GAI INSTITVTIONES OR INSTITUTES OF ROMAN LAW

Book IV

PROCEDURE [DE ACTIONIBVS]

(E. Poste, *Gai Institutiones*.., 4th ed., Oxford, 1904).

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§ 1. We have now to treat of Actions, which according to the better view fall into two classes, being either Real or Personal: for those who count four classes, including the forms of sponsio, commit the error of co-ordinating sub-classes with classes.

§ 2. A Personal action is an action which seeks to enforce an obligation imposed on the defendant by his contract or delict, that is to say, is an action by which one claims in the intentio of the formula that he is bound to convey some property to one, or to perform for one some service, or to make some other kind of performance.

§ 3. A Real action is an action by which one claims as one's own in the intentio some corporeal thing or some particular right in the thing, as a right of use or usufruct of a thing belonging to a neighbour, or a right of horseway or carriage-way through his land, or of fetching water from a source in his land, or of raising one's house above a certain height, or of having the prospect from one's windows unobstructed; or when the opposite party (that is the owner) brings the negative action asserting that there is no such right in the thing.

§ 4. Real and Personal actions being thus distinguished, it is clear that I cannot demand my own property from another in the following form: 'If it be proved that the defendant is bound to convey such property to me.' For what is already my own cannot be conveyed to me, since conveyance to me makes a thing mine, and what is already mine cannot be made more mine than it is. Yet, to show the law's detestation of thieves, in order to make them liable to a greater number of actions, it is received doctrine that besides the penalty of twice the value of the thing stolen awarded against the thief not caught in the act, and the penalty of four times the value against the thief caught in the act, damages for the thing itself may be recovered by a personal action in which the contention is thus worded: 'If it be proved that the defendant ought to convey the thing in question,' although they are also liable to be sued by an action with the intentio thus formulated: 'If it be proved that the plaintiff is owner of the thing in question.'

§ 5. A Real action is called vindicatio; a Personal action, whereby we contend that some property should be conveyed to us or some service performed for us, is called condictio.

§ 6. We sue sometimes only to obtain property, sometimes only for a penalty, sometimes both for property and for a penalty.

§ 7. We sue, for instance, only for property in actions founded on contract.

§ 8. We sue, for instance, only for a penalty in the action of Theft and of Outrage, and, according to some, of Rapine; for we may obtain restitution on account of the thing itself either by vindicatio or condictio.

§ 9. We sue, for instance, both for property and for a penalty in those actions where the defendant who denies his liability is condemned to pay double, as in the actions to recover a judgment debt, to recover money paid by a sponsor for his principal, to recover damages for injury to property under the lex Aquilia, and to recover legacies of a definite amount bequeathed in the form of legacy per damnationem.

§ 10. Some actions are moulded upon, and contain a reference to, the forms of statute-process; others are unrelated and independent. This makes some explanation of the statute-process system necessary.

§ 11. These actions, which our old jurisprudence employed, are called statute-process, either because they were appointed by statute before the edict of the praetor, the source of many new actions, began to be published, or because they followed the statute itself and therefore were as immutable as the statute. Thus, it was held that a man who sued another for cutting his vines, and in his action called them vines, irreparably lost his right because he ought to have called them trees, as the enactment of the Twelve Tables, which confers the action concerning the cutting of vines, speaks generally of trees and not particularly of vines.

§ 12. There were five forms of statute-process, Sacramentum, Judicis postulatio, Condictio, Manus injectio, and Pignoris capio.

§ 13. The actio sacramenti was the general form of action, for wherever no other mode was appointed by statute, the procedure was by sacramentum. It was a form of action attended with risk to the parties, like the modern action to recover money lent, wherein the defendant and plaintiff by the sponsio and restipulatio respectively forfeit a penal sum, if unsuccessful. Accordingly the party who was beaten had to pay the amount of the stake (summa sacramenti) by way of penalty; but it went to the public treasury, sureties on this account having to be given to the Praetor, instead of going as it does now by sponsio and restipulatio to the profit of the winning side.

§ 14. The penal sum of the sacramentum was either five hundred asses or fifty asses; five hundred when the object of dispute was valued at a thousand or upwards, fifty when at less than a thousand. This was provided by the law of the Twelve Tables When, however, personal freedom was the subject of dispute, however valuable a slave the man whose status was litigated might be, the penal sum was only fifty asses. This was enacted by the Twelve Tables in favour of liberty, in order that the vindex or assertor of liberty might never be deterred by the magnitude of the risk.

§ 15. [When the sacramentum was a personal action, that is to say, instituted to enforce an obligation, after giving securities for the stake, the parties left the praetor's court, having arranged to reappear on the thirtieth day] to receive a judex. When they appeared again the Praetor nominated a judex. This was in pursuance of the lex Pinaria, before which the judex was named at once. If the object of dispute was worth less than a thousand asses, the stake, as before mentioned, was only fifty. After the judex was named, they gave mutual notice to appear before him on the next day but one. At the appearance before the judex, before the case was fully developed, it was stated in a concise and summary form, and this summary statement was called causae conjectio.

§ 16. When the sacramentum was a real action, movables and animals that could be brought or led into the presence of the magistrate were claimed before him in the following fashion. The vindicant held a wand, and then grasping the object itself, as for instance a slave, said: 'This man I claim as mine by due acquisition, by the law of the Quirites. See! as I have said, I have put my spear (vindicta) on him,' whereupon he laid his wand upon the man. The adversary then said the same words and performed the same acts. After both had vindicated him, the praetor said: 'Both claimants quit your hold,' and both quitted hold. Then the first claimant said, interrogating the other: 'Answer me, will you state on what title you found your claim?' and he replied: 'My putting my spear over him was an act of ownership.' Then the first vindicant said: 'Since you have vindicated him in defiance of law, I challenge you to stake as sacramentum five hundred asses': the opposite party in turn used the same words, 'I too challenge you.' That is to say, if the thing was worth more than a thousand asses, they staked five hundred asses or else it was only fifty. Then ensued the same ceremonies as in a personal action. The praetor then awarded to one or other of the claimants possession of the thing pending the suit, and made him bind himself with sureties to his adversary to restore both the object of dispute and the mesne profits or value of the interim possession, in the event of losing the cause. The praetor also took sureties from both parties for the stake (summa sacramenti) which the loser was to forfeit. Now the wand which they used represented a lance, the symbol of absolute dominion, for what a man had captured from the enemy was held to be most distinctly his own. Accordingly in Centumviral trials (where questions of inheritance are decided) a lance is set up in front as an ensign or symbol.

§ 17. If the object of dispute was such as could not conveniently be carried or led before the praetor, as for instance a column, or a herd of cattle, a portion was brought into court, and the formalities were enacted over it as if it were the whole. Thus if it was a flock of sheep or herd of goats, a single sheep or goat, or even a single tuft of hair was taken before the magistrate; if it was a ship or column, a fragment was broken off and brought similarly; if it was land, a clod; or if it was a house, a tile; and if it was a dispute about an inheritance, then in the same way . . . . . on the thirtieth day when they were bound to appear in court to receive a judge.

§ 18. Condicere in old Latin was equivalent to denuntiare, to give notice. Hence this action was appropriately called condictio (notice), for the plaintiff used to give notice to the defendant to appear before the praetor on the thirtieth day to receive a judge. The name is now applied with less propriety to a personal action by which we sue for a transfer of property, for notice forms no part of the procedure.

§ 19. This form of statute-process was created by the lex Silia and lex Calpurnia, being prescribed by the lex Silia for the recovery of a certain sum, and extended by the lex Calpurnia to the recovery of any other certain thing.

§ 20. Why a new action was needed, when an obligation to transfer property to a person could be enforced either by Sacramentum or by Judicis postulatio, is a question much discussed.

§ 21. Manus injectio was the procedure specially prescribed by statute in certain circumstances; as, for instance, against a judgment debtor by the law of the Twelve Tables. The procedure was as follows: the plaintiff said, 'Whereas you have been adjudged or condemned to pay me ten thousand sesterces, which sum you have failed to pay, therefore I arrest you as judgment debtor for ten thousand sesterces,' and at the same time laid hands on him; and the debtor was not allowed to resist the arrest, or use the statute-process in his own defence, but gave a vindex to advocate his cause, or, in default, was taken prisoner to the plaintiff's house, and put in chains.

§ 22. Afterwards manus injectio was given by various laws against quasi judgment debtors, as by the lex Publilia against the principal whose debt had been paid by his sponsor, unless he indemnified his sponsor within six months from the payment of the debt; by the lex Furia de Sponsu against the

creditor who had exacted from one of several sponsors more than his ratable share; and by various other statutes in a number of cases.

§ 23. Other statutes established that certain actions on particular grounds should be enforced by manus injectio, but it was simple manus injectio, not that applicable to quasi judgment creditors: as the lex (Furia) testamentaria in the action against the legatee or donee in contemplation of death who received more than a thousand asses if not included in certain classes privileged by that statute; and the lex Marcia against usurers compelled those who exacted interest on a loan to refund by manus injectio.

§ 24. These statutes and certain others permitted the defendant to resist arrest and use the statute-process in his own defence, for in this case the plaintiff could not in carrying on the statute-process add the term quasi judgment debtor, but, after naming his cause of action, said simply, 'I therefore arrest you'; whereas, if he proceeded as quasi judgment creditor, after naming the cause he said, 'Therefore I arrest you as quasi judgment debtor.' I am aware that in proceeding under the lex Furia testamentaria the plaintiff added the words, 'As quasi judgment debtor,' though they are not inserted in the law; but this seems to have been done in an irrational way.

§ 25. But subsequently the lex Vallia permitted all defendants sued by manus injectio, except the judgment debtor and the principal indebted to his sponsor, to resist arrest and use the statuteprocess themselves in their own defence. Hence, the judgment debtor and the principal indebted to his sponsor for payment (depensum) had even after this law was passed either to give a vindex or else were carried off to the creditor's house; and this practice lasted as long as statute-process was in force. And thus it is that at the present day the defendant in the actio judicati and in the actio depensi must give security for the payment of the sum in which they may be condemned.

§ 26. Pignoris capio (distress) was employed in some cases by virtue of custom, in others by statute.

§ 27. By custom, in obligations connected with military service; for the soldier could distrain upon his paymaster for his pay, called aes militare; for money to buy a horse, called aes equestre; and for money to buy barley for his horse, called aes hordiarium.

§ 28. By statute as by the law of the Twelve Tables which rendered liable to distress on default of payment the buyer of a victim and the hirer of a beast of burden lent to raise money for a sacrifice to Jupiter dapalis. So too the law of the Censors gave the power of distress to the farmers of the public revenue of the Roman people (publicani) against those in default for taxes (vectigalia) due under any statute.

§ 29. As in all these cases the distrainor used a set form of words, the proceeding was generally considered a form of statuteprocess. Some, however, held otherwise, because it was performed in the absence of the praetor and generally of the debtor; whereas the other forms of statute-process could only be enacted in the presence of the praetor and the adversary; besides, it could take place on an unlawful day (dies nefastus) (2, § 279), that is, on a day when statute-process was not allowed.

§ 30. But all these branches of statute-process fell gradually into great discredit because the excessive subtlety of the ancient jurists made the slightest error fatal; and accordingly they were abolished by the lex Aebutia and the two leges Juliae, which introduced in their stead the system of formulas or written instructions of the praetor to the judex.

§ 31. Two cases only were reserved for statute-process, apprehended damage and centumviral causes. When there is recourse to the centumvirs, statute-process by way of sacramentum either before the praetor urbanus or peregrinus, as may happen, is the preliminary proceeding. For protection, however,

against apprehended damage a plaintiff no longer resorts to statute-process, but stipulates to be indemnified by the defendant in the manner provided by the edict, whereby he is put to less trouble and obtains ampler redress....

§ 32. So the formula provided for the farmer of the revenue contains a fiction directing that the debtor be condemned in the sum for which formerly, if his goods had been distrained on, he would have had to ransom the distress.

§ 33. But no formula is moulded on a fictitious legis actio per condictionem; for when we sue for a certain thing or sum of money, our intentio names the very thing or sum for which we sue, without any reference to a fiction of condictio; so that the present formulae by which we claim that a fixed sum of money or that some particular thing is due to us are understood to depend on their own force. Similarly independent of the elder system are the actions of loan for use, fiduciary agreement, unauthorized transaction of another person's affairs, and innumerable others.

§ 34. Fictions of a different kind are employed in certain formulae, as for example when the bonorum possessor or praetorian successor sues under a fiction that he is civil heir. For being only the praetorian, not the civil heir, he has no direct action, and can neither claim in the intentio of the formula to be [Quiritary] owner of the things belonging to the deceased, nor that the debtor is bound [by civil law] to pay the debts due to him. Accordingly, the intentio feigns him to be civil heir, and runs as follows: 'Let C D be judex. Supposing Aulus Agerius (plaintiff) were the civil heir of Lucius Titius, if in that supposition it be proved that the land in question ought to be his by the law of the Quirites;' or, in case of a debt, after a similar fiction of his being civil heir the intentio proceeds: 'if in that supposition it be proved that Numerius Negidius (defendant) ought [by civil law] to pay to Aulus Agerius ten thousand sesterces: then let the defendant be condemned,' etc.

§ 35. So the purchaser of a bankrupt's estate may either feign himself to be civil heir, or may use a different form [feigning to be procurator of the insolvent]: for he may name the insolvent in the intentio and himself in the condemnatio, requiring the defendant to restore or pay to himself any property that belonged or any debt that was due to the insolvent. This form of action is called Rutilian, from the praetor Rutilius, who invented execution against the entire estate of the insolvent (bonorum venditio): the action wherein the plaintiff feigns himself civil heir is called Serviana.

§ 36. So there is a fiction of usucapion in the Publician action, whereby a man claims a thing which had been delivered to him on a valid legal ground which he has lost possession of before having acquired ownership of it by usucapion. Being unable to claim it in the intentio as his property by the law of the Quirites, he is feigned to have acquired it by usucapion, and thus to have become owner by quiritary right, and his intentio runs as follows: 'Let C D be judex. Supposing that the slave who was sold and delivered to Aulus Agerius had continued during a year in his possession, if in that case the slave would have legally belonged to Aulus Agerius by the law of the Quirites, then condemn the defendant,' etc.

§ 37. So an alien is feigned to be a Roman citizen, if he sue or be sued in an action which would be valid as between Roman citizens, and it is an action which may justly be extended to aliens. For instance, if an alien sues or is sued for theft, in the latter case the formula runs as follows: 'Let C D be judex. If it be proved that Dio son of Hermaeus stole — or, if it be proved that Dio son of Hermaeus aided and abetted in stealing — from Lucius Titius a golden cup, for which, if he had been a Roman citizen, he would have had to make composition for theft, then condemn Dio son of Hermaeus,' etc. So if an alien sue for theft or sue or be sued under the Aquilian law for damage to property, he is feigned to be a Roman citizen.

§ 38. Again, we may feign that the defendant has not undergone a capitis deminutio: for if we make a contract with a person who afterwards undergoes a capitis deminutio, as an (independent) female by

her coemption, or an independent male by his adrogation, he or she ceases by the civil law to be our debtor, and we cannot directly declare in the intentio that he or she is bound to convey something to us. To protect our rights, however, from extinction by the act of another, the praetor grants a fictitious action, rescinding or ignoring the defendant's capitis deminutio, i. e. supposing by a fiction that the debtor had not undergone it.

§ 39. The formula is composed of the Demonstratio, the Intentio, the Adjudicatio, the Condemnatio.

§ 40. The principal function of the part of the formula called Demonstratio is to indicate the subject-matter of dispute, [the cause of action, the title of the plaintiff's right, the origin of his claim], as in the following example: 'Whereas Aulus Agerius sold a slave to Numerius Negidius,' or, 'Whereas Aulus Agerius deposited a slave in the hands of Numerius Negidius.'

§ 41. The Intentio is that part of the formula which expresses the claim of the plaintiff, thus: 'If it be proved that Numerius Negidius ought to convey ten thousand sesterces to Aulus Agerius;' or thus: 'Whatever it be proved that Numerius Negidius ought to convey or render to Aulus Agerius;' or thus: 'If it be proved that the slave in question belongs to Aulus Agerius by the law of the Quirites.'

§ 42. The Adjudicatio is that part of the formula which empowers the judex to transfer the ownership of a thing to one of the litigants, and occurs in the actions for partitioning an inheritance between co-heirs, for dividing common property between co-partners, and for determining boundaries between neighbouring landholders. In these the praetor says: 'The portion of the property that ought to be transferred to Titius, do thou, judex, by thy award transfer to him.'

§ 43. The Condemnatio is that part of the formula which empowers the judex to condemn or absolve the defendant, thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius ten thousand sesterces; if it be not proved, declare him to be absolved;' or thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding ten thousand sesterces; if the case be not proved, declare him to be absolved;' or thus: 'Do thou, judex, condemn Numerius Negidius to pay to Aulus Agerius,' et cetera, without inserting any maximum limit as, e. g., of not more than ten thousand sesterces.

§ 44. These parts are not concurrent, but where some are present others are absent. Sometimes the Intentio is found alone, as in the prejudicial formula to decide whether a man is a freedman, or to ascertain the amount of a dower, or to settle other preliminary inquiries. But the Demonstratio, Adjudicatio. and Condemnatio are never found alone, for the Demonstratio is inoperative without an Intentio and Condemnatio, and the Condemnatio and Adjudicatio are inoperative without a Demonstratio or an Intentio.

§ 45. Those formulae are said to be framed in jus, which raise a question of right; when, for instance, we claim in the intentio of the formula that the thing is ours by the law of the Quirites, or claim in it that the defendant is bound to convey something to us or to make composition to us as a thief; for in such formulae the intentio is one of civil law.

§ 46. But other formulae, on the contrary, are said to be in factum when they are not drawn up with an intentio of the above kind; but, after proposing a question of fact in the intentio, proceed at once to the Condemnatio and Absolutio; as in a formula used by a patron when suing his freedman for summoning him before the magistrate in contravention of the edict. The formula then runs thus: 'Let M N be recuperators. If it be proved that such and such a patron was summoned to appear by such and such a freedman against the edict of such and such a praetor, do you, recuperators, condemn the said freedman to pay to the said patron ten thousand sesterces; if it be not proved, declare him to be absolved.' The other formulae, which are set out in the title of the edict about summoning before the

magistrate, raise questions of fact, as the formula in an action against a defendant who on service of summons neither appears nor finds a vindex, or against a person who makes a violent rescue of a person summoned to appear; and many other formulae of this kind are set out in the praetor's album.

§ 47. But some actions may be instituted by formulae either of law or of fact, as for instance the actions of Deposit and Loan for use. Thus the following formula is one of law: 'Let C D be judex. Whereas Aulus Agerius deposited a silver table with Numerius Negidius, which is the ground of action, whatsoever it be proved that Numerius Negidius is on that account bound by good faith to convey or render to Aulus Agerius, do thou, judex, condemn Numerius Negidius to pay its value, unless he make restitution; if it be not proved, declare him to be absolved.' Whereas a formula thus framed: 'Let C D be judex. If it be proved that Aulus Agerius deposited a silver table in the hands of Numerius Negidius, and that by the fraud of Numerius Negidius it has not been restored to Aulus Agerius, do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value of the table; if it be not proved, declare him to be absolved:' is a formula of fact. And there is a similar alternative in the case of Loan for use.

§ 48. Whenever a formula contains a condemnation clause, such clause is so framed as to express value in money. So even when we claim a corporeal thing, like land, a slave, a garment, gold or silver, the judex condemns the defendant to deliver not the thing itself, as in the older system of procedure, but its value in money.

§ 49. The formula either sets out a certain sum in the Condemnatio or is for an uncertain sum.

§ 50. It is for a certain sum in that formula by which we claim in the intentio that a person is bound to pay us a liquidated debt, for then this final part of the formula runs as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius (say, e. g.) ten thousand sesterces; if it be not proved, absolve him.'

§ 51. A condemnation in an uncertain sum of money may be one of two kinds. In the first kind it is preceded by some limitation (commonly known as taxatio). This kind may occur, for example, when we sue for an uncertain amount, in which case the concluding part of the formula runs thus: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius not more than ten thousand sesterces; if it be not proved, absolve him;' or it is named without a limitation, as when we demand our property from the possessor in a real action, or demand the production of a person or thing in a personal action, where the conclusion runs as follows: 'Do thou, judex, condemn Numerius Negidius to pay Aulus Agerius whatever shall be the value; if it be not proved, absolve him.' But whatever the claim, the judex must condemn the defendant to pay a definite sum, even though no definite sum is named in the condemnatio.

§ 52. When a certain sum is laid in the condemnatio, he must be careful not to condemn the defendant in a greater or lesser sum, else he makes the cause his own: and if there is a limitation he must be careful not to exceed the maximum, else he is similarly liable; but he may condemn him in less than the maximum.

§ 53. If the Intentio claim more than the plaintiff is entitled to, he loses his entire claim, and is not restored to his original position by the praetor except in a few cases where minors and others are not permitted by him to suffer the consequences of their mistake.

§ 53 *a*. A plaintiff may claim too much in four ways, in amount, in time, in place, in his statement of the case: in amount, if instead of ten thousand sesterces, which are due to him, he claims twenty thousand, or if being co-proprietor he claims as sole proprietor, or more than his share:

§ 53 *b*. in time, if he demands to be paid at an earlier time than he stipulated for:

§ 53 *c*. in place, if he demands payment at a forum without mentioning that it is not the place at which he contracted to be paid: if, for instance, having stipulated—'Do you promise to pay at Ephesus?' he subsequently sues at Rome for payment without referring in his formula to Ephesus.

§ 53 *d*. He claims too much by his statement of the case if he deprives the debtor of an election to which he was entitled by the contract; for instance, if he stipulated to receive alternatively either ten thousand sesterces or the slave Stichus, and makes an unconditional claim for one or the other. For though the one that he claims be of lesser value, he nevertheless seems to claim too much because the other may be more convenient for the debtor to render. So if he stipulated for a genus and demands a species, stipulated, for instance, for purple and demands Tyrian purple, even though he demand the cheapest species, he claims more than his due, for the same reason. So he does if he stipulated generally for a slave and claims a certain slave, Stichus, for instance, however worthless. The intentio, then, must exactly pursue the terms of the stipulation.

§ 54. It is clear that an intentio naming an uncertain sum as due to the plaintiff, cannot be excessive, for it claims no certain quantity, but only whatever the defendant ought to convey or perform. The same is true of real actions to recover uncertain shares, as that whereby a plaintiff claims whatever portion of an estate he may be entitled to, which kind of action is very seldom granted.

§ 55. It is also clear that the plaintiff who claims the wrong thing in his intentio, runs no risk and can bring a fresh action because his right has not been tried; if he is entitled, for instance, to Stichus and claims Eros, or if he is entitled by stipulation and alleges in the intentio that he is entitled to have the object made over to him under a will, or if a cognitor or procurator claim to have the object made over to him in his own right instead of in the right of his principal.

§ 56. To claim too much in the intentio, as I have said, is dangerous; but a man who claims in the intentio less than his right does not forfeit his right, but cannot sue for the remainder in the same praetorship, for he is repelled by the exception against division of actions.

§ 57. If too much is claimed in the condemnatio the plaintiff is not imperilled, but, since the defendant has taken a formula which is unfair to him, he may obtain a reduction of the condemnation by in integrum restitutio. If less is laid in the condemnatio than the plaintiff is entitled to, he only obtains that amount, for his whole right has been brought before the judex and is restricted by the amount laid in the Condemnatio, a limit which the judex cannot exceed; and in this case the praetor gives no relief by in integrum restitutio, for he is more ready to relieve defendants than plaintiffs, excepting always minors, whom he invariably relieves.

§ 58. If more or less is laid in the demonstratio, the plaintiff's right is not at all brought into the action and therefore remains intact, and this is the meaning of the saying, that a right is not consumed by a false demonstration.

§ 59. Some think that the demonstratio may be properly restricted to less than is due; thus a man who has bought both Stichus and Eros may state in his Demonstratio, 'Whereas I bought of you the slave Eros,' and sue for Stichus by another formula, because it is true that the purchaser of both is also the purchaser of each; and this was more especially Labeo's opinion. But if the purchaser of one sues in respect of two, the Demonstratio is false; and the same principle applies to actions of Loan for use and Deposit.

§ 60. I have read in some writers that in actions of Deposit, and wherever condemnation involves infamy, a plaintiff loses his action if his demonstratio exceeds the amount due, for instance, if he

deposited one thing and says in the demonstratio that he deposited two, or if he was struck in the face and his demonstratio in an action of assault says he was struck in other parts also. But let us carefully examine this opinion. There are two formulas of the action of Deposit, one framed in jus, the other in factum, as we said before, § 47. The formula in jus begins by defining the title or ground of action in the demonstratio, and then in the Intentio which follows introduces as a consequence the question of law in these terms: 'Whatever the defendant ought on account of this thing to convey or perform.' Whereas the formula of fact commences at once without any preceding demonstratio with another form of intentio designating the ground of action, thus: 'If it be proved that such a plaintiff deposited such a thing with such a defendant.' Certainly in the latter case, that is, in a formula of fact, if the plaintiff asserts that he deposited more things than he really deposited, he loses the action, because the excess is in the intentio....

§ 61. In bonae fidei actions the judex has full power to assess on good and equitable grounds the amount due to the plaintiff, and can take into account the cross demand in the same transaction of the defendant, and condemn the defendant in the remainder.

§ 62. Bonae fidei actions are those of Purchase and Sale, Letting and Hiring, Unauthorized Agency, Agency, Deposit, Fiduciary conveyance, Partnership, Guardianship, dotal property, [loan of use, Pledge, Partition of inheritance, Partition of property held in common].

§ 63. The judex may, if he pleases, refuse to take any account of a set off, since he is not expressly instructed by the terms of the formula to do so, but as it seems suitable to the nature of a bonae fidei action, the power is assumed to be contained in his commission.

§ 64. It is otherwise in the action instituted by a banker for the balance of an account, for the banker is compelled to include a set off in his action and make express recognition of it in his formula, so much so that he must allow for any set off from the first, his Intentio only claiming the balance. Thus if he owes ten thousand sesterces to Titius, and Titius owes him twenty thousand, his Intentio runs as follows: 'If it be proved that Titius owes him ten thousand sesterces more than he owes Titius.'

§ 65. Likewise the purchaser of an insolvent debtor's estate must when he sues do so with a deduction in his formula, that is in the condemnatio only require the defendant to pay what he owes after deduction of what is due to him in turn from the purchaser as representing the debtor who has failed.

§ 66. Between the set off which is made against the claim of the banker and the deduction from the claim of the purchaser of an insolvent's estate there is this difference, that set off is confined to claims of the same genus and nature; money, for instance, is set off against money, wheat against wheat, or wine against wine; and some even hold that not every kind of wine or every kind of wheat may be set off against wine and wheat, but only wine and wheat of the same nature and quality. Deduction, on the contrary, is made of a debt of a different genus. Thus, if a purchaser of an insolvent's estate sues for money owed to the insolvent a person to whom he himself, as the insolvent's successor, owes corn or wine, he has to deduct the value of the corn or wine and bring the action only for the residue.

§ 67. Again, deduction is made of debts not yet due, set off only of debts already due.

§ 68. Again, set off is inserted in the Intentio, and if the Intentio of the banker is one sesterce more than the balance, he loses his present cause and on this account also his future claim; whereas the deduction is introduced in the Condemnatio, where an excessive claim is not hazardous; especially as the purchaser of an insolvent's estate, though the debt he claims is certain, draws up the condemnatio for an uncertain amount.

§ 69. As we have mentioned [4, § 61, Inst. 4, 6, 36] the action brought against the Peculium of

filiusfamilias and of slaves, we must explain more fully this and the other actions by which fathers and masters are sued on account of their sons or slaves.

§ 70. Firstly, if it was at the bidding of the father or master that the plaintiff contracted with the son or slave, the father or master may be sued for the whole amount of the debt contracted, and rightly so, for in this case the person with whom the contract is made looks rather to the credit of the father or master than to that of the son or slave.

§ 71. On the same principle the praetor grants two other actions, the actio exercitoria and institoria, one on account of a debt contracted by a ship-captain (magister), the other on account of a debt contracted by a manager of a shop or business (institor). The actio exercitoria lies against a father or master who has appointed a son or slave to be captain of a ship, to recover a debt incurred by the son or slave on account of the ship. As such a contract seems also to be made with the consent of the father or master, it has appeared most equitable that an action should be given to make him liable for the whole debt. But still further even if a man appoint another person's slave or a freeman over his ship, he may nevertheless be sued by this praetorian action. The action is called Exercitoria because exercitor signifies a person who takes the daily profits of a ship. The formula Institoria is applicable in the case of a man appointing his son or slave or another person's slave or a freeman to manage a shop or any business for him, should any debt be contracted by such person on account of that business. It is called Institoria because a person set over to manage a shop is called Institor, and the action is also brought to recover the whole amount of the debt.

§ 72. Besides the above, an action has also been established called Tributoria, against a father or a master of a slave, when their son or slave carries on some business with his Peculium with the knowledge of his father or master. For if any contracts are made with them on account of that business the praetor orders that whatever capital belongs to this business and any profits made in it shall be distributed between the father or master and the other creditors in proportion to their respective claims against the son or slave, and since the praetor permits the father or master to effect the distribution, this actio tributoria is provided to meet the case of a creditor complaining that he has received less than his share.

§ 72 *a*. There has also been instituted the action in respect of Peculium (de peculio) and of what has been converted to the profit of the father or master (de in rem verso), since notwithstanding the fact that a contract has been made without the consent of the father or master, yet if any portion has been converted to his profit, he ought to be altogether liable to that amount; or if no portion has been converted to his profit, he ought to be liable to the extent of the peculium. Conversion to his profit is understood to mean any necessary expenditure by his son or slave on his account, as borrowing money with which the son or slave pays his creditors, repair of his falling house, purchase of corn for his household of slaves (familia), purchase of an estate for him, or any other necessary. So if out of ten thousand sesterces which your slave borrowed of Titius he paid your creditor five thousand, and spent the remainder in some other way, you are liable for the whole of the five thousand, and for the remainder to the extent of the peculium. If the whole ten thousand was applied to your profit you are liable for the whole. And although the action in respect of Peculium and of conversion to profit is only one action, nevertheless it has two separate condemnations. Thus the judex first looks to see whether there has been a conversion to the profit of the father or master, and does not proceed to estimate the value of the peculium unless there was no such conversion or only a partial conversion.

§ 73. In ascertaining the amount of the peculium, deduction first is made of what the son or slave owes to the father or master or to a person in their power, and the residue only is regarded as peculium. Sometimes, however, what the son or slave owes to a person in the power of their superior is not deducted, for instance, if it is owed to a vicarius, that is to a slave belonging to the peculium of the son or slave.

§ 74. There is no doubt that both a creditor who has contracted at the bidding (jussu) of the father or master with a son or slave, and one who might sue, by exercitoria or institoria, may bring the action in respect of the peculium or of conversion to profit; but no one would be so foolish, who could recover the whole by one of the former actions, as to undertake the trouble of proving the existence of a peculium and that it was sufficient in amount to satisfy his claim, or that the transaction had been for the benefit of the father or master.

§ 74 *a*. A plaintiff who has the actio Tributoria may bring actio de peculio et in rem verso, and will generally find it expedient to do so; for actio Tributoria only relates to that portion of the peculium which consists of the trading capital and the profits of the business with which the son or slave traded, but other actions extend to the whole peculium; and a man may trade with only a third or fourth or less part of his peculium and have the greatest part of it invested in other concerns. A fortiori, if the plaintiff can prove that what he gave the son or slave in fulfilment of the contract was converted to the profit of the father or master, he should use this action, viz. de peculio et in rem verso, instead of the actio Tributoria; for, as I said above, the same formula lies both in respect of peculium and of what has been converted to uses.

§ 75. For a delict, such as theft or outrage, committed by a son or slave, a noxal action lies against the father or master, who has the option of either paying the damages assessed or surrendering the delinquent. For it is not just that the misdeed of a son or slave should involve the father or master in any detriment beyond the loss of his body.

§ 76. Noxal actions were introduced partly by statute, partly by the edict of the praetor: by statute, for instance the action for theft by the enactment of the Twelve Tables, and the action for injury to property by the lex Aquilia; by the edict, for instance theaction for outrage (injuriarum) and the action for rapine.

§ 77. All noxal actions are said to follow the person of the delinquent. Accordingly if your son or slave has done a wrong while he is in your power, an action lies against you; if he falls under the potestas, patria or dominica, of another person, an action lies against his new superior: if he becomes his own master (sui juris), a direct action lies against the delinquent himself, and the noxal action is extinguished. Conversely, a direct action may change into a noxal one: thus if a paterfamilias has committed a delict, and then has made himself your son by adrogatio or having been a free man has become your slave, as I showed in the first book might happen in certain circumstances, a noxal action lies against you in place of the direct action which formerly lay against the delinquent.

§ 78. But no action lies for an offence by a son or slave committed against his father or master; for between me and a person in my power no obligation is possible; and, consequently, if he passes into the power of another, or becomes his own master (sui juris), neither he himself in the one case nor the person in whose power he now is in the other can be sued. Hence it has been asked whether, if another man's son or slave has wronged me and subsequently passes into my power, the action is in consequence extinguished, or is only in abeyance. Our school maintains that the action is extinguished, because a state of circumstances has arisen in which an action is impossible, and therefore if the delinquent pass again out of my power I have no action. The other school maintains that while he is in my power the action is only in abeyance, because I cannot bring an action against myself, but that it revives when he passes out of my power.

§ 79. When a filiusfamilias is conveyed by mancipation to the injured party in a noxal action, the other school hold that he ought to be mancipated three times, because the law of the Twelve Tables provides that a son cannot pass out of the power of the father unless he is three times mancipated. Sabinus and Cassius and the other authorities of my school hold that a single mancipation is sufficient, and suppose that the three conveyances of the Twelve Tables are only required in voluntary mancipations.

§ 80. So much for the contracts and delicts of persons under the power of a father or master. As to persons subject to manus or mancipium, when they are sued for contracts, unless they are defended against the whole damages by the superior to whom they are subject, the goods which would have belonged to them but for their subjection are ordered by the praetor to be sold. But when their change of status is supposed to be rescinded and an action is brought resting on the praetor's executive supremacy (judicium quod imperio continetur)....

§ 81. But though I said that the surrender of a dead man was not allowed yet if the delinquent died a natural death and the body is surrendered by the person sued on his account in a noxal action, the judgment is satisfied.

§ 82. A man may sue either on his own account or on account of another as his cognitor, procurator, guardian (tutor), or curator, whereas in the days of statute-process a man could only sue on account of another in certain cases.

§ 83. A cognitor for a cause is appointed by a set form of words in the presence of the adversary. The form in which the plaintiff appoints a cognitor is the following: 'Whereas I sue you for, say, an estate, in that matter I appoint Lucius Titius as my cognitor;' the defendant thus: 'Whereas you sue me for an estate, in that matter I appoint Publius Maevius as my cognitor.' Or the plaintiff may use the words: 'Whereas I intend to sue you, in that matter I appoint Lucius Titius as my cognitor;' and the defendant these: 'Whereas you intend to sue me, in that matter I appoint Publius Maevius as my cognitor.' It is immaterial whether the person appointed cognitor is present or absent; but if an absent person is appointed, he is only cognitor if he consents and undertakes the office.

§ 84. A procurator is substituted in a suit for the principal without using any particular form of words, but simply by an informal mandate, and even in the absence and without the knowledge of the other party to the action. According to the opinion of some, a person may even become a procurator without a mandate if he undertakes the office in good faith and engages that the principal will ratify his proceeding. Although he who is acting under a mandate is also as a rule bound to give this security, the fact that he has a mandate being often concealed in the initial stage of the suit, and only coming to light subsequently when the parties are before the judge.

§ 85. How guardians and curators are appointed has been explained in the first book.

§ 86. He who sues on account of another names the principal in the intentio and himself in the condemnatio. If, for example, Lucius Titius sues for Publius Mevius, the formula runs thus: 'If it be proved that Numerius Negidius ought to pay to Publius Mevius ten thousand sesterces, do thou, judex, condemn Numerius Negidius to pay to Lucius Titius ten thousand sesterces; if it be not proved, absolve him.' In a real action the thing is affirmed in the intentio to be the property of Publius Mevius by the law of the Quirites, and the representative is named in the condemnatio.

§ 87. When the defendant is represented by a cognitor or procurator in a personal action the principal is named in the intentio, and his representative in the condemnatio. In a real action neither the principal defendant nor his representative is named in the intentio, which only affirms that the thing belongs to the plaintiff.

§ 88. We next inquire under what circumstances the plaintiff or defendant is required to give security.

§ 89. If I sue you in a real action you must give me security. For as you are permitted during the suit to retain possession of a thing to which your title is doubtful, it is fair that you should give me security with sureties so that if judgment goes against you and you refuse to restore the thing or to pay its value I may have the power of proceeding against you or your sponsors.

§ 90. And there is all the more reason that you should give security if you are only undertaking the action as the representative of another.

§ 91. A real action is either commenced by a petitory formula or by a sponsio: if the plaintiff proceeds by petitory formula, recourse is had to the stipulation known as security for satisfaction of judgment; if he proceeds by sponsio, the stipulation employed is known as security for the thing in dispute and for mesne profits.

§ 92. The Intentio of a petitory formula containing the assertion that the thing belongs to the plaintiff.

§ 93. But in a proceeding by sponsio we challenge the other party to such a wager as follows: 'If the slave in question belongs to me by the law of the Quirites, do you promise to pay me twenty-five sesterces?' and we then deliver a formula in which we sue for the sum named in the wager, but we only obtain judgment by this formula if we prove that the thing belongs to us.

§ 94. But the sum named in the wager in this case is not exacted, for it is not really penal, but prejudicial, and is used merely as a device for instituting a trial of ownership. Hence, the defendant does not enter into a counter stipulation with the plaintiff. But the stipulation in the place of security for the thing in dispute and for mesne profits (pro praede litis et vindiciarum) is so named because it was substituted for personal sureties (praedes); for in the days of statute-process restitution of the thing in dispute and the mesne profits was secured to the claimant (petitor) by the possessor giving him such sureties.

§ 95. When, however, the case is tried in the centumviral court the sum of the wager is not sued for by formula but by statute-process. For then we challenge the defendant by sacramentum, and a sponsio of a hundred and twenty-five sesterces is entered into by virtue of the lex Crepereia.

§ 96. But if a plaintiff in a real action sues in his own name he gives no security.

§ 97. And even if a cognitor sues, no security is required either from him or from his principal, for the cognitor being appointed by a fixed and, as it were, solemn form of words in the place of the principal, he is properly identified with the principal.

§ 98. But if a procurator sues, he is required to give security for the ratification of his proceedings by his principal, as otherwise the principal might sue again on the same claim, which he cannot do after suing by a cognitor on account of the acts of the latter being regarded as his own.

§ 99. Guardians (tutores) and curators are required by the edict to give the same security as procurators, but are sometimes excused.

§ 100. So much for real actions. In personal actions the plaintiff is governed by the same rules in respect of giving security as in real actions.

§ 101. As regards the defendant, if another person intervenes for him in the action, security must always be given, for no one is considered to be a sufficient defender of another without security; but in a suit against a cognitor it is the principal who gives security, while in a suit against a procurator it is the procurator who gives it; and this same rule applies to guardians and curators.

§ 102. But if a defendant accepts process in his own name in a personal action, he only gives security in certain cases named in the edict. These cases are of two kinds, depending either on the nature of the action or on the suspicious character of the defendant. The nature of the action is the reason in a suit against a judgment debtor, or a principal indebted to his surety, or in an action (for dower) in which the conduct of the wife is in question. The suspicious character of the defendant is the reason if he has

already made away with his property, or if his goods have been possessed or proscribed for sale by his creditors, or if an heir is sued whom the praetor looks on as a suspect.

§ 103. Actions are either statutable or are derived from magisterial power.

§ 104. Statutable actions are those that are instituted within the city of Rome, or within an area limited by the first milestone, between Roman citizens, before a single judex; and these by the lex Julia judiciaria expire in a year and six months from their commencement, unless previously decided; which is the meaning of the saying that by the lex Julia an action dies in eighteen months.

§ 105. Magisterial power is the source of those actions that are instituted before recuperators, or before a single judex, if the judex or a party is an alien, or that are instituted beyond the first milestone from Rome, whether the parties are citizens or aliens. They are said to be derived from magisterial power because they can only be prosecuted as long as the praetor who delivered the formula continues in office.

§ 106. To have sued in an action derived from magisterial power, whether real or personal, and whether it had a formula of fact (in factum) or an allegation of law (in jus), is not by direct operation of law a bar to the institution of a subsequent action on the same question: and therefore a counteractive plea (exceptio) is necessary alleging that the matter has been already decided (res judicata) or that issue has been joined upon it.

§ 107. But if a statutable action in personam with an intentio of civil law has been already brought, a subsequent action on the same question cannot by direct operation of law be afterwards maintained, and on this account a counteractive plea is not required. But if a statutable action in rem or a statutable action in personam with an intentio of fact has been brought, a subsequent action on the same question may nevertheless by direct law be maintained, and on this account the counteractive plea that the matter has been already decided, or the plea that there has been a previous joinder of issue on it is necessary.

§ 108. It was otherwise formerly in the case of statute-process, since in this procedure a subsequent action on a question which had already been the subject of an action was always barred by direct operation of law, nor were counteractive pleas (exceptiones) at all in use in those times, as they are now.

§ 109. An action may arise from statute (ex lege) and yet not be statutable (legitimum), or statutable and yet not arising from statute. For instance, an action arising from the lex Aquilia, or Ollinia, or Furia, if maintained in the provinces, is derived from the power of the magistrate, and so it is if instituted at Rome before recuperators, or though instituted before a single judex, if the judex or a party is an alien; and, on the contrary, an action given by the edict, if maintained at Rome, before a single judex, between Roman citizens, is statutable (legitimum).

§ 110. Here we ought to take notice that actions founded on a statute (lex) or a senatusconsultum are granted by the praetor after any length of time has elapsed, but those founded on the praetor's own jurisdiction are usually only granted within a year from their having arisen.

§ 111. But sometimes the praetor follows the pattern of civil law and makes his actions perpetual; such are the actions which he grants to the praetorian successor (bonorum possessor) and to other persons who are in the position of an heir (heres) (4, § 35). So for theft detected in the commission (furti manifesti), the action, though praetorian, is perpetual; and properly so, the pecuniary penalty having been instituted in the place of capital punishment.

§ 112. It is not always the case that the actions, whether civil or praetorian, which lie against a man lie

also against his heir, the rule being absolute that penal actions arising from delict, for instance, from theft (actio furti), rapine (vi bonorum raptorum), outrage (injuriarum), unlawful damage (damni injuriae), are not granted against the heir of the delinquent; but the heirs of the injured party are competent to bring, and are not refused, these actions, except in the case of the action for outrage and any similar action if such is to be found.

§ 113. Sometimes, however, even an action upon contract cannot be brought by the heir, nor against the heir; for the heir of the adstipulator has no action, nor does any lie against the heir of the sponsor or fidepromissor.

§ 114. We next inquire whether, if the defendant before judgment, but after the parties have joined issue, satisfies the plaintiff, the judex has power to absolve him, or must condemn him, because he was liable to condemnation when the formula was delivered. The authorities of my school hold that he should be absolved without distinction of the kind of action; and hence the common saying that according to Sabinus and Cassius all actions involve free power of absolution. The other school agree in respect of actions bonae fidei, where the judex has more discretion, and of real actions because there is an express provision to this effect in the terms of the formula: (as also in respect of actiones arbitrariae in personam, since they likewise contain an express provision in their formula that the judex is not to condemn if the defendant satisfies the plaintiff; but not in respect of actions stricti juris).

§ 115. We have next to examine the nature of Exceptions.

§ 116. Exceptions have been established for the protection of the defendant, as it is often the case that a person is under a liability by the civil law when justice forbids his condemnation.

§ 116 *a*. If, for instance, I have stipulated that you shall pay me a sum of money, on account of my advancing you the money, and then never advanced it, I can certainly sue you for the money, as by civil law you ought to pay, being bound by the stipulation; but it would be iniquitous that you should be condemned on this account, and therefore it is established that you may defend yourself against my claim by the exception of Fraud (doli).

§ 116 *b*. Or if I informally agree not to sue you for a debt you owe me, my right to assert in the intentio of the formula that you are bound to pay me nevertheless continues unimpaired, because a mere pact cannot extinguish a civil obligation, but it is held that my action would be defeated by the exception of pact or agreement between the parties.

§ 117. Actions which are not exclusively maintainable against one definite person also admit of exceptions; for instance, if by threats of violence or by fraud you compelled or induced me to convey the ownership of a thing to you by mancipation, and you sue me for it by vindication, I am granted an exception of intimidation or fraud, which, if I prove, I defeat your claim.

§ 117 *a*. Or if you knew land was an object of litigation, and bought it of a person not in possession, when you claim it of a person in possession you are entirely defeated by means of an exception.

§ 118. Some exceptions are published by the praetor in his edict, while others are granted by him after taking special cognizance of the case, while all are either founded on statute or on what is equivalent to statute, or on the praetor's jurisdiction.

§ 119. But all exceptions take the form of a supposition contrary to what the defendant affirms; if, for example, the defendant imputes fraud to the plaintiff in that he sues for money which he never advanced, the exception is thus expressed: 'If in that matter there was and is no fraud of Aulus Agerius.' Again, if he allege an informal agreement not to claim the money, the exception is thus

formulated: 'If Aulus Agerius and Numerius Negidius did not agree that the money should not be demanded;' and so in other cases. For every exception is an objection alleged by the defendant, but is so inserted in the formula as to make the condemnation conditional; that is, the judex is instructed not to condemn the defendant unless there has been no fraud of the plaintiff in this transaction, or unless there has been no informal agreement not to sue for the money.

§ 120. Exceptions are either peremptory or dilatory.

§ 121. Peremptory exceptions are such as are always available and cannot be avoided by postponing the action, as the exception of intimidation, or of fraud, or that there has been a contravention of the statute (lex) or of the senatusconsultum, or that the case has been previously decided (exceptio rei judicatae), or brought to trial (exceptio rei in judicium deductae), or that there has been a formless agreement not to sue for the debt (exceptio pacti conventi).

§ 122. Dilatory exceptions are such as merely avail the defendant for a time, such as exception of informal agreement that a debt shall not be sued for within five years, for at the end of five years the exception ceases to be pleadable. Of a similar nature is the exception of divided claim or of the claims left over (litis dividuae et rei residuae). Thus after suing for part of a debt if a man sue for the remainder in the same praetorship, he is barred by this exception (litis dividuae). Or, when a man who has several claims against the same defendant brings some actions and postpones others in order to come before new judices, if within the same praetorship he bring any of the postponed actions, he is met by the exception of claim left over (rei residuae).

§ 123. A plaintiff liable to a dilatory exception should be careful to postpone his action, for if he brings his action and the exception is opposed to it, this is fatal to his claim; for as this has been brought to trial and extinguished by the exception being opposed to it, he has lost his right to sue on it, even after the time has elapsed when if the matter had been res integra he would have escaped from being met by the exception.

§ 124. An exception is considered to be dilatory not only in respect of time but also on personal grounds, such as those which relate to the office of cognitor; for instance, if a person sues by means of a cognitor who is disabled by the edict from appointing one, or if he is able to appoint a cognitor, but appoints some one who is not allowed to serve the office. If the exception to a cognitor (exceptio cognitoria) is pleaded, the principal disabled from appointing a cognitor can himself carry on the action on his own account, or if one person is disabled from acting as cognitor, the principal can carry on the action by employing another, or by suing on his own account, and in either way avoid the exception; but if he disregard the matter and continues to carry on the action by the cognitor, he loses his cause.

§ 125. If a peremptory exception be inadvertently omitted by the defendant, the mistake is set right by the remedy of in integrum restitutio, the defendant being thus allowed to add the exception to the formula; but whether the same is true of a dilatory exception is a matter of controversy.

§ 126. Sometimes an exception, which in the absence of counter allegations seems prima facie to be just to the defendant, is unjust to the plaintiff, and then, to protect the plaintiff, the praetor adds to the instructions a clause called Replication, because it is an undoing and counteraction of the force of the exception. If, for instance, after we informally came to a contrary agreement that I should not sue you for a debt, we agreed that I might be allowed to sue, and then, when I sue you, you plead the informal agreement that you should only be condemned in case there has been no agreement that I should not sue, such exception stands in the way of my claim, for the fact of the first agreement remains true, although we subsequently came to a contrary agreement; but, as it would be unjust that I should be defeated by the exception, I am allowed to reply by pleading the subsequent agreement, thus: 'If there

was no subsequent agreement that I might sue for that money.'

§ 126 *a*. So if a banker sue for the price of goods sold by auction, he may be met by the exception that the purchaser is only to be condemned in the action if the thing which he has bought has been delivered, and this is prima facie a just exception. But if it was a condition of the sale, that the goods should not be delivered to the purchaser before payment of the purchase-money, the banker is permitted to insert the Replicatio: 'or if it was a condition of the sale that the goods should not be delivered till the price was paid.'

§ 127. But sometimes a Replicatio, though prima facie just, unjustly injures the defendant; and then, to protect the defendant, a clause has to be added called Duplicatio (Rejoinder).

§ 128. And again, if this, though prima facie just, on some ground or other unjustly injures the plaintiff, for his protection another clause in addition is required called Triplicatio (surrejoinder).

§ 129. And sometimes further additions are required by the multiplicity of circumstances by which dispositions may be successively or contemporaneously affected (Rebutter and Surrebutter).

§ 130. We next proceed to notice the Praescriptio, a clause designed for the protection of the plaintiff.

§ 131. For it often happens that one and the same obligation obliges a person to render some performance to us now and some performance at a future time. For example, when we have stipulated for an annual or monthly payment of a certain amount of money, at the end of a year or month there is an obligation to make to us a corresponding payment of money for this time; but in respect of future years, although an obligation is held to have been contracted, no payment has yet become due. If, then, we wish to claim what is at present due, and to bring the matter to trial, at the same time leaving the claim to future performance of the obligation untouched, we must, in bringing the action, employ this Praescriptio: 'Let the action relate exclusively to what is now due.' Otherwise, if we sue without this Praescriptio, the indefinite Intentio, 'Whatever it be proved that Numerius Negidius ought to convey to or perform for Aulus Agerius,' brings our whole right to future as well as to present payment before the judex, and, whatever payment may be due in future, we only recover what is due at the time of joinder of issue, and are barred from any subsequent action on account of the remainder.

§ 131 *a*. So again if we sue upon a contract of purchase (actio ex empto) for the conveyance of land by mancipation, we must prefix the Praescriptio, 'Let the action relate exclusively to the mancipation of the land,' in order that subsequently, when we wish vacant possession of the land to be delivered to us, we may be able to sue again on the contract of purchase for delivery of possession; as, without this Praescriptio, all our right under that contract is included in the uncertain Intentio, 'Whatever on that ground Numerius Negidius ought to convey to or perform for Aulus Agerius,' and is exhausted by the joinder of issue in the first action; so that afterwards, when we want to sue for the delivery of vacant possession, we have no right of action remaining.

§ 132. The Praescriptio is so named because it precedes the formula, as hardly needs to be stated.

§ 133. At present, as we previously noticed, all praescriptions are initiated by the plaintiff; though formerly some used to be put in as a plea of defence by the defendant, for instance, the Praescriptio, 'Let this question be tried if it does not prejudice the question of inheritance,' which clause is now transformed into an exceptio, and is employed when the claimant of an inheritance brings another action which prejudges the right to the inheritance; as, for instance, if he sues for particular things belonging to the inheritance; for it would be unjust [to make the decision of an action respecting an entire inheritance a mere corollary of a decision respecting a less important issue].

§ 134. If an action is brought on a stipulation made by a slave, the intention names the person entitled to recover, that is, the master; while the prescription gives the true history of the facts relating to the contract.

§ 135. What has been said of slaves applies to all persons subject to the power of another.

§ 136. We must further remark, that when a person who has promised something uncertain in amount is sued, the formula should contain a Praescriptio in place of a Demonstratio, thus: 'Let C D be judex. Whereas Aulus Agerius stipulated for something uncertain from Numerius Negidius, PAYMENT FOR WHICH IS DUE AT PRESENT, whatever payment in respect of this matter Numerius Negidius ought to make over to or perform for Aulus Agerius, etc.'

§ 137. When a sponsor or fidejussor is sued, in the case of the sponsor the common form of Praescriptio is as follows: 'LET THIS BE THE SUBJECT OF THE ACTION that Aulus Agerius has stipulated for something of uncertain amount from Lucius Titius, of which stipulation Numerius Negidius was sponsor IN RESPECT OF THE AMOUNT EXCLUSIVELY ON ACCOUNT OF WHICH PERFORMANCE IS NOW DUE;' in the case of a fidejussor: 'LET THE SUBJECT OF THE ACTION be this that Numerius Negidius has guaranteed as fidejussor for Lueius Titius something of uncertain amount, IN RESPECT OF THAT EXCLUSIVELY WHICH CAN NOW BE CLAIMED;' and then follows the rest of the formula.

§ 138. The last subject to be examined is interdicts.

§ 139. In certain cases for the purpose of putting an end to controversies, the praetor or proconsul directly interposes his authority as a magistrate, which he does then more especially, when possession or quasi-possession is in dispute between the parties: the magistrate in short thus commands or forbids something to be done: the formulae and set terms adapted and made use of for this procedure being called interdicts and decrees.

§ 140. They are called decrees, when he commands that something be done; for instance, when he orders that something be produced, or something be restored: and they are called interdicts, when he prohibits something being done; as when he forbids the violent disturbance of possession acquired without any defect, or the desecration of consecrated ground. Interdicts, then, are orders either of restitution, or of production, or of abstention.

§ 141. But the order to do or not to do something does not end the proceedings, since they go to a judex or to recuperators, and formulae having been issued for the purpose, an inquiry is held as to whether anything has been by them done contrary to the praetor's prohibition or omitted contrary to his injunction. And this procedure sometimes is penal, sometimes not penal; penal when it is by sponsio, not penal when an arbiter is demanded (formula arbitraria). Prohibitory interdicts are always carried on by way of sponsio; orders of restitution or production sometimes by sponsio, sometimes by means of a formula arbitraria.

§ 142. The first division, then, of interdicts is that they are either for abstention, for restitution, or for production.

§ 143. The next is into interdicts either for obtaining possession, or for retaining possession, or for recovering possession.

§ 144. An interdict for obtaining possession is issued to the bonorum possessor, beginning: 'Whatever portion of the property;' and injoining, that whatever portion of the property, whereof possession has been granted to the claimant, is in the hands of one who holds as heir or as mere possessor, such portion shall be delivered to the grantee of bonorum possessio. He holds as heir who either is heir or

thinks himself heir; he holds as mere possessor who relies on no title but holds a portion or the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession because it is only available to a person endeavouring to acquire possession for the first time, and so ceases to be available to a person who has already had and lost possession.

§ 145. Also the purchaser of an insolvent estate (bonorum emptor) is granted a similar interdict, which some call possessory (interdictum possessorium).

§ 146. Likewise the purchaser of confiscated property at a public auction has a similar interdict, which is called sectorium, because the purchasers of such public property are called sectores.

§ 147. The interdict called Salvianum is also an interdict for obtaining possession, and is available to the landlord against the tenant's property which has been hypothecated to him by the tenant as a security for rent.

§ 148. Interdicts for retaining possession are regularly granted when two parties are disputing about the ownership of a thing, and the question which has to be determined in the first place is which of the litigants shall be plaintiff and which defendant in the vindication; it is for this purpose that the interdicta Uti possidetis and Utrubi have been established.

§ 149. The former interdict is granted in respect of the possession of land and houses, the latter in respect of the possession of movables.

§ 150. When the interdict relates to land or houses, the praetor prefers the party who at the issuing of the interdict is in actual possession, such possession not having been obtained from the opposing party either by violence or clandestinely, or by his permission. When the interdict relates to a movable, he prefers the party who in respect of the adversary has possessed without violence, clandestinity, or permission, during the greater part of that year. The terms of the interdicts sufficiently show this distinction.

§ 151. But in the interdict, 'Whichever party possessed' (interdictum Utrubi), not only the litigant's own possession is taken advantage of for calculating the time, but also any possession of another person which may justly be treated as an accessory to it, such as that of a person deceased to whom he succeeds as heir, that of a person from whom he has purchased a thing, or has received it by way of gift or on account of dower; thus if my possession when added to the just possession of another person exceeds in time that of my opponent, I succeed against him in that interdict; but he who has no possession of his own neither receives nor can receive any accession of another's possession; for what is non-existent is incapable of having an accession made to it. But should the possession of a person be a defective one (vitiosa), that is, have been obtained from his opponent either by violence (vi) or clandestinely (clam) or by his leave and licence (precario), he cannot receive any accession to it, for his own possession is of no avail.

§ 152. The year computed is the year immediately preceding; so that if, for instance, you possessed during eight months previous to me, and I during the seven following months, I am preferred, because your possession for the first three months is not counted in your favour in this interdict, it having been in a different year.

§ 153. But a person is deemed to possess, not only when he possesses himself, but also when any one holds the thing in possession in his name, though the person so holding it is not subject to my power; such, for instance, is the holding of property by a hirer of land (colonus) or of a house (inquilinus). So also a person is deemed to possess by means of those with whom he has deposited a thing, or to whom he has lent gratuitous use or habitation of it, as is expressed by the saying that possession is retained by

any one who holds a thing in possession in our name. Moreover, it is generally allowed that mere intention suffices for the retention of possession, that is, that although we are neither in possession ourselves, nor any one else in our name, yet if we have gone away without meaning to abandon possession but with the intention of returning, it would seem we still retain possession. The persons by means of whom we may acquire possession were mentioned in the second book; there is not any doubt of the impossibility of acquiring possession by intention alone.

§ 154. An interdict for recovering possession is granted to a person dispossessed of an immovable by violence, beginning: 'In the place whence thou hast violently ejected,' which compels the ejector to restore possession, provided that the person ejected did not acquire possession from the other party either by violence or clandestinely or by his leave and licence. Whereas, if his own possession was thus acquired from the other he may be ejected by him with impunity.

§ 155. Sometimes, however, the person violently ejected, though his own possession was obtained from the opposite party either by violence or clandestinely or by his leave and licence, can claim to be reinstated, that is, when he has been ejected by force of arms: for then on account of the heinousness of the offence I am punished to the extent of being compelled by action [i. e. by the interdict de vi armata] to reinstate him whatever the previous circumstances may have been. By the term arms we are to understand not only shields, swords, and helmets, but also sticks and stones.

§ 156. A third division of interdicts is into Simple and Double.

§ 157. Those are simple wherein one party is plaintiff and the other defendant, as always is the case in all the restitutory or exhibitory interdicts; for he who demands the exhibition or restitution of a thing is plaintiff, and he from whom it is demanded is defendant.

§ 158. Of prohibitory interdicts, some are simple, others double.

§ 159. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from doing anything which is illegal on a public river or on its banks; for he who demands that the illicit act shall not be done is plaintiff, he who is attempting to commit the illicit act is defendant.

§ 160. Of double interdicts we have examples in Uti possidetis and Utrubi. They are denominated double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but both playing both parts, and both being addressed by the praetor in identical terms. For in brief these interdicts are thus drawn up respectively, 'I forbid violence to be used to prevent your possessing the property as you now in fact possess it'; and the other interdict runs thus, 'I forbid violence to be used to prevent the party who has possessed the slave during the greater part of the year from taking him away.'

§ 161. After classifying interdicts we have next to explain their process and result; and we begin with the simple.

§ 162. When an order of restitution or production is issued, for instance, of restitution of possession to a person who has been forcibly ejected from it, or of production of a freedman whose services his patron intends to call into request, the proceedings are sometimes penal, sometimes not penal.

§ 163. For when arbitration is demanded by the defendant, he receives what is called a formula arbitraria, and if by the arbitration of the judex he is directed to restore or produce anything, he either restores or produces it without further penalty and so is absolved, or if he does not restore or produce it he is condemned, but only to make good whatever loss is caused to the plaintiff by his not obeying the

order of the judex. Neither does the plaintiff incur any penalty for suing a defendant who is not obliged to produce or restore, unless he is challenged by the defendant to an action for vexatious litigation (calumniae judicium) to recover from him a tenth of the object of the suit by way of penalty. For though Proculus held that the demand of arbitration precludes the defendant from suing for vexatious litigation, on the ground that it is an admission by him of an obligation to restore or to produce the thing, we adopt the contrary view and justly so; for the demand of an arbiter shows that the defendant wishes to litigate in a more moderate way, but not that he confesses the opponent's claim.

§ 164. The defendant must be careful, if he wishes to demand an arbiter, to make the demand at once before he leaves the court or tribunal of the praetor; for a subsequent demand will not be granted.

§ 165. Thus if he leaves the court without requesting an arbiter, the proceeding is brought to an issue attended with risk to the parties: for the plaintiff challenges the defendant to wager a sum to be forfeited by the defendant if he has contravened the edict of the praetor by failing to produce or restore; and the defendant challenges the plaintiff to a counter-wager of a similar sum to be forfeited by the plaintiff upon the opposite condition. The plaintiff then delivers the formula of the wager to the defendant, and the defendant in turn delivers the formula of the counter-wager. But the plaintiff adds to the formula of the wager another action for the production or restoration of the thing in dispute, in order that if he obtains judgment in the action on the wager and the thing is not restored or produced, *the defendant may be condemned in damages to the amount of its value*.

§ 166. *When a double interdict has been issued*, the interim possession or mesne profits are sold by auction, and the higher bidder of the litigants is placed in possession pending the controversy, provided that he gives his opponent security by the fructuary stipulation, the force and effect of which is that if judgment on the main question of possession is pronounced against him, he has to pay to the other party the sum mentioned in the stipulation. This bidding of the parties against one another is called a bidding for the fruits, because the parties contend with one another in this way as to the power of taking the fruits of the thing during the preliminary interdict procedure. After this each party challenges the opponent to wager a sum to be forfeited by the promisor if he has contravened the edict by violently disturbing the possession of the promisee, and each party, after binding himself as promisor in a wager, becomes the promisee in a similar counter-wager.

§ 166 *a*. The judex who tries the action has to inquire into the question proposed by the praetor in the interdict, namely, which party was in possession of the house or land in question at the time when the edict was issued, not having acquired it from the other party either by violence or clandestinely or by his leave and licence. When the judex has thus inquired and has, it may be, decided the case in my favour, he condemns my adversary in the penal sums of the actions on the wager and counter-wager in which I was promisee, and absolves me in the actions upon the wager and counter-wager in which I was promisor; and, if my opponent is in possession as higher bidder in the auction, unless he restores possession, he is condemned in the action called Cascellianum or Secutorium.

§ 167. So that if the higher bidder in the auction fails to prove that he is entitled to possession, he is ordered to pay the sums of the wager and counter-wager in which he was promisor, and the price he offered for the mesne profits at the sale by auction, by way of penalty; and further, to restore possession of the thing in question, and restore any profits which he has made from the thing; for the sum of money fixed by the auction is not the price of the mesne profits, but a penalty for attempting to retain the possession that belonged to another and for thus obtaining the power of getting the fructus of the thing.

§ 168. If the unsuccessful bidder in the auction fails to prove that he had possession, he is only condemned to pay the sum of the wager and counter-wager by way of penalty.

§ 169. We shall notice, however, that it is open to the unsuccessful bidder instead of proceeding on the fructuary stipulation, to bring an action upon the sale by auction which is called fructuarium, just as he brings the Cascellianum or Secutorium action for recovering possession; for this purpose a special action has been established which is called fructuary (judicium fructuarium): this action, as following the result of the action on the wager, is also called consequential (Secutorium); but is not also called Cascellianum.

§ 170. As sometimes, after the issue of an interdict, one of the parties declined to take one of the subsequent steps, and the proceedings came to a stand-still, the praetor has provided for this contingency, and invented the socalled secondary interdicts, which in such a case are issued: whose effect is, that if a party decline to take any necessary step in the interdict procedure, such as to violently eject the other party (vis ex conventu), or to bid in the auction for the mesne profits, or to give security for the mesne profits, or to enter into the wagers, or to undertake the trial on the wagers, he shall, if in possession, be obliged to make over the possession to the other party, if out of possession he must not violently eject the other party, and so, although he might have been successful in maintaining the interdictum Uti possidetis if he had complied with the requisites of procedure, possession will be given by the secondary interdict to the other party, if he has not done so.

§ 171. We have now to notice that in order to prevent vexatious litigation, both plaintiffs and defendants are restrained sometimes by pecuniary penalties, sometimes by the sanction of an oath which they are compelled to take, sometimes by fear of suffering infamy. The defendant's denial of his obligation is in certain cases punished by the duplication of the damages to be recovered. This occurs in an action on a judgment debt, or for money paid by a sponsor (depensi), or for unlawful damage to property (damni injuriae), or for legacies left in the form per damnationem. Sometimes a wager of a penal sum is permitted, as in an action of loan of money, or on a promise to pay a preexisting money debt (pecunia constituta), in the former case of one third of the sum in dispute, in the latter of one half.

§ 172. In the absence of the risk of a penal wager, or of duplication of damages on account of denial, and when the action is not one which apart from any denial entails more than simple damages, the plaintiff is allowed by the Praetor to exact an oath from the defendant that his denial is not vexatious. Accordingly, although heirs and those in the position of heirs are always exempt from penalty, and women and wards are exempted from the risk of the penal wager, still the Praetor requires them to take the oath that they are not proceeding vexatiously.

§ 173. But apart from any denial, more than simple damages are involved in various actions: as in an action of manifest theft for a fourfold penalty, for theft not manifest for a twofold one, for stolen goods being discovered or introduced (concepti et oblati) a threefold penalty: for in these and some other cases the action is for something more than mere damages, whether the plaintiff denies or confesses the claim.

§ 174. Vexatious litigation (calumnia) on the part of the plaintiff is also checked sometimes by the judicium calumniae, sometimes by the Contrary action. sometimes by oath, and sometimes by restipulation.

§ 175. The action of reckless litigation (calumnia) lies against the plaintiff in respect of all actions and is for the tenth part of the value of what he has claimed by action, but in the case of an asserter of liberty it is for a third part.

§ 176. But it is at the option of the defendant whether he will bring the judicium calumniae or will exact an oath from the plaintiff that he is not bringing the action vexatiously.

§ 177. The Contrary action only lies in certain cases, for instance, against the plaintiff in an action of

outrage (injuriarum), and in an action against a widow who having been put into possession of property on account of her conceived but unborn child (ventris nomine) has fraudulently transferred it to some one else, or an action for refusing to admit a person [judgment creditor, damni infecti nomine, etc. Digest 42, 4] put into possession (missio in possessionem) by order of the praetor. In the action of outrage it lies for the tenth of what has been claimed, in the two latter actions for the fifth.

§ 178. Of these deterrent measures the Contrary action is the more severe. Plaintiff is condemned by the action of vexatious litigation (judicium calumniae) to forfeit the tenth of the value, unless he knows he has no right of action, and has sued to harass his adversary, in reliance on the error or iniquity of the judex, rather than on the justice of his cause; since vexatious litigation, like the crime of theft, consists in intention. But in the Contrary action the plaintiff is condemned in any case if he loses the previous action, even though he had some grounds for believing in the goodness of his cause.

§ 179. But it is clear that wherever the contrary action (contrarium judicium) lies, the action for vexatious litigation (calumniae judicium) also lies, though one is only allowed to make use of one or other of these actions; on this principle if an oath that the litigation is not vexatious has been exacted, just as the calumniae judicium is not granted, so also the contrarium judicium ought not to be allowed.

§ 180. The penalty of the restipulatio also is commonly required in certain cases; and just as in the contrary action the plaintiff is condemned under all circumstances where he loses his cause whether he knew that he had no proper cause of action or did not, even so he forfeits the penalty of the restipulatio in any case if he could not succeed in the action.

§ 181. But when a person suffers the penalty of the restipulation, neither the action for vexatious litigation can be brought against him, nor can he be bound by the religious form of oath; and that in this case the contrary action has no place is obvious.

§ 182. In some actions condemnation involves infamy, as in the actions of theft, rapine (vi bonorum raptorum), outrage (injuriarum), partnership, fiduciary agreement (fiduciae), guardianship (tutelae), mandate, deposit. In actions for theft, rapine, and outrage, it is not only infamous to be condemned, but also to compromise, according to the terms of the praetor's edict; and rightly so since obligation based on delict differs widely from an obligation based on contract. But although there is no express statement that a person is to be infamous in any part of the edict, a person is said to be infamous who is prohibited from appearing in a court of law on behalf of another, from appointing a cognitor or procurator, and from himself serving as cognitor or procurator.

§ 183. Finally, it is to be noticed that a party intending to sue must serve a summons on his opponent to appear before the magistrate; and if the summons is disregarded, the party summoned forfeits a penal sum according to the provisions of the praetor's edict. Some persons, however, cannot be summoned without the praetor's leave, such as parents, patrons, patronesses, and the children of a patron or patroness; and any one infringing this rule is liable to a penalty.

§ 184. Upon an appearance before the magistrate, if the proceedings are not terminated on the same day, the defendant must give security (vadimonium) for an adjourned appearance on a future day.

§ 185. The security is in some cases of a simple kind that is without sureties, in some with sureties, in some cases again it is accompanied by oath, while in some contains a reference to recuperators, so that on default of appearance the defendant may be immediately condemned by the recuperators in the penal sum of the security; all which matters are more particularly explained in the praetor's edict.

§ 186. In an action on a judgment debt (judicati), or for money paid by a sponsor (depensi), the sum of the security is equal to the sum in question. In other cases it is the amount which the plaintiff swears

that he is not vexatiously demanding as necessary to his security, provided that it is not more than half the sum in dispute, nor exceeds a hundred thousand sesterces. If, for instance, the sum in dispute is a hundred thousand sesterces, and the action is not brought to recover a judgment debt or money paid by a sponsor, the penal sum of the security conditioned for reappearance may not exceed fifty thousand sesterces.

§ 187. Those persons who cannot be summoned to appear without leave of the praetor cannot be compelled to give security for the adjourned appearance without similar permission.
