Section 2. PROCEDURE

A. PRIMARY SOURCES

1. Sample Formulae

a) formula certae creditae pecuniae

nominatio Octavius iudex esto—Let Octavius be judge
intentio Si paret Numerium Negidium [N^mN^m] Aulo Agerio [A°A°] HS X milia dare opportere—
If it appears that N.N. ought to give 10,000 sesterces to A.A.,

exceptio pacti Si inter A^mA^m et N^mN^m non convenit ne ea pecunia intra annum peteretur—
If A.A. and N.N. did not agree that the money would not be sought within a year.
replicatio doli Aut si quid dolo malo N^iN^i factum est—Or if anything was done by N.N.'s fraud

condemnatio Iudex N^mN^m A°A° HS X milia condemnato; si non paret absolvito.—
Let the judge condemn N.N. [to pay] A.A. 10,000 sesterces; if it does not appear let him absolve.

b) formula ficticia
Si A^sA^s L. Titio heres esset, tum si paret N^mN^m A°A° HS X milia dare opportere, iudex [etc.]—
If A.A. were heir to L. Titius, then if it appears that N.N. ought to pay A.A. 10,000 sesterces, the judge, etc.

c) rei vindicatio
Si paret mensam de qua agitur A^iA^i ex iure Quiritium esse neque ea mensa A°A° restituetur—
If it appears that the table which is the subject of the litigation belongs to A.A. by Quiritine right and that table is not restored to A.A.
Quanti ea mensa erit, tantam pecuniam iudex N^mN^m A°A° condemnato, si non paret absolvito—Whatever the table shall be worth, let the judge condemn NN [to pay] to AA so much money; if it does not appear let him absolve.

d) formula depositi in factum concepta
Si paret A^mA^m apud N^mN^m mensam argenteam deposuisse eamque dolo malo N^iN^i A°A° redditam non esse, quanti ea res erit, [etc.]—
If it appears that A.A. deposited a silver table with N.N. and it was not returned to A.A. by the fraud of N.N., whatever the thing shall be worth, etc.

e) formula venditi
Quod A^sA^s N°N° fundum Cornelianum, quo de agitur, vendidit—
Whereas A.A. sold N.N. the Cornelian land which is the subject of the litigation
Quidquid paret ob eam rem N^mN^m dare facere opportere ex fide bona—
Whatever it appears N.N. ought to give [or] do in good faith
Eius iudex N^mN^m A°A° condemnato; si non paret absolvito.—
With respect to that let the judge condemn N.N. [to pay] A.A.; if it does not appear, let him absolve.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[4] Two lines are illegible.

[5] Twelve to thirteen illegible letters.

[6] About one and a half illegible lines.

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

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

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

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

Section 3. THE ROMAN INSTITUTIONAL TREATISES

A. GAIUS, *INSTITUTES*

1. BOOK I [introduction]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 1–7, pp. [odd nos.] 2-5 [footnotes omitted][†]

BOOK I

1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius ciuile* (civil law) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.

2. The laws of the Roman people consist of *leges* (comitial enactments), plebiscites, senatusconsults, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned. **3.** A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *L. Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*. **4.** A senatusconsult is a command and ordinance of the senate; it has the force of *lex*, though this has been questioned. **5.** An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* (sovereign power) through a *lex*. **6.** The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there. **7.** The answers of the learned are the decisions and opinions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever decision he pleases. This is declared by a rescript of the late emperor Hadrian.

[†] Such footnotes as are there are by CD and explain omissions in the text.

2. BOOK I [of persons: slave and free]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book I, §§ 8–47, pp. [odd nos.] 5–15 [footnotes omitted]

8. The whole of the law observed by us relates either to persons or to things or to actions. Let us first consider persons.

9. The primary distinction in the law of persons is this, that all men are either free or slaves. **10.** Next, free men are either *ingenui* (freeborn) or *libertini* (freedmen). **11.** *Ingenui* are those born free, *libertini* those manumitted from lawful slavery. **12.** Next, of freedmen there are three classes: they are either Roman citizens or Latins or in the category of *dediticii.* Let us consider each class separately, and first *dediticii.*