grant freedom by applying to a tribunal can also appoint slaves their necessary heirs; and this necessity itself renders the manumission proper.

28.- THE SAME; *On the Law of Codicils*.- "Let Stichus be free, if I do not by a codicil forbid him to be manumitted," is the same as if a testator said, "Let Stichus be free, if I do not ascend to the Capitol," for an heir can be appointed in this way.

29.- SCAEVOLA; *Digest, Book XXIII*.- A man repudiated his wife, who was pregnant, and married another. The first one, having had a son, exposed it, and it was taken away and brought up by another, and bore the name of its father; but both the father and mother during their lives remained ignorant that it was living. The father died, and his will having been read, it was held that the son was neither disinherited nor appointed an heir by the will, and he, having been recognized by his mother and his paternal grandmother, obtained the estate of his father on the ground of intestacy, as the heir at law. The question arose whether the slaves who obtained their freedom under the will were free, or not. The answer was that the son should not suffer any wrong, if his father did not know that he was living, and therefore, as he was under the control of his father, who was not aware of the fact, the will was not valid. But if manumitted slaves remain for five years in a state of freedom, the favor with which liberty is regarded does not permit that when it has once been granted them it shall be revoked.

30.- ULPIANUS; *On the Edict, Book XIX*.- Where slaves who are in the hands of the enemy are ordered to be free, they will obtain their freedom, even though

los Divinos Hermanos respondieron favorablemente por Rescripto, que cuando se había hecho un legado a un esclavo substituido con la libertad, si no fuese heredero, no habiéndosele asignado la libertad, se consideraba el caso lo mismo que si hubiese sido asignada también la libertad.

27.- PAULO; *Comentarios a la ley Elia Sencia, libro I*.- Los que manumitiendo ante el consejo pudieren constituir a uno en libertad, pueden instituir también heredero necesario, a fin de que esta misma necesidad haga justificable la manumisión.

28.- EL MISMO; *Del derecho de los codicilos, libro único*.- «Sea libre Stico, si en codicilos yo no hubiere vedado que sea libre»; es lo mismo que si dijese: «Sea libre Stico, si yo no hubiere subido al Capitolio»; porque de este modo se puede instituir también heredero.

29.- SCÉVOLA; *Digesto, libro XXIII*.- Uno había repudiado a su mujer embarazada, y tomado otra; habiendo parido la primera expuso el hijo; recogido éste fue educado por otro, siendo llamado con el nombre del padre; hasta el término de la vida del padre se ignoró tanto por éste, como por la madre, si se hallaba en el número de los vivos; muerto el padre y leído su testamento, en el que ni había sido desheredado, ni instituido heredero el hijo, reconocido el hijo, tanto por la madre como por la abuela paterna, posee abintestato la herencia del padre, como legítimo; se preguntó, si serían libres o esclavos los que por el testamento recibieron la libertad. Respondió, que el hijo ciertamente no sufrió ningún perjuicio si el padre no supo de él, y que, por lo tanto, habiendo estado bajo la potestad de su padre aunque ignorándolo éste, no era válido el testamento; pero si los esclavos manumitidos permanecieron en libertad durante un quinquenio, sería empeño contrario al favor debido a la libertad que se inválidase la libertad una vez dada.

30.- ULPIANO; *Comentarios, al Edicto, libro XIX*.- Si se mandó que fuesen libres los esclavos que están en poder de los enemigos, llegan a la libertad,

mortis tempore testantis, sed hostium fuerunt.

31.- PAULUS; *libro XXVI, ad Edictum*.- Quum ex pluribus eodem nomine servis unus liber iussus non appareat qui sit, nullus liber est.

32.- ULPIANUS; *libro LXV, ad Edictum*.- Scendum est necessario herede existente, quamvis se absteineat, tamen libertates competere, si modo non in fraudem legis aeliae sentiae datae fuerint.

33.- PAULUS; *libro XII, Quaestionum*.- Libertas ad tempus dari non potest,

34.- IDEM; *libro LXXIV, ad Edictum*.- Ideoque si ita scriptum sit "Stichus usque ad annos decem liber esto", temporis adiectio supervacua est.

35.- IDEM; *libro L, ad Edictum*.- Servius existimabat iis posse servis dari testamento directam libertatem, qui utroque tempore, et quo testamentum fit et quo moritur, testatoris fuerunt: quae sententia vera est.

36.- IDEM; *libro VII, ad Plautium*.- Servum testamento ita manumisi: "si iuraverit se Cornelio filio meo decem operarum daturum, liber esto": quaeritur, quid iuris sit. Et sciendum est iurando servum condicionem implere, sed non teneri operarum nomine, quia nisi post manumissionem iuret, non obligatur.

37.- IDEM; *libro IX, ad Plautium*.- Nominatim codicillis manumissus videtur servus, cuius nomen testamento continetur.

38.- IDEM; *libro XII, ad Plautium*.- Libertas

at the time that the will was executed, or when the testator died, they did not belong to the latter, but were in captivity.

31.- PAULUS; *On the Edict, Book XXVI*.- Where one of several slaves who have the same name is ordered to be free, and it is not apparent which one was meant, none of them will obtain freedom.

32.- ULPIANUS; *On the Edict, Book LXV*.- It must be remembered that grants of freedom made by a will take effect whenever there is a necessary heir, even though he should reject the estate; provided they were not made contrary to the Lex Elia Sentia.

33.- PAULUS; *Questions, Book XII*.- Freedom cannot be granted for a certain time.

34.- THE SAME; *On the Edict, Book LXXIV*.- Therefore, where the following is inserted into a will, "Let Stichus be free for ten years," the addition of the term is superfluous.

35.- THE SAME; *On the Edict, Book L*.- Servius was of the opinion that freedom could be granted directly to slaves who had belonged to the testator, both at the time when the will was made, and when he died. This opinion is correct.

36.- THE SAME; *On Plautius, Book VII*.- I manumitted a slave by will as follows, "Let him be free if he will swear to pay to my son, Cornelius, ten aurei in lieu of his services." The question arises, what is the law in this case? It must be acknowledged that the slave will comply with the condition by taking the oath, but he will not be bound to pay the money in lieu of his services, because he will not be bound unless he takes the oath after his manumission.

37.- THE SAME; *On Plautius, Book IX*.- A slave is considered to have been manumitted specifically by a codicil, when his name is mentioned in the will.

38.- THE SAME; *On Plautius, Book XII*.- Freedom

aunque ni al tiempo del testamento ni al de la muerte hayan sido del testador, sino de los enemigos.

31.- PAULO; *Comentarios al Edicto, libro XXVI*.- Cuando se mandó que de muchos esclavos del mismo nombre uno solo fuera libre, y no apareciera quién sea, ninguno es libre.

32.- ULPIANO; *Comentarios al Edicto, libro LXV*.- Se ha de saber, que habiendo heredero necesario, aunque se abstenga de la herencia, competen sin embargo las libertades, con tal que no se hayan sido dadas en fraude de la ley Elia Sencia.

33.- PAULO; *Cuestiones, libro XII*.- La libertad no se puede dar por tiempo.

34.- EL MISMO; *Comentarios al Edicto, libro LXXIV*.- Y por lo tanto, si se hubiera escrito así: «sea libre Stico por diez años», es superflua la agregación del tiempo.

35.- EL MISMO; *Comentarios al Edicto, libro L*.- Opinaba Servio, que se les podía dar en testamento la libertad directa a los esclavos, que fueron del testador en uno y en otro tiempo, así en el que se hace el testamento, como en el que fallece; cuya opinión es verdadera.

36.- EL MISMO; *Comentarios a Plautio, libro VII*.- Manumité en testamento a un esclavo de este modo: «si hubiere jurado que le dará a Cornelio mi hijo, diez días de servicios, sea libre»; se pregunta, qué derecho habría. Y se ha de saber, que jurando el esclavo cumple la condición, pero que no queda obligado por razón de los servicios, porque no se obliga sino si jurase después de la manumisión.

37.- EL MISMO; *Comentarios a Plautio, libro IX*.- Se considera manumitido nominalmente en los codicilos el esclavo cuyo nombre se contiene en el testamento.

38.- EL MISMO; *Comentarios a Plautio, libro*

testamento servo ita dari potest: "quum per leges licebit, liber esto".

39.- IDEM; *libro XVI, ad Plautium*.- «Stichus servus meus, si eum heres alienaverit, liber esto»: inutiliter libertas datur, quia in id tempus confertur, quo alienus futurus sit. Nec contrarium est, quod statuliber, etiamsi venierit, ex testamento libertatem consequitur: quippe utiliter libertas data facto heredis non peremittitur. Aut quid in legato eo modo dato dicemus? Diversum enim nulla ratione dicitur: nam inter libertatem et legatum, quantum ad hanc causam, nihil distat. Igitur nec sic recte dabitur libertas "si heredis mei esse desierit, liber esto", quia nullum casum utilem habet.

40.- POMPONIUS; *libro V, ex Plautio*.- Iulianus ait, quum idem homo et per fideicommissum detur alicui et liber esse iubeatur, heredem libertatem praestare debere: non enim cogetur, inquit, ex causa fideicommissi aestimationem sufferre, quum debita libertatem reddiderit.

§ 1.- Sed et quum sub condicione servo libertas per fideicommissum detur et ipse praesenti die daretur, non aliter tradere eum cogetur, quam ut caveatur existente condicione libertati eum restitutum iri: nam in omnibus fere causis fideicommissas libertates pro directo datis habendas. Sed Ofilius aiebat, si adiuvandi legati causa fideicommissam libertatem testator dedisset, ea vera esse: si vero onerari heredem a testatore legatarius ostenderit, aestimationem nihilo minus legatario praestandam.

can be granted to a slave by will as follows, "Let him be free when he has a right to be so by law."

39.- THE SAME; *On Plautius, Book XVI*.- "Let my slave, Stichus, be free, if my heir should alienate him." This grant of freedom is void, because it has reference to the time when the slave will belong to another. Nor can the objection that a slave, who is to be free under a certain condition, will obtain his freedom by virtue of the will, even if he should be sold, be raised; for where freedom is legally granted, it cannot be annulled by the act of the heir. But what if a legacy is bequeathed in this manner? There is no reason to hold a different opinion under such circumstances, for no difference exists between a grant of freedom and a legacy, so far as this question is concerned. Therefore, freedom is not directly granted by the following clause, "Let my slave be free, if he ceases to belong to my heir," because there is no instance where a concession of this kind will be available.

40.- POMPONIUS; *On Plautius, Book V*.- Julianus says that where the same slave is granted a sum under the terms of a trust, and is also ordered to be free, the heir must grant him his freedom; for he says that he is not, by virtue of the trust, compelled to pay the value of the slave, as he gives him his freedom to which he is entitled.

§ 1.- But where freedom is granted to a slave conditionally, under the terms of a trust, and the slave himself is given at the time, the heir will not be obliged to deliver him, unless security is furnished by the beneficiary of the trust that, if the condition is fulfilled, he will liberate the slave; for in almost all cases freedom granted by virtue of a trust is considered as having been directly granted. Ofilius, however, says that if a testator bestowed freedom by means of a trust, with the intention of depriving the slave of a legacy, this opinion is correct. But if the legatee can prove that the heir was charged by the testator, he will still be obliged to pay the value of the slave to the legatee.

XII. - En testamento se le puede dar a un esclavo la libertad de este modo: «como fuere lícito por las leyes, sea libre».

39.- EL MISMO; *Comentarios a Plaucio, libro XVI*.- «Sea libre Stico, mi esclavo, si el heredero lo enajenare»; la libertad se da inútilmente, porque se confiere para un tiempo en que el esclavo habrá de ser de otro; y no es contrario a esto, que aquel a quien se le dejó la libertad bajo condición consigue la libertad en virtud del testamento, aunque hubiere sido vendido, porque la libertad dada útilmente no se extingue por un hecho del heredero. Mas ¿qué diremos respecto al legado dado de este modo? Por ninguna razón diremos lo contrario; porque ninguna diferencia hay entre la libertad y un legado en cuanto a este particular. Así, pues, no se dará directamente la libertad de este modo: «si hubiere dejado de ser de mi heredero, sea libre», porque no contiene ningún caso útil.

40.- POMPONIO; *Doctrina de Plaucio, libro V*.- Dice Juliano, que cuando un mismo esclavo sea dado por fideicomiso a alguno, y se mande que sea libre, el heredero debe darle la libertad; porque no se obligará, dice, a satisfacer por causa del fideicomiso el precio, pues habrá dado la libertad debida.

§ 1.- Pero también cuando bajo condición se le dé a un esclavo la libertad por fideicomiso, y él mismo fuese dado en aquel día, no se obligará, a entregarlo de otro modo, sino si se diera caución de que será constituido en libertad cumpliéndose la condición; porque casi en todos los casos han de ser consideradas las libertades dejadas por fideicomiso como dadas directamente. Pero Ofilio decía, que si el testador hubiese dado la libertad por fideicomiso para revocar el legado, esto sería verdad, pero que si el legatario probare que el heredero fue gravado por el testador, debía pagarse a pesar de ello la estimación al legatario.

41.- IDEM; *libro VII, ex Plautio*.- Si ita fuerit libertas relicta: "Stichus servus meus anno duodecimo, postquam ego mortuus ero, liber esto", verisimile est principio duodecimi anni eum liberum esse, nam hoc mortuum sensisse. Et inter hos sermones "duodecimo anno" et "post duodecim annos" multum interest et ita loqui solemus. Duodecimus annus est, quum quantulumlibet ex duodecimo anno venisset aut praeterisset, et qui duodecimo anno liber esse iubetur, omnibus anni diebus liber esse iussus est.

§ 1.- Sed si ita sit scriptum in testamento: "Stichus servus meus heredi meo mille nummos anno biennio triennio, postquam ego mortuus ero, si solverit satisve fecerit, liber esto", non potest is servus nisi triennio praeterito liber esse, nisi praesentem eam pecuniam solvat aut satisfaciat: compensanda etenim est heredi libertatis celeritas praematurae pecuniarum solutioni.

§ 2.- Labeo scribit, si sic libertas relicta sit: "Stichus intra annum, postquam mortuus ero, liber esto", statim eum liberum esse: nam et si ita sit: "si intra annum decimum heredi meo dederit, liber esto", statim solvendo eo liberum esse sine mora futurum.

42.- MARCELLUS; *libro XVI, Digestorum*.- Si quis ita scripserit "illum illius libertum esse volo", et servus libertatem petere potest et ille, ut habeat libertum.

43.- MODESTINUS; *libro singulari de Manumissionibus*.- Libertates directae et testamento et codicillis testamento confirmatis recte dantur, fideicommissae et ab intestato et codicillis non confirmatis relinqui possunt.

41.- THE SAME; *On Plautius, Book VII*.- Where freedom is granted as follows, "Let Stichus be free the twelfth year after my death," it is probable that he will become free at the beginning of the twelfth year, for this was the intention of the deceased. There is, however, a great deal of difference between the two expressions, "the twelfth year," and "after twelve years," and we are accustomed to say "the twelfth year" when ever so little of the twelfth year has arrived, or elapsed. He who is ordered to be free the twelfth year is ordered to be free for every day during that year.

§ 1.- Where the following provision is inserted in a will, "Let my slave, Stichus, be free, if he pays my heir a thousand sesterces at the end of one, two, and three years, after my death, or if he gives security to do so," the slave cannot become free before the expiration of the third year, unless he pays the entire sum immediately, or gives security; as the advantage which the heir derives from immediate payment should be compensated by the rapidity with which the grant of freedom is made.

§ 2.- Labeo says that where a testamentary grant of freedom is made as follows, "Let Stichus be free within a year after my death," he will become free immediately. And if his freedom had been bequeathed as follows, "Let him be free, if he pays such-and-such a sum to my heir within ten years," and he pays it at once, he will become free without delay.

42.- MARCELLUS; *Digest, Book XVI*.- If anyone should insert the following clause into his will, "I desire my slave to be the freedman of such-and-such a person," the slave can demand his liberty, and the other party can claim him as his • freedman.

43.- MODESTINUS; *On Manumissions*.- Direct grants of freedom can be legally made by will, and by a codicil confirmed by a will. Grants of freedom under a trust can be made ab intestato, and by codicils not confirmed by a will.

41.- EL MISMO; *Doctrina de Plaucio, libro VII*.- Si se hubiere dejado la libertad de este modo: «sea libre Stico, mi esclavo, el duodécimo año después que yo hubiere muerto», es verosímil que él sea libre al principio del año duodécimo; porque esto entendió el difunto, y entre estas expresiones: «el duodécimo año», y «después de doce años», hay mucha diferencia; y así solemos decir: «el año duodécimo», cuando del año duodécimo hubiese llegado o transcurrido una parte cualquiera; y respecto del que se mandó que fuese libre el año duodécimo, se mandó que fuese libre todos los días del año.

§ 1.- Pero si se hubiera escrito así en el testamento: «sea libre Stico, mi esclavo, si le hubiere pagado o satisfecho a mi heredero mil monedas al año, a los dos años, a los tres, después que yo hubiere muerto», este esclavo no puede ser libre, sino transcurrido el trienio, a no ser que pague o satisfaga de presente la cantidad; porque al heredero se le ha de compensar la anticipación de la libertad con el pago anticipado del dinero.

§ 2.- Escribe Labeón, que si se hubiera dejado así la libertad: «sea libre Stico dentro del año después que yo hubiere muerto», él ha de ser libre inmediatamente; porque también si lo hubiera sido así: «sea libre, si le hubiere dado a mi heredero dentro del décimo año», pagando él inmediatamente, habrá de ser libre sin demora.

42.- MARCELO; *Digesto, libro XVI*.- Si alguno hubiere escrito así: «quiero que aquél sea liberto de aquél», el esclavo puede pedir la libertad, y el otro tenerlo por liberto.

43.- MODESTINO; *De las Manumisiones, libro Único*.- Las libertades directas se dan válidamente así por testamento, como por codicilos confirmados por testamento, y las dadas por fideicomiso se pueden dejar tanto abintestato, como por codicilos no confirmados.

44.- IDEM; *libro X, Responsorum*.- Maevia decedens servis suis nomine sacco et Eutychiae et irenae sub condicione libertatem reliquit his verbis: "Saccus servus meus et Eutychia et Irene ancillae meae omnes sub hac condicione liberi sunt, ut monumento meo alternis mensibus lucernam accendant et sollemnia mortis peragant": quaero, quum adsiduo monumento Maeviae Saccus et Eutychia et Irene non adsint, an liberi esse possunt. Modestinus respondit neque contextum verborum totius scripturae neque mentem testatricis eam esse, ut libertas sub condicione suspensa sit, quum liberos eos monumento adesse voluit: officio tamen iudicis eos esse compellendos testatricis iussioni parere.

45.- IDEM; *libro Pandectorum*.- Quod volgo dicitur sub pluribus condicionibus data libertate levissimam condicionem spectandam esse, ita verum est, si separatim condiciones sint datae: quod si coniunctim datae sunt, nisi omnibus paruerit, liber non erit.

46.- POMPONIUS; *libro VII, ex variis Lectio-nibus*.- Aristo neratio appiano rescripsit, testamento liber esse iussus, quum annorum triginta esset, antequam ad eam aetatem perveniret si in metallum damnatus sit ac postea revocetur, sine dubitatione cum libertate legatum ad eum pertinere neque metallorum poena ius eius mutari: nec aliud, si heres esset sub condicione institutus: futurum enim eum etiam necessarium.

47.- PAPINIANUS; *libro VI, Quaestionum*.- Quum ex falsis codicillis per errorem libertas, licet non debita, praestita tamen ab herede fuisset, viginti solidos a singulis hominibus inferendos esse heredi princeps constituit.

§ 1.- Sed et si condicionis implendae gratia servum

44.- THE SAME, *Opinions, Book X*.- Msevia, at the time of her death, bequeathed freedom to her slaves named Saccus, Eutychia, and Hirena, conditionally, in the following terms: "Let my male slave, Saccus, and my female slaves, Eutychia and Hirena, be free, under the following condition, namely, that they burn a lamp on my tomb every other month, and celebrate funeral rites there." As the said slaves did not regularly visit the tomb of Maevia, I ask whether they would be free. Modestinus answered that neither the wording of the entire clause nor the intention of the testatrix indicated that the freedom of the slaves should be suspended under a condition, as she desired them to visit her tomb as persons who were free; but that it was, nevertheless, the duty of the judge to compel them to obey the order of the testatrix.

45.- THE SAME; *Pandects, Book II*.- It is commonly stated that where freedom is granted under several conditions, the one which is the least onerous should be observed; and this is true where the conditions are imposed separately. Where, however, they are imposed together, the slave will not be free unless he complies with all of them.

46.- POMPONIUS; *Various Passages, Book VII*.- Aristo replied to Neratius Appianus as follows: If a slave is directed to be free by will when he reaches the age of thirty years, and, before doing so, he is sentenced to the mines, and afterwards is released, there is no doubt that he will be entitled to the legacy left with his freedom, nor will his right be affected by his sentence to the mines. The rule is the same when the slave is appointed an heir under a condition, for he will become the necessary heir.

47.- PAPINIANS *Questions, Book VI*.- Where freedom is granted through mistake, under a forged codicil, although it is not due, still it must be granted by the heir, and the Emperor has decided that twenty solidi must be paid to the heir by each slave who is liberated.

§ 1.- When an appointed heir manumits a slave for

44.- EL MISMO; *Respuestas, libro X*.- Al morir Mevia les dejó a sus esclavos, llamados Sacco, Eutiquia, e Irene, la libertad bajo condición, con estas palabras: «Sacco, mi esclavo, y Eutiquia e Irene, mis esclavas, sean todos ellos libres bajo esta condición, que en meses alternados enciendan la lámpara de mi monumento, y celebren las solemnidades fúnebres»; pregunto, no asistiendo asiduamente al monumento de Mevia Sacco, Eutiquia e Irene, ¿pueden ser libres? Modestino respondió, que ni el contexto de las palabras de toda la escritura, ni la intención de la testadora era, que la libertad estuviera en suspenso bajo condición, puesto que quiso que ellos asistiesen libres a su monumento; pero que es del cargo del juez compelerlos a acatar la disposición de la testadora.

45.- EL MISMO; *Pandectas, libro ...*.- Lo que vulgarmente se dice, que dada la libertad bajo varias condiciones se ha de atender a la condición más llevadera, es verdad de este modo, si las condiciones hubieran sido fijadas por separado; pero si fueron fijadas conjuntamente, no será libre si no las hubiere cumplido todas.

46.- POMPONIO; *Doctrina de autores varios, libro VII*.- Aristón respondió a Neracio Apiano, que si el que se dispuso en testamento que fuera libre, cuando fuese de treinta años, hubiera sido condenado a las minas antes que llegase a esta edad, y después fuera llamado de ellas, le pertenece sin duda el legado juntamente con la libertad, y no altera su derecho la pena de las minas. Tampoco será otra cosa, si hubiese sido instituido heredero bajo condición; porque también habrá de ser él heredero necesario.

47.- PAPINIANO; *Cuestiones, libro VI*.- Cuando en virtud de falsos codicilos hubiese sido dada por error la libertad por el heredero, aunque no debida, determinó el príncipe que por cada esclavo se le habían de pagar veinte sueldos al heredero.

§ 1.- Pero aunque el instituido hubiere manumitido

institutus manumiserit ac postea filius de inofficioso agendo tenuerit vel testamentum falsum fuerit pronuntiatum, consequens erit idem in hac specie fieri, quod in falsis codicillis constitutum est.

48.- PAPINIANUS; *libro X, Quaestionum*.- Si socius testamento libertatem ita dederit: "Pamphilus, si eum socius manumiserit, liber esto", Servius respondit socio manumittente communem fieri libertum familiae atque manumissoris: neque enim novum aut incognitum est vario iure communi mancipio libertatem optingere.

49.- PAPINIANUS; *libro VI, Responsorum*.- Testamento militis ita manumissam "Samiam in libertate esse iussi" directam libertatem iure militiae cepisse placuit.

50.- PAPINIANUS; *libro IX, Responsorum*.- Quod divo marco pro libertatibus conservandis placuit, locum habet irritum testamento facto, si bona venitura sint: alioquin vacantibus fisco vindicatis non habere constitutionem locum aperte cavetur.

§ 1.- Servos autem testamento manumissos, ut bona suscipiant, iure cautionem idoneam offerre, non minus quam ceteros defuncti libertos aut extrarios declaravit: quod beneficium, minoribus annis heredibus scriptis auxilium bonis praestitutum more solito desiderantibus, non aufertur.

51.- PAPINIANUS; *libro XIV, Responsorum*.- Testamento centurio servos suos venire prohibuit ac petit, prout quisque meruisset, eos manumitti.

the purpose of complying with a condition, and the son, by subsequently bringing an action to declare the will inofficious gains his point, or the will is pronounced forged, the result will be that in this case the same course must be pursued as is prescribed in the one involving a forged codicil.

48.- THE SAME; *Questions, Book X*.- Where a partner granted freedom to a slave by will, as follows, "Let Pamphilus be free, if my partner should manumit him," Servius gave it as his opinion that if the partner should manumit the slave, he will become the common freedman of the heirs of the deceased and of the partner who manumitted him; for it is neither new nor unreasonable for a slave held in common to obtain his freedom by the exercise of different rights.

49.- THE SAME; *Opinions, Book VI*.- Where a female slave was manumitted by the will of a soldier, as follows, "I direct that Samia shall obtain her freedom," it was held that she obtained her freedom directly in accordance with military law.

50.- THE SAME; *Opinions, Book IX*.- It was decided by the Divine Marcus, with a view to the preservation of freedom, that his decree on that subject should apply to cases where a will was held to be void, and that the property of the estate should be sold; and, on the other hand, it was especially provided where the estate is claimed by the Treasury as being without an owner, that this decree shall not be applicable.

§ 1.-In order that slaves manumitted by a will might obtain the property of the deceased, it was decided that they must give a suitable bond in court, just as the other freedmen of the deceased, or foreign heirs. Minors, who are appointed heirs, and, as is customary, claim assistance with reference to the estate of the deceased, are not deprived of this advantage.

51.- THE SAME; *Opinions, Book XIV*.- A centurion, by his will, forbade his slaves to be sold, and asked that they be manumitted, so far as they

al esclavo para cumplir una condición, y luego el hijo hubiere ganado interponiendo la querella de inoficioso, o hubiere sido declarado falso el testamento, será consiguiente que en este caso se haga lo mismo que se estableció tratándose de codicilos falsos.

48.- EL MISMO; *Cuestiones, libro X*.- Si un condueño hubiere dado por testamento la libertad de este modo: «sea libre Pánfilo, si mi condueño lo manumitiere», respondió Servio, que manumitiéndolo el condueño se hace liberto común de la familia del testador y de la del manumisor; porque no es cosa nueva o ignorada, que por diverso derecho llegue la libertad a un esclavo común.

49.- EL MISMO; *Respuestas, libro VI*.- Se determinó, que la manumitida así en el testamento de un militar: «mandé que Samia estuviese en libertad», recibió por derecho militar la libertad directa.

50.- EL MISMO; *Respuestas, libro IX*.- Lo que para conservar la libertad le plugo al Divino Marco, tiene lugar habiéndose invalidado el testamento, si se hubieran de vender los bienes; en otro caso, claramente se dispone que, reivindicados por el fisco como vacantes, no tiene lugar la Constitución.

§ 1.- Pero declaró, que los esclavos manumitidos por testamento deben ofrecer en derecho, para recibir los bienes, caución idónea, no de otra suerte que los demás libertos del difunto, o que los extraños. Cuyo beneficio no se les quita a los menores de edad, instituidos herederos, que pretendiesen en la forma acostumbrada el auxilio establecido para los bienes.

51.- EL MISMO; *Repuestas, libro XIV*.- Un centurión prohibió en su testamento que sus esclavos fueran vendidos, y pidió que fueran manumitidos

Libertates utiliter datas respondit, quum, si nemo servorum offenderit, omnes ad libertatem pervenire possunt: quibusdam autem per offensam exclusis residui in libertatem perveniunt.

§ 1.- Quum ita testamento adscriptum esset: "servi, qui sine offensa fuerunt, liberi sunt", condicionem adscriptam videri placuit, cuius interpretationem talem faciendam, ut de his in libertate danda cogitasse non videatur, quos poena coercuit aut ab honore ministrandi vel administrandae rei negotio removit.

52.- PAULUS; *libro XII, Quaestionum*.- Imperatores Missenio Frontoni. Testamento militis his verbis adscripta libertate: "Stephanum servum meum liberum esse volo" vel "iubeo" adita hereditate libertas competit: et ideo ea, quae postea adiecta sunt: "sic tamen, ut quum herede meo sit quo usque invenis sit: quod si noluerit aut contempserit, iure servitutis teneatur", ad revocandam libertatem, quae competit, non sunt efficacia. Idem et in paganorum testamentis observatur.

53.- PAULUS; *libro XV, Responsorum*.- Lucius Titius servo libertatem dedit, si rationem actus sui ex fide dedisset Gaio Seio filio suo: quum annos pubertatis egressus fuisset Gaius Seius, a curatoribus eiusdem conventus servus etiam apud iudicem omnibus satisfecit: exacta condicione a curatoribus pronuntiatum est liberum eum esse: nunc Gaius Seius filius testatoris negat curatoribus suis recte pecuniam illatam: quaero, an iure soluta sit quantitas. Paulus respondit curatoribus quidem adulescentis reliquam rationem, ut condicio testamento adscripta impleatur, non iure exsolutam videri: sed si praesente adulescente pecunia illata est vel in rationibus eius relata, impletam condicionem videri, ac si ipsi soluta fuisset.

were deserving of it. The answer was that freedom was lawfully granted, since, if none of the servants had given cause for offence, all of them would be entitled to be free; but if some of them were excluded on account of having committed a crime, still the others ought to obtain their freedom.

§ 1.- Where the following provision was inserted into a will, "Let those slaves who have not given cause for offence be free," it was held that the grant of freedom was conditional, and that it should be interpreted in such a way that the testator, when liberating his slaves, did not intend to include those whom he had subjected to punishment, or had excluded from the honor of serving him or from transacting his business.

52.- PAULUS; *Questions, Book XII*.- The Emperors to Missenius Fronto. Freedom having been granted by the will of a soldier in the following terms, "I wish or I order my slave Stephen to be free," the slave can obtain his freedom whenever the estate is entered upon. Therefore, when the following words were added, "Provided, nevertheless, that he remains with my heir as long as he is a young man, but if he refuses to do so, or treats my proposal with contempt, let him continue to be held as a slave," they do not have the effect of revoking the freedom to which the slave was entitled. The same rule is observed with reference to the wills of civilians.

53.- THE SAME; *Opinions, Book XV*.- Lucius Titius granted freedom to his slave under the condition that he should render a faithful account of his administration to his son, Gaius Seius. When Gaius Seius had reached the age of puberty, the slave, having been sued by the curators of the former, paid in court everything that was due. A bond having been required of the curators, the slave was declared to be free. Now Gaius Seius, the son of the testator, denies that the money was legally paid to his curators, and I ask whether this was the case. Paulus answered that the balance of the account of the slave did not seem to have been paid to the curators of the youth in such a way as to comply with the condition prescribed by the will in accordance with law; but if the money had

según cada uno lo hubiere merecido; respondió, que se dieron útilmente las libertades, porque si ninguno de los esclavos hubiere inferido ofensa, pueden llegar todos a la libertad; y excluidos algunos por causa de ofensa, llegan los restantes a la libertad.

§ 1.- Cuando en un testamento se hubiese escrito así: «sean libres los esclavos que estuvieren exentos de ofensa», se determinó que se considerase puesta una condición; cuya interpretación se ha de hacer de modo, que no se considere que para que se les diera la libertad pensó en aquellos a quienes corrigió con una pena, o a quienes removió del honor de servirle, o del cargo de administrarle un negocio.

52.- PAULO; *Cuestiones, libro XII*.- Los Emperadores a Missenio Frontón. Habiéndose dejado en el testamento de un militar la libertad en estos términos: «quiero o mando que Stéfano, mi esclavo, sea libre», compete la libertad habiendo sido adida la herencia; y por lo tanto, esto que después se añadió; «pero de suerte que esté con mi heredero hasta que sea joven; y si no quisiere esto, o lo menospreciare, sea retenido por derecho de esclavitud», no es eficaz para revocar la libertad, que competió. Lo mismo se observa también en los testamentos de los paisanos.

53.- EL MISMO; *Respuestas, libro XV*.- Lucio Ticio le dio a un esclavo la libertad, si con fidelidad le hubiese dado a Cayo Seyo, su hijo, cuenta de su administración; habiendo salido Cayo Seyo de la edad de la pubertad, demandado el esclavo por los curadores del mismo, les satisfizo a todos ante el juez; exigido recibo de los curadores, se falló que él era libre; ahora Cayo Seyo, hijo del testador, dice que no fue entregado bien el dinero a sus curadores; pregunto, si habrá sido pagada con arreglo a derecho la cantidad. Paulo respondió, que no parece ciertamente que haya sido pagado con arreglo a derecho el remanente de las cuentas a los acreedores del adolescente, para que se haya cumplido la condición escrita en el testamento; pero que si el dinero fue

54.- SCAEVOLA; *libro IV, Responsorum*.- Qui habebat servum Cratistum, testamento ita cavit: "servus meus Cratinus liber esto": quaero, an servus Cratistus ad libertatem pervenire possit, quum testator servum Cratinum non habebat, sed hunc solum Cratistum. Respondit nihil obesse, quod in syllaba errasset.

§ 1.- Scripti testamento heredes ante aditam hereditatem pacti sunt cum creditoribus, ut parte dimidia contenti essent, et ita decreto a praetore interposito hereditatem adierunt: quaero, an libertates in eo testamento datae competierunt. respondit, si testator fraudandi consilium non habuisset, competere libertates.

55.- MAECIANUS; *libro II, Fideicommissorum*.- Libertate sub condicione data huc iam decursum est, ut, si per statuliberum non stet, quominus condicioni pareat, quamvis ne per heredem quidem stet, tamen ad libertatem perveniat. Quod credo responderi oportere et si per fideicommissum utique hereditariis servis libertas data fuerit.

§ 1.- Non absurde et de heredis servis idem dicitur.

§ 2.- De his autem, quos redimendos habebit, non iuste dubitamus, siquidem eo casu iniquum erit heredem perinde compelli debere redimere eos, atque si condicio impleta esset, quod forte dominus prohiberet condicioni parere, ut et pretium perciperet et in condicionem non rogaret.

56.- PAULUS; *libro I, Fideicommissorum*.- Si quis

been paid in the presence of the minor, or had been entered in his accounts, the condition should be considered to have been fulfilled, just as if it had been paid to him himself.

54.- SCAEVOLA; *Opinions, Book IV*.- A man who had a slave named Cratistus made the following provision in his will, "Let my slave, Cratinus, be free." I ask whether the slave Cratistus can obtain his freedom, as the testator had no slave called Cratinus, but only the said slave, Cratistus. The answer was that no impediment existed because a mistake had been made in a syllable.

§ 1.- Certain testamentary heirs, before entering upon the estate, agreed with the creditors that the latter should be content with half of their claims; and a decree having been issued by the Praetor to this effect, they accepted the estate. I ask whether the grants of freedom made by the will would take effect. The answer was that they would take effect, if the testator had no intention of committing fraud.

55.- MAECIANUS; *Trusts, Book II*.- A grant of freedom having been made under a condition, the decision was rendered that if neither the slave nor the heir was responsible for the condition not having been complied with, the slave would be entitled to his freedom. I think that the same opinion should be given where freedom is granted under the terms of a trust to slaves belonging to an estate.

§ 1.- It is not absurd to hold that this rule also applies to the slaves of the heir.

§ 2.- We cannot reasonably doubt that this is also applicable to slaves whom the heir was charged to purchase; for in this instance, it would be unjust for him to be compelled to purchase them as if the condition had been fulfilled, because it might happen that the owner would refuse to comply with the condition, in order to obtain the price of a slave, and not demand him as the condition.

56.- PAULUS; *Trusts, Book I*.- If anyone grants

pagado estando presente el adolescente, o fue incluido en las cuentas de éste, se consideraba cumplida la condición, como si a él mismo le hubiese sido pagado.

54.- SCÉVOLA; *Respuestas, libro IV*.- Uno, que tenía un esclavo llamado Cratisto, dispuso así en su testamento: «sea libre mi esclavo Cratino»; pregunto, si podría llegar a la libertad el esclavo Cratisto, no teniendo el testador esclavo llamado Cratino, sino este solo Cratisto. Respondió, que nada obstaba que hubiese errado en una sílaba.

§ 1.- Los herederos instituidos en el testamento pactaron con los acreedores antes de adida la herencia, que se contentasen con la mitad; y así, habiéndose interpuesto decreto por el Pretor, adieron la herencia; pregunto, ¿competieron las libertades dadas en este testamento? Respondió, que si el testador no hubiese tenido el designio de defraudar, competían las libertades.

55.- MECIANO; *Fideicomisos, libro II*.- Dada la libertad bajo condición, está ya determinado en este caso, que si en aquel a quien en testamento se le dió la libertad bajo condición no consistiera que no se cumpliera la condición, llegue, sin embargo, aquél a la libertad, aunque tampoco ciertamente consista en el heredero. Lo que creo que se debe responder, también si por fideicomiso se les hubiere dado la libertad a esclavos de la herencia.

§ 1.- No absurdamente se dirá lo mismo también tratándose de esclavos del heredero.

§ 2.- Mas respecto a los que tuviere que comprar no dudamos con razón; porque en este caso será injusto que el heredero deba ser compelido a comprarlos lo mismo que si hubiese sido cumplida la condición; porque acaso el señor prohibiría que cumpliera la condición para que percibiese el precio y no rogase respecto a la condición.

56. PAULO; *Fideicomisos, libro I*.- Si alguno le

servo testamento dederit libertatem et directo et per fideicommissum, in potestate servi est, utrum velit ex directo an ex fideicommisso ad libertatem pervenire: et ita marcus imperator rescripsit.

57.- GAIUS; *libro III, de Manumissionibus*.- Si locuples egenti heres exstiterit, videamus, an ea res testamento datis libertatibus proficiat, ut creditores fraudari non videantur. Et sane sunt quidam, qui, quum heres locuples existeret, tale esse crediderunt, quale, si ipse testator adauctis postea facultatibus decessisset. Sed mihi traditum est hoc iure nos uti, ut ad rem non pertineat, locuples an egens heres extiterat, sed quarum facultatum testator decesserit. Quam sententiam Iulianus adeo sequitur, ut existimet ne eum quidem libertatem consecuturum, quem is, qui solvendo non esset, ita liberum esse iussisset: "quum aes alienum solutum erit, Stichus liber esto". Sed non hoc est consequens Sabini et Cassii sententiae, quam et ipse sequi videtur, qui existimant consilium quemque manumittentis spectare debere: nam qui sub ea condicione servum suum liberum esse iubet, adeo sine fraudis consilio liberum esse iubet, ut apertissime curare videatur, ne creditores sui fraudarentur.

58.- MAECIANUS; *libro III, Fideicommissorum*.- Verum est eum, qui liber esse iussus esset, alienatum a testatore, si ante aditam eius hereditatem rursus hereditarius fieret, mox adiretur hereditas, ad libertatem pervenire.

59.- SCAEVOLA; *libro XXIII, Digestorum*.- Titia servis quibusdam et ancillis nominatim directas libertates dedit, deinde ita scripsit: "et pedisequas omnes, quarum nomina in rationibus meis scripta sunt, liberas esse volo". Quaesitum est, an Eutychia, quae testamenti facti tempore inter pedisequas libertatem acceperat, mortis autem tempore

freedom to a slave by will, both directly and under a trust, it is in the power of the slave to choose whether he will obtain his freedom directly, or by virtue of the trust. This the Emperor Marcus also stated in a Rescript.

57.- GAIUS; *On Manumissions, Book III*.- When a wealthy man becomes the heir of a person who is poor, let us see whether this will be of any advantage to the slaves who are granted their freedom by will, without the creditors of the estate being defrauded. And, indeed, there are certain authorities who hold that when a rich man appears as the heir, it is the same as if the testator had died after having increased his estate. But I have been informed (and this is our practice), that it makes no difference whether the heir is rich or poor, but the amount of the estate of which the testator died possessed must alone be taken into consideration. Julianus adopts this opinion to the extent that he holds that grants of freedom will not take effect where the testator was insolvent, and ordered the slave to be free, as follows, "Let Stichus be free when my debts are paid." This opinion, however, does not coincide with that of Sabinus and Cassius, which Julianus himself appears to accept, as he thinks that the intention of the testator who manumitted the slave should be considered. For a person who orders his slave to be free under such a condition does so without any intention of committing a fraud, since he is held clearly to desire that his creditors shall not be cheated.

58.- MAECIANUS; *Trusts, Book III*.- It is true that, where a slave is directed to be free under the terms of a will, and is afterwards alienated by the testator, and again becomes a part of the estate before it is entered upon, he will obtain his liberty as soon as the estate is accepted.

59.- SCAEVOLA; *Digest, Book XXIII*.- Titia bequeathed freedom directly to certain of her male and female slaves, and then inserted the following provision in her will, "And I wish all the slaves attached to my personal service, whose names are inscribed in my registers, to be free." The question arose whether Eutychia who, along with the other

hubiere dado por testamento a un esclavo la libertad directamente, y por fideicomiso, está en la facultad del esclavo preferir llegar a la libertad directamente, o por el fideicomiso; y así lo respondió por rescripto el emperador Marco.

57.- GAYO; *De las manumisiones, libro III*.- Si un rico hubiere quedado heredero de un pobre, veamos si esta circunstancia aprovechará para las libertades dadas en el testamento, de suerte que no parezca que se defrauda a los acreedores. Y a la verdad, hay algunos, que creyeron, que cuando el heredero fuese rico, el caso era igual que si el mismo testador hubiese fallecido habiendo aumentado después los bienes; pero a mí se me dijo, que nosotros observamos como derecho, que no hace al caso que el heredero sea rico o pobre, sino con qué bienes haya fallecido el testador, cuya opinión sigue de tal modo Juliano, que cree que ciertamente no habrá de obtener la libertad el que uno, que no fuese solvente, hubiese mandado de este modo que fuese libre: «cuando hayan sido pagadas las deudas, sea libre Stico», Pero esto no es conforme a la opinión de Sabino y de Cassio, que también él mismo parece seguir, los cuales estiman, que cada cual debe atender a la intención del que manumite; porque el que manda que su esclavo sea libre bajo esta condición, de tal modo manda sin propósito de fraude que sea libre, que parece que evidéntisimamente cuida de que no sean defraudados sus acreedores.

58.- MECIANO; *Fideicomisos, libro III*.- Es verdad que el que se hubiese mandado que fuese libre, si enajenado por el testador se hiciera otra vez de la herencia antes de haber sido adida la herencia, y después fuese adida la herencia, llega a la libertad.

59.- SCÉVOLA; *Digesto, libro XXIII*.- Ticia dió la libertad directa nominalmente a algunos esclavos y esclavas, y después escribió así: «y quiero que sean libres todas las acompañantes cuyos nombres se hallan escritos en mis libros»; se preguntó, si Eutiquia, que siendo de las acompañantes había recibido la libertad al tiempo de hacerse el

inveniatur actori in contubernio tradita, ex generali capite pedisequarum libertatem consequi posset. Respondit nihil impediri libertatem pedisequae, quod mortis demum tempore pedisequa esse desiit.

§ 1.- Puram et directam domini sui testamento libertatem Stichus acceperat et ex hereditate multa per fraudem amovisse dicitur: quaesitum est, an non ante in libertatem proclamare debeat, quam ea, quae ex hereditate amovisse probari poterit, heredibus restitueret. Respondit secundum ea, quae proponerentur, eum de quo quaereretur liberum esse. Claudius: videtur absolvisse et id de quo quaeritur: nam heredibus satis consultum est edicto de furtis.

§ 2.- Lucius Titius testamento suo ita cavit: "Onesiphore, nisi diligenter rationem excusseris, liber ne esto": quaero, an Onesiphorus ex his verbis libertatem sibi vindicare possit. Respondit verbis, quae proponerentur, libertatem adimi potius quam dari.

60.- SCAEVOLA; *libro XXIV, Digestorum*.- Testamento ita cavit: Volo, ut Eudoni dentur mille solidi, eo quod primo sit genitus, posteaquam mater eius ad libertatem pervenit: quaero, an, si Eudo non probet se post manumissionem matris suae natum, possit his verbis testamenti libertatem consequi. respondit non oportere eiusmodi consultationem praeiudicium parere.

61.- POMPONIUS; *libro XI, Epistolarum*.- Scio quosdam efficere volentes, ne servi sui umquam ad libertatem perveniant, hactenus scribere solitos: "Stichus quum moreretur, liber esto". Sed et Iulianus ait libertatem, quae in ultimum vitae tempus conferatur, nullius momenti esse, quum testator

personal slaves, was emancipated at the time when the will was executed, and who, when the testatrix died, was married to a steward who was a slave, would obtain her freedom under the general head of "Slaves attached to my personal service." The answer was that there was nothing to prevent her obtaining her freedom, even though at the time of the death of the testatrix she had ceased to be one of her attendants.

§ 1.- Stichus received his freedom directly by the will of his master, and was accused of having fraudulently secreted much of the property of the estate. The question arose if, before he could demand his freedom, he should not restore to the heirs the property which he was proved to have taken. The answer was that, according to the facts stated, the slave in question should be free. Claudius: The point raised seems to have been finally disposed of, for the interest of the heirs will be sufficiently consulted by having recourse to the Edict concerning thefts.

§ 2.- Lucius Titius provided by his will, "Onesiphorus shall not be free unless he renders an exact account of his administration." I ask whether Onesiphorus can demand his freedom by virtue of these words? The answer was that, in accordance with what is stated, he is rather deprived of freedom than granted it.

60.- THE SAME; *Digest, Book XXIV*.- The following provision was inserted in a will, "I wish that a thousand solidi be given to Eudo, for the reason that he is the first child born after his mother obtained her freedom." If Eudo cannot prove that he was born after the manumission of his mother, I ask whether he can obtain his freedom by virtue of these words of the will. The answer was that this inquiry should not prejudice him.

61.- POMPONIUS; *Epistles, Book XI*.- I know that many persons, desiring that their slaves may never become free, are accustomed to insert the following clause in their wills, "Let Stichus be free when he dies." Julianus, however, says that where freedom is granted at the last moment of life, it has no effect; as

testamento, pero que al tiempo de la muerte se hallaba dada en contubernio a un esclavo agente, podría conseguir la libertad por virtud de la cláusula general relativa a las acompañantes. Respondió, que en nada se impedía la libertad de la acompañante, porque dejó de ser acompañante solamente al tiempo de la muerte.

§ 1.- Stico había recibido la libertad pura y directa en el testamento de su señor, y es acusado de haber quitado por fraude muchas cosas de la herencia; se preguntó, si no deberá proclamarse en libertad antes que les restituyese a los herederos las cosas que se pudiese probar que quitó de la herencia. Respondió, que, según lo que se exponía, era libre éste de quien se trataba. Y dice Claudio: parece que absolvió también de esto de que se trata, porque suficientemente se atendió a los herederos con el Edicto sobre hurtos.

§ 2.- Lucio Ticio dispuso así en su testamento: «Onesíforo, no seas libre, si no hubieres rendido diligentemente las cuentas»; pregunto, si Onesíforo podría reivindicar para sí la libertad en virtud de estas palabras. Respondió, que con las palabras que se exponían; se quita más bien que se da la libertad.

60.- EL MISMO; *Digesto, libro XXIV*.- Uno dispuso así en su testamento: «quiero que a Eudon se le den mil sueldos, porque fue el primero que nació después que su madre llegó a la libertad»; pregunto, si, no probando Endon que él nació después de la manumisión de su madre, podría conseguir la libertad en virtud de estas palabras del testamento. Respondió, que tal consulta no debía originar prejuicio.

61.- POMPONIO; *Epístolas, libro XI*.- Sé que algunos, queriendo hacer que sus esclavos no llegasen nunca a la libertad, acostumbraron a escribir de este modo: «sea libre Stico, cuando él muriere»; pero también Juliano dice, que la libertad que se confiera para el ultimo instante de la vida es de

impediendae magis quam dandae libertatis gratia ita scripsisse intellegitur. Et ideo etiam si ita sit scriptum: "Stichus si in Capitolium non ascenderit, liber esto", nullius momenti hoc esse, si apparet in ultimum vitae tempus conferri libertatem testatorem voluisse, nec Mucianae cautioni locum esse.

§ 1.- Et si ita in testamento scriptum fuerit "Stichus, si Capuam ierit, liber esto", aliter liberum non esse, quam si Capuam ierit.

§ 2.- Hoc amplius Octavenus aiebat, si quis in testamento sub qualibet condicione libertate servo data ita scripsisset "ante condicionem nolo eum ab herede liberum fieri", nihil valere hanc adiectionem.

the testator is understood to have made a disposition of this kind for the purpose of preventing rather than of bestowing freedom. Hence, if the following should be inserted in a will, namely, "Let Stichus be free, if he should not ascend to the Capitol," it will be of no force or effect, if it is evident that the testator intended to grant the slave his freedom at the last moment of his life, nor will there be ground for a Mucian Bond.

§ 1.- If the following provision should be inserted in a will, "Let Stichus be free if he should go to Capua," the slave will not be free unless he goes to Capua.

§ 2.- Octavenus goes still further, for he holds that if a testator, having granted freedom to his slave under any condition whatsoever, should add, "I am unwilling that he be manumitted by my heir before the condition is fulfilled," this, addition will be void.

ningún valor, porque se entiende que el testador escribió así más bien para impedir que para dar la libertad. Y por lo tanto, también si se hubiera escrito de este modo: «sea libre Stico, si no subiere al Capitolio», será esto de ningún valor, si aparece que el testador quiso que se confiriese la libertad para el último momento de la vida, y no ha lugar a la caución Muciana.

§ 1.- Y si se hubiere escrito así en el testamento: «sea libre Stico, si fuere a Cápua», no es libre de otro modo, sino si hubiere ido a Cápua.

§ 2.- Además de esto decía Octaviano, que si alguno, habiéndole dado en su testamento la libertad a un esclavo bajo cualquier condición, hubiese escrito así: «no quiero que antes de la condición sea él hecho libre por el heredero», no era válida para nada esta adición.

TITULO V

DE FIDEICOMMISSARIIS LIBERTATIBUS

1.- ULPIANUS; *libro XIV, ad Edictum*.- Si quidam ex his, qui fideicommissam libertatem debeant, praesentes sint, alii ex iusta causa absint, alii latitent, perinde is cui fideicommissaria libertas relicta est liber erit, atque si soli, qui adessent et qui ex iusta causa abessent, rogati essent: pars ergo latitantis his proficit.

2.- IDEM; *libro LX, ad Edictum*.- Si quis intestatus decedens codicillis dedit libertates neque adita sit ab intestato hereditas, favor constitutionis Divi Marci debet locum habere et hoc casu, quae iubet libertatem competere servo et bona ei addici, si idonee creditoribus caverit de solido, quod cuique

TITLE V

CONCERNING FREEDOM GRANTED UNDER THE TERMS OF A TRUST

1.- ULPIANUS; *On the Edict, Book XIV*.- Where any persons among those who have been charged with a grant of freedom under a trust are present, and others are absent for some good reason, and others still have concealed themselves, the slave to whom freedom was bequeathed under the trust will become free, just as if those who were present, and those who were absent for good reasons had been charged with the execution of the trust; and therefore the share of the right of patronage to which those who concealed themselves are entitled will accrue to the others.

2.- THE SAME; *On the Edict, Book LX*.- If anyone, when dying intestate, should bequeath freedom to a slave by a codicil, and the estate should not be entered upon, the benefit conceded by the Constitution of the Divine Marcus will be available. In a case of this kind, it directs that the slave shall be entitled to his

TÍTULO V

DE LAS LIBERTADES DADAS POR FIDEICOMISO

1.- ULPIANO; *Comentarios al Edicto, libro XIV*.- Si estuvieran presentes algunos de los que deben la libertad dejada por fideicomiso, otros estuvieran ausentes por justa causa, y otros se ocultaran, aquel a quien se le dejó por fideicomiso la libertad será libre, lo mismo que si solos hubiesen sido rogados los que estuviesen presentes y los que por justa causa estuvieran ausentes; en su consecuencia a éstos les aprovecha la parte del que se oculta.

2.- EL MISMO; *Comentarios al Edicto, libro LX*.- Si alguno al morir intestado dio libertades en codicilos, y no hubiera sido adida la herencia abintestato, debe tener lugar también en este caso el beneficio de la Constitución del Divino Marco; la cual dispone que le competa al esclavo la libertad, y le sean

debetur, solvendo:

3.- IDEM; *libro LXV, ad Edictum.*- in quem etiam utiles actiones plerumque creditoribus competunt.

4.- IDEM.- *Libro LX, ad Edictum.*- Ergo quamdiu incertum sit, utrum existat successor an non, cessabit constitutio: quum certum esse coeperit, tunc erit constitutioni locus.

§ 1.- Si is qui in integrum restitui potest abstinuerit se hereditate, an, quamdiu potest in integrum restitui, existimamus constitutionem cessare, quia non est certum ab intestato neminem successorem exstare? Est tamen verius admittendam constitutionem.

§ 2.- Quid ergo, si post additionem libertatum conservandarum causa factam in integrum sit restitutus? Utique non erit dicendum revocari libertates, quae semel competierunt.

§ 3.- Illud videamus, utrum praesentes esse debent qui libertatem acceperunt an vero non: et quum invitis illis possunt bona propter libertatem addici, utique etiam absentibus.

§ 4.- Quid ergo, si quidam praesentes sint, quidam absentes? Videamus, an etiam absentibus competat libertas. Et potest dici exemplo aditae hereditatis competere libertatem etiam absentibus.

§ 5.- Si ex die data sit libertas, an dies expectandus sit? Et puto expectandum: ante ergo non addicuntur. quid deinde, si sub condicione data sit libertas? Et si quidem aliquae pure, aliquae sub condicione, utique addici statim possunt: si omnes sub condicione, quid

freedom, and that the estate shall be awarded to him if he gives sufficient security to the creditors of the same to pay the full amount which is due to each one of them.

3.- THE SAME; *On the Edict, Book LXV.*- Creditors generally have the right to bring praetorian actions against freedmen under these circumstances.

4.- THE SAME; *On the Edict, Book LX.*- Hence, as long as it remains doubtful whether there is a successor or not, the Constitution will not apply, but as soon as it is certain, it will become operative.

§ 1.- Where he who can obtain complete restitution rejects the estate, shall we hold that the Constitution will not become operative as long as his right to complete restitution continues to exist, because it is uncertain whether anyone will appear as an heir at law? The better opinion is that the Constitution will apply.

§ 2.- But what if, after judgment has been rendered for the purpose of procuring freedom, the heir should obtain complete restitution? It can by no means be said that freedom which has once been granted can be revoked.

§ 3.- Let us see whether those who receive their freedom must be present or not. And, as property awarded on account of freedom can be granted to them, even without their consent, this can also be done in their absence.

§ 4.- But what if some of them were present, and others were absent? Let us see whether those who are absent will be entitled to their freedom. It can be said, just as in the case where an estate is entered upon, that those who are absent will also become free.

§ 5.- If freedom is granted on a certain day, must we wait until the day arrives? I think that we should do so; therefore, the property will not be awarded before that time. But what should be done if freedom was granted under a condition? If some grants of

adjudicados los bienes, si les diera caución idónea a los acreedores de pagarles íntegramente lo que a cada uno se le debe.

3.- EL MISMO; *Comentarios al Edicto, libro LXV.*- Contra el cual también les competen las más de las veces a los acreedores las acciones útiles.

4.- EL MISMO; *Comentarios al Edicto, Libro LX.*- Luego mientras sea incierto si habrá o no sucesor, dejara de tener lugar la Constitución; y habrá lugar a la Constitución cuando hubiere comenzado a ser cierto.

§ 1.- Si el que puede ser restituido por entero se hubiere abstenido de la herencia, ¿estimamos que deja de tener lugar la Constitución mientras puede ser restituido por entero, porque no es cierto que no haya ningún sucesor abintestato? Pero es más verdadero que se debe admitir la Constitución.

§ 2.- ¿Luego qué se dirá, si después de hecha la adjudicación para conservar las libertades hubiera sido restituido por entero? Ciertamente no se habrá de decir que se revocan las libertades, que ya una vez competieron.

§ 3.- Veamos ¿si deberán acaso estar presentes, o no, los que recibieron la libertad? Y como los bienes pueden ser adjudicados por causa de la libertad contra la voluntad de ellos, también pueden serlo ciertamente estando ausentes.

§ 4.- Luego ¿qué se dirá, si algunos estuvieran presentes, y otros ausentes? Veamos si también a los ausentes les competirá la libertad; y se puede decir, que a la manera de la herencia que fue adida les compete la libertad también a los ausentes.

§ 5.- Si la libertad hubiera sido dada desde un día, ¿se habrá de esperar el día? Y opino que se ha de esperar; luego antes no se adjudicaran los bienes. ¿Y qué se dirá, si la libertad hubiera sido dada bajo condición? Que si verdaderamente algunas lo fueron

consequens erit dicere? Utrum expectandum, ut condicio existat, an vero statim addicimus, tunc demum competitura libertate, si extiterit condicio? Quod magis erit probandum. Addictis itaque bonis directae libertates pure datae statim competunt, ex die, quum dies venerit, condicionales, quum condicio extiterit: nec erit ab re existimare etiam pendente condicione libertatum, licet omnes sub condicione datae sint, constitutionem locum habere: ubi enim libertatis spes est, ibi dicendum est vel modica data occasione, quod sine damno creditorum futurum est, additionem admittendam.

§ 6.- Si sub condicione dandorum decem libertas data sit, sive heredi dare iussus sit qui libertatem accepit sive non sit dictum cui, an dando ei cui bona addicenda sunt perveniat ad libertatem, quaeri potest: et magis est, ut ei dare debeat, cui bona addicta sint, quasi translata condicio videatur. Certe si alii quam heredi dare iussus sit, ipsi, cui iussus est, dabit.

§ 7.- Si qui fideicommissam libertatem acceperunt, non statim ubi addicta bona sunt liberi sunt, sed fideicommissam libertatem possunt consequi, hoc est manumittendi sunt ab eo, cui addicta bona sunt.

§ 8.- Addici ita demum bona voluit, si idonee creditoribus cautum fuerit de solido, quod cuique debetur. Ergo cavendum est idonee. Quid est idonee? satisdato utique aut pignoris datis. Sed si ei fides habita fuerit promittenti sine satisfactione, idonee

freedom were made absolutely, and others conditionally, the property can be awarded immediately. When, however, all the grants of freedom were conditional, what then must be said? Must we wait until the condition is fulfilled, or shall we immediately award the property so that freedom will only be granted when the condition has been complied with? The latter opinion is preferable. Hence, when the property has been awarded, and freedom directly granted, it is immediately acquired; when it is granted at a certain time, it will be acquired when the time arrives; when it is conditional, it will be acquired when the condition is fulfilled. Nor is it unreasonable to hold that, while the condition upon which the grants of freedom are dependent is in abeyance, even though all the grants of freedom were conditional, the Constitution will apply. For it must be said where there is a prospect of freedom, the property must be awarded, when there is the slightest occasion for it, if this can be done without any loss to the creditors.

§ 6.- If the slave who receives the grant of freedom, under the condition of the payment of ten aurei either to the heir, to someone who is not mentioned, or to the person entitled to the estate, the question arises, can the slave obtain his freedom? The better opinion is that the money should be paid to the person to whom the estate is awarded, as the condition appears to have been transferred to him. It is, however, certain if he was directed to pay it to some other person than the heir, that it must be paid to the individual designated.

§ 7.- Where slaves have received their freedom under the terms of a trust, they do not become freedmen immediately, as soon as the estate is awarded, but they can obtain their freedom left them by the trust; that is to say, they should be manumitted by the person to whom the estate is adjudged.

§ 8.- The Emperor intended that an estate should be awarded only where sufficient security is given to the creditors for the payment of the entire amount due to each of them. Proper security must, therefore, be furnished. What is meant by the term "proper"? It

bajo condición, ¿qué será consiguiente decir, acaso que se ha de esperar que se cumpla la condición, o los adjudicamos desde luego, debiendo competir la libertad solamente cuando se hubiere cumplido la condición? Y esto es lo que preferentemente se ha de admitir. Y así, adjudicados los bienes competen desde luego las libertades directas dadas puramente; las que desde un día, cuando el día hubiere llegado; y las condicionales, cuando se hubiere cumplido la condición. Y no será fuera de propósito estimar, que aun pendiente la condición de las libertades tiene lugar la Constitución, aunque todas hayan sido dadas bajo condición; porque donde hay la esperanza de la libertad, allí se ha de decir que se ha de admitir la adjudicación por leve que sea la ocasión ofrecida, porque ha de ser sin perjuicio de los acreedores.

§ 6.- Si la libertad hubiera sido dada bajo la condición de que se habían de dar diez, ya si se le hubiera mandado al que recibió la libertad que los diese al heredero, ya si no se hubiera dicho a quién, se puede preguntar, si, dándolos a aquel a quien se hayan de adjudicar los bienes, llegará a la libertad. Y es más cierto que deba darselos a aquel a quien hayan sido adjudicados los bienes, como si se considerara transferida la condición; y a la verdad, si se le hubiera mandado que los diera a otro que al heredero, se los dará al mismo a quien se le mandó.

§ 7.- Si algunos recibieron la libertad por fideicomiso, no son libres tan pronto como fueron adjudicados los bienes, pero pueden conseguir la libertad dada por fideicomiso, esto es, que han de ser manumitidos por aquel a quien se le adjudicaron los bienes.

§ 8.- Quiso que los bienes fueran adjudicados solamente, si a los acreedores se les hubiere dado caución idónea por todo lo que a cada cual se le debe; luego se ha de dar caución idónea. ¿Qué es esto de idónea? Ciertamente habiéndose prestado fianza, o

satisdato utique aut pignoribus datis. Sed si ei fides habita fuerit promittenti sine satisfactione, idonee cautum videbitur.

§ 9.- Creditoribus caveri quemadmodum debet, utrum singulis an vero omnium nomine uni ab ipsis creato? Et oportet officio iudicis constitui convenire creditores unumque creare, cui caveatur omnium nomine.

§ 10.- Illud videndum: ante caveri debet creditoribus et sic addici bona, an vero sub condicione haec sunt addicenda, si fuerit cautum? Et puto sic comprehendendum decreto "si omnia ex Constitutione Divi Marci facta sint".

§ 11.- De solido utique sic accipiemus: de sorte et usuris debitis.

§ 12.- Hi, qui ad libertatem pervenerunt, quorum liberti fiant, constitutio ostendit, ut qui directam libertatem, orcinii erunt liberti, nisi forte is qui addici sibi bona desiderat ita velit addici, ut etiam hi, qui directam libertatem acceperunt, ipsius liberti fiant.

§ 13.- Qui autem volunt ipsius liberti fieri, utrum manumittendi sint ab eo an vero ipsa additione hoc comprehendendum hac condicione sibi addici bona, ut hi etiam, qui directam libertatem acceperunt, ipsius fiant liberti? Et puto hoc esse probandum, ut ipsa additione hoc comprehendatur: idque verba quoque constitutionis admittunt.

§ 14.- Quum autem servus libertatem nactus est, utique etiam tutelam eius habebit is cui bona addicta sunt.

signifies that sureties or pledges should be given. If, however, the creditor has faith in the promisor, without his furnishing a surety, the security will be considered sufficient.

§ 9.- In what way should security be furnished to creditors? Should it be given to them individually, or to one appointed by the entire number in the name of all? It is necessary and is part of the duty of the judge to call the creditors together, and appoint one of their number to whom security shall be furnished in the name of all.

§ 10.- Let us see whether security should be given to the creditors before the estate is awarded, or whether this should be done under the condition that security shall be furnished? I think that it will be sufficient if everything provided by the Constitution of the Divine Marcus is included in the decree.

§ 11.- We should understand the entire amount to mean both principal and interest.

§ 12.- The Constitution shows whose freedmen they who are manumitted become, so that those who receive their freedom directly will be the freedmen of the deceased; unless he who claims that the estate should be awarded to him alone wishes this to be done in such a way that those who have been emancipated directly may become his own freedmen.

§ 13.- Should those who wish to become his freedmen be manumitted by him, or in awarding the estate ought we to mention that it is awarded upon the condition that the slaves who have been granted their liberty directly shall become his freedmen? I think that this opinion should be adopted and stated in the decision, and the terms of the constitution also permit this to be done.

§ 14.- When a slave, under the age of puberty, obtains his freedom, the party to whom the estate is awarded shall be entitled to his guardianship.

habiéndose dado prendas; pero si sin fianza se hubiere tenido fe en el que promete, se considera que se dió caución idónea.

§ 9.- ¿De qué modo se les debe dar caución a los acreedores? ¿Acaso a cada uno, o en nombre de todos a uno solo nombrado por ellos mismos? Y es conveniente que por ministerio del juez se determine que se convengan los acreedores, y que elijan uno al cual se le dé caución en nombre de todos.

§ 10.- Se ha de ver esto: ¿se les debe dar caución a los acreedores antes, y deben ser de este modo adjudicados los bienes, o por el contrario han de ser éstos adjudicados bajo la condición, de si se hubiere dado la caución? Y opino, que así se ha de comprender en el decreto, si todo se hubiera hecho con arreglo a la Constitución del Divino Marco.

§ 11.- Por la totalidad, lo entenderemos ciertamente así: por el capital y los intereses debidos.

§ 12.- La Constitución muestra de quiénes se hacen libertos los que llegan a la libertad, de suerte que los que obtuvieron la libertad directa serán libertos orcinios, a no ser acaso que el que pretende que se le adjudiquen los bienes quiera que se le adjudiquen de modo que se hagan libertos de él mismo también los que recibieron la libertad directa.

§ 13.- Pero los que quieren hacerse libertos de él mismo, ¿han de ser manumitidos por él, o se ha de comprender en la misma adjudicación que a él se le adjudican los bienes con la condición de que se hagan libertos de él mismo también los que obtuvieron la libertad directa? Y opino que se ha de admitir que se comprenda esto en la misma adjudicación; y esto admiten también las palabras de la Constitución.

§ 14.- Mas cuando un esclavo alcanzó la libertad, tendrá ciertamente también su tutela aquel a quien se le adjudicaron los bienes.

§ 15.- Si alienos servos rogaverat heredem manumittere, utrum dicimus constitutionem locum habere an vero cessabit constitutio? Magisque est, ut locus sit constitutioni: addictis enim bonis redimere et praestare libertatem cogitur a praetore.

§ 16.- Si non heres, sed legatarius rogatus fuerit manumittere, numquid cesset constitutio, quod legatis non debitis nec libertates possunt deberi? Magisque est, ut idem favor sit: omnibus enim generaliter voluit libertatem praestare, quibus competeret, si hereditas adita fuisset.

§ 17.- Eadem constitutio prospexit, ut, si fiscus bona admiserit, aequae libertates competant: ergo sive iacent bona fisco spernente sive adgnoverit, constitutio locum habet. Ceterum si alia ratione adgnoscat, apparet cessare debere constitutionem: quare et si caducis legionis bona delata sint, idem erit probandum.

§ 18.- Item si minor viginti annis dedit libertatem, dicemus non competere, nisi si fideicommissam: haec enim competeret, si modo potuit causam probare minor viginti annis, si vivus manumitteret.

§ 19.- Si in fraudem creditorum libertas data sit ab eo, qui mortis tempore solvendo non est, an competit? Et si quidem fiscus bona non adgnoverit, forte competit libertas, quia solidum creditoribus offertur: atquin si adita hereditas fuisset, non competeret. Certe si fiscus adgnovit hereditatem, facilius probabitur cessare libertatem, nisi si quis verba constitutionis secutus dixerit ipsum sibi imputare debere, qui addici sibi hac condicione bona voluit, ut libertates competant. Si quis autem exemplum aditae

§ 15.- If the deceased charged his heir to manumit certain slaves belonging to another, shall we say that the Constitution is applicable, or, indeed, will it not take effect? The better opinion is that there is ground for its application, because the person to whom the estate is awarded will be compelled to purchase the slaves, and have their freedom granted them by the Praetor.

§ 16.- If the legatee, and not the heir, is charged to manumit the slave, will the constitution fail to apply, because, the legacies not being due, the grants of freedom cannot be due either? The better opinion is that the same advantage will be available, as the intention of the constitution, generally speaking, is to grant freedom to all who are entitled to it, if the estate has been entered upon.

§ 17.- The same constitution provides that if the Treasury acquires the estate, the grants of freedom must still be made. Therefore, if the property is without an owner, on account of the Treasury having either rejected or accepted it, the constitution will still apply. If, however, the Treasury obtains it in some other way, it is evident that the constitution will cease to be applicable. Hence, if the property of a legion, which is without an owner, escheats to the Treasury, the same opinion must be adopted.

§ 18.- Likewise, where a minor of twenty years of age bequeaths a grant of freedom, we say that the slave will not be entitled to it, unless the minor left it under a trust. The slave will, however, be entitled to it if the minor should manumit him during his lifetime, provided he can give a good reason for doing so.

§ 19.- Where freedom is granted and creditors defrauded by a testator who was not solvent at the time of his death, will the grant be valid? If the Treasury does not obtain the estate, the grant of freedom perhaps will be valid, because all that is due to the creditors is offered to them. If, however, the estate has been entered upon, it will not be valid. It is clear that if the Treasury should obtain the estate, there will be better ground for holding that the grant of freedom will not be valid. For anyone, strictly

§ 15.- Si uno le hubiera rogado a su heredero que manumitiera esclavos ajenos, ¿diremos acaso que tiene lugar la Constitución, o que dejará de ser aplicable la Constitución? Y es más cierto que haya lugar a la Constitución; porque, adjudicados los bienes, es obligado por el Pretor a comprarlos y a darles la libertad.

§ 16.- Si se le hubiere rogado, no al heredero, sino al legatario, que manumita, ¿dejará acaso de tener lugar la Constitución, porque no debiéndose los legados tampoco se pueden deber las libertades? Y es más cierto que hay el mismo favor; porque quiso que en general se les diese la libertad a todos aquellos a quienes competería, si la herencia hubiese sido adida.

§ 17.- Previó la misma Constitución, que si el fisco hubiere aceptado los bienes, competiesen igualmente las libertades; luego ya si despreciándolos el fisco estuvieran yacentes los bienes, ya si los hubiera aceptado, tiene lugar la Constitución; pero si los aceptara por otra razón, aparece que debe dejar de tener lugar la Constitución; por lo cual también se habrá de admitir lo mismo, si los bienes hubieran sido deferidos a los caducos de una legión.

§ 18.- Asimismo si el menor de veinte años dio la libertad, diremos que ésta no compete, sino si fue dada por fideicomiso; porque ella competería si el menor de veinte años, manumitiendo en vida pudo justificar la causa.

§ 19.- Si la libertad hubiera sido dada en fraude por quien no es solvente al tiempo de la muerte ¿competirá acaso? Y si verdaderamente el fisco no hubiere aceptado los bienes, quizá competirá la libertad, porque se les ofrece todo a los acreedores. Mas si la herencia hubiese sido adida, no competirá; y a la verdad, si el fisco aceptó la herencia, se admitirá más fácilmente que deja de tener lugar la libertad, a no ser que alguno, ateniéndose a las palabras de la Constitución, dijere que se lo debe

hereditatis fuerit secutus, directae libertates non competent, si consilium et eventus fuerit fraudandorum creditorum: nec fideicommissae praestabuntur, si eventu fraudentur creditores.

§ 20.- Si bona fuerint a fisco non adgnita eaque addicta libertatis conservandae gratia, an possit fiscus postea adgnosceret? Et magis est, ne possit. Plane si non certioratis praefectis aerario bona fuerint libertatis conservandae causa addicta, videndum est, an constitutioni locus sit. Et si quidem talia fuerint, ut adgnosci deberent, addictio cessat: si vero non fuerint, addictioni locus est.

§ 21.- Is autem cui bona addicta sunt bonorum possessori assimilaris debet et secundum hoc et iura sepulchrorum poterit habere.

§ 22.- Item videamus, an conveniri a creditoribus possit hereditariis actionibus an vero non nisi ex cautione quam interposuit? Magisque est, ut non aliter conveniatur quam ex ea cautione quam interposuit.

§ 23.- Si duobus pluribusve addicta fuerint bona, et communem rem et communes libertos habebunt et secum familiae heriscundae iudicio experientur.

5.- PAULUS; *libro LVII, ad Edictum*.- In fideicommissariis libertatibus si absente herede Praetor pronuntiasset libertatem deberi, est et liber et defuncti libertus, si et servus eius fuit, aut heredis, si

adhering to the terms of the constitution, might say that he can only blame himself, who desired that the estate should be awarded to him under the condition that the grants of freedom should be considered valid. If anyone, however, should follow the rule applicable where an estate is accepted, a direct grant of freedom will be void if the intention of the testator was fraudulent, and the result was that the creditors were cheated; nor will grants of freedom under a trust be executed if, by doing so, the creditors of the estate will be defrauded.

§ 20.- When an estate has not escheated to the Treasury, and it has been adjudged for the purpose of preserving freedom, can the Treasury afterwards acquire it? The better opinion is that it cannot do so. It is evident that, if notice had not previously been given to the officials of the Treasury, and the estate is awarded for the preservation of freedom, it should be considered whether there is ground for the application of the constitution. If the estate is in such a condition that the Treasury must accept it, the award will be of no effect; but if it is not, there will be ground for it.

§ 21.- Moreover, he to whom property had been adjudged should be compared to a possessor under the Praetorian Edict; and, according to this, he will be entitled to the rights of burial enjoyed by the deceased.

§ 22.- Again, let us see whether the person to whom an estate is awarded can be sued by the creditors as an heir, or only on the bond which he has furnished. The better opinion is that he can only be sued on the bond.

§ 23.- Where an estate is awarded to two or more persons, they will hold the property and the freedmen in common, and will have the right to bring an action in partition against one another.

5.- PAULUS; *On the Edict, Book LVII*.- With reference to freedom granted by the terms of a trust, if the Praetor should, in the absence of the heir, decide that the slave was entitled to be free, he will become

imputar a sí mismo el que quiso que se le adjudicaran los bienes con la condición de que competan las libertades. Mas si alguno hubiere seguido el ejemplo del caso en que fue adida la herencia, no competirán las libertades directas, si hubiere habido el designio y el resultado de defraudar a los acreedores; y no se darán las dejadas por fideicomiso, si de hecho fueran defraudados los acreedores.

§ 20.- Si los bienes no hubieren sido aceptados por el fisco, y hubieran sido adjudicados para conservar la libertad, ¿los podrá aceptar después el fisco? Y es más cierto que no podrá. Pero si los bienes fueron adjudicados para conservar la libertad sin haber tenido conocimiento los Prefectos del erario, se ha de ver si habrá lugar a la Constitución. Y si verdaderamente fueron tales, que debieran ser aceptados, deja de tener lugar la adjudicación, y si no lo fueron, ha lugar a la adjudicación.

§ 21.- Mas aquel a quien se le adjudicaron los bienes debe ser asimilado a un poseedor de los bienes, y según esto podrá tener también el derecho de sepulcros.

§ 22.- Veamos también, si podrá ser demandado por los acreedores con las acciones de la herencia, o si solamente en virtud de la caución que interpuso. Y es más cierto que no lo puede ser de otro modo, sino en virtud de la caución que interpuso.

§ 23.- Si los bienes hubieren sido adjudicados a dos o más, tendrán en común los bienes y en común los libertos, y ejercerán entre sí la acción de partición de herencia.

5.- PAULO; *Comentarios al Edicto, Libro LVII*.- Tratándose de libertades dadas por fideicomiso, si, ausente el heredero, el Pretor hubiese declarado que se debe la libertad, es libre el esclavo, y liberto del

servus heredis sit. Immo et si sine successore heres decesserit, conservandam esse libertatem Senatus Hadriani temporibus censuit.

6.- IDEM; *libro LX, ad Edictum*.- Decem legata sunt et rogatus est legatarius Stichum emere et manumittere: Falcidia intervenit et minoris emi servus non potest: quidam putant dodrantem accipere debere legatarium nec emere compellendum. Idem putant etiam si suum servum rogatus sit manumittere et dodrantem ex legato acceperit, non esse compellendum manumittere. Videamus, ne utique in hac specie aliud dicendum sit. Sed in superiore sunt qui putant cogendum legatarium redimere servum, et se oneri subiecisse, dum accipit vel dodrantem: sed si paratus sit retro restituere quod accepit, an audiendus sit, videndum. Sed cogendus heres tota decem praestare, perinde atque si adiecisset testator, ut integra praestentur.

7.- ULPIANUS; *libro LXIII, ad Edictum*.- Si cui legata sint centum ita, ut servum alienum redimat et manumittat, et bonis heredis venditis partem, non totum persequatur, non alias debet consequi legatum, quam si caverit se manumissurum; sed hoc tunc demum, si largiatur portio quam accepit ad servi pretium paratusque sit dominus tanti eum vendere: alioquin exceptione doli debebit legatarius repelli.

8.- POMPONIUS; *libro VII, ex Plautio*.- Eum cui mille nummi legati fuissent, si rogatus fuisset viginti servum manumittere, non cogi fideicommissam libertatem praestare, si legatum non caperet, constat.

so, and will be the freedman of the deceased, if he was his slave, or of the heir if he belongs to the latter. Moreover, if the heir should die without a successor, the Senate, in the time of Hadrian, decreed that the freedom of the slave should be preserved.

6.- THE SAME; *On the Edict, Book LX*.- Ten aurei were bequeathed by a testator, and the legatee was charged to purchase Stichus and manumit him. The Falcidian Law will apply, and the slave cannot be purchased for less than ten aurei. Some authorities hold that the legatee is entitled to three-fourths of the legacy, and should not be compelled to purchase the slave. They also think that even if an heir was requested to manumit his own slave, and only receives three-fourths of his legacy, he will not be compelled to manumit him. Let us see whether, in this instance, another opinion should not be adopted. There are certain authorities who hold that, in the first place, the legatee should be compelled to assume the charge and purchase the slave, if he only receives three-fourths of his legacy. If, however, he is prepared to return what he has received, let us see whether he should be heard. The heir should be forced to pay the entire ten aurei, just as if the testator had expressly stated that the legacy should be paid in full.

7.- ULPIANUS; *On the Edict, Book LXIII*.- Where a hundred aurei are bequeathed to anyone, under the condition that the legatee shall purchase and manumit a slave belonging to another, and when the property of the heir is sold, the legatee shall only demand a portion and not all of his legacy, he cannot obtain it unless he gives security to manumit the slave; provided that the value of the portion which he will obtain will be as much as the price of the slave, and the master of the latter is ready to sell him for this price; otherwise, the legatee will be barred by an exception on the ground of bad faith.

8.- POMPONIUS; *On Plautius, Book VII*.- Where a person to whom the sum of a thousand sesterces has been bequeathed is charged to manumit a slave worth twenty, he cannot be compelled to execute the grant of freedom under the trust, if he does not accept the

difunto, si fue esclavo de éste, o del heredero, si fue esclavo del heredero; y aun si el heredero hubiere fallecido sin sucesor, dispuso el Senado en tiempos de Adriano, que se había de conservar la libertad.

6.- EL MISMO; *Comentarios al Edicto, Libro LX*.- Se legaron diez, y se le rogó al legatario que comprase y manumitiese a Stico; media la Falcidia. Y el esclavo no puede ser comprado en menor precio; opinan algunos, que el legatario debe recibir los tres cuartos, y que no ha de ser compelido a comprarlo. Opinan los mismos, que aun si se le hubiera rogado que manumita a un esclavo suyo, y hubiere recibido los tres cuartos del legado, no ha de ser compelido a manumitirlo. Veamos si ciertamente en este caso no se haya de decir otra cosa; pero en el anterior, hay quienes opinan que el legatario ha de ser obligado a comprar el esclavo, y que él se sometió al gravamen al recibir, por lo menos, los tres cuartos. Pero se ha de ver, si, estando dispuesto a restituir lo que recibió, haya de ser oído. Más el heredero ha de ser obligado a pagar íntegros los diez, lo mismo que si el testador hubiese expresado que se pagasen íntegros.

7.- ULPIANO; *Comentarios al Edicto, libro LXIII*.- Si a uno se le hubieran legado cien monedas para que compre un esclavo ajeno y lo manumita, y vendidos los bienes del heredero obtuviera parte, no la totalidad, no debe obtener el legado de otra suerte, sino si diere caución de que hará la manumisión; pero esto solamente, si la porción que recibió bastase para el precio del esclavo, y el dueño estuviera dispuesto a venderlo por aquel tanto; en otro caso, el legatario deberá ser repelido con la excepción de dolo.

8.- POMPONIO; *Doctrina de Plaucio, libro VII*.- Es sabido, que aquel a quien se le hubiesen legado mil monedas, si se le hubiese rogado que manumitiera a un esclavo que valiese veinte, no es obligado a dar la libertad dejada por fideicomiso, si

9.- MARCELLUS; *libro XV, Digestorum*.- Quum fidei heredis commisit, ne servus alienam servitutem patiatur experiri, potest confestim, ut fuerit alienatus, petere libertatem. Sed ubi alienatio non est voluntaria, sed necessitas alienandi ex causa testatoris pendeat, prope est, ut nondum debeat praestari fideicommissum, quod potest videri defunctus nihil sensisse de huiusmodi casu alienationis.

10.- IDEM; *libro XVI, Digestorum*.- Quidam in testamento scripserat: illum et illum servos meos venire nolo. Si ideo eos noluit venumdari, ut, si veneant, ad libertatem perveniant, praestanda erit libertas: nam et illi videtur libertas relicta, de quo ita scriptum est: nolo alii quam tibi serviat. Secundum haec igitur si quoquo modo vendere temptaverit servum, confestim peti poterit libertas nec, quominus praestet libertatem, proderit heredi, si eum redemerit, quia semel exstitit condicio.

§ 1.- Is cui libertas debebatur veniit: si vult ab herede manumitti, non erit interveniendum ei, quum heres praesens erit, emptor latitabit: quoniam poterat uti Senatusconsulto, ut quasi ex testamento ad libertatem perveniat.

§ 2.- Is cui ex fideicommisso libertas debebatur ab eo qui solvendo non erat passus est se bonae fidei emptori tradi: existimas in manumissum constituendam actionem exemplo eius, qui liberi hominis emptorem simulata servitute decepit? Ego quoque adducor, ut putem recte adversus venditos actionem competere et magis similem videri statulibero, qui pridie, quam ex testamento ad libertatem perveniret, idem fieri passus est.

legacy.

9.- MARCELLUS; *Digest, Book XV*.- When an heir has been charged not to permit a certain slave to become the property of another, the slave can, immediately after having been alienated, institute proceedings to demand his freedom. Where, however, the alienation is not voluntary, but a necessity exists for it on account of some act of the testator, it is probable that the trust should not be executed, because the deceased is not supposed to have had an alienation of this kind in view.

10.- THE SAME; *Digest, Book XVI*.- A certain man inserted the following provision in his will, "I do not wish my slaves, So-and-So and So-and-So, to be sold." Therefore, if he did not wish them to be sold and intended, if they were sold, that they should become free, their freedom should be granted them; for freedom is considered to have been bequeathed to a slave by the following clause, "I do not wish So-and-So to belong to anyone but you." Hence, in accordance with this, if the heir should attempt in any way to sell the slave, the latter can immediately claim his freedom, and if the heir should purchase him to prevent him from obtaining it, it will be of no advantage to him, because the condition has been fulfilled.

§ 1.- A slave who was entitled to his freedom was sold. If he is willing to be manumitted by the heir, there will be no necessity to bring the purchaser, who has concealed himself, into court along with the present heir, as the slave can avail himself of the decree of the Senate to obtain his freedom under the will.

§ 2.- A slave who was entitled to his freedom under a trust permitted himself to be transferred to a bona fide purchaser by the heir, who was not solvent. Do you think that an action can be granted against this manumitted slave, just as where a freeman deceived his purchaser by pretending that he was a slave? I, however, am inclined to believe that an action will properly lie against the vendor, as the case seems to be similar to that of a slave entitled to be free under a

no recibiese el legado.

9.- MARCELO; *Digesto, libro XV*.- Cuando uno encomendó a la fidelidad del heredero que el esclavo no soporte esclavitud ajena, puede ejercitar acción, tan pronto como hubiere sido enajenado, para pedir la libertad. Mas cuando la enajenación no es voluntaria, sino que la necesidad de enajenar depende de causa del testador, es probable que no se deba pagar el fideicomiso, porque puede parecer que el difunto no tuvo para nada en cuenta el caso de esta enajenación.

10.- EL MISMO; *Digesto, libro XVI*.- Uno había escrito en su testamento: «no quiero que aquél, ni aquél, esclavos míos, sean vendidos»; si no quiso que fueran vendidos, de tal modo que si fueran vendidos llegasen a la libertad, se les habrá de dar la libertad; porque parece que se le dejó la libertad también a aquél respecto del cual se escribió así: «no quiero que le preste servidumbre a otro, sino a ti». Así, pues, según esto, si de algún modo hubiere intentado vender al esclavo, se podrá pedir inmediatamente la libertad, y para no darle la libertad no le aprovechará al heredero el haberlo comprado, porque ya una vez se cumplió la condición.

§ 1.- Aquel a quien se le debía la libertad fue vendido; si quiere ser manumitido por el heredero, no le servirá de obstáculo, estando presente el heredero, que se oculte el comprador, porque podrá valerse del Senadoconsulto para llegar a la libertad así como por virtud del testamento.

§ 2.- Uno, a quien se le debía la libertad por fideicomiso, consintió que por quien no era solvente fuese él entregado a un comprador de buena fe; ¿existimas que se ha de establecer acción contra el manumitido a la manera que contra aquél que habiendo simulado esclavitud engañó al comprador de un hombre libre? Yo también me inclino a creer, que con razón compete acción contra los vendidos, y que mas bien parecen semejantes a aquel a quien en

certain condition, and who suffered this to be done the day before he was to obtain his freedom by will.

11.- MODESTINUS; *libro I, Differentiarum*.- Ex causa fideicommissi servo libertatem dare sine tutoris auctoritate pupillus non potest.

12.- IDEM; *libro singulari de Manumissionibus*.- Imperator Antoninus, quum Firmus Titiano tragoedos tres legasset et adiecisset: "quos tibi commendo, ne cui alii serviant", publicatis bonis titiani rescipsit debere eos publice manumitti.

§ 1.- Et legatarius non minus quam heres rogari potest servum manumittere et, si ante manumissionem decesserit, successores eius debent manumittere.

§ 2.- Divus Antoninus et Pertinax rescripserunt hereditate fisco vindicata, quoniam tacite quis rogatus erat ei, qui capere non poterat, restituere hereditatem, et directo et per fideicommissum datas libertates deberi.

13.- IDEM; *libro IX, Regularum*.- Si praegnans ancilla moram non studio manumissoris, sed fortuito patiat, ne manumitteretur, liberum quidem non pariet, sed cogetur qui manumittere debuit natum matri tradere, ut per eam perveniat ad libertatem.

14.- IDEM; *libro X, Responsorum*.- Lucius Titius testamento facto Seiam uxorem suam, item Titiam filiam communem aequis portionibus scripsit heredes. Item alio capite: "erotem servum meum, qui et psyllus vocatur, liberum esse volo, si uxori meae placeat". Quum itaque Seia uxor Lucii Titii abstinerit ab eadem hereditate et ex substitutione portio eius ad Titiam filiam pervenerit, quaero, an eroti, qui et psyllus vocatur, ex his verbis supra

11.- MODESTINUS; *Differences, Book I*.- A ward cannot grant freedom to a slave by virtue of a trust without the authority of his guardian.

12.- THE SAME; *On Manumissions*.- When Firmus Titianus bequeathed three slaves, who were tragedians, and added, "I charge you not to permit them to become the slaves of anyone else," the Emperor Antoninus stated in a Rescript that, as the property of Titianus had been confiscated, the slaves should be publicly manumitted.

§ 1.- A legatee as well as an heir can be charged to manumit a slave, and if he should die before manumitting him, his heirs must do so.

§ 2.- The Divine Antoninus and Pertinax stated in a Rescript, where an estate was claimed by the Treasury because there was a secret provision to deliver it to a person who is not capable of receiving it, that all grants of freedom made directly, or under the terms of a trust, should be executed.

13.- THE SAME; *Rules, Book IX*.- If a female slave, who is pregnant, should suffer delay in being manumitted, not through the intention of the person charged with this duty, but accidentally, her child will not be free; but the person who should have manumitted the said slave will be compelled to deliver the child to its mother, in order that through her it may obtain its freedom.

14.- THE SAME; *Opinions, Book X*.- Lucius Titius, having made a will, appointed Seia, his wife, and Titia, their common daughter, heirs to equal shares of his estate. In another place he said, "I desire my slave, Eros, who is also called Psyllus, to be free, if my wife consents." Therefore, as Seia, the wife of Lucius Titius, refused to accept her share of the estate, which went to her daughter Titia, under the substitution, I ask whether Eros, who was also called

testamento se le dejó la libertad bajo condición que, antes de llegar a la libertad en virtud del testamento, consintió que se hiciera lo mismo.

11.- MODESTINO; *Diferencias, libro I*.- El pupilo no puede sin la autoridad del tutor darle la libertad a un esclavo por causa de fideicomiso.

12.- EL MISMO; *De las Manumisiones, libro único*.- Habiendo Firmo legado a Ticiano tres trágicos y habiendo añadido: «los que te recomiendo para que no presten servidumbre a otro», el Emperador Antonino, habiendo sido confiscados los bienes de Ticiano, respondió por rescripto que aquéllos debían ser manumitidos públicamente.

§ 1.- También al legatario se le puede rogar, no menos que al heredero, que manumita a un esclavo; y si hubiere fallecido antes de la manumisión deben manumitirlo sus sucesores.

§ 2.- Respondieron por rescripto el Divino Antonino y Pertinax, que, reivindicada para el fisco la herencia, porque a alguno se le había rogado tácitamente que restituyese la herencia a quien no podía adquirirla, se debían las libertades dadas tanto directamente, como por fideicomiso.

13.- EL MISMO; *Reglas, libro IX*.- Si una esclava embarazada sufriera demora para ser manumitida no con intención del manumisor, sino fortuitamente, no parirá ciertamente un hijo libre, pero el que debió manumitirla será obligado a entregarle a la madre el hijo nacido, a fin de que por medio de ella llegue a la libertad.

14.- EL MISMO; *Respuestas, libro X*.- Lucio Ticio, habiendo hecho testamento, instituyó herederas por partes iguales a Seya, su mujer, y también a Ticia, hija común; además en otra cláusula dijo: «quiero que Eros, mi esclavo, que también se llama Psilo, sea libre, si le pluguiera a mi mujer»; y así, habiéndose abstenido de la misma herencia Seya, mujer de Lucio Ticio, y habiendo ido su porción a su hija Ticia en virtud de la substitución, pregunto, ¿le

scriptis libertas competit. Modestinus Eroti, quod uxor testatoris hereditate se abstinuit, non obesse respondit. Item quaero, an Seia uxor, quae se hereditate abstinuit, petenti Eroti libertatem iuste contradicere possit. Modestinus respondit Seiae dissensum nullius esse momenti.

15.- IDEM; *libro III, Pandectarum.*- Is qui ex causa fideicommissi manumissurus est nullo modo deteriore eius servi condicionem facere potest: ideoque nec vendere eum interdum alii potest, ut ab eo cui traditus est manumittatur, et, si tradiderit, redimere illum cogitur et manumittere: interest enim nonnumquam a sene potius manumitti quam a iuvene.

16.- LICINIUS RUFINUS; *libro V, Regularum.*- Libertates etiam per fideicommissum dari possunt et quidem largius quam directo: nam non tantum propriis, sed et alienis servis per fideicommissum libertas dari potest: ita tamen, ut vulgaribus verbis et quibus evidenter voluntas testatoris exprimi possit.

17.- EX LIBRO XXI, *Digestorum Scaevolae Claudius.*- «Quum tibi visum fuerit manumittere» utiliter datur fideicommissa libertas.

18.- SCAEVOLA; *libro XXIII, Digestorum.*- Testamento ita cavit: "Pamphilus, si bene se gesserit rationibus meis, liber esto": quaesitum est, quum manente eodem testamento post aliquot annos decesserit nec ullae querellae locus de pamphilo circa rationes patroni sit, an ex testamento libertatem sit consecutus. Respondit nihil proponi, cur non sit consecutus.

Psyllus, will be entitled to his freedom by virtue of the above-mentioned clause. Modestinus answered that the rights of Eros were not prejudiced, because the wife of the testator declined to accept the estate. I also ask whether his wife, Seia, who did not enter upon the estate, could legally oppose Eros when he demanded his freedom? Modestinus answered that Seia's refusal of consent would be of no force or effect.

15.- THE SAME; *Pandects, Book III.*- A person charged with the manumission of a slave under the terms of a trust can, in no way whatever, render the condition of the said slave worse; and therefore he cannot in the meantime sell him to anyone else, in order that he to whom he was sold may emancipate him; and if he should deliver the slave, he will be compelled to purchase and manumit him; for it is sometimes to the interest of a slave to be manumitted by an old man rather than by a young one.

16.- LICINIUS; *Rufinus, Rules, Book V.*- Freedom can also be bestowed under the terms of a trust, and, in fact, to even a greater extent than where it is directly bestowed, for by means of a trust it can be granted not only to one's own slaves, but also to those of another; provided words in common use and by which the intention of the testator is plainly expressed are employed.

17.- CLAUDIUS; *On the Digest of Scaevola, Book XXI.*- Freedom is legally granted by a trust as follows, "When you think proper to manumit him."

18.- SCAEVOLA; *Digest, Book XXIII.*- The following provision was inserted in a will, "Let Pamphilus be free, if he transacts my business properly." As the testator died some years after making this will, and there was no ground for complaint of the conduct of Pamphilus, so far as his patron was concerned, the question arose whether he was entitled to his freedom under the will. The answer was that there was nothing in the case stated to prevent him from obtaining it.

compete a Eros, que también se llama Psilo, la libertad en virtud de las susodichas palabras? Y dice Modestino: respondí que a Eros no le obsta que la mujer del testador se haya abstenido de la herencia. También pregunto, si Seya, la mujer, que se abstuvo de la herencia, podrá oponerse con justicia a Eros al pedir la libertad. Modestino respondió, que el disentimiento de Seya no era de algún valor.

15.- EL MISMO; *Pandectas, libro III.*- El que por causa de fideicomiso ha de manumitir a otro no puede de ningún modo hacer peor la condición de este esclavo; y por ello tampoco puede venderlo mientras tanto a otro, para que por éste, a quien es entregado, sea manumitido; y si lo hubiere entregado, es obligado a rescatarlo y a manumitirlo; porque a veces interesa mas ser manumitido por un anciano, que por un joven.

16.- LICINIO RUFINO; *Reglas, libro V.*- Las libertades se pueden dar también por fideicomiso, y, a la verdad, con más amplitud que directamente; porque no solamente a los propios, sino también a los esclavos ajenos, se les puede dar la libertad por fideicomiso, pero con tal que sea con palabras vulgares, y con las que evidentemente se pueda expresar la voluntad del testador.

17.- CLAUDIO; *Digesto de Scévola, Libro XXI.*- Con estas palabras; «cuando te hubiere parecido manumitirlo», se da válidamente la libertad por fideicomiso.

18.- SCÉVOLA; *Digesto, libro XXIII.*- Uno dispuso así en su testamento: «sea libre Pánfilo, si se hubiere conducido bien llevando mis cuentas»; se preguntó, si, habiendo fallecido después de algunos años subsistiendo el mismo testamento, y no habiendo lugar a queja alguna contra Pánfilo respecto a las cuentas, habrá conseguido la libertad en virtud del testamento. Respondió, que nada se exponía para que no la haya conseguido.

19.- IDEM; *libro XXIV, Digestorum*.- Herede instituto marito per fideicommissum libertatem servis dedit, in quibus et Sticho actori mariti: quaesitum est, quum absente domino isti praesidem provinciae adierint, ut libertas sibi praestaretur, quasi ex iusta causa heres abesset, et praeses provinciae pronuntiaverit libertatem deberi, an agi quum Sticho possit, ut rationem actus a se administrati reddere compellatur. Respondit non posse.

§ 1.- Uxori dotem et alias res plures legavit et eius fidei commisit, ut aquilinum servum proprium mulieris apud consilium manumitteret: id negat se facere debere, quod ipsius proprius esset: quaero, an libertas ei debeatur. Respondit uxorem, si ex testamento non solum dotem, sed etiam cetera legata praestari sibi vellet, compellendam ex causa fideicommissi aquilinum manumittere eumque, quum liber erit, petiturum ea quae sibi legata sunt.

20.- POMPONIUS; *libro VII, Epistolarum*.- Apud iulianum ita scriptum est: "si heres rogatus servum manumittere ex Trebelliano Senatusconsulto hereditatem restituerit, cogi debebit manumittere, et, si latitabit vel si iusta ex causa aberit, Praetor causa cognita secundum Senatusconsulta ad eas causas pertinentia pronuntiare debebit. Si vero servum usuceperit is, cui hereditas restituta fuerit, ipsum competit manumittere et eadem in personam eius observari conveniet, quae circa emptores custodiri solent". An haec vera putes? nam ego discendi cupiditate, quam solam vivendi rationem optimam in octavum et septuagesimum annum aetatis duxi, memor sum eius sententiae, qui dixisse fertur: *Etsi alterum pedem in tumulo habere, adhuc tamen discere quid vellem*. Bellissime aristo et octavenus putabant hunc servum, de quo quaereretur, fideicommissae hereditatis non esse, quia testator rogando heredem, ut eum manumitteret, non videtur de eo restituendo sensisse: si tamen per errorem ab

19.- THE SAME; *Digest, Book XXIV*.- A woman, having appointed her husband her heir, liberated her slaves by a trust, among whom was Stichus, the steward of her husband. The slaves having appeared before the Governor of the province for the purpose of obtaining their freedom, during the absence of their master who had a good reason for being away, and the Governor of the province having decided that the slaves were entitled to their freedom, the question arose whether proceedings could be instituted against Stichus to compel him to render an account of his administration as steward. The answer was that this could not be done.

§ 1.- A man bequeathed a dowry and considerable other property to his wife, and charged her to manumit Aquilinus, her own slave, before the tribunal. The woman refused to do so, because the slave was her individual property. I ask whether he was entitled to his freedom. The answer was that if the wife had accepted not only her dowry, but also the other property left to her by the will, she could be compelled to manumit Aquilinus by virtue of the trust, and that, when he became free, he could demand anything that had been bequeathed to him.

20.- POMPONIUS; *Epistles, Book VII*.- It is stated by Julianus that, when an heir who is charged to manumit a slave transfers the estate under the Trebellian Decree of the Senate, he can be compelled to manumit the slave; and if he should conceal himself, or be absent for some good reason, the Praetor, after proper cause is shown, must render a decision in accordance with the decrees of the Senate which relate to cases of this kind. If, however, the beneficiary to whom the estate was transferred should have the custody of said slave, he himself can manumit him; and it is proper that the same formalities should be observed with reference to him, as is usually done with reference to purchasers in general. Do you think that this is true? I, myself, actuated by the desire to acquire knowledge, have for seventy-eight years considered the following saying, which I have always in mind, as the best rule of life, "When I have one foot in the grave I shall still be glad to learn something." Aristo and Octavenus very

19.- EL MISMO; *Digesto, libro XXIV*.- Una, habiendo instituido heredero a su marido, dio por fideicomiso la libertad a los esclavos, entre ellos también a Stico, agente de su marido; como hallándose ausente el señor hubieren ellos recurrido al Presidente de la provincia, para que se les diese la libertad, como si el heredero estuviese ausente por justa causa, y el Presidente de la provincia hubiere declarado que se les debía la libertad, se preguntó, si se podría ejercitar acción contra Stico, para que fuese compelido a rendir cuenta de los negocios administrados por él. Respondió que no se podía.

§ 1.- Uno legó a su mujer la dote y otras muchas cosas, y encomendó a su fidelidad que manumitiese ante el consejo a Aquilino, esclavo propio de su mujer; ella dice que no debía hacer esto, porque era propio de ella misma; pregunto, si se le deberá la libertad. Respondió, que la mujer, si quisiera que por virtud del testamento se le diese a ella no solamente la dote, sino también los demás legados, habrá de ser compelida a manumitir por causa del fideicomiso a Aquilino, y que éste, cuando fuere libre, había de pedir las cosas que se le legaron.

20.- POMPONIO; *Epístolas, libro VII*.- Se halla escrito en Juliano: si el heredero a quien se le rogó que manumitiese a un esclavo hubiere restituido la herencia en virtud del senadoconsulto Trebeliano, deberá ser obligado a manumitirlo; y si se ocultare, o si estuviere ausente por justa causa, el Pretor deberá determinar conforme a los Senadoconsultos pertenecientes a estas causas; pero si hubiere recibido el esclavo aquel a quien se le hubiere restituido la herencia, le compete al mismo manumitirlo; y convendrá que respecto a la persona de éste se observe lo mismo que suele observarse en cuanto a los compradores; y ¿crees que esto es verdad? Porque yo en mi deseo de aprender, la única razón óptima de vivir que he tenido hasta los setenta y ocho años de mi vida, me acuerdo de la sentencia de aquel que se refiere que dijo: «Aunque tenga un pie en la sepultura, todavía, sin embargo, querría aprender alguna cosa». Con muchísima razón opinaban Aristón y Octaviano, que este esclavo, de quien se

herede datus fuerit, ea dicenda sunt quae Iulianus scribit.

21.- PAPINIANUS; *libro XIX, Quaestionum*.- «Rogo, ne Stichus alterius servitutem experiatur». intellegi datam fideicommissam libertatem placuit principi: quid enim tam contrarium est servituti quam libertas? nec tamen quasi post mortem heredis data videbitur: quod eo pertinet, ut, si vivus eum alienaverit, confestim libertas petatur nec prosit ad impediendam libertatis petitionem, si redemerit eum, cuius semel condicio extitit. Idem probandum est et si non voluntaria alienatio ab herede facta est: nec refragabitur, quod non per ipsum alienatio facta est. Fuit enim quasi statuliber et quacumque ratione condicio impleta est.

22.- IDEM; *libro XXII, Quaestionum*.- Si legatario fundi decem pretii nomine relicta sint in hoc, ut servum suum manumittat, quamvis fundi legatum adgnoverit, si tamen pecuniae propter interventum Falcidiae non adgnoverit, cogendus est et pecuniam accipere habita legis falcidiae ratione et servo fideicommissariam libertatem praestare, quum semel fundi legatum adgnovit.

§ 1.- A duobus heredibus qui tres servos habebat petit, ut duos ex his quos voluissent manumittant: altero heredum latitante alter declarat, quos velit manumittere. Potest dici fieri liberos, ut perinde libertas competat, ac si praesens solus manumittere potuisset. Quod si ex servis unus decesserit, sive iusta ex causa absit heres sive fari non possit a quo

properly hold that the slave in question does not form part of the estate subject to the trust, because the testator, by asking the heir to manumit him, does not seem to have had in view that he should be delivered to the beneficiary of the same. If, however, he should be delivered through a mistake of the heir, the opinion of Julianus should be adopted.

21.- PAPINIANUS; *Questions, Book XIX*.- "I request that Stichus shall not become the slave of another." It was decided by the Emperor that freedom was granted by a trust under this clause: for what is more opposed to slavery than freedom? Freedom, however, is not considered as granted after the death of the heir. The result is that if the heir, during his lifetime, should alienate the slave, he can immediately demand his freedom, and if the heir purchases him, it will be no impediment to his becoming free, as the condition has already been fulfilled. This rule should also be adopted where the alienation by the heir was not voluntary, nor can it be stated, in opposition, that the alienation was not made by the heir himself; for the case resembles that of a slave who was to be free conditionally, where, to a certain extent, the condition has been complied with.

22.- THE SAME; *Questions, Book XXII*.- When a tract of land and the sum of ten aurei are left to a legatee, instead of the price of one of his slaves, under the condition that he shall manumit the said slave, and he accepts the devise of the land, but rejects the bequest of the money to avoid the operation of the Falcidian Law, he can be compelled to accept it, together with the diminution resulting from the Falcidian Law, and to grant freedom to the slave under the terms of the trust, when he has once accepted the devise of the land.

§ 1.- A testator, who had three slaves, charged his two heirs to manumit two of the said slaves whom they might select. One of the heirs failing to appear, the other mentioned the two slaves whom he desired to manumit. It can be said that they are liberated and obtain their freedom, just as if the heir who was present alone had the right to emancipate them. If,

trata, no era de la herencia dejada por fideicomiso, porque el testador, rogando al heredero que lo manumitiera, no parece que entendió que fuese restituido; pero si por error hubiere sido dado por el heredero, se ha de decir lo que escribe Juliano.

21.- PAPINIANO; *Cuestiones, libro XIX*.- «Ruego que Stico no experimente la esclavitud de otro»; le plugo al Príncipe, que se entendiese dada por fideicomiso la libertad; porque, ¿qué cosa hay tan contraria a la esclavitud como la libertad? Pero no se considerará como dada después de la muerte del heredero; lo que tiene por objeto, que si en vida lo hubiere enajenado, se pedirá inmediatamente la libertad, y para impedir la petición de la libertad no aprovechará que hubiere vuelto a comprar a aquél respecto del cual se cumplió una vez la condición. Lo mismo se ha de admitir, también si no fue voluntaria la enajenación hecha por el heredero; y no se objetará, que la enajenación no fue hecha por él mismo; porque éste fue como aquel a quien en testamento se le dejó la libertad bajo condición, y respecto del que se cumplió de algún modo la condición.

22.- EL MISMO; *Cuestiones, libro XXII*.- Si al legatario de un fundo se le hubieran dejado por razón de precio la suma de diez para que manumita a su esclavo, aunque hubiere aceptado el legado del fundo, si, no obstante, no hubiere admitido la cantidad por razón de la aplicación de la Falcidia, ha de ser obligado, habida cuenta de la ley Falcidia, tanto a recibir la cantidad, como a darle al esclavo la libertad dejada por fideicomiso, puesto que ya una vez aceptó el legado.

§ 1.- Uno que tenía tres esclavos, les pidió a dos herederos que manumitiesen de ellos a los dos que quisieran; estando oculto uno de los herederos declara el otro a quienes quería manumitir; se puede decir que se hacen libres, de modo que les compete la libertad lo mismo que si sólo el que está presente hubiese podido manumitirlos. Pero si hubiere

petitum est, decernente Praetore duos qui supersunt fieri liberos convenit.

§ 2.- Quum is qui fideicommissam libertatem praestare debet iusta ex causa abest aut latitat: aut quidam praesentes sunt, alii ex iusta causa absunt, nonnulli frustrandi gratia fideicommissi copiam sui non faciunt: aut ei, qui libertatem debuit, heres non extitit: aut suus heres hereditate se abstinuit: Praetor pronuntiare debet ex testamento Lucii Titii fideicommissam libertatem competere. Idque Senatusconsulto demonstratum est, quo Senatusconsulto comprehensum est, ne dubium et obscurum esset, cuius libertus fieret, praetorem pronuntiare debere, qui ex iusta causa et qui detractandae libertatis gratia absit.

23.- IDEM; *libro IX, Responsorum.*- Fideicommissaria libertas praetextu compilatae hereditatis aut rationis gestae non differtur.

§ 1.- Fideicommissariam libertatem ab herede non praestitam cogendus est heredis heres, qui restituit ex Trebelliano Senatusconsulto hereditatem, praestare, si eius personam eligat qui manumittendus est.

§ 2.- Servum peculii castrensis, quem pater fideicommissi verbis a legitimis filiis heredibus liberari voluit, filium militem vel qui militavit, si patris heres extitit, manumittere cogendum respondi, quoniam proprium manumisisse defunctus post donationem in filium collatam existimavit: portionem enim a fratre domino fratrem eundemque coheredem citra damnum voluntatis redimere non cogendum. Nec ob eundem errorem cetera, quae pater in militiam profecturo filio donavit, fratri, qui

however, one of the slaves should die, and the heir should be absent for some good reason, or he of whom the request was made did not have the power of speech, it is established that the two surviving slaves will become free by the Decree of the Praetor.

§ 2.- When a trustee who is charged with the grant of freedom is absent for a good and sufficient reason, or conceals himself; or where there are several heirs, some of whom are present and others absent for good cause; and still others do not appear in order to avoid the execution of the trust; or the heir charged with the grant of freedom is not living; or a proper heir rejects the estate; the Praetor must decree that the slave is entitled to his freedom under the trust provided by the will of Lucius Titius. It has been expressly stated by a decree of the Senate that, although it may not be doubtful or obscure whose freedman the slave will become, the Praetor must decide which one of the heirs was absent for a good reason, and which one failed to appear for the purpose of preventing the execution of the trust.

23.- THE SAME; *Opinions, Book IX.*- Freedom granted under the terms of a trust cannot be deferred under the pretext that the slave has stolen something belonging to the estate, or has administered its affairs improperly.

§ 1.- The heir of an heir, who has transferred the estate under the Trebellian Decree of the Senate, can be compelled to grant freedom to a slave, where the trust has not been executed by the former heir, if the slave who is to be manumitted selects him as his patron.

§ 2.- I gave it as my opinion that a son, who is a soldier, or who has served in the army, and who has accepted a trust created by his father requiring him to liberate a slave forming a part of his peculium castrense (the charge being that this should be done by his legitimate sons); if he should become the heir of his father he can be forced to emancipate the slave, because the deceased thought that he was manumitting his own slave after having given him to his son. The latter cannot be compelled by his

fallecido uno de los esclavos, ya si estuviera ausente por justa causa, ya si aun no pudiera hablar, el heredero, a quien se le rogó, es conveniente que decretándolo el Pretor, se hagan libres los que sobreviven.

§ 2.- Cuando el que debe dar la libertad dejada por fideicomiso está ausente por justa causa, o se oculta, o unos están presentes, y otros ausentes por justa causa, y algunos no se presentan para frustrar el fideicomiso, o no hubo heredero del que debió la libertad, o el heredero suyo se abstuvo de la herencia, el Pretor debe declarar que en virtud del testamento de Lucio Ticio compete la libertad dejada por fideicomiso; y así se determinó en el senadoconsulto; en cuyo senadoconsulto se consignó, para que no fuese dudoso y oscuro de quién se haría liberto, que el Pretor debe declarar quién esté ausente por justa causa, y quién para defraudar la libertad.

23.- EL MISMO; *Respuestas, libro IX.*- No se difiere so pretexto de haber sido despojada la herencia, o de haberse llevado una administración, la libertad dejada por fideicomiso.

§ 1.- El heredero del heredero, que restituyó la herencia en virtud del Senadoconsulto Trebeliano, ha de ser obligado a dar la libertad dejada por fideicomiso no dada por el heredero, si el que ha de ser manumitado eligiera la persona de aquél.

§ 2.- Respondí, que el hijo militar, o que fue militar, ha de ser obligado, si fue heredero de su padre, a manumitir al esclavo del peculio castrense, que el padre quiso con palabras de fideicomiso que fuese hecho libre por sus hijos, herederos legítimos, porque el difunto estimó que manumitió a un esclavo propio después de la donación hecha a su hijo; pues el hermano y coheredero no ha de ser obligado por el hermano dueño a rescatar su porción en perjuicio de la voluntad, y ni por causa del mismo error se le han

mansit in potestate, conferenda, quum peculium castrense filius etiam inter legitimos heredes praecipuum retineat.

§ 3.- Etiam fideicommissaria libertas a filio post certam aetatem eius data, si ad eam puer non pervenit, ab herede filii praestituta die reddatur: quam sententiam iure singulari receptam ad cetera fideicommissa relicta porrigi non placuit.

§ 4.- Servum a filio post quinque annos, si eo tempore mercedem diurnam filio praestitisset, manumitti voluit: biennio proximo vagatus non praestiterat: condicione defectus videbatur. Si tamen heres filius (aut tutores eius) ministerium servi per biennium elegisset, eam rem, ex praeterito quod per heredem stetisset, impedimento residuae condicioni non esse constitit.

24.- ULPIANUS; *libro V, Fideicommissorum.*- Generaliter dicemus eos posse fideicommissariam libertatem adscribere, qui fideicommissum pecuniarium possunt relinquere.

§ 1.- Et principis servo vel municipii et cuius alterius fideicommissa libertas adscripta valet.

§ 2.- Hostium servo si fideicommissaria libertas fuerit adscripta, potest tractari, an non sit inefficax. Et fortassis quis dixerit indignum esse civem Romanum fieri hostium servum: sed si in casum

brother, who is the co-heir of the owner of the slave, to pay him a portion of the price of the slave, as this would be contrary to the will of the father; nor, on account of this mistake, should the other property which his father gave to his son when he was about to depart for the army be brought into contribution for the benefit of the brother, who remained under paternal control; as the said son, who is included among the other lawful heirs, can retain his peculium castrense as a preferred legacy.

§ 3.- Where freedom is granted under the terms of a trust, and a son is charged with the execution of the same, after he arrives at a certain age, and he dies before reaching that age, freedom must be granted to the slave by his heir at the prescribed time; but it has been settled that this decision, which only applies to a particular case, does not extend to other kinds of trusts.

§ 4.- A testator wished a slave to be manumitted by his son after the expiration of five years, if, during that time, the slave paid him a certain sum every day. The slave ran away after two years had elapsed, and did not pay the money. It was held that the condition had not been complied with. If, however, the son, who was the heir, or his guardians, had chosen to accept the services of the slave during the two years, in lieu of payment, it was held that this would be no impediment to the freedom of the slave, as it was the fault of the heir that the remainder of the condition had not been fulfilled.

24.- ULPIANUS; *Trusts, Book V.*- Generally speaking, we say that persons who can leave money under a trust can also bequeath a grant of freedom in the same manner.

§ 1.- A grant of freedom under a trust, which is bequeathed to a slave of the Emperor, or of a municipality, or of anyone else, is valid.

§ 2.- Where freedom is bequeathed by the terms of a trust to a slave of the enemy, can it be maintained that it is not without force or effect? Perhaps someone may say that a slave of the enemy is unworthy to

de llevar a colación al hermano que permaneció bajo potestad las demás cosas, que el padre le donó al hijo al marchar a la milicia, puesto que el hijo retiene como privilegiado el peculio castrense aun entre los herederos legítimos.

§ 3.- La libertad dada por fideicomiso a cargo de un hijo para después de cierta edad de éste, si el impúbere no llegó a tal edad, será dada también por el heredero del hijo en el día prefijado; cuya decisión, admitida por derecho singular, no plugo que se extendiera a los demás fideicomisos dejados.

§ 4.- Uno quiso que por su hijo fuese manumitido después de cinco años un esclavo, si durante este tiempo le hubiese entregado al hijo el salario diario; habiendo andado vagando los dos años inmediatos, no lo había entregado; parecía que faltó a la condición; pero si el hijo heredero, o sus tutores, hubiesen preferido el servicio de aquel esclavo en los dos años, es sabido que esta circunstancia, que respecto al tiempo pasado hubiese consistido en el heredero, no sirve de impedimento para lo restante de la condición.

24.- ULPIANO; *Fideicomisos, libro V.*- En general diremos, que pueden dejar por fideicomiso la libertad los que pueden dejar dinero por fideicomiso.

§ 1.- Es válida la libertad dejada por fideicomiso a un esclavo del Príncipe, o de un municipio, y de otro cualquiera.

§ 2.- Si a un esclavo de los enemigos se le hubiere asignado por fideicomiso la libertad, se puede discutir si no será ineficaz. Y quizá diga alguno, que es indigno que se haga ciudadano romano un esclavo de

relinquatur, in quem noster esse incipit, quid prohibet dicere libertatem valere?

§ 3.- Si homini libero fuerit libertas per fideicommissum adscripta et is in servitutem redactus proponatur, petere potest libertatem, si modo mortis tempore vel condicionis existentis inveniatur servus.

§ 4.- Servo eius, qui nondum in rebus humanis est, libertas recte per fideicommissum relinquatur.

§ 5.- Si servus in metallum fuerit damnatus, libertatem sperare non poterit. Quid ergo, si fideicommissaria libertas ei relicta sit et poena metalli indulgentia Principis sit liberatus? Et est Rescriptum ab imperatore nostro hunc in dominium prioris domini non restitui: cuius tamen sit, non adicitur. certe quum fisci efficiatur, sperare potest fideicommissariam libertatem.

§ 6.- Ex damnata in metallum concepto et nato fideicommissaria libertas dari poterit: quid mirum, quum etiam venundari eum posse quasi servum Divus Pius Rescripsit?

§ 7.- Si petitem a testatore fuerit, ne postea Stichus serviret, placuit fideicommissariam libertatem datam videri: nam qui hoc petit, ne postea serviat, videtur petere, ut libertas ei praestetur.

§ 8.- Sed et si ita scripsit: «ne eum alienes» «ne eum vendas», idem erit dicendum, si modo hoc animo fuerit adscriptum, quod voluerit eum testator ad libertatem perducere. Ceterum si alia mente id scripsit, ut puta quia consilium dabat heredi retinere talem servum vel quia coercere voluit servum et

become a Roman citizen. If, however, it is bequeathed to him in case he becomes one of our allies, what is there to prevent anyone from holding that the grant of freedom is valid?

§ 3.- Where freedom is bequeathed under the terms of a trust to a man who is already free, and he is subsequently reduced to slavery, he can demand his freedom, provided he was a slave at the time of the death of the testator, or when a condition was fulfilled.

§ 4.- Freedom can legally be left under a trust to a slave who is yet unborn.

§ 5.- A slave cannot expect his freedom if he has been sentenced to the mines. But what if freedom was left to him under the terms of a trust, and he was released from the penalty of the mines by the indulgence of the Emperor? It was stated in a Rescript by our Emperor that he will not be restored to the ownership of his former master; but in this case, it is not stated to whom he will belong. It is certain that when he becomes the property of the Treasury that he can expect to obtain his freedom by virtue of the trust.

§ 6.- Freedom under the terms of a trust can be granted to a slave conceived and born of a woman who was condemned to the mines. What is there surprising in this, as the Divine Pius stated in a Rescript that he could be sold as a slave?

§ 7.- Where it is requested by the testator that Stichus should not afterwards serve as a slave, it was held that freedom should be considered to have been granted to him under a trust; for he who asks that he shall not afterwards serve as a slave is considered to ask that he be granted his freedom.

§ 8.- Where, however, the testator states, "You shall not alienate or sell him," the same rule will apply, provided that this was done by the testator with the intention that he should obtain his freedom. But if he inserted the clause with a different intention (for example, because he advised the heir to retain the

los enemigos; pero si fuese dejada para el caso en que comience a ser nuestro, ¿qué impide decir que es válida la libertad?

§ 3.- Si a un hombre libre le hubiere sido asignada por fideicomiso la libertad, y se dijera que fue reducido a esclavitud, puede pedir la libertad, si es que al tiempo de la muerte, o de cumplirse la condición, se hallase siendo esclavo.

§ 4.- Al esclavo del que aún no existe se le deja válidamente la libertad por fideicomiso.

§ 5.- Si un esclavo hubiere sido condenado a las minas, no podrá esperar la libertad. Luego ¿qué se dirá, si se le hubiera dejado la libertad por fideicomiso, y hubiera sido librado de la pena de las minas por indulgencia del Príncipe? Y se respondió por rescripto por nuestro Emperador, que éste no es restituido al dominio de su primer dueño; pero no se añade de quién sea; mas a la verdad, como se hace esclavo del fisco, puede esperar la libertad dejada por fideicomiso.

§ 6.- Al concebido y nacido de la que fue condenada a las minas se le puede dar la libertad por fideicomiso; ¿qué hay de extrañar, puesto que el Divino Pío respondió por rescripto que también él podía ser vendido como esclavo?

§ 7.- Si por el testador se hubiere pedido que en lo sucesivo no prestase servidumbre Stico, se determinó que se considerase dada por fideicomiso la libertad; porque el que pide que en lo sucesivo no preste servidumbre, parece que pide que se le dé la libertad.

§ 8.- Pero también si escribió de este modo: «no lo enajenes, ni lo vendas», se habrá de decir lo mismo, si esto hubiere sido escrito con tal intención porque el testador haya querido que aquél sea constituido en libertad; pero si lo escribió con otro designio, por ejemplo, porque le daba al heredero consejo para que

cruciare, ne meliorem dominum experiatur, vel aliqua mente, non tribuendae libertatis animo, dicendum est cessare libertatis praestationem: et ita Celsus libro vicensimo tertio Digestorum scribit. Non tantum enim verba fideicommissi, sed et mens testatoris tribuere solet libertatem fideicommissariam. Sed quum ex praesumptione libertas praestita esse videtur, heredis est contrariam voluntatem testatoris probare.

§ 9.- Si quis tutorem ideo scripserit, quia liberum putavit, certissimum est neque libertatem peti posse neque tutelam libertatis praestationi patrocinari: et ita et Marcellus libro quinto decimo digestorum et imperator noster quum patre rescripsit.

§ 10.- Si quis servo pignerato directam libertatem dederit, licet videtur iure suptili inutiliter reliquisse, attamen quasi et fideicommissaria libertate relicta servus petere potest, ut ex fideicommisso liber fiat: favor enim libertatis suadet, ut interpretemur et ad libertatis petitionem procedere testamenti verba, quasi ex fideicommisso fuerat servus liber esse iussus: nec enim ignotum est, quod multa contra iuris rigorem pro libertate sint constituta.

§ 11.- Ex testamento, quod agnatione postumae ruptum esse constitit, neque directas libertates competere neque fideicommissarias deberi, quas non a legitimis quoque heredibus pater familias reliquerit, satis constat.

§ 12.- Si quis alienum vel suum servum rogatus sit manumittere et minus sit in eo quod accepit iudicio testatoris, plus sit in pretio servi, an cogatur vel alienum redimere vel suum manumittere, videndum

slave; or because he desired to punish and torture the latter in order to prevent him from obtaining a better master, or did so with some other motive than that of liberating him), it must be said that he should not be granted his freedom. This was mentioned by Celsus in the Twenty-third Book of the Digest. It is not so much the terms of the trust as the intention of the testator, which usually confers freedom in such cases. As, however, freedom is always considered to be granted, it devolves upon the heir to prove the contrary intention of the testator.

§ 9.- When anyone appoints a slave a guardian, because he thinks that he is free, it is absolutely certain that he cannot demand his freedom, nor can the right to the guardianship be maintained by him on account of the grant of freedom. This is held by Marcellus in the Fifteenth Book of the Digest, and Our Emperor, with his Father, also stated it in a Rescript.

§ 10.- Where anyone grants liberty directly to a slave who has been pledged, although, by the strict construction of the law, the grant is held to be void; still, if freedom had been left to him by the terms of a trust, the slave can demand his liberation by virtue of it. For the favor conceded to freedom requires that we should interpret the bequest in this manner, and that the words of the will mean that freedom should be demanded, just as if the slave had been directed to be free under the terms of a trust. For it is well known that many things contrary to the strict construction of the law have been decided in favor of liberty.

§ 11.- It is established that grants of freedom which are either direct, or dependent upon the terms of a trust, cannot be carried out under a will which has been broken by the birth of a posthumous child, where the testator has not charged his lawful heirs with their execution.

§ 12.- Where anyone is requested to manumit his own slave, or the slave of another, and he receives less by the will of the testator than the value of the slave, whether he can be compelled either to

retuviera a tal esclavo, o porque quiso corregir y castigar al esclavo, para que no experimentase a un dueño mejor, o con otra intención, no con ánimo de que se le haya de conceder la libertad, se ha de decir que se deja de tener lugar la prestación de la libertad; y así lo escribe Celso en el libro vigésimo tercero del Digesto. Porque no solamente las palabras del fideicomiso, sino también la mente del testador, suelen dar la libertad por fideicomiso. Pero cuando por presunción parece que se dió la libertad, al heredero le incumbe probar la voluntad contraria del testador.

§ 9.- Si alguno hubiere nombrado a otro como tutor, porque lo creyó libre, es muy cierto que ni se puede pedir la libertad, ni la tutela favorece para la prestación de la libertad; y así lo dice Marcelo en el libro décimo quinto del Digesto, y lo respondió por Rescripto nuestro Emperador juntamente con su padre.

§ 10.- Si alguien le hubiere dado la libertad directa a un esclavo pignorado, aunque en estricto derecho parece que se la dejó inútilmente, sin embargo, el esclavo puede pedir, como si se le hubiera dejado la libertad también por fideicomiso, que se le haga libre en virtud del fideicomiso; porque el favor de la libertad aconseja que interpretemos, que las palabras del testamento son pertinentes también para la petición de la libertad, como si por fideicomiso se hubiere mandado que el esclavo sea libre; porque no es cosa ignorada que en favor de la libertad se establecieron muchas disposiciones contra el rigor del derecho.

§ 11.- Es bastante sabido, que en virtud del testamento, que se sabe que se rompió por el nacimiento de una póstuma, ni competen las libertades directas, ni se deben las dejadas por fideicomiso, si algunas hubiere dejado el padre de familia aun a cargo de los herederos legítimos.

§ 12.- Si a alguno se le hubiera rogado que manumita a un esclavo ajeno, o suyo propio, e importara menos lo que recibió por la última disposición del testador, y más el precio del esclavo, se ha de ver si

est. Et Marcellus scripsit, quum ceperit legatum, cogendum omnimodo suum manumittere: et sane hoc iure utimur, ut multum intersit, suum quisque rogatus sit manumittere an alienum: si suum, cogetur manumittere, etiamsi modicum accepit: quod si alienum, non alias erit cogendus, quam si tanti possit redimere, quantum ex iudicio testatoris consecutus sit.

§ 13.- Proinde consequenter Marcellus ait eum quoque, qui heres institutus est, si quidem aliquid ad eum deducto aere alieno pervenit, cogendum esse suum manumittere: si vero nihil pervenit, non esse cogendum.

§ 14.- Plane si forte minus relictum est alicui, verum crevit legatum ex aliqua causa, aequissimum erit tanti eum cogi redimere, quantum ad eum pervenit, nec causari debere, quod minus illi relictum sit, quum creverit eius legatum per testamenti occasionem: nam et si ex mora fructus usuraeve fideicommisso accessissent, dicendum est libertatem praestandam.

§ 15.- Proinde et si servi pretium decrevit, dicendum est redimere cogendum.

§ 16.- Quod si legatum sit imminutum, videndum, an cogatur servum manumittere qui speravit legatum uberius consecuturum. Et putem, si legatum refundere sit paratus, non esse cogendum, idcirco, quia alia contemplatione agnovit legatum, quod ex inopinato deminutum est: parato igitur ei a legato recedere concedendum erit, nisi forte residuum legatum ad pretium sufficit.

purchase the slave belonging to another, or to manumit his own, is a question for consideration. Marcellus says that, as soon as he accepts the legacy, he will, by all means, be compelled to manumit his slave. And, indeed, this is our practice, as it makes a great deal of difference whether anyone is requested to manumit his own slave, or a slave belonging to someone else. If it is his own slave, he will be compelled to manumit him, even if the amount he receives is very small; but if it is the slave of another, he should not be forced to manumit him unless he can purchase the said slave for a sum equal to what he receives by the will of the testator.

§ 13.- Hence Marcellus says that he also, who is appointed the heir, can be compelled to manumit his own slave, if he obtains anything from the estate after payment of its indebtedness, but if he obtains nothing, he cannot be forced to do so.

§ 14.- It is clear that, if less has been bequeathed to anyone than the slave is worth, but the legacy has been increased for some reason or other, it will be perfectly just for him to be compelled to purchase the slave with the amount which he obtains from the estate; but it should not be said that he has been left less than the slave was worth, as his legacy has been increased by reason of the will. For if, through delay, the crops or the interest should be added to the amount bequeathed under the trust, it must be held that freedom ought to be granted.

§ 15.- On the same principle, if the price of the slave has been reduced, it must be held that he should be forced to purchase him.

§ 16.- Where, however, the legacy has been diminished, it must be considered whether he who expected to obtain a larger legacy can be compelled to manumit the slave. I think that if he is ready to refund the legacy, he cannot be forced to do so, for the reason that he accepted the legacy with a different prospect, and it has been unexpectedly diminished. Therefore, if he is ready to surrender the legacy, he shall be permitted to do so, unless what remains of it is sufficient to pay the price of the slave.

será obligado o a comprar al ajeno, o a manumitir al suyo. Y escribe Marcelo, que, habiendo aceptado el legado, ha de ser obligado de todos modos a manumitir al suyo; y verdaderamente observamos este derecho, de suerte que hay mucha diferencia entre que a uno se le haya rogado que manumita al suyo, o que al ajeno; si al suyo, será obligado a manumitirlo, aunque haya recibido módica cosa; pero si al ajeno, no será obligado de otro modo, sino si pudiera comprarlo por tanto cuanto haya obtenido por la última disposición del testador.

§ 13.- Consiguientemente dice Marcelo, que también el que fue instituido heredero ha de ser obligado a manumitir al suyo, si verdaderamente fue alguna cosa a su poder deducidas las deudas; pero si nada fue a su poder, no ha de ser obligado.

§ 14.- Mas si acaso se le dejó a alguno menos, pero el legado creció por alguna causa, será muy justo, qué él sea obligado a comprarlo por tanto cuanto fue el poder de él; y no debe excusarse porque se le haya dejado menos, habiendo crecido su legado con ocasión del testamento; porque aunque por causa de mora se le hubiesen agregado al fideicomiso frutos o intereses, se ha de decir que se debe dar la libertad.

§ 15.- Por lo tanto, también si disminuyó el precio del esclavo, se ha de decir que ha de ser obligado a comprarlo.

§ 16.- Pero si el legado se hubiera disminuido, se ha de ver si será obligado a manumitir al esclavo el que esperó obtener un legado más pingüe. Y yo opinaría, que si estuviera dispuesto a devolver el legado no ha de ser obligado; por esto, porque aceptó por otra consideración el legado, que inopinada-mente se disminuyó. Así, pues, al que esté dispuesto a separarse del legado se le habrá de permitir, a no ser acaso que lo restante del legado baste para el precio.

§ 17.- Quid ergo, si plures servos rogatus sit manumittere et ad quorundam pretium sufficiat id quod relictum est, ad omnium non sufficiat, an cogendus sit quosdam manumittere? Et putem debere eum cogi vel eos, quorum pretium patitur, manumittere. Quis ergo statuet, qui potius manumittitur? Utrumne ipse legatarius eligat, quos manumittat, an heres a quo legatum est? Et fortassis quis recte dixerit ordinem scripturae sequendum: quod si ordo non pareat, aut sortiri eos oportebit, ne aliquam ambitionis vel gratiae suspicionem praetor subeat, aut meritis cuiusque allegatis arbitrari eos oportet.

§ 18.- Simili modo dicendum est et si redimere iussus sit libertatemque praestare nec pecunia quae legata est sufficiat ad redemptionem omnium, quibus libertas data est: nam et hic idem erit, quod supra probavimus.

§ 19.- Si cui legatum sit relictum isque rogatus sit servum proprium manumittere eique quod legatum est praestare, an fideicommissaria libertas praestanda sit? Quosdam movet, quia, si fuerit coactus ad libertatem praestandam, ex necessitate ad fideicommissi quoque praestationem erit cogendus: et sunt qui putant non esse cogendum. Nam et si mihi legatum fuisset relictum et id rogatus essem Titio restituere confestim et praeterea fideicommissam libertatem servo meo praestare, sine dubio diceremus non esse me cogendum ad libertatis praestationem, quia nihil pretii nomine videor acceperisse. Plane si forte post tempus fuerit rogatus restituere sibi legatum relictum, dici potest propter medii temporis fructum cogendum eum manumittere,

§ 20.- Si rogatus quis alii fundum, quum morietur, alii centum praestare si tantum ex fructibus fundi perceperit, quantum est in fideicommisso, cogendum

§ 17.- But what if a person is charged to manumit several slaves, and the sum bequeathed is equal to the value of some of them, but not to that of all; can he be compelled to manumit some of them? I think that he can be compelled to manumit as many as the legacy will permit him to do. But who shall decide which ones shall be manumitted; must the legatee select them, or must the heir do so? Perhaps someone may very properly say that the order given in the will should be followed. If the order is not indicated therein, the slaves ought to be selected by lot, to prevent the Praetor from being suspected of favoring any through interest, or kindness; for he must render his decision by taking into account the alleged merits of each slave.

§ 18.- In like manner, it must be held that, where a legatee is ordered to purchase certain slaves, and give them their freedom, and the money which was bequeathed for this purpose is not sufficient for the purchase of all of said slaves, the rule in this case will be the same as we have adopted in the preceding one.

§ 19.- Where a legacy is bequeathed to anyone, and he is requested to manumit his own slave, and transfer the legacy to him, must freedom be granted under the terms of the trust? Some authorities are in doubt on this point, because if the legatee is compelled to give the slave his liberty, he will necessarily be obliged to execute the trust and transfer the legacy; and there are some authorities who hold that he should not be forced to do so. For if a legacy should be left to me, and I should be charged to immediately transfer it to Titius, and also to grant freedom under the trust to my slave, we should undoubtedly hold that I cannot be compelled to grant him his freedom, because I am not considered to have received anything to take the place of his value. It is clear that if I should be charged to pay the legacy after a certain time has elapsed, it may be held that I can be compelled to manumit the slave if, in the meantime, I have obtained any benefit from the legacy.

§ 20.- Where anyone is asked to give to one person a tract of land, and to another a hundred aurei, at the time of his death, he will be compelled to pay

§ 17.- ¿Luego qué se dirá, si a uno se le hubiera rogado que manumita a varios esclavos, y lo que se dejó baste para el precio de algunos, y no baste para el de todos? ¿Habrá de ser acaso obligado a manumitir a algunos? Y yo opinaría, que él debe ser obligado a manumitir por lo menos a aquellos cuyo precio lo consiente. Mas ¿quién determinara el que preferentemente haya de ser manumitido? ¿Acaso elegirá el mismo legatario aquellos a quienes haya de manumitir, o el heredero? Y quizá alguno dirá con razón que se ha de seguir el orden de la escritura; pero si no apareciera el orden, convendrá sortearlos, a fin de que sobre el Pretor no recaiga sospecha alguna de intriga o de favor, o convendrá elegirlos por los méritos de cada uno, que se hayan alegado.

§ 18.- Del mismo modo se ha de decir, aunque a uno se le hubiera mandado comprarlos y darles la libertad, y el dinero que se legó no bastara para la compra de todos aquellos a quienes se les dio la libertad; porque también en este caso será lo mismo que en el anterior hemos admitido.

§ 19.- Si a uno se le hubiera dejado un legado, y a él se le hubiera rogado que manumitir a un esclavo propio, y darle lo que se legó, ¿se habrá de dar la libertad dejada por fideicomiso? Esto inclina a algunos, porque, si hubiere sido obligado a dar la libertad, por necesidad habrá de ser obligado también a la entrega del fideicomiso; y hay quienes opinan, que no ha de ser obligado. Porque también si se me hubiese dejado un legado, y se me hubiese rogado que lo restituyera inmediatamente a Ticio, y además que le diera a un esclavo mío la libertad por fideicomiso, sin duda diríamos, que yo no había de ser obligado a la prestación de la libertad, porque no parece que recibí cosa alguna a título de precio. Mas si acaso se le hubiere rogado a uno que restituya después de algún tiempo el legado que se le dejó, se puede decir, que ha de ser obligado a manumitirlo por razón de los frutos del tiempo intermedio.

§ 20.- Si a alguien se le hubiere rogado que cuando muera le dé a uno un fundo, y a otro la cantidad de ciento, ha de ser él obligado a darlos, si de los frutos

eum praestare. Sic fit, ut sit in pendenti fideicommissum pecuniarium et fideicommissae libertatis praestatio.

§ 21.- Quotiens autem fideicommissaria libertas relinquitur efficaciter, in ea causa est, ut neque alienatione neque usucapione extingui possit: ad quemcumque enim pervenerit is servus, cui fideicommissa libertas relicta est, cogi eum manumittere: et ita est saepissime constitutum. Cogetur igitur is, ad quem servus pervenerit, fideicommissam libertatem praestare si hoc maluit is qui rogatus est: latius enim acceptum est, ut et si sub condicione fuit ei libertas relicta et pendente condicione alienatus sit, attamen quum sua causa alienetur. Quod si nolit ab eo manumitti, sed potius ab eo velit ad libertatem perducere, qui erat rogatus eum manumittere, audiri eum oportere Divus Hadrianus et Divus Pius Rescripserunt. Quin immo et si iam manumissus est, velit tamen potius eius libertus fieri, qui erat rogatus eum manumittere, audiendum eum Divus Pius rescripsit. Sed et si ex persona manumissoris vel ex quacumque causa manumissus ostendere potest ius suum laedi manumissione vel etiam laesum, succurri ei ex his constitutionibus oportet, ne contra voluntatem defuncti durior eius condicio constituatur. Plane si ea sit defuncti voluntas, ut vel a quocumque manumitti voluerit, dicendum est constitutiones supra scriptas cessare.

25.- PAULUS; *libro III, Fideicommissorum.*- Si heres qui vendidit servum sine successore decesserit, emptor autem extet et velit servus defuncti libertus esse, non emptoris, non esse eum audiendum valens

whatever he has collected out of the profits of the land, if the amount is equal to that provided by the trust; so that, in this instance, it is not certain whether the money left under the trust, or the grant of freedom, will be due.

§ 21.- Whenever freedom is legally bequeathed by the terms of a trust, the condition is such* that the right can neither be extinguished by a donation, nor by usucaption; for no matter into whose hands the slave whose freedom has been left under the trust may come, his owner will be compelled to manumit him. This has been frequently set forth in the Imperial Constitutions. Therefore, he into whose hands the slave may come will be compelled to grant him his freedom by virtue of the trust, if he who was requested to do so prefers it; for it has been settled by a broader interpretation that, even if freedom were left to a slave conditionally, and he should be alienated while the condition is pending, he is, nevertheless, alienated with the understanding that he is to be free if the condition is complied with. If, however, the slave is unwilling to be manumitted by him, but prefers to obtain his freedom from the person who was charged to emancipate him, the Divine Hadrian and the Divine Pius stated in a Rescript that he must be heard. The Divine Pius also stated in a Rescript that even if he had been already manumitted and preferred to become the freedman of the person who had liberated him, he should be heard. But if the freedman can show that his rights may be, or have been prejudiced by his manumission, on account of some act of the person who manumitted him or for some other reason, relief must be granted him by one of these constitutions, in order that his condition may not become less endurable, which would be contrary to the wishes of the deceased. It is clear that if the intention of the deceased was that the slave should be manumitted by anyone whomsoever, it must be said that the constitutions above referred to will not apply.

25.- PAULUS; *Trusts, Book III.*- If the heir who sold the slave should die without leaving an heir, and the purchaser should be living, and the slave should desire to become the freedman of the deceased, and

del fundo hubiere percibido tanto cuanto importa el fideicomiso; resulta de aquí, que estarán en suspenso el fideicomiso pecuniario, y la prestación de la libertad dejada por fideicomiso.

§ 21.- Mas cuando la libertad dada por fideicomiso se deja eficazmente, es de tal condición, que no puede extinguirse ni por la enajenación, ni por la usucapición; porque cualquiera a cuyo poder hubiere ido este esclavo, al cual se le dejó por fideicomiso la libertad, es obligado a manumitirlo; y así se determinó muchísimas veces, En su virtud aquel a cuyo poder hubiere ido el esclavo será obligado a darle la libertad dejada por fideicomiso, si esto prefirió aquel a quien se le rogó; porque se admitió además, que también si bajo condición se le dejó la libertad, y pendiente la condición hubiera sido enajenado, sea sin embargo enajenado con su propia condición. Pero si no quisiera ser manumitido por éste, sino que quisiera más bien ser constituido en libertad por aquel a quien se le había rogado que lo manumitiera, respondieron por rescripto el Divino Adriano y el Divino Pío, que debe ser oído; y aun más, también si ya fue manumitido, pero quisiera preferentemente hacerse liberto de aquel a quien se le había rogado que lo manumitiera, resolvió por rescripto el Divino Pío que ha de ser oído. Pero también si el manumitido puede demostrar que por razón de la persona del manumisor, o por otra causa cualquiera, se lesiona su derecho con la manumisión, o también que fue lesionado, conviene que se le socorra en virtud de estas Constituciones, a fin de que no se haga más dura su condición contra la voluntad del difunto. Mas si la voluntad del difunto fuera tal, que hubiere querido que por cualquiera fuese manumitido, se ha de decir, que dejan de tener lugar las susodichas Constituciones.

25.- PAULO; *Fideicomisos, libro III.*- Si el heredero que vendió un esclavo hubiere fallecido sin sucesor, pero viviera el comprador, y el esclavo quisiera ser liberto del difunto, no del comprador,

scripsit, ne emptor et pretium et libertum perdat.

26.- ULPIANUS; *libro V, Fideicommissorum*.- Quum vero is qui rogatus est non alienum servum manumittere mortalitatis necessitate vel bonorum publicatione ad alium servum perduxit, magis opinor constitutionibus esse locum, ne deterior condicio fideicommissae libertatis fiat. Nam et quum quidam rogatus esset, quum moreretur, servum manumittere isque decessisset libertate servo non data, perinde eum habendum constitutum est atque si ad libertatem ab eo perductus esset: potest enim eo testamento dare libertatem utique directam. Sic fit, ut, quotiens quis libertatem accepit fideicommissariam, si ab alio quam qui erat rogatus manumittatur, auxilium constitutionum habeat perindeque habeatur atque si ab eo manumissus fuisset, quoniam fideicommissis libertatibus favor exhibetur nec interdicere solet destinata fideicommissa libertas: qui enim ea donatus est, in possessionem libertatis interim esse videtur.

§ 1.- Apparet igitur subventum fideicommissis libertatibus, ut in re mora facta esse his videatur et ex die quidem, quo libertas peti potuit, matri traderentur manumittendi causa, ex die vero, quo petita est, ingenui nascantur. Plerumque enim per ignaviam vel per timiditatem eorum, quibus relinquitur libertas fideicommissa, vel ignorantiam iuris sui vel per auctoritatem et dignitatem eorum, a quibus relicta est, vel serius petitur vel in totum non petitur fideicommissa libertas: quae res obesse libertati non debet. Quod igitur defendimus, ita determinandum est, ut ingenui quidem exinde nascantur, ex quo mora libertati facta est, manumitti autem partum dici debeat, ex quo peti libertas potuit, quamvis non sit petita. Certe minoribus viginti quinque annis et in hoc tribuendum est auxilium, ut videatur in re mora

not that of the purchaser, Valens decided that he ought not to be heard, for fear that the purchaser might lose both the price which he had paid and his rights over the freedman as well.

26.- ULPIANUS; *Trusts, Book V*.- Where anyone who was requested to manumit the slave of another transfers the slave to a third party on account of his death or the confiscation of his property, I think that it should be held that there is ground for the application of the constitutions, in order that the condition of the freedom bequeathed by the trust may not be rendered worse. For when anyone is charged to manumit a slave at the time of his death, and he dies before giving the slave his freedom, it has been decided that it is the same as if the slave had been bequeathed his freedom by him; for he could have granted him his freedom directly by his will. The result of this is, that whenever anyone who obtains his freedom by virtue of a trust is manumitted by someone, other than the person charged with manumitting him, he will be entitled to the benefit of the constitutions, and will be regarded just as if he had been manumitted by him who was asked to do so; for the reason that favor is always shown to grants of freedom under a trust, and when they are bequeathed they should not be interfered with, as he to whom they are granted is in the meantime held to be in the enjoyment of his liberty.

§ 1.- Therefore, it is apparent that relief should be granted where freedom is left under a trust, and that any delay which results should be considered as proceeding from the matter itself, and in reckoning the day from which freedom can be demanded, children should be given to their mother to be manumitted, where she is a liberated slave, and the children are born free from the day when freedom was demanded. For, generally, freedom which is left under a trust is demanded too late, or is not demanded at all, on account of the neglect or timidity of those who are entitled to it; or because of their ignorance of their rights; or on account of the authority and rank of those who are charged with the execution of the trust; which things should not stand in the way of the acquisition of freedom. Hence we maintain, and it

escribió Valente, que él no ha de ser oído, a fin de que el comprador no pierda el precio y el liberto.

26.- ULPIANO; *Fideicomisos, libro V*.- Mas cuando aquel a quien se le rogó que manumitiera a un esclavo ajeno, entregó el esclavo a otro o por necesidad de muerte, o por la confiscación de los bienes, opino que es mas cierto que tienen lugar las Constituciones, a fin de que no se haga peor la condición de la libertad dejada por fideicomiso. Porque también cuando a alguno se le hubiese rogado que al morir manumitiera a un esclavo, y él hubiese fallecido sin haberle dado la libertad al esclavo, se estableció que éste había de ser considerado como si por él hubiese sido puesto en libertad; porque puede darle la libertad en este testamento, y ciertamente directa. Resulta de aquí, que siempre que alguno recibió por fideicomiso la libertad, tiene, si fuera manumitido por otro que por aquel a quien se le había rogado, el auxilio de las Constituciones, y es considerado lo mismo que si hubiese sido manumitido por aquél, porque se les concede favor a las libertades dejadas por fideicomiso, y no suele perecer la libertad que se dejó por fideicomiso; pues aquel a quien se hizo donación de ella parece que mientras tanto está en posesión de la libertad.

§ 1.- Se ve, pues, que se auxilió a las libertades dejadas por fideicomiso, de suerte que se considere que en realidad se incurrió en mora respecto a ellas; y desde el día en que se pudo pedir la libertad se le entregarán los hijos a la madre para que los manumita, pero desde el día en que fue pedida aquéllos nacen ingenuos. Porque muchas veces por desidia, o por timidez de aquellos a quienes se les deja la libertad por fideicomiso, o por ignorancia de su derecho, o por la autoridad y la dignidad de aquellos, a cuyo cargo fue dejada, o es pedida tardíamente, o en absoluto no es pedida la libertad dejada por fideicomiso; lo cual no debe perjudicarle a la libertad. Así, pues, lo que defendemos se ha de determinar de modo que nazcan ciertamente ingenuos desde que se causó mora para la libertad;

esse: nam qua ratione decretum et a Divo Severo Constitutum est in re moram esse circa pecuniaria fideicommissa, quae minoribus relicta sunt, multo magis debet etiam in libertatibus hoc idem admitti.

§ 2.- Quum quidam Caecilius ancillam, quam pignori obligaverat, dimisso creditore per fideicommissum manumitti voluisset et heredibus creditorem non liberantibus infantes, qui postea erant editi, venissent a creditore, Imperator noster quum patre Rescripsit secundum ea, quae Divo Pio placuerint, ne pueri ingenuitate destinata fraudarentur, pretio emptori restituto perinde eos ingenuos fore, ac si mater eorum suo tempore manumissa fuisset.

§ 3.- Idem Imperator noster quum patre Rescripsit, si post quinquennium mortis testatoris tabulae testamenti apertae essent vel codicilli et partus medio tempore editus sit, ne fortuita mora servitutem partui irrogaverit, matri partum tradendum, ut ab ea ad libertatem perducatur.

§ 4.- Apparet igitur ex hoc scripto, item eo quod a Divo Pio Rescriptum diximus, noluisse eos moram libertati fortuitam nocere edito ex ea, cui fideicommissa libertas data est.

should so be decided, that children are born free from the very time when any delay is made in liberating their mother from servitude; and, moreover, the child of a female slave should be considered as manumitted from the very time when the mother had the right to demand her freedom, even though she may not have done so. It is clear that relief should be granted to minors of twenty-five years of age in a case of this kind, and that any delay should be held to have proceeded from the matter itself; for, as it has been decreed and set forth in the Constitution of the Divine Severus that wherever delay takes place in the payment of money left to minors under a trust, it should be considered as having proceeded from the matter itself, there is still greater reason that this rule should be adopted where grants of freedom are involved.

§ 2.- A certain Caecilius, who had given a female slave in pledge, provided by his will that, after the claim of his creditor had been satisfied, the slave should be manumitted by virtue of a trust. The heirs not having paid the creditor, the children afterwards born to the said slave were sold by him. Our Emperor and his Father stated in a Rescript that, in accordance with what had been decided by the Divine Pius, the children should not be defrauded of the freedom to which they are entitled, and that the price having been refunded to the purchaser, they should become free; just as if their mother had been manumitted at the time when they were born.

§ 3.- Our Emperor and his Father also stated in a Rescript that if a will or a codicil had not been opened within five years after the death of the testator, and the female slave had had a child in the meantime, it should be delivered to its mother, in order that it might be granted its freedom; and that it should not remain in slavery on account of accidental delay.

§ 4.- It is, therefore, apparent from this Rescript, as well as from the one which we have mentioned as promulgated by the Divine Pius, that these Emperors were unwilling that any accidental delay in granting

pero se debe decir que el parto es manumitido desde que se pudo pedir la libertad, aunque no haya sido pedida. Ciertamente que a los menores de veinticinco años se les ha de auxiliar también en esto, de modo que se considere que se incurre en mora; porque con mucha mas razón que por la que se decretó y se estableció por el Divino Severo, que se estaba en mora respecto a los fideicomisos pecuniarios, que se les dejaron a los menores, se debe admitir esto mismo respecto a las libertades.

§ 2.- Como quiera que un tal Cecilio hubiese querido, que, pagado el acreedor, fuese manumitida por fideicomiso una esclava, que había obligado en prenda, y no pagando los herederos al acreedor hubiesen sido vendidos por el acreedor los hijos que después habían nacido, resolvió por Rescripto nuestro Emperador juntamente con su padre, conforme a lo que le había parecido bien al Divino Pío, que, a fin de que los hijos no fuesen defraudados en la ingenuidad que se les había atribuido, hubieran de ser ingenuos, restituido el precio al comprador, lo mismo que si su madre hubiese sido manumitida a su tiempo.

§ 3.- Nuestro mismo Emperador resolvió por Rescripto juntamente con su padre, que, si las tablas del testamento, o del codicilo, hubiesen sido abiertas después de un quinquenio de la muerte del testador, y en el tiempo intermedio se hubiera dado a luz el parto, a fin de que la morosidad fortuita no le impusiere la esclavitud al nacido, se le había de entregar el nacido a la madre, para que por ella fuera constituido en libertad.

§ 4.- Aparece, pues, de este rescripto, y también del que dijimos que fue dado por el Divino Pío, que no quisieron ellos que la morosidad fortuita de la libertad le perjudicara al que nació de aquella a quien

§ 5.- Non tamen si a substituto impuberis fideicommissa libertas data sit ancillae eaque vivo impubere partum ediderit, vel si post tempus vel sub condicione libertatem acceperit et ante diem vel condicionem partum ediderit, ad libertatem partus perducetur, quia horum alia condicio est: non enim moram fortuitam, sed ex voluntate testantis passi sunt.

§ 6.- Si pro non scripto habitus sit servus alicui legatus, cui servo per fideicommissum libertas adscripta est, quaestionis est, num fideicommissa libertas debeat intercidere et an, si servus petat fideicommissam libertatem ab eo, penes quem remansisset pro non scripto habito legato quod erat relictum ei qui eum rogatus fuerat manumittere, vel si ipse servus, ut supra dictum est, fuit legatus, an libertas non debeat intercidere. Et putem debere dici fideicommissam libertatem salvam esse, licet ad eum nihil pervenerit, qui eum rogatus erat manumittere: cogetur igitur libertatem praestare is ad quem pervenit legatum, quia libertas fideicommissa nullum impedimentum pati debet.

§ 7.- Subventum libertatibus est Senatusconsulto, quod factum est temporibus Divi Traiani Rubrio Gallo et Caelio Hispone consulibus in haec verba: "si hi, a quibus libertatem praestari oportet, evocati a praetore adesse noluissent, si causa cognita Praetor pronuntiasset libertatem his deberi, eodem iure statum servari, ac si directo manumissi essent".

freedom should prejudice the rights of a child born of a slave to whom freedom was granted under the terms of a trust.

§ 5.- This, however, will not be the case where freedom is to be granted under a trust to a female slave by the substitute of a son under the age of puberty, if she had the child during the lifetime of the minor; or if she was to receive her freedom after the lapse of a certain time, or conditionally, and she brought forth the child before the time had arrived, or before the condition had been complied with; for the said child will not be entitled to freedom because the condition in this case is different, as the delay was not accidental, but was caused by the will of the testator.

§ 6.- If a slave should be bequeathed to anyone in such a way that the legacy is held to be void, and freedom is bequeathed to the same slave under the terms of a trust, the question arises whether the grant of freedom must also be held to be void. And if the slave demands his freedom under the terms of the trust of the person under whose control he remains, where the legacy left to him who was charged to manumit him has been declared to be void, or if the slave himself was bequeathed as was stated above, whether the bequest of his freedom should not be considered to be without force or effect. I think it should be said that the grant of freedom under the trust remains unimpaired, even though nothing may come into the hands of him who was asked to manumit the slave. Hence, he who obtains the legacy must liberate the slave, for the reason that freedom granted under the terms of a trust permits no obstacle to be interposed.

§ 7.- In the case of bequests of freedom, relief is granted by a decree of the Senate enacted in the time of the Divine Trajan, during the Consulate of Rubrius Gallus and Gselius Hispo, as follows: "If those charged with a grant of freedom, having been summoned by the Praetor, refuse to appear, and, after investigation, the Praetor finds that the slaves are entitled to be free, they will be in the same position under the law as if they had been directly manumitted."

se le dio por fideicomiso la libertad.

§ 5.- Pero si a cargo del substituto de un impúbbero fue dada por fideicomiso la libertad a una esclava, que hubiere dado a luz un parto en vida del impúbbero, o si hubiera recibido la libertad después de algún tiempo, o bajo condición, y antes del día o de la condición hubiere dado a luz el parto, el parto no será constituido en libertad, porque es diversa la condición de éstos; pues no sufrieron mora fortuita, sino por voluntad del testador.

§ 6.- Si hubiera sido considerado como no escrito el legado que a uno se le dejó de un esclavo, a cuyo esclavo se le había asignado por fideicomiso la libertad, hay la cuestión de si deberá extinguirse la libertad dejada por fideicomiso; y si, pidiéndole el esclavo la libertad dejada por fideicomiso a aquel en cuyo poder hubiese quedado, considerado como no escrito el legado que se le había dejado a aquel a quien se le había rogado que lo manumitiera, o habiendo sido legado el mismo esclavo, según arriba, se dijo, no deberá extinguirse la libertad. Y yo opinaría, que se debe decir que queda a salvo la libertad dejada por fideicomiso aunque nada haya ido a poder de aquel a quien se le había rogado que lo manumitiera; así, pues, será obligado a darle la libertad aquel a quien fue el legado, porque la libertad dejada por fideicomiso no debe sufrir impedimento alguno.

§ 7.- Por un senadoconsulto, que se hizo en tiempos del Divino Trajano bajo el consulado de Rubrio Galo y de Celio Hispón, se auxilió a las libertades en estos términos: «Si aquellos por quienes se debe dar la libertad no hubiesen querido comparecer llamados por el Pretor, y el Pretor hubiese fallado con conocimiento de causa que se debe la libertad a algunos, obsérvese lo establecido con el mismo derecho que si directamente hubiesen sido éstos manumitidos».

§ 8.- Hoc Senatusconsultum ad eos pertinet, quibus ex causa fideicommissi libertas debeatur. Proinde si libertas non deberetur, obreptum tamen Praetori est de libertate pronuntiatumque, ex hoc Senatusconsulto libertas non competit. Et ita Imperator noster quum patre suo rescripsit.

§ 9.- Evocari autem a Praetore oportet eos, qui fideicommissam libertatem debent: ceterum nisi fuerint evocati, cessat rubrianum Senatusconsultum. Proinde denuntiationibus et edictis litterisque evocandi sunt.

§ 10.- Hoc Senatusconsultum ad omnes pertinet latitantes, quos fideicommissam libertatem praestare oportet. Proinde sive heres rogatus sive quis alius, Senatusconsulto locus est: omnes enim omnino, qui deberent fideicommissam libertatem praestare, in ea causa sunt, ut ad Senatusconsultum pertineant.

§ 11.- Quare si heres quidem latitet, legatarius autem vel fideicommissarius, qui rogatus sit libertatem praestare, praesens sit, Senatusconsultum deficit et nihilo minus impeditur libertas: proponamus enim legatarium nondum dominium servi nactum esse.

27.- PAULUS; *libro III, Fideicommissorum*.- Itaque hoc casu princeps adeundus est, ut et in hoc casu libertati prospiciatur.

28.- ULPIANUS; *libro V, Fideicommissorum*.- Si eum servum, cui erat fideicommissa libertas relicta, distraxerit is qui erat rogatus et emptor quidem latitet, is autem qui rogatus erat praesens sit, an Rubriano Senatusconsulto locus sit? et ait Marcellus Rubrianum locum habere, quia abest quem manumittere oportet.

§ 8.- This Decree of the Senate has reference to those who are entitled to freedom by virtue of a trust. Hence, if they are not entitled to it, and it has been fraudulently obtained by a decision of the Praetor, freedom will not be granted under this Decree of the Senate. This Our Emperor and his Father stated in a Rescript.

§ 9.- Those must be summoned before the Praetor who are obliged to grant freedom under a trust, but the Rubrian Decree of the Senate will not apply unless they are summoned. Hence, they should be summoned by notices, by edicts, or by letters.

§ 10.- This Decree of the Senate applies to all those who conceal themselves, and who are required to grant freedom under the terms of a trust. Hence, no matter who is charged, whether it is the heir or anyone else, there will be ground for the application of the Decree of the Senate; for all of those who are obliged to grant freedom by virtue of a trust are in such a position that the Decree of the Senate will be applicable to them.

§ 11.- Wherefore, if the heir should conceal himself, and the legatee or the trustee who was asked to grant freedom to a slave is present, the Decree of the Senate will not take effect, and the grant of freedom will be prevented; for, in this instance, we suppose that the legatee has not yet obtained ownership of the slave.

27.- PAULUS; *Trusts, Book III*.- Therefore, in this case recourse must be had to the Emperor, in order that the interests of freedom may be consulted.

28.- ULPIANUS; *Trusts, Book V*.- Will there be ground for the application of the Rubrian Decree of the Senate, if a slave, to whom freedom was bequeathed by a trust, should be sold by the person charged with his liberation, and the purchaser should conceal himself, but the trustee should appear? Marcellus says that the Decree will apply, because the party who was charged to manumit the slave is not present.

§ 8.- Este Senadoconsulto se refiere a aquellos a quienes por causa de fideicomiso se les debía la libertad. Por consiguiente, si no se debiese la libertad, pero se engañó al Pretor respecto a la libertad, y se falló, no compete la libertad en virtud de este Senadoconsulto; y así lo resolvió por Rescripto nuestro Emperador juntamente con su padre.

§ 9.- Mas se debe llamar por el Pretor a los que deben la libertad dejada por fideicomiso, pero si no hubieren sido llamados, deja de tener lugar el Senadoconsulto Rubriano; por consiguiente, deben ser llamados con denunciaciones, edictos y cartas.

§ 10.- Este Senadoconsulto se refiere a todos los que se ocultan, que deben dar la libertad dejada por fideicomiso. Por lo tanto, ya si fuera un heredero rogado, ya si otro cualquiera, tiene lugar el Senadoconsulto; porque absolutamente todos los que debiesen dar la libertad dejada por fideicomiso se hallan en el caso de estar comprendidos en el Senadoconsulto.

§ 11.- Por lo cual, si ciertamente se ocultara el heredero, pero estuviera presente el legatario o el fideicomisario, a quien se le hubiera rogado que dé la libertad, deja de tener lugar el Senadoconsulto, y se impedirá, sin embargo, la libertad; porque supongamos que el legatario aun no alcanzó el dominio del esclavo.

27.- PAULO; *Fideicomisos, Libro III*.- Y así, en este caso se ha de recurrir al Príncipe, para que también en este caso se provea a favor de la libertad.

28.- ULPIANO; *Fideicomisos, libro V*.- Si aquel a quien se le había rogado hubiere vendido el esclavo, al cual se le había dejado la libertad por fideicomiso, y el comprador se ocultara; pero estuviera presente aquel a quien se le había rogado, ¿habrá lugar al Senadoconsulto Rubriano? Y dice Marcelo, que tiene lugar el Senadoconsulto Rubriano, porque está ausente el que debe manumitir.

§ 1.- Haec autem verba "adesse noluissent" non utique exigunt ut latitet is qui libertatem praestare debet: nam et si non latitet, contemnat autem venire, Senatusconsultum locum habebit.

§ 2.- Idem observatur etiam, si plures heredes constituti fideicommissam libertatem praestare rogati non iusta ex causa abesse pronuntiatum fuerit.

§ 3.- Eorum, qui iusta ex causa abessent, et eorum, qui praesentes fideicommissae libertati moram non facient, perinde libertus erit, atque si soli roati ad iustam libertatem perduxissent.

§ 4.- Si quis servum non hereditarium rogatus manumittere latitet, factum est Senatusconsultum, Aemilio Iunco et Iulio Severo consulibus in haec verba: "placere, si quis ex his, qui fideicommissam libertatem ex quacumque causa deberent servo, qui mortis tempore eius qui rogavit non fuerit, isque adesse negabitur, Praetor cognoscat et, si in ea causa esse videbitur, ut, si praesens esset, manumittere cogi deberet, id ita esse pronuntiet: cumque ita pronuntiasset, idem iuris erit, quod esset, si ita, ut ex fideicommisso manumitti debuisset, manumissus esset".

§ 5.- Ex iusta causa abesse eos demum dicendum est, qui non habent iniustam causam absentiae, quum sufficiat, quod non in fraudem libertatis absint, quo magis videantur ex iusta causa abesse: ceterum non est necesse, ut rei publicae causa absint. Proinde si alibi domicilium quis habeat, alibi petatur fideicommissaria libertas, dicendum est non esse necesse evocari eum, qui fideicommissam libertatem debere dicitur, quia etiam absente eo, si constiterit

§ 1.- The following words, "Refuse to appear," do not absolutely require that he whose duty it is to grant freedom should conceal himself, for if he does not do so, but merely fails to appear, the Decree of the Senate will be applicable.

§ 2.- The same rule should also be observed where several heirs are charged with the granting of freedom under the trust, and a decision rendered that no good cause exists for their absence.

§ 3.- The slave will become the freedman of those who are absent for a good reason, as well as of those who, being present, do not cause delay in the execution of the trust, just as if they alone had granted him his freedom.

§ 4.- Where anyone, having been charged to manumit a slave that does not belong to the estate, conceals himself, a Decree of the Senate to provide for such an emergency was enacted during the Consulate of Imilius Juncus and Julius Severus as follows: "It is decided that where any one of those who are charged to grant freedom to a slave under a trust, for any reason whatsoever, and the slave did not belong to the person who made the request at the time of his death, and the trustee refuses to appear, the Praetor shall take cognizance of the case, and if it is established that the slave has a right to be manumitted, and the person charged with his manumission is present, he must decide accordingly. And, after he has rendered his decision, the condition of the slave will be the same in law as it would have been if he had been manumitted by the person who was charged to do so under the trust."

§ 5.- It must be held that persons are not present for a good reason, when no improper cause exists for their absence; as it is sufficient if they have not absented themselves for the purpose of defrauding the slave of his freedom, in order that they may appear to be absent for a good reason. It is, however, not necessary that anyone should be absent on public business. Hence, if he has his domicile in one place, and he applies for freedom under the trust in another,

§ 1.- Mas estas palabras: «no hubiesen querido comparecer», no exigen, ciertamente, que esté oculto el que debiere dar la libertad; porque aunque no esté oculto, con tal que rehúse comparecer, tendrá lugar el Senadoconsulto.

§ 2.- Lo mismo se observa, también si habiéndoseles rogado a muchos herederos instituidos que den la libertad dejada por fideicomiso, se hubiere declarado que no están ausentes por justa causa.

§ 3.- Uno será liberto de los que estuviesen ausentes por justa causa, y de los que estando presentes no causaren mora para la libertad dejada por fideicomiso, lo mismo que si a ellos solos se les hubiera rogado que lo constituyesen en legítima libertad.

§ 4.- Si se ocultara alguno a quien se le hubiera rogado que manumitiese a un esclavo que no era de la herencia, se dio lugar al Senadoconsulto hecho bajo el consulado de Emilio Junco y Julio Severo en estos términos: «Está determinado, que si alguno de los que por cualquier causa debiesen por fideicomiso la libertad a un esclavo, que al tiempo de la muerte no hubiere sido del que rogó, y él se negare a comparecer, conozca de ello el Pretor; y si se viere que si estuviese presente se hallaría en el caso de que debería ser obligado a hacer la manumisión, declare que esto es así. Y cuando así lo hubiese declarado, se observará el mismo derecho que se observaría, si hubiese sido manumitido del modo que hubiese debido ser manumitido en virtud del fideicomiso».

§ 5.- Se ha de decir que están ausentes por justa causa solamente los que no tienen injusta causa para su ausencia, pues basta que no estén ausentes en fraude de la libertad, para que más bien se considere que están ausentes por justa causa; pero no es necesario que estén ausentes por causa de la República. Por consiguiente, si alguno tuviera el domicilio en una parte, y en otra se pidiera la libertad dejada por fideicomiso, se ha de decir que no es

libertatem deberi, pronuntiari potest iusta de causa eum abesse, nec libertum perdit: namque eos, qui apud sedes suas et domicilium suum sunt, nemo dubitabit ex iusta causa abesse.

29.- PAULUS; *libro III, Fideicommissorum*.- Si quis, posteaquam in ea causa esse coeperit, ut ex fideicommisso manumitti deberet, alienatus sit, is quidem, cuius interim servus erit, manumittere cogetur: sed hic non distinguitur, iusta an non iusta causa absit: omnimodo enim libertus ei servatur.

30.- ULPIANUS; *libro V, Fideicommissorum*.- Quum quasi absente quodam decretum fuisset interpositum ex iusta causa eum abesse, is autem mortuus iam esset, imperator noster rescripsit in heredis personam transferendum decretum eoque loco ius eius esse, quasi hunc ipsum ex eadem causa abesse pronuntiasset.

§ 1.- Si infans sit inter eos, qui manumittere debent, Senatus censuit, quum unius aetas impedierit, ut liberi liberaeque sint hi, quibus libertates ex causa fideicommissi praestari oportet.

§ 2.- Hoc idem erit dicendum et si solus sit heres institutus qui dari non potest.

§ 3.- Si vero pupillus tutorem habet isque nolit ad libertatem praestandum auctor esse, adeo non debet impedimento esse neque pupillo, ut libertos non habeat, neque libertati, ut Divi fratres rescripserint ex causa fideicommissi libertatem praestari debere servo, perinde atque si ab ipso pupillo tutore auctore manumissus esset.

it must be said that it is not essential for him who is alleged to be the one from whom the grant of freedom is due to be summoned, because if while he is absent, it should be established that freedom ought to be granted, a decree can be rendered that he is absent for a good reason, and he will not lose his rights over his freedman; for no one can entertain any doubt that he is absent for a just cause who is at his own residence.

29.- PAULUS; *Trusts, Book III*.- Where a slave is alienated after he has been placed in such a position that he ought to be liberated under the terms of a trust, the person to whom he belongs in the meantime will be compelled to manumit him. In this case, however, no distinction is made as to whether there is a good cause for his absence or not, for, in any event, he will be entitled to his freedom.

30.- ULPIANUS; *Trusts, Book V*.- When a decree is rendered by the Praetor that he who is absent has good reason for it, and he is already dead, Our Emperor stated in a Rescript that the decree must be transferred to his heir, and that the law would apply to him just as if the Praetor had decided that he himself was absent for a good reason.

§ 1.- Where an infant was among the slaves entitled to manumission, the Senate decided that the age of one of them would prevent the others who were entitled to be free under the terms of the trust from obtaining their liberty.

§ 2.- This rule will also apply where only one heir is appointed, and he is unable to speak for himself.

§ 3.- When, however, the minor has a guardian, and he is unwilling to authorize the grant of freedom, the Divine Brothers stated in a Rescript that the slave should become free under the terms of the trust, just as if he had been manumitted by the minor himself, by the authority of his guardian; and that it should not be productive of any disadvantage to the minor, nor would it, in any way, prejudice the grant of freedom,

necesario llamar al que se dice que debe la libertad dejada por fideicomiso, porque, aun estando él ausente, se puede declarar, si constare que se debe la libertad, que está ausente por justa causa, y no pierde el derecho sobre el liberto; porque nadie dudará que los que se hallan en su residencia y domicilio están ausentes por justa causa.

29.- PAULO; *Fideicomisos, libro III*.- Si alguno hubiera sido enajenado después que hubiere comenzado a estar en el caso de que debiese ser manumitido en virtud de fideicomiso, será ciertamente obligado a manumitirlo aquel de quien mientras tanto fuere esclavo; pero en este caso no se distingue si está ausente por causa justa o no justa porque de todos modos se le reserva a aquél la libertad.

30.- ULPIANO; *Fideicomisos, libro V*.- Habiéndose interpuesto, como si uno estuviera ausente, decreto en virtud del cual él se hallaba ausente por justa causa, pero habiendo fallecido ya él, resolvió por rescripto nuestro Emperador, que se debía transferir el decreto a la persona del heredero, y que sobre este particular su derecho era igual que si hubiese declarado que él mismo estaba ausente por la misma causa.

§ 1.- Si entre los que deben hacer la manumisión hubiera alguno en la infancia, decretó el Senado, que, cuando la edad de uno sólo lo impidiera, fuesen libres aquellos y aquellas a quienes se les debe dar la libertad por causa de fideicomiso.

§ 2.- Esto mismo se habrá de decir, también si hubiera un solo heredero instituido, que todavía no puede hablar.

§ 3.- Mas si el pupilo tiene tutor, y éste no quisiera autorizar la dación de la libertad, no debe por ello servir de impedimento ni al pupilo para que tenga los libertos, ni a la libertad, según resolvieron por, rescripto los Divinos Hermanos, que por causa de fideicomiso se le debe dar la libertad a un esclavo, lo mismo que si hubiese sido manumitido por el mismo pupilo con la autoridad del tutor.

if he did not have the slave as his freedman.

§ 4.- Quicumque igitur casus inciderit, quo is qui fari non potest fideicommissae libertati subiectus est, accommodabimus mentem Senatusconsulti, quae etiam ad heredem infantem rogati trahenda est.

§ 5.- Adeundus est autem etiam ex hac causa Praetor, praesertim quum Rescripto Divi Pii effectum est, ut, si quidam ex rogatis praesentes sunt, alii latitent, alii ex causa absint, intercedente infantis persona non omnium libertus efficiatur, sed tantum infantis et eorum qui ex iusta causa absunt vel etiam praesentium.

§ 6.- Si plures heredes sunt instituti et inter eos qui fari non potest, sed non ipse rogatus sit servum manumittere, non oportere intercidere libertatem ob hoc, quod coheredibus suis vendere eum infans non possit: et extat quidem Senatusconsultum Vitrasianum, sed et Divus Pius Cassio Dextro Rescripsit ita rem explicari, ut partes servorum, quibus per fideicommissum libertas data est, iusto pretio aestimentur atque ita servus ab his qui rogati sunt manumittatur. Hi autem, qui eos manumiserunt, pretii nomine perinde fratribus et coheredibus suis obligati erunt, atque si ob eam rem ex iudicati causa quum his agi possit.

§ 7.- In furiosi persona Divus Pius Rescripsit fideicommissam libertatem non impediri sub conditione scripti heredis, quem compotem mentis non esse affirmatur. Igitur si constiterit ei recte datam per fideicommissum libertatem, decretum interponetur, quo id ipsum complectatur, ad exemplum infantis.

§ 4.- Therefore, when any case occurs in which a child is not able to speak for himself, and yet is charged with a grant of freedom under a trust, we must take into consideration the spirit of the Decree of the Senate, which even extends to the infant heir of the person charged with the execution of the trust.

§ 5.- Recourse should also be had to the Praetor under these circumstances, especially as it is provided by a Rescript of the Divine Pius that where some of those charged with the execution of the trust are present, and others have concealed themselves, and others again are absent for some good reason, and there is also an infant, the slave will not become the freedman of all of them, but only of the infant and of those who are absent for a good reason, or of those who are present.

§ 6.- Where several heirs are appointed, and among them there is one who cannot speak for himself, but who has not been charged to manumit the slave, the grant of freedom will not lose its effect because the infant cannot sell his share of the slave to his co-heirs. The Vitra-sian Decree of the Senate is applicable in this instance. The Divine Pius, however, stated in a Rescript addressed to Cassius Dexter, that the matter could be disposed of as follows, namely, by appraising the shares of the slaves to whom freedom was granted under the terms of the trust, at their true value, and then directing the slaves to be manumitted by the persons charged with that duty. Those who manumitted them will, however, be liable to their brothers and coheirs, just as if judgment had been rendered against them on this account in court.

§ 7.- The Divine Pius stated in a Rescript, with reference to an insane person, that freedom granted under a trust was not prevented on account of the condition of the appointed heir, where it was alleged that he was not of sound mind; and, therefore, if it should be established that freedom had been legally provided for by the trust, a decree must be rendered in which this is stated.

§ 4.- Así, pues, cualquiera que sea el caso en que aconteciere que está obligado a la libertad dejada por fideicomiso el que todavía no puede hablar, aplicaremos el espíritu del Senadoconsulto que se ha de extender también al heredero, que aun no puede hablar, del que fue rogado.

§ 5.- Mas también se ha de recurrir al Pretor en virtud de esta causa, mayormente, porque en el rescripto del Divino Pío se determinó, que si algunos de los rogados estuvieran presentes, otros se ocultaran, y otros estuvieran ausentes con causa, mediando la persona de uno que todavía no habla, el esclavo no se hace liberto de todos, sino solamente del que todavía no habla y de los que están ausentes por justa causa, y también de los presentes.

§ 6.- Si fueron instituidos varios herederos, y entre ellos alguno que todavía no puede hablar, pero a éste no se hubiera rogado que manumita al esclavo, no se debe extinguir la libertad porque el que está en la infancia no pueda venderlo a sus coherederos. Y hay ciertamente el Senadoconsulto Vitrasiano; pero también el Divino Pío respondió por rescripto a Cassio Dextro, que el caso se resuelve de manera, que se estimen en su justo precio las porciones de los esclavos a quienes se les dió por fideicomiso la libertad, y que de este modo sea manumitido el esclavo por aquellos a quienes se les rogó. Mas los que los manumitieron se habrán obligado por razón del precio a sus hermanos y coherederos, lo mismo que por si virtud de esto se pudiera ejercitar contra ellos acción por causa de cosa juzgada.

§ 7.- Respecto a la persona del furioso, respondió por rescripto el Divino Pío, que la libertad dejada por fideicomiso no se impide por la condición del heredero instituido, que se afirma que no está en su cabal juicio; así, pues, si constare que debidamente le fue dada a uno por fideicomiso la libertad, se interpondrá decreto en el que se comprenderá esto mismo.

§ 8.- Ergo et in mutō et in surdo subvenietur.

§ 9.- Sed et si quis sine herede vel alio successore decesserit qui fideicommissam libertatem praestare debebat, adito praetore libertatem praestandam esse censuit Senatus.

§ 10.- Sed et si suus heres se abstinuerit, libertati fideicommissae per Senatusconsultum subventum est, tametsi non est sine herede, qui suum heredem habet licet abstinenter se.

§ 11.- Idem dicendum et si minor viginti quinque annis adierit hereditatem eius, qui libertatem fideicommissam debebat, et in integrum sit restitutus abstinendi causa.

§ 12.- Quaerendum est autem, cuius libertus iste fit: ex constitutione enim servo libertas perinde competit, atque si ex testamento libertatem consecutus esset. Erit igitur libertus orcinus, non eius qui fideicommissam libertatem debebat.

§ 13.- Si alter sine successore decesserit, alter ex iusta causa absit, extat rescriptum divorum marci et veri perinde dicentium eum ad libertatem perventurum, ac si ab eo qui sine successore decessit et ab eo qui ex iusta causa abesset ad libertatem ut oportuit perductus esset.

§ 14.- Eleganter quaeri potest, quum heres sine successore decedit, utrum expectari debet, donec certum sit heredem vel bonorum possessorem non extaturum, an vero etiam dum incertum est (forte deliberante herede scripto) possit ad libertatem pervenire: et melius est expectari oportere, quoad certum esse coeperit successorem non extaturum.

§ 8.- Relief should be granted to a deaf and dumb person just as in the case of an infant.

§ 9.- Where anyone dies without leaving an heir or other successor who can execute the trust conferring freedom, the Senate decreed that relief should be granted upon application being made to the Praetor.

§ 10.- If, however, a proper heir should reject the estate, relief should be granted by the Decree of the Senate to the person entitled to freedom under the trust; even though he cannot be said to die without an heir, who leaves a proper heir, even if he rejects the estate.

§ 11.- The same rule will also apply where a minor of twenty-five years of age enters upon the estate of the person charged with granting him freedom, and obtains complete restitution because of his rejection of the estate.

§ 12.- It may also be asked whose freedman the slave becomes; for, in accordance with the constitution, he obtains his freedom just as if he had acquired it by virtue of the will. He will, therefore, become the freedman of the deceased, and not of him who was charged with the execution of the trust.

§ 13.- A Rescript of the Divine Marcus and Verus is extant which says that where one of those charged with the execution of the trust dies without leaving a successor, and the other is absent for some good reason, the slave shall be entitled to his freedom, just as if it had been granted to him regularly by the person who died without a successor, or by him who was absent for a good reason.

§ 14.- A very nice point may arise; that is, where an heir dies without a successor, whether the slave can obtain his freedom before it is certain that an heir or a possessor of the estate under the Praetorian Edict will not appear, or while it is still doubtful (for instance, while the appointed heir is deliberating), whether he will accept the estate. The better opinion is that it is necessary to wait until it is certain that no successor will appear.

§ 8.- Luego, a la manera que al que está en la infancia, se le auxiliará al mudo, y también al sordo.

§ 9.- Pero también si alguno hubiere fallecido sin heredero, o sin otro sucesor, que debía dar la libertad dejada por fideicomiso, decretó el Senado que recurriéndose al Pretor se debía dar la libertad.

§ 10.- Mas si se hubiere abstenido de la herencia un heredero suyo, se auxilió también por el Senado-consulta a la libertad dejada por fideicomiso, aunque no esta sin heredero el que tiene heredero suyo, por más que éste se abstenga.

§ 11.- Lo mismo se ha de decir, también si un menor de veinticinco años hubiere adido la herencia del que debía la libertad dejada por fideicomiso, y hubiera sido restituido por entero para abstenerse.

§ 12.- Pero se ha de preguntar de quién éste se hace liberto; porque en virtud de la Constitución al esclavo le compete la libertad lo mismo que si hubiese conseguido la libertad por virtud del testamento; sera, pues, liberto orcinus, y no del que debía la libertad dejada por fideicomiso.

§ 13.- Pero si uno hubiere fallecido sin sucesor, y otro estuviera ausente con justa causa, hay un rescripto de los Divinos Marco y Vera, que dicen que el esclavo habrá de llegar a la libertad lo mismo que si hubiese sido constituido en libertad, como se debió, por el que falleció sin sucesor, y por el que estuviese ausente con justa causa.

§ 14.- Con razón se puede preguntar, cuando el heredero fallece sin sucesor, si se debe esperar hasta que sea cierto que no habrá heredero o poseedor de los bienes, o si también puede el esclavo llegar a la libertad mientras sea incierto, acaso por estar deliberando el heredero instituido. Y es mejor que se haya de esperar hasta que comencare a ser cierto que no habrá sucesor.

§ 15.- Imperator noster Antoninus Rescripsit eum cui fideicommissa libertas debetur, sine libertate aliquid ex testamento heredis accipere posse.

§ 16.- Divus etiam Marcus Rescripsit fideicommissas libertates neque aetate neque condicione neque mora non praestantium tardiusve reddentium corrumpi aut in deteriore statu perducere.

§ 17.- Quamquam ex irritis codicillis libertates non debeantur, attamen si heres hos codicillos ratos habuit et ex his quaedam praestitit et servos praestandae fideicommissae libertatis gratia in libertate morari voluit, ad iustam libertatem eos pervenisse rescriptum imperatoris nostri et divi patris eius declarat.

31.- PAULUS; *libro III, Fideicommissorum.*- Alieno servo dari potest per fideicommissum libertas, si tamen eius sit, cum quo testamenti factio est.

§ 1.- Quum intestato moriturus fidei filii commississet, ut servum manumitteret, et postumus ei natus fuisset, Divi Fratres Rescripserunt libertatem, quia dividi non potest, ab utroque praestandam.

§ 2.- Qui fideicommissariam libertatem debet, etiam eo tempore, quo alienare prohibitus erit, manumittere poterit.

§ 3.- Si patronus contra tabulas bonorum possessionem acceperit, quia eum praeterierit libertus, non cogetur vendere servum proprium, quem rogatus erat a liberto suo manumittere.

§ 4.- Si is cuius servus est nolit eum vendere, ut manumitteretur, nullae Praetoris partes sunt: idem est et si pluris iusto vendere velit. Sin autem certo quidem pretio, quod non prima facie videtur esse

§ 15.- Our Emperor, Antoninus, stated in a Rescript that a slave who is entitled to freedom by virtue of a trust cannot receive anything under the will of the heir without his freedom being mentioned.

§ 16.- The Divine Marcus also stated in a Rescript that grants of freedom under a trust could not be annulled or unfavorably affected by the age, the condition, the default, or the tardy action of those who were required to see that they were executed.

§ 17.- Although a bequest of freedom made by a codicil which is void is not due, still, if the heir considered the codicil to be valid, and paid out anything under it, and desired that the slaves should remain free for the sake of carrying out the provisions of the trust, it has been declared by a Rescript of Our Emperor and his Divine Father that they will justly be entitled to their freedom.

31.- PAULUS; *Trusts, Book III.*- Freedom can be granted under a trust to a slave belonging to another, provided he has testamentary capacity with reference to his master.

§ 1.- Where a person about to die intestate charged his son to manumit a certain slave, and a posthumous child was afterwards born to him, the Divine Fathers stated in a Rescript that, because the slave could not be divided, he should be manumitted by both the heir at law and the posthumous child.

§ 2.- A person who is charged with a grant of freedom under a trust can manumit a slave, even at the time when he is forbidden to alienate him.

§ 3.- If a patron acquires praetorian possession contrary to the provisions of the will, because his freedman has passed him over, he cannot be compelled to sell his own slave whom he was requested by his freedmen to manumit.

§ 4.- Where the person to whom a slave belongs is unwilling to sell him in order that he may be manumitted, the Praetor has no cause to interfere. The same rule applies when he wishes to sell him for

§ 15.- Respondió por rescripto nuestro Emperador Antonino, que aquel a quien se le debe la libertad por fideicomiso puede adquirir por virtud de testamento del heredero alguna cosa sin la libertad.

§ 16.- También respondió por rescripto el Divino Marco, que las libertades, dejadas por fideicomiso no son alteradas o reducidas a peor condición ni por la edad, ni por la condición, ni por morosidad de los que no las dan o de los que las dan tardíamente.

§ 17.- Aunque no se deba la libertad en virtud de codicilos nulos, sin embargo, si el heredero tuvo por válidos estos codicilos, y en virtud de ellos entregó algunas cosas, y quiso, para darles la libertad dejada por fideicomiso, que los esclavos viviesen en libertad, se declara en un rescripto de nuestro Emperador y de su Divino Padre, que aquéllos llegaron a la libertad legítima.

31.- PAULO; *Fideicomisos, libro III.*- A un esclavo ajeno se le puede dar por fideicomiso la libertad, si, no obstante, fuera de uno con quién hay testamentifacción.

§ 1.- Cuando el que hubiese de morir intestado hubiese encomendado a la fidelidad de su hijo que manumitiera a un esclavo, y le hubiese nacido un póstumo, resolvieron por rescripto los Divinos Hermanos, que, como no se puede dividir, había de darse por ambos la libertad.

§ 2.- El que debe la libertad dejada por fideicomiso podrá manumitir aun en aquel tiempo en que le estuviere prohibido enajenar.

§ 3.- Si el patrono hubiere recibido la posesión de los bienes contra el testamento, porque el liberto lo hubiere preterido, no será obligado a vender su propio esclavo, que por su liberto se le había rogado que lo manumitiera.

§ 4.- Si aquél, de quien es un esclavo, no quisiera venderlo para que sea manumitido, el Pretor no tiene intervención alguna. Lo mismo es, también si quisiera venderlo por mas de lo justo. Mas si el dueño

iniquum, dominus servum vendere paratus est, si vero, qui rogatus est manumittere, immodicum id esse nititur, praetoris partes erunt interponendae, ut iusto pretio volenti domino dato libertas ab emptore praestetur. Quod si et dominus vendere paratus sit et servus velit manumitti, cogendus est heres redimere et manumittere, nisi dominus velit servum manumittere, ut actio sibi pretii in heredem detur: idque faciendum est etiam, si heres latitet: et ita Imperator Antoninus Rescripsit.

32.- MAECIANUS; *libro XV, Fideicommissorum*.- Sed si alienare quidem sit paratus, non ante tamen id velit facere, quam sibi in pretium satisfiat, non erit manumittere compellendus, ne et servum manumittat et interdum nihil aut minus consequatur, si forte is, qui rogatus est manumittere, solvendo non sit.

§ 1.- Invito tamen servo neque alii neque domino eam rem persequi concedendum est, quia non tale sit hoc fideicommissum, ex quo domino quid adquiratur: alioquin ipsi datum videretur. Quod potest contingere, si testator pluris eum servum, quam quanti est, redimi ac manumitti voluit: nam tunc et domino erit fideicommissi persecutio, cuius interest Praeter verum pretium id, quod plus ei iussus est dare, consequi, et servi, ut ad libertatem perveniat.

§ 2.- Quod eveniet et si rem alienam certa pecunia redimere atque alii praestare heres vel legatarius intellegentur: namque tunc et domino rei et ei, cui eadem praestare deberet, persecutionem esse: utriusque enim interesse et domini, ut Praeter pretium accipiat, quo pluris eam testator redimi iussit, et eius cui relicta est, uti eam habeat.

more than a just price. If, however, the master is ready to sell his slave for a certain sum which, at the first glance, does not appear to be unjust, and he who was asked to manumit him contends that the price is unreasonable, the Praetor should interpose his authority, so that a just price having been paid with the consent of the master freedom may be granted to the slave by the purchaser. If, however, the master is willing to sell the slave, and the latter desires to be manumitted, the heir should be compelled to purchase and manumit him; unless the master wished to manumit the slave in order that an action might be granted him against the heir to recover the price. The same should be done if the heir conceals himself. The Emperor Antoninus, also, stated this in a Rescript.

32.- MAECIANUS; *Trusts, Book XV*.- If the master is ready to alienate the slave, but is not willing to do so before he is satisfied with the price, he ought not to be compelled to liberate him, lest, if he did it, he might obtain little or nothing, if he who is asked to manumit him should prove to be insolvent.

§ 1.- If the slave does not consent, neither the master nor anyone else should be permitted to proceed with the matter, because a trust of this kind is not one by which anything is acquired by the master; otherwise, the benefit of the trust would appear to accrue only to himself. This might happen if the testator wished the slave to be purchased for more than he was worth, and be manumitted, for then the master could proceed with the execution of the trust; because it would be to his interest to obtain, in addition to the true value of the slave, any excess which the testator ordered to be given him; and it is to the interest of the slave to secure his freedom.

§ 2.- This will occur where the heir or the legatee is directed to purchase certain property for a special sum of money, and deliver it to another; for then both the owner of the property and the person to whom it is to be delivered can proceed to compel the execution of the trust, as both of them are interested in doing so; the owner, in order that he may obtain any excess over and above the price which the testator has

está dispuesto a vender el esclavo por cierto precio, que a primera vista no parece que es injusto, y aquel a quien se le rogó que lo manumitiera se empeña en que es inmoderado, se habrán de interponer los oficios del Pretor, para que, dado el justo precio al dueño que lo quiere vender, se le dé por el comprador la libertad. Mas también si el dueño estuviera dispuesto a venderlo, y el esclavo quisiera ser manumitido, ha de ser obligado el heredero a comprarlo y a manumitirlo, a no ser que el dueño quiera manumitir al esclavo; para que a él se le dé contra el heredero la acción por el precio. Y esto se ha de hacer, también si se ocultara el heredero; y así lo resolvió por rescripto el Emperador Antonino.

32.- MECIANO; *Fideicomisos, libro XV*.- Pero si ciertamente estuviera dispuesto a enajenarlo, mas no quisiera hacerlo antes que se le satisficiera el precio, no habrá de ser compelido a manumitirlo no sea que manumita al esclavo y no obtenga nada u obtenga menos, si por ventura fuese insolvente aquel a quien se le rogó que lo manumitiera.

§ 1.- Mas contra la voluntad del esclavo no se le ha de conceder ni a otro, ni al dueño, que lleve la cosa a ejecución, porque este fideicomiso no es tal, que por él se adquiera algo para el señor; de otra suerte, parecería que se le dió a él mismo. Lo que puede acontecer, si el testador quiso que el esclavo fuese comprado en más de lo que vale, y que fuera manumitido; porque entonces tendrá acción para perseguir el fideicomiso también el señor, a quien le interesa conseguir, además del verdadero precio, lo que se mandó que se le diera de más, y al esclavo, llegar a la libertad.

§ 2.- Esto acontecerá también si se encomendase al heredero o al legatario que comprara una cosa ajena con cierta cantidad, y que se la entregase a otro; porque entonces tienen la acción persecutoria así el dueño de la cosa como aquel a quien la misma debiese ser entregada; porque a ambos les interesa, al dueño, recibir además del precio aquello en que por más dispuesto el testador que fuera comprada la cosa, y

33.- PAULUS; *libro III, Fideicommissorum*.- Si filius defuncti rogatus fuerit servum sui patris manumittere, dicendum est posse eum etiam contra tabulas habere et operas imponere: hoc enim potuisset, etiamsi directam libertatem acceperisset, quasi patroni filius.

§ 1.- Erit Rubriano Senatusconsulto locus, etiamsi sub condicione libertas data sit, si modo per ipsum servum non fiet, quo minus condicioni pareat: nec refert in dando an in faciendo an in aliquo casu condicio consistat. Immo etiam amittit libertum heres, si condicioni impedimentum fecerit, etsi filius defuncti sit, quamvis alio iure habiturus sit libertum. nonnullam enim et hic poenam patitur: nam et si in servitutem petierit aut capitis accusaverit, perdit bonorum possessionem contra tabulas.

§ 2.- Si is cui servus legatus est rogatus fuerat, ut eum manumitteret, et nolit eum accipere, compellendus est aut actiones suas ei praestare cui servus velit, ne intercidat libertas.

34.- POMPONIUS; *libro III, Fideicommissorum*.- Invitus is, cui fideicommisso libertas relicta est, non est tradendus alii, ut ab eo manumittatur et fiat alterius libertus, quam qui rogatus est manumittere.

§ 1.- Campanus ait, si minor annis viginti rogaverit heredem, ut proprium servum manumittat, praestandam ei libertatem, quia hic lex aelia sentia locum non habet.

ordered to be given him, and the person to whom the property was left, in order that he may acquire it.

33.- PAULUS; *Trusts, Book III*.- Where the son of the deceased is asked to manumit a slave belonging to his father, it must be said that he can have him as his freedman under the Praetorian Edict, and impose services upon him; for he can do this as the son of the patron, even if the slave should obtain his freedom directly.

§ 1.- There will be ground for the application of the Rubrian Decree of the Senate even when freedom is granted under a condition, provided compliance with the condition is not imposed upon the slave himself. Nor does it make any difference whether the condition consists of giving or doing something, or is dependent upon the occurrence of any other event, for the heir will lose his freedom as the son of the deceased if he places any obstacle in the way of the fulfillment of the condition, even though he can acquire his right over the freedman in another way. Sometimes he suffers a penalty, for if he demands that the slave shall remain in servitude, or accuses him of a capital crime, he will lose praetorian possession contrary to the provisions of the will.

§ 2.- Where a slave is bequeathed to anyone who is charged to manumit him, but refuses to accept him, he can be compelled to do so, or to assign his rights of action to whomever the slave may select, in order that the grant of freedom may not be annulled.

34.- POMPONIUS; *Trusts, Book III*.- When the person to whom a slave is left to be liberated under a trust is unwilling, the slave should not be delivered to him in order to be manumitted; but he can become the freedman of another than the one who was requested to emancipate him.

§ 1.- Campanus says that if a minor of twenty years of age should ask his heir to manumit a slave who belongs to him, his freedom must be granted; because, in this instance, the Lex Aelia Sentia does not apply.

a éste, a quien le fue dejada, tenerla.

33. PAULO; *Fideicomisos, libro III*.- Si al hijo del difunto se le hubiere rogado que manumitiera a un esclavo de su padre, se ha de decir que él puede tener la posesión de los bienes aun contra el testamento, e imponerle servicios; porque esto habría podido como hijo del patrono, aunque hubiese recibido la libertad directa.

§ 1.- Habrá lugar al Senadoconsulto Rubriano, aunque la libertad haya sido dada bajo condición, si por el mismo esclavo no se hiciera de modo que no se cumpla la condición; y no importa que la condición consista en dar o en hacer, o en algún accidente. Aún más, el heredero pierde el liberto, si hubiere causado impedimento para la condición, aunque sea hijo del difunto, por más que hubiera de tener por otro derecho al liberto; porque también en este caso sufre alguna pena, pues también si lo hubiere reclamado a esclavitud, o lo hubiere acusado de delito capital, pierde la posesión de los bienes contra el testamento.

§ 2.- Si a aquel a quien se legó un esclavo se le hubiera rogado que lo manumitiese, y no quisiera recibirlo, ha de ser compelido a cederle las acciones a quién el esclavo quiera, para que no se invalide la libertad.

34.- POMPONIO; *Fideicomisos, libro III*.- Aquel a quien se le dejó por fideicomiso la libertad no ha de ser contra su voluntad entregado a otro, para que por éste sea manumitido, y se haga liberto de otro que de aquel a quien se le rogó que lo manumitiese.

§ 1.- Dice Campano, que si un menor de veinte años le hubiere rogado a su heredero, que manumita a un esclavo propio, se le ha de dar a éste la libertad, porque en este caso no tiene lugar la ley Elia Sencia.

§ 2.- Servus legatus erat Calpurnio Flacco isque rogatus erat eum manumittere et, si non manumisisset, idem servus Titio legatus erat et is aeque rogatus erat, ut eum manumitteret: si non manumisisset, liber esse iussus erat. Sabinus dicit inutiliter legatum fore et ex testamento eum continuo liberum futurum.

35.- MAECIANUS; *libro XV, Fideicommissorum*.- Gaii Cassii non est recepta sententia existimantis et heredi et legatario remittendam interdum proprii servi manumittendi necessitatem, si vel usus tam necessarius esset, ut eo carere non expediret, veluti dispensatoris paedagogive liberorum, vel tantum delictum est, ut ultio remittenda non esset: visum est enim ipsos in sua potestate habuisse: nam potuissent discedere a causa testamenti: qua non omissa debere voluntati defuncti obsequi.

36.- IDEM; *libro XVI, Fideicommissorum*.- Neque infantes neque furiosi neque ab hostibus capti neque hi, quos religio aut honestior causa vel calamitas aliqua vel maior res familiaris aut capitis famaevae periculum aut similis causa moretur, rubriano Senatusconsulto continentur: ac ne pupilli quidem, qui tutores non habent, aut eos habeant, quos earum quae causa detinet. Sed nec, si hi data opera sui potestatem non faciunt, puto pupillis libertos eripi, quia et iniquum est facto tutoris, qui forsitan solvendo non sit, pupillum damno adfici, et Senatusconsulto non continetur alius quis quam qui ex causa fideicommissi debet praestare libertatem. Quid ergo est? Dasumiano Senatusconsulto subvenitur his, quo cautum est de his, qui iusta ex causa abessent, ut nec libertas impediatur nec libertus eripiaturs his, qui fraude careant.

§ 2.- A slave was bequeathed to Calpurnius Flaccus, who was charged to manumit him, and if he refused, the same slave was bequeathed to Titius, who was also charged to manumit him; and if he should fail to do so, the slave was ordered to be free. Sabinus says that the legacy is void, and that the slave will become free immediately by the terms of the will.

35.- MAECIANUS; *Trusts, Book XV*.- The opinion of Gaius Cassius is not adopted, for he held that the obligation of manumitting his own slave should not be imposed upon the heir or the legatee, if the services of the slave were so necessary that he could not dispense with them; as, for instance, where he was his steward, or the teacher of children, or where he had committed an unpardonable crime. For the testator is considered to have had these slaves in his power, and the owners have the right to reject the will, but if this is not done, the wishes of the deceased should be carried out.

36.- THE SAME; *Trusts, Book XVI*.- Neither infants, insane persons, captives taken by the enemy, nor those whom religion or any honorable cause, or some calamity, or important business, or the danger of forfeiting life or reputation, or anything of this kind detains, come within the scope of the Rubrian Decree of the Senate; nor, indeed, minors who have no guardians, and even if they have any, are they or their guardians subject to its provisions, where any of the above-mentioned matters are involved. For, even if the latter designedly refrain from exerting their authority, I do not think that their wards should be deprived of the rights over their freedmen, because it is unjust that a ward should suffer wrong by the act of his guardian who, perhaps, may not be solvent, and only those are included in the Decree of the Senate who are obliged to grant freedom in accordance with the provisions of the trust. What course must then be pursued? Relief is granted to such persons by the Dasumian Decree of the Senate, under which provision is made with reference to those who are absent for some good reason, in order that no impediment may be placed in the way of freedom, and that the rights over a freedman may not be taken

§ 2.- Se le había legado un esclavo a Calpurnio Flacco, y se le había rogado a éste que lo manumitiera; y si no lo hubiese manumitido, fue legado el mismo esclavo a Ticio, y a éste se le rogó igualmente que lo manumitiera; si no lo hubiese manumitido, se dispuso que fuera libre; dice Sabino, que se habrá hecho el legado inútilmente, y que aquél habrá de ser libre inmediatamente en virtud del testamento.

35.- MECIANO; *Fideicomisos, libro XV*.- No fue admitida la opinión de Cayo Cassio, que estimaba que al heredero y al legatario se les había de dispensar a veces la necesidad de manumitir a un esclavo propio, ya si su servicio les fuese tan necesario que no les conviniera carecer de él, como si fuera mayordomo o pedagogo de los hijos, ya si hay un delito tan grave, que no se les haya de remitir el castigo; porque se consideró que los tuvieron bajo su potestad, pues habrían podido separarse de la causa del testamento; más no prescindiendo de ella, deben cumplir la voluntad del difunto.

36.- EL MISMO; *Fideicomisos, libro XVI*.- Ni los que están en la infancia, ni los furiosos, ni los aprehendidos por los enemigos, ni aquellos a quienes retiene la religión, o una causa más honesta, o alguna calamidad, o grave negocio de familia, o el peligro de su vida o de su fama, u otra causa semejante, están comprendidos en el Senadoconsulto Rubriano; ni tampoco los pupilos que no tienen tutores, o que tienen aquellos a quienes detiene alguna causa de éstas. Pero si de intento no se presentan éstos, opino que no se les arrebatan los libertos a los pupilos, porque es injusto que por hecho del tutor, que acaso no sea solvente, se le cause daño al pupilo; y en el senadoconsulto no se comprende otro cualquiera, sino el que por causa de fideicomiso debe dar la libertad. ¿Qué se dirá, pues? Que a éstos se les auxilia con el Senadoconsulto Dasumiano, en el cual se dispuso, respecto a los que estuviesen ausentes por justa causa, que ni se impida la libertad, ni se prive de un liberto a los que estén exentos de fraude.

from those who are not guilty of fraud.

§ 1.- Si per procuratorem quis defendatur, semper iusta ex causa abesse dicitur nec libertus ei eripitur.

§ 2.- Nihil facit ad interpellandam iurisdictionem eius, qui de fideicommissa libertate cognoscit, privilegium cuiusque vel civitatis vel corporis vel officii, in quo quisque est, vel condicio personarum.

37.- ULPIANUS; *libro VI, Fideicommissorum*.- Si pure data sit fideicommissa libertas et is servus rationes administrasse dicatur, Divus Marcus Rescriptis moram libertati non esse faciendam, ex continenti tamen arbitrum dandum esse, qui computationem ineat. Verba rescripti ita se habent: "aequius videtur trophimo ex causa fideicommissi praestari libertatem, quam sine condicione reddendarum rationum datam esse constat, neque humanum fuerit ob rei pecuniariae quaestionem libertati moram fieri. Qua tamen repraesentata confestim arbiter a praetore erit dandus, apud quem rationem, quam administrasse eum apparuit, ex fide reddat". Tantum igitur rationes reddere cogetur. Sed an et reliqua restituere debeat, nihil adicitur, nec puto cogendum: nam de eo, quod in servitute gessit, post libertatem conveniri non potest. Corpora plane rationum et si quas res vel pecunias ex his detinet cogendus est per praetorem restituere: item de singulis instruere.

38.- PAULUS; *libro III, Decretorum*.- In testamento, quod perfectum non erat, alumnae suae libertatem et fideicommissa dedit. Quum omnia ut ab

§ 1.- If an absent party is defended by an attorney, he is always held to be absent for some good reason, and he will not be deprived of his rights over his freedman.

§ 2.- No objection can be urged against the jurisdiction of a magistrate who has cognizance of a grant of freedom under a trust, by alleging a personal privilege, or one attaching to a municipality or a corporation, or any office held by anyone, or the civil condition of any of the parties interested.

37.- ULPIANUS; *Trusts, Book VI*.- When an absolute grant of freedom is made under the terms of a trust to a slave who is said to have administered the affairs of his master, the Divine Marcus stated in a Rescript that it should not be delayed; but that an arbiter must immediately be appointed for the purpose of compelling the slave to render an account. The words of the Rescript are as follows: "It seems to be the more equitable course to grant freedom to Trophimus at once under the trust, because it is established that it was bestowed without the condition of his rendering an account. Nor would it be humane for the enjoyment of his liberty to be delayed on account of any pecuniary question which may arise. However, as soon as he obtains his freedom, an arbiter should be appointed by the Praetor before whom he who transacted the business must appear and render an account." Therefore, he is only obliged to render an account, but nothing is said as to his paying over any balance which may remain in his hands. I do not think that he can be forced to do so, for he cannot be sued after having obtained his freedom on account of any business which he transacted while in servitude. It is clear that he can be forced by the Praetor to surrender any property mentioned in his accounts, and all the articles or money of which he has possession, as well as to give information with reference to special matters.

38.- PAULUS; *Decrees, Book III*.- A testator, whose will was not perfect, bequeathed freedom and a trust to a female slave whom he had reared. As all

§ 1.- Si alguno se defendiera por medio de procurador, se dice siempre que está ausente por justa causa, y no se le priva del liberto.

§ 2.- Para impedir la jurisdicción del que conoce de la libertad dejada por fideicomiso, nada importa el privilegio de cualquiera, o el de la ciudad, o corporación, u oficio en que se halle alguno, o la condición de las personas.

37.- ULPIANO; *Fideicomisos, libro VI*.- Si hubiera sido dada puramente la libertad dejada por fideicomiso, y se dijera que el esclavo había administrado cuentas, respondió por rescripto el Divino Marco, que no se había de demorar la libertad, sino que inmediatamente se había de nombrar árbitro, que examine las cuentas. Dicen así las palabras del rescripto: «Parece más equitativo, que por causa de fideicomiso se le dé a Trofimo la libertad, que se sabe se dió sin la condición de rendir cuenta; y no sería humano que por una cuestión pecuniaria se causase mora para la libertad; pero, anticipada ésta, se habrá de nombrar inmediatamente por el Pretor árbitro ante el cual rinda con fidelidad la cuenta, que se haya visto que administró» Así, pues, será obligado solamente a rendir las cuentas; pero nada se añade sobre si deberá restituir también los sobrantes: y no creo que haya de ser obligado; porque después de obtenida la libertad no puede ser demandado por lo que hizo durante la esclavitud. Pero ha de ser obligado por el Pretor a restituir los documentos de las cuentas, y las cosas o las cantidades que de ellas retiene, y también a dar explicaciones sobre cada cosa.

38.- PAULO; *Decretos, libro III*.- En un testamento, que no se había perfeccionado, le dió uno a su alumna la libertad y fideicomisos; habiéndose

intestato egissent, quaesiit imperator, an ut ex causa fideicommissi manumissa fuisset: et interlocutus est, etiamsi nihil ab intestato pater petisset, pios tamen filios debuisse manumittere eam, quam pater dilexisset. Pronuntiavit igitur recte eam manumissam et ideo fideicommissa etiam ei praestanda.

39.- IDEM; *libro XIII, Responsorum*.- Paulus respondit, etsi alienus inveniatur servus, quem ut suum testator ab uno ex heredibus voluerit manumitti, tamen cogendum eum, qui rogatus est, redimere eum et manumittere, quoniam non putavit similem esse causam libertatis et fideicommissi pecuniarii.

§ 1.- Paulus respondit his verbis: Crede mihi, Zoile, gratias tibi referet filius meas Martialis, tibi et filiis tuis, plenam voluntatem defuncti contineri circa benefaciendum coniunctis personis Zoilum: qui si servi sint, nihil est gratum his praestari posse quam libertatem ideoque praesidem debere sequi voluntatem defuncti.

40.- IDEM; *libro XV, Responsorum*.- Lucius Titius septiciae filiae suae naturali concordiam ancillam suam donavit: idem postea testamento filiae suae quum aliis quibusdam ancillam supra scriptam legavit, ut manumitteretur: quaero, an Septicia filia naturalis ancillam supra scriptam manumittere cogi possit. Paulus respondit, si vivo patre naturali donatio ancillae fuit neque patris naturalis iudicium in ceteris legatis filia adgnovit, non posse eam compelli ancillam propriam ex causa fideicommissi manumittere.

§ 1.- Lucius Titius Stichum servum Maevio legavit

these bequests took effect under an intestate succession, it was asked whether the slave was manumitted by virtue of the trust. An interlocutory decree was rendered to the effect that even if the father had demanded that nothing be done ab intestato, his children, through respect for his memory, ought to have manumitted the slave to whom their father was attached. It was therefore decided that she was legally manumitted, and for this reason entitled to the benefit of the trust.

39.- THE SAME; *Opinions, Book XIII*.- Paulus gave it as his opinion that, even though the slave of another whom a testator desired to be manumitted by one of his heirs, under the impression that he belonged to himself, was concerned, he who was asked to manumit him should be compelled to purchase the slave, and liberate him; as he did not think a case involving freedom, and one relating to the disposition of money under a trust, were similar.

§ 1.- Paulus gave an opinion as follows, "Believe me, Zoilus, that my son Martial is grateful to you, and not to you alone, but also to your children" (meaning that the intention of the deceased, with reference to a benefit to be conferred upon the children of Zoilus, was included in this clause, they being slaves), "no greater service can be rendered them than to give them their freedom." Therefore the Governor should execute the will of the deceased.

40.- THE SAME; *Opinions, Book XV*.- Lucius Titius gave his female slave, Concordia, to his natural daughter, Septicia. Afterwards, by his will, he bequeathed the abovementioned slave along with others to his daughter, for the purpose of manumitting her. I ask whether his daughter, Septicia, can be compelled to manumit the slave. Paulus answered that, if the donation of the slave was made during the lifetime of the natural father, and the daughter did not accept other legacies left by the will of her father, she could not be compelled by the terms of the trust to manumit the said female slave, who was her own property.

§ 1.- Lucius Titius bequeathed his slave Stichus to

hecho todo como en un abintestato, preguntó el Emperador, si aquella habría sido manumitida como por causa de fideicomiso. Y proveyó interlocutoria-mente, que aunque el padre no había pedido nada abintestato, debieron, sin embargo, los hijos por piedad manumitir a la que el padre había querido; así, pues, declaró que ella fue bien manumitida, y que por lo tanto se le debían dar también los fideicomisos.

39.- EL MISMO; *Respuestas, libro XIII*.- Paulo respondió, que aunque se hallara que es ajeno el esclavo, que el testador hubiere querido que como suyo fuese manumitido por uno de los herederos, ha de ser, no obstante, obligado a comprarlo y a manumitirlo aquel a quien se le rogó, porque no creyó que fuese igual la condición de la libertad a la de un fideicomiso pecuniario.

§ 1.- Paulo respondió, que en estos términos: «Créeme, Zoilo, mi hijo Marcial te dará gracias a ti y a tus hijos», está comprendida la plena voluntad del difunto de hacer bien a Zoilo y a las personas conjuntas; a quienes si fueran esclavos nada se les puede dar tan grato como la libertad; y que por esto debía el Presidente atenerse a la voluntad del difunto.

40.- EL MISMO; *Respuesta libro XV*.- Lucio Ticio le donó a Septicia, hija natural suya, su esclava Concordia; el mismo le legó después en su testamento a su hija con algunas otras cosas la susodicha esclava, para que fuese manumitida; pregunto, si Septicia, hija natural, podría ser obligada a manumitir a la susodicha esclava, Paulo respondió, que si la donación de la esclava se hizo viviendo el padre natural, y la hija no aceptó respecto a los demás legados la última voluntad de su padre natural, no podía ella ser compelida a manumitir a su propia esclava por causa del fideicomiso.

§ 1.- Lucio Ticio le legó a Mevio su esclavo Stico, y

et petit, ut neque ab eo neque ab herede eius umquam manumitteretur. Paulus respondit testatorem potuisse postea hunc servum ad libertatem perducere, quia non sibi legem dixisset, sed legatario.

41.- SCAEVOLA; *libro IV, Responsorum*.- «Thais ancilla mea quum heredi meo servierit annos decem, volo sit mea liberta». Quaeritur, quum libertam suam esse voluerit nec id heres facere potuerit nec directa pure data sit libertas, an etiam post decem annos in servitutem remaneret. respondit nihil proponi, cur non Thaidi libertas debeatur.

§ 1.- Lucius Titius ita cavit: "Maevi fili carissime, te rogo, ut, si Stichus et Damas et Pamphilus te promeruerint, aere alieno liberato ne alterius quam tuam servitutem experiantur": quaero, an, si per heredem steterit, quo minus aes alienum exolveretur, ex causa fideicommissi libertatem consequi possint. Respondit non quidem imputandum heredi, si pro commoditatibus rei suae administrandae aes alienum tardius exsolverit: verum si manifeste studium non solventis ei rei paratum, ut libertatibus mora fieret, probaretur, repraesentandas libertates.

§ 2.- Tutoris, quem et ipsum testamento liberis dederat, fidei commisit de manumittendis servis ipsius tutoris, sed is a tutela excusatus fuerat: quaero, an eisdem servis libertatem praestare deberent tutores, qui in locum excusati dati tutelam administrarent. Respondit secundum ea quae proponerentur libertates et ab heredibus scriptis videri datas.

§ 3.- "Seio auri libras tres et Stichum notarium, quem peto manumittas". Seius eodem testamento tutor datus a tutela se excusavit: quaeritur, an nihilo

Maevius, and asked that he should never be manumitted either by him or by his heir. Paulus gave it as his opinion that the testator had the power afterwards to liberate this slave, because he did not impose any condition upon himself but upon his legatee.

41.- SCAEVOLA; *Opinions, Book IV*.- "I wish Thais, my female slave, to become my freedwoman, after she has served my heir as a slave for ten years." The question arises, as the testator desired the slave to be his freedwoman, and the heir could not make her such, and freedom was not absolutely and directly granted her, whether she would remain in slavery even after the ten years had elapsed. The answer was that there was nothing in the case stated to show why Thais should not be entitled to freedom.

§ 1.- Lucius Titius provided in his will as follows, "My dear son, Maevius, if Stichus, Damas, and Pamphilus have deserved it at your hands, I request you not to permit them to serve as slaves to another after my debts have been paid." If it was the fault of the heir that the debts of the estate were not paid, I ask whether the slaves can obtain their freedom under the terms of the trust. The answer was that the heir ought not to be blamed if he delayed payment of the debts on account of the convenience resulting to himself in managing his property; but if it should clearly be proved that he designedly did not pay the debts, in order to prejudice the grants of freedom, the latter will become operative.

§ 2.- A testator charged the testamentary guardian of his children to manumit his slaves, but the person appointed was excused. I ask whether the other guardians appointed in the place of the one who was excused should be required to liberate the slaves. The answer was that, according to the facts stated, the appointed heir appeared to have been charged with the grants of freedom.

§ 3.- "I give to Seius three pounds of gold and my notary Stichus, whom I charge him to manumit." Seius was appointed guardian by the same will, but

le pidió que nunca fuese manumitido ni por él, ni por su heredero. Paulo respondió, que el testador pudo constituir después a este esclavo en libertad, porque no se impuso a sí mismo condición, sino que se le impuso al legatario.

41.- SCÉVOLA; *Respuestas, libro IV*.- «Quiero que Tais, mi esclava, sea liberta mía cuando le hubiere servido diez años a mi heredero»; se pregunta, si habiendo querido que fuese su liberta, y no habiendo podido hacer esto el heredero, y no habiendo sido dada puramente la libertad directa, permanecería en esclavitud aun después de los diez años. Respondió, que nada se exponía para que no se le deba la libertad a Tais.

§ 1.- Lucio Ticio dispuso así: «Mevio, queridísimo hijo, te ruego que si Stico y Damas y Pánfilo lo merecieran de ti, los libres de deudas, de suerte que no experimenten la esclavitud de otro sino la tuya»; pregunto, si habiendo consistido en el heredero que no se pagasen las deudas, podrían conseguir la libertad por causa del fideicomiso. Respondió, que ciertamente no se le ha de imputar al heredero, que por las conveniencias de la administración de sus bienes haya pagado mas tarde las deudas, pero que si evidentemente se probase su empeño decidido de no pagar las deudas para demorar las libertades, se habrán de dar antes las libertades.

§ 2.- Uno encomendó a la fidelidad del mismo tutor, que en su testamento había dado a sus hijos, que manumitiera a esclavos del mismo tutor; pero éste se había excusado de la tutela; pregunto, si deberían darles a los mismos esclavos la libertad los tutores que administraron la tutela en lugar del nombrado que se excusó. Respondió, que, según lo que se exponía, se consideraban dadas las libertades también a cargo de los herederos instituidos.

§ 3.- «A ti, Seyo, tres libras de oro, y el notario Stico, que te pido lo manumitas»; nombrado Seyo tutor en el mismo testamento se excusó de la tutela;

minus fideicommissa libertas debeatur. Respondit nihil proponi, cur non debeatur.

§ 4.- Sorore sua herede instituta de servis ita cavit: Volo et rogo dulcissima mea soror, in commendatione te habere Stichum et Damam, negotiatores meos, quos ego non manumisi, donec rationes restituerent; si autem tibi placuerint, significavi tibi mentem mean. Quaero, si paratis actoribus rationes reddere heres libertatem non praestet, dicendo eos non placere sibi, an audienda esset. Respondit non spectandum, quod heredibus displiceret, sed id quod viro bono posset placere, ut libertatem consequantur.

§ 5.- Lucia Titia heredum fidei commisit, uti Pamphilam ancillam Seiae quum filiis eius redimerent et manumitterent, et iuridicus, quanti singuli essent redimendi, aestimavit: medio tempore Pamphila, antequam pecunia solveretur, peperit: quaero, id quod natum est ex Pamphila utrum ad heredes Seiae an ad heredem Titiae pertineat. Respondit id, quod natum est ex Pamphila, eius quidem esse, cuius ea fuerat tunc quum pareret: verum heredem, si moram fideicommissae libertati fecit, compellendum partum quoque ad libertatem perducere.

§ 6.- Lucius Titius ita testamento cavit: "medicos tibi commendo illum et illum: in tuo iudicio erit, ut habeas bonos libertos et medicos. Quod si ego libertatem eis dedissem, veritus sum, quod sorori meae carissimae fecerunt medici servi eius manumissi ab ea, qui salario expleto reliquerunt eam": quaero, an fideicommissa libertas supra scriptis competere potest. Respondit secundum ea quae proponerentur non necessitatem heredibus impositam, sed arbitrium permissum.

excused himself from accepting the guardianship. The question arises whether the grant of freedom under the trust should, nevertheless, be executed. The answer was that there was nothing in the case stated which would prevent this from being done.

§ 4.- A testator, having appointed his sister his heir, made the following provision with reference to his slaves, "I wish, and I charge you, my dear sister, to entertain the highest consideration for my stewards, Stichus and Damas, whom I have not manumitted, as they have not rendered their accounts. If you are also satisfied with those slaves, you know the feelings which I entertain towards them." Where the stewards were ready to render their accounts, and the heir did not grant them their freedom, I ask whether she should be heard if she alleged that she was not satisfied with them. The answer was that the displeasure of the heir should not be considered, but only what would satisfy a reliable citizen to enable them to obtain their freedom.

§ 5.- Lucia Titia charged her heirs to purchase Pamphila, the female slave of Seia, and her children, and manumit them. An estimate of the amount which ought to be given for them was made by a judge, and, in the meantime, before the money was paid, Pamphila brought forth a child. I ask whether the child of Pamphila would belong to the heirs of Seia, or to the heir of Titia? The answer was that the child would be the property of the person to whom the mother belonged at the time of its birth; but if the heir was in default in executing the trust, he should be compelled also to grant freedom to the child.

§ 6.- Lucius Titius made the following provision in his will: "I recommend So-and-So and So-and-So, slaves who are physicians, to you, and it depends upon you whether you have them as your good freedmen and medical attendants. I myself would grant them freedom, but I fear to do so, because the physicians of my sister, who were slaves, having been manumitted by her, and having served their time, abandoned her." I ask whether the above-mentioned slaves are entitled to their freedom under

se pregunta, si, no obstante, se deberá la libertad dejada por fideicomiso. Respondió, que nada se exponía para que no se deba.

§ 4.- Habiendo uno instituido heredera a su hermana, dispuso así respecto a los esclavos: «quiero y te ruego, cariñosísima hermana mía, que tengas como recomendados a Stico y Damas, negociantes míos, a quienes yo no manumití, hasta que rindieran cuentas; pero si te hubieren complacido, te he significado mi intención»; pregunto, si estando dispuestos los agentes a rendir las cuentas, habría de ser oída la heredera, si no les diese la libertad, diciendo que no la complacían. Respondió, que para que consigan la libertad no se ha de atender a lo que desagrada a los herederos, sino a lo que podría agradar a un hombre bueno.

§ 5.- Lucia Ticia encomendó a la fidelidad de los herederos, que comprasen y manumitiesen a Pánfila, esclava de Seya, juntamente con sus hijos, y el jurídico estimó en cuanto habría de ser comprado cada uno de ellos; parió Pánfila en el tiempo intermedio, antes que se pagase el dinero; pregunto, si pertenecerá a los herederos de Seya o al heredero de Ticia lo que nació de Pánfila. Respondió, que lo que nació de Pánfila era ciertamente de aquel de quien ella era cuando parió, pero que si el heredero causó mora para la libertad dejada por fideicomiso, habrá de ser compelido a constituir también en libertad al parto.

§ 6.- Lucio Ticio dispuso así en su testamento: «te recomiendo los médicos tal y tal; a tu juicio quedará que tengas buenos libertos y médicos; porque si yo les hubiese dado la libertad, habría temido lo que le hicieron a mi queridísima hermana, médicos, esclavos suyos, manumitidos por ella, los cuales, cumplido el tiempo de su servicio, la abandonaron»; pregunto, ¿puede competirles por fideicomiso la libertad a los susodichos? Respondió, que, según lo que se exponía, no se les impuso a los herederos la

the trust. The answer was that, in accordance with the facts stated, the necessity of liberating them is not imposed upon the heirs, but that this depends upon their judgment.

§ 7.- Titius Sticho servo suo libertatem dedit, si rationes sic dederit: quaero, an ratio per eum gesta ita putari debeat, ut Damna, quae casu contigerunt, ad onus reliquorum non pertineant. Respondit in negotio, quod voluntate domini administrasse proponatur, ea Damna, quae casu ita acciderint, ut servo nihil possit imputari, non pertinere ad reliquorum onus.

§ 8.- Item quaero, quum omne peculium reddere iussus sit, an ita peculium computari debeat, ut id solum peculii esse videatur, quod quaque ex causa domino debeat superesse. Respondit in ea specie, de qua quaereretur, non debere deduci ex peculio, quod domino debeatur.

§ 9.- Item quaero, an, si ex reliquis in peculio aliquid converterit, deduci hoc ex peculio reddendo debeat. Respondit, si id, quod ex causa quae proponeretur in peculium versum est, reliquorum nomine desolutum est, fieri satis conditioni, si id, quod reliquum est peculii, solvatur.

§ 10.- Libertatem ita testamento dedit: "Cupitum servum meum, quum Marcianus filius meus sedecim annos impleverit, rationibus redditus liberum esse volo": post mortem testatoris tutores Cupito exactionem commiserunt isque nummos redactos expensavit eisdem tutoribus: deinde filius impubes decessit, cui mater heres extitit et tutorem tutelae iudicio filii condemnatum habuit: Cupitus ad libertatem proclamat eo tempore, quo, si viveret Marcianus, annos sedecim aetatis habiturus esset, offerens rationes unius anni in diem mortis testatoris, quod ceterae subscriptae fuerunt. Quaesitum est, an

§ 7.- Titius granted freedom to his slave "in case he rendered his accounts." I ask whether the accounts rendered by him should include, as part of the sum remaining in his hands, any losses which may have accidentally been incurred. I gave it as my opinion that in any business which was transacted with the consent of the master, those losses which were the result of accident could not be charged to the slave, and must not be included, in the balance remaining in his hands.

§ 8.- I also ask, where a slave is directed to surrender all of his peculium, whether the peculium should be calculated in such a way that only that will be included in it which would belong to the master for any reason whatsoever. The answer was that, in the case in question, what the master was entitled to should not be deducted from the peculium.

§ 9.- I also ask, if the slave has placed in his peculium any of the balance remaining in his hands, whether this should be deducted from the peculium which he is required to surrender. The answer was that if what is mentioned has been placed in his peculium, it must be paid over as a part of the balance, for the condition is sufficiently complied with where the remainder of the peculium is delivered.

§ 10.- A testator made a grant of freedom by his will as follows: "I desire my slave, Cupitus, to be free, after rendering his accounts, when my son Marcianus reaches the age of sixteen years." After the death of the testator, the guardians of his son required Cupitus to pay a debt due to the estate, and the latter paid to the said guardians the amount which he had collected. The son afterwards died under the age of puberty, his mother became his heir, and caused judgment to be rendered against the guardians on account of their administration of the guardianship. Cupitus demanded his freedom at the time when

necesidad, sino que se les permitió su arbitrio.

§ 7.- Ticio le dio a su esclavo Stico la libertad, si hubiere rendido sus cuentas; pregunto, si la cuenta llevada por él deberá ser juzgada de modo que no se comprendan en el cargo de los remanentes los quebrantos que casualmente sobrevinieron. Respondió, que en el negocio, que se diga que administró por voluntad de su señor, no corresponden al cargo de los remanentes los perjuicios que casualmente hayan sobrevenido, de modo que nada se le pueda imputar al esclavo.

§ 8.- También pregunto, si, habiéndole mandado a uno que entregue todo el peculio, se deberá computar el peculio de modo que se considere que es del peculio sólo lo que por cualquier causa deba quedarle al señor. Respondió, que en el caso de que se trata no se debe deducir del peculio lo que se le deba al señor.

§ 9.- También pregunto, si, habiendo aplicado algo de los remanentes al peculio, deberá deducirse esto al devolver el peculio. Respondió, que si lo que por la causa que se exponía se aplicó al peculio fue pagado a título de remanentes, se satisfaría a la condición si se pagara lo que es remanente del peculio.

§ 10.- Uno dio así la libertad en su testamento: «quiero que Cúpito, mi esclavo, sea libre, habiendo rendido las cuentas, cuando Marciano, mi hijo, hubiere cumplido dieciséis años»; después de la muerte del testador los tutores le encomendaron a Cúpito la cobranza, y él les entregó a los mismos tutores el dinero recaudado; después falleció impúbero el hijo, de quien quedó heredera la madre, y logró que el tutor fuese condenado a favor del hijo en el juicio de tutela; Cúpito se proclama en libertad al tiempo en que, si viviese Marciano, habría tenido los dieciséis años de edad, ofreciendo las cuentas de

eas quoque rationes, quas tutores periculo suo egerunt, cupitus reddere compelli debeat. Respondit eum de quo quaeritur condicioni rationis reddendae ita videri paruisse, si omne ex eo, quod gessit, recte desiderari potest, reddiderit: nam alteram condicionem humaniore interpretatione ita accipi posse, ut defuncto pupillo tempus, quo, si viveret, sedecim annos impleret, exspectare satis fuerit.

§ 11.- "Stichus et Damas servi mei, si rationes reddideritis, liberi estote": quaesitum est, an non solum rationes, verum si qua alia consilio et fraude eorum amota sunt, praestari ab his debeant, ut ad libertatem perveniant. Respondit rationum reddendarum condicioni contineri omne, quod quoquo genere servi actum fidemque respiceret.

§ 12.- Intra certa tempora condicioni reddendarum rationum non paruerunt, postea parati erant: quaesitum est, an perveniant ad libertatem. Respondit, si per ipsos stetisset, quo minus intra tempora praescripta condicioni parerent, non idcirco liberos fore, quod postea rationes velint reddere.

§ 13.- "Ab heredibus meis peto fideique eorum committo, quum filius meus sedecim annos impleverit, Stichum rationibus redditus manumittant": quaero, an eundem servum testator in diem usque pubertatis filii sui actum agere voluerit. Respondit manifestum esse testatorem huius quoque actus rationem a Sticho reddi voluisse.

Marcianus would have been sixteen years of age, if he had lived; and offered to render his accounts for a year after the death of the testator, as the other accounts had been approved. The question arose whether Cupitus could also be compelled to render the accounts for which the guardians were responsible. The answer was that the slave in question seems to have complied with the condition of rendering his accounts, if he had rendered one of all the business which he had conducted, and which could properly be required. With regard to the other proviso, the more indulgent interpretation should be adopted, that is, the child having died, the slave had waited long enough, as he did not demand his freedom until the time when the minor would have attained his sixteenth year if he had lived.

§ 11.- "Stichus and Damas, my slaves, you will become my freedmen, if you render your accounts." The question arose whether, in order to obtain their freedom, they must not only render their accounts, but also give up any property which had been designedly and fraudulently appropriated by them. The answer was that, in the condition of rendering their accounts, everything which related to the administration and fidelity of the slave was included.

§ 12.- Certain slaves did not comply with the condition of rendering their accounts within a specified time, and afterwards announced that they were ready to do so. The question arose whether they could obtain their freedom. The answer was that if they were to blame for not complying with the condition within the prescribed time, they would not become free, even if they were subsequently willing to render their accounts.

§ 13.- "I request my heirs, and I charge them to manumit Stichus, after he renders his accounts, when my son reaches the age of sixteen years." I ask whether the testator intended that the slave should act as steward until the time when the son reached the age of puberty. The answer was that it was clear that the testator intended that Stichus should also render an account of this part of his administration.

un solo año hasta el día de la muerte del testador, porque las demás habían sido firmadas; se preguntó, si deberá ser compelido Cúpito a rendir también aquellas cuentas, que los tutores admitieron a su propio riesgo. Respondió, que éste, de quien se trata, parece que cumplió así con la obligación de rendir las cuentas, si las hubiere rendido de todo lo que administró y de lo que razonablemente se puede desear; porque la otra condición puede ser entendida con más benigna interpretación, de suerte que haya sido bastante esperar, fallecido el pupilo, al tiempo en que, si viviese, cumpliría los dieciséis años.

§ 11.- «Sed libres Stico y Damas, esclavos míos; si hubiereis rendido las cuentas»; se preguntó, si para que lleguen a la libertad deberán darse por ellos no solamente las cuentas, sino también alguna cosa que se haya quitado por consejo y fraude de ellos. Respondió, que en la condición de rendir las cuentas se comprende todo lo que de alguna manera se refiera a la administración y a la fidelidad del esclavo.

§ 12.-No cumplieron dentro de cierto término la condición de rendir las cuentas, y después estaban dispuestos a ello; se preguntó, si llegarán a la libertad. Respondió, que si en ellos hubiese consistido no haber cumplido la condición dentro del término establecido, no habrán de ser libres porque después quieran rendir las cuentas.

§ 13.- «Les pido a mis herederos, y encomiendo a su fidelidad, que, cuando mi hijo hubiere cumplido dieciséis años, manumitan a Stico, habiendo rendido las cuentas»; pregunto, si habrá querido el testador que el mismo esclavo desempeñe la administración hasta el día de la pubertad de su hijo. Respondió, que era manifiesto que el testador quiso que por Stico se rindieran las cuentas también de esta administración.

§ 14.- "Stichus servus meus iubeo ut det praestet filiae et uxori meae hereditibus meis sine ulla controversia tot aureos: et ut ipsum manumittant, fidei eorum committo": quaesitum est, quum uxor ab hereditate abstinuerit, utrum duobus an filiae praestare debeat. Respondit filiae, quae heres ex asse extitisse proponeretur, pro solido dandum.

§ 15.- Herede filio suo ex asse instituto libertatem dedit in haec verba: "December dispensator meus, Severus Vilicus et Victorina Vilica severi contubernalis in annos octo liberi sunt: quos in ministerio filii mei esse volo: te autem, severe fili carissime, peto, uti Decembrem et Severum commendatos habeas, quibus praesentem libertatem non dedi, ut idonea ministeria haberes, quos spero te et libertos idoneos habiturum". Quaero, quum eo tempore, quo Titius testamentum faciebat, filius natus annorum fuerat novem et Titius post biennium et sex menses decesserit, anni octo, in quos libertas erat dilata, ex testamenti facti tempore an vero ex mortis numerari debeant. Respondit posse videri testatorem eos annos octo dilatae libertatis comprehendisse, qui computandi sunt a die testamenti facti, nisi aliud voluisse testatorem probaretur.

§ 16.- "Spendophorus, quum filia mea in familia nupserit, si rationes idonee filiae meae administratas reddiderit, liber esto": filia quum adhuc pubes esset, vivo patre decessit et ex substitutione Seius heres extitit: quaero, quum Spendophorus rationes pupillae non administraverit et vivo patre familias desierit ipsius rationes administrare et, si viveret, Titia annos haberet amplius duodecim, an ex testamento liber sit. Respondit, si nullas rationes administrasset, quas reddere heredi deberet, secundum ea quae proponerentur liberum esse.

§ 14.- "I direct that my slave, Stichus, give and pay to my daughter and my wife, my heirs, so many aurei, without any controversy, and I charge them to manumit him." As the wife rejected the estate, the question arose whether the slave was obliged to pay both of them, or only the daughter. The answer was that the entire sum should be paid to the daughter, as she was the sole heir to the estate.

§ 15.- A testator having appointed his son heir to his entire estate, granted him his freedom in the following words: "Let December, my accountant, Severus, my steward, and Victorina, the wife of Severus, become free in eight years, and I wish them to remain in the service of my son for that time. Moreover, I charge you, my dear son Severus, to treat December and Severus, to whom I have not immediately granted freedom, with due consideration, in order that suitable services may be rendered by them to you, and I hope that you will have them as good freedmen." As the son of Titius was nine years of age at the time that the latter made his will, and Titius died two years and six months afterwards, I ask whether the eight years during which the grant of freedom was deferred should be reckoned from the date of the will, or from the time of the death of the testator. The answer was, that the testator appeared to have counted the eight years, during which the grant of freedom was in abeyance, from the day when the will was made, unless it can be proved that his intention was otherwise.

§ 16.- "Let Spendophorus be free when my daughter marries in my family, if he renders a satisfactory account of his administration to her." The daughter, having died before reaching the age of puberty, and during the lifetime of her father, Seius became the heir by substitution. If Spendophorus did not transact the business of the minor, and ceased to administer the affairs of her father, I ask whether he would become free by the terms of the will, at the time when, if Titia had lived, she would be twelve years old. The answer was that according to the facts stated, if the slave had not transacted any business of which he would be compelled to render an account to the heir, he would become free.

§ 14.- «Mando que Stico, mi esclavo, dé y entregue sin ninguna controversia a mi hija y a mi mujer, herederos mías, tantos áureos; y encomiendo a su fidelidad que lo manumitan»; se preguntó, si, habiéndose abstenido de la herencia la mujer, los deberá entregar a las dos, o a la hija. Respondió, que se le habían de dar íntegramente a la hija, que se dice quedó heredera de la totalidad.

§ 15.- Uno, habiendo instituido heredero de la totalidad a su hijo, dio la libertad en estos términos: «Sean libres dentro de ocho años Diciembre, mi administrador, el mayordomo Severo y la mayordoma Victorina, contubernal de Severo; los cuales quiero que estén al servicio de mi hijo; mas te pido, queridísimo hijo, que tengas como recomendados a Diciembre y a Severo; a quienes no les dí de presente la libertad, para que tuvieras buenos servidores, los que espero que habrás de tener también como buenos libertos»; pregunto, si, siendo de nueve años de edad el hijo al tiempo en que Ticio hacía testamento, y habiendo fallecido Ticio después de dos años y seis meses, se deberán contar los ocho años, por los que había sido aplazada la libertad, desde el tiempo en que se hizo el testamento, o desde el día de la muerte. Respondió, que podía parecer que el testador fijó estos diez años para aplazar la libertad, los cuales se han de computar desde el día en que se hizo el testamento, a no ser que se pruebe que quiso otra cosa el testador.

§ 16.- «Sea libre Spendoforo, cuando mi hija se hubiere casado en la familia, si a mi hija le hubiere rendido bien las cuentas administradas»; la hija, siendo todavía púbera, falleció en vida de su padre, y en virtud de substitución quedó heredero Seyo; pregunto, si no habiendo administrado Spendoforo las cuentas de la pupila, y habiendo dejado de administrar en vida del padre de familia las cuentas de éste, y habiendo de tener Ticia, si viviese, más de doce años, sería libre en virtud del testamento. Respondió, que, si no hubiese administrado ningunas cuentas, que le debiese rendir al heredero, sería libre, según lo que se exponía.

§ 17.- "Stichum rationibus redditis manumitti volo". Stichus arcarius probante domino nomina fecit et rationes a domino subscriptas exhibet nec postea nomen ullum fecit: quaero, an, si qui minus solvendo fuerint debitores, quibus alii exactores erant applicati, nondum videatur condicioni satisfactum. Respondit secundum ea quae proponerentur non pertinere ad onus reddendarum rationum, quod solvendo non esse debitores.

42.- MAECIANUS; *libro VII, Fideicommissorum*.- Antoninus Augustus pius noster, quo militum suorum per omnia rata esset voluntas suprema, quum et institutus et substitutus in continenti, priusquam adirent hereditatem, decessissent, eos, quibus ab his et libertas et hereditas a milite per fideicommissum data esset, perinde liberos et heredes esse iussit, ac si utrumque directo accepissent. Eorum autem, qui a pagano libertatem et hereditatem per fideicommissum acceperant, quum aequae in continenti et institutus et substitutus decessissent, satis habuit libertatem confirmare.

43.- PAULUS; *libro IV, ad Sabinum*.- Fideicommissa libertas non debetur ei, quem postea vinxit dominus.

44.- POMPONIUS; *libro VII, ad Sabinum*.- De libertate fideicommissaria praestanda servus quum domino recte contendit.

45.- ULPIANUS; *libro V, Disputationum*.- Si debitor rogatus sit a creditore ancillam suam pignoratam manumittere, dicendum est fideicommissariam libertatem utiliter relictam a debitore. Quid enim interest, certa quantitas ab eo relinquatur an fideicommissaria libertas? Et sive plus sit in pretio sive minus, cogitur libertatem praestare, si modo semel agnovit voluntatem creditoris. Agnovisse autem sic accipimus, si forte, quum conveniretur ab

§ 17.- "I wish Stichus to be manumitted after he has rendered his accounts." Stichus, who was a banker, executed certain promissory notes with the approval of his master, and produced accounts signed by the latter, but he did not afterwards contract any other liabilities. The question arose whether the condition could be held to have been complied with, if there were some insolvent debtors whose claims others had attempted to collect. The answer was, that the fact that some of the debtors were not solvent had nothing to do with the obligation of rendering the account.

42.- MAECIANUS; *Trusts, Book VII*.- Our Emperor, Antoninus Pius, in order that the last wills of his soldiers might in every respect be considered valid, where an appointed heir and his substitute died suddenly before entering upon the estate, ordered that those to whom freedom and the estate had been left under a trust, by soldiers, should become free and be heirs, just as if they had received both of these bequests directly. Moreover, where slaves, by means of a trust, had acquired their freedom and an estate from a civilian, and the appointed heir and his substitute had also died suddenly, he held that this was sufficient for the confirmation of their freedom.

43.- PAULUS; *On Sabinus, Book IV*.- Freedom granted under the terms of a trust is not due to a slave whom his master afterwards placed in chains.

44.- POMPONIUS; *On Sabinus, Book VII*.- A slave can legally bring suit against his master where the freedom has been bequeathed to him by a trust.

45.- ULPIANUS; *Disputations, Book V*.- When a debtor is asked by his creditor to manumit a female slave who has been pledged to him, it can be maintained that freedom has been legally bequeathed by the debtor under the terms of the trust. For what difference does it make whether a certain amount is left by him, or freedom is granted under a trust? Whether the value of the slave is more or less, he can be forced to grant her freedom; provided he has once

§ 17.- «Quiero que Stico sea manumitido habiendo rendido las cuentas»; Stico, cajero, hizo préstamos con la aprobación de su señor, y exhibe las cuentas escritas por su señor, y después no hizo ningún préstamo; pregunto, si, no siendo solventes algunos deudores, para los cuales habían sido destinados otros cobradores, se considerará que no se cumplió todavía la condición. Respondió, que, según lo que se exponía, no correspondía al cargo de haber de rendir las cuentas la circunstancia de que no fuesen solventes los deudores.

42.- MECIANO; *Fideicomisos, libro VII*.- Nuestro Antonino Augusto Pío, a fin de que en todo fuese válida la última voluntad de sus soldados, dispuso que cuando así el instituido como el substituido hubiesen fallecido inmediatamente, antes que adieran la herencia, fuesen libres y herederos aquellos a quienes a cargo de ellos se les hubiese dado en fideicomiso por un militar la libertad y la herencia lo mismo que si hubiesen recibido directamente la una y la otra; mas respecto a los que por fideicomiso habían recibido de un paisano la libertad y la herencia, cuando igualmente hubiesen fallecido inmediatamente el instituido y el substituido, consideró suficiente confirmarles la libertad.

43.- PAULO; *Comentarios a Sabino, libro IV*.- La libertad dejada por fideicomiso no se le debe a aquel a quien su señor puso después en prisión.

44.- POMPONIO; *Comentarios a Sabino, libro VII*.- El esclavo litiga válidamente con su señor para que le dé la libertad dejada por fideicomiso.

45.- ULPIANO; *Disputas, libro V*.- Si al deudor se le hubiera rogado por el acreedor que manumitiera a la esclava suya dada en prenda, se ha de defender que se dejó válidamente por el deudor la libertad en fideicomiso. Porque ¿qué importa que por él se deje cierta cantidad, o la libertad en fideicomiso? Y ya si importara mas el precio, ya si menos, es obligado a darle la libertad, una vez que haya aceptado la voluntad del acreedor. Mas entendemos que la

herede, usus est exceptione vel alias voluntatem suam ostendit: nam si conveniatur debitor ab herede creditoris, doli exceptione uti potest in id, quod intererit debitoris ancillam suam habere.

§ 1.- In fideicommissaria libertate, quamvis quis modicum legatum fuerit consecutus, necesse habet servum suum manumittere: pecuniarium enim fideicommissum si divisum fuerit, satis iniuriam facit libertati quam fideicommissario: satius est igitur eum, qui adgnovit legatum, onerari quam libertatem intercidere.

§ 2.- Quotiens servo vel ancillae fideicommissaria libertas relinquitur, in ea condicione est, ut, quoad manumittatur, servilis condicionis sit: et quidem si nullam moram praestandae libertati qui praestare debet fecit, nihil de statu eorum mutatur: ideoque eos interim legari posse, sed cum sua causa, constat.

46.- IDEM; *libro VI, Disputationum*.- Fideicommissa libertas ita potest dari: "heres, si volueris, fidei tuae committo, ut Stichum manumittas", quamvis nihil aliud in testamento potest valere ex nutu heredis.

§ 1.- Plane et ita "si Stichus voluerit" potest ei libertas adscribi.

§ 2.- Sed et si ita adscriptum sit "si Seius voluerit, Stichum liberum esse volo", mihi videtur posse dici valere libertatem, quia condicio potius est, quemadmodum si mihi legatum esset, si Titius Capitolium ascenderit.

acknowledged the validity of his creditor's will. We must understand that he has done so when, for instance, if he is sued by the heir, he avails himself of an exception; or proves the wishes of the creditor in some other way. For if the debtor should be sued by the heir of the creditor he can plead an exception on the ground of bad faith, because of the interest of the debtor in obtaining his slave.

§ 1.- In granting freedom under the terms of a trust, even though the legatee may only have obtained a small bequest, it will, nevertheless, be necessary for him to manumit his slave. For, if a pecuniary trust should be divided, great injury will be done to the cause of freedom as well as to the beneficiary; therefore, it is better for him who accepts the legacy to be burdened than that the bequest of freedom should be annulled.

§ 2.- Whenever freedom is bequeathed to a male or female slave under the terms of a trust, the slave is in such a position that he or she will remain in servitude until they are manumitted. If the person charged with this duty causes no delay in liberating the slave, no change will take place in his or her condition, and therefore it is established that the slave can, in the meantime, be bequeathed, subject to his manumission afterwards.

46.- THE SAME; *Disputations, Book VI*.- Freedom can be granted under a trust as follows, "I charge my heir to manumit Stichus, if he should choose to do so," even though nothing else in the will dependent upon the consent of the heir should be valid.

§ 1.- It is clear that if freedom is bequeathed as follows, "If Stichus should be willing," it can be granted him.

§ 2.- Where the following clause is inserted in a will, "I desire Stichus to be free if he is willing," it seems to me that the grant of freedom can be held to be valid, because the words rather imply a condition, just as if a bequest should be made to me, "If Titius should ascend to the Capitol."

aceptó, si acaso al ser demandado por el heredero usó de la excepción, o demostró de otro modo su voluntad; porque si el deudor fuera demandado por el heredero del acreedor, puede usar de la excepción de dolo por cuanto le interesase al deudor tener su propia esclava.

§ 1.- Tratandose de la libertad dejada por fideicomiso, aunque alguno haya obtenido un legado pequeño, tiene necesidad de manumitir a su propio esclavo; porque si se hubiere dividido un fideicomiso pecuniario, infiere bastante más injuria a la libertad que al fideicomisario; así, pues, es mejor que sea grabado el que aceptó el legado, que no que se extinga la libertad.

§ 2.- Siempre que por fideicomiso se le deja la libertad a un esclavo o a una esclava, se hallan en el caso de ser de condición servil hasta que sean manumitidos; y verdaderamente, si no causó mora alguna para dar la libertad el que debe darla, no se cambia nada del estado de ellos; y por esto es sabido, que pueden ser ellos legados entretanto, pero con su propia condición.

46.- EL MISMO; *Disputas. libro VI*.- Por fideicomiso sé puede dar la libertad de este modo: «heredero, si quisieres, encomiendo a tu fidelidad, que manumitas a Stico», aunque ninguna otra cosa puede ser válida en un testamento según la voluntad del heredero.

§ 1.- Ciertamente también si de este modo: «si Stico hubiere querido», se le puede dejar la libertad.

§ 2.- Mas también si se hubiera escrito así: «Si Seyo quisiere, quiero que sea libre Stico», me parece que se puede decir que es válida la libertad, porque más bien es una condición, a la manera que si se me hubiese legado así, «si Ticio subiere al Capitolio».

§ 3.- Quod si ita scriptum sit "si heres voluerit", non valebit, sed ita demum, si totum in voluntate fecit heredis, si ei libuerit. Ceterum si arbitrium illi quasi viro bono dedit, non dubitabimus, quin libertas debeatur: nam et eam libertatem deberi placuit "si tibi videbitur, peto manumittas": ita enim hoc accipiendum "si tibi quasi viro bono videbitur". Nam et ita relictum "si voluntatem meam probaveris" puto deberi: quemadmodum "si te meruerit" quasi virum bonum vel "si te non offenderit" quasi virum bonum vel "si comprobaveris" vel "si non reprobaveris" vel "si dignum putaveris". Nam et quum quidam graecis verbis ita fideicommissum dedisset: *si probaveris, libertatem dari volo*, a Divo Severo Rescriptum est fideicommissum peti posse.

§ 4.- Quamquam autem in heredis arbitrium conferri, an debeatur, non possit, quando tamen debeatur, conferri potest.

§ 5.- Quidam, quum tres servos legasset, fidei heredis sui commisit, ut ex his duos quos vellet manumitteret: fideicommissa libertas valebit et quos ex his vellet, heres manumittet: quare si eos vindicaret legatarius, quos heres vult manumittere, exceptione doli repellitur.

47.- IULIANUS; *libro XLII, Digestorum*.- Si pater duos filios heredes instituerit et adgnatione postumi ruptum testamentum fuerit, quamvis hereditas pro duabus partibus ad eos pertineat, tamen fideicommissae libertates praestari non debent, sicuti ne legata quidem aut fideicommissa praestare coguntur.

§ 1.- Si, quum alienum servum heres rogatus sit manumittere, item communem vel eum, in quo usus

§ 3.- Where it was stated in a will, "If the heir should consent," the trust will not be valid, but this will only be the case where the testator left everything to the discretion of his heir, "If he chooses." Where, however, he left it to his judgment as a good citizen, we have no doubt that freedom should be granted; for it has been decided that a slave was entitled to be free where the testator made the following provision, "If you think proper, I ask you to manumit him," for this must be understood to mean if you, as a good citizen, approve it. For where freedom is bequeathed as follows, "If you approve my will," I think it should be granted, just as in the following case, "If he deserves it of you as a good citizen," or "If he should not offend you as a good citizen," or "If you approve of it," or "If you do not disapprove it," or "If you think that he is worthy." For where a testator left a bequest of freedom under a trust, in the Greek words meaning, "I desire you to grant freedom to So-and-So, if you think best," it was stated by the Divine Severus in a Rescript that the execution of the trust could be demanded.

§ 4.- But, although a testator cannot leave it to the judgment of his heir whether or not he will grant freedom to a slave, he can let him decide when it shall be granted.

§ 5.- A certain man, who bequeathed three slaves, charged his heir to manumit any two of them that he might select. A trust of this kind will be valid, and the heir can manumit whichever of the three slaves he chooses. And therefore if a legatee should claim those whom the heir wishes to manumit, he will be barred by an exception on the ground of bad faith.

47.- JULIANUS; *Digest, Book XLII*.- If a father should appoint his two sons his heirs, and his will is annulled by the birth of a posthumous child, although the estate will belong to them equally, still, the grants of freedom under the trust ought not to be executed, as they are not compelled to pay any other legacies, or execute any other trusts.

§ 1.- Where an heir who is charged to manumit a slave belonging to a third party, or one who is owned

§ 3.- Pero si se hubiera escrito así: «si quisiera el heredero», no será válido, pero solamente, si todo lo dejó a la voluntad del heredero, si a éste le pluguiere. Mas si lo dejó a su arbitrio, como a hombre bueno, no dudaremos que se deberá la libertad; porque plugo que también se debiese esta libertad: «si te pareciere, te pido que manumitas»; porque esto se ha de entender, si te pareciere como a hombre bueno. Pues también lo que se dejó así: «si aprobares mi voluntad», opino que se debe, a la manera que «si lo hubiere merecido de ti como de hombre bueno», o, «si no te hubiere ofendido como a hombre bueno», o, «si lo aprobares», o, «si no lo desaprobares», o, «si lo juzgares digno». Porque también cuando alguno hubiese dado con palabras griegas un fideicomiso de este modo: «quiero que, si lo aprobares, se le dé a aquél la libertad», se respondió en rescripto por el Divino Severo, que se podía pedir el fideicomiso.

§ 4.- Mas aunque no se pueda dejar al arbitrio del heredero si se deberá, se puede, sin embargo, dejar cuándo se deberá.

§ 5.- Uno, habiendo legado tres esclavos, encomendó a la fidelidad de su heredero, que de ellos manumitiera a los dos que quisiera; valdrá la libertad dejada por fideicomiso, y el heredero manumitirá de ellos a los que quiera; por lo cual, si el legatario reivindicase los que el heredero quiere manumitir, será repelido con la excepción de dolo.

47.- JULIANO; *Digesto, libro XLII*. - Si un padre hubiere instituido heredero a dos hijos, y por el nacimiento de un póstumo se hubiere roto el testamento, aunque en dos partes les pertenezca la herencia, no se deben, sin embargo, dar las libertades dejadas por fideicomiso, como tampoco ciertamente son obligados a dar ni los legados ni los fideicomisos.

§ 1.- Si, cuando al heredero se le hubiera rogado que manumita a un esclavo ajeno, o a uno común, o a

fructus alienus est, latitet, non inique Senatus-consulto libertatibus succurretur.

§ 2.- Si Stichus libertas per fideicommissum data fuerit sub condicione, si rationes reddidisset, et is absente herede paratus sit reliqua solvere, Praetoris officio continetur, ut virum bonum eligat, cuius arbitrio rationes computentur, et pecuniam, quae ex computatione colligitur, deponat, atque ita pronuntiet libertatem ex causa fideicommissi deberi. haec autem fieri conveniet, si heres ex iusta causa aberit: nam si latitabit, satis erit liquere praetori per servum non stare, quo minus condicione pareat atque ita pronuntiare de libertate oportebit.

§ 3.- Quum sub condicione legato servo libertas datur non aliter fideicommissario tradi debet, quam ut caveatur existente condicione traditu iri eum.

§ 4.- Quaedam quum in extrema esset valetudine, praesentibus honestis viris compluribus et matre sua, ad quam legitima hereditas eius pertinebat, ita locuta est "ancillas meas Maeviam et Seiam liberas esse volo" et intestata decessit: quaero, si mater ex Senatusconsulto legitimam hereditatem eius non vindicasset et hereditas ad proximum cognatum pertinisset, an fideicommissa libertas deberetur. respondi deberi: nam eam, quae in extremis dixisset "ancillas meas illam et illam liberas esse volo", videri ab omnibus, qui legitimi heredes aut bonorum possessores futuri essent, petisse, ut hoc fieri possit.

48.- IDEM; *libro LXII, Digestorum.*- Quum in testamento scriptum est: "Stichum Titio lego" vel "heres meus dato ita, ut eum Titius manumittat", dixi petenti legatario Stichum exceptionem doli mali

in common, or one in whom the usufruct belongs to another, conceals himself, relief will not improperly be granted under the Decree of the Senate.

§ 2.- If freedom is bequeathed to Stichus by a trust under the condition that he shall render his account, and he is ready to pay over the balance in his hands, during the absence of the heir, it is the duty of the Praetor to select some reliable person under whose supervision the account may be rendered, so that the slave can deposit the money which is due according to the calculation; and then the Praetor shall decree that the slave is entitled to his freedom under the terms of the trust. It is proper for this to be done when the heir is absent for some good reason; for if he conceals himself, it will be sufficient to satisfy the Praetor that it is not the fault of the slave that the condition is not complied with, and hence he must decree that he is entitled to his freedom.

§ 3.- Where freedom is bequeathed conditionally to a slave who forms part of the legacy, he should not be delivered to the beneficiary of the trust, unless the latter gives security that he will surrender him if the condition should be complied with.

§ 4.- A certain woman, at the time of her death, made the following statement in the presence of several respectable men, and of her mother, who was entitled to the estate as her heir at law, "I wish my female slaves, Msevia and Seia, to be free," and then died intestate. I ask, if her mother does not claim the estate as heir at law under the Decree of the Senate, and it should pass to the next of kin, whether the slaves will be entitled to freedom under the terms of the trust. I answered that they would be, for when the woman being at the point of death said, "I wish my female slaves, So-and-So and So-and-So, to be free," she is considered to have asked this to be done by all those who would be her heirs at law, or the possessors of her estate under the Praetorian Edict.

48.- THE SAME; *Digest, Book LXII.*- Where the following was inserted in a will: "I bequeath Stichus to Titius," or "Let my heir give him to Titius, in order that he may manumit him," I held that if the legatee

aquél sobre el cual el usufructo es de otro, se ocultase, no injustamente se auxiliará a las libertades en virtud del Senadoconsulto.

§ 2.- Si a Stichus se le hubiere dado por fideicomiso la libertad bajo la condición de si hubiese rendido las cuentas, y él estuviera dispuesto a entregar en ausencia del heredero los remanentes, es de cargo del Pretor elegir un hombre bueno, a cuyo arbitrio se haga el cómputo de las cuentas; y depositar el dinero que se recoja por virtud de la computación; y declarar de este modo que se debe la libertad por causa del fideicomiso. Mas convendrá que se haga esto, si el heredero estuviere ausente por justa causa; porque si se ocultare, será suficiente que le conste al Pretor que no consiste en el esclavo el no cumplir la condición; y así convendrá que haga declaración respecto a la libertad.

§ 3.- Cuando bajo condición se le da la libertad a un esclavo legado, no debe ser entregado al fideicomisario de otro modo, sino si se diera caución de que habrá de ser entregado cumpliéndose la condición.

§ 4.- Una, hallándose en su última enfermedad, habló así en presencia de muchos hombres honrados, y de su madre, a quien le pertenecía su herencia legítima: «quiero que mis esclavas, Mevia y Seia, sean libres», y falleció intestada; pregunto, si, no habiendo reivindicado la madre en virtud del Senadoconsulto su herencia legítima, y habiéndole correspondido la herencia al próximo cognado se debería la libertad dejada por fideicomiso. Respondí que se debía; porque se considera que la que en sus postrimerías hubiese dicho: «quiero que sean libres aquélla y aquélla, esclavas mías», les pidió a todos, los que hubiesen de ser herederos legítimos o poseedores de los bienes, que se pudiera hacer esto.

48.- EL MISMO; *Digesto, libro LXII.*- Habiéndose escrito en un testamento: «le doy y lego a Ticio el esclavo Stichus», o «delo mi heredero, a fin de que lo manumita Ticio», dije que la excepción de dolo malo

obstaruram, nisi caverit se libertatem secundum voluntatem defuncti praestaturum.

49.- AFRICANUS; *libro IX, Quaestionum*.- Si is, cui servus legatus est, rogatus manumittere latitet, orcinum fieri libertum respondit: idem fore et si non legatarii, sed heredis fidei commissum esset. Sed et si non omnium, sed quorundam heredum fidei commissum sit, aequè dicendum orcinum fieri: in eos autem qui latitaverint coheredibus, a quibus redimendae partes essent, utilem actionem eo nomine dari debere vel etiam familiae erciscundae iudicio recte eos acturos.

50.- MARCIANUS; *libro VII, Institutionum*.- Si servus legatus et per fideicommissum manumissus sit, Cervidius Scaevola consultus putabat novissimam scripturam valere, sive libertas sit sive legatum, quia, quum libertatem datam postea placeat adimi, et per legatum constat posse adimi: sed si in obscuro sit, qua mente post libertatem legavit eundem servum, in obscuro libertatem praevalere. quae sententia mihi quoque verior esse videtur.

51.- IDEM; *libro IX, Institutionum*.- Non tantum ipse, qui rogatus est manumittere, ad libertatem perducere potest, sed et successores eius, sive emptione sive quo alio modo successerint. Sed et si nemo successor extiterit, ad fiscum ita transit, ut libertas ab eo praestetur.

§ 1.- Is autem qui rogatus est manumittere etiam eo tempore quo alienare prohibetur potest manumittere.

should claim Stichus, he can be opposed by an exception on the ground of bad faith; unless he gives security to grant him his freedom in accordance with the will of the deceased.

49.- AFRICANUS; *Questions, Book IX*.- Where a person to whom a slave is bequeathed and who is charged to manumit him conceals himself, the slave is held to become the freedman of the deceased. The same rule will apply where not the legatee but the heir is charged with the execution of the trust. Where not all of them, but only some, are charged with its execution, it must also be said that the slave will become the freedman of the deceased. Moreover, an equitable action should be granted against those who have concealed themselves, and in favor of their co-heirs, by whom the value of their shares must be paid, or they can properly bring suit in partition against them.

50.- MARCIANUS; *Institutes, Book VII*.- Where a slave has been bequeathed and manumitted under a trust, Cervidius Scaevola, having been consulted, held that the last disposition was valid, whether it had reference to freedom or to a legacy; for the reason that it is established that when freedom is bequeathed it may afterwards be taken away, and it is clear that this can be done at the request of the slave. If, however, it is doubtful with what intention the testator bequeathed the same slave, after having left him his freedom, the bequest of freedom should have the preference. This opinion also seems to me to be the more correct one.

51.- THE SAME; *Institutes, Book IX*.- Not only he who was requested to manumit a slave can give him his freedom, but his successors, whether they are such by purchase or by any other title, can do so. If, however, he should have no successor, the slave will escheat to the Treasury in order to obtain his freedom.

§ 1.- Moreover, he who is requested to manumit a slave, can do so at a time when he is forbidden to alienate him.

le habrá de obstar al legatario que reclame a Stico, a no ser que diere caución de que él dará la libertad conforme a la voluntad del difunto.

49.- AFRICANO; *Cuestiones, libro IX*.- Si aquel a quien se le legó un esclavo, rogándosele que lo manumitiera, se ocultara, respondió que el esclavo se hace liberto orcino, y que lo mismo habría de ser también si esto hubiese sido encomendado a la fidelidad no del legatario, sino del heredero; mas también si no hubiese sido encomendado a la fidelidad de todos, sino de algunos herederos, se habrá de decir igualmente que se hace orcino; pero que contra los que se ocultaren se les debe dar a los coherederos, por quienes se hubiesen de comprar las partes, la acción útil por este concepto, o habrán de ejercitar con razón la acción de partición de herencia.

50.- MARCIANO; *Instituta, libro VII*.- Si un esclavo hubiera sido legado, y manumitido por fideicomiso, consultado Cervidio Scévola opinaba, que era válida la última escritura, ya si se refiriese a la libertad, ya si allegado, porque estando admitido que la libertad dada se quite después, es evidente que también puede ser quitada por medio de un legado. Pero si no estuviera claro con que intención legó después de la libertad al mismo esclavo, en la duda prevalece la libertad; cuya opinión también a mí me parece más verdadera.

51.- EL MISMO; *Instituta, libro IX*.- No solamente puede constituir en libertad aquel a quien se le rogó que manumitiera, sino también sus sucesores, ora hubieren sucedido por compra; ora de otro cualquier modo. Pero aunque no hubiere quedado ningún sucesor, pasa al fisco para esto, para que por él se dé la libertad.

§ 1.- Mas aquel a quien se le rogó que manumita, puede manumitir también en el tiempo en que se le prohíbe enajenar.

§ 2.- Si alienum servum quis rogatus fuerit manumittere, quum ei pecunia certa legata esset, ut emat eum et manumittat, et dominus nolit eum vendere, legatum retinet ex voluntate defuncti.

§ 3.- Cui per fideicommissum libertas debetur, liberi quodammodo loco est, et statuliberi locum optinet vel eo magis, quod nec in alium transferendus est, ut aut libertas eius impediatur aut iura patronorum graviora experiatur.

§ 4.- Senatusconsulto Dasumiano cautum est, ut, si ex iusta causa absit qui fideicommissam libertatem debet et hoc pronuntiatum fuerit, perinde libertas competat, atque si, ut oportet, ex causa fideicommissi manumissus esset.

§ 5.- Abesse autem is intellegitur, qui a tribunali abest.

§ 6.- Et quia de heredibus tantum cautum erat, adiectum est eodem Senatusconsulto, ut quicumque fideicommissam libertatem ex quacumque causa pronuntiatum fuerit eum eosve abesse, perinde habeatur, atque si, ut oportet, ex causa fideicommissi manumissus esset.

§ 7.- Sed Articuleiano Senatusconsulto cavetur, ut in provinciis praesides provinciae cognoscant, licet heres non sit eius provinciae.

§ 8.- Sed si non hereditarium servum quis rogatus fuerit manumittere, sed proprium, ex Senatusconsulto Iunciano post pronuntiationem pervenit ad libertatem.

§ 2.- Where anyone is requested to manumit the slave of another, and a certain sum of money has been bequeathed to him to purchase and manumit the slave, and his master is unwilling to sell him, the legatee shall retain the legacy in accordance with the will of the deceased.

§ 3.- Where freedom is bequeathed by a trust to a slave, the latter is, to some extent, in the position of a freedman, and occupies the place of a slave to be free under a condition, and all the more, because he must not be transferred to another in such a way that his freedom will be prevented, or he will be exposed to more severe rights of patronage.

§ 4.- It is provided by the Dasumian Decree of the Senate that if the person who is charged with the grant of freedom should be absent for some good reason, and such a decision is rendered by the Praetor, the slave will be entitled to his freedom; just as if he had been regularly manumitted according to the terms of the trust.

§ 5.- A person is understood to be absent who does not appear in court.

§ 6.- And for the reason that provision had only been made for the absence of heirs, it was added in the same Decree of the Senate that when anyone is charged with the grant of freedom, and has been pronounced to be absent for any good cause whatsoever, the result will be the same as if the slave had been regularly manumitted in accordance with the terms of the trust.

§ 7.- It is, however, provided by the Articuleian Decree of the Senate that the governors of provinces shall have jurisdiction in cases of this kind, although the heir may not reside in the province.

§ 8.- Where anyone is asked to manumit a slave who does not form part of the estate, but is his own property, the slave will obtain his freedom under the Juncian Decree of the Senate, after the decision has been rendered.

§ 2.- Si a alguno se le hubiere rogado que manumita a un esclavo ajeno, habiéndosele legado cierta cantidad de dinero para que lo compre y lo manumita, y el dueño no quisiera venderlo, retiene el legado en virtud de la voluntad del difunto.

§ 3.- Aquel a quien por fideicomiso se le debe la libertad está en cierto modo en calidad de libre, y tiene la calidad de aquel a quien en testamento se le dejó la libertad bajo condición, o aun más, porque no puede ser transferido a otro, de modo que o se impida su libertad, o experimente más gravosos derechos de patronos.

§ 4.- Se dispuso en el Senadoconsulto Dasumiano, que si con justa causa estuviera ausente el que debe la libertad dejada por fideicomiso, y se hubiere declarado esto, competa la libertad lo mismo que si, como se debe, hubiese sido manumitido por causa de fideicomiso.

§ 5.- Mas se entiende que está ausente el que no comparece ante el tribunal.

§ 6.- Y como se había dispuesto solamente respecto a los herederos, se añadió en el mismo Senadoconsulto, que cualquiera que sea el que debe la libertad dejada por fideicomiso, sea cual fuere la causa por la que se hubiere declarado que él o ellos estaban ausentes, el esclavo sea considerado lo mismo que si, como se debe, hubiese sido manumitido por causa del fideicomiso.

§ 7.- Pero se dispone en el Senadoconsulto Articuleiano, que en las provincias conozcan de esto los Presidentes de la provincia, aunque el heredero no sea de esta provincia.

§ 8.- Pero también si a uno se le hubiere rogado que manumita a un esclavo que no fuese de la herencia, sino propio, llega a la libertad después de la declaración en virtud del Senadoconsulto Junciano.

§ 9.- Sive iusta ex causa abest sive latitet sive praesens non vult manumittere, pro absente eum haberi Divus Pius Rescripsit.

§ 10.- Emptor quoque ut manumittat, eodem Senatusconsulto expressum est.

§ 11.- Et praesens coheres perinde manumittat, atque si traditum a coherede accepisset. Quod et in impuberis persona coheredis, qui non erat rogatus manumittere, eundem principem rescripsisse relat-um est.

§ 12.- Sed si matrimonii causa quis manumittere rogatus est, non est cogendus eam uxorem ducere, sed sufficit fideicommissa libertas.

52.- ULPIANUS; *libro I, Responsorum*.- Posteaquam a creditore alienati sunt servi, quibus fideicommissa libertas adscripta est, non nisi ex iusta causa adversus heredem subveniri eis posse.

53.- MARCIANUS; *libro IV, Regularum*.- Si quis rogatus ancillam manumittere moram fecerit, si interea enixa fuerit, constitutum est huiusmodi partum liberum nasci et quidem ingenuum. Sed sunt constitutiones, quibus cavetur statim ex quo libertas deberi coeperit ingenuum nasci: et hoc magis est sine dubio sequendum, quatenus libertas non privata, sed publica res est, ut ultro is qui eam debet offerre debeat.

§ 1.- Sed si nondum debita libertate fideicommissa ancilla peperit, studio tamen heredis fuerit effectum, ut nondum libertas deberetur, veluti quod tardius adit hereditatem, ut qui nati sint ex ancilla servi eius fiant, placet manumittendos, sed tradi matri oportere, ut ab ea manumitterentur et liberti potius matris fiant: nam

§ 9.- The Divine Pius stated in a Rescript that where anyone is absent for some good reason, or conceals himself, or, if present, is unwilling to manumit the slave, he shall be considered as being absent.

§ 10.- It is stated by the same Decree of the Senate that a purchaser shall also manumit the slave.

§ 11.- A co-heir, who is present, can manumit the slave just as if he had acquired from his co-heir the share of the latter in the slave. It is said that the same Emperor stated in a Rescript that this rule will apply to a co-heir who is a minor under the age of puberty and was not asked to manumit the slave.

§ 12.- When anyone is requested to manumit a slave, in order to marry her, he should not be compelled to contract marriage with her, but it will be sufficient if he grants her her freedom.

52.- ULPIANUS; *Opinions, Book I*.- Where slaves, to whom freedom has been bequeathed under the terms of a trust, are afterwards sold by a creditor, they cannot be granted relief against the heir, except for good cause.

53.- MARCIANUS; *Rules, Book IV*.- Where anyone is asked to manumit a female slave, and delays doing so, and, in the meantime, she has a child; it has been established by an Imperial Constitution that under such circumstances the child will be born free, and will even be considered freeborn. There are, however, certain constitutions by which it is provided that the child is freeborn from the very time that the grant of freedom takes effect, and this rule should undoubtedly be observed; for freedom is not a private but a public matter, so that he who is under obligation to grant it should tender it voluntarily.

§ 1.- Where, however, the female slave had a child before she was entitled to her freedom under the trust, and this had been purposely brought about by the heir, in order that she might not yet be entitled to her freedom, as where he delayed entering upon the estate in order that any children born to the said female slave would belong to him, it is settled that

§ 9.- Ya si uno está ausente con causa, ya si se ocultara, ya si estando presente no quiere manumitir, respondió por Rescripto el Divino Pío, que debe él ser considerado como ausente.

§ 10.- En el mismo Senadoconsulto se expresó que también manumita el comprador.

§ 11.- Y manumítalo el coheredero que esté presente, lo mismo que si lo hubiese recibido, entregado por su coheredero. Lo que se dijo que respondió por rescripto el mismo Príncipe también respecto a la persona de un coheredero impúbere, a quien no se le había rogado que lo manumitiera.

§ 12.- Pero si a uno se le hubiera rogado que manumita por causa de matrimonio, no ha de ser obligado a tomar por mujer a la esclava, sino que basta que se le dé la libertad dejada por fideicomiso.

52.- ULPIANO; *Respuestas, libro I*.- Después que por el acreedor fueron enajenados los esclavos a quienes se les asignó la libertad por fideicomiso, no se les puede auxiliar contra el heredero sino en virtud de justa causa.

53.- MARCIANO; *Reglas, libro IV*.- Si aquel a quien se le rogó que manumitiera a una esclava hubiere incurrido en mora, se determinó, que, si entretanto hubiere parido, nazca libre este parto, y aún ingenuo; pero hay Constituciones en las que se dispone que nazca ingenuo inmediatamente después que se hubiere comenzado a deber la libertad; y esto es lo que preferentemente se ha de seguir sin duda, por cuanto la libertad no es cosa privada, sino pública, de suerte que debe ofrecerla voluntariamente el que la debe.

§ 1.- Pero también si aun no siendo debida la libertad dejada por fideicomiso hubiere parido la esclava, mas por ardid del heredero se hubiere hecho que aun no se debiese la libertad, por ejemplo, porque adió tardíamente la herencia, de suerte que los que hayan nacido de la esclava se hagan esclavos de él,

quos indignus est heres servos habere, ne quidem libertos habebit.

54.- MAECIANUS; *libro XVI, Fideicommissorum*.- Si mater, postquam filium accepisset, vel qui in eius locum successit praestare noluit libertatem, compellendi sunt: amplius si mater aut nollet sibi filium tradi aut in rerum natura esse desisset, non ab re est dicere, nihilo minus ita natis ab herede libertatem praestari.

55.- MARCIANUS; *libro IV, Regularum*.- Sed et si non data opera tardius adierit, sed dum de adeunda hereditate deliberat, idem dictum est. Et si postea cognovit se heredem institutum, quam ancilla peperit, placet hoc quoque casu subveniendum esse: hoc tamen casu ipse manumittere debebit, non matri tradere.

§ 1.- Sed si directo libertas data fuerit ancillae et horum aliquid venerit, quemadmodum natis subvenietur? Nam ibi quidem petitur fideicommissa libertas et Praetor parvulis subvenit: quum vero directo libertas datur, non petitur. Sed etiam hoc casu puto nato subveniendum esse, ut aditus Praetor in rem matri decernat actionem exemplo fideicommissariae libertatis. Sic denique et Marcellus libro sexto decimo Digestorum scripsit et ante aditam hereditatem usucaptis, qui testamento manumissi sunt, subveniendum esse, ut eis libertas conservetur utique per Praetorem, quamvis his et imputari possit, quare usucapti sunt: in parvulis autem nulla deprehenditur culpa.

emale slave would belong to him, it is settled that they should be manumitted, but they must be delivered to their mother to be set free by her, and become rather her freedmen than those of the heir, for where the latter is unworthy to have slaves, he is not worthy of having freedmen.

54.- MAECIANUS; *Trusts, Book XVI*.- If the mother, after having received her child, or he who has succeeded to her place, refuses to grant it its freedom, he or she should be compelled to do so. Again, if the mother is unwilling that the child should be delivered to her, or if she should die before this is done, it may not incorrectly be said that freedom should be granted to the child by the heir.

55.- MARCIANUS; *Rules, Book IV*.- The same rule will apply where the heir did not designedly delay entering upon the estate, but deliberated as to whether or not he would accept it; and if he learned that he had been appointed heir after the slave had brought forth her child, it is decided that relief should be granted in this case; for, under such circumstances, the heir himself ought to manumit the child, and not deliver it to its mother to be emancipated.

§ 1.- If, however, freedom has been directly bequeathed to the slave, and any of the above events should take place, in what way can relief be granted to the child? For, in these instances, freedom left under a trust is demanded, and the Praetor comes to the relief of the children, but where freedom is left directly, no such a demand is made. I think, however, that, in a case of this kind, the child is entitled to relief, and that the Praetor, having been applied to, may grant the mother an action in rem, just as where freedom is left by a trust. Hence, Marcellus, in the Sixteenth Book of the Digest, states that where children who have been manumitted by will before the estate is entered upon are acquired by usucaption, relief must be granted them, in order that their freedom may be preserved by the Praetor; and although they may have been to blame for suffering themselves to be acquired by usucaption, still, no responsibility can attach to children on this account.

está determinado que han de ser manumitidos, pero que deben ser entregados a la madre para que por ella sean manumitidos, y se hagan preferentemente libertos de su madre; porque el heredero que es indigno de tener ciertos esclavos, no los tendrá ciertamente como libertos.

54.- MECIANO; *Fideicomisos, libro XVI*.- Si la madre, después que hubiese recibido al hijo, o el que sucedió en su lugar, no quiso darle la libertad han de ser compelidos a ello. Además, si la madre o no quisiera que se le entregue el hijo, o hubiese dejado de existir, no es fuera de propósito decir que, esto no obstante, se les da a los así nacidos la libertad por el heredero.

55.- MARCIANO; *Reglas, libro IV*.- Pero aunque hubiere adido tardíamente la herencia, no de intento, sino mientras delibera para adir la herencia se ha de decir lo mismo; y si supo que él había sido instituido heredero después que la esclava hubiere parido, está determinado que también en este caso se ha de prestar auxilio; pero en este caso él mismo deberá manumitirlo, y no entregarlo a la madre.

§ 1.- Mas si a la esclava le hubiere sido dada directamente la libertad, y aconteciere alguna de estas cosas, ¿de qué modo se auxiliará a los hijos? Porque cuando se pide ciertamente la libertad dejada por fideicomiso, el Pretor auxilia a los pequeñuelos, pero cuando se da directamente la libertad, no se pide. Pero opino que también en este caso se le ha de auxiliar al que nació, de suerte que recorriéndose al Pretor le conceda a la madre la acción real a la manera que cuando se dejó la libertad por fideicomiso. Así finalmente escribió también Marcelo en el libro décimo sexto del Digesto, que se ha de auxiliar a los usucapidos aun antes de haber sido adida la herencia, que fueron manumitidos en testamento, a fin de que se les conserve la libertad, ciertamente por el Pretor, aunque a ellos se les pueda imputar que hayan sido usucapidos; pero en los párvulos no se halla ninguna culpa.

56.- MARCELLUS; *libro singulari Responsorum*.- Lucius Titius testamento ita cavit: "si quos codicillos reliquero, valere volo. Si quis mihi ex Paula, quae uxor mea fuit, intra decem menses natus natave erit, ex semisse heredes sunt. Gaius Seius ex semisse heres esto. Stichum et Pamphilum servos meos et Erotem et Diphilum peto et fidei heredum committo, ut, quum ad pubertatem liberi mei pervenerint, manumittant". Deinde novissima parte ita cavit: "quod si mihi liberi nati non erunt aut intra pubertatem decesserint, tunc heredes ex paribus partibus sunt Mucius et Maevidius. Legata, quae priore testamento, quo filios et Seium, reliqui, praestari volo, hoc est et a sequentibus heredibus".

Deinde codicillis ita cavit: "Lucius Titius heredibus primis et substitutis salutem. Peto, ut ea quae testamento cavi legavi et ea quae codicillis cavero legavero, praestetis". Quaero, quum liberi Lucio Titio nati non sint, an Sticho et Pamphilo et Eroti et Diphilo servis confestim fideicommissa libertas praestari debeat. Marcellus respondit condicionem, quae libertati eorum, de quibus quaereretur, si filii heredes exstiterint, adposita esset, repetitam non videri ideoque confestim libertatem praestandam esse et a primis et a substitutis heredibus: nam ut supra scriptum est, petit, ut quae testamento cavisset praestarentur, cavit autem de libertate eorum servorum. Atquin sub condicione cavit et, si alterius generis condicio esset, expectanda esset: sed non est verisimile, ut hoc in ista condicione cogitaverit, quum fidei substitutorum committeret, qui admitti ad hereditatem non possent, si impleretur condicio.

56.- MARCELLUS; *Opinions*.- Lucius Titius provided by his will as follows, "I desire 'that any codicils which I may hereafter execute shall be valid. If a child should be born to me by my wife, Paula, within ten months after my death, let it be the heir to half of my estate. Let Gaius Seius be the heir to half of my estate. I request my heirs, and I charge them to manumit my slaves Stichus, Pamphilus, Eros, and Diphilus, when my children arrive at the age of puberty." Then he inserted the following provision in the last part of his will: "If no children should be born to me, or if they should die before reaching the age of puberty, then let Mucius and Maevidius be heirs to equal shares of my estate. I desire that the legacies bequeathed by my former will, under which I appointed my sons and Seius my heirs, to be paid by the heirs who may succeed them."

He afterwards executed a codicil as follows: "Lucius Titius to his heirs in the first degree and to their substitutes; Greeting. I ask you to pay those legacies which I have bequeathed by my will, as well as those which I shall bequeath by my codicil." As no children were born to Lucius Titius, I ask whether the freedom granted by the trust should be immediately given to the slaves Stichus, Pamphilus, Eros and Diphilus. Marcellus answered that there was a condition attached to the bestowal of freedom upon the slaves in question, which was that the children of the testator should become his heirs; but the condition did not appear to be repeated, and therefore that freedom should be immediately granted to the slaves by the heirs in the first degree and the substitutes. For, as was stated above, the testator requested that everything which he mentioned in his will shall be carried out. Moreover, he provided for the freedom of the said slaves, but he did so under a condition, and if the condition had been of any other kind it would have been necessary to await its fulfillment. It is not, however, probable that he had this condition in his mind when he charged the substitutes, since if it should be fulfilled, the substitutes could not be admitted to the succession.

56.- MARCELO; *Respuestas, libro único*.- Lucio Ticio dispuso así en su testamento: «si yo dejare algunos codicilos, quiero que valgan; si de Paula, que fue mi mujer, me hubiere nacido dentro de diez meses algún hijo o hija, sean herederos de la mitad; Cayo Seyo sea heredero de la otra mitad; pido y encomiendo a la fidelidad de los herederos, que cuando mis hijos hubieren llegado a la pubertad manumitan a Stico y a Pánfilo, esclavos míos, y a Eros y a Difilo»; después, en la última parte dispuso así: «pero si no me nacieren hijos, o hubieren fallecido dentro de la pubertad, sean entonces herederos por partes iguales Mucio y Mevio; quiero que se paguen los legados, que dejé en el primer testamento, en que instituí a mis hijos y a Seyo, esto es, también por los herederos siguientes».

Finalmente dispuso así en codicilos; «Lucio Ticio a sus primeros herederos y a los substitutos, saludos pido que entreguéis lo que en el testamento dispuse y legué, y lo que en codicilos hubiere dispuesto y legado»; pregunto, si, no habiéndole nacido hijos a Lucio Ticio, se les deberá dar inmediatamente a Stico y a Pánfilo y a Eros y a Difilo la libertad dejada por fideicomiso. Marcelo respondió, que la condición, si hubiesen quedado herederos los hijos, que se puso para la libertad de aquellos de quienes se trataba, no se consideraba repetida, y que por lo tanto se ha de dar inmediatamente la libertad, así por los primeros herederos, como por los substituídos. Porque, como arriba se escribió, pidió que se entregase lo que hubiese dispuesto en el testamento; pero dispuso respecto a la libertad de estos esclavos, mas dispuso bajo condición, y si la condición fuese de otro género, se habría debido esperar a ella; pero no es verosímil que tratándose de esta condición haya pensado en esto, al encomendar tal encargo a la fidelidad de los substitutos, los cuales no podrían ser admitidos a la herencia, si se cumpliese la condición.

TIT. VI

DE ADEMTIONE LIBERTATIS

TERENTIUS CLEMENS; *libro XVIII, ad legem Iuliam et Papiam*.- Quum libertas lege adimatur, aut pro non data haberi debet aut certe perinde observari, ac si a testatore adempta esset.

TIT. VII

DE STATULIBERIS

1.- PAULUS; *libro V, ad Sabinum*.- Statuliber est, qui statutam et destinatum in tempus vel conditionem libertatem habet.

§ 1.- Fiunt autem statuliberi vel condicione expressa vel vi ipsa. condicione expressa quid est, manifestum est. Vi ipsa, quum creditoris fraudandi causa manumittuntur: nam dum incertum est, an creditor iure suo utatur, interim statuliberi sunt, quoniam fraus quum effectu in ege Aelia Sentia accipitur.

2.- ULPIANUS; *libro IV, ad Sabinum*.- Qui statuliberi causam adprehendit, in ea condicione est, ut, sive tradatur, salva spe libertatis alienetur, sive usucapiatur, quum sua causa usucapiatur, sive manumittatur, non perdat spem orcinii liberti. Sed statuliberi causam non prius servus nanciscitur nisi adita vel ab uno ex institutis hereditate: ceterum ante additionem sive tradetur sive usucapietur sive manumittetur, spes statutae libertatis intercidit.

TITLE VI

CONCERNING THE DEPRIVATION OF FREEDOM

1.- TERENTIUS CLEMENS; *On the Lex Julia et Papia, Book XVIII*.- When freedom is taken away by law, it should either be considered as not having been granted, or as having afterwards been taken away by the testator himself.

TITLE VII

CONCERNING SLAVES WHO ARE TO BE FREE UNDER A CERTAIN CONDITION

1.- PAULUS; *On Sabinus, Book V*.- A slave who is to be conditionally free is one who will be entitled to his freedom at the expiration of a prescribed time, or upon the fulfillment of a certain condition.

§ 1.- Slaves become free either under an express condition, or by the operation of the law itself. It is clear in what way this takes place under an express condition. They are manumitted by operation of law where they are liberated for the purpose of defrauding creditors. For as long as it is uncertain whether a creditor will avail himself of his rights, the slaves are conditionally free, because, by the Lex Aelia Sentia, the commission of a fraud under such circumstances must take effect.

2.- ULPIANUS; *On Sabinus, Book IV*.- We understand the position of the slave who is to be free under a condition to be such that, whether he is delivered after having been sold, while still retaining the hope of his freedom, or whether he has been acquired for his own benefit by usucaption, or whether when he is manumitted, he does not abandon the expectation of becoming the freedman of the deceased. The slave is not placed in such a position unless the estate has been entered upon by one of the heirs. But if he should be alienated, or acquired by usucaption, or manumitted before the estate is

TÍTULO VI

DE LA REVOCACIÓN DE LA LIBERTAD

TERENCIO CLEMENTE; *Comentarios a la ley Julia y Papia, libro XVIII*.- Cuando la libertad se quite por la ley, o se deberá considerar como no dada, o se deberá observar ciertamente lo mismo que si hubiese sido revocada por el testador,

TÍTULO VII

DE AQUELLOS A QUIENES EN TESTAMENTO SE LES DEJÓ LA LIBERTAD BAJO CONDICIÓN

1.- PAULO; *Comentarios a Sabino, libro V*.- Es *statuliber* el que tiene la libertad estatuida y destinada a tiempo o bajo condición.

§ 1.- Se hacen *statuliberi* o por condición expresa, o por la fuerza misma de las cosas. Es manifiesto que sea por condición expresa; por la fuerza misma de las cosas, cuando son manumitidos para defraudar a un acreedor; pues mientras es incierto si el acreedor usará de su derecho, son entretanto *statuliberi*, porque el fraude se entiende en la ley Elia Sencia seguido de efecto.

2.- ULPIANO; *Comentarios a Sabino, libro IV*.- El que adquiere la condición de *statuliber*, se halla en el caso de que, si es entregado, sea enajenado quedando a salvo la esperanza de la libertad; si es usucapido, sea usucapido con su propia condición, y si es manumitido, no pierda la esperanza de ser liberto orcinio. Pero el esclavo no alcanza la condición de *statuliber* antes que haya sido adida la herencia por lo menos por uno de los instituidos. Mas si fuere entregado, o usucapido, o manumitido antes de la adición, se extingue la esperanza de la libertad estatuida.

entered upon, his hope of the freedom bequeathed to him will be lost.

§ 1.- Sed si impuberis tabulis libertas servo sit adscripta, an vivo pupillo, post aditionem videlicet hereditatis patris, statuliber sit? Cassius negat: Iulianus contra existimat, quae sententia verior habetur.

§ 2.- Plus scripsit Iulianus et si legatus sit servus ab herede patris, liber esse iussus in pupillaribus tabulis, praevalere libertatis dationem.

§ 3.- Si primis tabulis sub condicione servus quum libertate ex parte dimidia heres sit institutus, an statuliberi causam optineat, ut adeunte coherede quum sua causa usucapiatur? Quum a semetipso acceperit libertatem, non potest statuliberi causam optinere. Plane si condicio hereditatis deficiat, quo casu secundum iulianum vel libertatem apiscitur, dicendum est statuliberi causam optinere, eo quod non a semetipso, sed a coherede accepisse libertatem creditur.

§ 4.- Quocumque gradu pupillo servus quum libertate substitutus sit, necessarii causam optinet: quae sententia utilitatis causa recepta est et a nobis probatur. Celsus quoque putat libro quinto decimo quum libertate substitutum statuliberi causam optinere.

3.- IDEM; *libro XXVII, ad Sabinum*.- Statuliberos condicioni parere oportet, si nemo eos impediat et sit condicio possibilis.

§ 1.- Sed si in heredis persona iussus sit parere

§ 1.- Where, however, freedom has been left to a slave under a pupillary substitution, will he become conditionally free during the lifetime of the minor, after the estate of his father has been accepted? Cassius denies that he will; but Julianus holds the opposite opinion, which is considered the more correct one.

§ 2.- Julianus further says that if a slave is bequeathed to the heir of the father, and, in the pupillary substitution he is ordered to be free, the grant of freedom will take precedence.

§ 3.- If a slave is appointed heir to half of the estate, with the grant of his freedom conditionally, by the first will, will he occupy the position of a slave, who is to be conditionally free, so that, if his co-heir enters upon the estate, he cannot under the circumstances be acquired by usucaption? He cannot occupy the position of a slave to be conditionally free, as he received freedom from himself. It is clear that it must be held that he will occupy the position of a slave to be conditionally free, if the condition under which he was appointed heir should not be complied with; in which case, according to Julianus, he will obtain his liberty because he is not held to have obtained it from himself but from his co-heir.

§ 4.- In whatever degree a slave may have been substituted for a minor, with the bequest of his freedom, he occupies the position of a necessary heir. This opinion has been adopted on account of its convenience, and we approve it. Celsus, also, in the Fifteenth Book, thinks that a slave who is substituted with a bequest of his freedom occupies the position of one who is to be conditionally free.

3.- THE SAME; *On Sabinus, Book XXVII*.- Slaves of this description must comply with the condition prescribed, if no one prevents them from doing so, and the condition is possible.

§ 1.- Where, however, the slave is ordered to

§ 1.- Pero si se le hubiera asignado la libertad a un esclavo en el testamento de un impúbero ¿será acaso *statuliber* en vida del pupilo, por supuesto después de la adición de la herencia del padre? Cassio dice que no, y Juliano opina lo contrario; cuya opinión es tenida por más verdadera.

§ 2.- Juliano escribió además, que si esclavo hubiera sido legado a cargo del heredero del padre, y en el testamento del pupilo se mandó que fuere libre, prevalece la dación de la libertad.

§ 3.- Si en el primer testamento el esclavo hubiera sido instituido heredero de la mitad con la libertad bajo condición, ¿obtendrá la condición de *statuliber*, de suerte que, añadiendo la herencia el coheredero sea usucapido con su propia condición? Habiendo recibido de sí mismo la libertad, no puede obtener la condición de *statuliber*. Pero si faltara la condición de la herencia, en cuyo caso adquiere, según Juliano, por lo menos la libertad, se ha de decir que adquiere la condición de *statuliber*, porque se cree que no recibió de sí mismo la libertad sino de su coheredero.

§ 4.- En cualquier grado, en que el esclavo haya sido substituido con la libertad a un pupilo, obtiene la condición de heredero necesario; cuya opinión fue admitida por causa de utilidad, y es aprobada por nosotros. También Celso opina en el libro décimo quinto, que el substituido con la libertad obtiene la condición de *statuliber*.

3.- EL MISMO; *Comentarios a Sabino, libro XXVII*.- Los *statuliberi* deben cumplir la condición, si nadie se lo impidiera, y si la condición fuese posible.

§ 1.- Pero ¿qué se deberá decir si se le hubiera

condicioni, quid dici debeat? Si quidem paruit condicioni, statim liber est etiam invito herede. Quod si non patitur heres pareri (puta offert decem, quae dare iussus erat), procul dubio liber est, quia per heredem stare videtur, quo minus condicionem impleat. Et parvi refert, de peculio ei offerat an ab alio accepta: receptum est enim, ut servus peculiares quoque nummos dando perveniat ad libertatem, sive ipsi heredi sive alii dare iussus est.

§ 2.- Inde quaeritur, si forte debeatur pecunia huic servo vel ab herede, quod in domini rationem plus erogaverat, vel ab extraneo, nec velit heres debitorem convenire vel statulibero solvere pecuniam: an debeat ad libertatem pervenire, quasi moram per heredem patiatur. et aut legatum huic statulibero fuit peculium aut non: si legatum peculium fuit, servius scribit moram eum libertatis passum ob hoc ipsum, quod ei aliquid ex ratione dominica deberetur nec ei ab herede praestaretur: quam sententiam et Labeo probat. Idem servius probat et si in eo moram faciat heres, quod nolit exigere a debitoribus: nam perventurum ad libertatem ait. Mihi quoque videtur verum quod servius ait. Quum igitur veram putemus sententiam servi, videamus, an et si non fuerit praelegatum peculium servo, idem debeat dici: constat enim statuliberum de peculio posse dare vel ipsi heredi iussum vel alii: et si eum dare impediatur, perveniet statuliber ad libertatem. Denique etiam remedii loco hoc monstratur domino statuliberi, ut eum extraneo iussum dare prohibeat, ne et nummos perdat quum statulibero. Proinde defendi potest et si non vult exigere vel ipse solvere, ut hic habeat, unde condicioni pareat, libertatem competere: et ita Cassius quoque scribit.

comply with the condition with respect to the heir, what must be said?" If he complies with it he will immediately become free, although the heir may not consent. If the heir prevents him from complying with the condition, as, for instance, where he refuses ten aurei which the slave was ordered to pay him, there is no doubt that the slave will be free, because it is the fault of the heir that the condition was not fulfilled. And it makes little difference whether he tenders the amount out of his peculium, or whether he has obtained it from some other source, for it is established that a slave who pays money out of his peculium will be entitled to his freedom, whether he is ordered to pay it to the heir or to anyone else.

§ 2.- Hence, the question arises, if a sum of money should be due to the said slave, either from the heir, because the slave had advanced it in transacting the business of his master, or from a stranger, and the heir does not wish to sue the debtor, or to pay the money to the slave, will the latter be entitled to his freedom on account of the delay he suffers through the fault of the heir? Either the peculium was bequeathed to the slave, or it was not; if it was bequeathed to him, Servius says that it is the heir who is responsible for the delay of the slave obtaining his freedom, because something is due to him from the estate of his master which is not paid by the heir. Labeo adopts this opinion. Servius also approves it, and says that if the heir causes delay for the reason that he is unwilling to collect money from the debtors of the slave, the latter will be entitled to his freedom. The opinion of Servius seems to me to be correct. Hence, as we think this opinion to be true, let us see whether the same rule should not apply, even where the peculium was not bequeathed as a preferred legacy to the slave. For it is settled that a slave, in order to be conditionally free, can make a payment out of his peculium whether he is ordered to do so to the heir, to himself, or to someone else; and if the heir should prevent him from doing so, the slave will be entitled to his freedom. Finally, this is given to the master of the slave as a remedy, that is, he is forbidden to pay to a stranger what he was ordered to pay, lest he may run the risk of losing both the money and the slave; hence it can be maintained that, if the heir does not wish to

mandado que cumpla la condición respecto a la persona del heredero? Si verdaderamente cumplió la condición, es libre inmediatamente, aun contra la voluntad del heredero; pero si el heredero no consiente que se cumpla, por ejemplo, ofrece los diez que se le había mandado dar, es libre sin duda alguna, porque se considera que consiste en el heredero que no cumpla la condición. Y poco importa que se los ofrezca del peculio, o recibidos de otros; porque esta permitido que el esclavo llegue a la libertad aun dando dinero del peculio, ya si se le mandó que el mismo lo diera al heredero, ya si a otro.

§ 2.- Por lo cual se pregunta, si acaso se le debiera dinero a este esclavo o por el heredero, porque había gastado más por cuenta de su señor, o por un extraño, y el heredero no quisiera demandar al deudor, o pagarle el dinero al *statuliber*, ¿deberá llegar a la libertad, como si sufriese mora por causa del heredero? Y a este *statuliber* se le legó, o no, el peculio; si se le legó el peculio, escribe Servio que él sufrió mora para la libertad por esto mismo, porque se le debía alguna cosa de las cuentas de su señor, y no se le pagaba por el heredero; cuya opinión aprueba también Labeón. Lo mismo aprueba Servio, también si el heredero causara la mora porque no quisiera reclamarles a los deudores; pues dice que habrá de llegar a la libertad; y a mi también me parece verdadero lo que dice Servio. Así, pues, considerando nosotros verdadera la opinión de Servio, veamos si se deberá decir lo mismo, aunque no se le hubiere prelegado el peculio al esclavo; porque es sabido, que el *statuliber* puede dar de su peculio lo que se le mandó, o al mismo heredero, o a otro; y si se le impidiera darlo, el *statuliber* llegara a la libertad. Finalmente, también se le concede en calidad de remedio al señor del *statuliber*, que le prohíba dar a un extraño lo que se le mandó, a fin de que no pierda el dinero y el *statuliber*; por lo cual se puede defender, que aunque no quiera reclamar, o pagar él mismo, para que el esclavo tenga con qué cumplir la condición, compete la libertad; y así lo escribe también Cassio.

collect the claim from the debtors of the slave, or to pay him himself, so that he may have the means with which to comply with the condition, the slave will be entitled to his freedom. Cassius also adopted this opinion.

§ 3.- Non solum autem si dare iussum dare prohibeat, statuliber ad libertatem pervenit, verum etiam si ascendere capitolium iussum ascendere vetet, item si capuae dare iussum capuam ire prohibeat: nam qui prohibet servum proficisci, intellegendus est impedire magis velle libertatem quam operis servi uti.

§ 4.- Sed et si iussum coheredi dare non patiat, unus ex heredibus dare, aequale liber erit: sed is, cui iussum erat dare et liber esse, familiae erciscundae iudicio ab eo qui impedit consequetur, quod sua intererat prohibitum statuliberum non esse.

§ 5.- Si decem iussus dare et liber esse quinque det, non pervenit ad libertatem, nisi totum det: interim igitur vindicare quinque nummos dominus eorum potest. sed si residuum fuerit solutum, tunc etiam id alienatum, cuius ante dominium non erat translatum. Ita pendebit praecedentis summae alienatio, sic tamen, ut non retro nummi fiant accipientis, sed tunc, quum residua summa fuerit exsoluta.

§ 6.- Si plus quam iussus erat dederit statuliber, puta decem iussus dare viginti dedit, sive numeravit sive in sacculo dedit, pervenit ad libertatem et superfluum potest repetere.

§ 7.- Si quis servum iussum decem dare et liberum esse vendiderit sine peculio, utrum statim liber sit (quasi prohibitus videatur de peculio dare hoc ipso,

§ 3.- Again, the slave will not only obtain his freedom when he is prevented from paying what he was ordered by the testator to pay, but also if he is forbidden to ascend to the Capitol, or if he is prevented from going to Capua; for anyone who hinders a slave from taking a journey is understood rather to desire that he shall lose his freedom than to wish to avail himself of his services.

§ 4.- Where the slave is ordered to pay a co-heir, and another of the heirs prevents him from doing so, he will also become free; but he to whom he was ordered to make payment and become free will be entitled to an action in partition against the one who prevented him, in order to obtain the amount of his interest in not having the slave prevented from paying him.

§ 5.- If a slave who is ordered to pay ten sesterces and become free pays five, he will not be entitled to his freedom unless he pays the entire sum. Therefore, in the meantime, the owner of the five sesterces can claim them, but if the balance should be paid, then the first five, the ownership of which had not previously passed to him to whom they were given will be acquired by him; hence, the transfer of the first sum paid will remain in suspense, so that the sesterces will not, by retroactive effect, become the property of him who received them, but only where the remainder of the amount has been paid.

§ 6.- If the slave should pay more than he had been ordered to do (for instance, if he had been ordered to pay ten sesterces, and he pays twenty), whether he counted the coins, or gave them in a bag, he will obtain his freedom, and can recover the surplus.

§ 7.- If anyone should sell, without his peculium, a slave who had been ordered to pay ten sesterces and become free, will the slave immediately obtain his

§ 3.- Mas el *statuliber* llega a la libertad no solamente si se le prohibiera dar lo que se le mando, sino también si se le vedara subir al Capitolio habiéndosele mandado que suba; también, si se le prohibiera ir a Cápua habiéndosele mandado que diese en Cápua; porque se ha de entender que el que prohíbe que el esclavo parta quiere más bien impedirle la libertad, que utilizar los servicios del esclavo.

§ 4.- Pero también si habiéndosele mandado que dé a un coheredero no consintiera uno de los herederos que le diera, será igualmente libre; mas aquél, para quien se le había mandado que diera, conseguirá del que lo impidió, con la acción de partición de herencia, que también sea libre, porque a él le interesaba que no se le hubiese hecho prohibición al *statuliber*.

§ 5.- Si aquel a quien se le mandó que diese diez y que fuera libre, diera cinco, no llega a la libertad si no diera la totalidad; así, pues, puede reivindicar mientras tanto las cinco monedas el dueño de ellas; pero si se hubiere pagado el resto, entonces también se habrá enajenado aquello cuyo dominio no había sido antes transferido; y de este modo estará pendiente la enajenación de la suma anterior, pero de suerte que los dineros no se hagan retroactivamente del que los recibe, sino cuando se hubiere pagado la restante suma.

§ 6.- Si el *statuliber* hubiere dado más de lo que se le había mandado, por ejemplo, dio veinte habiéndosele mandado que diese diez, llega a la libertad, ya si los contó, ya si los dio en una bolsa, y puede reclamar el sobrante.

§ 7.- Si alguno hubiere vendido sin el peculio un esclavo, al cual se le mandó que diera diez y que fuese libre, ¿será acaso inmediatamente libre, como

quod sine peculio distractus est) an vero quum fuerit prohibitus peculium tangere? Et puto tunc demum liberum fore, quum volens dare prohibeatur, non statim ubi veniit.

§ 8.- Si quis servum iussum decem dare et liberum esse operari prohibeat, vel si, quod ex operis suis meret, abstulerit ei heres, vel si, quod ex mercedibus suis coegit, heredi dederit, an ad libertatem perveniat? Et puto, si quidem ex operis dederit vel undecumque dederit, ad libertatem perventurum: quod si prohibeatur operari, non fore liberum, quia operari domino debet. Plane si ei ablata fuerit pecunia ex operis collecta, liberum fore arbitror, quia de peculio dare prohibetur. Sane si testator vel ex operis ut det iussit, prohibitum operari ad libertatem perventurum non dubito.

§ 9.- Sed et si argento subtracto vel rebus aliis distractis nummos corrasos dederit, perveniet ad libertatem, quamvis, si nummos subtractos dedisset, ad libertatem non perveniret: nec enim videtur dedisse, sed magis reddidisse. Sed nec si aliis subripuerit nummos et heredi dederit, ad libertatem perveniet, quia avelli nummi ei qui accepit possunt. plane si sic consumpti fuerint, ut nullo casu avelli possint, competet libertas.

§ 10.- Non solum autem si heres moram facit libertati, sed et si tutor vel curator vel procurator vel alius quivis, in cuius persona condicioni parendum est, libertatem competere dicemus. Et sane hoc iure

liberty, because he has been prevented from making payment out of his peculium, for the reason that he was sold without it, or will he become free from the time that he was forbidden to touch his peculium? I think that he will only become free from the time when he wished to make payment, and was prevented from doing so, and not from the very day when he was sold.

§ 8.- Where anyone prevents a slave, who was ordered to pay ten aurei and become free from working, or where the heir deprives him of what he has earned by his labor, or if he should give the heir whatever he has obtained in this way, will he be entitled to his freedom? I think that if he should pay him what he has earned by his labor, or anything that he has obtained from any source whatsoever, he will be entitled to his freedom. If, however, he was prevented from working, he will not become free, because he is obliged to work for his master. I think that it is clear that he will become free if he should be deprived by his master of money earned by his labor, because he has been deprived of the power to pay it out of his peculium; but if the testator ordered him to pay the said sum of money earned by his labor, and he is prevented from working, I have no doubt that he will be entitled to his freedom.

§ 9.- If, however, the slave should have abstracted any silver plate, or sold other property and made payment out of the proceeds, he will obtain his freedom, although if he has paid money which he stole he will not do so; for he is not considered to have given the said money but rather to have returned it. But if he stole money belonging to other persons, and paid it to the heir, he will not obtain his freedom, for the reason that the money which was stolen can be recovered from him who received it; still, if it was used in such a way that it can, under no circumstances, be recovered, the slave will be entitled to his freedom.

§ 10.- Moreover, not only where the heir delays in making a grant of freedom, but where a guardian, curator, agent, or anyone else by whom the condition should be complied with does so, we say that the

si se considerara que se le prohibió que los diera del peculio, por esto, porque fue vendido sin el peculio, o por el contrario, cuando se le hubiere prohibido tocar al peculio? Y opino, que habrá de ser libre solamente cuando al querer darlos se le prohíba, no inmediatamente que fue vendido.

§ 8.- Si alguno prohibiera que trabaje el esclavo, al cual se le mandó que diera diez y que fuese libre, o si el heredero le quitare lo que gana con su trabajo, o si le diere al heredero lo que percibió de sus salarios, ¿llegará a la libertad? Y opino, que, si los hubiere dado de su trabajo, o los diere de otra cualquier procedencia, habrá de llegar a la libertad; pero que si se le prohibiera trabajar, no habrá de ser libre, porque debe trabajar para su señor. Mas si se le hubiere quitado el dinero percibido por su trabajo, juzgo que habrá de ser libre, porque se le prohíbe que los dé de su peculio; pero si el testador dispuso que los diera aun de su trabajo, no dudo que habiéndosele prohibido que trabaje habrá de llegar a la libertad.

§ 9.- Mas si hubiere dado dinero recogido de plata substraída o de otras cosas vendidas, llegará a la libertad, aunque, si hubiere dado dineros substraídos, no llegaría a la libertad; porque no se considera que los dió, sino más bien que los devolvió. Pero si a otros les hubiere substraído el dinero, y lo hubiere dado al heredero, tampoco llegará a la libertad, porque el dinero le puede ser quitado al que lo recibió; mas si hubiere sido consumido de modo que en ningún caso pueda ser quitado, competará la libertad.

§ 10.- Mas no solamente si el heredero causa mora para la libertad, sino también si la causa el tutor o el curador, o el procurador, u otro cualquiera, respecto a cuya persona se ha de cumplir la condición, diremos

utimur in statulibero, ut sufficiat per eum non stare, quo minus condicioni pareat.

§ 11.- Si quis heredi in diebus triginta proximis mortis testatoris dare iussus fuerit, deinde heres tardius adierit, Trebatius et Labeo, si sine dolo malo tardius adierit, dantem eum intra dies triginta aditae hereditatis ad libertatem pervenire: quae sententia vera est. Sed quid si data opera traxit? An ob id statim, ut adita est hereditas, ad libertatem perveniat? Quid enim si tunc habuit, post aditam habere desiit? Sed et hic expleta videtur condicio, quoniam per eum non steterit, quo minus impleatur.

§ 12.- Si quis sic acceperit libertatem "quum decem dare poterit, liber esto", Trebatius ait, licet habuerit decem vel idoneus fuerit ad adquirendum et conservandum peculium, tamen non alias ad libertatem perventurum, nisi dederit aut per eum non steterit, quo minus det: quae sententia vera est.

§ 13.- Stichus annua bima trima die denos aureos heredi si dederit, liber esse iussus est. Si prima pensione stetit per heredem, quo minus acciperet decem, expectandam esse trimam pensionem placet, quia et tempus adiectum est et adhuc supersunt duae pensiones. Sed si eadem decem sola habeat, quae optulit ad primam pensionem, an etiam ad sequentem quoque prosit, si offerat? Et an et ad tertiam, si sequens pensio non sit accepta? Et puto sufficere haec eadem et paenitentiae heredi locum non esse: quod et Pomponius probat.

§ 14.- Quid si servus, qui annua bima trima die iussus est dena dare, tota simul offerat heredi non

slave will be entitled to his freedom. And, indeed, this is our practice, in the case of a slave who is to be conditionally free, and it is sufficient that it is not his fault that he does not comply with the condition.

§ 11.- If anyone should be ordered to pay the heir within thirty days after the death of the testator, and the heir enters upon the estate after that time has elapsed, Trebatius and Labeo say that if he did so without acting fraudulently, the slave will obtain his freedom within thirty days after the acceptance of the estate. This opinion is correct. But what course must be pursued if the heir purposely delayed; will the slave be entitled to his freedom on this account from the time when the estate was entered upon? What if he had the money then, but did not have it after the estate was accepted? In this case, however, the condition is held to have been fulfilled, as the slave was not responsible for it not having been complied with in the first place.

§ 12.- Where a slave receives his freedom under the following clause, "Let him be free when he can pay him ten aurei," Trebatius says that, although he may have the ten aurei, or be in a position to obtain and keep his peculium, still he will not be entitled to his freedom unless he pays the money, or is not to blame for failing to pay it. This opinion is correct.

§ 13.- Stichus was ordered to be free if he paid ten aurei to the heir annually for three years. If the heir was responsible for the nonpayment of the first instalment, it is established that the slave must wait until the date of the third payment, because the time is prescribed, and there are two payments remaining. If, however, the slave has only the ten aurei which he offered when the first payment was due, would it be of any advantage to him if he tendered them at the time of the second payment, or even at the time of the third, provided the second had not been accepted? I think that it would be sufficient for him to do so, and that the heir has no right to change his mind. Pomponius also adopts this opinion.

§ 14.- What must be done if the slave who was ordered to make the three annual payments should

que compete la libertad; y a la verdad, respecto al *statuliber* observamos este derecho, que basta que en él no consista que no cumpla la condición.

§ 11.- Si a alguno se le hubiere mandado que le dé alguna cosa al heredero en los treinta días inmediatos a la muerte del testador, y luego el heredero hubiere adido más tarde la herencia, dicen Trebacio y Labeón, que si la hubiere adido más tarde sin dolo malo, llega a la libertad el que da la cosa dentro de los treinta días de adida la herencia cuya opinión es verdadera. Pero ¿qué se dirá, si de intento lo demoró? ¿Acaso llegará por esta causa a la libertad inmediatamente que fue adida la herencia? Porque ¿qué se dirá, si entonces tuvo la cosa, y dejó de tenerla, después de adida la herencia? Mas también en este caso se considera cumplida la condición, porque en él no consistió que no se cumpliera.

§ 12.- Si alguno hubiere recibido así la libertad: «cuando hubiere podido dar diez, sea libre», dice Trebacio, que aunque hubiere tenido los diez, o fuere idóneo para adquirir y conservar el peculio, no habrá de llegar, sin embargo, a la libertad de otra suerte, sino si los hubiere dado, o en él no hubiere consistido que no los diera; cuya opinión es verdadera.

§ 13.- Se dispuso que Stico fuese libre, si le hubiere dado al heredero diez áureos por uno, dos, y tres años; si en la primera pensión consistió en el heredero, que no recibiese los diez, está determinado que se ha de esperar a la tercera pensión, porque se añadió un término, y quedan todavía dos pensiones. Pero si solamente tuviera los mismos diez que ofreció para la primera pensión, ¿aprovechará también para la siguiente, si la ofreciera, y acaso también para la tercera, si la segunda pensión no hubiera sido aceptada? Y opino que bastan estos mismos diez, y que no ha lugar al arrepentimiento del heredero; lo que aprueba también Pomponio.

§ 14.- ¿Qué se dirá, si el esclavo a quien se le mandó que diera diez el primero, el segundo, y el

expectata die? Vel decem primo anno datis secundo anno viginti optulit? Benignius est eum in libertatem pervenire, quum utriusque providentia infertur et servi, quatenus maturius in libertatem perveniat, et heredis, quatenus dilatione interempta ilico accipiat, quod post tempus consequi poterat.

§ 15.- Si ita sit libertas servo data, si quinquennio heredi servierit, deinde eum heres manumiserit, statim liber fit, quasi per eum sit effectum, quo minus ei serviat: quamvis si non pateretur eum sibi servire, non statim perveniret, quam si quinquennium praeterisset. Ratio huius res evidens est: manumissus enim amplius servire non potest: at is quem quis non patitur sibi servire, postea pati potest intra quinquennii tempus. Atquin iam quinquennio ei servire non potest: sed vel minus potest.

§ 16.- Item Iulianus libro sexto decimo Digestorum scripsit, si arethusa libertas ita sit data, si tres servos pepererit, et per heredem steterit, quo minus pepererit (puta quod ei medicamentum dedisset, ne conciperet), statim liberam futuram esse: quid enim expectamus? Idemque et si egisset heres, ut abortum faceret, quia et uno utero potuit tres edere.

§ 17.- Item si heredi servire iussum statuliberum heres vendidit et tradidit, credo statim ad libertatem pervenire.

4.- PAULUS; *libro V, ad Sabinum*.- Quum heres rei publicae causa abesset et pecuniam statuliber haberet: vel expectari eum debere, donec redeat is cui dare debet, vel deponere in aedem pecuniam consignatam oportet, quo subsecuto statim ad libertatem pervenit.

tender the entire amount to the heir without waiting for it to become due? Or if, having paid ten aurei at the end of the first year, he should offer twenty at the end of the second? The more indulgent interpretation is that he will be entitled to his freedom, as benefit will accrue to both parties; for the slave will obtain his freedom sooner, and the heir will receive without delay what he would have obtained after a certain time.

§ 15.- Where freedom is granted to a slave, if he serves the heir for five years, and the heir should manumit him, he immediately becomes free, as it is the fault of the heir that he did not serve him; although, if the heir did not wish him to do so, he would not become free until after the term of five years had elapsed. The reason for this is evident, as a manumitted slave can no longer remain in servitude. But the master who does not desire the slave to serve him can still permit this to be done within five years. The slave, however, cannot serve him for the entire term of five years but he can do so for a shorter period.

§ 16.- Julianus, also, in the Sixteenth Book of the Digest, says that if Arethusa was granted her freedom under the condition that she should bring forth three slaves, and the heir was responsible for her not doing so (for instance, because he gave her some drug to prevent her from conceiving), she will immediately become free. For why should we wait? It is just the same as if the heir should cause her to have an abortion, because she could have three children at a birth.

§ 17.- Likewise, if the heir should sell and deliver a slave who is to be liberated conditionally, and who has been ordered to serve him, I think that the slave will immediately be entitled to his freedom.

4.- PAULUS; *On Sabinus, Book V*.- When the heir is absent on business for the state, and the slave has the money ready for payment, he must wait until he to whom he is to pay it returns, or he must deposit it, sealed up, in a temple; and this having been done, he will immediately be entitled to his freedom.

tercer año, se los ofreciera todos al mismo tiempo al heredero sin haber esperado el día, o, habiendo dado diez en el primer año, ofreció veinte en el segundo? Es más equitativo que él llegue a la libertad, porque se provee a la conveniencia de ambos, así a la del esclavo, en cuanto llega más pronto a la libertad, como a la del heredero, porque prescindiendo de dilación recibe al punto lo que podría conseguir después de cierto tiempo.

§ 15.- Si a un esclavo se le hubiera dado la libertad de este modo, si le hubiere servido un quinquenio al heredero, y después lo hubiere manumitido el heredero, se hace inmediatamente libre, como si en él hubiera consistido que no le sirviera, aunque, si no consintiese que él le sirviera, no llegaría inmediatamente a la libertad, sino si hubiese transcurrido el quinquenio. La razón de esto es evidente; porque el manumitido no puede servir ya más, mas el que no consiente que uno le sirva, puede consentirlo después en el espacio del quinquenio, mas ya no puede servirle un quinquenio, pero puede servirle menos

§ 16.- Escribió también Juliano en el libro décimo sexto del Digesto, que si a Aretusa le hubiera sido dada la libertad, si hubiere parido tres esclavos, y en el heredero hubiere consistido que no los pariese, por ejemplo, porque le hubiese dado un medicamento para que no concibiese, habrá de ser inmediatamente libre; porque ¿qué esperamos? y lo mismo también si el heredero hubiese hecho que abortara, porque también pudo dar a luz tres en un solo parto.

§ 17.- Asimismo, si el heredero vendió y entregó el *statuliber*, al cual se le mandó que sirviera al heredero; creo que llega inmediatamente a la libertad.

4.- PAULO; *Comentarios a Sabino, libro V*.- Cuando el heredero estuviese ausente por causa de la república, y el *statauliber* tuviese el dinero, es conveniente o que éste haya de esperar hasta que regrese aquel a quien debe darlo, o que deposite sellado el dinero en un lugar público; hecho lo cual, llega

§ 1.- Non est statuliber, cui libertas in tam longum tempus collata est, ut eo tempore is qui manumissus est vivere non possit: aut si tam difficilem, immo paene impossibilem condicionem adiecerit, ut aliunde ea libertas optingere non possit, veluti si heredi milies dedisset aut quum moreretur, liberum esse iussisset: sic enim libertas inutiliter datur, et ita Iulianus scribit, quia nec animus dandae libertatis est.

§ 2.- Servire Titio anno et liber esse iussus Titio mortuo non statim liber fiet, sed quum annus transierit, quod videtur non tantum sub condicione, sed etiam ex tempore data libertas: etenim absurdum est maturius eum liberum fieri, quum condicionem non implet, quam futurus foret, si eam expleret.

§ 3.- Si duobus decem datis liber esse iussus sit et unus quinque accipere noluerit, melius est dicere posse eum eadem quinque alteri offerentem ad libertatem pervenire.

§ 4.- "Stichus si Titio per triennium servierit vel si illi centum operas dederit, liber esto". Constat hoc modo libertatem utiliter dari posse: nam et alienus servus servire nobis potest, sicuti liber, et multo magis operas dare: nisi testator servitutis appellatione dominium magis quam operam intellexit. Ideoque si prohibet heres Titio servire, pervenit ad libertatem.

§ 5.- "Stichus si heredi meo anno servierit, liber esto": Quaerendum est, annus quomodo accipi debeat, an qui ex continuis diebus trecentis sexaginta quinque constet an quibus libet. Sed superius magis intellegendum Pomponius scribit. Sed et si

§ 1.- A slave is not considered to become conditionally free whose liberty is deferred for so long a time that he who is to be manumitted cannot live until it has elapsed; or, if his owner has prescribed such a difficult, or even an impossible, condition that his freedom cannot be acquired by complying with it; as, for instance, if it was that he should pay a thousand times a certain sum to the heir, or if he should order him to be free from the time of his death. A grant of freedom made in this manner is void, as Julianus says, because there is, in fact, no intention of granting the slave his freedom.

§ 2.- If a slave is ordered to be free on condition of serving Titius for a year, and Titius should die, the slave will not immediately become free, but he will after the expiration of a year, because freedom is considered to have been given him not only under a condition, but also from a certain date. For it would be absurd for him to become free sooner when he did not comply with the condition than he would if he did comply with it.

§ 3.- Where a slave is ordered to be free on the payment of ten aurei to two persons, and one of them refuses to accept five, it is better to hold that the slave can obtain his freedom by tendering the said five aurei to the other party.

§ 4.- "Let Stichus be free, if he serves Titius for three years, or renders him services worth a hundred solidi." It is settled that freedom can be legally granted in this manner; for the slave of another can serve us as a freeman, and can, with greater propriety, render us his services; unless the testator, by the term services, meant ownership, rather than labor. Hence, if the heir prevents the slave from serving Titius, he will be entitled to his freedom.

§ 5.- "Let Stichus be free if he serves my heir for a year." The question might arise how ought the word "year" be understood in this case; should it be a term which contains three hundred and sixty-five consecutive days, or merely that many days?

inmediatamente a la libertad.

§ 1.- No es *statuliber* aquel a quien se le confirió la libertad para un tiempo tan remoto, que en él no pueda vivir el que fue manumitido; o si no le hubiere impuesto una condición tan difícil, aún más, casi imposible, que no pueda obtener de algún modo esta libertad, por ejemplo, si le hubiese dado mil al heredero, o si hubiese dispuesto que sea libre cuando muera; porque así se da inútilmente la libertad; y así lo escribe Juliano, porque no hay ni la intención de dar la libertad.

§ 2.- Aquel a quien se le mandó que sirviese a Ticio un año y que fuese libre, no se hará libre inmediatamente que haya muerto Ticio, sino cuando hubiere transcurrido el año porque se considera que la libertad fue dada no solamente bajo condición, sino también desde cierto tiempo; porque es absurdo, que, no cumpliendo la condición, él se haga libre más pronto que lo habría de ser, si la cumpliese.

§ 3.- Si se hubiera dispuesto que uno fuera libre habiendo dado diez a dos, y uno no quisiere recibir sus cinco, es mejor decir que él puede llegar a la libertad ofreciendo los mismos cinco al otro.

§ 4.- «Sea libre Stico, si le hubiere servido a Ticio tres años, o si le hubiere dado cien días de trabajo»; es sabido que de este modo se puede dar válidamente la libertad; porque también nos puede servir un esclavo ajeno, como un hombre libre, y mucho más damos días de trabajo, a no ser que el testador haya entendido con la palabra servidumbre más bien el dominio, que los días de trabajo; y por esto, si el heredero le prohíbe que sirva a Ticio, llega a la libertad.

§ 5.- «Sea libre Stico, si le sirviere un año a mi heredero»; se ha de ver, cómo deba entenderse el año, si el que conste de trescientos sesenta y cinco días continuos, o de otros cualesquiera, Pero escribe Pomponio, que preferentemente se ha de entender

quibusdam diebus aut valetudo aut alia iusta causa impedimento fuerit, quo minus serviat, et hi anno imputandi sunt: servire enim nobis intelleguntur etiam hi, quos curamus aegros, qui cupientes servire propter adversam valetudinem impediuntur.

§ 6.- Item si decem heredi dare iussus fuerit, heres etiam per partes accipere favore libertatis cogendus est.

§ 7.- Ita liber esse iussus "si Titius Capitolium ascenderit": si Titius nolit ascendere, impediatur libertas. Idemque iuris est in similibus causis et condicionibus.

§ 8.- Item Cassius ait ei, qui servire iussus est anno, illud tempus, quo in fuga sit vel in controversia pro libertate, non procedere.

5.- POMPONIUS; *libro VIII, ad Sabinum*.- Statuliber rationem reddere iussus reliquum quod apparet solvit, de eo, quod obscurius est, satisdare paratus est. Neratius et Aristo recte putant liberum fore, ne multi ad libertatem pervenire non possint incerta causa rationis et genere negotii huiusmodi.

§ 1.- Statuliber, qui non rationes reddere, sed pecuniam iussus est dare, numerare debet, non fideiussorem dare.

6.- ULPIANUS; *libro XXVII, ad Sabinum*.- Si statulibera serva poenae facta sit et post damnationem statutae libertatis condicio extiterit, quamvis ipsi statuliberae nihil proficiat, partui tamen proficere oportet, ut perinde liber nascatur, atque si mater damnata non esset.

Pomponius says that the word should be understood in the former sense. If, however, illness, or some other just cause prevents the slave from serving during certain days, these ought to be included in the year. For those whom we take care of when ill are understood to serve us, if they are willing to do so but are precluded by bad health.

§ 6.- If a slave is ordered to pay ten aurei to the heir, the latter will, through the indulgence conceded to freedom, be compelled to receive the money in separate payments.

§ 7.- Where a slave was ordered to be free, "if Titius should ascend to the Capitol," and Titius refuses to do so, the grant of freedom is annulled. This rule also applies to similar cases under the same conditions.

§ 8.- Cassius, likewise, says that where a slave is ordered to serve for a year, the time when he was in flight or in litigation will not be included in favor of his freedom.

5.- POMPONIUS; *On Sabinus, Book VIII*.- Where a slave who was to become free conditionally was ordered to render an account, and paid what appeared to be the balance remaining in his hands, and offered to give security with reference to what remained in doubt, Neratius and Aristo very properly hold that he will become free; as otherwise, many slaves might not obtain their liberty because of the uncertainties of accounts and the nature of business of this kind.

§ 1.- A slave who is to become free conditionally, and is ordered to pay a sum of money but not to render an account, should pay it, and not furnish a surety that he will do so.

6.- ULPIANUS; *On Sabinus, Book XXVII*.- If a female slave who is to become free conditionally is sentenced to servitude as punishment for crime, and after her conviction the condition upon which her freedom is dependent is fulfilled, although it will be of no advantage to her, it will, nevertheless, benefit any child which she may have, for it will be born free,

del primer modo. Mas aunque en algunos días o una enfermedad u otra justa causa hubiere servido de impedimento para que no le sirva, se han de computar también aquellos en el año; porque se entiende que nos sirven también aquellos a quienes cuidamos enfermos, los cuales deseando servirnos se hallan impedidos por su mala salud.

§ 6.- Asimismo, si a uno se le hubiere mandado que le dé diez al heredero, el heredero ha de ser obligado en favor a la libertad a recibirlos también por partes.

§ 7.- Habiéndose mandado que uno fuere libre de este modo: «si Ticio hubiere subido al Capitolio», se impedirá la libertad, si Ticio no quisiera subir; y el mismo derecho se observa en análogos casos y condiciones.

§ 8.- También dice Cassio, que a aquel a quien se le mandó que sirviera un año no le aprovecha para la libertad el tiempo que estuviese fugitivo o en litigio.

5.- POMPONIO; *Comentarios A Sabino, libro VIII*.- Un *statuliber*, a quien se le mandó rendir cuentas, entregó el remanente que aparece, y respecto a lo que está más oscuro se halla dispuesto a dar fianza; con razón opinan Neracio y Aristón, que habrá de ser libre, no sea que muchos no puedan llegar a la libertad por una causa incierta relativa a las cuentas, y por una especie de negocio de tal índole.

§ 1.- El *statuliber* a quien se le mandó, no que rindiera cuentas, sino que diese dinero, debe entregarlo, y no dar fiador.

6.- ULPIANO; *Comentarios a Sabino, libro XXVI*.- Si una *statuliber* hubiera sido hecha esclava de la pena, y después de la condenación se hubiere cumplido la condición de la libertad estatuida, aunque en nada le aproveche a la misma *statulibera*, debe aprovecharle, sin embargo, al parto, de suerte que nazca libre lo mismo que si la madre no hubiese

§ 1.- Quid tamen si qua conceperit in servitute, deinde ab hostibus capta peperit ibi post existentem condicionem, an liberum pariat? Et interim quidem quin servus hostium sit, nequaquam dubium est: sed verius est postliminio eum liberum fieri, quia, si mater in civitate esset, liber nasceretur.

§ 2.- Plane si apud hostes eum concepisset et post existentem condicionem edidisset, benignius dicetur competere ei postliminium et liberum eum esse.

§ 3.- Statuliber parendo condicioni in persona emptoris pervenit ad libertatem: et sciendum hoc ad statuliberos omnis sexus pertinere. Non solum autem si venierit, haec condicio ad eum transit qui emit, verum etiam ad omnes, quicumque quoquo iure dominium in statulibero nacti sunt. Sive igitur legatus sit tibi ab herede statuliber sive adiudicatus sive usucaptus a te sive traditus vel aliquo iure tuus factus, sine dubio dicemus parere condicioni in persona tua posse. Sed et in herede emptoris idem dicitur.

§ 4.- Si filius familias heres sit institutus et statuliber filio dare iussus est et liber esse, sive filio sive patri dando pervenit ad libertatem, quia et ad patrem hereditatis emolumentum pervenit. Sed et si post mortem filii patri dederit quasi heredis heredi, liber erit: nam et si quis extraneo dare iussus sit et liber esse, deinde hic heredi heres extiterit, non quasi in extranei persona, sed quasi in heredis condicioni parebit.

just as if its mother had not been convicted.

§ 1.- What, however, would be the result if such a female slave should conceive while in servitude, and, having been captured by the enemy, should have a child after the condition upon which her freedom was dependent had been complied with; would her child be free at its birth? There is no doubt whatever that it would, in the meantime, be the slave of the enemy; but it is also true that it would become free by the right of postliminium, because if the mother had been in her own country the child would have been born free.

§ 2.- It is clear that the more equitable opinion is that, if she should conceive while in the hands of the enemy, and bring forth the child after the condition had been fulfilled, it could profit by the right of postliminium and become free.

§ 3.- A slave to be free conditionally will obtain his liberty from his purchaser if the condition is complied with. It must be remembered that this rule is applicable to slaves of both sexes. If the condition is fulfilled, it not only binds the person who purchased the slave, but also all those who have obtained ownership of him by any title whatsoever. Therefore, whether the slave has been bequeathed to you by the heir, or awarded to you in court, or acquired by you through usucaption, or transferred to you, or has become your property by any other right, we say that, beyond any doubt, the condition can be complied with so far as you are personally concerned. The same can be said with reference to the heir of the purchaser.

§ 4.- Where a son under paternal control is appointed an heir, and a slave to be free conditionally is directed to pay to the son a certain sum of money, and be free, he will obtain his freedom by paying the said sum either to the son, or to his father; because the father is entitled to the benefit of the estate. If, however, he should pay the father after the death of the son, he will become free, as having made payment to the heir of the heir. For if a slave is ordered to pay a sum of money to a stranger, and

sido condenada.

§ 1.- Pero ¿qué se dirá, si alguna hubiere concebido en la esclavitud, y aprisionada luego por los enemigos pariere en poder de ellos después de cumplida la condición? ¿Parirá un hijo libre? Y ciertamente que de ninguna manera es dudoso que es mientras tanto esclavo de los enemigos; pero es mas verdadero que él se hace libre por el postliminio, porque, si la madre estuviese en la ciudad, nacería libre.

§ 2.- Mas si lo hubiese concebido en poder de los enemigos, y lo hubiese dado a luz después de cumplida la condición, se dirá con mas equidad que le compete el postliminio, y que él es libre.

§ 3.- El *statuliber*, cumpliendo la condición respecto a la persona del comprador, llega a la libertad; y se ha de saber, que esto se refiere a los *statuliberi* de ambos sexos. Mas esta condición, si se hubiere impuesto, pasa no solamente al que lo compró, sino también a todos los que con algún derecho adquirieron dominio sobre el *statuliber*. Así, pues, ya si el *statuliber* te hubiera sido legado a cargo del heredero, ya si te fue adjudicado, o fue por ti usucapido, o te fue entregado, o por algún derecho se hizo tuyo, diremos sin duda, que puede cumplir la condición respecto a tu persona; pero lo mismo se dice también en cuanto al heredero del comprador.

§ 4.- Si hubiera sido instituido heredero un hijo de familia, y se mandó que un *statuliber* le diera al hijo, y que fuese libre, éste llega a la libertad dándole o al hijo, o al padre, porque el emolumento de la herencia va también a poder del padre. Pero si le hubiere dado al padre después de la muerte de su hijo, como al heredero del heredero, también será libre; porque también si se mandó que alguno le diera a un extraño y que fuese libre, y después aquél hubiere quedado heredero del heredero, cumplirá la condición no

§ 5.- Statuliber decem dare iussus et liber esse, si quinque datis distractus sit, residua quinque emptori dabit.

§ 6.- Si servus tuus statuliberum emerit, tibi datur, quod heredibus dare iussus est. Sed et si tuo servo dederit, si modo is eum peculiari nomine emit neque ei tu peculium ademisti, puto liberum fore, scilicet ut eo modo tibi dedisse intellegatur, perinde atque si tua voluntate cuivis alii tuorum servorum dedisset.

§ 7.- Si quis non dare decem et liber esse, sed rationibus redditus liber esse iussus sit, an ad emptorem haec condicio transeat, videamus. Et alias sciendum est eas demum condiciones ad emptorem transire, quae sunt in dando: ceterum hae, quae sunt in faciendo, non transeunt, ut puta si filium eius litteras edocuerit: hae enim personis eorum cohaerent, quibus adscribuntur. Rationum autem reddendarum condicio, quod ad reliqua quidem attinet, in danda pecunia consistit, quod autem ad ipsa volumina rationum tradenda percontandasque et examinandas rationes et in dispungendas atque excutiendas, factum habet. Num quid ergo reliqua quidem et emptori dando perveniat ad libertatem, cetera in persona heredis consistant? Puto igitur et ad emptorem reliquorum solutionem transmitti: sic fiet, ut dividatur condicio: et ita Pomponius libro octavo ex Sabino scripsit.

7.- PAULUS; *libro V, ad Sabinum*.- Usus fructus

become free, and the latter becomes the heir of the heir, he will comply with the condition not with reference to the stranger, but as it were, with reference to the heir.

§ 5.- Where a slave is directed to pay ten aurei and become free, and he is sold after having paid five, he must pay the remaining five to the purchaser.

§ 6.- If your slave should purchase another slave, who is to be free conditionally, he must pay you what he was ordered to pay to the heirs. If, however, he has paid your slave, I think that he will be free, provided your slave bought him with money belonging to his peculium, and you have not deprived him of it; so that, in this way, he will be understood to have paid you, just as if payment had been made to any one of your slaves with your consent.

§ 7.- When a slave is ordered to be free, not upon the payment of a sum of money but if he renders his accounts, let us see whether this condition will pass to the purchaser. And it must be remembered that usually only those conditions which refer to the payment of money pass to a purchaser, and that such as refer to acts to be performed do not pass to him; for instance, if he gives his son instruction, for these conditions attach to the person of those upon whom they are imposed. The condition of rendering an account, however, which implies the existence of a balance, has reference to the payment of money; but the production of the books containing the amounts, and the calculation and examination of the accounts themselves, as well as their revision and investigation, have reference to acts to be performed. Therefore, can the slave obtain his freedom by paying the balance remaining in his hands to the purchaser, and by complying with the rest of the condition which concerns the heir? I think that the payment of the balance passes to the heir. Hence it happens that the condition may be divided. Pomponius, also, stated this opinion in the Eighth Book on Sabinus.

7.- PAULUS; *On Sabinus, Book V*.- The alienation

como respecto a la persona del extraño, sino en cuanto a la del heredero.

§ 5.- El *statuliber* a quien se le mandó que diera diez, y que fuese libre, si hubiera sido vendido habiendo dado cinco, le dará los cinco restantes al comprador.

§ 6.- Si un esclavo tuyo hubiere comprado a un *statuliber*, se te da lo que se le mandó que les diera a los herederos; pero también si lo hubiere dado a tu esclavo, si es que éste lo compró en nombre de su peculio, y tú no le quitaste el peculio, opino que ha de ser libre, puesto que se entiende que de este modo te lo dió a ti, lo mismo que si con tu voluntad lo hubiese dado a otro cualquiera de tus esclavos.

§ 7.- Si se hubiera mandado, no que uno diese diez, sino que fuese libre habiendo rendido cuentas, veamos si esta condición pasara al comprador. Y se ha de saber también, que pasan al comprador solamente aquellas condiciones, que consisten en dar; pero que no pasan las que consisten en hacer, por ejemplo, si hubiere enseñado a leer a su hijo; porque estas son inherentes a la persona de aquéllos para quienes se escriben. Pero la condición de haber de rendir cuentas, por lo que ciertamente atañe a los remanentes, consiste en dar el dinero; mas lo que se refiere a la entrega de los mismos libros de las cuentas, y al repaso y examen de las cuentas, y a su puntualización y discusión, contiene un hecho. Luego ¿llegará acaso a la libertad dándole ciertamente al comprador los remanentes, y se referirá lo demás a la persona del heredero? Yo opino que el pago de los remanentes se transmite también al comprador; y así sucederá que se dividirá la condición; y así lo escribió Pomponio en el libro octavo de Sabino.

7.- PAULO; *Comentarios a Sabino, libro V*.- La

alienato condicionem statuliberi secum non trahit.

8.- POMPONIUS; *libro VIII, ad Sabinum*.- Ita liber esse iussus "si decem dederit, liber esto" heredi dare debet: nam qui non habet, cui det, heredi dando ad libertatem pervenit.

§ 1.- Si partes suas quisque heredum diversis ementibus vendiderit, quas portiones heredibus dare statuliber debuit, easdem dabit emptoribus. Labeo autem ait, si nomina dumtaxat heredum in testamento posita sint, viriles partes eis dandas: si vero ita "si heredibus dedit", hereditarias.

9.- ULPIANUS; *libro XXVIII, ad Sabinum*.- Statuliberum medio tempore servum heredis esse nemo est qui ignorare debeat: eapropter noxae dedi poterit, sed deditus sperare adhuc libertatem poterit: nec enim deditio spem illi adimit libertatis.

§ 1.- Si statuliberum non eadem condicione heres vendat, causa eius immutabilis est et luere se ab eo potest simili modo ut ab herede. Si tamen suppresserit condicionem statuliberi? Et ex empto quidem tenetur: graviores autem etiam stellionatus crimen important ei, qui sciens dissimulata condicione statutae libertatis simpliciter eum vendiderit.

§ 2.- Illud tractatum est, an liberatio contingat ei qui noxae dederit statuliberum. Et Octavenus putabat liberari: et idem dicebat et si ex stipulatu Stichum deberet eumque statuliberum solvisset: nam et si ante solutionem ad libertatem pervenisset, extingueretur obligatio tota: ea enim in obligatione consistere, quae pecunia lui praestarique possunt, libertas autem

of the usufruct does not carry with it the condition upon which the slave is to become free.

8.- POMPONIUS; *On Sabinus, Book VIII*.- Where a slave is ordered to be free if he pays ten aurei, he must pay them to the heir; for when there is no one designated to whom payment shall be made, the slave will be entitled to his freedom by paying the heir.

§ 1.- If each one of the heirs sells his share in a slave to different purchasers, the slave must pay to every purchaser the same proportion of the sum which was due to each heir. Labeo, however, says that if the names of the heirs are only mentioned in the will, equal portions should be paid them; but if the testator said "If he pays my heirs," the amounts will correspond to the shares of the estate to which the heirs are respectively entitled.

9.- ULPIANUS; *On Sabinus, Book XXVIII*.- No one should be ignorant of the fact that, in the meantime, the slave remains the property of the heir. Hence, he can be surrendered by way of reparation for damage caused by him, but even if this is done, he can still hope to obtain his freedom, for his surrender does not deprive him of it.

§ 1.- If an heir sells a slave under a different condition than the one upon which his freedom is dependent, his status is not changed; and he can release himself from the control of the purchaser, just as he can do from that of the heir. If, however, the heir should conceal the condition upon which the slave is to be liberated, he will be liable to an action on purchase; and good authorities hold that anyone who knowingly conceals the condition under which a slave is to become free, and sells him absolutely, is guilty of swindling.

§ 2.- The question has been discussed whether he is released, who has delivered up a slave, that was to be conditionally free, by way of reparation for injury committed. Octavenus thinks that he is released, and says that the same rule will apply if someone owed Stichus on account of a stipulation, and delivered him to be free under a certain condition. For if he should

enajenación del usufructo no lleva consigo la condición del *statuliber*.

8.- POMPONIO; *Comentarios a Sabino, libro VIII*.- El que de este modo se dispuso que fuese libre: «sea libre, si hubiere dado diez», debe dárselos al heredero; porque el que no tiene a quien darle llega a la libertad dándole al heredero.

§ 1.- Si cada uno de los herederos hubiere vendido sus partes a diversos compradores, el *statuliber* les dará a los compradores las mismas porciones que debió darles a los herederos. Pero dice Labeón, que si en el testamento se hubieran puesto solamente los nombres de los herederos, se les han de dar porciones viriles; pero que si se hubiere escrito así: «si les dio a los herederos», las porciones hereditarias.

9.- ULPIANO; *Comentarios a Sabino, libro XXVIII*.- No hay nadie que deba ignorar que el *statuliber* es esclavo del heredero en el tiempo intermedio; podrá ser, por lo tanto, dado por noxa; pero el entregado podrá esperar todavía la libertad, porque la entrega no le quita la esperanza de la libertad.

§ 1.- Si el heredero vende al *statuliber* no con su misma condición, queda inmutable la condición de éste, y se puede redimir del comprador del mismo modo que del heredero. Mas si hubiere omitido la condición del *statuliber*, queda ciertamente obligado por la acción de compra; pues los mas grandes jurisconsultos atribuyen aun el crimen de estelionato al que a sabiendas lo hubiere vendido simplemente, habiendo disimulado la condición de la libertad estatuida.

§ 2.- Se discutió, si se alcanzará la liberación al que hubiere dado al *statuliber* por la noxa. Y Octaveno opinaba, que se liberaba; y lo mismo decía, también si en virtud de lo estipulado debiese a Stico, y entregase a este *statuliber*; pues aunque hubiese llegado a la libertad antes del pago, se extinguiría toda la obligación; porque en la obligación se

pecunia lui non potest nec reparari potest. Quae sententia mihi videtur vera.

§ 3.- Statuliberi condicio ita demum immutabilis est, si adita hereditas fuerit: ceterum ante aditam hereditatem in propriam usucapitur servitutem libertatisque spes infringitur: sed adita postea hereditate spes libertatis favore sui redintegrabitur.

10.- PAULUS; *libro V, ad Sabinum*.- Si decem dare iussum heres vendiderit et tradiderit dixeritque adscriptum libertati, si viginti dedisset, ex empto erit actio cum venditore, aut, si dupla promissa est, ob evictionem dumtaxat duplae repetitio erit, ex empto ob mendacium.

11.- POMPONIUS; *libro XIV, ad Sabinum*.- Si heres pecuniam donasset statulibero, ut sibi eam daret et liber esset, non fieri liberum aristo ait: sed si in plenum ei donasset, fieri liberum.

12.- IULIANUS; *libro VII, Digestorum*.- Si quis testamento libertatem acceperit sub condicione, si rationem dederit, debet pro hereditaria parte hereditibus reliqua solvere, etiamsi nomina quorundam heredum sint in condicione posita.

13.- IDEM; *libro XLIII, Digestorum*.- Si quis ita libertatem dedisset "Stichus, si eum heres meus testamento suo non manumiserit, liber esto", secundum voluntatem defuncti hoc significari videtur "si testamento suo heres non adscripserit ei libertatem". Quare si quidem heres libertatem servo

obtain his freedom before payment had been made, the entire obligation would be extinguished; because only that is included in it which can be settled by the payment of money; freedom, however, cannot be discharged or replaced by money. This opinion seems to me to be correct.

§ 3.- The position of a slave who is to be conditionally free is only unchangeable, if the estate is entered upon; for, before this is done, he can be acquired as a slave by usucaption, and the expectation of his freedom disappears. If, however, the estate is entered upon subsequently, his hope of freedom is restored through the favor with which it is regarded.

10.- PAULUS; *On Sabinus, Book V*.- If an heir sells a slave who had been ordered to pay ten aurei, and delivers him to the purchaser, and says that he was entitled to his freedom if he pays twenty aurei, an action on purchase will lie against the vendor. If double the amount had been promised, an action for double damages will lie on the ground of eviction, and an action on purchase on account of the false statement.

11.- POMPONIUS; *On Sabinus, Book XIV*.- If the heir should make a donation of a sum of money to a slave, who is to be conditionally free, in order that he may pay it to him and be liberated, Aristo says that he will not become free, but if the heir should give him the money absolutely he will obtain his freedom.

12.- JULIANUS; *Digest, Book VII*.- Where a slave receives his freedom by a will, under the condition of rendering an account, he must pay the balance remaining in his hands to the heirs, in proportion to their respective shares of the estate; even if the names of some of them are mentioned in the condition.

13.- THE SAME; *Digest, Book XLIII*.- Where a testator bequeaths a grant of freedom as follows, "Let Stichus be free, if my heir does not manumit him by his will," the intention of the testator is held to be that the slave will be free if the heir does not grant him freedom by his will. Hence, if the heir should

comprenden las cosas que con dinero se pueden pagar y entregar, mas la libertad no se puede pagar con dinero, ni se puede rescatar; cuya opinión me parece verdadera.

§ 3.- La condición del *statuliber* es inmutable solamente si hubiere sido adida la herencia, pero antes de adida la herencia es usucapido para la propia esclavitud, y se extingue la esperanza de la libertad; pero, adida después la herencia, se reintegrará la esperanza de la libertad por favor de ella misma.

10.- PAULO: *Comentarios a Sabino, libro V*.- Si el heredero hubiere vendido y entregado a aquel a quien se le mandó que diese diez, y hubiere dicho que fue destinado a la libertad, si hubiese dado veinte, habrá la acción de compra contra el vendedor; o si se prometió el duplo, habrá la repetición solamente del duplo por causa de la evicción, y la acción de compra por el engaño.

11.- POMPONIO; *Comentarios a Sabino, libro XIV*.- Si el heredero le hubiese donado dinero al *statuliber*, para que se lo diese, y fuese libre, dice Aristo, que no se hace libre, pero que si se lo hubiese donado plenamente, se hace libre.

12.- JULIANO; *Digesto, libro VII*.- Si alguno hubiere recibido por testamento la libertad bajo la condición de que hubiere dado las cuentas, les debe entregar a los herederos; los remanentes con arreglo a su parte de herencia, aunque se hayan expresado en la condición los nombres de algunos herederos.

13.- EL MISMO; *Digesto, libro XLIII*.- Si alguno hubiese dado así la libertad: «sea libre Stico, si mi heredero no lo manumitiere en su testamento», parece que según la voluntad del difunto se significa esto: si en su testamento no le hubiere adjudicado el heredero la libertad; porque si verdaderamente el

testamento suo dederit, defectus condicione videtur: si non dederit, impleta condicione ultimo vitae tempore heredis ad libertatem perveniet.

§ 1.- Servus communis liber esse iussus ita "si decem dederit" ex peculio dare potest, quod quocumque modo acquisitum habuerit: nec refert, apud heredem id an apud socium fuerit et heredi an extraneo dare iussus sit. Nam per omnia causae statuliberi applicatur: qui condicionis implendae gratia alienare peculiares nummos potest.

§ 2.- Si duo servi rationibus redditus liberi esse iussi fuerint et separatim rationes gesserint, non dubie separatim quoque condicioni parere poterunt. Sed si actus eorum communiter gestus ita immixtus fuerit, ut separari non possit, necessario alter cessando alterius libertatem impedit. Nec videbitur condicio in alterius persona impleta, nisi id, quod computatione rationum habita reliquum fuerit, aut uterque aut alter totum solverit.

§ 3.- Qui ita liber iussus est "si iuraverit se Capitolium ascensurum", confestim ut iuraverit, quamvis Capitolium non ascenderit, liber erit.

§ 4.- Servus heredis rem ipsius heredis dare iussus et liber esse ad libertatem perveniet, quia potest testator et sine ulla dandi condicione heredis servum manumitti iubere.

§ 5.- Haec scriptura "Stichus cum erit annorum

emancipate the slave by his will, the condition is considered to have failed; if he does not emancipate him, the condition will be fulfilled at the time of the death of the heir, and the slave will obtain his freedom.

§ 1.- If a slave held in common is ordered to be free under the condition of his paying ten aurei, he can pay the said sum out of his peculium, no matter in what way he may have obtained it; nor does it make any difference whether the peculium was in the hands of the heir, or in those of a joint-owner; or whether the slave was ordered to pay the money to the heir, or to a stranger. For it is a rule of general application that slaves who are to be free conditionally can alienate property belonging to their peculium for the purpose of complying with a condition upon which their freedom is dependent.

§ 2.- Where two slaves are ordered to be free on condition of rendering their accounts, and they have transacted business separately, there is no doubt that they can also comply with the condition separately. If, however, their administration has been conducted in common, and is so confused that it cannot be divided, it necessarily happens that if one of them fails to render an account, he will prevent the other from obtaining his freedom; nor will the condition be held to have been complied with with reference to one of them, unless both or either should pay all which may be found to be due as a balance after examination of the accounts.

§ 3.- Where a slave is ordered to be free under the condition that he will swear that he will ascend to the Capitol, and immediately takes such an oath, he will become free even if he does not ascend to the Capitol.

§ 4.- The slave of the heir, who is ordered to deliver property belonging to the heir himself, and be free, will be entitled to his freedom, because the testator can order the slave of the heir to be manumitted without imposing the condition of giving anything.

§ 5.- The following clause, "Let Stichus be free

heredero le hubiere dado en su testamento la libertad al esclavo, se considerará que faltó a la condición, y si no se la hubiere dado, llegará a la libertad habiéndose cumplido la condición en el último momento de la vida del heredero.

§ 1.- El esclavo común que se mandó que fuese libre de este modo: «si hubiere dado diez», puede darlos del peculio, que hubiere adquirido de cualquier modo; y no importa que éste se hallare en poder del heredero o de su consocio, y que se le hubiera mandado que los diera al heredero, o a un extraño, porque se aplica por completo a la causa del *statuliber*, el cual para cumplir la condición puede entregar dineros del peculio.

§ 2.- Si se hubiere mandado que dos esclavos fuesen libres habiendo rendido cuentas, y hubieren llevado por separado las cuentas, sin duda que podrán cumplir la condición también separadamente. Pero si llevada en común su administración se hallare de tal modo mezclada, que no se pudiere separar, dejando uno de darlas impedirá necesariamente la libertad del otro; y no se considerará cumplida la condición respecto a la persona del otro, sino si ambos, o uno, hubieren pagado la totalidad de lo que fuere remanente, hecha la computación de las cuentas.

§ 3.- El que se mandó que fuese libre de este modo: «si jurare que él subirá al Capitolio», será libre tan pronto como hubiere jurado, aunque no subiere al Capitolio.

§ 4.- El esclavo de un heredero, al cual se le mandó que diera una cosa del mismo heredero, y mandó que diera una cosa del mismo heredero, y que fuese libre, llegará a la libertad, porque el testador puede mandar que sea manumitido un esclavo del heredero, aún sin ninguna condición de dar.

§ 5.- Esta cláusula: «sea libre Stico, cuando tuviere

triginta, liber esto. Stichus si decem non dederit, liber ne esto", hanc vim habet: Stichus si decem dederit et ad annos triginta pervenerit, liber esto: namque ademptio libertatis vel legati sub condicione facta incipit contrariam condicionem legato vel libertati, quae prius data erat, iniecisce.

14.- ALFENUS VARUS; *libro IV, Digestorum*.- Servus, qui testamento domini, quum decem heredi dedisset, liber esse iussus erat, heredi mercedem referre pro operis suis solebat: quum ex mercede heres amplius decem recepisset, servus liberum esse aiebat: de ea re consulebatur. Respondit non videri liberum esse: non enim pro libertate, sed pro operis eam pecuniam dedisse nec magis ob eam rem liberum esse, quam si fundum a domino conduxisset et pro fructu fundi pecuniam dedisset.

§ 1.- Servus quum heredi annorum septem operas dedisset, liber esse iussus erat: is servus fugerat et annum in fuga fecerat. Quum septem anni praeterissent, respondit non esse liberum: non enim fugitivum operas domino dedisse: quare nisi totidem dies, quot afuisset, servisset, non fore liberum. Sed et si ita scriptum esset, ut tum liber esset, quum septem annis servisset, potuisse liberum esse, si tempus fugae reversus servisset.

15.- AFRICANUS; *libro IX, Quaestionum*.- Mortuo herede si statuliber locupletiore hereditatem tanta pecunia, quantam dare sit iussus, fecerit, veluti creditoribus solvendo, cibaria familiae dando: statim eum ad libertatem esse venturum existimavit.

§ 1.- Heres quum statuliberum decem dare iussum venderet, condicionem pronuntiavit et traditioni

when he is thirty years old; Stichus shall not be free unless he pays ten aurei," has the same effect as if it had been said that they should let Stichus be free if he pays ten aurei and reaches the age of thirty years. For the deprivation of freedom, or of the legacy which is bequeathed under a certain condition, is considered to impose the contrary condition upon the legacy or the grant of freedom previously made.

14.- ALFENUS VARUS; *Digest, Book IV*.- A slave, who was ordered to be free by the will of his master under the condition of paying ten aurei to the heir, paid to the latter the wages of his labor, and as the heir received from the same a larger sum than ten aurei, the slave alleged that he was free. Advice was taken on this point. The answer was that the slave did not appear to be free, as the money which he had paid was not in consideration of his freedom, but on account of the labor which he had performed; and that he was no more free on this account than if he had leased a tract of land from his master and paid him the money instead of giving him the crops.

§ 1.- A slave was ordered to be free after he had given his services to the heir for the term of seven years. He took to flight and remained absent for a year. When the seven years had expired, the opinion was given that he was not free, for he had not rendered his services to his master while he was a fugitive, and he would not become free until he had served his master for the number of days that he was absent. If, however, it had been stated in the will that he should be free after he had served seven years, he could become free if he served his master for the time of his flight, after his return.

15.- AFRICANUS; *Questions, Book IX*.- If a slave who was ordered to pay a certain sum of money at the death of the heir should have enriched the estate by an amount equal to that which he was ordered to pay, for instance, if he had paid the creditors, or had furnished the slaves with food, it was held that he would immediately be entitled to his liberty.

§ 1.- An heir, who sold a slave who was to become free on the payment of ten aurei, stated at the time

treinta años; no sea libre Stico, si no hubiere dado diez», tiene este valor: que si Stico hubiere dado los diez y hubiere llegado a los treinta años, sea libre; porque la revocación de la libertad o de un legado hecha bajo condición comienza a añadir una condición contraria allegado o a la libertad, que había sido dada antes.

14.- ALFENUS VARO; *Digesto, libro IV*.- Un esclavo, respecto del que se había dispuesto en el testamento de su señor que fuese libre, cuando hubiese dado diez al heredero, solía entregarle al heredero el salario de su propio trabajo; cuando el heredero hubo recibido de los salarios más de los diez, decía el esclavo que él era libre; se consultaba sobre el particular. Respondió, que no parecía que fuese libre; porque este dinero lo dio no por la libertad, sino por el trabajo, y que por tal motivo no era libre con más razón que si hubiese tomado de su señor un fundo en arrendamiento, y hubiese dado dinero por los frutos del fundo.

§ 1.- Se había dispuesto que un esclavo fuese libre cuando le hubiese dado al heredero siete años de jornales; este esclavo había huido, y había pasado un año fugitivo; habiendo transcurrido los siete años, respondió que no era libre, porque estando fugitivo no le dió los días de trabajo a su señor; por lo cual no habrá de ser libre, si no le hubiese servido otros tantos días como hubiese estado ausente. Pero también si se hubiese escrito así, que fuese libre siempre y cuando hubiese servido siete años, pudo ser libre, si habiendo regresado de su fuga hubiese servido este tiempo.

15.- AFRICANO; *Cuestiones, libro IX*.- Si, muerto el heredero, el *statuliber* hubiere enriquecido la herencia en tanta cantidad cuanta se le hubiera mandado que dé, por ejemplo, pagando a acreedores, o dando alimentos a la familia, estimó que inmediatamente habrá de llegar él a la libertad.

§ 1.- Un heredero, al vender un *statuliber*, al cual se le había mandado que diera diez, declaró la con-

legem dixit, ut sibi potius quam emptori eadem decem darentur: quaerebatur, utri eorum statuliber pecuniam dando libertatem consequeretur. Respondit heredi eum dare debere. Sed et si talem legem dixisset, ut extraneo alicui statuliber pecuniam daret, respondit et hoc casu conventionem valere, quia heredi videtur solvere, qui voluntate eius alii solvit.

16.- ULPIANUS; *libro IV, Regularum*.- Statulibera quidquid peperit, hoc servum heredis est.

17.- NERATIUS; *libro III, Membranarum*.- Si decem heredi dedisset, iussus est liber esse: decem habet et tantundem domino debet: dando haec decem non liberabitur. Nam quod statulibero ex peculio suo dare explendae condicionis causa concessum est, ita interpretari debemus, ut non etiam ex eo dare possit, quod extra peculium est. Nec me praeterit hos nummos peculiares posse dici, quamvis, si nihil praeterea servus habeat, peculium nullum sit. Sed dubitari non oportet, quin haec mens fuerit id constituentium, ut quasi ex patrimonio suo dandi eo nomine servo potestas esset, quia id maxime sine iniuria dominorum concedi videbatur. Quod si ultra quis progredietur, non multum aberit, quin etiam eos nummos, quos domino subriperit, dando statuliberum condicioni satisfacturum existimet.

18.- PAULUS; *libro singulari de libertatibus dandis*.- Si triennio dena dare iussus primo anno viginti optulerit, non accipiente herede non statim liber est, quia et si accepisset heres, nondum liber esset.

19.- ULPIANUS; *libro XIV, ad Edictum*.- Si servus liber esse iussus sit et legatum ei datum, si filius

when he sold him that the condition was that the said ten aurei should be paid to him and not to the purchaser. The question arose, to which of the two must the slave pay the money in order to obtain his freedom? The answer was that he must pay it to the heir. If, however, he had stated the condition to be that the slave should make payment to a stranger, the opinion was given that the agreement would be valid, because the slave is considered to pay the heir, if he pays someone else with the formers consent.

16.- ULPIANUS; *Rules, Book IV*.- If a female slave who is to be free conditionally has a child, it will be the slave of the heir.

17.- NERATIUS; *Parchments, Book III*.- A slave is ordered to be free if he pays ten aurei to the heir. He has the amount, but he owes an equal sum to his master. He will not be free by payment of these ten aurei, because where a slave is permitted to pay money out of his peculium for the purpose of complying with a condition, we must understand this to mean that he must not pay what does not belong to his peculium. I am perfectly aware that this money can be said to form part of his peculium; although if the slave had nothing else, he would have no peculium. But it cannot be doubted that the intention of those who established the rule was that the slave should have the power of making payment out of his peculium, just as out of his patrimony, because this could be conceded as being done without any injury to his master. If, however, anyone should go farther, the case would not differ much from one where a person might hold that the slave complied with the condition by the payment of money which he had stolen from his master.

18.- PAULUS; *On the Granting of Freedom*.- If a slave is ordered to pay ten aurei annually for three years, and offers ten the first year, and the heir does not accept it, he will not immediately become free, for the reason that even if the heir did accept it, he would not be free.

19.- ULPIANUS; *On the Edict, Book XIV*.- Where a slave is ordered to be free, and a legacy is left to him

dición, e impuso como ley para la entrega, que estos diez se le diesen a él más bien que al comprador; se preguntaba, si el *statuliber* conseguiría la libertad dando el dinero a cualquiera de ellos. Respondió, que él se lo debe dar al heredero. Pero también si hubiese impuesto la condición de que el *statuliber* diese el dinero a algún extraño, respondió, que aun este caso era válida la convención, porque se considera que le paga al heredero el que con la voluntad de éste le paga a otro.

16.- ULPIANO; *Reglas, libro IV*.- Lo que hubiere parido una *statulibera* es esclavo del heredero.

17.- NERACIO; *Pergaminos, libro III*.- Se mandó que uno fuese libre, si le hubiese dado diez al heredero; tiene los diez, y le debe otros tantos a su señor; dando estos diez no se hará libre; porque esto de que al *statuliber* se le concedió que diese de su peculio para cumplir la condición, lo debemos interpretar de modo que no pueda dar también de lo que está fuera de su peculio. Y no me pasa desapercibido que se pueda decir que estos dineros son del peculio, aunque, si el esclavo no tuviera nada mas el peculio sería nulo; pero no se debe dudar que la mente de los que establecieron esto fue que esclavo tuviese facultad para dar por este motivo como de su patrimonio, porque parecía que se concedía esto principalmente sin injuria de sus dueños; pero si alguno fuere mas allá, no distará mucho de estimar que el *statuliber* cumplirá la condición aun dando aquellos dineros, que le hubiere sustraído a su señor.

18.- PAULO; *De los casos en que debe darse la libertad, libro único*.- Si aquel a quien se le mandó que diese diez tres años, hubiere ofrecido veinte en el primer año, no recibiéndolos el heredero, no se hace libre inmediatamente, pues aunque los hubiese recibido el heredero, todavía no sería libre.

19.- ULPIANO; *Comentarios al Edicto, libro XIV*.- Si se hubiera dispuesto que un esclavo fuese

quartum decimum annum compleverit, et filius ante decesserit: libertas favore competet die veniente, legati autem condicio deficit.

20.- PAULUS; *libro XVI, ad Palutium*.- Si peculium servo legatum sit, qui iussus est alii dare decem et sic liber esse, et heres eum prohibuerit dare, deinde manumissus peculium petat ex causa legati, an per doli exceptionem eam summam, quam daturus esset, deducere heres possit, ut ipsi prosit, non manumisso, quod ea pecunia data non est? An vero indignus sit heres, qui contra voluntatem defuncti fecit, eam pecuniam lucrari? Et quum servo nihil absit et libertas ei competit, invidiosum est heredem fraudari.

§ 1.- De illo quaeritur, si invito herede det aut nesciente, an faciat nummos accipientis. Et Iulianus vere existimat ex hac causa concessam videri statuliberis alienationem nummorum etiam invito herede et ideo facere eos accipientis pecuniam.

§ 2.- Quod si heredi dare iussus est decem et eam summam heres debeat servo: si velit servus eam pecuniam compensare, erit liber.

§ 3.- Is, cui servus pecuniam dare iussus est ut liber esset, decessit. Sabinus, si decem habuisset parata, liberum fore, quia non staret per eum, quo minus daret. Iulianus autem ait favore libertatis constituto iure hunc ad libertatem perventurum, etiamsi postea habere coeperit decem. Adeo autem constituto potius iure quam ex testamento ad libertatem pervenit, ut, si eidem et legatum sit, mortuo eo cui dare iussus est ad

to vest when the son of the testator shall reach his fourteenth year, and the son dies before that time, the slave will become free when the term has expired, on account of indulgence with which freedom is regarded; but the condition upon which the legacy is dependent is held to have failed.

20.- PAULUS; *On Plautius, Book XVI*.- When his peculium is bequeathed to a slave who was ordered to pay ten aurei to a stranger, and become free, but the heir prevents him from paying it, and the slave, having afterwards been manumitted, demands his 'peculium by virtue of the legacy, can the heir, by means of an exception on the ground of bad faith, deduct from his peculium the sum which the slave should have paid in order that he, and not the manumitted slave, may be benefited, because the money was not paid; or will the heir be considered unworthy to profit by the money, having acted contrary to the will of the deceased? As the slave lost nothing, and gained his freedom, it would be invidious for the heir to be fraudulently deprived of the money.

§ 1.- In this case the question arises, if the slave should pay the money without the knowledge or consent of the heir, whether it would belong to the person who received it. Julianus very properly thinks that, in this instance, the right of the slave to pay the money is admitted even against the consent of the heir; and therefore it will become the property of him who receives it.

§ 2.- If a slave is ordered to pay ten aurei to the heir, and the latter owes that sum to the slave, if the slave wishes to set off the amount, he will become free.

§ 3.- A man to whom a slave was ordered to pay a certain sum of money in order to become free, died. Sabinus holds that if he had the ten aurei ready for payment, he would become free, because it was not his fault that they were not paid. Julianus, however, says that on account of the favor with which liberty is regarded, and by the law, as established, the slave will obtain his freedom even if the money was paid

libre, y se le hubiese dado un legado, si el hijo cumpliera catorce años, y el hijo hubiere fallecido antes, competirá por favor la libertad al vencer el término, pero falta la condición del legado.

20.- PAULO; *Comentarios a Plaucio, libro XVI*.- Si se le hubiera legado el peculio a un esclavo, al que se le mandó que diera diez a otro, y que así fuese libre, y el heredero le hubiere prohibido que los dé, y después de manumitido pidiera el peculio por causa del legado, ¿podría el heredero deducir por la excepción de dolo la suma, que habría de dar, para que le aproveche a él mismo, no al manumitido, que aquel dinero no haya sido dado, o será indigno de lucrarse con este dinero el heredero que obró contra la voluntad del difunto? Y puesto que al esclavo nada le falta y le compete la libertad, es odioso que sea defraudado el heredero.

§ 1.- Se pregunta, si hará uno del que lo recibe el dinero, si lo hubiere dado contra la voluntad del heredero o ignorándolo éste. Y opina con verdad Juliano, que por esta causa se consideraba concedida a los *statuliber* la enajenación del dinero, aún contra la voluntad del heredero, y que por esto hacían ellos del que lo recibía el dinero.

§ 2.- Pero si se le mandó que le diera diez al heredero, y el heredero le debiera esta suma al esclavo, si el esclavo quisiera compensar esta cantidad, será libre.

§ 3.- Falleció aquel a quien se dispuso que el esclavo le diese una cantidad para que fuese libre; dice Sabino, que si hubiese tenido preparados los diez, habrá de ser libre, porque no consistiría en él, que no los diera. Pero dice Juliano, que por derecho establecido en favor de la libertad habrá de llegar éste a la libertad, aunque después hubiere comenzado a tener los diez. Mas de tal modo llega a la libertad más

libertatem quidem perveniet, non autem et legatum habiturus est: idque et iulianus putat, ut in hoc ceteris legatariis similis sit. Diversa causa est eius, quem heres prohibet conditioni parere: hic enim ex testamento ad libertatem pervenit.

§ 4.- Heredi autem iussum dare etiam heredis heredi dare posse Divus Hadrianus rescripsit: et si hoc sensit testator, etiam in legatario idem dicendum est.

§ 5.- Quaedam condiciones natura sui nec possunt eodem tempore impleri, sed necessariam habent temporis divisionem, velut quum decem operarum iussum est dare, quia operae per singulos dies dantur. Igitur et si singulos aureos det statuliber, potest dici eum implesse condicionem. Alia causa est operarum, quia hae necessario singulae edendae sunt. Sed et si heres accipere noluerit, non statim liber erit, sed quum tempus transierit, per quod operarum quantitas consummatur. Idem dicendum est, si iussum capuam ire et liberum esse heres prohibeat ire: tunc enim erit liber, quum pervenire capuam potuisset: inesse enim videtur tempus tam operarum praestationi quam itineri.

§ 6.- Si ita quis acceperit libertatem "Stichus, si heres eum non manumiserit, liber esto", poterit ab herede manumitti: non contra voluntatem testatoris adimitur ei libertus. Sed non tam continuum tempus exigendum est, ut praecipitari cogatur heres vel ex peregrinatione celerius reverti ad manumittendum vel administrationem rerum necessariorum intermittere, nec rursus tam longum, ut, quamdiu

after his death, hence he obtains his freedom rather under the law than by virtue of the will; so that if a legacy was bequeathed to him at the time of the death of the person to whom he was directed to pay the money, he will obtain his freedom, but he will not be entitled to the legacy. Julianus is of the same opinion, so that, in this instance, he resembles other legatees. The case of a slave whom the heir prevents from complying with the condition is, however, different; for, in this instance, he obtains his freedom under the will.

§ 4.- The Divine Hadrian stated in a Rescript that a slave who is ordered to pay a sum of money to the heir can pay it to the heir of the latter; and, if this was the intention of the testator, the same rule must be held to apply to a legatee.

§ 5.- There are certain conditions which, by their nature, cannot be complied with simultaneously, but require a division of time; as, for example, where a slave is ordered to give the value of ten aurei in labor, because labor is reckoned by days. Therefore, if a slave who is to be free conditionally pays the aurei, one by one, he can be said to have complied with the condition. The case of labor is, however, different because it can necessarily only be performed a part of the time. But if the heir refuses to accept it, the slave will not become free immediately, but after the time required for the labor to be performed has elapsed. The same rule will apply where the slave is ordered to go to Capua and be free, and the heir forbids him to go; for then he will be free when the time necessary for him to go to Capua has expired, for time is considered essential in the performance of labor, as well as in making a journey.

§ 6.- If a slave should receive his freedom as follows, "Let Stichus be free if my heir should not manumit him," he can be manumitted by the heir, and he is not deprived of his liberty contrary to the will of the testator. But so short a time is not required that the heir will be compelled to hasten or to return from his journey immediately in order to manumit the slave, or to desist from the transaction of necessary

bien por el derecho establecido que en virtud del testamento, que si al mismo se le hubiera hecho también un legado, muerto aquél, a quien se le mandó que lo diera, llega ciertamente a la libertad, mas no ha de tener también el legado; y esto opina también Juliano, de suerte que en ello es semejante a los demás legatarios. Diversa es la situación de aquel a quien el heredero le prohíbe que cumpla la condición; porque éste llega a la libertad en virtud del testamento.

§ 4.- Mas respondió por rescripto el Divino Adriano, que el esclavo a quien se le mandó que le diese al heredero, podía darle también al heredero del heredero; y también se ha de decir lo mismo respecto al legatario, si así lo entendió el testador.

§ 5.- Algunas condiciones no se pueden cumplir al mismo tiempo por su propia naturaleza, sino que contienen necesaria división de tiempo, como cuando se le mandó a uno que diese diez días de trabajo, porque los jornales se dan de día en día; así, pues, si el *statuliber* da uno a uno los áureos, también se puede decir que cumplió la condición. Otra es la condición de los jornales, porque éstos se han de dar necesariamente uno a uno. Mas si el heredero no los hubiere querido recibir, no será libre inmediatamente, sino cuando hubiere transcurrido el tiempo durante el cual se complete la cantidad de los jornales. Lo mismo se ha de decir, si habiéndosele mandado que vaya a Cápua, y que sea libre, el heredero le prohibiera que fuese; porque en este caso será libre cuando hubiese podido ir a Cápua; porque se considera que el tiempo es inherente tanto para la prestación de los días de trabajo, como para hacer el viaje.

§ 6.- Si alguno hubiere recibido así la libertad: «sea libre Stico, si el heredero no lo hubiere manumitido», podrá ser manumitido por el heredero, porque contra la voluntad del testador no se le quita la libertad. Pero no se ha de exigir un tiempo tan inmediato, que al heredero se le obligue a precipitarse, o a volver más pronto de un viaje para hacer la manumisión, o a interrumpir la administración de negocios nece-

vivat, protrahatur manumissio, sed modicum, quo primum possit sine magno incommodo suo heres manumittere. Quod si tempus adiectum fuerit, illud spectabitur.

21.- POMPONIUS; *libro VII, ex Plautio*.- Labeo libro posteriorum ita refert: "Calenus dispensator meus, si rationes diligenter tractasse videbitur, liber esto suaeque omnia et centum habeto". Diligentiam desiderare eam debemus, quae domino, non quae servo fuerit utilis. Erit autem ei diligentiae coniuncta fides bona non solum in rationibus ordinandis, sed etiam in reliquo reddendo. Et quod ita scriptum est "videbitur", pro hoc accipi debet "videri poterit": sic et verba legis duodecim tabularum veteres interpretati sunt "si aqua pluvia nocet", id est "si nocere poterit". Et si quaereretur, cui eam diligentiam probari oporteat, heredum arbitratum viri boni more agentium sequi debebimus, veluti si is, qui certam pecuniam dedisset, liber esse iussus est, non adscripto eo, cui si dedisset, eo modo poterit liber esse, quo posset, si ita fuisset scriptum "si heredi dedisset".

§ 1.- Pactumeius Clemens aiebat, si ita sit fideicommissum relictum "cui eorum voles, rogo restituas", si nullum elegisset cui restitueret, omnibus deberi Imperatorem Antoninum constituisse.

22.- PAULUS; *libro III, ad Vitellium*.- Qui pecuniam dare iussus est, nisi adiectum sit, cui det, heredibus dare debet pro partibus hereditariis: pro ea enim parte quisque accipere debet, pro qua dominus est.

business for that purpose. Nor, on the other hand, can the manumission be protracted for his lifetime, but the heir should emancipate the slave as soon as he can do so without great inconvenience to himself. If a time for the manumission has been prescribed, it must be taken into consideration.

21.- POMPONIUS; *On Plautius, Book VII*.- Labeo, in his Book of Last Works, states the following case: "Let Galenus, my steward, be free, if he appears to have carefully conducted my business, and let him retain all his property, and receive a hundred aurei in addition." In this instance we should require such diligence as will benefit the master and not the slave. Moreover, good faith should be added to the diligence, not only in keeping the accounts, but also in the payment of any balance which may remain. By the word "appears" is meant "can be considered to have." The ancients interpreted the following words of the Law of the Twelve Tables, "If rain-water causes damage," to mean if it can cause damage. And if this question is asked before whom the abovementioned diligence must be established, we must answer that this ought to be decided by the heirs in accordance with the judgment of a reliable citizen; for instance, if a slave is ordered to be free on condition of his paying a certain sum of money, and it is not stated to whom he shall pay it, he will become free just as he would if the testator had written, "If he should pay the sum to my heir."

§ 1.- Pactumeius Clemens said that if a trust had been bequeathed as follows, "I charge you to deliver it to whichever of them you choose," and the heir did not make any choice as to whom he should deliver the property, he must deliver it to all, and this was decreed by the Emperor Antoninus.

22.- PAULUS; *On Vitellius, Book III*.- Where a slave was ordered to pay a certain sum of money, and the person to whom he was to pay it was not mentioned, he must pay it to the heirs in proportion to their respective shares of the estate, for each one of them must receive a share in proportion to his ownership of the slave.

sarios; ni por el contrario, tan largo, que la manumisión se difiera mientras viva, sino el moderado en que primeramente pueda el heredero hacer la manumisión sin grande incomodidad suya; pero si se hubiere expresado tiempo, se atenderá a éste.

21.- POMPONIO; *Doctrina de Plaucio, libro VII*.- Labeón dice así en el libro de los Posteriores: «sea libre Caleno, mi administrador, y tenga todo lo suyo, y la suma de ciento, si se viere que llevó diligentemente las cuentas»; debemos desear aquella diligencia que fuere útil al señor, no la que al esclavo; mas irá unida a esta diligencia la buena fe no solamente en la ordenación de las cuentas, sino también en la devolución de los remanentes. Y lo que se escribió así: «se viere», debe ser entendido de esta suerte: se pudiere ver; de este modo interpretaron los antiguos también las palabras de la ley de las Doce Tablas: «si perjudicare el agua llovediza», esto es, si pudiere perjudicar. Y si se preguntara por quién deba ser aprobada esta diligencia, diremos que debemos seguir el arbitrio de los herederos, que obren según la costumbre de hombre bueno, como si se mandó que fuese libre el que hubiese dado cierta cantidad, sin haberse expresado a quién; si la hubiese dado, será libre del modo en que podría, si se hubiese escrito así: «si la hubiese dado al heredero».

§ 1.- Decía Pactumeyo Clemente, que si se hubiera dejado así un fideicomiso: «te ruego que lo restituyas al que de ellos quisieras», determinó el Emperador Antonino, que si no hubiese elegido ninguno a quién restituírselo, se lo debe restituir a todos.

22.- PAULO; *Comentarios a Vitelio, libro III*.- Aquel a quien se le mandó que diese una cantidad, si no se hubiera añadido a quién la deberá dar, debe dársela a los herederos con arreglo a las porciones en la herencia; porque cada uno debe recibir con arreglo a la parte de que es dueño.

§ 1.- Si quidam ex heredibus, quibus dare debeat, nominati sint, dabit his pro hereditariis portionibus.

§ 2.- Si heredibus nominatis etiam extraneus iunctus sit, extraneo virilis, ceteris hereditariae dari debent: et si non solum Titium, sed etiam alios adiecisset, hos virilem partem habituros, coheredes autem hereditarias Iulianus scribit.

23.- CELSUS; *libro XXII, Digestorum*.- "Si intra quinquennium Stichus centum dederit, liber esto": nec Titio vel heredi vel emptori post quinquennium dabit.

§ 1.- Si rationes reddidisset, liberum esse iussum non patitur heres rebus peculiaribus venditis reliqua solvere: perinde liber est, quasi condicioni paruerit.

24.- MARCELLUS; *libro XVI, Digestorum*.- "Stichus, si heredi meo decem promiserit vel operas daturum se iuraverit, liber esto". Potest expleri condicio, si promiserit: nam spopondisse aliqua significatione dici potest, etiamsi non sit secuta obligatio.

25.- MODESTINUS; *libro IX, Differentiarum*.- Statuliberos venundari posse leges duodecim tabularum putaverunt: duris autem condicionibus in venditione minime onerandi sunt, veluti ne intra loca serviant neve umquam manumittantur.

26.- IDEM; *libro IX, Regularum*.- Libertate servo sub condicione rationis redditae testamento data heres non solum scriptam rationem exigit, verum etiam quae sine scriptura ab eo administrata est.

§ 1.- Where certain heirs are mentioned by the testator as those to whom the slave is required to make payment, he must do so in proportion to their respective shares of the estate.

§ 2.- If a stranger is joined with the heirs who are mentioned, the full share must be paid to him, and amounts in proportion to their respective shares of the estate should be paid to the others. If the testator not only added Titius, but others besides, they will each be entitled to a full share, and their co-heirs to amounts in proportion to their interest of the estate; as is stated by Julianus.

23.- CELSUS; *Digest, Book XXII*.- "Let Stichus be free if he pays a hundred aurei in five years." The slave, after the five years have elapsed, can pay the said amount to the heir of the purchaser.

§ 1.- Where the slave was ordered to be free if he rendered his accounts, and the heir, after the property belonging to the peculium has been sold, does not permit the slave to pay over the balance in his hands, he will be free just as if he had complied with the condition.

24.- MARCELLUS; *Digest, Book XVI*.- "Let Stichus be free if he promises my heir ten aurei, or swears to give him his services." The condition will be fulfilled if the slave makes the promise, for it can be said that he has, to a certain extent, bound himself, even if the obligation may not be compulsory.

25.- MODESTINUS; *Differences, Book IX*.- The Laws of the Twelve Tables are held to permit slaves, who are to be free conditionally, to be sold. In making the sale, rigorous conditions should, however, not be imposed; for example, that the slave should not serve in a certain country, or should never be manumitted.

26.- THE SAME; *Rules, Book IX*.- Where freedom has been granted to a slave by a will, under the condition that he renders his account, the heir can not only require a written account, but also one of any business which has been transacted without having been committed to writing.

§ 1.- Si se hubieran nombrado algunos de los herederos, a quienes deba darles, les daría con arreglo a sus porciones en la herencia.

§ 2.- Si a los herederos nombrados hubiera sido unido también un extraño, al extraño se le deberá dar una porción viril, y a los demás sus porciones en la herencia. Y si no hubiese añadido solamente a Ticio, sino también a otros, escribe Juliano que éstos habrán de tener una porción viril, pero los coherederos las señaladas en la herencia.

23.- CELSO; *Digesto, libro XXII*.- «Sea libre Stico, si hubiere dado ciento dentro de un quinquenio»; no se los dará después del quinquenio ni a Ticio, ni al heredero, ni al comprador.

§ 1.- El heredero no consiente que el que se mandó que fuese libre, si hubiese rendido las cuentas, pague los remanentes habiendo vendido los bienes del peculio; es, por lo tanto, libre, como si hubiere cumplido la condición.

24.- MARCELO; *Digesto, libro XVI*.- «Sea libre Stico, si a mi heredero le hubiere prometido diez, o hubiere jurado que él le dará días de trabajo»; puede estar cumplida la condición, si hubiere prometido; porque en algún sentido se puede decir que prometió, aunque no se haya seguido obligación.

25.- MODESTINO; *Diferencias, libro IX*.- Juzgaron las leyes de las Doce Tablas, que los *statuliberi* podían ser vendidos; pero de ningún modo han de ser gravados en la venta con condiciones duras, por ejemplo, que no sirvan en ciertos lugares, o que nunca sean manumitidos.

26.- EL MISMO; *Reglas, libro X*.- Habiéndosele dado por testamento a un esclavo la libertad bajo la condición de haber rendido cuentas, el heredero exigirá no solamente las cuentas escritas, sino también las que por aquél fueron llevadas sin ser escritas.

§ 1.- Servus iussus reddita ratione ad libertatem pervenire, licet nullam administraverit rationem, nihilo minus erit liber.

27.- IDEM; *libro I, Pandectarum*.- Si is, cui dare iussus est, redemerit statuliberum eumque rursus alii vendiderit, novissimo emptori dabit: iam enim quum apud eum, cui dare iussus est, dominium quoque servi pervenit, si eum alienet, condicionem quoque ab eo ad emptorem transire Iuliano placuit.

28.- IAVOLENUS; *libro VI, ex Cassio*.- Si hereditas eius, qui servum, intra dies triginta mortis suae si rationes reddidisset, liberum esse iusserat, post dies triginta adita est, iure quidem stricto ita manumissus liber esse non potest, quoniam condicione deficitur: sed favor libertatis eo rem perduxit, ut respondeatur expletam condicionem, si per eum, cui data esset, non staret quo minus expleretur.

§ 1.- Statuliber, antequam condicio libertatis optigerit, si quid comparasset, peculio legato non cessurum in libris Gaii Cassii scriptum est, nisi id legatum in tempus libertatis collatum esset. videamus, ne, quum peculium et accessionem et decessionem habeat, augmentum quoque eius peculii, si modo ab herede ei ablatum non sit, legato cessurum sit: et magis hoc iure utimur.

29.- POMPONIUS; *libro XVIII, ad Quintum Mucium*.- Statuliberi a ceteris servis nostris nihilo paene differunt. Et ideo quod ad actiones vel ex delicto venientes vel ex negotio gesto contractu pertinet, eiusdem condicionis sunt statuliberi cuius ceteri. Et ideo in publicis quoque iudiciis easdem poenas patiuntur, quas ceteri servi.

§ 1.- Where a slave was ordered to obtain his freedom after having rendered his account, he will still become free even if he has not transacted any business.

27.- THE SAME; *Pandects, Book I*.- If the person to whom the slave is ordered to make payment should purchase him, and then sell him to another, he must pay the last purchaser, for Julianus decided that if he to whom the slave was ordered to make payment obtains the ownership of him, and alienates him, the condition will also pass to the purchaser.

28.- JAVOLENUS; *On Cassius, Book VI*.- Where the estate of a person who directed that his slave should become free within thirty days after his death, if he rendered his accounts, was not entered upon until after the thirty days had expired, the manumitted slave cannot become free by the strict construction of the law, as the condition was not fulfilled; but the indulgence with which freedom is regarded causes the condition to be considered as complied with, if it was not the fault of the person upon whom it was imposed that this was not done.

§ 1.- It is stated in the Books of Gaius Cassius that if a slave, who is to be conditionally free, should acquire any property before the condition upon which his liberty is dependent is complied with, it will not be embraced in the bequest of his peculium, unless the legacy was made to include the time when he was free. As the peculium is susceptible of both increase and diminution, let us see whether its increase by the heir will form part of the legacy, provided the slave is not deprived of it. This is our present practice.

29.- POMPONIUS; *On Quintus Mucius, Book XVIII*.- Slaves who are to be free conditionally scarcely differ, in any respect, from our other slaves. Therefore, they are in the same position as the others with reference to legal actions, whether these arise from crimes, from business transacted, or from contracts. The result of which is that in public prosecutions they are liable to the same penalties as

§ 1.- El esclavo que se mandó que llegase a la libertad habiendo rendido las cuentas, aunque no hubiere administrado ningunas cuentas, sera, sin embargo, libre.

27.- EL MISMO; *Pandectas, libro I*.- Si aquel a quien se mandó que el esclavo le diera alguna cosa, hubiere comprado el *statuliber* y lo hubiere vendido de nuevo a otro, el esclavo la dará al último comprador; porque ,habiendo ido ya también el dominio del esclavo a poder de aquél para quien se mandó que la diera, le pareció bien a Juliano, que si lo enajenara, pasaba también de él la condición al comprador.

28.- JAVOLENO; *Doctrina de Cassio, libro VI*.- Si la herencia del que había mandado que un esclavo fuese libre dentro de los treinta días de su muerte, si hubiese vendido las cuentas, fue adida después de los treinta días, ciertamente que por estricto derecho no puede ser libre el manumitido de este modo, porque se falta a la condición; pero el favor debido a la libertad llevó a que se respondiera que se cumplió la condición, si no consistiese en aquél para quien hubiese sido dada, que no fuese cumplida.

§ 1.- Se halla escrito en los libros de Cayo Cassio, que si el *statuliber* hubiese comprado alguna cosa antes que se verificare la condición de la libertad, no habrá de ceder ella a favor del peculio legado, a no ser que este legado hubiese sido conferido para el tiempo de la libertad; veamos si teniendo el peculio aumento y disminución, habrá de ceder a favor del legado también el aumento de este peculio, si no se le hubiera quitado por el heredero; y preferentemente observamos este derecho.

29.- POMPONIO; *Comentarios a Quinto Mucio, libro XVIII*.- Los *statuliberi* no se diferencian en casi nada de nuestros demás esclavos; y por esto en lo que se refiere a las acciones provenientes de un delito, o de negocio administrado, o de contrato, los *statuliberi* son de la misma condición que los demás. Y por lo tanto, también sufren en los juicios públicos las mismas penas que los demás esclavos.

other slaves.

§ 1.- Quintus Mucius scribit: pater familias in testamento scripserat "si Andronicus servus meus heredi meo dederit decem, liber esto". Deinde de his bonis coeperat controversia esse: qui se lege heredem aiebat esse, is eam hereditatem ad se pertinere dicebat, alter, qui hereditatem possidebat, aiebat testamento se heredem esse. Secundum eum sententia dicta erat, qui testamento aiebat se heredem esse. Deinde Andronicus quaerebat, si ipsi viginti dedisset, quoniam secundum eum sententia dicta est, futurusne esset liber an nihil videatur sententia, qua vicit, ad eam rem valere? Quapropter si viginti heredi scripto dedisset et res contra possessorem iudicata esset, illum in servitute fore. Labeo hoc, quod Quintus Mucius scribit, ita putat verum esse, si vera lege ab intestato heres fuit is qui vicit: nam si iniuria iudicis victus esset scriptus verus heres ex testamento, nihilo minus eum paruisse condicioni ei dando et liberum fore.

Sed verissimum est, quod et Aristo Celso Rescripsit, posse dari pecuniam heredi ab intestato, secundum quem sententia dicta est, quoniam Lex Duodecim Tabularum emptionis verbo omnem alienationem complexa videretur: non interesse, quo genere quisque dominus eius fieret et ideo hunc quoque ea lege contineri, secundum quem sententia dicta est, et liberum futurum eum, qui ei dedisset pecuniam. Hunc autem, id est possessorem hereditatis, cui data esset summa, si victus esset hereditatis petitione, quum ceteris hanc quoque pecuniam victori restituere debere.

30.- IDEM; *libro VII, ex variis Lectionibus*.- Si ita liber esse iussus sit "Stichus, si eum heres non alienaverit, liber esto", etiamsi statuliber est, alienari

§ 1.- Quintus Mucius says that the head of a household stated in his will, "Let my slave Andronicus be free, provided he pays ten aurei to my heirs." A controversy then arose with reference to the estate. One person declared that he was the heir, and alleged that it belonged to him, and another who was in possession of the estate said that he was the heir under the will. Judgment was rendered in favor of the one who said that he was the heir under the will. Then Andronicus asked, if he should pay twenty aurei to the latter, whether he would become free, as judgment had been rendered in his favor; or whether the judgment which the successful party had obtained had no reference to the matter in question; hence, if he paid the ten aurei to the appointed heir, and the case should be decided against the possessor, he would remain in slavery. Labeo thinks that the opinion of Quintus Mucius can only be true, if the heir who gained the case should be decided to be the heir at law; for if the appointed heir should be found to have lost his case, through a just decision, and be held entitled to the estate under the will, the slave by paying him, will, nevertheless, comply with the condition, and will become free.

The opinion given by Aristo to Celsus is, however, perfectly correct, namely, that the money can be paid to the heir at law in favor of whom judgment has been rendered; as under the provisions of the Twelve Tables the term "purchase" is understood to have included every kind of alienation, and it makes no difference in what way any of the parties became the master of the slave; and therefore, he in favor of whom judgment was rendered is included in the law, and the slave who paid the money will be free. Moreover, if he who is in possession and to whom the money was paid should be beaten in a contest for the estate, he will be obliged to surrender the money together with the property to the party who is successful.

30.- THE SAME; *On Various Lessons, Book VII*.- Where a slave is ordered to be free as follows, "Let Stichus be free, if my heir does not alienate him,"

§ 1.- Escribe Quinto Mucio: un padre de familia había escrito en su testamento: «sea libre Andrónico, mi esclavo, si le hubiere dado diez a mi heredero»; después había comenzado a haber controversia sobre estos bienes; uno que decía que él era heredero por la ley, pretendía que a él le pertenecía esta herencia; otro, que poseía la herencia, decía que él era heredero por el testamento; se había pronunciado sentencia a favor del que decía que era heredero según el testamento; después preguntaba Andrónico, si, habiéndole dado a éste veinte, puesto que a su favor se pronunció la sentencia, habría de ser libre, o si se consideraría que la sentencia con que ganó no valdría nada para esto; por lo cual, si le hubiese dado los veinte al heredero instituido, y el negocio hubiese sido fallado contra el poseedor, aquél habría de permanecer en la esclavitud. Labeón opina, que es verdad lo que escribe Quinto Mucio, si en realidad fue heredero abintestato por la ley el que venció; porque si por injusticia del juez hubiese sido vencido el verdadero heredero instituido en el testamento, esto no obstante, dándole a éste cumplió aquél la condición, y habrá de ser libre.

Pero es lo mas verdadero, lo que también Aristón respondió a Celso, que se le puede dar el dinero al heredero abintestato, a cuyo favor fue pronunciada la sentencia, porque se considera que la ley de las Doce Tablas comprendió con la palabra compra toda clase de enajenación, y no importaría de qué modo se habría hecho cada cual dueño de aquél; y que por esto se comprende también en esta ley aquél a cuyo favor se pronunció la sentencia, y ha de ser libre el que le hubiese dado el dinero; pero que éste, esto es, el poseedor de la herencia, a quien se le hubiese dado la suma, si hubiese sido vencido en la petición de la herencia, debía restituírla al vencedor también este dinero junto con las demás cosas.

30.- EL MISMO; *Doctrina de autores varios, libro VII*.- Si de este modo se hubiera mandado que uno fuese libre: «sea libre Stico, si el heredero no lo

tamen poterit.

31.- GAIUS; *libro XIII, ad legem Iuliam et Papiam*.- Si servo sub condicione rationum editarum legatum sit, per eam condicionem eum iussum esse legatum accipere, ut pecuniam reliquorum reddat, non dubitatur.

§ 1.- Et ideo quum quaesitum est "Stichus quum rationes dederit, quum contubernali sua liber esto" an mortuo Sticho ante condicionem contubernalis eius libera esse possit: Iulianus dixit quaestionem esse in hac specie, quae et in legatis agitur "illi quum illo do", an altero deficiente alter ad legatum admittatur: quod magis sibi placere, perinde ac si ita scriptum esset "illi et illi". Aliam etiam esse quaestionem, an contubernali quoque condicio iuncta sit: quod magis esset. Itaque si nulla reliqua Stichus habuerit, statim eam liberam esse, si habuerit reliqua, debere eam numerare pecuniam: nec tamen licitum ex suo peculio dare, quia id illis permissum sit, qui principaliter pro sua libertate pecuniam dare iubentur.

32.- LICINIUS RUFINUS; *libro I, Regularum*.- Si duobus heredibus institutis servus liber esse iussus sit, si decem heredibus dederit, ab altero ex heredibus venierit et traditus fuerit, pro parte alteri ex heredibus, a quo non venierit, dando pecuniam liber erit.

33.- PAPINIANUS; *libro II, Quaestionum*.- Statuliberorum iura per heredem fieri non possunt duriora.

34.- IDEM; *libro XXI, Quaestionum*.- Servus si

even if he is to be free conditionally, he can, nevertheless, be alienated.

31.- GAIUS; *On the Lex Julia et Papia, Book XIII*.- If a legacy is bequeathed to a slave on the condition of his rendering his accounts, there is no doubt that, under the condition by which he is directed to receive the legacy, he must pay over any balance remaining in his hands.

§ 1.- Therefore, when inquiry was made with reference to the following clause, "Let Stichus, together with his female companion, be free, after he has rendered his accounts," and Stichus should die before the condition is complied with, will his companion be free? Julianus says that there is a point in this case which also arises with respect to legacies, as where a testator says, "I give to So-and-So together with So-and-So," and one of the parties is lacking, the other is permitted to take the legacy; because the better opinion is that the case is just as if the testator had said, "I give to So-and-So and So-and-So." It is also said that there is another question, namely, whether the condition is also imposed upon the female companion. It is held that this is the case; hence, if Stichus has no balance in his hands, the woman will immediately become free; but if a balance remained in his hands, she must pay the money, nor will it be lawful for her to take it out of the peculium, because this is only permitted to those who are directed to make payment in their own names, in consideration of the freedom which is granted them.

32.- LICINIUS RUFINUS; *Rules, Book I*.- Where two heirs are appointed, and a slave is ordered to be free if he pays ten aurei to the heirs, and he is sold and delivered by one of the latter, he will become free by paying half of the sum to the other heir by whom he was not sold.

33.- PAPINIANUS; *Questions, Book II*.- The rights of slaves who are to be conditionally free cannot be injuriously affected by the heir.

34.- THE SAME; *Questions, Book XXI*.- A slave

hubiere enajenado», aunque es *statuliber*, podrá, no obstante, ser enajenado.

31.- GAYO; *Comentarios a la ley Julia y Papia, libro XIII*.- Si a un esclavo se le hubiera hecho un legado bajo la condición de haber exhibido las cuentas, no se duda que mediante esta condición se le mandó que aceptase el legado, para que devuelva el importe de los remanentes.

§ 1.- Y por esto, habiéndose preguntado, si, habiéndose dispuesto: «sea libre Stico con su contubernal, cuando hubiere rendido las cuentas» podría ser libre su contubernal habiendo fallecido Stico antes de cumplida la condición, dijo Juliano que en este caso la cuestión era la que también se discute en los legados, «le doy a éste junto con aquél», sobre si faltando uno será el otro admitido al legado; que era lo que a él le parecía mejor, lo mismo que si se hubiese escrito así: «a éste y a aquél». Hay también otra cuestión, si la condición habrá sido impuesta también a la contubernal; lo que es más cierto. Y así, si Stico no hubiere tenido ningunos sobrantes, ella es libre inmediatamente, y si hubiere tenido sobrantes, debe ella entregar el dinero; pero no le habrá de ser lícito darlo de su peculio, porque esto les está permitido a aquéllos, a quienes en lo principal se les manda que den dinero por su libertad.

32.- LICINIO RUFINO; *Reglas, libro I*.- Si habiendo sido instituidos dos herederos se hubiera dispuesto que el esclavo fuese libre, si les hubiere dado diez a los herederos, y hubiere sido vendido y entregado por uno de los herederos, será libre dándole con arreglo a su parte el dinero al otro heredero, por quien no hubiere sido vendido.

33.- PAPINIANO; *Cuestiones, libro II*.- No se pueden hacer más gravosos por el heredero los derechos de los *statuliberi*.

34.- EL MISMO; *Cuestiones, libro XXI*.- Se

heredi decem dederit, liber esse iussus est: statuliberum heres eum manumisit ac postea defunctus est. Heredis heredi pecunia danda non est: quod enim placuit heredis heredi dari oportere, tunc memineris locum habere, quum prior heres dominus accepturus pecuniam fuit. Quae causa facit ambulatoriam, ut ita dixerim, condicionem: duae sunt enim causae, per quas in primi heredis persona condicio impletur, dominii ratio, item personae demonstratio: prior causa transit in omnem successorem, ad quem pervenerit statuliber per dominii translati continuationem, sequens personae dumtaxat eius, qui demonstratus est, adhaeret.

§ 1.- Imperator Antoninus Rescripsit iussum rationes reddere et liberum esse, si heres causabitur accipere rationes, nihilo minus liberum fore. Quod Rescriptum ita accipi debet, ut, si reliqua non trahat, liber sit: quod si trahat, ita demum, si optulit eam quantitatem, quae refundi debuit ex fide veritatis: non enim libertati sufficit heredem in mora fuisse, si non id fiat per statuliberum, quod remota mora libertati aditum daret. Quid enim si ita manumissum "Dama si in Hispaniam profectus anno proximo fructus coegerit, liber esto" Romae retineat heres neque proficisci patiat? Numquid dicturi sumus statim ante fructus coactos liberum fore? Nam et quum Romae stipulatio concipitur ita "centum in Hispania dare spondes?", inesse tempus stipulationi, quo possit in Hispaniam pervenire, nec ante iure agi placuit. Sed si heres acceptis rationibus et reliquis computatis donare se ea statulibero non habenti quod inferat proscribat aut etiam litteris ad eum missis palam faciat, condicio libertatis impleta videbitur. Quid ergo, si neget se reliqua traxisse atque ideo, quia per heredem steterit, ut accipiat rationes, liberum factum, heres autem neque se fecisse moram et reliqua debere statuliberum contendat? Apud eum qui de libertate cognoscit, an condicio sit impleta, constabit: cuius officio continebitur de mora considerare nec minus computare rationes et, si reliqua trahi compererit, non esse liberum pronuntiare. Sed si numquam negavit reliqua debere, quum autem

was ordered to be free if he paid ten aurei to the heir. The heir manumitted the slave, and afterwards died. In this instance, the money should not be paid to the heir of the heir; for when it was decided that he must pay the heir of the heir, you will remember that this applied where the first heir who was to receive the money was the master of the slave; which rendered the condition (so to speak), ambulatory. There are, in fact, two reasons for which the condition should be complied with so far as the first heir is concerned; the first one is the ownership, and the second the designation of the person. The first reason applies to every successor to whom the slave may pass through the continuation of the ownership which is transferred; but the second one only has reference to the person who is especially designated.

§ 1.- The Emperor Antoninus stated in a Rescript that where a slave was ordered to render his accounts and become free, if the heir should delay in receiving the accounts, the slave will, nevertheless, become free. This rescript should be understood to apply where the slave will become free if he does not defer the payment of the balance in his hands, but if he delays to do so, it will only become operative if he tenders the amount which should be refunded in good faith; for it will not be sufficient for the heir to be in default to enable the slave to be manumitted where nothing was done by him which would have contributed to his freedom, if the heir had not been in default. But what if a slave was manumitted as follows, "Let Damas be free, if he goes to Spain next year to gather the harvest," and the heir retains him at Rome, and will not suffer him to depart? Can we say that he will immediately be free before the crops are gathered? For if a stipulation is made at Rome, as follows: "Do you promise to pay me a hundred aurei in Spain?" The time during which you may be able to reach Spain is included in the stipulation, and it has been decided that legal proceedings cannot be instituted until this time has elapsed. If, however, the heir, after having allowed the accounts, and calculated the balance due from the slave, declares publicly that he donates the amount to the latter, because he has nothing to pay it with, or if he states this openly in a letter sent to him; the condition upon

mandó que un esclavo fuese libre, si le hubiere dado diez al heredero; el heredero manumitió a este *statuliber*, y falleció después; no se le ha de dar el dinero al heredero del heredero; porque lo que se determinó, que se debía dar al heredero del heredero, ten presente que tiene lugar siempre y cuando el primer heredero haya de haber recibido el dinero como dueño. Cuya circunstancia hace ambulatoria, por decirlo así, la condición; porque son dos las causas por las que se cumple la condición en la persona del primer heredero, la razón del dominio, y también la designación de la persona; la primera causa pasa a todo sucesor a quien fuere el *statuliber* mediante la continuación del dominio transferido, y la segunda es inherente solamente a la persona del que fue designado.

§ 1.- Respondió por rescripto el Emperador Antonino, que aquel a quien se le mandó que rindiera cuentas, y que fuese libre, si el heredero se excusara de recibir las cuentas, habrá de ser, no obstante, libre. Cuyo rescripto debe ser entendido de modo, que, si no arrastrara atrasos, sea libre, pero, si los arrastrase, solamente si ofreció aquella cantidad que debió ser reintegrada, con fiel sujeción a la verdad; porque para la libertad no basta que el heredero haya estado en mora, si por el *statuliber* no se hiciera lo que, prescindiéndose de la mora, le daría acceso a la libertad. Porque ¿qué se dirá, si se manumitió así: «sea libre Dama, si habiendo ido a España el año próximo hubiere recogido los frutos», y el heredero lo retuviera en Roma, y no consintiese que partiera? ¿Habremos de decir acaso, que inmediatamente habrá de ser libre, antes de recogidos los frutos? Porque también cuando en Roma se formula así la estipulación: ¿«prometes dar ciento en España»? hay inherente a la estipulación un tiempo en el que pueda llegar a España, y se determinó que antes no se ejercitaba acción en derecho. Pero si el heredero, recibidas las cuentas y computados los atrasos, dijese públicamente, o también lo hiciese manifiesto en carta dirigida a éste, que se los donaba al *statuliber* que no tenía lo que había de reintegrar, se considerará cumplida la condición de la libertad. Luego ¿qué se dirá, si negara que él haya tenido atrasos, y que por esto, porque en el heredero consistió el recibir las

conveniret heredem et rationes offerret, professus sit refusurum, quidquid in reliquis esse constiterit et eius pecuniae reum numerare paratum idoneum optulit et heres in mora fuit: sententia pro libertate dicetur.

35.- IDEM; *libro IX, Responsorum.*- Non videbitur per statuliberum non stare, quo minus condicio libertatis existat, si de peculio, quod apud venditorem servus habuit, pecuniam condicionis offerre non possit: ad alienum enim peculium voluntas defuncti porrigi non potuit. Idem erit et si peculio servus venierit et venditor fide rupta peculium retinuerit: quamquam enim ex empto sit actio, tamen apud emptorem peculium servus non habuit.

36.- IDEM; *libro II, Definitionum.*- In tabulis secundis filio servum data libertate substitutum iure statuliberi prudentes munierunt: quod utilitas recipit, scilicet ut quum sua causa alienaretur, ne patris testamentum puer filius rescindat. Quae iuris auctoritas citra dilectum ordinis ad secundum quoque vel tertium substitutum porrecta est.

which his freedom is dependent is held to have been complied with. But what course should be pursued if the slave should deny that he has delayed payment of the balance, and therefore, because the heir is to blame for not receiving his accounts, he should become free, and the heir maintains that he was not responsible for delay, and that the slave should pay over the balance in his hands? It shall be determined by the magistrate who has jurisdiction of the case whether the condition was complied with or not, and it is part of his duty to investigate the alleged default, as well as to cast up the accounts, and if he should ascertain that payment of the balance was delayed, to decide that the slave is not free. If, however, the slave never denied that a balance was due, and should sue the heir in order to be able to render his accounts, and it was established that he was prepared to pay any balance that might remain, and offered a good surety for the payment of the money, and the heir was found to be in default, judgment must be given in favor of freedom.

35.- THE SAME; *Opinions, Book IX.*- The slave will be considered responsible for failure to comply with the condition upon which his liberty is dependent if he cannot pay the money out of the peculium which he had when under the control of the vendor; because the will of the deceased does not extend to his peculium under another owner. The same rule will apply where the slave was sold with his peculium, and the vendor retains it in violation of his contract; for although an action on purchase will lie, still, the slave did not have the peculium when he was under the control of the purchaser.

36.- THE SAME; *Definitions, Book II.*- Persons learned in the law have placed in the class of slaves to be conditionally free one who has been substituted for a son with the grant of his freedom by a second will. This rule is useful, as it prevents a son, who is a minor, from annulling his father's will by permitting the slave to be alienated subject to the charge of his freedom. This interpretation of the law extends, without any distinction, to every case where the slave is substituted either in the second or the third degree.

cuentas, se hizo libre, pero el heredero sostuviera que él no causó mora, y que el *statuliber* debe atrasos? Que ante el que conozca de la libertad se hará constar si se habrá cumplido la condición; a cuyo ministerio corresponderá considerar respecto a la mora, y también computar las cuentas, y, si viere que se arrastran atrasos, declarar que no es libre. Pero si nunca negó que debiera atrasos, sino que al demandar al heredero manifestó que ofrecía las cuentas para reintegrar lo que constare que había de atrasos, y ofreció de este dinero fiador abonado dispuesto a pagarlo, y el heredero incurrió en mora, se pronunciará sentencia a favor de la libertad.

35.- EL MISMO; *Respuestas, libro IX.*- No se considerará que no consiste en el *statuliber* que no se cumpla la condición de la libertad, si el esclavo no pudiera ofrecer del peculio, que tuvo estando en poder del vendedor, el dinero de la condición; porque la voluntad del difunto no pudo extenderse al peculio ajeno. Lo mismo será, también si el esclavo hubiere sido vendido con el peculio, y el vendedor, quebrantando la fidelidad, hubiere retenido el peculio; porque aunque haya la acción de compra, sin embargo, el esclavo no tuvo peculio en poder del comprador.

36.- EL MISMO; *Definiciones, libro II.*- Los jurisconsultos ampararon con el derecho de *statuliber* al esclavo que habiéndosele dado la libertad fue substituido a un hijo en el segundo testamento; la utilidad admitió esto, a saber, para que fuese enajenado con su propia causa, a fin de que el hijo impúbbero no invalidase el testamento del padre; cuya disposición de derecho fue extendida sin distinción de orden también al segundo o tercer sustituto.

37.- GAIUS; *libro singulari de Casibus*.- Si ita scriptum sit: "Stichum Titio do, ut eum manumittat: si non manumiserit, liber esto", statim Stichum liberum esse.

38.- PAULUS; *libro I, ad Neratium*.- Non omne ab heredis persona interveniens impedimentum statulibero pro expleta condicione cedit, sed id dumtaxat, quod impediendae libertatis factum est.

39.- IAVOLENUS; *libro IV, ex Posterioribus Labeonis*.- "Stichum attio do lego et, si is ei nummos centum dederit, liber esto". Si servus ex testamento nummos Attio dedisset, eos repetere heredem non posse Labeo existimat, quia Attius eos a servo suo acceperit, non ab heredis servo. Eum autem statuliberum esse Quintus Mucius, Gallus et ipse Labeo putant: servius, Ofilius non esse. Superiorem sententiam probo, ita tamen, ut is servus heredis, non legatarii sit, utpote quum legatum statulibertate tollatur.

§ 1.- "Stichus liber esto, quando aes alienum meum solum creditoribusve meis satisfactum erit". Quamvis heres locuples extitisset, tamen non prius Stichum liberum futurum, quam creditores pecuniam aut satis accepissent aliove quo modo sibi cavissent, Labeo ofilius responderunt.

§ 2.- Si heres servo pecuniam ad negotiandum dedisset, statuliberum eam ipsam numerando liberari ex testamento non posse Labeo Trebatius responderunt, quia reddere eam magis quam dare videretur. ego puto, si peculiares nummi fuerunt, ex testamento eum liberum futurum.

§ 3.- "Dama servus quum heredi meo annorum septem operas solverit, liber esto" et is servus intra septem annos in iudicio publico esset et septimus annus praeterisset, servius ait eum non liberari

37.- GAIUS; *On Special Cases*.- If it is stated in a will, "I give Stichus to Titius, in order that he may manumit him, and if he does not do so, let him be free," Stichus will immediately become free.

38.- PAULUS; *On Neratius, Book I*.- Not every impediment for which the heir is responsible has the same effect as compliance with the condition by the slave, but only where this is done for the purpose of preventing him from obtaining his freedom.

39.- JAVOLENUS; *On the Last Works of Labeo, Book IV*.- "I give and bequeath Stichus to Attius, and if he pays him a hundred sesterces, let him be free." If the slave pays the sesterces to Attius under the terms of the will, Labeo holds that the heir cannot recover them, because Attius received them from his own slave, and not from the slave of the heir. Quintus Mucius, Gallus, and Labeo himself think that the slave should be considered conditionally free, and Servius and Ofilius think that he should not. I adopt the former opinion, that is to say, that the slave belongs to the heir and not to the legatee, just as if the legacy had been taken away by the grant of freedom.

§ 1.- "Let Stichus be free, when my debts are paid, or my creditors are satisfied." Even though the heir should be rich, Stichus will, nevertheless, not be free before the creditors have received their money, or their claims have been satisfied, or security has been furnished them in some other way; which is the opinion of Labeo and Ofilius.

§ 2.- Labeo and Trebatius held that if the heir should give a slave money for the purpose of transacting business he cannot become free under the terms of the will, by paying this money, because he is considered rather to have returned it than to have paid it. I think, however, that if the money formed part of his peculium, he will become free under the testamentary provision.

§ 3.- "Let my slave Damas be free, after he has given his services to my heir for seven years." The slave was implicated in a capital crime during the seven years, and the last year having elapsed, Servius

37.- GAYO; *Casos, libro único*.- Si se hubiera escrito así: «doy Stico a Ticio para que lo manumita; si no lo manumitiere, sea libre», Stico es libre desde luego.

38.- PAULO; *Comentarios a Neracio, libro I*.- No todo impedimento que media por la persona del heredero le favorece al *statuliber* para que se tenga por cumplida la condición, sino solamente el que se causó para impedir la libertad.

39.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro IV*.- «Le doy Stico a Acio; y si él le hubiere dado cien monedas, sea libre»; si el esclavo le hubiese dado en virtud del testamento las monedas a Acio, estima Labeón que no puede reclamarlas el heredero, porque Acio las recibió de su propio esclavo, no de un esclavo del heredero. Pero Quinto Mucio, Galo, y el mismo Labeón opinan que aquél es *statuliber*; Servio y Ofilio, que no lo es; apruebo la primera opinión, pero con tal que este esclavo lo sea del heredero, no del legatario, puesto que con la calidad de *statuliber* se quita el legado.

§ 1.- «Sea libre Stico cuando se hubieren pagado mis deudas, o se hubiere satisfecho a mis acreedores»; respondieron Labeón y Ofilio, que aunque hubiese quedado un heredero rico, no habrá de ser sin embargo libre Stico antes que los acreedores hubiesen recibido el dinero o fianza, o hubiesen obtenido caución de otro cualquier modo.

§ 2.- Si el heredero hubiese dado a un esclavo dinero para negociar, respondieron Labeón y Trebacio, que el *statuliber* no podía ser libre en virtud del testamento entregando este mismo dinero, porque se consideraría que lo devuelve más bien que no que lo da; yo opino, que, si los dineros fueron del peculio, él habrá de ser libre en virtud del testamento.

§ 3.- «Sea libre el esclavo Damas, cuando le hubiere pagado a mi heredero los días de trabajo de siete años»; este esclavo fue sometido a juicio público dentro de los siete años, y transcurrió el séptimo año;

debere, Labeo, et si postea solvisset annorum septem operas, liberum futurum: quod verum est.

§ 4.- "Si Stichus Attiae mille nummos dederit, liber esto". Attia vivo testatore decessit: non posse Stichum liberum esse Labeo Ofilius responderunt: Trebatius, si ante testamentum factum Attia decessisset, idem: si postea, eum liberum futurum. Labeonis et Ofilii sententia rationem quidem habet, sed hoc iure utimur, ut is servus ex testamento liber sit.

§ 5.- Si servus operas extraneo dare iussus esset, nullus nomine servi suas operas dando liberare servum potest: quod in pecunia aliter observatur, utpote quum extraneus pro eo servo dando pecuniam servum liberaret.

40.- SCAEVOLA; *libro XXIV, Digestorum*.- Sticho libertas data est: "ab heredibus meis peto fideique eorum committo, ut rationibus redditus Stichum manumittant". Quaesitum est, quum ampla pecunia exacta post mortem testatoris sibi commissa reliqueretur et quasdam summas a colonis exactis rationibus non intulerit hereditatemque spoliaverit apertis clam horreis sublatisque suppellectili et veste et apothecis exhaustis: an non prius ei fideicommissa libertas debeatur, quam ea, quae mala ratione reliquatus est quae furatus est, reposuerit. Respondit non prius ei fideicommissam libertatem praestandam, quam et reliqua et omnia, quae per eum abessent, restituisset.

§ 1.- "Pamphilus liber esto peculio suo heredibus vere dato". Quaesitum est, quum plus domino debeat quam in peculio habeat et omnes res, quas in peculio habebat, bona fide heredibus dederat, an libertas ex testamento competat. Respondit nihil proponi, cur

stated that he should not be liberated. Labeo, however, held that he would be free after having served his master for seven years. This opinion is correct.

§ 4.- "Let Stichus be free, if he pays a thousand sesterces to At-tia." Attia died during the lifetime of the testator. Labeo and Ofilius were of the opinion that Stichus could not become free. Trebatius agreed with them, if Attia died before the will was made; but if she died afterwards, he held that the slave would be free. The opinion of Labeo and Ofilius is reasonable, but it is our practice to consider the slave as free under the terms of the will.

§ 5.- Where a slave is ordered to serve a stranger, no one can liberate him by furnishing his own labor in the name of the slave. The rule, however, is different where the payment of money is concerned; as, for instance, where a stranger liberates a slave by paying money in his behalf.

40.- SCAEVOLA; *Digest, Book XXIV*.- Freedom was granted to Stichus as follows, "I request my heirs, and I charge them to manumit Stichus, after he renders his accounts." As the slave had collected a great deal of money after the death of the testator, which remained in his hands, and had not included in his own accounts certain sums paid by tenants; and had despoiled the estate by secretly opening warehouses and stealing furniture and clothing, and exhausting cellars of their contents, the question arose whether freedom under the trust should be granted him before he accounted for what fraudulently remained in his hands, and returned what he had stolen. The answer was that freedom should not be granted him under the terms of the trust until he had made restitution of the balance remaining in his hands, and everything which had been lost by his agency.

§ 1.- "Let Pamphilus be free, if he gives all of his peculium to my heirs." As the slave owed more to his master than there was in the peculium, and had transferred everything belonging to his peculium in good faith to the heirs, the question arose whether he

dice Servio, que él no debe ser libre, y Labeón, que habrá de ser libre, aunque después hubiese pagado los días de trabajo de los siete años; lo que es verdad.

§ 4.- «Sea libre Stico, si le hubiere dado a Acia mil monedas»; Acia falleció en vida del testador; respondieron Labeón y Ofilio, que Stico no podía ser libre; Trebacio, que él habrá de ser libre, si Acia hubiese fallecido antes de haberse hecho el testamento, y lo mismo si después; la opinión de Labeón y de Ofilio tiene ciertamente fundamento, pero observamos este derecho, que este esclavo sea libre en virtud del testamento.

§ 5.- Si a un esclavo se le hubiese mandado que le diese días de trabajo a un extraño, ninguno puede hacer libre al esclavo dando sus días de trabajo en nombre del esclavo; lo que tratándose de dinero se practica de otro modo, puesto que un extraño, dando el dinero por este esclavo, hace libre al esclavo.

40.- SCAEVOLA; *Digesto, libro XXIV*.- Se le dió así a Stico la libertad: «les pido a mis herederos, y encomiendo a su fidelidad, que manumitan a Stico habiendo rendido las cuentas»; se preguntó, adeudando considerables cantidades, cobradas después de la muerte del testador, que le habían sido encomendadas, y no habiendo incluido en las cuentas algunas sumas cobradas de los colonos, y habiendo despojado la herencia abriendo clandestinamente los graneros, y habiendo substraído el ajuar y los vestidos, y habiendo vaciado las despensas, si no se le deberá dar la libertad dejada por fideicomiso antes que haya reintegrado lo que quedó debiendo por su mala administración, y lo que hurtó. Respondió, que no se le ha de dar la libertad dejada por fideicomiso antes que hubiese restituido los atrasos, y todo lo que por causa de él faltase.

§ 1.-«Sea libre Pánfilo habiéndoles dado verdaderamente a los herederos su peculio»; se preguntó, si, debiéndole a su señor más de lo que tenía en el peculio, y habiéndoles dado de buena fe a los herederos todos los bienes que tenía en el peculio, le

non competeret.

§ 2.- Pamphilo liberto, quem heredem ex parte instituerat, Stichum servum praelegaverat et ei libertatem his verbis dederat: "ita ut, si tibi ex die mortis meae per annos continuos quinque menstruos sexagenos dederit, tunc eum manumittas". Pamphilus ante quinquennium moriens heredibus institutis filio et uxore de eodem Sticho ita cavit: "Stichus servus, qui mihi testamento patroni mei certa condicione relictus est, iubeo det praestet filio et uxori meae sine ulla controversia et eum tempore peracto manumittant". Quaesitum est, si Stichus sexagenos nummos menstruos non praestiterit, an impleto quinquennio fideicommissa libertas ei debeat. Respondit, nisi praestitisset, fideicommissam libertatem non deberi.

§ 3.- Servus testamento ita manumissus est: "Stichus servus meus actor si rationem omnem actus sui heredi meo reddiderit eoque nomine satisfecerit, liber esto eique, quum liber erit, dari volo viginti et peculium suum". Quaesitum est, an, si rationes, quas egit per multos annos sine subscriptione testatoris, heredi reddere paratus sit, liber ex testamento fiat, quum propter gravem valetudinem testator non potuerit rationibus subscribere, testamento tamen subscripserit. Respondit, si ex fide ratio redderetur reliquaue inferantur, liberum fore.

§ 4.- Item quaero, an ea, quae exacta sunt per adiutores eius neque calendario illata sunt aut

was entitled to freedom under the terms of the will. The answer was that there was nothing in the case stated to show that he was not entitled to it.

§ 2.- A testator bequeathed his slave Stichus as a preferred legacy to his freedman, Pamphilus, whom he had appointed heir to a portion of his estate; and he bequeathed freedom to Stichus, as follows: "You will manumit him if, during the five continuous years from the day of my death, he pays you sixty sesterces every month." Pamphilus, having died before the expiration of five years, and having appointed his son and his wife his heirs, made the following testamentary provision with reference to Stichus: "I direct that my slave, Stichus, who was bequeathed to me under a certain condition by the will of my patron, shall give and pay to my son and to my wife, without any dispute, the amount for which he is liable, and if this is done, they shall manumit him after the prescribed time has elapsed." If Stichus should not pay the sixty sesterces every month, the question arose whether he would be entitled to his freedom under the trust, after the five years had expired. The answer was that unless he made the payments he would not be entitled to the freedom granted to him under the terms of the trust.

§ 3.- A slave was manumitted by a will as follows: "Let Stichus, my slave, who is also my steward, be free, if he renders an account of his entire administration to my heir, and satisfies him in this respect; and when he becomes free, I wish twenty aurei and his peculium to be given to him." The question arose, if the slave was prepared to render accounts of his administration for the many years during which he had conducted it without the signature of the testator approving them whether he would become free under the will, as the testator had not been able to sign the accounts because of his serious illness, but could, nevertheless, sign his will. The answer was that the slave would become free if his accounts were rendered in good faith, and the balance remaining in his hands was paid.

§ 4.- I also ask whether any sums collected by the assistants of the slave, which either were not entered

competerá la libertad en virtud del testamento. Respondió, que nada se exponía para que no le competiese.

§ 2.- Uno le había prelegado al liberto Pánfilo, al cual había instituido heredero de una parte, el esclavo Stico, y le había dado a éste la libertad en estos términos: «de suerte que si desde el día de mi muerte te hubiere dado por espacio de cinco años continuos la suma de sesenta cada mes, lo manumitas entonces»; Pánfilo, al morir antes del quinquenio, habiendo instituido herederos a su hijo y a su mujer, dispuso así respecto al mismo Stico: «mando que el heredero Stico, que bajo cierta condición me fue dejado en el testamento de mi patrono, dé y pague a mi hijo y a mi mujer sin ninguna controversia, y transcurrido el término lo manumitan»; se preguntó, si, no habiendo entregado Stico las sesenta monedas mensuales, se le deberá, transcurrido el quinquenio, la libertad dejada por fideicomiso. Respondió, que si no las hubiese entregado, no se le debía la libertad dejada por fideicomiso.

§ 3.- Un esclavo fue manumitido así por testamento: «sea libre Stico, mi esclavo agente, si le hubiere dado a mi heredero todas las cuentas de su administración, y le hubiere satisfecho por tal motivo; y quiero que cuando fuere libre se le den veinte y su peculio»; se preguntó, si, estando dispuesto a entregarle al heredero, sin la firma del testador, las cuentas que llevó durante muchos años, se hará libre en virtud del testamento, cuando por su grave enfermedad no hubiere podido el testador subscribir las cuentas, no obstante, que hubiere firmado el testamento. Respondió, que si diese las cuentas de buena fe, y se entregasen los remanentes, habrá de ser libre.

§ 4.- También pregunto, si lo que fue cobrado por sus ayudantes, y no fue anotado en el libro de

fraudulenter acta, huic adscribi possint, quum esset is praepositus. Respondit, si id esset, quod culpa eius deberet imputari, spectare ad rationis reddendae necessitatem.

§ 5.- Item quaero, an eorum quoque nomine ratio haberi debeat, quod neque a conductoribus praediorum neque a vilicis pensiones exegerit et insuper etiam promutuum eis dederit. Respondit supra responsum est.

§ 6.- Item quaero, an eo nomine teneatur, quod omnem rem suam, id est peculium, exportaverit, antequam rationes redderet. Respondit nihil eam rem impedire condicionem, si modo ratio redderetur.

§ 7.- Titius testamento servos actores singulos diversis personis legavit quum adiectione "si rationes heredi reddiderint": deinde proprio capite ita scripsit: "omnes actores, quos legavi vel manumisero, intra quartum mensem mortis meae rationes reddere volo et dominis, quibus a me legati sint, reddi". Infra deinde alios actores liberos esse iussit aequum quum hac adiectione "si rationes heredi reddiderint". Quaero, quum per heredem fiat, quo minus reddantur, utrum statuliberi esse desinant an nihilo minus quandoque possint reddita ratione et reliquis illatis libertatem ex testamento consequi. Respondit legata quidem et libertates non alias competere, quam rationes redditae essent aut per heredem staret, quo minus redderentur: verum iudicaturum aestimandum, utrum tempus condicioni legatorum libertatumque additum videatur an, libero tempore reddere volentibus reliqua, heredibus quattuor menses appositum sint, sollicito testatore cunctationi et moram eorum proscribente. Melius autem est praesumptionem pro statuliberis esse.

upon his register at all, or were entered fraudulently, will render him liable, as he was placed over his assistants. The answer was, if the matter was one for which he could be held accountable, the necessity for his rendering a statement of the same should be taken into consideration.

§ 5.- I also ask if an account should be rendered of the rents which he had not collected from the lessees of land, or from tenants, over and above any sums which he may have advanced to them. The answer was that this has already been decided.

§ 6.- I also ask whether he will be liable on the ground that he had removed all his property, that is to say, his peculium, before rendering his account. The answer was that this was no impediment to the performance of the condition, provided the account was rendered.

§ 7.- Titius bequeathed to different persons by will each of the slaves employed by his steward, on condition that they should render their accounts to his heir. Then, in another clause of his will, he said: "I wish all the stewards whom I have bequeathed, or may manumit, to render their accounts within four months after my death, to their owners to whom they have been bequeathed by me." He then, lower down, ordered others of his stewards to be free, adding, "If they render their accounts to my heir." As it was the fault of the heir that their accounts were not rendered, I also ask whether the slaves ceased to be free under the condition; or whether they could, nevertheless, obtain their freedom under the will, by rendering their accounts and paying the balances remaining in their hands. The answer was that the legacies and grants of freedom would not take effect, unless the accounts were rendered, or if it was the fault of the heir that this was not done; but that it must be determined by the court whether time seemed to be included in the condition under which the legacies and the grants of freedom were to become operative; or whether the four months were added by the testator for the purpose of preventing further delay and to afford abundance of time for the rendering of the accounts to the heirs. It is, however, better to hold that

cuentas, o lo que fue administrado fraudulentamente, se le podrá cargar a él, porque había estado al frente de aquéllos. Respondió, que si hubiese algo que se debiese imputar a culpa suya, se comprende en la necesidad de rendir las cuentas.

§ 5.- Asimismo pregunto, si también se deberá tener en cuenta que no haya cobrado las pensiones ni de los arrendatarios de los predios, ni de los mayordomos, y si además les hubiere dado también dinero en mutuo. Respondió: ya antes se respondió.

§ 6.- Igualmente pregunto, si estará obligado por este motivo, porque haya retirado todos sus bienes, esto es, su peculio, antes de rendir las cuentas. Respondió, que esto en nada impediría a la condición, con tal que se rindieran las cuentas.

§ 7.- Ticio legó en su testamento cada uno de sus esclavos agentes a diversas personas, con esta adición: «si rindieran cuentas al heredero»; después escribió así en el propio capítulo: «quiero que todos los agentes, que he legado o que hubiere manumitido, rindan cuentas dentro del cuarto mes de mi muerte, y que se las rindan a los dueños a quienes por mí hayan sido legados»: después dispuso más abajo que otros agentes fuesen libres, igualmente con esta adición: «si hubieren rendido cuentas al heredero»; pregunto, si, haciéndose por el heredero que no se rindan, dejarán de ser *statuliberi*, o si, no obstante, en cualquier tiempo podrán conseguir la libertad en virtud del testamento, habiendo rendido las cuentas y entregado los remanentes. Respondió, que los legados y las libertades no competen ciertamente de otro modo, sino si se hubiesen rendido las cuentas, o consistiera en el heredero que no se rindieran, pero que se ha de estimar por el juzgador si se considerara que el tiempo fue agregado a la condición de los legados y de las libertades, o si se fijaron los cuatro meses, quedándoles libre el tiempo a los que quieran entregarles los remanentes a los herederos, habiendo atendido el testador al retardo, y proscribiendo la morosidad de éstos; pero es mejor que la presunción sea a favor de los *statuliberi*.

the presumption is in favor of the slaves.

§ 8.- Argentarius coactor quum paene totam fortunam in nominibus haberet, servis actoribus libertatem ita dedit: "quisquis mihi heres erit, si Dama servus meus actus sui, qui agitur nomine eius et Pamphili conservi sui, heredi meo rationes reddiderit pariaque fecerit a die mortis meae intra mensem sextum, liber esto". Quaesitum est, an haec verba "pariaque fecit" ad omnia nomina pertineant exceptis perditis, ut hoc significant "si omnem pecuniam ab omnibus exegerint et heredi solverint vel eo nomine satisfecerint" et, si in exactione nominum cessaverint intra sex menses, libertas illis non competat. Respondit manifestam esse condicionem verbis testamenti supra scriptis positam: igitur ita demum liberos fore, si aut ei pareant aut per heredem stet, quo minus pareant.

41.- LABEO; *libro I, Pithanon a Paulo epitomatum*.- Si quem servum tuum ad certum tempus statuliberum relinquere vis, nihil interest, utro modo caveas, "si servierit" an "si triennio operas dederit, liber esto".

§ 1.- Paulus: si quis liber esse iussus fuerit, si decem heredi promississet, quamquam ea promissio nullam rem habitura est, tamen promittendo liberabitur.

42.- IDEM; *libro III, Pithanon*.- Si quis eundem hominem uxori suae legaverit et, cum ea nupsisset, liberum esse iusserit et ea ex lege nupserit, liber fiet is homo.

§ 8.- The collector of a banker, almost all of whose fortune consisted of claims, gave freedom to his agents, who were his slaves, as follows: "No matter who may be my heir, if Damas, my slave, renders an account to him of the administration which he has carried on in his own name, and in that of Pamphilus, his fellow-slave, I wish both of them to be placed on an equal footing, and to become free within six months." The question arose if the words, "to be placed on an equal footing," applied to all the claims except the bad debts, so that the meaning of it was if they collected all that was due from all the debtors, and paid the heir, or satisfied him in some other way, and if they did not collect the claims within six months, whether they would not be entitled to their freedom. The answer was, that it was clear that the condition was inserted in the above-mentioned clause of the will, and therefore that the slaves would be free if they complied with it, or the heir was responsible for their not doing so.

41.- LABEO; *Epitomes of Probabilities, by Paulus, Book I*.- If you desire to permit one of your slaves to be liberated from servitude within a certain time, it makes no difference whether you make this provision under the condition that he "shall serve," or "render his services for the term of three years, in order to become free."

§ 1.- Paulus: If anyone is ordered to be free if he promises to pay ten aurei to the heir, although a promise of this kind will be of no effect, he will, nevertheless, be liberated by making it.

42.- THE SAME; *Probabilities, Book III*.- Where anyone bequeaths a slave to his wife, and orders him to be free in case she marries again, the slave will become free under this condition if she should marry a second time.

§ 8.- Un banquero recaudador, que tenía casi toda su fortuna en créditos, les dio así la libertad a esclavos agentes: «cualquiera que sea mi heredero, si Dama, mi esclavo, le hubiere dado a mi heredero las cuentas de su administración, que lleva en su nombre y en el de Pánfilo, su coesclavo, y hubiere saldado dentro de seis meses desde el día de mi muerte, sea libre»; se preguntó, si estas palabras: «y hubiere saldado» se referirán a todos los créditos, exceptuados los perdidos, de modo que signifiquen: si de todos hubieren cobrado todo el dinero, y lo hubieren pagado al heredero, o le hubieren satisfecho por este concepto, y, si hubieren dejado de hacer la cobranza de los créditos dentro de los seis meses, no les competa la libertad. Respondió, que con las susodichas palabras del testamento se impuso una condición manifiesta; así, pues, que solamente habrán de ser libres, si le saldaren, o consistiera en el heredero que no le saldasen.

41.- LABEON; *Dichos recopilados por Paulo, libro I*.- Si quieres dejar *statuliber* para cierto tiempo a un esclavo tuyo, no importa de qué modo lo dispongas: «si hubiere servido», o «si hubiere dado sus días de trabajo tres años, sea libre».

§ 1.- Y dice Paulo: si se hubiere dispuesto que uno sea libre, si le hubiese prometido diez al heredero, aunque esta promesa no ha de tener ningún efecto, se hará, sin embargo, libre prometiendo.

42. EL MISMO; *Dichos, libro III*.- Si alguno le hubiere legado un esclavo a su mujer, y hubiere dispuesto que sea libre cuando ella se hubiese casado, y se hubiere casado con arreglo a la ley, este esclavo se hará libre.

TIT. VIII

QUI SINE MANUMISSIONE AD LIBERTATEM
PERVENIUNT

1.- PAULUS; *libro V, ad Plautium*.- Si servus venditus est, ut intra certum tempus manumitteretur, etiamsi sine herede decessissent et venditor et emptor, servo libertas competit: et hoc Divus Marcus Rescripsit. Sed et si mutaverit venditor voluntatem, nihilo minus libertas competit.

2.- MODESTINUS; *libro VI, Regularum*.- Servo, quem pro derelicto dominus ob gravem infirmitatem habuit, ex Edicto Divi Claudii competit libertas.

3.- CALLISTRATUS; *libro III, de Cognitionibus*.- Eum, qui ita venit, ut intra tempus manumitteretur, cum dies praestandae libertatis venerit vivente venditore et perseverante in eadem voluntate, perinde haberi, ac si ab eo, a quo debuit manumitti, manumissus esset: mortuo autem venditore non esse heredum eius voluntatem explorandam Divus Marcus quum filio suo rescripsit.

4.- ULPIANUS; *libro III, ad Sabinum*.- Ei, qui hac lege emptus sit, ut a vivo emptore manumittatur, statim mortuo eo competit libertas.

5.- MARCIANUS; *libro V, Regularum*.- Qui ob necem detectam domini praemium libertatis consequitur, fit orcinus libertus.

6.- IDEM; *libro singulari ad formulam hypothecariam*.- Si quis obligatum servum hac lege emerit, ut manumittat, competit libertas ex constitutione Divi Marci, licet bona omnia quis obligaverit, quae habet habiturusve esset.

TITLE VIII

CONCERNING SLAVES WHO OBTAIN THEIR
FREEDOM WITHOUT MANUMISSION

1.- PAULUS; *On Plautius, Book V*.- Whenever a slave is sold on condition of being manumitted within a specified time, even if the vendor and the purchaser should both die without leaving any heirs, he will be entitled to his freedom. This the Divine Marcus stated in a Rescript. Even though the vendor should change his mind, the slave will, nevertheless, become free.

2.- MODESTINUS; *Rules, Book VI*.- By an Edict of the Divine Claudius, a slave who has been abandoned by his master on account of some serious infirmity will be entitled to his freedom.

3.- CALLISTRATUS; *On Judicial Inquiries, Book III*.- Where a slave has been sold on condition of being manumitted within a certain time, and the day appointed for his freedom arrives during the lifetime of the vendor, and the latter has not changed his mind, the result is that the slave will be manumitted, just as if this had been done by the person who should have liberated him; but if the vendor should be dead, the Divine Marcus and his son stated in a Rescript that it was not necessary to obtain the consent of his heirs.

4.- ULPIANUS; *On Sabinus, Book III*.- When a slave is sold under the condition that he shall be manumitted during the lifetime of the purchaser, when the latter dies, he will immediately be entitled to his freedom.

5.- MARCIANUS; *Rules, Book V*.- Where a slave has obtained his freedom as a reward for detecting the murderer of his master, he will become the freedman of the deceased.

6.- THE SAME; *On the Hypothecary Formula*.- If anyone purchases a slave, who has been hypothecated, under the condition that he will manumit him, the slave will be entitled to his freedom under the Constitution of the Divine

TÍTULO VIII

DE LOS QUE SIN LA MANUMISIÓN
LLEGAN A LA LIBERTAD

1.- PAULO; *Comentarios a Plaucio, libro V*.- Si un esclavo fue vendido de suerte que fuese manumitido dentro de cierto tiempo, le compete al esclavo la libertad aunque hubiesen fallecido sin heredero el vendedor y el comprador; y esto respondió por rescripto el Divino Marco. Pero aunque el vendedor hubiere cambiado de voluntad, compete, sin embargo, la libertad.

2.- MODESTINO; *Reglas, libro VI*.- Al esclavo, quien el señor tuvo por abandonado a causa de grave enfermedad, le compete la libertad en virtud del Edicto del Divino Claudio.

3.- CALISTRATO; *De las Jurisdicciones, libro III*.- El Divino Marco respondió por rescripto juntamente con su hijo, que el que fue vendido de modo que fuese manumitido dentro cierto tiempo, cuando hubiere llegado el día en que debe dársele la libertad viviendo el vendedor y perseverando en la misma voluntad, sea considerado lo mismo que si hubiese sido manumitido por aquel por quien debió ser manumitido; pero que muerto el vendedor, no se había de explorar la voluntad de sus herederos.

4.- ULPIANO; *Comentarios a Sabino, libro III*.- Al que haya sido comprado con la condición de que sea manumitido por el comprador en vida, le compete inmediatamente después de muerto éste la libertad.

5.- MARCIANO; *Reglas, libro V*.- El que por haber descubierto la muerte de su señor consigue el premio de la libertad, se hace liberto orcino.

6.- EL MISMO; *Comentarios a la fórmula hipotecaria, libro único*.- Si alguien hubiere comprado un esclavo obligado, con la condición de manumitirlo, compete la libertad en virtud de la Constitución del Divino Marco, aunque uno hubiere obligado todos

§ 1.- Tantundem dicendum est et si hac lege emerit, ne prostituatur, et prostituert.

7.- PAULUS; *libro singulari de libertatibus dandis*.- Imperator noster quum patre suo constituit in eo, qui, quum possit abducere prostitutam ancillam, pecunia accepta manus iniectionem vendidit, ut libera esset: nihil enim interesse, ipse abducas et prostituas an patiaris prostitutam esse pretio accepto, quum possis eximere.

8.- PAPINIANUS; *libro IX, Responsorum*.- Mancipia mater filiae donaverat, ut filia curaret ea post mortem suam esse libera: quum donationis legi non esset obtemperatum, ex sententia constitutionis Divi Marci libertates optingere matre consentiente respondi: quod si ante filiam mater vita decessit, omnimodo.

9.- PAULUS; *libro V, Quaestionum*.- Latinus Largus: vendidit ancillam ita, ut manumitteretur, non addito tempore: quaero, quando ex constitutione incipit ei libertas competere cessante emptore in manumittendo. Respondi: inspiciendum est, quid actum sit, utrum, quum primum potuisset, ut manumitteret, an ut in potestate esset emptoris, quando vellet manumittere. Priore casu facile tempus deprehendi poterit: posteriore utique moriente emptore competit libertas. Si non appareat, quid convenerit, favor priorem inducet opinionem, id est ut intra duos menses, si ambo praesto sunt tam servus quam emptor eius: servo enim absente nisi emptor intra quattuor menses imposuerit libertatem, ex constitutionibus ad libertatem eripitur.

Marcus, even though the vendor may have hypothecated all the property which he had then, or might acquire in the future.

§ 1.- The same must be said if he buys a female slave on condition of not subjecting her to prostitution, and he prostitutes her.

7.- PAULUS; *On Grants of Freedom*.- Our Emperor and his Father decided that a female slave would become free if the person in possession of her could have kept her from prostitution, but sold his right over her for money; as there is no difference whether you lead her astray and prostitute her, or whether you permit this to be done, and receive money therefor, when you can prevent it.

8.- PAPINIANUS; *Opinions, Book IX*.- A mother gave certain slaves to her daughter, under the condition that she would see that they became free after her death. As the condition of the donation was not complied with, I gave it as my opinion that, according to the spirit of the Constitution of the Divine Marcus, the slaves obtained their liberty with the consent of the mother, and that if she should die before her daughter, they would be entitled to their freedom unconditionally.

9.- PAULUS; *Questions, Book V*.- Latinus Largus sold a female slave under the condition that she should be manumitted, but did not mention any time when this must be done. I ask when she would be entitled to freedom, by virtue of the constitution, if the purchaser failed to manumit her? I answered that the understanding of the parties ought to be considered, whether the purchaser must manumit her as soon as he could, or whether it was in his power to liberate her whenever he chose to do so. In the first instance, the time can easily be determined; in the last, she will be entitled to her freedom at the death of the purchaser. If what was agreed upon is not apparent, the favor conceded to liberty will cause the first opinion to be accepted; that is to say, the slave will be entitled to her freedom within two months, if both the slave and her purchaser are present; but if the slave should be absent, unless the purchaser gives her

los bienes que tiene, o que hubiese de tener.

§ 1.- Otro tanto se ha de decir, también si hubiere comprado una esclava con la condición de que no fuese prostituida, y la hubiere prostituido.

7.- PAULO; *De los casos en que debe darse la libertad, libro único*.- Determinó nuestro Emperador juntamente con su padre, respecto al que pudiendo recuperar una esclava prostituida vendió por dinero el derecho de echarle mano, que ella fuese libre; porque nada importa que tú mismo la recuperes y la prostituyas, o que por precio recibido consientas que sea prostituida, pudiendo tú librarla.

8.- PAPINIANO; *Respuestas, libro IX*.- Una madre le había donado esclavos a su hija, para que su hija cuidase de que fuesen libres después de su muerte no habiéndose obedecido a la ley de la donación, respondí, que según el espíritu de la Constitución del Divino Marco prevalecen las libertades consintiéndolo la madre; pero si la madre falleció antes que la hija, subsisten de todos modos.

9.- PAULO; *Cuestiones, libro V*.- Latino Largo vendió una esclava con la condición de que fuese manumitida, no habiendo añadido tiempo; pregunto, ¿cuándo comienza en virtud de la Constitución a competirle la libertad al dejar de manumitirla el comprador? Respondí: se ha de ver lo que se haya tratado, si que la manumitiese tan pronto como hubiese podido, o que estuviese en la facultad del comprador manumitirla cuando quisiera; en el primer caso se podrá descubrir fácilmente el tiempo, y en el segundo compete ciertamente al morir el comprador la libertad. Si no apareciera qué se haya convenido, el favor se inclinará a la primera opinión, esto es, de suerte que competa dentro de dos meses, si ambos están presentes, tanto el esclavo como su comprador; porque hallándose ausente el esclavo, si el comprador no le hubiere dado la libertad dentro de cuatro meses, es arrancado para la libertad en virtud

freedom within four months, she will obtain it by virtue of the Imperial Constitutions.

de las Constituciones.

TIT. IX

TITLE IX

TÍTULO IX

QUI ET A QUIBUS MANUMISSI LIBERI
NON FIUNT ET AD LEGEM
AELIAM SENTIAM

WHAT SLAVES, HAVING BEEN
MANUMITTED, DO NOT BECOME FREE, BY
WHOM THIS IS DONE; AND ON THE
LAW OF AELIA SENTIA

QUÉ MANUMITIDOS, Y POR QUIÉNES, NO
SE HACEN LIBRES, Y COMENTARIOS
A LA LEY ELIA SENCIA

1.- ULPIANUS; *libro I, ad Sabinum*.- Celsus libro duodecimo Digestorum utilitatis gratia motus surdum ita natum manumittere posse ait.

1.- ULPIANUS; *On Sabinus, Book I*.- Celsus, in the Twelfth Book of the Digest, having the public welfare in view, says that a person born deaf can manumit a slave.

1.- ULPIANO; *Comentarios a Sabino, libro I*.- Dice Celso en el libro duodécimo del Digesto, movido por una razón de utilidad, que el sordo de nacimiento puede manumitir.

2.- IDEM; *libro III, ad Sabinum*.- Servo competere libertas non potest, si relegatus moratus sit in urbe.

2.- THE SAME; *On Sabinus, Book III*.- A slave cannot obtain his freedom if, after having been banished, he remains in the City.

2.- EL MISMO; *Comentarios a Sabino, libro III*.- Al esclavo no puede competirle la libertad, si relegado hubiera permanecido en la ciudad.

3.- GAIUS; *libro II, de legatis ad Edictum urbicum*.- Si optio hominis data sit vel indistincte homo legatus sit, non potest heres quosdam servos vel omnes manumittendo aut evertere aut minuire ius electionis: nam optione sive electione servi data quodammodo singuli sub condicionem legati videntur.

3.- GAIUS; *Concerning Legacies; On the Urban Edict*.- If the choice of a slave is given by the testator, or the slave is bequeathed without mentioning any particular one, the heir cannot annul or diminish the right of selection belonging to the legatee by manumitting some of the slaves, or all of them. For where the option or choice of a slave is granted, each slave is held to have been bequeathed under a condition.

3.- GAYO; *Comentarios al Edicto urbano, libro II de los legados*.- Si se hubiera dado la opción de un esclavo, o se hubiera legado indistintamente un esclavo, no puede el heredero, manumitiendo a algunos esclavos, o a todos, o invalidar o menoscabar el derecho de elección; porque dada la opción, o la elección de un esclavo, se considera que fueron legados cada uno bajo condición.

4.- ULPIANUS; *libro III, Disputationum*.- Servum pignori datum manumittere non possumus.

4.- ULPIANUS; *Disputations, Book III*.- We cannot manumit a slave who has been given in pledge.

4.- ULPIANO; *Disputas, libro III*.- No podemos manumitir a un esclavo dado en prenda.

5.- IULIANUS; *libro LXIV, Digestorum*.- Quum hereditas solvendo non est, quamvis heres locuples existat, libertas ex testamento competit.

5.- JULIANUS; *Digest, Book LXIV*.- When an estate is not solvent, even though the heir may be wealthy, freedom will not be acquired under the will.

5.- JULIANO; *Digesto, libro LXIV*.- Cuando la herencia no es solvente, aunque haya un heredero rico no compete la libertad en virtud del testamento.

§ 1.- Si autem is qui solvendo non est hoc modo libertatem dederit "si creditoribus meis solidum solutum fuerit, Stichus liber esto", non potest videri fraudandorum creditorum liberos esse iussisse.

§ 1.- If, however, an insolvent testator leaves a bequest of freedom as follows, "Let Stichus be free, if my creditors are paid in full," he cannot be considered to have ordered his slaves to become free in order to defraud his creditors.

§ 1.- Mas si el que no es solvente hubiere dado de este modo la libertad: «sea libre Stico, si a mis acreedores se les hubiere pagado la totalidad», no puede parecer que haya dispuesto que sean libres para defraudar a los acreedores.

§ 2.- Si Titius nihil amplius in bonis quam Stichum et Pamphilum habeat eosque stipulanti Maevio ita

§ 2.- If Titius has no other property than his slaves, Stichus and Pamphilus, and promises them to

§ 2.- Si Ticio no tuviera en sus bienes nada más que a Stico y a Pánfilo, y se los hubiere prometido a

promiserit "Stichum aut Pamphilum dare spondes?", deinde, quum alium creditorem non haberet, Stichum manumiserit: libertas per legem aeliam sentiam rescinditur. Quamvis enim fuit in potestate Titii, ut Pamphilum daret, tamen quamdiu eum non dederit, quia interim mori possit, non sine fraude stipulatoris Stichum manumisit. Quod si solum Pamphilum dari promississet, non dubitarem, quin Stichus ad libertatem perveniret, quamvis similiter Pamphilus mori possit: multum enim interest, contineatur ipsa stipulatione is qui manumittitur an extra obligationem sit. Nam et qui ob aureos quinque Stichum et Pamphilum pignori dederit, quum uterque eorum quinque aureorum sit, neuter manumitti potest: at si Stichum solum pignori dederit, Pamphilum non videtur in fraudem creditoris manumittere.

6.- SCAEVOLA; *libro XVI, Quaestionum*.- Iulianus de eo loquitur, qui in substantia nihil aliud habeat: nam si habeat, quare non dicetur unum posse manumitti? Quia et uno mortuo solvendo est, et uno manumisso solvendo est, nec adventicii casus computandi sint: alioquin et qui unum incertum ex servis suis promissit, neminem manumittet.

7.- IULIANUS; *libro II, ad Urseium Ferozem*.- Si quis integris facultatibus codicillos confirmavit, deinde, quum consilium creditorum fraudandorum cepisset, libertates codicillis dederit, optineri non potest, quo minus lege libertates interpellarentur: nam consilium testatoris fraudulentum non eo tempore observatur, quo codicilli confirmantur, sed quo libertas codicillis datur.

§ 1.- Minor annis viginti quum servum manumittere vellet nec iustam causam ad consilium manumittendi haberet, tibi eum ut manumitteres

Maevius, under the following stipulation: "Do you promise to give either Stichus or Pamphilus?" and then, having no other creditor, he should manumit Stichus, the freedom of the latter will be annulled under the Lex Aelia Sentia. For although it was in the power of Titius to give Pamphilus, still, as long as he did not do so, he could not, without defrauding the stipulator, give Stichus, for the reason that Pamphilus might die in the meantime. If, however, he only promised to give Pamphilus, I have no doubt that Stichus will obtain his freedom; although in like manner, Pamphilus might die, as it makes a great deal of difference whether the slave who is manumitted was included in the stipulation or not. For anyone who pledges Stichus and Pamphilus as security for five aurei, when each of them is worth five aurei, can manumit neither; but if he was to give Stichus alone in pledge, he will not be considered to have manumitted Pamphilus for the purpose of defrauding his creditor.

6.- SCAEVOLA; *Questions, Book XVI*.- Julianus refers to a person who owned nothing but two slaves; for if he had other property, why can it not be held that he has the power to manumit one of said slaves? For if one of them should die, he will still be solvent, and if one of them should be manumitted, he will also be solvent, and accidents which may occur are not to be considered; otherwise, the person who promised one of the slaves and indicated which one could not manumit any slave.

7.- JULIANUS; *On Urseius Ferox, Book II*.- Where anyone who is in possession of all his property confirms a codicil, and then grants freedom to his slaves by the codicil, with the intention of defrauding his creditors, his bequest will be of no force or effect; as, under such circumstances, bequests of freedom are prevented By law. For the intention of the testator to commit the fraud is not referred to the time when the codicil was confirmed, but to the time when freedom was granted by the codicil.

§ 1.- A minor of twenty years of age who desired to manumit a slave, without having any good reason to offer to the Council for doing so, gave him to you, so

Mevio que estipulaba así: ¿«me prometes dar a Stico o a Pánfilo»? y luego, no teniendo otro acreedor, hubiere manumitido a Stico, se rescinde la libertad por virtud de la ley Elia Sencia; porque aunque estuvo en la potestad de Ticio dar a Pánfilo, sin embargo, mientras no lo hubiere dado, como quiera que podría morir entretanto, manumitió a Stico no sin fraude del estipulante. Pero si hubiese prometido que solamente sería dado Pánfilo, yo no dudaría que llegaría Stico a la libertad, aunque del mismo modo podría morir Pánfilo; porque hay mucha diferencia entre que se comprenda en la misma estipulación el que es manumitido, y que se halle fuera de la obligación. Porque si uno hubiere dado en prenda por cinco áureos a Stico y a Pánfilo, aunque cada uno de ellos valiera cinco áureos, tampoco puede ser manumitido ninguno de ellos; mas si hubiere dado en prenda solamente a Stico, no se considera que manumite a Pánfilo en fraude del acreedor.

6.- SCÉVOLA; *Cuestiones, libro XVI*.- Juliano habla del que no tuviera ninguna otra cosa en sus bienes: porque si la tuviera, ¿por qué no se dirá que puede ser uno manumitido? Porque es solvente muerto uno, y solvente manumitido uno; y no se han de tener en cuenta los casos fortuitos; de otra suerte, tampoco el que prometió uno, y no determinado, de sus esclavos, no manumitirá a ninguno.

7.- JULIANO; *Comentarios a Urseyo Ferox, libro II*.- Si alguno, teniendo íntegros sus bienes, confirmó sus codicilos, y después, habiendo formado el designio de defraudar a sus acreedores, hubiere dado libertades en los codicilos, no se puede lograr que no sean impedidas por la ley las libertades; porque el designio fraudulento del testador es considerado no al tiempo en que son confirmados los codicilos, sino en el que es dada por codicilos la libertad.

§ 1.- Un menor de veinte años, queriendo manumitir a un esclavo, y no teniendo justa causa para el consejo de manumitirlo, te lo dió para que lo manu-

dedit: negavit eum proculus liberum esse, quoniam fraus legi facta esset.

8.- AFRICANUS; *libro III, Quaestionum*.- Quum is, qui sub condicione debet, manumittat fidei-commissi causa, lex Aelia Sentia locum habet.

§ 1.- Si miles iure militari testamento facto libertates dederit in fraudem creditorum et non solvendo moriatur, impediuntur libertates.

9.- MARCIANUS; *libro I, Institutionum*.- Ille servus liber non erit, qui vi coegerit, ut eum dominus manumittat, et ille perterritus scripsit liberum eum esse.

§ 1.- Item nec ille liber fieri potest, qui a domino non est defensus in capitali crimine posteaque absolutus est.

§ 2.- Qui hac lege venierint, ne manumittantur, vel qui testamento prohibiti sint manumitti vel iussu praesidis provinciae, licet manumittantur, tamen ad libertatem non perveniunt.

10.- GAIUS; *libro I, Rerum quotidianarum sive Aureorum*.- In fraudem creditorum manumittere videtur, qui vel iam eo tempore, quo manumittit, solvendo non est vel datis libertatibus desiturus est solvendo esse. Saepe enim de facultatibus suis amplius, quam in his est, sperant homines. Quod frequenter accidit his, qui transmarinas negotiationes et aliis regionibus, quam in quibus ipsi morantur, per servos atque liberos exercent: quod saepe, adtritis istis negotiationibus longo tempore, id ignorant et manumittendo sine fraudis consilio indulgent servis suis libertatem.

11.- MARCIANUS; *libro XIII, Institutionum*.- In

that you might manumit him. Proculus denied that the slave was free, because a fraud was committed against the law.

8.- AFRICANUS; *Questions, Book III*.- The Lex Aelia Sentia does not apply where a man who owes money under a condition manumits a slave by virtue of a trust.

§ 1.- Where a soldier makes a will under military law, and bequeaths freedom to slaves for the purpose of defrauding his creditors, and then dies insolvent, the bequest of freedom will be void.

9.- MARCIANUS; *Institutes, Book I*.- A slave will not become free who has compelled his master to manumit him, and the latter, having been intimidated, states in writing that he is free.

§ 1.- Moreover, a slave will not become free who was not defended by his master for a capital crime, and afterwards was acquitted.

§ 2.- Where slaves are sold under the condition that they shall not be manumitted, or where they are forbidden by will to be manumitted, or where this is done by order of the Governor of a province, and they should, nevertheless, be emancipated, they will not obtain their freedom.

10.- GAIUS; *Diurnal or Golden Matters*.- A person is considered to defraud his creditors by manumitting a slave who was insolvent at the time that he manumitted him, or ceased to be solvent after granting him his liberty. For men very frequently think that their property is more valuable than it really is, which often happens to those who, through the agency of slaves and freedmen, conduct commercial enterprises beyond sea, and in countries in which they do not reside, because they are often impoverished by transactions of this kind for a long time without being aware of it; and they grant their slaves freedom by manumitting them as a favor, without any intention of committing fraud.

11.- MARCIANUS; *Institutes, Book XIII*.- Where

mitieras; Próculo dijo que éste no era libre, porque se había defraudado a la ley.

8.- AFRICANO; *Cuestiones, libro III*.- Cuando el que debe bajo condición manumite por causa de fideicomiso, tiene lugar la ley Elia Sencia.

§ 1.- Si un militar, habiendo hecho testamento según fuere militar, hubiere dado libertades en fraude de los acreedores, y muriese no siendo solvente, se invalidan las libertades.

9.- MARCIANO; *Instituta, libro I*.- No será libre el esclavo que hubiere obligado a su señor a que lo manumita, y respecto del cual éste escribió amedrentado que fuese libre.

§ 1.- Asimismo tampoco puede hacerse libre el que no fue defendido por su señor en un crimen capital, y después fue absuelto.

§ 2.- Los que hubieren sido vendidos con la condición de que no sean manumitidos, o aquellos a quienes en el testamento, o por disposición del Presidente de la provincia, se les prohibió que fuesen manumitidos, aunque sean manumitidos no llegan, sin embargo, a la libertad.

10.- GAYO; *Diario, libro I*.- Se considera que manumite en fraude de acreedores, o el que ya al tiempo en fue manumite no es solvente, o el que por haber dado las libertades ha de dejar de ser solvente; porque muchas veces esperan los hombres de sus bienes más de lo que en ellos hay; lo que frecuentemente les acontece a los que por medio de esclavos y de liberos ejercen el comercio en ultramar y en otras regiones distintas de aquellas en que ellos moran; porque con frecuencia, quebrantados con estas negociaciones, lo ignoran largo tiempo, y manumitiéndolos sin propósito de fraude les conceden la libertad a sus esclavos.

11.- MARCIANO; *Instituta, libro XIII*.- Los

fraudem civitatum manumissi ad libertatem non veniunt, ut Senatus censuit.

§ 1.- Sed nec in fraudem fisci datas libertates procedere principalibus constitutionibus cavetur. Sed Divi Fratres Rescripserunt, non utique, si debitor fisci manumiserit, libertates impediuntur, sed ita, si, cum non erat solvendo, in fraudem manumisit.

12.- ULPIANUS; *libro V, de Adulteriis*.- Prospexit legis lator, ne mancipia per manumissionem quaestioni subducantur, idcircoque prohibuit ea manumitti certumque diem praestituit, intra quem manumittere non liceat.

§ 1.- Ipsa igitur quae divertit omnes omnimodo servos suos manumittere vel alienare prohibetur, quia ita verba faciunt, ut ne eum quidem servum, qui extra ministerium eius mulieris fuit vel in agro vel in provincia, possit manumittere vel alienare: quod quidem perquam durum est, sed ita lex scripta est.

§ 2.- Sed et si post divortium servum mulier paravit aut alia ratione adquisiit, aequè, quod ad verba attinet, manumittere non poterit: et ita Sextus quoque Caecilius adnotat.

§ 3.- Pater vero in cuius potestate filia fuerit, ea tantum mancipia prohibetur manumittere alienareve, quae in usu filiae fuerunt tributa.

§ 4.- Matrem quoque prohibuit manumittere alienareve ea mancipia, quae in ministerium filiae concesserat.

§ 5.- Sed et avum et aviam prohibuit manumittere, quum horum quoque mancipia quaestione postulari

a municipality is defrauded by the manumission of slaves, the latter do not obtain their freedom, as has been promulgated in a decree of the Senate.

§ 1.- It is provided by the Imperial Constitutions that when the Treasury is defrauded by grants of freedom, the latter are void. The Divine Brothers, however, stated in a Rescript that grants of freedom are not annulled merely by the fact that the person who emancipated the slaves was a debtor to the Treasury, but that he committed fraud if he was insolvent when he did so.

12.- ULPIANUS; *On Adultery, Book V*.- The legislator had in view that slaves should not by manumission be released from liability to torture; and therefore he forbade them to be manumitted, and prescribed a certain term within which it would not be lawful to set them free.

§ 1.- Therefore, a woman who is separated from her husband is forbidden, under any circumstances, to manumit or alienate any of her slaves, because in the words of the law, "She cannot either manumit or alienate a slave who was not employed in her personal service, or on her land, or in the province," which is, to a certain extent, a hardship, but it is the law.

§ 2.- And even if the woman, after a divorce, purchases a slave, or obtains one in any way, she cannot manumit him under the provisions of the law. Sextus Csecilius also mentions this.

§ 3.- A father, however, whose daughter is under his control, is only forbidden to manumit or alienate such slaves as have been given to his daughter for her personal service.

§ 4.- The law also prohibits a mother from manumitting or alienating any slaves which she has given for the service of her daughter.

§ 5.- It also forbids a grandfather and grandmother to manumit their slaves, as the intention of the law is

manumitidos en fraude de las ciudades no llegan a la libertad, según decretó el Senado.

§ 1.- Pero en las Constituciones de los Príncipes se dispone que tampoco son procedentes las libertades dadas en fraude del fisco. Mas respondieron por rescripto los Divinos Hermanos: no se invalidan ciertamente las libertades, si hubiere hecho las manumisiones un deudor del fisco, sino si cuando no era solvente hizo las manumisiones en fraude.

12.- ULPIANO; *De los adulterios, libro V*.- Proveyó el legislador a que por medio de la manumisión no fuesen substraídos los esclavos al tormento; y por esto prohibió que fuesen ellos manumitidos, y prefijó cierto término dentro del cual no fuera lícito manumitirlos.

§ 1.- Así, pues, a la que se divorció se le prohíbe que manumita o enajene a ningún esclavo suyo, porque la letra dice así, que no puede manumitir o enajenar ni aun ciertamente al esclavo que estuvo fuera del servicio de esta mujer, o en el campo, o en una provincia; lo que ciertamente es muy duro pero así está escrita la ley.

§ 2.- Pero aunque la mujer haya comprado después del divorcio un esclavo, o lo haya adquirido de otro modo, no podrá igualmente manumitirlo por lo que se refiere a la letra de la ley; y así lo nota también Sexto Cecilio.

§ 3.- Pero al padre bajo cuya potestad estuviere la hija se le prohíbe que manumita o enajene solamente aquellos esclavos, que fueron destinados al servicio de la hija.

§ 4.- También le prohibió a la madre que manumitiera o enajenara aquellos esclavos, que había dado para servicio de la hija.

§ 5.- Mas también les prohibió al abuelo y a la abuela que manumitieran, porque quiso la ley que

posse lex voluerit.

§ 6.- Sextus Caecilius recte ait angustissimum tempus legem praestitisse alienandis manumittendisve servis. Finge, inquit, ream adulterii intra sexagesimum diem postulatam: quae cognitio tam facile expediri potuit adulterii, ut intra sexagesimum diem finiatur? Et tamen licere mulieri quamvis postolatae adulterii servum suspectum in adulterio vel quaestioni necessarium, quod ad verba legis attinet, manumittere. Sane in hunc casum subveniendum est, ut destinati servi quasi conscii vel quasi nocentes non debeant manumitti ante finitam cognitionem.

§ 7.- Pater mulieris vel mater, si intra sexagesimum diem decedant, ex his servis, quos in ministerium filiae dederint, neque manumittere neque alienare poterunt.

13.- PAULUS; *libro III, de Adulteriis*.- Quod si intra diem sexagesimum manumiserint, erit servus statuliber.

14.- ULPIANUS; *libro IV, de Adulteriis*.- Sed si maritus intra sexagesimum diem decesserit, an manumittere vel alienare iam possit supra scriptas personas, videamus. Et non puto posse, quamvis accusatore mulier deficiatur marito, quum pater accusare possit.

§ 1.- Et simpliciter quidem lex mulierem prohibuit intra sexagesimum diem divortii manumittere:

§ 2.- Sive autem divertit sive repudio dimissa sit, manumissio impeditur.

§ 3.- Sed si morte mariti solutum sit matrimonium vel aliqua poena eius, manumissio non impeditur.

that they also may be subjected to torture.

§ 6.- Sextus Csecilius very properly holds that the time prescribed by the law for alienating or manumitting slaves is too short. For he says, suppose a woman has been accused of adultery within the sixty days; how can the trial for adultery readily take place, so as to be concluded within the said sixty days? Still, according to the terms of the law the woman, even though she has been accused of adultery, is permitted, after this time, to manumit the slave who is suspected of having committed adultery with her, or another slave who should be put to torture. And, indeed, relief should be granted in this instance, so that slaves who are indicated as guilty, or who have knowledge of the crime, may not be manumitted before the trial is ended.

§ 7.- If the father or mother of the woman should die within the sixty days, they can neither manumit nor alienate any of the slaves whom they have given to the daughter for her personal service.

13.- PAULUS; *On Adultery, Book V*.- If a slave is manumitted before the sixty days have elapsed, he will be conditionally free.

14.- ULPIANUS; *On Adultery, Book IV*.- If a husband should die within the sixty days, let us see whether the woman can manumit' or alienate the slaves above referred to. I do not think that she can do so, although she may have no other accuser than her husband, as the father of the latter can accuse her.

§ 1.- The law simply prohibits a woman from manumitting her slaves within sixty days after the divorce.

§ 2.- Manumission is also prohibited whether she is divorced or repudiated.

§ 3.- If the marriage is dissolved by the death of the husband, or on account of any penalty to which he has rendered himself liable, manumission will not be prevented.

también los esclavos de ellos pudieran ser reclamados para el tormento.

§ 6. -Con razón dice Sexto Cecilio, que la ley prefijó brevísimo tiempo para enajenar o manumitir los esclavos. Supón, dice, que la mujer haya sido acusada como reo de adulterio dentro de los sesenta días; ¿qué conocimiento del adulterio puede substanciarse tan fácilmente, que se termine dentro de los sesenta días? Y, sin embargo, a la mujer, aunque acusada de adulterio, le es lícito, por lo que se refiere a las palabras de la ley, manumitir al esclavo sospechoso de adulterio, o que sea necesario sujetarlo al tormento. Mas en este caso se ha de proveer que los esclavos designados como cómplices, o como delincuentes, no deben ser manumitidos antes de terminarse la causa.

§ 7.- El padre o la madre de la mujer, si fallecieran dentro de los sesenta días, no podrán manumitir ni enajenar a ninguno de los esclavos, que le hubieren dado a la hija para su servicio.

13.- PAULO; *De los adulterios, libro III*.- Pero si lo hubieren manumitido dentro de los sesenta días, el esclavo será *statuliber*.

14.- ULPIANO; *De los adulterios, libro IV*.- Pero si el marido hubiere fallecido dentro de los sesenta días, veamos si podría ya manumitir o enajenar a las susodichas personas. Y no opino que pueda, aunque falte para la mujer marido acusador, puesto que el padre puede acusarla.

§ 1.- Y, a la verdad, la ley prohibió simplemente que la mujer manumitiera dentro de los sesenta días del divorcio.

§ 2.- Mas ya si se divorció, ya si fue repudiada, se impedirá la manumisión.

§ 3.- Pero si el matrimonio se hubiera disuelto por la muerte del marido, o por alguna pena, no se le impedirá la manumisión.

§ 4.- Sed et si bona gratia finierit matrimonium, dicetur manumissionem vel alienationem non impediri.

§ 5.- Sed et si constante matrimonio mulier, dum divortium cogitat, manumittat vel alienet et hoc dilucidis probationibus fuerit adprobatum: quasi in fraudem legis hoc factum sit, non debet alienatio valere vel manumissio.

§ 6.- Alienationem omnem omnino accipere debemus.

15.- PAULUS; *libro I, ad legem Iuliam*.- Quaesitum est, an is, qui maiestatis crimine reus factus sit, manumittere possit, quoniam ante damnationem dominus est. Et Imperator Antoninus Calpurnio Critoni Rescripsit ex eo tempore, quo quis propter facinorum suorum cogitationem iam de poena sua certus esse poterat, multo prius conscientia delictorum, quam damnatione ius dandae libertatis eum amisisset.

§ 1.- Iulianus ait, si postea, quam filio permisit pater manumittere, filius ignorans patrem decessisse manumisit vindicta, non fieri eum liberum. Sed et si vivit pater et voluntas mutata erit, non videri volente patre filium manumisisse.

16.- IDEM; *libro III, ad legem Aeliam Sentiam*.- Si, quum fideicommissa libertas debeatur, minor viginti annis servum vendat, ut manumittatur, vel quia hac lege emerat, non impediatur alienatio.

§ 1.- Si partem, quam in communi servo habet minor viginti annis, manumittendi causa tradat, nihil aget: sed si, quum ipse causam probare posset, tradiderit, nulla fraus intellegitur.

§ 4.- Even if the marriage is terminated by agreement, it is held that manumission or alienation is not prevented.

§ 5.- When the woman, during the existence of the marriage but while she is contemplating divorce, manumits or alienates a slave, and this is established by conclusive evidence, the alienation or manumission will not be valid, as having been done to evade the law.

§ 6.- We must understand every kind of alienation to be meant.

15.- PAULUS; *On the Lex Julia, Book I*.- The question arose whether anyone accused of the crime of lese majeste could manumit a slave, inasmuch as he was the owner of slaves before his conviction. The Emperor Antoninus stated in a Rescript addressed to Calpurnius Crito that, from the time when the accused party was certain of having the penalty inflicted upon him, he would lose the right of granting freedom rather through his consciousness of guilt, than from his condemnation for crime.

§ 1.- Julianus says that, after a father has granted his son permission to manumit a slave, and the son, not being aware that his father is dead, manumits the slave, the latter will not become free. If, however, the father is living, and has changed his mind, his son will be considered to have manumitted the slave against the consent of his father.

16.- THE SAME; *On the Lex Aelia Sentia, Book III*.- Where freedom is granted to a slave by a trust, and a minor of twenty years of age sells the slave under condition that he shall be manumitted, or purchases him under the same condition, the alienation will not be prevented.

§ 1.- If a minor of twenty years of age relinquishes the share which he has in a slave owned in common, for the purpose of manumitting him, his act will be void. If, however, he can prove that there was a good reason for doing so, no fraud will be held to have been committed.

§ 4.- Mas si el matrimonio hubiere terminado de buen grado, se dirá que tampoco se impide la manumisión o la enajenación.

§ 5.- Pero si durante el matrimonio la mujer, mientras piensa en divorciarse, manumitiera o enajenase, y esto se hubiere probado con pruebas evidentes, no debe ser válida la enajenación o la manumisión, como si esto hubiera sido hecho en fraude de la ley.

§ 6.- Debemos entender absolutamente toda clase de enajenación.

15.- PAULO; *Comentarios a la ley Julia, libro I*.- Se preguntó, si el que se hizo reo del crimen de lesa majestad podría manumitir, puesto que era dueño antes de la condenación. Y respondió por Rescripto el emperador Antonino a Calpurino Critón, que desde el momento en que alguno podía por haber pensado en sus delitos estar ya cierto de su pena, perdió el derecho de dar la libertad mucho antes que por la condenación, por la conciencia de sus delitos.

§ 1.- Dice Juliano, que, si después que el padre le permitió al hijo que manumitiese, el hijo, ignorando que había fallecido su padre, manumitió por medio de la vindicta, el esclavo no se hace libre; pero si vive el padre, y se hubiere cambiado su voluntad, no parece que el hijo manumitió con la voluntad del padre.

16.- EL MISMO; *Comentarios a la ley Elia Sencia, libro III*.- Si, debiéndose la libertad dejada por fideicomiso, el menor de veinte años vendiera al esclavo, para que sea manumitido, o porque lo había comprado con esta condición, no se impedirá la enajenación.

§ 1.- Si un menor de veinte años entregara, para que fuese manumitido, la parte que tiene en un esclavo común, no hará cosa válida; pero si la hubiere entregado pudiendo probar la causa, no se entenderá que hubo ningún fraude.

§ 2.- Ne quis creditorum fraudandorum causa servum manumittat, hac lege cavetur: creditores autem appellantur, quibus quacumque ex causa actio quum fraudatore competat.

§ 3.- Aristo respondit a debitore fisci, qui solvendo non erat, manumissum ita revocari in servitutum debere, si non diu in libertate fuisset, id est non minus decennio: plane ea, quae in fraudem fisci in sinus eius collata sunt, revocanda.

§ 4.- Si sub condicione alicui pecunia debeatur, quasi statuliber erit a debitore manumissus, ut pen-deat libertas ex condicione.

§ 5.- Si voluntate patris filius manumiserit, sive pater sive filius sciat solvendo patrem non esse, libertas impediatur.

17.- IDEM; *libro singulari de Libertatibus*.- Si privatus coactus a populo manumiserit, quamvis voluntatem accommodaverit, tamen non erit liber: nam et Divus Marcus prohibuit ex adclamatione populi manumittere.

§ 1.- Item non fit liber, si mentitus dominus, ne a magistratibus castigaretur, dixit esse liberum, si non fuit voluntatis manumittendi.

§ 2.- In his, quos intra certa tempora non licet manumittere, si testamento acceperint libertatem, non testamenti facti, sed competentis libertatis tempus inspiciendum est.

18.- IDEM; *libro XVI, ad Plautium*.- Si mortis tempore solvendo sit hereditas, si tamen quum aditur desierit esse solvendo, libertas a testatore in fraudem

§ 2.- It is provided by this law that no one shall manumit a slave for the purpose of defrauding his creditors. Those are designated creditors who are entitled to an action on any ground whatsoever against the person who intended to defraud him.

§ 3.- Aristo gave it as his opinion that, where a slave was manumitted by an insolvent debtor of the Treasury, he could be returned to servitude, if he had not been free for a long time; that is to say, for not less than ten years. It is clear that anything which has been paid out for funeral expenses, with a view to defrauding the Treasury, can be recovered.

§ 4.- Where money is due from a person who is insolvent to anyone under a condition, and a slave is manumitted by the debtor, his freedom will remain in suspense until the condition is complied with.

§ 5.- If a son should manumit a slave with the consent of his father, and either the father or the son is aware that the former is not solvent, the grant of freedom will be void.

17.- THE SAME; *On Grants of Freedom*.- If a private individual, being compelled by the people, should manumit a slave, the latter will, nevertheless, not be free even though his owner may have given his consent; for the Divine Marcus forbade the manumission of slaves caused by the clamor of the populace.

§ 1.- Likewise, a slave is not emancipated if his master states falsely that he was free, in order to avoid punishment by the magistrates, if he has no intention of manumitting him.

§ 2.- With reference to those whom it is not lawful to manumit within a certain time, if they receive their freedom by a will, the time when it was executed should not be considered, but the time when the slaves were entitled to be free.

18.- THE SAME; *On Plautius, Book XVI*.- If the estate of the testator was solvent at the time of his death, but ceased to be so when it was accepted, any

§ 2.- Se dispone en esta ley que ninguno manumita a un esclavo para defraudar a los acreedores; mas se llaman acreedores aquellos a quienes por cualquier causa les compete acción contra el defraudador.

§ 3.- Respondió Aristón, que el manumitido por un deudor del fisco, que no era solvente, debe ser reducido a esclavitud, si no hubiese estado mucho tiempo en libertad, esto es, si no hubiese estado menos de diez años; y, a la verdad, todo lo que en fraude del fisco fue conferido para los bienes de aquél ha de ser revocado.

§ 4.- Si a alguno se le debiera dinero bajo condición, el manumitido por el deudor será como *statuliber*, de modo que la libertad esté pendiente de la condición.

§ 5.- Si el hijo hubiere manumitido con la voluntad del padre, ya si el padre, ya si el hijo, supiera que el padre no es solvente, se impedirá la libertad.

17.- EL MISMO; *De las libertades, libro único*.- Si un particular hubiere manumitido apremiado por el pueblo, aunque hubiere prestado su asentimiento, el esclavo no será, sin embargo, libre; porque también el Divino Marco prohibió manumitir por aclamación del pueblo.

§ 1.- Tampoco se hace libre el esclavo, si, habiendo mentido su señor para que no fuese castigado por los magistrados, dijo que era libre, si no tuvo voluntad de manumitirlo.

§ 2.- Respecto a aquellos a quienes no es lícito manumitirlos dentro de cierto tiempo, si hubieren recibido la libertad por testamento, se ha de mirar no al tiempo en que se hizo el testamento, sino a aquel en que compete la libertad.

18.- EL MISMO; *Comentarios a Plaucio, libro XVI*.- Si la herencia fuese solvente al tiempo de la muerte, pero hubiere dejado de ser solvente cuando

creditorum relicta non competet: nam sicut aucta hereditas prodest libertatibus, ita nocet diminuta.

§ 1.- Si is, cui libertas relicta est, iussus sit heredi dare tantum, quanti est, et liber esse, videamus, an adhuc fraus sit creditorum, quia heres mortis causa accepturus est, an vero, si alius pro eo vel ipse non de peculio det, nulla sit fraus. Sed si heres locuples non proficit ad libertatem, nec qui dat pecuniam prodesse potest.

19.- MODESTINUS; *libro I, Regularum*.- Nulla competit libertas data ab eo, qui postea servus ipse pronuntiatus est.

20.- IDEM; *libro singulari de enucleatis Casibus*.- Si servo alieno libertas non consentiente domino data est, valere ex auctoritate iuris non potest, quamvis postea manumissor domino heres extitit, nam licet eius iure cognationis qui manumisit heres extitit, non ideo aditione hereditatis libertatis datio confirmatur.

21.- IDEM; *libro I, Pandectarum*.- Matrimonii causa manumitti ancilla a nullo alio potest quam qui eam uxorem ducturus est. Quod si alter manumiserit matrimonii causa, alter eam uxorem ducat, non erit libera, adeo ut nec si intra sex quidem menses eam repudiatam postea manumissor uxorem duxerit, liberam eam fieri Iulianus respondit, quasi de his nuptiis senatus senserit, quae post manumissionem nullis aliis interpositis secutae fuerunt.

22.- POMPONII; *libro XXV, ad Quintum Mucium*.- Curator furiosi servum eius manumittere

grant of freedom by the testator which defrauds the creditors is void. For, as the increase of an estate is of benefit to liberty, so also its diminution injures it.

§ 1.- Where a slave to whom freedom is bequeathed is ordered to pay to the heir a sum of money equal to his value and become free, let us see whether any fraud is committed against the creditor, because the heir obtains the amount mortis causa; or, indeed, where a stranger pays the amount for the slave; or the slave himself pays it out of other property than his peculium; is any fraud perpetrated? But, as the fact that the heir is wealthy is of no advantage to the bequest of freedom, so neither should the person who pays the money be able to profit by it.

19.- MODESTINUS; *Rules, Book I*.- Freedom granted by a person who is afterwards himself legally decided to be a slave is of no effect.

20.- THE SAME; *On Cases Explained*.- Where freedom is bequeathed to a slave belonging to another, without the consent of his owner, the bequest is not valid according to law, even though the person who manumits him afterwards becomes the heir of the owner. For even if he becomes his heir by the right of relationship, the grant of freedom will be confirmed by his acceptance of the estate.

21.- THE SAME; *Pandects, Book I*.- A female slave cannot be manumitted on account of marriage by anyone but the man who intends to marry her; because if one man should manumit her for this reason, and another should marry her, she will not become free. Hence Julianus gave it as his opinion that she would not be liberated from servitude even if the person who manumitted and repudiated her should marry her within six months; on the ground that the Senate had reference to a marriage which should have taken place after the manumission, without any other preceding it.

22.- POMPONII; *On Quintus Mucius, Book XXV*.- The curator of an insane person cannot

es adida, no competirá la libertad dejada por el testador en fraude de los acreedores; porque así como les aprovecha a las libertades la herencia que aumenta, así les perjudica la que disminuye.

§ 1.- Si a aquel, a quien se le dejó la libertad se le hubiera mandado que le diese al heredero tanto cuanto vale, y que fuese libre, veamos si aun habrá fraude de los acreedores, porque el heredero lo ha de recibir por causa de muerte, o si no habrá ningún fraude, si otro lo diera por él, o él mismo lo diera no de su peculio. Mas si el heredero rico no aprovecha para la libertad, tampoco puede aprovechar el que da el dinero.

19.- MODESTINO; *Reglas, Libro I*.- No compete libertad alguna dada por el que después fue él mismo declarado esclavo.

20.- EL MISMO; *Casos ilustrados, libro único*.- Si a un esclavo ajeno le fue dada la libertad sin consentimiento de su señor, no puede ser válida por la autoridad del derecho, aunque después el manumisor sea heredero del señor; porque aun cuando el que manumitió haya quedado siendo heredero de él por derecho de cognación, no por esto se confirma la dación de la libertad con la adición de la herencia.

21.- EL MISMO; *Pandectas, Libro I*.- Una esclava no puede ser manumitida por causa de matrimonio por otro alguno sino por el que la ha de tomar por mujer. Mas si uno la hubiere manumitido por causa de matrimonio, y otro la tomara por mujer, no será libre, de tal manera que Juliano respondió que ella no se hacía libre, aunque repudiada dentro de seis meses la hubiere tomado después por mujer el manumisor, como si el Senado se hubiese referido a aquellas nupcias que se verificaron después de la manumisión sin haber mediado otras ningunas.

22.- POMPONIO; *Comentarios a Quinto Mucio, libro XXV*.- El curador de un furioso no puede

non potest.

23.- IDEM; *libro IV, ex variis Lectionibus*.- Semper in fraudem creditorum libertas datur ab eo, qui sciret se solvendo non esse, quamvis bene dedisset merenti hoc.

24.- TERENCEIUS CLEMENS; *libro IX, ad legem Iuliam et Papiam*.- Si quis, habens creditores, plures manumiserit, non omnium libertas impeditur, sed qui primi sunt, liberi erunt, donec creditoribus suum solvatur. Quam rationem Iulianus solet dicere velut duobus manumissis, si unius libertate fraudentur, non utriusque, sed alterutrius impediri libertatem et plerumque postea scripti, nisi si quando maioris pretii sit is qui ante nominatus sit nec sufficiat posteriore retrihi in servitutem, prior sufficiat: nam hoc casu sequenti loco scriptum solum ad libertatem perventurum.

25.- PAPINIANUS; *libro V, Responsorum*.- In fraudem creditorum testamento datae libertates prioribus creditoribus dimissis propter novos creditores irritae sunt.

26.- SCAEVOLA; *libro IV, Responsorum*.- Pignori obligatum servum debitoris heres manumisit: quaesitum est, an liber esset. Respondit secundum ea quae proponerentur, si pecunia etiam nunc deberetur, non esse manumissione liberum factum. Paulus: soluta ergo pecunia ex illa voluntate liber fit.

27.- HERMOGENIANUS; *libro I, Iuris Epitoma*.- In fraudem creditorum manumittitur liberque esse prohibetur, sive dies solvendae pecuniae iam cessit, sive in diem vel sub condicione sit debitum. diversa causa est legati sub condicione relict: nam antequam condicio extiterit, inter creditores

manumit a slave belonging to the latter.

23.- THE SAME; *Various Passages, Book IV*.- Freedom is always considered to have been granted fraudulently with respect to creditors, when this is done by a person who knows that he is not solvent, even though it was granted to a slave who deserved it.

24.- TERENCEIUS CLEMENS; *On the Lex Julia et Papia, Book IX*.- If anyone who has creditors should manumit several slaves, the grants of freedom to all of them will not be void, but only the first ones emancipated will become free; provided enough remains to satisfy the claims of the creditors. This rule was frequently stated by Julianus. For instance, where two slaves are manumitted, and the creditors will be defrauded by granting freedom to both, but not by granting it to either, one of them will not obtain his freedom; and this is generally he who is manumitted second, unless the first one designated is of greater value; and it will not be necessary to reduce the second to slavery if the value of the first will discharge the indebtedness, for, in this instance, the one which is mentioned in the second place will alone be entitled to his liberty.

25.- PAPINIANUS; *Opinions, Book V*.- Where freedom is granted by will, in fraud of creditors, although the first creditors may be satisfied, the grants of freedom are void, so far as the others are concerned.

26.- SCSEVOLA; *Opinions, Book IV*.- The heir of a debtor manumitted a slave who had been given in pledge. The question arose whether he became free. The answer was that, according to the facts stated, if the debt was still unpaid, he would become free by the manumission. Paulus: Therefore, if the money was paid, he would be free.

27.- HERMOGENIEMUS; *Epitomes of Law, Book I*.- A slave is manumitted in fraud of creditors, and is forbidden to be free, whether the day for payment of the debt has already arrived, or whether the debt is payable within a certain time, or under some condition. The case of a legacy bequeathed under a

manumitir a un esclavo de éste.

23.- EL MISMO; *Doctrina de autores varios, libro IV*.- Se da siempre en fraude de los acreedores la libertad por el que sabe que él no es solvente, aunque la hubiese dado al que bien la mereciera.

24.- TERENCEIO CLEMENTE; *Comentarios a la ley Julia y Papia, libro IX*.- Si el que tiene acreedores hubiere manumitido a muchos esclavos, no se impedirá la libertad de todos, sino que serán libres los que sean los primeros, en cuanto se les pague a los acreedores lo suyo; por cuya razón suele decir Juliano, por ejemplo, que si habiendo sido manumitidos dos fuesen aquéllos defraudados con la libertad de uno solo, se impedía la libertad no de ambos, sino de uno de los dos, y ordinariamente del escrito en segundo lugar, a no ser que sea de mayor precio el que fue nombrado en primero, y no baste que el segundo sea retenido en la esclavitud, y baste que el primero; porque en este caso habrá de llegar a la libertad solo el escrito en segundo lugar.

25.- PAPINIANO; *Respuestas, libro V*.- Las libertades dadas por testamento en fraude de los acreedores, pagados los primeros acreedores, son nulas por causa de los siguientes acreedores.

26.- SCÉVOLA; *Respuestas, libro IV*.- El heredero de un deudor manumitió a un esclavo obligado en prenda; se preguntó, si será libre. Respondió, que, según lo que se exponía, si todavía se debiese el dinero, no se hizo libre con la manumisión. Y dice Paulo: luego, pagado el dinero, se hace libre en virtud de aquella voluntad.

27.- HERMOGENIANO; *Epítome del Derecho, libro I*.- Es uno manumitido en fraude de los acreedores, y se le prohíbe que sea libre, ora si venció ya el término para que se pagase el dinero, ora si fuese debido a término o bajo condición. Diversa cosa es tratándose de un legado dejado bajo condición;

legatarius iste non habetur. Ex omni autem causa creditoribus in hac parte lex Aelia Sentia prospexit, inter quos fideicommissarium etiam esse placuit.

§ 1.- Pignori datus servus, antequam debiti nomine fiat satis, sine consensu creditorum manumitti non potest. Sed pupilli creditoris citra tutoris auctoritatem consensus nihil libertati prodest, sicuti non prodest, si fructuarius pupillus manumissioni similiter consentiat.

28.- PAULUS; *libro III, Sententiarum*.- Heres servum proprium, quem testator legaverat, manumittendo nihil agit, quia scientiae vel ignorantiae eius nullam placuit admitti rationem.

29.- GAIUS; *libro I, de Manumissionibus*.- Generaliter pignori datus servus sine dubio pleno iure debitoris est et iustam libertatem ab eo consequi potest, si lex Aelia Sentia non impediatur libertatem, id est si solvendo sit nec ob id creditores videantur fraudari.

§ 1.- Sub condicione servus legatus pendente condicione pleno iure heredis est, sed nullam libertatem ab eo consequi potest, ne legatario iniuria fieret.

30.- ULPIANUS; *libro IV, ad legem Aeliam Sentiam*.- Si quis hac lege servum emerit, ut manumittat, et non manumittente eo servus ad libertatem pervenerit ex Constitutione Divi Marci, an possit ut ingratum accusare, videamus. Et dici potest, quum non sit manumissor, hoc ius eum non habere.

§ 1.- Si filius meus ex voluntate mea manumiserit, an ut ingratum eum accusandi ius habeam, dubitari

condition is different, for the legatee will not be included among the creditors until the condition has been complied with. The Lex Aelia, Sentia, in this respect, applies to creditors of every description whatsoever; and it has been decided that the beneficiary of a trust is also included among them.

§ 1.- A slave who is given in pledge cannot be manumitted without the consent of the creditors before their claims have been satisfied. The consent of a creditor, who is a ward without the authority of his guardian, is of no benefit to a grant of freedom, just as no advantage results where, under similar circumstances, the ward, who is the usufructuary, consents to the manumission.

28.- PAULUS; *Opinions, Book III*.- The act of an heir, who manumits his own slave that the testator bequeathed to him, is void, because it has been decided that neither his knowledge nor his ignorance of the bequest should be considered.

29.- GAIUS; *On Manumissions, Book I*.- When a slave is given by way of pledge, in general terms, there is no doubt that he belongs to the debtor, and can legally obtain his freedom from him, if this is not prevented by the Lex Aelia Sentia; that is to say, if the owner is solvent, and his creditors do not appear to have been defrauded by his act.

§ 1.- Where a slave is bequeathed under a condition, he belongs absolutely to the heir while the condition is pending; but he cannot obtain his freedom from him lest injury be done to the legatee.

30.- ULPIANUS; *On the Lex Aelia, Sentia, Book IV*.- If anyone should purchase a slave under the condition of manumitting him, and, not having done so, the slave obtains his freedom under the Constitution of the Divine Marcus, let us see whether he can be accused of ingratitude. It may be said that, as the purchaser did not manumit him, he is not entitled to this right of action.

§ 1.- If my son should manumit my slave with my consent, it may be doubted whether I have the right to

porque antes que se haya cumplido la condición no es contado este legatario entre los acreedores. Mas en esta parte la ley Elia Sencia miró por los acreedores por cualquier causa, entre los cuales plugo que se hallara también el fideicomisario.

§ 1.- El esclavo dado en prenda no puede ser manumitido sin el consentimiento de los acreedores antes que se haya satisfecho la deuda, mas el consentimiento de un acreedor pupilo prestado sin la autoridad del tutor de nada aprovecha para la libertad, así como no aprovecha si del mismo modo consintiera la manumisión un pupilo usufructuario.

28.- PAULO; *Sentencias, libro III*.- El heredero no hace nada manumitiendo a un esclavo propio que el testador había legado, porque se determinó que no se admitiera razón alguna de su conocimiento o de su ignorancia.

29.- GAYO; *De las manumisiones, libro I*.- En general, el esclavo dado en prenda es sin duda de pleno derecho del deudor, y puede conseguir de éste la libertad legítima, si la ley Elia Sencia no impidiera la libertad, esto es, si el deudor fuese solvente, y no se viera que con esto son defraudados los acreedores.

§ 1.- El esclavo legado bajo condición es con pleno derecho del heredero estando pendiente la condición, pero, no puede conseguir de él la libertad, para que no se le cause perjuicio al legatario.

30.- ULPIANO; *Comentarios a la ley Elia Sencia, libro IV*.- Si alguno hubiere comprado un esclavo con la condición de manumitirlo, y, no manumitiéndolo él, hubiere llegado el esclavo a la libertad en virtud de la Constitución del Divino Marco, veamos si podrá acusarlo como a ingrato; y se puede decir, que no siendo él manumisor, no tiene él este derecho.

§ 1.- Si mi hijo lo hubiere manumitido con mi voluntad, se podrá dudar si tendré el derecho de

poterit idcirco, quia non manumisi: sed pro eo habendus sum, ac si manumissem.

§ 2.- Sed si castrensem servum filius meus manumittat, dubio Procul hoc ius non habeo, quia non ipse manumisi: ipse plane filius accusare poterit.

§ 3.- Tamdiu autem accusare quis poterit, quamdiu perseverat patronus.

§ 4.- Quotiens autem patroni libertum volunt accusare, utrum omnium consensus necessarius sit an vero et unus possit, videamus. Et est verius, si saltem in unum hoc commiserit, eum ut ingratus accusari, sed omnium consensum necessarium, si sint eiusdem gradus.

§ 5.- Si pater libertum uni ex filiis adsignaverit, solum eum accusare posse Iulianus scripsit: solum enim patronum esse.

31.- TERENCE CLEMENS; *libro V, ad legem Iuliam et Papiam*.- Quaesitum est, si libertam patronus iureiurando adgisset, ne ea liberis impubes habens nuberet, quid iuris esset. Iulianus dicit non videri contra legem Aeliam Sentiam fecisse eum, qui non perpetuam viduitatem libertae iniunxisset.

32.- IDEM; *libro VIII, ad legem Iuliam et Papiam*.- Si non voluntate patroni is, qui in eius potestate sit, iusiurandum adegerit vel stipulatus fuerit, ne nubat, nisi id patronus remittat aut liberabit libertam, incidit in legem: videbitur enim id ipsum dolo malo facere.

§ 1.- Non prohibentur lege Aelia Sentia patroni a libertis mercedes capere, sed obligare eos: itaque si

accuse him of ingratitude for the reason that I did not manumit him. I should, however, be considered as having manumitted him.

§ 2.- But if my son manumits a slave forming part of his castrense peculium, there is no doubt that I will not have this right, because I, myself, did not manumit him. It is clear that my son himself can accuse him.

§ 3.- Anyone can accuse a freedman of ingratitude as long as he remains his patron.

§ 4.- If, however, several patrons desire to accuse their freedman of ingratitude, let us see whether the consent of all of them will be necessary, or whether only one can do so. The better opinion is that, if the freedman displayed ingratitude against only one of his patrons, he can accuse him; but the consent of all of them will be necessary, if they are all in the same degree.

§ 5.- If a father should assign a freedman to one of his children, Julianus says he alone can accuse him of ingratitude, for he alone is his patron.

31.- TERENCE CLEMENS; *On the Lex Julia et Papia, Book V*.- The question arose, what would be the rule if a patron compelled his freedwoman to swear that she would not marry as long as her children are under the age of puberty? Julianus says that he would not be held to have acted against the Lex Aelia Sentia, as he did not enjoin her to remain in perpetual widowhood.

32.- THE SAME; *On the Law of Julia et Papia, Book VIII*.- If he who is under the control of a patron should compel the woman to swear, or to enter into a stipulation not to marry against the consent of the patron, unless the latter releases the woman from her oath, or her promise, he will come within the provisions of the law, for he himself will be held to have acted in bad faith.

§ 1.- Patrons are not prohibited by the Lex Aelia Sentia from receiving the wages of their freedmen,

acusarlo como a ingrato, por esto, porque no lo manumití; porque he de ser considerado como si yo lo hubiese manumitido.

§ 2.- Pero si mi hijo manumitiera a un esclavo castrense, sin duda alguna que no tendré este derecho, porque no lo manumití yo mismo; pero lo podrá acusar mi mismo hijo.

§ 3.- Mas podrá acusarlo cualquiera, mientras continúa siendo patrono.

§ 4.- Pero veamos si cuando los patronos quieren acusar a un liberto sera necesario el consentimiento de todos, o si podrá acusarlo también uno solo. Y es mas verdadero, que si el hecho lo hubiere cometido a lo menos contra uno solo, éste lo acuse como a ingrato; pero es necesario el consentimiento de todos, si fueran del mismo grado.

§ 5.- Si un padre le hubiere asignado un liberto a uno solo de los hijos, escribió Juliano, que sólo éste podía acusarlo; porque sólo él era patrono.

31.- TERENCE CLEMENTE; *Comentarios a la ley Julia y Papia, libro V*.- Se preguntó, qué derecho habría, si el patrono hubiese comprometido con juramento a la liberta, a que no se casase teniendo hijos impúberos. Dice Juliano, que no se considera que obró contra la ley Aelia Sentia el que no le impuso perpetua viudedad a la liberta.

32.- EL MISMO; *Comentarios a la ley Julia y Papia, libro VIII*.- Si sin la voluntad del patrono hubiere el que estuviese bajo su potestad impuesto juramento, o estipulado, para que la liberta no se case, si el patrono no le remitiera aquél, o no hubiera eximido a la liberta, incurrirá en la ley; porque se considerara que esto lo hizo con dolo malo.

§ 1.- No se les prohíbe a los patronos por la ley Aelia Sentia percibir salarios de los libertos, sino

sponte sua libertus mercedem patrono praestiterit, nullum huius legis praemium consequetur.

§ 2.- Is, qui operas aut in singulas eas certam summam promisit, ad hanc legem non pertinet, quoniam operas praestando potest liberari. Idem Octavenus probat et adicit: obligare sibi libertum, ut mercedem operarum capiat, is intellegitur, qui hoc solum agit, ut utique mercedem capiat, etiamsi sub titulo operarum eam stipulatus fuerit.

but they are forbidden to compel them to surrender them. Therefore, if a freedman voluntarily pays his wages to his patron, he will have no recourse against him under this law.

§ 2.- This law does not apply to a freedman who has promised certain days of labor, or a sum of money, as by performing labor he can become free. Octavenus approves this opinion, and adds that a patron is understood to have compelled his freedman to pay him the wages of his labor, where his acts show that his intention was only to obtain the said wages, even if he stipulated for days of labor.

obligarlos a ellos; y así, si espontáneamente le hubiere entregado el liberto salario a su patrono, no conseguirá ventaja alguna de esta ley.

§ 2.- El que prometió días de trabajo, o cierta cantidad por cada uno de ellos, no está comprendido en esta ley, porque se puede librar prestando los días de trabajo. Lo mismo aprueba Octaviano, y añade: se entiende que obliga a su favor al liberto para percibir de él la retribución de los trabajos el que hace esto solamente para percibir ciertamente la retribución, aunque la haya estipulado a título de trabajos.

TIT. X

TITLE X

TÍTULO X

DE IURE AUREORUM ANNULORUM

CONCERNING THE RIGHT TO
WEAR A GOLD RING

DEL DERECHO DE ANILLOS DE ORO

1.- PAPINIANUS; *libro I, Responsorum*.- Inter ceteros alimenta liberto relictas non idcirco non debentur, quia ius aureorum anulorum ab Imperatore libertus acceperit.

1.- PAPINIANUS; *Opinions, Book I*.- Where provision for support is left to a freedman along with several others, he will not cease to be entitled to it because he has obtained from the Emperor the right to wear a gold ring.

1.- PAPINIANO; *Respuestas, libro I*.- Los alimentos dejados entre otros a un liberto no le son menos debidos porque el liberto haya recibido del Emperador el derecho de anillos de oro.

§ 1.- Diversum in eo probatur, qui iudicatus ingenuus collusionem per alium patronum detecta conditioni suae redditus alimenta sibi, quae tertius patronus reliquerat, praeberi desiderat. Hunc enim etiam beneficium anulorum amittere placuit.

§ 1.- A different opinion prevails in the case of a freedman who has been judicially declared to be freeborn, and has been returned to his former condition through the collusion of another patron, which has been exposed, and who desires to obtain for himself the support that the third patron relinquished; for, in this instance, it has been established that the freedman will forfeit the right to wear a gold ring.

§ 1.- Diversa cosa se admite respecto al que, juzgado ingenuo, y restituído a su propia condición por haberse descubierto por otro patrono una colusión, pretende que se le den los alimentos que un tercer patrono le había dejado; porque se determinó que éste perdiera aun el beneficio de los anillos.

2.- IDEM; *libro XV, Responsorum*.- Intra quinque annos pro ingenuitate sententia dicta rescissa fuerat: victum anulorum aureorum beneficium, quod ante sententiam pro ingenuitate dictam acceperit ac deposuit, non retinuisse respondi.

2.- THE SAME; *Opinions, Book XV*.- A decision rendered with reference to the free birth of a freedman within five years was set aside. I gave it as my opinion that he had lost his right to wear a gold ring which he had received and relinquished before the decision was rendered.

2.- EL MISMO; *Respuestas, libro XV*.- La sentencia pronunciada a favor de la ingenuidad fue anulada dentro del quinquenio; respondí, que el vencido no retenía el beneficio de los anillos de oro, que hubiere obtenido antes de la sentencia proferida a favor de la ingenuidad, y que hubiere perdido.

3.- MARCIANUS; *libro I, Institutionum*.- Divus Commodus et ius anulorum datum ademit illis, qui invitis aut ignorantibus patronis acceperant.

3.- MARCIANUS; *Institutes, Book I*.- The Divine Commodus also deprived those of the right of wearing a gold ring who had obtained it without the

3.- MARCIANO; *Instituta, libro I*.- El Divino Cómodo les quitó aun el derecho de anillos concedido a los que lo habían obtenido contra la

4.- ULPIANUS; *libro III, ad legem Iuliam et Papiam*.- Etiam feminae ius anulorum aureorum impetrare et natalibus restitui poterunt.

5.- PAULUS; *libro IX, ad legem Iuliam et Papiam*.- Is, qui ius anulorum impetravit, ut ingenuus habetur, quamvis in hereditate eius patronus non excludatur.

6.- ULPIANUS; *libro I, ad legem Iuliam et Papiam*.- Libertinus si ius anulorum impetraverit, quamvis iura ingenuitatis salvo iure patroni nactus sit, tamen ingenuus intellegitur: et hoc Divus Hadrianus Rescripsit.

TIT. XI

DE NATALIBUS RESTITUENDIS

1.- ULPIANUS; *libro II, Responsorum*.- A principe natalibus suis restitutum eum, qui se ingenuum natum principi adfirmavit, si ex ancilla natus est, nihil videri impetrasse.

2.- MARCIANUS; *libro I, Institutionum*.- Interdum et servi nati ex post facto iuris interventu ingenui fiunt, ut ecce si libertinus a principe natalibus suis restitutus fuerit. Illis enim utique natalibus restituitur, in quibus initio omnes homines fuerunt, non in quibus ipse nascitur, quum servus natus esset. Hic enim, quantum ad totum ius pertinet, perinde habetur, atque si ingenuus natus esset, nec patronus eius potest ad successionem venire. Ideoque imperatores non facile solent quemquam natalibus restituere nisi consentiente patrono.

knowledge or consent of their patrons.

4.- ULPIANUS; *On the Lex Julia et Papia, Book III*.- Even women can obtain the right to wear a gold ring, as well as that of being considered freeborn, and be restored to the privileges they are entitled to by their birth.

5.- PAULUS; *On the Lex Julia et Papia, Book IX*.- He who has obtained the right to wear a gold ring is considered as having been freeborn; even though his patron may not have been excluded from his succession.

6.- ULPIANUS; *On the Lex Julia et Papia, Book I*.- A freedman who has obtained the right to wear a gold ring (although he may obtain the right attaching to the condition of being freeborn, reserving the rights of his patron), is still considered as freeborn. This the Divine Hadrian stated in a Rescript.

TITLE XI

CONCERNING THE RESTITUTION OF THE RIGHTS OF BIRTH

1.- ULPIANUS; *Opinions, Book II*.- Where anyone, who stated to the Emperor that he was born free, has been restored by him to the rights to which he was entitled by birth, is proved to have been born of a female slave, he is considered to have obtained nothing.

2.- MARCIANUS; *Institutes, Book I*.- Persons who are born slaves sometimes obtain the rights of those who are freeborn, by subsequent operation of law; as where a freedman is restored by the Emperor to the rights to which he is entitled by birth; for he is restored to these rights to which all men originally are entitled, but to which he himself could assert no claim by birth, as he was born a slave. He acquires the said rights in their entirety, and is in the same position as if he had been born free, hence his patron cannot succeed to his estate. For this reason the Emperors do not usually restore anyone to his birthright, unless

voluntad de los patronos, o ignorándolo éstos.

4.- ULPIANO; *Comentarios a la ley Julia y Papia, libro III*.- También las mujeres pueden impetrar el derecho de anillos de oro; y podrán impetrar los derechos de la ingenuidad, y ser restituidas a su condición natal.

5.- PAULO; *Comentarios a la ley Julia y Papia, libro IX*.- El que impetró el derecho de anillos es considerado como ingenuo, aunque no sea excluido de su herencia el patrono.

6.- ULPIANO; *Comentarios a la ley Julia y Papia, libro I*.- Si el libertino hubiere impetrado el derecho de anillos, aunque haya alcanzado los derechos de la ingenuidad quedando salvo el derecho del patrono, es, sin embargo, considerado ingenuo; y esto respondió por rescripto el Divino Adriano.

TÍTULO XI

DE LA RESTITUCIÓN DE LA CONDICIÓN NATAL

1.- ULPIANO; *Respuestas, libro II*.- Se considera que restituido a su condición natal por el príncipe el que le afirmó al príncipe que era ingenuo, si nació de una esclava, no impetró nada.

2.- MARCIANO; *Instituta, libro I*.- A veces aun los nacidos esclavos se hacen ingenuos por disposición del derecho en virtud de un hecho posterior, por ejemplo, si un libertino hubiere sido restituido por el príncipe a su condición natal. Porque se los restituye ciertamente a aquella condición natal en que estuvieron todos los hombres en un principio, no a aquella en que nace cuando hubiese nacido esclavo; pues éste, por lo que se refiere a todo el derecho, es considerado lo mismo que si hubiese nacido ingenuo; y ni su patrono puede ir a su sucesión. Y por esto no suelen los Emperadores restituir a cualquiera

3.- SCAEVOLA; *libro VI, Responsorum responsdit.*- Respondit: quaeris, an ingenuitatis iure utatur is, quem sanctissimus et nobilissimus imperator natalibus suis restituit. Sed ea res nec dubitationem habet nec umquam habuit, quin exploratum sit ad omnem ingenuitatis statum restitui eum, qui isto beneficio principis utatur.

4.- PAULUS; *libro IV, Sententiarum.*- Nec filio patroni invito libertus natalibus suis restitui potest: quid enim interest, ipsi patrono an filiis eius fiat iniuria?

5.- MODESTINUS; *libro VII, Regularum.*- Patrono consentiente debet libertus ab Imperatore natalibus restitui: ius enim patroni hoc impetrato amittitur.

§ 1.- Libertinus, qui natalibus restitutus est, perinde habetur, atque si ingenuus factus medio tempore maculam servitutis non sustinuisset.

with the consent of his patron.

3.- SCAEVOLA; *Opinions, Book VI, Gave the Following Opinion.*- You ask, if our Most Holy and Noble Emperor should restore anyone to his original birthright, whether he can enjoy all the rights of one who is born free. This does not admit, and never has admitted of any doubt, because it has been established that he who obtains this privilege from the Emperor is restored to all the rights of a person who is born free.

4.- PAULUS; *Opinions, Book IV.*- A freedman cannot be restored to his birthright without the consent of the son of his patron; for what difference does it make whether the wrong was done to the patron, or to his children?

5.- MODESTINUS; *Rules, Book VII.*- The freedman who desires to be restored to his natural birthright must obtain the consent of his patron, for the authority of his patron over him is lost if he acquires it.

§ 1.- A freedman who is restored to his birthright is considered, in every respect, as if he had become freeborn, and, in the meantime, had not endured the infamy of servitude.

a su condición natal, sino consintiéndolo el patrono.

3.- SCÉVOLA *respondió, Respuestas, libro IV.*- Preguntas si gozará del derecho de ingenuidad aquel a quien el muy santo y nobilísimo Emperador restituyó a su condición natal. Pero esto ni duda tiene, ni la tuvo nunca, porque es sabido que es restituido al estado íntegro de ingenuidad el que goza de este beneficio del Príncipe.

4.- PAULO; *Sentencias, libro IV.*- Contra la voluntad del hijo del patrono no puede ser restituido a su condición natal un liberto; porque ¿qué diferencia hay entre que se cause injuria al mismo patrono, o a sus hijos?

5.- MODESTINO; *Reglas, libro VII.*- El liberto debe ser restituido por el Emperador a su condición natal con el consentimiento del patrono; porque impetrado esto, se pierde el derecho del patrono.

§ 1.- El libertino, que fue restituido a su condición natal, es considerado lo mismo que si hecho ingenuo no hubiese soportado en el tiempo intermedio la mancha de la esclavitud.

TIT. XII

DE LIBERALI CAUSA

1.- ULPIANUS; *libro LIV, ad Edictum.*- Si quando is, qui in possessione servitutis constitutus est, litigare de condicione sua non patitur, quod forte sibi suoque generi vellet aliquam iniuriam inferre, in hoc casu aequum est quibusdam personis dari licentiam pro eo litigare: ut puta parenti, qui dicat filium in sua potestate esse: nam etiamsi nolit filius, pro eo litigabit. Sed et si in potestate non sit, parenti dabitur hoc ius, quia semper parentis interest filium servitutem non subire.

TITLE XII

CONCERNING ACTIONS RELATING TO FREEDOM

1.- ULPIANUS; *On the Edict, Book LIV.*- If a person who is free, but is held in possession as a slave, is not willing to go into court to establish his true condition, for the reason that he desires to do some wrong to himself or to his family, in this instance, it is but just that permission should be given to certain persons to appear in his behalf, as for example, to a father who alleges that his son is under his control; for if his son refuses to institute proceedings, he can do so for him. This right is granted to his father even if he is not under the control

TÍTULO XII

DE LA CAUSA SOBRE LA LIBERTAD

1.- ULPIANO; *Comentarios al Edicto, libro LIV.*- Si alguna vez el que esta constituido en posesión de la esclavitud no quiere litigar sobre su condición, porque acaso quisiera que se le infiriese a él mismo o a su linaje alguna injuria, en este caso es justo que se les dé licencia a algunas personas para litigar por él, por ejemplo, a su padre, que dice que aquél hijo esta. bajo su potestad; porque aunque el hijo no lo quiera, litigará por él. Pero aun cuando no esté bajo su potestad se le dará al padre este derecho, porque siempre le interesa al padre que el hijo no sufra la

of the latter, for it is always to the interest of a parent that his son should not be reduced to servitude.

§ 1.- Versa etiam vice dicemus liberis parentum etiam invitorum eandem facultatem dari: neque enim modica filii ignominia est, si parentem servum habeat.

§ 2.- Idcirco visum est cognatis etiam hoc dari debere,

2.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa.*- Quoniam servitus eorum ad dolorem nostrum iniuriamque nostram porrigitur.

3.- ULPIANUS; *libro LIV, ad Edictum.*- Amplius puto naturalibus quoque hoc idem praestandum, ut parens filium in servitute quaesitum et manumissum possit in libertatem vindicare.

§ 1.- Militi etiam pro necessariis sibi personis de libertate litigare permittitur.

§ 2.- Quum vero talis nemo alius est, qui pro eo litiget, tunc necessarium est dari facultatem etiam matri vel filiabus vel sororibus eius ceterisque mulieribus quae de cognatione sunt vel etiam uxori adire praetorem et hoc indicare, ut causa cognita et invito ei succurratur.

§ 3.- Sed et si libertum meum vel libertam dicam, idem erit dicendum.

4.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa.*- Sed tunc patrono conceditur pro libertate liberti litigare, si eo ignorante libertus venire se passus est.

§ 1.- On the other hand, we say that the same power is granted to children in behalf of their parents, even against the consent of the latter, as it is no small disgrace for a son to have his father a slave.

§ 2.- For the same reason it has been decided that this power is also granted to other blood-relatives,

2.- GAIUS; *On the Edict of the Urban Praetor, Title: Concerning Actions Relating to Freedom.*- Because the slavery to which our relatives are subjected causes us grief and injury.

3.- ULPIANUS; *On the Edict, Book LIV.*- I go still further, and hold that this power ought to be granted to natural relatives also, so that if a father has a son in servitude who is afterwards manumitted, he can demand his freedom should he again be reduced to slavery.

§ 1.- A soldier is also permitted to appear in court in a case where the freedom of any of his near relatives is involved.

§ 2.- When no one of this kind who can act for the party interested appears in court, then it becomes necessary to authorize his mother, his daughters or his sisters, as well as other women related to him by blood, or even his wife, to appear before the Praetor, and present the case; so that, after proper cause is shown, relief may be granted him even against his consent.

§ 3.- The same rule applies if I should allege that the party in question is my freedman or freedwoman.

4.- GAIUS; *On the Edict of the Urban Praetor, Title: Actions Relating to Freedom.*- The right to appear in court should, however, only be granted to a patron where the liberty of his freedman is involved, and the latter has permitted himself to be sold without his patron's knowledge.

esclavitud.

§ 1.- A la inversa también diremos, que se les da a los descendientes la misma facultad aun contra la voluntad de los ascendientes; porque no es poca la ignominia del hijo, si tuviera esclavo a su ascendiente.

§ 2.- Por esto pareció bien, que también a los cognados se les debía dar esta facultad.

2.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad.*- Porque la servidumbre redundaba en dolor nuestro y en injuria de nosotros.

3.- ULPIANO; *Comentarios al Edicto, libro LIV.*- Opino además, que esto mismo se les ha de conceder también a los naturales, a fin de que el padre pueda reivindicar para la libertad al hijo tenido en la esclavitud y manumitido.

§ 1.- También al militar se le permite litigar sobre la libertad por las personas parientes suyos.

§ 2.- Mas cuando no hay ninguno de éstos que litigue por él, entonces es necesario que se dé facultad también a la madre, o a las hijas, o a sus hermanas, y a las demás mujeres, que son cognadas, o aun a la mujer, para recurrir al Pretor, e indicar esto, a fin de que con conocimiento de causa se auxilie a aquél aun contra su voluntad.

§ 3.- Pero lo mismo se habrá de decir también si yo dijere que aquél o aquélla es mi liberto o liberta.

4.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad.*- Mas al patrono se le concede que litigue por la libertad de su liberto, si, ignorándolo él, consintió el liberto ser vendido.

§ 5.- ULPIANUS; *libro LIV, ad Edictum*.- Interest enim nostra libertos libertasque habere.

§ 1.- Quod si plures ex memoratis personis existant, qui velint pro his litigare, Praetoris partes interponendae sunt, ut eligat, quem potissimum in hoc esse existimat. Quod et in pluribus patronis observari debet.

6.- GAIUS; *ad edictum Praetoris urbani*.- Benignius autem hoc persequendum est, ut, si furiosus et infans est qui in servitutem trahitur, non solum necessariis personis, sed etiam extraneis hoc permittatur.

7.- ULPIANUS; *libro LIV, ad Edictum*.- Liberis etiam hominibus, maxime si maiores viginti annis venum se dari passi sunt vel in servitutem quaquaratione deduci, nihil obest, quo minus possint in libertatem proclamare, nisi forte se venum dari passi sunt, ut participaverint pretium.

§ 1.- Si quis minor viginti annis ad partiendum pretium venum se dari passus est, nihil ei hoc post viginti annos nocebit. Sed si ante quidem se venum dedit, post vicensimum autem annum pretium partitus est, poterit ei libertas denegari.

§ 2.- Si quis sciens liberum emerit, non denegatur vendito in libertatem proclamatio adversus eum qui eum comparavit, cuiusque sit aetatis qui emptus est, idcirco quia non est venia dignus qui emit, etiamsi scientem prudentemque se liberum emerit. sed enim si postea alius eum emerit ob hoc, qui scivit, ignorans, deneganda est ei libertas.

5.- ULPIANUS; *On the Edict, Book LIV*.- For it is to our interest to preserve our rights over our freedmen and freedwomen.

§ 1.- When several of the above-mentioned persons appear in court in behalf of a slave, the authority of the Praetor must be interposed to select the one whom he considers to be preferable. This rule should also be observed where several patrons appear for that purpose.

6.- GAIUS; *On the Edict of the Urban Praetor, Book II*.- It will be even more equitable to adopt such a course where the person who has been reduced to slavery is insane, or an infant; for this privilege should then not only be granted to near relatives but also to strangers.

7.- ULPIANUS; *On the Edict, Book LIV*.- Where men who are free, especially those who are over twenty years of age, have permitted themselves to be sold, or have been reduced to slavery for any other reason, no obstacle will arise to prevent them from demanding their freedom, unless they allowed themselves to be sold in order to share the purchase-money.

§ 1.- When a minor of twenty years of age permits himself to be sold for the purpose of sharing the purchase-money, this will not prejudice him after he reaches the age of twenty years. If, however, he permitted himself to be sold and obtained a portion of the purchase-money after reaching his twentieth year, freedom can be refused him.

§ 2.- If anyone should knowingly buy a man who is free, the right to demand his liberty will not be refused to him who was sold, as against the buyer, no matter at what age he was purchased; for the reason that he who bought him is not excusable, even if when he did so he who was the object of the sale well knew that he was free. But if another, without being aware of the fact, should afterwards purchase him from one who did know, freedom should be refused him.

5.- ULPIANO; *Comentarios al Edicto, libro LIV*.- Porque nos interesa tener los libertos y las libertas.

§ 1.- Pero si hubiera muchas de las susodichas personas, que quisieran litigar por aquéllos, se habrá de interponer el ministerio del Pretor, de suerte que elija a la que estime que es la más idónea para ello; lo que también se debe observar tratándose de varios patronos.

6.- GAYO; *Comentarios al Edicto del Pretor urbano*.- Mas esto se ha de ejecutar con más benignidad, para que, si es un furioso o uno que está en la infancia el que es reducido a esclavitud, se permita esto no solamente a las personas emparentadas, sino también a las extrañas.

7.- ULPIANO; *Comentarios al Edicto, libro LIV*.- A los hombres libres, especialmente si siendo mayores de veinte años consintieron ser vendidos, o ser reducidos por cualquier razón a esclavitud, tampoco les obsta nada para que no puedan reclamar la libertad, a no ser acaso que hayan consentido ser vendidos para participar del precio.

§ 1.- Si algún menor de veinte años consintió ser vendido para participar del precio, esto no le perjudicará en nada después de cumplidos los veinte años; pero si ciertamente se dio en venta antes, mas participó del precio después de cumplidos los veinte años, se le podrá denegar la libertad.

§ 2.- Si alguno hubiere comprado a sabiendas un hombre libre, no se le deniega al vendido la reclamación de la libertad contra el que lo compró, de cualquier edad que sea él que fue comprado; por esto, porque no es digno de venia el que lo compró, aunque haya comprado a uno que sabía y le constaba que él era libre. Porque si después otro, ignorándolo, lo hubiere comprado del que lo sabía, se le ha de denegar la libertad.

§ 3.- Si duo simul emerint partes, alter sciens, alter ignorans, videndum erit, numquid is qui scit non debeat nocere ignoranti: quod quidem magis est. Sed enim illa erit quaestio, partem solam habebit is qui ignoravit an totum? Et quid dicemus de alia parte? An ad eum qui scit pertineat? Sed ille indignus est quid habere, quia sciens emerit. Rursum qui ignoravit, non potest maiorem partem dominii habere quam emit: evenit igitur, ut ei prosit qui eum comparavit sciens, quod alius ignoravit.

§ 4.- Sunt et aliae causae, ex quibus in libertatem proclamatio denegatur, veluti si quis ex eo testamento liber esse dicatur, quod testamentum aperiri praetor vetat, quia testator a familia necatus esse dicatur: quum enim in eo sit iste, ut supplicio forte sit adficiendus, non debet liberale iudicium ei concedi. Sed et si data fuerit, quia dubitatur, utrum nocens sit an innocens, differtur liberale iudicium, donec constet de morte eius, qui necatus est: apparebit enim, utrum supplicio adficiendus sit an non.

§ 5.- Si quis ex servitute in libertatem proclamat, petitoris partes sustinet: si vero ex libertate in servitutem petatur, is partes actoris sustinet qui servum suum dicit. Igitur quum de hoc incertum est, ut possit iudicium ordinem accipere, hoc ante apud eum, qui de libertate cogniturus est, disceptatur, utrum ex libertate in servitutem aut contra agatur. Et si forte apparuerit eum, qui de libertate sua litigat, in libertate sine dolo malo fuisse, is qui se dominum dicit actoris partes sustinebit et necesse habebit servum suum probare: quod si pronuntiatum fuerit eo tempore, quo lis praeparabatur, in libertate eum non fuisse aut dolo malo fuisse, ipse qui de sua libertate

§ 3.- If two persons should buy a slave together, one of them knowing that he was free, and the other being ignorant of it, let us see whether he who was aware of the alleged slave's condition will prejudice the one who was not. This, indeed, is the better opinion. For, otherwise, the question would be whether he who was ignorant of the man's condition will only be entitled to his share in him, or to the entire alleged slave. Will what we have stated with reference to the share of the other apply to the purchaser who had knowledge? He, however, who bought the man, being aware that he was free, is unworthy to have anything. Again, the one who was ignorant of his true condition cannot have a greater portion of the ownership than he purchased. The result therefore will be that the ignorance of one will benefit the other who bought the man knowing that he was free.

§ 4.- There are other reasons for which the right to demand freedom is refused; as, for example, where a slave is said to be free by the terms of a will, and the Praetor forbids the will to be opened, because the testator is said to have been killed by his slaves; for he who desires to appear in court and who may, perhaps, be liable to punishment, should not be entitled to a judgment giving him his freedom. If, however, the right should be granted because it is uncertain whether he is guilty or innocent, the decision should be deferred until it is established who is responsible for the death of the testator, as it will then appear whether he will be liable to punishment or not.

§ 5.- Where anyone who is in slavery claims his freedom, he occupies the place of a plaintiff. If, however, being at liberty, he is demanded as a slave, the person who alleges that he is his slave assumes the part of the plaintiff. Hence, when the matter is in doubt, in order that the proceedings may be conducted in their proper order, the question should be argued before the magistrate who has cognizance of cases involving freedom, so that it may be determined whether the alleged slave should be reduced from freedom to servitude; or, on the other hand, whether, being in bondage, he ought to be liberated. If, however, it should appear that he who

§ 3.- Si dos hubieren comprado juntos cada uno una parte, uno sabiéndolo y otro ignorándolo, se habrá de ver si el que lo sabe no deberá perjudicar al que lo ignora; lo que verdaderamente es más cierto. Pero habrá esta cuestión; ¿tendrá el que lo ignoró una parte sola, o la totalidad? ¿Y qué diremos de la otra parte? ¿Le pertenecerá al que lo sabe? Mas éste es indigno de tener cosa alguna, porque lo compró a sabiendas; y a su vez, el que lo ignoró no puede tener mayor parte de dominio que la que compró; sucede, pues, que al que lo compró a sabiendas le aprovecha lo que otro ignoró.

§ 4.- Hay además otras causas por las cuales se deniega la reclamación de la libertad, por ejemplo, si se dijera que alguno es libre en virtud de un testamento, que el Pretor veda que se abra, porque se dijese que el testador había sido muerto por su servidumbre; porque hallándose éste en el caso de que quizá haya de ser sometido al suplicio, no se le debe conceder acción para reclamar la libertad. Pero aunque le hubiere sido dada, porque se dudaba si era inocente o culpable, se difiere la acción relativa a la libertad hasta que haya constancia respecto a la muerte del que fue matado; porque aparecerá si haya de ser, o no, sometido al suplicio.

§ 5.- Si alguno estando en esclavitud reclama la libertad, desempeña las funciones de demandante; pero si de la libertad fuese reclamado a esclavitud, representa las funciones de actor el que dice que aquél es esclavo suyo. Así, pues, cuando respecto a esto hay incertidumbre, para que pueda hacer orden para el juicio se discute primeramente ante el que ha de conocer de la libertad, si se ejercita acción reclamando a uno de la libertad a la esclavitud, o al contrario. Y si acaso apareciere que el que litiga por su propia libertad estuvo en libertad sin dolo malo, desempeñará las funciones de actor el que dice que él es dueño, y tendrá necesidad de probar que aquél es

litigat debet se liberum probare.

8.- IDEM; *libro LV, ad Edictum*.- Cognitione de liberali causa usufructuario datur, etiamsi dominus quoque velit, hoc est qui se dominum dicit, movere status controversiam.

§ 1.- Si plures sibi dominium servi vindicant dicentes esse communem, ad eundem iudicem mittendi erunt: et ita Senatus censuit. Ceterum si unusquisque suum esse in solidum, non in partem dicat, cessat Senatusconsultum: neque enim timor est, ne varie iudicetur, quum unusquisque solidum dominium sibi vindicet.

§ 2.- Sed et si alter usum fructum totum, alter proprietatem servi vindicet, item si alter dominium, alter pignoratam sibi dicat, idem iudex erit: et parvi refert, ab eodem an ab alio ei pigneri datus sit.

9.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa*.- Si pariter adversus eum, qui de libertate litigat, consistant fructuarius et proprietarius, fieri potest, ut alteruter absit: quo casu an praesenti soli permissurus sit Praetor adversus eum agere, dubitari potest, quia non debet alterius collusionem aut inertiam alteri ius corrumpi. Sed rectius dicitur etiam alterutri eorum permittendum agere, ut alterius ius incorruptum maneat. Quod si adhuc nondum finito iudicio supervenerit, ad eundem iudicem mittetur, nisi si iustam causam adferat, quare

contends that he is free was in that condition without having been guilty of fraud, he who alleges that he is his owner will take the part of the plaintiff, and will be required to prove that he is his slave. But if it is decided that, at the time when the proceedings were instituted, the alleged slave was not at liberty, or had fraudulently obtained his freedom, he who asserts that he is free must prove that this is the case.

8.- THE SAME; *On the Edict, Book LV*.- The right to appear in a case involving freedom is granted to an usufructuary, even if the owner (that is to say, he who alleges that he is the owner), also desires to institute proceedings respecting the status of the slave.

§ 1.- Where several persons claim the ownership of the slave, alleging that he belongs to them in common, they shall be sent before the same judge. This was decreed by the Senate. But if each one of them should say that the entire slave and not merely a share in him belongs to him alone, the Decree of the Senate will not apply. For then there will be no reason to apprehend that different decisions will be rendered, as each of the alleged owners claims that the slave is his individual property.

§ 2.- Where, however, one person claims the usufruct in the slave and another the ownership, or where one claims the ownership, and the other says that the slave has been pledged to him, the same judge must decide the case; and it makes little difference whether the slave was pledged to him by the same person who claims him as the owner, or by someone else.

9.- GAIUS; *On the Edict of the Urban Praetor, Title: Actions Relating to Freedom*.- Where two parties, that is to say, the alleged usufructuary and the alleged owner, are defendants at the same time against him who has brought an action to obtain his freedom, one of them may happen to be absent. It may be doubted whether, under such circumstances, the Praetor can permit the one who is present to appear alone against the alleged slave, because the rights of the third party should not be prejudiced by the collusion or the negligence of another. It can more

esclavo suyo. Pero si se hubiere fallado que al tiempo en que se preparaba el litigio no estaba aquél en libertad, o que lo estaba con dolo malo, debe probar que es libre el mismo que litiga sobre su propia libertad.

8.- EL MISMO; *Comentarios al Edicto, libro LV*.- Al usufructuario se le da acción para que se conozca sobre la causa de la libertad, aunque también quiera el dueño, esto es, el que dice que es dueño, promover la controversia sobre el estado.

§ 1.- Si muchos reivindicar para si el dominio de un esclavo, diciendo que es común, habrán de ser remitidos al mismo juez; y así lo dispuso el Senado. Pero si cada uno dijera que es suyo por completo, no en parte, deja de tener aplicación el Senadoconsulto; porque no hay temor de que se juzgue con diversidad cuando cada uno reivindica para si todo el dominio.

§ 2.- Mas si uno reivindicara todo el usufructo, y otro la propiedad del esclavo, y también si uno dijera que era suyo el dominio, y otro que estaba pignorado a su favor, habrá también el mismo juez; y poco importa que a éste le haya sido dado en prenda por él mismo, o por otro.

9.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad*.- Si contra el que litiga sobre la libertad comparecieran juntamente el usufructuario y el propietario, puede suceder que uno u otro se ausente; en cuyo caso se puede dudar si el Pretor le haya de permitir solamente al que está presente ejercitar la acción con aquél, porque por colusión o inercia de uno no debe perjudicar el derecho del otro; pero con más razón se dice que también se le ha de permitir a uno de ellos que ejercite la acción, a fin de que permanezca sin

ad eum mitti non debeat, forte si eum iudicem inimicum sibi esse adfirmet.

§ 1.- Idem dicemus et si duo pluresve domini esse dicantur et quidam praesto sint, quidam aberint.

§ 2.- Unde in utroque casu dispiciamus, an, si is qui prior egerit victus sit, prosit ei, quod posterior vicerit, vel contra, id est ut, quum omnino alteruter vicerit, prosit etiam alteri, sicut prodest heredi liberti, quod in fraudem patroni servi manumissi sint. Si cui placeat prodesse, consequens est, ut, quum idem petat, exceptioni rei iudicatae obiciatur replicatio: si cui vero placeat non prodesse, is habebit sequentem dubitationem, utrum id, in quo quis victus est, nullius erit an eius esse debeat, cum quo actum sit, an potius eius qui vicerit? Scilicet ut utilis actio detur ei qui vicerit, minime autem praetor pati debeat, ut pro parte quis servus sit.

10.- ULPIANUS; *libro LV, ad Edictum*.- Quod autem diximus "in libertate fuisse" sic est accipiendum non ut se liberum doceat is, qui liberale iudicium patitur, sed in possessione libertatis sine dolo malo fuisse. Quid sit autem "sine dolo malo fuisse", videamus. Nam Iulianus ait omnes, qui se liberos putant, sine dolo malo in libertate fuisse, si modo se pro liberis gerant, quamvis servi sint. Varus autem scribit eum, qui se liberum sciat, dum in fuga sit, non videri sine dolo malo in libertate esse: sed simul atque desierit quasi fugitivus se celare et pro

properly be held that one of them may proceed in such a way that the rights of the other will remain unimpaired. If the absent party should appear before the case has been terminated, he must be sent before the same judge, unless he gives a good reason why this should not be done; for instance, if he alleges that the judge is his enemy.

§ 1.- We say that the same rule will apply where of two or more persons who assert that they are the owners of the alleged slave some are present, and others are absent.

§ 2.- Therefore, in both cases, we must consider if the one who first instituted proceedings should be defeated, whether this will benefit the other, who gained his case, or vice versa; that is to say, if either one of them should succeed, whether this will profit the other; as the heir of a freedman obtains an advantage from the fact that his patron had been defrauded by the manumission of slaves. If it is held that a judgment rendered in favor of one will benefit the other; the result will be that if the latter again brings suit, he can be opposed by a replication on the ground that the matter has already been decided. If, indeed, it is held that he does not derive any advantage from the decision, the doubt will arise whether what was claimed by the party who lost the case belongs to either of them, or whether he against whom the action was brought, or he who was successful, is entitled to it; and it is evident that a praetorian action ought to be granted to the party who gained the case, as the Praetor should, by no means, permit the man to be part slave and part free.

10.- ULPIANUS; *On the Edict, Book LV*.- What we have said with reference to the alleged slave, proving that he has been free, must be understood to mean not that he who demands his liberty must show that he was absolutely free, but that he was in possession of his freedom without any fraud on his part. But let us see what would be considered fraud on his part. Julianus says, that all those who believe that they are free are not guilty of fraud, provided they act as freemen, even though they are actually slaves. Varus, however, says that one who knows himself to be free,

menoscabo el derecho del otro. Mas si se presentare no habiendo terminado todavía el juicio, será enviado al mismo juez, a no ser alegue justa causa, por la cual no deba ser remitido a él, acaso si afirmase que aquel juez es enemigo suyo.

§ 1.- Lo mismo diremos, también si dos o más dijieran que son dueños, y unos estuvieran presentes y otros ausentes.

§ 2.- Por lo cual veamos en uno y en otro caso, habiendo sido vencido el primero que ejercitó acción, le aprovechará, o al contrario, que el segundo haya vencido, esto es, que cuando absolutamente hubiere vencido uno de los dos le aproveche también al otro, como le aprovecha al heredero del liberto que los esclavos hayan sido manumitidos en fraude del patrono. Si a alguno le pareciera que le aprovecha, es consiguiente que al pedir lo mismo ponga la réplica a la excepción de cosa juzgada; pero si a alguno le pareciera que no le aprovecha, éste tendrá la siguiente duda, si aquello en que fue vencido no será de nadie, o si deberá ser de aquel contra quien se haya ejercitado la acción, o más bien del que hubiere vencido, de suerte que dé la acción útil al que hubiere vencido; mas ninguna manera deberá consentir el Pretor que uno sea esclavo en parte.

10.- ULPIANO; *Comentarios al Edicto, libro LV*.- Mas lo que hemos dicho: que estaba en libertad, se ha de entender así, no que pruebe que él es libre el que soporta el juicio sobre su libertad, sino que estaba en posesión de la libertad sin dolo malo. Pero veamos qué sea haber estado sin dolo malo; porque dice Juliano, que todos los que se juzgan libres han estado en libertad sin dolo malo, si se condujeran como libres, aunque sean esclavos. Mas escribe Varo, que el que sabe que él es libre, estando fugitivo, no parece que está en libertad sin dolo malo, sino que tan pronto

libero agere, tunc incipere sine dolo malo in libertate esse: etenim ait eum, qui scit se liberum, deinde pro fugitivo agit, hoc ipso, quod in fuga sit, pro servo agere,

and takes to flight, cannot be considered to be at liberty without any fraud on his part; but at the moment when he ceases to conceal himself as a fugitive slave, and acts as if he was free, he begins to be at liberty without fraud on his part. For he holds that he who knows that he is free, and afterwards conducts himself like a fugitive slave, should be considered to act as a slave from the very fact that he has taken to flight.

como dejare de ocultarse como fugitivo, y obrase como libre, comienza a estar en libertad sin dolo malo; porque dice que el que sabe que él es libre, y después obra como fugitivo, por lo mismo que está fugitivo obra como esclavo,

11.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa.*- licet fugae tempore pro libero se gesserit: dicemus enim eum in eadem causa esse.

11.- GAIUS; *On the Edict of the Urban Praetor, Title: Actions with Reference to Freedom.*- Even though, during his flight he acted as a freeman, we hold that the same rule will apply.

11.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad.*- aunque durante la fuga se haya conducido como libre; porque diremos que él se halla en el mismo estado.

12.- ULPIANUS; *libro LV, ad Edictum.*- Igitur sciendum est et liberum posse dolo malo in libertate esse et servum posse sine dolo malo in libertate esse.

12.- ULPIANUS; *On the Edict, Book LV.*- Hence, it should be noted that a person who is free can be fraudulently at liberty, and that a slave can be at liberty without being guilty of fraud.

12.- ULPIANO; *Comentarios al Edicto, libro LV.*- Así, pues, se ha de saber, que un hombre libre puede estar en libertad con dolo malo, y que un esclavo puede estar en libertad sin dolo malo.

§ 1.- Infans subreptus bona fide in servitute fuit, quum liber esset, deinde, quum de statu ignarus esset, recessit et clam in libertate morari coepit: hic non sine dolo malo in libertate moratur.

§ 1.- A child who is stolen in infancy served as a slave in good faith, although he was free; and afterwards, while ignorant of his condition, left his master and secretly began to live in freedom. He does not remain at liberty without being guilty of fraud.

§ 1.- Substraído uno que estaba en la infancia estuvo de buena fe en esclavitud, siendo libre, y después, ignorando su estado, se hizo fugitivo, y comenzó a estar en libertad clandestinamente; éste no permanece en libertad sin dolo malo.

§ 2.- Potest et servus sine dolo malo in libertate morari, ut puta testamento accepit libertatem, quod nullius momenti esse ignorat, vel vindicta ei imposita est ab eo, quem dominum esse putavit, cum non esset, vel educatus est quasi liber, quum servus esset.

§ 2.- A slave can also be at liberty without committing fraud, as, for instance, where he receives his freedom by a will and is not aware that the will is void; or where he obtains it before a magistrate from someone whom he believed to be his owner, when he was not; or where he has been brought up as free, when, in fact, he was a slave.

§ 2.- También puede el esclavo estar en libertad sin dolo malo, por ejemplo, si recibió la libertad por testamento, que ignora que es de ningún valor, o si se le dio con la vindicta la libertad por aquel a quien creyó que era su dueño, no siéndolo, o si fue educado como libre, siendo esclavo.

§ 3.- Et generaliter dicendum est, quotiens quis iustis rationibus ductus vel non iustis, sine calliditate tamen putavit se liberum et in libertate moratus est, dicendum est hunc in ea causa esse, ut sine dolo malo in libertate fuerit atque ideo possessoris commodo fruatur.

§ 3.- Generally speaking, whenever anyone thinks that he is free, without being guilty of deceit, whether he is induced to do so by good or bad motives, and he remains at liberty, it must be held that he is in the same condition as if he was free without being guilty of fraud, and therefore he can enjoy all the advantages of a possessor of freedom.

§ 3.- Y en general se ha de decir, que siempre que uno llevado por razones justas, o no justas, pero sin malicia, se juzgó libre, y permaneció en libertad, se ha de decir que se halla en el caso de haber estado en libertad sin dolo malo, y que por ello disfruta de las ventajas del poseedor.

§ 4.- Probatio autem ad id tempus referetur, quum sine dolo malo in libertate fuerit, quo primum in ius aditum est.

§ 4.- The proof of good faith, however, is referred to the time when he was at liberty without being guilty of fraud, which is when legal proceedings with reference to him were first instituted.

§ 4.- Pero la prueba, cuando uno hubiere estado en libertad sin dolo malo, se refiere al tiempo en que por primera vez se haya recurrido al juicio.

§ 5.- Si operae alicui debeantur, is quoque liberali iudicio experiri potest.

§ 6.- Si quod damnum mihi dederit, qui ad libertatem proclamat, illo tempore, quo bona fide mihi serviebat, veluti si ego bona fide dominus noxali iudicio conventus et condemnatus litis aestimationem pro eo optuli: in id mihi condemnabitur.

13.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa*.- Illud certum est damnum hoc solum in hac in factum actione deduci, quod dolo, non etiam quod culpa factum sit. Ideoque licet absolutus hoc iudicio fuerit, adhuc tamen postea quum eo poterit lege aquilia agi, quum ea lege etiam culpa teneatur.

§ 1.- Item certum est tam res nostras quam res alienas, quae tamen periculo nostro sunt, in hanc actionem deduci, veluti commodatas et locatas: certe depositae apud nos res, quia nostro periculo non sunt, ad hanc actionem non pertinent.

14.- ULPIANUS; *libro LV, ad Edictum*.- Rectissime Praetor calliditati eorum, qui, quum se liberos scirent, dolo malo passi sunt se pro servis venum dari, occurrit.

§ 1.- Dedit enim in eos actionem, quae actio totiens locum habet, quotiens non est in ea causa is qui se venire passus est, ut ei ad libertatem proclamatio denegetur.

§ 2.- Dolo autem non eum fecisse accipimus, qui non ultro instruxit emptorem, sed qui decepit;

§ 5.- Where the services of a slave are due to anyone, he can also avail himself of the action relating to freedom.

§ 6.- If a person who claims his freedom has caused me any damage during the time when he was serving me as a slave in good faith (as, for example, if I really, believing myself to be his owner, was sued in a noxal action, and judgment was rendered against me, and I paid the appraised damages, instead of surrendering the alleged slave by way of reparation), judgment will be rendered against him in my favor.

13.- GAIUS; *On the Edict of the Urban Praetor, Title: Actions Relating to Freedom*.-It is certain that in the action in factum under discussion, judgment should only be rendered for the amount of damages which were caused by fraud, and not for what was due to negligence. Therefore, even if the alleged slave should be released from liability in a case of this kind, still, suit can afterwards be brought against him under the Aquilian Law, as by this law he will also be liable for negligence.

§ 1.- Again, it is certain that in this action not only our own property but also that of another for which we are responsible can be claimed as having been lent or hired. But it is clear that this proceeding does not apply to property merely deposited with us for safe-keeping, because it is not at our risk.

14.- ULPIANUS; *On the Edict, Book LV*.- The Praetor very properly opposes the deceitful conduct of those who, knowing that they are free, fraudulently permit themselves to be sold as slaves; for he grants an action against them.

§ 1.- This action will lie whenever he who permitted himself to be sold as a slave is in such a position that he cannot be refused permission to demand his freedom.

§ 2.- We do not consider that he has acted in bad faith who did not voluntarily inform the purchaser of the fraud, but only when he himself deceived him.

§ 5.-Si a alguno se le debieran días de trabajo, también él puede ejercitar la acción sobre la libertad.

§ 6.- Si el que reclama la libertad me hubiere causado algún daño durante el tiempo en que me servía de buena fe, por ejemplo, si yo, dueño de buena fe, citado a juicio noxal y condenado pagué por él la estimación del litigio, será condenado en esto a mi favor.

13.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad*.- Es cierto que en esta acción por el hecho se comprende sólo este daño, que se hizo con dolo, no también el que con culpa. Y por esto, aunque hubiere sido absuelto en este juicio, se podrá, sin embargo, ejercitar después contra él la acción de la ley Aquilia, porque también por esta ley se está obligado por la culpa.

§ 1.- También es cierto, que en esta acción se comprenden tanto nuestras cosas, como las cosas ajenas, que están, no obstante, a nuestro riesgo, como las recibidas en comodato o en arrendamiento; y ciertamente que las cosas depositadas en nuestro poder no pertenecen a esta acción, porque no están a nuestro riesgo.

14.- ULPIANO; *Comentarios al Edicto, libro LV*.- Con muchísima razón provee el Pretor contra la malicia de los que sabiendo que ellos son libres consintieron con dolo malo ser vendidos como esclavos; porque dio acción contra ellos.

§ 1.- Cuya acción tiene lugar siempre y cuando el que consintió ser vendido no esta en el caso de que le sea denegada la reclamación de la libertad.

§ 2.- Mas entendemos que obró con dolo no el que no instruyó de buen grado al comprador, sino el que lo engañó.

15.- PAULUS; *libro LI, ad Edictum*.- idem est sive virilis sexus sive feminini sit, dummodo eius aetatis sit, ut dolum capiat;

16.- ULPIANUS; *libro LV, ad Edictum*.- immo eum, qui finxit se servum et sic veniit decipiendi emptoris causa.

§ 1.- Si tamen vi metuque compulsus fuit hic qui distractus est, dicemus eum dolo carere.

§ 2.- Tunc habet emptor hanc actionem, quum liberum esse nesciret: nam si scit liberum et sic emit, ipse se circumvenit.

§ 3.- Quare si filius familias emit, si quidem ipse scit, pater ignoravit, non adquisiit patri actionem: hoc si peculiari nomine egerit. Ceterum si patre mandante, hic quaeritur, an filii scientia noceat: et puto adhuc nocere, quemadmodum procuratoris nocet.

§ 4.- Plane si filius ignoravit, pater scit, adhuc dico repellendum patrem, etiamsi peculiari nomine filius emit, si modo pater praesens fuit potuitque filium emere prohibere.

17.- PAULUS; *libro LI, ad Edictum*.- In servo et in eo, qui mandato nostro emit, tale est, ut, si certum hominem mandavero emi sciens liberum esse, licet is cui mandatum est, ignoret, idem sit: et non competet ei actio. Contra autem, si ego ignoravi, procurator scit, non est mihi deneganda.

15.- PAULUS; *On the Edict, Book LV*.- That is to say, no matter whether the person who suffered himself or herself to be sold is of the male or the female sex; provided he or she is of an age at which fraud can legally be committed.

16.- ULPIANUS; *On the Edict, Book LV*.- The same rule applies to one who pretends to be a slave, and is sold as such, with the intention of deceiving the purchaser.

§ 1.- If, however, he, who was sold was under the influence of either force or fear, we say that he was not guilty of fraud.

§ 2.- The purchaser is entitled to this action when he was not aware that the alleged slave was free, for if he knew that he was free, and then bought him, he cheated himself.

§ 3.- Therefore, if a son under paternal control makes a purchase of this kind, and he himself was aware of the facts, but his father was ignorant of them, he will not be entitled to an action for the benefit of his father, if he made the purchase with reference to his peculium. But, in this instance, the question arises whether, if the father directed him to make the purchase, he will be prejudiced by the knowledge of his son. I think that it will prejudice him just as it would prejudice an agent.

§ 4.- If the son was not aware that the man who was sold was free, and his father knew it, I think that it is clear that the father will be barred from bringing an action, even if the son made the purchase with reference to his peculium; provided the father was present and could have prevented his son from doing so.

17.- PAULUS; *On the Edict, Book LI*.- The same rule will apply to the case of a slave, and where a purchase was made under our direction by an agent; and it is just as if I had ordered a certain man to be purchased, knowing him to be free, although he who was ordered to buy him may not have been aware of the fact, as an action will not lie in his favor. If, on the

15.- PAULO; *Comentarios al Edicto, libro LI*.- Lo mismo es, ya si fuera del sexo masculino, ya si del femenino, con tal que sea de tal edad, que sea capaz de dolo.

16.- ULPIANO; *Comentarios al Edicto, libro LV*.- Y aun el que se fingió esclavo, y de este modo se vendió para engañar al comprador.

§ 1.- Pero si el que fue vendido fue compelido a ello por violencia o miedo, diremos que carece de dolo.

§ 2.- El comprador tiene esta acción siempre y cuando no supiera que era libre; porque si sabe que es libre, y de este modo lo compró, él mismo se engañó.

§ 3.- Por lo cual si el comprador fue un hijo de familia, y éste lo sabe, y su padre lo ignoró, no adquirió acción para el padre; esto si hubiere obrado en nombre del peculio; pero si mandándose lo su padre, en este caso se pregunta si perjudicará que el hijo lo sepa. Y opino que aun perjudica, como perjudica que lo sepa el procurador.

§ 4.- Pero si el hijo lo ignoró, y el padre lo supo, digo que aun ha de ser repelido el padre, aunque el hijo lo haya comprado a nombre del peculio, si el padre estuvo presente y pudo prohibirle al hijo que lo comprase.

17.- PAULO; *Comentarios al Edicto, libro LI*.- Respecto de un esclavo, y del que compró por mandato nuestro, el caso es tal, que, si yo hubiere mandado que fuese comprado cierto hombre, sabiendo que era libre, será lo mismo, aunque lo ignore aquel a quien se le mandó; y no le competirá acción; pero al contrario, si yo lo ignoré, y el

18.- ULPIANUS; *libro LV, ad Edictum*.- In tantum ergo tenetur, quantum dedit vel in quantum obligatus est, scilicet in duplum.

§ 1.- Sed utrum pretium tantum an etiam id quod pretio accessit duplicetur, videamus. Et putem omne omnino, quod propter emptionem vel dedit.

19.- PAULUS; *libro LI, ad Edictum*.- Vel permittit vel compensavit eo nomine, nam et is dedisse intellegendus est,

20.- ULPIANUS; *libro LV, ad Edictum*.- Vel obligatus est, duplari debere.

§ 1.- Proinde si quid cuidam ob hanc actionem licito iure dedit, dicendum est in hoc edictum cadere duplarive.

§ 2.- Obligatum vel ipsi venditori accipere debemus vel alii obligatum: nam quod dedit, sive ipsi venditori sive alii ex iussu eius sive ipse sive alius dederit, aequè continebitur.

§ 3.- Obligatum accipere debemus, si exceptione se tueri non potest: ceterum si potest, dicendum non esse obligatum.

§ 4.- Interdum evenit, ut is qui comparavit habeat in quadruplum actionem: nam in ipsum quidem, qui sciens pro servo venit, hinc habet in duplum actionem et praeterea in venditorem vel eum, qui duplam promisit, in duplum actio est,

other hand, I was not aware that the man was free, but the agent knew it, the action will not be refused me.

18.- ULPIANUS; *On the Edict, Book LV*.- He, therefore, will be liable for as much as he has paid, or for the amount for which he bound himself, that is to say, for double the price.

§ 1.- Let us see, however, whether merely the purchase money or also whatever may have been added to it should be doubled. I think that either all that was paid on account of the sale ought, by all means, to be doubled,

19.- PAULUS; *On the Edict, Book LI*.- Or what was exchanged or set off, in lieu of the purchase money (for it also is understood to have been given as such under these circumstances);

20.- ULPIANUS; *On the Edict, Book LV*.- And what he bound himself to pay should be doubled.

§ 1.- Hence, if the purchaser has lawfully paid something to anyone in order to obtain this action, it must be said that it comes within the terms of this Edict, and will be doubled.

§ 2.- Where anyone is said to have bound himself, we must understand this to have been done either to the vendor or to someone else; for whatever he, either himself, or through another, gave to the vendor himself, or to some other person by his order, is equally included.

§ 3.- We should consider the purchaser to be bound where he cannot protect himself by an exception, but if he can do so, he is not held to be bound.

§ 4.- It sometimes happens that he who makes the purchase will be entitled to an action for quadruple the value of the property. For a suit for double damages will lie in his favor against the alleged slave himself, who, being free, knowingly permitted himself to be sold; and, in addition to this, he will be entitled to an action for double damages against the vendor, or against him who promised him double

procurador lo sabe, no me ha de ser denegada.

18.- ULPIANO; *Comentarios al Edicto, libro LV*.- Luego se obliga por tanto cuanto dio, o por aquello a que se obligó, por supuesto, en el duplo.

§ 1.- Pero veamos si se duplicará solamente el precio, o si también lo que fue accesorio del precio; y yo opinaría, que absolutamente todo lo que por causa de la venta dio.

19.- PAULO; *Comentanlos al Edicto, libro LI*.- O permutó, o compensó con tal motivo, porque se ha de entender que también este dió.

20.- ULPIANO; *Comentarios al Edicto, libro LV*.- O aquello por que se obligó, se debe duplicar.

§ 1.- Por consiguiente, si por causa de esta acción le dió a cualquiera alguna cosa, se ha de decir que cae dentro de este Edicto, o que se duplica.

§ 2.- Debemos entenderlo obligado o al mismo vendedor, o a otro; porque lo que dió o al mismo vendedor, o a otro por su mandato, ya lo hubiera dado él mismo, ya otro, sera igualmente comprendido.

§ 3.- Debemos entenderlo obligado, si no se puede amparar, con excepción; pero si puede, se ha de decir que no está obligado.

§ 4.- A veces sucede, que el que compró tiene acción por el cuádruplo; porque tiene ciertamente la acción por el duplo contra el mismo que a sabiendas se vendió como esclavo; y hay además la acción por el duplo contra el vendedor, o contra el que la prometió por el duplo.

damages.

21.- MODESTINUS; *libro I, de Poenis*.- Utique eius duplum, quod propter emptionem vel dedit vel obligatus est. Secundum quae id, quod alter eorum solverit, nihil ad exonerandum alterum pertinebit, quia placuit hanc actionem poenalem esse. Et ideo post annum non datur nec quum successoribus, quum sit poenalis, agetur. Actionem, quae ex hoc edicto oritur, manumissione non extinguere rectissime dicitur, quia verum est auctorem conveniri non posse, post quem ad eum, qui ad libertatem proclamavit, perveniebatur.

22.- ULPIANUS; *libro LV, ad Edictum*.- Non solus autem emptor, sed et successores eius hac in factum actione agere poterunt.

§ 1.- Emere sic accipiemus, etiamsi per alium quis emerit, ut puta procuratorem.

§ 2.- Sed et si plures emerint, omnes habebunt hanc actionem, sic tamen, ut, si quidem pro partibus emerint, pro parte pretii habeant actionem: enimvero si unusquisque in solidum, quisque in solidum habeat actionem. Nec alterius scientia alteri nocebit, vel ignorantia proderit.

§ 3.- Si eum liberum esse emptor nesciit, postea autem scire coepit, hoc ei non nocebit, quia tunc ignoravit. Sed si tunc sciit, postea dubitare coepit, nihilum proderit.

§ 4.- Heredi et ceteris successoribus scientia sua nihil nocet, ignorantia nihil prodest.

21.- MODESTINUS; *Concerning Penalties, Book I*.- Therefore, double the amount of what the purchaser either paid, or bound himself for with reference to the sale, will be due. According to this, whatever either of the parties may pay will not operate to release the other; because it has been decided that this action is a penal one. Hence, it is not granted after the lapse of a year, nor can it be brought against the successors of the person liable to it, as it is a penal action. Therefore, the action which arises from this Edict may, very properly, be said not to be extinguished by manumission, because it is true that the vendor cannot be sued after legal measures have been taken against him who demanded his freedom.

22.- ULPIANUS; *On the Edict, Book LV*.- Not only the purchaser himself, but also his heirs, can institute proceedings by means of this action in factum.

§ 1.- We understand anyone to make a purchase, even where he does so by another, as, for instance, through an agent.

§ 2.- Where, however, several persons make a purchase, while all of them will be entitled to this action, still, if they have bought different shares, they can bring suit in proportion to the respective amounts of the price which they have paid; or if each one bought the entire interest in the slave, each will be entitled to an action to recover in full; nor will the knowledge or the ignorance of any one of them benefit or prejudice the others.

§ 3.- If the purchaser was not aware that the man who was sold was free, and he afterwards learned this, his rights will not be prejudiced, because he was ignorant of the fact at the time. But if he knew it when the sale took place, and afterwards doubted its truth, this will be of no advantage to him.

§ 4.- Knowledge does not prejudice, nor ignorance benefit the heir and other successors of the purchaser in any way.

21.- MODESTINO; *De las Penas, libro I*.- Por supuesto, el duplo de lo que por causa de la compra dió, o de aquello a que se obligó. Según lo cual, lo que uno de ellos hubiere pagado no servirá de nada para descargar al otro, porque plugo que esta acción fuese penal; y por lo tanto, no se da después de un año; ni, siendo penal, se ejercitará contra los sucesores. Con muchísima razón se dirá que no se extingue con la manumisión la acción que nace de este Edicto, porque es verdad que no puede ser demandado el vendedor, después del cual se llegaba al que reclamó la libertad.

22.- ULPIANO; *Comentarios al Edicto, libro LV*.- Mas no solamente el comprador, sino también sus sucesores podrán ejercitar esta acción por el hecho.

§ 1.- Comprar lo entenderemos así, aunque alguno comprare por medio de otro, por ejemplo, por medio de procurador.

§ 2.- Pero aunque hayan sido muchos los compradores, todos tendrán esta acción, pero de modo, que si verdaderamente hubieren comprado por partes, tengan la acción por una parte del precio; pero si cada uno compró la totalidad, cada uno tendrá acción por la totalidad; y ni el conocimiento del uno le perjudicará al otro, ni la ignorancia le aprovechará.

§ 3.- Si el comprador ignoraba que aquél fuese libre, pero después comenzó a saberlo, esto no le perjudicará, porque lo ignoró entonces; pero si lo supo entonces, y después comenzó a dudar, de nada le aprovechará.

§ 4.- Su propio conocimiento en nada perjudica, y su ignorancia en nada aprovecha, al heredero y a los demás sucesores.

§ 5.- Sed si per procuratorem scientem quis emerit, ei nocet, sicuti tutoris quoque nocere labeo putat.

§ 6.- Haec actio post annum non datur, quum sit honoraria: est autem et poenalis.

23.- PAULUS; *libro L, ad Edictum*.- Si usum fructum tibi vendidero liberi hominis et cessero, servum effici eum dicebat Quintus Mucius, sed dominium ita demum fieri meum, si bona fide vendidissem, alioquin sine domino fore.

§ 1.- In summa sciendum est, quae de venditis servis, quibus denegatur ad libertatem proclamatio, dicta sunt, etiam ad donatos et in dotem datos referri posse, item ad eos, qui pignori se dari passi sunt.

§ 2.- Si mater et filius de libertate litigant, aut coniungenda sunt utrorumque iudicia aut differenda est causa filii, donec de matre constet, sicut Divus quoque Hadrianus decrevit. Nam quum apud alium iudicem mater litigabat, apud alium autem filius, Augustus dixit ante de matre constare oportere, sic dein de filio cognosci.

24.- IDEM; *libro LI, ad Edictum*.- Ordinata liberali causa liberi loco habetur is, qui de statu suo litigat, ita ut adversus eum quoque, qui se dominum esse dicit, actiones ei non denegentur, quascumque intendere velit: quid enim si quae tales sint, ut tempore aut morte intereant? Quare non concedatur ei litem contestando in tutum eas redigere?

§ 1.- Quin etiam servius ait in actionibus annuis ex

§ 5.- If, however, anyone should make the purchase by an agent, who knows that the man is free, it will prejudice him; and Labeo thinks that the knowledge of a guardian will, under these circumstances, prejudice his ward.

§ 6.- This action is not granted after a year, as it is an equitable as well as a penal one.

23.- PAULUS; *On the Edict, Book L*.- If I should sell and transfer to you the usufruct in a man who is free, Quintus Mucius says that he will become a slave, but the ownership will not become mine, unless I sell the usufruct in good faith, for, otherwise, there will be no owner.

§ 1.- In a word, it must be noted that what has been said with reference to men sold as slaves, and whose claim to freedom is denied, also applies to such as are donated, and given by way of dowry; just as it does to those who have permitted themselves to be given in pledge.

§ 2.- Where a mother and her son both demand their freedom, the cases of the two should be joined, or that of the son should be deferred until the mother's case has been decided; as was decreed by the Divine Hadrian. For where the mother has instituted proceedings before one judge, and her son before another, Augustus stated that the condition of the mother must first be established, and after that the case of the son should be heard.

24.- THE SAME; *On the Edict, Book LI*.- After the preliminaries of a suit involving the demand for freedom have been legally complied with, he who brought it to establish his status is considered to be free, and actions will not be refused him against one who alleges that he is his owner, no matter what actions he may desire to bring. But what if these are suits, the right to which is extinguished by lapse of time, or by death? Why should he not be granted the power to institute these proceedings in security after issue has been joined?

§ 1.- Moreover, Servius says that, in cases where

§ 5.- Pero si alguno hubiere comprado por medio de procurador que lo sabía, le perjudicará, como opina Labeón que perjudica también que lo sepa el tutor.

§ 6.- Esta acción no se da después del año, porque es honoraria; pero también es penal.

23.- PAULO; *Comentarios al Edicto, libro L*.- Si yo te hubiere vendido y cedido el usufructo de un hombre libre, decía Quinto Mucio que éste se hacía esclavo, pero que su dominio se hacía mío solamente si yo lo hubiese vendido de buena fe, pues de otra suerte estará sin dueño.

§ 1.- En suma, se ha de saber, que lo que se ha dicho respecto a los esclavos vendidos, a quienes se les deniega la reclamación de la libertad, se puede referir también a los que fueron donados, y a los dados en dote, y también a los que consintieron ser dados en prenda.

§ 2.- Si la madre y el hijo litigan sobre la libertad, o se han de acumular los juicios de ambos, o se ha de aplazar el litigio del hijo hasta que conste lo relativo a la madre, según decretó también el Divino Adriano; porque litigando la madre ante un juez, y el hijo ante otro, dijo Augusto, que antes debía constar lo relativo a la madre, y así conocerse después en cuanto al hijo.

24.- EL MISMO; *Comentarios al Edicto, Libro LI*.- Fijado el orden para la causa sobre la libertad es considerado en la calidad de libre el que litiga sobre su propio estado; de suerte que no se le denieguen aun contra el que dice que él es dueño las acciones, cualesquiera que desee intentar; porque ¿qué se dirá, si algunas fueran tales que se extingan con el tiempo o con la muerte? ¿Por qué no se le concederá que las ponga a seguro contestando el litigio?

§ 1.- Antes bien, dice Servio, que en las acciones

eo tempore annum cedere, ex quo lis ordinata sit.

§ 2.- Sed si quum aliis experiri velit, non est quaerendum, an lis ordinata sit, ne inveniatur ratio, quemadmodum subiecto aliquo, qui libertati controversiam moveat, interim actiones excludantur: aequae enim ex eventu iudicii liberalis aut utilis aut inanis actio eius efficietur.

§ 3.- Sed si quas actiones inferat dominus, quaeritur, an compellendus sit suscipere iudicium. Et plerique existimant, si in personam agat, suscipere ipsum ad litis contestationem, sed sustinendum iudicium, donec de libertate iudicetur: nec videri praeiudicium libertati fieri aut voluntate domini in libertate eum morari: nam ordinato liberali iudicio interim pro libero habetur, et sicut ipse agere, ita quum ipso quoque agi potest. Ceterum ex eventu aut utile iudicium erit aut nullum, si contra libertatem pronuntiatum fuerit.

§ 4.- Si is, qui in libertatem proclamat, furti aut damni iniuria ab aliquo arguatur, mela ait interim eum cavere debere iudicio se sisti, ne melioris conditionis sit qui dubiae libertatis est, quam qui certae: sed sustinendum iudicium, ne praeiudicium libertati fiat. Aequae si quum possessore hominis furti agi coeperit, deinde is, cuius nomine agebatur, in libertatem proclamaverit, sustinendum iudicium, ut, si liber iudicatus sit, in ipsum transferatur iudicium: et, si damnatio facta sit, iudicati actionem potius in eum dandam.

the right to bring actions is barred after a year has elapsed, the year must be reckoned from the day on which the case relating to freedom was disposed of.

§ 2.- If, however, it is considered desirable to proceed against others, it will not be necessary to wait until the first case has been decided, lest in the meantime means may be found to bar these actions by the introduction of someone who will dispute the right of the alleged slave to be free. In like manner, an action can legally be brought or not, according to the decision in the case involving the freedom of the party in question.

§ 3.- If the alleged owner should bring an action, the question arises whether the defendant will be obliged to join issue. Several authorities hold that if he brings an action in personam, he must undertake the defence of the case, but judgment must be suspended until the question of his freedom has been determined; nor should it be held that his attempt to obtain his freedom is prejudiced, or that he remains at liberty with the consent of his master. For after the case brought to establish his freedom has been decided, he is considered, in the meantime, to be free; and as he himself can bring actions, so also, actions can be brought against him; but it will depend upon the result, as the judgment will either be valid if it is in his favor, or it will be void if it is adverse to his freedom.

§ 4.- Where he who demands his freedom is accused of theft, or of wrongful damage by anyone, Mela says that he must, in the interim, furnish security that he will be present when the decision is rendered, to prevent the condition of one whose freedom is in doubt from becoming preferable to that of a person whose freedom is certain; but judgment must be deferred to avoid committing any wrong against liberty. Likewise, where an action of theft is brought against the possessor of a man alleged to be a slave, and he is afterwards sued in the name of him who claimed his freedom, the decision of the case must be suspended; so that if the latter is ascertained to be free, the case against him can be transferred, and if the judgment should be unfavorable, the action to

ánuas corre el año desde el momento en que fue fijado el orden para el litigio.

§ 2.- Pero si quisiera ejercitar la acción contra otros, no se ha de mirar si se ha fijado el orden del litigio, a fin de que no se halle razón para que, como si interviniera alguno, que promueva controversia sobre la libertad, se extingan entretanto las acciones; porque por el resultado del juicio sobre la libertad se hará igualmente o útil, o baldía, su acción.

§ 3.- Mas si el dueño promoviera algunas acciones, se pregunta si habrá de ser compelido a aceptar el juicio. Y estiman los más, que si ejercita acción personal, él lo acepta hasta la contestación del litigio, pero que ha de sostener el juicio hasta que se juzgue sobre la libertad, y que no se considera que se causa perjuicio a la libertad, o que él permanece en la libertad con la voluntad del dueño; porque fijado el orden para el juicio sobre la libertad, es considerado entretanto como libre; y así como él puede ejercitar la acción, así también puede ser ejercitada contra él; mas según el resultado o sera útil el juicio, o nulo, si se hubiere fallado contra la libertad.

§ 4.- Si el que reclama la libertad fuese acusado por alguno de hurto o de daño con injuria, dice Mela, que mientras tanto debe él dar caución de presentarse en el juicio, a fin de que no sea de mejor condición el que es de libertad dudosa, que el que de cierta. Pero se ha de sostener el juicio a fin de que no se cause perjuicio a la libertad; Igualmente, si se hubiere comenzado a ejercitar la acción de hurto contra el poseedor del esclavo, y después aquél en cuyo nombre se ejercitaba reclamare la libertad, se ha de sostener el inicio, para que, si fuera juzgado libre, se transfiera a él el juicio, y, si se hubiera hecho condenación, se haya de dar mas bien contra él la acción de cosa juzgada.

enforce it can be granted against him.

25.- GAIUS; *ad Edictum Praetoris urbani, titulo de liberali causa.*- Si cui de libertate sua litiganti optio legata sit, quaecumque hereditate ei relicta dicuntur, eadem et de optione tractari possunt.

§ 1.- Interdum ex integro datur ad libertatem proclamatio, veluti eius, qui adfirmat ideo se primo iudicio victum, quod statuta libertas nondum ei optigerat, quam nunc dicit sibi optigisse.

§ 2.- Licet vulgo dicatur post ordinatum liberale iudicium hominem, cuius de statu controversia est, liberi loco esse, tamen, si servus sit, certum est nihilo minus eum, quod ei tradatur vel stipuletur, perinde domino adquirere atque si non de libertate eius quaerebatur. Tantum de possessione videbimus, quum ipsum post litem ordinatam desinat dominus possidere: sed magis est, ut adquirat, licet ab eo non possideatur. et quum placuit per fugitivum quoque nos possessionem adquirere posse, quid mirum etiam per hunc, de quo quaeramus adquiri?

26.- IDEM; *libro XX, ad Edictum provinciale.*- Qui ex libertate in servitutem petit, si iudicii de evictione servandi causa contra libertatem agit, iniuriarum actione non convenitur.

27.- ULPIANUS; *libro II, de officio Consul.*- Divi Fratres Proculo et Munatio Rescripserunt: "quum Romulus, de cuius statu quaeritur, pupillaris aetatis sit, an exigente Varia Hedone matre et consentiente Vario Hermete tutore ad tempus pubertatis causa differenda sit, vestrae gravitatis est ex fide personarum quod utile est pupillo, constituere".

25.- GAIUS; *On the Edict of the Urban Praetor: Title: Actions Relating to Freedom.*- If an option has been bequeathed to anyone demanding his liberty in court, whatever has been stated with reference to the bequest of an estate will also apply to that of an option.

§ 1.- The right to bring a second action to obtain freedom is sometimes granted; as for instance, where a party alleges that he lost the first case because his freedom depended upon a condition which had not previously been complied with.

§ 2.- Although it is commonly stated that, after a case involving freedom has been decided, the person whose condition was in controversy is considered to be free; still, if he is really a slave, it is certain that he, nevertheless, will acquire for his master whatever has been delivered to or promised him, just as if no question had arisen concerning his freedom. We shall see that there is no dispute as to his possession, since his master ceases to possess him after the case has been decided. The better opinion is that he acquires possession, although he is not possessed by him. And, as it has been settled that we acquire possession by our slaves, even if they are fugitives, why should it be wondered at that we also acquire possession by one whose right to freedom we deny?

26.- THE SAME; *On the Provincial Edict, Book XX.*- Where anyone claims a person who is at liberty as his slave, and only brings the action for the purpose of having recourse in case of eviction, he cannot be sued in an action on injury.

27.- ULPIANUS; *On the Duties of Consul, Book II.*- The Divine Brothers, in a Rescript addressed to Proculus and Munatius, stated as follows: "As Romulus, whose condition is disputed, is near the age of puberty, and at the request of his mother, Varia Hado, and with the consent of Varius Hermes, his guardian, judgment in the case was postponed until the child should reach the age of puberty, it is left to

25.- GAYO; *Comentarios al Edicto del Pretor urbano, título de la causa sobre la libertad.*- Si al que litiga sobre su libertad se le hubiera hecho un legado de opción, se puede aplicar también a la opción lo mismo que se ha dicho respecto a la herencia que se le dejó.

§ 1.- A veces se da en virtud de la restitución por entero la reclamación de la libertad, por ejemplo, cuando alguno afirma que él fue vencido en el primer juicio porque aun no le había correspondido la libertad dejada, la cual dice que le ha correspondido ahora.

§ 2.- Aunque vulgarmente se diga que después de entablado el juicio sobre la libertad esta en calidad de libre el hombre sobre cuyo estado hay controversia, sin embargo, si fuera esclavo, es lo cierto que, ello no obstante, adquiere para su señor lo que se le entrega o lo que estipula, lo mismo que si no se cuestionaba sobre su libertad. Solamente lo entenderemos respecto a la posesión, porque después de entablado el litigio el señor deja de poseerlo a él. Pero es mas cierto que la adquiere, aunque por él no sea poseído; y como se determinó que podemos adquirir la posesión también por medio de un fugitivo, ¿qué extraño es que también se adquiriera por medio de éste de quien tratamos?

26.- EL MISMO; *Comentarios al Edicto provincial, libro XX.*- El que de la libertad reclama a otro a esclavitud, si reclama contra la libertad para conservar la acción de evicción, no es demandado con la acción de injurias.

27.- ULPIANO; *Del cargo de Cónsul, libro II.*- Los Divinos Hermanos respondieron por rescripto a Próculo y a Munacio: «siendo Rómulo, de cuyo estado se trata, de edad pupilar, exigiéndolo su madre Varia Hedon y consintiendo el tutor Vario Hermete, que la causa se haya de diferir al tiempo de la pubertad, corresponde a vuestra gravedad determinar por el testimonio de personas qué es lo que es

your discretion to determine what will be advantageous to the minor, the position of the parties interested being taken into account."

§ 1.- Si ea persona desit cognitioni, quae alicui status controversiam faciebat, in eadem causa est qui de libertate sua litigat, qua fuit, priusquam de libertate controversiam patiat: sane hoc lucratur, quod is qui eam status controversiam faciebat amittit suam causam. Nec ea res ingenuum facit eum qui non fuit: nec enim penuria adversarii ingenuitatem solet tribuere. Recte atque ordine iudices puto facturos, si hanc formam fuerint consecuti, ut, ubi deest is qui in servitutem petit, electionem adversario deferant, utrum malit cognitionem circumduci an audita causa sententiam proferri. Et si cognoverint, pronuntiare debebunt servum illius non videri: neque haec res captionem ullam habet, quum non ingenuus pronuntietur, sed servus non videri. Quod si ex servitute in ingenuitatem se allegat, melius fecerint, si cognitionem circumdlexerint, ne sine adversario pronuntient ingenuum videri, nisi magna causa suadeat et evidentes probationes suggerant secundum libertatem pronuntiandum: ut etiam Rescripto Hadriani continetur.

§ 2.- Quod si is, qui pro sua libertate litigat, desit, contradictor vero praesens sit, melius erit in augeri causam eius sententiamque proferri: si enim liquebit, contra libertatem dabit: evenire autem potest, ut etiam absens vincat: nam potest sententia etiam secundum libertatem ferri.

28.- POMPONIUS; *libro XII, ad Quintum Mucium*.- Non videtur domini voluntate servus in libertate esse, quem dominus ignorasset suum esse: et est hoc verum: is enim demum voluntate domini in

§ 1.- If the person who raised the question concerning the condition of another fails to appear at the trial, he who demands his freedom is in the same condition as he was before the controversy arose with reference to it. He, however, is benefited to this extent, namely, that he who disputed his status will lose his case. This fact, however, does not render him freeborn who previously was not so, for the failure of an adversary to appear does not confer the right of freedom. I think that judges will act lawfully and regularly if they pursue the regular order; so that where the party claiming the man as his slave fails to appear, his adversaries shall be given the choice either of having the case continued, or of having it heard and determined. If the judges should hear the case, they must decide that the party in question does not appear to be the slave of So-and-So. This decision does not take undue advantage of anyone, as the person whose estate is in controversy is not found to be freeborn, but is merely held not to be a slave. Where, however, one who is in slavery claims his freedom, the better course for the judges to pursue will be to continue the case, in order to avoid deciding that the said person appears to be born free, when no adversary appears, unless there should be good reason to cause them to hold that it is clear that judgment should be rendered in favor of liberty; as is also stated in a Rescript of Hadrian.

§ 2.- If, however, he who demands his freedom fails to appear, and his opponent is present, it will be better to proceed with the case and have judgment rendered. If the adversary offers sufficient evidence, the judge shall decide against freedom. It may, however, happen that the absent party will be successful, for the decision may be rendered in favor of freedom.

28.- POMPONIUS; *On Quintus Mucius, Book XII*.- A slave is not considered to be at liberty with the consent of his master when the latter does not know that he belongs to him. This is perfectly true; for the

útil al pupilo».

§ 1.- Si dejara de presentarse en el juicio la persona que a alguno le promovía controversia sobre su estado, el que litiga por su propia libertad se halla en el mismo caso en que estaba antes de que sufriera controversia sobre la libertad. Y gana a la verdad esto, que pierde su propia causa el que promovía aquella controversia sobre el estado; y esto no hace ingenuo al que no lo era, porque tampoco la falta de adversario suele atribuir la ingenuidad. Yo creo que los jueces obrarán bien y con orden si siguieren esta norma, que cuando falta el que reclama a esclavitud le defieran al adversario la elección de si prefiere que sea anulado el juicio, o que oída la causa se profiera sentencia; y si conocieren de ella, deberán declarar que no se considera que es esclavo de aquél; y esto no contiene ninguna capciosidad, porque no se declara que es ingenuo, sino que no parece que es esclavo. Pero si estando en la esclavitud alegara que es ingenuo, obrarán mejor si declararen anulado el juicio, a fin de no fallar sin adversario que parece ingenuo, a no ser que una poderosa causa aconseje, y evidentes pruebas indiquen, que se ha de fallar a favor de la libertad, como también se contiene en el rescripto de Adriano.

§ 2.- Mas si el que litiga por su libertad estuviera ausente, pero su contradictor estuviese presente, será mejor que se substancie la causa de éste, y que se profiera sentencia; porque si apareciere probado, la dará contra la libertad. Mas puede suceder que venza aun el que está ausente; porque también se puede proferir sentencia a favor de la libertad.

28.- POMPONIO; *Comentarios a Quinto Mucio, libro XII*.- No se considera que está en libertad con la voluntad de su señor el esclavo que su señor ignorase que es suyo; y esto es verdad, porque está en libertad

libertate est, qui possessionem libertatis ex voluntate domini consequitur.

29.- ARRIUS MENANDER; *libro I, de Re militari*.- Qui de libertate sua litigans necdum sententia data militiae se dedit, in pari causa ceteris servis habendus est nec exonerat eum, quod pro libero habeatur in quibusdam. Et licet liber apparuerit, exactoratus, id est militia remotus castris reicietur, utique qui ex servitute in libertatem petitus sit vel qui non sine dolo malo in libertate moratus est: qui vero per calumniam petitus in servitutem est, in militia retinebitur.

§ 1.- Qui ingenuus pronuntiatus est, si se militiae dedit, intra quinquennium retractata sententia novo domino reddendus est.

30.- IULIANUS; *libro V, ex Minicio*.- Duobus petentibus hominem in servitutem pro parte dimidia separatim, si uno iudicio liber, altero servus iudicatus est, commodissimum est eo usque cogi iudices, donec consentiant: si id non continget, Sabinum refertur existimasse duci servum debere ab eo qui vicisset: cuius sententiae Cassius quoque est et ego sum. Et sane ridiculum est arbitrari eum pro parte dimidia duci, pro parte libertatem eius tueri. commodius autem est favore libertatis liberum quidem eum esse, compelli autem pretii sui partem viri boni arbitrato victori suo praestare.

31.- ULPIANUS; *libro I, Responsorum*.- Filium ob hoc, quod patri heres extitit, prohiberi a patre suum servum manumissum in servitutem petere.

slave is only at liberty under such circumstances when he acquires possession of freedom with his master's consent.

29.- ARRIUS MENANDER; *On Military Affairs, Book V*.- Where anyone institutes proceedings to obtain his freedom, and enlists in the army before a decision is rendered, he should be held to occupy the same position as other slaves, and he will not be relieved because, in some respects, he is considered as free. And, although he may have appeared to be free, he can be dishonorably discharged, that is, dismissed from the army, and driven from the camp as one who demanded freedom while in slavery, or who was at liberty through fraud. But anyone who has been falsely and maliciously claimed as a slave shall be retained in the service.

§ 1.- Where anyone who has been judicially declared freeborn enlists in the army, and the decision is reversed within five years, he shall be returned to his new master.

30.- JULIANUS; *On Minicius, Book V*.- Where two persons separately claim a man as their slave, and each of them alleges that he owns half of him, and, by one judgment, he is declared to "be free, and by another, he is pronounced to be a slave, the most convenient course will be for the judges to be compelled to agree. If this cannot be done, Sabinus states that it has been held that the man should be taken as a slave by the party who gained the case. Cassius (as well as myself), adopts this opinion, and, indeed, it is ridiculous for the man to be considered half slave, and also to be protected in the enjoyment of half his freedom. It is, however, convenient to decide that he was free, on account of the favor conceded to liberty, and to compel him to pay to the party who gained the case half of his value, as appraised by a reliable citizen.

31.- ULPIANUS; *Opinions, Book I*.- A son who appears as the heir of his father is forbidden from demanding as a slave one who had been manumitted by his father.

con la voluntad de su señor solamente el que con la voluntad de su señor consigue la posesión de la libertad.

29.- ARRIO MENANDERO.- *De los asuntos militares, libro I*.- El que litigando sobre su libertad se dedicó a la milicia no habiéndose dado todavía la sentencia, ha de ser tenido en igual condición que los demás esclavos; y no le exime de ello que en algunas cosas sea tenido como libre; y aunque hubiere aparecido libre será expulsado de los campamentos degradado, esto es, excluido; de la milicia; esto ciertamente respecto al que estando en la esclavitud fue reclamado para la libertad, o respecto al que sin dolo malo permaneció en la libertad; mas el que por calumnia fue reclamado a la esclavitud sera retenido en la milicia.

§ 1.- El que fue declarado ingenuo, si se dedicó a la milicia, ha de ser restituido a su nuevo señor habiéndose revocado la sentencia dentro de un quinquenio.

30.- JULIANO; *Doctrina de Minicio, libro V*.- Reclamando dos a un hombre para la esclavitud cada uno separadamente por la mitad, si en un juicio fue juzgado libre, y esclavo en otro, es lo mas conveniente que se apremie a los jueces hasta que se pongan de acuerdo; y si esto no sucediera, dicese que opinó Sabino, que se debía llevar al esclavo el que hubiese vencido: de cuya opinión es también Cassio y soy yo. Y verdaderamente es ridículo que se determine que él sea llevado por mitad, y que respecto a la otra mitad se ampare su libertad; pero es mas conveniente que por favor a la libertad sea éste, a la verdad, libre, pero que sea compelido a entregarle a su vencedor parte de su propio precio a arbitrio de hombre bueno.

31.- ULPIANO; *Respuestas, libro I*.- Al hijo se le prohíbe que reclame a esclavitud, porque haya quedado siendo heredero de su padre, a un esclavo suyo manumitido por su padre.

32.- PAULUS; *libro VI, Regularum*.- De bonis eorum, qui ex servitute aut libertate in ingenuitatem vindicati sunt, Senatusconsultum factum est, quo cavetur de his quidem, qui ex servitute defensi essent, ut id dumtaxat ferrent, quod in domo cuiusque intulissent: in eorum autem bonis, qui post manumissionem repetere originem suam voluissent, hoc amplius, ut, quod post manumissionem quoque adquisissent non ex re manumissoris, secum ferant, cetera bona relinquerent illi, ex cuius familia exissent.

33.- IDEM; *libro singulari de liberali causa*.- Qui sciens liberum emit, quamvis et ille se pateretur venire, tamen non potest contradicere ei qui ad libertatem proclamat: sed si alii eum ignoranti vendiderit, denegabitur et proclamatio.

34.- ULPIANUS; *libro singulari Pandectarum*.- Imperator Antoninus constituit non alias ad libertatem proclamationem cuiquam permittendam, nisi prius administrationem rationes reddiderit, quas quum in servitute esset gessisset.

35.- PAPINIANUS; *libro IX, Responsorum*.- Servos ad templi custodiam, quod aedificari Titia voluit, destinatos neque manumissos heredis esse constitit.

36.- IDEM; *libro XII, Responsorum*.- Dominus qui optinuit, si velit servum suum abducere, litis aestimationem pro eo accipere non cogetur.

37.- CALLISTRATUS; *libro II, Quaestionum*.- Conventio privata neque servum quemquam neque libertum alicuius facere potest.

38.- PAULUS; *libro XV, Responsorum*.- Paulus respondit, si, ut proponitur, post perfectam sine ulla

32.- PAULUS; *Rules, Book VI*.- A decree of the Senate was enacted concerning the property of those who, as slaves or as freedmen, have acquired the status of freeborn persons. With reference to those who were formerly in a state of slavery, it permits them only to take with them what they conveyed into the houses of their alleged masters, and to those who, after their manumission, desired to recover their original rights. This also was conceded, namely, that whatever they had acquired after their manumission (but not anything obtained through the agency of the person who set them free), they could take with them; and that they must leave all other property with him from whose household they departed.

33.- THE SAME; *Actions Relating to Freedom*.- Anyone who knowingly purchases a man who is free, even if the latter permits himself to be sold, cannot, nevertheless, oppose him, if he demands his freedom. Where, however, he sells the man to another person who was ignorant of the facts, the supposed slave will not be permitted to demand his liberty.

34.- ULPIANUS; *Pandects*.- The Emperor Antoninus decided that no one should be permitted to demand his freedom, unless he previously had rendered an account of the administration which he had conducted while in slavery.

35.- PAPINIANUS; *Opinions, Book IX*.- It has been settled that the slaves destined for the care of a temple which Titia intended to build, and who had not been manumitted, belonged to her heir.

36.- THE SAME; *Opinions, Book XII*.- A master who has gained his case, and wishes to take away his slave, cannot be compelled to accept the appraised value instead of the slave.

37.- CALLISTRATUS; *Questions, Book II*.- A private agreement cannot make anyone either the slave or the freedman of another.

38.- PAULUS; *Opinions, Book XV*.- Paulus gave it as his opinion that if (as is stated) after a sale has been

32.- PAULO; *Reglas, libro VI*.- En cuanto a los bienes de los que del estado de esclavitud o de libertino fueron reivindicados para la ingenuidad, se hizo un Senadoconsulto en el que se dispone respecto a los que hubiesen sido defendidos de la esclavitud, que se lleven únicamente lo que hubiesen llevado a la casa de cualquiera; mas en cuanto a los bienes de los que después de la manumisión hubiesen querido reclamar su propio origen, se dispuso además que se lleven consigo también lo que hubiesen adquirido después de la manumisión, no con los bienes del manumisor, y que los demás bienes los dejen a aquél de cuya familia hubiesen salido.

33.- EL MISMO; *De la causa sobre la libertad, libro único*.- El que a sabiendas compró un hombre libre, aunque también éste consintiese ser vendido, no puede, sin embargo, oponerse al que reclama la libertad; pero si lo hubiere vendido a otro que lo ignora, se le denegará la reclamación de la libertad.

34.- ULPIANO; *Pandectas, libro único*.- Determinó el Emperador Antonino, que no se le ha de permitir a nadie la reclamación de la libertad de otra suerte sino si antes hubiere rendido las cuentas de las administraciones, que hubiese llevado cuando estaba en la esclavitud.

35.- PAPINIANO; *Respuestas, libro IX*.- Es sabido que los esclavos destinados a la custodia del templo, que Ticia quiso que se edificase, y que no fueron manumitidos, son del heredero.

36.- EL MISMO; *Respuestas, libro XII*.- El señor que venció, si quiere llevarse su esclavo, no será obligado a recibir en lugar de él la estimación del litigio.

37.- CALISTRATO; *Cuestiones, libro II*.- Una convención privada no puede hacer que uno sea ni esclavo ni liberto de alguno.

38.- PAULO; *Respuestas, libro XV*.- Paulo respondió, que, si perfeccionada, como se propone,

condicione emptionem postea emptor ex voluntate sua litteras emisit, quibus profiteretur se post certum tempus manumissurum eum quem emerat, non videri eas litteras ad constitutionem Divi Marci pertinere.

§ 1.- Idem respondit constitutionem quidem Divi Marci ad libertatem eorum Mancipiorum pertinere, quae hac lege venierint, ut post tempus manumitterentur: sed eundem favorem libertatis consequendae causa etiam eam mereri, pro qua dominus pretium accepit, ut ancillam suam manumitteret, quum idem etiam libertam habiturus sit.

§ 2.- Quaesitum est, an emptor servo recte libertatem dederit nondum pretio soluto. Paulus respondit servum, quem venditor emptori tradidit, si ei pro pretio satisfactum est, et nondum pretio soluto in bonis emptoris esse coepisse.

§ 3.- Caius Seius Stichum servum Lucio Titio vendidit ita, ut Titius Stichum post triennium manumitteret, si continuo triennio servisset: sed nondum exacto tempore trienni Stichus fugit et post aliquantum temporis defuncto Titio revertit: quaero, an obstet Sticho ad consequendam ex venditione libertatem, quod ante triennium discesserit. Paulus respondit secundum ea quae proponuntur expleto tempore, post quod Stichus manumitti debuit, libertatem ei competisse.

39.- IDEM; *libro V, Sententiarum*.- Cui necessitas probandi de ingenuitate sua non incumbit, ultro si ipse probare desideret, audiendus est.

§ 1.- Qui de ingenuitate cognoscunt, de calumnia eius, qui temere controversiam movit, ad modum exilii possunt ferre sententiam.

made unconditionally, the purchaser voluntarily sent a letter by which he declared that, after a certain time, he would manumit the slave whom he had bought, this letter had no reference whatever to the Constitution of the Divine Marcus.

§ 1.- He also gave it as his opinion that the Constitution of the Divine Marcus applied to the cases of slaves who were sold under the condition of being manumitted after a certain time; and that a female slave, for whom her master had received money for the purpose of manumitting her, was entitled to the same favor of freedom, as he would also have authority over her as his freedwoman.

§ 2.- The question arose whether a purchaser could legally grant freedom to his slave, if his price had not yet been paid. Paulus answered that if the vendor had delivered the slave to the purchaser, and had been furnished with security for his price, he would belong to the purchaser, even if the money had not been paid.

§ 3.- Gaius Seius sold Stichus, his slave, under the condition that Titius would manumit Stichus at the end of three years, if he served him continually during that time. Stichus fled before the three years had elapsed, and returned in a short time after the death of Titius. I ask whether Stichus would be prevented from obtaining his freedom under the terms of the sale, by having taken to flight before the three years had expired? Paulus gave it as his opinion that, according to the facts stated, Stichus should be manumitted, and was entitled to his freedom after the term which had been prescribed.

39.- THE SAME; *Opinions, Book V*.- He who is not required to produce proofs of his free birth should be heard, if he himself voluntarily desires to offer them.

§ 1.- Magistrates who have cognizance of causes involving freedom of birth can impose penalties, to the extent of exile, against anyone who rashly and maliciously institutes proceedings.

sin ninguna condición la compra, el comprador escribió después por su propia voluntad una carta en la que manifestase que él después de cierto tiempo manumitirá al que había comprado, no se consideraba que esta carta estuviese comprendida en la Constitución del Divino Marco.

§ 1.- El mismo respondió, que la Constitución del Divino Marco se refería ciertamente a la libertad de aquellos esclavos, que fueron vendidos con la condición de ser manumitidos después de cierto tiempo, pero que el mismo favor merece para conseguir la libertad también aquella por la cual su señor recibió precio, para que manumitiese a su esclava, porque él mismo la habrá de tener también como liberta.

§ 2.- Se preguntó, si el comprador le habrá dado válidamente la libertad a un esclavo, no habiendo pagado todavía el precio. Paulo respondió, que el esclavo que el vendedor entregó al comprador, si a aquél se le dio fianza respecto al precio, comenzó a estar en los bienes del comprador aun no habiéndose pagado el precio.

§ 3.- Cayo Seyo le vendió a Lucio Ticio su esclavo Stico con la condición de que Ticio manumitiese a Stico después de tres años, si le hubiese servido los tres años continuos; pero no habiendo transcurrido todavía el tiempo de los tres años huyó Stico, y volvió después de algún tiempo, habiendo fallecido Ticio; pregunto, si para conseguir la libertad en virtud de la venta le obstará a Stico el haberse marchado antes de los tres años. Paulo respondió, que, según lo que se expone, cumplido el tiempo, después del cual debió ser manumitido Stico, le competió a éste la libertad.

39.- EL MISMO; *Sentencias, libro V*.- Aquel a quien no le incumbe la necesidad de probar su ingenuidad, ha de ser oído si voluntariamente deseara probarla él mismo.

§ 1.- Los que conocen de la ingenuidad pueden proferir sentencia a manera de destierro por la calumnia del que temerariamente promovió la con-

§ 2.- Tutores vel curatores pupillorum, quorum tutelam et res administraverunt, postea status quaestionem facere non possunt.

§ 3.- Maritus uxori eidemque libertae status quaestionem inferre non prohibetur.

40.- HERMOGEINANUS; *libro V, iuris Epitomarum*.- Quum pacto partitionis pretii maior viginti annis venalem se praebuit, nec post manumissionem ad libertatem proclamare potest.

41.- PAULUS; *libro singulari de Articulis liberalis cause*.- Si in obscuro sit, in quo fuerit statu is, qui pro libertate sua litigat, prior audiendus est probare volens se ipsum in libertatis esse possessionem.

§ 1.- Iudex autem, qui de libertate cognoscit, etiam de rebus amotis damnove facto cognoscere debet: fieri enim potest, ut fiducia libertatis et subripere quaedam et corrumpere atque consumere ex bonis, quibus serviebat, ausus sit.

42.- LABEO; *libro IV, Posteriorum*.- Si servus quem emerat ad libertatem proclamavit et ab iudice perperam pro eo iudicatum est et dominus eius servi post rem contra te iudicatam te heredem fecit aut alio quo nomine is tuus esse coepisset, petere eum tuum esse poteris nec tibi obstat rei iudicatae praescriptio. Iavolenus: haec vera sunt.

43.- POMPONIUS; *libro III, Senatusconsultorum*.- De his, qui bona eorum quibus serviebant interceptissent, deinde ad libertatem proclamabant, Hadrianus Imperator Rescripsit, cuius rescripti verba haec sunt: "sicut non est aequum fiducia libertatis, quae ex fideicommissi causa praestanda est,

§ 2.- Guardians or curators cannot raise any question as to the condition of the wards whose guardianship and whose property they have administered.

§ 3.- A husband is not prohibited from raising a question as to the condition of his wife or his freedwoman.

40.- HERMOGENIANUS; *Epitomes of Law, Book V*.- Where a minor of twenty years of age permits himself to be sold under an agreement to share his price, he cannot, after his manumission, demand that he be declared freeborn.

41.- PAULUS; *Articles Referring to Actions for Freedom*.- If there is any doubt as to the condition of a person who demands his freedom, he should first be heard, if he wishes to prove that he himself is in possession of freedom.

§ 1.- The judge who has jurisdiction of cases where freedom is involved should also take cognizance of property which has been stolen, or serious damage committed by the claimant. For it can happen that, being confident that he will obtain his freedom, he may have ventured to steal, or spoil, or waste property belonging to those whom he was serving as a slave.

42.- LABEO; *Last Works, Book IV*.- If a slave whom you have purchased demands his freedom, and an unjust decision is rendered in his favor by the judge, and the master of the said slave makes you his heir, after the case has been decided against you, or the slave becomes yours in any other way, you can again claim him as yours; and the rule relating to res iudicata cannot be pleaded against you. Javolenus says this opinion is correct.

43.- POMPONIUS; *Decrees of the Senate, Book III*.- The Emperor Hadrian published a Rescript with reference to those who had stolen the property of the persons whom they were serving as slaves, and afterwards demanded their freedom, the words of which Rescript are as follows: "As it is not just that a

§ 2.- Los tutores o curadores de los pupilos, cuya tutela y cuyos bienes administraron, no pueden promover después cuestión sobre su estado.

§ 3.- Al marido no se le prohíbe que a su mujer y liberta le promueva la cuestión de estado.

40.- HERMOGENIANO; *Epítome del Derecho, libro V*.- Cuando un mayor de veinte años se dió para ser vendido con el pacto de partirse el precio, no puede reclamar su libertad ni aun después de la manumisión.

41.- PAULO; *Artículos sobre la causa de la libertad, libro único*.- Si estuviera oscuro en qué estado se halla el que litiga sobre su libertad, ha de ser oído primero al querer probar que él está en posesión de la libertad.

§ 1.- Mas el juez que conoce de la libertad debe conocer también de las cosas amovidas, o del daño causado al señor; porque puede suceder que con la esperanza de la libertad se haya atrevido sustraer, estropear y consumir algunas cosas de los bienes de aquellos a quienes servía.

42.- LABEON; *Obras póstumas, libro IV*.- Si el esclavo que tu habías comprado reclamó su libertad, y por el juez se falló malamente a su favor y el dueño de este esclavo te hizo heredero después de fallado el negocio contra ti, o aquél hubiese comenzado a ser tuyo por otro cualquier título, podrás reclamar que él es tuyo, y no te obstará la excepción de cosa juzgada. Y dice Javoleno, que esto es verdad.

43.- POMPONIO; *Senadoconsultos, libro III*.- El Emperador Adriano expidió un rescripto respecto a los que hubiesen substraído bienes de aquellos a quienes servían, y que después reclamaban la libertad; las palabras de cuyo rescripto son estas: «Así como no es justo que con la confianza en la

intercipere hereditariam pecuniam, ita nec libertati praestandae moram quaeri oportet. Quam primum ergo arbitrum dare debeat, apud quem constaret, quid servari potest heredi, antequam ad servum manumittendum compelleretur".

44.- VENABLEIUS; *libro VII, Actionum*.- Licet dubitatum antea fuit, utrum servus dumtaxat an libertus iurando patrono obligaretur in his quae libertatis causa imponuntur, tamen verius est non aliter quam liberum obligari. ideo autem solet iusiurandum a servis exigere, ut hi religione adstricti, posteaquam suae potestatis esse coepissent, iurandi necessitatem haberent, dummodo in continentia, quum manumissus est, aut iuret aut promittat.

§ 1.- Licet autem circa donum munus operas etiam uxorum personas inserere.

§ 2.- In eum, qui impubes iuraverit, scilicet qui et iurare potuerit, danda est utilis actio operarum nomine, quum pubes tamen factus erit. Potest tamen et impubes operas dare, veluti si nomenclator sit vel histrio.

TIT. XIII

QUIBUS AD LIBERTATEM PROCLAMARE
NON LICET

1.- ULPIANUS; *libro II, de Officio Proconsulis*.- Maiores viginti annis ita demum ad libertatem proclamare non possunt, si pretium ad ipsum qui veniit pervenerit: ex ceteris autem causis, quamvis maior viginti annis se venum dari passus sit, ad

slave, in expectation of his freedom, should take property belonging to the estate of his master, where freedom is to be granted him under the terms of a trust, so it is not necessary to seek for any reason to delay the grant of his freedom." Hence, in the first place, an arbiter should be appointed, in whose presence it should be determined what can be preserved for the heir, before he can be compelled to manumit the slave.

44.- VENABLEIUS; *Actions, Book VII*.- Although it was formerly doubtful whether only a slave or a freedman could be obliged by his patron to swear to observe the conditions which were imposed upon him in consideration of his liberty, it is, however, better to hold that he cannot be bound to a greater extent than a freeman. Hence it is customary to exact this oath from slaves, in order that they may be restrained by religion, and be required to again be sworn after they become their own masters; provided they take the oath, or make the promise at the very time when they are manumitted.

§ 1.- Moreover, it is lawful to insert the name of the wife with reference to any donation, present, or daily labor to be given or performed by the manumitted slave.

§ 2.- A pratorian action on account of labor to be performed should be granted against one who, before reaching the age of puberty, took the oath, that is to say if he was legally capable of doing so; as a boy under the age of puberty can render services if he is either a nomenclator or an actor.

TITLE XIII

CONCERNING THOSE WHO ARE NOT
PERMITTED TO DEMAND THEIR FREEDOM

1.- ULPIANUS; *On the Duties of Proconsul, Book I*.- Those who are more than twenty years of age cannot demand their freedom, if any of the price for which they have been sold should come into their hands. Where anyone has suffered himself to be sold

libertad, que se ha de dar por causa de fideicomiso, substraiga uno dinero de la herencia, así tampoco conviene que haya querella por demora en dar la libertad. Así, pues, se debe nombrar cuanto antes un árbitro, ante el cual se haga constar qué es lo que se le puede reservar al heredero antes que sea compelido a manumitir al esclavo».

44.- VENABLEYO; *Acciones, libro VII*.- Aunque antes se dudó si solamente el esclavo, o si también el liberto se obligaría mediante juramento al patrono respecto a las imposiciones que se hacen por causa de la libertad, es, sin embargo, mas verdadero que no se obliga de otra suerte sino libre. Mas por lo mismo se suele exigir juramento de los esclavos, a fin de que constreñidos éstos por la religión tengan, después que hubiesen comenzado a ser de propio derecho, necesidad de jurar, con tal que inmediatamente después que fue manumitido jure o prometa.

§ 1.- Mas es lícito comprender también a las personas de las mujeres en cuanto a los donativos, regalos y días de trabajo.

§ 2.- Contra el que siendo impúbere hubiere jurado, por supuesto, si también hubiere podido jurar, se ha de dar la acción útil por razón de días de trabajo, pero cuando se hubiere hecho púbero; mas también puede el impúbere dar días de trabajo, por ejemplo, si fuera nomenclator o histrión.

TÍTULO XIII

DE AQUELLOS A QUIENES NO LES ES
LÍCITO RECLAMAR LA LIBERTAD

1.- ULPIANO; *Del cargo de Procónsul, libro II*.- Los mayores de veinte años no pueden reclamar la libertad solamente si el precio hubiere ido a poder del mismo que fue vendido; mas en los demás casos, aunque el mayor de veinte años hubiera permitido ser

libertatem ei proclamare licet.

§ 1.- Minori autem viginti annis ne quidem ex causa supra scripta debet denegari libertatis proclamatio, nisi maior annis viginti factus duravit in servitute: tunc enim si pretium partitus sit, dicendum erit denegari ei debere libertatis proclamationem.

2.- MARCELLUS; *libro XXIV, Digestorum*.- Servum quis per vim a Titio accepit et testamento liberum esse iussit: quamquam solvendo decesserit, non erit ille liber: alioquin fraudabitur Titius, qui non procedente quidem libertate quum herede eius agere potest, at si ad libertatem servus pervenerit, nullam actionem habiturus est, quia nihil videbitur heres ex defuncti dolo consecutus.

3.- POMPONIOUS; *libro XI, Epistolarum et variarum lectionum*.- Eis, qui se passi sint venire, ad libertatem proclamandi licentiam denegari. Quaero, an et ad eos, qui ex mulieribus, quae se passae sint venire, nascuntur, ita Senatusconsulta pertinent? dubitari non potest, quin ei quoque, quae maior annis viginti venire se passa est, ad libertatem proclamandi licentia fuerit deneganda. His quoque danda non est, qui ex ea nati tempore servitutis eius erunt.

4.- PAULUS; *libro XII, Quaestionum*.- Licinnius Rufinus Iulio Paulo. Is cui fideicommissa libertas debebatur post vicensimum annum venire se passus est: quaero, denegandum sit ei ad libertatem proclamare. Movet me exemplum cuiusvis liberi hominis: nam et si consecutus esset libertatem, si se vendidisset, denegaretur ei ad libertatem proclamare, nec debet meliori loco intellegi, quod in servitute constitutus passus est se venum dari, quam si esset libertatem consecutus. Sed e contrario movet me, quod in hoc, de quo quaeritur, venditio constitit et est qui veneat, in libero autem homine neque venditio

for any other reason, even though he may be over twenty years of age, he can demand his freedom.

§ 1.- The right to demand his freedom should not be refused a minor under twenty years of age, for the above-mentioned reason, unless he remained in slavery after reaching the age of twenty years; for then, if he had shared in the price, it must be said that the right to demand his freedom will be refused him.

2.- MARCELLUS; *Digest, Book XXIV*.- A certain man extorted a slave from Titius by violence, and directed him to be free by his will. The slave will not become free, even if the testator died solvent; for otherwise, Titius will be defrauded, as he can bring an action against the heir of the deceased on the ground that the bequest of freedom was void; but if the slave should obtain his freedom, Titius will not be entitled to an action, because the heir will not be held to have gained anything by the fraud of the deceased.

3.- POMPONIOUS; *Letters and Various Passages, Book XI*.- Permission to demand their freedom is denied those who have suffered themselves to be sold. I ask whether these decrees of the Senate also apply to children born of women who have suffered themselves to be sold. There can be no doubt that a woman of over twenty years of age, who has suffered herself to be sold, will be refused permission to demand her freedom. Nor should it be granted to those children born to her during the time of her servitude.

4.- PAULUS; *Questions, Book XII*.- "Licinnius Rufinus, to Julius Paulus: A slave who was entitled to freedom under the terms of a trust, permitted himself to be sold after having reached his twentieth year. I ask whether he shall be forbidden to demand his freedom." The example of a man who is free causes me some difficulty; for if the slave should have permitted himself to be sold after having obtained his freedom, he would be refused permission to demand it; nor should he be understood to be in a better position when, being in slavery, he permitted himself to be sold, than if he had done so after having

vendido, le es lícito reclamar la libertad.

§ 1.- Pero al menor de veinte años no se le debe denegar ciertamente por la causa antes dicha la reclamación de la libertad, a no ser que haya permanecido en la esclavitud siendo mayor de veinte años; porque entonces, si hubiera participado del precio, se habrá de decir que se le debe denegar la reclamación de la libertad.

2.- MARCELO; *Digesto, libro XXIV*.- Uno recibió de Ticio a la fuerza un esclavo, y dispuso en su testamento que fuese libre; aunque hubiere fallecido siendo solvente, aquél no será libre; de otra suerte, sería defraudado Ticio, quién, no siendo, a la verdad, procedente la libertad puede ejercitar la acción contra su heredero. Mas si el esclavo hubiere llegado a la libertad, no ha de tener ninguna acción, porque no se considerará que el heredero haya conseguido cosa alguna por dolo del difunto.

3.- POMPONIO; *Epístolas y Doctrinas varias, libro XI*.- A los que consintieron ser vendidos se les deniega la facultad de reclamar la libertad; pregunto, ¿se referirán estos Senadoconsultos también a los que nacen de mujeres, que hayan consentido ser vendidas? No se puede dudar, que también se le habrá de denegar la facultad para reclamar la libertad a la mujer de veinte años, que consintió ser vendida. Tampoco se les ha de dar a los que nacieron de ella durante el tiempo de su esclavitud.

4.- PAULO; *Cuestiones, libro XII*.- Licinio Rutino a Julio Paulo: Uno, a quien se le debía la libertad dejada por fideicomiso, consintió ser vendido después de cumplidos los veinte años; pregunto, ¿se le ha de denegar que reclame la libertad? Me hace vacilar el ejemplo de lo que sucede con cualquier hombre libre; porque aun cuando habiendo conseguido la libertad se hubiese vendido, se le denegaría que reclamase la libertad; y no debe ser considerado de mejor condición, porque hallándose en la esclavitud haya consentido ser vendido, que si hubiese conseguido la libertad. Pero me hace dudar

constitit et nihil est quod veneat. Peto itaque plenissime instruas. Respondit: venditio quidem tam servi quam liberi contrahi potest et stipulatio de evictione contrahitur: non enim de eo loquimur, qui sciens liberum emit: nam adversus hunc nec ad libertatem proclamatio denegatur. Sed is, qui adhuc servus est, etiam invitatus veniri potest, quamvis et ipse in eo malus sit, quod de conditione sua dissimulat, quum in sua potestate habeat, ut statim ad libertatem perveniat. quod quidem non potest ei imputari, cui nondum libertas debetur. Pone statuliberum passum se venum dari: nemo dicturus est superveniente conditione, quae non fuit in eius potestate, libertatis petitionem ei denegandam. Idem puto, etiamsi in ipsius potestate fuit condicio. Sed in proposito magis probandum est, ut denegetur ei libertatis petitio, qui potuit petere libertatem et maluit se venum dari, quia indignus est auxilio Praetoris fideicommissarii.

5.- IDEM; *libro singulari ad Senatusconsultum Claudianum*.- Si duo liberum hominem maiorem annis viginti emerimus, unus sciens eius conditionem, alter ignorans, non propter eum qui scit ad libertatem ei proclamare permittitur, sed propter eum qui ignorat servus efficitur, sed non etiam eius qui scit, sed tantum alterius.

TIT. XIV

SI INGENUUS ESSE DICETUR

1.- MARCELLUS; *libro VII, Digestorum*.- Si libertus alterius alio agente ingenuus pronuntiatus esse dicetur, sine ulla exceptione temporis patronus

obtained his freedom. On the other hand, however, a difficulty arises, because in the case in question the sale is valid and the man can be sold, but in the case of a freeman the sale is void, and there is nothing to be sold. Therefore, I ask that you give me the most complete information on this point. The answer was that the sale of a slave as well as that of a man who is free can be contracted for, and a stipulation providing against eviction can be entered into. For, in this instance, we do not refer to anyone who knowingly purchases a man who is free, as a right to demand his freedom is not refused him as against the purchaser. He, however, who is still a slave, can be sold even against his own consent, although he is acting fraudulently when he conceals his condition, as it is in his power immediately to obtain his freedom, but he cannot be blamed when he is not yet entitled to be free. Suppose that a slave, who is to be free conditionally, suffers himself to be sold; no one will say that he has not the right to demand his freedom, in case the condition, which is not in his power, should be fulfilled; and, indeed, I think that the same rule will apply if it was in his power to comply with it. In the case proposed, it will be better to adopt the opinion that he should not be permitted to demand his freedom, if he could have done so, and preferred to let himself be sold; because he is unworthy of the aid of the Praetor having jurisdiction over trusts.

TITLE XIV

WHERE ANYONE IS DECLARED
TO BE FREEBORN

1.- MARCELLUS; *Digest, Book VII*.- If the freedman of one person is declared to be freeborn as the result of an action brought by another, his patron

por el contrario que respecto a éste de quien se trata subsiste una venta, y hay uno que es vendido; pero tratándose de un hombre libre, ni subsiste la venta, ni hay nada que se venda. Pido, pues, que me instruyas muy cumplidamente. Respondió: ciertamente que se puede celebrar venta tanto de un esclavo, como de un hombre libre, y se celebra estipulación respecto a la evicción; porque no hablamos del que a sabiendas compró un hombre libre, pues contra éste no se deniega la reclamación de la libertad; pero el que es todavía esclavo puede ser vendido también contra su voluntad, aunque también éste obre mal en disimular su condición, teniendo en su potestad el llegar inmediatamente a la libertad. Lo que ciertamente no se puede imputar a aquel a quien no se le debe todavía la libertad; supón que un *statuliber* consintió ser vendido; ninguno dirá, que cumpliéndose la condición, que no estuvo en su potestad, se le ha de denegar la reclamación de la libertad. Lo mismo opino, también si la condición estuvo en su potestad. Pero en el caso propuesto más bien se ha de admitir que se le deniegue la reclamación de la libertad al que pudo pedir la libertad y prefirió darse en venta, porque es indigno del auxilio del Pretor fideicomisario.

5.- EL MISMO; *Comentarios al Senadoconsulto Claudiano, libro único*.- Si dos hubiéramos comprado un hombre libre, mayor de veinte años, conociendo uno su condición, e ignorándola otro, ¿se le permite reclamar la libertad por causa del que lo sabe, o se hará esclavo por causa del que lo ignora? Mas no lo será también del que lo sabe, sino solamente del otro.

TÍTULO XIV

DE SI SE DIJERE QUE UNO ES
INGENUO

1.- MARCELO; *Digesto, libro VII*.- Si se dijere que el liberto de uno fue declarado ingenuo ejercitando otro la acción, suele su patrono ejercitar

eius cognitionem solet exercere.

2.- SATURNINUS; *libro I, de Officio Proconsulis*.- Qui se venire passus esset maiorem, scilicet ut pretium ad ipsum perveniret, prohibendum de libertate contendere Divus Hadrianus constituit: sed interdum ita contendendum permisit, si pretium suum reddidisset.

§ 1.- Qui se ex libertinitate ingenuitati adserant, non ultra quinquennium, quam manumissi fuissent, audientur.

§ 2.- Qui post quinquennium repperisse instrumenta ingenuitatis suae adseverant, de ea re ipsos principes adire oportere cognituros.

3.- POMPONIUS; *libro V, Senatusconsultorum*.- Hoc sermone "adgnitis natalibus" de nullis aliis intellegendum est senatum sensisse quam ingenuis.

§ 1.- Verbo autem "relinquerent" etiam hoc intelligendum est, ut quaecumque ex re eius, a quo manumissi erant, adquisita habeant, restituant. Sed id quemadmodum accipiendum sit, videndum est, utrumne quae ignorantibus dominis abstulissent, item quod ex his adquisitum, reddere debeant, an vero etiam concessa et donata a manumissoribus amplexi sint: quod magis est.

4.- PAPINIANUS; *libro XXII, Quaestionum*.- Oratio, quae prohibet apud Consules aut Praesides provinciarum post quinquennium a die manumissionis in ingenuitatem proclamare, nullam causam aut personam excipit.

can prosecute the same claim against him without being barred by an exception based on prescription.

2.- SATURNINUS; *On the Duties of Proconsul, Book I*.- The Divine Hadrian decided that anyone who was of age, and permitted himself to be sold in order that he might receive a portion of the price, should be forbidden to bring an action to obtain his freedom; but that he could do so under certain circumstances, if he returned his share of the price which had been paid.

§ 1.- Those who are freedmen, and assert their claim to freedom by birth, shall not be heard after the lapse of five years from the date of their manumission.

§ 2.- Those who, after the lapse of five years, allege that they have discovered documents establishing their rights to be considered freeborn, must have recourse to the Emperor, who will examine their claims.

3.- POMPONIUS; *Decrees of the Senate, Book V*.- By the following words: "Their birth having been acknowledged," the Decree of the Senate must be understood only to refer to those who would have been considered freeborn.

§ 1.- By the clause, "Would have left," it must be understood that whatever such persons have obtained from the property of him by whom they were manumitted must be restored. Let us see in what manner this must be interpreted, whether they must return whatever has been acquired by them by means of the property of their masters, or what they have abstracted from them without their knowledge, or whether this includes the property which has been granted and donated by the persons who manumitted them. The latter is the better opinion.

4.- PAPINIANUS; *Questions, Book XXII*.- The Rescript which forbids freedom of birth to be demanded before the Consuls or Governors of provinces, after the lapse of five years from the date of manumission, excepts no cases or persons.

sin ninguna excepción de tiempo acción para que se conozca de ello.

2.- SATURNINO; *Del cargo de Procónsul, libro I*.- Estableció el Divino Adriano, que se le ha de prohibir que litigue sobre su libertad al que siendo mayor hubiese consentido ser vendido, por supuesto, para que el precio fuese a poder del mismo; pero a veces se le permitió que litigara, si hubiese devuelto su propio precio.

§ 1.- Los que teniendo condición de libertinos afirman que son ingenuos no serán oídos después de un quinquenio de haber sido manumitidos.

§ 2.- Los que afirman que después de un quinquenio encontraron los documentos de su ingenuidad, deben recurrir a los mismos Príncipes para que conozcan de este asunto.

3.- POMPONIO; *Senadoconsultos, libro V*.- Se ha de entender que con estas palabras, «condición natal reconocida», el Senado no se refirió a ninguna otra mas que a la de los ingenuos.

§ 1.- Mas con la palabra «dejasen» se ha de entender también esto, que restituyan cualesquiera cosas que hayan adquirido con bienes de aquel por quien habían sido manumitidos. Pero se ha de ver de qué modo se ha de entender esto, si deberán restituir lo que hubiesen quitado ignorándolo los señores, así como lo que con bienes de ellos fue adquirido, o si también hayan sido comprendidas las cosas concedidas y donadas por los manumisores lo que es mas cierto.

4.- PAPINIANO; *Cuestiones, libro XXII*.- La Oración, que prohíbe que uno reclame la ingenuidad ante los Cónsules o los Presidentes de las provincias después de un quinquenio desde el día de la manumisión, no exceptúa ninguna causa o persona.

5.- IDEM; *libro X, Responsorum*.- Patronum post quinquennium sententiae pro ingenuitate dictae, quo ignorante res iudicata est, non esse praescriptione temporis summovendum respondi.

6.- ULPIANUS; *libro XXXVIII, ad Edictum*.- Quotiens de hoc contenditur, an quis libertus sit, sive operae petantur sive obsequium desideretur sive etiam famosa actio intendatur sive in ius vocetur qui se patronum dicit sive nulla causa interveniat, redditur praeiudicium. Sed et quotiens quis libertinum quidem se confitetur, libertum autem Gaii Seii se negat, idem praeiudicium datur. Redditur autem alterutro desiderante: sed actoris partibus semper qui se patronum dicit fungitur probareque libertum suum necesse habet aut, si non probet, vincitur.

TITULO XV

NE DE STATU DEFUNCTORUM POST
QUINQUENNium QUAERATUR

1.- MARCIANUS; *libro singulari de delatoribus*.- De statu defunctorum post quinquennium quaerere non licet neque privatim neque fisci nomine.

§ 1.- Sed nec eius status retractandus est, qui intra quinquennium decessit, si per huius quaestionem praeiudicium futurum est ante quinquennium mortuo.

§ 2.- Immo nec de vivi statu quaerendum est, si quaestio huius praeiudicium facit ei, qui ante quinquennium decessit: et ita Divus Hadrianus constituit.

5.- THE SAME; *Opinions, Book X*.- I gave it as my opinion, that a patron should not be barred by prescription after the lapse of five years from the date of the judgment entered in favor of freedom, when he is ignorant that such a judgment has been rendered.

6.- ULPIANUS; *On the Edict, Book XXXVIII*.- Whenever a dispute arises as to whether anyone is a freedman or services are demanded of him, or obedience from him is required, or where an action implying infamy is to be brought, or he who alleges that he is the patron is summoned to court, or proceedings are instituted without good cause, a prejudicial action will lie. The same prejudicial action will also be granted where a person confesses that he is a freedman, but denies that he has been liberated by Gaius Seius. It will also be granted where one or the other party requests it, but he who represents himself to be the patron shall always take the part of the plaintiff, for he must prove that the person in question is his freedman, and if he does not do so he will lose his case.

TITLE XV

NO QUESTION AS TO THE CONDITION OF
DECEASED PERSONS SHALL BE RAISED
AFTER FIVE YEARS HAVE ELAPSED
AFTER THEIR DEATH

1.- MARCIANUS; *On Informers*.- It is not lawful for either private individuals or the Treasury to raise any question with reference to the civil condition of deceased persons after five years from the time of their death.

§ 1.- Nor can the condition of him who died within five years be reconsidered, if, by doing so, the status of one who has died more than five years previously will be prejudiced.

§ 2.- Nor can any question be raised with reference to the condition of a man who is living, if, by doing so, the condition of one who died more than five years previously will be prejudiced. This point was

5.- EL MISMO; *Respuestas, libro X*.- Respondí, que después del quinquenio de haberse pronunciado sentencia a favor de la ingenuidad, el patrono, que ignorase que la cosa había sido juzgada, no ha de ser repelido con la prescripción del tiempo.

6.- ULPIANO; *Comentarios al Edicto, libro XXXVIII*.- Siempre que se litiga sobre esto, sobre si alguno es esclavo, ya se le reclamen días de trabajo, ya se pretenda un servicio, ya también si se intentara una acción infamante, ya si fuera llamado a juicio el que dice que es patrono, ya si no mediara ninguna causa, se da sentencia prejudicial. Mas también se da la misma sentencia prejudicial siempre que alguno se confiesa ciertamente libertino, pero niega que sea liberto de Cayo Seyo; mas se da pidiéndola uno u otro. Pero desempeña siempre las funciones de actor el que dice que es patrono, y tiene necesidad de probar que aquél es su liberto, o, si no lo probase, es vencido.

TÍTULO XV

DE QUE DESPUÉS DE UN QUINQUENIO
NO SE CUESTIONE SOBRE EL ESTADO
DE LOS FALLECIDOS

1.- MARCIANO; *De los delatores, libro único*.- Después de un quinquenio no es lícito cuestionar ni privadamente, ni en nombre del fisco, sobre el estado de los fallecidos.

§ 1.- Mas tampoco se ha de discutir de nuevo sobre el estado del que falleció dentro de un quinquenio, si mediante esta cuestión se ha de causar perjuicio a uno que falleció antes del quinquenio.

§ 2.- Ni aun sobre el estado de un vivo se ha de cuestionar, si la cuestión sobre él causa perjuicio a uno que falleció antes de un quinquenio; y así lo determinó el Divino Adriano.

decided by the Divine Hadrian.

§ 3.- Sed interdum et intra quinquennium non licet de statu defuncti dicere: nam oratione Divi Marci cavetur, ut, si quis ingenuus pronuntiatus fuerit, liceat ingenuitatis sententiam retractare, sed vivo eo qui ingenuus pronuntiatus est, non etiam post mortem, in tantum, ut etiam, si coepta quaestio fuit retractationis, morte eius extinguatur, ut eadem oratione cavetur.

§ 4.- Si quidem in deteriore condicionem quis statum retractaret, secundum ea quae dixi praescribendum est. Quid ergo si in meliorem? Veluti pro servo libertus dicitur: quare non admittatur? Quid enim si servus quis dicatur quasi ex ancilla natus, quae ante quinquennium mortua est? Quare non liceat probare liberam fuisse? Hoc enim et pro mortua est. Et Marcellus libro quinto de Officio Consulis scripsit posse: ego quoque in auditorio publico idem secutus sum.

2.- PAPINIANUS; *libro XIV, Responsorum*.- Non esse libertatis quaestionem filiis inferendam propter matris vel patris memoriam post quinquennium a morte non retractatam convenit.

§ 1.- Nec in ea re, quae publicam tutelam meruit, pupillis agentibus restitutionis auxilium tribuendum est, quod quinque annorum tempus, quum tutores non haberent, excesserit.

§ 2.- Praescriptio quinque annorum, quae statum defunctorum tuetur, specie litis ante mortem illatae non fit irrita, si veterem causam desistente qui movit longo silentio finitam probetur.

§ 3.- Sometimes, however, it is not permitted to raise a question with reference to the status of the deceased within five years from the time of his death. For it is provided by a Rescript of the Divine Marcus that if anyone has been judicially declared to be freeborn, it may be permitted to review the decision rendered during the lifetime of the person who has been pronounced freeborn, but not after his death. To such an extent is this true that even if the review of the case has been begun, it will be extinguished by death; as is set forth in the same Rescript.

§ 4.- If anyone reviews a decision of this kind in order to reduce the person to an inferior condition, this should be opposed, according to what I have already stated. But what if the intention was to improve his condition, as, for instance, to have him declared a freedman instead of a slave; why should this not be permitted? What course must be pursued, if he is said to be a slave, the issue of a female slave, who has been dead for more than five years? Why should he not be alleged to prove that she was free; for this itself is in favor of the deceased? Marcellus in the Fifth Book of the Duties of Proconsul stated that this should be done. I also adopted the same opinion in the audience room.

2.- PAPINIANUS; *Opinions, Book XIV*.- It is settled that, in the reconsideration of a case, no question should be raised with reference to the freedom of children which may involve the reputation of their mothers or fathers, after the latter had been dead for more than five years.

§ 1.- In a matter of this kind, which is worthy of public supervision, relief should be granted to minors instituting proceedings for restitution, where they had no guardians to act for them during the five years which have elapsed.

§ 2.- This prescriptive term of five years which protects the status of deceased persons is not affected by the filing of any action before death; if it can be proved that the right to bring the said action has been

§ 3.- Pero a veces ni aun dentro de un quinquenio es lícito cuestionar sobre el estado de un difunto. Porque se dispone en la Oración del Divino Marco, que, si alguno hubiere sido declarado ingenuo, sea lícito revisar la sentencia de la ingenuidad, pero viviendo el que fue declarado ingenuo, no también después de su muerte, de tal manera que, aunque se haya incoado la cuestión de la revisión, se extingue con su muerte, como se dispone en la misma Oración.

§ 4.- Si verdaderamente alguno volviese a discutir el estado para empeorar la condición, habrá la prescripción, según lo que he dicho. ¿Que se dirá, pues, si para mejorarla, por ejemplo, se dijera que uno es liberto en lugar de esclavo? ¿Por qué no será admitido? Porque si se dijera que uno es esclavo, como nacido de una esclava, que falleció antes del quinquenio, ¿por qué no será lícito probar que ella fue libre, -pues esto es también en favor de la difunta? Y escribió Marcelo en el libro quinto del Cargo de Cónsul, que se podía; yo también me atuve a lo mismo en audiencia pública.

2.- PAPINIANO; *Respuestas, libro XIV*.- Convino que no se les hubiera de promover a los hijos la cuestión sobre la libertad por no haberse revisado la memoria de la madre o del padre después de un quinquenio de la muerte.

§ 1.- En esta materia, que mereció la tutela pública, no se les ha de conceder a los pupilos que ejerciten la acción el beneficio de la restitución porque haya transcurrido el término de los cinco años sin tener tutores.

2.- La prescripción de los cinco años, que ampara el estado de los fallecidos, no se invalida so pretexto de que fue promovido el litigio antes de la muerte, si se probare que la antigua causa quedó terminada por

3.- HERMOGENIANUS; *libro VI, iuris Epitomarum*.- Ante quinquennium defuncto status honestior, quam mortis tempore fuisse existimabatur, vindicari non prohibetur. Idcirco et si quis in servitute moriatur, post quinquennium liber decessisse probari potest.

4.- CALLISTRATUS; *libro I, de Iure fisci*.- Primus omnium Divus Nerva Edicto vetuit post quinquennium mortis cuiusque de statu quaeri.

§ 1.- Sed et Divus Claudius Claudiano Rescripts, si per quaestionem nummariam praeiudicium statui videbitur fieri, cessare quaestionem.

extinguished by the long silence of him who originally brought it and then desisted.

3.- HERMOGENIANUS; *Epitomes of Law, Book VI*.- The condition of a person who died more than five years previously is considered to be more honorable than at the time of his death, and no one will be prevented from claiming this for him. Therefore, even if he died in slavery, he can be proved to have been free at his decease, even after the lapse of five years.

4.- CALLISTRATUS; *On the Rights of the Treasury*.- The Divine Nerva was the first of all who, by an Edict, forbade that any question should be raised regarding the condition of anyone after five years from the date of his death.

§ 1.- The Divine Claudius also stated in a Rescript addressed to Claudian that if, by the pecuniary question which had been raised, any prejudice appeared to be caused to the status of the deceased, the inquiry must cease.

haber desistido de ella con su largo silencio el que la promovió.

3.- HERMOGENIANO; *Epitome del Derecho, libro VI*.- No se prohíbe que antes del quinquenio se reivindique para los fallecidos un estado más honroso que el que se estimaba que tuvieron al tiempo de la muerte. Y por lo tanto, aunque alguno muera en la esclavitud, se puede probar cinco años después que falleció libre.

4.- CALISTRATO; *Del Derecho del fisco, Libro I*.- El Divino Nerva fue de todos el primero que prohibió por un edicto que después de un quinquenio de la muerte de cualquiera se cuestionase sobre su estado.

§ 1.- Pero también el Divino Claudio respondió por rescripto a Claudiano, que si se viere que por una cuestión pecuniaria se causaba perjuicio al estado de alguno, cesaba la cuestión.

TIT. XVI

DE COLLUSIONE DETEGENDA

1.- GAIUS; *libro II, ad Edictum Praetoris urbani, titulo de liberali causa*.- Ne quorundam dominorum erga servos nimia indulgentia inquinaret amplissimum ordinem eo, quod paterentur servos suos in ingenuitatem proclamare liberosque iudicari, Senatusconsultum factum est Domitiani temporibus, quo cautum est, ut, si quis probasset per collusionem quicquam factum, si iste homo servus sit, fieret eius servus qui detexisset collusionem.

2.- ULPIANUS; *libro II, de Officio Consulis*.- Collusionem detegere ingenuitatis post sententiam intra quinquennium posse divus marcus constituit.

TITLE XVI

CONCERNING THE DETECTION OF COLLUSION

1.- GAIUS; *On the Edict of the Urban Praetor, Title: Actions Relating to Freedom*.- To prevent the excessive indulgence of certain masters toward their slaves from contaminating the highest Order in the State, through suffering their slaves to claim the right of free birth and to be judicially declared free, a Decree of the Senate was enacted in the time of Domitian, by which it was provided, that: "If anyone can prove that an act was due to collusion, and the man pronounced to be free was actually a slave, the latter will belong to him who exposed the collusion."

2.- ULPIANUS; *On the Duties of Consul, Book II*.- The Emperor Marcus decided that collusion could be detected within five years after a decision declaring a person entitled to the privilege of free birth.

TÍTULO XVI

DEL DESCUBRIMIENTO DE COLUSIÓN

1.- GAYO; *Comentarios al Edicto del Pretor urbano libro II, título de la causa sobre la libertad*.- A fin de que la excesiva indulgencia de algunos dueños para sus esclavos no mancille el muy elevado orden, porque consientan que sus esclavos reclamen la ingenuidad, se hizo en tiempos de Domiciano un Senadoconsulto, en el que se dispuso, que, si alguien hubiese probado que se hizo alguna cosa por colusión, si este hombre fuese esclavo, se hiciera esclavo del que hubiese descubierto la colusión.

2.- ULPIANO; *Del Cargo de Cónsul, libro II*.- El Divino Marco estableció, que dentro de un quinquenio después de la sentencia se pudiera descubrir la colusión respecto a la ingenuidad.

§ 1.- Quinquennium autem continuum utique accipiemus.

§ 2.- Sicubi plane aetas eius, cuius retractatur collusio, differendam retractationem in tempus pubertatis vel alterius rei suadeat, quinquennium non currere dicendum est.

§ 3.- Quinquennium autem non ad perficiendam retractationem, sed ad inchoandam puto praefinitum: aliter atque circa eum, qui ex libertinitate se in ingenuitatem petit.

§ 4.- Oratione Divi Marci cavetur, ut etiam extraneis, qui pro altero postulandi ius haberent, liceret detegere collusionem.

3.- CALLISTRATUS; *libro IV de Cognitionibus*.- Quum non iusto contradictore quis ingenuus pronuntiatus est, perinde inefficax est decretum, atque si nulla iudicata res intervenisset: idque principalibus constitutionibus cavetur.

4.- ULPIANUS; *libro I, ad legem Iuliam et Papiam*.- Si libertinus per collusionem fuerit pronuntiatus ingenuus, collusionem detecta in quibus causis quasi libertinus incipit esse. Medio tamen tempore, antequam collusio detegatur et post sententiam de ingenuitate latam, utique quasi ingenuus accipitur.

5.- HERMOGENIANUS; *libro V, iuris Epitomarum*.- Sententiam pro ingenuitate dictam collusionis praetextu semel retractare permittitur.

§ 1.- Si plures ad collusionem detegendam pariter accedant, causa cognita quis debeat admitti, comparatis omnium moribus et aetatibus et cuius magis interest, statui oportet.

§ 1.- We understand that the five years must be continuous.

§ 2.- If it is clear that if the age of him who is accused of collusion renders it necessary that the investigation should be deferred until the age of puberty, or to some other time, it must be held that the term of five years will not run.

§ 3.- Moreover, I think that the term of five years has been prescribed not to terminate the inquiry, but to begin it. It is, however, different with respect to him who, being a liberated slave, demands that he be given the rights of a person who is freeborn.

§ 4.- It is provided by a Rescript of the Divine Marcus that even strangers, who have the right to assert claims for others, shall be permitted to expose collusion.

3.- CALLISTRATUS; *On Judicial Inquiries, Book IV*.- Where anyone, without having any legal adversary, is judicially declared to be entitled to the rights of a freeborn person, the decision will be without effect, and just as if none had been rendered. This is provided by the Imperial Constitutions.

4.- ULPIANUS; *On the Lex Julia et Papia, Book I*.- Where a freedman, through collusion, has been declared to be entitled to the rights of a freeborn person, and the collusion has been established, he is, in some respects regarded, as a freedman. In the meantime, however, before the collusion has been exposed, and after the decision with reference to his rights as a freeborn person has been rendered, he will be regarded as freeborn.

5.- HERMOGENIANUS; *Epitomes of Law, Book V*.- It is only permitted, under the pretext of collusion, to review a judgment rendered with reference to the right of free birth but once.

§ 1.- Where several persons appear at the same time for the purpose of proving the collusion, when proper cause is shown, a decision must be rendered after taking into account the morals and the ages of all the parties concerned; and especially should it be ascertained which one of them has the greatest interest in exposing the collusion.

§ 1.- Mas entenderemos ciertamente continuos los cinco años.

§ 2.- A la verdad, si la edad de aquel de cuya colusión se trata aconseja que se haya de diferir el examen hasta el tiempo de la pubertad o de otra cosa, se ha de decir que no corre el quinquenio.

§ 3.- Pero opino que el quinquenio no fue prefijado para terminar el examen, sino para incoarlo, al contrario de lo que se dice respecto al que estando en la condición de libertino reclama la ingenuidad.

§ 4.- Se dispone en la Oración del Divino Marco, que también a los extraños que tengan el derecho de pedir por otro les sea lícito descubrir la colusión.

3.- CALISTRATO; *De las Jurisdicciones, libro IV*.- Cuando alguno fue declarado ingenuo sin legítimo contradictor, el decreto es ineficaz lo mismo que si no hubiese mediado ninguna cosa juzgada; y esto se dispone en las constituciones de los Príncipes.

4.- ULPIANO; *Comentarios a la Ley Julia y Papia, libro I*.- Si por colusión hubiere sido declarado ingenuo un libertino, descubierta la colusión, comienza en algunos casos a ser como libertino; pero en el tiempo intermedio, antes que se descubra la colusión, y después de proferida la sentencia respecto a la ingenuidad, es considerado ciertamente como ingenuo.

5.- HERMOGENIANO; *Epitome del Derecho, libro V*.- Se permite revisar una sola vez, aun so pretexto de colusión, la sentencia dictada a favor de la ingenuidad.

§ 1.- Si para descubrir la colusión se presentaran muchos al mismo tiempo, conviene que se determine con conocimiento de causa quién deba ser admitido, teniendo en cuenta las costumbres y la edad de todos, y quién tiene mas interés.

LIBER QUADRAGESIMUS PRIMUS

TITULO I

DE ACQUIRENDO RERUM DOMINIO

1.- GAIUS; *libro II, Rerum quotidianarum, sive Aureorum*.- Quarundam rerum dominium nanciscimur iure gentium, quod ratione naturali inter omnes homines peraeque servatur, quarundam iure civili, id est iure proprio civitatis nostrae. et quia antiquius ius gentium quum ipso genere humano proditum est, opus est, ut de hoc prius referendum sit.

§ 1.- Omnia igitur animalia, quae terra mari caelo capiuntur, id est ferae bestiae et volucres pisces, capientium fiunt:

2.- FLORENTINUS; *libro VI, Institutionum*.- Vel quae ex his apud nos sunt edita.

3.- GAIUS; *libro II, Rerum quotidianarum, sive Aureorum*.- Quod enim nullius est, id ratione naturali occupanti conceditur.

§ 1.- Nec interest quod ad feras bestias et volucres, utrum in suo fundo quisque capiat an in alieno. Plane qui in alienum fundum ingreditur venandi aucupandive gratia, potest a domino, si is providerit, iure prohiberi ne ingrederetur.

§ 2.- Quidquid autem eorum ceperimus, eo usque nostrum esse intellegitur, donec nostra custodia coercetur: cum vero evaserit custodiam nostram et in naturalem libertatem se receperit, nostrum esse

BOOK XLI

TITLE I

CONCERNING THE ACQUISITION OF THE OWNERSHIP OF PROPERTY.

1.- GAIUS; *Diurnal or Golden Matters, Book II*.- We obtain the ownership of certain property by the Law of Nations, which is everywhere observed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the Civil Law, that is to say, by the law of our own country. And because the Law of Nations is the more ancient, as it was promulgated at the time of the origin of the human race, it is proper that it should be examined first.

§ 1.- Therefore, all animals which are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.

2.- FLORENTINUS; *Institutes, Book VI*.- The same rule applies to their offspring, born while they are in our hands.

3.- GAIUS; *Diurnal or Golden Matters, Book II*.- For what does not belong to anyone by natural law becomes the property of the person who first acquires it.

§ 1.- Nor does it make any difference, so far as wild animals and birds are concerned, whether anyone takes them on his own land, or on that of another; but it is clear that if he enters upon the premises of another for the purpose of hunting, or of taking game, he can be legally forbidden by the owner to do so, if the latter is aware of his intention.

§ 2.- When we have once acquired any of these animals, they are understood to belong to us, as long as they are retained in our possession; for if they should escape from our custody and recover their

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TÍTULO I

DE LA ADQUISICIÓN DEL DOMINIO DE LAS COSAS

1.- GAYO; *Diario, libro II*.- Adquirimos el dominio de algunas cosas por derecho de gentes, que por la razón natural se observa igualmente entre todos los hombres, y de otras por derecho civil, esto es, por el derecho propio de nuestra ciudad; y como el derecho de gentes, más antiguo, nació con el mismo género humano, es necesario que de éste se haga antes referencia.

§ 1.- Así, pues, todos los animales que son cogidos en la tierra, en el mar, o en el aire, esto es, las bestias silvestres, y las aves, y los peces, se hacen de los que los cogen,

2.- FLORENTINO; *Instituta, libro VI*.- o los que de ellos nacieron en nuestro poder.

3.- GAYO; *Diario, libro II*.- Mas lo que no es de nadie se concede por razón natural al que lo ocupa.

§ 1.- Y no importa, en cuanto a las bestias silvestres y a las aves, que uno las coja en su propio fundo, o en el ajeno. Mas al que entra en un fundo ajeno para cazar bestias o aves se le puede prohibir con derecho por el dueño, si éste lo viere, que entre.

§ 2.- Mas cualquiera de estos animales que hubiéremos cogido se entiende que es nuestro en tanto que está sujeto a nuestra custodia; pero cuando se hubiere evadido de nuestra custodia, y hubiere

desinit et rursus occupantis fit:

4.- FLORENTINUS; *libro VI, Institutionum*.- Nisi si mansuefacta emitti ac reverti solita sunt.

5.- GAIUS; *libro II, Rerum quotidianarum, sive Aurerum*.- Naturalem autem libertatem recipere intellegitur, quum vel oculos nostros effugerit vel ita sit in conspectu nostro, ut difficilis sit eius persecutio.

§ 1.- Illud quaesitum est, an fera bestia, quae ita vulnerata sit, ut capi possit, statim nostra esse intellegatur. Trebatio placuit statim nostram esse et eo usque nostram videri, donec eam persequamur, quod si desierimus eam persequi, desinere nostram esse et rursus fieri occupantis: itaque si per hoc tempus, quo eam persequimur, alius eam ceperit eo animo, ut ipse lucrifaceret, furtum videri nobis eum commisisse. Plerique non aliter putaverunt eam nostram esse, quam si eam ceperimus, quia multa accidere possunt, ut eam non capiamus: quod verius est.

§ 2.- Apium quoque natura fera est: itaque quae in arbore nostra consederint, antequam a nobis alveo concludantur, non magis nostrae esse intelleguntur quam volucres, quae in nostra arbore nidum fecerint. ideo si alius eas incluserit, earum dominus erit.

§ 3.- Favos quoque si quos hae fecerint, sine furto quilibet possidere potest: sed ut supra quoque diximus, qui in alienum fundum ingreditur, potest a domino, si is providerit, iure prohiberi ne ingrederetur.

§ 4.- Examen, quod ex alveo nostro evolaverit, eo usque nostrum esse intellegitur, donec in conspectu

natural freedom, they cease to belong to us, and again become the property of the first one who takes them,

4.- FLORENTINUS; *Institutes, Book VI*.- Unless, having been tamed, they are accustomed to depart and return.

5.- GAIUS; *Diurnal or Golden Matters, Book II*.- Wild animals are understood to recover their natural freedom when our eyes can no longer perceive them; or if they can be seen, when their pursuit is difficult.

§ 1.- It has been asked whether a wild animal which has been wounded in such a way that it can be captured is understood immediately to become our property. It was held by Trebatius that it at once belongs to us, and continues to do so while we pursue it, but if we should cease to pursue it, it will no longer be ours, and will again become the property of the first one who takes it. Therefore, if during the time that we are pursuing it another should take it, with the intention of himself profiting by its capture, he will be held to have committed a theft against us. Many authorities do not think that it will belong to us, unless we capture it, because many things may happen to prevent us from doing so. This is the better opinion.

§ 2.- The nature of bees, also, is wild. Hence, if they settle upon one of our trees, they are not considered to belong to us until we have enclosed them in a hive, any more than birds who have made their nests in our trees. Therefore, if anyone else should shut up the bees, he will become their owner.

§ 3.- Likewise, if bees make honey, anyone can take possession of it without being guilty of theft. But, as we have already stated, if anyone enters upon the land of another for such a purpose, he can legally be forbidden by the owner from doing so, if the latter is aware of his intention.

§ 4.- A swarm of bees which has left our hive is understood to be ours as long as it is in sight and its

recobrado su libertad natural, deja de ser nuestro, y se hace otra vez del que lo ocupa,

4.- FLORENTINO; *Instituta, libro VI*.- a no ser que amansados se hayan acostumbrado a irse y volver.

5.- GAYO; *Diario, libro II*.- Mas se entiende que recobra su libertad natural, o cuando haya desaparecido de nuestra vista, o cuando de tal modo esté a nuestra presencia, que sea difícil su persecución.

§ 1.- Se dudó, si se entiende que un animal silvestre, que esté herido de modo que pueda ser cogido, es nuestro desde luego. A Trebacio le pareció que desde luego era nuestro, y que se considera que es nuestro mientras lo perseguimos; pero que si dejáremos de perseguirlo dejaba de ser nuestro y se hacía a su vez del que lo ocupaba. Y así si durante el tiempo en que lo perseguimos otro lo hubiere cogido con animo de lucrarse él, se considera que nos hizo un hurto. Pero los mas opinaron, que no era nuestro de otro modo, sino si lo hubiéremos cogido, porque pueden acontecer muchas cosas para que no lo cojamos; lo que es más verdadero.

§ 2.- También es silvestre la naturaleza de las abejas; y así, las que se hubieren posado en un árbol nuestro, antes que por nosotros sean encerradas en una colmena, no se entiende que son nuestras de otra suerte que las aves, que hubieren anidado en un árbol nuestro; y por esto, si otro las hubiere recogido, sera dueño de ellas.

§ 3.- También puede poseer cualquiera, sin cometer hurto, los panales, si algunos hubieren hecho ellas. Pero, como también hemos dicho antes al que entra en un fundo ajeno se le puede prohibir con derecho por el dueño, si éste lo viere, que entre.

§ 4.- El enjambre, que hubiere salido volando de colmena nuestra, se entiende que es nuestro mientras

nostro est nec difficilis eius persecutio est: alioquin occupantis fit.

§ 5.- Pavonum et columbarum fera natura est nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam: cervos quoque ita quidam mansuetos habent, ut in silvas eant et redeant, quorum et ipsorum feram esse naturam nemo negat. In his autem animalibus, quae consuetudine abire et redire solent, talis regula comprobata est, ut eo usque nostra esse intellegantur, donec revertendi animum habeant, quod si desierint revertendi animum habere, desinant nostra esse et fiant occupantium. Intelleguntur autem desisse revertendi animum habere tunc, quum revertendi consuetudinem deseruerint.

§ 6.- Gallinarum et anserum non est fera natura: palam est enim alias esse feras gallinas et alios feros anseres. Itaque si quolibet modo anseres mei et gallinae meae turbati turbataeve adeo longius evolaverint, ut ignoremus ubi sint, tamen nihilo minus in nostro dominio tenentur. Qua de causa furti nobis tenebitur, qui quid eorum lucrandi animo adprehenderit.

§ 7.- Item quae ex hostibus capiuntur, iure gentium statim capientium fiunt:

6.- FLORENTINUS; *libro VI, Institutionum*.- Item quae ex animalibus dominio nostro eodem iure subiectis nata sunt:

7.- GAIUS; *libro II, Rerum quotidianarum, sive Aureorum*.- Adeo quidem, ut et liberi homines in servitutem deducantur: qui tamen, si evaserint hostium potestatem, recipiunt pristinam libertatem.

§ 1.- Praeterea quod per alluvionem agro nostro flumen adicit, iure gentium nobis adquiritur. Per

pursuit is not difficult; otherwise, it becomes the property of the first one who takes possession of it.

§ 5.- The nature of peacocks and pigeons is also wild. Nor does it make any difference whether or not they have the habit of flying away and returning; for bees, whose nature has been decided to be wild, do the same thing. Certain persons have stags, which are so tame that they go into forests and return, and no one denies that their nature is wild. Moreover, with reference to such animals as have the habit of going away and returning, the following rule has been adopted, namely: "That they shall be understood to belong to us, as long as they have the intention of returning, but if they should cease to have this intention, they will no longer be ours, and will become the property of the first occupant." They are understood to have ceased to have the intention to return where they have lost the habit of doing so.

§ 6.- The nature of chickens and geese is not wild, for it is well known that there are wild chickens and wild geese. Hence, if my geese or my chickens, having been frightened for any reason, fly so far that I do not know where they are, I will, nevertheless, retain ownership over them, and anyone who takes them with the intention of profiting by it will be held to have committed theft.

§ 7.- Likewise, anything which is taken from the enemy immediately becomes by the Law of Nations the property of him who takes it.

6.- FLORENTINUS; *Institutes, Book VI*.- Likewise, the increase of animals of which we are the owners belongs to us by the same law.

7.- GAIUS; *Diurnal, or Golden Matters, Book II*.- To such an extent is this true that even men who are free become the slaves of the enemy; but, still, if they escape from the power of the enemy they will recover their former freedom.

§ 1.- Moreover, anything which a river adds to our land as alluvium is acquired by us under the Law of

está a nuestra vista, y no es difícil su persecución; de otra suerte, se hace del que lo ocupa.

§ 5.- Es silvestre la naturaleza de los pavos reales y de las palomas; y no hace al caso que por costumbre suelen irse y volver volando; porque también hacen lo mismo las abejas, cuya naturaleza consta que es silvestre. También algunos tienen ciervos de tal modo amansados, que se van a las selvas, y vuelven, y nadie niega que sea silvestre la naturaleza de los mismos. Mas en cuanto a los animales que por costumbre suelen irse y volver, se admitió tal regla, que se entienda que son nuestros mientras tengan el instinto de volver, porque si hubieren dejado de tener el instinto de volver dejan de ser nuestros, y se hacen de quienes los ocupan; pero se entiende que dejaron de tener el instinto de volver cuando hubieren perdido la costumbre de volver.

§ 6.- No es silvestre la naturaleza de las gallinas y de los ánsares; porque es sabido que hay otras gallinas silvestres, y otros ánsares silvestres. Y así, si espantados o espantadas de algún modo mis ánsares y mis gallinas se hubieren ido volando tan lejos que ignoremos dónde estén, esto no obstante se retienen en nuestro dominio. Por cuya causa nos estará obligado por hurto el que hubiere cogido alguno de ellos con intención de lucrarse con él.

§ 7.- Asimismo, las cosas que se cogen a los enemigos se hacen al punto por derecho de gentes de los que las cogen;

6.- FLORENTINO; *Instituta, libro VI*.- Y también los animales que nacieron de los sujetos con el mismo derecho a nuestro dominio.

7.- GAYO; *Diario, libro II*.- Y ciertamente de tal modo, que también los hombres libres son reducidos a esclavitud; los que, sin embargo, recobran su primitiva libertad, si se hubieren evadido del poder de los enemigos.

§ 1.- Además de esto, lo que por aluvión agregó el río a nuestro campo, se adquiere por derecho de

alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possimus, quantum quoquo momento temporis adiciatur.

§ 2.- Quod si vis fluminis partem aliquam ex tuo praedio detraxerit et meo praedio attulerit, palam est eam tuam permanere. Plane si longiore tempore fundo meo haeserit arboresque, quas secum traxerit, in meum fundum radices egerint, ex eo tempore videtur meo fundo adquisita esse.

§ 3.- Insula quae in mari nascitur (quod raro accidit) occupantis fit: nullius enim esse creditur. In flumine nata (quod frequenter accidit), si quidem mediam partem fluminis tenet, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque praedii, quae latitudo prope ripam sit: quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident.

§ 4.- Quod si uno latere perruperit flumen et alia parte novo rivo fluere coeperit, deinde infra novus iste rivus in veterem se converterit, ager, qui a duobus rivis comprehensus in formam insulae redactus est, eius est scilicet, cuius et fuit.

§ 5.- Quod si toto naturali alveo relicto flumen alias fluere coeperit, prior quidem alveus eorum est, qui prope ripam praedia possident, pro modo scilicet latitudinis cuiusque praedii, quae latitudo prope ripam sit: novus autem alveus eius iuris esse incipit, cuius et ipsum flumen, id est publicus iuris gentium. Quod si post aliquod temporis ad priorem alveum reversum fuerit et flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident. cuius tamen totum agrum novus alveus occupaverit, licet ad priorem alveum reversum fuerit flumen, non tamen is, cuius is ager fuerat, stricta ratione quicquam in eo alveo habere potest, quia et ille ager qui fuerat desiit esse amissa propria forma et, quia

Nations. That, however, is considered to have been added by alluvium which is added little by little, so that we cannot perceive the amount which is added at each moment of time.

§ 2.- But if the force of a stream takes a portion of your land away from you, and brings it upon mine, it is evident that it will continue to be yours. If, however, it should remain on my land for a long time, so that the trees which it brought with it take root in my soil, it will be considered to form part of my land from that time.

§ 3.- Where an island arises in the sea (which rarely happens), it becomes the property of the first occupant; for it is considered to belong to no one. Where an island is formed in a river (which takes place very frequently), and it occupies the middle of the stream, it becomes the common property of those who have land near the banks on both sides of the stream in proportion to the extent of the land of each person along the banks. If the island is nearer to one side than the other, it will belong to him alone who has land along the bank on that side of the stream.

§ 4.- If a river overflows on one side, and begins to run in a new channel, and afterwards the new channel turns back to the old one, the field which is included between the two channels and forms an island will remain the property of him to whom it formerly belonged.

§ 5.- If, however, the stream, having abandoned its natural bed, begins to flow elsewhere, the former bed will belong to those who have land along the bank, in proportion to the extent of the land situated there, and the new bed will come under the same law as the river itself does, that is, it will become public by the Law of Nations. But if, after a certain length of time, the river should return to its former bed, the new bed will again belong to those who own the land along the banks. Where the new bed occupies all the land, even though the river may have returned to its former channel, he to whom the land belonged cannot, strictly speaking, assert any right to the bed of the stream; because the land which formerly belonged to him has ceased to be

gentes para nosotros; mas se considera que se agrega por aluvión lo que se agrega paulatinamente, de suerte que no podamos determinar cuanto se agrega en cada momento de tiempo.

§ 2.- Pero si la fuerza del río hubiere arrancado alguna parte de tu predio, y la hubiere traído a mi predio, es evidente que permanece tuya. Pero si se hubiere adherido por mas largo tiempo a mi fundo, y los árboles, que consigo hubiere traído, hubieren echado raíces en mi fundo, se considerará adquirida desde este momento para mi fundo.

§ 3.- La isla, que nace en el mar, lo que acontece raras veces, se hace del que la ocupa, porque se cree que no es de nadie; la nacida en un río, lo que acontece con frecuencia, si verdaderamente ocupa la parte media del río, es común de los que a una y otra parte del río poseen predios junto a la orilla, con arreglo a la latitud que cada predio tenga cerca de la orilla; pero si estuviera más próxima a una parte, es solamente de los que en aquella parte poseen predios junto a la orilla.

§ 4.- Mas si un río rompiere por un lado, y comenzaré a correr por otra parte en un nuevo cauce, y después este nuevo cauce se uniere más abajo al antiguo, el campo, que comprendido por los dos cauces quedó reducido a manera de isla, es ciertamente de aquel de quien fue antes.

§ 5.- Pero si habiendo dejado todo su cauce natural el río hubiere comenzado a correr por otra parte, el anterior cauce es ciertamente de los que poseen predios junto a la orilla; por supuesto, con arreglo a la latitud que cada predio tenga junto a la orilla; mas el nuevo cauce comienza a ser de aquel derecho de quien es también el mismo río, esto es, público por derecho de gentes. Mas si después de algún tiempo el río hubiere vuelto a su cauce anterior, el nuevo cauce comienza a ser otra vez de los que poseen predios junto a su orilla. Pero si el nuevo cauce hubiere ocupado todo el campo de alguno, aunque el río hubiere vuelto a su cauce anterior, sin embargo, aquel de quien había sido este campo no puede tener

vicinum praedium nullum habet, non potest ratione vicinitatis ullam partem in eo alveo habere: sed vix est, ut id optineat.

§ 6.- Aliud sane est, si cuius ager totus inundatus fuerit: namque inundatio speciem fundi non mutat est, ob id, quum recesserit aqua, palam est eiusdem esse, cuius et fuit.

§ 7.- Quum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nerva et Proculus placuit. Ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvae et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. Videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: quum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.

his, having lost its original form; and since he has no adjoining land, he cannot, by reason of neighborhood, be entitled to any part of the abandoned bed. To rigidly observe this rule, however, would be a hardship.

§ 6.- The rule is different when anyone's field is entirely covered by water, for the inundation does not change the form of the land; and it is clear that when the water subsides, the land will belong to him who previously owned it.

§ 7.- When anyone makes an article in his own name with materials belonging to another, Nerva and Proculus think that its ownership will belong to him who made it, for the reason that what has been fabricated formerly belonged to no one. Sabinus and Cassius think that, in accordance with natural reason, he who owned the materials would also be the proprietor of what was made out of them, because no article can be manufactured without materials; as, for instance, if I should make a vase out of your gold, silver, or brass; or a ship, a cupboard, or a bench cut out of your boards; or a garment out of your cloth; or mead out of your wine and honey; or a plaster, or an eye-wash out of your drugs; or wine out of your grapes, or grain; or oil out of your olives. There is, however, a moderate opinion entertained by persons of good judgment, who believe that, if the article can be reduced to its original form and material, what Sabinus and Cassius hold is true, but if this cannot be done, the opinion of Nerva and Proculus should be adopted; for example, when a vase of gold, silver, or copper can be melted and returned to its original rough metallic mass, but wine, oil, or grain cannot be restored to the grapes, olives, and ears from which it was derived; nor can mead be restored to the honey and wine of which it is composed, nor can a plaster or an eye-wash be resolved to the drugs out of which it was compounded. Still it seems to me that some authorities very properly held that no doubt should exist on this point, when wheat has been obtained from the ears of others to whom the latter belonged,"for the reason that the grain retains the ears in its perfect form, and he who threshes it does

parte alguna en este cauce, porque también dejó de existir el campo que había habido, por haber perdido su propia forma; y como no tiene ningún predio vecino, no puede tener por razón de vecindad parte alguna en este cauce; pero es muy difícil que esto prevalezca.

§ 6.- Mas otra cosa es, si todo el campo de uno hubiere sido inundado, porque la inundación no cambia la especie del fundo; y por esto es evidente que cuando se retirare el agua es del mismo de quien fue antes.

§ 7.- Cuando alguno hubiere hecho en su nombre alguna cosa con materia de otro, opinan Nerva y Próculo, que es dueño el que la hubiere hecho, porque lo que se hizo no había sido antes de nadie. Sabino y Cassio opinan, que la razón natural hace más bien que el mismo que haya sido dueño de la materia sea también dueño de lo que se haya hecho de la misma materia, porque sin la materia no se podría hacer ninguna cosa; por ejemplo, si con oro, o plata, o bronce hubiere yo hecho algún vaso; o si con tablas tuyas hubiere yo hecho una nave o un armario, o escaños; o con lana tuya un vestido; o con vino y miel mulso; o con medicamentos tuyos un emplastro o un colirio; o con uvas, o aceitunas o espigas tuyas vino, o aceite, o trigo. Pero hay también la opinión intermedia de los que juzgan con razón, que, si la cosa pudiera convertirse en la materia, es más verdadero lo que opinaron Sabino y Cassio; y si no pudiera convertirse, que es mas verdadero lo que les pareció bien a Nerva y a Próculo; por ejemplo, un vaso forjado puede convertirse en masa informe de oro, o de plata, o de bronce, pero el vino, o el aceite, o el trigo no se puede convertir en las uvas, las aceitunas y las espiga, y tampoco ciertamente el mulso se puede convertir en la miel y el vino, o el emplastro o los colirios en los medicamentos, Pero a mi me parece, que con razón dijeron algunos que no se debe dudar que el trigo sacado de espigas ajenas es de aquel de quien también fueron las espigas; porque los granos, que se contienen en las espigas, tienen perfecta su especie, y el que trilló las espigas no hace una nueva especie, sino que descubre la que existe.

not manufacture a new article, but only extracts what is already in existence.

§ 8.- Voluntas duorum dominorum miscentium materias commune totum corpus efficit, sive eiusdem generis sint materiae, veluti vina miscuerunt vel argentum conflaverunt, sive diversae, veluti si alius vinum contulerit alius mel, vel alius aurum alius argentum: quamvis et mulsi et electri novi corporis sit species.

§ 9.- Sed et si sine voluntate dominorum casu confusae sint duorum materiae vel eiusdem generis vel diversae, idem iuris est.

§ 10.- Quum in suo loco aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. Nec tamen ideo is qui materiae dominus fuit desiit eius dominus esse: sed tantisper neque vindicare eam potest neque ad exhibendum de ea agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iunctum eximere cogatur, sed duplum pro eo praestet. Appellatione autem tigni omnes materiae significantur, ex quibus aedificia fiunt. Ergo si aliqua ex causa dirutum sit aedificium, poterit materiae dominus nunc eam vindicare et ad exhibendum agere.

§ 11.- Illud recte quaeritur, an, si in aedificium vendiderit is qui aedificaverit et ab emptore longo tempore captum postea dirutum sit, adhuc dominus materiae vindicationem eius habeat. Causa dubitationis est, an eo ipso, quo universitas aedificii longo tempore capta est, singulae quoque res, ex quibus constabat, captae essent: quod non placuit.

§ 8.- If two owners agree to mix materials belonging to them, the entire compound becomes their common property, whether the materials are of the same description or not; as where they mix wine or melt silver, or combine different kinds of substances; or where one contributes wine and the other honey, or one gold and the other silver, although compounds of mead and electrum are products of a dissimilar character.

§ 9.- The same rule of law will apply where materials belonging to two persons are mingled without their consent, whether they are of the same, or of a different nature.

§ 10.- Where one person erects a building on his own ground out of materials belonging to another, he is understood to be the owner of the building, because everything is accessory to the soil which is built upon it. Nevertheless, he who was the owner of the materials does not, for this reason, cease to be such, but, in the meantime, he cannot bring an action to recover them, or to compel their production, under the Law of the Twelve Tables, by which it is provided that no one can be forced to remove timbers belonging to another which were used in the construction of his own house, but he must pay double their value. By the term "timbers" out of which buildings are constructed, all materials are meant. Therefore, if for any reason a house should be demolished, the owner can then bring an action to recover the materials, and have them produced.

§ 11.- The question was very properly asked, if the person who built the house under such circumstances should sell it, and it, after having been owned for a long time by the purchaser, should be demolished, whether the owner would still have a right to claim the materials as his own. The reason for the doubt is that, although the entire building can be acquired by prescription after a long time has elapsed, it does not follow that the separate materials of which it was composed can also be acquired. The latter opinion

§ 8.- La voluntad de dos dueños que mezclan sus materias hace común todo lo incorporado, ya si las materias fueran de una misma especie, como si mezclaron vinos, o fundieron plata, ya si diversas, como si uno hubiere aportado vino y otro miel, o uno oro y otro plata, aunque sean especies de un nuevo cuerpo la del mulso y la del electro.

§ 9.- Pero el mismo derecho hay aunque sin la voluntad de los dueños se hayan confundido materias de dos, ora del mismo género, ora diversas.

§ 10.- Cuando alguno hubiere edificado en lugar suyo con materiales ajenos, se entiende que el mismo dueño lo es del edificio, porque todo lo que en él se edifica cede al suelo. Mas el que fue dueño de los materiales no por eso dejó de ser dueño de ellos, sino que no puede reivindicarlos mientras tanto, ni ejercitar respecto de ellos la acción de exhibición por virtud de la ley de las Doce Tablas, en la cual se dispone que nadie sea obligado a quitar la viga ajena puesta en su casa, sino a pagar por ella el duplo. Mas con la denominación de viga se significan todos los materiales con que se hacen los edificios. Luego si por cualquier causa se arruinó el edificio, podrá el dueño de los materiales reivindicarlos entonces, y ejercitar la acción de exhibición.

§ 11.- Con razón se pregunta, si, habiendo vendido este edificio el que lo hubiere edificado, y, adquirido por el comprador por el transcurso de largo tiempo, se hubiera arruinado después, tendría todavía el dueño de los materiales acción para reivindicarlos. Es causa de la duda, si por lo mismo que por el transcurso de largo tiempo fue adquirida la totalidad del edificio, se habrían adquirido cada una de las cosas de que constaba; lo que no pareció bien.

has not been adopted.

§ 12.- Ex diverso si quis in alieno solo sua materia aedificaverit, illius fit aedificium, cuius et solum est et, si scit alienum solum esse, sua voluntate amisisse proprietatem materiae intellegitur: itaque neque diruto quidem aedificio vindicatio eius materiae competit. Certe si dominus soli petat aedificium nec solvat pretium materiae et mercedes fabrorum, poterit per exceptionem doli mali repelli, utique si nescit qui aedificavit alienum esse solum et tamquam in suo bona fide aedificavit: nam si scit, culpa ei obici potest, quod temere aedificavit in eo solo, quod intellegeret alienum.

§ 13.- Si alienam plantam in meo solo posuero, mea erit: ex diverso si meam plantam in alieno solo posuero, illius erit: si modo utroque casu radices egerit: antequam enim radices ageret, illius permanet, cuius et fuit. His conveniens est, quod, si vicini arborem ita terra presserim, ut in meum fundum radices egerit, meam effici arborem: rationem enim non permittere, ut alterius arbor intellegatur, quam cuius fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est.

8.- MARCIANUS; *libro III, Institutionum.*- Pro regione cuiusque praedii.

§ 1.- Sed et si in confinio lapis nascatur et sunt pro indiviso communia praedia, tunc erit lapis pro indiviso communis, si terra exemptus sit.

9.- GAIUS; *libro II, Rerum quotidianarum, sive Aureorum.*- Qua ratione autem plantae quae terra

§ 12.- On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom the ground belongs. If he knew that the land was owned by another, he is understood to have lost the ownership of the materials voluntarily; and therefore if the house is demolished he will have no right to claim them. Where, however, the owner of the ground claims the building, and does not reimburse the other for the value of the materials and the wages of the workmen, he can be barred by an exception on the ground of fraud; and if he who constructed the building did not know that the land belonged to another, and hence erected it in good faith, this course should certainly be pursued. For if he was aware that the land belonged to another, it can be alleged that he was to blame for rashly building a house upon land which he knew was not his.

§ 13.- If I plant a shrub belonging to another upon my ground, it will belong to me. If, on the other hand, I plant one of mine upon the ground of another, it will belong to him; provided that in either case it has taken root; for, otherwise, it will remain the property of him who previously owned it. In accordance with this, if I press a tree belonging to another into my soil, so it takes root, it will become my tree; for reason does not permit that a tree shall be considered to belong to another unless it takes root in his soil. Hence, if a tree planted near a boundary line sends its roots into the adjoining earth, it becomes the common property of both owners,

8.- MARCIANUS; *Institutes, Book III.*- In proportion to the place it occupies on each tract of land.

§ 1.- If, however, a stone is formed on a boundary line of two tracts of land held in common, but undivided, the stone also undivided will belong to the joint-owners if it is removed from the ground.

9.- GAIUS; *Diurnal or Golden Matters, Book II.*- For this reason plants which have taken root on land

§ 12.- Por el contrario, si alguno hubiere edificado con materiales suyos en suelo ajeno, el edificio se hace de aquel de quien también es el suelo; y si sabe que el suelo es ajeno, se entiende que por propia voluntad perdió la propiedad de los materiales; y así, ni aun arruinado ciertamente el edificio le compete la reivindicación de sus materiales. Verdaderamente, si el dueño del suelo reclamara el edificio, y no pagara el precio de los materiales y de los jornales de los operarios, podrá ser repelido por la excepción de dolo malo; por supuesto, si el que edificó no sabe que el suelo es ajeno, y edificó de buena fe, como si fuera en suelo suyo; porque si lo sabe, se le puede atribuir la culpa de que temerariamente haya edificado en aquel suelo, que sabía que era ajeno.

§ 13.- Si yo hubiere puesto en suelo mío una planta ajena, será mía; por el contrario, si en suelo ajeno hubiere puesto una planta mía, será de aquél, con tal que en uno y otro caso hubiere echado raíces; porque antes que echase raíces permanece siendo de aquél de quien fue antes. A esto es consiguiente, que si con la tierra hubiere yo comprimido el árbol del vecino de suerte que echase raíces en mi fundo, el árbol se hace mío; porque no permite la razón que se entienda que un árbol es de otro que de aquel en cuyo fundo hubiese echado raíces. Y por esto, si el árbol plantado junto a la linde hubiere echado raíces también en el fundo del vecino, es común

8.- MARCIANO; *Instituta, libro III.*- según la parte de cada predio.

§ 1.- Pero si en la linde naciera piedra, y están indivisos los predios comunes, en este caso será común *pro indiviso* la piedra, si hubiera sido arrancada.

9.- GAYO; *Diario, libro II.*- Mas por la misma razón que las plantas que agarran en la tierra ceden al

coalescunt solo cedunt, eadem ratione frumenta quoque quae sata sunt solo cedere intelleguntur. Ceterum sicut is, qui in alieno solo aedificavit, si ab eo dominus soli petat aedificium, defendi potest per exceptionem doli mali, ita eiusdem exceptionis auxilio tutus esse poterit, qui in alienum fundum sua impensa consevit.

§ 1.- Litterae quoque licet aureae sint, perinde chartis membranisque cedunt, ac solo cedere solent ea quae aedificantur aut seruntur. Ideoque si in chartis membranisque tuis carmen vel historiam vel orationem scripsero, huius corporis non ego, sed tu dominus esse intellegeris. Sed si a me petas tuos libros tuasve membranas nec impensas scripturae solvere velis, potero me defendere per exceptionem doli mali, utique si bona fide eorum possessionem nactus sim.

§ 2.- Sed non uti litterae chartis membranisque cedunt, ita solent picturae tabulis cedere, sed ex diverso placuit tabulas picturae cedere. Utique tamen conveniens est domino tabularum adversus eum qui pinxerit, si is tabulas possidebat, utilem actionem dari, qua ita efficaciter experiri poterit, si picturae impensam exsolvat: alioquin nocebit ei doli mali exceptio: utique si bona fide possessor fuerit qui solverit. adversus dominum vero tabularum ei qui pinxerit rectam vindicationem competere dicimus, ut tamen pretium tabularum inferat: alioquin nocebit ei doli mali exceptio.

§ 3.- Hae quoque res, quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem

belong to it, and grain which has been sowed, is also considered to form a part of the soil. Moreover, as in the case of one who builds upon land belonging to another, if the latter brings an action to recover the building, he can be barred by an exception on the ground of fraud; so, likewise, he who has, at his own expense, sowed seed upon the land of another, can protect himself by means of an exception.

§ 1.- Letters, also, even though they may be of gold, form part of the papyrus and parchment on which they are written; just as materials of which houses are constructed are accessory to the land, and, on the same principle, seeds that have been sown form part of it. Hence, if I write a poem, a history, or a speech of my own upon papyrus or parchment belonging to you, not I, but you, will be understood to be the owner of the work. If, however, you bring an action against me to recover your books or your parchment, and refuse to pay me the expense incurred by writing, I can protect myself by an exception on the ground of fraud, provided I have obtained possession of the articles in good faith.

§ 2.- Pictures, however, do not usually constitute part of the tablets on which they are painted, as letters do of the papyrus and parchment on which they are written; but, on the other hand, it has been decided that the tablet is accessory to the painting. Still, it is ever perfectly proper that a praetorian action should be granted to the owner of the tablet against him who painted the picture, provided he is in possession of the tablet; of which action he can effectually avail himself if he tenders the expense of painting the picture: otherwise, he will be barred by an exception on the ground of fraud, as he certainly should have paid the expense if he was the bona fide possessor of the tablet. We say, however, that an action to recover the tablet will properly lie in favor/of him who painted it, against the owner, but he should tender him the value of the tablet; otherwise, he will be barred by an exception on the ground of fraud.

§ 3.- Property which becomes ours by delivery is acquired by us under the Law of Nations; for nothing is so conformable to natural equity as that the wish of

terreno, se entiende que también cede al terreno el trigo que se sembró. Pero así como el que edificó en suelo ajeno, si el dueño del suelo le reclamara el edificio, se puede defender con la excepción de dolo malo, así podrá estar seguro con el auxilio de la misma excepción el que a su propia costa sembró en fundo ajeno.

§ 1.- Las letras, aunque sean de oro, ceden también al papel y al pergamino, como suele ceder al suelo lo que se edifica o se siembra, Y por esto, si en papel o pergamino tuyo hubiere yo escrito un poema, o una historia, o una oración, se entenderá que no yo sino tú eres dueño de esta cosa. Pero si me pidieras tus libros o tus pergaminos, y no quisieras pagarme los gastos de su escritura, podré defenderme con la excepción de dolo malo, por supuesto, si yo hubiera alcanzado de buena fe su posesión.

§ 2.- Pero no como ceden a los papeles y a los pergaminos las letras, suelen ceder de la misma manera a las tablas las pinturas; sino que plugo por el contrario, que las tablas cedieran a las pinturas. Pero es ciertamente conveniente, que al dueño de las tablas se le dé la acción útil contra el que más hubiere pintado, si éste poseía las tablas; porque de este modo podrá reclamar eficazmente, si pagase el gasto de la pintura, pues de otra suerte le perjudicará la excepción de dolo malo; esto, a la verdad, si fuere poseedor de buena fe aquel a quien le pagare, Mas decimos que al que las hubiere pintado le compete contra el dueño de las tablas la reivindicación directa, con tal, sin embargo, que pague el precio de las tablas, pues de otra suerte le perjudicará la excepción de dolo malo.

§ 3.- También se adquieren por derecho de gentes para nosotros las cosas que se hacen nuestras mediante entrega, porque nada es tan conforme a la

domini volentis rem suam in alium transferre ratam haberi.

§ 4.- Nihil autem interest, utrum ipse dominus per se tradat alicui rem an voluntate eius aliquis. Qua ratione si cui libera negotiorum administratio ab eo qui peregre proficiscitur permissa fuerit et is ex negotiis rem vendiderit et tradiderit, facit eam accipientis.

§ 5.- Interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam, veluti si rem, quam commodavi aut locavi tibi aut apud te deposui, vendidero tibi: licet enim ex ea causa tibi eam non tradiderim, eo tamen, quod patior eam ex causa emptionis apud te esse, tuam efficio.

§ 6.- Item si quis merces in horreo repositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

§ 7.- Hoc amplius interdum et in incertam personam collocata voluntas domini transfert rei proprietatem: ut ecce qui missilia iactat in vulgus, ignorat enim, quid eorum quisque excepturus sit, et tamen quia vult quod quisque exceperit eius esse, statim eum dominum efficit.

§ 8.- Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiciuntur: hae enim dominorum permanent, quia non eo animo eiciuntur, quod quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat. Quae de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit.

an owner, who intends to transfer his property to another, should be complied with.

§ 4.- It, however, makes no difference whether the owner himself delivers the article in person to another, or whether someone else does it with his consent. Hence, where the free administration of his affairs is entrusted to anyone by a person about to depart upon a journey to a distant country, and the former, in the regular course of business, sells and delivers anything to a purchaser, he transfers the ownership of the same to him who receives it.

§ 5.- Sometimes, even the mere wish of the owner is sufficient to transfer the property without delivery, as, for instance, if I have lent or hired an article to you, and then after having deposited it with you, I sell it to you. For, although I have not delivered it to you for this reason, still, I render it your property by the mere fact that I permit it to remain in your hands on account of it having been purchased.

§ 6.- Likewise, if anyone sells merchandise which is stored in a warehouse, and, at the same time, delivers the keys of the warehouse to the purchaser, he transfers to him the ownership of the merchandise.

§ 7.- Moreover, at times, the will of the owner transfers the title to property to a person who is not designated; for example, where someone throws anything into a crowd, for he does not know how much of it any individual may pick up; and, still, as he is willing that whatever anyone may pick up shall belong to him, he immediately renders him the owner of the same.

§ 8.- The rule is different where merchandise is thrown into the sea during a storm for the purpose of lightening a ship, for it remains the property of the owner, as it was not thrown overboard with the intention of relinquishing it, but that the owner together with the ship might the more readily escape the perils of the sea. For which reason, if anyone obtains the property while on the sea itself, or after it

equidad natural como que se tenga por válida la voluntad del dueño que quiere transferir a otra una cosa suya.

§ 4.- Mas nada importa que el mismo dueño entregue por sí la cosa a otro, o que alguno la entregue con la voluntad de aquél. Por cuya razón si a alguno le hubiere sido permitida la libre administración de los negocios por el que marcha de viaje y él hubiere vendido y entregado alguna cosa de los negocios, la hace del que la recibe.

§ 5.- A veces basta para transferir una cosa la nuda voluntad del dueño aun sin la entrega por ejemplo, si yo te hubiere vendido la cosa que te dí en comodato o en arrendamiento, o que deposité en tu poder; porque aunque yo no te la hubiere entregado por virtud de esta causa, sin embargo por lo mismo que consiento que esté en tu poder por causa de compra, la hago tuya.

§ 6.- Asimismo, si alguno hubiere vendido las mercancías puestas en un almacén, transfiere al comprador la propiedad de las mercancías lo mismo que si le hubiere entregado al comprador las llaves del almacén.

§ 7.- Además de esto, a veces la voluntad del dueño, aun refiriéndose a una persona incierta transfiere la propiedad de la cosa, por ejemplo, el que echa cosas al pueblo; porque ignora qué haya de recoger de ellas cada cual, y sin embargo, como quiere que sea de él lo que cada cual hubiere cogido, al punto hace dueño a éste.

§ 8.- Otra es la condición de las cosas que en caso de borrasca se arrojan al mar para aligerar la nave; porque éstas permanecen siendo de sus dueños, pues no son arrojadas porque uno no quiere tenerlas, sino para huir mejor con la misma nave del peligro del mar; por cuya causa, si alguno, habiendo sido arrojadas por las olas, o aun si habiéndolas cogido en el mismo mar, las hubiere quitado con intención de

has been cast on land by the force of the waves, and removes it with the intention of profiting by it, he commits a theft.

10.- IDEM; *libro II, Institutionum*.- Adquiruntur nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate habemus, item per servos, in quibus usum fructum habemus, item per homines liberos et servos alienos, quos bona fide possidemus: de quibus singulis diligentius dispiciamus.

§ 1.- Igitur quod servi nostri ex traditione nanciscuntur sive quid stipulentur vel ex qualibet alia causa adquirunt, id nobis acquiritur: ipse enim, qui in potestate alterius est, nihil suum habere potest. Ideoque si heres institutus sit, nisi nostro iussu hereditatem adire non potest, et si iubentibus nobis adierit, hereditas nobis acquiritur, perinde atque si nos ipsi heredes instituti essemus. Et his convenienter scilicet legatum nobis per eundem acquiritur.

§ 2.- Non solum autem proprietates per eos, quos in potestate habemus, acquiritur nobis, sed etiam possessio: cuiuscumque enim rei possessionem adepti fuerint, id nos possidere videmur. Unde etiam per eorum longam possessionem dominium nobis acquiritur.

§ 3.- De his autem servis, in quibus tantum usum fructum habemus, ita placuit, ut quidquid ex re nostra ex operis suis adquirant, id nobis adquiratur, si quid vero extra eas causas persecuti sint, id ad dominum proprietatis pertinet. Itaque si is servus heres institutus sit legatumve quid aut ei donatum fuerit, non mihi, sed domino proprietatis acquiritur.

§ 4.- Idem placet de eo, qui nobis bona fide

10.- THE SAME; *Institutes, Book II*.- Property is acquired for us not only by ourselves, but also by those whom we have in our power; as, for instance, by slaves in whom we have the usufruct, and also by freemen and slaves belonging to others of whom we have possession in good faith. Let us consider each of these cases in detail.

§ 1.- Hence, anything which our slaves obtain by delivery, or which they stipulate for, or acquire in any other way whatsoever, is acquired by us; for he who is in the power of another can have nothing of his own. Therefore, if our slave is appointed an heir, he cannot enter upon the estate unless by our order, and if we order him to do so, the estate is acquired by us, just as if we ourselves had been appointed heirs. In conformity with this principle, a legacy also is acquired by us through our slave.

§ 2.- Moreover, not only is ownership acquired for us by those whom we have under our control, but possession is also; for when they obtain possession of the property of anyone, we, ourselves, are considered to possess it; hence ownership is also acquired for us by long-continued possession.

§ 3.- With reference to those slaves in whom we have only the usufruct, it has been decided that when they acquire anything through the use of our property, or by their own labor, it is acquired by us. If, however, they obtain anything by any other means, it will belong to him in whom the ownership of it is vested. Therefore, if a slave of this kind is appointed an heir, or if anything is bequeathed or given to him, it will not be acquired by me but for the owner of the property.

§ 4.- The same rule which has been adopted with

lucrarse con ellas, comete hurto.

10.- EL MISMO; *Instituta, libro II*.- Se adquiere para nosotros no solamente por nosotros mismos, sino también por los que tenemos bajo potestad; asimismo por medio de los esclavos sobre los que tenemos el usufructo; también por medio de hombres libres y de esclavos ajenos, que poseemos de buena fe; de cada uno de los cuales trataremos más especialmente.

§ 1.- Así, pues, lo que nuestros esclavos adquieren por entrega, ya si estipulan alguna cosa, ya si adquieren por otra cualquier causa, se adquiere para nosotros; porque el mismo, que está bajo la potestad de otro, no puede tener nada suyo. Y por tanto, si hubiera sido instituido heredero, no puede adir la herencia sino por mandato nuestro; y si mandándonoselo nosotros la hubiere adido, la herencia es adquirida para nosotros, lo mismo que si nosotros mismos hubiésemos sido instituidos herederos; y consiguientemente a esto se adquiere, por supuesto, para nosotros por medio del mismo un legado.

§ 2.- Mas por medio de los que tenemos bajo potestad no solamente se adquiere para nosotros la propiedad, sino también la posesión; porque se considera que poseemos cualquier cosa de la que hubieren alcanzado la posesión; por lo cual, mediante la larga posesión de los mismos se adquiere para nosotros el dominio.

§ 3.- Mas respecto a los esclavos, sobre los que tenemos solamente el usufructo, se determinó que cualquier cosa que adquirieran con cosa nuestra, o con su trabajo, sea adquirida para nosotros; mas lo que por otras causas hubiesen adquirido le pertenece al dueño de la propiedad. Y así, si este esclavo hubiera sido instituido heredero, o si se le hubiere legado o donado alguna cosa, se adquiere no para mí, sino para el dueño de la propiedad.

§ 4.- Lo mismo se halla establecido en cuanto al

possidetur, sive liber sit sive alienus servus: quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore. Itaque quod extra duas causas acquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum eius, si servus est.

§ 5.- Sed bonae fidei possessor quum usuceperit servum, quia eo modo dominus fit, ex omnibus causis per eum sibi adquirere potest: usufructuarius vero usucapere servum non potest, primum quia non possidet, sed habet ius utendi fruendi, deinde quoniam scit servum alienum esse.

11.- MARCIANUS; *libro III, Institutionum*.- Pupillus quantum ad adquirendum non indiget tutoris auctoritate: alienare vero nullam rem potest nisi praesente tutore auctore, et ne quidem possessionem, quae est naturalis, ut Sabinianis visum est: quae sententia vera est.

12.- CALLISTRATUS; *libro II, Institutionum*.- Lacus et Stagna licet interdum crescant, interdum exarescant, suos tamen terminos retinent ideoque in his ius alluvionis non adgnoscur.

§ 1.- Si aere meo et argento tuo conflato aliqua species facta sit, non erit ea nostra communis, quia, quum diversae materiae aes atque argentum sit, ab artificibus separari et in pristinam materiam reduci solet.

13.- NERATIUS; *libro VI, Regularum*.- Si procurator rem mihi emerit ex mandato meo eique sit tradita meo nomine, dominium mihi, id est proprietatem acquiritur etiam ignorantibus.

§ 1.- Et tutor pupilli pupillae similiter ut procurator emendo nomine pupilli pupillae proprietatem illis acquirit etiam ignorantibus.

reference to an usufructuary is also applicable to one who is possessed by us in good faith, whether he is free, or a slave belonging to another; and is available in the case of a bona fide possessor. Hence, whatever is acquired in any other way than the two above mentioned will either belong to the person himself if he is free, or to his master if he is a slave.

§ 5.- Still, where a bona fide possessor obtains a slave by usucaption, for the reason that, under these circumstances, he becomes his owner, he can acquire property through him in every way. An usufructuary, however, cannot acquire a slave by usucaption; first, because he does not actually possess him, but merely has the right of using and enjoying him; second, because he knows that the slave belongs to another.

11.- MARCIANUS; *Institutes, Book III*.- A ward does not need the authority of his guardian for the purpose of acquiring property, but he cannot alienate anything unless his guardian is present and consents; nor (as was held by the Sabinians) can he even transfer possession although it may be natural. This opinion is correct.

12.- CALLISTRATUS; *Institutes, Book II*.- Although lakes and ponds sometimes increase in dimensions, and sometimes dry up, they still retain their original boundaries, and therefore the right of alluvium is not admitted, so far as they are concerned.

§ 1.- If a vessel of any kind is made by melting my copper and your silver together, it will not become our common property; because, as copper and silver are different materials, they can be separated by the artificers, and returned to their former condition.

13.- NERATIUS; *Rules, Book VI*.- If my agent, by my direction, should purchase anything for me, and it is delivered to him in my name, the ownership of the article, that is to say, the title to it, is acquired by me, even if I am not aware of the fact.

§ 1.- The guardian of a male or female ward, just like an agent, acquires property for him or her by purchasing it in the name of the ward, even without

que de buena fe es poseído por nosotros, ya sea libre, ya esclavo ajeno; porque lo mismo que se estableció respecto al usufructuario se admite también en cuanto al poseedor de buena fe. Y así, lo que se adquiere por causa distinta de estas dos, o le pertenece a él mismo, si es libre, o a su señor, si es esclavo.

§ 5.- Mas el poseedor de buena fe, cuando hubiere usucapido al esclavo, como de este modo se hace dueño, puede adquirir para sí por medio de él por todas las causas; pero el usufructuario no puede usucapir al esclavo, en primer lugar porque no lo posee, sino que tiene el derecho de usufructuario, y en segundo porque sabe que el esclavo es de otro.

11.- MARCIANO; *Instituta, libro III*.- El pupilo no necesita de la autoridad del tutor para adquirir; pero no puede enajenar cosa alguna, sino estando presente el tutor y con su autoridad, y ni la posesión, que es natural, como les pareció a los Sabinianos; cuya opinión es verdadera.

12.- CALISTRATO; *Instituta, libro II*.- Los lagos y los estanques, aunque a veces crezcan, y a veces se sequen, conservan, sin embargo, sus límites; y por lo tanto no se reconoce respecto a ellos el derecho de aluvión.

§ 1.- Si con cobre mío y plata tuya fundidos se hubiere hecho alguna cosa, no será ésta nuestra en común, porque siendo diversas materias el cobre y la plata, se separan por los artifices, y la cosa se suele reducir a la primitiva materia.

13.- NERACIO; *Reglas, libro VI*.- Si un procurador hubiere comprado para mí una cosa por mandato mío, y le hubiera sido entregada en mi nombre, se adquiere para mí el dominio, esto es, la propiedad, aun ignorándolo yo.

§ 1.- El tutor de un pupilo o de una pupila, a la manera que el procurador, comprando en nombre del pupilo o de la pupila, adquiere para ellos la pro-

14.- IDEM; *libro V, Membranarum*.- Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt.

§ 1.- Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. Quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem.

15.- IDEM; *libro V, Regularum*.- Qui autem in ripa fluminis aedificat, non suum facit.

16.- FLORENTINUS; *libro VI, Institutionum*.- In agris limitatis ius alluvionis locum non habere constat: idque et Divus Pius constituit et trebatius ait agrum, qui hostibus devictis ea condicione concessus sit, ut in civitatem veniret, habere alluvionem neque esse limitatum: agrum autem manu captum limitatum fuisse, ut sciretur, quid cuique datum esset, quid venisset, quid in publico relictum esset.

17.- ULPIANUS; *libro I, ad Sabinum*.- Si duo domini servo communi rem tradiderit, acquirit alteri ab altero.

his or her knowledge.

14.- THE SAME; *Parchments, Book V*.- Whatever anyone builds upon the shore of the sea will belong to him; for the shores of the sea are not public like the property which forms part of the patrimony of the people, but resembles that which was formed in the first place by Nature, and has not yet been subjected to the ownership of anyone. For their condition is not dissimilar to that of fish and wild animals, which, as soon as they are taken, undoubtedly become the property of him under whose control they have been brought.

§ 1.- Where a building which has been erected upon the seashore is removed, it should be considered what the condition of the ground on which it was situated is, that is to say whether it will remain the property of him to whom the building belonged, or whether it will revert to its former condition and again become public; just as if it had never been built upon. The latter should be deemed the better opinion, provided it remains in its former condition as a part of the shore.

15.- THE SAME; *Rides, Book V*.- He, however, who erects a house on the bank of a stream does not thereby make it his own.

16.- FLORENTINUS; *Institutes, Book VI*.- It is established that the right of alluvium does not exist with reference to land having boundaries. This was also decided by the Divine Pius. Trebatius says that where land taken from conquered enemies is granted under the condition that it shall belong to some city, it will be entitled to the right of alluvium, and has no established boundaries; but that land taken by individuals has prescribed boundaries, so that it may be ascertained what was given, and to whom, as well as what was sold, and what remained public.

17.- ULPIANUS; *On Sabinus, Book I*.- Where two masters deliver property to a slave owned by them in common, he acquires for one of his masters the share of the other.

piedad, aun ignorándolo ellos.

14.- EL MISMO; *Pergaminos, libro V*.- Lo que alguno hubiere edificado en un litoral será suyo; porque los litorales públicos no son como las cosas que están en el patrimonio del pueblo, sino como las que en un principio fueron producidas por la naturaleza, y no llegaron todavía al dominio de nadie; y no es diferente la condición de otras cosas, como los peces y los animales silvestres, los cuales tan pronto como fueron cogidos se hacen sin duda del dominio de aquél a cuyo poder fueron.

§ 1.- Se ha de ver, de qué condición sea el solar, habiendo sido demolido el edificio que en un litoral se emplazó, esto es, si permanecerá siendo de aquel de quien fue el edificio, o si volverá de nuevo a la primitiva condición, y será público lo mismo que si nunca se hubiese edificado en él; la que es mas probable que deba estimarse, si es que recobra su primitivo aspecto de litoral.

15.- EL MISMO; *Reglas, libro V*.- Mas el que edifica en la ribera de un río no hace suyo la edificado.

16.- FLORENTINO; *Instituta, libro VI*.- Es sabido que el derecho de aluvión no tiene lugar en los campos deslindados; y esto determinó también el Divina Pío. Y dice Trebacio, que el campo que, vencidos los enemigos, haya sido concedido con la condición de que vuelva a la ciudad, tiene aluvión, y no está deslindado; pero que el campo tomado materialmente fue deslindado, para que se supiese cuál había sido dado a cada uno, cuál fue vendido y cuál dejado para el público.

17.- ULPIANO; *Comentarios a Sabino, libro I*.- Si dos dueños le hubieren entregado una cosa a un esclavo común, éste la adquiere del uno para el otro.

18.- IDEM; *libro IV, ad Sabinum*.- Per hereditarium servum quod est eiusdem hereditatis heredi acquiri non potest et maxime ipsa hereditas.

19.- POMPONIUS; *libro III, ad Sabinum*.- Liber homo, qui bona fide mihi servit, id quod ex operis suis aut ex re mea pararet, ad me pertinere sine dubio aristo ait: quod vero quis ei donaverit aut ex negotio gesto adquisierit, ad ipsum pertinere. Sed hereditatem legatumve non acquiri mihi per eum, quia neque ex re mea neque ex operis suis id sit nec ulla eius opera esset in legato, in hereditate aliquatenus, quia per ipsum adiretur (quod et varium lucullum aliquando dubitasse), sed verius esse non acquiri, etiamsi testator ad me voluisset pertinere. Sed licet ei minime adquisit, attamen, si voluntas evidens testatoris appareat, restituendam esse ei hereditatem. Sed Trebatius, si liber homo bona fide serviens iussu eius cui serviet hereditatem adisset, heredem ipsum fieri nec interesse quid senserit, sed quid fecerit. Labeo contra, si ex necessitate id fecisset: quod si ita, ut et ipse vellet, ipsum fieri heredem.

20.- ULPIANUS; *libro XXIX, ad Sabinum*.- Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert.

§ 1.- Quotiens autem dominium transfertur, ad eum qui accipit tale transfertur, quale fuit apud eum qui tradit: si servus fuit fundus, quum servitutibus transit, si liber, uti fuit: et si forte servitutes debebantur fundo qui traditus est, quum iure servitutium debitarum transfertur. Si quis igitur fundum dixerit

18.- THE SAME; *On Sabinus, Book IV*.- Property forming part of an estate cannot be acquired by the heir through a slave belonging to the same estate, and still less can the estate itself be acquired in this way.

19.- POMPONIUS; *On Sabinus, Book III*.- Aristo says that a freeman who is serving me in good faith as a slave will undoubtedly acquire for me whatever he earns by his labor through the use of my property. But whatever anyone gives him, or whatever he obtains in transacting business, will belong to him. He says, however, that any estate or legacy which has been bequeathed will not be acquired by me through him, because it is not derived from my property, or from his labor; for he has performed no work to obtain the legacy, and it is, to a certain extent, an estate, because it is accepted by him. This was at one time doubted by Varius Lucullus. The better opinion, however, is that the estate is not acquired, even though the testator may have intended it to belong to me. But even if the supposed slave does not acquire it for me, still, if it was the evident intention of the testator that this was to be done, the estate should be delivered to me. Trebatius thinks that where a freeman is serving anyone in good faith as a slave, and enters upon an estate by order of the person whom he is serving, he himself will become the heir; for it makes no difference what a man intended to do, but what he did do. Labeo holds the contrary opinion, provided he was compelled to do this; but if he desired to do it, he will become the heir.

20.- ULPIANUS; *On Sabinus, Book XXIX*.- A delivery of property should not and cannot transfer any more right in the same to him who receives it than he who delivers it possessed. Therefore, anyone who owns land, can transfer it by delivery; but if he did not have the ownership of the same, he does not convey anything to him who receives it.

§ 1.- When the ownership is transferred to him who receives it, it is transferred in the same condition that it was while in the possession of the grantor. If it is subject to a servitude, it passes with the servitude; if it is free, it passes in that condition; and if servitudes are due to the land which is transferred, it is conveyed

18.- EL MISMO; *Comentarios a Sabino libro IV*.- Por medio de un esclavo de la herencia no se puede adquirir para el heredero lo que es de la misma herencia; y mucho menos la misma herencia.

19.- POMPONIO; *Comentarios a Sabino, libro III*.- Dice Aristón, que toda lo que un hombre libre, que me sirve de buena fe, adquiriese con su trabajo o con cosa mía, me pertenece sin duda; porque lo que cualquiera le hubiere donado o él hubiere adquirida por la gestión de un negocio, le pertenece al mismo. Mas por medio de él no se adquiere para mí una herencia o un legado, porque esta no proviene ni de cosa mía ni de su trabajo, ni en el legado hay trabajo alguno suyo; en la herencia hasta cierto punto, porque haya sido adida por medio de él; lo que alguna vez puso en duda también Vario Lúculo; pero es más verdadero que no se adquiere, aunque el testador hubiese querido que me perteneciera. Mas aunque de ninguna manera adquiere para él sin embargo, si apareciera evidente la voluntad del testador, se le ha de restituir, a él la herencia. Pero Trebacio dice, que si un hombre libre, que sirve de buena fe, hubiese adido una herencia por mandato de aquel a quien le sirviera, él mismo se hace heredero, y que no importa cuál haya sido su intención, sino qué es lo que haya hecho. Labeón dice lo contrario, si esto lo hubiese hecho por necesidad; pero que si porque también él la quisiera, él mismo se hace heredero.

20.- ULPIANO; *Comentarios a Sabino, libro XXIX*.- La entrega no debe ni puede transferir al que recibe nada más que lo que hay en poder del que entrega. Si, pues, uno tuvo el dominio sobre un fundo lo transfiere al entregarlo; y si no lo tuvo, no transfiere nada al que lo recibe.

§ 1.- Mas siempre que se transfiere el dominio se le transfiere al que lo recibe tal y como estuvo en poder del que lo entrega; si el fundo era sirviente, pasa con las servidumbres, y si libre, como era; y si acaso se le debían servidumbres al fundo que fue entregado, es transferido con el derecho de las servidumbres debi-

liberum, quum traderet, eum qui servus sit, nihil iuri servitutis fundi detrahit, verumtamen obligat se debebitque praestare quod dixit.

§ 2.- Si ego et Titius rem emerimus eaque Titio et quasi meo procuratori tradita sit, puto mihi quoque quaesitum dominium, quia placet per liberam personam omnium rerum possessionem quaeri posse et per hanc dominium.

21.- POMPONIUS; *libro XI, ad Sabinum*.- Si servus meus tibi bona fide serviret et rem emisset traditaque ei esset, Proculus nec meam fieri, quia servum non possideam, nec tuam, si non ex re tua sit parata. Sed si liber bona fide tibi serviens emerit, ipsius fieri.

§ 1.- Si rem meam possideas et eam velim tuam esse, fiet tua, quamvis possessio apud me non fuerit.

22.- ULPIANUS; *libro XL, ad Sabinum*.- Nemo servum vi possidens aut clam aut precario per hunc stipulantem vel rem accipientem potest adquirere.

23.- IDEM; *libro XLIII, ad Sabinum*.- Qui bona fide alicui servit, sive servus alienus est sive homo liber est, quidquid ex re eius cui servit acquirit, ei acquirit, cui bona fide servit. Sed et si quid ex operis suis adquisierit, simili modo ei acquirit: nam et operae quodammodo ex re eius cui servit habentur, quia iure operas ei exhibere debet, cui bona fide servit.

together with the rights to the servitudes imposed for its benefit. Hence if anyone should allege that certain land is free, and he delivers a tract which is charged with a servitude, he diminishes nothing of the right of the servitude attaching to the said land, but he, nevertheless, binds himself, and must furnish what he agreed to do.

§ 2.- If Titius and myself purchase property, and delivery of it is made to Titius individually, and also as my agent, I think that the property is also acquired by me, because it is established that possession of every kind of property, and consequently the ownership of the same, can be obtained through the agency of a person who is free.

21.- POMPONIUS; *On Sabinus, Book XI*.- If my slave is serving you in good faith, and he purchases something which is delivered to him, Proculus says that it will not become mine, because I have not the slave in my possession; nor will it be yours, because it was not acquired by means of your property. If, however, a freeman buys anything while he is serving you as a slave, it will belong to him individually.

§ 1.- If you are in possession of property belonging to me, and I wish it to be yours, it will become yours, even though it may not have come into my hands.

22.- ULPIANUS; *On Sabinus, Book XL*.- No one who is in possession of a slave either by force or clandestinely, or by a precarious title, can acquire a right to him by any stipulation he may enter into, or by delivery of the property.

23.- THE SAME; *On Sabinus, Book XLIII*.- Whoever serves anyone in good faith as a slave, whether he is the slave of another, or is free, will acquire for his possessor whatever he obtains by means of the property of the latter, while serving in good faith as a slave. He will, in like manner, acquire for him whatever he earns by his own labor, for it is, to a certain extent, considered as the property of the former, because he owes his labor to him whom he is serving in good faith.

das. Si, pues, alguno, al entregarlo, dijere que era libre el fundo que fuese sirviente, no le quita nada al derecho de servidumbre del fundo, pero se obliga y deberá prestar lo que dijo.

§ 2.- Si yo y Ticio hubiéremos comprado una cosa, y ésta hubiera sido entregada a Ticio también como a procurador mío, opino que se adquirió también para mí el dominio, porque está determinado que se puede adquirir por medio de una persona libre la posesión de todas las cosas, y por medio de ésta el dominio.

21.- POMPONIO; *Comentarios a Sabino, libro XI*.- Dice Próculo, que si un esclavo mío te sirviera de buena fe, y hubiese comprado una cosa, y ésta le hubiese sido entregada, no se hace mía, porque no poseo al esclavo, ni tuya, si no hubiera sido adquirida por virtud de cosa tuya; pero si la hubiere comprado un hombre libre, que de buena fe te servía, se hace del mismo.

§ 1.- Si poseyeras una cosa mía, y yo quisiera que fuese tuya, se hará tuya, aunque no estuviere en mi poder la posesión.

22.- ULPIANO; *Comentarios a Sabino, libro XL*.- Nadie que posee un esclavo a la fuerza, o clandestinamente, o en precario, puede adquirir por medio de él la cosa que él estipula, o que recibe.

23.- EL MISMO; *Comentarios a Sabino, libro XLIII*.- El que de buena fe le sirve a uno, ya si es esclavo de otro, ya si es un hombre libre, adquiere para aquél, a quien de buena fe sirve, todo lo que adquiere por cosa de aquel a quien sirve. Pero también adquiere del mismo modo para él lo que con su propio trabajo hubiere adquirido; porque también el trabajo es considerado en cierto modo parte de los bienes de aquel a quien le sirve, pues por derecho debe prestarle el trabajo a aquel a quien de buena fe sirve.

§ 1.- Tamdiu autem acquirit, quamdiu bona fide servit: ceterum si coeperit scire esse eum alienum vel liberum, videamus, an ei acquirit. Quaestio in eo est, utrum initium spectamus an singula momenta: et magis est, ut singula momenta spectemus.

§ 2.- Generaliter dicendum est, quod ex re sua, hoc est eius cui bona fide quis servit, ei adquirere non potest, sibi eum adquisiturum, quod autem non ex re eius sibi adquirere non potest, ei adquisiturum, cui bona fide servit.

§ 3.- Si quis duobus bona fide serviat, utrique adquirit, sed singulis ex re sua. Quod autem ex re alterius est, utrum pro parte ei, cui bona fide servit, pro parte domino, si servus sit, aut, si liber sit, ei cui bona fide servit, an vero ei debeat adquirere totum, ex cuius re est, videamus. Quam speciem Scaevola quoque tractat libro secundo quaestionum: ait enim, si alienus servus duobus bona fide serviat et ex unius eorum re adquirat, rationem facere, ut ei dumtaxat in solidum adquirat. Sed si adiciat eius nomen, ex cuius re stipulatur, nec dubitandum esse ait, quin ei soli adquiratur, quia et si ex re ipsius stipularetur alteri ex dominis, nominatim stipulando solidum ei adquirit. Et in inferioribus probat, ut, quamvis non nominatim nec iussu meo, ex re tamen mea stipulatus sit, quum pluribus bona fide serviret, mihi soli adquirat. Nam et illud receptum est, ut, quotiens communis servus omnibus adquirere non potest, ei soli eum adquirere, cui potest. Et hoc Iulianum quoque scribere saepe rettuli eoque iure utimur.

§ 1.- He will, however, acquire the property for his possessor only as long as he serves him in good faith as a slave; but as soon as he ascertains that he belongs to someone else, or is free, let us ascertain whether he will continue to acquire property for him. In examining this question, we must determine whether we shall consider the beginning of the possession, or all the moments included in it. The better opinion is that all the time should be taken into account.

§ 2.- Generally speaking, it must be said that whatever he who is serving in good faith cannot acquire by means of the property of his possessor he will acquire for himself; but what he cannot acquire for himself by means of property other than that of his possessor, he will acquire for him whom he serves in good faith as a slave.

§ 3.- Where anyone serves two persons in good faith as a slave, he will acquire property for both of them, but for each one in proportion to the use he has made of his capital. The question, however, may arise, whether what he acquires with the capital of one of them will partly belong to the person whom he is serving in good faith as a slave, and partly to his own master, if he is a slave; or, if he is free, whether it will belong to him whom he is serving in good faith, or whether he should acquire the entire amount for the benefit of him whose property he has used. Scaevola discusses this point in the Second Book of Questions. He says that if a slave belonging to another serves two persons in good faith, and acquires property by the use of something belonging to one of them, it is reasonable to hold that he acquires it for him alone. He also says, if the slave mentions the name of him with reference to whose property he enters into a stipulation, there is no doubt that he makes the acquisition solely for him; because if he had stipulated expressly in the name of one of his masters with reference to his property, he would acquire the entire amount for his benefit. He afterwards adopted the opinion that where anyone is serving several masters in good faith as a slave, he will acquire for me alone, even if he had not stipulated with reference to my property, either in my name or by my express order; for it has been

§ 1.- Pero adquiere en tanto que sirve de buena fe; mas si comenzare a saber que él es de otro, o que es libre, veamos si adquiere para él; la cuestión estriba en esto, ¿atenderemos acaso al principio, o a cada momento? Y es más cierto que atendemos a cada uno de los momentos.

§ 2.- En general se ha de decir, que lo que con cosa suya, esto es, de aquél, a quien alguno sirve de buena fe, no puede adquirir para éste, lo adquirirá él para sí; mas lo que no puede adquirir para sí con cosa de aquél, lo adquirirá para aquél a quien sirve de buena fe.

§ 3.- Si alguno les sirviera de buena fe a dos, adquirirá para ambos, pero para cada uno en virtud de su propia cosa. Mas lo que fue adquirido con cosa de otro, veamos si deberá adquirirlo en parte para aquel a quien sirve de buena fe, y en parte para su señor, si fuera esclavo, o para aquel a quien de buena fe le sirve, si fuera libre, o si todo para aquel de quien es la cosa; cuyo caso examina Scévola en el libro segundo de las Cuestiones. Porque dice, que si un esclavo ajeno sirviera de buena fe a dos, y adquiriese con cosa de uno de ellos, la razón hace que adquiriera en totalidad solamente para éste; pero si expresara el nombre de aquél por cuya cosa estipula, dice que no se ha de dudar que se adquiere para éste sólo, porque, también si estipulase por cosa del mismo, estipulando expresamente para uno de los dueños, lo adquirirá todo para éste. Y en casos posteriores aprueba, que, aunque no haya estipulado expresamente, ni por mi mandato, pero sí por cosa mía, cuando de buena fe sirviese a varios, adquiriera para mí sólo; porque también se admitió, que, cuando un esclavo común no puede adquirir para todos, él adquiere para aquél sólo para quien puede; y muchas veces he referido que también Juliano escribe esto; y este derecho observamos.

established that whenever a slave owned in common cannot acquire property for all his owners, he can acquire it for him alone who will be benefited thereby. I have repeatedly stated that Julianus held this opinion: which we also approve.

24.- PAULUS; *libro XIV, ad Sabinum*.- In omnibus, quae ad eandem speciem reverti non possunt, dicendum est, si materia manente species dumtaxat forte mutata sit, veluti si meo aere statuam aut argento scyphum fecisses, me eorum dominum manere,

25.- CALLISTRATUS; *libro II, Institutionum*.- Nisi voluntate domini alterius nomine id factum sit: propter consensum enim domini tota res eius fit, cuius nomine facta est.

26.- PAULUS; *libro XIV, ad Sabinum*.- Sed si meis tabulis navem fecisses, tuam navem esse, quia cupressus non maneret, sicuti nec lana vestimento facto, sed cupresseum aut laneum corpus fieret.

§ 1.- Proculus indicat hoc iure nos uti, quod servio et Labeoni placuisset: in quibus propria qualitas expectaretur, si quid additum erit toto cedit, ut statuae pes aut manus, scypho fundus aut ansa, lecto fulcrum, navi tabula, aedificio cementum: tota enim eius sunt, cuius ante fuerant.

§ 2.- Arbor radicitus eruta et in alio posita priusquam coaluerit, prioris domini est, ubi coaluit, agro cedit, et si rursus eruta sit non ad priorem dominum revertitur: nam credibile est alio terrae alimento aliam factam.

24.- PAULUS; *On Sabinus, Book XIV*.- It must be said with reference to everything which can be restored to its former condition, that if the material remains as it was, and the form only is changed (as, for instance, if you make a statue out of my bronze, or a cup out of my silver), I will be the owner of it:

25.- CALLISTRATUS; *Institutes, Book II*.- Unless this is done in the name of another with the consent of the owner; for then, by virtue of his consent, the entire article will belong to him in whose name it was made.

26.- PAULUS; *On Sabinus, Book XIV*.- If, however, you build a ship out of my boards, it will belong to you, for the reason that the cypress tree, of which they formed a part, is no longer in existence, any more than wool, where a garment is made of it; but a new form, composed of the cypress or the wool, has been produced.

§ 1.- Proculus informs us that men ordinarily follow the rule adopted by Servius and Labeo; that is to say, in cases where the quality of property is considered, anything that is added becomes accessory to all, as where a foot or a hand is added to a statue, a bottom or a handle to a cup, a support to a bed, a plank to a ship, or stones to a building, for they will all belong to him who formerly owned the property.

§ 2.- If a tree is torn up by the roots, and deposited upon the land of another, it will belong to the former owner until it has taken root; but, after it has done this, it will become an accessory of the land [1] and if it is torn up by the roots a second time, it will not revert to the former owner: for it is probable that it became another tree through the different nourishment it received from the soil.

24.- PAULO; *Comentarios a Sabino, libro XIV*.- Respecto a todo lo que se puede reducir a su misma especie se ha de decir, que, si, subsistiendo la materia, se hubiera cambiado acaso solamente la especie, como si con bronce mío hubieses hecho una estatua, o con plata una taza, yo continuo siendo dueño de estas cosas.

25.- CALISTRATO; *Instituta, libro II*.- A no ser que esto haya sido hecho a nombre de otro con el consentimiento del dueño; porque por virtud del consentimiento del dueño toda la cosa se hace de aquél en cuyo nombre fue hecha.

26.- PAULO; *Comentarios a Sabino, libro XIV*.- Pero si con maderas mías hubieses hecho una nave, la nave es tuya porque no subsiste el ciprés, como tampoco la lana habiéndose hecho un vestido sino que se hace un objeto de ciprés, o de lana.

§ 1.- Próculo indica, que observamos este derecho, que les había parecido bien a Servio y a Labeón; que en las cosas en que se atiende a la propia cualidad de la cosa, si se hubiere añadido algo, cede al todo, como el pie o la mano a la estatua, el fondo o el asa a una taza, un pie a una cama, una tabla a una nave, materiales a un edificio; porque todas estas cosas son de quien habían sido antes.

§ 2.- El árbol arrancado de raíz, y plantado en otro campo, es del dueño anterior antes que haya agarrado; y luego que agarró, cede al campo; y si de nuevo hubiera sido arrancado, no vuelve a su dueño anterior; porque es de creer que se convirtió en otro árbol con el alimento de otra tierra.

§ 3.- Si meam lanam infeceris, purpuram nihilo minus meam esse Labeo ait, quia nihil interest inter purpuram et eam lanam, quae in lutum aut caenum cecidisset atque ita pristinum colorem perdidisset.

27.- POMPONIUS; *libro XXX, ad Sabinum*.- Quidquid infecto argento alieni argenti addideris, non esse tuum totum argentum fatendum est: at contra si tuum scyphum alieno plumbo plumbaveris alienove argento ferruminaveris, non dubitatur scyphum tuum esse et a te recte vindicari.

§ 1.- Ubi simul plura contribuuntur, ex quibus unum medicamentum fit, aut coctis odoribus unguenta facimus, nihil hic suum vere dicere potest prior dominus: quare potissimum existimari, cuius nomine factum sit, eius esse.

§ 2.- Quum partes duorum dominorum ferrumine cohaereant, hae quum quaereretur utri cedant, cassius ait pro portione rei aestimandum vel pro pretio cuiusque partis. Sed si neutra alteri accessioni est, videamus, ne aut utriusque esse dicenda sit, sicuti massa confusa, aut eius, cuius nomine ferruminata est. Sed Proculus et Pegasus existimant suam cuiusque rem manere.

28.- IDEM; *libro XXXIII, ad Sabinum*.- Si supra tuum parietem vicinus aedificaverit, proprium eius id quod aedificaverit fieri Labeo et Sabinus aiunt: sed Proculus tuum proprium, quemadmodum tuum fieret, quod in solo tuo alius aedificasset: quod verius est.

29.- PAULUS; *libro XVI, ad Sabinum*.- Inter eos, qui secundum unam ripam praedia habent, insula in

§ 3.- Labeo says that if you dye my wool purple, it will still be mine, because there is no difference between wool after it has been dyed, and where it has fallen into mud or filth, and has lost its former color for this reason.

27.- POMPONIUS; *On Sabinus, Book XXX*.- It must be admitted that if you add any silver belonging to another to a mass of that metal of which you are the owner, all of it will not belong to you. On the other hand, if you solder your cup with lead or silver belonging to another, there is no doubt that the cup will be yours, and that you can legally recover it by an action.

§ 1.- Where several drugs belonging to different persons are contributed at the same time, and a similar remedy is compounded of them or where you make an ointment by combining different perfumes, none of the former owners can, in this instance, properly claim that the product belongs to him; therefore it is best to hold that it belongs to the one in whose name it was made.

§ 2.- Where two parts of an article belonging to different owners are soldered together, the question arises, to whom do they belong? Cassius says that this must be determined in accordance with the size or the value of each of the parts; but if neither one can be considered as accessory to the other, let us see whether it cannot be considered as a mass which has been melted, or whether it will belong to him in whose name the parts were soldered together. Both Proculus and Pegasus hold that each part will belong to the person who owned it before it was soldered to the other.

28.- THE SAME; *On Sabinus, Book XXXIII*.- If your neighbor builds upon your wall, Labeo and Sabinus say that what he builds will belong to him. Proculus, however, holds that it will belong to you, just as anything which another builds upon your land becomes your property. This is the better opinion.

29.- PAULUS; *On Sabinus, Book XVI*.- When an island is formed in a stream, it becomes the common

§ 3.- Si hubieres teñido con púrpura mi lana, dice Labeón, que esto no obstante es mía, porque no hay ninguna diferencia entre la púrpura y la lana que hubiese caído en el lodo o en el cieno, y que de este modo hubiese perdido su primitivo color.

27.- POMPONIO; *Comentarios a Sabino, libro XXX*.- Se ha de confesar, que si hubieres añadido algo de plata ajena a una masa de plata, no es tuya toda la plata; mas por el contrario, si una taza tuya la hubieres soldado con plomo ajeno, o la hubieres pegado con plata de otro, no se duda que la taza es tuya, y que con razón es reivindicada por ti.

§ 1.- Cuando al mismo tiempo se reúnen muchas cosas, con las que se hace un medicamento, o cuando habiendo cocido odórfieros hacemos un ungüento, el dueño anterior no puede decir con verdad en este caso que algo es suyo; por lo cual principalísimamente se estima que es de aquél en cuyo nombre fue hecho.

§ 2.- Cuando partes que son de dos dueños estuvieran unidas por soldaduras, si se preguntase a cual de los dos cederán aquéllas, dice Cassio, que se ha de hacer la estimación con arreglo a la porción de cosa, o conforme al precio de cada parte. Pero si ninguna es accesoria de la otra, veamos si se haya de decir que es de uno y de otro, como una masa confusa, o de aquél en cuyo nombre fue soldada. Mas opinan Próculo y Pegaso, que la cosa permanece siendo de cada cual.

28.- EL MISMO; *Comentarios a Sabino, libro XXXIII*.- Si el vecino hubiere edificado sobre tu pared, dicen Labeón y Sabino que se hace propio de él lo que hubiere edificado. Pero Próculo dice, que es tuyo propio, como se haría tuyo lo que otro hubiese edificado en solar tuyo; lo que es mas verdadero.

29.- PAULO; *Comentarios a Sabino, libro XVI*.- La isla formada en un río no se hace común *pro*

flumine nata non pro indiviso communis fit, sed regionibus quoque divisus: quantum enim ante cuiusque eorum ripam est, tantum, veluti linea in directum per insulam transducta, quisque eorum in ea habebit certis regionibus.

30.- POMPONIUS; *libro XXXIV, ad Sabinum*.- Ergo si insula nata adcreverit fundo meo et inferiorem partem fundi vendidero, ad cuius frontem insula non respicit, nihil ex ea insula pertinebit ad emptorem eadem ex causa, qua nec ab initio quidem eius fieret, si iam tunc, quum insula nasceretur, eiusdem partis dominus fuisset.

§ 1.- Celsus filius, si in ripa fluminis, quae secundum agrum meum sit, arbor nata sit, meam esse ait, quia solum ipsum meum privatum est, usus autem eius publicus intellegitur. Et ideo quum exsiccatus esset alveus, proximorum fit, quia iam populus eo non utitur.

§ 2.- Tribus modis insula in flumine fit, uno, quum agrum, qui alvei non fuit, amnis circumfluit, altero, quum locum, qui alvei esset, siccum relinquit et circumfluere coepit, tertio, quum paulatim colluendo locum eminentem supra alveum fecit et eum alluendo auxit. Duobus posterioribus modis privata insula fit eius, cuius ager propior fuerit, quum primum extitit: nam et natura fluminis haec est, ut cursu suo mutato alvei causam mutet. Nec quicquam intersit, utrum de alvei dumtaxat solo mutato an de eo, quod superfusum solo et terrae sit, quaeratur, utrumque enim eiusdem generis est. Primo autem illo modo causa proprietatis non mutatur.

§ 3.- Alluvio agrum restituit eum, quem impetus fluminis totum abstulit. Itaque si ager, qui inter viam publicam et flumen fuit, inundatione fluminis occupatus esset, sive paulatim occupatus est sive non paulatim, sed eodem impetu recessu fluminis

property of those who own land along the bank, not undivided, but separated by distinct boundaries; for each one of them will have a right to that portion of it which is opposite to his land on the bank of the stream, just as if a straight line were drawn through the island.

30.- POMPONIUS; *On Sabinus, Book XXXIV*.- Hence, if an island which has been formed accrues to my land, and I sell the lower part of the latter, which is not opposite to the island, none of the island will belong to the purchaser, for the reason that it would not have been his in the beginning, even if he had been the owner of that part of my land at the time when the island was formed.

§ 1.- Celsus, the son, says that if a tree grows along the bank of a river where my land is situated, it will belong to me, because the soil itself is my individual property and the public is only entitled to the use of the same; and, therefore, if the bed of the river should dry up, it will become the property of the neighbors, for the reason that the people no longer make use of it.

§ 2.- An island is formed in a river in three different ways; first, when the stream flows around land which did not originally belong to its bed; second, when it leaves the place, which was formerly its bed, dry, and commences to flow around it; third, when, by removing soil little by little, it raises a high place above the bed of the river and increases it by alluvium. By the last two ways the island becomes the private property of him whose land was nearest to it when it first appeared. For it is the nature of a stream to change its bed, when it alters its course, and it does not make any difference whether merely the soil forming the bed is changed, or whether it is raised by earth being deposited upon it, as it is always of the same character. In the first instance, the condition of the property is not altered.

§ 3.- Alluvium restores a field to the state in which it was before the force of a stream entirely removed it. Therefore, if a field which is situated between a public highway and a river is covered with water by the overflow of the stream, whether it is inundated

indiviso de los que tienen predios junto a una de las orillas, sino dividiéndose por regiones; porque cada uno de ellos tendrá en la misma en porciones determinadas tanto cuanto haya delante de la orilla de cada cual, como si se hubiese tirado una línea recta a través de la isla.

30.- POMPONIO; *Comentarios a Sabino, libro XXXIV*.- Luego si la isla que se formó acreciere a mi fundo, y yo hubiere vendido la parte inferior del fundo, a cuyo frente no mira la isla, nada de esta isla le pertenece al comprador; por la misma causa por la que ni aun ciertamente desde un principio se haría de él, si ya entonces, cuando se formase la isla, hubiese sido dueño de la misma parte.

§ 1.- Dice Celso, el hijo, que si en la margen del río, que esté junto a un campo mío, hubiera nacido un árbol, es mío, porque el mismo terreno es privadamente mío, aunque se entiende que su uso es público; y por esto, cuando se hubiese secado el cauce se hace de los que están próximos, porque ya el público no usa de él.

§ 2.- De tres modos se forma una isla en un río: uno, cuando el río circunda un campo, que no era del cauce; otro, cuando deja en seco un terreno, que era del cauce, y comienza a correr alrededor; y el tercero, cuando acumulando tierra paulatinamente formó una eminencia sobre el cauce, y la aumentó con los aluviones. En los dos últimos modos la isla se hace privada de aquel de quien fuere el campo más próximo, tan pronto como existió; porque también la naturaleza del río es tal, que cambiado su curso cambia la condición de su cauce, y no importa cosa alguna que se trate del fondo del cauce, que solo haya cambiado, o de lo que se extendió sobre el fondo y la tierra; porque lo uno y otro es del mismo género; mas en el primer modo no se cambia la condición de la propiedad.

§ 3.-EI aluvión restituye el campo que íntegro arrebató el ímpetu del río. Y así, si el campo, que estaba entre la vía pública y un río, hubiese sido ocupado por la inundación del río, ya si fue ocupado paulatinamente, ya si no paulatinamente, pero fue

restitutus, ad pristinum dominum pertinet: flumina enim censitorum vice funguntur, ut ex privato in publicum addicant et ex publico in privatum: itaque sicuti hic fundus, quum alveus fluminis factus esset, fuisset publicus, ita nunc privatus eius esse debet, cuius antea fuit.

§ 4.- Si pilas in mare iactaverim et supra eas inaedificaverim, continuo aedificium meum fit. Item si insulam in mari aedificaverim, continuo mea fit, quoniam id, quod nullius sit, occupantis fit.

31.- PAULUS; *libro XXXI, ad Edictum*.- Numquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur.

§ 1.- Thensaurus est vetus quaedam depositio pecuniae, cuius non extat memoria, ut iam dominum non habeat: sic enim fit eius qui invenerit, quod non alterius sit. Alioquin si quis aliquid vel lucri causa vel metus vel custodiae condiderit sub terra, non est thensaurus: cuius etiam furtum fit.

32.- GAIUS; *libro XI, ad Edictum provinciale*.- Etiam invitis nobis per servos adquiritur paene ex omnibus causis.

33.- ULPIANUS; *libro IV, Disputationum*.- In eo quod servo castrensi ante aditam hereditatem filii familias militis legatur, vel eo, quod stipulatur servus, tractatur apud Marcellum libro vicensimo, ex cuius persona vel stipulatio vires habeat vel legatum. Et puto verius, quod et Scaevolae videtur et ipse Marcellus tractat, si quidem adeatur hereditas, omnia ut in hereditario servo, si adita non sit, ut in proprio patris esse spectanda: et si usus fructus fuerit huic servo relictus, modo patri videri delatum, modo

little by little, or not, and it is restored by the same force through the receding of the river, it will belong to its former owner. For rivers perform the duties of those officials who designate the boundaries of land, and adjudge them sometimes from private individuals to the public, and sometimes from the public to private individuals. Hence, as the land above mentioned became public when it served as the bed of a river, it now should again become private, and belong to its original owners.

§ 4.- If I drive piles into the sea, and build upon them, the edifice will immediately be mine; as what belongs to no one becomes the property of the first occupant.

31.- PAULUS; *On the Edict, Book XXXI*.- The mere delivery of an article does not transfer its ownership, for this takes place only where a sale or some other just cause precedes delivery.

§ 1.- A treasure is an ancient deposit of money, the memory of which no longer remains, so that it now has no owner. Hence, it becomes the property of him who finds it, because it belongs to no one else. On the other hand, if anyone, for the sake of profit, or actuated by fear, with a view to its preservation, hides money in the ground, it is not a treasure, and anyone who appropriates it will be guilty of theft.

32.- GAIUS; *On the Provincial Edict, Book XI*.- We acquire by means of our slaves in almost every way, even against our consent.

33.- ULPIANUS; *Book IV*.- Marcellus, in the Twentieth Book, discusses the point as to whom a stipulation or a legacy applies when it is made by a slave forming part of the castrense peculium of a son under paternal control, who was serving in the army, before the estate was entered upon. I think that the opinion entertained by Scaevola, and discussed by Marcellus himself, is the correct one; namely, if the estate is entered upon, everything is acquired where the slave forms part of it; but if it is not entered upon,

restituido con el mismo ímpetu a la retirada del río, pertenece a su primitivo dueño; porque los ríos hacen las veces de distribuidores, de suerte que de lo privado hacen adjudicaciones a lo público, y de lo público a lo privado. Y así, a la manera que este fundo era público cuando se hizo cauce del río, así debe ser ahora privado de quien antes lo fue.

§ 4.- Si yo hubiere echado moles en el mar, y sobre ellas hubiere edificado, el edificio se hace mío inmediatamente. Asimismo, si yo hubiere edificado una casa en el mar, al punto se hace mía, porque lo que no es de nadie se hace del que lo ocupa.

31.- PAULO; *Comentarios al Edicto, libro XXXI*.- La nuda tradición nunca transfiere el dominio sino si hubiere precedido venta, o alguna justa causa por la cual siguiese la entrega.

§ 1.- Un tesoro es cierto antiguo depósito de dinero, del cual no queda memoria, de suerte que ya no tenga dueño, pues de este modo se hace del que lo hubiere encontrado, porque no es de otro; pero si alguien hubiere escondido bajo tierra alguna cosa por causa o de lucro, o de miedo, o de custodia, esto no es tesoro; y respecto de ello se comete también hurto.

32.- GAYO; *Comentarios al Edicto provincial, libro XI*.- Aun contra nuestra voluntad se adquiere para nosotros por medio de los esclavos, casi por todas las causas.

33.- ULPIANO; *Disputas, libro IV*.- Respecto a lo que se lega a un esclavo del peculio castrense antes de haber sido adida la herencia de un hijo de familia militar, o a lo que el esclavo estipula, se discute por Marcelo en el libro vigésimo por virtud de qué persona tiene eficacia la estipulación o el legado; y juzgo más verdadero, lo que también le parece a Scévola, y dice el mismo Marcelo, que si verdaderamente fuese adida la herencia, todo ha de ser considerado como tratándose de un esclavo de la

heredi, nec a persona in personam creditur transisse.

§ 1.- Eadem distinctione quis utetur etiam, si res fuerit subtracta: aut cessare aut non furti actionem dicet, si ex testamento adierit, quoniam hereditati furtum non fit, aut, si non adierit, patri dabitur furti actio.

§ 2.- Nam et condictio, quotiens servus hereditarius stipulatur vel per traditionem accipit, ex persona defuncti vires assumit, ut Iuliano placet: cuius et valuit sententia testantis personam spectandam esse opinantis.

34.- IDEM; *libro IV, de Censibus*.- Hereditas enim non heredis personam, sed defuncti sustinet, ut multis argumentis Iuris Civilis comprobatur est.

35.- IDEM; *libro VII, Disputationum*.- Si procurator meus vel tutor pupilli rem suam quasi meam vel pupilli alii tradiderint, non recessit ab eis dominium et nulla est alienatio, quia nemo errans rem suam amittit.

36.- IULIANUS; *libro XIII, Digestorum*.- Quum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi. Nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus.

the acquisition should be considered as made by a slave of the father. Where an usufruct is bequeathed to such a slave, it will sometimes be considered as left to the father, and sometimes to the heir, without being held to have passed from one of these persons to the other.

§ 1.- The same distinction is applicable where property has been taken in order to determine whether an action for theft will lie or not; since if the heir should enter upon the estate, the property will not be considered as having been stolen from it; or if he should not enter upon it, an action on the ground of theft, and also a personal one for the recovery of property, will be granted to the father.

§ 2.- Whenever a slave belonging to an estate enters into a stipulation, or acquires property by delivery, his act takes effect through the person of the deceased; as is held by Julianus, whose opinion that the person of the testator should be considered in a case of this kind is still accepted,

34.- THE SAME; *On Taxes, Book IV*.- For an estate does not represent the person of the heir, but that of the deceased, which rule has been established by many precepts of the Civil Law.

35.- THE SAME; *Disputations, Book VII*.- If my agent, or the guardian of a ward, delivers his own property as belonging to me, or to the ward, to another, he will not be deprived of the ownership of the same, as the alienation is void, because no one can lose his property through a mistake.

36.- JULIANUS; *Digest, Book XIII*.- When we agree as to property which has been delivered, but dissent as to the causes for its transfer, I do not understand why the delivery should not be valid; for example, if I think that I am obliged to transfer a tract of land to you in compliance with the terms of a will, and I transfer it, and you are under the impression that I should do so by virtue of a stipulation. For if I pay you a sum of money for the purpose of making a donation of the same, and you think I intend to lend it to you, it is settled that the ownership will pass to you,

herencia, y que si no hubiese sido adida, como tratándose de uno propio del padre; y si el usufructo hubiere sido dejado a este esclavo, unas veces se considera que se le defirió al padre, y otras que al heredero; y no se cree que pasó de persona a persona.

§ 1.- Cualquiera observará la misma distinción, aunque la cosa hubiere sido substraída; dirá, que deja de tener, o no, lugar la acción de hurto, si hubiere adido la herencia en virtud del testamento, porque no se comete hurto contra la herencia; o si no la hubiere adido, se le dará al padre la acción de hurto; pues también compete la condición.

§ 2.- Cuando un esclavo de la herencia estipula, o recibe mediante entrega, el acto adquiere eficacia por virtud de la persona del difunto, según le parece bien a Juliano; cuyo parecer prevaleció también, opinando que se había de atender a la persona del testador.

34.- EL MISMO; *De los Censos, libro IV*.- Porque la herencia representa la persona no del heredero, sino del difunto, como está comprobado con muchos argumentos del Derecho Civil.

35.- EL MISMO; *Disputas, libro VII*.- Si mi procurador o el tutor de un pupilo hubiere entregado a otro una cosa suya, como si fuese mía o del pupilo, no se separa de ellos el dominio, y es nula la enajenación, porque nadie, errando, pierde una cosa suya.

36.- JULIANO; *Digesto, libro XIII*.- Cuando convenimos ciertamente respecto a la cosa que se entrega, pero disentimos en cuanto a las causas, no advierto por qué sea ineficaz la entrega; por ejemplo, si yo creyera que estaba obligado en virtud de un testamento a entregarte un fundo, y tú estimases que se te debía en virtud de estipulación; porque también si yo te entregase por vía de donación dinero constante, y tú lo recibieses como acreditado, es sabido que pasa a ti la propiedad, y que no es impedimento que hayamos disentido respecto a la causa de dar y de

37.- IDEM; *libro XLIV, Digestorum*.- Per servum, qui pignori datus est, creditori nec possessio adquiritur, quia nec stipulatione nec traditione nec ullo alio modo per eum servum quicquam ei adquiritur, quamvis possessio penes eum sit.

§ 1.- Si unus ex dominis servo communi pecuniam donavit, in potestate domini est, quemadmodum servo communi pecuniam donet. Nam si hoc solum egerit, ut ea separetur a suis rationibus et in peculio servi sit, manebit eiusdem domini proprietas: si vero eo modo pecuniam servo communi donaverit, quomodo alienis servis donare solemus, fiet sociorum communis pro portione, quam in servo habebunt.

§ 2.- Sed ut sequens quaestio locum habeat, constituamus socium ita servo communi pecuniam donasse, ut proprietatem suam manere vellet. Si ex hac pecunia servus fundum comparaverit, erit is fundus communis sociorum pro portione domini: nam et si furtivis nummis servus communis fundum comparaverit, sociorum erit pro portione domini. neque enim ut fructuarius servus ex re fructuarii non acquirit proprietario, ita et communis servus ex re alterius domini non acquirit alteri domino. Sed quemadmodum in his, quae aliunde adquiruntur, diversa condicio est fructuarii et servi communis, veluti quum alter fructuario non adquirat, alter dominis adquirat: ita quod ex re quidem fructuarii adquisitum fuerit, ad eum solum pertinebit, quod ex re alterius domini servus communis adquisierit, ad utrumque dominum pertinebit.

and the fact that we differed with respect to the cause of giving and receiving it will be no impediment to its legal transfer.

37.- THE SAME; *Digest, Book XLIV*.- Possession of property is not acquired for a creditor by a slave who has been given in pledge, for the reason that neither by stipulation nor by mandate, nor in any other way whatsoever, can anything be acquired by him, even though he may have possession of the slave.

§ 1.- If one of several masters gives money to a slave owned in common, it is in the power of the master to bestow the money upon the said slave held in common in whatever way he may desire; for if he should only do this in order to deduct it from his accounts, and let it form part of the peculium of the slave, it will still remain the property of the said master. If, however, he should give the money to the slave held in common, in the same way that we are accustomed to make donations to the slaves of others, it will become the common property of the joint-owners in proportion to the share which each one has in the slave.

§ 2.- However, in order that the following question may be considered, let us suppose that one joint-owner has given a sum of money to a slave owned in common, in order to retain his ownership of the property; and if the slave should purchase a tract of land with the said money, it will be owned in common by the joint proprietors in proportion to the share which each one has in the slave; for, even if the common slave bought the tract of land with stolen money, it will become the property of the joint-owners, according to their interest in the slave. A slave in whom someone has an usufruct does not acquire property for his owner by reason of the usufruct; nor can a slave held in common acquire property for one master by means of that belonging to another. But, just as property is acquired from others under these circumstances, the condition of a slave subject to an usufruct differs from that of a slave owned in common (for instance, one of them does not acquire property for the usufructuary, but the other

recibir.

37.- EL MISMO; *Digesto, libro XLIV*.- Por medio del esclavo, que fue dado en prenda, no se adquiere para el acreedor la posesión, porque ni por estipulación, ni por mandato, ni de ningún otro modo se adquiere para él por medio de este esclavo cosa alguna, aunque la posesión esté en su poder.

§ 1.- Si uno de los dueños le donó a un esclavo común dinero, está en la facultad del dueño la manera como le donará el dinero al esclavo común porque si solamente hubiere hecho esto, separarlo en sus cuentas, y ponerlo en el peculio del esclavo, subsistirá siendo del mismo dueño la propiedad; pero si al esclavo común le hubiere donado el dinero del mismo modo como solemos donárselo a los esclavos ajenos, se hará común de los condueños a proporción de la parte que tuvieren en el esclavo.

§ 2.- Mas para que tenga lugar la siguiente cuestión supongamos que un condueño le dio a un esclavo común dinero, queriendo que permaneciese suya la propiedad; si el esclavo hubiere comprado un fundo con este dinero, el fundo será común de los condueños a proporción de su dominio; porque también si con dineros hurtados hubiere comprado un fundo el esclavo común, será de los condueños a proporción del dominio; porque así como el esclavo dado en usufructo no adquiere para el propietario con cosa del usufructuario, así el esclavo común no adquiere tampoco para el otro condueño con cosa de uno de los condueños. Pero a la manera que en cuanto a las cosas que se adquieren de otro modo es diversa la condición del usufructuario de la del esclavo común, por ejemplo, porque el uno no adquiere para el usufructuario, y el otro adquiere para los dueños, así lo que verdaderamente se hubiere adquirido con cosa del usufructuario pertenecerá a éste sólo, y lo que un esclavo común hubiere adquirido con cosa de

acquires it for his masters), as where anything is obtained by making use of the property of the usufructuary it will belong to him alone, but what a slave owned in common acquires by means of the property of one master will belong to both.

§ 3.- Sicut servus communis stipulando nominatim alteri ex dominis, ita per traditionem accipiendo soli ei adquiret.

§ 4.- Quod unius servus per traditionem accipiendo se accipere dixerit domino et Titio, partem domino adquiret, in parte nihil agit.

§ 5.- Fructuarius servus si dixerit se domino proprietatis per traditionem accipere, ex re fructuarii totum domino adquiret: nam et sic stipulando ex re fructuarii domino proprietatis adquireret.

§ 6.- Si, quum mihi donare velles, iusserim te servo communi meo et Titii rem tradere isque hac mente acciperet, ut rem Titii faceret, nihil agetur: nam et si procuratori meo rem tradideris, ut meam faceres, is hac mente acceperit, ut suam faceret, nihil agetur. Quod si servus communis hac mente acceperit, ut duorum dominorum faceret, in parte alterius domini nihil agetur.

38.- ALFENUS VARUS; *libro IV, Digestorum a Paulo epitomatorum*.- Attius fundum habebat secundum viam publicam: ultra viam flumen erat et ager Lucii Titii: fluit flumen paulatim primum omnium agrum, qui inter viam et flumen esset, ambedit et viam sustulit, postea rursus minutatim recessit et alluvione in antiquum locum rediit. Respondit, quum flumen agrum et viam publicam sustulisset, eum agrum eius factum esse, qui trans

§ 3.- As a slave owned in common, by expressly stipulating for one of his masters, acquires property for him alone, so also he acquires property solely for him through receiving it by delivery.

§ 4.- When a slave belonging to one person receives property by delivery, alleging that he receives it for his master, and Titius, he acquires half of it for his master, but his act with reference to the other half is void.

§ 5.- If a slave, subject to usufruct, should say that he received property acquired through the usufruct by delivery, for his owner, he will acquire all of it for him; for if he enters into a stipulation with reference to property belonging to the usufruct, he will acquire it for his owner.

§ 6.- If you wish to make me a donation, and I direct you to deliver the property to a slave jointly owned by Titius and myself, and the slave receives it with the intention of obtaining it for Titius, the transaction will be void; or if you deliver property to my agent with the intention that it shall become mine, and he receives it with the intention of making it his, this transaction will also be void. If a slave owned in common receives property with the intention of acquiring it for both his masters, the transaction, so far as one of them is concerned, will be of no force or effect.

38.- ALFENUS VARUS; *Epitomes of the Digest of Paulus, Book IV*.- Attius had a tract of land along a public highway; beyond the highway there was a river, and a field belonging to Lucius Titius. The river gradually surrounded the field, which was situated between the road and the river, and afterwards covered the road, then it receded little by little, and by alluvium returned to its ancient bed. The conclusion arrived at was that, since the river had covered both

uno de los dueños, pertenecerá a uno y a otro dueño.

§ 3.- Así como estipulando expresamente para uno de los condueños, así también recibiendo mediante entrega el esclavo común adquiere para éste sólo.

§ 4.- Lo que el esclavo de uno solo dijere que recibéndolo mediante entrega lo adquiriría para su señor y para Ticio, lo adquirirá en parte para su señor, y respecto a la otra parte nada hace.

§ 5.- Si un esclavo dado en usufructo hubiere dicho que por virtud de cosa del usufructuario adquiría él mediante entrega para el dueño de la propiedad, todo lo adquirirá para el dueño; porque también si estipulando hubiere adquirido con cosa del usufructuario, adquirirá para el dueño de la propiedad.

§ 6.- Si queriendo tú hacerme una donación, yo te hubiere mandado que entregases la cosa a un esclavo común, mío y de Ticio, y él la recibiese con la intención de hacer de Ticio la cosa, no se hará nada; porque tampoco se hará nada, si le hubieres entregado una cosa a mi procurador para hacerla tú mía, y él la hubiere recibido para hacerla suya. Pero si el esclavo común la hubiere recibido con la intención de hacerla de los dos condueños, no se hará nada en cuanto a la parte del otro condueño.

38.- ALFENO VARO; *Digesto compendiado por Paulo, Libro IV*.- Accio tenía un fundo junto a la vía pública, y al otro lado de la vía había un río, y un campo de Lucio Ticio; el río se extendió paulatinamente, y primeramente se llevó un campo que había entre la vía y el río, y ocupó la vía, y después se retiró a su vez poco a poco, y volvió por aluvión a su antiguo cauce; respondió, que habiendo suprimido el río el campo y la vía pública, este campo se hizo del

flumen fundum habuisset: postea quum paulatim retro redisset, ademisse ei, cuius factus esset, et addidisse ei, cuius trans viam esset, quoniam eius fundus proximus flumini esset. Id autem, quod publicum fuisset, nemini accessisset. Nec tamen impedimento viam esse ait, quo minus ager, qui trans viam alluvione relictus est, attii fieret: nam ipsa quoque via fundi esset.

39.- IULIANUS; *libro III, ex Minicio*.- Etiam furtivus servus bonae fidei emptori acquirit, quod ex re eius stipulatur aut per traditionem accipit.

40.- AFRICANUS; *libro VII, Quaestionum*.- Quaesitum est, si is, cui liber homo bona fide serviret, decesserit eique is heres extiterit, qui liberum eum esse sciat, an aliquid per eum adquirat. Non esse ait, ut hic bona fide possessor videatur, quando sciens liberum possidere coeperit, quia et si fundum suum quis legaverit, heres, qui eum legatum esse sciat, procul dubio fructus ex eo suos non faciet: et multo magis si testator eum alienum bona fide emptum possedit. Et circa servorum igitur operam ac ministerium eandem rationem sequendam, ut, sive proprii sive alieni vel legati vel manumissi testamento fuerint, nihil per eos heredibus, qui modo eorum id non ignorarent, adquiratur. Etenim simul haec fere cedere, ut, quo casu fructus praediorum consumptos suos faciat bona fide possessor, eodem per servum ex opera et ex re ipsius ei adquiratur.

41.- ULPIANUS; *libro IX, ad Edictum*.- Statuas in

the field and the highway, the field became the property of him who owned land on the other side of the stream, and afterwards, having little by little receded to its former channel, the land was taken away from him whose property it had become, and was added to that of him who was on the other side of the highway, as his land was nearest to the river. The highway, however, which was public, could belong to no one by accession. It was decided that the highway offered no impediment to prevent the field which was left on the other side of it by alluvium from becoming the property of Attius, for the highway itself was also part of his land.

39.- JULIANUS; *On Minicius, Book III*.- Even a slave who has been stolen acquires for a purchaser in good faith, if he makes a stipulation, or receives by delivery anything obtained by means of his property.

40.- AFRICANUS; *Questions, Book VII*.- The question was raised, if a person whom a freeman was serving in good faith as a slave should die, and leave an heir who knew that the alleged slave was free, whether the heir could acquire any property by his agency. It cannot be said that he is a bona fide possessor, since, when he begins to have possession, he is aware that the man is free; because, if anyone should devise land to him and the heir knew that it had been devised, there is no doubt that the crops from the land do not become his; and there is much more reason for the application of this principle, if the testator had possession of the land in good faith, having bought it from one who was not the owner. The same rule must be observed with reference to the labor and agency of slaves; so that, whether they are ours or belong to strangers, and whether they have been bequeathed or manumitted by will, nothing will be acquired by them for the heirs, provided the latter were not ignorant of their status; for at the same time it must be admitted that, in the case where a bona fide possessor renders the crops, which he has used and which were derived from the land, his own, the profits of his labor or his property will also be acquired for him by the slave.

41.- ULPIANUS; *On the Edict, Book IX*.-

que tenía el fundo al otro lado del río después, cuando paulatinamente volvió atrás, se lo quitó a aquel de quien se había hecho, y se lo agregó a aquel de quien era el fundo del otro lado de la vía, porque de éste era el fundo próximo al río pero que lo que era público, no fue por accesión a nadie; y dice, que la vía no fue impedimento para que no se hiciese de Accio el campo que por aluvión quedó al otro lado de la vía; porque también la misma vía era del fundo.

39.- JULIANO; *Doctrina de Minicio, libro III*.- Aun el esclavo hurtado adquiere para el comprador de buena fe todo lo que por cosa de éste estipula, o recibe mediante entrega.

40.- AFRICANO; *Cuestiones, Libro VII*.- Se preguntó, si, habiendo fallecido aquel a quien un hombre le servía de buena fe, y habiendo quedado heredero de él uno que sabía que aquél era libre, adquirirá alguna cosa por medio del mismo. Dice, que éste no es considerado poseedor de buena fe cuando sabiendo que aquél era libre hubiere comenzado a poseerlo; porque también si alguno hubiere legado un fundo suyo, el heredero que supiese que aquél había sido legado, no hará sin duda suyos los frutos de aquél, y mucho menos si el testador lo posee siendo ajeno habiéndolo comprado de buena fe y a la misma razón se ha de atender respecto al trabajo y al servicio de los esclavos, de suerte que, ya si siendo propios, ya si ajenos, hubieren sido legados o manumitidos por testamento, nada se adquiera por medio de ellos para los herederos, que no ignorasen esto; porque al mismo tiempo suele suceder, que en el mismo caso en que el poseedor de buena fe hace suyos los frutos que de los predios ha consumido, se adquiere para él por medio del esclavo con el trabajo y con cosa del mismo.

41.- ULPIANO; *Comentarios al Edicto, libro IX*.-

civitate positas civium non esse, idque Trebatius et Pegasus: dare tamen operam praetorem oportere, ut, quod ea mente in publico positum est, ne liceret privato auferre nec ei qui posuerit. Tuendi ergo cives erunt et adversus petentem exceptione et actione adversus possidentem iuvandi.

42.- PAULUS; *libro XI, ad Edictum*.- Substitutio, quae nondum competit, extra bona nostra est.

43.- GAIUS; *libro VII, ad Edictum provinciale*.- Servus, qui bona fide possidetur, id quod ex re alterius est possessori non acquirit.

§ 1.- Incorporales res traditionem et usucapionem non recipere manifestum est.

§ 2.- Quum servus, in quo alterius usus fructus est, hominem emit et ei traditus sit, antequam pretium solvat, in pendentem est, cui proprietatem adquisierit: et quum ex peculio, quod ad fructuarium pertinet, solverit, intellegitur fructuarii homo fuisse: quum vero ex eo peculio, quod proprietarium sequitur, solverit, proprietarii ex post facto fuisse videtur.

44.- ULPIANUS; *libro XIX, ad Edictum*.- Pomponius tractat: quum pastori meo lupi porcos eriperent, hos vicinae villae colonus quum robustis canibus et fortibus, quos pecoris sui gratia pascebat, consecutus lupis eripuit aut canes extorserunt: et quum pastor meus peteret porcos, quaerebatur, utrum eius facti sint porci, qui eripuit, an nostri maneant: nam genere quodam venandi id erant nacti. cogitabat tamen, quemadmodum terra marique capta, quum in suam naturalem laxitatem pervenerant, desinerent eorum esse qui ceperunt, ita ex bonis quoque nostris capta a bestiis marinis et terrestribus desinant nostra esse, quum effugerunt bestiae nostram persecutionem. Quis denique manere nostrum dicit, quod avis transvolans ex area

Trebatius and Pegasus hold that statues erected in a town do not belong to the citizens; but the Praetor must see that whatever has been placed there with the intention of rendering it public shall not be removed by any private person, not even by him who erected it. Therefore, the citizens will be entitled to an exception against anyone claiming the statues, and to an action against anyone having possession of them.

42.- PAULUS; *On the Edict, Book XI*.- A substitution which has not yet taken place is not considered to form part of our property.

43.- GAIUS; *On the Provincial Edict, Book VII*.- A man who is possessed in good faith as a slave does not acquire for the possessor anything which he obtains by means of the capital of another.

§ 1.- It is clear that incorporeal property is not capable of delivery and usucaption.

§ 2.- If a slave, the usufruct of whom belongs to another than his owner, himself purchases a slave who is delivered to him before he pays the price, it is uncertain for whom he acquires the ownership. For if he should pay the price out of the peculium belonging to the usufructuary, it is understood that the slave will become his; but if he pays it out of the peculium to which the owner is entitled, the slave will be considered to belong to the latter.

44.- ULPIANUS; *On the Edict, Book XIX*.- Pomponius discusses the following point. Wolves carried away some hogs from my shepherds; the tenant of an adjoining farm having pursued the wolves with strong and powerful dogs, which he kept for the protection of his flocks, took the hogs away from the wolves, or the dogs compelled them to abandon them. When my shepherd claimed the hogs, the question arose whether they had become the property of him who recovered them, or whether they were still mine; for they had been obtained by a certain kind of hunting. The opinion was advanced that, as where animals were captured on sea or land, and regained their natural freedom, they ceased to belong to those who took them, so, where marine or

Las estatuas puestas en una ciudad no son de los ciudadanos; y esto dicen Trebacio y Pegaso; pero el Pretor debe procurar que lo que con esta intención fue puesto en un lugar público, no le sea lícito a un particular, ni al que lo hubiere puesto, quitarlo; luego deberán ser amparados los ciudadanos con excepción contra el que lo reclame, y auxiliados con acción contra el que lo posea.

42.- PAULO; *Comentarios al Edicto, libro XI*.- La substitución, que no compete todavía, se halla fuera de nuestros bienes.

43.- GAYO; *Comentarios al Edicto provincial, libro VII*.- El esclavo, que es poseído de buena fe, no adquiere para el poseedor lo que se adquirió con cosa de otro.

§ 1.- Es manifiesto que las cosas incorpóreas no admiten entrega ni usucapión.

§ 2.- Cuando un esclavo, sobre el cual es de otro el usufructo, compró otro esclavo, y le fue entregado, antes que pague el precio está en suspenso para quién haya adquirido la propiedad; y cuando lo hubiere pagado del peculio, que le pertenece al usufructuario, se entiende que el esclavo fue del usufructuario; más cuando lo hubiere pagado de peculio que le corresponde al propietario, se considera que fue del propietario en virtud de hecho posterior.

44.- ULPIANO; *Comentarios al Edicto, libro XIX*.- Dice Pomponio, que, si los lobos le hubiesen arrebatado a un pastor mío puercos, y el colono de una granja vecina, persiguiéndolos con perros robustos y fuertes, que mantenía para guarda de su ganado, se los quitó a los lobos, o los perros se los arrancaron, y mi pastor reclamase los puercos, se preguntaba, si los puercos se hicieron del que los cogió, o si permanecerán nuestros, porque habían sido adquiridos como en cierta especie de caza; pero pensaba, que a la manera que los animales cogidos en la tierra y en el mar, cuando volvieron a su libertad natural, dejaban de ser de los que los cogieron, así también los cogidos de nuestros bienes por animales marinos y terrestres dejaban de ser nuestros, cuando

aut ex agro nostro transtulit aut quod nobis eripuit? Si igitur desinit, si fuerit ore bestiae liberatum, occupantis erit, quemadmodum piscis vel aper vel avis, qui potestatem nostram evasit, si ab alio capiat, ipsius fit. Sed putat potius nostrum manere tamdiu, quamdiu recipere possit: licet in avibus et piscibus et feris verum sit quod scribit. Idem ait, etsi naufragio quid amissum sit, non statim nostrum esse desinere: denique quadruplo teneri eum qui rapuit. Et sane melius est dicere et quod a lupo eripitur, nostrum manere, quamdiu recipi possit id quod ereptum est. Si igitur manet, ego arbitror etiam furti competere actionem: licet enim non animo furandi fuerit colonus persecutus, quamvis et hoc animo potuerit esse, sed et si non hoc animo persecutus sit, tamen quum reposcenti non reddit, suppressere et interceptare videtur. Quare et furti et ad exhibendum teneri eum arbitror et vindicari exhibitos ab eo porcos posse.

45.- GAIUS; *libro VII, ad Edictum provinciale*.- Communis servus si ex re alterius dominorum adquisierit, nihilo minus communi id erit, sed is, ex cuius re adquisitum fuerit, communi dividendo iudicio eam summam praecipere potest: nam fidei bonae convenit, ut unusquisque praecipuum habeat, quod ex re eius servus adquisierit. Sed si aliunde servus communis adquisierit, omnibus sociis pro parte domini hoc acquiritur.

46.- ULPIANUS; *libro LXV, ad Edictum*.- Non est novum, ut qui dominium non habeat, alii dominium

terrestrial animals deprive us of property, it ceases to be ours when the said animals have escaped beyond our pursuit. In fact, who can say that anything which a bird flying across my courtyard or my field carries away still belongs to me? If, therefore, it ceases to be mine, and is dropped from the mouth of the animal, it will belong to the first occupant; just as when a fish, a wild boar, or a bird, escapes from our control, and is taken by another, it becomes the property of the latter. Pomponius inclines to the opinion that the property continues to be ours, as long as it can be recovered; although what he states with reference to birds, fishes, and wild beasts is true. He also says that if anything is lost by shipwreck, it does not immediately cease to be ours, and that anyone who removes it will be liable for quadruple its value. And, indeed, it is better to hold that anything which is taken away by a wolf will continue to be ours as long as it can be recovered. Therefore, if it still remains ours, I think that an action on the ground of theft will lie. For if the tenant pursued the wolves, not with the intention of stealing the property (although he might have had such an intention), but admitting that he did not pursue them with this object in view, still, as he did not restore the hogs to my shepherd when he demanded them, he is held to have suppressed and concealed them; and therefore I think that he will be liable to an action on the ground of theft, as well as one to produce the property in court; and after this has been done, the hogs can be recovered from him.

45.- GAIUS; *On the Provincial Edict, Book VII*.- When a slave owned in common acquires anything by means of the property of one of his masters, it will, nevertheless, belong to both of them; but the one by means of whose property it was acquired can recover the entire amount by an action in partition; for good faith demands that each of the owners shall have a preferred claim to whatever the slave obtained by means of his property; but if the slave should acquire it in some other way, it will belong to all the joint-owners in proportion to their ownership.

46.- ULPIANUS; *On the Edict, Book LXV*.- There is nothing extraordinary in the fact that anyone can

tales animales huyeron de nuestra persecución. ¿Quién, por último, dice que permanece siendo nuestro el que un ave se llevó volando de un corral o de un campo nuestro, o el que nos arrebató? Si, pues, deja de ser nuestro, si fuere librado de la boca del animal, será del que lo ocupe, a la manera que el pez, o el jabalí, o el ave, que escapó de nuestro poder, si es cogido por otro se hace del mismo. Pero más bien opina, que permanece siendo nuestro mientras puede ser recuperada, aunque tratándose de aves y de peces y de animales silvestres sea verdad lo que escribe. Dice el mismo, que si también por naufragio se hubiera perdido alguna cosa, no deja de ser nuestra inmediatamente; y finalmente, que se obliga en el cuádruplo el que la coge. Y verdaderamente es mejor decir, que también lo que es arrebatado por el lobo permanece siendo nuestro mientras pueda ser recobrado lo que fue arrebatado. Si, pues, permanece siendo nuestro, opino que compete también la acción de hurto; porque aunque el colono no haya perseguido con la intención de hurtar, bien que también podrá haber sido con tal intención, si no obstante que no haya perseguido con tal intención no restituye al que reclama, se considera que quita y que hurta; por lo cual opino, que está obligado a exhibirlos, y que pueden ser reivindicados los puerco exhibidos por él.

45.- GAYO; *Comentarios al Edicto provincial, libro VII*.- Si un esclavo común hubiere adquirido con cosa de uno de los condueños, la cosa será, sin embargo, común, pero aquél con cuya cosa hubiere sido adquirida puede percibir previamente aquella suma con la acción de división de cosa común; porque es consiguiente a la buena fe, que cada uno tenga como privativo lo que con cosas de él hubiere adquirido el esclavo; pero si el esclavo común hubiere adquirido de otra manera, esto se adquiere para todos los condueños con arreglo a su parte de dominio.

46.- ULPIANO; *Comentarios al Edicto, libro LXV*.- No es nuevo que el que no tiene el dominio dé a

praebeat: nam et creditor pignus vendendo causam dominii praestat, quam ipse non habuit.

47.- PAULUS; *libro L, ad Edictum*.- Fructuario hereditas adquiri non potest, quod in operis servi hereditas non est.

48.- IDEM; *libro VII, ad Plautium*.- Bonae fidei emptor non dubie percipiendo fructus etiam ex aliena re suos interim facit non tantum eos, qui diligentia et opera eius pervenerunt, sed omnes, quia quod ad fructus attinet, loco domini paene est. Denique etiam priusquam percipiat, statim ubi a solo separati sunt, bonae fidei emptoris fiunt. Nec interest, ea res, quam bona fide emi, longo tempore capi possit nec ne, veluti si pupilli sit aut vi possessa aut praesidi contra legem repetundarum donata ab eoque abalienata sit bonae fidei emptori.

§ 1.- In contrarium quaeritur, si eo tempore, quo mihi res traditur, putem vendentis esse, deinde cognovero alienam esse, quia perseverat per longum tempus capio, an fructus meos faciam. Pomponius verendum, ne non sit bonae fidei possessor, quamvis capiat: hoc enim ad ius, id est capionem, illud ad factum pertinere, ut quis bona aut mala fide possideat: nec contrarium est, quod longum tempus currit, nam e contrario is, qui non potest capere propter rei vitium, fructus suos facit.

§ 2.- Et ovium fetus in fructu sunt et ideo ad bonae fidei emptorem pertinent, etiamsi praegnates

transfer to another the ownership of property which he does not possess; for a creditor, by selling a pledge, transfers to the purchaser a title which he himself did not have.

47.- PAULUS; *On the Edict, Book L*.- An estate cannot be acquired by the usufructuary through a slave, for an estate cannot consist of the services of a slave.

48.- THE SAME; *On Plautius, Book VII*.- A bona fide purchaser undoubtedly obtains as his own any profits acquired by means of the property of another in the interim, and this not only refers to such as are acquired by his diligence and labor, but to all others, because, as far as the profits are concerned, he practically occupies the position of the owner; for, even before he obtains the crops, and immediately after they are separated from the soil, they become the property of a bona fide purchaser. Nor does it make any difference whether what I buy in good faith can be acquired by prescription or not; as, for instance, if it belongs to a ward, or has been obtained by violence, or has been given to the Governor of a province contrary to the law against extortion, and has afterwards been transferred by him to a bona fide purchaser.

§ 1.- On the other hand, if at the time when the property was delivered to me I thought that it belonged to the vendor, and I afterwards ascertained that it belonged to someone else, the question arises whether I am entitled to the profits, because possession had lasted for a long time. Pomponius says that it must be apprehended that a purchaser of this kind is not one in good faith, although he may hold the property, for prescription has reference to the law, and whether he possesses the property either in good or bad faith is a question of fact. Nor can this be controverted by alleging that a long time has elapsed; as, on the other hand, he who can not acquire property by prescription on account of a defect in the title to the same has still a right to the profits thereof.

§ 2.- The increase of sheep is a profit, and therefore it belongs to a bona fide possessor, even if they

otro el dominio; porque el acreedor al vender la prenda dá una causa de dominio, que el mismo no tuvo.

47.- PAULO; *Comentarios al Edicto, Libro L*.- La herencia no puede ser adquirida para el usufructuario, porque la herencia no está comprendida en el trabajo del esclavo.

48.- EL MISMO; *Comentarios a Plautio, libro VII*.- El comprador de buena fe hace sin duda mientras tanto suyos, percibiéndolos; los frutos aun de cosa ajena, y no solamente los que con su diligencia y su trabajo fueron a su poder, sino todos, porque en lo que atañe a los frutos está casi en el lugar de dueño. Finalmente, aun antes que los perciba, tan pronto como fueron separados del suelo se hacen del comprador de buena fe. Y no importa que la cosa, que de buena fe compré, pueda ser o no, usucapida por largo tiempo; por ejemplo, si fuera de un pupilo, o poseída por fuerza, o donada a un presidente contra la ley de peculado, y por éste hubiera sido enajenada a un comprador de buena fe.

§ 1.- Se pregunta por el contrario, si, juzgando yo que era del vendedor al tiempo en que se me entrega la cosa, y habiendo sabido después que era de otro, haré míos los frutos, porque subsiste la usucapión por largo tiempo. Pomponio dice, que se ha de recelar que no sea poseedor de buena fe, aunque usucapia; porque esto se refiere al derecho, esto es, a la usucapión, y aquello a un hecho, para que uno posea de buena o de mala fe. Y no es contrario que corre el largo tiempo de la usucapión; porque, por el contrario, el que no puede adquirir por vicio de la cosa hace suyos los frutos.

§ 2.- También son frutos los partos de las ovejas, y pertenecen por lo tanto al comprador de buena fe,

venierint vel subreptae sint. Et sane quin lac suum faciat, quamvis plenius uberibus venierint, dubitari non potest: idemque in lana iuris est.

49.- IDEM; *libro IX, ad Plautium*.- Quod fructuarius ex re sua donat, ex re eius est: sed si eo animo id fecerit, ut ad proprietatis dominum pertineat, dicendum est illi adquiri. Si autem extraneus ei donet indistincte, soli proprietario acquiritur. eadem dicemus in homine libero, qui bona fide mihi servit, ut, si ei aliquid donaverim, meum sit. Et ideo Pomponius scribit, quamvis donaverim ei operas suas, tamen quidquid ex operis suis acquirat, mihi adquiri.

50.- POMPONIUS; *libro VI, ex Plautio*.- Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si quum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito.

51.- CELSUS; *libro II, Digestorum*.- Transfugam iure belli recipimus.

§ 1.- Et quae res hostiles apud nos sunt, non publicae, sed occupantium fiunt.

52.- MODESTINUS; *libro VII, Regularum*.- Rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem aut amittentes ad recipiendam eam actionem habemus.

53.- IDEM; *libro XIV, ad Quintum Mucium*.- Ea quae civiliter adquiruntur per eos, qui in potestate

should have been sold while pregnant, or had been stolen while in that condition. And, indeed, it cannot be doubted that a possessor in good faith is entitled to the milk, even though the animals may have been sold ready to be milked. The same rule applies to wool.

49.- THE SAME; *On Plautius, Book IX*.- Whatever the usufructuary of a slave gives him out of his own property will continue to be his. If, however, he did this with the intention that the property should belong to the owner, it must be said that it will be acquired by him. But where a stranger gives it to him, it will unquestionably be acquired for the owner alone. We make the same statement with regard to a freeman who is serving in good faith as a slave, so that, if I should give him anything, it will continue to remain mine. Therefore, Pomponius says, that even if I should give the slave his labor, whatever he acquires by means of it he will, nevertheless, acquire for me.

50.- POMPONIUS; *On Plautius, Book VI*.- Although whatever we construct on the public shore or in the sea will belong to us, still, a decree of the Praetor must be obtained to permit this to be done; and, indeed, if anyone should do something of this kind which inconveniences others, he can be prevented by force; for I have no doubt that he who puts up the building will have no right to a civil action.

51.- CELSUS; *Digest, Book II*.- We can seize a deserter by the law of war.

§ 1.- Any property of the enemy, which may be in our hands, does not belong to the public, but to the first occupant.

52.- MODESTINUS; *Rules, Book VII*.- We are understood to hold property as our own, whenever, being in possession, we have a right to an exception, or when, having lost the property, we are entitled to an action to recover it.

53.- THE SAME; *On Quintus Mucius, Book XIV*.- Property acquired by the Civil Law is obtained by us

aunque hayan sido vendidas o hurtadas estando preñadas. Y a la verdad, no se puede dudar que haga suya también la leche, aunque hayan sido vendidas teniendo llenas las ubres; y el mismo derecho hay respecto a la lana.

49.- EL MISMO; *Comentarios a Plautio, libro IX*.- Lo que de cosa suya dona el usufructuario es de su propia cosa; pero si esto lo hubiere hecho con la intención de que pertenezca al dueño de la propiedad, se ha de decir que se adquiere para él; mas si un extraño le hiciera una donación, se adquiere indistintamente para el propietario solo. Lo mismo diremos tratándose de un hombre libre, que me sirve de buena fe, de suerte que, si yo le hubiere donado alguna cosa, es mía. Y por esto escribe Pomponio, que aunque yo le hubiere donado su propio trabajo, se adquiere sin embargo para mí lo que adquiriese con su trabajo.

50.- POMPONIO; *Doctrina de Plautio, libro VI*.- Aunque se haga nuestro lo que hayamos edificado en un litoral público o en el mar, se ha de presentar decreto del Pretor para que sea lícito hacer esto; y aún se le ha de impedir a uno con la mano, si esto lo hiciera con molestia de los demás; porque no dudo que no tiene acción alguna civil para hacerla.

51.- CELSO; *Digesto, Libro II*.- Al transfuga lo recibimos por derecho de guerra.

§ 1.- Y las cosas de los enemigos, que están en nuestro poder, no se hacen públicas, sino de los que las ocupan.

52.- MODESTINO; *Reglas, Libro VII*.- Se entiende que tenemos una cosa en nuestros bienes cuando poseyéndola tenemos excepción, o, perdiéndola, acción para recuperarla.

53.- EL MISMO; *Comentarios a Quinto Mucio Libro XIV*.- Las cosas que se adquieren civilmente

nostra sunt, adquirimus, veluti stipulationem: quod naturaliter acquiritur, sicuti est possessio, per quemlibet volentibus nobis possidere adquirimus.

54.- IDEM; *libro XXXI, ad Quintum Mucium*.- Homo liber hereditatem nobis adquirere non potest, qui bona fide nobis servit: adquiret, si tamen sponte sua sciens condicionem suam adierit: nam si iussu nostro adierit, neque sibi neque nobis adquiret, si non habuerit animum sibi acquirendi: quod si eam mentem habuit, sibi acquirit.

§ 1.- Item promittendo nobis liber homo, qui bona fide nobis servit, ut et emendo vel vendendo, vel locando vel conducendo, obligari ipso iure poterit.

§ 2.- Sed damnum dando damni iniuriae tenebitur, ut tamen culpam in damno dando exigere debeamus graviorem nec tamen levem quam ab extraneo.

§ 3.- At si iussu nostro quid in re nostra gerant vel absentibus nobis quasi procuratores aliquid agant, danda erit in eos actio non solum si eos emerimus, sed etiam si donati fuerint nobis aut ex dotis nomine aut ex legati pertinere ad nos coeperunt aut ex hereditate, idem praestabunt: nec solum si nostros putaverimus, sed et si communes aut fructuarios, ut tamen, quod adquisituri non essent, si re vera communes aut usuarii essent, id hodieque non adquirant.

§ 4.- Quidquid tamen liber homo vel alienus quive bona fide nobis servit non acquirit nobis, id vel sibi liber vel alienus servus domino suo adquiret: excepto eo quod vix est, ut liber homo possidendo usucapere possit, quia nec possidere intellegitur, qui ipse

through those who are under our control; as, for example, in the case of a stipulation. Whatever is acquired naturally, as, for instance, possession, we can acquire by the agency of anyone, if we desire to obtain it.

54.- THE SAME; *On Quintus Mucius, Book XXXI*.- A freeman cannot acquire an estate for us. Anyone who is serving us in good faith as a slave can acquire one for us, if he enters upon it voluntarily, and is fully aware of his own condition. If, however, he should enter upon it by our order, he will neither acquire it for himself nor for us, if he did not have the intention of acquiring it for himself. But, if he had such an intention, he will acquire the estate for himself.

§ 1.- Likewise, a freeman who is serving us in good faith as a slave can legally bind himself, by making a contract with us, which involves a purchase, a sale, or hiring, or leasing.

§ 2.- If he wrongs us in any way, he will be liable to an action for injury, and, in this case, we can collect heavier damages from him than we can from a stranger.

§ 3.- If persons of this kind transact any business with reference to our property, under our direction, or perform any acts as agents during our absence, an action should be granted against them, not only when we have purchased them as slaves, but also if they have been given to us; or have been acquired as dowry, or through having been bequeathed to us; or are due to us from an estate; not only if we think that they are ours, but also where they are slaves owned in common, or are subject to usufruct; so that they do not acquire for us any more than they would have done if they had actually been slaves owned in common, or subject to the usufruct of others.

§ 4.- Whatever a freeman, or a slave belonging to another, or one who serves us in good faith as a slave, cannot acquire for us, the freeman can acquire for himself, and the slave belonging to another can acquire for his master; except that a freeman who is

las adquirimos por medio de los que están bajo nuestra potestad, por ejemplo, por medio de estipulación; lo que se adquiere naturalmente, como es la posesión, lo adquirimos por medio de cualquiera queriendo nosotros poseerlo.

54.- EL MISMO; *Comentarios a Quinto Mucio, Libro XXXI*.- Un hombre libre no puede adquirir para nosotros una herencia; el que de buena fe nos sirve la adquirirá, si no obstante la hubiere adido espontáneamente conociendo su propia condición; porque si la hubiere adido por mandato nuestro, ni la adquirirá para sí, ni para nosotros, si no hubiere tenido intención de adquirirla para sí; pero si tuvo esta intención, la adquiere para él.

§ 1.- Asimismo, el hombre libre que nos sirve de buena fe se podrá obligar de derecho prometiéndonos, como comprando, o vendiendo, o dando o tomando en arrendamiento.

§ 2.- Pero también causando daño se obligará por la acción de daño con injuria, pero de suerte que por causar el daño debamos exigirle la culpa grave, no también la leve, como a un extraño.

§ 3.- Mas si por mandato nuestro administraran alguno de nuestros negocios, o hicieran como procuradores alguna cosa estando nosotros ausentes, se habrá de dar acción contra ellos, no solamente si los hubiéremos comprado, sino que también responderán de lo mismo si nos hubieren sido donados, o si comenzaron a pertenecernos a título de dote o de legado, o por herencia; y no sólo si los juzgáremos nuestros, sino también si comunes o usufructuarios, pero de suerte que lo que no hubiesen de adquirir, si en realidad fuesen comunes o usufructuarios, tampoco lo adquieran hoy.

§ 4.- Pero todo lo que un hombre libre, o un esclavo ajeno, o el que nos sirve de buena fe, no adquiere para nosotros, lo adquirirá, siendo libre, para sí, o siendo esclavo ajeno para su señor, exceptuando lo que es difícil que un hombre libre pueda usucapir

possideretur. Sed nec per servum alienum, quem nos bona fide possidemus, dominus peculiari nomine ignorans usucapere poterit, sicuti ne per fugitivum quidem, quem non possidet.

55.- PROCULUS; *libro II, Epistolarum.*- In laqueum, quem venandi causa posueras, aper incidit: quum eo haereret, exemptum eum abstuli: num tibi videor tuum aprum abstulisse? Et si tuum putas fuisse, si solutum eum in silvam dimissem, eo casu tuus esse desisset an maneret? Et quam actionem mecum haberes, si desisset tuus esse, num in factum dari oportet, quaero. Respondit: laqueum videamus ne intersit in publico an in privato posuerim et, si in privato posui, utrum in meo an in alieno, et, si in alieno, utrum permissu eius cuius fundus erat an non permissu eius posuerim: praeterea utrum in eo ita haeserit aper, ut expedire se non possit ipse, an diutius luctando expediturus se fuerit. Summam tamen hanc puto esse, ut, si in meam potestatem pervenit, meus factus sit. Sin autem aprum meum ferum in suam naturalem laxitatem dimisisses et eo facto meus esse desisset, actionem mihi in factum dari oportere, veluti responsum est, quum quidam poculum alterius ex nave eiecisset.

56.- IDEM; *libro VIII, Epistolarum.*- Insula est enata in flumine contra frontem agri mei, ita ut nihil excederet longitudine regionem praedii mei: postea aucta est paulatim et processit contra frontes et superioris vicini et inferioris: quaero, quod adcrevit utrum meum sit, quoniam meo adiunctum est, an eius iuris sit, cuius esset, si initio ea nata eius longitudinis fuisset. Proculus respondit: flumen istud, in quo

serving in good faith can scarcely obtain property by usucaption based on possession, because he who is himself possessed is not understood to have possession. Nor can the owner of a slave of whom we have possession in good faith unconsciously acquire by usucaption what is included in the peculium of the slave, just as he cannot do this by means of a fugitive slave of whom he is not in possession.

55.- PROCULUS; *Epistles, Book II.*- A wild boar was caught in a trap which you set for the purpose of hunting, and after he was caught, I released him, and carried him away; is it your opinion that I have taken away your wild boar? And if you thought that it was yours, and I should release him and let him go into the woods, would he, in this instance, cease to be yours, or would he still remain your property? If he ceased to be yours, I ask what action you would be entitled to against me, and whether it would be necessary for an action in factum to be granted? The answer was, that we should first take into consideration the trap, and whether it does not make a difference if I set it on public or on private land; and if I set it on private land, whether I did so upon my own or upon that of another, and if I set it upon that of another, whether I did so with the permission of the owner of the said land, or without it. Moreover, it should be considered whether the wild boar was caught in the trap in such a way that he could not release himself, or whether, by struggling longer, he might have been able to escape. I think the conclusion should be that if the wild boar was under my control he became my property; but if you, by your act, restored him to his natural freedom, he ceased to belong to me; and I would be entitled to an action in factum; as was decided in a case where a person threw a cup belonging to another from a ship into the sea.

56.- THE SAME; *Epistles, Book VIII.*- An island arose in a river opposite to my land. At first the length did not exceed the boundary of the latter, but afterwards the island increased in size, little by little, and projected opposite to the boundaries of my upper and lower neighbors. I ask whether the increase belongs to me, as it adjoins my premises, or whether the rule of law would be the same as it would if the

poseyéndolo, porque no se entiende que posee el mismo que fuese poseído; pero tampoco por medio de un esclavo ajeno, a quien de buena fe poseemos, podrá usucapir el dueño que lo ignora a nombre del peculio, como tampoco ciertamente por medio de un esclavo fugitivo, al cual no posee.

55.- PRÓCULO; *Epístolas, libro II.*- Un jabalí cayó en el lazo que habías puesto para cazar; estando sujeto en él, lo desligué y me lo llevé; ¿se considera acaso que te quité tu jabalí? ¿Y considerando que era tuyo, si yo lo hubiese dejado ir suelto a la selva, habría dejado en este caso de ser tuyo, o permanecería siéndolo? Y pregunto, si hubiese dejado de ser tuyo, ¿qué acción tendrías contra mí si acaso se debería dar la acción por el hecho? Respondió: veamos si hay diferencia entre que yo haya puesto el lazo en sitio público, o en privado; y si lo puse en lugar privado, si en el que era mío o en el de otro; y si en el de otro, si lo puse con permiso de aquel de quien era el fundo, o sin su permiso; además de esto, si el jabalí estaba en aquél de tal modo sujeto que él mismo no se podía desligar o si luchando largo tiempo se habría de haber desligado. Pero opino que el resultado final es este, que, si llegó a mi poder, se hizo mío, pero que si hubieses dejado en su libertad natural un jabalí mío silvestre, y por este hecho hubiese dejado de ser mío se me debe dar la acción por el hecho, según se respondió, cuando uno arrojó de una nave un vaso de otro.

56.- EL MISMO; *Epístolas, libro VIII.*- Se formó en un río una isla frente por frente de un campo mío, de tal suerte que su longitud no excedía en nada de la extensión de un predio; después creció paulatinamente, y avanzó hasta el frente del predio vecino superior y del inferior; pregunto si será mío lo que acreció, porque se agregó a lo mío, o si será de la condición de derecho de que sería, si en un principio

insulam contra frontem agri tui enatam esse scripsisti ita, ut non excederet longitudinem agri tui, si alluvionis ius habet et insula initio propior fundo tuo fuit quam eius, qui trans flumen habebat, tota tua facta est, et quod postea ei insulae alluvione accessit, id tuum est, etiamsi ita accessit, ut procederet insula contra frontes vicinorum superioris atque inferioris, vel etiam ut propior esset fundo eius, qui trans flumen habet.

§ 1.- Item quaero, si, quum propior ripae meae enata est insula et postea totum flumen fluere inter me et insulam coepit relicto suo alveo, quo maior amnis fluerat, numquid dubites, quin etiam insula mea maneat et nihilo minus eius soli, quod flumen reliquit, pars fiat mea? Rogo, quid sentias scribas mihi. Proculus respondit: si, quum propior fundo tuo initio fuisset insula, flumen relicto alveo maiore, qui inter eam insulam fuerat et eum fundum vicini, qui trans flumen erat, fluere coepit inter eam insulam et fundum tuum, nihilo minus insula tua manet. Set alveus, qui fuit inter eam insulam et fundum vicini, medius dividi debet, ita ut pars propior insulae tuae tua, pars autem propior agro vicini eius esse intellegatur. Intellego, ut et quum ex altera parte insulae alveus fluminis exaruerit, desisse insulam esse, sed quo facilius res intellexeretur, agrum, qui insula fuerat, insulam appellant.

57.- PAULUS; *libro VI, ad Plautium.*- Per servum donatum a marito nec ex re quidem eius, cui donatus est, adquiri quicquam posse Iulianus scribit: hoc enim in eorum persona concessum est, qui bona fide serviunt.

island had been as long in the beginning as it is at present. Proculus answered, if the law of alluvium applies to the river, in which you have stated an island arose opposite to the boundary of your property in such a way that it did not exceed the length of the latter, and the island in the first place was nearer to your premises than to those of him who owned land across the stream, it all becomes yours, and whatever afterwards accrued to the island by way of alluvium also becomes yours, even though the increase was such as to cause the island to extend opposite to the boundaries of your upper and lower neighbors, or even to place it nearer to the property of him owning land across the river.

§ 1.- I also ask, if an island arises near my bank, and afterwards the entire river begins to flow between my land and the said island, after leaving its own bed where the greater portion of it had flowed, whether you have any doubt that the island continues to be mine, and whether, nevertheless, a part of the bed itself which was left by the river will become my property. I request you to write me your opinion on this point. Proculus answered that if the island in the first place was nearer to your land, and the river, having left its principal channel, which it occupied between the island and the land of the neighbor who was on the other side of the stream, began to flow between the said island and your land, the island will continue to be your property; but the bed which was between the island and the land of the neighbor should be divided in the middle, so that the part which was nearer to your island will be understood to belong to you, and that which is nearer to the land of your neighbor will be understood to belong to him. I think that the bed of the river which dried up on the other side of the island has ceased to be an island; but In order that the matter may be better understood, in this instance, the field which was formerly an island will still be designated such.

57.- PAULUS; *On Plautius, Book VI.*- Julianus says that nothing can be acquired through a slave donated by a husband, not even by means of the property of the wife to whom the slave was given; for this is only conceded in the case of those who are

se hubiese formado de aquella longitud. Próculo respondió: si tiene derecho de aluvión el río este, en el cual, según has escrito, se formó una isla frente por frente de tu campo, de suerte que no excediese de la longitud de tu campo, y la isla estuviese en un principio más cerca de tu fundo que del que tenía otro al otro lado del río, toda ella se hizo tuya, y es tuyo lo que después se agregó por aluvión a esta isla, aunque de tal manera se haya agregado que la isla avanzase hasta el frente de los fundos vecinos superior e inferior, o aunque estuviese más cercana al fundo del que lo tiene al otro lado del río.

§ 1.- También pregunto, si habiéndose formado la isla más próxima a mi orilla, y habiendo comenzado después a correr todo el río entre mí y la isla, habiendo dejado su cauce, por el que había corrido la mayor parte del río, ¿dudarás acaso si aun esta isla permanecerá siendo mía, y si no obstante se hará mía parte del cauce que el río dejó? Te ruego que me escribas lo que opinas. Próculo respondió: si habiendo estado en un principio más próxima a tu fundo la isla, el río, habiendo dejado el cauce mayor, que había entre esta isla y el fundo del vecino, que se hallaba al otro lado del río, comenzó a correr entre esta isla y tu fundo, ello no obstante, permanece siendo tuya la isla; pero el cauce, que hubo entre la isla y el fundo del vecino, debe ser dividido por medio, de suerte que se entienda que es tuya la parte más próxima a tu isla, y que es del vecino la parte más próxima a su campo; y entiendo que cuando se hubiere desecado el cauce del río en la otra parte de la isla, ésta dejó de ser isla; mas para que se entienda más fácilmente la cosa, llaman isla al campo que había sido isla.

57.- PAULO; *Comentarios a Plaucio, libro VI.*- Escribe Juliano, que por medio de un esclavo donado no se puede adquirir por el marido cosa alguna ni aun ciertamente con cosa de aquella a quien fue donado: porque esto fue permitido respecto a la persona de los

58.- IAVOLENUS; *libro XI, ex Cassio*.- Quaecumque res ex mari extracta est, non ante eius incipit esse qui extraxit, quam dominus eam pro derelicto habere coepit.

59.- CALLISTRATUS; *libro II, Quaestionum*.- Res ex mandato meo empta non prius mea fiet, quam si mihi tradiderit qui emit.

60.- SCAEVOLA; *libro I, Responsorum*.- Titius horreum frumentarium novum ex tabulis ligneis factum mobile in seii praedio posuit: quaeritur, uter horrei dominus sit. Respondit secundum quae proponerentur non esse factum seii.

61.- HERMOGENIANUS; *libro VI, iuris Epitomarum*.- Hereditas in multis partibus iuris pro domino habetur adeoque hereditati quoque ut domino per servum hereditarium acquiritur. In his sane, in quibus factum personae operaeve substantia desideratur, nihil hereditati quaeri per servum potest. Ac propterea quamvis servus hereditarius heres institui possit, tamen quia adire iubentis domini persona desideratur, heres exspectandus est.

§ 1.- Usus fructus, qui sine persona constitui non potest, hereditati per servum non acquiritur.

62.- PAULUS; *libro II, Manualium*.- Quaedam, quae non possunt sola alienari, per universitatem transeunt, ut fundus dotalis, ad heredem, et res, cuius aliquis commercium non habet: nam etsi legari ei non possit, tamen heres institutus dominus eius efficitur.

63.- TRYPHONINUS; *libro VII, Disputationum*.-

serving in good faith as slaves.

58.- JAVOLENUS; *On Cassius, Book XL*.- Anything which is taken from the sea does not begin to be the property of him who obtains it until the owner of said property begins to consider it as abandoned.

59.- CALLISTRATUS; *Questions, Book II*.- Property purchased by my order does not become mine until the person who bought it has delivered it to me.

60.- SCAEVOLA; *Opinions, Book I*.- Titius placed a movable granary for wheat constructed of wooden boards upon the land of Seius. The question arises, who is the owner of the granary? The answer is that, according to the facts stated, it does not become the property of Seius.

61.- HERMOGENIANUS; *Epitomes of Law, Book VI*.- An estate is often considered in law as an owner, and therefore anything that is acquired by a slave forming part of the same is considered to be acquired by it as his master. It is clear that, in matters in which the act or labor of a person is essential, nothing can be obtained for the estate by the agency of a slave; and therefore, although a slave belonging to the estate can be appointed an heir, still, as the personal order of his master is necessary to enable him to enter upon the same, we must wait until an heir appears.

§ 1.- As an usufruct cannot be created without someone to enjoy it, so it cannot be acquired for an estate through the medium of a slave.

62.- PAULUS; *Manuals, Book II*.- There are certain things which cannot themselves be alienated but pass by universal custom; hence a dotal tract of land and property which is not an object of commerce pass to the heir; for although it cannot be bequeathed to him, it, nevertheless, becomes his after his appointment.

63.- TRYPHONINUS; *Disputations, Book VII*.- If

que sirven de buena fe.

58.- JAVOLENO; *Doctrina de Cassio, libro XI*.- Ninguna cosa que fue extraída del mar comienza a ser del que la extrajo antes que su dueño haya comenzado a tenerla por abandonada.

59.- CALISTRATO; *Cuestiones, libro II*.- La cosa comprada por mandato mío no se hará mía antes que me la haya entregado el que la compró.

60.- SCÉVOLA; *Respuestas, libro I*.- Ticio puso en un predio de Seyo un nuevo almacén movable para trigo, hecho con tablas de madera; se pregunta, quién será el dueño del granero. Respondió, que según lo que se exponía, no se hizo de Seyo.

61.- HERMOGENIANO; *Epítome del Derecho, libro VI*.- En muchas partes del derecho la herencia es considerada como dueño, y por esto se adquiere también para la herencia como para el dueño por medio de un esclavo de la herencia. Pero en los casos en que se requiere el hecho de una persona o la realidad de un trabajo, no se puede adquirir nada para la herencia por medio de un esclavo; y por esto, aunque un esclavo de la herencia pueda ser instituido heredero, se ha de esperar, sin embargo, al heredero, porque se requiere la persona del dueño que mande adir la herencia.

§ 1.- El usufructo, que no puede ser constituido sin persona, no se adquiere para la herencia por medio de un esclavo.

62.- PAULO; *Manual, libro II*.- Algunas cosas, que no pueden ser enajenadas solas, pasan a otro en conjunto, como el fundo dotal al heredero, y la cosa respecto a la que alguno no tiene derecho de comercio; porque aunque no pueda ser legada a él, sin embargo, el heredero instituido se hace dueño de ella.

63.- TRIFONINO; *Disputas, libro VII*.- Si el que

58.- IAVOLENUS; *libro XI, ex Cassio*.- Quaecumque res ex mari extracta est, non ante eius incipit esse qui extraxit, quam dominus eam pro derelicto habere coepit.

59.- CALLISTRATUS; *libro II, Quaestionum*.- Res ex mandato meo empta non prius mea fiet, quam si mihi tradiderit qui emit.

60.- SCAEVOLA; *libro I, Responsorum*.- Titius horreum frumentarium novum ex tabulis ligneis factum mobile in seii praedio posuit: quaeritur, uter horrei dominus sit. Respondit secundum quae propo-nerentur non esse factum seii.

61.- HERMOGENIANUS; *libro VI, iuris Epitomarum*.- Hereditas in multis partibus iuris pro domino habetur adeoque hereditati quoque ut domino per servum hereditarium acquiritur. In his sane, in quibus factum personae operaeve substantia desideratur, nihil hereditati quaeri per servum potest. Ac propterea quamvis servus hereditarius heres institui possit, tamen quia adire iubentis domini persona desideratur, heres exspectandus est.

§ 1.- Usus fructus, qui sine persona constitui non potest, hereditati per servum non acquiritur.

62.- PAULUS; *libro II, Manualium*.- Quaedam, quae non possunt sola alienari, per universitatem transeunt, ut fundus dotalis, ad heredem, et res, cuius aliquis commercium non habet: nam etsi legari ei non possit, tamen heres institutus dominus eius efficitur.

63.- TRYPHONINUS; *libro VII, Disputationum*.-

serving in good faith as slaves.

58.- JAVOLENUS; *On Cassius, Book XL*.- Anything which is taken from the sea does not begin to be the property of him who obtains it until the owner of said property begins to consider it as abandoned.

59.- CALLISTRATUS; *Questions, Book II*.- Property purchased by my order does not become mine until the person who bought it has delivered it to me.

60.- SCAEVOLA; *Opinions, Book I*.- Titius placed a movable granary for wheat constructed of wooden boards upon the land of Seius. The question arises, who is the owner of the granary? The answer is that, according to the facts stated, it does not become the property of Seius.

61.- HERMOGENIANUS; *Epitomes of Law, Book VI*.- An estate is often considered in law as an owner, and therefore anything that is acquired by a slave forming part of the same is considered to be acquired by it as his master. It is clear that, in matters in which the act or labor of a person is essential, nothing can be obtained for the estate by the agency of a slave; and therefore, although a slave belonging to the estate can be appointed an heir, still, as the personal order of his master is necessary to enable him to enter upon the same, we must wait until an heir appears.

§ 1.- As an usufruct cannot be created without someone to enjoy it, so it cannot be acquired for an estate through the medium of a slave.

62.- PAULUS; *Manuals, Book II*.- There are certain things which cannot themselves be alienated but pass by universal custom; hence a dotal tract of land and property which is not an object of commerce pass to the heir; for although it cannot be bequeathed to him, it, nevertheless, becomes his after his appointment.

63.- TRYPHONINUS; *Disputations, Book VII*.- If

que sirven de buena fe.

58.- JAVOLENO; *Doctrina de Cassio, libro XI*.- Ninguna cosa que fue extraída del mar comienza a ser del que la extrajo antes que su dueño haya comenzado a tenerla por abandonada.

59.- CALISTRATO; *Cuestiones, libro II*.- La cosa comprada por mandato mío no se hará mía antes que me la haya entregado el que la compró.

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63.- TRIFONINO; *Disputas, libro VII*.- Si el que

Si is qui in aliena potestate est thesaurum invenerit, in persona eius cui acquirit hoc erit dicendum, ut, si in alieno agro invenerit, partem ei adquirat, si vero in parentis dominive loco invenerit, illius totus sit, si autem in alieno, pars.

§ 1.- Si communis servus in alieno invenerit, utrum pro domini partibus an semper aequis adquirit? Et simile est atque in hereditate vel legato vel quod ab aliis donatum servo traditur, quia et thesaurus donum fortunae creditur, scilicet ut pars, quae inventori cedit, ad socios, pro qua parte servi quisque dominus est, pertineat.

§ 2.- Si communis servus in domini unius fundo proprio invenit, de parte, quae soli domino semper cedit, non est dubium, quin solius domini praedii sit: verum an aliquid ex parte ferat alter socius, videntum est, et numquid simile sit, atque quum stipulatur servus iussu unius domini aut per traditionem aliquid accipit vel nominatim alteri: quod magis dici poterit.

§ 3.- Quod si servus, in quo usus fructus alienus est, invenerit in eius locum, qui servum proprium habet, an totum illius sit? Et si in alieno, an partem eidem adquirat an vero fructuario? inspectio in illo est, num ex operis servi adquiratur. Finge terram fodientem invenisse, ut hoc dicatur fructuarii esse: quod vero subito in abdito loco positum nihil agens, sed aliter ambulans invenit, proprietatis domini sit. Ego nec illius ad fructuarium pertinere partem arbitror: nemo enim servorum opera thesaurum quaerit nec ea propter tunc terram fodiebat, sed alii rei operam insumebat et fortuna aliud dedit. Itaque si in ipsius fructuarii agro invenerit, puto partem solam ut agri dominum habiturum, alteram ad eum, cuius in servo

anyone who is under the control of another finds a treasure, it must be said with reference to the person for whom it is acquired that if the former finds it upon the land of another, he will be entitled to half of it; but if he finds it upon the land of his father or master, the whole of it will belong to the latter; (and only half, if it is discovered upon the land of someone else).

§ 1.- If a slave owned in common finds a treasure upon the land of another, will he acquire the same in proportion to the shares of his masters, or will he always acquire it for both of them equally? This case resembles one where property which is derived from the State, or bequeathed by a legacy, or donated by strangers, is delivered to a slave, because a treasure is considered a gift of fortune; hence the part to which the finder is entitled will belong to the joint-owners in proportion to the interest which each one has in the slave.

§ 2.- If a slave owned in common finds a treasure on the land of one of his masters, no doubt can arise with reference to the share to which the master is always entitled, as it belongs to the owner of the land alone. But, on the other hand, it should be considered whether the other joint-owner will not have a right to part of the remaining half, and whether the case is not similar to that where a slave makes a stipulation by the order of one of his masters, or receives something by delivery, or specifically, for the other. The latter may be said to be the better opinion.

§ 3.- Where a slave in whom anyone has the usufruct finds a treasure on the land of him who has the ownership of the slave, will it all belong to him? And if he finds it on the land of another, will he acquire half of it for his owner, or for the usufructuary? In this instance, an examination must be made to ascertain whether the usufructuary can acquire property by the labor of the slave. Suppose that the slave found a treasure by digging in the ground; then it may be said to belong to the usufructuary. If, however, he should suddenly find it concealed in some retired place, while he was doing nothing but walking about, it will belong to the owner of the property. I, however, do not think that half the

está bajo ajena potestad hubiere encontrado un tesoro, se habrá de decir respecto a la persona de aquél para quien lo adquiere, que si lo hubiere encontrado en un campo ajeno, adquiere para aquél una parte, y si lo hubiere encontrado en terreno de un ascendiente o de su señor, todo será de éste, pero si en el de otro, una parte.

§ 1.- Si un esclavo común lo hubiere encontrado en terreno ajeno ¿lo adquirirá acaso con arreglo a las porciones del dominio, o siempre por partes iguales? Y esto es semejante a la herencia o al legado, o a lo que donado por otros se le entrega a un esclavo, porque también un tesoro es considerado don de la fortuna; de suerte que la parte que le corresponde al inventor les pertenecerá a los condueños con arreglo a la parte del esclavo de que cada uno es dueño.

§ 2.- Si un esclavo común lo halla en un fundo propio de uno solo de sus condueños, no hay duda, respecto a la parte que corresponde siempre al dueño del suelo, que será del único dueño del predio; pero se ha de ver si el otro condueño tomara algo de la parte, o si acaso esto será lo mismo que cuando por mandato de un solo dueño estipula el esclavo, o recibe alguna cosa mediante entrega o expresamente para otro: que es lo que más bien se podrá decir.

§ 3.- Pero si un esclavo, sobre el cual es de otro el usufructo, lo hubiere encontrado en terreno del que tiene la propiedad del esclavo, ¿será todo de aquél, y, si en el de otro, adquirirá una parte para éste, o quizá para el usufructuario? La consideración estriba en esto, en si se adquiere por virtud de trabajo del esclavo. Supón, que lo encontró cavando la tierra, para que se diga que es del usufructuario; pero si no haciendo nada, sino paseándose encontró de pronto lo depositado en lugar escondido, será del dueño de la propiedad. Yo opino, que ni una parte le pertenece al usufructuario de él porque nadie adquiere un tesoro por el trabajo de los esclavos, ni para esto cavaba entonces la tierra sino que aplicaba el trabajo

proprietas est, pertinere.

§ 4.- Quod si creditor invenerit, in alieno videbitur invenisse: partem itaque sibi, partem debitori praestabit, nec recepta pecunia restituet, quod iure inventoris, non creditoris ex thensauo apud eum remansit. Quae quum ita sint, et quum ex principis auctoritate creditor ut proprium agrum tenere coepit iure dominii, intra constitutum luendi tempus pignoris causa vertitur: Post transactum autem tempus thensaurum in eo inventum ante solutam pecuniam totum tenebit. Oblato vero intra constitutum tempus debito, quoniam universa praestantur atque in simplici petitore revocantur, restitui debebit, sed pro parte sola, quia dimidium inventori semper placet relinqui.

64.- QUINTUS MUCIUS SCAEVOLA; *libro singulari* ____.- Quae quisque aliena in censum deducit, nihilo magis eius fiunt.

65.- LABEO; *libro VI, Pithanon a Paulo epitomatum*.- Si epistulam tibi misero, non erit ea tua, antequam tibi reddita fuerit. Paulus: immo contra: nam si miseris ad me tabellarium tuum et ego rescribendi causa litteras tibi misero, simul atque tabellario tuo tradidero, tuae fient. Idem accidet in his litteris, quas tuae dumtaxat rei gratia misero, veluti si petieris a me, uti te alicui commendarem, et eas

treasure should belong to the usufructuary, for no one seeks for treasure with the labor of a slave, and it was not on his account that the slave was digging in the earth, but he was doing work for another purpose, and fortune gave him something else. Therefore, if he should find a treasure on the land of the usufructuary himself, I think that the latter will be entitled to only half of it, as the owner of the land, and that the other half will belong to him who has the ownership of the slave.

§ 4.- If a creditor finds a treasure on land which has been hypothecated to him, he will be considered to have found it on the land of another. Hence, he can take half of it himself, and give the other half to the debtor; and when the borrowed money is paid, he can retain the half which he has taken from the treasure by the right of the finder, and not by the right of the creditor. This being the case, if the creditor has begun to hold the land as his own by the right of ownership, under the authority of the Emperor the claim to the pledge will be considered to exist during the time appointed for payment; but, after this time has elapsed, the debtor will be entitled to any treasure found on the land before the money has been paid. Where, however, the amount of the debt is tendered within the time prescribed by law, the creditor must return the treasure, as everything must be restored which belongs to the land, just as in the case where it is returned by a possessor; but he will only be obliged to surrender half of it, because it is settled that the finder is always entitled to half.

64.- QUINTUS MUCIUS; *Scaevola, Definitions*.- When anyone enters property belonging to another in his accounts for taxation, it does not by any means become his.

65.- LABEO; *Epitomes of Probabilities, by Paulus*.- If I send a letter to you, it will not become yours until it has been delivered to you. Paulus: I am of the opposite opinion, for if you send your secretary to me, and I send you a letter by way of answer, the letter will become yours as soon as I have delivered it to your secretary. The same thing happens in the case of a letter which I send to you merely as a favor; for

a un objeto, y la fortuna le dio otra cosa. Y así, si lo hubiere hallado en un campo del mismo usufructuario, opino que habrá de tener una parte sola, como dueño del campo, y que la otra le pertenece a aquel de quien es la propiedad del esclavo.

§ 4.- Pero si lo hubiere encontrado un acreedor se considerará que lo encontró en terreno ajeno; y así tomará una parte para sí, y dará la otra parte al deudor; y no restituirá el dinero recibido, porque quedó del tesoro en poder de él, por derecho de descubridor, no de acreedor. Y siendo esto así, también cuando por la autoridad del Príncipe un acreedor comenzó a tener con derecho de dominio como propio un campo, la causa de la prenda subsiste durante el tiempo establecido para la luición, pero después de transcurrido el tiempo retendrá todo el tesoro encontrado en él antes de haberse pagado el dinero; mas ofrecida la deuda dentro del tiempo establecido, como quiera que todas las cosas se le dan y se le devuelven al simple demandante, deberá ser restituido, pero sólo en parte, porque está determinado que la mitad se le deje siempre al descubridor.

64.- QUINTO MUCIO SCEVOLA; *Definiciones, libro único*.- Las cosas ajenas que cualquiera comprendió en el censo no se hacen por esto tuyas.

65.- LABEON; *Dichos recopilados por Paulo, libro VI*.- Si yo te hubiere mandado una carta, ésta no será tuya antes que te haya sido entregada. Y dice Paulo: antes por el contrario, porque si me hubieres enviado a tu portador de cartas, y yo para contestarle te hubiere enviado una carta, se hará tuya tan pronto como yo la hubiere entregado a tu portador de cartas. Lo mismo sucederá en cuanto a las cartas que yo

commendaticias tibi misero litteras.

§ 1.- Si qua insula in flumine propria tua est, nihil in ea publici est. Paulus: immo in eo genere insularum ripae flumini et litora mari proxima publica sunt, non secus atque in continenti agro idem iuris est.

§ 2.- Si qua insula in flumine publico proxima tuo fundo nata est, ea tua est. Paulus: videamus ne hoc falsum sit de ea insula, quae non ipsi alveo fluminis cohaeret, sed virgultis aut alia qualibet levi materia ita sustinetur in flumine, ut solum eius non tangat, atque ipsa movetur: haec enim propemodum publica atque ipsius fluminis est insula.

§ 3.- Paulus: si insula in flumine nata tua fuerit, deinde inter eam insulam et contrariam ripam alia insula nata fuerit, mensura eo nomine erit instruenda a tua insula, non ab agro tuo, propter quem ea insula tua facta fuerit: nam quid interest, qualis ager sit, cuius propter propinquitatem posterior insula cuius sit quaeratur?

§ 4.- Labeo libro eodem. Si id quod in publico innatum aut aedificatum est, publicum est, insula quoque, quae in flumine publico nata est, publica esse debet.

66.- VENULEIUS; *libro VI, Interdictorum.*- Quum praegnas mulier legata aut usucapta aliove quo modo alienata pariat, eius fient partus, cuius est ea, quum eniteretur, non cuius tunc fuisset, quum conciperet.

instance, if you have asked me to recommend you to someone, and I send you a letter for that purpose.

§ 1.- If an island in a river belongs to you, none of it is public property. Paulus: The contrary is true, for in this kind of islands, the banks of a river and the shores of the sea are, to a certain extent, public property; and the rule of law is the same with reference to a field which adjoins the bank, or the shore.

§ 2.- If an island is formed in a public stream, which is near your property, it will belong to you. Paulus: Let us see if this is not false with reference to an island which is not contiguous to the channel of the river, but is suspended by branches, or some other light material, above the stream, so that the soil does not reach it, and the island can change its position. An island of this kind is, to a certain extent, public property, and belongs to the river itself.

§ 3.- Paulus: If an island which is formed in the river becomes yours, and another island is afterwards formed between the first one and the opposite bank, the measure will be taken from your island, and not from your land on account of which the island became your property; for what difference does it make what the character of the land may be, on account of whose situation the ownership of the last island is claimed?

§ 4.- Labeo, in the same Book, says that if anything is formed or built in a public place, it becomes public, and that an island which is formed in a public stream should also be considered public property.

66.- VENULEIUS; *Interdicts, Book VI.*- When a pregnant woman is bequeathed, acquired by usucaption, or alienated in any other way, and brings forth a child, it will become the property of him who purchased her, and not of him to whom she belonged when she conceived.

hubiere enviado solamente por tú interés, como si me hubieses pedido que te recomendase a alguno, y yo te hubiere enviado estas cartas de recomendación.

§ 1.- Si en un río hay una isla propia tuya, nada de ella es del público. Y dice Paulo: aun en esta clase de islas, las riberas próximas al río, y las costas próximas al mar son públicas, no de otra suerte que hay este mismo derecho en cuanto al campo contiguo.

§ 2.- Si en un río público se formó alguna isla próxima a tu fundo, es tuya. Y dice Paulo: veamos no sea que esto sea falso respecto de la isla que no esté unida al mismo cauce del río, sino que se sostenga en el río por matorrales, o con otra cualquier materia ligera, de suerte que no toque al fondo de aquél, y que ella misma se mueva; porque esta es isla casi pública y del mismo río.

§ 3.- Dice Paulo: si en un río se hubiere formado una isla tuya, y después se hubiere formado otra isla entre esta isla y la margen contraria, se habrá de tomar con tal motivo la medida desde tu isla, no desde el campo tuyo por el cual esta isla se hubiere hecho tuya; porque ¿qué importa cual sea el campo por razón de cuya proximidad se pregunte de quién sea la segunda isla?

§ 4.- Dice Labeón en el mismo libro: si lo que en sitio público se formó o se edificó es público, también debe ser pública la isla que se forma en un río público.

66.- VENULEYO; *De los Interdictos, libro VI.*- Cuando para la mujer embarazada que fue legada, o usucapida, o de otro cualquier modo enajenada, el parto se hará de aquel de quien es ella o para quien fuese comprada, no de aquel de quien hubiese sido cuando concibiese.

TIT. II

DE ACQUIRENDA, VEL AMITTENDA
POSSESSIONE

1.- PAULUS; *libro LIV, ad Edictum*.- Possessio appellata est, ut et Labeo ait, a sedibus quasi positio, quia naturaliter tenetur ab eo qui ei insistit, quam graeci (detentionem) dicunt.

§ 1.- Dominiumque rerum ex naturali possessione coepisse nerva filius ait eiusque rei vestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderint. Item bello capta et insula in mari enata et gemmae lapilli margaritae in litoribus inventae eius fiunt, qui primus eorum possessionem nactus est.

§ 2.- Apiscimur autem possessionem per nosmet ipsos.

§ 3.- Furiosus, et pupillus sine tutoris auctoritate, non potest incipere possidere, quia affectionem tenendi non habent, licet maxime corpore suo rem contingant, sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilius quidem et Nerva filius etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt: eam enim rem facti, non iuris esse: quae sententia recipi potest, si eius aetatis sint, ut intellectum capiant.

§ 4.- Si vir uxori cedat possessione donationis causa, plerique putant possidere eam, quoniam res facti infirmari iure Civili non potest: et quid attinet dicere non possidere mulierem, quum maritus, ubi noluit possidere, protinus amiserit possessionem?

TITLE II

CONCERNING ACQUIRING OR LOSING
POSSESSION

1.- PAULUS; *On the Edict, Book LIV*.- Possession, as Labeo says, is derived from the term sedes, or position, because it is naturally held by him who has it; and this the Greeks designate (retention).

§ 1.- Nerva, the son, asserts that the ownership of property originated from natural possession, and that the trace of this still remains in the case of whatever is taken on the earth, on the sea, and in the air, for it immediately belongs to those who first acquire possession of it. Likewise, spoils taken in war, and an island formed in the sea, gems, precious stones, and pearls found upon the shore, become the property of him who first obtains possession of them.

§ 2.- We also acquire possession by ourselves.

§ 3.- An insane person, or a ward, cannot begin to acquire possession without the authority of his curator or guardian; because, although the former may touch the property with their bodies, they have not the disposition to hold it, just as where anyone places something in the hands of a man who is asleep. A ward can begin to obtain possession by the authority of his guardian. Ofilius, and Nerva, the son, however, say that a ward cannot begin to obtain possession without the authority of his guardian, for possession is a matter of fact, and not of law. This opinion may be accepted where the ward is of such an age as to be capable of understanding what he is doing.

§ 4.- Where a husband gives possession to his wife for the purpose of making her a donation, several authorities hold that she is in actual possession, as a question of fact cannot be annulled by the Civil Law. And, indeed, what use would it be to say that the wife is not in possession, as the husband immediately lost

TÍTULO II

DE CÓMO SE ADQUIERE O SE PIERDE LA
POSESIÓN

1.- PAULO; *Comentarios al Edicto, libro LIV*.- Se denominó la posesión, como dice también Labeón, de sede, como si se dijera posición, porque naturalmente es tenida por el que está en ella; a la cual llaman los griegos (retención).

§ 1.- Y dice Nerva, el hijo, que el dominio de las cosas comenzó por la posesión natural, y que de esto queda vestigio en las cosas que se cogen en la tierra, en el mar y en el aire; porque ellas se hacen al punto de los que primero hubieren tomado posesión de las mismas. Asimismo, las cosas cogidas en la guerra, la isla formada en el mar, las perlas, las piedras preciosas, y las margaritas halladas en la costa se hacen del que primero alcanzó su posesión.

§ 2.- Pero adquirimos la posesión por nosotros mismos.

§ 3.- El furioso y el pupilo no pueden comenzar a poseer sin la autoridad del tutor, porque no tienen la intención de tener, aunque especialmente toquen con su cuerpo la cosa, a la manera que si alguno le pusiera en la mano alguna cosa al que duerme; pero el pupilo comenzará a poseer con la autoridad del tutor. Ciertamente que Afilio y Nerva, el hijo, dicen que el pupilo puede comenzar a poseer aun sin la autoridad del tutor, porque esta es cosa de hecho, no de derecho; cuya opinión puede ser admitida, si fueran de tal edad, que tengan entendimiento.

§ 4.- Si el marido le cediera a la mujer la posesión por causa de donación, opinan los más, que ella posee, porque una cosa de hecho no puede ser invalidada por el Derecho Civil; y ¿qué importa decir que la mujer no posee, porque el marido, luego que no quiso poseer, perdió inmediatamente la posesión?

it when he no longer desired to retain it ?

§ 5.- Item adquirimus possessionem per servum aut filium, qui in potestate est, et quidem earum rerum, quas peculiariter tenent, etiam ignorantes, sicut Sabino et Cassio et Iuliano placuit, quia nostra voluntate intellegantur possidere, qui eis peculium habere permiserimus. Igitur ex causa peculiari et infans et furiosus adquirunt possessionem et usucapiunt, et heres, si hereditarius servus emat.

§ 6.- Sed et per eum, quem bona fide possidemus, quamvis alienus sit vel liber, possessionem adquirimus. Si mala fide eum possideamus, non puto adquiri nobis possessionem per eum: sed nec vero domino aut sibi adquiret, qui ab alio possidetur.

§ 7.- Per communem sicut per proprium adquirimus, etiam singuli in solidum, si hoc agat servus, ut uni adquirat, sicut in dominio adquirendo.

§ 8.- Per eum, in quo usum fructum habemus, possidere possumus, sicut ex operis suis acquirere nobis solet: nec ad rem pertinet, quod ipsum non possidemus: nam nec filium.

§ 9.- Ceterum et ille, per quem volumus possidere, talis esse debet, ut habeat intellectum possidendi:

§ 10.- Et ideo si furiosum servum miseris, ut possideas, nequaquam videris adprehendisse possessionem.

§ 11.- Quod si impuberem miseris ad possidendum, incipies possidere, sicut pupillus, maxime

§ 5.- We also acquire possession by means of a slave or a son who is under our control; and this is the case with property constituting his peculium, even if we are ignorant of the fact, as was held by Sabinus. Cassius and Julianus: because those whom we have permitted to have peculium are understood to be in possession with our consent. Therefore, an infant and an insane person can obtain possession of property forming peculium, and can acquire it by usucaption; an heir also can do this, where a slave belonging to the estate makes a purchase.

§ 6.- We can also acquire possession through anyone whom we possess in good faith as a slave, even though he belongs to another, or is free. If, however, we have possession of him fraudulently, I do not think that we can acquire possession through his agency. He who is in possession of another can neither acquire property for his master nor for himself.

§ 7.- When we are joint-owners of a slave, we can individually acquire property through him to the full amount, as if he were one of our own slaves, if he intends to make the acquisition for one of his masters; just as is the case of acquiring ownership.

§ 8.- We can obtain possession through a slave in whom we have the usufruct in the same way that he is accustomed to acquire property for us by means of his labor; nor does it make any difference if we do not actually possess him, for the same rule applies to a son.

§ 9.- Moreover, he through whom we desire to obtain possession should be such a person as to be able to understand what possession means.

§ 10.- Therefore, if you send a slave, who is insane, to take possession, you will by no means be considered to have acquired it.

§ 11.- If you send a boy under the age of puberty to take possession, you will begin to do so; just as a

§ 5.- También adquirimos la posesión por medio de un esclavo, o del hijo que esta bajo potestad; y ciertamente de las cosas, que tienen en el peculio, aun ignorandolo nosotros, según les pareció bien a Sabino, a Cassio, y a Juliano, porque se entiende que poseen por nuestra voluntad aquellos a quienes les hemos permitido que tengan peculio. Luego por causa del peculio, así el que esta en la infancia como el furioso adquieren la posesión, y adquieren por usucapión, y el heredero, si hiciera una compra el esclavo de la herencia.

§ 6.- Mas también adquiriremos la posesión por medio de aquel a quien poseemos de buena fe, aunque sea esclavo ajeno, u hombre libre; porque si lo poseyéramos con mala fe, no creo que por medio de él se adquiriera para nosotros la posesión; mas ni para su verdadero dueño, ni para sí la adquirirá el que es poseído por otro.

§ 7.- Por medio de un esclavo común, así como por medio del propio, adquirimos cada uno la totalidad, si el esclavo hiciera de modo que adquiriera para uno solo, como al adquirirse el dominio.

§ 8.- Podemos poseer por medio de aquel en el cual tenemos el usufructo, así como suele adquirir para nosotros con su trabajo; y no importa al caso que no lo poseamos a él mismo; porque tampoco poseemos al hijo.

§ 9.- Por lo demás, también aquel por medio del cual queremos poseer debe ser tal, que tenga la intención de poseer.

§ 10.- Y por lo tanto, si, para poseer tú, hubieres enviado a un esclavo loco, de ninguna manera se considera que tomaste la posesión.

§ 11.- Pero si para poseer hubieres enviado a un impúbero, comenzarás a poseer, así como el pupilo

tutore auctore, acquirit possessionem.

§ 12.- Nam per ancillam quin possis nancisci possessionem, non dubitatur.

§ 13.- Pupillus per servum sive puberem sive impuberem acquirit possessionem, si tutore auctore iusserit eum ire in possessionem.

§ 14.- Per servum, qui in fuga sit, nihil posse nos possidere nerva filius ait, licet respondeatur, quamdiu ab alio non possideatur, a nobis eum possideri ideoque interim etiam usucapi. Sed utilitatis causa receptum est, ut impleatur usucapio, quamdiu nemo nactus sit eius possessionem. possessionem autem per eum adquiri, sicut per eos, quos in provincia habemus, cassii et iuliani sententia est.

§ 15.- Per servum corporaliter pignori datum non adquirere nos possessionem iulianus ait (ad unam enim tantum causam videri eum a debitore possideri, ad usucapionem), nec creditori, quia nec stipulatione nec ullo alio modo per eum adquirat, quamvis eum possideat.

§ 16.- Veteres putaverunt non posse nos per servum hereditarium adquirere, quod sit eiusdem hereditatis. itaque agitur, num haec regula longius producenda sit, ut, si plures servi legati sint, per unum an possint ceteri possideri. Idem tractatus est, si pariter empti vel donati sunt. Sed verius est ex his causis posse me per unum reliquorum adquirere possessionem.

ward acquires possession, and especially by the authority of his guardian.

§ 12.- There is no doubt that you can obtain possession by means of a female slave.

§ 13.- A ward can acquire possession by means of a slave, whether the latter has arrived at the age of puberty, or not, if he directs him to take possession with the authority of his guardian.

§ 14.- Nerva, the son, says that we cannot acquire possession by means of one of our slaves who is a fugitive, although it has been held that he remains in our possession as long as he is not in that of another; and therefore that, in the meantime, property can be acquired by him through usucaption. This opinion, however, is adopted on account of public convenience, so that usucaption may take place as long as no one has obtained possession of the slave. It is the opinion of Cassius and Julianus that possession may be acquired by such a slave, as well as by those whom we have in a province.

§ 15.- Julianus says that we cannot acquire possession by means of a slave who has been actually given in pledge, for he is held to be possessed by the debtor in one respect, that is to say, for the purpose of usucaption. Nor can the slave who is pledged acquire property for the creditor, because although the latter may have possession of him, he cannot acquire property through him by means of a stipulation, or in any other way.

§ 16.- The ancients thought that we could acquire anything by means of a slave belonging to an estate, because he was part of the said estate. Hence, a discussion arose whether this rule should not be extended farther so that where some slaves were bequeathed, the others could be possessed by the act of one of them. It was also discussed whether this would be the case if they were all purchased or donated together. The better opinion is that I cannot, under such circumstances, acquire possession by the act of one of them.

adquiere la posesión, especialmente con la autoridad del tutor.

§ 12.- Porque no se duda que por medio de una esclava puedas adquirir la posesión.

§ 13.- El pupilo adquiere la posesión por medio de un esclavo, o púbero o impúbero, si con la autoridad del tutor le hubiere mandado que entre en posesión.

§ 14.- Dice Nerva, el hijo, que nada podemos poseer por medio del esclavo que esté fugitivo, aunque se responda que mientras no sea poseído por otro es él poseído por nosotros, y que por esto también se adquiere mientras tanto por usucapión. Pero se admitió por causa de utilidad, que se complete la usucapión, mientras nadie haya adquirido su posesión. Mas se adquiere la posesión por medio de él, así como por medio de los que tenemos en una provincia. según es la opinión de Cassio y de Juliano.

§ 15.- Dice Juliano, que no adquirimos la posesión por medio de un esclavo dado en prenda corporalmente; porque se considera que es poseído por el deudor solamente para un solo objeto, para la usucapión; y no adquiere para el acreedor, porque no adquiere por medio de él ni por estipulación ni de ningún otro modo, aunque lo posea.

§ 16.- Opinaron los antiguos, que no podíamos adquirir por medio de un esclavo de la herencia lo que sea de la misma herencia. Y por esto se discute, si esta regla se haya de extender a más, de suerte que si se hubieran legado muchos esclavos se puedan poseer los demás por medio de uno solo. Lo mismo se discutió, si juntamente fueron comprados o donados. Pero es más verdadero que por estas causas puedo yo adquirir la posesión de los demás por medio de uno solo.

§ 17.- Si ex parte heredi instituto servus legatus sit, propter partem, quam ex causa legati habet, acquirat fundi hereditarii possessionem.

§ 18.- Idem dicendum est, si servum communem iussero adire hereditatem, quia propter partem meam acquiram.

§ 19.- Haec, quae de servis diximus, ita se habent, si et ipsi velint nobis acquirere possessionem: nam si iubeas servum tuum possidere et is eo animo intret in possessionem, ut nolit tibi, sed potius Titio acquirere, non est tibi adquisita possessio.

§ 20.- Per procuratorem tutorem curatoremve possessio nobis acquiritur. Quum autem suo nomine nacti fuerint possessionem, non quum ea mente, ut operam dumtaxat suam accommodarent, nobis non possunt acquirere. Alioquin si dicamus per eos non acquiri nobis possessionem, qui nostro nomine accipiunt, futurum, ut neque is possideat cui res tradita sit, quia non habeat animum possidentis, neque is qui tradiderit, quoniam cesserit possessione.

§ 21.- Si iusserim venditorem procuratori rem tradere, quum ea in praesentia sit, videri mihi traditam priscus ait, idemque esse, si nummos debitorem iusserim alii dare. Non est enim corpore et tactu necesse adprehendere possessionem, sed etiam oculis et affectu argumento esse eas res, quae propter magnitudinem ponderis moveri non possunt, ut columnas, nam pro traditis eas haberi, si in re praesenti consenserint: et vina tradita videri, quum claves cellae vinariae emptori traditae fuerint.

§ 17.- If a slave is partially bequeathed to an appointed heir, he can acquire possession of the land of the estate for him, in proportion to his share in the said slave, by virtue of the legacy.

§ 18.- The same rule will apply if I order a slave owned in common to accept an estate, because I obtain possession of my share of it on account of my interest in him.

§ 19.- What we have stated with reference to slaves also applies where they themselves desire to acquire possession for us; for if you order your slave to take possession, and he does so with the intention of acquiring the property not for you, but for Titius, possession is not acquired for you.

§ 20.- Possession is acquired by us by means of an agent, a guardian, or a curator. But when they take possession in their own names, and not with the intention of merely rendering their services, they cannot acquire possession for us. On the other hand, if we say that those who obtain possession in our name do not acquire it for us, the result will be that neither he to whom the property was delivered will obtain possession, because he did not have the intention of doing so, nor will he who delivered the article retain it, as he has relinquished possession of the same.

§ 21.- If I order a vendor to deliver the property to my agent, while it is in our presence, Priscus says that it will be held to have been delivered to me. The same rule will apply if I order my debtor to pay to another the sum which is due to me, for it is not necessary to take possession bodily and actually, but this can be done merely by the eyes and the intention. The proof of this appears in the case of property which, on account of its weight, cannot be moved, as columns, for instance; for they are considered to have been delivered if the parties consent, with the columns before them; and wines are held to have been delivered when the keys of the wine-cellar have been handed to the purchaser.

§ 17.- Si a un heredero instituido en parte le hubiera sido legado un esclavo, adquirirá la posesión de un fundo de la herencia por virtud de la parte que tiene por causa del legado.

§ 18.- Lo mismo se ha de decir, si a un esclavo común yo le hubiere mandado que ada la herencia, porque adquiero por razón de mi parte.

§ 19.- Lo que hemos dicho respecto a los esclavos es así, si también ellos quisieran adquirir para nosotros la posesión; porque si le mandarás a un esclavo tuyo que poseyera, y éste entrara en posesión con tal intención, que no quisiera adquirir para ti, sino más bien para Ticio, la posesión no fue adquirida para ti.

§ 20.- Se adquiere para nosotros la posesión por medio de procurador, tutor o curador. Mas cuando hubieren alcanzado en su propio nombre la posesión, no con la intención de prestar solamente su trabajo, no pueden adquirir para nosotros; de otra suene, si dijéramos que no se adquiere para nosotros la posesión por medio de los que la reciben en nuestro nombre, resultaría que tampoco poseería aquel a quien fue entregada la cosa, porque no tiene el ánimo de poseer, ni el que la hubiere entregado, porque habría cedido la posesión.

§ 21.- Si yo le hubiere mandado al vendedor que entregue la cosa a un procurador, estando ella presente, dice Prisco que se considera que me fue entregada; y que lo mismo es, si yo hubiere mandado a un deudor que le entregue el dinero a otro; porque no es necesario tomar la posesión corporalmente y con la mano, sino que también se toma con la vista y la intención; y son prueba de ello las cosas que por la magnitud de su peso no pueden ser movidas, como las columnas; porque se consideran entregadas, si en presencia de la cosa se hubiere convenido; y se consideran entregados los vinos cuando al comprador le hubieren sido entregadas las llaves de la bodega.

§ 22.- Municipales per se nihil possidere possunt, quia universi consentire non possunt. Forum autem et basilicam hisque similia non possident, sed promiscue his utuntur. Sed Nerva filius ait, per servum quae peculiariter adquisierint et possidere et usucapere posse: sed quidam contra putant, quoniam ipsos servos non possideant.

2.- ULPIANUS; *libro LXX, ad Edictum*.- Sed hoc iure utimur, ut et possidere et usucapere municipales possint idque eis per servum et per liberam personam adquiratur.

3.- PAULUS; *libro LIV, ad Edictum*.- Possideri autem possunt, quae sunt corporalia.

§ 1.- Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore. Quod autem diximus et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet: sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hac sit, uti totum fundum usque ad terminum velit possidere.

§ 2.- Incertam partem rei possidere nemo potest, veluti si hac mente sis, ut quidquid titius possidet, tu quoque velis possidere.

§ 3.- Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedit naturalis possessio. Ideoque si thesaurum in fundo meo positum sciam, continuo me possidere, simul atque possidendi affectum habuero, quia quod desit naturali possessioni, id animus implet. Ceterum quod Brutus et Manilius putant eum, qui fundum longa possessione cepit, etiam thesaurum cepisse, quamvis nesciat in fundo esse, non est verum: is enim qui nescit non possidet thesaurum, quamvis fundum possideat. Sed et si sciat, non capiet longa

§ 22.- Municipalities cannot possess anything by themselves, because all the citizens cannot consent. They do not possess the forums, and the temples, and other things of this kind, but they make use of them promiscuously. Nerva, the son, says that they can acquire, possess, and obtain by usucaption, the peculium of their slaves; others, however, hold the contrary; as they do not have possession of the slaves themselves.

2.- ULPIANUS; *On the Edict, Book LXX*.- The present rule is that municipalities can both hold possession and acquire by usucaption, and that this can be done through a slave, or a person who is free.

3.- PAULUS; *On the Edict, Book LXX*.- Moreover, only corporeal property can be possessed.

§ 1.- We obtain possession by means of both the body and the mind, and not by these separately. When, however, we say that we obtain possession by the body and the mind, this should not be understood to mean that where anyone desires to take possession of land he must walk around every field, as it will be sufficient for him to enter upon any part of the land, as long as it is his intention to take possession of it all, as far as its boundaries extend.

§ 2.- No one can obtain possession of property which is uncertain; as, for instance, if you have the intention and desire to possess everything that Titius has.

§ 3.- Neratius and Proculus think that we cannot acquire possession solely by intention, if natural possession does not come first. Therefore, if I know that there is a treasure on my land, I immediately possess it, as soon as I have the intention of doing so; because the intention supplies what is lacking in natural possession. Again, the opinion of Brutus and Manilius, who hold that anyone who has had possession of land for a long time has also had possession of any treasure to be found there, even though he was ignorant of its existence, is not correct.

§ 22.- Los municipales no pueden poseer nada por sí, porque no pueden convenir todos. Mas tampoco poseen el foro, la basílica, y otras cosas semejantes a estas, sino que usan promiscuamente de ellas. Pero dice Nerva, el hijo, que pueden poseer y usucapir por medio de un esclavo las cosas que hubieren adquirido por el peculio; pero algunos opinan lo contrario, porque no poseen a los mismos esclavos.

2.- ULPIANO; *Comentarios al Edicto, libro LXX*.- Pero observamos este derecho, que los municipales puedan poseer y usucapir, y que la cosa se adquiera para ellos por medio tanto de un esclavo, como de una persona libre.

3.- PAULO; *Comentarios al Edicto, libro LIV*.- Pero se pueden poseer las cosas que son corpóreas.

§ 1.- Y alcanzamos la posesión con el cuerpo y con el ánimo, y no solamente con el ánimo, o con el cuerpo. Mas lo que hemos dicho que debemos adquirir la posesión con el cuerpo y con el ánimo, no se ha de entender ciertamente de modo que el que quiera poseer un fundo haya de andar por toda su tierra; sino que basta que entre en cualquier parte de este fundo, con tal que sea con la intención y el designio de querer poseer todo el fundo hasta su término.

§ 2.- Nadie puede poseer parte incierta de una cosa, como si tuvieras la intención de querer tú también poseer todo lo que posee Ticio.

§ 3.- Neracio y Próculo dicen, que no podemos adquirir la posesión con solo el ánimo, si no procediera la posesión natural. Y por esto, si yo supiera que hay un tesoro depositado en mi fundo, lo poseo inmediatamente que tuviere la intención de poseerlo; porque el ánimo suple lo que falte a la posesión natural. Mas no es verdad lo que opinan Bruto y Manilio, que el que adquirió un fundo por larga posesión adquirió también el tesoro, aunque no sepa que lo hay en el fundo; porque el que no lo sabe no posee el tesoro, aunque posea el fundo pero

possessione, quia scit alienum esse. Quidam putant Sabini sententiam veriore esse nec alias eum qui scit possidere, nisi si loco motus sit, quia non sit sub custodia nostra: quibus consentio.

§ 4.-Ex plurimis causis possidere eandem rem possumus, ut quidam putant et eum, qui usuceperit et pro emptore, et pro suo possidere: sic enim et si ei, qui pro emptore possidebat, heres sim, eandem rem et pro emptore et pro herede possideo: nec enim sicut dominium non potest nisi ex una causa contingere, ita et possidere ex una dumtaxat causa possumus.

§ 5.- Ex contrario plures eandem rem in solidum possidere non possunt: contra naturam quippe est, ut, cum ego aliquid teneam, tu quoque id tenere videaris. Sabinus tamen scribit eum qui precario dederit et ipsum possidere et eum qui precario acceperit. Idem Trebatius probabat existimans posse alium iuste, alium iniuste possidere, duos iniuste vel duos iuste non posse. Quem Labeo reprehendit, quoniam in summa possessionis non multum interest, iuste quis an iniuste possideat: quod est verius. Non magis enim eadem possessio apud duos esse potest, quam ut tu stare videaris in eo loco, in quo ego sto, vel in quo ego sedeo, tu sedere videaris.

§ 6.- In amittenda quoque possessione affectio eius qui possidet intuenda est: itaque si in fundo sis et tamen nolis eum possidere, protinus amittes possessionem. Igitur amitti et animo solo potest, quamvis adquiri non potest.

For he who does not know that there is any treasure there does not possess it, although he may have possession of the land; and, if he was aware of its presence, he cannot acquire it by long possession, because he knows that it is the property of someone else. Several authorities hold that the opinion of Sabinus is the better one; namely, that he who knows that there is a treasure on his land does not gain possession of it unless it has been removed from its place, because it is not in our custody. I concur in this opinion.

§ 4.- We can hold possession of the same thing by several different titles; for example, certain authorities think that he who obtains property by usucaption does so not only as a purchaser, but as the owner. For if I am the heir of him who has possession as a purchaser I possess the same property, but as purchaser and as heir; for while ownership can only be established by a single title, this is not the case with possession.

§ 5.- On the other hand, several persons cannot have possession of the same thing without division; for, indeed, it is contrary to nature that while I hold something you should also be considered to hold it. Sabinus, however, says that he who gives property held by a precarious title possesses it himself, as well as he who received it with the risk. Trebatius, also, approves this opinion, for he thinks that one person can have possession justly, and another unjustly, but that both of them cannot possess it either unjustly or justly. Labeo contradicts him, since, in the case of complete possession, it does not make much difference whether anyone has possession justly or unjustly. This is correct, for the same possession cannot be held by two persons, any more than you can be considered to stand on the very place on which I am standing, or to sit exactly where I am seated.

§ 6.- When possession is lost, the intention of the party in possession must be considered. Therefore, although you may be on a tract of land, still, if you do not intend to retain it, you will immediately lose possession. Hence, possession can be lost by the intention alone, although it cannot be acquired in this

aunque lo sepa, no lo adquirirá por larga posesión, porque sabe que es de otro. Algunos opinan que es más verdadera la opinión de Sabino; y que el que lo sabe no lo posee de otra suerte, sino si hubiera sido cambiado de lugar, porque no estaría bajo nuestra custodia; con los cuales me conformo.

§ 4.- Podemos poseer una misma cosa por muchas causas, como opinan algunos; y el que la hubiere usucapido, la posee como comprador, y como suya propia; porque de este modo también si yo fuese heredero del que la poseía como comprador poseo la misma cosa tanto como comprador, cuanto como heredero; porque así como el dominio no se puede alcanzar sino por una sola causa, así podemos poseer también no por virtud de una sola causa.

§ 5.- Por el contrario, muchos no pueden poseer solidariamente la misma cosa; porque es contra naturaleza que cuando yo tenga alguna cosa, se considere que tú también la tienes. Pero escribe Sabino, que cuando uno hubiere dado una cosa en precario, la poseen él mismo, y el que la hubiere recibido en precario. Lo mismo aprobaba Trebatius, estimando, que uno podía poseer justamente, y otro injustamente; pero que dos no podían poseer injustamente o justamente; al cual le censuró Labeón, porque para el resultado de la posesión no importa mucho que uno posea justa o injustamente; lo que es más verdadero, porque la misma posesión no pueden tenerla dos, no de otra suerte que si se considerase que tú estás en el mismo lugar en que yo estoy, o se considerase que yo estoy sentado en el que tú estás sentado.

§ 8.- También para que se pierda la posesión se ha de atender al ánimo del que posee, Y así, si estuvieras en un fundo, y, sin embargo, no quisieras poseerlo, perderás inmediatamente la posesión. Luego se puede perder, aunque no se pueda adquirir, aun con solo el ánimo.

way.

§ 7.- Sed et si animo solo possideas, licet alius in fundo sit, adhuc tamen possides.

§ 8.- Si quis nuntiet domum a latronibus occupatam et dominus timore conterritus noluerit accedere, amisisse eum possessionem placet. Quod si servus vel colonus, per quos corpore possidebam, decesserint discesserintve, animo retinebo possessionem.

§ 9.- Et si alii tradiderim, amitto possessionem. nam constat possidere nos, donec aut nostra voluntate discesserimus aut vi deiectioni fuerimus.

§ 10.- Si servus, quem possidebam, pro libero se gerat, ut fecit Spartacus, et iudicium liberale pati paratus sit, non videbitur a domino possideri, cui se adversarium praeparat. sed hoc ita verum est, si diu in libertate moratur: alioquin si ex possessione servitutis in libertatem reclamaverit et liberale iudicium imploraverit, nihilo minus in possessione mea est et animo eum possideo, donec liber fuerit pronuntiatus.

§ 11.- Saltus hibernos aestivosque animo possidemus, quamvis certis temporibus eos relinquamus.

§ 12.- Ceterum animo nostro, corpore etiam alieno possidemus, sicut diximus per colonum et servum, nec movere nos debet, quod quasdam etiam ignorantes possidemus, id est quas servi peculiariter paraverunt: nam videmur eas eorundem et animo et corpore possidere.

§ 13.- Nerva filius res mobiles excepto homine, quatenus sub custodia nostra sint, hactenus possideri,

§ 7.- If, however, you have possession solely by intention, even though another may be on the land, you will still have possession of the same.

§ 8.- If anyone should give notice that a house is invaded by robbers, and the owner, being overcome with fear, is unwilling to approach it, it is established that he loses possession of the house. But if a slave or a tenant, through whose agency I actually possess property, should either die, or depart, I will retain possession by intention.

§ 9.- If I deliver an article to another, I lose possession of the same; for it has been decided that we hold possession until we voluntarily relinquish it, or are deprived of it by force.

§ 10.- If a slave, of whom I am in possession, asserts that he is free, as Spartacus did, and is ready to maintain his freedom in court, he will not be considered to be in possession of the master whom he is preparing to oppose. This, however, is only correct when he has remained for a long time at liberty; otherwise, if, from his condition as a slave, he demands his freedom, and petitions for a judicial decision on this point, he, nevertheless, remains under my control, and I hold possession of him by intention, until he has been pronounced to be free.

§ 11.- We possess by intention the places to which we resort in summer and in winter, although we leave them at certain times.

§ 12.- Moreover, we can have possession by intention, and also corporeally, by means of another, as we have stated in the case of a tenant and a slave. The fact that we possess certain property without being aware of it (as is the case where slaves obtain peculium), should not present any difficulty, for we are held to possess it by both the intention and the actual agency of the slaves.

§ 13.- Nerva, the son, thinks that we can possess movable property, with the exception of slaves, as

§ 7.- Pero aunque lo poseas con solo el ánimo, aun cuando otro esté en el fundo, lo posees, sin embargo, todavía.

§ 8.- Si alguno anunciara que una casa esta ocupada por los ladrones, y su dueño, aterrado por el temor, no quisiere acercarse a ella, esta establecido que éste perdió la posesión. Pero si hubieren fallecido, o se hubieren marchado, el siervo o el colono por medio de los cuales yo poseía corporalmente, retendré con el ánimo la posesión.

§ 9.- Y si yo la hubiere entregado a otro, pierdo la posesión; porque es sabido que poseemos hasta que o nos hayamos separado por nuestra voluntad, o hayamos sido echados a la fuerza.

§ 10.- Si el esclavo, a quien yo poseía, se condujese como libre, como hizo Spartaco, y estuviera dispuesto a soportar el juicio sobre la libertad, no se considerará que es poseído por el dueño, contra el cual se prepara como adversario; pero esto es así verdad, si permanece largo tiempo en libertad; de otra suerte, si en posesión de la esclavitud hubiere reclamado la libertad, e implorare el juicio sobre la libertad, está, sin embargo, en mi posesión, y lo poseo con el ánimo, hasta que haya sido declarado libre.

§ 11.- Los bosques para invierno y para verano los poseemos con el ánimo, aunque los dejemos en ciertas temporadas.

§ 12.- Mas poseemos con nuestro ánimo, y también con cuerpo de otro, según hemos dicho, por medio de un colono y de un esclavo. Y no nos debe hacer vacilar que poseemos algunas cosas aun ignorándolo, esto es, las que los esclavos adquirieron con su peculio; porque se considera que las poseemos mediante el ánimo y el cuerpo de los mismos.

§ 13.- Dice Nerva, el hijo, que poseemos las cosas muebles, excepto el esclavo, en tanto que estén bajo

id est quatenus, si velimus, naturalem possessionem nancisci possimus. Nam pecus simul atque aberraverit aut vas ita exciderit, ut non inveniatur, protinus desinere a nobis possideri, licet a nullo possideatur: dissimiliter atque si sub custodia mea sit nec inveniatur, quia praesentia eius sit et tantum cessat interim diligens inquisitio.

§ 14.- Item feras bestias, quas vivariis includimus, et pisces, quos in piscinas coiecerimus, a nobis possideri. Sed eos pisces, qui in stagno sint, aut feras, quae in silvis circumseptis vagantur, a nobis non possideri, quoniam relictæ sint in libertate naturali: alioquin etiam si quis silvam emerit, videri eum omnes feras possidere, quod falsum est.

§ 15.- Aves autem possidemus, quas inclusas habemus, aut si quae mansuetæ factæ custodiae nostræ subiectæ sunt.

§ 16.- Quidam recte putant columbas quoque, quae ab aedificiis nostris volant, item apes, quae ex alveis nostris evolant et secundum consuetudinem redeunt, a nobis possideri.

§ 17.- Labeo et Nerva filius responderunt desinere me possidere eum locum, quem flumen aut mare occupaverit.

§ 18.- Si rem apud te depositam furti faciendi causa contrectaveris, desino possidere. Sed si eam loco non moveris et infitiandi animum habeas, plerique veterum et Sabinus et Cassius recte responderunt possessorem me manere, quia furtum sine contrectatione fieri non potest nec animo furtum admittatur.

§ 19.- Illud quoque a veteribus praeceptum est

long as it remains in our charge; that is to say, as long as we can obtain natural possession of it, if we wished to do so. For if a flock should be lost, or a vase should fall in such a way that it cannot be found, it immediately ceases to be in our possession, although no one else can obtain possession of it; but the case is different where anything cannot be found which is in my charge, because it still remains in the neighborhood, and diligent search will discover it.

§ 14.- Likewise, wild animals which we shut up in enclosures, and fish which we throw into ponds, are in our possession. But fish which are in a lake, or wild animals that wander in woods enclosed by hedges, are not in our possession, as they are left to their natural freedom; for otherwise, if anyone purchased the woods, he would be considered to have possession of all the animals therein, which is false.

§ 15.- Moreover, we have possession of birds which we have shut up or tamed, and subjected to our control.

§ 16.- Certain authorities very properly hold that pigeons, which fly away from our buildings, as well as bees which leave our hives, and have the habit of returning, are possessed by us.

§ 17.- Labeo and Nerva, the son, have given it as their opinion that I cease to possess any place which a river or the sea has overflowed.

§ 18.- If you appropriate any property which has been deposited with you, with the intention of stealing it, I cease to have possession of the same. If, however, you do not move it from its place, and have the intention of denying that it was deposited with you, several ancient authorities, and among them Sabinus and Cassius, very properly hold that I still retain possession, for the reason that a theft cannot be committed without handling the article, nor can theft be committed by mere intention.

§ 19.- The rule that no one can himself change his

nuestra custodia, esto es, en tanto que, si quisiéramos, podamos alcanzar la posesión natural; porque tan pronto como el ganado se hubiere extraviado, o que un vaso se hubiere perdido de modo que no se encuentre, al punto deja de ser poseído por nosotros, aunque no sea poseído por ninguno; a diferencia de cuando la cosa esté bajo mi custodia, y no se encuentre, porque está presente, y solamente no tiene lugar mientras tanto su diligente busca.

§ 14.- También son poseídos por nosotros los animales silvestres, que hubiéremos encerrado en vivares, y los peces que hubiéremos echado en las piscinas. Mas no son poseídos por nosotros los peces que están en un estanque, ni los animales silvestres que vagan en selvas cercadas, porque han sido dejados a su natural libertad; de otra suerte, también si alguno hubiere comprado la selva, parecería que él poseía todos los animales silvestres, lo que es falso.

§ 15.- Mas poseemos las aves que tenemos encerradas, o las amansadas que están sujetas a nuestra custodia.

§ 16.- Algunos juzgan con razón, que también son poseídos por nosotros las palomas que vuelan desde nuestros edificios, y asimismo las abejas que vuelan desde nuestras colmenas, y vuelven por costumbre.

§ 17.- Labeón y Nerva, el hijo, respondieron, que yo dejaba de poseer el lugar que hubiere ocupado un río o el mar.

§ 18.- Si para cometer hurto hubieres tocado a la cosa depositada en tu poder, dejo de poseerla; pero si no la hubieres movido de lugar, y tuvieres la intención de negarla, respondieron con razón los más de los antiguos, y Sabino y Cassio, que yo permanecía siendo poseedor, porque no se podía cometer hurto sin tocar la cosa, ni se comete hurto con solo el ánimo.

§ 19.- También se determinó por los antiguos, que

neminem sibi ipsum causam possessionis mutare posse.

§ 20.- Sed si is, qui apud me deposuit vel commodavit, eam rem vendiderit mihi vel donaverit, non videbor causam possessionis mihi mutare, qui ne possidebam quidem.

§ 21.- Genera possessionum tot sunt, quot et causae acquirendi eius quod nostrum non sit, velut pro emptore: pro donato: pro legato: pro dote: pro herede: pro noxae dedito: pro suo, sicut in his, quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus. Et in summa magis unum genus est possidendi, species infinitae.

§ 22.- Vel etiam potest dividi possessionis genus in duas species, ut possideatur aut bona fide aut non bona fide.

§ 23.- Quod autem Quintus Mucius inter genera possessionum posuit, si quando iussu magistratus rei servandae causa possidemus, ineptissimum est: nam qui creditorem rei servandae causa vel quia damni infecti non caveatur, mittit in possessionem vel ventris nomine, non possessionem, sed custodiam rerum et observationem concedit: et ideo, quum damni infecti non cavente vicino in possessionem missi sumus, si id longo tempore fiat, etiam possidere nobis et per longam possessionem capere Praetor causa cognita permittit.

4.- ULPIANUS; *libro LXVII, ad Edictum*.- Quidquid filius peculiari nomine adprehenderit, id statim pater eius possidet, quamvis ignoret in sua potestate filium. Amplius etiam si filius ab alio

title to the possession of property has been established by the ancient authorities.

§ 20.- If, however, he who deposited an article with me, or lent it to me, should sell or give me the same thing, I will not be considered to have changed the title by which I hold possession, since I did not have possession.

§ 21.- There are as many kinds of possession as there are ways of acquiring property which does not belong to us; as, for example, by purchase, by donation, by legacy, by dowry, as an heir, by surrender as reparation for damage committed, by occupancy, as in the case where we obtain property from the land or the sea, or from the enemy, or which we ourselves create. And, in conclusion, there is but one genus of possession, but the species are infinite in number.

§ 22.- Possession may be divided into two kinds, for it is acquired either in good, or in bad faith.

§ 23.- The opinion of Quintus Mucius, who included among the different kinds of possession that given by order of a magistrate, for the purpose of preserving the property, or where we obtain possession because security against threatened injury is not furnished, is perfectly ridiculous. For where anyone places a creditor in possession for the purpose of preserving property, or where this is done because security has not been furnished against threatened injury, or in the name of an unborn child, he does not really grant possession, but merely the custody and supervision of the property. Hence, when a neighbor does not give security against threatened injury, and we are placed in charge, and this condition continues for a long time, the Praetor, upon proper cause being shown, will permit us to obtain actual possession of the property.

4.- ULPIANUS; *On the Edict, Book LXVII*.- A father immediately possesses whatever his son acquires as a part of his peculium, although he may not be aware that he is under his control. Moreover,

nadie podía cambiarse a sí mismo la causa de la posesión.

§ 20.- Pero si el que me dio en depósito o en comodato alguna cosa, me la hubiere vendido o donado, no se considerará que me cambio la causa de la posesión yo, que ni ciertamente poseía.

§ 21.- Hay tantos géneros de posesión como causas de adquirir lo que no sea nuestro, por ejemplo, a título de comprador, de donación, de legado, de dote, de heredero, de dación por noxa, de cosa suya; así como respecto a las cosas que cogemos en la tierra y en el mar o de los enemigos, o las que nosotros mismos hicimos que existiesen; y en suma más bien hay un solo género de poseer e infinitas especies.

§ 22.- Aun también se puede dividir el género de la posesión en dos especies, de suerte que se posea o de buena fe, o no de buena fe.

§ 23.- Mas es muy disparatado que Quinto Mucio haya puesto entre las especies de posesión, si alguna vez poseemos por mandato de un magistrado para conservar una cosa, o por que no se dé caución por daño que amenaza; porque el que pone en posesión al acreedor para conservar una cosa, o porque no se da caución por daño que amenaza, o en nombre del que está en el claustro materno, no concede la posesión, sino la custodia y la conservación de las cosas; y por esto, cuando no dando caución el vecino por daño que amenaza somos puestos en posesión, si esto durase largo tiempo, el Pretor nos permite con conocimiento de causa que también poseamos, y que adquiramos mediante la larga posesión.

4.- ULPIANO; *Comentarios al Edicto, libro LXVII*.- Todo lo que el hijo hubiere adquirido a nombre del peculio lo posee inmediatamente su padre, aunque ignore que el hijo está bajo su

tamquam servus possideatur, idem erit probandum.

5.- PAULUS; *libro LXIII, ad Edictum*.- Si ex stipulatione tibi Stichum debeam et non tradam eum, tu autem nactus fueris possessionem, praedo es: aequè si vendidero nec tradidero rem, si non voluntate mea nactus sis possessionem, non pro emptore possides, sed praedo es.

6.- ULPIANUS; *libro LXX, ad Edictum*.- Clam possidere eum dicimus, qui furtive ingressus est possessionem ignorante eo, quem sibi controversiam facturum suspicabatur et, ne faceret, timebat. Is autem qui, quum possideret non clam, se celavit, in ea causa est, ut non videatur clam possidere: non enim ratio optinendae possessionis, sed origo nanciscendae exquirenda est: nec quemquam clam possidere incipere, qui sciente aut volente eo, ad quem ea res pertinet, aut aliqua ratione bonae fidei possessionem nanciscitur. Itaque, inquit Pomponius, clam nanciscitur possessionem, qui futuram controversiam metuens ignorante eo, quem metuit, furtive in possessionem ingreditur.

§ 1.- Qui ad nundinas profectus neminem reliquerit et, dum ille a nundinis redit, aliquis occupaverit possessionem, videri eum clam possidere Labeo scribit: retinet ergo possessionem is, qui ad nundinas abiit: verum si revertentem dominum non admisit, vi magis intellegi possidere, non clam.

7.- PAULUS; *libro LIV, ad Edictum*.- Sed et si nolit in fundum reverti, quod vim maiorem vereatur, amisisse possessionem videbitur: et ita Neratius

the same rule should be adopted even if the son is in possession of another as a slave.

5.- PAULUS; *On the Edict, Book LXIII*.- If I owe you Stichus under the terms of a stipulation, and I do not deliver him, and you obtain possession of him in some other way, you are a depredator. Likewise, if I should sell you any property and do not deliver it, and you obtain possession of the same without my consent, you will not do so as a purchaser, but as a depredator.

6.- ULPIANUS; *On the Edict, Book LXX*.- We say that he holds anything clandestinely who takes possession of it by stealth, suspecting that the other party, not knowing what he has done, may raise a controversy, and fearing that he will contend his right. He, however, who does not take possession secretly, but conceals himself, is in such a position that he is not considered to have clandestine possession. For not the manner in which he acquired possession, but the beginning of his acquiring it, should be taken into account, nor does anyone begin to acquire possession clandestinely who does so in good faith, with the knowledge or consent of him to whom the property belongs, or for any other good reason. Hence Pomponius says that he obtains clandestine possession who, fearing that some future controversy may arise, and the person of whom he is apprehensive being ignorant of the fact, takes possession by stealth.

§ 1.- Labeo says that where a man goes to a market, leaving no one at home, and on his return from the market finds that someone has taken possession of his house, the latter is held to have obtained clandestine possession. Therefore, he who went to the market still retains possession, but if the trespasser should not admit the owner on his return, he will be considered to be in possession rather by force than clandestinely.

7.- PAULUS; *On the Edict, Book LIV*.- If the owner is unwilling to return to the land because he fears the exertion of superior force, he will be considered to

potestad, Aun más, también se habrá de admitir lo mismo, si el hijo fuera poseído por otro como esclavo.

5.- PAULO; *Comentarios al Edicto, libro LXIII*.- Si en virtud de estipulación yo te debiera a Stico, y no te lo entregara, pero tú hubieres alcanzado su posesión, eres un usurpador. Igualmente, si yo hubiere vendido y no hubiere entregado una cosa, si hubieras alcanzado su posesión no con mi voluntad, no la posees como comprador, sino que eres un usurpador.

6.- ULPIANO; *Comentarios al Edicto, libro LXX*.- Decimos que posee clandestinamente el que entró furtivamente en posesión, ignorándolo aquel que él sospechaba que le había de promover controversia, y que él temía que se la promoviese. Mas el que poseyendo, no clandestinamente, se ocultó, está en el caso de que no se considere que poseía clandestinamente; porque se ha de investigar no la razón de haber obtenido la posesión, sino el origen de haberla alcanzado; y no empieza a poseer clandestinamente nadie que sabiéndolo o queriéndolo aquel a quien la cosa pertenece, o por alguna razón, adquiere la posesión de buena fe. Y así, dice Pomponio, adquiere clandestinamente la posesión el que, temiendo una futura controversia, entra furtivamente en posesión, ignorándolo aquel a quien temió.

§ 1.- Si habiendo ido uno a ferias no hubiere dejado a nadie, y mientras él vuelve de las ferias otro hubiere ocupado su posesión, escribe Labeón, que se considera que éste posee clandestinamente; luego retiene la posesión el que fue a las ferias. Mas si no admitiere al dueño que regresaba, se entiende que posee más bien por fuerza que no clandestinamente.

7.- PAULO; *Comentarios al Edicto, libro LIV*.- Y si no quisiera volver al fundo, porque temiera mayor violencia, se considerará que perdió la posesión, y así

quoque scribit.

8.- IDEM; *libro LXV, ad Edictum*.- Quemadmodum nulla possessio adquiri nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est.

9.- GAIUS; *libro XXV, ad Edictum provinciale*.- Generaliter quisquis omnino nostro nomine sit in possessione, veluti procurator hospes amicus, nos possidere videmur.

10.- ULPIANUS; *libro LXIX, ad Edictum*.- Si quis ante conduxit, postea precario rogavit, videbitur discessisse a conductione: quod si ante rogavit, postea conduxit, conduxisse videbitur. Potius enim hoc procedere videtur, quod novissime factum est: et hoc pomponius ait.

§ 1.- Idem pomponius bellissime temptat dicere, numquid qui conduxerit quidem praedium, precario autem rogavit non ut possideret, sed ut in possessione esset (est autem longe diversum: aliud est enim possidere, longe aliud in possessione esse: denique rei servandae causa, legatorum, damni infecti non possident, sed sunt in possessione custodiae causa): quod si factum est, utrumque procedit.

§ 2.- Si quis et conduxerit et rogaverit precario, uti possideret, si quidem nummo uno conduxit, nulla dubitatio est, quin ei precarium solum teneat, quia conductio nulla est, quae est in uno nummo: sin vero pretio, tunc distinguendum, quid prius factum est.

have lost possession. This was also stated by Neratius.

8.- THE SAME; *On the Edict, Book LXV*.- As possession cannot be acquired except by intention and a corporeal act, so in like manner, it cannot be lost, except in a case where the opposite of both of these things takes place.

9.- GAIUS; *On the Edict, Book XXV*.- Generally speaking, we are considered to have possession when anyone as an agent, a host, or a friend, holds it in our name.

10.- ULPIANUS; *On the Edict, Book LXIX*.- Where anyone leases property, and afterwards claims it by a precarious title, he is considered to have abandoned his lease. If he claims it at first by a precarious title, and afterwards leases it, he is considered to hold possession under the lease; for whatever is done last should rather be taken into consideration. Pomponius, also, is of this opinion.

§ 1.- Pomponius discusses a very nice question; namely, whether a man who leases land, but claims it by a precarious title, does so, not for the purpose of possessing it, but merely to remain in possession; for there is a great difference, as it is one thing to possess, but quite another to be in possession. Persons placed in possession for the purpose of preserving the property, as legatees or neighbors, on account of threatened injury, do not possess the property but are in possession of the same for the purpose of caring for it. When this is done both of the above ways are merged into one.

§ 2.- Where anyone leases land, and asks to be placed in possession by a precarious title, if he leased it for one sesterce there is no doubt that he holds it at will, as a lease for only that sum is void. If, however, he leases it for a fair rent, it must then be ascertained what was done first.

lo escribe también Neracio.

8.- EL MISMO; *Comentarios al Edicto, libro LXV*.- Así como no se puede adquirir ninguna posesión sino con el concurso del ánimo y del cuerpo, así tampoco se pierde ninguna, sino aquella en la que con el uno y con el otro se haya obrado al contrario.

9.- GAYO; *Comentarios al Edicto provincial, libro XXV*.- Y en general, cualquiera que sea el que en nuestro nombre esté en posesión, por ejemplo, un procurador, un huésped, o un amigo, se considera que poseemos nosotros.

10.- ULPIANO; *Comentarios al Edicto, libro LXIX*.- Si alguno tomó antes una cosa en arrendamiento, y después la rogó en precario, se considerará que se separó del arrendamiento; pero si antes la rogó, y después la tomó en arrendamiento; porque se considera que más bien es lo procedente lo que se hizo últimamente; y esto dice Pomponio.

§ 1.- El mismo Pomponio trata de decir con muchísima discreción, ¿y si acaso uno hubiere ciertamente tomado un predio en arrendamiento, pero lo rogó en precario, no para poseerlo, sino para estar en posesión? Mas esto es muy diferente; porque una cosa es poseer, y otra muy diversa estar en posesión; por último, no se posee por causa de conservar los bienes, o los legados, o por el daño que amenaza, sino que se está en posesión por causa de custodia; y si se hizo esto, procede una y otra cosa.

§ 2.- Si alguno hubiere tomado en arrendamiento una cosa, y la hubiere rogado en precario, para poseerla, si la tomó en arrendamiento por una sola moneda, no hay duda alguna que para él subsiste solo el precario, porque es nulo el arrendamiento que consiste en una sola moneda; pero si en su precio, se ha de distinguir entonces qué es lo que se hizo antes.

11.- PAULUS; *libro LXV, ad Edictum.*- Iuste possidet, qui auctore praetore possidet.

12.- ULPIANUS; *libro LXX, ad Edictum.*- Naturaliter videtur possidere is qui usum fructum habet.

§ 1.- Nihil commune habet proprietas quum possessione: et ideo non denegatur ei interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possessioni renuntiasset, qui rem vindicavit.

13.- IDEM; *libro LXXII, ad Edictum.*- Pomponius refert, cum lapides in Tiberim demersi essent naufragio et post tempus extracti, an dominium in integro fuit per id tempus, quo erant mersi. Ego dominium me retinere puto, possessionem non puto, nec est simile fugitivo: namque fugitivus idcirco a nobis possideri videtur, ne ipse nos privet possessione: at in lapidibus diversum est.

§ 1.- Quum quis utitur adminiculo ex persona auctoris, uti debet quum sua causa suisque vitiis: denique addimus in accessione de vi et clam et precario venditoris.

§ 2.- Praeterea quaeritur, si quis hominem venditori redhibuerit, an accessione uti possit ex persona eius. Et sunt qui putent non posse, quia venditionis est resolutio redhibitio: alii emptorem venditoris accessione usurum et venditorem emptoris, quod magis probandum puto.

§ 3.- Si liber homo vel alienus servus, quum bona fide servirent, comparaverint et alii adquisierint possessionem, neque liberum neque servi dominum

11.- PAULUS; *On the Edict, Book LXV.*- He possesses justly who does so by the authority of the Praetor.

12.- ULPIANUS; *On the Edict, Book LXX.*- He who has the usufruct of property is held to possess it naturally.

§ 1.- Ownership has nothing in common with possession, and therefore an interdict *Uti possidetis* is not refused to one who has begun proceedings to recover the property, for he who does so is not held to have relinquished possession.

13.- THE SAME; *On the Edict, Book LXXII.*- Pomponius relates that stones were sunk in the Tiber by a shipwreck and were afterwards recovered; and he asks whether the ownership remained unchanged during the time that they were in the river. I think that the ownership, but not the possession, was retained. This instance is not similar to that of a fugitive slave, for the slave is considered to be possessed by us, in order to prevent him from depriving us of possession; but the case of the stones is different.

§ 1.- Where anyone makes use of the agency of another, he should do so with the liabilities and defects attaching to it. Hence, with reference to the time during which the vendor has had possession of the property, we also take into consideration the questions of violence, secrecy, and precarious title.

§ 2.- Moreover, where anyone returns a slave to the vendor, the question arises whether the latter can profit by the time that the slave was in possession of the purchaser. Some authorities think that he cannot, for the reason that the return of the slave annuls the sale; others hold that the purchaser can profit by the time of possession by the vendor, and the vendor by that of the purchaser. This opinion, I think, should be adopted.

§ 3.- If a freeman, or a slave belonging to another who is serving in good faith, purchases property, and a third party acquires possession of the same, neither

11.- PAULO; *Comentarios al Edicto, libro LXV.*- Posee injustamente el que posee con la autoridad del Pretor.

12.- ULPIANO; *Comentarios al Edicto, libro LXX.*- Se considera que posee naturalmente el que tiene el usufructo.

§ 1.- La propiedad no tiene nada de común con la posesión; y por esto no se le deniega el interdicto *Uti possidetis* al que comenzó a reivindicar la cosa; porque no se considera que renunció a la posesión el que reivindicó la cosa.

13.- EL MISMO; *Comentarios al Edicto, libro LXXII.*- Dice Pomponio, ¿habiéndose sumergido por naufragio unas piedras en el Tiber, y habiendo sido extraídas después, subsistió íntegro el dominio durante el tiempo que habían estado sumergidas? Yo opino que retengo el dominio, y no creo que la posesión, Y el caso no es semejante al de un fugitivo; porque se considera que el fugitivo es poseído por nosotros, por esto, para que el mismo no nos prive de la posesión; mas tratándose de las piedras el caso es diverso.

§ 1.- Cuando por virtud de la persona de su causante utiliza uno un recurso, debe utilizarlo con su propia causa y con sus vicios; y lo mismo decimos en cuanto a la accesión respecto a la violencia a la clandestinidad, y al precario del vendedor.

§ 2.- Además se pregunta, si, habiendo uno devuelto el esclavo al vendedor, podrá valerse de la accesión por razón de la persona de éste. Y hay quienes opinan que no puede, porque la devolución es disolución de la venta; otros, que el comprador utilizará la accesión del vendedor, y el vendedor la del comprador; lo que creo que más bien se ha de admitir.

§ 3.- Si un hombre libre o un esclavo ajeno, sirviendo de buena fe, hubieren comprado una cosa y adquirido para otro la posesión, ni el hombre libre, ni

debere uti accessione.

§ 4.- Quaesitum est, si heres prius non possederat, an testatoris possessio ei accedat. Et quidem in emptoribus possessio interrumpitur, sed non idem in heredibus plerique probant, quoniam plenius est ius successionis quam emptionis: sed subtilius est quod in emptorem, et in heredem id quoque probari.

§ 5.- Non autem ea tantum possessio testatoris heredi procedit, quae morti fuit iniuncta, verum ea quoque, quae umquam testatoris fuerit.

§ 6.- In dote quoque si data res fuerit vel ex dote recepta, accessio dabitur vel marito vel uxori.

§ 7.- Si is, qui precario concessit, accessione velit uti ex persona eius cui concessit, an possit, quaeritur. ego puto eum, qui precario concessit, quamdiu manet precarium, accessione uti non posse: si tamen receperit possessionem rupto precario, dicendum esse accedere possessionem eius temporis, quo precario possidebatur.

§ 8.- Ex facto quaeritur, si quis manumissus ex causa peculiari habeat rem non concesso sibi peculio, deinde dominus velit retracta possessione accessione uti, an possit. Et placuit non esse dandam hanc accessionem, quae clam habita est.

the alleged slave, when he becomes free, nor the real owner can profit by the time that the property has been in the hands of a bona fide possessor.

§ 4.- Where an heir did not possess in the first place, the question arose whether he can profit by the possession of the testator. And, indeed, possession is interrupted between the parties to the sale, but many authorities do not hold the same opinion with reference to heirs, as the right of succession is much more extensive than that of purchase. It is, however, more in accordance with a liberal interpretation of law that the same rule should be adopted concerning heirs which applies to purchasers.

§ 5.- Not only does the possession of the testator, which he had at the time of his death, benefit the heir, but also that which he had at any time whatsoever has this effect.

§ 6.- With reference to dowry also, if property has been either given or received as such, the time of possession will profit either the husband or the wife, as the case may be.

§ 7.- Where anyone has transferred property by a precarious title, the question arises whether he can profit by the time during which it was in possession of the person to whom it was transferred. I think that he who transfers it by a precarious title cannot profit by the time of possession, as long as the title continues to be precarious; but if he again acquires possession, and the precarious title is extinguished, he can profit by the possession during the time when the property was held by a precarious title.

§ 8.- In a certain case, it was asked if a manumitted slave has possession of property forming part of his peculium (his peculium not having been given to him) and his master desires to profit by the time it was held by the freedman, 'possession of the property having been surrendered, whether he can do so. It was decided that he should not be granted the benefit of the time of possession, because his conduct was clandestine and dishonest.

el señor del esclavo deben utilizar la accesión.

§ 4.- Se preguntó, si, no habiendo poseído antes el heredero, se le agregará la posesión del testador. Y ciertamente que respecto a los compradores se interrumpe la posesión, pero los más no aprueban lo mismo respecto a los herederos, porque el derecho de sucesión es mas pleno que el de compra; pero es más depurado que se admita también en cuanto al heredero lo que respecto al comprador.

§ 5.- Mas no solamente le aprovecha al heredero la posesión del testador, que fue próxima a su muerte, sino también la que en cualquier tiempo haya sido del testador.

§ 6.- También tratándose de la dote, si una cosa hubiere sido dada, o recibida en dote, se le dará al marido, o a la mujer la accesión.

§ 7.- Se pregunta, si, queriendo el que dió una cosa en precario utilizar la accesión por razón de la persona de aquel a quien se la dió, podría. Yo opino, que el que dió una cosa en precario, no puede utilizar la accesión mientras subsiste el precario; pero que, si, habiendo cesado el precario, hubiere recobrado la posesión, se ha de decir, que se agrega la posesión del tiempo en que se poseía en precario.

§ 8.- Se pregunta, respecto a este hecho: si, teniendo un manumitido una cosa por causa del peculio, no habiéndosele concedido el peculio, y queriendo después el dueño, recobrada la posesión, utilizar la accesión, podría. Y se determinó, que no se había de dar esta accesión, que fue tenida clandestinamente poseyendo un usurpador.

§ 9.- Praedone possidente si iussu iudicis res mihi restituta sit, accessionem esse mihi dandam placuit.

§ 10.- Sed et legatario dandam accessionem eius temporis, quo fuit apud testatorem, sciendum est. An heredis possessio ei accedat, videamus: et puto, sive pure sive sub condicione fuerit relictum, dicendum esse id temporis, quo heres possedit ante existentem condicionem vel restitutionem rei, legatario proficere. Testatoris autem semper proderit legatario, si legatum vere fuit vel fideicommissum.

§ 11.- Sed et is, cui res donata est, accessione utetur ex persona eius qui donavit.

§ 12.- Accessiones in eorum persona locum habent, qui habent propriam possessionem: ceterum accessio nemini proficit, nisi ei qui ipse possedit.

§ 13.- Praeterea ne vitiosae quidem possessioni ulla potest accedere: sed nec vitiosa ei, quae vitiosa non est.

14.- PAULUS; *libro LXVIII, ad Edictum*.- Si servus vel filius familias vendiderit, dabitur accessio eius, quod penes me fuit, scilicet si volente me aut de peculio, cuius liberam peculii administrationem habuerunt, vendiderunt.

§ 1.- Tutore quoque vel curatore vendente dabitur accessio eius temporis, quo pupillus vel furiosus possedit.

15.- GAIUS; *libro XXVI, ad Edictum provinciale*.- Rem, quae nobis subrepta est, perinde intellegimur

§ 9.- Where property has been restored to me by order of court, it has been decided that I am entitled to the benefit of the time during which it was held by my opponent.

§ 10.- It must, however, be remembered that a legatee is entitled to the benefit of the time when the property was in the hands of the testator. But let us see whether he will be benefited by the time that the property was in the possession of the heir. I think that, whether the legacy was bequeathed absolutely or conditionally, it should be held that the legatee can profit by the time that it was in the possession of the heir, before the condition was fulfilled, or the property, delivered. The time that it was in the possession of the testator will always profit the legatee, if the legacy or the trust is genuine.

§ 11.- Moreover, he to whom property is donated has a right to profit by the time it was possessed by the person who made the donation.

§ 12.- Times of possession are applicable to those who themselves have possession of what is their own; but no one will be entitled to this privilege unless he himself has been in possession.

§ 13.- Again, time of occupancy will be of no advantage where the possession is defective; possession, however, which is not defective, causes no injury.

14.- PAULUS; *On the Edict, Book LXVIII*.- If my slave, or my son who is under my control, should make a sale, the benefit of the time that he was in my power will be granted; that is, provided he acted with my consent, or had the free administration of his peculium.

§ 1.- Where anything is sold by a guardian or a curator, the purchaser will be entitled to the benefit of the time during which the ward or the insane person possessed the property.

15.- GAIUS; *On the Provincial Edict, Book XXVI*.- We are understood to cease to possess property which

§ 9.- Si la cosa me hubiera sido restituida por mandato del juez, se determinó que se me había de dar la accesión.

§ 10.- Pero se ha de saber, que también al legatario se le ha de dar la accesión del tiempo que la cosa estuvo en poder del testador. Veamos si a él se le agregará la posesión del heredero; y opino, que, ya si la cosa hubiere sido dejada puramente, ya si bajo condición, se ha de decir, que el tiempo que poseyó el heredero antes de cumplirse la condición, o antes de la restitución de la cosa, le aprovecha al legatario; pero la del testador le aprovechará siempre al legatario, si la cosa fue verdaderamente legada o dejada por fideicomiso.

§ 11.- Mas también aquel a quien le fue donada una cosa utilizará la accesión por razón de la persona que se la donó.

§ 12.- Las agregaciones del tiempo de la posesión tienen lugar respecto a la persona de los que tienen propia la posesión; pero la agregación no aprovecha a nadie sino al mismo que posee.

§ 13.- Además de esto, a una posesión ciertamente viciosa no se le puede agregar ninguna; mas tampoco una viciosa a la que no es viciosa.

14.- PAULO; *Comentarios al Edicto, libro LXVIII*.- Si un esclavo o un hijo de familia hubiere vendido una cosa, se dará la agregación del tiempo que estuvo en mi poder; por supuesto, si la vendieron queriendo yo, o siendo del peculio, del cual tuvieron ellos la libre administración.

§ 1.- Vendiendo el tutor o el curador se dará también la agregación del tiempo que poseyó el pupilo o el furioso.

15.- GAYO; *Comentarios al Edicto provincial, libro XXVI*.- Se entiende que dejamos de poseer la

desinere possidere atque eam, quae vi nobis erepta est. Sed si is, qui in potestate nostra est, subripuerit, quamdiu apud ipsum sit res, tamdiu non amittimus possessionem, quia per huiusmodi personas acquiritur nobis possessio. Et haec ratio est, quare videamur fugitivum possidere, quod is, quemadmodum aliarum rerum possessionem intervertere non potest, ita ne suam quidem potest.

16.- ULPIANUS; *libro LXXIII, ad Edictum*.- Quod uxor viro aut vir uxori donavit, pro possessore possidetur.

17.- IDEM; *libro LXXVI, ad Edictum*.- Si quis vi de possessione deiectus sit, perinde haberi debet ac si possideret, quum interdicto de vi recipiendae possessionis facultatem habeat.

§ 1.- Differentia inter dominium et possessionem haec est, quod dominium nihilo minus eius manet, qui dominus esse non vult, possessio autem recedit, ut quisque constituit nolle possidere. si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere.

18.- CELSUS; *libro XXIII, Digestorum*.- Quod meo nomine possideo, possum alieno nomine possidere: nec enim muto mihi causam possessionis, sed desino possidere et alium possessorem ministerio meo facio. Nec idem est possidere et alieno nomine possidere: nam possidet, cuius nomine possidetur, procurator alienae possessioni praestat ministerium.

§ 1.- Si furioso, quem suae mentis esse existimas, eo quod forte in conspectu inumbratae quietis fuit constitutus, rem tradideris, licet ille non erit adeptus possessionem, tu possidere desinis: sufficit quippe dimittere possessionem, etiamsi non transferas. Illud enim ridiculum est dicere, quod non aliter vult quis

has been stolen from us, just as if we had been deprived of it by force. But if someone who is under our control should steal anything from us, we will not lose possession of it, as long as it remains in his hands; for the reason that possession is acquired for us by means of persons of this kind. This is why we are considered to possess a fugitive slave; for, as we cannot be deprived of the possession of other things which he has, so, in like manner, we cannot be deprived of him.

16.- ULPIANUS; *On the Edict, Book LXXIII*.- Anything which a wife gives to her husband, or a husband to his wife, is held by him or her as its possessor.

17.- THE SAME; *On the Edict, Book LXXVI*.- If anyone is forcibly dispossessed he should be considered to have remained in possession, as he has the power to recover it by means of an interdict on the ground of violence.

§ 1.- The difference between ownership and possession is that ownership continues to exist, even against the wishes of the owner; but possession is lost as soon as anyone decides that he is unwilling to keep it. Therefore, if a man delivers possession with the intention that the property shall afterwards be returned to him, he ceases to possess it.

18.- CELSUS; *Digest, Book XXIII*.- What I possess in my own name I can possess in that of another. For I do not change the title to my possession when I hold it through another, but I cease to possess the property, and I render him possessor by my own act. It is not the same thing to possess personally and to possess in the name of another; for he possesses in whose name possession is held. A representative lends his agency to the possession of another.

§ 1.- If you deliver property to an insane person whom you think is in the enjoyment of his faculties, for the reason that, while in your presence he appeared to be quiet, and have his mind unclouded, although he will not obtain possession, you will "lose" it. For it is sufficient to have relinquished possession,

cosa que nos fue substraída, lo mismo que la que nos fue arrebatada a la fuerza. Pero si la hubiere substraído el que está bajo nuestra potestad, no perdemos su posesión mientras la cosa esté en poder del mismo, porque por medio de tales personas se adquiere para nosotros la posesión; y esta es la razón por la cual se considera que poseemos a un fugitivo, porque éste, así como no puede quitarnos la posesión de las otras cosas, así tampoco ciertamente la suya.

16.- ULPIANO; *Comentarios al Edicto, libro LXXIII*.- Lo que la mujer le donó al marido, o el marido la mujer, es poseído a título de poseedor.

17.- EL MISMO; *Comentarios al Edicto, libro LXXVI*.- Si a la fuerza hubiera sido alguno echado de la posesión, debe ser considerado lo mismo que si poseyese, porque tiene la facultad de recuperar la posesión con el interdicto relativo a la fuerza.

§ 1.- La diferencia entre el dominio y la posesión es esta, que el dominio permanece siendo, ello no obstante, del que no quiere ser dueño, pero la posesión la pierde uno luego que determina no querer poseer. Si, pues, alguno entregó la posesión con la intención de que después se le restituya, dejó de poseer;

18.- CELSO; *Digesto, libro XXIII*.- Lo que poseo en mi nombre lo puedo poseer a nombre de otro; porque no cambio para mí la causa de la posesión, sino que dejo de poseer, y hago poseedor a otro por ministerio mío; y no es lo mismo poseer que poseer en nombre de otro, porque posee aquél en cuyo nombre se posee; y el procurador presta su ministerio para la posesión de otro.

§ 1.- Si le hubieres entregado una cosa a un furioso, que tú estimas que está en su cabal juicio, porque acaso a la vista se hallaba en lúcido sosiego, aunque él no haya alcanzado la posesión, tú dejas de poseer; porque basta dimitir la posesión, aunque no la transfieras. Porque es ridículo decir que nadie quiere

dimittere, quam si transferat: immo vult dimittere, quia existimat se transferre.

§ 2.- Si venditorem quod emerim deponere in mea domo iusserim, possidere me certum est, quamquam id nemo dum attigerit: aut si vicinum mihi fundum mercato venditor in mea turre demonstret vacuumque se possessionem tradere dicat, non minus possidere coepi, quam si pedem finibus intulissem.

§ 3.- Si, dum in alia parte fundi sum, alius quis clam animo possessoris intraverit, non desisse ilico possidere existimandus sum, facile expulsurus finibus, simul sciero.

§ 4.- Rursus si quum magna vi ingressus est exercitus, eam tantummodo partem quam intraverit optinet.

19.- MARCELLUS; *libro XVII, Digestorum*.- Qui bona fide alienum fundum emit, eundem a domino conduxit: quaero, utrum desinat possidere an non. Respondi: in promptu est, ut possidere desierit.

§ 1.- Quod scriptum est apud veteres neminem sibi causam possessionis posse mutare, credibile est de eo cogitatum, qui et corpore et animo possessioni incumbens hoc solum statuit, ut alia ex causa id possideret, non si quis dimissa possessione prima eiusdem rei denuo ex alia causa possessionem nancisci velit.

20.- IDEM; *libro XIX, Digestorum*.- Si quis rem, quam utendam dederat, vendiderit emptorique tradi iusserit nec ille tradiderit, alias videbitur possessione dominum intervertisse, alias contra. Nam nec tunc quidem semper dominus amittit possessionem,

even if you did not legally transfer it, as it would be absurd to say that anyone did not intend to relinquish it unless he legally transferred it; and, indeed, it is because he thinks he transferred it that he manifests his intention to give possession.

§ 2.- If I order the vendor, of whom I have made a purchase, to deliver the article at my house, it is certain that I possess the property, even if no one has yet touched it. Or, if the vendor should show me from my tower a neighboring tract of land of which he says that he delivers me the possession, I begin to possess the said land, and just as if I had placed my foot within the boundaries of the same.

§ 3.- If, when I am on one side of my land, some other person enters upon the opposite side, with the intention of clandestinely obtaining possession, I am not considered to have immediately lost possession, as I can easily eject him from the premises, as soon as I am informed of his act.

§ 4.- Again, if an army enters upon land with great violence, it will only gain possession of that portion which it occupied.

19.- MARCELLUS; *Digest, Book XVII*.- A man who purchased a tract of land from another in good faith afterwards leased the same land from the owner. I ask whether he ceased to possess it or not. I answered that he immediately ceased to do so.

§ 1.- When it is stated by the ancients that no one could himself change the title of his possession, it is probable that they had in mind one who, being in possession of property bodily, as well as by intention, determined to possess it under some other title; and not one who, having relinquished possession under his first title, desired to obtain possession a second time, under another.

20.- THE SAME; *Digest, Book XIX*.- Where anyone who has lent an article to be used, sells it, and directs it to be delivered to the purchaser, and the borrower does not deliver it; in some instances the owner will be held to have lost possession, and in

dimitirla de otra suerte, sino si la transfiriese; antes bien quiere dimitirla, porque estima que la transfiere.

§ 2.- Si yo le hubiere mandado al vendedor que deposite en mi casa lo que le hubiere comprado, es cierto que poseo, aunque nadie haya tocado todavía la cosa; o si habiendo yo comprado un fundo vecino el vendedor que lo señalara desde mi torre, y dijese que el me entregaba la vacua posesión, comienzo a poseerlo, no de otra suerte que si yo hubiese puesto el pie dentro de sus linderos.

§ 3.- Si mientras yo estoy en una parte del fundo hubiere entrado clandestinamente otro cualquiera con animo de poseerlo, se ha de estimar que no dejé de poseerlo inmediatamente, pudiéndolo expulsar fácilmente de sus límites, tan pronto como yo lo supiere.

§ 4.- A su vez, si un ejército penetró con gran violencia, tendrá solamente la parte en que hubiere entrado.

19. MARCELO; *Digesto, libro XVII*.- Uno, que de buena fe compró un fundo ajeno, lo tomó a su dueño en arrendamiento; pregunto, si deja, o no, de poseerlo. Respondí: es evidente, que habrá dejado de poseerlo.

§ 1.- Lo que se escribió por los antiguos, que nadie puede cambiarse a sí mismo la causa de la posesión, es creíble que se pensó respecto del que, estando en posesión con el cuerpo y con el ánimo, solamente determinó poseer la cosa por otra causa, no si alguno, habiendo abandonado la primera posesión, quisiera alcanzar de nuevo por otra causa la posesión de la misma cosa.

20.- EL MISMO; *Digesto, libro XIX*. - Si alguno hubiere vendido la cosa que había dado para que fuera usada, y hubiere mandado que le fuese entregada al comprador, y el no la hubiere entregado, en unos casos parecerá que el dueño perdió la posesión,

quum reposcenti ei commodatum non redditur: quid enim si alia quaequam fuit iusta et rationabilis causa non reddendi, non utique ut possessionem eius interverteret?

21.- IAVOLENUS; *libro VII, ex Cassio*.- Interdum eius possessionem, cuius ipsi non habemus, alii tradere possumus, veluti quum is, qui pro herede rem possidebat, antequam dominus fieret, precario ab herede eam rogavit.

§ 1.- Quod ex naufragio expulsum est, usucapi non potest, quoniam non est in derelicto, sed in deperdito.

§ 2.- Idem iuris esse existimo in his rebus, quae iactae sunt: quoniam non potest videri id pro derelicto habitum, quod salutis causa interim dimissum est.

§ 3.- Qui alienam rem precario rogavit, si eandem a domino conduxit, possessio ad dominum revertitur.

22.- IDEM; *libro XIII, ex Cassio*.- Non videtur possessionem adeptus is qui ita nactus est, ut eam retinere non possit.

23.- IDEM; *libro I, Epistolarum*.- Quum heredes institui sumus, adita hereditate omnia quidem iura ad nos transeunt, possessio tamen nisi naturaliter comprehensa ad nos non pertinet.

§ 1.- In his, qui in hostium potestatem pervenerunt, in retinendo iura rerum suarum singulare ius est: corporaliter tamen possessionem amittunt: neque enim possunt videri aliquid possidere, quum ipsi ab alio possideantur: sequitur ergo, ut reversis his nova possessione opus sit, etiamsi nemo medio tempore res eorum possederit.

others he will not. For the owner will only lose possession when the article which has been lent is not returned when he demands it. But what if there was a just and reasonable cause for returning it, and not merely that the borrower desired to retain possession of the property?

21.- JAVOLENUS; *On Cassius, Book VII*.- We can sometimes deliver to another the possession of property which we ourselves do not hold; as, for instance, when he who possesses an article as heir, and, before becoming the owner of the same, claims it under a precarious title from the real heir.

§ 1.- Property which has been thrown overboard in a shipwreck cannot be acquired by usucaption, since it has not been abandoned, but merely lost.

§ 2.- I think that the same rule of law applies to property which has been thrown into the sea to lighten the ship, as that cannot be considered as abandoned which has been temporarily relinquished on account of safety.

§ 3.- When anyone claims the property of another by a precarious title, and leases it from him, possession of the same will revert to the owner.

22.- THE SAME; *On Cassius, Book XIII*.- He who obtains possession in such a way that he cannot retain it is not considered to have acquired it at all.

23.- THE SAME; *Epistles, Book I*.- When we are appointed heirs, and the estate has been accepted, all rights to it pass to us; but possession does not belong to us until it is taken naturally.

§ 1.- So far as those who fall into the hands of the enemy are concerned, the law relating to their retention of the rights of property is a peculiar one, for they lose corporeal possession of the same, nor can they be held to possess anything when they themselves are possessed by others; therefore it follows that, when they return, a new acquisition of possession is required, even if no one had possession

y en otros que no. Porque ciertamente no pierde el dueño la posesión siempre que al reclamarla no se le devuelve la cosa dada en comodato; porque ¿qué se dirá, si hubo otra cualquier justa y razonable causa para no devolverla, no ciertamente la de no quitarle su posesión?

21.- JAVOLENO; *Doctrina de Cassio, libro VII*.- A veces podemos entregar a otro la posesión de lo que nosotros mismos no la tenemos, por ejemplo, cuando el que poseía una cosa como heredero se la rogó, antes de hacerse dueño de ella, en precario al heredero.

§ 1.- Lo que por causa de naufragio fue arrojado no puede ser usucapido, porque no está como abandonado, sino como perdido.

§ 2.- Estimo que el mismo derecho hay respecto a las cosas que fueron lanzadas, porque no se puede considerar que sea tenido por abandonado lo que provisionalmente se echó por causa de salvación.

§ 3.- Si el que rogó en precario una cosa ajena se la tomó al dueño en arrendamiento, la posesión vuelve al dueño.

22.- EL MISMO; *Doctrina de Cassio, libro XIII*.- No se considera que haya alcanzado la posesión el que la adquirió de tal modo que no pueda retenerla.

23.- EL MISMO; *Epístolas, libro I*.- Cuando somos instituidos herederos, adida la herencia, pasan ciertamente a nosotros todos los derechos, pero la posesión no nos pertenece, si no fue tomada naturalmente.

§ 1.- Respecto a los que cayeron en poder de los enemigos hay un derecho singular para que retengan los derechos sobre sus cosas, pero pierden corporalmente la posesión; porque no se puede considerar que poseen cosa alguna. Estando ellos mismos poseídos por otro; síguese de aquí, que, habiendo regresado, haya necesidad de nueva posesión, aunque nadie haya poseído en el tiempo

§ 2.- Item quaero, si vinxero liberum hominem ita, ut eum possideam, an omnia, quae is possidebat, ego possideam per illum. Respondit: si vinxeris hominem liberum, eum te possidere non puto: quod quum ita se habeat, multo minus per illum res eius a te possidebuntur: neque enim rerum natura recipit, ut per eum aliquid possidere possimus, quem civiliter in mea potestate non habeo.

24.- IDEM; *libro XIV, Epistolarum*.- Quod servus tuus ignorante te vi possidet, id tu non possides, quoniam is, qui in tua potestate est, ignoranti tibi non corporalem possessionem, sed iustam potest adquirere: sicut id, quod ex peculio ad eum pervenerit, possidet. Nam tum per servum dominus quoque possidere dicitur, summa scilicet quum ratione, quia, quod ex iusta causa corporaliter a servo tenetur, id in peculio servi est et peculium, quod servus civiliter quidem possidere non posset, sed naturaliter tenet, dominus creditur possidere. Quod vero ex maleficiis adprehenditur, id ad domini possessionem ideo non pertinet, quia nec peculii causam adprehendit.

25.- POMPONIUS; *libro XXIII, ad Quintum*.- Si id quod possidemus ita perdiderimus, ut ignoremus, ubi sit, desinimus possidere.

§ 1.- Et per colonos et inquilinos aut servos nostros possidemus: et si moriantur aut furere incipiant aut alii locent, intellegimur nos retinere possessionem. nec inter colonum et servum nostrum, per quem possessionem retinemus, quicquam interest.

§ 2.- Quod autem solo animo possidemus, quaeritur, utrumne usque eo possideamus, donec alius corpore ingressus sit, ut potior sit illius corporalis possessio, an vero (quod quasi magis

of their property in the meantime.

§ 2.- I also ask, if I chain a freeman in order to possess him, whether I possess through him everything which he possesses. The answer is that if you claim a freeman, I do not think that you possess him; and, as this is the case, there is much less reason that his property should be possessed by you; nor does the nature of things admit that we can possess anything by the agency of one whom I do not legally have in my power.

24.- THE SAME; *Epistles, Book XIV*.- Anything that your slave obtains possession of by violence, without your knowledge, you do not possess, because he who is under your control cannot acquire corporeal possession if you are not aware of it; but he can acquire legal possession, as, for instance, he possesses what comes into his hands as part of his peculium. For when a master is said to possess by his slave, there is an excellent reason for this, because what is held by the slave actually, and for a good reason belongs to his peculium, and the peculium which a slave cannot possess as a citizen, but holds naturally, his master is considered to possess. Anything, however, which the slave acquires by illegal acts, is not possessed by the master, because it is not included in the peculium of the slave.

25.- POMPONIUS; *On Quintus Mucius, Book XXIII*.- We cease to possess anything which has been in our possession, and which has been so completely lost that we do not know where it is.

§ 1.- We possess through the medium of our farmers, our tenants, and our slaves. If they die, become insane, or are hired by others, we are understood to still retain possession of them. There is no difference whatever, in this respect, between our tenant and our slave by whose agency we retain possession of property.

§ 2.- When we only possess property by intention, the question arises whether we continue to do so until another actually enters upon it, so that his actual possession becomes preferable; or, indeed (and this

intermedio las cosas de los mismos.

§ 2.- También pregunto, si, habiendo yo aprisionado a un hombre libre, de suerte que lo posea, poseeré por medio de él todo lo que él poseía. Respondió: si hubieres aprisionado a un hombre libre, no juzgo que tú lo poseas; y siendo esto así, mucho menos serán poseídas por ti sus cosas por medio de él; porque la naturaleza de las cosas no admite que podamos poseer alguna cosa por medio de aquel a quien civilmente no tengo en mi potestad.

24.- EL MISMO; *Epístolas, libro XIV*.- Tú no posees lo que un esclavo tuyo posee a la fuerza, ignorándolo tú, porque el que esta bajo tu potestad no puede adquirir para tí, ignorándolo tú, la posesión corporal, sino la legítima, así como posee lo que por causa del peculio hubiere ido a su poder; porque entonces se dice que también el señor posee por medio del esclavo, por supuesto, con mucha razón, porque lo que con justa causa es tenido corporalmente por el esclavo, está en el peculio del esclavo; y se cree que el señor posee el peculio, que el esclavo no puede, a la verdad, poseer civilmente, sino que lo tiene naturalmente. Mas lo que es tomado por virtud de delitos no corresponde a la posesión del señor, porque no se refiere a causa del peculio.

25.- POMPONIO; *Comentarios a Quinto Mucio, libro XXIII*.- Si lo que poseemos lo hubiéremos perdido de modo que ignoremos donde está, dejamos de poseerlo.

§ 1.- También poseemos por medio de nuestros colonos, inquilinos, o esclavos; y si se murieran, o comenzaran a estar locos, o dieran en arrendamiento a otro, se entiende que retenemos la posesión. Y no hay diferencia alguna entre un colono y un esclavo nuestro, por medio del cual retenemos la posesión.

§ 2.- Pero se pregunta, si lo que poseemos con solo el ánimo lo poseemos hasta que otro haya ingresado corporalmente en la posesión, de suerte que sea preferente la posesión corporal de él, o si, lo que se

probatur) usque eo possideamus, donec revertentes nos aliquis repellat aut nos ita animo desinamus possidere, quod suspicemur repelli nos posse ab eo, qui ingressus sit in possessionem: et videtur utilius esse.

26.- IDEM; *libro XXVI, ad Quintum Mucium*.- Locus certus ex fundo et possideri et per longam possessionem capi potest et certa pars pro indiviso, quae introducitur vel ex emptione vel ex donatione vel qualibet alia ex causa. incerta autem pars nec tradi nec capi potest, veluti si ita tibi tradam: "quidquid mei iuris in eo fundo est": nam qui ignorat, nec tradere nec accipere id, quod incertum est, potest.

27.- PROCULUS; *libro V, Epistolarum*.- Si is, qui animo possessionem saltus retineret, furere coepisset, non potest, dum fureret, eius saltus possessionem amittere, quia furiosus non potest desinere animo possidere.

28.- TERTULLIANUS; *libro I, Quaestionum*.- Si aliquam rem possideam et eandem postea conducam, an amittam possessionem? Multum refert in his, quid agatur: primum enim refert, utrum sciam me possidere an ignorem: et utrum quasi non meam rem conducam an quasi meam: et sciens meam esse, utrum quasi proprietatis respectu an possessionis tantum. Nam et si rem meam tu possideas et ego emam a te possessionem eius rei vel stipuler, utilis erit et emptio et stipulatio, et sequitur, ut et precarium et conductio specialiter possessionis solius conducendae vel precario rogandae animus interveniat.

29.- ULPIANUS; *libro XXX, ad Sabinum*.-

is the better opinion) whether we possess the same until, upon our return, someone prevents us from entering; or whether we cease to possess by intention, because we suspect that we will be driven away by the person who has taken possession. This seems to be the more reasonable opinion.

26.- THE SAME; *On Quintus Mucius, Book XXVI*.- A definite portion of a tract of land can be possessed and acquired by long possession, and also a certain portion which is undivided and which is obtained by purchase, by donation, or by any other title whatsoever, can also be acquired in this manner. A portion, however, which is not specifically designated can neither be delivered nor received; as, for instance, if I transfer to you "all of such-and-such a tract of land that I am entitled to;" for anyone who is ignorant of the facts can neither transfer nor receive something which is uncertain.

27.- PAULUS; *Epistles, Book V*.- If a person who has become insane retains possession of a forest, he does not lose possession of it as long as he remains in that condition, because a lunatic cannot lose the intention of possessing.

28.- TERTULLIANUS; *Questions, Book I*.- If I possess property, and afterwards lease it, do I lose possession? It makes a great deal of difference as to what the intention of the testator was in this case. First, it is important to ascertain whether I know that I am in possession, or am ignorant of the fact; and whether I lease the property as my own, or as belonging to someone else, and, knowing it to be mine, whether I lease it with reference to the ownership, or merely to obtain possession. For if you are in possession of my property, and I purchase the possession of the same from you, or enter into a stipulation with reference thereto, both the purchase and the stipulation will be valid; and the result is that there will be both a precarious title and a lease, if there was an express intention of only leasing possession, or an intention of claiming it by a precarious title.

29.- ULPIANUS; *On Sabinus, Book XXX*.- It has

tiene por más probable, lo poseemos hasta que al volver nosotros a la posesión otro no nos repela, o si de tal modo dejamos de poseer con el ánimo, que sospechamos que podemos ser repelidos por el que haya entrado en la posesión. Y parece que esto es más útil.

26.- EL MISMO; *Comentarios a Quinto Mucio, libro XXVI*.- Un lugar determinado de un fundo puede ser poseído, y usucapido por la larga posesión, y también una cierta parte indivisa, en la cual se entra o por compra, o por donación, o por otra cualquier causa; mas una parte incierta no puede ser entregada, ni usucapida, por ejemplo, si yo te la hubiere entregado así: «todo lo que de mi derecho hay en este fundo»; porque el que ignora no puede ni entregar ni recibir lo que es incierto.

27.- PRÓCULO; *Epístolas, libro V*.- Si el que con el ánimo retuviese la posesión de un bosque hubiese comenzado a estar loco, no puede perder la posesión de este bosque mientras esté loco, porque el furioso no puede dejar de poseer con el ánimo.

28.- TERTULIANO; *Cuestiones, libro I*.- Si yo poseyera alguna cosa, y después la tomara en arrendamiento, ¿perderé acaso la posesión? Importa mucho saber qué es lo que se hace en estos casos; porque en primer lugar interesa conocer si yo sabía, o ignoraba, que yo la poseía, y si tomé en arrendamiento la cosa como no siendo mía, o como mía, y sabiendo que era mía, si con respecto a la propiedad, o solamente en cuanto a la posesión. Porque también si tú poseyeras una cosa mía, y yo te comprara la posesión de esta cosa, o la estipulara, serán válidas la compra y la estipulación; y es consiguiente, que también el precario y el arrendamiento, si especialmente hubiera el ánimo de tomar en arrendamiento la posesión sola, o de rogada en precario.

29.- ULPIANO; *Comentarios a Sabino, Libro*

Possessionem pupillum sine tutoris auctoritate amittere posse constat, non ut animo, sed ut corpore desinat possidere: quod est enim facti, potest amittere. Alia causa est, si forte animo possessionem velit amittere: hoc enim non potest.

30.- PAULUS; *libro XV, ad Sabinum*.- Qui universas aedes possedit, singulas res, quae in aedificio sunt, non videtur possedissee. Idem dici debet et de nave et de armario.

§ 1.- Possessionem amittimus multis modis, veluti si mortuum in eum locum intulimus, quem possidebamus: namque locum religiosum aut sacrum non possumus possidere, etsi contemnamus religionem et pro privato eum teneamus, sicut hominem liberum.

§ 2.- Item quum Praetor idcirco in possessionem rei iussit, quod damni infecti non promittebatur, possessionem invitum dominum amittere Labeo ait.

§ 3.- Item quod mari aut flumine occupatum sit, possidere nos desinimus, aut si is qui possidet in alterius potestatem pervenit.

§ 4.- Item quod mobile est, multis modis desinimus possidere: si aut nolimus, aut servum puta manumittamus, item si quod possidebam in aliam speciem translatus sit, veluti vestimentum ex lana factum.

§ 5.- Quod per colonum possideo, heres meus nisi ipse nactus possessionem non poterit possidere: retinere enim animo possessionem possumus, apisci non possumus. Sed quod pro emptore possideo per colonum etiam, usucapiet etiam heres meus.

been decided that a ward can lose possession without the authority of his guardian, but he does not cease to possess the property by intention, as he does by the performance of a corporeal act, for he can lose what depends upon an act. The case is different where he desires to lose possession by intention, for he cannot do so.

30.- PAULUS; *On Sabinus, Book XV*.- When anyone possesses an entire house, he is not considered to possess the different articles which are contained in the building.

§ 1.- We lose possession in several ways; as, for instance, if we bury a dead body in a place which we possess, for we cannot possess a place which is religious or sacred, even if we despise religion, and continue to hold it as 'private property. The same rule applies to a freeman who is held as a slave.

§ 2.- Labeo says that the owner of a building loses possession against his will when the Praetor orders possession of it to be taken, where security against threatened injury is not furnished.

§ 3.- Likewise, we do not cease to possess land which is occupied by the sea, or by a river, or if anyone who has possession of property comes under the control of another.

§ 4.- Again, we cease to possess property which is movable, in several ways, as where we are unwilling to possess it, or where for example, we manumit a slave. Moreover, if I possess something and its form is changed, as, for instance, a garment is made out of wool, the same rule will apply.

§ 5.- Anything that I possess by a tenant, my heir cannot possess, unless he actually obtains possession of it, for we can retain, but we cannot acquire possession by intention alone. What I possess as a purchaser, however, my heir can obtain by usucaption through the agency of a tenant.

XXX.- Es sabido, que el pupilo puede perder la posesión sin la autoridad del tutor, no de suerte que deje de poseer con el ánimo, sino con el cuerpo; porque puede perder lo que es de hecho. Otra cosa es, si acaso quisiera perder la posesión con el ánimo; porque esto no lo puede hacer.

30.- PAULO; *Comentarios a Sabino, libro XV*.- El que poseyó toda una casa no parece que poseyó cada una de las cosas que hay en el edificio; lo mismo se debe decir, así respecto a una nave, como a un armado.

§ 1.- Perdemos la posesión de muchos modos, por ejemplo, si enterramos un muerto en el lugar que poseíamos; porque no podemos poseer un lugar religioso o sagrado, aunque menospreciemos la religión, y lo tengamos como privado; como tampoco podemos poseer a un hombre libre.

§ 2.- Asimismo, cuando el Pretor mandó que se entrara en posesión, porque no se prometía por daño que amenazaba, dice Labeón, que el dueño pierde contra su voluntad la posesión.

§ 3.- Igualmente, dejamos de poseer lo que fue ocupado por el mar o por un río, o si el que posee llegó a estar bajo la potestad de otro.

§ 4.- También dejamos de poseer de muchos modos las cosas muebles, ya si no quisiéramos poseerlas, ya si, por ejemplo, manumitiéramos a un esclavo; igualmente, si lo que yo poseía fue convertido en otra especie, como si de la lana se hubiera hecho un vestido.

§ 5.- Lo que poseo por medio de un colono no podrá poseerlo mi heredero, a no ser que él mismo haya alcanzado la posesión; porque podemos retener con el ánimo la posesión, pero no podemos alcanzarla. Pero lo que poseo como comprador lo usucapirá también mi heredero por medio de un colono.

§ 6.- Si ego tibi commodavero, tu Titio, qui putet tuum esse, nihilo minus ego id possidebo. Et idem erit, si colonus meus fundum locaverit aut is, apud quem deposueram, apud alium rursus deposuerit. Et id quamlibet per plurium personam factum observandum ita erit.

31.- POMPONIUS; *libro XXXII, ad Sabinum*.- Si colonus non deserendae possessionis causa exisset de fundo et eo redisset, eundem locatorem possidere placet.

32.- PAULUS; *libro XV, ad Sabinum*.- Quamvis pupillus sine tutoris auctoritate non obligetur, possessionem tamen per eum retinemus.

§ 1.- Si conductor rem vendidit et eam ab emptore conduxit et utrique mercedes praestitit, prior locator possessionem per conductorem rectissime retinet.

§ 2.- Infans possidere recte potest, si tutore auctore coepit, nam iudicium infantis suppletur auctoritate tutoris: utilitatis enim causa hoc receptum est, nam alioquin nullus sensus est infantis accipiendi possessionem. Pupillus tamen etiam sine tutoris auctoritate possessionem nancisci potest. Item infans peculiari nomine per servum possidere potest.

33.- POMPONIUS; *libro XXXII, ad Sabinum*.- Fundi venditor etiamsi mandaverit alicui, ut emptorem in vacuum possessionem induceret, priusquam id fieret, non recte emptor per se in possessionem veniet. Item si amicus venditoris mortuo eo, priusquam id sciret, aut non prohibentibus heredibus id fecerit, recte possessio tradita erit. Sed si id fecerit, quum sciret dominum mortuum aut quum sciret heredes id facere nolle, contra erit.

§ 6.- If I lend you anything, and you lend it to Titius, and he thinks that it is yours, I will still continue to possess it. The same rule will apply if my tenant sublets my land, or he with whom I have deposited property should again deposit with another; and the same rule must be observed, even if this is done by several persons.

31.- POMPONIUS; *On Sabinus, Book XXXII*.- If a tenant leaves the land without the intention of relinquishing possession, and returns, it is held that the same lessor holds possession.

32.- PAULUS; *On Sabinus, Book XV*.- Although a ward is not bound without the authority of his guardian, we can still retain possession by him.

§ 1.- If a lessee sells the property, leases it from the purchaser, and pays rent to both lessors, the first one who rented it legally retains possession through the lessee.

§ 2.- An infant can lawfully possess anything if he obtains it with the consent of his guardian, for the want of judgment of the infant is supplied by the authority of the 'guardian. This opinion has been adopted on account of its convenience, for otherwise, an infant who receives possession of property would not know what he was doing. A ward can, nevertheless, obtain possession without the authority of his guardian, and an infant can possess peculium through the medium of a slave.

33.- POMPONIUS; *On Sabinus, Book XXXII*.- Even if the vendor of a tract of land should direct someone to place a purchaser in full possession of the same, the purchaser himself cannot legally acquire possession before this is done. Likewise, if a friend of the vendor, not being aware that the latter is dead, should place the purchaser in possession without being prevented from doing so by the heirs, possession will legally be delivered. But if he did this, knowing that the owner was dead, or if he was aware that the heirs were unwilling that it should be

§ 6.- Si yo te hubiere dado en comodato una cosa, y tú a Ticio, que creía que era tuya, esto no obstante la poseeré. Y lo mismo será, si un colono mío hubiere dado en arrendamiento el fundo, o si aquel en cuyo poder yo había constituido un depósito lo constituyere a su vez en poder de otro; y esto se habrá de observar así respecto a lo hecho por cualquier persona de muchas.

31.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- Si un colono hubiese salido de un fundo no para abandonar la posesión, y hubiese vuelto a él, está determinado que lo posee el mismo arrendador.

32.- PAULO; *Comentarios a Sabino, libro XV*.- Aunque un pupilo no se obliga sin la autoridad del tutor, retenemos, sin embargo, por medio de él la posesión.

§ 1.- Si el arrendatario vendió la cosa, y la tomó del comprador en arrendamiento, y pagó las pensiones a ambos, con muchísima razón retiene el primer arrendador la posesión por medio del arrendatario.

§ 2.- El que está en la infancia puede poseer válidamente, si comenzó a poseer con la autoridad del tutor; porque con la autoridad del tutor se suple el juicio del que está en la infancia; pues esto se admitió por causa de utilidad, porque de otra suerte no tiene consentimiento alguno del que está en la infancia el que adquiere la posesión. Sin embargo, el pupilo puede adquirir la posesión aun sin la autoridad del tutor; asimismo, el que está en la infancia puede poseer por medio de un esclavo a título del peculio.

33.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- Aunque el vendedor de un fundo le hubiere mandado a alguno que ponga al comprador en la vacua posesión, antes que se haya hecho esto no entrará válidamente en posesión el comprador por sí mismo. Asimismo, si un amigo del vendedor, fallecido éste, antes que él lo supiera, o no prohibiéndoselo los herederos, lo hubiere hecho, habrá sido entregada válidamente la posesión. Pero si esto lo hubiere hecho sabiendo que había fallecido el dueño, o sabiendo que los herederos no querían hacerlo, será

34.- ULPIANUS; *libro VII, Disputationum*.- Si me in vacuum possessionem fundi Cornelianus miseris, ego putarem me in fundum Sempronianum missum et in Cornelianum iero, non adquiram possessionem, nisi forte in nomine tantum erraverimus, in corpore consenserimus. Quoniam autem in corpore consenserimus, an a te tamen recedet possessio, quia animo deponere et mutare nos possessionem posse et Celsus et Marcellus scribunt, dubitari potest: et si animo adquiri possessio potest, numquid etiam adquisita est? Sed non puto errantem adquirere: ergo nec amittet possessionem, qui quodammodo sub conditione recessit de possessione.

§ 1.- Sed si non mihi, sed procuratori meo possessionem tradas, videndum est, si ego errem, procurator meus non erret, an mihi possessio adquiratur. Et quum placeat ignorantem adquiri, poterit et erranti. Sed si procurator meus erret, ego non errem, magis est, ut adquiram possessionem.

§ 2.- Servus quoque meus ignorantem mihi adquirit possessionem. Nam et servus alienus, ut Celsus scribit, sive a me sive a nemine possideatur, potest mihi adquirere possessionem, si nomine meo eam adipiscatur: quod et ipsum admittendum est.

35.- IDEM; *libro V, de omnibus Tribunalibus*.- Exitus controversiae possessionis hic est tantum, ut prius pronuntiet iudex, uter possideat: ita enim fiet, ut is, qui victus est de possessione, petitoris partibus fungatur et tunc de dominio quaeratur.

36.- IULIANUS; *libro XII, Digestorum*.- Qui pignoris causa fundum creditori tradit, intellegitur possidere. Sed et si eundem precario rogaverit, aeque per diutinam possessionem capiet: nam cum pos-

done, the contrary rule will apply.

34.- ULPIANUS; *Disputations, Book VII*.- If you place me in full possession of the Cornelian Estate, and I think that I am placed in possession of the Sempronian estate, but enter upon the Cornelian estate, I do not acquire possession unless we are only mistaken in the name, and agree with reference to the property. Since, however, we agree with reference to the property, a doubt may arise whether you do not lose possession; because Celsus and Marcellus say that we can lose and change possession merely by intention. And if possession can be acquired by intention, can it also be acquired in this instance? I do not think that a person who is mistaken can acquire it. Therefore, he who only relinquishes possession, as it were conditionally, does not lose it.

§ 1.- If, however, you deliver possession, not to me but to my agent, it should be considered whether possession will be acquired by me if I make a mistake, but my agent does not. As it is held that it can be acquired by a person who is ignorant of the facts, it can also be acquired by one who is mistaken. But if my agent is mistaken, and I am not, the better opinion is that I will acquire possession.

§ 2.- My slave also acquires possession for me without my knowledge. For even a slave belonging to another, as Vitellius says, can acquire possession for me, if he takes the property in my name, whether he is possessed by me or by no one at all. This also should be admitted.

35.- THE SAME; *On All Tribunals, Book V*.- A controversy for possession is terminated as soon as the judge decides which party is in possession. This is done in such a way that he who loses possession can take the position of plaintiff, and then bring an action against the owner.

36.- JULIANUS; *Digest, Book XIII*.- He who transfers a tract of land to a creditor, by way of pledge, is understood to retain possession of the same. But even if he should claim it by a precarious

lo contrario.

34.- ULPIANO; *Disputas, libro VII*.- Si me hubieres puesto en la vácuca posesión del fundo Corneliano, y yo creyese que había sido puesto en la del fundo Semproniano, y me fuere al Corneliano, no adquiriré la posesión, a no ser acaso que hubiéremos errado solamente en el nombre, y hubiéremos convenido respecto a la cosa. Mas habiendo convenido respecto a la cosa se puede dudar, si, no obstante, se separará de ti la posesión, porque Celso y Marcelo escriben, que podemos dejar y cambiar la posesión con el ánimo; y si la posesión puede ser adquirida por el ánimo ¿acaso no está también adquirida? Pero no creo que el que yerra la adquiere; luego tampoco perderá la posesión el que en cierto modo se separó de la posesión bajo condición.

§ 1.- Pero si no me entregaras a mí la posesión, sino a mi procurador, se ha de ver, si errando yo, y no errando mi procurador, se adquirirá para mí la posesión. Y como está establecido que se adquiere para el que lo ignora, se podrá adquirir también para el que yerra; pero si errase mi procurador, y yo no errara, es más cierto que adquiriré la posesión.

§ 2.- También mi esclavo adquirirá para mí la posesión ignorándolo yo; porque escribe Vitelio que también un esclavo ajeno, ya si fuera poseído por mí, ya si no lo fuera por nadie, puede adquirir para mí la posesión, si la adquiriese eu mi nombre lo que también se ha de admitir.

35.- EL MISMO; *De todos los Tribunales, libro V*.- El orden de la controversia sobre la posesión consiste en este caso solamente en que primeramente declare el juez cual de los dos posea; porque así se hará que el que haya sido vencido sobre la posesión desempeñe las funciones de demandante, y que entonces se cuestione sobre quién es el dueño.

36.- JULIANO; *Digesto, libro XIII*.- Se entiende que posee el que por causa de prenda entrega un fundo a su acreedor. Mas aunque lo hubiere rogado en precario, adquiere igualmente mediante la

sessio creditoris non impediatur capionem, longe minus precarii rogatio impedimento esse non debet, quum plus iuris in possessione habeat qui precario rogaverit quam qui omnino non possidet.

37.- MARCIANUS; *libro singulari ad formulam hypothecariam*.- Re pignoris nomine data et possessione tradita, deinde a creditore conducta convenit, ut is, qui hypothecam dedisset, pro colono in agro, aedibus autem pro inquilino sit: per eos creditor possidere videtur.

38.- IULIANUS; *libro XLIV, Digestorum*.- Qui absenti servo scribit, ut in libertate moretur, non eam mentem habet, ut statim velit servi possessionem dimittere, sed magis destinationem in id tempus conferre, quo servus certior factus fuerit.

§ 1.- Si quis possessionem fundi ita tradiderit, ut ita demum cedere ea dicat, si ipsius fundus esset, non videtur possessio tradita, si fundus alienus sit. Hoc amplius existimandum est possessiones sub conditione tradi posse, sicut res sub conditione traduntur neque aliter accipientis fiunt, quam condicio exstiterit.

§ 2.- Si is, qui Titio servum vendiderat, heredi eius eum tradiderit, poterit heres rerum hereditarium possessionem per eum adprehendere, quia non servus iure hereditario, sed actio ex empto ad eum pervenit: nam et si ex stipulatu vel ex testamento servus testatori debitus fuisset et heres eum accepisset, non prohiberetur rerum hereditarium possessionem per eundem adquirere.

39.- IDEM; *libro II, ex Minicio*.- Interesse puto,

title, he can also acquire a good one by lapse of time; for, as possession by the creditor does not interfere with prescription, there is less reason that the claim of the debtor under a precarious title should present no obstacle, since he has much better right who claims property by a precarious title and is in possession, than he who has no possession at all.

37.- MARCIANUS; *On the Hypothecary Formula*.- When land is given in pledge, and possession is delivered, and the property has then been leased by the creditor, and it is agreed that he who encumbered it shall be considered as a tenant in the country, and as a lessee in the city, the creditor is considered to possess the property through the debtor who has leased it.

38.- JULIANUS; *Digest, Book XLIV*.- A master who writes to his absent slave to remain at liberty has not the intention of immediately relinquishing possession of the slave; but his intention is rather deferred until the time when the slave will be informed of the fact.

§ 1.- When anyone delivers possession of land in such a way that he does not intend it to be given us, unless the land belongs to him, he is not considered to have delivered possession if the land is the property of another. It should, moreover, be understood that possession can be delivered conditionally, just as property is transferred under a condition and does not pass to the person who receives it unless the condition is complied with.

§ 2.- Where a man who sold a slave to Titius delivers him to his heir, the latter can obtain possession of the estate by means of the slave; not for the reason that the slave came into his hands from the estate, but because he is entitled to an action on purchase. For if a slave is due to a testator in accordance with the terms of a stipulation, or of a will, and the heir receives him, he will not be forbidden to obtain possession of the property of the estate by means of the slave.

39.- THE SAME; *On Minicius, Book II*.- I think

posesión de largo tiempo; porque como la posesión del acreedor no impidiera usucapión, mucho menos debe servir de impedimento el ruego del precario, porque mas derecho tiene respecto a la posesión el que la hubiere rogado en precario, que no el que no posea de ningún modo.

37.- MARCIANO; *Comentarios a la fórmula hipotecaria, libro único*.- Una cosa fue dada a título de prenda habiéndose entregado también la posesión, y después fue tomada en arrendamiento por el acreedor; se convino, que el que hubiese dado la hipoteca sea como colono tratándose de un campo, y como inquilino tratándose de una casa, y se considera que el acreedor posee por medio de ellos.

38.- JULIANO; *Digesto, libro XLIV*.- El que le escribe a un esclavo ausente, para que viva en libertad, no tiene la intención de querer dimitir inmediatamente la posesión del esclavo, sino más bien de aplazar su determinación al tiempo en que el esclavo haya sido hecho sabedor.

§ 1.- Si alguno hubiere entregado la posesión de un fundo, de modo que diga que solamente la cedía, si el fundo fuese de él, no se considera entregada la posesión, si el fundo fuese ajeno. Además de esto, se ha de considerar que las posesiones pueden ser entregadas bajo condición, así como las cosas se entregan bajo condición, y no se hacen de otro modo del que las recibe, sino si se hubiere cumplido la condición.

§ 2.- Si el que le había vendido a Ticio un esclavo lo hubiere entregado al heredero de aquél, podrá el heredero tomar por medio de él la posesión de los bienes de la herencia, porque no va a poder de él por derecho de herencia el esclavo, sino la acción de compra; porque también si por virtud de lo estipulado, o de testamento, le hubiese sido debido el esclavo al testador, y el heredero lo hubiese recibido, no se le prohibiría que adquiriese por medio de él la posesión de los bienes de la herencia.

39.- EL MISMO; *Doctrina de Minicio, libro II*.-

qua mente apud sequestrum deponitur res. Nam si omittendae possessionis causa et hoc aperte fuerit approbatum, ad usucapionem possessio eius partibus non procederet: at si custodiae causa deponatur, ad usucapionem eam possessionem victori procedere constat.

40.- AFRICANUS; *libro VII, Quaestionum*.- Si de eo fundo, quem, quum possiderem, pignori tibi dedi, servus tuus te deiciat, adhuc te possidere ait, quoniam nihilo minus per ipsum servum possessionem retineas.

§ 1.- Si forte colonus, per quem dominus possideret, decessisset, propter utilitatem receptum est, ut per colonum possessio et retineretur et continueretur: quo mortuo non statim dicendum eam interpellari, sed tunc demum, quum dominus possessionem apisci neglexerit. Aliud existimandum ait, si colonus sponte possessione discesserit. Sed haec ita esse vera, si nemo extraneus eam rem interim possiderit, sed semper in hereditate coloni manserit.

§ 2.- Servum tuum a Titio bona fide emi et traditum possedi, deinde quum comperissem tuum esse, ne eum peteres, celare coepi. Non ideo magis hoc tempore clam possidere videri me ait: nam retro quoque, si sciens tuum servum non a domino emerim et, quum clam eum possidere coepissem, postea certorem te fecerim, non ideo desinere me clam possidere.

§ 3.- Si servum meum bonae fidei emptori clam abduxerim, respondit non videri me clam possidere, quia neque precarii rogatione neque conductione suae rei dominum teneri et non posse causam clan-

that it makes a difference with what intention property is deposited in the hands of an arbiter; for if this is done for the purpose of relinquishing possession, and is clearly proved, the possession of the arbiter will be of no benefit to the parties for the purpose of usucaption. If, however, the property was deposited for safe-keeping, it is settled that he who gains the case can profit by the possession, in order to acquire the property by prescription.

40.- AFRICANUS; *Questions, Book VII*.- If your slave ejects you from land, which I gave you in pledge while it was in my possession, it is held that you continue to be in possession of the same, as you still retain possession by this same slave.

§ 1.- If the tenant by whom the owner holds possession should die, it has been decided for the sake of public convenience that possession is retained and continued through the agency of the tenant. It should not be held that possession is immediately interrupted by the death of the latter, for this is not the case unless the owner neglects to take possession. A different opinion must be held, if the tenant voluntarily relinquishes possession. This, however, is only true where a stranger has not, in the meantime, been in possession, but it always remains as part of the estate of the tenant.

§ 2.- I purchased your slave from Titius in good faith, and possessed him after he had been delivered, and then when I ascertained that he was yours, I concealed him, to prevent you from claiming him. It is held that, on his account, I should not be considered to have possessed him clandestinely during this time. For, on the other hand, if I should knowingly purchase your slave from someone who is not his owner, and should then retain clandestine possession of him, even after I notified you, I would not, for that reason, cease to have clandestine possession of the slave.

§ 3.- If I clandestinely remove my own slave from a bona fide purchaser, it has been decided that I ought not to be considered to have clandestine possession of him, because the owner does not hold him under a

Opino que interesa saber con qué intención se deposita la cosa en poder del secuestrador; porque si fue por causa de dejar la posesión, y esto se hubiere probado claramente, la posesión de aquella no aprovechará a las partes para la usucapición mas si fuera depositada por causa de custodia, es sabido que esta posesión le aprovecha para la usucapición al vendedor.

40.- AFRICANO; *Cuestiones, libro VII*.- Si tu esclavo te echase del fundo que, poseyéndolo yo, te dí en prenda, dice que aun lo posees, porque, ello no obstante, retienes la posesión por medio del mismo esclavo.

§ 1.- Si acaso hubiese fallecido el colono por medio del cual poseyese el dueño, se admitió por razón de utilidad, que la posesión sea retenida y continuada por medio del colono; y fallecido éste, no se ha de decir que inmediatamente se interrumpe aquella, sino solamente cuando el dueño hubiere descuidado alcanzar la posesión. Otra cosa se ha de estimar, dice, si el colono se hubiere separado espontáneamente de la posesión; pero esto es así verdad, si ningún extraño hubiere poseído mientras tanto la cosa, sino que ésta hubiera permanecido siempre en la herencia del colono.

§ 2.- Le compré de buena fe a Ticio un esclavo tuyo, y lo poseí habiéndoseme entregado; después, cuando hube descubierto que era tuyo, comencé a ocultarlo para que no me lo pidieses; dice, que no por esto parece que poseo clandestinamente durante este tiempo; porque si también antes hubiere yo comprado a sabiendas un esclavo tuyo a quien no era su dueño, y entonces lo hubiese comenzado yo a poseer clandestinamente, y después yo te lo hubiere hecho saber, no por eso dejaba yo de poseer clandestinamente.

§ 3.- Si clandestinamente yo le hubiere quitado un esclavo mío a un comprador de buena fe, respondió que no se consideraba que yo lo poseía clandestinamente, porque el dueño no esta obligado ni por el

destinae possessionis ab his duabus causis separari.

41.- PAULUS; *libro I, Institutionum*.- Qui iure familiaritatis amici fundum ingreditur, non videtur possidere, quia non eo animo ingressus est, ut possideat, licet corpore in fundo sit.

42.- ULPIANUS; *libro IV, Regularum*.- Communis servus etiamsi ab uno ex dominis omnium nomine possideatur, ab omnibus possideri intelligitur.

§ 1.- Procurator si quidem mandante domino rem emerit, protinus illi acquirit possessionem: quod si sua sponte emerit, non nisi ratam habuerit dominus emptorem.

43.- MARCIANUS; *libro III, Regularum*.- Si quis fundum emerit, cuius particulam sciebat esse alienam, Iulianus ait, si pro diviso sciat alienam esse, posse eum reliquas partes longa possessione capere: sed si pro indiviso licet ignoret quis sit locus, aequum capere posse, quod sine ullius damno pars, quae putatur esse vendentis, per longam possessionem ad emptorem transit.

§ 1.- Sed et Pomponius scripsit libro quinto variarum lectionum, si sciat vel putet alienum esse usum fructum, bona fide diutina possessione capere posse.

§ 2.- Idem, inquit, et si emero rem, quam sciam pignori obligatam.

44.- PAPINIANUS; *libro XXIII, Quaestionum*.- Peregre profecturus pecuniam in terra custodiae causa condiderat: quum reversus locum thesauri

precarious title, nor under a lease of his own property; and there are no other methods of acquiring clandestine possession.

41.- PAULUS; *Institutes, Book I*.- Anyone who enters upon a tract of land as a friend, by the right of familiarity, is not considered to possess it, because he did not enter upon it with the intention of doing so, although he may have actual possession of the land.

42.- ULPIANUS; *Rules, Book IV*.- Where a slave owned in common is possessed by one of the joint-owners in the name of all, he is understood to be possessed by all.

§ 1.- Where an agent purchases property by the direction of his principal, he immediately acquires possession of it for him. This is not true if he purchases it on his own responsibility, unless his principal ratifies the sale.

43.- MARCIANUS; *Rules, Book III*.- Julianus says that if anyone buys a tract of land, a small part of which he knows to belong to another, and he was aware that the said small part has been divided; he can acquire the remainder of the land by prescription. If, however, the said part was undivided, he can also acquire the land by prescription, although he may not know where the part in question was situated; because what he thought belonged to the vendor passes by prescription to the purchaser, without any damage resulting.

§ 1.- Pomponius, also, in the Fifth Book of Various Passages, says that if the purchaser knows, or thinks that the usufruct of the property belongs to another, he can still obtain the latter by long-continued possession.

§ 2.- The same rule applies, as he says, if I purchase property which I know has been pledged.

44.- PAPINIANUS; *Questions, Book XXIII*.- Where a man, about to start upon a long journey, buried his money in the ground for safe-keeping, and,

ruego en precario ni por el arrendamiento de su propia cosa, y no se puede separar de estas dos causas la causa de la posesión clandestina.

41.- PAULO; *Instituta, libro I*.- El que por razón de familiaridad entra en el fundo de un amigo, no parece que lo posee, porque no entró en él con el ánimo de poseerlo, aunque corporalmente esté en el fundo,

42.- ULPIANO; *Reglas, libro IV*.- Se considera que un esclavo común, aunque a nombre de todos sea poseído por uno solo de los dueños, es poseído por todos.

§ 1.- Si un procurador hubiere comprado una cosa mandádoselo ciertamente su principal, adquiere para él inmediatamente la posesión; pero no, si la hubiere comprado por su propia voluntad, a no ser que su principal hubiere ratificado la compra.

43.- MARCIANO; *Reglas, libro III*.- Si alguno hubiere comprado un fundo, del cual sabía que una pequeña parte era ajena, dice Juliano, que si sabía que era ajena estando dividida, puede él adquirir con la larga posesión las otras partes; pero que si estaba indivisa, aunque ignore cuál sea la parte, podía él adquirir igualmente, porque sin perjuicio de nadie pasa al comprador mediante la larga posesión la parte que se considera que es del vendedor.

§ 1.- Pero también Pomponio escribió en el libro quinto de sus Doctrinas varias, que si supiera o juzgase que el usufructo era ajeno, para adquirir con buena fe por la posesión de largo tiempo.

§ 2.- Lo mismo, dice, también si yo hubiere comprado una cosa, que supiera que estaba obligada en prenda.

44.- PAPINIANO; *Cuestiones, libro XXIII*.- Uno que había de salir de viaje había escondido en la tierra dinero para guardarlo; como habiendo vuelto no

memoria non repeteret, an desisset pecuniam possidere, vel, si postea recognovisset locum, an confestim possidere inciperet, quaesitum est. Dixi, quoniam custodiae causa pecunia condita proponeretur, ius possessionis ei, qui condidisset, non videri peremptum, nec infirmitatem memoriae damnum adferre possessionis, quam alius non invasit: alioquin responsuros per momenta servorum, quos non viderimus, interire possessionem. Et nihil interest, pecuniam in meo an in alieno condidissem, quum, si alius in meo condidisset, non alias possiderem, quam si ipsius rei possessionem supra terram adeptus fuisset. Itaque nec alienus locus meam propriam aufert possessionem, quum, supra terram an infra terram possideam, nihil intersit.

§ 1.- Quaesitum est, cur ex peculii causa per servum ignorantibus possessio quaereretur. Dixi utilitatis causa iure singulari receptum, ne cogerentur domini per momenta species et causas peculiorum inquirere. Nec tamen eo pertinere speciem istam, ut animo videatur adquiri possessio: nam si non ex causa peculiari quaeratur aliquid, scientiam quidem domini esse necessariam, sed corpore servi quaeri possessionem.

§ 2.- Quibus explicitis, quum de amittenda possessione quaeratur, multum interesse dicam, per nosmet ipsos an per alios possideremus: nam eius quidem, quod corpore nostro teneremus, possessionem amitti vel animo vel etiam corpore, si modo eo animo inde digressi fuisset, ne possideremus: eius vero, quod servi vel etiam coloni corpore possidetur, non aliter amitti possessionem, quam eam alius ingressus fuisset, eamque amitti nobis quoque ignorantibus. Illa quoque possessionis

having returned, could not remember the place where the treasure was concealed, the question arose whether he had ceased to possess it, or if, afterwards, he should find the place, whether he would immediately begin to acquire possession. I gave it as my opinion that, as the money was not said to have been hidden for any other purpose than safe-keeping, he who concealed it should not be considered to have been deprived of the right of possession; nor did the failure of his memory prejudice that right, as no one else had appropriated the money. On the other hand, it might be held that we lose possession of our slaves during the time when we no longer see them. Nor does it make any difference whether I hide the money on my own premises, or on those of another; for if anyone should hide his property on my premises, I would not obtain possession of it unless I did so where it was above ground. Hence, the fact that the land belongs to another does not deprive me of my own possession, as there is no difference whether I have possession above, or under ground.

§ 1.- The question arises why the possession of property belonging to his peculium is acquired by a slave for his master, without the knowledge of the latter. I said that this rule had been adopted on the ground of public convenience, to prevent masters from inquiring constantly about property belonging to the peculium of their slaves, and the reason why it was found there; so that, in this instance, it could not be held that possession was acquired by intention alone. For if any property is obtained which does not form part of the peculium, the knowledge of the master is necessary, but possession is acquired by the mere act of the slave.

§ 2.- These matters having been explained, the question of losing possession comes up for discussion; and I hold that it makes a great deal of difference whether we hold possession by ourselves or through the agency of others. For, so far as the possession which we hold by our own act is concerned, it can be lost either by intention, or by our act, provided we relinquish it with the expectation of no longer holding it; but possession to property which is acquired by the act of a slave or a tenant is

recordase en su memoria el sitio del tesoro, se preguntó, si habría dejado de poseer el dinero, o si habiendo reconocido después el sitio comenzaría a poseerla inmediatamente. Dije, que como se exponía que el dinero había sido escondido para guardarlo, no parecía que se extinguiría el derecho de posesión para el que lo hubiese escondido, y que la debilidad de la memoria no causaba perjuicio a una posesión, que otro no invadió; pues de otra suerte habríamos de responder que cada momento se extinguía la posesión de los esclavos, que no estuviéremos viendo. Y nada importa que ya hubiese escondido el dinero en sitio mío o ajeno, porque si otro lo hubiese escondido en el mío, yo no lo poseería de otra suerte, sino si hubiese adquirido la posesión de la misma cosa sobre el terreno. Y así, ni él ser ajeno el lugar me priva de mi propia posesión, pues nada importa que yo posea sobre la tierra o debajo de la tierra.

§ 1.- Se preguntó por qué se adquiría por causa del peculio por medio del esclavo la posesión para los que lo ignoraban. Dije, que por causa de utilidad se admitió por derecho especial, que no estuviesen obligados los dueños a investigar cada momento las cosas y causas de los peculios, y que, sin embargo, esta circunstancia no tiene por objeto que parezca que con él ánimo se adquiriera la posesión; porque si se adquiriese alguna cosa no por causa del peculio, es ciertamente necesario el conocimiento del señor, pero se adquiere la posesión con el cuerpo del esclavo.

§ 2.- Explicadas estas cosas, diré, que cuando se trata de la manera de perder la posesión, hay mucha diferencia entre que poseamos por nosotros mismos, o por medio de otros; porque, a la verdad, de lo que tengamos con nuestro cuerpo, se pierde la posesión o con el ánimo, o también con el cuerpo, si de ella nos hubiésemos separado con el ánimo de no poseer; mas de lo que se posee con el cuerpo de un esclavo, o también de un colono, no se pierde la posesión de otra suerte, sino si otro hubiese entrado en ella; y ésta

amittendae separatio est. Nam saltus hibernos et aestivos, quorum possessio retinetur animo.

45.- IDEM; *libro II, Definitionum*.- Licet neque servum neque colonum ibi habeamus,

46.- IDEM; *libro XXIII, Quaestionum*.- Quamvis saltus proposito possidendi fuerit alius ingressus, tamdiu priorem possidere dictum est, quamdiu possessionem ab alio occupatam ignoraret. Ut enim eodem modo vinculum obligationum solvitur, quo quaeri adsolet, ita non debet ignorantia tolli possessio quae solo animo tenetur.

47.- IDEM; *libro XXVI, Quaestionum*.- Si rem mobilem apud te depositam aut ex commodato tibi, possidere neque reddere constitueris, confestim amisisse me possessionem vel ignorantem responsum est. Cuius rei forsitan illa ratio est, quod rerum mobilium neglecta atque omissa custodia, quamvis eas nemo alius invaserit, veteris possessionis damnum adferre consuevit: idque Nerva filius libris de usucapionibus rettulit. Idem scribit aliam causam esse hominis commodati omissa custodia: nam possessionem tamdiu veterem fieri, quamdiu nemo alius eum possidere coeperit, videlicet ideo, quia potest homo proposito redeundi domino possessionem sui conservare, cuius corpore ceteras quoque res possumus possidere. Igitur earum quidem rerum, quae ratione vel anima carent, confestim amittitur possessio, homines autem retinentur, si revertendi animum habent.

48.- IDEM; *libro X, Responsorum*.- Praedia quum servis donavit eorumque se tradidisse possessionem litteris declaravit. Si vel unus ex servis, qui simul

not lost, unless another has appropriated the property; and this can also occur even without our knowledge. There is still another distinction applicable to loss of possession, for the possession of winter and summer resorts is retained by mere intention,

45.- THE SAME; *Definitions, Book II*.- Although we do not leave a slave or a tenant there when we depart.

46.- THE SAME; *Questions, Book XXIII*.- Even if another may have been entered upon property with the intention of taking possession of the same, the former possessor is held to retain possession, as long as he is ignorant that it has been taken by another. For, as the bond of an obligation is released in the same way that it has been made, so, where possession is held by intention alone, it should not be taken away without anyone's knowledge.

47.- THE SAME; *Questions, Book XXVI*.- If you decide not to return movable property which has been deposited with you, or of which you have been given possession as a loan, it has been held that the other party will lose possession immediately, even if he is not aware of your intention. The reason for this is, that where the care of movable property is neglected, or abandoned, even though no one else appropriates it, the former possession is usually prejudiced. This was stated by Nerva, the son, in his Books on Usucaption. He also says that the case is different, if proper care was not used, where a slave had been lent; for possession of him only will continue as long as no one else seizes him, that is to say, because a slave can retain possession for his master if he has the intention of returning to him; and we can likewise obtain possession of other property by his agency. Therefore, possession of such objects as are destitute of reason, or life, is immediately lost, but that of slaves is retained, if they have the intention of returning.

48.- THE SAME; *Opinions, Book X*.- A certain man donated a tract of land together with slaves attached to the same, and stated in a letter that he

se pierde para nosotros, aun ignorándolo. También hay esta diferencia en la manera de perder la posesión, porque los bosques de invierno y de verano, cuya posesión se retiene con el animo.

45.- EL MISMO; *Definiciones, libro II*.- Aunque en ellos no tengamos esclavo, ni colono.

46.- EL MISMO; *Cuestiones, libro XXIII*.- Y aun cuando otro hubiere entrado en el bosque con el propósito de poseerle, se dijo que los posee el primero, mientras ignore que la posesión está ocupada por otro; porque así como el vínculo de las obligaciones se disuelve del mismo modo con que se suele contraer, así no se le debe quitar al que lo ignora la posesión, que se tiene con solo el ánimo.

47.- EL MISMO; *Cuestiones, libro XXVI*.- Si hubieres determinado poseer la cosa mueble depositada en tu poder, o dada a ti en comodato, y no devolverla, se respondió que inmediatamente perdí la posesión, aún ignorándolo; acaso la razón de esto es que descuidada o dejada la custodia de los bienes muebles, fue costumbre que se causara perjuicio a la antigua posesión, aunque otro ninguno las haya tomado; y esto dijo Nerva, el hijo, en los libros de las Usucapiones. Escribe el mismo, que otra cosa es respecto al esclavo dado en comodato, habiéndose abandonado su custodia; porque se conserva la antigua posesión mientras otro alguno no hubiere comenzado a poseerlo; a saber, por esto, porque puede el esclavo con el propósito de volver conservarle a su señor la posesión de sí mismo, con cuyo cuerpo podemos poseer también otras cosas. Así, pues, se pierde inmediatamente la posesión de las cosas que carecen de razón o de alma, pero se retiene a los esclavos, si tuvieran el animo de volver.

48.- EL MISMO; *Respuestas, libro X*.- Uno donó predios juntamente con los esclavos, y declaró en carta haber entregado la posesión de los mismos; si

quum praediis donatus est, ad eum, qui donum accepit, pervenit, mox in praedia remissus est, per servum praediorum possessionem quaesitam ceterorumque servorum constabit.

49.- IDEM; *libro II, Definitionum*.- Possessio quoque per servum, cuius usus fructus meus est, ex re mea vel ex operis servi acquiritur mihi, quum et naturaliter a fructuario teneatur et plurimum ex iure possessio mutuetur.

§ 1.- Qui in aliena potestate sunt, rem pecuniariam tenere possunt, habere possidere non possunt, quia possessio non tantum corporis, sed et iuris est.

§ 2.- Etsi possessio per procuratorem ignoranti quaeritur, usucapio vero scienti competit, tamen evictionis actio domino contra venditorem invito procuratore non datur, sed per actionem mandati ea cedere cogitur.

50.- HERMOGENIANUS; *libro V, iuris Epitoma*.- Per eum, quem iusto ductus errore filium meum et in mea potestate esse existimo, neque possessio neque dominium nec quicquam aliud ex re mea mihi quaeritur.

§ 1.- Per servum in fuga agentem, si neque ab alio possideatur neque se liberum esse credat, possessio nobis acquiritur.

51.- IAVOLENUS; *libro V, ex Posterioribus Labeonis*.- Quarundam rerum animo possessionem apisci nos ait Labeo: veluti si acervum lignorum emero et eum venditor tollere me iusserit, simul atque custodiam posuisssem, traditus mihi videtur. idem iuris esse vino vendito, quum universae amphorae vini simul essent. Sed videamus, inquit, ne haec ipsa corporis traditio sit, quia nihil interest,

delivered possession of the property. If one of the slaves, who was donated, should come into the hands of him who received the house, and be afterwards sent back to the land, it has been decided that possession of the land and of the other slaves has been acquired by means of those above mentioned.

49.- THE SAME; *Definitions, Book II*.- Possession can be acquired by me through a slave in whom I have the usufruct if this is done by means of my property, or the services of the slave; because the latter is naturally held by the usufructuary, and possession borrows many things from the law.

§ 1.- Those who are under the control of others can hold property belonging to their peculium, but they cannot possess it; for the reason that possession is not only a matter of fact, but is also one of law.

§ 2.- Although possession through an agent can be acquired by a principal without his knowledge, usucaption can only benefit one who knows that possession has been taken; still, an action for eviction is not granted to the principal against the vendor without the consent of the agent, but he can be compelled to grant it by an action on mandate.

50.- HERMOGENIANUS; *Epitomes of Law, Book V*.- Neither possession nor ownership, nor anything else whatsoever, can be acquired through the use of my property by one whom I have been induced to erroneously consider my son under my control.

§ 1.- Possession can be acquired for us by a runaway slave, if he has not been taken possession of by another, and does not think that he is free.

51.- JAVOLENUS; *On the Last Works of Labeo, Book V*.- Labeo says that we can acquire possession of certain things by intention; as, for instance, if I purchase a pile of wood, and the vendor directs me to remove it, it will be considered to have been transferred to me, as soon as I place a guard over it. The same rule applies to a sale of wine where all the jars are together. But, he says, let us see whether this

siquiera uno de los esclavos, que fue donado juntamente con los predios, llegó a poder del que recibió la donación, y luego fue enviado a los predios, sera evidente que por medio de este esclavo se adquirió la posesión de los predios y de los demás esclavos.

49.- EL MISMO; *Definiciones libro II*.- Por medio del esclavo, cuyo usufructo es mío, se adquiere para mí la posesión alcanzada con cosa mía o con el trabajo del esclavo, porque también es poseído naturalmente por el usufructuario, y esta posesión se asemeja mucho a la de derecho.

§ 1.- Los que están bajo la potestad de otro pueden retener los bienes del peculio, pero no pueden tenerlos o poseerlos, porque la posesión no es cosa solamente del cuerpo, sino también de derecho.

§ 2.- Aunque por medio de procurador se adquiere la posesión para el que lo ignora, y la usucapión le compete al que no sabe, sin embargo, la acción de evicción no se le da al dueño contra el vendedor, contra la voluntad del procurador, pero se le obliga a cederla por la acción de mandato.

50.- HERMOGENIANO; *Epitome del Derecho, libro V*.- Por medio del que yo, inducido por justificado error, creo que es hijo mío y que está bajo mi potestad, no se adquiere para mí por virtud de cosa mía no la posesión, ni el dominio, ni otra cualquier cosa.

§ 1.- Por medio del esclavo que anda fugitivo, si ni fuera poseído por otro, ni él se creyera que es libre, se adquiere para nosotros la posesión.

51.- JAVOLENO; *Doctrina de las obras póstumas de Labeón, libro V*.- Labeón dice, que de algunas cosas adquirimos la posesión con el ánimo; por ejemplo, si yo hubiere comprado un montón de leña, y el vendedor me hubiere mandado que me lo llevara; tan pronto como yo le hubiese puesto guarda se considera que se me entregó; el mismo derecho se observa, habiéndose vendido vino, cuando todas las

utrum mihi an et cuilibet iusserim custodia tradatur. In eo puto hanc quaestionem consistere, an, etiamsi corpore acervus aut amphorae adprehensae non sunt, nihilo minus traditae videantur: nihil video interesse, utrum ipse acervum an mandato meo aliquis custodiat: utrobique animi quodam genere possessio erit aestimanda.

52.- VENULEIUS; *libro I, Interdictorum*.- Permisceri causas possessionis et usus fructus non oportet, quemadmodum nec possessio et proprietates misceri debent: nam neque impediri possessionem, si alius fruatur, neque alterius fructum amputari, si alter possideat.

§ 1.- Eum, qui aedificare prohibeatur, possidere quoque prohiberi manifestum est.

§ 2.- Species inducendi in possessionem alicuius rei est prohibere ingrediendi vim fieri: statim enim cedere adversarium et vacuam relinquere possessionem iubet, quod multo plus est quam restituere.

53.- IDEM; *libro V, Interdictorum*.- Adversus extraneos vitiosa possessio prodesse solet.

is an actual delivery, because it makes no difference whether I order the custody of the property to be delivered to me, or to someone else. I think that the question in this case is, that even if the pile of wood or the jars have not been actually handled, they should, nevertheless, be considered to have been delivered. I do not see that it makes any difference whether I, myself, take charge of the pile of wood, or someone else does so by my direction. In both instances, whether or not possession was obtained must be determined by the character of the intention.

52.- VENULEIUS; *Interdicts, Book I*.- The titles to the possession and usufruct of property must not be confused, just as possession and ownership should not be intermingled. For possession is prevented if another has the use and enjoyment, nor can the usufruct of one person be computed if another is in possession of the property.

§ 1.- It is clear that when anyone is forbidden to build, he is also forbidden to retain possession.

§ 2.- One method of placing a person in possession of property is to prohibit any violence being manifested toward him when he enters upon it. For the judge orders the adverse party immediately to surrender and relinquish possession, which is much more decisive than to order him merely to restore it.

53.- THE SAME; *Interdicts, Book V*.- Possession which is defective is usually only advantageous as against strangers.

ánforas del vino estuviesen juntas a la vista. Pero veamos, dice, si esta misma no sea una entrega corporal, porque nada importa que la cosa se me entregue a mí en custodia, o a aquél a quien yo hubiese mandado. Yo opino que en esto la cuestión consiste en que aun cuando no se haya tomado corporalmente el montón, o las ánforas, se considere, sin embargo, que se entregaron; y no veo que haya diferencia alguna entre que el montón lo custodie yo mismo, u otro por mi mandato; porque en uno, otro caso se habrá de estimar que hay posesión con cierta especie de ánimo de poseer.

52.- VENULEYO; *Interdictos, libro I*.- No conviene que se mezclen las causas de la posesión, y del usufructo, así como tampoco deben mezclarse la posesión y la propiedad; y no se impide la posesión si otro usufructúa, ni se le quita a uno el usufructo si otro poseyera.

§ 1.- Es evidente que al que se le prohíbe edificar se le prohíbe también que posea.

§ 2.- Es una especie de poner en posesión de alguna cosa prohibir que se le haga violencia al que entre en ella, porque manda que la ceda inmediatamente al adversario, y que deje vacua la posesión; que es mucho mas que restituirla.

53.- EL MISMO; *Interdictos, libro V*.- Contra los extraños suele aprovechar la posesión viciosa.

TÍTULO III

DE USURPATIONIBUS ET
USUCAPIONIBUS

§ 1.- GAIUS; *libro XXI, ad Edictum provinciale*.- Bono publico usucapio introducta est, ne scilicet quarundam rerum diu et fere semper incerta dominia essent, quum sufficeret dominis ad inquirendas res suas statuti temporis spatium.

TITLE III

CONCERNING THE INTERRUPTION OF
PRESCRIPTION, AND USUCAPTION

1.- GAIUS; *On the Provincial Edict, Book XXI*.- Usucaption was introduced for the public welfare, and especially in order that the ownership of certain property might not remain for a long time, and almost forever, undetermined; as a sufficient time is granted

TÍTULO III

DE LAS USURPACIONES
Y USUCAPIONES

1.- GAYO; *Comentarios al Edicto provincial, libro XXI*.- La usucapición fue introducida por el bien público, a saber, para que el dominio de algunas cosas no fuese largo tiempo, y casi siempre, incierto, pues a los dueños les basta el espacio de tiempo

to owners to make inquiry after their property.

establecido para buscar sus propias cosas.

2.- PAULUS; *libro LIV, ad Edictum*.- Usurpatio est usucapionis interruptio: oratores autem usurpationem frequentem usum vocant.

2.- PAULUS; *On the Edict, Book LIV*.- Usurpation is the interruption of usucaption. Orators call usucaption frequent use.

2.- PAULO; *Comentarios al Edicto, libro LIV*.- La usurpación es la interrupción de la usucapión; mas los oradores llaman a la usurpación uso frecuente.

3.- MODESTINUS; *libro V, Pandectarum*.- Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti.

3.- MODESTINUS; *Pandects, Book V*.- Usucaption is the addition of ownership by means of continuous possession for a time prescribed by law.

3.- MODESTINO; *Pandectas, libro V*.- La usucapión es la agregación del dominio mediante la continuación de la posesión por el tiempo determinado en la ley.

4.- PAULUS; *libro LIV, ad Edictum*.- Sequitur de usucapione dicere. Et hoc ordine eundum est, ut videamus, quis potest usucapere et quas res et quanto tempore.

4.- PAULUS; *On the Edict, Book LIV*.- In the next place, we must speak of usucaption; and, in doing so, we must proceed in regular order, and examine who can acquire property by usucaption, what property can be acquired in this manner, and what time is necessary.

4.- PAULO; *Comentarios al Edicto, libro LIV*.- Sigue que se hable de la usucapión; y se ha de proceder con este orden, de suerte que veamos quién puede usucapir, y qué cosas, y en cuánto tiempo.

§ 1.- Usucapere potest scilicet pater familias. Filii familias et maxime miles in castris adquisitum usucapiet.

§ 1.- The head of a household can acquire by usucaption; a son under paternal control can also do so; and this is especially the case where, as a soldier, he obtains by usucaption property acquired during military service.

§ 1.- Puede usucapir el padre de familia; el hijo de familia, y especialmente el militar, usucapirá lo adquirido en los campamentos.

§ 2.- Pupillus si tutore auctore coeperit possidere, usucapit: si non tutore auctore possideat et animum possidendi habeat, dicemus posse eum usucapere.

§ 2.- A ward can acquire property by usucaption if he takes possession of it with the consent of his guardian. If he takes possession without the consent of his guardian, but still has the intention of doing so, we say that he can acquire the property by usucaption.

§ 2.- El pupilo adquiere por usucapión, si hubiere comenzado a poseer con la autoridad del tutor; si no poseyera con la autoridad del tutor, y tuviera el ánimo de poseer, diremos que él puede usucapir.

§ 3.- Furiosus quod ante furorem possidere coepit, usucapit. Sed haec persona ita demum usucapere potest, si ex ea causa possideat, ex qua usucapio sequitur.

§ 3.- An insane person, who takes possession before his insanity appears, acquires the property by usucaption; but such a person can only acquire it in this manner if he has possession by a title through which usucaption may result.

§ 3.- El furioso adquiere por usucapión lo que comenzó a poseer antes de su locura; pero esta persona puede usucapir solamente si poseyera en virtud de una causa por la cual sigue la usucapión.

§ 4.- Servus pro herede possidere non potest.

§ 4.- A slave cannot hold possession as an heir.

§ 4.- El esclavo no puede poseer como heredero.

§ 5.- Fructus et partus ancillarum et fetus pecorum, si defuncti non fuerunt, usucapi possunt.

§ 5.- If the crops, the children of slaves, and the increase of flocks did not belong to the deceased, they can be acquired by usucaption.

§ 5.- Los frutos, los partos de las esclavas, y las crías de los ganados, si no fueron del difunto, pueden ser usucapidos.

§ 6.- Quod autem dicit lex Atinia, ut res furtiva non usucapiatur, nisi in potestatem eius, cui subrepta est, revertatur, sic acceptum est, ut in domini potestatem

§ 6.- The Atinian Law provides that stolen property cannot be acquired by usucaption, unless it is restored to the control of the person from whom it

§ 6.- Mas lo que dice la ley Atinia, que la cosa hurtada no se adquiere por usucapión, si no volviera a poder de aquel a quien le fue sustraída, se entendió

debeat reverti, non in eius utique, cui subreptum est. Igitur creditori subrepta et ei, cui commodata est, in potestatem domini redire debet.

§ 7.- Labeo quoque ait, si res peculiaris servi mei subrepta sit me ignorante, deinde eam nactus sit, videri in potestatem meam redisse: commodius dicitur, etiamsi sciero, redisse eam in meam potestatem (nec enim sufficit, si eam rem, quam perdidit ignorante me, servus adprehendat): si modo in peculio eam esse volui: nam si nolui, tunc exigendum est, ut ego facultatem eius nactus sim.

§ 8.- Ideoque et si servus meus rem mihi subriperit, deinde eandem loco suo reponat, poterit usucapi, quasi in potestatem meam redierit, utique si nescii: nam si scivi, exigimus, ut redisse sciam in meam potestatem.

§ 9.- Item si eam rem, quam servus subriperit, peculiari nomine teneat, non videri in potestatem meam reversam Pomponius ait, nisi ita habere coeperimus, quemadmodum habuimus, antequam subriperetur, aut, quum rescissemus, in peculio eum habere concessimus: item Labeo.

§ 10.- Si rem, quam apud te deposueram, lucri faciendi causa vendideris, deinde ex paenitentia redemeris et eodem statu habeas: sive ignorante me sive sciente ea gesta sint, videri in potestatem meam redisse secundum Proculi sententiam, quae et vera est.

§ 11.- Si pupilli res subrepta sit, sufficere dicendum est, si tutor eius sciat redisse eam in domum pupilli: et si furioso, sufficere curatores scire.

was stolen; and this must be understood to mean that it must be restored to the owner, and not to him from whom it was secretly taken. Therefore, if property is stolen from a creditor to whom it was lent or pledged, it should be returned to the owner.

§ 7.- Labeo also says that, if the peculium of my slave is stolen without my knowledge, and he afterwards recovers it, it will be held to have been restored to my control. It is more accurate to say, provided I was aware that the property had been returned to me. For it is not sufficient for the slave merely to recover the property which he had lost without my knowledge, but I must also have intended it to form part of his peculium, for if I did not wish this to be done, it will then be necessary for me to obtain actual control of it.

§ 8.- Hence, if my slave steals anything from me, and afterwards returns the article to its place, it can be acquired by usucaption as having been restored to my control, just as if I did not know that it had been stolen; for if I did know it, we require that I should be aware that it had been returned to me.

§ 9.- Moreover, if the slave should retain as part of his peculium the same property which he stole, it will not be considered to have been returned to me (as is stated by Pomponius), unless I have possession of it in the same way that I did before it was stolen; or if, when I learned that it had been taken, I consented that the slave should include it in his peculium.

§ 10.- Labeo says that if I deposit any property with you, and you sell it for the sake of gain, and then, having repented, you repurchase it, and retain it in the same condition in which it formerly was, whether I am ignorant or aware of the transaction, it will be considered to have been restored to my control, according to the opinion of Proculus, which is correct.

§ 11.- Where the property of a ward is stolen, it must be held to be sufficient if his guardian was aware that it had been returned to the house of the ward. In the case of an insane person, it will be

de modo que deba volver a poder de su dueño, no ciertamente al de aquel, a quien le fue hurtada. Así, pues, substraída a un acreedor, y a aquel a quien le fue dada en comodato, debe volver a poder de su dueño.

§ 7.- También dice Labeón, que si ignorándolo yo hubiera sido hurtada una cosa del peculio de mi esclavo, y después la hubiera éste recobrado, se considera que volvió a mi poder; mas bien se dice, que, también si yo lo hubiere sabido, volvió ella a mi poder. Porque no basta que ignorándolo yo mi esclavo recobre la cosa que perdió, si quise que fuera del peculio; porque si no lo quise, entonces se ha de exigir que yo haya alcanzado la posesión de ella.

§ 8.- Y por esto, también si un esclavo mío me hubiere hurtado una cosa, y luego la volviera a poner en su lugar, podrá ser usucapida, como si hubiere vuelto a mi poder; esto, ciertamente si no lo supe; porque si lo supe, exigimos que yo sepa que volvió a mi poder.

§ 9.- Asimismo, si la cosa que el esclavo hubiere substraído la tuviera él como siendo del peculio, dice Pomponio que no se considera que volvió a mi poder, si no la comenzáremos a tener del modo como la tuvimos antes que fuese substraída, o, habiéndolo sabido nosotros, concedimos que él la tuviera en el peculio.

§ 10.- También dice Labeón, que si para realizar un lucro hubieres vendido la cosa, que yo hubiere depositado en tu poder, y arrepintiéndote después la hubieses rescatado, y la tuvieses en el mismo estado, ya si esto haya sido hecho ignorándolo yo, ya si sabiéndolo, se considera que volvió a mi poder, según el parecer de Próculo; que también es verdadero.

§ 11.- Si hubiera sido substraída cosa de un pupilo, se ha de decir que basta, si lo supiera su tutor, que haya vuelto ella a la casa del pupilo; y si se trata de un furioso, basta que lo sepan los curadores.

sufficient if his curators know that the property has been returned.

§ 12.- Tunc in potestatem domini redisse dicendum est, quum possessionem eius nactus sit iuste, ut avelli non possit, sed et tamquam suae rei: nam si ignorans rem mihi subreptam emam, non videri in potestatem meam reversam.

§ 13.- Sed et si vindicavero rem mihi subreptam et litis aestimationem accepero, licet corporaliter eius non sim nactus possessionem, usucapietur.

§ 14.- Idem dicendum est etiam, si voluntate mea alii tradita sit.

§ 15.- Heres, qui in ius defuncti succedit, licet apud eum ignorantem ancillam furtivam esse conceperit ea et pepererit, non tamen usucapiet.

§ 16.- De illo quaeritur, si servus meus ancillam, quam subripuit, pro libertate sua mihi dederit, an partum apud me conceptum usucapere possim. Sabinus et Cassius non putant, quia possessio, quam servus vitiose nactus sit, domino noceret, et hoc verum est.

§ 17.- Sed et si, ut servum meum manumitterem, alius mihi furtivam ancillam dederit eaque apud me conceperit et pepererit, usu me non capturum. idemque fore etiam, si quis eam ancillam mecum permutasset aut in solutum dedisset, item si donasset.

§ 18.- Si antequam pariat, alienam esse rescierit emptor, diximus non posse eum usucapere: quod si

§ 12.- Property must be considered to have been restored to the control of the owner when he recovers possession of it in such a way that he cannot be deprived of it. This must be done just as if the property was his; for if I purchase an article, not knowing that it has been stolen from me, it will not be held to have been restored to my control.

§ 13.- Even if I should bring suit to recover property which has been stolen from me, and I accept payment of the amount at which it was appraised in court, it can be acquired by usucaption, even though I did not obtain actual possession of it.

§ 14.- The same rule must be said to apply even if the stolen property has been delivered to another with my consent.

§ 15.- An heir who succeeds to the rights of the deceased cannot acquire by usucaption a female slave whose mother had been stolen, and was found among the property of the deceased, provided the latter was not aware of the fact, if she conceived and brought forth the child while in his possession.

§ 16.- If my slave steals a female slave and gives her to me in return for his freedom, the question arises whether I can acquire by usucaption the child of said female slave who conceived while in my possession. Sabinus and Cassius do not think that I can, because the illegal possession which is obtained by the slave would prejudice his master; and this is correct.

§ 17.- If, however, anyone gives me a female slave who has been stolen, in order to induce me to manumit my slave, and the female slave conceives and has a child while in my possession, I cannot acquire that child by usucaption. The same rule will also apply if anyone gives me the said female slave in exchange, or by way of payment, or as a present.

§ 18.- If the purchaser ascertains before she has the child that the female slave belongs to another, we say

§ 12.- Se ha de decir que la cosa volvió a poder del dueño, cuando haya adquirido justamente su posesión, de modo que no se le pueda quitar, sino como de cosa suya; porque si ignorando yo que la cosa me había sido hurtada, la comprare, no se considera que volvió a mi poder.

§ 13.- Pero también si hubiere yo reivindicado una cosa que me había sido sustraída, y hubiere recibido la estimación del litigio, aunque corporalmente no haya yo alcanzado la posesión de ella, será usucapida.

§ 14.- Lo mismo se ha de decir, aunque por mi voluntad haya sido entregada a otro.

§ 15.- El heredero, que sucedió en el derecho del difunto, aunque, ignorando él que una esclava era hurtada, hubiere ésta concebido y parido en su poder, sin embargo, no usucapirá.

§ 16.- Se pregunta, si, habiéndome dado un esclavo mío por su libertad una esclava que él hurtó, podría yo usucapir el parto concebido en mi poder. Sabino y Cassio opinan que no, porque la posesión, que el esclavo hubiera alcanzado viciosamente, le perjudicaría al señor; y esto es verdad.

§ 17.- Pero si para que yo manumitiese a un esclavo mío otro me hubiere dado una esclava hurtada, y ésta hubiere concebido y parido en mi poder yo no usucapiré. Y lo mismo habrá de ser también, si alguno hubiese permutado conmigo una esclava, o me la hubiese dado en pago, y si me la hubiese donado.

§ 18.- Si antes que pariese, hubiere sabido el comprador que era ajena, hemos dicho que él no puede

nescierit, posse. Quod si, quum iam usucaperet, cognoverit alienam esse, initium usucapionis intueri debemus, sicut in emptis rebus placuit.

§ 19.- Lana ovium furtivarum si quidem apud furem detonsa est, usucapi non potest, si vero apud bonae fidei emptorem, contra: quoniam in fructu est, nec usucapi debet, sed statim emptoris fit. Idem in agnis dicendum, si consumpti sint, quod verum est.

§ 20.- Si ex lana furtiva vestimentum feceris, verius est, ut substantiam spectemus, et ideo vestis furtiva erit.

§ 21.- Si rem pignori datam debitor subripuerit et vendiderit, usucapi eam posse cassius scribit, quia in potestatem domini videtur pervenisse, qui pignori dederit, quamvis quum eo furti agi potest: quod puto rectius dici.

§ 22.- Si tu me vi expuleris de fundi possessione nec adprehenderis possessionem, sed Titius in vacuum possessionem intraverit, potest longo tempore capi res: quamvis enim interdictum Unde vi locum habeat, quia verum est vi me deiectionem, non tamen verum est et vi possessionem.

§ 23.- Ceterum etiamsi mala fide fundum me possidentem deieceris et vendideris, non poterit capi, quoniam verum est vi possessionem esse licet non a domino.

§ 24.- Idem dicendum est in eo, qui eum expulit qui

that he cannot acquire the child by usucaption, but he can do so if he was not aware of this. If, however, he should learn that she belongs to someone else, when he had already begun to acquire the child by usucaption; we must take into consideration the beginning of the usucaption, as has been decided in the case of property that has been purchased.

§ 19.- If stolen sheep have been sheared while in possession of the thief, the wool cannot be acquired by usucaption. The rule is otherwise, however, in the case of a bona fide purchaser, as there is no need of usucaption, since the wool is a profit, the right to which immediately vests in the purchaser. The same rule can be said to apply to lambs, if they have been disposed of. This is true.

§ 20.- If you make a garment of stolen wool, the better opinion is that we should consider the original material, and therefore the garment is stolen property.

§ 21.- If a debtor steals anything given by him in pledge, and sells it, Cassius says that it can be acquired by usucaption, because it is considered to have come under the control of the owner who pledged it, although an action for theft can be brought against him. I think that this opinion is perfectly correct.

§ 22.- If you forcibly deprive me of the possession of land, and you yourself do not take possession, but Titius, finding it unoccupied, does, he can acquire it by usucaption through lapse of time, for although it is true that an interdict on the ground of violence will lie, because I have been forcibly ejected; still, it is not true that Titius obtained possession by violence.

§ 23.- But if you should eject me from land which I possess in bad faith, and sell it, it cannot be acquired by usucaption, for while it is true that possession has been obtained by force, this has not been done by the owner.

§ 24.- The same rule must be said to apply to the

usucapir; pero que si no lo hubiere sabido, podía; pero si cuando ya hubiese usucapido hubiere sabido que era ajena, debemos mirar al comienzo de la usucapión, como se determinó respecto a las cosas compradas.

§ 19.- La lana de las ovejas hurtadas, si verdaderamente fue esquilada en poder del ladrón no puede ser usucapida; pero si en poder del comprador de buena fe, al contrario, porque está comprendida en los frutos, y no debe ser usucapida, sino que inmediatamente se hace del comprador. Lo mismo se ha de decir en cuanto a los corderos, si hubieran sido consumidos; lo que es verdad.

§ 20.- Si con lana hurtada hubieres hecho un vestido, es más cierto que hemos de atender a la materia; y por esto el vestido será como hurtado.

§ 21.- Si el deudor hubiere hurtado y vendido la cosa dada en prenda, escribe Cassio que puede ella ser usucapida, porque se considera que llegó a poder del dueño, que la dió en prenda, aunque puede ejercitarse contra éste la acción de hurto; lo que opino que se dice con más razón.

§ 22.- Si me hubieres expulsado a la fuerza de la posesión de un fundo, y no hubieres tomado la posesión, sino que Ticio hubiere entrado en la vacua posesión del mismo, la cosa puede ser usucapida por el transcurso de largo tiempo; porque aunque tenga lugar el interdicto *Unde vi*, porque es verdad que fui echado a la fuerza, no es, sin embargo, verdad que se haya poseído a la fuerza.

§ 23.- Pero aunque me hubieres echado del fundo que yo poseía con mala fe y lo hubieres vendido, no podrá ser usucapido, porque es verdad que fue poseído por fuerza, aunque no por el dueño.

§ 24.- Lo mismo se ha de decir respecto al que

pro herede possidebat, quamvis sciat esse hereditarium.

§ 25.- (Si fundum alienum bona fide possidentem quis sciens, esse alienum, expulerit, usucapere non potest), quoniam vi possidet.

§ 26.- Si dominus fundi possessorem vi deiecerit, Cassius ait non videri in potestatem eius redisse, quando interdicto Unde vi restitutus sit possessionem.

§ 27.- Si viam habeam per tuum fundum et tu me ab ea vi expuleris, per longum tempus non utendo amittam viam, quia nec possideri intellegitur ius incorporale nec de via quis (id est mero iure) detruditur.

§ 28.- Item si occupaveris vacuum possessionem, deinde venientem dominum prohibueris, non videberis vi possedissee.

§ 29.- Libertatem servitutium usucapi posse verius est, quia eam usucapionem sustulit lex Scribonia, quae servitutem constituebat, non etiam eam, quae libertatem praestat sublata servitute. Itaque si, quum tibi servitutem deberem, ne mihi puta liceret altius aedificare, et per statutum tempus altius aedificatum habuero, sublata erit servitus.

5.- GAIUS; *libro XXI, ad Edictum provinciale*.- Naturaliter interruptitur possessio, quum quis de possessione vi deicitur vel alicui res eripitur. Quo casu non adversus eum tantum, qui eripit, interruptitur possessio, sed adversus omnes. Nec eo casu quicquam interest, is qui usurpaverit dominus

case of one who ejected a person having possession as the heir, although he knew that the land formed part of an estate.

§ 25.- If one man should knowingly eject another who is in bona fide possession of land belonging to someone else, he cannot obtain it by usucaption, because he forcibly obtained possession.

§ 26.- Cassius says that if the owner of land forcibly ejects the party in possession, the land will not be considered to have again been brought under his control, as he who was ejected can recover possession of it by means of an interdict based on violence.

§ 27.- If I have a right of way through your land, and you forcibly prevent me from using it, I will lose the right of way by not making use of it for a long time, because an incorporeal right is not considered susceptible of possession; and no one can be said to be deprived of a right of way, that is to say, of a mere servitude, in this manner.

§ 28.- Likewise, if you take possession of land which is vacant, and afterwards prevent the owner from entering upon the same, you will not be considered to have taken forcible possession of the property.

§ 29.- It is true that a release of a servitude can be acquired by usucaption, because the Scribonian Law, which established a servitude, prohibited the usucaption of one; but it does not grant a release if the servitude has already been extinguished. Hence, if I owe you a servitude, for instance, that which prevents me from building my house any higher, and I have kept it built higher for the prescribed time, the servitude will be extinguished.

5.- GAIUS; *On the Provincial Edict, Book XXI*.- Possession is naturally interrupted when anyone is forcibly deprived of it, or the property is stolen from him; in which instance possession is interrupted, not only with reference to him who stole the property, but with reference to everyone else. Nor, under these

expulsó al que lo poseía como heredero, aunque sepa que es de la herencia.

§ 25.- Si al que de buena fe poseía un fundo ajeno lo hubiere expulsado uno que sabía que era ajeno, no puede éste usucapirlo, porque posee con violencia.

§ 26.- Si el dueño de un fundo hubiere echado de él por la fuerza al poseedor, dice Cassio, que no se considera que volvió a su poder, puesto que habrá de restituir la posesión por el interdicto *Unde vi*.

§ 27.- Si yo tuviera la servidumbre de vía por tu fundo, y tú me hubieres expulsado de ella a la fuerza, perderé la servidumbre de vía no usando de ella por largo tiempo, porque no se entiende que se posee un derecho incorpóreo, ni nadie es excluido, a saber, por mero derecho, de la servidumbre de vía.

§ 28.- Asimismo, si hubieres ocupado una vacua posesión, y luego al entrar en ella el dueño se lo hubieres prohibido, no se considerará que poseíste con violencia.

§ 29.- Es más cierto que se puede usucapir la libertad de las servidumbres, porque la ley Scribonia suprimió aquella usucapición, que constituía a servidumbre, no también aquella que da la libertad quitando la servidumbre. Y así, si debiéndote yo la servidumbre, por ejemplo, de que no me sea lícito edificar más alto, hubiere yo tenido edificado más alto durante el tiempo establecido, se habrá extinguido la servidumbre.

5.- GAYO; *Comentarios a Edicto provincial, libro XXI*.- La posesión se interrumpe naturalmente, cuando alguno es echado de la posesión a la fuerza, o cuando a alguno se le arrebató una cosa; en cuyo caso se interrumpe la posesión no solamente contra el que arrebató la cosa, sino contra todos; y en este caso no

sit nec ne: ac ne illud quidem interest, pro suo quisque possideat an ex lucrativa causa.

6.- ULPIANUS; *libro XI, ad Edictum*.- In usucapionibus non a momento ad momentum, sed totum postremum diem computamus.

7.- IDEM; *libro XXVII, ad Sabinum*.- Ideoque qui hora sexta diei kalendarum ianuariarum possidere coepit, hora sexta noctis pridie kalendas ianuarias implet usucapionem.

8.- PAULUS; *libro XII, ad Edictum*.- Labeo Neratius responderunt ea, quae servi peculiariter nanti sunt, usucapi posse, quia haec etiam ignorantes domini usucapiunt: idem Iulianus scribit.

§ 1.- Sed eum, qui suo nomine nihil usucapere potest, ne per servum quidem posse pedius scribit.

9.- GAIUS; *libro IV, ad Edictum provinciale*.- Usucapionem recipiunt maxime res corporales, exceptis rebus sacris, sanctis, publicis populi Romani et civitatum, item liberis hominibus.

10.- ULPIANUS; *libro XVI, ad Edictum*.- Si aliena res bona fide empta sit, quaeritur, ut usucapio currat, utrum emptionis initium ut bonam fidem habeat exigimus, an traditionis. et optinuit Sabini et Cassii sententia traditionis initium spectandum.

§ 1.- Hoc iure utimur, ut servitutes per se nusquam longo tempore capi possint, quum aedificiis possint.

circumstances, does it make any difference whether he who obtained legal possession is the owner of the property or not. Nor is it material whether the person in question possesses the property as the owner, or merely for the purpose of profiting by it.

6.- ULPIANUS; *On the Edict, Book XI*.- In the case of usucaption, the time is not reckoned from moment to moment, but we compute the entire last day of the prescription.

7.- THE SAME; *On Sabinus, Book XXVII*.- Therefore, anyone who begins to have possession at the sixth hour of the day of the Kalends of January will complete the usucaption on the sixth hour of the night preceding the Kalends of January.

8.- PAULUS; *On the Edict, Book XII*.- Labeo and Neratius held that all the property which slaves have acquired as their peculium can be obtained by usucaption, because it is obtained in this way by their owners, even without the knowledge of the latter. Julianus says the same thing.

§ 1.- Pedius says that a person who cannot acquire anything by usucaption in his own name cannot acquire it by his slave.

9.- GAIUS; *On the Provincial Edict, Book IV*.- Corporeal property is especially subject to usucaption, with the exception of sacred and holy things, and such as are the public property of the Roman people, and of cities, as well as persons who are free.

10.- ULPIANUS; *On the Edict, Book XVI*.- Where property belonging to another has been purchased in good faith, the question arises in order that the usucaption may run, whether, for the preservation of good faith, it should date from the beginning of the purchase, or from the time of delivery. The opinion of Sabinus and Cassius, which is that it dates from the time of delivery, has been adopted.

§ 1.- It is our practice that servitudes can never, of themselves, be acquired by usucaption, but that this

importa nada que el que la haya usurpado sea, o no, el dueño; y tampoco importa ciertamente que uno posea la cosa como suya, o por causa lucrativa.

6.- ULPIANO; *Comentarios al Edicto, libro XI*.- En las usucapiones no computamos el tiempo de momento a momento, sino todo el último día;

7.- EL MISMO; *Comentarios a Sabino, libro XXVII*.- Y por esto, el que comenzó a poseer a la hora sexta del día de las kalendas de Enero, completa la usucapición a la hora sexta de la noche de la víspera de las kalendas de Enero.

8.- PAULO; *Comentarios al Edicto, libro XII*.- Labeón y Neracio respondieron, que las cosas que los esclavos adquirieron como de su peculio podían ser usucapidas, porque las adquieren por usucapición los dueños aun ignorándolo; lo mismo escribe Juliano.

§ 1.- Pero escribe Pedio, que el que en su propio nombre no puede usucapir cosa alguna, tampoco puede ciertamente por medio del esclavo.

9.- GAYO; *Comentarios al Edicto provincial, libro IV*.- Admiten principalmente la usucapición las cosas corporales, exceptuándose las cosas sagradas, las santas, las públicas del pueblo Romano, y de las ciudades, y también los hombres libres.

10.- ULPIANO; *Comentarios al Edicto, libro XVI*.- Si una cosa ajena hubiera sido comprada de buena fe, se pregunta, ¿para que corra la usucapición exigimos acaso que tenga buena fe el comienzo de la compra, o el de la entrega? Y prevaleció la opinión de Sabino y de Cassio, que atendida al comienzo de la entrega.

§ 1.- Observamos este derecho, que las servidumbres no se pueden usucapir nunca por sí con el

§ 2.- Scaevola libro undecimo Quaestionum scribit Marcellum existimasse, si bos apud furem concepit vel apud furis heredem pariatque apud furis heredem, usucapi ab herede distractum iuvencum non posse: sic, inquit, quemadmodum nec ancillae partus. Scaevola autem scribit se putare usucapere posse et partum: nec enim esse partum rei furtivae partem. Ceterum si esset pars, nec si apud bonae fidei emptorem peperisset, usucapi poterat.

11.- PAULUS; *libro XIX, ad Edictum*.- Neque servus neque per servum dominus, qui apud hostes est, possidet.

12.- IDEM; *libro XXI, ad Edictum*.- Si ab eo emas, quem Praetor vetuit alienare, idque tu scias, usucapere non potes.

13.- IDEM; *libro V, ad Plautium*.- Pignori rem acceptam usu non capimus, quia pro alieno possidemus.

§ 1.- Eum, qui a furioso bona fide emit, usucapere posse responsum est.

§ 2.- Si mandavero tibi, ut fundum emas, ex ea causa traditum tibi diutina possessione capis, quamvis possis videri non pro tuo possidere, quum nihil intersit, quod mandati iudicio tenearis.

14.- IDEM; *libro XIII, ad Plautium*.- Id tempus venditoris prodest emptori, quo antequam venderet possedit: nam si postea nactus est possessionem venditor, haec possessio emptori non proficiet.

can be done along with the buildings upon which they are imposed.

§ 2.- Scaevola, in the Eleventh Book of Questions, says that Marcellus thought that if a cow should conceive while in the possession of a thief, or of his heir, and bring forth while in the possession of his heir, the calf, separated from its mother, cannot be acquired by usucaption by the heir; just as he says this cannot be done with the child of a female slave. Scaevola, however, states that, in his opinion, the child can be acquired by usucaption, because it does not form part of the stolen property. If, however, it should be a part of it, it can be acquired by usucaption, if it was born while in possession of a bona fide purchaser.

11.- PAULUS; *On the Edict, Book XIX*.- Neither a slave, nor a master who is in the power of the enemy, can acquire possession through the medium of his slave.

12.- THE SAME; *On the Edict, Book XXI*.- If you purchase property from one whom the Praetor has forbidden to alienate it, and you are aware of the fact, you cannot acquire it by usucaption.

13.- THE SAME; *On Plautius, Book V*.- We cannot acquire by usucaption property which has been taken in pledge, because we possess it in behalf of another.

§ 1.- It has been decided that anyone who has purchased property in good faith from an insane person can acquire it by usucaption.

§ 2.- If I direct you to buy a tract of land, you can obtain it by usucaption, after it has been delivered to you for this reason, although you cannot be considered to possess it as yours, as the fact that you are liable to an action on mandate makes no difference.

14.- THE SAME; *On Plautius, Book XIII*.- The time during which the vendor held property before selling it is an advantage to the purchaser, for if the vendor obtained possession afterwards, this will be

transcurso de largo tiempo, pero pueden serlo juntamente con los edificios.

§ 2.- Escribe Scévola en el libro undécimo de las Cuestiones, que opinó Marcelo, que si una vaca se hizo preñada en poder del ladrón, o en el del heredero del ladrón, y pariese en poder del heredero del ladrón, no se podía usucapir por el heredero el becerro enajenado; así como tampoco el parto de la esclava. Pero escribe Scévola, que él opina que puede usucapir también el parto; porque el parto no forma parte de la cosa hurtada. Mas si formase parte, ni aunque hubiese parido en poder de un comprador de buena fe, podía ser usucapido.

11.- PAULO; *Comentarios al Edicto, libro XIX*.- Ni posee el esclavo, ni por medio del esclavo el señor, que está en poder de los enemigos.

12.- EL MISMO; *Comentarios al Edicto, libro XXI*.- Si le compraras a aquel a quien el Pretor le vedó enajenar, y tú lo sabes, no puedes usucapir.

13.- EL MISMO; *Comentarios a Plautio, libro V*.- No adquirimos por usucapición la cosa dada en prenda, porque la poseemos como ajena.

§ 1.- Se respondió, que el que de buena fe le compró a un furioso, podía usucapir.

§ 2.- Si yo te hubiere mandado que compres un fundo, habiéndosete entregado por esta causa, lo adquieres por la posesión de largo tiempo, aunque se pueda considerar que no lo posees como tuyo porque nada importa que estés obligado por la acción de mandato.

14.- EL MISMO; *Comentarios a Plautio, libro XIII*.- Al comprador le aprovecha el tiempo que el vendedor poseyó antes que vendiera; porque si el vendedor adquirió después la posesión, esta posesión

§ 1.- In re legata in accessione temporis, quo testator possedit, legatarius quodammodo quasi heres est.

15.- IDEM; *libro XV, ad Plautium*.- Si is, qui pro emptore possidebat, ante usucapionem ab hostibus captus sit, videndum est, an heredi eius procedat usucapio: nam interruptitur usucapio, et si ipsi reverso non prodest, quemadmodum heredi eius proderit? Sed verum est eum in sua vita desisse possidere, ideoque nec postliminium ei prodest, ut videatur usucepisse. Quod si servus eius, qui in hostium potestate est, emerit, in pendenti esse usucapionem Iulianus ait: nam si dominus reversus fuerit, intellegi usucaptum: si ibi decesserit, dubitari, an per legem Corneliam ad successores eius pertineat. Marcellus posse plenius fictionem legis accipi, quemadmodum enim postliminio reversus plus iuris habere potest in his, quae servi egerunt, quam his, quae per se vel per servum possidebat, quum ad hostes pervenit. Nam hereditatem in quibusdam vice personae fungi receptum est. ideoque in successoribus locum non habere usucapionem.

§ 1.- Si servus, quem possidebam, fugerit, si pro libero se gerat, videbitur a domino possideri: sed hoc tunc intellegendum est, quum, si adprehensus fuerit, non sit paratus pro sua libertate litigare: nam si paratus sit litigare, non videbitur a domino possideri, cui se adversarium praeparavit.

§ 2.- Si quis bona fide possidens ante usucapionem

of no benefit to the purchaser.

§ 1.- With reference to property which is bequeathed, the legatee is considered to occupy the same position as the heir, so far as the benefit of the time during which the testator possessed the property is concerned.

15.- THE SAME; *On Plautius, Book XV*.- If a person who possessed the property as a purchaser is taken prisoner by the enemy before usucaption has taken place, let us see whether his heir will obtain any benefit from the usucaption, for it is interrupted; and if it is of no advantage to him on his return, how can it profit his heir? It is, however, true that he has ceased to possess the property, and therefore the right of postliminium will not benefit him to the extent that he may be considered to have acquired it by usucaption. If the slave of a person who was in the power of the enemy should purchase property, Julianus says that the usucaption of the same will remain in abeyance; for if the owner returns, the usucaption is understood to have taken place. If, however, the owner should die while in the hands of the enemy, it may be doubted whether the property will belong to his successors under the Cornelian Law. Marcellus thinks that the legal fiction is capable of a broader application, for one who has returned under the law of postliminium, has a better right to things which have been acquired by his slaves than to those which he himself acquired, or which he possessed by means of his slaves before he was captured by the enemy; as it has been decided, in some instances, that the estate takes the place of the person, and therefore that the right of usucaption is transmitted to the heirs of prisoners of war.

§ 1.- If a slave of whom I am in possession should take to flight, and represent himself to be free, he will be considered as still in the possession of his master. This, however, must be understood to apply where, if he is caught, he is not prepared to maintain in court that he is free; for, if he is ready to do so, he will not be considered to be possessed by his master, against whom he is about to appear as an adversary.

§ 2.- If a possessor of property in good faith should

no le aprovechara al comprador.

§ 1.- Tratándose de una cosa legada, el legatario es en cierto modo como heredero en cuanto a la accesión del tiempo que la poseyó el testador.

15.- EL MISMO; *Comentarios a Plautio, libro XV*.- Si el que poseía como comprador hubiera sido aprisionado por los enemigos antes de la usucapición, se ha de ver si le corresponderá a su heredero la usucapición, - porque se interrumpe la usucapición -, y si a él mismo, habiendo vuelto, no le aprovecha, cómo le aprovechará a su heredero. Pero es mas verdadero que el dejó de poseer durante su vida; y por esto no le aprovecha el postliminio, para que se considere que usucapió. Mas si hubiere comprado una cosa el esclavo del que está en poder de los enemigos, dice Juliano que queda pendiente la usucapición; porque si el señor hubiere vuelto, se entiende usucapida la cosa; y si hubiere fallecido en el cautiverio, se duda si por la ley Cornelia les pertenecerá a sus sucesores. Marcelo dice, que se puede admitir mas plenamente la ficción de la ley; porque ¿cómo el que volvió por el postliminio puede tener más de hecho sobre las cosas, que administraron los esclavos, que sobre las que él poseía por sí mismo o por medio de un esclavo, cuando cayó en poder de los enemigos? Porque se admitió que en algunos casos la herencia hace las veces de persona; y por esto, tratándose de los sucesores, no tiene lugar la usucapición.

§ 1.- Si hubiere huido el esclavo que yo poseía y se condujese como libre, se considerará que es poseído por su dueño; pero esto se ha de entender siempre y cuando, si hubiere sido cogido, no estuviera dispuesto a litigar por su libertad; porque si estuviera dispuesto a litigar, no se considerará que es poseído por un dueño contra el cual él se preparó como adversario.

§ 2.- Si alguno poseyendo de buena fe, habiendo

amissa possessione cognoverit esse rem alienam et iterum nanciscatur possessionem, non capiet usu, quia initium secundae possessionis vitiosum est.

§ 3.- Si ex testamento vel ex stipulatu res debita nobis tradatur, eius temporis existimationem nostram intuendam, quo traditur, quia concessum est stipulari rem etiam quae promissoris non sit.

16.- IAVOLENUS; *libro IV, ex Plautio*.- Servi nomine, qui pignori datus est, ad exhibendum quum creditore, non quum debitore agendum est, quia qui pignori dedit, ad usucapionem tantum possidet, quod ad reliquas omnes causas pertinet, qui accepit possidet, adeo ut adici possit et possessio eius qui pignori dedit.

17.- MARCELLUS; *libro XVII, Digestorum*.- Si per errorem de alienis fundis quasi de communibus iudicio communi dividundo accepto ex adiudicatione possidere coeperim, longo tempore capere possum.

18.- MODESTINUS; *libro V, Regularum*.- Quamvis adversus fiscum usucapio non procedat, tamen ex bonis vacantibus, nondum tamen nuntiatis, emptor praedii ex isdem bonis exstiterit, recte diutina possessione capiet: idque constitutum est.

19.- IAVOLENUS; *libro I, Epistolarum*.- Si hominem emisti, ut, si aliqua condicio extitisset, inemptus fieret, et is tibi traditus est et postea condicio emptionem resolvit: tempus, quo apud emptorem fuit, accedere venditori debere existimo, quoniam eo genere retro acta venditio esset redhi-

ascertain that it belongs to another, after having lost possession of it before the time necessary for usucaption has elapsed, and he should obtain possession of it a second time, he cannot acquire it by usucaption, because the beginning of the second possession is defective.

§ 3.- If property to which we are entitled is delivered to us in accordance with the terms of a will, or under a stipulation, we must take into account the time when it was delivered, because property can be made the subject of a stipulation, even if it does not belong to the promisor.

16.- JAVOLENUS; *On Plautius, Book IV*.- When suit is brought for the production of a slave who has been given in pledge, proceedings must be instituted against the creditor, and not against the debtor; for the reason that he who gave the slave in pledge only possesses him by the right of usucaption. In all other respects, however, he who receives property possesses it, and this is true to such an extent that the possession of him who gives property in pledge can also be included.

17.- MARCELLUS; *Digest, Book XVII*.- If, in a case in partition, I begin to hold possession under a judgment rendered by mistake, which has reference to the land of others supposed to be owned in common, I can acquire the said land by holding it for a long time.

18.- MODESTINUS; *Rules, Book V*.- Although usucaption is of no advantage as against the Treasury, it has been decided that where property without an owner has not yet been reported to the Treasury, and a purchaser appears who has bought land forming part of said property, he can legally acquire it by long-continued possession.

19.- JAVOLENUS; *Epistles, Book I*.- If you purchase a slave with the understanding that, if some condition should be complied with, the sale will be void, and the slave is delivered to you, and fulfillment of the condition afterwards annuls the transaction, I think that the time during which the slave was in

perdido la posesión antes de haber usucapido, hubiere sabido que la cosa era ajena, y adquiriese otra vez la posesión, no usucapirá, porque es vicioso el comienzo de la segunda posesión.

§ 3.- Si se nos entregara la cosa debida en virtud de testamento o de estipulación, se ha de atender a nuestra opinión al tiempo en que es entregada, porque se concedió que se estipulara también una cosa, que no fuese del promotor.

16.- JAVOLENO; *Doctrina de Plaucio, libro IV*.- Por razón del esclavo, que fue dado en prenda, se debe ejercitar la acción de exhibición contra el acreedor, no contra el deudor, porque el que dió en prenda posee solamente para la usucapición; y en cuanto se refiere a todas las demás causas, posee el que recibió; de tal modo, que se puede agregar también la posesión del que dió en prenda.

17.- MARCELO; *Digesto, libro XVII*.- Si habiendo aceptado por error el juicio de división de cosa común respecto a fundos ajenos, como si fueran comunes, hubiere yo comenzado a poseer en virtud de la adjudicación, puedo usucapir con el transcurso de largo tiempo.

18.- MODESTINO; *Reglas, libro V*.- Aunque contra el fisco no sea procedente la usucapición, sin embargo, tratándose de bienes vacantes, pero que todavía no hubieren sido denunciados, si uno hubiere sido comprador de un predio de los mismos bienes, lo usucapirá válidamente con la posesión de largo tiempo; y esto se determinó.

19.- JAVOLENO; *Epístolas, Libro I*.- Si compraste un esclavo, de modo que si se hubiese verificado alguna condición se tuviese por no comprado, y después la condición disolvió la compra, estimo que debe agregársele al vendedor el tiempo que estuvo en poder del comprador, porque la venta

bitioni similis, in qua non dubito tempus eius qui redhibuerit venditori accessurum, quoniam ea venditio proprie dici non potest.

20.- IDEM; *libro IV, Epistolarum*.- Possessio testatoris ita heredi procedit, si medio tempore a nullo possessa est.

21.- IDEM; *libro VI, Epistolarum*.- Ei, a quo fundum pro herede diutius possidendo captus eram, locavi eum: an ullius momenti eam locationem existimes, quaero: quod si nullius momenti existimas, an durare nihilo minus usucapionem eius fundi putes. Item quaero, si eidem vendidero eum fundum, quid de his causis, de quibus supra quaesivi, existimes. Respondit: si is, qui pro herede fundum possidebat, domino eum locavit, nullius momenti locatio est, quia dominus suam rem conduxisset: sequitur ergo, ut ne possessionem quidem locator retinuerit, ideoque longi temporis praescriptio non duravit. In venditione idem iuris est, quod in locatione, ut emptio suae rei consistere non possit.

22.- IDEM; *libro VII, Epistolarum*.- Heres et hereditas tametsi duas appellationes recipiunt, unius personae tamen vice funguntur.

23.- IDEM; *libro IX, Epistolarum*.- Eum, qui aedes mercatus est, non puto aliud quam ipsas aedes possidere: nam si singulas res possidere intellegatur, ipsas non possidebit: separatis enim corporibus, ex quibus aedes constant, universitas aedium intellegi non poterit. Accedit eo, quod, si quis singulas res possidere dixerit, necesse erit dicat possessione superficiei temporis de mobilibus statuto locum esse, solum se capturum esse ampliori: quod absurdum est

possession of the purchaser should benefit the vendor, because a sale of this kind is similar to the redhibitory clause for the return of property, which is introduced into contracts for sales; and, in a case of this kind, I have no doubt that the time that the purchaser held the property will benefit the vendor, as properly speaking, no sale took place.

20.- THE SAME; *Epistles, Book IV*.- The possession of a testator will profit the heir if, in the meantime, no one else had possession.

21.- THE SAME; *Epistles, Book VI*.- I rented land to a man against whom I was about to assert my claim, founded on prescription, as an heir. I ask whether you think that this lease has any force or effect. If you think that it has no effect, do you believe that the right of usucaption of said land will, nevertheless, continue to exist? I also ask, if I should sell the land, what is your opinion of the points which I have just raised? The answer was that if he who is in possession of the land, as heir, leased it to the owner of the same, the lease is void, because the owner rented his own land. Hence it follows that the lessor does not retain possession, and prescription based upon long occupancy will not continue to exist. The same rule of law applies to a sale, because, as in the case of a lease, the purchase of one's own property is void.

22.- THE SAME; *Epistles, Book VII*.- An heir and an estate, although they have two different names, are still regarded as one person.

23.- THE SAME; *Epistles, Book IX*.- I do not think that he who has purchased a house possesses anything but the house itself. For if he is considered to possess the different things of which the house is built, he does not possess the house itself; as, after the materials of which it is composed are separated, they cannot be understood to represent the entire house. Add to this, if anyone should say that the separate materials of which the house was composed are

deshecha de esta manera sería semejante a la devolución; en la cual no dudo que el tiempo del que hubiere hecho la devolución se habrá de agregar al vendedor, porque ésta no se puede llamar propiamente venta.

20.- EL MISMO; *Epístolas, libro IV*.- La posesión del testador le favorece al heredero, si la cosa no fue poseída por nadie en el tiempo intermedio.

21.- EL MISMO; *Epístolas, libro VI*.- A aquel, de quien yo había de usucapir un fundo poseyéndolo por largo tiempo como heredero, se lo di en arrendamiento; pregunto, si estimas que este arrendamiento es de algún valor; pero si lo estimas de ningún valor, ¿opinas, que, ello no obstante, continúa la usucapición de este fundo? También pregunto, qué opinas respecto a las causas por las que antes te he preguntado, si al mismo le hubiere yo vendido un fundo. Respondió: si el que poseía el fundo como heredero se lo dió en arrendamiento al dueño, el arrendamiento es de ningún valor, porque el dueño habría tomado en arrendamiento su propia cosa; síguese, por tanto, que ciertamente tampoco el arrendador habrá retenido la posesión; y por esto no continuará la prescripción de largo tiempo. El mismo derecho hay tratándose de venta, que de arrendamiento, de suerte que no puede subsistir la compra de su propia cosa.

22.- EL MISMO; *Epístolas, libro VII*.- El heredero y la herencia, aunque reciben dos denominaciones distintas, hacen, sin embargo, las veces de una sola persona.

23.- EL MISMO; *Epístolas, libro IX*.- El que compró una casa no creo que posea otra cosa más que la misma casa; porque si se entendiere que posee cada cosa, no poseerá la misma casa; porque separadas las cosas de que consta la casa, no se podrá entender que existe la totalidad de la casa; añádase a esto, que, si alguno dijere que posee cada una de las cosas, será necesario que diga que tendría lugar la usucapición aun la posesión de la superficie por el

minime Iuri Civili conveniens est, ut una res diversis temporibus capiatur, ut puta quum aedes ex duabus rebus constant, ex solo et superficie, et universitas earum possessionem temporis immobilium rerum omnium mutet.

§ 1.- Si autem columna evicta fuerit, puto te exempto quum venditore recte acturum et eo genere rem salvam habiturum.

§ 2.- Si autem demolita domus est, ex integro res mobiles possidendae sunt, ut tempore, quod in usucapione rerum mobilium constitutum est, usucapiantur. Et non potes recte uti eo tempore, quo in aedificio fuerunt: nam quemadmodum eas solas et separatas ab aedificio non possedisti, sic nec penes te singulae aut separatae fuerunt et cohaerentibus his in aedificio, depositis aedibus, quae hoc quoque ipsum continent. Neque enim recipi potest, ut eadem res et ut res soli et tamquam mobilis sit possessa.

24.- POMPONIUS; *libro XXIV, ad Quintum Mucium*.- Ubi lex inhibet usucapionem, bona fides possidenti nihil prodest.

§ 1.- Interdum etiamsi non fuerit inchoata usucapio a defuncto, procedit heredi eius: veluti si vitium, quod obstabat non ex persona, sed ex re, purgatum fuerit, ut puta si fisci res esse desierit aut furtiva aut vi possessa.

25.- LICINIUS RUFINUS; *libro I, Regularum*.-

possessed, it will be necessary to hold that there will be ground for the prescription of the movable property composing the house, during the time fixed for that purpose, and that a longer time will be necessary to acquire by usucaption the soil on which it stands. This is absurd, and it is by no means in conformity to the Civil Law that the same thing should be obtained by usucaption at different times; as, for example, since a house is composed of two different things, the soil, and what is erected upon it, that they united should change the time established for the usucaption of all immovable property by long-continued possession.

§ 1.- If you should be judicially deprived of a column forming part of your house, I think that you will be entitled to an action on purchase against the vendor, and, in that way, can hold the entire property.

§ 2.- If, however, the house has been demolished, in order that the movable property may be entirely acquired by usucaption, where it has been in possession for the term prescribed for that purpose, the time during which it composed the building cannot be legally reckoned; for, as you were not in possession of the materials alone and apart from the building, so, the house having been demolished, you cannot separately and distinctly possess the materials of which it was constructed; nor can it be held that the same property was possessed at the same time as both real estate and personalty.

24.- POMPONIUS; *On Quintus Mucius, Book XXIV*.- When the law forbids usucaption, the good faith of the possessor is of no advantage to him.

§ 1.- Sometimes usucaption is an advantage to the heir, even though it was not begun to be acquired by the deceased: as, for instance, where the defect, which does not arise from the person but from the property itself, has been remedied. It arises from the property, for example, where it has ceased to belong to the Treasury, or possession of it has been obtained through theft or violence.

25.- LICINIUS RUFINUS; *Rules, Book I*.-

tiempo establecido en las leyes, y que el suelo lo usucapiría por otro mayor; lo que es absurdo, y de ninguna manera conforme al Derecho Civil que una sola cosa sea usucapida en diversos tiempos, por ejemplo, que constando una casa de dos cosas, de suelo y de superficie, el conjunto de ellas cambie en cuanto a la posesión del tiempo de todas las cosas inmuebles.

§ 1.- Mas si se hubiere hecho evicción de una columna, opino que ejercitarás convenientemente la acción de compra contra el vendedor, y de este modo tendrás salva la cosa.

§ 2.- Pero si la casa fue demolida, las cosas muebles han de ser poseídas por completo, de suerte que sean usucapidas por el tiempo que se estableció para la usucapición de las cosas muebles; y no se puede utilizar válidamente el tiempo que estuvieron en el edificio; porque así como no las poseíste solas y separadas del edificio, así tampoco estuvieron en tu poder cada una o por separado, hallándose unidas al edificio, habiendo sido demolida la casa que también contiene a éste mismo; porque no se puede admitir que una misma cosa sea poseída tanto como cosa inmueble, cuanto como mueble.

24.- POMPONIO; *Comentarios a Quinto Mucio, libro XXIV*.- Cuando la ley prohíbe la usucapición, la buena fe no le aprovecha para nada al que posee.

§ 1.- A veces, aunque no hubiere sido comenzada por el difunto la usucapición, procede para su heredero, por ejemplo, si el vicio, que obstaba, no por la persona, sino por la cosa, hubiere sido purgado; por la cosa, por ejemplo, si la cosa hubiere dejado de ser del fisco, o hurtada, o poseída con violencia.

25.- LICINIO RUFINO; *Reglas, libro I*.- Sin la

Sine possessione usucapio contingere non potest.

26.- ULPIANUS; *libro XXIX, ad Sabinum*.- Numquam superficies sine solo capi longo tempore potest.

27.- IDEM; *libro XXXI, ad Sabinum*.- Celsus libro trigensimo quarto errare eos ait, qui existimarent, cuius rei quisque bona fide adeptus sit possessionem, pro suo usucapere eum posse nihil referre, emerit nec ne, donatum sit nec ne, si modo emptum vel donatum sibi existimaverit, quia neque pro legato neque pro donato neque pro dote usucapio valeat, si nulla donatio, nulla dos, nullum legatum sit, idem et in litis aestimatione placet, ut, nisi vere quis litis aestimationem subierit, usucapere non possit.

28.- POMPONIUS; *libro XVII, ad Sabinum*.- Si servo furiosi vel infantis res tradita sit, usu per eum eas personas capere posse constat.

29.- IDEM; *libro XXII, ad Sabinum*.- Quum solus heres essem, existimarem autem te quoque pro parte heredem esse, res hereditarias pro parte tibi tradidi. propius est, ut usu eas capere non possis, quia nec pro herede usucapi potest quod ab herede possessum est neque aliam ullam habes causam possidendi. Ita tamen hoc verum est, si non ex transactione id factum fuerit. Idem dicimus, si tu quoque existimes te heredem esse: nam hic quoque possessio veri heredis obstat tibi.

30.- IDEM; *libro XXX, ad Sabinum*.- Rerum mixtura facta an usucapionem cuiusque praeedentem interrumpit, quaeritur. Tria autem genera sunt corporum, unum, quod continetur uno spiritu et graece (unitum) enon vocatur, ut homo tignum lapis et similia: alterum, quod ex contingentibus, hoc est pluribus inter se cohaerentibus constat, quod

Usucaption cannot take place without possession.

26.- ULPIANUS; *On Sabinus, Book XXIX*.- A building can never be acquired by lapse of time separate from the ground on which it stands.

27.- THE SAME; *On Sabinus, Book XXXI*.- Celsus, in the Thirty-fourth Book, says that they are mistaken who believe that anyone who has obtained possession of property in good faith can acquire it, by usucaption, as his own; and that it makes no difference whether or not he purchased it, or it was given to him, provided he thinks it was purchased by, or given to him; for the reason that usucaption does not apply to a legacy, a gift, or a dowry, if no donation, dowry, or legacy exists. The same rule is held to be applicable to the case of an appraisal made in court, for if the party did not agree to the appraisal, he cannot acquire the property by usucaption.

28.- POMPONIUS; *On Sabinus, Book XVII*.- It is established that where property is delivered to the slave of an insane person, or an infant, the latter can obtain it by usucaption through the slave.

29.- THE SAME; *On Sabinus, Book XXII*.- If I am the sole heir to an estate, but believe that you are an heir to half of the same, and I deliver half of the estate to you, it is very probable that you cannot acquire the property by usucaption, because what is in possession of an heir cannot be obtained in this way by another, as the heir; and you have no other ground for possession. This is only true when done under the terms of a settlement. We hold that the same rule applies if you think that you are the heir; for, in this instance, the possession of the true heir will prevent you from obtaining the property by usucaption.

30.- THE SAME; *On Sabinus, Book XXX*.- It is asked whether a mixture of different things interrupts the usucaption which has begun to run with reference to each of them. There are three kinds of things which can be divided; first, those which are included in a substance of the same nature, styled by the Greeks (united). That is to say, united, as a slave, a piece of

posesión no puede tener lugar la usucapición.

26.- ULPIANO; *Comentarios a Sabino, libro XXIX*.- Nunca puede ser usucapida con el transcurso de largo tiempo la superficie sin el suelo.

27.- EL MISMO; *Comentarios a Sabino, libro XXXI*.- Dice Celso en el libro trigésimo cuarto, que yerran los que estimen que el que haya alcanzado de buena fe la posesión de una cosa puede usucapirla como suya; y que nada importa que la haya, o no, comprado, o que le haya sido, o no, donada, si estimare que la compró o que le fue donada, porque la usucapición no es válida ni poseyendo a título de legado, ni como donación, ni como dote, si no hubiera ninguna donación, ninguna dote, ni ningún legado. Lo mismo se halla establecido también respecto a la estimación de un litigio, de suerte que si uno no hubiere satisfecho verdaderamente la estimación del litigio, no podrá usucapir.

28. POMPONIO; *Comentarios a Sabino, libro XVII*.- Si la cosa hubiera sido entregada al esclavo de un loco o del que esté en la infancia, es sabido que estas personas pueden usucapir por medio de él.

29.- EL MISMO; *Comentarios a Sabino, libro XXII*.- Siendo yo solo heredero, pero estimando que tú también eras heredero de una parte, te entregué parte de los bienes de la herencia; es más probable que no puedas usucapirlos, porque no puede ser usucapido como heredero lo que se poseyó por el heredero, ni tienes alguna otra causa para poseerlos; pero esto es así verdad, si esto no se hubiere hecho por transacción. Lo mismo decimos, si tú también estimaras que eres heredero; porque también en este caso te obstará a ti la posesión del verdadero heredero.

30.- EL MISMO; *Comentarios a Sabino, libro XXX*.- Se pregunta, si la mezcla que se hizo de algunas cosas interrumpe la anterior usucapición de cada una. Mas hay tres géneros de cuerpos: uno que esta contenido por un solo espíritu, y que en griego se llama [unido], como el hombre, el madero, la piedra, y otras cosas semejantes; otro, que consta de

(conexum) vocatur, ut aedificium navis armarium: tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subiecta, veluti populus legio grex. Primum genus usucapione quaestionem non habet, secundum et tertium habet.

§ 1.- Labeo libris epistularum ait, si is, cui ad tegularum vel columnarum usucapionem decem dies superessent, in aedificium eas coniecisset, nihilo minus eum usucapturum, si aedificium possedisset. Quid ergo in his, quae non quidem implicantur rebus soli, sed mobilia permanent, ut in anulo gemma? In quo verum est et aurum et gemmam possideri et usucapi, quum utrumque maneat integrum.

§ 2.- De tertio genere corporum videndum est. Non autem grex universus sic capitur usu quomodo singulae res, nec sic quomodo cohaerentes. Quid ergo est? Etsi ea natura eius est, ut adiectionibus corporum maneat, non item tamen universi gregis ulla est usucapio, sed singulorum animalium sicuti possessio, ita et usucapio. Nec si quid emptum immixtum fuerit gregi augendi eius gratia, idcirco possessionis causa mutabitur, ut, si reliquus grex domini mei sit, haec quoque ovis, sed singulae suam causam habebunt, ita ut, si quae furtivae erunt, sint quidem ex grege, non tamen usucapiantur.

31.- PAULUS; *libro XXXII, ad Sabinum*.- Numquam in usucapionibus iuris error possessori prodest: et ideo Proculus ait, si per errorem initio venditionis tutor pupillo auctor factus sit vel post longum tempus venditionis peractum, usucapi non posse, quia iuris

timber, a stone, and other property of this kind. Second, things which are joined by contact, that is to say, which have coherence, and are connected, as a house, a ship, a cupboard. Third, such as are formed of distinct objects, as different bodies which are not united but are included under a single appellation, for instance, a people, a legion, a flock. No question can arise with reference to the usucaption of the first of these, but there is doubt as far as the second and third are concerned.

§ 1.- Labeo, in the Book of Epistles, says that where anyone who has only ten days left, in which to acquire the usucaption of tiles or columns, uses them in building a house, he will still be entitled to them by usucaption if he has possession of the house. What course must be pursued in case that articles are not joined to the soil, but remain movable property, as a precious stone set in a ring? In this instance, it is true that both the gold and the precious stone are in possession, and can be acquired by usucaption, if possession of both continues to exist.

§ 2.- Let us take into consideration the third class of things. An entire flock is not acquired by usucaption in the same way as distinct articles, or as those which are united, are. What, then, must be done? Although the nature of a flock is that it continues to exist by the addition of new animals, usucaption, nevertheless, cannot take place with respect to the flock as a whole, but it follows the same rule as possession, which applies to the separate individuals composing it. For if other animals are purchased and mingled with the flock for the purpose of increasing it, the title to the latter by possession will not be changed; so that if the remainder of the flock belongs to me, the sheep which have been purchased are also mine; but each of the latter will be held by its own title, so that if any of those included in the flock have been stolen, they cannot be acquired by usucaption.

31.- PAULUS; *On Sabinus, Book XXXII*.- In cases of usucaption, an error of law never benefits the possessor. Hence Proculus says that, if through mistake, a guardian does not, at the beginning of a sale or for a long time after it has been concluded,

componentes, esto es, de varias cosas unidas entre sí, que se llama [conexo], como un edificio, una nave, o un armario; y el tercero, que consta de partes distantes, como muchos cuerpos no unidos, sino subordinados a un solo nombre, como un pueblo, una legión, o un rebaño. El primer género no admite cuestión respecto a la usucapición, el segundo y el tercero la admiten.

§ 1.- Dice Labeón en sus libros de las Epístolas, que si aquel a quien le faltasen diez días para la usucapición de tejas o de columnas, las hubiese empleado en un edificio, esto no obstante, las usucapirá, si hubiese poseído el edificio. ¿Luego qué se dirá respecto a las cosas que no se aplican ciertamente a las cosas muebles, sino que permanecen muebles, como una perla en un anillo? En este caso es verdad que se posee y se adquiere por usucapición, así el oro como la perla, porque una y otra cosa permanecen íntegras.

§ 2.- Se ha de ver respecto al tercer género de cosas; mas todo un rebaño no es usucapido a la manera que cada una de las cosas, ni como las cosas unidas entre sí; ¿qué se dirá, pues? Aunque su naturaleza sea tal, que subsiste con la agregación de cuerpos, no hay, sin embargo, usucapición alguna de todo un rebaño, sino que así como se adquiere la posesión de cada uno de los animales, así se adquiere también la usucapición; y si para aumentarlo se le hubiere añadido al rebaño algún animal comprado, no se cambiará por esto la causa de la posesión, de suerte que si lo restante del rebaño fuera de mi dominio, lo será también aquella oveja; pero cada cosa tendrá su propia causa, de suerte que si algunas fueren hurtadas, pero fueren ciertamente del rebaño, no serán, sin embargo, usucapidas.

31.- PAULO; *Comentarios a Sabino, libro XXXII*.- Nunca en las usucapiones le aprovecha al poseedor el error de derecho; y por esto dice Próculo, que si por error el tutor hubiera autorizado al pupilo al principio de la venta, o después de transcurrido largo tiempo de

error est.

§ 1.- In usucapionibus mobilium continuum tempus numeratur.

§ 2.- Servus licet in libertate moretur, nihil possidet nec per eum alius. Atquin si nomine alicuius, dum in libertate moratur, nactus fuerit possessionem, adquiret ei, cuius nomine nactus fuerit.

§ 3.- Si servus meus vel filius peculiari vel etiam meo nomine quid tenet, ut ego per eum ignorans possideam vel etiam usucapiam: si is furere coeperit, donec in eadem causa res fuerit, intellegendum est et possessionem apud me remanere et usucapionem procedere, sicuti per dormientes quoque eos idem nobis contingeret. Idemque in colono et inquilino, per quos possidemus, dicendum est.

§ 4.- Si vi aut clam aut precario possessionem nactus quis postea furere coeperit, et possessio et causa eadem durat de hoc, quod precario furiosus habet, quemadmodum interdicto quoque Uti possidetis furiosi nomine recte experimur eius possessionis nomine, quam ante furorem per se vel post furorem per alium nactus est.

§ 5.- Vacuum tempus, quod ante aditam hereditatem vel post aditam intercessit, ad usu-capionem heredi procedit.

§ 6.- Si defunctus emit, heres autem putat eum ex donationis causa possedissee, usu eum capturum iulianus ait.

grant authority to his ward to make it, there will be no ground for usucaption, because an error of law exists.

§ 1.- In an usucaption of movable property, the time is computed continuously.

§ 2.- A slave, even though he may be at liberty, possesses nothing, and another does not possess anything by him. If, however, he should obtain possession in the name of another, while he is at liberty, he will acquire the property for him in whose name he obtained it.

§ 3.- If my slave, or my son, holds anything in my name, or as part of his peculium, so that I am not aware that I possess it, or even that I am entitled to acquire it by usucaption, and he becomes insane, then it must be understood that the property remains in the same condition, and that I still retain possession of it, and have a right to usucaption, just as these rights continue to exist in our favor, even when the parties are asleep. The same rule must be said to apply to the case of a lessee, or a tenant through whom we acquire possession.

§ 4.- Where anyone has obtained possession either by violence, clandestinely, or under a precarious title, and afterwards becomes insane, the possession and the title remain unchanged with reference to the property which the insane person holds precariously; just as, by means of an interdict, and by an action to obtain possession, we can legally institute proceedings in the name of an insane person, on account of the possession which he himself obtained before his reason became impaired, or acquired by means of another after his insanity had begun.

§ 5.- The time which intervened before the estate was accepted, or after this was done, will benefit the heir in usucaption.

§ 6.- Julianus says that if the deceased had made a purchase, and the heir thinks that he was in possession of the same as a donation, he can acquire the article by usucaption.

la venta, no se puede usucapir, porque hay error de derecho.

§ 1.- En las usucapiones de las cosas muebles el tiempo se cuenta continuado.

§ 2.- Aunque el esclavo viva en libertad no posee nada, ni otro por medio de él; pero si mientras vive en libertad hubiere adquirido en nombre de alguno la posesión, la adquirirá para éste en cuyo nombre la hubiere adquirido.

§ 3.- Si un esclavo mío o un hijo tuviera alguna cosa en el peculio, o aun a mi nombre, de suerte que ignorándolo yo la posea por medio de él o también la adquiriera por usucapion, si aquel hubiere comenzado a estar loco, se ha de entender que mientras la cosa se hallare en el mismo estado permanece en mi poder la posesión, y procede la usucapion. Así como nos sucede lo mismo con ellos aun estando ellos durmiendo. Y lo mismo se ha de decir respecto al colono y al inquilino, por medio de los cuales poseemos.

§ 4.- Si habiendo alcanzado alguno la posesión por fuerza, o clandestinamente, o en precario, hubiere comenzado después a estar loco, subsisten la posesión y la misma causa respecto a lo que el furioso tiene en precario, así como con razón ejercitamos a nombre del furioso también el interdicto *Uti possidetis* por razón de la posesión que antes de su locura adquirió por sí, o después de su locura por medio de otro.

§ 5.- El tiempo vacuo, que transcurrió antes de adida la herencia, o después de adida, le favorece al heredero para la usucapion.

§ 6.- Si el difunto compró una cosa, pero el heredero cree que él la poseyó por causa de donación, dice Juliano que él la adquirirá por usucapion.

32.- POMPONIUS; *libro XXXII, ad Sabinum*.- Si fur rem furtivam a domino emerit et pro tradita habuerit, desinet eam pro furtiva possidere et incipiet pro suo possidere.

§ 1.- Si quis id, quod possidet, non putat sibi per leges licere usucapere, dicendum est, etiamsi erret, non procedere tamen eius usucapionem, vel quia non bona fide videatur possidere vel quia in iure erranti non procedat usucapio.

§ 2.- Incertam partem possidere nemo potest: ideo si plures sint in fundo, qui ignorent, quotam quisque partem possideat, neminem eorum mera supplitate possidere labeo scribit.

33.- IULIANUS; *libro XLIV, Digestorum*.- Non solum bonae fidei emptores, sed et omnes, qui possident ex ea causa, quam usucapio sequi solet, partum ancillae furtivae usu suum faciunt, idque ratione iuris introductum arbitror: nam ex qua causa quis ancillam usucaperet, nisi lex duodecim tabularum vel atinia obstaret, ex ea causa necesse est partum usucapi, si apud eum conceptus et editus eo tempore fuerit, quo furtivam esse matrem eius ignorabat.

§ 1.- Quod vulgo respondetur ipsum sibi causam possessionis mutare non posse, totiens verum est, quotiens quis scieret se bona fide non possidere et lucri faciendi causa inciperet possidere: idque per haec probari posse. Si quis emerit fundum sciens ab eo, cuius non erat, possidebit pro possessore: sed si eundem a domino emerit, incipiet pro emptore possidere, nec videbitur sibi ipse causam possessionis mutasse. Idemque iuris erit etiam, si a non domino emerit, quum existimaret eum dominum esse. Idem hic si a domino heres institutus fuerit vel bonorum eius possessionem acceperit, incipiet fundum pro herede possidere. Hoc amplius si iustam

32.- POMPONIUS; *On Sabinus, Book XXXII*.- If a thief should purchase the stolen property from its owner, and hold it as delivered to him, he ceases to possess it as having been stolen, and begins to possess it as his own.

§ 1.- When anyone thinks that he is not legally entitled to acquire by usucaption property which is in his possession, it must be said that even if he is mistaken, he cannot profit by usucaption; either because he is not considered to possess it in good faith, or because usucaption is of no advantage where an error of law exists.

§ 2.- No one can possess a portion of anything, the amount of which is uncertain. Therefore, if several persons own land, and each is ignorant of the amount of his share, Labeo says that, strictly speaking, none of them has possession.

33.- JULIANUS; *Digest, Book XLIV*.- Not only bona fide purchasers, but also all those who have possession under any title by which usucaption is ordinarily acquired, can obtain as their own the child of a female slave; and I think that this rule has been legally established. For, in every instance, anyone can acquire a female slave by usucaption, unless it is prohibited by the Law of the Twelve Tables, or the Atinian Law. The child of such a slave can be acquired by usucaption, if it was conceived and brought forth at a time when the alleged possessor did not know that its mother had been stolen.

§ 1.- The common opinion that a person himself cannot change the title of his possession is only correct where he knows that he is not a possessor in good faith, and obtains it for the purpose of profit. This can be proved as follows: If anyone purchases a tract of land from another, knowing that it does not belong to the latter, he will hold it as the possessor; but if he purchases the same land from the owner, he will possess it as the purchaser; nor will he himself be considered to have changed the title to his possession. The same rule will apply even if he did not purchase the land from the owner, if he believed it to be his. In like manner, if he was appointed heir by

32.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- Si el ladrón hubiere comprado al dueño la cosa hurtada, y la hubiere tenido como entregada, deja de poseerla como hurtada, y comenzara a poseerla como propia.

§ 1.- Si alguno no cree que le es lícito por las leyes usucapir lo que posee, se ha de decir, que, aunque yerre, no es sin embargo procedente su usucapición, ya porque no se considera que posee de buena fe, ya porque no es procedente la usucapición para el que yerra en cuanto al derecho.

§ 2.- Nadie puede poseer una parte incierta. Por lo tanto, si en un fundo hubiera muchos, los cuales ignorasen qué parte posea cada cual, escribe Labeón, que ninguno de ellos posee en estricto rigor.

33.- JULIANO; *Digesto, libro XLIV*.- No solamente los compradores de buena fe, sino también todos los que poseen por causa por la que suele tener lugar la usucapición, hacen suyo con el uso el parto de una esclava hurtada; y opino que esto fue introducido por una razón de derecho; porque por la misma causa por la que uno usucapiría a una esclava, si no obstase la ley de las Doce Tablas, o la Atinia, es necesario que sea usucapido el parto, si hubiere sido concebido y dado a luz en poder de él al tiempo en que ignoraba que su madre era hurtada.

§ 1.- Lo que vulgarmente se dice, que uno no puede mudarse a sí mismo la causa de la posesión, es verdad siempre y cuando uno sepa que él no posee de buena fe, y comience a poseer para realizar lucro; y esto se puede probar por lo siguiente: si alguno le hubiere comprado a sabiendas un fundo a aquel de quien no era, lo poseerá como poseedor; pero si se lo hubiere comprado a su dueño, comenzará a poseer como comprador, y no se considerara que él se cambió a sí mismo la causa de la posesión. Y el mismo derecho habrá, aunque se lo hubiere comprado a quien no era dueño, estimando que él era dueño. El mismo en este caso, si hubiere sido instituido heredero por el dueño,

causam habuerit existimandi se heredem vel bonorum possessorem domino extitisse, fundum pro herede possidebit nec causam possessionis sibi mutare videbitur. Quum haec igitur recipiantur in eius persona, qui possessionem habet, quanto magis in colono recipienda sunt, qui nec vivo nec mortuo domino ullam possessionem habet? Et certe si colonus mortuo domino emerit fundum ab eo, qui existimabat se heredem eius vel bonorum possessorem esse, incipiet pro emptore possidere.

§ 2.- Si dominus fundi homines armatos venientes existimaverit atque ita profugerit, quamvis nemo eorum fundum ingressus fuerit, vi deiectus videtur: sed nihilo minus id praedium, etiam antequam in potestate domini redeat, a bonae fidei possessore usucapitur, quia lex Plautia et Iulia ea demum vetuit longa possessione capi, quae vi possessa fuissent, non etiam ex quibus vi quis deiectus fuisset.

§ 3.- Si mihi Titius, a quo fundum petere volebam, possessione cesserit, usucapionis causam iustam habebam. Sed et is, a quo ex stipulatu fundum petere volebam, cedendo mihi possessione, si solvendi causa id fecerit, eo ipso efficit, ut fundum longo tempore capiam.

§ 4.- Qui pignori rem dat, usucapit, quamdiu res apud creditorem est: si creditor eius possessionem alii tradiderit, interpellabitur usucapio: et quantum ad usucapionem attinet, similis est ei qui quid deposuit vel commodavit, quos palam est desinere usucapere, si commodata vel deposita res alii tradita fuerit ab eo, qui commodatum vel depositum accepit. Plane si creditor nuda conventionem hypothecam contraxerit, usucapere debitor perseverabit.

the owner, or obtained praetorian possession of his estate, he will possess the land as the heir. Further, if he had good reason to think that he was the heir, or was entitled to praetorian possession of the estate, he will possess the land as the heir, and will not be held to have himself changed the title to possession. As this rule must be adopted with reference to him who has possession, how much more is it applicable to the case of a tenant, who has no possession either during the lifetime, or after the death of the owner of the land? And, indeed, if the tenant, at the time of the death of the owner, purchased the land from him whom he believed to be the heir of the former, or the possessor of his estate under the Praetorian Edict, he will begin to hold the property as a purchaser.

§ 2.- If the owner of land thinks that armed men are coming, and, for this reason, takes to flight, he will be considered to have been forcibly dispossessed, even though none of them should enter upon the land. Still, the same land can be acquired by usucaption by a bona fide possessor, even before it again comes under the control of the owner, because the Lex Plautia et Iulia forbids property which has been taken possession of by force to be acquired by long possession, but not by those who have been driven from it by violence.

§ 3.- If Titius gives me possession of land which I had the intention of bringing suit to recover from him, I shall have good ground for usucaption. But if he from whom I had the intention of demanding a tract of land on account of a stipulation grants me possession of the same, and does so for the purpose of discharging his indebtedness, he places me in such a position that I can obtain the land by prescription.

§ 4.- Anyone who gives property in pledge can acquire it by usucaption as long as it remains in the hands of his creditor, but if the creditor should transfer his possession to another, the usucaption will be interrupted. And, so far as the usucaption is concerned, the case is similar to that of a person who deposited, or lent an article; for it is clear that he ceases to acquire it by usucaption, if the article which was lent or deposited should be delivered to a third

o hubiere recibido la posesión de sus bienes, comenzara a poseer el fundo como heredero. Además de esto, si hubiere tenido justa causa para estimar que él fue heredero o poseedor de los bienes del dueño, poseerá el fundo como heredero, y no se considerará que se cambia así la causa de la posesión. Admitiéndose pues, esto, respecto a la persona del que tiene la posesión, ¿con cuanta más razón se ha de admitir respecto al colono, que no tiene ninguna posesión ni en vida del dueño, ni fallecido éste? Y a la verdad, si el colono hubiere comprado, fallecido el señor, un fundo al que él creía que era heredero del mismo o poseedor de sus bienes, comenzará a poseerlo como comprador.

§ 2.- Si el dueño de un fundo hubiere creído que iban a él hombres armados, y por ello hubiere huido, aunque ninguno de aquéllos haya entrado en el fundo, se considera que fue echado a la fuerza; pero, esto no obstante, el predio, aun antes de que vuelva a poder del dueño, es usucapido por el poseedor de buena fe, porque la ley Plautia y Julia vedó que se usucapieran por la larga posesión solamente las cosas que hubiesen sido poseídas a la fuerza, no también aquellas de las que uno hubiese sido echado a la fuerza.

§ 3.- Si Ticio, a quien yo quería pedirle un fundo, me hubiere cedido la posesión, tendré justa causa para la usucapion. Pero también aquel, a quien yo quería pedirle un fundo en virtud de lo estipulado, cediéndome la posesión, si esto lo hubiere hecho para pagarme, hará por esto mismo que yo usucapia el fundo con la posesión de largo tiempo.

§ 4.- El que da una cosa en prenda, la adquiere por usucapion mientras la cosa está en poder del acreedor; si el acreedor hubiere entregado a otro la posesión de ella, se interrumpirá la usucapion; y por lo que atañe a la usucapion, es semejante al que depositó alguna cosa, o la dio en comodato, los cuales es evidente que dejan de usucapir, si la cosa dada en comodato o en depósito hubiere sido entregada a otro por el que recibió el comodato o el

§ 5.- Si rem tuam, quum bona fide possiderem, pignori tibi dem ignorantem tuam esse, desino usucapere, quia non intellegitur quis suae rei pignus contrahere. At si nuda conventionem pignus contractum fuerit, nihilo minus usucapiam, quia hoc quoque modo nullum pignus contractum videtur.

§ 6.- Si rem pignori datam creditoris servus subripuerit, quum eam creditor possideret, non interpellabitur usucapio debitoris, quia servus dominum suum possessione non subvertit. Sed et si debitoris servus subripuerit, quamvis creditor possidere desinat, tamen debitori usucapio durat, non secus ac si eam creditor debitori tradidisset: nam quantum ad usucapiones attinet, servi subtrahendo res non faciunt deteriore dominorum conditionum. facilius optinebitur, si precario possidente debitore servus eius subripuerit. nam conductio idem praestat, quod si apud creditorem res esset: possidet enim hoc casu creditor. Sed et si utrumque intercesserit et precarii rogatio et conductio, intellegitur creditor possidere et precarii rogatio non in hoc interponitur ut debitor possessionem habeat, sed ut ei tenere rem liceat.

34.- ALFENUS VARUS; *libro I, Digestorum a Paulo epitomatorum*.- Si servus insciente domino rem pecuniariam vendidisset, emptorem usucapere posse.

35.- IULIANUS; *libro III, ad Urseium Ferozem*.- Si homo, cuius usus fructus legatus erat, ab herede numquam possessus subreptus fuisset, quaesitum est, quia heres furti actionem non haberet, an usucapi

party by him who received it as a loan, or a deposit. It is evident if the creditor hypothecated it by a mere agreement, the debtor will continue to acquire it by usucaption.

§ 5.- If I possess in good faith property which belongs to you, and pledge it to you, you not being aware that it was yours, I cease to acquire it by usucaption, because no one is understood to hold his own property in pledge. If, however, it should be pledged by a mere agreement, I will still continue to acquire it by usucaption, because in this way the property is not considered to have been pledged.

§ 6.- If a slave should steal property which has been pledged to his master, as the creditor still continues to be in possession of it, the usucaption of the debtor will not be interrupted, because a slave does not deprive his master of possession. But if a slave of the debtor should steal the property, although the creditor ceases to have possession of the same, the usucaption of the debtor will remain the same as if the creditor had delivered the property to the debtor. For so far as usucaption is concerned, slaves do not injure the conditions of their owners by the theft of property. The question will be more easily decided if the slave of a debtor, having precarious possession, steals the property; for if it should be hired, the result will be the same as if it had remained in the hands of the creditor, since, in this instance, the creditor has possession of it. If, however, both titles existed, that is to say, one that is precarious, and another based upon the hiring, the creditor is understood to hold possession, for the claim under a precarious title is not, in this instance, introduced to enable the debtor to have possession, but only to permit him to retain the property.

34.- ALFENUS VERUS; *Epitomes of the Digest by Paulus, Book I*.- If a slave, without the knowledge of his master, sells property belonging to his peculium, the purchaser can acquire it by usucaption.

35.- JULIANUS; *On Urseius Ferox, Book III*.- If a slave, the usufruct of whom has been bequeathed, and who has never been in possession of the heir, should be stolen, the question arises, can the slave be

depósito. Pero si el acreedor hubiere contraído hipoteca por nuda convención, el deudor continuará usucapiendo.

§ 5.- Si poseyendo yo de buena fe una cosa tuya te la diera a ti en prenda ignorando tú que era tuya, dejo de usucapir, porque no se entiende que uno adquiera prenda de su propia cosa. Mas si la prenda se hubiere constituido por nuda convención, ello no obstante usucapiré, porque tampoco se entiende que de este modo se constituye prenda alguna.

§ 6.- Si un esclavo del acreedor hubiere substraído una cosa dada en prenda, cuando el acreedor la poseyese, no se interrumpirá la usucapición del deudor, porque el esclavo no perturba a su señor en la posesión. Pero también si la hubiere substraído un esclavo del deudor, aunque el acreedor deje de poseer, subsiste, sin embargo, para el deudor la usucapición, no de otra suerte que si el acreedor se la hubiese entregado al deudor; pues por lo que atañe a las usucapiones, los esclavos, sustrayéndoles cosas, no hacen peor la condición de sus dueños. Más fácilmente se admitirá, si poseyéndolas en precario el deudor las hubiere hurtado su esclavo porque el arrendamiento hace el mismo efecto que si la cosa estuviese en poder del acreedor, porque el acreedor posee en este caso, Pero también si hubiere mediado una y otra cosa, el ruego del precario; y el arrendamiento, se entiende que posee el acreedor; y el ruego del precario no se interpone para que el deudor tenga la posesión, sino para que le sea lícito tener la cosa.

34.- ALFENO VARO; *Digesto compendiado por Paulo, libro I*.- Si el esclavo hubiese vendido sin saberlo el señor una cosa del peculio, puede usucapirla el comprador.

35.- JULIANO; *Comentarios a Urseyo Ferox, libro III*.- Si un esclavo, cuyo usufructo había sido legado, hubiese sido hurtado no habiendo sido poseído nunca por el heredero, se preguntó si podría

possit. Sabinus respondit nullam eius rei usucapionem esse, cuius nomine furti agi possit, agere autem furti eum, qui frui deberet, posse. Quod si accipiendum est, ut fructuarius poterit uti frui: aliter enim homo in causa non perduceretur. Sed si utenti iam et fruenti abductus homo fuerit, non solum ipse, sed etiam heres furti agere poterit.

36.- GAIUS; *libro II, Rerum quotidianarum*.- Potest pluribus modis accidere, ut quis rem alienam aliquo errore deceptus tamquam suam vendat forte aut donet et ob id a bonae fidei possessore res usucapi possit: veluti si heres rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditariam esse alienaverit.

§ 1.- Item si quis aliqua existimatione deceptus crediderit ad se hereditatem pertinere, quae ad eum non pertineat, et rem hereditariam alienaverit, aut si is, ad quem usus fructus ancillae pertinet, partum eius existimans suum esse, quia et fetus pecudum ad fructuarium pertinet, alienaverit.

37.- IDEM; *libro II, Institutionum*.- Furtum non committit: furtum enim sine affectu furandi non committitur.

§ 1.- Fundi quoque alieni potest aliquis sine vi nancisci possessionem, quae vel ex negligentia domini vacet vel quia dominus sine successore decesserit vel longo tempore afuerit.

38.- IDEM; *libro II, Rerum quotidianarum*.- Quam rem ipse quidem non potest usucapere, quia intellegit alienum se possidere et ob id mala fide possidet. Sed si alii bona fide accipienti tradiderit, poterit is

acquired-by usucaption, because the heir is entitled to an action of theft? Sabinus says that no usucaption can exist in the case of property on account of which an action for theft will lie, but that he who is entitled to the usufruct can bring this action. This, however, must be understood to apply to a case where the usufructuary can use and enjoy his right; for otherwise, the slave would not be in the condition in which he should be. But if the slave had been stolen from the usufructuary, while in the enjoyment of his right, not only he himself, but also his heir, can bring the action for theft.

36.- GAIUS; *Diurnal or Golden Matters, Book II*.- It can happen in several ways, that a person laboring under some mistake may sell or give away property as his own which belongs to another; and, under such circumstances, it can be acquired by usucaption by a bona fide possessor; for instance, if the heir should sell property which was lent to the deceased, or leased by him, or deposited with him, believing that it belonged to the estate.

§ 1.- Likewise, if anyone, misled by some opinion, and thinking that he is entitled to an estate, which is not the case, should alienate property forming part of the same; or where a person to whom the usufruct of a female slave belongs, believing her children to be his, for the reason that the increase of flocks belongs to the usufructuary, should sell the children;

37.- THE SAME; *Institutes, Book II*.- He does not commit a theft, for a theft cannot be committed without the intention of stealing.

§ 1.- Anyone can also obtain possession of the land of another without violence, where it has become vacant through the neglect of the owner, or where the latter has died without leaving an heir, or has been absent for a long time.

38.- THE SAME; *Diurnal or Golden Matters, Book III*.- A person cannot, himself acquire the property by usucaption in this case, because he knows that it belongs to another, and therefore he is a

ser usucapido, puesto que el heredero no tendría la acción de hurto. Sabino respondió, que no hay usucapición alguna de cosa por la cual pueda ejercitarse la acción de hurto, pero que podía ejercitar la acción de hurto el que debiese disfrutarla. Lo que se ha de entender de modo que el usufructuario pueda usufructuar, porque de otra suerte el esclavo no sería constituido en causa; pero si el esclavo le hubiere sido quitado al que ya lo usufructuaba, no solamente éste mismo, sino también su heredero, podrán ejercitar la acción de hurto.

36.- GAYO; *Diario, libro II*.- Puede acaecer de muchos modos, que alguien, engañado por algún error, venda acaso o done como suya una cosa ajena, y que por esto pueda ser usucapida la cosa por el poseedor de buena fe, por ejemplo, si el heredero hubiere enajenado, creyendo que era de la herencia, una cosa dada en comodato o en arrendamiento al difunto.

§ 1.- Asimismo, si alguien engañado por alguna apreciación hubiere creído que le pertenecía una herencia, que no le perteneciera, y hubiere enajenado una cosa de la herencia, o si aquel, a quien le pertenece el usufructo de una esclava, hubiere enajenado el parto de ésta creyendo que era suyo, porque también la cría de los ganados le pertenece al usufructuario,

37.- EL MISMO; *Instituta, libro II*.- no comete hurto; porque no se comete hurto sin la intención de hurtar.

§ 1.- También puede uno adquirir sin violencia la posesión de un fundo ajeno, que esté vacante o por negligencia de su dueño, o porque el dueño hubiere fallecido sin sucesor, o estado ausente largo tiempo.

38.- EL MISMO; *Diario, libro II*.- Cuya cosa no puede ciertamente usucapir él mismo, porque sabe que posee una cosa ajena, y que por esto posee de mala fe; pero si la hubiere entregado a otro, que la

usucapere, quia neque vi possessum neque furtivum possidet: abolita est enim quorundam veterum sententia existimantium etiam fundi locive furtum fieri.

39.- MARCIANUS; *libro III, Institutionum*.- Si solum usucapi non poterit, nec superficies usucapietur.

40.- NERATIUS; *libro V, Regularum*.- Coeptam usucapionem a defuncto posse et ante aditam hereditatem impleri constitutum est.

41.- IDEM; *libro VII, Membranarum*.- Si rem subreptam mihi procurator meus adprehendit, quamvis per procuratorem possessionem apisci nos iam fere conveniat, nihilo magis eam in potestatem meam redisse usuque capi posse existimandum est, quia contra statui captiosum erit.

42.- PAPINIANUS; *libro III, Quaestionum*.- Quum vir praedium dotale vendidit scienti vel ignoranti rem dotis esse, venditio non valet. Quam defuncta postea muliere in matrimonio confirmari convenit, si tota dos lucro mariti cessit. Idem iuris est, quum is, qui rem furtivam vendidit, postea domino heres exstitit.

43.- IDEM; *libro XXII, Quaestionum*.- Heres eius, qui bona fide rem emit, usu non capiet sciens alienum, si modo ipsi possessio tradita sit: continuatio vero non impediatur heredis scientia.

possessor in bad faith; but if he transfers it to someone else who receives it in good faith, the latter can acquire it by/usucaption, for the reason that he has gained possession of property which has not been acquired by force, and has not been stolen: as the opinion of certain ancient authorities, who held that a theft of land or a house could be perpetrated has been abandoned.

39.- MARCIANUS; *Institutes, Book III*.- If the soil cannot be acquired by usucaption, what stands upon it can not be acquired in the same way.

40.- NERATIUS; *Rules, Book V*.- It has been established that where usucaption has been begun by a deceased person, it can be completed before the estate has been entered upon.

41.- THE SAME; *Parchments, Book VII*.- If my agent recovers property which has been stolen from me, although, generally speaking, it is now almost conclusively settled that we can obtain possession by means of an agent, the property, nevertheless, will not again come under my control so that it can be acquired by usucaption, because to decide otherwise would be fallacious.

42.- PAPINIANUS; *Questions, Book III*.- If a husband should sell a dotal tract of land to someone who knew, or was not aware that the property was a part of the dowry, the sale will not be valid. If the woman should afterwards die during the marriage, the transaction must be confirmed, if the entire dowry was given for the benefit of the husband. The same rule applies where he who sold stolen property subsequently becomes the heir of the owner of the same.

43.- THE SAME; *Questions, Book XXII*.- If the heir of him who purchased property in good faith knows that it belongs to another, he cannot acquire it by usucaption, provided possession of it has been delivered to him personally; but the knowledge of the heir will not prejudice him so far as the continuance of possession is concerned.

recibe de buena fe, podrá éste usucapirla, porque no posee ni cosa poseída con violencia, ni hurtada; pues quedó desechada la opinión de algunos antiguos que estimaban, que también se cometía hurto de un fundo o de un lugar.

39.- MARCIANO; *Instituta, libro III*.- Si no se pudiere usucapir el suelo, tampoco se usucapirá la superficie.

40.- NERACIO; *Reglas, Libro V*.- Se estableció, que aun antes de adida la herencia se podía completar la usucapición comenzada por el difunto.

41.- EL MISMO; *Pergaminos, Libro VII*.- Si mi procurador se apoderó de la cosa que me había sido hurtada, aunque de ordinario esté ya convenido que adquirimos la posesión por medio de procurador, no por eso se ha de estimar que volvió ella a mi poder, y que se puede usucapir, porque sería capcioso que se estableciera lo contrario.

42.- PAPINIANO; *Cuestiones, libro III*.- Cuando el marido vendió un predio dotal a uno que sabía o que ignoraba que la cosa era de la dote, no es válida la venta; la cual es conveniente que se confirme habiendo fallecido después la mujer en el matrimonio, si toda la dote cedió en lucro del marido. El mismo derecho hay, cuando el que vendió una cosa hurtada quedó siendo después heredero de su dueño.

43.- EL MISMO; *Cuestiones, libro XXII*.- El heredero del que de buena fe compró una cosa no la usucapirá sabiendo que era ajena, si a él mismo se le hubiera entregado la posesión; pero la continuación no será impedida por el conocimiento del heredero.

§ 1.- Patrem usu non capturum, quod filius emit, propter suam vel filii scientiam certum est.

44.- IDEM; *libro XXIII, Quaestionum*.- Iusto errore ductus titium filium meum et in mea potestate esse existimavi, quum adrogatio non iure intervenisset: eum ex re mea quaerere mihi non existimo. Non enim constitutum est in hoc, quod in homine libero qui bona fide servit placuit: ibi propter adsiduam et cottidianam comparationem servorum ita constitui publice interfuit, nam frequenter ignorantia liberos emimus, non autem tam facilis frequens adoptio vel adrogatio filiorum est.

§ 1.- Constat, si rem alienam scienti mihi vendas, tradas autem eo tempore, quo dominus ratum habet, traditionis tempus inspiciendum remque meam fieri.

§ 2.- Etsi possessionis, non contractus initium, quod ad usucapionem pertinet, inspicere placet, nonnumquam tamen evenit, ut non initium praesentis possessionis, sed causam antiquiorem traditionis, quae bonam fidem habuit, inspiciamus, veluti circa partum eius mulieris, quam bona fide coepit possidere: non enim ideo minus capietur usu puer, quod alienam matrem, priusquam eniteretur, esse cognovit. Idem in servo postliminio reverso dictum est.

§ 3.- Nondum aditae hereditatis tempus usucapioni datum est, sive servus hereditarius aliquid comparat, sive defunctus usucapere coeperat: sed haec iure singulari recepta sunt.

§ 1.- It is certain that a father cannot acquire by usucaption anything which his son has purchased, if he or his son knew that it was the property of someone else.

44.- THE SAME; *Questions, Book XXIII*.- Having been deceived by a plausible error, I believe Titius to be my son, and to be under my control, but the arrogation of him by me was found to be illegal. I do not think that, under the circumstances, he has a right to take charge of my property, for the same rule has not been established in this case as in that of a freeman who serves in good faith as a slave; as it was for the interest of the public to establish this rule, on account of the constant and daily transactions with reference to slaves. For we often purchase freemen, not knowing that they are such, and the adoption and arrogation of children is not as easy, or as frequent.

§ 1.- It is settled that if you sell me property belonging to another, and I know that this is the case, and you deliver it at the same time that the owner ratifies the sale, the time of delivery must be taken into account and the property becomes mine.

§ 2.- Although it has been decided that, so far as usucaption is concerned, the beginning of the possession, and not the time when the contract was made, must be considered; still, it sometimes happens that we take into consideration not the beginning of the present possession, but the reason for a former delivery, which was made in good faith; for instance, where the right to the child of a female slave, whose mother was possessed in good faith, is in question, as the child cannot any the less be acquired by usucaption, although the possessor knew that the mother was the property of another before the child was born. The same rule applies to the case of a slave who returns under the law of postliminium.

§ 3.- The time which has elapsed before the acceptance of an estate is granted for the benefit of usucaption, whether a slave belonging to the estate purchased any property, or whether the deceased had begun to acquire by usucaption. This principle is established as a special privilege.

§ 1.- Es cierto que por causa de su propio conocimiento o del de su hijo no usucapirá el padre lo que compró el hijo.

44.- EL MISMO; *Cuestiones, Libro XXIII*.- Llevado por justificado error estimé que Ticio era hijo mío y estaba bajo mi potestad, no habiendo mediado arrogación con arreglo a derecho; no creo que él adquiere para mí con cosa mía; porque no se estableció respecto a él lo que se determinó en cuanto a un hombre libre, que sirve de buena fe. En este caso fue de interés público, que así se estableciera por causa de la frecuente y cotidiana compra de esclavos; porque frecuentemente compramos por ignorancia hombres libres, mas no es tan fácil y frecuente la adopción o la arrogación de hijos.

§ 1.- Es sabido, que si me vendieras una cosa sabiendo yo que era ajena, pero me la entregaras al tiempo en que su dueño lo ratifica, se ha de atender al tiempo de la entrega, y la cosa se hace mía.

§ 2.- Y si está determinado que se atienda, por lo que a la usucapación se refiere, al comienzo de la posesión, no al del contrato, sin embargo, sucede a veces que atendemos no al comienzo de la posesión presente, sino a la causa más antigua de la entrega, que tuvo buena fe; por ejemplo, en cuanto al parto de aquella esclava, la que uno comenzó a poseer de buena fe; pues no dejará de ser usucapido el hijo porque uno haya sabido que la madre era ajena antes de darlo a luz. Y lo mismo se dijo en cuanto al esclavo que volvió por el postliminio.

§ 3.- Se le dio tiempo para la usucapación a la herencia que aun no había sido adida, ya si un esclavo de la herencia comprase alguna cosa, ya si el difunto había comenzado a usucapir; pero esto fue admitido por derecho especial.

§ 4.- Filius familias emptor alienae rei, quum patrem familias se factum ignoret, coepit rem sibi traditam possidere: cur non capiat usu, quum bona fides initio possessionis adsit, quamvis eum se per errorem esse arbitretur, qui rem ex causa peculiari quaesitam nec possidere possit? Idem dicendum erit et si ex patris hereditate ad se pervenisse rem emptam non levi praesumptione credat.

§ 5.- Non mutat usucapio superveniens pro emptore vel pro herede, quo minus pignoris persecutio salva sit: ut enim usus fructus usucapi non potest, ita persecutio pignoris, quae nulla societate dominii coniungitur, sed sola conventionione constituitur, usucapione rei non perimitur.

§ 6.- Eum, qui postea quam usucapere coepit in furem incidit, utilitate suadente relictum est, ne languor animi damnum etiam in bonis adferat, ex omni causa implere usucapionem.

§ 7.- Si, quum apud hostes dominus aut pater agat, servus aut filius emat, an et tenere incipiat? Si quidem ex causa peculii possedit, usucapionem inchoari nec impedimento domini captivitatem esse, cuius scientia non esset in civitate necessaria. Si vero non ex causa peculii comparetur, usu non capi nec iure postliminii quaesitum intellegi, quum prius esset, ut, quod usucaptum diceretur, possessum foret. Sin autem pater ibi decesserit, quia tempora captivitatis ex die quo capitur morti iungerentur, potest filium dici et possedissee sibi et usucepisse intellegi.

§ 4.- A son under paternal control bought property belonging to another, and then, becoming the head of a household without knowing it, began to possess the property, which had been delivered to him. Why can he not obtain it by usucaption, as he acted in good faith at the time that he obtained possession, although he was mistaken when he thought that he could not obtain property which he acquired as part of his peculium? The same rule must be said to apply if he had good reason to think that the property which was purchased had come into his hands as a part of his father's estate.

§ 5.- Usucaption which takes place in favor of a purchaser or an heir does not prevent the pursuit of a pledge by a creditor; for, as an usufruct cannot be the subject of usucaption, so the right to pursue a pledge, which is in no way connected with ownership but is founded on an agreement alone, is not extinguished by the usucaption of the property.

§ 6.- The opinion that anyone who becomes insane, and who had previously begun to acquire by usucaption, can continue to do so until it is completed under any title whatsoever, is based on considerations of convenience, in order to prevent his mental weakness from injuriously affecting his property.

§ 7.- If a slave or a son purchases property while the master or the father is in the hands of the enemy, will he begin to hold the same? If he has possession on account of his peculium, usucaption will begin to run, nor will the captivity of his father or master offer any impediment to this, as his knowledge of it would not be necessary if he was at home. If, however, the purchase was made without reference to the peculium, the property cannot be acquired by usucaption, nor can it be understood to be obtained by the right of postliminium; for, in order for this to take place, what is said to be obtained by usucaption must already have been possessed. But if the father should die in captivity, for the reason that the time of his death is held to date from the day of his capture, it may be said that the son has had possession for

§ 4.- Un hijo de familia, comprador de una cosa ajena, ignorando que él había sido hecho padre de familia, comenzó a poseer la cosa que se le había entregado; ¿por qué no la usucapirá, habiendo habido buena fe al principio de la posesión, aunque éste por error creyese que él era tal que no podía poseer una cosa adquirida por causa del peculio? Lo mismo se habrá de decir, también si por no leve presunción creyera que la cosa comprada fue a su poder por virtud de la herencia del padre.

§ 5.- La usucapición sobrevenida a título de comprador, o de heredero, no introduce cambio de modo que no esté a salvo la persecución de la prenda porque así como no puede ser usucapido el usufructo, así tampoco se extingue con la usucapición de la cosa la persecución de la prenda, la cual no está unida con ninguna conexión al dominio, sino que se constituye por sola convención.

§ 6.- Por aconsejarlo la utilidad se dijo, que el que después que comenzó a usucapir cayó en locura completase por toda causa la usucapición, a fin de que la debilidad de su mente no le causara perjuicio también en los bienes.

§ 7.- Si mientras el señor o el padre estuviera en poder de los enemigos un esclavo o un hijo comprara alguna cosa, ¿comenzará acaso a poseerla? Si verdaderamente la posee por causa del peculio, comienza la usucapición, y no es impedimento la cautividad del señor, cuyo conocimiento no sería necesario si estuviese en la ciudad; mas si la cosa no fuese comprada por causa del peculio, no es usucapida, ni se considera adquirida por derecho de postliminio, porque primero es que se haya poseído lo que se dijese usucapido; mas si el padre falleciere en el cautiverio, como quiera que el tiempo de la cautividad, desde el día en que fue aprisionado, se unirá al día de la muerte, se puede decir que el hijo poseyó para sí, y se entiende que usucapió.

himself, and he can be understood to have acquired the property by usucaption.

45.- IDEM; *libro X, Responsorum*.- Praescriptio longae possessionis ad optinenda loca iuris gentium publica concedi non solet. Quod ita procedit, si quis, aedificio funditus diruto quod in litore posuerat (forte quod aut deposuerat aut dereliquerat aedificium), alterius postea eodem loco extructo, occupantis datam exceptionem opponat, vel si quis, quod in fluminis publici deverticulo solus pluribus annis piscatus sit, alterum eodem iure prohibeat.

§ 1.- Post mortem domini servus hereditarius peculii nomine rem coepit tenere, usucapionis primordium erit tempus hereditatis aditae: quemadmodum etenim usucapietur, quod ante defunctus non possederat?

46.- HERMOGENIANUS; *libro V, iuris Epitomarum*.- Pro soluto usucapit, qui rem debiti causa recipit: et non tantum quod debetur, sed et quodlibet pro debito solutum hoc titulo usucapi potest.

47.- PAULUS; *libro III, ad Neratium*.- Si emptam rem mihi procurator ignorante me meo nomine apprehenderit, quamvis possideam, eam non usucapiam, quia ut ignorantes usuceperimus, in peculiaribus tantum rebus receptum est.

48.- IDEM; *libro II, Manualium*.- Si existimans debere tibi tradam, ita demum usucapio sequitur, si et tu putes debitum esse. Aliud, si putem me ex causa venditi teneri et ideo tradam: hic enim nisi emptio praecedat, pro emptore usucapio locum non habet.

45.- THE SAME; *Opinions, Book X*.- Prescription based upon long possession is not usually granted for the acquisition of places which are public by the Law of Nations. An instance of this is, where anyone abandons a building which he had constructed upon the seashore, or it was demolished, and another person, having built a house in the same place, the former opposes him by an exception based upon previous occupancy; or where anyone, for the reason that he alone has been accustomed to fish for years in a certain part of a river, under the same prescriptive right forbids another to do so.

§ 1.- A slave who belonged to an estate, after the death of his master, obtained possession of property forming part of his peculium. The beginning of usucaption will date from the time when the estate was entered upon, for how can property be acquired in this manner which was not previously in the possession of the deceased?

46.- HERMOGENIANUS; *Epitomes of Law, Book V*.- Property which has been received in payment is subject to usucaption where it has been obtained in the discharge of a debt. Not only what is due, but also whatever is given in discharge of the debt is subject to usucaption.

47.- PAULUS; *On Neratius, Book III*.- If my agent, without my knowledge, takes charge of property purchased in my name, although I may have possession of the same, I cannot acquire it by usucaption; because while we can acquire property by usucaption without knowing that we have possession of it, this has been decided to only be true where something forming part of the peculium is concerned.

48.- THE SAME; *Manuals, Book II*.- If, believing that I am indebted to you, I give you property in payment, usucaption can only take place if you yourself think that it is due. The case is different, if I think that I am bound on account of a sale, and

45.- EL MISMO; *Respuestas, libro X*.- No se suele conceder la prescripción de larga posesión para adquirir terrenos públicos por el derecho de gentes; lo que así sucede, si alguno, habiéndose derruido hasta los cimientos el edificio que había levantado en un litoral, o habiéndolo él abandonado, opusiera a otro ocupante que edificara después en el mismo lugar la excepción concedida, o si alguno, porque hubiera pescado solo muchos años en un remanso de un río público, se lo prohibiera con el mismo derecho a otro.

§ 1.- Un esclavo de la herencia comenzó a poseer, después de la muerte de su señor, una cosa por razón del peculio; el comienzo de la usucapion será el momento en que haya sido adida la herencia; porque ¿cómo se usucapirá, lo que antes no había poseído el difunto?

46.- HERMOGENIANO; *Epitome del Derecho, libro V*.- Adquiere por usucapion a título de pago el que por causa de una deuda recibe una cosa; y se puede usucapir con este título no solamente lo que se debe, sino también cualquier cosa que se haya pagado como deuda.

47.- PAULO; *Comentarios a Neracio, libro III*.- Si ignorándolo yo hubiere mi procurador tomado en mi nombre una cosa comprada para mí, aunque yo la posea no la usucapiré, porque solamente tratándose de cosas del peculio se admitió, que, ignorándolo, adquiriésemos por usucapion.

48.- EL MISMO; *Manuales, libro II*.- Si creyendo yo que te la debía te entregara una cosa, se seguirá la usucapion solamente si también tú creyeras que se te debía. Otra cosa será, si creyera yo que estaba obligado por causa de venta, y por esto hiciera la

Diversitatis causa in illo est, quod in ceteris causis solutionis tempus inspicitur neque interest, quum stipulor, sciam alienum esse nec ne: sufficit enim me putare tuum esse, quum solvis: in emptione autem et contractus tempus inspicitur et quo solvitur: nec potest pro emptore usucapere, qui non emit, nec pro soluto, sicut in ceteris contractibus.

49.- LABEO; *libro V, Pithanon a Paulo epitomatorem*.- Si quid est subreptum, id usucapi non potest, antequam in domini potestatem pervenerit. Paulus: immo forsitan et contra: nam si id, quod mihi pignori dederis, subriperis, erit ea res furtiva facta: sed simul atque in meam potestatem venerit, usucapi poterit.

TIT. IV

PRO EMTORE

1.- GAIUS; *libro VI, ad Edictum provinciale*.- Possessor, qui litis aestimationem optulit, pro emptore incipit possidere.

2.- PAULUS; *libro LIV, ad Edictum*.- Pro emptore possidet, qui re vera emit, nec sufficit tantum in ea opinione esse eum, ut putet se pro emptore possidere, sed debet etiam subesse causa emptionis. Si tamen existimans me debere tibi ignoranti tradam, usucapies. quare ergo et si putem me vendidisse et tradam, non capies usu? Scilicet quia in ceteris contractibus sufficit traditionis tempus, sic denique si sciens stipuler rem alienam, usucapiam, si, quum traditur mihi, existimem illius esse: at in emptione et

therefore deliver the property to you, for no action will lie against me, and you, as the purchaser, will not be entitled to usucaption. The reason for the difference arises from the fact that, in other instances, the time of payment should be considered. Nor does it matter whether, at the time when I make the stipulation, I am aware that the property belongs to another or not, as it will be sufficient if I think it is mine, when you give it to me in payment for a purchase; however, not only the time when a contract was entered into, but also that of payment is taken into account, for no one can acquire property by usucaption as a purchaser who did not buy it, and he cannot, as in other contracts, say that it has been received in payment.

49.- LABEO; *Epitomes of Probabilities by Paulus, Book V*.- Property which has been stolen cannot be acquired by usucaption before it has again come under the control of the owner. Paulus: Perhaps the contrary opinion is true; for if you should steal property which you have given to me in pledge, it becomes stolen goods, but it can be acquired by usucaption as soon as it again comes under my control.

TITLE IV

CONCERNING POSSESSION ACQUIRED
BY A PURCHASER

1.- GAIUS; *On the Provincial Edict, Book VI*.- A possessor who tenders the appraised value of the property in court begins to possess it as a purchaser.

2.- PAULUS; *On the Edict, Book LIV*.- He has possession as a purchaser who has actually bought the property, and it will not be sufficient for him merely to be of the opinion that he is in possession as purchaser, but the title to the property, as purchased, must actually exist. If, however, I think that I owe you something, and I deliver it to you without your being aware that it belongs to someone else, you can acquire it by usucaption. Why, therefore, can you not acquire it by usucaption if I deliver it to you, thinking

entrega; porque en este caso, si no precediera la venta, no tiene lugar la usucapición a título de comprador. La causa de la diversidad consiste en que tratándose de las demás causas se atiende al tiempo del pago; y no importa, que, cuando estipulo, yo sepa, o no, que la cosa es ajena; porque basta que yo crea que es tuya cuando me pagas; mas en la compra se atiende así al tiempo del contrato, como a aquel en que se paga; Y el que no compra no puede usucapir como comprador, ni a título de pago, como en los demás contratos.

49.- LABEON; *Dichos recopilados por Paulo, Libro V*.- Si se hurtó alguna cosa, no puede ser usucapida antes que haya llegado a poder de su dueño y dice Paulo: acaso se puede decir también lo contrario; porque si me hubieras hurtado la cosa, que me hubieras dado en prenda, esta cosa se habrá hecho furtiva; pero tan pronto como hubiere venido a mi poder, podrá ser usucapida.

TÍTULO IV

COMO COMPRADOR

1.- GAYO; *Comentarios al Edicto provincial, libro VI*.- El poseedor, que ofreció la estimación del litigio, comienza a poseer como comprador.

2.- PAULO; *Comentarios al Edicto, libro LIV*.- Posee como comprador el que verdaderamente compró; y no basta solamente que él esté en tal creencia, que juzgue que posee como comprador; sino que debe subsistir también la causa de la compra. Pero si creyendo yo que te debía una cosa, te la entregara a ti que lo ignorabas, la usucapirás. Luego ¿por qué, si yo creyera que te la vendí, y te la entregara, no la usucapirás también? Por esto, porque en los demás contratos basta que se atienda al tiempo

illud tempus inspicitur, quo contrahitur: igitur et bona fide emisse debet et possessionem bona fide adeptus esse.

§ 1.- Separata est causa possessionis et usucapionis: nam vere dicitur quis emisse, sed mala fide: quemadmodum qui sciens alienam rem emit, pro emptore possidet, licet usu non capiat.

§ 2.- Si sub condicione emptio facta sit, pendente condicione emptor usu non capiat. Idemque est et si putet condicionem extitisse, quae nondum exstitit: similis est enim ei, qui putat se emisse. Contra si exstitit et ignoret, potest dici secundum Sabinum, qui potius substantiam intuetur quam opinionem, usucapere eum. Est tamen nonnulla diversitas, quod ibi, quum rem putat alienam, quae sit venditoris, affectionem emptoris habeat, at quum nondum putat condicionem extitisse, quasi nondum putat sibi emisse. Quod apertius quaeri potest, si, quum defunctus emisset, heredi eius tradatur, qui nesciat defunctum emisse, sed ex alia causa sibi tradi, an usucapio cesset.

§ 3.- Sabinus, si sic empti sit, ut, nisi pecunia intra diem certum soluta esset, inempta res fieret, non usucapturum nisi persoluta pecunia. Sed videamus,

that I have sold it to you? This is because the time of the delivery is considered in all other contracts; hence, if I knowingly stipulate for property belonging to a third party, I can acquire it by usucaption if I thought that it belonged to you when it was delivered to me. In the case of a purchaser, however, the time when the contract was entered into is considered, and therefore the purchase must be made in good faith, and also possession must be obtained in this way.

§ 1.- Title to possession and title to usucaption are different, for anyone may truthfully be said to have made a purchase, but to have made it in bad faith; for anyone who knowingly buys property in bad faith has possession of it as the purchaser, although he cannot acquire it by usucaption.

§ 2.- Where a purchase is made under a condition, the purchaser cannot acquire the property by usucaption while the condition is pending. The same rule applies if he thinks that the condition has been fulfilled, and this has not yet taken place, for he resembles a person who thinks that he has made a purchase, when this is not the case. On the other hand, if the condition has been complied with and he is ignorant of the fact, he can be said to acquire it by usucaption, according to Sabinus, who held that this could be done by considering rather the nature of things than mere opinion. Some difference, however, exists between these two instances, because where anyone thinks that property belongs to another, which, in fact, belongs to the vendor, he occupies the position of a purchaser. But when he thinks that the Condition has not yet been complied with, it is just as if he thought that he had not yet made the purchase. This point can be presented more clearly if possession is delivered to the heir, who does not know that the deceased bought the property but thinks it was delivered to him for some other reason; but should it be held that usucaption cannot be acquired under such circumstances?

§ 3.- Sabinus says that if property has been purchased in such a way that the sale will be void unless payment is made within a certain time, it

de la entrega; y así, pues, si a sabiendas estipulara yo una cosa de otro, la usucapiré, si cuando se me entrega creyese yo que era de aquél, mas en la compra se atiende también al tiempo en que se contrata; así, pues, debe uno haber comprado de buena fe, y haber alcanzado de buena fe la posesión.

§ 1.- La causa de la posesión es distinta de la de la usucapición; porque se dice con verdad que uno compró, pero con mala fe, a la manera que posee como comprador el que a sabiendas compró una cosa ajena, aunque no la usucapia.

§ 2.- Si la compra hubiera sido hecha bajo condición, el comprador no la usucapirá estando pendiente la condición, y lo mismo es, también si juzgara que se cumplió la condición, que todavía no se cumplió; porque éste es semejante al que cree que él compró. Al contrario, si se cumplió y lo ignorase, se puede decir, según Sabino, que atiende más bien a la verdad que a la creencia, que él usucapirá. Hay, sin embargo, alguna diversidad, porque cuando cree que es ajena la cosa, que es del vendedor, tiene la voluntad de comprador, mas cuando no cree que se haya cumplido todavía la condición, en cierto modo cree que todavía no compró para sí; lo que más claramente se puede preguntar así: ¿si, habiendo comprado el difunto una cosa se le entregase a su heredero, que no supiera que el difunto la había comprado, sino que se le entregaba por otra causa, dejará de tener lugar la usucapición.

§ 3.- Sabino dice, que si hubiera sido comprada de modo que se tuviese por no comprada si el dinero no hubiese sido pagado dentro de cierto término, no la

utrum condicio sit hoc an conventio: si conventio est, magis resolvetur quam implebitur.

§ 4.- Si in diem addictio facta sit, id est nisi si quis meliorem condicionem attulerit, perfectam esse emptionem et fructus emptoris effici et usucapionem procedere Iulianus putabat: alii et hanc sub conditione esse contractam, ille non contrahi, sed resolvi dicebat, quae sententia vera est.

§ 5.- Sed et illa emptio pura est, ubi convenit, ut, si displicuerit intra diem certum, inempta sit.

§ 6.- Quum Stichum emissem, Dama per ignorantiam mihi pro eo traditus est; Priscus ait usu me eum non capturum, quia id, quod emptum non sit, pro emptore usucapi non potest. Sed si fundus emptus sit et ampliores fines possessi sint, totum longo tempore capi, quoniam universitas eius possideatur, non singulae partes.

§ 7.- Eius bona emisti, apud quem mancipia deposita erant; Trebatius ait usu te non capturum, quia emptum non sint.

§ 8.- Tutor ex pupilli auctione rem, quam eius putabat esse, emit. Servius ait posse eum usucapere: in cuius opinionem decursum est eo, quod deterior causa pupilli non fit, si propius habeat emptorem, et, si minoris emerit, tutelae iudicio tenebitur ac si alii minoris addixisset: idque et a Divo Traiano Constitutum dicitur.

cannot be acquired by usucaption, unless payment has actually been made. Let us see, however, whether this is a condition or an agreement; for if it is an agreement, the result will more readily be accomplished by payment than by complying with the condition.

§ 4.- If settlement is to be made within a specified time (that is to say, if anyone does not offer to pay a better price within that time), Julianus thinks that the sale is perfected, and that the profits will belong to the purchaser, who will have a right to acquire the property by usucaption; but others have held that the sale was made under a condition. He said that it was not made under a condition, but that it was annulled under a condition, which opinion is correct.

§ 5.- A sale is absolute where it is agreed that it shall be void in case the purchaser should not be content with the property within a certain time.

§ 6.- I purchased Stichus, and Damas was delivered to me instead of him, by mistake. Priscus says that I cannot acquire this slave by usucaption, because what was not bought cannot be acquired in that way by the purchaser. If, however, a tract of land was purchased and a larger amount has been in possession than what was conveyed, it can be acquired by lapse of time, as the entire tract, and not separate portions of the same, is possessed.

§ 7.- You purchase the property of a person with whom slaves have been deposited. Trebatius says that you cannot acquire the said slaves by usucaption, because they were not purchased.

§ 8.- A guardian bought an article at an auction of his ward, which he thought belonged to him. Servius says that he can acquire it by usucaption, and his opinion has been accepted, for the reason that the condition of the ward does not become worse if he has a purchaser in his guardian, who will pay more money for the property. If he should purchase it for less, he will be liable to an action on guardianship, just as if he had transferred it to some other person for less than it was worth. This, it is said, was also

usucapirá, a no ser que se haya pagado el dinero; pero veamos si esto es una condición, o una convención; si es una convención, más bien se disolverá, que se verificará.

§ 4.- Si la adjudicación hubiera sido hecha a término, esto es, que la compra quede perfeccionada si otro no hubiere ofrecido mejor condición, opinaba Juliano, que los frutos se hacían del comprador, y que procedía la usucapion; otros, que también esta venta fue contratada bajo condición; y él decía, que no se contrataba, sino que se resolvía; cuya opinión es la verdadera.

§ 5.- Pero también es pura aquella compra en la que se convino, que, si desagradare dentro de cierto tiempo, se considere como no hecha.

§ 6.- Habiendo yo comprado a Stico, por error me fue entregado Dama en lugar de él; dice Prisco, que no lo usucapiré, porque no se puede usucapir como comprador lo que no haya sido comprado. Mas si se hubiera comprado un fundo, y se hubieran poseído más extensos linderos, se usucapirá la totalidad mediante largo tiempo, porque es poseída la totalidad de aquél, no cada una de las partes.

§ 7.- Compraste los bienes de aquel en cuyo poder se habían depositado esclavos; dice Trebacio, que no usucapirás a éstos, porque no habían sido comprados.

§ 8.- Un tutor compró en la licitación de cosas del pupilo una que creía que era de él; dice Servio, que podía él usucapirla; a cuya opinión se asintió, porque no se empeora la causa del pupilo, si más ajustadamente tuviera comprador; y si la hubiere comprado por menos, estará sujeto a la acción de tutela, lo mismo que si se la hubiese adjudicado a otro por menos; y dicese que esto fue establecido también por el Divino Trajano.

decided by the Divine Trajan.

§ 9.- Procuratorem quoque, qui ex auctione, quam mandatu domini facit, emerit, plerique putant utilitatis causa pro emptore usucapturum. Idem potest dici et si negotia domini gerens ignorantis emerit propter eandem utilitatem.

§ 10.- Si servus tuus peculiari nomine emat rem, quam scit alienam, licet tu ignores alienam esse, tamen usu non capies.

§ 11.- Celsus scribit, si servus meus peculiari nomine adipiscatur possessionem, id etiam ignorantem me usucapere: quodsi non peculiari nomine, non nisi scientem me: et si vitiose coeperit possidere, meam vitiosam esse possessionem.

§ 12.- Pomponius quoque in his, quae nomine domini possideantur, domini potius quam servi voluntatem spectandam ait: quodsi peculiari, tunc mentem servi quaerendam. Et si servus mala fide possideat eamque dominus nactus sit, ut suo nomine possideat, adempto puta peculio, dicendum est, ut eadem causa sit possessionis et ideo usucapio ei non magis procedat.

§ 13.- Si servus bona fide emerit peculiari nomine, ego ubi primum cognovi sciam alienam, processuram usucapionem Celsus ait: initium enim possessionis sine vitio fuisse: sed si eo ipso tempore quo emit, quamquam id bona fide faciat, ego alienam rem esse sciam, usu me non capturum.

§ 14.- Et si quod non bona fide servus meus emerit,

§ 9.- Many authorities hold, if an agent buys property at auction by the direction of his principal, that he can acquire it by usucaption, as a purchaser, on the ground of public convenience. The same rule applies if, while transacting the business of his principal, he makes the purchase without the knowledge of the latter.

§ 10.- If your slave purchases property for his peculium which he knows belongs to another, you cannot acquire it by usucaption, even if you are not aware that it belongs to someone else.

§ 11.- Celsus says that if my slave, without my knowledge, obtains possession of property for his peculium, I can acquire it by usucaption. If he does not obtain it as a part of his peculium, I cannot acquire it, unless I know that he has obtained it; and if he has possession which is defective in law, my possession will also be defective.

§ 12.- Pomponius also says, with reference to property which is possessed in the name of the owner, that the intention of the latter, rather than that of the slave, should be considered. If the slave possesses property as part of his peculium, then his intention must be taken into consideration; and if the slave possesses it in bad faith, and his master obtains it in order to hold it in his own name, for instance, by depriving the slave of his peculium, it must be said that the same reason for possession exists, and therefore, that the master cannot avail himself of usucaption.

§ 13.- If my slave should purchase property for his peculium in good faith, and when I first heard of it I knew the property belonged to another, Cassius says that usucaption can take place, for the beginning of the possession was without any defect. If, however, at the time he purchased the property, even though he did so in good faith, I knew that it belonged to someone else, I cannot acquire it by usucaption.

§ 14.- If my slave should give to me, in

§ 9.- Los más opinan, que por causa de utilidad usucapirá como comprador también el procurador, que hubiere comprado una cosa en la licitación que por mandato de su principal hubiere hecho. Lo mismo se puede decir, por razón de la misma utilidad, si el gestor de negocios de su señor, que lo ignora, hubiere comprado una cosa.

§ 10.- Si un esclavo tuyo compró a nombre del peculio una cosa, que sabe que es ajena, aunque tú ignores que es ajena, no la usucapirás, sin embargo.

§ 11.- Escribe Celso, que si un esclavo mío adquiriese a nombre del peculio la posesión, la adquiriere por usucapion aun ignorándolo yo; pero si no a nombre del peculio, no de otra suerte sino sabiéndolo yo, y que, si él hubiere comenzado a poseer con vicio, mi posesión era viciosa.

§ 12.- También Pomponio dice, que tratándose de cosas, que sean poseídas a nombre del señor, se ha de atender a la voluntad del señor, más bien que a la del esclavo; pero que si de cosa del peculio, en este caso se ha de investigar la intención del esclavo; y si el esclavo poseyera de mala fe la cosa, y el señor la hubiere obtenido de modo que la posea en su propio nombre, por ejemplo, habiéndole quitado el peculio, se ha de decir que es una misma la causa de la posesión, y que por esto no procede a favor de él la usucapion.

§ 13.- Si un esclavo hubiere comprado de buena fe una cosa a nombre del peculio, y yo, tan pronto como de ello tuve conocimiento, supiera que era ajena, dice Celso que será procedente la usucapion, porque no tuvo vicio el principio de la posesión; pero que si al mismo tiempo en que la compró, aunque esto lo hiciera de buena fe, supiese yo que la cosa era ajena, no usucapiré la cosa.

§ 14.- Y si lo que mi esclavo hubiere comprado, no

in pactionem libertatis mihi dederit, non ideo me magis usucapturum; durare enim primam causam possessionis idem Celsus ait.

§ 15.- Si a pupillo emero sine tutoris auctoritate, quem puberem esse putem, dicemus usucapionem sequi, ut hic plus sit in re quam in existimatione; quodsi scias pupillum esse, putes tamen pupillis licere res suas sine tutoris auctoritate administrare, non capies usu, quia iuris error nulli prodest.

§ 16.- Si a furioso, quem putem sanae mentis, emero, constitit usucapere utilitatis causa me posse, quamvis nulla esset emptio et ideo neque de evictione actio nascitur mihi nec Publiciana competit nec accessio possessionis.

§ 17.- Si eam rem, quam pro emptore usucapiebas, scienti mihi alienam esse vendideris, non capiam usu.

§ 18.- Etiam heredi ulteriori defuncti possessio proderit, quamvis medius heres possessionem eius nactus non sit.

§ 19.- Si defunctus bona fide emerit, usucapietur res, quamvis heres scit alienam esse. Hoc et in bonorum possessore et in fideicommissariis, quibus ex Trebelliano restituitur hereditas, ceterisque praetoriis successoribus observatum est.

§ 20.- Emtori tempus venditoris ad usucapionem procedit.

consideration of his freedom, certain property which he had purchased in bad faith, I cannot acquire it by usucaption; for Celsus says that the first defective possession still continues to exist.

§ 15.- If I make a purchase from a ward without the authority of his guardian, believing that he has reached the age of puberty, we hold that usucaption can take place, as this rather applies to the property than to the opinion. If, however, you know the vendor to be a ward, and you still believe that wards have the right to transact their own affairs without the authority of their guardians, you will not acquire the property by usucaption, because an error of law is of no advantage to anyone.

§ 16.- If I purchase property from an insane person whom I think to be of sound mind, it has been established that I can acquire it by usucaption on the ground of public convenience, although the purchase was void; and therefore I will neither be entitled to an action founded upon eviction, nor will the Publician Action lie, nor will any benefit result from previous possession.

§ 17.- If you sell me property which you are about to acquire by usucaption as a purchaser, and I know that it belongs to another, I cannot acquire it by usucaption.

§ 18.- Although possession may benefit the immediate heir of the deceased, a more distant heir cannot obtain possession of the property.

§ 19.- If the deceased bought property in good faith, it can be acquired by usucaption, even though the heir knew that it belonged to someone else. This rule should be observed, not only in the case of praetorian possession, but also in that of trusts by virtue of which an estate is transferred under the Trebellian Decree of the Senate, as well as with reference to all other praetorian successors.

§ 20.- The time that the property was possessed by the vendor benefits the purchaser in acquiring usucaption of the same.

de buena fe, me lo hubiere dado por pacto para su libertad, no por eso lo usucapiré con más razón; porque dice el mismo Celso, que subsiste la primera causa de la posesión.

§ 15.- Si sin la autoridad del tutor le hubiere comprado una cosa a un pupilo, que yo creía que era púbero, diremos que tiene lugar la usucapición, de suerte que en este caso importe más la realidad que la opinión; mas si supieras que era pupilo, pero creyeses que a los pupilos les era lícito administrar sus propias cosas sin la autoridad del tutor, no la usucapirás, porque a nadie le aprovecha el error de derecho.

§ 16.- Si yo le hubiere comprado una cosa a un loco, a quien yo creía en su cabal juicio, es sabido que por causa de utilidad puedo usucapirla, aunque fuese nula la compra; y por esto ni nace para mí la acción de evicción, ni compete la Publiciana, ni la accesión de la posesión.

§ 17.- Si me hubieres vendido la cosa, que usucapías como comprador, sabiendo yo que era ajena, no la usucapiré.

§ 18.- La posesión del difunto aprovechará también al último heredero, aunque el heredero intermedio no haya alcanzado la posesión de aquél.

§ 19.- Si el difunto hubiere comprado de buena fe una cosa, será usucapida la cosa aunque el heredero sepa que era ajena. Esto se observó respecto al poseedor de los bienes, y a los fideicomisarios, a quienes en virtud del Senadoconsulto Trebelliano se les restituye la herencia, y en cuanto a los demás sucesores por derecho pretoriano.

§ 20.- El tiempo del vendedor le favorece al comprador para la usucapición.

§ 21.- Si rem alienam emero et, quum usucaperem, eandem rem dominus a me petierit, non interpellari usucapionem meam litis contestatione. Sed si litis aestimationem sufferre maluerim, ait Iulianus causam possessionis mutari ei, qui litis aestimationem sustulerit, idemque esse, si dominus ei, qui rem emisset a non domino, donasset: eaque sententia vera est.

3.- ULPIANUS; *libro LXXV, ad Edictum*.- Litis aestimatio similis est emptioni.

4.- IAVOLENUS; *libro II, ex Plautio*.- Emtor fundi partem eius alienam esse non ignoraverat; responsum est nihil eum ex eo fundo longa possessione capturum; quod ita verum esse existimo, si, quae pars aliena esset in eo fundo, emtor ignoraverat; quod si certum locum esse sciret, reliquas partes longa possessione capi posse, non dubito.

§ 1.- Idem iuris est, si is, qui totum fundum emebat, pro indiviso partem aliquam alienam esse scit; eam enim duntaxat non capiet, ceterarum partium non impediatur longa possessione capio.

5.- MODESTINUS; *libro X, Pandectarum*.- Si rem, quam tibi pigneravi, surripuero, eamque distrahero, de usucapione dubitatum est; et verius est utiliter cedere tempora usucapionis.

6.- POMPONIUS; *libro XXXII, ad Sabinum*.- Qui, quum pro herede vel pro emtore usucaperet, precario rogavit, usucapere non potest: quid porro inter eas res interest, quum utrobique desinat ex prima causa possidere, qui precario vult habere?

§ 21.- If I purchase property belonging to another, and while I am in the course of acquiring it by usucaption, the owner brings an action to recover it from me, my usucaption will not be interrupted by the joinder of issue in the case. If, however, I should prefer to pay the appraised value of the property in court, Julianus says that the title to possession is changed, so far as he who paid the value of the property in court is concerned. The same rule will apply, if the owner donates the property to him who purchased it from one who is not its owner. This opinion is correct.

3.- ULPIANUS; *On the Edict, Book LXXV*.- Payment of the appraised value of the property in court resembles a purchase.

4.- JAVOLENUS; *On Plautius, Book II*.- A purchaser knew that a part of the land which he bought belonged to another. The opinion was given that he could not obtain any of the land by virtue of long possession. I think that this is true, if the purchaser was not aware what part of the land belonged to another; for if he knew that it was a certain tract of it, I have no doubt that he could obtain the remainder on the ground of long possession.

§ 1.- The same rule of law applies, if a man who purchased an entire tract of land was aware that an undivided part of it belonged to someone else; for he can not only acquire that part by usucaption, but he will not be prevented from acquiring the remaining parts by long possession.

5.- MODESTINUS; *Pandects, Book X*.- If I have pledged property with you, and then steal and sell it, a doubt arises as to whether it can be acquired by usucaption. The better opinion is that it can be so acquired.

6.- POMPONIUS; *On Sabinus, Book XXXII*.- Where anyone who is in a way to acquire by usucaption any property, either as heir or as purchaser, has claimed it by a precarious title, he cannot acquire it by usucaption. For what difference is there between these things, when he claims the

§ 21.- Si yo hubiere comprado una cosa ajena, y al usucapirla yo su dueño me pidiera la misma cosa, no se interrumpe mi usucapición con la contestación de la demanda. Pero si yo hubiere preferido pagar la estimación del litigio, dice Juliano que se cambia la causa de la posesión al que hubiere pagado la estimación del litigio; y que lo mismo es, si el dueño le hubiese donado la cosa al que la hubiese comprado de quien no era dueño; y esta opinión es verdadera.

3.- ULPIANO; *Comentarios al Edicto, libro LXXV*.- La estimación del litigio es semejante a una compra.

4.- JAVOLENO; *Doctrina de Plaucio, libro II*.- El comprador de un fundo no había ignorado que parte de él era ajena; se respondió, que él no usucapirá nada de este fundo con la larga posesión, lo que estimo que es así verdad, si el comprador había ignorado cuál fuese la parte ajena en este fundo; pero si sabía que era cierto lugar, no dudo que con la larga posesión se pueden usucapir las de las partes.

§ 1.- El mismo derecho hay, si el que compraba todo un fundo sabe que alguna parte indivisa era ajena; porque solamente ésta no la usucapirá; y no se impedirá la usucapición de las otras partes con la larga posesión.

5.- MODESTINO; *Pandectas, libro X*.- Si yo te hubiere hurtado la cosa que te di en prenda, y la hubiere vendido, se dudó respecto a la usucapición; y es más verdadero que corre útilmente el tiempo de la usucapición.

6.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- El que estando usucapiendo una cosa, como heredero o como comprador, la rogó en precario, no puede usucapirla; ¿qué diferencia, pues, hay entre estos casos, cuando en uno y en otro deja de poseer el que quiere tener la cosa en precario?

property by a precarious title, he ceases in both instances to hold possession under his first title?

§ 1.- Si ex decem servis, quos emerim, aliquos putem alienos et qui sint sciam, reliquos usucapiam; quodsi ignorem, qui sint alieni, neminem usucapere possum.

§ 2.- Post mortem eius, qui hominem emerit, expleto tempore, quod defuisset ad usucapionem, quamvis eum hominem heres possidere non coepisset, fiet tamen eius: sed ita hoc, si nemo eum possedisset.

7.- IULIANUS; *libro XLIV, Digestorum*.- Qui fundum pro emtore possidebat, antequam diuturnam possessionem impleret, decessit: servi, qui in possessionem relictos fuerant, discesserunt relinquendae eius gratia; quaesitum est, an nihilominus heredi tempus longae possessionis procedere potest? Respondit etiam discedentibus servis hoc tempus heredi procedere.

§ 1.- Si fundum Cornelianum pro emtore longa possessione capiam et partem ex vicini fundo ei adiciam, utrum eam quoque partem reliquo tempore pro emtore capiam an integro statuto tempore? Respondi: partes, quae emtioni fundi adiiciuntur, propriam ac separatam condicionem habent; et ideo possessionem quoque earum separatim nancisci oportere et longam possessionem earum integro statuto tempore impleri.

§ 2.- Servus meus Titio mandavit, ut fundum ei emeret, eique manumisso Titius possessionem tradidit: quaesitum est, an longa possessione caperet. Respondit, si servus meus mandaverit Titio, ut fundum emeret, et manumisso ei Titius fundum

§ 1.- If, out of ten slaves whom I have purchased, I think that some belong to other persons, and I know which ones they are, I can acquire the others by usucaption. If, however, I do not know which of them belong to others, I cannot acquire any of them by usucaption.

§ 2.- The time for acquiring by usucaption having expired after the death of a man who purchased a slave, although the heir may not have begun to possess the slave, he will still become his, provided no one else has obtained possession of him in the meantime.

7.- JULIANUS; *Digest, Book XLIV*.- A certain person who possessed a tract of land, as purchaser, died before the time had elapsed for acquiring the land by usucaption, and the slaves who had been left in possession of the property departed with the intention of abandoning it. The question arose whether the time of long possession would, nevertheless, continue to benefit the heir. The answer was, that even if the slaves did leave, the heir could profit by the time.

§ 1.- If I obtain the Cornelian Estate, as purchaser, by virtue of long-continued possession, and I add to it a part of some adjoining land, can I also obtain this portion as purchaser during the remaining time necessary for prescription; or can I acquire it by usucaption during the time prescribed by law? I gave it as my opinion that the adjacent land, which was added to that already purchased, has its own peculiar and distinct condition, and therefore that possession of both tracts must be separately obtained, and must be acquired by long possession in accordance with the time prescribed by law.

§ 2.- My slave directed Titius to purchase a tract of land for him, and Titius transferred the possession of the same to the slave after his manumission. The question arose whether he could obtain it by long possession. The answer was, that if my slave had

§ 1.- Si de diez esclavos, que yo hubiere comprado, yo creía que algunos eran ajenos, y supiese cuáles eran, usucapiré los restantes; pero si ignorase cuáles eran ajenos, no puedo usucapir ninguno.

§ 2.- Cumplido después de la muerte del que hubiere comprado un esclavo el tiempo que hubiese faltado para la usucapición, aunque el heredero no hubiese comenzado a poseer este esclavo, se hará, sin embargo, de él; pero esto así, si nadie lo hubiese poseído.

7.- JULIANO; *Digesto, libro XLIV*. - Uno, que como comprador poseía un fundo, falleció antes de completar la posesión de largo tiempo; los esclavos, que habían sido dejados en la posesión, se marcharon de ella para abandonarla; se preguntó, ¿le puede aprovechar, sin embargo, al heredero el tiempo de la larga posesión? Respondió, que aun marchándose los esclavos le aprovechaba este tiempo al heredero.

§ 1.- Si como comprador usucapiera yo con la larga posesión el fundo Cornelianum, y le agregara parte de un fundo del vecino, ¿usucapiré como comprador también esta parte con el transcurso del tiempo restante, o con el de todo el tiempo establecido? Respondí: las partes que se agregan a la compra de un fundo tienen propia y separada condición; y por esto se debe adquirir por separado también la posesión de las mismas, y completarse con todo el tiempo establecido la larga posesión de las mismas.

§ 2.- Un esclavo mío le mandó a Ticio que comprase para él un fundo, y Ticio le entregó la posesión estando él manumitido; se preguntó, si lo usucapirá por la larga posesión. Respondió, que si un esclavo mío le hubiere mandado a Ticio que com-

tradiderit, quum putaret et peculium ei concessum esse vel etiam quum ignoraret peculium concessum non esse, nihilo minus servum diutina possessione capere, quia aut scit servus peculium sibi concessum non esse aut scire debet et per hoc similis est ei, qui se creditorem esse simulat; quodsi scierit Titius peculium manumisso concessum non esse, donare potius quam indebitum fundum solvere intelligendus est.

§ 3.- Si tutor rem pupilli surriperit et vendiderit, usucapio non contingit, priusquam res in potestatem pupilli redeat; nam tutor in re pupilli tunc domini loco habetur, quum tutelam administrat, non quum pupillum spoliat.

§ 4.- Qui bona fide alienum fundum emit et possessionem eius amisit, deinde eo tempore apprehendisset, quo scit rem alienam esse, non capiet longo tempore, quia initium secundae possessionis vitio non carebit. Nec similis est ei, qui emissionis quidem tempore putat fundum vendentis esse, sed quum traditur, scit alienum esse: quum enim semel amissa fuerit possessio, initium rursus recuperatae possessionis spectari oportet. Quare si eo tempore redhibeatur homo, quo emptor scit alienum esse, usucapio non contingit, quamvis antequam venderet, in ea causa fuerit, ut usucaperet. Idem iuris est in eo, qui de fundo deiectus possessionem per interdictum recipiavit sciens iam alienum esse.

§ 5.- Qui sciens emit ab eo, quem Praetor ut suspectum heredem deminuere vetuit, usu non capiet.

directed Titius to purchase the land, and Titius had delivered it to him after his manumission, whether he believed that the slave's peculium had been given to him, or did not know that it had not, the slave could, nevertheless, obtain the land by long-continued possession, because he either knew that his peculium had been given him, or he ought to have known it, and hence he resembles one who pretends to be a creditor. If, however, Titius knew that his peculium had not been given to the slave, he should be understood to have rather bestowed the land as a donation than, to have relinquished it for the discharge of a debt which was not due.

§ 3.- If a guardian should steal the property of his ward and sell it, usucaption will not take place before it has been again placed under the control of the ward; for the guardian is only considered to occupy the place of the owner with reference to the property of his ward when he is administering the affairs of the guardianship, and not when he is despoiling his ward.

§ 4.- Where anyone in good faith purchases land belonging to another and loses possession of the same, and afterwards, when he recovers it, ascertains that it belongs to someone else, he cannot acquire it by lapse of time, for the reason that the beginning of the second possession is defective. Nor does he resemble one who, at the time of the purchase, believed the land to belong to the vendor, but when it was delivered, knew that it belonged to someone else; for, when possession has once been lost, the beginning of the recovered possession must again be taken into consideration. Therefore, if a slave is returned at a time when the purchaser was aware that he belonged to another, usucaption will not take place; even though before he sold him he was in such a position that he could acquire him by usucaption. The same rule applies to one who has been ejected from land, and, knowing that it belonged to another, recovers possession of it by means of an interdict.

§ 5.- Anyone who knowingly purchases from one whom the Praetor has forbidden to dispose of the property of an estate, on account of his being suspected of not being the heir, cannot acquire it by

prase un fundo, y Ticio le hubiere entregado el fundo a aquél, estando él manumitido, creyendo que también se le concedió el peculio, o aun ignorándolo, esto no obstante, el esclavo no lo usucapía con la posesión de largo tiempo, porque o sabe el esclavo que no se le concedió el peculio, o debe saberlo, y es por ello semejante al que simula que él es acreedor; pero si Ticio hubiere sabido que al manumitido no se le concedió el peculio, se ha de entender que él más bien dona que entrega un fundo no debido.

§ 3.- Si el tutor hubiere hurtado, y vendido, una cosa del pupilo, no tiene lugar la usucapición antes que la cosa vuelva a poder del pupilo; porque el tutor es considerado en calidad de dueño de las cosas del pupilo cuando administra la tutela, no cuando despoja al pupilo.

§ 4.- El que de buena fe compró un fundo ajeno y perdió su posesión, y después la hubiese recobrado a tiempo en que sabe que la cosa era ajena, no la usucapirá por el largo tiempo, porque no carecerá de vicio el comienzo de la segunda posesión y no es semejante al que al tiempo de la compra cree que el fundo es del vendedor, pero cuando se le entrega sabe que es ajeno; porque cuando una vez se haya perdido la posesión, se debe atender al comienzo de la posesión recuperada de nuevo. Por lo cual, si un esclavo fuera devuelto a tiempo en que el comprador sabe que es ajeno, no tiene lugar la usucapición, aunque, antes que lo vendiese, hubiere estado en situación de usucapirlo. El mismo derecho hay respecto al que echado de un fundo hubiere recuperado por interdicto la posesión, sabiendo ya que era ajeno.

§ 5.- El que a sabiendas compró una cosa a aquel a quien el Pretor le vedó, como a heredero sospechoso, enajenar, no la usucapirá.

usucaption.

§ 6.- Procurator tuus si fundum, quem centum aureis vendere poterat, addixerit triginta aureis in hoc solum, ut te damno afficeret, ignorante emptore, dubitari non oportet, quin emptor longo tempore capiat: nam et quum sciens quis alienum fundum vendidit ignoranti, non interpellatur longa possessio. Quodsi emtor quum procuratore collusit et eum praemio corrupit, quo vilius mercaretur, non intelligitur bonae fidei emtor nec longo tempore capiet; et si adversus petentem dominum uti coeperit exceptione rei voluntate eius venditae, replicationem doli utilem futuram esse.

§ 7.- Furtiva res non intelligitur rediisse in domini potestatem, quamvis possideret eam, si modo ignoraverit surreptam sibi esse; si igitur servum, qui tibi surreptus erat, ignoranti tibi tuum esse pignori dederit et soluta pecunia eum Titio vendiderit, Titius usucapere non poterit.

§ 8.- Liber homo, qui bona fide nobis servit, iisdem modis ex re nostra acquirit nobis, quibus per servum nostrum acquirere solemus; quare sicut traditione, ita usucapione rem nostram faciemus interveniente libera persona, et si peculii nomine, quod nos sequi debet, emptio contracta fuerit, etiam ignorantes usucapiemus.

8.- IDEM; *libro II, ex Minicio*.- Si quis, quum sciret venditorem pecuniam statim consumpturum, servos ab eo emisset, plerique responderunt eum nihilominus bona fide emtorem esse, idque verius est: quomodo enim mala fide emisse videtur, qui a

§ 6.- If your agent sells a tract of land for only thirty aurei which he could have sold for a hundred, in order to cause you injury, and the purchaser is not aware of the fact, there is no doubt that the latter can acquire the land by long-continued possession; for even where anyone knowingly sells land belonging to another to one who is not aware that this is the case, long-continued possession is not interrupted. If, however, the purchaser should be in collusion with the agent, and, for the sake of a reward, corruptly induces him to sell the property for less than it was worth, the purchaser will not be understood to have acted in good faith, and he cannot acquire the land by prescription. If he avails himself of an exception on the ground that the land was sold with the consent of the owner, and the latter brings an action to recover it, the owner can avail himself of a reply based on fraud.

§ 7.- Stolen property is not understood to be again brought' under the control of the owner, even if he regains possession of the same, if he does not know that it has been stolen from him. Therefore, if I should give in pledge a slave who has been stolen from you, and you are not aware that he is yours, and, after payment of the debt, I should sell him to Titius, Titius cannot acquire him by usucaption.

§ 8.- A freeman who is serving us in good faith as a slave, while managing our property, can acquire other property for us in the same way in which we are accustomed to acquire it by means of our own slaves. Hence, as we obtain the ownership of property either by delivery or by usucaption through the intervention of a person who is free, so, if a contract for a sale is entered into by means of the peculium of a slave, to which we are entitled, we can acquire the property by usucaption, even if we are not aware that the purchase has been made.

8.- THE SAME; *On Minicius, Book II*.- Where anyone buys slaves knowing that the vendor will immediately squander the money paid for them, many authorities have held that he will, nevertheless, be a bona, fide purchaser in good faith; and this is

§ 6.- Si el fundo que podía vender por cien áureos lo hubiere entregado tu procurador por treinta áureos con el único objeto de causarte perjuicio, ignorándolo el comprador, no se debe dudar que el comprador lo usucapirá con el transcurso de largo tiempo; porque cuando uno a sabiendas vendió un fundo ajeno al que lo ignora, tampoco se interrumpe la larga posesión. Mas si el comprador hizo colusión con el procurador, y corrompió a éste con premio, para comprarlo por menos, no sera considerado comprador de buena fe, ni usucapirá por el transcurso de largo tiempo; y si contra el dueño que reclama hubiere comenzado a utilizar la excepción de haber sido vendida la cosa con su voluntad, habrá la réplica útil de dolo.

§ 7.- No se entiende que la cosa hurtada volvió a poder de su dueño, aunque la posea, si ignorare que le había sido hurtada; si, pues, yo te hubiere dado en prenda, ignorando tú que era tuyo, el esclavo que te había sido hurtado, y pagado el dinero yo se lo hubiere vendido a Ticio, Ticio no podrá usucapirlo.

§ 8.- Un hombre libre, que de buena fe nos sirve, adquiere para nosotros con cosa nuestra por los mismos modos por los que solemos adquirir por medio de un esclavo nuestro; por lo cual así como por la entrega, haremos nuestra por la usucapición una cosa interviniendo una persona libre, y si la compra hubiere sido contratada a nombre del peculio, que nos debe corresponder, usucapiremos aun ignorándolo.

8. EL MISMO; *Doctrina de Minicio, libro II*.- Si alguno, sabiendo que el vendedor consumirá inmediatamente el dinero, le hubiese comprado esclavos, respondieron los más, que él era, ello no obstante, comprador de buena fe; y esto es más verdadero,

domino emit? Nisi forte et is, qui a luxurioso et protinus scorto daturō pecuniam servos emit, non usucapiet-?

9.- IDEM; *libro III, ad Urseium Ferozem*.- Qui ob pactionem libertatis ancillam furtivam a servo accepit, potest partum eius quasi emtor usucapere.

10.- IDEM; *libro II, ad Minicium*.- Servus domino ancillam, quam surripuerat, pro capite suo dedit, ea concepit; quaesitum est, an dominus eum partum usucapere possit. Respondit: hic dominus quasi emtor partum usucapere potest; namque res ei abest pro hac muliere et genere quodammodo venditio inter servum et dominum contracta est.

11.- AFRICANUS; *libro VII, Quaestionum*.- Quod volgo traditum est eum, qui existimat se quid emisit nec emerit, non posse pro emtore usucapere, hactenus verum esse ait, si nullam iustam causam eius erroris emtor habeat; nam si forte servus vel procurator, cui emendam rem mandasset, persuaserit ei, se emisit atque ita tradiderit, magis esse, ut usucapio sequatur.

12.- PAPINIANUS; *libro X, Responsorum*.- Misso legatario in possessionem res pro emtore usucapiuntur salva praetorii pignoris causa.

13.- SCAEVOLA; *libro V, Responsorum*.- Alienam aream bona fide emit et ante impletam diutinam possessionem aedificare coepit; ei denuntiante domino soli intra tempora diutinae possessionis, perseveravit; quaero, utrum interpellata sit an coepta duraverit. Respondit, secundum ea quae proponerentur non esse interpellatam.

true. For, how can he be considered to have acted in bad faith, who bought the slaves from their master, unless he bought them from a man of licentious life, who will immediately give the money to a harlot, for then he cannot acquire the slaves by usucaption?

9.- THE SAME; *On Urseius Ferox, Book III*.- A man who has received from his own slave a female slave in consideration of the grant of his freedom, can, as a purchaser, acquire by usucaption the child of the said female slave.

10.- THE SAME; *On Minicius, Book II*.- A slave, in consideration of his freedom, gave to his master a female slave whom he had stolen. She conceived. The question arose whether her master could acquire her child by usucaption. The answer was that the master could, as purchaser, acquire the child by usucaption, for he gave something for the woman, and a kind of sale was made between the slave and his owner.

11.- AFRICANUS; *Questions, Book VII*.- It is usually said that he who thinks that he has bought something and did not do so cannot, as a purchaser, acquire it by usucaption; but this is only true to the extent that the purchaser must have no just cause for entertaining his erroneous opinion. For if a slave or an agent who has been directed to purchase the property should persuade his principal that he has done so, and deliver the property to him, the better opinion is that usucaption will take place.

12.- PAPINIANUS; *Opinions, Book X*.- When a legatee has been placed in possession of property, this can be acquired by usucaption by the heir, as purchaser, the right of praetorian pledge being reserved.

13.- SCAEVOLA; *Opinions, Book V*.- A certain man purchased, in good faith, a tract of land belonging to another, and began to build a house upon it before the time for acquiring possession of it by prescription had elapsed; and the owner of the land, having notified him before the term fixed by law had expired, continued to retain possession. I ask

porque ¿cómo se considera que compró de buena fe el que le compró al dueño, -a no ser acaso que no usucapia el que le compró los esclavos a un lujurioso, que inmediatamente le había de dar el dinero a una ramera-?

9.- EL MISMO; *Comentarios a Urseyo Ferox, libro III*.- El que por causa de pacto para la libertad recibió de un esclavo una esclava hurtada, puede usucapir como comprador el parto de ella.

10.- EL MISMO; *Comentarios a Minicio, Libro II*.- Un esclavo le dio por su libertad a su señor la esclava que él había hurtado, y ella concibió; se preguntó, si podrá el señor usucapir este parto. Respondió: el señor puede usucapir como comprador el parto; porque a él le falta algo por esta esclava, y en cierto modo se celebró una venta entre el esclavo y su señor.

11.- AFRICANO; *Cuestiones, Libro VII*.- Lo que vulgarmente se dijo, que el que cree que compró alguna cosa, y no la hubiere comprado, no puede usucapirla como comprador, dice que es verdad solamente si el comprador no tuviera alguna justa causa de su error; porque si acaso un esclavo o el procurador, a quien le hubiese mandado que comprara la cosa, le hubiere persuadido de que la compró, y así se la hubiere entregado, es mas cierto que tiene lugar la usucapición.

12.- PAPINIANO; *Respuestas, libro X*.- Puesto el legatario en posesión, se usucapirán las cosas a título de comprador, quedando salva la causa de la prenda pretoria.

13.- SCAEVOLA; *Respuestas, libro V*.- Uno compró de buena fe un solar ajeno, y comenzó a edificar antes de haber completado la posesión de largo tiempo; habiéndole hecho la denuncia el dueño del solar, continuó dentro del término de la posesión de largo tiempo; pregunto, si se habrá interrumpido, o si continuará la comenzada. Respondió, que, según lo

14.- IDEM; *libro XXV, Digestorum*.- Intestatae sororis hereditas obvenit duobus fratribus, quorum alter absens erat, alter praesens; praesens etiam absentis causam agebat; ex qua hereditate suo et fratris sui nomine fundum in solidum vendidit Lucio Titio bona fide ementi; quaesitum est, quum scierit partem fundi absentis esse, an totum fundum longa possessione ceperit. Respondit, si credidisset mandatu fratris veniisse, per longum tempus cepisse.

whether the prescription was interrupted, or, having once begun, continued to run. The answer was that, in accordance with the facts stated, it had not been interrupted.

14.- THE SAME; *Digest, Book XXV*.- The estate of a sister, who died intestate, passed to her two brothers, one of whom was absent and the other present. The one who was present acted for the absent one, and sold to Lucius Titius, a bona fide purchaser, an entire tract of land in his own name and in that of his brother. The question arose whether the purchaser, knowing that half of the land belonged to the absent heir, could acquire the entire tract by prescription. The answer was that he could do so, if he believed that it had been sold by the authority of the brother who was absent.

que se exponía, no se interrumpió.

14.- EL MISMO; *Digesto, libro XXV*.- La herencia de su hermana intestada les correspondió a dos hermanos, uno de los cuales estaba ausente, y otro presente; el presente defendía también la causa del ausente; de esta herencia vendió solidariamente a Lucio Ticio, que lo compró de buena fe, un fundo en su propio nombre y en el de su hermano; se preguntó, si, habiendo sabido que una parte del fundo era del ausente, usucapirá todo el fundo con la larga posesión. Respondió, que si hubiese creído que lo vendió con mandato de su hermano, lo usucapía con el transcurso de largo tiempo.

TITULO V

PRO HEREDE, VEL PRO POSSESSORE

1.- POMPONIUS; *libro XXXII, ad Sabinum*.- Pro herede ex vivi bonis nihil usucapi potest, etiamsi possessor mortui rem fuisse existimaverit.

2.- IULIANUS; *libro XLIV, Digestorum*.- Qui legatorum servandorum causa in possessionem mittitur, non interpellat possessionem eius, qui pro herede usucapit: custodiae enim causa rem tenet. Quid ergo est? etiam impleta usucapione ius pignoris retinebit, ut non prius discedat, quam si solutum ei legatum fuerit aut eo nomine satisdatum.

§ 1.- Quod volgo respondetur causam possessionis neminem sibi mutare posse, sic accipiendum est, ut possessio non solum civilis, sed etiam naturalis intelligatur. Et propterea responsum est neque colonum neque eum, apud quem res deposita aut cui

TITLE V

CONCERNING POSSESSION AS HEIR OR AS POSSESSOR

1.- POMPONIUS; *On Sabinus, Book XXXII*.- Nothing can be acquired by an heir through usucaption out of the property of a person who is living, even though the possessor thought that it belonged to one who is dead.

2.- JULIANUS; *Digest, Book XLIV*.- When anyone is placed in possession of an estate for the preservation of a legacy, he does not interrupt the possession of him who acquires by usucaption as heir, for he holds the property for safe-keeping. What then results? He will retain the property by the right of pledge, even after the time required for usucaption has elapsed, and he will not relinquish it until his legacy has been paid to him, or his claim to it has been satisfied.

§ 1.- The common opinion that no one can change the title of his own possession must be understood to apply, not only to civil, but also to natural possession. Therefore, it has been held that neither a tenant, nor anyone with whom property has been deposited, or

TÍTULO V

COMO HEREDERO, O COMO POSEEDOR

1.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- A título de heredero no se puede usucapir nada de los bienes del que vive, aunque el poseedor haya estimado que la cosa era de uno que había muerto.

2.- JULIANO; *Digesto, libro XLIV*.- El que es puesto en posesión para conservar los legados, no interrumpe la posesión del que usucapía como heredero; porque aquél tiene la cosa para custodiarla. ¿Qué se dirá, pues? Que aún cumplida la usucapición retendrá el derecho de prenda, de suerte que no se separe de la cosa antes que se le haya pagado el legado, o que por tal motivo se le haya dado fianza.

§ 1.- Lo que vulgarmente se responde, que nadie puede cambiarse a sí mismo la causa de la posesión, se ha de interpretar de modo que se entienda no solamente la posesión civil, sino también la natural. Y por esto se respondió, que ni el colono, ni aquel en

commodata est, lucri faciendi causa pro herede usucapere posse.

§ 2.- Filium quoque donatam rem a patre pro herede negavit usucapere Servius, scilicet qui existimabat naturalem possessionem penes eum fuisse vivo patre; cui consequens est, ut filius a patre heres institutus res hereditarias a patre sibi donatas pro parte coheredum usucapere non possit.

3.- POMPONIUS; *libro XXIII, ad Quintum Mucium*.- Plerique putaverunt, si heres sim et putem rem aliquam ex hereditate esse quae non sit, posse me usucapere.

4.- PAULUS; *libro V, ad legem Iuliam et Papiam*.- Constat eum, qui testamenti factionem habet, pro herede usucapere posse.

TIT. VI

PRO DONATO

1.- PAULUS; *libro LIV, ad Edictum*.- Pro donato is usucapit, cui donationis causa retradita est; nec sufficit opinari, sed et donatum esse oportet.

§ 1.- Si pater filio quem in potestate habet donet, deinde decedat, filius pro donato non capiet usu, quoniam nulla donatio fuit.

§ 2.- Si inter virum et uxorem donatio facta sit, cessat usucapio. Item si vir uxori rem donaverit et divortium intercesserit, cessare usucapionem, Cassius respondit, quoniam non possit causam

lent, can, as heir, acquire it by usucaption, for the purpose of profiting by it.

§ 2.- Servius denies that a son can, in the capacity of heir, acquire by usucaption property which has been given to him by his father; for he held that natural possession of it was in the hands of the son during the lifetime of his father. The result of this is that, where a son has been appointed heir by his father, he cannot acquire by usucaption any portion of the estate given to him by the former so far as this may affect the shares of his co-heirs.

3.- POMPONIUS; *On Quintus Mucius, Book XXIII*.- Many authorities hold that if I am the heir, and think that certain property belongs to the estate, but which really forms no part of it, I can acquire it by usucaption.

4.- PAULUS; *On the Lex Julia et Papia, Book V*.- It is established that he who has a right to make a will can, in the capacity of heir, acquire property by usucaption.

TITLE VI

CONCERNING POSSESSION ON THE
GROUND OF DONATION

1.- PAULUS; *On the Edict, Book LIV*.- He to whom property has been delivered as a gift acquires it by usucaption, because of the donation. It is not sufficient to think that this was the case, but it is necessary for the donation actually to be made.

§ 1.- If a father makes a donation to his son whom he has under his control, and then dies, the son cannot acquire the property given by usucaption, for the reason that the donation is void.

§ 2.- Where a donation is made between husband and wife, usucaption does not take place. Moreover, Cassius says that if a husband should give property to his wife, and a divorce should then take place,

cuyo poder fue depositada, o a quien fue dada en comodato una cosa, puede usucapirla como heredero para realizar lucro.

§ 2.- Dice Servio, que tampoco el hijo usucapía como heredero la cosa donada por su padre, porque él creía que la posesión natural se hallaba en poder del mismo en vida del padre; a lo cual es consiguiente, que el hijo instituido heredero por el padre no pueda usucapir por la parte de los coherederos los bienes de la herencia que se le donaron por el padre.

3.- POMPONIO; *Comentarios a Quinto Mucio, libro XXIII*.- Opinaron los más, que si yo fuese heredero y opinase que era de la herencia alguna cosa, que no lo fuese, podía yo usucapirla.

4.- PAULO; *Comentarios a la ley Julia y Papia, libro V*.- Es sabido, que el que tiene la testamentifacción puede usucapir como heredero.

TÍTULO VI

COMO POR DONACIÓN

1.- PAULO; *Comentarios al Edicto, libro LIV*.- Adquiere por usucapición como donación aquel a quien por causa de donación le fue entregada una cosa; y no basta que se crea, sino que es preciso que también se haya hecho la donación.

§ 1.- Si el padre le donara al hijo, que tiene bajo su potestad, y luego falleciera, el hijo no usucapirá como por donación, porque fue nula la donación.

§ 2.- Si se hubiera hecho donación entre marido y mujer, deja de tener lugar la usucapición. Asimismo, si el marido le hubiere donado una cosa a la mujer, y mediare divorcio, respondió Cassio, que dejaba de

possessionis sibi ipsa mutare; alias ait post divortium ita usucapturam, si eam maritus concesserit, quasi nunc donasse intelligatur. Possidere autem uxorem rem a viro donatam Iulianus putat.

2.- MARCELLUS; *libro XXII, Digestorum*.- Si is, qui alienam rem donaverit, revocare constituerit donationem, etiamsi iudicium ediderit remque coeperit vindicare, curret usucapio.

3.- POMPONIUS; *libro XXIV, ad Quintum Mucium*.- Si vir uxori vel uxor viro donaverit, si aliena res donata fuerit, verum est, quod Trebatius putabat, si pauperior is qui donasset non fieret, usucapionem possidenti procedere.

4.- IDEM; *libro XXXII, ad Sabinum*.- Si pater filiae donaverit, quae in potestate eius erat, et eam exheredaverit, si id heres eius ratum habeat, exinde ea usucapiet donationem, qua ex die ratam heres donationem habuerit.

5.- SCAEVOLA; *libro V, Responsorum*.- Qui pro donato coeperat usucapere, manumittendo nihil egit, quia nec dominium nactus fuerit: quaesitum est, an usucapere desierit. Respondi eum de quo quaeritur omisisse videri possessionem, et ideo usucapionem interruptam.

6.- HERMOGENIANUS; *libro II, iuris Epitoma*.- Donationis causa facta venditione non pro emptore, sed pro donato res tradita usucapitur.

usucaption cannot be acquired because the wife cannot, herself, change the title to possession. He states that the rule is different, and that she can obtain the property by usucaption after the divorce, if the husband has allowed her to use the property just as if he was understood to have donated it to her. Julianus, however, thinks that a wife is in possession of property donated by her husband.

2.- MARCELLUS; *Digest, Book XXII*.- Where anyone donates property belonging to another, and determines to revoke the donation, even if he has instituted proceedings to recover it, the usucaption will continue to run.

3.- POMPONIUS; *On Quintus Mucius, Book XXIV*.- When a husband makes a donation to his wife, or a wife to her husband, and the property donated belongs to another, the opinion of Trebatius is, if the party who made the donation does not become any poorer by doing so, the possessor can acquire the property by usucaption, is correct.

4.- THE SAME; *On Sabinus, Book XXXII*.- If a father makes a donation to his daughter, who is under his control, and has disinherited her, and the heir ratifies the donation, she can begin to acquire it by usucaption from the day when the ratification was made.

5.- SCAEVOLA; *Opinions, Book V*.- Where anyone has begun to acquire a slave by usucaption, as a gift, and manumits him, the act of manumission is void, because he has not yet obtained the ownership of the slave. The question arose whether he had ceased to acquire him by usucaption. The answer was that with reference to the person in question, he seemed to have relinquished possession, and hence usucaption was interrupted.

6.- HERMOGENIANUS; *Epitomes of Law, Book II*.- When sale has been made which is, in fact, a donation, the property delivered is acquired by usucaption, as a purchase, and not as a gift.

tener lugar la usucapición, porque no podía ella cambiarse a si misma la causa de la posesión; de otra suerte, dice, ella usucapirá después del divorcio, si el marido le hubiere concedido la cosa, como si se entendiera que entonces se la donó. Pero opina Juliano, que la mujer posee la cosa donada por el marido.

2.- MARCELO; *Digesto, libro XXII*.- Si el que hubiere donado una cosa ajena hubiere determinado revocar la donación, correrá la usucapición aunque hubiere promovido el juicio y comenzado a reivindicar la cosa.

3.- POMPONIO; *Comentarios a Quinto Mucio, libro XXIV*.- Si el marido a la mujer, o la mujer al marido le hubiere donado una cosa, es verdad, si hubiere sido donada una cosa ajena, lo que opinaba Trebacio, que, si no se hiciera más pobre el que la hubiese donado, procedía la usucapición a favor del que la poseía.

4.- EL MISMO; *Comentarios a Sabino, libro XXXII*.- Si el padre le hubiere donado a la hija, que estaba bajo su potestad, y la hubiere desheredado, si su heredero hubiere ratificado esto, ella usucapirá la donación desde el día en que el heredero hubiere tenido por ratificada la donación.

5.- SCÉVOLA; *Respuestas, libro V*.- El que había comenzado a usucapir como por donación no hizo nada manumitiendo, porque no había alcanzado el dominio; se preguntó, si dejaría de usucapir. Respondí, que parecía que éste de quien se trata dejó la posesión, y que por esto se interrumpió la usucapición.

6.- HERMOGENIANO; *Epítome del Derecho, libro II*.- Hecha una venta por causa de donación, la cosa entregada es usucapida no a título de comprador, sino como por donación.

TIT. VII

PRO DERELICTO

1.- ULPIANUS; *libro XII, ad Edictum*.- Si res pro derelicto habita sit, statim nostra esse desinit et occupantis statim fit, quia iisdem modis res desinunt esse nostrae, quibus acquiruntur.

2.- PAULUS; *libro LIV, ad Edictum*.- Pro derelicto rem a domino habitam si sciamus, possumus adquirere.

§ 1.- Sed Proculus non desinere eam rem domini esse, nisi ab alio possessa fuerit: Iulianus, desinere quidem omittentis esse, non fieri autem alterius, nisi possessa fuerit, et recte.

3.- MODESTINUS; *libro VI, Differentiarum*.- An pars pro derelicto haberi possit, quaeri solet. Et quidem si in re communi socius partem suam reliquerit, eius esse desinit, ut hoc sit in parte, quod in toto; atquin totius rei dominus efficere non potest, ut partem retineat, partem pro derelicto habeat.

4.- PAULUS; *libro XV, ad Sabinum*.- Id, quod pro derelicto habitum est et haberi putamus, usucapere possumus, etiam si ignoramus, a quo derelictum sit.

5.- POMPONIUS; *libro XXXII, ad Sabinum*.- Si id, quod pro derelicto habitum possidebas, ego sciens in ea causa esse abs te emerim, me usucapturum constat; nec obstat, quod in bonis tuis non fuerit; nam et si tibi rem ab uxore donatam sciens emerim, quia quasi volente et concedente domino id faceres, idem iuris est.

TITLE VII

CONCERNING POSSESSION ON THE GROUND OF ABANDONMENT

1.- ULPIANUS; *On the Edict, Book XII*.- Where property is considered to be abandoned, it immediately ceases to be ours, and belongs to the first occupant, because it ceases to belong to us under the same circumstances that it is acquired by others.

2.- PAULUS; *On the Edict, Book LIV*.- We can acquire property on the ground of abandonment, if we know that it is considered as relinquished by its owner.

§ 1.- Proculus holds that the property does not cease to belong to the owner, unless possession of it is acquired by someone else. Julianus, however, thinks that it ceases to belong to the owner when he abandons it, but that it does not become the property of another, unless he obtains possession of it. This is correct.

3.- MODESTINUS; *Differences, Book VI*.- An inquiry is sometimes made whether a portion of anything can be considered to have been abandoned. And, indeed, if a joint-owner gives up his share of the common property, it ceases to belong to him, so that the same rule is applicable to a portion that is to all. The sole owner of property, however, cannot retain a part of the same and abandon the remainder.

4.- PAULUS; *On Sabinus, Book XV*.- We can acquire by usucaption property which is considered to be abandoned, when we think that this is the case, even if we do not know by whom it has been abandoned.

5.- POMPONIUS; *On Sabinus, Book XXXII*.- If you possess any article which is considered to have been abandoned, and I, knowing this to be the case, purchase it from you, it is established that I can acquire it by usucaption, and the objection that it is not included in your property cannot be raised. For if I knowingly purchase property given to you by your

TÍTULO VII

COMO COSA ABANDONADA

1.- ULPIANO; *Comentarios al Edicto, libro XII*.- Si una cosa fuera tenida como abandonada, al punto deja de ser nuestra, e inmediatamente se hace del que la ocupa, porque las cosas dejan de ser nuestras de los mismos modos por que se adquieren.

2.- PAULO; *Comentarios al Edicto, libro LIV*.- Si supiéramos que una cosa es considerada por su dueño como abandonada, podemos adquirirla.

§ 1.- Pero dice Próculo, que esta cosa no deja de ser de su dueño, sino si fuere poseída por otro; y Juliano, que ciertamente dejaba de ser del que la abandonaba, pero que no se hacía de otro, a no ser que fuere poseída; y con razón.

3.- MODESTINO; *Diferencias, libro VI*.- Se suele preguntar, si se podrá tener como abandonada una parte. Y a la verdad, si en una cosa común hubiere un condueño abandonado su parte, deja de ser de él, de modo que sea en cuanto a la parte lo que respecto al todo; mas el dueño de toda una cosa no puede hacer de modo que retenga una parte, y tenga como abandonada la otra.

4.- PAULO; *Comentarios a Sabino, libro XV*.- Podemos usucapir lo que se tuvo, y creemos que se tiene, por abandonado, aunque ignoremos por quién haya sido abandonado.

5.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- Si te hubiere comprado una cosa que poseías habiéndose tenido por abandonada, sabiendo yo que se hallaba en esta condición, es sabido que la usucapiré; y no obsta que no haya estado en tus bienes; porque el mismo derecho hay también si a sabiendas hubiere yo comprado una cosa a ti donada

§ 1.- Id, quod quis pro derelicto habuerit, continuo meum fit: sicuti quum quis aes sparserit aut aves emiseric, quamvis incertae personae voluerit eas esse, tamen eius fierent, cui casus tulerit eaque, quum quis pro derelicto habeat, simul intelligitur voluisse alicuius fieri.

6.- IULIANUS; *libro III, ad Urseium Ferozem*.- Nemo potest pro derelicto usucapere, qui falso existimaverit rem pro derelicto habitam esse.

7.- IDEM; *libro II, ex Minicio*.- Si quis merces ex nave iactatas invenisset, num ideo usucapere non possit, quia non viderentur derelictae, quaeritur; sed verius est eum pro derelicto usucapere non posse.

8.- PAULUS; *libro XVIII, Responsorum*.- Sempronius Thetidi status quaestionem facere tentabat, quasi de serva sua nata sit. qui iam testato conventus a Procula, nutrice Thetidis in solvendis alimentis respondit, non se habere, unde alimenta eiusdem exsolvat, sed debere eam patri suo restituere Lucio Titio; idque quum illa in testationem redeisset, ut postea nullam quaestionem pateretur ab eodem Sempronio; Lucius Titius Seiae Proculae solutis alimentis puellam vindicta manumisit: quaero, an possit rescindi libertas Thetidis. Paulus respondit, quoniam dominus ancillae, ex qua Thetis nata est, Thetidem pro derelicto habuisse videtur, potuisse eam a Lucio Titio ad libertatem perducere.

wife, for the reason that you have done this, as it were, with the consent and permission of the owner, the same rule will apply.

§ 1.- Whatever anyone considers to have been abandoned by himself immediately becomes mine, if I take it. Hence, if anyone throws away money, or releases birds, although he intends that they shall belong to anyone who may seize them, they, nevertheless, become the property of him whom chance may favor; for where anyone relinquishes the ownership of property, he is understood to have intended it to belong to anyone else whomsoever.

6.- JULIANUS; *On Urseius Ferox, Book III*.- No one can acquire property by usucaption on the ground of abandonment who erroneously thinks that it has been abandoned.

7.- THE SAME; *On Minicius, Book II*.- When anyone finds merchandise which has been thrown overboard from a ship, the question arises whether he cannot acquire it by usucaption, for the reason that it should be considered as abandoned. The better opinion is that he cannot acquire it by usucaption on the ground of abandonment.

8.- PAULUS; *Opinions, Book XVIII*.- Sempronius attempted to raise a question as to the condition of a certain Thetis, alleging that she was the daughter of one of his female slaves. He, however, having been sued by Procula, the nurse of Thetis, in an action to compel him to reimburse her for Thetis's support, answered that he did not have the means to make payment, but that the nurse should restore the child to her father, Lucius Titius. The nurse then instituted proceedings to prevent any question from being raised afterwards by the said Sempronius. Lucius Titius, after having paid Seia Procula her claim for support, publicly manumitted the child. I ask whether the freedom granted to Thetis can be revoked. Paulus answered that, as the owner of the female slave to whom Thetis was born was considered to have abandoned the latter, she could obtain her freedom at the hands of Lucius Titius.

por tu mujer, porque esto lo harías como queriéndolo y concediéndolo su dueño.

§ 1.- Lo que uno hubiere tenido como abandonado, se hace mío inmediatamente, como cuando uno hubiere tirado dinero o dejado ir las aves; porque aunque hubiere querido que éstas fueran de persona incierta, se harían, sin embargo, de aquélla a quien la casualidad las llevare; y se entiende que cuando alguno tuviera cosas como abandonadas quiso al mismo tiempo que se hicieran de otro.

6.- JULIANO; *Comentarios a Urseyo Ferox, libro III*.- No puede usucapir como por abandono nadie que falsamente haya estimado que la cosa se tuvo por abandonada.

7.- EL MISMO; *Doctrina de Minicio, libro II*.- Si alguno hubiese hallado mercancías arrojadas de una nave, se pregunta, si, no por eso podría usucapirlas, porque no se consideren abandonadas; pero es más verdadero, que él no puede usucapirlas como abandonadas.

8.- PAULO; *Respuestas, libro XVIII*.- Sempronio intentaba promoverle a Tetis cuestión sobre su estado, como si ella hubiera nacido de una esclava suya; el cual, habiendo sido ya citado ante testigos por Prócula, nodriza de Tetis, para que le pagase los alimentos, respondió, que él no tenía por qué pagar los alimentos de la misma, sino que debía restituirla a su propio padre, Lucio Ticio; y habiendo ella consignado esto en un atestado, para no haber de soportar después ninguna cuestión por parte del mismo Sempronio; Lucio Ticio, habiéndole pagado los alimentos a Seia Prócula, manumitió por vindicta a la joven esclava; pregunto, si se podría revocar la libertad de Tetis. Paulo respondió, que como parece que el dueño de la esclava, de la cual nació Tetis, había tenido a Tetis como abandonada, pudo ésta ser declarada en libertad por Lucio Ticio.

TIT. VIII

PRO LEGATO

1.- ULPIANUS; *libro VI, Disputationum*.- Legatorum nomine is videtur possidere cui legatum est; pro legato enim possessio et usucapio nulli alii, quam cui legatum est, competit.

2.- PAULUS; *libro LIV, ad Edictum*.- Si possideam aliquam rem, quam putabam mihi legatam, quum non esset, pro legato non usucapiam.

3.- PAPINIANUS; *libro XXIII, Quaestionum*.- Non magis quam si quis emtum existimet, quod non emerit.

4.- PAULUS; *libro LIV, ad Edictum*.- Pro legato potest usucapi, si res aliena legata sit aut testatoris quidem sit, sed adempta codicillis ignoratur; in horum enim persona subest iusta causa, quae sufficit ad usucapionem. Idem potest dici et si in nomine erit dubitatio, veluti si Titio legatum sit, quum sint duo Titii, ut alter eorum de se cogitatum existimaverit.

5.- IAVOLENUS; *libro VII, ex Cassio*.- Ea res, quae legati nomine tradita est, quamvis dominus eius vivat, legatorum tamen nomine usucapietur.

6.- POMPONIUS; *libro XXXII, ad Sabinum*.- Si is, cui tradita est, mortui esse existimaverit.

7.- IAVOLENUS; *libro VII, ex Cassio*.- Nemo potest legatorum nomine usucapere, nisi is, quum quo testamenti factio est, quia ea possessio ex iure

TITLE VIII

CONCERNING POSSESSION ON THE
GROUND OF A LEGACY

1.- ULPIANUS; *Disputations, Book VI*.- He is considered to be in possession as a legatee to whom the bequest has been left, for possession and usucaption based on the legacy will take place only in favor of the person to whom the property has been bequeathed.

2.- PAULUS; *On the Edict, Book LIV*.- If I possess anything which I think was bequeathed to me, and this is not the case, I cannot, in the capacity of legatee, acquire it by usucaption.

3.- PAPINIANUS; *Questions, Book XXII*.- No more than where anyone thinks that he has purchased something which he has not purchased.

4.- PAULUS; *On the Edict, Book LIV*.- Property can be acquired by usucaption on the ground of its being a legacy, where something belonging to another has been bequeathed, or where it belonged to the testator, and it is not known that it was taken away by a codicil; for, in instances of this kind, a good reason exists for usucaption to take effect. The same rule can be said to apply where the name of the legatee is in doubt, as, for example, where a bequest is made to Titius, and there are two individuals of that name, so that one of them thinks that he was meant, when this was not the case.

5.- IAVOLENUS; *On Cassius, Book VII*.- Property delivered as a legacy can be acquired by usucaption on this ground, even though the owner of it may be living,

6.- POMPONIUS; *On Sabinus, Book XXXII*.- If the person to whom the property was delivered thinks that the testator is dead.

7.- IAVOLENUS; *On Cassius, Book VII*.- No one can acquire property by usucaption on account of a legacy, unless he himself had a right to make a will

TÍTULO VIII

COMO LEGADO

1.- ULPIANO; *Disputas, libro VI*.- Se considera que posee a título de legados aquel a quien se legó; porque a título de legado no le competen la posesión y la usucapición a otro ninguno, sino a aquel a quien se legó.

2.- PAULO; *Comentarios al Edicto, libro LIV*.- Si yo poseyera alguna cosa, que creía me había sido legada, no habiéndolo sido, no la usucapiré como legado.

3.- PAPINIANO; *Cuestiones, libro XXIII*.- No de otra suerte, que si alguno estimase haber comprado lo que no hubiere comprado.

4.- PAULO; *Comentarios al Edicto, libro LIV*.- Se puede usucapir como legado, si hubiera sido legada una cosa ajena, o fuera ciertamente del testador, pero que se ignora que fue quitada por codicilos; porque en cuanto a la persona de éstos hay justa causa, que basta para la usucapición. Lo mismo se puede decir, si hubiere duda en cuanto al nombre, por ejemplo, si se le hubiera hecho un legado a Ticio, habiendo dos Ticios, de suerte que cada uno de ellos estimare que se hizo referencia a él.

5.- IAVOLENO; *Doctrina de Cassio, libro VII*.- La cosa que fue entregada a título de legado, aunque viva su dueño, será, no obstante, usucapida como legado.

6.- POMPONIO; *Comentarios a Sabino, libro XXXII*.- Si aquel, a quien le fue entregada, hubiere creído que era de persona fallecida.

7.- IAVOLENO; *Doctrina de Cassio, libro VII*.- A título de legados no puede usucapir nadie sino aquel con quien hay testamentifacción, porque esta pose-

testamenti proficiscitur.

8.- PAPINIANUS; *libro XXIII, Quaestionum*.- Si non traditam possessionem ingrediatur sine vicio legatarius, legatae rei usucapio competit.

9.- HERMOGENIANUS; *libro V, iuris Epitomarum*.- Pro legato usucapit, cui recte legatum relictum est; sed et si non iure legatum relinquatur vel legatum ademptum est, pro legato usucapi post magnas varietates optinuit.

TIT. IX

PRO DOTE

1.- ULPIANUS; *libro XXXI, ad Sabinum*.- Titulus est usucapionis et quidem iustissimus, qui appellatur pro dote, ut, qui in dotem rem accipiat, usucapere possit spatio solenni, quo solent, qui pro emptore usucapiunt.

§ 1.- Et nihil refert, singulae res an pariter universae in dotem dentur.

§ 2.- Et primum de tempore videamus, quando pro dote quis usucapere possit, utrum post tempora nuptiarum an vero et ante nuptias. Est quaestio vulgata, an sponsus possit hoc est qui nondum maritus est, rem pro dote usucapere. Et Iulianus inquit, si sponsa sponso ea mente tradiderit res, ut non ante eius fieri vellet, quam nuptiae secutae sint, usu quoque capio cessabit: si tamen non evidenter id actum fuerit, credendum esse id agi Iulianus ait, ut

for the benefit of the testator, because possession of this kind depends upon testamentary capacity.

8.- PAPINIANUS; *Questions, Book XXIII*.- If the legatee takes possession of the legacy without any question arising to affect his title, even if the bequest has not been delivered to him, he will be entitled to acquire by usucaption the property bequeathed to him.

9.- HERMOGENIANUS; *Epitomes of Law, Book V*.- A person to whom a legacy has been legally bequeathed acquires property by usucaption, as a legatee. If, however, it has not been left in conformity to law, or the legacy has been taken away, it has been decided, after much controversy, that the property can be acquired by usucaption on account of the legacy.

TITLE IX

CONCERNING POSSESSION ON THE GROUND OF A DOWRY

1.- ULPIANUS; *On Sabinus, Book XXXI*.- A right to usucaption, and one which is extremely just, is that which is said to exist on account of a dowry, so that anyone who receives property by way of dowry can acquire it by usucaption, after the expiration of the time usually prescribed by law in the case of those who acquire property in this manner as purchasers.

§ 1.- It makes no difference whether certain specified articles, or the entire amount of the property, is given by way of dowry.

§ 2.- In the first place, let us consider the time when anyone can acquire property by usucaption as dowry; and whether this is to begin after the date of the marriage, or before it. A question commonly discussed is, whether a man who is betrothed (that is to say, one who has not yet been married), can acquire property by usucaption, because of its being a dowry. Julianus says that, if the woman who is betrothed delivers the property to the other party, with the

sión proviene del derecho del testamento.

8.- PAPINIANO; *Cuestiones, libro XXIII*.- Si el legatario entrara sin vicio en la posesión que no se le había entregado, le compete la usucapión de la cosa legada.

9.- HERMOGENIANO; *Epítome del Derecho libro V*.- Adquiere por usucapión a título de legado aquel a quien debidamente se le dejó el legado; pero también si no fuese dejado con arreglo a derecho el legado, o si el legado fue revocado, prevaleció después de grandes discrepancias que se usucapiera como legado.

TÍTULO IX

COMO DOTE

1.- ULPIANO; *Comentarios a Sabino, libro XXXI*.- Hay un título de usucapión, y ciertamente justísimo, que se llama como por dote; de modo que el que recibe una cosa en dote puede usucapirla por el espacio de tiempo legal, por el que suelen los que adquieren por usucapión como comprador.

§ 1.- Y nada importa, que se den en dote una a una las cosas, o todas juntamente.

§ 2.- Y veamos primeramente en qué tiempo puede uno usucapir como dote, si después del día de las nupcias, o si también antes de las nupcias. Es cuestión generalizada, si el esposo, esto es, el que todavía no es marido, puede usucapir como dote una cosa. Y dice Juliano, que si la esposa le hubiere entregado al esposo la cosa con la intención de no querer que se haga de él antes que se hayan verificado las nupcias, también dejará de tener lugar la

statim res eius fiant et, si alienae sint, usucapi possint; quae sententia mihi probabilis videtur; ante nuptias autem non pro dote usucapit, sed pro suo.

intention that it shall not belong to him until after the marriage has been solemnized, usucaption will not take place. If, however, this was evidently not the intention, it should be held (so Julianus says) that the property immediately becomes his; and if it belongs to someone else, it can be acquired by usucaption. This opinion seems to me to be plausible. But, before the marriage takes place, usucaption becomes operative, not because of the dowry, but on the ground of ownership.

usucapición; pero si esto no se hubiere hecho evidentemente, dice Juliano que se ha de creer que esto se hace a fin de que las cosas se hagan de él inmediatamente, y de que, si fueran ajenas, puedan ser usucapidas; cuya opinión me parece admisible; mas antes de las nupcias no adquiere por usucapición a título de dote, sino como cosa suya.

§ 3.- Constante autem matrimonio pro dote usucapio inter eos locum habet, inter quos est matrimonium; ceterum si cesset matrimonium. Cassius ait cessare usucapionem, quia et dos nulla sit.

§ 3.- During the existence of the marriage, usucaption takes place between the persons who are married, on account of the dowry. If, however, the marriage does not exist, Cassius says that usucaption cannot occur as there is no dowry.

§ 3.- Mas durante el matrimonio la usucapición a título de dote tiene lugar respecto a las personas entre las que subsiste el matrimonio; pero si cesara el matrimonio, dice Cassio que deja de tener lugar la usucapición, porque tampoco hay dote.

§ 4.- Idem scribit et si putavit maritus esse sibi matrimonium, quum non esset, usucapere eum non posse, quia nulla dos sit; quae sententia habet rationem.

§ 4.- He also says that if the husband thinks that he is married, when this is not the case, he cannot acquire the property by usucaption, because there is no dowry. This opinion is reasonable.

§ 4.- El mismo escribe, que también si el marido creyó que subsistía para él el matrimonio, no subsistiendo, no podía él usucapir, porque no había dote; cuya opinión tiene fundamento.

2.- PAULUS; *libro LIV, ad Edictum*.- Si aestimata res ante nuptias tradita sit, nec pro emptore nec pro suo ante nuptias usucapietur.

2.- PAULUS; *On the Edict, Book LIV*.- If property which has been appraised is delivered before the marriage has been solemnized, it cannot be acquired by usucaption, either on the ground of purchase or on that of ownership.

2.- PAULO; *Comentarios al Edicto, libro LIV*.- Si antes de las nupcias hubiera sido entregada una cosa estimada, no será usucapida ni a título de comprador, ni como propia.

3.- SCAEVOLA; *libro XXV, Digestorum*.- Duae filiae intestato patri heredes exstiterunt et mancipia communia singulae in dotem dederunt et post aliquot annos morte patris familiae erciscundae iudicium inter eas dictatum est; quaesitum est, quum mariti bona fide mancipia in dotem accepta ut dotalia multis annis possiderunt, an usucepisse videantur, si qui accipiebant, dantis credidissent esse. Respondit nihil proponi, cur non usucepissent.

3.- SCAEVOLA; *Digest, Book XXV*.- Two daughters became the heirs of their father who died intestate, and each one of them gave slaves belonging to them in common by way of dowry, and then, some years after the death of their father, they brought suit in partition. As the husbands had for many years held possession of the slaves given by way of dowry as dotal slaves, the question arose whether they could be held to have acquired them by usucaption, if they believed that they belonged to those who had given them as dowry. The answer was that there was nothing in the case stated to prevent them from being acquired by usucaption.

3.- SCÉVOLA; *Digesto, libro XXV*.- Dos hijas quedaron herederas de su padre intestado, y cada una dio en dote esclavos comunes, y después de algunos años de la muerte del padre se falló entre ellas el juicio de partición de herencia; se preguntó, si, habiendo poseído los maridos muchos años, como dotales, los esclavos recibidos de buena fe en dote, los podrán usucapir, si hubiesen creído los que los recibieron que eran de quien los dio. Respondió, que nada se exponía para que no los hubiesen usucapido.

TIT. X

PRO SUO

1.- ULPIANUS; *libro XV, ad Edictum.*- Pro suo possessio talis est. Quum dominium nobis acquiri putamus, et ex ea causa possidemus, ex qua acquiritur, et praeterea pro suo: utputa ex causa emtionis et pro emtore et pro suo possideo, item donata, vel legata vel pro donato, vel pro legato etiam pro suo possideo.

§ 1.- Sed si res mihi ex causa iusta puta emtionis tradita sit et usucapiam, incipio quidem et ante usucapionem pro meo possidere. sed an desinam ex causa emtionis post usucapionem, dubitatur. Et Mauricianus dicitur existimasse non desinere.

2.- PAULUS; *libro LIV, ad Edictum.*- Est species possessionis, quae vocatur pro suo. hoc enim modo possidemus omnia, quae mari terra caelo capimus aut quae alluvione fluminum nostra fiunt. Item quae ex rebus alieno nomine possedis nata possidemus, veluti partum hereditariae aut emptae ancillae, pro nostro possidemus: similiter fructus rei emptae aut donatae aut quae in hereditate inventa est.

3.- POMPONIVS; *libro XXII, ad Sabinum.*- Hominem, quem ex stipulatione te mihi debere falso existimabas, tradidisti mihi: si scissem mihi nihil debere, usu eum non capiam: quod si nescio, verius est, ut usucapiam, quia ipsa traditio ex causa, quam veram esse existimo, sufficit ad efficiendum, ut id quod mihi traditum est pro meo possideam. et ita Neratius scripsit idque verum puto.

TITLE X

CONCERNING POSSESSION ON THE
GROUND OF OWNERSHIP

1.- ULPIANUS; *On the Edict, Book XV.*- Possession on the ground of ownership exists where we think we acquire property for ourselves, and have possession of it under the title by which it was obtained, as well as because of ownership; as, for instance, when, by virtue of a purchase I hold possession both as purchaser and as owner. Moreover, I hold possession both as legatee and donee, and also on the ground of ownership, where property has been donated or bequeathed to me.

§ 1.- Where, however, property has been delivered to me under some good title, for example, by that of purchase, and I acquire it by usucaption, I begin to hold possession of it as mine, even before acquiring it by usucaption. But can any doubt arise as to whether I cease to hold it, as purchaser, after usucaption has taken place? Mauricianus says that he thinks that I do not cease to hold it.

2.- PAULUS; *On the Edict, Book LIV.*- There is a kind of possession which is said to be based upon ownership. For in this way we possess everything which we acquire from the sea, the land, or the air, or which becomes ours by the action of the alluvium of streams. We also possess any offspring of property which we hold in the name of others; as, for instance, we hold as our own the child of a female slave belonging to an estate, or who has been purchased; and, in like manner, we possess the profits derived from property which has been bought or donated, or which constitutes part of an estate.

3.- POMPONIVS; *On Sabinus, Book XXII.*- You delivered to me a slave whom you erroneously thought I was entitled to under the terms of a stipulation. If I knew that you did not owe me anything, I cannot acquire the slave by usucaption; but if I did not know it, the better opinion is that I can acquire him by usucaption, because the delivery, which was made for what I think to be a good

TÍTULO X

COMO COSA PROPIA

1.- ULPIANO; *Comentarios al Edicto, libro XV.*- Hay la posesión como de cosa propia cuando juzgamos que se adquiere para nosotros el dominio, y poseemos por causa por la cual se adquiere, y además como cosa propia; por ejemplo, por causa de compra poseo como comprador, y como cosa propia; asimismo, las cosas donadas, o legadas, las poseo a título o de donación, o de legado, y además como cosa propia.

§ 1.- Pero si se me hubiera entregado una cosa por justa causa, por ejemplo, por la de compra, la usucapiré, pero comienzo ciertamente a poseerla como mía aun antes de la usucapición; pero se duda si después de la usucapición dejaré de poseerla por causa de compra. Y se dice que Mauriciano estimó, que no deajo.

2.- PAULO; *Comentarios al Edicto, libro LIV.*- Hay una especie de posesión, que se llama como por cosa propia; porque de este modo poseemos todo lo que cogemos en el mar, en la tierra, o en el aire, o lo que se hace nuestro por el aluvión de los ríos. Asimismo, las cosas que poseemos, nacidas de las poseídas en nombre ajeno, como el parto de una esclava de la herencia, o comprada, las poseemos como nuestras; igualmente los frutos de una cosa comprada, o donada, o que fue hallada en la herencia.

3.- POMPONIO; *Comentarios a Sabino, libro XXII.*- Me entregaste un esclavo, que falsamente creías que me lo debías por virtud de estipulación; si yo hubiese sabido, que nada me debías, no lo usucapiré, porque si no lo sé, es más verdadero que lo usucapiré; porque la misma entrega, hecha por causa que estimo que es verdadera, basta para hacer que yo posea como mía propia la cosa que se me entregó; y

4.- IDEM; *libro XXXII, ad Sabinum*.- Si ancillam furtivam emisti fide bona ex ea natum et apud te conceptum est ita possedisti, ut intra constitutum usucapioni tempus cognosceres matrem eius furtivam esse; Trebatius omnimodo, quod ita possessum esset, usucaptum esse. Ego sic puto distinguendum, ut, si nescieris intra statutum tempus, cuius id Mancipium esset, aut si scieris neque potueris certiore dominum facere, aut si potueris quoque et feceris certiore, usucaperes: sin vero, quum scires et posses, non feceris certiore, contra esse; tum enim clam possedis videberis, neque idem et pro suo et clam possidere potest.

§ 1.- Si pater quum filiis bona quae habebat partitus sit ex ea causa post mortem patris ea teneant, quod inter eos conveniret, ut ea divisio rata esset: usucapio his procedet pro suo in his rebus, quae alienae in bonis patris inveniuntur.

§ 2.- Quod legatum non sit, ab herede tamen perperam traditum sit, placet a legatario usucapi, quia pro suo possidet.

5.- NERATIUS; *libro V, Membranarum*.- Usucapio rerum, etiam ex aliis causis concessa interim, propter ea, quae nostra existimantes possideremus, constituta est, ut aliquis litium finis esset.

consideration, is sufficient to enable me to possess as my own the property which has been delivered to me. Neratius adopted this opinion, and I think it is correct.

4.- THE SAME; *On Sabinus, Book XXXII*.- If you purchased in good faith a female slave who had been stolen, and you have in your possession the child of said slave, that she conceived while in your hands, and, before the time prescribed for usucaption has elapsed you ascertain that the mother of the said child has been stolen, Trebatius thinks that the child which is possessed in this manner can unquestionably be acquired by prescription. I think that a distinction should be made in this case, for, if within the time prescribed by law for usucaption to take effect you do not ascertain to whom the slave belongs or if you knew this, without being able to notify the owner of the slave, or if you were able to notify him, and did it, you can acquire the slave by usucaption. If, however, you were aware that the slave had been stolen, and you could have notified the owner, but failed to do so, the contrary rule will apply; for you will be considered to have possessed her clandestinely, as the same person cannot possess property as his own and clandestinely at the same time.

§ 1.- When a father divides his property among his children, and, after his death, they retain it, for the reason that it was agreed among them that this division of his estate should be ratified, usucaption on the ground of ownership will benefit so far as any property belonging to others, which may be found among the effects of the father, is concerned.

§ 2.- Where property has not been bequeathed, but has been delivered as such by the heir through mistake, it is established that it can be acquired through usucaption by the legatee, because he possesses it as owner.

5.- NERATIUS; *Parchments, Book V*.- The usucaption of property which we have obtained for other reasons than because we think that we are entitled to it as our own has been established in order to put an end to litigation.

así lo escribió Neracio, y lo tengo por verdadero.

4.- EL MISMO; *Comentarios a Sabino, libro XXXII*.- Si de buena fe compraste una esclava hurtada, y lo que nació de ella y fue concebido en tu poder lo poseíste de modo, que dentro del término establecido para la usucapición supieras que la madre era hurtada; dice Trebacio, que de todos modos fue usucapido lo que así fue poseído. Yo creo que se ha de distinguir de suerte, que si dentro del término establecido no hubieres sabido de quién era esta esclava, o si lo hubieres sabido y no hubieres podido hacer sabedor al dueño, o si también hubieres podido y lo hubieres hecho sabedor, la usucapirás; pero que sería lo contrario, cuando sabiéndolo y pudiendo, no lo hubieres hecho sabedor; porque se considerará que entonces poseíste clandestinamente, y uno mismo no puede poseer como cosa suya, y clandestinamente.

§ 1.- Si un padre hubiera partido con sus hijos los bienes que tenía, y por esta causa los tuvieran ellos después de la muerte del padre, como quiera que se convino entre ellos que fuese válida esta división, será procedente para ellos la usucapición como por cosa suya en cuanto a las cosas que en los bienes del padre se halla que son ajenas.

§ 2.- Lo que no haya sido legado, sino que haya sido malamente entregado por el heredero, está determinado que sea usucapido por el legatario, porque lo posee como cosa suya.

5.- NERACIO; *Pergaminos, libro V*.- Se estableció la usucapición de las cosas también por otras causas, concedida interinamente por razón de lo que poseemos estimándolo nuestro, a fin de que tuviesen algún término los litigios.

§ 1.- Sed id, quod quis, quum suum esse existimaret, possederit, usucapiet, etiamsi falsa fuerit eius existimatio; quod tamen ita interpretandum est, ut probabilis error possidentis usucapioni non obstet, veluti si ob id aliquid possideam, quod servum meum aut eius, cuius in locum hereditario iure successi, emisse id falso existimem, quia in alieni facti ignorantia tolerabilis error est.

§ 1.- A person can acquire by usucaption the property of which he has possession, thinking that it belongs to him; even if this opinion is false. This, however, should be understood to mean that a plausible error of the party in possession does not interfere with his right to usucaption; for instance, if I possess some article because I erroneously think that my slave, or the slave of someone whom I have succeeded as heir at law, purchased it, as ignorance of the act of another is an excusable mistake.

§ 1.- Pero lo que uno poseyere estimando que es suyo, lo usucapira, aunque hubiere sido falsa su creencia; lo que, sin embargo, se ha de estimar de modo, que el error probable no obste a la usucapición del que posee, como si yo poseyera una cosa porque estimara falsamente que la compró un esclavo mío, o de aquel en cuyo lugar sucedí por derecho de herencia; porque es tolerable el error en la ignorancia de un hecho ajeno.

DIGESTORUM - DIGEST - DIGESTO**PARS QUINTA - FIFTH PART - PARTE QUINTA****LIBER SEXTUS-TRICESIMUS - BOOK XXXVI - LIBRO TRIGÉSIMO SEXTO**

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 irritato facto testamento. Concerning illegal, invalid, and broken wills. Del testamento injusto, roto, o que se hizo irrito.	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

PARS SEXTA - SIXTH PART - PARTE SEXTA

LIBER SEPTIMUS-TRICESIMUS - BOOK XXXVII - LIBRO TRIGÉSIMO SÉPTIMO

I.- De bonorum possessionibus Concerning the Praetorian possession of property De la posesión de los bienes	115
II.- Si tabulae testamenti extabunt Concerning Praetorian possession where there is a will De si existiere testamento	120
III.- De bonorum possessione furioso, infantil, muto, surdo, caeco competente Concerning the Praetorian possession of property granted to an insane person, an infant, or one who is dumb, deaf, or blind De la posesión de los bienes que compete al furioso, al infante, al mudo, al sordo y al ciego	120
IV.- De bonorum possessione contra tabulas Concerning the Praetorian possession of property contrary to the provisions of the will De la posesión de los bienes contra el testamento	121
V.- De legatis praestandis contra tabulas bonorum possessione petita Concerning the payment of legacies where praetorian possession of an estate is obtained contrary to the provisions of the will De los legados que se deben dar habiéndose pedido la posesión de los bienes contra el testamento	141
VI.- De collatione Concerning the collation of property De la colación	155
VII.- De dotis collatione Concerning collation of the dowry De la colación de la dote	169

Titulus Titles Títulos	Pag.
VIII.- De coniungendis cum emancipato liberis eius Concerning the contribution to be made between an emancipated son and his children De que se hayan de unir con el emancipado sus hijos	173
IX.- De ventre in possessionem mittendo, et curatore eius Concerning the placing of an unborn child in possession of an estate, and his curator De la posesión que se ha de dar al que está en el claustro materno, y a su curador	180
X.- De Carbioniano edicto Concerning the Carbonian edict Del edicto Carboniano	188
XI.- De bonorum possessionibus secundum tabulas Concerning Praetorian possession of an estate in accordance with the provisions of the will De la posesión de los bienes con arreglo al testamento	203
XII.- Si a parente quis manumissus sit Concerning Praetorian possession where a son has been manumitted by his father De si alguno hubiera sido manumitido por su ascendiente	213
XIII.- De bonorum possessione ex testamento militis Concerning Praetorian possession of an estate in the case of the will of a soldier De la posesión de los bienes en virtud del testamento de un militar	215
XIV.- De iure patronatus Concerning the right of patronage Del derecho de patronato	216
XV.- De obsequiis parentibus et patronis praestandis Concerning the respect which should be shown to parents and patrons De las atenciones que se les han de prestar a los ascendientes y a los patronos	224
 LIBER TRIGESIMUS OCTAVUS - BOOK XXXVIII - LIBRO TRIGÉSIMO OCTAVO	
I.- De operis libertorum Concerning the services of freedmen De los servicios de los libertos	228

Titulus Titles Títulos	Pag.
II.- De bonis libertorum Concerning the property of freedmen De los bienes de los libertos	244
III.- De libertis universitatum Concerning the freedmen of municipalities De los libertos de universalidades	274
IV.- De assignandis libertis Concerning the assignment of freedmen De la asignación de los libertos	275
V.- Si quid infraudem patroni factum sit Where anything is done to defraud the patron De si se hubiera hecho algo en fraude del patrono	280
VI.- Si tabulae testamenti nullae extabunt, unde liberi Where no will is in existence by which children may be benefited De la posesión de los bienes «unde liber», si no existieren tablas de testamento	290
VII.- Unde legitimi Concerning Praetorian possession by agnates De la posesión de los bienes «unde legitimi»	296
VIII.- Unde cognati Concerning the Praetorian possession granted to cognates De la posesión de los bienes «unde cognati»	298
IX.- De succresorio edicto Concerning the successory edict Del edicto sucesorio	302
X.- De gradibus, et affinibus, et nominibus eorum Concerning the degrees of relationship and affinity and their different names De los grados, y de los afines, y de sus nombres	306
XI.- Unde vir et uxor Concerning Praetorian possession with reference to husband and wife De la posesión de los bienes «unde vir et uxor»	333

Titulus Titles Títulos	Pag.
XII.- De veteranorum et militum successione Concerning the succession of veterans and soldiers De la sucesión de los veteranos y de los militares	334
XIII.- Quibus non competit bonorum possessio Concerning those who are not entitled to Praetorian possession of an estate A quiénes no compete la posesión de los bienes	334
XIV.- Ut ex legibus Senatusve Consultis bonorum possessio detur Concerning praetorian possession of property granted by special laws or decrees of the Senate De que se dé la posesión de los bienes con arreglo a las leyes y a los Senadoconsultos	335
XV.- Quis ordo in possessionibus servetur What order is to be observed in granting Praetorian possession Del orden que se observará en la posesión de los bienes	335
XVI.- De suis et legitimis heredibus Concerning proper heirs and heirs at law De los herederos suyos y de los legítimos	339
XVII.- Ad Senatus Consultum Tertullianum et Orphitianum On the Tertullian and Orphitian decrees of the Senate Sobre el Senadoconsulto Tertuliano y sobre el Orficiano	348

LIBER TRIGESIMUS NONUS - BOOK XXXIX - LIBRO TRIGÉSIMO NOVENO

I.- De operis novi nuntiatione Concerning the notice of a new structure De la denuncia de obra nueva	364
II.- De damno infecto et de sugrundis et protectionibus Concerning threatened injury and the encroachments and projections of a neighboring house Del daño que amenaza y de los aleros y de los voladizos	380

Titulus Titles Títulos	Pag.
III.- De aqua, et aquae pluviae arcendae Concerning the right to compel a neighbor to take care of water and rain-water Del agua, y de la acción para que se contengan las aguas llovedizas	418
IV.- De publicanis et vectigalibus et commissis Concerning farmer of the public revenue, leases of public lands, and forfeitures De los publicanos, de los tributos y de los comisos	439
V.- De donationibus Concerning donations De las donaciones	449
VI.- De mortis causa donationibus et capionibus Concerning donations and other acquisition mortis causa De las donaciones y adquisiciones por causa de muerte	464
LIBER QUADRAGESIMUS - BOOK XL - LIBRO CUADRAGÉSIMO	
I.- De manumissionibus Concerning manumissions De las manumisiones	478
II.- De manumissis vindicta Concerning manumissions before a magistrate De los manumitidos con la vindicta	486
III.- De manumissionibus, quae servis ad universitatem pertinentibus imponuntur Concerning the manumission of slaves belonging to a community De las manumisiones que se dan a los esclavos pertenecientes a una universidad	493
IV.- De manumissis testamento Concerning testamentary manumissions De los manumitidos en testamento	494
V.- De fideicommissariis libertatibus Concerning freedom granted under the terms of a trust De las libertades dadas por fideicomiso	513

Titulus Titles Títulos	Pag.
VI.- De ademtione libertatis Concerning the deprivation of freedom De la revocación de la libertad	560
VII.- De statuliberis Concerning slaves who are to be free under a certain condition De aquellos a quienes en testamento se les dejó la libertad bajo condición	560
VIII.- Qui sine manumissione ad libertatem perveniunt Concerning slaves who obtain their freedom without manumission De los que sin la manumisión llegan a la libertad	590
IX.- Qui a quibus manumissi liberi non fiunt et ad legem Aeliam Sentiam Qhat slaves, having been manumitted, do not become free, by whom this is done; and on the law of Aelia Sentia Qué manumitidos, y por quiénes, no se hacen libres, y comentarios a la ley Elia Sencia	592
X.- De iure aureorum annulorum Concerning the right to wear a gold ring Del derecho de anillos de oro	603
XI.- De natalibus restituendis Concerning the restitution of the rights of birth De la restitución de la condición natal	604
XII.- De liberali causa Concerning action relating to freedom De la causa sobre la libertad	605
XIII.- Quibus ad libertatem proclamare non licet Concerning those who are not permitted to demand their freedom De aquellos a quienes no les es lícito reclamar la libertad	624
XIV.- Si ingenuus esse dicetur Where anyone is decided to be freeborn De si se dijere que uno es ingenuo	626

XV.- Ne de statu defunctorum post quinquennium quaeratur No Question as to the condition of deceased persons shall be raised after five years have elapsed after their death De que después de un quinquenio no se cuestione sobre el estado de los fallecidos	628
XVI.- De collusione detegenda Concerning the detection of collusion Del descubrimiento de colusión	630
 LIBER QUADRAGESIMUS PRIMUS - BOOK XLI - LIBRO CUADRAGÉSIMO PRIMERO	
I.- De acquirendo rerum dominio Concerning the acquisition of the ownership of property De la adquisición del dominio de las cosas	632
II.- De acquirenda, vel amittenda possessione Concerning acquiring or losing possession De cómo se adquiere o se pierde la posesión	667
III.- De usurpationibus et usucapionibus Concerning the interruption of prescription, and usucaption De las usurpaciones y usucapiones	695
IV.- Pro emtore Concerning possession acquired by a purchaser Como Comprador	718
V.- Pro herede, vel pro possessore Concerning possession as heir or as possessor Como heredero, o como poseedor	728
VI.- Pro donato Concerning possession on the ground of donation Como por donación	729
VII.- Pro derelicto Concerning possession on the ground of abandonment Como cosa abandonada	731

Titulus Titles Títulos	Pag.
VIII.- Pre legato	
Concerning possession on the ground of a legacy	
Como legado	733
IX.- Pro dote	
Concerning possession on the ground of a dowry	
Como Dote	734
X.- Pro suo	
Concerning possession on the ground of ownership	
Como cosa propia	736

