Book III.
Title IX.

Concerning joinder of issue.
(De litis contestatione.)

3.9.1. Emperors Severus and Antoninus to Valens.

A matter is not fully in court if a mere request for summons has been made, or the defendant has been made acquainted, before trial, with the kind of action which is brought. For there is a great difference between joinder of issue and exhibiting the action which is brought. For the issues appear to be joined only when the judge has commenced to hear the cause by listening to the statement of facts.
Given September 1 (202).

Note.

"Litis contestatio" was the technical name used by the Romans for what we know commonly translate as joinder of issues. But its meaning as used in connection with the formulary procedure was entirely different from the meaning which it had under Justinian, and the rescript has been much interpolated. See Index Interpolationes. As pointed out in note C. 2.57.2, the parties during the former period appeared before the praetor to obtain a formula, a set of instructions to be given to the referee who was to try the facts. The formula was given by the praetor to the plaintiff, and litis contestatio was simply the delivery of the formula to defendant and acceptance thereof by him (Wenger, 31) or the calling of witnesses by the plaintiff to the fact that he had delivered the formula, or a copy thereof,[1] to the defendant, for that had to be done. Schott, Gewahren d. Rechtschutzes 62. It was not necessary to do this in the presence of the praetor. Schott, supra at 61. The transaction is generally said to have been in the nature of a contract. Buckland 689 et seq., 706. But that is more or less a fiction.

When the formula was abolished, and cases were tried only under the extraordinary procedure, the old notion of joinder of issue necessarily disappeared, and with it some of its effects, and a different state of facts was fixed by Justinian to take the place of the old joinder of issue, namely the time when the case was stated in detail to the judge at the time when the case was commenced to be heard by him. See also C. 3.1.14.4.1. Inasmuch as the old joinder of issue was considered in the nature of a contract, it was generally held to be a novation of an old indebtedness, extinguishing the old. But the better view seems to be, says Buckland, at 693, that under Justinian, the extinctive effect of joinder of issue was practically gone. See also Wenger at 279. As to the manner of commencing an action under the formulary and subsequent procedure, see note C. 2. 2. 4. See Windscheid §124 where in a note he cites C. 3.1.13.2.5; C. 3.10.1; Inst. 4.13.10 as showing commencing power disappeared.[2]

[1] Blume penciled a question mark into the margin next to this line.
[2] Blume added this last sentence in pencil.