FOURTH COMMENTARY.

(1) It remains for us to speak of actions. And if we inquire how many kinds of actions there are, the better opinion seems to be that there are but two, real and personal; for those who say that there are four, and include such as arise from solemn agreements, do not perceive that some kinds of actions are subdivided into others.

(2) A personal action is one which we bring against anyone who is liable to us under a contract, or on account of a crime; that is, that (what) we claim is that he is bound to give something, to do something, or to perform some service.

(3) A real action is one in which we either claim some corporeal property to be ours, or that we are entitled to some particular right in the property, for instance, the right of use and enjoyment; or the right to walk or drive through the land of another; or to conduct water from his land; or to raise the height of a building, or to have the view unobstructed; or when a negative action is brought by the adverse party.

(4) Therefore, these actions being distinct, it is certain that we cannot make use of the following form to recover our property from another, namely: "If it appears that he should be required to transfer it." For what is ours cannot be transferred to us, as it is understood that what is given to us is given for the purpose that it may become ours, and property which already belongs to us cannot become ours any more than it now is. Through hatred of thieves, and for the purpose of making them liable to a greater number of actions, the rule has been adopted that, in addition to the penalty of double and quadruple the value of the property obtained, thieves are also liable to the form: "If it appears that the defendant should be required to transfer the property"; even though the action by which we seek to recover what belongs to us may also be brought against him.

(5) Moreover, real actions are styled suits for the recovery of property, but personal actions, by which we assert that something must be given, or some act be performed, are called *condictiones*.

(6) Again, we sometimes bring suit merely to recover property; sometimes only to recover the penalty; and sometimes to recover both.

(7) For example, we sue merely to recover property in actions brought under a contract.

(8) We bring suit only to recover a penalty, for example, in the actions of theft and of injury; and, according to the opinion of certain authorities, in an action for goods taken by violence; for we are entitled to recover the property by either a real or a personal action.

(9) Moreover, we bring suit to recover both the property and a penalty; for instance, in those cases in which we bring our action for double damages against a party who defends the case; and this happens in an action to recover a judgment debt; or expenses paid for a principal; or damages for injury under the *Lex Aquilia;* or to recover legacies; or a certain sum which has been bequeathed by condemnation.

(10) Moreover, there are some actions which refer to the ancient form of judicial procedure upon which they are based; and others become operative by their own force and power. In order that this may be clear, we must first treat of those which are based upon ancient judicial procedure.

(11) These actions which the ancients employed were so designated, either for the reason that they were provided by the law — although at that time the edicts of the Prætor, by means of which many new actions were introduced, had not come into use — or, because they followed the words of the law, and therefore, like the law itself, were observed without any alteration. Hence, it was decided that, a person who brought an action against another for cutting his vines, and in the pleadings called them "vines," should lose his case, as he ought to have called them "trees," because the Law of the Twelve Tables, under which the action for cutting

vines was brought, speaks in general terms of the cutting of trees.

(12) Actions were brought in five ways under the ancient form of judicial procedure, and were called *Sacramentum, Judicis Postulatio, Condictio, Manus Injectio, Pignoris Capio.*

(13) The action *Sacramentum* was a general one, for where no provision was made by the law in any other way for bringing suit with reference to certain property, it was done by means of an oath. This proceeding was attended with danger to the party swearing falsely; just as, at present, is the case in the action for the recovery of money lent, on account of the solemn agreement by which the defendant assumes a risk if he rashly denies the claim, and because of the counter engagement by which the plaintiff becomes liable if he did not recover the debt. Hence, the party who was defeated was obliged to pay the amount of money deposited by way of penalty, which was placed in the Public Treasury; and, for this reason, sureties were given to the Prætor; instead of, as at present, the amount deposited as penalty being for the benefit of the party who gained the case.

(14) The amount deposited by way of penalty in this proceeding was either five hundred, or fifty asses; five hundred were deposited when the property in question was worth a thousand or more asses, and fifty when it was worth less than a thousand; for this was provided by the Law of the Twelve Tables. When, however, the controversy was with reference to the freedom of a slave, although he may have been extremely valuable, still the amount deposited by way of penalty was only fifty asses. This was also provided by the Twelve Tables in favor of freedom, in order that the protector of the slave might not be unduly oppressed . . . . .

(15) Moreover, when all these actions were brought to enforce an obligation, the parties, having furnished sureties, agreed to again appear for the appointment of a judge; and having returned after thirty days, the judge was appointed in accordance with the *Lex Pinaria*; while before this law was enacted he was appointed immediately. We understand from what has been already stated, that if the property in dispute was worth less than a thousand asses, the amount deposited was usually only fifty, and not five hundred. Then, after the judge had been appointed, the parties gave notice to one another to appear before him on the third day following. Finally, when they came into court, and before the case was argued, it was customary to state it briefly, and in a concise manner; which was called the presentation of the case, which was, as it were, a mere summary of the same.

(16) When a real action was instituted, the movable property, and that which could move itself and be brought into court, was demanded as follows. The party making the claim, held a staff, and then grasping the object in dispute, as for instance, a slave, said: "I declare this slave to belong to me, on account of his condition, in accordance with quiritarian right. See! in accordance with what I have stated, I have placed my staff upon him"; and, at the same time, he laid the staff upon the slave. His opponent then said and did the same thing, and when both of them had asserted their claims, the Prætor said: "Both of you release your hold upon the slave"; and they did so. The one who first asserted his claim, then interrogated the other as follows: "I ask whether you will state on what ground you make this claim?" and he replied, "I asserted my right to him by placing my staff upon him." The first claimant than said, "As you have wrongfully claimed him I call upon you to deposit five hundred asses by way of forfeit," and his opponent then said, "I call upon you to do the same"; (that is if the property was worth more than a thousand asses five hundred were deposited but if it is worth less only fifty was the amount of the forfeiture).

After this the same proceedings took place as in a personal action, and then the Prætor made a temporary disposition of the property in favor of one of the parties, that is to say, he gave him possession of it for the time, and ordered him to furnish sureties to his adversary for the expenses of the suit as well as the mesne profits of the property which was the object of the action. The Prætor, moreover, took sureties for the forfeits, from both parties, for the benefit of the Public Treasury. The staff was employed instead of a spear, as an emblem of lawful

ownership, for whatever was taken from an enemy a man considered to be absolutely his own; wherefore in cases tried before the *Centumviri*, a spear was placed in front of the tribunal.

(17) If the property was of such a nature that it could not be brought or led into court without inconvenience, as for instance, if it consisted of a column, or a drove of cattle of any kind, a certain portion was brought in, and then the claim was made for that portion just as if all of it was present. Therefore, if the property in dispute consisted of a flock of sheep or goats, a single sheep or goat was brought into court, or even a single tuft of wool was produced; or if it consisted of a ship, or a column, a small part was broken off; and, in like manner, if a tract of land or a building, or an estate was the subject of controversy, a small part was brought in, and a claim was made for it in the same manner as if all the property was there; as, for instance, a clod was taken from the land, or a tile was taken from the building; and if the dispute was with reference to an estate, in like manner the property itself, or some part of it was produced in court . . . .

(17a) . . . . For they observed the same time and the same manner in appointing a judge, and agreed upon a day when they would be ready to receive the judge, for to "agree upon" meant originally "to notify".

(18) Therefore, this action was very properly styled a notification, for the plaintiff was accustomed to notify his adversary to appear before the court on the thirtieth day to receive a judge. At present, however, we do not properly call a suit of this kind by which we institute proceedings to have property conveyed to us a personal action, for now no notice is given for this purpose.

(19) This form of judicial procedure was established by the *Lex Silia* and the *Lex Calpurnia*; by the *Lex Silia*, to receive a certain sum of money, and by the *Lex Calpurnia*, to recover any other property which was certain.

(20) It has frequently been asked why this action was required when we could either by *Sacramentum* or *Judicis Postulatio*, obtain the transfer of property to which we are entitled.

(21) The proceeding of *Manus Injectio* was employed in certain cases, as for instance, by the Law of the Twelve Tables, when judgment had been obtained against a debtor. This was as follows: the party who brought the suit said, "As judgment has been rendered against you, or you have been condemned to pay me ten thousand sesterces, and you have not paid them, for this reason I lay my hands upon you, as being indebted to me under the judgment for ten thousand sesterces"; and at the same time he seized him by some part of the body, and the debtor was not permitted to resist, or to protect himself by law, but he appointed a defender, who conducted the case for him, or, if he did not do so, he was taken to his house by the plaintiff and placed in chains.

(22) Subsequently, certain laws in some other cases, permitted the arrest of debtors against whom judgment had been rendered; as the *Lex Publilia* against a party for whom his sponsor had paid the debt, if, within the next six months from the time when it was paid, he had not indemnified him; likewise, the *Lex Furia de Sponsu* against one who had collected from his sponsor more than his proportionate share; and finally, many other laws granted proceedings of this kind in numerous instances.

(23) Other enactments provided that, on certain grounds, proceedings could be instituted by the imposition of hands; but this was the simple act, and not authorized in the case of debtors against whom judgment had been rendered; for instance, the *Lex Furia Testamentaria* permitted this to be done against a party who, as a legatee or the recipient of a donation *mortis causa*, had received more than a thousand asses, when he was not excepted under this law, and was entitled to receive more; also the *Lex Marcia* against money-lenders, so that if they collected interest, they could be compelled by this proceeding to refund it.

(24) By these laws and others similar to them, the defendant was permitted to resist arrest, and take legal measures to defend himself, for the plaintiff in this form of judicial procedure was not entitled to add the words, "On account of a judgment rendered"; but after having stated his cause of action, said: "For this reason I lay hands upon you"; just as he in whose favor proceedings were instituted on account of a judgment, after having stated his cause of action, said: "I arrest you on account of the judgment which has been rendered against you." It has not escaped my notice that in proceedings under the *Lex Furia Testamentaria* the words, "On account of the judgment rendered against you," were inserted, although they do not appear in the law itself; which seems to have been done without any reason.

(25) Afterwards, however, by the *Lex Vallia* all other defendants, except judgment debtors and principals whose debts had been paid by their sureties, were permitted to resist arrest, and avail themselves of the law for their defence, when this proceeding was instituted against them. Therefore, the party against whom judgment was rendered, and one whose debt had been paid by his surety were, even after this law, required to appoint a defender; and if they did not do so, were taken to the house of their creditor; and this rule was observed as long as the ancient forms of procedure were employed. Hence, in our times, anyone against whom proceedings have been brought in an action on judgment or to recover the amount of the debt paid by a surety is compelled to furnish security to satisfy the claim.

(26) *Pignoris Capio* was employed in some instances through custom, and in others by virtue of law.

(27) It was introduced through custom into military affairs; for a soldier was entitled to employ this proceeding against the paymaster for his pay, if he did not give it, which compensation was designated *æs militare*, and he could also distrain for money for the purpose of purchasing a horse, which was called *æs equestre*, as well as for money with which to purchase barley for his horse which was called *æs hordiarium*.

(28) The detention of property in this manner was also legally authorized, for instance, by the Law of the Twelve Tables against a party who bought a victim for sacrifice and did not pay for it; and likewise against one who did not pay the hire of a beast of burden which he had leased for the purpose of raising money to meet the expenses of a festival, that is to say, of a sacrifice. In like manner, the right to distrain was granted by the law of Censors to the farmers of the revenue of the Roman people, against persons who owed taxes under any law.

(29) In all these instances the property was seized by the employment of certain words; and, on this account, it was held by most authorities that this proceeding was also a form of statute process.

Others, however, were of the contrary opinion; first, because it took place out of court, that is to say, not in presence of the Prætor, and usually also during the absence of the adverse party; while, on the other hand, other actions could not be made use of by any one except in the presence of both the Prætor, and the adverse party, and besides property could not be distrained on an unlawful day, that is to say, on one when it was not permitted to act under the law.

(30) All these forms of judicial procedure, however, gradually became unpopular on account of the extreme subtlety of the ancient legal authorities, so that the result was that anyone who committed the slightest error lost his case. Hence, by the *Lex Æbutia* and the two *Leges Julia*, proceedings under this law were abolished, and another form was substituted for them; so that at present in litigation we make use of written instructions, that is to say, formulas, for that purpose.

(31) In only two instances was permission granted to act under the ancient procedure, that is to say, those of threatened injury, and those before the Centumviral Tribunal. When application is made to the *Centumviri*, proceedings are first instituted by the deposit of forfeits before the

Urban or the Foreign Prætor; but in the case of threatened injury, no one wishes to employ the ancient procedure, but prefers to bind his adversary by a stipulation provided for in the Edict; by which means his rights are more conveniently and thoroughly protected. By the seizure of property as security for debt . . . . it is apparent.

(32) On the other hand, in the formula provided for the farmer of the revenue a fiction is inserted, ordering that the debtor be condemned to pay the same amount of money which he would have been compelled to pay in order to release his property, if it had been seized as security for the debt.

(33) No formula, however, is based on a fiction in a personal action for recovery; for whether we bring suit for a sum of money, or for any certain article of property as being due, we assert that the very thing itself should be transferred to us, and we do not add any fiction for the purpose of establishing the claim. Therefore, we understand these formulas to be those by which we allege that a definite sum of money, or certain specified property, should be transferred to us, and that the claim is valid by its own force and power. Actions of loan for use, trust, business transacted, as well as innumerable others are of the same nature.

(34) We make use of other fictions in certain formulas, for instance, when a party who claims possession of the property of an estate brings an action as a fictitious heir; for as he succeeds to the deceased by the prætorian, and not by the Civil Law, he is not entitled to a direct action, and cannot allege that what belongs to the deceased is his; nor can he demand that what was due to the latter should be paid to him; and therefore, under the fiction that he is the heir, he asserts his claim as follows: "Let So-and-So be judge. If Aulus Agerius" (that is to say, the plaintiff, himself) "should be the heir of Lucius Titius, and it is found that the land in question ought to belong to him by quiritarian right;" or if, in the case of a debt, a similar fiction having been employed by the party, as heir, there is added: "If it should appear that Numerius Negidius should pay to Aulus Agerius ten thousand sesterces."

(35) Likewise, the purchaser of the property of a bankrupt estate may proceed under the fiction that he is the heir, and sometimes he can do so in a different way; for in his statement of the claim he may mention the person whose property he purchased and himself in the condemnation; that is to say, that his adversary may be condemned to pay him on this account what belonged to the former or was due to him. This species of proceeding is called Rutilian, because it was devised by the Prætor Publius Rutilius, who is said to have also introduced the sale of bankrupt estates. The kind of action mentioned above, by which the purchaser of the property of an insolvent estate pretends to be the heir, is called Servian.

(36) Likewise, there is a pretended usucaption in the action which is styled Publician. This action is granted to a party who claims property which has been delivered to him for some legal reason, and of which he lost possession before obtaining a title to it by usucaption; for because he cannot claim it as his under quiritarian right, the fiction is employed that he has acquired it by usucaption and hence, as it were, to have become its owner, by quiritarian right; for instance, as follows: "Let So-and-So be judge. If the slave whom Aulus Agerius purchased and who was delivered to him remained in his possession for a year, the said slave would then have lawfully belonged to the said Aulus Agerius by quiritarian right, etc."

(37) Likewise, Roman citizenship is feigned in the case of an alien, if he either sues or is sued in an action established by our laws; provided it is just that the said action may be extended to aliens. For example, if an alien sues or is sued for theft, or for aiding and abetting theft, the following formula should be employed, "Let So-and-So be judge. If it appears that a gold cup was stolen from Lucius Titius by Dio the son of Hermæus, or with his aid and advice for which he would have been compelled to make restitution for theft if he had been a Roman citizen, then let the said Dio, the son of Hermæus be convicted, etc."

Again, if an alien brings the action of theft, or if, under the *Lex Aquilia* he sues or is sued for damage to property, he can avail himself of the fiction of Roman citizenship, and judgment

can be rendered either for or against him.

(38) Moreover, sometimes we may feign that our adversary has not suffered a loss of civil rights; for if a man or a woman has become liable to us under a contract, and he or she has afterwards undergone forfeiture of civil rights — as, for instance, the woman by coemption, and the man by arrogation — he or she ceases to be indebted to us under the Civil Law, and we cannot directly claim that either is bound to transfer anything to us. In order, however, that the party may not have power to annul our rights, an equitable action is granted against him or her by a fictitious rescission of the loss of civil rights; that is to say, one in which it is feigned that the party had not suffered a disability of this kind.

(39) The divisions of the Formula are the following, the *Demonstratio*, the *Intentio*, the *Adjudicatio*, and the *Condemnatio*.

(40) The *Demonstratio* is that part of the Formula which designates the ground on which the case is brought, that is to say, the following part of the same: "For the reason that Aulus Agerius sold a slave to Numerius Negidius"; or "For the reason that Aulus Agerius left a slave in the keeping of Numerius Negidius".

(41) The *Intentio* is that part of the Formula in which the plaintiff states his claim; for instance, as follows: "If it appears that Numerius Negidius should pay ten thousand sesterces to Aulus Agerius"; or, "Whatever it appears that Numerius Negidius should pay to, or do for, Aulus Agerius"; likewise, "If it appears that the slave in dispute is the property of Aulus Agerius, by quiritarian right".

(42) *Adjudicatio* is that part of the Formula by which the judge is permitted to assign the property in question to one of the litigants; as for instance, where an action for the partition of an estate is brought between co-heirs; one for the division of common property between partners; one for the establishment of boundaries between neighbors. In cases of this kind, the following form is employed, namely: "Judge, award to Titius the amount to which he is entitled."

(43) *Condemnatio* is that part of the Formula by which authority is granted to the judge to condemn or discharge the defendant; for instance, as follows: "Judge, condemn Numerius Negidius to pay ten thousand sesterces to Aulus Agerius, and if the claim should not be proved, discharge him." Likewise, as follows: "Judge, condemn Numerius Negidius to pay to Aulus Agerius not more than ten thousand sesterces, and if the claim should not be proved, let him be discharged," or, as follows: "Judge, let Numerius Negidius be condemned to pay to Aulus Agerius"; etc., without adding the clause, "Not more than ten thousand sesterces".

(44) All these divisions are not found together but in every formula; where some of them appear, others do not, and in fact, sometimes the *Intentio* exists alone, as in prejudicial formulas, in which the question is whether a man is a freedman, or what the amount of a dowry may be, and numerous others. The *Demonstratio*. the *Adjudicatio*, and the *Condemnatio* are never found alone; for the *Demonstratio* without the *Intentio* and the *Condemnatio*, is of no effect; and, in like manner, the *Condemnatio* or the *Adjudicatio* has no force without the *Intentio*, and for this reason they are never found alone.

(45) We say that the formulas in which a question of right is involved, are founded in law; as for instance, when we assert that any property belongs to us by quiritarian right, or that the adverse party is obliged to pay us something, or make good a loss to us as a thief, for these formulas and others are those in which the claim is based on the Civil Law.

(46) We say that other formulas are based upon questions of fact, that is, where a claim of this kind is not made with reference to them; but, where a fact is stated in the beginning of a formula, words are added by which authority is given to the judge to condemn or discharge the defendant. This kind of a formula is employed by a patron against his freedman, when the latter brings him into court contrary to the Edict of the Prætor; for then it is in the following

terms: "Let Soand-So be judges. If it is established that such-and-such a patron was brought into court by such-and-such a freedman, contrary to the edict of such-and-such a Prætor — judges, condemn the said freedman to pay to the said patron the sum of ten thousand sesterces. If the case should not be proved, discharge him."

The other formulas mentioned in the Edict with reference to the summoning of parties into court, refer to matters of fact; as for instance, against a person who, having been summoned into court, neither appeared nor appointed anyone to defend him; and also against one who rescued by force a party who was summoned to appear; and, in conclusion, innumerable other formulas of this description are set forth in the Register of the Prætor.

(47) In some instances, however, the Prætor permits formulas having reference to either law or fact to be employed; for example, in actions of deposit, and loan for use.

The following formula is one of law. "Let So-and-So be judge. Whereas Aulus Agerius deposited a silver table with Numerius Negidius, for which this action is brought, whatever Numerius Negidius is obliged to pay to, or do for, Aulus Agerius, in good faith, on this account, do you, judge, condemn Numerius Negidius to pay to, or do for Aulus Agerius, unless he makes restitution; and, if the case should not be proved, let him be discharged." The following formula: "Let Soand-So be judge. If it appears that Aulus Agerius deposited a silver table with Numerius Negidius, and, through the fraud of the said Numerius Negidius, the said table has not been restored to the said Aulus Agerius, do you, judge, condemn Numerius Negidius to pay to Aulus Agerius a sum of money equal to the value of the property, and if the case is not proved let him be discharged"; is one of fact. Similar formulas are employed in an action of loan for use.

(48) The condemnation clause of all formulas has reference to the pecuniary value of the property. Therefore if we claim any corporeal property, for instance, land, a slave, a garment, or gold or silver, the judge condemns the party against whom the suit was brought not to deliver the very thing itself, as was formerly the practice, but its estimated value in money.

(49) The judgment clause of the formula either mentions a certain, or an uncertain sum of money.

(50) The mention of a certain sum of money, for example, appears in the formula by which we demand the payment of a designated amount; for then the last part of the formula is as follows: "Judge, condemn Numerius Negidius to pay ten thousand sesterces to Aulus Agerius; and if the case is not proved, discharge him."

(51) A judgment for an uncertain sum of money has a two-fold signification. In the first instance, it is preceded by some restriction called a limiting clause, as, for instance, where we bring an action for an uncertain amount; for then in the last part of the formula the following words are employed: "Judge, condemn Numerius Negidius to pay not more than ten thousand sesterces to Aulus Agerius; and if the case should not be proved discharge him." If, however, the amount is uncertain, and there is no limit; for instance, where we bring suit for property belonging to us, which is in the possession of another, that is to say, if we institute proceedings for the production of property in court, the following words are used: "Judge, condemn Numerius Negidius to pay to Aulus Agerius a sum of money equal to the value of the property; and if the case is not proved let him be discharged."

(52) What then is the rule? If the judge decides against the defendant, he must require him to pay a certain sum of money even though no specified amount may have been mentioned in the judgment.

The judge should also be careful that, when a certain sum is stated in the judgment, not to require the defendant to pay a larger or a smaller amount, otherwise he makes the case his own. Again, if a limiting clause was inserted, he must take care not to condemn the defendant in a larger amount than is mentioned in said clause, otherwise, he will, in like manner, make

the case his own; he is, however, permitted to render a judgment against him for a smaller sum; and even if there should be no limiting clause, he can condemn him in any amount that he may wish.

(52a) For the reason that the party who accepts the formula should state the amount which he claims, the judge is not required to render a decree for a larger sum; but the plaintiff cannot make use of the same formula a second time, and he should state in the condemnation the certain sum of money which he claims, in order that he may not recover less than he desires.

(53) If anyone claims more than he is entitled to he will lose his case, that is to say, he will lose his property, and he cannot obtain complete restitution through the Prætor; except in certain instances in which the Prætor does not permit all plaintiffs to suffer loss on account of their own errors; for he always comes to the relief of minors under the age of twenty-five years, as in other cases.

(53a) A plaintiff may demand more than he is entitled to in four ways; in the amount of property, in time, in place, and in the statement of his cause of action. He does so in the amount of property, if he demands twenty thousand sesterces, instead of ten thousand which are due to him; or, if he demands as his own, either the whole, or the greater part of the property, when he is only a joint owner.

He demands more in point of time, if he asks for payment before the debt is due.

He demands more in place, for instance, where payment is promised in a certain place, and he demands that it be made somewhere else, which was not mentioned in the contract; for example, if I stipulate with you as follows: "Do you solemnly agree to pay me ten thousand sesterces at Ephesus?" and afterwards bring suit at Rome under the formula, "If it appears by the stipulation that you are obliged to pay me ten thousand sesterces," I am understood to claim more than I am entitled to, for the reason that in this way I subject the promisor to more inconvenience than he would suffer if he paid at Ephesus. I can still absolutely demand payment at Ephesus, for this is not an additional place.

(53b) He demands too much in his statement of his cause of action, if he deprives the debtor of a choice which he had by the terms of the contract, for example, if anyone stipulates as follows: "Do you solemnly agree to either pay ten thousand sesterces, or deliver the slave Stichus?" as then he can demand either the one or the other. For although he may demand what is of lesser value, he still is considered to claim too much, because his adversary may sometimes more conveniently deliver what is not demanded.

Likewise, if anyone stipulates for a genus, and afterwards claims a species; for instance, if he stipulates for purple, in general terms, and afterwards expressly demands Tyrian purple, even though he may demand that of the least value the same rule will apply, for the reason which we have just mentioned.

The same rule also applies where anyone stipulates for a slave in general terms, and afterwards demands a particular slave, for example, Stichus; although he may be almost worthless. Therefore, the phraseology of the formula designating the claim must exactly coincide with what was set forth in the stipulation.

(54) It is perfectly evident that too large an amount cannot be claimed by an uncertain formula, because as a definite amount is not demanded, but it is merely stated that the adversary shall give, or do only what he is required, no one can claim more. The same principle applies where a real action is granted to recover an uncertain share of property; as for example, when a plaintiff demands that there shall be transferred to him the share of the land in question to which he is entitled, which kind of action is granted in very few instances.

(55) It is also evident that if anyone claims one thing instead of another, he will run no risk, as he can bring another suit, because he is not considered to have previously done anything

which was legal; for instance, where a party who had a right to claim the slave Stichus, demands Eros; or where anyone states that he is entitled to property under a will, when in fact he is entitled to it under the terms of a stipulation; or where an agent or attorney claims that property should be transferred to him, instead of to his principal.

(56) To claim more than one is entitled to, as we have stated above, involves risk; but anyone is permitted to claim less. He is not permitted, however, to bring suit to recover the remainder in the jurisdiction of the same Prætor, for anyone who does so, is barred by the exception styled the exception against division of actions.

(57) If more is claimed in the condemnation than is proper, the plaintiff runs no risk; but as the defendant has made use of a formula which was unjust, he may obtain complete restitution, in order that the amount of the judgment may be reduced. If, however, less be set out in the condemnation than the plaintiff has a right to, he only obtains the amount which he sued for, as the entire claim was brought into court, and he will be limited by the amount stated in the condemnation which the judge cannot exceed. In a case of this kind the Prætor does not grant complete restitution, for he more readily comes to the relief of defendants than plaintiffs. We, however, except minors under the age of twenty-five years, for the Prætor always comes to the relief of such persons, where loss of property has been sustained by them.

(58) Where more or less than is due is set forth in the *Demonstratio*, no case is brought into court, and hence the matter remains unaltered; and this is what is meant when it is said that a right is not extinguished by a false statement of the cause of action.

(59) Still, there are some authorities, who hold that less than is due may be properly included in the *Demonstratio*; so that a party who has purchased both Stichus and Eros, is considered to have properly stated his cause of action as follows: "Whereas I purchased the slave Eros from you"; and, if he desires to do so, he may bring an action for the recovery of Stichus by means of another formula; because it is true that anyone who purchased both slaves also purchased each of them; and this was especially the opinion of Labeo. If, however, he who purchased one of them, should bring an action to recover both, he makes a full statement of his cause of action. The same rule is applicable to other actions, for instance, to those of Loan for Use, and Deposit.

(60) We have found it stated in certain writers that, in the action of Deposit — and indeed in all others in which, the condemned party is branded with infamy — anyone who demands more than he is entitled to in the statement of his cause of action, will lose his case; for instance, where he who had deposited one article, alleges in his statement that he had deposited two; or where he who was struck on the cheek with the fist, states in an action for injury sustained that he was also struck in some other part of the body. Let us carefully examine whether we should hold this opinion to be correct.

It is true that there are two formulas employed in the Action of Deposit, one based upon the law and the other upon fact, as we mentioned above. The one based on the law, in the first place, designates the cause of action in the manner in which this is usually done, and then sets out the claim as being based upon the law in the following terms: "Whatever the defendant should, on this account, give or perform." But in the formula based upon fact, the cause of action is set forth in the beginning without any previous statement, as follows, "If it appears that So-and-So deposited such-and-such property with Soand-So"; we should entertain no doubt that if anyone in a formula based on fact alleges that he has deposited more articles than was actually the case he will lose his suit, because he is considered to have included in his claim more than he was entitled to. . . .

(61) Set-offs frequently take place in such a way that each party receives less than he would otherwise be entitled to. For, as in *bona fide* actions, the judge is considered to have full power to estimate how much should justly and properly be paid to the plaintiff; on the other hand, he also has authority to determine how much the plaintiff should pay in the same case,

and to render judgment against the defendant for the remainder.

(62) *Bona fide* actions are such as the following: purchase and sale; leasing and hiring; the transaction of the business of others without authority; deposit; trust; partnership; guardianship; dotal property.

(63) The judge also has a right not to consider any set-off, at all, as he is not expressly directed to do so by the terms of the formula; but, for the reason that this seems to be proper in a *bona fide* action, it is therefore held to be part of his duty.

(64) The case of an action brought by a banker is different, for he is compelled to take account of a set-off, and to mention it in his statement; and to such an extent is this true, that he must make allowance for it in the first place, and only demand that the remainder shall be paid to him. For example, if he owes ten thousand sesterces to Titius, and Titius owes him twenty thousand, he should state his claim as follows: "If it appears that Titius owes him ten thousand sesterces more than he owes Titius."

(65) Again, the purchaser of the estate of a bankrupt is directed to make a deduction when he brings his action, so that his adversary will only have judgment rendered against him for the balance which remains after having deducted what the purchaser of the estate owes the defendant on account of the insolvent debtor.

(66) Between the set-off which is made against the claim of the banker, and the deduction to be taken from the claim of the purchaser of a bankrupt estate, there is this difference, namely: that property of the same kind and nature is only included in the set-off; as for instance, money is set-off against money; wheat against wheat; wine against wine; and it is even held by some authorities that wine cannot be set off against wine, or wheat against wheat, unless it is of the same nature and quality. In making the deduction, however, property is included which is not of the same kind. Hence, if the purchaser of the estate of a bankrupt brings an action for money due the latter, and he himself owes a certain quantity of grain or wine, after it has been deducted, suit shall be brought only for the remainder, whatever it may be.

(67) Deduction is also made of what will be due hereafter at a certain time, but set-off only takes place where the debt is already due.

(68) Moreover, the amount of the set-off is inserted in the statement of the claim, the result of which is that if the banker demands in the set-off a single sesterce more than he is entitled to, he will lose his case, and therefore his property as well. The deduction, however, is inserted in the judgment, in which place the claimant does not run any risk, for demanding too much; especially when the purchaser of a bankrupt estate brings a suit in which, although he makes a claim for a certain amount of money, he, nevertheless, sets out an uncertain amount in the condemnation.

(69) For the reason that we have previously mentioned the action brought against the *peculium* of sons under parental control and slaves, it is necessary for us to more clearly explain this, as well as the other actions, which are ordinarily brought against parents and masters, on account of their sons and slaves.

(70) In the first place, if a transaction was entered into with a son or a slave, by order of his father or his master, the Prætor will grant an action for the entire amount against the father or the master; and this is proper, because anyone who enters into a transaction of this kind takes into consideration their responsibility rather than that of the son, or the slave.

(71) For the same reason the Prætor grants two other actions, the *Actio Exercitoria*, and the *Actio Institoria*. The first will lie where the father or the master places his son or his slave in charge of a ship, and any business on this account is transacted by the party in charge. For whenever a debt has been contracted with the consent of the father or master, it appears to be perfectly just that an action for the entire amount should be granted against him. And even

though a person appoints as the master of a ship either a slave belonging to another, or a freeman, the prætorian action will, nevertheless, be granted against him. This action is called "*Exercitoria*," for the reason that the party who obtains the daily returns from the ship is called "*Exercitor*."

The Institorial Formula is employed when anyone places his son or slave, or the slave of another or a freeman, in charge of his shop, or of any kind of business whatsoever; and where the party placed in charge of the same contracts any debt which has reference to the said business. It is called "*Institoria*," for the reason that the party placed in charge of a shop is called "*Institor*"; and this formula is made use of for the collection of the entire amount which is due.

(72) In addition to these, the *Actio Tributoria* has been established against a father or a master, when his son or slave transacts some business with his *peculium*, with the knowledge of his father or his master. For if any contract having reference to said property should be made with either of them, the Prætor directs that whatever was invested in the said business, or any profits derived from the same, shall be distributed between the father or master, if anything is due to them, and among any other creditors, in proportion to their respective claims; and for the reason that he permits the distribution to be made to the father, or the master, if any creditor should complain of having received less than he was entitled to, he enables him to bring this action which is called "*Tributoria*."

(73) Moreover, the action *De Peculio* was introduced where any advantage accrued to the father, or the master; and although the business may have been transacted without the consent of either of them, still, whatever was expended for the benefit of their property should be paid in full; or if it was not expended for that purpose, payment should be made to the amount of the value of the *peculium*. It is supposed to have been expended for the benefit of the master's property if the slave should have disbursed anything necessarily for the advantage of his master; for instance, if he should pay borrowed money to his creditors; or should prop up buildings which are about to fall; or should purchase grain for his household; or should buy a tract of land, or any other property which it was necessary to acquire. Therefore, for example, if out of ten sesterces which your slave borrowed from Titius, he should pay five to your creditor, and should expend the remaining five in any way whatsoever, you ought to have judgment rendered against you for five, and for the other five to the amount of the *peculium*.

From this it is apparent that if all of the ten sesterces were employed for the benefit of your property, Titius can recover the entire ten; for, although there is but one action having reference to the *peculium* to recover what was used for the benefit of the property of the father, or the master, still, he has the right to two judgments; and, therefore, the judge before whom the action is brought, should investigate in the first place, whether the expenditure was made for the benefit of the property of the father, or master; and should not pass to the estimation of amount of the *peculium*, unless either nothing was understood to have been expended for the benefit of the property of the father, or master, or that not all of it was so employed; as, when the estimate is made of the amount of the *peculium*, that should previously be deducted which is due to the father or the master, by the son, or the slave who is under his control; and the remainder shall only be considered as *peculium*. Sometimes, however, the amount due by the son, or the slave, as aforesaid, is not deducted from the *peculium*; for instance, if he who owes it himself forms a part of the said *peculium*.

(74) But there is no doubt that either the *Actio Exercitoria*, or the *Actio Institoria* will lie in favor of anyone who has entered into a contract with a son or a slave, by the order of his father or master; and that he can bring the action of *peculium*, or that based on the employment of property for the benefit of another. No one, however, when he could undoubtedly obtain the whole amount of the debt by means of either of the above mentioned actions, would be so foolish as to take the trouble to prove that the party with whom he contracted had a *peculium*,

and that his claim could be satisfied out of it; or that the money which he demanded had been employed for the benefit of the father, or master.

(74a) Again, he who is entitled to bring the *Actio Tributoria,* can also bring the *Actio de Peculio*, as well as the one for the recovery of money employed for the benefit of another: and it will generally be more advantageous for him to make use of this action than of the *Actio Tributoria*, for in the latter only the account of the *peculium* is considered which the son, or the slave made use of in the business in which he was engaged, and the profits of the same; in the *Actio de Peculio,* however, the entire *peculium* is involved; and anyone may transact business with a third or a fourth of it, or even with a smaller portion, and have the greater part of his *peculium* otherwise invested. This is even more true, and he should certainly have recourse to this action if it can be proved that what the party who contracted with the son or the slave gave was used for the benefit of the father or the master; for, as we stated above, the same formula is employed both in the action having reference to the *peculium*, and in the one to recover property used for the benefit of another.

(75) Noxal actions are granted on account of offences committed by sons under paternal control, or by slaves; as, for instance, where they commit theft or injury; so that the father or master is permitted either to pay the damages assessed, or to surrender the culprit by way of reparation; for it would be unjust for the misconduct of a son or a slave to cause any loss to his parent, or his master, except by the forfeiture of the body of the son or the slave.

(76) Moreover, noxal actions were established either by law or by the Edict of the Prætor; by law, for instance, in the action of theft under the provision of the Twelve Tables; the action for wrongful damage by the *Lex Aquilia*; the action for injury, and that for property taken with violence by the Edict of the Prætor.

(77) All noxal actions follow the person of the culprit. Hence, if your son, or your slave commits a wrongful act while he is under your control, an action will lie against you; if he conies under the power of another, an action can be brought against the latter; if he becomes his own master, a direct action can be brought against him, and his surrender by way of reparation is extinguished.

On the other hand, a direct action may become a noxal one; for if the head of a household commits a wrongful act and he gives himself in arrogation to you, or becomes your slave; what we stated in the First Commentary might happen in certain cases takes place; that is to say, a noxal action can be brought against you, when, formerly, a direct action would lie against the offender himself.

(78) If, however, a son commits a wrongful act against his father, or a slave against his master, no right of action will arise; for no obligation can, under any circumstances, be created between me and one who is under my control. Hence, although he may pass under the control of another, or becomes his own master, an action will lie neither against himself, nor against the party under whose control he now is. Therefore, the question arises where the son or the slave of another commits a wrongful act against me, and subsequently is subjected to my authority; whether, on this account the action is extinguished, or remains in suspense. Our preceptors hold that it is extinguished, because conditions have become such that it cannot be brought; and, therefore, if the party should be freed from my control, I cannot bring suit.

The authorities of the other school are of the opinion that as long as he is in my power, the action remains in suspense, for the reason that I cannot sue myself; but that when he is no longer subject to my authority the action is revived.

(79) Moreover, when a son under paternal control is transferred by mancipation, on account of some wrongful act which he has committed, the authorities of the other school think that he should be sold three times, because it is provided by the Law of the Twelve Tables that a son cannot be released from the authority of his father unless he has been three times sold.

Sabinus, Cassius, and the other authorities of our school, however, hold that one sale is sufficient, and that the three mentioned by the Law of the Twelve Tables only refer to voluntary sales.

(80) So much with reference to those persons who are under the control of their fathers and masters whether the controversy relates to their contracts, or their crimes. But with reference to such persons as are in hand, or are liable to mancipation, the law is said to be that when an action founded on contract is brought against them, unless they are defended against the entire amount by the party to whose authority they are subject, any property which would be theirs, if they had not been under control, shall be sold. When, however, their forfeiture of civil rights having been rescinded, an action based on the judicial power of the magistrate is brought against them and is not defended, the woman herself can be sued, while she is in the hand of her husband, because, in this instance the authority of the guardian is not necessary. . . .

(81) What course then should be pursued? Although we stated that it was not permitted to surrender dead persons by way of reparation for the commission of a wrongful act; still, if anyone should surrender the body of such a person who had died, he will (be) legally released from liability.

(82) In the next place we should note that we can either sue in our own names, or in that of another, as for instance, our agent, attorney, guardian, or curator, while formerly, when the *legis actionis* were employed, a man could not bring an action in the name of another, except in certain cases.

(83) Moreover, the attorney in an action is appointed by prescribed forms of words in the presence of the adverse party. The plaintiff appoints an attorney as follows: "Whereas, I am bringing an action against you (for example) to recover a certain tract of land; I appoint Lucius Titius my attorney against you in this matter." The adverse party makes his appointment as follows: "Whereas, you have brought an action against me to recover a tract of land, I appoint Publius Mævius my attorney against you in this matter." The plaintiff may make use of the following words: "Whereas, I desire to bring an action against you, I appoint Lucius Titius my attorney in this matter." The defendant says: "Whereas, you desire to bring an action against me, I appoint Publius Mævius my attorney in this matter."

It makes no difference whether the attorney appointed is present, or absent; but if an absent person is appointed, he will only become the attorney if he accepts and undertakes the duties of the office.

(84) An agent, however, is substituted in the case without the use of any special forms of words, merely by mandate alone, and his appointment can be made during the absence, and without the knowledge of the adverse party. Moreover, there are some authorities who hold that one can become an agent, without having been directed to do so, provided he attends to the business in good faith, and gives security that his principal will ratify his acts; although he to whom the mandate was given is generally required to furnish security, because the mandate is frequently concealed in the beginning of the proceedings and is afterwards disclosed in court.

(85) We have stated in the First Commentary in what manner guardians and curators are appointed.

(86) He who brings an action in the name of another makes the claim in the name of his principal, and mentions his own name in the condemnation. If, for instance, Lucius Titius brings suit for Publius Mævius, the formula is in the following words: "If it appears that Numerius Negidius should pay to Publius Mævius ten thousand sesterces, Judge, condemn Numerius Negidius to pay ten thousand sesterces to Lucius Titius, and if his indebtedness should not be established discharge him from liability." Again, in a real action, the claim is made that the property belongs to Publius Mævius by quiritarian right, and the representative

is mentioned in the condemnation.

(87) When anyone intervenes in behalf of the party against whom the action is brought, and the claim is made that "the principal should make payment," the condemnation is stated in the name of the representative of the party sued. In the case of a real action, however, the name of the party defendant is not mentioned in the claim, either when he appears in person, or by a representative; for the claim merely states that the property in question belongs to the plaintiff.

(88) Let us now consider under what circumstances either the defendant or the plaintiff may be compelled to give security.

(89) Hence, for example, if I bring a real action against you, you should furnish me security, for it appears to be but just as you are permitted to retain possession of the property, and it is doubtful whether it belongs to you, or not, that you should give security that if you are defeated, and do not restore the property itself, or refuse to pay its value, I may have the power to proceed against you, or your sponsors.

(90) There is all the more reason that you should furnish me security, if you are acting as the representative of another in the case.

(91) Moreover, a real action is of a twofold nature; for it is either brought by a formula stating the claim, or by one based on a solemn engagement; and, if it is made in the manner first mentioned, the stipulation called "security for the payment of a judgment" will apply; but if it is based on a solemn engagement, that form of stipulation styled "security for the property in dispute and the profits derived from the same," is the one made use of.

(92) The formula which states the claim contains the allegation of the plaintiff that the property belongs to him.

(93) In the proceeding based upon a solemn engagement, we proceed as follows, and we make this demand upon the adverse party:'"If the slave in dispute is mine by quiritarian right, do you promise to pay me twenty-five sesterces?" And then we state the formula by which we claim that the sum mentioned in the promise should be paid to us; but we can only gain our case by means of this formula if we prove that the property is ours.

(94) The sum mentioned in the promise is not exacted, for it is not penal, but merely prejudicial, and is used only for the purpose of deciding the right to the property; therefore even the party against whom the action is brought does not make another stipulation with the plaintiff. Moreover, this kind of a stipulation instead of security for the property in dispute and for the profits of the same, was so called because it took the place of personal sureties who formerly, when proceedings were instituted under the *legis actiones*, were given by the party in possession to the plaintiff, for the restoration of the property itself and the mesne profits of the same.

(95) When, however, the suit is brought before the *Centumviri*, we do not demand the sum mentioned in the solemn engagement, by the formula, but under the ancient form of procedure; for then we challenge the defendant by the deposit, and the promise of a hundred and twenty-five sesterces is made by virtue of the *Lex* . . . .

(96) If a party brings a real action in his own name, he does not furnish security.

(97) And even if an action is brought by an agent, no security is required from him, or his principal, for he has been substituted for his principal by a prescribed and, as it were, solemn form of words; and he is very properly considered to occupy the place of his principal.

(98) If, however, an agent brings the action, he is ordered to give security that his principal will ratify his acts; for there is danger that, otherwise, the principal might bring a second action with reference to the same property, which danger does not exist where the suit was brought by an agent; for the reason that anyone who sues by an agent has no greater right of

action than if he brought the suit himself.

(99) The terms of the Edict compel guardians and curators to furnish security in the same way as agents; sometimes, however, they are not required to do so.

(100) So much with reference to real actions. In the case of personal actions, when inquiry is made now and when security should be furnished by the plaintiff, we repeat what we have already said with reference to real actions.

(101) But with respect to the party against whom the action is brought, where anyone intervenes in his behalf, he must, by all means, furnish security, for the reason that no one is understood to be a proper defender of another's affairs without security. If the action is brought against an attorney, his principal is required to furnish security, but if brought against an agent, the latter must furnish it himself. The same rule applies to guardians and curators.

(102) If, however, a party undertakes his own defence in a personal action he usually gives security to pay the judgment, in certain cases which are indicated by the Prætor. In these cases there are two reasons why security is exacted; for this is either done on account of the nature of the action, or because the character of the defendant is suspicious. It is required on account of the nature of the action, for instance, where it is one to compel the payment of a judgment, or to collect money expended for a principal; or where the morals of a wife are involved. It is required on account of the suspicious character of the defendant, where he has squandered his property; or his creditors have obtained possession of it, or advertised it for sale; or when proceedings have been instituted against an heir whom the Prætor considers liable to suspicion.

(103) Actions are either founded upon law, or are derived from the authority of a magistrate.

(104) Actions founded upon law are those which are brought in the City of Rome, or within the first mile-stone from that city, between Roman citizens before a single judge. Those brought under the *Lex Julia Judiciaria* expire after the lapse of a year and six months, unless they have been previously decided; and this is the reason why it is commonly stated that under the *Lex Julia* a case dies after a year and six months have elapsed.

(105) Actions derived from the authority of a magistrate are those brought before several judges, or before a single judge, if either the latter or one of the litigants is an alien. These actions belong to the same class as those which are brought beyond the first mile-stone from the City of Rome; whether the parties litigant are Roman citizens or aliens. Cases of this kind are said to be derived from the authority of the magistrate, for the reason that the proceedings are only valid as long as he who directed them to be instituted retains his office.

(106) Where an action is brought under the authority of a magistrate, whether it is real or personal, or whether it was based upon a formula of fact, or a statement of law, it is not by operation of law a bar to subsequent proceedings having reference to the same matter, and therefore it is necessary to plead an exception on the ground that a decision has already been rendered, or that issue has been joined in the case.

(107) If, however, a personal action based on a legal statement has been brought by the formula relating to claims under the Civil Law, an action cannot subsequently be maintained with reference to the same matter by operation of law, and for this reason an exception will be superfluous. If, however, a real action, or an equitable personal action based upon fact, should be brought, proceedings may nevertheless subsequently be instituted, by operation of law; and on this account an exception on the ground that the question has already been decided, or that issue has been joined, will be necessary.

(108) The rule was formerly different when the ancient method to procedure was employed, for when proceedings concerning a matter had once been instituted, no legal action could be taken with reference to it, nor was the employment of exceptions in those times customary, as

it is now.

(109) Moreover, an action may be founded upon law, and yet not be legal; and, on the other hand, it may not be founded upon law, but still be legal. For example, proceedings based upon the *Lex Aquilia, Publilia*, or *Furia*, when instituted in the provinces, are derived from the authority of the magistrate, and the rule is the same if we bring an action before several judges, or before a single judge if one of the parties is an alien; and, on the other hand, if an action in which all the parties are Roman citizens is brought at Rome before a single judge, for the same cause for which a right of action is granted to us by the Prætor, it will be legal.

(110) In this place we should note that those actions which are based upon a statute or a decree of the Senate are usually granted by the Prætor in perpetuity; but that those which are dependent upon the jurisdiction of the Prætor himself are only granted within a year from the time when the cause of action arose.

(111) Sometimes, however, he also grants such actions in perpetuity, as, for instance, those in which the Civil Law is imitated; such as the actions which he grants to the prætorian possessors of estates, and to other persons who occupy the place of an heir. The action of manifest theft, although it is derived from the jurisdiction of the Prætor himself, is granted without limitation of time, and this is reasonable, as a pecuniary penalty has been established instead of a capital one.

(112) All actions which lie against anyone, either by operation of law, or because they are granted by the Prætor, do not also lie against his heir, nor are usually granted by the Prætor; for this rule is so positive that penal actions arising from criminal offences do not lie, and are not usually granted against an heir; as, for instance, the action of theft, of the robbery of property by violence, or of injury, or of unlawful damage.

Actions of this kind will, however, lie in favor of heirs, and will not be refused them by the Prætor, with the exception of the action for injury, and any other of the same description if it can be found.

(113) Sometimes, however, even an action based upon a contract will not lie for or against an heir; since the heir of a joint stipulator has no right of action, and the heir of a sponsor or guarantor is not liable.

(114) It remains for us to consider whether, if the party against whom the action was brought before judgment had been rendered but after issue had been joined, should satisfy the plaintiff, what course the judge should pursue; whether he has authority to discharge him from liability, or whether he should rather decide against him for the reason that at the time of the joinder of issue he was in such a position that he should have been condemned. Our preceptors think that he should be discharged, and that it makes no difference what kind of a judgment is rendered; and this is the reason why it is commonly said that it was the opinion of Sabinus and Cassius that a discharge from liability could be granted in all actions.

The authorities of the other school agree in this point with reference to *bona fide* actions; because in cases of this kind no restraint is placed upon the judge; and their opinion is the same with reference to real actions, for the reason that there is an express provision of this kind stated in the terms of the formula, so that if the defendant should restore the property he shall be discharged from liability. This, of course, applies where the action was brought under the formula making the claim, in which the party is sued in such a way that the property is dispute is demanded, and the words above referred to are repeated in the beginning of the condemnation; for sometimes . . . . personal actions of this kind are brought in which it is not permitted ....

(115) In the next place let us examine exceptions.

(116) Exceptions have been introduced for the purpose of defending those against whom

actions have been brought; for it often happens that a party is liable by the Civil Law, when it would be unjust for a judgment to be rendered against him.

For example, if I stipulate for a sum of money from you on account of my having advanced it to you, when I never did so; as it is certain that I can bring an action against you for the money and you would be obliged to pay it as you are liable under the stipulation, but because it would be unjust for judgment to be rendered against you on this account, it is settled that you can defend yourself by the exception on the ground of fraud.

Likewise, if I make an informal agreement with you not to bring suit for a debt which you owe me; I can nevertheless, bring an action against you for the amount, and you will be obliged to pay me because the obligation is not extinguished by a mere agreement, but if I should sue you, it is established that you can bar me by an exception on the ground of an agreement entered into.

(117) Again, exceptions can be pleaded in actions which are not personal; for example, if you compel me through fear, or induce me through fraud, to sell any property to you, and then you sue me for the said property, an exception will be granted me by which you will be barred, if I can prove that you have been guilty of intimidation or fraud.

Likewise, if knowing that a case involving the title to a tract of land was pending in court, and you buy the land from a party who is not in possession, and claim it from one who is in possession, an exception can be pleaded against you by which you will be absolutely barred.

(118) The Prætor mentions other exceptions in his Edict, and he grants still others after having taken cognizance of the case. All of them are either based upon law or what is equivalent to it, or they are derived from the jurisdiction of the Prætor.

(119) Moreover, all exceptions are drawn up in language which is the opposite of what the party against whom the action is brought alleges. For if the defendant states that the plaintiff is guilty of fraud, for the reason that he brings suit for money which he never advanced, the exception is stated in the following words: "If in this matter no fraud was, or is committed by Aulus Agerius."

Likewise, if he states that the action was brought in opposition to an agreement not to demand the money, it is set forth as follows: "If it was not agreed between Aulus Agerius and Numerius Negidius that the said money should not be demanded"; and similar terms are ordinarily employed in other cases. Hence, because every exception is an objection made by the defendant but is inserted in the formula in such a way as to render the condemnation conditional, that is, the judge must not condemn the defendant unless no fraud was committed by the plaintiff with reference to the matter in question, the judge shall not render a decree against him if no informal agreement was entered into not to bring suit to recover the money.

(120) Exceptions are said to be either peremptory or dilatory.

(121) Peremptory exceptions are those which are always valid, and cannot be avoided; for instance, the exception on the ground of intimidation or fraud, or of a violation of the law; or of a decree of the Senate; or because the case has already been decided; or that issue has been joined; or that an informal agreement was entered into "that suit should not, under any circumstances, be brought to recover the money.

(122) Dilatory exceptions are such as are only valid for a time; for instance, the exception based on an informal agreement that suit shall not be brought within five years, and after that time has expired the exception cannot be pleaded. The exception of a divided claim, or that of a residual claim, is similar to this; for if anyone brings an action for a part of a debt, and should then bring another for the remainder in the same prætorship, he will be barred by the exception which is called that of a divided claim. In like manner, if one who has several claims against the same person brings suit on some of them, and defers doing so with

reference to the remainder in order that they may be brought before other judges, and he then brings an action within the same prætorship, to recover those which he postponed, he will be barred by the exception styled that of a residual claim.

(123) It should be observed, however, that the party against whom a dilatory exception may be pleaded ought to defer his action, otherwise, if he proceeds and the exception be pleaded against him, he will lose his claim; as if issue had been joined, and his case has been lost by this exception, he has no longer any power to sue after the time during which, if matters had remained unchanged, he could have avoided the effect of the exception.

(124) Exceptions are understood to be dilatory not only with reference to time, but also with regard to persons; and to this class belong those which are connected with the position of attorney; for instance, where a party who, under the terms of the Edict, has no right to appoint an attorney acts through one; or, if he has a right to appoint an attorney, but appoints one who is not legally qualified to undertake the duties of the *office*. If the exception to an attorney is pleaded, and the party himself is such a person that he cannot appoint an attorney, he himself can bring the action; if, however, the attorney is not permitted to assume the duties of the office, his principal has the power to bring the suit, either by another attorney, or in his own proper person, and he can, in either one of these ways, avoid the exception; but if he should pay no attention to this disability, and conduct the case by the attorney he will lose it.

(125) If the defendant, through mistake, should not avail himself of a peremptory exception, he can obtain complete restitution, by adding the exception to the pleadings; but if he should not make use of a dilatory exception, it is a question whether he will be entitled to complete restitution.

(126) It sometimes happens that an exception which, at first sight, appears to be just, will cause injury to the plaintiff, and when this is the case an addition is required to the pleadings for the purpose of affording protection to the plaintiff, which addition is called a *Replicatio*, because by means of it the force of the exception is weakened and destroyed. If, for example, I made an informal agreement with you not to sue you for money which you owe me, and afterwards we entered into a contrary agreement, that is to say, that I might be permitted to sue you, and then if I do sue you, you plead the exception against me that judgment should only be rendered against you where no agreement had been made that I should not bring suit for the money, this exception on the ground of an informal agreement prejudices my claim, as the first agreement still retains its force, even though we made a contrary one subsequently; but because it is unjust for me to be barred by an exception, a replication based on the subsequent agreement is granted me as follows: "If no agreement was entered into afterwards that I might be permitted to bring an action to recover the money."

(126a) Likewise, if a banker brings suit for the price of property sold at auction, the exception may be pleaded against him that judgment is only to be rendered against the purchaser where the property which he bought had been delivered; and this is apparently a just exception. If, however, the condition was imposed at the auction that the property should not be delivered to the purchaser until he had paid the price of the same, the broker can make use of the following replication: "Or if it was previously stated at the sale that the property would not be delivered to the purchaser before he paid the purchase money."

(127) Sometimes, however, it happens that a replication which, at first sight, appears to be equitable, unjustly inflicts an injury on the defendant; and when this takes place, an addition to the pleadings is required for the purpose of protecting the defendant, which is styled *Duplicatio*.

(128) Again, if this, though it appears at first sight to be just, for some reason or other injures the plaintiff, another addition to the pleadings is required by which the plaintiff may be protected, and this is called a *Triplicatio*.

(129) Sometimes the multiplicity of affairs requires the use of additional exceptions to those which we have already mentioned.

(130) Let us now consider Prescriptions, which have been adopted for the benefit of the plaintiff.

(131) For it is frequently the case that, under the same obligation a party is required to do something for us at present, and something more at a future time. For instance, where we have stipulated for the payment of a certain sum of money every year, or every month, and, at the end of the year or month, a sum of money is required to be paid to us for this time; and with reference to years to come, although an obligation is understood to have been contracted, the time of payment has not yet arrived. Therefore, if we desire to bring an action to recover what is now due, and to proceed to joinder of issue and leave the future discharge of the obligation unimpaired, it is necessary, when we bring suit, to make use of the following prescription: "Let the proceedings have reference only to what is at present due." Otherwise, if we bring suit without making use of this prescription, under the formula by which we sue for an uncertain amount, the statement of the claim is expressed as follows: "Whatever it appears that Numerius Negidius should transfer to, or do for Aulus Agerius," brings the entire obligation, that is to say, also what is due in the future, into court; and no matter what may be due hereafter it cannot be collected, nor can an action subsequently be brought to recover the remainder.

(131a) Likewise, where for example, we bring an action on purchase, in order that land may be conveyed to us by sale, we must state the prescription as follows: "Let the proceedings only have reference to the sale of the land"; and, afterwards, if we desire vacant possession be delivered to us, we will be entitled to an action under the stipulation, or to one under the contract of purchase to compel its delivery. If we neglect to make use of this prescription, the obligation of our entire right embraced in the uncertain claim: "Whatever on this account Numerius Negidius. should give to, or do for Aulus Agerius," is disposed of by the statement of the claim in the former suit; so that afterwards we will not be entitled to any action to any action to compel the delivery of vacant possession, if we should desire to bring one.

(132) Prescriptions are so called for the reason that they precede the formulas, which fact is perfectly obvious.

(133) At the present time, however, as we mentioned above, all prescriptions proceed from the plaintiff, while formerly some of them were pleaded in behalf of the defendant, as for instance, the following prescription: "Let this point be determined, if it does not prejudice the estate"; which is now changed into a species of exception, and is used when the claimant of the estate prejudices the right to the same by bringing another kind of action, for example, if he brings suit for certain articles belonging to the estate; for it would be unjust to render the result of an action involving the entire estate dependent upon a decision having reference to only a portion of the same . . . .

(134) If suit is brought under a stipulation entered into by a slave, and the *Intentio* states to whom the amount is to be paid, that is to say, that what the slave stipulated for should be paid to his master; the allegations in the prescription should be true in accordance with their natural meaning.

(135) Moreover, what we have said with reference to slaves we understand to be applicable to all other persons subject to our authority.

(136) Again, we should observe that when we bring an action against a party who promised something which was uncertain, the formula should be drawn up so as to include a prescription, instead of a statement of the cause of action, as follows: "Let So-and-So be judge. For the reason that Aulus Agerius stipulated for something uncertain from Numerius Negidius, payment of which is now due, whatever on this account Numerius Negidius should

transfer to, or do for, Aulus Agerius, etc."

(137) When an action is brought against a sponsor or surety, it is the practice, in the case of the sponsor, to employ the following form of prescription: "Let the action be tried on the ground that Aulus Agerius stipulated for something of uncertain amount from Lucius Titius, for which Numerius Negidius is sponsor for the amount which is now due." In the case of a surety, the following form is employed: "Let the case be tried on the ground that Numerius Negidius became surety for Lucius Titius for an uncertain amount, which is now due"; and then the formula is added.

(138) It remains for us to examine interdicts.

(139) The Prætor, or the Proconsul, interposes his authority directly in certain cases for the purpose of putting an end to controversies. This he especially does when there is a dispute between the parties with reference to possession or quasi possession; and, in short, he either orders something to be done, or forbids it to be done. Moreover, the formulas and the clauses made use of in this proceeding are styled interdicts and decrees.

(140) They are called decrees when he commands something to be done, for instance when he directs that something be produced in court, or restored; they are called interdicts when he forbids something to be done; for instance when he directs that no violence be employed against the party who is in possession without any defect; or that nothing be done on consecrated ground. Hence, all interdicts have reference to restitution, production, or prohibition.

(141) Still, when he orders that something shall be done, or prohibits some act from being performed, the affair is not immediately concluded, but recourse is had to one or more judges, and the formulas having been issued, an inquiry is held as to whether anything has been done, or some act which he ordered has not been performed, in opposition to the Edict of the Prætor. In a proceeding of this kind sometimes a penalty is involved, and sometimes it is not; it is penal, for instance, where a formal promise is concerned, and it is not where an arbiter is demanded. It is the practice to proceed under prohibitory interdicts always by way of solemn promise, and, in the case of orders for restitution or production, this is either done by way of formal promise or by means of the formula styled "arbitrary".

(142) Hence, the original division of interdicts is into prohibitory, or for restriction, or for production.

(143) The next division is into those instituted for the purpose of obtaining, retaining, or recovering possession.

(144) An interdict issued to the prætorian possessor of an estate for the purpose of obtaining possession begins: "Whatever portion of the property"; and its force and effect is that the possession of property held by anyone, as heir, or possessor, or who has fraudulently relinquished possession, shall be restored to the party to whom possession is granted by the interdict. He is considered to possess the property as heir, not only when he is the actual heir, but also when he thinks that he is the heir. He holds the property as the mere possessor who has anything belonging to an estate, or the entire estate, without any title to the same, knowing that he is in possession of something that does not belong to him.

The interdict for the purpose of obtaining possession is so called because it is only advantageous to him who now, for the first time, attempts to acquire possession of the property; therefore, if anyone having obtained possession should lose it, the interdict ceases to be of any benefit to him.

(145) Again, an interdict is granted to the purchaser of a bankrupt estate, which some authorities call a possessory interdict.

(146) In like manner, an interdict of the same kind is granted to one who purchases

confiscated property at a public sale, which is called *Sectorium* for the reason that those who purchase such property at public sale, are designated *Sectores*.

(147) The interdict called *Salvianum* was also one devised for the purpose of obtaining possession; and the owner of land can make use of it against the property of the tenant which the latter has pledged to him as security for the future payment of rent.

(148) It is the practice for interdicts for the purpose of retaining possession to be granted when a controversy arises between two parties with reference to the ownership of property; and it must be previously ascertained which one of the litigants should have possession, and which one should have a right to demand it; and it is for this purpose that the interdicts *Uti Possidetis* and *Utribi* has been established.

(149) The interdict *Uti Possidetis* is granted with reference to the possession of land or buildings; the interdict *Utrubi* with reference to the possession of movable property.

(150) If the interdict has reference to land or houses, the Prætor orders that party to have the preference who, at the time when the interdict was issued, obtained possession from his adversary, neither by force nor clandestinely, nor with his acquiescence.

When, however, it has reference to movable property, he orders that party to have the preference who, for the greater part of that year, has held possession against his adversary neither by force, nor clandestinely, or with his acquiescence; and this is sufficiently apparent from the terms of the interdicts themselves.

(151) But, in the interdict *Utrubi*, not only is the possession of every one a benefit to him, but that of another party which may be properly treated as accessory to it; for instance, that of a deceased person whose heir he is, and that of anyone from whom he has purchased property, or acquired it by means of a donation or a dowry. Hence, if the lawful possession of another party is added to our own, and it exceeds the possession of our adversary, we will be successful in the proceeding under that interdict.

The accession of time is not granted, and cannot be granted to one who has no possession of his own, for whatever does not exist can have nothing added to it. If, however, a party should have defective possession, that is to say, if it had been acquired from his adversary either by violence, or clandestinely, or by mere acquiescence, no accession is granted, for his own possession is of no advantage to him.

(152) Moreover, the year is reckoned backward, and hence, for example, if you had possession eight months before I did, and I had it during the seven following months, I will be entitled to the preference, because your possession for the first three months would be of no advantage to you under this interdict, as the possession was in another year,

(153) We consider a party to be in possession not only where we ourselves possess, but also where anyone is in possession in our name, although he may not be subject to our authority; as, for instance, a tenant or a lessee. We are also considered to have possession by means of those with whom we have deposited property, or lent it for use, or to whom we have granted gratuitous lodging, or the usufruct or use; and this is what is commonly called the power of retaining possession of property by anyone who possesses it in our name.

Again, many authorities hold that possession can be retained merely by intention; that is to say, that though we ourselves may not be in possession, nor anyone else in our name, still, if there be no intention of relinquishing possession, and we leave the property, intending afterwards to return, we are deemed to have retained possession of it. We stated in the Second Commentary by what persons we could obtain possession, nor is there any doubt that we cannot obtain it by mere intention.

(154) The interdict for the purpose of recovering possession is usually granted where anyone has been ejected by violence, for the interdict which is issued begins as follows: "In the place

from which you have been forcibly ejected"; and by means of it the party who ejected the other is compelled to restore possession of the property to him, provided the latter did not himself obtain possession either by violence, or clandestinely, or by permission from the former; hence, I can eject with impunity anyone who has obtained possession from me either by violence, or clandestinely, or by permission.

(155) Sometimes, however, even though I should forcibly eject the party who obtained possession from me either by violence, or clandestinely, or by permission, I can be compelled to restore possession to him; for instance, if I should eject him by force of arms, for, on account of the atrocity of the crime, I am liable to have proceedings instituted against me by which I shall be absolutely obliged to reinstate him in possession. We understand by the expression, "force of arms," not only the use of shields, swords, and helmets, but also that of sticks and stone.

(156) The third division of interdicts is into simple and double.

(157) Simple interdicts are, for instance, those in which one party is plaintiff and the other defendant, and of this description are all those established for the restitution or the production of property; for he is the plaintiff who demands that the property be either produced or restored, and he is the defendant from whom it is demanded that he produce or restore it.

(158) Of prohibitory interdicts some are double, and others simple.

(159) Simple interdicts are, for instance, those by which the Prætor forbids a defendant to perform any illegal act on consecrated ground, or in a public stream, or on its bank; for the plaintiff is he who demands that the act shall not be committed, and the defendant is he who attempts to commit it.

(160) Double interdicts are such, for instance, as *Uti Possidetis* and *Utrubi*. They are called double because the position of both litigants in them is the same, and neither is exclusively understood to be defendant or plaintiff, but both of them sustain the parts of defendant and plaintiff. In fact the Prætor addresses both in the same language, for the form of these interdicts is as follows: "I forbid force to be employed to prevent you from having possession of the property which you now possess." The terms of the other are as follows: "I forbid violence to be employed to prevent the party from removing the slave in dispute, and who has been in his possession for the greater part of the year."

(161) The different kinds of interdicts having been" explained, let us next consider their order and effects, and we shall begin with those which are simple.

(162) Therefore, if an interdict for the restitution or the production of property is issued; for instance, for the restitution of possession to one who has been forcibly ejected, or for the production of a freedman whose services his patron desires to claim, the proceedings are sometimes brought to a conclusion without the risk of incurring the penalty, and sometimes with that risk.

(163) For, if he against whom the case is brought should demand an arbiter, he receives the formula which is called "arbitrary," and if, by the award of the judge, he is required to restore or produce any property, he either produces or restores it without any penalty, and thus is discharged from liability; or if he does not restore or produce it, he is compelled to indemnify the plaintiff for the loss sustained through his disobedience. The plaintiff, however, can, without incurring a penalty, bring an action against one who is not required to produce or restore any property, unless an action for vexatious litigation is brought against him to recover the tenth part of the property in question; although it is said to have been held by Proculus that an action for vexatious litigation should be refused to him who demands arbitration, because he is considered to have, as it were, admitted that he ought to restore or produce the property. We, however, make use of another rule, and very properly; for anyone who demands an arbiter rather shows his intention to litigate in a more moderate manner, than for the reason

that he admits the validity of the claim of his adversary.

(164) It should be observed that he who desires to demand an arbiter must do so before leaving court, that is before he departs from the tribunal of the Prætor, for if such a demand is made later it will not be granted.

(165) Hence, if he does not demand an arbiter, but leaves the tribunal without doing so, the affair is brought to a conclusion at the risk of the parties; for the plaintiff challenges his adversary to deposit the forfeit which shall be paid if, in disobedience to the Edict of the Prætor, he does not produce or restore the property; and the defendant restipulates in opposition to the demand for a forfeit by his opponent. The plaintiff then delivers to his adversary the formula of the forfeit to be deposited, and the latter in his turn delivers that of the restipulation.

The plaintiff, however, adds to the formula of the promise of a forfeit another action for the restipulation or the production of the property in question, so that if he should be successful, and the property is not either reduced or restored to him . . . .

(166) When a double interdict has been granted, the mesne profits are sold at auction and the highest bidder is placed in possession of the property, provided he furnishes his adversary security under the stipulation for the enjoyment of the profits; the force and effect of which is that if judgment should be rendered against him with reference to possession, he shall pay his adversary the sum provided for in the stipulation.

This bidding between the parties is designated the bidding for the profits, because they contend with one another for the profits of the property during the preliminary proceedings. After this, each one of them challenges the other to deposit the forfeit to be -paid by the promisor, if he has by violence interfered with the possession of his adversary, and hence has violated the Edict of the Prætor; and each of them mutually bind themselves, or the two stipulations being united so that one promise is made between them, and also one restipulation is entered into by one party against the other, which is the more convenient way of proceeding, and therefore the one most generally in use.

(166a) Then, after the necessary formulas of all the promises and restipulations have been filed by both parties, the judge before whom the case is tried must examine the point introduced by the Prætor in the interdict; that is to say, which of the parties was in possession of the land or the house at the time when the interdict was issued, and that he did not obtain possession of it by violence, or clandestinely, or with the permission of the adverse party. When the judge has investigated this, and has, perhaps, decided in my favor, he condemns my adversary to pay the penal sums called for by the promise and the restipulation which I made with him, and in consequence discharges me from liability for the promise and restipulation which were made with me. Further, if my adversary had possession of the property for the reason that he made the highest bid for the profits of the same, and he does not restore possession to me, he can have judgment rendered against him in the action styled Cascellian or Secutorian.

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(167) Therefore, if he who is the highest bidder does not prove that he is entitled to possession, he is ordered to pay the sums mentioned in the promise and restipulation, as well as the amount he offered in his bid for the mesne profits at auction, by way of penalty, and to restore possession of the property; and, in addition to this, he must return the profits which, in the meantime he has collected; for the sum of money mentioned in the bid for the profits is not the price of the same, but is paid as a penalty because the party attempted to retain possession belonging to another, for this time, and also to enjoy the profits derived from the property.

(168) Moreover, if he who made a lower bid for the profits at the auction does not prove that

he is entitled to possession, he should only be required to pay the amount of the promise and restipulation by way of penalty.

(169) We should observe, however, that the unsuccessful bidder, without availing himself of the stipulation for the enjoyment of the profits, has a right to bring an action on the sale at auction, just as by the Cascellian or Secutorian action he can sue for the recovery of possession. A special action has been introduced for this purpose, which is called "fructuary," by means of which the plaintiff receives satisfaction for his judgment. This action is also called Secutorian, because it follows the advantage of the promise, but it is not also called Cascellian.

(170) But, for the reason that, after an interdict has been issued, some of the parties are unwilling to institute other proceedings under it, and on this account matters cannot be expedited, the Prætor made provision for a case of this kind, and introduced interdicts which we call "secondary"; because they are issued in the second place, under such circumstances. The force and effect of these is that he who does not institute further proceedings under the interdict, for example, one who does not forcibly eject the other party; or does not make a bid for the mesne profits of the property; or does not furnish security for the same; or does not participate in the promise, or defend the case; shall, if he is in possession of the property, restore it to his adversary; for if he is not in possession, he shall not use violence against the other party who is. Hence, although, otherwise, he might have been able to succeed under the interdict *Uti Possidetis*, if he could have complied with the other requirements imposed by it, and did not do so, he will still lose his case by means of a secondary interdict . . . .

(171) For the purpose of avoiding vexatious litigation, the parties are sometimes deterred by pecuniary penalties, and sometimes by an oath which is imposed by the Prætor. In certain cases an action for double damages is brought against a defendant; for instance, in the collection of a judgment debt, or for money expended for a principal, or for unlawful damage to property, or where proceedings are instituted to collect legacies left by condemnation. In some instances, the deposit of a forfeit is permitted to be made, for example, in an action for a certain sum of money which has been lent, or to collect a debt formerly incurred. Where suit is brought to collect a loan, the amount is one-third of the sum in question; and in the case of the acknowledgment of a balance due, it is one-half.

(172) If no deposit was made as a forfeit, and the penalty of double damages was not imposed upon the party against whom the action was brought, and under it, from the beginning, no more than simple damages can be collected; the Prætor permits the plaintiff to require the defendant to swear that he has not made a denial for the purpose of annoyance. Hence, although the heirs and those who are considered to occupy the position of heirs, are not subject to a penalty, and women and wards are exempted from the penalty of a forfeit, the Prætor, nevertheless, orders them to be sworn.

(173) Moreover, in some cases from the beginning an action for more than simple damages will lie; as in an action of manifest theft a fourfold penalty, in non-manifest theft a double penalty, and when stolen property has been delivered to another a threefold penalty can be collected; for in these and some other instances, the suit is for more than simple damages, whether the party denies, or admits the claim.

(174) Vexatious litigation by the plaintiff is also restrained sometimes by the action for this purpose, sometimes by the contrary action, sometimes by oath, and sometimes by a counter stipulation.

(175) The action of vexatious litigation is applicable as against all other actions, and is for the tenth part of the claim, but for the third part when brought against a joint stipulator.

(176) The party sued, however, has the right to choose whether he will bring the action of vexatious litigation, or exact an oath from his adversary that he has not brought suit for the

purpose of causing annoyance.

(177) The counter action, however, is only applicable in certain cases; for instance, where suit is brought for injury, and where one is brought against a woman on the ground that having been placed in possession on account of her unborn child, she transferred it fraudulently to some other party; or where anyone brings an action alleging that he has been placed in possession by the Prætor and is refused admission by another. In the case of an action of injury it is granted for the tenth part of the amount in dispute; in the two others for the fifth.

(178) But, the most severe restraint is that produced by the counter action. For no one is condemned in the action of vexatious litigation to pay the tenth part of the amount in dispute, unless he knew that he had no right to bring suit, and did so only for the purpose of annoying his adversary and relies for success rather upon the error or injustice of the judge, than on account of the merits of his cause; for vexatious litigation, like the crime of theft, depends upon intention. In the contrary action, however, the plaintiff will, under all circumstances, be condemned if he should not prevail in the former action, although he had good reason to believe that he had a right to bring suit.

(179) Still, in all those cases in which the contrary action can be brought, the action for vexatious litigation will also lie; but it is only permitted to have recourse to one or the other of these proceedings. For which reason if an oath should be exacted that the action has not been brought for the purpose of annoyance, just as the action for vexatious litigation will not lie, so the contrary action should not be granted.

(180) The penalty of the counter engagement is usually required in certain cases, and, as in the contrary action the plaintiff is condemned under all circumstances if he should not gain his case, nor is it necessary for him to know that he had no good cause of action; so the penalty of the counter engagement must, under all circumstances, be paid by the plaintiff if he was unable to gain his case.

(181) Moreover, when anyone undergoes the penalty of the counter engagement neither the action for vexatious litigation can be brought against him, nor can the oath be administered, for it is clear that in cases of this kind the contrary action will not lie.

(182) In certain actions persons who are condemned become infamous, as in those of theft, robbery with violence, and injury, also in cases of partnership, trust, guardianship, mandate, and deposit. In actions of theft, robbery with violence, and injury, not only are the persons convicted branded with infamy, but also where a compromise is made, as is stated in the Edict of the *Prætor*; and this is proper, for it makes a great deal of difference whether anyone becomes a debtor on account of the commission of a crime, or under a contract. But while it is not expressly stated in any part of the Edict that a party is to become infamous, still he is said to be infamous who is forbidden to represent another in court, or to appoint, give, or have an agent or attorney, or to intervene as agent or attorney in a case.

(183) In conclusion, it should be noted that a person who desires to bring an action against another must summon him to appear in court, and if the party summoned does not appear, he will be liable to a penalty under the Edict of the Prætor. It is, however, not permitted to summon certain persons without the permission of the Prætor; for instance, parents, patrons, patronesses, and the children or parents of a patron or patroness; and anyone who violates this provision is liable to a penalty.

(184) However, when the adversary who has been summoned appears in court, and the business cannot be finished on the same day, the defendant must furnish security; that is to say he must promise to appear on some other designated day.

(185) Security in certain instances is simple, that is, given without sureties; and in others it is given with sureties; in still other instances, it is given by oath; and in some cases a reference is made to judges, that is to say, if the party does not appear, he may be immediately condemned

to pay the amount of the security by the judges; and all these things are explained at length in the Edict of the *Prætor*.

(186) If proceedings have been instituted for the collection of a judgment, or for money expended for a principal, the amount of the security is equal to the value of the property in dispute. But in other cases the amount is that which the plaintiff swears that he has not brought suit for with the intention of causing annoyance; provided that the security is not more than half the sum in question, or more than a hundred thousand sesterces. Hence, if the property in dispute is valued at a hundred thousand sesterces, and the action is not for the collection of a judgment, or money expended for a principal, the amount of the security cannot be more than fifty thousand sesterces.

(187) Those persons whom we cannot summon to appear in court without the permission of the Prætor, we cannot compel to furnish security for their future appearance; unless the Prætor, after having been applied to, grants permission.

END OF THE INSTITUTES OF GAIUS.