The actio utilis in case of pignus nominis

Smit, A. J.H.

Published in:
Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte, Romanistische Abteilung

DOI:
10.1515/zrgr-2023-0003

Publication date:
2023

III.

The actio utilis in case of pignus nominis

Von

A.J.H. Smit*)

Summary: In Roman law, a creditor could establish a security right by pledging his claim (*nomen*) against a third person. In case of *pignus nominis,* the praetor granted the pledgee an *actio utilis,* which he could use to demand performance from the debtor of the claim that had been pledged to him. The prevailing doctrine with regard to the *actio utilis* in case of *pignus nominis* is that this action was formulated after the example of the *actio Serviana*. Smit explains that in her opinion the praetor did not shape the *actio utilis* after the *actio Serviana,* but after the action that the pledgor would have had against his debtor if he himself would have demanded performance from his debtor. Smit discusses the technique the praetor used, compares *pignus nominis* with assignment and proposes a reconstruction of the *formula* of the *actio utilis* that was given in case of *pignus nominis.*

Key Words: pignus nominis, actio utilis, formula ('Formeltechnik')

Zusammenfassung: Im römischen Recht könnte ein Gläubiger ein Sicherungsrecht begründen, indem er seine Forderung (*nomen*) gegen einen Dritten verpfändete. Beim *pignus nominis* gewährte der Prätor dem Pfandgläubiger eine *actio utilis*, mit der dieser vom Schuldner die Erfüllung der ihm verpfändeten Forderung verlangen könnte. Die herrschende Meinung bezüglich der *actio utilis* bei *pignus nominis* nimmt an, dass diese nach dem Vorbild der *actio Serviana* formuliert wurde. Der Beitrag versucht zu zeigen, dass der Prätor die *actio utilis* nicht nach der *actio Serviana* gestaltet hat, sondern nach der Klage, die der Pfandgeber gegen seinen Schuldner gehabt hätte, wenn er selbst Leistung von seinem Schuldner verlangt hätte. Er diskutiert die Technik, die der Prätor verwendete, vergleicht *pignus nominis* mit Abtretung und schlägt eine Rekonstruktion der Formel der *actio utilis* vor, die im Fall von *pignus nominis* gegeben wurde.

I. Pignus nominis

A veteran who had been called to service again asked emperor Alexander Severus if a *nomen,* i.e. a claim against a third person, could be pledged, and if so, how such a security was exercised. The imperial chancery responded in the name of the emperor at the 28th of February in the year 225:

*) a.j.h.smit@rug.nl, Faculty of Law, University, NL-9700ASGroningen, The Netherlands. – All translations from Latin into English are done by the author.

C. 8,16(17),4 (a. 225).
Imp. Alexander A. … evocato. Nomen quoque debitoris pignerari et generaliter et specialiter posse pridem placuit. quare si debitor is satis non facit, cui tu credidisti, ille, cuius nomen tibi pignori datum est, nisi ei cui debuit solvit nondum certior a te de obligatione tua factus, utilibus actionibus satis tibi facere usque ad id, quod tibi deberi a creditore eius probaveris, compelletur, quatenus tamen ipse debet.

Emp. Alexander, to …, a veteran again called to service. A claim can also be pledged both generally and specifically, as was long ago decided. If the debtor to whom you extended credit does not give you satisfaction, the debtor of the claim pledged is compelled – unless he paid his creditor while he was not yet informed by you of your claim – with *actiones utiles* to give satisfaction to you, up to what you prove is owed to you by his creditor, as far as he himself still is indebted the said amount.

According to this *rescriptum*, pledge of a claim had been accepted before. It speaks of *actiones utiles* granted to the pledgee, which he could use to demand performance from the debtor of the claim pledged. If a claim for money was concerned, the pledgee was only able to collect the amount his debtor, i.e. the pledgor, was due under the claim that had been secured by the pledge. The pledgee had to set off the received amount of money against the claim secured by the pledge. He thus took recourse against the proceeds to satisfy the claim secured by the pledge. If the object of the claim pledged was not a sum of money, but a tangible, then the pledgee obtained the tangible *pignoris loco*, that is to say as a pledge. In that case, pledge of a claim entailed a future right of pledge on a tangible[1]).

[1]) Both Paul (D. 13,7,18pr.) and Marcian spoke of the tangible *pignoris loco.* Marcian (D. 20,1,13,2) wrote with a reference to Pomponius: *si vero corpus is debuerit et solverit, pignoris loco futurum apud secundum creditorem*. *Pignoris loco* appears several times in the Roman law sources. Sometimes, *pignoris loco* merely meant retention, that is the capacity to withhold a thing until a debt had been fully paid, e.g. D. 21,1,31,8 (a text by Ulpian) and D. 47,2,15,2 (a text from Paul). However, these cases differ substantially from *pignus nominis.* Firstly, Paul clearly wrote *quasi pignoris loco* in D. 47,2,15,2 as opposed to the wording he chose in the text concerning *pignus nominis* (D. 13,7,18pr.)*,* which did not include *quasi.* Secondly, a right of pledge never existed in the aforementioned texts concerning a mere right to retention. A distinction has to be made between these cases and *pignus nominis.* In case of *pignus nominis*, the debtor of the claim that had been pledged carried out his obligation under the contract by giving the tangible to the pledgee instead of his creditor, the pledgor. The debtor was therefore discharged: the claim that had been pledged, ceased to exist. His economic interests would not have been sufficiently provided for, if he would only have had a right to retain the tangible. A right to retention did not empower the pledgee to, for example, sell the received tangible in order to use the proceeds to satisfy the pledgor's debt that had been secured by the pledge.

D. 13,7,18pr.
Paulus libro vicensimo nono ad edictum. Si convenerit, ut nomen debitoris mei pignori tibi sit, tuenda est a praetore haec conventio, ut et te in exigenda pecunia et debitorem adversus me, si cum eo experiar, tueatur. ergo si id nomen pecuniarium fuerit, exactam pecuniam tecum pensabis, si vero corporis alicuius, id quod acceperis erit tibi pignoris loco.

Paul, Edict XXIX. Suppose that it is agreed that my claim shall be your pledge. That agreement is to be respected by the praetor in such a way that assistance should be given to you in claiming the money and to my debtor if I should go against him. Thus, if the claim promised money, you will set off its money proceeds to your own claim, and if it promised a tangible of some kind, whatever you get you will hold as a pledge.

Pledge of a claim required a pledge agreement between pledgor and pledgee. Subsequently, notice of the pledge to the debtor led to the debtor being unable to discharge his obligation by paying his creditor, i.e. the pledgor. The pledgee could collect the claim by means of the *actio utilis* that was given to him by the praetor. In classical Roman law, someone did not ask himself the question whether he had a right, but whether an action was available to bring his case to court. An *actio utilis* was an analogous action, i.e. an action shaped after the example of an already existing action, called the direct action[2]). The Roman jurists sometimes even used the expression *actio ad*

Furthermore, it did not give him preference over other creditors of the pledgor, if the pledgor were to be declared bankrupt.

[2]) See e.g. the study by J.D. Harke, Actio utilis: Anspruchsanalogie im römischen Recht, Berlin 2016, who emphasized the analogy with the direct action. In my opinion, he captured the essence of the *actiones utiles* when he wrote (p. 16): "Der Begriff der actio utilis ist dabei gleicherma*ß*en trennend wie verbindend: Er erhellt einerseits, dass eine Ausnahme von den gewöhnlichen Verurteilungsvoraussetzungen vorliegt; andererseits stellt er den Ableitungszusammenhang heraus, in dem die gewährte Klage im Verhältnis zur actio directa steht"; see furthermore about *actiones utiles* in general e.g. S. Riccobono, Formulae ficticiae, a normal means of creating new law, TR 9 (1928) 1–61; E. Valiño, Actiones utiles, Navarra 1974; A. Steinwenter, Prolegomena zu einer Geschichte der Analogie, in: Studi in memoria di Emilio Albertario, vol. 2 Milano 1953, 103–127. Walter Selb wrote multiple articles concerning the methods used by the praetor to adapt the *formulae* of existing actions (in chronological order): W. Selb, Actiones in factum und Formeltechnik (Vorbemerkungen zu einer geplanten Untersuchung), in: G. Frotz/W. Ogris (ed.), Festschrift Heinrich Demelius zum 80. Geburtstag, Erlebtes Recht in Geschichte und Gegenwart, Wien 1973, 223–235; a review of the aforementioned book by Valiño in ZRG RA 95 (1978) 490–495; Selb, Formulare Analogien in 'actiones utiles' und 'actiones in factum' am Beispiel Julians, in: Studi in onore di Arnaldo Biscardi, vol. 3 Milano 1982, 315–350; id., Formulare Analogien in actiones utiles und actiones

exemplum to clarify after the example of which action the *actio utilis* had been formulated[3]). The praetor could give an *actio utilis* if a condition of the existing action was not met. The availability of an *actio utilis* meant that the new case was treated analogously to the case in which the direct action was available. The analogy with this action ensured that the *actio utilis* fit the Roman legal system, which was expanded because of the availability of such a new remedy[4]).

II. Pignus nominis: the actio Serviana as actio utilis?

The prevailing doctrine with regard to the *actio utilis* in case of *pignus nominis* is that this *actio utilis* was formulated after the example of the *actio*

in factum vor Julian, in: Studi in onore di Cesare Sanfilippo, vol. 5 Milano 1984, 729–759; see also more specifically about the *actiones in factum*, P. Gröschler, Actiones in factum, Eine Untersuchung zur Klage-Neuschöpfung im nichtvertraglichen Bereich, Berlin 2002, according to whom (29) *actiones utiles* were "Erweiterungsklagen (*actiones ad exemplum*), also solche Klagen, die sich an eine bereits vorhandene Grundklage (*actio directa*) anlehnen und diese abwandeln, dagegen nicht völlig neue Klagen, die vom Prätor ohne jedes Vorbild geschaffen werden." In France, a controversial theory was published by R. Sotty, Recherche sur les utiles actiones, La notion d'action utile en droit romain classique, Grenoble 1977, 631–632: "Les Romains n'ont jamais connu des utiles actiones qui seraient des extensions analogiques d'actions, édictales et civiles en général, déja reconnues par le droit. Ils ont, en revanche, pratiqué un système d'actions données utiles (*dare utilem actionem*), qui s'oppose en tout point au système des *utiles actiones*, connu et exploité depuis toujours par les romanistes"; furthermore, see about *exceptiones utiles* G. Nicosia, Exceptio utilis, ZRG RA 75 (1958) 251–301.

[3]) See G. Wesener, Actiones ad exemplum, ZRG RA 75 (1958) 220–250.

[4]) The Roman legal system was thus expanded through the expansion of the remedies available. This way of working fit the Roman legal system in which the actions took central stage. R. Zimmermann, The law of obligations: Roman foundations of the civil law tradition, Oxford 1996, 994 explained the difference with modern legal thinking: "The only difference to the modern argumentum per analogiam being that we would approach the issue from the point of view of substantive law whereas Roman law was actional law: it was, first and foremost, not the analogous rule as such that had to be carved out, but the analogous remedy that had to be provided (*ubi remedium ibi ius*)." In modern day law, we would interpret a provision in such a way that it extends to a case not literally covered by the provision in order to uphold the general principle underlying the provision. The Roman *actiones utiles* served the same purpose, see e.g the lectures that were given in Edinburgh in 1982 by P. Birks, The Roman law of obligations, ed. E. Descheemaeker, Oxford 2014, 214: "An *actio utilis* is an *actio in factum* upheld to implement the *utilitas*, the general policy or principle, of the lex." The same was said by I. Alibrandi, Delle azioni dirette ed utili, in: Opere giuridiche e storiche I, Roma 1896, 149–160, 160.

Serviana[5]). The *actio Serviana* was the action available to the pledgee of a tangible. Kaser believed that the *formula* of this action was flexible: it did not matter whether a claim had been pledged or a tangible[6]). According to Lenel, the *formula* of the *actio Serviana* read:

Si paret inter Aulum Agerium et Lucium Titium convenisse, ut ea res qua de agitur Aulo Agerio pignori esset propter pecuniam debitam, eamque rem tunc, cum conveniebat, in bonis Lucii Titii fuisse eamque pecuniam neque solutam neque eo nomine satisfactum esse neque per Aulum Agerium stare quo minus sol vatur, nisi ea res arbitrio iudicis restituetur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio, condemna, si non paret, absolve[7]).

If it should appear that Aulus Agerius and Lucius Titius have agreed that the thing which it concerns should serve as a pledge to Aulus Agerius because of a money debt, and that this thing was an asset of Lucius Titius at the moment when the agreement was made, and that this money was neither paid nor given satisfaction for, and that it was not due to Aulus Agerius that it was not paid, then, unless this thing has been returned on the ground of an interlocutory judgement, you, judge, must condemn Numerius Negidius in favour of Aulus Agerius to the value of the thing; if it does not appear so, absolve him.

In Kaser's view, in case of a pledge of a claim, the praetor supplemented *convenisse, ut …* with the object that had been pledged[8]). According to Kaser

[5]) See M. Kaser, Zum pignus nominis, IURA 20 (1969) 172–190 = in: Y. Lobin (ed.), Études offertes à Jean Macqueron, Aix-en-Provence 1970, 399–409. Kaser's theory has been adopted by most authors, e.g. Harke, Actio utilis (nt. 2) 286, who referred to "der überzeugende Vorschlag von Kaser"; see H.L.E. Verhagen, The evolution of *pignus* in classical Roman law, 'Ius honorarium' and 'ius novum', TR 81 (2013) 51–79, who wrote (61) with a reference to Kaser: "The praetor would grant an *actio in factum* (or *actio utilis*) to a creditor to whom a contractual claim had been pledged. The cause of the action (the *factum*) of this *actio in factum* was – like that of the *actio Serviana* itself – the pledge agreement, so that any admissible form of property defined in the pledge agreement could be made the object of the action. This action was modelled after the *actio Serviana* and with it the pledged claim could be enforced against the debtor thereof"; see also H.L.E. Verhagen, Ius honorarium, equity and real security, in: E. Koops/W.J. Zwalve (ed.), Law & Equity, Approaches in Roman Law and Common Law, Leiden 2014, 129–160, 134.

[6]) Kaser, Zum pignus nominis (nt. 5) 182 (404): "Nach dieser sehr beweglich gestalteten Formel ist die *actio Serviana* eine prätorische *actio in factum*: Der Sachverhalt (*factum*), auf den sie sich stützt, ist die Pfandkonvention, das *convenisse, ut … Ao.Ao. pignori esset propter pecuniam debitam.* Damit kann aber jeder zulässige Gegenstand, den die Pfandkonvention nennt, zur Grundlage der Klage gemacht werden, mithin auch das Forderungsrecht."

[7]) See O. Lenel, Das Edictum Perpetuum, Ein Versuch zu seiner Wiederherstellung, Leipzig 1927, 494 § 267.

[8]) Kaser, Zum pignus nominis (nt. 5) 182 (404).

the rest of the *formula* corresponded to that of the *actio Serviana*. He gave some examples, such as the *formula* of the *actio utilis* that in his opinion would have been used in case a claim based on a contract of deposit had been pledged[9]).

Si paret inter Aulum Agerium et Lucium Titium convenisse, ut mensa argentea, quam Lucius Titius apud Numerium Negidium deposuit, Aulo Agerio pignori esset propter pecuniam debitam, eamque pecuniam neque *solutam neque eo nomine satisfactum esse neque per Aulum Agerium stare* quo minus solvatur, eamque mensam dolo malo Numerii Negidii redditam non esse, quanti ea res erit, *tantam pecuniam iudex Numerium Negidium Aulo Agerio, condemna, si non paret, absolve.*

If it should appear that Aulus Agerius and Lucius Titius have agreed that a silver table, which Lucius Titius deposited with Numerius Negidius should serve as a pledge to Aulus Agerius because of a money claim, and that this money was neither paid nor given satisfaction for, and that it was not due to Aulus Agerius that it has not been paid, and that this table has not been returned by malice on the part of Numerius Negidius, then you, judge, must condemn Numerius Negidius in favour of Aulus Agerius to the value of the thing; if it does not appear so, absolve him.

Unfortunately, Kaser's example does not seem to concern the pledge of a claim based on a contract of deposit. Kaser merged the *formula* of the *actio Serviana* in such a way with the *actio depositi* (*forumula in factum concepta*) that the parties in his example merely agreed to a table, a tangible, to serve as pledge. The *formula* is therefore about pledge of a tangible, i.e. the table that had been deposited with Numerius Negidius. It does not concern the pledge of a claim and thus it is not a case of *pignus nominis.* The same is true for other examples given by Kaser, showing that – contrary to his belief – it is not easy to adapt the *formula* of the *Serviana* to fit a case of *pignus nominis*. For instance, Kaser's *formula* concerning the pledge of a *condictio certae pecuniae* is also about pledge of the *res debitae* instead of pledge of the claim. The parties agreed to the pledge of ten (perhaps *aurei*): *Si paret inter Aulum Agerium et Lucium Titium convenisse, ut decem, quae Numerium Negidium Lucio Titio dare oportet, Aulo Agerio pignori esset propter pecuniam debitam eamque pecuniam …*[10]).

In my opinion, the praetor did not shape the *actio utilis* of the pledgee after the *actio Serviana*. Firstly, the object of the *actio Serviana* was very different

[9]) See Kaser, Zum pignus nominis (nt. 5) 182 (404). Kaser used dots in his example to indicate where the *formula* would have been the same as the *formula* of the *actio Serviana.* To complete the *formula,* I replaced these dots by the wording of the *actio Serviana.* The words I added are in italics.

[10]) Kaser, Zum pignus nominis (nt. 5) 182 (404).

from that of the *actio utilis* in case of *pignus nominis.* The pledgee of a claim did not institute the *actio utilis* to obtain possession of the pledged property like the pledgee of a tangible did with the *actio Serviana*[11]). The *actio utilis* could not concern possession of the item pledged, because possession of a claim was impossible in Roman law[12]). The pledgee brought the *actio utilis*

---

[11]) The *actio Serviana* only lead to actual possession if the defendant handed the pledged object over before the judgement. Several mechanisms of Roman procedural law encouraged him to do so. The *clausula arbitraria* in the *formula* of the *actio Serviana* authorized the judge to absolve the defendant if he handed over the object of litigation before the judgement. The judge could order a defendant to do so by way of an *iussum de restituendo,* an interlocutory judgement. If the defendant did not, the final judgement condemned him to pay a sum of money, like all condemnations, see Gai inst. 4,48. In that case, the object of the litigation was valued and this could be done in a way that was disadvantageous to the defendant, putting pressure on him to hand over the object before the final judgement; see M. Kaser/K. Hackl, Das römische Zivilprozeßrecht, München 1996, § 48.

[12]) See e.g. D. 41,2,3pr., a text by Paul (54 ed.): *Possideri autem possunt, quae sunt corporalia*. Possession was obtained *corpore et animo*, see D. 41,2,3,1. A claim could not be possessed because it lacked *corpus,* it was a *res incorporalis*. Gaius listed as incorporeal *obligationes quoquo modo contractae* and explained to his students that it did not matter that the *res debitae* could very well be corporeal. The right, i.e. the claim, arising from the obligation itself was incorporeal: *ius obligationis incorporale est*, see Gai inst. 2,14. In certain cases, the Roman jurists acknowledged *quasi possessio,* but not in case of a claim. The modern lawyer would say *quasi possessio* was accepted in cases concerning a so-called *ius in re aliena,* an expression that was developed during the Middle Ages, see R. Feenstra, Dominium and ius in re alinea: The Origins of a Civil Law Distinction, in: P. Birks (ed.), New Perspectives in the Roman Law of Property, Essays for Barry Nicholas, Oxford 1989, 111–122. To the Roman lawyer the addition *in re aliena* was unnecessary, because an owner was not thought of as someone who had a *ius*. He did not need a right upon his own thing: his *proprietas* or *dominium* was all inclusive. *Quasi possessio* was accepted in cases where physical power, *corpus,* was exercised over a corporeal object that belonged to someone else, for instance an easement (servitude) containing a right to a flow of water could be acquiesced by use (*usucapio*), as Ulpian explained (see D. 8,5,10pr.). The same was true for a usufruct (see D. 4,6,23,2). *Interdicta* could also be obtained by *quasi* possessors, see Gai inst. 4,139. Possession of a *ius,* an incorporeal object, was, by way of exception, also accepted in case of *bonorum possessio,* because otherwise the person, who was not the heir according to *ius civile,* was unable to exercise the rights that were part of the inheritance that was granted to him by the praetor. In case of *bonorum possessio,* the praetor granted possession of the inheritance to someone who was not the heir according to *ius civile.* Ulpian (D. 37,1,3,1) explained that even when there were just rights and no corporeal objects to inherit, the *bonorum possessio* would be legally valid.

to collect the claim pledged[13]). Such a fundamental difference between the object of the direct action, i.e. the *Serviana*, and the analogous action did not fit the characteristics of the *actiones utiles* in Roman law. An *actio utilis* was given to achieve the unachievable: a person who did not meet the conditions of the direct action, could use the *actio utilis* to get what a person who did meet the conditions of the direct action could by instituting the direct action. The existence of an *actio utilis* meant a failure to meet the requirements of the direct action no longer stood in the way. For instance, the *actiones utiles* that were shaped after the *actio legis Aquiliae* could be used to claim compensation in cases that did not meet the requirements of the Lex Aquilia, e.g. an usufructuary could claim compensation by way of an *actio utilis,* whereas under the Lex Aquilia only an owner was entitled to an action[14]). The scope of the statute was thus extended by means of the *actiones utiles*, that is compensation came within the reach of persons whose case was not covered by the statute itself. The same was, for example, true in case an injury or death was not inflicted by the direct physical action of a defendant, which was a condition of the Lex Aquilia[15]). Gaius explained that in such a case an *actio utilis* was to be used to claim compensation, for example if an animal or slave had been starved to death[16]). Another example that shows that the object of

[13]) See e.g. D. 20,1,13,2.

[14]) See with regard to the usufructuary D. 7,1,17,3, a text by Ulpian (18 Sab.): *Si quis servum occiderit, utilem actionem exemplo Aquiliae fructuario dandam numquam dubitavi*.

[15]) See e.g. Inst. 4,3,16.

[16]) See Gai inst. 3,219: *Ceterum etiam placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit, ideoque alio modo damno dato utiles actiones dantur, uelut si quis alienum hominem aut pecudem incluserit et fame necauerit* … Ulpian spoke in such a case of an *actio in factum*, see D. 9,2,7,6 (18 ed.): *Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actione teneatur. Unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.* Actiones in factum were actions that were based on the facts of a case. This was reflected in the formula: it would start with the facts. These actions could be formulated after the example of an existing action, but that was not necessary, see Gröschler (nt. 2) 11ss. *Actiones in factum* were especially used to extend the scope of the Lex Aquilia and the innominate contracts by way of the *actio praescriptis verbis*. The title in the Digest concerning this action – D. 19,5 – is aptly called *De praescriptis verbis et in factum actionibus*. Especially after Julian, the jurists did not distinguish clearly between *actiones in factum* and *actiones utiles*, see Selb 1982 in Studi Biscardi (nt. 2) 330ss. Gaius did not use the term *actio in factum* in his Institutes at all. He only spoke of *actiones utiles*, maybe because he did not want to confuse his stu-

the analogous action was the same as that of the direct action, is the *actio utilis* granted to an assignee. An assignee used an *actio utilis* to claim what the assignor could have claimed with the direct action[17]).

Secondly, the *actio Serviana* was a real action[18]). The *actio utilis* that was given to the pledgee in case of *pignus nominis* could not be a real action, because the pledgee had no – what we would call – real right: the pledgee did not assert that a thing was his or that he had a real right to any object. On the contrary, the pledgee instituted the action against the debtor of the claim that had been pledged to him because the debtor was under an obligation to give something, to do something, or to perform some service on the basis of the claim that had been pledged. The *actio utilis* must therefore have been a personal action[19]). In fact, not even the pledgor himself had a real action against the debtor at his disposal. All he had was a personal action and therefore all the pledgee could have was a personal action. Papinian's warning applies in full here: *Non plus habere creditor potest, quam habet qui pignus dedit*[20]). Besides, the pledgee did not need a real action, because this *actio utilis* allowed him to do just what he wanted, namely to realize his security.

Because of the personal nature of the *actio utilis* in case of *pignus nominis,* it is not surprising that the *formula* of this *actio utilis* does not fit into the pat-

---

dents due to the similarity of the term *actio in factum* to the term *formula in factum concepta*, see Gröschler (nt. 2) 36. Gaius's terminology influenced later jurists, see Gröschler ibid. 37. Later jurists used the terms interchangeably, see M. Kaser, ‚ius honorarium' und ‚ius civile', ZRG RA 101 (1984) 1–114, 101.

[17]) I should put 'assignee' and 'assignor' between quotation marks, because in Roman law there was no actual assignment: the claim was not transferred, because the direct action remained with the assignor. The praetor enabled the assignee to collect the assigned claim by way of an *actio utilis* and he protected the debtor of the claim, if the assignor were to institute an action against the debtor after the assignment; see about the construction used instead of assignment in Roman law hereinafter p. 19.

[18]) See D. 20,1,17 and Inst. 4,6,31; see about the real nature of the *actio Serviana* e.g. M. Kaser, Studien zum römischen Pfandrecht, TR 44 (1976) 233–289, 255 = M. Kaser, Studien zum römischen Pfandrecht*,* Napoli 1982, 154; see also G. Krämer, Das besitzlose Pfandrecht: Entwicklungen in der römischen Republik und im frühen Prinzipat*,* Köln 2007, 39.

[19]) Of the same opinion are e.g. E. Koops, Vormen van subsidiariteit, Een historisch-comparatistische studie naar het subsidiariteitsbeginsel bij pand, hypotheek en borgtocht, diss. Leiden, Den Haag 2010, 108 nt. 186; and F. Brandsma, Pignus nominis: does the pledgee have a ius in re or a ius in personam?, in: V.A. Leontaritou/K.A. Bourdara/E.S. Papagianni (ed.), *ΑΝΤΙΚΗΝΣΩΡ*, Antecessor: Festschrift für Spyros N. Troianos, Athen 2013, 227–236.

[20]) See D. 20,1,3,1.

tern of the real actions, like the *actio Serviana.* In contrast to the pledgee of a claim, a pledgee of a tangible had the real *actio Serviana*, which they could bring against anyone who possessed the pledged thing. The *formula* of the *actio Serviana* showed its real character. The *intentio*, for instance, lacked the name of the defendant and the action contained the *clausula arbitraria* which lead to an acquittal if the tangible pledged was handed over to the pledgee in the course of the procedure. Moreover, the pledgee of a tangible could bring the action against any possessor of the thing pledged. The *actio Serviana* was thus very different from the *actio utilis* in case of *pignus nominis.* For one thing, this *actio utilis* could not contain the *clausula arbitraria*, because it did not concern the handing over of a tangible, but the rendering of a performance[21]). Moreover, it was unthinkable that the defendant was not named until the *condemnatio*, as in the real *actio Serviana*: the claim pledged had to be specified before the *condemnatio* and this required naming the creditor and the debtor. Furthermore, the *condemnatio* of the *actio Serviana* would have been very different from that of the *actio utilis.* The judge would condemn the defendant in the *Serviana* to the value of the pledged tangible[22]). Such a condemnation was appropriate to a real action. By contrast, the *actio utilis* was designed to render performance from the debtor of the claim pledged. If this claim concerned payment of an amount of money, the judge would condemn the defendant to paying the money. If it concerned giving or doing something, the judge valued this performance at an amount of money, because all condemnations in Roman law were condemnations to paying an amount of money[23]). Finally, the other remedies which the pledgee had at his disposal differed from those pertinent to the real *actio Serviana*. The pledgee of a claim could not, for instance, bring the *actio ad exhibendum*[24]).

According to Kaser, the praetor adapted the *actio Serviana* in such a way that in the case of *pignus nominis*, the pledgee was given a personal *actio Serviana*[25]). However, I do not know any analogous action that differed from the direct action in such a way that it changed from a real to a personal action.

---

[21]) See Kaser, Zum pignus nominis (nt. 5) 183 (405).

[22]) The *actio Serviana* only lead to actual possession if the defendant handed the pledged object over before the judgement, as I explained in nt. 11.

[23]) See Gai inst. 4,48.

[24]) See Kaser, Zum pignus nominis (nt. 5) 183 (405): "Da sich die Klage auf die persönliche Haftung stützt, kommt vielmehr nur wie bei allen persönlichen Klagen die Androhung der *missio in bona rei servandae causa* in Betracht" (italics by Kaser).

[25]) See Kaser ibid.

Kaser asserted to know such a case, namely the action of a lower-ranking pledgee who claimed the *superfluum* from a higher-ranking pledgee. The *superfluum* was what remained after the higher-ranking pledgee had sold the pledged property and set off the proceeds of the sale against the claim that had been secured by the pledge. The lower-ranking pledgee should get the surplus[26]). Kaser argued that the lower-ranking pledgee had the *actio Serviana utilis* and *in personam* to claim the *superfluum*[27]).

The gloss already asked the question which action the lower-ranking pledgee had to claim the *superfluum*[28]). Different answers were given to this question over the centuries[29]). In my view, the lower-ranking pledgee was given an action that was shaped after the action the pledgor would otherwise have had to claim the surplus, that is the *actio pigneraticia directa.* The lower-ranking pledgee, it seems, replaced the pledgor who would have received the surplus if the property had not been pledged a second time[30]). That the pledgor would have had the *pigneraticia* to claim the *superfluum* is clear from a constitution by emperor Diocletian: his chancery answered in 294 a certain Sabinus, who had asked through which action the surplus could be obtained, that it was through the *pigneraticia*[31]). The emperor emphasized

[26]) See, for example, D. 20,4,12,5.

[27]) See Kaser, Zum pignus nominis (nt. 5) 184 (405–406).

[28]) See the gloss Restituat to D. 20,4,12,5: "*Sed qua actione? Respon. in factum forte*."

[29]) See e.g. H. Dernburg, Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts, 2 Bde. Leipzig 1860, 1864, here II, 487: "Die Glosse spricht von einer actio in factum, andere denken an eine condictio ex lege, womit nur der Rathlosigkeit und dem Unvermögen, diesen Anspruch innerlich zu begründen, Ausdruck gegeben wird." In Dernburg's view the lower-ranking pledgee had the *actio pigneraticia in personam*, see ibid. 488. E.g. Cujas was of the opinion that the action was an *actio hypothecaria utilis*, see his commentary to Papinian D. 20,4,3 (11 resp.): Commentaria in Librum XI Responsorum Aemilii Papiniani ad l. III Qui pot. in pign. hab., in: Opera omnia, Bd. 4 Neapoli 1758, 1291. J.J. Bachofen, Das römische Pfandrecht, Bd. 1 Basel 1847, 492, for instance, agreed with Cujas.

[30]) See e.g. C. 8,17(18),1 (Sev.; a. 197). *N.b.* the lower-ranking pledgee could offer payment to the higher-ranking pledgee. If he did so, he took the place of the first pledgee. The Romans spoke of *successio in locum* or *successio in ius pignoris,* see e.g. C. 8,18(19),1pr., D. 20,5,5pr., D. 20,4,12,5 and D. 20,3,3*;* see about this mechanism, for instance, C. Emunds/J.D. Harke, Das ius offerendi et succedendi des nachrangigen Pfandgläubigers*,* in: J.D. Harke (ed.), Facetten des römischen Pfandrechts, Studien zur Geschichte und Dogmatik des Privatrechts*,* Berlin 2015, 15–38; see furthermore D. Schanbacher, Hypothekarische Sukzession, TR 84 (2016) 149–164, especially 161ss.

[31]) See e.g. C. 8,27(28),20 (a. 294), a constitution by Diocletian: *Secundum placiti*

that this was a personal action. In case of a property that had been pledged multiple times, a lower-ranking pledgee needed the *pigneraticia* to claim the *superfluum* instead of the pledgor. The lower-ranking pledgee could not have the *actio pigneraticia* itself, because there was no pledge agreement between both pledgees. However, the praetor could grant him this action *utilis*[32]).

I believe the lower-ranking pledgee used the *actio pigneraticia utilis* to claim the *superfluum* and not the *actio Serviana utilis,* which Kaser proposed, because a constitution of Emperor Alexander Severus shows that the lower-ranking pledgee no longer had the *actio Serviana* after the sale by the higher-ranking pledgee[33]). This remark would have been futile, if the *actio Serviana* was given as *actio utilis* to demand payment of the *superfluum.* Moreover, it was not this real action that was used to claim the *superfluum,* but the personal *actio pigneraticia*. After all, the possibility to claim the *superfluum* was based on the pledge agreement, not on a real right. Furthermore, the *actio Serviana* did not suit the need of the lower-ranking pledgee, because it aimed at acquiring possession of the pledged property[34]). The pledge was extinguished by the sale and all that was left for the lower-ranking pledgee was a claim to receive the *superfluum.* Besides, the lower-ranking pledgee needed an action that would result not only in being paid the *superfluum,* but also, for example, enable him to hold the higher-ranking pledgee accountable, for instance if he had sold the pledged property for a price too low. If there had been no lower-ranking pledgee, this problem would have been the pledgor's, who would have been able to sue the pledgee with the *actio pigneraticia directa* after the foreclosure sale. The *pigneraticia* was also the action the lower-ranking pledgee would have had if the *superfluum* had been paid to the pledgor by the higher-ranking pledgee, for example because the higher-

fidem, si nihil convenit specialiter, pignoribus a creditore maiore quam ei debebatur pretio distractis, licet ex eo fundus comparatus sit, non super hoc in rem, sed in personam, id est pigneraticia, de superfluo competit actio.

[32]) It would have meant some changes had to be made to the *formula.* The *formula in ius concepta,* that existed next to the *formula in factum concepta* of the *pigneraticia*, see Lenel (nt. 7) 255, was flexible enough to allow these changes. At the latest in post-classical times, it was one of the *bonae fidei* actions, see Inst. 4,6,28. The judge could investigate whether the higher-ranking pledgee had complied with the requirements of good faith, for instance, whether he had accepted a price too low at the foreclosure sale.

[33]) See C. 8,19(20),1pr. (a. 230). This constitution by Alexander Severus speaks of the *hypothecaria,* a name often used for the *actio Serviana.*

[34]) However, the *actio Serviana* only lead to actual possession if the defendant handed the pledged object over before the judgement, as I explained in nt. 11.

ranking pledgee did not know the property had been pledged another time[35]). If the pledgor had received the *superfluum* instead, the lower-ranking pledgee could claim it by instituting the *actio pigneraticia contraria*[36]).

All in all, I believe that Kaser wrongly used the example of the lower-ranking pledgee claiming the *superfluum* to support his theory that the *actio Serviana* could be a personal action if it was given *utilis,* because it seems unlikely that the lower-ranking pledgee was given the *actio Serviana* as *actio utilis* to claim the surplus. The *actio utilis* that would have been given to the lower-ranking pledgee is therefore not a case in which a real action was changed into a personal action if it was given as *actio utilis.* Because of the vast differences with the *Serviana* that I discussed before, I do not think that the praetor shaped the *actio utilis* in case of *pignus nominis* after the *Serviana.* I think the praetor had another action at his disposal to change into an *actio utilis* which suited the case of *pignus nominis* better.

III. Pignus nominis: the actio directa as actio utilis

I am of the opinion that the *actio utilis* of the pledgee to whom a claim had been pledged was shaped after the action that the pledgor would have had against his debtor if he himself collected the claim in his capacity as creditor[37]). I believe the praetor took the *formula* of this action and adapted it to

---

[35]) The lower-ranking pledgee could prevent the higher-ranking pledgee from paying the *superfluum* to the pledgor by having the pledgor pledge him his claim to the *superfluum.* If such a pledge was agreed, the lower-ranking pledgee could give notice to the higher-ranking pledgee of this pledge. The notice prevented the higher-ranking pledgee from discharging his obligation to pay the *superfluum* by paying the pledgor; see about this construction e.g. Dernburg II (nt. 29) 488. It is believed that this construction was used before it was established that property could be pledged multiple times; see about this development e.g. M. Kaser, Über mehrfache Verpfändung im römischen Recht, in: Studi in onore di Giuseppe Grosso, vol. 1 Torino 1968, 27–76; and A. Wacke, Prozessformel und Beweislast im Pfandrechtsprätendentenstreit, TR 37 (1969) 369–414.

[36]) See M. Kaser, Studien zum römischen Pfandrecht, II: Actio pigneraticia und actio fiduciae, TR 47 (1979) 195–234, 222 = M. Kaser, Studien zum römischen Pfandrecht*,* Napoli 1982, 59–126, 86. Recently, P. Scheibelreiter, Zum Klagsziel der *actio pigneraticia in personam contraria* in D. 13,7,9pr., TR 88 (2020) 50–93 wrote about the *actio pigneraticia contraria* in case of a pledge of a *res aliena.*

[37]) Wubbe and Selb were of the same opinion, but neither explained why. F.B.J. Wubbe, Eine 'Lehre vom Subpignus' im Corpus Iuris Civilis?, TR 26 (1958) 133–194, 178 nt. 111, stated: "Der Forderungspfandgläubiger kann mit a. utilis, der gleichen, welche dem Verpfänder als directa zusteht, auf Leistung klagen." Selb 1982 in Studi Biscardi (nt. 2) 335 wrote: "Die *actio utilis* ist die abgewandelte Grund-

suit the pledge agreement. For instance, if a *stipulatio* concerning an *incertum* had been pledged, the praetor adapted the *actio ex stipulatu* in order to enable the pledgee to enforce performance from the debtor[38]). Likewise, the pledgee would be granted the *actio venditi* or the *actio empti* in an adapted form if the claim pledged was based on an agreement of sale.

The advantage of an *actio utilis* shaped this way would have been that the *formula* of the *actio* given to the pledgee contained the same clauses as the action the pledgor would have had in his capacity as creditor against the debtor of the claim pledged. These clauses were present in the *formula* of the specific action. For example, the *actio ex stipulatu* contained the proviso that the claim was due[39]). Kaser's reconstruction of the *formula* of the *actio utilis* in a case where a claim based on a stipulation had been pledged lacked this clause[40]). Another example is the *clausula bonae fidei*. It would have been important that the provisions in the *formula* of the direct action were present in the *actio utilis*, because it ought not to have made a difference to the debtor whether the claim was collected by his creditor, i.e. the pledgor, or by the pledgee.

The praetor could adapt the direct action by a technique which he used more often in *actiones utiles*: he would replace a party that featured in the direct action with the person in whose interest the *actio utilis* had been given. In German, this is called Subjektumstellung[41]). The praetor used this technique, for example, in the *actio Rutiliana*, which served to enable someone who had purchased the estate of a bankrupt debtor, the *bonorum emptor*, to bring actions pertaining to the estate. Gaius explained that the

klage aus dem verpfändeten Recht; ähnlich dann beim *pignus nominis*, die abgewandelte Klage aus der verpfändeten Forderung, nicht eine *in personam* abgewandelte *actio Serviana*, nicht die Pfandverfolgungsklage" (Selb's italics). He also noted (ibid.) that his opinion was contrary to that of Kaser.

38) One of Kaser's examples was the pledge of a claim based on a *stipulatio* concerning an *incertum,* i.e. something other than the transfer of a specific thing or the payment of a specified amount. In case of such a stipulation, the *actio ex stipulatu* could be used by the creditor. If the object of the stipulation was *certum*, then the creditor instituted a *condictio* instead of the *actio ex stipulatu,* see D. 12,1,24, a text by Ulpian: *Si quis certum stipulatus fuerit, ex stipulatu actionem non habet, sed illa condicticia actione id persequi debet, per quam certum petitur.*

39) The *formula* contained the condition *rei dies fuit*, see Lenel (nt. 7) 152.

40) See Kaser, Zum pignus nominis (nt. 5) 182 (404).

41) Concerning the jurists up to the period of Julian see e.g. Selb 1982 in: Studi Biscardi (nt. 2) 318ss., who wrote that the expression *actio utilis* was used for actions in which the praetor used a fiction or changed one party into another (Subjektumstellung); see more recently Harke, Actio utilis (nt. 2) 12ss.

bonorum emptor was given *actiones utiles*: he derived the *intentio* from the person whose estate he bought, whereas the *condemnatio* was in favour of the *bonorum emptor,* meaning that the defendant had to pay the *bonorum emptor* what he owed the person whose estate had been sold e.g. on the basis of a contract[42]).

The praetor used the same technique to formulate an action that could be used against a person who was not liable under the direct action, in other words, an action to successfully claim performance from a person other than the debtor in the direct action. The person who was under an obligation to pay and who would have been condemned to pay if the applicant had sued using the direct action was exchanged for another in the *condemnatio* of the *actio utilis*[43]). Cases in which this change took place are the *actio institoria* and the *actio exercitoria*[44]). Both actions are known as *actiones adiecticiae qualitatis*, because these actions did not create a new obligation or a new claim, but made it possible to obtain payment of a claim from someone who had appointed the debtor to a specific position[45]). The *actio*

---

[42]) The praetor also used another technique to enable the *bonorum emptor* to institute actions pertaining to the estate, as Gaius explained: he would grant the *bonorum emptor actiones utiles* which contained the fiction that the *bonorum emptor* was the heir of the bankrupt debtor, whose estate he had bought. Both the *actio Rutiliana* and the *formula ficticia* that were given to the *bonorum emptor* were *actiones utiles*, see Gai inst. 3,81. Gaius announced in this fragment of his third book that he would comment upon these *actiones utiles* in his fourth book. In this book, he explained the technique that was used by the praetor, see Gai inst. 4,35; see about the *bonorum emptor* hereinafter p. 15. The same technique was used by the praetor to enable litigation through representatives like a *procurator*, see Gai inst. 4,86; F. de Zulueta, The Institutes of Gaius, II: Commentary, Oxford 1953, 257. Representatives, of course, did not litigate in their own name, because the action they brought was not their own. Gai inst. 4,86 writes that they litigated *alieno nomine*. They were merely an agent, whereas persons who were given an *actio utilis* could litigate in their own name, *suo nomine,* e.g. the assignee as I will explain hereinafter, see p. 19.

[43]) In German this is aptly called "Subjektumstellung auf der Passivseite", see e.g. M. Kaser, Das römische Privatrecht, 1: Das altrömische, das vorklassische und das klassische Recht, 2. Aufl. München 1971, 506 § 141.

[44]) See Gai inst. 4,71; see about these actions e.g. B. Schlösser, Die Bedeutung der praepositio für den Handelsverkehr im antiken Rom, Berlin 2008, 11ss.

[45]) These actions have been called *actiones adiecticiae qualitatis* since the days of the Glossators, see R. Feenstra, Romeinsrechtelijke grondslagen van het Nederlands privaatrecht, Leiden 1994, 256 nr. 398. Their nature was, however, already stressed e.g. by Paul, see D. 14,1,5,1 i.f. (29 ed.): *hoc enim edicto non transfertur actio, sed adicitur.*

exercitoria made it possible for a person who had a claim against a ship's captain to litigate against the owner of the ship[46]). The *actio institoria* could be brought by a person who had entered into a contract with a manager against the person who had appointed the manager, e.g. the owner of a business. The manager was liable, but the owner could be sued directly by the *actio institoria*[47]). The praetor adjusted the *formula* of the direct action in such a way that the owner was condemned, if the plaintiff could prove his case. The *intentio* contained both the name of the manager and that of his boss in the case of an *actio institoria*, because it encompassed the appointment of the manager[48]).

Lenel reconstructed the *formula* of the *actio institoria* in case of a contract of sale between a manager and a plaintiff[49]). In his example the manager ran an inn and had sold olive oil to the plaintiff, who could institute the *actio institoria ex empto*:

Quod Aulus Agerius de Lucio Titio, cum is a Numerio Negidio tabernae instructae praepositus esset, eius rei nomine decem pondo olei emit, qua de re agitur, quidquid ob eam rem Lucium Titium Aulo Augerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato si non paret absolvito[50]).	As for the alleged fact that Aulus Agerius has purchased from Lucius Titius, who has been placed in charge of an inn by Numerius Negidius, ten pounds of olive oil, which is the case here concerned, the judge must condemn Numerius Negidius in favour of Aulus Agerius to anything that Lucius Titius ought to give or do to Aulus Agerius because of this matter in accordance with good faith; if it does not appear so, absolve him.

A comparison between the *formula* of the *actio institoria ex empto* and the *formula* of the *actio empti* shows that they are almost identical[51]). In fact, they are so identical that Ulpian felt justified to simply speak of liability on the basis of the *actio empti*[52]). Lenel reconstructed the aforementioned *formula* of

---

[46]) See e.g. D. 14,1,1,9. D. 14,1 concerned the *actio exercitoria*.

[47]) See about the *actio institoria* D. 14,3.

[48]) See Feenstra (nt. 45) 258–259 nr. 398 and Kaser/Hackl (nt. 11) 341 § 49.

[49]) See Lenel (nt. 7) 263 § 101.

[50]) See Lenel (nt. 7) 263 § 101.

[51]) See Lenel (nt. 7) 299 § 110 for the formula of the *actio empti*. It reads: *Quod Aulus Agerius de Numerio Negidio hominem qua de agitur emit, quidquid ob eam rem Numerium Negidium dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato, si non paret, absolvito*.

[52]) See D. 14,3,5,12: *Proinde si praeposui ad mercium distractionem, tenebor nomine eius ex empto actione: item si forte ad emendum eum praeposuero, tenebor dumtaxat ex vendito …* Curiously, Lenel did not refer to this fragment.

the *actio institoria* by putting himself in the position of the praetor. Regarding a Digest fragment in which the *institor* was a slave, he wrote:

> "Er will den dominus aus den Geschäften des institor haftbar machen, so haftbar machen, wie der institor selbst haftbar ist oder sein würde, wenn er kein Sklave wäre. War es nicht das nächste und natürlichste, daß er an der aus diesen Geschäften abfließenden Formel nur so viel änderte, als sein Zweck es erforderte, daß er, soweit irgend möglich, es vermied, aus den mit so überlegter Feinheit konstruierten Formelgebäuden, an deren Interpretation sich das gesamte Kontraktsrecht anlehnte, wesentliche Bausteine herauszunehmen? Wurde er nicht mit zwingender Notwendigkeit auf unser Schema hingedrängt, das den Judex unter Benutzung der für den betreffenden Fall gegebenen Formelworte anweist, zu untersuchen, was der institor schulde oder schulden würde, und darauf dann den dominus zu kondemnieren?"[53]).

Lenel emphasized the consistency of the legal system. Formulating one specific *actio institoria* could endanger this consistency. The *actio institoria* had to contain the same clauses as the action the plaintiff would otherwise have had against the manager because an *actio institoria* did not change the clauses of the action, it only enabled the plaintiff to sue the owner, instead of the manager. The praetor could achieve this by merely adapting the action the plaintiff would otherwise have had against the manager. This solution ensured the consistency of the legal system: the action and thus its interpretation remained where it belonged in the "mit so überlegter Feinheit konstruierten Formelgebäuden"[54]).

In my opinion, the praetor could apply the same technique in formulating the *actio utilis* in case of *pignus nominis*, because the condemnation was in favour of a different party from the creditor mentioned in the *intentio*. I will explain why it seems less probable that the praetor would have used a different technique instead, such as inserting a fiction in the *formula*. The praetor used a fiction in various other *actiones utiles*, which are therefore known as *actiones ficticiae*[55]). Such an action might direct the judge to base his verdict on the fiction as if one of the parties involved were a Roman

---

[53]) See Lenel (nt. 7) 263 § 101.

[54]) E.g. D. Mantovani, Le formule del processo privato romano per la didattica delle Istituzioni di diritto romano, Padova 1999, 79–80 agreed with Lenel's way of reconstructing the *actio institoria*. Mantovani also gave as an example the *formula* of the *condictio certae pecuniae institoria*. He believed it to have been: *C. Aquilius iudex esto. Si paret L. Titium qui a N. Negidio tabernae instructae praepositus est eius rei nomine A. Agerio sestertium X milia dare oportere, qua de re agitur, C. Aquilius iudex N. Negidium A. Agerio sestertium X milia condemnato; si non paret absolvito.*

[55]) See about these *formulae* e.g. S. Riccobono, Formulae ficticiae, a normal means of creating new law, TR 9 (1928) 1–61; see more recently F. Mercogliano,

citizen[56]). Another example is the *actio Publiciana* which contains the fiction that a prescription period had expired, therefore enabling a possessor to claim a thing as if he already were the owner[57]). However, a fiction in the *actio utilis* in case of *pignus nominis*, was impossible, because a fiction did not allow the plaintiff to provide proof of the actual relation between the parties if this was what was feigned to be existing already. The praetor could not assume in the *formula* that the pledgee was the creditor or heir of the creditor and simultaneously demand proof of e.g. the pledge agreement in the *formula.* Consider, for example, a fiction that would have told the judge to treat the pledgee as if he were the creditor, or heir of the creditor. The praetor could only assume that the pledgee was the creditor, or heir of the creditor, if the pledgee had already proven his position, i.e. if he had provided evidence of both the pledge and his claim that was secured by the pledge. This would not have happened *in iure,* because the praetor examined the plaintiff's claim only to a limited extent. He denied the plaintiff the action if it was unquestionably clear that the claim was unfounded, for example because he was aware that the plaintiff intentionally misrepresented the facts[58]). The *formula* of the *actio utilis* therefore had to indicate the evidence had to be presented to the private judge during the second stage of the proceedings, *apud iudicem*, e.g. his position as creditor and the pledge agreement. The praetor would have worded the *formula* in such a way that proof of, for example, the pledge had to be given *apud iudicem.* Kaser rightly wrote:

> "Wollte man das Element der Verpfändung als Voraussetzung der Kondemnation nicht in die Formel aufnehmen, dann hätte auch hier der Prätor in iure von Amtswegen das wirksame Pfandverhältnis nachprüfen und die Erteilung der actio utilis von dem Ergebnis dieser Prüfung abhängig machen müssen. Eine solche prätorische Untersuchung, die häufig nicht anders als beim Erbschafts- oder Forderungskauf eine genaue und umständliche Beweisprüfung forderte, wäre aber über die regelmässige Funktion des Prätors hinausgegangen"[59]).

'Actiones ficticiae': tipologie e datazione*,* Napoli 2001; and A.R. Martín Minguijón, Acciones ficticias y acciones adyecticias. Fórmulas*,* Madrid 2001.

[56]) See Gai inst. 4,37.

[57]) The *actio Publiciana* was in a way a *reivindicatio utilis,* because it had been given after the example of the *reivindicatio*; see, for instance, Paul, D. 44,7,35 (1 ed.): *… item Publiciana, quae ad exemplum vindicationis datur ….*

[58]) See Kaser/Hackl (nt. 11) 239 § 32; see about *denegatio actionis* e.g. W.J. Zwalve, Proeve ener theorie der denegatio actionis, Een onderzoek naar de positie van de magistraat in het Romeinse burgerlijke procesrecht, Deventer 1981.

[59]) See Kaser, Zum pignus nominis (nt. 5) 180 (403).

A fiction that assumed the claimant was a creditor, or heir of the creditor would not fit in such a *formula,* because it would be contradictory to feign the claimant's position on the one hand, whilst on the other hand demand proof of this position. The fictions that were used in the *formulae ficticiae* we know of did not obstruct the *formulae* encompassing the factual evidence that had to be provided *apud iudicem.* For example, the fiction that one of the parties was a Roman citizen only enabled that person to litigate under Roman law. It did not assume that the claimant was e.g. a creditor. The fiction that one of the parties was a Roman citizen did not concern the facts of the case at hand and therefore did not prevent the *formula* describing the necessary facts to be given as evidence. Likewise, the fiction encompassed in the *actio Publiciana* did not stop the plaintiff from proving his position. The fiction only concerned the expiration of the period that led to acquisitive prescription[60]). The *formula ficticia* brought by the *bonorum emptor* assumed the purchaser was the heir[61]). The assumption that the *bonorum emptor* was the heir, was justified by the fact that the praetor did not need proof of his position because it was the praetor himself who had appointed the *bonorum emptor*[62]). The praetor presumably used this fiction, if the bankrupt had died: if the bankrupt was still alive, the praetor most probably used the aforementioned *actio Rutiliana*[63]).

[60]) See Gai inst. 4,36.

[61]) See Gai inst. 4,34. The *formula* using the fiction that the *bonorum emptor* was the heir of the bankrupt was called the *Serviana.*

[62]) The praetor did so in a *decretum*, see Kaser/Hackl (nt. 11) 427 § 65: "Die Einweisung in den Besitz (missio in possessionem) ist in den meisten Fällen dem Prätor und dem Provinzstatthalter vorbehalten. Sie erteilen, diese Maßnahmen auf Antrag (*postulatio*) durch *decretum* … Die Einweisung dient regelmäßig zur Vorbereitung des Verkaufs (*venditio bonorum*) an den *bonorum emptor*, der die Gläubiger konkursmäßig befriedigen soll." Moreover, the *missio in bona* was publicized by a notice (*proscriptio*), see D. Wiechmann, Die *separatio bonorum* im klassischen römischen Recht, Pfaffenweiler 1992, 3. In short, the praetor assigned the possession of an estate to the purchaser of the estate. The purchase price went to the creditors. The praetor enabled the purchaser to institute the actions pertaining to the estate by including the fiction that the purchaser was the heir of the bankrupt in the *formula*. The justification for this fiction lay in the allocation of the possession of the estate to the purchaser by the praetor.

[63]) See p. 11. We do not know for sure in which cases the praetor used the *Serviana* and in which the *Rutiliana.* The prevailing doctrine is that the praetor used the fiction that the *bonorum emptor* was the heir if the bankrupt was deceased and the *actio Rutiliana* if the bankrupt was still alive, see e.g. Lenel (nt. 7) 432, Kaser/Hackl (nt. 2) and Wiechmann (nt. 62) 6. A dissenting opinion has, for example, been voiced by G. Grevesmühl, Die Gläubigeranfechtung nach klassischem römischem Recht, Göttingen 2003, 23 nt. 83.

Proof of a number of elements would have been essential if the pledgee wished to claim performance from the debtor of the claim pledged. Firstly, the pledgee had to prove the existence of the claim pledged, like the creditor would have had to proof the existence of the claim if he had sued the debtor himself. Secondly, the pledgee had to give evidence of the *pignus nominis*, i.e. that the claim had been pledged to him. Thirdly, the pledgee had to demonstrate a number of aspects with regard to the claim that had been secured by the *pignus nominis*. The pledgee was only allowed to exercise his pledge if this claim had not been paid, nor that satisfaction had been given in another way[64]). Moreover, I think the pledgee was not allowed to be in default, as was also required by the *actio Serviana* in case a tangible had been pledged[65]).

Bearing these elements in mind, I will reconstruct the *formula* of the *actio utilis* using the terminology found in our sources. In case of *pignus nominis,* they speak of a pledge of the *nomen debitoris*. For instance, the constitution of Alexander Severus began with the words: *Nomen quoque debitoris pignerari*, and Paul said: *Si convenerit, ut nomen debitoris mei pignori tibi sit*[66]).

I will reconstruct the *formula* of the *actio utilis* that would have been awarded to the pledgee in the following imaginary case. Titius had sold a slave to Numerius. Titius had not yet been paid, in other words: he had a claim against Numerius for payment of the purchase price of the slave, i.e. ten thousand sesterces. Titius then borrowed nine thousand sesterces from Aulus. Titius and Aulus agreed that Titius's claim against Numerius was pledged to Aulus to secure Aulus's claim. When Titius failed to fulfill his obligation to Aulus, Aulus wanted to collect the claim that had been pledged to him. He went to the praetor to get the appropriate action against Numerius. The praetor would have given him an *actio utilis* that enabled him to collect payment of the purchase price that Numerius owed Titius.

In my opinion, the *formula* of this *actio utilis*, i.e. in case a claim from a contract of sale, *emptio venditio,* had been pledged, would have been:

---

[64]) See C. 8,16(17),4.

[65]) See Lenel (nt. 7) 494 § 267.

[66]) See C. 8,16(17),4: ***Nomen*** *quoque* ***debitoris pignerari*** *et generaliter et specialiter posse pridem placuit. quare si debitor is satis non facit, cui tu credidisti, ille,* ***cuius nomen tibi pignori datum est***, …; see D. 13,7,18pr. for Paul's wording: *Si convenerit, ut* ***nomen debitoris mei pignori tibi sit*** …; finally, see D. 20,1,13,2: *Et verum est, quod Pomponius libro septimo ad edictum scribit, si quidem pecuniam debet is,* ***cuius nomen pignori datum est*** …

X iudex esto.
Si paret Titium Numerio Negidio mensam argenteam sestertiorum X milia vendidisse et inter Aulum Agerium et Titium convenisse, ut id nomen Aulo Agerio pignori esset ob IX milia sestertiorum debita Aulo Agerio a Titio eaque IX milia neque soluta neque eo nomine satisfactum esse neque per Aulum Agerium stare quo minus solvatur, quidquid Numerius Negidius Titio dare facere oportet ex fide bona, usque ad id, quod Aulo Agerio a Titio debeatur, iudex, Numerium Negidium Aulo Agerio condemna, si non paret, absolve.

X be judge.
If it should appear that Titius sold a silver table to Numerius Negidius for the price of ten thousand sesterces and that Aulus Agerius and Titius have agreed that this claim of Titius would serve Aulus Agerius as a pledge, because of nine thousand sesterces owed by Titius to Aulus Agerius, and that this nine thousand have not been paid, nor given satisfaction for, and that it is not Aulus Agerius's fault that payment has not been made, then you, judge, must condemn Numerius Negidius in favour of Aulus Agerius to anything that Numerius Negidius ought to give or do to Titius in accordance with good faith up to the amount Titius owes Aulus Agerius; If it does not appear so, absolve him.

The core of this reconstruction is the *formula* of the *actio venditi*. The *formula* of this action was:

Quod Aulus Agerius Numerio Negidio hominem qua de re agitur vendidit, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemna, si non paret, absolve[67]).

As for the alleged fact that Aulus Agerius has sold the slave here concerned to Numerius Negidius: you, judge, must condemn Numerius Negidius in favour of Aulus Agerius to anything that Numerius Negidius ought to give or do to Aulus Agerius because of this matter in accordance with good faith; if it does not appear so, absolve him.

I have adapted this *formula* using the same technique as the praetor used in e.g. the *actio Rutiliana* and the *actio institoria.* Like in those cases, I think the praetor changed the direct action in such a way that the person in favour of whom the judge had to condemn the defendant was not the same as the person who appeared in the *intentio.* The *condemnatio* was in the name of the pledgee.

I then completed the *formula* by adding a few elements that follow from the constitution of Alexander Severus, C. 8,16(17),4: the pledgee was told that the debtor of the claim that had been pledged to him was compelled with *actiones utiles* to give satisfaction *usque ad id, quod tibi deberi a creditore eius probaveris*[68]). Thus, according to this constitution, the pledgee had to prove

[67]) See Lenel (nt. 7) 299 § 110.
[68]) See the beginning of this article for the text of this constitution.

what was owed to him on the basis of the debt that had been secured by the pledge and he could only collect the claim that had been pledged to him up to the amount his debtor, i.e. the pledgor, owed him[69]). I have wondered why the pledgee was not allowed to collect more than was owed to him by the pledgor, because the claim that had been pledged to him had been pledged in its entirety. Moreover, the debtor of the claim that had been pledged would have had to make more effort to pay his debt in full if the debtor of the claim that had been pledged owed a higher amount to the pledgor than the pledgor owed to the pledgee: in that case, the debtor first had to pay the pledgee up to the amount that the pledgor owed the pledgee and then he had to pay the rest of his debt to his creditor, i.e. the pledgor. However, the advantage of this limitation would have been that the pledgee did not receive more than he was entitled to. It was not in the interest of the pledgor to allow the pledgee to collect the entire claim, because if that were the case, the pledgor would have to obtain the surplus from the pledgee, which could proof to be impossible, for instance, if the pledgee went bankrupt. The praetor protected the pledgor against this risk by allowing the pledgee to collect the claim that had been pledged only up to the amount that the pledgor owed him[70]). The aforementioned constitution of Diocletian thus shows that the *actio utilis* did not only take the interests of the pledgee into account: the interests of the pledgor were secured by demanding proof not only of the pledge, but also by limiting the amount that the pledgee could collect to the amount that his debtor, i.e. the pledgor, owed him on the basis of the claim that had been secured by the pledge[71]).

---

[69]) Both Wubbe (nt. 37) 146 and Kaser, Zum pignus nominis (nt. 5) 186 nt. 59 (406 nt. 59) have interpreted C. 8,16(17),4 in such a way that the constitution does allow the pledgee to collect the claim in its entirety. They have taken *satis tibi facere usque ad id, quod tibi deberi a creditore eius probaveris* to refer to the satisfaction that the pledgee received when he set off the amount that he had collected against the amount the pledgor owed him on the basis of the claim that had been secured by the pledge and gave the surplus to the pledgor. Such an interpretation of the constitution does not seem likely given the wording of the constitution: the constitution states that the *actio utilis* was granted against the debtor, up to what the pledgee proved was owed to him by the pledgor. To demand this proof would not have made sense if this amount did not matter in the procedure that the pledgee could institute against the debtor of the claim that had been pledged.

[70]) See W.J. Zwalve, Hyperocha, in: F. Verstijlen *et al.* (ed.), Groninger zekerheid, Liber amicorum Wim Reehuis, Deventer 2014, 523–524.

[71]) It is perhaps worth noting that the *litis contestatio* between the pledgee and the debtor of the claim that had been pledged did not mean that the claim was consumed. The creditor who had pledged his claim remained the creditor under *ius civile.* The

Regarding the elements the *formula* thus had to contain with regards to the claim that had been secured by the pledge, the praetor could easily draw a parallel between pledge of a claim and pledge of a tangible, given the fact that the *actio utilis* required proof that the claim secured by the pledge had not been paid, like in case of the *actio Serviana*. The praetor could therefore copy this condition from the *Serviana,* probably even adding that no satisfaction had been given otherwise and that the pledgee was not in default in relation to his debtor, i.e. the pledgor. In contrast to Kaser's *formula*, the resemblance of my reconstruction to the *actio Serviana* ends here, thus avoiding the problems Kaser's *formulae* posed. Like I explained, I think the praetor did not use the *Serviana,* but the direct action that the pledgor would have had against his debtor as his starting point and adapted that. The personal nature of the direct action suited the *actio utilis* as opposed to the real nature of the *Serviana.* Moreover, using the direct action ensured that the clauses of the action were contained in the *actio utilis* if the pledgee collected the claim, instead of the creditor who had pledged his claim. The technique that I used in my reconstruction did not only fit the *modus operandi* of the praetor in other *actiones utiles*, but it also guaranteed that the *actio utilis* fit the legal system and it assured its consistency.

IV. Pignus nominis and assignment

The *actio utilis* given in case of *pignus nominis* fitted the system in yet another way. There were other cases where the praetor used *actiones utiles* to give effect to an agreement intending that a claim that was due to one party could be collected by another if certain conditions were met. The praetor did not only protect such an agreement in case of *pignus nominis*, but also in cases that we would refer to as assignment in modern day law. In Roman law, claims could not be transferred like tangibles could[72]). Gaius suggested novation: a creditor could order his debtor to bind himself to the assignee by way of a *stipulatio*[73]). In case of novation, there was no transfer of the claim:

obligation between him and his debtor was not extinguished by the *litis contestatio* between his debtor and the pledgee. However, the praetor protected the debtor, if the creditor who had pledged his claim sued the debtor after notice of the pledge had been given to the debtor. In that case, the praetor would ensure that the debtor did not have to pay more than the amount he owed his creditor, i.e. the pledgor: if the debtor had already paid part of this amount to the pledgee, the pledgor could only bring an action for the amount of money that was left.

[72]) See Gai inst. 2,38.

[73]) See Gai inst. 2,38.

the old obligation was extinguished and a new obligation arose, which enabled the assignee to successfully sue the debtor in his own name. Instead, an assignor could grant a mandate appointing the assignee as *procurator in rem suam* in order to enable him to collect the claim. Such a mandate made the assignee a representative of the assignor, as the assignee claimed in the name of the assignor[74]). This did not always provide a solution, which led the praetor to give an *actio utilis* to the assignee to collect the assigned claim in a number of cases. The assignee could bring the *actio utilis* in his own name. The first time the praetor granted such an action was triggered by the *senatusconsultum Trebellianum*, dated 56 or 57 AD[75]). He gave it to someone to whom a deceased's estate, had to be conveyed on the basis of a *fideicommissum*. After this, *actiones utiles* were granted in more cases of assignment[76]). For instance, a purchaser of a claim could bring an *actio utilis* to sue the debtor of the assigned claim for payment[77]).

An important difference with our modern-day assignment is that under the Roman *ius civile* the assignor kept his position: He was not replaced by the assignee in the obligation as is the case in modern law. The obligation between the assignor and the debtor continued to exist, thus the action of the assignor was not transferred to the assignee: the assignor still had the direct

---

[74]) See Gai inst. 2,39 and 4,86. The addition *in rem suam* was important, because a mandate was usually given in the interest of the principal and not in the interest of the agent, see Gai inst. 3,155–156. In this case, it was given in the interest of the assignee; see about this mandate e.g. Zimmermann (nt. 4) 61.

[75]) See Gai inst. 2,253.

[76]) In classical Roman law, it could not be said that such an *actio utilis* was available to every assignee, because it was only granted in specific cases. Examples of persons who were given an *actio utilis* in case of assignment were persons who had received a claim by way of dowry (see C. 4,10,2), persons to whom a claim had been bequeathed (see C. 6,37,18) and persons who had received a claim as *datio in solutum* (see C. 4,15,5). The number of cases in which an *actio utilis* was available grew steadily, but it would, for instance, take until Justinian's time for an *actio utilis* to be available to someone who had received a claim by way of a gift, see C. 8,53(54),33pr.–1; see about this e.g. W.J. Zwalve, Feuerversicherungsfall und römisches Recht, Einige Bemerkungen zur römischen Zessionslehre, ZRG RA 127 (2010) 296–309, 307. B. Windscheid, Die Actio des römischen Civilrechts, vom Standpunkte des heutigen Rechts, Düsseldorf 1856, 126 could therefore write: "Es findet sich nirgends in unseren Quellen der allgemeine Satz ausgesprochen, daß das Abtreten der Forderung immer und in allen Fällen die utilis actio verleihe. Sie wird immer nur für einen concreten Grund der Abtretung anerkannt, so für die Abtretung durch Kauf, Verpfändung, Legat, Mitgiftbestellung, Hingabe an Zahlungsstatt."

[77]) See e.g. C. 4,39,8.

action at his disposal[78]). He remained the creditor under the *ius civile*, but the praetor ensured that the debtor could not discharge his obligation by paying the assignor if the debtor had been notified of the assignment[79]). The debtor was given an exception, which he could use against the assignor[80]). If he did not use this exception, but knowingly paid the assignor, then this payment did not discharge the debtor vis-à-vis the assignee[81]). Simultaneously, the praetor gave the assignee an *actio utilis.* He became the creditor under the *ius honorarium* as the praetor ensured through procedural means that he received the proceeds of the assigned claim.

To a certain extent, the same happened in case of *pignus nominis.* The emperor Diocletian wrote the following to one Manasea concerning a case

---

[78]) See e.g. Kaser, Das römische Privatrecht 1 (nt. 43) 654 § 153; and Zimmermann (nt. 4) 62.

[79]) See e.g. C. 8,41(42),3pr., a rescript in which emperor Gordianus answered the question of a man named Mucianus, who had asked if he was allowed to collect a claim that he had given to someone by way of *datio in solutum.* For a long time, it was believed that Bähr was right that this constitution had been interpolated, see e.g. Kaser, Das römische Privatrecht 1 (nt. 43) 654 nt. 17; see for Bähr's theory O. Bähr, Zur Cessionslehre, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1 (1857) 351–502. However, the Codex was not as often interpolated as was believed, see J.H.A. Lokin, The End of an Epoch, Epilegomena to a Century of Interpolation Criticism, in: R. Feenstra *et al.* (ed.), Collatio iuris romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire, Amsterdam 1995, 261–273 = J.H.A. Lokin, Analecta Groningana ad ius graeco-romanum pertinentia, ed. Th. E. van Bochove, Groningen 2010, 17–30; and A. Watson, Prolegomena to Establishing Pre-Justinianic Texts, TR 62 (1994) 113–125. Moreover, there is no reason to believe this constitution was interpolated if we look at its content, see A.J.H. Smit, Pignus nominis, De verpanding van vorderingen naar Romeins recht (diss. Groningen), Den Haag 2020, 185ss. In case of *pignus nominis,* notice of the pledge to the debtor had the same consequences, see the aforementioned C. 8.16(17),4 and D. 13,7,18pr., a fragment from Paul who explained that the praetor protected the debtor if the creditor who had pledged his claim nevertheless started proceedings against his debtor.

[80]) See e.g. D. 2,14,16pr. in which case the debtor was given the *exceptio doli* against the creditor who sued him after assignment; see about this text e.g. A. Wacke, Übertragbarkeit des 'iuris vinculum' mittels Zession? Zur duplex interpretatio römischer Rechtsquellen, in: Iuris Vincula, Studi in onore di Mario Talamanca, vol. 8 Napoli 2001, 333–380, 341 who argued against the prevailing theory that the *exceptio doli* was solely given in the specific case Ulpian wrote about.

[81]) The payment was considered to be a gift, if a debtor paid his creditor after he had been given notice because he had not paid by mistake in that case and that was one of the requirements of the *condictio indebiti*, see e.g. D. 50,17,53 and D. 12,6,1,1.

in which a *cautio,* i.e. a bond, had been pledged[82]). To pledge a *cautio* was to pledge a claim, of which the written declaration served as evidence[83]).

C. 4,39,7 [date unknown]
Impp. Diocletianus et Maximianus AA. Manaseae. Postquam eo decursum est, ut cautiones quoque debitorum pignori darentur, ordinarium visum est, ut post nominis venditionem utiles emptori, sic (ut responsum est) vel ipsi creditori postulanti dandas actiones[84]).

The emperors Diocletian and Maximian, Augusti, to Manasea. After it was settled that bonds of debts could be pledged too, it is considered a normal rule that, just like after the sale of a claim, actiones utiles will be granted to the creditor, if he so demands (as has already been decided).

---

[82]) A *cautio* was a written document in which a debtor acknowledged his debt. Pledge of a *cautio* is believed to have been the prototype of *pignus nominis.* This theory is based on D. 20,1,20, a text from Ulpian, who wrote about an agreement that money lent for the repair of a building would be repaid by way of pledge directly from the lease installments. The lender obtained *actiones utiles* against the tenants *cautionis exemplo, quam debitor creditori pignori dedit,* i.e. these *actiones utiles* were given after the example of a *cautio* which the debtor gave to the creditor as pledge; see about this theory e.g. K. Hellwig, Die Verpfändung und Pfändung von Forderungen nach gemeinem Recht und der Rechts-Civilprozess-Ordnung unter Berücksichtigung des Preussischen Allgemeinen Landrechts und des Sächsischen Bürgerlichen Gesetzbuchs*,* Leipzig 1883, 6; and Harke, Actio utilis (nt. 2) 286; see for an example of a *cautio* D. 12,1,40, a text from Paul who wrote about a *cautio* that was read out aloud in the court of Papinian: *Lecta est in auditorio Aemilii Papiniani praefecti praetorio iuris consulti cautio huiusmodi:* "*Lucius Titius scripsi me accepisse a Publio Maevio quindecim mutua numerata mihi de domo et haec quindecim proba recte dari kalendis futuris stipulatus est Publius Maevius, spopondi ego Lucius Titius*." The *cautio* read, in translation: I, Lucius Titius, have written down that I have received 15.000 cash from Publius Maevius' estate and Publius Maevius has stipulated that these 15.000 be given duly on the first of the following month in good money. I, Lucius Titius, have promised it.

[83]) A *cautio* was a deed that could help prove the existence of the debt. Proof to the contrary was possible, see e.g. Kaser, Zum pignus nominis (nt. 5) 175 nt. 13 (401 nt. 13); W.J. Zwalve, Exit bos frisica, The Tolsum tablet and Roman law, TR 77 (2009) 355–366, especially 358; and H.L.W. Nelson/U. Manthe, Gai Institutiones III §§ 88–181, Die Kontraktsobligationen, Text und Kommentar*,* Berlin 1999, 516ss. Jakab and Sirks have argued that a *cautio* was a *contractus litteris,* see E. Jakab, Chirographum in Theorie und Praxis, in: K. Muscheler (ed.), Römische Jurisprudenz – Dogmatik, Überlieferung, Rezeption: Festschrift für Detlef Liebs zum 75. Geburtstag*,* Berlin 2011, 275–288; and B. Sirks, Chirographs: negotiable instruments?, ZRG RA 133 (2016) 265–285 about chirographs which contained the acknowledgement of a debt, particularly a monetary debt. I disagree with their theory, see Smit (nt. 79) 154ss.

[84]) P. Krüger, Zu Exners Pfandrechtsbegriff über l. 7 C. hered. vel act. vend. (4,39), Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 16

Pledge of a claim had partly the same legal effects as assignment in Roman law. Like in the event of assignment, the pledgor remained the creditor under the *ius civile,* but the praetor gave an *actio utilis* to someone other than the creditor under the *ius civile* to claim performance to give effect to an agreement intending that a claim that was due to one party could be collected by another if certain conditions were met. Like the assignee, the pledgee obtained an independent position vis-à-vis the debtor of the claim pledged thanks to the *actio utilis*. For example, once the debtor had been given notice of the pledge, he could only discharge his obligation by paying the pledgee. In this respect, the *actio utilis*, which the praetor granted the pledgee, led to a creditor under the *ius honorarium* alongside the creditor under the *ius civile*. The pledgor remained creditor under the *ius civile*, but the *ius honorarium* ensured that the debtor could only discharge his obligation by paying the pledgee.

However, pledge of a claim was not the same as assignment, if only because the intention of the parties to the pledge agreement was not to transfer the claim. Parties solely agreed to create a security interest. The economic purpose of the pledge agreement, i.e. the intention of the parties was taken into account by the praetor. The pledgee could, for example, only collect the claim that had been pledged to him up to the amount the pledgor owed him under the claim that had been secured by the pledge[85]). Moreover, the proceeds did not become the property of the pledgee, as was the case with assignment. If a money claim was concerned, the pledgee had to set off the collected amount with the claim, that had been secured by the pledge. If the object of the claim that had been pledged was not a sum of money, but a tangible, then the pledgee obtained the tangible by way of pledge[86]). The pledgee thus did not take the place of the creditor to the same extent as the assignee took his place. The powers of the pledgee were limited by the nature of the pledge. He was only, as Dernburg wrote, "Pfandgläubiger", i.e. pledge creditor[87]).

(1874) 115–116 showed that the text of the constitution was different from what had been thought until then; see about this e.g. Brandsma (nt. 19) 227–236, 234ss. Before Krüger, it was believed that the constitution answered the question whether or not the pledgee was allowed to sell the claim that had been pledged to him in the affirmative, because the constitution was thought to read that the buyer in such a case was given an *actio utilis* too, see D.E. Lioni, De verpanding van inschulden naar het Romeinsch en Nederlandsch recht (diss. Amsterdam), Amsterdam 1885, 150.

[85]) See C. 8, 16(17),4, cited at the beginning of this article.

[86]) See nt. 1 above.

[87]) See Dernburg I (nt. 29) 461. In the nineteenth century, several Pandectists

The actions and exceptions awarded by the praetor determined the relation between the parties to the pledge agreement and the debtor of the claim that had been pledged. The *ius honorarium* was a flexible instrument that gave the praetor the opportunity to award the pledgee only the powers that were necessary to give effect to the pledge agreement. The praetor understood the economic purpose of the pledge agreement and shaped the legal remedies accordingly. He thereby used a technique that ensured that the *actio utilis* fit the system. In our modern legal terminology, we would say that the praetor created a security right using the procedural approach that is so characteristic of the Roman legal system.

believed that *pignus nominis* was some sort of conditional assignment; see, besides Dernburg, e.g. C.F. Mühlenbruch, Die Lehre von der Cession der Forderungsrechte, Greifswald 1836, 522; and A. Exner, Kritik des Pfandrechtsbegriffes, Leipzig 1873, 152.