Actions

Ernest Metzger, *University of Aberdeen*

I. 'Action' (J.4.6 pr; 4.15)
II. The Formulary Procedure
III. The Law of Actions
IV. Real and Personal Actions (J.4.6.1 – 15, 20)
V. State-Law and Honorary Actions (J.4.6.3 – 13)
VI. Restorative, Penal, and Hybrid Actions (J.4.6.16 – 19; 4.12.1)
VII. Other Classifications (J.4.6.28 – 30; 4.8)

Select Bibliography
Notes
Errata

The law of actions is the last of the three subjects in the institutional scheme, and is quite different from the subjects that precede it. While the earlier subjects are concerned with substantive rules, the law of actions is concerned with redress. It is not quite the same as ‘the law of procedure’, however; it often includes matters that might easily have been treated under the law of persons or of things. This is because actions evolved as a subject over a time when procedure was not distinct from substantive law.

I. ‘Action’ (J.4.6 pr; 4.15)

The word ‘action’ is awkward to define, not because its meaning is hard to understand from any one example, but because it appears in many different contexts and therefore evades any one definition. In Latin the word is *actio*, from the verb *agere*, which for our purposes is best translated broadly: ‘to urge’. Generally, to have an action means that a person is entitled to pursue a remedy for some injustice done to him. If, for example, a person has been a victim of fraud, he might be allowed an *actio de dolo*, an ‘action for fraud’. This would entitle him to go before a judge and to urge the judge to give him relief.

From this example it might seem that an action is in fact a ‘right’, and that when we say a person is entitled to pursue a remedy we are saying that he has a right to relief. But to equate an action with a right is to substitute a concept that we appreciate easily, but

that the Romans came to appreciate only over time. We have no difficulty in understanding that a person under certain circumstances has a right (for example, when he is injured), that that right has an existence in the abstract, and that it is the function of the judicial machinery – the judges, tribunals, rules of procedure and evidence – to transform that right into a remedy. But in a system where the substantive law often speaks in the language of procedure ('If it appears that X ought to give 10 to Y, the judge shall condemn for 10'), and where procedure is not seen as something necessarily separate from the rest of the law, this sort of abstraction does not come easily.[1] Under such a system, someone who has suffered a wrong will probably see himself, not as a person with some abstract entitlement to be made whole, but as a person who is entitled to clear a procedural hurdle. This is made very plain <209> in the classical definition of *actio* (Celsus, D.44.7.51) which Justinian uses at J.4.6 pr, a definition that has certain shortcomings but otherwise conveys well the limited notion of an action: 'An action is nothing but a right to go to court to get one's due.'[2] This statement shows clearly that an action, if it is a right at all, is more a right to proceed than a right to prevail, and that any definition of 'action' ought to put process at the fore. Accordingly, *actio* is often translated as 'claim' or (circuitously) as 'right of action', to show that a person, on presenting certain facts, will be allowed to follow a certain procedural agenda appropriate to those facts. That person hopes, but is not assured, that this agenda will culminate in the granting of relief. In English the word 'warrant' also has something of *actio* in this sense.

[Note: in the original work, *endnotes* commence on page <227>]

[1] See generally P. Stein, *Legal Institutions: The Development of Dispute Settlement* (London, 1984) pp. 128-9; H.F. Jolowicz, *Roman Foundations of Modern Law* (Oxford, 1957) pp. 66-81.

[2] The flaw in the definition is that 'one's due' (*quod sibi debetur*) seems to exclude real actions.

For our purposes it is satisfactory to define an action as a claim or a warrant. At the same time it is worth mentioning that *actio* appears in contexts in which the meaning is either more broad or more refined, and where 'claim' or 'warrant' will not work.

(1) To describe an action as a claim or warrant gives the impression that an action requires the intervention of the state. Yet the word *actio* may describe a purely private event, as for example in D.48.1.7 (Macer), where *actio* is used to describe simply the act of a person, an act which (in this context) brings disgrace upon that person if it becomes the subject of certain proceedings. An important example of *actio* as a private event is self-help. An *actio* may describe not only the pursuit of a remedy with the sanction of the state, but also the act of an individual privately vindicating a wrong done to him. In the earlier forms of Roman procedure, for example, there existed actions for seizing a person or his property – the *legis actio per manus iniectionem* and *legis actio per pignoris capionem* (G.4.21 – 29) – that a person might resort to without prior litigation.

Self-help is not a particularly significant institution in the developed law of actions, but is nevertheless important for illustrating the essence of the word 'action'. Roman law did not draw a firm line between a person's real and formal claim, that is, between the claim a person possesses simply by virtue of being wronged, and the claim recognised by a court.[3] Thus a person might possess a claim for redress even if the judicial machinery had not yet granted it to him.

(2) In their treatments of actions, both Gaius and Justinian discuss a great deal more than simply ‘claims’, and for this reason we often understand the idea of ‘actions’ quite broadly. Gaius, for example, devotes a fair amount of space to procedure, and even discusses a form of procedure that was all but unused in his own time. Justinian, though he does not speak directly about the earlier forms of procedure (which were obsolete by his time), does speak about more general matters of litigation, for example, pleading, interdicts, and judges. And in our other sources we find definitions of ‘actio’ that are very broad (see e.g. Ulpian, D.44.7.37), generally encompassing the various ways of presenting issues to a tribunal. For <210> these reasons ‘actions’ is sometimes treated as synonymous with ‘procedure’ or ‘remedies’.

[3] H. Honsell, T. Mayer-Maly and W. Selb, *Römisches Recht* 4th ed. (Berlin, 1987) p. 218 n.2.

The two instances of *actio* just discussed – ‘private act’ and ‘procedure’ – are cited in order to show that ‘action’ may sometimes mean something more general than ‘claim’. In other contexts it is used in exactly the opposite way, to indicate not simply a claim, but a particular kind of claim:

(3) An action is sometimes distinguished from an interdict. ‘Interdict’ describes several decrees issued by magistrates and often used to confer or protect possession. They were highly procedural in character; it would be difficult to discuss the ‘substantive law of interdicts’, because an interdict was a specific order granted on the presentation of specific facts. What distinguishes an interdict from an action (as described here) is principally the fact that an interdict, in form, is virtually a remedy in itself. The magistrate does not, as in an ordinary action, summarise the dispute and pass it on to someone else for resolution, but instead issues a decree himself. The decree, it is true, might not be the end of the matter, instead often requiring the resolution of a judge, or serving as a predicate for a subsequent action. But the interdict alone, as a decree issued directly by the magistrate, was administrative in character, and was therefore distinguishable from an action.

Justinian offers several different ways to classify interdicts (J.4.15); the possessory interdicts and their three divisions are worth mentioning briefly. These interdicts have in common the feature that each culminates in the grant of possession in favour of a party. The first possessory interdict is for obtaining possession, and Justinian’s example is an interdict that arises in the context of succession law (J.4.15.3). This interdict existed as a part of the praetor’s efforts to alter the scheme of succession under the state law with a scheme (*bonorum possessio*) based to a greater extent on blood relationship (see Chapter 4, section III(c) above). A person favoured by the praetor’s innovations who wished to obtain possession of the tangible assets of the estate could request from the praetor an ‘interdict *quorum bonorum*’. The interdict took the form of an order to the person in possession – in this case a person without title or who claimed to possess as heir – directing that person to restore the property to the other. Even though the interdict determined the question of possession and nothing else, this would often be the end of the dispute: efforts to establish ownership of the property against the new possessor (if the grant of *bonorum possessio* were of a certain character) would be fruitless.

The situation was different under the second division of the possessory interdicts, those for retaining possession. Here the interdicts often served only as a procedural step in advance of a proper action for ownership, and not as a final remedy. In other words, these interdicts were very much part of a pretrial tactic, made necessary by the

characteristics of the ownership action.

In a perfect system of litigation, we would expect a tribunal to listen <211> equally to competing claims for ownership and give judgment in favour of the better claim. But in the Roman system, as in modern systems, a plaintiff carries the burden of proof, and proving ownership is not an easy matter, particularly where no system of public registration exists. This means that if a person had the freedom to do so he would choose to be a defendant and not a plaintiff, leaving it to his opponent to prove ownership. The possessory interdicts, to a certain extent, allowed such a choice: if a party could put himself in possession of the disputed property, it was then left to his opponent to bring suit and try to establish ownership. Thus the battle for ownership might be preceded by a battle for possession (J.4.15.4).

In the case of immoveables, the battle for possession might begin with the pronouncement of an interdict *uti possidetis*. This would consist of a decree addressed to both parties, stating that force could not be used to dispossess whichever of the parties was innocently in possession of the property. After a complex course of proceedings, the party with the better claim under the words of the interdict would be awarded possession. This would put him in the more enviable position of defending rather than establishing ownership, if his opponent sought to claim ownership in a further proceeding. In Justinian's time the interdict *utrubi*, applying to moveables, operated in the same way, although in the classical law the phrasing of the interdict was slightly different; it allowed an innocent possessor not only to retain possession, but to recover possession that was recently lost (J.4.15.4a).

The third kind of possessory interdict is for recovering possession. The *Institutes* gives the example of a person dispossessed of immoveable property by force (J.4.15.6). The interdict described there – the interdict *unde vi* – existed as two different interdicts in the classical law but was made uniform by Justinian's time. The classical interdict *unde vi* was an order to restore immoveable property to an innocent possessor who had been evicted by force within the previous year. The classical interdict *unde vi armata* was directed against one who had dispossessed not only by force, but by armed men as well, and given the gravity of the act it was unnecessary to show that the dispossessed person had come by his possession innocently. In Justinian's synthesis of these two interdicts, violent dispossession was enough disliked that an ejector could no longer challenge the innocence of the ejectee's possession in any event.

The taxonomy that distinguishes an action from an interdict is far from perfect. In the *Institutes* Justinian (borrowing from Gaius) first says that '*All* our law is about persons, things, or actions' (J.1.2.12), and later says 'We look next at interdicts *or the actions used instead of them*' (J.4.15 pr). It is important not to worry too much over this sort of inconsistency, but simply to recognise the basic difference between an action (a claim) and an interdict (an administrative remedy).

(4) There are other so-called 'praetorian remedies' that are often distin- <212> guished from actions. Like interdicts, these remedies were issued by the praetor himself, sometimes after a short inquiry, and sometimes after hearing only one party. There were various forms. For example, the praetor sometimes circumvented the law and restored parties to their previous positions, put a party in possession of the other party's property as security, or exacted a promise from one party in favour of the other. Some of these remedies appear sporadically in the *Institutes*.

(5) The three words *actio petitio persecutio* appear together in some contexts and are understood to refer to specific types of suits. In this narrow sense an *actio* refers to a personal action, *petitio* refers to a real action, and *persecutio* refers to a restorative action (according to Papinian, D.44.7.28), or to an extraordinary proceeding (according to Ulpian, D.50.16.178.2). The most familiar occurrence of these three words is in the so-called Aquilian stipulation, described at J.3.29.2 (see Chapter 5, section IX above). They also appear in some legislation (see the *lex Coloniae Genetivae Iuliae*, chapters 125-132, *passim*).

II. The Formulary Procedure

From the 2nd century BC until the 3rd century AD, most Roman litigation was conducted according to what is called the 'formulary procedure'. The subject is omitted from the *Institutes* but discussed at length by Gaius. It is difficult to give any account of actions without at least a sketch of the formulary procedure; the subject of actions owes a great deal to its influence. Of course 'claims' existed long before it was created and continued to exist long after it was abolished. But actions as Gaius and Justinian present them are not simply lists of claims. They are claims that are classified with great acuteness and expressed with great technical precision. Their classifications are due partly to the formulary procedure, and their expression is due almost entirely to it.
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[4] See P.G. Stein, '"Equitable" Remedies for the Protection of Property', in P. <228> Birks (ed), *New Perspectives in the Roman Law of Property* (Oxford, 1989) pp. 185-94.

Roman litigation was conducted in two phases. The first phase was public, conducted before a magistrate of the state, the praetor or aedile, charged with administering justice. The second phase was private, conducted before a judge, a private individual who need not have been a lawyer. The public phase was very brief; the magistrate would simply determine whether the litigants should be allowed to proceed and, if so, what form their action should take. The private phase was the trial itself.

The magistrate needed a scheme for determining which claims would be allowed to go forward. His duties would have become impossible if he had had to consult treatises and legislation and make a fresh decision on the suitability of every claim. Accordingly he maintained and put on display a long list announcing his intentions and expectations regarding the lawsuits he would allow. This list, the edict, contained individual entries describing the actions which he was willing to grant. If a litigant came before him and requested one of the actions, the magistrate would ordinar- <213> ily grant it (though he might deny under certain circumstances, for example on account of *res judicata*). If the litigant's circumstances did not match any of the entries, he might persuade the magistrate to invent a new claim and allow it to go before a judge. If the magistrate saw fit, he might even incorporate the new claim in the edict for future cases.

The passing of the suit from the magistrate to the judge was an act that required great care. The principal problem was the judge's peculiar standing within the legal system. The judge did not hold office, but was appointed for service in a single case, and selected personally by the parties if possible. He had no special qualifications other than his wealth. He was simply a private individual who conducted the trial without even intermittent guidance from the state. The consequences were (1) he required detailed written instructions at the outset, and (2) what he did with those instructions – his conduct

of the trial, his judgment – was of no enduring importance whatsoever to the legal system.

This meant that the final, formal act of the state, the final expression of the law in a given case, was the set of instructions that the magistrate gave to the judge. These instructions, from one perspective, were the parties' pleadings, as they contained their allegations, the matters they hoped to prove. But because the allegations had to satisfy the requirements of the law as determined by the magistrate, they came into the judge's hands in a technical form, a form that permitted relief under the law. This makes the instructions the single most important item in the lawsuit, far more important than the judgment. A judgment declaring who won or lost could have little value compared to these instructions which, under this public/private system of litigation, necessarily recited for the judge's benefit the kernel of the dispute: what a party had to show in order to win.

The instructions were prepared according to formulae, composed of 'specially prepared phrases' (G.4.30). Each formula was divided into parts, and each part had a particular function. Very few actual formulae survive; one of the few that does survive is below. It was found near Pompeii and dates from the first century AD:[5]

> C. Blossius Celadus shall be the judge. If it appears that C. Marcius Saturninus ought to give 18,000 sesterces to C. Sulpicius Cinnamus, which is the matter in dispute, C. Blossius Celadus, the judge, shall condemn C. Marcius Saturninus for 18,000 sesterces in favour of C. Sulpicius Cinnamus; otherwise he shall absolve.

This formula describes an action called a *condictio certae pecuniae*, a personal claim for a particular sum of money. It was the appropriate action in cases where, among other things, a person had given a stipulation to pay money to another. We are able to classify formulae in this way and pair certain formulae with certain actions because each different formulae was <214> drafted with a significant form of words. One part of the formula, the *intentio* (or 'principal pleading'), is particularly revealing in this respect. The *intentio* in the formula above is the phrase 'If it appears that C. Marcius Saturninus ought to give 18,000 sesterces to C. Sulpicius Cinnamus ….' The word 'if' tells us the claim is for a certain sum (quite apart from the appearance of the sum itself), and the word 'ought' tells us it is an action for a debt. If the words are altered, the action is altered. If the sum promised by the stipulation were uncertain, the formula would not order the judge to condemn 18,000 'if Cinnamus owes 18,000', but to condemn 'whatever Cinnamus owes'. The 'whatever' in the *intentio* indicates a claim for an uncertain sum. And the altered formula produces a different action, the *actio incerti ex stipulatu*.

Nearly every action is associated with a unique formula.[6] This means that one usually describes, classifies, and analyses different actions by addressing the formulae that describe each action.

[5] *L'année épigraphique* (1973) no. 155.

[6] The exception is the quoted formula. See Nicholas, *Introduction* p. 24 n.2.

III. The Law of Actions

It is not easy to understand how actions could constitute a subject by themselves. Under

the heading ‘law of actions’ one might expect to find a list of actions with a description of each action, in the form ‘if X injures Y in such a way, X will compensate Y to such a degree.’ But this sort of list would be useful only if all the law were expressed in the form of individual actions. That is, in a legal system such as the *Institutes* describe, where actions constitute only one subdivision of the law, we would not expect the law of actions to be a list of every action. In such a system there is no reason to discuss, for example, the depositor’s action, the ward’s action, or the vindicatory action as subjects apart from deposit, guardianship, or ownership. Therefore the law of actions – at least as it appears in the institutes of Gaius and Justinian – cannot be a list of actions, but must exist somehow as a subject apart from the underlying substantive rules.

As a subject ‘actions’ never stayed the same for very long, but changed as its relationship with the substantive rules changed. For this reason the subject has a very different character in different historical periods. In the beginning, actions very possibly encompassed most of the law. By Justinian’s time, actions in the classical sense of ‘claim’ were so reduced in importance that much of what appears on the subject in the *Institutes* must be read as (1) a historical description of how matters were pleaded centuries earlier, or (2) something like a discussion of rights, in the modern sense.

The customary view of actions in the earliest law was expressed famously by Henry Maine (1822-88). He does not refer directly to Rome at the time of the *Twelve Tables*, although he seems to have had it in mind, among other examples:[7] <215>

> The primary distinction between the early and rude, and the modern and refined, classifications of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law. So far as this the Roman Institutional writers had advanced, since they put the Law of Actions into the third and last compartment of their system. Nobody should know better than an Englishman that this is not an arrangement which easily and spontaneously suggests itself to the mind. So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.

[7] H.S. Maine, *Dissertations on Early Law and Custom* (London, 1883) p. 389.

Maine writes in a 19th-century style that produces memorable language, but at the expense of authorities and accuracy. We can nevertheless take his general point: rules in earlier Roman law were often expressed according to the remedial steps to be followed. The *Twelve Tables* have many examples of rules expressed in this way, e.g.,

> Table 1, 14. If he has broken the bone of a free man, let the penalty be 300. If of a slave, 150.
>
> Table 8, 11. Anyone who allows himself to be a witness or serve as a holder of the balances and then does not stand by his evidence will be untrustworthy and incompetent as a witness.
>
> Table 11, 2. If a slave commits theft or causes damage, [he shall be given noxally].

Of course not all of the rules in the *Twelve Tables* are expressed in this way, and there are even good arguments to the effect that the *Twelve Tables* is nothing like what Maine

describes.[8] But to whatever extent the *Twelve Tables* is dominated by procedure and remedies, it is clear this is not an effective way to present the law. The main criticism is that this sort of presentation is unreflective, that it leaps immediately to the question 'how much?' without stopping long to consider 'who is the wrongdoer?' or 'what is the wrong?'. A more reflective method of presenting laws would group similar rules together and consider in mass the substantive components – the 'whos' and the 'whats' – of each rule. This would allow a person better to classify a given set of facts as a particular kind of legal event. It is therefore something to be admired when, for example, jurists and legislators take up the events described under the first and third examples above, consider those events separately from any particular remedy, and then discuss them under the common rubric of delict. And that is Maine's point: that with time, the underlying substantive ideas were more frequently discussed and expressed as subjects apart from litigation, thus producing a more refined method of classification.

The law of actions is very much a function of this gradual division of <216> substantive law from procedure. If we imagine a system where the entire law is expressed in the form of actions, 'the law of actions' would be synonymous with 'the law'. As the substantive law underlying the actions is gradually set apart for separate discussion, what remains behind is a residue of procedure, remedies, and as yet undisentangled substantive law. For lack of a better term we might call this the 'law of actions'. How closely this model in fact describes the development of Roman law is a matter of debate. Some, notably Watson, insist that Roman law scrupulously divided substantive law from procedure, even as early as the *Twelve Tables*. Others find the model accurate, but rely heavily on the example of English law, where the evidence provides a better illustration of Maine's statement. Plunkett, for example, in trying to account for the 'monstrous distortion' in Bracton's *De Legibus et Consuetudinibus Angliae*, where actions constitute three-quarters of the whole treatise, resorts to the example of the *Institutes*: 'As a legal system develops more and more matter gets transferred from the law of actions to the law of obligations or of things until, finally, actions are reduced to the comparatively modest place accorded them in [Justinian's] *Institutes'*.[9]

[8] A. Watson, 'The Law of Actions and the Development of Substantive Law in the Early Roman Republic', *LQR* 89 (1973) pp. 387-92. Watson generally maintains that there was a 'strict Roman separation of substantive law and procedure'. A. Watson, 'The Structure of Blackstone's Commentaries', *Yale Law Journal* 97 (1988) pp. 798, 807.

Whatever was the true development of Roman actions, the law of actions that Gaius presents in the 2nd century AD is very much a 'residuary' division of the law in a way the law of persons and of things are not. The various components that make up the law of actions were not introduced by some superior intelligence, seeking to improve actions as a subdiscipline of the law. Instead, the law of actions comprises what is left over after centuries of picking away, of reallocation to the other divisions of the law. This means that actions is not a well-ordered subject, and instead of giving an integral whole with neat subdivisions, it frequently presents individual items of supplementary information that could not be fitted in elsewhere.

Aside from omitting discussion of formulae and actions in the law, Justinian presents a law of actions similar to Gaius'. Yet between the time of Gaius and Justinian, the idea of an action underwent a great deal of change.[10] The formulary procedure, long abolished

by Justinian's time, had given a certain amount of clarity to actions: a given entry on the praetor's edict would correspond to a particular action, and as long as justice was pursued by application to the praetor for a claim from the edict, the character of individual actions would continue to be important. As the formulary procedure gave way to the new imperial procedure, however, a litigant no longer pursued a particular action, but rather presented facts which he believed would support a claim for relief under the law.

[9] T.F.T. Plunkett, *Early English Legal Literature* (Cambridge, 1958) p. 51.

[10] On what follows, see P. Stein, 'The Development of the Institutional System', in Stein and Lewis (eds), *Studies in Memory of Thomas* pp.161-3, and Birks and McLeod (eds), *Institutes* pp. 17-18.

During the same period there was a broader change in the way actions were regarded. As mentioned above, in the classical law to have an action meant that a person was entitled to legal process. From there, however, it was only a short step to see an action as something that 'attached' to a person, a credit in his favour, as it was a debit against his opponent. This <217> new conception of an action became more prevalent in the centuries between Gaius and Justinian. If an action was a 'credit' to a person, and if at the same time that action was no longer tied to a particular remedy, then an action was very much like what we regard as a 'right'.

To the Romans this new action/right seemed to have much in common with an obligation – the condition of one person owing another – and not surprisingly this results in some confusion between obligations and actions. Both the *Digest* (D.44.7) and the *Codex* (C.4.10) have titles that are headed 'On Obligations and Actions'. Also, one of the compilers of the *Institutes*, in a Greek paraphrase of the work, sought to justify obligations as an introduction to actions by remarking that 'obligations are the mother of actions' (Theophilus, *Paraphrase* 3.13). This confusion between obligations and actions continued into modern times. It was common even until the 18th century to regard the three principal divisions of the law, not as persons, things, and actions, but as persons, things (principally corporeal), and obligations and actions.[11]

Although the idea of an action had altered by Justinian's time, Justinian by and large presents the various classifications of actions as they appeared in the classical law. These classifications tell us a great deal about the law. As Gaius and Justinian present it, the law of actions asks us to take a step back from the specific actions themselves, to examine them somewhat apart from the facts under which each developed, and to describe the ways in which they differ from or resemble one another. Standing back from and analysing actions in this way results in divisions of the law quite different from the divisions presented under the law of persons and of things. For example, under the law of things we might distinguish a contract as either 'by conduct' or 'by agreement', while under the law of actions we might distinguished a contract as either 'strict law' or 'good faith'. The law of actions often ignores the substantive boundaries altogether; a restorative action, for example, might arise under either contract or delict.

[11] H.F. Jolowicz, '*Obligatio* and *Actio*', *LQR* 68 (1952) pp. 469-74.

The principal classifications are given below. It is one of the awkward things about the law of actions that each classification is based on a different premise. Real and personal actions are distinguished by the rights to be enforced. State-law and honorary actions are distinguished by the source of the law. Penal, restorative, and hybrid actions

are distinguished by the object of the litigation. Each classification addresses a different component of the underlying law.

IV. Real and Personal Actions (J.4.6.1 – 15, 20)

If someone were to write a new *Institutes* that expressed all of the law in the language of actions, at the top of the hierarchy would be the division between personal (*in personam*) actions and real (*in rem*) actions. All <218> claims may be classified as one or the other, and the difference between the two types of claim is very much a matter of substantive law: a real action reflects a relationship between a person and property, and a personal action reflects a relationship between persons. The fact that a matter of substantive law is expressed as a difference in actions reflects the preference of the classical Romans for the language of remedies over the notion of rights.

A personal action arises from debt, and a real action arises from ownership. If, for example, a person receives money in payment for goods, insults another person, or damages another person's property, a debt arises between two people. If the matter comes to litigation, a claim is asserted by one person against the other. We say that the claim is personal, not because the litigation is between persons (it always is), but because the relationship being urged is one that exists between persons. Litigation over ownership, on the other hand, looks outwardly the same (person against person), but is based on something different. If a person loses possession of property that he owns and brings a claim to assert his ownership, this claim is *in rem*, because the relationship being urged is one that exists between a person and a thing.

The distinction was reflected clearly in the respective formulae. Typically the *intentio* in the formula of a real action would not mention the defendant. Instead, the issue would be framed purely in terms of the disputed ownership: Does the property belong to the plaintiff by Quiritary right (*ex iure Quiritium esse*)? Does he own the right (*ius esse*) to the fruits? In a personal action, the *intentio* typically did mention the defendant, reciting the issue with the formal language of debt: Should the defendant give (*dare oportere*) 1,000 sesterces to the plaintiff? Should the defendant do something for or give something to (*dare facere oportere*) the plaintiff on account of a prior *stipulatio* between them?

Real actions existed to enforce many kinds of ownership. Aside from the familiar example, the claim for ownership of a thing (*rei vindicatio*), there were claims for the ownership of an inheritance (*hereditatis petitio*), of a usufruct (*vindicatio usufructus*), of a right to draw water (*aquae ductus*), and many more. Real actions also existed not to enforce ownership but to deny it. An owner of land who wished to deny another's ownership of a usufruct or servitude might bring the appropriate '*actio negatoria*', a real action. In all of these real actions it is important to remember that a plaintiff does not seek the return of the thing. The judge, as always, is limited to giving a remedy in money damages, and the description 'real' refers only to the underlying relationship the plaintiff is attempting to establish. Of course as a practical matter, where the praetor inserts a special provision allowing restitution at the judge's direction, a plaintiff might have the thing restored, but this had nothing to do with the fact that the action was real.

Personal actions are described in the *Institutes* by a clever and terse <219> piece of reasoning which Justinian borrows from Gaius (J.4.6.14; G.4.4): personal actions are only suitable for parties who deserve to get something, not for parties who own something and

want it back; if you deserve to get it, *a priori* it isn't yours. The number of personal actions is of course very large, and the most familiar of them are those based on contract or delict. Among the more familiar of the remaining actions are the action against a guardian for breach of duty (*actio tutelae*, inquiring what the defendant 'ought to give or do for the plaintiff in accordance with good faith'), the action for production of a thing (*actio ad exhibendum*, inquiring whether the defendant 'ought to produce the thing'), and the action to restore a dowry (*actio rei uxoria*, inquiring whether the defendant 'ought to restore the dowry').

One of the consequences of dividing actions according to relationship is that, when a matter comes to litigation, the entire relationship, so to speak, is under review. This is clearest in the case of a real action. If an heir seeks to protect his inheritance by bringing a *hereditatis petitio*, the issue is whether the estate belongs to him under state law. If a person owns the right to channel water across certain land and his rights are interfered with, the issue is whether that person indeed owns the right to channel water. A person educated in the common law might prefer to see the issues here framed more narrowly (and in Roman terms, *in personam*), to inquire only whether someone had, for example, wrongfully interfered with the assets of the estate or the flow of the water. But to a Roman, ownership is the issue, and ownership is therefore the idea to be championed. The common lawyer might suggest further that it is a waste of resources to do anything more than try to resolve the particular issue between the parties. The Roman would answer that the waste lies on the other side, that his ownership is 'true' not only against one opponent but against the whole world, and he should not have to wait until everyone in the world sues him and loses before he can regard something as his own.

The situation is similar for personal actions, though only actions on contracts provide clear examples.[12] When a person sues on a contract, the relationship created by the contract is the subject of the action. The formula, after reciting the existence of the contract, will permit the judge to condemn the defendant 'for whatever on that account the defendant ought to give to or do for the plaintiff', or, if the matter involves a good-faith contract, 'for whatever on that account the defendant in good faith ought to give to or do for the plaintiff'. The inquiry is much broader than the particular act – for example, the failure to pay or to hand over the goods – that brought the parties to court in the first place. In other words, the basis or 'cause' underlying a contractual action *in personam* is the debt created by the contract, not the particular act or breach that brought about the dispute. This will seem unusual to a common lawyer, who is accustomed to treating the breach of a contract, not the contract itself, as the basis of a lawsuit. And the consequences of the Roman treatment are severe; <220> unless a party protects himself by careful pleading, his right to sue on the same contract in the future will be consumed when issue is joined, in the same way the right of his common-law counterpart to sue on the same breach is consumed.

V. State-Law and Honorary Actions (J.4.6.3 – 13)

The distinction between state-law and honorary actions is based on the source from which the claim is derived. In a system in which a magistrate has an independent power to create new claims, claims created within that power come to be distinguished from

claims that are not so created. Claims based upon the state law and unaltered by the magistrates' intervention are called 'state-law actions'. The 'state law' in this context means the *Twelve Tables* and other legislation (including interpretations of those statutes), together with the rules developed by juristic practice. Claims of the magistrates' creation are called honorary actions, and comprise actions in which the magistrate has exercised some degree of innovation, either by altering an existing state-law action (as in the Publician action) or in creating an entirely new action, not recognised as part of the state law (as in the *actio de dolo*). In Papinian's phrase, the honorary law acts 'to aid, supplement, or correct the state law, in the public interest' (D.1.1.7.1). 'Honorary' is an adjective that means 'pertaining to the office of a magistrate'; it includes the office of both the praetor and aedile.

[12] On what follows, see W.W. Buckland, 'Cause of Action: English and Roman', *Seminar* 1 (1944) pp. 3-10.

A magistrate was called upon to innovate when an action under the state law did not speak to a particular problem or would not produce a satisfactory result, and his innovations took several forms. A common form was the 'fictitious formula', a formula that directed the judge to accept as true something that was not. The most familiar example is the Publician action: a person who had lost possession of property and was not an owner under state law might be permitted to bring what amounted to an owner's vindicatory action. It was a vindicatory action in all respects, except that it asked the judge to assume as true the falsehood that the plaintiff had satisfied the time limits of usucapion. (The Publician action was available both to bonitary owners and *bona fide* possessors, though by Justinian's time bonitary ownership did not exist, and hence he speaks only of *bona fide* possessors at J.4.6.4.). Fictitious formulae were also used to good effect in lawsuits over inheritance. The state-law rules for intestate succession operated narrowly in favour of agnates, and as a result an emancipated child, for example, would not take a share of his parent's estate as heir, as one might expect. The praetor, however, innovated aggressively in this area, and in supplementing the state-law scheme by the institution of *bonorum possessio*, allowed the emancipated child to take the estate 'as if an heir' (G.4.34; see Chapter 4, section II(c) above). Fictions such as these allowed the praetor to be innovative without disturbing the law too much: <221>

> Roman fictions are common in two contexts, in pleadings and in legislation. Their function is the same in both, namely to extend a parcel of knowledge which is fixed and safe: we know exactly what happens when X is the case; now that Y is the case, we will proceed in exactly the same way, 'as if the case were X'. This is economical, cautious, and rigorous.[13]

A second way in which a magistrate innovated was by granting actions on the case. This type of innovation, as in the fictitious actions just described, was distinguished by a characteristic formula. But unlike a fictitious action, an action on the case might be highly creative and far-reaching.

In a state-law action, the formula was ordinarily *in ius concepta* ('conceived on the basis of the state law'). In practice this meant that the *intentio* of the formula was framed so as to recite a set of circumstances recognised in the state law. The formula in such an action would contain certain legally charged words, such as 'duty' (*oportere*), 'belong' (*rem suam esse*), 'sell' (*vendere*). In the buyer's action, for example, the *intentio* would

inquire ‘whereas the plaintiff bought from the defendant a thing which is the subject of this action …’. This recites the essence of a sale under state law, that the plaintiff bought a thing. A second example is the action for non-manifest theft. Here the *intentio* would inquire ‘if it appears that the theft of the thing was carried out by the defendant, for which act the defendant ought to pay a penalty as thief …’. This language follows the offence of non-manifest theft as recited in the *Twelve Tables*.

In an action on the case, however, the *intentio* was drafted ‘on the facts’. This meant that the *intentio* would simply recite certain factual allegations, and would direct the judge to condemn if he found those allegations to be true. In such a case the judge was saved the trouble of investigating whether the plaintiff’s claim was made out under the rules of the state law. So, for example, the formula in an action for fraud recited certain hypothetical facts, such as ‘if it appears that the plaintiff [has suffered some harm] by the fraud of the defendant …’ If the judge found these facts to be true, he would condemn the defendant.

We can see the value in this method of innovation by considering a particular action on the case, the *actio de recepto*.[14] If a shipmaster, innkeeper, or stablekeeper undertook to keep a person’s property safe, and then did not restore the property, the praetor would grant an action against him. (See Ulpian, D.4.9.1 pr, and Chapter 5, section VI above) It is surprising at first that the praetor saw fit to create this action, because there was no shortage of other actions available. An undertaking to keep something safe might constitute a *locatio conductio operis* if undertaken for pay, or *depositum* if not, and each might provide a remedy if the thing were not returned. Also, if the property were stolen or damaged, an action for theft (Ulpian, D.47.5) or damage (Paul, D.4.9.6) might be available against the keeper, even if the act were committed by an employee of the <222> keeper. Yet the *actio de recepto* is a useful addition: where the loss was not a result of theft or damage, or the fault was not of a degree (*dolus*) to allow an *actio depositi*, a general-purpose action holding the keeper to his undertaking was desirable. It may have required a degree of accountability of the keeper that was simply not available under any other action (though whether this was true of *locatio conductio* is uncertain), and had the further advantage that it imposed an unforgiving standard of conduct on professions that were not held in high regard.

[13] P. Birks, ‘Fictions Ancient and Modern’, in N. MacCormick and P. Birks (eds), *The Legal Mind: Essays for Tony Honoré* (Oxford, 1986) p. 95.

[14] On what follows, see generally R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1996) pp. 514-20.

Actions on the case were particularly useful in two areas of the law. First, they were of enormous importance under the Aquilian Act. Under the statute itself the requirement of causation was fairly narrow, restricted essentially to harm that was caused directly. The introduction of actions on the case allowed an aggrieved person to have a remedy even when the harm was caused indirectly. Second, a certain class of contractual actions on the case existed, called ‘actions with a special preface’ (*actiones praescriptis verbis*). These were praetorian extensions of the state-law actions on obligations contracted by conduct, and through these actions the praetor could recognise the existence of transactions that did not fit within one of the traditional categories of contract. Technically (and somewhat confusingly) these extensions were regarded as state-law

actions themselves, as each was modelled closely on the contract it resembled. But the formulae were drafted as actions on the case: a *demonstratio* was added at the beginning (hence 'special preface'), reciting the underlying facts of the transaction.[15]

Where a state-law action and an action on the case existed for the same underlying institution (as for the Aquilian Act), it was not always true that the action on the case was an innovation upon the state-law action. The difference, again, lay in the way the formulae were drafted, and we can take the example of the action for deposit. We know that, early on, the *Twelve Tables* allowed a penal action against a depositee under certain (unknown) circumstances. At some time during the early Republic the praetor recognised a new action on the case, the *actio depositi in factum*. As Gaius describes it (G.4.47), the action looked something like this:

[15] Zimmermann, above note 14, pp. 532-5.

> If it appears that the plaintiff deposited a thing with the defendant and through the fraud of the defendant it has not been restored to the plaintiff, condemn the defendant to pay the plaintiff whatever the thing is worth.

In creating this action the praetor probably recognised that the remedy under the *Twelve Tables* left something to be desired. Perhaps the *Twelve Tables* remedy was allowed only under narrow circumstances, or there was a need, apart from the existing penal remedy, for a new remedy allowing a depositor simply to recover the value of his property.[16] In any event, this action, with its formula drafted 'on the facts', was the result of praetorian innovation. In time the contract of deposit, with the help of juristic interpretation, came to be included among the so-called obligations con- <223> tracted by conduct and gave rise to an obligation under state law. And as with the other contracts in this category (except *mutuum*), a depositor might pursue a broadly grounded 'good faith' state-law action. This action, as again Gaius describes it (G.4.47), looked something like this:

> Whereas the plaintiff deposited a thing with the defendant, whatever on that account the defendant ought to give to or do for the plaintiff in good faith, condemn the defendant.

The state-law action for deposit was therefore a later creation than the action for deposit on the case.

Because both state-law and honorary actions were administered by the same person, it is often difficult to draw a line between them. Schulz[17] mentions the example of the vindicatory action: nothing would seem to belong more to the state law than an action which states 'condemn the defendant if it appears that the disputed thing belongs to the plaintiff by Quiritary right.' And yet the additional clause added by the praetor – 'unless the thing is restored to the plaintiff according to [the judge's] direction' – utterly transforms the action. The praetor was called upon to innovate here because, without his intervention, the judge would be permitted to condemn only in money damages, and this could not be a satisfactory remedy in every case. But in allowing restitution at the judge's direction (*arbitrium*), the resulting 'discretionary action' becomes difficult to classify firmly as either state-law or honorary.

[16] See generally R. Evans-Jones, 'The Penal Characteristics of the "*actio depositi in factum*"', *Studia et Documenta Historiae et Iuris* 52 (1986) pp. 105-60 .

[17] F. Schulz, *History of Roman Legal Science* (Oxford, 1946) p. 83.

A comparison between a Roman magistrate's power to innovate and the historical equity jurisdiction of the English Chancellor is unavoidable. In many respects the distinction between the state law and the honorary law resembles that between the common law and equity in England. But there is less to this resemblance than first appears. The Roman magistrate presided over both types of action and therefore, as Buckland[18] says, 'We shall not find in the Roman law a system of rules developed gradually by a permanent tribunal whose function it was to give relief which for any reason could not be obtained in the ordinary courts'. Also, when we consider that some of the innovations introduced by the praetor out of a desire for equity would then be memorialised in his edict for future cases, the praetor resembles more a legislator than a chancellor. Finally, it is a fair argument that the greater source of equity in Roman law is not the praetor but the jurists, whose innovations would be felt principally in the second, trial phase of a lawsuit.[19]

VI. Restorative, Penal, and Hybrid Actions (J.4.6.16 – 19; 4.12.1)

This classification is based on the object of the litigation. As the *Institutes* explains, some actions are directed to providing compensation, some to <224> inflicting a penalty, and some to both of these things. A cynical reader may come to the conclusion that there is too much classification here. The aim of the discussion, in the end, seems to be to identify the minority of actions that are either wholly or partly penal, and to indicate the consequences of bringing such actions.

A restorative action is one which would give to the plaintiff an award that does not exceed his loss. This may seem like a roundabout way of describing something fairly simple, but in fact the definition must be put carefully. The *Institutes* gives the example of an action for the death of a slave under the Aquilian Act (J.4.6.19). Under the action the slave, in a given case, might be valued higher than his worth at death, and the difference between the two values would be regarded as penal. We might treat this as a question of valuation and view the owner of the slave as overcompensated rather than avenged, but that is not how the matter is treated in the *Institutes*. Perhaps what this discussion best illustrates is that restorative actions are defined by what they are not (neither penal nor hybrid), and that time is better spent identifying actions that are wholly or partly penal. Most actions, after all, are restorative. In general, real actions and contractual actions fall into this class, leaving delictual actions as penal or hybrid.

[18] W.W. Buckland, *Equity in Roman Law* (London, 1911) p. 1.

[19] Id. pp. 1-8.

A penal action typically will (1) exact a sum greater than the amount of the loss, as just described, or (2) exact a multiple of the loss. The fact that they were viewed as inflicting a penalty led to certain other features. The first concerns the matter of transmissibility. The issue arises when a person who might have become a plaintiff or defendant dies before issue is joined. In such a case an heir might be permitted to bring the action the decedent would have brought, or be vulnerable to the action that would have been brought against the decedent. If the action is one that permits an heir to assert

the decedent's claim, it is said to be actively transmissible. If it is one that permits an heir to have a claim asserted against him, it is said to be passively transmissible. The general rule was that restorative actions were both actively and passively transmissible, but that penal actions were only actively transmissible. The rule of course reflects the idea that only the wrongdoer himself should be punished. An exception was made for contempt: it was neither passively nor actively transmissible, in keeping with the notion that the outrage suffered by the victim of contempt belongs to him alone.

The second feature was that, if more than one person were liable under such an action, both were liable in full, so that satisfaction by one did not release the others. If for example two persons had committed a non-manifest theft, each was liable for the double penalty. The rationale is the converse of that for the previous rule: just as it makes no sense to punish someone who did not commit the act, it makes no sense to spare someone who did. <225>

The third feature is that a penal action permitted noxal surrender. This is discussed below.

The *Institutes* glosses over what is actually at issue here, and presents the distinction between penal and restorative actions (almost) as a purely academic matter of classification. The real issue is bar. In general a person was not permitted to pursue two actions on the same matter. As soon as a dispute had passed the point at which issue was joined (the conclusion of the proceedings before the magistrate), a litigant could not raise the matter again. But this rule held true only for multiple restorative actions, or multiple penal actions. A person was permitted to bring both a restorative action and a penal action on the same matter, and hence the importance of identifying which actions were penal, wholly or in part. For example, a victim of theft could bring both an *actio furti* (penal) to punish the thief and a *rei vindicatio* (restorative) to the get the thing back, but not a *rei vindicatio* and a *condictio furtiva* (restorative).

Given the bar of multiple actions, it was particularly important to identify which actions were 'hybrid', that is, both restorative and penal.[20] A hybrid action would bar any further suit, of either type, on the same matter. One particular hybrid action both illustrates the usefulness of the classification 'hybrid' and betrays the true purpose of the restorative/penal/hybrid classification. The *Institutes* gives the action on robbery as an example of a hybrid action (J.4.6.19). It is a hybrid action because, of the fourfold penalty inflicted on the defendant, only three parts are considered to be a penalty. Centuries earlier Gaius had discussed the same subject, but unlike Justinian omitted robbery from his examples of actions 'both restorative and penal' (the term 'hybrid' not then existing). Instead, he included robbery among the purely penal actions, explaining that 'in the opinion of some' that is where it belonged (G.4.8). To say 'in the opinion of some' is tantamount to saying that in the opinion of others the action on robbery ought to be classed as both penal and restorative (it being beyond argument that anyone would class it as restorative alone).

Yet the dispute over how the action on robbery ought to be classified had nothing to do with classifications *per se*. The true issue was probably whether a robber could be treated as a 'thief' and sued by the *condictio furtiva*, a restorative action one brought against thieves. If a robber were a thief, the *condictio furtiva* would be available unless the action on robbery were deemed to be restorative in part, in which event it would bar any further restorative action. In short, what is presented as a scholarly disagreement over

classifications is in fact an argument over bar, something genuinely significant to a litigant. <226>

VII. Other Classifications (J.4.6.28 – 30; 4.8)

There are other classifications of actions which, unlike the classifications just given, are relevant only within certain areas of the law. That they are treated under the law of actions and not in the appropriate places under persons or things may be explained by a desire to avoid repetition, or the fact that they present characteristic formulae which make them attractive to discuss as actions.
[20]

[20] On what follows, see H. Ankum, 'Actions by which We Claim a Thing (*res*) and a Penalty (*poena*) in Classical Roman Law', *BIDR* (3rd Ser.) 24 (1982) pp. 15-39.

The most important of these other classifications pertains to certain personal actions. These actions were classed as to whether they were 'good-faith' or 'strict-law' (J.4.6.28 – 30). Superficially the difference was one of pleading, but the actions reflected a difference in substantive law as well. A strict-law action was characterised not by what it said but by what it did not say: the judge who presided in such an action could not consider any matters that were not a part of the pleadings, that is, the formula. If, for example, a defendant in a suit on a stipulation wished to argue that he was induced to give the stipulation by fraud or duress, or that his opponent had agreed not to pursue him, he would have to plead the matter expressly. The formula directed the judge very plainly to condemn the defendant if it appeared that the defendant ought to give a sum to the plaintiff. Accordingly, in the absence of special pleading, the judge would confine himself to examining the integrity of the stipulation. In a good-faith action, however, the judge was given far wider discretion to consider other defences, and this grant of discretion was an integral part of the formula. A formula in a good-faith action directed the judge to inquire what the defendant ought to give or do for the plaintiff in accordance with good faith. The addition of the words 'in accordance with good faith' (*ex bona fide*) distinguishes a good-faith action. The consequence of this addition is that a judge presiding, for example, in an action on sale, may absolve on his own motion a defendant who he believes was a victim of fraud when he agreed to purchase goods: such a defendant should not in good faith pay the purchase price.

Certain specific actions were set apart and classed as good-faith actions. The most important of these were actions on obligations contracted by agreement, and those contracted by conduct, with the exception of *mutuum*.

What Justinian describes as 'noxal actions' (J.4.8) might be more fully described as 'actions that allow noxal surrender as a remedy'. The remedy arises in the context of delict, and resembles a 'delictual mechanic's lien'. A person sometimes becomes liable for a delict committed by someone else, either a slave or a person within his family authority. If the delict is one that allows noxal surrender, the person liable is permitted either to pay damages or surrender the wrongdoer to the victim. By Justinian's time noxal surrender applied only to slaves, and not to children within authority. <227>

The common explanation for the origins of noxal surrender is that liability for delict is based on revenge, and that the victim's right to avenge his loss by seizing the wrongdoer could be forgone by the payment of a ransom. Whether this is the correct explanation or not, it is consistent with certain features of the remedy. In the case of a

slave, the person held liable is the person who owned the slave at the time of the action. The owner at the time of the delict is free from liability when he ceases to own the slave. Thus the aim of the action is simply to satisfy the victim, consistent with the notion of revenge. The same notion is apparent in the additional rule that a person may not have a noxal action against a slave that he owns.

The *Institutes* (borrowing from Gaius, G.4.75) justifies noxal surrender very poorly, arguing that it is unfair for a slave to inflict a loss on his owner beyond his own value (J.4.8.2). The statement is not convincing as a piece of legal analysis, and even less as a historical explanation. As Holmes points out, noxal surrender was not introduced as a vehicle for limitation of liability. His analysis is charitable: 'The Roman lawyers, not looking beyond their own system or their own time, drew on their wits for an explanation which would show that the law as they found it was reasonable'.[21]

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Errata

p. 221 l. 37: him~~.~~ (~~S~~see . . . above). It

p. 224 l.39: *all* ~~both~~

p. 227 l.24: Cours