THE ENACTMENTS OF JUSTINIAN.

BOOK IV.

TITLE I.

CONCERNING OBLIGATIONS ARISING FROM CRIME.

Since it has been explained in the preceding Book what obligations arising from contracts and quasi-contracts are, We have next to examine obligations growing out of crime. The former, however, as We stated in its place, are divided into four classes; but the latter are included in only one class, for they all arise from an act, that is to say from the crime itself, for instance, from theft, robbery, damage, or injury.

(1) Theft is the fraudulent handling of property, whether of the article itself or the use or possession of the same, and to commit it is prohibited by natural law.

(2) The term *furtum* is either derived from *furvus*, that is to say, black, because it is committed secretly and obscurely, and usually by night; or from *fraus;* or from *ferendo*, that is carrying away; or from a Greek word, as the Greeks call thieves φωρες and they also say that the term φωρες comes from φερειυ.

(3) There are two kinds of theft, namely: manifest and non-manifest; for *conceptum* and *oblatum* are rather certain kinds of action relating to theft than species of theft, as will appear later. A manifest thief is one whom the Greeks designate: επ αυτοφωρω and means not only he who is caught in the very act of theft, but also he who is caught in the place where it is perpetrated; as, for example where one who has committed a theft in a house and is taken before he has yet issued from the door; or he who has committed a theft of olives in an olive orchard, or of the grapes in a vineyard, provided he be caught in the said olive orchard or vineyard.

Moreover, manifest theft should further include a case where the thief has been seen or arrested with the stolen property in his possession, either in a public or private place, and either by the owner or by some other party, before he has arrived at the point where he intended to carry and deposit the article; but where he has carried it as he intended, even though he may be arrested with it in his possession, he is not a manifest thief. What non-manifest theft signifies may be understood from what We have said; for theft that is not manifest is evidently non-manifest.

(4) A theft is styled *conceptum* when the stolen property is sought for and found in the possession of anyone in the presence of witnesses; for a certain kind of suit called *actio concepti* lies against him, even though he may not be the thief. A theft is called *oblatum,*, when the stolen property has been brought to you and is found in your possession, if the party who gave it to you did so with the intention that it should be found on your premises rather than on those of him who brought it, for a proceeding called *actio oblati* has been provided in your favor against him who brought you the property, even if he was not the thief.

There is also an *actio prohibiti furti* which lies against him who resists anyone desirous of searching for stolen property in the presence of witnesses. Moreover, a penalty is prescribed by the Edict of the Prætor through an *actio furti non exhibiti* against a party who did not produce property which was sought for and found in his possession. These actions, however, that is to say *concepti, oblati, furti, prohibiti* and *furti non exhibiti*, have fallen into disuse; for as the search for stolen property is not conducted at present in accordance with the ancient method, the aforesaid actions are in consequence no longer generally made use of; since it is very evident that all who knowingly receive stolen property and conceal it are liable for non-manifest theft.

(5) The penalty for manifest theft is fourfold, whether the culprit be a slave or a freeman; that for non-manifest theft is double.

(6) A theft takes place not only when anyone removes the property of another for the sake of appropriating it, but, generally speaking, when anyone handles another's property against the consent of the owner. Therefore, whether a creditor makes use of a pledge, or a depositary of property left with him, or whether he who received an article to be used, employs it for some other purposes than that for which it was given, he commits a theft; for instance, if anyone has received silver to be used where friends are invited to supper, and takes it away with him out of town; or where anyone to whom a horse has been lent for the purpose of taking a ride, removes it to a greater distance; and the example which the ancients mentioned in this case was that of one who took the horse into battle.

(7) It has been established, however, that they who use property which has been borrowed for other purposes than those for which they receive it commit a theft, when they know that they are doing this contrary to the will of the owner, and that if he were aware of the act he should not permit it; and if they believe that he would permit it they are not guilty of the crime; and the distinction is certainly an excellent one, as theft is not committed without the intention of stealing.

(8) And if anyone believes that he is making use of property loaned to him against the will of the owner, but in fact it is done with the consent of the latter, it is said that no theft is committed. Wherefore, it has been asked; when Titius solicited a slave of Mævius to steal certain property from his master and bring it to him, and the slave acquainted Mævius with this; and Mævius, desiring to catch Titius in the act, permitted the said slave to take certain property to him; whether Titius is liable in an action for theft, or in an action for the corruption of a slave, or in neither of these? And as the resolution of this doubt has been submitted to Us, and We have examined the arguments of the ancient lawyers on this point, (some of whom hold that neither an action for theft nor a action for corrupting a slave will lie, and others think that only an action of theft is proper) We, desiring to oppose craftiness of this kind, have determined by Our decision that not only the action of theft, but also that for corrupting a slave can be brought against the party; for although the slave may not have been rendered worse by his making the request of him, and therefore the rules which laid the foundation for the action for corrupting a slave may not be entirely applicable; nevertheless, the advice of the corrupting party contributed to the destruction of the honesty of the slave, so that he is liable to the penal action just as if the slave had been actually corrupted; to the end that such a wicked act may not be attempted by anyone against some other slave who might be corrupted as a result of impunity under such circumstances.

(9) Sometimes theft of even freemen can be committed; for example, where one of Our children who is under Our control is stolen.

(10) Sometimes also a party commits a theft of his own property; as, for instance, where a debtor clandestinely removes an article which he has deposited with his creditor by way of pledge.

(11) Sometimes a person is liable for theft who himself did not commit it; of such a description is he by whose assistance and advice a theft has been committed; and in this class is comprehended one who knocked money out of your hand that another might carry it away; or hindered you so that another might remove your property; or dispersed your sheep or oxen, that another might take them; and the example given by ancient writers was that of a party who put a drove of cattle to flight by the use of a red cloth. Where any of these things is done through mischief, and not in order to commit a theft, an action *in factum* ought to.be brought. But where Titius has perpetrated a theft with the assistance of Mævius, both are liable to the action for theft.

Theft is also considered to have been committed by the assistance and advice of him who, for example, placed a ladder by a window; or broke a window or a door in order that another

might commit a theft; or lent iron tools for breaking in, or a ladder to be placed at a window, knowing for what purpose he lent these things. It is evident that where a party did not render aid for the commission of a theft, but merely gave advice, and encouragement for the perpetration thereof, he is not liable to the action for theft.

(12) When those under the control of parents or masters pilfer anything from them, they commit a theft against them, and whatever is taken becomes stolen property (so that it cannot on this account be held by usucaption before it is returned to the possession of the owner); but an action for theft does not lie because an action cannot arise between these persons for any cause whatever. But if the theft was committed by the assistance and advice of another, for the reason that there is no doubt that theft has been committed, the party is very justly liable to the action for theft, because it is a fact that the theft was perpetrated by his assistance and advice.

(13) An action for theft can be brought by him who is interested in the security of the property, although he may not be the owner of the same; and therefore an action does not lie in favor of the owner unless it is to his interest that the property should not be destroyed.

(14) Wherefore it is established that a creditor can bring the action of theft for a pledge which has been stolen, even though he may have a debtor who is solvent; because it is advantageous for the creditor rather to rely upon the pledge than upon a personal action; so that, even if the debtor may have removed the property, an action for theft will nevertheless lie in behalf of the creditor.

(15) In like manner if a fuller has received clothing to be pressed or cleaned, or a tailor has received it to be repaired, for a certain compensation, and loses the articles by theft, he, and not the owner, can bring an action for theft; because the owner has no interest in the preservation of the property as he can recover it from the fuller or tailor by an action of hiring. But when an article is purloined from a *bona fide* purchaser after he has bought it, an action of theft will lie just as much in his favor (although he is not the owner) as it would in favor of a creditor; it has, however, been decided that an action of theft will not lie in favor of the fuller or tailor except where they are solvent, that is, if they are able to pay the value of the article to the owner; for if they are not solvent, then for the reason that the owner cannot recover his property from them, an action of theft will lie in favor of the owner himself; because in this instance it is to his interest that the property should be secure; and the same rule is applicable where the fuller or tailor is partly solvent.

(16) What We have stated with reference to the fuller and tailor the ancients held should also apply to a party who had received property as a loan for use; for just as a fuller, by accepting compensation assumes responsibility for safe-keeping, so he who borrows anything for use likewise becomes liable for its custody. By way of precaution We have also corrected this by Our decisions, so that it depends upon the will of the owner whether he shall bring an action of loan against the party who borrowed the article, or one of theft against him who stole it; and, having chosen one of these, he cannot change his mind and bring the other action. If, indeed, he chooses to sue the thief, the party who received the property to be used is absolutely released from all liability; while if the lender proceeds against him who received the property for use, an action of theft can, by no means, be brought by him against the thief, but one can be brought against him by the party who has been sued on account of the article loaned.

These are the proper proceedings where the master, aware that the article has been stolen, brings an action against him to whom it was lent; but if he ignorantly and being in doubt as to whether the property was in the possession of the borrower, institutes an action of loan, and afterwards, when the facts have been ascertained, wishes to abandon the action of loan, and have recourse to that of theft; then, permission shall be granted him to bring suit against the thief, and no obstacle shall be placed in his way; since being uncertain when he proceeded by an action of loan against the party who received the property to be used, (unless the latter had

satisfied the owner; for then the thief is absolutely free from the action of theft, and is instead subjected to liability to the party who has paid the owner for the property loaned) and while it is perfectly evident that, even in the beginning, the owner instituted the action of loan while ignorant that the property had been stolen, still if he having afterwards ascertained this fact, has recourse to the thief, the party who received the property loaned is absolutely released from all liability, no matter what may be the result of the action brought by the owner against the thief; and the same rule applies whether he who received the property as a loan is partly or wholly solvent.

(17) He, however, with whom property is deposited does not guarantee its safe-keeping, but is only responsible for whatever he himself does fraudulently; for which reason if the property is stolen from him, he cannot bring an action of theft, because he is not bound to restore the property because of the deposit, and therefore is not interested in its being secure; but an action of theft will lie in favor of the owner.

(18) In conclusion, it must be noted that it was a question whether a person under puberty commits a theft by removing property belonging to another; and it is now settled that because theft is dependent upon the intention, such a person can only be liable for this crime if he had very nearly arrived at puberty, and for this reason is aware that he is committing an offence.

(19) The action of theft, whether for double or quadruple value, relates only to the recovery of a penalty, for the owner has, in addition, another proceeding for the recovery of the property itself; that is to say, either *vindicatio* or *condictio. Vindicatio*, however, must be employed against the possessor, whether he is the thief or someone else, while *condictio* must be brought against the thief or his heir, although he may not have possession of the property.

TITLE II.

CONCERNING ROBBERY BY VIOLENCE.

He who seizes the property of another by force is also liable for theft, for who handles the property of another more thoroughly against the will of the owner than he who carries it away by force? And therefore it is justly said that he is an audacious thief. The Prætor, however, has introduced an action peculiar to this crime, which is designated *actio vi bonorum raptorum;* and it is fourfold the value if brought within a year, and for single value if brought after a year has elapsed; and this action is available when anyone has stolen by violence any article, no matter how small it may be.

The fourfold value is not entirely a penalty, nor does an action lie for the recovery of the property in addition to the penalty, as We stated when treating of the action of manifest theft; but the recovery of the property is included in the fourfold value, so that the penalty is thrice the value, whether the culprit is taken in the act or not; for it is absurd that he who seizes property by force should be considered as of less importance than one who removes it secretly.

(1) However, as this action does not lie except against some one who has forcibly taken something with evil intent, but where a party through error, believing the property to be his, and ignorant of the law, carries it away by violence, being of the opinion that an owner is permitted to remove what is his own by force from those who have possession of the same, he should be acquitted; and, for the same reason, it is proper that he should not be liable for theft who took the property away by force while holding this belief.

But, lest by employing such pretexts means may be invented by which robbers can indulge their avaricious propensities with impunity, it has been judiciously provided with reference to this by certain constitutions of the Emperors, that no one shall be permitted to take away by force any property which is movable or which can move itself, even though he thinks that it is his; and if anyone acts contrary to these laws he shall forfeit the ownership of the property if it belongs to him, but if it belongs to someone else, he must pay the value of said property after

having made restitution of the same. This principle the said constitutions have not only stated are applicable to movable articles which can be forcibly taken away, but also to interference with property belonging to the soil; so that men may for this reason refrain from all kinds of robbery by violence.

(2) In this action it is evidently not essential that the property should be part of that belonging to the plaintiff; for whether it is or is not a part of the same, the action can be brought, provided it was merely removed from among his other possessions. Wherefore, if it was loaned, leased, pledged, or even deposited with Titius, so that it was to his interest that it should not be removed; for example, if it had been deposited and he agreed to be liable for negligence; or if he possessed it in good faith; or had the usufruct in it, or any other right, so that it was to his interest that it should not be taken away; it must be held

that this action will lie in his favor, not that he may recover the ownership of the property, but only that which was taken from among his possessions, that is to say from the resources of him who suffered the robbery.

It should be stated generally that the same causes which authorize an action of theft on account of some clandestine act, are also sufficient ground for an action of this kind.

TITLE III.

CONCERNING THE AQUILIAN LAW.

The action for damage wrongfully committed was established by the *Lex Aquilia*, in the first Section of which it is provided that if anyone has wrongfully killed the slave of another or a quadruped belonging to the class of cattle, he shall be condemned to pay to the owner the greatest amount that the said property was worth during that year.

(1) And this, moreover, does not merely refer to quadrupeds, but only to such as belong to the class of cattle, and signifies that we should not understand the provision to refer to wild beasts, or dogs, but only to such animals as can properly be said to pasture, such as horses, mules, asses, oxen, sheep, and goats. The same provision also applies to swine, for swine are included in the term cattle, because they pasture in droves, and as such, indeed, Homer mentions them in the Odyssey, as Ælius Marcianus states in his Institutes:

"You will find him Seated beside his swine, whose pasture Is near the rock of Korax, and at the spring Of Arethusa."

(2) A person is understood to kill wrongfully who kills without any right; and therefore he who kills a robber is not liable, that is if he could not otherwise avoid danger.

(3) Nor is anyone liable under this law who kills by accident, provided he cannot be accused of negligence; for otherwise anyone is liable under this law not less for negligence than for malice.

(4) Therefore, if anyone while engaged in sport or practising with javelins should kill your slave while he is passing by, a distinction arises; for if this was done by a soldier while in camp, or where such practice ordinarily takes place, he cannot be charged with negligence; but if anyone else should commit such an act, he is guilty of negligence. The same rule applies to a soldier if he committed the act in any other place than that appointed for military exercises.

(5) Again, where a person who is trimming a tree by throwing down a branch killed your slave while he is passing by; if this was done near a public highway or one leading through private premises, and he did not give warning so that the accident might be avoided, he is guilty of negligence; but if he did give warning, and the slave did not take the trouble to be careful, he who was trimming the tree is not liable for negligence. A person is also understood not to be liable for negligence where he was cutting branches at a distance from the road or in the middle of a field, even though he did not give warning, because no stranger had a right to be

wandering around there.

(6) Moreover, if a physician who has operated upon your slave neglects his treatment, and the slave dies for this reason, the physician is guilty of negligence.

(7) Lack of skill is also considered negligence, as for instance, where a physician caused the death of your slave because he operated on him improperly or administered medicine to him which was not suitable.

(8) Also, when your slave has been knocked down by the onset of mules which the muleteer could not control on account of his want of skill, the muleteer is guilty of negligence; but if he could not restrain them on account of weakness, he is equally liable for negligence, provided another stronger than he could have controlled them. The same rule was established with reference to one who either through weakness or want of skill was unable to control the movements of the horse which he was riding.

(9) The meaning contained in the following words of the law: "Of the greatest amount that it was worth during that year"; is that where anyone has killed one of your slaves who was at that time lame, blind of an eye, or crippled, but during the year had been sound or salable at a good price, the party who killed him is liable, not for what he was worth at the time of his death, but for the largest sum he was worth during the year; for which reason it has been presumed that the action growing out of this law is a penal one, since the party is liable not only for the amount of the actual damage, but sometimes for far more; and therefore it is held that the action does not persist as against the heir, which it would have done if the sum involved in the suit had not been greater than the damage sustained.

(10) What follows has been decided, not according to the terms of the law, but by its interpretation, that is, that the amount to be estimated not only includes the destruction of the body of the slave, in accordance with what We have stated, but also any damage in addition which you have sustained on account of the death of the slave; as, for instance, where a man has killed a slave of yours who had been appointed an heir by some one before he had entered on the estate by your order; for it is settled that the value of the estate which has been lost must also be taken into consideration. In like manner, if anyone has killed one of a pair of mules, or one of a team of horses, or a slave belonging to a band of comedians, the appraisement of the damage is not limited to the property which is killed, but the depreciation in value of whatever survives must also be computed.

(11) Where the slave of anyone is killed, the owner is at liberty to bring suit for damages by a private action under the *Lex Aquilia*, and also to prosecute the culprit for a capital offence.

(12) The Second Section of the *Lex Aquilia* is not in use at present.

(13) In the Third Section provision is made concerning every other kind of damage. Therefore, if anyone has wounded a slave or a quadruped classed under the term cattle, or wounded or killed a quadruped not belonging to said class, as, for instance a dog or a wild beast, the action must be brought under this Section. Also, with reference to all other animals, as well as property which is without life, where damage is inflicted wrongfully, suit is brought under this Section; for if anything is burned, broken, or dashed to pieces, the action is based upon this Section, although the term "broken" would be sufficient in all these cases, since by it is understood whatever is ruined in any way. Wherefore, not only articles which are burned, or dashed to pieces, but also such as are torn, battered, spilled, and in any way ruined and deteriorated, are included in this term; and in a word, it has been decided that if a man should mix something with the wine or oil belonging to another by means of which the natural goodness of the wine or oil is impaired, he will be liable under this Section of the law.

(14) It is also evident that as anyone is liable under the First Section only where a slave or a quadruped has been killed either maliciously or through negligence; so, under this Section, the party is also liable for every other kind of damage resulting from malice or negligence. Under

this Section, however, he who caused the damage is not liable for the value of the property during that year, but only during the thirty days immediately preceding the commission of the act.

(15) And not even the term "largest sum" is added, but it has been justly held by Sabinus that the estimate of damage must be made just as if the expression "the largest sum" had been likewise inserted into this Section; for the Roman plebeians who enacted this law (which was proposed by the tribune Aquilius) were satisfied because that term was mentioned in the First Section of the said law.

(16) It has also been determined that if an action can be brought under this law only where anyone has unquestionably inflicted damage by means of his own body; and therefore equitable actions are usually granted against a party who has caused damage in some other way; for example, where anyone has shut up the slave or flock of another party so that it died from hunger; or has driven a beast of burden with such violence that it was ruined; or has frightened an animal so badly that it fell and was trampled upon; or where anyone has induced a slave belonging to another to climb a tree, or descend into a well, and while ascending or descending he was either killed, or injured in some part of his body; in instances of this kind an equitable action is granted against him.

But where anyone has thrown down the slave of another from a bridge or a bank into a river and the slave was drowned because of having been thrown into the water, it cannot be difficult to understand that he caused the damage by means of his body, and therefore he is liable under the *Lex Aquilia*. But where the damage has not been inflicted by his body, or the body of the animal injured, but has happened to something in some other way, since neither the direct Aquilian nor an equitable action can be brought, it has been decided that he who is

to blame is liable to an *actio in factum;* as, for instance where anyone influenced by pity has released the slave of another from his shackles in order that he might escape.

TITLE IV.

CONCERNING INJURIES.

An injury, generally speaking, means everything that is done contrary to law, and particularly it sometimes signifies outrage, which is derived from the word *contemnere*, and is styled by the Greeks υβρις at other times gross negligence which the Greeks designate αδικημα, and in this way "unlawful damage" is understood in the *Lex Aquilia;* and then again it denotes unfairness and injustice which the Greeks call αδικια, for when a Prætor or a Judge renders a decision against anyone contrary to law the latter is said to have sustained an injury.

(1) Injury is committed not only when anyone is struck with the fist, or with a stick, or scourged; but also when insulting language is addressed to him in public; or when anyone's property is taken possession of as if he was a debtor by a party who knew that he did not owe him anything; or where anyone has written, composed, or published a paper or a poem to another's dishonor, or has maliciously caused any of these things to be done; or where anyone has followed a married woman, or a boy or girl who has not arrived at puberty; or when the modesty of some person is said to have been attacked; and in short, it is evident that injury can be committed in many other ways.

(2) Anyone suffers injury not only in his own person but also in that of his children who are under his control, as well as in that of his wife, for this opinion has generally prevailed. Therefore, if you inflict an injury upon the daughter of a person who is married to Titius, not only can an action be brought against you for injury in the name of the daughter, but also one in that of her father, and another in that of her husband as well.

But, on the other hand, where the injury has been inflicted upon a husband, his wife cannot bring an action for injury, for it is proper for wives to be defended by their husbands, and not

husbands by their wives. A father-in-law can also bring an action for injury in the name of his daughter-in-law when her husband in under his control.

(3) It is understood, however, that no injury can be inflicted upon slaves themselves, but it is considered to be inflicted upon their masters through them; not indeed in the same way as though children and wives, but only when some atrocious act is committed which seems to be plainly intended as an outrage against the master; as, for instance where anyone has whipped a slave belonging to another, and, in this case an action is granted. But where anyone publicly abuses a slave, or strikes him with his fist, no action can be brought against him by the master.

(4) Where an injury has been inflicted upon a slave who is the common property of two or more masters, it is equitable that the estimate of the injury should be made not in proportion to the interest which each master has in him, but with regard to the rank of the masters, because the injury is inflicted upon them.

(5) But where the usufruct in a slave belongs to Titius, and the ownership to Mævius, the injury is understood to be inflicted upon Mævius rather than upon Titius.

(6) Where, however, the injury has been inflicted upon a freeman who is serving you in good faith as a slave, no action will be granted you, but the freeman can bring suit in his own name, unless he has been beaten in order to inflict an outrage upon you, for then an action for injury will lie in your favor. Therefore, the same principle applies where a slave who belongs to another is serving you in good faith; so that an action for injury will be granted you whenever the injury has been committed for the purpose of affronting you.

(7) By a law of the Twelve Tables the penalty for injury was retaliation where a limb had been destroyed; but where a bone was broken pecuniary penalties were imposed in proportion to the great poverty of the ancients. Subsequently, however, the Prætors permitted those who had sustained an injury to make the estimate themselves, so that the judge condemns the party in the sum which he who sustained the injury estimates as damage, or in a smaller amount, according as it seems to him to be proper.

The penalty fixed by the law of the Twelve Tables for injury has fallen into disuse, and that which the Prætors introduced, and which is designated "honorary", is imposed in lawsuits, for the estimate of the injury is increased or diminished in proportion to the dignity and honorable position in life of the person injured; and this scale adopted in condemnation is not unreasonably observed even with reference to anyone in a servile condition; so that one amount is fixed where the slave is a steward, another where he has employment of less importance, and still another where he is of the lowest rank and held in chains.

(8) The *Lex Cornelia* mentions injuries, and introduced an action for them which lies when a person alleges that he has been beaten or scourged, or that his house has been entered by force. We understand the term "house" to refer either to that which belongs to anyone and in which he resides, or to one that he has leased, or to one in which he has been received gratuitously or in the capacity of a guest.

(9) An injury is deemed atrocious either from the act itself, as, for instance, where anyone has been wounded or beaten with rods; or on account of the place where the injury was committed, as in a theatre or a forum, or in the presence of the Prætor; or on account of the position of the person, for example where a magistrate sustained an injury, or where an injury has been done to a senator by an individual of inferior station, or to a parent or a patron by his children or freedmen (for an injury to a senator, a parent, or a patron, is estimated in a different way from that inflicted upon a stranger and a person of inferior rank); and sometimes the location of the wound makes the injury atrocious, for instance where a man is struck in the eye; and it makes little difference whether an injury of this kind is inflicted on the father of a family or the son of a family, for even in the latter case it is considered an atrocious act.

(10) In conclusion it must be noted that the party who sustains the injury can, in every

instance, proceed either criminally or civilly. If he proceeds civilly, a penalty is imposed after an estimate has been made, in accordance with what has already been stated; but if he proceeds criminally, an extraordinary penalty is inflicted upon the culprit by the judge in the discharge of the duty of his office. The rule which a Constitution of Zeno introduced must, however, be observed, namely; that men who are illustrious in rank and all who are above them may either prosecute or defend a criminal action for injury by means of an agent in accordance with the tenor of the same, as will appear more clearly from the terms of the Constitution itself.

(11) Not only is the person liable to a suit for injury who actually perpetrated it, that is to say, he who struck the blow; but he also is liable who maliciously acted or contrived so that the cheek of the party received the blow with the fist.

(12) This action is barred by concealment, and therefore if anyone abandons an injury, that is to say, does not manifest resentment as soon as he sustains it, he cannot, subsequently, by changing his mind revive what he has already forgiven.

TITLE V.

CONCERNING OBLIGATIONS WHICH ARISE FROM A QUASI-CRIME.

If a judge makes a case his own, he is not, strictly speaking, liable as for an unlawful act; but as he is also not liable upon a contract, and it is evident that he has been guilty of a fault, although through imprudence, it would seem that he is liable for a quasi-crime, and should be condemned to pay such a penalty as appears to be equitable to the moral sense of him who decides the case.

(1) In like manner he from whose bedchamber, whether it is his own or has been rented, or is one in which he was living without payment, anything has been thrown down or poured out in such a way as to injure someone, is understood to be responsible for a quasi-crime; for he cannot, strictly speaking, be held liable for a crime, since in most instances, he is bound for the negligence of another either as a slave or a freeman.

The case is similar where he who has something so placed or suspended over a road used for ordinary traffic, that if it falls down would injure someone, in which event a fine of ten *aurei* has been established; but where it fell down, or was poured out, action for double the amount of the damage caused will lie. For the death of a freeman a fine of fifty *aurei* is prescribed; if however, he lives, and it is proved that he was injured, a right of action exists for whatever amount seems to the judge to be equitable; and the latter must also calculate the fees paid to physicians and other expenses incurred in the cure, as well as the value of the labor which the party has lost or will lose on account of the incapacity which he suffers on this account.

(2) Where the son of a family lives separate from his father and something is thrown down or poured out from his room, or if he keeps something so placed or suspended that its fall would be dangerous; Julian decided that no action would lie against his father, but that it must be brought against the son himself; and this rule is also applicable where a judge under parental control has made a case his own.

(3) Likewise, the master of a ship, of an inn, or of a stable is deemed liable for a quasi-crime where any damage or theft is committed in the said ship, inn, or stable, provided the offence is not his own, but that of someone of those by whose labor he conducted the ship, the inn, or the stable; for, as the action cannot be brought against him on any contract, and still, to a certain extent he is guilty of negligence, and because he made use of the services of wicked men, it appears that he is liable for a quasi-crime. In these instances an *actio in factum* will lie, and this is granted the heir of the party injured, but cannot be brought against the heir of him who committed the illegal act.

TITLE VI.

CONCERNING ACTIONS.

It remains for Us to speak of actions. An action is nothing else but the right of bringing suit in court for whatever is owing to us.

(1) The principal division of all actions between parties litigant whether before judges or arbiters for any cause whatsoever, is into two classes; that is to say, such as are either *in rem* or *in personam,* for every plaintiff either brings a suit against a party who is liable to him on a contract, or because of an illegal act, (in which instance the action is brought *in personam*, and in it the party states that his adversary should give him something or do something for him, or his allegations are made in some other way) or he brings suit against a party who is not liable to him personally, but against whom he institutes proceedings relating to certain property, and in this case the action granted is *in rem*. For instance, where a party has in his possession some corporeal property which Titius says is his, but the possessor says that he is the owner of the same; and if Titius in the pleadings alleges that the said property is his, the action is *in rem*.

(2) In like manner, if he states that he has the right of use and enjoyment in a tract of land, or a house, or the right of walking or driving over the premises of a neighbor, or of conducting water from the land of a neighbor, the action is *in rem*. Of the same nature is the action concerning an urban servitude, for example, where a party claims that he has the right to raise his house higher, or the right to an unobstructed view, or the right of causing something to project over his neighbor's house or to insert timbers into it.

On the other hand, actions are also granted with reference to usufruct, and the servitudes attaching to both rustic and urban estates; so that where anyone, alleges that his adversary does not possess the right of use and enjoyment, or of walking or driving, or of conducting water, or of building to a greater height, or of an unobstructed view, or of projecting anything over his neighbor's premises, or of insetting anything into his house, these actions are also *in rem*, but they are negative. This kind of action is not employed in controversies in which corporeal property is involved; for in these cases the party who is not in possession brings the suit, while the possessor has no right of action by which he may deny that the said property belongs to the plaintiff. In only one instance can the party who is in possession act as plaintiff, as will be more conveniently set forth in Our greater work, the Digest.

(3) Those actions which We have mentioned and others similar to them derive their origin from statutory enactments, or from the Civil Law. Others, also, are those of which the Prætor has charge and arise from his jurisdiction, these are both *in rem* and *in personam*, and it is necessary to explain them by example. Thus, he generally permits a suit *in rem* to be brought in such a way that the plaintiff alleges that he has obtained a quasi-usucaption to which he had no such right; or on the other hand that a possessor states that his adversary did not acquire usucaption in property in which he in fact had such a right.

(4) For where any property has been transferred by a good title, as, for instance, on account of a sale, a donation, a dowry, or a legacy, and the party receiving it has not yet obtained the absolute ownership of the same; if he has by accident lost possession of it he has no direct action *in rem* for its recovery, although actions were granted by the Civil Law in order that anyone might assert his ownership; but since it was clearly oppressive that an action could not be brought in a case of this kind, one was introduced by the Prætor, in which he who has lost possession alleges that he has obtained usucaption in the property, and for this reason claims it as his own. This action is called *Publician*, for the reason that it was first published in an Edict by the Prætor Publicius.

(5) Again on the other hand, where anyone who is absent on public business or is in the power of the enemy, has acquired the right of usucaption in the property of one remaining in the state, then, where the possessor has ceased to be absent in the service of the country, the

owner is permitted within a year to bring suit for the said property the usucaption having been annulled; that is, to do so by alleging that the possessor has not obtained perfect usucaption, and that on this account the property belongs to him.

The Prætor concedes this kind of action to certain other parties also, being induced by similar sentiments of justice, as may be ascertained from the more extensive treatise the Digest or Pandects.

(6) Moreover, where anyone has transferred his property to another for the purpose of defrauding his creditors, and the latter have been placed in possession of said property by the decision of a magistrate, the creditors are authorized to set aside the transfer and bring an action for the property, that is to say, allege that it never was transferred and for this reason remained a part of the property of the debtor.

(7) Moreover, the Servian and quasi-Servian actions — the latter being also called "hypothecary" arise from the jurisdiction of the Prætor himself. The Servian action is one by which any person may proceed against the property of a tenant which is held by him in pledge for the rent of land; and a quasi-Servian is one by which creditors may bring suit for property either pledged or mortgaged. No distinction exists between a pledge and a mortgage, so far as the hypothecary suit is concerned; for where an agreement has been entered into between a debtor and creditor so that something may be encumbered for a debt, both of these are designated by this one name; but in other respects there is a difference, for by the term pledge, properly speaking, We mean what is immediately delivered to the creditor, especially if it is movable property; but whatever is held by mere agreement, without delivery, We declare is properly included by the term mortgage.

(8) The Prætor has also introduced actions *in personam* arising from his own jurisdiction; for example, the *actio de pecunia constituta*, that the *actio receptitia* seemed to resemble, which by one of Our Constitutions, (after any surplus provisions included in it had been transferred to the *actio de pecunia constituta)* has been ordered to be withdrawn from Our laws together with all its authority, as being superfluous. The Prætor has likewise introduced an action with reference to the *peculium* of slaves and parties under parental control, and one by which it is sought to be ascertained whether the plaintiff has been sworn, as well as several others.

(9) The *actio de pecunia constituta*, can be brought against all those who have agreed to make payment either in their own behalf or otherwise, where no stipulation has been made; for where the party has given a promise to him who stipulates he is liable by the Civil Law.[1]

(10) The Prætor has introduced the actions for *peculium* against the father and the master, because although under the strict construction of the law they are not liable for the contracts of their children or slaves, nevertheless, it is but just that they should be condemned in the amount of the *peculium*, as this is, as it were, the patrimony of sons and daughters and of slaves as well.

(11) Moreover, where anyone on a demand of his adversary swears that the money for which he has brought suit is owing to him and has not been paid; the Prætor most properly grants him an action in which it is to be ascertained, not whether the money is owing to him, but whether he has made oath.

(12) He has also introduced a great many penal actions arising from his jurisdiction, for example, against him who has damaged any portion of his *album;* and against him who has brought his patron or his father into court without previously obtaining permission to do so; and also against him who has rescued a party by violence who had been called into court, or by whose artifice another had rescued him; as well as in innumerable other cases.

(13) Prejudicial actions would appear to be *in rem*, such as those by which inquiry is made whether anyone is a freeman or a freedman, or concerning the acknowledgment of parentage; and among these that one alone is founded upon the Civil Law by which inquiry is made

whether a certain party is free, while the others derive their origin from the jurisdiction of the Prætor himself.

(14) Actions having therefore been distinguished in this manner, it is evident that a plaintiff cannot demand his property from another party by the words: "If it appears that he should give it"; for no obligation exists to give what belongs to the plaintiff, because, in a word, that is understood to be given to anyone which is bestowed in such a manner that it becomes his own; nor can anything which already belongs to the plaintiff be made his any more than it actually is. Nevertheless, through hatred of thieves, and that they may be liable to a greater number of actions, it has been established that in addition to the penalty of double or quadruple the value, thieves may, for the purpose of recovering the property be rendered liable to an action worded as follows: "If it appears that they should give it"; although an action *in rem* by means of which a party may bring suit for property alleging that it belongs to him can also be brought against them.

(15) We designate actions *in rem "vindicationes*", while we call actions *in personam*, in which it is stated that our adversary should give us something or do something for us, "*condictiones*". For in the language of former times *condicere* meant *denumtiare;* but now we improperly refer to a *condictio* as an action *in personam* by which the plaintiff alleges that something ought to be given to him; for at present there is no *denuntiatio* known by that name.

(16) The next division is, that certain actions are available for the purpose of recovering some particular property, others to obtain a penalty, and others again are mixed.

(17) All actions *in rem* can be brought for the purpose of recovering some particular property. Likewise, nearly all of those actions which are *in personam*, which originate from a contract, appear to be available for the purpose of obtaining some particular thing; for example, those in which the plaintiff sues for money loaned or mentioned in a stipulation, as well as suits on account of a loan, a deposit, a mandate, a partnership, a sale and a lease. It is evident that where an action of deposit is brought on the ground that the property was deposited because of a tumult, a fire, the ruin of a building, or a shipwreck; the Prætor authorizes an action for double the value, provided it is brought against him with whom the article was deposited, or against his heir, by reason of fraud committed by him; in which instance the action is mixed.

(18) Some actions available in the case of unlawful acts are instituted solely in order to obtain a penalty, others for the purpose of obtaining a penalty and the property, and for this reason they are mixed. A party brings a suit for a penalty only in an action of theft; for whether it is one of manifest theft for fourfold the value, or of non-manifest theft for double the value, it is brought for the penalty alone, as the party sues for the property itself by a separate action, that is to say by demanding it as his, whether the thief himself or anyone else has it in his possession; and, moreover, a *condictio* also lies against the thief.

(19) An action for property taken away by force is mixed, because the recovery of the property is included in the fourfold value, hence the penalty is threefold. The action for damages under the *Lex Aquilia* is mixed, not only where it is brought for double the value against the defendant, but sometimes where a party brings suit for the simple value; as, for instance, where anyone has killed a slave who is lame, or one-eyed, but who during the preceding year was sound, and of great value; for then the party is condemned in the largest amount that the slave was worth during the year, according to the division already stated.

Moreover, an action is mixed when brought against those who have delayed delivering property left as a legacy or trust to consecrated churches, or other venerated places, so long that they have to be brought into court; for then they are compelled to surrender either the property itself or the money which was bequeathed, and an equal sum also by way of penalty, and therefore the condemnation of the party is for double the amount.

(20) Certain other actions appear to be of a mixed nature being *in rem* as well as *in personam*, and to these belong the action for partition, which is available to co-heirs in order to divide an estate; as well as the action for the division of common property granted to those holding property in joint ownership that it may be divided; and the action for the establishment of boundaries brought between those who have adjoining lands. In these three actions the judge is permitted to adjudicate the property in question to either of the litigants in accordance with what is fair and just, and where the share of one of them seems to *be* too large to condemn him to pay to the other a certain sum of money as an equivalent.

(21) All actions are framed to obtain either single, double, or triple value, but no action extends beyond these.

(22) Suits are brought for single damages, for instance, such as grow out of a stipulation, a loan, a sale, a lease, a mandate, and indeed out of many other transactions.

(23) We bring suit for twofold the amount, for example, in a case of non-manifest theft, of wrongful injury based upon the *Lex Aquilia*, and of deposit in certain instances. Moreover, a suit of this kind is available where a slave has been corrupted, and lies against one by whose advice and counsel a slave belonging to another has absconded, or has become refractory toward his master, or has begun to live licentiously, or, in a word, has deteriorated in any respect; and in this action an estimate is made of any articles which the said slave took with him when he ran away; and also where property has been left as a legacy to sacred places, as We stated above.

(24) A demand for triple damages can be made when anyone has inserted into his complaint a larger amount than is true, so that for this reason the court attendants, that is to say the bailiffs who execute the process may exact a larger sum by way of fees; for then the defendant can recover from the plaintiff threefold the amount of the loss which he suffered on account of their act, so that in this triple amount is included the simple damage which he sustained. This rule has been introduced by a Constitution of Our own which is prominent in Our Code, on which an *actio condictitia ex lege* can undoubtedly be based.

(25) A demand for quadruple the amount may be made, for instance, in cases of manifest theft, and also when an act has been performed through fear, or where money has been paid in order that he to whom it was given may, for the sake of annoyance, induce a party either to perform or not to perform some act; and also an *actio condictitia ex lege* arises under Our Constitution which imposes a quadruple penalty upon those court attendants who extort anything from defendants contrary to the rule established by said Constitution.

(26) The actions for non-manifest theft and for corrupting a slave differ from the others concerning which We have spoken at the same time, in the fact that these are always for double the value; but the others, that is the one for wrongful injury under the *Lex Aquilia*, and sometimes that of deposit, are for double the amount when a denial is made, and single damages are granted where the party makes a confession.

The action, however, which is available for the recovery of property bequeathed to sacred places, not only provides for double damages when a denial is made, but also when the heir has deferred delivery of what has been bequeathed until brought into court by order of Our magistrates; while only single damages are granted when the party admits that he is liable and makes payment before proceedings are taken against him by the order of the magistrates.

(27) Moreover, the action growing out of what has been done because of fear differs from the others which We have mentioned at the same time in this, that it is tacitly understood in its nature that he who restores the property to the plaintiff in compliance with the order of court shall be acquitted. This is not so in other cases, but each party shall in every instance be condemned in fourfold damages as in the action for manifest theft.

(28) Certain actions, moreover, are of good faith and others of strict right. Those of good faith are such as arise from sale, lease, business transacted, mandate, deposit, partnership, guardianship, loan, pledge, partition of an estate, division of common property, the *actio 'præscriptis verbis* which relates to a sale at an estimated price, the action growing out of an exchange, and the action for an estate; although it was until recently uncertain whether the last should be included among *bonæ fidei* actions or not, still one of Our Constitutions has plainly declared it to be *bonæ fidei*.

(29) There was formerly an action to recover the property of a wife which was included among those of good faith, but as We found that the action arising out of a stipulation was broader in scope, We transferred all the regulations by which a wife's property was formerly governed, together with their numerous divisions, to the action arising out of a stipulation which was available for the purpose of recovering dowries; and the action to recover the property of a wife having been abolished, that arising from stipulation and introduced in its stead very justly assumed the nature of the action of good faith and becomes such, but only when used to recover a dowry. We have also granted the wife a mortgage by implication; but We think she should only be preferred to other hypothecary creditors when she herself, for whose sole benefit We have introduced this provision, brings suit for her dowry.

(30) Moreover, in actions of good faith free power appears to be granted the judge of estimating in accordance with the principles of justice and equity, how much should be paid to the plaintiff; and in this he has authority, (if the plaintiff should, on his part have to pay anything after this amount has been set off) to condemn the defendant to pay the remainder to him who brought the suit.

In actions of strict right also, in compliance with a Rescript of the Emperor Marcus, set-off was also permitted when an exception on the ground of fraud was pleaded; but one of Our Constitutions has more broadly introduced those set-offs which are based upon evident justice, so that they diminish litigation by operation of law, whether the actions are real or personal, or any others whatsoever, excepting only the action of deposit, and where anything is opposed to this on the ground of set-off We have considered it to be dishonorable, lest under the pretence of set-off a depositor might be defrauded of the recovery of the property he had deposited.

(31) Moreover, We designate certain actions as "arbitrary", that is dependent on the discretion of the judge; and in these, unless the defendant satisfies the plaintiff in accordance with the discretion of the judge, that is unless he restores the property, or produces it, or makes payment, or delivers up a slave in a case involving an illegal act, he should have judgment rendered against him. Both real and personal actions of this description exist; real for instance, the Publisian, the Servian relating to the property of a tenant, and the quasi-Servian, also styled hypothecary; personal, those in which the issue to be determined is whether an act has been committed through fear or fraudulently, and also that in which suit is brought for some article which was promised to be delivered in a certain place.

The action for the production of property also depends upon the discretion of the judge; for in these actions and in others similar to them he is permitted to make an estimate of the amount which would satisfy the plaintiff on just and equitable terms, dependent upon the nature of the property for which the action is brought.

(32) A judge under all circumstances, as far as it is possible, should be careful to render a judgment for a definite sum of money or for a certain article, although the amount involved in the action in undetermined.

(33) When anyone bringing a suit included more in the statement of his claim than he was entitled to, he lost his case, in other words the property; nor was complete restitution easily obtained from the Præter, unless he was under twenty-five years of age; for just as relief was ordinarily granted in other instances where a reason for it existed, so also was it customary to

give aid to a party of this kind if he had failed by reason of his youth. And it is evident if there was so good a ground for excusable error that the most prudent man might fail, relief was granted, even though the party was more than twenty-five years of age; for instance, where anyone brought suit for an entire legacy, and afterwards a codicil was produced by which either a part of the legacy was revoked, or legacies were bequeathed to other parties which caused it to appear that the plaintiff had brought suit for more than three-fourths, since legacies were diminished to that extent by the *Lex Falcidia*.

A party can bring suit for too much in four ways, in the amount, in time, in place, and in the nature of the article claimed. In amount, as, for instance, where anyone sues for twenty *aurei* instead of the ten which were owing to him, or where he who has an interest in property claims it all or too large a share of it. In time, as, for instance, where anyone brings an action before the appointed day or the condition has been complied with; for he who pays later than he should do is understood to pay too little, and on the same principle he who sues too early is considered to sue for too much. Suit can also be brought for too much with reference to place; as, for instance, where anyone who has stipulated for something to be delivered to him at a certain place, brings suit for it at another without mentioning the place where he had agreed that the article should be delivered to him; for example, where a party stipulates as follows: "Do you agree to pay me at Ephesus?" and asserts absolutely that payment should be made to him at Rome. In this case he is held to have brought suit for too much, because the advantage which the party who promised him would have enjoyed if he had paid at Ephesus is lost by his unqualified statement; and therefore an arbitrary action is available where anyone brings suit elsewhere, in which the advantage that the promisor would have possessed if he had made payment at the place agreed upon is taken into account. This advantage is frequently found to be material where merchandise, for instance, wine, oil, and grain, which have different values in different localities, is concerned, and money also is not loaned at the same interest everywhere. When, however, anyone brings a suit at Ephesus, that is in the identical place where he stipulated that he should be paid, his action is regularly in accordance with law; and this also the Prætor maintains, for the reason that the advantage of payment is preserved for the party making the promise.

He who sues for too much with reference to the nature of the property is considered to greatly resemble the party who sues for too much with reference to place; as where a person stipulated with you as follows: "Do you agree to give your slave Stichus or ten *aurei?*" and then demands one or the other, that is the slave alone or the ten *aurei* alone. He is understood to have brought suit for too much because in this kind of stipulation the party making the promise has the choice either of paying the money or giving the slave; and therefore he who alleges that the money alone or the slave alone should be given to him deprives his adversary of his right to make the choice, and in this way renders his own condition better and that of his adversary worse. For this reason a certain kind of action has been devised for a case of this description, by means of which where anyone avers that the slave Stichus or ten *aurei* should be given to him, he can bring suit in the same terms in which he made the stipulation for himself. Moreover, where anyone has stipulated generally for a slave and brings an action for Stichus specifically; or having stipulated for wine in general, brings one specifically for Campaman wine; or having stipulated for purple cloth then brings one specifically for Tyrian cloth, he is understood to bring suit for too much; because he takes the right of choice from his adversary, who by the terms of the stipulation was at liberty to give something else than what the action was brought for.

A party is even understood to bring suit for too much although he does so for property of the least value; since it frequently happens that it is easier for him who makes the promise to furnish that which is of greater value.

These rules were formerly in use; but afterwards the *Lex Zenoniand* and Our Constitution imposed certain limits upon them, and where, with reference to time, suit has been brought for

too much, the Constitution of Zeno of divine memory, prescribes what course should be taken; but where suit has been brought for too much with reference to quantity or in any other respect, any damage which may result on this account is punished, as We previously stated, by a judgment of three-fold the amount in favor of the party against whom the excessive demand was made.

(34) If the plaintiff inserted in his petition less than he was entitled to, as, for example, where ten *aurei* were due him, and he alleges that he should be paid five; or where an entire tract of land belonged to him, but he only brought suit for half of the same; he runs no risk, for the judge will still condemn his adversary in the same case to pay the balance, in compliance with the Constitution of Zeno of divine memory.

(35) Where anyone states one thing instead of another in his petition, it is settled that he runs no risk, but when the facts are ascertained We permit him to correct the mistake in the same case; as for instance, where he who should have brought suit for the slave Stichus brought it for Eros; or where anyone has alleged that something was owing to him under a will, when in reality it was owing by reason of a stipulation.

(36) There are, moreover, certain actions by means of which we recover not all that is due to us, but sometimes the entire amount and sometimes less; for instance, where we bring suit for the *peculium* of a son or a slave; for if the amount of the said *peculium* is not less than what we are attempting to recover, the father or the master will have judgment rendered against him for the whole; but where the amount of the *peculium* is found to be less than what was claimed, the court shall render judgment for the full amount of its value. We shall explain in its proper place how this *peculium,* should be estimated.

(37) Moreover, where a married woman brings suit for the recovery of her dowry, it is held that her husband should be condemned as far as he is able to pay, that is as far as his means will allow; and, therefore, if his property is equal in amount to the dowry, judgment shall be rendered against him for the whole; but if it is less, he shall be made to pay as much as he can. A claim for the restitution of a dowry is subject to retention; on account of expenses incurred with reference to the property included in said dowry, for the reason that a dowry is diminished by operation of law because of necessary expenses, as may be ascertained from the more extensive Books of the Digest.

(38) When anyone brings an action against his ascendant or his patron, or when one partner brings suit against another in the action of partnership, the plaintiff can not recover more than his adversary is able to pay; and the rule is the same where suit was brought against anyone by reason of a gift bestowed by him.

(39) Set-offs made by both parties often bring it about that one of them receives less than he is entitled to, for according to what is just and equitable an account is taken of what the plaintiff should for his part pay with reference to the same matter, and the party against whom suit is brought, as has already been stated, is required to pay the remainder.

(40) Also, when he who has surrendered his property to his creditors has afterwards acquired something which yields a substantial profit, his creditors can again proceed against him for whatever he may be able to pay; for it would be inhuman for a man who had already been deprived of his fortune to be condemned in the entire amount.

TITLE VII.

CONCERNING BUSINESS TRANSACTIONS ENTERED INTO WITH A PERSON UNDER THE CONTROL OF ANOTHER.

For the reason that We have treated above of the action which may be brought for the *peculium* of children of a family and of slaves, We must now explain more in detail the character of the said action as well as of others which are ordinarily granted against parents or

masters in the name of the said persons. And because the principles are almost the same whether the business be transacted with slaves or with those who are under the control of their relatives; hence, in order to avoid a tedious dissertation, We shall direct Our inquiry to the relation of slave and master, with the understanding that the same principles will also apply to children and to the parents under whose control they are; for if there is anything special to be mentioned respecting them We shall explain it separately.

(1) If then any business has been transacted with a slave by the order of his master, the Prætor promises an action for the entire amount against the master; evidently because he who makes a contract of this kind seems to have relied upon the credit of the master.

(2) Under the same rule the Prætor promises two other actions for the entire amount, one of which is called "exercitorian" and the other "institorian". The first is available when anyone has appointed his slave the master of a ship, and some contract has been made with him concerning the transaction which he was appointed to attend to. The action is called exercitorian because the party to whom the daily profits of a ship belong is styled *exercitor*. The *actio institoria* is applicable where anyone has appointed his slave to have charge of a shop or a business of any description, and a contract has been made with him concerning the matters of which he has charge, and it is called "institorian" for the reason that persons appointed to carry on a business are designated *institores*. The Prætor, however, allows these two actions also where anyone appoints a freeman or the slave of another person to take charge of a ship, a shop, or any kind of business, evidently because the same principle of equity likewise prevails in this instance.

(3) The Prætor has also introduced another action which is known as "tributorian". For if a slave transacting business with goods which are a part of his own *peculium*, his master being aware of the fact, and any contract is entered into with him by reason of the same, the Prætor has established the rule that everything belonging to said merchandise and whatever profit accrues from it, shall be divided between the master, if anything is owing to him, and the other creditors in proportion to their claims. And for the reason that he entrusts the distribution to the master himself, if any one of the creditors makes complaint that what has been allotted to him is less than it should be, he grants to this creditor the action styled "tributorian".

(4) Moreover, an action has been introduced which has reference to the *peculium* and to whatever has been employed for the benefit of the master; so that even if the business had been transacted without the master's consent, nevertheless, if anything had been employed for the benefit of the latter he will be obliged to account for the whole of it; but if nothing has been employed for his benefit he will still be required to make payment to the extent of his *peculium*. Everything which a slave necessarily expends on the property of his master is understood to have been done for his benefit; for example, where he has borrowed money and with it has paid his master's creditors, or repaired his buildings which were falling into ruin, or purchased grain for his family, or bought a tract of land, or anything else that was necessary. Therefore, for instance, if out of ten *aurei* which your slave borrowed from Titius he paid five to your creditor and expended the other five in any other way, you should have judgment rendered against you for the entire amount of the last five, but for the other five only to the extent of the *peculium* from which it is apparent that if the entire ten *aurei* have been expended for your benefit, Titius can recover all of them; for although there is but one kind of action for the recovery of the *peculium* and whatever has been expended for the benefit of the master, it has, nevertheless, two judgments. Therefore the judge before whom the action is brought should previously ascertain whether anything has been employed for the benefit of the master, and he can only proceed to the estimation of the amount of the *peculium* after he has learned that nothing, or less than the entire amount, has been employed in this way.

When, however, inquiry is made with reference to the amount of the *peculium*, anything which the slave owes to his master or to anyone under his control is first deducted, and the

remainder is considered to be *peculium*. Sometimes, however, what a slave owes to a person under the control of his master is not deducted from the *peculium;* for example, when he forms a part of his own *peculium;* which signifies that deduction is not made from the same where the slave is indebted to one of his own slaves.

(5) However, there is no doubt that he who has entered into a contract by the order of his master and in whose behalf the institorian or exercitorian action will lie, can also bring the action relating to property employed for the benefit of the master. Still, he would be extremely foolish if he failed to bring the suit by means of which he can with the greatest ease recover the entire amount under the contract, and attempt the difficult undertaking of proving that the property has been employed for the benefit of the master, or that the slave has such *a* valuable *peculium* that the entire amount can be paid to him out of the same.

Moreover, he who is entitled to the tributorian action can likewise bring the *actio de peculio et in rem verso;* but sometimes it is evidently expedient for him to bring the *tributoria actio* and at others the *actio de peculio et in rem verso*. It is to his advantage to bring the tributorian action because in doing so the condition of the master is not rendered preferable, that is, what is owing to him is not deducted, but he enjoys the same rights as the other creditors; but in the action on the *peculium* whatever is due to the master is first deducted and the latter is condemned to pay the balance to the creditor.

Again, under other circumstances it may be advantageous to bring the *actio de peculio* for the reason that in it an account is taken of the entire *peculium*, and in the tributorian action it is taken only of what is used in business; and anyone can carry on commercial transactions with a third part of the *peculium*, or possibly with a fourth, or even with a very little, and keep the greater portion in land and slaves, or in money loaned at interest. Therefore anyone should choose either one of these actions or the other, according as it may be deemed expedient; but it is evident that he should bring the *actio de in rem verso* where he can prove that the money has been used for his master's benefit.

(6) What We have stated with reference to a slave and his master We understand to apply to a son and a daughter, a grandson and a granddaughter, and the father or the grandfather under whose control they may be.

(7) The following especially applies to the former, namely, that the Macedonian decree of the Senate forbids money to be loaned to those who are under the control of their relatives; and an action is denied to a creditor who makes a loan to a son or a daughter, a grandson or a granddaughter themselves (whether they are still under paternal control, or whether by the death of their ascendant or by emancipation they have become their own masters); or against the father or grandfather, whether he still has them under his control, or has emancipated them. The Senate established this rule for the reason that parties burdened with debts for borrowed money which they had squandered in luxury, often plotted against the lives of their relatives.

(8) In conclusion, we must observe that when a contract has been entered into by the order of a father or a master, or when any property has been used for his benefit, a personal action for recovery can be brought against the father or master directly, just as if the business had been transacted with him as principal. It is also held that he against whom an exercitorian or an institorian action can be brought is liable to a personal action for recovery, because a contract of this kind is also understood to be entered into by his order.

TITLE VIII.

CONCERNING NOXAL ACTIONS.

Noxal actions have been established for the offenses of slaves, for instance, where they have committed theft, robbery with violence, damage, or injury, by means of which action the master, if he loses, is permitted to pay the amount of the damage or to surrender the slave who

has caused the injury.

(1) *Noxa* is the object responsible for the damage, that is to say, the slave; *noxia* is the illegal act itself, as, for instance, the theft, damage, robbery, or injury.

(2) Permission to discharge the liability incurred through an illegal act by the surrender of whatever was responsible for the same is consonant with the highest dictates of reason; for it is unjust that the wickedness of slaves should be injurious to their master beyond what their own bodies are worth.

(3) A master who has been sued on account of his slave in an action of this kind is released from liability by the surrender of the slave as the cause of the damage, and the ownership of the latter is perpetually transferred from the master; but if the said slave obtains money and makes reparation to him to whom he has been surrendered, he will be manumitted with the assistance of the Prætor, even though his master may be unwilling.

(4) Noxal actions have been provided either by statute or by the Edict of the Prætor; by statute, for instance, by the action of theft under a law of the Twelve Tables; by a suit for wrongful damage under the *Lex Aquilia;* and by the Edict of the Prætor, as the actions for injuries and robbery with violence.

(5) Moreover, every noxal action follows the person, for if your slave has committed a noxal offense, the action lies against you as long as he is under your control; but if he should come under the control of another, the action at once begins to lie against the latter; or if he should be manumitted, he himself, becomes directly liable and the right of surrender for the illegal act is extinguished. On the other hand, a direct action may be transformed into a noxal one; for where a freeman has committed a wrongful act and afterwards becomes your slave — which We explained in the First Book may take place under certain circumstances — the action which formerly was direct and against the culprit becomes noxal and against you.

(6) Where a slave has committed a noxal offence against his master no cause of action arises, for no obligation can exist between a master and one who is under his control. Therefore, although a slave may have come under the control of another, or have been manumitted, no action lies either against himself or against the party under whose control he now is. For this reason where a slave belonging to another has committed a noxal act against you, and afterwards comes under your control, the right of action is extinguished, for the reason that it is brought into such a condition that it cannot be maintained, and therefore although the slave may pass out of your power, you cannot bring the suit; just as where a master has committed an offence against his own slave, for the latter can have no right of action against his master, even if he should be manumitted or alienated.

(7) The ancients permitted these principles to be applied also to sons and daughters under parental control. Modern social conditions, however, have very justly determined that this severity should be rejected, so that it has entirely disappeared from ordinary practice; for who would allow his son, and especially his daughter, to be surrendered to another party by way of reparation for damage; since the father would be more exposed to bodily suffering than the son himself, while, where daughters are concerned common decency excludes their surrender? Therefore it has been held that noxal actions can only be brought in the case of slaves, as we find that it is often stated by ancient commentators on the laws that children under parental control can themselves be sued for any offences which they have committed.

TITLE IX.

WHERE A QUADRUPED Is SAID TO HAVE CAUSED DAMAGE.

A noxal action was established by a law of the Twelve Tables where animals destitute of reason have committed any damage in play, or through anger or savageness; and when such animals are surrendered as an equivalent for the damage, they benefit the defendant by

releasing him from liability, for the reason that it is so stated by the Law of the Twelve Tables; for example, where a horse known to be vicious kicks anyone, or an ox which is accustomed to do so attacks anyone with his horns. This action is applicable where the animals are irritated contrary to their natural disposition, but if their ferocity is born in them there is no cause of action; hence where a bear escapes from his owner and causes damage, the latter is not liable, because he ceased to be the owner when the wild beast escaped. Damage of this kind is such as is committed without malicious intent by whatever causes it; for an animal cannot be said to commit a wrongful injury, since it is destitute of reason. These are the matters which have reference to the noxal action.

(1) It must, however, be noted that by the Edict of the Ædile we are forbidden to have a dog, a tame or a wild boar, a bear, or a lion, in any common highway, and if this provision is violated and any freeman is said to have been injured, the owner may be condemned to pay such a sum as appears to the judge to be just and equitable, and double the amount of the damage caused to property. In addition to these Ædilian actions one *de pauperie* will lie; for actions are concurrent, especially those that are penal, when they relate to the same thing, and the use of one never prevents the institution of another.

TITLE X.

CONCERNING THOSE BY WHOM WE CAN BRING SUIT.

We must now remember that any man can bring a suit either in his own name, or in that of another. He brings one in the name of another when, for instance, he is acting as agent, guardian, or curator; although in former times it was not customary for a man to bring suit in the name of another, except where he was acting for the public, or in favor of freedom, or as a guardian. Moreover, by the *Lex Hostilia* it was permissible to bring an action of theft in the name of parties who were in the hands of the enemy, or were absent on public business, or in behalf of persons of either sex who were under the guardianship of those previously mentioned; and for the reason that it was not permitted either to sue or be sued in the name of another, and this resulted in no little inconvenience, men began to litigate by means of agents; for disease, age, and necessary journeys, as well as numerous other causes, frequently prevent men from being able to transact their own business personally.

(1) An agent is not appointed by any certain words, nor while the adverse party is present, in fact he is usually appointed without his knowledge; for when you permit anyone to bring or defend a suit for you, he is understood to be your agent.

(2) It has been explained in the First Book in what way guardians and curators are appointed.

TITLE XI.

CONCERNING THE GIVING OP SECURITY.

One method of giving security was established in ancient times; modern practice has adopted another. For formerly, where an action *in rem* was brought, the possessor of the property was obliged to furnish security, and if he was beaten and did not surrender the property itself or pay its appraised value, power was granted to the plaintiff to proceed either against him or his sureties. This species of security was styled *judicatum solvi;* and it is easy to understand why it was so called, for the party stipulated that whatever was decided by the judgment should be paid to him.

Still more was the defendant in an action *in rem* required to give security if he joined issue in the name of another; but where the plaintiff in an action *in rem* brought suit in his own name he was not compelled to give security; although where an agent brought an action *in rem* he was ordered to give security that his principal would ratify his acts; as there was danger that the principal might himself bring suit again for the same thing. Guardians and curators in compliance with the terms of the Edict were obliged to furnish security just as agents did, but

sometimes the obligation to furnish it was not enforced when they were plaintiffs. These rules were only applicable where actions *in rem* were brought.

(1) Where, however, the action was *in personam*, the same rules were available against the plaintiff that We have mentioned with reference to the action *in rem;* with respect to the defendant, however, where anyone appeared in the name of another, he was compelled in every instance, to provide security, for the reason that no one is deemed qualified to defend another without giving security; but if anyone joined issue in his own name he was not compelled to furnish security to pay the judgment.

(2) Now, however, matters are conducted differently; for when anyone is sued in his own name, whether the action be *in rem* or *in personam,* he is not obliged to furnish security for the value of the property in question, but only for his own person, that is to say that he will remain in court until the termination of the case; and this is effected by his giving a promise and at the same time taking an oath, (which is called juratory security), or he is forced to give his bare promise, or security according to his rank and position.

(3) But where an action has been brought or defended by an agent; or he acts as plaintiff, and his authority has not been recorded, or the actual principal in the case has not confirmed the appointment of his representative in court, the latter will be compelled to furnish security that his principal will ratify his acts; and the same rule shall be observed where a guardian, a curator, or other persons of this kind who have taken charge of the affairs of others, bring suit against any parties by another.

(4) But where anyone is sued, if he is present and ready to appoint an agent, he can either himself come into court and confirm the authority of his agent in person by formally stipulating to pay the amount of the judgment, or he can give security out of court, by means of which he himself with reference to all the clauses of the bond, becomes the surety of his agent, to pay the amount of the judgment. And by this he is compelled to encumber all his property, whether he has given his promise in court or furnished security out of court, so that both he and his heirs may be bound; and, in addition to this, he must find security or furnish a bond for his own person, that is to say that he will be present in court when judgment is to be rendered, or that if he should not appear his surety will pay the amount of the judgment unless an appeal should be taken.

(5) Where, however, the defendant for some reason or other does not appear, and another party is willing to conduct the defence, he can do so (and no distinction exists between actions *in rem*, and *in personam);* provided always that he furnishes security for payment of the judgment, in proportion to the value of the property in litigation; for in accordance with the ancient rule, (as has already been stated) no one is deemed to be qualified to conduct the defence of another where security is not given.

(6) All these things are more clearly and more thoroughly comprehended from the daily practice of the courts, and from the documents themselves relative to transactions therein.

(7) We decree that these rules shall prevail not only in this royal city, but also in all Our provinces, although on account of inexperience other modes of procedure were perhaps formerly used; since it is necessary for all the provinces to follow the practice which is observed in the Capital of all Our states, that is to say, in this royal city.

TITLE XII.

CONCERNING PERPETUAL AND TEMPORARY ACTIONS, AND THOSE THAT ARE TRANSMITTED TO, AND AGAINST HEIRS.

In this place We must bear in mind that those actions which proceed from a law, a decree of the Senate, or the Sacred Constitutions, could be brought at any time according to the practice of antiquity, until the Sacred Constitutions imposed certain limitations upon actions, not only

those *in rem* but also those *in personam;* while such as arise from the special jurisdiction of the Prætor, can as a rule be brought within a year, (as the authority of the Prætor ordinarily endured for that period). Sometimes, however, they were extended *in perpetuum*, that is up to the limit introduced by the constitutions; and these are the ones which the Prætor concedes to the possessor of an estate and to the others who occupy the place of heirs. The action of manifest theft also, though it arises from the jurisdiction of the Prætor himself, is, nevertheless, granted in perpetuity; for he considered it absurd that it should be terminated at the end of a year.

(1) Not all actions, however, which can be brought against anyone either under statutory enactment or by the Edict of the Prætor, are equally applicable or can be granted against the heir; for a most positive rule of law exists that penal actions growing out of crimes are not maintainable against an heir, as, for example, those of theft, of robbery by violence, of injury, or wrongful damage; but actions of this kind are maintainable by the heir and are not denied him, with the exception of that of injury and any other which may be found to resemble it. Sometimes, however, an action arising out of a contract does not lie against an heir, where a testator acted fraudulently and no benefit resulted to the heir from the fraud. The penal actions, however, which We mentioned above, where they have been conducted by their principals in person until issue has been joined, are granted to the heirs, and are transmitted against the heirs.

(2) It remains for Us to notify you that if before a decision is rendered the defendant satisfies the plaintiff, it is the duty of the judge to discharge him, even though at the time of joinder of issue he was in such a position that he should have been condemned; and from this arose the vulgar saying, "that all actions in court are subject to dismissal".

TITLE XIII.

CONCERNING EXCEPTIONS.

Next in order, let us examine exceptions. Exceptions are instituted for the sake of protecting those against whom suits are brought; for it often happens that although the action brought by the plaintiff is just, still it is unjust as against the defendant.

(1) For example, if compelled by fear, induced by fraud, or laboring under a mistake, you have, in stipulating with Titius, promised him something that you did not owe him, it is evident that you have rendered yourself liable by the Civil Law, and that the suit which he brings against you by which it is alleged that you should give him the property is valid; but it is unjust that you should have judgment rendered against you; and therefore the exception on the ground of fear, or fraud, or one suitable to the case, is granted you in order to contest his action.

(2) The same rule applies where anyone has stipulated for money under the pretext of making a loan, but does not do so; for it is certain that he can bring suit against you for the money as you are obliged to pay it, since you are liable under a stipulation; but because it is unjust for you to be condemned under such circumstances, it is established that you should defend yourself by the exception on the ground of non-payment. By one of Our Constitutions We have placed a limit upon the time for doing this, as We have already stated in preceding Books.

(3) Moreover, a debtor, even if he had not made an agreement with his creditor that he should not be sued by him, is, nevertheless, liable, because obligations are not in any respect dissolved by entering into an agreement; for which reason an action in which the plaintiff alleges, "that if it appears that the defendant should pay him", can be maintained against the debtor; but as it is unjust that he should have judgment rendered against him in opposition to the agreement, he can protect himself by the exception *pacti conventi*.

(4) A debtor also remains bound although, on the demand of the creditor he may have sworn that he ought not to pay anything; but for the reason that it is unjust to make an investigation with respect to his perjury, he protects himself by the exception on the ground of an oath. In actions *in rem* exceptions are also necessary; as, for instance, where on application of the plaintiff the possessor has sworn that the property is his own, and nevertheless the plaintiff still demands it; for although what he states may be true, that is, that the property belongs to him, still it is unjust that the possessor should be condemned.

(5) Moreover, if suit has been brought against you, either *in rem* or *in personam*, the obligation still continues, and therefore by strict construction of the law another action can be brought against you afterwards for the same cause, but you should be aided by the exception *rei judicatæ*.

(6) These statements are sufficient for the sake of example, but on the other hand how exceptions may be necessary in many and various occurrences can be ascertained from the greater volumes of the Digest or Pandects.

(7) Some of these derive their force from laws or statutes having the effect of laws, or arise from the jurisdiction of the Prætor himself.

(8) Moreover, exceptions are styled either perpetual and peremptory, or temporary and dilatory.

(9) Perpetual and peremptory exceptions are those which always oppose the plaintiffs, and always permanently dispose of the subject of the action; such as those of fraud, duress, and agreement; when it has been agreed that no demand whatever shall be made for the money.

(10) Temporary and dilatory exceptions are those which have a prohibitory effect for a time and procure a temporary delay; such is the exception *pacti conventi*, when it has been agreed that no action shall be brought within a certain time, as, for instance, within five years; for at the end of that period the plaintiff is not prevented from recovering the property. Therefore the exception *pacti conventi*, or one resembling it, is interposed against those who wish to bring suit within that time, and they ought to defer their action and bring it afterwards; therefore exceptions of this kind are called dilatory. Otherwise, if they brought suit within said time, and the exception was interposed, they were unable to gain anything in that action on account of the exception, nor could they formerly sue after the specified time, for since they had rashly brought the case into court and neglected it, they lost the property for this reason. Now, however, We have determined that matters shall not be conducted so strictly, and have decided that when anyone has ventured to bring suit before the time established by the agreement or obligation, he is subject to the Constitution of Zeno which that most revered legislator promulgated concerning those who brought suit for too much with reference to time, so that when the plaintiff treats with contempt the delay which he himself had voluntarily granted, or which is implied by the nature of the action, those who have suffered such an injury shall be entitled to double the time; and after it has elapsed they shall not be liable to another action unless they have previously received all the expenses of the former one; in order that plaintiffs, alarmed by such a penalty, may be taught to observe the times for bringing actions.

(11) Moreover, there are dilatory exceptions with reference to the person; and such are those that relate to agents, as, for instance, where anyone wishes to bring suit by a soldier, or a woman, for soldiers are not permitted to appear as agents either of a father, a mother or a wife, and not even under an Imperial Rescript; but they can transact their own business without committing a breach of discipline.

(12) With reference to those exceptions which in former times were pleaded against agents on account of the infamy of him who appointed them or of themselves, We, having noticed that they were by no means frequently offered in court, have decreed that they shall be abrogated,

lest the discussion of the principal point at issue be delayed while they are being argued.

TITLE XIV.

CONCERNING REPLICATIONS.

It sometimes happens that an exception, which at first sight seems to be just, has an iniquitous effect. When this happens another allegation is required for the purpose of aiding the plaintiff; and this is called a replication, because by means of it the force of the exception is repelled and annulled. For instance, where anyone has agreed with his debtor not to bring suit against him for the money, and afterwards they have both entered into a contrary agreement, that is that the creditor may be permitted to bring suit; and if he does so and the debtor files the exception, that he ought not to be condemned where there was no agreement that the creditor should not institute legal proceedings to collect the money, the exception prejudices the creditor, (for it was so agreed and still remains in force although they afterwards entered into an agreement to the contrary); but for the reason that it is unjust that the creditor should be deprived of what is due to him, a replication shall be granted him by reason of the subsequent agreement.

(1) Again, it sometimes happens that a replication which at first sight seems just, operates iniquitously; and when this happens another allegation is required for the purpose of aiding the defendant; which is styled a duplication.

(2) And if again this at first sight seems just, but for some reason or other prejudices the plaintiff, still another allegation is required by which the plaintiff may be assisted; and this is called a triplication.

(3) The multiplicity of business transactions has at times brought about the employment of all these exceptions, to a greater extent than We have stated; but it is easy to better ascertain what they all are from the more comprehensive work of the Digest.

(4) The exceptions by which the debtor is defended are for the most part also granted to his sureties, and justly so; because what they are sued for is considered to be demanded from the debtor himself, since by an action of mandate he is compelled to reimburse them for what they have paid for him. For which reason if anyone makes an agreement with his debtor that he will not bring suit for payment, it has been established that those who have obligated themselves for the former shall also have the benefit of the exception *pacti conventi;* just as if the agreement not to sue them for the money had been entered into with them personally. Certain exceptions, however, are not ordinarily granted in favor of sureties; as, for instance, where a debtor has made an assignment of his property and his creditor has entered suit against him, he is protected by the exception *nisi bonis cesserit;* but this exception is not granted to sureties, evidently because he who binds others for his debtor looks principally to the fact that, if the debtor should lose his property, he may be able to obtain whatever he is entitled to from those whom he has caused to assume the obligation for him.

TITLE XV.

CONCERNING INTERDICTS.

Next in order We shall consider interdicts, or the actions which are introduced in their stead. Interdicts were certain formularies by which the Prætor either ordered some act to be performed, or forbade it; and this he was especially accustomed to do when a controversy between parties with reference to possession or quasi-possession arose.

(1) The principal division of interdicts is the following, namely: they are either prohibitory, restitutory, or exhibitory. Those that are prohibitory are any by which the Prætor forbids some act to be performed; as, for instance, the employment of force against a party who has indisputable possession; or against one who is carrying a corpse into a place where he had a right to take it; or one who is erecting a building on consecrated ground; or who is committing

any act in a public stream, or upon its bank, whereby its navigation may be obstructed.

Restitutory interdicts are those by which he orders something to be surrendered; for example, when he directs possession to be restored to the rightful possessor of property belonging to an estate, which someone is holding as heir or as possessor; or when he orders possession of a field to be restored to a party who has been forcibly deprived of the same.

Exhibitory interdicts are those by which he orders something to be produced, for example, when the liberty of anyone is involved, as that of a freedman whose services are demanded by his patron, or the production of children in the presence of their relatives under whose control they are is required. There are those, however, who are of the opinion that only interdicts that are prohibitory should properly be thus named, because to interdict is to notify and prohibit; and that restitutory and exhibitory interdicts should be, strictly speaking, styled decrees; but it has been the practice to designate them all interdicts for the reason that they are referred to as between two parties.

(2) The next division of interdicts is this, namely, that some are instituted for the purpose of obtaining possession, others for retaining it, and others again for recovering it.

(3) An interdict for the purpose of obtaining possession which is called *quorum bonorum*, can be employed by the legal possessor of an estate; and its force and power are such that anyone is compelled to restore property which he holds as heir or possessor, the possession of which has been transferred to another.

A man is considered to be in possession as heir when he believes himself to be an heir; and to hold as possessor when he has possession of an entire estate or any portion of the same, being aware that it does not belong to him. The interdict is therefore said to be for the obtaining of possession because it is only useful to him who now, for the first time, is attempting to obtain possession of an estate; and, therefore, if anyone after having gained possession afterwards loses it, this interdict is of no advantage to him.

There is also an interdict, which is called *Salvianum*, instituted for the purpose of recovering possession, and which the owner of land makes use of to obtain the property of a tenant which the latter has pledged as security for the rent.

(4) The interdicts *Uti Possidetis* and *Utrubi* are available for the purpose of retaining possession when there is a dispute between both parties concerning the ownership of property, and the first question that arises is as to which of the litigants should be the possessor and which of them should bring suit. For, unless it is first established which of them is entitled to possession, the action for recovery cannot be instituted, because both civil and natural law declare that one party should have possession and that the other should bring suit against him as possessor; and because it is much more advantageous to have possession than to bring suit, therefore, for the most part and indeed almost always, a great contest arises for the actual possession. The advantage of possession is as follows, that even though the property in dispute does not belong to him who holds it, still, if the plaintiff cannot prove that it is his, the possession remains undisturbed; for which reason when the rights of the two parties are not clear, judgment is usually rendered against the plaintiff.

The interdict *Uti Possidetis* is available with reference to the possession of land or buildings, that of *Utrubi* with reference to the possession of movable property. The force and effect of both of these differed exceedingly among the ancients; for by means of the interdict *Uti Possidetis* he prevailed who had possession at the time of the interdict, provided he had obtained possession as against his adversary neither by violence, nor secretly, nor by tolerance; although he might have driven out another by violence, or clandestinely deprived another party of possession, or entreated someone that he would permit him to keep possession; but under the interdict *Utrubi* he was successful who, during the greater part of that year had possession neither by force, nor secretly, nor by tolerance, as against his

adversary.

At present, however, the practice is otherwise; for the effect of both interdicts is the same so far as possession is concerned, whether real or personal property is involved, so that he is successful who, at the time of the joinder of issue retains possession as against his adversary neither by force, nor secretly, nor through tolerance.

(5) Moreover, a man is considered a possessor not only when he himself holds the property, but also when anyone else has possession in his name, although he may not be under his control, as a tenant of land or the renter of a house. Anyone is also considered to be in possession through those with whom he has deposited or to whom he has lent something; and this is meant when it is said that "anyone can retain possession through a party who holds possession in his name". Besides, it is settled that possession is also retained by intention, that is, that although a party himself may not be in possession, nor another in his name, he still is deemed to retain possession of the property if he leaves it, not with the intention of abandoning it, but with the expectation of afterwards returning thither. We have explained in the Second Book through what persons anyone can obtain possession, and there is no doubt that no one can gain possession by intention alone.

(6) It is customary to allow an interdict for the recovery of possession where anyone has been ejected by force from land or from a building, for the interdict *unde vi* is provided for him, by which the party who ejected him is forced to restore possession to him, even though the latter acquired possession either by force, or secretly, or by indulgence from him who forcibly ejected him. However, according to certain Sacred Constitutions, as We have mentioned above, where anyone seizes property by force he is deprived of the ownership of the same, even if it be a part of his own goods; but if it belongs to someone else he is compelled, after making restitution of the same, to also pay its value to the party who was subjected to the violence. He who has forcibly ejected anyone from possession is also liable under the *Lex Julia "de vi privata aut de vi publica*", for force employed privately and without arms, but when he has deprived the party in possession by using weapons he is liable for public violence. By the term "arms", we understand not only shields, swords, and helmets to be meant, but also clubs and stones.

(7) A third division of interdicts is that they are either simple or double. The simple ones are, for instance, where one party is plaintiff and the other defendant, and to this class belong all restitutory and exhibitory interdicts; for the plaintiff is the one who desires that something may be either produced or restored, and the defendant is he from whom the production or restoration is demanded.

Some prohibitory interdicts, however, are simple and some are double. Simple ones, are, for example, when the Prætor forbids some act to be committed in a sacred place, or in a public stream or on its bank, for the plaintiff is he who desires that the act be not committed, and the defendant is he who attempts to commit it. Interdicts are double, for instance, such as the *Uti Possidetis* and *Utrubi;* and they are called double because the condition of each litigant in them is the same, and that neither is considered to be especially defendant or plaintiff, but each takes the part of defendant and plaintiff at the same time.

(8) It is superfluous to discuss at present the classification and force of interdicts in former times, for whenever the law prescribes an extraordinary method of procedure (and all suits are now of this description) it is not necessary for an interdict to be issued, but judgment is rendered without interdicts, just as if an equitable action had been granted by reason of an interdict.

TITLE XVI.

CONCERNING THE PENALTY FOR RECKLESS LITIGATION.

We must now bear in mind that those who formulated our laws exercised great care lest men should be too easily involved in litigation; and this likewise is Our object. This result can best be accomplished by restraining the rashness of plaintiffs or defendants, either by a pecuniary penalty, or by the religious character of an oath, or by the fear of infamy.

(1) For example, an oath is required of all parties sued by the terms of one of Our Constitutions, for a defendant cannot employ his allegations unless he has first sworn that he is defending himself because he thinks he has good grounds for doing so. In certain instances the action is for double or treble damages against defendants who make denial; as, for instance, where a suit is instituted for wrongful damage or for legacies bequeathed to places which are held in reverence. An action can also be brought in the first place for more than simple damages, as, for instance, that of fourfold for manifest theft, or for double for non-manifest theft; for in these cases and in certain others the action is brought for more than simple damages whether the party denies or admits that he is liable.

Moreover, proceedings instituted for the purpose of annoyance by the plaintiff are repressed; for he also is compelled by one of Our Constitutions to take an oath against such methods; and the advocates of each party must submit to take the oath prescribed by another of Our Constitutions. All these proceedings have been introduced instead of the ancient action of calumny, which has fallen into disuse, because it imposed a fine of a tenth part of the property in controversy upon the plaintiff, and We find that this was never required; so instead of these proceedings the aforesaid oath has been introduced, together with the rule that an unprincipled party shall be forced to pay his adversary the damage he has sustained and the costs of the suit.

(2) In some kinds of actions the parties condemned became infamous; as, for example, in the action of theft, robbery with violence, injury, fraud, and also in direct actions involving guardianship, mandate, and deposit, but not in contrary actions; and also in the action of partnership which is direct irrespective of the partner bringing it, and on this account either of the partners will be branded with ignominy if a decision is rendered against him. But in the action of theft, or of robbery with violence, or of injury or fraud, not only are the parties who lose the case branded with ignominy, but also those who have compromised, and justly so; for a great difference exists where anyone is a debtor on account of a crime or because of a contract.

(3) The order to be followed in instituting any action is based upon that part of the Edict in which the Prætor gives instructions for bringing the parties into court; for unquestionably the first thing to be done is for the adversary to be summoned, that is to say, to be called before him who is to interpret the law. And in the part afore said the Prætor concedes this right to parents and patrons, as well as to the children of parents and patrons, of both sexes, that their children or freedmen shall not be suffered to bring them into court unless they have asked and obtained permission to do this from the Prætor himself; and if anyone should summon them otherwise, he sentences him to pay a fine of fifty *solidi*.

TITLE XVII.

CONCERNING THE DUTY OF A JUDGE.

It remains for us to consider the duty of a judge; and, in the first place, a judge ought to be careful not to decide in any other way than is prescribed by the laws, the constitutions or the customs.

(1) Therefore, if a judge has been appointed to try a noxal action, he must, where the master appears to him to be liable, be careful to render his decision in the following terms: "I

condemn Publius Mævius to pay ten *aurei* to Lucius Titius, or to surrender the slave in satisfaction of the damage."

(2) And if the action is *in rem* and he decides against the plaintiff, he ought to discharge the possessor; or if he decides against the possessor, he should order him to restore the property along with the profits of the same. But if the possessor says that he cannot restore the property at present, and appears to ask for time in order to make restitution without any indication of deception, indulgence must be shown him, provided, however, that he gives security by furnishing a surety for the value of the property in litigation if he should not make restitution within the time granted him.

Where suit is brought for an estate, the same rules apply with respect to the profits which We have stated are applicable in one brought for a single piece of property. Almost the same account is taken in both actions with reference to those profits which the possessor did not collect through his own fault, where he had possession in bad faith. If, however, he has been a possessor in good faith, no account is taken of the profits which were consumed or not collected; although after the action has been instituted an account is taken of those not collected through the fault of the possessor, or of those which were collected and consumed.

(3) If the action is for production, it is not sufficient for the party who is sued to produce the property, but he is required to produce its condition also, that is to say, he must place the plaintiff in the same position which he would have occupied if the property had been produced when he first brought suit for its production; and therefore if on account of delay title to said property by usucaption had been obtained by the possessor, he will, nevertheless have judgment rendered against him.

Moreover, the judge ought to take account of the profits of the intermediate time, that is of those which have accrued after issue was joined in the suit for production, and before a decision has been rendered.

But if the defendant in the action for production states that he cannot produce the property at present, and asks for time for the purpose of doing so, and he appears to make the request without any intention to deceive, it should be granted him, provided he gives security that he will surrender the property. But if he neither produces the property immediately in compliance with the order of court, nor furnishes security that he will do so afterwards, he should have judgment rendered against him for such an amount as the plaintiff would be entitled to if it had been produced in the beginning.

(4) Where the action is in partition, the judge should assign each individual piece of property to a separate heir; and if his decision appears to confer an advantage on any particular heir, he should as has already been stated, condemn him to pay his co-heir a specified sum of money by way of compensation. A party should also have judgment rendered against him in favor of his co-heir for this same reason, when he alone has collected the profits of the hereditary estate, or ruined or consumed any property belonging to the same. These rules are also applicable when there are several co-heirs, or when there are only two.

(5) They also apply where an action is brought for the division of property held in common, and several articles are involved; but where only one thing is concerned, as, for instance, a tract of land, and the said tract can conveniently be divided into several parts, he ought to assign a portion of the same to each of the joint owners; and if the share of one of them seems to be excessive, he should be ordered to pay a certain sum of money to the other by way of compensation. Where, however, the property cannot be conveniently divided, or the subject of controversy is perchance either a slave or a mule, then the whole must be adjudged to one party, and he should be ordered to pay a certain sum of money to the other as an equivalent.

(6) Where suit is brought for the establishment of boundaries, the judge should determine whether an adjudication is necessary; and indeed it is necessary in only one instance, that is

when it is more convenient for the fields to be divided by more definite boundaries than those by which they were formerly distinguished; for then it is necessary that a part of the land of one should be adjudged to the owner of another tract; in which case it is proper that he should be condemned to pay a certain sum of money to the other. On the same principle, likewise, a party should be required to pay damages in this action, that is when he happens to have maliciously committed some act with reference to the boundaries; for example, where he has stolen the boundary stone, or cut down the trees marking the boundaries. A party is also condemned in an action of this kind because of contumacy, as, for instance, where he did not permit land to be measured when ordered to do so by the judge.

(7) Whatever is adjudicated to anyone in cases of this description immediately becomes the property of him to whom it is awarded.

TITLE XVIII.

CONCERNING PUBLIC PROSECUTIONS.

Public prosecutions are neither maintained by actions nor do they bear any resemblance whatever to the other proceedings of which We have treated; and a great difference exists between them both in their institution and in their procedure.

(1) They are called public because, generally speaking, they can be inaugurated by any one of the people.

(2) Some public prosecutions are capital and some are not. We call those capital which subject the offender to the extreme penalty, or with interdiction from fire and water, or with banishment, or with labor in the mines; the others which inflict infamy along with a pecuniary penalty are public but not capital.

(3) The following are public prosecutions. The *Lex Julia* relating to treason, whose force is directed against those who have plotted anything against the Emperor or the State; the penalty of which involves loss of life, and even after death the memory of the culprit is rendered infamous.

(4) Also the *Lex Julia* concerning the repression of adultery, which punishes capitally not only such as pollute the marriage-bed of others, but also those who dare to practice an abominable crime with persons of the male sex. By this same *Lex Julia* the crime of seduction is also punished, when anyone without the employment of force debauches a virgin or a widow living a virtuous life. This law imposes on offenders, if they are of honorable rank, the penalty of confiscation of half their property; and if they are of inferior station, corporeal punishment in addition to banishment.

(5) Also, the *Lex Cornelia de Sicariis* which pursues with the avenging sword persons guilty of homicide, or those who go about with missile weapons for the purpose of killing men. The words "missile weapon", as Our Gaius explained in writing, in his interpretation of the Law of the Twelve Tables, are ordinarily employed to indicate what is shot from a bow, and also signify everything dispatched by anyone's hand; it follows therefore that a stone and a piece of wood or iron are also embraced in this definition. It is derived from the fact that it is thrown to a distance, being formed from the Greek word τηλου. We can also find this signification in the Greek term for what we designate *telum* they call βελος from βαλλεσθαι. This Xenophon explains, for he he writes as follows: "All at once were cast missiles, spears, arrows, stones, for slings, and other stones". *Sicarii* get their name from *sica*, which means an iron knife. Under this same law poisoners are condemned to death, who have killed men by odious arts, either by poison or by magic formulas, or have publicly sold injurious drugs.

(6) Still another law, styled *Lex Pompeia de parricidiis* inflicts a novel punishment, for a most horrible crime; as it provides that anyone who has hastened the death of a parent, a child, or any relative included in the definition of parricide, whether he has ventured to do so secretly

or openly; and, moreover, anyone by whose wicked artifices the act has been accomplished; or anyone who is aware of the crime, even though he may be a stranger, shall be punished with the penalty of parricide; but not by the sword, or by fire, or by any other ordinary penalty, but he shall be sewed up in a sack with a dog, a cock, a viper, and an ape, and enclosed within these narrow and fatal limits shall be thrown either into the neighboring sea or into a stream, according as the nature of the region admits; in order that while living he may begin to lose the use of all the elements, that he may be deprived of the air while still living, and of the earth when he is dead. Where anyone kills other persons connected with him by consanguinity or affinity, he shall suffer the penalty of the *Lex Cornelia* concerning assassins.

(7) Moreover, the *Lex Cornelia* concerning forgery, also styled the *Lex Cornelia* concerning wills, punishes him who has written, sealed, read, or substituted a forged will or any other instrument, or has made, engraved or impressed a false seal, knowingly and fraudulently. The penalty of this law in the case of slaves is death (which is also that of the *Lex Cornelia* concerning assassins and poisoners), and where freemen are concerned it is deportation.

(8) Moreover, the *Lex Julia* relating to public or private violence applies to those who whether armed or unarmed commit violence. If armed force is proved, deportation is inflicted in compliance with the *Lex Julia de vi publica;* but where force is employed without arms, the penalty of confiscation of a third part of the property of the culprit is imposed. Where, however, rape with violence has been perpetrated upon a virgin, a widow, a nun, or any other woman, then the offenders as well as those who have aided in the crime are capitally punished, according to the terms of Our Constitution, from which it is possible to obtain further information upon this subject.

(9) The *Lex Julia* concerning peculation punishes those who have stolen money or property belonging to the State, or which is sacred or religious; but where judges themselves appropriate public money during their term of office they undergo capital punishment; and not only they, but also those who have assisted them in doing so, or have knowingly received the stolen property from them. Others, however, who break this law are subjected to the penalty of deportation.

(10) Among the public prosecutions is likewise the *Lex Fabia* relating to kidnappers, which sometimes imposes the punishment of death, and sometimes inflicts a lighter penalty, as provided by the Sacred Constitutions.

(11) There are moreover such public prosecutions as those under the *Lex Julia* concerning corruption in elections; the *Lex Julia* against judicial extortion; the *Lex Julia* concerning those who artificially or fraudulently raise the price of grain; and the *Lex Julia* concerning the embezzlement of public money; which have reference to certain particular acts and do not inflict loss of life, but subject those who violate their provisions to other penalties.

(12) We have explained these matters relating to public prosecutions so that it may be possible for you to touch them with the tip of your finger, and, as it were, by way of index. A better knowledge of them may be obtained by you, God willing, by consulting Our more extensive work, the Digest or Pandects.

END OF THE INSTITUTES.