2.Gaius, *Institutes*, Book IV

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book IV, §§ 1–187, pp. [odd nos.] 233–305 [footnotes omitted]

BOOK IV

1. It remains to speak of actions. Now, to the question how many *genera* of actions there are the more correct answer appears to be that there are two, *in rem* and *in personam*. For those who have maintained that there are four, counting the *genera* of *sponsiones* (i.e. of actions *per sponsionem*?) have inadvertently classed as *genera* certain *species* of actions. **2.** An action *in personam* is one in which we proceed against someone who is under contractual or delictual obligation to us, an action, that is, in which we claim 'that he ought to convey, do, or answer for' something. **3.** An action *in rem* is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right, such as that of use or usufruct, of foot- or carriage-way, of aqueduct, or raising a building or of view. On the other hand, an action (*in rem*) denying such rights is open to our opponent. **4.** Having thus distinguished actions we see that we cannot sue another for a thing belonging to us using the form of claim 'if it appears that the defendant ought to convey (*dare*)'. For what is ours cannot be conveyed (*dari*) to us, since obviously *dari* means the giving of a thing to us with the effect of making it ours; but a thing which is already ours cannot be made more so. It is true that out of hatred of thieves, in order to multiply the actions in which they are liable, it has become accepted that, in addition to the penalty of double or quadruple, that are liable also in action for the recovery of the thing in the form 'if it appears that they ought to convey', notwithstanding that the action claiming ownership of the thing lies against them as well. **5.** Actions *in rem* are called vindications; actions *in personam*, claiming that there is a duty to convey or do, are called condictions.

6. We sue in some cases in order to obtain only our right, in others in order to obtain only a penalty, and in others in order to obtain both the one and the other. **7.** We sue only for our right in, for example, actions founded on contract. **8.** We sue only for a penalty in, for example, actions of theft and outrage and, in the opinion of some, in the action of robbery with violence; for we are entitled to both a vindication and a condiction in respect of our property. **9.** We sue for our right and a penalty together in, for example, those cases in which we sue for double against a defendant who denies liability; this occurs in an action on a judgment debt, an *actio depensi* (by a *sponsor* against his principal), an action under the *L. Aquilia* for wrongful damage, and an action for a legacy of a definite amount left by damnation.

10. Furthermore, there are some actions that are framed on (the fiction of?) a *legis actio*, and others that stand by their own force and efficacy. To explain this we must begin by speaking of the *legis actiones*.

11. The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were nor yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word 'vines', had lost his claim, because he ought to have said 'trees', seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general. **12.** Procedure by *legis actio* was in five forms: *sacramentum*, *iudicis postulatio*, *condictio*, *manus iniectio* and *pignoris capio*.

13. Procedure by *sacramentum* was of general application: one proceeded by it in any cases for which another procedure had not been prescribed by statute. It involved, for parties found guilty of falsehood, the same sort of risk as is involved at the present day by the *actio certae creditae pecuniae* owing to the *sponsio* which the defendant risks, in case he is denying the debt rashly, and to the counter-*stipulatio* which the plaintiff risks, in case he is suing for what is not due. For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury, sureties for it being given to the praetor, instead of going into the pocket of the successful party, as the penalty of the *sponsio* or the counter-stipulatio now does. **14.** The penal sum of the *sacramentum* was either 500 or 50 *asses*: concerning matters worth 1,000 *asses* or more one proceeded by a *sacramentum* of 500 *asses*, but concerning matters of lower value by a *sacramentum* of 50 *asses*. For so the law of the Twelve Tables had provided. But where the dispute was as to a man's freedom, it was provided by the same law that the contest should be with a *sacramentum* of 50 *asses*, however great the value of the man might be, obviously in order to favour freedom by not burdening assertors of freedom.

15. . . .[1] should come to receive a *iudex*; on their subsequent reappearance a *iudex* was appointed. That he was appointed on the thirtieth day was due to the *L. Pinaria*; but before that statute he was appointed at once. As we know from what has already been said, if the action concerned a matter of less value than 1,000 *asses*, proceedings were by *sacramentum* of 50, not 500 *asses*. After the appointment of the *iudex* the parties gave each other notice to appear before him on the next day but one. Then, on their appearance before him, previously to arguing their case in detail, they stated it to him in summary outline; this was called *causae coniectio*, as being a gathering up of their case into an epitome.

16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing—let us say a slave—said: 'I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him', and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. Both parties having thus laid claim, the praetor said: 'Unhand the man, both of you.' They did so. The first claimant then put the following question to the other: 'I ask, will you declare on what title you have laid claim?' and he answered: 'By laying on my staff I have exercised my right.' Thereupon the first claimant said: 'Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.' And his opponent likewise said: 'And I you.' (Of course, if the thing was worth less than 1,000 *asses* they named a *sacramentum* of 50 *asses*.) Next followed the same proceedings as in an action *in personam*. Thereafter the praetor declared *uindiciae* in favour of one of the parties, that is, he established him as interim possessor, and ordered him to give his opponent sureties *litis et unidiciarum*, that is, for the thing and its profits. Other sureties were taken from both parties for the *sacramentum* by the praetor himself, because this went to the public treasury. The rod was employed to represent a spear, the symbol of lawful ownership, because they considered things they had captured from the enemy to be preeminently theirs by lawful ownership; and this is why in centumviral cases a spear is displayed. **17.** If the thing was such as could not be carried or led into court without inconvenience—for example, if it was a column or a ship or a flock or herd—some part was taken from it and brought into court, and claim was laid on that part as representing the whole thing. Thus from a flock a single sheep or goat would be led into court or just a hair was detached and brought in, while from a ship or a column some bit would be broken off. Similarly, if the dispute was over land or a house or an inheritance, some part of it was taken and brought to court, and claim was made on this part as representing the whole: thus a clod would be taken from the land or a tile from the house, or, where the dispute was as to an inheritance, some article was similarly taken from it. . . .[2]

17a. One proceeded by *iudicis postulatio* in any case in which statute had authorized such procedure: thus the law of the Twelve Tables authorized it in a claim arising out of a stipulation. The procedure was somewhat as follows. The plaintiff said: 'I affirm that under a *sponsio* you ought to pay me 10,000 sesterces. I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I ask you, Praetor, to grant a *iudex* or *arbiter*.' Thus in this kind of action one denied without penalty. The same law authorized procedure by *iudicis postulatio* likewise in suits for the partition of an inheritance between coheirs. The *L. Licinnia* did the same in suits for the partition of any common property. Thus, after the declaration of the cause of action, an *arbiter* was at once demanded.

17b. One proceeded by *condictio* as follows: 'I affirm that you ought to pay me 10,000 sesterces: I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I give you notice (*condico*) to appear on the thirtieth day in order to take a *iudex*.' Thereafter they had to appear on the thirtieth day in order to take a *iudex*. **18.** *Condicere* (the word used by the plaintiff), in primitive language, means to give notice. Thus this action was properly called *condictio*; for the plaintiff gave notice to his opponent to appear on the thirtieth day in order to receive a *iudex*. But in modern terminology a condiction is an action *in personam* in which we claim that something ought to be conveyed to us—an improper usage, since nowadays no such notice is given. **19.** This *legis actio* was established by the *L. Silia* and the *L. Calpurnia*, by the former when the debt claimed was of a definite sum of money, by the latter when of any definite thing. **20.** But there is much question why this action was needed, seeing that it was possible to proceed either by *sacramentum* or by *iudicis postulatio* on a claim for something to be conveyed to one.

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[1] One page is virtually illegible. It probably contained a fuller account of the *actio in personam*.

[2] Our mss. here are deficient; neither gives an account of the end of the *sacramentum* procedure.

21. One proceeded by *manus iniectio* likewise in those cases in which such procedure was prescribed by some statute, for example, under the law of the Twelve Tables for a judgment debt. The proceedings were as follows: the plaintiff. spoke thus: 'Whereas you are indebted to me by judgment' (or 'by damnation') 'in 10,000 sesterces, seeing that you have not paid, on that account I lay my hand on you for 10,000 sesterces of judgment debt'; and at the same time he laid hold of some part of the debtor's body. The judgment debtor was not allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf, but gave a *uindex* who conducted it for him. One who did not give a *uindex* was led off by. the plaintiff to his house and put in fetters. **22.** Various subsequent statutes granted *manus iniectio* as for a judgment debt on a number of other grounds against certain persons. Thus, the *L. Publilia* granted it against one on whose behalf his *sponsor* had paid, if he had not repaid the *sponsor* within the next 6 months. Again, the *L. Furia de sponsu* granted it against a creditor who had exacted from a *sponsor* more than his rateable part of the debt. And, in short, numerous other statutes authorized this procedure on many accounts. **23.** Other statutes, however, set up procedure by *manus iniectio* on various accounts, but in the form called *pura*, that is to say not as for a judgment debt. For example, the *L. Furia testamentaria* authorized it against one who had taken by way of legacy or gift *mortis causa* more than 1,000 asses, he not being privileged by that statute to take more; and again, the *L. Marcia* against usurers provided that if they had exacted interest, proceedings by *manus iniectio* for repayment should lie against them. **24.** In proceedings under these last-mentioned statutes and any like them the defendant was allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf. For in his formal claim the plaintiff did not use the phrase 'as for a judgment debt', but after stating his cause of action said: 'on that account I lay my hand on you', whereas a plaintiff permitted to proceed by *manus iniectio* as for a judgment debt, after naming his cause of action, concluded thus: 'on that account I lay my hand on you as for a judgment debt.' I am aware that in the scheme of claim under the *L. Furia testamentaria* the phrase 'as for a judgment debt' is inserted, though it is not in the statute itself; the insertion appears to be unwarranted. **25.** But later, by the *L. Vallia*, all persons subjected to *manus iniectio*, except judgment debtors and those on whose behalf their *sponsor* had paid, were allowed to throw off the hand themselves and to conduct the action on their own behalf. Thus even after the *L. Vallia* a judgment debtor and one on whose behalf his *sponsor* had paid were bound to give a *uindex*; in default of doing so they were led off to the creditor's house. And, so long as the *legis actiones* were in use, these rules continued to be observed, which is why at the present day a party sued upon a judgment debt or on account of payment by his *sponsor* is obliged to give security for the satisfaction of the judgment: (which may be given against him).

26. *Legis actio* by *pignoris capio* rested in some cases on custom, in others on statute. **27.** By custom it was established in the military sphere: For a soldier was allowed to distrain for his pay on the person responsible for paying it, if he defaulted; money given to a soldier by way of pay was called *aes militare*. He might also distrain for money assigned for the buying of his horse, this being called *aes equestre*; likewise for money assigned for buying barley for the horses, this being called *aes hordiarium*. **28.** By statute it was established, for instance, by the law of the Twelve Tables against one who had bought a sacrificial victim, but failed to pay for it; likewise against one who failed to pay the reward for a beast of burden which another had hired to him in order to raise money for a sacrificial feast. Again, by the censorial conditions farmers of public taxes of the Roman people were allowed to distrain upon anyone who owed taxes under some statute. **29.** In all these cases the levy of distress was accompanied by a set form of words, and for this reason it was generally held that *pignoris capio* was a further *legis actio*; some, however, held that it was not, first because the seizure was performed outside court, that is, not before the praetor, and usually when the other party was absent, whereas it was not possible to perform the other *legis actiones* except before the praetor and in the presence of the other party; and further because *pignoris capio* could be performed on a *dies nefastus*, that is, on a day on which a *legis actio* was not allowed.

30. But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *L. Aebutia* and the two *Ll. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established. **31.** In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court. But though, when one is going before the centumvirs, a *legis actio* by *sacramentum* is previously enacted before the urban or the peregrine praetor, one never wishes to proceed by *legis actio* for *damnum infectum*, but

prefers to bind the other party by the stipulation published in the Edict, this being a more convenient and a fuller remedy. By *pignoris capio* . . . .[3]

32. (On the other hand?) in the scheme laid down for a taxfarmer there is a fiction to the effect that the debtor be condemned in the sum for which in former times, where distress had been levied, the person distrained upon would have had to redeem.

33. But no *formula* is framed on the fiction of a *condictio* having taken place. For when we claim a sum of money or some other thing as owing to us, we simply declare that it ought to be conveyed to us and add no fiction of a *condictio*. This implies that *formulae* in which we declare that a sum of money or some other thing is owing to us stand on their own strength and efficacy. The *actiones commodati*, *fiduciae*, *negotiorum gestorum*, and innumerable others are of the same character.

34. Further, in certain *formulae* we find fictions of another kind, as where one who has applied for *bonorum possessio* under the Edict sues with the fiction that he is heir. For as he succeeds to the deceased by praetorian, not civil law, he has no straightforward actions, and cannot claim either that what belonged to the deceased is his or that what was due to the deceased ought to be paid to him. His statement of claim, therefore, contains the fiction that he is heir, as thus: 'Be *X iudex*. If, supposing that Aulus Agerius' (i.e. the plaintiff) 'were heir to Lucius Titius, the land, the subject of this action, would be his by Quiritary right.' Similarly, in a suit for a debt, first comes the same fiction and then: 'if on that supposition it appears that Numerius Negidius ought to pay Aulus Agerius 10,000 sesterces.' **35.** In the same way a *bonorum emptor* also sues with the fiction that he is heir; sometimes, however, he sues in another form; that is to say, he frames the claim in the name of the person whose estate he has bought, but transfers the *condemnatio* into his own name, demanding that the defendant be condemned to himself in what belonged or was owed to the insolvent. 'This latter form of action is called *Rutiliana*, having been devised by the praetor Publius Rutilius, who also is said to have introduced *bonorum uenditio*. The previously mentioned form of action, in which the *bonorum emptor* sues with the fiction that he is heir, is called *Seruiana*. **36.** In the action called *Publiciana* there is a fiction of usucapion. This action is granted to one who has been delivered a thing on lawful title, but has not yet completed usucapion of it, and who, having lost possession, sues for it. Since he cannot claim that it is his by Quiritary right, he is feigned to have completed the period of usucapion, and so claims as though he had become its owner by Quiritary right, as thus: 'Be *X iudex*. If, supposing that Aulus Agerius had possessed for a year the slave bought by and delivered to him, that slave, the subject of this action, would be his by Quiritary right', &c. **37.** Again, if a peregrine sues or is sued on a cause for which an action has been established by our statutes, there is a fiction that he is a Roman citizen, provided that it is equitable that the action should be extended to a peregrine, for example, if a peregrine sues or is sued by the *actio furti*. Thus if he is being sued by that action, the *formula* is framed as follows: 'Be *X iudex*. If it appears that a golden cup has been stolen from Lucius Titius by Dio the son of Hermaeus or by his aid and counsel, on which account, if he were a Roman citizen, he would be bound to compound for the wrong as a thief,' &c. Likewise if a peregrine is plaintiff in the *actio furti*, Roman citizenship is fictitiously attributed to him. Similarly an action with the fiction of Roman citizenship is granted if a peregrine sues or is sued for wrongful damage under the *L. Aquilia*. **38.** And again, in some cases we sue with the fiction that our opponent has not undergone a *capitis deminutio*. For if our opponent, being contractually bound to us, has undergone a *capitis deminuto*—a woman by *coemptio*; a male by adrogation—he or she ceases to be our debtor at civil law, and we cannot make a straightforward claim that he or she ought to convey to us. But, in order that it may not be in his or her power to destroy our right, a *utilis actio*, with rescission of the *capitis deminutio*, has been introduced against him or her, that is, an action in which the *capitis deminutio* is feigned not to have taken place.

39. The following are the parts or clauses of *formulae*: *demonstratio*, *intentio*, *adiudicatio*, *condemnatio*. **40.** A *demonstratio* is the part of a *formula* which is placed at the beginning, in order to make known the subject-matter of the action. Here is an example: 'Whereas Aulus Agerius sold the slave to Numerius Negidius', or 'Whereas Aulus Agerius deposited the slave with Numerius Negidius'. **41.** An *intentio* is the part of a *formula* in which the plaintiff defines what he claims, for example the clause: 'if it appears that Numerius Negidius ought to pay Aulus Agerius 10,000 sesterces', or again: 'whatever it appears that Numerius Negidius ought to pay to or do for Aulus Agerius', or again: 'if it appears that the

[3] A whole page is illegible. It probably dealt with the *formulae quae ad legis actionem exprimuntur*. Cf. GI.4.10.

slave belongs to Aulus Agerius by Quiritary right'. **42.** An *adiudicatio* is the part of a *formula* empowering the *iudex* to assign property to one among the litigants, as where the action is for the division of an inheritance between coheirs, or of partition between co-owners, or for the determination of boundaries between neighbours. Here we find the clause: 'let the *iudex* assign to Titius so much as ought to be assigned.' **43.** A *condemnatio* is the part of a *formula* empowering the *iudex* to condemn or absolve the defendant, for example the *formula*ry clause: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in 10,000 sesterces. If it does not appear, absolve', or this one: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in a sum not exceeding 10,000 sesterces. If it does not appear, absolve', or again this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius', &c., without the addition of the words 'not exceeding 10,000'. **44.** These clauses are not, however, found all together in one and the same *formula*, but some are present and others not. An *intentio* indeed is sometimes found by itself; so in prejudicial *formulae*' such as that raising the question whether a man is a freedman or what is the amount of a *dos*, and various others. But neither *demonstratio* nor *adiudicatio* nor *condemnatio* is ever found by itself; for a *demonstratio* without an *intentio* or a *condemnatio* is quite ineffectual, and equally a *condemnatio* without a *demonstratio* or an *intentio*, or an *adiudicatio* without a *demonstratio*; hence these clauses are never found by themselves.

45. *Formulae* raising a question of law are described as framed *in ius*. Examples are *formulae* with *intentio* to the effect that something belongs to us by Quiritary right, or that something ought to be conveyed to us, or that the defendant ought to compound for the wrong as a thief. Further examples could be given of *formulae* with *intentio* of civil law. **46.** But other *formulae* are described as framed *in factum*, those namely in which there is no *intentio* framed in the above manner, but in which, after an initial statement of what has happened, words are added empowering the *iudex* to condemn or absolve. An example is the *formula* employed by a patron against a freedman who has summoned him to court in contravention of the praetor's Edict, where we find: '*XYZ* be *recuperatores*. If it appears that such and such a patron has been summoned to court by such and such a freedman in contravention of the Edict of such and such a praetor, do ye, *recuperatores*, condemn the said freedman to the said patron in 10,000 sesterces. If it does not appear, absolve.' The other *formulae* which appear in the edictal title *De in ius uocando* are likewise framed *in factum*, for instance that against one who, having been summoned to court, has neither appeared nor given a *uindex*, and that against one who has forcibly rescued another who was being summoned to court; in short, countless other *formulae* of this kind are published in the Edict. **47.** But for certain cases the praetor publishes both a *formula* framed *in ius* and a *formula* framed *in factum*, for example, for *depositum* and *commodatum*. Thus the following *formula* is framed *in ius*: '*X* be *iudex*. Whereas Aulus Agerius deposited with Numerius Negidius the silver table which is the subject of this action, in whatever Numerius Negidius ought on that account in good faith to give to or do for Aulus Agerius, in that do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius. If it does not appear, absolve.' On the other hand, the following *formula* is framed *in factum*: '*X* be *iudex*. If it appears that Aulus Agerius deposited the silver table with Numerius Negidius and that by the fraud of Numerius Negidius it has not been returned to Aulus Agerius, do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in as much money as the thing shall be worth. If it does not appear, absolve.' The *formulae* on *commodatum* are similar.

48. The *condemnatio*, in all *formulae* containing one, is framed in terms of valuation in money. Accordingly, even where the suit is for a corporeal thing, such as land; a slave, a garment, gold, or silver, the *iudex*, condemns the defendant not in the actual thing, as was the practice in early days, but in the amount of money at which he values it. **49.** The *condemnatio* in a *formula* may be in terms of a definite or of an indefinite sum of money. **50.** A definite sum is named in, for instance, the *formula* by which a sum certain is claimed. There, at the end of the *formula*; we find this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in 10,000 sesterces. If it does not appear, absolve.' **51.** By a *condemnatio* naming an indefinite sum either of two things is meant. One such clause sets a preliminary limitation on the amount, commonly called a *taxatio*, as where what is claimed is unliquidated. There, at the end of the *formula*, we find this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in not more than 10,000 sesterces. If it does not appear, absolve.' Or the amount may be both uncertain and unlimited, as where one claims property from a possessor of it, that is, when one sues by action *in rem* or by action *ad exhibendum* (for production). There we find this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in as much money as the thing shall be worth. If it does not appear, absolve.' But, when all is said, the *iudex*, if he condemns, is bound to condemn in a definite sum of money, even though a definite

sum is not named by the clause of *condemnatio*. **52.** But the *iudex* must see to it that, where the *condemnatio* names a definite sum, he condemns in neither more nor less than the sum named; otherwise he becomes liable himself. He must also see that, where there is a *taxatio*, he does not condemn in a higher sum than that named by it, else similarly he becomes liable himself, though he is free to condemn in a lower sum. . . .[4]

53. A plaintiff who overclaims in his *intentio* fails in his case, in fact loses his right; nor is he restored by the praetor to his original position, except in certain cases in which . . . .[5] **53a.** 'There is overclaim in four ways: in amount, time, place, and *causa* (nature of the claim). There is overclaim in amount where, for instance, the *intentio* demands 20,000 sesterces instead of the 10,000 that are due to the plaintiff, or where a co-owner pleads that the whole thing or too great a part belongs to him. **53b.** There is overclaim in time where suit is brought before the claim falls due. **53c.** There is overclaim in place where, for instance, the promise was of conveyance at a certain place and claim is made elsewhere without mention of that place, for example where one who has been promised by stipulation conveyance at Ephesus sues at Rome for conveyance without qualification . . . .[6] **53d.** There is overclaim *causa* where, for instance, a plaintiff in his *intentio* deprives his debtor of an option to which he is entitled under the obligation, as where one who has received by *sponsio* a promise of '10,000 sesterces or the slave Stichus' sues for one or other only of the alternatives. For even if he sues for the less valuable alternative, he is held to overclaim, because it may be that the defendant could more easily render the alternative not claimed. The same holds if on a *stipulatio* for goods described generically suit is brought for a special kind of such goods, for example, if on a *stipulatio* for purple in general suit is brought specifically for Tyrian purple; indeed, even if the variety claimed is the cheapest, the same rule holds, for the reason we have just given. It holds also where one who has been promised by *stipulatio* an unspecified slave sues for a specific slave, naming, say, Stichus, however little Stichus may be worth. In fact, the *intentio* should be framed in the very terms of the *stipulatio*.

54. It is clear without more that in *formulae* making unliquidated claims there cannot be overclaim, because where no definite amount is claimed, but whatever it appear that the defendant ought to convey or do', an excessive *intentio* is impossible. The same holds also where an action claiming ownership of an indeterminate part of a thing is allowed, for instance, 'such part of the land the subject of the action as appears to belong to the plaintiff'—a kind of action allowed only in very few cases. **55.** It is also obvious that a plaintiff whose *intentio* claims the wrong thing risks nothing, but can bring a fresh suit, because he is held not to have sued at all. Examples are a man suing for Eros when he ought to have sued for Stichus, or an *intentio* claiming some conveyance to be due under a will when really it was due under a *stipulatio*, or a *cognitor* or *procurator* claiming conveyance as due to himself. **56.** But though overclaim in the *intentio* is, as we have already said, hazardous, underclaim in the *intentio* is permitted; only one is not allowed to sue for the rest during the same praetor's term of office. For if one does, one is debarred by the exception called *exceptio litis diuiduae*.

57. On the other hand, overstatement in the *condemnatio* does not put the plaintiff in jeopardy; the defendant, however, since he has accepted an unjust *formula*, is restored to his original position, in order that the *condemnatio* may be reduced. But if there is understatement in the *condemnatio*, the plaintiff will get only the amount he stated; for though his whole right is brought to trial, it is confined within the limit set by the *condemnatio*, which limit the *iudex* is unable to overstep. Nor on a plaintiff's behalf does the praetor grant restoration of the original position; for he is readier to relieve defendants than plaintiffs. From this statement we except persons below 25; for to persons of such age he grants relief in any, matter in which they have made a false step.

58. If there is over- or understatement in the *demonstratio*, nothing is brought into the issue, and consequently the plaintiff's right is unimpaired; this is expressed by the saying that a right is not destroyed by an untrue *demonstratio*. **59.** Some, however, hold that understatement in the *demonstratio* is in order, so that if, for example, I have bought Stichus and Eros, the *demonstratio* 'whereas I bought the slave Eros of you' is deemed correct, and I may, if I choose, go on to sue in regard to Stichus by a second *formula*, it being true that a man who has bought two slaves has bought each of them; so held by Labeo in

[4] Two lines are illegible.

[5] Twelve to thirteen illegible letters.

[6] About one and a half illegible lines.

particular. But if a man who has bought only one slave sues in respect of two, his *demonstratio* is untrue. The same holds in other actions, such as the *actiones commodati* and *depositi* **60.** For our part, we find it laid down by certain writers that in the *actio depositi*, and generally in actions in which a defendant, if condemned, incurs infamy, a plaintiff who makes an overstatement in his *demonstratio* loses his claim, for example, if, having deposited only one thing, he states in his *demonstratio* that he deposited two or more, or if, having been struck with the fist in the face, he states in the *demonstratio* of his *actio iniuriarum* that he was struck in some other part of the body as well. Whether this is to be accepted as the better view we must seriously consider. Now, as noted above there are two *formulae depositi*, one framed in ius and the other in factum; and the *formula in ius* begins by indicating, in the manner of a *demonstratio* the matter in question, and goes on to make the resulting claim in law in the words 'whatever on that account the defendant ought to convey to or do for the plaintiff' whereas in the *formula in factum* the matter in question is otherwise indicated at the beginning of the *intentio*, in the words 'if it appears that the plaintiff deposited the thing in question with tine defendant'. Thus we may not doubt that a plaintiff, who in a *formula in factum* indicates that he deposited more things than he really did, loses his suit, because he is held to have made an overstatement in his *intentio*. . . .[7]

61. In *bonae fidei* actions the *iudex* appears to be allowed complete discretion in assessing, on the basis of justice and equity, how much ought to be made good to the plaintiff', and this involves that he may take into account any counter-obligation due from the plaintiff under the same transaction, and may condemn the defendant only in the difference. **62.** The *bonae fidei* actions are those on sale, hiring, unauthorized agency [*negotiorum gestio*], mandate, deposit, *fiducia*, partnership, tutorship, and wife's dowry. **63.** It is nevertheless open to the *iudex* (in such actions) to take no account of any counter-obligation, for this is not enjoined expressly by the *formula*, but is considered to be within his office as being consonant with a *bonae fidei* action. **64.** It is otherwise in the action used by bankers. For a banker is obliged to include *compensatio* or set-off in his claim, and this *compensatio* is expressly mentioned by the *formula*. In fact, from the outset a banker in his *intentio* takes *compensatio* into account and reduces the amount claimed. For example, if a banker owes Titius 10,000 sesterces and Titius owes him 20,000, the banker's *intentio* will run: 'if it appears that Titius ought to pay the plaintiff 10,000 sesterces more than the plaintiff owes Titius.' **65.** It is also the rule that a *bonorum emptor* must sue subject to *deductio*, which means that his opponent is to be condemned only in the amount remaining after deduction of what on his side the *bonorum emptor*, as representing the insolvent, owes him. **66.** Between *compensatio* against a banker and *deductio* against a *bonorum emptor* there is the following difference. In *compensatio* only things of the same kind and nature as those claimed are set off, for example, money against money, wheat against wheat, wine against wine; indeed, it is even held by some that not every kind of wine or wheat can be set off, but only wine or wheat of the same kind and quality as that claimed. In *deductio*, on the other hand, things of a different kind are set off. Thus, if a *bonorum emptor* suing for money owes on his side corn or wine, he claims only the amount remaining after the value of what he owes has been deducted. **67.** Again, in *deductio* even debts falling due in the future are brought into account, but in *compensatio* only those already due. **68.** Furthermore, account is taken of *compensatio* in the *intentio*, with the result that, if a banker's *intentio* claims a farthing too much after allowing for *compensatio*, he loses his case and consequently forfeits all claim. But of *deductio* account is taken in the *condemnatio* where excessive claim is not hazardous, at any rate when the plaintiff is a *bonorum emptor* for a *bonorum emptor*, even though suing for a definite sum of money, couches the *condemnatio* as for an uncertain amount.

69. Having previously mentioned the action whereby one proceeds against the *peculium* of sons in *potestas* and of slaves we must discuss more in detail this and the other actions which are granted in respect of such persons against their parents and masters. **70.** Firstly, where the transaction with the son or slave has been entered into with the authorization of the father or master, the praetor has provided an action enforcing, the full liability against the father or master; and this is right, because a party entering, into a transaction in such circumstances gives credit to the father or master rather than to the son or slave. **71.** On the same principle the praetor has provided two other actions, the *exercitoria* and the *institoria*. The *exercitoria* applies when the father or master has put his son or slave in charge of a ship, and there has been some transaction with the son or slave arising out of the business over which he has been put. For since in this case too the transaction appears to be effected in accordance with the father's or master's

[7] Two pages are illegible; the subject may have been the same as JI.4.6.36–8.

desire, it has been considered entirely equitable that an action enforcing full liability should be allowed. Furthermore, this praetorian action is allowed against one who has put even a stranger, whether slave or free, in charge of his ship. It is called *exercitoria* because the person to whom the current earnings of a ship go is called *the exercitor*. The *formula institoria* applies when a man has put his son or slave, or a stranger whether slave or free, in charge of a shop or other business, and some transaction arising out of the business over which he has been put has been entered into with that person. It is called *institoria* because a person put in charge of a shop is called the *institor*. This *formula* too enforces full liability. **72.** Besides these actions there has also been created against a father or master an *actio tributoria*, which applies when a son or slave, to the knowledge of his father or master, carries on business with capital belonging to his *peculium*. For in regard to transactions entered into in the course of that business the praetor lays down that the father or master shall distribute between himself if anything is due to him, and the other creditors proportionately any capital embarked in the business and profits therefrom; and, should the creditors complain that less than was right has been distributed to them, the praetor offers them the present action, called, as we have said, *tributoria*, for the deficiency. **72a.** The praetor has also established an *actio de peculio et de in rem uerso* (in respect of the *peculium* and of what has been applied to the uses of the father or master). For notwithstanding that the transaction in question has been entered into with the son or slave without the will or consent of his father or master, the praetor grants against the father or master an action which, in respect of anything resulting from the transaction that has been applied to the uses of the father or master, is for the full liability, and in respect of what has not been so applied is up to the limit of what the *peculium* allows. . . .[8] **73.** In ascertaining the amount of the *peculium* liabilities of the son or slave to the father or master or to a person in his *potestas* are first deducted, and only the balance is reckoned as *peculium*. Sometimes, however, there is no deduction of what is due from the son or slave to a person in the *potestas* of the father or master, for instance where the creditor is in the *peculium* of the son or slave. **74.** That one who has contracted on the authority of the father or master, or who is entitled to a *formula exercitoria* or *institoria*, may proceed by *actio de peculio* or *de in rem uerso*, is beyond doubt. But no one, having it in his power to recover with certainty in full by one of the first mentioned actions, will be so foolish as to put himself to the trouble of proving that the person with whom he contracted possesses *peculium* and that his claim can be satisfied out of it, or else that what he is claiming has been applied to the uses of the father or master. **74a.** He likewise who is entitled to an *actio tributoria* may proceed *de peculio* or *de in rem uerso*. But he on the contrary will often do better to use this action in preference to the *tributoria*. For in the *tributoria* account is taken only of *peculium* which forms the capital with which the son or slave trades or has been produced therefrom, whereas in the *actio de peculio* account is taken of the whole *peculium*, and a man may trade with only a third or a fourth or even a smaller part of his *peculium*, keeping the most of it in other things. Still more ought one who has contracted with a son or slave to prefer this action to the *tributoria* where it can be proved that what he gave the son or slave has been applied to the uses of the father or master; for, as we have said above, one proceeds *de peculio* and *de in rem uerso* under one and the same *formula*.

75. Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender. For it would be inequitable that their misconduct should involve their parents or masters in loss beyond that of their persons. **76.** Noxal actions have been established in some cases by statute, in others by the praetor's Edict: by statute, for example for theft by the law of the Twelve Tables and for wrongful damage to property by the *L. Aquilia*; by the praetor's Edict, for example for outrage and violent robbery. **77.** Noxal actions always follow the person of the offender. Thus, if your son or slave commits a wrong, the action lies against you so long as he is in your *potestas*; if he passes into another person's *potestas*, the action now lies against that person; if he becomes *sui iuris*, there is a direct action against the offender himself, and noxal surrender is ruled out. Conversely, the direct action may become noxal. For if a *paterfamilias* commits a wrong, and then gives himself in adrogation to you or becomes your slave (this happens in some cases, as stated in our first book), the action which was previously direct becomes a noxal action against you. **78.** But if a son does wrong to his father or a slave to his master, no action arises, because no obligation at all can arise between me and a person in my *potestas*. Consequently, even it he passes into someone else's *potestas* or becomes *sui iuris*, no action lies either against the offender himself or against the person in whose *potestas* he now is. Hence the question whether, if another's

[8] About eight or nine lines are illegible.

slave or son has done me a wrong and he afterwards comes under my *potestas*, the action is extinguished or is merely dormant. Our teachers hold that it is extinguished, because in the circumstances that have come about it could never have arisen at all, and that therefore I can have no action, even if he passes out of my *potestas*. The authorities of the other school hold that so long as he is in my *potestas* the action is dormant, because I cannot bring an action against myself, but that it revives when he has passed out of my *potestas*. **79.** When a son in *potestas* is mancipated on account of wrongdoing, the authorities of the other school hold that he must be mancipated thrice, because the law of the Twelve Tables provides that a son is to pass out of paternal *potestas* only if mancipated thrice. Sabinus and Cassius and the other authorities of our school have held that a single mancipation suffices and that the three mancipations of the Twelve Tables mean voluntary mancipations. **80.** So much for suits arising cut of the contract or wrongdoing of a person in *potestas*. But with regard to persons in *manus* or *mancipium* the praetor's practice is that if, when action is brought upon their contract, they are not defended up to the full liability by the person to whose power they have been subjected, all the property that would have been theirs, had they not been subjected to that person's power, shall be put up for sale. But when their *capitis deminutio* has been rescinded and an action *imperio continens* is brought against them. . . .[9]

81. . . . W hat does this come to? Although, as we have just said, one is not allowed to surrender the dead, still one who surrenders a person who has died a natural death is equally cleared of liability.

82. We must next observe that a man may take proceedings either in his own right or in that of another person, as his *cognitor*, *procurator*, tutor or curator, whereas in former times, when the *legis actiones* were in use, one was not allowed to take proceedings on another's behalf, except in certain cases. **83.** A *cognitor* is substituted as party to an action by special words being uttered in the presence of the opposing party. Thus a plaintiff appoints a *cognitor* by the words: 'whereas I am claiming' for example, 'certain lands from you, I give you Lucius Titius as my *cognitor* in that behalf', and a defendant does so by the words: 'seeing that you are claiming certain lands from me, I give you P. Mevius as my *cognitor* in that behalf'. Or the plaintiff may express it thus: 'whereas I desire to sue you, I give you so and so as my *cognitor* in that behalf', and the defendant thus: 'seeing that you desire to sue me, I give you so and so as my *cognitor* in that behalf.' And it makes no difference whether the *cognitor* is present or absent when appointed, but if he is absent, he will be *cognitor* only if he is informed of the appointment and accepts the office. **84.** A *procurator*, on the other hand, can be substituted as a party without any special words, by simple mandate, and without the presence or the knowledge of the opposing party. Indeed, there are some who hold that a man is to be deemed *procurator* even if he has received no mandate, provided that he comes into the case in good faith and gives security for the future ratification of his acts by the principal; though (as far as that goes) every one who has received a mandate is usually bound to give security, because at the beginning of a suit a mandate is often uncertain and is only made clear later, before the *iudex*. **85.** We have related in the first book; how tutors and curators are appointed. **86.** A man suing in right of another person frames the *intentio* in the name of his principal, but transfers the *condemnatio* into his own name. For example, if L. Titius is suing on behalf of P. Mevius, the *formula* is framed thus 'If it appears that Numerius Negidius ought to pay Publius Mevius 10,000 sesterces, do thou, *iudex*, condemn Numerius Negidius to Lucius Titius in 10,000 sesterces. If it does not appear, absolve', or if he is suing *in rem*, he claims in the *intentio* that the thing belongs to P. Mevius by Quiritary title and transfers the *condemnatio* into his own name. **87.** Also, if someone appears on behalf of a defendant, and the pleadings are being settled with him, the *intentio* claims that the principal ought to pay, while the *condemnatio* is transferred into the name of the person who accepts the suit. When, however, the action is *in rem*, the *intentio* pays no regard to the identity of the defendant, whether he is appearing for himself or for another, but simply claims that the thing belongs to the plaintiff.

88. Next let us see in what cases a defendant or a plaintiff is obliged to give security. **89.** If then I bring an action *in rem* against you, you are bound to give me security; for, as you are being conceded interim possession of a thing your title to which is doubtful, it has been held equitable that you should make me a promise with sureties, so that, if you are defeated, but fail either to give me back the thing itself or to pay me its assessed value, it may be in my power to sue either yourself or your *sponsores*. **90.** All the more are you bound to give me security if it is on another's behalf that you are defending. **91.** But an *actio in rem* may take one of two forms—it may be by *formula petitoria* or by *sponsio*. If it is by

[9] A whole page is illegible, which probably dealt with the *actio de pauperie*. Cf. JI.4.9; Autun Gaius 81 ff. The reading of the first line of § 81 is also doubtful.

formula petitoria, the *stipulatio* employed is that known as *iudicatum solui*; if by *sponsio*, that known as *pro praede litis et uindiciarum*. **92.** The *formula petitoria* is that in which the plaintiff's *intentio* claims that the thing is his. **93.** By *sponsio* we proceed as follows: we challenge our opponent by a *sponsio* such as this: 'If the slave the subject of this action is mine by Quiritary title, do you solemnly promise to pay me 25 sesterces?' and we then issue a *formula* claiming that the sum named in the *sponsio* ought to be paid to us, and we succeed under that *formula* precisely if we prove the thing is ours. **94.**

The sum named in the *sponsio* is not, however, exacted. For the *sponsio* is not penal but prejudicial, being entered into solely in order to bring the question of ownership to trial. This also explains why the defendant does not put a counter-*stipulatio*. The *stipulatio pro praede litis uindiciarum* is so called because it has taken the place of the *praedes* (personal sureties) who formerly, when the procedure was by *legis actio*, were given by the possessor to the claimant *pro lite et uindiciis*, that is for the disputed thing and its profits. **95.** But when the action is before the *centumuiri*, we claim the sum named in the *sponsio* by *legis actio*, not by *formula*. For we challenge the defendant by *sacramentum*. And the *sponsio* in this case is for 125 sesterces, because of the *L. Crepereia*. **96.** On the other hand, the plaintiff in an action *in rem*, who sues in his own right, does not give security. **97.** Nor, even where he sues through a *cognitor*, is any security required either of the *cognitor* himself or of his principal. For a *cognitor*, being substituted for the principal by special and as it were solemn words, is rightly regarded as taking his place. **98.** But a *procurator* bringing an action is required to give security for the future ratification of his acts by his principal. For there is a risk that the principal may sue afresh on the same claim, a risk which does not exist where it is a *cognitor* who has brought the action, because on any claim on which one has sued through a *cognitor* one has no more a further action than where one has brought the action oneself. **99.** Tutors and curators are expressly required by the Edict to give security in the same manner as *procurator*es, but are sometimes excused. **100.** So much for actions *in rem*. As to actions *in personam*, we must, to the question when security is due from the plaintiff's side, give the same answer as we have given in the case of actions *in rem*. **101.** But from the defendant's side security is due whenever a man appears on behalf of another, since without security one is never regarded as an adequate defender of another's cause. The security, when the defence is conducted by a *cognitor*, is required from his principal; where by a *procurator*, from the *procurator* himself. The same rule applies to tutors and curators. **102.** But where a man defends an action *in personam* on his own behalf, he has to give security only in certain eases specified by the praetor himself. The grounds for requiring security are twofold; it is given either because of the nature of the action or because the character of the defendant is suspect—the former when the action is on a judgment-debt or on a payment by a *sponsor*, or when a wife's behaviour is in issue, the latter when the defendant is one who has been guilty of malversation or whose property has been seized and advertised for sale by his creditors, or when the defendant is an heir whom the praetor considers suspect.

103. Actions are either statutable or dependent on the magistrate's *imperium*. **104.** An action is statutable if it takes place at Rome or within the first milestone of the city, between parties who are all Roman citizens and before a single *iudex*. By the *L. Iulia iudiciaria* such actions lapse if they have not been carried to judgment within a year and 6 months. This is expressed in the common saying that under the *L. Iulia* a suit dies in a year and six months . **105.** An action is dependent on the magistrate's *imperium* if it is tried by *recuperatores*, or if, though it is before a single *iudex*, he or either of the parties is a peregrine. To the same category belong all actions that take place outside tile first milestone of Rome whether between citizen or peregrine parties. They are said to depend on the *imperium* owing to the fact that they remain effective only so long as the magistrate who has authorized them retains *imperium*. **106.** After proceedings have been taken by *imperium continens*, whether they be *in rem* or *in personam*, and whether under a *formula* framed *in factum* or one having an *intentio* framed *in ius*, it is still possible in point of civil law to sue again later on the same cause, and on this account the *exceptio rei iudicatae uel in iudicium deductae* is required. **107.** But where proceedings *in personam* have been taken by *iudicium. legitimum*, under a *formula* having an *intentio* framed *in ius*, a subsequent action on the same cause is impossible at civil law, and consequently the *exceptio* is superfluous; but if there have been proceedings *in rem* or under a *formula* framed *in factum*, a subsequent action is still possible in point of civil law, and consequently the *exceptio rei iudicatae uel in iudicium deductae* is required. **108.** It was otherwise formerly under the system of *legis actiones*. For then it was impossible at civil law to sue or a cause that had once been preferred nor in those time were any *exceptiones* in use, as they are today. **109.** Now an action may be based on a statute (*lex*) and yet not be statutable (*legitimum*), and vice versa may not he

based on a statute and yet be statutable. For example, an action brought in the provinces under the *L. Aquilia* or *Ollinia* or *Furia* will depend on the magistrate's *imperium*, and so will it if it is brought even at Rome before *recuperatores*, or, though before a single *iudex*, if he or one of the parties is a peregrine. On the other hand, an action on a cause rendered actionable by the praetor's Edict is statutable if it takes place at Rome, before a single *iudex* and between parties all of whom are Roman citizens.

110. Here it must be observed that the praetor allows actions founded on statute or senatusconsult without limitation of time, but grants actions founded on his own jurisdiction usually only within a year. **111.** Sometimes, however, he grants the latter actions without limitation of time, namely where he is copying the civil law; instances are the actions he provides for *bonorum possessores* and others who are in the position of heir, or the *actio furti manifesti*, which, though founded on the praetor's own jurisdiction, is allowed without limitation of time—properly, since it replaces capital punishment by a money penalty.

112. Not all actions that lie at civil law or are granted by the praetor against a man lie or are granted by the praetor equally against his heir. For there is no more certain rule of law than that penal actions based on wrongdoing, such as for theft, robbery with violence, outrage, or wrongful damage to property, neither lie nor are granted against the wrongdoer's heir. But in favour of heirs such actions lie and are granted, except the *actio iniuriarum* and any like action that may be found. **113.** But there are cases in which an action founded on contract does not lie in favour of an heir or against one. Thus the heir of an *adstipulator* cannot sue, and the heir of a *sponsor* or a *fidepromissor* cannot be sued.

114. It remains to consider what course befits the office of the *iudex* in a case where the defendant satisfies the plaintiff after joinder of issue, but before judgement—whether he should absolve the defendant, or rather condemn him on the ground that at the time of joinder of issue his position required his condemnation. Our teachers hold that he ought to absolve, irrespectively of the nature of the action; and this is expressed by the common saying the; according to Sabinus and Cassius all actions contain the possibility of an absolution. The authorities of the other school dissent in regard to strict actions, but agree in regard to *bonae fidei* actions, because in these the discretion of the *iudex* is unfettered. They hold the like of actions *in rem*, on the ground that the *formula* expressly orders that the defendant be condemned only if he does not give up the thing according to the arbitral finding of the *iudex*. . . .[10] There are also actions *in personam* of the same kind, which expressly order the *iudex* to give an arbitral finding as to how the defendant must satisfy the plaintiff, if he is to avoid being condemned. . . .[3]

115. Next we have to consider exceptions. **116.** These have been provided for the protection of defendants, since it is often the case that, though a man is liable at civil law, his condemnation in an action would be inequitable. **116a.** Thus, if I have taken a stipulatory promise from you of a sum of money, on the understanding that I will advance you the amount on loan, and then I do not advance it, it is undeniable that an action lies against you for the money; for you are legally liable to pay it, being bound by the stipulation; but, because it is inequitable that you should be condemned on this account, it is settled that you must be protected by an *exceptio doli mali*. **116b.** Again, if I have informally agreed with you not to sue you for what you owe me, I can none the less bring an action claiming that you are bound to pay, because the obligation is not discharged by informal agreement; but it is settled that if I sue I am to be defeated by an *exceptio pacti conuenti*. **117.** Exceptions are not confined to actions *in personam*. Thus, if you force me by duress or induce me by fraud to convey something to you by mancipation, then, if you sue me for that thing, I am granted an exception under which you will be defeated if I make out duress or fraud on your part. **117a.** Again, if you buy lands which to your knowledge are the subject of litigation from one not in possession and sue the possessor for them, you are met by an exception which is absolutely conclusive against you. **118.** Some exceptions are published by the praetor in his Edict, others are granted by him after inquiry into the case. All of them either derive their force from statute or some equivalent of statute or else owe their origin to the praetor's jurisdiction. **119.** The formulation of exceptions is invariably negative of the defendant's assertion. Thus if, for example, the defendant asserts fraud on the part of the plaintiff—say he is suing for money that he never advanced—the formulation of the exception is: 'if in this matter nothing has been or is being done *dolo malo* by Aulus Agerius'. Or again, if the defendant asserts that money is being sued for in contravention of an informal agreement, the exception is formulated thus: 'if it has not been agreed between Aulus Agerius and Numerius Negidius

[10] Fifteen illegible lines here, the sense of which has been restored in the translation

that the money should not be sued for'. And, in short, the formulation is similar in all other cases, because, though an exception is raised by the defendant, it is incorporated into the *formula* so as to make the condemnation conditional, in the sense that the *iudex* is not to condemn the defendant unless there has been no fraud in the matter in question on the part of the plaintiff, or (in the second example) unless there has been no informal agreement against the money being sued for.

120. Exceptions are termed either peremptory or dilatory. **121.** Those exceptions are peremptory that are available at any time and cannot be evaded: examples are the exceptions based on duress or fraud or contravention of statute or senatusconsult, or on the matter having been previously judged or brought to trial; also the defence of pact, if the pact was that the money should never be sued for. **122.** Those exceptions are dilatory that are available only for a time, for instance an exception based on a pact against suing within, say, 5 years; for when the time has expired the exception ceases to be available. The exceptions *litis diuiduae* and *rei residuae* are similar. For if a man sues for part of a claim, and then, within the same praetor's term of office, sues for the remainder, he is defeated by the exception known as *litis diuiduae*; and if a man who had several suits with the same defendant has proceeded in some of them, but deferred others in order that they should come before other *iudices*, he will, if he proceeds in the suits deferred within the same praetor's term of office, be defeated by the exception known as *rei residuae*. **123.** A plaintiff met by a dilatory exception must be careful to postpone his suit; otherwise, if he goes to trial in the face of the exception, he loses his right; for once it has been brought to trial and defeated by the exception, he no longer has the power to sue after the date when, if proceedings had not been taken, he would have avoided the exception. **124.** Exceptions may be dilatory in respect not only of time but of persons; take for example the *exceptiones congnitoriae*. Suppose, for instance, that a person who is disabled by the Edict from appointing a *cognitor* nevertheless sues through one, or that a person, having capacity to appoint a *cognitor*, appoints as *cognitor* one who cannot lawfully undertake the office: on an *exceptio cognitoria* being raised, if the plaintiff is himself one who is not allowed to appoint a *cognitor*, he can proceed in person, or if it is the *cognitor* who is disqualified from undertaking the office, the plaintiff is at liberty to proceed either through another *cognitor* or in person, and thus, by one means or the other, he can avoid the exception. But if he closes his eyes to it and proceeds by the *cognitor*, he forfeits his claim. **125.** A defendant who by mistake has failed to make use of a peremptory exception, is restored to his original position, in order that the exception may be added, but it is questionable whether one who has failed to make use of a dilatory exception can be restored.

126. Sometimes it happens that an. exception, which *prima facie* appears just, prejudices the plaintiff unfairly. When this occurs, a further addition to the *formula* is required, for the plaintiff's benefit. Such an addition is known as a replication, because by it the force of the exception is rolled back and undone. Suppose, for example, that I have informally agreed with you not to sue you for a sum of money you owe me, and then later we have informally agreed to the contrary, that is, that I shall be at liberty to sue; in such case if, when I sue you, you take the exception that you are to be condemned to me only if it has not been agreed that I should not sue you, I am prejudiced by this *exceptio pacti conuenti*, since the first agreement remains a fact in spite of our subsequent agreement to the contrary. But as it is unfair that I should be defeated by the exception, I am allowed a replication based on the subsequent agreement, to the following effect: 'if it has not subsequently been agreed that I might sue for the money'. **126a.** Again, suppose that a banker sues for the price of a thing sold by auction, and that he is met by the exception that the buyer is to be condemned only if the thing he bought has been delivered to him: this is a just exception. But if at the auction it was a condition of sale that the thing should not be delivered to the buyer until he should have paid the price, the banker has the benefit of the following replication: 'or if it was announced in advance that the thing should not be delivered to the buyer unless he should have paid the price'. **127.** But sometimes it happens that a replication, in its turn, prejudices the defendant unfairly. When this occurs, an addition to the *formula* is required, for his benefit; this is called a duplication. **128.** And again, if the duplication, though *prima facie* just, for some reason prejudices the plaintiff unfairly, once more an addition is required, for his benefit; this is called a triplication. **129.** The varying circumstances of business transactions may on occasion cause additions of these kinds to be carried even further.

130. Let us, further, consider prescriptions; these have been allowed for the benefit of plaintiffs. **131.** Frequently, under one and the same obligation, some performance is already due and some further performance will become due in the future,' as where we have made a *stipulatio* for a certain sum to be paid yearly or monthly: on any years or. months that have expired payment is due, but on future years of

course, although the obligation. is considered as already contracted, no payment is due as yet. If then we desire, whilst suing for and bringing to trial the payment already due, to preserve the obligation of future payments intact, we must sue with the following prescription: 'Let the action be confined to what has already fallen due'; otherwise, if we sue without this prescription, using, the *formula* for claims of an indefinite amount having the *intentio*: 'whatever it appears that Numerius Negidius ought to convey to or do for Aulus Agerius', we bring the whole obligation, including its future incidence, to present trial, and on what is brought to trial before the time provided by the obligation condemnation is impossible, nor can an action be brought for it again. **131a.** Another example: if I sue *ex empto* for the mancipation to me of land I have bought, I must prescribe thus: 'Let the action be confined to the mancipation of the land', so that if I afterwards desire delivery of vacant possession, I may be able to employ the same action against the seller. Otherwise, if I have been careless on this point, the whole obligation under the contract is used up by the indefinite *intentio*: 'whatever on that account Numerius Negidius ought to convey to or do for Aulus Agerius', with the result that, when later I wish to sue for delivery of vacant possession, no action remains to me. **132.** As anyone can see, prescriptions are so called because they are written in front of the *formula*e. **133.** At the present day, as we have indicated above, all prescriptions come from the plaintiff's side. But formerly they used also to be raised on behalf of defendants. An example was the prescription: 'Let the matter be tried only on condition that the question of the inheritance be not prejudged.' This, at the present day, has been transferred into a kind of exception, which is employed where the claimant of an inheritance prejudices the question by bringing some other action, as by suing for individual things (in the inheritance). For it is unjust that the question of the whole inheritance should be prejudged in an action for a single thing. . . .[11] **134.** . . . the *intentio* of the *formula* raises as a matter of law the question to whom conveyance is legally due; and clearly it is to the master that what a slave has been promised by stipulation is due; but the prescription raises it as a question of fact, which must be verified according to the natural meaning of the words. **135.** All that one have said about slaves is to be taken as said equally about every, other person subject to our power. **136.** It is further to he observed that, where we are suing the actual promisor by stipulation of something uncertain, the *formula* offered to us by the Edict has inserted in it, in place of a *demonstratio*, a prescription in the following terms: 'Be *N iudex*. Whereas Aulus Agerius has taken from Numerius Negidius a stipulatory promise of something uncertain, but only in so far as the obligation has already fallen due, whatever on that account Numerius Negidius ought to convey to or do for Aulus Agerius', &c. **137.** But in an action against a *sponsor* or a *fideiussor* the prescription will take, in the case of a *sponsor*, this form: 'Let the subject of this action be that Aulus Agerius has taken from L. Titius a stipulatory promise of something uncertain, for which Numerius Negidius is *sponsor*, but be confined to what has already fallen due', and, in the case of a *fideiussor*: 'Let the subject of the action be that Numerius Negidius has given a guarantee on his honour on behalf of L. Titius for an uncertain liability, but be confined to what has already fallen due'; then comes the *formula*.

138. It remains to consider interdicts.

139. In certain cases the praetor or proconsul interposes his authority from above for the ending of disputes. He does this mainly when parties are contending about possession or quasi-possession. To put it shortly, he either orders or forbids something to be done. The *formula*e or verbal schemes that he employs for this purpose are termed interdicts or decrees. **140.** They are termed decrees when he orders something to be done, for instance that some thing be produced or restored, interdicts when he forbids the doing of something, such as of violence to one in viceless possession, or of some act on sacred land. Hence interdicts are termed either restitutory or exhibitory or prohibitory. **141.** But when the praetor has issued his order for something to be done or not to be done, the case is not straightway ended, but goes before a *iudex* or *recuperatores*; there, *formula*e having first been issued, the question is examined whether anything has been done that the praetor's Edict forbids, or anything has not been done that he has ordered to be done. The proceedings are sometimes with and sometimes without penalty. They are with penalty when they are by *sponsio*, without penalty when an *arbiter* is asked for. On prohibitory interdicts proceedings are always by *sponsio*, but on restitutory or exhibitory they are sometimes by *sponsio* and sometimes by the *formula* known as *arbitraria*.

142. Thus the leading division is that interdicts are either prohibitory or restitutory or exhibitory. **143.** Next comes a division into interdicts for the purpose of acquiring possession or of retaining it or of recovering it. **144.** For acquiring possession *bonorum possessores* are provided with an interdict

[11] A whole page of uncertain content is illegible.

beginning *Quorum bonorum*, the force and effect of which is that any thing belonging to the estate of which *bonorum possessio* has been granted which someone holds *pro herede* or *pro possessore*, or has fraudulently ceased so to hold, must be given up to the grantee of *bonorum possessio*. A man is considered to hold *pro herede* alike when he is the heir and when he merely believes he is; a man holds *pro possessore* who holds some thing belonging to an inheritance or, maybe, the entire inheritance, without title and knowing that it does not belong to him. The interdict is classed as being for the acquisition of possession because it is only available to one who is now for the first time seeking to obtain possession. Hence, if a man has lost a possession which he had previously obtained, this interdict is no longer available to him. **145.** *Bonorum emptores* are offered a similar interdict, which some call *possessorium*. **146.** Purchasers of confiscated property likewise are offered an interdict of the same kind, called *sectorium* because purchasers of confiscated property are called *sectores*. **147.** Another interdict, called *Saluianum*, is provided for the purpose of acquiring possession; it is used by a landlord in respect of the goods of his farmer, which the latter has agreed shall be security for the rent.

148. An interdict for retaining possession is ordinarily issued when two parties are disputing as to the ownership of some thing, and the previous question, which of the litigants is to be in possession and which to be plaintiff, arises. For this purpose the interdicts *Uti possidetis* and *Utrubi* have been provided. **149.** The interdict *Uti possidetis* is issued in respect of the possession of lands or houses, the interdict *Utrubi* in respect of the possession of movable property. **150.** When the interdict concerns land or a house, the praetor's order is that that party is to be preferred who, at the moment when the interdict is issued, has possession, such possession having been obtained neither by force nor clandestinely nor by licence from the other party. When, however, the interdict concerns a movable thing, his order is that preference be given to the party who has been in possession for the greater part of that year, such possession having been obtained neither by force nor clandestinely nor by licence from the other party. All this is sufficiently indicated by the terms of the interdicts. **151.** Under the interdict *Utrubi* a man is credited not only with his own possession, but also with that of a third party which can justly be added to his, such as the possession of one whose heir he has become, or one from whom he has bought or received by gift or on account of dowry. Thus, if the lawful possession of the third party added to our own exceeds that of our opponent, we win on this interdict. But one who has no possession of his own is not and cannot be allowed any such addition of time; for there can be no addition to what does not exist. Also, if one has possession, but it is vicious, that is, has been acquired from the other party by force or clandestinely or by licence, addition to it is not allowed; for in such case one's own possession does not count. **152.** The year in question is that immediately preceding. Thus, if you have been in possession for 8 months before me, but I for the next 7 months, I shall be preferred, because for the purpose of this interdict your possession during 3 of the previous months does not count, since it belongs to another year. **153.** We are deemed to possess not only if we personally possess, but also if anyone is in possession in our name, even if he be not subject to our power, for example if he is tenant of our land or house. We are also deemed to possess through those with whom we have deposited or to whom we have lent a thing, or to whom we have granted free habitation. This is the meaning of the common saying that we can retain possession through anyone who is in possession on our behalf. Indeed it is generally held that we can retain possession by mere intention, that is that, in spite of neither ourselves, nor anyone else on our behalf, being in possession, we are considered to retain possession if we left the property with no intention of abandoning possession, but meaning to return later. The persons through whom we can acquire possession have been stated in the second book. That we cannot acquire possession by mere intention is beyond doubt.

154. An interdict for the recovery of possession is granted when a man has been ejected by force. For to him the Edict offers an interdict beginning: *Unde tu illum ui deiecisti*, which obliges the ejector to restore his possession, provided that the possession of the ejected party was not obtained by force, clandestinely, or by licence from the ejector. For I can eject one who has a possession obtained from me by force, clandestinely, or by license, with impunity. **155.** Sometimes, however, even though the person whom I forcibly eject is one who obtained possession from me by force, clandestinely, or by licence, I am compelled to restore his possession, namely where I have ejected him by force of arms; for the outrageous character of my misdeed renders me, without qualification, legally compellable to restore his possession. By 'arms' we must understand not only shields, swords, and helmets, but also sticks and stones.

156. A third division of interdicts is into simple and double **157.** Simple interdicts are those in which one party is plaintiff and the other defendant. Such are all restitutory and exhibitory interdicts, the party

demanding exhibition or restitution being plaintiff and the party upon whom the demand is made being defendant. **158.** But of prohibitory interdicts some are double and others simple. **159.** Examples of simple prohibitory interdicts are those whereby the praetor forbids a defendant to do something on sacred land or in a public river or on its bank; for he who wishes it not to be done is plaintiff, and he who is seeking to do it is defendant. **160.** Examples of double prohibitory interdicts are the interdicts *Uti possidetis* and *Utrubi*. They are called double because in them the two litigants are on the same footing and neither is specially defendant or plaintiff, but both play both parts; indeed the praetor addresses each of them in identical terms. For the general scheme of these interdicts is: 'I forbid force to be used to prevent you from possessing as you now possess', and, in the second case: 'I forbid force to be used to prevent the party with whom the slave, the subject of these proceedings, has been for the greater part of this year from leading him off.'

161. After this exposition of the various kinds of interdicts our next task is to consider their procedure and outcome. Let us begin with simple interdicts. **162.** When a restitutory or an exhibitory interdict is issued, for instance one ordering restitution of possession to someone forcibly dispossessed, or production of a freedman upon whom his patron wishes to impose services, the case is carried to its conclusion sometimes without and sometimes with risk. **163.** For if the defendant has demanded an *arbiter*, he receives a *formula* known as *arbitraria*, and if in obedience to the arbitral pronouncement of the *iudex* he produces or restores anything, he produces or restores it without penalty, and is then absolved; if he does not so produce or restore, he is condemned in the value of the thing. Likewise the plaintiff incurs no penalty by proceeding against one who is under no duty of production or restoration, except that of one-tenth of the value at stake if an action for vexatious suit (*calumniae iudicium*) is raised against him. However, Proculus held that a defendant who demands an *arbiter* should be refused the *iudicium calumniae*, on the ground that his very demand for an *arbiter* implies an admission of a duty to restore or produce. But present practice is to the contrary, and rightly so, since a man who demands an *arbiter* does so rather in order to litigate at less risk than because he admits liability. **164.** A defendant who intends to demand an *arbiter* must be careful to do so at once, before leaving court, that is, before departing from the praetor; for no indulgence is shown to a late demand. **165.** Thus where he does not demand an *arbiter*, but leaves court in silence, the case is carried to its conclusion at a risk. For the plaintiff challenges the defendant by a *sponsio* to the effect that by not producing or restoring the thing the defendant has contravened the praetor's Edict, and the defendant in turn puts a counter-*stipulatio* to the plaintiff. Then the plaintiff presents the defendant with a *formula* on the *sponsio* and the defendant presents the plaintiff with one on the counter-*stipulatio*. But the plaintiff subjoins to the *formula* on the *sponsio* a further *formula* for the restoration or production of the thing, so that, if he wins on the *sponsio* the defendant may be condemned to him in the value of the thing, if it is not produced or restored. . . .[12]

166. . . . and the winner in the auction of the mesne profits is for the time being established in possession, provided that he gives his opponent security by the *fructuaria stipulatio*, the effect of which is that, should the question of possession be decided against him, he is to pay the other party the amount of his bid. This rival bidding is known as *fructus licitatio* because it is a contest between the parties as to which of them is to take the profits during the proceedings. Next, each party challenges the other by a *sponsio* to the effect that the promisee, being in possession, has suffered violence in contravention of the praetor's Edict, and each puts to the other a counter-*stipulatio* to the opposite effect. . . .[13] **166a.** Then, after *formula*e on the *sponsiones* and counter-*stipulationes* have been issued, the *iudex* trying the case proceeds to examine the question raised by the praetor's interdict, namely which of the two, at the time when the interdict was issued, was in possession of the land or house, having obtained it neither by force nor clandestinely nor by licence from the other. When the *iudex* has considered the matter, and judgment has gone, let us say, in my favour, he condemns my opponent to pay me the sums of the *sponsio* and counter-*stipulatio* which I put to him and, as is consistent, absolves me from the sums of the *sponsio* and counter-*stipulatio* which he put to me. Moreover my opponent, if possession is with him owing to his having won the auction of mesne profits, is condemned in the Cascellian or consequential action, if he does not restore possession to me. **167.** Therefore, the winner in the auction of profits, if he fails to prove that he is entitled to possession, is ordered to pay by way of penalty the sums of the *sponsio* and counter-

[12] Two pages are illegible. Presumably they completed the discussion of simple interdicts and began that of double interdicts, which are being discussed in § 166.

[13] About a half a line is illegible.

stipulatio and of his bid in the auction, and further to restore possession, in addition to which he gives back the profits he has taken meanwhile. For the amount of the auction-bid is not a price given for the mesne profits, but is paid as a penalty for having sought to retain another man's possession during the interval and to have the power of taking the profits of the thing. **168.** But the loser in the auction of profits, if he fails to prove that he is entitled to possession, is liable merely for the sums of the *sponsio* and counter-*stipulatio*, by way of penalty. **169.** We should, however, observe that the loser in the auction of profits is free to waive the *stipulatio fructuaria* and to proceed on the auction-bid by an action, in the same way as, by the Cascellian or consequential action, he proceeds for the recovery of possession. For this a special action, called *iudicium fructuarium*, is provided, in which the plaintiff is given security for the satisfaction of judgment. This action too is termed consequential, because it is a sequel to success on the *sponsio*, but not also Cascellian. **170.** But as persons were found who, after an interdict had been issued, refused to take the further steps under it, and consequently matters could not be brought to a head, the praetor has met the difficulty by providing interdicts known as secondary, because issued in the second instance. Their effect is that a party who will not take the further steps under the interdict—for example, one who will not do an act of violence, or bid for the mesne profits, or give security for his successful bid, or enter into the *sponsiones*, or take part in the actions on them—must, if in possession, give up possession to his opponent, or, if not in possession, abstain from doing violence to his opponent who is in possession. The result is that, though he might have succeeded under the interdict *Uti possidetis* if he had taken the further steps under it, yet, it he does not take them, he is defeated under a secondary interdict. . . .[14]

171. Rash litigation on the part of both plaintiffs and defendants is restrained in some cases by a pecuniary penalty, in some by the sanctity of an oath, and in some by fear of infamy. . . .[15] Restraint by pecuniary penalty is exercised on defendants in certain cases by the liability in the action being doubled if liability is denied: examples are an action on a judgment debt, or on a payment by a sponsor, or for wrongful damage to property, or on a legacy left by damnation. In certain other cases there is permission to enter into a *sponsio*, as in the *actio certae creditae pecuniae* and the *actio de pecunia constituta*, *sponsio* being in the former action for one third and in the latter for one half. **172.** But where the defendant is subjected to the risk neither of a *sponsio* nor of double damages, and the action is not one which from the very outset is for more than simple damages, the praetor permits an oath to be exacted from him to the effect that he is not denying liability vexatiously. Hence, though heirs and those standing in the place of heirs are liable to no pecuniary penalty (?) and women and pupils are excused from the risk of *sponsio*, the praetor nevertheless requires them to take the oath. **173.** Actions which from the outset are for more than simple damages are, for example, the *actio furti manifesti* for fourfold, that for *furtum nec manifestum* for twofold, those for *furtum conceptum* and *furtum oblatum* for threefold. For in these cases and in some others the action is for more than simple damages, whether the defendant denies or admits liability.

174. Vexatious litigation on the part of plaintiffs is also subject to restraint, sometimes by a *iudicium calumniae*, sometimes by a *iudicium contrarium* sometimes by an oath, sometimes by a counter-*stipulatio*. **175.** The *iudicium calumniae* is allowed in response to any kind of action; it is for a tenth of the amount claimed, except that against an assertor of another's liberty it is for a third. **176.** Defendants are free to choose between resorting with a *iudicium calumniae* and exacting an oath that the action is not being brought vexatiously. **177.** A *iudicium contrarium* exists only in certain cases—where the action is an *actio iniuriarum*, or where a woman is sued on the allegation that, having been put in possession on behalf of her child *in utero*, she has fraudulently transferred possession to someone else, or when an action is based on the allegation that the plaintiff was sent into possession by the praetor, but was not admitted by the defendant. The action is for a tenth when it is in face of an *actio iniuriarum*, but for a fifth in face of the two other actions mentioned. **178.** The restraint exercised by a *iudicium contrarium* is the more severe. For in the *iudicium calumniae* a man is not condemned in the tenth unless he knows he is suing unjustifiably and has brought the action merely in order to annoy the other party, trusting for success to some mistake or injustice on the part of the *iudex* rather than to the true merits of his case. For *calumnia*, like *furtum*, depends on intention. On the other hand, in a *iudicium contrarium* a plaintiff who has lost his action is condemned in all cases, even if he mistakenly believed his suit to be justifiable. **179.**

[14] Fourteen lines are illegible.

[15] Approximately 25 illegible letters.

Naturally in those cases in which a *iudicium contrarium* is possible a *iudicium calumniae* is also open; but one may bring only one or other. Upon the same principle, if an oath disclaiming *calumnia* has been exacted, just as a *iudicium calumniae* is not allowed, so the *iudicium contrarium* ought not to be. **180.** In some cases a penal counter-*stipulatio* is entered into; and just as in a *contrarium iudicium* a plaintiff who has lost his case is invariably condemned, without inquiry as to whether he was aware that his suit was unjustified, so here, if he has failed in his suit, he is invariably condemned in the penal sum of the counter-*stipulatio*. **181.** A plaintiff who incurs the penalty of a counter-*stipulatio* is not faced with a *calumniae iudicium*, nor is he required to take the oath. And in such a case a *contrarium iudicium* is clearly inapplicable.

182. In some actions, such as those on theft, robbery with violence, outrage, and again those on partnership, *fiducia*, tutorship, mandate, and deposit, a defendant who is condemned becomes infamous. Indeed in the actions of theft, robbery, and outrage he is branded with infamy not only if he is condemned, but also if he compromises, as we read in the praetor's Edict; this is right, because there is a very great difference between being liable for delict and under contract. In no part of the Edict, however, is it expressly stated that anyone is to become infamous; but infamous is the current term for anyone who is forbidden to appear in court on another's behalf, or to appoint a *cognitor* or have a *procurator* on his own, or to intervene in a suit as someone else's *procurator* or *cognitor*.

183. Finally, it is to be noted that one who desires to take proceedings against another must summon him to court, and that the person summoned incurs a penalty under the praetor's Edict if he does not come. It is. however, unlawful to summon certain persons to court without the praetor's leave, for example one's parents, one's patron or patroness and the children and parents of one's patron or patroness; and there is a penalty for disobeying these rules. **184.** When a defendant has been summoned to court but the proceedings cannot be finished on the same day, he has to give bail (*uadimonium*), that is, he must enter into an undertaking to appear on a certain day. **185.** Bail is taken in some cases simply, that is without security, in some with security; in some cases it is accompanied by an oath; in some it is taken with *recuperatores* annexed, so that, if the defendant fails to appear, he may forthwith be condemned by the *recuperatores* in the amount of the bail. These several matters are carefully set out in the praetor's Edict.

186. When the action is for a judgment debt or on a payment made by a *sponsor*, bail is taken for a sum equal to that being claimed, but in other cases for the amount sworn to by the plaintiff as demanded with no vexatious intent, subject to this, that bail is not taken for a sum exceeding half the amount of the claim or for more than 100,000 sesterces. Thus where the action is not for a judgment debt or on a payment by a *sponsor*, if the matter in dispute is worth 100,000 sesterces, bail is not taken for more than 50,000. **187.** But persons whom one may not with impunity summon to court without the praetor's leave may similarly not be compelled to give bail, save if the praetor on application gives permission.

3. Justinian, *Institutes* 4.6–4.17

TITLE VI

OF ACTIONS

The subject of actions still remains for discussion. An action is nothing else than the right of suing before a judge for what is due to one.

1. The leading division of all actions whatsoever, whether tried before a judge or a referee, is into two kinds, real and personal; that is to say, the defendant is either under a contractual or delictal obligation to the plaintiff, in which case the action is personal, and the plaintiff's contention is that the defendant ought to convey something to, or do something for him, or of a similar nature; or else, though there is no legal obligation between the parties, the plaintiff asserts a ground of action against some one else relating to some thing, in which case the action is real. Thus, a man may be in possession of some corporeal thing, in which Titius claims a right of property, and which the possessor affirms belongs to r him; here, if Titius sues for its recovery, the action is real. **2**. It is real also if a man asserts that he has a right of usufruct over a landed estate or a house, or a right of going or driving cattle over his neighbour's land, or of drawing water from the same; and so too are the actions relating to urban servitudes, as, for instance, where a man asserts a right to raise his house, to have an uninterrupted prospect, to project some building over his neighbour's land, or to rest the beams of his own house in his neighbour's wall. Conversely, there are actions relating to usufructs, and to rustic and urban servitudes, of a contrary import, which lie at the suit

of plaintiffs who deny their opponent's right of usufruct, of going or driving cattle, of drawing water, of raising their house, of having an uninterrupted view, of projecting some building over the plaintiff's land, or of resting the beams of their house in the plaintiff's wall. These actions too are real, but negative, and never occur in disputes as to corporeal things, in which the plaintiff is always the party out of possession; and there is no action by which the possessor can (as plaintiff) deny that the thing in question belongs to his adversary, except in one case only, as to which all requisite information can be gathered from the fuller books of the Digest. **3**. The actions which have hitherto been mentioned, and others which resemble them, are either of statutory origin, or at any rate belong to the civil law. There are other actions, however, both real and personal, which the praetor has introduced in virtue of his jurisdiction, and of which it is necessary to give examples. For instance, he will usually, under the circumstances to be mentioned, allow a real action to be brought with a fictitious allegation— namely, that the plaintiff has acquired a title by usucapion where this, in fact, is not the case; or, conversely, he will allow a fictitious plea on the part of the defendant, to the effect that the plaintiff has not acquired such title where, in point of fact, he has. **4**. Thus, if possession of some object be delivered on a ground sufficient to legally transfer the same—for instance, under a sale or gift, as part of a dowry, or as a legacy—and the transferee has not yet acquired a complete title by usucapion, he has no direct real action for its recovery, if he accidentally loses possession, because by the civil law a real action lies at the suit of the owner only. But as it seemed hard that in such a case there should be no remedy, the praetor introduced an action in which the plaintiff, who has lost possession, fictitiously alleges that he has acquired a full title by usucapion, and thus claims the thing as his own. This is called the Publician action, because it was first placed in the Edict by a praetor called Publicius. **5**. Conversely, if a person, while absent in the service of the State, or while in the power of an enemy, acquires by usucapion property belonging to some one resident at home, the latter is allowed, within a year from the cessation of the possessor's public employment, to sue for a recovery of the property by a rescission of the usucapion: by fictitiously alleging, in other words, that the defendant has not thus acquired it; and the praetor from motives of equity allows this kind of action to be brought in certain other cases, as to which information may be gathered from the larger work of the Digest or Pandects. **6**. Similarly, if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor. **7**. Again, the Servian and quasi-Servian actions, the latter of which is also called 'hypothecary', are derived merely from the praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of mortgage as security for his rent; the quasi-Servian is a similar remedy, open to every pledgee or hypothecary creditor. So far then as this action is concerned, there is no difference between a pledge and a hypothec: and indeed whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called a pledge or a hypothec indifferently. In other points, however, there is a distinction between them; for the term 'pledge' is properly used only where possession of the property in question is delivered to the creditor, especially if that property be movable: while a hypothec is, strictly speaking, such a right created by mere agreement without delivery of possession. **8**. Besides these, there are also personal actions which the praetor has introduced in virtue of his jurisdiction, for instance, that brought to enforce payment of money already owed, and the action on a banker's acceptance, which closely resembled it. By our constitution, however, the first of these actions has been endowed with all the advantages which belonged to the second, and the latter, as superfluous, has therefore been deprived of all force and expunged from our legislation. To the praetor is due also the action claiming an account of the *peculium* of a slave or child in power, that in which the issue is whether a plaintiff has made oath, and many others. **9**. The action brought to enforce payment of money already owed is the proper remedy against a person who, by a mere promise, without stipulation, has engaged to discharge a debt due either from himself or from some third party. If he has promised by stipulation, he is liable by the civil law. **10**. The action claiming an account of a *peculium* is a remedy introduced by the praetor against a master or a father. By strict law, such persons incur no liability on the contracts of their slaves or children in power; yet it is only equitable that damages should be recoverable against them to the extent of the *peculium*, in which children in power and slaves have a sort of property. **11**. Again, if a plaintiff, on being challenged by the defendant, deposes on oath that the latter owes him the money which is the object of the action, and payment is not made to him, the praetor most justly grants to him an action in which the issue is, not whether the money is owing, but whether the plaintiff has sworn to the debt. **12**. There is also a considerable number of penal actions

which the praetor has introduced in the exercise of his jurisdiction; for instance, against those who in any way injure or deface his album; or who summon a parent or patron without magisterial sanction; or who violently rescue persons summoned before himself, or who compass such a rescue; and others innumerable. **13**. 'Prejudicial' actions would seem to be real, and may be exemplified by those in which It is inquired whether a man is free born, or has become free by manumission, or in which the question relates to a child's paternity. Of these the first alone belongs to the civil law: the others are derived from the praetor's jurisdiction. **14**. The kinds of actions having been thus distinguished, it is clear that a plaintiff cannot demand his property from another in the form 'if it be proved that the defendant is bound to convey'. It cannot be said that what already belongs to the plaintiff ought to be conveyed to him, for conveyance transfers ownership, and what is his cannot be made more his than it is already. Yet for the prevention of theft, and multiplication of remedies against the thief, it has been provided that, besides the penalty of twice or four times the value of the property stolen, the property itself, or its value, may be recovered from the thief by a personal action in the form 'if it be proved that the defendant ought to convey', as an alternative for the real action which is also available to the plaintiff, and in which he asserts his ownership of the stolen property. **15**. We call a real action a 'vindication', and a personal action, in which the contention is that some property should be conveyed to us, or some service performed for us, a 'condiction', this term being derived from *condicere*, which has an old meaning of 'giving notice'. To call a personal action, in which the plaintiff contends that the defendant ought to convey to him, a condiction, is in reality an abuse of the term, for nowadays there is no such notice as was given in the old action of that name.

16. Actions may next be divided into those which are purely reparative, those which are purely penal, and those which are mixed, or partly reparative, partly penal. **17**. All real actions are purely reparative. Of personal actions those which spring from contract are nearly all of the same character; for instance, the actions on loans of money, or stipulations, on loans for use, on deposit, agency, partnership, sale, and hire. If, however, the action be on a deposit occasioned by a riot, a fire, the fall of a building, or a shipwreck, the praetor enables the depositor to recover double damages, provided he sues the bailee in person; he cannot recover double damages from the bailee's heir, unless he can prove personal fraud against the latter. **18**. In these two cases the action, though on contract, is mixed. Actions arising from delict are sometimes purely penal, sometimes are partly penal and partly reparative, and consequently mixed. The sole object of the action of theft is the recovery of a penalty, whether that penalty be four times the value of the property stolen, as in theft detected in the commission, or only twice that value, as in simple theft. The property itself is recoverable by an independent action in which the person from whom it has been stolen claims it as his own, whether it be in the possession of the thief himself or of some third person; and against the thief himself he may even bring a condiction, to recover the property or its value. **19**. The action on robbery is mixed, for the damages recoverable thereunder are four times the value of the property taken, three-fourths being pure penalty, and the remaining fourth compensation for the loss which the plaintiff has sustained. So too the action on unlawful damage under the lex Aquilia is mixed, not only where the defendant denies his liability, and so is sued for double damages, but also sometimes where the claim is for simple damages only; as where a lame or one-eyed slave is killed, who within the year previous was sound and of large value; in which case the defendant is condemned to pay his greatest value within the year, according to the distinction which has been drawn above. Persons too who are under an obligation as heirs to pay legacies or trust bequests to our holy churches or other venerable places, and neglect to do so until sued by the legatee, are liable to a mixed action, by which they are compelled to give the thing or pay the money left by the deceased, and, in addition, an equivalent thing or sum as penalty, the condemnation being thus in twice the value of the original claim.

20. Some actions are mixed in a different sense, being partly real, partly personal. They are exemplified by the action for the division of a 'family', by which one of two or more joint heirs can enforce against the other or rest a partition of the inheritance, and by the actions for the division of common property, and for rectification of boundaries between adjoining landed proprietors. In these three actions the judge has power, according as shall to him seem fair and equitable, to adjudge any part of the joint property, or of the land in dispute, to any one of the parties, and to order any one of them who seems to have an undue advantage in the partition or rectification to pay a certain sum of money to the other or the rest as compensation. **21**. The damages recoverable in an action may be either once, twice, three, or four times the value of the plaintiff's original interest; there is no action by which more than fourfold damages can be claimed. **22**. Single damages only are recoverable in the actions on stipulation, loan for

consumption, sale, hire, agency, and many others besides. **23**. Actions claiming double damages are exemplified by those on simple theft, on unlawful damage under the lex Aquilia, on certain kinds of deposit, and for corruption of a slave, which lies against any one by whose instigation and advice another man's slave runs away, or becomes disobedient to his master, or takes to dissolute habits, or becomes worse in any way whatsoever, and in which the value of property which the runaway slave has carried off is taken into account. Finally, as we remarked above, the action for the recovery of legacies left to places of religion is of this character. **24**. An action for triple damages is grounded when a plaintiff makes an overstatement of his claim in the writ of summons, in consequence of which the officers of the court take too large a fee from the defendant. In such a case the latter will be able to recover from the plaintiff three times the loss which he sustains by the overcharge, including in these damages simple compensation for the sum paid in excess of the proper fee. This is provided by a distinguished constitution in our Code, under which a statutory condiction clearly lies for the damages in question. **25**. Quadruple damages are recoverable by the action on theft detected in the commission, by the action on intimidation, and by the action grounded on the giving of money in order to induce one man to bring a vexatious suit against another, or to desist from a suit when brought. Under our constitution too a statutory condiction lies for the recovery of fourfold damages from officers of the court, who exact money from defendants in excess of its provisions. **26**. There is this difference between the actions on simple theft and for the corruption of a slave, and the other of which we spoke in connexion with them, that by the two former double damages are recoverable under any circumstances; the latter, namely the action on unlawful damage under the lex Aquilia, and that on certain kinds of deposit, entail double damages on the defendant only if he denies his liability; if he admits it, simple damages alone can be recovered. The damages are double under an action for recovery of legacies left to religious places not only when the liability is denied, but also when the defendant delays payment until sued by the order of a magistrate; if he admits his liability, and pays before being so sued, he cannot be compelled to pay more than the original debt. **27**. The action on intimidation also differs from the others which we mentioned in the same connexion, in that it contains in its very nature an implied condition that the defendant is entitled to acquittal if, on being so ordered by the judge, he restores to the plaintiff the property of which the latter has been deprived. In other actions of the same class this is not so; for instance, in the action on theft detected in the commission, the defendant has under any circumstances to pay fourfold damages. **28**. Again, some actions are equitable, others are actions of strict law. To the former class belong the actions on sale, hire, unauthorized agency, agency proper, deposit, partnership, guardianship, loan for use, mortgage, division of a 'family', partition of joint property, those on the innominate contracts of sale by commission and exchange, and the suit for recovery of an inheritance. Until quite recently it was a moot point whether the lastnamed was properly an equitable action, but our constitution has definitely decided the question in the affirmative. **29**. Formerly too the action for the recovery of a dowry was an equitable action: but as we found that the action on stipulation was more convenient, we have, while establishing many distinctions, attached all the advantages which the former remedy possessed to the action on stipulation, when employed for the recovery of a dowry. The former action being thus by a judicious reform abolished, that on stipulation, by which it has been replaced, has deservedly been invented with all the characteristics of an equitable action, so far as and whenever it is brought for the recovery of a dowry. We have also given persons entitled to sue for such recovery a tacit hypothec over the husband's property, but this right is not to give any priority over other hypothecary creditors except where it is the wife herself who sues to recover her dowry; it being in her interest only that we have made this new provision. **30**. In equitable actions the judge has full power to assess on good and fair grounds the amount due to the plaintiff, and in so doing to take into account counterclaims of the defendant, condemning the latter only in the balance. Even in actions of strict law counterclaims have been permitted since a rescript of the Emperor Marcus, the defendant meeting the plaintiff's claim by a plea of fraud. By our constitution, however, a wider field has been given to the principle of set-off, when the counterclaim is clearly established, the amount claimed in the plaintifFs action, whether real or personal, or whatever its nature, being reduced by operation of law to the extent of the defendant's counterclaim. The only exception to this rule is the action on deposit, against which we have deemed it no less than dishonest to allow any counterclaim to be set up; for if this were permitted persons might be fraudulently prevented from recovering property deposited under the presence of a set-off. **31**. There are some actions again which we call arbitrary, because their issue depends on an '*arbitrium*' or order of the judge. Here, unless on such order the defendant satisfies the plaintiff's claim by restoring or producing the property, or by performing his obligation, or in a noxal action by surrendering the guilty slave, he ought to be condemned. Some of such actions are real, others

personal. The former are exemplified by the Publician action, the Servian action for the recovery of a tenant farmer's stock, and the quasi-Servian or so-called hypothecary action; the latter by the actions on intimidation and on fraud, by that for the recovery of a thing promised at a particular place, and by the action claiming production of property. In all these actions, and others of a similar nature, the judge has full power to determine on good and just grounds, according to the circumstances of each particular case, the form in which reparation ought to be made to the plaintiff.

32. It is the judge's duty, in delivering judgement, to make his award as definite as is possible, whether it relate to the payment of money or the delivery of property, and this even when the plaintiffs claim is altogether unliquidated.

33. Formerly, if the plaintiff, in his statement of claim, demanded more than he was entitled to, his case fell to the ground, that is, he lost even that which was his due, and in such cases the praetor usually declined to restore him to his previous position, unless he was a minor; for in this matter too the general rule was observed of giving relief to minors after inquiry made, if it were proved that they had made an error owing to their lack of years. If, however, the mistake was entirely justifiable, and such as to have possibly misled even the discreetest of men, relief was afforded even to persons of full age, as in the case of a man who sues for the whole of a legacy, of which part is found to have been taken away by codicils subsequently discovered; or where such subsequently discovered codicils give legacies to other persons, so that, the total amount given in legacies being reduced under the lex Falcidia, the first legatee is found to have claimed more than the three-fourths allowed by that statute. Over-statement of claim takes four forms; that is, it may relate either to the object, the time, the place, or the specification. A plaintiff makes an over-claim in the object when, for instance, he sues for twenty *aurei* while only ten are owing to him, or when, being only part owner of property, he sues to recover the whole or a greater portion of it than he is entitled to. Overclaim in respect of time occurs when a man sues for money before the day fixed for payment, or before the fulfilment of a condition on which payment was dependent; for exactly as one who pays money only after it falls due is held to pay less than his just debt, so one who makes his demand prematurely is held to make an over-claim. Over-claim in respect of place is exemplified by a man suing at one place for performance of a promise which it was expressly agreed was to be performed at another, without any reference, in his claim, to the latter: as, for instance, if a man, after stipulating thus, 'Do you promise to pay at Ephesus?' were to claim the money as due at Rome, without any addition as to Ephesus. This is an over-claim, because by alleging that the money is due at Rome simply, the plaintiff deprives his debtor of the advantage he might have derived from paying at Ephesus. On this account an arbitrary action is given to a plaintiff who sues at a place other than that agreed upon for payment, in which the advantage which the debtor might have had in paying at the latter is taken into consideration, and which usually is greatest in connexion with commodities which vary in price from district to district, such as wine, oil, or grain; indeed even the interest on loans of money is different in different places. If, however, a plaintiff sues at Ephesus—that is, in our example, at the place agreed upon for the payment—he need do no more than simply allege the debt, as the praetor too points out, because the debtor has all the advantage which payment in that particular place gives him. Over-claim in respect of specification closely resembles over-claim in respect of place, and may be exemplified by a man's stipulating from you 'do you promise to convey Stichus or ten *aurei*?' and then suing for the one or the other—that is to say, either for the slave only, or for the money only. The reason why this is an over-claim is that in stipulations of this sort it is the promisor who has the election, and who may give the slave or the money, whichever he prefers; consequently if the promisee sues, alleging that either the money alone, or the slave alone, ought to be conveyed to him, he deprives his adversary of his election, and thereby puts him in a worse position, while he himself acquires an undue advantage. Other cases of this form of over-claim occur where a man, having stipulated in general terms for a slave, for wine, or for purple, sues for the particular slave Stichus, or for the particular wine of Campania, or for Tyrian purple; for in all of these instances he deprives his adversary of his election, who was entitled, under the terms of the stipulation, to discharge his obligation in a mode other than that which is required of him. And even though the specific thing for which the promisee sues be of little or no value, it is still an over-claim: for it is often easier for a debtor to pay what is of greater value than what is actually demanded of him. Such were the rules of the older law, which, however, has been made more liberal by our own and Zeno's statutes Where the over-claim relates to time, the constitution of Zeno prescribes the proper procedure; if it relates to quantity, or assumes any other form, the plaintiff, as we have remarked above, is to be condemned in a sum equivalent to three times any loss which the defendant may have sustained thereby. **34**. If the plaintiff in his statement of

claim demands less than is his due, as for instance by alleging a debt of five *aurei*, when in fact he is owed ten, or by claiming only half of an estate the whole of which really belongs to him, he runs no risk thereby, for, by the constitution of Zeno of sacred memory, the judge will in the same action condemn the defendant in the residue as well as in the amount actually claimed. **35**. If he demands, the wrong thing in his statement of claim, the rule is that he runs no risk; for if he discovers his mistake, we allow him to set it right in the same action. For instance, a plaintiff who is entitled to the slave Stichus may claim Eros; or he may allege that he is entitled to a conveyance under a will, when his right is founded in reality upon a stipulation.

36. There are again some actions in which we do not always recover the whole of what is due to us, but in which we sometimes get the whole, sometimes only part. For instance, if the fund to which our claim looks for satisfaction be the *peculium* of a son in power or a slave, and it is sufficient in amount to meet that claim, the father or master is condemned to pay the whole debt; but if it is not sufficient, the judge condemns him to pay only so far as it will go. Of the mode of ascertaining the amount of a *peculium* we will speak in its proper place. **37**. So too if a woman sues for the recovery of her dowry, the rule is that the husband is to be condemned to restore it only so far as he is able, that is, so far as his means permit. Accordingly, if his means will enable him to restore the dowry in full, he will be condemned to do so; if not, he will be condemned to pay only so much as he is able. The amount of the wife's claim is also usually lessened by the husband's right of retaining some portion for himself, which he may do to the extent of any outlay he has made on dowry property, according to the rule, stated in the larger work of the Digest, that a dowry is diminished by operation of law to the extent of all necessary outlay thereon. **38**. Again, if a man goes to law with his parent or patron, or if one partner brings an action of partnership against another, he cannot get judgement for more than his adversary is able to pay. The rule is the same when a man is sued on a mere promise to give a present. **39**. Very often too a plaintiff obtains judgement for less than he was owed through the defendant's pleading a set-off: for, as has already been observed, the judge, acting on equitable principles, would in such a case take into account the cross demand in the same transaction of the defendant, and condemn him only in the residue. **40**. So too if an insolvent person, who surrenders all his effects to his creditors, acquires fresh property of sufficient amount to justify such a step, his creditors may sue him afresh, and compel him to satisfy the residue of their claims so far as he is able, but not to give up all that he has; for it would be inhuman to condemn a man to pay his debts in full who has already been once deprived of all his means.

TITLE VII

OF CONTRACTS MADE WITH PERSONS IN POWER

As we have already mentioned the action in respect of the *peculium* of children in power and slaves, we must now explain it more fully, and with it the other actions by which fathers and masters are sued for the debts of their sons or slaves. Whether the contract be made with a slave or with a child in power, the rules to be applied are much the same; and therefore, to make our statements as short as possible, we will speak only of slaves and masters, premising that what we say of them is true also of children and the parents in whose power they are; where the treatment of the latter differs from that of the former, we will point out the divergence.

1. If a slave enters into a contract at the bidding of his master, the praetor allows the latter to be sued for the whole amount: for it is on his credit that the other party relies in making the contract. **2**. On the same principle the praetor grants two other actions, in which the whole amount due may be sued for; that called *exercitoria*, to recover the debt of a ship-master, and that called *institoria*, to recover the debt of a manager or factor. The former lies against a master who has appointed a slave to be captain of a ship, to recover a debt incurred by the slave in his character of captain, and it is called *exercitoria*, because the person to whom the daily profits of a ship belong is termed an *exercitor*. The latter lies against a man who has appointed a slave to manage a shop or business, to recover any debt incurred in that business; it is called *institoria*, because a person appointed to manage a business is termed an *institor*. And these actions are granted by the praetor even if the person whom one sets over a ship, a shop, or any other business, be a free man or another man's slave, because equity requires their application in these latter cases no less than in the former. **3**. Another action of the praetor's introduction is that called *tributoria*. If a slave, with the knowledge of his master, devotes his *peculium* to a trade or business, the rule which the praetor follows, in respect of contracts made in the course of such trade or business, is that the *peculium* so invested and its profits shall be divided between the master, if anything is due to him, and the other

creditors in the ratio of their claims. The distribution of these assets is left to the master, subject to this provision, that any creditor who complains of having received less than his proper share can bring this action against him for an account. **4**. There is also an action in respect of *peculium* and of what has been converted to the uses of the master, under which, if a debt has been contracted by a slave without the consent of his master, and some portion thereof has been converted to his uses, he is liable to that extent, while if no portion has been so con" versed, he is liable to the extent of the slave's *peculium*. Conversion to his uses is any necessary expenditure on his account, as repayment to his creditors of money borrowed, repair of his falling house, purchase of corn for his slaves, or of an estate for him, or any other necessary. Thus, if out of ten *aurei* which your slave borrows from Titius, he pays your creditor five, and spends the remainder in some other way, you are liable for the whole of the five, and for the remainder to the extent of the *peculium*: and from this it i9 clear that if the whole ten were applied to your uses Titius could recover the whole from you. Thus, though it is but a single action which is brought in respect of *peculium* and of conversion to uses, it has two condemnatory clauses. The judge by whom the action is tried first looks to see whether there has been any application to the uses of the master, and does not proceed to ascertain the amount of the *peculium* unless there has been no such application, or a partial application only. In ascertaining the amount of the *peculium* deduction is first made of what is owed to the master or any person in his power, and the residue only is treated as *peculium*; though sometimes what a slave owes to a person in his master's power is not deducted, for instance, where that person is another slave who himself belongs to the *peculium*; thus, where a slave owes a debt to his own vicarial slave, its amount is not deducted from the *peculium*. **5**. There is no doubt that a person with whom a slave enters into a contract at the bidding of his master, or who can sue by the actions *exercitoria* or *institoria*, may in lieu thereof bring an action in respect of the *peculium* and of conversion to uses; but it would be most foolish of him to relinquish an action by which he may with the greatest ease recover the whole of what is owing to him under the contract, and undertake the trouble of proving a conversion to uses, or the existence of a *peculium* sufficient in amount to cover the whole of the debt. So too a plaintiff who can sue by the action called *tributoria* may sue in respect of *peculium* and conversion to uses, and sometimes the one action is the more advisable, sometimes the other. The former has this advantage, that in it the master has no priority; there is no deduction of debts owing to him, but he and the other creditors stand on precisely the same footing; while in the action in respect of *peculium* deduction is first made of debts owing to the master, who is condemned to pay over to the creditors only what then remains. On the other hand, the advantage of the action in respect of *peculium* is that in it the slave's whole *peculium* is liable to his creditors, whereas in the action called *tributoria* only so much of it is liable as is invested in the trade or business; and this may be only a third, a fourth, or even a less fraction, because the slave may have the rest invested in land or slaves, or out on loan. A creditor ought therefore to select the one or the other action by considering their respective advantages in each particular case; though he certainly ought to choose that in respect of conversion to uses, if he can prove such conversion. **6**. What we have said of the liability of a master on the contracts of his slave is equally applicable where the contract is made by a child or grandchild in the power of his or her father or grandfather. **7**. A special enactment in favour of children in power is found in the senatusconsult of Macedo, which has prohibited the giving of loans of money to such persons, and refused an action to the lender both against the child, whether he be still in power, or has become independent by death of the ancestor or emancipation, and against the parent, whether he still retains the child in his power, or has emancipated him. This enactment was made by the Senate because it was found that persons in power, when dragged down by the burden of loans which they had squandered in profligacy, often plotted against the lives of their parents.

8. Finally, it should be observed that where a contract has been entered into by a slave or son in power at his master's or parent's bidding, or where there has been a conversion to his uses, a condiction may be brought directly against the parent or master, exactly as if he had been the original contracting party in person. So too, wherever a man is suable by either of the actions called *exercitoria* and *institoria*, he may, in lieu thereof, be sued directly by a condiction, because in effect the contract in such cases is made at his bidding.

TITLE VII

OF NOXAL ACTIONS

Where a delict, such as theft, robbery, unlawful damage, or outrage, is committed by a slave, a noxal action lies against the master, who on being condemned has the option of paying the damages awarded, or surrendering the slave in satisfaction of the injury. **1**. The wrongdoer, that is, the slave, is called '*noxa*';

'*noxia*' is the term applied to the wrong itself, that is, the theft, damage, robbery, or outrage. **2**. This principle of noxal surrender in lieu of paying damages awarded is based on most excellent reason, for it would be unjust that the misdeed of a slave should involve his master in any detriment beyond the loss of his body. **3**. If a master is sued by a noxal action on the ground of his slave's delict, he is released from all liability by surrendering the slave in satisfaction of the wrong, and by this surrender his right of ownership is permanently transferred; though if the slave can procure enough money to compensate the surrenderee in full for the wrong he did him, he can, by applying to the praetor, get himself manumitted even against the will of his new master. **4**. Noxal actions were introduced partly by statute, partly by the Edict of the praetor; for theft, by the statute of the Twelve Tables; for unlawful damage, by the lex Aquilia; for outrage and robbery, by the Edict. Noxal actions always follow the person of the wrongdoer. Thus, if your slave does a wrong while in your power, an action lies against you; if he becomes the property of some other person, that other is the proper person to be sued; and if he is manumitted, he becomes directly and personally liable, and the noxal action is extinguished. Conversely, a direct action may change into noxal; thus, if an independent person has done a wrong, and then becomes your slave (as he may in several ways described in the first Book), a noxal action lies against you in lieu of the direct action which previously lay against the wrongdoer in person. **6**. But no action lies for an offence committed by a slave against his master, for between a master and a slave in his power there can be no obligation; consequently, if the slave becomes the property of some other person, or is manumitted, neither he nor his new master can be sued; and on the same principle, if another man's slave commits a wrong against you, and then becomes your property, the action is extinguished, because it has come into a condition in which an action cannot exist; the result being that even if the slave passes again out of your power you cannot sue. Similarly, if a master commits a wrong against his slave, the latter cannot sue him after manumission or alienation. **7**. These rules were applied by the ancients to wrongs committed by children in power no less than by slaves, but the feeling of modern times has rightly rebelled against such inhumanity, and noxal surrender of children under power has quite gone out of use. Who could endure in this way to give up a son, still more a daughter, to another, whereby the father would be exposed to greater anguish in the person of a son than even the latter himself, while mere decency forbids such treatment in the case of a daughter? Accordingly, noxal actions are permitted only where the wrongdoer is a slave, and indeed we find it often laid down by old legal writers that sons in power may be sued personally for their own delicts.

TITLE IX

OF PAUPERIES, OR DAMAGE DONE BY QUADRUPEDS

A noxal action was granted by the statute of the Twelve Tables in cases of mischief done through wantonness, passion, or ferocity, by irrational animals; it being by an enactment of that statute provided, that if the owner of such an animal is ready to surrender it as compensation for the damage, he shall thereby be released from all liability. Examples of the application of this enactment may be found in kicking by a horse, or goring by a bull, known to be given that way; but the action does not lie unless in causing the damage the animal is acting contrary to its natural disposition; if its nature be to be savage, this remedy is not available. Thus, if a bear runs away from its owner, and causes damage, the quondam owner cannot be sued, for immediately with its escape his ownership ceased to exist. The term *pauperies*, or 'mischief', is used to denote damage done without there being any wrong in the doer of it, for an unreasoning animal cannot be said to have done a wrong. Thus far as to the noxal action.

1. It is, however, to be observed that the Edict of the aedile forbids dogs, boars, bears, or lions to be kept near where there is a public road, and directs that if any injury be caused to a free man through disobedience of this provision, the owner of the beast shall be condemned to pay such sum as to the judge shall seem fair and equitable: in case of any other injury the penalty is fixed at double damages. Besides this aedilician action, that on *pauperies* may also be sometimes brought against the same defendant; for when two or more actions, especially penal ones, may be brought on one and the same ground, the bringing of one does not debar the plaintiff from subsequently bringing the other.

TITLE X

OF PERSONS THROUGH WHOM WE CAN BRING AN ACTION

We must now remark that a man may sue either for himself, or for another as attorney, guardian, or curator: whereas formerly one man could not sue for another except in public suits, as an assertor of freedom, and in certain actions relating to guardianship. The lex Hostilia subsequently permitted the

bringing of an action of theft on behalf of persons who were in the hands of an enemy, or absent on State employment, and their pupils. It was, however, found extremely inconvenient to be unable to either bring or defend an action on behalf of another, and accordingly men began to employ attorneys for this purpose; for people are often hindered by ill-health, age, unavoidable absence, and many other causes from attending to their own business. **1**. For the appointment of an attorney no set form of words is necessary, nor need it be made in the presence of the other party, who indeed usually knows nothing about it; for in law any one is your attorney whom you allow to bring or defend an action on your behalf. **2**. The modes of appointing guardians and curators have been explained in the first Book.

TITLE XI

OF SECURITY

The old system of taking security from litigants differed from that which has more recently come into use.

Formerly the defendant in a real action was obliged to give security, so that if judgement went against him, and he neither gave up the property which was in question, nor paid the damages assessed, the plaintiff might be able to sue either him or his sureties: and this is called security for satisfaction of judgement, because the plaintiff stipulates for payment to himself of the sum at which the damages are assessed. And there was all the more reason for compelling the defendant in a real action to give security if he was merely the representative of another. From the plaintiff in a real action no security was required if it was on his own account that he sued, but if he was merely an attorney, he was required to give security for the ratification of his proceedings by his principal, owing to the possibility of the latter's subsequently suing in person on the same claim. Guardians and curators were required by the Edict to give the same security as attorneys; but when they appeared as plaintiffs they were sometimes excused. So much for real actions. **1**. In personal actions the same rules applied, so far as the plaintiff was concerned, as we have said obtained in real actions. If the defendant was represented by another person, security had always to be given, for no one is allowed to defend another without security; but if the defendant was sued on his own account, he was not compelled to give security for satisfaction of judgement. **2**. Nowadays, however, the practice is different; for if the defendant is sued on his own account, he is not compelled to give security for payment of the damages assessed, whether the action be real or personal; all that he has to do is to enter into a personal engagement that he will subject himself to the jurisdiction of the court down to final judgement; the mode of making such engagement being either a promise under oath, which is called a sworn recognizance, or a bare promise, or giving of sureties, according to the defendant's rank and station. **3**. But the case is different where either plaintiff or defendant appears by an attorney. If the plaintiff does so, and the attorney's appointment is not enrolled in the records, or confirmed by the principal personally in court, the attorney must give security for ratification of his proceedings by his principal; and the rule is the same if a guardian curator, or other person who has undertaken the management of another's affairs brings an action through an attorney. **4**. If a defendant appears, and is ready to appoint an attorney to defend the action for him, he can do this either by coming personally into court, and confirming the appointment by the solemn stipulations employed when security is given for satisfaction of judgement, or by giving security out of court whereby, as surety for his attorney, he guarantees the observance of all the clauses of the so-called security for satisfaction of judgement. In all such cases he is obliged to give a right of hypothec over all his property, whether the security be given in or out of court, and this right avails against his heirs no less than against himself. Finally, he has to enter into a personal engagement or recognizance to appear in court when judgement is delivered; and in default of such appearance his surety will have to pay all the damages to which he is condemned, unless notice of appeal is given. **5**. If, however, the defendant for some reason or other does not appear, and another will defend for him, he may do so, and it is immaterial whether the action be real or personal, provided he will give security for satisfaction of the judgement in full; for we have already mentioned the old rule, that no one is allowed to defend another without security. **6**. All this will appear more clearly and fully by reference to the daily practice of the courts, and to actual cases of litigation. **7**. And it is our pleasure that these rules shall hold not only in this our royal city, but also in all our provinces, although it may be that through ignorance the practice elsewhere was different; for it is necessary that the provinces generally shall follow the lead of the capital of all our empire, that is, of this royal city, and observe its usages.

TITLE XII

OF ACTIONS PERPETUAL AND TEMPORAL, AND WHICH MAY BE BROUGHT BY AND AGAINST HEIRS

It should be here observed that actions founded on statutes, senatusconsults, and imperial constitutions could be brought at any length of time from the accrual of the cause of action, until certain limits were fixed for actions both real and personal by imperial enactments; while actions which were introduced by the praetor in the exercise of his jurisdiction could, as a rule, be brought only within a year, that being the duration of his authority. Some praetorian actions, however, are perpetual, that is to say, can be brought at any time which does not exceed the limit fixed by the enactments referred to; for instance, those granted to 'possessors of goods' and other persons who are fictitiously represented as heirs. So too the action for theft detected in the commission, though praetorian, is perpetual, the praetor having judged it absurd to limit it by a year. **1**. Actions which will lie against a man under either the civil or the praetorian law will not always lie against his heir, the rule being absolute that for delict—for instance, theft, robbery, outrage, or unlawful damage—no penal action can be brought against the heir. The heir of the person wronged, however, may bring these actions, except in outrage, and similar cases, if any. Sometimes, even an action on contract cannot be brought against the heir; this being the case where the testator has been guilty of fraud, and his heir has not profited thereby. If, however, a penal action, such as those we have mentioned, has been actually commenced by the original parties, it is transmitted to the heirs of each. **2**. Finally, it must be remarked that if, before judgement is pronounced, the defendant satisfies the plaintiff, the judge ought to absolve him, even though he was liable to condemnation at the time when the action was commenced; this being the meaning of the old dictum, that all actions involve the power of absolution.

TITLE XIII

OF EXCEPTIONS

We have next to examine the nature of exceptions. Exceptions are intended for the protection of the defendant, who is often in this position, that though the plaintiff's case is a good one in the abstract, yet as against him, the particular defendant, his contention is inequitable. **1**. For instance, if you are induced by duress, fraud, or mistake to promise Titius by stipulation what you did not owe him, it is clear that by the civil law you are bound, and that the action on your promise is well grounded; yet it is inequitable that you should be condemned, and therefore in order to defeat the action you are allowed to plead the exception of duress, or of fraud, or one framed to suit the circumstances of the case. **2**. So too, if, as preliminary to an advance of money, one stipulates from you for its repayment, and then never advances it after all, it is clear that he can sue you for the money, and you are bound by your promise to give it; but it would be iniquitous that you should be compelled to fulfil such an engagement, and therefore you are permitted to defend yourself by the exception that the money, in point of fact, was never advanced. The time within which this exception can be pleaded, as we remarked in a former Book, has been shortened by our constitution. **3**. Again, if a creditor agrees with his debtor not to sue for a debt, the latter still remains bound, because an obligation cannot b.c. extinguished by a bare agreement; accordingly, the creditor can validly bring against him a personal action claiming payment of the debt, though, as it would be inequitable that he should be condemned in the face of the agreement not to sue, he may defend himself by pleading such agreement in the form of an exception. **4**. Similarly, if at his creditor's challenge a debtor affirms on oath that he is not under an obligation to convey, he still remains bound; but as it would be unfair to examine whether he has perjured himself, he can, on being sued, set up the defence that he has sworn to the non-existence of the debt. In real actions, too, exceptions are equally necessary; thus, if on the plaintiff's challenge the defendant swears that the property is his, there is nothing to prevent the former from persisting in his action; but it would be unfair to condemn the defendant, even though the plaintiff's contention that the property is his be well founded. **5**. Again, an obligation still subsists even after judgement in an action, real or personal, in which you have been defendant, so that in strict law you may be sued again on the same ground of action; but you can effectually meet the claim by pleading the previous judgement. **6**. These examples will have been sufficient to illustrate our meaning; the multitude and variety of the cases in which exceptions are necessary may be learnt by reference to the larger work of the Digest or Pandects. **7**. Some exceptions derive their force from statutes or enactments equivalent to statutes, others from the jurisdiction of the praetor. **8**. And some are said to be perpetual or peremptory, others to be temporary or dilatory. **9**. Perpetual or peremptory exceptions are obstructions of unlimited duration, which practically destroy the plaintiff's ground of action, such as the exceptions of fraud, intimidation, and agreement never to sue. **10**. Temporary or dilatory exceptions are merely temporary obstructions, their only effect being to postpone for a while the plaintiff's right to sue; for example, the

plea of an agreement not to sue for a certain time, say, five years; for at the end of that time the plaintiff can effectually pursue his remedy. Consequently persons who would like to sue before the expiration of the time, but are prevented by the plea of an agreement to the contrary, or something similar, ought to postpone their action till the time specified has elapsed; and it is on this account that such exceptions are called dilatory. If a plaintiff brought his action before the time had expired, and was met by the exception, this would debar him from all success in those proceedings, and formerly he was unable to sue again, owing to his having rashly brought the matter into court, whereby he consumed his right of action, and lost all chance of recovering what was his due. Such unbending rules, however, we do not at the present day approve. Plaintiffs who venture to commence an action before the time agreed upon, or before the obligation is yet actionable, we subject to the constitution of Zeno, which that most sacred legislator enacted as to over-claims in respect of time; whereby, if the plaintiff does not observe the stay which he has voluntarily granted, or which is implied in the very nature of the action, the time during which he ought to have postponed his action shall be doubled, and at its termination the defendant shall not be suable until he has been reimbursed for all expenses hitherto incurred. So heavy a penalty it is hoped will induce plaintiffs in no case to sue until they are entitled. **11**. Moreover, some personal incapacities produce dilatory exceptions, such as those relating to agency, supposing that a party wishes to be represented in an action by a soldier or a woman; for soldiers may not act as attorneys in litigation even on behalf of such near relatives as a father, mother, or wife, not even in virtue of an imperial rescript, though they may attend to their own affairs without committing a breach of discipline We have sanctioned the abolition of those exceptions, by which the appointment of an attorney was formerly opposed on account of the infamy of either attorney or principal, because we found that they no longer were met with in actual practice, and to prevent the trial of the real issue being delayed by disputes as to their admissibility and operation.

TITLE XIV

OF REPLICATIONS

Sometimes an exception, which *prima facie* seems just to the defendant, is unjust to the plaintiff, in which case the latter must protect himself by another allegation called a replication, because it parries and counteracts the force of the exception. For example, a creditor may have agreed with his debtor not to sue him for money due, and then have subsequently agreed with him that he shall be at liberty to do so; here if the creditor sues, and the debtor pleads that he ought not to be condemned on proof being given of the agreement not to sue, he bars the creditor's claim,'for the plea is true, and remains so in spite of the subsequent agreement; but as it would be unjust that the creditor should be prevented from recovering, he will be allowed to plead a replication, based upon that agreement. **1**. Sometimes again a replication, though *prima facie* just, is unjust to the defendant; in which case he must protect himself by another allegation called a rejoinder. **2**. And if this again, though on the face of it just, is for some reason unjust to the plaintiff, a still further allegation is necessary for his protection, which is called a surrejoinder. **3**. And sometimes even further additions are required by the multiplicity of circumstances under which dispositions are made, or by which they are subsequently affected; as to which fuller information may easily be gathered from the larger work of the Digest. **4**. Exceptions which are open to a defendant are usually open to his surety as well, as indeed is only fair: for when a surety is sued the principal debtor may be regarded as the real defendant, because he can be compelled by the action on agency to repay the surety whatsoever he has disbursed on his account. Accordingly, if the creditor agrees with his debtor not to sue, the latter's sureties may plead this agreement, if sued themselves, exactly as if the agreement had been made with them instead of with the principal debtor. There are, however, some exceptions which, though pleadable by a principal debtor, are not pleadable by his surety; for instance, if a man surrenders his property to his creditors as an insolvent, and one of them sues him for his debt in full, he can effectually protect himself by pleading the surrender; but this cannot be done by his surety, because the creditor's main object, in accepting a surety for his debtor, is to be able to have recourse to the surety for the satisfaction of his claim if the debtor himself becomes insolvent.

TITLE XV

OF INTERDICTS

We have next to treat of interdicts or of the actions by which they have been superseded. Interdicts were formulae by which the praetor either ordered or forbad some thing to be done,and occurred most frequently in case of litigation about possession or quasi-possession.

1. The first division of interdicts is into orders of abstention, of restitution, and of production. The first are those by which the praetor forbids the doing of some act—for instance, the violent ejection of a bona fide possessor, forcible interference with the interment of a corpse in a place where that may lawfully be done, building upon sacred ground, or the doing of anything in a public river or on its banks which may impede its navigation. The second are those by which he orders restitution of property, as where he directs possession to be restored to a 'possessor of goods' of things belonging to an inheritance, and which have hitherto been in the possession of others under the title of heir, or without any title at all; or where he orders a person to be reinstated in possession of land from which he has been forcibly ousted. The third are those by which he orders the production of persons or property; for instance, the production of a person whose freedom is in question, of a freedman whose patron wishes to demand from him certain services, or of children on the application of the parent in whose power they are. Some think that the term interdict is properly applied only to orders of abstention, because it is derived from the verb *interdicere*, meaning to denounce or forbid, and that orders of restitution or production are properly termed decrees; but in practice they are all called interdicts, because they are given *inter duos*, between two parties. **2**. The next division is into interdicts for obtaining possession, for retaining possession, and for recovering possession. **3**. Interdicts for obtaining possession are exemplified by the one given to a 'possessor of goods' which is called *Quorum bonorum*, and which enjoins that whatever portion of the goods, whereof possession has been granted to the claimant, is in the hands of one who holds by the title of heir or as mere possessor only, shall be delivered up to the grantee of possession. A person is deemed to hold by the title of heir who thinks he is an heir; he is deemed to hold as mere possessor who relies on no title at all, but holds a portion of the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession, because it is available only for initiating possession; accordingly, it is not granted to a person who has already had and lost possession. Another interdict for obtaining possession is that named after Salvius, by which the landlord gets possession of the tenant's property which has been hypothecated as a security for rent. **4**. The interdicts *Uti possidetis* and *Utrubi* are interdicts for retaining possession, and are employed when two parties claim ownership in anything, in order to determine which shall be defendant and which plaintiff; for no real action can be commenced until it is ascertained which of the parties is in possession, because law and reason both require that one of them shall be in possession and shall be sued by the other. As the r"1e of defendant in a real action is far more advantageous than that of plaintiff, there is almost invariably a keen dispute as to which party is to have possession pending litigation: the advantage consisting in this, that, even if the person in possession has no title as owner, the possession remains to him unless and until the plaintiff can prove his own ownership: so that where the rights of the parties are not clear, judgement usually goes against the plaintiff. Where the dispute relates to the possession of land or buildings, the interdict called *Uti possidetis* is employed; where to movable property, that called *Utrubi*. Under the older law their effects were very different. In *Uti possidetis* the party in possession at the issue of the interdict was the winner, provided he had not obtained that possession from his adversary by force, or clandestinely, or by permission; whether he had obtained it from some one else in any of these modes was immaterial. In *Utrubi* the winner was the party who had been in possession the greater portion of the year next immediately preceding, provided that possession had not been obtained by force, or clandestinely, or by permission, from his adversary. At the present day, however, the practice is different, for as regards the right to immediate possession the two interdicts are now on the same footing; the rule being, that whether the property in question be movable or immovable, the possession is adjudged to the party who has it at the commencement of the action, provided he had not obtained it by force, or clandestinely, or by permission, from his adversary. **5**. A man's possession includes, besides his own personal possession, the possession of any one who holds in his name, though not subject to his power; for instance, his tenant. So also a depositary or borrower for use may possess for him, as is expressed by the saying that we retain possession by any one who holds in our name. Moreover, mere intention suffices for the retention of possession; so that although a man is not in actual possession either himself or through another, yet if it was not with the intention of abandoning the thing that he left it, but with that of subsequently returning to it, he is deemed not to have parted with the possession. Through what persons we can obtain possession has been explained in the second Book; and it is agreed on all hands that for obtaining possession intention alone does not suffice. **6**. An interdict for recovering possession is granted to persons who have been forcibly ejected from land or buildings; their proper remedy being the interdict *Unde vi*, by which the ejector is compelled to restore possession, even though it had been originally obtained from him by the grantee of the interdict by force, clandestinely, or by permission. But by imperial constitutions, as we have already observed, if a man violently seizes on

property to which he has a title, he forfeits his right of ownership; if on property which belongs to some one else, he has not only to restore it, but also to pay the person whom he has violently dispossessed a sum of money equivalent to its value. In cases of violent dispossession the wrongdoer is liable under the lex lulia relating to private or public violence, by the former being meant unarmed force, by the latter dispossession effected with arms; and the term 'arms' must be taken to include not only shields, swords, and helmets, but also sticks and stones. **7**. Thirdly, interdicts are divided into simple and double. Simple interdicts are those wherein one party is plaintiff and the other defendant, as is always the case in orders of restitution or production; for he who demands restitution or production is plaintiff, and he from whom it is demanded is defendant. Of interdicts which order abstention some are simple, others double. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from obstructing a public river or its banks; for he who demands such order is the plaintiff, and he who is attempting to do the act in question is defendant. Of double interdicts we have examples in *Uti possidetis* and *Utrubi*; they are called double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but each sustaining the double rôle.

8. To speak of the procedure and result of interdicts under the older law would now be a waste of words; for when the procedure is what is called 'extraordinary', as it is nowadays in all actions, the issue of an interdict is unnecessary, the matter being decided without any such preliminary step in much the same way as if it had actually been taken, and a modified action had arisen on it.

TITLE XVI

OF THE PENALTIES FOR RECKLESS LITIGATION

It should here be observed that great pains have been taken by those who in times past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant, are money fines, the employment of the oath, and the fear of infamy. **1**. Thus, under our constitution, the oath has to be taken by every defendant, who is not permitted even to state his defence until he swears that he resists the plaintiff's claim because he believes that his cause is a good one. In certain cases where the defendant denies his liability the action is for double or treble the original claim, as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places. In various actions the damages are multiplied at the outset; in an action on theft detected in the commission they are quadrupled; for simple theft they are doubled; for in these and some other actions the damages are a multiple of the plaintiff's loss, whether the defendant denies or admits the claim. Vexatious litigation is checked on the part of the plaintiff also, who under our constitution is obliged to swear on oath that his action is commenced in good faith; and similar oaths have to be taken by the advocates of both parties, as is prescribed in other of our enactments. Owing to these substitutes the old action of dishonest litigation has become obsolete. The effect of this was to penalize the plaintiff in a tenth part of the value he claimed by action; but, as a matter of fact, we found that the penalty was never exacted, and therefore its place has been taken by the oath above mentioned, and by the rule that a plaintiff who sues without just cause must compensate his opponent for all losses incurred, and also pay the costs of the action. **2**. In some actions condemnation carries infamy with it, as in those on theft, robbery, outrage, fraud, guardianship, agency, and deposit, if direct, not contrary; also in the action on partnership, which is always direct, and in which infamy is incurred by any partner who suffers condemnation. In actions on theft, robbery, outrage, and fraud, it is not only infamous to be condemned, but also to compound, as indeed is only just; for obligation based on delict differs widely from obligation based on contract.

3. In commencing an action, the first step depends upon that part of the Edict which relates to summons; for before anything else is done, the adversary must be summoned, that is to say, must be called before the judge who is to try the action. And herein the praetor takes into consideration the respect due to parents, patrons, and the children and parents of patrons, and refuses to allow a parent to be summoned by his child, or a patron by his freedman, unless permission so to do has been asked of and obtained from him; and for nonobservance of this rule he has fixed a penalty of fifty *solidi*.

TITLE XVII

OF THE DUTIES OF A JUDGE

Finally, we have to treat of the duties of a judge; of which the first is not to judge contrary to statutes, the imperial laws, and custom. **1**. Accordingly, if he is trying a noxal action, and thinks that the master ought to be condemned, he should be careful to word his judgement thus: 'I condemn Publius Maevius to

pay ten *aurei* to Lucius Titius, or to surrender to him the slave that did the wrong.' **2**. If the action is real, and he finds against the plaintiff, he ought to absolve the defendant; if against the latter, he ought to order him to give up the property in question, along with its fruits. If the defendant pleads that he is unable to make immediate restitution and applies for execution to be stayed, and such application appears to be in good faith, it should be granted upon the terms of his finding a surety to guarantee payment of the damages assessed, if restitution be not made within the time allowed. If the subject of the action b.c. an inheritance, the same rule applies as regards fruits as we laid down in speaking of actions for tile recovery of single objects. If the defendant is a *male fide* possessor, fruits which but for his own negligence he might have gathered are taken into account in much tbe same way in both actions; but a *bona fide* possessor is not held answerable for fruits which he has not consumed or has not gathered, except from the moment of the commencement of the action, after which time account is taken as well of fruits which might have been gathered but for his negligence as of those whicl1 have been gathered and consumed. **3**. If the object of the action be production of property, its mere production by the defendant is not enough, but it must be accompanied by every advantage derived from it; that is to say, the plaintiff must be placed in the same position he would have been in if production had been made immediately on the commencement of the action. Accordingly if, during the delay occasioned by trial, the possessor has completed a title to the property by usucapion, he will not be thereby saved from being condemned. The judge ought also to take into account the mesne profits, or fruits produced by the property in the interval between the commencement of the action and judgement. If the defendant pleads that he is unable to make immediate production, and applies for a stay, and such application appears to be in good faith, it should be granted on his giving security that he will render up the property. If he neither complies at once with the judge's order for production, nor gives security for doing so afterwards, he ought to be condemned in a sum representing the plaintiff's interest in having production at the commencement of the proceedings. **4**. In an action for the division of a 'family' the judge ought to assign to each of the heirs specific articles belonging to the inheritance, and if one of them is unduly favoured, to condemn him, as we have already said, to pay a fixed sum to the other as compensation. Again, the fact that one only of two joint-heirs has gathered the fruits of land comprised in the inheritance, or has damaged or consumed something belonging thereto, is ground for ordering him to pay compensation to the other; and it is immaterial, so far as this action is concerned, whether the joint-heirs are only two or more in number. **5**. The same rules are applied in an action for partition of a number of things held by jointowners. If such an action be brought for the partition of a single object, such as an estate, which easily admits of division, the judge ought to assign a specific portion to each jointowner, condemning such one as seems to be unduly favoured to pay a fixed sum to the other as compensation. If the property cannot be conveniently divided—as a slave, for instance, or a mule—it ought to be adjudged entirely to one only of the joint-owners, who should be ordered to pay a fixed sum to the other as compensation. **6**. In an action for rectification of boundaries the judge ought to examine whether an adjudication of property is actually necessary. There is only one case where this is so; where, namely, convenience requires that the line of separation between fields belonging to different owners shall be more clearly marked than heretofore, and where, accordingly, it is requisite to adjudge part of the one's field to the owner of the other, who ought, in consequence, to be ordered to pay a fixed sum as compensation to his neighbour. Another ground for condemnation in this action is the commission of any malicious act, in respect of the boundaries, by either of the parties, such as removal of landmarks, or cutting down boundary trees: as also is contempt of court, expressed by refusal to allow the fields to be surveyed in accordance with a judge's order. **7**. Wherever property is adjudged to a party in any of these actions, he at once acquires a complete title thereto.

TITLE XVIII

OF PUBLIC PROSECUTIONS

Public prosecutions are not commenced as actions are, nor indeed is there any resemblance between them and the other remedies of which we have spoken; on the contrary, they differ greatly both in the mode in which they are commenced, and in the rules by which they are conducted. **1**. They are called public because as a general rule any citizen may come forward as prosecutor in them. **2**. Some are capital, others not. By capital prosecutions we mean those in which the accused may be punished with the extremest severity of the law, with interdiction from water and fire, with deportation, or with hard labour in the mines: those which entail only infamy and pecuniary penalties are public, but not capital. **3**. The following statutes relate to public prosecutions. First, there is the lex Iulia on treason, which includes any design against the Emperor or State; the penalty under it is death, and even after decease the guilty

person's name and memory are branded with infamy. **4**. The lex Iulia, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also those who indulge in criminal intercourse with those of their own sex, and inflicts penalties on any who without using violence seduce virgins or widows of respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation. **5**. The lex Cornelia on assassination pursues those persons, who commit this crime, with the sword of vengeance, and also all who carry weapons for the purpose of homicide. By a 'weapon', as is remarked by Gaius in his commentary on the statute of the Twelve Tables, is ordinarily meant some missile shot from a bow, but it also signifies anything thrown with the hand; so that stones and pieces of wood or iron are included in the term. '*Telum*,' in fact, or 'weapon', is derived from the Greek τηλοῦ, and so means anything thrown to a distance. A similar connexion of meaning may be found in the Greek word βέλος, which corresponds to our *telum*, and which is derived from βάλλεσθαι, to throw, as we learn from Xenophon, who writes, 'they carried with them βέλη, namely spears, bows and arrows, slings, and large numbers of stones.' *Sicarius*, or assassin, is derived from *sica*, a long steel knife. This statute also inflicts punishment of death on poisoners, who kill men by their hateful arts of poison and magic, or who publicly sell deadly drugs. **6**. A novel penalty has been devised for a most odious crime by another statute, called the lex Pompeia on parricide, which provides that any person who by secret machination or open act shall hasten the death of his parent, or child, or other relation whose murder amounts in law to parricide, or who shall be an instigator or accomplice of such crime, although a stranger, shall suffer the penalty of parricide. This is not execution by the sword or by fire, or any ordinary form of punishment, but the criminal is sewn up in a sack with a dog, a cock, a viper, and an ape, and in this dismal prison is thrown into the sea or a river, according to the nature of the locality, in order that even before death he may begin to be deprived of the enjoyment of the elements, the air being denied him while alive, and interment in the earth when dead. Those who kill persons related to them by kinship or affinity, but whose murder is not parricide, will suffer the penalties of the lex Cornelia on assassination. **7**. The lex Cornelia on forgery, otherwise called the statute of wills, inflicts penalties on all who shall write, seal, or read a forged will or other document, or shall substitute the same for the real original, or who shall knowingly and feloniously make, engrave, or use a false seal. If the criminal be a slave, the penalty fixed by the statute is death, as in the statute relating to assassins and poisoners: if a free man, deportation. **8**. The lex Iulia, relating to public or private violence, deals with those persons who use force armed or unarmed. For the former, the penalty fixed by the statute is deportation; for the latter, confiscation of one third of the offender's property. Ravishment of virgins, widows, persons professed in religion, or others, and all assistance in its perpetration, is punished capitally under the provisions of our constitution, by reference to which full information on this subject is obtainable. **9**. The lex Iulia on embezzlement punishes all who steal money or other property belonging to the State, or devoted to the maintenance of religion. Judges who during their term of office embezzle public money are punishable with death, as also are their aiders and abettors, and any who receive such money knowing it to have been stolen. Other persons who violate the provisions of this statute are liable to deportation. **10**. A public prosecution may also be brought under the lex Fabia relating to manstealing, for which a capital penalty is sometimes inflicted under imperial constitutions, sometimes a lighter punishment. **11**. Other statutes which give rise to such prosecutions are the lex Iulia on bribery, and three others, which are similarly entitled, and which relate to judicial extortion, to illegal combinations for raising the price of corn, and to negligence in the charge of public moneys. These deal with special varieties of crime, and the penalties which they inflict on those who infringe them in no case amount to death, but are less severe in character.

12. We have made these remarks on public prosecutions only to enable you to have the merest acquaintance with them, and as a kind of guide to a fuller study of the subject, which, with the assistance of Heaven, you may make by reference to the larger volume of the Digest or Pandects.

4. Demosthenes, *Against Conon*

in *Demosthenes*, *Speeches 50-59*, Victor Bers trans., The oratory of classical Greece, 6
(Austin: University of Texas Press, 2003), 66–80

INTRODUCTION

From antiquity[1] until the present day, *Against Conon* has been one of the favorite speeches of the Demosthenic corpus. Moderns are amused by its vivid portrayal of drunken brawling in an army camp and in the streets of Athens

[1] If we can believe a fourth-century AD account by Eusebius, admiration for the work was first manifested by the plagiarism of *Against Conon* by Demosthenes' enemy Dinarchus in *Against Cleomedon for Battery.*