to another by Quiritary, his acquisitions from all sources go solely to the owner with the bonitary title. **89.** Through those whom we hold in *potestas* not only ownership but also possession is acquired for us. For we are held to possess anything of which they have acquired possession; hence through them usucapion likewise takes place. **90.** But though through persons whom we hold in *manus* or *mancipium* ownership is acquired for us by every method of acquisition, as much as through those in our *potestas*, it is commonly questioned whether possession is acquired for us through them, since we do not possess the persons themselves. **91.** With regard to slaves in whom we have only a usufruct the rule is that whatever they acquire in connexion with our affairs or from their own work is acquired far us, but that anything they acquire outside these two accounts belongs to the owner of the property in them. Hence if such a slave is instituted *heres* or is given some legacy or present, this acquisition is for the owner of the property in him, not for me. **92.** The same rule applies to a person *bona fide* possessed by us, whether he be a free man or another's slave; for what has been held of a usufructuary is applied also to a *bona fide* possessor, so that whatever is acquired outside the two accounts above mentioned belongs either to the man himself if he is free, or to his owner if he is a slave. **93.** But once the *bona fide* possessor has acquired the slave by usucapion, he can, since he thereby becomes his owner, acquire for himself through the slave's instrumentality on every account. But a usufructuary cannot acquire the slave by usucapion, first because he has not possession of him, but only the right of using and taking profits, and secondly because he knows that the slave belongs to someone else. **94.** Through a slave in whom we have a usufruct it is a question whether we can possess a thing and acquire it by usucapion, because we have not possession of the slave himself. But through one whom we *bona fide* possess there is no doubt but that we can both possess and acquire by usucapion. In both cases what we are saying is subject to the limitation just explained, namely that acquisition by such persons is for us, when it is in connexion with our affairs or from their own work. **95.** From what we have said it is evident that through free men who are neither subject to our power nor *bona fide* possessed by us, and through the slaves of others of whom we have neither a usufruct nor a lawful possession, acquisition is impossible on any account. This is the meaning of the common saying that there cannot be acquisition for us through a stranger. The only doubt is whether possession can be acquired for us through a *procurator*. **96.** Finally it is to be noted that *in iure cessio* to persons in *potestas*, *manus*, or *mancipium* is impossible; for since such persons can have nothing of their own, it obviously follows that they cannot vindicate in court anything as their own.

6. BOOK II [of things: testaments]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book II, §§ 97–190, pp. [odd nos.] 91–121 [footnotes omitted]

97. For the present it suffices to have carried our exposition of the methods of acquiring single things thus far. For the law of legacies, under which likewise single things are acquired, will be treated of more conveniently in another place. Let us therefore now consider how things are acquired in mass (*per universitatem*). **98.** If we become heirs to some person or have been granted possession of his estate (*bonorum possessio*), or if we buy an insolvent's estate, or adopt someone, or take a woman into our *manus* as wife, that person's assets pass to us.

99. Let us consider first inheritances. Of these there are two kinds, according as they come to us by will or by intestacy. **100.** First let us consider those coming by will.

101. Originally there were two kinds of wills: men made them either in the *comitia calata*, which were held twice a year for the purpose of making wills, or *in procinctu*, that is when they were arming for battle, *procinctus* being the army mobilized and armed. Thus they made the former in the quiet of peace and the latter when on the point of sallying to battle. **102.** Later a third kind of will was added, that executed *per aes et libram*. A man who had not made a will either in the *comitia calata* or *in procinctu*, if threatened with sudden death, would mancipate his *familia*, that is his whole estate, to a friend, whom he would request to distribute it after his death to such persons as he desired. This is called the will *per aes et libram*, because it is executed by means of a mancipation. **103.** The two earlier kinds of will have fallen into desuetude, and that executed *per aes et libram* has alone remained in use. Its present scheme, however, is other than what it was of old. For then the *familiae emptor*, that is he who by mancipation received the estate from the testator, used to occupy the position of heir, and consequently it was to him that the testator gave instructions as to the distribution of the estate after his death; but at the present day one person is instituted heir and the legacies are charged on him, whilst another figures formally as *familiae emptor* in imitation of the ancient system.

104. The proceedings are as follows: The testator, as in other mancipations, takes five Roman citizens above puberty to witness and a scale-holder, and, having previously written his will on tablets, formally mancipates his *familia* to someone. In the mancipation the *familiae emptor* utters these words: 'I declare your *familia* to be subject to your directions and in my custody, and be it bought to me with this bronze piece and'(as some add) 'this bronze scale, to the end that you may be able to make a lawful will in accordance with the public statute.' Then he strikes the scale with the bronze piece and gives it to the testator as the symbolic price. Next the testator, holding the tablets of his will says as follows: 'According as it is written in these tablets and on this wax, so do I give, so do I bequeath, so do I call to witness, and so, *Quirites*, do you bear me witness.' This utterance is called the nuncupation, *nuncupare* meaning to declare publicly; and the testator is considered by these general words to declare and confirm the specific dispositions which he has written on the tablets of his will.

105. One who is in the *potestas* of either the *familiae emptor* or the testator may not be among the witnesses, because, in imitation of the ancient law, the whole proceedings in executing a will are deemed to take place between the *familiae emptor* and the testator; indeed, as we have just said, in former times he who received the *familia* from the testator by mancipation was in the position of heir; consequently testimony from a man's own house was rejected. **106.** For the same reason, if the person serving as *familiae emptor* is in the *potestas* of his father, the father cannot he a witness, neither can a person in the same *potestas*, for example the *familiae emptor*'s brother. Again, if a *filiusfamilias* makes a will in virtue of his *peculium castrense* after his discharge from the army, neither his father nor anyone in the *potestas* of his father is properly employed as witness. **107.** What we have said with regard to witnesses must he understood to apply equally to the scale-holder; for he too ranks as a witness. **108.** But one who is in the *potestas* of the heir or of a legatee, or one in whose *potestas* the heir or a legatee is, or one who is in the same *potestas* as either of them, can serve as witness or as scale-holder; indeed, the heir himself or a legatee can do so lawfully. But as regards the heir or one who is in his *potestas* or in whose *potestas* he is, we do well not to avail ourselves of this right.

109. .Such strict observance of formalities in the making of wills has by imperial constitutions been relaxed for soldiers, because of their extreme inexperience. For though they fail to employ the ordained number of witnesses, or to sell their *familia*, or to make nuncupation of their wills, these are none the less valid. **110.** Moreover, they are allowed to institute both Latins and peregrines as heirs or to leave them legacies, though in general peregrines are prohibited from taking an inheritance or legacies by the principles of civil law, and Latins by the *L. Iunia*. **111.** Furthermore, unmarried persons, who are forbidden by the *L. Iulia* to receive an inheritance or legacies, and childless persons; whom the *L. Papia* forbids to take more than half of an inheritance or of legacies, take in full under the will of a soldier. . . .[1]

112. . . . *But later* a senatusconsult was passed under the authority of the late emperor Hadrian whereby permission was given to women . . .[2] to make wills without a *coemptio*, provided that they were not below the age of 12, and also, of course, that those not exempted from *tutela* must make their wills with the *auctoritas* of their tutors. **113.** Thus females appear to be better off than males; for a male below the age of 14 cannot make a will, even if he should propose to do so with his tutor's *auctoritas*, whereas a female acquires the right to make a will from the age of 12**.**

114. Accordingly, in considering whether a will is valid, we must first ascertain whether its maker had the capacity to make it; next, supposing he had capacity, whether he made it according to the requirements of the civil law, except that, as stated, soldiers owing to their extreme inexperience are allowed to make their wills in any way they will or can.

115. The formalities which we have explained above, of selling the *familia*, witnesses and nuncupation, are not, however, sufficient for the validity of a will at civil law; **116.** but before everything else it must be ascertained whether there has been an institution of an heir made in solemn form; for if an institution has been made otherwise, it is unavailing that the sale of the *familia*, the employment of witnesses, and the utterance of the nuncupation have been made in the manner we have mentioned. **117.** The solemn form of institution is this: 'Be thou Titius my heir'; but the form: 'I order that Titius be my

[1] Two pages are missing in the ms., and the first 21 lines the next page are virtually illegible. After completing the topic of military wills, Gaius probably proceeded to the question of testamentary capacity.

[2] About nine letters are illegible.

heir' seems now also to be approved; not approved is the form: 'I wish Titius to be my heir'; also disapproved by most authorities are the forms: 'I institute Titius my heir', and 'I make Titius my heir'.

118. It is further to be observed that if a woman who is in *tutela* makes a will, she must do so with her tutor's *auctoritas*; otherwise her testament will be of no effect at civil law. **119.** The praetor, however, if the will is sealed with the seals of 7 witnesses, promises *bonorum possessio secundum tabulas* (possession of the estate in accordance with the testamentary tablets) to the heirs named in the will, and if there is no one to whom the inheritance goes by the statute-law of intestacy—for example a brother by the same father, or a father's brother, or a brother's son—the testamentary heirs will thus be able to keep the inheritance. And the law is the same when the will is invalid on some other account, such as that the *familia* was not sold, or that the testator did not utter the nuncupation. **120.** But let us consider whether, even if there is a brother or a father's brother, they are preferred to the heirs named in the will. For by a rescript of the emperor Antoninus it is laid down that those who have been granted *bonorum possessio* under an improperly executed will can defend themselves by *exceptio doli mali* against parties claiming the inheritance by intestacy. **121.** Now it is certain that the rescript applies to the wills of males, and also to those of females that are invalid for such reason as that they have failed to sell their *familia* or to utter the nuncupation. What we have to consider is whether it applies to wills made by women without their tutor's *auctoritas*. **122.** We refer only to women who are not in *legitima tutela* of parents or patrons, but have a tutor of some other kind, one who can be compelled to give *auctoritas* even against his will. For it is obvious that a parent or a patron is not ousted by a will made without his *auctoritas*.

123. Moreover, a testator who has a son in *potestas* must be careful either to institute him heir or to disinherit him by name; for if he passes him over in silence, his testament will be of no effect. So much so, that the teachers of our school hold that even if the son dies in the father's lifetime, no one can qualify as heir under the will, because the institution was void *ab initio*. The authorities of the other school admit that if the son is living at the time of his father's death, he bars the heirs named by the will and becomes himself heir by intestacy; but they hold that if he predeceases his father, entry on the inheritance can be made under the will, there being now no son to bar it, because evidently, in their view, the will is not avoided *ab initio*, by the son being passed over. **124.**:But if a testator passes over any other *liberi* than a son, the will is good, but the persons so passed over come in by accretion with the testamentary heirs, for an aliquot share of the inheritance if the testamentary heirs are *sui heredes*, for half the inheritance if they are strangers. This means that if, for example, a testator institutes his three sons, but passes over his daughter, the daughter comes in by accretion as heir of a quarter, thus getting what she would have got had her father died intestate; but if the testator institutes strangers as heirs and passes over his daughter, the daughter by accretion comes in as heir of a half. What we have said of a daughter is to be understood to apply equally to a grandson and all other *liberi*, male or female. **125.** But there is more to be said. For though, according to our statement, such persons deprive the testamentary heirs of only half, nevertheless the praetor promises them *bonorum possessio contra tabulas* (possession of the estate against the will), and in this manner the stranger heirs are excluded from the entire inheritance and become heirs only in name (sine *re*). **126.** This law used to be applied to males and females without distinction. But recently the emperor Antoninus has declared by rescript that women *suae* are not to take more by *bonorum possessio* than they would get by their right of accretion. And this ruling is to be applied equally in the case of emancipated females, so that they too get by *bonorum possessio* exactly what they would have got by right of accretion had they been in *potestas*. **127.** But if a son is disinherited by his father, it must be by name; otherwise the disinherison is void. Disinherison is considered to be by name whether it be in the form 'Let my son Titius be disinherited' or in the form let my son be disinherited' without the addition of his proper name. **128.** Other *liberi*, female or male, are sufficiently disinherited by the general clause 'Let all others be disinherited', words which are commonly added immediately after the institution of heirs. But this is so only at civil law. **129.** For the praetor orders all male *liberi*, that is grandsons as well and great-grandsons, to be disinherited by name, females, however, either by name or by the general clause. . . .[3]

130. *Liberi* born after the making of the will (*postumi*) must likewise be either instituted heirs or disinherited. **131.** In this respect all *sui heredes* are in the same position: whether it be a son or any other of the *liberi*, male or female, that is passed over, the will is valid, but it is broken by the subsequent

[3] About two and a half lines are illegible following "great-grandsons." The translation gives the generally agreed sense, but there must have been more.

agnation of a *postumus* or *postuma*, and thereby made absolutely void. Thus, if a woman of whom a *postumus* or *postuma* as expected miscarries, there is no obstacle to the succession of the testamentary heirs. **132.** Females (*postumae*) may be disinherited either by name or by the general clause, provided that if it be by the general clause some legacy be left to them, in order that they may not appear to have been passed over through forgetfulness. But it is agreed that males (*postumi*) cannot be validly disinherited except by name, that is in the form 'Let any son that shall be born to me be disinherited'. . . .[4] **133.** Ranked as *postumi* are those who through succeeding to the position of a *suus heres* become *sui heredes* to their ancestors quasi-agnation. Thus, suppose I have in my *potestas* a son and a grandson and granddaughter by him; the son, being in the nearer degree, alone has the rights of a *suus heres*, although the grandson and granddaughter, his children, are in the same *potestas* as he; but if my son dies during my lifetime or passes out of my *potestas* in any manner, the grandson and granddaughter now succeed to his position and thus, by quasi-agnation, acquire the rights of *sui heredes*. **134.** Therefore, just as in order not to make a void will I am bound either to institute my son *heres* or disinherit him, so, in order to guard against my will being broken in the above manner, I must institute or disinherit any grandson or granddaughter by him, lest it should happen that my son should die in my lifetime and the grandson or granddaughter be succeeding to his position should break my will by quasi-agnation. This was provided for by the *L. Iunia Vellaea*, where also the form of disinherison is notified, namely that for male *postumi* it should. be by name, while for female it may be either by name or by the general clause, provided, however, that some legacy be left to those disinherited by the general clause. **135.** At civil law it is unnecessary either to institute or disinherit emancipated *liberi*, because they are not *sui heredes*. But the praetor orders disinherison of all such, whether males or females, who are not instituted heirs, of males by name, of females either by name or by the general clause. To those who have been neither instituted nor disinherited in the manner stated the praetor promises *bonorum possessio contra tabulas*. **I35a**. .Not in the *potestas* of their father are children who is have been granted Roman citizenship along with him, if he did not, when receiving the grant, ask to have them in his *potestas*, or asked, but unsuccessfully. Children brought under their father's *potestas* by the emperor differ in no respect from those born in his *potestas*. **136.** Adoptive sons are in the same position as natural so long as they remain in adoption, but when emancipated by their adoptive father the, take rank as *liberi* neither at civil law nor for the purposes of the praetor's edict. **137.** It is just the reverse is relation to their natural father: so long as they are in their adoptive family they are reckoned strangers to him, but when emancipated by their adoptive father the, are placed in tile same legal position as they would have occupied if they had been emancipated by their natural father.

138. If after making his will a man adopts as son either a person *sui iuris* through the *comitia* or one who was in *patria potestas* through the praetor, the will is inevitably broken by the quasi-agnation of a *suus heres*. **139.** The same holds where, after the making of a will, the testator's wife comes under his *manus* or one who was in his *manus* becomes his wife; for she thereby becomes in the position of his daughter and is a quasi *sua heres*. **140.** It is of no avail that such a woman or the adopted son has been instituted in the will; it seems idle to discuss their disinherison, seeing that at the time when the will was made they were not of the *sui heredes* **141.** Further, a son who is manumitted from his first or second mancipation by returning into *patria potestas* breaks a previously made will, and it is of no avail that he has been instituted or disinherited in that will. **142.** Formerly, the law was similar regarding one on whose account a case of error is proved under the senatusconsult, say on the ground that he was born of a peregrine or a Latin mother, who had been taken to wife in the mistaken belief that she was a Roman. For even if he had been instituted heir or disinherited by his father, and whether the case was proved before or after his father's death, he used inevitably to break; his father's will by quasi-agnation. **143.** But now, by a recent senatusconsult passed on the authority of the late emperor Hadrian, if the case is proved in the father's lifetime, he inevitably breaks the will a under the previous law, but where it is proved after his father's death, he breaks the will if he is passed over in it, but if he is named as heir or is disinherited in it, he does not break it, clearly in order that wills made with due care should not be set aside when it is no longer possible to remake them.

144. An earlier will is also broken by a subsequent validly made will. It makes no difference whether an heir qualifies under the second will or not, the sole question being whether one could have qualified. Therefore, if the person appointed by a subsequent validly executed will refuses to be heir, or if he dies

[4] A whole page is largely illegible. Restorations from D.28.3.13 and JI 2.13.2 are given in the translation.

either in the lifetime of the testator, or after his death but before entering on the inheritance, or if he is shut out by a *cretio* (clause requiring formal acceptance within a definite period), or if he is defeated by, the failure of a condition subject to which he was instituted or if he is debarred from the inheritance under the *L. Iulia* by reason of celibacy—in all these cases the *paterfamilias* dies intestate. For the earlier will is invalid because broken by the second, and the second is of no effect because no one qualifies as heir under it.

145. Yet another way in which validly made wills are invalidated is where the testator afterwards undergoes a *capitis deminutio*; how this may happen has been set out in the first book. **146.** In this case we shall speak of the will becoming inoperative, though wills that are broken also become inoperative, and wills improperly executed in the beginning are inoperative; and on the other hand, wills properly executed in the beginning, but subsequently rendered inoperative by the testator's *capitis deminutio*. may equally be said to be broken. But as it is obviously more convenient to distinguish the various cases by special terms, we speak in some cases of wills being improperly executed, in others of properly executed will being broken or becoming inoperative.

147. But neither wills improperly executed in the beginning, nor wills properly executed but subsequently rendered inoperative or broken are entirely worthless. For if a will be sealed with the seals of 7 witnesses, the heir named in it may apply for *bonorum*, *posses secundum tabulas*, provided only that the deceased testator was both a Roman citizen and *sui iuris* at the time of his death. For if the cause that has rendered the will inoperative is, say, the testator's loss of citizenship or even of liberty, or that he gave himself in adoption and at the time of his death was in his adoptive father's *potestas*, the heir named in his will is not entitled to apply for *bonorum possessio secundum tabulas*. **148.** Persons receiving *bonorum possessio* under a will improperly executed from the beginning, or under a will properly executed but afterwards broken or rendered inoperative, will, if they are able to keep the inheritance, have *bonorum possessio cum re* (effectual *bonorum possessio*), but if the inheritance can be taken away from them, they will have *bonorum possessio sine re* (ineffectual *bonorum possessio*). **149.** For anyone who has been instituted heir in accordance with the civil law by a previous or a later will, or who is heir by the civil law of intestacy, can turn them out of the inheritance. But if there be no other person who is heir at civil law, they can keep the inheritance, and the cognates, possessing no title by civil law, have no right against them. **149a.** Sometimes, however, as we hare already observed above, the heirs named in an invalid will are preferred even to the heirs by civil law, for example if the defect in the execution of the will was that the *familia* was not sold or that the testator did not utter the words of nuncupation; for in that case, if the agnates bring their suit for the inheritance, they can be defeated by the *exceptio doli mali* under the constitution of the emperor Antoninus. **150.** Clearly, where testamentary heirs have established themselves as *bonorum possessores* under the terms of the Edict, the *L. Iulia* does not deprive them of the inheritance. For by that statute an estate is escheated and must go to the people (*populus*) only where no one appears as heir to the deceased or as *bonorum possessor*.

151. It is possible for duly executed wills to be invalidated by change of intention. It is clear, however, that this cannot happen simply because later the testator desires that the will shall not stand; indeed, it remains valid at civil law even if he cuts its strings; and more than that, even if he effaces it or burns the tablets on which it is written, its contents do not on that account lose their validity, although their proof is difficult. **151a.** But what ensues? If someone applies for *bonorum possessio ab intestato* (by right of intestacy), the testamentary heir, if he brings his suit for the inheritance, will he defeated by the *exceptio doli mali*, [whilst, if no one applies for *bonorum possessio ab intestato*, the people will take the inheritance in preference to the testamentary heres, he being considered unmeritorious, so that the succession shall on no account pass to one whom the testator wished to exclude]. So it is is laid down by a rescript of the emperor Antoninus.

152. Heirs are termed either *necessarii* or *sui et necessarii* or *extranei*. **153.** A *necessarius heres* is a slave instituted heir with freedom annexed, so called because inevitably, whether he will or not, he is on the testator's death straightway free and heir. **154.** Hence those who doubt their own solvency, commonly institute either in the first, second, or a later place one of their slaves as free and heir, so that, if the creditors of the estate are not paid in full, the assets may be sold as belonging to this heir rather than to the testator himself, the object being that the discredit attaching to such a sale should fall on the heir rather than on the testator himself. True we read in Fulfidius that Sabinus holds that he ought to be exempted from discredit seeing that the sale is not brought upon him by his own fault, but by operation of law; but the accepted law is not so. **155.** In compensation for this disadvantage he is given the advantage that

everything he acquires after his patron's death for himself, whether before or after the sale, is reserved to him; and even if the sale realizes only a fraction of the liabilities, his property will not be subjected to a second sale on account of the hereditary liabilities, except where he acquires something in his capacity of heir, for instance if he is enriched out of property acquired by a (Junian) Latin (a freedman of the testator, who dies), whereas the subsequent acquisitions of all other persons whose property realizes only a fraction of their debts may be subjected to repeated sales. **156.** *Sui et necessarii heredes* are such persons as a son or daughter, grandson or granddaughter by a son, and the rest, provided that they were in the testator's *potestas* when he died. But for a grandson or granddaughter to he a *suus heres* it is not enough that they were in their grandfather's *potestas* at the time of his death; it is also necessary that their father should have ceased to be a *suus heres* in his father's (their grandfather's) lifetime, either he having been cut off by death or by having been freed from *potestas* in some way; for if that happens, the grandson or granddaughter succeeds to their father's position. **157.** They are called *sui heredes* because they are household heirs and even in their father's lifetime are considered in a manner owners. Accordingly, if a man dies intestate, the first right of succession belongs to his *liberi*. They are called *necessarii* because both under a will and by intestacy they inevitably become his *heredes*, whether they will or not. **158.** But the praetor allows them to abstain from the succession, in order that the assets may preferably sold as the ancestor's. **159.** The law is the same regarding a wife who is in *manus*, as she is in the position of a daughter, and regarding a daughter-in-law in a son's *manus*, as she is in the position of a granddaughter. **160.** Moreover, the praetor extends a similar power of abstaining to a person in *mancipii causa* if he be instituted heir with freedom annexed, though like a slave he is a *necessarius heres* and not also a *suus heres*. **161.** All other heirs, not being subject to the testator's *potestas*, are termed *extranei* . Accordingly, even our children, if not in our *potestas*, are regarded as *extranei heredes* when instituted heirs by us. It follows that those instituted by their mother are also in this same category, because women do not hold their children in *potestas*. In the same category also are slaves instituted as heirs with freedom annexed and afterwards manumitted by their owner. **162.** *Extranei heredes* are allowed a power of deliberating whether to enter on the inheritance or not. **163.** But if an heir who has the power of abstaining meddles with hereditary property, or if one who is allowed to deliberate whether to enter on the inheritance enters on it, he has thereafter no power of abandoning the inheritance, except if he be under the age of **25.** For the praetor relieves persons under that age if they rashly take up an insolvent inheritance, just as he does in all other cases where they have been deceived. I am aware, however, that the late emperor Hadrian relieved a person above the age of 25 in a case where after entry on an inheritance a large debt, which was unknown at the time of entry, came to light.

164. *Extranei heredes* are commonly given a *cretio*, that is a limited period for deliberation, so that they must either enter on the inheritance within the appointed period or in default of entry be barred on its expiry. This is called *cretio*, because *cernere* means to decide and determine. **165.** Thus, after writing: 'Be thou Titius my heir', we ought to add 'and do thou make *cretio* within the next hundred days during which thou knowest and canst. If thou canst not so make *cretio*, be thou disinherited'. **166.** One thus instituted heir must, if he wishes to be heir, make *cretio* within the appointed time, that is, he must make the following declaration: 'Whereas Publius Meuius by his will has instituted me his heir, I enter upon and make *cretio* of that inheritance.' If he does not do this, he is barred when the time of *cretio* has ended, and it is of no avail that he behave as heir, that is, deal with the hereditary property as if he were heir. **167.** But one instituted heir without *cretio*, or one who is called to the *hereditas* by the statute-law of intestacy, can become heir either by making *cretio*, or by behaving as heir, or even by informal (expression of) intention to take up the inheritance, and is free to enter on the inheritance at whatever time he likes. The praetor, however, on the petition of the hereditary creditors commonly fixes a time within which he may, if he chooses, enter on the inheritance; otherwise, the creditors are to be allowed to sell up the deceased's assets. **168.** But just as a person instituted heir with *cretio* does not become heir unless he makes *cretio* of the inheritance, so he is only debarred from the inheritance by not having done this within the time-limit of the *cretio*. Hence, although he may, before the end of the period, have decided not to enter on the inheritance, he can change his mind and become heir by making *cretio* before the period has expired. **169.** On the other hand, just as a person instituted *heres* without *cretio*, or one entitled by statue on intestacy, becomes heir by informal (expression of) intention, so by a contrary (expression of) intention he is forthwith barred from the inheritance. **17.** *Cretio* is always limited by a definite period. For this purpose the period of 100 days has been found reasonable. Nevertheless, at civil law, a longer or a shorter period may be given; but the praetor sometimes shortens the period a longer period. **171.** Though *cretio* is always limited by a definite time period, there is, nevertheless, on form of *cretio* called ordinary *cretio*

and another known as *cretio* of fixed days. The former is that above set out, namely that with the addition of the words 'during which he knows and can'; that of fixed days is the same with these words omitted. **172.** There is a wide difference between the two. For when the ordinary *cretio* is given, only the days during which the man was aware that he had been instituted heir and was able to make *cretio* are counted against him. But where a *cretio* of fixed days is given, the days are counted against him continuously, even though he is not aware that he has been instituted heir, and even against one who for some reason is prevented from making *cretio*; and more than this, time runs against one instituted heir conditionally. Hence it is better and more suitable to employ the ordinary form. **173.** This *cretio* (of fixed days) is called continuous *cretio*, because the days are counted continuously. But since is works hardship, the other is the common form, which is why it is called ordinary *cretio*.

174. Sometimes we make two or more grades of heirs, as follows: 'Be thou Lucius Titius my heir and do thou make *cretio* within the next 100 days during which thou knowest and canst. If thou dost not so make *cretio*, be thou disinherited. In that case be thou Meuius my heir and do thou make *cretio* within the next 100 days', &c. And we can go on substituting as often as we like. **175.** We may substitute one or more persons for a single heir and vice versa one or more persons for several heirs. **176.** The heir named in the first grade becomes heir by making *cretio*, and the substitute is shut out; by failing to make *cretio* he is himself shut out even if he behaves as heir, and the substitute steps into his place. And if there are further grades, the same results follow at each grade. **177.** But if *cretio is* enjoined without disinherison, that is in these words: 'if thou dost not make *cretio*, then be Publius Meuius my heir', there is this difference, that if the first-named, while omitting to make *cretio*, behaves as heir, he lets in the substitute for a share, and both become heirs in equal shares. But if he neither makes *cretio* nor behaves as heir, then clearly he is altogether shut out, and the substitute comes in for the whole inheritance. **178.** But Sabinus' opinion was that so long as the first person instituted had the right to make *cretio* and so become heir, the substitute was not let in by his merely behaving as heir; but that, once the period of *cretio* had run out, the substitute was let in even if he (the first-named) behaved as heir. But others have held that even if there is still time to make *cretio*, he can by behaving as heir let in the substitute for a share and can no longer gall back on *cretio*.

179. To our children below puberty and in our *potestas* we can institute substitutes not only in the manner we have described, namely to the effect that if they do not qualify as heirs someone else is to be our heir, but we can further appoint someone to be their heir in the event of their qualifying as our heirs and dying whilst still below puberty, for example thus: 'Be thou my son Titius my heir. If my son shall not be my heir or shall be my heir and die before becoming his own tutor (reaching puberty), be thou Seius heir.' **180.** In this case, if the son does not qualify as heir, the substitute becomes heir to the father, but if he does qualify and dies before puberty, the substitute becomes heir to the son. This means that there are in a sense two wills, one the father's, the other the son's, just as if the son had instituted an heir for himself; or at any rate there is a single wi11 dealing with two inheritances. **181.** But to guard the ward against foul play after his father's death the practice is to make the ordinary substitution openly, that is in the passage in which the ward is instituted. For the ordinary substitution calls the substitute to the inheritance only in the event of the ward not qualifying as heir at all; and this happens if he dies in his father's lifetime, in which case we cannot suspect malpractice by the substitute, since of course in the testator's lifetime the contents of his will are unknown. But the substitution whereby we appoint a substitute for the event of the ward qualifying as heir and dying before puberty we write separately, on later tablets, which tablets are closed up with strings and wax of their own, and it is provided in the earlier tablets that the later tablets shall not be opened whilst the son is alive and still below puberty. But it is far safer for both kinds of substitutions to be closed up separately on later tablets, because is they are closed up and kept separate in the way we have described, it can be inferred from the prior substitution that the same person is substituted in the later. **182.** Not only if we institute our *liberi* below age as heirs is it in our power to appoint substitutes for them, so that if they die before coming of age the person of our choice will be heir, but also if we disinherit them. In such case, all that the ward has acquired by inheritance, legacies, or presents from relatives goes to the substitutes. **183.** All we have said of substitution to instituted or disinherited *liberi* below age is to be understood to apply equally to *postumi*. **184.** But to an *extraneus heres* we cannot substitute to the effect that if he qualifies as heir and dies within a certain time someone else shall be his heir; all we can do is by means of a trust to lay him under an obligation to make over, in whole or in part, what he inherits from us. This branch of law will be explained in its proper place.

185. S1aves, whether our own or another's, can be appointed heirs just as well as free men. **186.** But a slave of our own must be declared free as well as heir simultaneously, as thus: 'Be thou my slave Stichus free and my heir' or 'my heir and free'. **187.** For if he be instituted heir without freedom annexed, he cannot become heir even though later manumitted by his owner, because the institution did not hold good in respect of his person; so also, if he have been alienated, he cannot make *cretio* of the inheritance with the sanction of his new owner. **188.** But where he has been instituted heir with freedom annexed, he becomes, if he has remained in the same position, free in virtue of the will and therefore *heres necessarius*. But if he has been manumitted by the testator, he can choose for himself whether or not to enter on the inheritance; and if he has been alienated, he can enter with the sanction of his new owner, who thereby becomes heir through him; for the slave himself can be neither heir nor free. **189.** Again, if another man's slave having been instituted heir remains in the same position, he must enter on the inheritance with his owner's sanction, but if he is alienated by his owner, either in the testator's lifetime or after his death but before he makes *cretio*, he must make it with the sanction of his new owner; if, however, he has been manumitted, he can choose for himself whether or not to enter on the inheritance. **190.** Where another man's slave has been instituted heir subject to the ordinary *cretio*, the period of the *cretio* begins only when the slave himself is aware of his institution and there is nothing to prevent him from informing his master, so that he may be able to make the *cretio* with his sanction.

7. BOOK II [of things: legacies and trusts]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book II, §§ 191–190, pp. [odd nos.] 121–289 [footnotes omitted]

191. Next let us consider legacies. This branch of the 1aw may appear to lie outside our present subject-matter; for we are dealing with the legal methods of acquiring things *per universitatem*. But seeing that we have spoken fully of wills and of heirs instituted by will, we shall be justified in taking next the law of legacies.

192. There are four kinds of legacies: for we legate either by vindication or by damnation or by way of permission or by preception.

193. By vindication we legate, for example, thus: "To Titius I give and legate the slave Stichus'; but if only one or other of the words is used, as 'I give' or 'I legate', it is equally a legacy by vindication; so also, according to the prevailing opinion, if the legacy be in the form: 'Let him take', or 'Let him have for himself', or 'let him seize'. **194.** It is called legacy by vindication because immediately on the inheritance being entered upon the thing becomes the legatee's by Quiritary title, and if he claims it from the heir or anyone else who possesses it, he must vindicate, that is, he must plead that the thing is his by Quiritary title. **195.** On a single point the learned differ. Sabinus, Cassius, and the rest of our teachers hold that a thing legated in this manner becomes the legatee's property immediately on the inheritance being entered upon, even though he is not aware of the legacy, but that if, having learnt of the legacy, he rejects it, it is as though it had not been left. On the other hand, Nerva and Proculus and the other authorities of that school hold that the thing becomes the property of the legatee only if that is his desire. At the present day, however, as the result of a constitution of the late emperor Antoninus Pius, the view taken by Proculus appears to be preferred. For in a case where a Latin (Junian Latin freedman) had been legated by vindication to a colony he said: 'The decurions are to consider whether they wish the Latin to be theirs, just as if he had been legated to an individual.' **196.** Only things belonging to the testator by Quiritary title can properly be legated by vindication. In the case of things reckoned by weight, number, or measure, such as wine, oil, corn, and money, it is held to be sufficient if they belong to the testator by Quiritary title at the time of his death. But all other things, it is held, are required to belong to him by Quiritary title at both times, namely that of his making the will and that of his death; otherwise the legacy is void. **197.** Such at least is the rule at civil law. But more recently a senatusconsult was passed on the authority of the emperor Nero whereby it is provided that, if a man legates a thing which at no time was his, the legacy is to be as valid as if it had been left in the most favourable form, that being legacy by damnation, whereby even another's property can be legated, as will appear below. **198.** If, however, a man legates what does belong to him, but after the execution of the will proceeds to alienate it, most authorities consider that not merely is the legacy void at civil law, but that it is not even validated by the senatusconsult. The ground for this view is that even where a man legates something belonging to him by damnation, yet if he afterwards alienates it, then although, in the view of the majority, by strict law the legacy is due, nevertheless the legatee's suit can he defeated by the *exceptio doli mali*, as running counter to the

deceased's intention. **199.** All agree in this, that where the same thing is legated by vindication, whether conjunctively, or disjunctively, to two or more persons, and all accept the legacy, each takes a share, and the share of a legatee who fails to take accrues to the co-legatee. Conjunctively one legates thus: 'To Titius and Seius I give and legate the slave Stichus'; disjunctively thus: 'to Lucius Titius I give and legate the slave Stichus. To .Seius I give and legate the same Stichus.' **200.** Where a thing is legated conditionally by vindication, it is a question whose it is whilst the condition is pending. Our teachers hold it belongs to the heir, on the analogy of the *statu liber*, that is of a slave declared by a will free on condition, who admittedly belongs to the heir during the interim. But the authorities of the other school hold that during the interim the thing belongs to no one, and they maintain the same still more strongly of a thing legated unconditionally, up to when the legatee accepts the legacy.

201. By damnation we legate thus: 'Be my heir specially bound to convey my slave Stichus'; but if the will says 'let my heir convey', it is also a legacy by damnation. **202.** By this kind of legacy even another man's thing can he legated, so that the heir is bound to buy the thing and convey it, or else to pay its value. **203.** Also, a thing which does not exist, provided it will exist, can be legated by damnation, for example 'the coming crops of that land' or 'the child that shall be born of that slave-woman'. **204.** What has been so legated, even, if it be unconditionally and immediately, is not acquired by thc legatee at once on the inheritance being entered upon, as in the case of a legacy by vindication, but belongs none the less to the heir. Hence the legatee must sue for it by action in *personam*, that is he must plead that the heir is under an obligation to convey it to him; thereupon, if the thing be *mancipi*, the heir must either mancipate or surrender it *in iure*, and deliver possession; if it be *nec mancipi*, it suffices if he delivers it. For if he merely delivers a *res mancipi* without mancipating it, it becomes the legatee's in full right only by usucapion, which, as we have said elsewhere, is completed in one year in the case of movables and in two years in the case of landed property. **205.** Another difference between this form of legacy and that by vindication is that where the same thing is legated by damnation to two or more persons, if this is done conjunctively, a share is clearly due to each, as in the ease of a legacy by vindication, but if it is done disjunctively, the whole is due to each, with the result, of course, that the heir must give the thing to one legatee and its value to the other. Also, if the legacy is conjunctive, the share of a legatee who fails to take does not go to the co-legatee, but stays in the inheritance.

206. But in regard to our statement that under a legacy by damnation the share of a legatee who fails to take stays in the inheritance, whereas under a legacy by vindication it accrues to the co-legatee, it must be observed that this was so at civil law, before the *L. Papia*; but since that statute it becomes caducous and goes to the beneficiaries under the will who have children. **207.** And though the first place in claiming caducous gifts belongs to heirs having children, and the next, if the heirs are childless, to legatees having children, yet by the *L. Papia* it is expressly declared that a conjoined legatee having children is to be preferred to heirs, even if they have children. **208.** Most authorities hold that in regard to this right conferred by the *L. Papia* on conjoined legatees, it makes no difference whether the legacy be by vindication or damnation.

209. By way of permission we legate thus: 'Be my heir specially bound to permit Lucius Titius to take and have for himself the slave Stichus. **210.** This kind of legacy has a wider application than that by vindication, but a narrower than that by damnation. For by it a testator can validly legate not only his own thing, but also that of his heir, whereas by vindication he can legate only his own, but by damnation that of any third party. **211.** If, then, at the time of the testator's death the thing belongs either to the testator or to the heir, the legacy is clearly valid, even though at the time of making the will it belonged to neither. **212.** But if the thing first becomes the property of the heir after the testator's death, it is a question whether the legacy is valid. Most authorities pronounce it invalid. But what follows? Even though what a man has legated was at no time his property and at no time afterwards became that of his heir, under the *SC. Neronianum* it is treated as having been left by damnation. **213.** Just as a thing legated by damnation does not become the legatee's property at once on the *hereditas* being entered upon, but remains that of the *heres* until he has made it the legatee's by delivery, mancipation, or surrender *in iure*, so is the law also in the case of a legacy by way of permission. And consequently the action on account of such a legacy is likewise *in personam*, the claim being 'whatever the heir is under obligation by the will to convey or do'. **214.** Some, however, hold that under this form of legacy the heir is not to be held bound to mancipate or surrender *in iure* or deliver the thing, but that it suffices if he suffer the legatee to take it, because the testator has enjoined on him no more than that he permit, that is suffer, the legatee to have the thing for himself. **215.** A more serious division of opinion regarding this form of legacy arises where you

have legated the same thing to two or more persons disjunctively. One view is that the whole is due to each; another that the first taker is preferred, because, seeing that under this form of legacy the heir is put under obligation merely to be passive, it follows that if he has been passive in regard to the first taker and that legatee has taken the thing, he (the heir) is unassailable by one claiming the thing later, because he neither has the thing so as to be able to suffer it to be taken by the second nor has by fraud prevented himself from having it.

216. By preception we legate thus: 'Let Lucius Titius take in advance the slave Stichus.' **217.** Now our teachers hold that a legacy in this form; can be made to no one except to one who has been appointed in some part heir; for to precept is to take in advance, and this can only occur in the case of a person instituted heir in some part, because he is to get the legacy in advance, over and above his share of the inheritance. **218.** On this view a legacy by preception to a stranger (non-*heres*) is void; so much so that Sabinus held it was not even validated by the *SC. Neronianum*: 'for', he says, 'by that senatusconsult are validated only those legacies that are invalid at civil law by reason of defective expression, not those which fail because of some disability personal to the legatee'. According to Julian and Sextus, however, the legacy is validated by the senatusconsult in the latter case also; for it is patent that there too it is owing to the words used that the legacy is invalid at civil law, seeing that it would be valid if made to the same person in different words, as by vindication or damnation or by way of permission, whereas a legacy is invalid owing to disability of the beneficiary only when it is left to one to whom it cannot be left in any form, as to a peregrine, in respect of whom there is no power of testation: in such a case admittedly the senatusconsult does not apply. **219.** Our teachers also hold that one to whom a legacy in this form has been left can recover it by no other method than an action for division of the inheritance, namely that lying between heirs *de hereditate erciscunda*, that is for its division; for it is in the province of the *iudex* to adjudicate to the legatee what has been left to him by preception. **220.** Hence it is intelligible that according to our teachers nothing can be legated by preception but what belongs to the testator; for nothing but what comes from the deceased is brought within the scope of this action. Consequently, if a testator legates by this method a thing that is not his, the legacy will be void at civil law; but it will be validated by the senatusconsult. Our teachers, however, admit that in a particular case there can he a legacy by preception of another's thing, where a man legates a thing which he has mancipated to his creditor by way of *fiducia*; for they consider that it lies within the powers of the *iudex* to compel the coheirs to redeem the thing by paying the debt, so that the legatee in question can have it in advance. **221.** But the authorities of the other school hold that there can be a legacy by preception even to a stranger, as if it were expressed: 'Let Titius take (*capito*) the slave Stichus', with a superfluous syllable *prae* added, and that therefore the thing appears to have been legated by vindication. This view is said to have been confirmed by a constitution of the late emperor Hadrian. **222.** According to this opinion, therefore, if the thing 1egated belonged to the deceased by Quiritary title, it can be vindicated by the legatee, whether he be one of the heirs or a stranger; but if it was the testator's by only bonitary title, the legacy will be valid under the senatusconsult if made to a stranger, but if to an heir will be secured to him under the powers of the *iudex* in the action for the division of the inheritance; while if the testator had no title to the thing at all, the legacy will he valid under the senatusconsult, whether made to an heir or to a stranger. **223.** If the same thing is legated conjunctively or disjunctively to two or more persons, each is entitled to a share, where the legatees are heirs according to our school, whether they are heirs or strangers according to the other school.

224. In ancient times it was permissible to exhaust the whole estate by legacies and gifts of liberty, and to leave the heir nothing but the empty title of heir. And the law of the Twelve Tables seemed to allow this, by providing that whatever a man had by his will enjoined regarding his property should hold good, the words of the statute being: 'as a man shall have legated of his property, so let law be'. In consequence, testamentary heirs would abstain from the inheritance, and thus many persons used to die intestate. **225.** Hence was enacted the *L. Furia*, whereby no one except certain persons was allowed to take more than 1,000 *asses* by legacy or gift *mortis causa*. But this statute failed of its purpose. For a man having, for example, an estate worth 5,000 *asses* could exhaust the whole estate by giving a legacy of 1,000 to each of five persons. **226.** Later, therefore, the *L. Voconia was* enacted, providing that no one might by legacy or gift *mortis causa* take more than the heirs. By this statute the heirs would evidently obtain at any rate something; but a similar defect came to light. For by distributing his estate among numerous legatees a testator was able to leave his heir so very little that it was not to the latter's interest to shoulder the burdens of the whole inheritance for so little gain. **227.** Consequently the *L. Falcidia* was enacted,

providing that a testator may not legate more than three-quarters of his estate. An heir is thus bound to get a quarter of the inheritance. And this is the law observed to-day. **228.** The *L. Fufia Caninia*, as mentioned in our first book, moderated extravagance in the giving of liberty (by will to slaves).

229. A legacy preceding the institution of an heir is void, for the simple reason that wills derive their whole efficacy from the institution of an heir, and on this account the institution of an heir is reckoned to be, as it were, the source and foundation of the whole will. **230.** On the same ground also liberty cannot be conferred before the institution of an heir. **231.** Our teachers hold that tutors too cannot be appointed in that place. But Labeo and Proculus hold that this can be done, because by the appointment of a tutor nothing is taken out of the inheritance. **232.** Void also is a legacy to take effect after the death of the heir, that is, if made in this way: when my heir shall have died, I give and legate' or 'let him give'. But the legacy is good if expressed thus: when my heir shall die', because the gift is not after the death of the heir, but at the last moment of his life. But again, one cannot legate thus: 'On the day before my heir dies', though this ruling seems to have been accepted without sufficient reason. **233.** The same remarks are to be taken to apply to gifts of liberty. **234.** The question whether a tutor can be appointed after the death of the heir may perhaps be regarded as raising the same issue as the question which arises as to the appointment of a tutor before the institution of the heir.

235. A legacy by way of penalty is also void. Considered as such is one that is left for the purpose of constraining the heir to do or not to do something, for example the following: 'If my heir gives his daughter in marriage to Titius, let him pay Seius 10,000 sesterces', or this one: 'If thou dost not give thy daughter in marriage to Titius, do thou pay Titius 10,000 sesterces'; and again, if the testator orders the heir, in the event of his not erecting a monument to him (the testator) within, say, two years, to pay Titius 10,000 sesterces. And, to cut matters short, from the very definition one can conceive many similar illustrations. **236.** Neither can liberty be conferred by way of penalty, though on this point there has been question. **237.** But concerning the appointment of a tutor there can be no question, because by the appointment of a tutor the heir cannot be constrained to do or not to do anything, and therefore, even if in the testator's intention an appointment of a tutor was by way of penalty, the appointment will be regarded as conditional rather than penal.

238. A legacy to an uncertain person is void. A person is considered uncertain of whom the testator had no certain conception, as where the legacy runs: "To the first person who comes to my funeral let my heir pay 10,000 sesterces.' The law is the same if the legacy be to all in general 'whosoever shall come to my funeral'. In the same case is a legacy left thus: 'Let my heir pay 10,000 sesterces to whoever gives his daughter in marriage to my son.' Also, a legacy 'to the first persons designated consuls after the making of this will' is equally considered to be to uncertain persons. And in short there are many other cases of this kind. But a legacy to an uncertain person of a defined class is valid, for instance: 'To that one of my kindred now living who is the first to come to my. funeral let my heir pay 10,000 sesterces.' **239.** It appears to be also impossible to confer liberty on an uncertain person, because the *L. Fufia Caninia* requires slaves to be liberated by name. **240.** Appointment to be tutor must also be of a certain person. **241.** A legacy to an afterborn stranger is likewise void. An afterborn stranger is one who when born will not be of the testator's *sui heredes*. Thus even a grandson begotten by, an emancipated son is an afterborn stranger; also a child in the womb of a woman whom the civil law does not regard as a wife is an afterborn stranger in relation to his father. **242.** Nor yet can an afterborn stranger be instituted heir; for he is an uncertain person. **243.** But though in general the rules we have stated apply strictly only to legacies, it is a reasonable opinion held by some that an heir cannot be instituted by way of penalty; for it makes no difference whether an heir be charged with a legacy in the event of his doing or not doing something, or if a coheir be added to him, seeing that he is constrained to do or not to do something, against his own desire as much by the addition of a coheir as by the charging of a legacy.

244. It is a question whether we can validly, legate to one who is in the *potestas* of him whom we are instituting heir. Servius holds that the legacy is valid, but that it is avoided if, at the time when the legacies vest, the legatee is still in *potestas*, and that therefore the legacy is due alike if it be unconditional and the legatee cease in the testator lifetime to be in the heir's *potestas*, or if it be conditional and the same happen before the condition is fulfilled. Sabinus and Cassius hold such a legacy to be valid if conditional but invalid if unconditional, arguing that though it is possible that the legatee may cease during the testator's lifetime to be in the *potestas* of the heir, the legacy must nevertheless be considered void, for the reason that it would be absurd that what would be invalid if the testator died immediately after the execution of the will should be valid just because he had a longer span of years. The authorities

of the other school hold the legacy invalid even if conditional, on the ground that we can no more be conditionally debtors of those in our *potestas* than we can unconditionally. **245.** On the other hand, it is agreed that a legacy to you can validly be charged upon one in your *potestas* who is instituted heir, but that if you become heir through him, the legacy is avoided, because you cannot owe yourself a legacy; if, however, the person instituted, being a son, is emancipated or, being a slave, is manumitted or transferred to someone else, and either qualifies as heir himself or makes someone else heir, the legacy, it is held, is due.

246. Let us now pass on to trusts.

247. And to begin with let us consider their application to inheritances. **248.** In the first place it must be borne in mind that it is necessary that someone be instituted heir directly, and that it be committed to his good faith to make over the inheritance to someone else; for a will in which no one is directly instituted is void. **249.** The following words seem to be the most usual in imposing trusts: 'I beg', 'I request', 'I desire', 'I commit to your good faith'; any one of them by itself is as binding as if all are employed cumulatively. **250.** Thus, after writing: 'Be thou Lucius Titius my heir', we may add: 'I request and beg thee, Lucius Titius, as soon as thou art able to enter upon my inheritance, to render and make it over to Gaius Seius.' We may, however, likewise make the request with regard to a fraction of the inheritance; also it is open to us to leave trusts conditionally or absolutely, or as from a certain date. **251.** After the inheritance has been transferred, the transferor still remains heir, while the transferee is sometimes in the position of an heir, sometimes in that of a legatee. **252.** But in former times he was in the position neither of an heir nor of a legatee, but rather in that of a purchaser. For the practice then was that the inheritance should formally be sold for a nominal sum to him to whom it was being made over, and the same stipulations as are usual between the vendor and the purchaser of an inheritance were entered into between him and the heir, that is to say, the heir would stipulate from the recipient of the inheritance that he (the heir) should be indemnified against any judgment given against him, and in respect of anything he might otherwise part with in good faith, on account of the inheritance, and that in general he should, if sued on account of the inheritance, he properly defended, while on his side the recipient of the inheritance stipulated that whatever should have come to the heir from the inheritance should be made over to him (the recipient), and further that the heir should suffer him to bring the actions belonging to the inheritance as his *procurator* or *cognitor* **253.** But in more recent times a senatusconsult passed in the consulship of Trebellius Maximus and Annaeus Seneca has provided that where an inheritance has been made over in obedience to a trust, the actions which would lie at civil law in favour of and against the heir should he granted in favour of and against him to whom the inheritance has been made over under the trust. In consequence of this senatusconsult the stipulations above mentioned have fallen out of use. For the praetor now gives *actiones utiles* in favour of and against the recipient of the inheritance as though in favour of and against the heir, and these actions are published in the Edict.. **254.** Another point: seeing that heirs, when requested to make over the whole or almost the whole inheritance, used commonly to refuse to enter on the inheritance for very little or no gain and thereby trusts were being brought to naught, the senate later, in the consulship of Pegasus and Pusio, decided that one who had been requested to make over an inheritance should be permitted to retain a quarter of it, just as he is allowed to do against legacies under the *L. Falcidia*; and the same right to retain a quarter was allowed against trust gifts of individual things. In consequence of this senatusconsult it is the heir who carries the burdens of the inheritance, whilst the recipient of the remaining fraction of the inheritance is in the position of a partiary legatee, that is of a legatee to whom a fraction of the estate is left. This kind of legacy is called a *partitio*, because the legatee shares (*partitur*) the inheritance with the heir. The result is that the stipulations customary between an heir and a partiary legatee are entered into between the recipient of an inheritance on account of a trust and the heir; these stipulations provide that both profit and loss on the inheritance shall be shared between the parties proportionately to their respective fractions. **255.** Accordingly, if a testamentary heir is requested to make over not more than three-quarters of the inheritance, then the transference takes place under the *SC. Trebellianum*, and the actions arising from the inheritance are granted against each proportionately, against the heir by civil law and against the transferee of the inheritance under the *SC. Trebellianum*. It is true the heir remains such in respect also of the fraction which he has made over, and (at civil law) actions arising out of the inheritance lie in favour of and against him in full, but (by the *SC.*) his liability is carried no farther than, and actions in his favour are not granted beyond, the beneficial interest in the inheritance remaining with him. **256.** Where, however, the heir is requested to make over more than three-quarters or even the whole of the inheritance,

the *SC. Pegasianum* comes into operation. **257.** Now, once the heir has entered on the inheritance provided he does so voluntarily, he shoulders the whole of the liabilities of the inheritance, whether he retains his quarter or chooses not to. But if he retains his quarter, stipulations dividing the rights and liabilities proportionately as between a partiary legatee and an heir must be entered into. If, however,, he makes over the whole inheritance, stipulations on the model of those between a purchaser and vendor of an inheritance must be entered into. **258.** But if a testamentary heir refuses to enter on the inheritance, alleging that he doubts its solvency, it is provided by the *SC. Pegasianum* that if the person to whom he has been requested to transfer so desires, he be ordered by the praetor to enter on and transfer the inheritance, and that actions be granted in favour of and against the transferee as under the system of the *SC. Trebellianum*. In this case no stipulations are required, because the transferor of the inheritance is protected against liability and at the same time the actions arising from the inheritance are carried over in favour of and against the transferee. **259.** It makes no difference whether an heir instituted to the whole inheritance is requested to make over the whole or a fraction of it, or an heir instituted to a share is requested to make over the whole or a fraction of that share; for in the latter case also account is taken under the *SC. Pegasianum* of the quarter of his share.

260. It is also possible to leave individual things, such as land, a slave, a garment, silver, or money, by means of a trust, and the request to make the things over may be addressed either to the heir himself or to a legatee, though a legacy cannot be charged on a legatee. **261.** Further, not only what belongs to the testator, but also what belongs to the heir or legatee or to anyone at all may be left by means of a trust. Thus one may request even a legatee to make over to someone else not only the actual thing legated to him, but also something else, whether belonging to the legatee himself or to a third party. The only point to beware of is that a man be not requested to make over to others more than he himself takes under the will; for beyond that the request is ineffectual. **262.** Where a third party's thing is left by way of trust, the person charged with the trust is bound either to buy the actual thing and make it over, or else to pay its value, as is the law where a third party's thing is legated by damnation. Some, however, hold that if the owner of the thing left by way of trust will not sell it, the trust is avoided, but that in the case of a legacy by damnation it is otherwise.

263. Also, liberty can be conferred on a slave by means of a trust, either the heir or a legatee being requested to manumit him. **264.** It makes no difference whether the request concerns a slave of the testator himself or one belonging to the heir or the legatee or even a third party. **265.** Thus even a third party's slave must be bought and manumitted. But if his owner will not sell him, clearly the trust for liberation is avoided, because in this case there can be no valuation in money. **266.** A slave manumitted under a trust does not become the testator's freedman, even though he was the testator's own, but becomes the freedman of him who manumits. **267.** He, on the other hand, who is directly ordered to be free by the will, for instance in the form: 'Let my slave Stichus be free', or 'I order that my slave Stichus he free', becomes the freedman of the testator himself. And further, no one can obtain freedom directly under a will but one who belonged to the testator by Quiritary title both when he made his will and when he died.

268. There are many differences between gifts left by way of trust and those left by direct legacy. **269.** Thus, by means of a trust property can be left away from the heir of one's heir, whereas a legacy charged on him is void. **270.** Again, by means of a trust a man about to die intestate can leave things away from the person to whom his property is going, whereas he cannot be charged with a legacy. **270a.** Again, a legacy left by codicil is only valid if the codicil has been confirmed by the testator, that is if he has provided in his will that anything he should have committed to codicils should hold good. But a trust can be left even by unconfirmed codicil. **271.** Again, a legacy cannot be charged on a legatee, but a trust can. Indeed, from one to whom we are leaving something by means of a trust we can by means of a further trust leave something to a further person. **272.** Again, upon a slave belonging to someone else liberty cannot be conferred directly, but it can be by way of trust. **273.** Again, it is impossible for anyone to be instituted heir or disinherited by a codicil, even though it be confirmed by a will. But a person instituted heir by a will may be requested by codicil to make over the inheritance in whole or part to someone else, even though the codicil be not confirmed by the will. **274.** Again, a woman, though prevented by the *L. Voconia* from being instituted heir by a person assessed in the census at more than 100,000 asses, can nevertheless take the inheritance if left to her by means of a trust. **275.** Also Latins, though forbidden by the *L. Iunia* to take inheritances and legacies directly, can take under a trust. **276.** Again, though it is

forbidden by senatusconsult[1] to free and institute as heir one's slave under 30 years of age, the general opinion is that one can order that he be free when he shall be 30 years old, and can request that the inheritance should then be made over to him. **277.** Again, although we cannot institute from after the death of the heir who succeeds us a further heir in his place, still we can request our heir, when he shall die, to make over our inheritance in whole or part to a further person. Moreover, since a trust can be imposed from after the death of the heir, we can obtain the same result by writing thus: 'when my heir Titius is dead, I wish my inheritance to go to Publius Meuius.' By either method Titius leaves his own heir bound by the trust to transfer the inheritance. **278.** Further, we sue for legacies by *formula*, but claim trust gifts at Rome before a consul or the praetor having special jurisdiction over trusts, in the provinces before the provincial governor. **279.** Again, at Rome jurisdiction over trusts is exercised at all seasons, but over legacies only during term. **280.** Again, interest and mesne profits are due on trust-property where the person owing the trust is late in performance, but there is no liability for interest on legacies; so it is declared by a rescript of the late emperor I Hadrian. I am aware, however, that Julian held that in the case of legacies left by way of permission the law was the same as for trusts, and I observe that even today this opinion is preferred. **281.** Again, legacies are invalid, but trusts valid, if expressed in Greek.[2] **282.** Again, if an heir denies a legacy left by damnation, the action against him is for double; but on a trust the claim is always for the simple amount. **283.** Again, what has by mistake been paid on a trust beyond what was due can he recovered, but what has been paid in excess on a legacy by damnation cannot be recovered. The law is the same where a payment not due at all has on either account been made by mistake.

284. There used to be further differences, which do not now exist. **285.** Thus peregrines could take under trusts–indeed, this was probably the origin of trusts–but later this was forbidden, and now on the proposition of the late emperor Hadrian a senatusconsult has enacted that such trusts should be claimed for the fisc. **286.** Also, unmarried persons, though forbidden by the *L. Iulia* to take inheritances or legacies, were at one time considered able to take under trusts. **286a.** Again, childless persons, though under the *L. Papia* they forfeit a moiety of inheritances and legacies because they have no children, were at one time considered to take trust gifts in full. But later, by the *SC. Pegasianum*, they have been forbidden to take trust gifts just as much as legacies and inheritances, these being transferred to beneficiaries under the will who have children, or, if none of them have children, to the people, as is the rule in regard to legacies and inheritances, which for the same or like reason become caducous. **287.** Again, at one time a trust could be left in favour of an uncertain person or an afterborn stranger, though such persons can neither he instituted heirs nor be left legacies. But by a senatusconsult made on the authority of the late emperor Hadrian the same rule has been established for trusts as for legacies and inheritances. **288.** Again, there is now no doubt that a penal gift cannot be left even by way of trust.

289. But though in many points of law trusts are far freer than, and in others just as effective as, direct testamentary gifts, still a tutor cannot be appointed by will otherwise than directly, as thus: 'Let Titius be tutor to my children', or thus: 'I appoint Titius tutor to my children.' He cannot be appointed by means of a trust

[1] "to institute free and heir one's slave" F.deZ.

[2] The scanner read this as "Creek"!

8. BOOK III [of things: intestacy]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 1–89; pp. [odd nos.] 155–179 [footnotes omitted]

BOOK III

1. The inheritances of intestates, by the law of the Twelve Tables, go first to *sui heredes*. **2.** Are reckoned *sui heredes*,, as we have said above, children who were in the *potestas* of the deceased when he died, such as a son or daughter, a grandson or grand daughter by a son, a great-grandson or great-granddaughter by grandson by a son, and it makes no difference whether they are natural or adoptive children. A grandson or granddaughter, however, or a great-grandson or great-granddaughter, is in the class of *sui heredes* only if the preceding person has ceased to be in the ancestor's *potestas*, whether owing to death or in some other way, as by emancipation. For if at the time of a man's death his son is in his *potestas*, his grandson by that son cannot be a *suus heres*. The same must be taken to apply to ulterior descendants. **3.** A wife who is in her husband's *manus* is likewise *sua heres* to him, being in the position of a daughter. So also is a daughter-in-law who is in the *manus* of a son, she being in the position of a

granddaughter but she will be a *sua heres* only if the son in whose *manus* she has been is not, when the father dies, in his *potestas*. The same applies also to a woman who is in the *manus* of a grandson as his wife, she being in the position of a great-granddaughter. **4.** *Sui heredes* also are posthumous children who would have been in the ancestor's *potestas* had they been born in his lifetime. **5.** In the same legal position are those on whose behalf a case under the *L. Aelia Sentia* or the senatusconsult is proved after their father's death; for, had their case been proved in the father's lifetime, they too would have been in his *potestas*. **6.** The same is to be taken to apply to a son manumitted from a first or second mancipation after his father' death. **7.** Accordingly, where a son or daughter and grandsons or granddaughters by another son survive, they are all called to the inheritance simultaneously, and the nearer in degree does no exclude the more remote; for it was considered just that grandsons and granddaughters should succeed to their father's place and share. On the same principle also, if there be a grandson or granddaughter by a son and a great-grandson or great-granddaughter by a grandson, they are all called to the inheritance simultaneously. 8. And, it having been settled that grandsons and granddaughters, and great-grandsons and great-granddaughters, succeed to their parent's place, it has been held consistent that the inheritance should be divided not by individuals, but by stocks, so that a son takes half the inheritance and two or more grandchildren by another son the other half, and so that, if there survive grandchildren by two sons—say one or two by one of them and three or four by the other—half goes to the one or two and the other half to the three or four.

9. If there be no *suus heres*, then by the same law of the Twelve Tables the inheritance goes to the agnates. **10.** Are termed agnates those related by civil cognation. Now cognation is civil where the connexion is through persons of the male sex. Thus brothers born of the same father (also termed consanguineous) are agnates to each other, and whether they had also the same mother is irrelevant. Again, an uncle is agnate to his brother's son and, conversely, his brother's son to him. Also agnates to each other are *fratres patrueles* (also commonly called *consobrini*), that is the sons of two brothers. And pursuing this principle we can arrive at further degrees of agnation. **11**. But the law of the Twelve Tables does not give the inheritance to all agnates simultaneously, but only to those who are nearest in degree at the moment when it is established that there is an intestacy. **12.** In this title by agnation there is no succession, and therefore, if the nearest agnate abstains from the inheritance or dies before having entered upon it, the next nearest agnates have no right under the statute. **13**. The reason why we inquire who stood nearest at the moment when it was established that there is an intestacy, and not at the time of the death, is that where a man dies having made a will, it has been found preferable to look for the nearest agnate at the moment when it first becomes certain that no one will be heir under that will. **14.** But as regards women in this branch of the law one rule has been adopted in respect of the taking of an inheritance from them and another in that of the taking of an inheritance by them. For inheritances left by women come to us by title of agnation on precisely the same principle as those left by males, whereas inheritances left by us do not go to women beyond the degree of sisters by the same father. Thus a sister is a statutory heir of her brother or sister, but a father's sister or a brother's daughter cannot be statutory heir. Also in the position of sister to us is our mother or stepmother, if she has acquired the rights of a daughter in our father's house by coming under his *manus*. **15.** If the deceased leaves a brother and a son of a second brother, the brother, as appears from what has already been said, is preferred, because he is nearer in degree, whereas between *sui heredes* the law has been otherwise interpreted. **16.** If, however, no brother of the deceased survives, but there are children of brothers, the inheritance goes to all of them. But the question has arisen, if the families are of unequal numbers, that is, if there are, say, one or two children by one brother and three or four by the other, whether the inheritance is to he divided by stocks, as is the law between *sui heredes* or by individuals. It has, however, long been established that the division is to be by individuals. Consequently the inheritance will be divided into as many shares as there are individuals in the two families, each individual getting one share.

17. If there be no agnate, the same law of the Twelve Tables calls the *gentiles* (fellow-clansmen) to the inheritance. Who gentiles are we have explained in the first book. And, seeing that, as we there observed, the whole law relating to them has fallen into disuse, it is superfluous at the present point to enter once more into the details of the subject.

18. This is the extent of the regulation of intestate succession by the Twelve Tables. It is obvious how narrow that system was. **19.** Thus to begin with emancipated children have no rights under the statute to their ancestor's inheritance, since they have ceased to be *sui heredes*. **20.** The same applies where children are not in their father's *potestas* because, when granted Roman citizenship along with him, they

were not brought under his *potestas* by the emperor. **21.** Again, under the statute agnates who have undergone *capitis deminutio* are not admitted to the inheritance, because the title of agnation is destroyed by *capitis deminutio*. **22.** Again, if the nearest agnate does not enter on the *hereditas*, that is no reason for the next nearest being let in under the statute. **23.** Again female agnates more remote than sisters by the same father have no right under the statute. **24.** Similarly, cognates who are related through females are not admitted, so much so that no right of inheriting from each other exists even between a mother and her son or daughter except where the rights of children by the same father have been created between them by the mother having come under (the father's) *manus*.

25. But these injustices of the law have been amended by the praetor's Edict. **26.** For he calls to the inheritance all children deficient in statutory title exactly as though they had been in the ancestor's *potestas* at the time of his death, whether they stand alone or whether *sui heredes*, that is persons who were in the father's *potestas*, come in with them. **27.** But agnates who have undergone *capitis deminutio* he does not call in the second class, next after the *sui heredes*; in other words, he does not call them in the class in which they would have been called by the statute had they not undergone *capitis deminutio* but in a third class, as next of kin. For though by *capitis deminutio* they have lost their statutory right, they indubitably retain their rights of cognation. If therefore there be someone else who retains the right of agnation unimpaired, he will be preferred, even if more remote in degree. **28.** The law is the same, as some hold, in the case of an agnate who, on the nearest agnate abstaining from the inheritance, is not thereby let in by statutory right. But there are others who hold that such a one is called by the praetor in the same class as that in which the inheritance is given by the statute to the (nearest) agnates. **29.** Female agnates beyond the degree of sisters by the same father are unquestionably called in the third class, supposing, that is, that there is neither a *suus heres* nor an agnate. **30.** In the same class also are called persons related through females. **31.** Children who are in an adoptive family are also called in this same class to the inheritance of their natural parents.

32. But those whom the praetor calls to an inheritance do not become heirs at civil law. For the praetor cannot make heirs, it being only by a *lex* or some similar enactment, such as a senatusconsult or imperial constitution, that heirs are made. But when the praetor grants them *bonorum possessio*, they are established in the position of heirs.

33. In the granting of *bonorum possessio* the praetor also makes several other classes, his object being, that no one shall die without a successor. Of these we deliberately do not treat in the present work as we have explored the whole subject fully in a special work. **33a.** It suffices to remark; only this. . . .[1]

33b. Sometimes, however, the praetor promises *bonorum possessio* for the purpose rather of supporting the ancient law than of amending or combating it. Thus he grants *bonorum possessio secundum tableaus* equally to persons instituted heirs by a properly executed will. **34.** Again, on an intestacy, he calls the *sui heredes* and the agnates to *bonorum possessio*. In these cases his indulgence appears to be of advantage only in that one who so applies for *bonorum possessio* can use the interdict beginning with the words *Quorum bonorum*, the advantage of which we shall explain in the proper place; for in any case, even apart from *bonorum possessio*, the inheritance belongs to these persons by civil law.

35. Frequently, however, *bonorum possessio is* granted in such circumstances that the grantee does not get the inheritance. Such *bonorum possessio is* called *sine re* (ineffectual). **36.** For instance, if an heir instituted by a properly executed will makes *cretio*, but chooses not to apply for *bonorum possessio secundum tabulas*, being satisfied with being heir at civil law, those called to the succession on intestacy can apply for *bonorum possessio* none the less; but it goes to them *sine re*, since the testamentary heir can evict them from the inheritance. **37.** The law is the same where in a case of intestacy the *suus heres* does not choose to apply for *bonorum possessio*, being satisfied with his statutory right: if this happens, *bonorum possessio is* open to the agnate, but *sine re*, since he can be evicted from the inheritance by the *suus heres*. In like manner, if an inheritance goes to an agnate by civil law and he enters upon it, but does not choose to apply for *bonorum possessio*, and then one of the nearest cognates applies for it, the latter will have a *bonorum*. *possessio sine re*, for the same reason. **38.** And there are other similar cases, some of which we have mentioned in the previous book.

[1] The remaining 14 lines of this page and virtually all of the next are illegible. The topics probably included mothers' right of succession under the *SC. Tertullianum* and perhaps others as well.

39. Now let us consider the estates of freedmen. **40.** In early days a freedman was allowed to pass over his patron in his will with impunity. For the law of the Twelve Tables called a patron to his freedman's inheritance only if the freedman had died intestate, leaving no *suus heres*. Thus, even if a freedman died intestate but leaving a *suus heres*, the patron had no claim on his estate. And if it was one of his natural children that he left as *suus heres* no grievance was apparent; but if it was an adoptive son or daughter, or a wife who was in *manus*, that was *suus* or *sua heres*, it was obviously unjust that no right should remain to the patron. **41.** In consequence this legal injustice was corrected by the praetor's Edict. For if a freedman makes a will, he is commanded to make it in such manner as to leave his patron one half of his estate, and if he leaves him nothing or less than the half, the patron is granted *bonorum possessio contra tabulas* in respect of half; or if he dies intestate, leaving as *suus heres* an adoptive son or a wife who was in his own *manus* or a daughter-in-law who had been in his son's, equally the patron is granted *bonorum possessio* in respect of half against these *sui heredes*. But natural children enable a freedman to exclude his patron, and not only those of them whom he holds in *potestas* at the time of his death, but also those emancipated or given in adoption, provided that they are appointed heirs in some part by the will or that, if passed over by it, they apply under the Edict for *bonorum possessio contra tabulas*: for, if disinherited, they in no way exclude the patron. **42.** Later, by the *L. Papia*, the rights of patrons were enlarged in respect of wealthier freedmen. For by that statute it is provided that of the estate of a freedman who leaves a fortune of 100,000 sesterces or more and has fewer than three children, whether he dies testate or intestate, there shall be due to his patron a share proportionate to the number of the children. Thus, where the freedman leaves only one son or daughter as heir, half of his estate is due to his patron, just as if he had died childless; where he leaves two sons or daughters as heirs, a third is due; where three, the patron is shut out.

43. In regard to the estates of their freedwomen patrons suffered no wrong under the ancient law. For a freedwoman being in her patron's statutory *tutela*, could not make a will except with his *auctoritas*. Thus, if he had given *auctoritas* for the execution of a will either he had himself to blame if he was not left heir by her, or if he was, the inheritance came to him under the will. If on the other hand he had not given *auctoritas*, so that she died intestate, again the inheritance went to him, since a woman cannot have *sui heredes*; for in early days there was no one who could, whether as heir or as *bonorum possessor*, keep the patron out of the estate of his intestate freedwoman. **44.** But later the *L. Papia*, in view of the fact that it was liberating freedwomen in right of four children from the *tutela* of their patrons and was thereby permitting them to make a will even without a tutor's *auctoritas*, provided that there shall be due to the patron a share of his freedwoman's estate proportionate to the number of children she had at the time of her death. Thus, if such a freedwoman leaves all four children surviving her, a fifth of her estate is due to her patron, but if she outlives all her children, the whole inheritance goes to him.

45. Our statements regarding a patron must be taken to apply equally to his son, grandson by a son, and great-grandson by a grandson by a son. **46.** On the other hand, while in early days a patron's daughter, granddaughter by a son, and great-granddaughter by a grandson by a son had the same rights as those given to a patron by the Twelve Tables, the praetor calls only male *liberi* of patrons. But under the *L. Papia* a daughter is entitled in right of three children to apply for *bonorum possessio* against the will of her father's freedman, or for *bonorum possessio ab intestato* against the freedman's adoptive son, or his wife or daughter-in-law who was in his *manus*; apart from this *lex* she has not these rights. **47.** But, in the opinion of some, she is not entitled, even in right of children, to a proportionate part of the estate of a freedwoman who, having four children, has left a will. Yet when a freedwoman dies intestate, the express terms of the *L. Papia* entitle her (the patron's daughter) to a proportionate part. If, on the other hand, a freedwoman leaves a will, the patron's daughter is given the same rights as she has against the will of a freedman, that is, the same rights as those possessed by male descendants of a patron against the will of a freedman. This part of the *lex* is, however, drafted with insufficient care. **48.** From all this it is clear that extraneous heirs of a patron are very far from possessing the rights belonging to the patron either over the succession to an intestate freedman or against his will.

49. In early days, before the *L. Papia*, patronesses had over the estates of their freedmen only the same rights as were by the law of the Twelve Tables given to patrons. For the praetor did not, as in the case of a patron and his children provide for them to apply for *bonorum possessio* against the will of an ungrateful freedman or, if the freedman died intestate for *bonorum possessio* against his adoptive son or his wife or daughter-in-law (in *manus*), in respect of half the estate. **50.** But the *L. Papia* has given to a patroness enjoying if free-born, the privilege of two children, and, if a freedwoman, that of three, pretty well the

same rights as patrons possess under the praetor's Edict, while to a free-born patroness enjoying the privilege of three children it has given the rights that it bestows on a patron; to a freedwoman patroness, however it has not given the same rights. **51.** But in respect of the estates of freedwomen who die intestate the *L. Papia* gives a patroness enjoying the privilege of children no new rights. Hence if neither the patroness nor the freedwoman has undergone *capitis deminutio* the inheritance goes to the patroness under the law of the Twelve Tables, and the freedwoman's children are excluded. This rule applies even where the patroness is not privileged by reason of children; for, as observed above, females cannot have a *suus heres*. But if *capitis deminutio* of either patroness or freedwoman has occurred, the freedwoman's children in their turn exclude the patroness, because, the patroness's statutory right having been destroyed by the *capitis deminutio*, the result is that the freedwoman's children are preferred in right of cognation. **52.** On the other hand, where a freedwoman dies testate, a patroness, if not privileged by reason of children, has no right against the freedwoman's will; but if so privileged, she is accorded by the *L. Papia* the same right as under the Edict a patron enjoys against his freedman's will.

53. To a patroness's son privileged by reason of children the same *lex* has given pretty well the right of a patron; but in his case privilege by reason of a single son or daughter suffices.

54. It is enough to have carried our summary account of the various rights (over the estates of citizen freedmen and freedmen) thus far; a more detailed exposition has been given in a special work.

55. We proceed to consider the estates of (Junian) Latin freedmen. **56.** In order to make this branch of the law clearer we must call to mind that, as we have said elsewhere, those who are now termed Junian Latins were in earlier times slaves by Quiritary law, but that they were maintained in apparent freedom by the praetor's intervention; and therefore their property used to go to their patrons by title of *peculium*; but that later, owing to the *L. Iunia*, all who used to be protected in a state of freedom by the praetor came to be free and to be styled Junian Latins: Latins because the law made them as free as if they were free-born Roman citizens who, by migrating from the city of Rome to Latin colonies, had become colonial Latins, Junian because it was by the *L. Iunia* that they were made free, though not Roman citizens. Now the author of the *L. Iunia*, realizing that as the result of this fiction the estates of deceased Latins would no longer go to their patrons, because of course they would die neither as slaves, whose property would go to their patrons as *peculium*, nor as (citizen) freedmen, whose estates would go to their patrons by right of manumission—(the author of the *L. Iunia*) deemed it necessary, in order to prevent the benefit given to them from being turned to the injury of their patrons, to provide that their estates should go to their manumitters just as if the *lex* had not been passed. Hence under the *lex* the estates of Latins go to their manumitters as it were by right of *peculium*. **57.** The consequence is that the rights created by the *L. Iunia* over the estates of Latins differ widely from those holding good where the inheritances of citizen freedmen are concerned. **58.** For the inheritance of a citizen freedman goes in no case to his patron's extraneous heirs, but always to his patron's son, grandsons by a son, or great-grandsons by a grandson by a son, even though these have been disinherited by their ancestor; whereas the estate of a Latin goes, like a slave's *peculium*, to the heirs, even if extraneous, and not to the disinherited children of his manumitter. **59.** Again, the inheritance of a citizen freedman goes to two or more patrons in equal shares, even though they owned him, when a slave, in unequal shares; whereas the estate of a Latin goes to several patrons in proportion to their former shares as his owners. **60.** Again, in the inheritance of a citizen freedman a patron shuts out the son of a second patron, and the son of a patron the grandson of a second patron; whereas the estates of Latins go to both a patron and the heir of a second (deceased) patron jointly, the latter taking the share that would have gone to the manumitter (whom he represents) himself. **61.** Again, if there are, say, three children of one patron and one of a second, the inheritance of a citizen freedman is divided by the number of persons concerned, that is, the three brothers take three shares and the only child a fourth; whereas the estate of a Latin goes to the successors of a manumitter in the same proportion as that in which it would have gone to the manumitter himself. **62.** Again, if one of two patrons rejects his share in the inheritance of a citizen freedman, or dies before making *cretio* the whole inheritance goes to the other patron; whereas the estate of a Latin, in respect of the share of a patron who fails to take, becomes caducous and goes to the people.

63. Later, in the consulship of Lupus and Largus, the senate decreed that the estates of Latins should devolve first on those who had freed them, next on their children, if not expressly disinherited, according to propinquity, and finally, under the old law, on the heirs of those who had freed them. **64.** In the opinion of some the intention of this senatusconsult was that we should apply to the estates of Latins the same rules as we apply to the inheritances of citizen freedmen. The chief exponent of this opinion was Pegasus.

But it is clearly erroneous; for the inheritance of a citizen freedman never goes to his patron's extraneous heirs, whereas by this very senatusconsult the estates of Latins go, if no children of the manumitter stand in the way, even to extraneous heirs. Again, in respect of the inheritance of a citizen freedman the manumitter's children are never disabled by disinherison; whereas the terms of the senatusconsult are that in respect of the estates of Latins express disinherison does disable them. **64a.** It is therefore more correct to say that the sole intention of the senatusconsult is that children of the manumitter, if not expressly disinherited, should be preferred to extraneous heirs. **65.** Thus, where an emancipated son of the patron has (merely) been passed over (in his father's will), he is, even though he does not apply for *bonorum possessio contra tabulas* in respect of his father's estate, nevertheless preferred to extraneous heirs in succession to Latins. **66.** Again, a daughter and further *sui heredes*, though disinherited by a general clause and thus barred front the whole inheritance of their ancestor at civil law, will nevertheless, in regard to the estates of Latins, be preferred to extraneous heirs, except if they have been disinherited by name by their ancestor. **67.** Again the estates of Latins belong to the manumitter's children notwithstanding that they have refrained from their ancestor's inheritance; for no more shall those passed over without mention by the will can they be said to have beer disinherited. **68.** From all this it is sufficiently clear that one who makes a Latin freedman. . . .[2] **69.** Again, it further appears to be agreed that, if a patron institutes his children as sole heirs, but in unequal shares, the estate of a Latin belongs to them, if they qualify as heirs to their father, in the same shares, because, where no extraneous heir is present, the senatusconsult does not apply. **70.** But where a patron leaves an extraneous person heir along with his children, Caelius Sabinus says that the whole estate (of a deceased Latin) belongs to the children of the deceased in equal shares, because, when an extraneous heir is present, the senatusconsult, and not the *L. Iunia*, applies. But Iavolenus says that the patron's children will share equally under the senatusconsult only that fraction of the Latin's estate which the extraneous heirs would have had under the *L. Iunia*, before the senatusconsult, but that the rest of the estate belongs to them in proportion to their shares in their father's inheritance. **71.** It is also a question whether this senatusconsult applies to a patron's descendants through his daughter or granddaughter, so that my grandson by my daughter will be preferred to my extraneous heir in respect of the estate of my Latin freedman. And a further question is whether the senatusconsult applies to a mother's Latin, so that a patroness's son will be preferred to his mother's extraneous heir in respect of the estate of her Latin. Cassius held that the senatusconsult applied in both cases, but his opinion is generally rejected, on the ground that the senatusconsult does not contemplate the case of children belonging to another family, and this, it is argued, appears from the fact that it bars children expressly disinherited; for the children contemplated would appear to be those who, if not instituted, are customarily disinherited; but there is no need for either a mother to disinherit her son or daughter, or a maternal grandfather his grandson or granddaughter, when not instituting him or her as heir, whether the question be as to the civil law or as to the praetorian Edict, whereby *bonorum possessio contra tabulas* is offered to children simply passed over by a will.

72. Sometimes, however, a citizen freedman dies as a Latin, for instance where a Latin has been granted Roman citizenship by the emperor, with a saving of his patron's rights. For, as the late emperor Trajan laid down, a Latin who obtains Roman citizenship from the emperor against the will or without the knowledge of his patron resembles, so long as he lives, any other citizen freedman, and the children he begets are his by civil law, but he dies under the law of a Latin, and neither can his children be his heirs nor has he any power to make a will, except that he may do so by instituting his patron as his heir and substituting someone else for him in the event of his declining to be heir. **73.** And as it seemed to result from this constitution (Trajan's) that such persons could never die as Roman citizens, even though they had afterwards availed themselves of the procedure for becoming citizens under the *L. Aelia Sentia* or the senatusconsult, the late emperor Hadrian, moved by the injustice of the case, caused a senatusconsult to be passed, to the effect that persons who, having obtained Roman citizenship from the emperor without the knowledge or against the opposition of their patrons, afterwards availed themselves of the procedure whereby under the *L. Aelia Sentia* or the senatusconsult they would, had they remained Latins, have obtained Roman citizenship should be treated exactly as if their citizenship had been obtained under the L. *Aelia Sentia* or the senatusconsult.

74. The estates of freedmen placed by the *L. Aelia Sentia* in the rank of *dediticii* go to their patrons in some cases as if they were those of citizen freedmen, in others as if they were those of Latins. **75.** For the

[2] The last line of this page and virtually all of the first 21 lines of the next are illegible.

estates of those who, had they not been in some disgrace, would by manumission have become Roman citizens, are by the same statute allotted to their patrons, as though they were the estates of citizen freedmen. Such persons, nevertheless, have no power to make a will, according to the well-grounded general opinion; for it seemed incredible that the legislator should have intended to concede the power of making a will to persons of the lowest status. **76.** On the other hand, the estates of those who had they not been in some disgrace, would by manumission have become Latins, are allotted to their patrons exactly as though they had died Latins. I am not forgetting that the legislator has not expressed his intention on the point with sufficient particularity.

77. Let us further consider the succession that comes to us by *emptio bonorum* (purchase of an insolvent's estate). **78.** The owner of the estate sold may be living or dead. The estates of living persons are sold if they abscond with intent to defraud and are not defended in their absence or if they give up their estates under the *L. Iulia*, or if they are judgement-debtors and the period allowed to them partly by the law of the Twelve Tables and partly by the praetor's edict for finding the money has expired. The estates of deceased persons are sold when it is established that they have left neither heirs nor *bonorum possessores* nor any other lawful successor. **79.** Where the estate that is being sold belongs to a living person, the praetor orders that it be held in possession and advertised for 30 successive days; where it is that of a deceased person. for 15 days. After that he orders the creditors to meet and appoint one of their number as manager, that is as the one to carry out the sale. And so, if the estate that is being sold is that of a living person, he orders this to be done in 10 (?) days, if that of a deceased person, in half that time. Thus he requires adjudgment of the estate to the buyer to take place in the case of a living person in 40 (?) days, in that of a deceased person in 20. The reason why he requires sales of estates of living persons to be completed more slowly is that in their case special care was necessary to save them from inconsiderate sales of their estates. **80.** Full ownership is not acquired by either *bonorum possessores* or *bonorum emptores*, but only bonitary. Quiritary ownership is acquired by them only if they have completed usucapion. Sometimes, however, not even usucapion is open to a *bonorum emptor*, for example if. . . .[3] **81.** Also, debts owed to or by the former owner of the estate are not owed to or by the *bonorum possessor* or *bonorurm emptor* at civil law, and therefore on all claims they sue and are sued by *actiones utiles*, which we shall describe in our next book.

82. There are also successions of another kind, brought in neither by the law of the Twelve Tables nor by the praetor's Edict, but by the law received by general consent. **83.** For when a man *sui iuris* has given himself in adoption, or a woman (*sui iuris*) has entered *manus*, all his or her assets, incorporeal as well as corporeal, and debts due to him or her, are acquired by the adoptive father or *coemptionator*, except rights that are destroyed by *capitis deminutio*, such as a usufruct, a freedman's obligation of services contracted by means of an oath, and issues joined in a *iudicium legitimum* (statutory suit). **84.** Contrariwise, what the man who has given himself in adoption, or the woman who has entered *manus*, owed does not become the debt of the *coemptionator* or adoptive father, except if the debt be hereditary; in that case the adoptive father or *coemptionator* is directly liable, because he becomes heir himself, whilst the person who has given himself in adoption or entered *manus* ceases to be heir. But for debts owed by such persons on their own account, though neither the adoptive father nor the *coemptionator* is liable, and though even the person who has given himself in adoption or entered *manus* no longer remains liable, because freed by the *capitis deminutio*, still a *utilis actio*, in which the *capitis deminutio* is set aside, is given against him or her, and if they are not defended against this action, the praetor permits the creditors to sell the whole of the property that would have been theirs, had they not subjected themselves to another's power.

85. Again, if an heir, before making *cretio* or behaving as heir, surrenders *in iure* to another person an inheritance coming to him by statute, the surrenderee becomes heir in full right precisely as if he were himself called to the inheritance by the statute. If, however, the heir surrenders after qualifying as heir, heir he remains, and consequently it is he that will be liable to the deceased's creditors; but he will transfer the corporeal things (in the inheritance) just as though he had surrendered them *in iure* one by one, while the debts due (to the inheritance) are destroyed, and in this manner the debtors of the inheritance are gainers. **86.** The law is the same where a testamentary heir surrenders *in iure* the inheritance after he has qualified as heir, but his surrender of the inheritance before entering upon it is void. **87.** It is a question whether surrender *in* i*ure* by a *suus heres* or by a *necessarius heres* has any effect. Our teachers think it has none; the authorities of the other school think it has the same effect as

[3] Approximately two and a half lines are illegible.

surrender made by other heirs after they have entered on the inheritance; for it makes no difference whether one becomes heir by *cretio* or behaving as heir, or is bound to the inheritance by legal necessity.

9. BOOK III [obligations *ex contractu*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 88–181; pp. [odd nos.] 179–213 [footnotes omitted]

88. Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict.

89. First let us consider those that arise from contract. Of such there are four *genera*: for an obligation by contract arises either *re* (by delivery of a *res*: real contract), by words (verbal contract), by writing (literal contract), or by consent (consensual contract).

90. A real obligation is contracted, for instance, by conveyance on loan for consumption. Such a contract takes place properly in the case of things that are reckoned by weight, number, or measure—such things as money, wine, oil, corn, bronze, silver, gold. We convey these things by counting, measuring, or weighing them out, to the end that they should become the property of the recipients, and that at some future time there should be restored to us not the identical things, but others of the same kind. Hence the term *mutuum*, because what is conveyed in this manner by me to you becomes *ex meo tuum* (from being mine yours). **91.** He too who receives what is not due to him from one who pays in error comes under a real obligation. For the *condictio* with the pleading 'if it appear that the defendant is bound to convey' lies against him precisely as if he had received the payment by way of loan. Hence some hold that a ward or a woman, to whom without their tutor's *auctoritas* payment of what is not due has been made in error, is not liable under the *condictio* any more than under a loan for consumption. This sort of obligation, however, appears not to be founded on contract, because one who gives with intent to pay means to untie rather than to tie a bond.[1]

92. A verbal obligation is created by question and answer in such forms as: 'Do you solemnly promise conveyance? I solemnly promise conveyance'; 'Will you convey? I will convey'; 'Do you promise? I promise'; 'Do you promise on your honour? I promise on my honor'; 'Do you guarantee on your honour? I guarantee on my honor'; 'Will you do? I will do.' **93.** Now the verbal obligation in the form *dari spondes*? *spondeo* is peculiar to Roman citizens; but the other forms belong to the *ius gentium* and are consequently valid between all men, whether Roman citizens or peregrines. And even though expressed in Greek, in such words as Δώσεις; Δώσω· Ὁμολογεῖς; Ὁμολογῶ· Πίστει κελύεις; Πίστει κελύω· Ποιήσεις; Ποιήσω, they are still valid between Roman citizens, provided they understand Greek. Conversely, though expressed in Latin, they are still valid even between peregrines, provided they understand Latin. But the verbal obligation *dari spondes*? *spondeo* is so far peculiar to Roman citizens that it cannot properly be put into Greek, although the word *spondeo* is said to be derived from a Greek word. **94.** Hence we are told that there is one case only in which a peregrine can incur obligation by using this word, namely where our emperor puts to the ruler of a peregrine people the question of peace in this wise: 'do you solemnly promise that there shall be peace?' or our emperor in turn is interrogated in the same form. But this statement is over-ingenious; for if the treaty is broken, there is no action on the stipulation, but recourse is had to the law of war. **95.** A point on which doubt may arise is . . . .[2] **95a.** There are also other cases in which obligations [can be contracted by words spoken without any previous interrogation, as where a woman constitutes a dowry by declaration to her betrothed or to her wedded husband, as can be done whether the property is movable or immovable. And by this form not only can the women herself incur obligation, but also her father; and so can] her debtor, by declaring as dowry, with her authority, what he owes to her. But no other person than these can incur obligation in this form. If therefore another person desires to promise dowry on behalf of a woman, he must engage himself in the ordinary form, that is he must make the promise in answer to a stipulatory question by the husband. **96.** Another case in which a binding contract is formed by the spoken promise of one party without a previous question from the other is where a freedman has taken an oath to make his patron some gift or render him some observance or services. This is the one case of obligation being contracted by oath; in Roman law at

[1] Similar language in D.44.7.5.3 (Gaius, *Aurea*, book 2).

[2] One and half lines are illegible. The discussion may have concerned what happens if the language of the question and answer differed or whether languages other than Latin and Greek were admissible. Cf. D.45.1.1.6, Theoph. 3.15.1.

exception— namely, that, as is ruled in a constitution of the Emperor Severus, a free person, such as a general agent, can acquire possession for you, and that not only when you know, but even when you do not know of the fact of acquisition: and through this possession ownership can be immediately acquired also, if it was the owner who delivered the thing; and if it was not, it can be acquired ultimately by usucapion or by the plea of long possession.

6. So much at present concerning the modes of acquiring rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate; and of these two modes we will first treat of acquisition by will. The first point which here calls for exposition is the mode in which wills are made.

TITLE X

OF THE EXECUTION OF WILLS

The term testament is derived from two words which mean a signifying of intention.

1. Lest the antiquities of this branch of law should be entirely forgotten, it should be known that originally two kinds of testaments were in use, one of which our ancestors employed in times of peace and quiet, and which was called the will made in the *comitia calata*, while the other was resorted to when they were setting out to battle, and was called *procinctum*. More recently a third kind was introduced, called the will by bronze and balance, because it was made by mancipation, which was a sort of fictitious sale, in the presence of five witnesses and a balance holder, all Roman citizens above the age of puberty, together with the person who was called the purchaser of the family. The two first mentioned kinds of testament, however, went out of use even in ancient times, and even the third, or will by bronze and balance, though it has remained in vogue longer than they, a has become partly disused. **2**. All these three kinds of will which we have mentioned belonged to the civil law, but later still a fourth form was introduced by the praetor's edict; for the new law of the praetor, or *ius honorarium*, dispensed with mancipation, and rested content with the seals of seven witnesses, whereas the seals of witnesses were not required by the civil law. **3**. When, however, by a gradual process the civil and praetorian laws, partly by usage, partly by definite changes introduced by constitutions, came to be combined into a harmonious whole, it was enacted that a will should be valid which was wholly executed at one time and in the presence of seven witnesses (these two points being required, in a way, by the old civil law), to which the witnesses signed their names—a new formality imposed by imperial legislation—and affixed their seals, as had been required by the praetor's edict. Thus the present law of testament seems to be derived from three distinct sources; the witnesses, and the necessity of their all being present continuously through the execution of the will in order that that execution may be valid, coming from the civil law: the signing of the document by the testator and the witnesses being due to imperial constitutions, and the exact number of witnesses, and the sealing of the will by them, to the praetor's edict. **4**. An additional requirement imposed by our constitution, in order to secure the genuineness of testaments and prevent forgery, is that the name of the heir shall be written by either the testator or the witnesses, and generally that everything shall be done according to the tenor of that enactment.

5. The witnesses may all seal the testament with the same seal; for, as Pomponius remarks, what if the device on all seven seals were the same? It is also lawful for a witness to use a seal belonging to another person. **6**. Those persons only can be witnesses who are legally capable of witnessing a testament. Women, persons below the age of puberty, slaves, lunatics, persons dumb or deaf, and those who have been interdicted from the management of their property, or whom the law declares worthless and unfitted to perform this office, cannot witness a will. **7**. In cases where one of the witnesses to a will was thought free at the time of its execution, but was afterwards discovered to be a slave, the Emperor Hadrian, in his rescript to Catonius Verus, and afterwards the Emperors Severus and Antoninus declared that of their goodness they would uphold such a will as validly made; for, at the time when it was sealed, this witness was admitted by all to be free, and, as such, had had his civil position called in question by no man. **8**. A father and a son in his power, or two brothers who are both in the power of one father, can lawfully witness the same testament, for there can be no harm in several persons of the same family witnessing

together the act of a man who is to them a stranger. **9**. No one, however, ought to be among the witnesses who is in the testator's power, and if a son in power makes a will of military peculium after his discharge, neither his father nor any one in his father's power is qualified to be a witness; for it is not allowed to support a will by the evidence of lo persons in the same family with the testator. **10**. No will, again, can be witnessed by the person instituted heir, or by any one in his power, or by a father in whose power he is, or by a brother under the power of the same father: for the execution of a will is considered at the present day to be purely and entirely a transaction between the testator and the heir. Through mistaken ideas on this matter the whole law of testamentary evidence fell into confusion: for the ancients, though they rejected the evidence of the purchaser of the family and of persons connected with him by the tie of power, allowed a will to be witnessed by the heir and persons similarly connected with him, though it must be admitted that they accompanied this privilege with urgent cautions against its abuse. We have, however, amended this rule, and enacted in the form of law what the ancients expressed in the form only of advice, by assimilating the heir to the old purchaser of the family, and have rightly forbidden the heir, who now represents that character, and all other persons connected with him by the tie referred to, to bear witness in a matter in which, in a sense, they would be witnesses in their own behalf. Accordingly, we have not allowed earlier constitutions on this subject to be inserted in our Code. **11**. Legatees, and persons who take a benefit under a will by way of trust, and those connected with them, we have not forbidden to be witnesses, because they are not universal successors of the deceased: indeed, by one of our constitutions we have specially granted this privilege to them, and, *a fortiori*, to persons in their power, or in whose power they are.

12. It is immaterial whether the will be written on a tablet, paper, parchment, or any other substance. **13**. And a man may execute any number of duplicates of his will, for this is sometimes necessary, though in each of them the usual formalities must be observed. For instance, a person setting out upon a voyage may wish to take a statement of his last wishes along with him, and also to leave one at home; and numberless other circumstances which happen to a man, and over which he has no control, will make this desirable. **14**. So far of written wills. When, however, one wishes to make a will binding by the civil law, but not in writing, he may summon seven witnesses, and in their presence orally declare his wishes; this, it should be observed, being a form of will which has been declared by constitutions to be perfectly valid by civil law.

TITLE XI

OF SOLDIERS' WILLS

Soldiers, in consideration of their extreme ignorance of law, have been exempted by imperial constitutions from the strict rules for the execution of a testament which have been described. Neither the legal number of witnesses, nor the observance of the other rules which have been stated, is necessary to give force to their wills, provided, that is to say that they are made by them while on actual service; this last qualification being a new though wise one introduced by our constitution. Thus, in whatever mode a soldier's last wishes are declared, whether in writing or orally, this is a binding will, by force of his mere intention. At times, however, when they are not employed on actual service, but are living at home or elsewhere, they are not allowed to claim this privilege: they may make a will, even though they be sons in power, in virtue of their service, but they must observe the ordinary rules, and are bound by the forms which we described above as requisite in the execution of the wills of civilians. **1**. Respecting the testaments of soldiers the Emperor Trajan sent a rescript to Statilius Severus in the following terms: 'The privilege allowed to soldiers of having their wills upheld, in whatever manner they are made, must be understood to be limited by the necessity of first proving that a will has been made at all; for a will can be made without writing even by civilians. Accordingly, with reference to the inheritance which is the subject of the action before you, if it can be shown that the soldier who left it, did in the presence of witnesses, collected expressly for the purpose, declare orally who he wished to be his heir, and on what slaves he wished to confer liberty, it may well be maintained that in this way he made an unwritten testament, and his wishes therein declared ought to be carried out. But if, as is so common in ordinary conversation, he said to some one, "I make you my heir", or, "I leave you all my property", such expressions cannot be held to amount to a testament, and the interest of the very soldiers, who are privileged in the way described, is the principal ground for rejecting such a precedent. For if it were admitted, it would be easy, after a soldier's death, to procure witnesses to affirm that they had heard him say he left his property to any one they pleased to name, and in this way it would be impossible to discover the true intentions of the deceased.' **2**. A soldier too may make a will though dumb or deaf. **3**.

This privilege, however, which we have said soldiers enjoy, is allowed them by imperial constitutions only while they are engaged on actual service, and in camp life. Consequently, if veterans wish to make a will after their discharge, or if soldiers actually serving wish to do this away from camp, they must observe the forms prescribed for all citizens by the general law; and a testament executed in camp without formalities, that is to say, not according to the form prescribed by law, will remain valid only for one year after the testator's discharge. Supposing then that the testator died within a year, but that a condition, subject to which the heir was instituted, was not fulfilled within the year, would it be feigned that the testator was a soldier at the date of his decease, and the testament consequently be upheld? And this question we answer in the affirmative. **4**. If a man, before going on actual service, makes an invalid will, and then during a campaign opens it, and adds some new disposition, or cancels one already made, or in some other way makes it clear that he wishes it to be his testament, it must be pronounced valid, as being, in fact, a new will made by the man as a soldier. **5**. Finally, if a soldier is adrogated, or, being a son in power, is emancipated, his previously executed will remains good by the fiction of a new expression of his wishes as a soldier, and is not deemed to be avoided by his loss of status.

6. It is, however, to be observed that earlier statutes and imperial constitutions allowed to children in power in certain cases a civil peculium after the analogy of the military peculium, which for that reason was called quasi-military, and of which some of them were permitted to dispose by will even while under power. By an extension of this principle our constitution has allowed all persons who have a peculium of this special kind to dispose of it by will, though subject to the ordinary forms of law. By a perusal of this constitution the whole law relating to this privilege may be ascertained.

TITLE XII

OF PERSONS INCAPABLE OF MAKING WILLS

Certain persons are incapable of making a lawful will. For instance, those in the power of others are so absolutely incapabIe that they cannot make a testament even with the permission of their parents, with the exception of those whom we have enumerated, and particularly of children in power who are soldiers, and who are permitted by imperial constitutions to dispose by will of all they may acquire while on actual service. This was allowed at first only to soldiers on active service, by the authority of the Emperors Augustus and Nerva, and of the illustrious Emperor Trajan; afterwards, it was extended by an enactment of the Emperor Hadrian to veterans, that is, soldiers who had received their discharge. Accordingly, if a son in power makes a will of his military peculium, it will belong to the person whom he institutes as heir: but if he dies intestate, leaving no children or brothers surviving him, it will go to the parent in whose power he is, according to the ordinary rule. From this it can be understood, that a parent has no power to deprive a son in his power of what he has acquired on service, nor can the parent's creditors sell or otherwise touch it; and when the parent dies it is not shared between the soldier's son and his brothers, but belongs to him alone, although by the civil law the peculium of a person in power is always reckoned as part of the property of the parent, exactly as that of a slave is deemed part of the property of his master, except of course such property of the son as by imperial constitutions, and especially our own, the parent is unable to acquire in absolute ownership. Consequently, if a son in power, not having a military or quasi-military peculium, makes a will, it is invalid, even though he is released from power before his decease. **1**. Again, a person under the age of puberty is incapable of making a will, because he has no judgement, and so too is a lunatic, because he has lost his reason; and it is immaterial that the one reaches the age of puberty, and the other recovers his faculties, before his decease. If, however, a lunatic makes a will during a lucid interval, the will is deemed valid, and one is certainly valid which he made before he lost his reason: for subsequent insanity never avoids a duly executed testament or any other disposition validly made. **2**. So too a spendthrift, who is interdicted from the management of his own affairs, is incapable of making a valid will, though one made by him before being so interdicted holds good.

3. The deaf, again, and the dumb cannot always make a will, though here we are speaking not of persons merely hard of hearing, but of total deafness, and similarly by a dumb person is meant one totally dumb, and not one who merely speaks with difficulty; for it often happens that even men of culture and learning by some cause or other lose the faculties of speech

TITLE XIII

OF THE DISINHERISON OF CHILDREN

The law, however, is not completely satisfied by the observance of the rules hereinbefore explained. A testator who has a son in his power must take care either to institute him heir, or to specially disinherit him, for passing him over in silence avoids the will; and this rule is so strict, that even if the son die in the lifetime of the father no heir can take under the will, because of its original nullity. As regards daughters and other descendants of either sex by the male line, the ancients did not observe this rule in all its strictness; for if these persons were neither instituted nor disinherited, the will was not avoided, but they were entitled to come in with the instituted heirs, and to take a certain portion of the inheritance. And these persons the ascendant was not obliged to specially disinherit; he could disinherit them collectively by a general clause. **1**. Special disinherison may be expressed in these terms—'Be Titius my son disinherited', or in these, 'Be my son disinherited,' without inserting the name, supposing there is no other son. Children born after the making of the will must also be either instituted heirs or disinherited, and in this respect are similarly privileged, that if a son or any other family heir, male or female, born after the making of the will, be passed over in silence, the will, though originally valid, is invalidated by the subsequent birth of the child, and so becomes completely void. Consequently, if the woman from whom a child was expected have an abortive delivery, there is nothing to prevent the instituted heirs from taking the inheritance. It was immaterial whether female family heirs born after the making of the will were disinherited specially or by a general clause, but if the latter mode be adopted, some legacy must be left them in order that they may not seem to have been passed over merely through inadvertence but male family heirs born after the making of the will, sons and other lineal descendants, are held not to be properly disinherited unless they are disinherited specially, thus: 'Be any son that shall be born to me disinherited.' **2**. With children born after the making of the will are classed children who succeed to the place of a family heir, and who thus, by an event analogous to subsequent birth, become family heirs to an ancestor. For instance, if a testator have a son, and by him a grandson or granddaughter in his power, the son alone, being nearer in degree, has the right of a family heir, although the grandchildren are in the testator's power equally with him. But if the son die in the testator's lifetime, or is in some other way released froM his power, the grandson and granddaughter succeed to his place, and thus, by a kind of subsequent birth, acquire the rights of family heirs. To prevent this subsequent avoidance of one's will, grandchildren by a son must be either instituted heirs or disinherited, exactly as, to secure the original validity of a testament, a son must be either instituted or specially disinherited; for if the son die in the testator's lifetime, the grandson and granddaughter take his place, and avoid the will just as if they were children born after its execution. And this disinherison was first allowed by the lex Iunia Vellaea, which explains the form which is to be used, and which resembles that employed in disinheriting family heirs born after the making of a will. **3**. It is not necessary, by the civil law, to either institute or disinherit emancipated children, because they are not family heirs. But the praetor requires all, females as well as males, unless instituted, to be disinherited, males specially, females collectively; and if they are neither appointed heirs nor disinherited as described, the praetor promises them possession of goods against the will. **4**. Adopted children, so long as they are in the power of their adoptive father, are in precisely the same legal position as children born in lawful wedlock; consequently they must be either instituted or disinherited according to the rules stated for the disinherison of natural children. When, however, they have been emancipated by their adoptive father, they are no longer regarded as his children either by the civil law or by the praetor's edict. Conversely, in relation to their natural father, so long as they remain in the adoptive family they are strangers, so that he need neither institute nor disinherit them: but when emancipated by their adoptive father, they have the same rights in the succession to their natural father as they would have had if it had been he by whom they were emancipated. Such was the law introduced by our predecessors. **5**. Deeming, however, that between the sexes, to each of which nature assigns an equal share in perpetuating the race of man, there is in this matter no real ground of distinction, and marking that, by the ancient statute of the Twelve Tables, all were called equally to the succession on the death of their ancestor intestate (which precedent the praetors also seem to have subsequently followed), we have by our constitution introduced a simple system of the same kind, applying uniformly to sons, daughters, and other descendants by the male line, whether born before or after the making of the will. This requires that all children, whether family heirs or emancipated, shall be specially disinherited, and declares that their pretermission shall have the effect of avoiding the will of their parent, and depriving the instituted heirs of the inheritance, no less than the pretermission of children who are family heirs or have been emancipated, whether already born, or born after, though conceived before the making of the will. In

respect of adoptive children we have introduced a distinction, which is explained in our constitution on adoptions. **6**. If a soldier engaged on actual service makes a testament without specially disinheriting his children, whether born before or after the making of the will, but simply passing them over in silence, though he knows that he has children, it is provided by imperial constitutions that his silent pretermission of them shall be equivalent to special disinherison. **7**. A mother or maternal grandfather is not bound to institute her or his children or grandchildren; they may simply omit them, for silence on the part of a mother, or of a maternal grandfather or other ascendant, has the same effect as actual disinherison by a father. For neither by the civil law, nor by that part of the praetor s edict in which he promises children who are passed over possession of goods against the will, is a mother obliged to disinherit her son or daughter if she does not institute them heirs, or a maternal grandfather to be equally precise with reference to grandchildren by a daughter: though such children and grandchildren, if omitted, have another remedy, which will shortly be explained.

TITLE XIV

OF THE INSTITUTION OF THE HEIR

A man may institute as his heirs either free men or slaves, and either his own slaves or those of another man. If he wished to institute his own slave it was formerly necessary, according to the more common opinion, that he should expressly give him his liberty in the will: but now it is lawful, by our constitution, to institute one's own slave without this express manumission—a change not due to any spirit of innovation, but to a sense of equity, and one whose principle was approved by Atilicinus, as is stated by Paulus in his books on Masurius Sabinus and on Plautius. Among a testator's own slaves is to be reckoned one of whom he is bare owner, the usufruct being vested in some other person. There is, however, one case in which the institution of a slave by his mistress is void, even though freedom be given him in the will, as is provided by a constitution of the Emperors Severus and Antoninus in these terms: 'Reason demands that no slave, accused of criminal intercourse with his mistress, shall be capable of being manumitted, before his sentence is pronounced, by the will of the woman who is accused of participating in his guilt: accordingly if he be instituted heir by that mistress, the institution is void.' Among 'other persons' slaves' is reckoned one in whom the testator has a usufruct. **1**. If a slave is instituted heir by his own master, and continues in that condition until his master's decease, he becomes by the will both free, and necessary heir. But if the testator himself manumits him in his lifetime, he may use his own discretion about acceptance; for he is not a necessary heir, because, though he is named heir to the testament, it was not by that testament that he became free. If he has been alienated, he must have the order of his new master to accept, and then his master becomes heir through him, while he personally becomes neither heir nor free, even though his freedom was expressly given him in the testament, because by alienating him his former master is presumed to have renounced the intention of enfranchising him. When another person's slave is instituted heir, if he continues in the same condition he must have the order of his master to accept; if alienated by him in the testator's lifetime, or after the testator's death but before acceptance, he must have the order of the alienee to accept; finally, if manumitted in the testator's lifetime, or after the testator's death but before acceptance, he may accept or not at his own discretion. **2**. A slave who does not belong to the testator may be instituted heir even after his master's decease, because slaves who belong to an inheritance are capable of being instituted or made legatees; for an inheritance not yet accepted represents not the future heir but the person deceased. Similarly, the slave of a child conceived but not yet born may be instituted heir. **3**. If a slave belonging to two or more joint owners, both or all of whom are legally capable of being made heirs or legatees, is instituted heir by a stranger, he acquires the inheritance for each and all of the joint owners by whose orders he accepts it in proportion to the respective shares in which they own him.

4. A testator may institute either a single heir, or as many as he pleases. **5**. An inheritance is usually divided into twelve ounces, and is denoted in the aggregate by the term as, and each fraction of this aggregate, ranging from the ounce up to the as or pound, has its specific name, as follows: *sextans* $\left(\frac{1}{6}\right)$, *quadrans* $\left(\frac{1}{4}\right)$, *triens* $\left(\frac{1}{3}\right)$, *quincunx* $\left(\frac{5}{12}\right)$, *semis* $\left(\frac{1}{2}\right)$, *septunx* $\left(\frac{7}{12}\right)$, *bes* $\left(\frac{2}{3}\right)$, *dodrans* $\left(\frac{3}{4}\right)$, *dextans* $\left(\frac{5}{6}\right)$, *deunx* $\left(\frac{11}{12}\right)$, and *as*. It is not necessary, however, that there should always be twelve ounces, for for the purposes of testamentary distribution an *as* may consist of as many ounces as the testator pleases; for instance, if a testator institutes only a single heir, but declares that he is to be heir *ex semisse*, or to one half of the inheritance, this half will really be the whole, for no one can die partly testate and partly intestate, except

soldiers, in the carrying out of whose wills the intention is the only thing regarded. **6**. Conversely, a testator may divide his inheritance into as large a number of ounces as he pleases. If more heirs than one are instituted, it is unnecessary for the testator to assign a specific share in the inheritance to each, unless he intends that they shall not take in equal portions; for it is obvious that if no shares are specified they divide the inheritance equally between them. Supposing, however, that specific shares are assigned to all the instituted heirs except one, who is left without any express share at all, this last heir will be entitled to any fraction of the *as* which has not been disposed of; and if there are two or more heirs to whom no specific shares have been assigned, they will divide this unassigned fraction equally between them. Finally, if the whole as has been assigned in specific shares to some of the heirs, the one or more who have no specific shares take half the inheritance, while the other half is divided among the rest according to the shares assigned to them; and it is immaterial whether the heir who has no specified share comes first or last in the institution, or occupies some intermediate place; for such share is presumed to be given to him as is not in some other way disposed of. **7**. Let us now see how the law stands if some part remains undisposed of, and yet each heir has his share assigned to him—if, for instance, there are three heirs instituted, and each is assigned a quarter of the inheritance. It is evident that in this case the part undisposed of will go to them in proportion to the share each has assigned to him by the will, and it will be exactly as if they had each been originally instituted to a third. Conversely, if each heir is given so large a fraction that the *as* will be exceeded, each must suffer a proportionate abatement; thus if four heirs are instituted, and to each is assigned a third of the inheritance, it will be the same as if each had been originally instituted to a quarter. **8**. If more than twelve ounces are distributed among some of the heirs only, one being left without a specific share, he will have what is wanting to complete the second as; and the same will be done if more than twenty-four ounces are distributed, leaving him shareless; but all these ideal sums are afterwards reduced to the single *as*, whatever be the number of ounces they comprise.

9. The institution of the heir may be either absolute or conditional, but no heir can be instituted from, or up to, some definite date, as, for instance, in the following form—'be so and so my heir after five years from my decease', or 'after the calends of such a month', or 'up to and until such calends'; for a time limitation in a will is considered a superfluity, and an heir instituted subject to such a time limitation is treated as heir absolutely. **10**. If the institution of an heir, a legacy, a fiduciary bequest, or a testamentary manumission is made to depend on an impossible condition, the condition is deemed unwritten, and the disposition absolute. **11**. If an institution is made to depend on two or more conditions, conjunctively expressed,—as, for instance, 'if this and that shall be done '— all the conditions must be satisfied: if they are expressed in the alternative, or disjunctively—as 'if this or that shall be done'—it is enough if one of them alone is satisfied.

12.A testator may institute as his heir a person whom he has never seen, for instance, nephews who have been born abroad and are unknown to him: for want of this knowledge does not invalidate the institution.

TITLE XV

OF ORDINARY SUBSTITUTION

A testator may institute his heirs, if he pleases, in two or more degrees, as, for instance, in the following form: 'If A shall not be my heir, then let B be my heir'; and in this way he can make as many substitutions as he likes, naming in the last place one of his own slaves as necessary heir, in default of all others taking. **1**. Several may be substituted in place of one, or one in place of several, or to each heir may be substituted a new and distinct person, or, finally, the instituted heirs may be substituted reciprocally in place of one another. **2**. If heirs who are instituted in equal shares are reciprocally substituted to one another, and the shares which they are to have in the substitution are not specified, it is presumed (as was settled by a rescript of the Emperor Pius) that the testator intended them to take the same shares in the substitution as they took directly under the will. **3**. If a third person is substituted to one heir who himself is substituted to his co-heir, the Emperors Severus and Antoninus have decided by rescript that this third person is entitled to the shares of both without distinction. **4**. If a testator institutes another man's slave, supposing him to be an independent person, and substitutes Maevius in his place to meet the case of his not taking the inheritance, then, if the slave accepts by the order of his master, Maevius is entitled-to a half. For, when applied to a person whom the testator knows to be in the power of another, the words 'if he shall not be my heir' are taken to mean 'if he shall neither be heir himself nor cause another to be heir'; but when applied to a person whom the testator supposes to be independent, they mean 'if he shall not

acquire the inheritance either for himself, or for that person to whose power he shall subsequently become subject', and this was decided by Tiberius Caesar in the case of his slave Parthenius.

TITLE XVI

OF PUPILLARY SUBSTITUTION

To children below the age of puberty and in the power of the testator, not only can such a substitute as we have described be appointed, that is, one who shall take on their failing to inherit, but also one who shall be their heir if, after inheriting, they die within the age of puberty; and this may be done in the following terms, 'Be my son Titius my heir; and if he does not become my heir, or, after becoming my heir, die before becoming his own master (that is, before reaching puberty), then be Seius my heir.' In which case, if the son fails to inherit, the substitute is the heir of the testator; but if the son, after inheriting, dies within the age of puberty, he is the heir of the son. For it is a rule of customary law, that when our children are too young to make wills for themselves, their parents may make them for them **1**. The reason of this rule has induced us to insert in our Code a constitution, providing that if a testator has children, grandchildren, or great-grandchildren who are lunatics or idiots, he may, after the analogy of pupillary substitution, substitute certain definite persons to them, whatever their sex or the nearness of their relationship to him, and even though they have reached the age of puberty; provided always that on their recovering their faculties such substitution shall at once become void, exactly as pupillary substitution proper ceases to have any operation after the pupil has reached puberty. **2**. Thus, in pupillary substitution effected in the form described, there are, so to speak, two wills, the father's and the son's, just as if the son had personally instituted an heir to himself; or rather, there is one will dealing with two distinct matters, that is, with two distinct inheritances. **3**. If a testator be apprehensive that, after his own death, his son, while still a pupil, may be exposed to the danger of foul play, because another person is openly substituted to him, he ought to make the ordinary substitution openly, and in the earlier part of the testament, and write the other substitution, wherein a man is named heir on the succession and death of the pupil, separately on the lower part of the will; and this lower part he should tie with a separate cord and fasten with a separate seal, and direct in the earlier part of the will that it shall not be opened in the lifetime of the son before he attains the age of puberty. Of course a substitution to a son under the age of puberty is none the less valid because it is an integral part of the very will in which the testator has instituted him his heir, though such an open substitution may expose the pupil to the danger of foul play. **4**. Not only when we leave our inheritance to children under the age of puberty can we make such a substitution, that if they accept the inheritance, and then die under that age, the substitute is their heir, but we can do it when we disinherit them, so that whatever the pupil acquires by way of inheritance, legacy or gift from his relatives or friends, will pass to the substitute. What has been said of substitution to children below the age of puberty, whether instituted or disinherited, is true also of substitution to afterborn children. **5**. In no case, however, may a man make a will for his children unless he makes one also for himself; for the will of the pupil is but a complementary part of the father's own testament; accordingly, if the latter is void, the former will be void also. **6**. Substitution may be made either to each child separately, or only to such one of them as shall last die under the age of puberty. The first is the proper plan, if the testator's intention is that none of them shall die intestate: the second, if he wishes that, as among them, the order of succession prescribed by the Twelve Tables shall be strictly preserved. **7**. The person substituted in the place of a child under the age of puberty may be either named individually—for instance, Titius—or generally described, as by the words 'whoever shall be my heir'; in which latter case, on the child dying under the age of puberty, those are called to the inheritance by the substitution who have been instituted heirs and have accepted, their shares in the substitution being proportionate to the shares in which they succeeded the father. **8**. This kind of substitution may be made to males up to the age of fourteen, and to females up to that of twelve years; when this age is once passed, the substitution becomes void. **9**. To a stranger, or a child above the age of puberty whom a man has instituted heir, he cannot appoint a substitute to succeed him if he take and die within a certain time: he has only the power to bind him by a trust to convey the inheritance to another either wholly or in part; the law relating to which subject will be explained in its proper place.

TITLE XVII

OF THE MODES IN WHICH WILLS BECOME VOID

A duly executed testament remains valid until either revoked or rescinded. **1**. A will is revoked when, though the civil condition of the testator remains unaltered, the legal force of the will itself is destroyed,

as happens when, after making his will, a man adopts as his son either an independent person, in which case the adoption is effected by imperial decree, or a person already in power, when it is done through the agency of the praetor according to our constitution. In both these cases the will is revoked, precisely as it would be by the subsequent birth of a family heir. **2**. Again, a subsequent will duly executed is a revocation of a prior will, and it makes no difference whether an heir ever actually takes under it or not; the only question is whether one might conceivably have done so. Accordingly, whether the person instituted declines to be heir, or dies in the lifetime of the testator, or after his death but before accepting the inheritance, or is excluded by failure of the condition under which he was instituted—in all these cases the testator dies intestate; for the earlier will is revoked by the later one, and the later one is inoperative, as no heir takes under it. **3**. If, after duly making one will, a man executes a second one which is equally valid, the Emperors Severus and Antoninus decided by rescript that the first is revoked by the second, even though the heir instituted in the second is instituted to certain things only. The terms of this enactment we have ordered to be inserted here, because it contains another provision. 'The Emperors Severus and Antoninus to Cocceius Campanus. A second will, although the heir named therein be instituted to certain things only, is just as valid as if no mention of the things had been made: but the heir is bound to content himself with the things given him, or with such further portion of the inheritance as will make up the fourth part to which he is entitled under the lex Falcidia, and (subject thereto) to transfer the inheritance to the persons instituted in the earlier will: for the words inserted in the later will undoubtedly contain the expression of a wish that the earlier one shall remain valid.' This accordingly is a mode in which a testament may be revoked. **4**. There is another event by which a will duly executed may be invalidated, namely, the testator's undergoing a loss of status: how this may happen was explained in the preceding Book. **5**. In this case the will may be said to be rescinded, though both those that are revoked, and those that are not duly executed, may be said to become or be rescinded; and similarly too those which are duly executed but subsequently rescinded by loss of status may be said to be revoked. However, as it is convenient that different grounds of invalidity should have different names to distinguish them, we say that some wills are unduly executed from the commencement, while others which are duly executed are either revoked or rescinded. **6**. Wills, however, which, though duly executed, are subsequently rescinded by the testator's undergoing loss of status are not altogether inoperative: for if the seals of seven witnesses are attached, the instituted heir is entitled to demand possession in accordance with the will, if only the testator were a citizen of Rome and independent at the time of his decease; but if the cause of the rescission was the testator's subsequent loss of citizenship or of freedom, or his adoption, and he dies an alien, or slave, or subject to his adoptive father's power, the instituted heir is barred from demanding possession in accordance with the will. **7**. The mere desire of a testator that a will which he has executed shall no longer have any validity is not, by itself, sufficient to avoid it; so that, even if he begins to make a later will, which he does not complete because he either dies first, or changes his mind, the first will remains good; it being provided in an address of the Emperor Pertinax to the Senate that one testament which is duly executed is not revoked by a later one which is not duly and completely executed; for an incomplete will is undoubtedly null. **8**. In the same address the Emperor declared that he would accept no inheritance to which he was made heir on account of a suit between the testator and some third person, nor would he uphold a will in which he was instituted in order to screen some legal defect in its execution, or accept an inheritance to which he was instituted merely by word of mouth, or take any testamentary benefit under a document defective in point of law. And there are numerous rescripts of the Emperors Severus and Antoninus to the same purpose: 'for though,' they say, 'the laws do not bind us, yet we live in obedience to them.'

TITLE XVIII

OF AN UNDUTEOUS WILL

Inasmuch as the disinherison or omission by parents of their children has generally no good reason, those children who complain that they have been wrongfully disinherited or passed over have been allowed to bring an action impeaching the will as unduteous, under the pretext that the testator was of unsound mind at the time of its execution. This does not mean that he was really insane, but that the will, though legally executed, bears no mark of that affection to which a child is entitled from a parent: for if a testator is really insane, his will is void. **1**. Parents may impeach the wills of their children as unduteous, as well as children those of their parents. Brothers and sisters of the testator are by imperial constitutions preferred to infamous persons who are instituted to their exclusion, so that it is in these cases only that they can bring this action. Persons related to the testator in a further degree than as brothers or sisters can

in no case bring the action, or at any rate succeed in it when brought. **2**. Children fully adopted, in accordance with the distinction drawn in our constitution, can bring this action as well as natural children, but neither can do so unless there is no other mode in which they can obtain the property of the deceased: for those who can obtain the inheritance wholly or in part by any other title are barred from attacking a will as unduteous. Afterborn children too can employ this remedy. if they can by no other means recover the inheritance. **3**. That they may bring the action must be understood to mean, that they may bring it only if absolutely nothing has been left them by the testator in his will: a restriction introduced by our constitution out of respect for a father's natural rights. If, however, a part of the inheritance, however small, or even a single thing is left them, the will cannot be impeached, but the heir must, if necessary, make up what is given them to a fourth of what they would have taken had the testator died intestate, even though the will does not direct that this fourth is to be made up by the assessment of an honest and reliable man. **4**. If a guardian accepts, under his own father's will, a legacy on behalf of the pupil under his charge, the father having left nothing to him personally, he is in no way debarred from impeaching his father's will as unduteous on his own account. **5**. On the other hand, if he impeaches the will of his pupil's father on the pupil's behalf, because nothing has been left to the latter, and is defeated in the action, he does not lose a legacy given in the same will to himself personally. **6**. Accordingly, that a person may be barred from the action impeaching the will, it is requisite that he should have a fourth of what he would have taken on intestacy, either as heir, legatee direct or fiduciary, donee in contemplation of death, by gift from the testator in his lifetime (though gift of this latter kind bars the action only if made under any of the circumstances mentioned in our constitution) or in any of the other modes stated in the imperial legislation. **7**. In what we have said of the fourth we must be understood to mean that whether there be one person only, or more than one, who can impeach the will as unduteous, one-fourth of the whole inheritance may be given them, to be divided among them all proportionately, that is to say, to each person a fourth of what he would have had if the testator had died intestate.

TITLE XIX

OF THE KINDS OF AND DIFFERENCES BETWEEN HEIRS

Heirs are of three kinds, that is to say, they are either necessary, family heirs and necessary, or external. **1**. A necessary heir is a slave of the testator, whom he institutes as heir: and he is so named because, willing or unwilling, and without any alternative, he becomes free and necessary heir immediately on the testator's decease. For when a man's affairs are embarrassed, it is common for one of his slaves to be instituted in his will, either in the first place, or as a substitute in the second or any later place, so that, if the creditors are not paid in full, the heir may be insolvent rather than the testator, and his property, rather than the testator's, may be sold by the creditors and divided among them. To balance this disadvantage he has this advantage, that his acquisitions after the testator's decease are for his own sole benefit; and although the estate of the deceased is insufficient to pay the creditors in full, the heir's subsequent acquisitions are never on that account liable to a second sale. **2**. Heirs who are both family heirs and necessary are such as a son or a daughter, a grandchild by a son, and further similar lineal descendants, provided that they are in the ancestor's power at the time of his decease. To make a grandson or granddaughter a family heir it is, however, not sufficient for them to be in the grandfather's power at the moment of his decease: it is further requisite that their own father shall, in the lifetime of the grandfather, have ceased to be family heir himself, whether by death or by any other mode of release from power: for by this event the grandson and granddaughter succeed to the place of their father. They are called family heirs, because they are heirs of the house, and even in the lifetime of the parent are to a certain extent deemed owners of the inheritance: wherefore in intestacy the first right of succession belongs to the children. They are called necessary heirs because they have no alternative, but, willing or unwilling, both where there is a will and where there is not, they become heirs. The praetor, however, permits them, if they wish, to abstain from the inheritance, and leave the parent to become insolvent rather than themselves.

3. Those who were not subject to the testator's power are called external heirs. Thus children of ours who are not in our power, if instituted heirs by us, are deemed external heirs; and children instituted by their mother belong to this class, because women never have children in their power. Slaves instituted heirs by their masters, and manumitted subsequently to the execution of the will, belong to the same class. **4**. It is necessary that external heirs should have testamentary capacity, whether it is an independent person, or some one in his power, who is instituted: and this capacity is required at two times; at the time of the making of the will, when, without it, the institution would be void; and at the time of the testator's

decease, when, without it, the institution would have no effect. Moreover, the instituted heir ought to have this capacity also at the time when he accepts the inheritance, whether he is instituted absolutely or subject to a condition; and indeed it is especially at this time that his capacity to take ought to be looked to. If, however, the instituted heir undergoes a loss of status in the interval between the making of the will and the testator's decease, or the satisfaction of the condition subject to which he was instituted, he is not thereby prejudiced: for, as we said, there are only three points of time which have to be regarded. Testamentary capacity thus does not mean merely capacity to make a will; it also means capacity to take for oneself, or for the father or master in whose power one is, under the will of another person: and this latter kind of testamentary capacity is quite independent of the capacity to make a will oneself. Accordingly, even lunatics, deaf persons, after-born children, infants, children in power, and other persons' slaves are said to have testamentary capacity; for though they cannot make a valid will, they can acquire for themselves or for another under a will made by some one else. **5**. External heirs have the privilege of deliberating whether they will accept or disclaim an inheritance. But if a person who is entitled to disclaim interferes with the inheritance, or if one who has the privilege of deliberation accepts it, he no longer has the power of relinquishing it, unless he is a minor under the age of twenty-five years, for minors obtain relief from the praetor when they incautiously accept a disadvantageous inheritance, as well as when they take any other injudicious step. **6**. It is, however, to be observed that the Emperor Hadrian once relieved even a person who had attained his majority, when, after his accepting the inheritance, a great debt, unknown at the time of acceptance, had come to light. This was but the bestowal of an especial favour on a single individual; the Emperor Gordian subsequently extended the privilege, but only to soldiers, to whom it was granted as a class. We, however, in our benevolence have placed this benefit within the reach of all our subjects, and drafted a constitution as just as it is splendid, under which, if heirs will but observe its terms, they can accept an inheritance without being liable to creditors and legatees beyond the value of the property. Thus so far as their liability is concerned there is no need for them to deliberate on acceptance, unless they fail to observe the procedure of our constitution, and prefer deliberation, by which they will remain liable to all the risks of acceptance under the older law. **7**. An external heir, whether his right accrue to him under a will or under the civil law of intestate succession, can take the inheritance either by acting as heir, or by the mere intention to accept. By acting as heir is meant, for instance, using things belonging to the inheritance as one's own, selling them, or cultivating or giving leases of the deceased's estates, provided only one expresses in any way whatsoever, by deed or word, one's intention to accept the inheritance, so long as one knows that the person with whose property one is thus dealing has died testate or intestate, and that one is that person's heir. To act as heir, in fact is to act as owner and the ancients often used the term 'heir' as equivalent to the term 'owner'. And just as the mere intention to accept makes an external heir heir, so too the mere determination not to accept bars him from the inheritance. Nothing prevents a person who is born deaf or dumb, or who becomes so after birth, from acting as heir and thus acquiring the inheritance, provided only he knows what he is doing.

TITLE XX

OF LEGACIES

Let us now examine legacies:—a kind of title which seems foreign to the matter in hand, for we are expounding titles whereby aggregates of rights are acquired; but as we have treated in full of wills and heirs appointed by will, it was natural in close connexion therewith to consider this mode of acquisition.

1. Now a legacy is a kind of gift left by a person deceased. **2**. And formerly they were of four kinds, namely, legacy by vindication, by condemnation, by permission, and by preception, to each of which a definite form of words was appropriated by which it was known, and which served to distinguish it from legacies of the other kinds. Solemn forms of words of this sort, however, have been altogether abolished by imperial constitutions; and we, desiring to give greater effect to the wishes of deceased persons, and to interpret their expressions with reference rather to those wishes than to their strict literal meaning, have issued a constitution, composed after great reflection, enacting that in future there shall be but one kind of legacy, and that, whatever be the terms in which the bequest is couched, the legatee may sue for it no less by real or hypothecary than by personal action. How carefully and wisely this constitution is worded may be ascertained by a perusal of its contents. **3**. We have determined, however, to go even beyond this enactment; for, observing that the ancients subjected legacies to strict rules, while the rules which they applied to fiduciary bequests, as springing more directly from the deceased person's wishes, were more liberal, we have deemed it necessary to assimilate the former completely to the latter, so that any features in which legacies are inferior to fiduciary bequests may be supplied to them from the latter, and the latter

themselves may in future possess any superiority which has hitherto been enjoyed by legacies only. In order, however, to avoid perplexing students in their first essays in the law by discussing these two forms of bequest together, we have thought it worth while to treat them separately, dealing first with legacies, and then with fiduciary bequests, so that the reader, having first learnt their respective natures in a separate treatment, may, when his legal education is more advanced, be able easily to comprehend their treatment in combination.

4. A legacy may be given not only of things belonging to the testator or heir, but also of things belonging to a third person, the heir being bound by the will to buy and deliver them to the legatee, or to give him their value if the owner is unwilling to sell them. If the thing given be one of those of which private ownership is impossible, such, for instance, as the Campus Martius, a basilica, a church, or a thing devoted to public use, not even its value can be claimed, for the legacy is void. In saying that a thing belonging to a third person may be given as a legacy we must be understood to mean that this may be done if the deceased knew that it belonged to a third person, and not if he was ignorant of this: for perhaps he would never have given the legacy if he had known that the thing belonged neither to him nor to the heir, and there is a rescript of the Emperor Pius to this effect. It is also the better opinion that the plaintiff, that is the legatee, must prove that the deceased knew he was giving as a legacy a thing which was not his own, rather than that the heir must prove the contradictory: for the general rule of law is that the burden of proof lies on the plaintiff. **5**. If the thing which a testator bequeaths is in pledge to a creditor, the heir is obliged to redeem it, subject to the same distinction as has been drawn with reference to a legacy of a thing not belonging to the testator; that is to say, the heir is bound to redeem only if the deceased knew the thing to be in pledge: and the Emperors Severus and Antoninus have decided this by rescript. If, however, the deceased expresses his intention that the legatee should redeem the thing himself, the heir is under no obligation to do it for him. **6**. If a legacy is given of a thing belonging to another person, and the legatee becomes its owner during the testator's lifetime by purchase, he can obtain its value from the heir by action on the will: but if he gives no consideration for it, that is to say, gets it by way of gift or by some similar title, he cannot sue; for it is settled law that where a man has already got a thing, giving no consideration in return, he cannot get its value by a second title of the same kind. Accordingly, if a man is entitled to claim a thing under each of two distinct wills, it is material whether he gets the thing, or merely its value, under the earlier one: for if he gets the thing itself, he cannot sue under the second will, because he already has the thing without giving any consideration, whereas he has a good right of action if he has merely got its value. **7**. A thing which does not yet exist, but will exist, may be validly bequeathed:—for instance, the produce of such and such land, or the child of such and such female slave. **8**. If the same thing is given as a legacy to two persons, whether jointly or severally, and both claim it, each is entitled to only a half; if one of them does not claim it, because either he does not care for it, or has died in the testator's lifetime, or for some other reason, the whole goes to his co-legatee. A joint legacy is given in such words as the following: 'I give and bequeath my slave Stichus to Titius and Seius': a several legacy thus, 'I give and bequeath my slave Stichus to Titius: I give and bequeath Stichus to Seius': and even if the testator says 'the same slave Stichus' the legacy is still a several one. **9**. If land be bequeathed which belongs to some one other than the testator, and the intended legatee, after purchasing the bare ownership therein, obtains the usufruct without consideration, and then sues under the will, Julian says that this action for the land is well grounded, because in a real action for land a usufruct is regarded merely as a servitude; but it is part of the duty of the judge to deduct the value of the usufruct from the sum which he directs to be paid as the value of the land. **10**. A legacy by which something already belonging to the legatee is given him is void, for what is his own already cannot become more his own than it is: and even though he alienates it before the testator's death, neither it nor its value can be claimed. **11**. If a testator bequeaths something belonging to him, but which he thought belonged to another person, the legacy is good, for its validity depends not on what he thought, but on the real facts of the case: and it is clearly good if he thought it already belonged to the legatee, because his expressed wish can thus be carried out. **12**. If, after making his will, a testator alienates property which he has therein given away as a legacy, Celsus is of opinion that the legatee may still claim it unless the testator's intention was thereby to revoke the bequest, and there is a rescript of the Emperors Severus and Antoninus to this effect, as well as another which decides that if, after making his will, a testator pledges land which he had therein given as a legacy, he is not to be deemed to have thereby revoked the bequest, and that consequently the legatee can enforce by action the heir's obligation to redeem the pledge. And if a testator alienates part of a thing which he has given as a legacy, the part which has not been alienated can in any case be claimed, and the alienated part as well if the alienor's intention was not to revoke the legacy. **13**. If a man bequeaths to his

debtor a discharge from his debt, the legacy is good, and the testator's heir cannot sue either the debtor himself, or his heir, or any one who occupies the position of heir to him, and the debtor can even compel the testator's heir to formally release him. Moreover, a testator can also forbid his heir to claim payment of a debt before a certain time has elapsed. **14.**. Contrariwise, if a debtor leaves his creditor a legacy of what he owes him, the legacy is void, if it includes no more than the debt, for the creditor is thus in no way benefited; but if the debtor unconditionally bequeaths a sum of money which the creditor cannot claim until a definite date has arrived or a condition has been satisfied, the legacy is good, because it confers on the creditor a right to earlier payment. And, even if the day arrives, or the condition is satisfied, during the testator's lifetime, Papinian decides, and rightly, that the legacy is nevertheless a good one, because it was good when first written; for the opinion that a legacy becomes void, because something happens to deprive it of all material effect, is now rejected. **15**. If a man leaves his wife a legacy of her dowry, the gift is good, because the legacy is worth more than a mere right of action for the dowry. If, however, he has never received the dowry which he bequeaths, the Emperors Severus and Antoninus have decided by rescript that the legacy is void, provided the general term 'dowry' is used, but good, if in giving it to the wife a definite sum or thing is specified, or described generally by reference to the dowry deed. **16**. If a thing bequeathed perishes through no act of the heir, the loss falls on the legatee: thus if a slave belonging to another person, who is given in this way, is manumitted through no act of the heir, the latter is not bound. If, however, the slave belongs to the heir, who manumits him, Julian says that he is bound, and it is immaterial whether he knew or not that the slave had been bequeathed away from him; and he is also bound if the slave be manumitted by another person to whom he has given him, even though he was unaware that he had been bequeathed away from him. **17**. If a testator gives a legacy of female slaves along with their offspring, the legatee can claim the latter even if the mothers are dead, and so again if a legacy is given of ordinary slaves along with their *vicarii* or subordinates, the latter can be claimed even if the former are dead. But if the legacy be of a slave along with his peculium, and the slave is dead, or has been manumitted or alienated, the legacy of the peculium is extinguished; and similarly, if the legacy be of land with everything upon it, or with all its instruments of tillage, by the alienation of the land the legacy of the instruments of tillage is extinguished. **18**. If a flock be given as a legacy, which is subsequently reduced to a single sheep, this single survivor can be claimed. **19**. And Julian says that in a legacy of a flock are comprised sheep which are added to it after the making of the will, a flock being but one aggregate composed of distinct members, just as a house is but one aggregate composed of distinct stones built together. So if the legacy consist of a house, we hold that pillars or marbles added to it after the making of the will pass under the bequest. **20**. If a slave's peculium be given as a legacy, the legatee undoubtedly profits by what is added to it, and is a loser by what is taken from it, during the testator's lifetime. Whatever the slave acquires in the interval between the testator's death and the acceptance of the inheritance belongs, according to Julian, to the legatee, if that legatee be the slave himself who is manumitted by the will, because a legacy of this kind vests from the acceptance of the inheritance: but if the legatee be a stranger, he is not entitled to such acquisitions, unless they are made by means of the peculium itself. A slave manumitted by a will is not entitled to his peculium unless it is expressly bequeathed to him, though, if the master manumits him in his lifetime, it is enough if it be not expressly taken from him, and to this effect the Emperors Severus and Antoninus have decided by rescript: as also, that a legacy of his peculium to a slave does not carry with it the right to sue for money which he has expended on his master's account, and that a legacy of a peculium may be inferred from directions in a will that a slave is to be free so soon as he has made a statement of his accounts and made up any balance, which may be against him, from his peculium. **21**. Incorporeal as well as corporeal things can be bequeathed: thus a man can leave a legacy even of a debt which is owed to him, and the heir can be compelled to transfer to the legatee his rights of action, unless the testator has exacted payment in his lifetime, in which case the legacy is extinguished Again, such a legacy as the following is good: 'be my heir bound to repair so and so's house, or to pay so and so's debts.' **22**. If a legacy be a general one, as of a slave or some other thing not specifically determined, the legatee is entitled to choose what slave, or what thing, he will have, unless the testator has expressed a contrary intention. **23**. A legacy of selection, that is, when a testator directs the legatee to select one from among his slaves, or any other class of things, was held to be given subject to an implied condition that the legatee should make the choice in person; so that if he died before doing so the legacy did not pass to his heir. By our constitution, however, we have made an improvement in this matter, and allowed the legatee's heir to exercise the right of selection, although the legatee has not done so personally in his lifetime; which enactment, through our careful attention to the subject, contains the further provision, that if there are either several co-legatees to whom

a right of selection has been bequeathed, and who cannot agree in their choice, or several co-heirs of a single legatee, who differ through some wishing to choose this thing and others that, the question shall be decided by fortune—the legacy not being extinguished, which many of the jurists in an ungenerous spirit wished to make the rule—; that is to say, that lots shall be drawn, and he on whom the lot falls shall have a priority of choice over the rest.

24. Those persons only can be legatees who have testamentary capacity, that is, who are legally capable of taking under a will. **25**. Formerly it was not allowed to leave either legacies or fiduciary bequests to uncertain persons, and even soldiers, as the Emperor Hadrian decided by rescript, were unable to benefit uncertain persons in this way. An uncertain person was held to be one of whom the testator had no certain conception, as the legatee in the following form: 'Whoever bestows his daughter in marriage on my son, do thou, my heir, give him such or such land.' So too a legacy left to the first consuls designate after the writing of the will was held to be given to an uncertain person, and many others that might be instanced: and so it was held that freedom could not be bequeathed to an uncertain person, because it was settled that slaves ought to be enfranchised by name, and an uncertain person could not be appointed guardian. But a legacy given with a certain demonstration, that is, to an uncertain member of a certain class, was valid, for instance, the following: 'Whoever of all my kindred now alive shall first marry my daughter, do thou, my heir, give him such or such thing.' It was, however, provided by imperial constitutions that legacies or fiduciary bequests left to uncertain persons and paid by mistake could not be recovered back. **26**. An after-born stranger again could not take a legacy; an after-born stranger being one who on his birth will not be a family heir to the testator; thus a grandson by an emancipated son was held to be an after-born stranger to his grandfather. **27**. These parts of the law, however, have not been left without due alteration, a constitution having been inserted in our Code by which we have in these respects amended the rules relating to legacies and fiduciary bequests no less than to inheritances, as will be made clear by a perusal of the enactment, which, however, still maintains the old rule that an uncertain person cannot be appointed guardian: for when a testator is appointing a guardian for his issue, he ought to be quite clear as to the person and character of the party he selects. **28**. An after-born stranger could and still can be instituted heir, unless conceived of a woman who cannot by law be a man's wife. **29**. If a testator makes a mistake in any of the names of the legatee, the legacy is nevertheless valid provided there is no doubt as to the person he intended, and the same rule is very properly observed as to heirs as well as legatees; for names are used only to distinguish persons, and if the person can be ascertained in other ways a mistake in the name is immaterial. **30**. Closely akin to this rule is another, namely, that an erroneous description of the thing bequeathed does not invalidate the bequest; for instance, if a testator says, 'I give and bequeath Stichus my born slave,' the legacy is good, if it is quite clear who is meant by Stichus, even though it turn out that he was not born the testator's slave, but was; purchased by him. Similarly, if he describe Stichus as 'the slave I bought from Seius', whereas in fact he bought him from some one else, the legacy is good, if it is clear what slave he intended to give. **31**. Still less is a legacy invalidated by a wrong motive being assigned by the testator for giving it: if, for instance, he says, 'I give and bequeath Stichus to Titius, because he looked after my affairs while I was away,' or 'because I was acquitted on a capital charge through his undertaking my defence', the legacy is still good, although in point of fact Titius never did look after the testator's affairs, or never did, through his advocacy, procure his acquittal. But the law is different if the testator expresses his motive in the guise of a condition, as: 'I give and bequeath such and such land to Titius, if he has looked after my affairs.' **32**. It is questioned whether a legacy to a slave of the heir is valid. It is clear that such a legacy is void if given unconditionally, even though the slave ceases to belong to the heir during the testator's lifetime: for a legacy which would be void if the testator died immediately after making his will ought not to become valid by the simple &ct of the testator's living longer. Such a legacy, however, is good if given subject to a condition, the question then being, whether at the vesting of the legacy the slave has ceased to belong to the heir. **33**. On the other hand, there is no doubt that even an absolute legacy to the master of a slave who is instituted heir is good: for, even supposing that the testator dies immediately after making the will, the right to the legacy does not necessarily belong to the person who is heir; for the inheritance and the legacy are separable, and a different person from the legatee may become heir through the slave; as happens if, before the slave accepts the inheritance at his master's bidding, he is conveyed to another person, or is manumitted and thus becomes heir himself; in both of which cases the legacy is valid. But if he remains in the same condition, and accepts at his master's bidding, the legacy is extinguished. **34**. A legacy given before an heir was appointed was formerly void, because a will derives its operation from the appointment of an heir, and accordingly such appointment is deemed the beginning and foundation of the

whole testament, and for the same reason a slave could not be enfranchised before an heir was appointed. Yet even the old lawyers themselves disapproved of sacrificing the real intentions of the testator by too strictly following the order of the writing: and we accordingly have deemed these rules unreasonable, and amended them by our constitution, which permits a legacy, and much more freedom, which is always more favoured, to be given before the appointment of an heir, or in the middle of the appointments, if there are several. **35**. Again, a legacy to take effect after the death of the heir or legatee, as in the form: 'After my heir's death I give and bequeath,' was formerly void, as also was one to take effect on the day preceding the death of the heir or legatee. This too, however, we have corrected, by making such legacies as valid as they would be were they fiduciary bequests, lest in this point the latter should be found to have some superiority over the former. **36**. Formerly too the gift, revocation, and transference of legacies by way of penalty was void. A penal legacy is one given in order to coerce the heir into doing or not doing something; for instance, the following: 'If my heir gives his daughter in marriage to Titius,' or, conversely, 'if he does not give her in marriage to Titius, let him pay ten *aurei* to Seius'; or again, 'if my heir parts with my slave Stichus,' or, conversely, 'if he does not part with him, let him pay ten *aurei* to Titius'. And so strictly was this rule observed, that it is declared in a large number of imperial constitutions that even the Emperor will accept no legacy by which a penalty is imposed on some other person: and such legacies were void even when given by a soldier's will, in which as a rule so much trouble was taken to carry out exactly the testator's wishes. Moreover, Sabinus was of opinion that a penal appointment of a co-heir was void, as exemplified in the following: 'Be Titius my heir: if Titius gives his daughter in marriage to Seius, be Seius my heir also '; the ground of the invalidity being that it made no difference in what way Titius was constrained, whether by a legacy being left away from him, or by some one being appointed co-heir. Of these refinements, however, we disapproved, and have consequently enacted generally that bequests, even though given, revoked, or transferred in order to penalize the heir, shall be treated exactly like other legacies, except where the event on which the penal legacy is contingent is either impossible, illegal, or immoral: for such testamentary dispositions as these the opinion of my times will not permit.

TITLE XXI

OF THE ADEMPTION AND TRANSFERENCE OF LEGACIES

Legacies may be revoked either in a later clause of the will or by codicils, and the revocation may be made either in words contrary to those of the gift, as the gift thus 'I give and bequeath', the revocation thus 'I do not give and bequeath', or in words not contrary, that is to say, in any words whatsoever. **1**. A legacy may also be transferred from one person to another, as thus: 'I give and bequeath to Seius the slave Stichus whom I bequeathed to Titius,' and this may be done either by a later clause of the will or by codicils; the result being that the legacy is taken away from Titius and simultaneously given to Seius.

TITLE XXII

OF THE LEX FALCIDIA

We have finally to consider the lex Falcidia, the most recent enactment limiting the amount which can be given in legacies. The statute of the Twelve Tables had conferred complete liberty of bequest on testators, by which they were enabled to give away their whole patrimony in legacies, that statute having enacted: 'let a man's testamentary disposition of his property be regarded as valid.' This complete liberty of bequest, however, it was thought proper to limit in the interest of testators themselves, for intestacy was becoming common through the refusal of instituted heirs to accept inheritances from which they received little or no advantage at all. The lex Furia and the lex Voconia were enactments designed to remedy the evil, but as both were found inadequate to the purpose, the lex Falcidia was finally passed, providing that no testator should be allowed to dispose of more than three-quarters of his property in legacies, or in other words, that whether there was a single heir instituted, or two or more, he or they should always be entitled to at least a quarter of the inheritance. **1**. If two heirs, say Titius and Seius, are instituted, and Titius's share of the inheritance is either wholly exhausted in legacies specifically charged thereon, or burdened beyond the limit fixed by the statute, while no legacies at all are charged on Seius, or at any rate legacies which exhaust it only to the extent of one half or less, the question arose whether, as Seius has at least a quarter of the whole inheritance, Titius was or was not entitled to retain anything out of the legacies which had been charged upon him: and it was settled that he could keep an entire fourth of his share of the inheritance; for the calculation of the lex Falcidia is to be applied separately to the share of each of several heirs in the inheritance. **2**. The amount of the property upon which the calculation is

brought to bear is its amount at the moment of the testator's decease. Thus, to illustrate by an example, a testator who is worth a hundred *aurei* at his decease gives the whole hundred away in legacies: here, if before the heir accepts, the inheritance is so much augmented through slaves who belong to it, or by births of children from such of them as are females, or by the young of cattle, that, even after paying away a hundred *aurei* in legacies, the heir will still have a clear fourth of the inheritance, the legatee's position is in no way improved, but a quarter of the sum given in legacies may still be deducted for himself by the heir. Conversely, if only seventy-five *aurei* are given in legacies, and before acceptance the inheritance is so much diminished in value, say by fire, shipwreck, or death of slaves, that no more or even less than seventy-five *aurei* are left, the legatees can claim payment of their legacies in full. In this latter case, however, the heir is not prejudiced, for he is quite free to refuse the inheritance: consequently, the legatees must come to terms with him, and content themselves with a portion of their legacies, lest they lose all through no one's taking under the will. **3**. When the calculation of the lex Falcidia is made, the testator's debts and funeral expenses are first deducted, and the value of slaves whom he has manumitted in the will or directed to be manumitted is not reckoned as part of the inheritance; the residue is then divided so as to leave the heirs a clear fourth, the other three quarters being distributed among the legatees in proportion to the amount of the legacies given them respectively in the will. Thus, if we suppose four hundred *aurei* to have been given in legacies, and the value of the inheritance, out of which they are to be paid, to be exactly that sum, each legatee must have his legacy abated by one-fourth; if three hundred and fifty have been given in legacies, each legacy will be diminished by one-eighth; if five hundred, first a fifth, and then a fourth, must be deducted: for when the amount given in legacies actually exceeds the sum of the inheritance, there must be struck off first the excess, and then the share which the heir is entitled to retain.

TITLE XXIII

OF TRUST INHERITANCES

We now proceed to fiduciary bequests or trusts; and let us begin with trust inheritances.

1. Legacies or inheritances given by trust had originally no binding legal force, because no one could be compelled against his will to do what he was merely asked to do. As there were certain classes of persons to whom testators were unable to leave inheritances or legacies, when they wished to effect these objects they used to trust to the good faith of some one who had this kind of testamentary capacity, and whom they asked to give the inheritance, or the legacy, to the intended beneficiary; hence the name 'trusts', because they were not enforced by legal obligation, but only by the transferor's sense of honesty. Subsequently the Emperor Augustus, either out of regard for various favourites of his own, or because the request was said to have been made in the name of the Emperor's safety, or moved thereto by individual and glaring cases of perfidy, commanded the consuls in certain cases to enforce the duty by their authority. And this being deemed equitable, and being approved by the people, there was gradually developed a new and permanent jurisdiction, and trusts became so popular that soon a special praetor was appointed to hear suits relating to them, who was called the trust praetor.

2. The first requisite is an heir directly instituted, in trust to transfer the inheritance to another, for the will is void without an instituted heir in the first instance. Accordingly, when a testator has written: 'Lucius Titius, be thou my heir,' he may add: 'I request you, Lucius Titius, as soon as you can accept my inheritance, to convey and transfer it to Gaius Seius'; or he can request him to transfer a part. So a trust may be either absolute or conditional, and to be performed either immediately or on a specified future day.

3. After the transfer of the inheritance the transferor continues heir, the transferee being sometimes regarded as quasi-heir, sometimes as quasi-legatee. **4**. But during the reign of Nero, in the consulate of Trebellius Maximus and Annaeus Seneca, a senatusconsult was passed providing that, when an inheritance is transferred in pursuance of a trust, all the actions which the civil law allows, to be brought by or against the heir shall be maintainable by and against the transferee: and after this enactment the praetor used to give indirect or fictitious actions to and against the transferee as quasi-heir. **5**. However, as the instituted heirs, when (as so often was the case) they were requested to transfer the whole or nearly the whole of an inheritance, declined to accept for what was no benefit, or at most a very slight benefit, to themselves, and this caused a failure of the trusts, afterwards, in the time of the Emperor Vespasian, and during the consulate of Pegasus and Pusio, the senate decreed that an heir who was requested to transfer the inheritance should have the same right to retain a fourth thereof as the lex Falcidia gives to an heir

charged with the payment of legacies, and gave a similar right of retaining the fourth of any specific thing left in trust. After the passing of this senatusconsult the heir, wherever it came into operation, was sole administrator, and the transferee of the residue was in the position of a partiary legatee, that is, of a legatee of a certain specified portion of the estate under the kind of bequest called participation, so that the stipulations which had been usual between an heir and a partiary legatee were now entered into by the heir and transferee, in order to secure a rateable division of the gains and losses arising out of the inheritance. **6**. Accordingly, after this, if no more than three-fourths of the inheritance was in trust to be transferred, then the SC. Trebellianum governed the transfer, and both were liable to be sued for the debts of the inheritance in rateable portions, the heir by civil law, the transferee, as quasi-heir, by that enactment. But if more than three-fourths, or even the whole was left in trust to be transferred, the SC. Pegasianum came into operation, and when once the heir had accepted, of course voluntarily, he was the sole administrator whether he retained one-fourth or declined to retain it: but if he did, he entered into stipulations with the transferee similar to those usual between the heir and a partiary legatee, while if he did not, but transferred the whole inheritance, he covenanted with him as quasi-purchaser. If an instituted heir refuse to accept an inheritance from a suspicion that the liabilities exceed the assets, it is provided by the SC. Pegasianum that, on the petition of the person to whom he is requested to transfer, he shall be ordered by the praetor to accept and transfer it, whereupon the transferee shall be as capable of suing and being sued as the transferee under the SC. Trebellianum. In this case no stipulations arc necessary, because by a concurrent operation of the two senatusconsults both the transferor is protected, and all actions relating to the inheritance pass to and against the transferee. **7**. As, however, the covenants which had become necessary through the SC. Pegasianum were disliked even by the older lawyers, and are in certain cases considered injurious by the eminent jurist Papinian, and it being our desire that our statute book should be clear and simple rather than complicated, we have, after placing these two senatusconsults side by side and examining their points of resemblance and difference, resolved to repeal the SC. Pegasianum, as the later enactment, and to give exclusive authority to the SC. Trebellianum, under which in future all trust inheritances are to be transferred, whether the testator has freely given his heir a fourth of the property, or more or less, or even nothing at all: provided always, that when the heir has either nothing or less than a fourth, it shall be lawful for him, under our authority expressed in this statute, to retain a fourth, or so much as will make his portion equal to a fourth, or to recover it by action if he has already paid it over, the heir and the transferee being capable both of suing and being sued in proportion to their shares in the inheritance, after the analogy of the SC. Trebellianum; and provided also, that if the heir voluntarily transfers the whole inheritance, the transferee shall be able to sue and be sued on all actions relating to the inheritance whatsoever. Moreover, we have transferred to the SC. Trebellianum the leading provision of the SC. Pegasianum, whereby it was enacted that when an instituted heir refused to accept an inheritance offered to him, he could be compelled to accept and transfer the whole inheritance if the intended transferee so desired, and that all actions should pass to and against the latter: so that it is under the SC. Trebellianum alone that the heir, if unwilling to accept, is now obliged to do so, if the intended transferee desire the inheritance, though to him personally no loss or profit can accrue under the transaction. **8**. It makes no difference whether it is a sole or part heir who is under a trust to transfer, or whether what he is requested to transfer is the whole or only a part of that to which he is heir; for we direct that the same rules shall be applied in the case of a part being transferred as we have said are observed in the transference of a whole inheritance. **9**. If the request addressed to the heir is to transfer the inheritance after deducting or reserving some specific thing which is equal in value to a fourth part thereof, such as land or anything else, the conveyance will be made under the SC. Trebellianum, exactly as if he had been asked after retaining ar fourth part of the inheritance to transfer the residue. There is, however, some difference between the two cases; for in the first, where the inheritance is transferred after deducting or reserving some specific thing, the senatusconsult has the effect of making the transferee the only person who can sue or be sued in respect of the inheritance, and the part retained by the heir is free from all encumbrances, exactly as if he had received it under a legacy; whereas in the second, where the heir, after retaining a fourth part of the inheritance, transfers the rest as requested, the actions are divided, the transferee being able to sue and be sued in respect of three-fourths of the inheritance, and the heir in respect of the rest. Moreover, if the heir is requested to transfer the inheritance after deducting or reserving only a single specific thing, which, however, in value is equivalent to the greater part of the inheritance, the transferee is still the only person who can sue and be sued, so that he ought well to weigh whether it is worth his while to take it: and the case is precisely the same, whether what the heir is directed to deduct or reserve before transferring is two or more specific things, or a definite sum which in

fact is equivalent to a fourth or even the greater part of the inheritance. What we have said of a sole heir is equally true of one who is instituted only to a part.

10. Moreover, a man about to die intestate can charge the person to whom he knows his property will go by either the civil or praetorian law to transfer to some one else either his whole inheritance, or a part of it, or some specific thing, such as land, a slave, or money: but legacies have no validity unless given by will. **11**. The transferee may himself be charged by the deceased with a trust to transfer to some other person either the whole or a part of what he receives, or even something different. **12**. As has been already observed, trusts in their origin depended solely on the good faith of the heir, from which early history they derived both their name and their character: and it was for that reason that the Emperor Augustus made them legally binding obligations. And we, in our desire to surpass that prince, have recently made a constitution, suggested by a matter brought before us by the eminent Tribonian, quaestor of our sacred palace, by which it is enacted, that if a testator charges his heir with a trust to transfer the whole inheritance or some specific thing, and the trust cannot be proved by writing or by the evidence of five witnesses—five being, as is known, the number required by law for the proof of oral trusts—through there having been fewer witnesses than five, or even none at all, and if the heir, whether it be his own son or some one else whom the testator has chosen to trust, and by whom he desired the transfer to be made, perfidiously refuses to execute the trust, and in fact denies that he was ever charged with it, the alleged beneficiary, having previously sworn to his own good faith, may put the heir upon his oath: whereupon the heir may be compelled to swear that no trust was ever charged upon him, or, in default, to transfer the inheritance or the specific thing, as the case may be, in order that the last wishes of the testator, the fulfilment of which he has left to the honour of his heir, may not be defeated. We have also prescribed the same procedure where the person charged with a trust is a legatee or already himself a transferee under a prior trust. Finally, if the person charged admits the trust, but tries to shelter himself behind legal technicalities, he may most certainly be compelled to perform his obligation.

TITLE XXIV

OF TRUST BEQUESTS OF SINGLE THINGS

Single things can be left in trust as well as inheritances; land, for instance, slaves, clothing, gold, silver, and coined money; and the trust may be imposed either on an heir or on a legatee, although a legatee cannot be charged with a legacy. **1**. Not only the testator's property, but that of an heir, or legatee, or person already benefited by a trust, or any one else may be given by a trust. Thus a legatee, or a person in whose favour the testator has already created a trust, may be asked to transfer either a thing left to him, or any other thing belonging to himself or a stranger, provided always that he is not charged with a trust to transfer more than he takes by the will, for in respect of such excess the trust would be void. When a person is charged by a trust to transfer a thing belonging to some one else, he must either purchase and deliver it, or pay its value. **2**. Liberty can be left to a slave by a trust charging an heir, legatee, or other person already benefited by a trust of the testator's, with his manumission, and it makes no difference whether the slave is the property of the testator, of the heir, of the legatee or of a stranger: for a stranger's slave must be purchased and manumitted; and on his master's refusal to sell (which refusal is allowable only if the master has taken nothing under the will) the trust to enfranchise the slave is not extinguished, as though its execution had become impossible, but its execution is merely postponed; because it may become possible to free him at some future time, whenever an opportunity of purchasing him presents itself. A trust of manumission makes the slave the freedman, not of the testator, though he may have been his owner, but of the manumitter, whereas a direct bequest of liberty makes a slave the freedman of the testator, whence too he is called '*orcinus*'. But a direct bequest of liberty can be made only to a slave who belongs to the testator both at the time of making his will and at that of his decease; and by a direct bequest of liberty is to be understood the case where the testator desires him to become free in virtue, as it were, of his own testament alone, and so does not ask some one else to manumit him. **3**. The words most commonly used to create a trust are I beg, I request, I wish, I commission, I trust to your good faith; and they are just as binding when used separately as when united.

TITLE XXV

OF CODICILS

It is certain that codicils were not in use before the time of Augustus, for Lucius Lentulus, who was also the originator of trusts, was the first to introduce them, in the following manner. Being on the point of death in Africa, he executed codicils, confirmed by his will, by which he begged Augustus to do

something for him as a trust; and on the Emperor's fulfilling his wishes, other persons followed the precedent and discharged trusts created in this manner, and the daughter of Lentulus paid legacies which could not have been legally claimed from her. It is said that Augustus called a council of certain jurists, among them Trebatius, who at that time enjoyed the highest reputation, and asked them whether the new usage could be sanctioned, or did not rather run counter to the received principles of law, and that Trebatius recommended their admission, remarking 'how convenient and even necessary the practice was to citizens', owing to the length of the journeys which were taken in those early days, and upon which a man might often be able to make codicils when he could not make a will. And subsequently, after codicils had been made by Labeo, nobody doubted their complete validity.

1. Not only can codicils be made after a will, but a man dying intestate can create trusts by codicils, though Papinian says that codicils executed before a will are invalid unless confirmed by a later express declaration that they shall be binding. But a rescript of the Emperors Severus and Antoninus decides that the performance of a trust imposed by codicils written before a will may in any case be demanded, if it appears that the testator had not abandoned the intention expressed in them. **2**. An inheritance can neither be given nor taken away by codicils, nor, accordingly, can a child be disinherited in this way: for, if it were otherwise, the law of wills and of codicils would be confounded. By this it is meant that an inheritance cannot directly be given or taken away by codicils; for indirectly, by means of a trust, one can very well be given in this manner. Nor again can a condition b.c. imposed on an instituted heir, or a direct substitution be effected, by codicils. **3**. A man can make any number of codicils, and no solemnities are required for their execution.

3. BOOK III

TITLE I

OF THE DEVOLUTION OF INHERITANCES ON INTESTACY

A MAN IS said to die intestate who either has made no will at all, or has made one which is invalid, or if one which has been duly executed has been subsequently revoked or rescinded, or finally, if no one accepts as heir under the testament.

1. The inheritances of intestate persons go first, by the statute of the Twelve Tables, to family heirs. **2**. And family heirs, as we said above, are those who were in the power of the deceased at the time of his death, such as a son or daughter, a grandchild by a son, or a great-grandchild by such grandchild if a male, and this whether the relationship be natural or adoptive. Among them must also be reckoned children who, though not born in lawful wedlock, have been inscribed members of the *curia* according to the tenor of the imperial constitutions relating to them, and thus acquire the rights of family heirs, or who come within the terms of our constitutions by which we have enacted that, if any one shall cohabit with a woman whom he might have lawfully married, but for whom he did not at first feel marital affection, and shall after begetting children by her begin to feel such affection and formally marry her, and then have by her sons or daughters, not only shall those be lawful children and in their father's power who were born after the settlement of the dowry, but also those born before, to whom in reality the later born ones owed their legitimacy; and we have provided that this rule shall hold even though no children are born after the execution of the dowry deed, or if, having been born, they are dead. It is to be observed, however, that a grandchild or great-grandchild is not a family heir, unless the person in the preceding degree has ceased to be in the power of the parent, either through having died, or by some other means, such as emancipation; for if at the time of a man's decease a son is in his power, a grandson by that son cannot be a family heir, and the case is exactly the same with more remote descendants. Children too who are born after the ancestor's death, and who would have been in his power had they been born during his lifetime, are family heirs. **3**. Family heirs succeed even though ignorant of their title, and they can take upon an intestacy even though insane, because whenever the law vests property in a person, even when he is ignorant of his title, it equally vests it in him if insane. Thus, immediately on the parent's death, the ownership is as it were continued without any break, so that pupils who are family heirs do not require their guardian's sanction in order to succeed, for inheritances go to such heirs even though ignorant of their title; and similarly an insane family heir does not require his curator's consent in order to succeed, but takes by operation of law. **4**. Sometimes, however, a family heir succeeds in this way to his parent, even though not in the latter's power at the time of his decease, as where a person returns from captivity after his father's death, this being the effect of the law of postliminium. **5**. And sometimes conversely a

man is not a family heir although in the power of the deceased at the time of his death, as where the latter after his death is adjudged to have been guilty of treason, and his memory is thereby branded with infamy: such a person is unable to have a family heir, for his property is confiscated to the treasury, though one who would otherwise have succeeded him may be said to have in law been a family heir, and ceased to be such. **6**. Where there is a son or daughter, and a grandchild by another son, these are called together to the inheritance, nor does the nearer in degree exclude the more remote, for it seems just that grandchildren should represent their father and take his place in the succession. Similarly a grandchild by a son, and a great-grandchild by a grandson are called to the inheritance together. And as it was thought just that grandchildren and great-grandchildren should represent their father, it seemed consistent that the inheritance should be divided by the number of stems, and not by the number of individuals, so that a son should take one-half, and grandchildren by another son the other: or, if two sons left children, that a single grandchild, or two grandchildren by one son, should take one-half, and three or four grandchildren by the other son the other. **7**. In ascertaining whether, in any particular case, so and so is a family heir, one ought to regard only that moment of time at which it first was certain that the deceased died intestate, including hereunder the case of no one's accepting under the will. For instance, if a son be disinherited and a stranger instituted heir, and the son die after the decease of his father, but before it is certain that the heir instituted in the will either will not or cannot take the inheritance, a grandson will take as family heir to his grandfather, because he is the only descendant in existence when first it is certain that the ancestor died intestate; and of this there can be no doubt. **8**. A grandson born after, though conceived before, his grandfather's death, whose father dies in the interval between the grandfather's decease and desertion of the latter's will through failure of the instituted heir to take, is family heir to his grandfather; though it is obvious that if (other circumstances remaining the same) he is conceived as well as born after the grandfather's decease, he is no family heir, because he was never connected with his grandfather by any tie of relationship; exactly as a person adopted by an emancipated son is not among the children of, and therefore cannot be family heir to, the latter's father. And such persons, not being children in relation to the inheritance, cannot apply either for possession of the goods of the deceased as next of kin. So much for family heirs.

9. As to emancipated children, they have, by the civil law, no right to succeed to an intestate; for, having ceased to be in the power of their parent, they are not family heirs, nor are they called by any other title in the statute of the Twelve Tables. The praetor, however, following natural equity, gives them possession of the goods of the deceased merely as children, exactly as if they had been in his power at the time of his death, and this whether they stand alone or whether there are family heirs as well. Consequently, if a man die leaving two children, one emancipated, and the other in his power at the time of his decease, the latter is sole heir by the civil law, as being the only family heir; but through the former's being admitted to part of the inheritance by the indulgence of the praetor, the family heir becomes heir to part of the inheritance only. **10**. Emancipated children, however, who have given themselves in adoption are not thus admitted, under the title of children, to share the property of their natural father, if at the time of his decease they are in their adoptive family; though it is otherwise if they are emancipated during his lifetime by their adoptive father, for then they are admitted as if they had been emancipated by him and had never been in an adoptive family, while, conversely, as regards their adoptive father, they are henceforth regarded as strangers. If, however, they are emancipated by the adoptive after the death of the natural father, as regards the former they are strangers all the same, and yet do not acquire the rank of children as regards succession to the property of the latter; the reason of this rule being the injustice of putting it within the power of an adoptive father to determine to whom the property of the natural father shall belong, whether to his children or to his agnates. **11**. Adoptive are thus not so well off as natural children in respect of rights of succession: for by the indulgence of the praetor the latter retain their rank as children even after emancipation, although they lose it by the civil law; while the former, if emancipated, are not assisted even by the praetor. And there is nothing wrong in their being thus differently treated, because civil changes can affect rights annexed to a civil title, but not rights annexed to a natural title, and natural descendants, though on emancipation they cease to be family heirs, cannot cease to be children or grandchildren; whereas on the other hand adoptive children are regarded as strangers after emancipation, because they lose the title and name of son or daughter, which they have acquired by a civil change, namely adoption, by another civil change, namely emancipation. **12**. And the rule is the same in the possession of goods against the will which the praetor promises to children who are passed over in their parent's testament, that is to say, are neither instituted nor duly disinherited; for the praetor calls to this possession children who were in their parent's power at the time of his decease, or

emancipated, but excludes those who at that time were in an adoptive family: still less does he here admit adoptive children emancipated by their adoptive father, for by emancipation they cease entirely to be children of his. **13**. We should observe, however, that though children who are in an adoptive family, or who are emancipated by their adoptive after the decease of their natural father, are not admitted on the death of the latter intestate by that part of the edict by which children are called to the possession of goods, they are called by another part, namely that which admits the cognates of the deceased, who, however, come in only if there are no family heirs, emancipated children, or agnates to take before them: for the praetor prefers children, whether family heirs or emancipated, to all other claimants, ranking in the second degree statutory successors, and in the third cognates, or next of kin. **14**. All these rules, however, which to our predecessors were sufficient, have received some emendation by the constitution which we have enacted relative to persons who have been given in adoption to others by their natural fathers; for we found cases in which sons by entering an adoptive family forfeited their right of succeeding their natural parents, and then, the tie of adoption being easily broken by emancipation, lost all title to succeed their adoptive parents as well. We have corrected this, in our usual manner, by a constitution which enacts that, when a natural father gives his son in adoption to another person, the son's rights shall remain the same in every particular as if he had continued in the power of his natural father, and the adoption had never taken place, except only that he shall be able to succeed his adoptive father should he die intestate. If, however, the latter makes a will, the son cannot obtain any part of the inheritance either by the civil or by the praetorian law, that is to say, either by impeaching the will as unduteous or by applying for possession against the will; for, being related by no tie of blood, the adoptive father is not bound either to institute him heir or to disinherit him, even though he has been adopted, in accordance with the SC. Afinianum, from among three brothers; for, even under these circumstances, he is not entitled to a fourth of what he might have taken on intestacy, nor has he any action for its recovery. We have, however, by our constitution excepted persons adopted by natural ascendants, for between them and their adopters there is the natural tie of blood as well as the civil tie of adoption, and therefore in this case we have preserved the older law, as also in that of an independent person giving himself in adrogation: all of which enactment can be gathered in its special details from the tenor of the aforesaid constitution.

15. By the ancient law too, which favoured the descent through males, those grandchildren only were called as family heirs, and preferred to agnates, who were related to the grandfather in this way: grandchildren by daughters, and great-grandchildren by granddaughters, whom it regarded only as cognates, being called after the agnates in the succession to their maternal grandfather or great-grandfather, or their grandmother or great-grandmother, whether paternal or maternal. But the Emperors would not allow so unnatural a wrong to endure without sufficient correction, and accordingly, as people are, and are called, grandchildren and great-grandchildren of a person whether they trace their descent through males or through females, they placed them altogether in the same rank and order of succession. In order, however, to bestow some privilege on those who had in their favour the provisions of the ancient law as well as natural right, they determined that grandchildren, great-grandchildren, and others who traced their descent through a female should have their portion of the inheritance diminished by receiving less by one-third than their mother or grandmother would have taken, or than their father or grandfather, paternal or maternal, when the deceased, whose inheritance was in question, was a woman; and they excluded the agnates, if such descendants claimed the inheritance, even though they stood alone. Thus, exactly as the statute of the Twelve Tables calls the grandchildren and great-grandchildren to represent their deceased father in the succession to their grandfather, so the imperial legislation substitutes them for their deceased mother or grandmother, subject to the aforesaid deduction of a third part of the share which she personally would have taken. **16**. As, however, there was still some question as to the relative rights of such grandchildren and of the agnates, who on the authority of a certain constitution claimed a fourth part of the deceased's estate, we have repealed the said enactment, and not permitted its insertion in our Code from that of Theodosius. By the constitution which we have published, and by which we have altogether deprived it of validity, we have provided that in case of the survival of grandchildren by a daughter, great-grandchildren by a granddaughter, or more remote descendants related through a female, the agnates shall have no claim to any part of the estate of the deceased, that collaterals may no longer be preferred to lineal descendants; which constitution we hereby re-enact with all its force from the date originally determined: provided always, as we direct, that the inheritance shall be divided between sons and grandchildren by a daughter, or between all the grand children, and other more remote descendants, according to stocks, and not by counting heads, on the principle observed by the ancient law in dividing an inheritance between sons and grandchildren by a son, the issue obtaining without any diminution the

portion which would have belonged to their mother or father, grandmother or grandfather: so that if, for instance, there be one or two children by one stock, and three or four by another, the one or two, and the three or four, shall together take respectively one moiety of the inheritance.

TITLE II

OF THE STATUTORY SUCCESSION OF AGNATES

If there is no family heir, nor any of those persons called to the succession along with family heirs by the praetor or the imperial legislation, to take the inheritance in any way, it devolves, by the statute of the Twelve Tables, on the nearest agnate. **1**. Agnates, as we have observed in the first book, are those cognates who trace their relationship through males, or, in other words, who are cognate through their respective fathers. Thus, brothers by the same father are agnates, whether by the same mother or not, and are called *consanguinei*; an uncle is agnate to his brother's son, and vice versa; and the children of brothers by the same father, who are called *consobrini*, are one another's agnates, so that it is easy to arrive at various degrees of agnation. Children who are born after their father's decease acquire the rights of kinship exactly as if they had been born before that event. But the law does not give the inheritance to all the agnates, but only to those who were nearest in degree at the moment when it first was certain that the deceased died intestate. **2**. The relation of agnation can also be established by adoption, for instance, between a man's own sons and those whom he has adopted, all of whom are properly called *consanguinei* in relation to one another. So too, if your brother, or your paternal uncle, or even a more remote agnate, adopts any one, that person undoubtedly becomes one of your agnates. **3**. Male agnates have reciprocal rights of succession, however remote the degree of relationship: but the rule as regards females, on the other hand, was that they could not succeed as agnates to any one more remotely related to them than a brother, while they themselves could be succeeded by their male agnates, however distant the connexion: thus you, if a male, could take the inheritance of a daughter either of your brother or of your paternal uncle, or of your paternal aunt, but she could not take yours; the reason of this distinction being the seeming expediency of successions devolving as much as possible on males. But as it was most unjust that such females should be as completely excluded as if they were strangers, the praetor admits them to the possession of goods promised in that part of the edict in which mere natural kinship is recognized as a title to succession, uncle. which they take provided there is no agnate, or other cognate of a nearer degree of relationship. Now these distinctions were in no way due to the statute of the Twelve Tables, which, with the simplicity proper to all legislation, conferred reciprocal rights of succession on all agnates alike, whether males or females, and excluded no degree by reason merely of its remoteness, after the analogy of family heirs; but it was introduced by the jurists who came between the Twelve Tables and the imperial legislation, and who with their legal subtleties and refinements excluded females other than sisters altogether from agnatic succession. And no other scheme of succession was in those times heard of, until the praetors, by gradually mitigating to the best of their ability the harshness of the civil law, or by filling up voids in the old system, provided through their edicts a new one. Mere cognation was thus in its various degrees recognized as a title to succession, and the praetors gave relief to such females through the possession of goods, which they promised to them in that part of the edict by which cognates are called to the succession. We, however, have followed the Twelve Tables in this department of law, and adhered to their principles: and, while we commend the praetors for their sense of equity, we cannot hold that their remedy was adequate; for when the degree of natural relationship was the same, and when the civil title of agnation was conferred by the older law on males and females alike, why should males be allowed to succeed all their agnates, and women (except sisters) be debarred from succeeding any? Accordingly, we have restored the old rules in their integrity, and made the law on this subject an exact copy of the Twelve Tables, by enacting, in our constitution, that all 'statutory' successors, that is, persons tracing their descent from the deceased through males, shall be called alike to the succession as agnates on an intestacy, whether they be males or females, according to their proximity of degree; and that no females shall be excluded on the pretence that none but sisters have the right of succeeding by the title of kinship. **4**. By an addition to the same enactment we have deemed it right to transfer one, though only one, degree of cognates into the ranks of those who succeed by a statutory title, in order that not only the children of a brother may be called, as we have just explained, to the succession of their paternal uncle, but that the children of a sister too, even though only of the half blood on either side (but not her more remote descendants), may share with the former the inheritance of their uncle; so that, on the decease of a man who is paternal uncle to his brother's children, and maternal uncle to those of his sister, the nephews and nieces on either side will now succeed him alike, provided, of course, that the brother and sister do

not survive, exactly as if they all traced their relationship through males, and thus all had a statutory title. But if the deceased leaves brothers or sisters who accept the inheritance, the remoter degrees are altogether excluded, the division in this case being made individually, that its to say, by counting heads, not stocks. **5**. If there are several degrees of agnates, the statute of the Twelve Tables clearly calls only the nearest, so that if, for instance, the deceased leaves a brother, and a nephew by another brother deceased, or a paternal uncle, the brother is preferred. And although that statute, in speaking of the nearest agnate, uses the singular number, there is no doubt that if there are several of the same degree they are all admitted: for though properly one can speak of 'the nearest degree' only when there are several, yet it is certain that even though all the agnates are in the same degree the inheritance belongs to them. If a man dies without having made a will **6**. at all, the agnate who takes is the one who was nearest at the time of the death of the deceased. But when a man dies, having made a will, the agnate who takes (if one is to take at all) is the one who is nearest when first it becomes certain that no one will accept the inheritance under the testament; for until that moment the deceased cannot properly be said to have died intestate at all, and this period of uncertainty is sometimes a long one, so that it not unfrequently happens that through the death, during it, of a nearer agnate, another becomes nearest who was not so at the death of the testator. **7**. In agnatic succession the established rule was that the right of accepting the inheritance could not pass from a nearer to a more remote degree; in other words, that if the nearest agnate, who, as we have described, is called to the inheritance, either refuses it or dies before acceptance, the agnates of the next grade have no claim to admittance under the Twelve Tables. This hard rule again the praetors did not leave entirely without correction, though their remedy, which consisted in the admission of such persons, since they were excluded from the rights of agnation, in the rank of cognates, was inadequate. But we, in our desire to have the law as complete as possible, have enacted in the constitution which in our clemency we have issued respecting the rights of patrons, that in agnatic succession the transference of the right to accept from a nearer to a remoter degree shall not be refused: for it was most absurd that agnates should be denied a privilege which the praetor had conferred on cognates especially as the burden of guardianship fell on the second degree of agnates if there was a failure of the first, the principle which we have now sanctioned being admitted so far as it imposed burdens, but rejected so far as it conferred a boon.

8. To statutory succession the ascendant too is none the less called who emancipates a child, grandchild, or remoter descendant under a fiduciary agreement, which by our constitution is now implied in every emancipation. Among the ancients the rule was different, for the parent acquired no rights of succession unless he had entered into a special agreement of trust to that effect prior to the emancipation.

TITLE III

OF THE SENATUSCONSULTUM TERTULLIANUM

So strict were the rules of the statute of the Twelve Tables in preferring the issue of males, and excluding those who traced their relationship through females, that they did not confer reciprocal rights of inheritance even on a mother and her children, though the praetors called them to succeed one another as next of kin by promising them the possession of goods in the class of cognates. **1**. But this narrowness of the law was afterwards amended, the Emperor Claudius being the first to confer on a mother, as a consolation for the loss of her children, a statutory right to their inheritance. **2**. And afterwards, very full provisions were made by the SC. Tertullianum, enacted in the time of the Emperor Hadrian, and relating to the melancholy succession of children by their mothers, though not by their grandmothers, whereby it was provided that a freeborn woman who had three or a freedwoman who had four children should be entitled to succeed to the goods of her children who died intestate, even though herself under paternal power; though, in this latter case, she cannot accept the inheritance except by the direction of the person in whose power she is. **3**. Children of the deceased who are or who rank as family heirs, whether in the first or any other degree, are preferred to the mother, and even where the deceased is a woman her children by imperial constitutions have a prior claim to the mother, that is, to their own grandmother. Again, the father of the deceased is preferred to the mother, but not so the paternal grandfather or great-grandfather, at least when it is between them only that the question arises who is entitled. A brother by the same father excluded the mother from the succession to both sons and daughters, but a sister by the same father came in equally with the mother; and where there were both a brother and a sister by the same father, as well as a mother who was entitled by number of children, the brother excluded the mother, and divided the inheritance in equal moieties with the sister. **4**. By a constitution, however, which we have placed in the Code made illustrious by our name, we have deemed it right to afford relief to the mother, in

consideration of natural justice, of the pains of childbirth, and of the danger and even death which mothers often incur in this manner; for which reason we have judged it a sin that they should be prejudiced by a circumstance which is entirely fortuitous. For if a freeborn woman had not borne three, or a freedwoman four children, she was undeservedly defrauded of the succession to her own offspring; and yet what fault had she committed in bearing few rather than many children? Accordingly, we have conferred on mothers a full statutory right of succession to their children, whether they be freeborn or freedwomen, although they may not have given birth to three or four children, and even if they have had no other child than the one in question deceased. **5**. The earlier constitutions, in their review of statutory rights of succession, were in some points favourable, in others unfavourable, to mothers; thus in some cases they did not call them to the whole inheritance of their children, but deducted a third in favour of certain other persons with a statutory title, while in others they did exactly the opposite. We, however, have determined to follow a straightforward and simple path, and, preferring the mother to all other persons with a statutory title, to give her the entire succession of her sons, without deduction in favour of any other persons except a brother or sister, whether by the same father as the deceased, or possessing rights of cognation only; so that, as we have preferred the mother to all with a statutory title, so we call to the inheritance, along with her, all brothers and sisters of the deceased, whether statutorily entitled or not: provided that, if the only surviving relatives of the deceased are sisters, agnatic or cognatic, and a mother, the latter shall have one-half, and all the sisters together the other half of the inheritance; if a mother and a brother or brothers, with or without sisters agnatic or cognatic, the inheritance shall be divided among mother, brothers, and sisters in equal portions. **6**. But, while we are legislating for mothers, we ought also to bestow some thought on their offspring; and accordingly mothers should observe that if they do not apply within a year for guardians for their children, either originally or in lieu of those who have been removed or excused, they will forfeit their title to succeed such children if they die under the age of puberty. **7**. A mother can succeed her child under the SC. Tertullianum even though the child be illegitimate.

TITLE IV

OF THE SENATUSCONSULTUM ORFITIANUM

Conversely, children were admitted to succeed their mother on her death intestate by the SC. Orfitianum, passed in the time of the Emperor Marcus, when Orfitus and Rufus were consuls: by which a statutory right of succession was conferred on both sons and daughters, even though in the power of another, in preference to their deceased mother's brothers and sisters and other agnates. **1**. As, however, grandsons were not called by this senatusconsult with a statutory title to the succession of their grandmothers, this was subsequently amended by imperial constitutions, providing that grandchildren should be called to inherit exactly like children. **2**. It is to be observed that rights of succession such as those conferred by the SC[a]. Tertullianum and Orfitianum are not extinguished by loss of status, owing to the rule that rights of succession conferred by later statutes are not destroyed in this way, but only such as are conferred by the statute of the Twelve Tables. **3**. And finally that under the latter of these two enactments even illegitimate children are admitted to their mother's inheritance.

4. If there are several heirs with a statutory title, some of whom do not accept# or are prevented from doing so by death or some other cause, their shares accrue in equal proportions to those who do accept the inheritance, or to their heirs, supposing they die before the failure of the others to take.

TITLE V

OF THE SUCCESSION OF COGNATES

After family heirs, and persons who by the praetor and the imperial legislation are ranked as such, and after persons statutorily entitled, among whom are the agnates and those whom the aforesaid senatusconsults and our constitution have raised to the rank of agnates, the praetor calls the nearest cognates. **1**. In this class or order natural or blood relationship alone is considered: for agnates who have undergone loss of status and their children, though not regarded as having a statutory title under the statute of the Twelve Tables, are called by the praetor in the third order of succession. The sole exceptions to this rule are emancipated brothers and sisters (not, however, including their children), who are admitted by the statute of Anastasius to the statutory succession of a brother or sister along with other brothers and sisters, though not in equal shares with them, but with some deduction, the amount of which can easily be ascertained from the terms of the constitution itself. But to other agnates of remoter degrees, even though they have not undergone loss of status, and still more to cognates, they are preferred by the aforesaid

statute. **2**. Again, collateral relations connected with the deceased only by the female line are called to the succession by the praetor in the third order as cognates. **3**. And children who are in an adoptive family are admitted in this order to the inheritance of their natural parent. **4**. It is clear that illegitimate children can have no agnates, for in law they have no father, and it is through the father that agnatic relationship is traced, while cognatic relationship is traced through the mother as well. On the same principle they cannot be held to be *consanguinei* of one another, for *consanguinei* are in a way agnatically related: consequently, they are connected with one another only as cognates, and in the same way too with the cognates of their mother. Accordingly, they can succeed to the possession of goods under that part of the Edict in which cognates are called by the title of mere kinship. **5**. In this place too we should observe that a person who claims as an agnate can be admitted to the inheritance, even though ten degrees removed from the deceased, both by the statute of the Twelve Tables, and by the Edict in which the praetor promises the possession of goods to heirs statutorily entitled: but on the ground of mere natural kinship the praetor promises possession of goods to those cognates only who are within the sixth degree; the only persons in the seventh degree whom he admits as cognates being the children of a second cousin of the deceased.

TITLE VI

OF THE DEGREES OF COGNATION

It is here necessary to explain the way in which the degrees of natural relationship are reckoned. In the first place it is to be observed that they can be counted either upwards, or downwards, or crosswise, that is to say, collaterally. Relations in the ascending line are parents, in the descending line, children: collateral relations are brothers and sisters, their children, and similarly uncles and aunts paternal and maternal. In the ascending and descending lines a man's nearest cognate may be related to him in the first degree; in the collateral line he cannot be nearer to him than the second. **1**. Relations in the first degree, reckoning upwards, are the father and mother; reckoning downwards, the son and daughter. **2**. Those in the second degree, upwards, are grandfather and grandmother; downwards, grandson and granddaughter; and in the collateral line brother and sister. In the third degree, upwards, are the great-grandfather and great-grandmother; downwards, the great-grandson and great-granddaughter; in the collateral line, the sons and daughters of a brother or sister, and also uncles and aunts paternal and maternal. The father's brother is called *patruus*, in Greek πατρῷος, the mother's brother *avunculus*, in Greek specifically μητρῷος, though the term θεῖος is used indifferently to indicate either. The father's sister is called *amita*, the mother's *matertera*; both go in Greek by the name θεία, or, with some, τιτθίς. In the fourth degree, upwards, are the great-great-grandfather and the great-great-grandmother; downwards, the great-great-grandson and the great-great-granddaughter; in the collateral line, the paternal great-uncle and great-aunt, that is to say, the grandfather's brother and sister: the same relations on the grandmother's side, that is to say, her brother and sister: and first cousins male and female, that is, children of brothers and sisters in relation to one another. The children of two sisters, in relation to one another, are properly called *consobrini*, a corruption of *consororini*; those of two brothers, in relation to one another, *fratres patrules*, if males, *sorores patrueles*, if females; and those of a brother and a sister, in relation to one another, *amitini*; thus the sons of your father's sister call you *consobrinus*, and you them *amitini*. **5**. In the fifth degree, upwards, are the grandfather's great-grandfather and great-grandmother, downwards, the great-grandchildren of one's own grandchildren, and in the collateral line the grandchildren of a brother or sister, a great-grandfather's or great-grandmother's brother or sister, the children of one's first cousins, that is, of a *frater* or *soror patruelis*, of a *consobrinus* or *consobrina*, of an *amitinus* or *amitina*, and first cousin once removed, that is to say, the children of a great-uncle or great-aunt paternal or maternal. **6**. In the sixth degree, upwards, are the great-grandfather's great-grandfather and great-grandmother; downwards, the great-grandchildren of a great-grandchild, and in the collateral line the great-grandchildren of a brother or sister, as also the brother and sister of a great-great-grandfather or great-great-grandmother, and second cousins, that is to say, the children of *fratres* or *sorores patrueles*, of *consobrini*, or of *amitini*. **7**. This will be enough to show how the degrees of relationship are reckoned; for from what has been said it is easy to understand how we ought to calculate the remoter degrees also, each generation always adding one degree: so that it is far easier to say in what degree any one is related to some one else than to indicate his relationship by the proper specific term. **8**. The degrees of agnation are also reckoned in the same manner. **9**. But as truth is fixed in the mind of man much better by the eye than by the ear, we have deemed it necessary, after giving an account of the degrees of relationship, to have a

table of them inserted in the present book, that so the youth may be able by both ears and eyes to gain a most perfect knowledge of them.

10. It is certain that the part of the Edict in which the possession of goods is promised to the next of kin has nothing to do with the relationships of slaves with one another, nor is there any old statute by which such relationships were recognized. However, in the constitution which we have issued with regard to the rights of patrons—a subject which up to our times had been most obscure, and full of difficulties and confusion—we have been prompted by humanity to grant that if a slave shall beget children by either a free woman or another slave, or conversely if a slave woman shall bear children of either sex by either a freeman or a slave, and both the parents and the children (if born of a slave woman) shall become free, or if the mother being free, the father be a slave, and subsequently acquire his freedom, the children shall in all these cases succeed their father and mother, and the patron's rights lie dormant. And such children we have called to the succession not only of their parents, but also of one another reciprocally, by this enactment, whether those born in slavery and subsequently manumitted are the only children, or whether there be others conceived after their parents had obtained their freedom, and whether they all have the same father or mother, or the same father and different mothers, or vice versa; the rules applying to children born in lawful wedlock being applied here also.

11. To sum up all that we have said, it appears that persons related in the same degree of cognation to the deceased are not always called together, and that even a remoter is sometimes preferred to a nearer cognate. For as family heirs and those whom we have enumerated as equivalent to family heirs have a priority over all other claimants, it is clear that a great-grandson or great-great-grandson is preferred to a brother, or the father or mother of the deceased; and yet the father and mother, as we have remarked above, are in the first degree of cognation, and the brother is in the second, while the great-grandson and great-great-grandson are only in the third and fourth respectively. And it is immaterial whether the descendant who ranks among family heirs was in the power of the deceased at the time of his death, or out of it through having been emancipated or through being the child of an emancipated child or of a child of the female sex. **12**. When there are no family heirs, and none of those persons who we have said rank as such, an agnate who has lost none of his agnatic rights, even though very many degrees removed from the deceased, is usually preferred to a nearer cognate; for instance, the grandson or great-grandson of a paternal uncle has a better title than a maternal uncle or aunt. Accordingly, in saying that the nearest cognate is preferred in the succession, or that, if there are several cognates in the nearest degree, they are called equally, we mean that this is the case if no one is entitled to priority, according to what we have said, as either being or ranking as a family heir, or as being an agnate; the only exceptions to this being emancipated brothers and sisters of the deceased who are called to succeed him, and who, in spite of their loss of status, are preferred to other agnates in a remoter degree than themselves.

TITLE VII

OF THE SUCCESSION TO FREEDMEN

Let us now turn to the property of freedmen. These were originally allowed to pass over their patrons in their wills with impunity: for by the statute of the Twelve Tables the inheritance of a freedman devolved on his patron only when he died intestate without leaving a family heir. If he died intestate, but left a family heir, the patron was not entitled to any portion of this property, and this, if the family heir was a natural child, seemed to be no grievance; but if he was an adoptive child, it was clearly unfair that the patron should be debarred from all right to the succession. **1**. Accordingly this injustice of the law was at a later period corrected by the praetor's Edict, by which, if a freedman made a will, he was commanded to leave his patron half his property; and, if he left him nothing at all, or less than a half, possession of such half was given to him against the testament. If, on the other hand, he died intestate, leaving as family heir an adoptive son, the patron could obtain even against the latter possession of the goods of the deceased to the extent of one-half. But the freedman was enabled to exclude the patron if he left natural children, whether in his power at the time of his death, or emancipated or given in adoption, provided that he made a will in which he instituted them heirs to any part of the succession, or that, being passed over, they demanded possession against the will under the Edict: if disinherited, they did not avail to bar the patron. **2**. At a still later period the lex Papia Poppaea augmented the rights of patrons who had more wealthy freedmen. By this it was enacted that, whenever a freedman left property amounting in value to a hundred thousand sesterces and upwards, and not so many as three children, the patron, whether he died testate or intestate, should be entitled to a portion equal to that of a single child. Accordingly, if the

freedman left a single son or daughter as heir, the patron could claim half the property, exactly as if he had died without leaving any children: if he left two children as heirs, the patron could claim a third: if he left three, the patron was excluded altogether. **3**. In our constitution, however, which we have drawn up in a convenient form and in the Greek language, so as to be known by all, we have established the following rules for application to such cases. If the freedman or freedwoman is less than a *centenarius*, that is, has a fortune of less than a hundred *aurei* (which we have reckoned as equivalent to the sum of a hundred thousand sesterces fixed by the lex Papia), the patron shall have no right to any share in the succession if they make a will; while, if they die intestate without leaving any children, we have retained unimpaired the rights conferred on the patron by the Twelve Tables. If they are possessed of more than a hundred *aurei*, and leave a descendant or descendants of either sex and any degree to take the inheritance civil or praetorian, we have given to such child or children the succession to their parents, to the exclusion of every patron and his issue, If, however, they leave no children, and die intestate, we have called the patron or patroness to their whole inheritance: while if they make a will, passing over their patron or patroness, and leaving no children, or having disinherited such as they have, or (supposing them to be mothers or maternal grandfathers) having passed them over without leaving them the right to impeach the testament as unduteous, then, under our constitution, the patron shall succeed, by possession against the will, not, as before,to one-half of the freedman's estate, but to one-third, or, if the freedman or freedwoman has left him less than this third in his or her will, to so much as will make up the difference. But this third shall be free from all charges, even from legacies or trust bequests in favour of the children of the freedman or freedwoman, all of which are to fall on the patron's co-heirs. In the same constitution we have gathered together the rules applying to many other cases, which we deemed necessary for the complete settlement of this branch of law: for instance, a title to the succession of freedmen is conferred not only on patrons and patronesses, but on their children and collateral relatives to the fifth degree: all of which may be ascertained by reference to the constitution itself If, however, there are several descendants of a patron or patroness, or of two or several, the nearest in degree is to take the succession of the freedman or freedwoman, which is to be divided, not among the stocks, but by counting the heads of those nearest in degree. And the same rule is to be observed with collaterals: for we have made the law of succession to freedmen almost identical with that relating to freeborn persons. **4**. All that has been said relates nowadays to freedmen who are Roman citizens, for *dediticii* and *Latini Iuniani* having been together abolished there are now no others. As to a statutory right of succession to a Latin, there never was any such thing; for men of this class, though during life they lived as free, yet as they drew their last breath they lost their liberty along with their life, and under the lex Iunia. their manumitters kept their property, like that of slaves, as a kind of peculium. It was subsequently provided by the SC. Largianum that the manumitter's children, unless expressly disinherited, should be preferred to his external heirs in succession to the goods of a Latin; and this was followed by the edict of the Emperor Trajan, providing that a Latin who contrived, without the knowledge or consent of his patron. to obtain by imperial favour a grant of citizenship should live a citizen, but die a Latin. Owing, however, to the difficulties accompanying these changes of condition, and others as well, we have determined by our constitution to repeal for ever the lex Iunia, the SC. Largianum, and the edict of Trajan, and to abolish them along with the Latins themselves, so as to enable all freedmen to enjoy the citizenship of Rome: and we have converted in a wonderful manner the mode in which persons became Latins, with some additions, into modes of attaining Roman citizenship.

TITLE VIII

OF THE ASSIGNMENT OF FREEDMEN

Before we leave the subject of succession to freedmen, we should observe a resolution of the Senate, to the effect that, though the property of freedmen belongs in equal portions to all the patron's children who are in the same degree, it shall yet be lawful for a parent to assign a freedman to one of his children, so that after his own death the assignee shall be considered his sole patron, and the other children who, had it not been for such assignment, would be admitted equally with him, shall have no claim to the succession whatever: though they recover their original rights if the assignee dies without issue. **1**. It is lawful to assign freedwomen as well as freedmen, and to daughters and granddaughters no less than to sons and grandsons. **2**. And the power of assignment is conferred on all who have two or more children in their power, and enables them to assign a freedman or freedwoman to such children while so subject to them. Accordingly the question arose, whether the assignment becomes void, if the parent subsequently emancipates the assignee? And the affirmative opinion, which was held by Julian and many others, has

now become settled law. **3**. It is immaterial whether the assignment is made in a testament or not, and indeed patrons are enabled to exercise this power in any terms whatsoever, as is provided by the senatusconsult passed in the time of Claudius, when Suillus Rufus and Ostorius Scapula were consuls.

TITLE IX

OF POSSESSION OF GOODS

The law as to the possession of goods was introduced by the praetor by way of amending the older system, and this not only in intestate succession, as has been described, but also in cases where deceased persons have made a will. For instance, although the posthumous child of a stranger, if instituted heir, could not by the civil law enter upon the inheritance, because his institution would be invalid, he could with the assistance of the praetor be made possessor of the goods by the praetorian law. Such a one can now, however, by our constitution be lawfully instituted, as being no longer unrecognized by the civil law. **1**. Sometimes, however, the praetor promises the possession of goods rather in confirmation of the older law than for the purpose of correcting or impugning it; as, for instance, when he gives possession in accordance with a duly executed will to those who have been instituted heirs therein. Again, he calls family heirs and agnates to the possession of goods on an intestacy; and yet, even putting aside the possession of goods, the inheritance belongs to them already by the civil law. **2**. Those whom the a praetor calls to a succession do not become heirs in the eye of law, for the praetor cannot make an heir, because persons become heirs by a statute only, or some similar ordinance such as a senatusconsult or an imperial constitution: but as the praetor gives them the possession of goods they become quasi heirs, and are called ‘possessors of goods’. And several additional grades of grantees of possession were recognized by the praetor in his anxiety that no one might die without a successor; the right of entering upon an inheritance, which had been confined by the statute of the Twelve Tables within very narrow limits, having been conferred more extensively by him in the spirit of justice and equity. **3**. The following are the kinds of testamentary possession of goods. First, the so-called ‘contratabular’ possession, given to children who are merely passed over in the will. Second, that which the praetor promises to all duly instituted heirs, and which is for that reason called ‘*secundum tabulas*’. Then, having spoken of wills, the praetor passes on to cases of intestacy, in which, firstly, he gives the possession of goods which is called *unde liberi* to family heirs and those who in his Edict are ranked as such. Failing these, he gives it, secondly, to successors having a statutory title: thirdly, to the ten persons whom he preferred to the manumitter of a free person, if a stranger in relation to the latter, namely the latter’s father and mother, grandparents paternal and maternal, children, grandchildren by daughters as well as by sons, and brothers and sisters whether of the whole or of the half blood only. The fourth degree of possession is that given to the nearest cognates; the fifth is that called *tum quam ex familia*: the sixth, that given to the patron and patroness, their children and parents: the seventh, that given to the husband or wife of the deceased; the eighth, that given to the cognates of the manumitter. **4**. Such was the system established by the praetorian jurisdiction. We, however, who have been careful to pass over nothing, but correct all defects by our constitutions, have retained, as necessary, the possession of goods called *contra tabulas* and *secundum tabulas*, and also the kinds of possession upon intestacy known as *unde liberi* and *unde legitimi*. **5**. The possession, however, which in the praetor’s Edict occupied the fifth place, and was called *unde decem personae* we have with benevolent intentions and with a short treatment shown to be superfluous. Its effect was to prefer to the extraneous manumitter the ten persons specified above; but our constitution, which we have made concerning the emancipation of children, has in all cases made the parent implicitly the manumitter, as previously under a fiduciary contract, and has attached this privilege to every such manumission, so as to render superfluous the aforesaid kind of possession of goods. We have therefore removed it, and put in its place the possession which the praetor promises to the nearest cognates, and which we have thus made the fifth kind instead of the sixth. **6**. The possession of goods which formerly stood seventh in the list, which was called *tum quam ex familia*, and that which stood eighth, namely, the possession entitled *unde liberi patroni palronaeque et parentes eorum*, we have altogether suppressed by our constitution respecting the rights of patrons. For, having assimilated the succession to freedmen to the succession to freeborn persons, with this sole exception—in order to preserve some difference between the two classes—that no one has any title to the former who is related more distantly than the fifth degree, we have left them sufficient remedies in the ‘contratabular’ possession, and in those called *unde legitimi* and *unde cognati*, wherewith to vindicate their rights, so that thus all the subtleties and inextricable confusion of these two kinds of possession of goods have been abolished. **7**. We have preserved in full force another possession of goods, which is called *unde vir et uxor*, and which occupied the ninth place in

the old classification, and have given it a higher place, namely, the sixth. The tenth kind, which was called *unde cognati manumissoris*, we have very properly abolished for reasons which have been already stated: thus leaving in full operation only six ordinary kinds of possession of goods. **8**. The seventh, which follows them, was introduced with most excellent reason by the praetors, whose Edict finally promised the possession of goods to those persons expressly entitled to it by any statute, senatusconsult, or imperial constitution; but this was not permanently incorporated by the praetor with either the intestate or the testamentary kinds of possession, but was accorded by him, as circumstances demanded, as an extreme and extraordinary remedy to those persons who claim, either under a will or on an intestacy, under statutes, senatusconsults, or the more recent legislation of the emperors. **9**. The praetor, having thus introduced many kinds of successions, and arranged them in a system, fixed a definite time within which the possession of goods must be applied for, as there are often several persons entitled in the same kind of succession, though related in different degrees to the deceased, in order to save the creditors of the estate from delay in their suits, and to provide them with a proper defendant to sue; and with the object also of making it less easy for them to obtain possession of the property of the deceased, as in bankruptcy, wherein they consulted their own advantage only. He allowed to children and parents, adoptive no less than natural, an interval of a year, and to all other persons one hundred days, within which to make the application. **10**. If a person entitled does not apply for the possession of goods within the time specified, his portion goes by accrual to those in the same degree or class with himself: or, if there be none, the praetor promises by his successory edict the possession to those in the next degree, exactly as if the person in the preceding one were non-existent. If any one refuses the possession of goods which he has the opportunity of accepting, it is not usual to wait until the aforesaid interval, within which possession must be applied for, has elapsed, but the next degree is admitted immediately under the same edict. **11**. In reckoning the interval, only those days are considered upon which the persons entitled could have made application. **12**. Earlier emperors, however, have judiciously provided that no one need trouble himself expressly to apply for the possession of goods, but that, if he shall within the prescribed time in any manner have signified his intention to accept, he shall have the full benefit of such tacit acceptance.

TITLE X

OF ACQUISITION BY ADROGATION

There is another kind of universal succession which owes its introduction neither to the statute of the Twelve Tables nor to the praetor's Edict, but to the law which is based upon custom and consent. **1**. When an independent person gives himself in adrogation, all his property, corporeal and incorporeal, and all debts due to him formerly passed in full ownership to the adrogator, except such rights as are extinguished by loss of status, for instance, bounden services of freedmen and rights of agnation. Use and usufruct, though formerly enumerated among such rights, have now been saved by our constitution from extinction by the least loss of status. **2**. But we have now confined acquisition by adrogation within the same limits as acquisition through their children by natural parents; that is to say, adoptive as well as natural parents acquire no greater right in property which comes to children in their power from any extraneous source than a mere usufruct; the ownership is vested in the children themselves. But if a son who has been adrogated dies in his adoptive family, the whole of his property vests in the adrogator, failing those persons who, under our constitution, are preferred to the father in succession to property which is not acquired immediately from him. **3**. Conversely, the adrogator is not, by strict law, suable for the debts of his adoptive son, but an action may be brought against him as his representative; and if he declines to defend the latter, the creditors are allowed, by an order of the magistrates having jurisdiction in such cases, to take possession of the property of which the usufruct as well as the ownership would have belonged to the son, had he not subjected himself to the power of another, and to dispose of it in the mode prescribed by law.

TITLE XI

OF THE ADJUDICATION OF A DECEASED PERSON'S ESTATE TO PRESERVE GIFTS OF LIBERTY

A new form of succession was added by a constitution of the Emperor Marcus, which provided that if slaves, who have received a bequest of liberty from their master in a will under-which no heir takes, wish to have his property adjudged to them, in order that effect may be given to the gift of freedom, their application shall be entertained. **1**. Such is the substance of a rescript addressed by the Emperor Marcus to Popilius Rufus, which runs as follows: 'If there is no successor to take on the intestacy of Virginius Valens, who by his will has conferred freedom on certain of his slaves, and if, consequently, his property

is in danger of being sold, the magistrate who has cognizance of such matters shall on application entertain your desire to have the property adjudged to you, in order to give effect to the bequests of liberty, direct and fiduciary, provided you give proper security to the creditors for payment of their claims in full. Slaves to whom liberty has been directly bequeathed shall become free exactly as if the inheritance had been actually accepted, and those whom the heir was requested to manumit shall obtain their liberty from you; provided that if you will have the property adjudged to you only upon the condition, that even the slaves who have received a direct bequest of liberty shall become your freedmen, and if they, whose status is now in question, agree to this, we are ready to authorize compliance with your wishes. And lest the benefit afforded by this our rescript be rendered ineffectual in another way, by the Treasury laying claim to the property, be it hereby known to those engaged in our service that the cause of liberty is to be preferred to pecuniary advantage, and that they must so effect such seizures as to preserve the freedom of those who could have obtained it had the inheritance been accepted under the will.' **2**. This rescript was a benefit not only to slaves thus liberated, but also to the deceased testators themselves, by saving their property from being seized and sold by their creditors; for it is certain that such seizure and:sale cannot take place if the property has been adjudged on this account, because some one has come forward to defend the deceased, and a satisfactory defender too, who gives the creditors full security for payment. **3**. Primarily, the rescript is applicable only where freedom is conferred by a will. How then will the case stand, if a man who dies intestate makes gifts of freedom by codicils, and on the intestacy no one accepts the inheritance? We answer, that the boon conferred by the constitution ought not here to be refused. No one can doubt that liberty given, in codicils, by a man who dies having made a will, is effectual. **4**. The terms of the constitution show that it comes into application when there is no successor on an intestacy; accordingly, it is of no use so long as it is uncertain whether there will be one or not; but, when this has been determined in the negative, it at once becomes applicable. **5**. Again, it may be asked whether, if a person who abstains from accepting an inheritance can claim a judicial restoration of rights, the constitution can still be applied, and the goods adjudged under it? And what, if such person obtains a restoration after they have been actually adjudged in order to give effect to the bequest of freedom? We reply that gifts of liberty to which effect has once been given cannot possibly be recalled. **6**. The object with which this constitution was enacted was to give effect to bequests of liberty and accordingly it is quite inapplicable where no such bequests are made. Supposing, however, that a man manumits certain slaves in his lifetime, or in contemplation of death, and, in order to prevent any questions arising whether the creditors have thereby been defrauded, the slaves are desirous of having the property adjudged to them, should this be permitted? and we are inclined to say that it should, though the point is not covered by the terms of the constitution. **7**. Perceiving, however, that the enactment was wanting in many minute points of this kind, we have ourselves issued a very full constitution, in which have been collected many conceivable cases by which the law relating to this kind of succession has been completed, and with which any one can become acquainted by reading the constitution itself.

TITLE XII

OF UNIVERSAL SUCCESSIONS, NOW OBSOLETE, IN SALE OF GOODS UPON BANKRUPTCY, AND UNDER THE SC. CLAUDIANUM

There were other kinds of universal succession in existence prior to that last before mentioned; for instance, the 'purchase of goods' which was introduced with many prolixities of form for the sale of insolvent debtors' estates, and which remained in use under the so-called 'ordinary' system of procedure. Later generations adopted the 'extraordinary' procedure, and accordingly sales of goods became obsolete along with the ordinary procedure of which they were a part. Creditors are now allowed to take possession of their debtor's property only by the order of a judge, and to dispose of it as to them seems most advantageous; all of which will appear more perfectly from the larger books of the Digest. **1**. There was too a miserable form of universal acquisition under the SC. Claudianum, when a free woman, through indulgence of her passion for a slave, lost her freedom by the senatusconsult, and with her freedom her property. But this enactment we deemed unworthy of our times, and have ordered its abolition in our Empire, nor allowed it to be inserted in our Digest.

TITLE XIII

OF OBLIGATIONS

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. **1**. The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at

"natural" modes of acquisition–JI.2.1.11					
occupatio–§§12–19	alluvio avulsio–§§20–24	specificatio confusio accessio–§§25–43	fruits–§§35–38	treasure–§39	traditio–§§40–48

res corporales vs.	res incorporales–JI.2.2.2		
	servitutes–§3	usufructus–§4	usus et habitatio–§5

acquisition of *res singulae*–alienation by those in *tutela*–GI.2.80–85 –acquisition by others–GI.2.86–96						
iure civili–usucapio–§§40–61 –capacity–§§62–64		vs.	iure naturali		
res corporales–§§19–27	res incorporales		occupatio–§§66–69	alluvio accessio–§§70–78	specificatio–§79
	servitutes usus fructus–§§28–33	hereditas–§§34–37	obligationes –§§38–39		

acquisition of things *per universitatem*–2.97–9			
si qui heredes facti sumus (hereditas)	bonorum possessio–scattered	bonorum emptio–3.77–81	adoptio, conventio in manum, [in iure cessio]–3.81–87
1. ex testamento –2.100–190	**2.** [legacies and *fideicommissa*] –2.191–289	**3.** ab intestato –3.1–76	

1. ex testamento–2.100–190		
form and capacity–2.101–13	requirements for validity–2.114–51a	heirs–2.152–90

1.a. forms of *testamentum*–2.101–11		
calatis comitiis–§101	in procinctu–§101	per aes et libram–§§102–4
restrictions on witnesses–§§105–8 soldiers' wills–§§105–8		

b. fragment concerning women's wills (the whole § may have dealt with capacity)–§§112–13
c. requirements for validity: *testamenti factio* and *secundum regulam iuris civilis*–§§114–46

initial requirements

heredis institutio–§§116–17	auctoritas tutoris–§§118–23 [with excursus on *bonorum possessio secundum tabulas*]	exheredatio–§§123–9

subsequent requirements		
postumi	subsequent will–§144	capitis deminutio–§§145–6
agnatio–§§130–7	quasi agnatio–§§138–43	

d. bonorum possessio cum re–§§147–51a

e. heredes–§§152		
necessarii–§§153–5	sui et necessarii–§§156–60	extranei *and* cretio–§§161–73

f. substitutio	
vulgaris–§§174–8	pupilaris–§§179–84

g. institution of slaves–§§185–90

2. legacies and *fideicommissa*–2.191–289

a. legacies			
vindication–§§193–200	damnation–§§201–8	permission–§§209–15	preception–§§216–23
ll. Furia (c. 200 B.C.), Voconia (169 B.C.), Falcidia (40 B.C.), Fufia Canina (2 B.C.)–lawyers' legal history–§§224–28			

void legacies				
ante heredis institutionem –§§229–31	post mortem heredis –§§223–4	poenae nomine –§§209–15	incertae personae –§§216–23	his qui in potestate sunt –§§216–23

b. fideicommissa		
of *hereditas*–§§247–59	of *res singulae*–§§260–2	of *libertas*–§§263–7
differences between *fideicommissa* and legacies–note parallels to the development of the use–§§268–89		

3. succession *ab intestato*–3.1–76	
a. ab ingenuis–§§1–38	**b.** a libertis–§§39–76

a. ab ingenuis					
[iure civili]			[iure honorario] bonorum possessio		
sui–§§1–9	agnati–§§9–16	gentiles–§17	emendandi *or* impugnandi iuris civilis–§§1–38	confrimandi iuris civilis–§§1–38	bonorum possessio sine re–§§1–38

b. a libertis–§39

cives–§54		Latini–§§55–72	cives tamquam Latini–§§72–3	dediticii–§§74–6
men–§§40–42	women–§§43–44			
descendants of patrons–§§45–48 descendants of patronesses–§§49–53				

other forms of acquisition *per universitatem*–3.77–87		
bonorum emptio–§§77–81	adoptio *and* conventio in manum–§§82–84	in iure cessio *of an* hereditas–§§185–7

Obligations–in general–§88	
ex contractu–3.88–181	ex delicto–3.182–225

acquisition of obligations *ex contractu*–§89							
re	verbis –§§92–127	litteris –§§128–34, 138	consensu–§§135–7				
mutuum–§§90–1			emptio venditio –§§102–4	locatio conductio –§§102–4	societas–§§102–4	mandatum–§§102–4	
acquisition of contractual obligations through others–§§163–67a							

extinction of obligations *ex contractu*				
solutio–§168	acceptilatio–§§169–72	per aes et libram–§§173–5	novatio–§§176–9	litis contestatio–§§180–1

acquisition of obligations *ex delicto*–§182			
furtum–§§183–208	vi bona rapta–§209	damnum iniuria datum–§§210–19	iniuria–§§220–5

JI.3.13 to JI.4.5

Obligations–in general–3.13, .28–9			
ex contractu–3.14–26	quasi ex contractu–3.27	ex delicto–4.1–4	quasi ex delicto–4.5

ex contractu									
re				verbis –3.15–20	litteris –3.21	consensu–§§135–7			
mutuum –3.14pr-1	commodatum –3.14.2	depositum –3.14.3	pignus –3.14.4			emptio venditio –3.23	locatio conductio –3.24	societas –3.25	mandatum –3.26
quasi-contract–*negotiorum gestio*–3.27									
acquistion of obligations through others–3.28									
discharge of obligations–3.29									