

WILLIAM WARWICK BUCKLAND'S LECTURES
ON THE ROMAN LAW OF ACTIONS

HISTORICAL LECTURES IN LEGAL HISTORY

Ernest Metzger, General Editor

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E.M.

AUTHORS

William Warwick Buckland (1859–1946) was Regius
Professor of Civil Law at the University of Cambridge from
1914 to 1945.

Ernest Metzger is the Douglas Professor of Civil Law at the
University of Glasgow.

Preface

Ernest Metzger

The lectures presented here were given by William Warwick Buckland (1859–1946) at the University of Cambridge and can be dated to 1937. The text itself comes to us indirectly. A written version of the lectures was originally in the possession of James Campbell (1916–2003), a law fellow at Pembroke College, and then passed to Geoffrey Samuel, then an undergraduate at Cambridge, now Emeritus Professor of Law at the University of Kent. Professor Samuel gives the background:

In 1969 for Part I of the Law Tripos at the University of Cambridge I took Roman Law I and Roman Law II, having taken a general course on Roman law in the previous year for the Law Qualifying Examination. Roman Law I was devoted to the law of property and the law of obligations, while Roman law II focussed uniquely on Digest 47.2 (*de Furtis*) and on the law of actions. There were no supervisions for Roman Law II, but the then Law Fellow at Pembroke College, James Campbell (1916–2003), lent me his copy of notes of William Buckland's lectures on the law of actions. This latter topic is, of course, quite technical and so during one of the vacations I made my own complete handwritten copy of these lectures from the text provided by James Campbell. It is from this handwritten copy that this reconstruction of Buckland's lectures has been compiled.

The text has therefore passed through two hands, but other than occasional syntactic mistakes there are no serious reasons to doubt its contents. We owe a great debt to Professor Samuel for making this available.¹ Efforts to find other versions have not been successful.

¹ Professor Samuel does not wish his editorship to be formally acknowledged. However readers should know that he contributed considerably to the manuscript and that many of his additions are included here. For a complete description of the editing, see the

William Warwick Buckland

Buckland was born at Newton Abbot in Devon on 11 June 1859. He matriculated at the University of Cambridge and was admitted to Gonville and Caius College in 1881. He remained associated with Caius for his entire career, becoming a Fellow in 1889 and elected President of Fellows (and Vice-Master) in 1923. He was awarded a B.A. in 1884, an M.A. in 1888, and an LL.D. in 1923, receiving also multiple honorary degrees during his career. He was Regius Professor of Civil Law from 1914 to 1945. He died in 1946.²

The lectures have a style that will be familiar to Buckland's readers. Most readers know him from two books, *A Text-Book of Roman Law from Augustus to Justinian* (1921)³ and *The Roman Law of Slavery* (1908),⁴ which remain respected works and are still cited. He also wrote introductory books that dominated Roman law teaching in Britain for many decades: *Elementary Principles of the Roman Private Law* (1912),⁵ *The Main Institutions of Roman Private Law* (1931),⁶ and especially *A Manual of Roman Private Law* (1925).⁷ His ambition in all of these books was to give a full, rounded picture of the law. His method was to draw out and faithfully record the significance of the relevant sources (legal and literary), while bringing them into some kind of whole. Systemization was there to provide a

section 'Editorial decisions and conventions'. I also owe a debt to David Ibbetson's publication of Buckland's lectures on the *lex Aquilia*, which sets a high standard for works of this kind: D. Ibbetson, 'William Warwick Buckland on the *lex Aquilia*', in P. J. du Plessis, ed., *Wrongful Damage to Property in Roman Law: British Perspectives* (Edinburgh 2018), 46–116.

² For the details given here, see P. W. Duff and Wilfrid E. Rumble, 'Buckland, William Warwick (1859–1946), Jurist', *Oxford Dictionary of National Biography* (2004), and the Cambridge Alumni Database.

³ Now known through the third edition edited by Peter Stein. Cambridge: Cambridge University Press, 1963.

⁴ Cambridge: Cambridge University Press, 1908.

⁵ Cambridge: Cambridge University Press, 1912.

⁶ Cambridge: Cambridge University Press, 1931.

⁷ Cambridge: Cambridge University Press, 1925; reprinted with corrections 1928; 2nd ed. 1939. It was reprinted up to 1957.

scaffold rather than determine the contents.⁸ All of this gives a slightly clipped and segmented character to his writing, and this is apparent also in the lectures here, which are comparable to the student works and roughly match them in style, though more colloquial.

Social and historical context is what readers in the past sometimes found missing in Buckland, and they typically turned to Jolowicz's *Historical Introduction to the Study of Roman Law* (1932) and later to Nicholas' *Introduction to the Study of Roman Law* (1963), where they could get a fuller sense of a once living legal system. This is not a shortcoming in Buckland; preferences in the discipline (and in teaching) changed over time and his approach was less suitable to the new climate. But this is partly a matter of style, and the point needs stressing because changing preferences have never really cast a shadow over the quality of Buckland's works. Modern readers appreciate that when he considered a source he often showed exceptionally good judgment. By the same measure the lectures presented here are not antiquities: they can be read seriously, in the same way Buckland's *Text-Book* and *Roman Law of Slavery* are still read seriously.

Are the lectures simply a breezier version of the student textbooks? Worth remembering is that Buckland was more than a textbook writer and wrote in other registers. The Buckland we see in 'Wardour Street Roman Law',⁹ or his comparative studies,¹⁰ or in his correspondence with David Daube,¹¹ is far-ranging and reflective, closer perhaps to his true profile than what first comes to mind. There are glimpses of this in the lectures.

⁸ 'The general plan of the book follows the Institutional arrangement, though with no hesitation in abandoning it where this course seems to tend to lucidity of exposition.' *Text-Book* (note 3), ix (Preface to the first edition).

⁹ W. W. Buckland, 'Wardour Street Roman Law', *Law Quarterly Review*, 17 (1901), 179.

¹⁰ W. W. Buckland, *Some Reflections on Jurisprudence* (Cambridge 1945), 96–106.

¹¹ A. Rodger, 'Buckland and Daube: A Cambridge Friendship', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 127 (2010): 245–54.

For comparison, these are works by Buckland (within the relevant date range) that treat to some degree the subject of the lectures:

- 1908. *The Roman Law of Slavery*. Cambridge. Pp. 166–86, 207–49, 652–75, 702–12.
- 1911. *Equity in Roman Law*. London. Pp. 21–39.
- 1912. *Elementary Principles of the Roman Private Law*. Cambridge. Pp. 336–410.
- 1925. *A Manual of Roman Private Law*. Cambridge. Pp. 359–420. Reprinted with corrections 1928. 2nd ed. 1939.
- 1931. *Main Institutions of Roman Private Law*. Cambridge. Pp. 345–400.
- 1932. *A Text-Book of Roman Law from Augustus to Justinian*. 2nd ed. Cambridge. Pp. 604–744. 3rd ed. 1963.
- 1936. *Roman Law and Common Law: A Comparison in Outline* (with Arnold McNair). Cambridge. Pp. 315–41. 2nd ed. 1952.
- 1943. ‘Cause of Action: English and Roman’. *Seminar. Annual Extraordinary Number of The Jurist*, 1:3–10.
- 1945. *Some Reflections on Jurisprudence*. Cambridge. Pp. 96–106.

These works obviously treat Buckland’s views more fully and readers may find the comparisons useful. The works listed up to 1936 (Buckland and McNair) were available to students and perhaps reveal something of Buckland’s expectations as a teacher.

Background and dating of the lectures

The lectures are undated but based on several internal markers the broad span is 1933–1937. The earliest date is the simplest: Buckland refers to an article published by Jolowicz¹² in 1935¹³ and refers also to the new Gaius fragments, which were first discovered in 1933.¹⁴ The latest date depends on the

¹² Herbert Felix Jolowicz (1890–1954), Regius Professor of Civil Law, University of Oxford, 1948–1954.

¹³ Identified by Professor Samuel.

¹⁴ V. Arangio-Ruiz, ‘Frammenti di Gaio’, *Pubblicazioni della Società Italiana per la Ricerca dei Papiri Greci e Latini in Egitto*, 11

reasonable inference that James Campbell transcribed the lectures in anticipation of sitting the examination for Part I of the Law Tripos, which began on 3 June 1937.¹⁵ Campbell's university career is worth describing in more detail, both for the dating of the lectures and for general context.¹⁶

The ordinances for the Law Tripos in force during Campbell's university career were published in 1931¹⁷ and describe the examination requirements for the first two years of law study. Campbell matriculated in 1935;¹⁸ his first hurdle would have been the Law Qualifying Examination at the end of his first year.¹⁹ Among the lectures put on expressly for the Qualifying Exam were P. W. Duff's²⁰ lectures on 'Roman Judicial Process' during the Lent term 1936.²¹ This would have been Campbell's first exposure to Roman procedure, and a student had to perform adequately on the exam in order to attend Buckland's lectures.²² Campbell received a First.²³ The second year was dedicated to preparation for the Tripos. The Schedule of Subjects for Part I were:²⁴

(1935), 1182–1222 (no. 1182). Buckland may also have consulted Francis de Zulueta, 'The New Fragments of Gaius (PSI 1182)', *Journal of Roman Studies*, 24 (1934), 168–86. Despite its later publication date, Arangio-Ruiz is the *editio princeps*.

¹⁵ *The Cambridge University Calendar for the Year 1936–1937* (Cambridge University Press 1936), xviii.

¹⁶ Further on James Campbell, see: 'James Campbell; Obituary', *The Times* (17 December 2003); Lord Justice Ward, 'Letter', *The Times* (19 December 2003); Michael Kuczynski, 'James Campbell MC TD (1916–2003)', *Pembroke College News* (December 2013).

¹⁷ The Registry of the University, ed., *Supplementary Ordinances of the University of Cambridge to the end of the Easter Term 1932* (Cambridge University Press 1931), 701–12.

¹⁸ *Calendar* (note 15), 414.

¹⁹ Three subjects and an essay, beginning May 1936. The first subject: 'Roman Law (Outlines of Roman Private Law and the History of Roman Legislative and Judicial Processes)'. *Supplementary Ordinances* (note 17), 707–708.

²⁰ Patrick William Duff (1901–1991), Regius Professor of Civil Law, University of Cambridge, 1945–1968.

²¹ *Cambridge University Reporter*, 66:3 (4 October 1935), 92. [Hereafter the *Reporter* is cited *CUR*.]

²² See note 25.

²³ *CUR* 66:41 (20 June 1936), 1191.

²⁴ *Supplementary Ordinances* (note 17), 707, 709.

1. A paper on the general principles of Roman Law.
2. A paper on the general principles of Roman Law and a selected portion of the Digest.
3. A paper on Public International Law.
4. A paper on Constitutional Law.
5. A paper on English Criminal Law.
6. An essay paper.

The lecture timetable for 1936–1937 shows the lectures Buckland conducted to prepare students for the Roman law papers.²⁵

Digest, 47. 2 (*De Furtis*). Timetabled for 16 lectures (Michaelmas 1936).

Principles of the Roman Law of Property. Timetabled for 12 lectures (Michaelmas 1936 and Lent 1937).

The Roman Law of Obligations. Timetabled for 20 lectures (Lent 1937).

The Formulary System. Timetabled for 19 lectures (Easter 1937).

The last of these is of course the subject of the written lectures presented here. Lectures were scheduled for Monday, Wednesday, and Friday at 10.00. The first lecture of the Easter Term fell on Wednesday 21 April.²⁶ But because the first Roman law paper began relatively soon, on 3 June,²⁷ it is reasonable to assume that there were roughly 16 lectures.²⁸

A few observations for context. First, the previous year's

²⁵ The schedule included here is from the *CUR* 67:3 (3 October 1936), 93. The lecture schedules were published in the *CUR* at intervals throughout the year, sometimes with corrections. (E.g., an earlier version of this schedule mistakenly listed the Digest title as 19. 2 (*Locati conducti*), which was assigned the previous year: *CUR* 66:43 (28 July 1936), 1284.) The same schedule appears later in the year with no changes to Buckland's lectures: *CUR* 67:17 (9 January 1937), 525. A footnote is attached to each of Buckland's lectures, saying 'Intended specially for students who obtained a First or Second Class in the Qualifying Examination.'

²⁶ *CUR* 66:43 (28 July 1936), 1261; *CUR* 67:29 (16 April 1937), 825.

²⁷ *CUR* 67:35 (19 May 1937), 1030.

²⁸ This estimate is based in part on the fact that Buckland's lectures on *condictiones* (unpublished) are divided into 16.

timetable was broadly similar (with *locatio conductio* instead of theft), but ‘The Formulary Procedure’ was not announced until late, though occupying the same space in the timetable as in the subsequent year.²⁹ It’s possible that Buckland was taking time to gauge student interest before committing himself to the timetable. Second, Buckland had given lectures titled ‘Roman Formulary System’ for the LL.B. degree (not the Law Tripos) in Lent 1936³⁰ and 1937³¹ and no doubt the lectures were similar (though shorter in duration).³²

The examiners for Part I of the Law Tripos 1937³³ included Arnold McNair,³⁴ H. F. Jolowicz,³⁵ D. T. Oliver,³⁶ and P. W. Duff.³⁷ Campbell sat the Tripos achieved a First.³⁸

Reading list

On 22 April 1937 the Faculty Board of Law adopted the practice of publishing reading lists,³⁹ and the reading list for the 1938 Law Tripos was published in the *Reporter*.⁴⁰ Though directed at later students, it indicates the books that Campbell

²⁹ *CUR* 66:30 (16 April 1936), 816. Cf. *CUR* 66:3 (4 October 1935), 92; *CUR* 66:17 (10 January 1936), 520.

³⁰ *CUR* 66:3 (4 October 1935), 93.

³¹ *CUR* 66:43 (28 July 1936), 1285.

³² The LL.B. lectures were only twice per week, so perhaps they omitted either the *legis actiones*, or the *cognitio* procedure, or both.

³³ *CUR* 67:40 (19 June 1937), 1180.

³⁴ Arnold Duncan McNair (1885–1975) was a Fellow of Gonville and Caius College and co-authored with Buckland *Roman Law and Common Law: A Comparison in Outline* (Cambridge 1936), a book best known now from the second edition revised by F. H. Lawson (Cambridge 1952). For his full career see R. Y. Jennings, ‘McNair, Arnold Duncan, first Baron McNair (1885–1975)’, *Oxford Dictionary of National Biography* (2004).

³⁵ See note 12.

³⁶ David Thomas Oliver (1863–1947) was a Fellow of Trinity Hall and wrote occasionally on Roman law. He was best known to an earlier generation of students from his *Digest XII.1 and 4–7 and XIII.1–3 De conductionibus* (Cambridge 1937).

³⁷ See note 20.

³⁸ *CUR* 67:40 (19 June 1937), 1180.

³⁹ *CUR* 67:32 (4 May 1937), 959.

⁴⁰ *CUR* 67:40 (19 June 1937), 1164.

and his contemporaries might have consulted. The Roman law books were:⁴¹

- Gneist, *Syntagma* (parallel texts of Gaius and Justinian).
- Buckland, *Text-book of Roman Law, or Manual of Roman Law* [*sic*].
- Buckland, *Main Institutions of Roman Private Law*.
- Jolowicz, *Historical Introduction to the Study of Roman Law*.
- Moyle, *Contract of Sale in Civil Law*.
- Moyle, *Institutes of Justinian*.
- Poste or Muirhead, *Institutes of Gaius*.
- Muirhead, *Historical Introduction to the Private Law of Rome*.
- Clark, *History of Roman Private Law*.
- Cuq, *Manuel des Institutions Juridiques des Romains*.
- Girard, *Manuel de Droit Romain*.
- Cornil, *Droit Romain*.
- Roby, *Roman Private Law*.
- Sohm (Mitteis-Wenger), *Institutionen des Römischen Rechts*.
- Krueger, *Geschichte der Quellen und Litteratur des Römischen Rechts*.
- Roby, *Introduction to the Study of the Digest*.
- Schulz, *Einführung in das Studium der Digesten*.
- Texts for reference:
 - Corpus Iuris Civilis, ed Krueger.
 - Codex Theodosianus, ed Mommsen.
 - Bruns, *Fontes Iuris Romani*.
 - Girard, *Textes de Droit Romain*.
- Lexicon: Heumann-Seckel, *Handlexicon zu den Quellen*.

Editorial decisions and conventions

The intention is to preserve Buckland's presentation so far as possible, in order to give the best sense of the event. Professor Samuel adopted certain editing conventions in his draft, and the version here builds on these, specifically:

⁴¹ In the *CUR* three works are in bold: Gneist, *Syntagma*; Buckland, *Text-Book* and *Manual*.

1. Spelling mistakes are silently corrected, along with small lapses in clarity (usually set right with ‘ands’ and ‘buts’).
2. All editorial additions offered for the sake of clarity are enclosed in square brackets.
3. The headings, subheadings and their numbering are editorial.
4. Paragraph divisions are sometimes altered for the sake of readability.
5. Punctuation is regularised and corrected but conservatively. The letter *j* in quoted Latin is occasionally⁴² retained as perhaps a clue to how Buckland pronounced the words (with discrepancies silently regularised).
6. All other editorial additions are supplied by footnotes. References are strictly contemporary, i.e. to sources the students themselves might have consulted. These works are abbreviated:

Dig.	Justinian’s Digest
Gai. inst.	Gaius’ Institutes.
Iust. cod.	Justinian’s Code.
Iust. inst.	Justinian’s Institutes.
Lenel	Lenel, O. <i>Das Edictum perpetuum</i> , 3rd ed. Leipzig. 1927.
Manual	Buckland, W. W. <i>A Manual of Roman Private Law</i> . Reprinted with corrections. Cambridge. 1928.
Slavery	Buckland, W. W. <i>The Roman Law of Slavery</i> . Cambridge. 1908.
Text-Book	Buckland, W. W. <i>A Text-Book of Roman Law from Augustus to Justinian</i> . 2nd ed. Cambridge. 1932.

⁴² Namely: *lex Julia, adjudicatio, bona fide/strictum iudicium*.

Lectures on the Roman Law of Actions

William Warwick Buckland

I. Introduction

As we understand it, an action is a process by which a dispute as to the legal rights of two persons is submitted to a public official. In an increasing number of civil cases the official is a judge who decides the case himself. Sometimes he has the help of a jury. If the judgment is not obeyed, it is enforced by officers of the court. Except that there was no jury, that was roughly the situation under Justinian. But it is very unlike the formulary system and still more unlike the *legis actio* procedure. There are two marked differences.

First, in the formulary and *legis actio* proceedings there are two distinct parts. One before the magistrate *in iure* where the issue to be tried is formulated – this corresponding with the settlement of pleadings in the English system. The other, the procedure *apud iudicem* where the issue is tried and decided. The judge who tries the issue is not an official; indeed he is not necessarily a lawyer and is advised by a *consilium*. He is rather like a single jurymen, but different in that he has not got a judge behind him to help him with the law, and that the *iudex* was an upper class person. As he was a private citizen, there was no means of enforcing his judgment. The plaintiff had to get authorisation from the magistrate and, to do this, he brings the *actio iudicati*.

Secondly, even this magistrate does not enforce the judgment. He merely authorises the plaintiff to do so, which he does in two ways. This is by the seizure of the person or the property of the defendant. The point of view all through these procedures is different from the English system. In England the state uses its power to enforce the legal procedure. In Rome it is essentially a private dispute and the state only has to see that the case is tried according to custom.

The double procedure goes back as far as one can see. Is it primitive? It is generally held that it is not and that in regal times the king decided disputes. A recent article by Jolowicz suggest that the disputes' [sc. double] procedure did not supervene on procedure in which the king judged but on a procedure where the king or a magistrate referred the matter to an ordeal.¹ It is to be noted that the *iudicis postulatio* which we know existed at the time of the XII Tables implies a double procedure: most probably the division took place between 509 and 450 BC when consuls found themselves overworked by having to adjudicate on everything.

II. *Legis actio* system

To understand the formulary system one must first look at the *legis actio* procedure. There were two stages. In the proceedings *in iure* the ritual character prevails; each party says and does the things prescribed. The ritual is not prescribed by the *lex* (the words given by Gaius² do not appear in the XII Tables) but are words prescribed by the *pontifices*. Where the statute expressly gives an action, the words devised by the *pontifices* follow the *lex* very clearly and exact words must be used.

Gaius tells us that there were five modes of *legis actio*.³ What does *actio* mean? Not quite the same as in our modern litigation. Three of them were [comparable], but *pignoris capio* was a means of putting pressure on a debtor and so was *manus iniectio* originally. As we know it, it [*manus iniectio*] is a means of enforcing a judgment. For this purpose, *legis actio* is any process based on statute for the enforcement of a legal right.

¹ See H. F. Jolowicz, 'Procedure *in iure* and *apud iudicem*. A Suggestion', in *Atti del Congresso Internazionale di diritto romano (Bologna e Roma, XVII-XXVII aprile, MCMXXXIII)* (Pavia: Tipografia Successori Fratelli Fusi, 1935), ii, 57-81. An account of Jolowicz's *relazione* ('Procedimenti in iure e apud iudicem: un'ipotesi'), with discussion, is in *Atti del Congresso Internazionale di diritto romano (Bologna e Roma, XVII-XXVII aprile, MCMXXXIII)* (Pavia: Tipografia Successori Fratelli Fusi, 1934), i, xlvii-xlvix.

² See Gai. inst. 4.16, 17a, 17b, 21.

³ Gai. inst. 4.12.

Sacramentum

Sacramentum was a formal process. It must be used where no other procedure was prescribed and could be used either *in rem* or *in personam*. In the former⁴ there was a formal claim, a prescribed counter-claim, formal words by the Praetor and a formal challenge to a *sacramentum*: 'quando tu iniuria vindicavisti quingentis assibus sacramento te provoco';⁵ the other party replies: 'et ego te'.⁶ Once, no doubt, the *sacramentum* was an oath, but in historic times it was a promise or a deposit of a forfeit to the state if the claim was false. The promise of the amount of the *sacramentum* was made not by a party but by a *praes* who guaranteed the *sacramentum* to the state. There then comes an award of interim possession and security given in return, also by the *praes* (*praedes litis et vindictiarum*).

If the claim was *in personam* there was probably less ritual.⁷ There was a formal claim that something is due followed by a denial and a challenge to a *sacramentum* as before. Then, after the *lex Pinaria*,⁸ there was a thirty-day delay. After this delay, a *iudex* was appointed and on the next day but one he tries the case. His decision is not that one or the other is owner or that the debt is due, but that one of the parties has forfeited his *sacramentum*. Then, apparently in most cases other than for a sum of money, three *arbitri* were appointed to assess the damages: *arbitrium litis aestimandae*.⁹ They report to the court. Such damages would have to be assessed when the person to whom interim possession had been assigned lost and they would consist of the value of the thing plus the value of interim fruits. In real actions all subsequent proceedings would

⁴ Gai. inst. 4.16. Very little is preserved of Gaius' discussion of the *in personam* procedure by *sacramentum* and hence Buckland offers more details on the *in rem* procedure.

⁵ 'Since your claim is unjust I challenge you by a *sacramentum* of five hundred *asses*.'

⁶ 'And I you.'

⁷ Gai. inst. 4.15.

⁸ The date and general import of this statute is unknown.

⁹ On the 'arbitration on the value of the controversy' Buckland is following F. de Zulueta, 'The New Fragments of Gaius. Part III. The *legis actiones*', *Journal of Roman Studies*, 26 (1936), 178.

be against the *praedes* (*praedes litis et vindiciarum*). The situation presupposes judgment against persons to whom interim possession was awarded (Jolowicz¹⁰). *Praedes* were probably relations who gave security in their land. If the proceedings were *in personam* there was the same procedure up to the *sacramentum* stage, but no security was taken for the thing itself.

Iudicis postulatio¹¹

There was always some evidence that the proceedings *iudicis postulatio* applied to divisory actions. This is confirmed, but this has led to further opinion that it was specifically designed for *incerta*. However the new fragments [of Gaius] negative this view. They tell us that it was prescribed by the XII Tables for a stipulation, something about which nothing could be more certain.¹² They tell us also that the XII Tables prescribed it for the *iudicium familiae erciscundae* and the *lex Licinnia* for the *communi dividundo*.¹³ There is no evidence for any other application. Was there an *arbitrium litis aestimandae*? No, because in that proceeding there were three *arbitri* while there was only one in the *iudicis postulatio*.

The fragments tell us of the advantages over *sacramentum*.¹⁴ First, there was no penalty. Secondly, the *arbitri* were appointed at once; there was no thirty days' delay (an advantage not to be found in the fragments). Thirdly, in the *sacramentum* procedure the formal words do not include a statement of the basis of the claim; in the *iudicis postulatio* procedure the *causa* had to be stated.

¹⁰ H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1932), 190.

¹¹ The new Gaius fragments contributed especially to the *legis actio per iudicis postulationem* and *per conductionem*.

¹² Gai. inst. 4.17a.

¹³ Id.

¹⁴ Id.

Condictio

The *condictio* action came later, but is of uncertain date: we are told that it was introduced by the *lex Silia* plus the *lex Calpurnia*.¹⁵ Its characteristic is that notice is given to appear in thirty days to receive a *iudex*.¹⁶ The fragments confirm¹⁷ the opinion that notice is given in court before the Praetor after the ordinary *vocatio in ius*.

Why was it introduced? *Iudicis postulatio* had given a good remedy for *promissio* but not for *dationes* (for example a *mutuum*). These latter would have had to be tried by *sacramentum* which involved a penalty. And so it was probably introduced for *dationes* and it is possible that this was its sole application.

Like *sacramentum*, the *condictio* did not state the *causa*. Gaius says nothing about any promises of one-third of the *res* in dispute. In the later *condictio certae pecuniae* there was a *sponsio et restipulatio tertiae partis*:¹⁸ was this descended from the old *condictio*? Gaius' fragments negative this idea.

Manus iniectio and pignoris capio

See Gaius 4.21–29.¹⁹

III. Formulary system

General remarks

The *legis actiones* were full of ritual words. Sometimes these words were described as ritual dialogues which is a mistake; all the declarations are unilateral. This is true even of *sacramentum* where there is no dialogue as each party is claiming.

¹⁵ Gai. inst. 4.19.

¹⁶ Gai. inst. 4.17b.

¹⁷ See du Zulueta (note 9), 177.

¹⁸ Gai. inst. 4.171.

¹⁹ It appears to be Buckland's own choice to refer students to Gaius on these two *legis actiones*. Buckland returns to the formulary *manus iniectio* below, in discussing execution.

It is a characteristic of Roman law that he who benefits always uses formal words. These ritual words are called *verba certa* and they are uttered orally. In the formulary system there are no more *certa verba*; one chooses the words to state the issue. Also in the formula these words are in writing; they are written *verba concepta*.²⁰

The old system was suited only to times when issues were simple. It could not work in a commercial system. Its rules carry one very far back, and the rule which made a slight error in the words fatal carries one back to the time when words had a magical force. There were two major weaknesses of the *legis actio* system: it was too technical and it was inelastic.²¹ These weaknesses did not result from the procedure per se, but because one had to follow the actual words of the *lex* or of the pontifical interpretation. The surprising thing is that the old system lasted so long. It was not until a century before the end of the Republic that the *lex Aebutia* authorised the use of the formula; and it was not until Augustus that the *lex Julia* [*de iudiciis privatis*] definitely substituted the formula.²² But it is becoming clear that at the time of the *lex Aebutia* the formula was not new; it, or something like it, was in fact in use before this *lex*. It is probable that the formula or something similar was used by the *Praetor peregrinus*. The next step is that probably the *Praetor urbanus* applied it before the *lex Aebutia* in cases not triable by the *legis actio*, that is to say cases involving consensual contracts which evolved in the *ius gentium*. Then came the *lex Aebutia*.

There are three views regarding this law.²³ First, it allowed the use of the formula in any action as an alternative; the *lex Julia* then followed which superseded the *legis actio* in all but a few cases. This is not a probable view. Secondly, the *lex Aebutia* introduced the formula for *condictiones* and made it compulsory, the *lex Julia* making it compulsory in all other cases. Thirdly, the *lex Aebutia* authorised the use of the formula in conjunction with the *legis actio*. There were two exceptions to the general effect of the *lex Julia*. These were

²⁰ Gai. inst. 4.30.

²¹ Gai. inst. 4.11.

²² Gai. inst. 4.30.

²³ See *Text-Book*, 628.

cases tried by the *centumviri*; and in *damnum infectum* situations where the *legis actio* procedure was an alternative to the *cautio damni infecti*.²⁴

Characteristics of the system

There are several characteristics. The first is consent. In theory all jurisdiction is based on consent and there is no action without the active concurrence of the parties. But in practice this is unreal and so the Praetor had methods for compelling the parties. Secondly, whatever the value of the claim, the judge is always directed to condemn for a sum of money. If a certain sum, then it is for this sum. If it is for anything else, the *condemnatio* is in a different form: 'whatever the value of the claim may prove to be'.²⁵ Thirdly, as the procedure could be varied it was possible to state the claim with precision. The Praetor published in his *album* a number of model forms which could be adapted and this meant that the Praetor, by his *imperium*, could himself vary the formula and establish new ones. The result was that he had got control over substantive law. This control was exercised through *actiones in factum*²⁶ and *actiones fictitiae*.²⁷ He also evidently created civil actions, for it was the Praetor who gave actions on consensual contracts and who gave a formula *in ius* in *commodatum*.

Classification

The most important classification of actions is the one between civil and praetorian actions.²⁸

1. *Civil actions*. Civil actions are those in the formula which state a right at civil law and these are subdivided into *actiones in rem* and *actiones in personam*. The former assert that a thing belongs to the plaintiff. In the *legis actio* procedure both parties had to claim, but in

²⁴ Gai. inst. 4.31.

²⁵ Gai. inst. 4.51.

²⁶ Gai. inst. 4.46.

²⁷ Gai. inst. 4.34–38.

²⁸ Gai. inst. 4.45–47.

the formula the defendant only denies the claim. The general name for all actions *in rem* is *vindicatio*, which in itself usually means *vindicatio rei*, that is to say a claim for ownership. A civil action *in personam* asserts a duty which is expressed by the word *oportere* (except in delictual actions).

2. *Praetorian actions*. There were three kinds. First, an *actio in factum* which does not assert any right but alleges certain facts and directs the *iudex*, if he finds these facts, to condemn. These *actiones in factum* themselves are of two kinds. In some (i) the *iudex* is directed to condemn but to condemn *ex bono et aequo*; these words gave him a discretion and thus these actions were practically the same as *actiones ex fide bona*. This meant that equitable exceptions did not have to be practically pleaded. But (ii) in other cases equitable exceptions have to be expressly pleaded. Secondly, in *actiones fictitiae* a right is not alleged but the *iudex* is directed to proceed as if a certain fact was true which would give rise to a right if the fact were true. The consequence is that they use language similar to that used in civil actions. For example, in the *actio Publiciana* the *intentio* is: 'if the thing would be A's if . . .'.²⁹ Again, suppose that an action is brought against the master of a slave appointed as *institor*, the formula would run: 'if the slave would owe if a free man'.³⁰ Thirdly, there are actions with the Rutilian formula where one name appears in the *intentio* and another in the *condemnatio*.³¹ Illustrations of this can be found in the *actio institoria* and also in *bonorum emptio*. This is not really a distinct type of action because it might be confirmed in one of the other actions.

²⁹ Gai. inst. 4.36.

³⁰ See Dig. 14.3.

³¹ Gai. inst. 4.35.

Course of the action

The first step was the *in ius vocatio*: this was an informal notice to appear³² accompanied by an *editio actionis* (statement of the case).³³ The summons may be to come at once or to come at a later date. If the latter, then security had to be given by a *vindex* who was liable for the claim, whether due or not, if the defendant did not turn up. If the defendant went into hiding so that no summons could take place, then the plaintiff could apply for *missio in possessionem* of his goods.

Another method was to dispense with the *in ius vocatio* and to take an informal security for appearance if the defendant did not turn up. In that case the security was called a *vadimonium* and was given by a *sponsor*.

On appearance the plaintiff states his claim and asks for the appropriate formula (*editio actionis* or *postulatio actionis*).³⁴ There would then be a discussion which ultimately would result in the issue of a formula. Often, however, steps would be taken to classify the issue before one got to the formula. There were some actions in which the plaintiff could put certain questions to the defendant (*actiones interrogatoriae*), but these were abolished under Justinian.³⁵ There were at least two situations where such questions might be posed.³⁶ First, in noxal actions. If the defendant did not produce the slave, the plaintiff could ask: 'Have you *potestas* over that slave?' If *potestas* is admitted, the action continues; if it is denied, the plaintiff can ask for a formula under which, if he proves the facts and *potestas*, there will be no right of surrender [of the offending slave]. Or, if the slave is produced, a further question may be added by the plaintiff: 'Is that slave yours?' A false denial involved similar consequences. Secondly, in an action against a man as *heredes*, he may be asked: 'are you the *heredes* and for what slave?' A similar risk arose from refusals or false answers.

³² Gai. inst. 4.183.

³³ Dig. 2.13.

³⁴ Dig. 3.1.

³⁵ See *Manual*, 383, 389.

³⁶ See Gai. 3 ed. prov. Dig. 11.1.5; Ulp. 22 ed. Dig. 11.1.11 pr. – 11.12.

In certain cases limited to claims for *certa*, the plaintiff may offer the defendant an oath as to his liability.³⁷ If he takes it, the action fails; if he refuses it judgment goes against him. However the defendant may offer it back (*relatio iusiurandi*): if the plaintiff swears he wins but if he refuses he loses. Instead of doing one of these three things, the defendant may offer an oath *de calumnia*, that is to say as to the plaintiff's good faith. If he refuses, the action is lost; if he takes it, the defendant is back in his old position and must do one of the three things.

It is only the plaintiff who can initiate this oath-taking machinery. Once initiated, the matter can never go before the *iudex*. If the plaintiff refused the oath offered back, he lost the action; but there has been no *litis contestatio*. However if the plaintiff does sue again he will be met by an *exceptio iusiurandi*. But this *exceptio* does not apply where the action was lost merely because the defendant refused the oath given back.

Apart from the oath, and in any action not involving a penalty, either party can offer the other an oath of *calumnia*. If taken the action went on; if refused by the plaintiff, he lost the action but could sue again without an *exceptio*. If the defendant refused, he was treated as an *indefensus*.

Another possibility is that the defendant may admit the claim (*confessio in iure*).³⁸ If for a certain sum, then the *confessio* was equivalent to judgment. If for an *incertum* it was not possible because the value of the *incertum* could not be calculated. If in a *confessio* of an *incertum* the defendant does not offer security for the claim he is treated as an *indefensus*, but in fact in *actiones in personam* (where the amount was disputed) he is only nominally an *indefensus*. If he was ready to proceed in the action, things proceeded as if there was no *confessio*. In actions *in rem* there was this principle: a *confessio* was treated as a *pronuntiatio* by the *iudex*. There would be no judgment, but the plaintiff could take the *res*. If not takeable, there were interdicts by which he could get the *res* in his control: the interdicts *quem fundum* and *quam hereditatem*. If these interdicts for any reason failed, the defendant was an *indefensus*.

³⁷ For what follows, see Gai. inst. 4.172–179; Dig. 12.2.

³⁸ For what follows, see *Manual*, 381–82, 385–86.

What is an *indefensus*? He is one who has not co-operated by taking proper steps for his defence. An *indefensus* in a claim for *certa pecunia* was *pro iudicato*. But apart from this an *indefensus* was at once liable to *missio in possessionem* of all his property resulting in sale and bankruptcy; however this *missio* would be stopped if the defendant co-operated.

Once all this is over, the formula is settled. It may take days and there may be adjournments. The defendant must give security for his appearance on a fixed day, this *vadimonium*³⁹ being given by *sponsores*; the amount was uncertain, but it was large. If the defendant refuses to give such security he becomes an *indefensus*.

The discussion was conducted between the parties and their advisors under the general supervision of the Praetor. It was not his job to see the parties stated their issues correctly, but he had to see that the formula issued is a legally possible one. Of course, he could be, and usually was, much more helpful.

Parts of the formula

Gaius says that there are four parts of the formula: these are *demonstratio*, *intentio*, *adjudicatio* and *condemnatio*.⁴⁰ Why does Gaius pick out these four? *Adjudicatio* and *demonstratio* only occur sometimes.⁴¹ The answer seems to be that any formula which needed any one of those parts would have no meaning at all unless they were put in. Any of the other parts might be left out and not render the formula an impossible one. For example, a formula without an *intentio* would be an impossible one. The same applies where a *demonstratio* is necessary and the *intentio* refers back to it. A divisory formula would be impossible without an *adjudicatio*,⁴² and a claim has no sense unless there is an order to condemn or absolve [*condemnatio*].

1. *Nominatio iudicis*. It is disputed whether this was settled before or after *litis contestatio*. The difference is

³⁹ Gai. inst. 4.184.

⁴⁰ Gai. inst. 4.39.

⁴¹ Gai. inst. 4.44.

⁴² Gai. inst. 4.42.

practically unimportant; if settled before, the name of the judge was part of the procedural contract. If added afterwards, it was no part of the contract, so that if the judge died or was removed another judge could have been appointed without a fresh *litis contestatio*. It is usually held that the appointment was in the third person: *Titius iudex esto*. However Gaius sometimes [speaks] in the second person and sometimes in the third person.

2. *Praescriptio*.⁴³

Pro actore. The purpose is to limit the barring effect of *litis contestatio*. A man takes a stipulation for a number of annual payments and one is not paid: what is the remedy? An action on the stipulation; but, having brought it, he cannot bring another and so one limits the scope of the action: *ea res agatur cuius rei dies fuit*.⁴⁴ Gaius gives another example. There is a sale of a *res Mancipi* which the vendor hands over but refuses to mancipate; the buyer brings an *actio ex empto*. The vendor then discovers some other breach of contract. There will be no further action unless he has prefixed his last action with 'let this be limited to mancipation'.⁴⁵ These continued in force throughout the formulary system.

Pro reo. A different theory or a different history? If one examines those actually recorded, then they serve the same purpose as *exceptiones*. This, then, is an easier form of *exceptio*; they admit the primary claim but allege facts which counteract it. The *praescriptio praeiudicii* is a claim by the defendant that even admitting that the plaintiff's claim is well founded, it should not be allowed in that it will prejudice the trial of a more important action. For example, A vindicates a *res* from B. Suppose at the time they were both claiming to be the *heres* of X. A trial for that *vindicatio* for that chattel would

⁴³ Gai. inst. 4.130–137.

⁴⁴ 'only the portion due shall be litigated.' Gai. inst. 4.131.

⁴⁵ Gai. inst. 4.131a.

prejudice the wider issue outstanding between these two parties, namely the title to the *hereditas*. At the time of Gaius the same defence is raised by an *exceptio praeiudicii*; and all the others [*praescriptiones*]⁴⁶ were replaced by *exceptiones* except the *praescriptio longi temporis* which is not a *praescriptio* in the formulary sense at all. The *praescriptio pro reo* raises a very difficult question. On principle a successful *exceptio* involves the loss of the action and consequent loss of the right; but if the *praescriptio pro reo* acted like the *praescriptio pro actore* only to limit the issue, then a further action was not barred. Did it operate like an *exceptio* or a *pro actore*? The answer is unknown, but probably, on the whole, it acted like an *exceptio*. Gaius treats the change to *exceptio* purely as a matter of form, and so if there had been a tremendous difference he would have mentioned it.

3. *Demonstratio*.⁴⁷ This is a statement of facts usually beginning with 'Quod . . .'. It is not a statement of facts giving rise to the action, or rather not necessarily so. It was simply a statement of the legal relations out of which the action arose. It must not be described as a statement of admitted facts, for the facts may later be denied. It is a statement of the alleged legal relation. In one respect the *demonstratio* differed from other parts of the formula: it could be amended, even after *litis contestatio*. It was not a vital part. In what actions did it occur?

– It never occurred in actions *in rem*, when the *intentio* stated the nature of the right. The *causa* was not mentioned. This meant that one could prove any title on which one claimed; but a further action could not be brought on any title which one had at the time of the [first] action. Thus, if having claimed as heir one lost the action, one could not sue the other party again in some other title.

⁴⁶ Gai. inst. 4.133.

⁴⁷ Gai. inst. 4.40.

- It did not occur in the *condictio certae pecuniae* where the *intentio* alleged a civil law debt and no *causa* was stated.
- Its main field of application was in all *bonae fidei iudicia* and it also appeared in divisory actions. Outside of that field there is some uncertainty. It occurred in an action for an *incerta* on a stipulation, but it did not occur in an action *ex testamento* on a legacy. We do not know if it occurred in a *condictio incerti*.
- It does not seem to occur in *furtum nec manifestum* or in other delictual actions. It is not in, for example, an action under the *lex Aquilia*. It was not needed in praetorian actions *in factum*, where the *intentio* sets out the facts and hence does not appear in the *actio furti manifesti*.
- It did occur in the *actio iniuriarum*, but that was not an ordinary *actio in factum*. It was *ex bono et aequo*.
- *Praetorian actiones fictitiae* are all modelled on civil actions and therefore they had a *demonstratio* whenever the civil actions had it.

Intentio

The *intentio* [was] a statement of the issue between the parties. *Prima facie* there could be no action without an *intentio*, but there are cases in which the *intentio* is actually merged with some other parts of the formula.⁴⁸ In divisory actions it is merged with the *adjudicatio: quantum adiudicari oportet iudex Titio adiudicato*.⁴⁹ Gaius calls that clause the *adjudicatio*. It is the *intentio* as well. Then in *actiones in factum ex bono et aequo* the *intentio* is merged in the *condemnatio*, for example in the *actio iniuriarum*, where there was a *demonstratio* followed by *quantum bonum aequum videbitur condemnna*. So, some writers have held that in those actions there is no *intentio*; others have

⁴⁸ For what follows, see *Text-Book*, 652.

⁴⁹ 'Let the judge assign to Titius as much as ought to be assigned.' Gai. inst. 4.42.

held that a statement of facts in actions *in factum* is not an *intentio*. That seems entirely a question of purposes: to all intents and purposes there has been an *intentio*.

There were some actions that only had a *nominatio iudicis* plus an *intentio*: *actiones praeiudiciales*.⁵⁰ In some cases there was a preliminary question of status to be considered before the main question could be decided. For example, a *libertus* is sued for not doing his services and he raises a defence that he is not a *libertus*: '*Titius iudex esto*. Settle the question whether the man is the *libertus* of the plaintiff.' This is preliminary to the action for failure to perform services. Both formulae would be issued together, but the *iudex* would settle the prejudicial one first. A number of these formulae are recorded.

[*Actiones in rem*; *actiones in personam*.]

1. *Actiones in rem*. The *vindicatio* is the most usual *actio in rem*. The trade marks are (i) the defendant's name is not stated, the *intentio* merely stating the right; and (ii) the *intentio* does not mention the *causa*: *Si paret fundum Cornelianum de quo agitur Auli*⁵¹ *esse ex iure Quiritium*.⁵² Or, if the action was for a usufruct: *Si paret ius Aulo esse per fundum Cornelianum uti frui*. Or if it was a claim for a servitude: *Si paret ius Aulo esse per fundum Cornelianum ire agere*.⁵³ These last two actions are called *actiones confessoriae* by Justinian in the sense that they are assertive.⁵⁴

Besides actions asserting a servitude, there was an action denying the existence of a servitude.⁵⁵ This was the *actio negatoria*, a claim that ownership is free from a servitude: *Si paret Numerio ius non esse in fundo*

⁵⁰ Gai. inst. 4.44.

⁵¹ sc. *Agerii*. Buckland typically abbreviates the stock party names (Aulus Agerius, Numerius Negidius) to 'Aulus' and 'Numerius' and his practice is retained here.

⁵² 'If it appears that the Cornelian estate, the subject of this suit, belongs to the plaintiff by ancient right.' See *Manual*, 419.

⁵³ Respectively: 'If it appears that the plaintiff has a right to the usufruct of the Cornelian estate'; 'If it appears that the plaintiff has the rights of *iter* and *actus* over the Cornelian estate.'

⁵⁴ Ulp. 17 ed. Dig. 8.5.2 pr.

⁵⁵ Id.

Cornelianum ire agere invito Aulo.⁵⁶ The plaintiff must prove ownership and apparently the defendant must prove the existence of a servitude. There is also an *actio prohibitoria*, but it is not known what this was for.⁵⁷

Then there was the *hereditatis petitio*: *Si paret hereditatem Lucii quo de agitur Auli esse ex iure Quiritium*.⁵⁸ That action did not lie against everybody but only against persons who claimed to be heirs or who set up no title at all. Accordingly the words 'whatever N[umerius] holds as heir or without title' were added. They really belong to the *condemnatio*.

Actions for the recovery of provincial land – which could not assert a civil ownership – usually held that the formula ran: *Si paret fundum Cornelianum de quo agitur Aulo possidere habere, frui, licere*.⁵⁹

[With regard to] praetorian fictitious actions *in rem*, there was the *action Publiciana*:⁶⁰ 'If *fundus Cornelianus* which A bought and of which he received delivery would have been his if he held it for two years'. And a claim by a *bonorum possessor*:⁶¹ 'If *res* would have belonged to Aulus if he had been *heres* of Titius'. On the face of it anyone could have recovered, but it was usually held that the formula was only issued *causa cognita*. The Praetor would have to be satisfied that the claimant had got a grant of *bonorum possessio*. All these are *formulae petitoriae*. But in *legis actio* time [there was] the alternative *actio per sponsionem*⁶² which was a dodge to avoid the risk of forfeiture of *sacramentum*. One party makes to the other a promise of small sums if the land in question is not his; the issue cannot be

⁵⁶ 'If it appears that the defendant does not have the rights to *iter* and *actus* over the Cornelian estate when the plaintiff is unwilling.'

⁵⁷ 'If it appears that the plaintiff is the heir of Lucius by ancient right.' See *Manual*, 161.

⁵⁸ See *id.* 420.

⁵⁹ 'If it appears that the plaintiff has the incidents of ownership over the Cornelian estate, the subject of this action.' See *Gai. inst.* 2.7; *Manual*, 113–114.

⁶⁰ *Gai. inst.* 4.36.

⁶¹ *Gai. inst.* 4.34–35.

⁶² For what follows, see *Manual*, 378.

decided without deciding the issue of ownership. The action [would be] brought on a *sponsio* and the trial would be *de facto* to decide the question of ownership. Judgment would only be for a small sum and this of itself was of no value. But before the action was brought, the party in possession would give *praedes litis et vindictiarum*.⁶³ This was carried forward into the formulary system. After *sponsio* a *condictio* would be brought for the sum and the security taken for the value of the land. The security is no longer by a *praedes* but by a *stipulatio: satisdatio pro praede litis et vindictiarum*. The promise of a small sum purely *praeiudicialis* [was] in order to raise the issue as to ownership of the *res* and was not actually exacted. One disadvantage of this method of procedure, as against the *formula petitoria*, was that the *condictio* could not contain an *arbitrium* clause. In the second century the *formula petitoria* or *arbitrium* clause was superseded by the procedure *per sponsionem*.

2. *Actiones in personam*. Actions *in personam* must be dealt with within two classes. The main division is between *stricti iuris* and *bona fide*.⁶⁴

- i. *Stricti iuris*.⁶⁵ The most important of the *actiones stricti iuris* are the *condictiones* which are divided as *condictio certae pecuniae, certae rei* (including fungibles) and *incertae*.⁶⁶ This classifies *condictiones* according to what is sought to be recovered. Another classification deals in them according to the basis of the claim: *indebiti, ob rem dati* etc. The latter classification is of no significance as regards the formulation of the claim. In the formulation there was no *demonstratio* and the *intentio* said nothing about the basis of the claim or *causa*. The trademark of the *condictio* for a certain sum is *dare oportere* and the *intentio* will not have *ex bona fide: Si paret Numerius Aulo 10 milia aut servum*

⁶³ Gai. inst. 4.94.

⁶⁴ Inst. inst. 4.6.28–30.

⁶⁵ *Manual*, 364–65.

⁶⁶ *Text-Book*, 682–684.

Stichum aut decem modios frumenti dare oportere.⁶⁷ A formula is not known for *condictio incertae*. This name is not classical but the action did exist and was a *condictio*. As it was a *condictio*, on principle it should have no *demonstratio* and should not state a *causa*. As it was for *incertum* it should begin: *Quidquid*. It could not have run: *Quidquid paret Numerium Aulo dare facere oportere* – there would have been no limit to it at all. As the obligation might be to render or serve it was expressed as: *dare facere oportere*. Probably *facere* sometimes stood alone. The dominant view is that the formula of the *condictio incertae* began *Si paret* and specified a *causa* (contrary to principle).

Other *stricti iuris* actions were: (a) Action on a stipulation for an *incertum* – an *actio de stipulatu*. It had a *demonstratio*, then an *intentio*: *Quod Aulus Numerio incertum stipulatus est cuius rei dies fuit, quidquid ob eam rem Numerium Aulo dare facere oportet*.⁶⁸ (b) An *actio ex testamento* for a legacy *per damnationem*. It had no *demonstratio*, but stated a *causa* in the *intentio*. If the legacy was *certum* it ran: *Si paret Numerium ex testamento Titii Aulo 10 milia dare oportere*.⁶⁹ If for an *incertum*: *Quidquid paret Numerium Aulo ex testamento Titii dare facere oportere*.⁷⁰

ii. *Bona fide iudicia*.⁷¹ What were they? The list extends from time to time.⁷² Gaius says they included all consensual contracts [and in addition] *commodatum*, *depositum*, *fiducia*, *negotiorum gestio* and *tutela*.⁷³

⁶⁷ 'If it appears that the defendant ought to give to the plaintiff ten thousand, or the slave Stichus, or ten measures of corn.'

⁶⁸ Gai. inst. 4.136. 'Whereas the plaintiff has stipulated for an *incertum*, now due, from the defendant, whatever on that account the defendant ought to give to or do for the plaintiff . . .'

⁶⁹ 'If it appears that the defendant, on the basis of the will of Titius, ought to give ten thousand to the plaintiff . . .'

⁷⁰ 'Whatever it appears that the defendant, on the basis of the will of Titius, ought to give to or do for the plaintiff . . .'

⁷¹ Gai. inst. 4.61–63; *Manual*, 362–63.

⁷² See *Manual*, 365.

⁷³ Gai. inst. 4.62.

Possibly *rei uxoriae* as well,⁷⁴ which was originally an *actio in factum* of the *ex bono et aequo* class. Some say the text [that includes the *rei uxoriae*] is still true in classical times; and certainly *bona fide* in later law. Justinian abolished it and substituted an *actio de dote*⁷⁵ based on a stipulation actual or implied.⁷⁶ He goes on to say that the *actio* is *bona fide*, which is very odd. The *actio pignoratitia* was *in factum* in the time of Gaius, and later it became *bona fide*.⁷⁷ Then there is the *actio praescriptis verbis*, which is *bona fide* but as a general action is post-classical. It was probably descended from the *actio de aestimato* which was *bona fide*. Lastly there are the divisory actions described by Justinian as *bona fide*,⁷⁸ but it is generally held that in classical times they were not.

iii. Distinction. What was the importance of the distinction between *stricti iuris* and *bona fide* actions? First, the effect of *pacta adiecta* was different. Secondly, the rules of *compensation* were different. In all *bona fide iudicia* the *iudex* might take into account any set-off arising from the same transaction. The point could not have arisen in *stricti iuris* actions which were usually unilateral and that therefore, if there was to be a set-off, it must arise from some other transaction, and classical law did not admit joining two issues. But in two cases it was allowed: (a) An *argentarius* suing his debtor must allow for any counter-claim which the debtor has against him but only if it was of the same kind.⁷⁹ He must allow for it in the *intentio* and if he does not do so, he loses his action on the ground of *plus petitio*. There is no hardship in this as bankers kept their clients' accounts and knew the state of them. (b) The *bonorum emptor*, if he sues a debtor to the estate must allow any counter-claim which the debtor has against the estate. But he cannot know

⁷⁴ Id.

⁷⁵ MS: *actio de doli*.

⁷⁶ Iust. inst. 4.6.29.

⁷⁷ See *Text-Book*, 679 n.2.

⁷⁸ Iust. inst. 4.6.28.

⁷⁹ Gai. inst. 4.66.

what claims there may be, so he does not make allowance in the *intentio* but in the *condemnatio* by *deductio* [with] words limiting the claim to whatever is due on balance. And so he runs no risk of *plus petitio*. Marcus Aurelius laid down a new rule which we learn from Justinian.⁸⁰ In *stricti iuris* actions *compensatio* may be enforced by an *exceptio doli*, [but] probably only to debts of the same kind. There is no question of *plus petitio* as set-off is enforced by means of *exceptio*. What is the effect of *exceptio*? On principle of the formula, it ought to be loss of the action. But it is suggested that it merely causes a reduction in the *condemnatio*. There is no real evidence for this. However this is not as hard as it seems as *exceptio* is raised *in iure*, so one could take precautions.

Justinian provided that in all actions except deposit and actions for the recovery of land all set-offs must be allowed provided they were liquid. He adds the point that those set-offs *ipso iure minuunt* ['shall automatically reduce'] the claim.⁸¹ It is difficult to know how that could be applied in real actions since the judgment is not necessarily for money, a point taken in Buckland at page 706.⁸² Note that Justinian's rule of set-offs applied to claims of different kinds. It is suggested that it might have been enforced by *retentio*, as was the case in chargeable expenses. There is a word to be added about this: certain claims were only enforceable by retention and not by action. Thus a defendant to a real action could resist a *vindicatio* unless reimbursed for certain expenses which he could not recover by action. The same position arose when a creditor sought to enforce a pledge against a *bona fide* holder and in the case of *commo-*

⁸⁰ Iust. inst. 4.6.30.

⁸¹ The MS here reads 'ipso iure minuunt' with the verb in the present, yet Justinian (Iust. inst. 4.6.30) has the verb in the subjunctive and the *constitutio* on which the Institutes text is based (Iust. Cod. 4.31.14 (531)) does not use the verb at all. Buckland himself (*Text-Book*, 705, 706) misquotes 'minuunt', so it appears either that Buckland misspoke or that Campbell has 'corrected' to *minuunt* based on the *Text-Book*.

⁸² See *Text-Book*, 706 ('Thus the effect is reduction, but, for the rest, his rule is obscure.').

datum and deposit until an *actio contraria* was allowed (see Buckland, *Text-Book*, 410, 411). The practice seems to have dated from the time of Hadrian, the sanction against a person seeking to set up his right without paying compensation being the defeat of his claim by the *exceptio doli*. What does *ipso iure* mean?⁸³ It might mean only that it could be raised without express pleading, but it means more than that. If the counterclaim was proved the two debts were regarded as cancelling each other out from the moment that they co-existed. If the claim sued on was one bearing interest, no interest was due from the moment the counterclaim had arisen. This does not mean that the counterclaim came as a matter of course; the defendant need not raise it if he did not want to, for he could recover it by independent action. Furthermore, if he does raise it and the judge rejects it, he cannot sue on it independently. But if the *iudex* ignores it he can sue. Note one case where *compensatio* is *ipso iure*, that is in an action for the recovery of a *dos*. In the *actio de dote (rei uxoriae)* for recovery of a *dos* [we are told that] *impensae necessariae ipso iure dotem minuunt*⁸⁴ and there was no other way in which expenses could be claimed.

In *bona fide iudicia* interest and fruits were due from *mora*. In other actions fruits were due from *litis contestatio* and interest was not due at all except by agreement. There are some exceptions, for example in legacies the interest was due from *mora* (even although the *actio ex testamento* was *stricti iuris*). Also, there were specific rules as to fruits in *hereditatis petitio*.⁸⁵

The maxim *omnia iudicia absolutoria sunt* was strictly appealing.⁸⁶ The *iudex* must decide on the facts at *litis contestatio*. Suppose after the claim the defendant

⁸³ See *Text-Book*, 707.

⁸⁴ See Paul. 6 Plaut. Dig. 23.3.56.3: *Quod dicitur necessarias impensas ipso iure dotem minuere*

⁸⁵ *Text-Book*, 681.

⁸⁶ Gai. inst. 4.114: *et hoc est quod vulgo dicitur Sabino et Cassio placere omnia iudicia absolutoria esse* ('and this is popularly expressed by Sabinus and Cassius as "all actions are absolvable").

satisfies the claim? In *bona fide judicia* there was no difficulty: the *iudex* must absolve. In *stricta judicia* Proculians thought what happened after *litis contestatio* did not matter, but Sabinians thought that it must be taken into account and this latter view prevailed.⁸⁷

The classification between *stricti iuris* and *bona fide* actions is not exhaustive. The distinction applies only to actions *in ius* and *in personam* or contracts and quasi-contracts. It does not cover real actions, delictual actions and actions *in factum*.

Intentio in *bona fide* actions. (a) It is always preceded by *demonstratio* to which it referred. (b) It was always for an *incertum*. (c) The obligation was always expressed as *dare facere oportere*. (d) It always contained the words *ex bona fide*; for example: *Quidquid paret Numerium Aulo ob eam rem ex fide bona dare facere oportere*.⁸⁸

The effect of the words *ex bona fide*. It allowed the *iudex* to take certain *exceptiones* into account without the necessity of express pleading. [However this] does not apply to all *exceptiones*. [The] only certain ones are *exceptiones doli, metus* and *pacti*. Also, the words *ex bona fide* account for rules about fruits and interest. *Bona fide* here means not mere abstention of *dolus*, but behaving like a gentleman.

iv. Other actions. Having considered civil actions *in personam* under the heads of *stricti iuris* and *bona fide*, some other civil actions *in personam* remain.

– Delictual actions. *Furtum manifestum* was *in factum*, but *nec manifestum* was *in ius*. It had a sort of *demonstratio* of facts which was run into the *intentio*. Obligation was stated as *damnum decidere*. Lenel states it: *Si paret Aulo a Numerio opeve consilio Numerii furtum factum esse paterae aureae quam ob rem Numerium pro*

⁸⁷ *Text-Book*, 679–80.

⁸⁸ Gai. inst. 4.47. 'Whatever it appears the defendant ought to give to or do for the plaintiff in that matter according to the standards of good faith.'

fure damnum decidere oportet.⁸⁹ The Aquilian action was on the same lines, but there was this difference: *obligatio* was *dare* not *damnum decidere*. Lenel suggests: *Si paret Numerium servum Auli injuria occidissee quantum pecuniam ob eam rem Numerium Aulo dare oportet*.⁹⁰ Some of these delictual actions were complicated by the fact that they might also be noxal. The statement of fact would allege Aulus was given the slave of the defendant and the obligation would be expressed as alternative – either to pay or surrender: *quam ob rem Numerium pro fure damnum decidere aut servum Stichum ad noxam dedere oportet*.⁹¹ Then there was the *actio de pauperie*, which was on the same lines as *furtum*. Obligation expressed as *aut noxiam sarcire aut ad noxam dedere oportet*.⁹²

– Divisory actions. Divisory actions in classical times and later had dual functions. They claimed a division of property and a number of compensatory payments. The formula is nowhere recorded. On one view, the whole thing, division and payments, was run together in one long *intentio* followed by the words *quantum adiudicari oportet iudex adiudicato* followed by condemnations for various payments.⁹³ On another view, the formula was in two parts; first the claim for division and then the *intentiones* and the *condemnationes* for various payments.

⁸⁹ ‘If it appears that there was a theft of a golden cup against the plaintiff by the defendant or with the defendant’s assistance or advice, on account of which the defendant ought to be condemned as a thief’ See Lenel, 324–28.

⁹⁰ ‘If it appears that the defendant has unjustly killed the plaintiff’s slave, whatever sum on that matter the defendant should give to the plaintiff’ See Lenel, 198–202.

⁹¹ ‘on which account the defendant either ought to be condemned as a thief or hand over the slave Stichus noxally’.

⁹² ‘ought to make good the damage or hand over noxally’.

⁹³ See *Text-Book*, 659; Lenel, 206–12.

v. Praetorian actions.⁹⁴

– In an action on the Rutilian formula, nothing need be said as the *intentio* is normal.

– In fictitious actions, the formula is in the usual form plus words raising the fiction. This involves a further modification and *oportere*.

– In actions *in factum* normally the *intentio* is a statement of most facts. Many say that it is not the *intentio* at all on the ground that Gaius defines the *intentio* as that part of the formula in which the plaintiff states his claim. A statement of facts is not a claim. They say that in Gaius 4.60⁹⁵ *nulla talis intentionis* means *nulla intentio*. But in G.4.60 he definitely refers to the *intentio* of an action *in factum*. At best, this is only a matter of words. Actions *in factum* are of two kinds:

a. Ordinary type. These ordinary type actions are the most common. The formula is perfectly simple: the *intentio* says *Si paret* such and such are the facts, condemn, if not, absolve.

b. Actions *ex bono et aequo*. Examples of *actiones ex bono et aequo* are *rei uxoriae* and *iniuriarum*. The *intentio* is the same as in other cases, but *condemnatio* clause contains words *quantum bonum aequum videbitur*.

In [a.] any defence not amounting to a denial had to be raised by an *exceptio* and so they resembled *stricti iuris* actions. In [b.] the *iudex* has more or less the same powers as in *bona fide judicia* so that certain equitable defences could be raised without being pleaded. They are like *bona fide* actions. They are so alike that if they are in contract or quasi-contract they might easily pass for one another. This suffered in the *rei uxoriae* which started life as an *actio in factum ex bono et aequo* but

⁹⁴ See *Manual*, 365–66.

⁹⁵ Buckland means 4.46. It is not likely to be a slip of the pen, because 4.60 also deals with *actiones in factum*.

later passed into the *bona fide* class. The same thing happened to the *actio fiduciae*.

Exceptio⁹⁶

The *exceptio* is not one of Gaius' four parts of the formula and the formula is not affected by its omission. *Exceptiones* did not come into the formula; originally these defences were raised by *praescriptio pro reo*.⁹⁷ Owing to its later introduction, it is worded in a very clumsy manner: 'if it appears . . . *oportere*, unless there is *dolus*, condemn, if it does not appear, absolve.' In practice it was taken as a direction to absolve in the event of facts alleged being proved – a condition of condemnation. It follows that if the *exceptio* is proved there can be no condemnation; once the *exceptio* is proved the action is lost. Some find it difficult to believe this owing to the rules about *compensatio* and say that the effect of a ruling of Marcus Aurelius was to reduce the *condemnatio*.⁹⁸ [This view is] entirely contrary to principle. Gaius expressly says that the *exceptio* completely excludes the plaintiff.⁹⁹ In later law the *exceptio doli* often merely reduced the *condemnatio*. This was quite logical as by then there was no procedural contract and no reference by a magistrate to a *iudex*. It is a praetorian device, but the defence it expresses is not necessarily praetorian – for example *lex Plaetoria*, *lex Cincia*, *senatusconsultum Macedonianum* and *beneficium divisionis*.¹⁰⁰ So far as *leges* are concerned, the need for an *exceptio* is due to the fact that a *lex* forbade the act but did not say it was void. As to *senatusconsulta*, they did not have force of law at this time. They arose in the last part of the Empire when the Senate had not yet assumed power to alter the civil law; it merely gave orders to the Praetor. It is not obvious why *beneficium divisionis* (introduced by Hadrian) was treated thus.¹⁰¹ But having said all this, it is still true that praetorian *exceptiones* are much more important.

⁹⁶ See Gai. inst. 4.115–129; *Manual*, 395–97.

⁹⁷ See above note 43 and accompanying text.

⁹⁸ Inst. inst. 4.6.30.

⁹⁹ See Gai. inst. 4.119.

¹⁰⁰ *Manual*, 395.

¹⁰¹ Gai. inst. 3.121.

An *exceptio* does not deny facts; it alleges other issues. Accordingly, attention of the *iudex* must be directly called to it, except in the case of certain equitable exceptions in *bona fide iudicia* and in actions *in factum ex bono et aequo*. These are, however, exceptional. Main *exceptiones* set out in *edicto propositae*.¹⁰² But there were others which were said to be given *causa cognita*.¹⁰³ These latter are nearly all described as *exceptiones in factum* because they allege facts. The best known case is an action by a patron; [the defendant] was not allowed to raise an *exceptio doli* against him, but the Praetor might, after enquiring, allow one to allege facts amounting to *dolus*.¹⁰⁴ The test of a so-called *exceptio in factum* is not whether it alleges facts (as opposed to rights) as that was what most did, but whether it was given *causa cognita* but had no special name. An *exceptio* given *causa cognita* which had a special name (and also incidentally expressed a right) was the *exceptio iusti dominii*. *Dominus* sued by a *bona fide* possessor in the *actio Publiciana* has this *exceptio* 'unless it appears that N[umerius] is *dominus*.'¹⁰⁵

Exceptiones are either *peremptoriae* and *perpetuae* or *dilatoriae* and *temporariae*.¹⁰⁶ The first class could be used at whatever time the action was brought. The second class would be effective only for a limited time, for example *exceptio* based on an agreement for three years.¹⁰⁷ Gaius puts on the same level cases where one challenges the quality of the other party to act – for example a *cognitor*.¹⁰⁸ This is only dilatory. The names are rather misleading because if a dilatory *exceptio* is inserted the case goes on and if the *exceptio* is proved the action is lost. Exactly the same effect as peremptory *exceptio*. They are called dilatory because the practical effect is that a man against whom it is sought to introduce such an *exceptio* will delay his suit until the time within which the *exceptio* is

¹⁰² MS: *Edicto Praeproritae*. Cf. *Manual*, 397.

¹⁰³ Gai. inst. 4.118.

¹⁰⁴ *Manual*, 397.

¹⁰⁵ Pap. 10 resp. Dig. 17.1.57.

¹⁰⁶ Gai. inst. 4.120–125

¹⁰⁷ Gai. inst. 4.122.

¹⁰⁸ Gai. inst. 4.124.

effective has passed.¹⁰⁹ All this is true of classical law only. Under Justinian *litis contestatio* no longer barred revival of the action. Thus some exceptions are said to be *rei cohaerentes* and some *personae cohaerentes*.¹¹⁰ The only one really belonging to the latter group is the *exceptio pacti conventi*,¹¹¹ an agreement not to sue could be expressed in many forms. It might be agreed that A will not sue B, or that B will not be sued, or that no action will be brought.

Exceptio pacti may be either *in rem* or *in personam* or *in rem* on one side and *in personam* on the other.¹¹² If it were *in personam*, it affected only the actual person for or against whom it was made. If *in rem*, it could be used for or against other persons if its refusal would make the pact useless. One exception is *metus*: this is available not only against actual threateners but also against innocent acquirers from them. *Exceptio doli* could not be brought against a plaintiff in respect of *dolus* of one from whom he derived title, at any rate unless he held by gift. We are told that in *exceptiones* the defendant is in *loco actoris*, that is to say, the burden of proof is on him.¹¹³ An apparent exception was the *exceptio non numeratae pecuniae*. This was not really part of the formulary system,¹¹⁴ it came in as the system was decaying. The plaintiff might have some counter-reply called a *replicatio*. Thus the *exceptio pacti* could be met by an *exceptio doli*. It could be that there was no reply to *exceptio* or *replicatio doli*, only disproof.¹¹⁵

1. *Exceptio doli*. If in an action the defendant can prove that the transaction was vitiated by fraud, he must be absolved if fraud is pleaded (except in *bona fide iudicia*). The primary field of this *exceptio* is fraud in the making of the transaction, but fraud may occur in carrying out

¹⁰⁹ Gai. inst. 4.123.

¹¹⁰ *Manual*, 397.

¹¹¹ Gai inst. 4.116b.

¹¹² *Manual*, 346–47. The thread in this section, not wholly clear from Buckland's exposition, is that some *exceptiones* are effective against persons not immediately involved in the act which prompted the *exceptio*.

¹¹³ *Textbook*, 655.

¹¹⁴ *Manual*, 396.

¹¹⁵ *Id.*

the transaction. The wording was: *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*.¹¹⁶ That opens the field to a much wider application of the *exceptio doli* and includes *dolus* since the contract was made, for example if one shows that a claim is unfounded it is *dolus* to persist in it. If the plaintiff does persist and the defence is good, no *exceptio* will be needed if the defence amounts to a denial of the *intentio*. But if it was one which had to be pleaded and the defendant knew that the plaintiff knew of the defence then, instead of bringing the *exceptio* raising the defence, one could bring the *exceptio doli*. On this line of thought Marcus Aurelius allowed an *exceptio doli* against a plaintiff who did not allow for a set-off.¹¹⁷ Another case is where a *bona fide* possessor who has incurred expense is sued. This is sometimes called an *exceptio doli generalis*, connoting a defence on equitable grounds, but where there is no element of fraud. This extended use of the *exceptio doli* appears only in late classical law.

2. *Exceptio rei iudicatae vel in iudicium deductae*.¹¹⁸ Every case which is *iudicialis* must *ex hypothesi* have been brought *in iudicium*; accordingly there is no obvious reason for the *exceptio rei iudicatae* as *litis contestatio* provided a bar. Nevertheless that part was always expressed and put first and this led people to imagine whether there were cases where *litis contestatio* did not destroy the claim. And it is suggested that this may have been true of all *iudicia imperio continentia* (which ceased when the praetor ceased to serve). That would be a very large exception. It may have been so, but, if so, it had gone by the time of Gaius. Again it is suggested that the *exceptio rei iudicatae* was used where substantially the same claim was raised in another action, for example bringing the *condictio furtiva* after the *rei vindicatio*. There is no evidence for this. Why is the *rei*

¹¹⁶ 'if in that matter nothing by the plaintiff was or is being done dolously.' See Gai. inst. 4.119.

¹¹⁷ Inst. inst. 4.6.30. See also notes 80–81, 98 above.

¹¹⁸ *Manual*, 399–400.

iudicatae part put first? *Litis contestatio* is a decisive moment. The reason is that in most cases there will in fact have been a judgment. Then: is it one exception or two? In the edict they are stated together as one *exceptio*; it does not follow that both would have been brought. It is most probable that a party only stated that part on which he proposed to rely, more usually the first part. In the time of Justinian the destructive effect of *litis contestatio* had gone and so the *iudicium deductae* part goes and Justinian calls it simply *exceptio rei iudicatae*.¹¹⁹

3. *Exceptio rei residuae* and *exceptio litis dividuae*. The *exceptio litis dividuae* is simple. If having a claim against B, A sues for only a part, he cannot sue for the rest in the same magistracy.¹²⁰ This was, apparently, in order to prevent the plaintiff annoying the defendant. The *exceptio rei residuae* is more difficult. Gaius says that if one has *plures lites* against the same person and proceeds with one in order to go before a different *iudex* and delays the other, if he proceeds with the second in the same magistracy, he will be met with the *exceptio rei residuae*.¹²¹ But it seems absurd that a man with several independent claims should be compelled to bring all at once. The explanation is that as his is a dispute which is already before the magistrate, one must proceed with them together. There is no trace of either of the exceptions under Justinian.

Condemnatio¹²²

There might be a simple *condemnatio*. Thus if a claim is for a certain sum, condemnation will be for that sum. This is true whether it is for a *condictio* or an *actio ex testamento*. If it was a *stricti iuris* action for *incertum* or for *certa res* it runs: *quanti ea res erit, tantam pecuniam iudex Numerium Aulo condemna*.

¹¹⁹ Iust. inst. 4.13.5.

¹²⁰ Gai. inst. 4.56, 122.

¹²¹ Gai. inst. 4.122.

¹²² See *Manual*, 397–99.

*Si non paret, absolve.*¹²³ If it was a *bona fide iudicium* (always for an *incertum*) the *condemnatio* refers back to the *intentio*: *quidquid paret . . . eius condemna.*¹²⁴ In an action *in rem* it is: *quanti ea res erit.*¹²⁵ If it was *in factum ex bono et aequo* the *intentio* and the *condemnatio* ran together: *Quantum bonum aequum iudici*¹²⁶ *videbitur tantam pecuniam recuperatores Numerium Aulo condemnanto.*¹²⁷ If an ordinary *actio in factum*: *Quanti ea res erit tantam pecuniam condemna.* In an Aquilian action the matter is complicated by the word *plurimi* (highest value). For *furtum nec manifestum* it is: *quanti ea res fuit cum furtum factum est tantae pecuniae duplum iudex Numerium Aulo condemna.*¹²⁸ The thief was responsible for the highest value at any time during the theft, as he commits theft all the time. *Fuit* means 'at any time'. There were some actions when the *condemnatio* was for a multiple. Words must be put in to express that, but [it is] not known how.

Quanti ea res est or *quanti ea res erit*: one gets both in different cases. The business of the *iudex* was to decide how things were at *litis contestatio* so that in principle the right word is *est*. And so, in a *condictio* for a *certum* it is always *est*. But in hardly any other action do you find *est*; for example in all praetorian delicts, in *pignus*, *commodatum* and *depositum*, *in factum*, in *vindicatio* and *actio ad exhibendum*, one finds *erit*. In Aquilian actions, one finds *plurimi fuit*; and in *furtum nec manifestum*, *fuit*. The point does not arise in consensual contracts, *negotiorum gestio*, divisory actions, *depositum*, *commodatum* and *pignus in ius*. There the word is *eius*. [Thus:]

¹²³ '[To the judge:] for as much as the matter shall be worth, condemn the defendant to the plaintiff. If it does not appear, absolve.' Cf. Gai. inst. 4.47, framed in the third person.

¹²⁴ 'whatever appears . . . condemn for that amount.' See Gai. inst. 4.131.

¹²⁵ 'as much as the matter is worth.' See Gai. inst. 4.51.

¹²⁶ *iudici* should probably read *recuperatoribus*.

¹²⁷ 'what seems good and fair to the judge [sc. recuperators], for that sum the recuperators shall condemn the defendant to the plaintiff.' See e.g. Ulp. 57 ed. Dig. 47.10.17.2; Paul. 55 ed. Dig. 47.10.18 pr.

¹²⁸ 'for as much as the matter was worth when the theft was committed, for that sum doubled the judge shall condemn the defendant to the plaintiff.' See Ulp. 37 ed. Dig. 47.2.50 pr.

*quidquid ob eam rem Numerium Aulo dare facere oportet ex fide bona eius iudex Numerium Aulo condemna.*¹²⁹ What does it matter? The word *erit* shifts the time of valuation from *litis contestatio* to judgment. That is in a simple *condemnatio*. But there may be necessary clauses:

1. *Taxatio*. There might be a *taxatio*.¹³⁰ The first form was where there was a fixed maximum: *dumtaxat 10 milia*.¹³¹ That recurs in the *actio iniuriarum* and was probably used in all actions for an *incertum*. In the *actio furti* there is a statement of value, but that is not a *taxatio* – it occurs in the *demonstratio*.¹³² The second form was in certain cases when the action was limited to payments out of a certain fund. Thus in the *actio de peculio et in rem verso*, the master is only liable to the extent of the *peculium*: *dumtaxat actio de peculio et in rem verso*. The third form was in cases where a man has *beneficium competentiae* and cannot be condemned beyond his means: *dumtaxat in id quod facere potest*. The fourth form was in certain cases where an action lay against *heres* to the extent of his enrichment: *dumtaxat in id quod ad eum parvenit*.¹³³
2. *Noxal actions*. The *condemnatio* is expressed as an alternative.¹³⁴ For example, in *furti nec manifesti noxalis: tantae pecuniae duplum aut servum Stichum noxae dedere condemna*. It is not an alternative obligation until after the action was begun. At any stage before *condemnatio* one was released by surrendering such as one had; after *condemnatio* full unencumbered ownership passed to surrenderee. Noxal surrender only applies to delicts and to a number of private wrongs. It

¹²⁹ 'whatever on that account the defendant ought to give to or do for the plaintiff according to good faith, for that amount [*eius*] the judge shall condemn the defendant to the plaintiff.'

¹³⁰ A *taxatio* was a clause placing a limit on the amount of the *condemnatio*. See *Manual*, 399.

¹³¹ Gai. inst. 4.51.

¹³² See *Manual*, 399. This is a hypothesis that Buckland borrows from Lenel, 329.

¹³³ On these different forms see *Text-Book*, 661–62.

¹³⁴ *Text-Book*, 601, 659.

had no application in contract, save for one exception. If some act of a slave was both a delict and a breach of contract, in later classical law one could surrender the slave even in the contractual action.

3. *Arbitrium clause*.¹³⁵ An *arbitrium* clause gives the *iudex* power to order restitution in lieu of damages and to condemn only if disobeyed. Actions where the clause occurs were called by Justinian *actiones arbitrariae*.¹³⁶ The word is not found in any classical text except one concerning the *actio de eo quod certo loco*.¹³⁷ This action lay where money due in one place was sued for in another. The *iudex* took into account any inconvenience which may have been suffered. The wording is not known but an attempt ran: *Decem milia aut si alterius interfuit eam pecuniam Roma absolvi*¹³⁸ *tanto pluris minorisue condemnato*.¹³⁹ [As to the] form of the *arbitrium* clause: [the words] *nisi arbitrio iudicis restituetur* [are] placed at the beginning of the *condemnatio*. Take the case of a *rei vindicatio*: *Si paret fundum Cornelianum Auli ex iure Quiritium esse, neque ea res arbitrio iudicis Aulo restituetur quanti ea res erit tantum pecuniam iudex Numerium Aulo condemna. Si non paret absolve*.¹⁴⁰ In what actions did the *arbitrium* clause appear? [It appeared] in all real actions of every possible type and in the *actio ad exhibendum* which was generally preliminary to a real action. Sometimes it is said that the clause did not occur in actions for servitudes; whether or not they did is doubtful. It appeared in actions for *metus* and *doli* and in a number

¹³⁵ Also: 'clausula arbitraria'. See *Manual*, 398–99.

¹³⁶ Iust. inst. 4.6.31.

¹³⁷ See *Text-Book*, 660 n.7.

¹³⁸ sc. *solvi*.

¹³⁹ 'ten thousand, or if a different sum was at stake for money paid at Rome, condemn for so much more or less.'

¹⁴⁰ 'If it appears that the Cornelian estate belongs to the plaintiff by ancient right, and no restitution of the matter be made at the discretion of the judge, for as much as the matter is worth the judge shall condemn the defendant to the plaintiff. If it does not appear he shall absolve.'

of other praetorian actions *in factum*. It certainly did not appear in *stricti iuris* actions *ex contractu* or *quasi ex contractu*. Nor in the *actio furti* or Aquilian action. In *bona fide iudicia*, it might have been useful in sale but there is no trace of it. With regard to actions on real contracts the better view is that it does not occur, though there is a corrupt text which suggests it.

4. In many cases the *condemnatio* would be for more than the claim in the *intentio*. There was a group of actions when, in denial, condemnation was *in duplum*, for example the Aquilian action, *actio ex testamento*, *actio iudicati* and the old *actio depensi*. In another group, condemnation was always *in duplum*, for example *furtum nec manifestum*, *servi corrupti*, *depositum miserabile*. In all cases the wording is the same: *tantae pecuniae duplae*.

*Representation.*¹⁴¹ The question of representation must be considered in connection with the *condemnatio*. In all formulary procedure personal co-operation was necessary and under *legis actiones* there was no opportunity for representation. But it was allowed in the formulary system. A representative might be a *cognitor* who was appointed by formal words; or he might be a *procurator* who was an informal representative. How can one harmonise the need for personal presence with a power of representation? A representative was not one in the modern sense; he has to be made an actual party in the dispute. That involves modification of the formula, but not of the *intentio*, which remains the same. The name of the agent is substituted in the *condemnatio*. Suppose an action *in rem* with a *cognitor* or *procurator* for the defence: *si paret rem Agerii esse neque restituetur iudex Negidii procuratorem Agerio condemna*.¹⁴² Or if for the plaintiff: *si paret rem quo de agitur Titii esse neque restituetur iudex Negidium Auli procuratori*

¹⁴¹ *Text-Book*, 708–11; *Manual*, 404–406.

¹⁴² 'If it appears that a thing belongs to the plaintiff and shall not be restored, the judge shall condemn the defendant's procurator to the plaintiff.' See Gai. inst. 4.87.

condemna.¹⁴³ As the persons really concerned are not made parties, the judgment ought not in principle to affect them at all. The agent ought to be liable for the *actio iudicati* himself. Or, if for the plaintiff, he ought to bring the *actio iudicati*. But this matter is dealt with by the Edict which expressly provided that in the case of a *cognitor* the *actio iudicati* would lie for and against the principal. The same rule applied to *procuratores* only in later classical law.

*Security*¹⁴⁴

In many actions security must be given. This is done before *litis contestatio*. In personal actions no security is needed apart from representation; but it is always needed for actions *in rem*.¹⁴⁵ If the action is tried by formula *per sponsionem*, then security was *satisdatio pro praede litis et vindictiarum*.¹⁴⁶ This must be done by *sponsor*. If the action was *formula petitoria*, one had to give *satisdatio iudicatum solvi*.¹⁴⁷ This was an undertaking by the surety which had three branches embodied in one stipulation: (i) to satisfy the judgment given against him; (ii) to commit no *dolus* in respect of the subject matter; and (iii) to take all necessary steps in the action.¹⁴⁸

If there were representatives, other security must be given; a *cognitor* for a plaintiff, however, was given no special security because on the principle of the Edict a judgment is effective against a principal. But a *procurator* was different and he had to give security that the principal would not renew the action. All representatives of the defendant had to give security. As the position of *procurator* was gradually assimilated to that of *cognitor*, security for the former gradually dropped out, but the defendant's representative continued to give security.

¹⁴³ 'If it appears that the thing which is the subject matter of this suit belongs to Titius and shall not be restored, the judge shall condemn the defendant to the plaintiff's procurator.' See Gai. inst. 4.86.

¹⁴⁴ See *Text-Book*, 711–13.

¹⁴⁵ Gai. inst. 4.89.

¹⁴⁶ Gai. inst. 4.91.

¹⁴⁷ *Id.*

¹⁴⁸ Ulp. 78 ed. Dig. 46.7.6.

*Selection of iudex*¹⁴⁹

The *iudex* was not necessarily a lawyer; he was more like a one-man jury. But he had to decide law as well as fact. He was chosen from a list made up of people of high standing, unlike the common law jurymen. He was chosen as follows. The plaintiff offers the defendant a name which he may refuse. If he persistently refused he was an *indefensus*. In some cases *recuperatores* were used. They always tried cases in which *peregrines* were condemned and also [cases involving] the *actio iniuriarum*. [These] judges are also taken from the *album [iudicum]* and are an uneven number who can decide by majority. *Iudex* cannot refuse to act and was sworn.¹⁵⁰ The agreed formula is now written down, either by the plaintiff who hands it to the defendant or it is dictated by the plaintiff to the defendant, the whole thing being under the supervision of the Praetor. Is the issue of the formula the act of the Praetor or the parties? The old view was that the issue of the formula was the Praetor's act. That would imply that the obligation between the parties was quasi-contractual. The modern view is that the issue of the formula is the act of the parties and *litis contestatio* sets up a contractual relation between them. The result is that the formula is a procedural contract and hence cannot be altered after issue. The Praetor hands the *iudex* a copy of the formula and at the same time issues him with the instructions to decide the case (*iussum iudicandi*).¹⁵¹ What the Praetor has done he can undo, so he could always revoke his instructions. It does not appear that any security was given for appearance before the *iudex*.

*Litis contestatio*¹⁵²

The next stage is *litis contestatio*. (i) It fixes the terms of the procedural contract so that thereafter there can be no material change. If change is necessary, one must do it all over again.

¹⁴⁹ See *Text-Book*, 635–39; *Manual*, 382–84.

¹⁵⁰ Ulp. 23 ed. Dig. 50.5.13.2.

¹⁵¹ See *Text-Book*, 632 n.7.

¹⁵² See *Text-Book*, 695–701; *Manual*, 399–402.

As the original right was destroyed, it can only be done by *restitutio in integrum*. In some cases *restitutio* was a matter of form, for example where the *iudex* died. (ii) It makes all actions transmissible to and against heirs. (iii) It makes all actions *perpetuae* and so an *actio annua* can go on [even after the year had expired]. (iv) *Litis contestatio* destroys the old right and substitutes another for it. It is commonly said that it novates the old obligation; but the effect is not the same as novation. The notion of novation cannot apply to real actions, where there is no obligation to novate. Nor to actions *in factum*, where there was no obligation in issue. The matter was governed by a maxim common to most systems of law: *nemo bis in idem*.¹⁵³ There was one case where the notion of novation might perhaps be applied: *in iudicia legitima in persona[m]*, *in ius*. In such *iudicia*, actions which [sc. after] *litis contestatio* could not be brought again; if renewed, the new action was a nullity. But in other cases the bar was praetorian: the *exceptio rei iudicatae vel in iudicium deductae* had to be pleaded. Why, it may be asked in the case of real actions in *iudicia legitima* was it necessary to plead a praetorian *exceptio*? Why was this not *ipso iure* consumed as it was in the *legis actio* system? In the *legis actio* days, there was no question of novation; a later conception (the *eadem* principle) singly operated as automatic bar. The answer seems to be that the notion of *novatio* had got hold of the minds of lawyers. The essence of *ipso iure consumptio*, as they saw it, was that one obligation was substituted for another. Where this could not be so, *consumptio* must be praetorian – *ope exceptionis*. What, then, is the position of X who asserts that a claim brought against him by T has been consumed by a previous *litis contestatio*? The second action need not be the same action, but must be *eadem res*, *eadem causa* or *eadem persona*.

1. *Eadem res* means that what one is seeking to recover could have been recovered in the first action. Suppose that on a sale A sues B for breach of contract. The

¹⁵³ Buckland gives this as *non bis in idem* ('not twice in the same [matter]') in *Text-Book*, 695; *Manual*, 402. The version here may be a slip by the note taker.

following week A discovers another breach. A cannot sue again. Or suppose that A vindicates a *res* from B and fails. Then A discovers that he had a good title which he did not know about. Again, he cannot sue. If A had acquired a new title, then he could sue again.

2. *Eadem causa*. In contract *causa* is the contract; in delict *causa* is the delict; and in *vindicatio*, *causa* is the ownership. Suppose A has a *res* stolen from him. A has a *vindicatio* based on his ownership and a *condictio furtiva* based on the delict. One does not stop the other. Suppose A is an heir and brings the *hereditatis petitio* against B in respect of property forming part of the inheritance. Can A afterwards bring the *vindicatio* in respect of the same property? No, because *causa* and A's ownership are the same. Suppose A makes a contract with B's slave and brings the *actio quod iussu*. A fails. Could A bring an *actio de peculio*? No, because the *causa* is the same (that is to say, the contract with the slave).
3. *Eadem persona* means juristic identity. If a man has sued or been sued, his *heres* are the same *persona*. If a tutor sues on behalf of his ward and fails and afterwards sues on his own behalf: he is not *eadem persona*. The principle, however, covers representatives. One gives a *cognitor* a mandate to sue; he sues and fails. One cannot sue again. It also covers *correi* (see Buckland, *Textbook*, p 453): if one sues or is sued, the action is barred by or against all.

One's *institor* contracts: an action against either releases the other. It is difficult to see the identity either of *causa* or of *persona*. The texts answer this question by saying it is the same *persona* as the action arises *ex persona institoria*.¹⁵⁴ Buckland says he does not understand this. An action against a principal releases a surety. This is *eadem res*, but not *eadem persona* or *eadem causa*. The surety is released not on any *lis in idem* principle but because the debt is accessory and if

¹⁵⁴ The texts Buckland refers to are unclear, though see Macer 2 app. Dig. 42.1.63; Ulp. 75 ed. Dig. 44.2.11.7; Iust. inst. 4.7.8. The word 'institoria' should probably read 'institoris'.

the principle debt is destroyed then the *lis* is gone too. In many cases where there is no formal bar it would be extremely unjust to allow a second action. In such cases there could be judicial bars. Suppose that a *vindicatio* was brought and then a *condictio furtiva*. If it was clear to the Praetor that a previous action had been brought, he might simply refuse the second action or allow an *exceptio doli*; or he might require the plaintiff to renounce his rights under the old action. But the point might not arise before the Praetor. The *iudex* could then take the same things into account. Alternatively, at the bringing of the first action they might require renunciation of any future action to which the facts may give rise.

4. *Exceptio iudicatae*.¹⁵⁵ The *exceptio iudicatae* had as its object a bar to all future actions. The test is its negative function. But it also has a positive function. This might arise in a number of instances. Thus there are cases in which a judgment affected not only the parties but other people too. Buckland, *Textbook* (p 699), gives an example of claims for and against liberty; a decision was good not only against the actual party but against everybody. And not in the sense that a man was conclusively held to be free or a slave at the time of judgment, but that any claim to the contrary must be independent of those [earlier] set up. Then it might have a positive function as against the two original parties. Not only is any future action barred but the fact is supposed as between them to be true.¹⁵⁶ For example the failure of a *vindicatio* proves only that the thing does not belong to the plaintiff or rather that the plaintiff has proved no title. Suppose that A vindicates and wins, but somehow the *res* gets back into B's hands. A sues again. It is *eadem causa, res and persona*. But of *causa*, A is not defeated by B's *exceptio rei iudicatae*. A has the

¹⁵⁵ This is frequently given as *exceptio rei iudicatae vel in iudicium deductae* (see Gai. inst. 4.106, 107) and Buckland's *Text-Book*, 696–99, takes up the significance of this fuller description in detail.

¹⁵⁶ See Ulp. 9 ed. Dig. 3.3.40.2.

replicatio rei secundum rei iudicatae:¹⁵⁷ the original judgment here has a positive effect. Another example. A vindicates and wins. B then vindicates from A. [This is] *eadem res* but not *eadem causa*. But even although the first judgment may be wrong and however good a case B may have, A is allowed to plead the judgment in his favour (*exceptio rei iudicatae*) – again a positive function.¹⁵⁸

Proceedings apud iudicem

The actual hearing took place after a certain delay. Any adjournments were always to the next day but one¹⁵⁹ and no security was taken for appearance at an adjourned hearing. If the plaintiff does not appear and the defendant does, the defendant is absolved. If vice versa, then the defendant is condemned. But most [cases] have some kind of hearing. Judgment in default could not be given until late in the afternoon. If someone on behalf of the defendant gave a reason for absence, the *iudex* could order an adjournment.¹⁶⁰ The *iudex* sits in an open forum and is advised by a *consilium*. Parties are present but take no formal part in the proceedings. Cases were conducted by orators who were not lawyers but who were grounded by lawyers. There were no rules of evidence, as there were no means of enforcing them. Hearsay was admitted. Unsworn written documents might be put in. Witnesses were sworn, [but] it is not clear whether they were examined by the court or by the orators. Slaves were admissible witnesses only if other evidence was lacking; [but] they could not give evidence against their masters.¹⁶¹ Parties did not give evidence but if a party did give a declaration, the *iudex* could take it into account. Either party could offer the other an oath and the other could offer it back. But these oaths had no decisive effect. They did not bind the *iudex*, though they might affect his mind.

¹⁵⁷ Ulp. 75 ed. Dig. 44.2.9.1.

¹⁵⁸ Paul. 14 quaest. Dig. 44.2.30.1.

¹⁵⁹ See Gai. inst. 4.15.

¹⁶⁰ Ulp. 74 ed. Dig. 2.11.2.3; Iul. 5 dig. Dig. 42.1.60.

¹⁶¹ The complex treatment of slaves as witnesses is discussed at length by Buckland in *Slavery*, 86–91.

The burden of proof is on the plaintiff unless there is an *exceptio*. The *iudex* gave judgment after consultation with the *consilium*. The primary question: is the *intentio* fully proved? If not, the case goes the other way, [for] it must be fully proved.

Plus petitio, minus petitio.¹⁶² If the plaintiff proves a debt less than he claimed, that is *plus petitio* which may occur:¹⁶³ (i) *re*, where one claims more than is due, as opposed to claiming that which is not due. In the latter case, the action is lost but the right to what is in fact due survives; (ii) *loco*, where one is suing in the wrong place; (iii) *causa*, for example omitting in the *intentio* any option which the defendant may have; (iv) *tempore*, where one sues before a debt is due or condition satisfied. Gaius says that *plus petitio* could only occur where the *intentio* was certain¹⁶⁴ – *si paret*. Gaius [also] said that if *plus petitio* occurred in the *intentio*, one lost both the action and the right.¹⁶⁵

If one put in a *praescriptio* that was *minus petitio* [claiming too little] it did not prevent one from suing for the rest. But not in the same year. [One would be met with] the *exceptio litis dividuae*.¹⁶⁶

[If] too much was claimed in the *demonstratio*, [this] was fatal to the action. But Gaius says that it did not bar one's [second] claim; it just nullifies the *formula*.¹⁶⁷ Unless the action was one in which a condemned defendant incurred *infamia*, then one lost the right as well according to some jurists.¹⁶⁸ This is certainly true of a deposittee with a *formula in factum* says Gaius in G.4.60. But in such an action there was no *demonstratio*; the facts were related to the *intentio*. Gaius says the same of *minus petitio* in the *demonstratio*, but also mentions that others held that it had the same effect as *minus petitio* in the *intentio*, that is, it was lawful, subject to the *exceptio litis dividuae*.¹⁶⁹

¹⁶² Gai. inst. 4.53–60; *Manual*, 402–404.

¹⁶³ Gai. inst. 4.53a.

¹⁶⁴ Gai. inst. 4.54: *in incertis formulis plus peti non posse*.

¹⁶⁵ Gai. inst. 4.53.

¹⁶⁶ Gai. inst. 4.56.

¹⁶⁷ Gai. inst. 4.58.

¹⁶⁸ Gai. inst. 4.60.

¹⁶⁹ Gai. inst. 4.56.

[As regards the] *condemnatio*, if too much is stated the *iudex* must necessarily condemn for that amount. But the defendant could get *restitutio in integrum*. If too little is stated, then the plaintiff was bound by it; [there was] no *restitutio* except for minors.¹⁷⁰

Judgment. If the *intentio* is proved and there are no *exceptiones*, the task of the *iudex* is practically finished. If there are *exceptiones* he must go into them. In practice it would often be the *exceptio* which was considered first.

1. In *actiones praeiudiciales* there is no *condemnatio* but the *iudex* issues a *pronuntiatio*. That ends the case. This would only be a preliminary, but other actions might be barred by the decision.
2. In *real actions* the *iudex* would begin with a *pronuntiatio*. If this is in favour of the plaintiff, it is not of itself the judgment which is always for a sum of money. In all these actions there was an *arbitrium* clause.¹⁷¹ *Iudex* may either give judgment for a certain sum or he may order restitution. If the thing is available and he thinks restitution is just, he issues an order for restitution. He also issues such an order if, though, the *res* is not available due to the *dolus* of the defendant. If the thing is fairly not available, the *iudex*, if aware of the position, does not [issue an] *arbitrium*. When he does not, he must value the property. But if he issues an *arbitrium* which is wilfully disobeyed, he can call on the plaintiff to swear to the value of the *res*. That valuation will be high and not carefully scrutinised. The *iudex* is not bound to allow that oath – he might himself fix a value – or, if he has called for an oath, he might ignore it.¹⁷² It is doubtful that the law for this rule was classical.
3. The *arbitrium* clause also occurs in some *personal actions*. In personal actions, whether *in ius* or *in factum*, the *iudex* must arrive at a fixed money sum. In many of

¹⁷⁰ Gai. inst. 4.57.

¹⁷¹ Above, note 135.

¹⁷² *Text-Book*, 659.

these actions there was a *taxatio*.¹⁷³ And when there was a *taxatio*, the judge could not condemn for more. Suppose he does? His judgment is good. The same principles are probably true in an action by the *bonorum emptor*, [but] the judge must allow for the set-off [*compensatio*]. In other cases of set-off, the *iudex* is perfectly entitled to ignore them if he sees fit. But it may be raised in an independent action. Note that in a case where the *iudex* goes beyond the *taxatio* he would be liable for any loss caused as one who *litem suam facit*.¹⁷⁴

4. [Aggravated penalties.] In the case of the defendant, there were a number of instances where unsuccessful defendants were condemned for a multiple (for example, Aquilian action, *actio ex testamento*) and some instances where the *condemnatio* involved *infamia*. This consequence could sometimes be avoided by making good before the judgment. On principle, the *condemnatio* involved *infamia* in cases where liability was for *dolus* only. There were also compulsory promises of a certain fraction of what was due. Thus in the *condictio certae pecuniae*, the plaintiff could and would insist on a *sponsio et restipulatio tertiae partis* (also a personal *sponsio* of one-half in an *actio de pecunia constituta* – an action on a constitution).¹⁷⁵ Then there is the question of *calumnia* which affects the plaintiff only.¹⁷⁶ At an early stage the defendant may have offered an oath; if that was refused, the action was refused. If there had been no such oath and the defendant was absolved, he [the plaintiff] might be [subject to a] *iudicium calumniae* for one-tenth of the *res* in dispute.¹⁷⁷ It is believed to have been claimed in a *sponsio* clause appended to the main *formula*. It lay only if bad faith was proved. It does not seem to have been available if the plaintiff had already incurred the same penalty. Then, in a few cases

¹⁷³ Gai. inst. 4.51–52; *Manual*, 399.

¹⁷⁴ Gai. inst. 4.52.

¹⁷⁵ Gai. inst. 4.171.

¹⁷⁶ Gai. inst. 4.174.

¹⁷⁷ Gai. inst. 4.175.

including *iniuria*, there was *iudicium contrarium* for one-tenth of the *res* in dispute which lay without proof of any bad faith.¹⁷⁸ All of these remedies had gone by Justinian who required an oath of *calumnia* in all cases.¹⁷⁹

5. There was no appeal.¹⁸⁰ But the defendant might always ask the magistrate to veto proceedings from going any further. There might also be *restitutio in integrum*, for example if a judgment was given in default and there was some excuse for absence from hearing. But these are not appeals; they do not depend on the merits of the case. Then there was the *revocatio in duplum*. Without waiting for *actio iudicati*, the defendant could attack a judgment giving security for double damages if he failed. The only ground for objection was the formal validity of the judgment; but as this objection could be taken to *actio iudicati*, it is not easy to see what purpose the procedure served.

Execution of Judgment

A judgment had no legal force and so one had to go back to the magistrate. After a delay of thirty days a successful plaintiff asks for an *actio iudicati* which is an action in the usual form of which the defendant would have to have a *formula*.¹⁸¹ There might be *exceptiones* in the *formula*, for example if it was alleged that judgment was obtained by fraud. If the *iudicium* had been *legitimum*, the *formula* was civil; otherwise it was praetorian. Security had to be given if the defendant lost. *Condemnatio* was *in duplum*. It was the same as the old *manus iniectio*. In the action there is no issue as to the merits of the case; the only question is whether there is a valid, unsatisfied, judgment. If the defendant is defeated, or if he does not want to defend the *actio iudicati*, one can proceed to execution. There are two forms.

¹⁷⁸ Gai. inst. 4.177–178.

¹⁷⁹ Inst. inst. 4.16.

¹⁸⁰ *Manual*, 384.

¹⁸¹ *Manual*, 384–85.

1. *Seizure of defendant*. [A defendant could be seized] as under *manus iniectio*, but there was no longer a sale into slavery, nor was imprisonment limited to sixty days. Also, the creditor is bound to allow the debtor to work off his debt and at the same time was bound to give the debtor necessities. So, the mode of execution was not wholly satisfactory. An alternative [*bonorum venditio*] was invented by the Praetor which could be used in addition to, or substitution of, *manus iniectio*.
2. *Bonorum venditio*.¹⁸² On application, the Praetor issues a decree of *missio in possessionem* which entitles the creditor to seize all the property of the defendant, although it does not give the creditor legal possession. There may be other creditors and time is allowed for them to bring in their claims. After another thirty days, a *magister bonorum* is appointed to sell the goods.¹⁸³ After that point the debtor becomes an *infamis*. The *magister* prepares a list of debts and assets and then holds an auction. Bidders did not bid a sum but for a percentage of the debts; and the highest bidder becomes *bonorum emptor*. The effect is that all the assets vest in him and also, to the extent of his winning bid, all the liabilities. He is only a bonitary owner and to vindicate he must use an *actio Publiciana*. He sues debtors by *actiones utiles*;¹⁸⁴ and since the debt is not due to him he uses the Rutilian formula.¹⁸⁵ He must sue with a *deductio* counterclaim, which may be of any kind.¹⁸⁶ If it rested on a judgment, then the amount was clear, otherwise an issue might arise as to whether a debt counter-claimed was in fact due. So apparently in an *actio utilis* the *iudex* would have to try these matters. Looks very unlike the usual R[oman] method.¹⁸⁷ The

¹⁸² *Manual*, 245–46, 385–86.

¹⁸³ Gai. inst. 3.79.

¹⁸⁴ Gai. inst. 3.81.

¹⁸⁵ Gai. inst. 4.35.

¹⁸⁶ *Manual*, 399, 403.

¹⁸⁷ In the handwritten text there is just the letter 'R' and the suggestion here is that 'Roman' is intended. Buckland perhaps regarded it as anomalous that the *emptor* is put in the position of

bonorum emptor is also liable to be sued, but only to the extent of the dividend. This again will be [under] the Rutilian formula and the *condemnatio* will not be for the whole debt but for that fraction which the *bonorum emptor* owed. Certain privileged debts had, however, to be paid in full and anyone with a security could enforce it. During all this time the debtor has not suffered *capitis deminutio*; thus he still remains liable for his debts and can be sued again if he ever acquires assets. So, it is not a case of universal succession. But within a year he cannot be sued beyond his means to pay.

From the beginning of the Empire, it was possible to make a voluntary surrender of one's estate without becoming an *infamis: cessio bonorum*. It gave the debtor perpetual protection against seizure and perpetual limitation as to his means to pay.¹⁸⁸ Why did not every insolvent do this? Probably because it was limited to cases in which a man's insolvency is not his fault.

To sell up a man's whole property for a single debt was clumsy, and *infamia* would not often be deserved. So quite early in the Empire a *senatusconsultum* of uncertain date provided for a *clarae personae* procedure which could be varied at the option of the creditors after a decree of *missio in possessionem*. A *curator* can be appointed and he does not sell up the whole of the estate but only what is necessary.¹⁸⁹

The system of *bonorum emptio* had gone by Justinian. Bankruptcy still remained and what happened was a procedure similar to *curatio*. But the debtor could still thereafter be sued.

defending a debt he never himself assumed. The alternative is that 'R' stands for 'Rutilian'.

¹⁸⁸ *Text-Book*, 645.

¹⁸⁹ *Id.*

IV. *Cognitio extraordinaria*¹⁹⁰

There were always some matters dealt with by the Praetor *extra ordinem*, for example interdicts, *missio in possessionem*, *restitutio in integrum* (interdicts being where public order was involved and possessory interdicts were within the *ordo*¹⁹¹). These involved administrative functions. At the beginning of the Empire certain judicial and quasi-judicial functions were dealt with *extra ordinem*, for example appointment of tutors, enforcement of trusts,¹⁹² award of *honoraria* in mandate. And the evolutionary trend was by the third century to do away with the *ordo* and for all judicial functions to be exercised *extra ordinem*. The outstanding change is that there is no reference from Praetor to *iudex*; the whole matter was dealt with by a magistrate or deputy. There was no theory of jurisdiction or the taking of any step being based on consent. The system owed its origin to its simplicity in conception and also to its accordance with the current practice of concentrating all power into the hands of the Emperor's nominees. The independent *iudex* ran in contravention to this policy. Consequently:

– In the early Empire a number of matters are being dealt with *extra ordinem*. As yet, there is no supersession of existing jurisdiction. Then – the thin end of the wedge – officials [were charged] with functions affecting public order (*praefecti annonae*, *vigilum* etc.) usurping *iuris[dictio]* in private suits arising out of matters within the sphere of their authority, for example matters affecting freedom.¹⁹³

– *Cognitio extraordinaria* was ousting the formula in the provinces. Then the disappearance of the *ordo* in Rome, sometime in the third century.¹⁹⁴

¹⁹⁰ Buckland discusses *cognitio extraordinaria* in *Manual*, 387–91; *Text-Book*, 662–73. His lectures here follow the order and detail of the *Text-Book* fairly closely.

¹⁹¹ I.e. *ordo iudiciorum*, the formulary procedure.

¹⁹² I.e. *fideicommissa*.

¹⁹³ *Text-Book*, 663, 668.

¹⁹⁴ *Id.*, 664.

Procedural characteristics

On a comparison of procedure, remember that under the formulary system it was the plaintiff's job to get the defendant to [court] by an *in ius vocatio* or a *vadimonium*. In the developed procedure of Justinian, the plaintiff filed a statement of claim (*libellus conventionis*) which was served on the defendant by an official, together with a summons to appear twenty days later. An official took security for appearance and, before appearance, the defendant must file a statement of defence (*libellus contradictionis*).¹⁹⁵

If the plaintiff did not appear, the case was dismissed, but as there had been no *litis contestatio* the case could be renewed. If the defendant did not appear, sureties might be proceeded against, but we are told that a magistrate could not compel attendance by force.¹⁹⁶

On the appointed day there was a *cognitio*. Parties appeared and stated their cases and the facts upon which they relied. When this was done, *litis contestatio* took place, although this seems to have been changed by Justinian to the time when parties took an oath against *calumnia*. In the pre-*litis contestatio* stages certain changes must be noted. A *confessio* leads to immediate judgment whatever the nature of the claim, whereas, previously, there was a difference between a *confessio* for a *certum* and an *incertum*. Then the class of *actiones interrogatoriae* (noxal actions and actions against heirs) have gone but interrogatories still played a big part in the system; in any action one party can, with leave, submit interrogatories to the other. Then the *iusiurandum necessarium*, which previously could be offered only in claims for a *certum*, could now be offered in any action, with some right of *relatio* and the same results of accepting and or of refusing [as in the formulary system].¹⁹⁷

The old terminology remained, for example *exceptio*, *replicatio*, *litis contestatio* and interdicts. But they do not have the same meanings. When Justinian talks of *exceptio* he means something which can be pleaded in bar to claims (in the *libellus*

¹⁹⁵ *Text-Book*, 665.

¹⁹⁶ *Id.*, 665–66.

¹⁹⁷ *Id.*, 666.

contradictionis, or in an oral statement of claim, or in both?) So, for him a possessory interdict is a possessory action; no interdict was in fact issued. And a change has come about in *exceptiones*: some might be raised after *litis contestatio* without any need for *restitutio in integrum*. And some no longer destroying the action, for example where there was a set-off the plaintiff's claim was reduced *ipso iure*.¹⁹⁸

After *litis contestatio* the issue of fact was tried and there were many rules as to the burden of proof and methods of proof (for example hearsay forbidden; documents more and more used; and there must be at least two witnesses to any one event for testimony to be valid). The case proceeded from day to day as fixed by the *iudex*. Non-appearance was treated in the same way as non-appearance before *litis contestatio*.¹⁹⁹

Who exercised iuris[dictio]?

In Rome and later in Constantinople there was a *praefectus urbi* and *praefecti annonae* and *vigilum*. In the provinces there was the *praeses* who, sitting in [the] chief town, was an ordinary judge and the municipal magistrate also had a limited *iuris[dictio]*. All these acted with assessors. It was a common practice to delegate *iuris[dictio]*, from the initiation to the decision of a case, to a deputy called a *iudex pedaneus*. Diocletian by a constitution of 294 provided against this except under pressure of work.²⁰⁰ Julian in 362 allowed such delegation apart from pressure of work in matters of small importance.²⁰¹ One might note the difference between these *iudices* and the old *iudex*. These [new *iudices*] dealt with the whole matter being clothed ad hoc with full powers of deputies. They were chosen like commissioners from advocates practising in courts and whose function ceased as soon as they had given judgment. Judgment was given publicly; and it need no longer be for a sum of money but must still be certain. There could be interim judgments, for example on the admissibility of

¹⁹⁸ Id., 666–67.

¹⁹⁹ Id., 667–68.

²⁰⁰ Iust. cod. 3.3.2 (294).

²⁰¹ Iust. cod. 3.3.5 (362).

exceptiones. And there could be *pronuntiationes* in *actiones praeiudiciales* and *arbitrariae*, and *adjudicationes* in appropriate cases. There was no *taxatio* in the old sense, but rules limiting the amount of *condemnatio* must still be observed, for example *beneficium competentiae*, *actio de peculio*.²⁰²

Appeals

If the defendant satisfied the judgment, there the matter ended. But he might want to appeal. This he could do from the *iudex* to the magistrate who had appointed him, then from municipal magistrate to *praeses*, then from *praeses* to *praefectus praetorio* and finally to the Emperor. [However] there was only an appeal to the Emperor on matters of importance. And there were certain penalties on unsuccessful appellants which discouraged frivolity.²⁰³

Apart from his appellate function, the Emperor might have occasion to interfere in other ways:

1. *Consultatio* or *relatio*. When an official referred some point of difficulty to the Emperor, the answer would be given in the form of a rescript, either a final judgment or a statement of principle and remission for judgment.²⁰⁴
2. *Supplicatio*. A *supplicatio* was a petition by a private person. It was only allowed after judgment and if there was some reason to suppose that a denial of justice might take place. It might be decided by rescript, but more often it would be remitted with a statement of principle to a special judge.²⁰⁵

Execution

Bonorum venditio had gone. Execution is now the carrying out of the magistrate's order. If the judgment was for a specific thing, officials seize it and give it to the plaintiff. If the

²⁰² *Text-Book*, 668–69.

²⁰³ *Id.*, 670.

²⁰⁴ *Id.*, 671.

²⁰⁵ *Id.*

judgment is for money, officials seize some part of the defendant's property to satisfy the claim and the charges. A man's estate could still be sold in the event of insolvency. *Missio in possessionem* and a *curator bonorum* were applicable to conduct a sale, but although he [the *curator*] seized the whole property, he did not sell it in mass but in detail.²⁰⁶

V. Classification of actions²⁰⁷

Conditiones

In the *legis actio* system a *condictio* was an action *in personam* for the recovery of a *certum* and probably applied only to *dationes*. In the formulary system it was extended to all claims for *certa* whether *dationes*, *promissiones* or otherwise. There were also some claims for *incerta*. Gaius says that it covers all claims *in personam* which allege that something ought to be given or done.²⁰⁸ But this is too wide. There was an *actio de stipulatu* on a stipulation *incerta* and *actio ex testamento* on a legacy *per damnationem* or *sinendi modo*. Neither were *condictiones*: both allege *causa* in the *intentio* and the *condictio* did not do this. *Conditiones* are sometimes distinguished according to the *causa*, or facts which give rise to the claim. Procedurally this is of no importance. Whether a *condictio* is *furtiva*, *indebiti*, *ob rem dati*, *sine causa* makes no difference to the way the claim is framed.²⁰⁹

Another distinction, according to the nature of what is claimed, is more important. These were the *condictiones certi* or *incerti*. The former might be for a *certa pecunia* or a *certa res*. Those for *certa res* had forms for a specific thing or specific quantity (*triticaria*). The *condictiones incerti* covered a narrow field. The most common obligation for an *incertum* would be by stipulation and the appropriate remedy would be the *actio ex*

²⁰⁶ Id., 671–72.

²⁰⁷ This is a brief and somewhat eclectic section treating three subjects that more naturally fall in the earlier lectures in section III. Buckland is selecting among the topics he treats in *Text-Book*, 682–91.

²⁰⁸ Gai. inst. 4.5.

²⁰⁹ *Text-Book*, 682–84; *Manual*, 364–65.

stipulatu. But illustrations²¹⁰ of the residue of *stricti iuris* claims for an *incertum* are the *condictio incerti* in favour of: (i) a vendor who had transferred land and had accidentally omitted to reserve a servitude agreed upon; (ii) a person who had undertaken an obligation in the mistaken belief that there was a legal duty to undertake it; and (iii) an heir who pays a legacy and in error fails to take security for a possible Falcidian reduction.²¹¹

On some late texts²¹² it seems that one could bring a *condictio* – a *condictio generalis* – on any kind of debt provided one stated it as a *certum*, running the risk of *plus petitio*. Buckland thinks that this is not classical.²¹³

*Iudicia legitima and iudicia imperio continentur*²¹⁴

The distinction between the two had many important consequences. Thus in the latter, adjudication is only given praetorian rights. So, in the former, a woman needed her tutor's consent to proceed. So, the latter, owing their force to the *imperium* of a magistrate, ended if the *imperium* ended. The former were not so determined, but by the *lex Julia [de iudiciis privatis]* they were extinguished by the expiration of eighteen months from *litis contestatio*.²¹⁵ The extinction of the remedy destroyed the plaintiff's right, which had been novated by the *litis contestatio* either *ipso iure* (in the case of *iudicium legitimum in personam in ius*) or by *exceptio rei iudicatae vel in iudicium deductae* (in the case of other actions).²¹⁶ If delay was wilfully caused by the defendant, there would be *doli* against him; or, if by the fault of the *iudex*, there was a remedy. This limitation of time has nothing to do with civil and praetorian

²¹⁰ See respectively Pomp. 22 Sab. Dig. 12.6.22.1; Paul. 3 Sab. Dig. 19.1.5.1; Ulp. 79 ed. Dig. 35.3.3.10.

²¹¹ *Text-Book*, 683–84.

²¹² Ulp. 26 ed. Dig. 12.1.9 pr–1.

²¹³ See *Text-Book*, 684; *Manual*, 365.

²¹⁴ The definitions are found in Gai. inst. 4.103–113. A formal or 'statutory' proceeding is one that takes place between Roman citizen, before a single judge, and in or near Rome. Other suits are classed as resting on the Praetor's *imperium*. See *Text-Book*, 687–89.

²¹⁵ Gai. inst. 4.104.

²¹⁶ Gai. inst. 4.107.

actions. *Actio in factum* was *iudicium legitimum* if brought in Rome. *Legitimum* means 'statutory' and the *lex Aebutia* probably the cause of its name. *Iudicia legitima* were so called because the formula was issued under the direction of the law and not under *imperium*. According to Gaius those *iudicia* were *legitima* which were brought within a mile of Rome before *unus iudex*, all parties being *cives*.

Actiones temporariae and perpetuae

The distinction between *actiones temporariae* and *perpetuae* deals with the question of limitation.²¹⁷ All civil rights of action were perpetual except against *sponsores* and *fidepromissores* and *praeiudicia* under the *lex Cicereia*.²¹⁸

In praetorian actions one finds a distinction. Generally if *ad rem persequendam* they are perpetual. If penal, they are usually limited to one year. But where a praetorian penal action is only an extension of a civil law action, it is perpetual, for example the *actio furti manifesti*.²¹⁹ What is a penal action? Buckland suggests an action is penal if its primary object was the repression of a wrong and the stigmatising of the wrongdoer. Thus *actio doli*, although only for restitution, was penal and made the defendant an *infamis*; but if the purpose of an action was merely to adjust property relations, then it is not penal even though it may involve double liability (for example the *actio ex testamento*).

VI. Praetorian remedies other than actions²²⁰

Stipulations

In many cases the Praetor could compel a party in a dispute to make a stipulation which gives a civil action.²²¹ It is a contract

²¹⁷ For what follows, see *Text-Book*, 689–90.

²¹⁸ Gai. inst. 3.121.

²¹⁹ Gai. inst. 4.111.

²²⁰ In this section Buckland discusses the subjects he treats in *Text-Book*, 719–44 and *Manual*, 407–18, but altering the order.

²²¹ *Stipulationes praetoriae*: *Text-Book*, 728–29; *Manual*, 411.

only in form, the terms being settled by the Praetor. These are older than the Praetor's power of civil actions. The purpose was to provide securities in litigation. If the desired security was refused, the litigant became an *indefensus*. Thus in *damnum infectum* there was a praetorian stipulation for security and if it was refused a *missio in possessionem* would follow. Again in *collatio bonorum*, if any claimant refused to undertake to bring in his share, *bonorum possessio* would be refused to him. So [also] a promise to refund proportionally a legacy cut down under the *lex Falcidia* could be enforced by the sanction of denying an action on the legacy. *Stipulationes iudiciales* are those enforced by a *iudex* who will not give judgement unless the required promise is given.²²²

Restitutio in integrum

Restitutio in integrum is a step by which the Praetor will practically set aside a transaction.²²³ It does not actually cancel the transaction but allows the parties to proceed as if it never occurred. In most cases it begins with an application for restitution (the form of the application is not known) and must be made within *annus utilis* from when first possible. Then there would be an inquiry to see whatever comes within the recognised ground for restitution. If the application succeeds, then there is a decree of *restitutio* and it is then up to the parties. In general it was not allowed if there was any other remedy available, but in cases of *dolus* and *metus* there were actions as well as restitution. There must have been damage to a property interest; there was no restitution from a change of status, for example adoption. One text does speak of restitution from adrogation,²²⁴ but that really means that in some cases the adrogator could be compelled to emancipate. There was no *restitutio* from marriage, which could be dissolved by consent. And there must be some conveyance or release to be set aside. Suppose a transaction affected by *metus* resulting in a convey-

²²² For the *stipulatio iudicialis* see Pomp. 26 Sab. Dig. 45.1.5 pr.; Inst. inst. 3.18.

²²³ For what follows, see *Text-Book*, 719–24; *Manual*, 407–409.

²²⁴ Ulp. 11 ed. Dig. 4.4.3.6.

ance from A to B.²²⁵ One would get their decree and then proceed by the formula 'if it appears that the land would be A's if he had not conveyed it to B'. If the obligation was undertaken by A, there was simply a formula with an *exceptio metus*. If there was an *acceptilatio*, there would be a decree with subsequent formula 'if such and such a sum would be due from B to A if no release had been given'. Alternatively in some cases the matter could be kept to the *iudex* without the need for an inquiry and decree by the Praetor: 'if it appears that *x* would be due from A to B if no release had been obtained from A by B by threats, then condemn.'

The grounds for which *restitutio* is obtained are:

1. *Dolus*. Very little is known about *dolus* as a ground and it seems to serve very little purpose because of the existence of the *actio doli* and *exceptio doli*. On one view the *restitutio* was introduced before the *actio* and the *exceptio*. It still remained in classical law, but Justinian strikes out most allusions to it. On another view, classical law knew nothing of it and it was introduced by Justinian.²²⁶
2. *Metus*. The same difficulty arises with *metus*. It is perfectly certain that restitution on this ground existed in classical law. A suggestion to account for it is that it may have had a definite utility in classical law on the assumption that the *actio* [*quod*] *metus* [*causa*], which in the time of Justinian lay against third parties to the extent of their enrichment, did not so lie in classical times and, accordingly, *restitutio* would be the only remedy.
3. *Minority*.²²⁷ Minority was the most important case. It was a praetorian extension of the *lex Plaetoria*.²²⁸ It was available only if the minor had not confirmed an act after reaching full age. He need not prove he had been

²²⁵ Buckland discusses the 'complex praetorian machinery' in cases of *metus* in *Text-Book*, 593–94.

²²⁶ On these points, see *Text-Book*, 594 & nn.7–8.

²²⁷ *Text-Book*, 721–22.

²²⁸ *Text-Book*, 169–70.

defrauded, but it is not enough to prove that he had made a bad bargain. He must show that he was led into the bargain by inexperience. He might get an order even if he had been advised by an older man, but of course much less readily. It was available only on a contract or quasi-contract. Suppose he was also a *filiusfamilias*: could the *pater* get restitution? Not if the contract was made with the father's authority. But if the son had contracted *iussu patris* and did not apply for relief, the father could do it on account of his liability *de peculio*.

4. Absence.²²⁹ When a claim has been barred by time, one can get *restitutio* if one's absence was not one's own fault and was inevitable. Or, when the other party was absent and could not be got at, for example, [in] case of captivity, state service, absence due to fear, imprisonment etc.²³⁰ *Restitutio* for absence covered one queer case: where a magistrate has delayed proceedings so that a claim is barred.²³¹
5. Error. Error is not usually a ground for *restitutio*; if error was of a kind to vitiate the transaction, *restitutio* was not necessary. If the error was not of such a kind, it would be unjust. But if it occurs in relation to some procedural rules – for example, when by error the amount in the *condemnatio* was overstated – the defendant, after being condemned, could get *restitutio*.²³²

Missio in possessionem²³³

Missio in possessionem is a decree based on the *imperium* [of the Praetor] whereby one is given some sort of possessory right over another's property. The cases vary, as both to the nature of the right which one is given and to the property over which

²²⁹ *Text-Book*, 722.

²³⁰ Ulp. 12 ed. Dig. 4.6.26.9.

²³¹ Ulp. 12 ed. 4.6.26.4.

²³² Gai. inst. 4.53.

²³³ Buckland's treatment here largely follows *Text-Book*, 724–28; cf. *Manual*, 409–11.

that right can be exercised. For instance, some cases affected the whole of another's property. For example:

1. When A has got judgment against B, if B is an *indefensus*, or has made *cessio bonorum*, or is decreed insolvent without an heir. The decree gives A the right to take possession but it did not effect an actual transfer in fact or in law. A had the power to take further steps such as *bonorum venditio*. The decree was said to be *rei servandae causa* ('for the protection of property').
2. If A is B's creditor and B has been adrogated by X, A can bring an action against B on the fiction that B has not been adrogated. But this is valueless in the absence of any property in B. By a decree of *missio in possessionem in bona*, A was allowed to enter into possession of such property, as would have been B's but for the adrogation, and sell it.²³⁴
3. Suppose A summons B by *in ius vocatio*. B gives A a *vindex*. B does not appear. An *actio in factum* lies against the *vindex* and A can get *missio in possessionem* of B's property.²³⁵

Alternatively A might get a decree over a whole estate but not necessarily over B's whole estate. For example:

1. *Dotis conservandae*²³⁶ *causa*: a widow might get custody of husband's property to secure her *dos*.
2. *Missio in possessionem ex edicto Hadriani*:²³⁷ a will in favour of A is challenged by B as being *ruptum* or *irritum*. A could obtain possession of the estate pending a decision.
3. *Missio in possessionem ventris nomine*: A leaves his wife pregnant with an heir. She could get possession of the estate and was entitled to be maintained out of it. This

²³⁴ See *Text-Book*, 399.

²³⁵ See *Text-Book*, 631. The *vindex* is a temporary representative of the *vocatus*.

²³⁶ Corrected from *servandae* to the form Buckland uses at *Text-Book*, 725.

²³⁷ Iust. cod. 6.33.

was a form of *bonorum possessio* but *decretalis* as opposed to *edictalis*. It was only awarded after an investigation. The possessor was not a praetorian owner but only had the right to administer.

Similar decrees are made:

4. Where B alleges that A's *impubes* heir was not in fact his heir. Heir was given possession of A's estate with a right to be maintained out of it.²³⁸
5. Where a madman was made *heres*.²³⁹
6. If heir is of doubtful solvency.²⁴⁰

Creditors might get possession of the estate:

7. Where A brings a *hereditas petitio* against B and B evades the process. A gets possession of the estate.
8. Where A is entitled to a conditional legacy from an estate to which B is heir. Then B refuses security. A might get possession of the estate.²⁴¹

Finally a decree of *missio in possessionem* may be made in favour of specific things:

1. A sells property subject to a trust in B's favour to C. B might get an order for possession against C if he knew of the trust.²⁴²
2. *Missio in possessionem damni infecti causa*: where A's property is threatened by the ruinous condition of B's property. *Legis actio* was superseded by praetorian machinery. Praetor could order security against the damage; if this was refused, a decree of *in possessionem*

²³⁸ Buckland gives this as 'M. in possessionem ex Carboniano edicto': Dig. 37.10; *Text-Book*, 726. See further at id., 398.

²³⁹ Buckland gives this as 'M. in possessionem curatoris furiosi heredis': *Text-Book*, 726.

²⁴⁰ Buckland gives this as 'M. in possessionem si heres suspectus non satisdabit': id.

²⁴¹ Buckland gives this as 'M. in possessionem legatorum servandorum causa': id., 727.

²⁴² Buckland gives this as 'M. in possessionem in rem of the fideicommissary': id.

ire would issue. This did not give A possession; A could go onto B's land but could not eject B. If B persisted in his refusal either to put things right or to give security, A might get a second decree which would give A praetorian ownership.

The interdicts

An interdict was a command of the praetor based on a principle set out in the Edict.²⁴³ It could be formulated in civil law but need not be so. An interdict was an order to do or not to do something and, where the order was positive, the command was also called a *decretum*.²⁴⁴ Originally all cases were more or less in the nature of police measures intended to prevent breach of the peace, but their function in some cases greatly changed, although a public order flavour was retained. [Classification:]

1. *Possessory and non-possessory*. Possessory and non-possessory interdicts were for example to compel the production of an individual.
2. *Possessory interdicts*. Possessory interdicts were either (a) *adipiscendae causa*²⁴⁵ (for example *quorum bonorum*, *Salvianum*, etc.); (b) *retinendae causa*²⁴⁶ (*uti possidetis* and *utrubi*), although in practice they were used to recover possession; (c) *recuperandae causa* (*unde vi*).²⁴⁷
3. An interdict might be *prohibitorium*, *restitutorium* or *exhibitorium*.²⁴⁸ (a) *Exhibitorium*: to produce something

²⁴³ This final section follows the order of subjects in *Text-Book*, 729–43, omitting only Buckland's concluding remarks on the history of interdicts (id., 743–44). Because the final sections of these lectures closely track the *Text-Book*, it's safe to conclude that we have the entirety of Campbell's notes. On interdicts see also Gai. inst. 4.138–170; *Manual*, 412–18.

²⁴⁴ Gai. inst. 4.139–140.

²⁴⁵ *sc. possessionis*. Gai. inst. 4.144–147.

²⁴⁶ *sc. possessionis*. Gai. inst. 4.148–153.

²⁴⁷ *sc. possessionis*. See Gai. inst. 4.154–155. In the sources also *recip-* but Buckland prefers the spelling given above.

²⁴⁸ Gai. inst. 4.142. See *Text-Book*, 731–32.

wrongfully detained, for example *homine libero exhibendo*. (b) *Restitutorium*: this was an order to hand over property, for example *quorum bonorum*, or to restore a status quo, for example *de vi publica*. (c) Prohibitory: this was an order to forbid the doing of something. Many had purely police purposes but the private property interdicts include *uti possidetis* and *utrubi*.

4. An interdict is either single or double.²⁴⁹ (a) Interdicts were single where in the subsequent proceedings the person who obtained the interdict was the plaintiff and his adversary was the defendant. These include all restitutionary and exhibitory interdicts. (b) Double interdicts were where each party was at once plaintiff and defendant, for example *utrubi* and *uti possidetis*.

[*Procedure*.²⁵⁰] Originally the Praetor did everything himself but later reference to a *iudex* was normal. Two methods were used to get the matter to a *iudex* whose job it was to decide whether the interdict had been disobeyed.

1. *Formula arbitraria*.²⁵¹ The *formula arbitraria* was available only at the request of the defendant and only where the interdict was either exhibitory or restitutionary. If for example a defendant against whom *unde vi* was issued desired it, a formula could be issued instructing the *iudex* to decide whether the defendant had disobeyed the interdict. If the *iudex* found against him and he complied with the order, he incurred no penalty. If he won, the plaintiff incurred no penalty unless the defendant brought *iudicium calumniae* against him.²⁵² Thus Gaius says that this form of proceeding was without risk to either party.
2. *Per sponsionem*.²⁵³ (i) Single interdicts. If the plaintiff on issue of *unde vi* does not restore or ask for a formula, the procedure is as follows. The plaintiff challenges the

²⁴⁹ See *Text-Book*, 733, 736–37; *Manual*, 415–18.

²⁵⁰ *Text-Book*, 736–43.

²⁵¹ *Text-Book*, 739.

²⁵² Gai. inst. 4.163.

²⁵³ *Text-Book*, 737–39, 40–41.

defendant to a wager (*sponsio*) and the defendant in return challenges the plaintiff, the point at issue being whether or not the defendant's continued possession is a violation of the interdict. A formula would then be drafted on each *sponsio* and tried in the normal way. In addition the plaintiff would secure a formula for a *iudicium de re restituenda*²⁵⁴ to be tried at the same time and instructing the *iudex* to condemn the defendant to pay damages to the plaintiff if the plaintiff won on the formula and the defendant had not restored the *res*. This was probably a form of *iudicium secutorium*.²⁵⁵ (ii) Double interdicts. Double interdicts [include] for example *uti possidetis*: the plaintiff is the person who wants something done and has applied for the interdict, which is issued as a matter of course. The defendant is the other party. As the interdict is double, both the parties are at once plaintiff and defendant; and the Praetor is impartial between them: 'I forbid force to be used to disturb the possession of whichever of you possesses the land in question *nec vi nec clam nec precario* of the other.'²⁵⁶ Both parties would now make a formal trespass on the land so as to amount to a disregard of the interdict by both. The question now is which had been justified in doing so, that is, who at the time the interdict was issued had been in possession of the land. The first question (perhaps) was to settle interim possession. This was settled by bidding between the parties before the Praetor. The highest bidder got interim possession. This auction was called *fructuum licitatio*.²⁵⁷ But the interim possessor must promise by stipulation to pay the other party the amount of his bid if he lost and the formula was issued on this promise. They then bet as to whom²⁵⁸ has disobeyed the Praetor. There is a bet as to whether the plaintiff has disobeyed

²⁵⁴ Gai. inst. 4.165.

²⁵⁵ *Text-Book*, 738.

²⁵⁶ *Text-Book*, 740.

²⁵⁷ Corrected from 'fructum'. Gaius uses the plural: Gai. inst. 4.166.

²⁵⁸ 'Who' is better but perhaps Buckland said 'whom'.

and as to whether the defendant has disobeyed. Each bet involves two stipulations and thus four promises are made each for an identical sum. On each of these four promises a *condictio* is then brought with a formula in the usual fashion. Thus in all, five formulae on five stipulations were submitted to the *iudex*. If the party without interim possession loses, then he just pays up on his two stipulations. If the party with interim possession loses, then he also pays up on the two bets and also on his stipulation to pay the other party the amount of his bid as a penalty if he lost. As an alternative to the latter, the losing bidder who won at the trial could bring a *iudicium fructuarium* for the value of the interim fruits etc.²⁵⁹ Lastly the interim possessor who lost was also liable to restore possession to the other party and this would be done by adding to the various *condictiones* a formula to secure a *iudicium Cascellianum*²⁶⁰ which had the effect of restoring possession to the losing bidder if he won on the *condictiones*.

[*Advantages of the Interdict.*] (i) It was quicker than bringing an action. And (ii) there was no need to prove title, only possession.

Gaius says that in his day the principal purpose of the interdict was to decide who should be the plaintiff and who should be the defendant in a *vindicatio*;²⁶¹ on whom the difficult burden of proof should fall.

Note that if a party refused to co-operate in the proceedings, an *interdictum secundarium* could be issued in which he would be treated as having admitted his opponent's claim. He was ordered to restore possession if he had it or, if not, to refrain from disturbing the other party.²⁶²

²⁵⁹ Gai. inst. 4.169.

²⁶⁰ *Text-Book*, 741.

²⁶¹ Gai. inst. 4.148.

²⁶² Gai. inst. 4.170.

