2.Gaius, *Institutes*, Book IV

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book IV, §§ 1–187, pp. [odd nos.] 233–305 [footnotes omitted]

BOOK IV

1. It remains to speak of actions. Now, to the question how many *genera* of actions there are the more correct answer appears to be that there are two, *in rem* and *in personam*. For those who have maintained that there are four, counting the *genera* of *sponsiones* (i.e. of actions *per sponsionem*?) have inadvertently classed as *genera* certain *species* of actions. **2.** An action *in personam* is one in which we proceed against someone who is under contractual or delictual obligation to us, an action, that is, in which we claim 'that he ought to convey, do, or answer for' something. **3.** An action *in rem* is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right, such as that of use or usufruct, of foot- or carriage-way, of aqueduct, or raising a building or of view. On the other hand, an action (*in rem*) denying such rights is open to our opponent. **4.** Having thus distinguished actions we see that we cannot sue another for a thing belonging to us using the form of claim 'if it appears that the defendant ought to convey (*dare*)'. For what is ours cannot be conveyed (*dari*) to us, since obviously *dari* means the giving of a thing to us with the effect of making it ours; but a thing which is already ours cannot be made more so. It is true that out of hatred of thieves, in order to multiply the actions in which they are liable, it has become accepted that, in addition to the penalty of double or quadruple, that are liable also in action for the recovery of the thing in the form 'if it appears that they ought to convey', notwithstanding that the action claiming ownership of the thing lies against them as well. **5.** Actions *in rem* are called vindications; actions *in personam*, claiming that there is a duty to convey or do, are called condictions.

6. We sue in some cases in order to obtain only our right, in others in order to obtain only a penalty, and in others in order to obtain both the one and the other. **7.** We sue only for our right in, for example, actions founded on contract. **8.** We sue only for a penalty in, for example, actions of theft and outrage and, in the opinion of some, in the action of robbery with violence; for we are entitled to both a vindication and a condiction in respect of our property. **9.** We sue for our right and a penalty together in, for example, those cases in which we sue for double against a defendant who denies liability; this occurs in an action on a judgment debt, an *actio depensi* (by a *sponsor* against his principal), an action under the *L. Aquilia* for wrongful damage, and an action for a legacy of a definite amount left by damnation.

10. Furthermore, there are some actions that are framed on (the fiction of?) a *legis actio*, and others that stand by their own force and efficacy. To explain this we must begin by speaking of the *legis actiones*.

11. The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were nor yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word 'vines', had lost his claim, because he ought to have said 'trees', seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general. **12.** Procedure by *legis actio* was in five forms: *sacramentum*, *iudicis postulatio*, *condictio*, *manus iniectio* and *pignoris capio*.

13. Procedure by *sacramentum* was of general application: one proceeded by it in any cases for which another procedure had not been prescribed by statute. It involved, for parties found guilty of falsehood, the same sort of risk as is involved at the present day by the *actio certae creditae pecuniae* owing to the *sponsio* which the defendant risks, in case he is denying the debt rashly, and to the counter-*stipulatio* which the plaintiff risks, in case he is suing for what is not due. For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury, sureties for it being given to the praetor, instead of going into the pocket of the successful party, as the penalty of the *sponsio* or the counter-stipulatio now does. **14.** The penal sum of the *sacramentum* was either 500 or 50 *asses*: concerning matters worth 1,000 *asses* or more one proceeded by a *sacramentum* of 500 *asses*, but concerning matters of lower value by a *sacramentum* of 50 *asses*. For so the law of the Twelve Tables had provided. But where the dispute was as to a man's freedom, it was provided by the same law that the contest should be with a *sacramentum* of 50 *asses*, however great the value of the man might be, obviously in order to favour freedom by not burdening assertors of freedom.

15. . . .[1] should come to receive a *iudex*; on their subsequent reappearance a *iudex* was appointed. That he was appointed on the thirtieth day was due to the *L. Pinaria*; but before that statute he was appointed at once. As we know from what has already been said, if the action concerned a matter of less value than 1,000 *asses*, proceedings were by *sacramentum* of 50, not 500 *asses*. After the appointment of the *iudex* the parties gave each other notice to appear before him on the next day but one. Then, on their appearance before him, previously to arguing their case in detail, they stated it to him in summary outline; this was called *causae coniectio*, as being a gathering up of their case into an epitome.

16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing—let us say a slave—said: 'I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him', and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. Both parties having thus laid claim, the praetor said: 'Unhand the man, both of you.' They did so. The first claimant then put the following question to the other: 'I ask, will you declare on what title you have laid claim?' and he answered: 'By laying on my staff I have exercised my right.' Thereupon the first claimant said: 'Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.' And his opponent likewise said: 'And I you.' (Of course, if the thing was worth less than 1,000 *asses* they named a *sacramentum* of 50 *asses*.) Next followed the same proceedings as in an action *in personam*. Thereafter the praetor declared *uindiciae* in favour of one of the parties, that is, he established him as interim possessor, and ordered him to give his opponent sureties *litis et unidiciarum*, that is, for the thing and its profits. Other sureties were taken from both parties for the *sacramentum* by the praetor himself, because this went to the public treasury. The rod was employed to represent a spear, the symbol of lawful ownership, because they considered things they had captured from the enemy to be preeminently theirs by lawful ownership; and this is why in centumviral cases a spear is displayed. **17.** If the thing was such as could not be carried or led into court without inconvenience—for example, if it was a column or a ship or a flock or herd—some part was taken from it and brought into court, and claim was laid on that part as representing the whole thing. Thus from a flock a single sheep or goat would be led into court or just a hair was detached and brought in, while from a ship or a column some bit would be broken off. Similarly, if the dispute was over land or a house or an inheritance, some part of it was taken and brought to court, and claim was made on this part as representing the whole: thus a clod would be taken from the land or a tile from the house, or, where the dispute was as to an inheritance, some article was similarly taken from it. . . .[2]

17a. One proceeded by *iudicis postulatio* in any case in which statute had authorized such procedure: thus the law of the Twelve Tables authorized it in a claim arising out of a stipulation. The procedure was somewhat as follows. The plaintiff said: 'I affirm that under a *sponsio* you ought to pay me 10,000 sesterces. I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I ask you, Praetor, to grant a *iudex* or *arbiter*.' Thus in this kind of action one denied without penalty. The same law authorized procedure by *iudicis postulatio* likewise in suits for the partition of an inheritance between coheirs. The *L. Licinnia* did the same in suits for the partition of any common property. Thus, after the declaration of the cause of action, an *arbiter* was at once demanded.

17b. One proceeded by *condictio* as follows: 'I affirm that you ought to pay me 10,000 sesterces: I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I give you notice (*condico*) to appear on the thirtieth day in order to take a *iudex*.' Thereafter they had to appear on the thirtieth day in order to take a *iudex*. **18.** *Condicere* (the word used by the plaintiff), in primitive language, means to give notice. Thus this action was properly called *condictio*; for the plaintiff gave notice to his opponent to appear on the thirtieth day in order to receive a *iudex*. But in modern terminology a condiction is an action *in personam* in which we claim that something ought to be conveyed to us—an improper usage, since nowadays no such notice is given. **19.** This *legis actio* was established by the *L. Silia* and the *L. Calpurnia*, by the former when the debt claimed was of a definite sum of money, by the latter when of any definite thing. **20.** But there is much question why this action was needed, seeing that it was possible to proceed either by *sacramentum* or by *iudicis postulatio* on a claim for something to be conveyed to one.

---

[1] One page is virtually illegible. It probably contained a fuller account of the *actio in personam*.

[2] Our mss. here are deficient; neither gives an account of the end of the *sacramentum* procedure.

21. One proceeded by *manus iniectio* likewise in those cases in which such procedure was prescribed by some statute, for example, under the law of the Twelve Tables for a judgment debt. The proceedings were as follows: the plaintiff. spoke thus: 'Whereas you are indebted to me by judgment' (or 'by damnation') 'in 10,000 sesterces, seeing that you have not paid, on that account I lay my hand on you for 10,000 sesterces of judgment debt'; and at the same time he laid hold of some part of the debtor's body. The judgment debtor was not allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf, but gave a *uindex* who conducted it for him. One who did not give a *uindex* was led off by. the plaintiff to his house and put in fetters. **22.** Various subsequent statutes granted *manus iniectio* as for a judgment debt on a number of other grounds against certain persons. Thus, the *L. Publilia* granted it against one on whose behalf his *sponsor* had paid, if he had not repaid the *sponsor* within the next 6 months. Again, the *L. Furia de sponsu* granted it against a creditor who had exacted from a *sponsor* more than his rateable part of the debt. And, in short, numerous other statutes authorized this procedure on many accounts. **23.** Other statutes, however, set up procedure by *manus iniectio* on various accounts, but in the form called *pura*, that is to say not as for a judgment debt. For example, the *L. Furia testamentaria* authorized it against one who had taken by way of legacy or gift *mortis causa* more than 1,000 asses, he not being privileged by that statute to take more; and again, the *L. Marcia* against usurers provided that if they had exacted interest, proceedings by *manus iniectio* for repayment should lie against them. **24.** In proceedings under these last-mentioned statutes and any like them the defendant was allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf. For in his formal claim the plaintiff did not use the phrase 'as for a judgment debt', but after stating his cause of action said: 'on that account I lay my hand on you', whereas a plaintiff permitted to proceed by *manus iniectio* as for a judgment debt, after naming his cause of action, concluded thus: 'on that account I lay my hand on you as for a judgment debt.' I am aware that in the scheme of claim under the *L. Furia testamentaria* the phrase 'as for a judgment debt' is inserted, though it is not in the statute itself; the insertion appears to be unwarranted. **25.** But later, by the *L. Vallia*, all persons subjected to *manus iniectio*, except judgment debtors and those on whose behalf their *sponsor* had paid, were allowed to throw off the hand themselves and to conduct the action on their own behalf. Thus even after the *L. Vallia* a judgment debtor and one on whose behalf his *sponsor* had paid were bound to give a *uindex*; in default of doing so they were led off to the creditor's house. And, so long as the *legis actiones* were in use, these rules continued to be observed, which is why at the present day a party sued upon a judgment debt or on account of payment by his *sponsor* is obliged to give security for the satisfaction of the judgment: (which may be given against him).

26. *Legis actio* by *pignoris capio* rested in some cases on custom, in others on statute. **27.** By custom it was established in the military sphere: For a soldier was allowed to distrain for his pay on the person responsible for paying it, if he defaulted; money given to a soldier by way of pay was called *aes militare*. He might also distrain for money assigned for the buying of his horse, this being called *aes equestre*; likewise for money assigned for buying barley for the horses, this being called *aes hordiarium*. **28.** By statute it was established, for instance, by the law of the Twelve Tables against one who had bought a sacrificial victim, but failed to pay for it; likewise against one who failed to pay the reward for a beast of burden which another had hired to him in order to raise money for a sacrificial feast. Again, by the censorial conditions farmers of public taxes of the Roman people were allowed to distrain upon anyone who owed taxes under some statute. **29.** In all these cases the levy of distress was accompanied by a set form of words, and for this reason it was generally held that *pignoris capio* was a further *legis actio*; some, however, held that it was not, first because the seizure was performed outside court, that is, not before the praetor, and usually when the other party was absent, whereas it was not possible to perform the other *legis actiones* except before the praetor and in the presence of the other party; and further because *pignoris capio* could be performed on a *dies nefastus*, that is, on a day on which a *legis actio* was not allowed.

30. But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *L. Aebutia* and the two *Ll. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established. **31.** In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court. But though, when one is going before the centumvirs, a *legis actio* by *sacramentum* is previously enacted before the urban or the peregrine praetor, one never wishes to proceed by *legis actio* for *damnum infectum*, but

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

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

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

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

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

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