

# The Law of Actions: The Roman Civil Law Trial

**GLOBAL LAW AND TRANSNATIONAL LEGAL STUDIES**

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## 1. Preliminary Notions

### 'Actio' and subjective right

In Roman law, the whole trial turned around the concept of '*actio*'. We can start from the definition of '*actio*' given by the jurist Celsus: "*Nihil aliud est actio quam ius quod sibi debeat, iudicio persequendi*". According to such definition, '*actio*' was meant as the right ('*ius*') to claim in a trial ('*iudicio*') something that was due ('*debeat*').

There is some difficulty, though, in understanding this idea of '*actio*' as '*ius*' correctly. The relationship between the right to claim something in a trial and the subjective right laying under it (or, in more general terms, between procedural law and substantive law) is still much disputed nowadays, as the same distinction between the two aspects is sometimes

denied.

In modern thinking, it is however certain that substantive law is conceived as a necessary ground for procedure. In other words, a trial can begin only if it is founded on substantive law, namely on a subjective right.

Such perspective is, in Roman law, totally inverted. The existence of a subjective right can be inferred from the same fact that an *actio* is created (by the *ius*, or the *lex*, or the *praetor*, etc.) to defend a certain juridical position or situation. No expression matching our modern 'subjective right' in its general sense can be found in Roman law lexicon; in fact, the word '*ius*' means «subjective right» only in the case of some *iura in re aliena* (subjective rights upon a thing, which someone else

has the ownership of). Besides, it must be remarked that the *actiones* were

(in each one of the procedures known in Roman law - see under) "typical". This adjective means that each *actio* was specifically admitted in the Roman law system, so there was only a limited list of them, and simply no such thing as a "general action" that could be used for all purposes. Such conception implied that each *actio* defended only a specific juridical position, or, in modern terms, that we can infer the creation of a new subjective right only from the creation of the *actio* itself.

N. B. '*actio*' is singular; '*actiones*' is plural.

[\*\*\*PAY ATTENTION: we have just said that no such thing as a "general action", which could be used for all purposes, was ever admitted in Roman law. However, this did not keep some *actiones* from having a wider scope because of their nature, and from being applied to more than one only case. This could be said, for instance, for the *actio de dolo*, or, to some extent, for the *actio praescriptis verbis* (which was used for all innominate contracts and not for only one)]

### Trial Procedures in Rome

In Roman civil law, three different forms of procedures were admitted, each one in a different period:

- **procedure per legis actiones** – it was created in the archaic age; it has been used together with (alternatively to) the procedure *per formulas* for a large part of the preclassical age, and then it disappeared;
- **procedure per formulas** - it was created in the preclassical age; it has been used together with (alternatively to) the *cognitio extra ordinem* for a large part of the preclassical age, and then it disappeared;
- **cognitio extra ordinem** - it was created in the classical age and survived till the age of Justinian.

[\*\*\*PAY ATTENTION: with the only exception of the *cognitio extra ordinem*, civil law process in Rome was characterised by a clear difference between the role of the magistrate and the role of the judge. Magistrates held a public office and were elected by Roman citizens; judges were public citizens, to whom magistrates – with the agreement of the two parties of the trial – entrusted the duty to judge the case. This implies that, in Roman law, till a quite advanced stage, the two offices of judge and of magistrate

– differently from what happens nowadays in most legal systems – **did not coexist in the same person. In fact, judges and magistrates had different roles and the two words cannot be used as synonyms]**

## The process of legis actiones

What we know of the process of *legis actiones* derives essentially from the *Institutiones* of Gaius. We know that such process was abrogated in two stages: 1) firstly with the *lex Aebutia* (130-120 BC), which probably abrogated only the *legis actio per conditionem*; 2) secondly, with the *lex Iulia iudiciorum privatorum* (in the first century BC), which abrogated all *legis actiones*, with the exception of the *damnum infectum* and of trials concerning inheritances before the *centumviri* (a kind of jury that was used in very specific cases instead of the ordinary single judge).

The main characteristics of the *legis actiones* are:

- **Formalism** - *Legis actiones* were based on a specific ritual; the party who did not respect it would have lost the trial;
- **Uniqueness** - *legis actiones* could be used only for the kind of claim for which they were created;
- **Orality** – writing was not used at all;
- **Availability reserved only to Roman citizens;**
- **Presence of both plaintiff and defendant** (except for the *legis actio per pignoris capionem*) **before the magistrate**. In fact, if the defendant refused to appear before the magistrate after the plaintiff asked him to (such asking was called '*in ius vocatio*'), he could be physically dragged by the same plaintiff;
- (only for declarative *legis actiones* – see under ) **Division in two phases:** *in iure* and *apud iudicem*;
- **Typicality** - the *legis actiones* were five: *legis actio sacramenti (in rem e in personam)*, *legis actio per conditionem*, *legis actio per iudicis arbitrive postulationem*, *legis actio per pignoris capionem*, *legis actio per manus iniunctionem*. Three of them were declarative (*legis actio sacramenti (in rem e in personam)*, *legis actio per conditionem*, *legis actio per iudicis arbitrive postulationem*), namely their purpose was to ascertain (to declare) if the claim of the plaintiff was or was not founded; the other two (*legis actio per pignoris capionem*, *legis actio per manus iniunctionem*) were executive,
- namely their purpose was to directly put the claim of the plaintiff into effect.

Furthermore, the process of *legis actiones* hosts a fundamental distinction between ***actiones in rem* and *actiones in personam*** (see under about *legis actio sacramenti in rem* and *in personam*), which distinction is one of the fundamentals of the Roman civil process in each form of it.

***actiones in rem* are all *actiones* where the claim of the plaintiff is potentially *erga omnes* («towards everybody», so not only towards a specific person), which means that the *actio* can potentially be brought forth against everybody.** The task of the judge is to ascertain the power of the plaintiff on the thing that is the object of the trial. In the test of the *formula* (see under), the *intentio* mentions only the name of the plaintiff (and not the name of the defendant); besides – we are always referring to the test of the *formula* – the claim of the plaintiff is always defined as

deriving *ex iure Quiritium*, namely «from the law of the Quirites» (in the case of *dominium*), or defined in terms of a *ius in re aliena* to which the plaintiff is entitled (in the case of praedial servitudes, usufruct, etc.). **In terms of substantive law, it can be said that the *actiones in rem* were brought forth for the defence of rights *in rem*.**

[N.B.: '*Quirites*' was the old name for 'Romans', deriving from the ancient Roman god *Quirinus*.]

- ***actiones in personam* are all *actiones* where the claim of the plaintiff, who affirms to be a creditor, is towards a specific person, who, as the plaintiff declares him to be his debtor, is bound to a specific kind of behaviour towards the same plaintiff; so the *actio* can be brought forth only against such person.** The task of the judge is to ascertain whether the defendant is truly bound to such behaviour. In the test of the *formula* (see under), the *intentio* mentions both the name of the plaintiff and the name of the defendant; besides – we are always referring to the test of the *formula* – the bond of the defendant toward the plaintiff is always expressed with the Latin verb *oportere*. **In terms of substantive law, it can be said that the *actiones in personam* were brought forth for the defence of credits.**

Let us now examine the *legis actiones* in details.

## Legis actio sacramenti

The *legis actio sacramenti* had two forms, *in rem* and *in personam*:

- the *legis actio sacramenti in rem* was used for the defence of rights *in rem*; so, it was the most ancient form of *reivindicatio*;
- the *legis actio sacramenti in personam* was used for the defence of credits;

Gaius' Institutes are contained in the Veronese Palimpsest, which is unfortunately incomplete regarding the *legis actio sacramenti in personam*. What follows refers mainly to the *legis actio sacramenti in rem*.

The phase *in iure* included the following steps:

- both parties should come before the magistrate taking the thing with themselves (if the trial concerned immovables, the *actio* should take place on the same piece of land that was the object of the trial; later, the thing could be represented by a symbol, for instance a brick, the keys, etc.);
- both parties should touch the thing with a stake ('*festuca*'); at the same time, each party should affirm that the thing was his (*vindictio* of the plaintiff and *contravindictio* of the defendant);
- each party should defy the other party to make the *sacramentum*, which was, according to Gaius' description, a sort of bet (which probably had a religious value at its origin, as the juridical oath) to pay 50 (in case the value of the trial was not more than a thousand axes) or 500 axes (in case the value of the trial was more than a thousand axes) if the party should lose the trial;
- the magistrate assigned the temporary possession of the thing (i.e. the possession from the beginning of the trial to the end of it) to the party who offered the most reliable guarantors; such guarantors promised that, in case the trial was lost, the thing would have been handed over to the winning party together with the fruits that the thing would have produced during the trial (so the guarantors were called *praedes litis et*

*vindiciarum*, namely «guarantors of the thing object of the trial and of

the fruits»); if the defendant, having the possession of the thing, lost the trial and did not hand over the thing, the plaintiff, as winner of the trial, could bring forth an *actio* against the *praedes*.

Acts *apud iudicem* («before the judge») consisted basically in a discussion before the judge about who was the true owner of the thing (hence, about the evidence that could be given about such ownership); the burden of the proof was on both parties, because both parties had affirmed, *in iure*, that the thing was theirs.

The loser had to pay the sum of money to the public exchequer.

We know that, in the *legis actio sacramenti in personam*, the defendant could deny the claim of the plaintiff; in this case, the procedure would have included the *sacramentum* and the phase *apud iudicem*.

The defendant, though, instead of denying the claim of the plaintiff, could also: 1) neither admit nor deny such claim, in which case he would have been legally considered as *indefensus* («having no legal defence») and should have been *addictus* («given», «assigned») to the plaintiff; 2) admit his debt, in which case he would have been considered as *confessus in iure* («having confessed such debt during the phase *in iure*») and the plaintiff could have sued him with the *legis actio per manus iniunctionem*.

The plaintiff who won the trial could also sue the defendant with the *legis actio per manus iniunctionem*, but if the credit did not consist in a certain sum of money, the value of the credit should have been firstly determined by an *arbitrium*, namely by the *legis actio per iudicis arbitrive postulationem*.

## Legis actio per condictionem

The *legis actio per condicionem* was introduced in the Roman legal system by a *lex Silia* in the IIIrd century BC, for credits of a certain sum of money; it was then extended by a following *lex Calpurnia* to credits regarding specific things different from money. The reasons for the creation of such *actio* are uncertain, as one could use the *legis actio sacramenti in personam* and the *legis actio per iudicis arbitrive postulationem* for the same credits.

The phase *in iure* included the following steps:

- the plaintiff stated the amount or the object of his credit, without mentioning its legal source (so it was irrelevant how the credit was created);
- the defendant could: 1) neither admit nor deny such claim, in which case he would have been legally considered as *indefensus* and *addictus* to the plaintiff; 2) admit his debt, in which case he would have been considered as *confessus in iure* and the plaintiff could have sued him with the *legis actio per manus iniunctionem*; 3) deny to be a debtor, in which case the magistrate would have ordered him to come back after thirty days for the appointment of the judge who would have decided the trial.

The rules for the *manus iniectio* (see under) in case the plaintiff should have won the trial were the same of the *legis actio sacramenti in personam*.

## Legis actio per iudicis arbitrive postulationem

The *legis actio per iudicis arbitrive postulationem*, according to the XII tables, could be used only for credits deriving from *stipulatio* and for the division of an inheritance; the *lex Licinnia* (which was enforced before 210 BC) extended the *actio* to the case of division of things that were in common ownership. The procedure implied that the parties uttered specific words ("*certa verba*"), mentioning the source of their right and asking for the appointment of a *iudex* (in case of credits deriving from *stipulatio*) or an *arbiter* (in all other cases).

## Legis actio per manus iniunctionem

The *legis actio per manus iniunctionem* was executive and was also one of the most ancient *legis actiones*. It could be used in three cases:

- *manus iniectio iudicati* – it could be used in case the defendant was condemned for being debtor of a sum of money. In this case the creditor could sue with the *manus iniectio*: 1) the debtor who did not pay within thirty days from the sentence; 2) the *confessus* (who, according to the XII tables, was considered as the *iudicatus*);
- *manus iniectio pro iudicato* - it could be used in cases where the juridical situation was clear enough to be considered as similar to a situation ascertained in a previous trial; for example, the *lex Pubilia* provided the *manus iniectio* in favour of the *sponsor* (namely, of the guarantor who promised by a *sponsio*) and against the debtor who did not repay the guarantor within six months what the same guarantor paid to the creditor;
- *manus iniectio pura* – it could be used in further cases where the claim of the plaintiff was founded in itself; for example, the *lex Furiatamentaria* gave to the heir the *manus iniectio* against the legatee who obtained the payment of more than a thousand axes because of a *legatum*.

[N.B. it is not evident why some cases were considered as ground for the *manus iniectio pro iudicato* and other cases as ground for *manus iniectio pura*. The choice between the two could have been a mere question of judicial politics.]

The procedure was the same in all three cases and it included the following steps:

- both parties should come before the magistrate;
- the plaintiff (creditor), addressing the defendant (debtor), said the amount or the object of his credit and the source of it;
- the plaintiff (immediately after the previous statement) declared his intention to "*manum inicere*" (namely, «to physically grab by hand») the debtor, at the same time grabbing the debtor in facts.

The debtor could:

- appoint a *vindex*, who could save him from the *manus iniectio*. Such *vindex*, in his turn, could choose either to pay the debt or to deny it; if he denied, the creditor could sue him with a declarative *legis actio* where the *vindex* could have been condemned to pay twofold;
- (in the only *manus iniectio pura*) deny the existence of the debt without the intervention of any *vindex*, in which case the same debtor would have been sued with a declarative *legis actio* and could have been condemned to pay twofold;
- (in case he did not have any *vindex* or did not deny the debt) be *addictus* to the creditor, who could keep him in chains in his private prison for sixty days; during such period, the creditor should take the debtor to the city market for three market days running, proclaiming aloud the amount of the debt so that somebody could ransom the debtor. If the debtor was not ransomed, he could be sold as a slave beyond the borders of Rome, or killed, in which case, according to the XII Tables, creditors could divide his body into pieces (being irrelevant if such pieces were or not proportionate to each debt).

The possibility, originally admitted only in the *manus iniectio pura*, to deny the debt even without the help of a *vindex*, was extended by a *lex Vallia* to all cases of *manus iniectio*, apart from the *iudicatus* and of the debtor toward the *sponsor*.

## Legis actio per pignoris capionem

The *legis actio per pignoris capionem* was executive and dated back before the XII Tables; it could be used for religious or military credits. The procedure included the utterance of specific words ("*certa verba*"), while at the same time the plaintiff took possession of (some) things belonging to the debtor, which the creditor would have kept as a pledge; the debtor had the possibility to ransom them. The presence of the magistrate and the debtor was not needed.

## 2. The procedure per formulas

### General features

The creation of the procedure *per formulas* is strongly connected to the growth of business and trade between Roman and foreigners (*peregrini*). Legal issues could arise in reference to such trade, but these could not be solved by using *legis actiones*, as they were available only to Roman citizens.

Therefore, the *praetor*, being a magistrature with *iurisdictio* (namely, a magistrature with the power of "*dicere ius inter duos*", of «stating the law [that could be applied] between two [parties]»), provided a new form of procedure that was both available (also) to foreigners and easier to use than the *legis actiones*, as these were characterised by a high formalism (see above).

### The formula and its parts

The procedure *per formulas* («by means of the formulae») was focused on the *formula*. The *formula* was a **written document**, formally addressing the judge, elaborated by the magistrate according to the will of the parties.

[N.B.: The relationship between the will of the parties and the role of the magistrate in the elaboration of the *formula* is much disputed in Roman law studies. Please notice that the magistrate could legitimately deny the *actio*. Thus, the role of the magistrate cannot be reckoned as simply "ratifying" other people's will.]

The "models" of the *formulae* and of the parts of them (see under) were published in the edict of the *praetor*.

The *formula* could include many parts. Some of them are traditionally called "ordinary". However, in a strict sense, this adjective is not used correctly. The "ordinary" parts were included in the majority of cases, but not in all of them; in a strict sense, almost all parts of the *formula* were "accessory", as they could or could not be included. Only two parts were always included in the *formula*: the appointment of the judge and the *intentio*, which was nonetheless missing from the *formula* of the *actio iniuriarum*.

The ordinary part of the *formula* were:

- the appointment of the judge ("*Titius iudex esto*", «let Titius be judge»);

- the *intentio*, which contained the claim of the plaintiff. It could be *certa* or *incerta*, depending on the fact that the object of the claim was or was not determined (for instance, there was no determined object in the *actiones bonae fidei*, where the claim of the plaintiff had to be “quantified” in terms of money by the judge). If the *intentio* was *incerta*, the *formula* had to include the *demonstratio*. If the *intentio* was *certa*, it could mention a different thing or a higher or lower value than the real value of the claim. This gave way to a *pluris petitio* («request of something more») or *minoris petitio* («request of something less»). The consequences of *pluris petitio* were negatively relevant for the plaintiff, because of the effects of the *litis contestatio* (see under), according to which the claim was preserved in the terms in which it was poured in the *intentio*. Thus, if the claim consisted in a *pluris petitio*, the judge would have considered such claim to be without grounds, as the plaintiff had no right to a higher sum of money. The plaintiff would have lost the trial, but also it would have been impossible for him to use again the same claim, as this was considered extinct.
- the *demonstratio*, which was included only in the *formulae* with *intentio incerta* and mentioned the grounds for the claim of the plaintiff (for instance, the *demonstratio* was included in all the *actiones bonae fidei*);
- the *condemnatio*, which attributed expressly to the judge the power to condemn the defendant – if the *intentio* appeared as founded on solid ground at the end of the trial –, or to absolve him;
- the *adiudicatio*, which replaced the *condemnatio* in the divisory trials (*actio familiae erciscundae* and *actio communi dividundo*) and in trials concerning the determination of borders (*actio finium regundorum*); it attributed expressly to the judge the power to assign to the heirs or to the co-owners or the neighbours owners the ownership of the single parts of the thing or plot of land;

[\*\*\*PAY ATTENTION: in the procedure *per formulas*, the defendant could be condemned only to pay a sum of money. The procedure *per formulas* did not admit any different kind of condemnation (namely, a condemnation to give or do something different from paying a sum of money)]

Further (“accessory”) parts of the *formula* are:

- the *praescriptio*, which, from a formal point of view, should not be considered as part of the formula, as it was placed before the appointment of the judge. The *praescriptio* could be *pro actore* («in favour of the plaintiff») or *pro reo* («in favour of the defendant»);
  - o the *praescriptio pro actore* – in case of a debt that should have been paid by instalments – avoided the extinction of the whole claim of the plaintiff (ordinarily due to the effects of the *litis contestatio*, see under), limiting the efficacy of the action to the only due instalment payment;
  - o the *praescriptio pro reo* – in case somebody claimed the ownership of a thing being part of an inheritance – prevented the defendant from losing his status of heir as a consequence of being sued. Gaius affirmed that, in his age, such *praescriptio* was not used anymore, as it was transformed in an *exceptio*;
- the *exceptio*, which was a remedy in favour of the defendant and described the legal or factual situation modifying or denying the claim of the plaintiff. The *exceptio* was placed between the *intentio* and the *condemnatio* and it worked as a negative condition of the *intentio*; if the claim of the plaintiff was founded on solid grounds, the judge would have to condemn the defendant “provided that the facts mentioned in the *exceptio* did not happen”.

The *exceptio* is different from the “mere defence”, namely from the mere denying of the claim of the plaintiff because of its non-existence, for two reasons:

- (concerning facts) the *exceptio* made it possible to let the judge evaluate other facts than the simple evidence of a *groundless intentio* (to explain the point: If the defendant declared that he was not in Rome at the time when the plaintiff affirmed he promised him a sum of money, this can be considered as a mere defence; if the defendant declared that he had promised because of the *dolus* of the plaintiff, this required an *exceptio*);
- (concerning form) the mere defence was allowed in any trial, regardless of the content and parts of the

*formula*; on the contrary, the defendant could let the judge evaluate facts that should be included in an *exceptio* only if he asked for the *exceptio* before the magistrate and the *exceptio* was consequently included in the *formula*.

[\*\*\*PAY ATTENTION – this last rule has an exception with reference to the *actiones bonae fidei*. These actions had such specific characteristics that some facts modifying the claim of the plaintiff (facts that, as a rule, should have been included in an *exceptio*) could have been examined by the judge without any need to include a proper *exceptio* in the *formula* (this happened, for instance, in case of “*dolus*”, namely fraud, or “*metus*”, namely fear)]

A connected distinction in matter of termination of obligations can be traced between ‘**extinction ope exceptionis**’ (“by means of an *exceptio*”) and **extinction ipso iure** (“by means of the law”), depending on the fact that the obligation could be terminated only because of an *exceptio* included in the *formula* by request of the defendant, or that the obligation could be considered as automatically terminated according to the law, in which case the claim of the plaintiff could be denied by a mere defence (for instance: the plaintiff sued the defendant so that he performed the obligation; the defendant had to ask for an *exceptio*, if he intended to mention a *pactum de non petendo* - an informal agreement by which the creditor accepted not to ask the performance; otherwise, if he intended to declare that he already performed, he can simply deny the claim of the plaintiff by mere defence, as performance worked *ipso iure*).

The *clausola arbitraria*, which could be considered as a remedy in favour of both parties. It was used in case the object of the trial was a thing, which the plaintiff claimed to have back, as it gave a solution to the problem following from the impossibility of a condemnation different from the payment of a sum of money (see above). The *clausola arbitraria* gave to the judge the *arbitrium*, namely the power to absolve the defendant in case he gave the thing back before the judgement. Such clause was typically included in the *reivindicatio* (the *actio* for the defence of ownership) and, generally, in all *actiones in rem*. In the *actiones* including a *clausola arbitraria*, which were called *actiones arbitrarie*, the amount of the *condemnatio* was determined by the judge, often on the basis of an oath of the plaintiff about the value of the thing (*iusiurandum aestimatorium*). The plaintiff could fix a bigger value than the real one, by such making it more convenient for the defendant to give the thing back. Nonetheless, as it was considered unfair to let the plaintiff have no limits, a *taxatio* was usually added to the *iusiurandum*, namely a clause that imposed to the plaintiff's oath not to go beyond a certain value.

## The two phases of the procedure per formulas

The procedure *per formulas*, as the procedure *per legis actiones*, can be distinguished in two phases: a) *in iure* («before the magistrate» [N.B. ‘*iure*’ has many meanings. Here, it means the «place where the magistrate is»]); b) *apud iudicem* («before the judge»).

The trial was preceded by the *in ius vocatio*. This latter was the act consisting in the plaintiff calling upon the defendant to appear in the trial, by such explaining which action he was about to bring forth against him. If the defendant (who was ‘*vocatus*’, «called upon») did not follow the plaintiff *in iure*, the *praetor* could grant the same plaintiff, as a defence, the ‘*missio in bona*’, namely the «possession of <all> goods» belonging to the *vocatus*. The *vocatus* could, though, promise to the plaintiff, with a *vadimonium* (a sort of oath), that he would have appeared in trial on a certain day, by such avoiding coming immediately before the *praetor*; he could also give a *vindex*, namely a guarantor, for the same purpose.

- a) **Phase in iure.** The phase *in iure* included the following stages:
- *editio actionis*, namely the choice of the *actio* and *formula* among the many mentioned in the Edict. This choice was actually a repetition before the magistrate of the same choice that the plaintiff made before the only defendant in the *ius vocatio*;
  - *postulatio actionis*, namely the request, made by the plaintiff to the magistrate, to grant the chosen *actio*;
  - plaintiff exposing his claim and possibly discussing it with the defendant; at this stage the defendant could also ask for an *exceptio* to be included in the *formula*, the plaintiff could ask for a *replicatio* (namely a reply to the *exceptio*), etc.

The phase *in iure* could be ended by the magistrate denying the *actio* to the plaintiff (*denegatio actionis*), or it could continue, if the *praetor* granted the *actio* (*datio actionis*).

- In case of *denegatio actionis*, such denying could happen either because the claim of the plaintiff had evidently no ground at all, or because the magistrate found it unfair to grant the *actio* (this could happen

as *aequitas*, namely fairness, was a ground value in Roman law and in *ius praetorium* particularly). The *denegatio actionis* was not a judgement, thus it did not have its effects; this meant that the plaintiff could possibly – once the magistrate who denied him the *actio* left his office – ask the new magistrate for an *actio* founded on the same claim.

- In case of *datio actionis*, granting the *actio* implied both that the two parties agreed on the text of the *formula* and that the magistrate approved such text. In this case, the phase *in iure* would have ended with the following three acts:
  1. the magistrate *iudicium dabat*, namely he granted the *formula*;
  2. the plaintiff *iudicium dictabat*, namely he read aloud the *formula* to the defendant;
  3. the defendant *iudicium accipiebat*, namely he received the *formula*, listening to it from the plaintiff.

[N.B.: here, as it might be easily inferred, the word '*iudicium*' is synonymous for '*formula*']

The sum of these three acts was called *litis contestatio*.

The *litis contestatio* is the most crucial moment of the phase *in iure*. According to the interpretation of the Roman sources made by modern scholars, it had three effects:

- **preclusive effect** - after the *litis contestatio*, the plaintiff could not propose the same claim anymore (see under);
- **preserving effect** – after the *litis contestatio*, the claim of the plaintiff was “preserved” in the same terms in which it was included in the *formula*

[N.B. notice that the expression ‘preserving effect’ is in some way misleading, as it seems to give for granted that the claim was in any case “preserved” as it was before being included in the *formula*. We know, though, that mistakes were possible, as in *pluris petitio* (see above), when the claim was “preserved” in a bigger economical value than the original value of the claim].

In case of procedural representation (namely in case the party was replaced, in the trial, by somebody else) either referring to the plaintiff or to the defendant, these effects worked differently, depending on the representative being a *cognitor*, namely a representative formally appointed by the plaintiff or the defendant before the other party, or the representative being a *procurator*, namely somebody appointed either informally or without the other party being present. This topic will be further discussed elsewhere.

- **novative** – as this is the most complex effect of the *litis contestatio*, such topic will be discussed in a further paragraph (see hereunder).

The *litis contestatio* had a ‘novative’ effect about the obligations that were ground for '*iudicia legitima*'. '*iudicia legitima*' was the name given to trials being held within one mile from Rome before a judge who was a Roman citizen and between parties that were Roman citizens as well, trials whose judgement had to be given within 18 months from the granting of the *formula*; all other trials were called *iudicia quae imperio continentur*.

We use the adjective ‘novative’ to qualify the effect of *litis contestatio* because of which the original obligation, after “passing through” the *litis contestatio*, was at the same time terminated and recreated as it was included in the *formula*; thus, after the *litis contestatio*, the defendant was not bound *ex obligatione*, but *ex litis contestatione*.

We also use the expression ‘extinctive effect’ to refer to the only extinction of the original obligation caused by the *litis contestatio*.

The “novativity” of the *litis contestatio* was not a strict one, as it is not the same of the *novatio* obtained through *stipulatio*. The *litis contestatio* did not terminate pledges or interests.

A relevant consequence derived from the innovative effect. An obligation that could not be transferred to heirs by way of inheritance, could become transferable after the *litis contestatio*, because the source of the bond was changed (for instance: *Iniuria* is a *delictum* from which an obligation arises. The claim, which the victim of the delict had against the offender, could not be transferred; but if the victim died after the *litis contestatio*, his heir could take his place in the trial, because the claim, which once derived from the delict, changed into a claim *ex litis contestatione*).

It is not to be thought that in the *iudicia quae imperio continentur* (namely, all trials not answering to the same

requirements asked for the *iudicia legitima*), and in trials concerning ownership and other *iura in re*, where the obligation was not terminated by way of *litis contestatio*, the claim could still be ground for a further *actio*. The preclusive effect worked in all trials, though, in the *iudicia quae imperio continentur*, and in trials concerning ownership and other *iura in re*, such effect was not applied automatically, but an *exceptio* was given to the defendant, called *exceptio rei iudicatae vel iudicium deductae*, to stop further attempts of the plaintiff to propose again the same claim.

#### b) Phase *apud iudicem*.

The judge was to be chosen by the two parties with the agreement of the magistrate. Normally there was a one single judge, but in some cases juries were used, as for instance the *recuperatores*, who were judges in trials concerning the status of freedom, or concerning *iniuria* or *bona vi rapta*, and in other trials of major social relevance. Judges were chosen from specific lists.

We do not know much about the phase *apud iudicem*; we know that it was held with no kind of formality and that the two parties expressed freely their claims, defenses, and evidence of them, to which admission and evaluation there were no specific limits (so proofs were all admitted, independently from their nature, being irrelevant that they consisted in witnesses, documents, etc.).

The judge, though, was strictly bound to the instructions included in the formula, as what was not mentioned in the formula could not be evaluated at all (for instance, if the defendant did not ask for the inclusion of the *exceptio doli* in the formula, evidence of such *dolus* could not be admitted by the judge in the trial); furthermore, the judge could not, because of the *condemnatio*, end up the trial by other way than an acquittal or a condemnation of the defendant (except in case the formula included an *adiudicatio*, in which case the trial would have ended up by an "assigning" judgement).

Judgements could not be appealed (neither in the formulary procedure, nor in the procedure *per legis actiones*). They created an *obligatio iudicati*, because of which the plaintiff, if he did not receive the *summa condemnationis* (namely, the sum of money that was due because of the condemnation) from the defendant, could sue the same defendant with the *actio iudicati* (see under).

## Executive procedure

The defendant who, having lost the trial, did not perform the *obligatio iudicati* within 30 days from the condemnation, could be sued with the *actio iudicati, in personam*.

In the phase *in iure* of such *actio*, the defendant could admit or deny his debt; if he admitted, the magistrate gave way to the executive phase; if he denied, the *actio iudicati* went on. If the denial of the defendant had no ground, it would have been considered as '*infitiatio*', namely as a fraudulent attempt to prolongate the time of payment. Hence, the defendant would have been condemned to pay the double; then, the executive phase would have taken place.

The execution could be personal (namely it could affect the defendant personally) or it could be patrimonial (namely it could affect only the assets of the defendant).

- Personal execution had softer rules than the ones applied in the *legis actio per manus iniunctionem*, though it recalled it. It provided for the debtor to be *addictus* to the creditor; the latter, though, could not sell him or kill him anymore, but could keep him in his private prison if he repaid his debt by his work or somebody would redeem him, by paying his debt.
- Patrimonial execution was a creation of the *praetor*. It was called '*bonorum venditio*', «sale of the goods», and included several stages:
  1. creditor would have been given the possession of all the assets of the debtor (*missio in bona*);
  2. the magistrate enforced the *proscriptio*, which consisted in breaking the news (by way of public announcement) that the procedure had started; this concerned specifically all the creditors of the defendant, as each one of them had a right to take a part in the procedure;
  3. if the creditor, after 30 days from the *proscriptio*, had not received his money yet, the debtor would have been declared *infamis* (this implied many consequences, among which the most relevant in civil law was that the defendant could not be appointed as representative in a trial);
  4. the magistrate, after 30 days from the *proscriptio*, appointed a *curator bonorum*, who temporarily managed

the goods of the debtor;

5. creditors appointed a *magister bonorum*, who would be the auctioneer in the auction of the goods of the debtor;
6. the winning bidder was called *bonorum emptor* («buyer of the goods»), and it must be remarked that the bid did not directly concern the value of the goods, but it directly concerned the value of the debts; so, the auction was won by offering to pay a higher percentage of such debts.

The *bonorum emptor* was considered, according to the *ius praetorium*, as a universal successor *inter vivos*. This implied that he took the place of the debtor in all the rights and obligations the debtor originally had. Such succession was possible because of specific *actiones praetoriae* (see under), which, by way of some needed modifications, could be brought forth either by or against the *bonorum emptor* (instead of being brought forth either by or against the original debtor). These *actiones* were:

- the *actio Serviana ficticia*, which included in its *formula a fictio*, namely a clause according to which the judge should have judged the matter on the premise that the *bonorum emptor* was the heir of the original debtor;
- the *actio Rutiliana*, which included the name of the original debtor in the *intentio*, and the name of the *bonorum emptor* in the *condemnatio* (this pattern of the *formula*, which was also applied in other cases, is modernly called “transposition”).

A *lex Iulia*, probably enforced under the emperor Augustus, granted to the debtor who could not be morally reproached for not paying his debt the chance to avoid *infamia* by accepting the *cessio bonorum*, namely the voluntary transfer of all his goods to his creditors, a transfer that would have been in any case followed by the auction of such goods, which would have been bought by some *bonorum emptor*.

## Classification of *actiones* in the procedure *per formulas*

*Actiones* were differently classified in the procedure *per formulas*. Such classifications have an outstanding relevance in the correct understanding of the formulary trial.

- a) *Actiones bonae fidei* and *actiones stricti iuris*.

*Actiones* were called ‘*bonae fidei*’ (also the expression ‘*iudicia bonae fidei*’ was much in use) if the expression “*ex fide bona*” was added in their *intentio* to the verb “*oportere*”. All *actiones bonae fidei* were *in personam*. The inclusion of the expression ‘*ex fide bona*’ implied that the power of the judge was widened, as the judge could evaluate the juridical relationship that was the matter of the trial:

- as a whole (not only within the limits of the claim of the plaintiff);
- not only according to the *ius*, but also according to good faith and fairness (considered as objective values and standards).

Some relevant juridical consequences derived from such major power of the judge:

- vitiating factors as *dolus* (fraud) e *metus* (moral violence) were firstly relevant only in the *actiones bonae fidei*, because such conducts were clearly the opposite of good faith; accordingly, *dolus* and *metus* could be relevant in such *actiones* without any need to include an *exceptio* in the *formula*;
- as the judge could evaluate the matter of the trial, he could also evaluate the eventual counterclaim of the defendant. Thus, compensation was admitted in the *actions bonae fidei* (provided that the counterclaim of the defendant regarded the same matter of the trial);
- performance of pacts, if they were added to a “*bonae fidei* contract or legal act” (namely, to a contract or legal act defended by an *actio bonae fidei*) at the same time when the contract or act was concluded (such pacts were called “*pacta in continenti*”), could have been demanded with the same *actio bonae fidei* that defended the main contract; in the perspective of substantial law, this meant that such pacts produced an obligation;
- in case of delay of payment, debtor who obliged himself by way of a *bonae fidei* contract should also

pay interests on his debt.

All other *actiones* (namely, all *actiones* that are not *bonae fidei*) are called *stricti iuris*. The *actiones stricti iuris*, being opposite to the *bonae fidei*, required the inclusion of an *exceptio* in case of *dolus* and *metus*, did not allow compensation (but this changed in time) and any pact added to *stricti iuris* contracts or legal acts (as well as pacts added to *bonae fidei* contract or legal act but after some time that such contract or legal act was concluded, which were called "*pacta ex intervallo*") could be enforced only by an *exceptio*; as exceptions were procedural remedies in favour of the defendant, in the perspective of substantial law, this meant that such pacts, instead of creating an obligation, terminated it, hence they had an extinctive effect.

a) *Actiones iuris civilis* and *actiones praetoriae*

*Actiones* were either *iuris civilis* or *praetoriae*, depending on being founded on *ius civile* or, on the contrary, being founded on *ius praetorium*, namely being granted by the *praetor* (based on his *iurisdictio*) for situations which *ius civile* did not provide for. You should remember that the edict included the *formulae* of both kind of *actiones*.

*Actiones praetoriae* could be either *utiles* or *in factum*.

Each *actio utilis* was created, by way of analogy, on the model of an *actio iuris civilis*; hence, the *actio utilis* applied to cases which the *actio iuris civilis* did not apply to, being, as such, an extension of it (for instance, in case of damage, the *praetor* granted to the usufructuaries an *actio utilis*, which was modelled on the original *actio legis Aquiliae iuris civilis* – available only to the owner of the damaged thing). Therefore, the *intentio* of the *actio utilis* referred to *ius civile*.

The extension of *ius civile* made possible through the *actiones utiles* could work in different ways, of which the following two are the most relevant:

1. *fictio* - the *fictio* was a clause, which was included in the text of the *formula* in connection with the *intentio*, and imposed on the judge the evaluation of the matter "as if" some event, being relevant for *ius civile*, had happened, though it did not happen at all (for instance, in the *actio Publiciana* the *fictio* obliged the judge to consider that the time for *usucapio* had duly passed). The *actiones utiles* including a *fictio* in their *formula* were called *actiones ficticiae*;
2. transposition – transposition occurred when the name of a party, who was mentioned in the *intentio* either as plaintiff or defendant (a transposition could work on both sides), was replaced, in the *condemnatio*, by a different name (for instance, a transposition worked in the *actio Rutiliana*, in favour of the *bonorum emptor* – see above). This happened when the person who, according to *ius civile*, had the right to be party in the trial was not the same person whom the *condemnatio* should work in favour of or against. Thus, such complex mechanism was applied in case the person who should be, according to *ius praetorium*, a party in the trial had no right, according to *ius civile*, to have such role. Transposition was used especially in the *actiones adiecticiae qualitatis* and in case of the appointment of a *cognitor* or *procurator*.

The *actio in factum* totally disregarded the *ius civile*. An instance can be the *actio* granted by the *praetor* for the defence of *depositum* (*actio depositi in factum*) before such contract was included in *ius civile* and an *actio depositi in ius bonae fidei* was created. The *intentio* of the *actio in factum* mentioned only the fact on which the claim of the plaintiff was founded (so the *intentio* was "*in factum concepta*").

a) *Actiones poenales*, *reipersecutoriae*, *mixtae*

- the *actiones reipersecutoriae* had as their purpose the pursuit of a *res* (namely, of a «thing» in a wide sense, including in such word everything having an economical value), namely a restoration for a loss (which can be obtained by having the thing back or by payment).
- the *actiones poenales* had as their purpose the pursuit of a punishment (*poena*), namely of a sanction that, at its origin, could consist both in a corporal punishment or in a sum of money (for instance, according to the XII tables the thief caught during the theft should be flogged), but that, with the procedure *per formulas*, consisted only in payment. As such, in the formulary procedure, *actiones poenales* and *reipersecutoriae* could not be distinguished because of the kind of *condemnatio*; the penal nature of the action could usually be deduced by the fact that the *condemnatio* referred to a multiple value of the offence, as there were *condemnationes* in twofold, threefold, etc. There were also *actiones poenales in simplicium*, for the mere value of the offence (such was the case for the *actio de dolo* or the *actio depositi* in case of *depositum miserabile* or *necessarium*, concluded because of a war or a natural disaster as floods, earthquakes, etc.).

The *actiones poenales* have the following characteristics (which the reipersecutory actions have not):

- **“un-transfereability” on the passive side** – penal actions could be brought forth only against the offender and not against his heirs; during the classical age, it was admitted that the victim could sue the heir with a reipersecutory action *in id quod ad eum pervenit*, namely within the limits of what the heir obtained as an inheritance deriving from the conduct of his father;
- **noxality** – in the case of a penal action brought forth against the *dominus* or *pater* for the delict committed by his *servus* or his *filius*, the *dominus* or *pater* could free himself from the obligation either by paying the *summa condemnationis* or by giving the son or slave *in noxam*, namely transferring to the victim, by way of *mancipatio*, the *potestas* on the *filius* or *servus*, in order to let this latter redeem himself with his work.
- **Strict solidarity** – penal action could be brought forth against each of the offenders for the whole amount of the punishment (namely, if the thieves caught during the same theft were ten, the victim could potentially obtain a sum of money amounting to 40 times the value of the thing stolen, as each thief could be sued with the *actio furti manifesti* and such *actio* included a *condemnatio* to fourfold). The same was true on the active side, as each victim could sue the same offender for the whole value of the punishment.
- **Cumulation with reipersecutory actions** – if the same case could be defended both with a reipersecutory and a penal action, both actions could be brought forth together (namely, there was no need to choose between the two; but each action gave way to a different trial).

The *actiones mixtae* had as their purpose the pursuit of *res et poena* together. Such concept was elaborated during the classical age with reference to some penal actions whose condemnation was in a multiple value of the thing; in such cases, a part of the condemnation was considered as having the purpose of reintegration, and the other part having the purpose of punishment.

## Pretorian remedies

The *praetor*, beyond the *actiones*, had many judicial devices of different kind, which were very frequently applied and are modernly called “pretorian remedies”. They included the *interdicta*, the *in integrum restitutio*, the *cautio praetoria* and the *missio in possessionem*:

- **Interdicta** – these were procedural orders, which the *praetor* gave on request of a private citizen against another private citizen, and which, at the beginning, in the procedure *per legis actiones*, prohibited a specific conduct; after, in the procedure *per formulas*, they could also concern a positive order to do something, hence they were classified as following:
  1. **interdicta prohibitoria**, which prohibited to do something;
  2. **interdicta restitutoria**, which ordered to give back something;
  3. **interdicta exhibitoria**: which ordered to exhibit something;

In case the interdict was not performed, a complex procedure took place before the two parties and the magistrate, in which procedure the matter of discussion was whether the interdict had been given on solid ground or not.

- **In integrum restitutio** – this was a remedy whose purpose was to restore the juridical situation of the requester to its previous state, namely to the time before the damage or offence happened. The procedure required the two parties to be present before the magistrate, who usually granted to the victim an *actio ficticia*, sometimes preceded by a *decretum* (an act by which the magistrate stated the necessity to reintegrate the damage). Among modern scholars, the phase of this procedure consisting in the granting of the *decretum* is often called *iudicium rescindens*, while the *actio ficticia* is called *iudicium rescissorium*.
- **Cautiones or stipulationes praetoriae** – the two expressions are synonymous. They consisted in a very peculiar use of the *stipulatio*, a private law contract, which could be applied to force somebody to do something, in case the *ius* did not impose at all (or did not impose effectively) the correct behaviour. In such case, the *praetor*, once he had received the request and carried out the needed checks, imposed on the party against whom the request was made to adopt an obligation by *stipulatio* towards the requester. If the promissor did not behave according to the *cautio*, he could be sued with the *actio ex stipulatu* (deriving from the same *stipulatio/cautio*).

- *Missio in possessionem* – this was the acquisition of detention or possession (depending on different cases) of one or of the whole goods belonging to somebody. The magistrate could grant such acquisition once he had received a request and carried out the needed checks, sometimes after having heard both parties. In case of the *cautio damni infecti* (see under the law of property), two different *missions in possessionem* could take place, of which the first one consisted in the detention, while the second one (*missio in possessionem ex secundo decreto*) consisted in the immediate *possessio ad usucapionem* of the thing. The purpose of the provision could either consist in the simple preservation of the goods, or in putting pressure on the owner to have him keeping a conduct or performing something.

### 3. The *cognitio extra ordinem*

The *cognitio extra ordinem* [«cognisance <of the dispute> acquired “outside” the *ordo iudiciorum privatorum* (namely, the formulary procedure)] emerged under Augustus, in matter of *fideicommissum* (a kind of clause in last wills and testaments, in which the testator prayed informally his heir or some other person to perform something in favour of somebody else); other *cognitiones* were created in the first classical age, each one focused on a specific matter.

Beyond these special *cognitiones*, the *princeps* also started to intervene in private law trials, on request of a private citizen, by way of binding provisions, included in written documents (*decreta* and *rescripta*). If the trial would have started directly before the *princeps* or his delegate, the *cognitio extra ordinem* had to be applied. The *princeps*, though, could be judge not only in a first-grade trial, but also in case of appeal, both if the judgement was given in a *cognitio extra ordinem* and if it was given in a formulary trial. However, if the *princeps* was to be judge, the applied procedure would have always been *extra ordinem*.

In many provinces of the Roman empire, the *cognitio extra ordinem* prevailed on the formulary trial, becoming the only applicable form of procedure.

The *cognitio extra ordinem* had the following characteristics, which are opposite to the characteristics of the formulary procedure:

- the judge and the magistrate were the same person. In the provinces, such double role were given to the governor; in Rome, old magistrates belonging to the Republican order were sometimes competent, but more often the double role was given to public officers appointed by the emperor;
- summoning was done by public officers (who held the court of jurisdiction). If the defendant did not appear in court, he was declared '*contumax*' (namely «somebody who does not obey to an order of the court»). However, despite the absence of the defendant, the trial could go on, but the defendant would not necessarily have been condemned at the end of it, because he should have been judged objectively.
- there was no distinction between phase *in iure* and phase *apud iudicem*;
- there was no proper *litis contestatio*, and the effect of it were attributed to other aspects of the procedure (preserving effects were attributed to summoning; preclusive effects were attributed to the sentence; the unusual novative effects of the formulary *litis contestatio* in the *iudicia legitima* seemed to have disappeared);
- the judgement *extra ordinem* had a “prejudicial” effect, namely (except in the case of appeals), if the matter of a trial was in some way connected with another matter already decided by a sentence, the new judge could not modify it and had to adjust to [N.B. modern scholars discuss whether this effect was already connected to the formulary sentence];
- the judge was not bound to judge according to a *formula* and he was totally free in his evaluation of the matter;
- the *condemnatio* could also consist in doing something or giving something different than money. In any case, the judge could impose on the defendant the order to perform the *condemnatio*, and there was no need for the plaintiff to bring forth a further executive procedure.

Similarly, to the formulary procedure, the *cognitio* had no specific rules of evidence or rules for the discussion between the two parties.